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RELEASE NO. 184 AUGUST 2010

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1 California Forms of Pleading and Practice--Annotated PREFACE 1973

PREFACE 1973

This set of books is designed to provide lawyers with forms they need in their everyday practice, to set forth the law necessary for the effective use of the forms, and to delineate to procedure that must be followed in the various actions, special proceedings, and procedures covered.

The set contains four kinds of articles: (1) pleading (the articles Complaints and Cross-Complaints, Answers, and Demurrers, Motions to Strike, Motions for Judgment on the Pleadings, and Motions for Non-suit and Judgment); (2) procedural (e.g., the articles Attachment, Claim and Delivery, Motions After Trial, Reference, and Summary Judgment); (3) specific action (e.g., the articles Assault and Battery, Contracts, Injunctions, Negligence, Nuisance, Reformation of Instruments, and Rescission and Restitution); and (4) subject matter (e.g., the articles Fences, Fires, Garages and Gas Stations, and Hospitals).

Each article is "definitive" in the sense that it sets forth the governing law as found in the state and federal Constitutions, statutes, court rules, and appellate cases. It is "didactic" in the sense that through the forms it attempts to show the practicing lawyer what to do rather than to involve him in the dialectics as to why it should be done.

As with the law itself, there has been, since Volume 1 was published in 1962, a continual change or evolution in the approach and specific content of each article, and much of this change results from comments and suggestions received from practicing lawyers.

Anyone who has followed the development of the law over the past several years in California cannot help but be aware of the vast changes that have been effected. The individual's right to privacy, which for so many years lay dormant, has exploded into a dynamic expanding area with more and more statutes, both state and federal, being enacted to preserve the right and more courts being inclined to enforce it. Laws that have tended to invade this right, such as the antiabortion statutes, have been held unconstitutional by the courts. Consumers' remedies against manufacturers and others in the marketing chain and the protection of the environment against waste and pollution are two new and rapidly expanding areas of law. Courts have rediscovered procedural due process and held a plethora of statutes, such as those involving civil arrest, attachment, claim and delivery, and so forth, unconstitutional; moreover, the language of the courts in some of their opinions suggests that they are about to rediscover substantive due process as well, and when that happens a great many more statutes of questionable social value will no doubt fall by the wayside.

California Forms of Pleading and Practice attempts to keep pace with these changes and to provide the legal profession with the law and forms just as quickly as possible. To do this, some volumes have had to be completely revised in order to accommodate the changes. In revising a volume, every article, and not just the ones fatally afflicted, is thoroughly reexamined and brought up to date in a manner that cannot be matched by mere annual supplementation, which is subject to intense time pressures. Moreover, in revising a volume, new articles are added when required by the carving out of new areas of the law.

The new and revised specific action and procedural articles also contain a practice or procedural guide taking the lawyer through the various steps of the proceeding involved and alerting him or her to things he or she must do that might otherwise be forgotten under the pressures of a busy schedule.

As in the past, our aim shall continue to be to provide service a notre puissance to all members of the California bar and bench, and we sincerely hope that they, in turn, will continue to supply us with their comments and suggestions so that we may, working together, provide the best books possible.

The Publisher

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1 California Forms of Pleading and Practice--Annotated PREFACE 1962

PREFACE 1962

Since 1938, California's population has almost tripled. This human explosion has had its impact on litigation and on legislation. There has in the last 25 years been an increase of more than 200 volumes of California and California Appellate Reports-an increase of about 50 percent-and the number of Codes has increased six times. The dramatic changes in practice and procedure that these 25 years have brought about makes any law book published 25 years ago less valuable. Indeed, such a law book is now virtually obsolete. Litigation and legislation have rendered it undependable-dangerous to rely on. Because of this tremendous increase in reported cases and codes and the changes in practice and procedure, it has been deemed desirable to publish a new, modern, and comprehensive compilation of pleading and practice forms based exclusively on California cases, referenced exclusively to California statutes, rules, and texts, and annotated with California case notes.

California Forms of Pleading and Practice is a new and modern publication. The forms that comprise this set have been reproduced from California court records or contributed by California practicing attorneys. Every form has been meticulously checked against the latest California statutes and rules. They conform to present-day practice.

TABLE OF CONTENTS. Following the title of each article under which forms are classified will be found a Table of Contents. An examination of these tables gives testimony to the comprehensiveness of coverage. Note that in each article the forms are separately numbered. The reference to any form is the abbreviation of the article to which it is classified, followed by the number of the form.

INTRODUCTION. Following the Table of Contents is a text statement as to the practical aspects of the law distinctive to the article to which it relates. It is broken down into paragraphs with italicized headings. For a more detailed discussion, of course, textbooks on local practice and procedure should be consulted.

GOVERNING STATUTES. In each article under this heading, references are made to pertinent provisions of the California Codes. Statutory references also follow most of the individual forms.

RULES OF COURT. The newly compiled California Rules of Court numbers in a single sequence all rules of practice and procedure adopted by the Judicial Council and the Supreme Court in effect April 1, 1962. Wherever applicable these rules are referred to throughout California Forms of Pleading and Practice, the citation references being to the

rules according to their newly assigned numbers.

MUNICIPAL ORDINANCES. For perhaps the first time in any California legal publication, references are made to pertinent provisions of the municipal codes and charters of the larger cities in California.

PERTINENT DECISIONS. Here are found short, succinct statements indicating relevant holdings in California cases. Notes of decisions also follow the particular forms to which they are pertinent.

LAW REVIEWS. References here are to helpful articles in the various California Law Reviews.

TEXT REFERENCES. Text publications, where a more detailed discussion of the subject matter of the article may be found, are referred to here.

INDEX. In addition to the indexes at the end of each of the volumes, there will be in the final volume a general detailed index to all the forms.

TABLES. The last volume will include tables consisting of cross references to the form from pertinent sections of the California Codes, and also such other tables as may be considered to be of practical value to users of the forms.

CONTRIBUTORS. To the hundreds of California practicing lawyers who have made available to our editors transcripts containing forms of pleading and practice, the publisher wishes to express its thanks and appreciation. In the final volume of the set, the names of all such contributors will be listed.

Firm in its confidence in the merits of this publication, hopefully the publisher looks forward to the day when California Forms of Pleading and Practice will not only be found in most of the offices of California attorneys, but will be universally recognized as California's most accurate and dependable compilation of pleading and practice forms.

The Publisher

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1 California Forms of Pleading and Practice--Annotated Abbreviations

Abbreviations

Constitutions

Amend. Amendment

Art. Article

Cal. Const. California Constitution

U.S. Const. United States Constitution **Federal Statutes and Uncodified Laws**

I.R.C. Internal Revenue Code

Pub. L. Public Law (uncodified)

U.S.C. United States Code **State Statutes and Uncodified Laws**

Bus. & Prof. Code Business and Professions Code

Civ. Code Civil Code

Code Civ. Proc. Code of Civil Procedure

Com. Code Commercial Code

Corp. Code Corporations Code

Educ. Code Education Code

Elec. Code Elections Code

Evid. Code Evidence Code

Fam. Code Family Code

Fin. Code Financial Code

Fish & Game Code Fish and Game Code

Food & Agric. Code Food and Agricultural Code

Gov. Code Government Code

Harb. & Nav. Code Harbors and Navigation Code

Health & Safety Code Health and Safety Code

Ins. Code Insurance Code

Lab. Code Labor Code

Mil. & Vet. Code Military and Veterans Code

Penal Code Penal Code

Prob. Code Probate Code

Pub. Contract Code Public Contract Code

Pub. Res. Code Public Resources Code

Pub. Util. Code Public Utilities Code

Rev. & Tax. Code Revenue and Taxation Code

Stats. Statutes of California (uncodified)

Sts. & Hy. Code Streets and Highways Code

Unemp. Ins. Code Unemployment Insurance Code

Veh. Code Vehicle Code

Water Code Water Code

Welf. & Inst. Code Welfare and Institutions Code **Federal Rules and Regulations**

B.A.P. Rules Bankruptcy Appellate Panel Rules

Bankr. Rules Bankruptcy Rules

C.B. IRS Cumulative Bulletin

C.F.R. Code of Federal Regulations

Fed. R. App. P. Federal Rules of Appellate Procedure

Fed. R. Civ. P. Federal Rules of Civil Procedure

Fed. R. Evid. Federal Rules of Evidence

Fed. Reg. Federal Register

Rev. Rul. IRS Revenue Ruling

Treas. Reg. Treasury Regulations

U.S. Sup. Ct. Rules United States Supreme Court Rules **State Rules and Regulations**

Cal. Code Reg. California Code of Regulations (formerly California Administrative Code)

Cal. Rules of Ct. California Rules of Court

Cal. Rules Prof. Conduct California Rules of Professional Conduct **Federal Court Reporters**

F. Federal Reporter

F.2d Federal Reporter, Second Series

F.3d Federal Reporter, Third Series

F. Supp. Federal Supplement

F.R.D. Federal Rules Decisions

L. Ed. Lawyers' Edition, United States Supreme Court Reports

L. Ed. 2d Lawyers' Edition, United States Supreme Court Reports, Second Series

S. Ct. West's Supreme Court Reporter

T.C. Tax Court Reports

U.S. United States Supreme Court Reports **State Court Reporters**

Cal. California Reports

Cal. 2d California Reports, Second Series

Cal. 3d California Reports, Third Series

Cal. 4th California Reports, Fourth Series

Cal. App. California Appellate Reports

Cal. App. 2d California Appellate Reports, Second Series

Cal. App. 3d California Appellate Reports, Third Series

Cal. App. 3d Supp. California Appellate Reports, Third Series, Appellate Department of Superior Court

Cal. App. 4th California Appellate Reports, Fourth Series

Cal. App. 4th Supp. California Appellate Reports, Fourth Series, Appellate Department of Superior Court

Cal. Rptr. West's California Reporter

Cal. Rptr. 2d West's California Reporter, Second Series

Cal. Rptr. 3d West's California Reporter, Third Series

P. West's Pacific Reporter

P.2d West's Pacific Reporter, Second Series

P.3d West's Pacific Reporter, Third Series

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What's New

1 California Forms of Pleading and Practice--Annotated Scope

Scope

HIGHLIGHTS

Release 184 August 2010

HIGHLIGHTS

Limitation of Actions-- ***Arbitration.*** *Pearson Dental Supplies, Inc. v. Superior Court (2010) 48 Cal. 4th 665* holds that if an arbitration agreement requires that arbitration of a controversy be demanded or initiated by a party to the arbitration agreement within a stated period of time, the commencement of a civil action by that party based upon that controversy, within that period of time, tolls the applicable time limitations contained in the agreement, from the date the civil action is commenced until 30 days after a final determination by the court hearing the action that the party is required to arbitrate the controversy, or 30 days after the final termination of the civil action, whichever date occurs first.

Limitation of Actions-- ***CEQA.*** *Committee for Green Foothills v. Santa Clara County (2010) 48 Cal. 4th 32* holds that the filing of a notice of decision triggers the 30-day statute of limitations in *Pub. Res. Code § 21167(e)* for all CEQA challenges to the decision announced in the notice.

2010 Legislation, Rules of Court, Regulations, Judicial Council Forms, and Latest Cases. This release updates various chapters throughout the publication with the changes to California legislation and regulations, as well as the July 1, 2010, changes to the Rules of Court and Judicial Council forms. This release also updates various chapters with the latest state and federal case law opinions of 2009 and 2010.

Important new developments are added in other areas of law, including:

Alternative Dispute Resolution
Appeals and Writs
Attorneys
Civil Procedure
Civil Rights
Class Actions
Conservatorships and Guardianships

Constitutional Law
Contracts and Commercial Law
Costs and Attorney's Fees
Discovery
Employment
Equity
Federal Courts
Insurance
Judgments, Enforcement, and Debt Collection
Juvenile Law
Physicians
Probate
Public Administration
Real Estate
Schools
Torts
Trial
Unfair Competition

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Release 184 of California Forms of Pleading and Practice Annotated updates the publication in many areas noted in more detail below.

ALTERNATIVE DISPUTE RESOLUTION

Arbitration Tolled During Pendency of Civil Action. *The California Supreme Court in Pearson Dental Supplies, Inc. v. Superior Court (2010) 48 Cal. 4th 665* holds that by statute effective January 1, 2007, if an arbitration agreement requires that arbitration of a controversy be demanded or initiated by a party to the arbitration agreement within a stated period of time, the commencement of a civil action by that party based upon that controversy, within that period of time, tolls the applicable time limitations contained in the agreement, from the date the civil action is commenced until 30 days after a final determination by the court hearing the action that the party is required to arbitrate the controversy, or 30 days after the final termination of the civil action, whichever date occurs first [*Code Civ. Proc. § 1281.12*]. The end of a tolling period under this provision, i.e., 30 days after the final determination, simply means that the contractual limitations clock begins to run again from where it stopped at the filing of the civil action. See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.40[1]*.

Agreed Limitation on Arbitration Discovery. In *Dotson v. Amgen, Inc. (2010) 181 Cal. App. 4th 975* , the court holds limitations on discovery contained in arbitration agreements are generally enforceable so long as they entitle the parties to discovery sufficient to adequately arbitrate their claims, including access to essential documents and witnesses, as determined by the arbitrator; and in challenges to clauses of arbitration agreements limiting discovery, the courts assume that the arbitrator will operate in a reasonable manner in conformity with the law. See *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceedings, § 33.25[1][b][ii]*.

Review of Error of Fact or Law in Award. This chapter's analysis on review of error of fact or law when confirming an arbitration award is reorganized according to (1) judicial review of merits under California statutes, (2) expanded judicial review under the California Rule, (3) the effect of the Federal Arbitration Act on judicial review, and

(4) expanded arbitral review. See *Ch. 34, Contractual Arbitration: Judicial Review, § 34.10*.

APPEALS AND WRITS

Prejudicial Error Not Required on Appeal When Error Questions Structural Fairness of Trial. In *Biscaro v. Stern (2010) 181 Cal. App. 4th 702* , the court of appeal held that the trial court's failure to rule on a continuance as an accommodation under *Cal. Rules of Ct., Rule 1.100*, was a structural error, and was reversible per se without a showing of prejudice. See *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.10[1]*.

Deadlines for Filing Notice of Appeal. In *Anderson v. Chikovani (2010) 181 Cal. App. 4th 1397* , the court of appeal held that if a party files a valid motion for new trial and the trial court issues a timely order denying that motion, but no one serves the order or notice of entry of that order, then the applicable deadline for filing the notice of appeal from the judgment is 180 days after entry of judgment. See *Ch. 42, Appeal: Notice of Appeal, § 42.14[1]*.

Mandate Petition Requires Proper Pleading. In *Galbiso v. Orosi Public Utility Dist. (2010) 182 Cal. App. 4th 652* , the court of appeal held that a plaintiff's failure to allege that an agency had a duty to act in a certain way was fatal to a cause of action for mandate. See *Ch. 358, Mandate and Prohibition, § 358.31[2]*.

ATTORNEYS

Attorney's Duty of Loyalty Not Unlimited. In *Oasis West Realty, LLC v. Goldman (2010) 182 Cal. App. 4th 688* , the court of appeal held that, as a private citizen, an attorney may sign a petition and ask neighbors to sign a petition that was adverse to a prior client's interests. See *Ch. 72, Attorney Practice and Ethics, § 72.31*.

Vicarious Disqualification of Attorney's Law Firm Not Automatic. In *Kirk v. First American Title Ins. Co. (2010) 183 Cal. App. 4th 776* , the court of appeal held that when an attorney with client confidences moves from one private law firm to another, there is a rebuttable presumption of imputed knowledge to the law firm, which may be rebutted by evidence of effective ethical screening. See *Ch. 72, Attorney Practice and Ethics, § 72.150[6][a]*.

Actual Injury May Occur When Incurring Legal Fees Caused by Defendant's Malpractice. In *Truong v. Glasser (2009) 181 Cal. App. 4th 102* , the court of appeal held that if attorney malpractice consists of negligent advice that prompts plaintiff to sign a contract he or she later seeks to rescind, actual injury for purposes of triggering the statute of limitations may be sustained when the plaintiff hires a new attorney to pursue rescission, as plaintiff at that point incurs liability for legal fees due to the first attorney's malpractice. See *Ch. 76, Attorney Professional Liability, § 76.170[2][b]*.

Attorney Signature Recital Not Basis for Tort Liability to Opposing Attorney. In *Freedman v. Brutzkus (2010) 182 Cal. App. 4th 1065* , the court of appeal held that an attorney who, on behalf of a client, signs a contract that contains a signature recital reading "approved as to form and content" does not by doing so make a representation to the attorney for the other contracting party that may form the basis for tort liability to that other attorney. See *Ch. 76, Attorney Professional Liability, § 76.200[3][a]*.

Limitation of Actions for Attorney Malpractice. *Jocer Enterprises, Inc. v. Price (2010) 183 Cal. App. 4th 559* holds that although the tolling provisions of *Code Civ. Proc. § 340.6* are exclusive with regard to legal malpractice claims, the broad terms of the fourth tolling provision of *Code Civ. Proc. § 340.6(a)*--the provision applicable to legal and physical disabilities--encompass the circumstances described in the general tolling provisions set forth in *Code Civ. Proc. § 351*, which generally provides that if, when the cause of action accrues against a person, he or she is out of the state, the action may be commenced within the applicable limitations period after his or her return to the state. See *Ch. 345, Limitation of Actions, § 345.20[2][f]*.

CIVIL PROCEDURE

Allegations Commonly Used --Complete Absence of Notice to Fictitiously Named Defendant in Summons Violated *Code Civ. Proc. § 474*. In *Carol Gilbert, Inc. v. Haller (2009) 179 Cal. App. 4th 852* , the court held that the complete absence of the notice required by *Code Civ. Proc. § 474* to notify defendant that he was served as a person sued under a fictitious name was a violation of *Code Civ. Proc. § 474*, and service of an amended pleading did not serve as "process" under § 474 to satisfy the requirement. See *Ch. 20, Allegations Commonly Used, § 20.12[4]*.

Anti-SLAPP Motion--Settlement Negotiations. In *Seltzer v. Barnes (2010) 182 Cal. App. 4th 953* , an action by a condominium owner against an attorney arising from the negotiation of a settlement agreement in a prior case, alleging fraud and intentional infliction of emotional distress, the trial court erred in denying defendant's anti-SLAPP motion, because settlement negotiations were an exercise of the right to petition and the statements made as part of the negotiations were in connection with the underlying lawsuit for the purposes of *Code Civ. Proc. § 425.16(e)(2)*. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376, § 376.43[1][a].

Anti-SLAPP Motion--Foreign Lawsuits. In *Guessous v. Chrome Hearts, LLC (2009) 179 Cal. App. 4th 1177* , an action between business competitors, the trial court properly denied defendant's motion to strike because petitioning activity undertaken in a foreign country by filing lawsuits in France was not protected by the anti-SLAPP statute, as neither the United States nor the California Constitution granted a United States citizen the right to petition a foreign government. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.14[2].

Anti-SLAPP Motion--Homeowners Association's Communications. In *Turner v. Vista Pointe Ridge Homeowners Assn. (2009) 180 Cal. App. 4th 676* , the court of appeal held that a trial court erred in granting a homeowners association's anti-SLAPP motion on the ground that each cause of action alleged by the homeowners against the association arose out of a dispute over architectural guidelines and related to communications from the association pertaining to purported noncompliance with guidelines and a dispute about architectural guidelines was a public issue. There was no indication that the association's actions giving rise to the dispute were undertaken in furtherance of the right of petition or free speech. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.14[3][c].

Anti-SLAPP Motion--Activities in Representing Former Client. In *PrediWave Corp. v. Simpson Thacher & Bartlett LLP (2009) 179 Cal. App. 4th 1204* , the trial court erred in granting the anti-SLAPP motion of a law firm and lawyers that had previously represented the plaintiff-company, which sued the law firm based on its representation of the company and its former president and CEO, because the principal thrust of the company's causes of action was that the company and the former president had an irreconcilable conflict of interest, and, as former client, the company did not bring the lawsuit to deter speech and petitioning activities done by their own attorneys on their behalf but rather to complain about the quality of their former attorneys' performance. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.14[2].

Anti-SLAPP Motion--Malicious Prosecution Action. In *Daniels v. Robbins (2010) 182 Cal. App. 4th 204* , a malicious prosecution action against the attorneys representing plaintiff in the underlying slander litigation, which was dismissed as resulting of terminating sanctions imposed for plaintiff's refusal to follow court orders and comply with his discovery obligations, the trial court properly granted defendants' anti-SLAPP motion as to the malicious prosecution cause of action, because, although plaintiff established a prima facie showing that the underlying action was terminated in her favor and brought without probable cause, plaintiff failed to establish a prima facie showing that defendants acted with malice. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.17[1].

Declaratory Relief--Court Has Discretion to Stay Action Between Liability Insurer and Insured Even if Issues Are Different From Those Presented in Underlying Action. Generally, a court must stay a declaratory judgment action between an insurer and insured to adjudicate coverage issues under a liability policy, if factual issues presented in the declaratory judgment action will necessarily be resolved in an underlying action brought by a third party against the insured. A California court of appeal has held that if the declaratory judgment action can be resolved on legal issues or factual issues unrelated to those in the underlying action, the trial court still has discretion to stay the declaratory judgment action [*Great Am. Ins. Co. v. Superior Court (2009) 178 Cal. App. 4th 221]* . See *Ch. 182,*

Declaratory Relief, §§ 182.20[3], 182.22.

Demurrers--Compulsory Cross-Complaint. In *Align Technology, Inc. v. Tran (2009) 179 Cal. App. 4th 949* , the trial court properly sustained a demurrer to the complaint by a former employer against a former employee alleging breach of contract and conversion of patents belonging to the employer, on the grounds that under *Code Civ. Proc. § 426.30*, the compulsory cross-complaint statute, the employer was required to raise the claims in response to the former employee's prior cross-complaint filed in a prior action by the employer against the employee. However, the trial court abused its discretion in denying the employer leave to amend for the employer to provide additional allegations as to when it discovered the misconduct at issue. See *Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.14[1][h]*.

Dismissal--Indigent Pro Se Prisoner. In *Jameson v. Desta (2009) 179 Cal. App. 4th 672* , the trial court abused its discretion by choosing the "drastic measure" of dismissal of an indigent prisoner's pro se action against a prison doctor for failure to appear telephonically at the case management conference and subsequent order to show cause hearing, without first determining that the prisoner had been afforded meaningful access to the courts and that his failure to appear at the required hearings was willful. See *Ch. 212, Dismissal, § 212.62[3]*.

Dismissal--Court Congestion. In *Jordan v. Superstar Sandcars (2010) 182 Cal. App. 4th 1416* , the trial court did not abuse its discretion in dismissing plaintiffs' action based on the finding that plaintiffs failed to establish that bringing the action to trial was impossible, impracticable, or futile based on two court-declared moratoria on civil trials preventing civil cases from being tried, which did not prevent or interfere with plaintiffs prosecuting their case, and, with regard to an alleged de facto moratorium during the final year within which plaintiffs were required to bring their case to trial, while few civil cases were being tried due to a backlog in cases, cases approaching the five-year cutoff were being tried. See *Ch. 212, Dismissal, § 212.125[4][c]*.

Injunctions--Preliminary Injunction Bond May Be Forfeited or Waived. In *Smith v. Adventist Health System/West (2010) 182 Cal. App. 4th 729*, the court of appeal held that a bond required under Code Civ. Proc. § 529a may be waived or forfeited by the person to be enjoined. See *Ch. 303, Injunctions, § 303.46[1]*.

Judges-- ***Disqualification Challenge by Appeal.*** *Fink v. Shemtov (2010) 180 Cal. App. 4th 1160* holds *Code Civ. Proc. § 170.3(d)* provides that the determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding. A party's attempt to challenge the trial court's order striking that party's statement of disqualification by way of appeal is improper. See *Ch. 317, Judges, 317.51*.

Limitation of Actions-- ***Attorney Malpractice.*** *Jocer Enterprises, Inc. v. Price (2010) 183 Cal. App. 4th 559* holds that although the tolling provisions of *Code Civ. Proc. § 340.6* are exclusive with regard to legal malpractice claims, the broad terms of the fourth tolling provision of *Code Civ. Proc. § 340.6(a)*--the provision applicable to legal and physical disabilities--encompass the circumstances described in the general tolling provisions set forth in *Code Civ. Proc. § 351*, which generally provides that if, when the cause of action accrues against a person, he or she is out of the state, the action may be commenced within the applicable limitations period after his or her return to the state. See *Ch. 345, Limitation of Actions, § 345.20[2][f]*.

Limitation of Actions-- ***Arbitration Tolling.*** *Pearson Dental Supplies, Inc. v. Superior Court (2010) 48 Cal. 4th 665* holds *Code Civ. Proc. § 1281.12* provides that if an arbitration agreement requires that arbitration of a controversy be demanded or initiated by a party to the arbitration agreement within a period of time, the commencement of a civil action by that party based upon that controversy, within that period of time, shall toll the applicable time limitations contained in the arbitration agreement with respect to that controversy, from the date the civil action is commenced until 30 days after a final determination by the court that the party is required to arbitrate the controversy, or 30 days after the final termination of the civil action that was commenced and initiated the tolling, whichever date occurs first. The end of the tolling period simply means that the contractual limitations clock begins to run again, not that the limitations

period ended. See *Ch. 345, Limitation of Actions, § 345.20[3]*.

Motions to Reconsider--Relief From Default. In *D.R.S. Trading Co., Inc. v. Barnes (2009) 180 Cal. App. 4th 815* , after plaintiff obtained a default judgment against defendants, the trial court, after initially denying defendants' motion for relief from default, properly reconsidered its decision under *Code Civ. Proc. § 1008* and granted the motion, because the trial court had jurisdiction to reconsider its order under the circumstances. In *Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868* , the court of appeal held that to the extent defendants' second motion for relief from default relied upon the mandatory provisions of *Code Civ. Proc. § 473(b)*, it did not ask the trial court to reconsider its previous order under *Code Civ. Proc. § 1008(a)*, because the first order was entirely correct when made and the second motion rested on an entirely different legal theory, invoked a different statutory ground, and relied in very substantial part on markedly different facts. See *Ch. 374, Motions to Reconsider and Renewed Motions, § 374.12*.

Small Claims Cases--New and Revised Judicial Council Forms. The California Judicial Council has promulgated new and revised forms for use in small-claims cases. The forms are effective for use beginning July 1, 2010. See *Ch. 526, Small Claims, §§ 526.161, 526.162, 526.164, 526.164A, 526.164B, 526.166, 526.166A, 526.167, 526.167A, 526.167B, 526.176*.

Summary Judgment--Expert's Declaration Contradicting Prior Statement. In *Alvis v. County of Ventura (2009) 178 Cal. App. 4th 536* , an action against a county as a result of a massive landslide after heavy rains, although the trial court admitted plaintiff's expert's declaration into evidence over the county's objection that opinions expressed in his declaration were without foundation and some of them contradicted his prior statements, the trial court properly found the declaration did not constitute substantial evidence so as to raise a triable issue of fact because it contained assertions that directly contradicted his prior statement in a report to an insurance company and the contradiction was unexplained. See *Ch. 537, Summary Judgment, § 537.24[1][e]*.

Summary Judgment--Prior Motion for Summary Adjudication Did Not Bar Motion for Summary Judgment. In *Nieto v. Blue Shield of California Life & Health Ins. (2010) 181 Cal. App. 4th 60* , the trial court properly exercised its discretion in determining that *Code Civ. Proc. § 437c(f)(2)* did not bar summary judgment because the operative motion addressed an issue not raised by the prior motion. Even assuming it did not assert a new issue, the trial court had inherent authority to reconsider sua sponte its prior order denying defendant's second motion for summary judgment. See *Ch. 537, Summary Judgment, § 537.34[3]*.

Vexatious Litigants--Adverse Litigations. In *Fink v. Shemtov (2010) 180 Cal. App. 4th 1160* , the trial court properly declared plaintiff a vexatious litigant on the ground that he commenced, prosecuted, or maintained at least five separate litigations that were finally determined adversely to him. He conceded that the first, second, and fifth cases listed in the vexatious litigant order each qualified as litigation finally determined adversely to him. The third case also qualified, because the appellate court's decision showed that judgment was entered in his favor, but he appealed from the judgment and the appellate court affirmed, thereby finally determining the appeal adversely to him. Two more litigations were determined adversely to him because his notices of appeal were untimely filed. See *Ch. 573, Vexatious Litigants, § 573.13[3]*.

CIVIL RIGHTS

No Right to Internal Campaign Information Because of Impact on *First Amendment* Rights. In *Perry v. Schwarzenegger (9th Cir. 2010) 591 F.3d 1147* , the Ninth Circuit held that proponents of Proposition 8, which was later challenged in court, as to which the opponents sought disclosure of internal campaign information, made a prima facie showing of an arguable *First Amendment* infringement by demonstrating the consequences objectively suggesting an impact on, or chilling of, associational rights. Applying the *First Amendment's* more demanding heightened relevance standard, plaintiffs did not demonstrate an interest in obtaining disclosures sufficient to justify the deterrent effect on the free exercise of the constitutionally protected right of association. See Ch. 59, *Assemblies, Meetings, and*

Demonstrations .

No Prelitigation Notice Required for Title IX Action. In *Mansourian v. Regents of the Univ. of Cal. (9th Cir. 2010) 594 F.3d 1095* , a class action by female wrestlers against a university for money damages for violation of effective accommodation under Title IX, based on the elimination of women from the varsity wrestling team, the trial court erred in finding that plaintiffs were required to give defendant prelitigation notice of and an opportunity to rectify the specific alleged violation. The trial court erred in granting the university summary judgment on ground that the record demonstrated a history and continuing practice of program expansion for women under Option Two under Title XI. Further, the trial court erred in dismissing the students' action under *42 U.S.C. § 1983* for violation of the *Equal Protection Clause* by maintaining an athletics program that discriminated on the basis of gender on the ground that Title IX's enforcement scheme was sufficiently comprehensive to demonstrate that Congress intended to preclude § 1983 claims when it enacted Title IX, because Title IX does not bar § 1983 suits to enforce rights under the *Equal Protection Clause*. See Ch. 112, *Civil Rights: Government-Funded Programs and Activities* .

Nominal Damage Award Sufficient to Support Award of Attorney's Fees. In *Mahach-Watkins v. Depee (9th Cir. 2010) 593 F.3d 1054* , the Ninth Circuit held that although plaintiff obtained only nominal damages in an action under *42 U.S.C. § 1983* and a state wrongful death action, the trial court properly awarded attorney's fees, because plaintiff's success in achieving a liability verdict was significant, independent of any damage award, even though the difference between the damages sought and obtained somewhat disfavored the award of attorney's fees. See Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

Blanket Strip-Search Policy Passes Muster. In *Bull v. City & County of San Francisco (9th Cir. 2010) 595 F.3d 964* , the Ninth Circuit held that a blanket jail policy requiring strip searches of all arrestees classified for custodial housing in the general population was facially reasonable under the *Fourth Amendment*, notwithstanding the lack of individualized reasonable suspicion as to the individuals searched. See Ch. 114, *Civil Rights: Prisoners' Rights* .

Attorney's Fees Properly Awarded to Prevailing Defendant in CDPA Action. In *Jankey v. Lee (2010) 181 Cal. App. 4th 1173* , because an award of attorney's fees to the prevailing party is mandatory under *Civ. Code § 55*, and because no finding that plaintiff's claim was frivolous is required under *Civ. Code § 55*, nor is *Civ. Code § 55* preempted by the Americans With Disabilities Act, the trial court properly awarded the prevailing defendant attorney's fees. See Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

Governmental Immunity in Action Under *Civ. Code § 52.1*. In *County of Los Angeles v. Superior Court (2009) 181 Cal. App. 4th 218* , an action against a county and district attorney alleging civil rights violations under *Civ. Code, § 52.1*, based on the seizure of property after a criminal investigation, the trial court erred in denying defendants' motion for summary adjudication on the grounds of prosecutorial immunity under *Gov. Code §§ 821.6, 820.8, 815.2(b), 815.6, 820.2*. See Ch. 117A, *Civil Rights: Interference With Civil Rights by Threats, Intimidation, Coercion, or Violence* .

Teacher-Led Recitation of Pledge of Allegiance Not Establishment of Religion. In *Newdow v. Rio Linda Union Sch. Dist. (9th Cir. 2010) 597 F.3d 1007* , the Ninth Circuit held that a state statute and a school district policy requiring the teacher-led recitation of the Pledge of Allegiance by students in public schools, but not compelling students to participate, and Pledge itself, did not constitute the establishment of religion prohibited by United States Constitution. See Ch. 513, *Schools: Student Rights and Responsibilities* .

Refusal to Classify Pupil as Autistic Rather Than Mentally Retarded Violation of IDEA. In *Weissburg v. Lancaster School Dist. (9th Cir. 2010) 591 F.3d 1255* , an administrative law judge's conclusion that a school district misclassified a pupil as mentally retarded rather than autistic qualified the parents for attorney's fees under IDEA as the prevailing party, even though the pupil was not denied a fair appropriate public education because he received instruction by a qualified teacher. Further, the parents were entitled to attorney's fees even though the pupil was represented by his paternal grandmother, who was a practicing attorney, but not his legal guardian or acting in place of his natural or adoptive parent. See Ch. 513, *Schools: Student Rights and Responsibilities* .

CLASS ACTIONS

Predominance of Common Issues in Class Actions Involving Reliance of Defendant's Misrepresentations. Two recent appellate decisions illustrate when consumer claims of reliance on a seller's misrepresentations about a product can be litigated on a classwide basis. In one case, the claim was that, in reliance on the defendant's deceptive conduct, consumers purchased an illegal product they would not otherwise have purchased. The action did not seek actual damages, but instead sought restitution. The court of appeal concluded that class certification was appropriate, because the materiality of the defendant's alleged deceptive conduct could be determined on a classwide basis [*Steroid Hormone Prod. Cases (2010) 181 Cal. App. 4th 145]* . The other case involved claims of actual damages suffered by class members who had purchased the medication Vioxx believing it to be safe and more effective than a less-expensive generic medication, based on misleading information provided by the manufacturer of Vioxx. The court of appeal concluded that class certification was inappropriate, because each individual's claim was dependent on a showing of his or her specific medical needs and history [*In re Vioxx Class Cases (2009) 180 Cal. App. 4th 116]* . See *Ch. 120, Class Actions, § 120.12[2][b]*.

Class-Action Settlement Notice Must Include Unambiguous Class Definition. A California court of appeal has held that a trial court reviewing a class-action settlement for fairness must ensure that the class definition is unambiguous, so that persons receiving notice of the settlement will be able to determine whether they are members of the class [*Cho v. Seagate Tech. Holdings, Inc. (2009) 177 Cal. App. 4th 734]* . See *Ch. 120, Class Actions, § 120.21[1]*.

Rules Regarding Class Certification in Unfair Competition Cases Clarified. In *Steroid Hormone Product Cases (2010) 181 Cal. App. 4th 145* , the court of appeal held that when a plaintiff sought class certification under the unfair competition statute in a lawsuit seeking the disgorgement of money received by selling over-the-counter nutritional supplements that contained steroids that were illegal to sell or possess without a prescription, class certification was improperly denied on the grounds of individualized factual inquiries about whether that illegality was material to the decision to purchase. In *McAdams v. Monier, Inc. (2010) 182 Cal. App. 4th 174* , the court of appeal held that as individualized proof of reliance and injury are not generally required for nonrepresentative class members when a class action seeks restitution for alleged misrepresentations in extensive, long-term advertising campaigns, issues concerning reliance by and injury to unnamed class members will not foreclose a class action in that context. In *Pfizer Inc. v. Superior Court (2010) 182 Cal. App. 4th 622* , however, the court of appeal held that in advertising campaigns of shorter duration, for example, a campaign lasting only six months, evidence that many or most of the proposed class members were never actually exposed to alleged misrepresentations can defeat an attempt to certify a class by showing that there was no class-wide injury. See *Ch. 565, Unfair Competition, § 565.35[1]*.

CONSERVATORSHIPS AND GUARDIANSHIPS

Guardianships--Standing Under *Prob. Code § 1510(a)* Requires Showing of Ultimate Facts Demonstrating Financial Misconduct or Other Information to Warrant Court Intervention. In *Suleman v. Superior Court (2010) 180 Cal. App. 4th 1287* , the court held that an "other person on behalf of the minor" under *Prob. Code § 1510(a)* is a person who pleads ultimate facts demonstrating financial misconduct, or alleges other information sufficient to warrant court intervention in the management of the minor's money or other property. See *Ch. 280, Guardianship and Conservatorship: Appointment of Guardians, §§ 280.60, 280.84*.

Conservatorships--No Error in Accepting Stipulation to Reestablish Conservatorship. In *Conservatorship of Deidre B. (2010) 180 Cal. App. 4th 1306* , the court held that a trial court did not err when it accepted a stipulation from appellant's appointed counsel stating that appellant consented to the reestablishment of a conservatorship of her person and waived her right to a formal hearing. See *Ch. 281, Guardianship and Conservatorship: Appointment of Conservators, §§ 281.51, 281.73*.

Guardianships--Trial Court Did Not Abuse Discretion in Awarding Compensatory Costs to Guardian. In *Guardianship of K.S. (2009) 177 Cal. App. 4th 1525* , the court held that in a dispute relating back to the removal of a trustee of a life insurance trust for day trading with trust funds and paying himself for services, the trial court did not abuse its discretion in awarding compensatory costs to the guardian of the trust beneficiaries under *Prob. Code § 2622.5* based on its finding of bad faith and objective unreasonableness. See *Ch. 290E, Guardianship and Conservatorship: Accounts, §§ 290E.41, 290E.63*.

Conservatorships--Statutory and Due Process Right Not Violated When Court Proceeded in Proposed Conservatee's Absence. In *Conservatorship of John L. (2010) 48 Cal. 4th 131*, the California Supreme Court held that a hearing to establish a conservatorship under the Lanterman-Petris-Short Act did not violate the act or the conservatee's constitutional right of due process when the court accepted representation of the conservatee's attorney and proceeding with the hearing in the proposed conservatee's absence. See *Ch. 304, Insane and Other Incompetent Persons, § 304.144[6][a]*.

CONSTITUTIONAL LAW

Laws That Discriminate Against Out-of-State Persons. This chapter adds new sections on the constitutionality of laws that discriminate against out-of-state persons, including *National Association of Optometrists & Opticians Lenscrafters, Inc. v. Brown (9th Cir. 2009) 567 F.3d 521* , which holds to determine whether the laws have a practical discriminatory effect, it is necessary to compare the out-of-state entity with a similarly situated in-state entity. See *Ch. 126A, Constitutional Law, § 126A.22*.

Preemption--Plain Language. In *Sanchez v. Aerovias De Mex., S.A. de C.V. (9th Cir. 2010) 590 F.3d 1027* , the court holds that when interpreting a preemption clause, courts must give effect to its plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning. Interpretation does not occur in a contextual vacuum, but rather is informed by two presumptions. First, the states are independent sovereigns in the U.S. federal system, so courts have long presumed that Congress does not cavalierly preempt state law causes of action. Second, the purpose of Congress is the ultimate touchstone in every preemption case. See *Ch. 126A, Constitutional Law, § 126A.23[2][b]*.

Waiver of Express Preemption. In *California Energy Com. v. U.S. Dep't of Energy (9th Cir. 2009) 585 F.3d 1143* , the court holds federal law may provide procedure and standards for administrative waiver of express preemption of state law by the federal law; and an appellate court will uphold an agency decision on a waiver application only on the basis of the reasoning articulated therein. See *Ch. 126A, Constitutional Law, § 126A.23[2][c]*.

CONTRACTS AND COMMERCIAL LAW

Sales of Goods--Express Warranty Under U.C.C. In *Weinstat v. Dentsply Int'l, Inc. (2010) 180 Cal. App. 4th 1213* , the court illuminated the meaning and effect of *Com. Code § 2313* concerning express warranties in sales of goods. See *Ch. 502, Sales: Warranties, § 502.23[1]*.

COSTS AND ATTORNEY'S FEES

Recovery Is Offset to Determine Prevailing Party. In *Goodman v. Lozano (2010) 47 Cal. 4th 1327* , the California Supreme Court held that the term "prevailing party" does not include a plaintiff who prevails on the issue of a defendant's liability but who recovers nothing from the defendant because the judgment against the defendant is offset by the amount of plaintiff's settlement with codefendants prior to trial. See *Ch. 174, Costs and Attorney's Fees, § 174.15[1][d]*.

Equitable Powers to Award Attorney's Fees. *Rudnick v. Rudnick (2009) 179 Cal. App. 4th 1328* holds courts have inherent equitable power in limited situations to award attorney's fees when it was warranted by the equities of the case,

and may be granted under (1) the "common fund" principle, (2) the "substantial benefit theory," and/or (3) the "private attorney general" theory. See *Ch. 251, Equity, § 251.224*.

DISCOVERY

Work Product Protection-- ***Witness Statements.*** *Coito v. Superior Court (2010) 182 Cal. App. 4th 758* holds that written and recorded witness statements, including those taken by counsel, are not attorney work product. See *Ch. 191, Privileges and Other Discovery Limitations, § 191.102*.

Mediation Confidentiality. *Porter v. Wyner (2010) 183 Cal. App. 4th 949* holds that communications between an attorney and client are not within mediation confidentiality. See *Ch. 191,Privileges and Other Discovery Limitations, § 191.125A*.

Deposition Subpoena for Production of Business Records. This chapter has been updated with revised Judicial Council Form SUBP-010, Deposition Subpoena for Production of Business Records [*Code Civ. Proc. §§ 2020.410-2020.440*], effective July 1, 2010. See *Ch. 193, Discovery: Depositions, § 193.228[1]*.

EMPLOYMENT

Employer's Current Application of Discriminatory Practice May Be Subject of Disparate-Impact Claim, Even if Claim Based on Previous Adoption of That Practice Would Be Time-Barred. The United States Supreme Court has held that a plaintiff who does not file a timely charge under Title VII challenging the *adoption* of a discriminatory practice may assert a disparate-impact claim in a timely charge challenging the employer's later *application* of that practice [*Lewis v. City of Chicago (2010) 2010 U.S. LEXIS 4165]* . See *Ch. 115, Civil Rights: Employment Discrimination, § 115.51[2][a]*.

Employment-Arbitration Award Must Be Vacated if Legal Error in Award Deprives Employee of Hearing on FEHA Claim. The California Supreme Court has held that an employment-arbitration award is subject to vacatur if a legal error in the award prevents the employee from obtaining a hearing on a claim based on the Fair Employment and Housing Act or on other unwaivable statutory rights [*Pearson Dental Supplies, Inc. v. Superior Court (2010) 48 Cal. 4th 665]* . See *Ch. 115, Civil Rights: Employment Discrimination, § 115.55[2]*, and see *Ch. 249, Employment Law: Termination and Discipline, § 249.21[16]*.

California State University Employee May Sue on Whistleblower-Retaliation Claim After Adverse Decision on Administrative Complaint. The California Supreme Court has held that *Gov. Code § 8547.12(c)*, which authorizes a California State University employee to file suit on a whistleblower retaliation claim if the university has not "satisfactorily addressed" the employee's administrative complaint within 18 months, refers to satisfaction of the complaining employee, rather than some good-faith standard for investigation of the complaint. The employee may therefore sue after receiving an adverse administrative decision [*Runyon v. Board of Trs. of Cal. State Univ. (2010) 48 Cal. 4th 760]* . See *Ch. 118, Civil Service, §§ 118.58, 118.147[2]*.

Industrial Welfare Commission Wage Orders Define Employment Relationship for Purposes of Action to Recover Minimum Wages or Overtime Compensation. The California Supreme Court has held that for purposes of an employee's action to recover minimum wages or overtime compensation under *Lab. Code § 1194*, the relevant "employer" is defined by the applicable Industrial Welfare Commission wage order [*Martinez v. Combs (2010) 49 Cal. 4th 35]* . See *Ch. 250, Employment Law: Wage and Hour Disputes, §§ 250.40[3][a], 250.62[3]*.

Evidence of Employee's Unfitness Allowed to Prove Negligent Hiring Claim Even When Vicarious Liability Also Alleged. In *Diaz v. Carcamo (2010) 182 Cal. App. 4th 339* , the court of appeal held that if a plaintiff seeks to impose on an employer both vicarious liability for the tort of an employee and direct liability for negligent hiring and retention of that employee, the trial court does not err when allowing the plaintiff to introduce evidence of the

employee's unfitness in order to establish the negligent hiring and retention claim, even if that evidence would be inadmissible as proof that the employee was negligent on the occasion that forms the basis for plaintiff's suit. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.12[2]*.

Frequency of Use of Vehicle for Employer Business Does Not Defeat Application of Required-Vehicle Exception to Coming-and-Going Rule. In *Lobo v. Tamco (2010) 182 Cal. App. 4th 297* , the court of appeal held that for purposes of establishing respondeat superior liability, if an employer requires or reasonably relies upon the employee to make his or her personal vehicle available for use for the employer's benefit, the fact that the employer only rarely makes use of the employee's personal vehicle should not, in and of itself, defeat application of the required-vehicle exception to the coming-and-going rule. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.16[4][c]*.

EQUITY

Promissory Estoppel. In *Garcia v. World Savings, FSB (2010) 183 Cal. App. 4th 1031* , the court holds the doctrine of promissory estoppel cannot be invoked and must be held inapplicable in the absence of a showing that a promise had been made upon which the complaining party relied to his or her prejudice. The promise must be clear and unambiguous in its terms, and to meet this standard, a promise need only be definite enough that a court can determine the scope of the duty, and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages. The fact that a promise is conditional does not render it unenforceable or ambiguous; if extrinsic evidence is needed to interpret a promise, then obviously the promise is not clear and unambiguous. Thus, promissory estoppel cannot be established from preliminary discussions and negotiations. See *Ch. 251, Equity, § 251.94[2][c], [3]*.

Eqitable Estoppel and Government Bodies. *Steinhart v. Cty. of Los Angeles (2010) 47 Cal. 4th 1298* holds that equitable estoppel only applies to a governmental body when necessary to avoid grave injustice and when the result will not defeat a strong public policy. See *Ch. 251, Equity, § 251.94[3]*.

Doctrine of Waiver Operates Defensively Only. *Supervalu, Inc. v. Wexford Underwriting Managers, Inc. (2009) 175 Cal. App. 4th 64* holds the doctrine of waiver operates defensively only. In other words, it protects a party from unfair advantage sought by another. It is not designed to permit a person, offensively, to thereby obtain unfair advantage. See *Ch. 251, Equity, § 251.151*

Equitable Estoppel Proven Without Fraud. *Superior Dispatch, Inc. v. Ins. Corp. of N.Y. (2010) 181 Cal. App. 4th 175* holds the defendant need not intend to deceive the plaintiff to give rise to an equitable estoppel. That is, an estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. It is enough if the party has been induced to refrain from using means or taking action that is within his or her power, by which the party might have retrieved his or her position and prevented his or her loss. Where the delay in commencing action is induced by the conduct of the defendant, the defendant may not assert the expiration of the statute of limitation as a defense. See *Ch. 251, Equity, § 251.170[2]*.

Equitable Powers to Award Attorney's Fees. *Rudnick v. Rudnick (2009) 179 Cal. App. 4th 1328* holds courts have inherent equitable power in limited situations to award attorney's fees when it was warranted by the equities of the case, and may be granted under (1) the "common fund" principle, (2) the "substantial benefit theory," and/or (3) the "private attorney general" theory. See *Ch. 251, Equity, § 251.224*.

FEDERAL COURTS

Mootness. *Alvarez v. Smith (2009) 130 S. Ct. 576* holds that an actual controversy must exist at all stages of review, not just when the complaint is filed. See *Ch. 265, Federal Courts: Jurisdiction and Removal, § 265.16[4][a]*.

State Immunity Under the *Eleventh Amendment.* *Alaska v. U.S. (9th Cir. 2009) 564 F.3d 1062* holds that to determine when Congress has validly abrogated state immunity under the *Eleventh Amendment*, a court must resolve two predicate questions: (1) whether Congress unequivocally expressed its intent to abrogate, and (2) if so, whether Congress acted pursuant to a valid grant of constitutional authority. See *Ch. 265, Federal Courts: Jurisdiction and Removal, § 265.18[4][c]*.

Removal Is Absolute for Conduct Performed Under Color of Federal Office. *Medical Dev. Intl v. Cal. Dept of Corr. and Rehab. (9th Cir. 2009) 585 F.3d 1211* holds that the right of removal created by *28 U.S.C § 1442(a)* is absolute for conduct performed under color of federal office, and the policy favoring removal should not be frustrated by a narrow, grudging interpretation of the statutory language (receiver acting under color of federal office). See *Ch. 265, Federal Courts: Jurisdiction and Removal, § 265.31[3]*.

INSURANCE

Underlying Complaint Need Not Specifically Allege Negligence of Indemnitor. In *UDC-Universal Development, L.P. v. CH2M Hill (2010) 181 Cal. App. 4th 10* , the court of appeal held that the complaint underlying an indemnity claim need not allege negligence specifically on the part of the indemnitor in order to trigger a duty to defend on the part of that indemnitor, and it is sufficient that the complaint describe factual circumstances that suggest the possible negligence of the indemnitor, and the indemnitee then specify in a cross-complaint or otherwise that at least some of the damage would have been caused by the indemnitor's negligence. See *Ch. 300, Indemnity and Contribution, § 300.36*.

Court Modifies Punitive Damages in Insurance Bad Faith Case. In *Amerigraphics, Inc. v. Mercury Cas. Co. (2010) 182 Cal. App. 4th 1538* , the appellate court found substantial evidence supporting a punitive damages award against the insurer, but modified the amount of punitive damages award from $1.7 million (10:1 punitive to compensatory damages) to $500,000 (3.8:1 punitive to compensatory damages). See *Ch. 308, Insurance, § 308.24[5]*.

Insurer Providing Defense May Intervene. In *Gray v. Begley (2010) 182 Cal. App. 4th 1509* , the appellate court held that an insurer providing a defense under a reservation of rights may intervene in the action when the insured attempts to settle the case to the potential detriment of the insurer. See *Ch. 308, Insurance, § 308.117*.

Material Misrepresentation in Insurance Application Bars Coverage. In *Superior Dispatch, Inc. v. Insurance Corp. of N.Y. (2010) 181 Cal. App. 4th 175* , summary judgment for the insurer was proper in insured's action based on denial of coverage, because of the insured's material misrepresentation in the application regarding the specific commodities hauled by its trucking operation. See *Ch. 308, Insurance, § 308.18[3]*.

JUDGMENTS, ENFORCEMENT, AND DEBT COLLECTION

Collection on Secured Certificate. In *Ho v. Hsieh (2010) 181 Cal. App. 4th 337* , the court of appeal explained the procedure to be used to reach a debtor's interest in a security represented by a certificate. See *Ch. 254, Executions and Enforcement of Judgments, § 254.65[4][c]*.

Fraudulent Transfers--Requirement That Creditor Must Be Injured. In *Fidelity Nat'l Title Ins. Co. v. Schroeder (2009) 179 Cal. App. 4th 834* , the court discussed and applied the rule that a creditor has no cause of action under the Uniform Fraudulent Transfer Act to set aside a putatively fraudulent transfer unless the creditor has been injured by the transfer. The case illustrates how the minimum-bid requirement for a judicial sale of a homestead [*Code Civ. Proc. § 704.710 et seq.*] can operate to preclude the possibility of injury for a particular creditor. See *Ch. 270, Fraudulent Conveyances, § 270.34*.

JUVENILE LAW

Social Worker Affidavit. This chapter is updated with the July 1, 2010, Judicial Council Form, JV-210, Application to Commence Proceedings by Affidavit and Decision by Social Worker. See *Ch. 327, Juvenile Courts: Jurisdiction, and General Procedures, § 327.150*.

Judicial Council Forms. This chapter is updated with the July 1, 2010, Judicial Council Forms, including: JV-300, Notice of Hearing on Selection of a Permanent Plan; JV-320, Orders Under *Welfare and Institutions Code Sections 366.24, 366.26, 727.3, 727.31*; JV-510, Proof of Service--Juvenile; JV-800, Notice of Appeal--Juvenile; JV-810, Notice of Intent to File Writ Petition; and JV-825, Petition for Extraordinary Writ. See *Ch. 328, Juvenile Courts: Dependency Proceedings, §§ 328.351, 328.390, 328.392, 328.400, 328.401, 328.402*.

PHYSICIANS

Medical Board's Duties to Publish Information. In *Fulton v. Medical Bd. of Cal. (2010) 183 Cal. App. 4th 1510* , the court of appeal held that the Medical Board of California was required to publish and update information about actions against an individual that were initiated while he was licensed to practice in California, even if he was no longer licensed to practice medicine in California. See *Ch. 414, Physicians: Licensing and Discipline, § 414.67*.

PROBATE

Trusts--*CCP § 366.2(a)* Barred Action Against Successor Trustee. In *Property Trust v. Newman Trust (2009) 179 Cal. App. 4th 287, 296* , the court held that the one-year statute of limitations of *CCP § 366.2(a)* applied to a lawsuit against a trust based on actions of a deceased trustee. The court reasoned that a suit for breach of fiduciary duty and accounting, which was filed against a successor trustee more than one year after the decedent trustee's death and alleged that the decedent trustee had concealed financial information, was time-barred under *CCP § 366.2(a)* because it could have been brought on a liability of the person claim. See *Ch. 454, Claims Against Estate, §§ 454.51, 454.253*.

Trusts--Beneficiary Had Standing to Sue Another Beneficiary for Breach of Trustee's Duties. In *King v. Johnston (2009) 178 Cal. App. 4th 1488* , the court held that although a successor trustee had been appointed, a trust beneficiary had standing to sue a fellow beneficiary, under either a third-party participant theory or a constructive trustee theory, for aiding the former trustee in transferring property out of the trust in breach of the trustee's duties. See *Ch. 560,Trusts, §§ 560.184, 560.444*.

Trusts--Trust Is a Relationship to Hold Property and Not a Separate Entity From Its Trustees. In *Presta v. Tepper (2009) 179 Cal. App. 4th 909* , the court held that when two individuals entered into a real estate partnership acting in their capacity as trustee of a family trust, the partners were the individuals, not the trusts, and that an ordinary express trust created under *Prob. Code § 15200* is not a separate entity and cannot be a partner as contemplated by *Corp. Code § 16101*. See *Ch. 560, Trusts, §§ 560.41, 560.361*.

Trusts--Spendthrift Provision Does Not Insulate Trustee-Beneficiary From Liability for Breach of Fiduciary Duty. In *Chatard v. Oveross (2009) 179 Cal. App. 4th 1098* , the court affirmed a surcharge order and held that a trust beneficiary, who also acted as trustee and committed a breach causing financial harm to the trust, could have her interest in the trust estate impounded to satisfy a claim arising from her misfeasance notwithstanding the existence of the spendthrift provision. See *Ch. 560, Trusts, §§ 560.224, 560.381*(2).

Trusts--Court Has Equitable Power to Charge Reasonable and Necessary Fees. In *Rudnick v. Rudnick (2009) 179 Cal. App. 4th 1328* , the court held that when a trust beneficiary instigates an unfounded proceeding against the trust in bad faith, a probate court has the equitable power to charge the reasonable and necessary fees incurred by the trustee in opposing the proceeding against the beneficiary's share of the trust estate. See *Ch. 560, Trusts, § 560.444*.

Trusts--Modification Petition Does Not Violate No Contest Clause. In *Balian v. Balian (2009) 179 Cal. App. 4th 1505* , the court held that under *Prob. Code § 21305(b)(1)*, a *Prob. Code § 15409* modification petition to delete a

special needs provision because the settlor misunderstood the circumstances did not violate a no contest clause as a matter of public policy, and the safe harbor petition was properly granted. See *Ch. 444,Will Contests, §§ 444.14, 444.33,* and *Ch. 560, Trusts, §§ 560.16, 560.361*.

PUBLIC ADMINISTRATION

Pitchess Discovery Not Available in DMV Administrative Per Se Hearings. In *Brown v. Valverde (2010) 183 Cal. App. 4th 1531* , the court of appeal held that a driver facing license suspension following arrest for driving under the influence may not seek discovery of confidential peace officer personnel records pursuant to *Pitchess v. Superior Court (1974) 11 Cal. 3d 531* . See *Ch. 92, Automobiles: Drivers' Licenses, § 92.48[2][a]*.

REAL ESTATE

California Environmental Quality Act--Statutes of Limitations. In *Stockton Citizens for Sensible Planning v. City of Stockton (2010) 48 Cal. 4th 481* , the California Supreme Court held that the 35-day statute of limitations set forth in *Pub. Res. Code § 21167(d)* begins to run on the filing of a notice of exemption (NOE), whether or not the NOE is substantively or procedurally flawed. See *Ch. 418, Pollution and Environmental Matters, § 418.15[2]*.

California Environmental Quality Act--Statutes of Limitations. In *Committee for Green Foothills v. Santa Clara County (2010) 48 Cal. 4th 32* , the California Supreme Court held that the filing of a notice of decision triggers the 30-day statute of limitations in *Pub. Res. Code § 21167(e)* for all CEQA challenges to the decision announced in the notice. See *Ch. 418, Pollution and Environmental Matters, § 418.15[2]*.

Options to Purchase Real Property. In *Steiner v. Thexton (2010) 48 Cal. 4th 411* , the California Supreme Court concluded that although an agreement was titled "Real Estate Purchase Contract," the label was not dispositive. Rather, the Court looked through the agreement's form to its substance, and determined that the agreement contained the classic features of an option. See *Ch. 569, Vendor and Purchaser of Real Property, § 569.27*.

SCHOOLS

Teacher-Led Recitation of Pledge of Allegiance Not Establishment of Religion. In *Newdow v. Rio Linda Union Sch. Dist. (9th Cir. 2010) 597 F.3d 1007* , the Ninth Circuit held that a state statute and a school district policy requiring the teacher-led recitation of the Pledge of Allegiance by students in public schools, but not compelling students to participate, and Pledge itself, did not constitute the establishment of religion prohibited by United States Constitution. See Ch. 513, *Schools: Student Rights and Responsibilities* .

Refusal to Classify Pupil as Autistic Rather Than Mentally Retarded Violation of IDEA. In *Weissburg v. Lancaster School Dist. (9th Cir. 2010) 591 F.3d 1255* , an administrative law judge's conclusion that a school district misclassified a pupil as mentally retarded rather than autistic qualified the parents for attorney's fees under IDEA as the prevailing party, even though the pupil was not denied a fair appropriate public education because he received instruction by a qualified teacher. Further, the parents were entitled to attorney's fees even though the pupil was represented by his paternal grandmother, who was a practicing attorney, but not his legal guardian or acting in place of his natural or adoptive parent. See Ch. 513, *Schools: Student Rights and Responsibilities* .

TORTS

Actual Injury May Occur When Incurring Legal Fees Caused by Defendant's Malpractice. In *Truong v. Glasser (2009) 181 Cal. App. 4th 102* , the court of appeal held that if attorney malpractice consists of negligent advice that prompts plaintiff to sign a contract he or she later seeks to rescind, actual injury for purposes of triggering the statute of limitations may be sustained when the plaintiff hires a new attorney to pursue rescission, as plaintiff at that point incurs liability for legal fees due to the first attorney's malpractice. See *Ch. 76, Attorney Professional Liability, §*

76.170[2][b].

Attorney Signature Recital Not Basis for Tort Liability to Opposing Attorney. In *Freedman v. Brutzkus (2010) 182 Cal. App. 4th 1065* , the court of appeal held that an attorney who, on behalf of a client, signs a contract that contains a signature recital reading "approved as to form and content" does not by doing so make a representation to the attorney for the other contracting party that may form the basis for tort liability to that other attorney. See *Ch. 76, Attorney Professional Liability, § 76.200[3][a]*.

Amendment of Complaint Permitted After Demurrer in Attorney Conspiracy Case. In *Central Concrete Supply Co., Inc. v. Bursak (2010) 182 Cal. App. 4th 1092* , the court of appeal held that, in appropriate circumstances, a trial court may permit amendment of a complaint after sustaining a demurrer based on failure to comply with *Civ. Code § 1714.10* when the complaint seeks to hold an attorney liable for conspiracy. See *Ch. 126, Conspiracy, § 126.14[2][e]*.

Constructive Notice of Damages Sought Insufficient to Support Default Judgement Damage Award. In *Stein v. York (2010) 181 Cal. App. 4th 320* , the court of appeal held that if a complaint fails to state an amount of damages sought, constructive notice of the amount of potential liability on the part of the defendant is insufficient to support an award of damages through default judgment. See *Ch. 177, Damages, § 177.43*.

Evidence of Employee's Unfitness Allowed to Prove Negligent Hiring Claim Even When Vicarious Liability Also Alleged. In *Diaz v. Carcamo (2010) 182 Cal. App. 4th 339* , the court of appeal held that if a plaintiff seeks to impose on an employer both vicarious liability for the tort of an employee and direct liability for negligent hiring and retention of that employee, the trial court does not err when allowing the plaintiff to introduce evidence of the employee's unfitness in order to establish the negligent hiring and retention claim, even if that evidence would be inadmissible as proof that the employee was negligent on the occasion that forms the basis for plaintiff's suit. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.12[2]*.

Frequency of Use of Vehicle for Employer Business Does Not Defeat Application of Required-Vehicle Exception to Coming-and-Going Rule. In *Lobo v. Tamco (2010) 182 Cal. App. 4th 297* , the court of appeal held that for purposes of establishing respondeat superior liability, if an employer requires or reasonably relies upon the employee to make his or her personal vehicle available for use for the employer's benefit, the fact that the employer only rarely makes use of the employee's personal vehicle should not, in and of itself, defeat application of the required-vehicle exception to the coming-and-going rule. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.16[4][c]*.

Communications Decency Act Immunized Forwarder of Defamatory E-Mail. In *Phan v. Pham (2010) 182 Cal. App. 4th 323* , the court of appeal held that the federal Communications Decency Act provided immunity from liability to a person who forwarded an allegedly defamatory e-mail on to others with added prefatory remarks to the forwarded message that essentially stated only that the truth would come out in the end. See *Ch. 340, Libel and Slander, § 340.75*.

Litigation Privilege Protects Conduct to Compel Testimony of Witness for Criminal Defense. In *Kemps v. Beshwate (2009) 180 Cal. App. 4th 1012* , the court of appeal held that because the right to compel the attendance at trial of witnesses on behalf of a criminal defendant is a constitutionally protected right, conduct undertaken to compel a witness to attend and testify is protected under the litigation privilege. See *Ch. 340, Libel and Slander, § 340.61[4]*.

Dismissal for Discovery Abuses Supported Favorable Termination Finding in Malicious Prosecution Action. In *Daniels v. Robbins (2010) 182 Cal. App. 4th 204* , the court of appeal held that when a plaintiff seeks to prove the elements of a malicious prosecution claim against the attorneys who prosecuted the underlying action, the favorable termination requirement may be shown with evidence that the underlying action was dismissed as a sanction for discovery abuses when the court determines that the underlying plaintiff could not have proved his or her case with admissible evidence, and the fact that the discovery abuses may have been the fault of the client rather than the

attorneys does not matter for purposes of establishing the favorable termination element on the cause of action even as brought against the underlying attorneys. See *Ch. 357, Malicious Prosecution and Abuse of Process, §§ 357.14[1]* and *357.17[2][a]*.

CHP Officers Owed Duty Not to Disseminate Gruesome Photos of Decedent on Internet Absent Official Reason for Dissemination; Privacy Action Also Supported. In *Catsouras v. Department of California Highway Patrol (2010) 181 Cal. App. 4th 856* , the court of appeal held that officers of the California Highway Patrol owed a duty of care to the family of an 18-year-old girl who died when she was decapitated in an automobile accident when the officers e-mailed nine of the photographs of the decedent to their friends and family members, allegedly as a Halloween prank because of the gruesome nature of the photographs, and thousands of Internet sites picked up the images and some of the plaintiffs received personal e-mails from strangers taunting them with the gruesome photographs. The court also held that the relatives of the decedent could state a cause of action for public disclosure of private facts based on revelations about the decedent if that conduct invaded the privacy of those surviving relatives. See *Ch. 380, Negligence, § 380.32[3][c][iii]*, and see *Ch. 429, Privacy, § 429.32*.

Facility Owed Duty to Provide Medical Care to Infant Child Incarcerated With Mother Under Pregnant and Parenting Women's Alternative Sentencing Program Act. In *Lawson v. Superior Court (2010) 180 Cal. App. 4th 1372* , the court of appeal held that because a child residing with his or her incarcerated mother under the Pregnant and Parenting Women's Alternative Sentencing Program Act is dependent on the personnel running the housing facility when medical care is needed by the child, a special relationship between the facility and the infant daughter of an inmate existed sufficient to impose a duty to care on facility staff to provide timely care for the infant. The court also held, however, that a child residing with an incarcerated mother is not a "prisoner" for purposes of the Tort Claims Act, and thus although neither the State nor the state employee were entitled to claim the special immunities of *Gov. Code §§ 844.6* and *845.6*, the complaint did not state a cause of action for failure to provide medical care to a prisoner in violation of *Gov. Code § 845.6*. See *Ch. 380, Negligence, § 380.32[3][c][x]*, and see *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.103[2]*.

Duty of Employer at Multi-Employer Sites to Report Hazards Supports Tort Action for Failure to Report. In *Suarez v. Pacific Northstar Mechanical, Inc. (2009) 180 Cal. App. 4th 430* , the court of appeal held that taken in conjunction, *Lab. Code § 6400(b)* and *8* Cal. Code Regs. § 336.11 impose a duty of care on each employer engaged at a multi-employer work site, both construction and non-construction, to report all non-obvious hazards about which the employer learns because its own employees were exposed to the hazard during the course of their work, even if that employer did not create the hazard, and a breach of this duty is actionable in tort by any worker at the site who is subsequently injured by the hazard if it is not reported. See *Ch. 380, Negligence, § 380.32[5][b]*.

Lack of Evidence Showing Property Can Be Repaired at Reasonable Cost by Reasonable Means Can Defeat Continuing Nuisance Claim. In *McCoy v. Gustafson (2009) 180 Cal. App. 4th 56* , the court of appeal held that failure to provide evidence showing that plaintiff's property can be repaired or the damage abated at a reasonable cost by reasonable means will defeat a claim that a nuisance should be treated as a continuing nuisance. The court also held that expert witness testimony may be required to prove that abatement or repair can be achieved at a reasonable cost by reasonable means, and failure to designate an expert to provide such testimony can defeat an effort to prove a continuing nuisance. See *Ch. 391, Nuisance, § 391.17*.

Publisher's Decisions on Content and Placement of Advertisements Protected by *First Amendment.* In *Stewart v. Rolling Stone LLC (2010) 181 Cal. App. 4th 664* , the court of appeal held that the constitutional right guaranteeing freedom of the press protects publishers from liability to persons mentioned in articles for decisions as to the content and placement of advertisements, even when the advertisements are part of a double-gatefold page layout that includes the editorial content that mentions the plaintiffs. See *Ch. 429, Privacy, § 429.36[12]*.

PUC Not Liable for Death at Railroad Crossing It Did Not Control. In *Public Utilities Com. v. Superior Court (2010) 181 Cal. App. 4th 364* , the court of appeal held as a matter of law that the PUC did not control a railroad

crossing at which a fatal accident occurred and thus could not be held liable for a dangerous condition on public property, even though many years earlier the PUC had recommended that a gate be placed at the crossing but then failed to ensure that the gate was installed. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.81[2]*.

Failure to Notify of Contractual Noncompliance May Support Claim Under False Claims Act. In *San Francisco Unified School Dist. ex rel. Contreras v. Laidlaw Transit, Inc. (2010) 182 Cal. App. 4th 438* , the court of appeal held that a request for payment made to a public entity under a contract to provide goods or services impliedly constitutes a certification that the vendor has complied with its express contractual requirements, and a request for payment made without notifying the government entity that the vendor is not in compliance with the material terms of the contract may be the basis of a claim under the False Claims Act. See *Ch. 468, Public Entities and Officers: False Claims Actions, 468.21[3]*.

TRIAL

Constitutional Reasons Support Peremptory Challenges. In *People v. Mills (2010) 48 Cal. 4th 158, 189* , the California Supreme Court held that the defendant's constitutional rights were not violated when the prosecutor exercised peremptory challenges to excuse African-American jurors because each challenge was supported by constitutional reasons. See *Ch. 322, Juries and Jury Selection, § 322.42*.

Timing Regarding Polling Jury. In *Bell v. Bayerische Motoren Werke Aktiengesellschaft (2010) 181 Cal. App. 4th 1108* , the court of appeal held that any challenge to the verdict based on the polling must be asserted before the jury is discharged if the purported defect is apparent and could be corrected, or else the challenge is forfeited. See *Ch. 326A, Jury Verdicts, § 326A.14[3]*.

UNFAIR COMPETITION

Proposition 64 Did Not Bar Claim for Injunction Prosecuted After Plaintiff Settled Remaining Claims. In *Zermeno v. Precis, Inc. (2009) 180 Cal. App. 4th 773* , the court of appeal held that if a plaintiff suffered actual injury sufficient to meet the requirements for standing under Proposition 64, but prior to the passage of Proposition 64 entered into a settlement agreement under which plaintiff released all claims for that injury at least partly in exchange for the right to pursue a claim for injunctive relief, the general rule applying the changes made by Proposition 64 to actions pending at the time of its passage in November 2004 does not bar such a plaintiff from prosecuting the action for injunctive relief. See *Ch. 565, Unfair Competition, § 565.35[1]*.

Rules Regarding Class Certification in Unfair Competition Cases Clarified. In *Steroid Hormone Product Cases (2010) 181 Cal. App. 4th 145* , the court of appeal held that when a plaintiff sought class certification under the unfair competition statute in a lawsuit seeking the disgorgement of money received by selling over-the-counter nutritional supplements that contained steroids that were illegal to sell or possess without a prescription, class certification was improperly denied on the grounds of individualized factual inquiries about whether that illegality was material to the decision to purchase. In *McAdams v. Monier, Inc. (2010) 182 Cal. App. 4th 174* , the court of appeal held that as individualized proof of reliance and injury are not generally required for nonrepresentative class members when a class action seeks restitution for alleged misrepresentations in extensive, long-term advertising campaigns, issues concerning reliance by and injury to unnamed class members will not foreclose a class action in that context. In *Pfizer Inc. v. Superior Court (2010) 182 Cal. App. 4th 622* , however, the court of appeal held that in advertising campaigns of shorter duration, for example, a campaign lasting only six months, evidence that many or most of the proposed class members were never actually exposed to alleged misrepresentations can defeat an attempt to certify a class by showing that there was no class-wide injury. See *Ch. 565, Unfair Competition, § 565.35[1]*.

Current Ownership of Trade Secret Not Required to Seek Damages for Misappropriation. In *Jasmine Networks, Inc. v. Superior Court (2009) 180 Cal. App. 4th 980* , the court of appeal held that a plaintiff is not required to prove current ownership of the relevant trade secret in order to prosecute an action for misappropriation of a trade

secret, and it is sufficient that the plaintiff had an ownership interest in the secret during the time period for which damages are being sought. See *Ch. 565, Unfair Competition, § 565.103[10]*.

California Forms of Pleading and Practice--Annotated

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 1 NEW DEVELOPMENTS
PART I. SCOPE

1-1 California Forms of Pleading and Practice--Annotated § 1.01

§ 1.01 Scope of Chapter

This chapter presents selected new developments in California law divided by the year in which the changes were included in this publication, and arranged according to topic. Topics are arranged alphabetically, and entries within a topic are arranged by chapter number, with the newest developments first. New developments may include new legislation, case authorities, rules of court, regulations, forms, and other legal developments.

For the latest developments of the current release, review the "What's New?" file on lexis.com or on the CD-ROM product, or use the most current Publication Update that is shipped with the printed pages that updates this publication.

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§ 1.10 Alcoholic Beverages

State Laws Regarding Wine Distribution Governed by Commerce Clause. In *Granholm v. Heald (2005) 161 L. Ed. 2d 796* , the U.S. Supreme Court held that *U.S. Const., amend. XXI, § 2* does not allow states to regulate wine shipments on terms that discriminate in favor of in-state producers. See *Ch. 18, Alcoholic Beverage Licenses, § 18.37[1][a]*.

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§ 1.11 Alternative Dispute Resolution

[1] Appointment of Arbitrator and Conduct of Proceedings

Private Arbitration--California Supreme Court Agrees: Ethics Standards Preempted by Securities Exchange Act of 1934. The California Supreme Court has agreed with the Ninth Circuit Court of Appeals [*see Credit Suisse First Boston Corp. v. Grunwald (9th Cir. 2005) 400 F.3d 1119]* that the Ethics Standards for Neutral Arbitrators, although intended by the California Legislature to apply to NASD (and NYSE) appointed arbitrators, are in fact preempted by the Securities Exchange Act of 1934, which requires oversight and approval of NYSE and NASD rules by the Securities Exchange Commission. This decision should end the delays and confusion involved when the contract calls for arbitration in accordance with NYSE Rules or the NASD Code of Arbitration Procedure. See *Jevne v Superior Court (JB Oxford Holdings) (2005) 35 Cal. 4th 935* , in *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.14[1][a], [2][a]*.

Private Arbitration--Second Level Arbitrator Can Do What Court Cannot. There is nothing wrong with a contract provision for review by a second arbitrator to do what a trial court or appeal court could not do: review the award for errors of law [*Cummings v. Future Nissan (2005) 128 Cal. App. 4th 321]* . The provision reviewed in *Cummings* had the defendant/employer paying the costs of the review, which was completed within a reasonable time. A party wishing to object to an arbitrator review provision must do so at the time of the petition to compel arbitration and will forfeit any claims against the validity of the provision by waiting until the time of that review to raise the objection. See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.50[2]*; *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.28[7]*.

Private Arbitration--Consolidation When One Contract Calls for Three-Arbitrator Panel. The right to a three-arbitrator panel is such a substantial right--it minimizes the risk of factual or legal error, which are subject to only limited judicial review--that a court ordering consolidation of arbitrations must order arbitration before a three-arbitrator panel if one of the contracts involved provides for arbitration before a panel [*Parker v. McCaw (2005) 125 Cal. App. 4th 1494]* . See *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.21[3]*.

Private Arbitration--Ninth Circuit Court of Appeals Finds Ethics Standards Preempted by Securities Exchange

Act of 1934. In the first case decided at the Circuit Court of Appeals level, the *Ninth Circuit in Credit Suisse First Boston Corp. v. Grunwald (9th Cir. 2005) 400 F.3d 1119* held that the Ethics Standards for Neutral Arbitrators were intended by the California Legislature to apply to NASD-appointed arbitrators, but that the Securities Exchange Act of 1934 has preempted them. The issue should soon be addressed by the California Supreme Court, which held argument in March 2005 in *Jevne v. Superior Court* (JB Oxford Holdings), S121532. See *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.14[1][a], [2][a]*.

Private Arbitration--Arbitrator Cannot Dismiss Arbitration for Change in Law. Once the court has ordered arbitration, an arbitrator has no power to dismiss the arbitration by reexamining whether the parties were bound by the arbitration provision, even if the law changes while the matter is being arbitrated. The proper course in that situation is to petition the trial court pursuant to *Code Civ. Proc. § 1008(c)* to reconsider its original order compelling arbitration. See *Malek v. Blue Cross of California (2004) 121 Cal. App. 4th 44* , now *covered in Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.20[1]*.

Private Arbitration--When Party No Access to Arbitration Provider Organization Specified in Contract. When a party is no longer a member of the organization that was to conduct the arbitration and therefore not entitled to use that organization's services as arbitrator unless the other party consents, and that party does not consent, arbitration cannot be ordered. See *Provencio v. WMA Securities, Inc. (2005) 125 Cal. App. 4th 1028* , now *covered in Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.12*.

Private Arbitration--Neutral Arbitrator's Failure to Disclose Prior Service As Neutral Arbitrator Requires Vacatur of Award. Chs. 33 and 34 have been updated to reflect *International Alliance of Theatrical Stage Employees, etc. v. Laughon (2004) 118 Cal. App. 4th 1380* , which held that the 2001 amendments to *Code Civ. Proc. §§ 1281.9* and *1286.2(a)(6)(A)* express a Legislative intent that failure to disclose any of the matters enumerated in *Code Civ. Proc. § 1281.9(a)* satisfy the "might cause a reasonable person to question" standard for determining bias. Thus, a court must vacate an award once it is shown that the neutral arbitrator failed to disclose in a timely fashion one of the matters required to be disclosed. There is no room for argument that the undisclosed matter is not one that might cause a reasonable person to question the arbitrator's impartiality. See *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.14[3][a], [f],* and *Ch. 34, Contractual Arbitration: Judicial Review, § 34.19[d]*.

[2] Agreements and Compelling Arbitration

Private Arbitration--Consumer Adhesion Contract's Prohibition Against Classwide Arbitration Is Unenforceable. In a definitive blow to commercial interests, the California Supreme Court held that a class arbitration prohibition in a consumer contract of adhesion amounts to an exculpatory clause [*Civ. Code § 1668*] and is unconscionable and unenforceable when its practical effect is to deprive consumers individually damaged in small amounts, of any redress at all. This position, the Court said, does not run afoul of the Federal Arbitration Act, because unconscionability is a generally applicable contract defense, not one specifically applicable to arbitration agreements, and is not foreclosed by *Green Tree Financial Corp. v. BazzleGreen Tree Financial Corp. v. Bazzle (2003) 539 U.S. 444* , which involved contract interpretation and a far narrower holding [*Discover Bank v. Superior Court (Boehr) (2005) 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100]* . See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.32*.

Private Arbitration--Second Level Arbitrator Can Do What Court Cannot. There is nothing wrong with a contract provision for review by a second arbitrator to do what a trial court or appeal court could not do: review the award for errors of law [*Cummings v. Future Nissan (2005) 128 Cal. App. 4th 321]* . The provision reviewed in *Cummings* had the defendant/employer paying the costs of the review, which was completed within a reasonable time. A party wishing to object to an arbitrator review provision must do so at the time of the petition to compel arbitration and will forfeit any claims against the validity of the provision by waiting until the time of that review to raise the objection. See *Ch. 32,*

Contractual Arbitration: Agreements and Compelling Arbitration, § 32.50[2]; *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.28[7]*.

Private Arbitration--Unconscionability. It takes more than a form contract to render an arbitration provision procedurally unconscionable. A purchaser of a used motor home mistakenly relied on inferences to be drawn from the parties' relative bargaining positions to prove procedural unconscionability and claimed the contract was one of adhesion. The court of appeal in *Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159* disagreed, distinguishing other relationships. See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21[3][a], [b]*.

Private Arbitration Under AAA Commercial Rules. When an arbitration agreement provides that any dispute will be arbitrated in accordance with American Arbitration Association's Commercial Arbitration Rules, which specify that the arbitrator will decide arbitrability, the parties' intent is clear and the arbitrator, not a court, must determine whether the dispute must be submitted to arbitration. See *Dream Theater, Inc. v. Dream Theater (2004) 124 Cal. App. 4th 547* , now covered in *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, §§ 32.13[2], 32.21[1][a], [c][ii]*.

Private Arbitration--Uninsured Motorist. Once an insurer that has paid its insured the full amount of the uninsured motorist coverage, it cannot be compelled to arbitrate. Any damages sustained by the insured attributable to the accident that are over and above the uninsured motorist policy limits have no relevance in uninsured motorist arbitration, nor are such damages relevant to any bad faith claim the insured may have against the insurer. See *State Farm Mutual Automobile Ins. Co. v. Superior Court (Balen) (2004) 123 Cal. App. 4th 1424* , now *covered in Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.92[5][a]*.

Private Arbitration--Federal Arbitration Act Does Not Preempt Stay of Arbitration Under *Code Civ. Proc. § 1281.2(c)*. The California Supreme Court has declared that *Code Civ. Proc. § 1281.2(c)*, which allows a trial court to stay *either* the arbitration or related litigation if common questions of law or fact are involved and some parties to the litigation are not bound by the arbitration agreements, is not preempted by the FAA because the FAA has no procedural provisions applicable in state court, and because *Code Civ. Proc. § 1281.2(c)* is not special rule applicable only to arbitration but evenhanded law that allows trial courts to avoid conflicting rulings on common issues of fact [Cronus Investments, Inc. v. Concierge Services (2005)]. See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, §§ 32.24[2][b], [c], 32.43[8][d], [g], 32.63[13][c], 32.94[3][b][iv]*.

Employer-Employee Arbitration Agreement May Be Unconscionable Even If Employee Was Represented by Attorney. A California Court of Appeal has held a mandatory employment arbitration provision unenforceable, even though the employee's attorney reviewed the provision before the employee signed it. The court emphasized that the provision clearly was substantively unconscionable, because only the employee's claims were required to be arbitrated, the provision required a prearbitration dispute-resolution procedure controlled by the employer, and it imposed a severe limitation on the time for the employee to assert claims. That high degree of substantive unconscionability, plus the nonnegotiable nature of the provision, were sufficient reasons to deny enforcement of the provision. See *Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal. App. 4th 1267* , now covered in *Ch. 249, Employment Law: Termination and Discipline, § 249.21[16]*.

Private Arbitration--Under Federal Arbitration Act, Arbitrator Determines Gateway Claims of Waiver. In a matter governed by the Federal Arbitration Act, *9 U.S.C. § 3*, not *Code Civ. Proc. § 1281.2(a)*, applies and the arbitrator determines whether a party has waived the right to compel arbitration This rule is further complicated by the fact that even if the matter is governed by the FAA, a waiver claim that involves litigation conduct is to be determined by the court. *Omar v. Ralphs Grocery Co. (2004) 118 Cal. App. 4th 955* . See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, §§ 32.21[1][c], 32.25[1][b]*.

Private Arbitration--Unconscionability--Court Refused to Remake Agreement to Provide for Adequate Discovery. Ch. 32 has been updated to reflect the latest case finding arbitration provisions in an employer-drafted mandatory agreement unconscionable and unenforceable in the context of attempts by an employee to vindicate unwaivable rights: *Fitz v NCR (2004) 118 Cal. App. 4th 702* . *Fitz* involved claims under the Fair Housing and Employment Act (FEHA; *Gov. Code § 12940*). The arbitration agreement did not provide for adequate discovery and granted a "carve-out" to allow the employer to litigate intellectual property-related claims against the employee. Because there was an express agreement regarding discovery, the court could not imply an agreement to allow sufficient discovery. See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, §§ 32.21[[3][b], [f], 32.22[2][c]*.

Arbitration Agreement Between Claimants Does Not Bar Interpleader Action. A California Court of Appeal has held that if interpleaded claimants have an arbitration agreement, but the interpleading party is not a party to that agreement, the arbitration agreement does not deprive a trial court of jurisdiction to determine whether the claims can be interpleaded and whether to discharge the interpleading party. See *Dial 800 v. Fesbinder (2004) 118 Cal. App. 4th 32* , now covered in *Ch. 314, Interpleader, § 314.16[2][a]*.

[3] Judicial Review

Private Arbitration--Neutral Arbitrator's Failure to Disclose Prior Service As Neutral Arbitrator Requires Vacatur of Award. Chs. 33 and 34 have been updated to reflect *International Alliance of Theatrical Stage Employees, etc. v. Laughon (2004) 118 Cal. App. 4th 1380* , which held that the 2001 amendments to *Code Civ. Proc. §§ 1281.9* and *1286.2(a)(6)(A)* express a Legislative intent that failure to disclose any of the matters enumerated in *Code Civ. Proc. § 1281.9(a)* satisfy the "might cause a reasonable person to question" standard for determining bias. Thus, a court must vacate an award once it is shown that the neutral arbitrator failed to disclose in a timely fashion one of the matters required to be disclosed. There is no room for argument that the undisclosed matter is not one that might cause a reasonable person to question the arbitrator's impartiality. See *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.14[3][a], [f]*, and *Ch. 34, Contractual Arbitration: Judicial Review, § 34.19[d]*.

[4] Mediation

Settlement Judge Can Be Mediator and Must Remain Neutral. In a case involving a stipulation that their settlement conference be a mediation, the settlement judge exceeded his authority by making "findings" as to settlement valuations and insurers' conduct (refusal to mediate) being in bad faith [*Travelers Casualty and Surety Company v. Superior Court (Roman Catholic Diocese of Orange) (2005) 126 Cal. App. 4th 1131]* . Orders in excess of mediator's proper role must be vacated and expunged or, as here, sealed [*Travelers Casualty and Surety Company v. Superior Court (Roman Catholic Diocese of Orange) (2005) 126 Cal. App. 4th 1131]* . See *Ch. 31, Mediation, § 31.13[6]*.

Court-Ordered Mediation--Tolling of Mandatory Dismissal Period. Ch. 37, Judicially Mandated Civil Action Mediation, has been updated with an illustration to show the calculations under *Code Civ. Proc. § 1775.7(b)*, which extends the mandatory dismissal date if mediation is or remains submitted more than four years and six months after the plaintiff filed the action [*Gonzalez v. County of Los Angeles (2004) 122 Cal. App. 4th 1124]* . See *Ch. 37, Judicially Mandated Civil Action Mediation, § 37.30*.

Voluntary Mediation--Attorney's Fees. The standard form for a residential purchase agreement now provides that a prevailing party in litigation or arbitration who refused a request to mediate made before the commencement of those proceedings is barred from recovering attorney fees. A court of appeal applied that provision in the context of a lawsuit filed to enable recording of a lis pendens when mediation was refused after the action was commenced. See *Frei v. Davey (2004) 124 Cal. App. 4th 1506* , now *covered in Ch. 30, Using Alternative Dispute Resolution, § 30.12[1]*.

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§ 1.12 Appeals

[1] Abandonment, Dismissal, Stipulated Reversal

1999 Legislation Creates Presumption Against Stipulated Reversals. In *Hardisty v. Hinton & Alfert (2004) 124 Cal. App. 4th 999* , the court of appeal held that the idea that a stipulated reversal under *Code Civ. Proc. § 128(a)(8)* should be made available whenever it would assist parties in resolving their disputes was repudiated by 1999 legislation. See *Ch. 48, Appeal: Abandonment, Dismissal, and Stipulated Reversal, § 48.12[2]*.

[2] Briefs

Appellate Arguments Waived if Not Properly Briefed. In *Berger v. California Insurance Guarantee Association (2005) 128 Cal. App. 4th 989* , the court of appeal held that the defendants waived an issue on appeal when they failed to make any coherent argument or cite any authority or facts to support the issue. See *Ch. 50, Appeal: Briefs, § 50.35[1]*.

By Failing to Discuss Unfavorable Evidence, Appellant Forfeited Argument. In *Ferraris v. Alexander (2005) 125 Cal. App. 4th 1417* , the court of appeal held that the argument portion of a brief must relate the facts as found by the trial court, and then persuade the appellate court that those facts were insufficient to support the trial court's holding. The argument may not emphasize only the evidence favorable to the appellant and ignore the evidence on which the trial court relied to make its ruling. See *Ch. 50, Appeal: Briefs, § 50.13[2][c][iv]*.

Court May Disregard Arguments Made for First Time in Reply Brief. In *Banning v. Newdow (2004) 119 Cal. App. 4th 438* , the court of appeal refused to hear a constitutional challenge to a "reasonableness" standard because the appellant did not raise the issue in his opening brief. See *Ch. 50, Appeal: Briefs, § 50.13[4]*.

[3] Class Actions

Named Plaintiff May Not Appeal on Behalf of Nonappealing Class Members When Named Plaintiff Not Aggrieved. In *Estrada v. RPS, Inc. (2005) 125 Cal. App. 4th 976, 23 Cal. Rptr. 3d 261* , the court of appeal held that a named plaintiff in a class action is not the "guardian" of class members, and, therefore, did not have standing to appeal

on behalf of dismissed class members when he could not show that he was aggrieved by their dismissal. See *Ch. 40, Appeal: An Overview, § 40.13[1][a][iii]*.

[4] Hearing and Decision

Court of Appeal May Review Only Specific Portion of Judgment From Which Appeal Taken. In *Readylink Healthcare v. Cotton (2005) 126 Cal. App. 4th 1006* , the court of appeal held that a notice of appeal referring only to one paragraph of an injunction does not give the appellate court jurisdiction to review the other paragraph of the injunction. See *Ch. 51, Appeal: Hearing and Decision, § 51.17[4][c][viii]*.

[5] Notice of Appeal

If Notice of Appeal Is Clear and Unambiguous, Reviewing Court Will Not Construe Notice to Allow Review of Order Not Specified in Notice. In *Sole Energy Co. v. Petrominerals Corp. (2005) 128 Cal. App. 4th 212* , the court of appeal refused to liberally construe a notice of appeal that did not specify that the appellant sought to appeal the new trial order or make it reasonably clear that plaintiffs were trying to appeal from it. See *Ch. 42, Appeal: Notice of Appeal, § 42.11[2][a][ii]*.

Improper Appeal May Be Treated as Petition for Writ. In *Molz v. Daily Journal Corp. (2005) 127 Cal. App. 4th 836* , the court of appeal held that even if the order at issue there were not appealable, the court would treat the appeal as a petition for writ relief because the record contained all the required elements and the question at issue presented significant public policy implications. See *Ch. 42, Appeal: Notice of Appeal, § 42.12[2][c]*.

Order Made After Final Judgment May Be Appealed. In *Yeboah v. Progeny Ventures, Inc. (2005) 128 Cal. App. 4th 443* , the court of appeals held that when a trial court refers a matter to a master or referee after ordering an accounting, the court's initial order directing the accounting is interlocutory. See *Ch. 42, Appeal: Notice of Appeal, § 42.12[3][b]*.

Notice of Appeal Liberally Construed. In *Walker v. Los Angeles County Metropolitan Transportation Authority (2005) 35 Cal. 4th 15* , the California Supreme Court held that an appellate court should treat a notice of appeal from an unappealable order denying a new trial as an appeal from the underlying judgment when it is reasonably clear appellant intended to appeal from judgment and respondent would not be misled or prejudiced. See *Ch. 42, Appeal: Notice of Appeal, § 42.11[2][d]*.

Appeal of Judgment Against One Defendant May Violate One Final Judgment Rule. In *C3 Entertainment, Inc. v. Arthur J. Gallagher & Co. (2005) 125 Cal. App. 4th 1022* , the court of appeal held that when the liability of one defendant is intertwined with and dependent on an earlier non-final judgment against another defendant, entry of judgment in the first defendant's favor is premature and the judgment cannot be appealed without violating the one final judgment rule. See *Ch. 42, Appeal: Notice of Appeal, § 42.12[1][a]*.

Notice of Appeal Liberally Construed. In *Morgan v. San Joaquin Community Hospital (2004) 124 Cal. App. 4th 1169* , the court of appeal held that a self-represented litigant's purported motion for reconsideration and/or appeal was a timely notice of appeal. See *Ch. 42, Appeal: Notice of Appeal, § 42.11[2][d]*.

***11 U.S.C. § 108(c)(2)* Provides 30-Day Extension of Time for Court to Rule on Motion for New Trial.** In *ECC Construction, Inc. v. Oak Park Calabasas Homeowners Association (2004) 118 Cal. App. 4th 1031* , the court of appeal held that a notice of appeal filed within 30 days of notice of ruling on a motion for new trial was timely because the 30-day deadline for ruling on a motion for new trial set forth in *Code Civ. Proc. § 660* passed while an automatic stay was in effect. See *Ch. 42, Appeal: Notice of Appeal, § 42.14[1]*.

Denial of Certification to Entire Class Is Appealable. In *Lebrilla v. Farmers Group, Inc. (2004) 119 Cal. App. 4th 1070* , the court of appeal held that the denial of certification to an entire class is appealable, although, absent other error, a trial court ruling supported by substantial evidence generally will not be disturbed. See *Ch. 42, Appeal: Notice of Appeal, § 42.35[9][b]*.

[6] Review Standards and Appellate Rules of Law

Appellant's Brief Must Fairly and Fully Set Forth Both Sides' Evidence. In *Boeken v. Philip Morris Inc.* (2005) 127 Cal. App. 4th 1640 , the court of appeal held that a recitation solely of the appellant's own evidence was not a fair summary for purposes of determining whether any inferences drawn by the jury were reasonable and supported by substantial evidence. See *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.13[1][b]*.

Statutory Interpretation Requires De Novo Review. In *Law Offices of Dixon R. Howell v. Valley (2005) 129 Cal. App. 4th 1076* , the court of appeal held that whether a statute requires dismissal of an action is a question of statutory interpretation that the appellate court must independently review. See *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.14[4][b]*.

Independent Review Standard Applies to Statutory Interpretation of Undisputed Facts. In *Librers v. Black (2005) 129 Cal. App. 4th 114* , the court of appeal held that the application of a statute presents a question of law to be reviewed de novo if the relevant facts are not in dispute. See *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.14[4][b]*.

Dicta May Be Controlling Law. In *Howard Jarvis Taxpayers Association v. City of Fresno (2005) 127 Cal. App. 4th 914* , the court of appeal refused to reject dicta by the California Supreme Court without a compelling reason. See *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.31[2]*.

Issue of Estoppel Cannot Be Raised for First Time on Appeal. In *Honig v. San Francisco Planning Department (2005) 127 Cal. App. 4th 520* , the court of appeal held that the rule that issues not raised in the trial court cannot be raised for the first time on appeal is especially applicable to the doctrine of estoppel, which includes factual elements that must be established in the trial court. See *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.63[1][d]*.

[7] Stay of Proceedings

Stay Suspends Trial Court's Power to Enforce, Vacate, or Modify Judgment or Order While Appeal From That Judgment or Order Pending. In *Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal. 4th 180* , the California Supreme Court held that a trial court had no jurisdiction to hear proceedings on the merits following an appeal from the denial of an anti-SLAPP motion. See *Ch. 43, Appeal: Stay of Proceedings, § 43.42[11]*.

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§ 1.13 Attorneys

[1] Admission and Discipline

California Supreme Court Has Inherent Power of Admission of Attorneys in California. In *Gadda v. Ashcroft, 363 F.3d 861 (9th Cir. 2004)* , the Ninth Circuit Court of Appeal held that federal law does not preempt the California Supreme Court's authority to regulate attorneys who practice only immigration law and only in federal courts. See Ch. 71, *Attorney Discipline* .

[2] Fee Arbitration

Dismissal Discretionary for Failure to Provide Notice to Client of Right to Arbitrate. In *Law Offices of Dixon R. Howell v. Valley (2005) 129 Cal. App. 4th 1076* , the court of appeal held that dismissal of an attorney's action against a client for fees for failing to provide written notice of the client's right to arbitration under the MFAA is discretionary rather than mandatory. See Ch. 72, *Notice to Client of Right to Arbitration* .

[3] Practice and Ethics

Attorney Must Represent Client with Undivided Loyalty. In *Apple Computer, Inc. v. Superior Court (2005) 126 Cal. App. 4th 1253* , the court of appeal held that a conflict of interest existed when a class representative was an attorney employed by co-counsel of the attorney representing the class. See Ch. 72, *Attorney Practice and Ethics* .

Court Determines Whether Attorney's Employment Creates Conflict of Interest. In *Abbott v. United States Internal Revenue Service, 399 F.3d 1083 (9th Cir. 2005)* , the Ninth Circuit Court of Appeals held that there was no conflict of interest when the lawyer for a taxpayer was employed as a consultant by the IRS while he represented the taxpayer before the IRS. See Ch. 72, *Attorney Practice and Ethics* .

Order Granting or Denying Motion to Disqualify Attorney Reviewable by Writ or Appeal. In *Apple Computer, Inc. v. Superior Court (2005) 126 Cal. App. 4th 1253* , the court of appeal held that a petition for writ of mandate accompanied by a request for an immediate stay is preferable to a direct appeal because generally extraordinary writs are determined more speedily than appeals, and the specter of disqualification of counsel should not be allowed to hover

over the proceedings for an extended period of time for an appeal. See Ch. 72, *Attorney Practice and Ethics* .

Disqualification of Firm Not Required When Client Consulted With Firm Briefly Three Years Previously With Attorney No Longer Working With Firm. In *Goldberg v. Warner/Chappell Music, Inc. (2005) 125 Cal. App. 4th 752* , the court of appeal held that disqualification of a law firm is not required under *Cal. Rules Prof. Conduct, Rule 3-310(E)* if the lawyer who handled the previous matter is no longer working for the firm and left before the new matter arose, because there is no concern that the "tainted" attorney will spread information to the "nontainted" attorneys. See Ch. 72, *Attorney Practice and Ethics* .

Attorney Owes Duty to Intended Beneficiary Under *Probate Code §§ 21350* and *21351*. In *Osornio v. Weingarten (2004) 124 Cal. App. 4th 304* , the court of appeal held that when a client seeks an attorney's services to effect a transfer of assets to a beneficiary who is presumptively disqualified from receiving a donative transfer under *Prob. Code § 21350(a)*, the attorney owes a duty of care that runs both to the client and to the intended beneficiary to advise the client that the proposed transfer, if challenged, would have a significant likelihood of failing unless steps are taken under *Prob. Code § 21351* to exempt the transfer from this statutory presumption of disqualification. See Ch. 76, *Attorney Professional Liability* .

If Second Representation Uses Confidential Information Attorney Acquired in First Representation, Attorney Disqualified. In *Farris v. Fireman's Fund Insurance Company (2004) 119 Cal. App. 4th 671* , an attorney was disqualified when he previously represented an insurer in coverage issues and, in his new firm, subsequently represented an insured in a bad faith action against the insurer. See Ch. 72, *Attorney Practice and Ethics* .

Successor Fiduciary May Assert Professional Negligence Claim Against Attorney Hired by Predecessor. In *Borissoff v. Taylor & Faust (2004) 33 Cal. 4th 523* , the court held that a successor fiduciary of an estate in probate has the authority to assert a professional negligence claim against an attorney retained by a predecessor fiduciary to provide tax assistance for the benefit of the estate. See Ch. 458B *Probate: Suspension, Removal, and Resignation* .

Duty of Class Attorney May Extend Beyond Certified Claims. In *Janik v. Rudy, Exelrod & Zieff (2004)) 119 Cal. App. 4th 930* , the court of appeal held that if an attorney represents the plaintiff class in a class action lawsuit, the certification of the class does not relieve the attorney from a duty to advise about other potential claims that plaintiffs may have that arise from the same facts that underlie the certified claims. See Ch. 76, *Attorney Professional Liability* .

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§ 1.14 Automobiles

[1] Drivers Licenses

Driver Violates *Veh. Code § 12500* Even if Driver Does Not Know License is Invalid. In *People v. Spence (2005) 125 Cal. App. 4th 710* , the court of appeal held that it was irrelevant that a driver claimed he never received notice that his driver's license was suspended when he was convicted under *Veh. Code § 12500* with driving without a driver's license. See *Ch. 92, Automobiles: Drivers' Licenses, § 92.20*.

Cough Syrup Considered Alcoholic Beverage for Purpose of *Veh. Code § 23136*. In *Bobus v. Department of Motor Vehicles (2004) 125 Cal. App. 4th 680* , the court of appeal held that the primary goal of *Veh. Code § 23136* was to enhance public safety, rather than to discourage minors from consuming alcoholic beverages. Thus, a minor's driver's license was properly suspended when she was found driving with a blood alcohol concentration of more than 0.01 percent purportedly because she drank cough syrup containing alcohol. See *Ch. 92, Automobiles: Drivers' Licenses, § 92.155[6][g]*.

[2] Liability

Losses Arising Out of "Use" of Vehicle. In *State Farm Mutual Automobile Insurance Co. v. Grisham (2004) 122 Cal. App. 4th 563* . the court of appeal held that in determining whether a loss arises out of the "use of" a vehicle, the "predominating cause," or "substantial factor" test applies, which precluded liability coverage for a dog's jumping out of the camper shell of an unattended pickup truck and biting a pedestrian. See *Ch. 88, Automobiles: Automobile Insurance, § 88.15[4][b]*.

[3] Insurance and Uninsured Motorists

Insolvency Triggering Uninsured Motorist Coverage. In *Romano v. Mercury Ins. Co. (2005) 128 Cal. App. 4th 1333* , the court of appeal held that an insurer's inability to pay a claim "because of insolvency," triggering uninsured motorist coverage, means actual insolvency precipitating nonpayment of a claim within a year, regardless of whether any court or insurance commissioner took the formal step of ordering the insurer into liquidation. See *Ch. 88A, Automobiles: Uninsured Motorist Claims, § 88A.10[4][e]*.

No Arbitrable Controversy Once Uninsured Motorist Limits Paid. In *State Farm Mutual Automobile Insurance Co. v. Superior Court (2004) 123 Cal. App. 4th 1424* , the court of appeal held that if an insurer has paid the uninsured motorist limits of its policy, no controversy remains to be arbitrated under *Ins. Code § 11580.2(f)*. See *Ch. 88A, Automobiles: Uninsured Motorist Claims, § 88A.19[3][c]*.

Insurance Coverage for Nonowned Automobiles. In *Nava v. Mercury Casualty Co. (2004) 118 Cal. App. 4th 803* , the court of appeal held that a vehicle registered to, but not owned by, a listed driver who was the father of the permissive driver of another vehicle, is not a nonowned automobile for which coverage is provided. See *Ch. 88, Automobiles: Automobile Insurance, § 88.15[6][b]*.

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§ 1.15 Bankruptcy

[1] In General

Bankruptcy --Major 2005 Legislative Changes. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [Pub. L. No. 109-8 (Apr. 20, 2005)] made substantial changes to the Bankruptcy Code and other bankruptcy-related statutes, effective October 17, 2005 (or earlier, in a few cases). Some of the significant changes in bankruptcy law affecting individuals are:

- Introduction of measures intended to prevent abusive filing by individuals.
- Suppression of selected abusive creditor practices.
- Enhancement of the survivability of debts for family support.
- Increased protection for retirement savings, education savings, and personal information.
- Regulation of businesses offering debt-relief services.

See Ch. 94, *Bankruptcy* , which has been completely revised to reflect the Bankruptcy Code changes that are within the scope of that chapter. Conforming changes have also been made in other chapters.

[2] Automatic Stay

Automatic Stay--Limitations Period. In *ECC Construction, Inc. v. Oak Park Calabasas Homeowners Assn. (2004) 118 Cal. App. 4th 1031* , the court held that if the judgment debtor files a bankruptcy petition so that the automatic-stay period overlaps or falls within that 10-year limitation period, then the limitation period is extended for as long as the applicable automatic-stay provision precludes the commencement of judicial proceedings against the debtor within that 10-year period. See *Ch. 94, Bankruptcy, § 94.30[5]*.

Automatic Stay--Damages for Violation. In *Dawson v. Washington Mut. Bank (In re Dawson) (9th Cir. 2004) 390*

F.3d 1139 , the court held that actual damages may be recovered by an individual who is injured by a willful violation of the automatic stay, and those damages may include damages for emotional distress. See *Ch. 94, Bankruptcy, § 94.32*.

[3] Discharge

Discharge of Debt--Student Loans. In *Educational Credit Management Corp. v. Mason (In re Mason) (Bankr. 9th Cir. 2004) 315 B.R. 554* , the court held discharge is available if a debtor shows an undue hardship for payment of student loans. Although repayment of the full amount of the loans would impose an undue hardship on the debtor, if repayment of some lesser amount would not then the court may grant a partial discharge. See *Ch. 94, Bankruptcy, § 94.53*.

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§ 1.16 Business and Commercial

[1] Consumer Contracts and Loans

Consumer Loans Secured by Real Property. In *Wolski v. Fremont Investment & Loan (2005) 127 Cal. App. 4th 347* , the court held that a yield spread premium (YSP) paid in connection with a residential mortgage loan was not included in the definition of points and fees payable by a borrower at or before closing under *Fin. Code § 4970*. The transaction did not violate the predatory lending law because it was not a "covered loan"; the total points and fees exceeded six percent only if the YSP was included. See *Ch. 127, Consumer Contracts and Loans, §§ 127.31[2], 127.120[2]*.

[2] Corporations

Corporations--Shareholder Derivative Suits--Nature of Action. In *Schuster v. Gardner (2005) 127 Cal. App. 4th 305* , the court held that a shareholder's action for officer/director breach of fiduciary duty was a derivative action, and thus the demurrer to plaintiff's complaint was properly sustained for lack of standing. See Ch. 168, *Corporations: Derivative Actions* .

Corporations--Shareholder Derivative Suits--Attorney Fees in Derivative Action. In *Robbins v. Alibrandi (2005) 127 Cal. App. 4th 438* , the court held that the trial court has a duty to review an agreement to pay attorney fees negotiated as part of the settlement of a shareholder derivative suit, but unlike the obligation of a court when fashioning a fee award, the court's task is to determine if the negotiated fee is fair and reasonable. That negotiated fee need not perfectly duplicate the fees that would be awarded under the "substantial benefit doctrine." See Ch. 168, *Corporations: Derivative Actions* .

Annual Statement. *Corp. Code § 1502.1* provides that in addition to the annual statement required by *Corp. Code § 1502*, every publicly traded company must file another statement describing: (1) the name of the independent auditor that prepared the most recent auditor's report on the corporation's annual financial statements; (2) a description of annual compensation and loans made to any member of the board; (3) whether an order for relief has been entered in a bankruptcy case with respect to the corporation or its officers or board members within the previous 10 years; and (4) whether any officer or board member was convicted of fraud within the previous 10 years. See Ch. 160, *Corporations: Capacity* .

Notice by Electronic Transmission. *Corp. Code § 20* now provides definitions for electronic transmission of notices sent by corporations and for notices sent to the corporations, and that the communications must create a record that is capable of retention, retrieval, and review, and that may thereafter be rendered into clearly legible tangible form. See Ch. 165, *Corporations: Corporate Records and Reports* .

Electronic Meetings. *Corp. Code § 600* now provides a meeting of the shareholders may be conducted, in whole or in part, by electronic transmission by and to the corporation or by electronic video screen communication. See Ch. 166, *Corporations: Shareholders' Meetings and Voting* .

Securities--Broker-Dealer Agent. *Corp. Code § 25004* now provides definitions for when an agent is an employee of a broker-dealer. See *Ch. 515, Securities and Franchise Regulation, § 515.10* et seq.

Securities--Broker-Dealer Liability. *Corp. Code § 25501.5* now provides a person who purchases a security from or sells a security to a broker-dealer that is required to be licensed and has not, at the time of the sale or purchase, applied for and secured from the commissioner a certificate that is in effect at the time of the sale or purchase authorizing that broker-dealer to act in that capacity, may bring an action for rescission of the sale or purchase or, if the plaintiff or the defendant no longer owns the security, an action for damages. See Ch. 515, *Securities and Franchise Regulation* .

[3] Preemption

Federal Law Does Not Preempt *Bus. & Prof. Code § 25241*. In *Bronco Wine Company v. Jolly (2004) 33 Cal. 4th 943* , the California Supreme Court held that federal law does not preempt *Bus. & Prof. Code § 25241*, which prohibits the use of the word "Napa" in wine brand names where the grapes are not grown in Napa Valley. See *Ch. 18, Alcoholic Beverage Licenses, § 18.37[6][a]*.

[4] Sales

Express Warranty. This chapter is updated with *Schauer v. Mandarin Gems of California, Inc. (2005) 125 Cal. App. 4th 949* , which holds whether a seller has created an express warranty or merely made nonactionable statements of opinion is for the trier of fact to determine from all of the circumstances of the transaction. See *Ch. 502, Sales: Warranties, § 502.23[1]*.

Definition of Consumer. This chapter is updated with *Schauer v. Mandarin Gems of California, Inc. (2005) 125 Cal. App. 4th 949* , which holds a third party beneficiary of a contract for such goods or services is not a "consumer" within the meaning of the Consumers Legal Remedies Act. See *Ch. 504, Sales: Consumers Legal Remedies Act, § 504.10[1]*.

[5] Suretyship, Bonds, and Undertakings

Suretyship and Guaranty--Continuing Guaranties. In *Central Building, LLC v. Cooper (2005) 127 Cal. App. 4th 1053* , a case in which the principals of a corporation executed personal guaranties of payment on the corporation's commercial lease, the court of appeal held that the guaranty agreements were continuing guaranties of performance under the lease that applied to lease amendments. See Ch. 538, *Suretyship, Bonds, and Undertakings* .

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§ 1.17 Civil Procedure

[1] Affidavits, Certificates, and Declarations

Out of State Declarations. *Kulshrestha v. First Union Commercial Corp. (2004) 33 Cal. 4th 601* holds for a declaration to comply with the requirements of *Code Civ. Proc. § 2015.5*, the declaration must either state on its face that it was executed in California or state that it is declared under the laws of the state of California. See *Ch. 15, Affidavits, Certificates, and Declarations, § 15.11*.

[2] Answers

Affirmative Defenses. *Yoo v. Robi (2005) 126 Cal. App. 4th 1089* , holds the defense of illegality based on public policy is not waived by the defendant's failure to include it as an affirmative defense in the answer to the complaint. See *Ch. 26, Answers, § 26.17[7][d]*.

[3] Anti-SLAPP Motions

Civil Harassment. *Thomas v. Quintero (2005) 126 Cal. App. 4th 635* holds that petitions for injunctive relief filed under California's civil harassment statute [*Code Civ. Proc. § 527.6*] are subject to the anti-SLAPP statute, with the exception of a request for a temporary restraining order under *Code Civ. Proc. § 527.6(c)*. See Ch. 375, *Motions to Strike*, § 375.24[4].

Automatic Stay. *Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal. 4th 180* holds a defendant's appeal of the denial of an anti-SLAPP motion operates to automatically stay all further trial court proceedings on the merits; however, further proceedings on matters not subject to the anti-SLAPP motion are not stayed by the appeal, nor is the appeal of the denial of a motion to strike on the grounds that a cause of action is exempt under *Code Civ. Proc. § 425.17* subject to the automatic stay. See Ch. 375, *Motions to Strike*, § 375.24[12].

Anti-SLAPP Motion Inapplicable to Breach of Loyalty Claim. In *Benasra v. Mitchell Silberberg & Knupp LLP (2004) 123 Cal. App. 4th 1179* , the court of appeal held that a claim for breach of loyalty under *Cal. Rules Prof. Conduct, Rule 3-310* is not subject to a special motion to strike pursuant to *Code Civ. Proc. § 425.16*, the anti-SLAPP

statute. See Ch. 72, *Attorney Practice and Ethics* .

Eliminating Parts of a Cause of Action Prohibited. *Mann v. Quality Old Time Service, Inc. (2004) 120 Cal. App. 4th 90* holds an anti-SLAPP motion may not be used like a motion to strike under *Code Civ. Proc. § 436*, eliminating parts of a cause of action that plaintiff cannot substantiate. When a cause of action refers to both protected and unprotected activity, it is sufficient for purposes of the anti-SLAPP motion that plaintiff can show a probability of prevailing on any part of its cause of action. See Ch. 375, *Motions to Strike*, § 375.24[11][b].

[4] Complaints and Cross Complaints

Signature Requirement. *CLD Construction v. City of San Ramon (2004) 120 Cal. App. 4th 1141* holds a corporation's failure to have an attorney sign the complaint on behalf of the corporation is a defect that may be corrected, on such terms as are just in the sound discretion of the court. See *Ch. 123, Complaints and Cross Complaints, § 123.23[1]*.

Venue. *K.R.L. Partnership v. Superior Court (2004) 120 Cal. App. 4th 490* holds a plaintiff/cross defendant against whom a compulsory cross complaint has been filed is not entitled to seek a change of venue under *Code Civ. Proc. § 396b* based on a claim of improper venue as determined by reference to the cross-complaint. See *Ch. 123, Complaints and Cross Complaints, § 123.53[5][b]*.

[5] Continuances

Continuance--Servicemembers Civil Relief Act. This chapter is updated with *George P. v. Superior Court (2005) 127 Cal. App. 4th 216* , which holds that while the initial 90-day stay is essentially automatic under the Servicemembers Civil Relief Act, the granting of an *additional* stay is discretionary. A request for an additional stay may be denied if the servicemember's ability to appear and participate in the civil action is not adversely affected by his or her military duties. See *Ch. 136, Continuances, § 136.20[2][a]*.

Reversible Error. *Oliveros v. County of Los Angeles (2004) 120 Cal. App. 4th 1389* holds failure to consider all the facts and circumstances that are relevant to the determination of a continuance, and overemphasis on the Trial Court Delay Reduction Act, is reversible error. See *Ch. 136, Continuances, § 136.14*.

Illness or Death of Trial Counsel. *Hernandez v. Superior Court (2004) 115 Cal. App. 4th 1242* holds a request for a continuance supported by a showing of the serious physical illness or death of trial counsel will generally be granted absent a lack of diligence or other abusive circumstances. See *Ch. 136, Continuances, § 136.21*.

Continuance for Discovery in Support of Summary Judgment Motion. *Lerma v. County of Orange (2004) 120 Cal. App. 4th 709* holds that an inquiry into whether a continuance is needed for discovery does not end once the court determines that a continuance is not mandatory under *Code Civ. Proc. § 437c(h)*; the court must then determine whether the party requesting the continuance has nonetheless established good cause therefore, and this determination is within the court's discretion. See *Ch. 537, Summary Judgment, § 537.36*.

[6] Coordination

Electronic Submissions to Judicial Council. Cal. Rules of Court, Rule 1511.5, effective July 1, 2005, permits the electronic submission of specified coordination documents to the Chair of the Judicial Council using email, the technical requirements for submission, and the method for documents that require a signature under penalty of perjury. See *Ch. 125, Consolidation, Severance, and Coordination of Actions, §§ 125.37[1], 125.101[2]*.

[7] Defaults

Specifying Damages. *Falahati v. Kondo (2005) 127 Cal. App. 4th 823* holds when the complaint contained no specific

factual allegations with respect to the particular defendant seeking relief from the default judgment and did not specify the amount of damages plaintiff sought from the particular defendant, the default judgement against that defendant was void. See *Ch. 205, Defaults and Default Judgments, § 205.23[1]*.

Requesting Entry of Default. Judicial Council Form 982(a)(6) for requesting entry of default, effective February 18, 2005, is included. See *Ch. 205, Defaults and Default Judgments, § 205.90*.

[8] Injunctions

Scope of Injunction Must Be Narrowly Tailored. In *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal 129 Cal. App. 4th 1228* , the court of appeal held that an injunction against a corporate employer is inappropriate to enjoin the actions of certain employees. See *Ch. 303, Injunctions, § 303.13*.

Anti-Slapp Motion to Strike Applicable to Preliminary Injunction. In *Thomas v. Quintero (2005) 126 Cal. App. 4th 635* , the court of appeal held that a petition for injunctive relief under *Code Civ. Proc. § 527.6* is subject to a special motion to strike under the anti-SLAPP statute. However, the court held that no motion to strike can be filed in response to the TRO procedure provided for in *Code Civ. Proc. § 527.6*. See *Ch. 303, Injunctions, § 303.44*.

Injunction Upheld When Defendant's Speech Not Protected. In *Brekke v. Wills (2005) 125 Cal. App. 4th 1400* , the court of appeal held that the defendant's speech was not protected by the *First Amendment* when it was between purely private parties, about purely private parties, on matters of purely private interest. See *Ch. 303, Injunctions, § 303.71[3]*.

Preliminary Injunction Requires Verified Showing of Threatened Harm. In *Gray v. Superior Court (2005) 125 Cal. App. 4th 629* , the court of appeal held that there was no competent evidence supporting an injunction when a criminal complaint was signed under penalty of perjury by the Chief Deputy District Attorney, but there was no indication that the attorney had any personal knowledge of facts alleged. See *Ch. 303, Injunctions, § 303.42[4]*.

[9] Interpleader

Voluntary Deposit of Funds in Interpleader Action May Be Made at Any Time. A California Court of Appeal has held that in an interpleader action, a voluntarily deposit of funds that the stakeholder admits are payable may occur at any time, even though *Code Civ. Proc § 386(c)* expressly authorizes such a deposit only at the time of filing the complaint or cross-complaint. See *Wells Fargo Bank v. Zinnel (2004) 125 Cal. App. 4th 393* , now covered in *Ch. 314, Interpleader, §§ 314.22[1], 314.23[1]*.

Arbitration Agreement Between Claimants Does Not Bar Interpleader Action. A California Court of Appeal has held that if interpleaded claimants have an arbitration agreement, but the interpleading party is not a party to that agreement, the arbitration agreement does not deprive a trial court of jurisdiction to determine whether the claims can be interpleaded and whether to discharge the interpleading party. See *Dial 800 v. Fesbinder (2004) 118 Cal. App. 4th 32* , now covered in *Ch. 314, Interpleader, § 314.16[2][a]*.

[10] Judges

Mandatory Disqualification on Review. *Housing Authority of the County of Monterey v. Jones (2005) 130 Cal. App. 4th 1029* holds *Code Civ. Proc. § 170.1(a)(6)(C)* is broad enough to require the disqualification of a judge from a Superior Court appellate panel reviewing a judgment where that same judge heard a pretrial matter involving a contested factual or legal issue related to the merits, or made a procedural determination that had a substantial effect on the ultimate outcome, or where the determination, though not directly appealable, is related to an issue on appeal from the final judgment. See *Ch. 317, Judges, § 317.43[6]*.

Reconsideration of Disqualification. *Geddes v. Superior Court (2005) 126 Cal. App. 4th 417* holds while a judge that has been disqualified has no authority to act on substantive matters, the new judge assigned to the case may hear a motion for reconsideration under *Code Civ. Proc. § 1008* on the basis that the disqualified judge is "unavailable." If the new judge finds the disqualification is erroneous, the disqualified judge's authority to rule on the matter is reinstated. See *Ch. 317, Judges, § 317.82*.

Number of Peremptory Challenges. This chapter is updated with a completely revised analysis of peremptory challenges under *Code Civ. Proc. § 170.6* in light of *The Home Ins. Co. v. Superior Court (2005) 34 Cal. 4th 1025* , wherein the Supreme Court clarifies when a side may exercise additional peremptory challenges when parties have adverse interests, the burden for showing adverse interests, and the effect of late added parties. See *Ch. 317, Judges, § 317.77[3]*.

Peremptory Challenges After Remand. *State Farm v. Superior Court (2004) 121 Cal. App. 4th 490* holds a trial court's decision on motions regarding conflicts of laws issues did not constitute a "trial" such that parties would be entitled to make peremptory challenge pursuant to *CCP § 170.6(a)(2)* after remand. See *Ch. 317, Judges, § 317.122[10][c]*.

[11] Judgments

French Judgment Not Enforceable Without Service of Summons. In *Renoir v. Redstar Corp. (2004) 123 Cal. App. 4th 1145, 20 Cal. Rptr. 3d 603* , the California Court of Appeal held that after plaintiffs obtained a French judgment against the defendants and sought to have the judgment enforced in California under the Foreign Money-Judgments Act, the trial court erred in denying defendants' motion to set aside the judgment as void for lack of personal jurisdiction based on plaintiffs' failure to serve a summons on defendants. Defendants' knowledge of the action did not satisfy the requirement of adequate service of a summons and complaint, and defendants' brief references to issues related to whether the trial court correctly enforced the French judgment did not constitute a general appearance. See Ch. 318, *Judgments* .

[12] Jurisdiction: Personal

Foreign Corporation Doing Business in California. *Snowney v. Harrah's Entertainment, Inc. (2005) 35 Cal. 4th 1054* holds foreign corporations, in this instance Nevada hotels, that purposefully and successfully soliciting business of California residents, can reasonably anticipate being subject to litigation in California in the event their solicitations caused an injury to a California resident. Even though the Nevada hotels conducted no business in California and had no bank accounts or employees in California, the hotels were subject to California personal jurisdiction because they used an internet website advertising to California residents, had a wholly owned subsidiary operating offices in California to assist customers who contact those offices and attempt to attract a limited number of high-end gaming patrons to Nevada gaming hotel properties, advertised extensively in California through billboards, newspapers, and radio and television stations located in California, listed a toll-free phone number for making reservations at their hotels in their California advertisements and on their web site, and many of their California patrons used this number to make reservations, and regularly sent mailings advertising their hotels to selected California residents. See *Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances, §§ 323.14[4][a], [b], 323.15[5][d]*.

Forum Selection Clause. In *Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* , the court summarizes the state's choice-of-law provisions in regard to potentially unconscionable choice-of-law clauses, and applies the Restatement Second of Conflict of Laws. See *Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Fourm, and Appearances, § 323.34[1]*.

Motion to Quash. *Roy v. Superior Court (2005) 127 Cal. App. 4th 337* holds a defendant who chooses to demur or move to strike must also move to quash; he or she cannot reserve the jurisdictional objection and later file it with his answer if his challenge to the pleadings fails. See *Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum,*

and Appearances, § 323.50[1].

[13] Jurisdiction: Subject Matter

Reclassification of Case. *Ytuarte v. Superior Court (2005) 129 Cal. App. 4th 266* holds, under the *Walker* test, the superior court must deny a motion to reclassify the case as limited (and thus keep the matter in the unlimited civil court) *unless* it appears to a legal certainty that the plaintiff's damages will necessarily be less than $ 25,000. This standard of "legal certainty" is not met when it appears a verdict within the unlimited court's jurisdiction is "possible." See *Ch. 324, Jurisdiction: Subject Matter Jurisdiction, § 324.67[5].*

Concurrent Jurisdiction. *Donaldson v. National Marine (2005) 35 Cal. 4th 503* holds the federal supremacy principles prohibit state courts of general jurisdiction from refusing to entertain suits under the Federal Employers' Liability Act (FELA) [*45 U.S.C.S. § 51 et seq.*], which is incorporated by reference into the Jones Act [*46 U.S.C.S. App. § 688 et seq.*], solely because suit is brought under federal law or because enforcement of the federal right of action is deemed contrary to state policy or apt to cause inconvenience and confusion because of differing state and federal standards. Thus, states must entertain suits timely filed under the Jones Act despite state limitation statutes that might otherwise bar suit. See *Ch. 324, Jurisdiction: Subject Matter Jurisdiction, § 324.25[1].*

Administrative Remedies. *Neil & Associates v. Jones (2004) 33 Cal. 4th 917* holds a trucking company participating in the California Automobile Assigned Risk Plan (CAARP), a statutorily created program governed by the Insurance Commissioner designed to make automobile liability insurance available to those unable to obtain insurance through ordinary methods, is not required to exhaust the administrative remedies available to those participating in the CAARP before bringing a Lukenas v. Bryce's Mountain Resort, Inc. (W.D. Va. 1975) 66 F.R.D. 69. lawsuit in which the central issue was the determination of the proper premium to be charged, a matter governed by the CAARP's and the Insurance Commissioner's internal regulations. However, the doctrine of primary jurisdiction required the trial court to stay proceedings and refer the premium billing dispute to the Department of Insurance and the Insurance Commissioner. See *Ch. 324, Jurisdiction: Subject Matter Jurisdiction, § 324.15.*

Native American Intertribal Disputes. *Ackerman v. Edwards (2004) 121 Cal. App. 4th 946* holds *28 U.S.C. § 1360* does not confer on California jurisdiction over disputes between tribal members and tribes. See *Ch. 324, Jurisdiction: Subject Matter Jurisdiction, § 324.24[1].*

Void or Voidable Acts. *People v. American Contractors Indemnity Co. (2004) 33 Cal. 4th 653* holds in determining whether a prematurely entered summary judgment is void or voidable, the court must look first to the language of the relevant statute. The court's failure to comply with *Penal Code § 1306* by prematurely entering summary judgment did not deprive it of jurisdiction over the subject matter of the bail bond forfeiture or personal jurisdiction over the surety, and thus the premature entry of summary judgment was voidable, not void. See *Ch. 324, Jurisdiction: Subject Matter Jurisdiction, § 324.42[1].*

[14] Limitation of Actions

Delayed Discovery. *Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal. 4th 797* holds for a party to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period, and that as to cross-actions against codefendants or new parties, the statute of limitations is not tolled by the commencement of a plaintiff's action. The principle underlying the rule that a statute of limitations is suspended by the filing of the original complaint is that the plaintiff has thereby waived the claim and permitted the defendant to make all proper defenses to the cause of action pleaded. But, where the controversy is limited to cross-defendants, none of whom has done any act in the nature of a waiver, the reason for the rule does not exist. See *Ch. 345, Limitation of Actions, §§ 345.19[3][a], 345.19[3][c], 345.20[5][a].*

Myers-Milias-Brown-Act. *Coachella Valley Mosquito and Vector Control Dist. v. California Public Relations Board (2005) 35 Cal. 4th 1072* holds the statute of limitations for making a Myers-Milias-Brown-Act unfair practice charge to the California Public Employment Relations Board is six months. See *Ch. 345, Limitation of Actions, § 345.262A.*

Usury. In *Gibbo v. Berger (2004) 123 Cal. App. 4th 396* , the court held when a loan is usurious the creditor is entitled to repayment of principal only, and that the statute of limitations on recovery of usurious interest does not apply if the lender has initiated foreclosure proceedings based on the usurious note; in that case the borrower may cross-complain for recovery of all interest actually paid. See Ch. 568, *Usury* .

Choice of Law Provision. *Hughes Electronics Corp. v. Citibank Delaware (2004) 120 Cal. App. 4th 251* holds a choice of law provision that states the contract will be governed by the "laws" of a particular state incorporates that state's "borrowing statute." A borrowing statute requires that each cause of action be timely under the state chosen by the contract and any state in which the claim arose, effectively applying the shorter of the two states' limitations periods. See *Ch. 345, Limitation of Actions, § 345.13[2].*

Limitations Period Begins Running As to All Physicians Once Plaintiff Suspects Someone's Medical Malpractice. In *Knowles v. Superior Court (2004) 118 Cal. App. 4th 1290* , the court of appeal held that in a medical malpractice action, the limitations period begins running as to all potential defendants when the plaintiff suspects medical negligence on the part of someone, and it is not necessary that the plaintiff suspect a particular physician for the statute to begin running as to that physician or any other physician who may have been negligent. See Ch. 415, *Physicians: Medical Malpractice* .

[15] Motions to Reconsider

Motions to Reconsider--Interim Orders. *Le Francois v. Goel (2005) 35 Cal. 4th 1094* , which reviewed the split of authority regarding reconsideration of interim orders in the absence of new facts of new law, holds a court has the jurisdiction to review interim orders on its own motion, but that a party may not file a written motion to reconsider that has procedural significance if it does not satisfy the requirements of *Code Civ. Proc. § 1008*. The court concluded that the Legislature did not want to hinder the courts' ability to act, but rather to protect the courts from repetitive motions. The court did suggest that proper procedure would be for a court that had a concern about an erroneous prior ruling to inform the parties, solicit briefing, and hold a hearing. See *Ch. 374, Motions to Reconsider and Renewed Motions, § 374.12*.

New Circumstances. *Johnston v. Corrigan (2005) 127 Cal. App. 4th 553* , which holds a court's failure to consider properly submitted points and authorities may constitute "new circumstances" such that the trial court has jurisdiction to grant reconsideration under *Code Civ. Proc. § 1008(a)*. See *Ch. 374, Motions to Reconsider and Renewed Motions, § 374.16[1].*

[16] Parties

Intervention. *City of Malibu v. California Coastal Com. (2005) 128 Cal. App. 4th 897* holds a party may not intervene in an action where the party seeking intervention has identical interests as a party already in the action but can only speculate on the type of damage involved, and the party already litigating the matter is an able advocate of his/her and the other party's position. See *Ch. 395, Parties, § 395.34[2].*

[17] Res Judicata

Issue Preclusion from *Bankruptcy Proceeding.* *Roos v. Red (2005) 130 Cal. App. 4th 870, 30 Cal. Rptr. 3d 446* holds issue preclusion applies to a bankruptcy court's factual findings in a wrongful death case, and the defendant's right to a

jury trial was not denied simply because the court had given collateral estoppel effect to the bankruptcy court's findings on the issue of liability. See *Ch. 491, Res Judicata, § 491.15[3][k]*.

Post Complaint Facts. *Allied Fire Protection v. Diede Const. (2005) 127 Cal. App. 4th 150* holds res judicata is not a bar to claims that arise after the initial complaint is filed. Although the parties litigated a breach of contract action in federal court, res judicata did not bar plaintiff from later suing defendant on a fraud theory in state court where plaintiff was unaware of the facts forming the basis for the fraud suit until after the federal complaint was filed. See *Ch. 491, Res Judicata, § 491.18*.

Small Claims Action. *Pitzen v. Superior Court (2004) 120 Cal. App. 4th 1374* holds issue preclusion may be applied to prevent a plaintiff from relitigating an issue litigated and expressly decided against the plaintiff in a small claims action. See *Ch. 491, Res Judicata, § 491.15[3][i]*.

[18] Service of Summons and Papers

Certified Mail. *Bear Creek Master Assn. v. Edwards (2005) 130 Cal. App. 4th 1470* holds *Code Civ. Proc. § 1020* is *permissive*; where a notice is required to be sent by mail, and compliance with the mailing requirement may be satisfied by sending the notice by registered mail with a return receipt requested. This section does not *require* mailed notices to be sent by registered mail. Likewise, while a signed return receipt *may* create a rebuttable presumption that the notice was received, the absence of such a signed return receipt does not negate any other presumptions concerning mailed items; and a party cannot defeat notice by a willful failure to accept certified mail. See *Ch. 518, Service of Summons and Papers, § 518.34[7][a]*.

[19] Summary Judgment and Adjudication

Effect of Admissions. *Scalf v. D.B. Log Homes, Inc. (2005) 128 Cal. App. 4th 1510* holds all admissions elicited in the course of discovery are not created equal under the *D'Amico* rule [*D'Amico v. Board of Medical Examiners (1974) 11 Cal. 3d 1]* ; and deposition answers are simply evidence and do not constitute incontrovertible judicial admissions as do concessions in a pleading or answers to requests for admissions. See *Ch. 537, Summary Judgment, § 537.33[2][g][i]*.

Motion for Reconsideration. *Le Francois v. Goel (2005) 35 Cal. 4th 1094* holds *Code Civ. Proc. § 437c(f)(2)* does not restrict the court's ability to reconsider its prior interim rulings on its own motion, and the specific requirements of *Code Civ. Proc. § 437c(f)(2)* govern the motion for reconsideration rather than the general provisions of *Code Civ. Proc. § 1008*. See *Ch. 537, Summary Judgment, § 537.39*.

Objections to Evidence. *Andrews v. Mobile Aire Estates (2005) 125 Cal. App. 4th 578* holds a party opposing a summary judgment motion has the right to waive evidentiary objections; it is therefore error for a trial court to interpose and sustain its own hearsay objection. See *Ch. 537, Summary Judgment, § 537.25[4]*.

Preparation of Order. *Carnes v. Superior Court (2005) 126 Cal. App. 4th 688* holds the court may not grant a summary judgment motion without any specification of the reasons for doing so, and the drafting of the order may not be given solely to the prevailing party without specifying the basis for the ruling. See *Ch. 537, Summary Judgment, § 537.37[2]*.

Notice of Motion. *Urshan v. Musicians' Credit Union (2004) 120 Cal. App. 4th 758* holds a court's setting of a motion for summary judgment 10 days before trial violated the *Code Civ. Proc. § 437c(a)* notice requirement, and the two days to the prepare motion denied the party's due process rights. See *Ch. 537, Summary Judgment, § 537.20[1]*.

Declaration Supporting Motion. *Kulshrestha v. First Union Commercial Corp. (2004) 33 Cal. 4th 601* holds for a declaration in support of a motion for summary judgment to comply with the requirements of *Code Civ. Proc. § 2015.5*, the declaration must either state on its face that it was executed in California or state that it is declared under the laws of

the state of California. See *Ch. 537, Summary Judgment, § 537.24[1][a]*.

Evidentiary Objections. *Vineyard Springs Estates, LLC v. Superior Court (2004) 120 Cal. App. 4th 633* holds when evidentiary objections are in a proper form, a trial court must rule on the objections; it is imperative that a trial court rule on evidentiary objections regardless of whether the motion is denied or granted, and failure to rule on the objections is reversible error. See *Ch. 537, Summary Judgment, § 537.25[4]*.

Continuance for Discovery. *Lerma v. County of Orange (2004) 120 Cal. App. 4th 709* holds that an inquiry into whether a continuance is needed for discovery does not end once the court determines that a continuance is not mandatory under *Code Civ. Proc. § 437c(h)*; the court must then determine whether the party requesting the continuance has nonetheless established good cause therefore, and this determination is within the court's discretion. See *Ch. 537, Summary Judgment, § 537.36*.

[20] Venue

Limited Liability Companies. This chapter is updated with a revised interpretation of *Code Civ. Proc. § 395.5* and where venue may lie for a limited liability company. See *Ch. 571, Venue, § 571.18[3A]*.

Change of Venue Based on Cross Complaint. *K.R.L. Partnership v. Superior Court (2004) 120 Cal. App. 4th 490* holds a plaintiff/cross defendant against whom a compulsory cross complaint has been filed is not entitled to seek a change of venue under *Code Civ. Proc. § 396b* based on a claim of improper venue as determined by reference to the cross complaint. Rather, the cross complaint is to be tried in the same county that has been established as the proper venue based on the original complaint. See *Ch. 571, Venue, § 571.36*.

[21] Vexatious Litigants

Relitigation in Federal and State Courts. *Holcomb v. U.S. Bank Nat. Assn. (2005) 129 Cal. App. 4th 1494* holds that although one plaintiff attempted to relitigate matters that had been finally determined when he filed an untimely motion for reconsideration in a federal court case and then filed a similar action in state court, he did not repeatedly relitigate within the meaning of *Code Civ. Proc. § 391(b)(2)*, the vexatious litigant statute. See *Ch. 573, Vexatious Litigants, § 573.13[3][b]*.

California Forms of Pleading and Practice--Annotated

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 1 NEW DEVELOPMENTS
PART II. 2005 NEW DEVELOPMENTS

1-1 California Forms of Pleading and Practice--Annotated § 1.18

§ 1.18 Civil Rights

[1] Assemblies, Meetings, and Demonstrations

Ordinance Prohibiting Eviction Threats Unconstitutional Content-Based Regulation. In *Baba v. Board of Supervisors of San Francisco (2004) 124 Cal. App. 4th 504* , the court of appeal held that a rent control ordinance prohibiting landlords from making bad faith threats of eviction was unconstitutional content-based regulation of speech under state and federal speech protections. The ordinance regulated both commercial and noncommercial speech, and the provision regulated speech that was neither false nor inherently misleading, and it was not narrowly tailored to serve governmental interest. See *Ch. 59, Assemblies, Meetings, and Demonstrations, § 59.12[3][a]*.

Qualified Immunity for Denying March Permit and Dispersing Prayer Service to *First Amendment* Area. In *Galvin v. Hay (9th Cir. 2004) 374 F.3d 739* , Federal Park Service employees were entitled to qualified immunity in a *Bivens* action based on denial of a march permit to protestors without a concomitant promise on their part not to engage in civil disobedience and the dispersal of their prayer service that began as an alternative to the march. See *Ch. 59, Assemblies, Meetings, and Demonstrations, § 59.12[2][c]*.

[2] Discrimination in Business Establishments

Unruh Act Covers Marital Discrimination. In *Koebke v. Bernardo Heights Country Club (2005) 36 Cal. 4th 824* , the California Supreme Court held that, although domestic partners registered under the California Domestic Partner Rights and Responsibilities Act of 2003 are the equivalent of spouses for purposes of the Unruh Civil Rights Act, prior to the effective date of the Domestic Partner Act, a county club's policy of denying to domestic partners of members the same benefits granted to spouses of members did not violate the Unruh Act. See *Ch. 116, Civil Rights: Discrimination in Business Establishments, § 116.12[4]*.

Barrier Removal on Foreign-Flag Cruise Ships. In *Spector v. Norwegian Cruise Line Ltd.Spector v. Norwegian Cruise Line Ltd. (2005) 125 S. Ct. 2169* , the U.S. Supreme Court held that barrier removal required by Title III of Americans With Disabilities Act that would bring a foreign-flag cruise vessel into noncompliance with International Convention for Safety of Life at Sea, or any other international legal obligation, and would create serious difficulties for the vessel and have a substantial impact on its operation, would not be readily achievable. See *Ch. 116, Civil Rights:*

Discrimination in Business Establishments, § 116.52[3].

[3] Interference With Civil Rights

Governmental Agency Can Be Liable for Statutory Penalty Under Tom Bane Civil Rights Act. In *Los Angeles County Metropolitan Transit Authority v. Superior Court (2004) 123 Cal. App. 4th 261* , the court held that a county transportation authority could be liable for statutory penalties under *Civ. Code §§ 51.7, 52(b)(2)* despite *Gov. Code § 818*, which precludes a public entity's liability for damages imposed primarily for sake of example and by way of punishing defendant. See *Ch. 117A, Civil Rights: Interference With Civil Rights by Threats, Intimidation, Coercion, or Violence, § 117A.11[1][c].*

[4] Government Funded Programs

Retaliation Within Scope of Private Right of Action Under Title IX. In *Jackson v. Birmingham Bd. of Ed.Jackson v. Birmingham Bd. of Ed. (2005) 125 S. Ct. 1497* the district court erred in dismissing the complaint of a schoolteacher and coach alleging that the board of education retaliated against him for complaining about sex discrimination in a high school athletic program in violation of Title IX. The error was because (1) retaliation falls within Title IX's prohibition of intentional discrimination on the basis of sex, and (2) retaliation against the teacher for advocacy of the rights of the girls' basketball team was discrimination on the basis of sex. See *Ch. 112, Civil Rights: Government-Funded Programs and Activities, § 112.16[3].*

[5] Post War Civil Rights Statutes

Standing Under *42 U.S.C.S. § 1981*. In *Bains LLC v. ARCO Prods. Co. (9th Cir. 2005) 405 F.3d 764* , the court found that a corporation has standing to bring a *U.S.C.S. § 1981* claim against a defendant that employs the corporation as a contractor but imposes ethnic discrimination against the corporation's employees. See *Ch. 113, Civil Rights: Post-Civil War Civil Rights Statutes, § 113.12[2][d].*

No Action Under *42 U.S.C.S. § 1983* to Enforce Telecommunications Act. In *City of Rancho Palos Verdes v. AbramsCity of Rancho Palos Verdes v. Abrams (2005) 125 S. Ct. 1453* , the United States Supreme Court held that Congress did not mean for the judicial remedy expressly authorized by the Telecommunications Act of 1996 to coexist with an alternative remedy available in a *42 U.S.C.S. § 1983* action, because the Act adds no remedies to those available under *§ 1983* and limits relief in ways *§ 1983* does not. See *Ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes, § 113.14[1][a].*

Police Officer Entitled to Qualified Immunity. In *Brosseau v. HaugenBrosseau v. Haugen (2004) 125 S. Ct. 596* , a *42 U.S.C. § 1983* action against a police officer for excessive force in shooting a suspect in the back as he attempted to flee the scene, the United States Supreme Court held that the officer was entitled to qualified immunity. The Court found that the officer made a decision that, even if constitutionally deficient, reasonably misapprehended the law governing the circumstances she confronted. Her actions fell in the hazy border between excessive and acceptable force, and the case law did not clearly establish that her conduct violated the *Fourth Amendment*. See *Ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes, § 113.14[11][b].*

Political Party That Prevailed in *42 U.S.C. § 1983* Action Entitled to Attorneys' Fees. In *Democratic Party of Washington State v. Reed (9th Cir. 2004) 388 F.3d 1281* , the court found that a prevailing party in an action under *42 U.S.C. § 1983* should ordinarily recover attorneys' fees unless special circumstances could render such an award unjust. See *Ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes, § 113.17[2][a][i].*

[6] Prisoners' Rights

Prison Officials Failed to Show Three Strikes to Bar Suit--In Forma Pauperis Status. In *Andrews v. King (9th*

Cir. 2005) 398 F.3d 1113 , the Ninth Circuit held that the trial court erroneously dismissed a prisoner's action under the three strikes provision of *28 U.S.C. § 1915(g)*. This provision prohibits a prisoner from proceeding *in forma pauperis* if the prisoner has, on three or more occasions while incarcerated or detained in any facility, brought an action or appeal that was dismissed on grounds it was frivolous, malicious, or failed to state claim on which relief could be granted. State prison officials failed to meet their burden of producing evidence that the prisoner had brought the required number of actions, because only one case plainly qualified as a strike. See *Ch. 114, Civil Rights: Prisoners' Rights, § 114.28[7]*.

Strict Scrutiny Is Standard for Reviewing Prison Racial Classifications. In *Johnson v. CaliforniaJohnson v. California (2005) 125 S. Ct. 1141* , the United States Supreme Court held that strict scrutiny is the proper standard of review for the California Department of Corrections' unwritten policy of racially segregating prisoners in double cells in reception centers for up to 60 days each time they enter a new correctional facility. The Court would not decide whether the policy violated the *Equal Protection Clause*. See *Ch. 114, Civil Rights: Prisoners' Rights, § 114.17[2]*.

No Claims Under § 1983 for Denying Parole Dates. In *McQuillion v. Schwarzenegger (9th Cir. 2004) 369 F.3d 1091* , the Ninth Circuit found that an inmate's claim for damages under *42 U.S.C. § 1983*, based on alleged conspiracy between the California governor and others to deny parole to inmates serving life sentences by abusing state statutes that authorized the governor to be involved with parole, was barred by collateral estoppel to the extent he attempted to sue members of the Board of Prison Terms because an earlier complaint against them on the same grounds was dismissed based on their absolute immunity. However, collateral estoppel did not apply against the remaining defendants, because they were not entitled to absolute immunity. See Ch. 114, *Civil Rights: Prisoners' Rights* .

Incarcerated Father Had No Right to Be Present at Paternity Proceeding and Error in His Absence at Dependency Proceeding Was Harmless. In *In re Jesusa V. (2004) 32 Cal. 4th 588* , the California Supreme Court held that in a hearing held in the absence of an incarcerated biological father, but in the presence of his counsel, a juvenile court properly found the mother's husband, not the biological father, was the child's presumed father, because a proceeding to declare a presumed father is governed by *Pen. Code § 2625(e)*, which gives the court discretion whether to order the prisoner produced and the juvenile court did not abuse its discretion in proceeding without the biological father's personal attendance at the hearing. Under *Pen. Code § 2625(d)*, the juvenile court erred in adjudicating the child a dependent of the court without the biological father's presence or his waiver of the right to be present, but the error was harmless because the father was not prejudiced by his absence. See Ch. 114, *Civil Rights: Prisoners' Rights* .

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§ 1.19 Civil Service

California Supreme Court Rejects Seniority-Based Preference in State Civil Service. The California Supreme Court has held that the constitutional merit principle for state civil service hiring and promotion bars the Legislature from adopting a program, or approving a collectively bargained program, that requires the application of an absolute seniority-based preference. See *California State Personnel Bd. v. California State Employees Assn., Local 1000, SEIU, AFL-CIO (2005) 36 Cal. 4th 758* , now covered in *Ch. 118, Civil Service, § 118.19[1]*.

Psychological Screening Now Mandatory for State Peace Officer Candidates. The State Personnel Board now requires all candidates for peace officer positions in the state civil service to undergo psychological screening as part of the application process, and the Board has issued regulations prescribing procedures for psychological screening. See Cal. Code Reg. §§ 172.4-172.10, now covered in *Ch. 118, Civil Service, § 118.16*.

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§ 1.20 Class Actions

Class Action Fairness Act of 2005 Facilitates Removal to Federal Court. This chapter is updated throughout with the federal Class Action Fairness Act of 2005 [Pub. L. No. 109-2, 119 Stat. 4], which took effect February 18, 2005, and provides special rules for federal courts' exercise of diversity jurisdiction over interstate class actions, adds new provisions to facilitate the removal of class actions from state court, and imposes new consumer-protection requirements for the settlement of class actions. For discussion, see *Ch. 120, Class Actions, §§ 120.10[2], 120.13, 120.21[2]*.

Waivers. The California Supreme Court has held, in *Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* , that a contractual provision waiving the right to pursue a class remedy for disputes arising under the contract is not necessarily unenforceable, although some class-action waivers in consumer contracts, such as in unmarkable "bill-stuffer" form, are unconscionable and unenforceable. See *Ch. 120, Class Actions, § 120.12[6]*.

Attorney's Fees. In a recent court of appeals case, *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc. (2005) 127 Cal. App. 4th 387* , the court held that an unnamed member of a putative class who successfully objects to class certification and approval of a proposed classwide settlement agreement is not entitled to an award of attorney fees under the "private attorney general" statute. See *Ch. 120, Class Actions, § 120.24[3], [4]*.

Named Plaintiff May Not Appeal on Behalf of Nonappealing Class Members When Named Plaintiff Not Aggrieved. In *Estrada v. RPS, Inc. (2005) 125 Cal. App. 4th 976, 23 Cal. Rptr. 3d 261* , the court of appeal held that a named plaintiff in a class action is not the "guardian" of class members, and, therefore, did not have standing to appeal on behalf of dismissed class members when he could not show that he was aggrieved by their dismissal. See *Ch. 40, Appeal: An Overview, § 40.13[1][a][iii]*.

Individual Showing of Damages by Each Class Member Does Not Make Class Action Inappropriate. The California Supreme Court has held that a class action is not inappropriate simply because each class member may at some point be required to make individual showing of eligibility for recovery or amount of damages; rather, determining whether common questions predominate requires the court to compare costs and benefits of adjudicating plaintiffs' claims in a class action with the costs and benefits of proceeding by numerous separate actions. See *Sav-on*

Drug Stores, Inc. v. Superior Court (2004) 34 Cal. 4th 319 , now covered in Ch. 120, *Class Actions* , Introduction.

Duty of Class Attorney May Extend Beyond Certified Claims. In *Janik v. Rudy, Exelrod & Zieff (2004)) 119 Cal. App. 4th 930* , the court of appeal held that if an attorney represents the plaintiff class in a class action lawsuit, the certification of the class does not relieve the attorney from a duty to advise about other potential claims that plaintiffs may have that arise from the same facts that underlie the certified claims. See Ch. 76, *Attorney Professional Liability* .

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§ 1.21 Contracts

[1] Breach of Contract

Implied Covenant of Good Faith and Fair Dealing. In *Celador International Ltd v. The Walt Disney Co. (C.D. Cal. 2004) 347 F. Supp. 2d 846* , the court held a claim for breach of the implied covenant is separate and distinct from a contract claim in three situations: (1) if no contract claim is alleged; (2) if the plaintiff is seeking recovery in tort; and (3) if the plaintiff alleges that the defendant acted in bad faith to frustrate the benefits plaintiff was to receive under the contract. See *Ch. 140, Contracts, § 140.12*.

[2] Damages

Scope of Contract Damages. In *Robinson Helicopter Company, Inc. v. Dana Corporation (2004) 34 Cal. 4th 979* , the court holds the scope of a contract remedy assumes that the parties can negotiate the risk of loss occasioned by a breach; accordingly courts enforce those obligations each party voluntarily assumes and award only those benefits they expected to receive. See *Ch. 140, Contracts, § 140.56[3][a]*.

Pleading General Damages. In *Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960* , the court held general damages for breach of contract are those losses that arise directly and inevitably from any similar breach of any similar agreement; special damages are secondary or derivative losses arising from circumstances that are particular to the contract or to the parties and are recoverable if the special or particular circumstances from which they arise were actually communicated to or known by the breaching party or were matters of which the breaching party should have been aware at the time of contracting. See Ch. 177, *Damages* ., and *Ch. 140, Contracts § 140.101[3][f]* ,.

Usury. In *Gibbo v. Berger (2004) 123 Cal. App. 4th 396* , the court held when a loan is usurious the creditor is entitled to repayment of principal only, and that the statute of limitations on recovery of usurious interest does not apply if the lender has initiated foreclosure proceedings based on the usurious note; in that case the borrower may cross-complain for recovery of all interest actually paid. See Ch. 568, *Usury* .

[3] Fraudulent Conveyances

Right to Jury Trial. In *Wisden v. Superior Court (Sims) (2004) 124 Cal. App. 4th 750* , the court held because the right to trial by jury existed for common-law fraudulent transfer claims when the California Constitution was adopted in 1850, in California a plaintiff still has a right to trial by jury on a claim for fraudulent transfer. See Ch. 270, *Fraudulent Conveyances* .

[4] Illegal or Unconscionable Contracts

Public Policy. In *Yoo v. Robi (2005) 126 Cal. App. 4th 1089* , the court held that substantial evidence supported the trial court's finding that a singer's personal manager violated the Talent Agencies Act in procuring performance engagements without a license, thus rendering his contracts void and barring recovery of a commission. See *Ch. 140, Contracts, §§ 140.23[2], 140.83[12], 140.44[3]*.

Unconscionable Contract. In *Crippen v. Central Valley RV Outlet (2004) 124 Cal. App. 4th 1159* , the court held: (1) there is no general rule that a form contract is procedurally unconscionable; rather, procedural unconscionability arises from the manner in which the contract is presented to the party in the weaker position; (2) no extrinsic evidence of procedural unconscionability is required if a great disparity of power can be inferred from the parties' relationship or from the contract itself; and (3) surprise may be found if a contract merely refers to rules set forth in another source that the customer would have to see prior to signing in order to learn the full import of the contract. acted in bad faith to frustrate the benefits plaintiff was to receive under the contract. See *Ch. 140, Contracts, § 140.25*.

[5] Recission

Recission of Third-Party Beneficiary Contracts. *Schauer v. Mandarin Gems of California, Inc. (2005) 125 Cal. App. 4th 949* holds a third party beneficiary has no standing to rescind a contract. See *Ch. 490, Rescission and Restitution, § 490.19*.

[6] Statute of Frauds

Email Signature. *Lamle v. Mattel, Inc. (Fed. Cir. 2005) 394 F.3d 1355* holds, applying California common law, an email signed with a party's name was held to have satisfied the statute of frauds, assuming that a binding oral agreement existed and that the email included all the material terms of that agreement. See *Ch. 530, Statute of Frauds, § 530.15[3]*.

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§ 1.22 Copyright

Copyright Liability--Types. In *Ellison v. Robertson (9th Cir. 2004) 357 F.3d 1072* , the court held that there are three types of liability for copyright infringement: (1) direct infringement, (2) contributory infringement, and (3) vicarious infringement. See *Ch. 349, Literary Property and Copyright, § 349.27*.

Copyright Liability--Damages and Limitation of Action. In *Polar Bear Prods., Inc. v. Timex Corp. (9th Cir. 2004) 384 F.3d 700, 72 U.S.P.Q.2d 1289* , the court held actual damages must be suffered "as a result of the infringement," and recoverable profits must be "attributable to the infringement," and an infringement suit is time-barred if it is based on an act of infringement that the plaintiff discovered, or reasonably should have discovered, more than three years before commencement of the suit. See *Ch. 349, Literary Property and Copyright, § 349.27*.

Copyright Liability--Online Liability Limitations. The Online Copyright Infringement Liability Limitation Act [*17 U.S.C. § 512*], enacted as title II of the Digital Millennium Copyright Act [Pub. L. No. 105-304], creates four safe-harbor defenses that Internet service providers may raise to limit their liability for claims of copyright infringement. These defenses relate to (1) transitory digital-network communications, (2) system caching, (3) information residing on systems or networks at the direction of users, and (4) information-location tool. See *Ch. 349, Literary Property and Copyright, § 349.27*.

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§ 1.23 Costs and Attorney's Fees

Unnamed Objector to Settlement of Putative Class Action Not Entitled to Attorney's Fees. In *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc. (2005) 127 Cal. App. 4th 387* , the court held that an unnamed putative objector who successfully opposed the settlement of a class action was not entitled to attorney's fees under either the equitable substantial benefit theory or as a private attorney general under *Code Civ. Proc. § 1021.5*. See Ch. 174, *Costs and Attorney's Fees* .

Approval of Negotiated Fee in Shareholder Derivative Action Was Abuse of Discretion. In *Robbins v. Alibrandi (2005) 127 Cal. App. 4th 438* , the court held that in approving a negotiated settlement of a shareholder derivative action including an attorney's fee award, the trial court abused its discretion. The court used factors unsupported by the record in calculating the amount of fees, and enhanced the lodestar amount by applying multipliers for which there was scant evidentiary support; and there was very little real benefit conferred on corporation and shareholders as a result of litigation. See Ch. 174, *Costs and Attorney's Fees* .

Motion for Attorney's Fees for Post Injunction Litigation Not Untimely. In *Crespin v. Shewry (2004) 125 Cal. App. 4th 259* , the Court of Appeal held that the plaintiffs' motion for attorney's fees after successfully defending a permanent injunction, which was brought three years after the last litigation on the injunction, was not untimely. *Cal. Rules of Ct., Rule 3.1702* did not govern the time for the bringing motion. Further, defendant was not unfairly prejudiced by the delay, because even a motion timely under Rule 870.2 would have required the parties to reconstruct litigation activities occurring five years earlier, and the delay did not prevent settlement of the fee issue. The fact that the judge that granted the injunction retired in interim also did not show prejudice. See Ch. 174, *Costs and Attorney's Fees* .

Failure to Mediate Precluded Attorney's Fees Award to Prevailing Parties. In *Frei v. Davey (2004) 124 Cal. App. 4th 1506* , prevailing defendants in an action to specifically enforce a residential purchase agreement were not entitled to an attorney's fees award. The agreement required mediation as a condition precedent to commencing arbitration or litigation, and the defendants' course of conduct constituted a refusal to respond to a clear and unequivocal request to mediate. Further, the defendants' refusal to mediate was not excused. See Ch. 174, *Costs and Attorney's Fees* .

Attorney's Fee Awards in Civil Rights Actions Deductible From Plaintiff's Gross Income. The American Jobs Creation Act of 2004 [Pub. L. No. 108-357] now provides that an award of attorney's fees recovered by a plaintiff and paid to the plaintiff's attorney in a civil rights action, including an action brought under the California Fair Employment and Housing Act, is deductible from the plaintiff's gross income for income-tax purposes. See *I.R.C. § 62*, now covered in *Ch. 115, Civil Rights: Employment Discrimination, § 115.56[8]*.

Anti-SLAPP Motion Inapplicable to Breach of Loyalty Claim. In *Benasra v. Mitchell Silberberg & Knupp LLP (2004) 123 Cal. App. 4th 1179* , the court of appeal held that a claim for breach of loyalty under *Cal. Rules Prof. Conduct, Rule 3-310* is not subject to a special motion to strike pursuant to *Code Civ. Proc. § 425.16*, the anti-SLAPP statute. See Ch. 72, *Attorney Practice and Ethics* .

Political Party That Prevailed in *42 U.S.C. § 1983* Action Entitled to Attorneys' Fees. In *Democratic Party of Washington State v. Reed (9th Cir. 2004) 388 F.3d 1281* , the court found that a prevailing party in an action under *42 U.S.C. § 1983* should ordinarily recover attorneys' fees unless special circumstances could render such an award unjust. See *Ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes, § 113.17[2][a][i]*.

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§ 1.24 Damages

[1] Contracts

Scope of Contract Damages. In *Robinson Helicopter Company, Inc. v. Dana Corporation (2004) 34 Cal. 4th 979* , the court holds the scope of a contract remedy assumes that the parties can negotiate the risk of loss occasioned by a breach; accordingly courts enforce those obligations each party voluntarily assumes and award only those benefits they expected to receive. See *Ch. 140, Contracts, § 140.56[3][a]*.

Pleading General Damages. In *Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960* , the court held general damages for breach of contract are those losses that arise directly and inevitably from any similar breach of any similar agreement; special damages are secondary or derivative losses arising from circumstances that are particular to the contract or to the parties and are recoverable if the special or particular circumstances from which they arise were actually communicated to or known by the breaching party or were matters of which the breaching party should have been aware at the time of contracting. See Ch. 177, *Damages* ., and *Ch. 140, Contracts § 140.101[3][f]* ,.

[2] Tort and Punitive Damages

State to Receive Share of Punitive Damages Awards Until 2006. In new *Civil Code § 3294.5*, the legislature, to meet pressing budgetary needs, has provided that only 25 percent of any punitive damages award must be paid to the plaintiff in a civil action, with the other 75 percent paid to the state treasury and made available for annual budget appropriation by the state, with a share of that amount going to pay the plaintiff's attorney. However, this statute only applies to actions that are filed after August 16, 2004, and that are finally adjudicated, including any appeals, prior to July 1, 2006, unless a later-enacted statute extends or deletes the 2006 repeal date. See Ch. 177, *Damages* .

Supreme Court Clarifies Proper Considerations in Awarding Punitive Damages. In *Simon v. San Paolo U.S. Holding Co., Inc. (2005) 35 Cal. 4th 1159* , the California Supreme Court held that although the wealth of a defendant alone cannot justify a high punitive damages award and cannot substitute for tailoring the award to the reprehensibility of the defendant's conduct or to the amount of compensatory damages, the state has a legitimate interest in deterring future misconduct and may still allow juries to consider the wealth of the defendant in awarding punitive damages. In

addition, the Court concluded that it may be appropriate in some rare circumstances to proportion punitive damages to some measure of harm other than the actual amount of compensatory damages awarded, such as uncompensated harm or potential damages that were not--but could have been--inflicted, if these potential damages are a truer measure of the risk created by the defendant's conduct. However, the use of potential harm as a measure must be limited to potential harm that was actually intended by the defendant or was reasonably likely to occur from the defendant's conduct. In the companion case of *Johnson v. Ford Motor Co. (2005) 35 Cal. 4th 1191* , the California Supreme Court held that the state may, to further its legitimate goal in deterring future misconduct through an award of punitive damages, consider whether the type of misconduct perpetrated against the particular plaintiff was an isolated event or was but one instance in a pattern of similar misconduct in determining the reprehensibility of the defendant's conduct, which in turn will necessarily affect the amount of punitive damages awarded. See Ch. 177, *Damages* ,

Punitive Damages Award Against Tobacco Company Reduced to $50 Million. In *Boeken v. Philip Morris, Inc.* (2005) 127 Cal. App. 4th 1640 , the court of appeal reduced a punitive damages award against a tobacco company from $100 million to $50 million on a compensatory damage award of $5.5 million, concluding that a 9-to-1 ratio was warranted given the extreme reprehensibility of the company's longstanding conduct in adding substances to its cigarettes to increase their addictiveness, gaining smokers by fraud and through its long denial of the dangers of smoking, and marketing a product that was more dangerous than consumers expected. In addition, the court held that in a fraud action, communication and reliance may be shown by evidence that the plaintiff was influenced by widespread advertising targeted at a group of which the plaintiff was a member, even if the plaintiff cannot specify that any particular advertisement or statement was made directly to him or her or that the plaintiff relied on any one advertisement. See Ch. 177, *Damages* , and *Ch. 269, Fraud and Deceit § 269.15[2]* ,.

Evidence Plaintiff Paid for Own Medical Expenses Admissible to Prove Damages. In *Smalley v. Baty (2005) 128 Cal. App. 4th 977* , the court of appeal held that if a plaintiff has paid for past medical services out of his or her own pocket, evidence of this payment is admissible to prove damages. See Ch. 177, *Damages* .

Shareholder Not Entitled to Recover for Lost Future Corporate Profits. In *Sole Energy Co. v. Petrominerals Corp. (2005) 128 Cal. App. 4th 212* , the court of appeal held that a corporate shareholder does not have an ownership interest in corporate profits and cannot recover individually for lost future profits suffered by the corporation. See Ch. 177, *Damages* .

Punitive Damages Upheld Against Ex Post Facto Challenge. In *Roman Catholic Bishop of Oakland v. Superior Court (2005) 128 Cal. App. 4th 1155* , the court of appeal held that because an award of punitive damages in a civil claim does not constitute a criminal punishment, a statute reviving the limitations period for a common law tort cause of action, thus allowing a plaintiff to seek punitive damages after the time for filing the action had originally expired, does not violate the prohibition against ex post facto laws. See Ch. 177, *Damages* .

Hospital Emergency Lien Limited to Amount Owed by Plaintiff to Hospital. In *Parnell v. Adventist Health System/West (2005) 35 Cal. 4th 595* , the California Supreme Court held that a hospital's lien rights against a patient's recovery from a third-party tortfeasor under *Civ. Code § 3045.1* do not extend to the difference between the amount the hospital agreed to receive from that plaintiff under a managed care contract and the full-rate amount that the hospital would have charged to a patient not covered by the managed care contract, although the Court noted that hospitals are free to negotiate with patients the right to assert that greater lien amount in those managed care contracts. See *Ch. 177, Damages, § 177.40* et seq.

Joint and Several Liability for Noneconomic Damages in Civil Conspiracy Action. In *Kesmodel v. Rand (2004) 119 Cal. App. 4th 1128* , the court of appeal held that the passage of Proposition 51 did not change the rule of joint and several liability for noneconomic damages in a case of civil conspiracy. See Ch. 126, *Conspiracy* , Introduction.

Nine to One Ratio of Punitive Damages to Compensatory Damages Approved. In *Bardis v. Oates (2004) 119 Cal.*

App. 4th 1 , the court of appeal reduced a punitive damages award from $7 million to $1.5 million, concluding that a punitive damages to compensatory damages ratio of just over 9 to 1 was justified because the defendant's conduct was highly reprehensible and the amount of compensatory damages did not fully reflect the outrageousness of the conduct. See Ch. 177, *Damages* .

Child's Mental Disability Does Not Preclude Loss of Companionship Damages in Wrongful Death Action. In *Knowles v. Superior Court (2004) 118 Cal. App. 4th 1290* , the court of appeal held that mental retardation does not necessarily render a child less able to suffer loss of companionship damages, as the plaintiff in a wrongful death action, than a child with no such mental disability. See Ch. 181, *Death and Survival Actions* .

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§ 1.25 Discovery

[1] In General

Reorganization of Discovery Statutes. The Civil Discovery Act of 1986 is repealed and replaced with a new Civil Discovery Act on July 1, 2005. This publication is extensively updated throughout to reflect the new statutory citations in the reorganized code where many sections of the former Act are pulled apart and reassembled in a new code scheme. Correlation tables are included to help you quickly identify the citation for the new provision that replaces the familiar old provision.

[2] Depositions

July Mandatory Judicial Council Forms. Three new mandatory deposition subpoena Judicial Council forms effective July 1, 2005 are included. See *Ch. 193, Discovery: Depositions, §§ 193.226, 193.227, 193.228*.

[3] Interrogatories

Boilerplate Privilege Objections in Response to Interrogatories Do Not Waiver Right to Assert Privilege. In *Best Products, Inc. v. Superior Court (2004) 119 Cal. App. 4th 1181* , the court of appeal held that defendant's failure to provide a privilege log did not constitute waiver of its right to assert attorney-client privilege and work product protection in regard to interrogatories propounded by plaintiff, when defendant provided a timely, albeit boilerplate, response. See *Ch. 194, Discovery: Interrogatories, § 194.16[4]*.

[4] Privileges and Other Discovery Limitations

Discovery: Clergy-Penitent and Psychotherapist-Patient Privileges Construed. In *Roman Catholic Archbishop of Los Angeles v. Superior Court (People) (2005) 131 Cal. App. 4th 417* , a case investigating allegations of child sexual assault committed by two priests, the court of appeal held that documents generated in the course of "troubled-priest interventions" were not privileged as penitential communications under *Evid. Code § 1032*, because both parties to the original communications knew they would be transmitted to a third person. Further, only one memorandum from a member of the Archbishop's staff to a priest's psychotherapists was protected by psychotherapist-patient privilege,

because this document supplied the troubled priest's therapeutic team with information about his personal history as an aid to diagnosis and treatment. See *Ch. 191, Discovery: Privileges and Other Discovery Limitations, §§ 191.70[2], 191.80[4]*.

Disclosure of Records Concerning Probation-Conditioned Psychotherapy. In *In re Christopher M. (2005) 127 Cal. App. 4th 684 , amended, 2005 Cal. App. LEXIS 382* , the court of appeal held that probation conditions that required all records related to juvenile defendant's treatment be made available on request to the court and the probation department were reasonable and did not violate juvenile's right of privacy or his psychotherapist-patient privilege, given the state's legitimate countervailing interest in protecting the public against defendant's violent conduct and in determining whether he was fully complying with his probation conditions. See *Ch. 191, Discovery: Privileges and Other Discovery Limitations, § 191.70[2]*.

Discovery of Police Officer Personnel Records. In *Garcia v. Superior Court (City of Santa Ana) (2004) 120 Cal. App. 4th 1252, 16 Cal. Rptr. 3d 603* , the court of appeal held, as an issue of first impression, that a criminal defendant may file a declaration under seal in support of his or her *Pitchess* motion on the grounds that it contains information protected from disclosure by the attorney-client privilege and attorney work protection. The court also outlined the procedures a trial court should follow when faced with a sealed declaration or affidavit in support of a *Pitchess* motion. See *Ch. 191, Discovery: Privileges and Other Discovery Limitations, § 191.153[13]*.

[5] Production or Inspection of Tangible Evidence

Boilerplate Privilege Objections in Response to Request for Inspection and Production of Documents Do Not Waiver Right to Assert Privilege. The court of appeal in *Best Products, Inc. v. Superior Court (2004) 119 Cal. App. 4th 1181* found no waiver of the attorney-client and work product privileges when defendant asserted those privileges in a timely manner, "albeit in a boilerplate fashion," but failed to file a privilege log as part of its opposition to plaintiff's request to inspect and product. See *Ch. 195, Discovery: Production or Inspection of Tangible Evidence, §§ 195.16[1], 195.18*.

[6] Sanctions

Sanctions May Not Be Awarded Ex Parte. In *Sole Energy Co. v. Hodges (2005) 128 Cal. App. 4th 199* , the appellate court ruled that a failure to notify and provide an opportunity to be heard to the defendants that their defaults might be entered as a discovery sanction violated former *Code Civ. Proc. § 2023(b)* (now see *Code Civ. Proc. § 2023.030*) and due process, because sanctions for abuse or misuse of discovery may not be awarded ex parte. See *Ch. 192, Discovery: Sanctions for Discovery Misuse, § 192.19*.

Stipulation Was Tantamount to Requisite Court Order Compelling Responses, for Purposes of Awarding Terminating Sanctions. In *Mileikowsky v. Tenet Healthsystem (2005) 128 Cal. App. 4th 262* , the court of appeal held that a stipulation signed by both parties waived the right to insist on a formal order compelling responses, as required by former *Code Civ. Proc. §§ 2030* and *2031*, as a precursor to imposing terminating sanctions, when plaintiff's discovery violation was willful, preceded by history of abuse, and evidence showed that less severe sanctions would not produce compliance. See *Ch. 192, Discovery: Sanctions for Discovery Misuse, § 192.13[3][b][iii]*.

[7] Scope, Regulation and Timing

Non-Party Insurer's Financial Information Is Not Discoverable Under Former *Code Civ. Proc. § 2017(b)*. In *Catholic Mut. Relief Soc'y v. Superior Court (2005) 128 Cal. App. 4th 879, 27 Cal. Rptr. 3d 515* , the court of appeal held that a non-party liability insurer's financial condition was not discoverable under former *Code Civ. Proc. § 2017(b)* (now see *Code Civ. Proc. § 2017.210*), which provided for discovery of the existence and contents of an insurance policy. The court also held that former § 2017(b) did not authorize discovery of reinsurance policies because an injured

plaintiff could not be considered a third party beneficiary to the reinsurance contracts. Finally, the insurer's financial condition was not discoverable for settlement purposes under the general relevancy rules of former § 2017(a) (now see *Code Civ. Proc. § 2017.010*). See *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.21[1]*.

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§ 1.26 Employment

[1] Discrimination

California Supreme Court Rejects "Deterrence Standard" for Determining Whether FEHA Retaliation Plaintiff Has Suffered Adverse Employment Action. The California Supreme Court has held that to qualify as an "adverse employment action" under FEHA, an employer's retaliatory act against an employee must have a material effect on the terms, conditions, or privileges of employment; it is not sufficient that the act deter the employee from engaging in protected activities. See *Yanowitz v. L'OrealUSA, Inc. (2005) 36 Cal. 4th 1028* , now covered in *Ch. 115, Civil Rights: Employment Discrimination, § 115.37[3][a]*.

Widespread Workplace Favoritism Based on Sexual Relationships May Create Hostile Work Environment. The California Supreme Court has held that widespread workplace sexual favoritism on the part of a supervisor toward female employees with whom the supervisor is conducting consensual sexual affairs may create a hostile work environment for other employees. See *Miller v. Department of Corrections. (2005) 36 Cal. 4th 446* , now covered in *Ch. 115, Civil Rights: Employment Discrimination, §§ 115.36[5][b][iii], 115.37[1][b]*.

Ministerial Exception to Fair Employment and Housing Act Explained. A California Court of Appeal has explained the scope of the nonstatutory "ministerial exception" to state civil rights laws. See *Hope Int'l Univ. v. Superior Court (2004) 119 Cal. App. 4th 719* , now covered in *Ch. 115, Civil Rights: Employment Discrimination, §§ 115.20[2][d], 115.22[6][e]*.

Disparate Impact Theory Applies to Age Discrimination in Employment Act. The United States Supreme Court has held that the disparate impact theory is available in Age Discrimination in Employment Act cases, although the scope of disparate-impact liability under the ADEA is narrower than under Title VII. See *Smith v. City of JacksonSmith v. City of Jackson (2005) 125 S. Ct. 1536* , now covered in *Ch. 115, Civil Rights: Employment Discrimination, § 115.23[4][a]*.

Public Employee Need Not Exhaust Employer's Internal Administrative Remedy For Nonstatutory Wrongful-Termination Claim Related to FEHA Claim. A California Court of Appeal has held that a public

employee who asserts a Fair Employment and Housing Act claim and a related nonstatutory claim for wrongful termination in violation of public policy need not exhaust the internal administrative remedy provided by the employer with respect to the nonstatutory claim before filing a civil action, if the resolution of that claim would have a preclusive impact on the FEHA claim. See *Williams v. Housing Auth. (2004) 121 Cal. App. 4th 708* , now covered in *Ch. 115, Civil Rights: Employment Discrimination, § 115.51[1][a], [g]*.

Attorney's Fee Awards in Civil Rights Actions Deductible From Plaintiff's Gross Income. The American Jobs Creation Act of 2004 [Pub. L. No. 108-357] now provides that an award of attorney's fees recovered by a plaintiff and paid to the plaintiff's attorney in a civil rights action, including an action brought under the California Fair Employment and Housing Act, is deductible from the plaintiff's gross income for income-tax purposes. See *I.R.C. § 62*, now covered in *Ch. 115, Civil Rights: Employment Discrimination, § 115.56[8]*.

Preprinted Workers' Compensation Release Form Settles Only Claims Within Scope of Workers' Compensation System. The California Supreme Court has held that the standard language of the mandatory preprinted form used in settling workers' compensation claims [*see 8 Cal. Code Reg. § 10874*] releases only those claims that are within the scope of the workers' compensation system, and extrinsic evidence is not admissible to show that the parties intended the preprinted release form to encompass any other claims. See *Claxton v. Waters (2004) 34 Cal. 4th 367* , now covered in *Ch. 115, Civil Rights: Employment Discrimination, §§ 115.35[1][a], 115.54[8], 115.106[2]*.

[2] Employer Liability

Commercial Traveler Rule Not Applicable to Respondeat Superior Case. In *Sunderland v. Lockheed Martin Aeronautical Systems Support Co. (2005) 130 Cal. App. 4th 1* , the court of appeal refused to apply the "commercial traveler rule," under which a workers' compensation claimant can be acting in the course and scope of employment during the entire period of travel on an employer's business, to a respondeat superior case. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.16[3]*.

Action Against Employer for Employee's Torts Must Name Employer as Defendant Within Limitations Period. In *Boyer v. Jensen (2005) 129 Cal. App. 4th 62* , the court of appeal held that a plaintiff seeking to hold an employer liable for the torts of an employee must name the employer as a defendant prior to the running of the applicable statute of limitations, even if the claim against the employee is not barred by limitations. The court also held that if the employee's debts have been discharged by bankruptcy, shielding the employee from suit, and the plaintiff neglected to name the employer as a defendant prior to expiration of the statute of limitations, the plaintiff may not pursue the action against the employee in order to obtain a judgment that might be enforced against the employer. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.19[1]*.

Hirer of Independent Contractor May Be Liable for Injury to Employee for Breach of Regulatory Duty. In *Barclay v. Jesse M. Lange Distributor, Inc. (2005) 129 Cal. App. 4th 281* , the court of appeal held that a hirer of an independent contractor may be liable to an employee of the independent contractor if the hirer breaches a duty imposed on the hirer by regulation and the breach affirmatively contributes to the employee's injury. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.22[2][b][iv]*.

Vicarious Liability Requires Causal Connection Between Negligence and Injury. In *Dixon v. City of Livermore (2005) 127 Cal. App. 4th 32* , the court of appeal held that an employer could not be vicariously liable for the negligence of an employee if there was no causal connection between that negligence and the plaintiff's injuries. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.14*.

Businesses Classified as Private Carriers Not Vicariously Liable for Torts of Independent Contractor Drivers. In *Hill Brothers Chemical Co. v. Superior Court (2004) 123 Cal. App. 4th 1001* , the court of appeal held that businesses that are classified as "private carriers," that is, businesses that use the highways only to transport their own products

incidental to carrying on their business, are not vicariously liable for the acts of independent-contractor drivers. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.22[2][c]*.

[3] Termination and Discipline

Whistleblower Claiming Retaliation Must Exhaust Employer's Internal Administrative Remedy. The California Supreme Court has held that a public employee must exhaust the employer's internal administrative remedy before suing for retaliation for statutorily protected "whistleblowing" activity under *Lab. Code § 1102.5* or *Gov. Code § 12653*. See *Campbell v. Regents of Univ. of Cal. (2005) 35 Cal. 4th 311* , now covered in *Ch. 115, Civil Rights: Employment Discrimination, § 115.51[1][g]*, and *Ch. 249, Employment Law: Termination and Discipline, § 249.21[20]*.

School District's Denial of Part-Time Employment Does Not Violate Fundamental Public Policy. A California Court of Appeal has held that *Education Code § 44922*, which authorizes school districts to establish programs allowing senior employees to work part time, does not create a fundamental and substantial public policy. Therefore, an employee whose request for a reduced workload under such a program has been denied may not use that denial as the basis of an action for wrongful constructive discharge in violation of public policy. See *Sinatra v. Chico Unified Sch. Dist. (2004) 119 Cal. App. 4th 701* , now covered in *Ch. 249, Employment Law: Termination and Discipline, § 249.12[3][b][i]*.

***First Amendment* Does Not Support Claim Against Private Employer for Wrongful Termination in Violation of Public Policy.** A California Court of Appeal has held that the *First Amendment's* free speech provision fails to establish a public policy against terminations by private employers for speech-related activities, because the *First Amendment* applies only to government actions and expresses no public policy regarding terminations by private employers. See *Grinzi v. San Diego Hospice Corp. (2004) 120 Cal. App. 4th 72* , now covered in *Ch. 249, Employment Law: Termination and Discipline, § 249.12[3][f]*.

Employer-Employee Arbitration Agreement May Be Unconscionable Even If Employee Was Represented by Attorney. A California Court of Appeal has held a mandatory employment arbitration provision unenforceable, even though the employee's attorney reviewed the provision before the employee signed it. The court emphasized that the provision clearly was substantively unconscionable, because only the employee's claims were required to be arbitrated, the provision required a prearbitration dispute-resolution procedure controlled by the employer, and it imposed a severe limitation on the time for the employee to assert claims. That high degree of substantive unconscionability, plus the nonnegotiable nature of the provision, were sufficient reasons to deny enforcement of the provision. See *Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal. App. 4th 1267* , now covered in *Ch. 249, Employment Law: Termination and Discipline, § 249.21[16]*.

Employer Has Cause of Action for Intentional Interference With At-Will Employment. The California Supreme Court has held that an employer may recover damages from a third party who intentionally engages in an independently wrongful act (i.e., one that is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard) that induces an at-will employee to leave the employer. See *Reeves v. Hanlon (2004) 33 Cal. 4th 1140* , now covered in *Ch. 249, Employment Law: Termination and Discipline, §§ 249.22[6], 249.33*.

[4] Wage and Hour Disputes

Corporate Agents Not Personally Liable for Wages of Corporate Employees. The California Supreme Court has held that an employee's suit to recover statutory minimum wages or overtime compensation must be brought directly against the employer and may not be maintained against shareholders, officers, directors, or other agents of a corporate employer. See *Reynolds v. Bement (2005) 36 Cal. 4th 1075* , now covered in *Ch. 250, Employment Law: Wage and Hour Disputes, §§ 250.40[3][a], 250.62[3]*.

Special Limitations Period for Actions to Recover Compensation for World War II Slave Labor Inapplicable to Claims Against Japan. A California Court of Appeal has held that *Code Civ. Proc. § 354.6(c)*, which provides a special limitations period for actions to recover compensation for labor performed as a Second World War slave labor victim or forced labor victim, does not apply to claims against Japan or its nationals, because it conflicts with the federal policy (embodied in the 1951 Treaty of Peace with Japan) that such claims are to be resolved diplomatically. See *Taiheiyo Cement Corp. v. Superior Court (2004) 117 Cal. App. 4th 380* , now covered in *Ch. 250, Employment Law: Wage and Hour Disputes, § 250.34[1][b]*.

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§ 1.27 Guardianships and Conservatorships

New Judicial Council Forms. The following Judicial Council forms have been adopted for use in guardianship and conservatorship proceedings, effective July 1, 2005: Ex Parte Application for Order Authorizing Completion of Capacity Declaration (GC-333), Ex Parte Order re Completion of Capacity Declaration (GC-334), Notice of Hearing (GC-020), Attachment to Notice of Hearing Proof of Service by Mail (GC-020(MA)), Clerk's Certificate of Posting Notice of Hearing (GC-020(C)), Proof of Personal Service of Notice of Hearing (GC-020(P)), Notice of Opening or Changing Guardianship or Conservatorship Account or Safe Deposit Box. See *Ch. 281, Appointment of Conservators, §§ 281.101A, 281.101B*; *Ch. 284, Notice, §§ 284.70, 284.70A, 284.70B, 284.70C*; *Ch. 290A, Asset Management, § 290A.120*.

Conservators--Authority With Respect to Conservatee's Marriage. In *Michael J. v. Superior Court (2004) 120 Cal. App. 4th 37* , the court held that a conservator of the person and estate of a mentally disabled person who is unable to communicate his or her wishes does not have the authority to bring a proceeding for the dissolution of the conservatee's marriage, but may bring a proceeding for legal separation if necessary to protect the assets of the estate, subject to the probate court's approval. For discussion, see *Ch. 290C, Guardianship and Conservatorship: Actions and Disputed Claims, § 290C.11*.

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§ 1.28 Hospitals

Hospital Emergency Lien Limited to Amount Owed by Plaintiff to Hospital. In *Parnell v. Adventist Health System/West (2005) 35 Cal. 4th 595* , the California Supreme Court held that a hospital's lien rights against a patient's recovery from a third-party tortfeasor under *Civ. Code § 3045.1* do not extend to the difference between the amount the hospital agreed to receive from that plaintiff under a managed care contract and the full-rate amount that the hospital would have charged to a patient not covered by the managed care contract, although the Court noted that hospitals are free to negotiate with patients the right to assert that greater lien amount in those managed care contracts. See Ch. 177, *Damages* .

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§ 1.29 Insurance

[1] In General

Arbitration Clause in Disability Insurance Policy Upheld. In *Boghos v. Certain Underwriters at Lloyd's of London (2005) 36 Cal. 4th 495* , the California Supreme Court upheld a binding arbitration clause in an individual disability insurance policy despite assertedly contrary language in the Certificate of Insurance. See Ch. 308, *Insurance* .

Recoupment of Sums Advanced by Insurer if No Duty to Defend. In *Scottsdale Insurance Co. v. MV Transport (2005) 36 Cal. 4th 643* , the California Supreme Court held that an insurer under a standard CGL policy, having properly reserved its rights, may advance sums to defend its insured against a third party lawsuit, and may thereafter recoup those costs from the insured if it is determined, as a matter of law, that no duty to defend ever arose because the third-party suit never suggested the possibility of a covered claim. See Ch. 308, *Insurance* , Part I, Subpart E.

Property Insurance Coverage of Losses Due to Weather Conditions. In *Julian v. Hartford Underwriters Ins. Co. (2005) 35 Cal. 4th 747* , the California Supreme Court held that a "weather conditions" clause, excluding coverage for losses incurred when weather conditions contribute to a loss caused by excluded perils, did not violate *Ins. Code § 530* under the facts in that case, which involved a landslide induced by excessive rain. See Ch. 308, *Insurance* , Part I, Subpart I, Form 138.

Life Insurance Coverage May Exist Even Without Specific Formalities. In *Hodgson v. Banner Life Insurance Co. (2004) 124 Cal. App. 4th 1358* , the court of appeal held that *Ins. Code § 10115* imposes a coverage obligation whenever the conditions for issuance of a policy of life insurance have been satisfied, but the formalities of issuance and deliverance have not occurred. See Ch. 308, *Insurance* , Part I, Introduction; Part I, Subpart B, Introduction.

Liability of Insurance Broker to Insurer. In *Century Surety Co. v. Crosby Insurance, Inc. (2004) 124 Cal. App. 4th 116* , the court of appeal held that an insurance broker who forged a document regarding the insured's loss history, and submitted it with an insurance application, may be liable to the insurer for fraud and negligence. See *Ch. 308, Insurance, §§ 308.10 et seq., 308.170* et seq.

Retroactive Overcharging of Premium Not Owed Is Not Basis for Tort Action. In *Jonathan Neil & Assocs., Inc. v. Jones (2004) 33 Cal. 4th 917* , the California Supreme Court has held that an insurance company's breach of the covenant of good faith and fair dealing, based on the insurer's retroactive overcharging a premium it knows is not owed, is not the basis for a tort action, outside the context of the deliberate mishandling of claims that would otherwise give rise to tort remedies. See Ch. 308, *Insurance* .

[2] Indemnity and Contribution

No Comparative Indemnity From Party Who Violated No Tort Duty. In *BFGC Architects Planners, Inc. v. Forcum/Mackey Construction, Inc. (2004) 119 Cal. App. 4th 848* , the court of appeal held that an indemnitor cannot be liable for comparative indemnity to the tortfeasor if the only duties allegedly violated by the indemnitor are contractual duties owed to the tort victim, the indemnitor had no contractual relationship with the tortfeasor, and there is no other basis for the indemnitor's liability in tort. See Ch. 300, *Indemnity and Contribution* .

[3] Subrogation

Insurer That Obtained Partial Subrogation Had Right to Intervene. In *Hodge v. Kirkpatrick Development, Inc. (2005) 130 Cal. App. 4th 540* , an insurer had a statutory right to intervene in a construction defect lawsuit brought by the insureds against third-party tortfeasors, after the insurer obtained partial subrogation rights against the third parties by paying a portion of the insured's claims for property damage to their house. See Ch. 536, *Subrogation* .

[4] Uninsured Motorists

Insolvency Triggering Uninsured Motorist Coverage. In *Romano v. Mercury Ins. Co. (2005) 128 Cal. App. 4th 1333* , the court of appeal held that an insurer's inability to pay a claim "because of insolvency," triggering uninsured motorist coverage, means actual insolvency precipitating nonpayment of a claim within a year, regardless of whether any court or insurance commissioner took the formal step of ordering the insurer into liquidation. See *Ch. 88A, Automobiles: Uninsured Motorist Claims, § 88A.10[4][e]*.

No Arbitrable Controversy Once Uninsured Motorist Limits Paid. In *State Farm Mutual Automobile Insurance Co. v. Superior Court (2004) 123 Cal. App. 4th 1424* , the court of appeal held that if an insurer has paid the uninsured motorist limits of its policy, no controversy remains to be arbitrated under *Ins. Code § 11580.2(f)*. See *Ch. 88A, Automobiles: Uninsured Motorist Claims, § 88A.19[3][c]*.

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§ 1.30 Jury Instructions

CACI Are Freely Available for Use and Reproduction. Your jury instructions coverage has been updated with revisions to *Cal. Rules of Ct., Rule 2.1050*. The revisions, brought about by Rules Memo R-09 (05), provide that the Judicial Council of California Civil Jury Instructions (CACI) are intended to be freely available for use and reproduction by parties, attorneys, and the public, and that commercial publishers of CACI must get a license from the Administrative Office of the Courts. LexisNexis Matthew Bender is the official publisher of CACI. See *Ch. 326, Jury Instructions, § 326.23[2]*.

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§ 1.31 Liens

Hospital Liens--Underlying Debt Required. In *Parnell v. Adventist Health System/West (2005) 35 Cal. 4th 595* , the California Supreme Court held that a lien under the Hospital Lien Act [*Civ. Code § 3045.1 et seq.*] requires the existence of an underlying debt owed by the patient to the hospital and that, absent such a debt, no lien may attach. See Ch. 342, *Liens and Wage Preferences* .

Hospital Emergency Lien Limited to Amount Owed by Plaintiff to Hospital. In *Parnell v. Adventist Health System/West (2005) 35 Cal. 4th 595* , the California Supreme Court held that a hospital's lien rights against a patient's recovery from a third-party tortfeasor under *Civ. Code § 3045.1* do not extend to the difference between the amount the hospital agreed to receive from that plaintiff under a managed care contract and the full-rate amount that the hospital would have charged to a patient not covered by the managed care contract, although the Court noted that hospitals are free to negotiate with patients the right to assert that greater lien amount in those managed care contracts. See Ch. 177, *Damages* .

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§ 1.32 Mandate and Prohibition

Writ of Mandate Granted Concerning Discovery Orders Only When Question of First Impression. In *Toshiba America Electronics Components v. Superior Court (2004) 124 Cal. App. 4th 762* , the court of appeal granted a writ petition when it was ruling for the first time on the question of which party should pay to translate electronic data compilations to obtain usable information responsive to discovery requests. See Ch. 358, *Mandate and Prohibition* .

Petitioner Has Standing to File Petition for Writ of Mandate If Question Involves Public Interest. In *Marshall v. Pasadena Unified School District (2004) 119 Cal. App. 4th 1241* , the court of appeal ruled that a contractor and a taxpayer had a public interest in filing a petition for writ of mandate challenging a school district's failure to use competitive bidding procedure. See Ch. 358, *Mandate and Prohibition* .

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§ 1.33 Marriage and Cohabitation

[1] Cohabitation and Domestic Partnerships

Criminal Penalties for Destruction of Household Property. A husband or wife may be held criminally liable for intentionally causing harm to property in which the other spouse has an interest, whether the property is individual or marital, and whether the harm occurs inside or outside the marital home. *People v. Wallace (2004) 123 Cal. App. 4th 144* rejected a husband's argument that a cohabiting spouse could not be guilty of vandalizing community or separate property inside the marital home. See Ch. 122, *Community Property* .

Domestic Partnership Forms. The Secretary of State has issued new forms for Declaration of Domestic Partnership (Form DP-1), Notice of Termination of Domestic Partnership (Form DP-2), and Revocation of Termination of Domestic Partnership (Form DP-3) reflecting the provisions of the California Domestic Partner Rights and Responsibilities Act of 2003 that became operative January 1, 2005. Also discussed are new forms of Petition and Response (Cal. Judicial Council Forms FL-103, FL-123) issued pursuant to the Act's provision for court proceedings for dissolution of domestic partnerships. These forms are covered in Ch. 387, *Nonmarital Cohabitation* .

Domestic Partners' Agreements. Parties to existing domestic partnerships became subject generally to the rights and responsibilities provided by state law for married persons on January 1, 2005, when the California Domestic Partner Rights and Responsibilities Act of 2003 became operative. Amended *Fam. Code § 297.5* gives those parties up to June 30, 2005, to make agreements between themselves that will be enforceable in the same manner as premarital agreements. This development is covered in Ch. 387, *Nonmarital Cohabitation* .

Unmarried Partner's Child. A nonmarital partner who supports a child in reliance on his partner's representations that he is the child's father, but then discovers that the child in not his, may not sue the partner on an unjust enrichment theory for the return of his support expenditures. *McBride v. Boughton (2004) 123 Cal. App. 4th 379* , states that to give a former putative father the right to restitution from the child's biological parents would give priority to the former putative father's desire to be made financially whole, to the potential detriment of the child's ongoing needs. See Ch. 387, *Nonmarital Cohabitation* .

[2] Dissolution of Marriage and Child Support

Separate Property Contributions to Separate Estate. New legislation [*Fam. Code § 2640(c)*] provides for reimbursement to a spouse who makes contributions from separate property to the acquisition of property in the other spouse's separate estate, unless there is a written transmutation or waiver of the right to reimbursement. See Ch 222, *Dissolution of Marriage: Property Division and Valuation* .

Dependent Exemption. Federal legislation has amended the Internal Revenue Code to adopt a new definition of "dependent" and to revise the rules relating to the dependent exemption in the case of divorced parents. Under the new definition, a parent who resides with a "qualifying child" for over half the year is entitled to the exemption without regard to what portion of the child's support the parent provides. See Ch. 227, *Dissolution of Marriage: Tax Effects of Dissolution* .

Innocent Spouse Relief. Relief under *Internal Revenue Code Section 6015(b)* or *(c)* requires a tax understatement or deficiency. In *Foor (Jeanine F.) v. Commissioner, T.C. Memo. 2004-54* , relief was denied because there was no understatement when proper tax amount was reported but not paid. In *Demirjian (Louise) v. Commissioner, T.C. Memo. 2004-22* , relief was denied because there was no deficiency when amended returns corrected an earlier understatement). However, if no understatement or deficiency exists, equitable relief may still be available under *Internal Revenue Code Section 6015(f)*, as shown by *Foor (Jeanine F.) v. Commissioner, T.C. Memo. 2004-54* , where relief was granted even though the taxpayer had reason to know that taxes would not be paid. See Ch. 227, *Dissolution of Marriage: Tax Effects of Dissolution* .

[3] Member of Armed Forces

Marriage of Member of Armed Forces. *Fam. Code § 420(b)* provides a procedure for a member of the armed forces, who is stationed overseas and serving in a conflict or a war and is unable to appear for the licensure and solemnization, to enter into marriage by the appearance of an attorney-in-fact. See Ch. 359, *Marriage* .

[4] Same-Sex Marriage

Same-Sex Marriage. The California Supreme Court has unequivocally stated that *Family Code Section 300* limits marriage in California to marriage between a man and a woman and flatly prohibits persons of the same sex from lawfully marrying in California in *Lockyer v. City and County of San Francisco (2004) 33 Cal. 4th 1055* . The Court held that same-sex marriages performed by city officials acting outside their authority are void from inception. This development is covered in Ch. 359, *Marriage* .

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§ 1.34 Newspapers

Newspaper of General Circulation. This chapter is converted to easy to use section format and is updated with *In re Molz (2005) 127 Cal. App. 4th 836* , which holds a newspaper may not seek modification of a prior decree regarding which cities are within its scope as a newspaper of general circulation using *Gov. Code § 6024* (modification of decree); a change of this type is in substance a petition for an order declaring it to be newspaper of general circulation and requires the newspaper to follow the procedural requirements of *Gov. Code §§ 6021, 6022* and provide notice of the petition to the public. Whether a newspaper of general circulation that was established prior to 1923 may obtain an adjudication that it is a newspaper of general circulation for every city incorporated since 1923 within the county in which the newspaper is established is a question that has not yet been decided by the courts. See *Ch. 386, Newspapers, §§ 386.13, 386.16.*

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§ 1.35 Patents and Trademarks

Exclusive Jurisdiction. In *Holiday Matinee, Inc. v. Rambus, Inc. (2004) 118 Cal. App. 4th 1413* , the court held the question of whether a federal court has exclusive jurisdiction depends on plaintiff's own statement of the claim in the complaint. If a review of the plaintiff's "well-pleaded complaint" (considering only what necessarily appears in it and unaided by anything alleged in anticipation or avoidance of defenses that the defendant might interpose) makes it clear that plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, then federal-court jurisdiction is exclusive. See Ch. 411, *Patents and Inventions* .

Infringement of Registered Mark. In *In re Lorillard Tobacco Co. (9th Cir. 2004) 370 F.3d 982* , the court held a district court's denial of a motion for an ex parte seizure order would not be appealable under *28 U.S.C. § 1292(a)(1)* (appeal from interlocutory orders) because it would be neither an automatically appealable literal refusal of an injunction nor a practical denial of ultimate injunctive relief. See *Ch. 549, Trademarks and Trade Names, § 549.24*.

Noncommercial Speech. In *Nissan Motor Co. v. Nissan Computer Corp. (9th Cir. 2004) 378 F.3d 1002* , the court held an injunction prohibiting Nissan Computer Corporation from linking its website visitors to other websites that presented disparaging or negative commentary about Nissan Motor Company because of ongoing trademark dispute was content-based restriction on noncommercial speech and thus was inconsistent with the *First Amendment*. See *Ch. 549, Trademarks and Trade Names, § 549.27*.

Patent License. In *SuperBrace, Inc. v. Tidwell (2004) 124 Cal. App. 4th 388* , the court held that because the federal patent statutes contain no provisions governing licenses, federal courts have fashioned a rule of federal common law to apply in cases concerning transfers of patent licenses. However, in California, the supreme court has determined that state law, not federal common law, should be applied in deciding whether a patent license is assignable. See *Ch. 411, Patents and Inventions, § 411.10* et seq.

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§ 1.36 Physicians and Other Medical Personnel

Application of MICRA Noneconomic Damages Cap Clarified When Absent Parties at Fault Are Not Subject to MICRA. In *Francies v. Kapla (2005) 127 Cal. App. 4th 1381* , the court of appeal held that in an action against a health care provider, when adjusting damages to account for the comparative fault of nonparties who are not subject to MICRA, a noneconomic damages award should be reduced prior to applying the $250,000 cap of Code Civ. Proc. § 3333.2. See *Ch. 295, Hospitals, § 295.18[1],* and Ch. 415, *Physicians: Medical Malpractice* .

Good Faith of Physician Providing Emergency Care Clarified For Purposes of Statutory Immunity. In *Reynoso v. Newman (2005) 126 Cal. App. 4th 494* , the court of appeal held that in applying *Bus. & Prof. Code § 2395,* which immunizes a health care provider from liability when providing emergency health care in good faith, the good faith belief that an emergency existed extends only to the subjective belief of the physician while actually providing treatment to the patient, and proof is not required that prior to arriving at the scene, the physician held a good-faith belief that he or she was responding to an emergency. See Ch. 415, *Physicians: Medical Malpractice* .

Physician Must Have Knowledge of Condition Placed Upon Patient's Consent to be Liable for Battery. In *Piedra v. Dugan (2004) 123 Cal. App. 4th 1483* , the court of appeal held that if a patient or his or her representative gives conditional consent to a general course of medical treatment, a physician must have knowledge of that condition in order to be held personally liable for battery for failing to abide by the condition. See Ch. 415, *Physicians: Medical Malpractice* .

Limitations Period Begins Running As to All Physicians Once Plaintiff Suspects Someone's Medical Malpractice. In *Knowles v. Superior Court (2004) 118 Cal. App. 4th 1290* , the court of appeal held that in a medical malpractice action, the limitations period begins running as to all potential defendants when the plaintiff suspects medical negligence on the part of someone, and it is not necessary that the plaintiff suspect a particular physician for the statute to begin running as to that physician or any other physician who may have been negligent. See Ch. 415, *Physicians: Medical Malpractice* .

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§ 1.37 Probate

[1] Accounts, Final Distribution, and Compensation

Presumed Mother Status. The California Supreme Court has issued three decisions affirming that the lesbian partner of a child's birth mother also may be deemed to be the child's mother. In *Elisa B. v. Superior Court (2005) 37 Cal. 4th 108* , the Court held that under the Uniform Parentage Act, a woman may be a presumed mother of a child of her lesbian partner if they agree to raise the child together, she receives the child into her home, and she holds the child out as her natural child. In *K.M. v. E.G. (2005) 37 Cal. 4th 130* , the Court held that when a woman provides ova to her lesbian partner so that the partner can bear a child who will be raised in their joint home, both women are considered to be the child's parents. In *Kristine H. v. Lisa R. (2005) 37 Cal. 4th 156* , the Court held that the lesbian mother of a child was estopped from challenging the validity of a stipulated judgment declaring that she and her lesbian partner were the child's parents. See Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation* .

Intestate Succession. In *Jackson v. Fitzgibbons (2005) 127 Cal. App. 4th 329* , the court held that a child is no longer considered the "issue" of his or her natural parent for purposes of intestate succession when the parental rights of the parent have been terminated. See Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation* .

[2] Attorney Liability

Attorney Owes Duty to Intended Beneficiary Under *Probate Code §§ 21350* and *21351*. In *Osornio v. Weingarten (2004) 124 Cal. App. 4th 304* , the court of appeal held that when a client seeks an attorney's services to effect a transfer of assets to a beneficiary who is presumptively disqualified from receiving a donative transfer under *Prob. Code § 21350(a)*, the attorney owes a duty of care that runs both to the client and to the intended beneficiary to advise the client that the proposed transfer, if challenged, would have a significant likelihood of failing unless steps are taken under *Prob. Code § 21351* to exempt the transfer from this statutory presumption of disqualification. See Ch. 76, *Attorney Professional Liability* .

Successor Fiduciary May Assert Professional Negligence Claim Against Attorney Hired by Predecessor. In *Borissoff v. Taylor & Faust (2004) 33 Cal. 4th 523* , the court held that a successor fiduciary of an estate in probate has the authority to assert a professional negligence claim against an attorney retained by a predecessor fiduciary to provide

tax assistance for the benefit of the estate. See Ch. 458B, *Probate: Suspension, Removal, and Resignation* .

[3] Claims Against Estate

Medi-Cal Claim for Benefits Provided to Decedent. In *Fitch v. Select Products Co. (2005) 36 Cal. 4th 812* , the California Supreme Court held that the Department of Health Services may not assert a Medi-Cal lien for costs incurred in treating a decedent's final illness against a recovery in a wrongful death action when this recovery does not and could not include these medical expenses. See Ch. 454, *Probate: Claims Against Estate* .

Statute of Limitations for Action to Recover Medi-Cal Benefits. In *Shewry v. Begil (2005) 128 Cal. App. 4th 639* , the court held that the statute of limitations for a recovery action by the Department of Health Services seeking reimbursement for Medi-Cal benefits provided to a decedent begins running on the date on which notice under *Prob. Code § 215* is given, not on the date of the decedent's death. See Ch. 454, *Probate: Claims Against Estate* .

[4] Disposition Without Administration

Domestic Partnerships. In *Koebke v. Bernardo Heights Country Club (2005) 36 Cal. 4th 824* , the California Supreme Court held that in light of the domestic partnership law, which substantially equalizes the status of registered domestic partners and spouses, businesses are required to treat registered domestic partners the same as spouses in order to comply with the Unruh Act. See Ch. 441, *Probate: Disposition Without Administration* .

Domestic Partnerships. In *Knight v. Superior Court (2005) 128 Cal. App. 4th 14* , the court held that the legislature's enactment of *Fam. Code § 297.5*, giving registered domestic partners the same rights and obligations as spouses, is not an improper legislative amendment of the defense of marriage initiative (Proposition 22). Because Proposition 22 did not address domestic partnerships, changing the domestic partnership law did not amend the initiative. See Ch. 441, *Probate: Disposition Without Administration* .

[5] Inventory and Appraisal

Transmutation Agreements. In *In re Marriage of Benson (2005) 36 Cal. 4th 1096* , the California Supreme Court reaffirmed its decision in *Estate of MacDonald (1990) 51 Cal. 3d 262* , that a purported transmutation agreement must expressly state that the characterization or ownership of the subject property is being changed. The Court held that there is no exception from the "express declaration" requirement for partial performance of an agreement to transmute property. See Ch. 451, *Probate: Inventory and Appraisal* .

[6] Statutory Notice Requirements

New Judicial Council Forms. The following revised and new Judicial Council forms have been adopted for use in probate proceedings, effective July 1, 2005: Notice of Hearing (DE-120), Attachment to Notice of Hearing Proof of Service by Mail (DE-120(MA)), and Proof of Personal Service of Notice of Hearing (DE-120(P)). See Ch. 447, *Probate: Statutory Notice Requirements* .

[7] Will Contests

Revocation by Dissolution of Marriage. In *Estate of Coleman (2005) 129 Cal. App. 4th 380* , and *Regents of University of California v. Benford (2005) 128 Cal. App. 4th 867* , the court held that provisions of a trust incorporated in a decedent's will, appointing his wife as trustee, granting her a power of appointment, or transferring any property or income from property to her were revoked by *Prob. Code § 6122* on the dissolution of their marriage, because that statute provides that the terms of a trust incorporated in a will must be administered and distributed as though the former spouse had predeceased the decedent. See Ch. 444, *Probate: Will Contests* .

Missing Will. In *Lauermann v. Superior Court (2005) 127 Cal. App. 4th 1327* , the court held that the term "duplicate original," as used in *Prob. Code § 6124,* does not include a photocopy of the will that has not been personally signed by the testator and the witnesses. Therefore, the presumption of revocation applies when this is the only copy of the will that can be produced. See Ch. 444, *Probate: Will Contests* .

No-Contest Clause. In *Estate of Davies (2005) 127 Cal. App. 4th 1164* , the court held that the surviving spouse of a beneficiary under a decedent's will does not violate the no-contest clause of the will by filing a "safe harbor" petition seeking a determination that the beneficiary satisfied the survivorship condition in the will. See Ch. 444, *Probate: Will Contests* .

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§ 1.38 Public Accountants

Discipline Proper for Failure to Test Compliance With Investment-Related Laws. In *McBride v. California Bd. of Accountancy (2005) 130 Cal. App. 4th 518* , the Court of Appeal held that public accountants were property disciplined for failure to test Orange County's compliance with investment-related laws. See Ch. 462, *Public Accountants* .

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§ 1.39 Public Administration

Time Period for Employer to Deny Liability Runs for Date of Filed Claim. In *Honeywell v. Worker's Compensation Appeal Board (2005) 35 Cal. 4th 24* , the California Supreme Court held that the WCAB improperly interpreted the provisions of *Labor Code § 5402* (90-day time period for presumption of compensability) in a WCAB decision. The statute is clear that the 90-day time period for an employer to deny liability runs from the date that the employee filed a claim form, and does not include the date that the employer received notice or knowledge of the injury. See *Ch. 470, Overview of Public Administrative Law, § 470.12[1]*.

Dismissal for Failure to Exhaust Internal Administrative Remedies. In *Campbell. v. Regents of Univ. of Cal. (2005) 35 Cal. 4th 311* , the California Supreme Court affirmed the dismissal of a lawsuit brought against the Regents of the University of California by a former employee who had been terminated by the university. The court held that the former employee's lawsuit was barred because the employee failed to exhaust administrative remedies before filing her lawsuit. Specifically, the court held that the former employee failed to exhaust required university internal administrative remedies. See *Ch. 474A, Timing of Judicial Review of Agency Decisions, § 474A.11[2][a]*.

Statutory Descriptions Are Required for Closed Session Agenda. *Gov. Code § 54954.5* provides a statutory list of closed session agenda item descriptions that are sufficient to comply with the law. See *Ch. 470B, Public Agency Meetings, § 470B.14[2]*.

Case Defines the Private Attorney General Fee Award Authorization. In *Tipton-Whittingham v. City of Los Angeles (2004) 34 Cal. 4th 604* , the California Supreme Court held that attorneys fees awards against public entities under the provisions of the private attorney general fee award statute [*Code Civ. Proc. § 1021.5*] and under the Fair Employment and Housing Act (FEHA) fee award statute [*Gov. Code § 12965(b)*] can be authorized under the "catalyst" theory without proof of a judicially recognized change in the legal relationship between the parties, such as a judgment on the merits, a consent decree, or a court ordered settlement. See *Ch. 473G, Agency Adjudication Decisions, § 473G.35[9]*.

PUC Has Jurisdiction Over Matter About Which It Is Authorized to Make Policy, Over Which It Has Assumed Jurisdiction, and Which It Continues to Regulate. In *City of Anaheim v. Pacific Bell Telephone Company (2004)*

119 Cal. App. 4th 838 , the court of appeal held that the PUC has exclusive jurisdiction to resolve a dispute about who must pay for relocation of telephone company's overhead facilities to underground. See *Ch. 480, Public Utilities, § 480.12[2]*.

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§ 1.40 Public Entities and Officers

Action for Childhood Sexual Abuse Against Public Entity Must Comply With Tort Claims Act. In *County of Los Angeles v. Superior Court (2005) 127 Cal. App. 4th 1263* , the court of appeal held that an action against a public entity stemming from an act of childhood sexual abuse is subject to the provisions and time limitations of the California Tort Claims Act and must first be presented to the public entity, and if the entity rejects the claim, the plaintiff has only six months after the rejection of the claim to file an action against the entity, regardless of the longer limitations period of *Code of Civil Procedure Section 340.1*. See *Ch. 5, Abuse of Minors and Elderly, § 5.13*.

Whistleblower Under False Claims Act Required to Exhaust Internal Grievance Procedures. In *Campbell v. Regents of University of California (2005) 35 Cal. 4th 311* , the California Supreme Court held that a former employee of the University of California was required to exhaust internal grievance procedures prior to filing suit against the university for retaliatory discharge under the whistleblower provisions of the False Claims Act. See Ch. 468, *Public Entities and Officers: False Claims Actions* .

Actions Under False Claims Act May be Arbitrated. In *County of Solano v. Lionsgate Corp. (2005) 126 Cal. App. 4th 741* , the court of appeal held that actions under the False Claims Act may be subject to a contractual arbitration provision, if the language of the arbitration provision in the contract encompasses claims under the Act, and that an arbitrator has the authority to award civil penalties under the Act. See Ch. 469, *Public Entities and Officers: False Claims Act* .

Police Officer Entitled to Qualified Immunity. In *Brosseau v. HaugenBrosseau v. Haugen (2004) 125 S. Ct. 596* , a *42 U.S.C. § 1983* action against a police officer for excessive force in shooting a suspect in the back as he attempted to flee the scene, the United States Supreme Court held that the officer was entitled to qualified immunity. The Court found that the officer made a decision that, even if constitutionally deficient, reasonably misapprehended the law governing the circumstances she confronted. Her actions fell in the hazy border between excessive and acceptable force, and the case law did not clearly establish that her conduct violated the *Fourth Amendment*. See *Ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes, § 113.14[11][b]*.

Governmental Agency Can Be Liable for Statutory Penalty Under Tom Bane Civil Rights Act. In *Los Angeles*

County Metropolitan Transit Authority v. Superior Court (2004) 123 Cal. App. 4th 261 , the court held that a county transportation authority could be liable for statutory penalties under *Civ. Code §§ 51.7, 52(b)(2)* despite *Gov. Code § 818*, which precludes a public entity's liability for damages imposed primarily for sake of example and by way of punishing defendant. See *Ch. 117A, Civil Rights: Interference With Civil Rights by Threats, Intimidation, Coercion, or Violence, § 117A.11[1][c]*.

Compliance With Tort Claims Act Is Prerequisite for Seeking Damages for Violation of Information Practices Act. In *Bates v. Franchise Tax Board (2004) 124 Cal. App. 4th 367* , the court of appeal held that when damages are sought from a state agency under the Information Practices Act, *Civ. Code § 1798 et seq.*, the plaintiff must first comply with the claims filing requirement of the Tort Claims Act and allege such compliance in the complaint. See Ch. 429, *Privacy* .

Minors Alleging Molestation Claim Against Public Entity May Be Granted Additional Time for Meeting Claims Presentation Requirements. In *Curtis T. v. County of Los Angeles (2004) 123 Cal. App. 4th 1405* , the court of appeal held that, when determining whether a plaintiff has timely complied with the Tort Claims Act's claims presentation requirements, courts may equitably grant additional time for the accrual of molestation claims by minors who, because of their young age, inexperience, ignorance, or other vulnerabilities, were unable at the time of the assault to comprehend the wrongfulness of the conduct. See Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

Civil Penalty for Commission of Hate Crimes May be Imposed Against Public Entity. In *Los Angeles County Metropolitan Transportation Authority v. Superior Court (2004) 123 Cal. App. 4th 261* , the court of appeal held that the civil penalty provided by *Civil Code Section 52(b)(2)* for victims of hate crimes may be imposed against a public entity because the civil penalty is designed to provide an economic incentive for victims to bring suit and is not primarily punitive in nature. See Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

PUC Has No Jurisdiction Over Municipally Owned Utilities Unless Provided by Statute. In *Santa Clara Valley Transportation Authority v. Public Utilities Commission (2004) 124 Cal. App. 4th 346* , the court of appeal held that the PUC does not have exclusive railroad crossing jurisdiction over municipally owned light rail crossings pursuant to *Pub. Util. Code §§ 1201, 1202*. See *Ch. 480, Public Utilities, § 480.12[2]*.

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§ 1.41 Real Estate

[1] Arbitration

Arbitration of Disputes--Small Residential Building Contracts. In *Woolls v. Superior Court (2005) 127 Cal. App. 4th 197* , the court held that under the facts of the case, the requirements in *Bus. & Prof. Code § 7191* (regarding the title of a provision for arbitration of disputes in a contract for work on specified residential property) were not preempted by the Federal Arbitration Act [*9 U.S.C.S. § 1 et seq.*] because the contractor failed to show that the transaction at issue involved interstate commerce. See Ch. 104, *Building Contracts* .

[2] Building Contracts

Actions by Unlicensed Contractors. In *MW Erectors Inc. v. Niederhauser Ornamental and Metal Works Co. (2005) 36 Cal. 4th 412* , the California Supreme Court found that *Bus. & Prof. Code § 7031* (recovery of compensation paid to unlicensed contractor) does not allow a contractor who was unlicensed at any time during contractual performance to recover compensation for individual acts performed while he or she was duly licensed. However, if fully licensed at all times during contractual performance, a contractor is not barred from recovering compensation for the work solely because he or she was unlicensed when the contract was executed. See Ch. 104, *Building Contracts* .

[3] Easements

Creation of Easements by Owner Who Conveys Less Than Full Title. In *Beyer v. Tahoe Sands Resort (2005) 129 Cal. App. 4th 1458* , the court found that a property owner who conveys less than full title may validly create easements in his or her favor on the property. See *Ch. 240, Easements, § 240.12[1][c]*.

[4] Eminent Domain

Constitutional Limits of Exactions. In *Lingle v. Chevron U.S.A. Inc. (2005) 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876* , the U.S. Supreme Court made clear that *Nollan v. California Coastal Commission* is limited to the context of exactions. The Court emphasized that the rule articulated in *Nollan* is not whether the exaction would substantially advance the same interests that land use authorities asserted would allow them to deny the permit altogether. See Ch.

247, *Eminent Domain* .

Federal Takings Claims. In *San Remo Hotel, L.P. v. City & County of San FranciscoSan Remo Hotel, L.P. v. City & County of San Francisco (2005) 125 S. Ct. 2491* , the U.S. Supreme Court held that the full faith and credit rule bars relitigation in federal court of issues decided by the state court that are dispositive of the federal takings claims. See Ch. 247, *Eminent Domain* .

Date of Valutation. In *Mt. San Jacinto Community College Dist. v. Superior Court (2005) 126 Cal. App. 4th 619* , which involved an eminent domain "quick take" proceeding where the condemnor applied for a prejudgment order for possession on a deposit of probable compensation for the owner, the court found that the date of valuation is the date the deposit of probable compensation was made. See Ch. 247, *Eminent Domain* .

[5] Landlord and Tenant

Mitigation by Landlord Does Not Waive Right to Damages. In *Lu v. Grewal (2005) 130 Cal. App. 4th 841* , the court of appeal found that a landlord who operated a gas station after it was abandoned by the tenants, and turned a profit, was not precluded from seeking damages under *Civ. Code § 1951.2* (landlord's remedies on breach by tenant). See *Ch. 332, Landlord and Tenant: The Tenancy, § 332.24[4][f]*.

[6] Lis Pendens

Fraudulent Conveyance Claims. In *Kirkeby v. Superior Court (2004) 33 Cal. 4th 642* , the California Supreme Court held that a fraudulent conveyance claim affects title to or the right to possession of specific real property and therefore supports the recording of a lis pendens. The Court found specifically that a creditor's action to set aside as fraudulent a debtor's transfer of real property, brought under the Uniform Fraudulent Transfer Act, is a "real property claim" within the meaning of *Code Civ. Proc. § 405.4* because it is a cause of action that would, if meritorious, affect title to real property. See Ch. 348, *Lis Pendens* .

[7] Mobilehomes

New and Revised Mobilehome Regulations. *Register 2004, No. 28* (operative July 6, 2004) amended the "Mobile Home Parks and Installations" regulations [*25 Cal. Code Reg. § 1000 et seq.*] and added new "Special Occupancy Parks" regulations [*25 Cal. Code Reg. § 2000 et seq.*]. Included in these regulations are (1) the requirement to comply with the California Environmental Quality Act before developing and constructing a mobilehome park [*see 25 Cal. Code Reg. §§ 1030, 1032(b)*]; (2) requirements regarding the information a mobilehome park owner must provide when there has been a change in the park's name, ownership, or possession [*see 25 Cal. Code Reg. § 1014*]; and (3) requirements surrounding mobilehome installations and foundation systems [*see 25 Cal. Code Reg. § 1020*]. See Ch. 369, *Mobilehomes and Mobilehome Parks* .

[8] Mortgages and Trust Deeds

Lending Practices in Home Mortgages--Preemption of Local Regulation. In *American Financial Services Assn. v. City of Oakland (2005) 34 Cal. 4th 1239* , the California Supreme Court held that *Fin. Code § 4970 et seq.* fully occupies the field of regulation of predatory lending tactics in home mortgages. Thus, the legislation preempted a city ordinance regulating such lending practices, including an ordinance's regulation of loans not covered by the state statute. See *Ch. 555, Trust Deeds and Real Property Mortgages, § 555.21A[7]*.

[9] Zoning and Planning

Environmental Regulations Affecting Real Estate--Constitutionality of California Coastal Commission. In *Marine Forests Society v. California Coastal Commission (2005) 36 Cal. 4th 1* , the California Supreme Court found

that the current statutory provisions governing the composition of the Coastal Commission do not violate the separation of powers clause of the California Constitution. However, the Court also found that the history of the State Constitution, as well as case law, made it clear that the California Constitution, unlike the United States Constitution, does not categorically preclude the Legislature from enacting a statutory provision authorizing the Legislature itself to appoint a member or members of an executive commission or board. See Ch. 579, *Zoning and Planning* .

Regulation of Time-Share Developments. The Vacation Ownership and Time-Share Act of 2004 (VOTSA) [*Bus. & Prof Code § 11210 et seq.*], which went into effect on July 1, 2005, provides for the disclosure to purchasers and prospective purchasers of time-share plans and exchange programs by time-share developers and exchange companies. It requires specified time-share plans offered for sale in California or created and existing in California to comply with specified fee, registration, notice, and disclosure requirements, including the issuance of a public report by the California Real Estate Commissioner. See Ch. 579, *Zoning and Planning* .

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§ 1.42 Schools

School District's Denial of Part-Time Employment Does Not Violate Fundamental Public Policy. A California Court of Appeal has held that *Education Code § 44922*, which authorizes school districts to establish programs allowing senior employees to work part time, does not create a fundamental and substantial public policy. Therefore, an employee whose request for a reduced workload under such a program has been denied may not use that denial as the basis of an action for wrongful constructive discharge in violation of public policy. See *Sinatra v. Chico Unified Sch. Dist. (2004) 119 Cal. App. 4th 701* , now covered in *Ch. 249, Employment Law: Termination and Discipline, § 249.12[3][b][i]*.

Zero Tolerance Policy Resulting in Expulsion Did Not Violate State Law or Due Process Rights. In *T.H. v. San Diego Unif. Schl. Dist. (2004) 122 Cal. App. 4th 1267* , a school district's "zero tolerance" policy governing expulsions, which required the principal or a designee to immediately suspend and recommend for expulsion a pupil who committed specified acts at school or a school activity off school grounds, did not violate state law by eliminating the principal's statutory discretion to decide not to recommend a student for an expulsion hearing. The policy also did not violate state or federal constitutional due process rights, because it provided the required procedural protections. See Ch. 513, *Schools: Student Rights and Responsibilities* .

Schoolteacher's Probationary Status Begins on Date of Contract, Not Date of Credential. A California Court of Appeal has held that if a teacher serving under an emergency permit accepts a new contract as a probationary teacher during the school year, the teacher's probationary status begins on execution of the new contract, even if the validity date of the teacher's credential preceded the beginning of the school year. See *Fine v. Los Angeles Unified School Dist. (2004) 116 Cal. App. 4th 1070* , now covered in Ch. 514, *Schools: Injuries to Students* .

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§ 1.43 Settlement

[1] Code Civ. Proc. § 998 Offers

Post Section 998 Offer Payments Properly Included in Determination of More Favorable Judgment. In *Arias v. Katella Townhouse Homeowners Assn., Inc.* (2005) 127 Cal. App. 4th 847, 26 Cal. Rptr. 3d 113 , an action by a condominium owner for damages and declaratory relief against the homeowners association for failure to maintain common areas resulting in damage to her unit, the trial court properly determined that the owner obtained a judgment more favorable than the Section 998 offer made by association, which the owner had refused, by including voluntary post-offer payments made by the association to the homeowner and the value of the association's agreement to make repairs in conformance with its legal obligations. See Ch. 520, *Settlement and Release* .

Offer to Multiple Plaintiffs to Settle for Waiver of Costs Improperly Conditional. In *Menees v. Andrews (2004) 122 Cal. App. 4th 1540* , a *§ 998* offer by defendant to two plaintiffs to settle the action for a waiver of costs did not confer liability for expert witness fees on the plaintiffs after they failed to prevail at trial because the offer was conditional. See Ch. 520, *Settlement and Release* .

Section 998 Offer Including Attorney's Provision Not Fatally Uncertain for Failure to Specify Amount. In *Elite Show Services, Inc. v. Staffpro, Inc. (2004) 119 Cal. App. 4th 263* , the defendant's failure to specify a dollar amount for attorney's fees in a settlement offer under § 998 did not render the offer so uncertain as to be unenforceable. The failure to specify a dollar amount would not have precluded the court from ascertaining with reasonable certainty the defendant's obligations under the offer had plaintiff accepted it, because applicable statutory and rule provisions set forth the procedure for determining the amount of attorney's fees to be awarded pursuant to a contractual provision. The offer was not also uncertain because the plaintiff would have been required to incur additional, nonrecoverable attorney's fees to bring a motion to have the court determine the fee amount if the parties could not reach an agreement. See Ch. 520, *Settlement and Release* .

[2] Costs and Attorney's Fees

Unnamed Objector to Settlement of Putative Class Action Not Entitled to Attorney's Fees. In *Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc. (2005) 127 Cal. App. 4th 387* , the court held that an unnamed putative

objector who successfully opposed the settlement of a class action was not entitled to attorney's fees under either the equitable substantial benefit theory or as a private attorney general under *Code Civ. Proc. § 1021.5*. See Ch. 174, *Costs and Attorney's Fees* .

Approval of Negotiated Fee in Shareholder Derivative Action Was Abuse of Discretion. In *Robbins v. Alibrandi (2005) 127 Cal. App. 4th 438* , the court held that in approving a negotiated settlement of a shareholder derivative action including an attorney's fee award, the trial court abused its discretion. The court used factors unsupported by the record in calculating the amount of fees, and enhanced the lodestar amount by applying multipliers for which there was scant evidentiary support; and there was very little real benefit conferred on corporation and shareholders as a result of litigation. See Ch. 174, *Costs and Attorney's Fees* .

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§ 1.44 Ships and Shipping

DOHSA Applied to Death Occurring on Inland Water in Mexico. In *Beckett v. MasterCraft Boat Co. (2005) 126 Cal. App. 4th 1045* , the court of appeal held that the federal Death on the High Seas Act applies to injuries that occur within the territorial waters of another nation, even if that body of water is an inland river or lake. See *Ch. 100, Boats and Boating, § 100.21[1],* and Ch. 522, *Ships and Shipping* .

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§ 1.45 Small Claims

Small Claims Judgment May Have Collateral Estoppel Effect. A California Court of Appeal has held that collateral estoppel may apply to prevent a small-claims plaintiff from relitigating an issue that was decided in small claims court, if the small-claims record is sufficiently clear to enable a court in a subsequent action to determine that the issue was actually litigated and expressly decided against the plaintiff in the small claims action. See *Pitzen v. Superior Court (2004) 120 Cal. App. 4th 1374* , now covered in Ch. 526, *Small Claims* .

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§ 1.46 Taxes

Dependent Exemption. Federal legislation has amended the Internal Revenue Code to adopt a new definition of "dependent" and to revise the rules relating to the dependent exemption in the case of divorced parents. Under the new definition, a parent who resides with a "qualifying child" for over half the year is entitled to the exemption without regard to what portion of the child's support the parent provides. See Ch. 227, *Dissolution of Marriage: Tax Effects of Dissolution* .

Innocent Spouse Relief. Relief under *Internal Revenue Code Section 6015(b)* or *(c)* requires a tax understatement or deficiency. In *Foor (Jeanine F.) v. Commissioner, T.C. Memo. 2004-54* , relief was denied because there was no understatement when proper tax amount was reported but not paid. In *Demirjian (Louise) v. Commissioner, T.C. Memo. 2004-22* , relief was denied because there was no deficiency when amended returns corrected an earlier understatement). However, if no understatement or deficiency exists, equitable relief may still be available under *Internal Revenue Code Section 6015(f)*, as shown by *Foor (Jeanine F.) v. Commissioner, T.C. Memo. 2004-54* , where relief was granted even though the taxpayer had reason to know that taxes would not be paid. See Ch. 227, *Dissolution of Marriage: Tax Effects of Dissolution* .

Information Practices Act. In *Bates v. Franchise Tax Bd. (2004) 124 Cal. App. 4th 367* , the court held the Franchise Tax Board is subject to the requirements and remedial provisions of the Information Practices Act [*Civ. Code § 1798 et seq.*], under which every state agency is required to limit the collection and retention of personal information to what is necessary to accomplish the agency's specific purpose. Damages can be recovered, in an appropriate case, for a violation of the act. Injunctive relief against violation of the act is available, and the legal prohibitions against enjoining the collection of taxes do not prevent giving effect to the act's provision for injunctive relief in an action against the FTB. See *Ch. 540, Taxes and Assessments, § 540.10* et seq.

Time Period for Hearing on for Reduced Assessment. In *Helene Curtis, Inc. v. Los Angeles County Assessment Appeals Boards (2004) 121 Cal. App. 4th 29* , the court held the board remains empowered to decide the application after expiration of the two-year period. Expiration of the period does not prevent the board from acting on an application; rather, it operates as a milestone to encourage completion of the process. Accordingly, if reinstatement of a procedurally terminated application is necessary in order for the board to make a determination on the merits, the board

may reinstate the application after expiration of the two-year period. See *Ch. 540, Taxes and Assessments, § 540.10* et seq.

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1-1 California Forms of Pleading and Practice--Annotated § 1.47

§ 1.47 Torts

[1] Abuse of Minors and Elderly

Action for Childhood Sexual Abuse Against Public Entity Must Comply With Tort Claims Act. In *County of Los Angeles v. Superior Court (2005) 127 Cal. App. 4th 1263* , the court of appeal held that an action against a public entity stemming from an act of childhood sexual abuse is subject to the provisions and time limitations of the California Tort Claims Act and must first be presented to the public entity, and if the entity rejects the claim, the plaintiff has only six months after the rejection of the claim to file an action against the entity, regardless of the longer limitations period of *Code of Civil Procedure Section 340.1*. See *Ch. 5, Abuse of Minors and Elderly, § 5.13*.

Elder Abuse Actions Governed by Two-Year Limitations Period. In *Benun v. Superior Court (2004) 123 Cal. App. 4th 113* , the court of appeal held that actions for the abuse of elderly or dependent adults brought under *Welf. & Inst. Code § 15600 et seq.* are governed by the two-year limitations period of *Code Civ. Proce. § 335.1* applicable generally to actions for personal injury or wrongful death, rather than the limitations period for medical malpractice found in *Code Civ. Proc. § 340.5*. See *Ch 5, Abuse of Minors and Elderly, § 5.36A*.

[2] Airlines and Airports

Claim Against Airline for Bad Faith Refusal to Perform Under Contract Was Preempted. In *Power Stds. Lab, Inc. v. Federal Express Corp. (2005) 127 Cal. App. 4th 1039* , the court of appeal held that the plaintiff was preempted by the Airline Deregulation Act of 1978 from recovering for an airline carrier's bad faith delay in paying for damage to transported goods. See *Ch. 16, Airplanes and Airports, § 16.10[6]*.

[3] Assumption of Risk

Manufacturer of Swimming Pool Liner Not Shielded by Primary Assumption of Risk Doctrine. In *Bunch v. Hoffinger Industries (2004) 123 Cal. App. 4th 1278* , the court of appeal held that the manufacturer of a swimming pool liner was not shielded from liability by the primary assumption of risk doctrine for failing to warn of the hazards of diving into a shallow pool. See Ch. 273, *Games, Sports, and Athletics* .

[4] Attorney Professional Liability

Negligent Expert Witness May Seek Indemnification From Hiring Attorney. In *Forensis Group, Inc. v. Frantz, Townsend & Foldenauer (2005) 130 Cal. App. 4th 14* , the court of appeal held that an expert witness, sued for negligence by the clients on whose behalf the expert was hired, could seek indemnity from the clients' former law firm, which hired the expert. See Ch. 76, *Attorney Professional Liability* .

No Malpractice Action for Bad Legal Advice That Led to Commission of Felony. In *Chapman v. Superior Court (2005) 130 Cal. App. 4th 261* , the court of appeal held that a plaintiff could not pursue a legal malpractice action if the receipt of bad legal advice led to the plaintiff's commission of a felony. See Ch. 76, *Attorney Professional Liability* .

[5] Carriers

Roller Coaster Is Common Carrier. In *Gomez v. Superior Court (2005) 35 Cal. 4th 1125* , the California Supreme Court held that roller coasters and similar amusement park rides are common carriers and that a passenger's purpose in purchasing transportation, whether it is to get from one place to another or to travel for entertainment or sightseeing, does not determine whether the transportation provider is a common carrier under the Civil Code. See Ch. 109, *Carriers* .

Businesses Classified as Private Carriers Not Vicariously Liable for Torts of Independent Contractor Drivers. In *Hill Brothers Chemical Co. v. Superior Court (2004) 123 Cal. App. 4th 1001* , the court of appeal held that businesses that are classified as "private carriers," that is, businesses that use the highways only to transport their own products incidental to carrying on their business, are not vicariously liable for the acts of independent-contractor drivers. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.22[2][c].*

Common Carrier Must Pick Up Persons or Property at Some Point and Put Them Down at Another. In *City of St. Helena v. Public Utilities Commission (2004) 119 Cal. App. 4th 793, 802* , the court of appeal held that a Napa Valley wine train was not a common carrier because it provided a round-trip excursion, rather than picking up passengers at one location and putting them down at another location. See Ch. 109, *Carriers* .

[6] Conspiracy

Joint and Several Liability for Noneconomic Damages in Civil Conspiracy Action. In *Kesmodel v. Rand (2004) 119 Cal. App. 4th 1128* , the court of appeal held that the passage of Proposition 51 did not change the rule of joint and several liability for noneconomic damages in a case of civil conspiracy. See Ch. 126, *Conspiracy* .

[7] Conversion

Prejudgment Interest Awarded for Period After Recovery of Converted Goods. In *Irving Nelkin & Co. v. South Beverly Hills Wilshire Jewelry & Loan (2005) 129 Cal. App. 4th 692* , the court of appeal held that if a plaintiff regains possession of converted goods prior to adjudication of the right to possession of those goods, either through a writ of possession under *Code Civ. Proc. § 512.010 et seq.* or otherwise, the plaintiff's right to prejudgment interest continues beyond the point at which the plaintiff regained possession and extends to the entry of judgment. See *Ch. 150, Conversion, § 150.16[2][b].*

[8] Damages

State to Receive Share of Punitive Damages Awards Until 2006. In new *Civil Code § 3294.5*, the legislature, to meet pressing budgetary needs, has provided that only 25 percent of any punitive damages award must be paid to the plaintiff in a civil action, with the other 75 percent paid to the state treasury and made available for annual budget appropriation by the state, with a share of that amount going to pay the plaintiff's attorney. However, this statute only applies to

actions that are filed after August 16, 2004, and that are finally adjudicated, including any appeals, prior to July 1, 2006, unless a later-enacted statute extends or deletes the 2006 repeal date. See Ch. 177, *Damages* .

Supreme Court Clarifies Proper Considerations in Awarding Punitive Damages. In *Simon v. San Paolo U.S. Holding Co., Inc. (2005) 35 Cal. 4th 1159* , the California Supreme Court held that although the wealth of a defendant alone cannot justify a high punitive damages award and cannot substitute for tailoring the award to the reprehensibility of the defendant's conduct or to the amount of compensatory damages, the state has a legitimate interest in deterring future misconduct and may still allow juries to consider the wealth of the defendant in awarding punitive damages. In addition, the Court concluded that it may be appropriate in some rare circumstances to proportion punitive damages to some measure of harm other than the actual amount of compensatory damages awarded, such as uncompensated harm or potential damages that were not--but could have been--inflicted, if these potential damages are a truer measure of the risk created by the defendant's conduct. However, the use of potential harm as a measure must be limited to potential harm that was actually intended by the defendant or was reasonably likely to occur from the defendant's conduct. In the companion case of *Johnson v. Ford Motor Co. (2005) 35 Cal. 4th 1191* , the California Supreme Court held that the state may, to further its legitimate goal in deterring future misconduct through an award of punitive damages, consider whether the type of misconduct perpetrated against the particular plaintiff was an isolated event or was but one instance in a pattern of similar misconduct in determining the reprehensibility of the defendant's conduct, which in turn will necessarily affect the amount of punitive damages awarded. See Ch. 177, *Damages* .

Punitive Damages Award Against Tobacco Company Reduced to $50 Million. In *Boeken v. Philip Morris, Inc.* (2005) 127 Cal. App. 4th 1640 , the court of appeal reduced a punitive damages award against a tobacco company from $100 million to $50 million on a compensatory damage award of $5.5 million, concluding that a 9-to-1 ratio was warranted given the extreme reprehensibility of the company's long-standing conduct in adding substances to its cigarettes to increase their addictiveness, gaining smokers by fraud and through its long denial of the dangers of smoking, and marketing a product that was more dangerous than consumers expected. In addition, the court held that in a fraud action, communication and reliance may be shown by evidence that the plaintiff was influenced by widespread advertising targeted at a group of which the plaintiff was a member, even if the plaintiff cannot specify that any particular advertisement or statement was made directly to him or her or that the plaintiff relied on any one advertisement. See Ch. 177, *Damages* , and *Ch. 269, Fraud and Deceit § 269.15[2]* ,.

Evidence Plaintiff Paid for Own Medical Expenses Admissible to Prove Damages. In *Smalley v. Baty (2005) 128 Cal. App. 4th 977* , the court of appeal held that if a plaintiff has paid for past medical services out of his or her own pocket, evidence of this payment is admissible to prove damages. See Ch. 177, *Damages* .

Shareholder Not Entitled to Recover for Lost Future Corporate Profits. In *Sole Energy Co. v. Petrominerals Corp. (2005) 128 Cal. App. 4th 212* , the court of appeal held that a corporate shareholder does not have an ownership interest in corporate profits and cannot recover individually for lost future profits suffered by the corporation. See Ch. 177, *Damages* .

Punitive Damages Upheld Against Ex Post Facto Challenge. In *Roman Catholic Bishop of Oakland v. Superior Court (2005) 128 Cal. App. 4th 1155* , the court of appeal held that because an award of punitive damages in a civil claim does not constitute a criminal punishment, a statute reviving the limitations period for a common law tort cause of action, thus allowing a plaintiff to seek punitive damages after the time for filing the action had originally expired, does not violate the prohibition against ex post facto laws. See Ch. 177, *Damages* .

Hospital Emergency Lien Limited to Amount Owed by Plaintiff to Hospital. In *Parnell v. Adventist Health System/West (2005) 35 Cal. 4th 595* , the California Supreme Court held that a hospital's lien rights against a patient's recovery from a third-party tortfeasor under *Civ. Code § 3045.1* do not extend to the difference between the amount the hospital agreed to receive from that plaintiff under a managed care contract and the full-rate amount that the hospital would have charged to a patient not covered by the managed care contract, although the Court noted that hospitals are

free to negotiate with patients the right to assert that greater lien amount in those managed care contracts. See *Ch. 177, Damages, § 177.40* et seq.

Fraud Accompanying Breach of Contract Supports Award of Tort Damages. In *Robinson Helicopter Co., Inc. v. Dana Corp., (2004) 34 Cal. 4th 979* , the California Supreme Court held that a helicopter manufacturer could recover tort damages, including punitive damages, from a parts manufacturer that provided vital parts, knowing that they were not in conformity with manufacturing specifications as detailed in the contract between the parties. The Court concluded that the parts manufacturer committed the intentional tort of fraud when it provided certificates of compliance with the parts, even though it knew that the parts were not in compliance, and the helicopter manufacturer relied on these affirmative misrepresentations to its detriment when accepting the nonconforming parts. See Ch. 177, *Damages* , and Ch. 380, *Negligence* .

Nine to One Ratio of Punitive Damages to Compensatory Damages Approved. In *Bardis v. Oates (2004) 119 Cal. App. 4th 1* , the court of appeal reduced a punitive damages award from $7 million to $1.5 million, concluding that a punitive damages to compensatory damages ratio of just over 9 to 1 was justified because the defendant's conduct was highly reprehensible and the amount of compensatory damages did not fully reflect the outrageousness of the conduct. See Ch. 177, *Damages* .

Child's Mental Disability Does Not Preclude Loss of Companionship Damages in Wrongful Death Action. In *Knowles v. Superior Court (2004)118 Cal. App. 4th 1290* , the court of appeal held that mental retardation does not necessarily render a child less able to suffer loss of companionship damages, as the plaintiff in a wrongful death action, than a child with no such mental disability. See Ch. 181, *Death and Survival Actions* .

[9] Death and Survival Actions

Bankruptcy Court Adjudication Given Collateral Estoppel Effect in Subsequent Wrongful Death Action. In *Roos v. Red (2005) 130 Cal. App. 4th 870, 30 Cal. Rptr. 3d 446* , the court of appeal held that the doctrine of collateral estoppel may be used to prevent a wrongful death defendant from relitigating the issue of liability, if a bankruptcy court, in determining whether a wrongful death judgment would be dischargeable in bankruptcy, had already adjudicated the issue and concluded that the defendant's conduct in causing the deaths was intentional. See Ch. 181, *Death and Survival Actions* .

Terminated Parent-Child Relationship Severs Right of Child to Sue for Wrongful Death of Parent. In *Jackson v. Fitzgibbons (2005) 127 Cal. App. 4th 329* , the court of appeal held that if a court order finally and conclusively terminates the relationship between a birth parent and his or her child, that child loses standing to sue for the wrongful death of that parent, regardless of whether the child has been adopted by another at the time of the death of the birth parent. See Ch. 181, *Death and Survival Actions* .

Child's Mental Disability Does Not Preclude Loss of Companionship Damages in Wrongful Death Action. In *Knowles v. Superior Court (2004) 118 Cal. App. 4th 1290* , the court of appeal held that mental retardation does not necessarily render a child less able to suffer loss of companionship damages, as the plaintiff in a wrongful death action, than a child with no such mental disability. See Ch. 181, *Death and Survival Actions* .

[10] Emergency Vehicles

Liability for Costs of Emergency Response Expanded. In new *Government Code § 53159* and amended *Government Code § 53155*, any person who intentionally, knowingly, and willfully enters into any area that is closed or has been closed to the public is liable for the expenses of an emergency response required to search for or rescue that person, or if the person was operating a vehicle, any of his or her passengers, plus the expenses for the removal of any inoperable vehicle. Also, a person who drives a vehicle on a public street or highway that is temporarily covered by a rise in water

level and that is barricaded is liable for the expenses of any emergency response required to remove the driver, any passenger in an inoperable vehicle, or the vehicle itself. See Ch. 246, *Emergency Vehicles* .

[11] Employer Liability

Commercial Traveler Rule Not Applicable to Respondeat Superior Case. In *Sunderland v. Lockheed Martin Aeronautical Systems Support Co. (2005) 130 Cal. App. 4th 1* , the court of appeal refused to apply the "commercial traveler rule," under which a workers' compensation claimant can be acting in the course and scope of employment during the entire period of travel on an employer's business, to a respondeat superior case. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.16[3].*

Action Against Employer for Employee's Torts Must Name Employer as Defendant Within Limitations Period. In *Boyer v. Jensen (2005) 129 Cal. App. 4th 62* , the court of appeal held that a plaintiff seeking to hold an employer liable for the torts of an employee must name the employer as a defendant prior to the running of the applicable statute of limitations, even if the claim against the employee is not barred by limitations. The court also held that if the employee's debts have been discharged by bankruptcy, shielding the employee from suit, and the plaintiff neglected to name the employer as a defendant prior to expiration of the statute of limitations, the plaintiff may not pursue the action against the employee in order to obtain a judgment that might be enforced against the employer. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.19[1].*

Vicarious Liability Requires Causal Connection Between Negligence and Injury. In *Dixon v. City of Livermore (2005) 127 Cal. App. 4th 32* , the court of appeal held that an employer could not be vicariously liable for the negligence of an employee if there was no causal connection between that negligence and the plaintiff's injuries. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.14.*

[12] False Imprisonment

***Civil Code § 47(b)* Inapplicable to Act of Making Citizen's Arrest.** In *Kesmodel v. Rand (2004) 119 Cal. App. 4th 1128* , the court of appeal held that the absolute privilege of *Civil Code § 47(b)* does not apply to the act of making a citizen's arrest, which is affirmative conduct that constitutes more than the communicative act of reporting potential criminal activity to the police. See Ch. 257, *False Imprisonment* .

Decision Not to Prosecute Does Not Vitiate Probable Cause to Arrest. In *Johnson v. Lewis (2004) 120 Cal. App. 4th 443* , the court of appeal held that a subsequent decision not to prosecute made by prosecutors does not vitiate probable cause to arrest for purposes of a subsequent action for false imprisonment. See Ch. 257, *False Imprisonment* .

[13] Fraud and Deceit

Punitive Damages Award Against Tobacco Company Reduced to $50 Million. In *Boeken v. Philip Morris, Inc.* (2005) 127 Cal. App. 4th 1640 , the court of appeal reduced a punitive damages award against a tobacco company from $100 million to $50 million on a compensatory damage award of $5.5 million, concluding that a 9-to-1 ratio was warranted given the extreme reprehensibility of the company's longstanding conduct in adding substances to its cigarettes to increase their addictiveness, gaining smokers by fraud and through its long denial of the dangers of smoking, and marketing a product that was more dangerous than consumers expected. In addition, the court held that in a fraud action, communication and reliance may be shown by evidence that the plaintiff was influenced by widespread advertising targeted at a group of which the plaintiff was a member, even if the plaintiff cannot specify that any particular advertisement or statement was made directly to him or her or that the plaintiff relied on any one advertisement. See Ch. 177, *Damages* , and *Ch. 269, Fraud and Deceit , § 269.15[2].*

[14] Invasion of Privacy

No Invasion of Privacy Claim for Publication of Truthful Information Contained in Public Court Records. In *Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679* , the California Supreme Court overruled an earlier holding and held that the publication of truthful information that is part of a public criminal court record is constitutionally protected regardless of any claim that the information is not newsworthy. The Court also held that the passage of time did not lessen this constitutional protection. See Ch. 429, *Privacy* ,

[15] Libel and Slander

Judicial Privilege Waived By Contractual Agreement Not to Make Public Comments. In *Wentland v. Wass (2005) 126 Cal. App. 4th 1484* , the court of appeal held that the judicial privilege of *Civ. Code § 47(b)* did not apply in a case seeking liquidated damages following a breach of a contract in which the defendants had agreed not to make public comments accusing the plaintiff of wrongdoing in connection with his role as managing partner of a business venture. The court concluded that in contractually agreeing not to make such public statements, the defendants had waived the protection of the litigation privilege. See Ch. 340, *Libel and Slander* .

Pre-Litigation Demand Letters Sent to Multiple Potential Defendants Covered by Judicial Privilege. In *Blanchard v. DIRECTV, Inc. (2004) 123 Cal. App. 4th 903* , the court of appeal held that when pre-litigation demand letters are sent to a large number of potential defendants, a plaintiff need not actually file suit against every defendant to be entitled to the protection of the judicial privilege as to all of the demand letters. See Ch. 340, *Libel and Slander* .

[16] Malicious Prosecution

Unsuccessful Petition for Injunction Against Harassment Not Grounds for Malicious Prosecution Action. In *Siam v. Kizilbash (2005) 130 Cal. App. 4th 1563* , the court of appeal held that an unsuccessful petition for an injunction prohibiting harassment under *Code Civ. Proc. § 527.6* is not a proper basis for a subsequent malicious prosecution action. See Ch. 357, *Malicious Prosecution and Abuse of Process* .

Default Judgment Will Not Support Malicious Prosecution Action. In *Bergman v. Drum (2005) 129 Cal. App. 4th 11* , the court of appeal held that a default judgment in the underlying action does not establish probable cause for bringing a malicious prosecution action because the trial court does not have the benefit of the presentation of evidence on the merits by both sides in the underlying lawsuit. See Ch. 357, *Malicious Prosecution and Abuse of Process* .

Dismissal for Lack of Standing Not Favorable Termination for Subsequent Malicious Prosecution Action. In *Hudis v. Crawford (2005) 125 Cal. App. 4th 1586* , the court of appeal held that a dismissal due to a lack of standing, which is a jurisdictional defect, does not constitute a favorable termination reflecting on the merits of the action for purposes of a subsequent malicious prosecution action. See *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.10* et seq.

[17] Mental Suffering and Emotional Distress

Unrelated Plaintiff Cannot Recover Under Bystander Theory for Negligent Infliction of Emotional Distress. In *Rodriguez v. Kirchhoefel (2005) 128 Cal. App. 4th 427* , the court of appeal held that, in an action to recover for negligent infliction of emotional distress, a bystander who is not actually related to the injured person, such as by blood or marriage, cannot recover regardless of how close the relationship between the persons may be. See Ch. 362, *Mental Suffering and Emotional Distress* .

[18] Negligence

Supreme Court Clarifies Foreseeability Required to Impose Premises Liability on Businesses for Third-Party Criminal Conduct. In *Delgado v. Trax Bar & Grill (2005) 36 Cal. 4th 224* , the California Supreme Court clarified that the degree of foreseeability needed to impose a particular duty to prevent harm caused by a third party varies,

depending on the burden of imposing the preventative measures suggested by the plaintiff in the particular case. A heightened degree of foreseeability, which may include evidence of prior similar incidents, is necessary to impose a duty on a defendant to take great or onerous preventative security measures. A lesser degree of foreseeability is all that is required if the plaintiff seeks to impose a duty to take preventative measures that are simple or create only a minimal burden on the defendant. See Ch. 380, *Negligence* , and *Ch. 421, Premises Liability , § 421.15[2][a]*.

Store Employees May Have Duty to Call Police During Ongoing Criminal Conduct. In *Morris v. De La Torre (2005) 36 Cal. 4th 260* , the California Supreme Court held that to protect invitees, including customers and potential customers, from criminal conduct as it is occurring, store or restaurant employees may have a duty to take minimally burdensome measures, such as issuing a warning or calling 911, if those measures can be undertaken without increasing the risk of harm to the employees. See Ch. 380, *Negligence* , and *Ch. 421, Premises Liability , § 421.15[4]*.

Fraud Accompanying Breach of Contract Supports Award of Tort Damages. In *Robinson Helicopter Co., Inc. v. Dana Corp., (2004) 34 Cal. 4th 979* , the California Supreme Court held that a helicopter manufacturer could recover tort damages, including punitive damages, from a parts manufacturer that provided vital parts, knowing that they were not in conformity with manufacturing specifications as detailed in the contract between the parties. The Court concluded that the parts manufacturer committed the intentional tort of fraud when it provided certificates of compliance with the parts, even though it knew that the parts were not in compliance, and the helicopter manufacturer relied on these affirmative misrepresentations to its detriment when accepting the nonconforming parts. See Ch. 177, *Damages* , and Ch. 380, *Negligence* .

Violation of Cal-OSHA Rules May Be Used to Establish Presumption of Negligence. In *Elsner v. Uveges (2004) 34 Cal. 4th 915* , the California Supreme Court held that, subsequent to an amendment to *Labor Code Section 6304.5*, a plaintiff may now introduce evidence of a violation of Cal-OSHA statutes and regulations to establish a presumption of negligence under *Evid. Code § 669*, so long as the plaintiff is not an employee of the defendant. See Ch. 244, *Elevators and Escalators* .

Manufacturer of Swimming Pool Liner Not Shielded by Primary Assumption of Risk Doctrine. In *Bunch v. Hoffinger Industries (2004) 123 Cal. App. 4th 1278* , the court of appeal held that the manufacturer of a swimming pool liner was not shielded from liability by the primary assumption of risk doctrine for failing to warn of the hazards of diving into a shallow pool. See Ch. 273, *Games, Sports, and Athletics* .

Communication of Threatened Harm Made to Psychotherapist by Patient's Family Member Can Trigger Duty to Warn. In *Ewing v. Goldstein (2004) 120 Cal. App. 4th 807* , the court of appeal held that although *Civil Code § 43.92* states that a communication of threatened harm to another person made to a psychotherapist must come from the patient to trigger a duty to warn, the duty to warn is also triggered under the statute if the threat of harm is communicated to the psychotherapist by a member of the patient's immediate family for the purpose of facilitating and furthering the patient's treatment. See *Ch. 304, Insane and Other Incompetent Persons, § 304.110 et seq.,* and *Ch. 380, Negligence, § 380.30* et seq.

[19] Premises Liability

Supreme Court Clarifies Foreseeability Required to Impose Premises Liability on Businesses for Third-Party Criminal Conduct. In *Delgado v. Trax Bar & Grill (2005) 36 Cal. 4th 224* , the California Supreme Court clarified that the degree of foreseeability needed to impose a particular duty to prevent harm caused by a third party varies, depending on the burden of imposing the preventative measures suggested by the plaintiff in the particular case. A heightened degree of foreseeability, which may include evidence of prior similar incidents, is necessary to impose a duty on a defendant to take great or onerous preventative security measures. A lesser degree of foreseeability is all that is required if the plaintiff seeks to impose a duty to take preventative measures that are simple or create only a minimal burden on the defendant. See Ch. 380, *Negligence* , and *Ch. 421, Premises Liability , § 421.15[2][a]*.

Store and Security Guard Not Liable for Failing to Take Further Response to Vague Suspicions Reported by Plaintiff. In *Roe v. McDonald's Corp. (2005) 129 Cal. App. 4th 1107* , the court of appeal held that the defendants could not be liable for the sexual assault of the plaintiff, who had previously reported to a clerk at a fast-food restaurant, and to a mall security guard who was standing in line with her, that a man outside the restaurant had been eying her and making suggestive facial expressions. Because the man was not to be seen when the guard and a store employee looked for him, the court concluded that in the absence of a more definite threat beyond the plaintiff's vague suspicions, the defendants could not have foreseen the sexual assault and were under no duty to take further steps to protect the plaintiff under the circumstances. See *Ch. 421, Premises Liability, § 421.15[2][d]*.

Ordinance Imposing Duty on Landowners to Maintain Adjacent Sidewalks Upheld. In *Gonzales v. City of San Jose (2005) 125 Cal. App. 4th 1127* , the court of appeal held that a charter city, through a valid exercise of its police powers, may pass an ordinance that imposes a duty on landowners to keep adjacent public sidewalks in a safe condition, and may impose liability on the property owner for injuries that occur to a pedestrian if the landowner fails to do so. See *Ch. 421, Premises Liability, § 421.12[7]*.

Landowner Not Liable for Injury Caused to Employee of Tenant by Tenant's Work Conditions. In *Laico v. Chevron U.S.A., Inc. (2004) 123 Cal. App. 4th 649* , the court of appeal held that a petroleum company could not be held liable for an injury sustained by an employee of a business that leased property owned by the petroleum company, when the injury was caused by work conditions created by the tenant. See Ch. 421, *Premises Liability* .

[20] Trespass

Under *Civ. Code § 3334(b)*, "Benefits" Not Obtained Absent Financial or Business Advantage. In *Watson Land Co. v. Shell Oil Co. (2005) 130 Cal. App. 4th 69* , the court of appeal held that in a trespass action, for purposes of determining the benefits obtained by the person wrongfully occupying the property under *Civ. Code § 3334(b)*, "benefits" are not obtained unless the trespass provided the trespasser with a financial or business advantage. Therefore, the avoidance of remediation costs by a trespasser who dumps some material on the property cannot be recovered as a "benefit obtained" by the trespasser, although the remediation costs themselves can be recovered under *Civ. Code § 3334(a)*, which allows recovery for the reasonable cost of repair or restoration. See *Ch. 550, Trespass, § 550.21[1]*.

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§ 1.48 Trial

Predispute Contractual Waiver Is Unenforceable as Jury Trial Waiver. In *Grafton Partners v. Superior Court (2005) 36 Cal. 4th 944* , the California Supreme Court overruled *Trizec Properties, Inc. v. Superior Court (1991) 229 Cal. App. 3d 1616* , and held that a predispute waiver of a jury trial is not authorized by *Code Civ. Proc. § 631* and that only waivers authorized by § 631 are consistent with *article I, section 16 of the California Constitution*. Thus, a predispute contractual waiver of a jury trial cannot waive a jury trial. See Ch. 322, *Juries and Jury Selection* .

Implied Assertions Are Hearsay. In *People v. Morgan (2005) 125 Cal. App. 4th 935* , the Court of Appeal held that implied assertions are hearsay, but that case law, recognized and accepted when the Evidence Code was adopted and continuing thereafter, has created an exception to the hearsay rule for this reliable type of evidence. In this case, while executing a search warrant for evidence of possession of a controlled substance for sale, an officer answered the phone and heard the caller ask to buy drugs. The caller's statements, some of which were in response to the officer's questions, were hearsay, but admissible under a judicially created exception to the hearsay rule. See Ch. 551, *Trial* .

Right to Jury Trial on Fraudulent Conveyance. In *Wisden v. Superior Court (2004) 124 Cal. App. 4th 750* , the California Court of Appeal held that plaintiff was entitled to a jury trial on a claim of fraudulent conveyance because the right to jury trial existed at English common law in an action to recover an alleged fraudulent conveyance of a determinate sum of money, and there was no evidence that any change in English common law occurred between 1791 and 1850. See *Ch. 322, Juries and Jury Selection, § 322.13[1][a]*.

Witness Unavailability. In *People v. Winslow (2004) 123 Cal. App. 4th 464* , the trial court did not err in determining that the teenage victim, who suffered from cerebral palsy and learning deficiencies, was unavailable to testify at trial because of mental illness or infirmity and because he was unable to testify without suffering substantial trauma. The victim suffered from post-traumatic stress syndrome manifesting in recurrent flashbacks of the incident, among other symptoms, and involving severe stress syndromes that were persistent and could be disabling, and his physician opined that for him to testify at trial would be damaging to his emotional state at the current time. See *Ch. 551, Trial, § 551.72*.

Admission of Statement as Spontaneous Declaration Was Prejudicial Error. In *People v. Pirwani (2004) 119 Cal. App. 4th 770* , a prosecution based on the defendant's alleged theft of money from a resident of a residential,

intermediate-care facility for physically dependent adults at which the defendant worked, the trial court erred in admitting a statement by the resident to a social worker about her dealings with the defendant as a spontaneous declaration. Although at time she first telephoned the social worker, the resident was tearful and evidently quite shaken by news she was about to be evicted from the care facility for non-payment of rent, two days elapsed before the substantive discussion between the two women. Further, the two-day lapse was apparently punctuated by a visit to a police station, so that the resident patently had the chance to return to a calmer mental state. The cumulative effect of errors in admitting this statement and statements by the resident to police accusing the defendant of theft was prejudicial to the defendant and required reversal. See Ch. 551, *Trial* .

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§ 1.49 Trusts

Revocation of Trust. In *Gardenhire v. Superior Court (2005) 127 Cal. App. 4th 882* , the court held that when a trust expressly permits revocation during the settlor's lifetime by written notice signed by the settlor and delivered to the trustee, and the settlor does not limit or qualify the term "written notice," the settlor is deemed to have authorized revocation by any writing that unambiguously manifests his or her intention to revoke the trust, including a will. See Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

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§ 1.50 Unfair Competition

Nonrestitutionary Disgorgement Into Fluid Recovery Fund Not Permitted in Unfair Competition Class Action. In *Madrid v. Perot Sys. Corp. (2005) 130 Cal. App. 4th 440* , the court of appeal held that in a class action suit brought under the unfair competition statute, disgorgement into a fluid recovery fund is limited to disgorgement of restitutionary funds and does not extend to amounts that are not restitutionary in nature. See Ch. 565, *Unfair Competition* .

Requirements for Proving Fraudulent Business Practice Under Unfair Competition Statute Clarified. In *Blakemore v. Superior Court (2005) 129 Cal. App. 4th 36* , the court of appeal held that in an action brought under the unfair competition statute, proving a fraudulent or deceptive business practice only requires a showing that members of the public are likely to be deceived, and unlike common law fraud, does not require allegations of actual deception, reasonable reliance, and damage. See Ch. 565, *Unfair Competition* .

Interference With Contract Claim May Be Asserted Against Owner, Officer, or Director of Contracting Company. In *Woods v. Fox Broadcasting Sub., Inc. (2005) 129 Cal. App. 4th 344* , the court of appeal held that a claim for interference with contract may be brought against an owner, officer, or director of a company whose contract was the subject of the litigation, although such defendants may defend on the grounds that their conduct was privileged or justified. See Ch. 565, *Unfair Competition* .

Gun Manufacturers and Dealers Not Liable Under Unfair Competition Statute for Actions of Gun Dealers and Users. In *In re Firearm Cases (2005) 126 Cal. App. 4th 959* , the court of appeal held that gun manufacturers and distributors, acting legally, could not be liable under the unfair competition statute for harm caused by gun dealers and users. Although the defendants' conduct may have created a risk of harm, the plaintiffs were required, but failed, to provide evidence of a causal connection between the defendants' business practices and the alleged harm (evidence that the defendants' conduct caused or was likely to cause substantial injury). See Ch. 565, *Unfair Competition* .

Restitution Under Unfair Competition Statute Measured by Amount Defendant Received. In *Inline, Inc. v. Apace Moving Systems, Inc. (2005) 125 Cal. App. 4th 895* , the court of appeal held that because a plaintiff is not entitled to damages under the unfair competition statute, the proper measure of restitution is the amount received by the defendant as a result of the improper conduct, even if the amount of monetary damage suffered by the plaintiff as a consequence

of the conduct is greater. See Ch. 565, *Unfair Competition* .

Prevailing Cartwright Act Defendant Not Entitled to Recover Attorney's Fees Even Under Contractual Provision. In *Carver v. Chevron U.S.A., Inc. (2004) 119 Cal. App. 4th 498* , the court of appeal held that a prevailing defendant in an action under the Cartwright Act cannot recover attorney's fees even under a contractual attorney fee provision, if the legal work that was performed to defend against the claims under the Cartwright Act overlapped with work to defend against other claims that would otherwise be covered by the contractual provision. See Ch. 565, *Unfair Competition* .

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§ 1.51 Workers' Compensation

Independent Medical Review. The Administrative Director has promulgated the final versions of *8 Cal. Code Reg. §§ 9768.1-9768.17*, regarding the independent medical review process that is triggered by an injured employee's disagreement with a third opinion by a physician in a medical provider network. See *Ch. 577, Workers' Compensation, § 577.45[1][d][v]*.

Permanent Disability--Description--Rating--Apportionment. The Administrative Director has promulgated the final versions of *8 Cal. Code Reg. §§ 9725-9727, 9785, 9805*, and *10150-10165.5*, regarding aspects of permanent disability, including its description, rating, and apportionment. See *Ch. 577, Workers' Compensation, § 577.45[4][a] -[d]*.

Supplemental Job Displacement Benefit. The Administrative Director has promulgated the final versions of *8 Cal. Code Reg. §§ 10133.50-10133.60*, regarding supplemental job displacement benefits. See *Ch. 577, Workers' Compensation, § 577.45[2A][a] -[f]*.

Employer Denial of Claims-- Time to Deny. The Supreme Court in *Honeywell v. Workers' Comp. Appeals Bd. (2005) 35 Cal. 4th 24* , has rejected the proposition that the 90-day period during which the employer's rejection of liability will avoid the presumption of compensability of the employee's injury begins to run when the employer receives knowledge of an injury or asserted injury, even though no claim form has been filed. See *Ch. 577, Workers' Compensation, § 577.43[4][c]*.

Permanent Disability--Apportionment--Retroactive Application of SB 899. The court of appeal in *Kleemann v. W.C.A.B. (2005) 127 Cal. App. 4th 274* , has held that there was no "existing order, decision, or award" in the case before it, within the meaning of Section 47 of SB 899, and that the Legislature intended Section 47's language that SB 899 "shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision, or award" to be consistent with the general rule that statutory rights end during litigation with repeal or amendment of the statute unless appeals were exhausted and a final judgment existed. See *Ch. 577, Workers' Compensation, § 577.14[3][e]*.

Civil Actions--Employment Relationship--Independent Contractors--Exemptions. The court of appeal in *Moehring v. Thomas (2005) 126 Cal. App. 4th 1515* , has held that the exemption from the contractor's license

requirement contained in *Bus. & Prof. Code § 7049* for construction or maintenance work incidental to "clearing or other work upon the land in rural districts for fire prevention purposes" meant that the trial court erred in ruling that the defendant was an employee as a matter of law pursuant to *Lab. Code § 2750.5*. See *Ch. 577, Workers' Compensation, § 577.22[3][c]*.

Penalties--Delay in Payment of Benefits--Retroactive Application of SB 899. The court of appeal in *Green v. Workers' Comp. Appeals Bd. (2005) 127 Cal. App. 4th 1426, 26 Cal. Rptr. 3d 527* , has held that new *Lab. Code § 5814*, as enacted by SB 899, and which became operative on June 1, 2004, applies to all injuries in cases pending on that date. See *Ch. 577, Workers' Compensation, § 577.243[4][a]*.

Penalties--Delay in Payment of Benefits--Multiple Penalties. The court of appeal in *Green v. Workers' Comp. Appeals Bd. (2005) 127 Cal. App. 4th 1426, 26 Cal. Rptr. 3d 527* , has held that agreed medical evaluator opinions and a stipulation may each result in liability under new *Lab. Code § 5814* and may each qualify as a separate, legally significant event, and that the legislature did not eliminate multiple increases in compensation for conduct occurring either before or after an award, as long as the events are "separate and distinct." See *Ch. 577, Workers' Compensation, § 577.243[4][d]*.

Uninsured Employers Benefits Trust Fund--Identity of Employer. The court of appeal in *Rea v. Workers' Comp. Appeals Bd. (2005) 127 Cal. App. 4th 625* , has held that the UEBTF may not be joined in any proceedings unless a legal person or entity has been identified as an illegally uninsured employer in an application and special notice of lawsuit and that employer has been served with the application and special notice of lawsuit in the manner provided for service of summons in the Code of Civil Procedure. See *Ch. 577, Workers' Compensation, § 577.13[4][b]*.

Exclusive Remedy--Petition for Writ of Mandate. The court of appeal in *Veguez v. Governing Board of the Long Beach Unified School District (2005) 127 Cal. App. 4th 406* , has held that an employee's petition for writ of mandate, seeking differential pay and reinstatement under *Ed. Code §§ 44977* and 44987.1, not tort damages for a work-related injury, was not preempted by the exclusivity provisions of workers' compensation law. See *Ch. 577, Workers' Compensation, § 577.313[4]*.

Permanent Disability--Rating. The Administrative Director has promulgated emergency regulations *8 Cal. Code Reg. §§ 10150, 10151* (repealed), 10152, 10154 (repealed), *10158, 10160, 10165.5*, effective 1/1/2005, which have been approved by the OAL, regarding aspects of permanent disability, including its rating via a new schedule. See *Ch. 577, Workers' Compensation, §§ 577.14[5], 577.45[4][a], [b], [d][iii], 577.46[3][e], 577.421[2], 577.422[3]*.

Utilization Review Standards. The Administrative Director has promulgated emergency regulations *8 Cal. Code Reg. §§ 9792.6-9792.11*, effective 12/13/2004, regarding standards for utilization review of requests for medical treatment services. See *Ch. 577, Workers' Compensation, § 577.45[1][c]*.

Cal-OSHA Regulations-- Admissibility. *The California Supreme Court, in Elsner v. Uveges (2004) 34 Cal. 4th 915* , has held that *Lab. Code § 6304.5*, as amended effective January 1, 2000, allows plaintiffs to use Cal-OSHA provisions to show duty or standard of care to the same extent as any other regulation or statute, whether the defendant is the plaintiff's employer or a third party. See *Ch. 577, Workers' Compensation, § 577.320[2]*.

Preprinted Workers' Compensation Release Form Settles Only Claims Within Scope of Workers' Compensation System. The California Supreme Court has held that the standard language of the mandatory preprinted form used in settling workers' compensation claims [*see 8 Cal. Code Reg. § 10874*] releases only those claims that are within the scope of the workers' compensation system, and extrinsic evidence is not admissible to show that the parties intended the preprinted release form to encompass any other claims. See *Claxton v. Waters (2004) 34 Cal. 4th 367* , now covered in *Ch. 115, Civil Rights: Employment Discrimination, §§ 115.35[1][a], 115.54[8], 115.106[2]*.

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[Reserved]

§§ 1.52[Reserved]

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§ 1.60 Adoptions

Presumed Father's Consent to Adoption. *Family Code § 8604(a)* has been amended to provide that a presumed father's consent is not required for a child's adoption unless he became a presumed father under *Fam. Code §§ 7540-7541, 7570-7577,* or *7611(a)-(c)* before the mother's consent became irrevocable or before her parental rights were terminated. See *Ch. 12A, Adoptions: Termination of Parental Rights, § 12A.15[3]*.

Abandonment of Child. In *In re Amy A. (2005) 132 Cal. App. 4th 63* , the court held that the fact that a parent has not communicated with a child or that the parent intended to abandon the child does not become material unless the parent has "left" the child within the meaning of *Fam. Code § 7822*. A parent leaves a child by voluntarily surrendering the child to another person's care and custody; actual desertion is not required for a finding of abandonment. See *Ch. 12A, Adoptions: Termination of Parental Rights, § 12A.68[1]*.

Standing to File Petition for Independent Adoption. In *In re Michael R. (2006) 137 Cal. App. 4th 126* , the court held that persons not designated in *Fam. Code § 8802(a)* lack standing to file a petition for an independent adoption. Thus, for example, a long-term caretaker may proceed with adoption only after obtaining guardianship of the child. See *Ch. 12B, Adoptions: Unmarried Minors, § 12B.110[1]*.

Compliance With Indian Child Welfare Act. In *In re X.V. (2005) 132 Cal. App. 4th 794* , the court held that if a trial court has reason to know that the proceedings involve an Indian child, it has a duty to give the notice required by the Indian Child Welfare Act or to ensure the social services agency's compliance with the notice requirements. This duty is sua sponte, because notice is intended to protect the interests of Indian children and tribes despite the parents' inaction. Several other recent appellate decisions have also emphasized the importance of strict compliance with the notice requirements of the Act. See *Ch. 12B, Adoptions: Unmarried Minors, § 12B.270*.

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§ 1.61 Alternative Dispute Resolution

[1] Agreements and Compelling Arbitration

Private Arbitration-- ***Code Civ Proc § 998*** **Applies to Uninsured Motorist Arbitration.** Uninsured motorist arbitration conducted pursuant to *Ins. Code § 11580.2*, is a form of contractual arbitration governed by *Code Civ. Proc. § 1280 et seq.*, and thus is an arbitration within the meaning of *Code Civ. Proc. § 998* [*Pilimai v. Farmers Ins. Exchange Co. (2006) 39 Cal. 4th 133]* . When the insured's Section 998 offer is not accepted and an arbitration award for a larger amount is granted, the maximum liability provision of *Ins. Code § 11580.2(p)(4)* does not preclude the successful insured's recovery of costs under *Code Civ. Proc § 998* even if those costs, when added to the award, exceed the coverage limits [*Pilimai v. Farmers Ins. Exchange Co. (2006) 39 Cal. 4th 133]* . See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.92[3][c]*; *Ch. 33, Appointment of Arbitrator and Conduct of Proceeding, § 33.29[2]*.

Private Arbitration--No Immunity for Breach of Contract. Neither the arbitrator nor his or her sponsoring organization has immunity from breach of contract actions for the arbitrator's withdrawal, for no stated reason, after hearing all the evidence and thereafter failing and refusing to render an award [*Morgan Phillips, Inc. v. JAMS/Endispute, L.L.C. (2006) 140 Cal. App. 4th 795]* . See *Ch. 33, Appointment of Arbitrator and Conduct of Proceeding, § 33.30*.

Private Mediation--No Exception for Fraud Challenge. When a mediated settlement agreement is attacked as having been obtained by fraud, duress, or undue influence, there is no exception to the mediation confidentiality privilege. The party seeking to have the mediation settlement agreement set aside bears the burden of proof, which he or she likely cannot meet without waiving the mediation privilege [*In re Marriage of Kieturakis (2006) 138 Cal. App. 4th 56]* . See *Ch. 31, Mediation, § 31.13[4]*.

Private Arbitration--Arbitrator, Not Court, Decides Scope of Arbitrable Issues Under Rules Chosen by Parties. When the contract calls for arbitration in accordance with the American Arbitration Association Rules, which specify the arbitrator is to determine his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement, the arbitrator, not the court, determines which issues are arbitrable [*see Rodriguez*

v. American Technologies, Inc. (2006) 136 Cal. App. 4th 1110, 1123] . See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21[1][c][ii]*.

Private Arbitration--Parties Chose Federal Arbitration Act, Including Procedural Provisions, to Govern Arbitration. The Federal Arbitration Act (*9 U.S.C.A. § 1 et seq.*), unlike *Code Civ. Proc. § 1281.2(c)*, gives a court no option but to compel arbitration when a party to the arbitration agreement is also a party to a pending court action with a third party, and there is a possibility of conflicting rulings on a common issue of laws or fact. Under a contract that contains no explicit choice of law provision but a broad and unconditional provision calling for the parties to arbitrate "in conformance with" and "in agreement with" the FAA, the parties will be deemed to have adopted all of the FAA, including its procedural provisions; and a California court will have no authority to exercise its discretion under *Code Civ. Proc. § 1281.2(c)*, but must order arbitration even in the face of possible conflicting rulings [*see Rodriguez v. American Technologies, Inc. (2006) 136 Cal. App. 4th 1110, 1122]* . See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.43[8][g][ii]*.

Private Arbitration--Arbitrator, Not Court, Decides Challenge Based on Illegality of Underlying Contract. Pursuant to *9 U.S.C. § 2* and *Buckeye Check Cashing, Inc. v Cardegna (2006) 163 L. Ed. 2d 1038* , under the Federal Arbitration Act, when the challenge is to the validity of the contract as a whole, not just the arbitration clause, the issue of the illegality of that contract is to be determined by the arbitrator. See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21[1][c][ii]*.

Private Arbitration--Two More Unconscionable Class Arbitration Waivers. In *Klussman v. Cross Country Bank (2005) 134 Cal. App. 4th 1283* and *Aral v. Earthlink, Inc. (2005) 134 Cal. App. 4th 544* , after choice of law analysis, which found California had a more compelling interest in resolution of the statutory claims asserted than the states whose law was specified as applicable by the contracts at issue, two court of appeal cases refused to enforce class arbitration waivers. Both involved relatively small individual losses, causes of action under California consumer protection statutes, and attempts to represent classes consisting of only California residents. See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.32*.

Private Arbitration--Statement as Settlement Conference as Basis for Agreement to Binding Arbitration. An agreement to arbitrate and the resultant award can be confirmed on the basis of estoppel. One party was estopped to deny the promise of its apparent agent, made at a settlement conference, to pay the full amount of a binding arbitration award [*CalFarm Ins. Co. v. Krusiewicz (2005) 131 Cal. App. 4th 273]* . See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21[1][b]*.

Private Arbitration--Nonsignatory Agent Is Entitled to Enforce Arbitration Agreement. One of the better-known exceptions to the rule that only parties to an arbitration agreement can enforce it is the doctrine that allows an agent of a signatory to compel arbitration under an agreement which it did not sign [*Westra v. Marcus & Millichap Real Estate Inv. Brokerage Co., Inc. (2005) 129 Cal. App. 4th 759]* . See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21[5][c]*.

Private Arbitration--Unwaivable Statutory Rights. Claims under the California Franchise Investment Law (*Corp. Code § 31000 et seq.*), the Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*), the Uniform Trade Secrets Act (*Civ. Code § 3426 et seq.*), and the Unfair Competition Law (*Bus. & Prof. Code § 17200 et seq.*) have been added to the list of those that make up the so-called *Armendariz* criteria [*Indep. Ass'n of Mailbox Ctr. Owners, Inc. v. Superior Court (Mail Boxes Etc., USA, Inc.) (2005) 133 Cal. App. 4th 396]* . See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.22[2][b], [3]*.

Private Arbitration--Effect of Clause Prohibiting Consolidation. Like a clause prohibiting classwide arbitration, a clause prohibiting consolidation of arbitrations may be unconscionable, and thus, void and unenforceable. The determination of unconscionability is for the court to make, and it most assuredly should not be made by an arbitration

service provider as an administrative proceeding without at least referring the matter to an arbitrator [*Indep. Ass'n of Mailbox Ctr. Owners, Inc. v. Superior Court (Mail Boxes Etc., USA, Inc.) (2005) 133 Cal. App. 4th 396]* . See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 33.21[1][e]*.

Private Arbitration--Uninsured Motorist Arbitration. The January 1, 2004, amendment to *Ins Code § 11580.2(i)(1)* (requiring an insured to commence litigation against the uninsured motorist, settle the claim, or demand arbitration within one year of the accident in order to preserve his or her claim against the insurer) was not retroactive. Thus, insureds who were injured by an uninsured motorist on June 16, 2002, lost any cause of action against their insurer by failing to demand arbitration and by not filing suit against the uninsured motorist until June 19, 2004 [*Bullard v. Cal. State Auto. Ass'n (2005) 129 Cal. App. 4th 211]* . See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.92*.

[2] Appointment of Arbitrator and Conduct of Proceedings

Private Arbitration--Court Has No Authority to Appoint Successor Arbitrator When Delays in Completion of Arbitration Are Not Fault of First Arbitrator. Under *Bosworth v. Whitmore (2006) 135 Cal. App. 4th 536* , the court ruled that although a trial court has authority to set a completion date within which the arbitrator must render his or her award, and although an arbitrator may be removed for failure to act, when the delays in concluding the arbitration are not chargeable to the arbitrator, but to the parties and/or the arbitration administrator, there is no failure to act within the meaning of *Code Civ. Proc. § 1281.6*; and a court has no authority to remove that arbitrator and appoint a successor. When a court removes an arbitrator and appoints a successor without authority, any award made by the successor is void. See *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.13[1][b]*.

[3] Judicial Review

Private Arbitration-- *Code Civ. Proc. § 1286.2(a)(6)(A)* Requiring Award To Be Vacated, Is Not Preempted by Federal Arbitration Act. *Ovitz v. Schulman (2005) 133 Cal. App. 4th 830* held that *Code Civ. Proc. § 1286.2(a)(6)(A)*, which governs vacation of arbitration awards under the Federal Arbitration Act (FAA), applies only in federal courts, and it is not inconsistent with the purpose of the FAA, as it does not undermine the enforceability of arbitration agreements but merely requires the vacating of an award if the arbitrator failed timely to disclose a ground for disqualification of which he or she was aware. See *Ch. 34, Contractual Arbitration: Judicial Review, § 34.19[1][d][i]*.

Private Arbitration--Award Must Be Vacated for Arbitrator's Failure to Disclose Appointment as Arbitrator in Second Arbitration During Pendency of First Arbitration. Under *Code Civ. Proc. § 1286.2(a)(6)(A)*; Cal Rules of Ct, Appen., Div. VI, Standards 7(c), (d)(4)(A)(i), 12(b), (c) and *Ovitz v. Schulman (2005) 133 Cal. App. 4th 830* , an arbitrator who does not disclose an intent to entertain additional offers from the parties or their lawyers, and despite the prohibition of Standard 12(c), accepts such an offer, must disclose that fact to the parties in writing within 10 calendar days. If an arbitrator who has not disclosed his or her intention to accept employment from a party of lawyer for a party accepts employment as a dispute resolution neutral from a party or lawyer while the arbitration is pending and fails to disclose that fact, any award rendered by that arbitrator must be vacated. See *Ch. 34, Contractual Arbitration: Judicial Review, § 34.19[1][d][iii]*.

Private Arbitration--Arbitrator Cannot Require Employee to Pay Costs and Fees of Arbitration When Statutory Rights Are at Issue. The *Armendariz* criteria are applicable whenever an employee or former employee seeks to vindicate an unwaivable statutory right. Thus, an arbitrator cannot render an award that requires the employee to pay any portion of the fees and expenses of arbitration. The proper remedy is to correct the award, by amending it to require employer to pay all arbitral costs and fees, not to vacate it [*Jones v. Humanscale Corp. (2005) 130 Cal. App. 4th 401]* . See *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.29[1]*; *Ch. 34, Contractual Arbitration: Judicial Review, § 34.20[1]*.

Private Arbitration--Cost Award for Prevailing Party in Arbitration-Related Judicial Proceeding Is Mandatory. The court must award costs as provided in *Code Civ. Proc. § 1293.2*, in any judicial proceeding connected with arbitration, including petitions to confirm and to vacate awards. The award of costs pursuant to *Code Civ. Proc. § 1293.2* is mandatory, and the court's determination under *Code Civ. Proc. § 1293.2* of which party, if either, is the prevailing party in a post-arbitration judicial proceeding is a judicial function distinct from the arbitrator's decision to award or not to award fees in the arbitration itself [*Marcus & Millichap Real Estate Inv. Brokerage Co. v. Woodman Inv. Group, Inc. (2005) 129 Cal. App. 4th 508]* . See *Ch. 34, Contractual Arbitration: Judicial Review, §§ 34.18[2], [3], 34.58*.

[4] Mediation

Judicial Mediation--Settlement Agreement Admissible. Under *Stewart v Preston Pipeline, Inc. (2005) 134 Cal. App. 4th 1565* , a settlement agreement can comply with *Evid. Code § 1123*, and thus be admissible, even if it is not signed by all parties. Signature by counsel is enough because waiver of confidentiality is a procedural matter. See *Ch 31, Mediation, § 31.14[1]*.

Judicial Mediation--Rules Applicable to Court-Connected Mediators. Ch. 37, *Judicially Mandated Civil Action Mediation*, had been revised to a discussion of the rules of conduct for mediators on court panels [Cal. Rules of Ct, Rules 1620-1620.9] and the rules relating to complaint procedures against them [Cal. Rules of Ct., Rule 1620.1, 1622-1622.3]. Neither set of rules are intended to create a cause of action against a mediator who does not perform in accordance with Cal. Rules of Ct., Rules 1620-1620.9. See *Ch. 37, Judicially Mandated Civil Action Mediation, §§ 37.34, 37.35*.

[5] Reference

Judicial Reference--New Judicial Council Forms. New Judicial Council Forms ADR-109, 110, and 111, Stipulation or Motion for Reference, Order Appointing Referee, and Referee's Report, all optional as of January 1, 2006, have been added to Ch. 38, *Reference*. See *Ch. 38, Reference, §§ 38.60, 38.63, 38.70*.

Judicial Reference--Another Clause Requiring Judicial Reference Upheld. Another clause requiring judicial reference of a construction defect case has been upheld [*Trend Homes, Inc. v. Superior Court (Azperren) (2005) 131 Cal. App. 4th 950*]. See *Ch. 38, Reference, § 38.11[4]*.

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§ 1.62 Appeals

[1] Amicua Curia

Amicus Curia Not Real Party in Interest for Attorney's Fees Liability Purposes. In *Connerly v. State Personnel Bd. (2006) 37 Cal. 4th 1169* , the California Supreme Court held that an amicus curiae may not be held liable to a prevailing party for attorney's fees under *Code Civ. Proc. § 1021.5*. See *Ch. 22, Amicus Curia, § 22.17*.

[2] Notice of Appeal

Document Must Literally Be Entitled "Notice of Entry" to Start Appeal Clock Running. In *Sunset Millennium Associates, LLC v. Le Songe, LLC (2006) 138 Cal. App. 4th 256* , the court of appeal held that a 14-page minute order with notice of entry language on page 13 did not comply with the requirement of *Cal. Rules of Ct., Rule 2(a)(1)* that a document providing notice of entry must be so entitled. See *Ch. 42, Appeal: Notice of Appeal, § 42.13[2][a]*.

Reclassification Order Not Appealable. In *Garau v. Torrance Unified School District (2006) 137 Cal. App. 4th 192* , the court of appeal held that an order reclassifying and transferring a case to the limited jurisdiction department was not an appealable order. See *Ch. 42, Appeal: Notice of Appeal, § 42.12[2][b]*.

Interlocutory Order May be Directly Appealed. In *Godinez v. Schwarzenegger (2005) 132 Cal. App. 4th 73, 87* , the court of appeal held that an exception to the one final judgment rule applies when a court renders an interlocutory order collateral to the main issue, dispositive of the parties' rights in relation to the collateral matter, and directing payment of money or performance of an act. See *Ch. 42, Appeal: Notice of Appeal, § 42.12[1][a]*.

[3] Record on Appeal

Appellate Record May Not Be Augmented to Include Matter That Was Not Before Trial Court. In *Electronic Funds Solutions v. Murphy (2005) 134 Cal. App. 4th 151* , the court of appeal denied a request to augment the appellate record with discovery responses that were not before the trial court when it entered judgments. See *Ch. 44, Appeal: Preparing and Filing the Record, § 44.91*.

[4] Review Standards and Appellate Rules of Law

If Material Facts Are Largely Undisputed, Appellate Court Applies De Novo Standard of Application of Statute. In *Connerly v. State Personnel Bd. (2006) 37 Cal. 4th 1169* , the California Supreme Court applied a de novo review standard as to whether the California Business Council could be assessed attorney's fees under *Code Civ. Proc. § 1021.5*. See *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.63[4][d]*.

Issues Omitted From Appellate's Opening Brief Waived. In *Singh v. Lipworth (2005) 132 Cal. App. 4th 40, 42* , the court of appeal held that points raised for the first time in a reply brief (other than those which are strictly responsive to arguments in the respondent's brief) are waived, unless the appellant shows good cause for failing to include them. See *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.10[5]*.

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§ 1.62A Attorneys

Attorney Liability--Subjective Standard Applied to Continuous Representation Tolling of Attorney Malpractice Statute of Limitations. In *Gonzalez v. Kalu (2006) 140 Cal. App. 4th 21* , the court of appeal held that if an attorney unilaterally withdraws or abandons a client, the attorney's representation ends for purposes of starting the statute of limitations on a malpractice action when the client actually has or reasonably should have no expectation that the attorney will provide further legal services. Therefore, the representation may end when the attorney provides express notification to the client that the attorney will perform no further services, or, if the attorney remains silent, the end of the representation may be inferred from the circumstances of the case. See *Ch. 76, Attorney Professional Liability, § 76.170[2][c]*.

Attorney Liability--Attorney Acting as Escrow Holder Liable to Non-Client for Conversion. In *Virtanen v. O'Connell (2006) 140 Cal. App. 4th 688* , the court of appeal held that an attorney acting as an escrow holder could be liable for conversion to a non-client who placed property into escrow, if the attorney disposed of the property in a way that was not in accordance with the escrow instructions provided when the property was deposited. See *Ch. 76, Attorney Professional Liability, § 76.200[1]*.

Attorney Liability--"Continuing Representation" Tolling Provision Applied in Transactional Malpractice Action. In *Fritz v. Ehrmann (2006) 136 Cal. App. 4th 1374* , the court of appeal held that if a case involves attorney negligence in the preparation of transactional documents, the statute of limitations is tolled under the continued representation provision when the client comes to the attorney after the potential malpractice manifests itself, and before the limitations period has run, in an attempt to have the attorney rectify the problem or mitigate the damage, and it does not matter if the attorney was not actually "continuing to represent" the client with respect to that specific subject matter between the time the documents were completed and the time that the client returned with the problem. The court also held that if an attorney commits two distinct acts of malpractice with two distinct injuries or potential injuries, the statute of limitations may accrue and run for one injury without affecting the limitations period for bringing suit for the other injury. See *Ch. 76, Attorney Professional Liability, §§ 76.170[2][b]* and *76.170[2][c]*.

Attorney Liability--Collateral Estoppel Applied to Legal Malpractice Action. In *Mooney v. Caspari (2006) 138 Cal. App. 4th 704, 41 Cal. Rptr. 3d 728* , the court of appeal held that a real estate developer and a real estate broker

shared a common interest in pursuing a claim against the developer's former joint venture partner when their real estate venture broke down, such that it was appropriate to apply the collateral estoppel doctrine to the broker's lawsuit against the developer's attorney after the developer's own action against the attorney was terminated in favor of the attorney. See *Ch. 76, Attorney Professional Liability, § 76.180*.

Attorney Practice--To Determine Conflict of Interest, Lawyer's Knowledge Imputed to Lawyer's New Firm. *In Pound v. DeMera DeMera Cameron (2005) 135 Cal. App. 4th 70* , the court of appeal held that when a lawyer possessing material confidential information changes firms, the lawyer's knowledge is imputed to the new firm. See *Ch. 72, Attorney Practice and Ethics, § 72.113[6]*.

Attorney Practice--Law Firm Partnership Agreement Not Illegal Fee Splitting Arrangement. In *Anderson, McPharlin & Connors v. Yee (2005) 135 Cal. App. 4th 129* , the court of appeal held that *Cal. Rule Prof. Conduct, Rule 2-200* did not apply to a law firm's partnership agreement requiring a former partner to pay the firm 25 percent of revenues of services rendered, during the 24 months following former partner's departure from the firm, to the firm's clients who had followed the partner when he departed. See *Ch. 72, Attorney Practice and Ethics, § 72.531[7]*.

Attorney Practice--Attorney Has Authority to Bind Client Without Consulting Him or Her, Even Against Client's Wishes. *In Stewart v. Preston Pipeline Inc. (2005) 134 Cal. App. 4th 1565* , the court of appeal held that a stipulation waiving mediation confidentiality does not impact a client's substantial rights; therefore, the client is bound by the attorney's agreement. See *Ch. 72, Attorney Practice and Ethics, § 72.220[1]*.

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§ 1.63 Automobiles

[1] Defects and Repairs

Automobiles--Application of Lemon Law Limited to Vehicles Bought in California. The California Supreme Court has held that insofar as the Song-Beverly Consumer Warranty Act applies to new motor vehicles [*see Civ. Code §§ 1793.2(d)(2), 1793.22*], the Act is limited in application to vehicles that were bought in California [*Cummins, Inc. v. Superior Court (2005) 36 Cal. 4th 478]* . See *Ch. 91, Automobiles: Actions Involving Defects and Repairs, § 91.12[1]*.

[2] Liability

Inference That Employee Drove Employer's Vehicle With Permission May be Proper. In *Taylor v. Roseville Toyota, Inc. (2006) 138 Cal. App. 4th 994* , the court of appeal held that if a driver involved in an accident is an employee and if the owner of the vehicle is the driver's employer, a jury may infer that the vehicle was driven with the permission of the owner, and the fact that the employer failed to monitor or adequately supervise how the employer's vehicles were used may be evidence that the employer gave implied permission for their use. See *Ch. 82, Automobiles: Causes of Action, § 82.16[1][e][i]*.

Employer's Admission of Vicarious Liability May Preclude Evidence of Negligent Entrustment of Vehicle. In *Jeld-Wen, Inc. v. Superior Court (2005) 131 Cal. App. 4th 853* , the court of appeal held that in the context of a negligent entrustment claim made against an employer for injuries caused by an employee/driver, if the employer makes a pretrial admission of liability for any negligence of the employee/driver under respondeat superior principles, the negligent entrustment claim becomes moot, and the trial court may not admit evidence that the employer knew of the employee's prior accidents. See *Ch. 82, Automobiles: Causes of Action, § 82.11[2]*.

[3] Uninsured Motorists

Uninsured Motorist Claims. In *Pilimai v. Farmers Insurance Exchange Co. (2006) 39 Cal. 4th 133* , the California Supreme Court held that the provisions of *Code Civ. Proc. § 998* apply to uninsured motorist arbitrations conducted pursuant to *Ins. Code § 11580.2*. See *Ch. 88A, Automobiles: Uninsured Motorist Claims, § 88A.19[3A]*.

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§ 1.63A Banking and Commercial Law

Banks--Diversity Citizenship. The United States Supreme Court has held that a national bank (1) is a citizen of the state in which its main office is located, as set forth in its articles of association, and (2) is not a citizen of any other state in which it has established a branch [*Wachovia Bank, N.A. v. Schmidt* (2006)]. See *Ch. 95, Banks, Deposits, and Checks, § 95.100[2]*.

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§ 1.63B Bankruptcy

Recovery of Attorney's Fees. The Ninth Circuit has held that while the Bankruptcy Code does contain some provisions regarding attorney's fees, it does not contain any provisions that create a general right for the prevailing party to be awarded attorney's fees in federal bankruptcy litigation. Moreover, no fees are available under state law for litigation of substantive federal bankruptcy issues in bankruptcy court [*Deroche v. Arizona Indus. Comm'n (In re Deroche) (9th Cir. 2006) 434 F.3d 1188*]. See *Ch. 94, Bankruptcy, § 94.54[1][c]*.

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§ 1.64 Business and Commercial

[1] Consumer Contracts and Loans

Consumer Contracts--Class-Action Waiver Unenforceable. The California Supreme Court has held that in some cases in California, class-action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class-action litigation or the right to class-wide arbitration. Moreover, the Federal Arbitration Act [*9 U.S.C. § 1 et seq.*] does not preempt California law in this respect [*Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100]* . See *Ch. 140, Contracts, § 140.25[2][a]*.

[2] Limited Liability Companies

Limited Liability Companies--Permitted and Prohibited Activities. *Corp. Code § 17002(b)* now permits an LLC to operate as a health care service plan licensed under *Health & Safety Code § 1340 et seq.* if it is a subsidiary of a licensed plan and if it is established to serve an existing line of business of the parent plan [Stats. 2005, ch. 16, § 1]. See *Ch. 346, Limited Liability Companies, § 346.10[5]*.

Limited Liability Companies--Assumption of Liability Upon Merger. New *Corp. Code § 17554.5* [Stats. 2005, ch. 286, § 7] provides that upon merger, an LLC or other business entity will be deemed to have assumed the liability of each disappearing LLC or other business entity to prepare and file tax and information returns and to pay any tax liability. See *Ch. 346, Limited Liability Companies, § 346.16[1]*.

[3] Partnerships

Limited Partnerships--Assumption of Liability Upon Merger. New *Corp. Code § 15678.10* [Stats. 2005, ch. 286, § 5] provides that upon merger, a surviving limited partnership or other business entity will be deemed to have assumed the liability of each disappearing limited partnership or other business entity to prepare and file tax and information returns and to pay any tax liability. See *Ch. 404, Partnerships: Actions Between Limited Partners and Partnerships, § 404.21[10]*; *Ch. 405, Partnerships: Actions Between Limited Partners or Partnerships and Third Parties, §§ 405.14, 405.43*.

[4] Securities and Franchise Regulation

Corporate Securities--Limited Offering Exemption Notice. *10 Cal. Code Reg. § 260.102.14*, which sets forth the requirements for a limited offering exemption notice of transaction, has been amended to require electronic filing unless the issuer claims a hardship exception. See *Ch. 515, Securities and Franchise Regulation, § 515.14[5][g]*.

Franchises--New Motor Vehicle Dealerships. *13 Cal. Code Reg. §§ 585, 595*, which specify the contents of a protest by a franchisee to the New Motor Vehicle Board, have been amended. See *Ch. 515, Securities and Franchise Regulation, § 515.520*.

Franchises--Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers Act. The law governing contracts between equipment dealers and suppliers [*Bus. & Prof. Code §§ 22900-22927*] has been extensively revised and expanded [Stats. 2005, ch. 712]. Among other things, the 2005 legislative changes expand the definition of equipment to include all-terrain vehicles and other machinery, revise provisions dealing with discriminatory pricing, establish procedures for approving or denying a transfer of a dealership when a dealer dies, and prohibit suppliers from engaging in other practices deemed coercive and discriminatory with respect to dealers. Existing restrictions on termination and nonrenewal are now limited to contracts with dealers and suppliers who are not single-line dealers or suppliers. The legislation also establishes a procedure for approval or denial of dealer requests for transfer of a dealer's business. Statutes governing inventory return policies and inventory purchase requirements have been modified, and a definition of fair market value for inventory return purposes has been added, as well as exclusions from the repurchase requirements. See *Ch. 515, Securities and Franchise Regulation, §§ 515.210 -515.221, 515.380 -515.382, 515.580*.

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§ 1.65 Civil Procedure

[1] Amended and Supplemental Pleadings

Amended Pleadings--Time to Amend. In *Harlan v. Dept. of Transportation (2005) 132 Cal. App. 4th 868* , the court held that while leave to amend within 10 days is standard under *Cal. Rules of Court, Rule 3.1320*, the court may grant leave to amend "upon any terms as may be just and shall fix the time within which the amendment or amended pleading shall be filed" [*Code Civ. Proc. § 472a(c)*]. In fact, even if the court has not ordered additional time beyond the standard 10 days, the court has the discretion to accept a late filing even after the 10 days has expired, effectively fixing a new time for amendment; and the late filing may be accepted even without noticed motion requesting an extension of time. See *Ch. 21, Amended and Supplemental Pleadings, § 21.17[1][b]*.

[2] Anti-SLAPP Motions

Official Proceeding. In *Kibler v. Northern Inyo County Local Hospital Dist. (2006) 39 Cal. 4th 192* , the California Supreme Court holds a hospital's peer review procedure qualified as an "official proceeding authorized by law" under *Code Civ. Proc. § 425.16(e)(2)* because the procedure is required under *Bus. & Prof. Code § 805 et seq.*; not only is the peer review process an important tool in protecting the public, but a hospital's decisions resulting from peer review are also subject to judicial review by administrative mandate; therefore, peer review committees are involved in "matters of public significance" pursuant to section 425.16(a) and therefore statements made in connection with issues under consideration by a hospital peer review committee are subject to anti-SLAPP protection. See Ch. 375, *Motions to Strike*, § 375.24[6][c].

Litigation Privilege. In *Flatley v. Mauro (2006) 39 Cal. 4th 299* , the California Supreme Court holds a defense attorney's communications made to plaintiff constituted extortion and therefore were not protected activity for purposes of the anti-SLAPP statute. The court emphasized that the question of whether defendant's conduct leading to the lawsuit was illegal as a matter of law is preliminary and unrelated to the second prong of the anti-SLAPP determination. Defendant then argued that section 425.16 protected all pre-litigation communications, even those that constitute extortion. The court disagreed, stating that litigation-related activity which is privileged under the litigation privilege is *not* necessarily protected by the anti-SLAPP statute. The attorney's threats to publicly accuse plaintiff of rape unless he paid money was clearly criminal extortion as a matter of law, and because those actions formed the basis of defendant's

special motion to strike, the motion was properly denied. See Ch. 375, *Motions to Strike,* § 375.24[7].

Malicious Prosecution. In *Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal. 4th 260* , the California Supreme Court holds that the purpose of a SLAPPback is to "seek compensation for damages beyond the attorney fees and costs awarded to the defendant who prevails on the special motion to strike under the anti-SLAPP statute." The purpose of these provisions is "to stack the procedural deck in favor of the SLAPPback plaintiff confronted with a special motion to strike;" however, the Legislature did create a categorical rule exempting SLAPPbacks from the anti-SLAPP statute. Section 425.18(h) provides a narrow exception to the general rule that malicious prosecution actions are subject to the anti-SLAPP statute in cases where the filing and maintenance of the underlying action was illegal as a matter of law. In practical terms, as with all anti-SLAPP motions, defendant must first make the required threshold showing that the challenged action arises from protected activity. Plaintiff then carries the burden of demonstrating that the underlying action was illegal as a matter of law and in doing so must identify with particularity the statute or statutes violated. Because it is procedural in character, the SLAPPback statute applies retroactively to pending actions that originated prior to section 425.18's effective date. See Ch. 375, *Motions to Strike,* § 375.24[7B][a], [b].

Attorneys Fees and Costs. In *S.B. Beach Properties v. Berti (2006) 39 Cal. 4th 374* , the California Supreme Court holds that if a defendant does not get its anti-SLAPP motion on file prior to a plaintiff's voluntary dismissal of an action, defendant is not entitled to fees or costs under *Code Civ. Proc. § 425.16(c)*; although defendant may incur fees in preparing such a motion prior to plaintiff's dismissal of the action, the court reasoned that allowing recovery of fees in such a situation would run counter to the purpose of section 425.16, which is to discourage prolonged litigation. See Ch. 375, *Motions to Strike,* § 375.24[13][b].

Emails Regarding Public Interest. This chapter is updated with *Integrated Healthcare Holdings, Inc. v. Fitzgibbons (2006) 140 Cal. App. 4th 515* , which holds a doctor's e-mail to a small number of people articulating his concerns about struggling company's acquisition and operation of four hospitals was subject to protection under the anti-SLAPP statute because the email concerned an issue of widespread public interest. See Ch. 375, *Motions to Strike,* § 375.24[6][c].

Prevailing Party. This chapter is updated with the following cases regarding recovery of attorney's fees and costs as a "prevailing party" for purposes of the anti-SLAPP statute: *Mann v. Quality Old Time Service, Inc. (2006) 139 Cal. App. 4th 328* , where a defendant was successful in striking a trade libel cause of action and therefore was a prevailing party despite losing anti-SLAPP motion on three other causes of action; *ComputerXpress, Inc. v. Jackson (2001) 93 Cal. App. 4th 993* , where defendants were prevailing parties as they were successful in striking five of nine causes of action alleged in complaint; and *ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc. (2006) 138 Cal. App. 4th 1307* , where a grant of judgment on the pleadings does not render an anti-SLAPP motion moot; therefore, a defendant prevailing on both a motion for judgment on the pleadings and an anti-SLAPP motion is entitled to its attorney's fees. See Ch. 375, *Motions to Strike,* § 375.24[13].

Restraining Orders. This chapter is updated with *City of Los Angeles v. Animal Defense League (2006) 135 Cal. App. 4th 606* , which holds petitions for workplace violence restraining orders under *Code Civ. Proc. § 527.8* are subject to the anti-SLAPP statute [*Code Civ. Proc. § 425.16*]. See Ch. 375, *Motions to Strike,* § 375.24[4].

Public Issues. This chapter is updated with *Ruiz v. Harbor View Community Assn. (2006) 134 Cal. App. 4th 1456* , which holds the anti-SLAPP statute [*Code Civ. Proc. § 425.16*] covers private letters concerning matters of public interest. See Ch. 375, *Motions to Strike,* § 375.24[6][c].

Recovery of Attorney's Fees and Costs. This chapter is updated with *City of Los Angeles v. Animal Defense League (2006) 135 Cal. App. 4th 606* , which holds an award of fees is mandatory; however, in accord with *Endres v. Moran (2006) 135 Cal. App. 4th 952* , a moving defendant cannot be said to have prevailed and therefore recover attorney's fees when his or her anti-SLAPP motion is only granted as to one of numerous causes of action. See Ch. 375, *Motions to Strike,* § 375.24[13][a].

SLAPPback Suits. Effective January 1, 2006, *Code Civ. Proc. § 425.18* is added to the Code and defines the term "SLAPPback" [Stats. 2005 ch. 535, § 2]. A SLAPPback is any cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to an anti-SLAPP motion under *Code Civ. Proc. § 425.16*. The Legislature found that a SLAPPback is distinguishable in character and origin from an ordinary malicious prosecution action, and, in fact, is consistent with the Legislature's intent to protect the valid exercise of the constitutional rights of free speech and petition by its deterrent effect on SLAPP litigation. Therefore, a SLAPPback should be treated different from an ordinary malicious prosecution action in terms of the application of the anti-SLAPP statute. See Ch. 375, *Motions to Strike,* § 375.24[7B][b].

Public Interest. In *Terry v. Davis Community Church (2005) 131 Cal. App. 4th 1534* , the court discussed the definition of "an issue of public interest" within the meaning of *Code Civ. Proc. § 425.16(e)(4)* and the court held that the societal interest in protecting children from child molesters was clearly a public interest such that the speech in question was protected under the anti-SLAPP statute. See Ch. 375, *Motions to Strike,* § 375.24[6][c].

Hearing Schedule. Effective January 1, 2006, *Code Civ. Proc. § 425.16(f)* is amended to require the clerk to schedule the hearing not more than 30 days after the service of an anti-SLAPP motion. This amendment was specifically in response to, and for the purposes of, overruling cases holding that a defendant who files an anti-SLAPP motion bears the burden of demonstrating the delay was due to the court's docket conditions rather than the attorney's calendar. See Ch. 375, *Motions to Strike,* § 375.24[8].

[3] Captions

Captions of Pleadings and Papers--E-mail Address. *Cal. Rules of Ct, Rule 2.111* is amended to provide an attorney must include the attorney's e-mail address, if available, at the top of pleadings and papers; however, a clerk cannot reject a paper for filing solely on the ground that it does not contain an attorney's or a party's fax number or e-mail address on the first page. See *Ch. 108, Captions and Introductions, § 108.11[2]*.

[3A] Change of Name

New Forms for Gender Change and Issuance of Amended Birth Certificate. The Judicial Council has issued new forms for use in obtaining a court order reflecting gender reassignment and requiring the issuance of an amended birth certificate, as a separate proceeding from a name-change [Cal. Judicial Council Forms NC-300, NC-320, and NC-330]. See Ch. 377, *Name, Change Of,* §§ 377.77, 377.78, 377.79.

[4] Complaints and Cross Complaints

Complaints and Motions--Uniform Filing Fees. Effective January 1, 2006, the state has adopted a uniform schedule of filing fees and other civil fees for the superior courts throughout the state, known as the Uniform Civil Fees and Standard Fee Schedule Act of 2005. Surcharges may be tacked onto the uniform fee for filings in complex cases, unlawful detainer actions, and, where imposed, for court construction funds in the county or county and city of Riverside, San Bernardino, and San Francisco [*see Gov. Code §§ 70600 et seq.*]. See *Ch. 123, Complaints and Cross Complaints, § 123.26[1], Ch. 372, Motions and Orders, § 372.18*.

Complaints--Insufficient Fees. Legislative amendments now provide the clerk must void the filing if the party who tendered a returned check or on whose behalf a returned check was tendered has not paid the full amount of the fee and the administrative charge by a means specified in *Code Civ. Proc. § 411.20(a)* within 20 days of the date on which the notice was mailed, and any filing voided by this section can be disposed of immediately after the 20 days have elapsed without preserving a copy in the court records, notwithstanding *Gov. Code § 68152* [*Code Civ. Proc. § 411.20(b)*]. The clerk must void the filing if the party who tendered a check in an amount less than the required filing fee or on whose

behalf a check in an amount less than the required filing fee was tendered has not paid the full amount of the fee and the administrative charge by a means specified in *Code Civ. Proc. § 411.21(a)* within 20 days of the date on which the notice was mailed, and any filing voided by this section may be disposed of immediately after the 20 days have elapsed without preserving a copy in the court records, notwithstanding *Gov. Code § 68152* [*Code Civ. Proc. § 411.21(b)*]. See *Ch. 123, Complaints and Cross Complaints, § 123.28*.

[4A] Default

Default--Relief Limited to Demand. This chapter is updated with *Electronic Funds Solutions v. Murphy (2006) 134 Cal. App. 4th 1161* , where the court held compensatory damages on default cannot exceed the $50,000 amount prayed for in the complaint; phrase "in an amount in excess of $50,000" does not provide notice of unlimited damages and the recoverable damages on default are limited to $50,000. See *Ch. 205, Defaults and Default Judgments, § 205.42*.

[4B] Fax Filing

Fax Filing. Effective July 1, 2006, the Rules of Court no longer require a $1 fee for each page of a document filed by fax directly with the court [*Cal. Rules of Ct, Rule 2.304*]. See Ch. 264, *Fax Filing and Service* .

[5] Judges

Temporary Judges--Revised Rules of Court. This chapter is updated with the revised Rules of Court effective July 1, 2006 that completely rewrite the procedures for appointment and disqualification of temporary judges. The Rules of Court distinguish between temporary judges appointed by the trial courts [*Cal. Rules of Ct., Rule 2.810 et seq.*] and temporary judges requested by the parties [*Cal. Rules of Ct., Rule 2.830 et seq.*]. These two types of temporary judges are subject to different qualification standards and different disqualification criteria and procedures. Court-appointed temporary judges have more standards to meet before appointment, such as training and continuing education, and there are more instances where other activities may disqualify the attorney from serving. Temporary judges requested by the parties, are privately compensated, and do not have the degree of standards required for court-appointed temporary judges. See Ch. 317, *Judges* , §§ *317.20 -317.22*.

Disqualification of Judge--Prospective Employment With Dispute Resolution Professional. A judge may be disqualified for cause under *Code Civ. Proc. § 170.1(a)(8)(A)* for current or prospective employment as a dispute resolution neutral where (1) the judge directs the parties to participate in an alternative dispute resolution process in which the dispute resolution neutral will be an individual or entity with whom the judge has the arrangement, has previously been employed or served, or is discussing or has discussed the employment or service; or (2) the judge will select a dispute resolution neutral or entity to conduct an alternative dispute resolution process in the matter before the judge, and among those available for selection is an individual or entity with whom the judge has the arrangement, with whom the judge has previously been employed or served, or with whom the judge is discussing or has discussed the employment or service. See *Ch. 317, Judges, § 317.44A*.

[6] Judicial Notice

Judicial Notice--Legislative Intent. ***Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*** *(2005) 133 Cal. App. 4th 26* , provides a comprehensive list of legislative history documents that are admissible and inadmissible under the doctrine of judicial notice for proving legislative intent. See *Ch. 321, Judicial Notice, § 321.17[7][c]*.

[7] Jurisdiction

Personal Jurisdiction--Waiver B Notice-- Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc. (2005) 133 Cal. App. 4th 26, 34 Cal. Rptr. 3d 520 Ch. 321, *Judicial Notice*, § 321.17[7][c] Seeking Injunctive Relief.

Factor Health Management v. Superior Court (2005) 132 Cal. App. 4th 246 , the court held that a party waives objections to California personal jurisdiction and makes a general appearance under *Code Civ. Proc. § 418.11* if the party seeks an order to show cause for a preliminary injunction and files a motion for discovery in connection with the order to show cause. See *Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances, § 323.62[2]*.

Subject Matter Jurisdiction--Tribal Immunity. This chapter is updated with *Campo Band of Mission Indians v. Superior Court (2006) 137 Cal. App. 4th 175* , where the court held the tribe's Compact with the state included a waiver of the tribe's tribal sovereign immunity relating to patron claims for negligence resulting in personal injury up to specific limits, thus the court had limited subject matter jurisdiction over the patron's claim against the tribe. See *Ch. 324, Jurisdiction: Subject Matter Jurisdiction, § 324.24[3]*.

[8] Limitation of Actions

Employment Discrimination of Minors. *Gov. Code § 12960(d)(4)* is amended to provide the one-year period of *Gov. Code § 12960* for filing an administrative complaint under the California Fair Employment and Housing Act [*Gov. Code § 12940 et seq.*] is extended for one year from the date the aggrieved party attains majority. See *Ch. 345, Limitation of Actions, § 345.20[11][a]*.

[9] Pretrial Proceedings

Civil Case Cover Sheet. Judicial Council Form CM-010, Civil Case Cover Sheet, is updated effective January 1, 2006. See *Ch. 425, Pretrial Proceedings, § 425.130*.

[10] Reconsider and Renewed Motions

Motions to Reconsider--Use of Motions In Limine. In *Coshow v. City of Escondido (2005) 132 Cal. App. 4th 687* , the court held that *Code Civ. Proc. § 1008* is not the exclusive vehicle by which a court can reconsider issues previously decided by demurrer and summary judgment; a trial court may revisit its prior rulings on its own initiative and use a party's motions in limine as a basis for granting judgment on the pleadings. See *Ch. 374, Motions to Reconsider and Renewed Motions, § 374.12*.

[11] Res Judicata

Privity. This chapter is updated with *Rodgers v. Sargent Controls & Aerospace (2006) 136 Cal. App. 4th 82* , which holds the fact that plaintiff was represented by same counsel as plaintiffs in a prior cases was not sufficient to extend the doctrine of privity to the plaintiff's present case; plaintiff had no proprietary interest in the prior cases and could not be charged with notice that he "avoided the prior proceedings at his peril." See *Ch. 491, Res Judicata, § 491.15[4][a]*.

Arbitration Award. In *Richard B. LeVine, Inc v. Higashi (2005) 131 Cal. App. 4th 566* , the court held res judicata can even operate to bar a plaintiff from litigating a claim against a non-arbitrating party where an arbitration award eliminated the basis for that party's liability. See *Ch. 491, Res Judicata, § 491.14[3][g]*.

[12] Service of Summons and Papers

Summons--Proof of Service of Summons. After payment of the applicable fees, the plaintiff or cross complainant may have the clerk issue one or more summonses for any defendant, but the clerk must keep each original summons in the court records and provide a copy of each summons issued to the plaintiff who requested issuance of the summons. Amendments to *Code Civ. Proc. § 412.10*, effective January 1, 2006, deleted the requirement of giving the plaintiff the original summons, and deleted the requirement that the summons be returned or a declaration of lost summons be filed with the court [2005 Stats. 300, § 2]. Proof of service of the summons must be filed within 60 days after the time the

summons and complaint must be served upon a defendant [*Code Civ. Proc. § 583.210(b)*]. See *Ch. 518, Service of Summons and Papers, §§ 518.14[1], 518.21*.

Summons--Incarcerated Persons. Legislative amendments provide that service of summons directed to a person who is incarcerated within any institution in California is made to the sheriff or jailer, and may be served by any person who may lawfully serve process; the sheriff or jailer served with a paper in a judicial proceeding must forthwith deliver it to the prisoner, with a note thereon of the time of its service; to neglect to do so makes the sheriff or jailer liable to the prisoner for all damages occasioned thereby [*Penal Code § 4013(a)*]. See *Ch. 518, Service of Summons and Papers, § 518.17[17]*.

[13] Stay of Action

Notice of Termination or Modification of Stay. *Cal. Rules of Ct., Rule 3.650(d)* is amended to provide when a stay is vacated, is no longer in effect, or is modified, the party who filed the notice of the stay must immediately serve and file a notice of termination or modification of stay. If that party fails to do so, any other party in the action who has knowledge of the termination or modification of the stay must serve and file a notice of termination or modification of stay. Once one party in the action has served and filed a notice of termination or modification of stay, other parties in the action are not required to do so. A mandatory form of notice, Judicial Council Form CM-181, Notice of Termination or Modification of Stay, is provided for this notice. See Ch. 137, *Continuing Duties During Litigation* , §§ *137.13, 137.64*.

[13A] Stipulations

Setting Aside. This chapter is updated with *Mileikowsky v. Tenet Healthsystem (2005) 128 Cal. App. 4th 262* , which holds a poor outcome is not a principled reason to set aside a stipulation by counsel; such as where a discovery stipulation waives a party's right to insist on a formal order compelling responses as a precursor to an issuance of evidentiary, issue, or terminating sanctions. See *Ch. 533, Stipulations, § 533.17[1][a]*.

[14] Summary Judgment and Adjudication

Summary Judgment--Notice of Motion. This chapter is updated with *Barefield v. Washington Mutual (2006) 136 Cal. App. 4th 299* , which holds when increasing the 75 days' notice required by two court days for overnight delivery, the two court days are added on at the end of the 75-day period; and with *Boyle v. Certainteed Corp. (2006) 137 Cal. App. 4th 645* , which holds a court cannot shorten the 75-day notice period required for a motion for summary judgment under *Code Civ. Proc. § 437c(a)* by issuing a general order providing for an expedited summary judgment on 60 days' notice. See *Ch. 537, Summary Judgment, § 537.22*.

Summary Judgment--Sufficiency of Evidence. This chapter is updated with *Andrews v. Foster Wheeler (2006) 138 Cal. App. 4th 96, 113* , which holds speculative expert declarations lacking factual basis and consisting of merely general statements are not sufficient to create a triable issue of material fact. See *Ch. 537, Summary Judgment, § 537.25[3][b]*.

Summary Judgment--Issues Not Raised in Motion. This chapter is updated with *County of Santa Clara v. Atlantic Richfield* (2006) 137 Cal. App. 4th 292, 326 , which holds where a defendants' summary judgment motion was based solely on the statute of limitations, and did not assert that plaintiffs had failed to state a cause of action due to the absence of allegations of physical injury to their buildings, and plaintiffs were given no opportunity to respond to defendants' motion on that unstated ground, it was reversible error for the trial court to grant the motion. See *Ch. 537, Summary Judgment, § 537.33[3]*.

Summary Judgment--Defects in Motion. In *Parkview Villas Assn., Inc. v. State Farm Fire & Casualty Co. (2005)*

133 Cal. App. 4th 1197 , the court held that it is an abuse of discretion for a court to grant summary judgment based on deficiency in opposing party's separate statement where the separate statement plainly indicated which proposed material facts were disputed and included general references to supporting evidence but did not set forth the nature of the dispute or specific citations to the evidence. Similarly, in *Zimmerman, Rosenfeld, Gersh & Leeds v. Larson (2005) 131 Cal. App. 4th 1466* , the court found a trial court has discretion to overlook procedural errors in the moving and opposition papers, but only if the evidence presented warrants it, and that glaring omissions and concessions cannot be overlooked. See *Ch. 537, Summary Judgment, § 537.21[3]*.

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§ 1.65A Civil Rights

[1] Abortions

Remedy for Unconstitutional Abortion Statute Not Necessarily Invalidation. In *Ayotte v. Planned Parenthood (2006) 126 S. Ct. 961* , the United States Supreme Court considered the remedy to be applied to a state law that unconstitutionally requires parental notification before performing an abortion on a pregnant minor, with no exception for medical emergencies. The Court held that the lower courts were not required to have invalidated the law wholesale, because they could issue a declaratory judgment and an injunction prohibiting the statute's unconstitutional application. The Supreme Court would remand for lower courts to determine whether to grant an injunction prohibiting unconstitutional applications or to hold that consistency with legislative intent required invalidating the statute in toto. See *Ch. 4, Abortion and Birth Control Methods, § 4.11[2]*.

[1A] Associations and Clubs

New Legislation on Governance of Unincorporated Associations. The California Legislature has enacted legislation [2005 Stats., ch. 116] regarding the governance of unincorporated associations, including termination of membership, expulsion from or suspension of membership, membership voting, and liability of members for harm. For discussion, see *Ch. 61, Associations and Clubs, §§ 61.14, 61.24, 61.25, 61.31[1]*.

[2] Discrimination in Business Establishments

Employer's Duty Under FEHA to Accommodate Disability Applies Even If Employee Is "Regarded As" Disabled. A California Court of Appeal has held that under the Fair Employment and Housing Act, an employer's duty to accommodate an employee's disability, and to engage in good-faith interactive process to determine reasonable accommodations, applies whether the applicant or employee is actually disabled or is "regarded as" disabled. See *Gelfo v. Lockheed Martin Corp. (2006) 140 Cal. App. 4th 34* , now *covered in Ch. 115, Civil Rights: Employment Discrimination, § 115.35[1][a]*.

Unruh Act Explicitly Bars Marital Status and Sexual Orientation Discrimination. With the Civil Rights Act of 2005 [2005 Stats., ch 420], the Legislature amended *Civ. Code § 51* to specifically include marital status and sexual

orientation as prohibited bases of discrimination under the Unruh Act, and amended *Civ. Code §§ 51.5, 51.8*, and *53* to prohibit discrimination under those sections based on the characteristics specified in *§ 51(b), (e)*, thus conforming those sections with the Unruh Act. See Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

[3] Housing Discrimination

Procedure Changed for Challenging Racially Restrictive Covenants. The California Legislature has amended the Fair Employment Housing Act [2005 Stats., ch 297] to change the procedure for challenging racially restrictive covenants. Instead of filing an application with the Department of Fair Employment and Housing, a person holding an ownership interest of record in property he or she believes is the subject of an unlawfully restrictive covenant may record a document titled Restrictive Covenant Modification. Before recording the modification document, the county recorder submits it and the original document to the county counsel, who determines whether the original document contains an unlawful restriction based on race, color, religion, sex, sexual orientation, familial status, marital status, disability, national origin, source of income, or ancestry. The county counsel returns the documents and informs the county recorder of the determination. See *Ch. 117: Civil Rights: Housing Discrimination, § 117.15[5]*.

[4] Interference With Civil Rights

Bane Act Conformed to Unruh Act; Legislature Provides Three-Year Statute of Limitations. In the Civil Rights Act of 2005 [2005 Stats., ch 420], the California Legislature amended *Civ. Code § 51.7* to conform the prohibited bases of action with the prohibited bases of discrimination under the Unruh Act. In other legislation [2005 Stats., ch. 123], the Legislature enacted a three-year statute of limitations for actions under *§ 51.7* [*see Code Civ. Proc. § 338(n)*]. For discussion, see *Ch. 117A: Civil Rights: Interference With Civil Rights by Threats, Intimidation, Coercion, or Violence, § 117A.12[1]*.

Attorney General Defines Hate Crimes and Required Motivation. In 88 Op. Atty Gen. Cal. 141 (2005) , the Attorney General opined that if a perpetrator commits a sexual assault wholly or partly because of the victim's gender, a hate crime has not been committed unless the perpetrator also acts on some animosity or other bias motivation toward the victim's gender. See *Ch. 117A: Civil Rights: Interference With Civil Rights by Threats, Intimidation, Coercion, or Violence, § 117A.12[2][a]*.

[4A] Post-Civil War Rights Statutes

Prima Facie Showing of Intentional Discrimination in Racial Discrimination Claim Under *42 U.S.C. § 1981*. In *Lindsey v. SLT (9th Cir. 2005) 432 F.3d 954* , the Ninth Circuit adapted the McDonnell Douglas test for proving intentional discrimination in an employment discrimination context to a claim of racial discrimination under *42 U.S.C. § 1981*. The court then held that a hotel's placing of a smaller bar mitzvah event in the main ballroom, instead of an African-American organization's annual fashion show and luncheon, which had been held in the main ballroom for the previous three years, and the placing of the fashion show and luncheon in a much smaller ballroom, showed a prima facie case of discriminatory treatment in violation of *42 U.S.C. § 1981*. See *Ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes, § 113.12[2][a]*.

Attorney Lacked Standing to Seek Fees or to Challenge County's Settlement Policy. In *Pony v. County of Los Angeles (9th Cir. 2006) 433 F.3d 1138* , the Ninth Circuit held that when the prevailing party did not exercise her rights to pursue attorney's fees, but, instead, waived them as a condition of settlement with the county, her former attorney had no standing to pursue attorney's fees. A putative assignment of the right to fees to the attorney was invalid because the right to seek attorney's fees under *42 U.S.C. § 1988* is a substantive cause of action which cannot be transferred contractually. See *Ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes, § 113.17[2][h]*.

[5] Prisoners' Rights

Enforcement of Prisoners' Civil Rights. In *Hill v. McDonough (2006) 126 S. Ct. 2096* , the United States Supreme Court held that an action challenging the constitutionality of the drug sequence a state likely would use to execute a prisoner by lethal injection, rather than an action challenging the validity of the death sentence, was a type of action that may proceed under *42 U.S.C. § 1983*. And, there is no requirement the claim be raised by petition for writ of habeas corpus. See *Ch. 114, Civil Rights: Prisoners' Rights, § 114.28[1]*.

PLRA Requires Proper Exhaustion of Administrative Remedies. In *Woodford v. Ngo (2006) 126 S. Ct. 2378* , the Supreme Court held that a prisoner cannot satisfy the Prison Litigation Reform Act's (PLRA) exhaustion requirement by filing an untimely or otherwise procedurally defective administrative grievance or appeal, but that proper exhaustion of administrative remedies is necessary. See *Ch. 114, Civil Rights: Prisoners' Rights, § 114.28[2]*.

PLRA Applies to Privately Operated Prison; Exhaustion Required for Claim of Magazine Confiscation. In *Roles v. Maddox (9th Cir. 2006) 439 F.3d 1016* , the Ninth Circuit held that the PLRA's exhaustion requirement applies with equal force to prisoners held in private prisons as to prisoners held in prisons operated by local or state governments or the federal government. Further, an allegation of confiscation of a prisoner's magazines was a prison condition to which the exhaustion requirement applied. See *Ch. 114, Civil Rights: Prisoners' Rights, § 114.28[2]*.

Prisoner Could Sue State For Damages for Violation of Title II of Americans With Disabilities Act. In *United States v. Georgia (2006) 126 S. Ct. 877* , the United States Supreme Court held that a prisoner could maintain an action against the state for damages for violation of Title II of the Americans With Disabilities Act to the extent the state's conduct violated the prisoner's constitutional rights, including violations of the *Eighth Amendment's* prohibition of cruel and unusual punishment. See *Ch. 112, Civil Rights: Government-Funded Programs and Activities, § 112.15[2][h]*, and *Ch. 114: Civil Rights: Prisoners' Rights, § 114.10[1]*.

No Deprivation of Criminal Defendant's Right of Access to Courts. In *People v. Ringo (2005) 134 Cal. App. 4th 870* , an in propria persona criminal defendant failed to show denial of access to the law library and to the court. The defendant had advisory counsel who adequately protected his rights, and there is no *Sixth Amendment* right to law library access when an in propria persona defendant is assisted by advisory counsel. See *Ch. 114, Civil Rights: Prisoners' Rights, § 114.13[2]*.

Sexual Abuse Protection for Inmates. Under the Sexual Abuse in Detention Elimination Act [*Pen. Code §§ 2635 et seq.*], prison inmates have the right to be protected from sexual abuse while held in institutions operated by the Department of Corrections and Rehabilitation. See *Ch. 114: Civil Rights: Prisoners' Rights, § 114.26*.

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§ 1.66 Civil Service

Municipality Need Not Bargain With Employees Regarding Implementation of Study That Minimally Impacts Working Conditions. The California Supreme Court has held that a city was not required to "meet and confer" with its police employees regarding the city's implementation of a study to determine whether its police were engaging in racial profiling, so long as the study would have only a minimal impact on the employees' working conditions. See *Claremont Police Officers Assn. v. City of Claremont (2006) 39 Cal. 4th 623* , now covered in *Ch. 118, Civil Service, § 118.52[3]*.

Legislative Attempt to Bypass State Personnel Board Review of Disciplinary Actions Is Unconstitutional. The California Supreme Court has held that Cal. Const., art. VII, *3(a)*, invalidates the Legislature's attempt, under *Gov. Code § 18670(c)-(e)*, to authorize an entity other than the State Personnel Board to review disciplinary actions taken against state civil-service employees. See *State Personnel Bd. v. Department of Personnel Admin. (2005) 37 Cal. 4th 512* , now covered in *Ch. 118, Civil Service, § 118.48[1], 118.59*.

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§ 1.67 Class Actions

California Law Applies in Interstate Class Action Alleging Unlawful Recording or Telephone Calls. In a case involving alleged privacy violations resulting from a Georgia business's recording of its telephone conversations with California residents, the California Supreme Court concluded that California law (which prohibits recording without the consent of all participants [*see Penal Code §§ 632-632.7*]), rather than Georgia law (which allows recording with the consent of one participant), should apply. See *Kearney v. Salomon Smith Barney, Inc. (2006) 39 Cal. 4th 95* , now covered in *Ch. 120, Class Actions, § 120.14[3][b][ii]*.

Court Denying Class Certification May Not Order That Former Potential Class Members Be Notified of Their Possible Individual Claims. A California Court of Appeal has held that once class certification has been denied, the trial court cannot order notification of former potential class members of their possible legal claims. The Court of Appeal reasoned that in non-class litigation, it is not the trial court's role to order notification to third parties of their possible legal claims. See *Experian Info. Solutions, Inc. v. Superior Court (2006) 138 Cal. App. 4th 122* , now covered in *Ch. 120, Class Actions, § 120.19[1]*.

Court May Allow Precertification Discovery to Seek Class Representative. In *Best Buy Stores, L.P. v. Superior Court (2006) 137 Cal. App. 4th 772* , the Court of Appeal has held that if a conflict of interest prevents a lawyer from serving as both class representative and counsel for a putative class, the trial court may allow precertification discovery for purpose of seeking a new class representative, so long as the court acts to protect the privacy rights of potential class members. See *Ch. 120, Class Actions , 120.15[1], [5]*.

Legislative Attempt to Bypass State Personnel Board Review of Disciplinary Actions Is Unconstitutional. A California Court of Appeal has held that the statute governing the distribution of the unpaid residue of class-action settlements, *Code Civ. Proc. § 384*, is inapplicable when a settlement agreement contains its own provisions for distributing residue that is not paid to class members. However, in such a case the trial court must scrutinize the settlement and approve it only after determining that it is fair, adequate, and reasonable. See *In re Microsoft IV Cases (2006) 135 Cal. App. 4th 706* , now covered in *Ch. 120, Class Actions, § 120.22[2]*.

"Opt-in" Class Actions Barred. A California Court of Appeal has held that a court may not require that class

members affirmatively request inclusion in a certified class before liability is determined; such an "opt-in" procedure is neither required by constitutional due-process principles nor permitted by applicable court rules. See *Hypertouch, Inc. v. Superior Court (2005) 128 Cal. App. 4th 1527* , now covered in *Ch. 120, Class Actions, §§ 120.19[3], 120.41[6]*.

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§ 1.68 Contracts

Enforcement of Foreign Law Under Choice-of-Law Provision. In *Discover Bank v. Superior Court (2005) 134 Cal. App. 4th 886, 895* , a California appellate court has concluded that if enforcement of a particular provision in a consumer contract of adhesion could be contrary to a fundamental policy of California, but nevertheless would be consistent with the law of the state that the contract specifies will govern the parties' rights and obligations, and if the party opposing enforcement is asserting claims in a California court against a resident of that other state solely under the law of that state, the California court may conclude that the other state has a materially greater interest in seeing its law enforced than California has in enforcing its contrary fundamental policy [*Discover Bank v. Superior Court (2005) 134 Cal. App. 4th 886]* . On the other hand, if the party opposing enforcement is asserting claims under California law, then the court may conclude that California's interest in enforcing its fundamental policy is greater than the other state's interest in enforcing its contrary law [*Klussman v. Cross Country Bank (2005) 134 Cal. App. 4th 1283]* . See *Ch. 140, Contracts, § 140.30[3]*.

Treating Repudiation as Anticipatory Breach. In *Howard S. Wright Constr. Co. v. BBIC Investors, LLC (2006) 136 Cal. App. 4th 228* , a California appellate court held that after repudiation of a contract, if the aggrieved party normally would be entitled to mechanic's lien rights, a lien would have to be recorded within 90 days "after [the aggrieved party] completes his contract." A contract is complete for purposes of commencing the recordation period when all work under the contract has been performed or excused--or has been otherwise discharged, as would be the case when the aggrieved party elects to treat repudiation of the contract as an anticipatory breach. See *Ch. 140, Contracts, § 140.54*.

Promissory Estoppel. A court of appeal has concluded that a plaintiff seeking recovery on a promissory estoppel theory must prove, as in ordinary contract actions, that the defendant's breach of promise was a substantial factor in causing the plaintiff's injury [*US Ecology, Inc. v. State of California (2005) 129 Cal. App. 4th 887]* . For discussion and a form for a complaint alleging a promissory estoppel cause of action, see *Ch. 140, Contracts, §§ 140.23[8], 140.106*.

Quantum Meruit--Recovery Under Statutes Mandating That Services Be Provided and That Providers Be Reimbursed. A court of appeal has concluded that quantum meruit may be the basis for an action to recover the reasonable value of the plaintiff's services when a statutory scheme (1) requires the plaintiff to provide the services

without regard to the recipient's ability to pay and (2) requires the defendant to "reimburse" the plaintiff for providing the services [*Bell v. Blue Cross of California (2005) 131 Cal. App. 4th 211]* . For discussion, see *Ch. 121, Common Counts, § 121.25[2][a]*.

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§ 1.69 Copyright and Trademarks

Copyrights and Trademarks--Exemption From Infringement Liability. The Family Movie Act of 2005 [*17 U.S.C. § 110(11)*] authorizes household viewers of movies (whether the movie is being broadcast on television or is being played from a videotape or disc) to use any suitable technology for the purpose of skipping objectionable video and audio portions of a movie. The act also authorizes manufacturers to create, and distributors to provide, suitable technology for that purpose. All such activity is protected by specific exemptions from liability for infringement under the Copyright Act and the Lanham Act. See *Ch. 349, Literary Property and Copyright, § 349.27[6][e],* and *Ch. 549, Trademarks and Trade Names, § 549.28[12]*.

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§ 1.69A Corporations

Suspension for Nonpayment of Taxes. In *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc. (2006) 136 Cal. App. 4th 212, 39 Cal. Rptr. 3d 33* , the court held that if a corporation's status has been suspended for nonpayment of taxes, the corporation's liability insurer may not defend a lawsuit in the corporation's name. However, the insurance company may intervene in a lawsuit to protect the rights of the insured suspended corporation, and intervention is the insurance company's only procedural option. See *Ch. 160, Corporations: Capacity, § 160.15*.

Dissenters' Rights After Merger. In *Singhania v. Uttarwar (2006) 136 Cal. App. 4th 416* , a California appellate court has held that after a merger, shareholders on notice that the corporation is obligated by statute to provide a statement of the price determined by the corporation to represent the fair market value of dissenters' shares, and that the statement constitutes an offer by the corporation to purchase dissenters' shares at the price stated, can act to protect their interests as potential dissenters by promptly demanding a buyout price from the corporation. If unsuccessful, the shareholders can seek judicial relief by petitioning for a writ of mandate to compel the corporation to immediately provide a statement of the buyout price as required by statute. The court concluded that there is no reason for derailing the statutory buyout procedure when the corporation sends the required notice of approval of a reorganization, and the notice omits the required statement of a fair-market price for dissenters' shares, but the corporation does provide the full text of *Corp. Code §§ 1300-1304* as required by statute. See *Ch. 169, Corporations: Reorganizations, § 169.18*.

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§ 1.70 Costs and Attorney's Fees

***Code Civ. Proc. § 998* Applies to Inverse Condemnation Proceedings and Expert Witness Fees Allowable From Inception of Action.** In *Regency Outdoor Advertising, Inc. v. City of Los Angeles (2006) 39 Cal. 4th 507* , the California Supreme Court held that the categorical exclusion of eminent domain proceedings from the application of *Code Civ. Proc. § 998* does not preclude its application in inverse condemnation proceedings, and that expert witness fees awarded under § 998 are not limited to those incurred after the offer to compromise is made. See *Ch. 174, Costs and Attorney's Fees, § 174.17[2]*.

Arbitration Plaintiffs Are Eligible for Deposition and Exhibit Preparation Costs Under § 998. In *Pilimai v. Farmers Ins. Exchange Co. (2006) 39 Cal. 4th 133* , the California Supreme Court held that an uninsured motorist arbitration pursuant to *Ins. Code § 11580.2* was an "arbitration" within the meaning of *Code Civ. Proc. § 998* and subject to § 998's cost-shifting provisions. Further, the "maximum liability" provision of § 11580.2(p)(4), limiting the maximum liability of an insurer when bodily injury is caused by one or more motor vehicles, whether insured, underinsured, or uninsured, to the insured's underinsured motorist coverage limits, less an amount paid to the insured by or for any person or organization that could be held legally liable for the injury, did not preclude court-awarded costs under § 998 to the insured when costs plus the damages awarded the insured would exceed the coverage limit. Finally, the Court held that arbitration plaintiffs such as the plaintiff in this case are eligible for deposition and exhibit preparation costs pursuant to § 998(d). See *Ch. 174, Costs and Attorney's Fees, § 174.17[1]*.

Insurance. In *Essex Insurance Co. v. Five Star Dye House, Inc. (2006) 38 Cal. 4th 1252* , the California Supreme Court held that an insured's assignment of a bad faith cause of action against an insurance company based on wrongful denial of benefits carries with it the right to recover *Brandt* fees that the assignee incurs to recover the policy benefits in the lawsuit against the insurance company. See *Ch. 308, Insurance, § 308.24[6]*.

Costs Recoverable in Trade Secret Misappropriation Actions. Under an amendment to *Civ. Code § 3426.4*, the prevailing party now has a right to recover costs, including expert witness fees, if a claim of trade secret misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or the misappropriation was willful or malicious. See *Ch. 565, Unfair Competition, § 565.32[1]*.

Neighbors Obtaining New Hearing Entitled to Attorney's Fees. In *Bowman v. City of Berkeley (2005) 131 Cal. App. 4th 173* , a mandamus action by neighbors who successfully petitioned to vacate a city's original approval of a housing project for senior citizens, the trial court properly awarded attorney's fees to the neighbors. The neighbors were concerned as much with the process by which the city approved the project as with the project itself, and the court could choose to credit their professed intentions if their credibility were at issue. See *Ch. 174, Costs and Attorney's Fees, § 174.56[2]*.

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§ 1.71 Damages

Medi-Cal Lien Limited to Recovered Medical Expenses Paid by Medi-Cal. In *Fitch v. Select Products Co. (2005) 36 Cal. 4th 812* , the California Supreme Court held that the Director of Health Services may not assert a Medi-Cal lien against a wrongful death recovery that does not include compensation for the decedent's medical expenses covered by Medi-Cal. See *Ch. 177, Damages, § 177.54[1]*.

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§ 1.72 Discovery

[1] Examinations

Court Order for Mental Examinations Must Specify Tests. In *Carpenter v. Superior Court (2006) 141 Cal. App. 4th 249* , the court of appeal held that under *Code Civ. Proc. § 2032.320*, the trial court must "specify the ... diagnostic tests and procedures" of mental examination by naming the tests and procedures to be performed; ordering "standardized written psychological tests" of "emotional and cognitive functioning" failed to meet the statutory requirements. See *Ch. 197, Discovery: Physical and Mental Examinations, § 197.17[6]*.

[2] Expert Witness

Simultaneous Exchange of Expert Witness Information. In *Fairfax v. Lords (2006) 138 Cal. App. 4th 1019* , the court of appeal held the trial court committed prejudicial error by allowing a medical malpractice defendant to delay his designation of retained expert witnesses until 20 days after plaintiff had designated his own expert, instead of enforcing a simultaneous exchange of information as required by former *Code Civ. Proc. § 2034* [*now see Code Civ. Proc. §§ 2034.210(a)*]. See *Ch. 198, Discovery: Exchange of Expert Witness Information, § 198.11[1]*.

[3] Privileges and Other Discovery Limitations

Tax Return Privilege Does Not Apply to Foreign Taxes. In *Firestone v. Hoffman (2006) 140 Cal. App. 4th 1408* , the court of appeal concluded that although California case law does create privilege for tax returns, that privilege does not apply to foreign taxes. See *Ch. 191, Privileges and Other Discovery Limitations, § 191.124[2]*.

Newsmedia Privileges Are Available to Online Journalists. In *O'Grady v. Superior Court (2006) 139 Cal. App. 4th 1423* , an action brought by a manufacturer of computer hardware and software alleging misappropriation of trade secrets, the court of appeal held any subpoenas seeking unpublished information from online journalists would be unenforceable through contempt proceedings in light of the California reporter's shield [*Cal. Const., art. I, § 2(b)*; *Evid. Code, § 1070*]; and discovery of petitioners' sources was also barred by the conditional constitutional privilege against compulsory disclosure of confidential sources. See *Ch. 191, Privileges and Other Discovery Limitations, §§ 191.123[1], [2][b], 191.123[4][c]*.

Mediation Confidentiality Waiver. In *Stewart v. Preston Pipeline Inc. (2005) 134 Cal. App. 4th 1565* , the court of appeal held that the requirement in *Evid. Code § 1123*, that the written settlement agreement be signed by the settling parties, did not require that an effective mediation-confidentiality waiver be signed by each of the litigants, provided that the written waiver was signed by each of the settling parties or their respective counsel. See *Ch. 191, Discovery: Privileges and Other Discovery Limitations, § 191.125*.

Discovery: Clergy-Penitent and Psychotherapist-Patient Privileges Construed. In *Roman Catholic Archbishop of Los Angeles v. Superior Court (2005) 131 Cal. App. 4th 417* , a case investigating allegations of child sexual assault committed by two priests, the court of appeal held that documents generated in the course of "troubled-priest interventions" were not privileged as penitential communications under *Evid. Code § 1032*, because both parties to the original communications knew they would be transmitted to a third person. See *Ch. 191, Discovery: Privileges and Other Discovery Limitations, § 191.70[2]*.

***Code Civ. Proc. § 2019.210* Extends to Any Cause of Action That Relates to Trade Secret.** In *Advanced Modular Sputtering, Inc. v. Superior Court (2005) 132 Cal. App. 4th 826* , a trade secret civil discovery case of first impression, the court of appeal held that *Code Civ. Proc. § 2019.210* is not limited in its application to a cause of action under the Uniform Trade Secrets Act, for misappropriation of the trade secret, but extends to any cause of action that relates to the trade secret. See *Ch. 191, Discovery: Privileges and Other Discovery Limitations, § 191.82[2]*.

[4] Sanctions

Evidence Preclusion Sanctions Available for Repeated Pattern of Abuse. In *Karlsson v. Ford Motor Co. (2006) 140 Cal. App. 4th 1202* , the court of appeal upheld evidence preclusion sanctions under *Code Civ. Proc. § 2023.030* against defendant minivan manufacturer on the issues of warnings and the technical feasibility of safer, alternative seat belt design, because the manufacturer's repeated pattern of abuse led to loss of evidence on failure to warn. See *Ch. 192, Discovery: Sanctions for Discovery Misuse, § 192.13[3][b]*.

Terminating Sanctions. In *Electronic Funds Solutions, LLC v. Murphy (2005) 134 Cal. App. 4th 1161* , the court of appeal found striking defendants' answer under former *Code Civ. Proc. § 2023(b)(4)(A)* (now see *Code Civ. Proc. § 2023.030(d)(1)*) an appropriate discovery sanction, based on defendants' "pervasive and consistent" misuse of the discovery process. See *Ch. 192, Sanctions for Discovery Misuse, § 192.13[3][b][iii]*.

[5] Scope, Regulation, and Timing

Third Party Financial Discovery in Legal Malpractice Cases. In *Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court (2006) 137 Cal App. 4th 579* , the court of appeal, addressing the standards governing an important aspect of third party financial discovery in legal malpractice cases, held that even assuming non-party petitioner law firm had protectible financial privacy rights, those rights did not preclude discovery that was relevant to essential issues, such as collectibility, in this legal malpractice action brought by real party in interest client against other attorneys, because the malpractice plaintiff could show that the requested financial and insurance information was relevant and material to prove that a better result should have been obtained for him by current attorney defendants. See Ch. 190, *Discovery: Scope, Regulation, and Timing* , §§ *190.64[2], [7]*.

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§ 1.72A Drugs and Pharmacists

Civ. Code § 2527 **Reporting Requirement Is Unconstitutional.** In *ARP Pharmacy Svcs., Inc. v. Gallagher Bassett Svcs., Inc. (2006) 138 Cal. App. 4th 1307* , the Court of Appeal held that the fee study reporting requirements in *Civ. Code § 2527* and the related penalty and enforcement provisions in *Civ. Code § 2528* violate the free speech provision of the California Constitution because they violate the free speech rights guaranteed to prescription drug claims processors by compelling speech, and regulation is not narrowly tailored to achieve a governmental interest to encourage insurers to pay pharmacists fair rate for drug dispensing services. See *Ch. 214, Drugs and Pharmacists, § 214.81[1]*.

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§ 1.73 Elections and Initiatives

Elections--Voter Registration Confidentiality. Amendments to *Elec. Code § 2194* now provide voter registration card information must not be used for any personal, private, or commercial purpose, including, but not limited to the harassment of any voter or voter's household; the advertising, solicitation, sale, or marketing of products or services to any voter or voter's household; or reproduction in print, broadcast visual or audio, or display on the Internet or any computer terminal; and the signature of the voter shown on the voter registration card is confidential and must not be disclosed to any person, except as provided by law. See *Ch. 243, Elections, 243.17[1]*.

Elections--Challenge to Voter Registration. Amendments to *Elec. Code § 2194* now provide the home address or signature of any voter must be released whenever the person's vote is challenged pursuant to the Elections Code; the address or signature must be released only to the challenger, to elections officials, and to other persons as necessary to make, defend against, or adjudicate the challenge; and an elections official must permit a person to view the signature of a voter for the purpose of determining whether the signature matches a signature on an affidavit or registration or a petition, but cannot permit a signature to be copied. See *Ch. 243, Elections, § 243.17[2][c]*.

Elections--Affidavit of Registration and Required Postings on Confidentiality. New *Elec. Code § 2157* provides for statewide standards for the affidavit of registration and voter registration cards, and includes such requirements as type size and color of ink, statements regarding confidential voter status and misdemeanor punishment for using voter registration information for commercial purposes, and a toll-free fraud hot line telephone number maintained by the Secretary of State that the public may use to report suspected fraudulent activity concerning misuse of registration information. New *Elec. Code § 2157.2* also requires state ballot pamphlets and local and state web sites to post required text on voter confidentiality and reporting suspected misuse of such information. See *Ch. 302, Initiative, Referendum, and Recall, § 302.16[2], [4]*.

Initiatives--Title and Ballot Summary. The California Supreme Court in *Costa v. Superior Court (2006) 37 Cal. 4th 986* held that slight discrepancies between the ballot summary version submitted to the Attorney General and the version circulated for signature may be permissible if the discrepancies do not mislead the public or otherwise frustrate or undermine the purposes underlying any of the applicable constitutional or statutory provisions or threaten the integrity of the electoral process. However, the Court narrowed its holding to the facts of the case in finding that the

discrepancy was inadvertent, and emphasized that its holding did not mean that the proponents of an initiative measure properly may circulate, even inadvertently, a version of the measure that differs from the version submitted to the Attorney General; the Court's conclusion in the *Costa* might not be warranted under other circumstances. See *Ch. 302, Initiative, Referendum, and Recall, § 302.21[2][a]*.

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§ 1.74 Employment

[1] Discrimination

Hostile Work Environment Sexual Harassment Plaintiff Must Show More Than Crude Language and Conduct. The California Supreme Court in *Lyle v. Warner Bros. Television Prods. (2006) 38 Cal. 4th 264, 42 Cal. Rptr. 3d 2, 132 P.3d 211* now holds that a hostile work environment sexual harassment claim is not established (1) by a coworker's crude language and lewd gestures that are not directing sexual innuendos or gender-related language toward the plaintiff or toward women in general; or (2) by infrequent sexual comments directed at employees other than the plaintiff, if those comments do not permeate and destroy the plaintiff's work environment. See *Ch. 115, Civil Rights: Employment Discrimination, § 115.36[5][b]*.

Fair Employment and Housing Act Does Not Obligate Employer To Create New Position for Employee With Disability. A California Court of Appeal has held that an employer that has provided a reasonable accommodation for an employee with a temporary disability is not obligated to transform that accommodation into a permanent position once the employee's temporary disability becomes permanent. See *Raine v. City of Burbank (2006) 135 Cal. App. 4th 1215* , now covered in *Ch. 115, Civil Rights: Employment Discrimination, § 115.35[1][a]*.

[2] Employer Liability

Premises-Line Rule Inapplicable in Respondeat Superior Case. In *Hartline v. Kaiser Foundation Hospitals (2005) 132 Cal. App. 4th 458* , the court of appeal refused to apply the "premises line rule" in the respondeat superior context and held that an employer could not be vicariously liable for an employee's automobile accident that occurred while the employee was turning into the parking lot on the employer's premises. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.16[3]*.

[3] Termination and Discipline

"At Will" Employment Contract Need Not Specify That Termination May Be Without Cause. The California Supreme Court has held that an employment contract stating that the employment was "at will" and terminable "at any time" unambiguously created an at-will employment relationship, even though did not also state that termination could

be without cause. Because there was no ambiguity about the at-will nature of the employment, additional contractual provisions regarding a 90-day probationary period and annual reviews did not expressly or impliedly create a right to be terminated only for cause. See *Dore v. Arnold Worldwide, Inc. (2006) 39 Cal. 4th 384* , now covered in *Ch. 249, Employment Law: Termination and Discipline, §§ 249.13[1], 249.30*.

"Materiality" Test for Adverse Employment Action in FEHA Retaliation Suit Also Applies in Retaliation Suit Under Whistleblower Statute. A California Court of Appeal has held that to qualify as an "adverse employment action" under the whistleblower statute, *Lab. Code § 1102.5(b)*, an employer's retaliatory act against an employee must have a material effect on the terms, conditions, or privileges of employment; it is not sufficient that the act deter the employee from engaging in protected activities. In so holding, the Court of Appeal adopted the same test that the Supreme Court recently announced in *Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal. 4th 1028* , for retaliation actions under the Fair Employment and Housing Act. See *Patten v. Grant Union High Sch. Dist. (2005) 134 Cal. App. 4th 1378* , now covered in *Ch. 249, Employment Law: Termination and Discipline, § 249.15[2]*.

[4] Wage and Hour Disputes

Court of Appeal Strikes Down IWC-Created Exemption From Meal-Period Requirements. A California Court of Appeal has struck down a provision of Wage Order No. 16-2001 that created a new exemption from employers' statutory duty to provide meal periods for certain collective bargaining agreements [see *8 Cal. Code Reg. § 11160*, P 10(E)]. The court held that the Wage Order exceeded the Industrial Wage Commission's authority because its creation of a new exemption was inconsistent with the limited exemptions expressly set forth in *Lab. Code § 512*. See *Bearden v. U.S. Borax, Inc. (2006) 179 L.R.R.M. (BNA) 2993, 138 Cal. App. 4th 429, 41 Cal. Rptr. 3d 482* , now covered in *Ch. 250, Employment Law: Wage and Hour Disputes, § 250.14[2][f]*.

Employer May Not Use "Averaging" to Establish Compliance With California Minimum Wage Law. A California Court of Appeal has held that an employer may not use "averaging" (under which some hours would be compensated at less than the minimum statutory or contractual rate so long as the average compensation for the relevant pay period equals or exceeds the minimum rate) to establish compliance with the California minimum wage law, even though averaging is permissible under federal law. See *Armenta v. Osmose, Inc. (2005) 135 Cal. App. 4th 314* , now covered in *Ch. 250, Employment Law: Wage and Hour Disputes, § 250.11*.

Employees' "Walking Time" After Start of Workday Is Compensable. The United States Supreme Court has held that under the Fair Labor Standards Act, as amended by the Portal-to-Portal Act, *29 U.S.C. § 201 et seq.*, an employee is entitled to compensation for time spent walking to the employer's production area after donning required protective gear. See *IBP, Inc. v. Alvarez (2005) 126 S. Ct. 514* , now covered in *Ch. 250, Employment Law: Wage and Hour Disputes, § 250.41[1][d]*.

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§ 1.74A Environmental Law

State Forestry Laws Do Not Preempt All Local Zoning Regulations. In *Big Creek Lumber Co. v. County of Santa Cruz (2006) 38 Cal. 4th 1139* , the California Supreme Court held that the California Forest Practice Act and the Timberland Productivity Act do not expressly or impliedly preempt all local zoning regulations with regard to timber operations. See *Ch. 350, Logs and Timber, § 350.20*.

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§ 1.75 Guardianships and Conservatorships

Judicial Council Forms--Updated Forms. Numerous official Judicial Council forms have been updated, including Form GC-212 [*see* Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians,* § 281.110A], Form GC-310 [*see Ch. 281, Guardianship and Conservatorship: Appointment of Conservators, § 281.100*], Form GC-314 [*see Ch. 281, Guardianship and Conservatorship: Appointment of Conservators, § 281.100A*], Form GC-320 [*see Ch. 281, Guardianship and Conservatorship: Appointment of Conservators, § 281.103*], Form GC-340 [*see Ch. 281, Guardianship and Conservatorship: Appointment of Conservators, § 281.106*], Form GC-255 [*see Ch. 290H, Guardianship and Conservatorship: Termination of Guardianships and Conservatorships, § 290H.31*], and Form GC-260 [*see Ch. 290H, Guardianship and Conservatorship: Termination of Guardianships and Conservatorships, § 290H.32*].

Conservatorship--Action for Elder Abuse. In *Conservatorship of Kayle (2005) 134 Cal. App. 4th 1* , the court held that a conservator has the authority to bring an action for elder abuse committed against the conservatee by caregivers and others, and in that action the conservator may recover damages for the conservatee's pain and suffering. See *Ch. 290C, Guardianship and Conservatorship: Actions and Disputed Claims, § 290C.11*.

Guardians--Visitation Rights. Under *Fam. Code § 3105(b)*, a court may grant reasonable visitation rights to a person who previously served as the legal guardian of a child if the court determines that such visitation is in the child's best interest [*see Ch. 290H, Guardianship and Conservatorships: Termination of Guardianship and Conservatorships, § 290H.11[6]*].

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§ 1.76 Habeas Corpus

Special Requirements Imposed for Habeas Corpus Petitions Prepared by Attorneys. The California Rules of Court have been amended to distinguish between habeas corpus petitions prepared by parties proceeding without counsel from and petitions prepared by counsel, with special requirements applicable to petitions prepared by counsel. See *Cal. Rules of Ct., Rules 8.380, 8.384,* now covered in *Ch. 292, Habeas Corpus, § 292.13[2]*.

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§ 1.77 Hospitals and Long-Term Care

Continuing Care Contracts--Conditions and Procedures for Transfer of Patient. Requirements for a continuing care contract to contain the procedures and conditions under which a resident may be voluntarily or involuntarily transferred from a designated living unit [*see Health & Safety Code § 1788*] have been expanded [2005 Stats., ch. 454, § 2]. For discussion, see *Ch. 351, Long-Term Health and Residential Care, § 351.76[5]*.

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§ 1.77A Injunctions

Declaratory Judgment Does Not Render Request for Injunction Moot. In *Syngenta Crop Protection, Inc. v. Helliker (2006) 136 Cal. App. 4th 1464* , the court of appeal held that a declaratory judgment is a cumulative remedy and does not preclude injunctive relief based on the same facts. See *Ch. 303, Injunctions, § 303.40[4]*.

Decision to Grant a Restraining Order Rests in Trial Court's Sound Discretion; Abuse of Discretion Occurs Only When Court Has Exceeded the Bounds of Reason or Contravened the Uncontradicted Evidence. In *Biosense Webster, Inc. v. Superior Court (2006) 135 Cal. App. 4th 827* , the court of appeal held that a trial court improperly granted a temporary restraining order prohibiting a company from commencing or taking any action to enforce any noncompetition agreement or restrictive covenant against three of its former employees in any court other than the Los Angeles County Superior Court or federal court in the State of California. See *Ch. 303, Injunctions, § 303.85[1]*.

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§ 1.78 Insurance

[1] In General

Attorney's Fees. In *Essex Insurance Co. v. Five Star Dye House, Inc. (2006) 38 Cal. 4th 1252* , the California Supreme Court held that an insured's assignment of a bad faith cause of action against an insurance company based on wrongful denial of benefits carries with it the right to recover *Brandt* fees that the assignee incurs to recover the policy benefits in the lawsuit against the insurance company. See *Ch. 308, Insurance, § 308.24[6]*.

Parties Entitled to Sue for Insurance Bad Faith. In *Century Surety Co. v. Polisso (2006) 139 Cal. App. 4th 922* , the court of appeal held that the spouse of the named insured, who was a co-owner of the insured business, was an insured within the CGL policy definition, entitling her to sue the insurer for bad faith. See *Ch. 308, Insurance, § 308.24[3]*.

Insurer's Duty to Indemnify. In *County of San Diego v. Ace Property & Casualty Ins. Co. (2005) 37 Cal. 4th 406* , and *Powerine Oil Co., Inc. v. Superior Court (2005) 37 Cal. 4th 377* , the California Supreme Court reached different conclusions, based on different insuring language, with respect to excess liability insurers' obligations to indemnify the insured for administrative cleanup and related costs outside the context of damages in a lawsuit. See *Ch. 308, Insurance, § 308.114[4]*.

Liability for Failure to Obtain Coverage. In *Business to Business Markets, Inc. v. Zurich Specialties London Ltd. (2005) 135 Cal. App. 4th 165* , the court of appeal found that a surplus lines insurance broker owed a duty to a third party to obtain adequate insurance as requested, based on the relationships formed among the third party, the retail broker it contacted, the surplus lines broker, and the insured company, because the commercial contract between the third party and the insured required the insured to obtain that coverage. See *Ch. 308, Insurance, § 308.173*.

[2] Indemnity and Contribution

Intentional Tortfeasor Not Entitled to Apportionment of Liability Under Proposition 51. In *Thomas v. Duggins Construction Co., Inc. (2006) 139 Cal. App. 4th 1105* , the court of appeal held that an intentional tortfeasor is not entitled to apportionment of liability under Proposition 51 for noneconomic damages if the negligence of another contributed to the injury, regardless of whether the negligent person is the plaintiff or a third-party tortfeasor. The court

also held that because no apportionment is permitted, a party who is vicariously liable for an intentional tort may be liable for all of the plaintiff's noneconomic damages. See *Ch. 300, Indemnity and Contribution, § 300.63[3][c][vi], [f]*.

Manufacturer of Defective Product Not Entitled to Reduction of Damages for Fault of Noninjured Product Owner. In *Ford v. Polaris Industries, Inc. (2006) 139 Cal. App. 4th 755* , the court of appeal held that a product manufacturer liable for a product defect could not reduce its liability under Proposition 51 by pointing to the fault of the product owner, who was not the injured party. The court had already held that under the primary assumption of risk doctrine, the product owner owed no duty of care to the injured party. See *Ch. 300, Indemnity and Contribution, § 300.63[3][d]*.

Good-Faith Settlement Provisions May Be Applied Without Action in Which Co-Tortfeasors Were Named as Co-Defendants. In *Bob Parrett Construction, Inc. v. Superior Court (2006) 140 Cal. App. 4th 1180* , the court of appeal held that the good-faith settlement provisions of *Code Civ. Proc. § 877.6* may apply even if equitable indemnity claims are not pursued in an action in which the injured party has actually named the tortfeasors as co-defendants. See *Ch. 300, Indemnity and Contribution, § 300.73[2]*.

Indemnity of Residential Builder by Subcontractor for Builder's Negligence Unenforceable. Pursuant to amended *Civ. Code § 2782(c)*, for residential construction contracts entered into after January 1, 2006, provisions, clauses, covenants, and agreements contained in, collateral to, or affecting the construction contract and any amendments to the contract that purport to indemnify or defend the builder by a subcontractor against liability for claims of construction defects are unenforceable to the extent that the claims arise out of, pertain to, or relate to the negligence of the builder, or the builder's other agents, servants, or independent contractors who are directly responsible to the builder, or for defects in design furnished by those persons, or to the extent the claims do not arise out of, pertain to, or relate to the scope of work in the written agreement between the parties. See *Ch. 300, Indemnity and Contribution, § 300.34[2]*.

Indemnity Agreement Did Not Cover General Contractor's Own Negligence. In *McCrary Construction Co. v. Metal Deck Specialists, Inc. (2005) 133 Cal. App. 4th 1528* , the court of appeal held that if responsibility for workplace safety is shared between a general contractor and subcontractors under their contractual agreements, but the general contractor specifically assumes responsibility for eliminating the known danger of holes left in a roof by a subcontractor after the subcontractor failed to correct the dangerous condition, the general contractor engaged in active negligence by failing to ensure that the holes were covered and marked appropriately. Because an indemnity agreement with the subcontractor did not specifically cover the general contractor's own negligence, indemnity of the general contractor was inappropriate. See *Ch. 300, Indemnity and Contribution, § 300.02[5][b]*.

***Code Civ. Proc. § 356* Does Not Extend Statute of Repose in Construction Defect Cases.** In *Inco Development Corp. v. Superior Court (2005) 131 Cal. App. 4th 1014* , the court of appeal held that in a construction defect case, a bankruptcy stay that ended prior to expiration of the 10-year period imposed by *Code Civ. Proc. § 337.15* did not extend that 10-year period under *Code Civ. Proc. § 356*, because *Code Civ. Proc. § 337.15* is technically a statute of repose, not a statute of limitations. See *Ch. 300, Indemnity and Contribution, § 300.70[3]*.

Proposed Allocation of Non-Adjudicated Claims Requires Evidence of Reasonableness. In *Jones v. John Crane, Inc. (2005) 132 Cal. App. 4th 990* , the court of appeal held that in multi-defendant actions, if there is no pretrial finding that a settlement with defendants who did not go to trial was reached in good faith, an allocation of non-adjudicated claims by the trial court requires the plaintiff to present to the court evidence of the reasonableness of the proposed allocation, including evidence of a rational basis for the allocation and that the allocation was reached in an atmosphere of appropriate adversity with the settling parties. See *Ch. 300, Indemnity and Contribution, § 300.73[3][e]*.

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§ 1.78A Juvenile Law

Revised Text and Judicial Council Forms. Juvenile law chapters are updated throughout with legislation, case law, and Judicial Council forms for 2006. See Ch. 327, *Juvenile Courts: Jurisdiction and General Procedures* , Ch. 328, *Juvenile Courts: Dependency Proceedings* , and Ch. 329, *Juvenile Courts: Delinquency Proceedings* .

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§ 1.79 Mandate and Prohibition

Court May Have Discretion to Hear Writ Petition Filed Beyond 60-Day Limit. In *Bob Parrett Construction, Inc. v. Superior Court (2006) 140 Cal. App. 4th 1180* , the court of appeal held that absent an applicable statute, courts have discretion to hear a writ petition filed beyond the judicially imposed 60-day limit. See *Ch. 358, Mandate and Prohibition, § 358.63*.

Petitioner for Writ of Mandate Must Establish That There Is No Plain, Speedy, and Adequate Remedy, in the Ordinary Course of Law. In *BarrattAmerican, Inc. v. City of Rancho Cucamonga (2005) 37 Cal. 4th 685* , the California Supreme Court dismissed a mandate petition, holding that the issue in the petition seeking to compel the City to review and adjust building permit fees could be determined in a validation action, and therefore the petitioner had an adequate remedy at law. See *Ch. 358, Mandate and Prohibition, § 358.50*.

Party on Whom Alternative Writ Has Been Served May Make Return by Demurrer, Verified Answer, or Both. In *Caliber Bodyworks, Inc. v. Superior Court (2005) 134 Cal. App. 4th 365* , the court of appeal held that a return must be in the form of a demurrer or verified answer, not a memorandum of points and authorities in opposition to the petition. See *Ch. 358, Mandate and Prohibition, § 358.85[1]*.

Writ Petition Following Demurrer May Be Proper. In *Big Valley Band of Pomo Indians v. Superior Court (2005) 133 Cal. App. 4th 1185* , the court of appeal held that a writ petition following a demurrer was proper when waiting for resolution after a final judgment would undermine a party's sovereign immunity. See *Ch. 358, Mandate and Prohibition, § 358.51[4][a]*.

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§ 1.80 Marriage, Cohabitation, and Harassment

[1] Annulment

Fraud. In *In re Marriage of Meagher & Maleki (2005) 131 Cal. App. 4th 1* , the court held that a husband's misrepresentations about his financial status, which were intended to fraudulently induce his wife to invest in a business venture with him, to enable him to gain control of her assets, was not the type of fraud that constitutes an adequate basis for granting the wife an annulment. See *Ch. 25, Annulment (Nullity) of Marriage and Related Spousal Rights, § 25.15[5][c]*.

[2] Cohabitation and Domestic Partnerships

Domestic Partnership Rights. In *Koebke v. Bernardo Heights Country Club (2005) 36 Cal. 4th 824* , the California Supreme Court held that in light of the legislature's intent to create a policy favoring domestic partnerships similar to the policy favoring marriage, the Unruh Act (*Civ. Code § 51*) requires businesses to treat registered domestic partners the same as married couples, and precludes them from granting married couples benefits they deny to persons registered as domestic partners. Subsequent to this decision, *Civ. Code § 51* was amended to prohibit discrimination based on marital status or sexual orientation [2005 Stats., ch. 420, § 3]. See *Ch. 359, Marriage, § 359.13[4]*.

Proposition 22. In *Knight v. Superior Court (2005) 128 Cal. App. 4th 14* , the court held that the Domestic Partner Act does not violate Proposition 22, codified in *Fam. Code § 308.5*, which states that only marriage between a man and a woman is valid or recognized in California. This Proposition was intended only to limit the status of marriage to heterosexual couples and to prevent the recognition in California of same-sex marriages that have been, or may in the future be, legitimized by laws of other jurisdictions. By enacting the Domestic Partner Act, the legislature has not created a "same-sex marriage" by another name. See *Ch. 359, Marriage, § 359.13[4]*.

Standing to Sue for Wrongful Death of Domestic Partner. In *Bouley v. Long Beach Memorial Medical Center (2005) 127 Cal. App. 4th 601* , the court held that the 2002 and 2005 amendments to *Code Civ. Proc. § 377.60*, giving domestic partners standing to sue for wrongful death, operate retroactively and apply to deaths occurring before January 1, 2002. In *Armijo v. Miles (2005) 127 Cal. App. 4th 1405* , the court held that giving domestic partners standing does not violate the California Defense of Marriage Act (*Fam. Code § 308.5*) because it has nothing to do with marriage. See

Ch. 387, Nonmarital Cohabitation, § 387.11[2][e].

Custody Rights of Lesbian Cohabitants. The California Supreme Court has recognized in a number of cases that lesbian cohabitants may both be a child's mother, with attendant custody and support rights and obligations. In *Elisa B. v. Superior Court (2005) 37 Cal. 4th 108* , the Court held that under the Uniform Parentage Act a woman may be a presumed mother of a child of her lesbian partner if they agree to raise the child together, she receives the child into her home, and she holds the child out as her natural child. In *K.M. v. E.G. (2005) 37 Cal. 4th 130* , the Court held that when a woman provides ova to her lesbian partner so that the partner can bear a child who will be raised in their joint home, both women are considered to be the child's parents. In *Kristine H. v. Lisa R. (2005) 37 Cal. 4th 156* , the Court held that the lesbian mother of a child is estopped from challenging the validity of a stipulated judgment declaring that she and her lesbian partner are the child's parents. See *Ch. 387, Nonmarital Cohabitation, § 387.11[5][c]*.

[3] Community Property

Recovery in Legal Malpractice Action. In *In re Marriage of Klug (2005) 130 Cal. App. 4th 1389* , the court held that a wife's recovery in her settlement of her legal malpractice action against the couple's former attorney was her separate property, even though two necessary elements of her cause of action--duty and breach--occurred during marriage, when she did not suffer any loss or injury until after separation, and when it was the husband's actions, with the attorney's aid, in transferring funds offshore that resulted in the injury the wife claimed in the malpractice action. See *Ch. 122, Community Property, § 122.32[2][b]*.

Reimbursement. In *In re Marriage of Weaver (2005) 127 Cal. App. 4th 858* , the court held that when a husband contributes his separate property interest in real property, which he acquired by gift during the marriage, to the parties' acquisition of their community property, joint tenancy interest in the property, the husband is entitled to reimbursement for the equity value of his separate property contribution on dissolution of the marriage; and the husband and wife are each entitled to one-half of the value of the remaining community property interest in the property. See *Ch. 122, Community Property, § 122.33[4][a][ii]*.

Transmutation. In *In re Marriage of Benson (2005) 36 Cal. 4th 1096* , the California Supreme Court held that there is no exception from the "express declaration" requirement of *Fam. Code § 852(a)* for partial performance of an agreement to transmute property. The writing requirement of *Fam. Code § 852(a)* cannot be satisfied when there is no writing at all about the subject property, and when a transmutation would have to be inferred from acts surrounding the parties' purported agreement. In *In re Marriage of Starkman (2005) 129 Cal. App. 4th 659* , the court held that a clause in a trust agreement, which provided that the property transferred to the trust was community property unless the transferor spouse identified it as separate property, was insufficient to create a transmutation to community property of the husband's separate property which he transferred to the trust and did not identify as separate property. See *Ch. 122, Community Property, § 122.34[3][b]*.

Undue Influence. In *In re Marriage of Mathews (2005) 133 Cal. App. 4th 624, 35 Cal. Rptr. 3d 1* , the court held that a husband receives an advantage or benefit from his wife's execution of a quitclaim deed to real property in his favor, so that the property becomes his separate property. The husband has the burden of establishing that the wife's execution of the quitclaim deed was freely and voluntarily made, with full knowledge of all the facts, and with a complete understanding of its effect of making the property the husband's separate property. See *Ch. 122, Community Property, § 122.51[4][a]*.

[4] Dissolution of Marriage and Child Custody/Support

Goodwill as Community Asset. In *In re Marriage of McTiernan & Dubrow (2005) 133 Cal. App. 4th 1090* , the court found that there was no goodwill in a husband's career as a motion picture director because there was no "business." It noted that *Bus. & Prof. Code §§ 14101* and *14102* refer to the goodwill of a business, and that a business is a

professional, commercial, or industrial enterprise with assets, not a natural person. The court rejected the contention that the term "business" also includes "a person doing business." See *Ch. 222, Dissolution of Marriage: Property Division and Valuation, § 222.131[7][a]*.

Reimbursement for Support Payments. In *In re Marriage of Sherman (2005) 133 Cal. App. 4th 795* , the court held that each support payment made by a party must be treated as a separate obligation or debt. To secure reimbursement under *Fam. Code § 915*, a party must show that the other spouse had nonexempt separate income available at the time that spouse used community funds to make a support payment. A spouse has a right to use community funds to make a support payment when the spouse does not have nonexempt separate income available to use for that purpose. See *Ch. 222, Dissolution of Marriage: Property Division and Valuation, § 222.300[2][b]*.

Custody if Household Member Is Registered Sex Offender. *Family Code § 3030(a)* has been amended to provide that a court may not grant physical or legal custody of a child to a person if anyone residing in the person's household is required, as a result of a felony conviction in which the victim was a minor, to register as a sex offender under *Penal Code § 290*, unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record. See *Ch. 223, Dissolution of Marriage: Child Custody, § 223.12[5][l]*.

Order for Drug Testing. In *Deborah M. v. Superior Court (2005) 128 Cal. App. 4th 1181* , the court held that the "least intrusive method of testing" which the court is required to order when requiring a parent to submit to drug testing under *Fam. Code § 3041.5* means urine testing and that testing must comply with strict federal standards; hair follicle drug testing is not permitted. See *Ch. 223, Dissolution of Marriage: Child Custody, § 223.12[5][m]*.

Effect of Party's Military Service Out of State. *Family Code § 3047* has been added to provide that a party's absence, relocation, or failure to comply with a custody order is not, by itself, sufficient to justify a modification of the order if the reason for the absence, relocation, or failure to comply is the party's activation to military service and deployment out of state. See *Ch. 223, Dissolution of Marriage: Child Custody, § 223.27[2][a]*.

Hearing in Move-Away Case. In *In re Marriage of Brown & Yana (2006) 37 Cal. 4th 947* , the California Supreme Court held that an evidentiary hearing in a move-away situation should be held only if necessary. A court may deny the noncustodial parent's request to modify custody based on the relocation without holding an evidentiary hearing to take oral evidence if this parent's allegation or showing of detriment to the child is insubstantial in light of all of the circumstances presented in the case or is otherwise legally insufficient to warrant relief. An evidentiary hearing serves no legitimate purpose or function if the noncustodial parent is unable to make a prima facie showing of detriment or has failed to identify a material, contested factual issue that should be resolved by taking oral testimony. See *Ch. 223, Dissolution of Marriage: Child Custody, § 223.28[2][d]*.

Income Available for Child Support. In *County of Orange v. Smith (2005) 132 Cal. App. 4th 1434* , the court held that sublease rental payments a parent receives are included in his or her gross income for purposes of determining child support, even if the parent does not include these payments as income on his or her tax return. In *In re Marriage of Calcaterra & Badakhsh (2005) 132 Cal. App. 4th 28* , the court refused to accept the father's statement of his gross income, based on the variances in his income shown by his tax returns, loan applications, income and expense declaration, and testimony. In *In re Marriage of Heiner (2006) 136 Cal. App. 4th 1514* , the court held that the entire amount of a lump sum, undifferentiated personal injury award or settlement received by a party is not income for purposes of calculating child support; however, the components of a personal injury award that are intended to be compensation for loss of income and loss of earning capacity may be considered by the court as income for child support. In *In re Marriage of Henry (2005) 126 Cal. App. 4th 111* , the court held that an increase in the equity value of a party's residence is not income for purposes of calculating child support. See *Ch. 224, Dissolution of Marriage: Child Support, § 224.105[1]*.

Using Imputed Income to Calculate Child Support. In *In re Marriage of Eggers (2005) 131 Cal. App. 4th 695* , the

court held that when a supporting parent quits a job, the court may conclude that the parent's conduct reflects a divestiture of resources required for child support obligations. It may impute income to that parent based on his or her earning capacity if the amount of income imputed is supported by evidence of opportunity and ability to work reflecting that level of income. See *Ch. 224, Dissolution of Marriage: Child Support, § 224.105[5]*.

Modification of Support Order Due to Military Service. *Family Code § 3651* has been amended to provide that a party to a support order who is activated to military duty or National Guard service may request modification of a support order by filing a Notice of Activation of Military Service and Deployment and Request to Modify a Support Order [Cal. Judicial Council Form FL-398]. See *Ch. 224, Dissolution of Marriage: Child Support, §§ 224.178, 224.220*.

Consideration of Parties' Retirement Plans in Setting Spousal Support. In *In re Marriage of Schmir (2005) 134 Cal. App. 4th 43* , the court held that when considering the parties' retirement plans in setting spousal support, a court should weigh the public policy favoring provision for one's retirement against all other circumstances in the case. Courts have broad discretion to determine whether to consider as income available for spousal support purposes contributions made by a participant to his or her retirement plan. See *Ch. 225, Dissolution of Marriage: Spousal Support, § 225.116*.

[5] Harassment and Domestic Violence

Burden of Proof in Civil Harassment Proceeding. In *Brekke v. Wills (2005) 125 Cal. App. 4th 1400* , the court held that a lesser standard of proof is required to show harassment in a proceeding for civil harassment than is required to show a criminal threat under *Penal Code § 422*, which specifies that the threat must be so unequivocal, unconditional, immediate, and specific as to convey a gravity of purpose and an immediate prospect of the execution of a crime resulting in death or great bodily injury. See *Ch. 293, Harassment and Domestic Violence, § 293.12*.

Parties to Civil Harassment Proceeding. In *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc. (2005) 129 Cal. App. 4th 1228* , the court held that the summary procedures of *Code Civ. Proc. § 527.6* only apply to natural persons, not to corporations, partnerships, or other entities. See *Ch. 293, Harassment and Domestic Violence, § 293.13*.

Defendant's Response to Civil Harassment Petition. In *City of Los Angeles v. Animal Defense League (2006) 135 Cal. App. 4th 606* , and *Thomas v. Quintero (2005) 126 Cal. App. 4th 635* , the courts held that a defendant may file a special motion to strike under *Code Civ. Proc. § 425.16*, challenging a petition under *Code Civ. Proc. § 527.6* for injunctive relief; such a motion may not be used, however, to challenge an application for an interim restraining order issued pending a hearing on the petition for injunctive relief. In *Siam v. Kizilbash (2005) 130 Cal. App. 4th 1563* , the court held that a malicious prosecution action cannot be based on an unsuccessful civil harassment petition; the defendant's remedy is to seek sanctions for the filing of a frivolous petition. See *Ch. 293, Harassment and Domestic Violence, § 293.14*.

Civil Harassment Order. *Code of Civil Procedure § 527.10* has been added, and provides that any injunctive order issued in a civil harassment proceeding must prohibit the defendant from taking any action to obtain the address or location of the plaintiff or the plaintiff's family members, caretakers, or guardian, unless there is good cause not to make this order. See *Ch. 293, Harassment and Domestic Violence, § 293.15[1][b]*.

Workplace Violence Injunction. In *City of Los Angeles v. Animal Defense League (2006) 135 Cal. App. 4th 606* , the court held that the petitioner who requests an injunction under *Code Civ. Proc. § 527.8* must establish a nexus between the unlawful violence or credible threat of violence and his or her workplace. See *Ch. 293, Harassment and Domestic Violence, § 293.34[3]*.

Domestic Violence Protective Order. *Family Code § 6322.7* has been added, and provides that any domestic violence protective order must prohibit the enjoined party from taking any action to obtain the address or location of a protected

party or a protected party's family members, caretakers, or guardians, unless there is good cause not to make this order. See *Ch. 293, Harassment and Domestic Violence, § 293.53[1]*.

Contempt Proceeding to Enforce Order. *Code of Civil Procedure § 1218(d)* now gives district attorneys and city attorneys the authority to initiate and pursue a court action for contempt against a party for failing to comply with a court order entered under the DVPA. See *Ch. 293, Harassment and Domestic Violence, § 293.56[5]*.

[6] Paternity

Semen Donor. In *Steven S. v. Deborah D. (2005) 127 Cal. App. 4th 319* , the court held that *Fam. Code § 7613(b)*, which provides that a semen donor is not the resulting child's legal father, applies even if the sperm donor and the woman who conceives the child are known to each other and the woman acknowledges that the donor is the child's father. This statute does not make an exception for known sperm donors or for cases in which the parties have an intimate relationship. See Ch. 412, *Paternity* .

Motion to Set Aside Judgment of Paternity. The Judicial Council has adopted new forms [Cal. Judicial Council Forms FL-272, FL-273, FL-274, FL-276, FL-278] that may be used to seek an order setting aside a judgment of paternity under *Fam. Code § 7646*. See Ch. 412, *Paternity* .

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§ 1.81 Physicians and Other Medical Personnel

Additional Injury Not Necessary for Physician to Be Liable for Performing Unnecessary Surgery. In *Tortorella v. Castro (2006) 140 Cal. App. 4th 1* , the court of appeal held that even in the absence of additional injury, a physician may be liable for performing a surgery that was unnecessary under the appropriate standard of care. See *Ch. 415, Physicians: Medical Malpractice, § 415.11[5]*.

Signed Consent Form Not Determinative in Lack of Informed Consent Claim Against Physician. In *Quintanilla v. Dunkelman (2005) 133 Cal. App. 4th 95* , the court of appeal held that although a physician may defend a claim of lack of informed consent on the grounds of a signed consent form, the adequacy of a written consent form is a factual issue for the jury. In that case, the court upheld a jury verdict for a Spanish-speaking patient who had signed a pre-surgery consent form written in Spanish, because she testified that she did not read Spanish, she was rushed through the pre-surgery admissions procedures and told to "sign here" and "initial there," and neither the examining physician nor the surgeon had adequately explained what procedures were going to be performed. See *Ch. 415, Physicians: Medical Malpractice, § 415.13[8]*.

Failure of Physician to Report Suspected Child Abuse Governed by MICRA Limitations Period. In *David M. v. Beverly Hospital (2005) 131 Cal. App. 4th 1272* , the court of appeal held that a claim that a physician negligently failed to report suspected child abuse is a claim for professional negligence that is governed by the limitations period of *Code Civ. Proc. § 340.5* and is not subject to the general tolling rule that would otherwise apply during a person's minority. See *Ch. 415, Physicians: Medical Malpractice, § 415.47[3][a]*.

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§ 1.82 Probate

[1] Accounts, Final Distribution, and Compensation

Judicial Council Forms. Two official Judicial Council forms have been updated: Form DE-121 [*see Ch. 442, Probate: Initiating Probate Administration, § 442.146*] and DE-122 [*see Ch. 447, Probate: Statutory Notice Requirements, § 447.64*]. In addition, Judicial Council form DE-295, Ex Parte Petition for Final Discharge and Order, has been added [*see Ch. 458E, Probate: Discharge, § 458E.51*].

Assignment of Interest. New *Prob. Code § 11604.5(b)* specifies requirements that must be met when a beneficiary has assigned all or part of his or her interest in a decedent's estate to a "transferee for value" in exchange for a cash advance or other consideration. For discussion, see *Ch. 458D, Probate: Accounts, Final Distribution, and Compensation, § 458D.107*.

[2] Statutory Notice Requirements

Judicial Council Forms. Two official Judicial Council forms have been updated: Form DE-121 [*see Ch. 442, Probate: Initiating Probate Administration, § 442.146*] and DE-122 [*see Ch. 447, Probate: Statutory Notice Requirements, § 447.64*]. In addition, Judicial Council form DE-295, Ex Parte Petition for Final Discharge and Order, has been added [*see Ch. 458E, Probate: Discharge, § 458E.51*].

Notice to Director of California Victim Compensation and Government Claims Board. *Prob. Code § 216* has been added, effective January 1, 2006, to require notification to the Board of a decedent's death if the decedent has an heir who is confined in a local or California state correctional facility. See *Ch. 447, Probate: Statutory Notice Requirements, § 447.14[7]*.

[3] Taxes

Transfers With Retained Life Estate. In *Strangi v. Comm'r (5th Cir. 2005) 417 F.3d 468* , the court held that a transferor retains "possession or enjoyment" of property within the meaning of *I.R.C. § 2036(a)* if the transferor retains a substantial present economic benefit from the property rather than a speculative contingent benefit that may or may

not be realized. See *Ch. 453, Probate: Estate Tax, § 453.13[12][c]*.

Deduction for State Death Taxes. For estates of individuals dying after 2004, the value of the taxable estate is determined by deducting from the gross estate any estate, inheritance, legacy, or succession taxes actually paid to a state for any properly included in the gross estate. This deduction may be claimed on line 3b of IRS Form 706. It replaces the credit for state death taxes allowed for decedents dying before 2005. No dollar limits are imposed on the amount of this deduction. See *Ch. 453, Probate: Estate Tax, § 453.18[6]*.

[4] Will Contests

No Contest Clause. In *Zwirn v. Schweizer (2005) 134 Cal. App. 4th 1153* , the court held that a beneficiary who claimed the decedent orally agreed to give the beneficiary 50 percent of the decedent's estate violated the no contest clause of the decedent's will by filing a creditor's claim and seeking to prosecute an action to enforce that claim. See *Ch. 444, Probate: Will Contests, § 444.14[2]*.

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§ 1.82A Public Administration

Agency Interpretation Invalid Because Not Probably Adopted as a Regulation. In *Morning Star Company v. State Board of Equalization (2006) 38 Cal. 4th 324* , the California Supreme Court held that the Department of Toxic Substances Control interpretation of a statute that virtually all California corporations with 50 or more employees "use, generate, store, or conduct activities in this state related to hazardous activities" was a regulation subject to APA requirements, and was therefore invalid because the interpretation was not properly adopted as a regulation under the provisions of the California APA. See *Ch. 472, Public Agency Rules, § 472.20[1]*.

Liquor License Applicant Bears Burden of Proof. In *Coffin v. Alcoholic Beverage Control Appeals Board (2006) 139 Cal. App. 4th 471* , the court of appeal held that the applicant for a liquor license bears the burden of proof regarding the applicant's eligibility for a liquor license from the start of the application process until the Department makes a final determination. See *Ch. 18, Alcoholic Beverage Licenses, § 18.13[3]*.

Revocation of License Must Be Related to Fitness to Practice. Pursuant to *Donaldson v. Dept. of Real Estate (2005) 134 Cal. App. 4th 948* , when licensees are convicted for crimes of moral turpitude, the department must prove that the conviction was substantially related to the licensee's fitness to engage in the profession in order for the department to suspend or revoke the license of the licensee based on the conviction. See *Ch. 473G, Agency Adjudication Decisions, § 473G.35[2]*.

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§ 1.83 Public Entities and Officers

Joint Powers Agreement Not Sufficient to Hold City Liable Because Police Chief Had No Authority to Enter Into Agreement on City's Behalf. In *Authority for California Cities Excess Liability v. City of Los Altos (2006) 136 Cal. App. 4th 1207* , the court of appeal held that an agreement reached by a city police chief was not an agreement binding on the city under *Gov. Code § 895*, because no law authorized the police chief to reach agreements on behalf of the city. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.61[9][a]*.

Primary Assumption of Risk Protected Community College From Liability to Baseball Player Hit by Pitch. In *Avila v. Citrus Community College District (2006) 38 Cal. 4th 148* , the California Supreme Court held that the primary assumption of risk doctrine protected a community college from liability to an intercollegiate baseball player who was struck by a pitch, even if the pitch was thrown at the player intentionally. The Court determined that the risk of being hit with a pitch was inherent in the game of baseball, and despite the fact that the conduct was in violation of the official rules of the game, intentionally throwing a pitch at or near a batter was a recognized strategy that was part of the game. The Court also held that the immunity granted by *Gov. Code § 831.7* to public entities for injuries sustained during hazardous recreational activities did not apply, concluding that school-sponsored athletics were not "recreational" in nature, but rather were part of a school's educational mission. See *Ch. 273, Games, Sports, and Athletics, § 273.30[5][b], Ch. 380, Negligence, § 380.172[4][a][i], Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.85[8]*, and *Ch. 514, Schools: Injuries to Students, § 514.14*.

No Negligence or Strict Liability Causes of Action by Public Entities Against Lead Manufacturers; Fraud and Nuisance Action Seeking Abatement Allowed. In *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal. App. 4th 292 , the court of appeal held that public entities, suing as the owners of buildings that contained lead paint, could not state a cause of action for negligence or strict liability against lead manufacturers, because the plaintiffs could not allege any actual damage to the buildings themselves. However, the court also held that an earlier Supreme Court holding allowing recovery for economic loss without accompanying property damage or personal injury applies to any action involving intentional, affirmative fraudulent conduct on the part of the defendant, if that fraudulent conduct exposes the plaintiff to liability to third parties, and therefore the public entities could pursue an action for fraud against the manufacturers. Finally, the court held that the public entities could pursue an action for public nuisance seeking abatement, although they could not recover through a nuisance action for damage caused to their own buildings. See

Ch. 177, Damages, § 177.47[1], and *Ch. 391, Nuisance, § 391.25[5]*.

Equitable Estoppel Applied to Guidance Counselor Who Threatened to Humiliate Sexual Abuse Victim. In *Doe v. Bakersfield City School District (2006) 136 Cal. App. 4th 556* , the court of appeal held that a school district was equitably estopped from resisting a petition to file a late claim because a school guidance counselor, who had sexually molested the plaintiff beginning in junior high school and continuing until after the plaintiff was out of high school, continually threatened to humiliate the plaintiff publicly, and these threats actually deterred the plaintiff from reporting the abuse even after he graduated from school. See Ch. 464, *Public Entities and Officers: California Tort Claims Act*, § 464.67[1].

Claims Against Judicial Branch Entity Subject to Tort Claims Act. Under newly enacted *Gov. Code § 905.7*, claims against a judicial branch entity for money or damages based on an express contract or for an injury for which the judicial branch entity is liable are subject to the claims filing requirements of the Tort Claims Act. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.22[1]*.

Tort Claims Act Claim Presentation Requirements Clarified. *Gov. Code § 911.2* has been amended to provide that for purposes of determining whether a claim was presented within the required six-month period of the Tort Claims Act, the presentation date is: (1) the date the claim is submitted with the filing fee; (2) if a fee waiver is granted, the date the claim was submitted with an affidavit requesting the fee waiver; or (3) if a fee waiver is denied, the date the claim was submitted with an affidavit requesting the fee waiver, so long as the filing fee is paid within 10 calendar days after the mailing of the notice of denial of the fee waiver. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.23[4][a][i]*.

Funds Held in Trust for Private Parties Not "State Funds" Under False Claims Act. In *State of California v. Altus Finance (2005) 36 Cal. 4th 1284* , the California Supreme Court held that the assets of an insolvent insurer held by the Insurance Commissioner in trust for creditors of the insurer were not "state funds" as necessary to state a claim under the False Claims Act, because "state funds" include only funds that are part of the public treasury, the diminution of which would harm taxpayers. See *Ch. 468, Public Entities and Officers: False Claims Actions, § 468.21[2]*.

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1-1 California Forms of Pleading and Practice--Annotated § 1.84

§ 1.84 Real Estate

[1] Adverse Possession

Hostile Occupancy. In *Preciado v. Wilde (2006) 139 Cal. App. 4th 321* , the court of appeal found that a plaintiff who held title to property as a tenant in common and who sought to quiet title based on adverse possession failed to carry his burden of proving ouster. See *Ch. 13, Adverse Possession, § 13.17[3][e]*.

[1A] Building Contracts

Comprehensive Revision of Law Governing Home Improvement Contracts. The statutes governing home improvement contracts have been comprehensively revised [2005 Stats., chs. 48, 385]. The legislation revises and refines the elements of home improvement contracts to prescribe in great detail the required contents of these contracts. It also defines and sets forth requirements for "service and repair" contracts in similar detail. See Ch. 104, *Building Contracts* .

[2] Brokers

Supplemental Property Tax Bills. 2005 legislation [2005 Stats., ch. 392, § 2] makes it the sole responsibility of the seller of residential real property in a transfer subject to *Civ. Code § 1102 et seq.* (disclosures on transfer of real property), or the seller's agent, to deliver to the prospective purchaser a prescribed disclosure notice concerning supplemental property tax bills. See *Ch. 103, Brokers, § 103.31[14][d]*.

[3] Condominiums

Homeowners' Associations Required to Adopt Rules Safeguarding Election Procedures. The Davis-Stirling Common Interest Development Act has been amended, operative July 1, 2006 [2005 Stats., ch. 450], to require homeowners' associations in common interest developments to adopt rules to safeguard the procedures used in conducting elections to provide, among other things, equal access to association media for all candidates and members with a point of view to express, and voting procedures that preserve confidentiality. The legislation gives members the right to bring a civil action for violations of the rules. See *Ch. 124, Condominiums and Other Common Interest*

Developments, § 124.23[3].

Options of Homeowners' Association for Collecting Assessment Debts of Less Than $1,800. New legislation [2005 Stats., ch. 452] precludes a homeowners' association from resorting to judicial or nonjudicial foreclosure proceedings to collect on a debt arising from delinquent regular or special assessments when (1) the debt arose on or after January 1, 2006, and (2) the delinquent amount is less than $1,800. Available enforcement options include filing a civil action in small claims court to recover the amount in arrears. The legislation also imposes some new conditions on the association's right to foreclose assessment liens equal to or more than $1,800. See *Ch. 124, Condominiums and Other Common Interest Developments, § 124.23[15]*.

[4] Deeds

Restrictive Covenants--Procedure for Removal From Recorded Documents. The statutory procedure for removing a restrictive covenant (such as a race-based restraint on alienation) from a recorded document [*see Gov. Code 12956.2*] has been changed [2005 Stats., ch. 297, § 2]. For discussion, see *Ch. 184, Deeds, § 184.66[2][b]*.

[5] Homesteads

Declared Homestead Entitled Homeowner to Trustee Sale Proceeds. In *Title Trust Deed Service Co. v. Pearson (2005) 132 Cal. App. 4th 168* , an interpleader action by the trustee of a deed of trust after a nonjudicial foreclosure sale to distribute the surplus proceeds, the trial court erred in refusing to acknowledge the declared homestead exemption afforded by *Code Civ. Proc. § 704.720(c)* by denying the homeowner's motion to amend his answer to include the declared homestead, because the judgment lien created by the recording of an abstract of judgment, only attached to equity in property above and beyond the recorded homestead exemption and any preexisting liens on the property. See Ch. 294, *Homesteads* .

[6] Landlord and Tenant

Interrogatories in Unlawful Detainer Proceedings. The Judicial Council form interrogatories for use in unlawful detainer proceedings has been revised and updated. See *Ch. 333, Landlord and Tenant: Eviction Actions, § 333.120*.

[7] Mobilehomes

Fees for Enforcement of Rules Under Mobilehome Residency Law. Under 2005 legislation [2005 Stats., ch. 24, § 1], management of a mobilehome park may charge a reasonable fee if, in good faith, it has removed and stored a homeowner's or resident's personal property in order to bring the premises into compliance with park rules and regulations. Written notice of the intent to remove the property must be provided [*see Civ. Code § 798.36*]. For discussion, see *Ch. 369, Mobilehomes and Mobilehome Parks, § 369.66[1]*.

[8] Mortgages and Trust Deeds

Expiration of Ancient Trust Deeds. In *Ung v. Koehler (2005) 135 Cal. App. 4th 186* , the court of appeal found that a beneficiary of a deed of trust who is otherwise entitled to claim the 60-year time limit on expiring deeds of trust, does not lose that entitlement by filing a notice of default before exercising a power of sale that specifies the "final maturity date" of the underlying debt. See *Ch. 555, Trust Deeds, § 555.18[4][b]*.

Regulation of Certain Secured Loans. The regulation of certain secured consumer loans has been revised [*see Fin. Code § 4970 et seq.*; 2005 Stats., ch. 531]. For discussion, see *Ch. 555, Trust Deeds, § 555.21A[1]*.

Temporary Relief From Mortgage Payments for Service Members in Iraq and Afghanistan. 2005 legislation [2005 Stats., ch. 291] provides for the temporary relief from mortgage payments under *Mil. & Vet. Code § 800 et seq.* to

a member of the U.S. military reserve or California national guard called to active duty as a result of the conflicts in Iraq and Afghanistan. For discussion, including coverage of eligibility for deferment of payment and limitations on relief, see Ch. 555, *Trust Deeds*, § 555.21B.

Trust Deed Foreclosure--Notice of Sale After Postponements. The trustee's power to postpone a foreclosure sale under a deed of trust has been clarified, and requirements for a new notice of sale after postponement have been changed [*see Civ. Code § 2924g(c)*; 2005 Stats., ch. 224, § 2]. For discussion, see *Ch. 555, Trust Deeds, § 555.57[4]*.

[9] Vendor and Purchaser

Real Property Sales Agreements--Seller's Disclosures. The seller of residential real property in a transfer that is subject to *Civ. Code § 1102 et seq.* (concerning required disclosures by sellers), or the seller's agent, now is required to deliver to the prospective purchaser a prescribed disclosure notice concerning supplemental property tax bills, in addition to the other disclosures required by statute [2005 Stats., ch. 392, § 2]. For discussion, see *Ch. 569, Vendor and Purchaser, § 569.13[2]*.

Real Property Sales Agreements--Notice of Law Enforcement Database of Registered Sex Offenders' Locations. The required form of notice [*see Civ. Code § 2079.10a*] has been changed, for contracts entered into on and after April 1, 2006 [2005 Stats., ch. 722, § 1]. See *Ch. 569, Vendor and Purchaser, § 569.13[5]*.

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§ 1.84A Schools

School Not Liable for Student's Killing by Drunk Driver While on Way to Off-Campus Bus Stop. In *Bassett v. Lakeside Inn, Inc. (2006) 140 Cal. App. 4th 863* , the court of appeal held that a school district was not liable for a student's being killed by a drunk driver off school property while the student was on the way to a school bus stop, because the student was not and should not have been under school supervision at the time. See *Ch. 514, Schools: Injuries to Students, § 514.12[3]*.

Primary Assumption of Risk Protected Community College From Liability to Baseball Player Hit by Pitch. In *Avila v. Citrus Community College District (2006) 38 Cal. 4th 148* , the California Supreme Court held that the primary assumption of risk doctrine protected a community college from liability to an intercollegiate baseball player who was struck by a pitch, even if the pitch was thrown at the player intentionally. The Court determined that the risk of being hit with a pitch was inherent in the game of baseball, and despite the fact that the conduct was in violation of the official rules of the game, intentionally throwing a pitch at or near a batter was a recognized strategy that was part of the game. The Court also held that the immunity granted by *Gov. Code § 831.7* to public entities for injuries sustained during hazardous recreational activities did not apply, concluding that school-sponsored athletics were not "recreational" in nature, but rather were part of a school's educational mission. See *Ch. 273, Games, Sports, and Athletics, § 273.30[5][b], Ch. 380, Negligence, § 380.172[4][a][i], Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.85[8]*, and *Ch. 514, Schools: Injuries to Students, § 514.14*.

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§ 1.85 Settlement

Providing for "Binding Mediation" Made Stipulation for Settlement Unenforceable. In *Lindsay v. Lewandoski (2006) 139 Cal. App. 4th 1618* , the court held that although leaving an unresolved term for future agreement is not invariably fatal, because a settlement may be enforceable under *Code Civ. Proc. § 664.6* if the parties agree the remaining issue will be decided by arbitration, the agreement at issue was not enforceable because the court could not tell what the parties meant when they provided for "binding mediation" of a payment dispute. See *Ch. 520, Settlement and Release, § 520.21[2]*.

Statute of Frauds Did Not Bar Action to Enforce Settlement Agreement and Four-Year Statute of Limitations Applied. In *Pietrobon v. Libarle (2006) 137 Cal. App. 4th 992* , an action to enforce a settlement agreement, the Court of Appeal held that the statute of frauds did not render the agreement invalid, even though the agreement by its terms was not to be performed within one year from its making and the defendant did not sign the agreement, and the four-year statute of limitations for a written contract applied. The defendant agreed to the terms of the settlement on the record of the settlement hearing and affirmed the agreement and its terms in his testimony at the trial of the action to enforce the agreement. *Code Civ. Proc. § 664.6* did not apply because the underlying matter was dismissed and the parties did not request that the court retain jurisdiction. See *Ch. 520, Settlement and Release, § 520.20*.

Section 998 Offer and Acceptance Requirements. Effective January 1, 2006, the Legislature has amended *Code Civ. Proc. § 998* to require that the written offer must include a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. Any acceptance of the offer must be in writing and signed by counsel for the accepting party or, if not represented by counsel, by the accepting party. See *Ch. 86, Automobiles: Pretrial Motions and Settlement Negotiations, § 86.12[2][a][ii]*; *Ch. 174, Costs and Attorney's Fees, § 174.17[4]*; Ch. 520, *Settlement and Release* .

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§ 1.86 Small Claims

New Rules for Temporary Judges. The Judicial Council has issued new court rules governing the qualifications and appointment of temporary judges to hear small claims cases [Cal. Rules of Ct., Rule 243.10 et seq.]. See *Ch. 526, Small Claims, § 526.70[2]*.

Small Claims Jurisdiction Expanded; Official Forms Updated. The Legislature expanded the jurisdiction of small claims courts to include claims up to $7,500 made by natural persons. The Legislature enacted related provisions, including a specification of the scope of personal advisory services to be offered to small claims litigants, as well as continuing education requirements for temporary judges serving in small claims court [*see* 2005 Stats., chs. 600, 618, amending *Code Civ. Proc. § 116.240, 116.610, 116.940*, and adding *Code Civ. Proc. §§ 116.221, 116.222*]. In response to the legislative changes, the Judicial Council has issued new and revised forms for use in small claims court. For full coverage, see *Ch. 526, Small Claims, §§ 526.32[1], 526.35[2][a], 526.50[2], 526.70[2], 526.150, 526.151, 526.152, 526.153, 526.154, 526.155, 526.158, 526.164*.

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§ 1.86A Taxes

Taxpayer's Suit for Refund--Recovery of Costs. A California appellate court has held that in a taxpayer's suit for a refund, even if the taxpayer cannot recover costs under *Rev. & Tax. Code § 7156*, it is possible that the taxpayer could recover costs under *Code Civ. Proc. § 1028*. In addition, if the taxpayer offered to settle, and the state rejected the offer but failed to obtain a more favorable judgment, the taxpayer may invoke *Code Civ. Proc. § 998(d)* to recover expert witness costs in addition to other costs [*Agnew v. State Bd. of Equalization (2005) 134 Cal. App. 4th 899]*. See *Ch. 540, Taxes and Assessments, § 540.232[9][b]*

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§ 1.87 Torts

[1] Abuse of Minors and Elderly

Surviving Heirs Cannot Recover for Own Injuries Under Elder Abuse Statute; Elder Abuse Action Does Not "Relate Back" to Wrongful Death Action. In *Quiroz v. Seventh Ave. Center (2006) 140 Cal. App. 4th 1256* , the court of appeal held that if an abused person protected by the elder abuse statute dies, the surviving heirs cannot recover the remedies provided by the statute for their own injuries in a wrongful death action. The court also held that because they seek recovery for different injuries, a cause of action asserted under the elder or dependent adult abuse statute does not "relate back" to a cause of action for wrongful death, and a plaintiff must state an action under the elder abuse statute within the applicable limitations period for it to be timely. See *Ch. 5, Abuse of Minors and Elderly, §§ 5.31* and *5.36A*, and *Ch. 181, Death and Survival Actions, § 181.44[1]*.

60-Day Period for Filing Certificates of Merit in Sexual Abuse Cases Applicable to Certificate Explaining Late Filing. In *McVeigh v. Doe I (2006) 138 Cal. App. 4th 898* , the court of appeal held that in sexual abuse lawsuits brought by plaintiffs who are at least 26 years of age, the certificates of merit required to be filed under *Code Civ. Proc. § 340.1* may be filed up to 60 days after the complaint is filed, regardless of whether the statute of limitations has run when the certificates are filed, and that this 60-day period also applies to a certificate that explains why the certificates were not filed with the complaint. See *Ch. 5, Abuse of Minors and Elderly, §§ 5.14[1]* and *5.60[5]*.

Revival of Actions for Childhood Sexual Abuse Applicable Only to Actions Against Third Parties Arising From Employment Relationship. *In Aaronoff v. Martinez-Senftner (2006) 136 Cal. App. 4th 910* , the court of appeal held that the 2002 amendment to *Code Civ. Proc. § 340.1*, which revives actions for childhood sexual abuse against certain third parties who failed to take steps to stop known abuse, does not apply to claims brought against the actual perpetrator of the sexual abuse. Moreover, the claim against a third party must arise from an employment relationship, and a claim of abuse that is the result of a parent-child relationship is not covered under the revival statute, even if some of the abuse occurred at the parent's site of employment. See *Ch. 5, Abuse of Minors and Elderly, § 5.13*.

Tolling of *Code Civ. Proc. § 364(d)* Inapplicable to Elder Abuse Action. In *Smith v. Ben Bennett, Inc. (2005) 133 Cal. App. 4th 1507* , the court of appeal held that because the applicable limitations period in an action under the Elder

Abuse statute is not the MICRA limitations period, the tolling provision of *Code Civ. Proc. § 364(d)*, which extends the limitations period in an action for professional negligence of a health care provider for 90 days after issuing a notice of intent to sue, does not apply to a cause of action for elder abuse. See *Ch. 5, Abuse of Minors and Elderly, § 5.36A.*

[1A] Assault and Battery

Judicial Immunity Provides No Immunity for Assault or False Imprisonment. In *Regan v. Price (2005) 131 Cal. App. 4th 1491* , the court of appeal held that judicial immunity does not protect judges and other judicial actors from liability for assault and battery if the judge abandons the traditional role of the judge and uses brute force against a litigant. See *Ch. 58, Assault and Battery, § 58.31,* and *Ch. 257, False Imprisonment, § 257.22[2].*

[2] Conspiracy

Exceptions to Prefiling Order Requirement for Alleging Attorney-Client Conspiracy Applied. In *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc. (2005) 131 Cal. App. 4th 802* , the court of appeal, in a case of attorney-client conspiracy involving the prefiling order requirement of *Civ. Code § 1714.10,* held that an attorney for an assignee for the benefit of creditors does not owe an independent duty to the creditors or to any one of them individually, and thus the exception for an independent duty owed to the plaintiff did not apply. The court also held that in applying the exception for conspiracy to violate a legal duty in furtherance of the attorney's financial gain, the phrase "in furtherance of the attorney's financial gain" requires that the attorney derive economic advantage over and above the monetary compensation received in exchange for professional services actually rendered on behalf of the client, regardless of whether the attorney fees charged are alleged to have been excessive. See *Ch. 126, Conspiracy, § 126.14[2][c][i], [ii].*

[3] Damages

Medicaid Lien Limited to Amount of Recovery for Medical Expenses. In *Arkansas Department of Health & Human Services v. AhlbornArkansas Department of Health & Human Services v. Ahlborn (2006) 547 U.S. 268, 164 L. Ed. 2d 459* , the United States Supreme Court held that in an action against a third-party tortfeasor, a state's lien for medical expenses paid on behalf of a Medicaid recipient is limited to the amount of the recovery that is allocated to the recipient's medical expenses. See *Ch. 177, Damages, § 177.54[1].*

No Negligence or Strict Liability Causes of Action by Public Entities Against Lead Manufacturers; Fraud and Nuisance Action Seeking Abatement Allowed. In *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal. App. 4th 292 , the court of appeal held that public entities, suing as the owners of buildings that contained lead paint, could not state a cause of action for negligence or strict liability against lead manufacturers, because the plaintiffs could not allege any actual damage to the buildings themselves. However, the court also held that an earlier Supreme Court holding allowing recovery for economic loss without accompanying property damage or personal injury applies to any action involving intentional, affirmative fraudulent conduct on the part of the defendant, if that fraudulent conduct exposes the plaintiff to liability to third parties, and therefore the public entities could pursue an action for fraud against the manufacturers. Finally, the court held that the public entities could pursue an action for public nuisance seeking abatement, although they could not recover through a nuisance action for damage caused to their own buildings. See *Ch. 177, Damages, § 177.47[1],* and *Ch. 391, Nuisance, § 391.25[5].*

Medi-Cal Lien Limited to Recovered Medical Expenses Paid by Medi-Cal. In *Fitch v. Select Products Co. (2005) 36 Cal. 4th 812* , the California Supreme Court held that the Director of Health Services may not assert a Medi-Cal lien against a wrongful death recovery that does not include compensation for the decedent's medical expenses covered by Medi-Cal. See *Ch. 177, Damages, § 177.54[1].*

[3A] Death and Survival Actions

Surviving Heirs Cannot Recover for Own Injuries Under Elder Abuse Statute; Elder Abuse Action Does Not "Relate Back" to Wrongful Death Action. In *Quiroz v. Seventh Ave. Center (2006) 140 Cal. App. 4th 1256* , the court of appeal held that if an abused person protected by the elder abuse statute dies, the surviving heirs cannot recover the remedies provided by the statute for their own injuries in a wrongful death action. The court also held that because they seek recovery for different injuries, a cause of action asserted under the elder or dependent adult abuse statute does not "relate back" to a cause of action for wrongful death, and a plaintiff must state an action under the elder abuse statute within the applicable limitations period for it to be timely. See *Ch. 5, Abuse of Minors and Elderly, §§ 5.31* and *5.36A*, and *Ch. 181, Death and Survival Actions, § 181.44[1]*.

No Right to Jury Apportionment of Settlement Recovery in Wrongful Death Action. In *Kim v. Yi (2006) 139 Cal. App. 4th 543* , the court of appeal held that apportionment of damages among wrongful death plaintiffs by a court does not deprive the plaintiffs of the right to a jury trial, even if the plaintiffs are not members of the same family and the proceeds are from a settlement. See *Ch. 181, Death and Survival Actions, § 181.20*.

[4] Employer Liability

***Privette* Doctrine Applicable if Injured Party Is Independent Contractor Hired by Another Independent Contractor.** In *Michael v. Denbeste Transportation, Inc. (2006) 137 Cal. App. 4th 1082* , the court of appeal held that the *Privette* doctrine, which provides generally that the hirer of an independent contractor is not vicariously liable for an injury to an employee of the independent contractor, applies even if the injured party is actually an independent contractor, rather than an employee, of another contractor. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.22[2][b][iii]*.

Premises Liability May Be Asserted Against Hirer of Independent Contractor for Injury to Contractor's Employee. In *Kinsman v. Unocal Corp. (2005) 37 Cal. 4th 659* , the California Supreme Court held that a hirer who is also the owner or possessor of property may be liable under a premises liability theory for an injury to the employee of an independent contractor if: (1) the hirer knows or reasonably should know of a concealed, preexisting hazardous condition on the premises; (2) the contractor does not know and could not reasonably have discovered the hazardous condition; and (3) the hirer fails to warn the contractor about the hazard. See Ch. 248, *Employer's Liability for Employee's Torts* , §§ *248.22[2][b][iv], [c]*.

Premises--Line Rule Inapplicable in Respondeat Superior Case. In *Hartline v. Kaiser Foundation Hospitals (2005) 132 Cal. App. 4th 458* , the court of appeal refused to apply the "premises line rule" in the respondeat superior context and held that an employer could not be vicariously liable for an employee's automobile accident that occurred while the employee was turning into the parking lot on the employer's premises. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.16[3]*.

[5] Fraud and Deceit

Preemption of Class Actions Alleging Securities Fraud Inducing Stockholder to Hold Stock. In *Merrill Lynch v. DabitMerrill Lynch v. Dabit (2006) 547 U.S. 71, 164 L. Ed. 2d 179* , the United States Supreme Court held that the Securities Litigation Uniform Standards Act of 1998 (*15 U.S.C.S. § 78bb(f)(1)(A)*) preempts class action suits alleging fraud or misrepresentation in connection with the sale or purchase of securities, including actionable conduct that induces a decision to hold already-purchased securities, if those suits are brought in the name of 50 or more class members. See *Ch. 269, Fraud and Deceit, § 269.15[1]*.

Justifiable Reliance Not Shown if Action Was Required by Law. In *Leegin Creative Leather Products, Inc. v. Diaz (2005) 131 Cal. App. 4th 1517* , the court of appeal held that because an employer was required by law and by its workers' compensation insurance policy to report any claims to its insurer, the employer could not demonstrate reliance on an alleged fraudulent claim filed by an employee when it reported the claim to the insurer. See *Ch. 269, Fraud and*

Deceit, § 269.16[9].

[5A] Games and Sports

Primary Assumption of Risk Protected Community College From Liability to Baseball Player Hit by Pitch. In *Avila v. Citrus Community College District (2006) 38 Cal. 4th 148* , the California Supreme Court held that the primary assumption of risk doctrine protected a community college from liability to an intercollegiate baseball player who was struck by a pitch, even if the pitch was thrown at the player intentionally. The Court determined that the risk of being hit with a pitch was inherent in the game of baseball, and despite the fact that the conduct was in violation of the official rules of the game, intentionally throwing a pitch at or near a batter was a recognized strategy that was part of the game. The Court also held that the immunity granted by *Gov. Code § 831.7* to public entities for injuries sustained during hazardous recreational activities did not apply, concluding that school-sponsored athletics were not "recreational" in nature, but rather were part of a school's educational mission. See *Ch. 273, Games, Sports, and Athletics, § 273.30[5][b], Ch. 380, Negligence, § 380.172[4][a][i], Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.85[8]*, and *Ch. 514, Schools: Injuries to Students, § 514.14*.

Court Decides Whether Defendant in Primary Assumption of Risk Case Increased Risks of Activity. In *Huff v. Wilkins (2006) 138 Cal. App. 4th 732* , the court of appeal held that in an assumption of risk case involving a sporting activity, the trial court, rather than the jury, decides the question of whether the defendant increased the risks inherent in the activity. See *Ch. 273, Games, Sports, and Athletics, § 273.12[3]*.

Personal Trainer Not Liable for Death of Client. In *Rostai v. Neste Enterprises (2006) 138 Cal. App. 4th 326* , the court of appeal held that the assumption of risk doctrine protected a personal trainer from liability when a client suffered a heart attack due to overexertion during his first workout with the trainer. See *Ch. 273, Games, Sports, and Athletics, § 273.30[6]*, and Ch. 380, *Negligence*, § 380.172[4][b].

Primary Assumption of Risk No Shield if Minor Operated ATV Without Compliance With Applicable Safety Regulations. In *Huff v. Wilkins (2006) 138 Cal. App. 4th 732* , the court of appeal held that the operation of an all-terrain vehicle by a minor without first complying with reasonable safety regulations governing that operation increased the risks of injury to other operators beyond those inherent in the activity, and that imposing liability for that conduct would not chill vigorous participation in off-road, recreational all-terrain vehicle use. See *Ch. 273, Games, Sports, and Athletics, § 273.30[7][f]*, and *Ch. 380, Negligence, § 380.172[4][a][vii]*.

[5B] Insane and Other Incompetent Persons

Clarification of Immunity of Mental Health Professionals for Conduct of Persons Granted Early Release. In *Coburn v. Sievert (2005) 133 Cal. App. 4th 1483* , the court of appeal held that for purposes of applying the immunity provided to mental health professionals for actions caused by persons granted early release from treatment facilities, the releasing professional is only required to show that the provisions of *Welf. & Inst. Code § 5152* actually dealing with early release have been met and need not show compliance with other provisions of *Welf. & Inst. Code § 5152*. See *Ch. 304, Insane and Other Incompetent Persons, § 304.96*.

[6] Invasion of Privacy

Amendments to Provisions Governing Disclosure of Results of HIV Testing. Amendments to various Health & Safety Code provisions governing disclosure of HIV test results include increases in the amount of the applicable civil fines. A new provision, *Health & Safety Code § 121022*, mandates disclosure to state and local health officials but otherwise provides for confidentiality. Newly amended *Health & Safety Code § 121025* now provides for a private right of action if a person negligently, willfully, or maliciously discloses the content of confidential public health records to a third party. See *Ch. 429, Privacy, § 429.250* et seq.

Assault Actionable Under Anti-Paparazzi Statute. *Civ. Code § 1708.8*, the so-called "anti-paparazzi" statute, has been amended to make actionable an assault committed with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff. See *Ch. 429, Privacy, § 429.34A.*

[6A] Libel and Slander

In Action Against Non-Media Defendant, Plaintiff Bears Burden of Proving Falsity of Defamatory Statements Concerning Public Interest. In *Integrated Healthcare Holdings, Inc. v. Fitzgibbons (2006) 140 Cal. App. 4th 515* , the court of appeal held that a private-figure plaintiff bears the burden of proving the falsity of allegedly defamatory statements in an action against non-media defendants, if the statements concern a matter of public interest. See *Ch. 340, Libel and Slander, § 340.55[6]*.

Motion to Strike Under Anti-SLAPP Statute Denied if Litigation Privilege Would Not Apply to Same Conduct. In *A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc. (2006) 137 Cal. App. 4th 1118* , the court of appeal held that because the litigation privilege of *Civ. Code § 47(b)* does not extend to pre-litigation communications made when no lawsuit was seriously being considered, a motion to strike a cause of action under *Code Civ. Proc. § 425.16* is properly denied if based on the same conduct. See *Ch. 340, Libel and Slander, § 340.52*.

Complaints to School Board Granted Judicial Immunity Even Without Formal Hearings. In *Lee v. Fick (2005) 135 Cal. App. 4th 89* , the court of appeal held that because a complaint constitutes part of the official proceedings, it is not necessary that the official body take any particular action on the complaint for the complaint itself to be protected under the judicial immunity provided in *Civ. Code § 47(b)*. Therefore, written complaints from parents to a school board about a coach's conduct were protected, even though no formal hearings were ever requested or held. See *Ch. 340, Libel and Slander, § 340.61[3]*.

[7] Malicious Prosecution

Malicious Prosecution Plaintiff Cannot Meet Favorable Termination Requirement By Comparing Judgment to Settlement Offer. In *StaffPro, Inc. v. Elite Show Services, Inc. (2006) 136 Cal. App. 4th 1392* , the court of appeal held that a malicious prosecution plaintiff cannot meet the favorable termination requirement merely by demonstrating that the termination was more favorable to that party than the terms of a settlement offer made by that party earlier in the underlying action. See *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.14[1]*.

Severability of Underlying Action Only Relevant to Probable Cause Element of Malicious Prosecution Claim. In *StaffPro, Inc. v. Elite Show Services, Inc. (2006) 136 Cal. App. 4th 1392* , the court of appeal held that in a malicious prosecution action based on an underlying lawsuit involving multiple, severable causes of action, only some of which were terminated in favor of the malicious prosecution plaintiff, severability of the underlying action only comes into play when analyzing the lack of probable cause element of the malicious prosecution cause of action, and the element of favorable termination is concerned only with the result in the underlying proceeding as a whole. See *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.14[5]*.

Probable Cause for Bringing Civil Suit Not Defeated By Opposing Attorney's Assertion of No Liability. In *Marijanovic v. Gray, York & Duffy (2006) 137 Cal. App. 4th 1262* , the court of appeal held that if the plaintiff in an underlying civil action has some evidence suggesting that a particular party may be liable, a mere assertion by the attorney for that potentially-liable party that the party is not liable, without more, is not enough to defeat a finding of probable cause for bringing an action against that party for purposes of establishing a subsequent malicious prosecution action. See *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.16[1]*.

Litigation Privilege Extended to Noncommunicative Conduct Used to Enforce Judgment. In *Rusheen v. Cohen*

(2006) 37 Cal. 4th 1048 , the California Supreme Court held that if the gravamen of an action is a communicative act, the litigation privilege of *Civ. Code § 47* extends to noncommunicative acts that are necessarily related to the communicative conduct, including acts necessary to enforce a judgment, thereby providing a defense to an abuse of process claim based on such conduct. See *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.56[1]*.

Continuation of Meritless Litigation Not Abuse of Process. In *Ramona Unified School District v. Tsiknas (2005) 135 Cal. App. 4th 510* , the court of appeal held that continuing to pursue litigation that has been determined to be without merit, such as through the filing of an amended complaint or a motion for attorney's fees, is not actionable as an abuse of process, although it may be actionable under a cause of action for malicious prosecution. See *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.53[1]*.

Special Procedures to Strike "SLAPPback" Suits. Effective October 5, 2005, *Code Civ. Proc. § 425.18* provides special procedures for a motion to strike a cause of action for malicious prosecution or abuse of process if that cause of action arises from the filing or maintenance of a prior cause of action that was itself dismissed pursuant to the anti-SLAPP statute, *Code of Civ. Proc. § 425.16*. See *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.24[2]*.

[8] Mental Suffering and Emotional Distress

Manufacturer of Defective Product Not Liable for Emotional Distress to Non-Using Buyer. In *Gu v. BMW of North America, LLC (2005) 132 Cal. App. 4th 195* , the court of appeal held that unlike the duty owed to a user, a car manufacturer does not owe a duty of care to prevent causing emotional distress to the buyer of the car if that buyer was not the party using the car at the time of the injury and if that buyer did not witness the injury-causing event. See *Ch. 362, Mental Suffering and Emotional Distress, §§ 362.11[6][d][iv], 362.13[5]*.

[8A] Negligence

Cause of Action for Negligent Transmission of HIV Recognized. In *John B. v. Superior Court (2006) 38 Cal. 4th 1177* , the California Supreme Court held that a plaintiff who has contracted HIV from a sexual partner may state a cause of action for negligent transmission of HIV. Moreover, this cause of action does not require actual knowledge by the defendant that he or she was infected at the time of transmission, but instead it is sufficient that the defendant, under the totality of the circumstances, had reason to know that he or she was infected. See *Ch. 380, Negligence, § 380.32[4]*.

Primary Assumption of Risk Protected Community College From Liability to Baseball Player Hit by Pitch. In *Avila v. Citrus Community College District (2006) 38 Cal. 4th 148* , the California Supreme Court held that the primary assumption of risk doctrine protected a community college from liability to an intercollegiate baseball player who was struck by a pitch, even if the pitch was thrown at the player intentionally. The Court determined that the risk of being hit with a pitch was inherent in the game of baseball, and despite the fact that the conduct was in violation of the official rules of the game, intentionally throwing a pitch at or near a batter was a recognized strategy that was part of the game. The Court also held that the immunity granted by *Gov. Code § 831.7* to public entities for injuries sustained during hazardous recreational activities did not apply, concluding that school-sponsored athletics were not "recreational" in nature, but rather were part of a school's educational mission. See *Ch. 273, Games, Sports, and Athletics, § 273.30[5][b], Ch. 380, Negligence, § 380.172[4][a][i], Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.85[8]*, and *Ch. 514, Schools: Injuries to Students, § 514.14*.

Personal Trainer Not Liable for Death of Client. In *Rostai v. Neste Enterprises (2006) 138 Cal. App. 4th 326* , the court of appeal held that the assumption of risk doctrine protected a personal trainer from liability when a client suffered a heart attack due to overexertion during his first workout with the trainer. See *Ch. 273, Games, Sports, and Athletics, § 273.30[6]*, and *Ch. 380, Negligence, § 380.172[4][b]*.

Primary Assumption of Risk No Shield if Minor Operated ATV Without Compliance With Applicable Safety Regulations. In *Huff v. Wilkins (2006) 138 Cal. App. 4th 732* , the court of appeal held that the operation of an all-terrain vehicle by a minor without first complying with reasonable safety regulations governing that operation increased the risks of injury to other operators beyond those inherent in the activity, and that imposing liability for that conduct would not chill vigorous participation in off-road, recreational all-terrain vehicle use. See *Ch. 273, Games, Sports, and Athletics, § 273.30[7][f]*, and *Ch. 380, Negligence, § 380.172[4][a][vii]*.

Parent Not Liable for Rape of Daughter's Friend After Friend Left Parent's Home. In *Margaret W. v. Kelley R. (2006) 139 Cal. App. 4th 141* , the court of appeal held that in an action seeking to hold a defendant liable for the criminal conduct of a third party, foreseeability of harm must be measured by what the defendant actually knew, not by constructive knowledge or information that the defendant arguably should have known, but did not. In this particular case, a mother who invited her daughter's teenaged friend to spend the night at her home was not liable for the friend's being raped after leaving the house while the mother was out, because the mother had no actual knowledge to suggest any danger of rape. See *Ch. 380, Negligence, § 380.32[3][a]*.

Issue of Causation Should Have Gone to Jury in Store Clerk's Action Alleging Failure to Provide Security Guard. In *Mukthar v. Latin American Security Service (2006) 139 Cal. App. 4th 284* , the court of appeal held that in an action brought by a convenience store clerk, the trial court erred in granting summary judgment in favor of the defendant, a security company that failed to provide an armed security guard at the store one night as they were under contract to do. Noting undisputed evidence that the security guard was normally positioned about a foot from the door where the clerk was injured by a woman who was trying to shoplift, the court of appeal held that the issue of causation should have gone to the jury. See *Ch. 380, Negligence, § 380.72[2]*.

Primary Assumption of Risk Applied to Snowboarders. In *Lackner v. North (2006) 135 Cal. App. 4th 1188* , the court of appeal held that a snowboarder has a duty not to board at a high rate of speed into a flat area used for resting without looking ahead to see and avoid contact with other skiers or boarders who are using the area to rest between runs. In *Mammoth Mountain Ski Area v. Graham (2006) 135 Cal. App. 4th 1367* , the court of appeal held that requiring a snowboarder to watch where he or she is going and not engage in a snowball fight while snowboarding at a high rate of speed would not deter vigorous participation in the sport or otherwise fundamentally alter the nature of snowboarding. See *Ch. 273, Games, Sports, and Athletics, § 273.30[5][b]*, and Ch. 380, *Negligence, § 380.172[4][c][ii], [d]*.

Primary Assumption of Risk Applied to Police Officer Training Class. In *Saville v. Sierra College (2005) 133 Cal. App. 4th 857* , the court of appeal, in applying the primary assumption of risk doctrine to a case in which a student in a community college police officer training class was injured while participating in training exercises demonstrating police officer arrest and control maneuvers, held that the risk of injury was inherent in the physically-demanding maneuvers and the instructors had no duty to eliminate all risk of injury to the students, since doing so would invariably chill vigorous participation in the training exercises. See *Ch. 380, Negligence, § 380.172[4][e]*.

[8B] Nuisance

No Negligence or Strict Liability Causes of Action by Public Entities Against Lead Manufacturers; Fraud and Nuisance Action Seeking Abatement Allowed. In *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal. App. 4th 292 , the court of appeal held that public entities, suing as the owners of buildings that contained lead paint, could not state a cause of action for negligence or strict liability against lead manufacturers, because the plaintiffs could not allege any actual damage to the buildings themselves. However, the court also held that an earlier Supreme Court holding allowing recovery for economic loss without accompanying property damage or personal injury applies to any action involving intentional, affirmative fraudulent conduct on the part of the defendant, if that fraudulent conduct exposes the plaintiff to liability to third parties, and therefore the public entities could pursue an action for fraud against the manufacturers. Finally, the court held that the public entities could pursue an action for public nuisance seeking

abatement, although they could not recover through a nuisance action for damage caused to their own buildings. See *Ch. 177, Damages, § 177.47[1],* and *Ch. 391, Nuisance, § 391.25[5]*.

[8C] Premises Liability

Driveway Owner Granted Recreational User Immunity for Injury on Intersecting Public Trail. In *Miller v. Weitzen (2005) 133 Cal. App. 4th 732* , the court of appeal held that a homeowner's right of way to construct a driveway over an adjacent public trail fits within the definition of an "interest in real property" under *Civ. Code § 846*, thus providing the owner immunity from liability for injuries to recreational users that occur where the trail intersects the driveway. See *Ch. 421, Premises Liability, § 421.21*.

[9] Railroads

No Duty to Warn of Dangers Associated With Walking Alongside Moving Train. In *Christoff v. Union Pacific Railroad Co. (2005) 134 Cal. App. 4th 118* , the court of appeal held that at points along a railroad track other than a road crossing or a train station, a railroad is under no duty to warn of the hazards of walking along a track while a train is passing. See *Ch. 485, Railroads, § 485.62[3][c]*.

[9A] Trucks

Federal Regulation May Be Used to Determine Negligence of Commercial Truck Driver. In *Weaver v. Chavez (2005) 133 Cal. App. 4th 1350* , the court of appeal held that a regulation issued under the federal Commercial Motor Vehicle Safety Act requiring a commercial motor vehicle driver to use extreme caution and to reduce speed if hazardous conditions (such as rain or snow) exist, is a higher standard of care than the reasonable care standard imposed by state law, and this higher federal standard may be used to determine the negligence of a commercial vehicle driver during hazardous driving conditions. See *Ch. 553, Trucks, § 553.11[1][c]*.

[10] Tort Claims Act

Joint Powers Agreement Not Sufficient to Hold City Liable Because Police Chief Had No Authority to Enter Into Agreement on City's Behalf. In *Authority for California Cities Excess Liability v. City of Los Altos (2006) 136 Cal. App. 4th 1207* , the court of appeal held that an agreement reached by a city police chief was not an agreement binding on the city under *Gov. Code § 895*, because no law authorized the police chief to reach agreements on behalf of the city. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.61[9][a]*.

Equitable Estoppel Applied to Guidance Counselor Who Threatened to Humiliate Sexual Abuse Victim. In *Doe v. Bakersfield City School District (2006) 136 Cal. App. 4th 556* , the court of appeal held that a school district was equitably estopped from resisting a petition to file a late claim because a school guidance counselor, who had sexually molested the plaintiff beginning in junior high school and continuing until after the plaintiff was out of high school, continually threatened to humiliate the plaintiff publicly, and these threats actually deterred the plaintiff from reporting the abuse even after he graduated from school. See Ch. 464, *Public Entities and Officers: California Tort Claims Act*, § 464.67[1].

Claims Against Judicial Branch Entity Subject to Tort Claims Act. Under newly enacted *Gov. Code § 905.7*, claims against a judicial branch entity for money or damages based on an express contract or for an injury for which the judicial branch entity is liable are subject to the claims filing requirements of the Tort Claims Act. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.22[1]*.

Tort Claims Act Claim Presentation Requirements Clarified. *Gov. Code § 911.2* has been amended to provide that for purposes of determining whether a claim was presented within the required six-month period of the Tort Claims Act, the presentation date is: (1) the date the claim is submitted with the filing fee; (2) if a fee waiver is granted, the date the

claim was submitted with an affidavit requesting the fee waiver; or (3) if a fee waiver is denied, the date the claim was submitted with an affidavit requesting the fee waiver, so long as the filing fee is paid within 10 calendar days after the mailing of the notice of denial of the fee waiver. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.23[4][a][i]*.

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§ 1.87A Trial

No Discretion to Reopen Jury Selection Once Jury Is Empaneled. In *People v. Cottle (2006) 39 Cal. 4th 246* , the California Supreme Court held that under the Trial Jury Selection and Management Act, which governs civil and criminal proceedings, a trial court does not have discretion to reopen jury selection after the trial jury has been impaneled, but before alternate jurors are sworn. See *Ch. 322, Juries and Jury Selection, § 322.43*.

No Jury Trial Right for Appointment of Proceeds of Settlement of Wrongful Death Action. In *Kim v. Yi (2006) 139 Cal. App. 4th 543* , the court ruled that in an action arising from a wrongful death action involving several decedents, there is no right to have a jury apportion the proceeds of the settlement of the action. The apportionment proceeding is equitable and is a special proceeding. See *Ch. 322, Juries and Jury Selection, § 322.15[2][g]*.

Exercise of All For-Cause Challenges Not Required Before Exercise of Any Peremptory Challenges. In *People v. Avila (2006) 38 Cal. 4th 491, 43 Cal. Rptr. 3d 1, 133 P.3d 1076* , the California Supreme Court held that *Code Civ. Proc. § 226* does not dictate that all challenges for cause be exercised before any peremptory challenges may be exercised. A procedure in which challenges are exercised in groups, even if within each group challenges for cause are exercised before peremptory challenges, does not violate the statutory mandate. See *Ch. 322, Juries and Jury Selection, § 322.39[5][a]*.

Prosecutor Must Offer Explanation for Challenge of Juror When Prima Facie Case of Discrimination Shown. In *Yee v. Duncan (9th Cir. 2006) 441 F.3d 851* , the Ninth Circuit held that when a criminal defendant established a prima facie case of gender discrimination in the prosecutor's use of a peremptory challenge during jury selection, and the prosecutor was unable to recall the basis for the challenge, the trial court could not substitute findings of the prosecutor's sincerity, together with circumstantial evidence indicating a lack of a discriminatory motive, for the prosecutor's failure to offer a non-discriminatory explanation for the challenge. See *Ch. 322, Juries and Jury Selection, § 322.42[6][b]*.

California Constitution Superseded *Evidence Code § 787*. In *In re Freeman (2006) 38 Cal. 4th 630, 42 Cal. Rptr. 3d 850, 133 P.3d 1013* , a writ of habeas corpus after a conviction resulting in imposition of the death penalty, the California Supreme Court held that there was more than substantial evidence to support the referee's finding that the character and reputation for honesty and integrity of the district attorney who had prosecuted the case and later executed

an affidavit and testified that the judge had improperly colluded with him during jury selection was poor, relying in part on testimony concerning specific instances of the prosecutor's dishonesty in violation of *Evid. Code §§ 787, 1101(a)*. The Court found that the enactment of *Cal. Const., art. I, § 28(d)* superseded all California restrictions on the admission of relevant evidence except those preserved or permitted by the express words of § 28(d) itself, and among the superseded provisions was *Evid. Code § 787*. See *Ch. 551, Trial, § 551.123[5]*.

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§ 1.88 Trusts

No Contest Clause. In *McIndoe v. Olivos (2005) 132 Cal. App. 4th 483* , the court held that a proposed challenge to the validity of amendments to a living trust that was to be divided into a survivor's trust and an exempt trust on the trustor's death, thereby removing the contestant as a beneficiary and cotrustee of the survivor's trust, did not violate the no-contest clause of the exempt portion of the trust. See *Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, § 560.17*.

Indemnification of Trustee. In *Terry v. Conlan (2005) 131 Cal. App. 4th 1445* , the court held that if litigation is necessary to preserve the trust, the trustee is entitled to reimbursement for his or her expenditures from the trust; however, if the litigation is specifically for the trustee's benefit, the trustee must bear his or her own costs. See *Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, § 560.91*.

Charitable Gift. In *L.B. Research & Ed. Foundation v. UCLA Foundation (2005) 130 Cal. App. 4th 171* , the court held that a conditional contract, not a charitable trust, was created by an instrument giving a $1 million contribution to the university but also providing that if this money is not used as directed, the fund must be transferred to another institution. See *Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, § 560.290*.

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§ 1.89 Unfair Competition

Costs Recoverable in Trade Secret Misappropriation Actions. Under an amendment to *Civ. Code § 3426.4*, the prevailing party now has a right to recover costs, including expert witness fees, if a claim of trade secret misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or the misappropriation was willful or malicious. See *Ch. 565, Unfair Competition, § 565.32[1]*.

Litigation Privilege No Defense Against Unfair Competition Action Brought by Nonparty to Underlying Litigation. In *American Products Co., Inc. v. Law Offices of Geller, Stewart & Foley, LLP (2005) 134 Cal. App. 4th 1332* , the court of appeal held that the litigation privilege is not a defense in an unfair competition action brought against an attorney if the plaintiff was not a party to the earlier litigation in which the allegedly protected conduct occurred. See *Ch. 565, Unfair Competition, § 565.32[2]*.

Well-Defined Trade Rule or Standard May Support Action for Interference With Prospective Economic Advantage if Rule or Standard is Independently Actionable. In *Stevenson Real Estate Services, Inc. v. CB Richard Ellis Real Estate Services, Inc. (2006) 138 Cal. App. 4th 1215* , the court of appeal held that in an action between competitors who are bound by well-defined, established rules or standards of a trade, association, or profession, a violation of those rules or standards may constitute wrongful conduct that is actionable as interference with prospective economic advantage, so long as the rule or standard allegedly violated provides for, or gives rise to, a sanction or means of enforcement for a violation. See *Ch. 565, Unfair Competition, § 565.133[6]*.

Large Video Rental Retailer's Revenue-Sharing Agreements With Movie Studios May Have Violated Unfair Business Practices Statute. In *Eddins v. Redstone (2005) 134 Cal. App. 4th 290* , the court of appeal held that the trial court erred by not considering whether revenue-sharing agreements between a large video rental retailer and large movie studios tended to destroy competition between the large video rental retailer and smaller, independently owned rental outlets that were not doing business with the studios under the same revenue-sharing agreements. The court also held that liability cannot be imposed under *Bus. & Prof. Code § 17045* for price discrimination if that liability is premised on agreements made between two companies that are part of the same corporate family, because these companies form part of a single economic enterprise with a complete unity of financial interest. See *Ch. 565, Unfair Competition, § 565.52[4]*.

State Antitrust and Unfair Competition Claims Alleging Damage in California Caused by Out-of-State Conduct Not Necessarily Preempted by Commerce Clause. In *RLH Industries, Inc. v. SBC Communications, Inc. (2005) 133 Cal. App. 4th 1277* , the court of appeal held that the Commerce Clause does not necessarily prevent the application of state antitrust and unfair competition laws to out-of-state conduct causing damage in California, but determining whether a particular claim under state law would be preempted by federal law requires a factual analysis of the burden that would be imposed on interstate commerce. See *Ch. 565, Unfair Competition, § 565.78[1]*.

Refusal to Deal With Competitor Not Actionable Under Unfair Competition Statute. In *People's Choice Wireless, Inc. v. Verizon Wireless (2005) 131 Cal. App. 4th 656* , the court of appeal held that a supplier's refusal to deal on favorable terms with a competitor, although perhaps injurious to the competitor, is not necessarily actionable as an injury to competition under the unfair competition statute, *Bus. & Prof. Code § 17200 et seq.* See *Ch. 565, Unfair Competition, § 565.31[5][a]*.

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§ 1.90 Workers' Compensation

Medical Liens Filing Fees. In repealing *Lab. Code § 4903.05*, the legislature has repealed the requirement, enacted in 2003, that a filing fee of $100 accompany each lien for medical treatment expenses or for medical-legal expenses, and it has enacted *Lab. Code § 4903.6*, placing specified restrictions on the filing of such liens. See *Ch. 577, Workers' Compensation, § 577.262*.

Workers' Compensation Insurance--Roofing Contractors. In amending *Bus. & Prof. Code § 7125(e)*, the legislature has made workers' compensation insurance mandatory for all roofing contractors holding Class C-39 licenses, even for those who have no employees. See *Ch. 577, Workers' Compensation, § 577.22[4][b][ii]*.

Workers' Compensation Insurance--Roofing Contractors. In enacting *Ins. Code § 11665*, the legislature has required an insurer who issues a workers' compensation policy to a roofing contractor holding a Class C-39 license from the Contractors State License Board to perform an annual payroll audit for the contractor. See *Ch. 577, Workers' Compensation, § 577.22[4][b][ii]*.

Petitions for Writ of Review--Certificate of Interested Entities or Persons. The California Supreme Court has amended Cal. Rules of Ct., Rule 8.494, effective July 1, 2006, to require each party, other than the Appeals Board, to comply with the requirements of Cal. Rules of Ct., Rule 14.5, concerning serving and filing a Certificate of Interested Entities or Persons. See *Ch. 577, Workers' Compensation, § 577.510[3]*.

Permanent Disability-Apportionment. The court of appeal in *E J Gallo Winery v. Workers' Comp. Appeals Bd. (2005) 134 Cal. App. 4th 1536* , has held that an employee who sustained multiple disabling injuries while working for a single self-insured employer was entitled to compensation for total disability above any percentage of permanent disability previously awarded, and that the correct formula for apportioning awards in this situation required calculating the most recent award without regard to whether a previous award existed, then subtracting the dollar amount of the previous award from the dollar amount of the most recent award. See *Ch. 577, Workers' Compensation, § 577.22[5]*.

Aliens/Undocumented Workers. A new section of text discusses the rights of undocumented workers to workers' compensation benefits. See *Ch. 577, Workers' Compensation, § 577.22[5]*.

Medical Provider Networks. The Administrative Director has adopted the final versions of the medical provider network regulations, *8 Cal. Code Reg. §§ 9767.1-9767.15*. See *Ch. 577, Workers' Compensation, § 577.45[1][d][i] -[iv]*.

Utilization Review Standards. The Administrative Director has promulgated final regulations, *8 Cal. Code Reg. §§ 9792.6-9792.10*, effective September 22, 2005, regarding standards for utilization review of requests for medical treatment services. See *Ch. 577, Workers' Compensation, § 577.45[1][c]*.

Physician Fee Schedule. The Administrative Director has promulgated the final version of *8 Cal. Code Reg. § 9789.11*, the physician fee schedule. See *Ch. 577, Workers' Compensation, § 577.45[1][b]*.

Appeals Board Forms. The Appeals Board has promulgated new versions of DWC WCAB Form 3, Stipulations With Request for Award, and DWC WCAB Form 5, Stipulation and Award and/or Order. See *Ch. 577, Workers' Compensation, §§ 577.470, 577.472*.

Appeals Board Forms. The Appeals Board has promulgated a new version of DWC WCAB Form 15, Compromise and Release. See *Ch. 577, Workers' Compensation, § 577.460*.

Apportionment --Existing Order-- Applicability of SB 899. The court of appeal in *Marsh v. Workers' Comp. Appeals. Bd. (2005) 130 Cal. App. 4th 906* , following *Kleemann v. Workers' Comp. Appeals Bd.*, affirmed an Appeals Board order that remanded the case to the worker's compensation judge (WCJ) for the purpose of determining the applicability of SB 899, enacted 10 days after the WCJ's order denying apportionment, when the employer petitioned for reconsideration of the WCJ's order in light of SB 899. See *Ch. 577, Workers' Compensation, § 577.14[3][e]*.

Civil Actions --Respondeat Superior-- Commercial Traveler Rule. The court of appeal in *Sunderland v. Lockheed Martin Aeronautical Systems Support Co. (2005) 130 Cal. App. 4th 1* , has held that the "commercial traveler rule" of workers' compensation law could not be incorporated into the respondeat superior doctrine of civil tort law. See *Ch. 577, Workers' Compensation, § 577.24[6][b][iii]*.

Permanent Disability--Apportionment--Retroactivity of SB 899. The court of appeal *in Rio Linda Union School District v. Workers' Comp. Appeals Bd. (Scheftner) (2005) 131 Cal. App. 4th 517* , has held that submission orders and orders closing discovery, issued prior to the effective date of SB 899, April 19, 2004, were not "existing" orders that could not be reopened due to the prohibition set forth in Sec. 47 of SB 899, so that SB 899's repeal of the former apportionment statutes, *Lab. Code §§ 4663, 4750*, and *4750.5*, and enactment of new apportionment statutes, *Lab. Code §§ 4663* and *4664*, applied to the present case. See *Ch. 577, Workers' Compensation, § 577.14[3][e]*.

Wrongful Death Actions --Liens-- ***Medi-Cal.*** *The California Supreme Court in Fitch v. Select Products Co. (2005) 36 Cal. 4th 812* , has held that a Medi-Cal lien could not be asserted against a wrongful death action, when the damages recoverable by the plaintiff in that action did not and could not include compensation for medical services provided to the decedent by Medi-Cal. See *Ch. 577, Workers' Compensation, § 577.318[2]*.

Civil Actions--Fraudulent Workers' Compensation Claim. The court of appeal in *Leegin Creative Leather Products, Inc. v. Diaz (2005) 131 Cal. App. 4th 1517* , affirming the trial court's order pursuant to an employee's anti-SLAPP motion that struck the employer's complaint that alleged the employee's filing of a fraudulent workers' compensation claim, held that the employer failed to demonstrate a probability that it would prevail on the merits of its fraud claim and that permitting an employer to bring a civil action for fraud against an employee while a workers' compensation proceeding was pending could have a chilling effect on the employee's exercise of the right to file a workers' compensation claim. See *Ch. 577, Workers' Compensation, § 577.19[1]*.

Evidence--Admissibility. The court of appeal in *Grupe Co. v. Workers' Comp. Appeals Bd. (Ridgeway) (2005) 132 Cal. App. 4th 977* , has held admissible at trial the testimony of a vocational rehabilitation counselor developed as a consequence of meetings between the counselor and the injured employee, all of which took place following closure of discovery at the mandatory settlement conference, since, at the conference, the employee had identified the counselor as an expert trial witness. See *Ch. 577, Workers' Compensation, § 577.157[4]*.

Employment Relationship--Immigration Status. The court of appeal in *Farmer Brothers Coffee v. Workers' Comp. Appeals Bd. (Ruiz) (2005) 133 Cal. App. 4th 533* , has held that a worker, who at the time of injury was an illegal alien who had obtained his job by showing the employer false Social Security and green cards, was an employee entitled to workers' compensation benefits, excluding reinstatement and back pay, and that, by virtue of *Lab. Code § 1171.5*, neither the Federal Immigration Reform and Control Act nor *Hoffman Plastic Compounds, Inc. v. National Labor Relations Bd.Hoffman Plastic Compounds, Inc. v. National Labor Relations Bd.Hoffman Plastic Compounds, Inc. v. National Labor Relations Bd. (2002) 535 U.S. 137* , preempted California from providing workers' compensation coverage to a worker who was unlawfully employed. See *Ch. 577, Workers' Compensation, § 577.22[5]*.

Answer to Petition for Penalties. A new form has been added that illustrates an answer to an applicant's petition for penalties pursuant to *Labor Code § 5814*. See *Ch. 577, Workers' Compensation, § 577.506*.

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[Reserved]

§§ 1.91[Reserved]

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1-1 California Forms of Pleading and Practice--Annotated § 1.100

§ 1.100 Accounting

Remainder Beneficiary of Trust May Seek Court-Ordered Account if Trustee Fails to Respond to Request for Information. A California Court of Appeal has held that a remainder beneficiary of a trust, who generally does not have a right to receive the trustee's annual accounting, may petition the court to compel the trustee to report information about the trust or to account, if the trustee does not respond to the beneficiary's request for information. See *Esslinger v. Cummins (2006) 144 Cal. App. 4th 517* , now *covered in Ch. 7, Action for Accounting, § 7.13[2]*.

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1-1 California Forms of Pleading and Practice--Annotated § 1.101

§ 1.101 Alternative Dispute Resolution

[1] Agreements and Compelling Arbitration

Private Arbitration--Class Arbitration Prohibition and Unwaivable Statutory Rights. The California Supreme Court has considered class arbitration prohibitions in the context of unwaivable statutory rights, specifically wage claims under *Lab. Code §§ 500 et seq.* and *1194*. The prohibition should not be enforced if the court finds that class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration [*see Gentry v. Superior Court (Circuit City Stores, Inc.) (2007) 42 Cal. 4th 443* (remanding for trial court to make that determination)]. See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.32*.

Private Arbitration--Under Federal Arbitration Act, Court, Not Arbitrator, Determines Existence of Contract to Arbitrate. Under federal law, issues regarding the *validity* or *enforcement* of a putative contract mandating arbitration should be referred to an arbitrator, but challenges to the *existence* of a contract as a whole must be determined by the court prior to ordering arbitration [*Sanford v. Members Works, Inc. (9th Cir. 2007) 483 F. 3d 956]* . See Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*, § 32.21[1][c].

Private Arbitration--Arbitrator, Not Court, Determines Limitations Defense. The defense that the claim sought to be arbitrated is barred by the statute of limitations is for the arbitrator, not the court, to decide. The statute of limitations is an affirmative defense that falls naturally within the plain language of the parties' agreement to arbitrate [*Wagner Construction Co. v. Pacific Mechanical Corp. (2007) 41 Cal. 4th 19]* . See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21[1][c][ii]*.

Private Arbitration--Minor's Right to Disaffirm Arbitration Contract Requires Vacating Award. The statutory rights of a minor to disaffirm both the agreement containing the arbitration provision and any adverse arbitration award are one of the exceptional circumstances that require vacating an award on public policy grounds. The court in *Berg v. Traylor (2007) 148 Cal. App. 4th 809* found that the minor had disaffirmed the contract and held that, as a separate ground, the award could also be vacated because no guardian ad litem was appointed for the minor when the parent's interests were adverse to the minor's. See Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*, § 32.21[9], and Ch. 34, *Contractual Arbitration: Judicial Review*, § 34.19[1][b][v].

Private Arbitration--Disqualified Judge's Order Compelling Arbitration Is Void. If a judge who is disqualified does not disclose the disqualification but instead hears and determines the petition to compel arbitration, that order must be vacated, because a disqualified judge's rulings are void regardless of their legal correctness. However, any ensuing award does not necessarily have to be vacated [*Rossco Holdings, Inc. v. Bank of America (2007) 149 Cal. App. 4th 1353]* . See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.95[2],* and *Ch. 34, Contractual Arbitration: Judicial Review, § 34.19[1][b][v].*

Private Arbitration--Arbitration Clause in Retainer Agreement and MFAA. Relying on *Aguilar v. Lerner (2004) 32 Cal. 4th 974* , the court of appeal in *Ervin, Cohen & Jessup, LLP v. Kassel (2007) 147 Cal. App. 4th 821* held that a client who has waived his or her rights under the MFAA by failing to request arbitration within 30 days after receipt of the notice required by *Bus. & Prof. Code § 6201(a)* can be compelled to arbitrate a fee dispute with the former attorney under the retainer agreement governed by *Code Civ. Proc. § 1280 et seq.* See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.12*[[4].

Private Arbitration--Unconscionability. When a party resisting arbitration challenges the entire agreement as unconscionable, not just the arbitration clause, under the Federal Arbitration Act, that determination is for the arbitrator to make [*Higgins v. Superior Court (Disney/ABC International Television, Inc.) (2006) 140 Cal. App. 4th 1238]* . See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21[1][c][i], [b][iii].*

Private Arbitration--Attempt to Incorporate Arbitration Clause by Reference Failed. A preliminary title report referenced and incorporated the standard form ALTA policy, which included an arbitration clause, but a CTLA form of policy was actually issued. Although the CTLA policy also contained an arbitration clause, and the court of appeal found the argument that it should be incorporated had a sort of "no harm, no foul" appeal, they concluded that it was unreasonable to rely on an arbitration clause in a nonexistent policy to deny the policyholders the right to a jury trial [*Kleveland v. Chicago Title Ins. Co. (2006) 141 Cal. App. 4th 761]* . See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21[2].*

Private Arbitration--Arbitration Agreement Covers Later Treatment for Different Condition. An arbitration agreement has been held to require arbitration of a malpractice claim arising from treatment of a different condition two years after the agreement was signed, despite the parties not having an "open book account" relationship because nothing in *Code Civ. Proc. § 1295* prevents a medical malpractice arbitration agreement from including provisions in addition to those required by the statute and this agreement clearly provided that it applied to future treatment [*Reigelsperger v. Siller (2007) 40 Cal. 4th 574]* . See Ch. 39, *Tactics and New Developments in ADR*, §§ 39.60, 39.61[1], 39.65.

Private Arbitration--Unconscionability. HDTV subscription service provider's arbitration agreement was found unconscionable and unenforceable in *Cohen v. DirecTV, Inc. (2006) 142 Cal. App. 4th 1442, 1451-1455* . The class arbitration prohibition was imposed unilaterally in a bill stuffer, relatively small amounts were involved, and the situation otherwise satisfied the requirements enunciated in *Discover Bank.* See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.32.*

Private Arbitration--Arbitration Demand Not Subject to Motion to Strike. Because an arbitration claim filed only in an agreed arbitral forum and not asserted by the claimant in any complaint, cross-complaint or petition filed in court is not a "complaint" within the meaning of *Code Civ. Proc. § 425.16*, it is not subject to a motion to strike under that section [*Sheppard v. Lightpost Museum Fund (2006) 146 Cal. App. 4th 315]* . See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, §§ 32.11, 32.41, 32.90[3].*

[2] Appointment of Arbitrator and Conduct of Proceedings

Private Arbitration--Arbitrator Can Consider Submitted Issue That Is Beyond Scope of Contractual Authority. Parties may submit for decision issues they are not contractually compelled to arbitrate. If they do so, the losing party cannot then claim on appeal that the arbitrator exceeded his or her powers as specified in the arbitration clause [*J.C.Gury Co. v. Nippon Carbide Indus. (USA), Inc. (2007) 152 Cal. App. 4th 1300]* . *See Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.20[3][a], [e],* and *Ch. 34, Contractual Arbitration: Judicial Review, § 34.19[1][e]*.

Private Arbitration--Upholding Arbitrator's Power to Issue Successive Incremental Partial Awards . Arbitration awards may contemplate future proceedings. In fact, the ongoing and changing nature of trust administration may require them--for instructions, to settle accounts, to fix compensation, and to allow, compromise or settle claims. Thus, an arbitrator does not abuse his or her discretion by issuing an award that determines some matters, but reserves jurisdiction to determine ongoing matters [*Roehl v. Ritchie (2007) 147 Cal. App. 4th 338]* . See Ch. 33, *Contractual Arbitration : Appointment of Arbitrator and Conduct of Proceeding,* § 33.28[1A].

Private Arbitration--Certification Program for Out-of-State Counsel Extended. The automatic repeal date for the version of *Code Civ. Proc. § 1282.4* that overruled *Birbrower v. Superior Court (1998) 17 Cal. 4th 119* and established a program for certification of out-of-state counsel so they can represent people in California arbitration matters has been extended from January 1, 2007, until January 1, 2011. There are minor changes in the certification requirements, which are discussed at *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.23[3]*.

Private Arbitration--Prior Service as Uncompensated Mediator Need Not Be Disclosed. A proposed neutral arbitrator has no duty to disclose his or her prior service as an uncompensated mediator in a mediation in which an attorney for one of the parties to the arbitration served as attorney for one of the parties in the mediation. Neither *Code Civ. Proc. § 1281.9(a)* nor Ethical Standards 7(d)(5), (8), or (14)(A) require disclosure of uncompensated service as a dispute resolution neutral, nor does acting as an uncompensated mediator in a single mediation in which an attorney for one of the parties to the arbitration represented a party to the mediation constitute a professional relationship or a circumstance that would cause a reasonable person to entertain doubt whether the arbitrator was impartial [*Guseinov v. Burns (2006) 145 Cal. App. 4th 944]* . See *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.14[1][a], [2][a], [3][a]*[[iv].

[3] Judicial Review

Private Arbitration--Arbitrator Can Consider Submitted Issue That Is Beyond Scope of Contractual Authority. Parties may submit for decision issues they are not contractually compelled to arbitrate. If they do so, the losing party cannot then claim on appeal that the arbitrator exceeded his or her powers as specified in the arbitration clause [*J.C.Gury Co. v. Nippon Carbide Indus. (USA), Inc. (2007) 152 Cal. App. 4th 1300]* . *See Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.20[3][a], [e],* and *Ch. 34, Contractual Arbitration: Judicial Review, § 34.19[1][e]*.

Private Arbitration--Arbitration Has Discretion Not to Postpone Hearing. Not every request for postponement of an arbitration hearing needs to be granted. Although an award must be vacated if the rights of the party were substantially prejudiced by the refusal of the arbitrator to postpone the hearing on sufficient cause [*Code Civ. Proc. § 1286.2(a)(5)*], faced with a long course of delays (including filing three lawsuits to stop the arbitration) and a last minute request to add a new claim that the plaintiff had known about from the beginning (three years earlier), it was held no abuse of discretion for the arbitrator to hear and determine the matter even though the plaintiff did not appear at the arbitration hearing [SWAB Financial, LLC v. E* *Trade Securities, LLC (2007) 150 Cal. App. 4th 1181]* . See *Ch. 34, Contractual Arbitration: Judicial Review, § 34.19[1][f] [iii]*.

Private Arbitration--Minor's Right to Disaffirm Arbitration Contract Requires Vacating Award. The statutory rights of a minor to disaffirm both the agreement containing the arbitration provision and any adverse arbitration award

are one of the exceptional circumstances that require vacating an award on public policy grounds. The court in *Berg v. Traylor (2007) 148 Cal. App. 4th 809* found that the minor had disaffirmed the contract and held that, as a separate ground, the award could also be vacated because no guardian ad litem was appointed for the minor when the parent's interests were adverse to the minor's. See Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* , § 32.21[9], and Ch. 34, *Contractual Arbitration: Judicial Review,* § 34.19[1][b][v].

Private Arbitration--Disqualified Judge's Order Compelling Arbitration Is Void. If a judge who is disqualified does not disclose the disqualification but instead hears and determines the petition to compel arbitration, that order must be vacated, because a disqualified judge's rulings are void regardless of their legal correctness. However, any ensuing award does not necessarily have to be vacated [*Rossco Holdings, Inc. v. Bank of America (2007) 149 Cal. App. 4th 1353]* . See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.95[2],* and *Ch. 34, Contractual Arbitration: Judicial Review, § 34.19[1][b][v].*

Order Compelling Arbitration Not Appealable Final Order. In *Vivid Video, Inc. v. Playboy Entertainment Group, Inc. (2007) 147 Cal. App. 4th 434* , the court of appeal held that a ruling as to who decides a matter's arbitrability is not an appealable final order. See *Ch. 40, Appeal: An Overview, § 40.12[2][a].*

[4] Mediation

Mediation--Briefs and E-Mails Not Admissable. Briefs prepared in aid of mediation and e-mails that discussed them were protected by mediation confidentiality and not admissible in the related legal malpractice action. A purported conversation by the attorney, in which he made a reduced settlement demand, allegedly without the client's authorization, was not protected [*see Wimsatt v. Superior Court (Kausch) (2007) 152 Cal. App. 4th 137]* . See *Ch. 31, Mediation, § 31.13[3].*

Private Mediation--Trial Courts Cannot Order Parties to Complex Litigation to Mediate. Trial courts have no authority to order parties to a complex civil action to attend and pay for private mediation [*Jeld-Wen, Inc. v. Superior Court (Marlborough Development Corp.) (2007) 146 Cal. App. 4th 536]* . See *Ch. 31, Mediation, § 31.10[2].*

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§ 1.102 Appeals

[1] Notice of Appeal

Denial of Class Action Is Appealable. In *Berry v. American Express Publishing, Inc. (2007) 147 Cal. App. 4th 224, 228* , the court of appeal held that an order sustaining demurrers to class action allegations is appealable to the extent that it prevents further proceedings as a class action. See *Ch. 42, Appeal: Notice of Appeal, § 42.35[9][c]*.

Documents Mailed by the Clerk to Trigger 60-Day Period for Filing Notice of Appeal must Strictly Comply With *California Rules of Ct., Rule 8.104(a)*. In *Alan v. American Honda Motor Co., Inc. (2007) 40 Cal. 4th 894* , the California Supreme Court held that *California Rules of Ct., Rule 8.104(a)(1)* requires a single document, either a "Notice of Entry" or a file-stamped copy of the judgment or appealable order, that is sufficient in itself to satisfy all of Rule 8.104(a)'s conditions, including the requirement that the document itself show the date on which it was mailed. See *Ch. 42, Appeal: Notice of Appeal, § 42.13[2][a]*.

[2] Review of Standards and Appellate Rules of Law

Decisions of Every Division of Court of Appeal Are Binding on All State Superior Courts. In *Cuccia v. Superior Court (2007) 153 Cal. App. 4th 347, 353-354, 62 Cal. Rptr. 3d 796* , the court of appeal held that under stare decisis, precedent is binding even if the judge disagrees. See *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.63[5][a]*.

When Demurrer Sustained Without Leave to Amend, Appellate Court Decides Whether There Is Reasonable Possibility That Defect Can Be Cured by Amendment. In *City of Dinuba v. County of Tulare (2007) 41 Cal. 4th 859, 865, 62 Cal. Rptr. 3d 614* , the California Supreme Court held that on appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the appellate court gives the complaint a reasonable interpretation, reading it as a whole and its parts in their context. See *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.63[3][h]*.

Appellant Has Burden to Identify Appeal Issues. In *Huong Que, Inc. v. Luu (2007) 150 Cal. App. 4th 400, 409, 58 Cal. Rptr. 3d 527* , the court of appeal held that the appellant has the burden to identify and establish deficiencies in the

evidence; the appellate court is not required to independently search the evidentiary record to determine its sufficiency. See *Ch. 41, Appeal: Review Standards, § 41.13[1][b]*.

To Constitute "Substantial Evidence," Evidence Must Be Reasonable, Credible, and of Solid Value. In *Bridgeman v. McPherson, (2006) 141 Cal. App. 4th 277* , the court of appeals holds that unsworn memoranda of points and authorities and hearsay do not constitute substantial evidence. See *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.13[1][d]*.

Order Compelling Arbitration Not Appealable Final Order. In *Vivid Video, Inc. v. Playboy Entertainment Group, Inc. (2007) 147 Cal. App. 4th 434* , the court of appeal held that a ruling as to who decides a matter's arbitrability is not an appealable final order. See *Ch. 40, Appeal: An Overview, § 40.12[2][a]*.

[3] Briefs

Waiver of Issues on Appeal. In *Expansion Pointe Properties Limited Partnership v. Procopio, Cory, Hargreaves & Savitch, LLP (2007) 152 Cal. App. 4th 42, 61 Cal. Rptr. 3d 156* , the court of appeal held that theories not fully developed to trial court cannot create a triable issue on appeal. See *Ch. 50, Appeal: Briefs, § 50.35[4][a]*.

[4] Costs on Appeal

Power of Trial Court After Remittitur. In *In re Justin S. (2007) 150 Cal. App. 4th 1426, 1434-1435, 59 Cal. Rptr. 3d 376* , the court of appeal held that if appellate directions to the trial court are ambiguous, they are interpreted in accordance with the views, reasoning, and holdings expressed in the appellate opinion as a whole. See *Ch. 53, Appeal: Remittitur and Costs on Appeal, § 53.42[1][c]*.

[5] Record

Purposes of Notice to Prepare Reporter's Transcript Are to Inform Court Reporter Which Portions of Oral Proceedings to Transcribe, to Limit Scope of Appellate Review, and to Enable Respondent to Determine Whether to Request Transcription of Additional Portions of Proceedings. In *Ermoian v. Desert Hospital (2007) 152 Cal. App. 4th 475, 497, 61 Cal. Rptr. 3d 754* , the court of appeal held that a notice to prepare a reporter's transcript is insufficient to bring defects in statement of decision to the trial court's attention. See *Ch. 44, Appeal: The Record, § 44.51*.

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§ 1.103 Attorneys

Holding Barring Recovery of Damages for Lost Punitive Damages Claim Applied Retroactively. In *Expansion Pointe Properties Limited Partnership v. Procopio, Cory, Hargreaves & Savitch, LLP (2007) 152 Cal. App. 4th 42* , the court of appeal held that the Supreme Court's 2003 holding preventing the recovery of damages in a legal malpractice suit for a lost opportunity at punitive damages in an underlying lawsuit applies retroactively, even if the negligent attorney was retained prior to the date of the Supreme Court's decision. See *Ch. 76, Attorney Professional Liability, § 76.92[2]*.

Reinsurer Not Client of Insurer's Attorney. In *Zenith Ins. Co. v. O'Connor (2007) 148 Cal. App. 4th 998* , the court of appeal held that if an insurer contracts with a reinsurer to obtain reimbursement coverage for some of the insurer's coverage liabilities, and the insurer subsequently hires an attorney to represent it when a claim is brought against its insured, the reinsurer on that claim does not become a client of the insurer's attorney in the absence of an express agreement between the retained attorney and the reinsurer. In addition, the reinsurer is not a third-party beneficiary of the attorney's services given the potential, if not actual, conflict of interest between the insurer and the reinsurer. See *Ch. 76, Attorney Professional Liability, § 76.200[3][b][v]*.

Professional Rules of Conduct Do Not Prohibit Representation if Only Adverse in Matter Where Attorneys Do Not Represent Either Client. In *Fremont Indemnity Company v. Fremont General Corporation (2006) 143 Cal. App. 4th 50* , the court of appeal held that *Cal. Rules Prof. Conduct, Rule 3-310(C)(3)* does not prohibit the concurrent representation of clients whose interests are adverse only in a matter in which the attorney does not represent either client. See *Ch. 72, Attorney Practice and Ethics, § 72.111[3][b]*.

Court Should Look at Totality of Circumstances to Determine Whether to Disqualify Attorney Under *Cal. Rules Prof. Conduct, Rule 3-310(E)*. In *Rhaburn v. Superior Court (2006) 140 Cal. App. 4th 1566* , the court of appeal held that the public defender's office should not be automatically disqualified when the public defender's office had previously represented a witness for the prosecution. See *Ch. 72, Attorney Practice and Ethics, § 72.113[6][b][ii]*.

No Malpractice Action Against Attorney if Statute of Limitations Expired Prior to First Consultation Between Attorney and Client. In *Slovensky v. Friedman (2006) 142 Cal. App. 4th 1518* , the court of appeal held that a client

has no malpractice action against an attorney for failing to achieve a better result in underlying litigation if the statute of limitations had already expired on that underlying suit before the client first consulted the attorney about filing a lawsuit, because the client cannot prove that the attorney's negligence caused harm to the client. See *Ch. 76, Attorney Professional Liability, § 76.90*.

Attorney Being Disqualified Has Burden of Proving No Exposure to Confidential Information. In *Ochoa v. Fordel, Inc. (2007) 146 Cal. App. 4th 898* , the court of appeal held that an attorney whose disqualification is sought has the burden of proving that he or she had no exposure to confidential information relevant to the current action. That burden requires an affirmative showing and is not satisfied by a cursory denial. See *Ch. 72, Attorney Practice, § 72.113[5][c]*.

When Expert Witness Interviewed by Opposing Council, a Rebuttable Presumption Arises. In *Shandralina G. v. Homonchuk (2007) 147 Cal. App. 4th 395* , the court of appeal held that when a law firm retains an expert witness who was interviewed previously by opposing counsel and exposed to the opposing side's confidential information, a rebuttable presumption arises that the expert disclosed that confidential information to the law firm that subsequently hired the expert witness. However, the presumption does not apply when the expert witness remains a consultant for and in the employ of the party that originally retained the expert. See *Ch. 72, Attorney Practice, § 72.113[6][b][v]*.

MFAA Trumps CAA. In *Schatz v. Allen Matkins Leck Gamble & Mallory LLP (2007) 146 Cal. App. 4th 674* , the court of appeal held that the Mandatory Fee Arbitration Act gives clients the right to trial de novo after nonbinding arbitration even when they have signed prospective waivers of trial after arbitration; in such situations the MFAA trumps the California Arbitration Act. See *Ch. 72, Attorney Practice, § 72.613[2]*.

Criminal Defendant Can Sue Attorney for Failing to Secure Return of Property Without Proof of Actual Innocence. In *Brooks v. Shemaria (2006) 144 Cal. App. 4th 434* , the court of appeal held that a plaintiff who had been represented by an attorney in a criminal defense case need not prove actual innocence in order to pursue a fee dispute claim or a claim that the attorney committed negligence in failing to secure the return of plaintiff's property that had been seized in connection with the criminal arrest, at least when the relevant law enforcement authorities had concluded that the property should have been returned to plaintiff. See *Ch. 76, Attorney Professional Liability, §§ 76.10[2], 76.70*.

Attorney Malpractice Defendant May Defeat Causation With Showing of Court Error. In *Church v. Jamison (2006) 143 Cal. App. 4th 1568* , the court of appeal held that an attorney sued for malpractice is permitted to defend on the grounds that the court in the underlying case made an error and that had the court made a proper decision, and that the malpractice plaintiff would not have been damaged. See *Ch. 76, Attorney Professional Liability, § 76.71*.

Requirement of Factual Innocence in Malpractice Action Against Criminal Defense Attorney Extends to Lesser-Included Offenses. In *Sangha v. LaBarbera (2006) 146 Cal. App. 4th 79* , the court of appeal held that the factual innocence requirement applicable when suing a criminal defense attorney for malpractice applies not just to the criminal charges actually brought against the criminal defendant, but to lesser-included criminal offenses as well. See *Ch. 76, Attorney Professional Liability, §§ 76.10[2], 76.70*.

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§ 1.103A Automobiles

Uninsured Motorist Coverage--Personal Liability Umbrella Policy Covers Vehicle. In *California Capital Ins. Co. v. Nielsen (2007) 153 Cal. App. 4th 1221* , an appellate court held that when the owner and the operator of an otherwise uninsured vehicle have liability insurance coverage for bodily injury damages through a personal liability umbrella policy, that vehicle is not an uninsured motor vehicle. See *Ch. 88A, Automobiles: Uninsured Motorist Claims, § 88A.10[2][d]*.

Implied Consent to Blood Alcohol Testing Doesn't Require Actual Driving. In *Troppman v. Valverde (2007) 40 Cal. 4th 1121, 1133, 57 Cal. Rptr. 3d 306, 156 P. 3d 328* , the California Supreme Court held that the implied consent statute applies broadly and generally to the motoring public (i.e., those who take advantage of the public streets, roads, and highways to operate a motor vehicle), and does not require evidence that actual driving occurred immediately prior to the arrest for driving under the influence. See *Ch. 92, Automobiles: Driver's Licenses, § 92.40[1]*.

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California Forms of Pleading and Practice--Annotated

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PART IV. 2007 NEW DEVELOPMENTS

1-1 California Forms of Pleading and Practice--Annotated § 1.104

§ 1.104 Business and Commercial

[1] Commercial Code

Commercial Code--UCC Revisions. Legislation enacted in 2006 [Stats. 2006, ch. 254] generally revised, reorganized, and renumbered the basic definitional provisions in Article 1 of the California Commercial Code to conform to revisions of the Uniform Commercial Code (UCC) proposed by the National Conference of Commissioners on Uniform State Law. In addition, this legislation also revised the California Commercial Code version of Article 7 of the UCC, which governs documents of title, including bills of lading and warehouse receipts, and establishes the rights, duties, and liabilities of a warehouse operators and carriers. The Article 7 revisions incorporate national UCC changes and include provisions specifically applicable to electronic documents of title. The changes affect numerous references in this publication to the Commercial Code articles affected by the legislation, including changes throughout Ch. 213, *Documents of Title*, and Chs. 500 through 504, dealing generally with sales and other transactions under the Commercial Code.

[2] Fraudulent Transfers

Fraudulent Transfers--Jury Instructions. The California Judicial Council approved a new series of jury instructions for use in cases governed by the Uniform Fraudulent Transfer Act [*see* Judicial Council of California Civil Jury Instructions (CACI), Series 4300 (LexisNexis Matthew Bender Official Publisher)]. Citations to particular instructions in the series have been added at appropriate places throughout Ch. 270, *Fraudulent Conveyances*.

[3] Limited Liability Companies

LLC Franchise Tax Liability--Limited Liability Companies. New *Rev. & Tax. Code § 17947* provides that an LLC is not subject to franchise tax for a taxable year if it files a timely final annual return for the preceding taxable year, does no business in California after the end of the year for which it filed that return, and files a certificate of cancellation before the end of the 12-month period beginning with the date that return was filed. See *Ch. 346, Limited Liability Companies, § 346.11[3]*.

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§ 1.104A Churches and Religious Organizations

Removal of Cross From County Seal Did Not Violate *Establishment Clause*. In *Vasquez v. Los Angeles County (9th Cir. 2007) 487 F.3d 1246* , the Ninth Circuit held that a religious Christian county employee had standing to state an *Establishment Clause* claim based on the county's removal of a cross from the county seal, but that the claim was without merit. Removal of the cross had a secular purpose, a reasonable view of the removal of the cross was as an effort to restore neutrality and ensure continued compliance with the *Establishment Clause* rather than hostility to religion, and the plaintiff failed to allege excessive entanglement. *See Ch. 110, Churches and Religious Organizations, § 110.13[1][a]*.

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1-1 California Forms of Pleading and Practice--Annotated § 1.105

§ 1.105 Civil Procedure

[1] Affidavits, Certificates, and Declarations

Declarations--Conclusory. This chapter is updated with *Johnson v. Superior Court (2006) 143 Cal. App. 4th 297* which holds a declaration that is conclusory in nature is insufficient to establish the nonexistence of any triable issue of material fact, and thus may not serve as a basis for granting summary judgment. See *Ch. 15, Affidavits, Certificates, and Declarations, § 15.20[3]*.

[2] Amended and Supplemental Pleadings

Amended Complaints--Leave to Amend. This chapter is updated with *Branick v. Downey Savings & Loan (2006) 39 Cal. 4th 235* , which holds leave to amend a complaint is entrusted to the sound discretion of the trial court. The exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse. More importantly, the discretion to be exercised is that of the trial court, not that of the reviewing court. See *Ch. 21, Amended and Supplemental Pleadings, § 21.13[1][a]*.

[3] Anti-SLAPP Motions

New Chapter for Anti-SLAPP Special Motions to Strike. With Release 170, this publication adds a new chapter specifically devoted to anti-SLAPP special motions to strike [*Code Civ. Proc. § 425.16 et seq.*]. Analysis of this subject was previously contained in former Ch. 375, *Motions to Strike*. Now the material has been extracted from former Ch. 375, reorganized, and updated with the latest case law developments on anti-SLAPP motions; and the former Ch. 375 is reorganized to address standard motions to strike pleadings or portions of pleadings. See Ch. 375, *Motions to Strike: Pleadings and* Ch. 376, *Motions to Strike: Anti-SLAPP* .

Anti-SLAPP Motion--Mixed Causes of Action. In *Gallanis-Politis v. Medina (2007) 152 Cal. App. 4th 600, 61 Cal. Rptr. 3d 701* , the court holds in certain cases, a complaint may allege causes of action arising from both activity protected by the anti-SLAPP statute and activity not protected by the anti-SLAPP statute. Such "mixed" causes of action are subject to an anti-SLAPP motion to strike "unless the protected conduct is merely incidental to the unprotected conduct;" and a supervisor's investigation in response to county counsel's inquiry stemming from discovery requests

was at heart of plaintiff's retaliation claim and therefore claim was subject to an anti-SLAPP motion to strike. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.14[4].

AntiSLAPP Motion--Hearing. In *Hall v. Time Warner, Inc. (2007) 153 Cal. App. 4th 1337, 63 Cal. Rptr. 3d 798* , the court reaffirms the requirement that the anti-SLAPP motion must be scheduled by the clerk of the court for a hearing not more than 30 days after service unless the docket conditions of the court require a later hearing. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 37618[1].

AntiSLAPP Motion--Hearing. In *Hall v. Time Warner, Inc. (2007) 153 Cal. App. 4th 1337, 63 Cal. Rptr. 3d 798* , the court reaffirms the requirement that the anti-SLAPP motion must be scheduled by the clerk of the court for a hearing not more than 30 days after service unless the docket conditions of the court require a later hearing. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.18[1].

AntiSLAPP Motion--Protected Activity. In *Rohde v. Wolf (2007) 154 Cal. App. 4th 28, 64 Cal. Rptr. 3d 348* the court holds a defendant attorney's allegedly defamatory voice mail messages to plaintiff's real estate broker were made in connection with a piece of real property, which was an asset that was the subject of a dispute over which all involved parties threatened litigation; therefore, the statements were made in connection with an issue under review by a judicial body within the meaning of *Code Civ. Proc. § 425.16(b)(1)(2)*. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.43[1][a].

AntiSLAPP Motion--Protected Activity. In *Philipson & Simon v. Gulsvig (2007) 154 Cal. App. 4th 347, 64 Cal. Rptr. 3d 504* , the court holds the defendant's conduct in initiating State Bar sponsored fee arbitration proceeding and later filing civil complaint were protected activity under *Code Civ. Proc. § 425.16(e)(2)*; plaintiff law firm therefore had to show a probability of success on the merits regarding its claims of breach of contract, breach of implied covenant of good faith, fraud, and misrepresentation claims against defendant. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.43[1][a].

AntiSLAPP Motion--Issue of Public Interest. In *Hall v. Time Warner Inc. (2007) 153 Cal. App. 4th 1337, 63 Cal. Rptr. 3d 798* , the court holds the defendant's interview of Marlon Brando's former housekeeper at her nursing home regarding Brando's will constituted conduct in connection with an issue of public interest; distribution of Brando's assets was an issue of public interest and television interview contributed to public discussion of the issue. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.43[1][c].

AntiSLAPP Motion--Issue of Public Interest. In *McGarry v. University of San Diego (2007) 154 Cal. App. 4th 97, 117, 64 Cal. Rptr. 3d 467* , a controversy surrounding university football coach's termination was of concern to a substantial number of people such that university officials' statements to newspaper and statements to parents during meeting constituted protected speech in connection with a public issue within the meaning of the anti-SLAPP statute. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.43[1][c].

AntiSLAPP Motion--Non-Protected Activity . In *Department of Fair Employment and Housing v. 1105 Alta Loma Road Apartments, LLC (2007) 154 Cal. App. 4th 1273* , the court holds the gravamen of plaintiff Department of Fair Employment and Housing's complaint against landlord was disability discrimination, not landlord's actions in connection with rental control removal proceeding and filing of unlawful detainer action; mere fact that plaintiff filed complaint after protected activity took place does not mean complaint arose from protected activity. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.43[2].

AntiSLAPP Motion--Non-Protected Activity. In *Freeman v. Schack (2007) 154 Cal. App. 4th 719, 726-727, 64 Cal. Rptr. 3d 867* , the court holds in an action by class action litigants against their attorney for breach of contract, negligence, and breach of fiduciary duty, principal thrust of complaint was not attorney's filing or settlement of litigation, but rather was his unethical conduct in representing a party with interests adverse to his clients; because

protected activity was merely incidental to unprotected activity, action was not a SLAPP suit. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.43[2].

AntiSLAPP Motion--Non-Protected Activity. In *Wang v. Wal-Mart Real Estate Business Trust (2007) 153 Cal. App. 4th 790, 63 Cal. Rptr. 3d 575* , the court holds a complaint for breach of contract, fraud, and conspiracy to defraud did not arise out of protected activity under the anti-SLAPP statute in case where landowner sued Wal-Mart and others on the basis of a contract to sell land for a Wal-Mart store; the alleged improper conduct on defendants' part did not arise from petitioning activity in pursuing the necessary permits, but rather from conduct and practices involved in carrying out contractual duties, and the thrust of the complaint challenged the manner in which the parties dealt with each other rather than the activity of pursuing governmental approvals for development. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.43[2].

AntiSLAPP Motion--Non-Protected Activity . In *Marlin v. Aimco Venezia, LLC (2007) 154 Cal. App. 4th 154, 160-162, 64 Cal. Rptr. 3d 488* , the court holds a defendants' actions in terminating plaintiffs' tenancy and removing plaintiffs' apartment from the rental market under the Ellis Act were not activities undertaken in furtherance of defendants' constitutional rights of petition or free speech; although filing and serving the Ellis Act notice and notice to vacate may have constituted protected activity, plaintiffs' complaint requesting declaratory relief did not arise out of the filing and serving of the notice, but rather out of the termination of the tenancy, which was not protected activity under the anti-SLAPP statute. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.43[2].

Attorney's Fees. This chapter is updated with *Carpenter v. Jack In The Box Corp. (2007) 151 Cal. App. 4th 454, 59 Cal. Rptr. 3d 839* , which holds a plaintiff prevailing on a special motion to strike may seek attorney's fees as a part of the motion to strike, by a subsequent noticed motion filed at any time prior to the conclusion of the lawsuit, or as part of a cost memorandum at the conclusion of the lawsuit. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.22[2].

Issue of Public Interest. This chapter is updated with *Morrow v. Los Angeles Unified School Dist. (2007) 149 Cal. App. 4th 1424, 1436-1437, 57 Cal. Rptr. 3d 885* , which holds statements made by a local superintendent and a superintendent of schools regarding a principal's inability to properly handle high school violence concerned an issue of public interest under *Code Civ. Proc. § 425.16(e)*, and the superintendents' special motion to strike the principal's causes of action for invasion of privacy and defamation based on those statements was therefore granted. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.20[3][a].

Religious Rights. This chapter is updated with *Castillo v. Pacheco (2007) 150 Cal. App. 4th 242, 58 Cal. Rptr. 3d 305* , which holds because the anti-SLAPP statute does not extend to claims arising out of the free exercise of religion, the statute was not available in a lawsuit arising out of defendants' religious ceremonial outdoor fires and the trial court properly denied defendants' special motion to strike. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.43[2].

Public Interest. This chapter is updated with *Holbrook v. City of Santa Monica (2006) 144 Cal. App. 4th 1242* , involving a lawsuit by two city council members seeking declaratory relief against the City of Santa Monica based on the fact that the city council meetings frequently run late into the night was not in the public interest within the meaning of *Code Civ. Proc. § 425.17(b)*; the court held the action concerned members' preference for particular working hours, not public interest and, if successful, would not confer a significant benefit on the public as a whole. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.14[3][a].

Attorney's Fees and Costs. This chapter is updated with *Maughan v. Google Technology Inc. (2006) 143 Cal. App. 4th 1242* , which holds a trial court did not abuse its discretion in reducing attorney fees and costs sought by prevailing defendant from $112,000 to $23,000; trial court determined that attorneys experienced in anti-SLAPP litigation would not have needed to spend 200 hours preparing a motion and that 50 hours was a more reasonable figure. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.43[6].

Arbitration. This chapter is updated with *Sheppard v. Lightpost Museum Fund (2006) 146 Cal. App. 4th 315* , which holds the anti-SLAPP statute does not apply to claims pending in such nonjudicial forums as private arbitration proceedings. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.13[2].

Issue of Public Interest. This chapter is updated with *Taus v. Loftus (2007) 40 Cal. 4th 683* , which holds that two articles published in a scientific journal responding to an article published in a different journal regarding suppressed memories of childhood abuse were protected speech under *Code Civ. Proc. § 425.16(e)(3)* and *(4)*, and were matters of public interest given the controversy of suppressed memories. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.14[3][c].

Discovery. This chapter is updated with *Britts v. Superior Court (2006) 145 Cal. App. 4th 1112* , which holds the stay of discovery for an anti-SLAPP motions includes any discovery motions pending at the time the special motion to strike is filed. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.19.

[4] Complaints and Cross Complaints

Signature on Complaint. This chapter is updated with *Board of Trustees v. Superior Court (2007) 149 Cal. App. 4th 1154, 57 Cal. Rptr. 3d 755* , which holds where a complaint was signed by the party's father, instead of by the party or his or her attorney of record, the plaintiff's failure to comply with the subscription requirement did not constitute an incurable defect where the correction is promptly made and the court finds that the plaintiff actually assented to the filing of the action. See *Ch. 123, Complaints and Cross Complaints, § 123.23[1]*.

Notice of Related Cases. *Cal. Rules of Ct., Rule 3.300* is amended to require notice of a related case, and provides a pending civil case is related to another pending civil case, or to a civil case that was dismissed with or without prejudice, or to a civil case that was disposed of by judgment, if the cases (1) involve the same parties and are based on the same or similar claims, (2) arise from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or facts, (3) involve claims against, title to, possession of, or damages to the same property, or (4) are likely for other reasons to require substantial duplication of judicial resources if heard by different judges. The Notice of Related Case must be served and filed as soon as possible, but no later than 15 days after the facts concerning the existence of related cases become known. See *Ch. 123, Complaints and Cross Complaints, § 123.25*; *Ch. 125, Consolidation, Severance, and Coordination of Actions, § 125.11, Ch. 137; Continuing Duties During Legislation, § 137.12*.

[5] Continuances

Continuances--Right to Defend. This chapter is updated with *Cadle Co. v. WorldWide Hospitality Furniture (2006) 144 Cal. App. 4th 504* , which holds a trial court abused its discretion in entering judgment against the corporate defendant where brief trial continuance would have permitted the defendant to file the required informational statement, restore the corporation's good standing with the state, and defend the litigation. See *Ch. 136, Continuances, § 136.45[3][a]*.

[6] Defaults

Default Awarding Damages Properly Set Aside on Legal Malpractice Complaint. In *Levine v. Smith (2006) 145 Cal. App. 4th 1131, 52 Cal. Rptr. 3d 197* , a legal malpractice action, the trial court properly set aside a $2.5 million superior court default judgment as void because it was greater than the amount demanded in the first amended complaint. The first amended complaint sought damages based on contract and tort theories according to proof, and the filing of a statement of damages under *Code Civ. Proc. § 425.11* before the default was entered based on the sixteenth cause of action for emotional distress based on the same professional negligence did not make the action one for personal injury or wrongful death within the meaning of § 425.11. See Ch. 489, *Relief from Judgments and Orders* .

[6A] Injunctions

Injunction May Limit Free Speech. In *Balboa Island Village Inn, Inc. v. Lemen (2007) 40 Cal. 4th 1141, 1161, 57 Cal. Rptr. 3d 320, 156 P.3d 339* , the California Supreme Court held that following a trial at which it is determined that the plaintiff defamed the defendant, the court may issue an injunction prohibiting the defendant from repeating the statements determined to be defamatory. See *Ch. 303, Injunctions, § 303.71[3]*.

[7] Judges

Judicial Administration and Judicial Ethics and Discipline. This chapter is updated with two new, comprehensive parts on Judicial Administration and Judicial Ethics and Discipline. With analyses on trial court administration, as well as judicial agencies and appellate administration, practitioners can review judicial policies that will have an effect on litigation. The analysis of judicial ethics and discipline reviews the California Code of Judicial Ethics and the processes of the Commission on Judicial Performance for disciplining judges. See *Ch. 317, Judges, § 317.83* et seq.

[8] Jurisdiction

Inconvenient Forum--Appearance. In *Britton v. Dallas Airmotive, Inc. (2007) 153 Cal. App. 4th 127, 62 Cal. Rptr. 3d 487* , the court holds *Code of Civ. Proc. § 418.10* provides requirements for bringing a forum non conveniens motion when a defendant has not yet appeared in an action, and *Code of Civ. Proc. § 410.30* applies to a defendant bringing a forum non conveniens motion after having generally appeared in the action. Under *Code Civ. Proc. § 410.30(b)*, a defendant who has generally appeared may make a forum non conveniens motion at any time, not only on or before the last day to plead. See *Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances, § 323.32*.

Inconvenient Forum--Demurrer. In *Miller-Leigh v. Henson (2007) 152 Cal. App. 4th 1143, 62 Cal. Rptr. 3d 83* , the court holds a challenge to a forum selection clause cannot properly be raised by demurrer. See *Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances, § 323.34[6]*.

Jurisdiction--Sovereign Immunity. In *Lawrence v. Barona Valley Ranch Resort and Casino (2007) 153 Cal. App. 4th 1364, 64 Cal. Rptr. 3d 23* , the court holds that although an Indian trit waived its sovereign immunity to certain negligence claims against it, such waiver did not constitute a consent to suit in state court on negligence claims against it; instead, the tribal court was the exclusive forum for the resolution of such claims. See *Ch. 324, Jurisdiction: Subject Matter Jurisdiction, § 324.25[3]*.

Forum Non Conveniens. This chapter is updated with *Morris v. AGFA Corp. (2006) 144 Cal. App. 4th 1452* , which holds a trial court must be flexible in its weighing of the *Stangvik* factors. Private and public interest factors must be applied flexibly, without giving undue emphasis to any one element. The doctrine of forum non conveniens may not be based on identification of a single factor rather than the balancing of several. An undue emphasis on a single factor is especially threatening to a balanced analysis because some of the matters to be weighed will by their nature point to a grant or denial of the motion. See *Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances, § 323.35[4]*.

Forum Non Conveniens. This chapter is updated with *Sinochem Int'l Co. Ltd v. Malaysia Int'l Shipping Corp. (2007) 127 S. Ct. 1184, 167 L. Ed. 2d 15* , which holds a district court has discretion to respond at once to a defendant's forum non conveniens plea, and need not take up first any other threshold objection. In particular, a court need not resolve whether it has authority to adjudicate the cause (subject matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is the more suitable arbiter of the merits of the case. See *Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances, § 323.33*.

Sovereign Immunity. This chapter is updated with *Agua Caliente Band of Cahuilla Indians v. Superior Court (2006)*

40 Cal. 4th 239 , which holds, in a case with limited applicability, that a tribe lacks immunity from suit for its alleged failure to follow the Political Reform Act's mandated reporting requirements. See *Ch. 324, Jurisdiction: Subject Matter Jurisdiction, § 324.24[2]*.

[9] Limitation of Actions

Limitation of Actions--Discovery Rule. In *Lyles v. State of California (2007) 153 Cal. App. 4th 281, 62 Cal. Rptr. 3d 696* , the court holds the discovery rule is not so broad as to delay accrual indefinitely until the plaintiff stumbles upon a claim. Rather, the plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof--when, simply put, he at least suspects that someone has done something wrong to him, "wrong" being used, not in any technical sense, but rather in accordance with its lay understanding. See *Ch. 345, Limitation of Actions § 345.19[3][a]*.

Limitation of Actions--Employment Discrimination. This chapter is updated with *Ledbetter v. Goodyear Tire & Rubber Co.* (2007) 550 U.S. 618, 127 S. Ct. 2162, 167 L. Ed. 2d 982 , which holds the time frame for filing a charge of employment discrimination with the Equal Employment Opportunity Commission is triggered when a discrete unlawful practice takes place. A new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination. See *Ch. 345, Limitation of Actions, § 345.19[3][a]*.

Limitation of Actions--Arbitration. This chapter is updated with *Wagner Construction Co. v. Pacific Mechanical Corp. (2007) 41 Cal. 4th 19, 25, 58 Cal. Rptr. 3d 434, 157 P.3d 1029* , which holds a court may not deny a petition to compel arbitration on the ground the statute of limitations has run on the claims the parties agreed to arbitrate. See *Ch. 345, Limitation of Actions, § 345.20[3]*.

Limitation of Actions--Action for Vested Vacation. This chapter is updated with *Church v. Jamison (2006) 143 Cal. App. 4th 1568* , which holds there are three statutes of limitations that might apply to a claim by a former employee seeking payment for unused vested vacation because the claim could be characterized as one based on (1) an oral employment contract, (2) a written employment contract, or (3) a liability created by statute. A two-year limitations period applies to oral contract claims, as provided by *Code Civ. Proc., § 339(1)*. A four-year limitations period applies to claims based on written contracts, as set forth in *Code Civ. Proc., § 337(1)*. See Ch. 345, *Limitation of Actions, Appendix*, § 345APP.204.

Limitation of Actions--Sexual Abuse of Minor. This chapter is updated with *Perez v. Roe (2006) 146 Cal. App. 4th 171* , which holds the part of *Code Civ. Proc. § 340.1* purporting to revive previously dismissed complaints has been found to violate the state's constitutional separation of powers doctrine. Where final judgments have been entered in earlier actions under the statute of limitations that previously existed, and those judgments were upheld on appeal, they became final for separation of powers purposes and cannot be legislatively revived. See *Ch. 345, Limitation of Actions, § 345.20[11][a][v]*.

Limitation of Actions--Decedent Estate. This chapter is updated with *Stewart v. Seward (2007) 148 Cal. App. 4th 1513* , which holds where a claim arises from an alleged oral promise or agreement concerning distribution from a decedent's estate, the action is governed by the limitations period of *Code Civ. Proc., § 366.3*. See *Ch. 345, Limitation of Actions, § 345.53[12]*.

[10] Notice of Related Cases

Expanded Categories. *Cal. Rules of Ct., Rule 3.300* is amended to require notice of a related case, and provides a pending civil case is related to another pending civil case, or to a civil case that was dismissed with or without prejudice, or to a civil case that was disposed of by judgment, if the cases (1) involve the same parties and are based on

the same or similar claims, (2) arise from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or facts, (3) involve claims against, title to, possession of, or damages to the same property, or (4) are likely for other reasons to require substantial duplication of judicial resources if heard by different judges. The Notice of Related Case must be served and filed as soon as possible, but no later than 15 days after the facts concerning the existence of related cases become known. See *Ch. 123, Complaints and Cross Complaints, § 123.25*; *Ch. 125, Consolidation, Severance, and Coordination of Actions, § 125.11*; *Ch. 137, Continuing Duties During Legislation, § 137.12*.

Notice of Related Case. This chapter is updated with the July 2007 revised Judicial Council Form CM-015, Notice of Related Case, which requires additional information about related cases. See *Ch. 137, Continuing Duties During Legislation, § 137.61*.

[11] Pretrial Proceedings

Pretrial Proceedings--Collection Cases. This chapter is updated with the July 2007 Rules of Court that now provide specified collection cases seeking $25,000 or less as defined in *Cal. Rules of Ct., Rule 3.740(a)*, and in which the defendant does not file a responsive pleading, are exempt from differential case management rules. See *Ch. 425, Pretrial Proceedings, § 425.32[4][d]*.

[12] Reconsider and Renewed Motions

Motions to Reconsider--Sanctions. This chapter is updated with *Valdez v. Himmelfarb (2006) 144 Cal. App. 4th 1261* , where the court held it would be an abuse of discretion for a trial court not to reconsider, pursuant to *Code Civ. Proc. § 1008(c)*, its sanction order against a plaintiff in a case where appellate court decided that plaintiff's action was not barred by applicable statute of limitations and therefore plaintiff did not bring the case in bad faith; appellate court's decision regarding statute of limitations issue constituted a "change of law" for purposes of *Code Civ. Proc. § 1008(c)*. See *Ch. 374, Motions to Reconsider, § 374.14[1]*.

[13] Relief from Judgments and Orders

Relief From Default Based on Attorney's Affidavit of Fault Was Mandatory. In *Matera v. McLeod (2006) 145 Cal. App. 4th 44* , defendants were entitled under *Code Civ. Proc. § 473(b)* to mandatory relief from defaults entered by the court after striking defendants' answer as a sanction for failure to comply with a discovery order and from the resulting default judgment, based on defendants' attorney's affidavit of fault. The default judgment entered by the court was a "default judgment" within the meaning of the statute, and defendant's attorney's neglect was the sole cause of defendants' failure to comply with the discovery order resulting in the terminating sanction. See Ch. 489, *Relief from Judgments and Orders* .

Default Awarding Damages Properly Set Aside on Legal Malpractice Complaint. In *Levine v. Smith (2006) 145 Cal. App. 4th 1131, 52 Cal. Rptr. 3d 197* , a legal malpractice action, the trial court properly set aside a $2.5 million superior court default judgment as void because it was greater than the amount demanded in the first amended complaint. The first amended complaint sought damages based on contract and tort theories according to proof, and the filing of a statement of damages under *Code Civ. Proc. § 425.11* before the default was entered based on the sixteenth cause of action for emotional distress based on the same professional negligence did not make the action one for personal injury or wrongful death within the meaning of § 425.11. See Ch. 489, *Relief from Judgments and Orders* .

[13A] Res Judicata

Res Judicata. In *Smith v. Exxon Mobile Oil Corp. (2007) 153 Cal. App. 4th 1407, 64 Cal. Rptr. 3d 69* , the court has declined to apply collateral estoppel for equitable reasons after determining that the party against whom the doctrine was to be invoked had not, through no fault of its own, had a "full and fair opportunity" to litigate the claim in the prior

litigation. In a case where defendant's expert was unable to testify at the last minute due to his daughter's death in a car accident, the court held it was not equitable to apply collateral estoppel on the issue of defendant's liability in a subsequent lawsuit involving the same issues. The court noted that the unavailability of a crucial witness at the prior proceeding might render the use of collateral estoppel inappropriate and, in the "unusual and compelling" circumstance presented in that case, collateral estoppel should not have been applied. See *Ch. 491, Res Judicata, § 491.19[5]*.

[14] Service of Summons and Papers

Service of Summons--Substitute Service: This chapter is updated with *Summers v. McClanahan (2006) 140 Cal. App. 4th 403* , which holds for determining who is a proper agent for acceptance of service on behalf of a defendant, a specific appointment is not required, but the principal-agent relationship must be close and enduring enough to make it highly probable the defendant will receive actual notice; and service on an actor's personal manager did not comport with statutory requirements despite defendant having actual notice of the complaint. See *Ch. 518, Service of Summons and Papers, § 518.16[2][a]*.

Service of Summons--Collection Cases: This chapter is updated with the July 2007 Rules of Court that now provide the 60-day service of summons requirement of *Cal. Rules of Ct., Rule 3.110(b)* does not apply to collections cases, as defined in *Cal. Rules of Ct., Rule 3.740(a)* [*Cal. Rules of Ct., Rule 3.740(c)(1)*]. A "collections case" is an action for recovery of not more than $25,000, exclusive of interest and attorney fees, arising from a credit transaction for property, services, or money. See *Ch. 518, Service of Summons and Papers, § 518.15[4]*.

Service of Summons--Mail Service: This chapter is updated with *Cruz v. Fagor America, Inc. (2007) 146 Cal. App. 4th 488* , which holds when read together, *Code Civ. Proc. §§ 415.40* and *417.20* permit completion of service by mail outside California when the return receipt is signed by a person so authorized by the defendant, and evidence that a mailed summons actually reached the individual to be served is sufficient to establish valid service, and thus to establish substantial compliance, even if the summons was signed for by someone who did not have the authority to do so. See *Ch. 518, Service of Summons and Papers, § 518.16[5]*.

[15] Summary Judgment and Adjudication

Summary Judgment--Objections to Evidence. This chapter is updated with *Demps v. San Francisco Housing Authority (2007) 149 Cal. App. 4th 564, 57 Cal. Rptr. 3d 204* , which holds a trial court presented with timely evidentiary objections in proper form must rule on the objections or they are deemed waived and the objected-to evidence will be included in the record; where counsel expressly requests ruling on objections and court fails to do so, objections may not be waived. See *Ch. 537, Summary Judgment, § 537.25[4]*.

Summary Judgment--Objecting to Evidence. *Cal. Rules of Ct., Rule 3.1354* is amended to require unless otherwise excused by the court on a showing of good cause, all written objections to evidence in support of a motion for summary judgment or summary adjudication must be served and filed at the same time as the objecting party's opposition papers. The rule now describes two specific format requirements for written objections to evidence in support of or in opposition to summary judgment and summary adjudication motions. All written objections to evidence must be served and filed separately from the other papers in support of or in opposition to the motion, and a proposed order for each objection must be included. New forms are added to the chapter showing either format and proposed order. See *Ch. 537, Summary Judgment, §§ 537.25[4], 537.86, 537.87*.

[15A] Venue

Venue. In *Metropolitan Transit System v. Superior Court (2007) 153 Cal. App. 4th 293, 62 Cal. Rptr. 3d 517* , the court holds where a local agency files a compulsory cross-complaint asserting a claim in the county where it resides against a nonresident of that county, the cross-defendant has the right to move for a change of venue pursuant to *Code*

Civ. Proc. § 394. See *Ch. 571, Venue, § 571.19[3][a]*.

[16] Vexatious Litigants

Weighing of Evidence. This chapter is updated with *Moran v. Murtaugh Miller Meyer & Nelson, LLP (2007) 40 Cal. 4th 780* , which holds the court must order a plaintiff to furnish security if the court determines that plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation. In determining whether there is a reasonable probability plaintiff will prevail, the court is permitted to weigh the evidence rather than simply assume the truth of plaintiff's alleged facts. See *Ch. 573, Vexatious Litigants, § 573.14*.

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§ 1.106 Civil Rights

[1] Discrimination in Business Establishments

No Need to Demand Equal Treatment Under Unruh Act. In *Angelucci v. Century Supper Club (2007) 41 Cal. 4th 160, 166-180, 59 Cal. Rptr. 3d 142, 158 P.3d 718* , the California Supreme Court held that in order to recover under the Unruh Act, plaintiffs who are discriminated against when they present themselves at a business establishment and pay the price of admission need not demand equal treatment and be refused. Thus, men who alleged that they patronized a club on several occasions and were charged an admission fee higher than the fee charged to women were not required to request nondiscriminatory treatment and be refused before stating a claim under the Unruh Act. See *Ch. 116, Civil Rights: Discrimination in Business Establishments, § 116.11[9]*.

[1A] Housing Discrimination

Refusing Mortgage to Day Care Operator Stated Claim Under Unruh Act and FEHA. In *Sisemore v. Master Financial, Inc. (2007) 151 Cal. App. 4th 1386, 60 Cal. Rptr. 3d 719* , the court of appeal held that an allegation that a mortgage lender rejected a mortgage application because it did not lend on homes operating a day care for profit stated a claim under the Unruh Act, because arbitrary occupational discrimination is prohibited under the Act. The court also held that the allegations stated a claim under the FEHA for intentional discrimination on the basis of source of income, and on a disparate impact theory under *Gov. Code § 12955.8* by alleging that the lender's policies disproportionately affected women and families with children. Finally, a nonprofit housing corporation had standing to sue as an "aggrieved person" under FEHA because it alleged that it was required to divert scarce resources to address the lender's alleged wrongful conduct. See *Ch. 117, Civil Rights: Housing Discrimination, § 117.17[6]*.

[1B] Interference With Civil Rights

Bane Act Covers Interference With Right to Free Public Education. In *Austin B. v. Escondido Union Sch. Dist. (2007) 149 Cal. App. 4th 860, 57 Cal. Rptr. 3d 454* , the California Court of Appeal held that under the Bane Act, the constitutional right with which the defendant interferes can include the right to a free public education embodied in *Cal. Const., art. IX, § 5*. See *Ch. 117A, Civil Rights: Interference With Civil Rights by Threats, Intimidation, Coercion, or Violence, § 117A.11[e]*.

[2] Post-Civil War Statutes

No New *Bivens* Claim for Retaliation. In *Wilkie v. Robbins (2007)551U.S.537, 127 S. Ct. 2588, 168 L. Ed. 2d 389* , the United States Supreme Court held that a rancher did not have *Bivens* claims against officials of the Bureau of Land Management, because the rancher had a variety of administrative and judicial remedies to redress his injuries, and the Court would not create a new *Bivens* remedy to redress his injuries collectively on a theory of retaliation for exercising his property rights. See *Ch. 113, Civil Rights: The Post Civil War Statutes, § 113.14[7][e]*.

Claims Based on Publication of Attorney's Disciplinary History Were Time Barred. In *Canatella v. Van De Kamp (9th Cir. 2007) 486 F.3d 1128* , an attorney's claims under *42 U.S.C. § 1983* filed in 2005, based on the California State Bar's publication of summary of plaintiff's disciplinary history, were barred by California's one-year, rather than two-year, statute of limitations. The cause of action was more than one-year old as of the effective date of the two-year statute of limitations (January 1, 2003), because run plaintiff saw the summary in the print version of the bar journal in 2000, and knew or should have known that the same summary appeared on Internet website. See *Ch. 113, Civil Rights: The Post Civil-War Statutes, § 113.14[9][c]*.

Challenge to Extradition Procedures Not Subject to *Heck* Favorable Termination Rule. In *Weilburg v. Shapiro (9th Cir. 2007) 488 F.3d 1202* , the Ninth Circuit held that a challenge to extradition procedures under *42 U.S.C. § 1983* did not implicate the validity of the underlying conviction, so that the favorable termination rule of *Heck v. Humphrey* did not apply. See *Ch. 113, Civil Rights: The Post Civil-War Statutes, § 113.14[5]*.

Evidence Can Contradict Plaintiff's Version of Facts on Summary Judgment. In *Scott v. Harris (2007)550U.S.372, 127 S. Ct. 1769, 167 L. Ed. 2d 686* , the United States Supreme Court held that on a motion for summary judgment in a case arising under *42 U.S.C. § 1983*, when there have not yet been factual findings by a judge or jury, courts are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion. In qualified immunity cases, this usually means adopting the plaintiff's version of the facts. However, if there is undisputed evidence contradicting the plaintiff's version of the facts, such as a videotape of the events, so that no reasonable jury could believe the plaintiff's version of the facts, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment. See *Ch. 113, Civil Rights: The Post-Civil War Statutes, § 113.14[11][b]*.

No Attorney's Fees for Preliminary Injunction if No Permanent Injunction. In *Sole v. Wyner (2007)551U.S.74, 127 S. Ct. 2188, 167 L. Ed. 2d 1069* , the United States Supreme Court held that under *42 U.S.C. § 1988*, a plaintiff who obtains a preliminary injunction but is denied a permanent injunction after a dispositive hearing on the merits is not entitled to attorney's fees as a prevailing party. A final decision on the merits denying permanent injunctive relief ordinarily determines who prevails in the action for purposes of *42 U.S.C. § 1988(b)*. See *Ch. 113, Civil Rights: The Post-Civil War Statutes, § 113.17[2][b]*.

Statute of Limitations on False Arrest Starts to Run Once Plaintiff Subject to Legal Process. In *Wallace v. Kato (2007) 127 S. Ct. 1091* , the United States Supreme Court held that the statute of limitations on a § 1983 claim of false arrest commenced to run when the plaintiff appeared before the examining magistrate and was bound over for trial, rather than when the charges against him were ultimately dropped. Because state law provided a limitations period of two years, and more than two years elapsed between that date and the filing of suit, even leaving out the period before the plaintiff reached his majority, the action was time barred. See *Ch. 113, Civil Rights: The Post-Civil War Statutes, § 113.14[9][c]*.

[3] Prisoners' Rights

Exhaustion Rules Under PLRA Exceeded Judicial Authority. In *Jones v. Bock* (2007) 127 S. Ct. 910 , the United States Supreme Court held that the adoption by the Sixth Circuit of rules requiring a prisoner to allege and demonstrate

exhaustion of administrative remedies in the complaint, permitting suit only against defendants identified by the prisoner in an initial grievance, and requiring courts to dismiss an entire action if the prisoner failed to satisfy the exhaustion requirement as to any single claim in the complaint are not required by the PLRA, and crafting and imposing them exceeded proper limits on the judicial role. See *Ch. 114, Civil Rights: Prisoners' Rights, § 114.28[2]*.

No Cognizable Liberty Interests in Inmate Classification or Prison Publication Regulations. In *Myron v. Terhune (9th Cir. 2007) 476 F.3d 716* , the Ninth Circuit held that California prison regulations governing inmate classification did not create cognizable *Eighth* or *Fourteenth Amendment* liberty interests, because the classification of prisoners did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest. Further, a California regulation allowing inmates to participate in the publication and distribution of an inmate publication only with the institution head's specific approval did not create a liberty interest importing the *Fourteenth Amendment*, because a prison official's determination that a prisoner may not engage in the publication and distribution of an inmate publication also did not present the type of atypical significant deprivation in which a state might conceivably create a liberty interest. See *Ch. 114, Civil Rights: Prisoners' Rights, § 114.12[1]*.

Denial of Use of Comb-Binding Machine to Bind Petition for Certiorari Denied Access to Courts. In *Phillips v. Hust (9th Cir. 2007) 477 F.3d 1070* , a prison librarian's denial of the use of a comb-binding machine to an inmate filing a petition for certiorari with the United States Supreme Court, resulting in denial of the petition as untimely, contrary to the prison's established past practice, violated the inmate's right of access to the courts. The librarian was not entitled to qualified immunity, because the librarian violated the inmate's right of access to the courts when she arbitrarily denied him access to the comb-binder contrary to the consistent practice of the prison both before and after the event at issue, and both the right of access to the courts and the right not to be subjected to the arbitrary and selective enforcement of prison regulations were clearly established at the time of the librarian's action. See *Ch. 114, Civil Rights: Prisoners' Rights, § 114.13[3]*.

Felony Probation Does Not Take Away Right to Vote. In *League of Women Voters of California v. McPherson (2006) 145 Cal. App. 4th 1469, 52 Cal. Rptr. 3d 585* , the California Court of Appeal held that persons confined in local facilities as a condition of felony probation or persons for whom a felony offense is punishable by fine or imprisonment in county jail and the trial court enters judgment imposing something other than imprisonment in state prison, who are otherwise qualified to vote, are entitled to register and vote in elections. See *Ch. 114, Civil Rights: Prisoners' Rights, § 114.27*.

[4] Privacy

Litigation Privilege Applies to Action Under State Constitutional Right to Privacy. In *Jacob B. v. County of Shasta (2007) 40 Cal. 4th 948, 56 Cal. Rptr. 3d 477, 154 P.3d 1003* , the California Supreme Court held that the litigation privilege of *Civ. Code § 47(b)*, which generally protects from tort liability a publication made in connection with a judicial proceeding, protects against a cause of action based on California's constitutional right to privacy, and protected a letter that the supervisor of a county victim witness program wrote in connection with a family law proceeding involving visitation rights, which provided information regarding whether one of the persons being considered for visitation had molested his nephew one decade earlier. See *Ch. 429, Privacy, § 429.16[19]*.

No Standing to Bring Federal Privacy Action. In *Fleck & Assocs. v. City of Phoenix (9th Cir. 2006) 471 F.3d 1100* , the Ninth Circuit held that a federal trial court was required to dismiss for lack of jurisdiction based on lack of standing an action by a corporation that operated a gay men's social club, which alleged that the city's ban of live sex act businesses violated the corporation's federal privacy rights. The complaint failed to demonstrate that the corporation suffered a distinct and palpable injury to any cognizable corporate right of privacy, and the corporation did not have associational standing to assert the rights of its customers. See *Ch. 429, Privacy, § 429.330[2]*.

Disclosure of Medical Information to Persons Involved With Patient's Care Permitted. Under newly added *Civ.*

Code § 56.1007, a health care provider, service plan, or contractor may disclose to a family member, another relative, a domestic partner, or a close personal friend of the patient, or to any other person identified by the patient, medical information directly relevant to that person's involvement with the patient's care or payment related to the patient's care. See *Ch. 429, Privacy, § 429.200[4]*.

Disclosure of Medical Information to Persons Involved With Patient's Care Permitted. Under newly added *Civ. Code § 56.1007*, a health care provider, service plan, or contractor may disclose to a family member, another relative, a domestic partner, or a close personal friend of the patient, or to any other person identified by the patient, medical information directly relevant to that person's involvement with the patient's care or payment related to the patient's care. See *Ch. 429, Privacy, § 429.200[4]*.

California Privacy Statute Applicable to Telephone Calls May Be Applied to Calls Made From Another State. In *Kearney v. Salomon Smith Barney, Inc. (2006) 39 Cal. 4th 95* , the California Supreme Court held that *Pen. Code § 632*, which allows recording of a telephone conversation only if all parties agree, applies to a confidential communication that takes place partly in California and partly in another state that has a law requiring the permission of only one party. However, the Court permitted the plaintiffs to seek only injunctive relief in this particular case due to the uncertainty that would have existed prior to the Court's decision as to which state's law would govern. See *Ch. 429, Privacy, § 429.34[2]*.

Drug Testing of Ward Upheld. In *In re Carmen M. (2006) 141 Cal. App. 4th 478* , the court of appeal upheld a juvenile court order for the drug testing of a ward of the court who had a documented history of drug abuse, because the drug testing order in that case was narrowly tailored to require testing only if the staff of the minor's group home believed that the minor was under the influence. See *Ch. 429, Privacy, § 429.16[12][a]*.

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§ 1.107 Class Actions

Employees' Class-Arbitration Waiver Does Not Bar Class Arbitration of Claims for Overtime Pay, if *Class Arbitration Would Allow More Effective Vindication of Claims.* *The California Supreme Court in Gentry v. Superior Court (2007) 42 Cal. 4th 443* has held that a class-arbitration waiver in an employment arbitration agreement is not enforceable to preclude class arbitration by employees whose unwaivable statutory rights to overtime pay [*see Lab. Code §§ 500 et seq., 1194*] have allegedly been violated, if the trial court determines that class arbitration would be a significantly more effective way of vindicating the employees' rights than individual arbitration. See *Ch. 120, Class Actions, § 120.12[6]*.

Trial Court Ordinarily Should Resolve Procedural Class Issues Before Addressing Substantive Merits of Case. The California Supreme Court has reaffirmed the general rule that in a putative class action, the trial court ordinarily should decide whether class treatment is appropriate before the court adjudicates the merits of the case. The purpose of this general rule is to protect the defendant from "one-way intervention," under which potential class members could elect to stay in the class after a favorable merits ruling but opt out after an unfavorable merits ruling. However, the Supreme Court also noted that the class defendant may waive this protection by failing to object to merits adjudication or by actively seeking adjudication of the merits. And even in the absence of a waiver by the defendant, the trial court may decide class issues after a merits determination if there is a compelling justification for doing so, such as when the plaintiff makes a belated motion for class certification based on a change in circumstances occurring after a merits determination. See *Fireside Bank v. Superior Court (2007) 40 Cal. 4th 1069* , now *covered in Ch. 120, Class Actions, §§ 120.18[2], 120.41[3], 120.51[2]*.

Particularized Individual Liability Issues Prevent Class Certification. *A California Court of Appeal in Dunbar v. Albertson's, Inc. (2006) 141 Cal. App. 4th 1422* has affirmed a denial of class certification, in an action seeking overtime compensation based on a claim that a putative class of grocery managers had been misclassified as executive employees exempt from the overtime wage laws. The denial of class treatment was based not on the mere presence of individual liability issues--i.e., the need to establish that each grocery manager had been misclassified as an executive--but on the significant variation in the grocery managers' work from store to store, and from week to week. Thus, establishing liability required very particularized individual liability determinations that predominated over common issues. See *Ch. 120, Class Actions, § 120.12[2][b], [4]*.

Proposed Class Does Not Meet Ascertainability Requirement if Class Definition Rests on Determination of Liability. A California Court of Appeal has held that class certification is not appropriate when the proposed class definition is not based on objective criteria, but instead requires a merits-based determination in order to establish whether a particular person is a member of the class. See *Sony Elecs. Inc. v. Superior Court (2006) 145 Cal. App. 4th 1086* , now *covered in Ch. 120, Class Actions, § 120.12[3]*.

Court May Order Precertification Notice to Prospective Class Members To Enable Them to Protect Their Privacy. The California Supreme Court has held that although pre-certification notice to prospective class members is not generally authorized or required, if prospective class members' identifying information is disclosed in precertification discovery, it may be appropriate for a court to order that notice be provided to prospective class members so that they may take steps to protect their privacy. See *Pioneer Elecs. (USA) Inc. v. Superior Court (2007) 40 Cal. 4th 360* , now *covered in Ch. 120, Class Actions, §§ 120.19[1], 120.41[6]*.

Judgment Denying Class Certification May Have Issue-Preclusive Effect on Subsequent Putative Class Action. A California Court of Appeal has held that a judgment denying class certification in one action will preclude relitigation of the class-certification issue in a subsequent action brought by a different plaintiff, if all of the requirements for the application of collateral estoppel are met. See *Alvarez v. May Dept. Stores Co. (2006) 143 Cal. App. 4th 1223* , now *covered in Ch. 120, Class Actions, §§ 120.20[1], 120.23[2]*.

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§ 1.107A Constitutional Law

New Chapter on Constitutional Law. This publication is updated with a new chapter on constitutional law. This new chapter provides a comprehensive review of the structure of the California constitution, with reference to corresponding United States Constitution provisions. Topics of analysis include division of powers among state government and between state and federal governments, governmental powers, substantive civil constitutional rights, procedural due process, equal protection and privileges and immunities, and procedures for challenging the constitutionality of laws or governmental actions. This chapter also identifies constitutional law issues that exist throughout other areas of law. With extensive cross referencing to other topics and chapters, this new chapter acts as a gateway for finding focused constitutional law analysis and forms on specific topics and fact patterns. See Ch. 126A, *Constitutional Law* .

Litigation Privilege Applies to Action Under State Constitutional Right to Privacy. In *Jacob B. v. County of Shasta (2007) 40 Cal. 4th 948, 56 Cal. Rptr. 3d 477, 154 P.3d 1003* , the California Supreme Court held that the litigation privilege of *Civ. Code § 47(b)*, which generally protects from tort liability a publication made in connection with a judicial proceeding, protects against a cause of action based on California's constitutional right to privacy, and protected a letter that the supervisor of a county victim witness program wrote in connection with a family law proceeding involving visitation rights, which provided information regarding whether one of the persons being considered for visitation had molested his nephew one decade earlier. See *Ch. 429, Privacy, § 429.16[19]*.

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§ 1.107B Contempt

Direct Contempt Order Must Describe Prior Order. In *In re Ringgold (2006) 142 Cal. App. 4th 1001* , the court holds that if an adjudication of direct contempt is based on the violation of a prior order, the written direct contempt order must describe the prior order. See *Ch. 135, Contempt, § 135.31[3]*.

Direct Contempt Order Must Describe Prior Order. In *Goold v. Superior Court (2006) 145 Cal. App. 4th 1* , the court holds that *Code Civ. Proc. § 1218(a)* authorizes a trial court to award attorney's fees and costs to the complainant in all contempt proceedings, including those involving violations of Family Code orders that are otherwise punishable under *Code Civ. Proc. § 1218(c)*. See *Ch. 135, Contempt, § 135.33[3], [4][f]*.

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§ 1.107C Contracts and Commercial Law

Electronic Funds Transfers --Division 11 of California Commercial Code. Detailed coverage of Division 11 of the California Commercial Code [*Com. Code § 11101 et seq.*], covering electronic funds transfers, has been added to Ch. 95, *Banks, Deposits, and Checks* in this release (Release 170). Division 11, which is derived from UCC Article 4A, governs a specialized method of payment commonly referred to in the banking community as a wholesale wire transfer. A funds transfer that is subject to Division 11 typically comprises a series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order. A funds transfer is completed on acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's payment order [*Com. Code § 11104(a)*]. The added coverage discusses the scope of Division 11, the funds transfer process, and the nature and incidents of payment orders. It incorporates the detailed rules set forth in Division 11, as well as the explanatory materials in the Official UCC Comments and the limited California case law that exists under Division 11. See Ch. 95, *Banks, Deposits* , and Checks.

Art--Sale of Work Is Protected Speech. In *White v. City of Sparks (9th Cir. 2007) 500 F.3d 953, 2007 U.S. App. LEXIS 20621* , the Ninth Circuit held that an artist's sale of his or her original artwork constitutes speech protected under the *First Amendment*. See *Ch. 57, Art, § 57.98*.

Contracts--Acceptance of New Terms Posted on Web Site. In *Douglas v. United States Dist. Court (9th Cir. 2007) 495 F.3d 1062* , the Ninth Circuit considered (for the first time by any federal court of appeals) whether to enforce a modified consumer service contract when the customer claimed that the only notice of the modified terms consisted of posting the revised contract on the service provider's web site. The court concluded that the revised contract could not be enforced unless the customer received proper notice of how the contract had been changed, and then signified assent to the changes. See *Ch. 140, Contracts, § 140.22[5][f]*.

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§ 1.108 Corporations

Foreign Corporations--Transaction of Intrastate Business. *Corp. Code § 191(b)* has been amended to provide that a foreign corporation is not considered to be transacting intrastate business merely because of its status as shareholder, partner, or member of another entity. See *Ch. 160, Corporations: Capacity, § 160.54[3]*.

Listed Corporations--Election of Directors. New *Corp. Code § 708.5* provides that a listed corporation that has eliminated cumulative voting may amend its articles or bylaws to require approval of the shareholders to elect a director in an uncontested election. See *Ch. 166, Corporations: Shareholders' Meetings and Voting, § 166.30[1]*; *Ch. 167, Corporations: Directors and Management, § 167.12[2]*.

Public Benefit Corporations--Election of Directors. *Corp. Code § 5220(a)* has been amended to provide that directors in public benefit corporations may now be elected for terms of up to four years. See *Ch. 388, Nonprofit Corporations, § 388.110[1]*.

Franchise Tax Liability--Corporate Conversions and Dissolutions. *Corp. Code § 1155(e)* has been amended to eliminate the requirement that a statement or certificate of conversion may be filed with the Secretary of State only after the converting corporation files a Franchise Tax Board certificate of satisfaction of tax liability. See *Ch. 169, Corporations: Reorganizations, § 169.16[6]*. Similarly, *Corp. Code § 1905* has been amended to require a certificate of dissolution to state, relative to franchise tax liability, merely that a final franchise tax return has been or will be filed. See *Ch. 170, Corporations: Dissolution, § 170.63*.

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§ 1.109 Costs and Attorney's Fees

Trial Court, Not Arbitration, Was Venue to Resolve Claim for Attorney's Fees. In *Acosta v. Kerrigan (2007) 150 Cal. App. 4th 1124* , a California appellate court held that when a trial court is responsible for deciding a petition to compel arbitration, it also is responsible for resolving a claim for attorney fees made in connection with that petition to compel arbitration, and that attorney's fees were properly awarded at the interim stage of granting the petition to compel arbitration. See Ch. 174, *Costs and Attorney's Fees* .

Sublessees Entitled to Attorney's Fees After Voluntary Dismissal of Unlawful Detainer. In *Drybread v. Chipain Chiropractic Corp (2007) 151 Cal. App. 4th 1063* , after sublessors dismissed an unlawful detainer action against sublessees without prejudice, the sublessees were entitled to attorney's fees under the attorney's fees provision in the sublease, despite the limitation of *Civ. Code § 1717(b)(2)* which precludes attorney's fees when a complaint is voluntarily dismissed. The attorney's fees clause was broad enough to encompass noncontract claims, and plaintiffs pleaded a tort-based claim based on unlawful holdover possession after expiration of the lease, not on a breach of the lease. See Ch. 174, *Costs and Attorney's Fees* .

Sheriffs' Association Entitled to Private Attorney General Attorney's Fees Award for Enforcing Right Under POBRA. In *Riverside Sheriffs' Assn. v. County of Riverside (2007) 152 Cal. App. 4th 414* , the trial court did not abuse its discretion in finding that an award of attorney's fees under *Code Civ. Proc. § 1021.5* was proper in an action by a sheriffs' association under the Peace Officers' *Bill of Rights* Act [*Gov. Code § 3303*] to enforce the right of representation for sheriffs during a criminal investigation of sexual improprieties with female inmates, because *Gov. Code § 3309.5(3)* did not provide the sole authority for a fee award in an action under POBRA, and the action secured an important right affecting the public interest. See Ch. 174, *Costs and Attorney's Fees* .

***Code Civ. Proc. § 1021.5* Does Not Allow Award of Expert Witness Fees and Other Costs.** In *Benson v. Kwikset Corp. (2007) 152 Cal. App. 4th 1254* , the trial court did not abuse its discretion in denying plaintiff over $400,000 in fees for retained expert witnesses and investigators, plus charges for long distance telephone calls, copying, faxes, overnight deliveries, messenger services, and other miscellaneous expenses. The general costs statute applied and precluded recovery of expert witness fees and other expenses except when expressly authorized by law. See Ch. 174, *Costs and Attorney's Fees* .

Taxpayers Not Entitled to Attorney's Fees on Common Fund or Substantial Benefit Theory. In *Abouab v. City and County of San Francisco (2006) 141 Cal. App. 4th 643* , taxpayers petitioned for a writ of mandamus to compel a city to recognize a change in property ownership, which would result in a substantial increase in property taxes collected from the property. The taxpayers then sought attorney's fees under both the common fund and substantial benefit theory. The Court of Appeal held that although the catalyst theory could apply to the common fund and substantial benefit theories, the taxpayers were not entitled to attorney's fees under either theory even though the city eventually assessed increased property taxes against the property. The taxpayers were not prevailing parties, because there was no favorable result in the writ proceeding; under the catalyst theory, the taxpayers did not meet their burden of having given the city presuit notification; and the trial court did not abuse its discretion in finding that there was no sound basis to find that the taxpayers were more than an initial impetus behind the creation of the benefit. See *Ch. 174, Costs and Attorney's Fees, § 174.55[1], [2]*.

Dismissed Defendant Must Obtain Order or Judgment of Dismissal to Be Awarded Costs. In *Boonyarit v. Payless Shoesource, Inc. (2006) 145 Cal. App. 4th 1188, 52 Cal. Rptr. 3d 241* , a negligence action in which plaintiff voluntarily dismissed one defendant, the trial court erred in awarding that defendant costs as a "prevailing party" under *Code Civ. Proc. § 1032(a)(4)*, because no order or judgment of dismissal was entered. See Ch. 174, *Costs and Attorney's Fees* .

Home Buyer Entitled to Costs and Attorney's Fees. In *Wakefield v. Bohlin (2006) 145 Cal. App. 4th 963, 52 Cal. Rptr. 3d 400* , an action by a home buyer against the sellers for fraud and negligent misrepresentation, the Court of Appeal held that, as to costs, despite good faith settlements with other defendants, the buyer obtained a net monetary recovery against one seller and thus was categorically entitled to costs under *Code Civ. Proc. § 1032*. As to the seller's wife, who was also a defendant, although the jury entered verdicts in her favor so that she categorically qualified as a prevailing party, the unity of interest exception applied. As to attorney's fees, although fees were not available under the contract because the cause of action was in tort, under *Code Civ. Proc. § 1033.5*, the buyer was the prevailing party and entitled to a fees award, because he obtained a jury verdict and monetary award against the one seller on the negligent misrepresentation claim, and the other seller was not a prevailing seller, because the contract plainly contemplated that either buyer or seller would prevail. See Ch. 174, *Costs and Attorney's Fees* .

Real Estate Sellers Entitled to Attorney's Fees Without Mediation. In *Van Slyke v. Gibson (2007) 146 Cal. App. 4th 1296, 53 Cal. Rptr. 3d 491* , an action based on a real estate transaction, the prevailing sellers were entitled to an attorney's fees award under the standard California Residential Purchase Agreement attorney's fee provisions, which provided that the buyer and seller agreed to mediate any dispute or claim arising between them out of the agreement or any resulting transaction, before resorting to arbitration or court action. The sellers did not have to seek mediation because they sought fees for their defense of the buyer's action, not for prosecution of their cross-complaint, and the sellers' attorney telephoned the buyer's attorney and proposed arbitration and mediation but was rebuffed and the sellers the in a pretrial brief confirmed they offered arbitration and mediation to the buyer but he rejected those alternatives. See Ch. 174, *Costs and Attorney's Fees* .

§ 998 Applies to Actions Under Song-Beverly Act. In *Duale v. Mercedes-Benz USA, LLC (2007) 147 Cal. App. 4th 880, 54 Cal. Rptr. 3d 711* , an action under the Song-Beverly Act seeking rescission of the contract for the sale of a car, contract revocation and damages and penalties, *Code Civ. Proc. § 998* operated to cut off the recovery of post-offer attorney's fees and costs for otherwise prevailing plaintiffs who failed to obtain a judgment more favorable than the offer made by defendants under § 998, despite being the prevailing parties under the Song-Beverly Act attorney's fees provision. Even though the cost-shifting feature of the Song-Beverly Act was more the specific statute, it did not trump or supersede the provisions of § 998 because the two could be reconciled. See Ch. 174, *Costs and Attorney's Fees* .

Attorney's Fees Under *Code Civ. Proc. § 1021.5* Proper for Relief Through Preliminary Injunction. In *County of Colusa v. California Wildlife Conservation Bd. (2006) 145 Cal. App. 4th 637* , the trial court did not abuse its discretion

in finding that a county was the successful party against state agencies on a cause of action alleging that the state agencies failed to follow the notice procedures of the Williamson Act and failed to make the required findings prior to approving the acquisition of a conservation easement on private property for public use in ruling on a motion for a preliminary injunction. The practical result of the county's lawsuit was an agreement regarding the easement, which excused the findings requirement and apparently satisfied the county's notice concerns. See Ch. 174, *Costs and Attorney's Fees* .

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§ 1.110 Discovery

[1] Depositions

Revised Rules of Court Requirements for Ex Parte Applications. *Cal. Rules of Ct., Rule 3.1201* slightly changed the requirements for ex parte applications. See *Ch. 193, Discovery: Depositions, § 193.221[3][a]*.

[2] Interrogatories

Discovery: Court's Authority to Hear Motion to Compel Response to Interrogatories Under *Code Civ. Proc. § 2030.290(b)*. In *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants (2007) 148 Cal. App. 4th 390* , the court of appeal held that the mere service of an untimely interrogatory response, which may or may not reflect a good faith effort to comply with the party's discovery obligations, does not divest the trial court of authority to hear and grant a motion to compel responses under *Code Civ. Proc. § 2030.290(b)*. That decision rests on the court's "sound discretion." See *Ch. 194, Interrogatories, §§ 194.16[1], 194.19, 194.21*.

[3] Privileges

Discovery of Police Officer Personnel Records. In *Garcia v. Superior Court (City of Santa Ana) (2007) 42 Cal. 4th 63* , the California Supreme Court affirmed that a criminal defendant may file a declaration under seal in support a *Pitchess* motion on the grounds that it contains information protected from disclosure by the attorney-client privilege and attorney work protection. The court outlined the procedures a trial court should follow when faced with a sealed declaration or affidavit in support of a *Pitchess* motion. See Ch. 191, *Discovery : Privileges and Other Discovery Limitations*, § 191.153[13].

Evidence Code Established a Human Trafficking Victim-Caseworker Privilege. *Evid. Code § 1038* establishes a human trafficking victim-caseworker privilege. A trafficking victim, whether or not a party to the action, has a qualified privilege to refuse to disclose, or to prevent another from disclosing, a confidential communication between the victim and the caseworker. See *Ch. 191, Discovery: Privileges and Other Discovery Limitations, § 191.80[7]*.

[4] Scope, Regulation, and Timing

Non-Party Insurer's Financial Information Is Not Discoverable Under *Code Civ. Proc. § 2017.210*. In *Catholic Mut. Relief Soc'y v. Superior Court (2007) 42 Cal. 4th 358* , the California Supreme Court held that *Code Civ. Proc. § 2017.210* does not authorize discovery of reinsurance policies by an injured plaintiff to facilitate settlement of the underlying tort action. See *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.21[1]*.

Requests for Admissions Cannot Be Used in SVPA Cases. In *Murillo v. Superior Court (2006) 143 Cal. App. 4th 730* , the Fourth Appellate District held, as a matter of first impression, that requests for admissions may not be propounded in Sexually Violent Predator Act (SVPA) proceedings because their use would eviscerate the SVPA's requirement that the state prove its case beyond a reasonable doubt and, when the case is tried to a jury, obtain a unanimous verdict before a person may be committed. See *Ch. 190, Discovery: Scope, Regulation and Timing, § 190.11[3][c]*.

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§ 1.111 Elections

California Voting Rights Act of 2001 Not Subject to Strict Scrutiny. In *Sanchez v. City of Modesto (2006) 145 Cal. App. 4th 660* , the court of appeal held that the California Voting Rights Act of 2001 (CVRA) is not facially invalid and passes rational-basis review. The CVRA is race-neutral because it does not favor any race over others or allocate burdens or benefits to any groups on the basis of race. Curing vote dilution is a legitimate government interest and creation of a private right of action like that in the CVRA is rationally related to that interest. See *Ch. 243, Elections, § 243.19*.

Legislature Cannot Combine Unrelated Changes in Single Constitutional Amendment. In *Californians for an Open Primary v. McPherson (2006) 38 Cal. 4th 735* , the court held that the Legislature's proposed submission, in a single constitutional amendment, of two changes to the state Constitution that are not germane to a common theme, purpose, or subject, violated the separate-vote requirement of *Cal. Const., art. XVIII, § 1*. See *Ch. 302, Initiative, Referendum, and Recall, § 302.12[2][f]*.

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§ 1.112 Employment

[1] Civil Service

Same Official May Initiate Disciplinary Proceedings and Conduct *Skelly* Hearing for Public Employee. A California Court of Appeal has held that an official who initiates disciplinary proceedings against a public employee may also serve as the hearing officer at the employee's *Skelly* hearing, at which the employee has the opportunity to respond to the charges on which the proposed discipline is based. See *Flippin v. Los Angeles City Bd. of Civil Serv. Comm'rs (2007) 148 Cal. App. 4th 272* , now *covered in Ch. 118, Civil Service, § 118.13[3]*.

[1A] Discrimination

Title VII Limitations Period Runs From Time of Discriminatory Act and Is Not Extended Merely Because Subsequent Events Entail Adverse Consequences of Discriminatory Act. The United States Supreme Court has held that if an employer's intentionally discriminatory pay raise decision results in lower paychecks for an employee, the employee must file a Title VII charge within the applicable 180- or 300-day period after the pay raise decision [*see 42 U.S.C. § 2000e-5(e)(1)*]; once the applicable limitations period has lapsed, a charge cannot be based on the mere fact that paychecks issued within the limitations period entail adverse effects resulting from the past discriminatory pay raise decision. See *Ledbetter v. Goodyear Tire & Rubber Co*. (2007) 127 S. Ct. 2162 , now *covered in Ch. 115, Civil Rights: Employment Discrimination, §§ 115.23[2][b], 115.51[2][a]*.

Same-Sex Harassment May Consist of Attack on Victim's Sexual Identity. *A California Court of Appeal in Singleton v. United States Gypsum Co. (2006)140 Cal. App. 4th 1547* has held that harassment between members of the same sex can be "because of sex" if it involves an attack on the plaintiff's sexual identity. Moreover, there is no requirement that the motive for the harassment be sexual in nature; sexual harassment occurs when sex is used as a weapon to create a hostile work environment. See *Ch. 115, Civil Rights: Employment Discrimination, §§ 115.22[4][b], 115.36[5][a]*.

Procedures For Administrative Claims Under FEHA Clarified. California Courts of Appeal in *Blum v. Superior Court (2006)141 Cal. App. 4th 418* and *Wasti v. Superior Court (2006) 140 Cal. App. 4th 667* have issued decisions clarifying procedural requirements for administrative claims of employment discrimination filed with the Department of Fair Employment and Housing. One court held that the verification requirement for an administrative complaint can be

satisfied by the signature of the aggrieved person's attorney. Another court ruled that if an aggrieved employee files an administrative complaint and immediately requests a right-to-sue letter, the administrative complaint need not be served on the employer. See *Ch. 115, Civil Rights: Employment Discrimination, § 115.51[1][c]*.

Employer May Terminate Employee Who Is Unable to Work After Completion of Family Leave. A California Court of Appeal has held that the California Family Rights Act's guaranty of an employee's reinstatement after returning from family and medical care [*see Gov. Code § 12945.2*(*l*)] is not violated by an employer that terminates an employee who is unable to return to work at the completion of the maximum available leave. See *Neisendorf v. Levi Strauss & Co. (2006) 143 Cal. App. 4th 509* , now *covered in Ch. 115, Civil Rights: Employment Discrimination, § 115.32[6][a], [h]*.

Federal Immigration Reform and Control Act Does Not Preempt California Law. The Ninth Circuit has held that the federal Immigration Reform and Control Act (IRCA), which forbids employers from knowingly employing unauthorized aliens [*see 8 U.S.C. § 1324a(a)(2)*], does not preempt California statutes that make employment-law protections available to all individuals regardless of immigration status [*see Civ. Code § 3339*; *Gov. Code § 7285*; *Lab. Code § 1171.5*], at least not when an employer can comply with the IRCA without creating a conflict with state law. See *Incalza v. Fendi N. Am., Inc. (9th Cir. 2007) 479 F.3d 1005* , now *covered in Ch. 115, Civil Rights: Employment Discrimination, §§ 115.22[3], 115.54[2],* and *Ch. 249, Employment Law: Termination and Discipline, § 249.21[19]*.

Employer Has Duty to Take Steps to Prevent Unlawful Retaliation Against Employees. A California Court of Appeal has held that Fair Employment and Housing Act requires employers to take all reasonable steps necessary to prevent unlawful retaliation against employees who engage in activity protected under the Act. See *Taylor v. City of Los Angeles Dept. of Water & Power (2006) 144 Cal. App. 4th 1216* , now *covered in Ch. 115, Civil Rights: Employment Discrimination, §§ 115.37[1][a], [3][a], 115.94*.

[2] Termination and Discipline

Employees' Class-Arbitration Waiver Does Not Bar Class Arbitration of Claims for Overtime Pay, if *Class Arbitration Would Allow More Effective Vindication of Claims.* *The California Supreme Court in Gentry v. Superior Court (2007) 42 Cal. 4th 443* has held that a class-arbitration waiver in an employment arbitration agreement is not enforceable to preclude class arbitration by employees whose unwaivable statutory rights to overtime pay [*see Lab. Code §§ 500 et seq., 1194*] have allegedly been violated, if the trial court determines that class arbitration would be a significantly more effective way of vindicating the employees' rights than individual arbitration. See *Ch. 115, Civil Rights: Employment Discrimination, § 115.55[2]*; *Ch. 120, Class Actions, § 120.12[6]*; *Ch. 249, Employment Law: Termination and Discipline, § 249.21[16]*; and Ch. 250, *Employment Law: Wage and Hour Disputes* , §§ 250.12[1], 250.34[1][a].

Physician May Be Terminated for Failure to Comply With Employer's Directives That Are Medically Appropriate. A California Court of Appeal has held that, although public policy prohibits the termination of a physician for advocating for medically appropriate health care [*see Bus. & Prof. Code § 2056(c)*], an employer may terminate a physician for refusing to comply with the employer's directives that are themselves medically appropriate. See *Sarka v. Regents of Univ. of Cal. (2006) 146 Cal. App. 4th 261* , now *covered in Ch. 249, Employment Law: Termination and Discipline, § 249.12[4]*.

Federal Immigration Reform and Control Act Does Not Preempt California Law. The Ninth Circuit has held that the federal Immigration Reform and Control Act (IRCA), which forbids employers from knowingly employing unauthorized aliens [*see 8 U.S.C. § 1324a(a)(2)*], does not preempt California statutes that make employment-law protections available to all individuals regardless of immigration status [*see Civ. Code § 3339*; *Gov. Code § 7285*; *Lab. Code § 1171.5*], at least not when an employer can comply with the IRCA without creating a conflict with state law. See *Incalza v. Fendi N. Am., Inc. (9th Cir. 2007) 479 F.3d 1005* , now *covered in Ch. 115, Civil Rights: Employment*

Discrimination, §§ 115.22[3], 115.54[2], and *Ch. 249, Employment Law: Termination and Discipline, § 249.21[19].*

[3] Wage and Hour Disputes

Employer May Deduct Expenses From Gross Income to Determine "Profit" for Purposes of Employee Profit-Sharing Plan. *The California Supreme Court in Prachasaisoradej v. Ralphs Grocery Co. (2007) 42 Cal. 4th 217, 64 Cal. Rptr. 3d 407* has held that the deduction of an employer's expenses from gross receipts to calculate net profits for purposes of an employee profit-sharing program does not run afoul of the statutory and regulatory prohibitions against unauthorized deductions from wages [*see, e.g., Lab. Code §§ 221-224, 400-410, 3751(a)*; *8* Cal. Code Reg. § 11070(8)], so long as no unauthorized deductions are made from employees' *regular* wages. See *Ch. 250, Employment Law: Wage and Hour Disputes, § 250.20[1].*

Employees' Class-Arbitration Waiver Does Not Bar Class Arbitration of Claims for Overtime Pay, if *Class Arbitration Would Allow More Effective Vindication of Claims.* *The California Supreme Court in Gentry v. Superior Court (2007) 42 Cal. 4th 443* has held that a class-arbitration waiver in an employment arbitration agreement is not enforceable to preclude class arbitration by employees whose unwaivable statutory rights to overtime pay [*see Lab. Code §§ 500 et seq., 1194*] have allegedly been violated, if the trial court determines that class arbitration would be a significantly more effective way of vindicating the employees' rights than individual arbitration. See *Ch. 115, Civil Rights: Employment Discrimination, § 115.55[2]*; *Ch. 120, Class Actions, § 120.12[6]*; *Ch. 249, Employment Law: Termination and Discipline, § 249.21[16]*; and Ch. 250, *Employment Law: Wage and Hour Disputes* , §§ 250.12[1], 250.34[1][a].

No Limit on Terminated Employee's Claim for Unused Vacation. A California Court of Appeal has held that there is no limit on years of vested, unused vacation time that terminated employee may claim under *Lab. Code § 227.3*; rejecting the reasoning of the Division of Labor Standards Enforcement, the court held that the statute of limitations only limits the time in which the employee may file suit after the termination of employment. See *Church v. Jamison (2006) 143 Cal. App. 4th 1568* , now *covered in Ch. 250, Employment Law: Wage and Hour Disputes, §§ 250.16[2][c], 250.34[1][b],* and *Ch. 531, Statutes and Ordinances, § 531.67[1].*

Three-Year Limitations Period Applies to Employee's Claim for Pay Covering Missed Rest and Meal Periods. The California Supreme Court in *Murphy v. Kenneth Cole Prods., Inc. (2007) 40 Cal. 4th 1094* has held that the three-year limitations period of *Code Civ. Proc. 338(a)* applies to an employee's claim under *Lab. Code § 226.7(b)* for additional pay based on the employer's failure to provide requisite meal periods or rest periods. See, now *covered in Ch. 250, Employment Law: Wage and Hour Disputes, §§ 250.32[4][b], 250.34[1][b],* and *Ch. 531, Statutes and Ordinances, §§ 531.62, 531.65[3], 531.67[1].*

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§ 1.112A Equity

New Chapter on Equity. This publication is updated with a new chapter on equity. This new chapter provides a comprehensive review of this overarching principle of law. Topics of analysis include the nature, jurisdiction, and principles of equitable power; equitable causes of action; equitable remedies; defenses to actions in equity; equitable defenses of general application; specific equitable relief against particular wrongs; and proceedings for relief in equity. This chapter also identifies equitable issues that exist throughout other areas of law. With extensive cross referencing to other topics and chapters, this new chapter acts as a gateway for finding focused equity analysis and forms on specific topics and fact patterns. See Ch. 251, *Equity* .

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§ 1.113 Insurance

Interpretation of Insurance Contracts Under *Civ. Code § 1646*. In *Frontier Oil Corp. v. RLI Ins. Co. (2007) 153 Cal. App. 4th 1436* , an appellate court held that pursuant to the choice-of-law rule in *Civil Code § 1646*, California law governed the interpretation of a commercial general liability policy for oil and gas operations in California that was executed in Texas. See *Ch. 308, Insurance, § 308.22*.

Indemnitee's Failure to Tender Defense to Indemnitor Does Not Bar Recovery of Defense Costs. In *City of Watsonville v. Corrigan (2007) 149 Cal. App. 4th 1542* , the court of appeal held that if an indemnitor does not offer to provide a defense, the fact that an indemnitee provides its own defense without first tendering defense of the action to the indemnitor will not preclude the indemnitee from recovering its defense costs, at least in the absence of language in the indemnity agreement that demonstrates a contrary intent. See *Ch. 300, Indemnity and Contribution, § 300.41[2][a]*.

Settlement for Amount of Limitation of Liability Clause Not in Good Faith. In *TSI Seismic Tenant Space, Inc. v. Superior Court (2007) 149 Cal. App. 4th 159* , the court of appeal held that a settlement between a plaintiff and one defendant for the $50,000 amount specified by a pre-existing limitation of liability clause should not have been found to have been in good faith pursuant to *Code Civ. Proc. § 877.6*, because the settling defendant's proportionate share of culpability in relation to the amount of potential damages was vastly greater. See *Ch. 300, Indemnity and Contribution, § 300.73[5][b]*.

Allocation of Primary and Excess Insurance. *Ins. Code § 11580.9* has been amended to allocate primary and excess insurance coverage for a power unit and attached trailer. See *Ch. 88, Automobiles: Automobile Insurance, § 88.17[10]*.

Restrictions on Indemnity Agreements Between Public Entities and Design Professionals. Under newly added *Civ. Code § 2782.8*, for contracts or contractual amendments made after 2006 between a public agency and a design professional such as an architect, landscape architect, professional engineer, or land surveyor, agreements purporting to require the design professional to indemnify the public agency are unenforceable except to the extent that the design professional agrees to be liable for the design professional's own negligence, recklessness, or willful misconduct. See *Ch. 300, Indemnity and Contribution, § 300.34[2]*.

Nature of Underlying Action Relevant in Subrogation. In *State Farm General Insurance Co. v. Wells Fargo Bank, N.A. (2006) 143 Cal. App. 4th 1098* , the court held that in applying the doctrine of superior equities in a subrogation action, the nature of the underlying cause of action is a relevant factor in balancing the respective equities of the parties. See *Ch. 536, Subrogation, § 536.17[2]*.

Insurer Not Required to Cover Costs and Attorney's Fees Assessed Against Insured for Willful Act. In *Combs v. State Farm Fire & Cas. Co. (2006) 143 Cal. App. 4th 1338* , the court of appeal held that if *Ins. Code § 533* precludes the duty of indemnity, it also prevents coverage for the insured's costs of suit, such as attorney's fees. See *Ch. 308, Insurance, § 308.115[2]*.

Automobile Insurance. In State Farm *Mut. Auto. Ins. Co. v. Progressive Marathon Ins. Co. (2007) 148 Cal. App. 4th Supp. 1* , the court held that "liability loss" within the meaning of *Ins. Code § 11580.9(d)* (which determines primary liability coverage among policies when one policy describes or rates leased automobile as "owned") includes uninsured motorist coverage. See *Ch. 88, Automobiles: Automobile Insurance, § 88.17[3][a]*.

Prop. 51 Inapplicable to Strict Liability Action Based on Single Product. In *Bostick v. Flex Equipment Co., Inc. (2007) 147 Cal. App. 4th 80* , the court of appeal held that Proposition 51 does not apply to a strict product liability action when the plaintiff's injuries are caused solely by a single defective product and all of the defendants are in the same chain of distribution. See *Ch. 300, Indemnity and Contribution, § 300.63[3][c][v]*.

Sovereign Immunity Prevents Assigning Percentage of Fault to Public Entity. In *Munoz v. City of Union City (2007) 148 Cal. App. 4th 173* , the court of appeal held that when no statutory basis exists for imposing liability on a public entity, no percentage of fault can be attributed to a public entity under Proposition 51 regardless of whether the entity is named as a defendant in the suit. See *Ch. 300, Indemnity and Contribution, § 300.63[3][d]*.

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§ 1.113A Intellectual Property

Copyright Infringement--Contributory or Vicarious Liability. In *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n (9th Cir. 2007) 494 F.3d 788* , the Ninth Circuit held that a credit card company is not liable for contributory or vicarious copyright infringement merely because the company, with knowledge that certain websites sell content wrongly appropriated from a copyright holder, refuses to stop processing credit card payments to those websites by Internet users. See *Ch. 349, Literary Property and Copyright, § 349.27[1][b], [c]*.

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§ 1.114 Family Law

[1] Adoptions

Presumed Fathers. Under the UPA, as interpreted in the case of *Gabriel P. v. Suedi D. (2006) 141 Cal. App. 4th 850* , fathers are classified as "alleged," "biological," and "presumed" fathers. A presumed father has greater rights than an alleged or biological father. See *Ch. 12, Adoption: Termination of Parental Rights, § 12A.15[2]*.

Termination of Parental Rights. Parental rights may be terminated under *Fam. Code § 7825* only when parent's unfitness is demonstrated by facts underlying the felony conviction; mere existence of felony conviction is not sufficient to prove parental unfitness. See *In re Baby Girl M. (2006) 135 Cal. App. 4th 1528* , now *covered in Ch. 12, Adoption: Termination of Parental Rights, § 12A.104[1]*.

[2] Community Property

Scope of Interspousal Fiduciary Duties. *In re Marriage of Walker (2006) 138 Cal. App. 4th 1408* holds that the 2002 amendments to *Fam. Code § 721*, which based scope of spousal fiduciary duty on duties that did not exist before the 2002 amendments, makes *Fam. Code § 721* retroactive, to extent that *Corp. Code §§ 16403, 16404*, and *16503* impose greater duties on partners than did former *Corp. Code §§ 15019-15022*. See *Ch. 122, Community Property, § 122.51[4][a]*.

Presumption of Undue Influence. In *In re Marriage of Balcof (2006) 141 Cal. App. 4th 1509* , the court found that the presumption of undue influence was not rebutted when wife secured husband's agreement to transfer 20 percent of his separate property corporation and his share of marital residence to her as result of her threats and numerous instances of verbal and physical abuse directed at husband. See Ch. 122, *Community Property* , § 122.5[4][d].

No Presumption of Undue Influence Based on Facts. *In re Marriage of Burkle (2006) 139 Cal. App. 4th 712* holds that a presumption of undue influence does not arise in interspousal transaction unless one spouse obtains unfair advantage or obtains property for which no or clearly inadequate consideration has been given, and does not apply to postmarital agreement in which both spouses obtain advantages, both are represented by counsel, each is offered full access to other's records relating to marital assets, and both acknowledge in agreement that neither has obtained unfair

advantage from agreement. See *Ch. 122, Community Property, § 122.71[4]*.

No Presumption of Undue Influence in Mediated Marital Agreements. *In re Marriage of Kieturakis (2006) 138 Cal. App. 4th 56* holds that a presumption of undue influence applies to unequal marital settlement agreements but not to marital settlement agreements reached through mediation, agreements in which parties acknowledge that no undue influence was exercised, or when undue influence is alleged with respect to judgment that has long been final. See *Ch. 122, Community Property, § 122.71[4][a]*.

[3] Dissolution of Marriage

Alternate Property Valuation Date. When a party precludes experts from valuing property as of date of trial by failing to provide needed information, *e.g.*, due to poor record-keeping, the court may value property as of an alternate date, such as the date of separation. See *In re Marriage of Nelson (2006) 139 Cal. App. 4th 1546* , now *covered in Ch. 222, Dissolution of Marriage: Property Division and Valuation, § 222.52[2][b][i]*.

Termination of Spousal Support Based on Domestic Violence. The court is not required to consider the factors outlined in *Fam. Code § 4320* in making its determination under *Fam. Code § 4325*. The presumption of *Fam. Code § 4325* applies even when the parties' settlement agreement provides that spousal support is not subject to modification or termination. See *In re Marriage of Cauley (2006) 138 Cal. App. 4th 1100* , now *covered in Ch. 225, Dissolution of Marriage: Spousal Support, § 225.119*.

[4] Family Law Enforcement

Retroactivity of Family Code Amendments. In a unanimous decision, the California Supreme Court relied on *Fam. Code § 4*, a previously unnoticed section, to move the issue of retroactive application of amendments to existing law or the addition of new law to the forefront of consideration by Family Law practitioners. See *In re Marriage of Fellows (2006) 39 Cal. 4th 179* , now *covered in Ch. 258, Family Law Enforcement: General Enforcement Principles and Remedies, § 258.12[5]*.

Applicability of Laches Defense. *In In re Marriage of Fellows (2006) 39 Cal. 4th 179* , the Court held that *Fam. Code § 4 (c)* established that amendments to the California Family Code apply retroactively unless otherwise provided by law; thus, the statute at issue barred a laches defense even when the failure to make payments occurred before the statute's enactment. See *Ch. 258, Family Law Enforcement: General Enforcement Principles and Remedies, § 258.12[5]*.

[5] Parent and Child

Registered Domestic Partner Petition to Establish Parental Relationship. A registered domestic partner of the birth mother is entitled to bring a petition under *Fam. Code § 7611(d)* to establish her parental relationship with a child born to the birth mother by artificial insemination from an anonymous donor. The court must determine first whether the petitioner is a presumed parent of the child under *Fam. Code § 7611(d)*, and then, whether this is an appropriate action in which to rebut the presumption that the petitioner is the child's parent. See *Charisma R. v. Kristina S. (2006) 140 Cal. App. 4th 301* , now covered in *Ch. 394, Parent and Child, § 394.14A*.

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§ 1.115 Federal Courts

Preemption. This chapter is updated with *Hall v. North American Van Lines, Inc. (9th Cir. 2007) 476 F.3d 683* which holds the existence of a defense based upon federal law is insufficient to support federal jurisdiction. See Ch. 265, *Federal Courts,* § 235.14[4].

Removal--Amount in Controversy. This chapter is updated with *Lowdermilk v. United States Bank Nat. Ass'n (9th Cir. 2007) 479 F.3d 994* , which holds a defendant seeking removal in an action in which the plaintiff's complaint prays for relief in an amount below the jurisdiction amount must prove with "legal certainty" that the amount in controversy is satisfied, and attorney fees are included in the amount in controversy for determining federal class action jurisdiction if an award of fees is authorized by statute. See Ch. 265, *Federal Courts,* § 235.15[6][a][i].

Removal--Notice of Grounds. This chapter is updated with *Williams v. Costco Wholesale Corp. (9th Cir. 2006) 471 F.3d 975* which holds the civil removal statute has no requirement that all grounds for removal be listed in the notice; if the original complaint supports federal jurisdiction on both diversity and federal question grounds, the defendant is not required to list both grounds in notice of removal. See Ch. 265, *Federal Courts,* § 235.38[2][a].

Removal--Review. This chapter is updated with *Reddam v. KPMG LLP (9th Cir. 2006) 457 F.3d 1054* , which holds a remand order based on events subsequent to removal, which caused the district court to lose jurisdiction, is subject to review, because the remand was not taken for one of the grounds listed in *28 U.S.C.S. § 1447(c)*. See Ch. 265, *Federal Courts,* § 235.40[5][a][ii].

Well-Pleaded Complaint Rule. This chapter is updated with *Hall v. North American Van Lines, Inc. (9th Cir. 2007) 476 F.3d 683* which holds the presence of underlying federal issues does not create jurisdiction over a well-pleaded state law claim. See Ch. 265, *Federal Courts,* § 235.33[2][a].

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§ 1.116 Juvenile Law

Reorganized Rules of Court and Judicial Council Forms. The juvenile law chapters of this publication are revised throughout with the 2007 reorganization of California Rules of Court and the latest revisions and additions to Judicial Council Forms. See Ch. 327, *Juvenile Courts: Jurisdiction and General Procedures* ; Ch. 328, *Juvenile Courts: Dependency Proceedings* ; and Ch. 329, *Juvenile Courts: Delinquency Proceedings* .

Rehearing. This chapter is updated with *In re B.A. (2006) 141 Cal. App. 4th 1411* , which holds upon application for rehearing, the judge must read the entire transcript of the proceeding before the referee and independently weigh and evaluate the evidence. The judge may then either grant the rehearing or adopt the referee's findings and deny the request for rehearing. A judge's signed and dated handwritten note on the order denying a rehearing within the 20-day requirement of *Welf. & Inst. Code § 252* will satisfy the timeliness requirement of that section even if a formal minute order is not prepared within that time. See *Ch. 327, Juvenile Courts: Jurisdiction and General Procedures, § 327.20[2][g][iii]*.

Indian Child Welfare Act--Dependency. This chapter is updated with a revised analysis of the Indian Child Welfare Act [*25 U.S.C. § 1901 et seq.*] in regard to dependency proceedings, with detailed review of notice under both federal and California law, non-federally recognized tribes, expert witnesses, and includes new practice tips. See Ch. 328, *Juvenile Courts: Dependency Proceedings,* § 328.32A.

Appellate Counsel. This chapter is updated with a new section on appointment of counsel for children in dependency appeals. See *Ch. 328, Juvenile Courts: Dependency Proceedings, § 328.62[3][e]*.

Indian Child Welfare Act--Delinquency. This chapter is updated with a revised discussion of the Indian Child Welfare Act [*25 U.S.C. § 1901 et seq.*] in regard to delinquency proceedings, and the case of *In re Enrique O. (2006) 137 Cal. App. 4th 728* which holds Rule 1439(b), which has since been renumbered as Rule 5.664, does not expressly contradict the federal statute by requiring ICWA notices and procedures occur in all out of home placements arising out of acts that would be crimes if committed by an adult. On the other hand, the court expressed no opinion as to when, if ever, a delinquency proceeding could fall within the ambit of ICWA. See *Ch. 329, Juvenile Courts: Delinquency Proceedings, § 329.25*.

Maximum Penalties--Delinquency. This chapter is updated with *People v. Demirdjian (2006) 144 Cal. App. 4th 10* , which holds a minor who is prosecuted in criminal court is subject to different maximum penalties, depending upon the age at which they committed their offenses. For juveniles under the age of 16, who were 14 or 15 when the crime was committed, a life term without the possibility of parole is not permitted, leaving the maximum possible term as 25 years to life with the possibility of parole. For offenders 16 years of age or older, punishment may be a life term without the possibility of parole. In no case can a minor prosecuted in adult court be sentence to death. See *Ch. 329, Juvenile Courts: Delinquency Proceedings, § 329.64[5]*.

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§ 1.117 Mandate and Prohibition

Substantial Evidence Standard Applies to Mandamus Review. In *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal. 4th 412* , the California Supreme Court held that the substantial evidence standard applies to review of an agency's factual determinations under either a writ for administrative mandamus or for traditional mandamus. See *Ch. 358, Mandate and Prohibition, § 358.90*.

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§ 1.118 Patents and Trademarks

Trademarks--Antidilution Law Revised. The Trademark Dilution Revision Act [Pub. L. No. 109-312 (Oct. 6, 2006)] amends the Trademark Dilution Act [Pub. L. No. 104-98 (Jan. 16, 1996)], which added provisions in *15 U.S.C. § 1125* for the purpose of protecting famous trademarks, whether registered or unregistered, from subsequent uses (by persons other than the famous-mark owners) that blurred the distinctiveness of a mark or tarnished or disparaged it, even in the absence of a likelihood of confusion. The provisions of *15 U.S.C. § 1125(c)* that were added in 1996 were to be applied when unauthorized users attempted to trade on the goodwill and established renown of famous marks, and thereby diluted their distinctive quality. The 2006 act revises section 1125 to eliminate a flaw cited by the U.S. Supreme Court, which held that the 1996-enacted language of *15 U.S.C. § 1125(c)* "unambiguously require[d] a showing of actual dilution, rather than a likelihood of dilution" before a famous-mark owner could obtain injunctive relief [*Moseley v. V Secret Catalogue, Inc.* (2003) 537 U.S. 418, 432-433, 123 S. Ct. 1115, 155 L. Ed. 2d 1] . In addition, the 2006 act clarifies some issues of interpretation of the 1996-enacted language of *15 U.S.C. § 1125(c)* that had been noted by courts of appeals [*see generally* H.R. Rep. No. 109-23 (2005)]. Consequently some Ninth Circuit cases will have diminished relevance under the new version of *15 U.S.C. § 1125(c)* [*e.g., Nissan Motor Co. v. Nissan Computer Corp. (9th Cir. 2004) 378 F.3d 1002* ; *Playboy Enters. v. Netscape Communs. Corp. (9th Cir. 2004) 354 F.3d 1020* ; *Thane Int'l, Inc. v. Trek Bicycle Corp. (9th Cir. 2002) 305 F.3d 894* ; *Mattel, Inc. v. MCA Records, Inc. (9th Cir. 2002) 296 F.3d 894* ; *Panavision Intern., L.P. v. Toeppen (9th Cir. 1998) 141 F.3d 1316]* . For discussion of the new version of *15 U.S.C. § 1125(c)*, see *Ch. 549, Trademarks and Trade Names, § 549.27*.

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§ 1.119 Physicians and Other Medical Personnel

Occurrence of Pre-Discussed Medical Complications Can Trigger Statute of Limitations in Medical Negligence Action. In *Garabet v. Superior Court (2007) 151 Cal. App. 4th 1538* , the court of appeal held that the occurrence of complications that had been discussed prior to the providing of medical treatment can trigger the running of the statute of limitations in cases in which the patient alleges that the treatment was performed negligently or should not have been performed at all. See *Ch. 415, Physicians: Medical Malpractice, § 415.47[1]*.

Colorado Physician Liable for Prescribing Medicine for California Resident via Internet. In *Hageseth v. Superior Court (2007) 150 Cal. App. 4th 1399* , the court held that California had jurisdiction to prosecute a Colorado physician under *Bus. & Prof. Code § 2052* for practicing medicine in California without a California license when the physician prescribed medication over the Internet and that medication was sent to a California resident. See Ch. 414, *Physicians: Licensing and Discipline* .

Nursing Homes--Violation of Patients' *Bill of Rights*. In *Fitzhugh v. Granada Healthcare & Rehab. Ctr. (2007) 150 Cal. App. 4th 469, 473-474* , the court held that a cause of action for violation of the Patients' *Bill of Rights* [*see Health & Safety Code § 1430(b)*] survives the death of the resident or patient. See *Ch. 351, Long Term Health and Residential Care, § 351.21[4]*.

MICRA "Personal Injury" Does Not Cover Purely Economic Injury. In *Vazquez de Mercado v. Superior Court (2007) 148 Cal. App. 4th 711* , the court of appeal held that, for purposes of establishing the applicability of MICRA to the conduct of a medical professional, the term "personal injury" covers only injury that impairs the well-being or mental or physical health of the plaintiff, and the term does not cover purely economic injury. See *Ch. 295, Hospitals, § 295.13[2]*, and *Ch. 415, Physicians: Medical Malpractice, §§ 415.10, 415.49[5]*.

New Requirements for Electronically Created Health Care Directive. *Prob. Code § 4673* has been amended to allow a directive or power of attorney for health care to be created electronically, but to be effective, it must be acknowledged by a notary public and otherwise meet the requirements for a written directive, and if it contains a digital signature, that signature must meet certain requirements. See *Ch. 415, Physicians: Medical Malpractice, § 415.15[8]*.

Hospital May Indemnify Nonemployee Member for Peer Review Activities. Under newly added *Health & Safety Code § 32128*, the board of directors of a local hospital district has the authority to agree to indemnify a nonemployee member of the medical staff for damages and costs associated with being named a defendant in a civil action stemming from the member's participation in medical peer review activities, although the authority to indemnify for punitive damages is subject to restrictions. See *Ch. 415, Physicians: Medical Malpractice, § 415.15[13]*.

Malpractice Award Reporting Requirements for Physicians and Dentists Updated. *Bus. & Prof. Code § 801 et seq.* has been amended to change the reporting requirements for malpractice awards and settlements in suits brought against dentists. See *Ch. 209, Dentists, § 209.18*, and *Ch. 415, Physicians: Medical Malpractice, § 415.51*.

Health Care Services Contract May Provide for Arbitration of All Future Claims. In *Reigelsperger v. Siller (2007) 40 Cal. 4th 574* , the California Supreme Court held that if an arbitration agreement in a health care services contract meets the requirements of *Code Civ. Proc. § 1295*, the parties may agree to arbitrate all future claims, even those stemming from treatment for different injuries. See *Ch. 415, Physicians: Medical Malpractice, § 415.51*.

Requirements for Serving Notice of Intent to File Medical Malpractice Action Clarified. In *Jones v. Catholic Healthcare West (2007) 147 Cal. App. 4th 300* , the court of appeal held that although compliance with *Code Civ. Proc. § 1010 et seq.* is not mandatory when serving a notice of intent to commence a malpractice action against a health care provider, a plaintiff who does not comply with those provisions must show that defendant received actual notice. See *Ch. 415, Physicians: Medical Malpractice, § 415.90[4]*.

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§ 1.119A Probate and Estate Practice

No-Contest Clauses--Election of Beneficiaries. In *Colburn v. Northern Trust Co. (2007) 151 Cal. App. 4th 439, 447* , the court upheld a no-contest clause in a testamentary trust which forced the trustor's former wife and their children to choose between enforcing their rights under an existing martial dissolution judgment by filing creditor's claims, or relinquishing those rights and taking the gifts provided for them in trustor's trust. See *Ch. 444, Probate: Will Contests, § 444.14[4][a]*; *Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, § 560.16[1]*.

No-Contest Clauses--Application to Actions Under Uniform Principal and Income Act. In *McKenzie v. Vanderpoel (2007) 151 Cal. App. 4th 1442* , the court upheld a no-contest clause in trust instrument that applied to any attempt to "impair" the trust, and therefore extended to the trust beneficiary's adjustment petition under the California Uniform Principal and Income Act to reallocate principal and income, when such a reallocation would have resulted in more income to the beneficiary than allowed by the trust, and would have resulted in the invasion of trust principal reserved to other beneficiaries. See *Ch. 444, Probate: Will Contests, § 444.14[4][a]*; *Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, § 560.16[1]*.

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§ 1.120 Public Administration

Implied Consent to Blood Alcohol Testing Doesn't Require Actual Driving. In *Troppman v. Valverde (2007) 40 Cal. 4th 1121, 1133, 57 Cal. Rptr. 3d 306, 156 P.3d 328* , the California Supreme Court held that the implied consent statute applies broadly and generally to the motoring public (i.e., those who take advantage of the public streets, roads, and highways to operate a motor vehicle), and does not require evidence that actual driving occurred immediately prior to the arrest for driving under the influence. See *Ch. 92, Automobiles: Driver's Licenses, § 92.40[1]*.

Federal Preemption and Savings Clause. In *Capital Research and Management Company v. Brown (2007) 147 Cal. App. 4th 58, 53 Cal. Rptr. 3d 770* , the court holds the provisions of the National Securities Markets Improvement Act of 1996 (NSMIA) [*15 U.S.C. § 77r*] did not preempt the California Attorney General from bringing an enforcement action under *California Corporations Code §§ 25216, 25401* against an investment advisor and registered wholesale broker dealer for statutory violations. The state enforcement action was protected by the savings clause of the preemption provisions of federal law [*15 U.S. C. § 77r (c)(1)*]. See *Ch. 470, Overview of Public Administration Law, § 470.16[1][a]*.

Government Contracts. In *Benn v. County of Los Angeles (2007) 150 Cal. App. 4th 478, 58 Cal. Rptr. 3d 563* , the court holds that a non-profit corporation did not have a due process of law protected property interest in contracts with the county of Los Angeles to provide foster care services, nor did it have a protected interest under a federal statute, the Adoption Assistance and Child Welfare Act [*42 U.S.C. § 671*]. The contracts were not permanent, there was no good cause for termination clause, and there was no extreme dependence by the non profit corporation on the continuation of the contract terms by the county. Thus, the county decision to confer do not refer status on the corporation did not violate due process of law. See *Ch. 470A, Due Process Restrictions, § 470A.21[5]*.

Notice Requirements. In *California School Employees Association v. Livingston Unified School District (2007) 149 Cal. App. 4th 391, 400, 56 Cal. Rptr. 3d 923* , the court holds a school district's notice procedures denied a terminated employee due process of law because those procedures were not reasonably calculated under the circumstances to inform the terminated employee of his right to request a hearing to challenge the termination. The school district required that an employee request a hearing within five days of the date of mailing the notice to the employee. The former employee requested a hearing within five days of receiving actual notice of the termination. The notice was

mailed during the summer time, when the school employee was not working and was on vacation. The districts notice procedures violated the reasonable calculated to inform standard for procedural due process of law termination. See *Ch. 470A, Due Process Restrictions, § 470A.43[2]*.

Right of Cross Examination. In *Stardust Mobile Estates v. City of San Buenaventura (2007) 147 Cal. App. 4th 1170, 55 Cal. Rptr. 3d 218* , the court holds that the due process of law right to cross examine witnesses was not violated in a rent review board hearing proceeding. This was because the issues in the proceeding and the hearing record was based primarily on documentary evidence and reports from experts on both sides in the litigation for which there was no need to test credibility since the issues in the case did not turn on live witness testimony. The Court of Appeal also rejected procedural due process challenges based on the lack of discovery and based on conflicting advocacy and advisory roles by outside counsel for the rent board. The court concluded that discovery in mandate proceedings was limited because judicial review under *Code of Civil Procedure Section 1094.5* (administrative mandamus) was based on the hearing record before the agency. The Court of Appeal rejected the conflicting roles defense of unconstitutional bias even though the lawyer in question had advised the rent board. See *Ch. 470A, Due Process Restrictions, § 470A.46[3]*.

California Industrial Welfare Commission Rulemaking. In *Small v. Superior Court (2007) 148 Cal. App. 4th 222, 55 Cal. Rptr. 3d 410* , the court holds the Industrial Welfare Commission (IWC) was delegated the authority under *Labor Code § 517(a)* to adopt wage orders relating to elections to adopt and repeal alternative workweek schedules. The IWC adopted Wage Order No. 16-2001 (Wage Order 16 [*Cal. Code Regs., tit. 8, § 11160*] applicable to the construction industry that required new alternative workweek schedules elections when the number of employees working for 30 days increased above 50 percent since the prior election. The California court of Appeal overturned the decision of the superior court which had invalidated the wage order. The superior court gave three reasons for setting aside the wage order: 1) lack of required adequate statement of the basis for the rule; 2) lack of proper publication of the wage order; and 3) the wage order is unreasonable, arbitrary, capricious, and unfair because it contained an unworkable definition of a specific craft in the construction industry. See *Ch. 472A, Agency Rulemaking Procedures, § 472A.31[1][k]*.

***Skelly* Hearings.** In *Flippin v. Los Angeles City Board of Civil Service Commissioners (2007) 148 Cal. App. 4th 272, 55 Cal. Rptr. 3d 458* , the court rejected a due process of law challenge in a *Skelley* [*Skelly v. State Personnel Board (1975) 15 Cal. 3d 194, 539 P.2d 774]* hearing context based upon the practice that the same public employee that investigated and then initiated the employee discipline proceeding also acted as the *Skelley* hearing officer. That same employee also made the recommendation that the employee be discharged. There was no due process of law violation because the agency hearing procedure after the *Skelley* hearing included the following elements; another supervisor imposed the penalty; there was a full evidentiary hearing before a neutral hearing examiner, and there was review of the hearing examiners decision by the civil service commission board. See *Ch. 473, Public Agency Adjudication, § 473.24*.

Ex Parte Communications. In *Chevron Stations Inc. v. Alcoholic Beverage Control Appeals Board (2007) 149 Cal. App. 4th 116, 57 Cal. Rptr. 3d 6* , the court holds that the Department of Alcoholic Beverage Control violated provisions of the California Administrative Procedures Act [*Gov. Code § 11430.10*] because the Department prosecutor sent an ex parte communication (prosecutor's hearing report) to the department decision maker prior to the time the decision maker decided whether or not to adopt the proposed decision of the administrative law judge. The Court of Appeal in Chevron Stations relied upon the decision of the California Supreme Court in the *Quintenar* case [*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal. 4th 1, 4-6, 50 Cal. Rptr. 3d 585, 145 P.3d 462* (Department rejected ALJ proposed decision)]. The Court of Appeal held that the ex parte communication violated the California Administrative Procedures Act even though the Department adopted the proposed decision of the administrative law judge. The Court of Appeal also held that the licensee established a prima facie case of a violation of the ex parte communications prohibition in *Gov. Code §§ 11430.10 to 11430.70*. Once that showing was made, the Department had the burden of proof to justify the department's practices under the APA, and the department failed to meet that burden of proof before the Board. The court of appeal rejected the department's efforts to make this showing for the first time on appeal. See *Ch. 473, Public Agency Adjudication, § 473.28[1]*.

Equitable Estoppel. In *California School Employees Association v. Tustin Unified School District (2007) 148 Cal. App. 4th 510, 55 Cal. Rptr.3d 739* , the court rejected the assertion of equitable estoppel against an employee organization by a school district because the litigation position of the organization was not inconsistent with the terms of a collective bargaining agreement that addressed similar issue. Since there was no inconsistency, there was no change of position by the school district, and no basis for the application of equitable estoppel as a defense. See *Ch. 473F, Agency Adjudication Hearing, § 473F.54[1][b]*.

Equitable Estoppel. In *Feduniak v. California Coastal Commission (2007) 148 Cal. App. 4th 1346, 56 Cal. Rptr. 3d 591* , the court rejected the application of equitable estoppel as a defense to enforcement of a restoration order by the California Coastal Commission against a homeowner with a three hole golf course on the homeowner's property. The Court of Appeal rejected this defense against the Coastal Commission because of lack of proof of three elements of estoppel: 1) The Commission lacked knowledge that the golf course violated the easement and permit conditions; 2) regulatory inaction by the Commission related to the golf course for many years did not satisfy the requirement that the Commission intended that others would take action based upon its failure to enforce the requirements of the; and 3) application of estoppel against a government agency would nullify a strong land use related policy designed to protect the public. Another California Court of Appeal rejected the application of the laches defense to actions taken by the California Coastal Commission ordering that homeowners who had developed a three hole golf course on their land restore the land to its native state as an area of dunes with vegetation. Laches was rejected as a defense to enforcement of the order by the Commission, because there was no unreasonable delay in the enforcement of the easement, no acquiescence by the commission in the easement violation and the application of the defense would nullify an important public policy. See *Ch. 473F, Agency Adjudication Hearing, § 473F.54[1][b]*.

Attorney'S Fees. In *People ex rel Brown v. Tehama County Board of Supervisors (2007) 149 Cal. App. 4th 422, 56 Cal. Rptr. 3d 558* , the court holds the California Attorney general could not recover $173,450 in attorney's fees incurred in litigation with county agency defendants to enforce provisions of the subdivision map act even though the attorney general was the prevailing party in that lawsuit because the attorney general could not satisfy the financial burden requirement for recovery of attorneys fees under *Code of Civil Procedure § 1021.5*. See *Ch. 473G, Agency Adjudication Decisions, § 473G.35[9]*.

Attorney's Fees. In *Zuehlsdorf. v. Simi Valley Unified School District (2007) 148 Cal. App. 4th 249, 55 Cal. Rptr. 3d 467* , the court holds attorney's fees (in the amount of $6,334) were properly awarded under *Gov. Code § 800* to a father of a high school student who successfully challenged the school district's decision that prevented the high school student from participating in high school athletics. The daughter was reinstated into the athletics program after the superior court granted a temporary restraining order and a preliminary injunction enjoining the school district from prohibiting the student's athletic participation. The superior court found that the denial of athletic participation by the school district was arbitrary and capricious within the meaning of the Government Code. The superior court denied an application by the father for a permanent injunction because of mootness in that the student had completed the athletic season, and there was no need to further enjoin the school district. The Court of Appeal upheld the fee award concluding that there was an adequate factual finding that the school district acted arbitrarily and capriciously in denying athletic participation, and that the father was a prevailing party under *Gov. Code § 800* notwithstanding the denial of the permanent injunction on the grounds of mootness, because the father achieved his litigation objectives, getting his daughter reinstated into the athletic program at her high school. See *Ch. 473G, Agency Adjudication Decisions, § 473G.35[9]*.

Judicial Review--Exhausting Administrative Remedies. In *Ohton v. Board of Trustees of the California State University* (2007) 148 Cal. App. 4th 749, 56 Cal. Rptr. 3d 111 , the court holds a state university employee who filed an action for damages for retaliation under the California Whistleblower Protection Act [*Gov. Code § 8547.12*] was required to exhaust administrative and judicial remedies before filing a civil lawsuit. The employee had failed to file a petition for a writ of administrative mandamus to challenge the action of the university in retaliating against him, and was required to seek mandamus relief before bringing the civil lawsuit. The Court of Appeal ordered a remand of the

matter to the trial court to give the employee the opportunity to amend the complaint to add a petition for a writ of mandate. See *Ch. 474A, Timing of Judicial Review, § 474A.11[2][a]*.

Judicial Review--Exhausting Administrative Remedies. In *Eight Unnamed Physicians v. Medical Executive Committee of Medical Staff of Washington Township Hospital (2007) 150 Cal. App. 4th 503, 59 Cal. Rptr. 3d 100* , the court holds a group of physicians that challenged the refusal of the hospital at which they worked to order a consolidated hearing rather then hold eight individual hearings failed to exhaust administrative remedies because there was an available internal hospital remedy available (appeal of the JRC decision to the hospital board) to challenge the refusal to consolidate the hearing. The California Court of Appeal held that the failure to exhaust administrative remedies required reversal of the petition granting a writ of mandate requiring the consolidation of the hearings. See *Ch. 474A, Timing of Judicial Review, § 474A.12[1][a]*.

Judicial Review--Exhausting Administrative Remedies. In *Imagistics International, Inc. v. Department of General Services (2007) 150 Cal. App. 4th 581, 59 Cal. Rptr. 3d 18* , the court holds an unsuccessful bidder for a state contract failed to exhaust administrative remedies required to challenge the award of the contract to another bidder. The protestor challenged the adequacy of the administrative remedies by claiming that the protest arbitration process violated due process of law because the protest coordinator and the Office of Administrative Hearings were too closely aligned with the Department of General Services. The protestor claimed that it violated due process of law to have a small body of OAH hearing officers hear bid protests because DGS is a repeat player in bid protests administrative proceedings. The Court of Appeal rejected this argument and found that due process of law was not violated in these circumstances. Thus, the bid protestor was required to pursue the administrative remedy specified in these circumstances, protest arbitration. See *Ch. 474A, Timing of Judicial Review, § 474A.12[1][a]*.

Judicial Review--Exhausting Administrative Remedies. In *McAllister v. County of Monterey (2007) 147 Cal. App. 4th 253, 54 Cal. Rptr. 3d 116* , the court holds the administrative jurisdiction exception to exhaustion of administrative remedies did not apply to excuse failure to exhaust administrative remedies by a challenger to a coastal development permit who failed to appeal to the California Coastal Commission a county decision to grant the permit to a neighboring landowner. The challenger argued that the county action was void and therefore exhaustion was not required, but the court of appeal rejected that argument and held that exhaustion is required for as applied challenges to agency action based on voidness. The Coastal Commission had jurisdiction over this type of dispute at the appellate level. See *Ch. 474A, Timing of Judicial Review, § 474A.12[4]*.

Laches. In *Womack v. San Francisco Community College District (2007) 147 Cal. App. 4th 854, 54 Cal. Rptr 3d 558* , the court accepted the laches defense and held that it precluded a teacher's lawsuit for reinstatement as a regular employee against the San Francisco Community College District. The court held that the teacher waited too long to challenge an adverse personnel decision. Public employees who want to challenge adverse personnel decision by their employers must see writ review within a reasonable time after completion of the administrative proceeding. The teacher waited nine years to claim the right to full time employment from the time that the teacher first taught a full time unit load. The teacher filed a writ of mandamus action under *Code of Civil Procedure 1085*, but then waited three years to prosecute the mandamus action and obtain a hearing on the merits. The court of appeal did not accept the reasons offered by the plaintiff for these delays, specifically ignorance of the law, because the teacher had an experienced attorney to represent him. The court held that the teacher acquiesced in the challenged employment action and that the school district was prejudiced by the substantial delay in making the teacher's challenge in that the district had the potential for increased liability for back pay in the form of a seven-year wage differential if the teacher had been misclassified. See *Ch. 474A, Timing of Judicial Review, § 474A.22*.

Judicial Review of Penalty Assessments. In *Flippin v. Los Angeles City Board of Civil Service Commissioners (2007) 148 Cal. App. 4th 272, 55 Cal. Rptr. 3d 458* , the court holds judicial review of an agency assessment of a penalty is very limited and the standard of review is arbitrary, capricious, or abuse of discretion. The reviewing court cannot substitute its judgment for that of the agency and can not overturn a penalty assessment that has a reasonable

basis of support. The appellate court review of a trial court penalty determination is de novo and without deference to the trial. The California Court of Appeal reversed the superior court decision that overturned a penalty assessment by a city review board of upholding the discharge of a public employee when the employee was found to have committed serious misconduct that reflected adversely on other public employees of the same agency. The discharge penalty had a reasonable basis in the fact record and the agency did not abuse its discretion in sustaining the discharge of the public employee. Therefore it was improper for the superior court to overturn the penalty assessed against the employee. See *Ch. 474B, Standards of Judicial Review, § 474B.16[4][e]*.

Judicial Review of Disciplinary Penalty. In *Kolender v. San Diego County Civil Service Commission (2007) 149 Cal. App. 4th 464, 57 Cal. Rptr. 3d 84* , the court holds it was an abuse of discretion for a county civil service commission to reduce a disciplinary penalty imposed by a county sheriff on a county employee from a permanent demotion to a temporary demotion. The sheriff challenged the change in penalty by petitioning for a writ of administrative mandate under *Code Civ. Proc. § 1094.5* (penalty reduction was abuse of discretion because criteria for penalty assessment in law enforcement employment is harm to public service, and commission erroneously relied upon inaccurate performance evaluation to reduce penalty). See *Ch. 474B, Standards of Judicial Review, § 474B.16[4][e]*.

County's Discretion Limited in Determining Eligibility for Indigent Relief. In *Alford v. County of San Diego (2007) 151 Cal. App. 4th 16, 32, 59 Cal. Rptr. 3d 596* , the court of appeal held that a flat income cap eligibility standard that does not consider an individual's ability to pay all or a part of subsistence medical care is not permitted under *Welf. & Inst. Code § 17000*. See *Ch. 527, Social Services, § 527.13[2]*.

Mandamus Permitted for Parties with Standing to Complain about Social Service Benefits. In *California Association for Health Services at Home v. State Department of Health Services (2007) 148 Cal. App. 4th 696, 705-707, 56 Cal. Rptr. 3d 102* , the court of appeal held that interested persons who are neither applicants for nor recipients of public social service benefits, but who otherwise have standing to complain, may challenge invalid regulations by traditional mandamus pursuant to *Code Civ. Proc. § 1085*. See *Ch. 527, Social Services, § 527.60*.

PAS Results Admissible in Evidence. In *Roze v. Department of Motor Vehicles (2006) 141 Cal. App. 4th 1176* , the court of appeal held that preliminary alcohol screening test results are admissible in evidence at a trial, but the trier of fact may not give them much weight, depending on the method by which they were conducted. See *Ch. 92, Automobiles: Drivers' License, § 92.47[2][b]*.

Superior Court May Not Overrule PUC Order. In *Anchor Lighting v. Southern California Edison Company (2006) 142 Cal. App. 4th 541* , the court of appeals held that the PUC's interpretation of Public Utilities Code may not be disturbed, even if it is invalid, unless it fails to bear a reasonable relation to the statute's purposes and language. See *Ch. 480, Public Utilities, § 480.141*.

Churches--Religious Use of Public Property. In *Faith Ctr. Church Evangelistic Ministries v. Glover (9th Cir. 2006) 462 F.3d 1194* , the Ninth Circuit held that a county's policy and practice of prohibiting the use of a public library meeting room for religious worship services, while allowing its use for other religion-related purposes, was permissible on the ground of preserving the intended purpose of that meeting room as limited public forum. See *Ch. 110, Churches and Religious Organizations, § 110.34[1]*.

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§ 1.120A Public Entities and Officers

Stipulation of Innocence in *Penal Code § 851.8* Proceeding Lacks Collateral Estoppel Effect in Subsequent Proceeding Under *Penal Code § 4900*. In *Tennison v. California Victim Comp. & Government Claims Bd. (2007) 152 Cal. App. 4th 1164* , the court of appeal held that a stipulated finding of innocence in an earlier proceeding under *Penal Code § 851.8* does not have collateral estoppel effect in a subsequent proceeding for compensation under *Penal Code § 4900*. The court also held that a reviewing court should apply a substantial evidence standard when reviewing a decision of the Victim Compensation and Government Claims Board. See *Ch. 465, Public Entities and Officers: Civil Claims Arising From Criminal Acts, §§ 465.63[2][b], 465.64[2]*.

Use of "False Record or Statement" Not False Claim Under False Claims Act. In *Fassberg Construction Co. v. Housing Authority of Los Angeles (2007) 152 Cal. App. 4th 720* , the court of appeal held that, while a general contractor made a "claim" under the False Claims Act each time it submitted a request for a progress payment to a housing authority with which it had a construction contract, the submission of weekly payroll reports in support of those requests for payment did not constitute individual claims and a civil penalty is available only for the making of each false claim. The court also held that requests to modify the construction contract were not actionable claims, although any subsequent request for payment based on a falsely documented change request would be a false claim. See *Ch. 468, Public Entities and Officers: False Claims Actions, § 468.21[3]*.

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§ 1.121 Real Estate, Land Use, and Environmental Laws

[1] Building Contracts

Contractor Licensing--Legislature Enacts Prohibitions Related to Individual With Revoked Contractor's License Who Performs Acts for Which License Is Required. Supplementing currently ineffective administrative remedies, legislation has been enacted to deter those whose contractor's license has been revoked for good reason from continuing to conduct business under the licenses issued to associates or family members [Stats. 2006, ch. 171]. The legislation imposes misdemeanor charges against revoked licensees who associate with a licensed contractor and act in any capacity other than as a supervised employee. It also imposes misdemeanor charges against licensees who knowingly employ a revoked licensee in any capacity other than as a supervised employee. See *Ch. 104, Building Contracts, § 104.83A.*

[2] Easements

Easements--No Ownership in Fee When Easement Is Restricted in Scope. A California appellate court has held that an easement incorporating a right of exclusive use may fall short of ownership in fee when the easement is restricted in scope. See *Blackmore v. Powell (2007) 150 Cal. App. 4th 1593* , now *covered in Ch. 240, Easements, § 240.12[1][b]*.

State Registry for Conservation Easements. 2006 legislation [Stats. 2006, ch. 531] requires the state Resources Agency to establish a central public registry of all conservation easements held or required by the state, or purchased with state grant funds. For discussion, including coverage of the registry's required information, see *Ch. 240, Easements, § 240.12[6]*.

[3] Eminent Domain

Eminent Domain--Public Entity May Not Use Property for Any Use Other Than Use Stated in Resolution of Necessity Unless New Resolution Is Adopted. 2006 legislation [Stats. 2006, ch. 602] prohibits a public entity from using a property for any use other than the public use stated in its resolution of necessity, unless the entity first adopts a new resolution that finds the public interest and necessity of using the property for a new stated public use. Pursuant to the legislation, a public entity is also required to adopt a new resolution finding the continued public interest and

necessity of using a property for its original stated public use if the property was not put to use within 10 years of adoption of the original resolution. If an entity fails to adopt a new resolution under either circumstance, it must offer a right of first refusal to repurchase the property to the original owner or owners, under specified conditions. See *Ch. 247, Eminent Domain, § 247.32[4A]*.

Eminent Domain--Property Owner Has Right to Leaseback Property Taken by Eminent Domain When Property Will Not Be Developed Within Two Years. Pursuant to 2006 legislation [Stats. 2006, ch. 602], a public entity must offer a one-year leaseback agreement to the owner of any property acquired after January 1, 2007, under any of the following circumstances: (1) pursuant to eminent domain, (2) following adoption of a resolution of necessity for the property, or (3) before adoption of a resolution of necessity but after written notice that the public entity could take the property by eminent domain, unless the entity states in writing that development or redevelopment of the property is scheduled to begin within two years of its acquisition. The leaseback offer is not required if the public entity states in writing that a leaseback would create or allow the continuation of a public nuisance to the surrounding community. The leaseback is subject to the property owner's compliance with specified conditions, including payment of fair market rent. See *Ch. 247, Eminent Domain, § 247.33*.

Eminent Domain--Order of Pre-Judgment Possession Now Requires Prior Notice and Opportunity to Respond for Property Owner and Occupants. New legislation [Stats. 2006, ch. 594] prevents the issuance of a pre-judgment order of possession, formerly available on ex parte application, without giving the property owner and occupants prior notice, an opportunity to respond, and a hearing if the motion is opposed. See *Ch. 247, Eminent Domain, §§ 247.113, 247.308 -247.309*.

Eminent Domain. This chapter is updated with *Mt. San Jacinto Comm. College Dist. v. Superior Court (2007) 40 Cal. 4th 648* , which holds when a deposit of probable compensation is made in a "quick take" proceeding, in which the condemnor applies for a prejudgment order for possession on a deposit of probable compensation for the owner [*Code Civ. Proc. § 1255.410 et seq.*], and the trial court determines that the deposit equals or exceeds the probable amount of the owner's just compensation, the property must be valued on the date of the deposit. See *Ch. 247, Eminent Domain, § 247.134*.

[4] Environment

California Global Warming Act. In 2006, the California Legislature passed landmark legislation with the goal of curbing greenhouse gas emissions. The California Global Warming Solutions Act of 2006 [Stats. 2006, ch. 488; *Health & Safety Code § 38500 et seq.*] establishes the first comprehensive greenhouse gas regulatory program in the United States. See *Ch. 418, Pollution and Environmental Matters, § 418.91[1]*.

[5] Landlord and Tenant

Landlord-Tenant: Notice to Terminate Tenancy. 2006 legislation [Stats. 2006, ch. 842] reenacts formerly repealed provisions requiring that an owner of a residential dwelling give at least 60 days' notice before terminating the tenancy or 30 days' notice before termination if the tenant had resided in the dwelling for less than one year, or if other circumstances were satisfied [*see Civ. Code § 1946.1*]. See *Ch. 333, Landlord and Tenant: Eviction Actions, § 333.11*.

[6] Mobilehomes

Mobilehome Residency Law Does Not Preempt Local Rent Control Ordiances. The California Supreme Court held that the Mobilehome Residency Law (*Civ. Code § 798 et seq.*) does not preempt local rent control ordinances insofar as they allow mobilehome park owners to separately charge park residents for property taxes imposed on mobilehome park land [*Cacho v. Boudreau (2007) 40 Cal. 4th 341]* . See *Ch. 369, Mobilehomes and Mobilehome Parks, § 369.66[5]*.

[7] Zoning

Regulation of Time-Share Developments--Regular and Special Assessments. 2006 legislation [Stats. 2006, ch. 429] permits the owners' association of a time-share development to levy regular and special assessments against the time-share owners and to secure a lien against delinquent assessments. For discussion, including what an association may recover if an assessment is delinquent, see *Ch. 579, Zoning and Planning, § 579.286[6A]*.

Equitable Estoppel. This chapter is updated with *Feduniak v. California Coastal Com. (2007) 148 Cal. App. 4th 1346* , which holds the doctrine of equitable estoppel did not bar the Coastal Commission from ordering a homeowner to remove a private three-hole golf course from around his house and restore area to its native sand dune vegetation in accordance with applicable restrictions on landscaping, even though property had been in visible violation of coastal development permit conditions for 18 years. See *Ch. 579, Zoning and Planning, § 579.317[6]*.

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§ 1.122 Religious Organizations

Churches--Religious Use of Public Property. In *Faith Ctr. Church Evangelistic Ministries v. Glover (9th Cir. 2006) 462 F.3d 1194* , the Ninth Circuit held that a county's policy and practice of prohibiting the use of a public library meeting room for religious worship services, while allowing its use for other religion-related purposes, was permissible on the ground of preserving the intended purpose of that meeting room as limited public forum. See *Ch. 110, Churches and Religious Organizations, § 110.34[1]*.

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§ 1.123 Schools

Special Ed Teacher Not Liable for Battery of Autistic Students. In *Austin B. v. Escondido Union School Dist. (2007) 149 Cal. App. 4th 860* , the court of appeal held that a special education teacher was not liable for battery when his touching of autistic students was reasonable under the circumstances and the plaintiffs failed to prove that the defendant intended to harm the students. See *Ch. 58, Assault and Battery, § 58.13[3][a]*.

Voluntary Student Assignment Plans Based on Race Did Not Survive Strict Scrutiny. In *Parents Involved in Community Schools v. Seattle School Dist. No. 1 (2007)551U.S.701, 127 S. Ct. 2738, 168 L. Ed. 2d 508* , the United States Supreme Court held that when a school district voluntarily adopts a student assignment plan that relies on race to determine which public schools certain children may attend, the district must show that the plan is necessary under the strict scrutiny standard of equal protection analysis. Under the strict scrutiny analysis, school districts did not carry their burden of showing that the ends they sought justified classifying individual students on basis of their race and discriminating among them on that basis. See *Ch. 513, Schools: Student Rights and Responsibilities, § 513.15[1]*.

School Could Discipline Student Displaying Pro-Drug Banner. In *Frederick v. Morse (2007)551U.S.393127 S. Ct. 2618, 168 L. Ed. 2d 290* , the United States Supreme Court held that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use, and that school officials did not violate the *First Amendment* by confiscating a pro-drug banner at a school-sanctioned and school-supervised event held offsite and suspending the student responsible for it. See *Ch. 513, Schools: Student Rights and Responsibilities, § 513.34[1]*.

School Violated *Educ. Code § 48907* by Announcing Editorial Was Not Protected Speech. In *Smith v. Novato Unif. School Dist. (2007) 150 Cal. App. 4th 1439, 59 Cal. Rptr. 3d 508* , the Court of Appeal held that a controversial student editorial on immigration was protected speech under *Educ. Code § 48907*, because there was no evidence the student-author intended to cause substantial disruption of the school. The school district did not violate § 48907 by holding meetings providing an opportunity for protestors to express their reactions to the editorial or by sending a letter disavowing the author's viewpoint, but it did violate § 48907 by announcing that the editorial was not protected speech, which was likely to chill future speech. See *Ch. 513, Schools: Student Rights and Responsibilities, § 513.34[5]*.

Charter Schools Provided Field Trip Immunity. Under amended *Educ. Code § 35330*, charter schools have been added to the list of entities that are immune from liability for injuries to persons who voluntarily participate in field trips or excursions. See *Ch. 514, Schools: Injuries to Students, § 514.12[3]*.

Four-Year Limit on Conduct for Which School District May Dismiss Teacher Is Subject to Equitable Exceptions. The California Supreme Court has held that *Education Code § 44944(a)*, which bars the dismissal of a teacher by a school district for events occurring more than four years before the district initiates dismissal proceedings, is not absolute, and application of the four-year limit may be limited by equitable principles in an appropriate case. See *Atwater Elementary Sch. Dist. v. California Dep't of Gen. Servs. (2007) 41 Cal. 4th 227* , now *covered in Ch. 512, Schools: Certification, Dismissal, and Related Employment Issues, § 512.28[6][g]*.

Parents Can Represent Themselves Under IDEA. In *Winkelman v. Parma City Sch. Dist., (2007)550U.S.516, 127 S. Ct. 1994, 167 L. Ed. 2d 904* , the United States Supreme Court held that when parents and their child, dissatisfied with the outcome of the due process hearing, seek review in a United States District Court, the parents on their own behalf may proceed in court unrepresented by counsel even though they are not trained or licensed as attorneys. See *Ch. 513, Schools: Student Rights and Responsibilities, § 513.33[5][g]*.

No Violation of IDEA Without Material Failure to Implement IEP. In *Van Duyn v. Baker School District (9th Cir. 2007) 481 F.3d 770* , the Ninth Circuit held that when a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when the services provided to a disabled child fall significantly short of those required by the IEP. See *Ch. 513, Schools: Student Rights and Responsibilities, § 513.33[5][a]*.

Student Rights and Responsibilities: Partial Attorney's Fees Award Under IDEA Vacated for Failure to Consider Degree of Success. In *Aguirre v. Los Angeles Unified School Dist. (9th Cir. 2006) 461 F.3d 1114* , the Ninth Circuit held that attorney's fees awarded under IDEA are governed by the standards set forth by the United States Supreme Court in *Hensley v. Eckerhart* and its progeny for fee awards under *42 U.S.C. § 1988*. Thus, although a district court's partial attorney's fees award to a mother may ultimately prove consistent with *Hensley*, the award was vacated and remanded to the district court, because it did not appear that the court considered the mother's degree of success. See *Ch. 513, Schools: Student Rights and Responsibilities, § 513.33[5][f]*.

School District May Not Classify Teachers Based on Types of Credentials Held. A California Court of Appeal has held that the classification of a certificated employee as probationary or temporary depends on the position he or she occupies, and a school district may not determine the employee's classification based on the type of credential or certification he or she has. See *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist. (2006) 145 Cal. App. 4th 1260* , now *covered in Ch. 512, Schools: Certification, Dismissal, and Related Employment Issues, § 512.19*.

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§ 1.124 Settlement

Release of Liability for Gross Negligence Violates Public Policy. In *City of Santa Barbara v. Superior Court (2007) 41 Cal. 4th 747* , the California Supreme Court held that an application form signed by parents releasing a city and its employees from liability for "any negligent act" related to a child's participation in the city's summer camp for developmentally disabled children violated public policy and was unenforceable to the extent it released liability for future gross negligence. See Ch. 520, *Settlement and Release* .

Changing Date for Performance of Settlement Agreement Was Proper. In *Osumi v. Sutton (2007) 151 Cal. App. 4th 1355* , on motions to enforce a settlement agreement, the trial court did not create a material term of the settlement or otherwise err when it extended the closing date for a real property transaction. To grant the relief sought by both parties, the trial court had to impose a new closing date. The trial court also did not err when it ordered plaintiff to sign a purchase agreement incorporating a revised counteroffer, and in refusing to award plaintiff interest from the original closing date or his costs or attorney fees. See Ch. 520, *Settlement and Release* .

Personal Injury Plaintiff Entitled to Prejudgment Interest From Date of First § 998 Offer. In *Ray v. Goodman (2006) 142 Cal. App. 4th 83* , the court held that in a personal injury action, under *Civ. Code § 3291*, when there are two successive unaccepted *Code Civ. Proc. § 998* offers tendered by a successful plaintiff in personal injury litigation, and that plaintiff subsequently recovers a judgment in excess of either offer, the prejudgment interest awarded pursuant to § 3291 begins from the date of the first offer. See *Ch. 520, Settlement and Release, § 520.14[8][d]*.

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§ 1.124A Suretyship

Surety Relationships Differ from Relationships Between Parties to Letter of Credit Transaction. In *Morgan Creek Residential v. Kemp (2007) 153 Cal. App. 4th 675, 687-689, 63 Cal. Rptr. 3d 232* , the court of appeal held that a letter of credit applicant had a different level of liability from guarantors, and therefore had no viable claim for contribution against the guarantors. See *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.165[5]*.

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§ 1.125 Torts

[1] Abuse of Minors and Elderly

Attachment for Financial Abuse Under Elder Abuse Statute Allowed. Under new *Welf. & Inst. Code § 15657.01*, a plaintiff who is awarded damages in an action for financial abuse under the Elder and Dependent Adult Abuse statute is authorized to seek attachment against the defendant's property, and an attachment may be issued whether or not other forms of relief are demanded. See *Ch. 5, Abuse of Minors and Elderly, § 5.35*.

Standing Under Elder Abuse Statute Amended When Abused Person Has Died. Under amended *Welf. & Inst. Code § 15657.3*, the rules governing standing for bringing an action under the Elder and Dependent Adult Abuse statute when the abused adult has died have been modified. See *Ch. 5, Abuse of Minors and Elderly, § 5.37*.

Prevailing Defendant Not Entitled to Attorney's Fees Under Elder Abuse Statute. In *Wood v. Santa Monica Escrow Co. (2007) 151 Cal. App. 4th 1186* , the court of appeal held that, unlike a prevailing plaintiff, a prevailing defendant is not entitled to recover attorney's fees under the Elder and Dependent Adult Abuse statute, and if all causes of action arose from a single transaction, a prevailing defendant is not entitled to attorney's fees even if there are issues in common with other causes of action under which fees might be recovered. See *Ch. 5, Abuse of Minors and Elderly, § 5.35*.

Neglect Under Elder Abuse Statute Clarified. In *Sababin v. Superior Court (2006) 144 Cal. App. 4th 81* , the court of appeal held that a health care provider may be liable for neglect under the Elder or Dependent Adult Abuse Act even if some care is provided, for example, if the provider knows that it is supposed to be providing a certain type of care on a daily basis, but provides that level of care only sporadically, or there is otherwise a significant pattern of withholding portions or types of care. See *Ch. 5, Abuse of Minors and Elderly, § 5.33[3]*.

Court Rules Childhood Sexual Abuse Revival Statute Is Unconstitutional. In *Perez v. Roe 1 (2006) 146 Cal. App. 4th 171* , the court of appeal held that the Legislature's attempt when amending *Code Civ. Proc. § 340.1(b)*, which is applicable to childhood sexual abuse, to revive causes of action that were adjudicated to finality under the prior statute of limitations is a violation of the separation of powers doctrine, because the power to resolve cases conclusively by

rendering dispositive judgments rests with the judiciary alone. See *Ch. 5, Abuse of Minors and Elderly, § 5.13*.

[2] Animals

Primary Assumption of Risk Applied to Strict Liability Cause of Action Brought Under Dog Bite Statute. In *Priebe v. Nelson (2006) 39 Cal. 4th 1112* , the California Supreme Court held that the assumption of risk doctrine was a defense to the imposition of strict liability under the dog bite statute, *Civ. Code § 3342*, for an injury to a kennel worker, but remanded the case for retrial on common law claims that were beyond the scope of the Court's review. See *Ch. 23, Animals: Civil Liability, § 23.31[4]*, and *Ch. 380, Negligence, § 380.173[1]*.

[3] Assault and Battery

Special Ed Teacher Not Liable for Battery of Autistic Students. In *Austin B. v. Escondido Union School Dist. (2007) 149 Cal. App. 4th 860* , the court of appeal held that a special education teacher was not liable for battery when his touching of autistic students was reasonable under the circumstances and the plaintiffs failed to prove that the defendant intended to harm the students. See *Ch. 58, Assault and Battery, § 58.13[3][a]*.

Recovery for Domestic Violence Occurring More Than Three Years Before Suit is Brought Allowed. In *Pugliese v. Superior Court (2007) 146 Cal. App. 4th 1444* , the court of appeal held that, although the three-year statute of limitations of *Code Civ. Proc. § 340.15(a)* uses the "last act" of domestic violence as a trigger, a plaintiff may recover for domestic violence occurring more than three years before suit is brought if plaintiff proves a continuing course of abusive conduct and files suit within three years of the last act. See *Ch. 58, Assault and Battery, § 58.30[3]*.

[4] Carriers

Commercial Code Sections Updated. Citations to the Commercial Code have been updated to reflect changes made by the legislature to bring that Code into conformity with the revisions of Uniform Commercial Code Article 1 proposed by the National Conference of Commissioners on Uniform State Law. See *Ch. 109, Carriers, § 109.60* et seq.

[5] Damages

Plaintiff May Recover Full Billed Amount for Medical Services Even if Medical Lien Sold at Discount. In *Katiuzhinsky v. Perry (2007) 152 Cal. App. 4th 1288* , the court of appeal held that if a medical provider sells a plaintiff's account and lien to a third-party financial services company at a discount, but plaintiff remains liable to the financial services company for the full amount charged for the medical services, plaintiff may recover as damages from a third-party tortfeasor the full amount charged if that is a reasonable amount for the services rendered. See *Ch. 177, Damages, § 177.45[3][b]*.

Award for Lost Anticipated Profits Reversed. In *Parlour Enterprises, Inc. v. Kirin Group, Inc. (2007) 152 Cal. App. 4th 281* , the court of appeal reversed a damage award for lost anticipated profits for unopened business franchises when projections made by plaintiff's expert witness lacked sufficient factual support. See *Ch. 177, Damages, § 177.45[6]*.

Punitive Damages Barred in Survival Action When Only Actual Damage Alleged is Nonrecoverable Emotional Distress. In *Berkley v. Dowds (2007) 152 Cal. App. 4th 518* , the court of appeal held that if a decedent's representative files a survival action seeking to recover for injury sustained by the decedent before death, but the only injury alleged is emotional distress, there is no basis for an award of punitive damages because there can be no compensatory damages, as the representative is precluded by statute from recovering for the decedent's pain and suffering. See *Ch. 177, Damages, § 177.51[12]*.

Punitive Damages for Harm to Nonparties Unconstitutional. In *Philip Morris USA v. Williams (2007)549U.S.346,*

166 L. Ed. 2d 940 , the United States Supreme Court cautioned that while harm caused to nonparties may be considered when evaluating the reprehensibility of a defendant's conduct, such as when the evidence shows that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, an award of punitive damages specifically intended to punish for harm allegedly caused to nonparties violates due process. See *Ch. 177, Damages, § 177.51[5][a], [14]*.

Punitive Damages Evidence Must Show Defendant's Financial Liabilities. In *Baxter v. Peterson (2007) 150 Cal. App. 4th 673* , the court of appeal held that in order to support an award of punitive damages, a plaintiff must present evidence showing not just the defendant's financial assets, but financial liabilities as well. See *Ch. 177, Damages, § 177.51[16]*.

Lien Created Prior to Notice of Hospital Emergency Lien Takes Precedence. In *County of San Bernardino v. Calderon (2007) 148 Cal. App. 4th 1103* , the court of appeal held that a hospital emergency lien is not created under *Civ. Code § 3045.1* until proper notice is given to the defendant, and if a competing lien exists that was created prior to the hospital lien, that competing lien has priority. See *Ch. 177, Damages, § 177.54[3]*.

Evidence of Full Value of Medical Services Admissible, Even if Provider Accepted Lesser Amount. In *Greer v. Buzgheia (2006) 141 Cal. App. 4th 1150* , the court of appeal held that if a health care provider has agreed to accept a compromise amount as payment in full for services provided, evidence of the full, reasonable value of those services may be admitted at trial to provide a more complete picture of the extent of the plaintiff's injuries. If such evidence is admitted, it is incumbent on the defendant to ensure that the jury's verdict specifies what damages, if any, are being awarded for past medical expenses, to enable the court to reduce the award, if necessary, and to reflect the amount that was actually paid for the services. See *Ch. 177, Damages, § 177.45[3][b]*.

Evidence of Defendant's Financial Worth Not Limited to California Activities in Proving Appropriate for Punitive Damages Amount. In *Buell-Wilson v. Ford Motor Co. (2006) 141 Cal. App. 4th 525* , the court of appeal held that in proving an appropriate measure for punitive damages, evidence of the financial condition of the defendant is not limited to the defendant's financial condition as it relates to California activities, but properly includes the defendant's overall worth. See *Ch. 177, Damages, § 177.51[16]*.

Legal Malpractice Action Not Action for Personal Injury Under *Code Civ. Proc. § 425.11*. In *Levine v. Smith (2006) 145 Cal. App. 4th 1131* , the court of appeal held that an action for legal malpractice is not considered to be an action for personal injury for purposes of *Code Civ. Proc. § 425.11*, and no statement of damages is required under that statute, although a plaintiff is limited to the amount of damages specified in the complaint if a default judgment is entered. See *Ch. 177, Damages, § 177.43*.

[6] Death and Survival Actions

Trial Court Jurisdiction to Allocate Settlement in Wrongful Death Action Approved; Declarations Insufficient to Show Decedent Was About to Divorce. In *Corder v. Corder (2007) 41 Cal. 4th 644* , the California Supreme Court held that if a wrongful death action has been brought to trial against non-settling defendants, that trial court has jurisdiction to apportion the proceeds from a settlement with other defendants when the plaintiff heirs cannot agree to an allocation, and when making the allocation, the assessments and intentions of the settling defendant in settling the case for the amount it did are irrelevant. The Court also held that mere declarations made by a decedent that he was unhappy in his marriage and was considering divorce were insufficient evidence to support a finding that the marriage was in fact about to end. See *Ch. 181, Death and Survival Actions, §§ 181.17[4], 181.20*.

Judgment May Be Backdated to Precede Plaintiff's Death When Death is After Jury Verdict. In *Cadlo v. Metalclad Insulation Corp. (2007) 151 Cal. App. 4th 1311* , the court of appeal held that a trial court may enter judgment nunc pro tunc when a plaintiff dies after a jury verdict, but before judgment is rendered, in order to date the

judgment prior to the plaintiff's death. See *Ch. 181, Death and Survival Actions, § 181.45[1]*.

Duties of Research Institutions to Decedent's Survivors Under Willed Body Programs Clarified. In *Conroy v. Regents of University of California (2007) 151 Cal. App. 4th 132* , the court of appeal held that absent an express contract to do so, a research institution does not have a duty to a decedent's family to track the body or its specific disposition. In *Melican v. Regents of University of California (2007) 151 Cal. App. 4th 168* , the court of appeal held that a research institution that contractually agrees only to dispose of a decedent's remains in accordance with state law has no duty to return any remains to the decedent's family. It may voluntarily undertake to do so, however, although such a voluntary undertaking will not support the imposition of liability if the remains returned have been commingled with the remains of another corpse. See *Ch. 180, Dead Bodies, § 180.14[4]*; *Ch. 362, Mental Suffering and Emotional Distress, § 362.11[4]*.

Wrongful Death Plaintiffs May Be Forced to Arbitrate Claims. In *Fitzhugh v. Granada Healthcare & Rehabilitation Center, LLC (2007) 150 Cal. App. 4th 469* , the court of appeal held that if some wrongful death plaintiffs are contractually obligated to arbitrate their claim, other heirs may be required to join the arbitration in order to keep the action consolidated. However, the court noted that plaintiffs cannot be forced to arbitrate their wrongful death claim if none of the plaintiffs are contractually obligated to arbitrate the claim, and the fact that the decedent would have been required to arbitrate any claims against the defendant will not obligate the decedent's heirs to arbitrate their wrongful death action. See *Ch. 181, Death and Survival Actions, § 181.12[7]*.

Registration With Local Authority Insufficient to Acquire Rights Under Domestic Partnership Act. In *Velez v. Smith (2006) 142 Cal. App. 4th 1154* , the court of appeal held that registration of a domestic partnership with a local authority such as a city is insufficient to acquire rights under the Domestic Partnership Act; registration with the Secretary of State is required. See *Ch. 181, Death and Survival Actions, § 181.14[2]*.

Relation-Back Doctrine Does Not Apply When Adding New Plaintiff in Wrongful Death Action. In *San Diego Gas & Elec. Co. v. Superior Court (2007) 146 Cal. App. 4th 1545* , the court of appeal held that if an attempt is made to add a plaintiff to a timely-filed wrongful death action, the limitations period runs to the time of amendment or intervention for that plaintiff and the "relation back" doctrine does not apply. See *Ch. 181, Death and Survival Actions, § 181.23[1]*.

[7] Emergency Vehicles

Liability Imposed for Costs of Response to False Police Report. Under newly added *Gov. Code § 53153.5*, any person 18 years old or older who is convicted of making a false police report in violation of *Pen. Code § 148.3* may be liable for the expense of any appropriate emergency response that proximately results from the false report. See *Ch. 246, Emergency Vehicles, § 246.15*.

Police Pursuit Immunity Statute Amended. Discussion of *Veh. Code § 17004.7* has been updated to reflect new criteria for granting immunity to public entities that adopt written policies to govern the vehicular pursuit of suspected criminals, when that pursuit results in injury. See *Ch. 246, Emergency Vehicles, § 246.12[3][b]*, and *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.102[3]*.

[8] Employer Liability

Employee Seeking Indemnification of Defense Costs From Employer Bears Burden of Proving Costs Incurred. In *Cassady v. Morgan, Lewis & Bockius LLP (2006) 145 Cal. App. 4th 220* , the court of appeal held that when seeking indemnification of defense costs from his or her employer, an employee bears the burden of proving which costs were incurred in defense of claims arising from employment with that employer, even if apportionment of costs is required because the underlying claims arose from employment with multiple employers. See *Ch. 248, Employer's Liability for*

Employee's Torts, § 248.20[2].

[9] False Claims Actions

Public Entity May Not Sue as Qui Tam Plaintiff Under False Claims Act. In *State ex rel. Harris v. Pricewaterhouse Coopers, LLP (2006) 39 Cal. 4th 1220* , the California Supreme Court held that because the statutory definition of "person" under the False Claims Act does not encompass a state or local government entity, a public entity may not bring an action as a qui tam plaintiff on behalf of another government agency. See *Ch. 468, Public Entities and Officers: False Claims Actions, § 468.22[1]*.

[10] Fraud and Deceit

Oakland Raiders Waived Right to Sue Coliseum for Fraud. In *Oakland Raiders v. Oakland-Alameda County Coliseum, Inc. (2006) 144 Cal. App. 4th 1175* , the court of appeal held that the Oakland Raiders National Football League team had waived the right to sue the Oakland-Alameda County Coliseum for fraud in inducing the Raiders in 1995 to sign a long-term agreement to play at the Coliseum, because after learning during the 1995 season that season ticket sales were not as high as they had been told, the Raiders subsequently entered into a new contract with the Coliseum in September 1996 concerning the same subject matter as the previous contract. See *Ch. 269, Fraud and Deceit, § 269.31[6]*.

[11] Games and Sports

Sports Facility Under No Duty to Notify Users of Presence of Defibrillator. In *Rotolo v. San Jose Sports & Entertainment, LLC (2007) 151 Cal. App. 4th 307* , the court of appeal held that sports facility operators do not owe a duty to sports participants to provide advance notice of the availability of an automatic external defibrillator at the facility for use should a medical emergency arise. See *Ch. 273, Games, Sports, and Athletics, § 273.32*.

Liability for Negligent Supervision of Seventh-Grade Golf Class to Be Determined Through Prudent Person Standard. In *Hemady v. Long Beach Unified School Dist. (2006) 143 Cal. App. 4th 566* , the court of appeal held that when a seventh-grade student in a physical education golf class was inadvertently hit in the face by a golf club swung by another student, the potential liability of the instructor and school district was not barred by the primary assumption of risk doctrine, but was to be determined through application of a prudent person standard of care. See *Ch. 273, Games, Sports, and Athletics, § 273.31[1]*, and *Ch. 380, Negligence, § 380.172[4][b]*.

Skier Not Liable for Blind Turn. In *Towns v. Davidson (2007) 147 Cal. App. 4th 461* , the court of appeal held that a snow skier will not be held liable for a collision caused by quick and aggressive skiing, as this is an inherent part of the sport, even if the skier makes a quick turn without looking. See *Ch. 273, Games, Sports, & Athletics, § 273.30[7][h]*.

[12] Hospitals

MICRA "Personal Injury" Does Not Cover Purely Economic Injury. In *Vazquez de Mercado v. Superior Court (2007) 148 Cal. App. 4th 711* , the court of appeal held that, for purposes of establishing the applicability of MICRA to the conduct of a medical professional, the term "personal injury" covers only injury that impairs the well-being or mental or physical health of the plaintiff, and the term does not cover purely economic injury. See *Ch. 295, Hospitals, § 295.13[2]*, and *Ch. 415, Physicians: Medical Malpractice, §§ 415.10, 415.49[5]*.

Private Action to Enforce *Evid.* *Code § 1158* Permitted. In *Thornburg v. El Centro Regional Medical Center (2006) 143 Cal. App. 4th 198* , the court of appeal held that a patient may file a civil action to enforce *Evid. Code § 1158* (disclosure of medical records) if a hospital fails to make records available under the conditions prescribed by the statute, and that failure includes charging more for copies than permitted. See *Ch. 295, Hospitals, § 295.23[2]*.

Res Ipsa Loquitur Instruction Appropriate in Suit Against Surgeon When Sponge Left in Body Cavity. In *Baumgardner v. Yusuf (2006) 144 Cal. App. 4th 1381* , the court of appeal held that a surgeon could not escape application of the res ipsa loquitur doctrine after a patient was injured by a sponge left in the body cavity by arguing that a nurse assisting with surgery was responsible for ensuring that all sponges were removed, as that duty was ultimately the responsibility of the surgeon despite hospital protocols placing responsibility on the nursing staff. See *Ch. 295, Hospitals, § 295.22[1][e]*.

[13] Invasion of Privacy

Litigation Privilege Applies to Action Under State Constitutional Right to Privacy. In *Jacob B. v. County of Shasta (2007) 40 Cal. 4th 948, 56 Cal. Rptr. 3d 477, 154 P.3d 1003* , the California Supreme Court held that the litigation privilege of *Civ. Code § 47(b)*, which generally protects from tort liability a publication made in connection with a judicial proceeding, protects against a cause of action based on California's constitutional right to privacy, and protected a letter that the supervisor of a county victim witness program wrote in connection with a family law proceeding involving visitation rights, which provided information regarding whether one of the persons being considered for visitation had molested his nephew one decade earlier. See *Ch. 429, Privacy, § 429.16[19]*.

Disclosure of Medical Information to Persons Involved With Patient's Care Permitted. Under newly added *Civ. Code § 56.1007*, a health care provider, service plan, or contractor may disclose to a family member, another relative, a domestic partner, or a close personal friend of the patient, or to any other person identified by the patient, medical information directly relevant to that person's involvement with the patient's care or payment related to the patient's care. See *Ch. 429, Privacy, § 429.200[4]*.

California Privacy Statute Applicable to Telephone Calls May Be Applied to Calls Made From Another State. In *Kearney v. Salomon Smith Barney, Inc. (2006) 39 Cal. 4th 95* , the California Supreme Court held that *Pen. Code § 632*, which allows recording of a telephone conversation only if all parties agree, applies to a confidential communication that takes place partly in California and partly in another state that has a law requiring the permission of only one party. However, the Court permitted the plaintiffs to seek only injunctive relief in this particular case due to the uncertainty that would have existed prior to the Court's decision as to which state's law would govern. See *Ch. 429, Privacy, § 429.34[2]*.

Drug Testing of Ward Upheld. In *In re Carmen M. (2006) 141 Cal. App. 4th 478* , the court of appeal upheld a juvenile court order for the drug testing of a ward of the court who had a documented history of drug abuse, because the drug testing order in that case was narrowly tailored to require testing only if the staff of the minor's group home believed that the minor was under the influence. See *Ch. 429, Privacy, § 429.16[12][a]*.

Video Game Maker Not Liable for Appropriation of Singer's Likeness. In *Kirby v. Sega of America, Inc. (2006) 144 Cal. App. 4th 47* , the court of appeal held that the *First Amendment* protected a video game maker from a suit for commercial appropriation of likeness brought by a singer with a distinctive stage persona, concluding that there were sufficient transformative elements in the character such that the character was not a mere likeness or literal depiction of plaintiff. See *Ch. 429, Privacy, § 429.36[12]*.

Researcher Who Used Deception to Obtain Private Information From Plaintiff's Foster Mother Could Be Sued for Intrusion. In *Taus v. Loftus (2007) 40 Cal. 4th 683* , the California Supreme Court denied a motion to strike a cause of action for invasion of privacy by intrusion against an academic researcher who allegedly used deception to obtain personal and private information from the plaintiff's former foster mother. The researcher allegedly deceived the foster mother into believing that the researcher was working with a psychiatrist who plaintiff had worked with and trusted, and the foster mother would not have shared plaintiff's personal information had she known the truth. The Court in that case also held that otherwise private facts that have clear scholarly interest may be considered newsworthy. See *Ch. 429, Privacy, §§ 429.34[3], 429.40[4]*.

[14] Libel and Slander

Injunction Prohibiting Repetition of Defamatory Statements Permitted. In *Balboa Island Village Inn, Inc. v. Lemen (2007) 40 Cal. 4th 1141* , the California Supreme Court held that a narrowly drawn injunction issued after a trial at which defendant's particular speech has been adjudicated to be defamatory may properly enjoin the defendant from repeating the defamation and is not considered an unconstitutional prior restraint on speech. See *Ch. 340, Libel and Slander, § 340.33*.

Anti-SLAPP Statute Does Not Protect Conduct That Is Illegal as Matter of Law. In *Flatley v. Mauro (2006) 39 Cal. 4th 299* , the California Supreme Court held that even assuming that the litigation privilege might apply to pre-litigation conduct that is illegal, a defendant may not successfully pursue a motion to strike under the anti-SLAPP statute, *Code Civ. Proc. § 425.16*, if the underlying conduct taken by the defendant was illegal as a matter of law, because illegal conduct is not constitutionally protected. See *Ch. 340, Libel and Slander, § 340.52*.

Federal Communications Decency Act Provides Immunity for Internet Republications Made With Notice of Potential Defamation. In *Barrett v. Rosenthal (2006) 40 Cal. 4th 33* , the California Supreme Court held that the Federal Communications Decency Act of 1996, which provides a statutory immunity from common law liability for defamation for Internet publications that originate from a different party, applies to republications made with notice of the potential defamatory nature of the content. The Court also concluded that the immunity extends to all individuals who use an interactive computer service, regardless of whether the "use" at issue consists of merely receiving defamatory information, or screening and removing defamatory publication from an Internet site, or some other use of the interactive computer service. See *Ch. 340, Libel and Slander, § 340.75*.

Actual Malice to be Shown by Clear and Convincing Evidence to Defeat Motion to Strike. In *Christian Research Inst. v. Alnor (2007) 148 Cal. App. 4th 71* , the court of appeal held that a public figure plaintiff attempting to defeat a motion to strike a defamation action under Code Civ. Proc. § 426.16 must show a probability of demonstrating actual malice by clear and convincing evidence, and neither the trial court nor a reviewing court is required to consider the evidence of actual malice in the light most favorable to the plaintiff or draw all permissible inferences in favor of plaintiff. See *Ch. 340, Libel and Slander, § 340.52*.

Employer Is "Provider" Under Federal Communications Decency Act When Providing Internet Access to Employees. In *Delfino v. Agilent Technologies, Inc. (2006) 145 Cal. App. 4th 790* , the court of appeal held that an employer that provides its employees with Internet access through the company's internal computer system is a "provider" of an interactive computer service for purposes of the federal Communications Decency Act. See *Ch. 340, Libel and Slander, § 340.75*.

[15] Malicious Prosecution

Voluntary Dismissal to Avoid Further Litigation Hardships Not Favorable Termination for Defendant for Malicious Prosecution Purposes. In *Contemporary Services Corp. v. Staff Pro Inc. (2007) 152 Cal. App. 4th 1043* , the court of appeal held that voluntary dismissal in order to save the cost of further litigation, rather than because the plaintiff lost faith in the merits of the claim, does not constitute a favorable termination for the defendant for purposes of establishing a subsequent malicious prosecution claim. See *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.14[3]*.

Postjudgment Settlement Constituted Favorable Termination for Malicious Prosecution Purposes. In *Siebel v. Mittlesteadt (2007) 41 Cal. 4th 735* , the California Supreme Court held that if a malicious prosecution plaintiff received a favorable judgment on the merits at trial in the underlying action, but the parties subsequently settled the action without the malicious prosecution plaintiff giving up any portion of the favorable judgment, the postjudgment settlement constitutes a favorable termination of the underlying action for the malicious prosecution plaintiff. See *Ch.*

357, Malicious Prosecution and Abuse of Process, § 357.14[3].

Denial of Anti-SLAPP Motion Does Not Show Probable Cause to Bring Action. In *Hutton v. Hafif (2007) 150 Cal. App. 4th 527* , the court of appeal held that denial of a motion to strike brought under *Code Civ. Proc. § 425.16* cannot be used to support a finding that the underlying action was brought with probable cause for purposes of a subsequent malicious prosecution lawsuit. The court also held that a defendant prevailing on a special motion to strike a SLAPPback suit is not entitled to attorney's fees under *Code Civ. Proc. § 425.16(c)*. See *Ch. 357, Malicious Prosecution and Abuse of Process, §§ 357.16[3], 357.24[4].*

Plaintiff's Attorney May Be Liable for Filing Appeal After Discovering Case Lacks Probable Cause. In *Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal. 4th 260* , the California Supreme Court held that a plaintiff's attorney may be liable for malicious prosecution for filing an appeal in a case after the attorney discovers that the action lacks probable cause. See *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.16[1].*

SLAPPback Statute Applicable to Pending Cases. In *Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal. 4th 260* , the California Supreme Court held that *Code Civ. Proc. § 425.18*, the so-called SLAPPback statute, applies to cases pending at the time of its enactment, because the statute effects only procedural changes. The Court also held that in applying the statute, an underlying suit is "illegal as a matter of law" if the defendant concedes the illegality of the assertedly protected activity or if the illegality is conclusively established by the evidence presented in connection with the motion to strike. See *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.24[4].*

Action Seeking Injunction Under Workplace Violence Safety Act Will Not Support Malicious Prosecution Action. In *Robinzine v. Vicory (2006) 143 Cal. App. 4th 1416* , the court of appeal held that filing an action for an injunction under the Workplace Violence Safety Act, *Code Civ. Proc. § 527.8*, will not support a subsequent malicious prosecution action if the request for an injunction is denied. See *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.11[7].*

[16] Negligence

Pre-Injury Waiver of Liability for Negligence Does Not Extend to Gross Negligence. In *City of Santa Barbara v. Superior Court (2007) 41 Cal. 4th 747* , the California Supreme Court held that even if a pre-injury agreement purporting to excuse a potential defendant from liability for negligence is valid and enforceable, the same release will not generally excuse the defendant from liability for gross negligence. In that specific case, the Court held that an agreement releasing a city from liability for negligence committed against a developmentally disabled child who was participating in a recreational camp designed for the needs of such children violated public policy and was unenforceable to the extent that it could be used to release the city from liability for gross negligence. See *Ch. 380, Negligence, § 380.171[2][b].*

Subcontractor Liable to Contractor's Hirer for Substandard Performance. In *Stonegate Homeowners Assn. v. Staben (2006) 144 Cal. App. 4th 740* , the court of appeal held that despite the lack of privity of contract, it is clearly established that a subcontractor on a construction project can be held liable in negligence to the party who hires the general contractor if the subcontractor's work is below the applicable standard of care in the industry. See *Ch. 380, Negligence, § 380.31[3].*

[17] Premises Liability

Landlord Owed Duty of Care When Knowing That Tenant Threatened Others With Firearm. In *Barber v. Chang (2007) 151 Cal. App. 4th 1456* , the court of appeal held that a landlord who knows that a tenant has brandished firearms at others while threatening them with harm has a duty to take reasonable precautions to prevent harm, although the precise scope of that duty will depend on the particular facts and may under the appropriate circumstances be

satisfied by minimally burdensome measures such as calling the police. See *Ch. 421, Premises Liability, § 421.12[5][c]*.

Landlord Not Liable for Injury Caused by Tenant's Dog. In *Chee v. Amanda Goldt Property Management (2006) 143 Cal. App. 4th 1360* , the court of appeal held that evidence that a particular breed of dog generally has certain characteristics, by itself, does not establish that a landlord had actual knowledge that a tenant's dog had any dangerous propensities. The court also held that in the absence of actual knowledge of the danger posed by a tenant's dog, a landlord cannot be held vicariously liable for an injury caused by the dog merely because the covenants, conditions, and restrictions governing the residence purport to make the landowner responsible for the acts and omissions of the owner's delegates. See *Ch. 421, Premises Liability, § 421.12[5][c]*.

Landlord With Unlawful Detainer Judgment Owes Duty to Inspect. In *Stone v. Center Trust Retail Properties, Inc. (2007) 146 Cal. App. 4th 1435* , the court of appeal held that, for purposes of a subsequent premises liability action, a landlord that has instituted a successful unlawful detainer action has a duty to inspect the property that attaches upon entry of judgment in the unlawful detainer action, even if the tenant has not yet vacated the premises, and includes a duty to make subsequent inspections at reasonable intervals. See *Ch. 421, Premises Liability, § 421.12[5][c]*.

Sufficient Evidence of Causation Shown in Suit Against Property Owner by Tenant Who Was Raped. In *Ambriz v. Kelegian (2007) 146 Cal. App. 4th 1519* , the court of appeal held that a woman raped in her apartment complex by a transient known to have loitered in the complex in the past had provided sufficient evidence to show a triable issue of fact on causation in a suit against the property owner by demonstrating that there were gates to the complex that did not lock properly and that unauthorized males had been using these gates to gain access. See *Ch. 421, Premises Liability, § 421.15[3]*.

[18] Products Liability

Plainly Visible Snowmaking Equipment Was Not Defective. The appellate court rejected the strict products liability claim of a skier who collided with a plainly-visible snow making hydrant. *Souza v. Squaw Valley Ski Corp. (2006) 138 Cal. App. 4th 262, 271, 41 Cal. Rptr. 3d 389* . See *Ch. 460, Products Liability, §§ 460.11[2][c]*; *460.104[24][i1]*.

MTBE Plaintiffs Need Not Have Used the Product to Have Standing to Assert Products Liability Action. A property owner alleged that MTBE-containing gasoline sold by defendant leaked from gas stations into the plaintiff's water system. The court held that strict liability does not require use of a product by an ultimate consumer, and may include foreseeable uses of a product while it is still on the market. See *Nelson v. Superior Court (2006)144 Cal. App. 4th 689* now covered in Ch. 460, *Products Liability*, §§ 460.460.11[2][b], [c]; 460.31[1]; 460.31[2][b][ii]; 460.104[1]; 460.104[6][m]; 460.140[3][ii]; 460.161[2].

Economic Loss Rule Bars County's Lead Paint Abatement Action. Municipalities filed an action seeking to recoup the costs of abatement of lead-based paint in their buildings. They alleged only that lead paint is harmful to human beings, and did not allege any physical injury to their buildings. The deterioration of lead paint did not constitute a physical injury to their buildings sufficient to support a negligence or strict liability cause of action. See *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal. App. 4th 292 , now *covered in Ch. 460, Products Liability, §§ 460.11[4]*; *460.31[1], [2][a]*; *460.104[1], [6][o], [22a][a], [22a][c]*.

Establishing Causation in Asbestos Cases. Appellate courts addressed the requirement of proving exposure to a defendant's asbestos product in two cases. In *Weber v. John Crane, Inc. (2006) 143 Cal. App. 4th 1433* , one court clarified that a defendant does not shift the burden of production to the plaintiff by showing that the plaintiff has no personal recall of the defendant's product. Rather, the defendant must make an affirmative showing that the plaintiff will be unable to prove his or her case by any means. In *Andrews v. Foster Wheeler LLC (2006) 138 Cal. App. 4th 96* , a defendant met its initial burden of making a prima facie showing that a triable issue of fact did not exist regarding

causation. See *Ch. 460, Products Liability, §§ 460.11[9][iv]*; *460.104[10]*.

Constitutional Limitations on Punitive Damages. In *Buell-Wilson v. Ford Motor Co. (2006) 141 Cal. App. 4th 525* , the plaintiff was rendered a paraplegic in a Ford Explorer rollover. The appellate court reduced the remitted $75 million punitive damages award to $55 million. The court determined that a two-to-one ratio with compensatory damages was appropriate. In *Bullock v. Philip Morris USA, Inc., (2006) 2006 Cal. LEXIS 9289* , a cigarette case, the Supreme Court depublished and granted review of a decision affirming a $28 million punitive damages award, an amount 33 times greater than the compensatory damages award. See *Ch. 460, Products Liability, §§ 460.33[2]*; *460.104[15][a], [b]*; *460.104[21]*[a.1], [c]; 460.140[3][b][ii]; 460.168[3][a].

Preemption of State Law Claims Regarding Train Seats and DVT. A woman died from deep vein thrombosis (DVT) after riding on an Amtrak train. The state law claims regarding seats and seating configurations were unduly burdensome on the passenger train industry and were preempted by the *Commerce Clause*. The claim alleging a duty to warn passengers of the dangers of DVT, in contrast, was not preempted. See *Haynes v. AMTRAK (C.D. Cal. 2006) 423 F. Supp. 2d 1073* , now *covered in Ch. 460, Products Liability, §§ 460.11[2][a], [6][a], [10][a][i]*; *460.52[f]*; *460.104[24][m]*; *460.104[39]*

Primary Assumption of Risk Did Not Bar Claims Against Personal Watercraft Manufacturer. The plaintiff sustained severe orifice injuries after falling off the rear of a personal watercraft. Primary assumption of risk did not foreclose plaintiff's strict products liability claim. When the operator of the jet ski prevailed on summary judgment based on primary assumption of risk, the manufacturer was not entitled to a verdict form permitting allocation of fault to her under *Civ. Code § 1431.2(a)*. See *Ford v. Polaris Indus., Inc. (2006) 139 Cal. App. 4th 755* , now *covered in Ch. 460, Products Liability, §§ 460.11[9][b]*; *460.53*; *460.70[3]*; *460.104[7]*; *460.104[29][i]*; *460.104[42a]*.

Plainly Visible Snowmaking Equipment Was Not Defective. The appellate court rejected the strict products liability claim of a skier who collided with a plainly visible snow making hydrant. *Souza v. Squaw Valley Ski Corp. (2006) 138 Cal. App. 4th 262, 271, 41 Cal. Rptr. 3d 389* . See *Ch. 460, Products Liability, §§ 460.11[2][c]*; *460.104[24][i1]*.

[19] Railroads

Same Standard of Causation Applied to Negligence of Employee and Employer Under FELA. In *Norfolk Southern Railway Co. v. Sorrell (2007)549U.S.158, 166 L. Ed. 2d 638* , the United States Supreme Court held that, in an action under the Federal Employer's Liability Act (FELA), the same standard of causation applies to an employee's contributory negligence as applies to the railroad's negligence. See *Ch. 485, Railroads, § 485.42[2]*.

New Requirements for Audible Railroad Warning Signals. *Pub. Util. Code § 7604* has been amended to incorporate federal regulations governing audible warning signal requirements for railroads. See *Ch. 485, Railroads, § 485.62[4][e]*.

Expert Witness Fees Unavailable Under *Code Civ.* *Proc. § 998* in FELA Action. In *Miller v. Union Pac. R.R. Co. (2007) 147 Cal. App. 4th 451* , the court of appeal held that, in an action brought in state court under the Federal Employers' Liability Act, expert witness fees cannot be awarded under *Code Civ. Proc. § 998* when a party receives a more favorable outcome at trial than the amount of a rejected settlement offer, as such fees are not recoverable under federal law. See *Ch. 485, Railroads, § 485.44*.

[20] Shipping

Shipping and Maritime Statutes Updated. Citations to the Death on the High Seas Act, the Jones Act, and other maritime and shipping statutes formerly codified in 46 U.S.C.S. Appendix have been updated to reflect recodification in Title 46. See primarily Ch. 100, *Boats and Boating*, and Ch. 522, *Ships and Shipping*.

[21] Tort Claims Act

Motion to Preserve Evidence Not Action Sufficient to Meet Tort Claims Act Limitations Period. In *Orr v. City of Stockton (2007) 150 Cal. App. 4th 622* , the court of appeal held that a petition to perpetuate testimony or preserve evidence under *Code Civ. Proc. § 2035.010 et seq.* does not constitute the filing of a "suit" for purposes of the six-month limitations period of the California Tort Claims Act. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.42[1][a]*.

Deputy District Attorneys Protected by Prosecutorial Immunity. In *Miller v. Filter (2007) 150 Cal. App. 4th 652* , the court of appeal held that persons appointed as deputy district attorneys are protected by prosecutorial immunity under *Gov. Code § 821.6*, even if there is a ministerial defect in the appointment process, so long as the deputy district attorney acts under color of authority and is performing the proper function of a deputy district attorney at the time. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.64[7][a]*.

Public Entity May Not Be Sued Under False Claims Act. In *Wells v. One2One Learning Foundation (2006) 39 Cal. 4th 1164* , the California Supreme Court held that a public entity may not be sued under the False Claims Act. The Court also held, however, that private entities that engage in traditional public entity activities and are perhaps subject to some public entity oversight, such as charter schools, may be sued under the Act if they otherwise meet the statutory definition of "person." However, a plaintiff bringing an action under the False Claims Act need not comply with the California Tort Claims Act before filing suit. See *Ch. 468, Public Entities and Officers: False Claims Actions, §§ 468.21[2], 468.22[5][a]*.

Recreational Trail Immunity Applicable in Defective Design/Maintenance Claims. In *Amberger-Warren v. City of Piedmont (2006) 143 Cal. App. 4th 1074* , the court of appeal held that recreational trail immunity is available to a public entity even when the claim alleges defects in the design or maintenance of the trail. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.85[7]*.

Police Pursuit Immunity Statute Amended. Discussion of *Veh. Code § 17004.7* has been updated to reflect new criteria for granting immunity to public entities that adopt written policies to govern the vehicular pursuit of suspected criminals, when that pursuit results in injury. See *Ch. 246, Emergency Vehicles, § 246.12[3][b]*, and *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.102[3]*.

Claims Filing Requirement Inapplicable to Action Against Charter School. In *Knapp v. Palisades Charter High School (2007) 146 Cal. App. 4th 708* , the court of appeal held that claims against charter schools run by nonprofit corporations that are legal entities independent from the chartering school districts are not subject to the claims filing requirement of the Tort Claims Act, as a charter school is not considered to be a public entity. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.22[4]*.

Substantial Compliance With Claims Filing Requirement Found. In *Connelly v. County of Fresno (2006) 146 Cal. App. 4th 29* , the court of appeals held that a claimant who described the general facts surrounding a car accident allegedly caused when a county employee ran a stop sign and stated that she sought "unspecified medical, lost income, future medical," met the substantial compliance test for filing a claim with the county, as it put the county on notice of personal injuries suffered by the claimant in the accident and that the claimant did not at that time know the extent of the injuries or the associated costs. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.23[3][e]*.

Time for Filing Suit Against Public Entity Generally Runs From Rejection of First Filed Claim. In *Sofranek v. County of Merced (2007) 146 Cal. App. 4th 1238* , the court of appeal held that if an amended claim is timely filed against a public entity that relates to the same transaction or occurrence that gave rise to the original claim, the six-month period for filing suit generally runs from the time that the first claim is rejected. The court also held,

however, that if a government entity sends notice upon rejection of an amended claim that the claimant has six-months from rejection of the claim to file suit, the entity may be estopped from relying on rejection of the original claim for purposes of calculating the six-month period for filing suit. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, §§ 464.42[1][a], 464.47[4]*.

Public Entity Immunity for Malicious Prosecution Inapplicable to Claim for Arrest Without Probable Cause. In *Gillan v. City of San Marino (2007) 147 Cal. App. 4th 1033* , the court of appeal held that a public entity is not immune from suit under *Gov. Code § 821.6* for an arrest made without probable cause. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.64[7][a]*.

[22] Trucks

New Rules Governing Towing of Vehicle Parked on Private Property. The legislature has amended *Veh. Code § 22658*, which governs the towing of a vehicle parked on private property. See *Ch. 553, Trucks, § 553.13[4]*.

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§ 1.126 Trials

[1] Evidence

Forensic Report Properly Excluded as Not Meeting Timeliness Requirement of Official Record. In *Glatman v. Valverde (2006) 146 Cal. App. 4th 700, 53 Cal. Rptr. 3d 319* , a proceeding to require the Department of Motor Vehicles to set aside the suspension of a driver's license, the trial court did not abuse its discretion by finding the results of the driver's blood alcohol test were not timely recorded as required by *Evid. Code § 1280(b)* to be admissible under the hearsay exception for public records. The forensic report was prepared one week later, and, although it was only five working days after the arrest, memory was subject to erosion with every day that passed. Further, the record was silent as to the Department's recordation policies and procedures, and *Evid. Code § 664* did not create a presumption the analysts timely recorded the test results. See Ch. 551, *Trial* .

Burn Victim's Statements to Police Admissible as Spontaneous Declarations. In *People v. Pedroza (2007) 147 Cal. App. 4th 784, 54 Cal. Rptr. 3d 636* , a murder prosecution based on a husband's burning of his wife, the statements of the wife to police officers in response to their questions were admissible under the *Evid. Code § 1240* hearsay exception for spontaneous declarations. Two officers encountered the victim and asked only what happened and then followed up by asking how she was burned and spoke to the victim for approximately 10 to 15 seconds, and the victim's response, minutes after she sustained severe burns and while she was still suffering from resulting intense pain, suggested her statements were the product of the stress of the moment, not deliberation. Although a third officer spoke to the victim for about five minutes and asked more questions than the other officers, the evidence supported the trial court's finding that the victim's answers were nonetheless spontaneous. See Ch. 551, *Trial* .

[2] Juries and Jury Selection

Jury Trial Waiver in Forfeiture Proceeding. In *People v. $17,522.08 United States Currency (2006) 142 Cal. App. 4th 1076* , the court found a statutory right to a jury trial in a civil forfeiture proceeding, but found that a claimant who represented herself waived a jury trial by consent under *Code Civ. Proc § 631*, because she did not request a jury trial or announce one was required, and she did not post the required jury fees. See *Ch. 322, Juries and Jury Selection, § 322.15[2][h]*.

Prosecutor's Inability to Remember Why She Excused Male Prospective Juror Only Evidence of Discriminatory Use of Peremptory Challenge. In *Yee v. Duncan (9th Cir. 2006) 463 F.3d 893* , the Ninth Circuit held that a party's failure to satisfy the burden to produce evidence of nondiscriminatory reasons for the exercise of peremptory challenges once the opposing party has presented a prima facie case, becomes evidence added to the inference of discrimination raised by the prima facie showing, but does not end the inquiry. Thus, the prosecutor's failure to provide a reason for striking a male potential juror because she could not remember why she struck him, was not an automatic violation of the defendant's equal protection rights. It was not objectively unreasonable for the California Court of Appeal to conclude that defendant did not meet his ultimate burden of establishing purposeful discrimination by accepting the prosecutor's statement that she forgot why she exercised the peremptory challenge as credible, and voir dire testimony suggested a gender-neutral reason for the challenge. See *Ch. 322, Juries and Jury Selection, § 322.42[6][b]*.

No Jury Trial Right in Unfair Competition Law Action. In *Hodge v. Superior Court (2006) 145 Cal. App. 4th 278* , a class action by employees brought under the Unfair Competition Law (UCL) alleging that the employees were improperly denied payment for overtime work, the defendant-employer was not entitled to a jury trial. The UCL provides only for equitable remedies, the fact that contract issues may have been implicated did not transform the equitable action into a legal one, the employer's affirmative defense based on a wage order did not require a jury trial, and the existence of a factual issue did not require a jury trial. See Ch. 322, *Juries and Jury Selection* .

Defense Counsel's Oral Waiver of Jury Trial at Status Conference Waived Jury Trial. In *Cadle Co. v. World Wide Hospitality Furniture, Inc. (2006) 144 Cal. App. 4th 504* , the defendant's attorney's oral consent to a jury waiver at the final status conference, stated in open court and entered in the court minutes, provided a basis for a jury waiver under *Code Civ. Proc. § 631(d)(3)*. See Ch. 322, *Juries and Jury Selection* .

Peremptory Challenges to African-American Prospective Jurors Proper. In *People v. Phillips (2007) 147 Cal. App. 4th 810, 54 Cal. Rptr. 3d 678* , a robbery prosecution, it was proper for the trial court to require explanations from the prosecution for peremptory challenges to only two of three prospective African-American jurors who were the subject of the African-American defendant's *Batson/Wheeler* motion, because the trial court properly determined that the facts did not support an inference of discrimination against one prospective juror. The trial court did not fail to elicit sufficient reasons for the peremptory challenges of other two jurors, because the prosecuting attorney disclosed she had mistakenly dismissed one prospective juror because she relied on information in the questionnaire of another juror with the same last name, and the prosecutor's reason for excusing one prospective juror based on his body language was not too vague to rebut the prima facie showing of group bias. See *Ch. 322, Juries and Jury Selection, 322.76[5][6][ii]*.

No Jury Trial Right in Rescission Action. In *NMSBPCSLDHB v. County of Fresno (2007) 152 Cal. App. 4th 954* , the court held that a rescission action in which the plaintiff sought to recover money, which was something other than the consideration paid by plaintiff, which was land, was an action in equity and plaintiff was not entitled to a jury trial. See Ch. 322, *Juries and Jury Selection* .

No New Trial on Conflicting Evidence of Juror Misconduct. In *Oakland Raiders v. National Football League (2007) 41 Cal. 4th 624* , the California Supreme Court, upon an independent review of the record, concluded that the moving party failed to discharge its burden to persuade the Court of jury misconduct warranting the grant of new trial, when the trial court failed to specify reasons for granting a new trial on juror misconduct grounds, the testimonial evidence submitted by the parties in the form of juror declarations was sharply conflicting on every material issue, and the party supporting the grant of a new trial submitted no other evidence to support its motion. See Ch. 371, *Motions After Trial* .

[3] Motions After Trial

No New Trial on Conflicting Evidence of Juror Misconduct. In *Oakland Raiders v. National Football League (2007) 41 Cal. 4th 624* , the California Supreme Court, upon an independent review of the record, concluded that the

moving party failed to discharge its burden to persuade the Court of jury misconduct warranting the grant of new trial, when the trial court failed to specify reasons for granting a new trial on juror misconduct grounds, the testimonial evidence submitted by the parties in the form of juror declarations was sharply conflicting on every material issue, and the party supporting the grant of a new trial submitted no other evidence to support its motion. See Ch. 371, *Motions After Trial* .

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§ 1.127 Trusts

No-Contest Clauses--Election of Beneficiaries. In *Colburn v. Northern Trust Co. (2007) 151 Cal. App. 4th 439, 447* , the court upheld a no-contest clause in a testamentary trust which forced the trustor's former wife and their children to choose between enforcing their rights under an existing martial dissolution judgment by filing creditor's claims, or relinquishing those rights and taking the gifts provided for them in trustor's trust. See *Ch. 444, Probate: Will Contests, § 444.14[4][a]*; *Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, §§ 560.16[1]*.

No-Contest Clauses--Application to Actions Under Uniform Principal and Income Act. In *McKenzie v. Vanderpoel (2007) 151 Cal. App. 4th 1442* , the court upheld a no-contest clause in trust instrument that applied to any attempt to "impair" the trust, and therefore extended to the trust beneficiary's adjustment petition under the California Uniform Principal and Income Act to reallocate principal and income, when such a reallocation would have resulted in more income to the beneficiary than allowed by the trust, and would have resulted in the invasion of trust principal reserved to other beneficiaries. See *Ch. 444, Probate: Will Contests, §§ 444.14[4][a]*; *Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, § 560.16[1]*.

Remainder Beneficiary of Trust May Seek Court-Ordered Account If Trustee Fails to Respond to Request for Information. A California Court of Appeal has held that a remainder beneficiary of a trust, who generally does not have a right to receive the trustee's annual accounting, may petition the court to compel the trustee to report information about the trust or to account, if the trustee does not respond to the beneficiary's request for information. See *Esslinger v. Cummins (2006) 144 Cal. App. 4th 517* , now *covered in Ch. 7, Action for Accounting, § 7.13[2]*.

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§ 1.128 Unfair Competition

Standing Under Unfair Competition Statute Lacking When Unlawful Conduct Caused No Actionable Harm. In *Daro v. Superior Court (2007) 151 Cal. App. 4th 1079* , the court of appeal held that in an action under the unfair competition statute, if the cause of action is based on an unlawful business practice, plaintiff cannot predicate standing to sue on an injury caused by lawful conduct of the defendant that is somehow connected to defendant's unlawful conduct, if that unlawful conduct does not itself cause actionable injury to plaintiff. See *Ch. 565, Unfair Competition, § 565.35[1]*.

Contractual Provision Prohibiting Customer From Hiring Business's Employees Unenforceable. In *VL Systems, Inc. v. Unisen, Inc. (2007) 152 Cal. App. 4th 708* , the court of appeal held that a broad provision in a contract with a customer prohibiting that customer from hiring the employees of the other contracting party for a specified term, and imposing a penalty on the customer if doing so, violates *Bus. & Prof. Code § 16600*, since it limits the ability of the affected employees to change employment and does so without extracting a prior agreement from the employees or ensuring that the employees even have advance notice of the restriction being placed on their employment opportunities. See *Ch. 565, Unfair Competition, § 565.71[2][c]*.

Cable Company's Tying of Digital Music or FM Channels to Cable Television Service Not Illegal. In *Belton v. Comcast Cable Holdings, LLC (2007) 151 Cal. App. 4th 1224* , the court of appeal held that a cable company did not engage in an illegal tying arrangement when requiring customers to purchase basic cable television in order to receive FM or audio-only music channels. As the plaintiffs admitted they had no interest in purchasing basic cable, the tying arrangement did not injure competition in that market. See *Ch. 565, Unfair Competition, § 565.77[4]*.

Precertification Discovery Denied in Unfair Competition Class Action. In *Cryoport Systems v. CNA Ins. Companies (2007) 149 Cal. App. 4th 627* , the court of appeal held that, in an action under the unfair competition statute, a plaintiff who has been given an opportunity to amend but cannot meet the requirements for standing, and who has not identified a substitute plaintiff who does meet the requirements for standing, does not have a right to precertification discovery in an attempt to locate an appropriate representative to continue the original plaintiff's action as a class action. See *Ch. 565, Unfair Competition, § 565.35[2]*.

No Antitrust or Unfair Competition Claim Based on Exclusive Agreement Between Blue Cross and Provider Group. In *Lori Rubinstein Physical Therapy, Inc. v. PTPN, Inc. (2007) 148 Cal. App. 4th 1130* , the court of appeal rejected antitrust and unfair competition claims stemming from an exclusive provider contract between Blue Cross and a physical therapy provider group brought by competing physical therapy providers. Under the contract between Blue Cross and the defendant provider group, the provider group would accept reduced rates from Blue Cross for its services but would be the exclusive preferred provider of physical therapy services for Blue Cross members. The court concluded that such agreement was expressly authorized by these statutes, notwithstanding the fact that it inhibited the ability of competing providers to compete on the basis of price. See *Ch. 565, Unfair Competition, § 565.73[9]*.

Proposition 64 Applies to Actions Pending at Time of Passage, but Ordinary Rules of Amendment Apply. In *Californians for Disability Rights v. Mervyn's, LLC (2006) 39 Cal. 4th 223* , the California Supreme Court held that the changes to the requirements for standing in an action brought by a private plaintiff under the unfair competition statute, as enacted by Proposition 64, apply to actions that were pending when Proposition 64 was passed. However, in *Branick v. Downey Savings & Loan Association (2006) 39 Cal. 4th 235* , the Court also held that the ordinary rules governing the amendment of complaints and their relation back to the original complaint apply to these pending lawsuits. See *Ch. 565, Unfair Competition, § 565.35[1]*.

Federal Test for Determining Unfair Conduct Applied in Consumer Action Under Unfair Competition Statute. In *Camacho v. Automobile Club of Southern California (2006) 142 Cal. App. 4th 1394* , the court of appeal adopted a test for determining actionable unfair conduct in consumer actions brought under *Bus. & Prof. Code § 17200 et seq.* that is patterned on the test applicable in similar cases brought under the Federal Trade Commission Act. Under this test, a consumer must show that the injury: (1) is substantial; (2) is not outweighed by any countervailing benefits to consumers or competition; and (3) is not one that consumers themselves could reasonably have avoided. See *Ch. 565, Unfair Competition, § 565.31[5][b]*.

***Bus. & Prof. Code § 16601* Does Not Protect Assets of Buyer Business.** In *Strategix, Ltd. v. Infocrossing West, Inc. (2006) 142 Cal. App. 4th 1068* , the court of appeal held that an agreement prohibiting the seller of a business from soliciting the employees and customers of the buying company is not enforceable under *Bus. & Prof. Code § 16601*. See *Ch. 565, Unfair Competition, § 565.73[1]*.

No Right to Jury Trial in Action Under Unfair Competition Statute. In *Hodge v. Superior Court (2006) 145 Cal. App. 4th 278* , the court of appeal held that there is no right to a jury trial in an action that is brought solely under the unfair competition statute, even if a jury trial would be available in an action to enforce directly a statute the violation of which forms the basis for the unfair competition action. See *Ch. 565, Unfair Competition, § 565.35[6]*.

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§ 1.129 Workers' Compensation

Medical Treatment Utilization Schedule. In promulgating *8 Cal. Code Reg. §§ 9792.20*-9792.23, the Administrative Director has adopted, as required by *Lab. Code § 5307.27*, a medical treatment utilization schedule. See *Ch. 577, Workers' Compensation, § 577.45[1][c]*.

Permanent Disability-- Apportionment. The California Supreme Court in *Brodie v. Workers' Comp. Appeals Bd. (2007) 40 Cal. 4th 1313* has held that "Formula A" adopted by the Supreme Court in *Fuentes v. W.C.A.B.*, pursuant to which the percentage of disability attributable to a new injury is calculated by subtracting the old permanent disability rating from the new permanent disability rating, then consulting the table for the award due this difference, remains the proper method for calculating apportionment. See *Ch. 577, Workers' Compensation, § 577.01, 577.14[3][e]*.

Permanent Disability--Retroactive Application of 2005 Permanent Disability Rating Schedule. The Appeals Board en banc in *Baglione v. Hertz Car Sales* (2007) *72 Cal. Comp. Cases 444 (Appeals Board en banc opinion)* has, by a 4-3 vote, rescinded its previous decision in *Baglione v. Hertz Car Sales* (2007) *72 Cal. Comp. Cases 86 (Appeals Board en banc opinion)* , which had also been decided by a 4-3 vote, and held that, for compensable claims arising before January 1, 2005, in order for the 1997 schedule for rating permanent disabilities to apply, pursuant to *Lab. Code § 4660(d)*, the existence of permanent disability must be indicated in either a pre-2005 comprehensive medical-legal report or a pre-2005 report from a treating physician, and that, otherwise, the 2005 permanent disability rating schedule applied. See *Ch. 577, Workers' Compensation, § 577.01*.

Permanent Disability--Retroactive Application of 2005 Permanent Disability Rating Schedule. The Appeals Board en banc in *Pendergrass v. Duggan Plumbing* (2007) *72 Cal. Comp. Cases 456 (Appeals Board en banc opinion)* has, by a 4-3 vote, rescinded its previous decision in *Pendergrass v. Duggan Plumbing* (2007) *72 Cal. Comp. Cases 95 (Appeals Board en banc opinion)* , which had also been decided by a 4-3 vote, and held that, for compensable claims arising before January 1, 2005, only if the last payment of temporary disability indemnity was made for any period of temporary disability ending before that date would the 1997 schedule for rating permanent disabilities apply to determine the extent of permanent disability, pursuant to *Lab. Code § 4660(d)*, and that, otherwise, the 2005 permanent disability rating schedule applied. See *Ch. 577, Workers' Compensation, § 577.01*.

Permanent Disability--Retroactive Application of 2005 Permanent Disability Rating Schedule--Comprehensive Medical-Legal Report--Notice Under *Labor Code § 4061*. The court of appeal in *Costco Wholesale Corp. v. Workers' Comp. Appeals Bd. (2007) 151 Cal. App. 4th 148* has reached the same conclusion as the Appeals Board reached in *Baglione v. Hertz Car Sales* (2007) *72 Cal. Comp. Cases 444 (Appeals Board en banc opinion)* and *Pendergrass v. Duggan Plumbing* (2007) *72 Cal. Comp. Cases 456 (Appeals Board en banc opinion)* (*see above*), regarding the interpretation of the third sentence of *Lab. Code § 4660(d)*. See *Ch. 577, Workers' Compensation, § 577.01*.

Permanent Disability--Retroactive Application of 2005 Permanent Disability Rating Schedule. The court of appeal in *Zenith Ins. Co. v. Workers' Comp. Appeals Bd. (2007) 153 Cal. App. 4th 461* , has agreed with *Costco Wholesale Corp. v. Workers' Comp. Appeals Bd. (2007) 151 Cal. App. 4th 148* , and *Pendergrass v. Duggan Plumbing* (2007) *72 Cal. Comp. Cases 456 (Appeals Board en banc opinion)* (*see above*), and held that the employer was required to provide notice under *Labor Code § 4061* "together with the last payment of temporary disability indemnity," which in this case was in August 2005, and that the employer was, therefore, "not required to provide the notice required by Section 4061 to the injured worker," pursuant to *Labor Code § 4660(d)*, prior to 2005. See *Ch. 577, Workers' Compensation, § 577.01*.

Permanent Disability--Retroactive Application of 2005 Permanent Disability Rating Schedule. The court of appeal in *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (2007) 146 Cal. App. 4th 1311* has held that the WCAB's decision to apply the 1997 permanent disability rating schedule was not supported by substantial evidence, since a 12/15/2004 single-sentence report by the treating physician stating the physician's belief that permanent disability was within reasonable medical probability as a result of the employee's 7/21/2004 industrial injury was not followed by any other treating physician's report that provided reasoning to support the physician's conclusion, and that medical opinion is not substantial evidence if it does not indicate the reasoning behind the physician's opinion. See *Ch. 577, Workers' Compensation, § 577.01*.

Petitions for Reconsideration--Time to File--Amended Award. The court of appeal in *Nestle Ice Cream Co. v. W.C.A.B. (Ryerson) (2007) 146 Cal. App. 4th 1104* has held that the WCJ's amendment of an award by increasing the amounts of retroactive temporary disability payments and vocational rehabilitation maintenance allowance awarded meant that the employer's subsequent petition for reconsideration, timely filed as to the amended award, but untimely as to the original award, was timely filed. See *Ch. 577, Workers' Compensation, § 577.212[1]*.

Discrimination-- *Labor Code § 132a*. The court of appeal in *Andersen v. W.C.A.B. (2007) 149 Cal. App. 4th 1369* has held that an employer had discriminated against its employee, in violation of *Lab. Code § 132a*, by requiring the employee, who had returned to work following industrial injuries, to use earned vacation time rather than sick leave to attend medical appointments needed to care for those industrial injuries, while permitting employees with non-industrial injuries to use their sick leave for medical appointments. See *Ch. 577, Workers' Compensation, § 577.18[1]*.

Third-Party Actions --Settlement-- Notice and Consent. The court of appeal in *McKinnon v. Otis Elevator Co. (2007) 149 Cal. App. 4th 1125* has held, pursuant to *Lab. Code §§ 3853, 3859*, and *3860(a)*, that when the employer fails to adequately notify its employee of its subrogation lawsuit and proposed settlement involving an alleged third-party tortfeasor and fails to obtain the employee's consent to settlement of that suit, and when the settling alleged third-party tortfeasor, prior to settlement, was or reasonably should have been aware of the possibility of the employee's claim for damages against the tortfeasor, the alleged tortfeasor cannot use the mere settlement and dismissal of the employer's subrogation action to bar the employee from maintaining an action for damages against the alleged tortfeasor. See *Ch. 577, Workers' Compensation, § 577.335[3][a][i]*.

Workers' Compensation Coverage--Contractors' Licenses--Suspension of License. The court of appeal in *Wright v. Issak (2007) 149 Cal. App. 4th 1116* has held that a contractor's license is automatically suspended, pursuant to Lab. Code § 7125.2(a)(2), for failure to *obtain* workers' compensation insurance, whereas, pursuant to Lab. Code §

7125.2(a)(1), suspension of a license for failure to *maintain* workers' compensation insurance requires notice from the registrar of contractors. See *Ch. 577, Workers' Compensation, § 577.22[4][b][ii]*.

Petition to Reopen--New and Further Disability--Temporary Disability Benefits. The court of appeal in *Sarabi v. Workers' Comp. Appeals Bd. (2007) 151 Cal. App. 4th 920* has held that the Appeals Board had jurisdiction to order additional temporary disability benefits more than five years after the date of injury when the employee filed a timely petition to reopen and his new and further disability commenced within five years of the date of his injury. See *Ch. 577, Workers' Compensation, § 577.222[4][a]*.

Permanent Disability--Apportionment--Public Safety Employees. In amending *Lab. Code § 4663*, the legislature has provided that the statute's apportionment provisions do not apply to injuries or illnesses covered under *Lab. Code §§ 3212 through 3213.2*. See *Ch. 577, Workers' Compensation, § 577.14[3][e], 577.46[3][c]*.

Medical Treatment--Predesignation of Personal Physicians. In amending *Lab. Code § 4600*, the legislature has extended until December 31, 2009, the right of workers for companies that offer group health insurance to predesignate their personal physicians and has removed the cap seven percent of California workers who may take advantage of this right. See *Ch. 577, Workers' Compensation, § 577.45[1][a]*.

Death Benefits. In amending *Lab. Code § 4702*, the legislature has clarified that a survivor's entitlement to a deceased employee's accrued and unpaid compensation does not diminish a survivor's entitlement to full statutory death benefits. See *Ch. 577, Workers' Compensation, § 577.13[2][b]*.

Permanent Disability--Apportionment. The court in *Nabors v. Workers' Comp. Appeals Bd. (2006) 140 Cal. App. 4th 217* , has followed *E & J Gallo Winery v. Workers' Comp. Appeals Bd. (2005) 134 Cal. App. 4th 1536* , and held that the correct formula for apportioning awards to an employee who sustained multiple disabling injuries while working for the same employer required calculating the most recent award without regard to whether the previous award existed, then subtracting the dollar amount of the previous award from the dollar amount of the subsequent award. Thus, as in *Dykes*, "Formula C," rejected in *Fuentes*, was held to be, following SB 899, the correct formula. See *Ch. 577, Workers' Compensation, § 577.14[3][e]*.

Permanent Disability--Apportionment--Appeals Board's Deferral of Issue. In light of conflicting court of appeal opinions regarding calculation of apportionment, the Appeals Board has announced that it will defer deciding such issues in the cases that come before it until the Supreme Court has resolved the conflict and uncertainty. See *Ch. 577, Workers' Compensation, § 577.14[3][e]*.

Permanent Disability--Apportionment. The court in *Brodie v. Workers' Comp. Appeals Bd. (2006) 142 Cal. App. 4th 685* , has followed the courts of appeal in *E & J Gallo Winery v. Workers' Comp. Appeals Bd. (2005) 134 Cal. App. 4th 1536* , and *Nabors v. Workers' Comp. Appeals Bd. (2006) 140 Cal. App. 4th 217* , in holding that Formula C, as articulated in *Fuentes*, was the correct formula for apportioning permanent disability. However, the court in the present case held that the correct use of Formula C required that the *current* dollar value of the percent of the prior disability be subtracted from the monetary value of the overall current disability. See *Ch. 577, Workers' Compensation, § 577.14[3][e]*.

Permanent Disability--Apportionment. The court in *Welcher v. Workers' Comp. Appeals Bd. (2006) 142 Cal. App. 4th 818* has held that SB 899's repeal of *Lab. Code §§ 4663* and *4750* and enactments of new *Lab. Code §§ 4663* and *4664* neither clearly expressed nor necessarily implied an intent to abandon "Formula A" established by the Supreme Court in *Fuentes*. See *Ch. 577, Workers' Compensation, § 577.14[3][e]*.

Medical Treatment --ACOEM Guidelines-- Retroactive Application of SB 899. The court in *Sierra Pacific Industries v. W.C.A.B. (Chatham) (2006) 140 Cal. App. 4th 1498* has held that § 47 of SB 899, providing that the

amendment, addition, or repeal of any law made by SB 899 applied prospectively from the date of SB 899's enactment (April 19, 2004), regardless of the date of injury, means that the ACOEM Guidelines apply to determine what is reasonable medical treatment in all cases in which no such determination had been made as of April 19, 2004. See *Ch. 577, Workers' Compensation, § 577.45[1][a]*.

Penalties--Delay in Payment of Permanent Disability Benefits. The court in *New United Motors Manufacturing, Inc. v. W.C.A.B. (Gallegos) (2006) 141 Cal. App. 4th 1533* has held that an employer, pursuant to *Lab. Code § 5814(b)*, may avoid a *Lab. Code § 5814* penalty if the potential violation of that statute is discovered by the employer prior to a claim for a penalty by the employee, and the fact that the employee discovered the potential violation before the employer did is immaterial. See *Ch. 577, Workers' Compensation, § 577.243[4][a]*.

Temporary Disability--Seasonal Workers. The court in *Signature Fruit Co. v. Workers' Comp. Appeals Bd. (2006) 142 Cal. App. 4th 790* has held that, pursuant to *Lab. Code § 4653*, temporary disability during a seasonal employee's in-season period of regular employment was payable based on two-thirds of the employee's in-season average weekly earnings, but the seasonal employee was not entitled to temporary disability during the off-season when the parties stipulated that the employee did not have any off-season earnings. See *Ch. 577, Workers' Compensation, § 577.243[4][a]*.

Psychiatric Injury--Actual Events of Employment. The court in *Sonoma State University v. Workers' Comp. Appeals Bd. (2006) 142 Cal. App. 4th 500* has held that an employee's psychiatric injury satisfied the standard for compensability set forth in *Lab. Code § 3208.3(b)(1)* only if it was proven that events of employment were predominant as to all causes combined of the psychiatric disability taken as a whole. See *Ch. 577, Workers' Compensation, § 577.14[3][d][i]*.

Civil Actions--Employment Relationship. The court in *Mendoza v. Brodeur (2006) 142 Cal. App. 4th 72* has held that the plaintiff, injured while repairing the defendant's roof, was the defendant's employee pursuant to *Lab. Code § 2750.5*, which operated to allow the plaintiff's lawsuit, despite the fact that the plaintiff, by virtue of *Lab. Code § 3352(h)*, was not an employee of the defendant for workers' compensa- tion purposes, when the court of appeal found that the plaintiff was not a licensed roofing contractor and, therefore, not an independent contractor. See *Ch. 577, Workers' Compensation, § 577.22[4][b][ii]*.

Permanent Disability--Apportionment--Overlap--Burden of Proof. The court in *Kopping v. Workers' Comp. Appeals Bd. (2006) 142 Cal. App. 4th 1099* has held that the Appeals Board correctly determined that, pursuant to *Lab. Code § 4664(b)*, an employee was not entitled to prove that he was medically rehabilitated from a prior permanent disability when he sustained a subsequent industrial injury, but that the Board incorrectly determined that the employee had the burden of disproving overlap between the current permanent disability and the previous disability in order to establish his claim to permanent disability benefits. See *Ch. 577, Workers' Compensation, § 577.14[3][e]*.

Employment Relationships--Independent Contractors. The court in *JKH Enterprises, Inc. Department of Industrial Relations (2006) 142 Cal. App. 4th 1046* has held that substantial evidence supported the determination by the Department of Industrial Relations that the drivers for plaintiff courier service were functioning as employees rather than as true independent contractors and found that the question of the hiree's status must be considered in light of the history and remedial and social purposes of the Workers' Compensation Act, and the court followed *S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341* in finding that the functions performed by drivers did not require a high degree of skill, that the functions constituted an integral heart of plaintiff's courier service business, that, by obtaining clients in need of the service and providing workers to conduct it, plaintiff retained all "necessary" control over the operation as a whole, and that these circumstances were enough to find an employment relationship for purposes of the Workers' Compensation Act, even in the absence of plaintiff's exercise of control over the details of work and with plaintiff being more concerned with the results of the work rather than with the means of its accomplishment. See *Ch. 577, Workers' Compensation, § 577.22[3][c]*.

Psychiatric Injury---Sudden and Extraordinary Employment Condition. The court of appeal in *Matea v. Workers' Comp. Appeals Bd. (2006) 144 Cal. App. 4th 1435* , has held that an employee suffered a psychiatric injury as a result of a sudden and extraordinary employment condition, making his psychiatric injury compensable even though it occurred during his first six months of employment, when lumber fell into an aisle and onto the employee's leg. See *Ch. 577, Workers' Compensation, § 577.14[3][d][ii]*.

Utilization Review. The court of appeal in *State Compensation Insurance Fund v. Sandhagen; State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (2006) 144 Cal. App. 4th 1050* , has held that: (1) an Appeals Board holding that an employer's failure to meet the utilization review deadlines specified in *Lab. Code § 4610(g)(1)* prevented the employer from using the utilization review process and rendered the untimely utilization review reports inadmissible was a final order subject to judicial review via petition for writ of error; (2) the Appeals Board acted within its authority in prohibiting the use of a report generated by an untimely utilization review process in subsequent proceedings challenging the treatment decision; (3) an employer has discretion to undertake or not to undertake utilization review with respect to any particular proposed medical treatment; and (4) both employers and employees may utilize the provisions of *Lab. Code § 4062* in objecting to a treating physician's medical determination. See *Ch. 577, Workers' Compensation, § 577.45[1][c]*.

Civil Actions---Statute of Limitations. The court of appeal in *Valdez v. Himmelfarb (2006) 144 Cal. App. 4th 1261* , has held that a personal injury action filed under *Lab. Code § 3706* is subject to the three-year statute of limitations in *Code of Civ. Proc. § 338(a)*. See *Ch. 577, Workers' Compensation, § 577.312[2][a]*.

Permanent Disability--Apportionment. The court of appeal in *Davis v. W.C.A.B.; Davis v. Workers' Comp. Appeals Bd. (2006) 145 Cal. App. 4th 324* , has held that, when the legislature enacts a statute, the legislature is presumed not to have intended to overthrow long-established principles of law unless such an intention is clearly expressed or necessarily implied, and that the plain language of *Lab. Code §§ 4663* and *4664* reflects a legislative intent to retain "Formula A" established by the Supreme Court in *Fuentes*. See *Ch. 577, Workers' Compensation, §§ 577.14[3][e]*.

Death Benefits---Decedent's Estate. The court of appeal in *Six Flags, Inc. v. Workers' Comp. Appeals Bd. (2006) 145 Cal. App. 4th 91* , has held that *Lab. Code § 4702(a)(6)(B)*, which provides that, when a worker without dependents suffers a fatal industrial injury, the employer must pay $250,000 to the deceased worker's estate as a workers' compensation death benefit, is unconstitutional. See *Ch. 577, Workers' Compensation, § 577.13[2][b]*.

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[Reserved]

§§ 1.130[Reserved]

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1-1 California Forms of Pleading and Practice--Annotated § 1.150

§ 1.150 Abortions and Birth Control Methods

No Duty of Physician to Inform Pregnant Mother of Right to Abortion. In *Barragan v. Lopez (2007) 156 Cal. App. 4th 997* , a wrongful life action brought by twins born with cerebral palsy, the Court of Appeal held that a doctor who treated the mother did not owe her a duty to advise her of her right to an abortion under *Health & Safety Code § 123462(2)*. Before the twins became viable fetuses, there was no evidence they had any hereditary trait or other physiological condition that should have led the doctor to predict they would be born impaired, and the mother's pregnancy progressed in a normal fashion without any evidence of potential complication; after the twin fetuses became viable, there was no evidence of any significant fetal anomaly or endangerment of the mother's life by continuing the pregnancy; and, after the mother began experiencing significant complications during her pregnancy, under *Health & Safety Code § 123468*, it would have been improper for the doctor to advise the mother that she had a right to an abortion since the fetuses were viable. See *Ch. 4, Abortion and Birth Control Methods, § 4.21*.

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1-1 California Forms of Pleading and Practice--Annotated § 1.150A

§ 1.150A Adoptions

Indian Child Welfare Act. Adoptions of unmarried minors coverage is updated with the new California Judicial Council forms under the Indian Child Welfare Act, ICWA-010 to ICWA-060. See Ch. 12B, *Adoptions: Unmarried Minors* .

Confidential Intermediary. Adoption record coverage is updated with the new California Judicial Council forms, ADOPT-330 and ADOPT-331, addressing a request and order for appointment of a Confidential Intermediary. See Ch. 12D, *Adoptions: Amendment and Inspection of Records* .

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§ 1.150B Acknowledgments

Notary Must Obtain Evidence of Identity of Person Making Acknowledgment. The former statutory authorization for a notary public to take an acknowledgment based on his or her personal knowledge of the individual making the acknowledgment has been repealed. Effective January 1, 2008, unless an acknowledgment is made before a military officer, it may be taken only on the basis of satisfactory evidence of the identity of the individual making the acknowledgment [*Civ. Code §§ 1183.5, 1185(a), 1189(a)(1)*]. See Ch. 9, *Acknowledgments* , and see Ch. 390, *Notaries Public* .

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1-1 California Forms of Pleading and Practice--Annotated § 1.151

§ 1.151 Alternative Dispute Resolution

[1] Appointment of Arbitrator and Conduct of Proceedings

Private Arbitration--Arbitrator Determines Discovery Matter Involving Nonparty. The California Supreme Court has held that an arbitrator has the power to hear and determine discovery matters involving nonparties, for example a challenge by a nonparty to a subpoena issued by a party for documents. The matter is to be heard and determined first by the arbitrator, but the nonparty has the right to full judicial review of the arbitrator's discovery order [*Berglund v. Arthroscopic Laser & Surgery Center of San Diego, LP (2008) 44 Cal. 4th 528*]. See *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.25[1][c][i]*.

Private Arbitration--Insurance Appraisers Are Arbitrators Too. An appraiser in an appraisal under *Ins. Code § 2071* is functioning as an arbitrator and is entitled to immunity [*Lambert v. Carneghi (2008) 158 Cal. App. 4th 1120, 1129-1137, 70 Cal. Rptr. 3d 626*]. See *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.30[1], [3]*.

[2] Agreements and Compelling Arbitration

Private Arbitration--Uninsured Motorist Arbitration. The California Supreme Court clarified issues required to be arbitrated under mandatory uninsured and underinsured motorist coverage. Coverage questions, i.e., whether the claimant is an "insured" within the policy definition is not a matter for arbitration. Whether the insurer is bound by a default judgment against the driver who was at fault is to be arbitrated because it falls squarely within the questions of liability and damages statutorily subject to arbitration [*Bouton v. USAA Casualty Insurance Company (2008) 43 Cal. 4th 1190*]. See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.92[5]*a].

Private Arbitration--Federal Arbitration Act Preempts Jurisdiction of Labor Commissioner. The United States Supreme Court has considered *Ferrer v. Preston (2006) 145 Cal. App. 4th 440* , and reversed, finding that the Federal Arbitration Act supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative. At issue was *Lab. Code § 1700.44(a)*, which purports to vest exclusive jurisdiction in the Labor Commissioner to determine application of the Talent Agency Act to a particular management contract [*Preston v. Ferrer (2008) 552 U.S. 346, 128 S. Ct. 978, 169 L. Ed. 2d 917, 923, 927-929*]. See *Ch. 32, Contractual Arbitration: Agreements and*

Compelling Arbitration, §§ 32.21[1][c][ii], 32.24[2][b], [g].

Private Arbitration--Under Federal Arbitration Act Statutory Grounds for Vacating Award Are Exclusive. The United States Supreme Court has addressed the circuit split regarding the parties' ability to expand the scope of judicial review of an arbitration award and held in line with the Ninth Circuit that the grounds enumerated in *9 U.S.C. § 10* are exclusive, and the parties cannot expand the scope of review by contract. A provision for review of the award for legal error is void and unenforceable [*Hall St. Assocs., L.L.C. v. Mattel, Inc. (2008) 552U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254, 259, 263-265, 268*]. See *Ch. 34, Contractual Arbitration: Judicial Review, § 34.19[1][b][i].*

Private Arbitration--Class Arbitration Waiver in Context of Wage and Hour Laws. The First Appellate District, Division One has considered a class arbitration prohibition in the context of employees' statutory rights regarding hours and wages, and followed *Gentry v. Superior Court (Circuit City Stores, Inc.) (2007) 42 Cal. 4th 443* , finding the prohibition unconscionable and unenforceable [*Murphy v. Check 'N Go of California, Inc. (2007) 156 Cal. App. 4th 138, 148-149*]. See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.32[2][a], [c].*

Private Arbitration--Single Overlapping Issue Requires Stay Under *Code Civ. Proc. § 1281.4*. A single overlapping issue is sufficient to require imposition of a stay under *Code Civ. Proc. § 1281.4*. The court has no discretion in the matter [*Heritage Provider Network, Inc. v. Superior Court (Eastland Medical Group) (2008) 158 Cal. App. 4th 1146, 1152-1153*]. See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, §§ 32.31[2][a], 32.97[2].*

Private Arbitration--Spousal Relationship Is Not Enough to Confer Agency. The Fourth Appellate District, Division Three has agreed with the Fourth District, Division One in holding that the spousal relationship alone is not sufficient to empower one spouse, as agent, to bind the other spouse to an arbitration agreement. The case involved elder abuse and other claims against a residential care facility for the elderly. The court was careful to distinguish medical malpractice cases in which the patient can bind the other spouse to arbitrate [*Warfield v. Summerville Senior Living, Inc. (2007) 158 Cal. App. 4th 443, 447-449*]. See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21[1][b].*

Private Arbitration--Award of Attorney's Fees May Be Proper on Denial of Petition to Compel Arbitration. When an action is brought solely to compel arbitration of contractual disputes between the parties and the merits of the claims sought to be arbitrated are not at issue in the proceedings to compel arbitration, respondent, if successful in obtaining an order denying the petition to compel arbitration and the contract provides for them, will be entitled to its attorney's fees incurred in responding to the petition [*Otay River Constructors v. San Diego Expressway (2007) 158 Cal. App. 4th 796, 799, 805-808*]. Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration,* § 32.94[3][vi].

Private Arbitration--Nonsignatory Officer Alleged to Be Alter Ego Can Compel Arbitration. In a case of first impression, the Court of Appeal has held that nonsignatory officers alleged to be alter egos of a corporate defendant can compel signatories to arbitrate under an agreement signed by the corporation [*Rowe v. Exline (2007) 153 Cal. App. 4th 1276*]. See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21[5][c], [g].*

Private Arbitration--Deception During Settlement Negotiations Causes Forfeiture of Right to Compel Arbitration. In a case involving interstate commerce, and thus, governed by federal law, the Court of Appeal held that although settlement efforts are not interpreted as waiving the right to arbitrate if the settlement is not finalized, a party that attempts to obtain settlement by misleading the court and proposed class members about the benefits of the proposed settlement forfeits its right to arbitrate [*Aviation Data, Inc. v. American Express Travel Related Services Company, Inc. (2007) 152 Cal. App. 4th 1522*]. See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.25[1][d][i].*

[3] Judicial Review

Private Arbitration--Arbitrator Does Not Exceed Powers by Excusing Futile Condition. The California Supreme Court has held that an arbitrator has the power to excuse a performance that would have been futile unless the arbitration agreement explicitly and unambiguously bars the arbitrator from modifying the contract or excusing any performance [*Gueyffier v. Ann Summers, Ltd. (2008) 43 Cal. 4th 1179* (excused notice of breach finding it was not curable)]. See *Ch. 34, Contractual Arbitration: Judicial Review, § 34.19[1][e]*.

Private Arbitration--Cannot Waive Right to Vacate Award Based on Arbitrator's Failure to Make Required Disclosure. The right to seek to vacate an award under *Code Civ. Proc. § 1286.2(a)(6)(A)* is available even if the party did not seek disqualification in a timely fashion under *Code Civ. Proc. § 1281.91(c)*. Further, this right cannot be waived by agreeing to arbitrate under rules that state the arbitration provider's determinations regarding disqualification will be conclusive. The statutes were passed to advance a public purpose of crucial importance over which the state retained ultimate control [*Advantage Medical Services, LLC v. Hoffman (2008) 160 Cal. App. 4th 806, 820-823, 72 Cal. Rptr.3d 935* (AAA Rule 17)]. See *Ch. 34, Contractual Arbitration: Judicial Review, § 34.19[1][a], [d]*.

Private Arbitration--Arbitrator Can't Be Disqualified for Matter Not Required to Be Disclosed. An arbitrator was not required to disclose that one of party's counsel and a proposed expert witness (later stricken from witness list) were attorneys with whom he sat on 36-member board of the Business Trial Lawyers Association; the fact that the arbitrator disclosed that out of an excess of caution did not give a party the right to disqualify him. Of course, the award could not be vacated because of that disclosure [*Luce, Forward, Hamilton & Scripps, LLP v. Koch (2008) 162 Cal. App. 4th 720, 75 Cal. Rptr. 3d 869*]. See *Ch. 34, Contractual Arbitration: Judicial Review, § 34.19[1][d]*.

Private Arbitration--Parties Can Agree to Judicial Review for Errors of Law. Without deciding whether one or the other of the clauses involved or some different formulation would be sufficient to confer an expanded scope of review, the California Supreme Court overruled several court of appeal cases to hold that parties may provide for expanded judicial review of arbitration awards to include review for errors of law [*Cable Connection, Inc. v. DirecTV, Inc. (2008) 44 Cal. 4th 1334*]. See *Ch. 34, Contractual Arbitration: Judicial Review, § 34.10[2]*.

[4] Mediation

Private Mediation--No Exceptions to Confidentiality Based on Waiver or Estoppel. The California Supreme Court has held that there are no exceptions to strict compliance with the statutes providing for enforcement of settlement agreements reached in mediation based on equitable principles such as estoppel or waiver. A party who voluntarily submits evidence of events that occurred during mediation and does not object to similar evidence submitted by the opposing party can later invoke the privilege to render that evidence inadmissible [*Simmons v. Ghaderi (2008) 44 Cal. 4th 570* (action to enforce oral settlement agreement that did not meet requirements of *Evid. Code §§ 1118, 1122, 1124* for making agreement admissible)]. See *Ch. 31, Mediation, §§ 31.13[4][a]*; *31.14[1], [3]*.

Mediation--Person Cannot Conduct Settlement Conference and Mediation Simultaneously. The Judicial Council has adopted a new subdivision (d) to *Cal. Rules of Ct. Rule 3.1380*, effective January 1, 2008, that prohibits a court from appointing a person to conduct a settlement conference under Rule 3.1380 at the same time as that person is serving as a mediator in the same action [*Cal. Rules of Ct., Rule 3.1380(d)(1)*], nor may the court appoint a person to conduct a mediation under Rule 3.1380 [*Cal. Rules of Ct., Rule 3.1380(d)(2)*]. The new provision was added to address problems involving the blurring of distinctions between different ADR processes [*see e.g., Jeld-Wen. v. Superior Court (Marlborough) (2007) 146 Cal. App. 4th 536, 543, 53 Cal. Rptr. 3d 115* ; Advisory Committee Comment to *Cal. Rules of Ct., Rule 3.1380(d)*]. See discussion in *Ch. 31, Mediation, § 31.13[6]*.

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1-1 California Forms of Pleading and Practice--Annotated § 1.152

§ 1.152 Appeals

Revised Rules of Court and Forms for Limited Civil Cases Appealed to the Superior Court Appellate Division. Effective January 1, 2009, all Rules of Court relating to the Superior Court Appellate Division are being repealed and replaced with new rules and Judicial Council forms for limited civil, misdemeanor, and infraction cases, as well as entirely new rules for writ proceedings [*see Cal. Rules of Court, Rules 8.800 et seq.*, 10.110 et seq.]. The new rules use similar language recently adopted for Court of Appeal rules, reflect current practices, fill in gaps, improve the record preparation process, create a more logical structure, and provide more forms. This update includes a complete review of these rules and forms for limited civil cases to prepare you for this important development. See Ch. 345A, *Limited Civil Cases* .

When Court Clerk and Party Fail to Serve Notice of Entry of Judgment, Sole Consequence Is That Longer Statutory Period for Filing Notice of Appeal Applies. In *Kimball Avenue v. Franco (2008) 162 Cal. App. 4th 1224, 1228-1229* , the court of appeal held that noncompliance with the statutory notice requirements for entry of judgment does not render the judgment void; instead, the 180-day deadline in *Cal. Rules of Ct., Rule 8.104(a)(3)* for filing a notice of appeal applies. See *Ch. 42, Appeal: Notice of Appeal, § 42.13[1]*.

Certain Collateral Orders Such as Sealing Court Records Are Appealable. In *Mercury Interactive Corporation v. Klein (2007) 158 Cal. App. 4th 60, 70 Cal. Rptr. 3d 88* , the court of appeal held that orders concerning the sealing of court records are an exception to the one final judgment rule and are appealable. See *Ch. 42, Appeal: Notice of Appeal, § 42.12[1][a]*.

Notice of Entry of Judgment and Time for Appeal. In *Adaimy v. Ruhl (2008) 160 Cal. App. 4th 583* , the court of appeal held that notice of entry of judgment sent to only one of a party's two attorneys constitutes legal notice and starts the time running to file a notice of appeal. See *Ch. 42, Appeal: Notice of Appeal, § 42.13[2][a]*.

Reference to the Record. In *Schmidlin v. City of Palo Alto (2007) 157 Cal. App. 4th 728* , the court of appeal held a failure to present a full and fair summary of the evidence supporting a judgment effects a waiver of any challenge to the sufficiency of the evidence. See *Ch. 50, Appeal: Briefs, § 50.12[1][c]*.

Reasonableness of Costs Reviewed Under Abuse of Discretion Standard. In *Peterson v. John Crane, Inc. (2007) 154 Cal. App. 4th 498, 513, 65 Cal. Rptr. 3d 185* , the court of appeal held that an award of expert witness fees under *Code Civ. Proc. § 998* must be for no more than a reasonable sum covering the defendant's costs of the services of expert witnesses, actually incurred, and reasonably necessary in trial or preparation for trial. A determination that the cost award is reasonable is reviewed for an abuse of discretion. See *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.12[3][e]*.

Alternative Writ Not Necessarily Binding on Court of Appeal. In *Cerna v. City of Oakland (2008) 161 Cal. App. 4th 1340, 1354-1355, 75 Cal. Rptr. 3d 168* , the court of appeal held that absent a written opinion following issuance of an alternative writ, the appellate court's reasoning in issuing the alternative writ is not the law of the case binding on appeal. See *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.30[2]*.

Frivolous Appeals. In *Gong v. Kwong (2008) 163 Cal. App. 4th 510, 520-521* , the court of appeal held that counsel has a professional responsibility not to pursue an appeal that is frivolous or taken for the purpose of delay, just because the client instructs him or her to do so. See *Ch. 49, Appeal: Sanctions, § 49.11[2]*.

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§ 1.153 Assemblies, Meetings, and Demonstrations

Violation of *First Amendment* to Arrest Plaintiff for Political Messages Painted on Van. In *Fogel v. Collins (9th Cir. 2008) 531 F.3d 824* , the Ninth Circuit found that police officers violated plaintiff's *First Amendment* rights by arresting him for political messages painted on his van, because a reasonable person would expect that an observer of the van would have seen an old Volkswagen van covered with artwork, an American flag, and obviously satiric or hyperbolic political messages as political speech and not as a threat. The actions of the first officers who actually saw the van and its message made clear that reasonable people would not have understood and did not understand the speech as a true threat. Further, there was virtually no evidence plaintiff subjectively intended the speech as a true threat of serious harm. See Ch. 59, *Assemblies, Meetings, and Demonstrations* .

City's Pursuit of Preliminary Injunction and Stay Under Unconstitutional Ordinance Would Not Provide Basis for Damages Under § 1983. In *Manta Management Corp. v. City of San Bernardino (2008) 43 Cal. 4th 400, 75 Cal. Rptr. 3d 353, 181 P.3d 159* , a city's seeking a preliminary injunction and a stay in violation of the *First Amendment* would not provide the basis for liability under *42 U.S.C. § 1983* even though the ordinance on which the injunction and stay are based was found unconstitutional and the city's acts caused injury to the party against whom the preliminary injunction and stay were sought, in the absence of evidence that the city materially misled or pressured the judge who issued the injunction and/or the stay. The exercise of independent judgment by the judges in granting the injunction and stay broke the chain of causation for purposes of § 1983 liability. See Ch. 59, *Assemblies, Meetings, and Demonstrations* .

***First Amendment* Right of Access.** In *United States v. Higuera-Guerrero (9th Cir. 2008) 518 F.3d 1022* , the Ninth Circuit held that the public had a qualified *First Amendment* right of access to documents in a criminal prosecution, including a cooperation addendum to a plea agreement; the government's motion and memoranda filed in support of it to seal the plea agreement; and the district court's orders granting the government's motion, which could be overcome if the government could show that closure serves a compelling interest, there is a substantial probability that, in the absence of closure, the compelling interest would be harmed, and there are no alternatives to closure that would adequately protect the compelling interest. See Ch. 59, *Assemblies, Meetings, and Demonstrations* .

Special License Plate Program Created Limited Public Forum. In *Ariz. Life Coalition, Inc. v. Stanton (9th Cir.*

2008) 515 F.3d 956 , an action by a nonprofit coalition of pro-life organizations alleging violation of *First Amendment* rights by a state license plate commission's denial of an application for a special organization license plate that would portray its message, the trial court erred in granting summary judgment to the license plate commission on the grounds that it was state-adopted speech which the state was free to regulate without *First Amendment* constraint. By allowing organizations to obtain speciality license plates with their logo and motto, the state provided a forum in which philanthropic organizations could exercise their *First Amendment* rights in the hopes of raising money to support their cause, supporting a finding of private speech, not government speech. See Ch. 59, *Assemblies, Meetings, and Demonstrations* .

Anonymous Speech on Internet Has *First Amendment* Protection. In *Krinsky v. Doe 6 (2008) 159 Cal. App. 4th 1154, 72 Cal. Rptr. 3d 231* , an action for defamation based on anonymous postings on a financial bulletin board on the Internet, plaintiff's ability to discover the identity of an anonymous poster through a subpoena to the message board host had to be weighed against the poster's long-recognized *First Amendment* right to speak anonymously. The applicability of the *First Amendment* to speech on the message board also foreclosed a cause of action for interference with business relationships. See Ch. 59, *Assemblies, Meetings, and Demonstrations* .

Mall's Prohibition of Urging Boycotting of Store Unconstitutional. In *Fashion Valley Mall, LLC v. National Labor Relations Board (2007) 42 Cal. 4th 850* , the California Supreme Court held that under *Cal. Const., art. I, § 2,* a shopping mall could not enforce a rule prohibiting a union from urging customers to boycott a store in the mall. The mall was a public forum in which persons could reasonably exercise their right to free speech guaranteed by *Cal. Const., art. I, § 2.* Although the mall could enact and enforce reasonable regulations of the time, place, and manner of free expression to assure these activities did not interfere with the normal business operations of the mall, it could not prohibit certain types of speech based upon content, such as prohibiting speech urging a boycott of one or more of stores in the mall. See *Ch. 59, Assemblies, Meetings, and Demonstrations, § 59.14[2][b].*

Payrolls of Local Government Employers Not Public Fora. In *Pocatello Educ. Ass'n v. Heideman (9th Cir. 2007) 504 F.3d 1053* , a state statute prohibiting payroll deductions for political activities was constitutional as applied to the state government itself, but violated the *First Amendment* as applied to local government employers. It was a content-based law for which there was no compelling justification. Further, state officials failed to demonstrate that the statute should be reviewed under the more relaxed standard applicable to speech restrictions in nonpublic fora. See *Ch. 59, Assemblies, Meetings, and Demonstrations, § 59.13[1].*

Artists Have *First Amendment* Protection in the Sale of Their Owner Artwork. In *White v. City of Sparks (9th Cir. 2007) 500 F.3d 953* , the Ninth Circuit held that the *First Amendment* protects an artist's sale of the artist's original artwork, and a city applied the wrong *First Amendment* standard in its *First Amendment* exception to its vendor-permitting policy, which only allowed an exception for the sale of merchandise carrying or constituting a political, religious, philosophical or ideological message. See Ch. 59, *Assemblies, Meetings, and Demonstrations* .

Vote Swapping and Vote Exchange Websites Have *First Amendment* Protection. In *Porter v. Bowen (9th Cir. 2007) 496 F.3d 1009* , the Ninth Circuit held that the threatened criminal prosecution of the owners of websites offering voters mechanisms for vote swapping and vote exchange violated their *First Amendment* rights. The owners had a *First Amendment* interest the vote-swapping mechanisms and communication and the vote swaps that the mechanisms enabled, and the state's legitimate interests of preventing corruption, preventing fraud and preventing subversion of the Electoral College did not support the threatened criminal prosecution. See Ch. 59, *Assemblies, Meetings, and Demonstrations* .

No Protected Expressive Activity Around Individual Store in Shopping Center. In *Van v. Target Corp. (2007) 155 Cal. App. 4th 1375, 66 Cal. Rptr. 3d 497* , the Court of Appeal held that the California Constitution did not protect expressive conduct in an area immediately surrounding the entrance of an individual retail store that, although located in a shopping center, did not itself possess the characteristics of a public forum. See Ch. 59, *Assemblies, Meetings, and*

Demonstrations .

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§ 1.153A Attachment

Unlicensed Contractors. In *Goldstein v. Barak Construction (2008) 164 Cal. App. 4th 845* , the court of appeal held that a claim brought under the Contractors' State License Law against an unlicensed contractor may form the basis for a right to attach order since an agreement for the performance of services lies at the heart of such a claim. See *Ch. 62, Attachment, § 62.11[1]*.

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§ 1.154 Attorneys

Attorney May Not Disclose Client Confidences if He or She Is Not Involved in Malpractice Action or Fee Dispute. In *Styles v. Mumbert (2008) 164 Cal. App. 4th 1163* , the court held that no disclosure of client confidences was permitted when the attorney represented the client and the attorney sought to step into the action as the client's adversary. See *Ch. 72, Attorney Practice and Ethics, § 72.33[6][j]*.

Consent to Conflict of Interest in Class Action. In *Sharp v. Next Entertainment, Inc. (2008) 163 Cal. App. 4th 410, 427-430* , the court held that obtaining consent to a potential conflict of interest from all absent class members prior to certification was not required under *Cal. Rules Prof. Conduct, Rule 3-310(C)(1)*. See *Ch. 72, Attorney Practice and Ethics, § 72.111[2][d]*.

Contingent Fee Contracts by Public Entities. In *County of Santa Clara v. Superior Court* (2008) 161 Cal. App. 4th 1140, 1148-1155 , the court held that public entities may engage private counsel under a contingent fee arrangement to assist in public nuisance abatement litigation, as long as the public entities' in-house counsel retain control over all decision making. See *Ch. 72, Attorney Practice and Ethics, § 72.196[7][f]*.

Statute of Limitations in Criminal Defense Attorney Malpractice Action Runs Despite Lack of Postconviction Relief; Proposition 51 Applicable to Legal Malpractice Action Seeking Primarily Noneconomic Damages. In *Ovando v. County of Los Angeles (2008) 159 Cal. App. 4th 42* , the court of appeal in an attorney malpractice action brought against a criminal defense attorney held that the lack of postconviction relief for the criminal defendant does not stay the running of the statute of limitations. In addition, the court held that Proposition 51, as codified in *Civ. Code § 1431.2*, can be applied to an action that seeks primarily noneconomic damages, such as damages for emotional distress caused when a criminal defense attorney's malpractice resulted in his client's criminal conviction. See *Ch. 76, Attorney Professional Liability, §§ 76.10[2], 76.70, 76.92[1]*; *Ch. 300, Indemnity and Contribution, § 300.63[3][d]*.

Contingency Fee Agreements. In *Stroud v. Tunzi (2008) 160 Cal. App. 4th 377, 382-383* , the court held that modifications to a valid contingency fee agreement must comply with *Bus. & Prof. Code § 6147*. See *Ch. 72, Attorney Practice, § 72.196[2]*.

Court May Revoke Pro Hac Vice Status. In *Sheller v. Superior Court of Los Angeles County (2008) 158 Cal. App. 4th 1697, 1716* , the court held that a trial court's inherent powers include the authority to revoke an attorney's pro hac vice status when that attorney has engaged in conduct that would be sufficient to disqualify a California attorney. See *Ch. 72, Attorney Practice, § 72.223[4]*.

Substitution of Attorney Form May Not Establish That Continued Representation Has Ended. In *Nielsen v. Beck (2007) 157 Cal. App. 4th 1041* , the court of appeal held that execution of a substitution of attorney form does not necessarily dictate a finding that the attorney's representation of the client has ceased for purposes of ending the tolling period on the statute of limitations in an attorney malpractice action, at least if there is contrary evidence from which the trier of fact could conclude that the representation continued beyond that date. The court then held that a triable issue of fact existed when the attorney provided, and billed for, phone advice solicited by the client after the substitution of attorney form was executed. See *Ch. 76, Attorney Professional Liability, § 76.170[2][c]*.

Attorneys--No Conflict of Interest When No Confidential Information Disclosed. In *Med-Trans Corp. v. City of California City (2007) 156 Cal. App. 4th 655, 666-669* , the court held that no attorney-client relationship existed when there was no evidence that the client ever considered the attorney to be its lawyer or potential lawyer or that any confidential matters were disclosed. See *Ch. 72, Attorney Practice and Ethics, § 72.113[5][b]*.

Tolling of Limitations Period for Continued Representation in Attorney Malpractice Action Ends if Client No Longer Represented by Attorney Still With Firm. In *Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal. 4th 503* , the California Supreme Court held that if an attorney leaves a law firm and takes the representation of a particular client with him or her, the statute of limitations does not continue to toll under the continued representation exception on a malpractice action that the client may have against the attorney's former law firm or any of the other attorneys in that firm. See *Ch. 76, Attorney Professional Liability, § 76.170[2][c]*.

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§ 1.155 Automobiles

Drivers' License Suspension. I n *Cinquegrani v. Department of Motor Vehicles (2008) 163 Cal. App. 4th 741, 750* , the court of appeal held that a driver's license cannot be suspended without due process of law. Once a license issues, an administrative decision to suspend or revoke it affects a fundamental right. See *Ch. 92, Automobiles: Drivers' Licenses, § 92.12[3]*.

Judgment Based on Appraisal in Insurance Case Must Conform to Appraisal Award. The court of appeal in *Devonwood Condominium Owners Assn. v. Farmers Ins. Exchange (2008) 162 Cal. App. 4th 1498* , held that a judgment that is not in conformity with the appraisal award made pursuant to *Ins. Code § 2071*, on which it is based, violates *Code Civ. Proc. § 1287.4*. See *Ch. 308, Insurance, § 308.151[2]*.

Arbitrability of Uninsured Motorist Claim. In *Bouton v. USAA Casualty Ins. Co. (2008), 43 Cal. 4th 1190* , the California Supreme Court held that *Ins. Code § 11580.2(f)* requires arbitration of whether a default judgment obtained against the underinsured tortfeasor by the insured is binding on the insurer, but does not require arbitration of whether a claimant is an insured under a particular policy. See *Ch. 88A, Automobiles: Uninsured Motorist Claims, § 88A.19[3][c], [e]*.

Insurer's Denial of Underinsured Motorist Benefits Based Upon Insufficient Investigation of Insured's Alleged Injuries Raises Triable Issue of Fact With Regard to Bad Faith Claim. In *Wilson v. 21st Century Ins. Co. (2007) 42 Cal. 4th 713, 2007 Cal. LEXIS 13314* , a first-party insurance bad faith case, the California Supreme Court reversed summary judgment in favor of an insurer that failed to pay underinsured motorist benefits to its insured, because it failed to investigate properly the insured's claim of injuries resulting from an automobile accident, and it asserted without supporting evidence that the insured's condition consisted of "soft tissue" injuries related to a preexisting condition. See *Ch. 88A, Automobiles: Uninsured Motorist Claims, § 88A.25[1]*; *Ch. 308, Insurance, § 308.24[1]*.

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§ 1.155A Business Entities

Alter-Ego Liability--Enforcing Corporation's or LLC's Arbitration Agreement. In the first California case to address the issue, a court of appeal has held that when a person is sued on the theory that a corporation is the person's alter ego, that person has standing to enforce the corporation's agreement to arbitrate the underlying dispute, even though that person was not a party to the agreement [*Rowe v. Exline (2007) 153 Cal. App. 4th 1276*]. See *Ch. 161, Corporations: Alter Ego Liability, § 161.14[5]*. The holding probably would apply also in a case involving a limited liability company's arbitration agreement, since the alter-ego theory can be applied in a case involving an LLC. See *Ch. 346, Limited Liability Companies, § 346.14[14][b][i]*.

Nonprofit Corporations--Liability of Officers/Directors. *Corp. Code § 5047.5(h)* has been amended to provide that the limitation on liability of volunteer officers and directors in nonprofit corporations does not apply if the corporation discriminates on the basis of any characteristic listed in the Unruh Civil Rights Act [Stats. 2007, ch. 568, § 17]. See *Ch. 388, Nonprofit Corporations, § 388.17[5]*.

Securities Regulation-- Certification of NASDAQ Global Market. Commissioner of Corporations Release No. 87-C (revised Aug. 9, 2007) certifies the NASDAQ Global Market of the NASDAQ Stock Market LLC in accordance with *Corp. Code § 25100(o)*. See *Ch. 515, Securities and Franchise Regulation, § 515.11[4]*.

Securities Regulation-- Liability for Untrue Statements. *Corp. Code § 25404(b)* now provides that it is unlawful for any person to knowingly make an untrue statement during the course of licensing, investigation, or examination, with the intent to impede, obstruct, or influence the administration or enforcement of any provision of the Corporate Securities Law of 1968 [Stats. 2007, ch. 101, § 5]. See *Ch. 515, Securities and Franchise Regulation, § 515.11[4]*.

Franchise Regulation--California Fair Dealership Law. The prohibitions on discrimination in *Civ. Code § 82* have been broadened to include discrimination based on any characteristic listed in the Unruh Civil Rights Act [Stats. 2007, ch. 568, § 10]. See *Ch. 515, Securities and Franchise Regulation, §§ 515.161, 515.540*.

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§ 1.156 Civil Procedure

[1] Amended and Supplemental Pleadings

Amended Complaints. Where plaintiffs presented factual assertions in their original Government Code claim to defendant city that fences erected on city property prevent access to the sidewalk area, and block the sight lines upon entering and exiting their garage, these assertions support both a public nuisance per se and specific injury, and plaintiffs are entitled to amend their complaint to allege a valid cause of action for public nuisance [*Kempton v. Los Angeles (2008) 165 Cal. App. 4th 1344*]. See *Ch. 21, Amended and Supplemental Pleadings, § 21.43*.

Amendment of Complaint--Effect. One defendant's filing of an answer does not divest a plaintiff of the right to amend the complaint with respect to causes of action brought against other demurring defendants [*Barton v. Khan (2007) 157 Cal. App. 4th 1216, 69 Cal. Rptr. 3d 238*]. See *Ch. 21, Amended and Supplemental Pleadings, § 21.12*.

Amendment of Complaint--Delay. Leave to amend a complaint may be denied for undue delay when a plaintiff asserts the right to amendment five weeks after the trial court granted summary judgment and the plaintiff cannot justify the long delay [*O'Brien v. Camisasca Automotive Manufacturing, Inc. (2008) 161 Cal. App. 4th 388, 73 Cal. Rptr. 3d 911*]. See *Ch. 21, Amended and Supplemental Pleadings, § 21.13*.

[1A] Answers

Answers--Affirmative Defenses. This chapter's Table of Affirmative Defense Forms, which cross references the various affirmative defense forms throughout the publication, is enhanced with primary law citations to statutes, cases, and rules of court for each subject included in the table. The table works as a check for making sure an applicable affirmative defense is not overlooked when preparing an answer, and provides the primary law citation for further research. See *Ch. 26, Answers, § 26.150* et seq.

[1B] Anti-SLAPP Motions

Anti-SLAPP Motion--Protected Activity. Defendant's alleged breach of a settlement agreement reached with plaintiff in a prior lawsuit did not constitute protected activity under the anti-SLAPP statute simply because the breach of

contract pertained to a settlement agreement [*Applied Business Software, Inc. v. Pacific Mort. Exchange, Inc. (2008) 164 Cal. App. 4th 1108*]. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.43[7].

Anti-SLAPP Motion--Time to File Motion. A court of appeals abused its discretion in allowing defendant to file anti-SLAPP motion more than two years after the filing of the complaint [*Platypus Wear, Inc. v. Goldberg (2008) 166 Cal. App. 4th 772*]. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.16[3].

AntiSLAPP Motion--Qualifying Pleading. A mere request for a subpoena, unaccompanied by any actual pleading, is not subject to an anti-SLAPP motion. The qualifying pleading must contain one of more causes of action [*Tendler v. www.jewishsurvivors.blogspot.com (2008) 164 Cal. App. 4th 802*]. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.13[2].

AntiSLAPP Motion--Statutory Exceptions. The plaintiff, as the party claiming the exemption to the anti-SLAPP statute provided by *Code Civ. Proc. § 425.17*, has the burden of proving the exception is applicable [*Simpson Strong-Tie Co., Inc. v. Gore* (2008) 162 Cal. App. 4th 737, 76 Cal. Rptr. 3d 292]. This is contrary to the court's holding in *Brill Media Co. v. TCW Group, Inc*. (2005) 132 Cal. App. 4th 324, 33 Cal. Rptr. 3d 371 , and therefore there exists a split of authority in the courts of appeal regarding the burden of proof on statutory exceptions to the anti-SLAPP statute. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.16[3].

AntiSLAPP Motion--Attorney Fees. The party appealing an award of attorney fees under the anti-SLAPP statute must point to the specific items on the bill they are challenging and provide sufficient argument. General claims that the fees are duplicative or excessive will not suffice [*Premier Medical Management Systems, Inc. v. California Ins. Guarantee (2008) 163 Cal. App. 4th 550, 77 Cal. Rptr. 3d 695*]. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.43[6].

Anti-SLAPP Motion--Issue of Public Interest. One court of appeal has adopted a much more expansive interpretation of the phrase "issue of public interest" as "any issue in which the public is interested," and that the issue need not be significant as long as the public has taken an interest [*Nygard, Inc. v. Uusi-Kerttula (2007) 159 Cal. App. 4th 1027, 72 Cal. Rptr. 3d 210*]. The court found an employer's defamation action against a former employee based on an interview the employee gave to a magazine, fell within the statute because there was extensive interest in the plaintiff among the Finnish public. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.14[3][c].

Anti-SLAPP Motion--Definition of Public Forum. There is a split of authority regarding whether a newspaper or magazine is a public forum within the meaning of *Code Civ. Proc. § 425.16(e)(3)*. One line of cases holds newspapers are not public fora because members of the public cannot freely publish their opinions in them [*see Lafayette Morehouse, Inc. v. Chronicle Publishing Co. (1995) 37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46*]. The other line of cases holds that newspapers and magazines are public forma because the opinions expressed in them are open to the public and their contents contribute to the public debate [*see Nygard, Inc. v. Uusi-Kerttula (2007) 159 Cal. App. 4th 1027, 72 Cal. Rptr. 3d 210* ; *Damon v. Ocean Hills Journalism Club (2000) 85 Cal. App. 4th 468, 102 Cal. Rptr. 2d 205*]. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.14[3][d].

Anti-SLAPP Motion--Statutory Exceptions. The legislature intended to exempt purely commercial disputes under *Code Civ. Proc. § 425.17*, and a cause of action arising from lawyer's advise to prospective clients regarding pending litigation does not fall within the statutory exemptions to anti-SLAPP statute [*Taheri Law Group v. Evans (2008) 160 Cal. App. 4th 482, 491, 72 Cal. Rptr. 3d 847*]. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.16[3].

Anti-SLAPP Motion--Protected Activity. This chapter is updated with *City of Riverside v. Stansbury (2007) 155 Cal. App. 4th 1582, 66 Cal. Rptr. 3d 862* , which holds a city's declaratory relief action requesting court's input on constitutionality of proposed initiative was not subject to a special motion to strike; although the action followed the initiative proponents' constitutionally protected activity, the action did not arise out of that activity. See Ch. 376,

Motions to Strike: Anti -SLAPP, § 376.20[2].

Anti-SLAPP Motion--Abuse of Process. This chapter is updated with *Booker v. Rountree (2007) 155 Cal. App. 4th 1366, 66 Cal. Rptr. 3d 733* , which holds a defendant and cross-complainant's cause of action for abuse of process fell squarely within protection of anti-SLAPP statute; indeed, the court stated it was difficult to imagine an abuse of process claim that would not fall within the protection of the statute. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.43[1][a].

Anti-SLAPP Motion--Nonjudicial Foreclosure. This chapter is updated with *Garretson v. Post (2007) 156 Cal. App. 4th 1508, 68 Cal. Rptr. 3d 230* , which holds a defendant's act of noticing and initiating a nonjudicial foreclosure sale after plaintiff defaulted on loan was not subject to anti-SLAPP protection; nonjudicial foreclosure is a private, contractual proceeding, not a proceeding that is closely linked to any governmental, administrative, or judicial proceedings or regulation. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.43[2].

[1C] Change of Name

Election to Change Name on Entering Marriage or Domestic Partnership. The Name Equality Act of 2007 [2007 Stats., ch. 567] allows persons entering into a marriage or a domestic partnership to change their middle or last names by making an appropriate election in the marriage license application or Declaration of Domestic Partnership form, without the need to petition the superior court for a change of name [*Fam. Code §§ 298.6, 306.5*]. See Ch. 377, *Name, Change of*, § 377.31.

[2] Complaints and Cross-Complaints

Complaints--Essential Facts and Specificity. Where plaintiff's complaint requested, in its prayer for relief, double damages under the Uniform Trade Secrets Act, but failed to allege, or even try to allege, a prima facie case for misappropriation of a trade secret, the lawsuit failed to constitute a claim for misappropriation of trade secrets [*CytoDyn of New Mexico, Inc. v. Amerimmune Pharmaceuticals, Inc. (2008) 160 Cal. App. 4th 288, 72 Cal. Rptr. 3d 600*]. See *Ch. 123, Complaints and Cross-Complaints, § 123.53*.

Amendment of Complaint--Effect. One defendant's filing of an answer does not divest a plaintiff of the right to amend the complaint with respect to causes of action brought against other demurring defendants [*Barton v. Khan (2007) 157 Cal. App. 4th 1216, 69 Cal. Rptr. 3d 238*]. See *Ch. 21, Amended and Supplemental Pleadings, § 21.12*.

Amendment of Complaint--Delay. Leave to amend a complaint may be denied for undue delay when a plaintiff asserts the right to amendment five weeks after the trial court granted summary judgment and the plaintiff cannot justify the long delay [*O'Brien v. Camisasca Automotive Manufacturing, Inc. (2008) 161 Cal. App. 4th 388, 73 Cal. Rptr. 3d 911*]. See *Ch. 21, Amended and Supplemental Pleadings, § 21.13*.

Privacy Protections--Social Security and Financial Account Numbers. New *Cal. Rules of Ct., Rule 1.20(b)* provides for privacy protections by requiring parties or their attorneys to redact social security and financial account numbers in documents filed with the court. The responsibility for excluding or redacting these numbers from all documents filed with the court rests solely with the parties and their attorneys, and the court clerk will not review each pleading or other paper for compliance with this provision. A party filing a document containing these numbers may file a reference list, along with the redacted document that will be placed in the public file. The reference list is confidential, and a new mandatory Judicial Council Form MC-120, Confidential Reference List of Identifiers is included. See *Ch. 26, Answers, § 26.17[1][d]*; *Ch. 123, Complaints and Cross-Complaints, §§ 123.19[5], 123.69*.

[2A] Defaults

Default--Entry Proper. Trial court properly granted landlords' motion for summary adjudication following the tenants' failure to appear at trial, resulting in a default judgment, in the landlords' action for breach of contract, declaratory relief, ejectment, and quiet title. Tenants failed to file the separate statement of facts in opposition required pursuant to *Code Civ. Proc. § 437c(b)(3)*, and the tenants' attempt to shift the blame for their failure to comply to the trial court, without any case authority demonstrating that the trial court abused its discretion, was incorrect and misplaced. The tenants had taken the time to file a sur-reply to the landlords' reply brief, and could have used that opportunity to remedy their deficiency, but did not do so [*Whitehead v. Habig (2008) 163 Cal. App. 4th 896, 77 Cal. Rptr. 3d 679*]. See *Ch. 205, Defaults and Default Judgments, § 205.64*.

[2B] Dismissal

Dismissal--Discretionary Dismissal for Impossibility, Impracticability, or Futility. This chapter is updated with a new discussion on discretionary dismissal of an action and reasonable excuses for plaintiff's delay due to impossibility, impracticability, or futility, and analyzes the three-way split of authority between different districts in the California Courts of Appeal in light of the 1984 amendments to *Code Civ. Proc. § 583.340*. See *Ch. 212, Dismissal, § 212.154[4]*.

[3] Fax Filing

Fax Service--Service Lists. Amended *Cal. Rules of Ct., Rule 2.306(b)(1)* now provides that in a case in which the parties have agreed to service by fax, the plaintiff or petitioner named first in the complaint or petition must maintain a current list of the parties that includes their fax numbers for service of notice on each party and furnish a copy of the list on request to any party or the court. Additionally, in a case in which the parties have agreed to service by fax, each party must furnish the first-named plaintiff or petitioner with the party's current fax number for service of notice when it first appears in the action; and the party serves an order, notice, or pleading on a party that has not yet appeared in the action, that party must serve a copy of the service list at the same time that the order, notice, or pleading is served. See *Ch. 264, Fax Filing, § 264.41[3]*.

[4] Guardian Ad Litem

Guardians Ad Litem--Appointment. In probate proceedings, a guardian ad litem may be appointed by the court at any stage of a proceeding to represent the interest of a minor, if the court determines that representation of the interest otherwise would be inadequate. The guardian or guardian ad litem is not a party to the action; instead, he or she is a representative of record of a party who lacks capacity to sue. The guardian ad litem's powers include the right to compromise or settle the action, to control the procedural steps incident to the conduct of the litigation, and, with the approval of the court, to make stipulations or concessions that are binding on the minor, provided they are not prejudicial to the latter's interests [*Safai v. Safai (2008) 164 Cal. App. 4th 233, 78 Cal. Rptr. 3d. 759*]. See *Ch. 291, Guardians ad Litem, § 291.33*.

Guardians Ad Litem--Appointment. In a parental rights termination case, a juvenile court's failure to appoint a guardian ad litem for a minor mother was not harmless error where the mother's rights were compromised at key hearings as a result of the failure to appoint a guardian ad litem [*In re M.F. (2008) 161 Cal. App. 4th 673, 74 Cal. Rptr. 3d 383*]. See *Ch. 291, Guardians ad Litem, § 291.33*.

Guardian Ad Litem--Appointment. This chapter is updated with revised Judicial Council Forms CIV-010, Application and Order for Appointment of Guardian Ad Litem, and revised Judicial Council Form DE-350, GC-100, Petition for Appointment of Guardian Ad Litem--Probate. See *Ch. 291, Guardian Ad Litem, §§ 291.50, 291.51*.

[4A] Judicial Notice

Judicial Notice--Websites. Courts may take judicial notice of the existence of a particular website but not of the factual content found on the website [*Searles Valley Minerals Operations, Inc. v. State Bd. of Equalization (2008) 160*

Cal. App. 4th 514, 72 Cal. Rptr. 3d 857]. See *Ch. 321, Judicial Notice, § 321.17[12]*.

[5] Judges

Judges--Peremptory Challenge. A ruling under *Civ. Code § 3295(c)* that a plaintiff has demonstrated a substantial probability that he or she will prevail on a claim for punitive damages is not a "determination of contested fact issues relating to the merits" for purposes of asserting a peremptory challenge to a judge pursuant to *Code Civ. Proc. § 170.6(a)(2)* [*Guardado v. Superior Court (2008) 163 Cal. App. 4th 91, 77 Cal. Rptr. 3d 149*]. See *Ch. 317, Judges, § 317.122*.

Judges--Disqualification for Cause. This chapter is updated with *Rossco Holdings, Inc. v Bank of America (2007) 149 Cal. App. 4th 1353, 58 Cal. Rptr. 3d 141* , which holds disqualification occurs when the facts creating disqualification arise, not when the disqualification is established, and a disqualified judge's orders are void, regardless of whether they happen to have been legally correct. Additionally, grounds for disqualification under *Code Civ. Proc. § 170.1(a)(8)(A)* (prospective employment as dispute resolution professional) apply when they both arise and are learned of, not when the judge understands their legal significance. See *Ch. 317, Judges, § 317.44A*.

Judges--Peremptory Disqualification. This chapter is updated with *Bravo v. Superior Court (2007) 149 Cal. App. 4th 1489, 57 Cal. Rptr. 3d 910* , which holds if a *Code Civ. Proc. § 170.6* motion is timely filed in proper form, the court must accept it without further inquiry, the disqualification is effective immediately, and as a remedial statute the statute is liberally construed in favor of the allowing the peremptory challenge and a challenge should be denied only if the statute absolutely forbids it. Additionally, although two cases may involve the same parties (e.g., same employee and the same employer), if the second action arises out of later events distinct from those in the previous action, the second action does not constitute a continuation of the previous action and a party's peremptory challenge may be timely. See *Ch. 317, Judges, §§ 317.71, 317.77[6][d]*.

Judges--Judicial Minimum Educational Requirements. This chapter is updated with new *Cal. Rules of Ct., Rule 10.452 et seq.* which set forth minimum education requirements, expectations, and recommendations for justices, judges, subordinate judicial officers, and court personnel. See *Ch. 317, Judges, § 317.84[3]*.

[6] Personal Jurisdiction

Jurisdiction--Renewal of Judgment. There is nothing unreasonable about subjecting a defendant to the jurisdiction of California courts in an independent action to renew a 1992 judgment. Defendant had entered into a contract in California (a promissory note), that was to be performed in California (i.e., payment of the debt), which he breached when he failed to repay the debt. An action on the note was filed in California and defendant submitted himself to the jurisdiction of the California court when he appeared in the action. A money judgment was entered against defendant in California, and he has failed to pay his obligations. The passage of time between the original California litigation and the revival action, during which defendant has had no additional contacts with California, does not defeat personal jurisdiction as concerns the enforcement of the 1992 judgment. Such a conclusion could encourage judgment debtors to evade legal obligations imposed by a judgment of this state's courts by simply packing up their assets and leaving the jurisdiction [*The Cadle Co. II v. Fiscus (2008) 163 Cal. App. 4th 1232, 78 Cal. Rptr. 3d 238*]. See *Ch. 323, Jurisdiction: Personal, § 323.86*.

Jurisdiction--Purposeful Availment. Where the only contact a Virginia university had with California was the university's recruiting coordinator visit to plaintiff in California to recruit him to play football for the university, and the execution of a scholarship agreement by plaintiff in California, the court found that the university had not purposely availed itself of the benefits of doing business in California such that it could expect to be subject to the jurisdiction of California courts. The nexus between the university's activities in California and the injury plaintiff suffered in Virginia was so attenuated as to be virtually nonexistent [*Roman v. Liberty University, Inc. (2008) 162 Cal. App. 4th 670, 75*

Cal. Rptr. 3d 828]. See *Ch. 323, Jurisdiction: Personal, § 323.86*.

Jurisdiction--Forum Non Conveniens. In challenging the trial court's granting of a motion based on forum non conveniens, plaintiff argued that no suitable alternative forum is available because Virginia applies contributory, rather than comparative, negligence principles, and plaintiff's own negligence or assumption of the risk would completely bar his recovery under Virginia law. As a general rule, comparative law questions are irrelevant to a forum non conveniens analysis, except when the alternate forum provides no remedy at all. Accordingly, the court of appeal affirmed, holding that plaintiff has identified no bar to filing a negligence action in Virginia. If he proves his case, and proves that he was not contributorily negligent, he will be entitled to recover damages under Virginia law; a forum is suitable where an action can be brought, although not necessarily won [*Roman v. Liberty University, Inc. (2008) 162 Cal. App. 4th 670, 75 Cal. Rptr. 3d 828*]. See *Ch. 323, Jurisdiction: Personal, § 323.102*.

Personal Jurisdiction--Activities in Forum State. The proper jurisdictional question is not whether a defendant can be liable for the acts of another person or entity under state substantive law, but whether the defendant has purposefully directed its activities at the forum state by causing a separate person or entity to engage in forum contacts. That constitutional question does not turn on the specific state law requirements of alter ego or agency, although the inquiry may be similar in some circumstances [*Anglo Irish Bank Corp. v. Superior Court (2008) 165 Cal. App. 4th 969*]. See *Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances, § 323.86*.

Jurisdiction--Subsequent Events. Once acquired, jurisdiction is not defeated by subsequent events that might have prevented jurisdiction had they occurred before personal service of the action was made [*Goldman v. Simpson (2008) 160 Cal. App. 4th 255, 72 Cal. Rptr. 3d 729*]. See *Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances, § 323.13*.

Forum Non Conveniens--Timing of Motion. This chapter is updated with *Britton v. Dallas Airmotive, Inc. (2007) 153 Cal. App. 4th 127, 62 Cal. Rptr. 3d 487* , which holds the defendant may make a forum non conveniens motion under *Code Civ. Proc. § 410.30* at any time, not only on or before the last day to plead; however, unreasonable delay in bringing a forum non conveniens motion may be grounds to deny the motion, and any delay would be relevant to whether the motion should be granted. Also, the failure to make a motion under *Code Civ. Proc. § 410.10* at the time of filing a demurrer or motion to strike constitutes a waiver of the issue of, among others, inconvenient forum. See *Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances, § 323.34[4]*.

[7] Subject Matter Jurisdiction

Subject Matter Jurisdiction--Indian Child Welfare Act (ICWA). This chapter is updated with a new analysis of the Indian Child Welfare Act [*25 U.S.C. § 1901 et seq.*] and its effect on jurisdiction in California, federal, and tribal courts. See *Ch. 324, Jurisdiction: Subject Matter Jurisdiction, § 324.24[1A]*.

Subject Matter Jurisdiction--Tribal Sovereignty. This chapter is updated with *San Manuel Indian Bingo and Casino v. N.L.R.B. (D.C. Cir. 2007) 475 F.3d 1306* , which holds that principles of tribal sovereign immunity did not preclude the enforcement of the National Labor Relations Act's provisions relating to employment activities at a tribal casino. See *Ch. 324, Jurisdiction: Subject Matter Jurisdiction, § 324.24[2]*.

Subject Matter Jurisdiction--Appellate Jurisdiction. This chapter is updated with amended *Code Civ. Proc. § 904.3*, which provides an appeal cannot be taken from a judgment of the appellate division of a superior court granting or denying a petition for issuance of a writ of mandamus or prohibition directed to the superior court, or a judge thereof, in a limited civil case or a misdemeanor or infraction case; and an appellate court may, in its discretion, upon petition for extraordinary writ, review the judgment. See *Ch. 324, Jurisdiction: Subject Matter Jurisdiction, § 324.46[1]*.

[8] Limitation of Actions

Limitation of Actions--Absent Defendants. The tolling provisions of *Code Civ. Proc. § 351* have been applied to nonresident defendants who have never entered the state and to resident defendants who are temporarily absent from the state. Whether section 351 applies to resident defendants who are permanently absent from California, i.e., those who move out of state, was considered by the court in *Heritage Marketing & Ins. Services, Inc. v. Chrustawka (2008) 160 Cal. App. 4th 754, 73 Cal. Rptr. 3d 126* , which concluded that section 351 penalizes people who move out of state by imposing a longer statute of limitations on them than on those who remain in the state, and that the *commerce clause* protects persons from such restraints on their movements across state lines. See *Ch. 345, Limitation of Actions, §§ 345.20, 345.53*.

Limitation of Actions--Intentional Acts by Physicians. Where plaintiffs' claim is based on defendant doctors' intentional acts of egregious abuse, MICRA's statute of limitations, which pertains to medical malpractice actions, would not apply [*Unruh-Haxton v. Regents of University of California (2008) 162 Cal. App. 4th 343, 76 Cal. Rptr. 3d 146*]. See *Ch. 345, Limitation of Actions, § 345.53* and Ch. 345APP, *Table of Limitations Periods*, § 345APP.227.

Limitation of Actions--Conduct by Defendant. A defendant will be estopped to invoke the statute of limitations where there has been some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action. It is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. It is sufficient that the defendant's conduct in fact induced the plaintiff to refrain from instituting legal proceedings. Whether an estoppel exists--whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice--is a question of fact and not of law [*Holdgrafer v. Unocal Corp. (2008) 160 Cal. App. 4th 907, 73 Cal. Rptr. 3d 216*]. See *Ch. 345, Limitation of Actions, § 345.53*.

Limitation of Actions--Discovery Regarding Absence From State. The tolling provision of *Code Civ. Proc. § 351* applies to the one-year limitation in medical malpractice cases. Harm resulted from the trial court's denial of plaintiff's discovery motions because his notice of intent to sue was six days late, and at trial the surgeon testified that he was outside California for three days. An absence for three more days--merely a long weekend perhaps--would have made a world of difference to the timeliness of the complaint. Thus, denying discovery prevented the patient from gathering evidence on a dispositive issue. The patient did not have to accept the surgeon's testimony as the final word [*Kaplan v. Mamelak (2008) 162 Cal. App. 4th 637, 75 Cal. Rptr. 3d 861*]. See *Ch. 345, Limitation of Actions, § 345.53*.

Limitation of Actions--Agent's Knowledge of Facts. In determining whether an agent's knowledge of certain facts is imputed to the principal for purposes of establishing the principal's notice of those facts, for purposes of *Code Civ. Proc. § 340.1(b)(2), (c)*, the court of appeal held that so long as the agent was under a duty to disclose certain information, the principal is bound by the agent's knowledge of that information whether or not the agent communicated it to the principal. For this purpose, there is no difference between constructive and actual notice [*Santillan v. Roman Catholic Bishop of Fresno (2008) 163 Cal. App. 4th 4, 77 Cal. Rptr. 3d 343*]. See *Ch. 345, Limitation of Actions, § 345.53*.

Limitation of Actions--Additional Damage After Date of Accrual of Cause of Action. Even though a prior discriminatory evaluation and pay adjustment continue to have negative effects on an employee's pay throughout her employment, the cause of action accrues at the time the evaluation and pay adjustment are made, when the employer acted in a discriminatory manner with adverse consequences for the employee. Once the damage is such that the cause of action accrues, additional damage from the same wrong does not alter the accrual of the cause of action or otherwise extend the limitations period [*Hammond v. County of Los Angeles (2008) 160 Cal. App. 4th 1579, 73 Cal. Rptr. 3d 690*]. See *Ch. 345, Limitation of Actions, § 345.53*.

Limitation of Actions--Suspicion of Wrongdoing. Where someone steals a trade secret and then sells it to a third party, with respect to the element of knowledge, the statute of limitations on a cause of action for misappropriation

begins to run when the plaintiff has any reason to suspect that the third party knows or reasonably should know that the information is a trade secret. The third party's actual state of mind does not affect the running of the statute [*Cypress Semiconductor Corp. v. Superior Court (2008) 163 Cal. App. 4th 575, 77 Cal. Rptr. 3rd 685*]. See *Ch. 345, Limitation of Actions, § 345.53*.

Limitation of Actions--Suspicion of Wrongdoing. Public awareness of a problem through media coverage alone does not create constructive suspicion for purposes of discovery. The statute of limitations does not begin to run when some members of the public have a suspicion of wrongdoing, but only once the plaintiff has a suspicion of wrongdoing [*Unruh-Haxton v. Regents of University of California (2008) 162 Cal. App. 4th 343, 76 Cal. Rptr. 3d 146*]. See *Ch. 345, Limitation of Actions, § 345.53*.

Limitation of Actions--Identification for Credit Card Usage. The statute of limitations for an action under *Civ. Code § 1747.08* (business requiring identification information as condition of acceptance of credit card) is one year [*Code Civ. Proc. § 340*; *see The TJX Companies, Inc. v. Superior Court (2008) 163 Cal. App. 4th 80, 77 Cal. Rptr. 3d 114*]. See *Ch. 345APP, Table of Limitations Periods, § 345.183*.

Limitation of Actions--Recorded and Unrecorded Restrictions. The statute of limitations on actions arising from recorded restrictions and unrecorded restrictions is five years [*Code Civ. Proc. §§ 336(b), 784*; *see Pacific Hills Homeowners Assn. v. Prun (2008) 160 Cal. App. 4th 1557, 73 Cal. Rptr. 3d 653*]. See *Ch. 345APP, Table of Limitations Periods, § 345.318*.

Limitation of Actions--Contractual Stipulations. A contractual stipulation to limit a statute of limitations must be clear and explicit, and is to be strictly construed against the party invoking the provision [*Western Filter Corp. v. Argan, Inc. (9th Cir. 2008) 540 F.3d 947*]. See *Ch. 345, Limitation of Actions, §§ 345.28, 345.53*.

Limitation of Actions--Estoppel. Defendants who induce plaintiffs not to sue pending settlement may not assert a statute of limitations defense where their conduct caused the untimely filing of the action [*Union Oil Co. of California v. Greka Energy Corp. (2008) 165 Cal. App. 4th 129*]. See *Ch. 345, Limitation of Actions, § 345.53*.

Limitation of Actions--Criminal Conviction of Licensee. With respect to a licensee who has been convicted of a crime and, as a result of that conviction is subject to discipline under *Bus. & Prof. Code § 7123*, the disciplinary action must be filed within two years after the discovery of the conviction by the registrar or by the board [*Bus. & Prof. Code § 7091(d)*]. See *Ch. 345APP, Table of Limitation Periods, § 345.185*.

Limitation of Actions--Land Use Authority. In an action governed by *Gov. Code § 65009(d)*, a party has 90 days from the date a legislative action is taken or approval is given to notify the local land use authority of any claimed deficiencies in such an action or approval [*Urban Habitat Program v. City of Pleasanton (2008) 164 Cal. App. 4th 1561*]. See *Ch. 345APP, Table of Limitation Periods, § 345.329*.

Limitation of Actions--Single Publication Rule. In a defamation action, for example, the single-publication rule provides that, for any single edition of a newspaper or book, there is but a single potential action for a defamatory statement contained in the newspaper or book, no matter how many copies of the newspaper or the book were distributed; and the accrual of the cause of action in that case is not delayed by the discovery rule when the defamation occurred by means of a book, magazine, or newspaper that was distributed to the public. The single publication rule applies to all publications, including those that receive only limited circulation and, thus, are not generally distributed to the public [*Hebrew Academy of San Francisco v. Goldman (2007) 42 Cal. 4th 883, 890, 70 Cal. Rptr. 3d 178, 173 P.3d 1004*]. See *Ch. 345, Limitation of Actions, § 345.19[3][a]*.

Limitation of Actions--Table of Limitation Periods. This chapter's Table of Limitation Periods, which provides the various periods of limitation organized by types of action, is updated with additional entries and cross references. The

table may be used as a quick reference for researching the limitation period governing a given action or proceeding. Included in the table are convenient cross references, when applicable, to other chapters in this publication that contain related forms, further discussion, or both. See *Ch. 345, Limitation of Actions, § 345.150* et seq.

Limitation of Actions--Delayed Discovery. This chapter is updated with *E-Fab, Inc. v. Accountants, Inc. Services (2007) 153 Cal. App. 4th 1308, 64 Cal. Rptr. 3d 9* , which holds if a plaintiff's reasonable and diligent investigation discloses only one kind of wrongdoing when the injury was actually caused by tortious conduct of a wholly different sort, the discovery rule postpones accrual of the statute of limitations on the newly discovered claim. In such cases, the key issue is whether a reasonable investigation at that time would have revealed a factual basis for that particular cause of action. See *Ch. 345, Limitation of Actions, § 345.19[3][d]*.

Limitation of Actions--Time From Judgment. This chapter is updated with *Archdale v. American Internat. Specialty Lines Co. (2007) 154 Cal. App. 4th 449, 64 Cal. Rptr. 3d 632* , which holds an insured's cause of action for breach of the implied covenant may accrue on the entry of the trial court's judgment, but the limitations period should not commence to run until that judgment becomes final. Until such judgment is final, the insured has either not been harmed or the amount of that harm cannot be determined. See *Ch. 345, Limitation of Actions, § 345.21[1][f]*.

Limitation of Actions--Time From Judgment. This chapter is updated with *Sahadi v. Scheaffer (2007) 155 Cal. App. 4th 704, 66 Cal. Rptr. 3d 517* , which holds the two-year statute of limitations prescribed by *Code Civ. Proc. § 339(1)* applies to actions for accounting malpractice, and where the gravamen of the case is accounting negligence, the two-year statute is applicable, notwithstanding the existence of other claims against the professionals, such as misrepresentation, for which a different statute of limitations might otherwise apply. See *Ch. 345, Limitation of Actions, § 345.53[10][a]*.

Limitation of Actions--Action Against Attorney. This chapter is updated with *Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal. 4th 503, 66 Cal. Rptr. 3d 52, 167 P.3d 666* , which holds an action against an individual attorney is tolled so long as *that attorney* continues representation. See *Ch. 345, Limitation of Actions, § 345.168*.

[9] Minors

Minors--Disaffirmation of Judgment. This chapter is updated with *Berg v. Traylor (2007) 148 Cal. App. 4th 809, 56 Cal. Rptr. 3d 140* , which holds unless a minor is duly represented as provided by law at the time a judgment is entered against him, his right to disaffirm such judgment continues until barred by laches after the minor has attained the age of majority, such a judgment is voidable and may be disaffirmed, the right of disaffirmance by a minor of a judgment rendered voidable by the fact that he was not represented by a guardian in the action is absolute, and such right continues throughout his minority. See *Ch. 367, Minors: Judgments, § 367.10*.

[9A] Motions to Strike

Motions to Strike--Pleadings. A motion to strike filed pursuant to *Code Civ. Proc. § 436(b)* must identify law, court rule, or court order violated rather than merely generically asserting that the objected-to pleading was "illegally filed without leave of court" [*Ferraro v. Camarlinghi (2008) 161 Cal. App. 4th 509, 75 Cal. Rptr. 3d 19*]. See *Ch. 375, Motions to Strike: Pleadings, § 375.44[3][b]*.

[10] Motions and Orders

Conferences, Motions, and Hearings--Telephone Appearances. This chapter is updated with new *Code Civ. Proc. § 367.5*, enacted to promote uniformity in the procedures and practices relating to telephone appearances. In all general civil cases, as defined in *California Rules of Ct., Rule 1.6(4)*, a party that has provided notice may appear by telephone at the following conferences, hearings, and proceedings: (1) a case management conferences, provided the party has

made a good faith effort to meet and confer before the conference as required by law and has timely served and filed a case management statement; (2) a trial setting conference; (3) a hearing on law and motion, except motions in limine; (4) a hearing on a discovery motion; (5) a conference to review the status of an arbitration or mediation; (6) a hearing to review the dismissal of an action; and (7) any other hearing, conference, or proceeding if the court determines that a telephone appearance is appropriate. The statute provides for procedures, notice, retractions, exceptions, and required personal appearance. See *Ch. 372, Motions and Orders, § 372.21[16]*; *Ch. 425, Pretrial Proceedings, § 425.35*.

Documents--Electronic Judicial Signatures. This chapter is updated with amended *Cal. Rules of Ct., Rule 2.257(e)*, which provides if a document requires a signature by a court or a judicial officer, the document may be electronically signed in any manner permitted by law. See *Ch. 372, Motions and Orders, § 372.21[24]*; *Ch. 518, Service of Summons and Papers, § 518.45[4][e]*.

[10A] Relief From Judgment

No Mandatory Relief for Attorney Acting In Pro Per. In *Esther B. v. City of Los Angeles (2008) 158 Cal. App. 4th 1093, 70 Cal. Rptr. 3d 596* , the Court of Appeal held that an attorney who brought an action both on the attorney's own behalf in pro per and on behalf of others as a taxpayer in a representative capacity was not entitled to mandatory relief under *Code Civ. Proc. § 473(b)*. The mandatory relief provision of § 473(b) only applied in the case of an attorney representing a client, and, as to aspect of bringing the action on behalf of other taxpayers, if the attorney bound other taxpayers by the action, the attorney did so as a fellow taxpayer, not as an attorney for the taxpayers. See Ch. 489, *Relief From Judgments and Orders* .

[10B] Res Judicata

Res Judicata--Same Cause of Action. Plaintiff's wrongful death action seeking damages for noneconomic loss arising out of her spouse's tobacco-related death involved the same primary right as her previously litigated and adjudicated loss of consortium action; the court therefore held the action was barred by res judicata [Boeken v. Philip Morris USA, Inc. (2008) 159 Cal. App. 4th 1391, 72 Cal. Rptr. 3d 454]. See Ch. 491, *Res Judicata*, § 491.23[3][d].

[11] Service of Summons and Papers

Documents--Electronic Judicial Signatures. This chapter is updated with amended *Cal. Rules of Ct., Rule 2.257(e)*, which provides if a document requires a signature by a court or a judicial officer, the document may be electronically signed in any manner permitted by law. See *Ch. 372, Motions and Orders, § 372.21[24]*; *Ch. 518, Service of Summons and Papers, § 518.45[4][e]*.

Electronic Filing and Service. This chapter is updated with revised *Cal. Rules of Ct., Rule 2.253* providing for electronic filing and service in special cases. See *Ch. 518, Service of Summons and Papers, § 518.43*.

[12] Shortening and Extending Time

Extending Time. This chapter is updated with the revised Judicial Council Form CM-020, Ex Parte Application for Extension of Time to Serve Pleadings and Orders. See *Ch. 524, Shortening and Extending Time, § 524.53A.*

[13] Summary Judgment and Adjudication

Summary Judgment--Supporting Evidence. A party responding to interrogatories may not use those responses in support of its own motion or opposition to a motion for summary judgment [*Great American Ins. Companies v. Gordon Trucking, Inc. (2008) 165 Cal. App. 4th 445*]. See *Ch. 537, Summary Judgment, § 537.24[3]*.

Summary Judgment--Issues Framed by Pleadings. A plaintiff may not raise, for the first time, a new theory of

liability in opposition to defendant's motion for summary judgment unless the controlling pleading, construed broadly, encompasses that theory. Rather, plaintiff should seek to amend his or her complaint prior to the hearing on the motion for summary judgment [*Laabs v. City of Victorville (2008) 163 Cal. App. 4th 1242, 78 Cal. Rptr. 3d 372*]. See *Ch. 537, Summary Judgment, § 537.21[2]*.

Summary Judgment--Failure to File Separate Statement. The court of appeals upheld summary judgment for plaintiff landlord based solely on opposing tenant's failure to file an opposing separate statement. Tenants filed a document entitled "Objections to Separate Statement of Undisputed Facts," which was insufficient to comply with the requirements of *Code Civ. Proc. § 437c(b)(3)* and *Cal. Rules of Ct., Rule 3.1350(e)*. [*Whitehead v. Habig (2008) 163 Cal. App. 4th 896, 77 Cal. Rptr. 3d 679*]. See *Ch. 537, Summary Judgment, § 537.25[2]*.

Summary Judgment--Statement of Undisputed Material Fact. An expert doctor's opinion based solely on his review of medical records had no evidentiary value where records were not authenticated and placed before the court and no foundation for a business record exception to the hearsay rule was established; as a result, defendant's summary judgment motion had no evidentiary basis and was reversed [Garibay v. Hemmatt (2008) *(2008) 161 Cal. App. 4th 735, 74 Cal. Rptr. 3d 715*]. See *Ch. 537, Summary Judgment, § 537.24[1][b], [c], 537.25[3][b]*.

Summary Judgment--Statement of Undisputed Material Fact. This chapter is updated with revised *Cal. Rule of Ct., Rule 3.1350(d)*, which still requires a two-column format for a statement of undisputed material fact, but now requires the moving party to state in numerical sequence the undisputed material facts in the first column followed by the evidence that establishes those undisputed facts in that same column. See *Ch. 537, Summary Judgment, § 537.74*.

[14] Vexatious Litigants

Vexatious Litigants--Prefiling Order. An appellate court may not require a defendant who has previously been declared a vexatious litigant to obtain leave of court to appeal a judgment against him or her; the defendant is entitled to appeal an adverse ruling regardless of vexatious litigant status [*Mahdavi v. Superior Court (2008) 166 Cal. App. 4th 32*]. See *Ch. 573, Vexatious Litigants, § 573.31*.

Vexatious Litigants--Lifting Prefiling Requirement. A prefiling order is an injunction, and the order may be modified as provided in *Code Civ. Proc. § 533* based on a change in the facts, a change in the law, or when a change would serve the ends of justice. The factors for lifting the order include: 1) the litigant must show honesty in the presentation of relevant facts in his or her application for the lifting of the prefiling order, 2) the litigant must show genuine remorse for the costs of litigation inflicted on defendants in prior lawsuits, 3) the litigant must attempt restitution toward the targets of prior litigation, especially payment of cost orders made by the court, 4) the litigant must give up the "habit of suing people as a way of life," and 5) the vexatious litigant must file an application to lift a prefiling order in the same forum that originally entered the order [*Luckett v. Panos (2008) 161 Cal. App. 4th 77, 73 Cal. Rptr. 3d 745*]. See *Ch. 573, Vexatious Litigants, § 573.14*.

Vexatious Litigants--Statutory Requirements. This chapter is updated with *Morton v. Wagner (2007) 156 Cal. App. 4th 963, 67 Cal. Rptr. 3d 818* , which holds where the plaintiff does not have five adverse litigations and the motions are not unmeritorious or frivolous, a finding of the plaintiff as a vexatious litigant under *Code Civ. Proc. § 391(b)(3)* will not be upheld on appeal; however, repeated motions on the same issue may form the basis for a vexatious litigant finding. See *Ch. 573, Vexatious Litigants, § 573.13[3][a]*.

Vexatious Litigants--Request to File New Litigation by Vexatious Litigant. This chapter is updated with the new Judicial Council Form MC-701, Request and Order to File New Litigation by Vexatious Litigant. See *Ch. 573, Vexatious Litigants, § 573.43*.

California Forms of Pleading and Practice--Annotated

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Chapter 1 NEW DEVELOPMENTS
PART V. 2008 NEW DEVELOPMENTS

1-1 California Forms of Pleading and Practice--Annotated § 1.157

§ 1.157 Civil Rights

[1] Discrimination in Business Establishments

Plaintiff Had Standing Under ADA but Summary Judgment Was Proper. In *Doran v. 7-Eleven, Inc. (9th Cir. 2007) 506 F.3d 1191* , the Ninth Circuit held that a plaintiff who suffered an injury in fact that was concrete, particularized, actual, and imminent had constitutional standing under U.S. Const. Art. III to bring a suit against a store challenging accessibility barriers under Title III of Americans with Disabilities Act and could, in one suit, permissibly challenge all barriers in the public accommodation related to his specific disability. However, the district court did not err in granting summary judgment to the store on the issues of whether the store's aisle width and the refusal to allow him to access an employees-only restroom were ADA violations. See *Ch. 116, Civil Rights: Discrimination in Business Establishments, § 116.52[1]*.

Plaintiff Pled Injuries to Allow Suit Under ADA and Was Entitled to Attorney's Fees and Costs. In *Skaff v. Meridien North America Beverly Hills (9th Cir. 2007) 506 F.3d 832* , a hotel's initial mistake in assigning a room with a bathtub rather than a roll-in shower caused no cognizable damage under the ADA, because it was immediately corrected by reassignment to a room with a roll-in shower as plaintiff had requested. Similarly, the initial absence of a shower chair was promptly corrected, and plaintiff had a chair he could use in the roll-in shower by the next morning, so he suffered no cognizable injury concerning the shower. However, plaintiff pled injuries that gave him standing to pursue the case by alleging encounters with accessibility barriers, other than the barrier of the inaccessible showers, at the hotel. Finally, because the ADA did not require plaintiff to give the hotel pre-suit notice that he intended to sue or give the hotel the opportunity to cure the alleged violations as a prerequisite to recovering attorney's fees, the district court erred when it denied plaintiff's motion for attorney's fees and costs. See *Ch. 116, Civil Rights: Discrimination in Business Establishments, § 116.52[1]*.

No Standing If Regulations Not Intended to Prevent Type of Injury Suffered. In *Urhausen v. Longs Drug Stores California, Inc. (2007) 155 Cal. App. 4th 254, 65 Cal. Rptr. 3d 838* , although disabled, plaintiff had no standing under *Civ. Code § 54.1* based on defendant's violation of disabled access regulations governing the slope of parking spaces. The regulations were not intended to prevent the type of accident plaintiff suffered by falling; the failure of the access aisle to comply with the applicable regulations did not deny her equal access to the store, because there was no reason to

believe plaintiff would have been unable to reach the store entrance had she taken the prescribed route. See Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

Reasonable to Exclude Blind Passenger From Area Excluding Animals Based on Another Passenger's Allergy. In *Lockett v. Catalina Channel Express, Inc. (9th Cir. 2007) 496 F.3d 1061* , a single decision by the ticket seller of a ferry operator to ask a blind passenger to ride in the general passenger area with her guide dog, rather than in the more expensive lounge area, was a reasonable judgment under *28 C.F.R. § 36.208*. The ferry operator had adopted the policy excluding animals from the lounge based on another passenger's alleged allergy. See Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

[1A] Employment Discrimination

Employee Suing Under FEHA Need Not Exhaust Certain Administrative Remedies. California courts of appeal have held that an employee suing under the Fair Employment and Housing Act need not exhaust the employer's internal remediation procedures if the procedures do not include a quasi-judicial hearing with sufficient due process to generate a legally binding result or if the internal procedures are provided by a collective bargaining agreement rather than a statute [*Ahmadi-Kashani v. Regents of Univ. of Cal. (2008) 159 Cal. App. 4th 449* , and *Ortega v. Contra Costa Cmty. Coll. Dist. (2007) 156 Cal. App. 4th 1073*]. See *Ch. 115, Civil Rights: Employment Discrimination, § 115.51[1][a], [g]*.

42 U.S.C. § Prohibits Retaliation on Basis of Race. The United States Supreme Court has held that *42 U.S.C. § 1981* prohibits retaliation on the basis of race, including retaliation against a person for complaining about the violation of another person's rights under § 1981 [*CBOCS W., Inc. v. Humphries (2008) 170 L. Ed. 2d 864*]. See *Ch. 115, Civil Rights: Employment Discrimination, §§ 115.21[4], 115.22[2], 115.37[1][a],* and *Ch. 531, Statutes and Ordinances, § 531.62*.

Supreme Court Adopts EEOC's Interpretation of "Charge" Under Age Discrimination in Employment Act. The United States Supreme Court has held that, to constitute a "charge" that starts the waiting period before an employee may file suit under the Age Discrimination in Employment Act, the employee's filing with the Equal Employment Opportunity Commission must include a request that the EEOC take remedial action [*see 29 U.S.C. § 626(d)*]. In so holding, the Supreme Court applied a "measure of respect" for the statutory interpretation embodied in the EEOC's compliance manual and internal directives [Federal Express Corp. v. Holowecki (2008) 170 L. Ed. 2d 10]. See *Ch. 115, Civil Rights: Employment Discrimination, § 115.51[2][a]*; *Ch. 531, Statutes and Ordinances, § 531.67[1], [2]*.

California Family Rights Act Dispute Resolution Procedure Is Not Mandatory. The California Supreme Court, in *Lonicki v. Sutter Health Cent. (2008) 43 Cal. 4th 201* ,has held that the statutory procedure under California's Moore-Brown-Roberti Family Rights Act to determine whether an employee has a serious health condition entitling him or her to a medical leave of absence [*see Gov. Code § 12945.2(k)(3)*] is not mandatory, and an employer's failure to use that procedure does not bar the employer from contending in subsequent litigation that the employee did not have a serious health condition that made him or her unable to perform the job. See *Ch. 115, Civil Rights: Employment Discrimination, § 115.32[6][b]*.

[1B] Government-Funded Programs and Activities

ADA Considerations in Prisons and Jails Must Include Administration Needs. In *Pierce v. County of Orange (9th Cir. 2008) 519 F.3d 985* , the Ninth Circuit found that the trial court erred by terminating an order in a class action regarding mobility- and dexterity-impaired pretrial detainees in a county jail, because the county's failure to accommodate their disabilities prevented them from enjoying a number of the county's services, programs, and activities, and the county did not reasonably address various structural barriers, the county maintained unreasonable policies and practices in violation of the ADA, and the county did not posit any legitimate rationale for maintaining

inaccessible bathrooms, sinks, showers, and other fixtures in the housing areas and common spaces assigned to mobility- and dexterity-impaired detainees or offer an explanation or justification for significant differences between the vocational and recreational activities available to able and disabled detainees. See Ch. 112, *Civil Rights: Government-Funded Programs and Activities* .

[2] Housing Discrimination

Conclusion of Design and Construction Phase Triggers Statute of Limitations Under FHA. In *Garcia v. Brockway (9th Cir. 2007) 503 F.3d 1092* , private civil actions based on design-and-construction claims under the Fair Housing Act, the two-year statute of limitations began to run at the conclusion of the design-and-construction phase, which occurred on the date the last certificate of occupancy was issued, which occurred long before plaintiffs filed suit. See Ch. 117, *Civil Rights: Housing Discrimination* .

[3] Interference With Civil Rights

No Qualified Immunity Under *Civ. Code § 52.1*. In *Venegas v. County of Los Angeles (2007) 153 Cal. App. 4th 1230, 63 Cal. Rptr. 3d 741* , the Court of Appeal held that the doctrine of qualified immunity, which applies to federal civil rights actions under *42 U.S.C. § 1983*, does not apply to California civil rights actions under *Civ. Code § 52.1*. See Ch. 117A, *Civil Rights: Interference With Civil Rights by Threats, Intimidation, Coercion, or Violence* .

[4] Post-Civil War Civil Rights Statutes

***Heck* Decision Not an Exclusionary Rule.** In *Simpson v. Thomas (9th Cir. 2008) 528 F.3d 685* , the Ninth Circuit found that *Heck v. Humphrey* did not create a rule of evidence exclusion and could not be used to bar evidence in a § 1983 claim by a prisoner for excessive force by a guard, even if the district court determined that the prisoner could not file a § 1983 lawsuit relating to any injuries stemming from the guard's alleged punch based on a disciplinary proceeding against the prisoner related to the incident. See Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

Prisoner Had Right to Reasonable Post-Conviction Access to Evidence Used to Convict Him. In *Osborne v. District Attorney's Office (9th Cir. 2008) 521 F.3d 1118* , the Ninth Circuit held that under the special circumstances of the case, the right to due process of law prohibited a state from denying a prisoner reasonable post-conviction access to biological evidence for the purpose of further DNA testing. The biological evidence was used to secure his conviction of kidnapping and sexual assault, the testing was to be conducted using methods unavailable at the time of trial and far more precise than the methods that were then available, and the new methods were capable of conclusively determining whether the prisoner was the source of the genetic material, the testing could be conducted without cost or prejudice to the state, and the evidence was material to available forms of post-conviction relief. See Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

Due Process Right to Notice Before Car Towed. In *Clement v. City of Glendale (9th Cir. 2008) 518 F.3d 1090* , because there was very little by way of a legitimate government interest in ordering a tow without notice to the owner of an inoperable car parked in a parking lot in violation of a valid planned non-operation certificate, rather than giving the owner notice and the opportunity to avoid the cost and hassle of having to deal with the towed vehicle, the police officer violated the owner's due process rights by ordering of the towing of the car without attempting to notify the owner before the government could tow and impound it. See Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

No Absolute Immunity for Social Workers. In *Beltran v. Santa Clara County (9th Cir. 2008) 514 F.3d 906* , the Ninth Circuit held that a social worker who investigated whether a mother was abusing her son and her supervisor who filed a child dependency petition were not entitled to absolute immunity in the mother's action under *42 U.S.C. § 1983* after the dependency petition was denied, claiming that much of the information in the three-page statement of facts

included in the petition was false. Social workers conducting investigations have no absolute immunity, and, although social workers have absolute immunity when they make discretionary, quasi-prosecutorial decisions to institute court dependency proceedings to take custody away from parents, they are not entitled to absolute immunity from claims that they fabricated evidence during the investigation or made false statements in the dependency petition affidavit they signed under penalty of perjury, because those actions are not similar to discretionary decisions about whether to prosecute. See Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

Police Officers in High-Speed Chases Qualifiedly Immune Unless They Intend to Harm. In *Bingue v. Prunchak (9th Cir. 2008) 512 F.3d 1169* , the Ninth Circuit found that a police officer involved in a high-speed chase was qualifiedly immune in a § 1983 action by the driver of a car sideswiped by the officer in the course of the chase. The intent to harm standard applies to all high-speed police chases, and the officer did not act with the requisite intent, even though his decision to join the pursuit may have been ill-advised as well as his execution, because poor judgment alone in a high-speed chase did not violate the *Fourteenth Amendment*. See Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

Private Entity Not Entitled to Sovereign Immunity. In *Del Campo v. Kennedy (9th Cir. 2008) 517 F.3d 1070* , an action under *42 U.S.C. § 1983* based on the behavior of a private corporation contracted with the district attorney to run a bad check diversion program, the Ninth Circuit held that the corporation, as a private entity, was not entitled to sovereign immunity. See Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

No Claim Under § 1981 Against Arm of State. In *Pittman v. Oregon (9th Cir. 2007) 509 F.3d 1065* , the Ninth Circuit held that a federal district court properly dismissed an action under *42 U.S.C. § 1981* alleging employment discrimination on the basis of race against a state employment department, because § 1981 does not contain a cause of action against states or arms of states. See *Ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes, § 113.11[1][c]*.

Notice to Appeal on Misdemeanor Charges Tolled Statute of Limitations Until Charges Dismissed. In *Schmidlin v. City of Palo Alto (2007) 157 Cal. App. 4th 728* , a notice to appear on specified misdemeanor charges inferentially served on a criminal defendant at the time of his release commenced tolling of a civil rights action against law enforcement officers based on alleged use of excessive force during his arrest under *Gov. Code § 945.3*. A criminal complaint was timely filed after service of the notice to appear so that the tolling period continued through final disposition of charges by dismissal by the prosecutor. Thus, a civil rights complaint under *42 U.S.C. § 1983* filed within one year under the then-applicable statute of limitations was timely. See *Ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes, § 113.14[9][b]*.

[5] Prisoner Rights

RLUIPA Claim Not Barred Because Not Specifically Pleaded by Prisoner. In *Alvarez v. Hill (9th Cir. 2008) 518 F.3d 1152* , the Ninth Circuit held that because federal complaints plead claims, not causes of action or statutes or legal theories, a prisoner's failure to specifically plead in the complaint a violation of RLUIPA did not bar the argument that the district court erred in not analyzing religious exercise claims under RLUIPA, which establishes a more protective standard than the *First Amendment*. See Ch. 114, *Civil Rights: Prisoners' Rights* .

No Fair Notice of Summary Judgment Procedure Given to Jail Inmate. In *Solis v. County of Los Angeles (9th Cir. 2008) 514 F.3d 946* , a jail inmate's civil rights action against a city, the sheriff and deputy sheriffs resulting from his placement in the jail's "gang module," the district court erred in granting summary to defendants because neither the court nor defendants provided the inmate with the required fair notice of summary judgment procedure. See Ch. 114, *Civil Rights: Prisoners' Rights* .

Maximum Security Prisoners Entitled to Group Worship. In *Greene v. Solano County Jail (9th Cir. 2008) 513*

F.3d 982 , the trial court erred in granting summary judgment to a sheriff in a civil rights action by a maximum security jail prisoner alleging that the jail's policy of prohibiting maximum security prisoners from participating in group worship was a violation of his rights under the Religious Land Use and Institutionalized Persons Act. The policy substantially burdened his ability to exercise his religion, and there was a genuine issue of material fact as to whether a total ban on group religious worship by maximum security prisoners at the jail was the least restrictive means of maintaining jail security. See Ch. 114, *Civil Rights: Prisoners' Rights* .

Prisoner Should Have Been Allowed to Proceed In Forma Pauperis on Complaint Alleging Imminent Danger of Serious Physical Injury. In *Andrews v. Cervantes (9th Cir. 2007) 493 F.3d 1047* , an action by a prisoner alleging a cause of action under *42 U.S.C. § 1983* for cruel and unusual punishment premised on the danger of contracting various communicable diseases, based on the Department of Corrections and Rehabilitation's alleged ongoing policy of not screening inmates for communicable diseases and housing contagious inmates with others without regard to the risk they posed, the district court erred in finding that the three-strikes rule under the PLRA applied to prisoner, refusing his request to proceed in forma pauperis, and ordering the case closed. The prisoner sufficiently alleged imminent danger of serious physical injury, even though at the time he filed the complaint he already had contracted hepatitis and did not allege that he was presently confined with a prisoner with another contagious disease. See Ch. 114, *Civil Rights: Prisoners' Rights* .

Exhaustion of Remedies Required for ADA and Rehabilitation Act Action. In *O'Guinn v. Lovelock Correctional Center (9th Cir. 2007) 502 F.3d 1056* , the Ninth Circuit held that the Prison Litigation Reform Act requires prisoners to exhaust available administrative remedies before bringing claims under the Americans With Disabilities Act and the Rehabilitation Act. A prisoner did not exhaust remedies by repeated requests to move to a bottom bunk due to poor balance resulting from a previous brain injury, because the lower bunk claims were not equivalent to claims of denial of mental health treatment in violation of the ADA and Rehabilitation Act. A complaint filed with the DOJ alleging denial of mental health treatment did not exhaust the prison's internal grievance process. See Ch. 114, *Civil Rights: Prisoners' Rights* .

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§ 1.158 Class Actions

"Coupon" Settlement of Class Action Not Inherently Suspect. A California court of appeal has held that a "coupon" settlement (in which class members would receive a coupon, voucher, or discount that would partly defray the cost of making a new purchase of goods or services from the defendant) is not inherently suspect or improper [*Chavez v. Netflix, Inc. (2008) 162 Cal. App. 4th 43*]. See *Ch. 120, Class Actions, §§ 120.21[1], 120.21[2][b]* **.**

Equitable Defenses Not Relevant to Liability Do Not Preclude Class Certification. A California court of appeal has held that even though equitable defenses such as fraud and unclean hands may be relevant in fashioning each class member's individual remedy, those defenses do not preclude class certification if under applicable substantive law they are not relevant on the question of the defendant's liability [*Ticconi v. Blue Shield of Cal. Life & Health Ins. Co. (2008) 160 Cal. App. 4th 528*]. See *Ch. 120, Class Actions, §§ 120.12[2][b], 120.15[1]*.

Court May Allow Precertification Discovery to Find Suitable Class Representative. A California court of appeal has held that a trial court may authorize precertification discovery designed to ascertain a suitable class representative even if the original named plaintiffs lack standing to prosecute the action [*CashCall, Inc. v. Superior Court (2008) 159 Cal. App. 4th 273*]. See *Ch. 120, Class Actions, § 120.15[5]*.

Local Law May Disallow Use of Class Actions. In *Batt v. City & County of San Francisco (2007) 155 Cal. App. 4th 65* , the court has enforced a local ordinance disallowing the use of class actions to claim refunds of local taxes. See *Ch. 120, Class Actions, § 120.10[1]*.

Class Representative May Recover Attorney's Fees Under Private Attorney General Statute Even if Primarily Motivated by Own Financial Interests. A California Court of Appeal has held that a class representative may recover fees under the "private attorney general statute" [*Code Civ. Proc. § 1021.5*], even if he or she was primarily motivated by his or her own financial interests. Such personal motivation does not preclude a fee award so long as the class action affected the public interest and resulted in a significant benefit to a large class of persons. See *Estrada v. FedEx Ground Package System, Inc. (2007) 154 Cal. App. 4th 1* , now *covered in Ch. 120, Class Actions, § 120.24[3]*.

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§ 1.158A Constitutional Law

Amendment Versus Revision. The question of whether an initiative constitutes an amendment or a revision requires analysis of the statute on its face [*Rippon v. Bowen (2008) 160 Cal. App. 4th 1308, 1319, 73 Cal. Rptr. 3d 421*]. See *Ch. 126A, Constitutional Law, § 126A.13[3]*.

Separation of Powers. A court is without power to interfere with purely legislative action, and when the Legislature has committed to a municipal body the power to legislate on a given subject, the court has no power to command or prohibit the exercise of the legislative function [*County of Orange v. Barratt American, Inc. (2007) 150 Cal. App. 4th 420, 58 Cal. Rptr. 3d 542*]. Additionally, the principle of constitutional separation of power underlies the mental processes principle, which precludes any judicial inquiry into the subjective motives or mental processes of legislators [*Sutter's Place v. Superior Court (2008) 161 Cal. App. 4th 1370*]. See *Ch. 126A, Constitutional Law, § 126A.21[4][a]*.

Federal Preemption. Where the federal law does not expressly preempt or impliedly occupy the field, states may establish their own requirements, including a state-law cause of action, pertaining to the subject of the federal statute so long as the state requirements are identical to those contained in the federal statute [*Farm Raised Salmon Cases (2008) 42 Cal. 4th 1077, 1086, 1096, 72 Cal. Rptr. 3d 112, 175 P.3d 1170* (labeling of artificially colored food under Federal Food, Drug, and Cosmetic Act, *21 U.S.C. § 343(k)*)]. Additionally, while there is a strong presumption against federal preemption of state law governing historic police powers, the United States Supreme Court has held that the presumption does not apply when a state regulates in an area where there has been a history of significant federal presence [*Silvas v. E*Trade Mortg. Corp. (9th Cir. 2008) 514 F.3d 1001, 1004* (banking)]. See *Ch. 126A, Constitutional Law, §§ 126A.23[3][a], 126A.23[5]*.

Police Powers. Among other things, the police power empowers cities to control and organize development within their boundaries as a means of serving the general welfare [*Hernandez v. City of Hanford (2007) 41 Cal. 4th 279, 59 Cal. Rptr. 3d 442, 159 P.3d 33*]. Accordingly, a governmental entity may not contract away its right to exercise the police power in the future, and a contract that purports to do so is invalid as against public policy [*Cotta v. City and County of San Francisco (2007) 157 Cal. App. 4th 1550, 1558, 69 Cal. Rptr. 3d 612*]. See *Ch. 126A, Constitutional Law, § 126A.31[2], [4]*.

Regulatory Fees. Regulatory fees, unlike other types of user fees, often are not easily correlated to a specific, ascertainable cost. This may be due to the complexity of the regulatory scheme and the multifaceted responsibilities of the department or agency charged with implementing or enforcing the applicable regulations, the multifaceted responsibilities of each of the employees who are charged with implementing or enforcing the regulations, the intermingled functions of various departments as well as intermingled funding sources, and expansive accounting systems thast are not designed to track specific tasks. A municipality may, under its police powers, spend regulatory fee revenues for the purpose of legitimate regulation so long as those revenues do not exceed the reasonably necessary expense of the regulatory effort [*Collier v. City and County of San Francisco (2007) 151 Cal. App. 4th 1326, 1339, 60 Cal. Rptr. 3d 698*]. See *Ch. 126A, Constitutional Law, § 126A.31[6]*.

Privacy Rights of Public Employees. California's right to privacy does prevent the release of names and salaries of public employees earning $100,000 or more per year, including peace officers [*International Fed. of Prof. and Tech. Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal. 4th 319, 64 Cal. Rptr. 3d 693, 165 P.3d 488*]. See *Ch. 126A, Constitutional Law, § 126A.42[3][b]*.

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§ 1.159 Contracts and Commercial Law

Assignments--Standing of Assignee for Collection to Sue. State law has long recognized that a creditor's assignee for collection has standing to sue the debtor, even though the assignee's only interest in suing is to obtain funds that will be turned over to the creditor (less a fee for the assignee's services). Federal courts have not all been in accord with that view when an assignee for collection has tried to sue in a federal court. Now the U.S. Supreme Court has held, in a 5-to-4 decision, that an assignee of a legal claim for money owed has standing to pursue that claim in a federal court, even when the assignee has promised to remit the proceeds of the litigation to the assignor [*Sprint Communs. Co. v. APCC Servs. (2008) 171 L. Ed. 2d 424*]. See *Ch. 60, Assignments, § 60.19[4*].

Fraudulent Conveyances--Recovery From Investors in "Ponzi" Scheme. The Ninth Circuit has applied California's Uniform Fraudulent Transfer Act [*Civ. Code § 3439 et seq.*] to allow recovery from investors in a Ponzi scheme, describing theories of liability on which a receiver may proceed and describing a two-step process for determining the existence of liability and the amount of the recovery [*Donell v. Kowell (9th Cir. 2008) 533 F.3d 762*]. See *Ch. 270, Fraudulent Conveyances, § 270.48[1]*.

Breach of Contract Action--Attorney's Fees for Defendant After Successful Motion to Quash Service. The court of appeal in *Profit Concepts Management, Inc. v. Griffith (2008) 162 Cal. App. 4th 950* held that in an action for breach of contract, if the contract provides that in any litigation involving the contract, the prevailing party will be entitled to recover attorney's fees and costs, and if the trial court grants the defendant's motion to quash service of summons for lack of personal jurisdiction, then the defendant is the party prevailing on the contract under *Civ. Code § 1717* and therefore is entitled to recover reasonable attorney's fees as costs, because the complaint is necessarily dismissed in its entirety and thus the plaintiff obtains nothing. See *Ch. 140, Contracts, § 140.83[2]*.

Investigative Consumer Reporting Agencies Act--Report Containing Unlawful Detainer Information. In a case of first impression in California, a court of appeal has held that the Investigative Consumer Reporting Agencies Act [*Civ. Code § 1786 et seq.*] is unconstitutionally vague as applied to an investigative consumer report containing information about whether any unlawful detainer actions were filed against the subject of the report, because reasonable persons cannot readily determine whether the unlawful detainer information constitutes "character" information--in which case, the agency must comply with requirements prescribed in that Act--or constitutes "creditworthiness" information

governed by the Consumer Credit Reporting Agencies Act [§ 1785.1 et seq.], which imposes somewhat different requirements on the agency [Ortiz v. Lyon Management Group, Inc . *(2007) 157 Cal. App. 4th 604* (statutory scheme embodied in those two Acts "presents a false dichotomy between creditworthiness and character")]. See *Ch. 129, Consumer Credit Reporting, § 129.12*.

Contracts--Application of Government Claims Act. In *City of Stockton v. Superior Court (2007) 42 Cal. 4th 730* , the California Supreme Court has settled a difference of opinion between courts of appeal by holding that *Gov. Code § 810 et seq.*, commonly known as the Government Claims Act, applies to a claim for damages based on breach of a contract by the state or a local public entity. In addition, the court took the opportunity to state that henceforth *Gov. Code § 810 et seq.*, traditionally called the Tort Claims Act, should be referred to more appropriately as the Government Claims Act. See *Ch. 140, Contracts, § 140.55[5]*.

Suretyship/Usury--Guarantor's Contract Cannot Waive Usury Defense to Creditor's Claim Against Debtor-Principal. A court of appeal, resolving an issue not previously addressed by California appellate courts, has held that insofar as a guaranteed debt for interest is unenforceable on the ground of usury, the guarantor's contract cannot be construed or enforced so as to waive the guarantor's right to raise that defense, since a promise to pay usurious interest is illegal and therefore cannot be enforced on any theory [*WRI Opportunity Loans II, LLC v. Cooper (2007) 154 Cal. App. 4th 525*]. See *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.17[4]*; *Ch. 568, Usury, § 568.32[5]*.

Contracts--Procedural Unconscionability in Consumer Contract. A California appellate court has held that, except in unusual circumstances--such as when the consumer is highly sophisticated and the challenged provision does not undermine important public policies--the use of a contract of adhesion establishes a minimal degree of procedural unconscionability notwithstanding the availability of market alternatives [*Gatton v. T-Mobile USA, Inc. (2007) 152 Cal. App. 4th 571, 583-585*]. See *Ch. 140, Contracts, § 140.25[2][b]*.

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§ 1.159A Corporations

Derivative Actions. The California Supreme Court in *Grosset v. Wenaas (2008) 42 Cal. 4th 1100* has elected to follow the majority rule and, applying the basic principles that govern corporation law and shareholder litigation, and has held that *Corp. Code § 800(b)* is properly construed as containing a continuous ownership requirement in shareholder's derivative actions. That is, California law generally requires a plaintiff in a shareholder's derivative action to maintain continuous stock ownership throughout the pendency of the litigation. Consequently, when the shareholder relationship is terminated, whether voluntarily or involuntarily, the derivative-action plaintiff loses standing. For discussion, as well as new forms for notice of motion for dismissal of a derivative action, and judgment of dismissal, based on the plaintiff's loss of shareholder status, see *Ch. 168, Corporations: Derivative Actions, § 168.74, 168.75*.

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§ 1.160 Costs and Attorney's Fees

Code Civ. Proc. § 998 **Offer Demanding Release of "All Claims" Not Effective to Shift Costs.** In *Chen v. Interinsurance Exchange of the Automobile Club (2008) 164 Cal. App. 4th 117* , the Court of Appeal held that an insurer's demand for a release of "all claims" as part of its *Code Civ. Proc. § 998* offer was ambiguous and did not operate to shift post-offer costs under § 998, because the insureds had a claim against the insurer other than the claims being litigated in that litigation, and the offer did not make clear whether it applied to that claim as well. See Ch. 174, *Costs and Attorney's Fees* .

Code Civ. Proc. § 998 **Offer Shifts Cost if Plaintiff Receives Verdict Better Than Defendant's Offer Notwithstanding Later Settlement With Other Parties.** In *Guerrero v. Rodan Termite Control, Inc. (2008) 163 Cal. App. 4th 1435* , an action by a home buyer against several defendants based on defects discovered after the close of escrow, pretrial settlements with parties other than the pest control company, which offset the buyer's recovery at trial against the pest control company to zero, could not be taken into account to determine whether the buyer recovered more than the pest control company's *Code Civ. Proc. § 998* offer, which the buyer had rejected, in order to determine whether to award the buyer his post-offer costs against the pest control company. The buyer recovered more than the pest control company's § 998 offer at trial before the offset, and the settlements with the other parties had not yet been reached at the time of the pest control company's § 998 offer to the buyer, so that the buyer did not fail to obtain a judgment or award more favorable than he would have received, at the time the pest control company's offer was outstanding, if he had accepted the offer. See Ch. 174, *Costs and Attorney's Fees* .

Defendants Entitled to Attorney's Fees When Case Ended Against Them. In *Pueblo Radiology Medical Group, Inc. v. Gerlach (2008) 163 Cal. App. 4th 826, 77 Cal. Rptr. 3d 880* , an action under a contract, in which plaintiff sued individuals alleging they were alter egos of the corporate defendant, and the trial court found they were not and entered judgment accordingly, the court properly awarded attorney's fees under the contract to the individuals after the entry of judgment. The award was not premature because the trial court's determination they were not alter egos of the corporation effectively ended the case as to them. See Ch. 174, *Costs and Attorney's Fees* .

Granting of Motion to Quash Entitled Defendant to Attorney's Fees Under *Civ. Code § 1717*. In *Profit Concepts Management, Inc. v. Griffith (2008) 162 Cal. App. 4th 950, 76 Cal. Rptr. 3d 396* , the court of appeal held that the

granting of a motion to quash for lack of personal jurisdiction entitled a former employee sued by his employer to attorney's fees in an action on a contract under *Civ. Code § 1717* as the prevailing party. See Ch. 174, *Costs and Attorney's Fees* .

Under Private Attorney General Statute, Change Must Be Relief Sought. In *Marine Forests Society v. Cal. Coastal Commission (2008) 160 Cal. App. 4th 867, 74 Cal. Rptr. 3d 32* , the court found that for the catalyst theory to apply under *Code Civ. Proc. § 1021.5*, the lawsuit must have caused the defendant to change its behavior, resulting in a significant benefit to the general public. If another body changes defendant's behavior, the catalyst theory will not entitle the plaintiff to an attorney's fees award under *Code Civ. Proc. § 1021.5*. See Ch. 174, *Costs and Attorney's Fees* .

Successful Opposition to Petition to Compel Arbitration Entitled Party to Attorney's Fees Under *Civ. Code § 1717*. In *Otay River Constructors v. San Diego Expressway (2008) 158 Cal. App. 4th 796, 70 Cal. Rptr. 3d 434* , a party that obtained an order denying arbitration in a dispute between parties to several highway project contracts was the prevailing party for purposes of *Civ. Code § 1717*, even though the merits of the underlying contractual disputes were not resolved. The petition to compel arbitration under the agreement that coordinated the other agreements and provided for the recovery of attorney's fees was an action on that contract for purposes of § 1717, and the decision on the petition to compel arbitration was final and on the merits of the only contractual issue before the trial court. See Ch. 174, *Costs and Attorney's Fees* .

Private Attorney General Statute Does Not Allow for Expert Witness Fees. In *Olson v. Automobile Club of So. Cal. (2008) 42 Cal. 4th 1142* , the California Supreme Court held that under *Code Civ. Proc. § 1021.5*, a prevailing plaintiff who is awarded attorney's fees is not entitled to recover expert witness fees as well. See Ch. 174, *Costs and Attorney's Fees* .

Attorney's Fees Under § 1021.5 Awardable Based on Necessity and Burden of Litigation Against Real Party in Interest. In *Mejia v. City of Los Angeles (2007) 156 Cal. App. 4th 151* , the court of appeal held that a plaintiff's substantial personal interest as a homeowner and resident in opposing a proposed development based on inadequate environmental review did not preclude a finding that the financial burden of the litigation was out of proportion to her personal stake in the matter. Further, the developer who opposed, as the real party in interest, the homeowner's petition seeking invalidation of a mitigated negative declaration and the preparation of an environmental impact report under CEQA prior to the city's approval of the development was an opposing party under *Code Civ. Proc. § 1021.5*, and its purported absence of fault or misconduct did not relieve it of liability for attorney's fees. Finally, the court found that an award of attorney's fees under *Code Civ. Proc. § 1021.5* against a party that is without fault does not impermissibly infringe that party's *First Amendment* right to petition the government for a redress of grievances. See Ch. 174, *Costs and Attorney's Fees* .

No Private Attorney General Attorney's Fee Award Against Party Who Only Defended Private Interest. In *Adoption of Joshua S. (2008) 42 Cal. 4th 945* , the California Supreme Court held that the trial court erred in awarding attorney's fees against a mother who litigated the validity of second-parent adoption by her former partner and lost. Although there was no question the litigation yielded substantial and widespread public benefit, even if the trial court was within its discretion in holding that the costs of the litigation transcended the partner's personal interests, the mother was not the type of party on whom private attorney general fees were intended to be imposed. She only engaged in the litigation to adjudicate private rights from which important appellate precedent happened to emerge, but otherwise did nothing to compromise the rights of the public or a significant class of people, and she was a private litigant with no institutional interest in the litigation, and the judgment she sought would have settled only her private rights and those of her children and her partner. See Ch. 174, *Costs and Attorney's Fees* .

No Reduction in Fee Award for Pursuit of Related Unsuccessful Claims. In *Hogar Dulce Hogar v. Community Development Com. (2007) 157 Cal. App. 4th 1358, 69 Cal. Rptr. 3d 250* , in which plaintiff sued under the Community Redevelopment Law [*Health & Saf. Code § 33000 et seq.*], challenging the manner in which defendant calculated its

required payments to the Low and Moderate Income Housing Fund, given the long-term impact of defendant's amendment to a tax-sharing agreement with the county and the significant amount of reimbursement plaintiff obtained, the trial court did not abuse discretion in not reducing plaintiff's attorney's fee award under *Code Civ. Proc. § 1021.5* based on plaintiff's pursuit of unsuccessful claims as well as successful ones. The trial court could reasonably have found plaintiff had achieved excellent results, and, because all of plaintiff's claims were related to its contention that the housing fund had not been properly reimbursed, it had standing to assert those claims, and the statute of limitations had not expired, so that trial court was not required to segregate the claims between those upon which plaintiff was successful and those on which defendant prevailed. See Ch. 174, *Costs and Attorney's Fees* .

Unlawful Detainer for Breach of Lease Was Action on Contract. In *Mitchell Land & Improvement Co. v. Ristorante Ferrantelli, Inc. (2007) 158 Cal. App. 4th 479* , an attorney's fees award under *Civ. Code § 1717* after the landlord's voluntary dismissal of an unlawful detainer action against the lessee based on alleged violations of a lease provision requiring the premises only be used for lawful purposes was improper, because the unlawful detainer was an action based upon an alleged breach of contract so that *Civ. Code § 1717(b)(2)*, prohibiting attorney's fees awards after voluntarily dismissal of an action based on a contract, applied. See Ch. 174, *Costs and Attorney's Fees* .

Cross-Defendant Entitled to Costs After Dismissal of Cross-Complaint. In *City of Long Beach v. Stevedoring Services of America (2007) 157 Cal. App. 4th 672* , the court of appeal held that when a trial court dismissed a cross-complaint for equitable indemnity as moot, the cross-defendant was one in whose favor the cross-complaint was dismissed and therefore a prevailing party under *Code Civ. Proc. § 1032*, entitled to costs as a matter of right. See Ch. 174, *Costs and Attorney's Fees* .

Award of Attorney's Fees--Proper to Depart From Local Rule Guidelines on Award of Attorney's Fees--Attorney's Fees in Contract Cases. In *Cruz v. Ayromloo (2007) 155 Cal. App. 4th 1270* , landlord-tenant litigation involving a written lease with attorney's fees provision, the court held that the trial court did not abuse its discretion in awarding the tenants higher attorney's fees than allowed for in guidelines for contested contract cases under Los Angeles Superior Court Rule 3.2, because the rule allowed the trial court to exercise its discretion to depart from the rule to award higher fees. Further, broad language of the attorney's fee clause in the lease agreements covered all fees in any civil action stemming from the lease, not just security deposit recovery litigation, and allocation of fees incurred in representing multiple tenants, some of whom had a written lease with the attorney's fees provision and some of whom did not, was not necessary. See Ch. 174, *Costs and Attorney's Fees* .

Award of Attorney's Fees--No Fees for Prevailing Championing Contract Without Attorney's Fees Provision. In *Brittalia Ventures v. Stuke Nursery Co. (2007) 153 Cal. App. 4th 17* , the court held in consolidated breach of contract actions that the prevailing party could not obtain attorney's fees under *Civ. Code § 1717* because the contract it championed did not contain an attorney fee provision, notwithstanding that the losing party defended the matter by championing a different contract that did contain an attorney's fee provision. See Ch. 174, *Costs and Attorney's Fees* .

Award of Attorney's Fees--Third Party Beneficiary Entitled to Attorney's Fees. In *Loduca v. Polyzos (2007) 153 Cal. App. 4th 334* , the court held that a third party beneficiary who prevails in litigation under the contract may recover attorney's fees under *Civ. Code § 1717* if the contract contains an attorney's fees provision. Thus, a property owner who successfully sued a subcontractor as an express third party beneficiary to a contract between the subcontractor and the general contractor was entitled to an award of attorney's fees. See Ch. 174, *Costs and Attorney's Fees* .

Award of Attorney's Fees--Municipal Resolution Was Basis for Award of Attorney's Fees. In *Torres v. City of San Diego (2007) 154 Cal. App. 4th 214* , the court held that a municipal resolution could serve as the basis for an award of attorney's fees. See Ch. 174, *Costs and Attorney's Fees* .

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§ 1.161 Discovery

Electronic Discovery Legislation Vetoed. Citing time constraints resulting from the California budget stalemate, the Governor has vetoed AB926, which would have established new rules governing the discovery of electronically stored evidence (ESI) or "e-discovery." Passage of the measure, which was co-sponsored by the California Judicial Council and organizations representing both plaintiff and defense bar, had been widely predicted, and most observers had expected the legislation and the conforming rules of court to take effect January 1, 2009. As a result of the veto, California e-discovery issues will continue to be decided under existing law for the time being. Given the circumstances surrounding the veto, it is likely that the legislation will be re-introduced in 2009. See *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.24[4]*.

Review of Arbitrator's Discovery Order. In *Berglund v. Arthroscopic & Laser Surgery Ct. of San Diego (2008) 44 Cal. 4th 528* , the California Supreme Court held that an arbitrator's discovery order against a *nonparty* is subject to full judicial review. See *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.11[3][b]*.

Waiver of Attorney-Client Privilege. In *Regents of Univ. of Cal. v. Superior Court (2008) 165 Cal. App. 4th 672* , the court of appeal held that corporations' production of documents to the government did not waive the attorney-client privilege and work product protection when production was coerced by the threat of indictment if the corporations failed to cooperate. See *Ch. 191, Privileges and Other Discovery Limitations, § 191.15[6]*.

Mediation Confidentiality. In *Simmons v. Ghaderi (2008) 44 Cal. 4th 570* , the California Supreme Court held that a party cannot impliedly waive mediation confidentiality through litigation conduct, and that estoppel could not be applied to prevent defendant from tardily claiming mediation confidentiality, because estoppel is not an express statutory exception to mediation confidentiality. See *Ch. 191, Privileges and Other Discovery Limitations, § 191.125*.

E-Discovery. Ch. 190, *Discovery: Scope, and Timing*, has been updated to include coverage of the latest cases and statutes addressing electronic discovery. The chapter includes discussion of the new Federal Rules of Civil Procedure governing electronically stored evidence and the proposed California legislation and rules. Also included is discussion of the particular issues presented by e-discovery with respect to preservation and production or spoliation of evidence, privacy and privilege, and inadvertent disclosure. See *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.24*.

Deliberative Process Privilege. In *San Joaquin Cty. Local Agency Formation Comm'n v. Superior Court (2008) 162 Cal. App. 4th 159* , an action brought by real party in interest irrigation district to challenge a local agency formation commission's denial of the district's application to provide retail electric service, the deliberative process privilege protected from discovery the commissioners' reasoning process and the evidence they relied on in rejecting district's application. See *Ch. 191, Privileges and Other Discovery Limitations, § 191.153[4][i]*.

Mental Processes Privilege. In *Sutter's Place Inc. v. Superior Court (2008) 161 Cal. App. 4th 1370* , documents relating to legislators' mental processes or reasons for enacting ordinance that imposed limits on operation of card rooms were irrelevant, and even if relevant, were not discoverable under the "mental processes" privilege. See *Ch. 191, Privileges and Other Discovery Limitations, § 191.153[4][i]*.

Fees to Nonnoticing Party for Deposition Transcript. In *Serrano v. Stefan Merli Plastering Co. (2008) 162 Cal. App. 4th 1014* , the court of appeal ruled that the trial court in a pending action has the authority to require a deposition reporter to provide a copy of a transcript to a nonnoticing party for a reasonable fee; and in the event of a dispute, the trial court may determine the amount of the reasonable fee. See *Ch. 193, Discovery: Depositions, §§ 193.70, 193.76*.

SVPA Proceeding. In *People v. Dixon (2007) 148 Cal. App. 4th 414* , the court of appeal held that a civil commitment proceeding under the Sexually Violent Predators Act (SVPA) requires application of civil discovery rules [*People v. Dixon (2007) 148 Cal. App. 4th 414, 443, 56 Cal. Rptr. 3d 33*]. See *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.11[3][c]*.

Opt-in Notice. In *Puerto v. Superior Court (2008) 158 Cal. App. 4th 1242* , the opt-in notice, requiring class action petitioners to obtain non-party potential witnesses' affirmative consent to disclosure of their addresses and phone numbers, exceeded the protections necessary to safeguard the witnesses' privacy interests. See *Ch. 191, Privileges and Other Discovery Limitations, § 191.120[3]*.

Precertification Discovery of Identity of Class Members. In *Cashcall, Inc. v. Superior Court (2008) 159 Cal. App. 4th 273* , the court, addressing an issue of first impression, held that an original plaintiff who lacked standing in a *Code Civ. Proc. § 382* class action should be allowed to obtain precertification discovery of the identities of potential plaintiffs with standing, subject to a balancing test weighing the danger of potential abuses against the rights of the parties. See *Ch. 191, Privileges and Other Discovery Limitations, § 191.153[15]*.

Sealed Records. In *Mercury Interactive Corp. v. Klein (2007) 158 Cal. App. 4th 60* , the court held that the presumed right of pubic access discussed in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 Cal. 4th 1178* and *Cal. Rules of Ct., Rules 2.550-2.551* does not apply to discovery materials that are not used at trial or submitted as a basis for adjudication. See *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.37*.

Corporate Attorney-Client Privilege. In *Zurich Am. Ins. Co. v. Superior Court (2007) 155 Cal. App. 4th 1485* , the court held that the corporate attorney-client privilege could extend to confidential communications among the client's employees regarding legal advice and strategy, even though the corporation's attorneys are not directly involved and the communications did not include excerpts of direct communications from the attorneys, provided that the employees involved were third persons to whom disclosure was reasonably necessary to further the purpose of the legal consultation. See *Ch. 191, Discovery: Privileges and Other Discovery Limitations, § 191.40[3]*.

Terminating Sanctions. In *Stephen Slesinger, Inc. v. The Walt Disney Co. (2007) 155 Cal. App. 4th 736* , the court held that a trial court may, when faced with pervasive, deliberate, and egregious misconduct--abuse that makes lesser sanctions inadequate to ensure a fair trial--use its inherent judicial power to dismiss the action. See *Ch. 192, Discovery: Sanctions for Discovery Misuse, § 192.13[3][a][iii]*.

Filing Motion to Compel Production of Business Records. In *Unzipped Apparel, LLC v. Bader* (2007) 156 Cal. App. 4th, the court held that the 60-day period for filing a motion to compel under *Code Civ. Proc. § 2025.480(b)* applies to subpoenas for business records, as well as to subpoenas for oral or written depositions. See *Ch. 193, Discovery: Depositions, § 193.156[1][i]*.

New Judicial Council Form for Commission to Take Deposition Outside California. An illustration of the new Judicial Council Form DISC-030, Commission to Take Deposition Outside California, approved by the Judicial Council for optional use, is reproduced in Ch. 193, *Discovery: Depositions*, § 193.272.

Revised Judicial Council Forms. Ch. 194, *Discovery: Interrogatories*, § 194.83[1], includes revised Judicial Council Form DISC-001, Form Interrogatories--General. Ch. 196, *Discovery: Requests for Admissions*, § 196.61[1], includes revised Judicial Council Form DISC-020, Requests for Admissions. Ch. 535, *Discovery: Subpoena*, § 535.69[1], includes revised Judicial Council Form SUBP-025 Notice to Consumer or Employee and Objection.

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§ 1.161A Elections

Referendum Petition--Disqualification of Assisted Signatures. In a case of first impression, a court of appeal has held that when a voter signs a referendum petition with assistance as permitted by *Elec. Code § 100.5*, which requires the assisting person also to sign, the signature of the assisting person must be near the voter's mark or signature. Noncompliance with the requirements cannot be cured by construing *Elec. Code § 100.5* in such a way that the voter's assisted signature could be deemed validated by the required declaration of the petition circulator [*see Elec. Code § 104*] on each sheet of signatures [*Friends of Bay Meadows v. City of San Mateo (2007) 157 Cal. App. 4th 1175*]. See *Ch. 302, Initiative, Referendum, and Recall, § 302.45[4][c]*.

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§ 1.161B Eminent Domain

Residential Property. In June 2008, *Cal. Const., art. I, § 19* was amended through the initiative process [Proposition 99 (eff. June 4, 2008)] to expressly prohibit governmental agencies from using eminent domain to take an owner-occupied home to transfer it to another private owner or developer. See *Ch. 247, Eminent Domain, § 247.12*.

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§ 1.162 Employment

Limited Whistleblower Protection for University of California Employees. Construing *Gov. Code § 8547.10(c)*, the California Supreme Court in *Miklosy v. Regents of Univ. of Cal. (2008) 44 Cal. 4th 876* has held that a University of California employee who claims to be the victim of retaliation for whistleblowing activity may bring an action for damages only if the university's administrative remedy fails to result in a timely decision; if the university reaches a timely decision--even one in its own favor--the employee has no cause of action for damages. See *Ch. 118, Civil Service, §§ 118.58, 118.147[2]*, and *Ch. 249, Employment Law: Termination and Discipline, §§ 249.12[1], 249.16[1], 249.22[5], 249.50[3]*.

Employee Noncompetition Agreements Generally Unenforceable. *The California Supreme Court in Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937* has held that an employee's noncompetition agreement is invalid under *Bus. & Prof. Code § 16600*, even if narrowly drawn, unless it falls within one of the statutory exceptions provided by *Bus. & Prof. Code §§ 16601, 16602*, and *16602.5*. See *Ch. 249, Employment Law: Termination and Discipline, §§ 249.12[1], 249.33*, and *Ch. 250, Employment Law: Wage and Hour Disputes, § 250.21[1]*.

Public Entity Can Be Liable Under *Gov. Code § 815.4* for Injury to Employee of Independent Contractor. In *McCarty v. Department of Transportation (2008) 164 Cal. App. 4th 955* , the court of appeal held that *Gov. Code § 815.4* can provide a statutory basis for imposing liability on a public entity hirer of an independent contractor based on retention of control over safety at the worksite when negligent exercise of that retained control affirmatively contributes to an injury to an employee of the independent contractor. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.22[2][b][iv]*.

42 U.S.C. § Prohibits Retaliation on Basis of Race. The United States Supreme Court has held that *42 U.S.C. § 1981* prohibits retaliation on the basis of race, including retaliation against a person for complaining about the violation of another person's rights under § 1981 [*CBOCS W., Inc. v. Humphries (2008) 170 L. Ed. 2d 864*]. See *Ch. 115, Civil Rights: Employment Discrimination, §§ 115.21[4], 115.22[2], 115.37[1][a]*, and *Ch. 531, Statutes and Ordinances, § 531.62*.

Employee Suing Under FEHA Need Not Exhaust Certain Administrative Remedies. California courts of appeal

have held that an employee suing under the Fair Employment and Housing Act need not exhaust the employer's internal remediation procedures if the procedures do not include a quasi-judicial hearing with sufficient due process to generate a legally binding result or if the internal procedures are provided by a collective bargaining agreement rather than a statute [*Ahmadi-Kashani v. Regents of Univ. of Cal. (2008) 159 Cal. App. 4th 449* ; *Ortega v. Contra Costa Cmty. Coll. Dist. (2007) 156 Cal. App. 4th 1073*]. See *Ch. 115, Civil Rights: Employment Discrimination, § 115.51[1][a], [g]*.

Individual Employee Is Not Liable Under FEHA for Retaliation Against Fellow Employee. The California Supreme Court has held in *Jones v. Lodge at Torrey Pines P'ship (2008) 42 Cal. 4th 1158* that a nonemployer individual is not personally liable for his or her participation in retaliation prohibited by the Fair Employment and Housing Act. See *Ch. 115, Civil Rights: Employment Discrimination, § 115.20[4][a], [b], [1][a]*; *Ch. 249, Employment Law: Termination and Discipline, § 249.12[3][f]*.

California Family Rights Act Dispute Resolution Procedure Is Not Mandatory. The California Supreme Court, in *Lonicki v. Sutter Health Cent. (2008) 43 Cal. 4th 201* , has held that the statutory procedure under California's Moore-Brown-Roberti Family Rights Act to determine whether an employee has a serious health condition entitling him or her to a medical leave of absence [*see Gov. Code § 12945.2(k)(3)*] is not mandatory, and an employer's failure to use that procedure does not bar the employer from contending in subsequent litigation that the employee did not have a serious health condition that made him or her unable to perform the job. See *Ch. 115, Civil Rights: Employment Discrimination, § 115.32[6][b]*.

Notice of Disciplinary Action Against Peace Officer Need Not Identify Specific Punishment. The California Supreme Court, in *Mays v. City of Los Angeles (2008) 43 Cal. 4th 313* , has held that to satisfy the one-year limitation period for imposing discipline on a peace officer under the Public Safety Officers Procedural *Bill of Rights* Act [*see Gov. Code § 3304(d)*], an employer's notice of disciplinary action need not identify the specific proposed punishment. Rather, the notice is sufficient if it states that the employing agency, having completed its investigation into the alleged misconduct within the statutory period, has decided that it may take disciplinary action against the officer for specified misconduct. See *Ch. 118, Civil Service, § 118.72*.

Employer Not Required to Accommodate Employee's Medical Use of Marijuana. The California Supreme Court has held in *Ross v. RagingWire Telecommunications, Inc. (2008) 42 Cal. 4th 920* that the Compassionate Use Act of 1996 (Proposition 215) does not require an employer to accommodate an employee's medical use of marijuana by waiving the employer's policy requiring negative drug tests for employees. See *Ch. 115, Civil Rights: Employment Discrimination, § 115.35[1][a]*, and *Ch. 249, Employment Law: Termination and Discipline, § 249.12[3][b][i]*.

National Bank's Power to Terminate Employees "At Pleasure" Applies Only to Bona Fide Officers. In *Ramanathan v. Bank of America (2007) 155 Cal. App. 4th 1017* , the court has held that the federal statute provision authorizing a national bank to discharge its officers "at pleasure" [*12 U.S.C. § 24* P 5] applies only if the terminated employee meets all of the elements of the definition of "officer" articulated by the California Supreme Court in *Wells Fargo Bank v. Superior Court (1991) 53 Cal. 3d 1082* . See *Ch. 115, Civil Rights: Employment Discrimination, § 115.20[2][f]*, and *Ch. 249, Employment Law: Termination and Discipline, §§ 249.21[6], 249.69[2]*.

Firefighters Procedural *Bill of Rights* Act. To provide firefighters with procedural protections similar to those afforded public safety officers, the Legislature has enacted the Firefighters Procedural *Bill of Rights* Act. See *Gov. Code § 3250 et seq.*, now *covered in Ch. 118, Civil Service, §§ 118.90 -118.94*.

Employer May Reimburse Employees for Business Expenses by Paying Enhanced Compensation. The California Supreme Court has held that an employer may satisfy its statutory obligation to reimburse employees for business expenses by paying employees enhanced compensation in the form of increases in base salary or commissions, provided that (1) the amount paid is sufficient to provide full reimbursement for actual expenses necessarily incurred, and (2) the

employer provides a method or formula to identify what part of the combined compensation is intended to provide expense reimbursement. See *Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal. 4th 554* , now *covered in Ch. 250, Employment Law: Wage and Hour Disputes, § 250.21*.

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§ 1.162A Equity

Equitable and Promissory Estoppel. This chapter is updated with a new analysis of equitable and promissory estoppel, including the elements for each claim and the effect of estoppel on government entities. See *Ch. 251, Equity, § 251.94*.

Terminating Sanction as Equitable Defense. This chapter is updated with a new analysis of a terminating sanction as an equitable defense. The decision whether to exercise the inherent power to dismiss as an equitable defense to plaintiff's misconduct requires consideration of all relevant circumstances, including the nature of the misconduct, the strong preference for adjudicating claims on the merits, the integrity of the court as an institution of justice, the effect of the misconduct on a fair resolution of the case, and the availability of other sanctions to cure the harm [*Stephen Slesinger, Inc. v. The Walt Disney Co. (2007) 155 Cal. App. 4th 736, 66 Cal. Rptr. 3d 268*]. See *Ch. 251, Equity, § 251.153*.

No Jury Trial for Legal Defense to Equitable Action. Given that the right to trial pertains to an action at law, there is no right to trial by jury on an affirmative defense at law to an equitable action that can be tried separately and first, because the defense does not constitute an action [*DiPirro v. Bondo Corporation (2007) 153 Cal. App. 4th 150, 186, 62 Cal. Rptr. 3d 722* (affirmative defense of warning exemption under *Health & Saf. Code § 25249.10(c)* not subject to jury trial of right)]. See *Ch. 251, Equity, § 251.222[4]*.

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§ 1.162B Family Law

2008 Legislation and Judicial Council Forms. Family law chapters are updated throughout the publication with legislation effective January 1, 2008, and the latest revised and new California Judicial Council forms. For new Judicial Council forms on declarations and orders for appointing counsel for a child, see Ch. 223, *Dissolution of Marriage: Child Custody* . For revised Judicial Council forms on minutes and order of judgment in government child support actions, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* . For revised Judicial Council forms on a request for hearing regarding registration of support orders, see Ch. 260, *Family Law Enforcement: Foreign Judgments* .

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§ 1.162C Federal Courts

Diversity Jurisdiction. The amount-in-controversy requirement for diversity jurisdiction excludes only "interest and costs" and therefore includes attorneys' fees as well as any other sums that would be paid to a party as a result of judgment [*Guglielmino v. McKee Foods Corp. (9th Cir. 2007) 506 F.3d 696, 700-701*]. See *Ch. 265, Federal Courts, § 265.15[1]*.

Prudential Standing Doctrine. When a plaintiff states an overbreadth claim under the *First Amendment*, the court suspends the prudential standing doctrine because of the special nature of the risk to expressive rights. While the prudential standing doctrine typically prevents the court from hearing lawsuits on the basis of injuries to non-parties, the overbreadth doctrine operates as a narrow exception permitting the lawsuit to proceed on the basis of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression [*Get Outdoors II, LLC v. City of San Diego (9th Cir. 2007) 506 F.3d 886, 891*]. See *Ch. 265, Federal Courts, § 265.16[2*].

Removal. Where a plaintiff moves to remand and it is unclear or ambiguous from the face of a state-court complaint whether the requisite amount in controversy is pled, the removing defendant bears the burden of establishing, by a preponderance of the evidence, that the amount in controversy exceeds the jurisdictional amount. Under this burden, the defendant must provide evidence establishing that it is more likely than not that the amount in controversy exceeds that amount [*Guglielmino v. McKee Foods Corp. (9th Cir. 2007) 506 F.3d 696, 701*]. See *Ch. 265, Federal Courts, § 265.40[2]*.

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§ 1.163 Guardianships and Conservatorships

Conservators, Guardians, and Trustees--Important New Licensing Requirements for Professional Fiduciaries. This release incorporates detailed discussion of the new Professional Fiduciaries Act [*Bus. & Prof. Code § 6500 et seq.*], which imposes new licensing requirements on all persons coming within the statutory definition of professional fiduciaries [*see Bus. & Prof. Code § 6501(f)*]. As of July 1, 2008, courts cannot appoint a professional fiduciary in a guardianship or conservatorship matter unless the fiduciary is licensed under the Act, and all professional fiduciaries must be licensed under the Act by January 1, 2009, in order to act in that capacity [*Bus. & Prof. Code § 6530(a), Prob. Code §§ 60.1, 2340*]. For detailed discussion of the Act, see *Ch. 281, Guardianship and Conservatorship: Appointment of Conservators, § 281.66*, and *Ch. 560, Trusts, § 560.74*. Conforming references have been made throughout the guardianship, conservatorship, and trust materials. In addition, an allegation for removal of a guardian or conservator for failure to comply with the Act's registration requirements has been added. See *Ch. 290G, Guardianship and Conservatorship: Removal or Resignation of Guardians and Conservators, § 290G.37A.*

Certification to Qualify as Appointed Counsel. Every attorney appointed or eligible for appointment by a court under *Prob. Code §§ 1470* and *1471* now must certify that he or she is qualified before becoming eligible for an appointment; and, beginning January 1, 2009, each appointed counsel must certify to the court before the end of March of each year that he or she has completed the continuing education required for the preceding calendar year [*see Cal. Rules of Ct., Rule 7.1101*]. The Judicial Council has issued a new mandatory form for this certification, Form GC-010, which is now illustrated in Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians*, § 280.118. For discussion of the new form, *Prob. Code §§ 1470* and *1471*, and the relevant Rules of Court, see *Ch. 280, Guardianship and Conservatorship: Appointment of Guardians, § 280.118*, and *Ch. 281, Guardianships and Conservatorships: Appointment of Conservators, § 281.32[5]*.

Conservatorships and Guardianships--New and Revised Judicial Council Forms; Revised Accounting Requirements. *Prob. Code § 2620(a)* requires that as of January 1, 2008, all accounts must be submitted on Judicial Council forms [*Prob. Code § 2620(a)*; *see Prob. Code §§ 1060-1064*]. The California Judicial Council, implementing *Prob. Code § 2620(a)* has promulgated a series of mandatory and optional forms for accounts. If specified criteria are met, an option now exists to file a simplified account instead of a standard account [*see Cal. Rules of Court, Rule 7.575*]. All accounts must use the new standard Judicial Council Summary of Account form [Cal. Judicial Council Form

GC-400(SUM)/GC-405(SUM); *see Ch. 290E, Guardianship and Conservatorship: Accounts, § 290E.71A*], and simplified accounts also must use the Judicial Council schedules for receipts and disbursements [Cal. Judicial Council Forms GC-405(A) and GC-405(C), *see Ch. 290E, Guardianship and Conservatorship: Accounts, § 290E.71B*]. For standard accounts, the Judicial Council has promulgated an extensive series of optional forms for the schedules that must be used to report types of charges and credits [*see Ch. 290E, Guardianship and Conservatorship: Accounts, § 290E.71C*]. For more detailed discussion of the use of the summary and schedules, see discussion in *Ch. 290E, Guardianship and Conservatorship: Accounts, §§ 290E.31*, *20.32*. New Judicial Council form GC-42, Notice of Filing of Inventory and Appraisal and How to Object to the Inventory or the Appraised Value of Property, has been added to Ch. 286, *Guardianship and Conservatorship: Inventory and Appraisal*, § 286.45A. Other revised Judicial Council forms have also been incorporated into Ch. 280 through Ch. 285 in the guardianship and conservatorship materials in this publication.

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1-1 California Forms of Pleading and Practice--Annotated § 1.164

§ 1.164 Homesteads

Homestead Exemption When Separated or Former Spouse Resides in Homestead. Effective January 1, 2008, the Legislature has amended *Code Civ. Proc. § 704.720* to provide that if a judgment debtor is not currently residing in the homestead, but his or her separated or former spouse continues to reside in or exercise control over possession of the homestead, the judgment debtor continues to be entitled to an exemption until entry of judgment or other legally enforceable agreement dividing the community property between the judgment debtor and the separated or former spouse, or until a later time period as specified by court order. However, the judgment debtor is not entitled to more than one exempt homestead. See Ch. 294, *Homesteads* .

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§ 1.164A Injunctions

Standard of Reviewing Injunction. In *Evans v. Evans (2008) 162 Cal. App. 4th 1157, 1166, 76 Cal. Rptr. 3d 859* , the court of appeal held that to the extent review of an injunction depends on its constitutionality, the court of appeals independently reviews whether the trial court correctly interpreted and applied the applicable constitutional principles; facts relevant to the constitutional analysis are reviewed de novo, independent of the trial court's findings. See *Ch. 303, Injunctions, § 303.86[2]*.

Severity of Harm. The likelihood of a plaintiff's ultimate success on the merits affects the showing necessary to a balancing-of-hardships analysis. That is, the more likely it is that the plaintiff will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue. It is the mix of these factors that guides the trial court in its exercise of discretion [*Right Site Coalition v. Los Angeles Unified School Dist. (2008) 160 Cal. App. 4th 336, 72 Cal. Rptr. 3d 678*]. See *Ch. 303, Injunctions, § 303.104[15][f]*.

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§ 1.165 Insurance

Indemnitor's Duty to Defend Indemnitee Not Contingent on Whether Indemnity Is Owed. In *Crawford v. Weather Shield Mfg. Inc. (2008) 44 Cal. 4th 541* , the California Supreme Court held that unless an indemnity agreement provides otherwise, *Civ. Code § 2778(4)* effectively places in every indemnity contract a duty on the part of the indemnitor to assume the indemnitee's defense, if tendered, against all claims embraced by the indemnity agreement, and this duty arises immediately upon a proper tender of defense by the indemnitee and does not first require a determination of whether indemnity is actually owed. See *Ch. 300, Indemnity and Contribution, § 300.36*.

Judgment Based on Appraisal in Insurance Case Must Conform to Appraisal Award. The court of appeal in *Devonwood Condominium Owners Assn. v. Farmers Ins. Exchange (2008) 162 Cal. App. 4th 1498* , held that a judgment that is not in conformity with the appraisal award made pursuant to *Ins. Code § 2071*, on which it is based, violates *Code Civ. Proc. § 1287.4*. See *Ch. 308, Insurance, § 308.151[2]*.

Arbitrability of Uninsured Motorist Claim. In *Bouton v. USAA Casualty Ins. Co. (2008), 43 Cal. 4th 1190* , the California Supreme Court held that *Ins. Code § 11580.2(f)* requires arbitration of whether a default judgment obtained against the underinsured tortfeasor by the insured is binding on the insurer; but does not require arbitration of whether a claimant is an insured under a particular policy. See *Ch. 88A, Automobiles: Uninsured Motorist Claims, § 88A.19[3][c], [e]*.

Settlement Credit Applied After Offset for Damage Awards to Both Plaintiff and Nonsettling Defendant. In *Brawley v. J.C. Interiors, Inc. (2008) 161 Cal. App. 4th 1126* , the court of appeal held that, after a plaintiff's settlement with some defendants, when a nonsettling defendant countersued the plaintiff and both parties were found liable and awarded damages to each other for breach of contract, the proper procedure is for the court to offset the jury's damage awards against each other, just as if there had been no settlement, and then to apply the settlement credit toward any amount that the nonsettling defendant might still owe. See *Ch. 300, Indemnity and Contribution, § 300.73[3][a]*.

Statute of Limitations in Criminal Defense Attorney Malpractice Action Runs Despite Lack of Postconviction Relief; Proposition 51 Applicable to Legal Malpractice Action Seeking Primarily Noneconomic Damages. In *Ovando v. County of Los Angeles (2008) 159 Cal. App. 4th 42* , the court of appeal in an attorney malpractice action

brought against a criminal defense attorney held that the lack of postconviction relief for the criminal defendant does not stay the running of the statute of limitations. In addition, the court held that Proposition 51, as codified in *Civ. Code § 1431.2*, can be applied to an action that seeks primarily noneconomic damages, such as damages for emotional distress caused when a criminal defense attorney's malpractice resulted in his client's criminal conviction. See *Ch. 76, Attorney Professional Liability, §§ 76.10[2], 76.70, 76.92[1]*; *Ch. 300, Indemnity and Contribution, § 300.63[3][d]*.

Liability for Noneconomic Damages May Be Reduced by Fault of Subsequent Negligent Health Care Provider. In *Henry v. Superior Court (2008) 160 Cal. App. 4th 440* , the court of appeal held that a defendant being sued for a personal injury under a theory of premises liability must be allowed to introduce evidence of subsequent negligence by a treating doctor that allegedly exacerbated the injury, in order to limit the defendant's liability for noneconomic damages to that percentage caused by the fault of the premises owner. See *Ch. 300, Indemnity and Contribution, § 300.63[3][d]*.

Insurer's Denial of Underinsured Motorist Benefits Based Upon Insufficient Investigation of Insured's Alleged Injuries Raises Triable Issue of Fact With Regard to Bad Faith Claim. In *Wilson v. 21st Century Ins. Co. (2007) 42 Cal. 4th 713, 2007 Cal. LEXIS 13314* , a first-party insurance bad faith case, the California Supreme Court reversed summary judgment in favor of an insurer that failed to pay underinsured motorist benefits to its insured, because it failed to investigate properly the insured's claim of injuries resulting from an automobile accident, and it asserted without supporting evidence that the insured's condition consisted of "soft tissue" injuries related to a preexisting condition. See *Ch. 88A, Automobiles: Uninsured Motorist Claims, § 88A.25[1]*; *Ch. 308, Insurance, § 308.24[1]*.

Bad Faith *Brandt* Fees Are Recoverable on Appeal. In *Baron v. Fire Ins. Exchange (2007) 154 Cal. App. 4th 1184* , the Court of Appeal held that *Brandt* attorneys' fees incurred in responding to an appeal brought by the insurer in a bad faith action are recoverable, just as attorneys' fees the insurer incurs in bringing the action at the trial court level are recoverable. See *Ch. 308, Insurance, § 308.24[6]*.

First Degree Murder Conviction Meets Burden of Proof Under *Prob. Code § 254(b)*. In *Principal Life Ins. Co. v. Peterson (2007) 156 Cal. App. 4th 676* , an appellate court held that the burden of proof under *Prob. Code § 254(b)* that a life insurance beneficiary feloniously and intentionally killed the decedent is met by evidence of a criminal conviction for the decedent's first-degree murder although the conviction is on appeal, when there is no rebuttal evidence that the beneficiary did not commit that act. See *Ch. 308, Insurance, § 308.45*.

Damage Allocation When Determining Good Faith of Settlement May Be Altered Upon Proof at Trial. In *El Escorial Owners' Assn. v. DLC Plastering, Inc. (2007) 154 Cal. App. 4th 1337* , the court of appeal held that in a complex multiparty case, a trial court may make an initial allocation between types of damages when making the determination that a pre-trial settlement is made in good faith, although if the evidence produced at trial against non-settling defendants shows that the defendants should not be held liable for one claimed category of damage, settlement amounts initially allocated to compensate for that type of damage may be allocated by the trial court to other categories of damage. See *Ch. 300, Indemnity and Contribution, § 300.73[3][c]*.

Damages Offset for Settlement Requires Actual Payment to Plaintiff of Settlement Amounts. In *Garcia v. Duro Dyne Corp. (2007) 156 Cal. App. 4th 92* , the court of appeal held that when calculating the amount of a damages offset at trial when some defendants have entered into pre-trial settlements, an offset credit may be applied only for settlement money actually paid to plaintiff by settling defendants and should not be applied for settlement amounts plaintiff has not yet received and may never receive. However, under those circumstances, the trial court should reserve jurisdiction to calculate and award offsets in the event that plaintiff is paid additional settlement amounts in the future. The court of appeal also held that an offset credit may be applied for waiver of litigation costs by settling defendants even if it is undisputed that those settling defendants would have prevailed had they proceeded to trial. See *Ch. 300, Indemnity and Contribution, § 300.73[3][a], [b]*.

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§ 1.165A Intellectual Property

Trademarks--Action Under *15 U.S.C. § 1125(a)(1)* *Based on Unfair Competition.* *The Ninth Circuit, in Fisher Tool Co. v. Gillet Outillage (9th Cir. 2008) 530 F.3d 1063* has adopted the Federal Circuit's position in holding that in a complaint under *15 U.S.C. § 1125(a)(1)* based on the defendant's representation that someone (such as the plaintiff) infringed the defendant's patent, the plaintiff must show, in addition to the circumstances contemplated by the statute, that the defendant's representation was made in bad faith. See *Ch. 549, Trademarks and Trade Names, § 549.26[1][a]*.

Copyright Infringement--Displaying Images on Websites. The Ninth Circuit, for the first time, has addressed the question of when a computer "displays" a copyrighted work, specifically a photograph, for purposes of *17 U.S.C. § 106*, which provides that a copyright owner has the exclusive right "to display the copyrighted work publicly." The court accepted the validity of a so-called server test, which the trial court devised, to determine whose computer "displays" a photograph (thus to identify who, if anyone, is chargeable with infringement) when a person using Internet browser software on the person's own computer makes the photograph viewable on that computer by means of a connection, over the Internet, to another computer [*Perfect 10, Inc. v. Amazon.com, Inc. (9th Cir. 2007) 508 F.3d 1146]* . See *Ch. 349, Literary Property and Copyright, § 349.27[4][d]*.

Trademarks--Enactment of Model State Trademark Law. The Legislature repealed the California Trademark Law [former *Bus. & Prof. Code §§ 14200-14342*] in 2007 and enacted in its place the Model State Trademark Law, which is based on a model act proposed by the International Trademark Association. This enactment brings California law into alignment with the laws of 30 other states that have enacted a version of that model act. The new law preserves unique features of California's trademark law while providing a system of state trademark registration and protection that is substantially consistent with the federal system of trademark registration and protection. See Ch. 549, *Trademarks and Trade Names* , which has been extensively revised to incorporate the provisions of the new law.

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§ 1.166 Judgments

Insufficient Contacts Not Defense on Renewal of Judgment. In *Goldman v. Simpson (2008) 160 Cal. App. 4th 255, 72 Cal. Rptr. 3d 729* , the court of appeal held that the defense of insufficient contacts with California to confer personal jurisdiction at the time of renewal of a judgment is unavailable under the statutory renewal of judgment procedure as long as there was personal jurisdiction at the time of the judgment. The court has continuing jurisdiction, derived from its jurisdiction at the time of the original judgment, to enter the renewal. See Ch. 318, *Judgments* .

No Mandatory Relief for Attorney's Failure to File Opposition to Motion to Enforce Settlement and Own Motion to Enforce. In *Hossain v. Hossain (2007) 157 Cal. App. 4th 454* , a dispute over the termination of a partnership for the operation of a hotel, the trial court properly denied plaintiff relief under *Code Civ. Proc. § 473(b)* based on his attorney's failure to file timely opposition to the defendant's motion to enforce a settlement agreement, and the plaintiff's tardiness in filing his own motion to enforce, which the trial court declined to consider. The attorney fault provision in *Code Civ. Proc. § 473(b)* did not apply to the attorney's failure to timely file opposition and a cross-motion to motion to enforce the settlement. See Ch. 489, *Relief From Judgments and Orders* .

Uniform Foreign Money Judgments Recognition Act Replaced. Effective January 1, 2008, and applicable to all actions filed on or after January 1, 2008, in which the issue of recognition of a foreign country judgment is raised, the Uniform Foreign Money Judgments Recognition Act has been replaced by the Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*]. The Uniform Foreign Money-Judgments Recognition Act continues to apply to actions filed before January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised. See *Ch. 318, Judgments, § 318.184*.

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§ 1.166A Juvenile Law

Referee Findings. Some decisions have suggested the referee's findings and orders become null and void on the granting of a rehearing, but the better rule is that they are entitled to full force and effect until the matter is actually reheard [*Ricardo V. v. Superior Court (2007) 147 Cal. App. 4th 419, 54 Cal. Rptr. 3d 223*]. See Ch. 327, *Juvenile Courts: Jurisdiction and General Procdures* .

Records and Copies of Court Juvenile Files. Prior to January 1, 2008, the language of the statute authorizing juvenile case files to be "inspected" by certain persons did not include that such documents could be "copied" [*In re Gina S. (2005) 133 Cal. App. 4th 1074, 1082-1084, 35 Cal. Rptr. 3d 277 , citing* Opinion No. 02-103, *85 Ops. Cal. Atty. Gen. 194 (Sept. 10, 2002)*]. Effective January 1, 2008, however, some of the persons entitled to inspect juvenile case files under *Welf. & Inst. Code § 827(a)(1)* may also receive copies of the documents [*Welf. & Inst. Code § 827(a)(5)*]. Also effective January 1, 2008, it is clear that when considering a request for records concerning a deceased child, "no weighing or balancing of the interests of those other than a child is permitted" [*Welf. & Inst. Code § 827(a)(2)(C)*]. See Ch. 327, *Juvenile Courts: Jurisdiction and General Procdures* .

Guardian Ad Litem for Minor Parent. This chapter is updated with a review of case authority on the issue of whether the juvenile dependency court must automatically appoint a guardian ad litem for a parent who is a minor, with recommendations for more effective procedures. See Ch. 328, *Juvenile Courts: Dependency Proceedings* .

Relative Guardianship Versus Adoption. Effective January 1, 2008, a relative caregiver's preference for legal guardianship over adoption shall not constitute the sole basis for recommending removal of the child from the relative caregiver for purposes of adoptive placement, if the preference is due to circumstances that do not include an unwillingness to accept legal or financial responsibility for the child [*Welf. & Inst. Code § 361.5(g)(2)(A)*]. Moreover, a relative caregiver is to be given information regarding the alternative permanency options of guardianship and adoption, including the long-term benefits and consequences of each option, prior to establishing legal guardianship or pursuing adoption [*Welf. & Inst. Code § 361.5(g)(2)(B)*]. See Ch. 328, *Juvenile Courts: Dependency Proceedings* .

Revised Writ Analysis. This chapter is updated with a revised analysis of writ practice for dependency actions, including writs in general, writs of supersedeas, writs of mandamus, writs of prohibition, and writs of habeas corpus.

See Ch. 328, *Juvenile Courts: Dependency Proceedings* .

Court Security for Delinquency Proceedings. This chapter is updated with a new analysis on court security and that unwarranted shackling of juveniles at jurisdictional hearings apply the same standard used for adult defendants in preliminary hearings, specifically that some showing of necessity is required and the finding stated on the record [*In re DeShaun M. (2007) 148 Cal. App. 4th 1384, 1387, 56 Cal. Rptr. 3d 627*]. See Ch. 329, *Juvenile Courts: Delinquency Proceedings* .

Continuing Conduct and Conspiracies Committed Before and After the Age of 18. A hearing pursuant to *Welf. & Inst. Code § 604(a)* is not required when criminal conduct is committed before an individual reaches the age of 18 and continues after they become an adult. When a jury can find that a defendant continues to participate in a criminal conspiracy or criminal conduct after his or her 18th birthday, the trial court may deny a motion to suspend the proceedings and conduct an examination for the purpose of certification to Juvenile Court [*People v. Quiroz (2007) 155 Cal. App. 4th 1420, 1427-1431, 66 Cal. Rptr. 3d 767*]. See Ch. 329, *Juvenile Courts: Delinquency Proceedings* .

Mental Incompetence v. Developmental Incompetence. Under *Penal Code § 1367*, an adult's incompetence to stand trial arises from a mental disorder or developmental disability that limits his or her ability to understand the nature of the proceedings and to assist counsel [*Penal Code § 1367(a)*]. Recent case law suggests that this is not the sole standard to be applied in delinquency cases and, in fact, prior case law requires that the court make an inquiry to determine developmental disability, including a minor's age, to assess cognitive, psychological, social, and moral development [Timothy J. v. *Superior Court and Dante H. v. Superior Court (2007) 150 Cal. App. 4th 847, 58 Cal. Rptr. 3d 746*]. See Ch. 329, *Juvenile Courts: Delinquency Proceedings* .

Education and Mental Health. This chapter is updated with a new section on education and mental health and the interpretation of the federal Individuals with Disabilities Education Act and the comparable state statutes. See Ch. 329, *Juvenile Courts: Delinquency Proceedings* .

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§ 1.166B Liens

Liens--Table of Liens. This chapter's Table of Liens is updated with a new format for easier access and cross referencing. This table is an extensive list of California statutes relating to the creation of liens, including both liens discussed in this chapter and those covered in other chapters of the publication. Convenient cross references to the other chapters are included in the table. See *Ch. 342, Liens and Wage Preferences, § 342.250* et seq.

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§ 1.167 Mandate and Prohibition

Writ of Mandate Appropriate in Dispute Regarding Discovery Privilege. In *Ombudsman Services of Northern California v. Superior Court (2007) 154 Cal. App. 4th 1233, 1241, 65 Cal. Rptr. 3d 456* , the court of appeal held that although writ review of discovery rulings is generally disfavored, interlocutory review by writ is the only adequate remedy when a court compels the disclosure of documents or information that may be subject to a privilege, because once privileged matter has been disclosed there is no way to undo the harm that consists in the very disclosure. See *Ch. 358, Mandate and Prohibition, § 358.51[4][b]*.

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§ 1.167A Partnerships

Partnerships--Uniform Limited Partnership Act of 2008. This release contains a major revision of the publication's partnership coverage that adds detailed coverage of the California Uniform Limited Partnership Act of 2008 [*Corp. Code §§ 15900-15912.07*]. The new Act governs all California limited partnerships formed after 2007. After 2009, it will govern all California limited partnerships, except that a few provisions will not apply to pre-2008 partnerships unless specifically elected [*Cal. Corp. Code § 15912.06*]. It also governs foreign limited partnerships transacting intrastate business in California [Cal. Corp. Code § 15909.0108]. The 2008 Act is a major revision of limited partnership law that is designed, among other purposes, to be a stand-alone law that does not rely on California's General Partnership Act or other sources for its provisions. Ch. 404, *Partnerships: Actions Between Limited Partners and Partnerships,* and Ch. 405, *Partnerships: Actions Between Limited Partners or Partnerships and Third Parties,* are completely revised and replaced, as well as significant portions of Ch. 400, *Partnerships: Governing Statutes,* and Ch. 406, *Partnerships: Dissolution*. As revised, the foregoing chapters now cover both the 2008 law and the former law, since the former law will have continuing application in pending actions for a number of years to come. Conforming changes are being made to numerous other chapters throughout the publication as well.

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§ 1.167B Physicians and Other Medical Personnel

Specific Jury Finding of No Consent Required When Using Special Verdict Form in Medical Battery Action. In *Saxena v. Goffney (2008) 159 Cal. App. 4th 316* , the court of appeal held that because performing a medical procedure without informed consent is not the same thing as performing that procedure with no consent at all, and the latter forms the basis for an action for battery, a party seeking to hold a physician liable for battery must obtain a specific jury finding that no consent was given if a special verdict form is used at trial. A finding that no informed consent was given is insufficient, as such a finding does not preclude the conclusion that *uninformed* consent was given. See *Ch. 415, Physicians: Medical Malpractice, § 415.20*.

No Wrongful Life Liability for Failing to Advise on Abortion When No Warning of Possible Birth Defects Existed. In *Barragan v. Lopez (2007) 156 Cal. App. 4th 997* , the court of appeal held that liability cannot be imposed for wrongful life just because the physician fails to advise the mother of the right to terminate a pregnancy, if the physician provides proper care and testing and, up to the time at which the fetus is considered viable, nothing indicates that the fetus is in danger of being born with a birth defect. See *Ch. 367A, Minors: Tort Actions, § 367A.11[3][c]*.

Doctor's Communications With Patient's Insurer Covered by Arbitration Requirements of *Code Civ. Proc. § 1295*. In *Titolo v. Cano (2007) 157 Cal. App. 4th 310* , the court of appeal held that a doctor's communications with a patient's insurer about the patient's medical records, done at the request of the patient, comes within the provision of medical services for purposes of the arbitration provisions of *Code Civ. Proc. § 1295*, and disputes about the propriety and scope of the communications are covered by an arbitration agreement meeting the requirements of that statute. See *Ch. 415, Physicians: Medical Malpractice, § 415.51*.

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§ 1.167C Privacy

Statutory Immunity Precluded Constitutional Invasion of Privacy Action. In *Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE) (2007) 157 Cal. App. 4th 1056, 69 Cal. Rptr. 3d 176* , the court of appeal did not need to resolve whether plaintiff stated a cause of action under the California constitutional right of privacy for damages based on a workers' compensation investigation into her private life, because the alleged conduct was within the scope of the immunity provided by *Gov. Code § 821.6*, and the constitutional right to privacy did not limit the scope of a preexisting statutory immunity. See Ch. 429, *Privacy* .

Government Tort Immunities Applicable to Privacy Action Based on California Constitution. In *Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE) (2007) 157 Cal. App. 4th 1056* , the court of appeal held that although the constitutional right to privacy was designed to protect against some forms of governmental intrusion, this right to privacy does not limit the scope of statutory immunities that existed under the California Tort Claims Act when the right to privacy was added in 1972. The court specifically held that *Gov. Code § 821.6*, which immunizes a governmental employee for injury caused by instituting or prosecuting any judicial or administrative proceeding within the scope of his or her employment, regardless of malice or lack of probable cause, extends to investigatory activities and may be used to defeat a claim for damages for violation of the constitutional right to privacy. See *Ch. 429, Privacy, § 429.16[20]*.

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§ 1.167D Probate

Conservators, Guardians, and Trustees--Important New Licensing Requirements for Professional Fiduciaries. This release incorporates detailed discussion of the new Professional Fiduciaries Act [*Bus. & Prof. Code § 6500 et seq.*], which imposes new licensing requirements on all persons coming within the statutory definition of professional fiduciaries [*see Bus. & Prof. Code § 6501(f)*]. As of July 1, 2008, courts cannot appoint a professional fiduciary in a guardianship or conservatorship matter unless the fiduciary is licensed under the Act, and all professional fiduciaries must be licensed under the Act by January 1, 2009, in order to act in that capacity [*Bus. & Prof. Code § 6530(a), Prob. Code §§ 60.1, 2340*]. For detailed discussion of the Act, see *Ch. 281, Guardianship and Conservatorship: Appointment of Conservators, § 281.66*, and *Ch. 560, Trusts, § 560.74*. Conforming references have been made throughout the guardianship, conservatorship, and trust materials. In addition, an allegation for removal of a guardian or conservator for failure to comply with the Act's registration requirements has been added. See *Ch. 290G, Guardianship and Conservatorship: Removal or Resignation of Guardians and Conservators, § 290G.37A.*

Wills & Trusts--No-Contest Provision Was Not Incorporated Into Decree of Distribution. In *Meyer v. Meyer (2008) 162 Cal. App. 4th 983, 998* , a *Prob. Code § 21320* proceeding seeking a declaration that a proposed action against a trustee would not amount to a will contest, the court held that the no-contest clause, which contained no reference to the testamentary trust, was not incorporated by reference into the trust provisions of the decree of distribution. The court noted that *Prob. Code § 21304* requires that a no-contest clause be strictly construed and even though the decrees of distribution contained some language in the recitals that referred to the will, the clear statement in the distributing clause that the trust was completely set forth in the decree established that no trust provisions were omitted and that there was no room to supplement trust provisions by incorporating provisions contained in the will. Furthermore, the no-contest clause in the will did not refer to contests regarding the trust. See *Ch. 444, Probate: Will Contests, §§ 444.14, 444.33[9]*, and *Ch. 560, Trusts, § 560.362[2]*.

Wills and Trusts--Beneficiary Whose Will Contest Triggered No-Contest Clause Also Lacked Standing to Contest Trust. In *Montegani v. Johnson (2008) 162 Cal. App. 4th 1231, 1239* , the trial court acted properly after an appellate decision that a settlor's daughter had triggered the no-contest clause contained in an irrevocable trust when it reconsidered on its own motion a grant of *Prob. Code §§ 21320* relief and held that the daughter lacked standing because she was no longer a beneficiary, and since the irrevocable trust contained the same no-contest language as a

revocable trust, the trial court did not err in ruling that the daughter lacked standing as to both trusts. See *Ch. 444, Probate: Will Contests, § 444.33[9]*, and Ch. 560, *Trusts*, § 560.362[2].

Wills--Former Wife Not Entitled to Inherit. In *Estate of McDaniel (2008) 161 Cal. App. 4th 458, 463* , a decedent's former wife was not entitled to inherit from decedent's estate inasmuch as she was a party to a valid dissolution proceeding that concluded in an order terminating all marital property rights; therefore, she was not a "surviving spouse" under *Prob. Code §§ 78(d)* at the time of decedent's death. See *Ch. 458, Probate: Determination of Heirship, § 458.42[1][m]*, and *Ch. 458D, Probate: Accounts, Final Distribution, and Compensation, §§ 458D.72[2][c], 458D.155[4][e]*.

Trusts--Settlor Could Petition for Reformation of Irrevocable Trust. In *Bilafer v. Bilafer (2008) 161 Cal. App. 4th 363, 370* , the settlor of two irrevocable trusts had standing to petition for reformation under the court's common law equitable power, even though he was not a beneficiary and did not have a pecuniary interest, on the grounds that drafting errors defeated his dispositive intent. The court reasoned that had the trusts not been reformed, the trustor would have suffered a real and substantial injury because his estate would pass to his children and grandchildren in a manner contrary to his wishes. See *Ch. 560, Trusts, §§ 560.113[2], 560.401*.

Wills & Trusts--Law Firm Barred From Fee Recovery Against Estate Could Make Quantum Meruit Claim Against Client for Services Rendered to Client Personally. In *Miller v. Campbell (2008) 162 Cal. App. 4th 1331* , the court held that a law firm was not barred by a final probate judgment finding disputed fees were not expenses of the estate from making quantum meruit claim to recover fees for services rendered to a client personally and not as the executor of the estate. The firm's evidence was sufficient to raise a factual question as to whether the firm reasonably expected to be paid by the client personally. See *Ch. 458D, Probate: Accounts, Final Distribution, and Compensation, § 458D.155[2][c]*.

New Probate Petition Form. The Judicial Council has issued a new version of Form DE-111, Petition for Probate, effective March 1, 2008. For an illustration of the new form, and revised commentary, see *Ch. 442, Probate: Initiating Probate Administration, § 442.140*.

Decedent's Estates--Filing Fees. *Gov. Code § 70650* has been amended to require the full uniform filing fee for a petition for letters in a decedent's estate or the first account of a trustee to be determined on the final appraisal value of the estate without reference to encumbrances or other obligations on estate property, or the value of the trust shown in the first account. The petitioner for letters must pay $320 at the time of filing the petition. In a decedent's estate, the balance of the uniform fee, if any, must be paid by the general personal representative no later than the date the general personal representative files its final account or report and petition for settlement or for final distribution. The filing fee for a trust must be paid when the first account is filed. See Ch. 442, *Probate: Initiating Probate Administration* .

Wills and Trusts--No-Contest Clauses. In *Betts v. City Nat'l Bank (2007) 156 Cal App 4th 222* , the court held that beneficiary's filing of a second proposed petition did not violate a trust's no-contest clause because it sought to impose liability on the trustees for alleged breach of fiduciary duty for improper disbursements and did not seek an accounting nor seek to void, nullify, or set aside the portion of the trust limiting liability of successor trustees, and that the doctrine of conclusiveness of pleadings applies to filed pleadings but has no application to pleadings proposed to be filed under *Prob. Code § 21320*. See *Ch. 444, Probate: Will Contests, §§ 444.14*.

California Forms of Pleading and Practice--Annotated

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PART V. 2008 NEW DEVELOPMENTS

1-1 California Forms of Pleading and Practice--Annotated § 1.168

§ 1.168 Public Administration

Delegation--Separation of Powers Academic Decisions. This chapter is updated with *Coastside Fishing Club v. California Resources Agency (2008) 158 Cal. App. 4th 1183, 1203-1205, 1211, 71 Cal. Rptr. 3d 87* , which holds that provisions of the Marine Life Protection Act [*Fish & Game Code §§ 2853, 2855, 2856, 2857*] that authorized the Department of Fish & Game and other state agencies to enter into a memorandum of understanding (MOU) with a private foundation (the Resources Legacy Fund Foundation) to obtain private funds to cover the costs of implementing the provisions of the MLPA by the Department did not improperly delegate legislative powers to an executive branch agency in violation of the doctrine of separation of powers. This is because the statute provided adequate safeguards so that the agency was not making fundamental policy choices but was rather carrying out the legislative policy choices provided by the statute (MLPA). See *Ch. 470, Overview of Public Administrative Law, § 470.12 [6][a]*.

Rulemaking Procedures--Rulemaking Review. This chapter is updated with *California Forestry Association v. California Fish & Game Commission (2007) 156 Cal. App. 4th 1535, 1554-1555, 68 Cal. Rptr. 3d 391* , which holds that regulations that listed endangered species of Coho salmon satisfied the non-duplication standard of the California APA because the focus of the regulation was narrower in protecting species from extinction in California, and thus the regulation did not duplicate parallel regulations issued under federal statutes (FESA). The case also holds that the regulation that listed endangered species of Coho salmon satisfied the necessity standard of the California APA because the underlying statute (CESA) was not self-implementing. See *Ch. 472A, Agency Rulemaking Procedures, § 472A.16 [3][b], [g]*.

Timing of Judicial Review--Exhaustion of Administrative Remedies. This chapter is updated with *Schutte & Koerting, Inc. v. Regional Water Quality Control Board, San Diego Region (2007) 158 Cal. App. 4th 1373, 1385-1387, 71 Cal. Rptr. 3d 54* , which holds that a party challenging the order of a regional water quality control board is not required to request a hearing before that regional board under *Water Code § 13330 (b)* so long as that party petitions the state water quality control board for review under the provisions of *Water Code § 13320(a)*. See *Ch. 474A, Timing of Judicial Review, § 474A.11 [2][b]*.

Driver's License Suspension. I n *Cinquegrani v. Department of Motor Vehicles (2008) 163 Cal. App. 4th 741, 750* , the court of appeal held that a driver's license cannot be suspended without due process of law. Once a license issues, an

administrative decision to suspend or revoke it affects a fundamental right. See *Ch. 92, Automobiles: Drivers' Licenses, § 92.12[3]*.

Social Services. In *In re Darlene T. (2008) 163 Cal. App. 4th 929, 939, 2008 Cal. App. LEXIS 841* , the court of appeal held that an applicant for or recipient of public social services who has filed a request for a state hearing with the state department that administers the service must be accorded an opportunity for that hearing. See *Ch. 527, Social Services, § 527.11*.

Due Process--Academic Decisions. This chapter is updated with *Lachtman v. Regents of the University of California (2007) 158 Cal. App. 4th 187* , which holds that a graduate student in the department of history at the University of California at Irvine was not denied due process of law when he was denied advancement into the department's Ph.D. program and graduated with a master's degree. The department provided sufficient due process procedures because it informed the student that there were deficiencies with the student's academic performance, it explained to the student the consequences of deficient academic performance, and it made a careful and deliberate decision regarding the student's academic progress. The student did not have a right to a formal hearing to challenge the denial of advancement. See *Ch. 470A, Due Process Restrictions on Public Agencies, § 470A.32[1]*.

Public Records--Peace Officers. This chapter is updated with *Chambers v. Appellate Division of the Superior Court (2007) 42 Cal. 4th 673* , which holds that derivative information developed as a result of disclosures under a *Pitchess* motion procedure can be disclosed and used only in the proceeding in which the disclosure is ordered. Otherwise, the protective order authorized under *Evid. Code § 1045(e)* prohibits disclosure of that information in any other judicial proceeding. Thus, if counsel obtains complainant information in one case through the granting of a *Pitchess* motion, that leads to the discovery of derivative information (information other than the name, address, and telephone number of a complaining party, and other witnesses identity), that derivative information may only be used in that judicial proceeding and it subject to a protective order. However, if the same lawyer files a *Pitchess* motion in another case representing another party, and that lawyer obtains the same complainant information as in the prior motion, they are permitted to use the same derivative information in the new proceeding and that does not violate the protective order rules. See *Ch. 470C, Public Records Act, § 470C.13[14]*.

Public Records--Judges. This chapter is updated with *Commission on Judicial Performance v. Superior Court (2007) 156 Cal. App.4th 617* , which holds that confidential records maintained by the Commission on Judicial Performance related to complaints against judges are official records that are protected by the official records privilege under *Evid. Code § 1040*. These records can not be disclosed using the *Pitchess* motion procedure, and an in camera review of these judicial records is improper. See *Ch. 470C, Public Records Act, § 470C.13[14]*.

Adjudication--Equitable Estoppel. This chapter is updated with *Cotta v. City and County of San Francisco (2007) 157 Cal. App. 4th 1550* , which holds that equitable estoppel cannot be applied against a city and county and its airport commission that had reduced incentives to taxicab drivers operating clean-air taxicabs serving San Francisco Airport. The court of appeal rejected the estoppel defense because the taxicab drivers could not have reasonably relied upon the city incentives resolution as binding the city to make no further changes in the incentives contained in the resolution. The drivers sued the city for breach of contract when incentives for CNG cabs were reduced by action of the city and county. The drivers argued that equitable estoppel should be applied to estop the city from denying liability for breach of contract. The court of appeal rejected the defense because of a lack of reasonable reliance by the drivers, and because the court did not want to limit the city's exercise of the police power through the recognition of equitable estoppel. See *Ch. 473F, Agency Adjudication Hearings, § 473F.54[1][b]*.

Adjudication--Equitable Estoppel. This chapter is updated with *Holland v. Union Pacific Railroad Company (2007) 154 Cal. App. 4th 940* , which holds that equitable estoppel can be applied to excuse the filing of an untimely administrative complaint before the Department of Fair Employment and Housing and to excuse the failure to exhaust administrative remedies by an employee who brought an employment discrimination action against an employer.

Equitable estoppel applied because the employee diligently pursued the administrative remedy and reasonably relied on the conduct of department officials that the limitations period was not something to be concerned about. See *Ch. 473F, Agency Adjudication Hearings, § 473F.54[1][b]*.

Adjudication--Attorneys Fees. This chapter is updated with *Hogar v. Community Development Commission of the City of Escondido (2007) 157 Cal. App. 4th 1358* , which affirmed an award of attorney's fees under the private attorney general statute [*Code Civ. Proc. § 1021.5*] against the Community Development Commission of the City of Escondido based upon the application of the catalyst theory adopted by the California Supreme Court in *Graham v. Daimler Chrysler Corp. (2004) 34 Cal. 4th 553* to the challenger (Hogar). The court of appeal held that the challenger was a prevailing party under the private attorney general statute because the challenger's lawsuit was the catalyst for the commission to change its position and provide 20 percent of gross tax receipts to a low-cost housing fund. The court of appeal also held that the challenger was entitled to a fully compensatory lodestar fee even though the challenger did not prevail on all claims. The court rejected a negative lodestar reduction for partial success by the challenger because of substantial success, long-term impact, and related claims. The court of appeal also held that the challenger could recover attorney's fees for work done prior to the filing of the complaint, and for work done in prosecuting the motion for attorneys fees, but the court upheld the trial court's rejection of a multiplier to the lodestar (reasonable hours times a reasonable hourly rate) fee amount. See *Ch. 473G, Agency Adjudication Decisions, § 473G.35[9]*.

Adjudication--Attorney's Fees. This chapter is updated with *Plumbers and Steamfitters, Local 290 v. Duncan (2007) 157 Cal. App. 4th 1083* , which upholds an award of $55,010 in attorney's fees under the private attorney general statute [*Code Civ. Proc. § 1021.5*] against the director of the Department of Industrial Relations brought by a union enforcing the prevailing wage law for public works projects. The court held that the department was an opposing party against whom an award of fees could be enforced because the department was responsible for making the policy decision that was the subject of the lawsuit. The court also upheld the award on statutory grounds, that the litigation enforced important rights affecting the public interest. This was because the department's policy decision that limited the scope of prevailing wage laws was designated as a precedential decision that would have been likely to impact other public works projects and other unions in the future. Finally, the court upheld the recovery of attorney's fees for charges incurred by the union for computerized legal research. See *Ch. 473G, Agency Adjudication Decisions, § 473G.35[9]*.

Adjudication--Attorney's Fees. This chapter is updated with *Mejia v. City of Los Angeles (2007) 156 Cal. App. 4th 151* , which upholds an award of $50,000 in attorney's fees, split equally between the city of Los Angeles, and the project developer under the private attorney general statute [*Code Civ. Proc. § 1021.5*] to a challenger based upon a successful challenge to the environmental review process under the California Environmental Quality Act undertaken by the city in approving a residential development project. The court upheld a $25,000 award against the developer and concluded that the developer was an opposing party under the statute against whom attorney's fees could be awarded, even though the city was responsible for the approval and review decisions. The court also held that the challenger satisfied the requirements for a statutory private attorney general award in that the financial burden of the litigation was out of proportion to the personal stake of the plaintiff challenger who was a real property owner and resident next to the proposed development. Finally, the court held that the fee award did not improperly infringe on the developer's *first amendment* right to petition the government for redress of grievances, including the right of access to the courts. See *Ch. 473G, Agency Adjudication Decisions, § 473G.35[9]*.

Judicial Review--Exhaustion of Administrative Remedies. This chapter is updated with *Mokler v. County of Orange (2007) 157 Cal. App. 4th 121* , which holds that the exhaustion of administrative remedies defense was waived by the county in a retaliatory termination lawsuit brought by a former employee of the county because the county failed to assert the defense in the proceeding before the superior court. The court of appeal rejected the jurisdiction rationale, and held that exhaustion of administrative remedies is a judicially created rule of procedure that can be waived on appeal if not asserted before the superior court. See *Ch. 474A, Timing of Judicial Review of Agency Decisions, § 474A.11[1]*.

Judicial Review--Exhaustion of Administrative Remedies. This chapter is updated with *Ortega v. Contra Costa Community College District (2007)156 Cal. App. 4th 1073* , which holds that a former employee of a community college district did not have to exhaust administrative remedies that included an internal grievance procedure before challenging his demotion and termination based on claims of discrimination under the Fair Employment and Housing Act (FEHA). Exhaustion was not required because the internal grievance procedures were established by collective bargaining agreement, not by statute, and arbitration, not judicial review by mandamus, was the enforcement and review mechanism. Also, the employee did not have to exhaust administrative remedies for his non-statutory claims. See *Ch. 474A, Timing of Judicial Review of Agency Decisions, § 474A.11[3][a]*.

Judicial Review--Exhaustion of Administrative Remedies. This chapter is updated with *Porterville Citizens for Responsible Hillside Development v. City of Porterville (2007) 157 Cal. App. 4th 885* , which holds that a local citizens group that challenged the approval by a city of a subdivision development failed to exhaust administrative remedies as to issues related to CEQA violations under state CEQA guidelines, and also as to issues related to General Plan consistency. The citizens group did not raise these issues before the city council, and therefore the city council did not have an opportunity to consider these issues. Because they failed to raise these issues before the city council, the challengers could not raise these issues on judicial review. See *Ch. 474A, Timing of Judicial Review of Agency Decisions, § 474A.11[3][b]*.

Judicial Review--Exhaustion of Administrative Remedies. This chapter is updated with *American Employers Group, Inc. v. Employment Development Department (2007) 154 Cal. App. 4th 836* , which holds that an employers' group that challenged an assessment for unemployment insurance contributions failed to exhaust administrative remedies because it failed to complete the administrative proceeding it started by filing the petition for reassessment. See *Ch. 474A, Timing of Judicial Review of Agency Decisions, § 474A.11[3][b]*.

Judicial Review--Substantial Evidence Test. This chapter is updated with *Porterville Citizens for Responsible Hillside Development v. City of Porterville (2007) 157 Cal. App. 4th 885* , which holds that the substantial evidence fair argument test (that a project may have adverse environmental effects) was not satisfied in a mandamus proceeding challenging a mitigated negative declaration related to a subdivision development approved by a city council. This was because the record before the city council did not support the fair argument test, and extra-record evidence may not be considered by the courts to support the fair argument test. See *Ch. 474B, Standards in Reviewing Agency Decisions, § 474B.16[5][a]*.

Judicial Review--Parties. This chapter is updated with *TG Oceanside v. City of Oceanside (2007) 156 Cal. App. 4th 1355* , which holds that a hearing officer who heard an administrative appeal that affirmed a denial of a rent increase was not an indispensable party under *Code Civ. Proc. § 389* in an administrative mandate proceeding brought by a mobilehome park owner against a city and a city manufactured homes fair practices commission. The court reasoned that the hearing officer was an agent of the city and commission, the city and commission would defend the hearing officer's decision on judicial review, the commission could set aside the hearing officer's decision and require that a new hearing be held, and the ordinance does not require the hearing officer to be named as a respondent in the administrative mandate proceeding. See *Ch. 474C, Reviewing Procedures, § 474C.13[2]*.

Certificate of Interested Entities of Persons. If a party files a motion, application, or opposition to a motion or application in the Court of Appeal before filing its principal brief, the party must serve and file its Certificate of Interested Entities or Persons at the time it files the first such motion, application, or opposition and must include a copy of this certificate in the party's principal brief. If no motion, application, or opposition to a motion or application is filed before the parties file their principal briefs, each party must include its certificate in its principal brief [*Cal. Rules of Ct., Rule 8.208(d)(1)*]. If the identity of any party has not been publicly disclosed in the proceedings, the party may serve and file an application for permission to file its certificate under seal separately from its principal brief, motion, application, or opposition [*Cal. Rules of Ct., Rule 8.208(d)(1)*]. See *Ch. 18, Alcoholic Beverage Licenses, § 18.70[7a]*; *Ch. 480, Public Utilities, § 480.144[3a]*.

Federal Preemption. This chapter is updated with *Viva! International Voice for Animals v. Adidas Promotional Retail Operations, Inc., (2007) 41 Cal. 4th 929, 935, 63 Cal. Rptr. 3d 50, 162 P.3d 569* , where the court holds the provisions of the Endangered Species Act (ESA) [16 U. S. C. § 1530 et seq.] do not preempt claims brought against shoe manufacturers under the California Unfair Competition Law [*Bus. & Prof. Code § 17200 et. seq.*] for selling athletic shoes made from kangaroo hides in violation of the provisions of *Penal Code § 308*, prohibiting the importation into or sale within California of products made from kangaroo. See *Ch. 470, Overview of Public Administrative Law, § 470.16[1][a]*.

Due Process--Property Interests. This chapter is updated with *Savient Pharmaceuticals, Inc. v. Department of Health Services (2007) 146 Cal. App. 4th 1457, 53 Cal. Rptr. 3d 689* , which holds the drug formulary maintained by the Department of Health Services for the AIDS Drug Assistance Program (ADAP) under the statutory authority of *Health & Safety Code § 120955(a)(2)* is a rule of general application that is within the APA definition of a regulation. Thus, the decision to partially delist the drug Oxandin from the drug formulary must comply with APA rulemaking procedure requirements. See *Ch. 470A, Due Process Restrictions on Public Agencies, § 470A.21[5]*.

Due Process--Notice. This chapter is updated with *Valenzuela v. California State Personnel Board (2007) 153 Cal. App. 4th 1179, 63 Cal. Rptr. 3d 529* , which holds a correction officer dismissed from his job by the Department of Corrections and Rehabilitation for failing a drug test did not receive adequate notice that a foreign prescription, a Mexican diet medication, legally obtained in Mexico, that he took could result in a positive drug test for amphetamines. Without that adequate notice, dismissal as a penalty for failing a drug test was an abuse of discretion, and the court of appeal affirmed the judgment of the superior court vacating the decision of the State Personnel Board, upholding the termination. See *Ch. 470A, Due Process Restrictions on Public Agencies, § 470A.43[2]*.

Public Records--Peace Officers. This chapter is updated with *Commission on Peace Officer Standards and Training v. Superior Court (2007) 42 Cal. 4th 278, 287-289, 64 Cal. Rptr. 3d 661, 165 P.3d 462* , which holds information relating to California peace officers that is maintained in an electronic database by the California Commission on Peace Officer Standards and Training was a "public record" within the meaning of the California Public Records Act [*Gov. Code § 6252(e), (g)*]. The Court also held that these records were not exempt from disclosure under *Penal Code §§ 832.7, 832.8*, peace officer personnel records, and that no other statutory exemption in the California Public Records Act applied to exempt disclosure of these records. The California Supreme Court rejected the argument that the records kept by the Commission were categorically exempt under *Gov. Code § 6254(c)* because the privacy and safety interest of the peace officers as a group did not outweigh the public interest in disclosure of the information. However, The California Supreme Court also held that the Commission could seek to justify exclusion from the disclosed records of information about specific officers because disclosure of that information would jeopardize the safety or efficacy of the peace officers. The exclusion would be based on a showing under the personnel and medical records exemption [*Gov. Code § 6254(c)*], and under the public interest exemption [*Gov. Code § 6255*]. The California Supreme Court remanded the case back to the superior court to allow the Commission to make such a showing. See *Ch. 470C, Public Records Act, §§ 470C.11[1], 470C.13[6], 470C.14[9]*.

Public Records--Interagency Disclosure. This chapter is updated with *Los Angeles Unified School District v. Superior Court (2007) 151 Cal. App. 4th 759, 60 Cal. Rptr. 3d 445* , which holds the City of Long Beach, and its city attorney, were authorized to seek disclosure of public records held by another public agency, the Los Angeles Unified School District (LAUSD), relating to a school construction project undertaken by LAUSD. The Court of Appeal held that the city was a person within the meaning of the California Public Records Act [*Gov. Code §§ 6252(c), 6253*]. The Court of Appeal also held that the city attorney was a person within the meaning of the California Public Records Act [*Gov. Code § 6252(c)*] and as an elected official had the right to request these records under the California Public Records Act [*Gov. Code § 6252.5*]. See *Ch. 470C, Public Records Act, § 470C.11[3]*.

Public Records--Salaries. This chapter is updated with *International Federation of Professional and Technical*

Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal. 4th 319, 64 Cal. Rptr. 3d 693, 165 P.3d 488 , which held salary information for specific public employees of the City of Oakland earning $100,000 or more per year was a disclosable "public record" within the meaning of the California Public Records Act [*Gov. Code §§ 6252(d), 6253(a)*]. The Court held that the salary information was not exempt form disclosure under the personnel and medical records exemption [*Gov. Code § 6254(c)*] because disclosure of this information did not constitute an unwarranted invasion of personal privacy. See *Ch. 470C, Public Records Act, §§ 470C.13[4], 470C.14[9]*.

Investigations--Subpoenas. This chapter is updated with *City of Santa Cruz v. Patel (2007) 155 Cal. App. 4th 234, 65 Cal. Rptr. 3d 824* , which upheld the enforcement of a subpoena duces tecum authorized by the City of Santa Cruz under the statutory authority of *Gov. Code § 37104* for the purposes of conducting a tax compliance audit of a hotel operator's records to determine compliance with a city-imposed transient occupancy tax that must be collected from guests by the hotel and then remitted to the city. The court also held that the superior court orders compelling compliance with the subpoena duces tecum issued under the statutory authority of *Gov. Code § 37104* are final judgments that are appealable under *Code Civ. Proc. § 904.1*. See *Ch. 471, Investigations by Public Agencies, §§ 471.30[1], [4], 471.31[3], 471.32[2]*.

Adjudication--Hearings. This chapter is updated with *Corrales v. Bradstreet (2007) 153 Cal. App. 4th 33, 62 Cal. Rptr. 3d 440* , which holds *Lab. Code § 98* hearings conducted by the Labor commissioner are not subject to the provisions of Chapter 4.5 of the California Administrative Procedures Act because those hearings are discretionary and not required by Section 98. Chapter 4.5 applies to agency decisions in which a hearing is required by statute or constitutional provision, and it does not apply when a hearing is not required by statute [*Gov. Code § 11410.10*]. The court also held that an evidentiary hearing is not required by the constitution (due process of law) because an employer has the right to obtain a trial de novo in the superior court following an adverse decision from a Section 98 hearing. See *Ch. 473, Public Agency Adjudication, §§ 473.15[1][b], 473.27*.

Adjudication--Ex Parte Communications. This chapter is updated with *Rondon v. Alcoholic Beverage Control Appeals Board (2007) 151 Cal. App. 4th 1274, 60 Cal. Rptr. 3d 295* , which holds the Department of Alcoholic Beverage Control violated provisions of the California Administrative Procedures Act [*Gov. Code § 11430.10*] because the Department allowed its decision-makers to have access to prosecuting attorneys reports of hearings prior to the time the decision-maker decided whether or not to adopt the proposed decision of the administrative law judge. These hearing reports were not part of the administrative record in the case, and allowing the decision-maker access to the reports resulted in extra-record information being considered by the decision-maker, in violation of the administrative law principle that the agency record provides the exclusive basis for the decision. See *Ch. 473, Public Agency Adjudication, § 473.28[1]*.

Adjudication--Exclusionary Rule. This chapter is updated with *Park v. Valverde (2007) 152 Cal. App. 4th 877, 61 Cal. Rptr. 3d 895* , where the court refused to apply the exclusionary rule to exclude evidence that a driver was driving while intoxicated in a DMV administrative hearing. Any additional deterrent value (deterring police misconduct) of applying the rule to DMV proceedings was offset by the danger to both the motorist and the public from drunk driving, given the DMV's primary responsibility to protect the public from drunk drivers by getting those drivers off the roads. See *Ch. 473F, Agency Adjudication Hearings, § 473F.34[2][a]*.

Adjudication--Exclusionary Rule. This chapter is updated with *Tennison v. California Victim Compensation and Government Claims Board (2007) 152 Cal. App. 4th 1164, 62 Cal. Rptr. 3d 88* , which holds collateral estoppel did not apply in a proceeding (application for compensation benefits) before the victim compensation and government claims board under *Penal Code § 4900* to give preclusive effect to a determination of factual innocence made in a judicial proceeding under *Penal Code § 851.8*. Even though the issues were the same, and even though there was a privity relationship between the district attorney in the *Penal Code § 851.8* proceeding, and the attorney general in the *Penal Code § 4900* claims board proceedings, the factual innocence issue was not actually litigated in the *Penal Code § 851.8* proceeding because there was a stipulation as to that issue. See *Ch. 473F, Agency Adjudication Hearings, § 473F.41[3]*.

Judicial Review--Equitable Excuse. This chapter is updated with *Holland v. Union Pacific Railroad Company (2007) 154 Cal. App. 4th 940, 65 Cal. Rptr. 3d 145* , which holds that an employee's discrimination lawsuit against the employer was not barred by failure to exhaust administrative remedies because the court recognized that the employees' failure to file a timely complaint with the Department of Fair Employment and Housing was equitably excused. Circumstance justifying equitable excuse included facts that the employee relied on the DFEH representative's assurances that he would meet the required deadline, the employee was diligent in pursuing the administrative complaint, the employee raised the timeliness issue with the DFEH, and he was only slightly late in filing the agency complaint. See *Ch. 474A, Timing of Judicial Review of Agency Decisions, § 474A.11[3][a]*.

Judicial Review--Substantial Evidence Test. This chapter is updated with *Chrisman v. City of Los Angeles (2007) 155 Cal. App. 4th 29, 65 Cal. Rptr. 3d 701* , where the court reversed and remanded the denial of a petition for a writ of mandate brought by a police officer terminated by the Los Angeles Police Department for on the job misuse of police department computers. The officer sought reinstatement. The Court of Appeal concluded that it was an abuse of discretion (specifically, a misapprehension of the law) for the police department to base termination in part on misconduct of the police officer that occurred more than two years before the department filed an administrative complaint against the officer. The Court of Appeal remanded the matter to the police department to reconsider the appropriate punishment for misconduct within the two year time period. See *Ch. 474B, Standards in Reviewing Agency Decisions, § 474B.16[4]*.

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1-1 California Forms of Pleading and Practice--Annotated § 1.169

§ 1.169 Real Estate

Building Contracts--Subcontractor's Duty to Defend. The California Supreme Court held, in *Crawford v. Weather Shield Mfg. Inc. (2008) 44 Cal. 4th 541* , that for contracts entered into before 2006, a provision in a subcontract setting forth the subcontractor's duty "to defend" the general contractor against claims "founded upon" damage or loss caused by the subcontractor's negligent performance of its work imposes a duty to defend on the subcontractor as soon as a suit is filed against the general contractor asserting such claims, regardless of whether it is ultimately determined that the subcontractor was actually negligent. See *Ch. 104, Building Contracts, § 104.13*.

State Housing Law--Appointment of Receiver. In *City of Santa Monica v. Gonzalez (2008) 43 Cal. 4th 905* , the California Supreme Court addressed the requirements applicable to appointment of a receiver in cases of substandard housing. The Court upheld the trial court's approval of the receiver's application to demolish the substandard building at issue in that case, despite the owner's desire to have the building repaired. See *Ch. 579, Zoning and Planning, § 579.141*.

Unlicensed Contractors. In *Goldstein v. Barak Construction (2008) 164 Cal. App. 4th 845* , the court of appeal held that a claim brought under the Contractors' State License Law against an unlicensed contractor may form the basis for a right to attach order since an agreement for the performance of services lies at the heart of such a claim. See *Ch. 62, Attachment, § 62.11[1]*.

Eminent Domain--Residential Property. In June 2008, *Cal. Const., art. I, § 19* was amended through the initiative process [Proposition 99 (eff. June 4, 2008)] to expressly prohibit governmental agencies from using eminent domain to take an owner-occupied home to transfer it to another private owner or developer. See *Ch. 247, Eminent Domain, § 247.12*.

Nonjudicial Foreclosure--Foreclosure Prevention. In SB 1137 [Stats 2008, Ch. 69, effective July 8, 2008] the legislature declared its intent to ameliorate the deleterious effects on the state economy and local economies and the California housing market that will result from the continued foreclosures of residential properties in unprecedented numbers, by modifying the foreclosure process to require mortgagees, beneficiaries, or authorized agents to contact borrowers and explore options that could avoid foreclosure. The legislature declared that these changes in accessing the

state's foreclosure process are essential to ensure that the process does not exacerbate the current crisis by adding more foreclosures to the glut of foreclosed properties already on the market when a foreclosure could have been avoided. See *Ch. 555, Trust Deeds and Real Property Mortgages, § 555.51A*.

Date of Valuation. On remand from the California Supreme Court, the court of appeal in *San Diego Metropolitan Transit Development Board v. RV Communities (2007) 158 Cal. App. 4th 313* , a "quick take" eminent domain proceeding, reaffirmed that the trial court did not err in changing the date of valuation of the condemned property from the date of deposit of probable compensation to the date of trial, because it was undisputed that the deposit was substantially less than the probable amount of just compensation under *Cal. Const., art. I, § 19*. See *Ch. 247, Eminent Domain and Inverse Condemnation, § 247.137[7]*.

Inverse Condemnation Damages. In *San Diego Metropolitan Transit Development Board v. RV Communities (2007) 158 Cal. App. 4th 313* , the court of appeal clarified that inverse condemnation damages may be sought by cross-complaint in an eminent domain proceeding, and are not required to be claimed in the answer to the eminent domain complaint. See *Ch. 247, Eminent Domain and Inverse Condemnation, § 247.197[3], [4]*.

Real Property Transfer Disclosures--Private Transfer-Fee Requirement. If property being transferred after 2007 is subject to a private transfer fee, the transferor must provide, at the time the transfer disclosure statement required pursuant to *Civ. Code § 1102.6* is provided, an additional disclosure statement [*Civ. Code § 1102.6e*]. In addition, the recipient of any such fee imposed before 2008, or the person or entity imposing any such fee after 2007, must record a document in which pertinent facts about the fee-payment requirement are disclosed [*Civ. Code § 1098.5*]. See *Ch. 103, Brokers, § 103.31[14][e]*.

Condominium Conversions. *Gov. Code § 66427.1* has been amended to improve the process for giving tenants notice that the rental property in which they are tenants is to be converted to condominiums and giving them a right of first refusal to purchase their units [Stats. 2007, ch. 612]. The former notice provisions have been replaced by provisions that separate all of the notice requirements into individual subsections and clarify what the various notices are to contain and when they are to be sent. For coverage of the notice requirements, see *Ch. 124, Condominiums and Other Common Interest Developments, § 124.19*.

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§ 1.169A Receivers

Nature of Receiver. In *City of Santa Monica v. Gonzalez (2008) 43 Cal. 4th 905, 930, 76 Cal. Rptr. 3d 483, 182 P.3d 1027* , the California Supreme Court held that as an officer of the court, a receiver is not an agent of any particular party to the action, but represents all persons interested in the property. See *Ch. 486, Receivers, § 486.11[2]*.

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1-1 California Forms of Pleading and Practice--Annotated § 1.170

§ 1.170 Sanctions

Dismissal as Sanction--No Abuse of Discretion to Dismiss Complaint Based on Plaintiff's Egregious Conduct. In *Stephen Slesinger, Inc. v. Walt Disney Co. (2007) 155 Cal. App. 4th 736* , the trial court did not abuse its inherent discretion in dismissing plaintiff's complaint as a terminating sanction for deliberate and egregious misconduct. Plaintiff employed an investigator who improperly entered areas of defendant's properties not accessible to the public and trespassed onto a document destruction firm's secure facility and, at those locations, improperly took documents defendant had not abandoned. Plaintiff knew of the investigator's illegal conduct, or at least acted with deliberate indifference to whether his conduct was legal. Plaintiff also altered stolen documents with the intent to mislead to create a false impression documents were not confidential or that defendant had created confidential and nonconfidential sets of documents. Lesser sanctions were inadequate to ensure fair trial. See Ch. 510, *Sanctions* .

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1-1 California Forms of Pleading and Practice--Annotated § 1.171

§ 1.171 Schools

Possible Cause of Action Under § 504 of Rehabilitation Act Regulations. In *Mark H. v. Lemahieu (9th Cir. 2008) 513 F.3d 922* , an action by parents individually and as guardians ad litem for their autistic daughters against a state education department for alleged violations of the IDEA and § 504 of Rehabilitation Act of 1973, the Ninth Circuit would not decide whether the plaintiffs alleged a privately enforceable cause of action for damages. Although injunctive relief was available under the IDEA, monetary damages were not. Although the FAPE requirements in the IDEA and in the § 504 regulations requiring a FAPE were overlapping but different, the availability of relief under the IDEA did not limit the availability of a damages remedy under § 504 FAPE regulations. However, the parents did not specify which § 504 regulations they believed were violated and which supported a privately enforceable cause of action. See Ch. 513, *Schools: Student Rights and Responsibilities* .

Mother Lacked Standing to Sue Under IDEA Because She Did Not Suffer Injury. In *Levina v. San Luis Coastal Unified School Dist. (9th Cir. 2007) 514 F.3d 866* , after a school district filed an administrative complaint against a mother when she refused to consent to an Individualized Education Plan for her son, and the administrative hearing officer dismissed the complaint without prejudice, the mother lacked standing to pursue an action in federal district court under the IDEA claiming that the hearing officer erred in failing to dismiss with prejudice and in failing to identify her as a prevailing party. The mother did not suffer an injury in fact because her injuries were speculative, and she did not affirmatively request relief because the school district had filed the administrative complaint and when the hearing officer dismissed the matter without prejudice, it merely restored the status quo. See Ch. 513, *Schools: Student Rights and Responsibilities* .

Mother Not Entitled to Damages Under IDEA. In *Blanchard v. Morton Sch. Dist. (9th Cir. 2007) 504 F.3d 771* , the Ninth Circuit found that a mother was not entitled to damages to compensate her for lost income and the emotional distress she experienced during her ultimately successful efforts to obtain benefits for her son under the Individuals With Disabilities Education Act, because *42 U.S.C. § 1983* did not create a cause of action for money damages under the IDEA for lost earnings and the suffering of a parent pursuing IDEA relief. Further, because the mother was not a qualified individual with disability, her claim was not cognizable under either Title II of the Americans With Disabilities Act of 1990 or § 504 of Rehabilitation Act of 1973. See *Ch. 513, Schools: Student Rights and Responsibilities, § 513.33[5][h]*.

Dismissal of Action Based on Conflicts Over Student's IEP for Failure to Exhaust Administrative Remedies. In *Kutasi v. Las Virgenes Unified Sch. Dist. (9th Cir. 2007) 494 F.3d 1162* , an action by parents and an autistic student brought under *42 U.S.C. § 1983* and *§ 504* of the Rehabilitation Act of 1973, based on conflicts between the plaintiffs and the school district over the student's IEP, was properly dismissed for failure to exhaust administrative remedies. Plaintiffs alleged injuries could be redressed to some degree by the IDEA's administrative procedures and remedies. See Ch. 513, *Schools: Student Rights and Responsibilities* .

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§ 1.171A Securities

Securities Act of 1933--State Court Class Action Not Removable. Per *Luther v. Countrywide Home Loans Serv'g LP (9th Cir. 2008) 533 F.3d 1031* , a suit commenced in a state court under the Securities Act of 1933 may not be removed to federal court, pursuant to *15 U.S.C. § 77v(a)*. The Ninth Circuit has held that the Class Action Fairness Act of 2005, which permits in general the removal to federal court of high-dollar class actions involving diverse parties, does not supersede that specific bar against removal. See *Ch. 515, Securities, § 515.10[3]*.

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§ 1.172 Settlement and Release

Settlement Applied to Offset Judgment in Favor of Nonsettling Defendant. In *Brawley v. J.C. Interiors, Inc. (2008) 161 Cal. App. 4th 1126, 74 Cal. Rptr. 3d 832* , the court found that when each party sues the other for breach of contract, and each party is found by the jury to have breached the contract, the proper procedure for the court is to offset the jury's damages award findings against each other, just as the court would do if there had been no settlement, and to then apply the settlement credit to any net amount of damages for which the nonsettling defendant would have been liable if there had been no settlement. See Ch. 520, *Settlement and Release* .

No Requirement That Release Waive *Civ. Code § 1542*. In *Perez v. Uline (2007) 157 Cal. App. 4th 953* , an employment severance agreement could be enforced despite the lack of a waiver of *Civ. Code § 1542*, providing that a general release does not extend to claims the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor. The agreement stated that the plaintiff waived all claims existing as of the date he signed the agreement arising from or relating to his employment or termination of his employment and plaintiff understood he was releasing claims arising under all the statutes the agreement referred to, even those he did not understand. Further, nothing in *Civ. Code § 1542* required that it be designated in the release or that a party specifically waive its provisions. See Ch. 520, *Settlement and Release* .

Judicial Council Form for Section 998 Offer to Compromise. The Judicial Council has promulgated a form for optional use by a single plaintiff in an action for money damages involving a single defendant to make an offer to compromise under *Code Civ. Proc. § 998*. The form also contains a form by acceptance by the defendant. See Ch. 520, *Settlement & Release* .

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1-1 California Forms of Pleading and Practice--Annotated § 1.173

§ 1.173 Torts

[1] Abuse of Minors and Elderly

Knowledge of Agent With Duty to Report May Be Imputed to Principal Under *Code Civ. Proc. § 340.1(b)(2)*. In *Santillan v. Roman Catholic Bishop of Fresno (2008) 163 Cal. App. 4th 4* , the court of appeal held that for purposes of applying the revival statute of limitations for child abuse actions against non-perpetrator defendants who had notice of abuse but failed to take protective measures, when establishing the requisite knowledge on the part of a principal, knowledge on the part of an agent may be imputed to the principal if the agent had a duty to report that information to the principal. See *Ch. 5, Abuse of Minors and Elderly, § 5.13*.

Constructive Notice Under *Code Civ. Proc. § 340.1(b)(2)* Requires Actual Notice of Relevant Facts; Principal May Be Liable for Acts of Ostensible Agent. In *Deutsch v. Masonic Homes of California, Inc. (2008) 164 Cal. App. 4th 748* , the court of appeal held that for purposes of applying the revival statute of limitations for child abuse actions against non-perpetrator defendants who had notice of abuse but failed to take protective measures, constructive notice cannot be based on what the defendant *should* have noticed, but did not, even if plaintiff argues that the conduct was so pervasive and obvious that a reasonably attentive person would have noticed. The court also held that a principal may be liable when the principal intentionally or through the lack of ordinary care causes a third person to believe another person is an agent even though that person is not actually employed by the principal. See *Ch. 5, Abuse of Minors and Elderly, § 5.13*.

All Elements Under Elder Abuse Statute Must Be Proven by Clear and Convincing Evidence. In *Perlin v. Fountain View Management, Inc. (2008) 163 Cal. App. 4th 657* , the court of appeal held that because liability for the requisite abuse or neglect under the elder abuse statute must be shown by clear and convincing evidence, rather than the preponderance of the evidence standard generally applicable in civil cases, all elements of the abuse or neglect, including causation, are subject to that heightened burden of proof in order to establish eligibility for the heightened remedies available under the statute. See *Ch. 5, Abuse of Minors and Elderly, § 5.35*.

***Code Civ. Proc. § 425.13* Applicable to Elder Abuse Actions Against Religious Corporations.** In *Little Co. of Mary Hospital v. Superior Court (2008) 162 Cal. App. 4th 261* , the court of appeal held that although the procedural

requirements of *Code Civ. Proc. § 425.13* do not apply to an action brought under the Elder Abuse Act, the similar procedural requirements of *Code Civ. Proc. § 425.14* when a plaintiff seeks to recover punitive damages from a religious corporation do apply to a cause of action brought under the Elder Abuse Act. See *Ch. 5, Abuse of Minors and Elderly, § 5.35*.

Pleading Standard for Childhood Sexual Abuse Action Against Nonperpetrator Entity Clarified. In *Doe v. City of Los Angeles (2007) 42 Cal. 4th 531* , the California Supreme Court held that the plaintiff bringing an action for childhood sexual abuse against a nonperpetrator entity must establish that the nonperpetrator defendant had actual knowledge, constructive knowledge, or was otherwise on notice that the perpetrator had engaged in past unlawful sexual conduct with a minor and, despite this knowledge or notice, failed to take reasonable preventative steps or implement reasonable safeguards to avoid acts of future sexual conduct by the perpetrator, and for these purposes, constructive knowledge exists if, after examining the facts in the nonperpetrator defendant's possession, a reasonable person of ordinary intelligence--or, in the particular circumstance, a person of superior intelligence--would have inferred that the perpetrator had had prior unlawful sexual conduct with a minor or regarded it as so highly probable as to take action under the assumption that the perpetrator had done so. See *Ch. 5, Abuse of Minors and Elderly, § 5.13*.

Tort Claims Act Compliance Required for Sexual Abuse Actions Against Non-Abusing Entities Under 2003 Revival Period. In *Shirk v. Vista Unified School Dist. (2007) 42 Cal. 4th 201* , the California Supreme Court held that a plaintiff seeking to take advantage of the 2003 statute of limitations revival period in a childhood sexual abuse action against a negligent public entity must have complied with the claims presentation requirement of the California Tort Claims Act at the time the cause of action initially accrued. See *Ch. 5, Abuse of Minors and Elderly, § 5.13*.

Standard of Review of Protective Order Issued Under Elder Abuse Statute Clarified. In *Bookout v. Nielsen (2007) 155 Cal. App. 4th 1131* , the Court of Appeal held that a trial court's issuance of a protective order under *Welf. & Inst. Code § 15657.03* may be reviewed for abuse of discretion, and the factual findings necessary to support a protective order need only be supported by a preponderance of the evidence and are reviewed under the substantial evidence test. See *Ch. 5, Abuse of Minors and Elderly, § 5.74[2]*.

[1A] Assault and Battery

Action Against Police for Unreasonable Use of Deadly Force Not Barred by Conviction for Resisting Police in Performance of Duties. In *Yount v. City of Sacramento (2008) 43 Cal. 4th 885* , the California Supreme Court held that although an admission by a convicted criminal defendant that he or she resisted officers in the performance of their duties, and that those officers had the right to respond with reasonable force, may bar a civil action based on the use of reasonable force, an action for battery alleging the *unreasonable* use of deadly force is not barred if that civil action would not call into question the validity of the arrest and conviction. See *Ch. 58, Assault and Battery, § 58.22[2]*.

[1B] Conspiracy

Private Parties Not Liable for Conspiracy to Violate Statute Governing Only Public Officials. In *Klistoff v. Superior Court (2007) 157 Cal. App. 4th 469* , the court of appeal held that private parties could not be liable for conspiracy to violate *Gov. Code § 1090*, which only prohibits public officials from holding financial interests in public contracts and does not place any duty on private parties. See *Ch. 126, Conspiracy, § 126.11[3][b]*.

No Conspiracy Liability for Attorneys Communicating With Commercial Tenants on Behalf of Landlord. In *Panoutsopoulos v. Chambliss (2007) 157 Cal. App. 4th 297* , the court of appeal held that, for purposes of pleading an alleged conspiracy between attorney and client, attorneys representing a landowner owed no actionable independent duty to the landowner's commercial tenants when communicating with the commercial tenants about their possible lease violations in furtherance of their client's interests. See *Ch. 126, Conspiracy, § 126.14[2][c][i]*.

[2] Damages

Evidence of Dissimilar Misconduct Inadmissible to Prove Right to Punitive Damages. In *Holdgrafer v. Unocal Corp. (2008) 160 Cal. App. 4th 907* , the court of appeal held that, because evidence of other misconduct by the defendant is inadmissible to prove either a right to or amount of punitive damages if that other misconduct is not sufficiently similar to the misconduct that allegedly damaged the plaintiff, an oil company's denials and concealments in relation to other oil spills and contaminations was inadmissible in a suit involving the amount of damage from subsurface contamination that was not denied or concealed. See *Ch. 177, Damages, § 177.51[5][a], [14]*.

Testimony on Deceitful Concealing of Wealth Can Support Imposition of Higher Amount of Punitive Damages. In *County of San Bernardino v. Walsh (2007) 158 Cal. App. 4th 533* , the court of appeal held that evidence that a defendant has systematically and deceitfully manipulated and concealed assets and net worth and provided evasive or knowingly false testimony on the issue at trial provides a fact-finder or trial court with wide latitude to make inferences unfavorable to the defendant when setting an amount of punitive damages. See *Ch. 177, Damages, § 177.51[16]*.

Standard for Proving Liability to Pay Third Party as Element of Damages Clarified. In *Green Wood Industrial Co. v. Forceman Internat. Development Group, Inc. (2007) 156 Cal. App. 4th 766* , the court of appeal held that if a plaintiff seeks damages to compensate for a liability owed to a third party caused by defendant's actionable conduct, but plaintiff has not yet paid that third-party liability, plaintiff must provide more than just evidence of an obligation to pay, but must prove to a reasonable certainty that plaintiff could and would pay the liability. See *Ch. 177, Damages, § 177.46[1]*.

Medi-Cal Lien Statutes Amended. Under amended *Welf. & Inst. Code § 14124.76*, when a Medi-Cal lien has been filed in a suit, all reasonable efforts are to be made to support Medi-Cal's advance agreement as to what portion of a settlement, judgment, or award represents payment for medical expenses; however, absent such advance agreement, the matter must be submitted to the court for decision. Amended *Welf. & Inst. Code § 14124.78* and new *Welf. & Inst. Code § 14124.785* also place certain limits on the amount that may be recovered under a Medi-Cal lien. See *Ch. 177, Damages, § 177.54[1]*.

Federal Instrumentality Such as Federal Credit Union Not Generally Immune From Punitive Damages. In *McGee v. Tucoemas Federal Credit Union (2007) 153 Cal. App. 4th 1351* , the court of appeal held that a federal instrumentality, such as a federal credit union, is not generally entitled to immunity from punitive damages merely by virtue of its status as a federal instrumentality, noting that if Congress has provided that the instrumentality may sue and be sued, immunity from punitive damages is generally deemed to have been waived as an incident of suit. See *Ch. 177, Damages, § 177.51[9]*.

Court Reduction in Compensatory Damages Does Not Mandate Corresponding Reduction in Punitive Damages. In *McGee v. Tucoemas Federal Credit Union (2007) 153 Cal. App. 4th 1351* , the Court of Appeal held that a reduction in compensatory damages will not necessarily mandate a corresponding reduction in punitive damages, and a trial court may issue a remittitur as to compensatory damages, but refuse to grant a reduction in punitive damages, so long as the punitive damage award still bears a reasonable relation to the reduced compensatory damage award and the award is not otherwise excessive. See *Ch. 177, Damages, § 177.51[15]*.

[3] Death and Survival Actions

Putative Spouse Doctrine Applied to Domestic Partnership. In *In re Domestic Partnership of Ellis & Arriaga (2008) 162 Cal. App. 4th 1000* , the court of appeal held that domestic partners who have failed to comply with the domestic partnership registration requirements, but who held a reasonable, good-faith belief that they had registered with the Secretary of State, are entitled under the putative spouse doctrine to the same rights granted to domestic partners who have properly registered. See *Ch. 181, Death and Survival Actions, § 181.14[2]*.

Omitted Heir Named But Not Served in Wrongful Death Action May Maintain Subsequent Action. In *Romero v. Pacific Gas & Elec. Co. (2007) 156 Cal. App. 4th 211* , the court of appeal held that if an actual plaintiff to a wrongful death action joins a potential plaintiff as a nominal defendant, but fails to serve that nominal party with a summons and complaint, that nominal defendant is not a party to the action and he or she is not barred from bringing a separate wrongful death action if the initial action is settled. The court also held that the actual defendant has the burden of determining whether an heir has been served. See *Ch. 181, Death and Survival Actions, § 181.12[8]*.

Wrongful Death Action Not Barred by Failure to Bring Decedent's Original Action to Trial Within Five Years. In *Brumley v. FDCC California, Inc. (2007) 156 Cal. App. 4th 312* , the Court of Appeal held that wrongful death and loss of consortium claims did not relate back to personal injury claims brought by a decedent before his or her death, and therefore the five-year time limit for bringing a case to trial applicable to the original personal injury action did not apply to the subsequent wrongful death and loss of consortium claims. See *Ch. 181, Death and Survival Actions, § 181.23[1]*.

[3A] Elevators and Escalators

Admissibility of Safety Regulations in Action by Subcontractor's Employee Clarified. In *Millard v. Biosources, Inc. (2007) 156 Cal. App. 4th 1338* , the court of appeal held that under *Lab. Code § 6304.5*, safety regulations may be admissible in actions brought by employees of subcontractors against general contractors that retain control of safety conditions only if the general contractor affirmatively contributed to the employee's injuries. See *Ch. 244, Elevators and Escalators, § 244.10[2]*.

[3B] Emergency Vehicles

MICRA Applicable to EMT Negligence. In *Canister v. Emergency Ambulance Service, Inc. (2008) 160 Cal. App. 4th 388* , the court of appeal held that the Medical Injury Compensation Reform Act of 1975 (MICRA) applies to actions against paramedics and other emergency medical technicians licensed under *Health & Safety Code § 1797 et seq.* if the cause of action is based on professional negligence; and for these purposes, negligence in the operation of an ambulance when transporting a patient to or from a medical facility is included under the term "professional negligence." See *Ch. 246, Emergency Vehicles, § 246.16*.

[3C] Fires

Public Entity's Recovery of Firefighting Costs Not Affected by Entity's Own Negligence. In *People ex rel. Grijalva v. Superior Court (2008) 159 Cal. App. 4th 1072* , the court of appeal held that a public entity's own negligence in fighting a fire or in failing to minimize its firefighting costs cannot be used to reduce the entity's recovery of firefighting costs under *Health & Safety Code § 13009*. See *Ch. 267, Fires, § 267.18[2]*.

[4] Fraud and Deceit

Reliance on Falsity of Advertising When Purchasing Product in Order to Sue Does Not Constitute Justifiable Reliance. In *Buckland v. Threshold Enterprises, Ltd. (2007) 155 Cal. App. 4th 798* , the Court of Appeal held that a consumer who purchases a product with the belief that the manufacturer has falsely represented the product in its advertising cannot show actual reliance to support a fraudulent misrepresentation action. See *Ch. 269, Fraud and Deceit, § 269.16[2]*.

[5] Games, Sports, and Athletics

Primary Assumption of Risk Applied to Errant Golf Shot. In *Shin v. Ahn (2007) 42 Cal. 4th 482* , the California Supreme Court held that a golfer who injures another golfer with an an errant golf shot may defend against liability on

the basis of the primary assumption of risk doctrine, so long as the defendant golfer did not intend to injure the other golfer or engage in conduct so reckless as to be totally outside the range of ordinary activity involved in the sport. While a golfer cannot just ignore other players when making a shot, once having checked to see if others are reasonably likely to be struck and having concluded that it is safe to hit, a golfer who then concentrates on the ball in order to make the shot is not required to break his or her concentration in order to check the field again. In addition, the violation of a golfing rule of etiquette by the defendant does not in and of itself establish a basis for liability. See *Ch. 273, Games, Sports, and Athletics, § 273.30[7][a]*; *Ch. 380, Negligence, § 380.172[4][a][vii]*.

[6] Libel and Slander

Media Defendant Not Liable for Publishing One-Sided Report; Discovery Requirements Under Anti-SLAPP Statute Clarified. In *Paterno v. Superior Court (2008) 163 Cal. App. 4th 1342* , the court of appeal held that a media defendant is not liable in defamation for publishing a factual account that provides only one perspective on a story, but fails to include additional facts that might give the reader or listener a different impression of the events discussed. The court also held that a plaintiff opposing a motion to strike under *Code Civ. Proc. § 425.16* who must demonstrate actual malice to prevail on a defamation claim does not have good cause to seek discovery on the issue of malice without first making a prima facie demonstration that the allegedly defamatory statements are provably false factual assertions. See *Ch. 340, Libel and Slander, § 340.55[3]*.

No Third-Party Publication Found When Defamatory Material Faxed to Number Provided by Plaintiff. In *Martinelli v. International House USA (2008) 161 Cal. App. 4th 1332* , the court of appeal held that allegedly defamatory allegations contained in a letter to plaintiff faxed to a number provided by plaintiff did not constitute publication to a third party, even though plaintiff's daughter read the fax after it came out of the machine. See *Ch. 340, Libel and Slander, § 340.17[1]*.

Single Publication Rule Applicable, Discovery Rule Inapplicable to Defamation Action When Publication Is Not Widely Disseminated to Public. In *Hebrew Academy of San Francisco v. Goldman (2007) 42 Cal. 4th 883* , the California Supreme Court held that in a defamation action, the single publication rule is applicable to a publication available to the public even if the publication is not widely disseminated or mass marketed, although the discovery rule is inapplicable to such a publication when applying the statute of limitations. See *Ch. 340, Libel and Slander, §§ 340.28, 340.30[2]*.

Plaintiff Seeking Identity of Anonymous Internet Poster Must Make Prima Facie Showing of Libel in Order to Defeat Motion to Quash Subpoena. In *Krinsky v. Doe 6 (2008) 159 Cal. App. 4th 1154* , the court of appeal held that if a defendant being sued for defamation because of the content of an anonymous internet posting has been notified that a plaintiff seeks his or her identity, and the defendant seeks to quash a subpoena issued to the site host or service provider, the plaintiff must make a prima facie showing of the elements of libel in order to defeat the motion to quash. See *Ch. 340, Libel and Slander, § 340.76*.

Alleged Victim of Child Abuse Cannot Be Held Liable Under *Penal Code § 11172* for Making False Report. In *Chabak v. Monroy (2007) 154 Cal. App. 4th 1502* , the Court of Appeal held that an alleged victim of child abuse cannot be held liable under *Penal Code § 11172(a)* for making a false report of the abuse to police, and the litigation privilege of *Civ. Code § 47(b)* otherwise immunizes the alleged victim from liability for making statements about the alleged abuse to parents or others in anticipation of litigation. See *Ch. 340, Libel and Slander, § 340.73[2]*.

[7] Malicious Prosecution and Abuse of Process

Fraud Exception to Interim Adverse Judgment Rule Cannot Be Relitigated in Malicious Prosecution Action. In *Plumley v. Mockett (2008) 164 Cal. App. 4th 1031* , the court of appeal held that, although there is a fraud exception to the general rule that a trial court judgment in the underlying action in favor of the malicious prosecution defendant will

establish probable cause for bringing the action even if that decision is subsequently reversed on appeal, if the claims of fraud or perjury are litigated and rejected by the fact finder in the underlying action, a malicious prosecution plaintiff cannot rely on those same claims of fraud or perjury to establish the absence of probable cause in the malicious prosecution action. See *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.23[4]*.

Co-counsel Joining After Suit Is Filed May Be Liable for Malicious Prosecution When Failing to Take Corrective Steps. In *Sycamore Ridge Apartments LLC v. Naumann (2008) 157 Cal. App. 4th 1385* , the court of appeal held that an attorney joining in as co-counsel for a plaintiff in a case that has already been filed may be held liable for malicious prosecution if failing to take corrective steps immediately after associating in as co-counsel to cease prosecution of claims that lack probable cause and have been brought maliciously. See *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.16[1]*.

Delaying Service of Process in One Lawsuit to Achieve Larger Settlement in Another Lawsuit Against Same Defendant Can Constitute Abuse of Process. In *Booker v. Rountree (2007) 155 Cal. App. 4th 1366* , the court of appeal held that delaying service of process in one lawsuit with knowledge that another identical complaint has already been filed and served by a different plaintiff, with the ulterior motive of obtaining a larger settlement than would be obtained had defendant known of the second claim when settling the first, can support a finding of abuse of process, and such conduct is not protected by the litigation privilege. See *Ch. 357, Malicious Prosecution and Abuse of Process, §§ 357.52, 357.56[1]*.

[8] Mental Suffering and Emotional Distress

Facts Sufficient to State Emotional Distress Claim Against Health Insurer. In *Hailey v. California Physicians' Service (2007) 158 Cal. App. 4th 452* , the court of appeal held that plaintiffs had adequately stated a cause of action for intentional infliction of emotional distress against their health insurer after the insurer sought to rescind their policy after one of the plaintiffs suffered severe injuries in an automobile accident, although the insurer learned of alleged misrepresentations in the original insurance application justifying the rescision a month before the accident. See *Ch. 362, Mental Suffering and Emotional Distress, § 362.10[3][b]*.

To Recover for Emotional Distress as Bystander, Contemporaneous Awareness of Injury Requires More Than Belief That Injury Was More Likely Than Not. In *Ra v. Superior Court (2007) 154 Cal. App. 4th 142* , the Court of Appeal held that a wife was not entitled to recover for negligent infliction of emotional distress as a bystander when she heard a loud crash emanating from a nearby area of a store and believed more likely than not that her husband had been injured, but she did not otherwise observe or contemporaneously perceive an injury to her husband as it actually occurred. See *Ch. 362, Mental Suffering and Emotional Distress, § 362.11[6][c][iv]*.

[9] Negligence

Negligent or Wrongful Conduct Required in Action for Dangerous Condition of Public Property. In *Metcalf v. County of San Joaquin (2008) 42 Cal. 4th 1121* , the California Supreme Court held that, under the plain language of *Gov. Code § 835*, it is not enough that a plaintiff suing a public entity for injury caused by a dangerous condition on public property plead and prove that a dangerous condition existed and that it caused injury to plaintiff, but plaintiff must also plead and prove that the dangerous condition was created through the negligent or wrongful act or omission of an employee of the public entity, or that the public entity had notice of the dangerous condition a sufficient time prior to the injury to take remedial steps. The Court noted that while the fact that a dangerous condition was created by a public entity employee, even created deliberately, may be used to support a finding that the dangerous condition was created negligently, such facts do not *necessitate* a factual finding that the dangerous condition was created negligently or wrongfully. The Court also affirmed that the negligence standard applicable to a finding of liability under this statute is the common-law ordinary negligence standard, which measures the reasonableness of a defendant's conduct in light of the foreseeable risk of harm. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.81[1],*

[4][a].

Primary Assumption of Risk Applied to Injury Suit Stemming From Skateboard "Product Toss" at Promotional Event. In *McGarry v. Sax* (2008) 158 Cal. Ap. 4th 983, the court of appeal held that primary assumption of risk was a defense when plaintiff was injured by co-participants in a "product toss" at a skateboarding competition sponsored by a skateboard store. See *Ch. 380, Negligence, § 380.172[4][c]*.

Primary Assumption of Risk Applied to Injury Sustained by Passenger on Personal Watercraft. In *Truong v. Nguyen (2007) 156 Cal. App. 4th 865* , the court of appeal held that the primary assumption of risk doctrine applies to the activity of riding a personal watercraft, even if the rider is merely a passenger on the watercraft and the watercraft is being operated at a modest rate of speed. See *Ch. 273, Games, Sports, and Athletics, § 273.30[6]*, and *Ch. 380, Negligence, § 380.172[4][a][ii]*.

No Wrongful Life Liability for Failing to Advise on Abortion When No Warning of Possible Birth Defects Existed. In *Barragan v. Lopez (2007) 156 Cal. App. 4th 997* , the court of appeal held that liability cannot be imposed for wrongful life just because the physician fails to advise the mother of the right to terminate a pregnancy, if the physician provides proper care and testing and, up to the time at which the fetus is considered viable, nothing indicates that the fetus is in danger of being born with a birth defect. See *Ch. 367A, Minors: Tort Actions, § 367A.11[3][c]*.

Residential Substance Abuse Treatment Facility Owed No Duty to Neighborhood Residents for Harm Caused by Escapees. In *Rice v. Center Point, Inc. (2007) 154 Cal. App. 4th 949* , the Court of Appeal held that a residential substance abuse treatment facility housing inmates from the Department of Corrections owes no legal duty to neighborhood residents who are injured by escaped inmates, even if the treatment facility is negligent in allowing inmates to escape with a kitchen knife stolen from the facility. See *Ch. 380, Negligence, § 380.32[3][b][i]*.

Duty to Students of Adult Education Classes Similar to Duty Owed to College Students. In *Patterson v. Sacramento City Unified School Dist. (2007) 155 Cal. App. 4th 821* , the Court of Appeal held that the same considerations that apply when determining the duty owed by colleges to their students should apply to school districts that offer adult education classes. See *Ch. 380, Negligence, § 380.32[3][c][vi]*.

[10] Physicians

MICRA Statute of Limitations Inapplicable to Intentional Torts. In *Unruh-Haxton v. Regents of University of California (2008) 162 Cal. App. 4th 343* , the court of appeal held that the statute of limitations provided in *Code Civ. Proc. § 340.5*, enacted as part of MICRA, did not apply to plaintiffs' causes of action for the intentional torts of fraud, intentional infliction of emotional distress, and conversion, based on allegations that doctors in a fertility clinic stole human genetic materials from plaintiffs, such as eggs that had been frozen for future use, and sold the materials without authorization. See *Ch. 295, Hospitals, § 295.13[2]*, and *Ch. 415, Physicians: Medical Malpractice, § 415.47[1]*.

Registered Social Worker Working Toward Licensure Is Covered by MICRA. In *Prince v. Sutter Health Central (2008) 161 Cal. App. 4th 971* , the court of appeal held that an unlicensed social worker who is registered with the appropriate agency and working toward licensure is a health care provider under MICRA. See *Ch. 415, Physicians: Medical Malpractice, § 415.10*.

Specific Jury Finding of No Consent Required When Using Special Verdict Form in Medical Battery Action. In *Saxena v. Goffney (2008) 159 Cal. App. 4th 316* , the court of appeal held that because performing a medical procedure without informed consent is not the same thing as performing that procedure with no consent at all, and the latter forms the basis for an action for battery, a party seeking to hold a physician liable for battery must obtain a specific jury finding that no consent was given if a special verdict form is used at trial. A finding that no informed consent was given is insufficient, as such a finding does not preclude the conclusion that *uninformed* consent was given. See *Ch. 415,*

Physicians: Medical Malpractice, § 415.20.

No Wrongful Life Liability for Failing to Advise on Abortion When No Warning of Possible Birth Defects Existed. In *Barragan v. Lopez (2007) 156 Cal. App. 4th 997* , the court of appeal held that liability cannot be imposed for wrongful life just because the physician fails to advise the mother of the right to terminate a pregnancy, if the physician provides proper care and testing and, up to the time at which the fetus is considered viable, nothing indicates that the fetus is in danger of being born with a birth defect. See *Ch. 367A, Minors: Tort Actions, § 367A.11[3][c]*.

Doctor's Communications With Patient's Insurer Covered by Arbitration Requirements of *Code Civ. Proc. § 1295*. In *Titolo v. Cano (2007) 157 Cal. App. 4th 310* , the court of appeal held that a doctor's communications with a patient's insurer about the patient's medical records, done at the request of the patient, comes within the provision of medical services for purposes of the arbitration provisions of *Code Civ. Proc. § 1295*, and disputes about the propriety and scope of the communications are covered by an arbitration agreement meeting the requirements of that statute. See *Ch. 415, Physicians: Medical Malpractice, § 415.51*.

Medical Students and Other Medical Professionals Exempt From Licensing Are Health Care Providers Under MICRA. In *Chosak v. Alameda County Medical Center (2007) 153 Cal. App. 4th 549* , the Court of Appeal held that medical students and other medical professionals who are authorized to practice in California, but who are specifically exempt from license or certificate requirements, are considered health care providers subject to MICRA. See *Ch. 415, Physicians: Medical Malpractice, § 415.10*.

[11] Premises Liability

Landowner Owed No Duty to Post Warning Sign at Intersection of Private Farm Road and Public Road. In *Garcia v. Paramount Citrus Assn., Inc. (2008) 164 Cal. App. 4th 1448* , the court of appeal held that the owner of agricultural land used for orchards owed no duty to post a warning sign at the spot that a private farm road intersected a public road just because an unauthorized driver who was using the farm road failed to recognize the transition to the public road, drove from the farm road to the public road at an excessive rate of speed, and caused a collision with another vehicle on the public road. See *Ch. 421, Premises Liability, § 421.15[2][d]*.

Apartment Owners Owed Duty to Extend Gate Around Leasing Office. In *Tan v. Arnel Management Co. (2008) 162 Cal. App. 4th 621* , the court of appeal held that owners of a 20-acre apartment complex had a duty of care owed to a tenant who was the victim of a carjacking to either move existing security gates so that they provided protection around the leasing office and its adjacent parking lot, or otherwise install a very similar gate around that area, which according to the existing evidence would require a minor gate extension over a small area. See *Ch. 421, Premises Liability, § 421.15[2][b]*.

Causation Evidence Sufficient to Support Tenant Action Against Landlord. In *Raven H. v. Gamette (2007) 157 Cal. App. 4th 1017* , the court of appeal held that, while the plaintiff did not know exactly how her assailant gained access to her apartment complex, the evidence was sufficient to support a finding that the landlord's failure to provide bars or locks on her first-story windows, which were provided to other tenants, and the landlord's failure to control vegetation growth around her windows, allowing the intruder to enter through a window shrouded in darkness, were a cause of plaintiff's injury. See *Ch. 421, Premises Liability, § 421.15[3]*.

Premises Liability Plaintiff Must Plead and Prove Lack of Triviality of Premises Defect. In *Kasparian v. AvalonBay Communities, Inc. (2007) 156 Cal. App. 4th 11* , the Court of Appeal held that lack of triviality of a premises defect is an element of a premises liability cause of action to be pleaded and proved by the plaintiff. See *Ch. 421, Premises Liability, § 421.14[3]*.

Landlord Generally Owes No Duty to Tenants Not to Rent to Suspected Gang Members. In *Castaneda v. Olsher*

(2007) 41 Cal. 4th 1205 , the California Supreme Court held that absent circumstances showing extraordinary foreseeability, a landlord owes no duty to existing tenants not to rent to suspected gang members, nor to screen the criminal records of suspected gang members before renting, although once having rented, a landlord may have a duty to evict if a threat of violence is highly foreseeable. See *Ch. 421, Premises Liability, § 421.15[2][c]*.

[12] Privacy

Government Tort Immunities Applicable to Privacy Action Based on California Constitution. In *Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE) (2007) 157 Cal. App. 4th 1056* , the court of appeal held that although the constitutional right to privacy was designed to protect against some forms of governmental intrusion, this right to privacy does not limit the scope of statutory immunities that existed under the California Tort Claims Act when the right to privacy was added in 1972. The court specifically held that *Gov. Code § 821.6*, which immunizes a governmental employee for injury caused by instituting or prosecuting any judicial or administrative proceeding within the scope of his or her employment, regardless of malice or lack of probable cause, extends to investigatory activities and may be used to defeat a claim for damages for violation of the constitutional right to privacy. See *Ch. 429, Privacy, § 429.16[20]*.

Prosecutorial Immunity Provides Complete Defense to Statutory Intrusion Claim. In *Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE) (2007) 157 Cal. App. 4th 1056* , the court of appeal held that *Civ. Code § 1708.8*, the so-called anti-paparazzi statute, cannot be used to impose liability on a public entity, or employee acting within the scope of his or her employment with a public entity, when a public employee is immune from liability for injury caused by instituting or prosecuting any judicial or administrative proceeding within the scope of his or her employment pursuant to *Gov. Code § 821.6*. See *Ch. 429, Privacy, § 429.34A[1]*.

Doctor's Communications With Patient's Insurer Covered by Arbitration Requirements of *Code Civ. Proc. § 1295*. In *Titolo v. Cano (2007) 157 Cal. App. 4th 310* , the court of appeal held that a doctor's communications with a patient's insurer about the patient's medical records, done at the request of the patient, comes within the provision of medical services for purposes of the arbitration provisions of *Code Civ. Proc. § 1295*, and disputes about the propriety and scope of the communications are covered by an arbitration agreement meeting the requirements of that statute. See *Ch. 415, Physicians: Medical Malpractice, § 415.51*.

Rules for Transfer of Publicity Rights for Deceased Personalities Amended. *Civ. Code § 3344.1* has been amended to alter the rules governing the vesting and transfer of the right to enforce the right of publicity of a deceased personality. See *Ch. 429, Privacy, § 429.36[8]*.

Statute Specifies Psychotherapist's Right to Disclose Medical Information to Prevent Harm to Identifiable Victim. *Civ. Code § 56.10* has been amended to specify the circumstances under which a psychotherapist may disclose medical information when the psychotherapist believes disclosure is necessary to prevent a serious and imminent threat to a reasonably foreseeable victim. See *Ch. 429, Privacy, § 429.200[5]*.

Disclosure of Medical Information of Minors Under County Control Authorized for Medical Treatment Coordination. New *Civ. Code § 56.103* provides that a health care provider may disclose medical information to a county social worker, a probation officer, or any other person legally authorized to have custody or care of a minor for the purpose of coordinating the health care services and medical treatment provided to the minor, if the minor has been taken into temporary custody, is the subject of a court petition, or has been adjudged to be a dependent child or ward of the juvenile court. See *Ch. 429, Privacy, § 429.200[5]*.

New Notice Requirements Prior to Testing for HIV. *Health & Safety Code § 120990* has been amended to alter the requirements for obtaining informed consent prior to testing for HIV. See *Ch. 429, Privacy, § 429.256[1], [3]*.

Multiple Actions Taken in Furtherance of One Common Plan of Appropriation Limited to One Payment of Statutory Penalty. In *Miller v. Collectors Universe, Inc. (2007) 154 Cal. App. 4th 1047* , the Court of Appeal held that 14,060 separate certificates of authenticity issued to customers over several months by a celebrity autograph authentication business using the plaintiff's name without consent gave rise to only a single cause of action for appropriation under *Civ. Code § 3344* and supported only a single payment of $750 for statutory damages, as these acts were taken with a common purpose and as part of a common plan. See *Ch. 429, Privacy, § 429.474[4]*.

[12A] Products Liability

Punitive Damages Award Based in Part Upon Harm Defendant Caused Non-Parties Is Unconstitutional. The U.S. Supreme Court issued yet another pronouncement on the constitutionality of punitive damages. The Court struck down a $79.5 million punitive damage against a cigarette manufacturer, holding that an award based in part upon the jury's desire to punish the defendant for harming persons not before the court would amount to a taking of "property" without due process. *Philip Morris USA v. Williams (2007)549U.S.346, 127 S. Ct. 1057, 1063, 166 L. Ed. 2d 940, 949* . See *Ch. 460, Products Liability, § 460.104[15][b]*.

Supreme Court Holds Medical Devices Act Preempts State Common Law Claims. In *Riegel v. Medtronic, Inc., 2008 U.S. LEXIS 2013* , the U.S. Supreme Court held that *21 U.S.C.S. § 360k(a)*, the MDA's express preemption clause, bars common law claims challenging the safety or effectiveness of a medical device given FDA premarket approval. The high Court also granted a drug manufacturer's petition for writ of certiorari and agreed to hear its first case on the issue of federal preemption of drug liability claims. The Court will determine whether conflict preemption preempts state law claims involving fraud-on-the-FDA, and whether such claims are barred by Michigan's drug shield law. *Warner-Lambert Co. v. Kent (2007) 551 U.S. 1190, 128 S. Ct. 31, 168 L. Ed. 2d 807* . See *Ch. 460, Products Liability, § 460.52[2][a], [b]*.

No Special Presumption That Smoking Is Addictive or Harmful for Statute of Limitation Purposes. In responding to certified questions regarding the application of the statute of limitations, the Supreme Court of California in *Grisham v. Philip Morris U.S.A., Inc. (2007) 40 Cal. 4th 623* held that there is no special presumption based on common knowledge that plaintiffs are aware that smoking is addictive or harmful. However, there is a general, rebuttable presumption that plaintiffs have knowledge of the wrongful cause of their injuries. The Court also held that the fact that an unfair competition claim based on *economic* injury from addiction might be time-barred did not mean that plaintiff's other claims based on *physical* injury were also barred. See *Ch. 460, Products Liability, § 460.31[2][i]*.

Federal Law Preempts Section 17200 ***Unfair Competition Claims Against Tobacco Manufacturers.*** *The Supreme Court of California in In re Tobacco Cases II (2007) 41 Cal. 4th 1257* , *overruling Mangini v. R.J. Reynolds Tobacco Co. (1994) 7 Cal. 4th 1057* , ruled that claims based on the state's unfair competition law and the penal code section prohibiting the sale of tobacco to minors and possession of tobacco by minors were preempted by the federal Labeling Act. See Ch. 460, *Products Liability* , §§ 460. 52[2][i], 460.104[39].

Appellate Courts Hold MDA Preempts Negligence and Strict Liability Claims. Two appellate courts issued opinions addressing federal preemption of medical devices. Division Three of the Fourth Appellate Department determined that the federal Medical Device Amendments (MDA) preempted negligence and strict liability claims regarding a heart valve [*Blanco v. Baxter Healthcare Corp. (2008) 158 Cal. App. 4th 1039]* . Division Seven of the Second Appellate Department then ruled that the MDA preempted claims alleging that a testicular prosthesis was defective because it lacked a warning on the outer packaging that the device had to be filled with saline prior to implantation [*Jessen v. Mentor Corp., 2008 Cal. App. LEXIS 61, at *17-*23]* . See *Ch. 460, Products Liability, § 460.52[2][b]*.

Federal Law Preempts Railroad Employee's Design Defect Claims. In *Frastaci v. Vapor Corp. (2007) 2007 Cal. App. LEXIS 2147* , a locomotive repairman died of mesothelioma. The federal Boiler Inspection Act (BIA) foreclosed

the plaintiffs' design defect claims against the locomotive manufacturer, regardless of whether the locomotive was "in use" or off line when the injury occurred. See *Ch. 460, Products Liability, § 460.52[2][f]*.

[13] Railroads

Negligence Action Against Commuter Railroad Preempted by Federal Law. In *Southern California Regional Rail Authority v. Superior Court (2008) 163 Cal. App. 4th 712* , the court of appeal held that a negligence claim brought against a commuter railroad for an accident that occurred when defendant ran a train in push mode with a cab car in the lead position was preempted by federal law, because federal regulations addressed safety concerns over the use of cab cars in the lead position. See *Ch. 485, Railroads, § 485.60A*.

Scope of Federal Preemption in Railroad Cases Clarified. Under amended *49 U.S.C.S. § 20106*, a state law cause of action seeking damages for personal injury, death, or property damage is not preempted by federal law if the cause of action alleges that a party has (1) failed to comply with the federal standard of care established by a regulation or order on railroad safety issued by the Secretary of Transportation, or a regulation or order on railroad security issued by the Secretary of Homeland Security, covering the subject matter as provided in *49 U.S.C.S. § 20106(a)*; (2) failed to comply with its own plan, rule, or standard created pursuant to a regulation or order issued by either of the federal Secretaries; or (3) failed to comply with a state law, regulation, or order that is not incompatible with *49 U.S.C.S. § 20106(a)(2)*. See *Ch. 485, Railroads, § 485.60A*.

[14] Ships and Shipping

Commuter Seaman Not in Service of Ship When Bitten by Mosquito After Work Hours. In *Price v. Connolly-Pacific Co. (2008) 162 Cal. App. 4th 1210* , the court of appeal held that a seaman with permission to live in his own camper parked on company property was not in service of his ship when contracting a disease from a mosquito bite likely sustained after duty hours. See *Ch. 522, Ships and Shipping, § 522.33[3]*.

[15] Tort Claims Act

Lack of Signal or Crossing Guard at Crosswalk Near School Not Dangerous Condition of Public Property. In *Cerna v. City of Oakland (2008) 161 Cal. App. 4th 1340* , the court of appeal held that the lack of a traffic signal or crossing guard at a crosswalk near which a school has opened does not constitute a dangerous condition of public property. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.83[4]*.

No Suit Under False Claims Act Against Public Employee Acting in Scope of Employment. In *State of California ex rel. Dockstader v. Hamby (2008) 162 Cal. App. 4th 480* , the court of appeal held that because a public agency is required to defend and indemnify a public employee against claims arising out of an act or omission occurring within the scope of his or her employment, a public employee may not be sued under the False Claims Act for conduct taken within the scope of employment, as such a suit would be the equivalent of suing the public entity itself. See *Ch. 468, Public Entities and Officers: False Claims Actions, § 468.21[2]*.

Negligent or Wrongful Conduct Required in Action for Dangerous Condition of Public Property. In *Metcalf v. County of San Joaquin (2008) 42 Cal. 4th 1121* , the California Supreme Court held that, under the plain language of *Gov. Code § 835*, it is not enough that a plaintiff suing a public entity for injury caused by a dangerous condition on public property plead and prove that a dangerous condition existed and that it caused injury to plaintiff, but plaintiff must also plead and prove that the dangerous condition was created through the negligent or wrongful act or omission of an employee of the public entity, or that the public entity had notice of the dangerous condition a sufficient time prior to the injury to take remedial steps. The Court noted that while the fact that a dangerous condition was created by a public entity employee, even created deliberately, may be used to support a finding that the dangerous condition was created negligently, such facts do not *necessitate* a factual finding that the dangerous condition was created negligently

or wrongfully. The Court also affirmed that the negligence standard applicable to a finding of liability under this statute is the common law ordinary negligence standard, which measures the reasonableness of a defendant's conduct in light of the foreseeable risk of harm. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.81[1], [4][a]*.

Notice to Appear Is "Accusatory Pleading" for Purposes of *Gov. Code § 945.3*. In *Schmidlin v. City of Palo Alto (2007) 157 Cal. App. 4th 728* , the court of appeal held that a notice to appear served on a civil plaintiff for alleged criminal conduct constitutes an "accusatory pleading" for purposes of the limitations tolling provisions of *Gov. Code § 945.3*, regardless of whether that notice was ever filed with a court. The court also held that "charges pending before a court" includes any charges embodied in a notice to appear, as long as the charges have not yet been disposed of or defeated through prosecutorial inaction. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.42[4][a]*.

County Not Liable for Death Caused When Wife Murdered Husband With Drugs Stolen From County. In *de Villers v. County of San Diego (2007) 156 Cal. App. 4th 238* , the Court of Appeal, in determining that a county could not be held liable for a murder committed by an employee with drugs stolen from the medical examiners office, held that a public entity cannot be held liable under general tort principles for alleged negligence in hiring and supervising its employees, as there is no statutory basis for imposing such liability. The court also held that regulatory language in *21 C.F.R. § 1301.71* requiring licensed labs to "guard against" the theft of drugs with "effective controls and procedures" did not impose a mandatory duty on a licensed county facility to take any particular steps, thereby precluding liability for failing to perform a mandatory duty. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.61[1], [4]*.

Prisoner-Release Immunity Does Not Extend to Ministerial Act. In *Perez-Torres v. State of California (2007) 42 Cal. 4th 136* , the California Supreme Court held that ministerial acts undertaken in the performance of correctional policy decisions are not covered by the prisoner-release immunity of *Gov. Code § 845.8(a)*, and while the State's decision to revoke a prisoner's parole, even if based on erroneous information about the person's identity, is a policy decision covered by immunity, the failure of State personnel to release the prisoner after they knew or should have known that they were detaining the wrong person is a ministerial act not protected by immunity. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.103[6]*.

Violation of General Guideline Insufficient to Impose Liability on Public Entity Under *Gov. Code § 855*. In *Lockhart v. County of Los Angeles (2007) 155 Cal. App. 4th 289* , the Court of Appeal held that if a plaintiff seeks to impose public entity liability under *Gov. Code § 855* for violation of a regulation prescribing minimum standards for public or mental health equipment, personnel, or facilities, that regulation must have been promulgated by one of the four state departments specified by *Gov. Code § 855*, and regardless of whether liability is predicated on a statute or regulation, the relevant statute or regulation must prescribe a specific minimum standard that has been violated, rather than merely provide general guidelines. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.105[1][a]*.

[16] Trespass

Oil Extraction Wastewater Can Constitute Continuing Trespass. In *Starrh & Starrh Cotton Growers v. Aera Energy LLC (2007) 153 Cal. App. 4th 583* , the Court of Appeal held that wastewater produced through use of unlined percolation ponds during oil extraction can constitute a continuing trespass if it seeps into the groundwater of an adjacent landowner. See *Ch. 550, Trespass, § 550.17*.

Statutory Damages for Trespass Clarified. In *Starrh & Starrh Cotton Growers v. Aera Energy LLC (2007) 153 Cal. App. 4th 583* , the Court of Appeal held that restoration costs may be recovered under *Civ. Code § 3334* for trespass only if restoration is possible and economically feasible in light of all the competing interests. The court also held that profits obtained by the trespasser by virtue of the decision to trespass may be recovered as a "benefit obtained" under

Civ. Code § 3334, although the plaintiff must provide evidence specifically linking the profits to the decision to trespass. In *Bailey v. Outdoor Media Group (2007) 155 Cal. App. 4th 778* , the Court of Appeal held that if the defendant presents credible evidence of the expenses incurred, the trial court may offset those amounts against the gross income generated to determine gross profits. However, if the defendant does not present evidence of appropriate expenses, the trial court may award damages based on gross revenue as the benefit obtained by the trespass. See *Ch. 550, Trespass, § 550.21[1]*.

California Forms of Pleading and Practice--Annotated

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
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PART V. 2008 NEW DEVELOPMENTS

1-1 California Forms of Pleading and Practice--Annotated § 1.173A

§ 1.173A Trials

Skepticism About Criminal Justice System Is Not Proxy for Race. In *People v. Calvin (2008) 159 Cal. App. 4th 1377, 72 Cal. Rptr. 3d 300* , the court of appeal found that challenged jurors had skeptical attitudes toward the criminal justice system, and skepticism toward the criminal justice system could not be seen to be so prevalent among African-Americans that it could be considered a proxy for race and, as a result, peremptory challenges based on such an attitude could not be deemed discriminatory. See Ch. 322, *Juries and Jury Selection* .

Court Had Jurisdiction to Grant Partial New Trial Even Though Judge Not in California. In *Dell'Oca v. The Bank of New York Trust Co., N.A. (2008) 159 Cal. App. 4th 531, 71 Cal. Rptr. 3d 737* , a judge other than the judge who presided at trial and heard arguments on a new trial motion telephonically while out of state pursuant to the agreement of the parties could appoint another judge to sign the order conditionally granting a new trial. The superior court had territorial and subject matter jurisdiction over posttrial motions irrespective of the original judge's location, and appointing another judge to sign for the presiding judge in her absence was a proper exercise of the presiding judge's authority. See Ch. 371, *Motions After Trial* .

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1-1 California Forms of Pleading and Practice--Annotated § 1.174

§ 1.174 Unfair Competition

Separate Limitations Period Runs Against Third Party Who Obtains Misappropriated Trade Secret From Original Misappropriator. In *Cypress Semiconductor Corp. v. Superior Court (2008) 163 Cal. App. 4th 575* , the court of appeal held that if a third party subsequently obtains misappropriated trade secrets from the original misappropriating party, a plaintiff's claim against that third party accrues only when the plaintiff discovers that third party's misappropriation; as to that third party, consistent with the single-claim rule, any continuing misappropriation constitutes a single claim. See *Ch. 565, Unfair Competition, § 565.103[5]*.

Unpaid Wages Not Generally Recoverable Under Unfair Competition Statute From Owners, Officers, or Managers of Employer. In *Bradstreet v. Wong (2008) 161 Cal. App. 4th 1440* , the court of appeal held that while unpaid wages may be recovered from an employer under the unfair competition statute, *Bus. & Prof. Code § 17200 et seq.*, wages may not be recovered as restitution from the employer's owners, officers, or managers, unless the labor was performed for such persons personally or those persons appropriated funds from the employer that would otherwise have been used to pay the unpaid wages. See *Ch. 565, Unfair Competition, § 565.34[3][b]*.

Trademarks--Action Under *15 U.S.C. § 1125(a)(1)* *Based on Unfair Competition.* *The Ninth Circuit in Fisher Tool Co. v. Gillet Outillage (9th Cir. 2008) 530 F.3d 1063* has adopted the Federal Circuit's position in holding that in a complaint under *15 U.S.C. § 1125(a)(1)* based on the defendant's representation that someone (such as the plaintiff) infringed the defendant's patent, the plaintiff must show, in addition to the circumstances contemplated by the statute, that the defendant's representation was made in bad faith. See *Ch. 549, Trademarks and Trade Names, § 549.26[1][a]*.

Covenant Not to Solicit Customers Enforceable as Part of Employment Agreement. In *Alliant Ins. Services, Inc. v. Gaddy (2008) 159 Cal. App. 4th 1292* , the court of appeal held that if the seller of a business goes to work for the buyer as an employee after selling the company, a covenant prohibiting that employee from soliciting the buying company's customers in the event of termination of employment may be enforceable if necessary to protect the buyer's trade secrets, which may include confidential client information. See *Ch. 565, Unfair Competition, § 565.73[2]*.

Claim for Misappropriation of Patents and Trademarks Does Not Support Award of Attorney's Fees Under UTSA. In *CytoDyn of New Mexico, Inc. v. Amerimmune Pharmaceuticals, Inc. (2008) 160 Cal. App. 4th 288* , the court

of appeal held that an award of attorney's fees was not authorized under the Uniform Trade Secrets Act because the complaint alleged only misappropriation of patents and trademarks, which, by their very nature, are not trade secrets. See *Ch. 565, Unfair Competition, § 565.103[7][d]*.

Revenue From Product Sale May Be Recovered as Restitution Under Unfair Competition Statute. In *Shersher v. Superior Court (2007) 154 Cal. App. 4th 1491* , the Court of Appeal held that a plaintiff who purchases a product because of false or misleading advertisements or product packaging statements is entitled to recover the revenue obtained from the sale of the product from the product manufacturer as restitution under the unfair competition statute, *Bus. & Prof. Code § 17200 et seq.*, even if the plaintiff purchased the product from a retailer rather than directly from the manufacturer. See *Ch. 565, Unfair Competition, § 565.34[2][a]*.

Litigation Expenses Not "Injury in Fact" for Purposes of Standing to Sue Under Unfair Competition Statute. In *Buckland v. Threshold Enterprises, Ltd. (2007) 155 Cal. App. 4th 798* , the Court of Appeal held that a plaintiff may not effectively avoid the changes made to the unfair competition statute by Proposition 64 by claiming as "injury in fact" the expenses incurred in pursuing litigation against the defendant, nor may an individual consumer create the requisite injury by purchasing a defendant's product if the purchase was made solely to facilitate a subsequent lawsuit. See *Ch. 565, Unfair Competition, § 565.35[1]*.

No Interference With Contract Found. In *PM Group, Inc. v. Stewart (2007) 154 Cal. App. 4th 55* , the Court of Appeal held that neither a party to a contract nor agents of that party may be liable for interference with related subcontracts that would require the performance of the party to the primary contract. See *Ch. 565, Unfair Competition, § 565.137[2][a]*.

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§ 1.175 Workers' Compensation

Preferred Provider Networks; Common-Law Doctrine of Fair Procedure. The court of appeal in *Palm Medical Group, Inc. v. State Compensation Insurance Fund (2008) 161 Cal. App. 4th 206* , has held that the defendant, State Compensation Insurance Fund, had denied the plaintiff, Palm Medical Group, admission into its preferred provider network in violation of the common-law fair procedure doctrine. See *Ch. 577, Workers' Compensation, § 577.45[1][d]*.

Temporary Disability; Industrial Disability Leave; Two-Year Limitation on Temporary Disability Indemnity. The court of appeal in *Brooks v. Workers' Comp. Appeals Bd. (2008) 161 Cal. App. 4th 1522* , has held that the one year of industrial disability leave payable to state employees under *Gov. Code §§ 19869-19877.1* falls within the ambit of the two-year limitation on aggregate temporary disability payments in *Lab. Code § 4656(c)(1)*. See *Ch. 577, Workers' Compensation, § 577.45[3][b]*.

Temporary Disability; Multiple Injuries; Time Limits on Payments. The court of appeal in *Foster v. Workers' Comp. Appeals Bd. (2008) 161 Cal. App. 4th 1505* , has held that, when independent injuries result in concurrent periods of temporary disability, the 104-week, two-year limitation of *Lab. Code § 4656(c)(1)* likewise runs concurrently. See *Ch. 577, Workers' Compensation, § 577.45[3][b]*.

Injury AOE/COE; Off-Duty Athletic Activities. The court of appeal in *Tomlin v. Workers' Comp. Appeals Bd. (2008) 162 Cal. App. 4th 1423* , has held that a police officer's physical training injury, even though occurring while he was on vacation, was a compensable injury because his training was, pursuant to *Lab. Code § 3600(a)(9)*, "a reasonable expectancy of ... the employment." See *Ch. 577, Workers' Compensation, § 577.24[4]*.

Employment Relationships; Newspaper Carriers. The court of appeal in *Antelope Valley Press v. Steve Poizner as Insurance Commissioner (2008) 162 Cal. App. 4th 839* , has held that the administrative record supported the conclusion that newspaper carriers were employees for purposes of the workers' compensation law, not independent contractors. See *Ch. 577, Workers' Compensation, § 577.22[3][c]*.

Permanent Disability; Retroactive Application of 2005 Permanent Disability Rating Schedule. The court of appeal in *Tanimura & Antle v. Workers' Comp. Appeals Bd. (2007) 157 Cal. App. 4th 1489* has followed *Costco*

Wholesale Corp. v. Workers' Comp. Appeals Bd. (2007) 151 Cal. App. 4th 148 , *Vera v. Workers' Comp. Appeals Bd. (2007) 154 Cal. App. 4th 996* , *Chang v. Workers' Comp. Appeals Bd. (2007) 153 Cal. App. 4th 750* , *Energetic Painting & Drywall, Inc. v. Workers' Comp. Appeals Bd. (2007) 153 Cal. App. 4th 633* , and *Zenith Insurance Co. v. Workers' Comp. Appeals Bd. (2007) 153 Cal. App. 4th 461* , to hold that an employer's duty to provide the notice required by *Lab. Code § 4061* is not triggered simply by commencement of temporary disability benefits, but only by the last payment of those benefits, and that the employer here was not required to provide the employee with that notice until 2006, so that no exception listed in *Lab. Code § 4660(d)* justified use of the 1997 Schedule for Rating Permanent Disabilities, and that the 2005 Permanent Disability Rating Schedule applied instead. See *Ch. 577, Workers' Compensation, § 577.01*.

Permanent Disability; Apportionment; *Wilkinson* Rule. The Appeals Board in *Benson v. Permanente Medical Group* (2007) *72 Cal. Comp. Cases 1620 (Appeals Board en banc opinion)* has held en banc that the rule established by *Wilkinson v. Workers' Comp. Appeals Bd. (1977) 19 Cal. 3d 491* , which provided that an injured worker who, while employed by the same employer, sustained two separate injuries to the same part of the body, which became permanent and stationary at the same time, was entitled to receive a combined award of permanent disability, is no longer generally applicable because inconsistent with the post-SB 899 requirement that apportionment be based on causation. See *Ch. 577, Workers' Compensation, § 577.14[3][e]*.

Psychiatric Injuries; Actual Events of Employment. The court of appeal in *Verga v. Workers' Comp. Appeals Bd. (2008) 159 Cal. App. 4th 174* has held that an employee did not suffer psychiatric injury AOE/COE as a result of actual events of employment that were predominant as to all causes combined, when it found that substantial evidence supported the Appeals Board's factual findings that the employee's supervisor and coworkers did not persecute or harass her and that it was the employee who caused a stressful work environment by being rude, inflexible, easily upset, and demeaning toward other employees. See *Ch. 577, Workers' Compensation, § 577.14[3][d][i]*.

Permanent Disability; Permanent and Stationary Status; Application of 1997 Schedule for Rating Permanent Disabilities. The court of appeal in *Genlyte Group v. Workers' Comp. Appeals Bd. (2008) 158 Cal. App. 4th 705* , and in *Zenith Insurance Co. v. Workers' Comp. Appeals Bd. (2008) 159 Cal. App. 4th 483* , has held that a pre-2005 comprehensive medical-legal report must indicate the existence of permanent disability to satisfy the *Lab. Code § 4660(d)* exception to application of the 2005 Permanent Disability Rating Schedule and, rejecting another court of appeal's decision in *Vera v. Workers' Comp. Appeals Bd. (2007) 154 Cal. App. 4th 996* , that the employee's condition need not be permanent and stationary for a treating physician's report or a comprehensive medical-legal report to indicate the existence of permanent disability. See *Ch. 577, Workers' Compensation, § 577.01*.

Injury AOE/COE; Bunkhouse Rule. The court of appeal in *Vaught v. State of California, Department of Parks and Recreation (2007) 157 Cal. App. 4th 1538* has held that the exclusive remedy rule of *Lab. Code § 3602(a)* barred the plaintiffs' civil action against the defendant for negligence and failure to make a house habitable for human occupation, when the court found that the plaintiffs, a husband and wife, lived in a ranch house owned by the defendant as an "employment benefit" of the husband's job as a park ranger employed by defendant and that the husband was injured while in the house. See *Ch. 577, Workers' Compensation, § 577.24[7]*.

Fair Employment and Housing Act--Discrimination--Burden of Proof. The California Supreme Court in *Green v. State of California (2007) 42 Cal. 4th 254* has held that FEHA requires an employee to prove that he or she is a "qualified individual" when alleging discrimination on grounds of disability, meaning that a plaintiff's burden of proving an actionable discrimination on the basis of disability includes proof that he or she has the ability to perform the essential duties of the position with reasonable accommodation. See *Ch. 577, Workers' Compensation, § 577.315[2][b][iii]*.

Attorney's Fees--Effect of SB 899. The Court of Appeal in *Vierra v. Workers' Comp. Appeals Bd. (2007) 154 Cal. App. 4th 1142* , has held that a written attorney's fee agreement between an employee and his attorney was not binding

to the extent that it purported to "draft around" *Lab. Code § 4906* by depriving the Appeals Board of its statutory authority to fix attorney fees, making it in conflict with state law and unenforceable. See *Ch. 577, Workers' Compensation, § 577.41[3]*.

Permanent Disability--Retroactive Application of *2005 Permanent Disability Rating Schedule.* *The Court of Appeal in Energetic Painting and Drywall, Inc. v. W.C.A.B. (Reyes Ramirez) (2007) 153 Cal. App. 4th 633* has held that an employer, who paid an injured employee temporary disability benefits through March 2005, was, following *Pendergrass v. Duggan Plumbing* (2007) *72 Cal. Comp. Cases 456 (Appeals Board en banc opinion)* , not required to provide the employee with *Lab. Code § 4061* notice until that date, that, therefore, no exception in *Lab. Code § 4660(d)* justified use of the 1997 Schedule for Rating Permanent Disabilities in rating the employee's permanent disability, and that the 2005 Permanent Disability Rating Schedule was to be used instead. See *Ch. 577, Workers' Compensation, § 577.01*.

Permanent Disability--Retroactive Application of 2005 Permanent Disability Rating Schedule. The Court of Appeal in *Vera v. Workers' Comp. Appeals Bd. (2007) 154 Cal. App. 4th 996* has held that a treating physician's report dated April 26, 2004, which stated that the employee had the existence of permanent disability but that the employee had not reached permanent and stationary status, was not a pre-2005 treating physician report indicating the existence of permanent disability, because a disability is not ratable if it has not reached permanent and stationary status. See *Ch. 577, Workers' Compensation, § 577.01*.

Guardian ad Litem--Conservator--Payment for Services. The Court of Appeal in *Hodgman v. Workers' Comp. Appeals Bd. (2007) 155 Cal. App. 4th 44* has held that the Appeals Board had no basis for restricting the compensation of a guardian ad litem and conservator of an incompetent injured worker to nonduplicative care and that the employer, not the estate of the injured worker, should bear the expense. See *Ch. 577, Workers' Compensation, § 577.81*.

Workers' Compensation Judges--Summary of Evidence. *The Court of Appeal in Sharareh v. W.C.A.B. (2007) 156 Cal. App. 4th 189* , has held that it was mandatory for a WCJ to provide a summary of the trial evidence under *Lab. Code § 5313* and *8* Cal. Code Reg. § 10566 and that a failure to submit such a summary mandated that the matter be returned to the WCJ to prepare and submit one. See *Ch. 577, Workers' Compensation, § 577.191[2]*.

Injury AOE/COE--Death Benefits. The Court of Appeal in *City of Los Angeles v. Workers' Comp. Appeals Bd. (2007) 157 Cal. App. 4th 78* has held that an employee's death was not the result of an industrial injury, when the court found that the decedent, an accountant with a CPA license, died from injuries received from a fall while attending a CPA convention in Atlantic City, New Jersey, when the employer did not require the decedent to have a CPA license, and traveling to attend the convention for CPA credit was not expressly or impliedly authorized by the decedent's employment contract. See *Ch. 577, Workers' Compensation, § 577.24[1]*.

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[Reserved]

§§ 1.176[Reserved]

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1-1 California Forms of Pleading and Practice--Annotated § 1.200

§ 1.200 Acknowledgments

Notary Public Must Require Documentation of Identity of Subscribing Witness. *Civil Code § 1196* has been amended to delete a former provision authorizing a notary public to rely on his or her personal knowledge of the identity of a subscribing witness to an unacknowledged document. Instead, the witness must present documentation of his or her identity. For discussion and an updated form of a Certificate of Proof of Execution, see *Ch. 9, Acknowledgments, §§ 9.52[2], 9.130*.

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1-1 California Forms of Pleading and Practice--Annotated § 1.201

§ 1.201 Alternative Dispute Resolution

[1] Appointment of Arbitrator and Conduct of Proceedings

Attorney's Fees and Costs. Where a contract containing an arbitration clause allows for court actions under the contract and provides for attorney fees and costs to the prevailing party in an action on the contract, the prevailing party in an action based on an independent complaint for declaratory and injunctive relief that addresses only the issue of whether an arbitration must proceed may be entitled to an award of fees and costs under the applicable standards, regardless of who might become the prevailing party in any subsequent arbitration [*Turner v. Schultz (2009) 175 Cal. App. 4th 974*]. See *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceedings, § 33.22*.

Private Arbitration--Failure to Disclose All Specific Details of Prior Arbitrations by Neutral Arbitrators Does Not Necessarily Lead to Vacation of Arbitration Award. The neutral arbitrator acknowledged a prior relationship with both the health care provider and its counsel, and he disclosed pursuant to *Code Civ. Proc., § 1281.9*, that he had served as an arbitrator in a number of prior arbitrations involving them. He did not provide dates and other details of those prior arbitrations. The Court of Appeal affirmed the trial court's judgment denying patient's petition to vacate the arbitration award, holding that the patient, by consenting to proceed with arbitration despite being aware of deficiencies in the arbitrator's disclosure, waived her right to disqualify the arbitrator, and could not later challenge the arbitration award on the ground of inadequate disclosure [*Dornbirer v. Kaiser Foundation Health Plan, Inc. (2008) 166 Cal. App. 4th 831]* . See *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceedings, § 33.14*.

Private Arbitration--No Duty to Disclose Arbitrator's Law Firm's Past Representation of Third Party Who Had Adversarial Relationship With a Party. The court of appeal held that the applicable rule of law was the general requirement of *Code Civ. Proc., § 1281.9(a)* that a proposed neutral arbitrator shall disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial. Based on the entirety of the facts, the court of appeal found that there was adequate support for the trial court's finding that an objective person would not reasonably doubt the arbitrator's ability to be impartial. Thus, the arbitrator's law firm's prior representation of a third party who had an adversarial relationship with plaintiff was not required to be disclosed [*Agri-Systems v. Foster Poultry Farms (2008) 168 Cal. App. 4th 1128]* . See *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceedings, § 33.14*.

Private Arbitration--Insured's Complaint of Insurer's Bad Faith and Unreasonable Conduct Following Arbitration Award for Insured's Policy Limit. The insured was injured in an automobile accident caused by an underinsured motorist. After the parties failed to agree on the amount to be paid under the policy, an arbitration was scheduled. The insured received an arbitration award for the policy limit. Thereafter, the insured filed a complaint alleging that the insurer had unreasonably failed to make a good faith effort to resolve the claim. The court held that the insured's allegations of intentional misconduct and bad faith were sufficient, noting that a genuine dispute existed only where an insurer's position was maintained in good faith and on reasonable grounds [*Brehm v. 21st Century Ins. Co. (2008) 166 Cal. App. 4th 1225]* . See *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.29* . See also *Ch. 34, Contractual Arbitration: Judicial Review, § 34.18*.

[2] Agreements and Compelling Arbitration

Lis Pendens. Arbitration is not an "action" under *Code Civ. Proc. § 405.5* governing the filing of a notice of lis pendens; however, a party to arbitration may simultaneously file and stay a court action pending the arbitration of a dispute that is claimed to be arbitrable and relevant to the action, giving grounds for filing a lis pendens and not itself waiving arbitration, so long as other steps are not taken in the litigation that have the effect of waiving arbitration [*Manhattan Loft, LLC v. Mercury Liquors, Inc. (2009) 173 Cal. App. 4th 1040*]. See *Ch. 30, Using Alternative Dispute Resolution, § 30.11[5][b]*.

Existence of Contract for Arbitration. Analysis of the existence of a contract that is subject to contractual arbitration is reorganized, and a new subsection on the signature and effect of provisions requiring signature of all parties is added in light of *Fagelbaum & Heller LLP v. Smylie (2009) 174 Cal. App. 4th 1351* , which holds, as with the general rule, the signatory resisting enforcement of the contract or clause cannot escape liability without affirmatively establishing that the signatures of all parties were contemplated as being a condition precedent to the validity of the contract. See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21[1][b]*.

Unconscionable Arbitration Agreements. This chapter is updated with *Sanchez v. Western Pizza Enterprises, Inc. (2009) 172 Cal. App. 4th 154* , which holds under California law the question whether grounds exist for the revocation of an arbitration agreement based on grounds as exist for the revocation of any contract is for the courts to decide, not an arbitrator. This includes the determination of whether arbitration agreements or portions thereof are deemed to be unconscionable or contrary to public policy. See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21[1][c]*.

Illegal Terms. This chapter is updated with *Roman v. Superior Court (2009) 172 Cal. App. 4th 1462* , which holds in determining whether to sever or restrict illegal terms rather than voiding the entire contract, the overarching inquiry is whether the interests of justice would be furthered by severance; and in making this determination, the strong legislative and judicial preference is to sever the offending term and enforce the balance of the agreement. See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21[3][f]*.

Private Arbitration-- ***Uninsured Motorist Arbitration.*** *The California Supreme Court in Bouton v USAA Casualty Insurance Company (2008) 167 Cal. App. 4th 412, 84 Cal. Rptr. 3d 152* clarified issues required to be arbitrated under mandatory uninsured and underinsured motorist coverage: (1) Coverage questions, i.e., whether the claimant is an "insured" within the policy definition is not a matter for arbitration and must be decided by the court. The California Supreme Court reversed and remanded this issue to the court of appeal, which ultimately held that coverage questions are not arbitrable. The court of appeal reversed regarding coverage questions and remanded with directions to the trial court to conduct further proceedings to determine whether claimant was an insured under the policy. (2) The second issue, whether the insurer is bound by a default judgment against the driver who was at fault is to be arbitrated because it falls squarely within the questions of liability and damages statutorily subject to arbitration. The California Supreme Court affirmed the judgment of the court of appeal in the case in which the default judgment was found to be an

arbitrable issue. See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.92*.

Private Arbitration--Covenants, Conditions and Restrictions Not Sufficient to Waive Trial by Jury. Covenants, Conditions and Restrictions (CCRs) cannot be construed as a contract that is sufficient to waive the constitutional right to trial by jury pursuant to *Code Civ. Proc. § 638*, although it may be reasonable to bind owners and the homeowners association concerning the governance of the community and the placement of restrictions on the use of property. A provision of the homeowners association's CCRs required that all disputes between the association and the developer be decided by a general judicial reference. When the legislature stated in *Code Civ. Proc. § 638* that the right to jury trial could be waived by written contract, it did not mean to include equitable servitudes created by the CCRs of common interest communities. Treating CCRs as a contract such that they were sufficient to waive the right to trial by jury did not comport with the importance of the right waived [*Treo v. Kettner Homeowners Assn. v. Superior Court (2008) 166 Cal. App. 4th 1055]* . See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21*.

Private Arbitration--Trial Court Must Determine Whether Constructive Fraud Existed in Execution of Arbitration Agreement Between Elderly Client and Financial Institution. In *Brown v. Wells Fargo Bank (2008) 168 Cal. App. 4th 938* , plaintiffs are elderly Wells Fargo customers with substantial assets. Wells Fargo assigned a "relationship manager" to plaintiffs in order to ensure that the bank handled all of plaintiff's assets. The trial court concluded that Wells Fargo had established a fiduciary relationship with the plaintiffs, and that this relationship may have given rise to a fiduciary duty on the part of Wells Fargo to make certain that the plaintiffs understood the material terms of the contract they were signing. The court of appeal agreed with the trial court but found that the trial court failed to consider and rule on whether there was fraud in the execution of the brokerage account agreement, which conclusion would necessarily preclude enforcement of any part of that agreement, including the arbitration clause. Therefore, the court of appeal reversed the trial court's order and remanded for further proceedings during which the trial court should determine whether there was fraud in the execution of the agreement. See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21*.

Private Arbitration--Preliminary Injunction Granted to Prevent Further Economic Harm. In a dispute concerning the termination of a franchise agreement, a preliminary injunction was granted to prohibit the franchisees from continuing to represent themselves as franchisees and from using franchise trademarks. The franchise agreement contained an arbitration provision that excluded disputes in which injunctive relief was sought. The court of appeal affirmed the trial court's grant of the injunction, concluding that the franchisors established the likelihood of prevailing on the merits by presenting evidence that the franchisees had failed to make royalty payments and to pay advertising fees [*Jay Bharat Developers, Inc. v. Minidis (2008) 167 Cal. App. 4th 437]* . See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.42*.

Private Arbitration--No Jurisdiction to Compel or Dismiss Arbitration After Plaintiff's Voluntary Dismissal of Action. There is nothing to preclude a plaintiff's dismissal of a complaint after a case has been ordered into arbitration, but before an arbitration has commenced. The court of appeal declined to exercise its discretion to review the trial court's order compelling arbitration and stated that an order compelling arbitration is nonappealable; however, the court also stated that after plaintiff's dismissal, the trial court no longer has jurisdiction to order the parties to complete the arbitration. To preclude a plaintiff from voluntarily dismissing a case ordered to arbitration before the arbitration had commenced would be at odds with the right of a plaintiff to dismiss a case voluntarily and without prejudice set forth in *Code Civ. Proc. § 581(b)(1)* and *(c)* [*Cardiff Equities, Inc. v. Superior Court (2008) 166 Cal. App. 4th 1541]* . See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.43*.

[3] Judicial Review

Correction of Award. Correction of an arbitration award to provide for prejudgment interest not previously awarded or compensation for additional fees and costs not previously awarded is outside the scope of a statutorily permitted correction [*Law Offices of David S. Karton v. Segreto (2009) 176 Cal. App. 4th 1*]. See *Ch. 34, Contractual*

Arbitration: Judicial Review, § 34.20.

Partial Vacatur of Arbitration Award. This chapter is updated with *Sunnyvale Unified Sch. Dist. v. Jacobs (2009) 171 Cal. App. 4th 168* , which holds an order partially vacating an arbitration award is not authorized by *Code Civ. Proc. § 1286*. An appellate court reviewing such an order may treat it as a vacation of the entire arbitration award. See *Ch. 32, Contractual Arbitration: Judicial Review, § 34.19[2][a1]*.

Private Arbitration--Insured's Complaint of Insurer's Bad Faith and Unreasonable Conduct Following Arbitration Award for Insured's Policy Limit. The insured was injured in an automobile accident caused by an underinsured motorist. After the parties failed to agree on the amount to be paid under the policy, an arbitration was scheduled. The insured received an arbitration award for the policy limit. Thereafter, the insured filed a complaint alleging that the insurer had unreasonably failed to make a good faith effort to resolve the claim. The court held that the insured's allegations of intentional misconduct and bad faith were sufficient, noting that a genuine dispute existed only where an insurer's position was maintained in good faith and on reasonable grounds [*Brehm v. 21st Century Ins. Co. (2008) 166 Cal. App. 4th 1225]* . See *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.29* . See also *Ch. 34, Contractual Arbitration: Judicial Review, § 34.18*.

Private Arbitration--Courts May Correct an Arbitration Award by Awarding a Settlement Credit for Pre-Arbitration Settlement. In *Wade v. Schrader (2008) 168 Cal. App. 4th 1039* , a court has the authority to correct and offset an arbitration award by awarding a settlement credit for a pre-arbitration settlement. Pursuant to *Code Civ. Proc. § 877*, the court can reduce an arbitration award against a nonsettling defendant by awarding a settlement credit of the amount paid to plaintiff by other defendants in prior settlements on the same issue. See *Ch. 34, Contractual Arbitration: Judicial Review, §§ 34.20, 34.31*.

[4] Mediation

Mediation--No Waiver of Confidentiality Unless All Parties Sign Mediation Agreement. There is no waiver of confidentiality if all parties did not sign a mediation agreement, and there was an understanding at the time of execution that the mediation agreement would not become operative until all parties signed it. Thus, the agreement would be inadmissible pursuant to *Evid. Code § 1119(b)* [*Rael v. Davis (2008) 166 Cal. App. 4th 1608]* . See *Ch. 31, Mediation, § 31.31*.

Mediation--Order That Erroneously Failed to Set Forth All of the Material Settlement Terms Was Unenforceable and Must Be Modified. In *Hines v. Lukes (2008) 167 Cal. App. 4th 1174* , after participating in a mandatory settlement conference, the parties entered into a settlement that was intended to resolve a dispute concerning the scope of plaintiff's easement on defendant's property. On plaintiff's motion, the court entered an order for entry of judgment pursuant to the settlement under *Code Civ. Proc. § 664.6*, and defendant appealed. The court of appeal held that the order erroneously failed to set forth all of the material settlement terms relating to the easement. Although plaintiff did not argue in her opening brief that the order was incomplete, the court found that the failure to enter a judgment reflecting all of the material terms of settlement that had yet to be fully performed could defeat the purposes of the settlement and spawn further litigation. By omitting material terms of the settlement, the order failed to accurately reflect the parties' agreement and therefore failed to comply with *Code Civ. Proc. § 664.6*. See *Ch. 31, Mediation, § 31.31*.

Mediation--Trial Courts Must Determine That Terms of Written Settlement Agreements Are Fair, Adequate, and Reasonable Before Entering Judgment. In *Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal. App. 4th 116* , the trial court erred in finding the terms of the settlement to be fair, reasonable, and adequate without any evidence of the amount to which class members would be entitled if they prevailed in the litigation, and without any basis to evaluate the reasonableness of the agreed recovery. The court bears the ultimate responsibility to ensure the reasonableness of the settlement terms and must also receive and consider enough information about the nature and magnitude of the

claims being settled, as well as the impediments to recovery, to make an independent assessment of the reasonableness of the terms to which the parties have agreed. See *Ch. 31, Mediation, §§ 31.14, 31.31*.

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1-1 California Forms of Pleading and Practice--Annotated § 1.202

§ 1.202 Appeals

[1] Amicus Curiae

Amicus Curiae and Attorney's Fees. In *Ramon v. County of Santa Clara (2009) 173 Cal. App. 4th 915* , the court of appeal held that when a party is an amicus curiae in one case and a party defending the same issue in another case, it may be liable for attorney's fees under *Code Civ. Proc. § 1021.5* to a plaintiff under the private attorney general theory. See *Ch. 22, Amicus Curiae, § 22.17*.

Amicus Briefs--Monetary Contributions. *Cal. Rules of Ct., Rule 8.200* is amended to require an application for an appellate amicus brief must identify any party or any counsel for a party in the pending appeal who authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. It must also identify every person or entity who made a monetary contribution intended to fund the preparation or submission of the brief, other than the amicus curiae, its members, or its counsel in the pending appeal [*Cal. Rules of Ct., Rule 8.200(c)(3)*]. See *Ch. 22, Amicus Curiae, §§ 22.16[3], 22.40*.

[2] Briefs

Certificate of Interested Entities or Persons--Confidential Information. *Cal. Rules of Ct., Rule 8.208* is amended to provide if the identity of any party or any entity or person subject to disclosure has not been publicly disclosed in the proceedings and a party wants to keep that identity confidential, the party may serve and file an application for permission to file its certificate under seal separately from its principal brief, motion, application, or opposition. If the application is granted, the party must file the certificate under seal and without service within 10 days of the court's order granting the application [*Cal. Rules of Ct., Rule 8.208(d)(2)*]. This chapter is also updated with the revised Judicial Council Form, APP-008, Certificate of Interested Entities or Persons. See *Ch. 50, Appeal: Briefs, §§ 50.12[1][d], 50.83*.

Reply Briefs--Increased Size. *Cal. Rules of Ct., Rule 8.40* is amended to provide if produced on a computer, the reply brief must not exceed 8,400 words (previously 4,200 words). The brief must include a certificate by counsel stating the number of words in the brief. The person certifying may rely on the word count of the computer program used to prepare the brief [*Cal. Rules of Ct., Rule 8.520(c)(1)*]. If typewritten, the reply brief on the merits must not exceed 30

pages (previously 15 pages) [*Cal. Rules of Ct., Rule 8.520(c)(2)*]. See *Ch. 54, Appeal: Supreme Court Review, § 54.34*.

[3] Limited Civil Cases

Revised Rules of Court and Forms for Limited Civil Cases Appealed to the Superior Court Appellate Division. Effective January 1, 2009, all Rules of Court relating to the Superior Court Appellate Division are being repealed and replaced with new rules and Judicial Council forms for limited civil, misdemeanor, and infraction cases, as well as entirely new rules for writ proceedings [*see Cal. Rules of Court, Rules 8.800 et seq.*, 10.110 et seq.]. The new rules use similar language recently adopted for Court of Appeal rules, reflect current practices, fill in gaps, improve the record preparation process, create a more logical structure, and provide more forms. See Ch. 345A, *Limited Civil Cases* .

[3A] Notice of Appeal

Time to File Notice of Appeal. In *Bi-Coastal Payroll Services, Inc. v. California Insurance Guarantee Association (2009) 174 Cal. App. 4th 579* , the court of appeal held that a minute order that was not entitled "Notice of Entry" of judgment or order did not trigger the 60-day period to file a notice of appeal. See *Ch. 42, Appeal: Notice of Appeal, § 42.13[2][a]*.

"Mails" in *Cal. Rules of Ct., Rule 8.104(a)(1)*, Does Not Mean "E-mails." However, "Serves" in *Cal. Rules of Ct., Rule 8.104(a)(2)*, Includes "E-mail." In *Insyst, Ltd. v. Applied Materials, Inc. (2009) 170 Cal. App. 4th 1129* , the court of appeal held that the clerk must mail the notice of entry to trigger the time to appeal under *Cal. Rules of Ct., Rule 8.104(a)(1)*, whereas a party may e-mail the notice of entry to trigger the time to appeal under *Cal. Rules of Ct., Rule 8.104(a)(2)*. See *Ch. 42, Appeal: Notice of Appeal, § 42.13[2][a]*.

U.S. Mailing of Judgment Required to Trigger Deadline to Appeal. In *Citizens for Civic Accountability v. Town of Danville (2008) 167 Cal. App. 4th 1158* , the court of appeal held that the clerk's e-mailing the judgment to the parties failed to trigger the 60-day appeal deadline under *Cal. Rules of Ct., Rule 8.104(a)(1)*. See *Ch. 42, Appeal; Notice of Appeal, § 42.13[2][a]*.

[4] Overview

Vexatious Litigants. In *Mahdavi v. Superior Court (2008) 166 Cal. App. 4th 32, 36* , the court of appeal held that a court may not require a person who has been determined under *Code Civ. Proc. § 391.7* to be a vexatious litigant in prior litigation to seek leave of the court before he or she may file an appeal in a case in which he or she is the defendant. See *Ch. 40, Appeal: An Overview, § 40.13[1][b]*.

Fee Waivers on Appeal. This release sets forth the new law regarding governing applications for fee waivers on appeal based on financial condition (in forma pauperis), which went into effect July 1, 2009. The legislature has repealed *Gov. Code § 68511.3*, and enacted *Gov. Code §§ 68630-68641* in its stead. This release also includes the corresponding amended *California Rules of Court, Rule 3.50 et seq.* and new forms. See *Ch. 40, Appeal: An Overview, § 40.13[3]*, and see *Ch. 174, Costs and Attorney's Fees, § 174.110* et seq.

[4A] Record on Appeal

Appendix on Appeal. In *Doppes v. Bentley Motors, Inc. (2009) 174 Cal. App. 4th 967* , the court of appeal held that conformed copies are preferred, but not required, for documents included in an appendix on appeal. See *Ch. 44, Appeal: Preparing and Filing the Record, § 44.33[4][a]*.

[4B] Review Standards

Party May Raise New Theories for First Time on Appeal, So Long as It Is a Question of Law That Is Only

Applied to Undisputed Facts in the Record. In *Larner v. Los Angeles Doctors Hospital Associates, LP (2008) 168 Cal. App. 4th 1291* , the court of appeal held that to determine the appeal of a summary judgment motion, the appellate court may consider issues not raised in trial court. See *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.10[4][b]*.

[5] Supreme Court Review

Reply Briefs--Increased Size. *Cal. Rules of Ct., Rule 8.40* is amended to provide if produced on a computer, the reply brief must not exceed 8,400 words (previously 4,200 words). The brief must include a certificate by counsel stating the number of words in the brief. The person certifying may rely on the word count of the computer program used to prepare the brief [*Cal. Rules of Ct., Rule 8.520(c)(1)*]. If typewritten, the reply brief on the merits must not exceed 30 pages (previously 15 pages) [*Cal. Rules of Ct., Rule 8.520(c)(2)*]. See *Ch. 54, Appeal: Supreme Court Review, § 54.34*.

Writs--Revised Rules and New Form. This chapter is revised throughout with amended and new and amended *Cal. Rules of Ct., Rules 8.485 et seq.* governing petitions for writs of mandate, certiorari, or prohibition, or other writs within the original jurisdiction of the Supreme Court and appellate courts. This chapter also includes the new Judicial Council Form APP-151, Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case). See *Ch. 54, Appeal: Supreme Court Review, § 358.130A*.

[6] Writ of Certiorari

Certiorari--Revised Rules. This chapter is revised throughout with amended and new *Cal. Rules of Ct., Rules 8.485 et seq.* governing writs of certiorari. See Ch. 492, *Review (Certirorari), Writ Of.*

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1-1 California Forms of Pleading and Practice--Annotated § 1.203

§ 1.203 Attorneys

[1] Practice and Ethics

Attorneys--Anti-SLAPP Statute Does Not Protect Attorney Conflict of Interest. In *United States Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton (2009) 171 Cal. App. 4th 1617* , the court held that it is not a defense to a claim under Cal. Rules Prof. Conduct, Rule 3 310(E) that the attorney's actions were protected activity under *Code Civ. Proc. § 425.16*, the anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) statute. See *Ch. 72, Attorney Practice and Ethics, § 72.134*.

Attorneys--Client Consent to Division of Fees. In *Cohen v. Brown (2009) 173 Cal. App. 4th 302* , the court held that *Cal. Rule Prof. Conduct, Rule 2-200* requires that the client's consent to a division of fees be given prior to the actual division of the fees; it does not require client consent prior to the commencement of work by the associated attorney. See *Ch. 72, Attorney Practice and Ethics, § 72.199[1]*.

Attorneys--Ethical Walls Permitted for Nonprofit Law Firms. In *In re Charlisse C. (2008) 45 Cal. 4th 145, 165* , the California Supreme Court held that a nonprofit law firm does not have the same financial incentives as a private firm insofar as the clients do not pay for services; therefore no single client becomes more important than others, and ethical walls are more effective. See *Ch. 72, Attorney Practice and Ethics, § 72.113[6][c][ii]*.

Attorneys--California Arbitration Act Does Not Trump MFAA. In *Schatz v. Allen Matkins Leck Gamble & Mallory LLP (2009) 45 Cal. 4th 557* , the California Supreme Court held that the MFAA does not limit the ability of attorneys and clients to enter into binding contractual arbitration. See *Ch. 72, Attorney Practice and Ethics, § 72.470[5]*.

Attorneys--Arbitration Awards. In *Perez v. Grajales (2008) 169 Cal. App. 4th 580, 596-603* , the court held that if a party rejects an arbitration award by filing a request for a trial de novo, the party effectively repudiates that rejection by causing or permitting the action to be dismissed. See *Ch. 72, Attorney Practice and Ethics, § 72.478[3]*.

Attorneys--Attorney Acting in Pro Per May Not Recover Sanctions. In *Musaelian v. Adams (2009) 2009 Cal. LEXIS 115* , **5-16, the California Supreme Court held that an attorney may not recover sanctions under *Code Civ.*

Proc. § 128.7 if the attorney represents himself or herself in the action and does not pay or "incur" any liability for attorney's fees. See *Ch. 510, Sanctions, § 510.12[12A]*.

Fee-Splitting-- ***Cal. Rules Prof. Conduct, Rule 2-200*** **Applies to Approval of Class Action Settlement**. In *Mark v. Spencer (2008) 166 Cal. App. 4th 219* , the court held that the attorneys' failure to fully disclose their fee-splitting agreement to the court when they petitioned for approval of a class action settlement barred enforcement of the agreement. See *Ch. 72, Attorney Practice and Ethics, § 72.199[1]*.

Action Against Another Attorney Under Quantum Meruit. In *Strong v. Beydoun (2008) 166 Cal. App. 4th 1398* , the court held that attorneys who violate *Cal. Rules of Conduct, Rule 2-200* may recover against another attorney under quantum meruit, but not from the client. See *Ch. 72, Attorney Practice and Ethics, § 72.199[1]*.

[2] Professional Liability

Attorney Not Liable to Beneficiary for Failing to Modify Trust Before Decedent's Death. In *Chang v. Lederman (2009) 172 Cal. App. 4th 67* , the court of appeal held that an estate trust beneficiary could not state a claim against the testator's attorney based on the attorney's failure to modify the trust to increase the beneficiary's bequest, allegedly in accordance with the decedent's wishes, as the requested change was not memorialized in a written document. See *Ch. 76, Attorney Professional Liability, § 76.200[3][b][ii]*.

Factual Innocence Requirement in Criminal Defense Malpractice Cases Extends to All Transactionally Related Offenses. In *Wilkinson v. Zelen (2008) 167 Cal. App. 4th 37* , the court of appeal held that the requirement of factual innocence and exoneration applicable when suing a criminal defense attorney for malpractice applies to transactionally related offenses stemming from the same criminal event that do not necessarily qualify as lesser-included offenses. See *Ch. 76, Attorney Professional Liability, §§ 76.10[2], 76.70*.

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§ 1.204 Automobiles

Interest Under *Civ. Code § 3291* Imposed Only Once Under *Code Civ. Proc. § 998*. In *Cadlo v. Metalclad Insulation Corp. (2009) 172 Cal. App. 4th 1040* , the court of appeal held that when multiple defendants are found liable at trial and each rejected a *Code Civ. Proc. § 998* settlement offer that was less than the judgment ultimately imposed against him or her, the 10 percent prejudgment interest award is imposed only once on the entire judgment under *Civ. Code § 3291* and is not imposed separately against each defendant on the full amount of the total judgment. See *Ch. 86, Automobiles: Pretrial Motions and Settlement Negotiations, § 86.12[2][b]*.

Unknowing Community Property Interest in Vehicle Insufficient to Confer Owner Status Under *Civ. Code § 3333.4*. In *Ieremia v. Hilmar Unified School Dist. (2008) 166 Cal. App. 4th 324* , the court of appeal held that despite the fact that a vehicle was purchased with community funds, a spouse's unknowing community property interest was not sufficient to find her an owner of the vehicle for purposes of *Civ. Code § 3333.4*. See *Ch. 82A, Automobiles: Damages, § 82A.15[1][d][ix]*.

Uninsured Motorist Coverage--Arbitration. In a case originally concerning the attempt of the sister of the automobile policyholder to compel arbitration under *Ins. Code § 11580.2(f)*, on remand from the California Supreme Court, an appellate court held that the question whether a party is an insured with standing to enforce an arbitration provision can be decided by a trial court either in the proceedings on a petition to compel arbitration or in a separate action for declaratory relief [*Bouton v. USAA Casualty Ins. Co. (2008) 167 Cal. App. 4th 412]* . See *Ch. 88A, Automobiles: Uninsured Motorist Claims, § 88A.19[3][e][iv]*.

Uninsured Motorist Coverage--Bad Faith. *Ins. Code § 11580.26(b)*, which prohibits a cause of action against either the insured or insurer for exercising the right to request arbitration of an uninsured motorist claim, does not create a broad immunity from a bad-faith claim based on the insurer's pre-arbitration conduct regarding an uninsured motorist claim [*Brehm v. 21st Century Ins. Co. (2008) 166 Cal. App. 4th 1225]* . See *Ch. 88A, Automobiles: Uninsured Motorist Claims, § 88A.24[1]*.

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§ 1.204A Bankruptcy

Nondischargeability of Debts Arising From False Statements of Financial Condition. In *Boyajian v. New Falls Corp. (In re Boyajian) (9th Cir. 2009) 564 F.3d 1088* , the court construed one of the tests, in *11 U.S.C. § 523(a)(2)(B),* for nondischargeability of any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent that it was obtained by use of a false statement as to the debtor's financial condition. The test requires that "the creditor to whom the debtor is liable for the money, property, services, or credit" must have reasonably relied on the false statement. The Ninth Circuit concluded that the reliance requirement should not be construed as meaning that, in the case of a subsequent assignment of the creditor's claim, there must also be proof of reliance by the assignee holding the claim at the time of the bankruptcy. Reliance by the assignee is not required, if the original creditor reasonably relied on the false representation: The assignee can stand in the shoes of the original creditor and assert nondischargeability under *11 U.S.C. § 523(a)(2)(B)*. For discussion, see *Ch. 94, Bankruptcy, § 94.55[4][c]*.

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1-1 California Forms of Pleading and Practice--Annotated § 1.204B

§ 1.204B Churches and Religious Organizations

Scholarship Tax Credit Program Violated *Establishment Clause*. In *Winn v. Arizona Christian School Tuition Organization* (9th Cir. 2009) 562 F.3d 1002 , the Ninth Circuit held that a state scholarship tax credit program, granting income tax credits to taxpayers who made contributions to nonprofit organizations awarding private school scholarships to children, some of which restricted the availability of scholarships to religious schools, violated the *Establishment Clause* even though the state did not directly decide whether particular sectarian organizations would receive program aid. See Ch. 110, *Churches and Religious Organizations* .

Resolution by Board of Supervisors Urging Cardinal to Withdraw Directive Instructing Against Same-Sex Couple Adoption of Children Did Not Violate *Establishment Clause*. In *Catholic League for Religious and Civil Rights v. City and County of San Francisco (9th Cir. 2009) 567 F.3d 595* , the adoption by a city board of supervisors of a non-binding resolution in response to a directive from a Catholic cardinal instructing the city's archdiocese that Catholic social services agencies should not place children in need of adoption with gay or lesbian couples, urging the cardinal, in his capacity as the head of the Congregation for the Doctrine of the Faith at the Vatican, to withdraw the directive did not violate the *Establishment Clause* by expressing disapproval of and hostility toward the Catholic religion. See Ch. 110, *Churches and Other Religious Organizations* .

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1-1 California Forms of Pleading and Practice--Annotated § 1.205

§ 1.205 Civil Procedure

[1] Amended Pleadings

Amended Pleadings--Doe Defendants. Where counsel does not state the dates upon which he or she learned the names of the Doe defendants and does not explain why their identities could not have been discovered sooner, and where the record indicates that counsel had access to the information sooner, and Doe defendants are brought into the case less than one month before the case was set to begin trial, a two-year delay to amend the pleadings is unreasonable and prejudicial [*A.N. v. County of Los Angeles (2009) 171 Cal. App. 4th 1058*]. See *Ch. 21, Amended and Supplemental Pleadings, § 21.14[2]*.

Inconsistent or Sham Pleadings. Although a trial court has good reason to be hesitant to accept new factual allegations from the plaintiff, at least to the extent they are inconsistent with prior allegations, the court may not demand the production of admissible evidence, specifically excluding plaintiff's own testimony, to support the proposed amendment to the complaint while at the same time preventing plaintiff from conducting any discovery. Although a trial court has powerful tools to shield parties and nonparties from abusive litigation tactics, it does not have the power to demand, as the condition for leave to amend, that a party present admissible evidence sufficient to withstand summary judgment [*Sanai v. Saltz (2009) 170 Cal. App. 4th 746*]. See *Ch. 21, Amended and Supplemental Pleadings, § 21.22*.

[1A] Answers

Answers--General Denial. This chapter is updated with the revised Judicial Council Form PLD-050, General Denial. See *Ch. 26, Answers, § 26.90*.

[2] Anti-SLAPP Motions

Anti-SLAPP Motion--Protected Activity. This chapter is updated with *McConnell v. Innovative Artists Talent and Literary Agency, Inc. (2009) 175 Cal. App. 4th 169* , which holds a talent agents' retaliation and wrongful termination claims arose out of defendant's conduct in preventing plaintiffs from performing their job duties, which was not protected activity; the mere fact that defendant's conduct occurred after plaintiffs filed their original complaint seeking a declaration that their employment contracts with defendant were illegal did not transform unprotected activity to

protected activity within the meaning of the anti-SLAPP statute. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.43[2].

Anti-SLAPP Motion--Illegal Activity. Activity amounting to extortion is not protected under *Code Civ. Proc. § 425.16* [*Cohen v. Brown (2009) 173 Cal. App. 4th 302*]. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.15[3].

Anti-SLAPP Motion--Official Proceeding Authorized by Law. A demand for private, contractual arbitration is not a judicial proceeding within the meaning of *Code Civ. Proc. § 425.16(e)(1)* and thus does not trigger anti-SLAPP protections [*Century 21 Chamberlain & Associates v. Haberman (2009) 173 Cal. App. 4th 1*]. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.14[2].

Anti-SLAPP Motion--Protected Individuals. The protections of *Code Civ. Proc. § 425.16* extend to statements and writings of governmental entities and public officials on matters of public interest [*Vargas v. City of Salinas (2009) 46 Cal. 4th 1*]. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.15[2].

Anti-SLAPP Motion--Statutory Exceptions. Public interest exception found in *Code Civ. Proc. § 425.17(b)* does not apply to an action that seeks any advantage, no matter how narrow, for a particular plaintiff [*Club Members for an Honest Election v. Sierra Club (2008) 45 Cal.4th 309*]. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.16[2].

Motions to Strike--Anti-SLAPP. This chapter is updated with *Club Members for an Honest Election v. Sierra Club (2008) 45 Cal. 4th 309* , which holds the exception of *Code Civ. Proc. § 425.17(b)* to remove an action from the protections of the anti-SLAPP statute [*Code Civ. Proc. § 425.16*] applies only to actions brought "solely" in the public interest or on behalf of the general public; use of the term "solely" expressly conveys the Legislative intent that section 425.17(b) not apply to an action that seeks a more narrow advantage for a particular plaintiff. Such an action would not be brought "solely" in the public's interest. The statutory language of 425.17(b) is unambiguous and bars a litigant seeking "any" personal relief from relying on the section 425.17(b) exception. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.16[2].

Motions to Strike--Anti-SLAPP. Communications forming the "principle thrust" or "gravamen" of plaintiff's complaint for interference with contract and prospective economic advantage were not within the litigation privilege of the anti-SLAPP special motion to strike [*Code Civ. Proc. § 425.16*]; the tone of communications was cooperative and not in "serious consideration" of litigation [*Haneline Pacific Properties, LLC v. May (2008) 167 Cal. App. 4th 311]* . See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.43[2].

[3] Change of Name

Change of Name--Confidentiality. *Code Civ. Proc. § 1277* has been amended to require that when a participant in the address confidentiality program [*see Gov. Code § 6205 et seq.*] petitions for a change of name to avoid domestic violence, stalking, or sexual assault, the court must keep confidential the petitioner's current name as well as his or her proposed name. See *Ch. 377, Change of Name, §§ 377.14[2] -[4], 377.60[1][c], [f]*.

[4] Complaints and Cross Complaints

Cross Complaint--Willful Misconduct. A willful misconduct claim under *Code Civ. Proc. § 337.15(f)* may be made in a cross-complaint by way of incorporating by reference allegations contained in the complaint [*Pine Terrace Apartments, LP v. Windscape, LLC (2009) 170 Cal. App. 4th 1, 87 Cal. Rptr. 3d 630*]. See *Ch. 123, Complaints and Cross Complaints, § 123.15*.

Cross Complaints--Summons. This chapter is updated with reference to the new and mandatory Judicial Council Form SUM-110, Summons--Cross-Complaint. See *Ch. 123, Complaints and Cross Complaints, § 123.33*.

[5] Continuances

Continuance--Summary Judgment. A party opposing summary judgment does not have an automatic right for a second chance to prepare a responsive separate statement or present evidence; instead, the party must demonstrate a reason for the trial court to exercise its discretion, by offering a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion. Where no such affidavit is filed, and where defendants do not contend they needed a continuance to obtain essential facts, a trial court does not abuse its discretion by declining to grant a continuance [*Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co. (2009) 170 Cal. App. 4th 554*]. See *Ch. 136, Continuances, § 136.19[1]*.

Continuance--ADA. This chapter is updated with *In re Marriage of James & Christine C. (2008) 158 Cal. App. 4th 1261* , which holds *Cal. Rules of Ct., Rule 1.100* provides a party who is a "person with disabilities" within the meaning of the Americans With Disabilities Act (ADA), the California related statutes of *Civ. Code § 51 et seq.*, or other applicable state and federal laws, may seek an "accommodation" that may include making reasonable modifications in policies, practices, and procedures of the court, and may include a continuance of a trial date for an absent party. See *Ch. 136, Continuances, § 136.20[3]*.

[6] Defaults

Defaults--Notice. Although a plaintiff's attorney is not legally required to warn a defendant's attorney before taking a default, if plaintiff's counsel knows the identity of the lawyer representing a defendant, such warning is at the least an ethical obligation of counsel [*Fasuyi v. Permatex, Inc. (2008) 167 Cal. App. 4th 681]* . See *Ch. 205, Defaults and Default Judgments, § 205.64[4]*.

[7] Guardians Ad Litem

Guardians Ad Litem--Minor Is a Parent. Notwithstanding *Code Civ. Proc. § 372(a)*, a minor may appear in court without a guardian ad litem if the minor is a parent of the child who is the subject of Family Court proceedings pursuant to *Fam. Code § 7600 et seq.* [*Code Civ. Proc. § 372(c)(1)(a)*]; dependency proceedings pursuant to *Welf. & Inst. Code § 200 et seq.* [*Code Civ. Proc. § 372(c)(1)(b)*]; guardianship proceedings for a minor child pursuant to *Prob. Code § 1500 et seq.* [*Code Civ. Proc. § 372(c)(1)(c)*]; or any other proceedings concerning child custody, visitation, or support [*Code Civ. Proc. § 372(c)(1)(d)*]. If the court finds that the minor parent is unable to understand the nature of the proceedings or to assist counsel in preparing the case, the court must, upon its own motion or upon a motion by the minor parent or the minor parent's counsel, appoint a guardian ad litem [*Code Civ. Proc. § 372(c)(2)*]. See *Ch. 291, Guardians Ad Litem, § 291.11[3][e]*

[7A] Interpleader

Interpleader--No Jury Right in Interpleader Action, Even if Apportionment of Competing Claims Requires Resolution of Some Legal Issues. A California Court of Appeal has held that because the gist of an interpleader action is the equitable apportionment of competing claimants' rights to deposited funds or property, there is no right to a jury trial of such an action, even if the equitable issue of apportionment is partially dependent on the resolution of legal issues [*Shopoff & Cavallo LLP v. Hyon (2008) 167 Cal. App. 4th 1489]* . See *Ch. 314, Interpleader, §§ 314.10[2], 314.60[2][d]*.

[8] Judges

Judges--Peremptory Challenge. Trial court erred when it struck a peremptory challenge filed pursuant to *Code Civ. Proc. § 170.6* on the ground that it had previously made a determination of contested fact issues relating to the merits, when the trial court's only factual determinations were made in connection with discovery motions and did not relate to the merits of the case. The mere fact that a judge considering discovery motions and sanctions may draw upon his or her

knowledge regarding the parties' past conduct in the case is insufficient to broaden the category of cases in which a peremptory challenge is considered untimely [*Swift v. Superior Court (2009) 172 Cal. App. 4th 878*]. See *Ch. 317, Judges, § 317.77[6][c]*.

Judges--Education and Training. Commencing five years after last serving in a judicial position either as a full-time judicial officer or as an assigned judge, a retired judicial officer serving as a temporary judge must satisfy all the education and training requirements of *Cal. Rules of Ct., Rule 2.812(d)*. However, a retired judicial officer serving as a temporary judge in a small claims case must satisfy all the requirements of *Code Civ. Proc. § 116.240(b)* and the rules in Ch. 1, Div. 6, Tit. *2 of the Cal. Rules of Ct*. before serving in the case [*Cal. Rules of Ct., Rule 2.812(d)*]. See *Ch. 317, Judges, § 317.21[3]*.

Judges--Disqualification. Disqualification claim was untimely where party waited seven months before asserting the alleged ground for disqualification, even where appellate court stay of trial court proceedings was in effect for part of that time [*Tri Counties Bank v. Superior Court (2008) 167 Cal. App. 4th 1332]* . See *Ch. 317, Judges, § 317.56[2]*.

Judges--Disqualification. Disqualification was not available where appellate court order to juvenile court was clearly for the performance of ministerial acts, i.e., entering an order denying reunification services and setting a permanent plan selection hearing [*C.C. v. Superior Court (2008) 166 Cal. App. 4th 1019]* . See *Ch. 317, Judges, § 317.77[6][e]*.

Judges--ADR Neutrals. Inclusion on a court list of ADR neutrals and eligibility to be recommended, appointed, or compensated by the court to serve as a neutral are privileges that are revocable and confer no vested right on the neutral. A court has absolute discretion to determine who may be included on a court list of ADR neutrals or is eligible to be recommended, selected, appointed, or compensated by the court to serve as a neutral (except as otherwise expressly provided by statute or rule of court) [*Cal. Rules of Ct., Rule 10.781(c)*]. See *Ch. 317, Judges, § 317.84[5][f][ii]*.

Judges--Refusal to Reassign Case Subsequent to Peremptory Disqualification Challenge. If a petition for writ of mandate to reassign a case subsequent to a peremptory disqualification challenge requests a temporary stay, it must comply with the following or the reviewing court may decline to consider the request for a temporary stay: it must explain the urgency [*Cal. Rules of Ct., Rule 8.486(a)(7)(A)*], the cover of the petition must prominently display the notice "STAY REQUESTED" and identify the nature and date of the proceeding or act sought to be stayed [*Cal. Rules of Ct., Rule 8.486(a)(7)(B)*], and the trial court and department involved and the name and telephone number of the trial judge whose order the request seeks to stay must appear either on the cover or at the beginning of the text [*Cal. Rules of Ct., Rule 8.486(a)(7)(C)*]. See *Ch. 317, Judges, § 317.214[8]*.

[8A] Judgments

California Does Not Recognize Non-Final Foreign Judgment. In *Manco Contracting Company v. Bezdikian (2008) 45 Cal. 4th 192* , the California Supreme Court held that when a foreign judgment is appealed, and the foreign nation's law provides that a judgment on appeal is not final, former *Code Civ. Proc. § 1713.2* does not permit a California court to recognize the judgment. See *Ch. 318, Judgments, § 318.183[2]*.

Judgments--Void Versus Voidable Judgments. In *Lee v. An (2008) 168 Cal. App. 4th 558, 565* , the court held that if a court lacks fundamental authority, any judgment it renders is void. If a court acts in excess of it jurisdiction or defined power, any judgment it renders is voidable. See *Ch. 489, Relief from Judgment, § 489.130*.

Enforcement of Judgments--Homestead Exemption. In *California Coastal Commission v. Allen (2008) 167 Cal. App. 4th 322* , the court held that the continuous residence requirement for a principal dwelling homestead exemption was not met when the defendant resided elsewhere while retaining the right to be temporarily present in a room on the subject property. See *Ch. 294, Homesteads, § 294.50[3]*.

[8B] Judicial Notice

Judicial Notice--Grant Deeds. In *Lockhart v. MVM, Inc. (2009) 175 Cal. App. 4th 1452* , the court held that grant deeds are judicially noticeable under *Evid. Code § 452(c)*. See *Ch. 321, Judicial Notice, § 321.43[11][g]*.

Judicial Notice--Matters Not Before Trial Court. Court of appeals will not take judicial notice of documents not provided to the trial court [*Termo Co. v. Luther (2008) 169 Cal. App. 4th 394*]. See *Ch. 321, Judicial Notice, § 321.24*.

[9] Jurisdiction: Personal

Jurisdiction--Personal Jurisdiction. While it is true that once a motion to quash is granted, the court may not review the merits of the underlying action, at least as far as they pertain to the defendant that prevailed on the motion to quash for lack of personal jurisdiction, it does not necessarily follow that the lack of power to rule on the merits of the lawsuit deprives the trial court of jurisdiction to rule upon a collateral motion for attorney fees. A defendant does not forfeit a collateral right to attorney fees by choosing to assert the right to challenge the court's in personam jurisdiction [*Shisler v. Sanfer Sports Cars, Inc. (2008) 167 Cal. App. 4th 1]* (noting that it would be unfair to allow a plaintiff to sue an out-of-state defendant in California, force that defendant to the expense required to quash service, then preclude that defendant from collecting attorney fees that would be available had the defendant prevailed on the merits of the case]. See *Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances, § 323.54*.

[10] Jurisdiction: Subject Matter

Jurisdiction--Subject Matter. No appeal or petition filed in the superior court shall be dismissed solely because the appeal or petition was not filed in the proper state court [*Code Civ. Proc. § 396(a)*]. If the superior court lacks jurisdiction of an appeal or petition, and a court of appeal or the Supreme Court would have jurisdiction, the appeal or petition shall be transferred to the court having jurisdiction upon terms as to costs or otherwise as may be just, and proceeded with as if regularly filed in the court having jurisdiction [*Code Civ. Proc. § 396(b)*]. See *Ch. 324, Jurisdiction: Subject Matter Jurisdiction, § 324.43[1]*.

[11] Limitation of Actions

Limitation of Actions--Death of Defendant. This chapter is updated with *Farb v. Superior Court (2009) 174 Cal. App. 4th 678* , which holds in an action arising from a surrogacy contract between a decedent and his former wife and a surrogate mother, it was undisputed that the complaint was filed more than one year after the decedent's death and that none of the enumerated exceptions in *Code Civ. Proc. § 366.2* applied. In accordance with the plain language of Section 366.2, the one-year limitations period was not tolled during the minority of the children. Moreover, the one-year limitations period in Section 366.2 applied to an action on the liability of a deceased person, without regard to the location of the decedent's personal representative or estate. See *Ch. 345, Limitation of Actions, § 345.20[8]*.

Limitation of Actions--Medical Negligence Against Public Entity. This chapter is updated with *Roberts v. County of Los Angeles (2009) 175 Cal. App. 4th 474* , which holds in action for medical negligence against public entities, plaintiffs must comply with both the six-month statute of limitations in the Government Claims Act (*Gov. Code § 945.6*) and the three-year statute in the Medical Injury Compensation Reform Act (MICRA) (*Code Civ. Proc. § 340.5*), and the latter statute establishes the outside date by which actions against health care providers, including public entities, must be brought. See *Ch. 345, Limitation of Actions, § 345.53[10][b][vi]*.

Limitation of Actions--Holocaust Art. This chapter is updated with a warning that a Ninth Circuit panel in August 2009 has held the limitation-period extension in *Code Civ. Proc. § 354.3(c)* for recovery of Holocaust-era artwork is invalid under the field-preemption doctrine because it "intrudes on the power to make and resolve war, a power reserved exclusively to the federal government by the Constitution" [*Saher v. Norton Simon Museum of Art at Pasadena (9th*

Cir. 2009) 578 F.3d 1016, 2009 U.S. App. LEXIS 18604]. See *Ch. 345, Limitation of Actions, §§ 345.164, 345.187*.

Limitation of Actions--Exhausting Administrative Remedies. Internal administrative remedies for resolving employment grievances are optional and need not be exhausted before filing an action under the California Fair Employment and Housing Act, *Gov. Code § 12900 et seq.*, but if an aggrieved party voluntarily elects to pursue such an administrative remedy, it does not follow from this that the voluntariness of that election renders equitable tolling unavailable [*McDonald v. Antelope Valley Community College Dist. (2008) 45 Cal. 4th 88]* . See *Ch. 345, Limitation of Actions, § 345.21[2]*.

Limitations--Actions Upon Foreign Judgments. The 10-year statute of limitations in *Code Civ. Proc. § 337.5*, applicable to actions upon sister state judgments, also applies to actions upon foreign judgments, regardless of whether the action is styled as a claim for "recognition" or "enforcement" or "domestication" [*Manco Contracting Co. (WLL) v. Bezdikian (2008) 45 Cal. 4th 192]* . See *Ch. 345, Limitation of Actions, § 345.53[26]*.

[12] Pretrial Proceedings

Pretrial Proceedings--Motion For Preference. *Code Civ. Proc. § 36* is amended to provide that unless the court orders otherwise, a party may file and serve a motion for preference supported by a declaration of the moving party that all essential parties have been served with process or have appeared [*Code Civ. Proc. § 36(c)(1)*]; and at any time during the pendency of the action, a party who reaches 70 years of age may file and serve a motion for preference [*Code Civ. Proc. § 36(c)(2)*]. See *Ch. 425, Pretrial Proceedings, § 425.73[6]*.

Pretrial Proceedings--Case Management. This chapter is updated with the revised Judicial Council Form CM-110, Case Management Conference Statement. See *Ch. 425, Pretrial Proceedings, § 425.131*.

[12A] Sanctions

Juvenile Court May Not Use Contempt Power to Incarcerate Parent for Failure to Satisfy Condition of Reunification Plan in Dependency Proceeding. *The California Supreme Court, in In re Nolan W. (2009) 45 Cal. 4th 1217* , has held that because of the unique nature of reunification orders issued in juvenile dependency proceedings, a juvenile court may not use its contempt power to incarcerate a parent solely for the failure to satisfy a condition of a voluntary reunification plan. See *Ch. 135, Contempt, § 135.14[5][a]*.

Attorney Acting in Pro Per May Not Recover Sanctions. In *Musaelian v. Adams (2009) 45 Cal. 4th 512* , the California Supreme Court held that an attorney may not recover sanctions under *Code Civ. Proc. § 128.7* if the attorney represents himself or herself in the action and does not pay or "incur" any liability for attorney's fees. See *Ch. 510, Sanctions, § 510.12[12A]*.

[13] Service of Summons and Papers

Summons--Cross Complaints. This chapter is updated with the new and mandatory Judicial Council Form SUM-110, Summons--Cross-Complaint. See *Ch. 425, Service of Summons and Papers, § 518.70A*.

Service of Papers--Proof of Service. This chapter is updated with the revised Judicial Council Form POS-040, Proof of Service--Civil, and Judicial Council Form POS-040, Attachment to Proof of Service--Civil (Persons Served). See *Ch. 425, Service of Summons and Papers, § 518.92*.

[14] Summary Judgment

Summary Judgment--Complex Litigation. This chapter is updated with *Magana Cathcart McCarthy v. CB Richard Ellis, Inc. (2009) 174 Cal. App. 4th 106* , which holds parties must comply with the summary judgment procedures

mandated by statute and court rules and it is improper for parties to enter into a stipulated judgment that the trial court would have granted summary judgment in a matter for purposes of expediting an appeal; it is not the place of the parties, even if assigned to the complex litigation court, to rewrite the Code of Civil Procedure for their own convenience and economic interests. See *Ch. 537, Summary Judgment, § 537.12*.

Summary Judgment--Moving Plaintiff's Burden. A plaintiff moving for summary judgment need not disprove any affirmative defenses asserted by defendant; plaintiff's only burden is to prove each element of his own cause of action [*Oldcastle Precast, Inc. v. Lumbermens Mut. Cas. Co. (2009) 170 Cal. App. 4th 554*]. See *Ch. 537, Summary Judgment, § 537.33[2][d]*.

Summary Judgment--Continuance. A party opposing summary judgment does not have an automatic right for a second chance to prepare a responsive separate statement or present evidence; instead, the party must demonstrate a reason for the trial court to exercise its discretion, by offering a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion. Where no such affidavit is filed, and where defendants do not contend they needed a continuance to obtain essential facts, a trial court does not abuse its discretion by declining to grant a continuance [*Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co. (2009) 170 Cal. App. 4th 554*]. See *Ch. 136, Continuances, § 136.19[1]*.

Summary Judgment--Unlawful Detainer. This chapter is updated with new *Cal. Rules of Ct., Rule 3.1351*, which provides (1) notice of a motion for summary judgment in an unlawful detainer case must be given in compliance with *Code Civ. Proc. §§ 1013* and *1170.7*, and *(2)* opposition to the motion and any reply to that opposition may be made orally at the time of the hearing. Alternatively, if a party seeks to have a written opposition considered in advance of the hearing, the written opposition must be filed and served on or before the court day before the hearing and must be by personal delivery, facsimile transmission, express mail, or other means consistent with *Code Civ. Proc. §§ 1010, 1011, 1012*, and *1013*, and reasonably calculated to ensure delivery to the other party or parties no later than the close of business on the court day before the hearing. The court, in its discretion, may consider written opposition filed later [*Cal. Rules of Ct., Rule 3.1351(b), (c)*]. See *Ch. 537, Summary Judgment, § 537.18[1]*.

Summary Judgment--Evidence on Appeal. This chapter is updated with *Mamou v. Trendwest Resorts, Inc. (2008) 165 Cal. App. 4th 686* , which holds in reviewing summary judgment, as in any other appeal, if a party's position depends on patently inadmissible evidence admitted over a proper objection, a reviewing court is empowered, and indeed obliged, to acknowledge the error and disregard the evidence [*Mamou v. Trendwest Resorts, Inc. (2008) 165 Cal. App. 4th 686]* . See *Ch. 537, Summary Judgment, § 537.43[3][c]*.

Summary Judgment--Judicial Notice on Appeal. This chapter is updated with *City of Oakland v. Hassey (2008) 163 Cal. App. 4th 1477* , which holds an appellate court may properly decline to take judicial notice under *Evid. Code §§ 452* and *459* of a matter that should have been presented to the trial court for its consideration in the first instance. See *Ch. 537, Summary Judgment, § 537.43[3][c]*.

[15] Vexatious Litigants

Vexatious Litigants--Identity. This chapter is updated with *Kobayashi v. Superior Court (2009) 175 Cal. App. 4th 536* , which holds the Judicial Council is required to keep a list of persons declared by courts to be vexatious litigants subject to prefiling orders, but it is not required to make the list public. In this case, the plaintiff falsely claimed he was not the same person as the one on the vexatious litigant list. Should this issue arise, consult *Kobayashi* for a list of suggestions for determining if the plaintiff is on the Judicial Council list and for suggestions of improving the verification process. Note: Plaintiff in this case was referred to the county district attorney's office for possible criminal prosecution for perjury. See *Ch. 573, Vexatious Litigants, § 573.14*.

Vexatious Litigants--Appeal. In *Mahdavi v. Superior Court (2008) 166 Cal. App. 4th 32* , the court of appeal held

that a court may not require a person who has been determined under *Code Civ. Proc. § 391.7* to be a vexatious litigant in prior litigation to seek leave of the court before he or she may file an appeal in a case in which he or she is the defendant. See *Ch. 40, Appeal: An Overview, § 40.13[1][b]*.

California Forms of Pleading and Practice--Annotated

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 1 NEW DEVELOPMENTS
PART VI. 2009 NEW DEVELOPMENTS

1-1 California Forms of Pleading and Practice--Annotated § 1.206

§ 1.206 Civil Rights

[1] Assemblies, Meetings, and Demonstrations

City's Rejection of Monument Not Subject to Free Speech Clause. In *Pleasant Grove City, Utah v. Summum* (2009) -- U.S. --, 129 S. Ct. 1125 , the United States Supreme Court held that although a public park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which the forum analysis applies. Thus, a city's decision not to accept a privately donated monument for permanent placement in a public park was best viewed as a form of government speech and therefore not subject to scrutiny under the Free Speech Clause. See Ch. 59, *Assemblies, Meetings and Demonstrations* .

Ordinance Gave Official Unduly Broad Discretion. In *Seattle Affiliate of the October 22nd Coalition to Stop Police Brutality, Repression and the Criminalization of a Generation v. City of Seattle (9th Cir. 2008) 550 F.3d 788* , the Ninth Circuit held that the open-ended standard in a city's parade ordinance, combined with the absence of a requirement that officials articulate their reasons or an administrative-judicial review process, vested the chief of police with sweeping authority to determine whether a parade could utilize the forum of the streets to broadcast its message, which was prohibited by the *First Amendment* as placing unfettered discretion in the hands of the licensing officials and rendered the parade ordinance constitutionally defective on its face. See Ch. 59, *Assemblies, Meetings and Demonstrations* .

[1A] Discrimination in Business Establishments and Housing

Intentional Discrimination Need Not Be Shown for Disability Discrimination Under Unruh Act. In *Munson v. Del Taco, Inc. (2009) 46 Cal. 4th 661* , pursuant to the request of the Ninth Circuit Court of Appeals, the California Supreme Court held that a plaintiff who establishes a violation of the Americans With Disabilities Act need not prove intentional discrimination in order to obtain damages for disability discrimination under the Unruh Act in violation of *Civil Code § 51(f)*, disapproving two California Court of Appeal cases insofar as they held to the contrary. See Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

Trustee's Comments to Mother of Trust Beneficiary Not Sexual Harassment Violating *Civ. Code § 51.9*. In *Hughes v. Pair (2009) 46 Cal. 4th 1035* , alleged comments made by a trustee to the mother of the trust beneficiary during a single telephone conversation and a brief statement to the mother in person later the same day during a social

event at a museum failed to establish "severe" or "pervasive" conduct necessary to pursue a claim of hostile environment sexual harassment under *Civ. Code § 51.9*, as those terms are interpreted under Title VII and FEHA in decisions pertaining to sexual harassment in the workplace. The mother also failed to allege facts establishing a violation of *Civ. Code § 51.9* based on the quid pro quo form of sexual harassment. See Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

Private Marina Was Subject to Americans With Disabilities Act. In *Nicholls v. Holiday Panay Marina, L.P. (2009) 173 Cal. App. 4th 966* , an action under the ADA by a paraplegic plaintiff who leased a slip at a marina and sued the marina for lack of wheelchair access, the trial court erred in finding that the private marina was not a public accommodation subject to the ADA. The marina was on its face rental establishment subject to the ADA, the fact that the marina did not allow within the marina any functions open to the general public was not dispositive, and the trial court erroneously miscast the marina as a permanent lodging exempt from the ADA, because there was no evidence any marina tenants lived at the marina or regularly slept overnight on their boats. See Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

Business May Be Liable for Sexual Harassment By Ratification. In *C.R. v. Tenet Healthcare Corp. (2009) 169 Cal. App. 4th 1094* , the court held that *Civ. Code § 51.9* does not require that the defendant have a fiduciary relationship with the plaintiff, and that principles of ratification apply to a Section 51.9 cause of action, so that a business can be liable for sexual harassment under *Civ. Code § 51.9* based its ratification of the actions of its employees. See Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

Error to Dismiss FHA Action Claiming Discrimination in Underwriting Homeowners' Insurance Policies. In *Ojo v. Farmers Group, Inc. (9th Cir. 2009) 565 F.3d 1175* , a district court erred in dismissing a class action by an African-American homeowner's insurance policy owner against the homeowner's insurance company, alleging that he and other minorities received less favorable pricing than Caucasians as a result of a discriminatory credit evaluative and scoring system developed and administered by the insurer in violation of FHA. The court read the complaint as challenging credit scoring per se, when in fact it challenged only the use of undisclosed factors in credit scoring and the disparate impact that resulted and did not "impair" state law by challenging credit scoring per se. The court also erred in interpreting the state's credit scoring law as permitting disparate impact race discrimination despite evidence the state legislature intended to prohibit insurers from engaging in unfair discrimination, so that the federal FHA claim was not reverse-preempted by McCarran-Ferguson. See Ch. 117, *Civil Rights: Housing Discrimination* .

No Standing Under Unruh Civil Rights Act or Gender Tax Repeal Act. In *Surrey v. TrueBeginnings (2008) 168 Cal. App. 4th 414* , the Court of Appeal held that a person must tender the purchase price for a business's services or products to have standing to sue it for alleged discriminatory practices relating to it under either the Unruh Civil Rights Act or the Gender Tax Repeal Act. See Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

Constitutional Guarantees of Freedom of Religion and Speech Did Not Allow Physicians to Discriminate in Violation of Unruh Act. In *North Coast Women's Care Medical Group, Inc. v. Benitez (2008) 44 Cal. 4th 1145, 81 Cal. Rptr. 3d 708* , the California Supreme Court held that the rights of religious freedom and free speech, as guaranteed in both the federal and the California Constitutions, do not exempt a medical clinic's physicians from complying with the Unruh Civil Rights Act's prohibition against discrimination based on a person's sexual orientation. Thus, physicians employed by a clinic could not refuse fertility treatments to a lesbian on the basis of the physicians' religious beliefs regarding the particular type of treatment. To avoid a conflict between their religious beliefs and the Unruh Act's antidiscrimination provisions, the physicians could simply refuse to perform the medical procedure at issue for any patient of the clinic or, because they would incur liability under the Act if they infringed on the right to full and equal services of the clinic's medical practice, they could avoid the conflict by ensuring that every patient requiring the procedure received full and equal access to the procedure through a clinic physician lacking their religious objections. See *Ch. 116, Civil Rights: Discrimination in Business Establishments, § 116.11[c]*.

Prevailing Defendant Entitled to Attorneys' Fees Under *Civ. Code § 55*. In *Molski v. Arciero Wine Group (2008) 164 Cal. App. 4th 786* , an action under *Civ. Code § 55*, the trial court acted within its discretion when it determined the defendant was the prevailing party and awarded attorneys' fees. Plaintiff obtained none of the relief he sought and defendant obtained a judgment in its favor on every cause of action. Further, there was no requirement that a prevailing defendant be awarded fees only if plaintiff's claim was frivolous, unreasonable, or groundless; any violations were remediated by defendant before the action was filed, and plaintiff did not voluntarily dismiss his groundless claim for injunctive relief. See *Ch. 116, Civil Rights: Discrimination in Business Establishments, § 116.36[4][b]*.

ADA Preempts California Disabled Persons Act as to Attorneys' Fees. In *Hubbard v. SoBreck, LLC (9th Cir. 2008) 531 F.3d 983* , an action under the ADA and the California Disabled Persons Act, an award of attorneys' fees to prevailing defendants was preempted by the ADA, even though the CAPA authorized fees to the "prevailing party." The trial court found plaintiffs' claims were not frivolous and fees were not warranted under the ADA, and a violation of the federal ADA constituted a violation of the CAPA so that to the extent *Civ. Code § 55* mandated imposition of fees on a losing plaintiff who brought both a nonfrivolous ADA action and a parallel action under the CAPA, the fee award under the CAPA would be inconsistent with the ADA. See *Ch. 116, Civil Rights: Discrimination in Business Establishments, § 116.36[4][b]*.

New Requirements for Construction-Related Accessibility Claims. The Legislature has enacted the Construction-Related Accessibility Claims Act [*Civ. Code § 55.51 et seq.*], with new requirements for those claims. See *Ch. 116, Civil Rights: Discrimination in Business Establishments, § 116.36[6][e]*.

[2] Post-Civil War Civil Rights Statutes

No *Bivens* Claim Stated Against Former Attorney General or Former FBI Director by Detainee. In *Ashcroft v. Iqbal (2009) -- U.S. --, 129 S. Ct. 1937* , a *Bivens* action by a citizen of Pakistan who was arrested on criminal charges in the United States in the wake of the September 11, 2001, terrorist attacks and detained by federal officials, the former Attorney General and the former Director of the Federal Bureau of Investigation were entitled to qualified immunity as to allegations they adopted an unconstitutional policy subjecting him to harsh conditions of confinement on account of his race, religion, or national origin. The complaint did not plead factual matter that, if taken as true, stated a claim that defendants deprived him of his clearly established constitutional rights by failing to plead sufficient facts to state a claim for purposeful and unlawful discrimination. See Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

School Officials Entitled to Qualified Immunity for Violation of Student's Rights Through Search. In *Safford Unified School Dist. v. Redding (2009) -- U.S. --, 129 S. Ct. 2633* , the United States Supreme Court held that, although a 13-year-old student's *Fourth Amendment* right was violated when she was subjected to a search of her bra and underpants by school officials acting on a reasonable suspicion she had brought forbidden prescription and over-the-counter drugs to school because there were no reasons to suspect the drugs presented a danger or were concealed in her underwear, the school officials who ordered and conducted the unconstitutional search were entitled to qualified immunity from liability, because there was reason to question the clarity with which the right was established. See Ch. 113, *Civil Rights: The Post Civil-War Civil Rights Statutes* , and see Ch. 513, *Schools: Student Rights and Responsibilities* .

Absolutely Immunity for Parole Decisions. In *Brown v. Cal. Dep't of Corrections (9th Cir. 2009) 554 F.3d 747* , the Ninth Circuit held that state prosecutors and state parole board officials have absolute immunity from liability under *42 U.S.C. § 1983* for parole recommendations, because parole decisions are a continuation of the sentencing process. See Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

***Saucier* Not Inflexible Mandate and Officers Entitle to Qualified Immunity.** In *Pearson v. Callahan (2009) -- U.S. --, 129 S. Ct. 808* , the Supreme Court held that the *Saucier* procedure for determining qualified immunity should not be regarded as mandatory, and courts may exercise their discretion in determining qualified immunity. Further, the police

officers who arrested plaintiff without a warrant and without exigent circumstances were entitled to qualified immunity because their entry into his home did not violate clearly established law. When the entry occurred, the "consent-once-removed" doctrine had gained acceptance in the lower courts and the officers were entitled to rely on those cases, even though their own Federal Circuit had not yet ruled on "consent-once-remove" entries, so that the unlawfulness of officers' conduct was not clearly established. See Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

Title IX Does Not Preclude Action Under § 1983. In *Fitzgerald v. Barnstable School Committee (2009) -- U.S. --, 129 S. Ct. 788, 172 L. Ed. 2d582, 2009 U.S. LEXIS 592* , an action by parents alleging unconstitutional gender discrimination in a school based on alleged peer-to-peer sexual harassment, Title IX of the Education Amendments of 1972 did not preclude an action under *42 U.S.C. § 1983*, because Congress did not intend Title IX to preclude § 1983 constitutional suits. See Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

Prosecutors Entitled to Absolute Immunity. In *Van De Kamp v. Goldstein (2009) -- U.S. --, 129 S. Ct. 855, 172 L. Ed. 2d 706, 2009 U.S. LEXIS 1003* , the Supreme Court held that prosecutors were entitled to absolute immunity from a claim of failure to provide potential impeachment information about a jailhouse informant who testified against plaintiff at his murder trial that the informant had previously received reduced sentences for providing prosecutors with favorable testimony in other cases, at least some prosecutors in the district attorney's office knew about the favorable treatment, the office had not provided plaintiff's attorney with that information, and the prosecution's failure to provide the attorney with the potential impeachment information had led to his erroneous conviction. Absolute immunity extended to claims the prosecution failed to disclose impeachment material due to a failure properly to train prosecutors, a failure properly to supervise prosecutors, or a failure to establish an information system containing potential impeachment material about informants. See Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

***Bivens* Relief Not Precluded for Public Health Service Employees.** In *Castaneda v. United States* (9th Cir. 2008) 546 F.3d 682 , the Ninth Circuit held that *42 U.S.C. § 233(a)*, providing that the remedy against the United States provided by the Federal Tort Claims Act ("FTCA") for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions by any commissioned officer or employee of the Public Health Service while acting within the scope of office or employment, is exclusive of any other civil action or proceeding by reason of the same subject matter against the officer or employee whose act or omission gave rise to the claim, did not establish the Federal Tort Claims Act as the exclusive remedy for constitutional violations committed by officers and employees of the Public Health Service in failing to provide plaintiff's decedent adequate medical attention while in their custody, resulting in his death, and did not preclude a *Bivens* cause of action against them. See Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

Standard for Police Officer's Behavior Was Whether He Acted With Purpose to Harm. In *Porter v. Osborn (9th Cir. 2008) 546 F.3d 1131* , an action under *42 U.S.C. § 1983* by parents for violation of their *Fourteenth Amendment* due process right to associate with their son, who was killed by defendant police officer, the appropriate standard of culpability to apply to the conduct of the police officer was whether the officer's behavior shocks the conscience, which would be met by a showing that he acted with a purpose to harm plaintiffs' decedent for reasons unrelated to legitimate law enforcement objectives. Because that standard was clearly established at the time of the shooting, facts suggesting that the officer's own conduct created and agitated the escalating situation and his reactions were disproportionate to the situation he faced were more relevant to the district court's determination on remand whether the officer was entitled to qualified immunity or whether the plaintiffs could show the officer's purpose was to harm plaintiffs' decedent for reasons unrelated to legitimate law enforcement objectives. See Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

[3] Prisoner Rights

Prison-Delivery Rule Applies to Criminal and Civil Appeals. In *Silverbrand v. County of Los Angeles (2009) 46*

Cal. 4th 106 , the California Supreme Court held that under the prison-delivery rule, which had previously only been applied to criminal appeals by self-represented prison inmates, the court of appeal erred in dismissing as untimely a notice of appeal by a state prison inmate of a trial court's dismissal of his medical malpractice lawsuit as barred by the statute of limitations. The inmate properly delivered the notice of appeal to prison authorities before the expiration of the 60-day deadline for appealing the judgment, even though the notice was not received by the superior court clerk until two days after the last day to file the notice of appeal had passed. See Ch. 114, *Civil Rights: Prisoners' Rights* .

Error to Dismiss Complaint for Failure to Exhaust Administrative Remedies Without Findings Prisoner Was Able to Exhaust Them. In *Marella v. Terhune (9th Cir. 2009) 562 F.3d 983* , a magistrate judge (and the district court by adopting the magistrate judge's recommendations and report) erred in concluding that, as a matter of law, although a prison's regulations explicitly created an exception to the timely filing requirement for an administrative grievance if an inmate did not have the opportunity to file the grievance during the filing period, an inmate's purported inability to file an administrative grievance due to his time in the prison hospital and in administrative segregation following a knife attack by fellow inmates of which he was complaining was not an exception to the timely filing requirement, because the magistrate judge did not make factual findings as to whether the inmate had access to the necessary forms and the ability to file during his stay in the hospital and prison infirmary or during administrative lockdown. See Ch. 114, *Civil Rights: Prisoners' Rights* .

Harmless Error to Order Involuntary Administration of Psychotropic Medication Mentally Disordered Defendant Absent From Hearing. In *People v. Fisher (2009) 172 Cal. App. 4th 1006* , the constitutional right of a mentally disordered offender to a fair hearing was violated by an order authorizing the state hospital to forcibly administer psychotropic medication, issued at a hearing at which he was absent for one day. He did not personally waive his right to be present and was not unable to attend the hearing. But the deprivation of his right to be present was harmless beyond a reasonable doubt, because his counsel thoroughly cross-examined the witness whose testimony was compelling, and the offender, who was thereafter present, was given a full and fair opportunity to rebut the testimony but did not do so. The offender was not denied the right to a jury trial, because there is no federal or state constitutional or state statutory right to a jury trial, and substantial evidence supported the trial court's finding that he was a danger to others within the meaning of *Welf & Inst. Code § 5300*. See Ch. 114, *Civil Rights: Prisoners' Rights* .

Failure to Specifically Grieve Deliberate Indifference Did Not Invalidate Exhaustion of Remedies. In *Griffin v. Arpaio (9th Cir. 2009) 557 F.3d 1117* , the Ninth Circuit held that an inmate's failure to specifically grieve deliberate indifference to his medical needs as an *Eighth Amendment* violation did not invalidate his exhaustion attempt concerning his unsatisfactory bunking situation. However, he failed to exhaust administrative remedies properly because he did not provide notice of prison staff's alleged disregard of his lower bunk assignments, and his grievance did not provide enough information to allow prison officials to take appropriate responsive measures. See Ch. 114, *Civil Rights: Prisoners' Rights* .

No Private Right of Action for Damages for Cruel and Unusual Punishment. In *Giraldo v. Dept. of Corrections & Rehabilitation (2008) 168 Cal. App. 4th 231* , the Court of Appeal held that there is no private right of action for damages for violation of the *cruel or unusual punishment clause* of *Cal. Const., art. I, § 17*. Thus, the trial court properly dismissed the claim of a male-to-female transgender inmate based on defendants' alleged failure to take action on plaintiff's repeated complaints that she was being beaten and raped by her cellmate at a state prison. See Ch. 114, *Civil Rights: Prisoners' Rights* .

Blanket Strip Search Policy of Pre-Arraignment Detainees Unconstitutional. In *Bull v. City & County of San Francisco (9th Cir. 2008) 539 F.3d 1193* , the Ninth Circuit held that blanket strip searches of pre-arraignment detainees regardless of severity of charge and without reasonable suspicion are unconstitutional as violating the detainees' *Fourth Amendment* rights, and that a policy of strip searching arrestees solely because they are classified for housing in the general population, in the absence of any reasonable suspicion, violates the arrestees' constitutional rights. See *Ch. 114, Civil Rights: Prisoners' Rights, § 114.14B.*

Prisoner Properly Barred From Filing Complaint After Three "Strikes" Under PLRA. In *O'Neal v. Price (9th Cir. 2008) 531 F.3d 1146* , the trial court properly declined to allow a prisoner to proceed in forma pauperis after determining that three prior actions brought by the prisoner constituted strikes for the purposes of *28 U.S.C. § 1915(g)* as having been brought and dismissed within meaning of *28 U.S.C. § 1915(g)*. The district court disposed of two actions in forma pauperis complaints during the screening process mandated by *28 U.S.C. §§ 1915A*, *1915(e)(2)*, and *42 U.S.C. § 1997e(c)*, and in order to determine the actions did not qualify for in forma pauperis status, the district court necessarily reviewed the complaints and assessed their merits, even though the district court did not use the word "dismiss" in its disposition of the actions. The district court dismissed the complaint in the third action both for failure to exhaust and for failure to state a substantive claim for alleged deprivation of his medicine, so that it was clear from the magistrate judge's reasoning, adopted by the district court, that he considered the prisoner's failure to state a claim to be a fully sufficient condition for his recommendation for dismissal with prejudice. See *Ch. 114, Civil Rights: Prisoners' Rights, § 114.28[7]*.

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1-1 California Forms of Pleading and Practice--Annotated § 1.207

§ 1.207 Class Actions

Labor Union Lacks Standing to Bring Action on Behalf of Its Members Under Unfair Competition Law or Labor Code Private Attorneys General Act. The California Supreme Court has held that a labor union lacks standing to sue as an assignee or association of its members under the Unfair Competition Law [*see Bus. & Prof. Code § 17200 et seq.*] or the Labor Code Private Attorneys General Act of 2004 [*see Lab. Code § 2698 et seq.*]. The Court also held that an employee's representative action under the Labor Code Private Attorneys General Act need not satisfy class-action requirements [*Amalgamated Transit Union, Local 1756 v. Superior Court (2009) 46 Cal. 4th 993* , and *Arias v. Superior Court (2009) 46 Cal. 4th 969*]. See *Ch. 120, Class Actions, §§ 120.11[2], 120.15[1], [4]*.

Proposition 64's Standing Requirements Apply Only to Class Representative. The California Supreme Court has held that the standing requirements imposed by Proposition 64 for a private action under the unfair competition law--a representative plaintiff must have suffered injury in fact and must have lost money or property as a result of the alleged unfair business practice of the defendant [*see Bus. & Prof. Code § 17204*]--apply only to the class representative, and unnamed class members need not show injury in fact or actual loss of money or property. The Court also held that in the context of an alleged fraudulent business practice, the class representative must demonstrate actual reliance on the allegedly deceptive or misleading statements of the defendant, in accordance with settled principles regarding the element of reliance in ordinary fraud actions. Thus, the representative plaintiff need not plead or prove with an unrealistic degree of specificity that the plaintiff relied on particular misrepresentations or false statements when the alleged unfair practice is an extensive and long-term advertising campaign [*In re Tobacco II Cases (2009) 46 Cal. 4th 298*]. See *Ch. 120, Class Actions, § 120.15[1]*.

Plaintiff Who Voluntarily Settles Lacks Standing to Pursue Class Action. A California Court of Appeal has held that a named plaintiff who voluntarily settles his or her individual claim lacks standing to proceed as a class representative, even if the settlement purports to reserve a right to pursue a "class claim" [*Watkins v. Wachovia Corp. (2009) 172 Cal. App. 4th 1576*]. See *Ch. 120, Class Actions, § 120.15[1]*.

Violation of Consumers Legal Remedies Act Does Not Confer Standing to Sue Unless Consumer Suffers Some "Damage." The California Supreme Court in *Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634* has held that a representative plaintiff who has not suffered pecuniary damages may nevertheless have standing to sue under the

Consumers Legal Remedies Act if he or she has incurred some damage, such as transaction costs or opportunity costs, as a result of an alleged violation of the Act. However, the existence of a violation of the Act is not itself a form of "damage" and will not, by itself, confer standing on a consumer exposed to the violation (such as a consumer who enters into a contract that includes an unconscionable term that is never enforced). See *Ch. 120, Class Actions, § 120.15[1]*.

Denial of Class Certification Does Not Have Issue-Preclusive Effect in Subsequent Action That Does Not Present Identical Class-Certification Issues. The court, in *Johnson v. GlaxoSmithKline, Inc. (2008) 166 Cal. App. 4th 1497* , has held that a judgment denying class certification in one action will not preclude litigation of the class-certification issue in a subsequent action in which the class-certification issues are not identical to those presented in the earlier action. See *Ch. 120, Class Actions, § 120.23[2]*.

Private Attorney General Awards in Class Action Suits. In *Grodensky v. Artichoke Joe's Casino (2009) 171 Cal. App. 4th 1399* , the court of appeal held that when assessing the disproportionate financial burden under *Code Civ. Proc. § 1021.5* in a class action, the trial court should look at the expected (not actual) value for the entire class and then discount this benefit by an estimate of the probability of success at the time vital litigation decisions were made. See *Ch. 174, Costs and Attorney's Fees, § 174.56*.

"Death Knell" Doctrine Does Not Authorize Appeal From Order Denying Class Certification if Order Grants Leave to Amend. A California Court of Appeal has held that the "death knell" doctrine, under which an order denying class certification is immediately appealable if it effectively dismisses all class members except the named plaintiff, does not extend to allow an appeal from an order granting a demurrer with leave to amend. Such an order does not sound the "death knell" of the class action, since the complaint can be amended in a way that would permit class certification [*Farwell v. Sunset Mesa Property Owners Assn., Inc. (2008) 163 Cal. App. 4th 1545]* . See *Ch. 120, Class Actions, § 120.18[5][a]*.

Prelitigation Settlement Efforts Not Required for Fee Award Under "Private Attorney General" Statute. The California Supreme Court has held that a prelitigation settlement demand is not a prerequisite to an award of attorney's fees under the private attorney general statute, *Code Civ. Proc. § 1021.5*, unless the award is made pursuant to the catalyst theory in a case in which does not result in a judicial resolution or a judicially recognized change in the parties' legal relationship [*Vasquez v. State (2008) 45 Cal. 4th 243]* . See *Ch. 120, Class Actions, § 120.24[3]*.

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§ 1.207A Constitutional Law

Constitutional Amendment Versus Revision. This chapter is updated with *Strauss v. Horton (2009) 46 Cal. 4th 364* , which holds that Proposition 8, which prohibits same-sex marriage after November 2009, is an amendment to the California Constitution, and that the distinction drawn by the California Constitution between an amendment and a revision does not turn on the relative importance of the measure, but rather upon the measure's scope. See *Ch. 126A, Constitutional Law, § 126A.13[3]*.

Same-Sex Marriages and Proposition 8. This chapter is updated with *Strauss v. Horton (2009) 46 Cal. 4th 364* , which holds Proposition 8 is a permissible constitutional amendment to limit the rights of people of the same sex to marry, is not an impermissible constitutional revision, does not violate the separation of powers doctrine and is not invalid under an "inalienable rights" theory, and applies both to marriages performed in California and to those performed in other jurisdictions. The Court observed that if there is to be a change to the state constitutional rule embodied in that measure, it must "find its expression at the ballot box." The Court also concluded that Proposition 8 does not apply retroactively. Therefore, the approximately 18,000 marriages of same-sex couples that were performed between the time of the Court's decision in *In re Marriage Cases* and the effective date of Proposition 8 (November 5, 2008) remain valid in all respects and must continue to be recognized in this state. The Court noted that Proposition 8 did not entirely repeal or abrogate a same-sex couple's state constitutional rights of privacy, due process, and equal protection that the Court had previously recognized in *In re Marriage Cases* [*In re Marriage Cases (2008) 43 Cal. 4th 757*]. See *Ch. 126A, Constitutional Law, § 126A.42[3][b]*.

Equal Protection and Proposition 8. The California Supreme Court has ruled that sexual orientation is a suspect classification for purposes of the California *Constitution's Equal Protection Clause*. Therefore, statutes that treat persons differently because of their sexual orientation are subject to strict scrutiny [*see In re Marriage Cases (2008) 43 Cal. 4th 757*]. The ratification by the voters of Proposition 8, which added Cal. Const., *art. I, § 7.5 to the state constitution* effective November 5, 2008, limits the scope of equal protection in respect to marriage on the basis of sexual orientation by defining a valid marriage as being between a man and a woman. Per *Strauss v. Horton (2009) 46 Cal. 4th 364* , upholding the constitutionality of Proposition 8 "[w]ith respect to the specific subject of the designation of the word 'marriage,' Proposition 8 does change the rule, set forth in the majority opinion in the *Marriage Cases*, that limiting access to this designation to opposite-sex couples constitutes an impermissible violation of the state *equal*

protection clause. ... By incorporating into the California Constitution a specific provision that expressly restricts the designation of 'marriage' to the union of a man and a woman, Proposition 8 must be understood as creating a limited exception to the state *equal protection clause* as interpreted in the majority opinion in the Marriage Cases. ... This exception--although constituting the governing state constitutional rule with regard to the specific matter it addresses--does not alter the general equal protection principles set forth in the *Marriage Cases* and in other California decisions interpreting and applying the state constitutional *equal protection clause*. Those principles continue to apply in all other contexts." See *Ch. 126A, Constitutional Law, § 126A.63A*.

Legislative Powers. This chapter is updated with *The Zumbrun Law Firm v. California Legislature (2008) 165 Cal. App. 4th 1603* , which holds under *Cal. Const., art. IV, § 7*, the Legislature retains powers necessary to its lawmaking functions, including the power to protect the safety and security of the Legislature, its members, and any buildings and grounds used by the Legislature. See *Ch. 126A, Constitutional Law, § 126A.21[3][b]*.

Separation of Powers and Expenditure of Funds. This chapter is updated with *County of San Diego v. California (2008) 164 Cal. App. 4th 580* , which holds while a court cannot compel the Legislature either to appropriate funds or to pay funds not yet appropriated, no violation of the separation of powers doctrine occurs when a court orders appropriate expenditures from already existing funds. The test is whether such funds are reasonably available for the expenditures in question. Funds are reasonably available for reimbursement when the purposes for which those funds were appropriated are generally related to the nature of costs incurred. There is no requirement that the appropriation specifically refer to the particular expenditure, nor that past administrative practice must sanction coverage from a particular fund. Still, funds appropriated for one specific educational purpose may not be judicially diverted to another. See *Ch. 126A, Constitutional Law, § 126A.21[4][a]*.

Local Regulation and Preemption. This chapter is updated with *Rental Housing Ass'n of N. Alameda Cty. v. City of Oakland (2009) 171 Cal. App. 4th 741* , which holds absent a clear indication of preemptive intent from the Legislature, the court presumes that local regulation in an area over which the local government traditionally has exercised control is not preempted by state law. See *Ch. 126A, Constitutional Law, § 126A.24[1]*.

California *Takings Clause* Broader Than Federal. This chapter is updated with *Monks v. City of Rancho Palos Verdes (2008) 167 Cal. App. 4th 263* , which holds California's *Takings Clause, Cal. Const., art. I, § 19*, requires compensation for damage as well as a taking, which the Federal *Takings Clause, U.S. Const., amend. V* does not. Therefore, the California *Takings Clause* protects a somewhat broader range of property values than does the corresponding federal provision. Aside from that difference, California courts have construed the clauses congruently. Thus, courts have analyzed takings claims under decisions of both the California and United States Supreme Courts. See *Ch. 126A, Constitutional Law, § 126A.32[3][d]*.

Economic Regulation. This chapter is updated with *Amaral v. Cintas Corp. No. 2 (2008) 163 Cal. App. 4th 1157* , which holds economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. See *Ch. 126A, Constitutional Law, § 126A.52*.

Reformation of Laws. This chapter is updated with *Am. Bankers Ass'n v. Lockyer (9th Cir. 2008) 541 F.3d 1214* , which holds if the Legislature's intent clearly would be furthered by application of the revised version rather than by the alternative of invalidation of the entire statute, then the court is to sever the invalid portion of the statute; and under California law, when faced with a question of whether to reform a state statute, the function of a federal court is to divine, to the best of its ability, how the state's highest court would resolve that state law issue. See Ch. 126A, *Constitutional Law*, § 126A.77.

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§ 1.208 Contracts and Commercial Law

Advertising--Standing to Sue for CAN-SPAM Act Violations. In *Gordon v. Virtumundo, Inc. (9th Cir. 2009) 575 F.3d 1040, 2009 U.S. App. LEXIS 17518* , the court discussed how to resolve a threshold issue in any private action based on a violation of the federal CAN SPAM Act [*15 U.S.C. § 7701 et seq.*], which is whether the plaintiff meets the statutory standing requirements. That is, was the plaintiff an "Internet access" service provider, and was the plaintiff "adversely affected by" actionable statutory violations? See *Ch. 14, Advertising, § 14.15[3][f][i]*.

Banks--Right of Setoff Extends to Recouping Overdraft and Charging Fee. In *Miller v. Bank of Am. (2009) 46 Cal. 4th 630* , the California Supreme Court held that a bank's practice of recouping overdrafts and extracting insufficient funds fees from the customer's overdrawn account is permissible in light of the unequivocal statement in *Fin. Code § 864(a)(2)* that overdrafts and bank charges are not debts, meaning that they are not subject to the statute's limitations on a bank's right of setoff. See *Ch. 95, Banks, Deposits, and Checks, § 95.294*.

Negotiable Instruments--Claiming Statutory Damages Precludes Claim for Prejudgment Interest on Dishonored Check. In *Imperial Merchant Servs., Inc. v. Hunt (2009) 47 Cal. 4th 381, 2009 Cal. LEXIS 8030* , the California Supreme Court answered the question, certified to it by the Ninth Circuit, whether a debt collector recovering on a dishonored check may recover both a service charge under *Civ. Code § 1719(a)(1)* and prejudgment interest under *Civ. Code § 3287*. The court held that the statutory damages prescribed in *Civ. Code § 1719* are exclusive; therefore, a payee who recovers a service charge pursuant to *Civ. Code § 1719* may not also recover prejudgment interest under *Civ. Code § 3287*. The case is discussed in comments to *forms in Ch. 385, Negotiable Instruments, §§ 385.119[4], 385.120[4][a]*.

Usury--Structured Settlement Transfer Act. This chapter is updated with *321 Henderson Receivables Origination LLC v. Sioteco (2009) 173 Cal. App. 4th 1059* , which holds the transfer of structured settlement payments under the Structured Settlement Transfer Act [*Ins. Code § 10136 et seq.*] does not implicate the prohibition against usury in *Cal. Const., art. XV, § 1* because a structured settlement transfer is not a loan or forbearance but is instead a sale, as indicated in *Ins. Code § 10136(b)*. See *Ch. 568, Usury, § 568.12[1]*.

Credit Card Transactions--Prohibition Against Recording Personal Identification Information. In *Party City Corp. v. Superior Court (2008) 169 Cal. App. 4th 497* , the court held that the prohibition in *Civ. Code § 1747.08(c)*

against requesting a cardholder's "personal identification information" in connection with a credit card transaction does not encompass the cardholder's five-digit ZIP code, which is not personal identification information" as defined in the statute. See Ch. 127, *Consumer Contracts and Loans* , § 127.8[17][a].

Contracts--Fraud in Inducement, Fraud in Execution, and Arbitration Clause. In *Brown v. Wells Fargo Bank, N.A. (2008) 168 Cal. App. 4th 938* , the court clarified that when a party to a contract containing an arbitration clause elects to resist arbitration and asserts fraud in the inducement or fraud in the execution, special procedural rules apply because an arbitration clause is considered to be separable from the contract. The court explained when the fraud issue is decided by the arbitrator, and when the court decides it. See *Ch. 140, Contracts, § 140.22[1]*.

Sales --Implied Warranties-- Requirement for Privity Between Seller and Buyer. In *Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116* , the court concluded that if the manufacturer or supplier of goods affirmatively engages in conduct directly with the ultimate buyer, so that functionally the manufacturer or supplier is in the position of the direct seller, it is fair and appropriate to hold that manufacturer or supplier to an implied warranty that the goods will be fit for the buyer's purposes, if all other elements of the buyer's claim have been established. In that case, the lack of actual privity between those parties can be disregarded. See *Ch. 502, Sales: Warranties, § 502.24[7]*.

Damages--Setoff Against Awarded Damages When Each Party Has Claim Against Other on Same Contract. In *Great W. Drywall, Inc. v. Roel Constr. Co. (2008) 166 Cal. App. 4th 761* , the court held that in an action for breach of contract, if the defendant pleads a claim against the plaintiff based on defective performance of the same contract, and damages are awarded to both parties on their claims against each other, then each party is entitled to have the two awards set off against each other, regardless of whether the defendant pleaded a tort claim (such as negligent performance) or a contract claim against the plaintiff. For discussion of setoffs against damages awarded in contract actions, see *Ch. 177, Damages, § 177.81*.

Consumers Legal Remedies Act--Meaning of "Any Damage" as Standing Requirement. In *Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634* , the California Supreme Court clarified that in order to bring an action under the Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*], not only must a consumer be exposed to an unlawful practice, but there must also be some kind of resulting damage. The Court disapproved its dictum in an earlier case, to the effect that the standing requirement of suffering "any damage" [*Civ. Code § 1780(a)*] means suffering the infringement of any legal right as defined by *Civ. Code § 1770* [*see Kagan v. Gibraltar Sav. & Loan Ass'n (1984) 35 Cal. 3d 582, 593]* . The Court concluded that a consumer has not suffered any damage as a result of an unlawful practice if unconscionable terms in a consumer contract have not yet actually been enforced so as to impose "some kind of tangible increased cost or burden" on the consumer. In that situation, the consumer has no standing under *Civ. Code § 1780(a)* to sue for injunctive relief aimed at precluding the future use of an unlawful practice. See *Ch. 504, Sales: Consumers Legal Remedies Act, § 504.13[1]*.

Sales of Goods--Merchant's Implied Warranty of Title. In *Pacific Sunwear of Cal., Inc. v. Olaes Enters., Inc. (2008) 167 Cal. App. 4th 466* , the court held, on a question of first impression in California, that a merchant's implied warranty that the goods are "free of the rightful claim of any third person by way of infringement or the like" [*Com. Code § 2312(3)*] protects the buyer against a nonfrivolous claim of infringement that has any significant and adverse effect on the buyer's ability to make use of the goods, without regard to whether the claim ultimately might prove successful in litigation. See *Ch. 502, Sales: Warranties, § 502.22*.

Contracts--Specific Performance. A California appellate court has confirmed that specific performance can be appropriately decreed even in the case of a commercial contract (when, usually, damages would presumably be an adequate remedy) and even though that relief would entail protracted supervision or direction by the court and the exercise of special knowledge, skill, and judgment by the party ordered to perform. In this case, the trial court properly ordered the defendant to plan and undertake the plugging of abandoned oil wells on property that the defendant had purchased from the plaintiff [*Union Oil Co. v. Greka Energy Corp. (2008) 165 Cal. App. 4th 129]* . See *Ch. 528,*

Specific Performance, § 528.44.

Truth in Lending Act--Private Education Loans. Congress has extended the reach of the Truth in Lending Act to private lenders that make education loans, as defined. Although unsecured consumer loans exceeding $25,000 are generally exempt from TILA regulation, that exemption does not cover private education loans subject to the new legislation [*see* Pub. L. 110-315, § 1001 et seq.]. See *Ch. 127, Consumer Contracts and Loans, § 127.34*.

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§ 1.209 Corporations and Business Entities

Director's Right to Inspect Records. In *Tritek Telecom, Inc. v. Superior Court (2009) 169 Cal. App. 4th 1385* , the court held that a corporate director does not have the right to access documents that are covered by the attorney-client privilege and were generated in defense of a suit for damages that the director filed against the corporation. See *Ch. 165, Corporations: Corporate Records and Reports, § 165.19[3]*.

Derivative Actions--Defense by Corporation. In *Patrick v. Alacer Corp. (2008) 167 Cal. App. 4th 995* , a case of first impression, the court addressed the question of whether a corporation can file a demurrer opposing a shareholder's derivative action complaint, and, if so, on what grounds. The court held that the corporation has no ground to challenge the *merits* of a derivative claim by demurrer because the claim is filed on the corporation's behalf, from which the corporation stands to benefit, but may demur to the complaint on the ground that the plaintiff lacks standing to sue derivatively. The court noted that the corporation also may assert the "special litigation committee" defense, to the effect that the corporation legitimately does not want to pursue the litigation. See *Ch. 168, Corporations: Derivative Actions, § 168.15[3]*.

Corporations--"Outside Reverse Piercing" Doctrine. In a case of first impression, a California appellate court has concluded that the theory of outside reverse piercing (or third-party piercing) of the corporate veil, by which the corporate veil is pierced to permit a third-party judgment creditor to reach corporate assets to satisfy claims against a shareholder, is not recognized in California [*Postal Instant Press, Inc. v. Kaswa Corp. (2008) 162 Cal. App. 4th 1510]* . See *Ch. 161, Corporations: Alter Ego Liability, § 161.11[2]*.

Corporations--Annual Report to Shareholders. *Corp. Code § 1501(a)* has been amended [Stats. 2008, ch. 177, § 1] to provide that a corporation with an outstanding class of securities registered under § 12 of the federal Exchange Act will satisfy California's annual report requirement by complying with federal regulations relating to internet availability of the annual report. See *Ch. 165, Corporations: Corporate Records and Reports, §§ 165.25[2], 165.73*.

Securities--Broker-Dealer Licensure of Directors and Officers. Dept. of Corporations Release No. 119-C (Oct. 22, 2008) clarifies licensure requirements for directors and officers of issuers who do not receive commissions for effecting securities transactions. See *Ch. 515, Securities and Franchise Regulation, §§ 515.13[5], 515.15*.

Franchise Regulation--Recreational Vehicle Dealers. Legislation effective January 1, 2009, expands franchise regulation to include the business relationships between recreational vehicle manufacturers and dealers (except those who deal exclusively in truck campers) [*see* Stats. 2008, ch. 743]. The legislation expands franchise regulation to include the business relationships between recreational vehicle manufacturers and dealers (except those who deal exclusively in truck campers) [*see* Stats 2008 ch. 743]. See *Ch. 515, Securities and Franchise Regulation, §§ 515.131[1], 515.150*.

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§ 1.210 Costs and Attorney's Fees

Including General Release in Settlement Offer Acceptable Under *Code Civ. Proc. § 998*. In *Linthicum v. Butterfield (2009) 175 Cal. App. 4th 259* , the court of appeal held that including a general release as part of a settlement offer does not defeat an award of costs under *Code Civ. Proc. § 998*. See *Ch. 174, Costs and Attorney's Fees, § 174.17[2]*.

Party May Recover Attorney's Fees for Work Done in Related Case. In *Ramon v. County of Santa Clara (2009) 173 Cal. App. 4th 915* , the court of appeal held that under *Code Civ. Proc. § 1021.5*, a party may recover attorney's fees for work performed by counsel in opposing an amicus curiae brief in a related lawsuit that resolved an issue in a present case. See *Ch. 174, Costs and Attorney's Fees, § 174.56[1]*.

Statute Regarding Fee Waivers Amended. This release sets forth the new law regarding governing applications for fee waivers during trial based on financial condition (in forma pauperis), which went into effect July 1, 2009. The legislature has repealed *Gov. Code § 68511.3* and enacted *Gov. Code §§ 68630-68641* in its stead. This release also includes the corresponding amended *California Rules of Court, Rule 3.50 et seq.* and new forms. See *Ch. 174, Costs and Attorney's Fees, § 174.110* et seq.

Private Attorney General Awards in Class Action Suits. In *Grodensky v. Artichoke Joe's Casino (2009) 171 Cal. App. 4th 1399* , the court of appeal held that when assessing the disproportionate financial burden under *Code Civ. Proc. § 1021.5* in a class action, the trial court should look at the expected (not actual) value for the entire class and then discount this benefit by an estimate of the probability of success at the time vital litigation decisions were made. See *Ch. 174, Costs and Attorney's Fees, § 174.56*.

Fees Recoverable to Enforce Judgment in Companion Case. In *Globalist Internet Technologies, Inc. v. Reda (2008) 167 Cal. App. 4th 1267* , the court of appeal held that attorney's fees incurred in defending a companion action were incurred in enforcing a judgment and were therefore recoverable under *Code Civ. Proc. § 685.040*. See *Ch. 174, Costs and Attorney's Fees, § 174.33[1]*.

Plaintiff Need Not Have Tried to Enforce Right Without Litigation to Recover Under Private Attorney General

Theory. In a major change from prior law, in *Vasquez v. California (2008) 45 Cal. 4th 243* , the California Supreme Court held that a plaintiff need not first attempt to settle a dispute short of litigation to recover attorney's fees under *Code Civ. Proc. § 1021.5*. See *Ch. 174, Costs and Attorney's Fees, § 174.56[7]*.

15-Day Time Limit in Rule 3.1700 Not Applicable to Expert Witness Fees. In *Anthony v. City of Los Angeles (2008) 166 Cal. App. 4th 1011* , the court of appeals held that the time limits prescribed by *Cal. Rules of Ct., Rule 3.1700* apply only to the items allowable as costs listed in *Code Civ. Proc. § 1033.5(a)*, i.e., cost items to which a party is entitled as a matter of right. See *Ch. 174, Costs and Attorney's Fees, § 174.28[2][c]*.

Settlement Proceeds Not Included in Determining Prevailing Party. In *Chinn v. KMR Property Management (2008) 166 Cal. App. 4th 175* , the court of appeal held that net monetary recovery for purposes of determining a prevailing party does not include settlement proceeds plaintiff received in exchange for dismissing defendant. See *Ch. 174, Costs and Attorney's Fees, § 174.15[1][d]*.

New Fee Waiver Statute. Effective July 1, 2009, *Gov. Code § 68511.3* is repealed and replaced by new, broader fee waiver statutes, contained in *Gov. Code §§ 68630-68641*. The new statutes provide that the court may grant an initial fee waiver at any stage of the proceedings, trial or appellate. See Ch. 174, *Costs and Attorney's Fees*, § 174.130.

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§ 1.211 Declaratory Relief

Declaratory Relief Regarding Liability Insurance Coverage Is Generally Unavailable to Injured Party Until Liability of Insured Is Settled. A California Court of Appeal has held that an injured party generally may not obtain declaratory relief against an insurer to establish that the injury is covered under the alleged tortfeasor's liability insurance policy, if the injured party's suit against the tortfeasor is still pending. Declaratory relief is unavailable because until the tortfeasor's liability is settled, a court cannot be certain that a controversy will arise between the injured party and the insurer [*Otay Land Co. v. Royal Indem. Co. (2008) 169 Cal. App. 4th 556*]. See *Ch. 182, Declaratory Relief, § 182.14[3]*.

Court Has Discretion to Deny Declaratory Relief if It Would Have No Practical Effect. The California Supreme Court has held that a trial court has considerable discretion to deny declaratory relief if the parties' controversy is primarily over the enforceability of certain contractual remedies should a future dispute over substantive rights arise, no substantive dispute has arisen, and declaratory relief would have little practical effect in terms of altering parties' behavior [*Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634]* . See *Ch. 182, Declaratory Relief, §§ 182.20[1], 182.60[3][b][iii]*.

Juvenile Court May Grant Declaratory Relief in Juvenile Dependency Case. A California court of appeal has held that although juvenile dependency proceedings are governed generally by *Welf. & Inst. Code § 300 et seq.*, the juvenile court may under appropriate circumstances grant declaratory relief in a juvenile dependency case, such as when it is alleged that a county department of social services has a policy of ignoring statutory deadlines in dependency proceedings [*Imperial County Dep't of Soc. Servs. v. J.E. (In re Claudia E.) (2008) 163 Cal. App. 4th 627]* . See *Ch. 182, Declaratory Relief, §§ 182.13[4], 182.20[2]*.

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§ 1.212 Discovery

Important New Chapter on E-Discovery. New Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* discusses the discovery of electronically stored information (ESI), generally known as e-discovery. ESI is pervasive in today's civilization and e-discovery is rapidly becoming the rule rather than the exception in litigation. The Electronic Discovery Act, passed by the Legislature in 2009 as an urgency measure and effective immediately, refines the Civil Discovery Act in the area of e-discovery by covering, among other things:

- The availability of e-discovery in California state courts.
- The requirement that the parties meet and confer regarding e-discovery issues.
- The form and manner in which ESI must be produced.
- The extent of e-discovery and the court's power to regulate and limit its use.
- Protective orders and motions to compel.
- Allocation of e-discovery costs.
- Discovery of ESI in the possession of third parties.
- The recovery of privileged information that was inadvertently disclosed to the other party.

The chapter was reviewed by Michael F. Kelleher, the e-discovery expert at the San Francisco office of Folger Levin & Kahn LLP. In addition to the discussion of the Electronic Discovery Act, it contains procedural checklists and forms for e-discovery under the new law. See Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery).*

Discovery--California Statutes Governing E-Discovery. Chapters 190 through 200 (Discovery), and Ch. 535, *Subpoena*, have been updated throughout to conform to the legislative changes enacted by the California Electronic

Discovery Act [Stats. 200, ch. 5], effective June 29, 2009. The Act addresses the problems created by application of the general Discovery Act rules to the specific issues that typically arise in e-discovery. Also included are the very recent changes to *Cal. Rules of Court, Rule 3.724*, adopted by the Judicial Council. These changes, adopted effective August 14, 2009, include some last-minute changes to the proposed rules as previously discussed in Ch. 195A, *Discovery: Discovery of Electronic Evidence (E-Discovery)*. Specifically, the period during which the "meet and confer" conference on e-discovery must be conducted, which was at least 45 days prior to the initial case management conference under the proposed rule, was changed to not less than 30 days before the initial conference in the version adopted by the Judicial Council. Thus, the e-discovery meet-and-confer requirement is subject to the same time frame as the general meet-and-confer provision under Rule 3.724. In addition, the version adopted by the Judicial Council eliminated language in the proposed version stating that the e-discovery meet-and-confer obligation was triggered by written notice that e-discovery was likely to be conducted in the case. In the final version, discussion of e-discovery issues is simply mandatory in all cases; no written notice is required. Last, proposed conforming changes to Rule 3.728 were eliminated as unnecessary and redundant. All of these changes have been integrated into Ch. 195A, *Discovery: Discovery of Electronic Evidence (E-Discovery)*.

Discovery--Sanctions. Ch. 192, *Sanctions for Discovery Misuse*, has been updated with discussion of *Doppes v. Bentley Motors, Inc. (2009) 174 Cal. App. 4th 967* , a case presenting "the rare occasion" when the trial court abused its discretion by not imposing a terminating sanction for defendant's discovery misconduct. See Ch. 192, *SSanctions for Discovery Misuse*, §192.13[3][b][iii].

Discovery--Subpoena Duces Tecum. Ch. 535, *Subpoena* has been updated with discussion of *Terry v. SLICO (2009) 175 Cal. App. 4th 352* , in which the court held that service of the deposition subpoena on nonparty witness was effective despite absence of a supporting affidavit or declaration. *Code Civ. Proc. § 2020.510(b)*, providing that a deposition subpoena need not be accompanied by an affidavit or declaration showing good cause for the production of the documents and things designated, controlled, prevailing over *Code Civ. Proc. § 1987.5*, which provides that service of subpoena duces tecum issued before trial without copy of affidavit is invalid. See *Ch. 535, Subpoena, § 535.17[3]*.

Discovery--Revised Judicial Council Form SUPB-200. Ch. 535, *Subpoena*, has been updated with revised Judicial Council Form SUPB-002, Civil Subpoena for Personal Appearance and Production of Documents and Things at Trial or Hearing and Declaration. See *Ch. 535, Subpoena, § 535.61[1]*.

Trade Secret Protection. This chapter has been updated with discussion of two recent trade secret cases. In *Brescia v. Angelin (2009) 172 Cal. App. 4th 133* , the court addressed when plaintiff is required to particularize how the alleged trade secret differs from matters already known to skilled persons in the field in order to describe the trade secret with the required "reasonable particularity" sufficient to permit discovery to begin. In *Citizens of Humanity, LLC v. Costco Wholesale Corp. (2009) 171 Cal. App. 4th 1* , the court analyzed whether the identity of defendant's suppliers was a protectable trade secret. See *Ch. 191, Discovery: Privileges and Other Discovery Limitations, § 191.82[1]* and *[2]*, respectively.

Discovery in Actions Pending Outside California. *Cal. Rules of Ct., Rule 3.1025*, effective March 13, 2009, fills the gap left by the unintended early repeal of former *Code Civ. Proc. § 2029.010*. This rule incorporates the text of the former statute, and is slated for repeal January 1, 2009, when new statutes take effect. See *Ch. 193, Discovery: Depositions, § 193.130*.

Appealability of Denial of Motion for Sanctions. This chapter has been updated with expanded discussion regarding when denial of a motion for sanctions is appealable, including coverage of *Muller v. Fresno Community Hospital & Medical Ct. (2009) 172 Cal. App. 4th 887* , which purports to reconcile apparent inconsistencies in the California Supreme Court's opinions on this issue. See *Ch. 200, Discovery: Review of Discovery Orders, § 200.11[4]*.

Privacy--Right to Privacy in Relatively Nonsensitive Contact Information. Ch. 191, *Discovery: Privileges and*

Other Discovery Limitations, has been updated with expanded coverage of the tension between privacy interests and access to relevant information necessary to pursue the litigation in employment law cases. In *Puerto v. Superior Court (2008) 158 Cal. App. 4th 1242* , a case alleging wage and hour violations, a California court held that an order restricting the disclosure of potential witnesses' contact information through the use of an opt-in letter exceeded the protections necessary to safeguard the legitimate privacy interests in the addresses and telephone numbers of the witnesses, and as such was an abuse of discretion. In *Lee v. Dynamex, Inc. (2008) 166 Cal. App. 4th 1325* , a California court found reversible error in denying a motion to compel disclosure of independent contractor names and addresses using an opt-out procedure in a class action lawsuit alleging improper reclassification of class members from employees to independent contractors. In *Crab Addison, Inc. v. Superior Court (2008) 169 Cal. App. 4th 958* , involving a pending class action to enforce employees' statutory wage and overtime rights, the violation of the employees' right to privacy did not outweigh plaintiffs' right to discover the class members' names, addresses, and telephone numbers, subject to an opt-out notice. See *Ch. 191, Discovery: Privileges and Other Discovery Limitations, §§ 191.120[3]*.

Sanctions--Limitations on Court's Inherent Power to Award Sanctions. In *New Albertsons, Inc. v. Superior Court (2008) 168 Cal. App. 4th 1403* , a California court held that sanctions based on court's inherent power are reserved for egregious violations of discovery process. Accordingly, imposition of evidence and issue sanctions based on the court's inherent power to control the litigation, absent defendant's failure to obey an order compelling discovery, was an abuse of discretion. See *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 195.13[3][b][i]*.

Admissions--Ruling on Motion to Withdraw or Amend Admission Under *Code Civ. Proc. §§ 2033.300*. In *New Albertsons, Inc. v. Superior Court (2008) 168 Cal. App. 4th 1403* , a California court held that any doubts in ruling on a motion to withdraw or amend an admission must be resolved in favor of the moving party. See *Ch. 196, Discovery: Requests for Admissions, §§ 196.16[6]*.

Discovery--Amendments to California Rules of Court. Chapters 190-200 regarding discovery have been updated throughout to reflect the renumbering of (former) *California Rules of Court 3.1020, 3.1025*, and *3.1030* and the addition of Rule 3.1347, governing discovery motions in summary proceedings involving real property. Rules 3.1020, 3.1025, and 3.1030, governing the format of discovery motions, the service of motion papers on a nonparty deponent, and sanctions for failure to provide discovery, have been renumbered to 3.1345, 3.1346 and 3.1348, respectively.

Discovery--Motion to Compel. This chapter has been updated to include discussion of *Pelton-Shepherd Industries, Inc. v. Delta Packaging Products, Inc. (2008) 165 Cal. App. 4th 1568* , in which the court concluded that the trial court erred by granting defendant's motion to compel discovery filed after the discovery motion cutoff date, because defendant failed to file a motion to reopen discovery under *Code Civ. Proc. § 2024.050* before or simultaneously with, filing its motion to compel. See *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.51[1]*.

Discovery--Balancing Privacy and Litigants' Need for Discovery in Class Action. This chapter has been updated to include discussion of *Alch v. Superior Court (2008) 165 Cal. App. 4th 1412* , a consolidated class action by television writers asserting an industry-wide pattern and practice of age discrimination, in which the appellate court held that the trial court erred by denying access to all requested information from third-party objectors on privacy grounds, without considering whether "a more nuanced approach" to different categories of data would satisfy the balance between privacy interests and the litigants' need for discovery. See *Ch. 191, Privileges and Other Discovery Limitations, § 191.120[6][a]*.

Discovery--Terminating Sanctions. This chapter has been updated to include discussion of *Williams v. Russ (2008) 167 Cal. App. 4th 1215* , in which the court of appeal affirmed that a terminating sanction was merited under *Code Civ. Proc. §§ 2023.010(d)* and *2023.030(d)* when plaintiff had intentionally allowed material unfavorable to his legal malpractice claims to be destroyed. See *Ch. 192, Sanctions for Discovery Misuse, § 192.13[3][b]*.

Discovery--Revised Judicial Council Subpoena Forms. Ch. 193, *Discovery: Depositions*, has been updated to

include revised Judicial Council Form SUBP-015, Deposition Subpoena for Personal Appearance, and Form SUBP-020, Deposition Subpoena for Personal Appearance and Production of Documents and Things. See *Ch. 193, Discovery: Depositions, §§ 193.226[1], 193.227[1]*. Ch. 196, *Discovery: Requests for Admissions*, now includes revised Judicial Council Form DISC-002, Form Interrogatories--Employment Law. See *Ch. 196, Discovery: Requests for Admissions, § 196.61[1]*. Ch. 535, *Subpoena*, has been updated with revised Judicial Council Form SUPB-002, Civil Subpoena for Personal Appearance and Production of Documents and Things at Trial or Hearing and Declaration. See *Ch. 535, Subpoena, § 535.61[1]*.

Discovery--Subpoenas. This chapter has been updated throughout to reflect the amendments to *Code Civ. Proc. §§ 1987.1* and *1987.2*. *Code Civ. Proc. § 1987.1* expands the rights and protections available to specified persons whose records are subject to a subpoena to include a person whose personally identifying information is sought in connection with an underlying action involving that person's free speech rights. *Code Civ. Proc. § 1987.2* provides for a mandatory award of reasonable expenses incurred in making the motion for an order to quash or modify a subpoena for personally identifying information if specified requirements are met. See Ch. 535, *Subpoena* .

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§ 1.212A Elections

Voters--Registration Through Secretary of State's Website. The legislature has set the stage for the Secretary of State to receive voter-registration affidavits electronically on the secretary of state's website [*see* 2008 Stats., ch. 613]. See *Ch. 243, Elections, § 243.13[6]*.

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§ 1.213 Employment

Workplace Privacy. In *Hernandez v. Hillsides, Inc. (2009) 47 Cal. 4th 272* , the California Supreme Court held that an employer's clandestine videotaping of a computer workstation during non-business hours to determine the identity of a person who was using the computer to access pornographic websites during non-business hours was not considered so highly offensive that it would support causes of action for intrusion based upon state common law and *Cal. Const., art. 1, § 1*. See *Ch. 429, Privacy, § 429.39*.

Age Discrimination in Employment Act Does Not Authorize Mixed-Motive Age-Discrimination Claims. The U.S. Supreme Court has held that the ADEA does not authorize mixed-motive age-discrimination claims. Rather, a plaintiff claiming disparate treatment must prove by a preponderance of the evidence (which may be direct or circumstantial) that age was the "but-for" cause of the employer's adverse action [*29 U.S.C. § 623(a)(1)*]. Therefore, in an ADEA case the burden of proof never shifts to the employer to show that it would have taken the adverse action regardless of age [*Gross v. FBL Fin. Servs., Inc.* (2009) 174 L. Ed. 2d 119]. See *Ch. 115, Civil Rights: Employment Discrimination, § 115.23[2][a], [b]*.

Employer Can Discard Test Results to Avoid Disparate Impact Only if There Is Strong Basis in Evidence to Believe Use of Test Results Will Result in Disparate-Impact Liability. The United States Supreme Court has held that under Title VII, before an employer can discard test results to avoid a disparate impact on minority candidates--an act that would itself constitute intentional race-based discrimination against those who did well on the test--the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action of discarding the test results [*Ricci v. DeStefano (2009) 174 L. Ed. 2d 490]* . See *Ch. 115, Civil Rights: Employment Discrimination, § 115.30[4][c]*.

Plaintiff Under Labor Code Private Attorneys General Act Must Have Suffered Injury. The California Supreme Court has held that an employee has standing to sue an employer to collect civil penalties under the Labor Code Private Attorneys General Act of 2004 [*see Lab. Code § 2698 et seq.*] only if the employee suffered injury from the employer's unlawful action; a labor union, therefore, lacks standing to sue as an assignee or association of injured members. The Court also held that an employee's representative action under the Act need not satisfy class-action requirements [*Amalgamated Transit Union, Local 1756 v. Superior Court (2009) 46 Cal. 4th 993* , and *Arias v. Superior Court (2009)*

46 Cal. 4th 969]. See *Ch. 250, Employment Law: Wage and Hour Disputes, §§ 250.30, 250.33[2]*.

Employment Discrimination--Broader Protection Under Americans With Disabilities Act. In the ADA Amendments Act of 2008, effective January 1, 2009, Congress clarified that the ADA's definition of "disability" is to be construed in favor of broad coverage of individuals "to the maximum extent permitted by the terms of" the ADA. Congress also expressly rejected the reasoning and standards enunciated by the United States Supreme Court in *Toyota Motor Mfg., Ky., Inc. v. Williams* (2002) 534 U.S. 184 and *Sutton v. United Airlines* (1999) 527 U.S. 471 as incorrectly narrowing the broad scope of protection intended to be afforded by ADA [Pub. L. No. 110-325, 122 Stat. 3553]. See *Ch. 115, Civil Rights: Employment Discrimination, §§ 115.22[8][b][ii], [c][ii], [d], 115.35[1][a]*.

Employment Discrimination-- ***Collective Bargaining Agreement May Require Arbitration of Statutory Claims.*** *The United States Supreme Court in 14 Penn Plaza LLC v. Pyett (2009) 173 L. Ed. 2d 398* has held that a collective bargaining agreement provision that clearly and unmistakably requires union members to arbitrate statutory antidiscrimination claims is enforceable. See *Ch. 115, Civil Rights: Employment Discrimination, §§ 115.55[2], 115.37[1][a]*, and see *Ch. 249, Employment Law: Termination and Discipline, § 249.21[16]*.

Civil Service-- ***Privilege Against Self-Incrimination Does Not Prevent Employer From Requiring Public Employee to Answer Job-Related Questions.*** *The California Supreme Court, in Spielbauer v. County of Santa Clara (2009) 45 Cal. 4th 704* , has held that a public employer may discipline and even dismiss a public employee for refusing, on grounds of the constitutional privilege against self-incrimination, to answer the employer's job-related questions as long as the employee is not required, as a condition of remaining in the job, to waive or surrender his or her constitutional protection against criminal use of the statements thus obtained, at least when the employee is specifically advised that he or she retains that protection. See *Ch. 118, Civil Service, §§ 118.62, 118.73[5]*.

Wage Discrimination Claims--Statute of Limitations. The Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, provides that for purposes of triggering the limitations period for a wage-discrimination claim, a discriminatory act occurs (1) when the discriminatory compensation decision or other practice is adopted; (2) when the employee becomes subject to the discriminatory compensation decision or other practice; and (3) when the employee is affected by application of the discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from that decision or other practice. The Act thus overrules *Ledbetter v. Goodyear Tire & Rubber Co.* (2007) 550 U.S. 618 , which had held that the limitations period was triggered only by the discriminatory pay raise decision and that an employee's claim of discrimination in compensation could not be based on the fact that paychecks issued within the limitations period entailed adverse effects resulting from past discriminatory pay raise decisions. The Act is effective as if enacted on May 28, 2007, and applies to all discriminatory compensation claims pending on or after that date under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans With Disabilities Act, and the Rehabilitation Act of 1973. See *Ch. 115, Civil Rights: Employment Discrimination, §§ 115.21[1], 115.51[2][a], 115.56[5]*.

Employment Law--Anti-Retaliation Provisions. The United States Supreme Court has held that the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, *42 U.S.C. §§ 2000e-3(a)*, protects an employee who opposes unlawful discrimination by speaking out about it in answering questions during an employer's internal investigation, even if that employee did not report the discrimination on his or her own initiative [*Crawford v. Metropolitan Gov't (2009) 129 S. Ct. 846]* . See *Ch. 115, Civil Rights: Employment Discrimination, §§ 115.21[1], 115.37[1][a]*.

FEHA Limitations Period Subject to Equitable Tolling. The California Supreme Court has held that the one-year statute of limitations for claims under the Fair Employment and Housing Act (FEHA), *Gov. Code § 12960(d)*, is subject to equitable tolling while the aggrieved employee voluntarily pursues the employer's internal administrative remedy, even though the internal remedy is optional and need not be exhausted before filing a FEHA action, and even if employee voluntarily terminates the internal proceeding before an administrative decision is rendered [*McDonald v. Antelope Valley Cmty. Coll. Dist. (2008) 45 Cal. 4th 88]* . See *Ch. 115, Civil Rights: Employment Discrimination, §*

115.51[1][a], [c], [g].

Employee's Right to Indemnity Under *Lab. Code § 2802* Is Nonwaivable. In *Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937* , the California Supreme Court held that an employee's right to indemnity from an employer provided by *Lab. Code § 2802* is nonwaivable and any contract that purports to waive this right is unlawful to that extent. The Court also held that a contract provision releasing "any and all" claims generally does not encompass the nonwaivable statutory protections afforded by *Lab. Code § 2802* and does not implicitly apply to an employee's right to indemnification from an employer. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.20[2]*.

Use of Safety Regulations Limited in Actions Brought by Subcontractor's Employee Against General Contractor. In *Padilla v. Pomona College (2008) 166 Cal. App. 4th 661* , the court of appeal held that safety regulations are only admissible in actions by employees of subcontractors brought against a general contractor if the evidence establishes that the general contractor affirmatively contributed to the employee's injuries. The court also held that the Cal-OSHA regulation found at *8 Cal. Code Regs. § 1735(a)* did not impose a nondelegable duty on any particular party. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.22[2][b][iv], [c]*.

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§ 1.213A Equity

Modification of Equitable Decree. This chapter is updated with *Union Oil Co. of Cal. v. Greka Energy Corp. (2008) 165 Cal. App. 4th 129* , which holds changed circumstances occurring after judgment may justify modifying an equitable decree, and a trial court has discretion to consider whether changed circumstances following its judgment require modification of its order on specific performance. See *Ch. 251, Equity, § 251.37[1][b]*.

Estoppel Versus Waiver. This chapter is updated with *City of Hollister v. Monterey Ins. Co. (2008) 165 Cal. App. 4th 455* and *Oakland Raiders v. Oakland-Alameda County Coliseum, Inc. (2006) 144 Cal. App. 4th 1175* , which hold estoppel effects a forfeiture, i.e., the loss of an otherwise viable right. It is akin to the doctrine of waiver, often invoked in the same breath, and sometimes confused with it. The essence of waiver, however, is the voluntary relinquishment of a known right that may be effective as a matter of law without any demonstration that the other party was caused by the waiver to expose himself or herself to any harm. That causation is essential to estoppel, and where it is present the estoppel may arise involuntarily, and may effect the loss of rights the actor did not know he or she possessed. See *Ch. 251, Equity, § 251.94[1][a]*.

Equitable Estoppel. This chapter is updated with *Estate of Bonanno (2008) 165 Cal. App. 4th 7* , which holds equitable estoppel is generally a question of fact. However, if the facts are undisputed and only one reasonable conclusion can be drawn from them, whether estoppel applies is a question of law. See *Ch. 251, Equity, § 251.94[1][c]*.

Unjust Enrichment. This chapter is updated with *Federal Deposit Ins. Corp. v. Dintino (2008) 167 Cal. App. 4th 333* , which holds whether termed unjust enrichment, quasi-contract, or quantum meruit, the equitable remedy of restitution when unjust enrichment has occurred is an obligation (and not a true contract) created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to his or her former position by return of the thing or its equivalent in money. See *Ch. 251, Equity, § 251.110*.

Trial y Jury. This chapter is updated with *Jogani v. Superior Court (2008) 165 Cal. App. 4th 901* , which holds the right to trial by jury guaranteed by the Constitution is the right as it existed at common law at the time the state Constitution was adopted in 1850. In determining whether a common law court before 1850 could have entertained a plaintiff's action and granted the requested relief, a court must look past the form or label attached to the plaintiff's claim

and discern its substance, i.e., gist. If the claim is, in substance, one that was cognizable at law before 1850 and seeks relief that could have been obtained at law before 1850, then the action is legal and the right to jury trial attaches, regardless of the extent to which the claim requires the application of equitable doctrines. See *Ch. 251, Equity, § 251.222[1]*.

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§ 1.213B Family Law

Same-Sex Marriages. This chapter is updated with *Strauss v. Horton (2009) 46 Cal. 4th 364* , which holds Proposition 8 is a permissible constitutional amendment to limit the rights of people of the same sex to marry, is not an impermissible constitutional revision, and does not violate the separation of powers doctrine and is not invalid under an "inalienable rights" theory, and applies both to marriages performed in California and to those performed in other jurisdictions. The Court observed that if there is to be a change to the state constitutional rule embodied in that measure, it must "find its expression at the ballot box." The Court also concluded that Proposition 8 does not apply retroactively. Therefore, the approximately 18,000 marriages of same-sex couples that were performed between the time of the Court's decision in *In re Marriage Cases* and the effective date of Proposition 8 (November 5, 2008) remain valid in all respects and must continue to be recognized in this state. The Court noted that Proposition 8 did not entirely repeal or abrogate a same-sex couple's state constitutional rights of privacy, due process, and equal protection that the Court had previously recognized in *In re Marriage Cases* [*In re Marriage Cases (2008) 43 Cal. 4th 757*]. See *Ch. 359, Marriage, § 359.13[4]*, and see *Ch. 429, Privacy, § 429.161* 2[c].

Putative Domestic Partners. The court of appeal in *In re Domestic Partnership of Ellis & Arriaga (2008) 162 Cal. App. 4th 1000* , applied the putative spouse doctrine to domestic partners and held that a person's reasonable, good faith belief that his or her domestic partnership was validly registered with the Secretary of State entitles that person to the rights and responsibilities of a registered domestic partner even if the registration never occurred. *See Ch. 387, Nonmarital Cohabitation, § 387.11[3]*.

Community Property--Transmutation. The court of appeal in *In re Marriage of Holtemann (2008) 166 Cal. App. 4th 1166* concluded that husband intended and did transmute certain separate property to community property, was fully informed of the legal consequences of his actions and, rejecting his contention that a transmutation can be rendered conditional or temporary, held that once the character of the property has been changed a "retransmutation" can only be effected by an express agreement to that effect that independently satisfies the requirements of *Fam. Code § 852(a). See Ch. 122, Community Property, § 122.34*.

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§ 1.213C Federal Courts

***Younger* Abstention.** This chapter is updated with *San Jose Silicon Valley Chamber of Commerce Political Action Com. v. City of San Jose (9th Cir. 2008) 546 F.3d 1087* , which holds that in addressing *Younger* abstention issues, federal district courts must exercise jurisdiction except when specific legal standards are met, and may not exercise jurisdiction when those standards are met. There is no discretion vested in the district courts to do otherwise. Accordingly, the limited circumstances in which abstention by federal courts is appropriate remain the exception rather than the rule. See *Ch. 265, Federal Courts: Jurisdiction and Removal, § 265.14[3]*.

Dismissal Before Considering the Existence of Federal Subject Matter Jurisdiction. This chapter is updated with *Potter v. Hughes (9th Cir. 2008) 546 F.3d 1051* , which holds there are non-constitutional grounds on which the federal district court may dismiss a suit before considering the existence of federal subject matter jurisdiction. These include jurisdictional grounds that are discretionary, such as pendent jurisdiction or *Younger* abstention, grounds of prudential standing, such as statutory standing, and grounds that are "logically antecedent to the existence of any Article III issues," such as class certification under *Fed. R. Civ. P., Rule 23*, and the demand pleading requirements of *Fed. R. Civ. P., Rule 23.1* for derivative actions. See Ch. 265, *Federal Courts: Jurisdiction and Removal* .

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§ 1.214 Guardianships and Conservatorships

Guardianships and Conservatorships--*Prob. Code § 1516.5* Does Not Violate Due Process and Is Facially Constitutional. In *Guardianship of Ann S. (2009) 45 Cal. 4th 1110, 1118* , the California Supreme Court upheld *Prob. Code § 1516.5* as facially constitutional and consistent with due process. The Court held that a showing of current unfitness is not always necessary when a court terminates parental rights, and that the trial court properly granted a petition filed by the guardians of a minor child under *Prob. Code § 1516.5* to terminate the parental rights of the child's mother when it found by clear and convincing evidence that adoption by the guardians would be in the child's best interest. In a companion case, *In re Charlotte D. (2009) 45 Cal. 4th 1140* , the Court followed its holding in *Guardianship of Ann S.*, holding that *Prob. Code § 1516.5* does not violate due process and is facially constitutional, and that parental rights may be terminated based on the child's best interest, but that parents may challenge the constitutionality of the statute as applied to them individually. See *Ch. 280, Guardianship and Conservatorship: Appointment of Guardians, § 280.73, 280.84*.

Guardianships & Conservatorships--Sua Sponte Duty to Instruct Not Applicable in LPS Act Conservatorships. In *Conservatorship of George H. (2008) 169 Cal. App. 4th 157* , court held that because Lanterman-Petris-Short Act [*Welf. & Inst. Code § 5500 et seq.*] conservatorship proceeds are not criminal proceedings, the sua sponte duty to instruct that applies to jury trials in criminal cases does not apply to jury trials under *Welf. & Inst. Code § 5350*. Thus, the trial court did not err in failing to instruct the jury that if a proposed conservatee was able to accept voluntary treatment, there was no need for a conservatorship. Additionally, the trial court in this case properly specified each of the powers and disabilities it imposed, and the evidence warranted the trial court's findings. See *Ch. 304, Insane Persons, § 304.144[6][a]*.

Guardianship and Conservatorship--New and Revised Judicial Council Forms. The California Judicial Council has revised a significant number of official Judicial Council forms, and issued several new forms, effective January 1, 2009. Existing forms have been revised in the guardianship and conservatorship materials in this release, new forms added, and relevant discussion changed as necessary. For forms, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* ; Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* ; Ch 282, *Guardianship and Conservatorship: Temporary Guardians and Conservators* ; Ch. 286, *Guardianship and Conservatorship: Inventory and Appraisal* .

Guardianship and Conservatorship--Fraud and Unfluence--Collateral Estoppel. In *Murphy v. Murphy (2008) 164 Cal. App. 4th 376* , the court held that collateral estoppel prevented a beneficiary from bringing an action for fraud and undue influence relating to certain trust and testamentary instruments when the issues of fraud and undue influence were necessarily adjudicated and decided in a prior substituted judgment proceeding. See *Ch. 290B, Guardianship and Conservatorship: Substituted Judgment, § 290B.32*.

Conservatorship--Due Process Rights. In *Conservatorship of David L. (2008) 164 Cal. App. 4th 701* , the court held that a prospective conservatee who requests substitute appointed counsel must be given a full opportunity to state the reasons for his or her requests, as in a criminal case. The trial court's failure to afford a prospective conservatee a full opportunity to state his reasons for requesting substitute counsel violated his right to due process of law when he was not at the hearing and there was no evidence to support a finding that he voluntarily failed to appear. See *Ch. 304, Insane and Other Incompetent Persons, § 304.42*.

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§ 1.214A Initiatives

Initiative as Constitutional Amendment Versus Revision. This chapter is updated with *Strauss v. Horton (2009) 46 Cal. 4th 364* , which holds an initiative that makes very significant changes constitutes only an amendment to the state constitution if its changes nonetheless operate functionally within a relatively narrow range of subject matter, and with *Rippon v. Bowen (2008) 160 Cal. App. 4th 1308* , which holds the question of whether an initiative constitutes an amendment or a revision requires analysis of the statute on its face. See *Ch. 302, Initiative, Referendum, and Recall, § 302.12[7]*.

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§ 1.215 Insurance

Utility's Statutory Immunity Barred Homeowner From Recovering Implied Contractual Immunity. In *Prince v. Pacific Gas & Electric Co. (2009) 45 Cal. 4th 1151* , the California Supreme Court held that a utility's immunity from liability to a tort victim under the recreational-use immunity of *Civ. Code § 846* prevented a landowner from obtaining implied contractual indemnity from the utility for the landowner's own liability to the victim. See *Ch. 300, Indemnity and Contribution, §§ 300.61[5], 300.63[1]*.

Prop. 51 Does Not Defeat Liability Based on Nondelegable Duty. In *Koepnick v. Kashiwa Fudosan America, Inc. (2009) 173 Cal. App. 4th 32* , the court of appeal held that Proposition 51 does not limit the vicarious liability of the hirer of an independent contractor when the hirer's liability is based on the nondelegable duty doctrine. See *Ch. 300, Indemnity and Contribution, § 300.63[3][f]*.

Insurer's Service Charge for Monthly Policy Payments Constitutes a Premium. The statutory requirement that an insurance policy include either a statement of the premium or a statement of the basis and rates on which the final premium is determined includes within the definition of "premium" a service charge imposed for payment in full of the stated insurance premium for a one-month term policy [*Troyk v. Farmers Group, Inc. (2009) 171 Cal. App. 4th 1305*]. See *Ch. 308, Insurance, § 308.16*.

Appellate Court Upholds Emotional Distress and Punitive Damages Award in Excess of $1 Million Against Insurer in Bad Faith Action. In an action against an insurer under a homeowners' policy, the appellate court upheld awards of $31,000 in economic damages for breach of contract, $450,000 for emotional distress, $646,500 in punitive damages for bad faith, and *Brandt* fees [*Major v. Western Home Ins. Co. (2009) 169 Cal. App. 4th 1197*]. See *Ch. 308, Insurance, § 308.24[5]*.

Dispute Between Insured and Insurer Over Amount of *Cumis* Fees Is Subjection to Mandatory Arbitration. Notwithstanding the inclusion of nonarbitrable issues in a complaint by the insured against its liability insurer, any contested issues concerning the amount of *Cumis* fees allegedly owed by the insurer are subject to mandatory arbitration under *Civ. Code § 2860(c)* [*Compulink Mgmt. Ctr., Inc. v. St. Paul Fire & Marine Ins. Co. (2008) 169 Cal. App. 4th 289*]. See *Ch. 308, Insurance, § 308.118[2]*.

Willful-Misconduct Exception to 10-Year Statute of Repose in Latent Construction Defect Case Applies to Indemnity Cross-Complaints. In *Pine Terrace Apartments, L.P. v. Windscape, LLC (2009) 170 Cal. App. 4th 1* , the court of appeal held that the willful-misconduct exemption to the 10-year limitations period applicable in latent construction defect cases may be applied to cross-complaints for indemnity, and a cross-complainant may incorporate by reference the allegations of willful misconduct found in the complaint without specifically repeating those allegations in the cross-complaint. See *Ch. 300, Indemnity and Contribution, § 300.70[3]*.

Post-Arbitration Procedures for Settlement Credits Under *Code Civ. Proc. § 877* Clarified. In *Wade v. Schrader (2008) 168 Cal. App. 4th 1039* , the court of appeal held that if the fact and amount of a settlement credit under *Code Civ. Proc. § 877* are undisputed and the action against a nonsettling defendant is adjudicated by an arbitrator, the credit need not be applied by the arbitrator and may be applied by a trial court when rendering judgment. Moreover, if the offset is greater than the amount of the arbitrator's award and the defendant has not previously brought the credit to the attention of the trial court, the nonsettling defendant may use a motion to compel acknowledgment of satisfaction of judgment under *Code Civ. Proc. § 724.050(d)* to effectively achieve the offset. See *Ch. 300, Indemnity and Contribution, § 300.73[3][a]*.

State Bar May Pursue Subrogation Claim Against Attorney. An appellate court has held that the State Bar has statutory subrogation rights under *Bus. & Prof. Code § 6140.5(b)* (Client Security Fund or CSF) against an attorney who settled with claimants to whom the CSF paid some claims, when the parties to the settlement agreed that the plaintiffs could seek full reimbursement from the CSF, and the attorney would not object to the notice of intent to pay issued by the CSF [*State Bar of Cal. v. Statile (2008) 168 Cal. App. 4th 650]* . See *Ch. 536, Subrogation, § 536.14[2]*.

Uninsured Motorist Coverage--Arbitration. In a case originally concerning the attempt of the sister of the automobile policyholder to compel arbitration under *Ins. Code § 11580.2(f)*, on remand from the California Supreme Court, an appellate court held that the question whether a party is an insured with standing to enforce an arbitration provision can be decided by a trial court either in the proceedings on a petition to compel arbitration or in a separate action for declaratory relief [*Bouton v. USAA Casualty Ins. Co. (2008) 167 Cal. App. 4th 412]* . See *Ch. 88A, Automobiles: Uninsured Motorist Claims, § 88A.19[3][e][iv]*.

Uninsured Motorist Coverage--Bad Faith. *Ins. Code § 11580.26(b)*, which prohibits a cause of action against either the insured or insurer for exercising the right to request arbitration of an uninsured motorist claim, does not create a broad immunity from a bad-faith claim based on the insurer's pre-arbitration conduct regarding an uninsured motorist claim [*Brehm v. 21st Century Ins. Co. (2008) 166 Cal. App. 4th 1225]* . See *Ch. 88A, Automobiles: Uninsured Motorist Claims, § 88A.24[1]*.

Indemnity Rules for Residential Construction Contracts Amended. Under amended *Civ. Code § 2782*, the indemnity rules for residential construction contracts provided by that statute have been expanded to apply to agreements that purport to insure or indemnify the builder or a general contractor or other contractor not affiliated with the builder, and provide that a subcontractor owes no defense or indemnity for a construction defect claim unless and until the builder or contractor provides a written tender of the claim to the subcontractor, which has the same force and effect as a notice of commencement of a legal proceeding. The statute also now provides for subcontractor options upon tender of a written claim, and specifies consequences for a failure to meet defense obligations. See *Ch. 300, Indemnity and Contribution, § 300.34[2]*.

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§ 1.216 Intellectual Property

Trademark Infringement--Criteria for Ordering Product Recall. In *Marlyn Nutraceuticals v. Mucos Pharma GmbH & Co. (9th Cir. 2009) 571 F.3d 873* , the Ninth Circuit adopted criteria developed by the Third Circuit for use by a district court in determining whether to require a product recall in a trademark infringement case. After considering those criteria, if the court finds that leaving the infringing product in the hands of resellers and end-users will cause a substantial risk of danger to the public, the court should order a recall. See *Ch. 549, Trademarks and Trade Names, § 549.91[5]*.

Trademarks--Standing to Sue for Infringement. A case from the Ninth Circuit presents a clarifying analysis of the standing requirements for commencing a trademark infringement action [*Halicki Films v. Sanderson Sales & Mktg. (9th Cir. 2008) 547 F.3d 1213]* . See *Ch. 549, Trademarks and Trade Names, § 549.22[4]*.

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§ 1.216A Judgments

Judgment Debtor's Property May Be Turned Over to Levying Officer or Receiver, Not to Judgment Creditor. In *Palacio Del Mar Homeowners Assn., Inc. v. McMahon (2009) 174 Cal. App. 4th 1386* , the court of appeal held that pursuant to *Code Civ. Proc. § 708.205(a)*, after an examination regarding a judgment debtor's interest in property in the possession or under the control of the judgment debtor or a third person to be applied toward the satisfaction of a money judgment, property may be ordered turned over to a levying officer or a receiver, but not to the judgment creditor directly. See *Ch. 254, Executions and Enforcement of Judgments, § 254.227*.

Nunc Pro Tunc Permitted Only to Avoid Injustice to Preserve Litigants' Rights. In *In re Marriage of Padgett (2009) 172 Cal. App. 4th 830* , the court of appeal held that the trial court exceeded its power to issue a nunc pro tunc order by creating an interest in a retirement plan. See *Ch. 318, Judgments, § 318.70*.

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§ 1.216B Juvenile Law

Juvenile Court May Not Use Contempt Power to Incarcerate Parent for Failure to Satisfy Condition of Reunification Plan in Dependency Proceeding. *The California Supreme Court, in In re Nolan W. (2009) 45 Cal. 4th 1217* , held that because of the unique nature of reunification orders issued in juvenile dependency proceedings, a juvenile court may not use its contempt power to incarcerate a parent solely for the failure to satisfy a condition of a voluntary reunification plan. See *Ch. 135, Contempt, § 135.14[5][a]*.

Emancipation of Minors--Medical Emancipation. This chapter is updated with a new section reviewing California's variety of "limited medical emancipation" statutes. See *Ch. 245, Emancipation of Minors, § 245.14[5]*.

Interstate Compact on Juveniles. *Welf. & Inst. Code § 1300* prohibits California from exercising ICJ supervision powers under standards different from those they apply to their own delinquent juveniles released on probation. The court of appeal in *In re Lee Dale Crockett (2008) 159 Cal. App. 4th 751* , has determined that this prohibition applies in cases requiring registration, such as sex offender registration--even if the minor agreed to register pursuant to ICJ transfer conditions. See *Ch. 328, Juvenile Delinquency Proceedings, § 329.124*.

Education for Children in Dependency. Children who are abused or neglected and separated from their family face enormous disadvantages in their education. Placement changes from one school to another can create stress and behavioral problems. These students can be given meaningful access to educational programs and supplemental services by identifying the holder of the child's educational rights, pursuing the significant rights available under both federal and California law and considering special education for the 30 percent to 40 percent of foster children so classified. See *Ch. 328, Juvenile Dependency Proceedings, § 328.62[6]*.

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§ 1.216C Physicians and Other Medical Personnel

Specific Intent Required to Impose Battery Liability on Doctor Who Fails to Abide by Condition. In *Dennis v. Southard (2009) 174 Cal. App. 4th 540* , the court of appeal held that to be liable for performing a medical procedure while failing to abide by a known condition imposed by the patient, the doctor must have intended to perform the procedure without abiding by the condition and a negligent failure to abide by the condition is an insufficient basis for liability for battery. See *Ch. 58, Assault and Battery, § 58.14[5]*, and see *Ch. 415, Physicians: Medical Malpractice, § 415.20*.

Lump Sum Present Value Used to Calculate Undertaking Required Pending Appeal. In *Leung v. Verdugo Hills Hospital (2008) 168 Cal. App. 4th 205* , the court of appeal held that if a defendant against whom a judgment has been rendered must post an undertaking to stay the judgment pending appeal under *Code Civ. Proc. § 917.1*, the amount of the undertaking is calculated under that statute using the lump sum present value of the entire judgment, not using some lesser amount based on the payments that might otherwise actually be payable during the appeal under a periodic payment schedule created under *Code Civ. Proc. § 667.7*. See *Ch. 415, Physicians: Medical Malpractice, § 415.49[4]*.

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§ 1.217 Probate

Vital Records--Out-of-State Residency Does Not Bar Obtaining Change of Gender on California Birth Certificate. In *Somers v. Superior Court (2009) 172 Cal. App. 4th 1407* , the court held that out-of-state residency did not bar the out of state resident from obtaining a change of gender on a California birth certificate under *Health & Safety Code § 103425*. See *Ch. 99, Birth & Death, §§ 99.13, 99.22, 99.35*.

No Contest Clauses--Trust Reformation in Accordance with Grantors' Intent Would Not Violate No Contest Clause. In *Giammarrusco v. Simon (2009) 171 Cal. App. 4th 1586* , the court found that language in trust documents establishing three methods of exercising a limited power of appointment was ambiguous and that reformation in accordance with the grantors' intent did not violate a no contest clause. The court explained that the mere name of the remedy sought, i.e., modification, reformation or interpretation, did not dictate whether a no contest clause would be violated because substance, the effect of the proposed action, and not form, controlled. See *Ch. 444, Will Contests, § 444.14*, and *Ch. 560, Trusts: Express, § 560.16*.

No Contest Clauses--Petition Challenging Exercise of Fiduciary Power Did Not Violate No Contest Clause. In *Bradley v. Gilbert (2009) 172 Cal. App. 4th 1058* , the court held that a proposed petition by a decedent's son as a successor trustee of two trusts would not constitute a contest of a third trust and would not violate a no contest clause as a matter of public policy, because the petition was a pleading challenging the exercise of a fiduciary power within the means of *Prob. Code § 21305(b)(6)*. See *Ch. 444, Will Contests, § 444.14*, and see *Ch. 560, Trusts: Express, § 560.16*.

***Probate--Prob. Code § 8226(c)* Applies Only to Those Who Receive Notice.** In *Estate of Kelly (2009) 172 Cal. App. 4th 1367* , the court held that the time limits in *Prob. Code § 8226(c)* did not apply to bar as untimely a petition for probate of a holographic will when the will proponent never received notice of the petition for letters of administration, as required to trigger the statute. The court concluded that *Prob. Code § 8226(c)* applies only to those who have received notice of a petition for letters of administration pursuant to the notice provisions of the California Probate Code. See *Ch. 444, Will Contests, § 444.16*.

Probate--Time Limits of *Prob. Code § 8226(c)* Bar Petition to Admit Untimely Holographic Will. In *Estate of Earley (2009) 173 Cal. App. 4th 369* , the court held that the trial court properly found that a petition to admit a

holographic will to probate was untimely under *Prob. Code § 8226(c)* when the petition was filed more than five months after the determination of intestacy and more than three months after administrator discovered will. See Ch. 444, *Will Contests* , § 3.

Wills & Trusts--Natural Parent Entitled to Inherit From Child. In *Estate of Shellenbarger (2008) 169 Cal. App. 4th 894* , the court held that a probate court may not, on principles of equity, disinherit a natural parent who abandons a child who later dies intestate. The court further held that under *Prob. Code § 6402*, the father was entitled to inherit through the decedent, reasoning the father's alleged failure to pay child support or the lack of a meaningful parent-child relationship did not affect the father's rights as an intestate heir. The court noted that had the decedent been born out of wedlock, the father's alleged failure to pay support would have been relevant, but in this instance the decedent was conceived during his parents' marriage and the father acknowledged paternity. See *Ch. 458D, Probate: Accounts, Final Distribution, and Compensation, §§ 458D.78[4][a], 458D.155[4][e]*.

Wills & Trusts--Anti-lapse Statute Allows Bequest to Pass by Right of Representation. In *Estate of Mooney (2008) 169 Cal. App. 4th 654* , the court held that California's anti-lapse statute consistently provides that when a bequest to a protected transferee would otherwise lapse due to the transferee's death, that bequest passes by right of representation to his or her descendants. The probate court erred by determining that "the nearest generation of issue then living" for purposes of applying *Prob. Code § 240* in this context was determined with respect to the decedent rather than her sisters, the deceased transferees. See *Ch. 458D, Probate: Accounts, Final Distribution, and Compensation, §§ 458D.80[7], 458D.155[4][e]*, 458.200[4].

Trusts--No Contest Clause Not Applicable to Trust Amendment. In *Townsend v. Townsend (2009) 171 Cal. App. 4th 389* , the court held that a beneficiary's proposed challenge to a trust amendment would not violate the trust's no contest clause. The court reiterated that for trusts executed on or after January 1, 2001, a trust's no contest clause may not be applied to an amendment of the trust unless there is a specific reference to amendment to the trust in the no contest clause. Furthermore, the ratification language contained in the trust amendment did not render the no contest clause in the trust applicable to the beneficiary's challenge to the amendment because the trust was executed after *Prob. Code § 21305(a)(3)* was enacted, yet made no mention of amendments. The trust's no contest clause did not permit the court to conclude that the settlors unequivocally expressed an intent that a beneficiary could challenge any future amendments to their estate plan only on pain of forfeiture. See *Ch. 444, Will Contests, § 444.14*, and see *Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, § 560.16*.

Will and Trust Contests--What Constitutes a "Contest." In *Schwartz v. Schwartz (2008) 167 Cal. App. 4th 733* , the court concluded that when a beneficiary knowingly filed a petition, which took him outside the safe harbor provisions of *Prob. Code §§ 21320*, and his clear purpose was to defeat the surviving settlor's testamentary and donative intent, the action was a contest, under the will's no contest clause. The court further noted that the beneficiary used the mechanisms of the trial court in attempting to achieve his goal of redistributing the trust estate. See *Ch. 444, Will Contests, §§ 444.14, 444.30*, and *Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, §§ 560.16, 560.362*.

Probate--Damages When Purchaser of Real Property Dafaults. In *Estate of Felder (2008) 167 Cal. App. 4th 518* , it was held that the probate court was authorized under *Prob. Code §§ 10350(e)(1)* to award an estate damages in an amount equal to the difference between the price at which the first would-be purchaser defaulted and the eventual purchase price actual paid for the property when it was resold at a lower price. The court further noted that the estate was entitled to retain the defaulting buyer's deposit; it made no legal difference that the deposit amount reflected both the estate's interest in property and that of a co-owner, since *Prob. Code §§ 10350(e)(1)* does not authorize damaged to be pro-rated based on the sellers' respective interests in the property. See *Ch. 455, Sale of Estate Property, §§ 445.25, 455.52[6]*.

Trusts--Irrevocable Trust Binding on Settlors. In *Aguilar v. Aguilar (2008) 168 Cal. App. 4th 35, 40* , the court concluded that a wife breached the terms of a joint inter vivos trust by executing a deed purporting to withdraw property

from the trust after her husband's death. Even though the property she sought to withdraw was her share of the community property, it was too late for her to withdraw it, as the trust had become irrevocable in its entirety on the death of her husband. Any change to the trust after the husband's death would have required consent from the other beneficiaries of the joint trust, which the wife did not have. See *Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, §§ 560.112, 560.401, 560.584*.

Trusts--General Church Can Impress a Trust in Governing Documents. In *Episcopal Church Cases (2009) 45 Cal. 4th 467* , the California Supreme Court held that *Corp. Code §§ 9142(c)(2)* gives a general church the authority to impress a trust on a local church if the local church agrees to be subject to the governing instruments of the general church and the governing instruments provide that any property held by the local church is held in trust for the general church. Thus, the local church did not have the right to take church property with it when it disaffiliated from the general church, even though the deeds to the property had long been in the name of the local church. See *Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, §§ 560.11, 560.483[6]*.

Probate--Survivor's Rights. In *Estate of Bonanno (2008) 165 Cal. App. 4th 7, 23* , the court held that the decedent's estranged wife was equitably estopped under *Evid. Code § 623* from asserting her statutory right as surviving spouse to have her share of decedent's property pass without administration under *Prob. Code § 13500*, when the wife, daughter, and decedent's girlfriend had all entered into a written settlement agreement and the spouse implicitly acknowledged that she would not ask that her share pass to her outside of probate. Ch. 441, *Probate: Disposition Without Administration*, § 441.171.

Probate--Filing Fees. As of January 1, 2009, the sliding scale of fees that grew progressively larger with the size of the estate was eliminated and replaced with a flat filing fee [*Gov. Code § 70650(a)*]. The uniform filing fee for the first petition for letters of administration or letters testamentary, or the first petition for special letters of administration with the power of a general personal representative is $350 [*Gov. Code § 70650(a)*]. The uniform filing fee for the first objections to the probate of any will of codicil under *Prob. Code § 8250*, or the first petition for revocation of probate of any will or codicil under *Prob. Code § 8270*, also is $350 [*Gov. Code § 70650(b)*]. The uniform filing fee for the first petition for special letters of administration without the powers of a general personal representative is provided in *Gov. Code § 70657.5* [*Gov. Code § 70650(b)*]. A fee of $350 also will be charged for the filing of each subsequent petition or objection in the same proceeding by a person other than the original petitioner or contestant [*Gov. Code § 70650(c)*]. If a petition for special administration is filed together with a petition for letters of administration or letters testamentary by the same person, the person filing the petitions will be charged the applicable filing fees for both petitions [*Gov. Code § 70650(d)*]. See *Ch. 442, Probate: Initiating Probate Administration, § 442.14*.

Wills and Trusts--Witness Requirements. A revised *Prob. Code § 6110* codifies the California Supreme Court's holding in *Estate of Saueressig (2006) 38 Cal. 4th 1045* , requiring that a will be witnessed by being signed during the testator's lifetime [*Prob. Code § 6110(c)(1)*]. *Prob. Code § 6110 (c)(2)* further provides that if a will was not executed in compliance with *Prob. Code § 6110(c)(1)*, the will must be treated as if it was executed in compliance if the proponent of the will establishes by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will. See *Ch. 442, Probate: Initiating Probate Administration, § 442.147[2]*.

Wills and Trusts--Gifts to Will Drafter. In *Estate of Clementi (2008) 166 Cal. App. 4th 375* , the court held that since the testator was a nonresident of California when he signed his will in Pennsylvania, *Prob. Code § 21351(i)*, exempted his will from the prohibition in *Prob. Code § 21350* against donative transfers to the drafters of wills, even though the testator was a resident of California at the time of his death. See *Ch. 444, Probate: Will Contests, § 444.13*; and see *Ch. 560, Trusts, § 560.14[4]*.

Wills and Trusts --No Contest Clauses-- New *Prob. Code §§ 21230-21235* Operative January 1, 2010. As of January 1, 2010, new *Prob. Code §§ 21310-21315* will substantially revise existing law relating to no contest clauses in

wills and trusts. The new provisions will apply to any instrument, whenever executed, that became irrevocable on or after January 1, 2001 [*Prob. Code § 21315(a)*]. These new provisions limit the enforceability of a no contest clause to specific contests, redefine what a direct contest is, and provide that a no contest clause may be enforced against a direct contest only when it is brought without probable cause. The new statutes also will repeal all provisions allowing a beneficiary to apply for declaratory relief for a determination of whether or not a proposed contest would violate a no contest clause. See *Ch. 444, Probate: Will Contests, § 444.14[1]*; *Ch. 560, Trusts, § 560.16[1]*.

Wills and Trusts--No Contest Clauses. In *Perrin v. Lee (2008) 164 Cal. App. 4th 1239* , the court held that a proposed challenge to two trust amendments would not trigger the no contest clause in a trust because the clause did not specifically state that it applied to trust amendments and the amendments did not contain no contest clause as required by *Prob. Code § 21305(a)(3)*. Additionally, the language of the amendments did not demonstrate an intent on the part of the settlor to accomplish the incorporation by reference of the no contest clause. See *Ch. 444, Probate: Will Contests, § 444.14*; and see *Ch. 560, Trusts, § 560.16*.

California Forms of Pleading and Practice--Annotated

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Chapter 1 NEW DEVELOPMENTS
PART VI. 2009 NEW DEVELOPMENTS

1-1 California Forms of Pleading and Practice--Annotated § 1.218

§ 1.218 Public Administration

Due Process--Timing of Hearing. This chapter is updated with *Kolter v. Commission on Professional Competence of the Los Angeles Unified School Dist. (2nd 2009) 170 Cal. App. 4th 1346* , which holds that the governing board of the Los Angeles Unified School District properly met in closed session consistent with *Gov. Code § 54957* to begin the process to dismiss a permanent certificated teacher without giving the teacher the 24-hour notice otherwise required by *Gov. Code § 54957*. This was because the 24-hour notice requirement did not apply when the public employee had the right to an evidentiary hearing under *Educ. Code § 44934* subsequent to the closed session. Furthermore, the teacher did not have a due process right to notice and opportunity to be heard before the governing board began the dismissal proceedings. See *Ch. 470A, Due Process Restrictions on Public Agencies, § 470A.42[1]*.

Public Agency Meetings--Personnel Exemption. This chapter is updated with *Kolter v. Commission on Professional Competence of the Los Angeles Unified School Dist. (2009) 170 Cal. App. 4th 1346* , which holds that the governing board of the Los Angeles Unified School District properly met in closed session consistent with *Gov. Code § 54957* to begin the process to dismiss a permanent certificated teacher without giving the teacher the 24-hour notice otherwise required by *Gov. Code § 54957*. This was because the 24-hour notice requirement did not apply when the public employee had the right to an evidentiary hearing under *Educ. Code § 44934* subsequent to the closed session. Furthermore, the teacher did not have a due process right to notice and opportunity to be heard before the governing board began the dismissal proceedings. See *Ch. 470B, Public Agency Meetings, § 470B.13[2]*.

Public Agency Meetings--Personnel Exemption. This chapter is updated with *Hofman Ranch v. Yuba County Local Agency Formation Commission (2009) 172 Cal. App. 4th 805* , which holds that a local agency formation commission properly conducted a closed session personnel evaluation of the executive officer of the agency under *Gov. Code § 54957* because that officer was considered to be an employee of the agency for purposes of *Gov. Code § 54957* even though he was a contractor hired to provide executive officer services. See *Ch. 470B, Public Agency Meetings, § 470B.13[2]*.

Public Records Act--Law Enforcement Records. This chapter is updated with *Dixon v. Superior Court (2009) 170 Cal. App. 4th 1271* , which holds that coroner and autopsy reports that constitute investigations of a suspected homicide death are exempt from disclosure under the law enforcement records exemption [*Gov. Code § 6254(f)*] when the

prospect of criminal law enforcement proceedings is concrete and definite. See *Ch. 470C, Public Records Act, § 470C.13[9]*.

Public Records Act--Records Exempt Under Other Laws. This chapter is updated with *People v. Gaines (2009) 46 Cal. 4th 172* , which holds that when a trial court improperly failed to review a peace officer's personnel records in camera under the provisions of *Penal Code § 832.7* and *Evid. Code § 1043(b)*, the proper remedy was to remand the matter to the trial court with an order to review the records. The Supreme Court also held that if relevant information in confidential personnel records was not disclosed, then the judgment is reversible only if there is a reasonable probability that a different result would have occurred if the information had been disclosed. See *Ch. 470C, Public Records Act, § 470C.13[14]*.

Public Records Act--Records Exempt Under Other Laws. This chapter is updated with *McMahon v. City of Los Angeles (2009) 172 Cal. App. 4th 1324* , which holds that a police officer did not have the right under the Public Safety Officers Procedural *Bill of Rights* act (POBRA) provisions [*Gov. Code §§ 3305, 3306.5*] to review all investigative materials maintained by the police department related to complaints against the officer, but only those materials that contained complaints or adverse comments against the officer so that the officer had the opportunity to respond to the complaints or adverse comments. See *Ch. 470C, Public Records Act, § 470C.13[14]*.

Public Records Act--Public Interest Exemption. This chapter is updated with *County of Santa Clara v. Superior Court (2009) 170 Cal. App. 4th 1301* , which holds that by the County of Santa Clara is required to disclose geographic information system (GIS) base maps prepared by the county because the public interest exemption [*Gov. Code § 6255*] did not prohibit disclosure because the public interest in disclosure outweighed the public interest in nondisclosure. The court of appeal weighed disclosure interests (public scrutiny of public records) against nondisclosure interests (financial and security interests), and found that the balance between those two interests justified disclosure of the information. Furthermore, the court held that the California Public Records Act [*Gov. Code § 6254.9*] did not provide for copyright protection of public records maintained by the county, and that the county could not insist on an end user agreement as a condition of disclosure to protect any copyright interest. See *Ch. 470C, Public Records Act, § 470C.13[55]*.

Public Records Act--Judicial Enforcement of Rights. This chapter is updated with *County of Santa Clara v. Superior Court (2009) 171 Cal. App. 4th 119* , which holds that taxpayers could properly bring a declaratory and injunctive relief action against local and state government bodies (including cities, counties, and the state of California, among others) under *Code Civ. Proc. § 526a* to challenge the illegal expenditure of public funds by those bodies related to public records. Litigation related to public records is not limited to challenges under the California Public Records Act. See *Ch. 470C, Public Records Act, § 470C.17[1]*.

Public Administrative Law Judges--Multiple Roles of Agencies. This chapter is updated with *Morongo Band of Mission Indians v. State Water Resources Control Board (2009) 45 Cal. 4th 731* , which holds that due process of law was not violated when an attorney for the State Water Resources Control Board was the agency prosecutor in a specific administrative proceeding and that same agency attorney advised the Board in an unrelated administrative proceeding. In so holding, the California Supreme Court concluded that neither due process of law nor the California APA are violated by combining advocacy and advising functions within the same agency so long as there is separation of functions internally on a case by case basis. Thus, the same agency employee could not perform conflicting functions (advocacy versus advising) in the same case. To establish that the tribunal is biased in the due process manner requires a showing of actual bias when separation of function issues are the bases for showing bias. The probability of bias standard was rejected by the court in this setting, and that standard only applies when there are disqualifying financial interests. In so holding, the Supreme Court disapproved of the California Court of Appeal decision in *Quintero v. City of Santa Ana (2003) 114 Cal. App. 4th 810* (an agency attorney who performs conflicting roles of advocacy and advising agency in unrelated cases violates due process of law). See Ch. 473E, *Public Administrative Law Judges* , § 473E.8[a].

Agency Adjudication Hearings--Administrative Hearsay. This chapter is updated with *Molenda v. Department of Motor Vehicles (2009). 172 Cal. App. 4th 974* , which holds that forensic lab blood test results were not admissible in evidence in DMV administrative hearing because the Department of Justice lab report containing the test results was not prepared at or near the time of the recorded event, as required for the public employee records exception [*Evid. Code § 1280(b)*] to the hearsay rule. Thus, it was not an abuse of discretion for the trial court to exclude the lab report of the blood test results from admission into evidence. Preparation of the report one week after the analysis was completed was not sufficient in the absence of any information as to when the test results were entered into the lab database. Also, *Veh. Code § 23612(g)(2)* permits the DMV to receive or retrieve electronically evidence of a licensee's blood alcohol results directly from a government forensic database and provides that the electronic information is the best available evidence of the test results, but *Veh. Code § 23612(g)(2)* is not an exception to the hearsay rule. Thus, the lab report could be challenged on hearsay grounds notwithstanding compliance with the requirements of *Veh. Code § 23612(g)(2)*. Furthermore, the PAS test results were not admissible because of inadequate foundation since there was insufficient evidence that the test results met the foundations requirements of the DMV regulations (*Tit. 17 Cal. Code Regs. §§ 1215*-1222.2). The evidence related to PAS test results also did not meet the foundational requirements of properly functioning equipment, a properly administered test, and a qualified operator. Finally the DMV cannot rely upon the presumption of official duty codified in *Evid. Code § 664* to establish the foundation for admissibility of the PAS test results. See *Ch. 473F, Agency Adjudication Hearings, § 473F.32[1]*.

Agency Adjudication Hearings--Administrative Hearsay. This chapter is updated with *Bledsoe v. Biggs Unified School District (2009)170 Cal. App. 4th 127* , which holds that the admission into evidence of a prior administrative law judge decision was permissible under *Gov. Code § 11513(c)* because the ALJ decision was reliable evidence. That decision, which was hearsay, properly supplemented other evidence under *Gov. Code § 11513(d)*, and did not consume an undue amount of time under *Gov. Code § 11513(f)*. The prior judge's decision assisted in proving that two teachers had special training and experience for teaching community day school, and therefore the school district was justified in laying off more senior teachers and retaining these two teachers consistent with the requirements of *Educ. Code § 44955(d)*. The prior ALJ decision addressed a prior reduction in force by the same school district, and the qualifications of the same two teachers were discussed in that prior decision. See *Ch.473F, Agency Adjudication Hearings, § 473F.32[1]*.

Agency Adjudication Hearings--Privilege Against Self-Incrimination. This chapter is updated with *Spielbauer v. County of Santa Clara (2009) 45 Cal. 4th 704* , which holds that a county could terminate a county employee for insubordination based on the employee's assertion of the privilege against self-incrimination as grounds for refusal to answer questions in a county internal investigation of the employee's conduct without the county granting the employee immunity from criminal prosecution based upon answers to those questions The Supreme Court explained that a public employee can be compelled by threat of job discipline to answer employer's questions so long as the employee is not required to waive the constitutional protection against criminal use of the answers. The public employer is not required to seek and obtain a formal grant of immunity as a condition of requiring answers to questions. See *Ch. 473F, Agency Adjudication Hearings, § 473F.33[2][b]*.

Agency Adjudication Hearings--Res Judicata and Collateral Estoppel. This chapter is updated with *State Board of Chiropractic Examiners v. Superior Court (2009) 45 Cal. 4th 963* , which holds that a state employee pursuing a whistleblower retaliation complaint under *Gov. Code § 8547.8* against agency officials where the state employee worked was only required to pursue a complaint with the State Personnel Board under *Gov. Code § 19683*. The employee was not required to request a hearing before an ALJ working for the State Personnel Board (SPB), nor was the employee required to seek judicial review under administrative mandamus before filing a civil action for damages based on whistleblower retaliation. The employee was only required to receive the findings of the executive officer of the SPB based on review of the complaint. The employee was not required to exhaust administrative or judicial remedies to challenge those findings before filing a civil lawsuit. Furthermore, the executive officer's findings (which were adverse to the employee) were not binding on the employee as a matter of issue preclusion because the executive officer's findings were not a final judgment following an administrative hearing. See *Ch. 473F, Agency Adjudication*

Hearings, § 473F.41[1].

Agency Adjudication Decisions--Consequences of Agency Decisions. This chapter is updated with *County of Santa Cruz v. Civil Service Commission of Santa Cruz (2009) 171 Cal. App. 4th 1577* , which holds that a county civil service commissions' decision to reduce the penalty awarded (from demotion in rank to a 30-day suspension without back pay) against a sergeant who allegedly made false statements and was found to have acted with insubordination and willful disobedience during the investigation of a gender harassment claim against him brought by a female deputy was an abuse of discretion given the seriousness of the employee misconduct by the sergeant. See *Ch. 473G, Agency Adjudication Decisions, § 473G.35[2].*

Timing of Judicial Review--Exhaustion of Administrative Remedies. This chapter is updated with *Lloyd v. County of Los Angeles (2009) 172 Cal. App. 4th 320* , which holds that a former county employee who filed a whistleblower retaliation complaint against his former employer did not have to exhaust either an internal administrative remedy or the remedy provided by *Lab. Code § 98.7* (filing a complaint with the Labor Commissioner) before filing his lawsuit in superior court. See *Ch. 474A, Timing of Judicial Review, § 474A.11[3][a].*

Timing of Judicial Review--Commencement and Running of Limitation Period. This chapter is updated with *Tarkington v. California Unemployment Insurance Appeals Board (2009) 172 Cal. App. 4th 1494* , which holds that equitable tolling of the applicable statute of limitations [*Unemp. Ins. Code § 410*] for challenging denial of unemployment insurance benefits by filing a petition for a writ of administrative mandate applied and continued after the superior court denied reconsideration of an order sustaining demurrer for misjoinder of parties until filing of new petition for writ of administrative mandate correcting that error. See *Ch. 474A, Timing of Judicial Review, § 474A.20[3].*

Timing of Judicial Review--Expedited Judicial Review of *First Amendment* Claims. This chapter is updated with *Stearn v. County of San Bernadino (2009) 170 Cal. App. 4th 434* , which holds that the 21-day statute of limitations codified in *Code Civ. Proc. § 1094.8 (d)* for actions seeking to review issuance of permits that affect expressive conduct did not apply to a challenge by a third-party resident of a county to a decision of the county board of supervisors to approve 14 conditional use permits requested by a billboard advertiser for billboards to be placed in the desert. See *Ch. 474A, Timing of Judicial Review, § 474A.20[4].*

Cable Television Access and Fees. This chapter is updated with a new section on the access of cable television operators to a real property, and a revised analysis of permissible fees for delinquent payment of cable television fees. See *Ch. 484, Radio and Television, §§ 484.17[2][a1], [e].*

Sanitation Districts. This chapter is updated with several new sections on sanitary districts covering such topics as formation, powers, construction contracts, and liability for damages. See *Ch. 511, Sanitation and Sewerage Districts, § 511.15.*

Blood Alcohol Tests. This chapter is updated with *Molenda v. Department of Motor Vehicles (2009) 172 Cal. App. 4th 974* , where the court of appeal held that while *Vehicle Code § 23612(g)(2)* provides the DMV may receive or retrieve evidence of a licensee's blood alcohol test results directly from a government forensic lab database and that such evidence is the best available evidence of the test results, the opponent of the evidence may challenge the document or other record on other exclusionary grounds, including hearsay. See *Ch. 92, Automobiles: Drivers' Licenses, § 92.107[4][c].*

Due Process--Liberty Interest. This chapter is updated with *Katzberg v. Regents of the University of California (2002) 29 Cal. 4th 300* , which holds that an at-will public employee who can be terminated without cause (and therefore has no due process property interest in continued employment) does have a liberty interest that is deprived when the termination includes charges that could negatively affect the employee's standing or associations in the

community or that could negatively affect the employee's job-related reputation. In that setting, the employee has the right to a name-clearing hearing. See *Ch. 470A, Due Process Restrictions on Public Agencies, § 470A.22[4]*.

Due Process--Liberty Interest. This chapter is updated with *Kreutzer v. City and County of San Francisco (2008) 166 Cal. App. 4th 306* , which holds that a physician who was released for non-disciplinary reasons from an exempt position with the City and County of San Francisco did not have a liberty interest that was deprived because no reasons for the release from employment with the city were publicly disclosed. Public disclosure of reason is required to establish stigma. Since there was no public disclosure of reasons, the physician's employment related reputation was not stigmatized. See *Ch. 470A, Due Process Restrictions on Public Agencies, § 470A.22[4]*.

Due Process Hearing Procedures--Cross-Examination. This chapter is updated with *Manufactured Home Communities, Inc. v. County of San Luis Obispo (2008) 167 Cal. App. 4th 705* , which holds that mobilehome park owners' due process of law rights were violated when a county rent review board denied the owners the right to cross examine opposing witnesses--tenants in the mobilehome park--at a hearing before the Board to determine whether or not rent increases proposed by the owners violated the county rent control ordinance. The court also held that it violated due process of law to make fact findings against the owner based upon tenant testimony without cross-examination of those tenant witnesses. See *Ch. 470A, Due Process Restrictions on Public Agencies, § 470A.46[3]*.

Due Process Hearing Procedures--Hearing Costs. This chapter is updated with *Soto v. County of Riverside (2008) 162 Cal. App. 4th 492* , which holds that a provision in a memorandum of understanding (between a city and a public employee association) that required a disciplined city employee to pay one-half of the hearing costs for an administrative appeal (binding arbitration) if the employee brought the appeal through a privately retained attorney rather than through the union violated due process of law. See *Ch. 470A, Due Process Restrictions on Public Agencies, § 470A.48*.

Public Agency Meetings--Attorney's Fees. This chapter is updated with *Galbiso v. Orosi Public Utility Dist. (2008) 167 Cal. App. 4th 1063* , which holds that the denial of attorney's fees under Brown Act was an abuse of discretion because the district violated the Brown Act in not allowing a landowner to make public comments related to an action to foreclose her land and because the district improperly went into a closed session without making required public disclosures. See *Ch. 470B, Public Agency Meetings, § 470B.15[3]*.

Public Agency Meetings--Civil Enforcement. This chapter is updated with *North Pacifica LLC v. California Coastal Commission (2008) 166 Cal. App. 4th 1416* , which holds that the California Coastal Commission's failure to give 10 days notice of a public hearing to a developer (who received actual notice six days before hearing) substantially complied [*Gov. Code § 11130.3(b)(3)*] with the obligations of the Bagley Keene Open Meetings Act statute because the commission staff made a good-faith effort to notify interested persons and the public about the date and time of the hearing. Furthermore, the developer failed to show prejudice from the commission's failure to provide timely notice of the public hearing. Therefore, the commission's actions taken at the public hearing were not invalid or nullified for failure to comply with the requirements of the Bagley Keene Open Meetings Act. See *Ch. 470B, Public Agency Meetings, § 470B.25[2][b]*.

Public Records Act--Information Practices Act. This chapter is updated with *Moghadam v. Regents of University of California (2008) 169 Cal. App. 4th 466* , which holds that the Regents of the University of California did not violate the Information Practices Act (IPA) [*Civ. Code §§ 1798-1798.78*] when they did not retain and return midterm and final exams taken by a student who filed a lawsuit that challenged the failure to maintain and return those exams. The IPA was not violated by the Regents because student exams are not "records" within the meaning of the IPA. See *Ch. 470C, Public Records Act, § 470C.10[5][b]*.

Public Records Act--Legislative Open Records Act. This chapter is updated with *Zumbrun Law Firm v. California Legislature (2008) 165 Cal. App. 4th 1603* , which holds that the California legislature did not violate the Legislative

Open Records Act [*Gov. Code §§ 9070 to 9080*] in not disclosing records related to the Capital Park Safety and Security Improvements Project because those records were exempt under *Gov. Code § 9075(h)*: "Correspondence of and to individual Members of the Legislature and their staff; and (i) Records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." Furthermore, the legislature was not required to provide a privilege log to justify the applicability of particular exemptions to specific documents, and it would be sufficient to describe the documents in general and how specific exemptions applied to those documents in general. See *Ch. 470C, Public Records Act, § 470C.10[5][c]*.

Public Records Act--Records Exempt Under Other Laws. This chapter is updated with *Berkeley Police Association v. City of Berkeley (2008) 167 Cal. App. 4th 385* , which holds that the City of Berkeley's Police Review Commission (PRC) violated the confidentiality of peace officer personnel records under *Penal Code § 832.7*, as interpreted in the Copley Press decision, because the PRC hearings into complaints of police misconduct were public hearings and members of the public had access to PRC reports, investigations, and findings. The Court of Appeal affirmed the mandate order requiring the City of Berkeley and the PRC to maintain the confidentiality of police officer records, prohibit members of the public from attending PRC complaint hearings, and prohibit public access to PRC reports, investigations, or findings. See *Ch. 470C, Public Records Act, § 470C.13[14]*.

Public Records Act--Records Exempt Under Other Laws. This chapter is updated with *Sutter's Place Inc. v. Superior Court (2008) 161 Cal. App. 4th 1370* , which holds that the records exempt under other laws statutory exemption [*Gov. Code § 6254(k)*] applied to legislative process records because of the common law principle that the mental processes of legislators could not be probed through the judicially ordered discovery process includes public records related to legislative processes that may reveal legislators' motives for passing specific laws. These records are protected from disclosure under this statutory exemption [*Gov. Code § 6254(k)*]. See *Ch. 470C, Public Records Act, § 470C.13[14]*.

Public Records Act--Judicial Review. This chapter is updated with *Tracy Press, Inc. v. Superior Court (2008) 164 Cal. App. 4th 1290* , which holds that failure to name the city council member in a mandate action brought by a newspaper in the superior court to obtain e-mails exchanged between a member of a city council and the Lawrence Livermore National Laboratory provided grounds for dismissal of the action. The newspaper sought the e-mails claiming that they were public records that had to be disclosed under the California Public Records Act. The dismissal by the court of appeal was based on the newspaper's failure to name the city council member as a real party in interest in the appellate original proceeding after having named the city council member as a party in the superior court proceeding. The city council member was held to be an indispensable party under *Code Civ. Proc. § 389*, thereby justifying dismissal of the proceeding in the court of appeal. The city council member had unique interests related to whether her e-mails sent from home on a private e-mail account that discussed city business were public records. See *Ch. 470C, Public Records Act, § 470C.17[3]*.

Public Records Act--Attorney's Fees. This chapter is updated with *Bernardi v. County of Monterey (2008) 167 Cal. App. 4th 1379* , which holds that an award of attorney's fees in the amount of $244,287.50 under *Gov. Code § 6259* to litigants who were successful in receiving a court order requiring production of documents (related to a pending subdivision proposal) under the Public Records Act was proper. The court of appeal held that the hours charged were reasonable, that no reduction of hours based upon degree of success was required, and that the application of a 1.25 multiplier to the lodestar amount was valid. See *Ch. 470C, Public Records Act, § 470C.17[4]*.

Public Records Act--Attorney's Fees. This chapter is updated with *Galbiso v. Orosi Public Utility Dist. (2008) 167 Cal. App. 4th 1063* , which holds that a party was successful in obtaining access to records under the Public Records Act, and thus was a prevailing party entitled to recover attorney's fees under *Gov. Code § 6259* even though the landowner was denied access to all records because she was denied access to the premises of the district to inspect documents. The landowner prevailed on that claim and that was sufficient to satisfy the prevailing party requirement for recovery of attorney's fees. See *Ch. 470C, Public Records Act, § 470C.17[4]*.

Agency Investigations--Statutory Authority for Agency Subpoenas. This chapter is updated with *DuFauchard v. U.S. Financial Management, Inc. (2009) 169 Cal. App. 4th 1502* , which holds that an investigative subpoena that sought records related to non-California residents business activities with a California company was proper and valid because the agency had proper investigative authority under *Gov. Code § 11180*, and *Fin. Code § 12106*. See *Ch. 471, Investigations by Public Agencies, § 471.30[4][a]*.

Agency Investigations--Statutory Authority for Agency Subpoenas. This chapter is updated with *State ex rel. Dept. of Pesticide Regulation v. Pet Food Exp. Ltd. (3rd Dist. 2008) 165 Cal. App. 4th 841* , which holds that an order compelling compliance with an investigative subpoena was valid because the records sought were reasonably relevant and production of the documents under subpoena did not violate *fourth amendment* protections against unreasonable searches and seizures. See *Ch. 471, Investigations by Public Agencies, § 471.30[4][a]*.

Agency Investigations--Appellate Review of Subpoena Order. This chapter is updated with *State ex rel. Dept. of Pesticide Regulation v. Pet Food Exp. Ltd. (2008) 165 Cal. App. 4th 841* and *People ex rel. DuFauchard v. U.S. Financial Management, Inc. (2009) 169 Cal. App. 4th 1502* , which hold that an order compelling compliance with an administrative subpoena is appealable as a final judgment under *Code Civ. Proc. § 904.1(a)(1)*. See *Ch. 471, Investigations by Public Agencies, § 471.31[5]*.

Public Agency Rules--Exemptions From Rulemaking. This chapter is updated with *Morales v. California Department of Corrections and Rehabilitation (2008) 168 Cal. App. 4th 729* , which holds that the lethal injection protocol adopted by the California Department of Corrections and Rehabilitation was a regulation subject to the APA requirements because it implemented a statutory directive and it satisfied the rule of general application requirement even though only a small number of persons were subject to the protocol. See *Ch. 472, Public Agency Rules, § 472.21[1][e]*.

Prehearing Procedures in Agency Adjudications--Hearing Continuances. This chapter is updated with *Bussard v. Department of Motor Vehicles (2008) 164 Cal. App. 4th 858* , which holds that a DMV hearing officer had good cause to grant a continuance of a DMV hearing so that a police office could testify that he was on duty when he observed the motorist drive his car. The testimony would provide proper foundation for the admission of police reports related to the stop of a driver for a DUI violation. The motorist objected to admission of police reports because of lack of foundation. Also, the motorist was not prejudiced by the delay in the hearing. See *Ch. 473C, Prehearing Procedures in Agency Adjudications, § 473C.15*[41[a].

Public Administrative Law Judges--Separation of Functions. This chapter is updated with *Witt Home Ranch, Inc. v. County of Sonoma (2008) 165 Cal. App. 4th 543* , which holds that a property owner was not denied due process of law because of dual incompatible roles of an agency attorney because the attorney acted only in a legal advisory role for the agency at the administrative hearing level and did not act as an advocate at that level. See *Ch. 473E, Public Administrative Law Judges, § 473E.21*[8[a].

Agency Adjudication Hearings--Collateral Estoppel. This chapter is updated with *Noble v. Draper (2008) 160 Cal. App. 4th 1* , which holds that a former state employee's civil lawsuit for retaliation by a supervisor against the Public Employees Retirement System based on *Gov. Code § 8547.8* was properly dismissed based upon the application of collateral estoppel principles. The court of appeal held that the employee was given a quasi-judicial hearing before the SPB that was sufficient to satisfy the requirements of *Code Civ. Proc.§ 1094.5*, and that the plaintiff was collaterally estopped from relitigating fact findings that were actually litigated in the administrative proceeding before the SPB. Those fact findings could only be challenged in a writ of mandate proceeding under *Code Civ. Proc.§ 1094.5*. A failure to challenge the decision and findings in a mandate proceeding means that the decision and findings are final and binding on the plaintiff, and cannot be relitigated in the civil lawsuit. See *Ch. 473F, Agency Adjudication Hearings, § 473F.41[1]*.

Agency Adjudication Hearings--Collateral Estoppel. This chapter is updated with *California Logistics, Inc. v. State of California (2008) 161 Cal. App. 4th 242* , which holds that the provisions of *Cal. Const. art. 13, § 32*, which is also known as the "pay first, litigate later" rule takes precedence over principles of collateral estoppel. Thus, a company's declaratory and injunctive relief action against the State of California was properly dismissed. The court of appeal held that the Section 32 principle takes precedence over collateral estoppel. The State was not precluded form relitigating the employment status issue against the company, and from collecting the tax. The company's challenge to the employment tax liability would have to be litigated after the company paid the tax. See *Ch. 473F, Agency Adjudication Hearings, § 473F.41[2]*.

Agency Adjudication Hearings--Collateral Estoppel. This chapter is updated with *California Physicians' Service v. Aoki Diabetes Research Institute (2008) 163 Cal. App. 4th 1506* , which holds that a health care plan was collaterally estopped from relitigating the coverage issue of whether or not a health care provider's diabetes-related treatment was experimental (and therefore not covered by the plan) because the same coverage issue had previously been litigated by the California Public Employees Retirement System (CalPERS) and the health care plan was in privity with CalPERS, and therefore bound by the prior determination under collateral estoppel principles. See *Ch. 473F, Agency Adjudication Hearings, § 473F.41[3]*.

Agency Adjudication Decisions--Attorney's Fees. This chapter is updated with *State Water Resources Control Board Cases (2008) 161 Cal. App. 4th 304* , which holds that it was improper to deny an award of attorney's fees under *Code Civ. Proc. § 1021.5* to a nonprofit organization. The superior court had denied the fee award based on the necessity for private enforcement criteria, that the nonprofit organization's efforts were unnecessary because a public entity had achieved the same success in the underlying litigation as a private attorney general. The court of appeal held that the necessity criteria were met, and that the nonprofit organization was entitled to attorney's fees. The court noted that it was irrational to provide a fee award to the public entity under *Code Civ. Proc. § 1021.5*, and to deny a fee award to the nonprofit organization when both had contributed to the same successful result. See *Ch. 473G, Agency Adjudication Decisions, § 473G.35[9]*.

Agency Adjudication Decisions--Attorney's Fees. This chapter is updated with *The Utility Reform Network v. Public Utilities Commission (2008) 166 Cal. App. 4th 522* , which holds that an order of the California Public Utilities Commission that a non-profit consumer advocacy organization could not recover attorney's fees under *Pub. Util. § 1802* for a court challenge to a settlement of a lawsuit between a regulated electric utility (Southern California Edison) and the California Public Utilities Commission (PUC) was proper. The PUC concluded that the challenge was not successful and did not make a substantial contribution to the PUC proceedings. The court also affirmed an order that TURN was not entitled to a multiplier to increase the amounts of the fees awarded for participating in lawsuits related to electrical deregulation. However, the court reversed the order of the PUC requiring payment of outside counsel's compensation at the same rate as inside counsel. The court held that was an abuse of discretion. See *Ch. 473G, Agency Adjudication Decisions, § 473G.35[9]*.

Agency Adjudication Decisions--Attorney's Fees. This chapter is updated with *Marine Forests Society v. California Coastal Commission (2008) 160 Cal. App. 4th 867* , which holds that a nonprofit corporation, the Marine Forests Society, could not recover appellate attorney's fees under *Code Civ. Proc. § 1021.5* because it was not a prevailing party as to the claims for which it sought attorney's fees. The corporation sought injunctive relief against the California Coastal Commission to prohibit the commission from commencing cease and desist proceedings against the corporation's experimental manmade reef on the ocean floor. The corporation was successful in challenging the legislative appointment authority for the commissioners of the California Coastal Commission. However, its successful litigation related to appointment did not change the behavior of the commission, only the Legislature's behavior, and thus neither the judicially sanctioned relief nor the catalyst theory are applicable (citing the *Graham* decision), and the corporation was not a prevailing party (successful litigant) under *Code Civ. Proc. § 1021.5*. See *Ch. 473G, Agency Adjudication Decisions, § 473G.35[9]*.

Agency Adjudication Decisions--Attorney's Fees. This chapter is updated with *Vasquez v. State of California (2008) 45 Cal. 4th 243* , which holds that the catalyst theory requirement that the party seeking attorney's fees under *Code Civ. Proc. § 1021.5* make a reasonable attempt to settle the dispute with defendant prior to litigation did not apply to recovery of fees in cases that did not rely on the catalyst theory. In non-catalyst theory cases, the reasonable attempt factor would be considered as part of the court's equitable discretion in determining whether the necessity and financial burden of private enforcement requirement for fee recovery under *Code Civ. Proc. § 1021.5* was satisfied, but it would not be a requirement for fee recovery. See *Ch. 473G, Agency Adjudication Decisions, § 473G.35[9]*.

Agency Adjudication Decisions--Attorney's Fees. This chapter is updated with *Villanueva v. City of Colton (2008) 160 Cal. App. 4th 1188* , which upheld an award of $39,472.30 in trial-related attorney's fees under *Gov. Code § 12965* in favor of a city and against a former city employee who bought a frivolous lawsuit claiming racial discrimination under the FEHA statute. The court held that while the trial court that ordered the fee award has the responsibility to consider the losing parties financial status, the losing party in this case did not offer any evidence of financial or income information that would support a lowered fee award. Therefore, the fee order was not an abuse of discretion. The court of appeal denied the city appellate attorneys fees under *Gov. Code § 12965* because the former employees appeal was not frivolous as to the issue of whether the fee awarding court has to consider the losing parties ability to pay. See *Ch. 473G, Agency Adjudication Decisions, § 473G.35[9]*.

Availability of Judicial Review--Ordinary Mandate. This chapter is updated with *Environmental Protection & Information Center v. California Dept. of Forestry & Fire Protection (2008) 44 Cal. 4th 459* , which holds that regulatory approvals related to a streambed alteration agreement did not require findings, and agreement was not invalid without findings, because statutory approval process did not require that a hearing be held by law. Agreement was reviewable under *Code Civ. Proc. § 1085* (ordinary mandate). Also, the steelworkers union had standing (was beneficially interested) under *Code Civ. Proc. § 1086* as a citizen litigant to challenge regulatory approvals related to a streambed alteration agreement. See *Ch. 474, Availability of Judicial Review, § 474.11[3][a]*.

Availability of Judicial Review--Standing. This chapter is updated with *County of San Diego v. San Diego NORML (2008) 165 Cal. App. 4th 798* , which holds that counties had standing to challenge the constitutionality of state laws that imposed direct obligation on counties, but counties did not have standing challenge the constitutionality of state laws that did not impose obligations of counties. See *Ch. 474, Availability of Judicial Review, § 474.11[3][a]*.

Availability of Judicial Review--Standing. This chapter is updated with *Mission Hospital Regional Medical Center v. Shewry (2008) 168 Cal. App. 4th 460* , which holds that hospitals have standing to challenge a freeze on Medicaid reimbursement rates enacted by the state legislature. Hospitals are beneficially interested under *Code Civ. Proc. § 1086* because they have an interest in the proper administration of the Medicaid laws that is distinct from the interest of the public at large in that they are adversely affected by the reimbursement rate freeze. See *Ch. 474, Availability of Judicial Review, § 474.11[3][a]*.

Standards of Judicial Review--Fundamental Vested Rights. This chapter is updated *Termo Company v. Luther (2008) 169 Cal. App. 4th 394* , which holds that the independent judgment standard of review applied to an appeal by two oil companies that challenged the decision of the director of conservation affirming the decision of the state oil and gas supervisor directing the plugging and abandoning of 28 oil wells owned by the companies that were still in operation. The court held that the right to continue to operate oil wells was a fundamental right "of particular importance in the current economic climate." The right to operate oil wells was also vested because these oil wells had been either in operation or in idle status for many years. The order to plug and abandon the wells terminated the right to extract oil, and that impacted the fundamental vested right. When fundamental vested rights are affected, the independent judgment standard of review must be applied by the reviewing court. The statutory exception permitting the substantial evidence standard of review to be applied when the Legislature mandates that standard of review does not apply here, because the governing statute, *Pub. Res. Code § 3355*, does not clearly express a substantial evidence

standard of review, and does not contain required due process procedural safeguards. Section 3355 did not expressly state that the substantial evidence standard of review applied to decisions of the director. The statutory procedures contained in Sections 3350 to 3359 lacked some fundamentals of due process of law, including no separation of prosecutorial and adjudicatory functions, inadequate notice because no written notice of charges is required, no right to file an answer, no specification of burden of proof, and no right to have a hearing conducted consistent with the evidence code. Because of the lack of procedural due process safeguards, the independent judgment standard of review must be applied to challenges of the decision of that director. Finally, the statement of decision requested by the appealing parties must be prepared on remand when the reviewing court applies the independent judgment standard of review. See *Ch. 474B, Standards of Judicial Review, § 474B.16[9][a]*.

Review of Agency Decision--Parties. This case is updated with *Center for Biological Diversity v. FPL Group, Inc. (2008) 166 Cal. App. 4th 1349* , which holds that members of the public have standing under the public trust doctrine to challenge harm to the public trust related to wildlife including raptors and other birds allegedly harmed by wind turbines However, members of the public seeking to challenge harm to the public trust must file a lawsuit against the responsible public agencies, the County of Alameda, and the California Department of Fish and Game, which are charged with enforcing the public trust. They may not file a lawsuit against the operators of the wind turbines that have allegedly caused the harm. Failure to join the County of Alameda under *Code Civ. Proc. § 389* is grounds for dismissing the action. The county is a necessary party because it issued the wind turbine permits being challenged. Because the limitations period for challenging the issuance of the permits has expired, the county cannot be joined to the lawsuit and the county is considered to be an indispensable party. See *Ch. 474C, Review of Agency Decision, § 474C.13[2]*.

Due Process--Hearing Procedures. This chapter is updated with *California Consumer Health Care Council, Inc. v. California Department of Managed Health Care (*2008) *161 Cal. App. 4th 684* , which holds that asymmetrical hearing procedures did not violate due process of law when enrollees in health plans did not have the opportunity to see or rebut the filings of a health care plan, even thought the plan had the opportunity to see and rebut the filings of enrollees. See *Ch. 470A, Due Process Restrictions on Public Agencies, § 470A.41[3]*.

Public Agency Meetings--Personnel Exception. This chapter is updated with *Travis v. Board of Trustees of The California State University (2008) 161 Cal. App. 4th 335* , which holds that the personnel exception was properly invoked by a board of trustees to discuss the return of a former chancellor to employment with the university. The personnel exception properly included a closed session meeting of the trustees to discuss a decision by a former chancellor to return from an extended leave of absence and assume a teaching job. The trustees did not violate the Bagley Keene Act in holding a closed session for this purpose. See *Ch. 470B, Public Agency Meetings, § 470B.23[2]*.

Public Agency Adjudication--Local Agencies. This chapter is updated with *Patterson Flying Service v. California Department of Pesticide Regulation (2008) 161 Cal. App. 4th 411* , which holds that the provisions of Chapter 4.5 apply to hearings conducted under the authority of the county agricultural commissioner, because the office of county agricultural commissioner is a local agency created or appointed by concerted action of the state and one or more local agencies. The flying service had the opportunity at the hearing to contest a fine imposed on them for not properly following the label directions for the application of pesticides. See *Ch. 473, Public Agency Adjudication, § 473.15[1][d]*.

Timing of Judicial Review--Issue Exhaustion. This chapter is updated with *Niles Freeman Equipment v. Joseph (2008) 161 Cal. App. 4th 765* , which holds that the failure of a party to raise a due process issue before the ALJ at an administrative hearing meant that this issue could not be brought on appeal. The party waived the right to raise the claim that the agency failure to follow APA procedures violated due process of law. See *Ch. 474A, Timing of Judicial Review, § 474A.11[3][b]*.

Timing of Judicial Review--Statute of Limitations. This chapter is updated with *Capitol Racing v. California Horse Racing Board (2008) 161 Cal. App. 4th 892* , which holds that the provisions of *Bus. & Prof. Code § 19463* (30-day

time limit) for filing a petition for administrative mandate was controlling not the provisions of *Gov. Code § 11523* (30-day time limit). The challenge of Capitol Racing to the decision of the board was held to be untimely because it was filed more than 30 days after the date that the decision was issued by the Board. See *Ch. 474A, Timing of Judicial Review, § 474A.20[2][a]*.

Alcoholic Beverage Licenses--Writs. This chapter is revised throughout with amended and new and amended *Cal. Rules of Ct., Rules 8.485 et seq.* governing writs of mandate. See Ch. 18, *Alcoholic Beverage Licenses* .

Public Utilities--Compensation. In *The Utility Reform Network v. Public Utilities Commission (2008) 166 Cal. App. 4th 522* , the court of appeal held that substantial contribution to a PUC decision by an intervener does not automatically entitle the intervener to compensation for all ensuing judicial proceedings without regard to changed circumstances or results achieved. See *Ch. 480, Public Utilities, § 480.26[2]*.

Public Utilities--Determination Regarding Ability to Pay Penalties or Fines. This chapter is updated with a new section in light of the amendment of *Pub. Util. Code § 1701.2*. The PUC may determine that a respondent lacks, or may lack, the ability to pay potential penalties or fines or to pay restitution that may be ordered by the PUC [*Pub. Util. Code § 1701.2(e)(1)*]. If so, the PUC may order the respondent to demonstrate, to the PUC's satisfaction, sufficient ability to pay. The respondent must demonstrate the ability to pay, or make other financial arrangements satisfactory to the PUC, within seven days of the PUC commencing an adjudication case. The PUC may delegate to the attorney to the PUC the determination of whether a sufficient showing has been made by the respondent of an ability to pay [*Pub. Util. Code § 1701.2(e)(2)*]. The amended code section also provides for administrative law judge review [*Pub. Util. Code § 1701.2(e)(3)*]; and a respondent that is a public utility regulated under a rate-of-return or rate-of-margin regulatory structure or that has gross annual revenues of more than $100,000,000 generated within California is presumed to be able to pay potential penalties or fines or to pay restitution that may be ordered by the PUC [*Pub. Util. Code § 1701.2(e)(4)*]. See *Ch. 480, Public Utilities, § 480.67*.

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1-1 California Forms of Pleading and Practice--Annotated § 1.219

§ 1.219 Real Estate

Boundaries--Validating Acts. This chapter is updated with a new section on Validating Acts, which according to nonbinding legislative history materials, for nearly 70 years the Legislature's annual Validating Acts have boosted the stability and credit ratings of state and local bonds. The Validating Acts cure public officials' mistakes that might otherwise invalidate boundary changes. However, the Acts do not protect against fraud, corruption, or unconstitutional actions. See *Ch. 101, Boundaries, § 101.16[4]*.

Lis Pendens. Arbitration is not an "action" under *Code Civ. Proc. § 405.5* governing the filing of a notice of lis pendens; however, a party to arbitration may simultaneously file and stay a court action pending the arbitration of a dispute that is claimed to be arbitrable and relevant to the action, giving grounds for filing a lis pendens and not itself waiving arbitration, so long as other steps are not taken in the litigation that have the effect of waiving arbitration [*Manhattan Loft, LLC v. Mercury Liquors, Inc. (2009) 173 Cal. App. 4th 1040*]. See *Ch. 30, Using Alternative Dispute Resolution, § 30.11[5][b]*.

Condominiums and Other Common Interest Developments. The Davis-Stirling Common Interest Development Act sets forth requirements that must be met before a homeowners' association may file a complaint for damages against the builder, developer, or general contractor based upon a claim for defects in the design or construction of the development. The expiration date of those provisions has been extended from July 1, 2010, to July 1, 2017. See *Ch. 124, Condominiums and Other Common Interest Developments, § 124.26*.

Easement by Necessity. In *Murphy v. Burch (2009) 46 Cal. 4th 157* , the California Supreme Court held that when the claimant of an easement by necessity traces common ownership back to the federal government and seeks to establish an implied reservation of an access right-of-way, the claimant bears the burden of producing evidence on the issues regarding the government's intent to reserve an easement and the government's lack of power to condemn; an easement is not a matter of necessity when the federal government had the power of eminent domain to gain access to its property and strict necessity may be extinguished when a sovereign owner failed to exercise that power. See *Ch. 240, Easements, § 240.13*.

Homesteads and Bankruptcy Actions. This chapter is updated with a new section on the use of the homestead

exemption in forced and unforced sales of real property in bankruptcy proceedings. See *Ch. 294, Homesteads, § 294.13*.

Lost Papers--Evidentiary Proof. This chapter is updated with a new section on proving the content of a lost writing with other evidence under the secondary evidence rules and the use of oral testimony. See *Ch. 356, Lost Papers, § 356.27*.

Mechanics' Liens--Demolition and Removal. This chapter is updated with *United Rentals Northwest, Inc. v. Snider Lumber Products, Inc. (2009) 174 Cal. App. 4th 1479* , which holds since "work of improvement" is defined to include demolition and removal of buildings, the entirety of a work of improvement can consist of the demolition or removal of a building. There is no basis for the view that removal of a building--or anything else included in the definition--only counts if something else is done to the land in addition. See *Ch. 361, Mechanics' Liens, § 361.11[3][a]*.

Mechanics' Liens--Unlicensed Contractor. This chapter is updated with *Goldstein v. Barak Construction (2008) 164 Cal. App. 4th 845* , which holds *Bus. & Prof. Code § 7031* represents legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business outweighs any harshness between the parties, and applies even when a person for whom work was performed knew the contractor was unlicensed. This chapter is also updated with *Great West Construction, Inc. v. WSS Industrial Construction, Inc. (2008) 162 Cal. App. 4th 581* , which holds a subcontractor who is unlicensed cannot maintain an action against a general contractor for work performed under a construction service agreement. See *Ch. 361, Mechanics' Liens, § 361.152[4]*.

Foreclosure Protection for Federally Related Mortgage Loan. In 2009, Congress established a 90-day notice to vacate requirement in the Protecting Tenants at Foreclosure Act [P.L. 111-22, S. 896]. This requirement applies to any foreclosure on a federally related mortgage loan or on any dwelling or residential real property after May 20, 2009 [P.L. 111-22, sec. 702, 123 Stats. 1660-1661]. As of August 2009, the California Legislature was in the process of amending *Code Civ. Proc. § 1161b* to extend the notice period from 60 to 90 days if required by any other provision of state or federal law [SB 483, Corbett]. *See Ch. 555, Trust Deeds and Real Property Mortgages, § 555.51A[6]*.

Foreclosure Protection for Tenants. In 2009, Congress established a 90-day notice to vacate requirement in the Protecting Tenants at Foreclosure Act [P.L. 111-22, S. 896]. This requirement applies to any foreclosure on a federally related mortgage loan or on any dwelling or residential real property after May 20, 2009 [P.L. 111-22, sec. 702, 123 Stats. 1660-1661]. As of August 2009, the California Legislature was in the process of amending *Code Civ. Proc. § 1161b* to extend the notice period from 60 to 90 days if required by any other provision of state or federal law [SB 483, Corbett]. See *Ch. 332, Landlord and Tenant: The Tenancy, § 332.20[5]*.

Timber--Wrongful Removal and Delivery. This chapter is updated with several new sections on the wrongful removal of timber, specifically addressing the issues of measure of damages, evidentiary issues, punitive damages, and post-trial challenges to the method of valuation. Another new section addresses the failure to deliver timber with the land conveyed. See *Ch. 350, Logs and Timber, §§ 350.12, 350.14A*.

Subdivision Map Act. In 2009 Stats., Ch. 18, the Legislature amended the Subdivision Map Act to provide that the expiration date of any tentative or vesting tentative map, or parcel map for which a tentative or vesting tentative map has been approved, that was in existence on July 15, 2009, and will not expire before January 1, 2012, has been extended by 24 months, as has any legislative, administrative, or other state agency approval pertaining to a development project included in the map [*Gov. Code § 66452.22(a), (c)*]. See *Ch. 579, Zoning and Planning, § 579.267[9]*.

Recovering Economic Damages. A court of appeals has held that a home builder may recover from a product manufacturer for economic losses caused by the manufacturer's violation of the standards set forth in the Right to Repair Act [*Civ. Code § 895 et seq.*] through a derivative equitable indemnity action, even though a builder may not recover for those losses through a direct negligence claim against the manufacturer [*Greystone Homes, Inc. v. Midtec, Inc.*

(2008) 168 Cal. App. 4th 1194] . See *Ch. 104, Building Contracts, § 104.46*.

No Exempting Property From Rent Control. A court of appeals has held that a landlord and tenant may not agree to exempt rented property from rent control [*Gombiner v. Swartz (2008) 167 Cal. App. 4th 1365]* . See *Ch. 335, Landlord and Tenant: Rent Control, § 335.12[1]*.

No Recording Pending Litigation Notice From Other State. A court of appeals has held that the California lis pendens statutes do not authorize the recording in California of a notice of litigation pending in the court of another state [*The Formula Inc. v. Superior Court (2008) 168 Cal. App. 4th 1455]* . See *Ch. 348, Lis Pendens, § 348.14*.

New Form of Zoning Summons. A new Judicial Council form of summons to enforce the state housing law has been added to added [*Health & Safety Code § 17990*; JC Form SUM-145]. See *Ch. 579, Zoning and Planning, § 579.374*.

Construction Contracts--Indemnification By Subcontractor in Specified Residential Construction Defect Situations. *Civ. Code § 2782* has been amended [*see* Stats. 2008, ch. 467, § 1] to provide that for all contracts, and amendments to such contracts, entered into after January 1, 2009, for residential construction that purport to insure or indemnify the builder, general contractor, or any contractor not affiliated with the builder, by a subcontractor against liability for construction defect claims are unenforceable to the extent the claims either arise out of, pertain to, or relate to the negligence of the builder or contractor or the builder's or contractor's other agents, servants, or independent contractors who are directly responsible to the builder; are for defects in design furnished by those persons; or do not arise out of, pertain to, or relate to the scope of work in the written agreement between the parties. See *Ch. 104, Building Contracts, § 104.41[7]*.

Real Estate Broker or Salesperson Liability--Recovery Account. The coverage limits for the Recovery Account administered by the Department of Real Estate have been raised, for causes of action occurring on or after January 1, 2009. Persons having qualified claims against licensees may now apply for compensation from the Recovery Account, up to $50,000 for any one transaction and $250,000 for any one licensee [Stats. 2008, ch. 279]. For discussion, see *Ch. 103, Brokers, § 103.41[4]*.

Condominiums--Remedy for Separate Interest Owner's Dispute With Association. *Civ. Code § 1367.6* has been added [*see* Stats. 2008, ch. 502, § 2] to provide that, in addition to pursuing the formal alternative dispute resolution procedure, the owner of a separate interest who is disputing any charge or sum levied by the association, when the disputed amount does not exceed the jurisdictional limits of small claims court, may pay under protest the disputed amount and commence an action in small claims court. For discussion, see *Ch. 124, Condominiums and Other Common Interest Developments, § 124.17[1][d]*.

Personal Property Left in Commercial Property. The Legislature adopted *Civ. Code § 1993 et seq.* [Stats. 2008, ch. 440], which establishes an optional procedure for disposing of personal property left behind in commercial property after termination of occupancy. This procedure parallels the existing procedure set forth in *Civ. Code § 1980 et seq.*, now applicable to personal property left behind in residential property. Ch. 332, *Landlord and Tenant: The Tenancy*, § 332.26, has been updated to reflect these changes.

Termination of Tenancy--Domestic Violence, Sexual Assault, or Stalking. 2008 legislation [Stats. 2008, ch. 440] provides that a tenant may notify his or her landlord that he or she or a household member was a victim of an act that constitutes an act of domestic violence, sexual assault, or stalking and that the tenant intends to terminate the tenancy. A tenant who provides a notice of termination is responsible for payment of rent for 30 days following the giving of the notice, and thereafter is released from any rent payment obligation under the rental agreement without penalty. See *Ch. 332, Landlord and Tenant: The Tenancy, § 332.27*.

Disabled Access to Mobilehomes. New *Civ. Code §§ 798.29*.6, 799.11 [Stats. 2008, ch. 170] provide that mobilehome

park management cannot prevent a mobilehome resident or owner from adding disabled access and accommodations to the home or lot. For discussion, see *Ch. 369, Mobilehomes and Mobilehome Parks, § 369.39[4]*.

Statute of Frauds Unsigned Forbearance Agreement--Within Statute of Frauds. In *Secrest v. Security National Mortgage Loan Trust 2002-2 (2008) 167 Cal. App. 4th 544* , the court of appeal held that an unsigned agreement by which a lender agreed to forbear from exercising the right of foreclosure under a deed of trust securing an interest in real property came within the statute of frauds. Although the forbearance agreement did not create, renew, or extend the note and deed of trust, it did modify them, and an agreement to modify a contract that is subject to the statute of frauds is also subject to the statute of frauds. See *Ch. 530, Statute of Frauds, § 530.12[6]*.

Homeowners' Association--Request for Trustee's Deed After Sale of Separate Interest. With respect to separate interests governed by a homeowners' association, the association may cause to be filed in the recorder's office in the county in which the separate interests are situated, a request that a mortgagee, trustee, or other person authorized to record a notice of default regarding any of those separate interests, mail to the association a copy of any trustee's deed on a sale concerning a separate interest [2008 Stats., ch. 527]. For discussion and a form for use by the association, see *Ch. 555, Trust Deeds and Real Property Mortgages, § 555.141A*.

Zoning and Planning Subdivision Map Act--Antiquated Subdivision Maps. In *Witt Home Ranch., Inc. v. County of Sonoma (2008) 165 Cal. App. 4th 543* , the court of appeal held that the Subdivision Map Act's grandfather provisions do not validate subdivision maps approved under the statutes in effect from 1893 (the date of the state's first regulation of private subdivision maps) through 1915. See *Ch. 579, Zoning and Planning, § 579.279[4]*.

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§ 1.220 Schools

Foreseeability of Injury to Special Needs Student Inflicted in Hidden Area of Campus Need Not Require Prior Incidents. In *Jennifer C. v. Los Angeles Unified School Dist. (2008) 168 Cal. App. 4th 1320* , the court of appeal held that if a school district allows a hidden area to be maintained on campus without taking adequate steps to prevent access by students, the foreseeability of that area being used to inflict injury on a special-needs student may be imputed to the district even without proof of prior incidents of victimization taking place in that hidden area. See *Ch. 380, Negligence, § 380.32[3][c][vi],* and see *Ch. 514, Schools: Injuries to Students, § 514.12[2]*.

Education Code Recognizes Claim for Peer Sexual Orientation Harassment. In *Donovan v. Poway Unif. School Dist. (2008) 167 Cal. App. 4th 567* , the court of appeal found that high school students suffered severe, pervasive, and offensive harassment under *Educ. Code § 220*, prohibiting discrimination based on disability, gender, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic contained in the definition of hate crimes in *Pen. Code § 422.55* in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid and were properly awarded money damages. See Ch. 513, *Schools: Student Rights and Responsibilities* .

Home Schooling in California Is Protected, but Can Be Overridden for Child's Safety. In *Jonathan L. v. Superior Court (2008) 165 Cal. App. 4th 1074* , the court of appeal held that California statutes permit home schooling as a species of private school education, which is exempted from compulsory education laws, but the statutory permission to home school may constitutionally be overridden in order to protect the safety of a child who has been declared dependent. Thus, for a family with a history of dependency court proceedings involving charges of physical abuse, neglect, and failure to prevent sexual abuse, the dependency court erred in declining to issue an order that the two youngest children be sent to a private or public school after they were declared dependent due to the abuse and neglect of their siblings. See *Ch. 513, Schools: Student Rights and Responsibilities, § 513.13[4]*.

Bullying Added to Grounds for Suspension. The Legislature has added bullying, including by electronic means, to the grounds for which a student may be suspended from school [*see Educ. Code § 32261(f), (g)*]. See *Ch. 513, Schools: Student Rights and Responsibilities, § 513.38[3]*.

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§ 1.221 Tax

Taxpayers Rights Advocates-- Power to Grant Relief. Until January 1, 2012, the taxpayers' rights advocate appointed by the Franchise Tax Board is empowered to review and grant an application for relief from any penalty, fee, addition to tax, or interest assessed on a taxpayer because of specified errors. The advocate may act on any application for relief received by the advocate after 2008, regardless of the tax year involved [*see* Stats 2008, ch. 305]. See *Ch. 540, Taxes and Assessments, § 540.403[1]*.

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§ 1.222 Torts

[1] Abuse of Minors and Elderly

Accrual Rule of *Code Civ. Proc. § 340.1* May Be Applied to Action Against Public Entity. In *K.J. v. Arcadia Unified School Dist. (2009) 172 Cal. App. 4th 1229* , the court of appeal held that although the childhood sexual abuse limitations period of *Code Civ. Proc. § 340.1* does not apply to actions against public entities, the language in that statute suggesting that in delayed discovery cases the cause of action accrues on the date that the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after plaintiff reached the age of majority was caused by childhood sexual abuse, can be used to determine the accrual date in an action against a public entity defendant when application of a delayed discovery rule is appropriate. See *Ch. 5, Abuse of Minors and Elderly, § 5.13*.

Limitations in Sex Abuse Case Against Third-Party Nonperpetrator Clarified. In *Quarry v. Doe 1 (2009) 170 Cal. App. 4th 1574* , the court of appeal held that, in a suit for childhood sexual abuse brought by a person over the age of 26 against a third-party nonperpetrator, a cause of action alleging post-2003 discovery of the cause of the plaintiff's psychological problems may be brought within three years of that discovery, even if the complaint may have been barred under an earlier version of the statute of limitations. See *Ch. 5, Abuse of Minors and Elderly, § 5.13*.

Plaintiff in Child Sex Abuse Case Not Required to Comply With Government Claims Act. Under amended *Gov. Code § 905*, a plaintiff seeking to file suit for damages for childhood sexual abuse pursuant to *Code Civ. Proc. § 340.1* against a local public entity arising from conduct occurring on or after January 1, 2009, is not required to first file a claim with the local public entity within six months after accrual of the claim, as would generally be the case under the Government Claims Act. See *Ch. 5, Abuse of Minors and Elderly, § 5.13*.

Definition of "Financial Abuse" Under Elder Abuse Statute Amended. The Legislature has amended *Welf. & Inst. Code § 15610.30* to change the definition of "financial abuse" under the elder or dependent adult abuse statute. See *Ch. 5, Abuse of Minors and Elderly, § 5.33[4]*.

***Civ. Code § 3294* Only Applies to Punitive Damages in Financial Abuse Cases.** Under amended *Welf. & Inst. Code*

§ 15657.5, the standards of *Civ. Code § 3294(b)*, regarding the imposition of punitive damages on an employer for the acts of an employee, apply in financial abuse cases only for the imposition of punitive damages and do not apply to the recovery of compensatory damages or attorney's fees or costs. See *Ch. 5, Abuse of Minors and Elderly, § 5.35*.

Remedy for Return of Property Under Elder Abuse Statute Added. Under new *Welf. & Inst. Code § 15657.6*, a person or entity that takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining the real or personal property of an elder or dependent adult when the elder or dependent adult lacks capacity pursuant to *Prob. Code § 812*, or is of unsound mind, but not entirely without understanding, pursuant to *Civ. Code § 39*, must, upon demand by the elder or dependent adult or a representative of the elder or dependent adult, return the property. If that person or entity fails to return the property, the elder or dependent adult is entitled to the remedies provided for financial abuse pursuant to *Welf. & Inst. Code § 15657.5*, including attorney's fees and costs. See *Ch. 5, Abuse of Minors and Elderly, § 5.35*.

Limitations Period for Financial Abuse Added. Under new *Welf. & Inst. Code § 15657.7*, unlike an action for physical abuse or neglect, an action for damages for financial abuse of an elder or dependent adult must be commenced within four years after the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered, the facts constituting the financial abuse. See *Ch. 5, Abuse of Minors and Elderly, § 5.36A*.

[2] Animal Liability

Animal Liability. This chapter is updated with *McMahon v. Craig (2009) 176 Cal. App. 4th 222* , which holds a pet owner may not recover for loss of the companionship of a pet, nor for negligent or intentional infliction of emotional distress based on veterinary malpractice that is not outrageous. See *Ch. 23, Animals: Civil Liability, § 23.15[2]*.

[3] Assault and Battery

Specific Intent Required to Impose Battery Liability on Doctor Who Fails to Abide by Condition. In *Dennis v. Southard (2009) 174 Cal. App. 4th 540* , the court of appeal held that to be liable for performing a medical procedure while failing to abide by a known condition imposed by the patient, the doctor must have intended to perform the procedure without abiding by the condition and a negligent failure to abide by the condition is an insufficient basis for liability for battery. See *Ch. 58, Assault and Battery, § 58.14[5]*, and see *Ch. 415, Physicians: Medical Malpractice, § 415.20*.

Police Not Liable When Ricochet Strikes Innocent Bystander. In *Brown v. Ransweiler (2009) 171 Cal. App. 4th 516* , the court of appeal held that police acted reasonably as a matter of law in shooting at a murder suspect who, while attempting to flee in a vehicle being driven on a curb at a strip mall, was headed straight for another police officer, and as the suspect, who was shot and killed, could not have sued for battery; police also had a defense from liability for battery to a bystander in one of the mall offices who was hit by a deflected bullet fragment. See *Ch. 58, Assault and Battery, § 58.22[1]*.

[4] Conversion

Triable Issue on Liability of Steward for Preventing Removal of Plaintiff's Horse From Track. In *Jamgotchian v. Slender (2009) 170 Cal. App. 4th 1384* , the court of appeal held that a triable issue of fact existed as to whether conduct by a steward of the California Horse Racing Board to prevent the owner of a horse from removing the horse from the race grounds before a race constituted intentional interference with the owner's possession of the horse sufficient to support a cause of action for trespass to chattels. See *Ch. 150, Conversion, § 150.18[3]*.

Interpleader Action Insufficient Basis for Conversion Claim. In *Shopoff & Cavallo LLP v. Hyon (2008) 167 Cal. App. 4th 1489* , the court of appeal held that a person such as an attorney who, acting as a mere custodian, intermediary,

or conduit, files a complaint in interpleader when faced with conflicting claims against litigation proceeds, does not exercise dominion over those funds sufficient to support an action for conversion. See *Ch. 150, Conversion, § 150.15*.

[5] Damages

Hospital Lien Act Ineffective to Create Lien Against Recovery From Victim's Own Insurer. In *Weston Reid, LLC v. American Ins. Group, Inc. (2009) 174 Cal. App. 4th 940* , the court of appeal held that the Hospital Lien Act, *Civ. Code § 3045.1 et seq.*, does not provide for creation of a lien against recovery from the victim's own first-party insurer, even if the victim's recovery from his or her own insurer is under an uninsured motorist coverage that substitutes for recovery from a third-party tortfeasor who does not carry appropriate insurance coverage. See *Ch. 177, Damages, § 177.54[3]*.

Homebuilder May Recover Equitable Indemnity From Product Manufacturer Under Right to Repair Act. In *Greystone Homes, Inc. v. Midtec, Inc. (2008) 168 Cal. App. 4th 1194* , the court of appeal held that a homebuilder liable for construction defects under the Right to Repair Act, *Civ. Code § 895 et seq.*, may in turn recover for economic loss from a product manufacturer through an action for equitable indemnity, if the manufacturer's negligence or breach of contract caused a violation of the standards provided by the Act. See *Ch. 177, Damages, § 177.47[1]*.

[6] Death and Survival Actions

Application of Statute of Limitations in Action Against Decedent Clarified. In *Farb v. Superior Court (2009) 174 Cal. App. 4th 678* , the court of appeal held that the limitations period of *Code Civ. Proc. § 366.2*, which governs claims against a decedent's estate, applies to a claim filed in California even if the decedent's personal representative resides outside of California or the estate is in probate in another state. The court also held that the limitations period is not tolled while the plaintiff is a minor. See *Ch. 181, Death and Survival Actions, § 181.44[2]*.

[7] Drugs and Pharmacists

Failure-to-Warn Claim Against Drug Manufacturer Not Preempted. In *McKenney v. Purepac Pharmaceutical Co. (2008) 167 Cal. App. 4th 72* , the court of appeal held that a failure-to-warn strict liability claim against a generic drug manufacturer is not necessarily preempted by federal approval of the label if the FDA did not expressly preclude the warning requested by the plaintiff. See *Ch. 214, Drugs and Pharmacists, § 214.62[2][a]*.

[8] Emergency Vehicles

Scope of Pursuit. Under *Veh. Code § 17001*, it is not sufficient that a motor vehicle somehow be involved in the series of events that results in the injury; instead, the vehicle must be in a state of being at work or in the exercise of some specific function by performing work or producing effects at the time and place the injury is inflicted. Accordingly, where police shot and killed a suspect well after a police vehicular pursuit concluded (after the police stopped and exited their cars and chased the suspect on foot), neither the individual officers nor the public entity may be held civilly liable for the suspect's actions based on the manner in which the officers conducted the vehicular pursuit [*Hernandez v. City of Pomona (2009) 46 Cal. 4th 501*]. See *Ch. 246, Emergency Vehicles, § 246.12[1]*.

Immunity for Training of Emergency Services Personnel Volunteered During Emergencies. Under new *Health & Safety Code § 1799.100*, the Legislature has provided civil immunity from liability for improper training for local agencies, state or local government entities, and private businesses or nonprofit organizations included on the statewide emergency services registry established under *Gov. Code § 8588.2* that voluntarily and without expectation and receipt of compensation donate services, goods, labor, equipment, resources, or dispensaries or other facilities in compliance with *Gov. Code § 8588.2*. See *Ch. 246, Emergency Vehicles, §§ 246.12[3][b], 246.14[2]*.

[9] Employer Liability

Injury Caused by Former Employer After Termination Not Attributable to Employer. In *Phillips v. TLC Plumbing, Inc. (2009) 172 Cal. App. 4th 1133* , the court of appeal held that because the employer-employee relationship ends on the termination of employment, an employer cannot be held liable for the negligent hiring and retention of an unfit employee for harm inflicted by the employee after his or her employment has been terminated, even if the former employee initially met the plaintiff while working for the employer. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.12[2]*.

[10] Fires

Fire Protection Services. In a case in which the Department of Forestry and Fire Protection sought to recover its costs in fighting a brush fire from real parties in interest, the affirmative defenses of comparative negligence or failure to mitigate damages were not to available to real parties; real parties were not allowed to challenge the reasonableness of the methods the department used (or did not use) to fight the fire [*People ex rel. Grijalva v. Superior Court (2008) 159 Cal. App. 4th 1072*]. See *Ch. 267, Fires, § 267.16[4]*.

[11] Fraud and Deceit

Property Seller's Duty to Disclose Can Extend to Past Lawsuits. In *Calemine v. Samuelson (2009) 171 Cal. App. 4th 153* , the court of appeal held that a real estate seller's duty to disclose can extend to a duty to disclose lawsuits affecting the property's value or desirability, even lawsuits that are past and settled, and the issue of whether an undisclosed matter is of sufficient materiality to have affected the value or desirability of the property is a question of fact. See *Ch. 269, Fraud and Deceit, § 269.14[3]*.

[12] Games, Sports, and Athletics

Jury to Determine Whether Defendant Increased Risks Inherent in Volleyball Game. In *Luna v. Vela (2008) 169 Cal. App. 4th 102* , the court of appeal held that it was for the jury to determine whether a homeowner increased the risks inherent in volleyball when failing to mark net tie-down lines in order to prevent persons from tripping over the lines. See *Ch. 273, Games, Sports, and Athletics, § 273.12[3]*.

[13] Garages and Gas Stations

No Tort Liability for Remounting Bald Tire on Vehicle. In *Alcala v. Vazmar Corp. (2008) 167 Cal. App. 4th 747* , the court of appeal held that a violation of *Veh. Code § 27465(a)*, which generally prohibits a dealer or person holding a retailer's permit from selling, offering for sale, exposing for sale, or installing on a vehicle axle for use on a highway any pneumatic tire having less than a specified amount of tread depth, does not support the imposition of tort liability when a tire already mounted on a vehicle is removed and remounted on that same vehicle by a dealer or retail seller. See *Ch. 274, Garages and Gas Stations, § 274.11[1]*.

[14] Indemnity and Contribution

Post-Arbitration Procedures for Settlement Credits Under *Code Civ. Proc. § 877* Clarified. In *Wade v. Schrader (2008) 168 Cal. App. 4th 1039* , the court of appeal held that if the fact and amount of a settlement credit under *Code Civ. Proc. § 877* are undisputed and the action against a nonsettling defendant is adjudicated by an arbitrator, the credit need not be applied by the arbitrator and may be applied by a trial court when rendering judgment. Moreover, if the offset is greater than the amount of the arbitrator's award and the defendant has not previously brought the credit to the attention of the trial court, the nonsettling defendant may use a motion to compel acknowledgment of satisfaction of judgment under *Code Civ. Proc. § 724.050(d)* to effectively achieve the offset. See *Ch. 300, Indemnity and Contribution, § 300.73[3][a]*.

[15] Insane and Other Incompetent Persons

Psychiatrist Not Liable for Patient's Murder of His Neighbors. In *Greenberg v. Superior Court (2009) 172 Cal. App. 4th 1339* , the court of appeal held that a psychiatrist owed no duty of care to the neighbors of a patient when the patient shot and killed two of the neighbors' family members, despite plaintiffs' contentions that the psychiatrist's negligent prescription of drugs to the patient caused him to become violent and caused the shooting. See *Ch. 304, Insane and Other Incompetent Persons, § 304.93[2]*.

[16] Libel and Slander

Actual Republication Required to Impose Liability on Original Publisher of Defamatory Content for Forced Republication by Defamed Person. In *Dible v. Haight Ashbury Free Clinics, Inc. (2009) 170 Cal. App. 4th 843* , the court of appeal held that imposing liability on the original publisher for forced republication by a defamed person requires an actual republication of the defamatory comments, and mere foreseeability that the defamed person might have to repeat the defamatory comments at some point in the future is an insufficient basis for imposing liability. See *Ch. 340, Libel and Slander, § 340.21[2]*.

Retraction Demand Only Effective as to Listed Plaintiffs. In *Anschutz Entertainment Group, Inc. v. Snepp (2009) 171 Cal. App. 4th 598* , the court of appeal held that a demand for retraction of defamatory material is only effective as to the plaintiffs listed or so described in the demand such that the defendant fairly knows who is objecting to the challenged publication, and merely stating that a business entity is seeking a retraction does not preserve the rights of that entity's parent corporation to seek general or punitive damages. See *Ch. 340, Libel and Slander, §§ 340.53[4], 340.232[2]*.

Ministerial Exception Applied to Post-Termination Statements Made to Congregation. In *Gunn v. Mariners Church, Inc. (2008) 167 Cal. App. 4th 206* , the court of appeal held that because evaluating the truth or falsity of those statements would necessarily require an inquiry into the truth or falsity of the doctrinal beliefs of the church, a gay worship director could not sue his former church employer for post-termination statements to the congregation suggesting that plaintiff had been "caught in a sin," had admitted to "moral and sexual actions that are sin," had suffered a "breakdown in character," and was a "broken man." See *Ch. 340, Libel and Slander, § 340.16[2]*.

[17] Medical Malpractice

Specific Intent Required to Impose Battery Liability on Doctor Who Fails to Abide by Condition. In *Dennis v. Southard (2009) 174 Cal. App. 4th 540* , the court of appeal held that to be liable for performing a medical procedure while failing to abide by a known condition imposed by the patient, the doctor must have intended to perform the procedure without abiding by the condition and a negligent failure to abide by the condition is an insufficient basis for liability for battery. See *Ch. 58, Assault and Battery, § 58.14[5]*, and see *Ch. 415, Physicians: Medical Malpractice, § 415.20*.

Lump Sum Present Value Used to Calculate Undertaking Required Pending Appeal. In *Leung v. Verdugo Hills Hospital (2008) 168 Cal. App. 4th 205* , the court of appeal held that if a defendant against whom a judgment has been rendered must post an undertaking to stay the judgment pending appeal under *Code Civ. Proc. § 917.1*, the amount of the undertaking is calculated under that statute using the lump sum present value of the entire judgment, not using some lesser amount based on the payments that might otherwise actually be payable during the appeal under a periodic payment schedule created under *Code Civ. Proc. § 667.7*. See *Ch. 415, Physicians: Medical Malpractice, § 415.49[4]*.

[18] Mental Suffering

Willed-Body Program Not Liable for Mishandling of Corpse Based Merely on General Pattern of Mishandling

Corpses. In *Conroy v. Regents of University of California (2009) 45 Cal. 4th 1244* , the California Supreme Court held that evidence of a general pattern of mishandling of donated bodies by a willed-body program will not support liability for negligence absent evidence demonstrating to a "well-founded substantial certainty" that the body of plaintiff's decedent was actually mishandled. See *Ch. 180, Dead Bodies and Cemeteries, § 180.14[4]*, and *Ch. 362, Mental Suffering and Emotional Distress, § 362.11[4]*.

[19] Negligence

Third-Party Administrator Owes Duty to Health Plan Members When Administering Claims. In *Mintz v. Blue Cross of California (2009) 172 Cal. App. 4th 1594* , the court of appeal held that a corporation under contract to a health plan to administer claims owes a duty to health plan members to exercise due care to protect those members from physical injury caused by negligence in denying benefits under the plan. The court also held that only a "stranger to the contract" may be liable for interference with that contract, and an agent for a contracting principal, including a corporate agent or employee, cannot be liable for interfering with the principal's contract with the plaintiff if the alleged interference was committed when the agent was acting in the scope of the agency. See *Ch. 380, Negligence, § 380.31[3]*, and see *Ch. 565, Unfair Competition, § 565.133[2][a]*.

Third-Party Workers' Compensation Claims Administrator Owed Duty of Care to Client's Excess Insurer. In *National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc. (2009) 171 Cal. App. 4th 35* , the court of appeal held that a workers' compensation claims administrator hired to provide claim services for a self-insured employer owes a duty of care when handling claims to the employer's excess insurer liable for paying claims that exceed a specified amount. See *Ch. 380, Negligence, § 380.31[3]*.

Statutory Immunity for Providing Emergency Care Applies Only to Emergency Medical Care. In *Van Horn v. Watson (2008) 45 Cal. 4th 322* , the California Supreme Court held that the immunity provided by *Health & Safety Code § 1799.102* does not apply to all emergency care, but applies only to the rendition of emergency *medical* care at the scene of a *medical* emergency, and pulling an injured friend from a car involved in an accident out of fear that the car might explode was not emergency medical care covered by the statute. See *Ch. 380, Negligence, § 380.32[2][d]*.

Jailer Owes Special Relationship to Prisoner; No Private Right of Action for Violating *Cruel and Unusual Punishment Clause* of State Constitution. In *Giraldo v. Department of Corrections & Rehabilitation (2008) 168 Cal. App. 4th 231* , the court of appeal held that because a prisoner is dependent and vulnerable, there is a special relationship between a jailer and a prisoner such that the jailer owes a duty of care to the prisoner to take steps to protect the prisoner from foreseeable harm. The court also held that there is no private right of action for violation of the prohibition against cruel and unusual punishment contained in *Section 17 of Article I of the California Constitution*. See *Ch. 380, Negligence, § 380.32[3][c][x]*, and *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.103[1]*.

Primary Assumption of Risk Inapplicable to Injury to Boat Passenger. In *Kindrich v. Long Beach Yacht Club (2008) 167 Cal. App. 4th 1252* , the court of appeal held that primary assumption of risk was not a defense in an action brought against a yacht club by a passenger on a boat who broke his leg when he jumped off of the boat in an attempt to help in tying off the boat as it was returning to the dock. See *Ch. 380, Negligence, § 380.172[4][a][ii]*.

[20] Nuisance

Nuisance Claim Permitted Against Apartment Owner for Secondhand Cigarette Smoke. In *Birke v. Oakwood Worldwide (2009) 169 Cal. App. 4th 1540* , the court of appeal held that, because both private and public nuisances were alleged, an apartment tenant could bring suit against the apartment owner for harm caused by secondhand cigarette smoke permitted in outdoor common areas without a showing that the tenant suffered damage different in kind from that suffered by the general public, so long as plaintiff alleged that the presence of the secondhand smoke interfered

with plaintiff's use and enjoyment of the outdoor facilities. See *Ch. 391, Nuisance, § 391.14*.

Continuing Nuisance Damages Denied for Contamination That Impaired Ability to Refinance. In *Gehr v. Baker Hughes Oil Field Operations, Inc. (2008) 165 Cal. App. 4th 660* , the court of appeal held that a plaintiff who was unable to obtain refinancing on real property due to soil contamination caused by the previous owner could not recover damages for a continuing nuisance based on the difference in interest paid under the original loan and what would have been paid had plaintiff been able to obtain refinancing at a lower rate. See *Ch. 391, Nuisance, § 391.26*.

[21] Premises Liability

Power Company Not Liable for Electrocution. In *Manuel v. Pacific Gas & Electric Co. (2009) 173 Cal. App. 4th 927* , the court of appeal held that an electric utility company that placed anti-climbing guards on an electric tower, even if they were installed incorrectly, did not engage in willful misconduct such that the company could be liable when a teenager was electrocuted when she climbed the tower. See *Ch. 421, Premises Liability, § 421.23[3]*.

Apartment Owners Owed Duty to Extend Gate Around Leasing Office. In *Tan v. Arnel Management Co. (2009) 170 Cal. App. 4th 1087* , the court of appeal held that owners of a 20-acre apartment complex owed a duty of care to a tenant who was the victim of a carjacking to either move existing security gates so that they provided protection around the leasing office and its adjacent parking lot, or otherwise install a very similar gate around that area, which according to the existing evidence would require a minor gate extension over a small area. See *Ch. 421, Premises Liability, § 421.15[2][b]*.

[22] Privacy

Republication of Material Plaintiff Posted on Internet Not Actionable as Public Disclosure of Private Facts. In *Moreno v. Hanford Sentinel, Inc. (2009) 172 Cal. App. 4th 1125* , the court of appeal held that the unauthorized republication in a newspaper of an article plaintiff had written and posted on the highly popular Internet site MySpace.com was not an actionable public disclosure of private facts, as plaintiff herself made the information available to any person with a computer. See *Ch. 429, Privacy, § 429.37[1]*.

Workplace Privacy. In *Hernandez v. Hillsides, Inc. (2009) 47 Cal. 4th 272* , the California Supreme Court held that an employer's clandestine videotaping of a computer workstation during non-business hours to determine the identity of a person who was using the computer to access pornographic websites during non-business hours was not considered so highly offensive that it would support causes of action for intrusion based upon state common law and *Cal. Const., art. 1, § 1*. See *Ch. 429, Privacy, § 429.39*.

Privacy Claim Stemming From Pat-Down Searches at NFL Games Reversed for Further Proceedings. In *Sheehan v. San Francisco 49ers, Ltd. (2009) 45 Cal. 4th 992* , the California Supreme Court reversed the sustaining of defendant's demurrer after plaintiffs had alleged that having to submit to full-body pat-down searches as a condition for entering a stadium to watch a professional football game infringed their privacy rights. Assuming that plaintiffs had alleged a serious invasion of their privacy rights, the Court noted that the case could not be decided on demurrer as defendant had not yet offered into the record any explanation or reasoned justification for the searches. See *Ch. 429, Privacy, § 429.16[8]*.

Student Exams Not Covered by Information Practices Act. In *Moghadam v. Regents of University of California (2008) 169 Cal. App. 4th 466* , the court of appeal held that the Information Practices Act applies only to institutional records that are preserved in the ordinary course of business by a single, central custodian, and in the university context, registration forms and transcripts would be examples of such records, while student exams not stored or maintained by the university in a central location would not. See *Ch. 429, Privacy, § 429.100[2]*.

Privacy--Right to Privacy in Relatively Nonsensitive Contact Information. Ch. 191, *Discovery: Privileges and Other Discovery Limitations*, has been updated with expanded coverage of the tension between privacy interests and access to relevant information necessary to pursue the litigation in employment law cases. In *Puerto v. Superior Court (2008) 158 Cal. App. 4th 1242* , a case alleging wage and hour violations, a California court held that an order restricting the disclosure of potential witnesses' contact information through the use of an opt-in letter exceeded the protections necessary to safeguard the legitimate privacy interests in the addresses and telephone numbers of the witnesses, and as such was an abuse of discretion. In *Lee v. Dynamex, Inc. (2008) 166 Cal. App. 4th 1325* , a California court found reversible error in denying a motion to compel disclosure of independent contractor names and addresses using an opt-out procedure in a class action lawsuit alleging improper reclassification of class members from employees to independent contractors. In *Crab Addison, Inc. v. Superior Court (2008) 169 Cal. App. 4th 958* , involving a pending class action to enforce employees' statutory wage and overtime rights, the violation of the employees' right to privacy did not outweigh plaintiffs' right to discover the class members' names, addresses, and telephone numbers, subject to an opt-out notice. See *Ch. 191, Discovery: Privileges and Other Discovery Limitations, §§ 191.120[3]*.

Testing of Arrestee's Blood May Be Required. Under amended *Health & Safety Code § 121060*, if a peace officer, firefighter, or emergency medical personnel, while acting within the scope of his or her duties, is exposed to an arrestee's blood or bodily fluids, the arrestee may be required through a court order to submit to blood testing for HIV, hepatitis B, and hepatitis C, although a licensed health care provider must first make a good-faith effort to secure the arrestee's consent. See *Ch. 429, Privacy, § 429.60[3], [4]*.

[23] Products Liability

U.S. Supreme Court Sets Punitive Damages Award Ratio for Maritime Cases. A divided U.S. Supreme Court vacated the already remitted $2.5 billion punitive damages award arising out of the *Exxon Valdez* oil spill. Exercising its "federal maritime common law authority," the Court held that a one-to-one ratio between compensatory and punitive damages was the maximum upper limit in that type of maritime case [*Exxon Shipping Co. v. Baker (2008) -- U.S. --, 128 S. Ct. 2605]* . See *Ch. 460, Products Liability, § 460.33[2]*.

U.S. Supreme Court Grants Certiorari in *Philip Morris* Punitive Damages Case. The high Court also granted Philip Morris' petition for certiorari after the Oregon Supreme Court reinstated a $79.5 million punitive damages award. Limiting its review to a procedural question, the Court declined to consider the second question of whether a punitive damages award that is 97 times the compensatory damages may be upheld [*Philip Morris USA Inc. v. Williams (2008) -- U.S. --, 128 S. Ct. 2904]* . See *Ch. 460, Products Liability* **,** *§ 460.104[15][b]*.

Federal Cigarette Labeling Act Does Not Preempt State Law Advertising Fraud Claim. In a 5-4 decision, the U.S. Supreme Court held that the federal cigarette Labeling Act did not preempt a state law fraud claim alleging that advertisements regarding "light" cigarettes violated Maine's Unfair Trade Practices Act [*Altria Group, Inc. v. Good (2008) -- U.S. --, 129 S. Ct. 538]* . See *Ch. 460, Products Liability, § 460.52[2][i]*.

California Supreme Court Adopts Sophisticated User Doctrine. In a case of first impression, the Supreme Court of California adopted the sophisticated user doctrine [*Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56]* . See *Ch. 460, Products Liability, § 460.11[10][b][vii]*.

Fitness Club's Provision Of Exercise Machines to Patrons Constitutes A Service. A fitness club provided a service, not a product, and could not be held strictly liable for a customer's injuries on an exercise machine [*Ontiveros v. 24 Hour Fitness USA, Inc. (2008) 169 Cal. App. 4th 424]* . See *Ch. 460, Products Liability, § 460.11[6][d]*.

Finance Lessor Not Subject To Strict Products Liability. In a case of first impression involving a glue press, the court held that a finance lessor was not subject to strict products liability [*Citicapital Commercial Corp. (2008) 167 Cal. App. 4th 1527]* . See *Ch. 460, Products Liability, § 460.11[6][j], [k]*.

Right to Repair Act Does Not Bar Home Builder's Equitable Indemnity Claim Against Building Materials Manufacturer. Under the Right to Repair Act, *Civ. Code § 895 et seq.*, a builder could recover from a plumbing fittings manufacturer for economic losses caused by the manufacturer's violations of the Act's standards through an equitable indemnity action. However, it could *not* recover for economic losses through a direct negligence claim based on the manufacturer's violations of the standards [*Greystone Homes, Inc. v. Midtec, Inc. (2008) 168 Cal. App. 4th 1194]* . See *Ch. 460, Products Liability, § 460.11[4]*.

Strict Products Liability Applies To Raw Asbestos Suppliers. The First District Court of Appeal declined to find that *Arena v. Owens-Corning Fiberglas Corp. (1998) 63 Cal. App. 4th 1178, 74 Cal. Rptr. 2d 580* , which held that strict liability can apply to suppliers of raw asbestos, was wrongly decided [*Garza v. Asbestos Corp. (2008) 161 Cal. App. 4th 651]* . See *Ch. 460, Products Liability, § 460.11[5]*.

Refusal To Instruct Jury That Cigarette Manufacturer Cannot Be Punished for Harm Suffered by Nonparties Warrants Reversal of $28 Billion Punitive Damages Award. A trial court's refusal to give the cigarette manufacturer's proposed punitive damages instruction not to impose punishment for harm caused to nonparties constituted prejudicial error. Consequently, the Second District Court of Appeal ordered a new trial to determine the amount of punitive damages [*Bullock v. Philip Morris USA, Inc. (2008) 159 Cal. App. 4th 655]* . See *Ch. 460, Products Liability, § 460.33[2]*.

Plaintiffs May Use Reasonable Inferences to Prove Food Poisoning. Food poisoning cases are governed by same rules as other personal injury actions, and reasonable inferences are available to show causation. The Fourth District Court of Appeals declined to follow *Minder v. Cielito Lindo Rest. (1977) 67 Cal. App. 3d 1003* , to the extent that it requires a plaintiff in food poisoning cases to exclude other possible causes of his or her illness [*Sarti v. Salt Creek Ltd. (2008) 167 Cal. App. 4th 1187]* . See *Ch. 460, Products Liability, § 460.11[9][b][iv][C]*.

Drug Manufacturer May Be Held Liable for Misrepresentation Even Though Plaintiff Sustains Injuries From Using Drug's Generic Equivalent. A plaintiff who took the generic form of Reglan sustained permanent injuries. The name-brand manufacturer was improperly granted summary judgment on her misrepresentation claim. Its duty to use due care when providing product warnings extended to consumers whose physicians foreseeably relied on its product information when prescribing a medication, even if the prescription was filled with a generic equivalent [*Conte v. Wyeth, Inc. (2008) 168 Cal. App. 4th 89]* . See *Ch. 460, Products Liability, § 460.11[10][n][iii]*.

Failure-To-Warn Claim Not Barred by Preemption in Prescription Drug Case. In another case claiming injuries from use of the generic from of Reglan, the plaintiff's failure-to-warn claim against the generic drug manufacturer was not barred by conflict preemption [*McKenney v. Purepac Pharm. Co. (2008) 167 Cal. App. 4th 72 , time for granting or denying review extended, 2008 Cal. LEXIS 14899]* . See *Ch. 460, Products Liability, § 460.52[2][c]*.

[24] Subrogation

State Bar May Pursue Subrogation Claim Against Attorney. An appellate court has held that the State Bar has statutory subrogation rights under *Bus. & Prof. Code § 6140.5(b)* (Client Security Fund or CSF) against an attorney who settled with claimants to whom the CSF paid some claims, when the parties to the settlement agreed that the plaintiffs could seek full reimbursement from the CSF, and the attorney would not object to the notice of intent to pay issued by the CSF [*State Bar of Cal. v. Statile (2008) 168 Cal. App. 4th 650]* . See *Ch. 536, Subrogation, § 536.14[2]*.

[25] Tort Claims Act

Public Entity Employer May Be Directly Liable for Discrimination Prohibited by Fair Employment and Housing Act. In *DeJung v. Superior Court (2008) 169 Cal. App. 4th 533* , the court of appeal held that the Fair

Employment and Housing Act applies to public entity employers, making such employers susceptible to direct liability for prohibited discrimination. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.61[1]*.

Jailer Owes Special Relationship to Prisoner; No Private Right of Action for Violating *Cruel and Unusual Punishment Clause* of State Constitution. In *Giraldo v. Department of Corrections & Rehabilitation (2008) 168 Cal. App. 4th 231* , the court of appeal held that because a prisoner is dependent and vulnerable, there is a special relationship between a jailer and a prisoner such that the jailer owes a duty of care to the prisoner to take steps to protect the prisoner from foreseeable harm. The court also held that there is no private right of action for violation of the prohibition against cruel and unusual punishment contained in *Section 17 of Article I of the California Constitution*. See *Ch. 380, Negligence, § 380.32[3][c][x]*, and *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.103[1]*.

Statutory Government Claims Procedures Not Applicable When Contractual Claims Procedures Are Provided. In *Arntz Builders v. City of Berkeley (2008) 166 Cal. App. 4th 276* , the court of appeal held that, except as required by statute, a claim subject to contractual claims procedures written into a public contract is not subject to the statutory claims presentation requirements of *Gov. Code §§ 905* and *910 et seq.*, unless such a requirement is written into the agreement. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.22[3]*.

City Not Liable for Injury to Pedestrian at Bulb-Out Intersection. In *Sun v. City of Oakland (2008) 166 Cal. App. 4th 1177* , the court of appeal held that the installation of "bulb out" sidewalk extensions did not make an intersection a dangerous condition of public property, even when preexisting crosswalk markings were removed in the process. The court also held that a city's failure to comply with the public notice requirements of *Veh. Code § 21950.5* prior to removing crosswalk markings did not render the city liable for an injury to a pedestrian caused by a motorist who failed to yield the right of way. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.22[3]*.

Los Angeles County Flood Control Agency Immunity Amended. Under amended *Gov. Code § 831.8*, Los Angeles County flood control agencies and water conservation facilities and their employees are immune from liability for injury to children 16 years old or younger caused by the condition or use of unlined flood control channels or adjacent groundwater recharge spreading grounds if, at the time of injury, the person injured was using the property for any purpose other than that for which the public entity intended it to be used. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.85[9]*.

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§ 1.223 Trial

Juror's Silence During Polling Does Not Constitute Disagreement. In *Keener v. Jeld-Wen, Inc. (2009) 46 Cal. 4th 247* , the California Supreme Court held that a juror's silence at polling, due to the trial court's failure to poll the juror on one of multiple special verdict questions, does not constitute an expressed disagreement with the verdict under *Code Civ. Proc. § 618*. See *Ch. 326A, Jury Verdicts, § 326A.14[3]*.

Jury to Determine Whether Defendant Increased Risks Inherent in Volleyball Game. In *Luna v. Vela (2008) 169 Cal. App. 4th 102* , the court of appeal held that it was for the jury to determine whether a homeowner increased the risks inherent in volleyball when failing to mark net tie-down lines in order to prevent persons from tripping over the lines. See *Ch. 273, Games, Sports, and Athletics, § 273.12[3]*.

Guardianships & Conservatorships--Sua Sponte Duty to Instruct Not Applicable in LPS Act Conservatorships. In *Conservatorship of George H (2008) 169 Cal. App. 4th 157, 165* , court held that because Lanterman-Petris-Short Act [*Welf. & Inst. Code § 5500 et seq.*] conservatorship proceeds are not criminal proceedings, the sua sponte duty to instruct that applies to jury trials in criminal cases does not apply to jury trials under *Welf. & Inst. Code § 5350*. Thus, the trial court did not err in failing to instruct the jury that if a proposed conservatee was able to accept voluntary treatment, there was no need for a conservatorship. Additionally, the trial court in this case properly specified each of the powers and disabilities it imposed, and the evidence warranted the trial court's findings. See *Ch. 304, Insane Persons, § 304.144[6][a]*.

Trial by Jury. This chapter is updated with *Jogani v. Superior Court (2008) 165 Cal. App. 4th 901* , which holds the right to trial by jury guaranteed by the Constitution is the right as it existed at common law at the time the state Constitution was adopted in 1850. In determining whether a common law court before 1850 could have entertained a plaintiff's action and granted the requested relief, a court must look past the form or label attached to the plaintiff's claim and discern its substance, i.e., gist. If the claim is, in substance, one that was cognizable at law before 1850 and seeks relief that could have been obtained at law before 1850, then the action is legal and the right to jury trial attaches, regardless of the extent to which the claim requires the application of equitable doctrines. See *Ch. 251, Equity, § 251.222[1]*.

Interpleader--No Jury Right in Interpleader Action, Even if Apportionment of Competing Claims Requires Resolution of Some Legal Issues. A California Court of Appeal has held that because the gist of an interpleader action is the equitable apportionment of competing claimants' rights to deposited funds or property, there is no right to a jury trial of such an action, even if the equitable issue of apportionment is partially dependent on the resolution of legal issues [*Shopoff & Cavallo LLP v. Hyon (2008) 167 Cal. App. 4th 1489]* . See *Ch. 314, Interpleader, §§ 314.10[2], 314.60[2][d]*.

Substance of Claim, Not Label, Determines Entitlement to Jury Trial. In *Jogani v. Superior Court (2008) 165 Cal. App. 4th 901* , the court of appeal held that to classify an action as legal or equitable for purposes of determining whether a jury trial is allowed, the court looks to its substance, i.e., the nature of the rights at issue and the remedy sought. The label attached to a complaint or cause of action does not control. See *Ch. 322, Juries, § 322.13[1][b][i]*.

Felony Conviction Admissible to Show Bias. In *Piscitelli v. Salesian Society (2008) 166 Cal. App. 4th 1* , the court of appeal held that evidence that a witness has been convicted of a felony is admissible to show bias under *Evid. Code § 786* without regard to the nature of the underlying crime as it relates to the character traits of honesty and truthfulness. See *Ch. 551, Trial, § 551.123[5]*.

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§ 1.224 Unfair Competition

Third-Party Administrator Owes Duty to Health Plan Members When Administering Claims. In *Mintz v. Blue Cross of California (2009) 172 Cal. App. 4th 1594* , the court of appeal held that a corporation under contract to a health plan to administer claims owes a duty to health plan members to exercise due care to protect those members from physical injury caused by negligence in denying benefits under the plan. The court also held that only a "stranger to the contract" may be liable for interference with that contract, and an agent for a contracting principal, including a corporate agent or employee, cannot be liable for interfering with the principal's contract with the plaintiff if the alleged interference was committed when the agent was acting in the scope of the agency. See *Ch. 380, Negligence, § 380.31[3]*, and see *Ch. 565, Unfair Competition, § 565.133[2][a]*.

Requirements for Showing Standing in Unfair Competition Class Action Clarified. In *In re Tobacco II Cases (2009) 46 Cal. 4th 298* , the California Supreme Court held that when pursuing a class action under the unfair competition statute, *Bus. & Prof. Code § 17200 et seq.*, only the class representative plaintiffs must demonstrate that they meet the statutory requirements for standing to bring the action. The Court also held that if the unfair competition claim is based on fraud stemming from alleged false advertising and misrepresentations made to consumers, the plaintiff must plead and prove actual reliance to satisfy the standing requirement, although the plaintiff is not required to necessarily plead and prove individualized reliance on specific misrepresentations or false statements when those misrepresentations and false statements were part of an extensive and long-term advertising campaign. See *Ch. 565, Unfair Competition, § 565.35[1]*.

Precertification Discovery May Be Allowed in Unfair Competition Class Action. In *Safeco Ins. Co. of America v. Superior Court (2009) 173 Cal. App. 4th 814* , the court of appeal held that when a class action is brought under the unfair competition statute, a plaintiff who is not a class member or is otherwise unqualified to serve as a class representative may, in appropriate cases, move for precertification discovery for the purposes of identifying a proper class representative, although the absence of a reasonable, good-faith belief that the plaintiff had standing under the law in effect at the time the plaintiff was first named as a plaintiff will ordinarily compel denial of a motion for precertification discovery. See *Ch. 565, Unfair Competition, § 565.35[1]*.

Pudding Manufacturer Adequately Described Alleged Trade Secrets. In *Brescia v. Angelin (2009) 172 Cal. App.*

4th 133 , the court of appeal held that a plaintiff alleging misappropriation of an allegedly distinct high-protein pudding formula and manufacturing process sufficiently described the claimed trade secret when listing the specific ingredients by common name, as well as by their supplier and brand name, and listing the percentage of the total formala each ingredient constituted. Plaintiff also particularly described each step in the mixing, testing, and code marking of the pudding. See *Ch. 565, Unfair Competition, § 565.103[8]*.

Cause of Action for Negligent Interference With Existing Contract Rejected. In *Davis v. Nadrich (2009) 174 Cal. App. 4th 1* , the court of appeal held that because the California Supreme Court case holding that there is no cause of action for negligent interference with a contract has never been overruled, they were bound to conclude that the cause of action still does not exist in California. See *Ch. 565, Unfair Competition, § 565.135[2]*.

Failure to Comply With Talent Agencies Act Barred Unfair Competition Claim. In *Blanks v. Seyfarth Shaw LLP (2009) 171 Cal. App. 4th 336* , the court of appeal held that the Talent Agencies Act vests exclusive original jurisdiction in the Labor Commissioner for all claims arguably coming under its provisions, and failure to meet this jurisdictional hurdle will bar an action under the unfair competition statute for violation of the Act. See *Ch. 565, Unfair Competition, § 565.31[4][a]*.

Restitution May Be Based on Money Paid to Defendant's Agent. In *Troyk v. Farmers Group, Inc. (2008) 168 Cal. App. 4th 1337* , the court of appeal held that in an action for statutory unfair competition, a defendant may be ordered to pay restitution even if plaintiff did not pay the money directly to that defendant, as for example, when the money was paid to an agent for the defendant or otherwise was paid to an enterprise of which defendant was an integral part and defendant directly benefited financially from the payments. See *Ch. 565, Unfair Competition, § 565.34[2][a]*.

Damage to Goodwill of Business Insufficient to Confer Standing to Sue for Unfair Competition. In *Citizens of Humanity, LLC v. Costco Wholesale Corp. (2009) 171 Cal. App. 4th 1* , the court of appeal held that alleged damage to the goodwill of a business, for which no restitution could be recovered under the unfair competition statute, is not a loss of "money or property" sufficient to confer standing to sue under that statute. See *Ch. 565, Unfair Competition, § 565.35[1]*.

No Standing to Bring Unfair Competition Claim for Falsely Representing That Non-Defective Locks Were "Made in America." In *Kwikset Corp. v. Superior Court (2009) 171 Cal. App. 4th 645* , the court of appeal held that consumers had no standing to sue a padlock manufacturer under the unfair competition statute for falsely representing that locks were made in America, as no restitution would be available for the purchase of non-defective locks. See *Ch. 565, Unfair Competition, § 565.35[1]*.

Discovery Rule Applied to Unfair Competition Action. In *Broberg v. The Guardian Life Ins. Co. of America (2009) 171 Cal. App. 4th 912* , the court of appeal held that the delayed discovery rule applied to a complaint alleging deceptive insurance marketing and sales practices. See *Ch. 565, Unfair Competition, § 565.35[4]*.

Sanctions Imposed for Failing to Protect Alleged Trade Secrets Revealed in Court File. In *Wallis v. PHL Associates, Inc. (2008) 168 Cal. App. 4th 882* , the court of appeal upheld the imposition of sanctions under *Code Civ. Proc. § 128.5* when an attorney and client failed to protect an opposing party's alleged trade secrets that were contained in confidential documents that were apparently inadvertently included in the court file made available to the public. See *Ch. 565, Unfair Competition, § 565.103[9]*.

Collateral Estoppel Did Not Bar Class Certification in Unfair Competition Action. In *Johnson v. GlaxoSmithKline, Inc. (2008) 166 Cal. App. 4th 1497* , the court of appeal held that collateral estoppel did not bar an unfair competition action seeking class certification under California law just because a court in a previous action alleging the same actionable conduct denied class certification, as the class certification in the previous action was denied because the proposed class included all plaintiffs eligible to bring suit under the more liberal pre-Proposition 64

standing requirements and class certification in the subsequent action was limited to only those plaintiffs who could meet the more stringent standing requirements imposed by Proposition 64. See *Ch. 565, Unfair Competition, § 565.35[1]*.

Narrow-Restraint Exception to *Bus. & Prof. Code § 16600* Rejected. In *Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937* , the California Supreme Court rejected a "narrow-restraint" exception to *Bus. & Prof. Code § 16600*, finding that statute to be unambiguous in invalidating all restraints of trade that do not fall under a specific statutory exception. See *Ch. 565, Unfair Competition, § 565.71[2][c]*.

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§ 1.225 Workers' Compensation

Qualified Medical Evaluators. In amending *8 Cal. Code Reg. §§ 30*-49.9, the Administrative Director has updated the regulations governing qualified medical evaluators. See *Ch. 577, Workers' Compensation, § 577.46[3][a] -[p]*.

Employment Relationships--Independent Contractors. The court of appeal, in *Cristler v. Express Messenger Systems (2009) 171 Cal. App. 4th 72* , has held that the plaintiffs, representatives of a class of parcel and message drivers/deliverers, were independent contractors, not the defendant's employees, and that the trial court's jury instructions properly placed the burden on the defendant of rebutting the *Lab. Code § 3357* presumption that the plaintiffs were the defendant's employees. See *Ch. 577, Workers' Compensation, § 577.22[3][c]*.

Permanent Disability; AMA *Guides*; 2005 Permanent Disability Rating Schedule. The Appeals Board en banc in *Almaraz v. Environmental Recovery Services*; *Guzman v. Milpitas Unified School District* (2009) *74 Cal. Comp. Cases 201 (Appeals Board en banc opinion)* has held that the AMA *Guides* portion of the 2005 Permanent Disability Rating Schedule is rebuttable, and that it is rebutted by showing that an impairment rating based on the Guides would result in a permanent disability award that would be inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability. Subsequently, the Board granted reconsideration in these joint cases. See *Ch. 577, Workers' Compensation, § 577.01*.

Permanent Disability--2005 Permanent Disability Rating ScheduleM--Diminished Future Earning Capacity. The Appeals Board en banc, in *Ogilvie v. City and County of San Francisco* (2009) *74 Cal. Comp. Cases 248 (Appeals Board en banc opinion)* , held that the diminished future earning capacity portion of the 2005 Permanent Disability Rating Schedule is rebuttable, since *Lab. Code § 4660(c)* provides that the 2005 Schedule is merely "prima facie evidence of the percentage of permanent disability to be attributed to each injury." Subsequently, the Board granted reconsideration in this case. See *Ch. 577, Workers' Compensation, § 577.01*.

Permanent Disability--Offers of Modified of Alternative Work. The court of appeal, in *Bontempo v. W.C.A.B.* (2009) 173 Cal. App. 4th, has held that in the pretrial conference statement the parties stipulated that the permanent disability benefits that the employer was already paying to the employee included a 15 percent increase pursuant to *Lab. Code § 4658(d)*, and that, by checking the boxes on the pretrial conference form labeled "Permanent Disability" and

"Apportionment," the parties conveyed their intention that the WCJ calculate the award for permanent disability benefits under the applicable formula and the facts presented, including *Lab. Code § 4658(d)*. See *Ch. 577, Workers' Compensation, § 577.45[4][a]*.

Vocational Rehabilitation--Sunsetting. The Appeals Board en banc has held in *Weiner v. Ralphs Co.* (2009) *74 Cal. Comp. Cases 736 (Appeals Board en banc opinion)* that: (1) repeal of *Lab. Code § 139.5* terminated any rights to vocational rehabilitation benefits or services pursuant to orders or awards that were not final before January 1, 2009; (2) no saving clause was adopted to protect vocational rehabilitation rights in cases still pending on or after January 1, 2009; (3) vocational rehabilitation statutes that were repealed in 2003 do not continue to function as "ghost statutes" on or after January 1, 2009; (4) effective January 1, 2009, the WCAB lost jurisdiction over non-vested and inchoate vocational rehabilitation claims, but the WCAB continues to have jurisdiction under *Lab. Code §§ 5502(b)(3)* and *5803* to enforce or terminate vested rights; and (5) subject matter jurisdiction over non-vested and inchoate vocational rehabilitation claims cannot be conferred by waiver, estoppel, stipulation, or consent. See *Ch. 577, Workers' Compensation, § 577.45[2]*.

Third-Party Workers' Compensation Claims Administrator Owed Duty of Care to Client's Excess Insurer. In *National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc. (2009) 171 Cal. App. 4th 35* , the court of appeal held that a workers' compensation claims administrator hired to provide claim services for a self-insured employer owes a duty of care when handling claims to the employer's excess insurer liable for paying claims that exceed a specified amount. See *Ch. 380, Negligence, § 380.31[3]*.

Workers' Compensation Judges--Ethical Standards. In amending *8 Cal. Code Reg. §§ 9720.1*-9723, the Administrative Director has updated the regulations governing the ethical standards to which Workers' Compensation Judges must adhere. See *Ch. 577, Workers' Compensation, § 577.12[1]*.

Rules of Court Administrator. In promulgating *8 Cal. Code Reg. §§ 10210*-10297, the Administrative Director and Court Administrator have specified various procedures, including those for EAMS, the Electronic Adjudication Management System, being implemented by the Division of Workers' Compensation. See *Ch. 577, Workers' Compensation, §§ 577.12A, 577.84[1] -[9]*.

Disability Evaluation Unit Regulations. In promulgating new regulations and amending existing regulations, the Administrative Director has conformed the Disability Evaluation Unit regulations, *8 Cal. Code Reg. §§ 10150*-10167, to the requirements of document filing with the Electronic Adjudication Management System (EAMS). See *Ch. 577, Workers' Compensation, § 577.45[4][a] -[e]*.

Retraining and Return to Work Regulations. In promulgating new regulations and amending existing regulations, the Administrative Director has conformed the retraining and return to work regulations, *8 Cal. Code Reg. §§ 10116*-10133.58, to the requirements of document filing with the Electronic Adjudication Management System (EAMS) and enabled the same definitions to apply to both the return to work and the supplemental job displacement regulations. See *Ch. 577, Workers' Compensation, § 577.45[5][a] -[e]*.

Employment Relationships--Independent Contractors. The court of appeal in *Chin v. Namvar (2008) 166 Cal. App. 4th 994* has held that *Lab. Code § 2750.5*, which creates a rebuttable presumption that an unlicensed person who performs work requiring a license is an employee, not an independent contractor, was irrelevant because the statute's presumption of employee status may be rebutted only as to persons who hold a valid contractor's license, which plaintiff did not at the time of his injury. See *Ch. 577, Workers' Compensation, § 577.22[4][b][ii]*.

Permanent Disability--Rating. The court of appeal in *Hertz Corp. v. Workers' Comp. Appeals Bd. (Aguilar) (2008)*

169 Cal. App. 4th 232 has held that the employer was not liable for the portion of the employee's permanent disability caused by pre-existing factors consisting of his inability to read and write English that rendered him non-feasible for vocational rehabilitation. See *Ch. 577, Workers' Compensation, § 577.14[3][e]*.

Permanent Disability --Rating-- Application of 1997 Schedule for Rating Permanent Disabilities. The court of appeal in *Lewis v. Workers' Comp. Appeals Bd. (2008) 168 Cal. App. 4th 696* has followed line of cases holding that a comprehensive medical-legal report or a treating physician's report need not state that an injured worker's condition has reached permanent and stationary status to indicate the existence of permanent disability within the meaning of *Lab. Code § 4660(d)*. See *Ch. 577, Workers' Compensation, § 577.01*, Important Note.

FORMS. Optical Character Recognition (OCR) forms, developed by DWC for mandatory use have been included. These are:

- § 577.390 Application for Adjudication of Claim
- § 577.394 Answer to Application for Adjudication of Claim
- § 577.397 Application for Subsequent Injuries Fund Benefits
- § 577.397A Document Cover Sheet
- § 577.397B Document Separator Sheet
- § 577.399 Declaration of Readiness to Proceed
- § 577.421 Employee's Disability Questionnaire
- § 577.422 Request for Summary Rating Determination of Qualified Medical Evaluator's Report
- § 577.423 Request for Summary Rating Determination of Primary Treating Physician Report
- § 577.424 Request for Consultative Rating
- § 577.460 Compromise and Release
- § 577.461 Compromise and Release--Dependency Claim
- § 577.462 Compromise and Release--Third Party Action
- § 577.470 Stipulations With Request for Award
- § 577.471 Stipulations With Request for Award--Death Case
- § 577.480 Notice and Request for Allowance of Lien
- § 577.484 Settlement of Prospective Vocational Rehabilitation Services
- § 577.490 Declaration of Readiness to Proceed to Expedited Hearing (Trial)
- § 577.491 Pre-Trial Conference Statement

- § 577.492 Pre-Trial Conference Statement--Multiple Parties

Costs; Vocational Rehabilitation Experts. The court of appeal in *Barr v. Workers' Comp. Appeals Bd. (2008) 164 Cal. App. 4th 173* , has held that the Appeals Board has discretion to award costs, pursuant to *Lab. Code § 5811*, for a vocational rehabilitation expert's report, regardless of whether the report is admissible. See *Ch. 577, Workers' Compensation, § 577.193*.

Statute of Limitations --Tolling-- Estoppel. The court of appeal in *California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd. (2008) 163 Cal. App. 4th 853* has held that CIGA failed to meet its burden to prove that an employee gained actual knowledge of his potential eligibility for workers' compensation benefits for a 1997 injury more than one year prior to filing his claim. See *Ch. 577, Workers' Compensation, § 577.42[2][d]*.

Medical Treatment--Utilization Review; Objections to Medical Determination. The California Supreme Court in *State Comp. Ins. Fund v. Workers Comp. Appeals Bd. (2008) 44 Cal. 4th 230* , has held that, when deciding whether to approve or deny an injured employee's request for medical treatment, the employer must conduct utilization review pursuant to *Lab. Code § 4610* and that the employer may not, as an alternative to utilization review, elect to dispute the request for medical treatment pursuant to *Lab. Code § 4062*. See *Ch. 577, Workers' Compensation, §§ 577.45[1][c], 577.46[4]*.

Medical Treatment--Chiropractic Treatment Limits--Constitutionality. The court of appeal in *Facundo-Guerrero v. Workers' Comp. Appeals Bd. (2008) 163 Cal. App. 4th 640* has upheld the constitutionality of *Lab. Code § 4604.5(d)*'s limitation to 24 chiropractic treatment visits per industrial injury occurring on or after January 1, 2004. See *Ch. 577, Workers' Compensation, § 577.45[1][c]*.

Wrongful Termination--Retaliation. The court of appeal in *Arteaga v. Brink's, Inc. (2008) 163 Cal. App. 4th 327* has held that an employee's claim alleging wrongful termination in retaliation for filing a workers' compensation claim failed because the employer terminated the employee's employment for a legitimate, nondiscriminatory reason, i.e., management's loss of confidence in the employee. See *Ch. 577, Workers' Compensation, § 577.18[1]*.

Permanent Disability--Validity of 2005 Permanent Disability Rating Schedule. The Appeals Board en banc in *Boughner v. Comp USA* (2008) *73 Cal. Comp. Cases 854 (Appeals Board en banc opinion)* has held that an employee did not carry his burden of demonstrating that adoption of the 2005 Permanent Disability Rating Schedule by the Administrative Director was arbitrary and capricious or inconsistent with *Lab. Code § 4660(b)(2)*. See *Ch. 577, Workers' Compensation, § 577.01*.

Uninsured Employers Benefits Trust Fund--Sanctions. The court of appeal in *Duncan v. Workers' Comp. Appeals Bd. (2008) 166 Cal. App. 4th 294* , has held that the limitation of liability specified by *Lab. Code § 3716.2* precludes imposition of a sanction against the UEBTF pursuant to *Lab. Code § 5813* for bad-faith actions or tactics that are frivolous or intended solely to cause unnecessary delay. See *Ch. 577, Workers' Compensation, §§ 577.13[4][b], 577.194[2]*.

Temporary Disability--Two-Year Limitation on Temporary Disability Indemnity-- *Education Code § 44043* Payments. The court of appeal in *Mt. Diablo Unified School Dist. v. Workers' Comp. Appeals Bd. (2003) 165 Cal. App. 4th 1154* , has held that, for purposes of determining the two-year limitation period on temporary disability indemnity, temporary disability payments commenced when a school district paid its injured employee her normal wages under *Educ. Code § 44043*. See *Ch. 577, Workers' Compensation, § 577.45[3][b]*.

Negligence; Duty of Care --Negligence Per Se-- *Moving or Operating Equipment Near Power Lines.* *The Supreme Court in Ramirez v. Nelson (2008) 44 Cal. 4th 908* has held that homeowners neither had nor breached any statutory

duty of care owed to a deceased worker under *Pen. Code § 385(b)*, which provides that "[a]ny person who either personally or through an employee or agent, or as an employee or agent of another, operates ... or moves any tools ... [or] equipment ... within six feet of a high voltage overhead conductor is guilty of a misdemeanor." See *Ch. 577, Workers' Compensation, § 577.22[4][b][ii]*.

Discrimination; *Lab. Code § 4850-- Lab. Code § 132a*. The court of appeal in *Los Angeles County Professional Peace Officers' Association v. County of Los Angeles (2008) 165 Cal. App. 4th 63* has held that an employer's policy regarding "cash out" payments of excess accumulated vacation hours to sheriff's deputies who were not on *Lab. Code § 4850* leave as a result of industrial injuries, as opposed to its policy regarding such payments to deputies who were on such leave, discriminated against the latter group in violation of *Lab. Code §§ 4850* and *132a*. See *Ch. 577, Workers' Compensation, § 577.18[1]*.

Penalties--Unreasonable Delay in Payment of Benefits--Amount of Penalty. The Appeals Board en banc has held in *Ramirez v. Drive Financial Services* (2008) *73 Cal. Comp. Cases 1324 (Appeals Board en banc opinion)* that the overriding consideration in determining what penalty amount to assess should be whether the penalty imposed would serve the purposes sought to be accomplished by *Lab. Code § 5814*, which are both penal and remedial. See *Ch. 577, Workers' Compensation, § 577.243[4][a]*.

Penalties--Unreasonable Delay in Payment of Benefits--Successive Penalty. The Appeals Board en banc has held in *Ramirez v. Drive Financial Services* (2008) *73 Cal. Comp. Cases 1324 (Appeals Board en banc opinion)* that, although, under *Lab. Code § 5814(a)*, a successive penalty may be awarded for an unreasonable delay in making a prior penalty payment, it should not be awarded when the employer had genuine doubt as to its liability or when there has been no legally significant intervening event. See *Ch. 577, Workers' Compensation, § 577.243[4][d]*.

Medical Liens; Proof of Claim; Evidence. The Appeals Board en banc has held in *Tapia v. Skill Master Staffing* (2008) 73 Cal. Comp. Cases 1338 (Appeals Board en banc opinion) that, pursuant to *Kunz v. Patterson Floor Coverings, Inc.*, an outpatient surgery center lien claimant (or any medical lien claimant) has the burden of proving that its charges are reasonable, and that the outpatient surgery center lien claimant's billing, by itself, does not establish that the claimed fee is reasonable, so that, even in the absence of rebuttal evidence, a lien need not be allowed in full if unreasonable on its face. See *Ch. 577, Workers' Compensation, § 577.45[1][b]*.

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 1 NEW DEVELOPMENTS
PART VII. 2010 NEW DEVELOPMENTS

1-1 California Forms of Pleading and Practice--Annotated § 1.250

§ 1.250 Alternative Dispute Resolution

[1] Agreements and Compelling Arbitration

Contractual Arbitration--Attorney's Authority to Bind Party. This chapter is updated with *Toal v. Tardif (2009) 178 Cal. App. 4th 1208* , which holds an attorney at law, merely by virtue of his or her employment as such, has no apparent authority to bind a client to an agreement for arbitration. See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21[1][b][v]*.

Contractual Arbitration--Unconscionable Terms. This chapter is updated with *Jackson v. Rent-A-Center West, Inc.* (2009) 581 F.3d 912 , which holds where a party challenges an arbitration provision as unconscionable, and thus asserts that he or she could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court, even if the agreement specifically says otherwise. See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21[1][c][ii]*.

Contractual Arbitration--Unconscionable Terms. This chapter is updated with *Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554* , which holds an arbitration agreement containing a clause that "Any deletions from, additions to or cutting or mutilation of any portion of this Agreement will render the Agreement unacceptable" controverted the broker's claim that the petitioners were given reasonable notice of the opportunity to negotiate or reject the terms of a contract, and an actual, meaningful, and reasonable choice to exercise that discretion. See *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21[3][a]*.

Contractual Arbitration--International Disputes. This chapter is updated with *Balen v. Holland America Line Inc. (9th Cir. 2009) 583 F.3d 647* , which holds the Convention on the Recognition and Enforcement of Foreign Arbitral Awards contemplates very limited inquiry by the courts when considering a motion to compel arbitration. Generally, four factors to determine whether to enforce an arbitration agreement under the Convention, which require that 1) there is an agreement in writing within the meaning of the Convention, 2) the agreement provides for arbitration in the territory of a signatory of the Convention, 3) the agreement arises out of a legal relationship, whether contractual or not, which is considered commercial, and 4) a party to the agreement is not a U.S. citizen, or the commercial relationship has some reasonable relation with one or more foreign states. See *Ch. 35, Arbitration and Conciliation of International*

Commercial Disputes, § 35.21[3].

[2] Appointment of Arbitrator and Conduct of Proceedings

Contractual Arbitration--Expenses, Costs, and Fees. This chapter is updated with an extensive rewrite of the analysis of expenses, costs, and fees other than for attorney's fees. See *Ch. 34, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceedings, § 33.29[1]*.

[3] Judicial Review

Contractual Arbitration--Vacating Award. This chapter is updated with *Burlage v. Superior Ct. (2009) 178 Cal. App. 4th 524* , which holds an arbitrator's refusal to admit evidence that directly affects the issue of damages substantially prejudices the proffering party's ability to dispute the amount of damage and constitutes grounds for vacating an award. See *Ch. 34, Contractual Arbitration: Judicial Review, § 34.19[1][f][ii]*.

[4] Mediation

Complaint About Mediator. A party who contends that a court-program mediator may have violated a provision of the rules of conduct for court-program mediators may submit a written complaint to the court's complaint coordinator, and rules provide a framework for what action the court may take [*Cal. Rules of Ct., Rules 3.865-3.872*]. See *Ch. 37, Mandated Mediation, § 37.35*, and *Ch. 221, Dissolution of Marriage: Procedure, § 221.42*.

Mediation Confidentiality. In *Cassel v. Superior Court(2009) 179 Cal. App. 4th 152* , the court of appeal concluded that communications between client and his law firm, two weeks before trial, were for trial strategy preparation, not just for mediation of underlying lawsuit, and therefore were not protected by *Evid. Code § 1119(a), (b)*, or *(c)*. See *Ch. 191, Discovery: Privileges and Other Discovery Limitations, § 191.125*.

Mediation--Communications Neither Materially Related to, Nor Fostering, Mediation. This chapter is updated with *Cassel v. Superior Ct. (2009) 179 Cal. App. 4th 152* , which holds the moving party has the burden to show that the conversation is protected by mediation confidentiality; the timing, context, and content of the communication all bear on the question. Mediation confidentiality applies only to writings or statements that exist solely because of a mediation communication, negotiation, or settlement discussion. The timing of a conversation in relation to a scheduled mediation session is not determinative of whether the conversation was protected by mediation confidentiality. See *Ch. 31, Mediation, § 31.13[4][d]*.

[5] Reference

Motion to Seal Records. This chapter is updated with revised *Cal. Rules of Ct., Rule 3.932(a)*, which provides a party's motion to seal records in a cause before a referee must be filed with and heard by the judge to whom the case is assigned, or the presiding judge or his or her designee, and the motion must be served on the referee and all parties who have appeared in the case. See Ch. 25, *Reference*, § 25.05[3].

Information Statement. This chapter is updated with revised *Cal. Rules of Ct., Rule 3.931(b)(2)*, which provides in each case in which he or she is appointed referee, a referee must file a statement that provides the name, telephone number, and mailing address of a person who may be contacted to obtain information about the date, time, location, and general nature of all hearings scheduled in matters pending before the referee that would be open to the public if held before a judge. The referee may also provide the address of a website containing the information and must file his or her statement of contact information at the same time that he or she files the referee certification. See *Ch. 38, Reference, § 8.14[3][d]*.

Hearing Location and Public Proceedings. This chapter is updated with revised *Cal. Rules of Ct., Rule 3.931*, which

provides if a court staff mediator or evaluator is required to attend a hearing before a referee, unless otherwise ordered by the presiding judge or his or her designee, the location selected for the hearing must be no more than 15 minutes' travel time from the mediator's or evaluator's work site [*Cal. Rules of Ct., Rule 3.931(c)(2)*]. All proceedings before a referee that would be open to the public if held before a judge must be open to the public [*Cal. Rules of Ct., Rule 3.931(a)*]. This chapter also is updated with a motion for a hearing site and a motion to stay a hearing, as well as the accompanying court orders. See *Ch. 38, Reference, §§ 38.17[3], [4]*; *38.81 -38.84*.

Documents to Referee and Court. This chapter is updated with revised *Cal. Rules of Ct., Rule 2.400*, which provides that in a case pending before a referee, all original documents are to be filed with the clerk in the same manner as would be required if the case were being heard by a judge, including paying any required fees. The filing party must provide to the referee a file-stamped copy of each document relevant to the issues before the referee, and a party who has submitted a document to a temporary judge or referee must immediately notify the temporary judge or referee if the document is not accepted for filing by the court or if the filing is subsequently canceled. Documents and exhibits in the possession of a temporary judge or referee that would be open to the public if filed or lodged with the court must be made available during business hours for inspection by any person within a reasonable time after request and under reasonable conditions. See *Ch. 38, Reference, § 38.19*.

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1-1 California Forms of Pleading and Practice--Annotated § 1.251

§ 1.251 Appeals

[1] Notice of Appeal

Invalid Motion for Reconsideration Does Not Extend Time to File Notice of Appeal. In *Branner v. Regents of University of California (2009) 175 Cal. App. 4th 1043* , the court of appeal held that to extend the time to file a notice of appeal under *Cal. Rules of Ct., Rule 8.104*, a motion for reconsideration must comply with all procedural requirements. See *Ch. 42, Appeal: Notice of Appeal, § 42.14[3]*.

[2] Overview

Issues Not Raised in Trial Court Cannot Be Raised for First Time on Appeal. In *Johnson v. Greenelsh (2009) 47 Cal. 4th 598* , the California Supreme Court held that a party to an action may not, for the first time on appeal, change the theory of the cause of action. See *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.10[4][a]*.

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1-1 California Forms of Pleading and Practice--Annotated § 1.252

§ 1.252 Attorneys

[1] Practice and Ethics

Liens--Attorney's Lien Has Priority Over Medical Lien. In *Gilman v. Dalby (2009) 176 Cal. App. 4th 606* , the court resolved an issue that no prior case had directly decided: Does a contractual medical lien have priority over a personal-injury attorney's lien for fees and costs of litigation? The court concluded that public policy and equity favor always giving the attorney's lien for fees and costs priority over any medical lien, regardless of which lien was first in time. See *Ch. 72, Attorney Practice and Ethics, § 72.198[2]*.

Attorneys--Authority. In *Toal v. Tardif (2009) 178 Cal. App. 4th 1208* , the court held that an attorney lacks apparent authority to sign an arbitration contract on the client's behalf. Therefore, the lawyer's signature alone was not sufficient evidence the client consented to arbitration. See *Ch. 72, Attorney Practice and Ethics, § 72.220[3][c]*.

Attorneys--Negotiation of Mortgage Loan Relief. An attorney may be subject to discipline for negotiating, arranging, or otherwise offering to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower without certain required notices to the borrower [*see Bus. & Prof. Code § 6106.3*; *Civ. Code § 2944.6*]. In addition, an attorney who negotiates, arranges, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee may only claim, demand, charge, collect, or receive any compensation after fully performing each and every service the attorney contracted to perform or represented that he or she would perform [*see Bus. & Prof. Code § 6106.3*; *Civ. Code § 2944.7*]. See *Ch. 71, Attorney Discipline, § 71.30[1]*.

[2] Professional Liability

Relief From Judgment--Attorney Neglect. In *Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868* , the court of appeal held that *Code Civ. Proc. § 473* is mandatory and requires the court to grant relief whether the attorney's neglect is excusable or not. See *Ch. 489, Relief from Judgment, § 489.37*.

Limitation of Actions--Attorney Malpractice. In *Truong v. Glasser (2009) 181 Cal. App. 4th 102* , the court holds that in a legal malpractice action, plaintiffs first sustained actual injury when they were required to obtain and pay new

counsel to file a lawsuit seeking to escape the consequences of their signing lease documents that were among the actual damages plaintiffs suffered as a result of the attorney's alleged malpractice. See *Ch. 345, Limitation of Actions, § 345.53[2][a]*.

Specific Limitations Period for Attorney Malpractice Claims Against Criminal Defense Attorneys Added. Under amended *Code Civ. Proc. § 340.6*, if a plaintiff is required to establish his or her factual innocence for an underlying criminal charge as an element of his or her malpractice claim against a criminal defense attorney, the action must be commenced within two years after the plaintiff achieves postconviction exoneration in the form of a final judicial disposition of the criminal case. See *Ch. 7, Attorney Professional Liability, § 76.170[1]*.

Class Attorneys Not Liable for Utilizing Class Settlement Notice Procedures Approved by Court. In *Martorana v. Marlin & Saltzman (2009) 175 Cal. App. 4th 685* , the court of appeal held that a member of a plaintiff class in a class action cannot sue class counsel for negligence on the grounds that counsel should have negotiated a different settlement notice procedure, at least when the trial court approved the final settlement and notice procedures after providing class members an opportunity to object. The court also held that class attorneys utilizing an approved procedure for providing mass notification of settlement claims procedures to class members have no additional duty to follow up with individual class members who do not respond before the deadline for doing so. See *Ch. 7, Attorney Professional Liability, § 76.135*.

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1-1 California Forms of Pleading and Practice--Annotated § 1.253

§ 1.253 Automobiles

Automobiles--Insurer's Requirement for Vehicle to Be Repaired at Specified Dealer. In *Maystruk v. Infinity Ins. Co. (2009) 175 Cal. App. 4th 881* , the court construed *Ins. Code § 758.5(d)*, which provides that if the owner of an insured vehicle elects to have the vehicle repaired at the shop of his or her choice, the insurer must not limit or discount the reasonable repair costs based on charges that would have been incurred had the vehicle been repaired by the insurer's chosen shop. The court concluded that this does not prevent an insurance policy from providing two tiers of coverage, such as 100 percent coverage for reasonable costs at a shop selected by the insurer, but only 80 percent coverage for reasonable costs at a shop selected by the insured. See *Ch. 91, Automobiles: Actions Involving Defects and Repairs, § 91.33[2].*

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1-1 California Forms of Pleading and Practice--Annotated § 1.254

§ 1.254 Churches and Religious Organizations

Court May Determine Whether Local Church Was Successfully Disaffiliated From Hierarchical Organization. In *Classis of Cent. Calif. v. Miraloma Cmty. Church (2009) 177 Cal. App. 4th 750* , the court held that a trial court could render a declaratory judgment on whether a local church was successfully disaffiliated from the hierarchical organization in which it was a member, in a case not involving conflicting claims to the local church's property. The trial court can apply neutral principles of law to determine that an attempt at disaffiliation by the local church was procedurally ineffective, based on the documents defining the parties' relationship and pertinent provisions of the Corporations Code. See *Ch. 110, Churches and Religious Organizations, § 110.14[2][e]*.

No Free Expression Violation to Require Pharmacies to Deliver Lawfully Prescribed Medications and Not to Discriminate. In *Stormans, Inc. v. Selecky (9th Cir. 2009) 586 F.3d 1109* , the Ninth Circuit held a pharmacy had standing to bring an action alleging the violation of Free Expression rights of its owners. However, rules promulgated by a state Board of Pharmacy requiring pharmacies to deliver lawfully prescribed Federal Drug Administration-approved medications and prohibiting discrimination against patients did not violate the Free Exercise rights of a pharmacy and of individual pharmacists by requiring delivery of a contraceptive that the pharmacy owners and pharmacists claimed was against their religious beliefs. See Ch. 110, *Churches and Religious Organizations* .

Religious Organizations--Voluntary Dissolution. *Corp. Code § 9680(b)(3)* has been added [Stats. 2009, ch. 631, § 35] to set forth voluntary dissolution procedures for bankrupt or inactive religious corporations when the number of directors is less than a quorum. See *Ch. 110, Churches and Religious Organizations, § 110.22*.

Churches--Property Disputes Resolved by Applying Neutral Principles of Law. In *Iglesia Evangelica Latina, Inc. v. Southern Pac. Latin Am. Dist. of Assemblies of God (2009) 173 Cal. App. 4th 420* , the court provided an example, with extended discussion of the method, of applying neutral principles of law to resolve disputes about church property, in the face of some parties' contention, with evidence supporting the contention, that they had acted strictly within the ambit of ecclesiastical rights under the protection of the *First Amendment*. See *Ch. 110, Churches and Religious Organizations, § 110.14[2][a]*.

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1-1 California Forms of Pleading and Practice--Annotated § 1.255

§ 1.255 Civil Procedure

[1] Affidavits, Certificates, and Declarations

Declarations--Subscribed Under California Law. This chapter is updated with *Hearn v. Howard (2009) 177 Cal. App. 4th 1193, 99 Cal. Rptr. 3d 642* , which holds a declaration that is not subscribed in compliance with *Code Civ. Proc. § 2015.5* may be deemed harmless error if another properly subscribed declaration is concurrently filed with the defective declaration. See *Ch. 15, Affidavits, Certificates, and Declarations, § 15.11*.

[2] Amended Pleadings

Amended Pleadings--Conforming to Proof at Trial. This chapter is updated with *Garcia v. Roberts (2009) 173 Cal. App. 4th 900* , which holds amendments to conform to proof should not be granted at trial if by permitting the amendment new and substantially different issues are introduced in the case or the rights of the adverse party prejudiced; amendments of pleadings to conform to the proofs should not be allowed when they raise new issues not included in the original pleadings and upon which the adverse party had no opportunity to defend. See *Ch. 21, Amended and Supplemental Pleadings, § 21.25*.

[3] Anti-SLAPP Motions

Anti-SLAPP Motion--Prevailing Defendant's Recovery of Fees. Effective January 1, 2010, defendants prevailing on an anti-SLAPP motion are not entitled to an award of attorney's fees and costs if plaintiff's cause of action is brought pursuant to certain Gov. Code sections relating to the improper withholding of public records and certain meetings and actions of legislative bodies [*Code Civ. Proc. § 425.16(c)*]. See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.22[1][b].

Anti-SLAPP Motion--Dismissal Before Ruling on Motion. Trial court has no jurisdiction to rule on anti-SLAPP motion when plaintiff dismisses complaint, without prejudice, one day prior to scheduled hearing [*Law Offices of Andrew L. Ellis v. Yang (2009) 178 Cal. App.4th 869]* . See Ch. 376, *Motions to Strike: Anti -SLAPP*, § 376.22[1][c].

[4] Change of Name

Change of Name--New Court Rules and Forms for Confidential Name Changes Under "Safe at Home" Program. The California Judicial Council has adopted rules [*Cal. Rules of Ct., Rules 2.575-2.577*] and prescribed forms [Judicial Council Forms NC-400-INFO, NC-400, NC-410, NC-420, NC-425] for proceedings for confidential name changes for participants in the "Safe at Home" address confidentiality program for victims of domestic violence, sexual assault, and stalking [*see Gov. Code § 6205 et seq.*]. See Ch. 377, *Change of Name* , §§ 377, 377.80-377.84.

[4A] Defaults and Default Judgments

Defaults--Notice of Damages. In *Stein v. York (2010) 181 Cal. App. 4th 320* , the court holds under *Code Civ. Proc. § 580*, actual notice of the damages sought in a default action is not sufficient. Due process requires formal notice, and constructive notice of potential liability does not satisfy *Code Civ. Proc. § 580*. Where the dollar amount demanded on plaintiff's request for entry of default was "0.00," the appellate court found that it could not support a default judgment in any amount ($2.65 million judgment declared void). See *Ch. 205, Defaults and Default Judgments, § 205.23[1]*.

[5] Judges

Judges--Temporary Judges. This chapter is updated with revised *Cal. Rules of Ct., Rule 2.834*, which now provides 1) temporary judges must provide contact information to the parties at the same time the judge's certificate is filed, 2) a party who has elected to use the services of a temporary judge requested by the parties is deemed to have elected to proceed outside court facilities, and 3) procedures for requesting use of court facilities. See *Ch. 317, Judges, § 317.22[8]*.

Judges--Judicial Adminstration. This chapter is updated with revised *Cal. Rules of Ct., Rules 10.1, 10.11-10.14*, which outline the judicial branch's goals in its strategic and operational plans. See *Ch. 317, Judges, § 317.83*.

[5A] Jurisdiction

General Appearance. In *State Farm General Ins. Co. v. JT's Frames, Inc. (2010) 181 Cal. App. 4th 429* , the court holds *Code Civ. Proc. § 418.10(e)* does not change the essential rule that a defendant submits to the court's jurisdiction by making a general appearance in an action by participating in the action in a manner that recognizes the court's jurisdiction. It merely delays the effect of such actions until the motion to quash is denied or, if the defendant seeks writ review, until proceedings on the writ have concluded. Once the motion is denied or writ proceedings have concluded, the actions undertaken by the defendant while the motion or writ was pending that recognized the trial court's jurisdiction will be deemed to constitute a general appearance, and no further objection to jurisdiction will be permitted. See *Ch 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances, § 323.50[1]*.

[6] Limitation of Actions

Limitation of Actions--Attorney Malpractice. In *Truong v. Glasser (2009) 181 Cal. App. 4th 102* , the court holds that in a legal malpractice action, plaintiffs first sustained actual injury when they were required to obtain and pay new counsel to file a lawsuit seeking to escape the consequences of their signing lease documents that were among the actual damages plaintiffs suffered as a result of the attorney's alleged malpractice. See *Ch. 345, Limitation of Actions, § 345.53[2][a]*.

Limitation of Actions--Trusts. This chapter is updated with *Stoltenberg v. Newman (2009) 179 Cal. App. 4th 287* , which holds fraud claims based on statements of the decedent on behalf of a trust of which he was trustor and trustee is subject to *Code Civ. Proc. § 366.2* period of limitations, even if the action is against the successor trustee. See *Ch. 345, Limitation of Actions, § 345.194*.

[7] Motions and Orders

Motions and Orders--New Form for Telephonic Appearance. The Judicial Council has a created a form for notice of intent to appear telephonically at a hearing, conference, or proceeding. The form is approved for optional use, effective July 1, 2010 [Judicial Council Form CIV-020]. See *Ch. 372, Motions and Orders, § 372.63*.

[8] Parties

Parties--Intervention. This chapter is updated with *Hinton v. Beck (2009) 176 Cal. App. 4th 1377* , which holds an insurer who denies coverage and refuses to defend does not have a direct interest in litigation between the plaintiff and its insured to justify intervention. See *Ch. 395, Parties, § 395.34[3]*.

[9] Pretrial Proceedings

Pretrial Proceedings--Case Management Statement. This chapter is updated with revised *Cal. Rule of Ct., Rule 3.724*, which now requires the case management statement to include 1) identifying the dates on which all parties and their attorneys are available or not available for trial, including the reasons for unavailability, and 2) any issues relating to the discovery of electronically stored information. See *Ch. 425, Pretrial Proceedings, § 425.34[4]*.

[10] Sanctions

Sanctions --If Less Than 21 Days Before Hearing on Challenged Motion, Party Seeking Sanctions Under *Code Civ. Proc. § 128.7* Must Move to Continue Challenged Motion or Shorten Safe Harbor Period. In *Li v. Majestic Industrial Hills LLC (2009) 177 Cal. App. 4th 585* , the court of appeal held that a ruling on a challenged motion during the 21-day safe harbor period precludes recovery of sanctions under *Code Civ. Proc. § 128.7*. See *Ch. 510, Sanctions, § 510.12[8]*.

[11] Service of Summons and Papers

Summons--Service on Fictitiously Named Defendant. In *Carol Gilbert, Inc. v. Haller (2009) 179 Cal. App. 4th 852* , the court holds that to satisfy the requirements of *Code Civ. Proc. § 474*, a summons must notify the recipient that he or she was sued as a fictitiously named defendant. To support a finding of substantial compliance with the statutory requirements for service of process requires three preconditions. First, there must have been some degree of compliance with the offended statutory requirements. Second, the objective nature and circumstances of the attempted service must have made it highly probable that it would impart the same notice as full compliance. Finally, it must in fact have imparted such notice, or at least sufficient notice to put the defendant on his or her defense. In this regard, it is not enough that the process inform the defendant of the fact of a lawsuit, or even of a lawsuit in which his or her name appears; due process requires notice of the duty to defend. See *Ch. 518, Service of Summons and Papers, §§ 518.20[3][a]*.

Service--Electronic Service. This chapter is updated with three optional Judicial Council Forms for facilitation electronic service between the parties and the courts: Consent to Electronic Service and Notice of Electronic Notification Address [Judicial Council Form EFS-005]; Notice of Change of Electronic Notification Address [Judicial Council Form EFS-010]; Proof of Electronic Service [Judicial Council Form POS-050/EFS-050], as well as addendums for extra parties and documents served. See *Ch. 518, Service of Summons and Papers, §§ 518.94 -518.96*.

[11A] Settlement and Release

Withdrawn Section 998 Offer. In *One Star, Inc. v. Staar Surgical Co. (2009) 179 Cal. App. 4th 1082* , the court of appeal held that if a *Code Civ. Proc. § 998* offer is withdrawn by a party prior to its statutory expiration, then the withdrawing party's right to cost shifting under Section 998 is determined by the last rejected Section 998 offer. See *Ch. 520, Settlement and Release, § 520.14[5]*.

[12] Summary Judgment

Summary Judgment--Ruling on Objections. Trial court abused its discretion in merely sustaining, without further comment, all except one of defendant's 764 objections [*Nazir v. United Airlines (2009) 178 Cal. App. 4th 243]* . See *Ch. 537, Summary Judgment, § 537.43[2][a]*.

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1-1 California Forms of Pleading and Practice--Annotated § 1.256

§ 1.256 Civil Rights

[1] Assemblies, Meetings, and Demonstrations

Sign Ordinance Did Not Violate *First Amendment*. In *Reed v. Town of Gilbert (9th Cir. 2009) 587 F.3d 966* , a provision of a town's sign ordinance prohibiting all signs without a permit, subject to 19 enumerated exemptions, did not violate the *First Amendment* rights of a church by regulating its deployment of temporary directional signs. However, although ideological signs, political signs, and qualifying event signs were all exempted from the permit requirement and treated favorably in that respect, each category faced different restrictions and requirements, and the district court did not address whether the church was likely to succeed on its claim that the ordinance impermissibly discriminated among certain forms of noncommercial speech, requiring remand. See Ch. 59, *Assemblies, Meetings, and Demonstrations* .

Prohibition of Leafleting Unoccupied Parked Vehicles Unconstitutional. In *Klein v. City of San Clemente (9th Cir. 2009) 584 F.3d 1196* , a city ordinance prohibiting leafleting of unoccupied vehicles parked on city streets violated the *First Amendment* as not narrowly tailored to serve significant government interests. The city failed to provide any evidence that placing leaflets on parked cars resulted in any litter, much less more-than-minimal amount of additional litter; and protection of private property was not a sufficiently substantial government interest to justify an across-the-board ban. See Ch. 59, *Assemblies, Meetings, and Demonstrations* .

Some Qualified Immunity for Removal of Child From Home. In *Burke v. County of Alameda (9th Cir. 2009) 586 F.3d 725* , a sheriff's officer who removed a child from her home without a warrant and placed her in protective custody based on an interview with her after she had returned home after running away was entitled to summary judgment on the claim that he violated the mother's and stepfather's familial association rights, because his reliance on the child's statements was reasonable and, under the totality of circumstances, he had reasonable cause to believe she was in imminent danger of physical harm. As to the mother, removing the child from her because she lived with the allegedly abusive stepfather was reasonable. However, as to the non-custodial father, who was never personally accused of violence, the scope of the intrusion on his associational rights was for the jury to decide, because the officers made no attempt to contact him and did not explore possibility of putting the child in his care rather than in government custody, and he was not informed of the removal for two days. See Ch. 59, *Assemblies, Meetings, and Demonstrations* .

Rules Regulating Street Performers in City Park Violated *First Amendment.* In *Berger v. City of Seattle (9th Cir. 2009) 569 F.3d 1029* , the Ninth Circuit held that a city's rule requiring street performers at a public park and entertainment complex to obtain permits before performing and to wear a badge displaying the permit while performing was not a valid time, place, and manner regulation. There was a genuine issue of material fact as to whether the city met its burden of justifying a rule setting out specified locations for street performances and establishing a first-come, first-served rule for using the locations. A rule allowing only passive solicitation of funds by street performers was a content-based regulation that did not satisfy the exacting standard for a valid content-based regulation. A rule prohibiting any communication, by street performers or anyone else, within 30 feet of visitors to the complex waiting in line, attending an event, or sitting in a spot available for eating or drinking was an unconstitutional "captive audience" regulation. See Ch. 59, *Assemblies, Meetings, and Demonstrations* .

[2] Discrimination in Business Establishments

Plaintiff Had No Standing to Sue Mobilehome Park Under Disabled Persons Act. In *Reycraft v. Lee (2009) 177 Cal. App. 4th 1211* , although a mobilehome park was a place of public accommodation under the California Disabled Persons Act, the trial court properly held that plaintiff did not have standing to sue for monetary damages under *Civ. Code § 54.3* based on the noncompliance of the park's swimming pool with the American With Disabilities Act Accessibility guidelines, because she was unable to show she actually presented herself to the business, as any other customer or guest would do, with the intent of paying the guest fee to gain admittance to the park or to use the swimming pool. See Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

No Standing Under ADA Based on Unencountered Barriers. In *Chapman v. Pier 1 Imports (U.S.) Inc. (9th Cir. 2009) 571 F.3d 853* , plaintiff did not have standing to pursue claims of violation of ADA, because he could not show that he suffered an injury in fact as to unencountered barriers, and he could not show a deterrent effect, given that he admitted that the encountered alleged barriers did not deter him from visiting the store or using the restroom. See Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

[3] Government Funded Programs

Paratransit System Not Required to Provide Sedan or Taxi Rides in Lieu of Buses. In *Boose v. Tri-County Metropolitan Transportation District of Oregon (9th Cir. 2009) 587 F.3d 997* , an action by a paratransit rider under the Americans With Disabilities Act seeking accommodation by rides provided in sedans and taxis rather than buses, the Ninth Circuit held that a Department of Justice regulation requiring public entities to make reasonable modifications in policies, practices, or procedures when necessary to avoid discrimination did not apply to public transportation systems governed by a different part of the ADA of its own independent force and was not incorporated by reference in the Department of Transportation's regulations implementing the ADA and the Rehabilitation Act. The Secretary of Transportation had sole authority to determine the level of services paratransit systems had to provide to be considered "comparable" under the ADA; although the Secretary had apparently decided paratransit systems should make reasonable modifications to be considered comparable, the Secretary had yet to issue final rules to impose that requirement. See Ch. 112, *Civil Rights: Government-Funded Programs and Activities* .

Regulation Requiring Public Entities to Develop Transition Plans for Achieving ADA's Accessibility Requirements Not Enforceable Through Private Right of Action. In *Lonberg v. City of Riverside (9th Cir. 2009) 571 F.3d 846* , the Ninth Circuit held that *28 C.F.R. § 35.150(d)*, requiring public entities to develop a transition plan for achieving the ADA's accessibility requirements, is not enforceable through a private right of action under the ADA. See Ch. 112, *Civil Rights: Government-Funded Programs and Activities* .

[3A] Housing Discrimination

Federal Fair Housing Act Applies to Post-Acquisition Discrimination. In *Committee Concerning Community Improvement v. City of Modesto (9th Cir. 2009) 583 F.3d 690* , the Ninth Circuit held that the federal Fair Housing Act applied to post-acquisition discrimination, and the district court erred in dismissing in its entirety a claim under the FHA against a city alleging discrimination in the provision of services to existing homeowners and renters in specific neighborhoods on the basis of race or ethnicity. However, to the extent the complaint alleged violations related to certain municipal services, plaintiffs were bound by an agreement limiting their claims regarding services to areas of sewer access, police services, and bilingual assistance, and plaintiffs failed to put forth evidence of disparate impact with regard to the provision of sewer services or infrastructure. See Ch. 117, *Civil Rights: Housing Discrimination* .

[4] Post-Civil War Civil Rights Statutes

Alleged Discrimination Against Latino Neighborhoods Not Continuing Violation and Some Claims Adequately Shown by Statistical Evidence. In *Committee Concerning Community Improvement v. City of Modesto (9th Cir. 2009) 583 F.3d 690* , an action alleging discrimination against predominantly Latino neighborhoods based on ethnicity or race by a city's failure to provide adequate municipal services and to bring neighborhoods into the city, the Ninth Circuit held that with regard to the continuing violation doctrine, the district court correctly concluded plaintiffs had not shown the existence of a pattern or practice of discrimination but rather ongoing harm resulting from earlier discrete decisions. However, reenactment of a master tax sharing agreement within the limitations period preserved the claim that exclusion chilled the plaintiff's annexation attempts and the district court erred in dismissing the agreement as merely an automatic renewal of past action. Further, plaintiffs presented evidence of discriminatory impact through statistical and other evidence, which, in turn, created sufficient inference of discriminatory intent to permit them to present their claim of intentional discrimination in the exclusion of the neighborhoods from the master tax sharing agreement to a factfinder, but, given the lack of disparity in actual access to sewer services, plaintiffs' statistical evidence was insufficient to give rise to an inference of discriminatory intent on the claim that an infrastructure condition, requiring the county to install all infrastructure in a neighborhood up to the city standards before the city would permit city voters to consider extending sewer services to a neighborhood, was applied in a discriminatory way. See Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

No Qualified Immunity for Police Officers for Failure to Provide Prosecution With Exculpatory Evidence. In *Tennison v. City & County of San Francisco (9th Cir. 2009) 570 F.3d 1078* , an action by two men who served nearly 13 years in state prison for a murder of which both were declared factually innocent by the courts, alleging that police officers withheld exculpatory evidence and manufactured and presented perjured testimony during the investigation and prosecution of plaintiffs, the Ninth Circuit held that police inspectors were not entitled to absolute or qualified immunity with respect to their failure to provide the prosecution with a confession by another man to the murder with which plaintiffs were charged. *Brady* imposed a duty on the officers as well as the prosecutors to disclose exculpatory evidence, and the officers acted with reckless indifference to plaintiffs' due process rights. Issues of fact precluded summary judgment on issue of whether they were entitled to qualified immunity with respect to their request for a reward from the Secret Witness Program to encourage witnesses to come forward with information about the murder, about which they never notified the district attorney or the defense. See Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

Indian Officers Not Entitled to Tribal Immunity, But Were Entitled to Qualified Immunity. In *Bressi v. Ford (9th Cir. 2009) 575 F.3d 891* , a § 1983 action by a non-Indian challenging a roadblock set up and maintained by tribal officers on a state highway crossing the reservation, the district court erred in dismissing claims based on tribal immunity, because the officers were acting under color of state law once they departed from, or went beyond, the inquiry to establish that plaintiff was not Indian. However, the Indian tribal officers were entitled to qualified immunity based on their actions in arresting and citing plaintiff for state law violations at the roadblock, because probable cause supported the arrest and citation of plaintiff, and even if the roadblock were to be determined unconstitutional and the stop was determined to be unlawful and to taint probable cause for the arrest, this principle was not clearly established law at the time of the arrest. See Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

Former United States Attorney General Not Entitled to Immunity From Action Based on Detention Under Material Witness Statute. In *al- Kidd v. Ashcroft (9th Cir. 2009) 580 F.3d 949* , a *Bivens* action based on plaintiff's arrest and detention under a federal material witness warrant against a former United States Attorney General, alleging the Attorney General unlawfully used the federal material witness statute to investigate or preemptively detain him by promulgating a policy by which the FBI and the DOJ would use the federal material witness statute as a pretext to arrest and detain terrorism suspects about whom they did not have sufficient evidence to arrest on criminal charges but wished to hold preventatively or to investigate further, the Attorney General was not entitled to absolute immunity, because when a prosecutor seeks a material witness warrant to investigate or preemptively detain suspect, rather than to secure his testimony at another's trial, the prosecutor is entitled at most to qualified, rather than absolute, immunity. However, the Attorney General was not entitled to qualified immunity, because *Fourth Amendment* rights were violated as the material witness statute was not used for its intended purpose, and plaintiff's right not to be arrested as a material witness in order to be investigated or preemptively detained was clearly established. See Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

[5] Prisoners' Rights

Inmate Presented Genuine Issue of Material Fact on Claim of Retaliation for Exercise of *First Amendment* Rights. In *Brodheim v. Cry (9th Cir. 2009) 584 F.3d 1262* , an appeals officer's handwritten statement warning an inmate to be careful what he writes on grievance forms was sufficient to establish a genuine issue of material fact as to whether it constituted an adverse action in a claim for retaliation for the exercise of the *First Amendment* right of filing grievances. See Ch. 114, *Civil Rights: Prisoners' Rights* .

Trial Court Should Make Sure Inmate Can Participate by Phone. In *Jameson v. Desta (2009) 179 Cal. App. 4th 672* , an action by an indigent prison inmate against a physician for allegedly negligent medical care at a correctional facility, the court of appeal found that the trial court abused its discretion by choosing the drastic measure of dismissal based on the ground that the prisoner did not appear telephonically at a case management conference and a subsequent hearing on an order to show cause as to whether the case should be dismissed, without first determining that the prisoner had been afforded meaningful access to the courts and his failure to appear at the required hearings was willful. See Ch. 114, *Civil Rights: Prisoners' Rights* .

Jury Instruction on Denial of Outdoor Exercise Error and Prison Officials Entitled to Qualified Immunity. In *Norwood v. Vance (9th Cir. 2009) 572 F.3d 626* , an inmate's action alleging denial of outdoor exercise during lockdown periods, which were based on inmate violence toward guards, staff, and other inmates, the jury instruction correctly stated the deliberate indifference standard, but the failure to give additional guidance on the deference the jury was required to give to the expert judgment of the prison officials rendered the instruction incomplete and misleading, which was prejudicial. Further, prison officials were entitled to qualified immunity, because the inmate's constitutional right to outdoor exercise was not absolute and indefeasible and did not trump all other considerations, and the officials had substantial reasons for imposing lockdowns in attempting to restore order during a series of brutal attacks. See Ch. 114, *Civil Rights: Prisoners' Rights* .

City and Police Officers Could Be Liable to Children of Arrestee Who Committed Suicide in Custody. In *Conn v. City of Reno (9th Cir. 2009) 572 F.3d 1047* , the district court erred in granting summary judgment and police officers could be liable to the children of an arrestee who committed suicide while in their custody based on sufficient objective evidence of their mother's objective, serious medical need for a reasonable jury to find in their favor, and the officers were not entitled to qualified immunity, because it was clearly established that the *Eighth Amendment* protected against deliberate indifference to a detainee's serious risk of suicide. With regard to the liability of the city, the children established a genuine issue of fact on the question of the city's failure to train its officers in suicide prevention and identification of suicide risks, the failure to train officers produced the highly predictable consequence that police officers would fail to respond to serious risks of suicide and constitutional violations will ensue, and that had the city

trained its officers, violation of the arrestee's constitutional rights could have been avoided. However, there was no evidence the city should have known or did know that one officer would have been likely to show deliberate indifference in these circumstances; further, failure to discipline officers was not a separate ground for establishing municipal liability, but, rather, was evidence tending to establish the absence of or failure to enforce a policy on suicide prevention. See Ch. 114, *Civil Rights: Prisoners' Rights* .

Juvenile Probationer Could Be Required to Continue to Take Medications as Condition of Probation. In *In re Luis F. (2009) 177 Cal. App. 4th 176* , a medical condition of a juvenile's probation that he continue to take medications prescribed by a physician was not overbroad, because the trial court intended the condition to have a narrow scope and the condition had to be construed as only requiring him to continue taking medications prescribed by his doctors for depression and social anxiety disorder. The condition also did not violate his constitutional privacy or liberty rights. See Ch. 114, *Civil Rights: Prisoners' Rights* .

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1-1 California Forms of Pleading and Practice--Annotated § 1.257

§ 1.257 Class Actions

Collective Action Under Federal Fair Labor Standards Act to Recover Unpaid Wages Is Not Class Action. A California Court of Appeal has held that because a collective action to recover wages under the federal Fair Labor Standards Act is predicated on additional plaintiffs opting in [*see 29 U.S.C. § 216(b)*], it is not a class action and, if brought in a California court, is not governed by *Code Civ. Proc. § 382* or *Cal. Rules of Ct., Rule 3.760 et seq.*, which govern class actions [*Haro v. City of Rosemead (2009) 174 Cal. App. 4th 1067]* . See *Ch. 120, Class Actions, §§ 120.18[5][a], 120.19[3]*, and *Ch. 250, Employment Law: Wage and Hour Disputes, § 250.15[4]*.

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1-1 California Forms of Pleading and Practice--Annotated § 1.258

§ 1.258 Contracts and Commercial Law

Advertising--Credit Cards and Consumer Accounts--Automatic Purchase Renewals. Through the addition of *Bus. & Prof. Code § 17600 et seq.* [2009 Stats., ch. 350], operative December 1, 2010, the Legislature intends to end the practice of ongoing charging of consumer credit or debit cards or third-party payment accounts without the consumers' explicit consent for ongoing shipments of a product or ongoing deliveries of service. See *Ch. 14, Advertising, § 14.13[20]*.

UCC Secured Transactions--Priority of Security Interests. In *Fariba v. Dealer Servs. Corp. (2009) 178 Cal. App. 4th 156* , the court held, on an issue of first impression, that when a secured creditor of a business has actual knowledge that the business is substantially engaged in making consignment sales, the rights of the consignors with respect to the consigned goods are superior to the rights of the secured creditor. In other words, a creditor's actual knowledge that the business was substantially engaged in selling goods of others on a consignment basis can defeat the right of that creditor in the consigned goods, even when the creditor has a perfected security interest in the inventory of a business. See *Ch. 503, Sales: Secured Transactions, § 503.46[6]*.

Automobiles--Insurer's Requirement for Vehicle to Be Repaired at Specified Dealer. In *Maystruk v. Infinity Ins. Co. (2009) 175 Cal. App. 4th 881* , the court construed *Ins. Code § 758.5(d)*, which provides that if the owner of an insured vehicle elects to have the vehicle repaired at the shop of his or her choice, the insurer must not limit or discount the reasonable repair costs based on charges that would have been incurred had the vehicle been repaired by the insurer's chosen shop. The court concluded that this does not prevent an insurance policy from providing two tiers of coverage, such as 100 percent coverage for reasonable costs at a shop selected by the insurer, but only 80 percent coverage for reasonable costs at a shop selected by the insured. See *Ch. 91, Automobiles: Actions Involving Defects and Repairs, § 91.33[2]*.

Bailments--Car Rental Charges. *Civil Code § 1936.015* [2009 Stats., ch. 8] allows a car rental company, from May 19, 2009, forward, to impose a separate charge covering the company's payments to meet a temporary increase in the vehicle license fee. This statute will remain operative for an indefinite period (as long as the vehicle license fee exceeds 0.65 percent of the fair market value of the vehicle). For discussion, see *Ch. 93, Bailments, § 93.106[5]*.

Consumer Contracts--Venue Exception in *Code Civ. Proc. § 395(b)* Applies Whether Consumer Is Plaintiff or Defendant. In *Fontaine v. Superior Court (CashCall, Inc.) (2009) 175 Cal. App. 4th 830* , the court concluded that nothing in the language of *Code Civ. Proc. § 395(b)*(creating a venue exception for actions arising from certain consumer transactions) limits its application to actions brought against a consumer defendant. Therefore, whether the action is brought *against a consumer defendant* or *by a consumer plaintiff*, the venue provisions of that statute apply as long as the action arises from a consumer transaction specified in the statute. See *Ch. 140, Contracts, §§ 140.100[3][d], 140.107*.

Liens--Priority Between Personal Injury Attorney's Lien and Medical Lien. In *Gilman v. Dalby (2009) 176 Cal. App. 4th 606* , the court resolved an issue that no prior case had directly decided: Does a contractual medical lien have priority over a personal injury attorney's lien for fees and costs of litigation? The court concluded that public policy and equity favor always giving the attorney's lien for fees and costs priority over any medical lien, regardless of which lien was first in time. For discussion, see *Ch. 342, Liens and Wage Preferences, § 342.22[2]*.

Residential Care Facilities for Elderly--Eviction Notice. *Health & Safety Code § 1569.683* [2009 Stats., ch. 617] adds specific requirements to be met by a licensee of a residential care facility for the elderly who sends a notice of eviction to a resident. See *Ch. 351, Long Term Health and Residential Care, § 351.45[7]*.

Continuing Care Retirement Community Facility--Permanent Closure. Under *Health & Safety Code § 1793.80 et seq.* [2009 Stats., ch. 442], a regulated provider of a continuing care retirement community facility, when undertaking the permanent closure of that facility, must meet specific requirements for the safe and appropriate relocation of the displaced residents. See *Ch. 351, Long Term Health and Residential Care, § 351.85*.

Negotiable Instruments--Effect of Alteration or Forged Signature Resulting From Party's Lack of Care. In *Burns v. Neiman Marcus Group, Inc. (2009) 173 Cal. App. 4th 479* , the court clarified the meaning of *Com. Code § 3406*, which states rules concerning the effect of alteration of a negotiable instrument or forgery of a signature on an instrument, when the alteration or forgery resulted from a lack of care by a party to the instrument. For discussion, see Ch. 385, *Negotiable Instruments* , § 385.4.

Song Beverly Consumer Warranty Act--Recovery of Prejudgment Interest. In *Doppes v. Bentley Motors, Inc. (2009) 174 Cal. App. 4th 1004* , the court concluded that nothing in the Song Beverly Consumer Warranty Act bars recovery of prejudgment interest under *Civ. Code § 3287*. See Ch. 502, *Sales: Warranties* .

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1-1 California Forms of Pleading and Practice--Annotated § 1.259

§ 1.259 Corporations and Business Entities

Corporations--Directors' Duty to Creditors When Corporation Is Insolvent. In *Berg & Berg Enters. v. Boyle (2009) 178 Cal. App. 4th 1020* , the court held that the directors of an insolvent corporation owe no fiduciary duty of due care or loyalty to the corporation's creditors solely because the corporation is insolvent. The scope of any noncontractual duty owed by corporate directors to the insolvent corporation's creditors is limited to the avoidance of acts that divert, dissipate, or unduly risk corporate assets that might otherwise be used to pay creditors' claims. See *Ch. 167, Corporations: Directors and Management, § 167.61*.

Selection of Directors--Listed Corporations. *Corp. Code § 301.5(d)* has been amended [Stats. 2009, ch. 131, § 1] to provide that a "listed corporation," for purposes of dividing the board into classes or eliminating cumulative voting, means a corporation with outstanding shares listed on the New York Stock Exchange, the NYSE Amex, the NASDAQ Global Market, or the NASDAQ Capital Market. See *Ch. 167, Corporations: Directors and Management, § 167.12[3]*.

Nonprofit Corporations--Board Meetings. *Corp. Code §§ 5211(c)* and *7211(c)* have been amended [Stats. 2009, ch. 631, §§ 9, 19] to specify that each director present and voting at a meeting has one vote on each matter presented to the board for action, and that no director may vote at a meeting by proxy. See *Ch. 388, Nonprofit Corporations, § 388.90*.

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1-1 California Forms of Pleading and Practice--Annotated § 1.260

§ 1.260 Costs and Attorney's Fees

***Code Civ. Proc. § 1033(a)* Gives Trial Court Discretion Regarding Fees in FEHA Action.** In *Chavez v. City of Los Angeles (2010) 47 Cal. 4th 970* , the California Supreme Court held that *Code Civ. Proc. § 1033(a)* gives a trial court discretion to deny attorney's fees to a plaintiff who prevails on an FEHA claim but recovers an amount that could have been recovered in a limited civil case. See Ch. 174, Costs *and Attorney's Fees*, § 174.15[2][b][i].

Substantial Benefit Theory Requires More Than Ephemeral or Peripheral Change. In *Pipefitters Local No. 636 Defined Benefit Plan v. Oakley, Inc. (2010) 180 Cal. App. 4th 1542* , the court of appeal held that to recover fees under the substantial benefit theory, there must be actual and concrete benefits to the plaintiffs. See *Ch. 174, Costs and Attorney's Fees, § 174.55[2]*.

Attorney's Fees Not Recoverable Under Unfair Competition Statute. In *Davis v. Ford Motor Credit Co. LLC (2009) 179 Cal. App. 4th 581* , the court of appeal held that attorney's fees may not be recovered under the unfair competition statute even if the violation of another statute serves as a predicate for the unfair competition action and that underlying statute has a provision for the recovery of attorney's fees, at least when the plaintiff brings the action solely under the unfair competition statute rather than directly under the underlying statute. See *Ch. 565, Unfair Competition, § 565.34[5]*.

Prevailing Party on Appeal Not Entitled to Attorney's Fees if Appeal Does Not Decide Who Wins the Lawsuit but Contemplates Further Trial Court Proceedings. In *Wood v. Santa Monica Escrow Co. (2009) 176 Cal. App. 4th 802* , the court of appeal held that *Civ. Code § 1717* does not support an award of attorney's fees to the prevailing party on appeal, but only to the prevailing party in the lawsuit. See *Ch. 174, Costs and Attorney's Fees, § 174.54[4]*.

Court Not Required to Explain Basis of Attorney's Fees Decision. In *Gorman v. Tassajara Development Corp. (2009) 178 Cal. App. 4th 44* , the court of appeal held that a court is not required to explain its reasons for awarding a certain amount of fees. See *Ch. 174, Costs and Attorney's Fees, § 174.54[14][a]*.

Self-Representation. In *Gorman v. Tassajara Development Corp. (2009) 178 Cal. App. 4th 44, 93-97, 100 Cal. Rptr. 3d 152* , the court of appeal held that an attorney may not recover fees for self-representation even if his or her law firm

is incorporated. See *Ch. 174, Costs and Attorney's Fees, § 174.54[3]*.

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1-1 California Forms of Pleading and Practice--Annotated § 1.261

§ 1.261 Declaratory Relief

Declaratory Relief Need Not Resolve Cause of Action for Coercive Remedy. A California Court of Appeal has held that a court may issue declaratory relief to resolve an actual controversy over the parties' obligations under their contract, even if the declaration judgment does not resolve any particular cause of action for coercive relief [*Supervalu, Inc. v. Wexford Underwriting Managers, Inc. (2009) 175 Cal. App. 4th 64]* . See *Ch. 182, Declaratory Relief, §§ 182.14[1], 182.17*.

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§ 1.262 Discovery

Discovery--Trade Secret Protection. In *Perlan Therapeutics, Inc. v. Superior Court (2009) 178 Cal. App. 4th 1333* , the court of appeal held that while trade secret identification does not require "every minute detail" or the "greatest degree of particularity possible[,]" in this case, the trade secret claimant's *Code Civ. Proc. § 2019.210* statement was insufficient, in light of its broad language, surplusage, and voluminous attachments. See *Ch. 191, Discovery: Privileges and Other Discovery Limitations, § 191.82[2]*.

Discovery--Mediation Confidentiality. In *Cassel v. Superior Court (2009) 179 Cal. App. 4th 152* , the court of appeal concluded that communications between client and his law firm, two weeks before trial, were for trial strategy preparation, not just for mediation of underlying lawsuit, and therefore were not protected by *Evid. Code § 1119(a), (b),* or *(c)*. See *Ch. 191, Discovery: Privileges and Other Discovery Limitations, § 191.125*.

Discovery-- ***Attorney-Client Privilege.*** *The California Supreme Court, in Costco Wholesale Corp. v. Superior Court (2009) 47 Cal. 4th 725* , holds that the attorney-client privilege attaches to a confidential communication between the attorney and the client and bars discovery of the communication *irrespective* of whether it includes unprivileged material. See *Ch. 191,Discovery: Privileges and Other Discovery Limitations, §§ 191.40[3], 191.41[1]*.

Depositions--International Depositions and Discovery Act. Ch. 193, *Discovery: Depositions*, has been expanded to include detailed coverage of the Interstate and International Depositions and Discovery Act (*Code Civ. Proc. § 2029.100 et seq.*), governing depositions in California for actions pending outside California, including the procedure for obtaining a subpoena under the Act, and the resolution of disputes arising under the Act relating to discovery. Also reproduced and discussed are three new Judicial Council Forms:

- Application for Discovery Subpoena in Action Pending Outside California [Cal. Judicial Council Form SUBP-030].

- Deposition Subpoena for Personal Appearance in Action Pending Outside California [Cal. Judicial Council Form SUBP-040].

- Deposition Subpoena for Personal Appearance and Production of Documents and Things in Action Pending Outside California [Cal. Judicial Council Form SUBP-045].

See *Ch. 193, Discovery: Depositions, §§ 193.130 et seq. and §§ 193.280 -193.282*.

Interrogatories. Ch. 194, *Discovery: Interrogatories*, has been updated with discussion of *Clement v. Alegre (2009) 177 Cal. App. 4th 1277* , in which the court considered whether an interrogatory failed to comply with the statutory requirement that each be "full and complete in and of itself," as required by *Code Civ. Proc. § 2030.060(d)*, when it referred to a previous interrogatory, and whether it violated the prohibition of *Code Civ. Proc. § 2030.060(f)* against compound, conjunctive, or disjunctive questions. See *Ch. 194, Discovery: Interrogatories, § 84.20[4][a]*.

Inspection of Tangible Evidence. Ch. 195, *Discovery: Inspection of Tangible Evidence*, has been updated to include discussion of discovery subpoenas for the inspection of premises in California, and for any testing, sampling, or other activity to take place during the inspection, in an action pending outside California, including the new Judicial Council form of Subpoena for Inspection of Premises in Action Pending Outside California [Cal. Judicial Council Form SUBP-050]. See *Ch. 195, Discovery: Inspection of Tangible Evidence, § 195.70*.

Subpoena Duces Tecum. Ch. 535, *Subpoena*, has been updated with discussion of *Lee v. Superior Court (2009) 177 Cal. App. 4th 1108* , addressing the sufficiency of the affidavits accompanying subpoenas in proceedings under California's Sexually Violent Predator Act (SVPA). See *Ch. 535, Subpoena, §§ 535.16[2], 535.43[6]*, and *535.61[6]*.

Subpoenas in Actions Pending Outside California--Revised Judicial Council Form SUBP-035. Ch. 535, *Subpoena*, has been updated with detailed coverage of the Interstate and International Depositions and Discovery Act (*Code Civ. Proc. § 2029.100 et seq.*), governing subpoenas in California for actions pending outside California, including new Judicial Council Form of Subpoena for Production of Business Records in Action Pending Outside California [Cal. Judicial Council Form SUBP-035] See *Ch. 535, Subpoena, §§ 535.21B, 535.85*.

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1-1 California Forms of Pleading and Practice--Annotated § 1.262A

§ 1.262A Elections

State Initiative and Referendum Petitions. Stats. 2009, ch. 373, amends Elections Code provisions governing state initiative petitions, specifically as to requesting and preparing a title, now called a circulating title, and summary for the initiative petition, compelling preparation of the circulating title and summary, obtaining a fiscal estimate or opinion by the Department of Finance and the Joint Legislative Budget Committee, sending a copy of the title and summary to the Secretary of State, amending the proposed measure, and formatting, circulating, and filing the petition. Similar amendments affect provisions governing state referendum petitions, except that no fiscal estimate is required for a referendum petition. See *Ch. 302, Initiative, Referendum, and Recall, §§ 302.21[2] -[4], 302.42[2] -[4]*.

City Initiative Measures. In *Vargas v. City of Salinas (2009) 46 Cal. 4th 1* , the California Supreme Court explained the circumstances in which a municipal entity may expend public funds on activities connected with a city initiative measure and how a court can make the distinction between campaign activities (generally not eligible for public-funds support) and informational activities (which may be supported by public funds). See *Ch. 302, Initiative, Referendum, and Recall, § 302.24[8]*.

City Referendum Petitions. In *Lin v. City of Pleasanton (2009) 176 Cal. App. 4th 408* , and *Defend Bayview Hunters Point Com. v. City and County of San Francisco (2008) 167 Cal. App. 4th 846* , the courts explained the scope of the requirement in *Elec. Code § 9238(b)* that a city referendum petition must include the "text" of the challenged ordinance. See *Ch. 302, Initiative, Referendum, and Recall, § 302.45[4][a]*.

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1-1 California Forms of Pleading and Practice--Annotated § 1.263

§ 1.263 Employment

Court May Deny Fees to FEHA Plaintiff Whose Recovery Could Have Been Had in Limited Civil Case. In *Chavez v. City of Los Angeles (2010) 47 Cal. 4th 970* , the California Supreme Court has held that if an action under the Fair Employment and Housing Act (FEHA) is not brought as limited civil case, and the plaintiff recovers an amount that could have been awarded in limited civil case, the trial court has discretion under *Code Civ. Proc. § 1033(a)* to deny the plaintiff's request for attorney's fees. However, in exercising that discretion, the court must give due consideration to the policies and objectives of FEHA in general and of its fee-shifting provision, *Gov. Code § 12965(b)*, in particular. See *Ch. 115, Civil Rights: Employment Discrimination, § 115.56[8]*.

School District Dismissing Probationary Teacher for Unsatisfactory Performance Must Provide 90-Day Written Notice Specifying Nature of Unsatisfactory Performance. In *Achene v. Pierce Joint Unified Sch. Dist. (2009) 176 Cal. App. 4th 757* , the court has held that a school district dismissing a probationary teacher for unsatisfactory performance must comply with the notice requirements that apply to the dismissal of a permanent employee for unsatisfactory performance. Accordingly, the district must give the teacher at least 90 calendar days before the notice of dismissal, a written notice specifying the nature of the unsatisfactory performance, with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge [*Educ. Code §§ 44932(a)(4), 44938(b), 44948.3(a)*]. See *Ch. 512, Schools: Certification, Dismissal, and Related Employment Issues, §§ 512.29[2], 512.120*.

Collective Action Under Federal Fair Labor Standards Act to Recover Unpaid Wages Is Not Class Action. A California Court of Appeal has held that because a collective action to recover wages under the federal Fair Labor Standards Act is predicated on additional plaintiffs opting in [*see 29 U.S.C. § 216(b)*], it is not a class action and, if brought in a California court, is not governed by *Code Civ. Proc. § 382* or *Cal. Rules of Ct., Rule 3.760 et seq.*, which govern class actions [Haro v. City of *Rosemead (2009) 174 Cal. App. 4th 1067]* . See *Ch. 120, Class Actions, §§ 120.18[5][a], 120.19[3]*, and *Ch. 250, Employment Law: Wage and Hour Disputes, § 250.15[4]*.

Out-of-Town Business Conference Constituted Special Errand for Employer. In *Jeewarat v. Warner Bros. Entertainment Inc. (2009) 177 Cal. App. 4th 427* , the court of appeal held that an employee attending an out-of-town business conference authorized and paid for by the employer is on a special errand for the employer until the trip is

completed, and if the employee intends to drive from the airport to his or her residence at the end of the trip, in the absence of any intervening personal deviations, the special errand continues until the employee arrives at home. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.16[4][b]*.

City Not Liable for Sexual Assault Committed by Firefighters. In *M.P. v. City of Sacramento (2009) 177 Cal. App. 4th 121* , the court of appeal held that an employer was not liable for a sexual assault committed by firefighters, even if the firefighters were on duty at the time of the assault, noting that the firefighters had no coercive authority over the victim and did not purport to detain the victim in the course of any investigation or even while performing any official duties. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.17[2]*.

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§ 1.263A Family Law

Termination of Parental Rights in Guardianship Proceeding. The California Supreme Court has held that *Prob. Code § 1516.5*, which provides for termination of parental rights in a guardianship proceeding, is constitutional [*Guardianship of Ann S. (2009) 45 Cal. 4th 1110]* . See *Ch. 12A, Adoptions: Termination of Parental Rights, § 12A.61A*.

Form-of-Title Presumption. The act of taking title to property in the name of one spouse during marriage *with the other spouse's consent* effectively removes that property from the general community property presumption, and the property is presumably the separate property of the spouse in whose name title is taken [*In re Marriage of Brooks & Robinson (2008) 169 Cal. App. 4th 176]* . See *Ch. 122, Community Property, § 122.33[2][a]*.

Setting Aside Judgment Dissolving Marriage. A court must set aside a judgment that is entered when the parties have failed to comply with all of the disclosure requirements of *Fam. Code § 2100 et seq.*, because a failure to comply with these requirements does not constitute harmless error [*Fam. Code § 2107(d)*]. See *Ch. 221, Dissolution of Marriage, § 221.15[3][c]*.

Complaint About Mediator. A party who contends that a court-program mediator may have violated a provision of the rules of conduct for court-program mediators may submit a written complaint to the court's complaint coordinator [*Cal. Rules of Ct., Rules 3.865-3.872*]. See *Ch. 221, Dissolution of Marriage: Procedure, § 221.42*.

Agreement to Divide Community Property. A parties' oral agreement to divide their community property is void and unenforceable when the agreement is not reduced to writing and the parties do not enter into an in-court stipulation to divide their property in accordance with the oral agreement [*In re Marriage of Dellaria & Blickman-Dellaria (2009) 172 Cal. App. 4th 196]* . See *Ch. 222, Dissolution of Marriage: Property Division and Valuation, § 222.54[1]*.

Characterization of Disability Benefits. Private disability benefits paid to a spouse during marriage are that spouse's separate property when the spouse acquired the right to those benefits before marriage without any contribution from the community [*In re Marriage of Rossin (2009) 172 Cal. App. 4th 725]* . See *Ch. 222, Dissolution of Marriage: Property Division and Valuation, § 222.180[3][b]*.

Reservation of Jurisdiction to Supervise Payment of Retirement Benefits. Entry of a nunc pro tunc order following the retirement or preretirement death of the spouse who is the plan participant to facilitate qualification of a domestic relations order as a QDRO when that order was obtained before the benefit-triggering event is proper in circumstances in which the record indicates that the parties or the court intended the order to create an interest in surviving spouse benefits in the former spouse [*In re Marriage of Padgett (2009) 172 Cal. App. 4th 830]* . See *Ch. 222, Dissolution of Marriage: Property Division and Valuation, § 222.201[2][d]*.

Sanctions for False Accusations of Child Abuse. A party who has been falsely accused of child abuse or neglect in a child custody proceeding may move for sanctions under *Fam. Code § 3027.1* against the person or persons who made the allegations, as long as the motion is filed on or before the earlier of 60 days after the judgment or order exonerating the moving party is served or 180 days from the entry of the judgment or order [*Robert J. v. Catherine D. (2009) 171 Cal. App. 4th 1500]* . See *Ch. 223, Dissolution of Marriage: Child Custody, § 223.12[6]*.

Award of Custody to Nonparent. Custody may be awarded to a nonparent without a finding of parental unfitness [*H.S. v. N.S. (2009) 173 Cal. App. 4th 1131]* . See *Ch. 223, Dissolution of Marriage: Child Custody, § 223.17[2]*.

Parent's Gross Income for Purposes of Child Support Determination. A court may consider monies a parent receives that are not required to be included as income under federal tax law. For example, a court may consider gifts to a parent to be income for purposes of child support, as long as they bear a reasonable relationship to the traditional meaning of income as a recurrent monetary benefit [*In re Marriage of Alter (2009) 171 Cal. App. 4th 718]* . See *Ch. 224, Dissolution of Marriage: Child Support, § 224.105[1]*.

Subsequent Spouse's Income Used to Pay Child Support. While the obligor parent's community interest in the subsequent spouse's income may be looked to in *discharge* of his or her child support obligation, a court may not consider the subsequent spouse's community income in *calculating* the child support obligation [*In re Marriage of Knowles (2009) 178 Cal. App. 4th 35]* . See *Ch. 224, Dissolution of Marriage: Child Support, § 224.105[6]*.

Levy by Local Child Support Agency. A support obligor's bank account is exempt from levy by a local child support agency under *Fam. Code § 17450(c)(2)*, when the obligor's sole income is from Social Security disability insurance benefits [*In re Marriage of Hopkins (2009) 173 Cal. App. 4th 281]* . See *Ch. 259, Family Law Enforcement: Special Remedies for Support Enforcement, § 259.156[2]*.

"Seek Work" Order. A court has the discretion to impose an employment efforts order on the support obligee, as well as on the support obligor who is in default [*Barron v. Superior Court (2009) 173 Cal. App. 4th 293]* . See *Ch. 259, Family Law Enforcement: Special Remedies for Support Enforcement, § 259.156[4]*.

Attorney's Fees in Proceeding for Injunction Under *Code Civ. Proc. § 527.6*. A court may award attorney's fees to a prevailing defendant even if the action was not frivolous or brought in bad faith [*Krug v. Maschmeier (2009) 172 Cal. App. 4th 796]* . See *Ch. 293, Harassment and Domestic Violence, § 293.17[8]*.

Abuse for Purposes of Domestic Violence Restraining Order. Nonviolent conduct, such as contacting the applicant and disturbing the applicant's peace, can constitute abuse, which can include accessing, reading, and publicly disclosing the applicant's confidential e-mails [*In re Marriage of Nadkami (2009) 173 Cal. App. 4th 1483]* . See *Ch. 293, Harassment and Domestic Violence, § 293.51*.

Custody Determination in Domestic Violence Proceeding. A domestic violence order is not a permanent custody determination. Although a finding of domestic violence changes the burden of persuasion as to the best interest test, it does not eliminate the best interest requirement [*Keith R. v. Superior Court (2009) 174 Cal. App. 4th 1047]* . See *Ch. 293, Harassment and Domestic Violence, § 293.52[1][b]*.

Termination of Domestic Violence Restraining Order. A court has the discretion to determine that the changed circumstances alleged by the restrained party are not material and, therefore, do not present a reason for terminating the order, and it may award attorney's fees and costs to the party who prevails in defeating an application to terminate the order [*Loeffler v. Medina (2009) 174 Cal. App. 4th 1495]* . See *Ch. 293, Harassment and Domestic Violence, § 293.55[2]*.

Presumed Parent. A petitioner is not required to receive the child in his or her home for a "significant period of time" in order to be considered a presumed parent under *Fam. Code § 7611(d)* [*Charisma R. v. Kristina S. (2009) 175 Cal. App. 4th 361]* . See *Ch. 387, Nonmarital Cohabitation, § 387.11[5][c]*.

De Facto Mother. A woman who cohabited with the father of minor children may not seek custody and visitation rights with respect to the children as a presumed or de facto mother, when the parental rights of the natural mother have not been terminated [*Scott v. Superior Court (2009) 171 Cal. App. 4th 540]* . See *Ch. 387, Nonmarital Cohabitation, § 387.12*.

Effect of Declaration of Paternity. A valid declaration of paternity signed and filed by the biological father has the force of a judgment, which trumps another man's presumed father status under *Fam. Code § 7611(d)* [*Kevin Q. v. Lauren W. (2009) 175 Cal. App. 4th 1119]* . See *Ch. 394, Parent and Child, § 394.14*.

Custody Proceeding by Nonparent. A guardianship petition under the Probate Code is the only judicial means for a nonparent to obtain custody when the parents have not initiated a custody proceeding [*Scott v. Superior Court (2009) 171 Cal. App. 4th 540]* . See *Ch. 394, Parent and Child, § 394.73[2][a]*.

International Custody Dispute. California properly assumed initial jurisdiction over a child custody dispute as the child's home state, even though the mother had taken the child to Pakistan when he was five months old and he was in Pakistan on the date he turned six months of age. Because the trip began as a "temporary absence," the time the child spent in Pakistan before the mother informed the father that she would not return to California was properly considered part of the child's period of residence in California [*In re Marriage of Nurie (2009) 176 Cal. App. 4th 478]* . See *Ch. 394, Parent and Child, § 394.107[2][c]*.

Correction of Birth Certificate After Adoption. Even though a child has been adopted, a court still has the authority to adjudicate facts concerning a possible biological relationship between the birth mother and the child, in an action to adjudicate the child's parentage for purposes of correcting the child's original birth certificate to state the actual names of the birth parents in place of the fictitious names the birth mother used when the original certificate was prepared [*Wynn v. Superior Court (2009) 176 Cal. App. 4th 346]* . See *Ch. 412, Paternity, § 412.13[1]*.

Some Qualified Immunity for Removal of Child From Home. In *Burke v. County of Alameda (9th Cir. 2009) 586 F.3d 725* , a sheriff's officer who removed a child from her home without a warrant and placed her in protective custody based on an interview with her after she had returned home after running away was entitled to summary judgment on the claim that he violated the mother's and stepfather's familial association rights, because his reliance on the child's statements was reasonable and, under the totality of circumstances, he had reasonable cause to believe she was in imminent danger of physical harm. As to the mother, removing the child from her because she lived with the allegedly abusive stepfather was reasonable. However, as to the non-custodial father, who was never personally accused of violence, the scope of the intrusion on his associational rights was for the jury to decide, because the officers made no attempt to contact him and did not explore possibility of putting the child in his care rather than in government custody, and he was not informed of the removal for two days. See Ch. 59, *Assemblies, Meetings, and Demonstrations* .

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§ 1.264 Guardianships and Conservatorships

Guardianships and Conservatorships--Conservatee May File Initial Petition for Rehearing at Any Time. In *Conservatorship of Amanda B.* (2009) *173 Cal. App. 4th 1380, 1384* , the court held that once a conservatorship has been established, a conservatee may file an initial petition for rehearing under *Welf. & Inst. Code § 5364* to challenge his or her status as a conservatee at any time. The court further held that once a conservatee has filed an initial petition for rehearing, he or she must wait six months before filing another petition for rehearing concerning his or her status as conservatee. See *Ch. 304, Insane and Other Incompetent Persons, §§ 304.42[14][a], 304.144[6][d], 304.283[7]*.

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§ 1.265 Injunctions

Irreparable Harm Occurs When Inability to Ascertain Damage. In *DVD Copy Control Assn., Inc. v. Kaleidescape, Inc. (2009) 176 Cal. App. 4th 697* , the court of appeal held that, for purposes of imposing an injunction, irreparable harm may be established where there is an injury, but an inability to ascertain the amount of damage, i.e., pecuniary compensation, would not afford adequate relief or that it would be extremely difficult to ascertain the amount that would afford adequate relief. See *Ch. 303, Injunctions, § 303.40[2]*.

Burden on Restrained Party to Terminate Restraining Order. In *Loeffler v. Medina (2009) 174 Cal. App. 4th 1495* , the court of appeal held that the burden is on the restrained party to show by a preponderance of the evidence that one of the circumstances set forth in *Code Civ. Proc. § 533* is present and justifies terminating the restraining order. See *Ch. 303, Injunctions, § 303.138[2]*.

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§ 1.266 Insurance

Statutory Unfair Competition Cause of Action Against Insurer Survives Demurrer. In *Zhang v. Superior Court (2009) 178 Cal. App. 4th 1081* , an appellate court ordered the trial court to overrule the insurer's demurrer with respect to a cause of action under the Unfair Competition Law for false advertising, in an action brought by the insured based on the insurer's improper handling of a first-party claim. See *Ch. 308, Insurance, § 308.25[2]*.

***Code Civ. Proc. §§ 877* and *877.6* Inapplicable to Settlements Reached After Judgment.** In *Jhaveri v. Teitelbaum (2009) 176 Cal. App. 4th 740* , the court of appeal held that *Code Civ. Proc. §§ 877* and *877.6* apply only to settlements entered into before a verdict or judgment has been reached in the case, and the statutes have no application to a settlement or compromise reached after a judgment has been entered. However, the court also noted that even without application of these statutes, through application of equitable principles, if one joint tortfeasor satisfies a judgment in full or in part, the judgment creditor cannot obtain a double recovery by collecting the same amounts from another of the joint tortfeasors. See *Ch. 300, Indemnity and Contribution, § 300.73[2]*.

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§ 1.267 Intellectual Property

Discovery--Trade Secret Protection. In *Perlan Therapeutics, Inc. v. Superior Court (2009) 178 Cal. App. 4th 1333* , the court of appeal held that while trade secret identification does not require "every minute detail" or the "greatest degree of particularity possible[,]" in this case, the trade secret claimant's *Code Civ. Proc. § 2019.210* statement was insufficient, in light of its broad language, surplusage, and voluminous attachments. See *Ch. 191, Discovery: Privileges and Other Discovery Limitations, § 191.82[2]*.

Entertainment Industry--Talent Services for Entertainment Artists. Stats. 2009, ch. 286, added *Lab. Code § 1701 et seq.* to regulate persons providing "talent services" to entertainment industry artists (such as actors, models, extras, radio artists, musical artists, musical organizations, directors, musical directors, writers, cinematographers, composers, lyricists, arrangers). These provisions supersede the former regulatory scheme that concerned "advance-fee talent services" (which are declared to be unlawful in the 2009 legislation). See *Ch. 370, Motion Pictures, §§ 370.10[4], 370.54, 370.55*.

Trademarks--Counterfeit Goods--Nuisance Abatement Action Targeting Place Where Counterfeiting Occurred. Stats. 2009, ch. 453, added *Bus. & Prof. Code § 17800* to authorize a nuisance abatement action as a new remedy (until January 1, 2015) for use against persons dealing in goods bearing counterfeit trademarks. See *Ch. 549, Trademarks and Trade Names, § 549.56[3][f]*.

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§ 1.268 Judgments

Homesteads--Attachment of Judgment Liens. In *Fidelity National Title Insurance Co. v. Schroeder (2009) 179 Cal. App. 4th 834* , the court held that a judgment lien attaches to a declared homestead in the amount of any surplus equity. See *Ch. 294, Homesteads, § 294.51[1]*.

Relief From Judgment--Attorney Neglect. In *Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868* , the court of appeal held that *Code Civ. Proc. § 473* is mandatory and requires the court to grant relief whether the attorney's neglect is excusable or not. See *Ch. 489, Relief from Judgment, § 489.37*.

Judgments--Perjured Testimony Not Ground for Reversing Judgment. In *Buesa v. City of Los Angeles (2009) 177 Cal. App. 4th 1537* , the court held that the introduction of perjured testimony is a classic example of intrinsic fraud and may not be used to overthrow a judgment. See *Ch. 489, Relief From Judgments and Orders, § 489.246[6]*.

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§ 1.268A Juvenile Law

Enforcement of Juvenile Court Orders. A revised section on incarceration and other sanctions is updated with *In re Nolan W. (2009) 45 Cal. 4th 1217* and the distinction between criminal and civil contempt and that in civil contempt it is sometimes said the person in contempt holds the key to their release by complying with the court order. This statement, however, is more applicable to orders that can be complied with by a single action. In juvenile proceedings, particularly juvenile dependency proceedings, orders for the protection and welfare of minors are often of a more continuing nature, requiring an ongoing course of conduct rather than a single, specific action [*see, e.g., Welf. & Inst. Code §§ 245.5, 361.5(a), 362(c)*]. In such cases, the line between civil and criminal contempt can become blurred, mandating the court take steps to make a clear record of the reasons for and purpose of any contempt judgment. See *Ch. 327, Juvenile Courts: Jurisdiction, and General Procedures, § 327.14[1]*.

Dependency Proceedings--Summaries of Proceedings. This update reorganizes this chapter with quick summaries of the various proceedings in dependency actions for a quick overview of the process, followed by more in-depth coverage later in the chapter for more efficient and effective research. See *Ch. 328, Juvenile Courts: Dependency Proceedings, §§ 328.13 -328.20*.

Dependency Proceedings--Initial or Detention Hearing. This update reorganizes this chapter with a thoroughly revised part on the initial or detention hearing, along with the latest 2009 cases in this area and many new practice tips. See *Ch. 328, Juvenile Courts: Dependency Proceedings, §§ 328.40 -328.48*.

Dependency Proceedings--Parentage in Sex Same Cases. This update adds a new section on parentage in same sex cases. The rights and obligations of registered domestic partners with respect to a child of either of them are the same as those of spouses [*Fam. Code § 297.5(d)*]. Consequently, registered domestic partners who have a child born after the effective date of this statute, January 1, 2005, have rights and responsibilities regardless of their biological connection to the child [*Elisa B. v. Superior Court (2005) 37 Cal. 4th 108]* . See *Ch. 328, Juvenile Courts: Dependency Proceedings, § 328.60[2][e]*.

Dependency Proceedings--Declarations of Paternity. This update adds a new section with practice tips on declarations on paternity, including analysis on the declarations requirements, effects of a voluntary declaration, and

challenging a voluntary declaration. See *Ch. 328, Juvenile Courts: Dependency Proceedings, § 328.60[5]*.

Dependency Proceedings--School Discipline. This update adds a new section with practice tips on school discipline of dependents, including analysis on the school discipline for children eligible for services under the IDEA and school discipline for children under the Section 504 of the Rehabilitation Act of 1973. See *Ch. 328, Juvenile Courts: Dependency Proceedings, § 328.62[6][e]*.

Dependency Proceedings--Subject Matter and Dependency Jurisdiction. This update adds a thoroughly revised part with new practice tips on subject matter and dependency jurisdiction. See *Ch. 328, Juvenile Courts: Dependency Proceedings, §§ 328.80 -328.84*.

Dependency Proceedings--Indian Children and ICWA. This update adds a thoroughly revised section with new practice tips on Indian children and the Indian Child Welfare Act, addressing required notices, tribal jurisdiction, intervention, transfer, custody, placement preferences, waiver of rights, postadoption contact for tribes, and tribal customary adoptions. See *Ch. 328, Juvenile Courts: Dependency Proceedings, § 328.125*.

Dependency Proceedings--Appeals and Extraordinary Writs. This update adds a new section on standing requirements for appeals and extraordinary writs, including first party standing, standing to appeal dismissal of a dependency proceeding, and standing in de facto parent cases. See *Ch. 328, Juvenile Courts: Dependency Proceedings, § 328.125*.

Delinquency Proceedings--Jurisdiction. This update adds a new section on dual status of jurisdiction of delinquency and dependency courts, including analyses and practice tips on procedures for recommending single status, what to do if two counties are involved, procedures with dual status is available, notice and decision making, and jurisdiction over matters incidental to the proceedings. See *Ch. 329, Juvenile Courts: Delinquency Proceedings, § 329.27*.

Delinquency Proceedings--Multiple Prosections. This update adds a new section on the proscriptions against multiple prosecutions as applied to delinquency proceedings. See *Ch. 329, Juvenile Courts: Delinquency Proceedings, § 329.74[4]*.

Delinquency Proceedings--Conditions of Probation. This update adds new sections on conditions of probation, including conditions related to home supervision and gang and weapons orders. See *Ch. 329, Juvenile Courts: Delinquency Proceedings, § 329.94[10], [14]*.

Delinquency Proceedings--Mandatory Parole Releases. This update adds a new section on mandatory parole releases and how they relate to orders limiting control of a minor by a parent or guardian. See *Ch. 329, Juvenile Courts: Delinquency Proceedings, § 329.96[6][e][iii]*.

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§ 1.268B Mandate and Prohibition

Appellate Court May Issue Suggestive *Palma* Notice; Trial Court Must Provide Opportunity to Be Heard. In *Brown, Winfield & Canzoneri, Inc. v. Superior Court (2010) 47 Cal. 4th 1233* , the California Supreme Court held that if a trial court decides on its own motion to revisit its interim ruling in response to a suggestive *Palma* notice, that court must inform the parties of its intent to do so, and provide them with an opportunity to be heard. See *Ch. 358, Mandate and Prohibition, § 358.16[3]*.

Extra-Record Evidence May Be Admitted in Mandamus Actions. In *Golden Drugs Co. v. Maxwell-Jolly (2009) 179 Cal. App. 4th 1455* , the court of appeal held that extra-record evidence is generally inadmissible in traditional mandamus actions challenging quasi-legislative administrative decisions, though extra-record evidence may be admitted in traditional mandamus actions challenging ministerial or informal administrative actions. See *Ch. 358, Mandate and Prohibition, § 358.87[4][b]*.

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§ 1.269 Physicians

Physicians--Drunk Driving Has Nexus to Practicing Medicine. In *Watson v. Superior Court (2009) 176 Cal. App. 4th 1407* , the court held that a physician driving while intoxicated demonstrates an unwillingness to obey laws against such conduct and constitutes a serious breach of duty to society, thereby constituting a nexus to the practice of medicine. See *Ch. 414, Physicians: Licensing and Discipline, § 414.65[1]*.

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§ 1.270 Probate

Wills and Trusts--No Contest Clauses. Effective January 1, 2010, existing statutes governing no contest clauses become inoperative, and a revised *Prob. Code §§ 21310-21315* become operative. The new provisions apply to any instrument, whenever executed, that became irrevocable on or after January 1, 2001 [*Prob. Code § 21315(a)*]. Instruments that became irrevocable before January 1, 2001, are governed by common law [*Prob. Code § 21315(b)*]. These new provisions limit the enforceability of a no contest clause to specific contests, redefine what constitutes a direct contest, and provide that a no contest clause may be enforced against a direct contest only when it is brought without probable cause. Additionally, the new provisions repeal all provisions allowing a beneficiary to apply for declaratory relief for a determination whether or not a contest would violate a no contest clause. See *Ch. 444, Will Contests, § 444.14*, and *Ch. 560, Trusts: Express, § 560.16*. In *Salter v. Lerner (2009) 176 Cal. App. 4th 1184* , the court held that a petition by contingent remainder beneficiaries, seeking information with regard to how the trustee, who was also the income beneficiary, was spending trust funds, would not violate the trust's no contest clause. The court reasoned that the proposed petition sought only information that was necessary to enable the beneficiaries to enforce their rights under the trust pursuant to *Prob. Code § 16060*. Therefore, the proposed petition was not a contest within the meaning of the no contest clause. In *Cory v. Toscano (2009) 174 Cal. App. 4th 1039* , a beneficiary's challenge to the validity of handwritten notations made by a settlor on his trust after it was executed, qualified as an instrument other than the instrument containing the no contest clause, and was determined to not a contest under *Prob. Code § 21305(a)(3)*. See *Ch. 444, Will Contests, § 444.14*, and *Ch. 560, Trusts: Express, § 560.16*.

Birth and Death--Court Has Authority to Adjudicate Facts Concerning Biological Relationship. In *Wynn v. Superior Court (2009)176 Cal. App. 4th 346* , the court held that when a plaintiff has filed a petition seeking an order to correct her original birth certificate so it would state the actual names of her birth parents, rather than the fictitious names her mother used when the original certificate was prepared, the trial court has the authority to adjudicate the facts concerning a possible biological relationship. The court held that if a court determines a plaintiff's original birth certificate is not accurate, the court is obligated to order the issuance of a new birth certificate. See *Ch. 99, Birth and Death, §§ 99.12[1], 99.22*.

Escheat--Statutory Changes. Several changes have been made to the escheat statutes in Code of Civ. Pro. §§ 1513-1520. A deposit or account will not escheat to the state if the owner has owned an individual retirement account or

funds held by the banking organization under a retirement plan for self-employed individuals or a similar account or plan [*see Code Civ. Proc. § 1513*]. Additionally, electronic notice is allowed, provided the owner has consented [*see Code Civ. Proc. § 1513.5(a)*]. Additional requirements for notices have been specified in Code Civ. Proc. §§ 1315.5, *1516(d)*, and *1520(b)*. See Ch. 252, *Escheat (Unclaimed Property)*.

Guardianships and Conservatorships--Conservatee May File Initial Petition for Rehearing at Any Time. In *Conservatorship of Amanda B. (2009) 173 Cal. App. 4th 1380* , the court held that once a conservatorship has been established, a conservatee may file an initial petition for rehearing under *Welf. & Inst. Code § 5364* to challenge his or her status as a conservatee at any time. The court further held that once a conservatee has filed an initial petition for rehearing, he or she must wait six months before filing another petition for rehearing concerning his or her status as conservatee. See *Ch. 304, Insane and Other Incompetent Persons, §§ 304.42[14][a], 304.144[6][d], 304.283[7]*.

Wills, Trusts, and Intestate Succession--New Statute Clarifies Degrees of Consanguinity. New *Prob. Code § 13* provides that the degree of kinship or consanguinity between two persons is determined by counting the number of generations separating those persons as defined in that section. It specifies how degrees of consanguinity are to be calculated and provides examples with respect to certain classes of related persons. See *Ch. 442, Probate: Initiating Probate Administration, § 442.120*.

Intestate Succession--*Probate Code § 50* Includes All Lineal Descendants. In *Estate of Beckel (2009) 174 Cal. App. 4th 34* , the court reversed a trial court decision which allowed an administrator to limit the distribution of an intestate decedent's estate to surviving first cousins and the children of predeceased first cousins. In reversing, the court held that distribution of an intestate decedent's estate could not be limited to the surviving first cousins and the children of predeceased first cousins while excluding grandchildren of predeceased first cousins. The court noted that governing statutes, *Prob. Code §§ 50, 240, 6402(d)*, do not limit the surviving issue of a predeceased heir entitled to inherit to the first generation; rather, surviving issue includes all lineal descendents of all generations. The court concluded that decedent's estate must be divided into as many shares as there were first cousins who survived decedent and the first cousins who predeceased the decedent but left surviving issue of any generation. See *Ch. 458D, Accounts, §§ 458D.78[14], 458D.155[4][e]*.

Probate--Filing Fees. The uniform filing fee for the first petition for letters of administration or letters testamentary, or the first petition for special letters of administration with the power of a general personal representative, is $355 [*Gov. Code § 70650(a)*]. The uniform filing fee for the first objections to the probate of any will of codicil under *Prob. Code § 8250*, or the first petition for revocation of probate of any will or codicil under *Prob. Code § 8270*, also is $355 [*Gov. Code § 70650 (b)*]. A fee of $355 also will be charged for filing each subsequent petition or objection in the same proceeding by a person other than the original petitioner or contestant [*Gov. Code § 70650(c)*]. See Ch. 442, *Probate: Initiating Probate Administration* .

Trusts--Modification of Irrevocable Trusts. In *Boys and Girls Club of Petaluma v. Walsh (2009) 169 Cal. App. 4th 1049* , the court upheld a trial court decision allowing the trust beneficiaries to modify a charitable trust without first ascertaining the beneficiaries. The trust gave discretion to the trustees to add charitable organizations, and the beneficiaries entered into a settlement agreement that defined the additional beneficiaries and provided for the trust modification. See *Ch. 560, Express Trusts, §§ 560.114, 560.401*.

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§ 1.271 Public Administration

2010 Statutory Updating. Volumes 41 and 41A, *Public Administrative Law*, are updated throughout with the legislative additions, amendments, and repeals effective January 1, 2010.

California Agencies. This release updates the Appendix with latest changes to the list of agencies, their statutory authority, and where further, specific information may be found on these agencies throughout this publication. See *Ch. 470, Overview of Public Administrative Law, § 470.50* et seq.

Public Agency Meetings. Amended *Gov. Code § 11122.5* now provides a majority of the members of a state body shall not, outside of a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter of the state body [*Gov. Code § 11122.5(b)(1)*]. Additionally, subsection (1) shall not be construed to prevent an employee or official of a state agency from engaging in separate conversations or communications outside of a meeting authorized by this law with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the state agency, if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body. See *Ch. 470B, Public Agency Meetings, § 470B.21[2]*.

Public Records Act Exemptions. The list of Exempt Record Statutes is revised throughout with the latest statutes, arranged by topic, that exempt specified records from the Public Records Act. See *Ch. 470C, Public Records Act, § 470C.15*.

Alcoholic Beverage License. *Bus. & Prof. Code § 24013* is amended to provide a person may file a protest against issuance of a license at any office of the Department of Alcoholic Beverage Control within 30 days from the first date of posting the notice of intention to engage in the sale of alcoholic beverages at the premises, within 30 days of the mailing of the notification pursuant to *Bus. & Prof. Code § 23985.5*, or within 30 days of the mailing of the notices of the Department of Alcoholic Beverage Control to public officials as required by *Bus. & Prof. Code § 23987*, whichever is later. The time within which a local law enforcement agency may file a protest may be extended by the period prescribed in section *Bus. & Prof. Code § 23987*, pursuant to a request made under that section. See *Ch. 18, Alcoholic*

Beverage Licenses, § 18.13[1].

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§ 1.272 Real Estate

California Environmental Quality Act--Projects. In *Sunset Sky Ranch Pilots Assn. v. County of Sacramento (2009) 47 Cal. 4th 902* , the California Supreme Court held that a county's decision not to renew a conditional use permit for a privately owned airport was not a public project subject to CEQA, because the county did not "directly undertake" to close the airport but rather decided not to reauthorize a private activity that required the issuance of a permit. See *Ch. 418, Pollution and Environmental Matters, § 418.32[2]*.

Nonjudicial Foreclosure--Trustee's Duties. In *Banc of America Leasing & Capital LLC v. 3 Arch Trustee Services Inc. (2009) 180 Cal. App. 4th 1090* , the court of appeal held that a trustee conducting a nonjudicial foreclosure sale that results in excess sale proceeds does not have a duty to search for, verify, prioritize, and distribute the surplus funds to a junior lien holder who has not recorded a request to receive notice of default and sale. See *Ch. 555, Trust Deeds and Real Property Mortgages, § 555.60[2][a]*.

Homesteads--Attachment of Judgment Liens. In *Fidelity National Title Insurance Co. v. Schroeder (2009) 179 Cal. App. 4th 834* , the court held that a judgment lien attaches to a declared homestead in the amount of any surplus equity. See *Ch. 294, Homesteads, § 294.51[1]*.

Landlord-Tenant--Rent Deduction for Nonpayment of Utilities. A tenant who has paid for utilities on behalf of the landlord may deduct that payment from rent as provided in certain Public Utility Code sections [*Civ. Code § 1942.2*]. For discussion and a form of affirmative defense, see *Ch. 334, Landlord and Tenant: Claims for Damages, §§ 334.17[2], 334.118*.

Residential Mortgage Loans. Legislation in 2009 added numerous provisions concerning residential mortgage loans and lenders' practices:

- Stats. 2009, ch. 629, added *Fin. Code § 4995 et seq.*, imposing restrictions on higher-priced mortgage loans, and added *Civ. Code § 2923.1*, specifying fiduciary duties of mortgage brokers. For discussion, see *Ch. 555, Trust Deeds and Real Property Mortgages, §§ 555.21C* and *555.21D*.

- Stats. 2009, ch. 43, amended *Civ. Code §§ 2923.5, 2923.6,* and *2924.8*, to enhance protections for homeowners whose homes are subject to mortgages and deeds of trust recorded from January 1, 2003, to December 31, 2007, inclusive. For discussion, see *Ch. 555, Trust Deeds and Real Property Mortgages, § 555.51A[2] -[4]*.

- Stats. 2009, ch. 43, amended *Civ. Code § 2943* to enable escrow agents to obtain valid payoff statements in short-sale transactions, which can occur often when deeds of trust or mortgages have to be foreclosed in a distressed real estate market. For discussion, see *Ch. 555, Trust Deeds and Real Property Mortgages, § 555.53[4]*.

- Stats. 2009, 2d Ex. Sess., ch. 5, added *Civ. Code §§ 2923.52-2923.55*, tacking a temporary 90-day extension onto the normal three-month period after a default under a mortgage or deed of trust (that was recorded from January 1, 2003, to January 1, 2008, inclusive), in which a homeowner can attempt to cure the default. The purpose of the extension is to allow the parties to pursue a loan modification so as to prevent the impending foreclosure. For discussion, see *Ch. 555, Trust Deeds and Real Property Mortgages, § 555.54[1][f]*.

- Stats. 2009, ch. 264, added *Civ. Code § 1103.20 et seq.*, titled the Buyer's Choice Act, to provide that a mortgagee or trust deed beneficiary, after acquiring title to residential property at a foreclosure sale, may not require, directly or indirectly, as a condition of selling the property to another purchaser, that title insurance or escrow services must be obtained by the purchaser from a particular title insurer or escrow agent. For discussion, see *Ch. 555, Trust Deeds and Real Property Mortgages, § 555.62[4]*.

Sales of Real Property--No Requirement to Buy Particular Title Insurance. Under the Buyer's Choice Act, a seller of residential property may not require that title insurance covering the property or escrow service provided in connection with the sale be purchased by the buyer from a particular title insurer or escrow agent [*Civ. Code § 1103.22(a)*]. For discussion, see *Ch. 569, Vendor and Purchaser, § 569.16A*.

Sales of Real Property--Noncompliant Plumbing Fixtures. Stats. 2009, ch. 587, added *Civ. Code §§ 1101.2-1101.4* and *1102.155*, mandating that single-family residences, if built and available for use before January 1, 1994, must be equipped with water-conserving plumbing fixtures on or before January 1, 2017, and after that date, the seller of such a property must disclose whether the property includes any noncompliant plumbing fixtures. For discussion, see *Ch. 569, Vendor and Purchaser, § 569.13[7]*.

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§ 1.272A Schools

School District Dismissing Probationary Teacher for Unsatisfactory Performance Must Provide 90-Day Written Notice Specifying Nature of Unsatisfactory Performance. In *Achene v. Pierce Joint Unified Sch. Dist. (2009) 176 Cal. App. 4th 757* , the court held that a school district dismissing a probationary teacher for unsatisfactory performance must comply with the notice requirements that apply to the dismissal of a permanent employee for unsatisfactory performance. Accordingly, the district must give the teacher, at least 90 calendar days before the notice of dismissal, a written notice specifying the nature of the unsatisfactory performance, with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge [*Educ. Code §§ 44932(a)(4), 44938(b), 44948.3(a)*]. See *Ch. 512, Schools: Certification, Dismissal, and Related Employment Issues, §§ 512.29[2], 512.120*.

Seizure of Student and Interrogation at School Violated *Fourth Amendment* Rights. In *Greene v. Camreta (9th Cir. 2009) 588 F.3d 1011* , the Ninth Circuit held that a child protective services officer's decision to seize and interrogate a suspected child abuse victim at school with a law enforcement officer present, in the absence of a warrant, a court order, exigent circumstances, or parental consent, violated the child's *Fourth Amendment* rights. The general law of search warrants applied to child abuse investigations, and with the direct involvement of law enforcement in the in-school seizure and interrogation, the child was not seized for some special need beyond the normal need for law enforcement. However, the child protective services officer and the law enforcement officer were entitled to qualified immunity, because child protective services officer and a law enforcement officer involved in an in-school seizure and interrogation were entitled to qualified immunity, because Ninth Circuit precedent did not clearly establish that an in-school seizure of a student suspected of being a victim of child sexual abuse could be subject to traditional *Fourth Amendment* protections. See Ch. 513, *Schools: Student Rights and Responsibilities* .

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§ 1.272B Statutory Interpretation

Proposition 83 Residence Restrictions Apply to Registered Sex Offenders Convicted Before Proposition's Effective Date. The California Supreme Court has held that *Penal Code § 3003.5(b)*, as amended by Proposition 83 (Jessica's Law) to restrict where paroled sex offenders subject to lifetime registration may reside, applies to a person who was convicted of a registrable offense before the effective date of Proposition 83 (Nov. 8, 2006) but was paroled--and sought housing--after that date. Applying the amended statute to such a person is not an impermissible retroactive application of the statute, because the last act or event that must occur before the mandatory residency restrictions come into play--the registered sex offender's securing of a residence on his or her release from custody on parole--occurs after the effective date of the statutory amendment [*In re E.J. (2010) 47 Cal. 4th 1258]* . See *Ch. 531, Statutes and Ordinances, § 531.71[1]*.

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§ 1.273 Taxes

Property Tax--Transfer of Base Year Value to Replacement Dwelling. In *Wunderlich v. County of Santa Cruz (2009) 178 Cal. App. 4th 680* , the court held, on an issue of first impression, that under *Rev. & Tax. Code § 69.5*, if a taxpayer applies to have the base-year value of an existing dwelling transferred to a replacement dwelling that consists of a newly built structure on land that the taxpayer purchased many years earlier (land that, therefore, has an artificially low base-year value because of Proposition 13), then for the purpose of determining whether the replacement dwelling meets the "equal or lesser value" test of the statute, both the land and the new structure must be valued together, as a unit, as of the date construction was completed. See *Ch. 540, Taxes and Assessments, § 540.53[5][d]*.

Taxes--Attorney-Client Privilege Extends to Taxpayer-Practitioner Communications. *Rev. & Tax Code §§ 7099.1* and *21028* [2009 Stats., ch. 411] extend the same statutory protections of confidentiality that apply to a communication between a taxpayer and an attorney [*see Evid. Code § 950 et seq.*] to a communication between a taxpayer and a federally authorized tax practitioner with respect to tax advice, to the extent that the communication would be considered a privileged communication if it were between a client and an attorney. The privilege is effective with regard to communications made on or after January 16, 2009, and, under previously enacted temporary versions of the governing code sections, also with regard to communications made from September 13, 2000, until January 16, 2009. See *Ch. 540, Taxes and Assessments, § 540.408*.

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§ 1.274 Torts

[1] Abuse of Minors and Elderly

Sexual Abuse Action Against Babysitter for Conduct of Husband Untimely Absent Allegations of Control. In *Joseph v. Johnson (2009) 178 Cal. App. 4th 1404* , the court of appeal held that a childhood sexual abuse action against a non-perpetrator spouse was not subject to the extended limitations period of Code Civ. Proc. § 34.1(b)(2) to the extent that the action was based on allegations that the defendant, while babysitting plaintiffs, left them alone with her husband, who committed the abuse, as plaintiffs had not alleged that the non-perpetrator spouse exercised the requisite control over her husband's actions. However, the court did allow plaintiffs to proceed based on allegations that the wife intentionally made plaintiffs available to her husband for lewd and lascivious purposes, allegations which, if proven, would support a finding that the wife had committed sexual abuse because she violated *Penal Code § 266j*. See *Ch. 5, Abuse of Minors and Elderly, § 5.13*.

Attorney's Litigation Conduct Did Not Support Finding of Elder Abuse. In *Gdowski v. Gdowski (2009) 175 Cal. App. 4th 128* , the court of appeal held that, under the Elder or Dependent Adult Abuse Statute, a finding of past abuse may not be predicated on the manner in which the elder or dependent adult is questioned by defendant's counsel during legal proceedings to ascertain whether defendant abused the adult in the past, even if counsel's conduct is rude or loud and the client does not take steps to prevent his or her attorney from utilizing such tactics. See *Ch. 5, Abuse of Minors and Elderly, § 5.33[1]*.

Elder Abuse Protective Order May Extend to Other Family Members. Under amended *Welf. & Inst. Code § 15657.03*, family or household members other than petitioner, or a conservator of the petitioner, may also be protected by an order under the Elder or Dependent Adult Abuse Statute, at the discretion of the court and on a showing of good cause. See *Ch. 5, Abuse of Minors and Elderly, § 5.71[2]*.

[2] Attorney Professional Liability

Specific Limitations Period for Attorney Malpractice Claims Against Criminal Defense Attorneys Added. Under amended *Code Civ. Proc. § 340.6*, if a plaintiff is required to establish his or her factual innocence for an underlying criminal charge as an element of his or her malpractice claim against a criminal defense attorney, the action must be

commenced within two years after the plaintiff achieves postconviction exoneration in the form of a final judicial disposition of the criminal case. See *Ch. 7, Attorney Professional Liability, § 76.170[1]*.

Class Attorneys Not Liable for Utilizing Class Settlement Notice Procedures Approved by Court. In *Martorana v. Marlin & Saltzman (2009) 175 Cal. App. 4th 685* , the court of appeal held that a member of a plaintiff class in a class action cannot sue class counsel for negligence on the grounds that counsel should have negotiated a different settlement notice procedure, at least when the trial court approved the final settlement and notice procedures after providing class members an opportunity to object. The court also held that class attorneys utilizing an approved procedure for providing mass notification of settlement claims procedures to class members have no additional duty to follow up with individual class members who do not respond before the deadline for doing so. See *Ch. 7, Attorney Professional Liability, § 76.135*.

[3] Automobiles

Contract Action Permitted Against Insurer for Failing to Preserve Evidence. In *Cooper v. State Farm Mutual Automobile Ins. Co. (2009) 177 Cal. App. 4th 876* , the court of appeal held that an insurance company had explicitly agreed to preserve an allegedly defective automobile tire after plaintiff had informed the company that the tire would be needed in a lawsuit against the manufacturer, and because plaintiff relied on the insurer's promise to preserve the tire, plaintiff had a cause of action based in contract against the insurance company when that company failed to preserve the tire. See *Ch. 81A, Automobiles: Investigation, § 81A.14*.

[4] Damages

Collateral Source Rule Applied to Preclude Reduction in Medical Expense Damages. In *Howell v. Hamilton Meats & Provisions, Inc. (2009) 179 Cal. App. 4th 686* , the court of appeal, applying the collateral source rule, held that when a plaintiff was contractually liable for the full amount that would normally have been charged for the health care services provided, the fact that the plaintiff's private health care insurer negotiated a lesser amount as payment in full for those services did not reduce a tortfeasor's liability for the full, reasonable value of the services. See *Ch. 177, Damages, §§ 177.45[3][b], 177.50[2][a]*.

Restoration Damages for Real Property Destruction Exceeded Property's Market Value; Double Damages Mandated for Negligence That Causes Fire That Damages Trees. In *Kelly v. CB&I Constructors, Inc. (2009) 179 Cal. App. 4th 442* , the court of appeal held that even though the pre-damage value of plaintiff's real property was estimated at no more than $1.8 million, restoration costs of almost $3 million were appropriate when that was the amount that would be required to allow plaintiff to make the property safe and habitable by his family, and the property was unmarketable in its current condition due to damage caused by the defendant. The court also held that the double damages provision of *Civ. Code § 3346* is applicable when damage to trees is caused by a fire that was the result of the defendant's negligent act, and that a person who was merely storing personal property on the premises is not entitled to damages for annoyance and discomfort. See *Ch. 177, Damages, § 177.47[5]*, and *Ch. 550, Trespass, §§ 550.21[3][c], [h]*.

Punitive Damages Award Reduced. In *Roby v. McKesson Corp. (2009) 47 Cal. 4th 686* , the California Supreme Court held that a 1-to-1 ratio between punitive and compensatory damages was the appropriate maximum in an employment harassment and termination case in which most of the actionable conduct was committed by a low-level supervisor and the conduct of the corporate employer in not responding to a single complaint brought by the employee was not very reprehensible. The Court also held that an employee who supervised four employees in a company that employed over 20,000 was not a managing agent for purposes of establishing a claim to punitive damages against the company. See *Ch. 177, Damages, § 177.51[10], [15]*.

Court Upholds Reduction in Medi-Cal Lien Amount. In *Lopez v. DaimlerChrysler Corp. (2009) 179 Cal. App. 4th*

1373 , the court of appeal upheld a reduction in the State's Medi-Cal lien amount when, after the State and the plaintiff could not agree on what portion of plaintiff's settlement amount should be allocated to past medical expenses, the trial court made an allocation based on the evidence provided by the plaintiff because the State failed to provide any evidence of its own in support of a different allocation. See *Ch. 177, Damages, § 177.54[1]*.

Attorney Lien Given Priority Over Medical Lien. In *Gilman v. Dalby (2009) 176 Cal. App. 4th 606* , the court of appeal held that, when both a medical lien and an attorney lien for fees and costs exist, in the event a recovery is insufficient to cover the liens, the attorney lien has priority over the medical lien regardless of which lien was created first. See *Ch. 177, Damages, § 177.54[5]*.

[5] Employer Liability

Homeowners Not Required to Comply With OSHA Safety Regulations During Home Remodeling Project. In *Cortez v. Abich* (2009) 177 Cal. App. 4th 261 , the court of appeal held that work on a home remodeling project that was undertaken by homeowners to enhance enjoyment of their own residence constituted "household domestic service" within the meaning of a statutory OSHA provision, thus excluding application of OSHA safety regulations. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.15[1]*.

Out-of-Town Business Conference Constituted Special Errand for Employer. In *Jeewarat v. Warner Bros. Entertainment Inc. (2009) 177 Cal. App. 4th 427* , the court of appeal held that an employee attending an out-of-town business conference authorized and paid for by the employer is on a special errand for the employer until the trip is completed, and if the employee intends to drive from the airport to his or her residence at the end of the trip, in the absence of any intervening personal deviations, the special errand continues until the employee arrives at home. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.16[4][b]*.

City Not Liable for Sexual Assault Committed by Firefighters. In *M.P. v. City of Sacramento (2009) 177 Cal. App. 4th 121* , the court of appeal held that an employer was not liable for a sexual assault committed by firefighters, even if the firefighters were on duty at the time of the assault, noting that the firefighters had no coercive authority over the victim and did not purport to detain the victim in the course of any investigation or even while performing any official duties. See *Ch. 248, Employer's Liability for Employee's Torts, § 248.17[2]*.

[6] Fraud and Deceit

Fraud Allegations Based on Misleading Advertising Campaign Need Not Include Allegations of Reliance on Specific Advertisements. In *Morgan v. AT&T Wireless Services, Inc. (2009) 177 Cal. App. 4th 1235* , the court of appeal held that if a fraud claim is based on a series of numerous misrepresentations, such as an advertising campaign that is alleged to be misleading, plaintiffs need not allege the specific advertisements the individual plaintiffs relied upon, and it is sufficient for the plaintiff to provide a representative selection of the advertisements or other statements to indicate the language upon which the claim is based. See *Ch. 269, Fraud and Deceit, § 269.91[4]*.

[7] Games, Sports, and Athletics

Ranch Owners Not Liable to Social Guest Injured While Riding Horse. In *Levinson v. Owens (2009) 176 Cal. App. 4th 1534* , the court of appeal held that the primary assumption of risk doctrine provided a complete defense to the owners of a cattle ranch who had invited friends to their ranch for a barbecue and one guest who asked to ride one of their horses and assured the owners that she knew how to ride was injured when thrown by the horse, who had no history of problems with riders. See *Ch. 273, Games, Sports, and Athletics, § 273.33[4][b]*.

[8] Libel and Slander

Judicial Privilege May Be Unavailable When Application of Privilege Would Defeat Other Statutory Interests.

The judicial privilege of *Civ. Code § 47(b)* may not apply when another statute specifically prohibits the conduct alleged to be protected by the privilege, at least when applying the privilege would defeat the purposes of the other statute. In *Cabral v. Martins (2009) 177 Cal. App. 4th 471* , the court of appeal held that application of the litigation privilege to attorneys' conduct in representing clients in probate proceedings would not defeat the purposes of the child support evasion statutes, *Civ. Code §§ 1714.4, 1714.41*. By contrast, in *Komarova v. National Credit Acceptance, Inc. (2009) 175 Cal. App. 4th 324* , the court of appeal held that the judicial privilege did not apply to conduct in violation of the Rosenthal Fair Debt Collection Practices Act, *Civ. Code § 1788 et seq.*, as application of the privilege would seriously undermine the protections afforded by that Act. See *Ch. 340, Libel and Slander, § 340.60[1]*.

[9] Malicious Prosecution

Malicious Prosecution Damages Cannot Include Attorney Fees Previously Awarded Under *Code Civ. Proc. § 425.16* in Underlying Lawsuit. In *Jackson v. Yarbray (2009) 179 Cal. App. 4th 75* , the court of appeal held that if a defendant in an underlying lawsuit was successful in whole or in part on a special motion to strike under *Code Civ. Proc. § 425.16*, and recovered attorney's fees and costs under that statute, that party may not recover as damages in a subsequent malicious prosecution action any attorney's fees and costs that were awarded and actually paid to him or her under the motion to strike for defending against the underlying action. See *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.18[1]*.

Dismissal of Malicious Prosecution Action After Adverse Appellate Result in Underlying Action Is Not Termination on Merits of Malicious Prosecution Action. In *Drummond v. Desmarais (2009) 176 Cal. App. 4th 439* , the court of appeal held that if a malicious prosecution action is stayed on the grounds that an appeal from the underlying judgment is pending, and the underlying appeal is then resolved adversely to the malicious prosecution plaintiff, a voluntary dismissal of the malicious prosecution action by that plaintiff in response to losing the underlying appeal is considered a technical disposition and not a termination on the merits for purposes of any subsequent malicious prosecution action that might be brought by the defendant in the first malicious prosecution action. See *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.14[3]*.

[10] Medical Malpractice

Arbitration Agreement With Hospital Unenforceable When Patient Dies Within 30 Days of Signing. In *Rodriguez v. Superior Court (2009) 176 Cal. App. 4th 1461* , the court of appeal held that in the context of an arbitration agreement between a patient and a hospital, if the patient dies within the 30-day period provided by *Code Civ. Proc. § 1295(c)* during which the patient has the right to rescind the agreement, the agreement to arbitrate will generally be unenforceable as the person signing the agreement did not have the full statutory period to reconsider whether to rescind. See *Ch. 295, Hospitals, § 295.14[9]*, and see *Ch. 415, Physicians: Medical Malpractice, § 415.51*.

[11] Mental Suffering and Emotional Distress

Veterinarian Not Liable for Pet Owner's Emotional Distress. In *McMahon v. Craig (2009) 176 Cal. App. 4th 1502* , the court of appeal held that although a pet owner may be emotionally involved in the pet's health and especially susceptible to emotional distress should the pet die, a veterinarian's medical care is directed solely at the pet and malpractice by a veterinarian will not support recovery by the pet owner for negligent or intentional infliction of emotional distress. See *Ch. 362, Mental Suffering and Emotional Distress, §§ 362.10[3][c], 362.11[6][d][iii]*.

[12] Negligence

Good Samaritan Statute Amended. Under amended *Health & Safety Code § 1799.102*, medical, law enforcement, and emergency personnel providing emergency medical or nonmedical care in good faith and not for compensation at the scene of an emergency are not liable for any civil damages resulting from any act or omission. Persons other than medical, law enforcement, and emergency personnel who render emergency medical or nonmedical care or assistance at

the scene of an emergency are not to be held liable for civil damages for any act or omission other than an act or omission that constitutes gross negligence or willful or wanton misconduct. See *Ch. 380, Negligence, § 380.32[2][d]*.

Determination of Liability Unresolved When Fact Issue Remained on Power Company's Control Over Placement of Light Pole. In *Laabs v. Southern California Edison Co. (2009) 175 Cal. App. 4th 1260* , the court of appeal, recognizing that a utility company can be held liable for the negligent placement of utility poles along a roadway, concluded that there was an unresolved issue of fact as to whether the defendant power company exercised sufficient control over the placement of the light pole hit by plaintiff's vehicle to impose a duty on the power company to place the pole in such a way as to minimize the risk of injury caused by collisions. See *Ch. 380, Negligence, § 380.30[4][c]*.

MySpace.com Not Liable for Failing to Control Sexual Predators. In *Doe II v. MySpace Inc. (2009) 175 Cal. App. 4th 561* , the court of appeal held that, because of the broad immunity provided to website operators under the federal Communications Decency Act of 1996, the Internet social networking site MySpace.com could not be held liable in negligence, gross negligence, or products liability for failing to implement controls on its site to prevent sexual predators from communicating with minors. See *Ch. 380, Negligence, § 380.32[4]*.

"Burning Man" Burn Victim Assumed Risk of Injury. In *Beninati v. Black Rock City, LLC (2009) 175 Cal. App. 4th 650* , the court of appeal held that the primary assumption of risk doctrine provided a complete defense to the possessors of land upon which a "Burning Man" festival was held when an experienced participant tripped and fell after voluntarily entering the aftermath of a large, man-shaped bonfire. See *Ch. 380, Negligence, § 380.172[4][c]*.

[13] Nuisance

Medical Marijuana Dispensary in Violation of Zoning Laws Was Nuisance Per Se. In *City of Claremont v. Kruse (2009) 177 Cal. App. 4th 1153* , the court of appeal upheld an injunction against a medical marijuana dispensary under the nuisance per se doctrine because operation of the dispensary violated the city's local zoning laws and the dispensary was being operated without a business license. See *Ch. 391, Nuisance, § 391.18*.

[14] Privacy

Physical Invasion of Privacy Statute Amended. Under amended *Civ. Code § 1708.8*, the physical invasion of privacy statute, the Legislature has imposed new requirements for liability under the statute based on the transmission, publication, broadcast, sale, offer for sale, or other use of a visual image, sound recording, or other physical impression that was taken or captured in violation of the statute. See *Ch. 429, Privacy, § 429.34A[1], [2]*.

Medical Information May Be Disclosed to Employee Welfare Benefit Plan. Under amended *Civ. Code § 56.10*, medical information may be disclosed under specified conditions to an employee welfare benefit plan to the extent that the plan provides medical care, and may also be disclosed to an entity contracting with the employee welfare benefit plan for billing, claims management, medical data processing, or other administrative services related to the provision of medical care. See *Ch. 429, Privacy, § 429.200[4]*.

Single-Publication Rule Applies to Appropriation Tort. In *Christoff v. Nestle USA, Inc. (2009) 47 Cal. 4th 468* , the California Supreme Court held that the single-publication rule developed in the context of defamation actions and as codified in *Civ. Code § 3425.3* applies to a cause of action for unauthorized commercial use of likeness. The Court also held that, in determining whether a cause of action has been filed within the limitations period, the delayed-discovery rule does not apply to publications widely disseminated to the general public, such as in books, magazines, and newspapers. See *Ch. 429, Privacy, § 429.35[1]*.

Employer Not Liable for Placing Hidden Camera in Office to Capture Evidence of After-Hours Misconduct. In

Hernandez v. Hillsides, Inc. (2009) 47 Cal. 4th 272 , the California Supreme Court held that while two women employed at a facility for neglected and abused children had shown an intrusion into their shared office space, a place in which they had a reasonable expectation of privacy, by showing that the facility director had placed a hidden camera and motion sensor in their office in order to capture video evidence of which employee had been using one of the computers in that office late at night to view Internet pornography, they could not demonstrate under the circumstances that the intrusion would be considered utterly unjustified and highly offensive to a reasonable person. See *Ch. 429, Privacy, § 429.39*.

[14A] Products Liability

FDCA Did Not Preempt Warning Claim Against Pharmaceutical Manufacturer. The U.S. Supreme Court held in its 6-3 opinion that FDA approval of a drug's label does not provide a complete defense to failure-to-warn claims [*Wyeth v. Levine (2009) 129 S. Ct. 1187]* . See *Ch. 460, Products Liability, §§ 460.52[2], 460.104[39]*.

Instruction on Standard for Fear-of-Cancer Damages Is Required in FELA Cases. The U.S. Supreme Court found reversible error in the failure to instruct a FELA jury on the legal standard for fear of cancer damages [*CSX Transp., Inc. v. Hensley (2009) 129 S. Ct. 2139]* . See *Ch. 460, Products Liability, §§ 460.33[1], 460.104[15]*.

Government Contractor Defense Applies to Non-Military Products. In an asbestos case, the Court of Appeal, First Appellate District ruled that the government contractor defense applies to non-military products, but does not necessarily immunize manufacturers from liability for failure-to-warn claims. Moreover, a finding of negligent failure to warn could not be reconciled with the jury's finding that boilers were not defective with respect to their warnings [*Oxford v. Foster Wheeler LLC (2009) 177 Cal. App. 4th 700]* . See *Ch. 460, Products Liability, §§ 460.11[10], 460.104[4], [23], 460.187[3]*.

Ninth Circuit Asks California Supreme Court to Revisit Discovery Rule. The Ninth Circuit certified questions asking whether (1) two separate physical injuries arising out of the same wrongdoing may be conceived of as invading two different primary rights, and (2) whether two separate physical injuries--both caused by a plaintiff's use of tobacco--may be considered "qualitatively different" for purpose of determining when the statute of limitations begins to run [*Pooshs v. Phillip Morris USA, Inc. (9th Cir. 2009) 561 F.3d 964]* . See *Ch. 460, Products Liability, §§ 460.31[2], 460.104[1]*.

Component Part Manufacturers Had No Duty to Warn Regarding Other Manufacturers' Products. Two appellate courts have ruled that manufacturers of ship engine components were not liable for failure to warn because they did not supply the asbestos-containing materials used in its products [*Merrill v. Leslie Controls, Inc. (2009) 179 Cal. App. 4th 262* ; *Taylor v. Elliott Turbomachinery Co. (2009) 171 Cal. App. 4th 564]* . See *Ch. 460, Products Liability, §§ 460.11[2], [6], 460.11[10], 460.104[6], [16]*.

Court Sheds Light on Sophisticated User Defense. Following remand by the California Supreme Court, the Court of Appeal ruled that the sophisticated user defense applies to a negligent failure-to-warn cause of action on a negligence per se theory, but not to a strict liability, design defect cause of action [*Johnson v. Honeywell Int'l Inc. (2009) 179 Cal. App. 4th 549]* . See *Ch. 460, Products Liability, §§ 460.11[8], [9], [10], 460.104[16]*.

[15] Public Entities and Officers

County Not Liable for Failing to Direct Water System Operator to Notify of Unsafe Water. In *Guzman v. County of Monterey (2009) 46 Cal. 4th 887* , the California Supreme Court held that the Safe Drinking Water Act and implementing regulations did not explicitly mandate that a county direct the operator of a water system to notify the public that its drinking water had impermissibly high levels of fluoride, and as such, the county could not be liable for failing to discharge a mandatory duty. On remand, however, the court of appeal held that the county had a mandatory

duty under *22 C.C.R. § 64256(e)* to read the water quality reports submitted by the water system operator. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.61[4]*.

County Immune for Design of Landslide Retaining Wall. In *Alvis v. County of Ventura (2009) 178 Cal. App. 4th 536* , the court of appeal held that a plaintiff suing a public entity cannot avoid the design immunity provided by *Gov. Code § 830.6* by arguing that the public entity was negligent in its maintenance of a public project if the "maintenance" proposed by the plaintiff is actually a change in the original design of the project. The court also held that design immunity applies even if the decision-maker who approved the design was not informed before the approval was made of every negative comment or concern expressed by every consultant or expert who reviewed the proposed plan, so long as evidence supports the reasonableness of the plan or design. Finally, the court held that when a county's approval of a landslide retaining wall considered and made allowances for drainage through the wall, plaintiff's change of condition argument failed when it was based on alleged inadequate drainage. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.85[2][a], [b]*.

Rules for Indemnification for Erroneous Criminal Conviction Amended. Under amended *Pen. Code §§ 4901* and *4903*, a person filing a claim seeking indemnification for a false criminal conviction must file the claim within two years after discharge, pardon, or release, and when determining whether the claimant intentionally contributed to the bringing about of his or her arrest or conviction, the fact finder is not to consider statements obtained from an involuntary false confession or involuntary plea. See *Ch. 464, Public Entities and Officers: Civil Claims Arising From Criminal Acts, §§ 465.62[2], 465.63[2][a]*.

Amendments Made to False Claims Act. The Legislature has amended the False Claims Act to make various changes, including adding additional definitions, expanding the definition of a claim, and mandating that a civil penalty be imposed on a person found liable for a violation. See *Ch. 468, Public Entities and Officers: False Claims Actions, §§ 468.21[2], [3], [4][i], [5], 468.22[2]*.

[16] Ships and Shipping

Seaman May Recover Punitive Damages for Failure to Pay Maintenance and Cure. In *Atlantic Sounding Co., Inc. v. Townsend (2009) 174 L. Ed. 2d 382* , the United States Supreme Court held that a seaman may recover punitive damages under general maritime law for a ship owner's willful and wanton failure to pay maintenance and cure, even if such damages might not be available in an action brought solely under the Jones Act. See *Ch. 522, Ships and Shipping, § 522.33[1]*.

[17] Tort Claims Act

Medical Malpractice Claim Against Public Entity Hospital Must Meet Three-Year Limitations Period of *Code Civ. Proc. § 340.5*. In *Roberts v. County of Los Angeles (2009) 175 Cal. App. 4th 474* , the court of appeal held that a plaintiff suing a public entity hospital for malpractice must meet the three-year limitations period of *Code Civ. Proc. § 340.5*, and failure to do so will provide a limitations defense for the defendant even if the plaintiff's action is otherwise timely under the Government Claims Act. See *Ch. 295, Hospitals, § 295.14[4][c], [7]*; see *Ch. 415, Physicians: Medical Malpractice, § 415.47[1]*; and see *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.42[1][a]*.

County Not Liable for Failing to Direct Water System Operator to Notify of Unsafe Water. In *Guzman v. County of Monterey (2009) 46 Cal. 4th 887* , the California Supreme Court held that the Safe Drinking Water Act and implementing regulations did not explicitly mandate that a county direct the operator of a water system to notify the public that its drinking water had impermissibly high levels of fluoride, and as such, the county could not be liable for failing to discharge a mandatory duty. See *Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.61[4]*.

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§ 1.275 Trial

Motions in Limine. Ch. 373, *Motions in Limine*, has been completely updated in this release with revised discussion, better organization, recent cases, and strategic and practice tips from Patrick Cathcart, a partner with Adorno, Yoss, Alvarado & Smith in Los Angeles. See Ch. 373, *Motions in Limine* .

Length of Juror Service. Coverage of *Cal. Rules of Ct., Rule 2.1002*, and *Gov. Code § 68550*, governing court systems implementation of restrictions on length of juror service, has been added in this release. See *Ch. 322, Juries and Jury Selection, § 322.34[2]*.

Trial Court Should Make Sure Inmate Can Participate by Phone. In *Jameson v. Desta (2009) 179 Cal. App. 4th 672* , an action by an indigent prison inmate against a physician for allegedly negligent medical care at a correctional facility, the court of appeal found that the trial court abused its discretion by choosing the drastic measure of dismissal based on the ground that the prisoner did not appear telephonically at a case management conference and a subsequent hearing on an order to show cause as to whether the case should be dismissed, without first determining that the prisoner had been afforded meaningful access to the courts and his failure to appear at the required hearings was willful. See Ch. 114, *Civil Rights: Prisoners' Rights* .

Amended Pleadings--Conforming to Proof at Trial. This chapter is updated with *Garcia v. Roberts (2009) 173 Cal. App. 4th 900* , which holds amendments to conform to proof should not be granted at trial if by permitting the amendment new and substantially different issues are introduced in the case or the rights of the adverse party prejudiced; amendments of pleadings to conform to the proofs should not be allowed when they raise new issues not included in the original pleadings and upon which the adverse party had no opportunity to defend. See *Ch. 21, Amended and Supplemental Pleadings, § 21.25*.

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§ 1.276 Unfair Competition

Attorney's Fees Not Recoverable Under Unfair Competition Statute. In *Davis v. Ford Motor Credit Co. LLC (2009) 179 Cal. App. 4th 581* , the court of appeal held that attorney's fees may not be recovered under the unfair competition statute even if the violation of another statute serves as a predicate for the unfair competition action and that underlying statute has a provision for the recovery of attorney's fees, at least when the plaintiff brings the action solely under the unfair competition statute rather than directly under the underlying statute. See *Ch. 565, Unfair Competition, § 565.34[5]*.

Pre-Discovery Trade Secret Statement Must Clearly Describe Trade Secrets Without Extensive Extraneous Material. In *Perlan Therapeutics, Inc. v. Superior Court (2009) 178 Cal. App. 4th 1333* , the court of appeal held that a trial court has the authority to reject a plaintiff's pre-discovery trade secret statement if the statement does not clearly identify all of the trade secrets at issue, or if it includes broad, catch-all language, extensive extraneous material, or voluminous attachments as a tactic to preserve an unrestricted, unilateral right to subsequently amend the statement to include trade secrets that were not envisioned when the initial statement was filed, although a plaintiff cannot be required at the pre-discovery stage to convince the trial court that the purported trade secrets are actually secret. See *Ch. 565, Unfair Competition, § 565.103[8]*.

Standing to Sue Under Unfair Competition Statute Not Transferable. In *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court (2009) 46 Cal. 4th 993* , the California Supreme Court held that an injured party who would have standing cannot assign the right to sue under the unfair competition statute to another party who does not otherwise meet the requirements for standing to sue. The Court also held that an association, such as a labor union, does not have standing to sue on behalf of its individual members when the association itself cannot meet the requirements for standing. See *Ch. 565, Unfair Competition, §§ 565.35[1], 565.231[4]*.

Employer May Not Prohibit Former Employees From Soliciting Customers Without Resort to Employer's Protected Customer Lists. In *The Retirement Group v. Galante (2009) 176 Cal. App. 4th 1226* , the court of appeal held that only the use of confidential trade secrets may be enjoined under the trade-secret exception to *Bus. & Prof. Code § 16600*, and an employer may not prohibit former employees from soliciting its customers through use of information obtained independently of the employer's protected customer lists. See *Ch. 565, Unfair Competition, §*

565.71[2][c].

Evidence That Will Support Finding of Bad-Faith Prosecution of Claim for Misappropriation of Trade Secret Clarified. In *FLIR Systems, Inc. v. Parrish (2009) 174 Cal. App. 4th 1270* , the court of appeal held that evidence that plaintiffs had an anticompetitive motive in filing a lawsuit for trade secret misappropriation will support a finding that the lawsuit was objectively specious, at least when there is no evidence of actual damages, misappropriation or threatened misappropriation, and no threat of imminent harm. The court also held that the denial of a defendant's motion for summary judgment will not preclude a later finding that the plaintiff's action was brought or maintained in bad faith. See *Ch. 565, Unfair Competition, § 565.103[7][c]*.

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§ 1.277 Workers' Compensation

Compensable Injuries--Employee's Race, Etc. The legislature has amended *Lab. Code § 3600* to provide that no personal relationship or personal connection will be deemed to exist between an employee and a third party based only on a determination that the third party injured or killed the employee solely because of the third party's personal beliefs relating to his or her perception of the employee's race, religious creed, color, national origin, age, gender, disability, sex, or sexual orientation. See *Ch. 577, Workers' Compensation, § 577.24[4]*.

Personal Physician--Employee's Predesignation. The legislature has amended *Lab. Code § 4600* to delete the December 31, 2009, repeal date for those provisions pertaining to an employee's predesignation of a personal physician. See *Ch. 577, Workers' Compensation, § 577.45[1][a]*.

Medical Treatment; Authorization. The legislature has enacted *Lab. Code § 4610.3* to provide that an employer that authorizes medical treatment may not rescind or modify that authorization after the medical treatment has been provided for any reason, including, but not limited to, the employer's subsequent determination that the physician who provided the treatment was not eligible to treat that injured employee. See *Ch. 577, Workers' Compensation § 577.45[1][c]*.

Temporary Disability --Credits-- Time to Claim. The court of appeal, in *J.C. Penney Co. v. Workers' Comp. Appeals Bd. (2009) 175 Cal. App. 4th 818* , has held that the employer's claim of credit against permanent disability payments was allowable only for temporary disability payments made after June 2006, which was the last date for which the employee's treating physician reported that he was temporarily disabled, so that any claim of credit for temporary disability payments made prior to that date was foreclosed by *Lab. Code § 4062(a)*. See *Ch. 577, Workers' Compensation, § 577.46[4]*.

Employment Relationships--Unemployment Insurance. The court of appeal, in *Messenger Courier Association of the Americas v. California Unemployment Insurance Appeals Board (2009) 175 Cal. App. 4th 1074* , has held that California courts and administrative agencies are all authorized to apply the comprehensive and overlapping tests regarding employment status stated in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* and that the reasoning of *Borello*, which arose in a workers' compensation context, applied equally to analysis of tax-related issues, such as employer contributions, requiring an employment determination. See *Ch. 577, Workers' Compensation, §*

577.22[3][c].

Third Party Actions--Settlements; Credit; California Insurance Guarantee Association. The court of appeal, in *Baur v. Workers' Comp. Appeals Bd. (2009) 176 Cal. App. 4th 1260* , has held that, pursuant to *Lab. Code § 3861*, an employer was entitled to credit against future workers' compensation benefits to be paid to an employee in the amount of the net settlement of the employee's action against a third-party tortfeasor, paid to the employee by CIGA. See *Ch. 577, Workers' Compensation, § 577.335[4][a]*.

Third Party Actions --Insurance-- Medical Payments; Reimbursement-- *Attorney's Fees.* *The Supreme Court, in 21st Century Insurance Co. v. Superior Court of San Diego County; Silvia Quintana, Real Party in Interest (2009) 47 Cal. 4th 511* , has held that, although the made-whole rule applies in the medical payments insurance context, and the insured must be made whole as to all damages proximately caused by the injury, liability for attorney's fees is not included under the made-whole rule, but is instead subject to the equitable apportionment rule. See *Ch. 577, Workers' Compensation, § 577.335[3][b][ii]*.

Vocational Rehabilitation--Sunsetting. The Appeals Board en banc in *Weiner v. Ralphs Co.* (2009) *74 Cal. Comp. Cases 958 (Appeals Board en banc opinion)* has held that, even if the Board assumed that some vocational rehabilitation maintenance allowance was indisputably due to the employee prior to January 1, 2009, this does not mean that the employee's right to this vocational rehabilitation maintenance allowance had vested. See *Ch. 577, Workers' Compensation, § 577.45[2]*.

Vocational Rehabilitation--Sunsetting. The court of appeal, in *Beverly Hilton Hotel v. Workers' Comp. Appeals Bd. (2009) 176 Cal. App. 4th 1597* , has held that an October 2008 WCAB decision that affirmed the WCJ's January 2008 award of vocational rehabilitation benefits to an employee was not a "final" decision, so that the employee lost all rights to vocational rehabilitation benefits as of the January 1, 2009, repeal of *Lab. Code § 139.5*. See *Ch. 577, Workers' Compensation, § 577.45[2]*.

Injury AOE/COE--Going and Coming Rule--Special Mission Exception. The court of appeal, in *Jeewarat v. Warner Brothers Entertainment, Inc. (2009) 177 Cal. App. 4th 427* , has held that the fact that an employee coincidentally passed his office on his return route home from attendance at an out-of-town business conference that constituted a special mission did not mean that the special mission had terminated, since the employee did not stop at the office and intended to return home from the airport. See *Ch. 577, Workers' Compensation, § 577.24[6][b][ii]*.

Injury AOE/COE--Compensable Consequence Injuries--Medical Treatment. The court of appeal in *Esquivel v. W.C.A.B. (2009) 178 Cal. App. 4th 330* , has held that an employee who, upon leaving her mother's home where she had gone to visit, was injured while driving 136 miles to keep a medical appointment for treatment of her industrial injuries, had not suffered new compensable injuries because those injuries were sustained outside the reasonable geographic area of her employer's risk for incurring compensability liability for such injuries. See *Ch. 577, Workers' Compensation, § 577.24[6][a]*.

Permanent Disability--AMA *Guides*; 2005 Permanent Disability Rating Schedule. The Appeals Board en banc, in *Almaraz v. Environmental Recovery Services*; *Guzman v. Milpitas Unified School District* (2009) *74 Cal. Comp. Cases 1084 (Appeals Board en banc opinion) , pet. for writ of rev. filed sub nom. Milpitas Unified School District v. W.C.A.B. (Guzman)* 10/16/2009, has specifically rejected the "inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability" standard set forth in its previous en banc opinion. See *Ch. 577, Workers' Compensation, § 577.01*.

Permanent Disability--2005 Permanent Disability Rating Schedule--Diminished Future Earning Capacity. The Appeals Board en banc, in *Ogilvie v. City and County of San Francisco* (2009) *74 Cal. Comp. Cases 1127 (Appeals Board en banc opinion) , pet. for writ of rev. filed* 10/7/2009, has held that any individualized diminished future earning

capacity adjustment factor must be consistent with *Lab. Code § 4660(b)(2)*, the RAND data to which it refers, and the numeric formula adopted by the Administrative Director in the 2005 Schedule. See *Ch. 577, Workers' Compensation, § 577.01*.

Death Benefits--Decedent's Estate. The court of appeal, in *City of Los Angeles v. Workers' Comp. Appeals Bd. (2009) 179 Cal. App. 4th 134* , has held that, because the employer had paid a deceased employee's mother/heir death benefits pursuant to *Lab. Code § 4702(a)(6)(B)*, before ceasing such payments following the decision in *Six Flags, Inc. v. W.C.A.B.* that declared that statute unconstitutional, the Death Without Dependents Unit was not entitled to be paid any death benefit. See *Ch. 577, Workers' Compensation, § 577.13[2][b]*.

Discrimination--*Labor Code § 132a*. The court of appeal, in *Gelson's Markets v. Workers' Comp. Appeals Bd. (2009) 179 Cal. App. 4th 201* , has held that an employee did not make a prima facie showing of discrimination in violation of *Lab. Code § 132a* when the reports and releases to return to work from the treating physician and the agreed medical evaluator received by the employer were unclear and ambiguous regarding the employee's ability to return to his usual and customary duties. See *Ch. 577, Workers' Compensation, § 577.18[1]*.

Medical Treatment--Utilization Review--Spinal Surgery. The Appeals Board en banc in *Cervantes v. El Aguila Food Products, Inc.* (2009) 74 Cal. Comp. Cases 1336 (Appeals Board en banc opinion) has elucidated the procedures and timelines governing objections to a treating physician's recommendation for spinal surgery contained in *Lab. Code §§ 4610* and *4062* and *8* Cal. Code Reg. §§ 9788.1, 9788.11, and 9792.6(o). See *Ch. 577, Workers' Compensation, § 577.46[4]*.

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Scope

By

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§ 1.300 Electronic Discovery

[1] Importance of Electronic Evidence in Modern Law Practice

The explosion of data in the Information Age has changed the face of litigation. In the past, cases were often built on eyewitness accounts, personal recollection, and credibility. Documents always have been important, but "smoking gun" evidence was difficult to locate manually (among mountains of paper files)--or simply wasn't written down.

Litigation is different today. Juries are now conditioned to *expect* "smoking gun" evidence. This evidence is often found in the growing mass of e-mail, video, text messages, online commentary, instant messages, and presentations, electronically recorded and stored--somewhere. Electronic information often takes center stage when a dispute arises. "A picture is worth a thousand words." So is an incriminatory e-mail.

Electronically stored information ("ESI") is at issue in almost every case. Information stored on such devices as cell phones, blackberries, computers, computer networks, and voicemail systems is prevalent. It is difficult to imagine a case in which, at a minimum, early discussions to ascertain whether ESI is at issue would not be appropriate--and these discussions must take place at the earliest possible time to insure that ESI is not lost due to the normal functioning of the devices described above. All practitioners should make it a routine practice to identify these issues at the outset of discovery. In the rare case in which ESI is not at issue, nothing will be lost aside from a short letter and a brief amount of time spent confirming that ESI is not at issue. Such cases, however, will be the exception; the rule is that ESI will almost always be at issue, and a practitioner who ignores this reality does so at her own peril, both in terms of seeking information from an adversary *and* in insuring that she has taken appropriate steps in relation to her own client.

[2] Need for Regulation of Electronic Discovery

In the past few years a pressing need has arisen to manage the discovery demands created by all this electronic data. Counsel need a common set of rules. Judges need uniform guidelines for resolving electronic discovery issues that now appear regularly in their courtrooms.

The general federal and state discovery rules simply were not specific enough to provide detailed guidance on the handling of ESI discovery matters, and did not deal effectively with some of the unique issues that typically arise in

e-discovery. Until 2006, the Federal Rules of Civil Procedure did not address issues relating to ESI, and the law governing such matters was developed through case law. Similarly, until 2009, California had virtually no statutes or rules addressing ESI.

In 2006, the Federal Rules of Civil Procedure were amended to explicitly deal with issues relating to ESI. These changes were made due to a recognition that while existing rules provided a rough framework to deal with the issues presented by ESI, that was all that was provided. There was little uniformity in the application of these rules, and both courts and litigants demanded that the system provide clearer guidance--especially given the draconian consequences which could follow from the failure to preserve data in anticipation of, or during litigation. The amendments to the Federal Rules of Civil Procedure were made with these concerns in mind.

Over the last few years, a number of states also amended their rules of procedure to address issues concerning ESI. In addition, the Uniform Law Commission established model e-discovery rules. Many states followed the approach of the Federal Rules, others were more consistent with the Uniform Law Commission's model rules, while others blended the two.

California, however--the home of Silicon Valley and the seventh largest economy in the world, with some of the world's most active courts both in the state and federal system--took no action. For that reason, courts and litigants tried, with results that varied throughout the state, to apply the general principles governing discovery as set forth in the Discovery Act to ESI issues. There was little consistency, as decisions were often made based upon the familiarity (or lack thereof) of a particular judicial officer with ESI issues. The same lack of uniformity which prompted the amendments to the Federal Rules of Civil Procedure exists in California, and courts and litigants had no ability to conform their conduct with a clear set of rules because there was none.

[3] The Federal Rules of Civil Procedure

The 2006 amendments to the Federal Rules of Civil Procedure, which became effective December 1, 2006, address ESI in the following ways:

- Issues relating to electronic document maintenance, preservation, and production are to be discussed at the conference of parties [Fed. R. *Civ. Proc. 26(f)(3)(C)*].

- A party serving a request to produce documents or information "may specify the form or forms in which electronically stored information is to be produced" [Fed. R. *Civ. Proc. 34(b)(1)(C)*].

- A party responding to such a request may "state an objection to a requested form for producing electronically stored information," and if the responding party objects to the requested form or if no form was specified in the request, "the [responding] party must state the form or forms it intends to use" [Fed. R. *Civ. Proc. 34(b)(2)(D)*].

- The foregoing provisions must be read in conjunction with Fed. R. *Civ. Proc. 34(b)(2)(E)(ii)* and *(iii)*, which provide that if the request does not specify the form of production, a party "must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms (34(b)(2)(E)(ii)) and that a "party need not produce the same electronically stored information in more than one form" [Fed R. *Civ. Proc. 34(b)(2)(E)(iii)*].

- A "safe harbor" is created which provides that absent exceptional circumstances, a court may not impose sanctions on a party for evidence lost due to routine, good-faith operation of an electronic information system [Fed. R. *Civ. Proc. 37(f)*]. The Advisory Committee Note to this Rule explains that the rule is intended to prevent a party from permitting electronic systems to destroy evidence after a

party knows of actual or potential litigation.

The Federal Rules also provide a "claw back" provision that protects a party against claims of waiver when privileged materials are unintentionally produced as part of an electronic production [*Fed. Rule Civ. Proc. Rule 26(b)(5)*]. This is a reasonable response to the fact that extraordinarily large productions of electronic information make it difficult to perform a traditional privilege review before production without unduly delaying production. This change was incorporated into prior amendments to the Federal Rules of Civil Procedure, and is also reflected in newly amended Fed. R. *Evid. 502*.

The relevant Federal Rules are reproduced in Appendix F, *below*.

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PART VIII. California E-Discovery: Analysis of the 2009 Legislation and Rules

1-1 California Forms of Pleading and Practice--Annotated § 1.302

§ 1.302 California Law Governing Electronic Discovery

[1] Prior Law

The general law concerning discovery in California primarily resides in the provisions of the Civil Discovery Act of 1986, presently codified in *Code Civ. Proc. §§ 2016 et seq.* These provisions provide general rules and principles governing discovery in civil cases in California, but for the most part do not explicitly address issues relating to ESI. One of the few exceptions to this is *Code Civ. Proc. §§ 2017.710-2017.740* (Chapter 3, relating to "Use of Technology in Conducting Discovery in a Complex Case"), which was added to the Discovery Act in 2004.

Cases which addressed issues of ESI under California law may be viewed as simply applying the general principles of California discovery law rather than creating new rules unique to ESI. For example, in *Electronic Funds Solutions v. Murphy (2005) 134 Cal. App. 4th 1161, 36 Cal. Rptr. 3d 663* , terminating discovery sanctions were affirmed after a party had "wiped" computer hard drives after production of the computer had drives had been ordered. The result is not substantively different from what would have resulted had paper documents been destroyed after an order to produce the files had been issued.

[2] Development of Judicial Council Proposal

The California Judicial Council Rules and Projects Committee on Electronic Discovery (the "Committee") first circulated a proposal for electronic discovery in spring, 2006. Those proposed changes would have only amended Rule 212 of the California Rules of Court (on civil case management). However, the Committee withdrew the 2006 proposal out of concern that more comprehensive changes were needed to the framework of the Code of Civil Procedure.

[3] Passage of the 2009 Electronic Discovery Act

The Committee developed a new proposal after working with members of attorney organizations. The new proposal involved various amendments to the Civil Discovery Act [*Code Civ. Proc. § 2016.010 et seq.*], along with supporting changes in civil case management rules in the California Rules of Court.

In January, 2008 the Judicial Council Rules and Projects Committee on Electronic Discovery circulated the first version

of the new proposal for public comment. Thereafter, the Committee evaluated those comments and made final changes. The proposal was unanimously approved by the Judicial Council on April 25, 2008. The legislative changes were introduced in the California Legislature shortly thereafter as AB 926, with the Judicial Council as co-sponsor of the bill along with the Consumer Attorneys of California and the California Defense Counsel. AB 926 was approved unanimously by both houses of the legislature and sent to enrollment. It was expected that the bill would be signed prior to expiration of the legislative session, with the changes going into effect on January 1, 2009. Governor Schwarzenegger, however, vetoed this bill on September 27, 2008, along with many others, as part of the fallout from the protracted budget crisis which took up much of the summer and fall of 2008.

The bill was reintroduced in 2009 as AB 5, in essentially identical form. Due to the importance of the topic and the immediate need for statewide rules in the area [*see* § 1, *above*], the 2009 version was designated as an urgency measure. The bill again passed both houses of the legislature unanimously, and this time was signed by Governor Schwarzenegger [Stats. 2009 ch. 5]. The legislation, known as the Electronic Discovery Act [Stats. 2009 ch. 5, § 1], became effective on June 29, 2009, as an urgency measure, "[i]n order to eliminate uncertainty and confusion regarding the discovery of electronically stored information, and thereby minimize unnecessary and costly litigation that adversely impacts access to the courts" [Stats. 2009 ch. 5, § 23].

Conforming amendments to *Cal. Rules of Court, Rule 3.724*, establishing the duty of the parties to meet and confer regarding issues relating to the discovery of electronically stored information, were adopted by the California Judicial Council, effective August 14, 2009 [*see Cal. Rules of Court, Rule 3.724(8)*, discussed in § 5, *below*].

[4] Basic Features of New Statutes and Rules

Production of electronic documents involves important considerations of subject matter, accessibility, and cost-benefit analysis. The obligation to identify and produce certain electronic documents is spelled out with particularity in the new electronic discovery rules, as well as in the broader Civil Discovery Act itself.

The new California Electronic Discovery Act and its conforming rules (referred to collectively in this analysis as the "California rules") are largely based on the Uniform Rules Relating to Discovery of Electronically Stored Information ("*Uniform Rules*") issued by the National Conference of Commissioners on Uniform State Laws ("NCCUSL").

The new California rules were carefully developed by the Judicial Council to operate *within the basic framework of existing California civil discovery law*. Because California civil discovery law is organically different from federal law, there are differences between the California rules and the Federal Rules of Civil Procedure [*see* § 2[5], *below*]. However, there are also many similarities, as will be discussed below.

This commentary primarily addresses core subjects of the proposed California Rules for electronic discovery:

- The *scope* and frequency of production [*see* § 3, *below*].
- Document *preservation* [*see* § 4, *below*].
- The *form* of production [*see* § 6, *below*].
- Maintaining *privilege* [*see* § 7, *below*].

These are perhaps the most important substantive areas of electronic discovery.

This commentary also addresses the new "meet and confer" rules that are important to the smooth functioning of electronic discovery rules in practice [*see* § 5, *below*].

Businesses and consumer advocates need to know about these changes and be ready to implement them when e-discovery situations arise in their practices.

[5] Comparison Between California Law and Federal Rules

California ESI law is similar to Federal law in many respects. The key differences are:

- California law defines ESI as stored information having "electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities." The Federal rules refer to information "stored in any medium" which can be "retrieved and examined."

- The Federal rules permit discovery of ESI that is "reasonably accessible," which some suggest is intended to preclude discovery of information which is not reasonably accessible due to burden. The California rules, in contrast, do not create a presumption that information which is not "reasonably accessible" is not subject to discovery, but instead provide for case-by-case examination of whether ESI which is not reasonably accessible should be produced in a particular case.

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§ 1.303 Scope and Frequency of Allowable Discovery

[1] Discovery Allowed if Relevant to Subject Matter of Action

The *scope* of allowable discovery under the Civil Discovery Act is as follows:

> § 2017.010. Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is *relevant to the subject matter involved* in the pending action or to the determination of any motion made in that action, *if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.*

Discovery is allowed if relevant to the *subject matter* of the pending action and the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. This section is not amended by the Electronic Discovery Act, and remains in effect.

Federal court practitioners will recognize the foregoing rule as the broader standard of discovery used in federal court prior to 2000. However, changes to FRCP Rule 26(b)(1) in the 2000 amendments changed the subject matter of federal discovery from information relevant to the "subject matter involved" to information relevant to the "claims and defenses of the parties." The Federal Advisory Committee Notes state that the 2000 amendment "signals to the parties that they have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings" [192 F.R.D. at 389 (2000)].

This is an important difference in discovery practice in California state court, *irrespective* of electronic discovery. California Superior Court practitioners may seek discovery of matter relevant to the subject matter of the action, so long as it is reasonably calculated to lead to the discovery of admissible evidence.

Due consideration should be given to identification, preservation, collection and production of electronic documents in California state courts that are relevant to the *subject matter involved*, not just to the claims and defenses of the parties.

[2] Preservation Request and Litigation Holds

Conducting discovery of ESI should begin well before a request for production is served. Practitioners should contemplate sending a preservation letter to the opposing party along with the first documents served in a case. At the same, time, a letter setting forth preservation responsibilities should be sent to one's own client.

For plaintiffs, the preservation letter may be served with the summons and complaint or in some instances *before* an action is commenced. Defendants should send a preservation letter at an early point as well. While there may be some variations among practitioners, a preservation letter should advise an adversary of the general nature of the claims at issue in the case and advise of the duty to maintain and preserve documents and information relating to such claims, whether they be in hard copy or electronic form. Reference may be made to data having "electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities," and reference should also be made to devices including cell phones, blackberries, computers, laptop computers, servers, networks, backup tapes, and digital cameras. The letter should specifically advise an adversary that routine backup procedures should be suspended to the extent necessary to avoid deletion of material which may be subject to discovery.

See Appendix A for an example of a preservation letter.

[3] Conference of Counsel

Prior to the first case management conference, counsel must meet and confer to discuss whether there are particular ESI issues at issue in the case [*see Cal. Rules of Court, Rule 3.724*; *see* § 5, *below*]. If so, the parties should discuss how they propose to handle such issues including such key topics as preservation, form of production, the extent to which discoverable ESI is not "reasonably accessible," and whether there is ESI which a party will not search for potentially discoverable information.

Assertions that ESI is not "reasonably accessible" due to burden or for other reasons should be tested by seeking specifics as to how data is maintained and what steps are necessary to make such data accessible, given that the disputes over such matters are to be resolved by weighing the need for the information against the burdens posed by searching and producing the information.

[4] Requests for Production

Under the Electronic Discovery Act, *Code Civ. Proc. § 2031.010(a)* has been amended to state:

> § 2031.010(a). Any party may obtain discovery within the scope delimited [by Chapters 2 and 3] by inspecting, copying, testing or sampling...electronically stored information in the possession, custody, or control of any other party to the action.

This amendment clarifies that electronically stored information may be sought in discovery.

In serving discovery requests, the practitioner should specify the form of production which is desired. Those who use litigation database programs such as Summation or Concordance typically ask that electronic documents be produced as ".tiff files with load files." See Appendix B for a sample set of comprehensive instructions setting forth the manner in which ESI should be produced.

When the parties recognize that issues concerning ESI are present, it is often helpful to negotiate an ESI protocol. See Appendix C for a sample ESI protocol. If agreement cannot be reached, the parties may present the issue to the court for resolution.

[5] Testing and Sampling

The amendment to *Code Civ. Proc. § 2031.010(a)* also expands the methods of discovery beyond "inspecting" to also include "copying, testing or sampling." Sampling has become a very useful tool in federal court electronic discovery, and is often used to determine whether broader discovery should be sought or allowed from backup tapes and other legacy information. Through sampling, a requesting party is allowed to review production from a certain number of backup tapes for relevant information and, based on the result, may be allowed broader access to backup tapes and other information otherwise deemed "not reasonably accessible." This option will be available under the new California rules.

The Electronic Discovery Act has not incorporated a limitation that exists under the Federal rules. Specifically, the Advisory Committee Note to FRCP Rule 34(a) contains a limiting clarification on the scope of sampling which states:

> The addition of testing and sampling to federal rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

A similar provision apparently was considered by the Committee but is not contained in the California statute.

[6] Protective Orders

Code Civ. Proc. § 2031.060(a), relating to protective orders, has been amended to clarify that:

> § 2031.060(a). When an *inspection, copying, testing, or sampling* of documents...or *electronically stored information* has been demanded, the party to whom the demand has been directed, and any other party of affected person or organization, may promptly move for a protective order.

The amendments to *Code Civ. Proc. § 2031.060(a)* add the words "inspection, copying, testing or sampling" and add the words "electronically stored information." Otherwise, the code provision relating to protective orders remains as before--a *party resisting discovery may move for a protective order in lieu of production*.

The Electronic Discovery Act also added a new *Code Civ. Proc. § 2031.060(b)*, which provides as follows:

> § 2031.060(b). The *party* or affected person or organization *seeking a protective order* regarding the production, inspection, copying, testing, or sampling of electronically stored information on the basis that such information is *not reasonably accessible* because of undue burden or expense *bears the burden* of so demonstrating.

This new subsection clarifies that the party seeking a protective order on the grounds that the information sought is not reasonably accessible because of undue burden or expense bears the burden of proof.

The burden is similarly placed under the Federal Rules, once the discovery dispute is before the court. However, the way a discovery dispute is brought to attention of the court is different under the Federal Rules. In both systems, the party is required to respond to the discovery request fully and completely unless the responding party believes an objection is appropriate. If the responding party chooses to object rather than respond, the propounding party will have the obligation to bring a motion to compel, however, the burden remains with the responding party to establish the appropriateness of the objection.

Thus, under the Federal Rules a producing party "*need not provide*" information "*it identifies*" as being not reasonably accessible because of undue burden or expense. If a requesting party disagrees, it must bring a motion to compel. Alternatively, the responding party may move for a protective order in response to a discovery request [*Fed. Rules Civ. Proc., Rule 26(c)*]. Similarly, under the California Civil Discovery Act, a responding party may either object to the production, requiring the propounding party to move to compel, or may file a motion for a protective order [*Code Civ.*

Proc. § 2031.060(a)].

The California approach is an extension of the existing framework of the Civil Discovery Act. Moreover, the burden of production is consistent with Rule 6 of the *Uniform Rules* of the National Conference of Commissioners on Uniform State Laws, which provides:

> A party on which a request to produce electronically stored information has been served shall, in a timely manner, serve a response on the requesting party. The *response must state*, with respect to each item or category in the request *that inspection, copying, testing, or sampling of the information will be permitted as requested; or any objection to the request and the reasons for the objection*.

With its consensus view that any new e-discovery legislation needs to operate within the basic framework of California civil discovery law, and with the *Uniform Rules* as an overall guide, the Committee determined that production of electronic information should be based on the same standard as production of other documents and things.

[7] Production of Documents "Not Reasonably Accessible"

The amended protective order statute requires production of electronically stored information found by the court to be "not reasonably accessible" under some circumstances. New *Code Civ. Proc. § 2031.060(d)*, which is similar to the Federal Rules, provides:

> § 2031.060(d). If the party or affected person or organization from whom discovery of electronically stored information is sought establishes that the information is from a source that is not reasonably accessible because of undue burden or expense, the court may nonetheless order discovery if the requesting party shows *cause*.

The Committee note states that this provision is based on the NCCUSL Uniform Rules, Rule 8, subdivision (c); however, the Uniform Rules contain a specific *balancing test* rather than a *good cause* standard. The Uniform Rules test provides that the court may order the discovery of electronically stored information from sources deemed "not reasonably accessible" because of undue burden or expense if the party requesting discovery shows that the likely benefit of the proposed discovery outweighs its likely burden or expense, taking into account the following:

- Amount in controversy.
- Resources of the parties.
- Importance of the issues.
- Importance of the requested discovery in resolving the issues.

After seeking comments from the public as to whether a good cause standard or a version of the NCCUSL balancing test should be used in new *Code Civ. Proc. § 2031.060(d)*, the present proposal provides that "the court may ... order discovery if the demanding party shows good cause[.]"

Under the Electronic Discovery Act, new subsection *Code Civ. Proc. § 2031.060(e)* provides that if the court finds good cause for production of electronically stored information that is not reasonably accessible, it may set conditions for the discovery of the information, including allocation of the expense of discovery. A similar provision is found in the Federal Rules.

Another new subsection, *Code Civ. Proc. § 2031.210(d)*, provides that if a party objects to the discovery of

electronically stored information on the ground that it is from a source that is not reasonably accessible because of undue burden or expense and that the responding party will not search the source in the absence of an agreement with the demanding party or a court order, the responding party must identify in its response the types or categories of sources of electronically stored information that it asserts are not reasonably accessible. By so doing, the responding party preserves any objections it may have relating to that electronically stored information which it asserts is not readily accessible.

The purpose of this latter provision is to provide notice to a propounding party of what types of sources and locations are *not being searched* for responsive documents. This will permit the parties to meet and confer productively to either resolve the issue or present it to the court for resolution in a more productive manner. In the absence of this provision, it was feared that a party could hide the ball by objecting to discovery on the ground of undue burden; a propounding party would have no way of knowing what the contours of this objection were. For example, a party may object to searching ESI at all on the ground of burden. Such an objection ordinarily would not be reasonable; the burdens of searching various categories of ESI differ and a party should provide some specificity. Taken to its extreme, ESI resident on a computer without a power source might be called "not reasonably accessible." Of course, once power is supplied, the ESI would become reasonably accessible. On the other hand, a party which objects to searching archived backup tapes relating to computer systems which were replaced by the responding party years ago, and for which even putting the backup tapes in a searchable format would be expensive and burdensome, has stated a much more appropriate objection. Providing this type of identification of a category of ESI which will not be searched permits the propounding party to determine quickly which areas are worth pursuing and which are not. Particular objections are preserved for a simple reason: until such time as a responding party actually searches such a source for responsive information, there is typically no feasible way for the responding party to determine whether privileged material is implicated and to determine what, if any, privileges need be asserted.

[8] Frequency of Discovery

Another new subsection, *Code Civ. Proc. § 2031.060(f)*, allows the court to limit the frequency or extent of discovery of electronically stored information, *even from a source that is reasonably accessible*, if the court determines that one or more of the following conditions exist:

- It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive;
- The discovery sought is unreasonably cumulative or duplicative;
- The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
- The likely burden or expense outweighs the likely benefit, considering the amount in controversy, resources of the parties, importance of the issues and importance of the requested discovery in resolving the issues.

The Federal Rules contain a similar provision. This is a potentially challenging provision for attorneys unfamiliar with electronic discovery. A disciplined approach to discovery is typically required with electronic information. Some attorneys do not seriously focus on documents until later in the case, as trial approaches. Delay in pursuing documents creates the risk that a court may determine that ample opportunity to pursue discovery existed but was not sought, and that belated efforts therefore will not be permitted.

[9] Subpoenas to Nonparties

An area that is always of significant concern to businesses and individuals is subpoenas. People often have information relevant to cases in which they are not directly involved. Searching for, and producing, this information raises concerns of cost and disruption, as well as confidentiality. *Courts are much more likely to be solicitous of claims of burden asserted by non-parties than they might be when a party asserts burden.*

The Electronic Discovery Act addresses this issue in the context of electronic discovery by adding a new section to the Civil Discovery Act, *Code Civ. Proc. § 1985.8*, which is similar in many ways to the section governing production of electronic documents by a party to the litigation.

The parts of *Code Civ. Proc. § 1985.8* governing subpoenas that *are the same as production rules for parties* are as follows:

- A party serving a subpoena requiring production of electronically stored information must specify the form in which each type of information is to be produced.

- If a party responding to a subpoena objects to a specified form for producing electronic information, or if no form is specified, the responding party shall state in its response the form in which it intends to produce each type of information.

- Unless the parties otherwise agree or the court otherwise orders, if a subpoena does not specify form of electronic production, the subpoenaed party must produce the information in a form in which it is ordinarily maintained or in a form that is reasonably usable.

- The subpoenaed party need not produce the same electronically stored information in more than one form.

The parts of *Code Civ. Proc. § 1985.8* governing subpoenas that *differ from production rules for parties* are as follows:

- If necessary, the responding party at the reasonable expense of the requesting party must translate any data compilations included in the demand into reasonably usable form.

- A party serving a subpoena requiring production of electronically stored information must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.

- An order of the court requiring compliance with a subpoena must protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance.

- If a subpoenaed person notifies the subpoenaing party that electronically stored information produced pursuant to a subpoena is subject to a claim of privilege or of protection as attorney work product, the special "claw back" provisions of *Code Civ. Proc. § 2031.285*, discussed in § 7[2], *below*, are applicable.

These last three rules implement the common sense notion that parties involved in litigation should bear the expense of translating data compilations and should otherwise take reasonable steps to avoid imposing an undue burden on third parties.

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§ 1.304 Document Preservation Obligations

[1] Importance

Document preservation goes to the heart of electronic discovery. If documents are modified, overwritten, deleted, or destroyed, important evidence may be lost and the goals of discovery undermined. However, businesses need latitude to periodically destroy documents not part of reasonably anticipated or active litigation, and not otherwise subject to retention under Sarbanes-Oxley, HIPPA, etc. For example, most businesses maintain backup tapes of their computer systems for the purpose of disaster recovery. These backup tapes are usually overwritten on a regular basis, e.g., every 30 to 45 days. Voicemail systems, both traditional and cellular, tend to overwrite messages unless special steps to preserve messages are taken. Suspending these processes can cause disruption and expense.

[2] Client Notification

The practice of immediately notifying clients to preserve electronic information is already widespread in federal court as a matter of common law. The initial notification to clients about document preservation is no small matter and should be considered carefully by the practitioner. For example, if a client has a routine document destruction policy in place, *how much* of that policy must be suspended upon notice of a suit or claim? *How early* should potential document custodians and document collection categories be identified so that routine destruction of these documents is stopped?

Federal common law requires a party to cease destruction of "relevant" information upon knowledge that a claim or case is likely. In many cases this is prior to litigation actually being filed. Importantly, the party's legal counsel is also required to inform his or her client of this duty. Failure by counsel to do so has resulted in sanctions.

It remains to be seen how notification to clients of the duty to preserve documents will develop under California law. Even if the Civil Discovery Act required counsel to immediately notify clients of the duty to preserve, the question of *what should be in the notification letter* still remains. The full scope of preservation duties will likely develop under California as a matter of common law, as has occurred under federal law. However, it would be wise for practitioners to take appropriate steps when litigation is anticipated or initiated to insure that information likely to become the subject of discovery is not inadvertently lost or modified through routine business operations. As seen in the sample preservation letter in Appendix A, such obligations may appear onerous. Failure to take reasonable steps to preserve evidence, on the

other hand, may lead to severe consequences in proving or defending a case.

[3] Development of Common Law Preservation Obligations

Widely-followed case law defining a range of preservation obligations in *federal courts* is found in four published opinions from the Southern District of New York in *Zubulake v. USB Warburg.* The principal opinion on affirmative obligations is *Zubulake v. UBS Warburg LLC (S.D.N.Y 2003) 220 F.R.D. 212* . *Zubulake* has been followed by the Southern District of California in *Qualcomm Inc. v. Broadcom Corp.* (S.D. Cal. 2008) 2008 U.S. Dist. LEXIS 911 , and by the Central District of California in *Hous. Rights Ctr. v. Sterling (C.D. Cal. 2005) 2005 U.S. Dist. LEXIS 31872* .

Practitioners in California state courts are justifiably hesitant to cite federal sources in support of a California common law argument. California tends to finds its own way in legislation and judicial decisions, and cannot be expected to follow federal common law without good reason. Nevertheless, given the widespread acceptance of the *Zubulake* decisions, it seems likely that California common law regarding the document preservation duty may develop along similar lines.

The starting point in an analysis of California law is probably *Cedars-Sinai Med. Ctr. v. Superior Court (1998) 18 Cal. 4th 1* , in which the California Supreme Court declined to adopt a tort remedy for spoliation of evidence, deferring instead to the "potent" sanctions rules governing discovery under former *Code Civ. Proc*. § 2023 [*now see Code Civ. Proc. § 2023.010 et seq.*]. The California Supreme Court explained:

> [O]ur discovery laws provide a broad range of sanctions for conduct that amounts to a "misuse of the discovery process."
>
> *Section 2023 of the Code of Civil Procedure* gives examples of misuses of discovery... *Destroying evidence* in response to a discovery request *after litigation has commenced would surely be a misuse of discovery within the meaning of section 2023*.

See also *Electronic Funds Solutions, LLC v. Murphy (2005) 134 Cal. App. 4th 1161, 36 Cal. Rptr. 3d 663* , in which a California Court of Appeal affirmed a discovery sanction striking a defendant's answer for destruction of electronic evidence.

While neither of these California cases addresses the broader scope of the *affirmative duty to preserve*, the underlying principles are grounded in similar goals of substantive and procedural fairness. Ambiguity arises, however, from the fact that *Cedars-Sinai* and *Electronic Funds Solutions* arise from loss of evidence *after* litigation has been initiated and discovery served. Less clear is the obligation to preserve discoverable information prior to the commencement of litigation and service of discovery requests.

Given the increasing practice of counsel sending letters to opponents at the outset of litigation demanding document preservation, it seems inevitable that document preservation practices will receive increasing scrutiny in California state courts just as has occurred in federal courts. And given the broad range of sanctionable conduct, as suggested by the California Supreme Court in Cedars-Sinai Med. Ctr. v. Superior Court, *above,* document preservation duties may generate the kind of scrutiny no lawyer wants to be on the wrong side of.

[4] Safe Harbor for Inadvertent Destruction of ESI

Federal practitioners are familiar with the idea of a "safe harbor" provision, prohibiting sanctions in the event of inadvertent, *good faith* destruction of documents during the course of litigation. The Electronic Discovery Act contains a similar provision. *Code Civ. Proc. § 2031.060(i)* provides a safe harbor to parties and counsel for failure to provide electronically stored information that is "lost, damaged, altered, or overwritten as the result of the routine, good-faith operation of an electronic information system."

California state practitioners therefore can assume that good faith mistakes will not be deemed sanctionable conduct. However, the safe harbor defense will likely require a careful explanation of the mistake and why it was in "good faith." *Code Civ. Proc. § 2031.060(i)* states that "[t]his subdivision shall not be construed to alter any existing obligation to preserve discoverable information."

The "safe harbor" provision is developing in federal common law in a way that does not excuse negligence or material oversight [*see, e.g., Hous. Rights Ctr. v. Sterling (C.D. Cal. 2005) 2005 U.S. Dist. LEXIS 31872]* . Prudence suggests cautious expectations about relying too heavily on safe harbor protections.

[5] Duty to Preserve May Be Broader Than Duty to Produce

Finally, it is noteworthy that under federal common law the duty to preserve electronic information is broader than the duty to produce. Advisory Committee Notes to FRCP Rule 26 provide: "A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence."

This specific issue is not addressed in the new California rules or Judicial Council commentary. Again, prudence dictates caution about the scope of document preservation under California law. It seems likely that the duty to preserve will be interpreted to be broader than the duty to produce. For that reason, a preservation letter should be sent when litigation is anticipated or has commenced. This letter not only serves to advise the client of what steps are necessary in relation to discovery obligations, but may also become important if claims of loss of evidence or spoliation arise later in the case. In recent years, focus on document preservation issues has become a routine area of discovery, and parties seek to score points by establishing that their adversary took no steps to preserve important evidence--even when the party cannot point to any particular evidence which has been lost. A letter or memo to the client putting them on notice of their obligation to preserve ESI will not only serve to avoid this problem, but may also provide the attorney with protection should the client claim that they were not told of their obligations. No one wants these issues to arise for the first time at their client's deposition.

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§ 1.305 Meet and Confer Obligations

In addition to the Electronic Discovery Act itself, *California Rules of Court, Rule 3.724* has been amended to highlight important obligations of counsel to meet and confer regarding electronic discovery. Rule 3.724 generally requires the parties to meet and confer, in person or by telephone, no later than 30 calendar days before the date set for the initial case management conference (unless the court orders another time period), to consider specified issues [*Cal. Rules of Court, Rule 3.724*]. The amended version of the rule, effective August 14, 2009, specifically requires that the parties consider the following issues relating to e-discovery as part of their obligation to meet and confer [*Cal. Rules of Court, Rule 3.724(8)* (note that the proposed version of the amendment would have established a separate 45-day meet-and-confer rule for e-discovery, but that period was changed to 30 days in the final version to conform to the general meet-and-confer rule)]:

- Any issue relating to the *preservation* of discoverable electronically stored information.
- The *form or forms* in which information will be produced.
- The *time* within which the information will be produced.
- The *scope* of discovery of the information.
- The method for asserting or preserving *claims of privilege or attorney work product*, including whether such claims may be asserted after production.
- The method for asserting or preserving the *confidentiality, privacy, trade secrets*, or proprietary status of information relating to a party or persons not a party to the civil proceedings.
- How the *cost* of production of electronically stored information is to be allocated among the parties.
- *Any other issues* relating to the discovery of electronically stored information, including developing a proposed plan relating to the discovery of the information.

Meet and confer conferences smooth the issues of electronic discovery immensely. Many questions that counsel ask in the abstract about electronic discovery can, and typically are, dealt with successfully in conference.

While the outer boundaries of discovery need to be explored at times, most discovery of electronic information is focused on active data, readily accessible to most producing parties. Both parties can assist the process immensely by disclosing basic information about computer networks and storage that allow the other party to focus requests more intelligently.

Conversely, counsel who wait until the proverbial "last minute" to seriously address discovery may find themselves short on electronic documents and inadequately prepared for depositions, motions and trial.

Cal Rules of Court, Rule 3.728(13) provides that the court's case management order may contain "any additional orders that may be appropriate, including orders on matters listed in rules 3.724 and 3.727." This section provides authority for the court to include provisions relating to e-discovery in its case management order.

As experience in federal courts has shown, strong case management orders are of great value in facilitating electronic discovery. Proper focus on electronic discovery at the early phases of a case pays dividends as the case proceeds.

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1-1 California Forms of Pleading and Practice--Annotated § 1.306

§ 1.306 Form in Which Electronic Evidence Must Be Produced

[1] Production Obligations Under California Rules

The Electronic Discovery Act contains somewhat competing provisions governing the form of production. One sees this by comparing the rules for specifying the form of production in a request against the rules for objecting to the form of production in a response.

Code Civ. Proc. § 2031.030(a) has been amended to allow the *requesting party* to "*specify the form* in which each type of electronically stored information is to be produced." This provision suggests that the requesting party controls the form of production.

However, a new subsection, *Code Civ. Proc. § 2031.280(b)*, allows the *responding party* to *object to a specified form* for production and "*state in its response the form in which it intends to produce* each type of the information." This suggests that the responding party ultimately may control the form of production because if it does not agree with the form specified by the requesting party, it can simply object and specify the form in which it agrees to produce.

Another new subsection, *Code Civ. Proc. § 2031.280(c)*, provides that unless the parties agree or the court otherwise orders:

- The responding party must produce the information in a form in which it is ordinarily maintained or in a form that is reasonably usable if no production format is specified in the request, and

- A party need not produce the same electronically stored information in more than one form.

No default form of production is specified in the new rules.

If a dispute develops between the parties as to the form of production--if, for example, the responding party chooses to make a production in a format different from that which was requested and the propounding party is not pleased with the chosen form of production--it is in all parties' interest to promptly present the matter to the court *before* production

is made. Choosing the wrong format could entail great expense if the court orders a subsequent, alternative form of production. It is also possible that a court will refuse to order a new production due to cost concerns even if the court concludes that the responding party was wrong in refusing to produce in the format which was requested by the propounding party. As with many other areas of ESI, it is critical that the parties identify disputes, address them, and present them to the court for resolution where necessary before great expense is incurred.

[2] Native Form Versus "Reasonably Usable" Form

Whether or not a default production form is specified, we expect that debates over the form of production will reduce, in practice, to whether documents are produced in "native format" (including all metadata) or a "reasonably usable form" (not including metadata). Requesting counsel should always consider requesting documents in native format, and should always seek metadata. Because this is likely to be a disputed issue, it is once again imperative for counsel to address it at an early point of the case so that court intervention may be sought if necessary.

Metadata is the hidden information about a document that reveals many things that may be important to litigation, including: file and document history, date of creation, author, editors, dates of access, dates of modification and revision history.

Production in "native" format is almost always cheaper than production in other formats. However, because responding counsel resist producing metadata, the more common current practice is not to produce documents in native format, and instead to incur the additional expense to produce in some other form. In some cases, issues concerning metadata may be minor because of the nature of the case or the value of the case. In other cases, parties will pursue metadata because, for example, it may be critical to determine who accessed and read critical documents. Counsel should note that metadata *will not* be produced unless affirmative efforts are made to require its production. Attention must be paid to this issue at the earliest point of the discovery process, as metadata may be lost or altered in the absence of preservation, and metadata will not typically be produced unless specifically sought.

A form currently in vogue in federal and state court is to produce *electronic documents* in "*TIFF" format*, together with extracted text and a "load file" (computer instructions for loading the data), which can all be matched up and loaded into a litigation software package (such as Concordance or Summation) for review. Parties then agree to retain the original native documents, including metadata, for further possible review.

It is common practice to produce *databases* in *native format*. Because databases are constructed in "bits and pieces" of information, it is usually not feasible to print out a database in image format. Most databases can only be meaningfully accessed in native format using search commands such as SQL (search query language). This sometimes requires a reviewing party to obtain a software license from a third party vendor for viewing the database data.

It remains to be seen whether electronic images (TIFF or PDF) will continue to be the accepted standard for production of e-mails and other documents, or whether courts will require production in native format. This is a debate taking place in state and federal courts across the country and will likely continue in California state courts, as well, after adoption of the Electronic Discovery Act.

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1-1 California Forms of Pleading and Practice--Annotated § 1.307

§ 1.307 Inadvertent Production of Privileged Information

[1] Nature of the Problem

Inadvertent productions of privileged documents are not uncommon in the era of electronic discovery. When a party and reviewing counsel are producing hundreds of thousands of electronic files in one production, it is possible for privileged documents to slip through from time to time. Because of the volume of material which is produced, it is frequently impossible to perform a complete privilege review while still producing documents in a timely manner. The Federal Rules, and the new California law, both provide for a "claw back" as the only practical means of protecting privilege while permitting production of information in litigation [*see Fed. R. Civ. Proc., Rule 26(b)(5)*; *Code Civ. Proc. § 2031.285*].

It is not unusual for a document which is either marked "attorney-client privileged" on its face to be produced, or for an e-mail, memo, or letter to or from counsel, to be produced as part of a large production. It is vital that counsel for the requesting party be aware of the rules, and advise all paralegals or other staff of how to recognize such documents. Any such documents should immediately be segregated and notice provided to the responding party, so that the responding party can determine whether the production was intentional or inadvertent. No use of such documents should be made until the responding party has had a chance to express its position on the issue and the issue has been resolved between the parties or by the court.

[2] California "Claw Back" Rule

The Electronic Discovery Act deals with this problem by adding an entirely new section to the Civil Discovery Act, *Code Civ. Proc. § 2031.285*, which works like this:

- If privileged (or attorney work product protected) *electronically stored information* is discovered to have been produced, the party making the claim may give notice of the privilege claim and the basis for the claim.

- After being notified, the receiving party must "immediately sequester" the information and either return the information (and any copies) or, *within 30 days* present the information to the court

conditionally under seal for a determination of the claim. Until resolution, the receiving party is required to preserve the information and keep it confidential.

- Any receiving party is precluded from using or disclosing the specified information until the claim of privilege is resolved.

This is known as a "*claw back*" provision, since a party who inadvertently produces an electronic document can simply "claw" or take it back after production without regard to waiver issues.

[3] 30-Day Limitation

It is important that the receiving party move the court to address the privilege question *within 30 days*, or it will lose the ability to use that document [*Code Civ. Proc. § 2031.285(d)(1)*]. This is not a lot of time. And since document "claw backs" often occur during depositions, it is critical that deposing counsel not lose track of the 30-day filing period after the deposition is over.

[4] Obligations of Party Receiving Privileged Information

The new California provision discussed above will control inadvertent production insofar as *electronically stored information* is concerned. However it does *not* address inadvertent production of other documents and things and does *not* address any possible *affirmative obligations* a receiving party's counsel may have if he or she received inadvertently produced information that is obviously privileged.

In *Rico v. Mitsubishi Motors Corp. (2007) 42 Cal. 4th 807, 68 Cal. Rptr. 3d 758, 171 P.3d 1092* , the California Supreme Court addressed the affirmative duty of counsel who receive inadvertent productions that are obviously identifiable as confidential or privileged:

> When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as may be justified.

The new California rules for electronic discovery should be read in context of this duty spelled out by the California Supreme Court. It is not always the case that inadvertent productions are obvious. In fact, some companies seem to have an unspoken policy to include an attorney on many e-mails that are sensitive, but not necessarily privileged.

A good way to deal with the potential conflict in this issue will be to agree among counsel as part of the initial meet and confer conference precisely *how all forms* of privileged and confidential documents will be dealt with in discovery. Proposed new additions to *California Rules of Court, Rule 3.724* (discussed in § 5, *above*) require this.

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§ 1.308 Other LexisNexis References

For coverage of electronic discovery procedures in California, with checklists, *see* Matthew Bender(R) Practice Guide: California Civil Discovery, Ch. 5, *Discovery of Electronic Evidence* .

For a general guide to electronic discovery in Federal courts in California under the Federal Rules of Civil Procedure, *see* Matthew Bender(R) Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 23, *Methods of Discovery* , Part VII, *Discovery of Electronically Stored Information*, § 23.158 et seq.

For coverage of the revision of the Federal Rules of Court as they effect electronic discovery, *see* E-Discovery: Newly Amended Fed Rules of Civil Procedure; *see also* Moore's Federal Practice, Ch. 37A, *Discovery of Electronically Stored Information* .

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Appendix A Sample Preservation Letter

1-A California Forms of Pleading and Practice--Annotated Appendix A

Scope

The following form is a sample preservation letter directing an opposing party to preserve electronic evidence. For discussion of preservation letters, see § 3[1], *above*. A preservation letter should contain the provisions included in this sample.

SAMPLE:

You are hereby given notice to immediately take all steps necessary to prevent the destruction, loss, concealment, or alteration of any paper, document, or electronically stored information ("ESI") and other data or information generated by and/or stored on your computers and storage media (e.g., hard disks, floppy disks, backup tapes, etc.), and e-mail related to (1) _____ [*subject matter of lawsuit*]; (2) the events and causes of action described in Plaintiffs' Complaint; and (3) ESI and documents you may use to support any defenses you may claim to have in this action.

You should anticipate that much of the information subject to disclosure and responsive to discovery in this action is stored on your current or former computer systems and other media and devices (including personal digital or data assistants, voice-messaging or voice-mail systems, online repositories, and cell phones).

ESI should be afforded the broadest possible definition and includes, but is not limited to, all digital communications (e.g., e-mail, voice mail, instant messaging), word processed documents (e.g. Word and WordPerfect documents and drafts), spreadsheets and tables (e.g. Excel and Lotus 123 worksheets), accounting application data (such as QuickBooks, Money, or Peachtree), image and facsimile files (including PDF, TIFF, JPG, and GIF images), sound recordings (including WAV and MP3 files), video recordings, all databases, all contact and relationship management data, calendar and diary application data, online access data (including temporary, internet files, History, and Cookies), all presentations (including PowerPoint and Corel), all network access and server activity logs, all data created with the use of any Personal Data Assistant (PDA) such as Palm Pilot, HP Jornada, Cassiopeia, or other Windows-based or Pocket PC devices, all CAD files, and all back-up and archival files.

Adequate preservation of ESI requires more than simply refraining from efforts to destroy or dispose of such evidence. You must also intervene to prevent loss due to routine operations and employ proper techniques to safeguard all such evidence.

Because hard copies do not preserve electronic searchability or metadata, they are not an adequate substitute for ESI. If information exists in both electronic and paper form, you should preserve them both.

LITIGATION HOLD

You are requested to immediately initiate a litigation hold for potentially relevant ESI, documents, and tangible things, and to act diligently and in good faith to secure and audit compliance with that litigation hold. You are also requested to preserve and not destroy all passwords, decryption procedures (including, if necessary, the software to decrypt the files), network access codes, ID names, manuals, tutorials, written instructions, decompression or reconstruction software, and any and all other information and things necessary to access, view, and (if necessary) reconstruct any ESI. You should not pack, compress, purge, or dispose of any file or any part thereof.

You are further requested to immediately identify and modify or suspend features of your operations, information systems, and devices that, in routine operations, operate to cause the loss of documents, tangible items, or ESI. Examples of such features and operations include, but are not limited to, purging the contents of e-mail repositories by age, capacity, or other criteria; using data or media wiping, disposal, erasure, or encryption utilities or devices; overwriting, erasing, destroying, or discarding back-up media; re-assigning, re-imaging or disposing of systems, servers, devices, or media; running antivirus or other programs that alter metadata; using metadata stripper utilities; and destroying documents or any ESI by age or other criteria.

SERVERS

With respect to servers like those used to manage electronic mail and network storage, the entire contents of each user's network share and e-mail account should be preserved and not modified.

STORAGE

With respect to on-line storage and/or direct access storage devices attached to your mainframe computers and/or minicomputers, in addition to the above, you are not to modify or delete any ESI, "deleted" files, and/or file fragments existing on the date of this letter's delivery that contain potentially relevant information.

With regard to all electronic media used for off-line storage, including magnetic tapes and cartridges, optical media, electronic media, and other media or combinations of media containing potentially relevant information, you are requested to stop any activity which may result in the loss of any ESI, including rotation, destruction, overwriting and erasure in whole or in part. This request is intended to cover all media used for data or information storage in connection with your computer systems, including magnetic tapes and cartridges, magneto-optical disks, floppy diskettes, and all other media, whether used with personal computers, minicomputers, mainframes or other computers, and whether containing backup and/or archival ESI.

PERSONAL COMPUTERS

You should take immediate steps to preserve all ESI on all personal computers used by your officers, directors and employees, including all secretaries and assistants, that in any way relate to the [subject matter of action], and the events and causes of action described in the Complaint. As to fixed devices, (1) a true and correct copy is to be made of all such ESI, including all active files and completely restored versions of all deleted electronic files and file fragments; (2) full directory listings (including hidden files) for all directories and subdirectories (including hidden directories) on such fixed devices should be written; and (3) all such copies and listings are to be preserved until this litigation is ended. As to floppy diskettes, CDs, tapes, and other non-fixed media relating to this matter, they are to be collected and stored pending resolution of this litigation.

PORTABLE SYSTEMS

In addition to your immediate preservation of ESI, documents and tangible items in your business, on servers and workstations, you should also determine if any home or portable systems may contain potentially relevant data or information. To the extent that officers, board members, or employees have sent or received potentially relevant e-mails or created or reviewed potentially relevant documents away from the office, you must preserve the contents of systems, devices, and media used for these purposes (including not only potentially relevant data from portable and home computers, but also from portable thumb drives, CD-R discs, PDAs, smart phones, voice mailboxes, or other forms of ESI storage). Additionally, if any employees, officers, or directors used online or browser-based e-mail accounts or services to send or receive potentially relevant messages and attachments, the contents of these account mailboxes should be preserved.

EVIDENCE CREATED OR ACQUIRED IN THE FUTURE

With regard to documents, tangible things, and ESI that are created or come into your custody, possession, or control subsequent to the date of delivery of this letter, potentially relevant evidence is to be preserved. You should take all appropriate action to avoid destruction of potentially relevant evidence.

Please forward a copy of this letter to all persons and entities possessing or controlling potentially relevant evidence. Your obligation to preserve potentially relevant evidence is required by law.

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Appendix B Comprehensive Instructions for Manner of Production of ESI

1-B California Forms of Pleading and Practice--Annotated Appendix B

Scope

The following form is a sample set of instructions setting forth the manner in which ESI should be preserved in connection with requests for production. For discussion of the use of these instructions, see § 3[4], *above*.

SAMPLE:

When a request specifically seeks DOCUMENTS in electronic form, such DOCUMENTS shall be produced (i) with a load file suitable for loading the data into a litigation database that defines document breaks, attachments, metadata, and other information (identified below) and (ii) with a cross-reference file that facilitates the linking of the produced TIFF or native file with a litigation database; specifically, production to be as follows:

(a) Spreadsheets -- To be produced (i) as a native file, and (ii) with a load file suitable for linking it to a litigation support database that (for authentication) identifies the MD-5 hash value of each file.

(b) Standard Office File Forms (e.g. E-mails, Word Processing Documents, Presentations) -- To be produced (i) in TIFF format, and (ii) with metadata and text searchable information extracted from the native file and produced as fielded metadata. Family relationships among e-mail and attachments are to be maintained.

When any such DOCUMENTS cannot be provided in one of the above manners, as in the case of certain scheduling, accounting, contact management, and database programs (e.g. Primavera, MS Access, Oracle, Microsoft SQL Server), or if Plaintiffs and each Defendant otherwise agree, Plaintiffs and each Defendant will determine another acceptable electronic form for production.

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Appendix C Sample ESI Production Protocol

1-C California Forms of Pleading and Practice--Annotated Appendix C

Scope

The following form is a sample ESI protocol. In cases when the parties recognize that issues concerning ESI are present, it is often helpful to negotiate such a protocol. For discussion of the use of such a protocol, see § 3[4], *above*.

SAMPLE: ESI PRODUCTION PROTOCOL

1. **Obligation to Produce Electronically Stored Information.** The parties acknowledge and agree that to the extent they possess electronically stored information ("ESI") responsive to a document request, that ESI is within the scope of matters subject to discovery in this case.

2. **Load Files.** Except for ESI described in sections 3(b) and (c) below, ESI will be produced in electronic format, with files suitable for loading into a litigation support database. The load files will define document breaks, attachments and other information identified below.

(a) **Document Cross-Reference File.** The producing party will provide a cross-reference file that identifies the start and end of the document, its attachments and its corresponding metadata.

(b) **Cross-Reference or Linking File.** The producing party will also provide a cross-reference file that facilitates the linking of the produced image or native file with the litigation database. This cross-reference file will contain fields such as the unique document ID (*i.e.*, BegBates) and the file path of the corresponding image or native file. The producing party may provide this information either in a litigation database format or as a standard delimited ASCII text file.

3. **Categories of Production of ESI.** ESI will be produced as follows, depending on its classification.

(a) **Production of ESI as TIFF Images With Metadata and Extracted Text.** Documents created in standard office automation file formats (including but not limited to Microsoft Word or WordPerfect documents) and ESI that can practicably be converted into TIFF format will be produced as single-page TIFF Group IV images, with any available fielded metadata and text searchable information extracted from the native documents.

(i) **Bates Numbering.** The producing party will brand all TIFF images in the lower right-hand corner with its corresponding bates number, using a consistent font type and size. The Bates number must not obscure any part of the underlying image.

(ii) **File Names.** Image file names will be identical to the corresponding bates numbered images, with a ".tif" file extension.

(iii) **Confidentiality Endorsements.** The producing party will brand any confidentiality or similar endorsements in a corner of the TIFF image. Those endorsements must be in a consistent font type and size, and must not obscure any part of the underlying image or Bates number.

(iv) **Production of Extracted Full Text.** The producing party will provide extracted full text (*i.e.*, text extracted from ESI) for all material originating as ESI in a text file corresponding to a single page of a document. The full text file name will be composed of the Bates number of the associated document, with a ".txt" file extension. When a party is unable to produce extracted full text, it will provide an explanation of that inability with its document production.

(v) **Production of Metadata.** The producing party will provide the following metadata, as applicable, for all ESI: start bates, end bates, start attachment, end attachment, custodian or source, original file path, original file name, file type/file extension, MD-5 hash value, title, creation date, creation time, page count, last modification date, last modification time, and last saved by name.

(vi) **Metadata for E-Mail.** In addition to the metadata to be produced for all ESI, for all e-mail, the producing party will also produce the following as fielded metadata: subject, author, recipients, from, to, copyees, blind copyees, date sent, time sent, date received, time received, MD-5 hash value, attachment file name, begin attachment, and end attachment. Family relationships among e-mail and attachments will be maintained by ensuring that attachments immediately follow their parent e-mail, and setting the "begin attachment" and "end attachment" metadata fields appropriately.

(vii) **Explanation of Inability to Produce Metadata.** When a party is unable to produce metadata for a particular field, it will provide an explanation of that inability with its document production.

(viii) **Redaction.** If a file that originates in ESI needs to be redacted before production, the file will be rendered in TIFF, and the TIFF will be redacted and produced. However, to the extent that the text is searchable in the native format, the producing party will still provide searchable text for those portions of the document that have not been redacted.

(b) **Production of Native Format Documents That Are Impractical to Convert to TIFF.** ESI that is not practical to convert to TIFF may be produced using one of the two following methods, which method

will be subject to meet and confer between the parties.

(i) **Spreadsheets that are Impractical to Convert to TIFF.** ESI that is not practical to convert to TIFF (for example, spreadsheets) may be produced in electronic format suitable for loading to a litigation support database with links to the native files.

(A) **Identification**. ESI produced in native file format will be assigned a unique DocID number within the litigation database.

(B) **File Names.** File names will be identical to the DocID number, followed by the original file name and file extension.

(C) **Authentication.** The producing party will provide a litigation database load file with separately fielded data, which will contain, as one of the fields, the MD-5 hash value of each file produced in native format.

(ii) **ESI That is Impractical to Produce with Links to a Database.** The parties understand and acknowledge that certain categories of ESI are structurally complex and do not lend themselves to production as native format documents with links to a litigation database. For example, in some instances renaming and/or linking a native document comprised of subparts will render the document unusable. After meet and confer, the parties may agree to produce these types of documents in native form, accompanied with a bates number and MD-5 hash value, but separate from a litigation support database. In those instances, if a propounding party or its experts lack access to proprietary software needed to review the producing party's ESI in native format, the parties will meet and confer to obtain a resolution which allows that party to view the affected documents.

(iii) **Encrypted or Password-Protected ESI.** For any ESI that exists in encrypted format or is password-protected, the producing party will provide the propounding party a means to gain access to those native files (for example, by supplying passwords).

(c) **Reports in Lieu of Native Production.** If a party believes that it would be impractical to produce ESI in native format because of complexities associated with certain scheduling programs (such as Primavera), accounting systems, mapping systems, and/or other databases (such as MS Access, Oracle, and Microsoft SQL Server), it will so notify the propounding party and will inform the propounding party whether it has generated reports in the normal course of business using those programs or systems. In any such instance, the parties will meet and confer concerning the manner of production of those reports.

(d) **Production of Pictures/Images.** Any photographic images created and/or maintained in electronic format will be produced in that format.

4. **Production Media.** The producing party will use the appropriate electronic media (CD, DVD or hard drive) for its ESI production, and will cooperate in good faith to use the highest-capacity available media to minimize associated overhead. The producing party will label the physical media with the producing party, production date, media volume name, and document number range.

5. **Avoidance of Duplicate Production.** Each producing party will take all reasonable steps to reduce duplication of ESI. De-duplication will be performed within a custodian. The producing party will maintain references to all removed duplicate files.

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Appendix D California Statutes Governing E-Discovery (including 2009 changes)

1-D California Forms of Pleading and Practice--Annotated Appendix D

Scope

Appendix D contains the text of the principal California statutes relevant to the discovery of electronically stored information. It incorporates all codified legislative changes enacted in 2009 as part of the California Electronic Discovery Act [Stats. 2009 ch. 5], and includes relevant code sections that are discussed in this pamphlet even though they are unaffected by the 2009 legislation. The headings appearing in **boldface** type at the beginning of each code section are prepared by the publisher for convenience of the reader and do not form a part of the actual text of the section as enacted or amended by the legislature.

Immediately following each code section, after the designation **Leg.H.**, is a chronological list of all statutes affecting the section since its enactment. Language deleted by the 2009 legislative amendments is indicated by bracketed numbers (e.g., "[1]") in the section at the point where the deletion was made, with the deleted language appearing in small type following the section. Language added by the 2009 legislation is indicated in **boldface** type.

California Code of Civil Procedure

Synopsis:

Selected Provisions of the
Code of Civil Procedure

PART 4. MISCELLANEOUS PROVISIONS

Title 3. Of the Production of Evidence

Chapter 2. Means of Production
§ 1985.8. Subpoena--Electronically Stored Information; Access to Information by Party

Serving Subpoena.

Title 4. Civil Discovery Act

Chapter 1. General Provisions

§ 2016.020. Definitions.

Chapter 2. Scope of Discovery

Article 1. General Provisions

§ 2017.010. What Matters May Be Subject to Discovery.

§ 2017.020. When Court May Limit Scope of Discovery; Motion for Protective Order; Monetary Sanction.

Chapter 14. Inspection and Production of Documents, Tangible Things, Land, and Other Property

Article 1. Inspection Demand
§ 2031.010. Right to Discovery by Inspecting, Copying, Testing, or Sampling Documents, Tangible Things, Land or Other Property, and Electronically Stored Information.

§ 2031.020. Demand for Inspection, Copying, Testing, or Sampling by Defendant Authorized at Any Time; When Plaintiff May Make Demand for Inspection, Copying, Testing, or Sampling.

§ 2031.030. Format and Requirements for Demands for Inspection, Copying, Testing, or Sampling.

§ 2031.040. Service of Demand for Inspection, Copying, Testing, or Sampling.

§ 2031.050. When Supplemental Demand May Be Propounded.

§ 2031.060. Motion for Protective Order; What Protective Order May Provide; Denial of Protective Order; Monetary Sanction.

Article 2. Response to Inspection Demand

§ 2031.210. Nature and Format of Response to Demand for Inspection, Copying, Testing, or Sampling.

§ 2031.220. Statement Regarding Compliance in Whole or in Part.

§ 2031.230. Representation of Inability to Comply.

§ 2031.240. Statements Regarding Demand That Is Objectionable in Whole or in Part.

§ 2031.250. Signing of Response to Demand.

§ 2031.260. Time for Service of Response; Unlawful Detainer Action.

§ 2031.270. Extension of Date for Inspection or Time for Service of Response; Written Confirmation of Agreement.

§ 2031.280. Production of Documents--Form; Date Specified; Production of Electronically Stored Information; Translation; Expense.

§ 2031.285. Production of Electronically Stored Information--Claim of Privilege or of Protection as Attorney Work Product; Notification to Receiving Party; Receiving Party's Responsibilities; Preclusion From Using or Disclosing Specified Information; Resolution.

§ 2031.290. Retention of Demand for Inspection, Copying, Testing, or Sampling, Proof of Service, and Response by Demanding Party.

§ 2031.300. Effect of Failure to Serve Timely Response to Demand for Inspection, Copying, Testing, or Sampling; Motion for Order; Monetary and Other Sanctions.

§ 2031.310. Motion for Order Compelling Further Response; Grounds; Notice; Waiver; Monetary and Other Sanctions.

§ 2031.320. Motion for Order Compelling Compliance on Failure to Permit Inspection, Copying, Testing, or Sampling in Accordance With Response; Monetary and Other Sanctions.

Text:

PART 4
Miscellaneous Provisions

TITLE 3
OF THE PRODUCTION OF EVIDENCE

CHAPTER 2
MEANS OF PRODUCTION

§ 1985.8. Subpoena--Electronically Stored Information; Access to Information by Party Serving Subpoena.

(a) (1) A subpoena in a civil proceeding may require that electronically stored information, as defined in Section 2016.020, be produced and that the party serving the subpoena, or someone acting on the party's request, be permitted to inspect, copy, test, or sample the information.

(2) Any subpoena seeking electronically stored information shall comply with the requirements of this chapter.

(b) A party serving a subpoena requiring production of electronically stored information may specify the form or forms in which each type of information is to be produced.

(c) Unless the subpoenaing party and the subpoenaed party otherwise agree or the court otherwise orders, the following shall apply:

(1) If a subpoena requiring production of electronically stored information does not specify a form or forms for producing a type of electronically stored information, the person subpoenaed shall produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable.

(2) A subpoenaed person need not produce the same electronically stored information in more than one form.

(d) The subpoenaed person opposing the production, inspection, copying, testing, or sampling of electronically stored information on the basis that information is from a source that is not reasonably accessible because of undue burden or expense shall bear the burden of demonstrating that the information is from a source that is not reasonably accessible because of undue burden or expense.

(e) If the person from whom discovery of electronically stored information is subpoenaed establishes that the information is from a source that is not reasonably accessible because of undue burden or expense, the court may nonetheless order discovery if the subpoenaing party shows good cause, subject to any limitations imposed under subdivision (h).

(f) If the court finds good cause for the production of electronically stored information from a source that is not reasonably accessible, the court may set conditions for the discovery of the electronically stored information, including allocation of the expense of discovery.

(g) If necessary, the subpoenaed person, at the reasonable expense of the subpoenaing party, shall, through detection devices, translate any data compilations included in the subpoena into a reasonably usable form.

(h) The court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that any of the following conditions exists:

(1) It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive.

(2) The discovery sought is unreasonably cumulative or duplicative.

(3) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.

(4) The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.

(i) If a subpoenaed person notifies the subpoenaing party that electronically stored information produced pursuant to a subpoena is subject to a claim of privilege or of protection as attorney work product, as described in Section 2031.285, the provisions of Section 2031.285 shall apply.

(j) A party serving a subpoena requiring the production of electronically stored information shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.

(k) An order of the court requiring compliance with a subpoena issued under this section shall protect a person

who is neither a party nor a party's officer from undue burden or expense resulting from compliance.

(*l*) (1) Absent exceptional circumstances, the court shall not impose sanctions on a subpoenaed person or any attorney of a subpoenaed person for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.

(2) This subdivision shall not be construed to alter any obligation to preserve discoverable information. Leg.H. 2009 ch. 5 (AB 5) § 2, effective June 29, 2009.

TITLE 4
CIVIL DISCOVERY ACT

CHAPTER 1
GENERAL PROVISIONS

§ 2016.020. Definitions.

As used in this title:

(a) "Action" includes a civil action and a special proceeding of a civil nature.

(b) "Court" means the trial court in which the action is pending, unless otherwise specified.

(c) "Document" and "writing" mean a writing, as defined in *Section 250 of the Evidence Code*.

(d) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(e) "Electronically stored information" means information that is stored in an electronic medium. Leg.H. 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 3, effective June 29, 2009.

CHAPTER 2
SCOPE OF DISCOVERY

ARTICLE 1
General Provisions

§ 2017.010. What Matters May Be Subject to Discovery.

Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action. Discovery may be obtained of the identity and location of persons having knowledge of any discoverable matter, as well as of the existence, description, nature, custody, condition, and location of any document, tangible thing, or land or other property. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005.

§ 2017.020. When Court May Limit Scope of Discovery; Motion for Protective Order; Monetary Sanction.

(a) The court shall limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence. The court may make this determination pursuant to a motion for protective order by a party or other affected person. This motion shall be accompanied by a meet and confer declaration under Section 2016.040.

(b) The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005.

CHAPTER 14
INSPECTION AND PRODUCTION OF DOCUMENTS, TANGIBLE THINGS, LAND, AND OTHER PROPERTY

ARTICLE 1
Inspection Demand

§ 2031.010. Right to Discovery by Inspecting, Copying, Testing, or Sampling Documents, Tangible Things, Land or Other Property, and Electronically Stored Information.

(a) Any party may obtain discovery within the scope delimited by Chapters 2 (commencing with Section 2017.010) and 3 (commencing with Section 2017.710), and subject to the restrictions set forth in Chapter 5 (commencing with Section 2019.010), by inspecting**, copying, testing, or sampling** documents, tangible things, [1] land or other property [2]**, and electronically stored information** in the possession, custody, or control of any other party to the action.

(b) A party may demand that any other party produce and permit the party making the demand, or someone acting on that party's behalf, to inspect and to copy a document that is in the possession, custody, or control of the party on whom the demand is made.

(c) A party may demand that any other party produce and permit the party making the demand, or someone acting on that party's behalf, to inspect and to photograph, test, or sample any tangible things that are in the possession, custody, or control of the party on whom the demand is made.

(d) A party may demand that any other party allow the party making the demand, or someone acting on that party's behalf, to enter on any land or other property that is in the possession, custody, or control of the party on whom the demand is made, and to inspect and to measure, survey, photograph, test, or sample the land or other property, or any designated object or operation on it.

(e) A party may demand that any other party produce and permit the party making the demand, or someone acting on that party's behalf, to inspect, copy, test, or sample electronically stored information in the possession, custody, or control of the party on whom demand is made. Leg.H. 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 4, effective June 29, 2009.

§ 2031.010. 2009 Deletes. [1] and **[2]** that are

§ 2031.020. Demand for Inspection, Copying, Testing, or Sampling by Defendant Authorized at Any Time;

When Plaintiff May Make Demand for Inspection, Copying, Testing, or Sampling.

(a) A defendant may make a demand for inspection**, copying, testing, or sampling** without leave of court at any time.

(b) A plaintiff may make a demand for inspection**, copying, testing, or sampling** without leave of court at any time that is 10 days after the service of the summons on, or appearance by, the party to whom the demand is directed, whichever occurs first.

(c) Notwithstanding subdivision (b), in an unlawful detainer action or other proceeding under Chapter 4 (commencing with Section 1159) of Title 3 of Part 3, a plaintiff may make a demand for inspection**, copying, testing, or sampling** without leave of court at any time that is five days after service of the summons on, or appearance by, the party to whom the demand is directed, whichever occurs first.

(d) Notwithstanding subdivisions (b) and (c), on motion with or without notice, the court, for good cause shown, may grant leave to a plaintiff to make [1] **a** demand **for inspection, copying, testing, or sampling** at an earlier time. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005, 2007 ch. 113 (AB 1126) § 9, 2009 ch. 5 (AB 5) § 5, effective June 29, 2009.

§ 2031.020. 2009 Deletes. [1] an inspection

§ 2031.030. Format and Requirements for Demands for Inspection, Copying, Testing, or Sampling.

(a) **(1)** A party demanding [1] inspection**, copying, testing, or sampling** shall number each set of demands consecutively.

(2) A party demanding inspection, copying, testing, or sampling of electronically stored information may specify the form or forms in which each type of electronically stored information is to be produced.

(b) In the first paragraph immediately below the title of the case, there shall appear the identity of the demanding party, the set number, and the identity of the responding party.

(c) Each demand in a set shall be separately set forth, identified by number or letter, and shall do all of the following:

(1) Designate the documents, tangible things, [2] land or other property**, or electronically stored information** to be inspected**, copied, tested, or sampled** either by specifically describing each individual item or by reasonably particularizing each category of item.

(2) Specify a reasonable time for the inspection**, copying, testing, or sampling** that is at least 30 days after service of the demand, unless the court for good cause shown has granted leave to specify an earlier date. In an unlawful detainer action or other proceeding under Chapter 4 (commencing with Section 1159) of Title 3 of Part 3, the demand shall specify a reasonable time for the inspection**, copying, testing, or sampling** that is at least five days after service of the demand, unless the court, for good cause shown, has granted leave to specify an earlier date.

(3) Specify a reasonable place for making the inspection, copying, **testing, or sampling,** and performing any related activity.

(4) Specify any **inspection, copying, testing, sampling, or** related activity that is being demanded [3], as well as the manner in which that [4] activity will be performed, and whether that activity will permanently alter or destroy the item involved. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005, 2007 ch. 113 (AB 1126) § 10, 2009 ch. 5 (AB 5) § 6,

effective June 29, 2009.

§ 2031.030. 2009 Deletes. [1] an **[2]** or **[3]** in addition to an inspection and copying **[4]** related

§ 2031.040. Service of Demand for Inspection, Copying, Testing, or Sampling.

The party [1] **making a demand for** inspection**, copying, testing, or sampling** shall serve a copy of the [2] demand on the party to whom it is directed and on all other parties who have appeared in the action. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 7, effective June 29, 2009.

§ 2031.040. 2009 Deletes. [1] demanding an **[2]** inspection

§ 2031.050. When Supplemental Demand May Be Propounded.

(a) In addition to the [1] demands **for inspection, copying, testing, or sampling** permitted by this chapter, a party may propound a supplemental demand to inspect**, copy, test, or sample** any later acquired or discovered documents, tangible things, [2] land or other property [3]**, or electronically stored information** in the possession, custody, or control of the party on whom the demand is made.

(b) A party may propound a supplemental [4] demand **for inspection, copying, testing, or sampling** twice before the initial setting of a trial date, and, subject to the time limits on discovery proceedings and motions provided in Chapter 8 (commencing with Section 2024.010), once after the initial setting of a trial date.

(c) Notwithstanding subdivisions (a) and (b), on motion, for good cause shown, the court may grant leave to a party to propound an additional number of supplemental demands for inspection**, copying, testing, or sampling**. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 8, effective June 29, 2009.

§ 2031.050. 2009 Deletes. [1] inspection **[2]** or **[3]** that are **[4]** inspection

§ 2031.060. Motion for Protective Order; What Protective Order May Provide; Denial of Protective Order; Monetary Sanction.

(a) When an inspection**, copying, testing, or sampling** of documents, tangible things [1]**,** places**, or electronically stored information** has been demanded, the party to whom the demand has been directed, and any other party or affected person [2], may promptly move for a protective order. This motion shall be accompanied by a meet and confer declaration under Section 2016.040.

(b) The court, for good cause shown, may make any order that justice requires to protect any party or other [3] **person** from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense. This protective order may include, but is not limited to, one or more of the following directions:

(1) That all or some of the items or categories of items in the [4] demand need not be produced or made available at all.

(2) That the time specified in Section 2030.260 to respond to the set of [5] demands, or to a particular item or category in the set, be extended.

(3) That the place of production be other than that specified in the [6] demand.

(4) That the inspection**, copying, testing, or sampling** be made only on specified terms and conditions.

(5) That a trade secret or other confidential research, development, or commercial information not be disclosed, or be disclosed only to specified persons or only in a specified way.

(6) That the items produced be sealed and thereafter opened only on order of the court.

(c) **The party or affected person who seeks a protective order regarding the production, inspection, copying, testing, or sampling of electronically stored information on the basis that the information is from a source that is not reasonably accessible because of undue burden or expense shall bear the burden of demonstrating that the information is from a source that is not reasonably accessible because of undue burden or expense.**

(d) If the party or affected person from whom discovery of electronically stored information is sought establishes that the information is from a source that is not reasonably accessible because of undue burden or expense, the court may nonetheless order discovery if the demanding party shows good cause, subject to any limitations imposed under subdivision (f).

(e) If the court finds good cause for the production of electronically stored information from a source that is not reasonably accessible, the court may set conditions for the discovery of the electronically stored information, including allocation of the expense of discovery.

(f) The court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that any of the following conditions exist:

(1) It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive.

(2) The discovery sought is unreasonably cumulative or duplicative.

(3) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.

(4) The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.

(g) If the motion for a protective order is denied in whole or in part, the court may order that the party to whom the demand was directed provide or permit the discovery against which protection was sought on terms and conditions that are just.

[7] **(h) Except as provided in subdivision (i),** the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(i) (1) Notwithstanding subdivision (h), absent exceptional circumstances, the court shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.

(2) This subdivision shall not be construed to alter any obligation to preserve discoverable information. Leg.H. 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 9, effective June 29, 2009.

§ 2031.060. 2009 Deletes. [1] or **[2]** or organization **[3]** natural person or organization **[4]** inspection **[5]** inspection **[6]** inspection **[7]** (d)

ARTICLE 2
Response to Inspection Demand

§ 2031.210. Nature and Format of Response to Demand for Inspection, Copying, Testing, or Sampling.

(a) The party to whom [1] **a** demand **for inspection, copying, testing, or sampling** has been directed shall respond separately to each item or category of item by any of the following:

(1) A statement that the party will comply with the particular demand for inspection**, copying, testing, or sampling** by the date set for **the** inspection**, copying, testing, or sampling** pursuant to paragraph (2) of subdivision (c) of Section 2031.030 and any related activities.

(2) A representation that the party lacks the ability to comply with the demand for inspection**, copying, testing, or sampling** of a particular item or category of item.

(3) An objection to the particular demand **for inspection, copying, testing, or sampling**.

(b) In the first paragraph of the response immediately below the title of the case, there shall appear the identity of the responding party, the set number, and the identity of the demanding party.

(c) Each statement of compliance, each representation, and each objection in the response shall bear the same number and be in the same sequence as the corresponding item or category in the demand, but the text of that item or category need not be repeated.

(d) If a party objects to the discovery of electronically stored information on the grounds that it is from a source that is not reasonably accessible because of undue burden or expense and that the responding party will not search the source in the absence of an agreement with the demanding party or court order, the responding party shall identify in its response the types or categories of sources of electronically stored information that it asserts are not reasonably accessible. By objecting and identifying information of a type or category of source or sources that are not reasonably accessible, the responding party preserves any objections it may have relating to that electronically stored information. Leg.H. 2004 ch. 182 (AB 3081), operative July 1, 2005, 2007 ch. 738 (AB 1248) § 7, 2009 ch. 5 (AB 5) § 10, effective June 29, 2009.

§ 2031.210. 2009 Deletes. [1] an inspection

§ 2031.220. Statement Regarding Compliance in Whole or in Part.

A statement that the party to whom [1] **a** demand **for inspection, copying, testing, or sampling** has been directed will comply with the particular demand shall state that the production, inspection, **copying, testing, or sampling,** and related activity demanded**,** will be allowed either in whole or in part, and that all documents or things in the demanded category that are in the possession, custody, or control of that party and to which no objection is being made will be

included in the production. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 11, effective June 29, 2009.

§ 2031.220. 2009 Deletes. [1] an inspection

§ 2031.230. Representation of Inability to Comply.

A representation of inability to comply with the particular demand for inspection**, copying, testing, or sampling** shall affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand. This statement shall also specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party. The statement shall set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 12, effective June 29, 2009.

§ 2031.240. Statements Regarding Demand That Is Objectionable in Whole or in Part.

(a) If only part of an item or category of item in [1] **a** demand **for inspection, copying, testing, or sampling** is objectionable, the response shall contain a statement of compliance, or a representation of inability to comply with respect to the remainder of that item or category.

(b) If the responding party objects to the demand for inspection**, copying, testing, or sampling** of an item or category of item, the response shall do both of the following:

(1) Identify with particularity any document, tangible thing, [2] land**, or electronically stored information** falling within any category of item in the demand to which an objection is being made.

(2) Set forth clearly the extent of, and the specific ground for, the objection. If an objection is based on a claim of privilege, the particular privilege invoked shall be stated. If an objection is based on a claim that the information sought is protected work product under Chapter 4 (commencing with Section 2018.010), that claim shall be expressly asserted. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 13, effective June 29, 2009.

§ 2031.240. 2009 Deletes. [1] an inspection **[2]** or

§ 2031.250. Signing of Response to Demand.

(a) The party to whom the demand for inspection**, copying, testing, or sampling** is directed shall sign the response under oath unless the response contains only objections.

(b) If that party is a public or private corporation or a partnership or association or governmental agency, one of its officers or agents shall sign the response under oath on behalf of that party. If the officer or agent signing the response on behalf of that party is an attorney acting in that capacity for a party, that party waives any lawyer-client privilege and any protection for work product under Chapter 4 (commencing with Section 2018.010) during any subsequent discovery from that attorney concerning the identity of the sources of the information contained in the response.

(c) The attorney for the responding party shall sign any responses that contain an objection. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 14, effective June 29, 2009.

§ 2031.260. Time for Service of Response; Unlawful Detainer Action.

(a) Within 30 days after service of [1] **a** demand **for inspection, copying, testing, or sampling**, the party to whom the demand is directed shall serve the original of the response to it on the party making the demand, and a copy of the response on all other parties who have appeared in the action, unless on motion of the party making the demand, the court has shortened the time for response, or unless on motion of the party to whom the demand has been directed, the court has extended the time for response.

(b) Notwithstanding subdivision (a), in an unlawful detainer action or other proceeding under Chapter 4 (commencing with Section 1159) of Title 3 of Part 3, the party to whom [2] **a** demand **for inspection, copying, testing, or sampling** is directed shall have at least five days from the date of service of the demand to respond, unless on motion of the party making the demand, the court has shortened the time for the response, or unless on motion of the party to whom the demand has been directed, the court has extended the time for response. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005, 2007 ch. 113 (AB 1126) § 11, 2009 ch. 5 (AB 5) § 15, effective June 29, 2009.

§ 2031.260. 2009 Deletes. [1] an inspection **[2]** an inspection

§ 2031.270. Extension of Date for Inspection or Time for Service of Response; Written Confirmation of Agreement.

(a) The party demanding [1] inspection**, copying, testing, or sampling** and the responding party may agree to extend the date for **the** inspection**, copying, testing, or sampling** or the time for service of a response to a set of [2] demands, or to particular items or categories of items in a set, to a date or dates beyond those provided in Sections 2031.030, 2031.210, 2031.260, and 2031.280.

(b) This agreement may be informal, but it shall be confirmed in a writing that specifies the extended date for inspection**, copying, testing, or sampling,** or **for the** service of a response.

(c) Unless this agreement expressly states otherwise, it is effective to preserve to the responding party the right to respond to any item or category of item in the demand to which the agreement applies in any manner specified in Sections 2031.210, 2031.220, 2031.230, 2031.240, and 2031.280. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005, 2007 ch. 738 (AB 1248) § 8, 2009 ch. 5 (AB 5) § 16, effective June 29, 2009.

§ 2031.270. 2009 Deletes. [1] an **[2]** inspection

§ 2031.280. Production of Documents--Form; Date Specified; Production of Electronically Stored Information; Translation; Expense.

(a) Any documents produced in response to [1] **a** demand **for inspection, copying, testing, or sampling** shall either be produced as they are kept in the usual course of business, or be organized and labeled to correspond with the categories in the demand.

(b) The documents shall be produced on the date specified in the [2] demand pursuant to paragraph (2) of subdivision (c) of Section 2031.030, unless an objection has been made to that date. If the date for inspection has been extended pursuant to Section 2031.270, the documents shall be produced on the date agreed to pursuant to that section.

(c) **If a party responding to a demand for production of electronically stored information objects to a specified**

form for producing the information, or if no form is specified in the demand, the responding party shall state in its response the form in which it intends to produce each type of information.

(d) Unless the parties otherwise agree or the court otherwise orders, the following shall apply:

(1) If a demand for production does not specify a form or forms for producing a type of electronically stored information, the responding party shall produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable.

(2) A party need not produce the same electronically stored information in more than one form.

(e) If necessary, the responding party at the reasonable expense of the demanding party shall, through detection devices, translate any data compilations included in the demand into reasonably usable form. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005, 2007 ch. 738 (AB 1248) § 9, 2009 ch. 5 (AB 5) § 17, effective June 29, 2009.

§ 2031.280. 2009 Deletes. [1] an inspection **[2]** inspection

§ 2031.285. Production of Electronically Stored Information--Claim of Privilege or of Protection as Attorney Work Product; Notification to Receiving Party; Receiving Party's Responsibilities; Preclusion From Using or Disclosing Specified Information; Resolution.

(a) If electronically stored information produced in discovery is subject to a claim of privilege or of protection as attorney work product, the party making the claim may notify any party that received the information of the claim and the basis for the claim.

(b) After being notified of a claim of privilege or of protection under subdivision (a), a party that received the information shall immediately sequester the information and either return the specified information and any copies that may exist or present the information to the court conditionally under seal for a determination of the claim.

(c) (1) Prior to the resolution of the motion brought under subdivision (d), a party shall be precluded from using or disclosing the specified information until the claim of privilege is resolved.

(2) A party who received and disclosed the information before being notified of a claim of privilege or of protection under subdivision (a) shall, after that notification, immediately take reasonable steps to retrieve the information.

(d) (1) If the receiving party contests the legitimacy of a claim of privilege or protection, he or she may seek a determination of the claim from the court by making a motion within 30 days of receiving the claim and presenting the information to the court conditionally under seal.

(2) Until the legitimacy of the claim of privilege or protection is resolved, the receiving party shall preserve the information and keep it confidential and shall be precluded from using the information in any manner. Leg.H. 2009 ch. 5 (AB 5) § 18, effective June 29, 2009.

§ 2031.290. Retention of Demand for Inspection, Copying, Testing, or Sampling, Proof of Service, and Response by Demanding Party.

(a) The [1] demand **for inspection, copying, testing, or sampling,** and the response to it, shall not be filed with the court.

(b) The party demanding an inspection**, copying, testing, or sampling** shall retain both the original of the [2] demand, with the original proof of service affixed to it, and the original of the sworn response until six months after final disposition of the action. At that time, both originals may be destroyed, unless the court, on motion of any party and for good cause shown, orders that the originals be preserved for a longer period. **Leg.H.** 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 19, effective June 29, 2009.

§ 2031.290. 2009 Deletes. [1] inspection **[2]** inspection

§ 2031.300. Effect of Failure to Serve Timely Response to Demand for Inspection, Copying, Testing, or Sampling; Motion for Order; Monetary and Other Sanctions.

If a party to whom [1] **a** demand **for inspection, copying, testing, or sampling** is directed fails to serve a timely response to it, the following rules **shall** apply:

(a) The party to whom the [2] demand **for inspection, copying, testing, or sampling** is directed waives any objection to the demand, including one based on privilege or on the protection for work product under Chapter 4 (commencing with Section 2018.010). The court, on motion, may relieve that party from this waiver on its determination that both of the following conditions are satisfied:

(1) The party has subsequently served a response that is in substantial compliance with Sections 2031.210, 2031.220, 2031.230, 2031.240, and 2031.280.

(2) The party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.

(b) The party making the demand may move for an order compelling response to the [3] demand.

(c) **Except as provided in subdivision (d),** the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response to [4] **a** demand **for inspection, copying, testing, or sampling**, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust. If a party then fails to obey the order compelling a response, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Chapter 7 (commencing with Section 2023.010). In lieu of or in addition to this sanction, the court may impose a monetary sanction under Chapter 7 (commencing with Section 2023.010).

(d) (1) Notwithstanding subdivision (c), absent exceptional circumstances, the court shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as a result of the routine, good faith operation of an electronic information system.

(2) This subdivision shall not be construed to alter any obligation to preserve discoverable information. Leg.H. 2004 ch. 182 (AB 3081), operative July 1, 2005, 2005 ch. 22 (SB 1108) § 23, 2009 ch. 5 (AB 5) § 20, effective June 29, 2009.

§ 2031.300. 2009 Deletes. [1] an inspection **[2]** inspection **[3]** inspection **[4]** an inspection

§ 2031.310. Motion for Order Compelling Further Response; Grounds; Notice; Waiver; Monetary and Other Sanctions.

(a) On receipt of a response to [1] **a** demand **for inspection, copying, testing, or sampling**, the **demanding** party [2] may move for an order compelling further response to the demand if the demanding party deems that any of the following apply:

(1) A statement of compliance with the demand is incomplete.

(2) A representation of inability to comply is inadequate, incomplete, or evasive.

(3) An objection in the response is without merit or too general.

(b) A motion under subdivision (a) shall comply with both of the following:

(1) The motion shall set forth specific facts showing good cause justifying the discovery sought by the [3] demand.

(2) The motion shall be accompanied by a meet and confer declaration under Section 2016.040.

(c) Unless notice of this motion is given within 45 days of the service of the response, or any supplemental response, or on or before any specific later date to which the demanding party and the responding party have agreed in writing, the demanding party waives any right to compel a further response to the [4] demand.

(d) **In a motion under subdivision (a) relating to the production of electronically stored information, the party or affected person objecting to or opposing the production, inspection, copying, testing, or sampling of electronically stored information on the basis that the information is from a source that is not reasonably accessible because of the undue burden or expense shall bear the burden of demonstrating that the information is from a source that is not reasonably accessible because of undue burden or expense.**

(e) If the party or affected person from whom discovery of electronically stored information is sought establishes that the information is from a source that is not reasonably accessible because of the undue burden or expense, the court may nonetheless order discovery if the demanding party shows good cause, subject to any limitations imposed under subdivision (g).

(f) If the court finds good cause for the production of electronically stored information from a source that is not reasonably accessible, the court may set conditions for the discovery of the electronically stored information, including allocation of the expense of discovery.

(g) The court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that any of the following conditions exists:

(1) It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive.

(2) The discovery sought is unreasonably cumulative or duplicative.

(3) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.

(4) The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the

amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.

(h) Except as provided in subdivision (j), the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response to [5] **a** demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

[6] **(i) Except as provided in subdivision (j),** if a party fails to obey an order compelling further response, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Chapter 7 (commencing with Section 2023.010). In lieu of or in addition to that sanction, the court may impose a monetary sanction under Chapter 7 (commencing with Section 2023.010).

(j) (1) Notwithstanding subdivisions (h) and (i), absent exceptional circumstances, the court shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.

(2) This subdivision shall not be construed to alter any obligation to preserve discoverable information. Leg.H. 2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 21, effective June 29, 2009.

§ 2031.310. 2009 Deletes. [1] an inspection **[2]** demanding an inspection **[3]** inspection **[4]** inspection **[5]** an inspection **[6]** (e)

§ 2031.320. Motion for Order Compelling Compliance on Failure to Permit Inspection, Copying, Testing, or Sampling in Accordance With Response; Monetary and Other Sanctions.

(a) If a party filing a response to a demand for inspection**, copying, testing, or sampling** under [1] **Sections** 2031.210, 2031.220, 2031.230, 2031.240, and 2031.280 thereafter fails to permit the inspection**, copying, testing, or sampling** in accordance with that party's statement of compliance, the **demanding** party [2] may move for an order compelling compliance.

(b) **Except as provided in subdivision (d),** the court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel compliance with [3] **a** demand, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(c) **Except as provided in subdivision (d),** if a party then fails to obey an order compelling inspection**, copying, testing, or sampling**, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Chapter 7 (commencing with Section 2023.010). In lieu of or in addition to that sanction, the court may impose a monetary sanction under Chapter 7 (commencing with Section 2023.010).

(d) (1) Notwithstanding subdivisions (b) and (c), absent exceptional circumstances, the court shall not impose sanctions on a party or any attorney of a party for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.

(2) This subdivision shall not be construed to alter any obligation to preserve discoverable information. Leg.H.

2004 ch. 182 (AB 3081), operative July 1, 2005, 2009 ch. 5 (AB 5) § 22, effective June 29, 2009.

§ 2031.320. 2009 Deletes. [1] Section **[2]** demanding the inspection **[3]** an inspection

California Forms of Pleading and Practice--Annotated

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 1 NEW DEVELOPMENTS
PART VIII. California E-Discovery: Analysis of the 2009 Legislation and Rules
Appendix E California Rules of Court E-Discovery Rules

1-E California Forms of Pleading and Practice--Annotated Appendix E

Scope

Appendix E contains the amended version of *California Rules of Court, Rule 3.724*, as adopted by the California Judicial Council effective August 14, 2009. Language deleted by the 2009 changes is indicated by bracketed numbers (e.g., "**[1]**") in the section at the point where the deletion was made, with the deleted language appearing following the end of the section. Language added by the 2009 amendment is indicated in **boldface** type. For convenience, the text of Rule 3.728, which was unaffected by the final version of the 2009 amendments, is also included.

Synopsis:

Selected Provisions of the Rules of Court

Title 3. Civil Rules

Division 7. Civil Case Management

Chapter 3. Case Management
Rule 3.724. Duty to meet and confer

Rule 3.728. Case management order

Text:

TITLE 3
Civil Rules

Division 7

Civil Case Management

Chapter 3
Case Management

Rule 3.724. Duty to meet and confer

Unless the court orders another time period, no later than 30 calendar days before the date set for the **initial** case management conference, the parties must meet and confer, in person or by telephone, to consider each of the issues identified in rule 3.727 and, in addition, to consider the following:

(1) Resolving any discovery disputes and setting a discovery schedule;

(2) Identifying and, if possible, informally resolving any anticipated motions;

(3) Identifying the facts and issues in the case that are uncontested and may be the subject of stipulation;

(4) Identifying the facts and issues in the case that are in dispute;

(5) Determining whether the issues in the case can be narrowed by eliminating any claims or defenses by means of a motion or otherwise;

(6) Determining whether settlement is possible;

(7) Identifying the dates on which all parties and their attorneys are available or not available for trial, including the reasons for unavailability; **[1]**

(8) Any issues relating to the discovery of electronically stored information, including:

(A) Any issues relating to the preservation of discoverable electronically stored information;

(B) The form or forms in which information will be produced;

(C) The time within which the information will be produced;

(D) The scope of discovery of the information;

(E) The method for asserting or preserving claims of privilege or attorney work product, including whether such claims may be asserted after production;

(F) The method for asserting or preserving the confidentiality, privacy, trade secrets, or proprietary status of information relating to a party or person not a party to the civil proceedings;

(G) How the cost of production of electronically stored information is to be allocated among the parties; and

(H) Any other issues relating to the discovery of electronically stored information, including developing a proposed plan relating to the discovery of the information; and

[2] (9) Other relevant matters. 16

Rule 3.724 amended effective January 1, 2010, or earlier; adopted effective January 1, 2007.

Rule 3.724. 2009 Deletes. [1] and [2] (8)

Rule 3.728. Case management order

The case management conference must be conducted in the manner provided by local rule. The court must enter a case management order setting a schedule for subsequent proceedings and otherwise providing for the management of the case. The order may include appropriate provisions, such as:

(1) Referral of the case to judicial arbitration or other alternative dispute resolution process;

(2) A date for completion of the judicial arbitration process or other alternative dispute resolution process if the case has been referred to such a process;

(3) In the event that a trial date has not previously been set, a date certain for trial if the case is ready to be set for trial;

(4) Whether the trial will be a jury trial or a nonjury trial;

(5) The identity of each party demanding a jury trial;

(6) The estimated length of trial;

(7) Whether all parties necessary to the disposition of the case have been served or have appeared;

(8) The dismissal or severance of unserved or not-appearing defendants from the action;

(9) The names and addresses of the attorneys who will try the case;

(10) The date, time, and place for a mandatory settlement conference as provided in rule 3.1380;

(11) The date, time, and place for the final case management conference before trial if such a conference is required by the court or the judge assigned to the case;

(12) The date, time, and place of any further case management conferences or review; and

(13) Any additional orders that may be appropriate, including orders on matters listed in rules 3.724 and 3.727.

Rule 3.728 adopted effective January 1, 2007.

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 1 NEW DEVELOPMENTS
PART VIII. California E-Discovery: Analysis of the 2009 Legislation and Rules
Appendix F E-Discovery Provisions of Federal Rules of Civil Procedure and Federal Rules of Evidence

1-F California Forms of Pleading and Practice--Annotated Appendix F

Scope

Appendix E contains the full text of the Federal Rules of Civil Procedure and Federal Rules of Evidence that govern e-discovery in federal courts. They are included in this pamphlet for the convenience of readers and to provide a basis for comparison between the 2009 California changes discussed in this pamphlet and the corresponding provisions of federal law.

Synopsis:

Selected Provisions of the
Federal Rules of Civil Procedure

Title I. Scope of Rules; Form of Action

Rule 1. Scope and Purpose

Title III. Pleadings and Motions

Rule 16. Pretrial Conferences; Scheduling; Management

Title V. Disclosures and Discovery

Rule 26. Duty to Disclose; General Provisions Governing Discovery

Rule 33. Interrogatories to Parties

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

Title VI. Trials

Rule 45. Subpoena

Text:

TITLE I
Scope of Rules; Form of Action

Rule 1. Scope and Purpose

These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding. [*Adopted Dec. 20, 1937, effective Sept. 16, 1938; amended Dec. 29, 1948, effective Oct. 20, 1949; Feb. 28, 1966, effective July 1, 1966; Apr. 22, 1993, effective Dec. 1, 1993; last amended April 30, 2007, effective December 1, 2007.*]

Committee Note of 2007 to Rule 1

The language of Rule 1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The merger of law, equity, and admiralty practice is complete. There is no need to carry forward the phrases that initially accomplished the merger.

The former reference to "suits of a civil nature" is changed to the more modern "actions and proceedings." This change does not affect such questions as whether the Civil Rules apply to summary proceedings created by statute. *See SEC v. McCarthy, 322 F.3d 650 (9th Cir. 2003)* ; *see also New Hampshire Fire Ins. Co. v. Scanlon, 362 U.S. 404 (1960)* .

TITLE III
Pleadings and Motions

Rule 16. Pretrial Conferences; Scheduling; Management

(a) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating settlement.

(b) Scheduling.

(1) ***Scheduling Order.*** Except in categories of actions exempted by local rule, the district judge--or a magistrate judge when authorized by local rule--must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means.

(2) ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.

(3) ***Contents of the Order.***

(A) *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) *Permitted Contents.* The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure or discovery of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;

(v) set dates for pretrial conferences and for trial; and

(vi) include other appropriate matters.

(4) ***Modifying a Schedule.*** A schedule may be modified only for good cause and with the judge's consent.

(c) Attendance and Matters for Consideration at a Pretrial Conference.

(1) ***Attendance.*** A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) ***Matters for Consideration.*** At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of *Evidence 702*;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a magistrate judge or a master;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(J) determining the form and content of the pretrial order;

(K) disposing of pending motions;

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(O) establishing a reasonable limit on the time allowed to present evidence; and

(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) Pretrial Orders. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify an order issued after a final pretrial conference only to prevent manifest injustice.

(f) Sanctions.

(1) ***In General.*** On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate--or does not participate in good faith--in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) ***Imposing Fees and Costs.*** Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses--including attorney's fees--incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.
[*Adopted Dec. 20, 1937, effective Sept. 16, 1938; amended Apr. 28, 1983, effective Aug. 1, 1983; Mar. 2, 1987, effective Aug. 1, 1987; Apr. 22, 1993, effective Dec. 1, 1993; Apr. 12, 2006, effective Dec. 1, 2006; last amended April 30, 2007, effective December 1, 2007.*]

Committee Note of 2007 to Rule 16 (style revision)

The language of Rule 16 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Committee Note of 2007 to Rule 16 (style-substance revision)

When a party or its representative is not present, it is enough to be reasonably available by any suitable means, whether telephone or other communication device.

TITLE V
Disclosures and Discovery

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) ***Initial Disclosure.***

(A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy--or a description by category and location--of all documents, electrically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) *Proceedings Exempt from Initial Disclosure.* The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) *Time for Initial Disclosures--In General.* A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) *Time for Initial Disclosures--For Parties Served or Joined Later.* A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) *Basis for Initial Disclosure; Unacceptable Excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) ***Disclosure of Expert Testimony.***

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of *Evidence 702, 703*, or 705.

(B) *Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the data or other information considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous ten years;

(v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after the other party's disclosure.

(D) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

(3) ***Pretrial Disclosures.***

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness--separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) *Time for Pretrial Disclosures; Objections.* Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made--except for one under Federal Rule of *Evidence 402* or *403*--is waived unless excused by the court for good cause.

(4) ***Form of Disclosures.*** Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) ***Scope in General.*** Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain

discovery regarding any nonprivileged matter that is relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

(2) ***Limitations on Frequency and Extent.***

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(3) ***Trial Preparation: Materials.***

(A) *Documents and Tangible Things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure.* If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement.* Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for

a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

(4) ***Trial Preparation: Experts.***

(A) *Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(C) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B); and

(ii) for discovery under (B), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) ***Claiming Privilege or Protecting Trial-Preparation Materials.***

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) ***In General.*** A party or any person from whom discovery is sought may move for a protective order in the court

where the action is pending--or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) ***Ordering Discovery.*** If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) ***Awarding Expenses.*** Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) ***Timing.*** A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) ***Sequence.*** Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) ***In General.*** A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) ***Expert Witness.*** For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) ***Conference Timing.*** Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable--and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b).

(2) ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) ***Discovery Plan.*** A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including--if the parties agree on a procedure to assert these claims after production--whether to ask the court to include their agreement in an order;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) ***Expedited Schedule.*** If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) ***Signature Required; Effect of Signature.*** Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--or by the party personally, if unrepresented--and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) ***Failure to Sign.*** Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) ***Sanction for Improper Certification.*** If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation. [*Adopted Dec. 20, 1937, effective Sept. 16, 1938; amended Dec. 27, 1946, effective Mar. 19, 1948; Jan. 21, 1963, effective July 1, 1963; Feb. 28, 1966, effective July 1, 1966; Mar. 30, 1970, effective July 1, 1970; Apr. 29, 1980, effective Aug. 1, 1980; Apr. 28, 1983, effective Aug. 1, 1983; Mar. 2, 1987, effective Aug. 1, 1987; Apr. 22, 1993, effective Dec. 1, 1993; Apr. 17, 2000, effective Dec. 1, 2000; Apr. 12, 2006, effective Dec. 1, 2006; last amended April 30, 2007, effective December 1, 2007.*]

Committee Note of 2007 to Rule 26 (style revision)

The language of Rule 26 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 26(a)(5) served as an index of the discovery methods provided by later rules. It was deleted as redundant. Deletion does not affect the right to pursue discovery in addition to disclosure.

Former Rule 26(b)(1) began with a general statement of the scope of discovery that appeared to function as a preface to each of the five numbered paragraphs that followed. This preface has been shifted to the text of paragraph (1) because it does not accurately reflect the limits embodied in paragraphs (2), (3), or (4), and because paragraph (5) does not address the scope of discovery.

The reference to discovery of "books" in former Rule 26(b)(1) was deleted to achieve consistent expression throughout

the discovery rules. Books remain a proper subject of discovery.

Amended Rule 26(b)(3) states that a party may obtain a copy of the party's own previous statement "on request." Former Rule 26(b)(3) expressly made the request procedure available to a nonparty witness, but did not describe the procedure to be used by a party. This apparent gap is closed by adopting the request procedure, which ensures that a party need not invoke Rule 34 to obtain a copy of the party's own statement.

Rule 26(e) stated the duty to supplement or correct a disclosure or discovery response "to include information thereafter acquired." This apparent limit is not reflected in practice; parties recognize the duty to supplement or correct by providing information that was not originally provided although it was available at the time of the initial disclosure or response. These words are deleted to reflect the actual meaning of the present rule.

Former Rule 26(e) used different phrases to describe the time to supplement or correct a disclosure or discovery response. Disclosures were to be supplemented "at appropriate intervals." A prior discovery response must be "seasonably * * * amend[ed]." The fine distinction between these phrases has not been observed in practice. Amended Rule 26(e)(1)(A) uses the same phrase for disclosures and discovery responses. The party must supplement or correct "in a timely manner."

Former Rule 26(g)(1) did not call for striking an unsigned disclosure. The omission was an obvious drafting oversight. Amended Rule 26(g)(2) includes disclosures in the list of matters that the court must strike unless a signature is provided "promptly * * * after being called to the attorney's or party's attention."

Former Rule 26(b)(2)(A) referred to a "good faith" argument to extend existing law. Amended Rule 26(b)(1)(B)(i) changes this reference to a "nonfrivolous" argument to achieve consistency with Rule 11(b)(2).

Committee Note of 2007 to Rule 26 (style-substance revision)

As with the Rule 11 signature on a pleading, written motion, or other paper, disclosure and discovery signatures should include not only a postal address but also a telephone number and electronic-mail address. A signer who lacks one or more of those addresses need not supply a nonexistent item.

Rule 11(b)(2) recognizes that it is legitimate to argue for establishing new law. An argument to establish new law is equally legitimate in conducting discovery.

Rule 33. Interrogatories to Parties

(a) In General.

(1) ***Number.*** Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(2).

(2) ***Scope.*** An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

(b) Answers and Objections.

(1) ***Responding Party.*** The interrogatories must be answered:

(A) by the party to whom they are directed; or

(B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.

(2) ***Time to Respond.*** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(3) ***Answering Each Interrogatory.*** Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(4) ***Objections.*** The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.

(5) ***Signature.*** The person who makes the answers must sign them, and the attorney who objects must sign any objections.

(c) Use. An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence.

(d) Option to Produce Business Records. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries. [*Adopted Dec. 20, 1937, effective Sept. 16, 1938; amended Dec. 27, 1946, effective Mar. 19, 1948; Mar. 30, 1970, effective July 1, 1970; Apr. 29, 1980, effective Aug. 1, 1980; Apr. 22, 1993, effective Dec. 1, 1993; Apr. 12, 2006, effective Dec. 1, 2006; last amended April 30, 2007, effective December 1, 2007.*]

Committee Note of 2007 to Rule 33

The language of Rule 33 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence of former Rule 33(a) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference.

Former Rule 33(b)(5) was a redundant reminder of Rule 37(a) procedure that is omitted as no longer useful.

Former Rule 33(c) stated that an interrogatory "is not necessarily objectionable merely because an answer * * * involves an opinion or contention * * *." "[I]s not necessarily" seemed to imply that the interrogatory might be objectionable merely for this reason. This implication has been ignored in practice. Opinion and contention interrogatories are used routinely. Amended Rule 33(a)(2) embodies the current meaning of Rule 33 by omitting "necessarily."

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land,

for Inspection and Other Purposes

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information--including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations--stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) ***Contents of the Request.*** The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) ***Responses and Objections.***

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.

(C) *Objections.* An objection to part of a request must specify the part and permit inspection of the rest.

(D) *Responding to a Request for Production of Electronically Stored Information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form--or if no form was specified in the request--the party must state the form or forms it intends to use.

(E) *Producing the Documents or Electronically Stored Information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

(c) Nonparties. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection. [*Adopted Dec. 20, 1937, effective Sept. 16, 1938; amended Dec. 27, 1946, effective Mar. 19, 1948; Mar. 30, 1970, effective July 1, 1970; Apr. 29, 1980, effective Aug. 1, 1980; Mar. 2, 1987, effective Aug. 1, 1987; Apr. 30, 1991, effective Dec. 1, 1991; Apr. 22, 1993, effective Dec. 1, 1993; Apr. 12, 2006, effective Dec. 1, 2006; last amended April 30, 2007, effective December 1, 2007.*]

Committee Note of 2007 to Rule 34

The language of Rule 34 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The final sentence in the first paragraph of former Rule 34(b) was a redundant cross-reference to the discovery moratorium provisions of Rule 26(d). Rule 26(d) is now familiar, obviating any need to carry forward the redundant cross-reference.

The redundant reminder of Rule 37(a) procedure in the second paragraph of former Rule 34(b) is omitted as no longer useful.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) Motion for an Order Compelling Disclosure or Discovery.

(1) ***In General.*** On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) ***Appropriate Court.*** A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) ***Specific Motions.***

(A) *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to respond that inspection will be permitted--or fails to permit inspection--as requested under Rule 34.

(C) *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the

examination before moving for an order.

(4) ***Evasive or Incomplete Disclosure, Answer, or Response.*** For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) ***Payment of Expenses; Protective Orders.***

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted--or if the disclosure or requested discovery is provided after the motion was filed--the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) Failure to Comply with a Court Order.

(1) ***Sanctions in the District Where the Deposition Is Taken.*** If the court where the discovery is taken orders a deponent to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

(2) ***Sanctions in the District Where the Action Is Pending.***

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent--or a witness designated under Rule 30(b)(6) or 31(a)(4)--fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

(1) ***Failure to Disclose or Supplement.*** If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

(2) ***Failure to Admit.*** If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) Party's Failure to Attend Its Own Deposition, Serve Answers to Interrogatories, or Respond to a Request for Inspection.

(1) ***In General.***

(A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent--or a person designated under Rule 30(b)(6) or 31(a)(4)--fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) *Certification.* A motion for sanctions for failing to answer or respond must include a certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) ***Unacceptable Excuse for Failing to Act.*** A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) ***Types of Sanctions.*** Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure. [*Adopted Dec. 20, 1937, effective Sept. 16, 1938; amended Dec. 29, 1948, effective Oct. 20, 1949; Mar. 30, 1970, effective July 1, 1970; Apr. 29, 1980, effective Aug. 1, 1980; Oct. 21, 1980, effective Oct. 1, 1981; Mar. 2, 1987, effective Aug. 1, 1987; Apr. 22, 1993, effective Dec. 1, 1993; Apr. 17, 2000, effective Dec. 1, 2000; Apr. 12, 2006, effective Dec. 1, 2006; last amended April 30, 2007, effective December 1, 2007.*]

Committee Note of 2007 to Rule 37

The language of Rule 37 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

TITLE VI
Trials

Rule 45. Subpoena

(a) In General.

(1) ***Form and Contents.***

(A) *Requirements--In General.* Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action, the court in which it is pending, and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(c) and (d).

(B) *Command to Attend a Deposition--Notice of the Recording Method.* A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) *Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.* A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) *Command to Produce; Included Obligations.* A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(2) ***Issued from Which Court.*** A subpoena must issue as follows:

(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and

(C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(3) ***Issued by Whom.*** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena as an officer of:

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.

(b) Service.

(1) ***By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.

(2) ***Service in the United States.*** Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:

(A) within the district of the issuing court;

(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;

(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

(3) ***Service in a Foreign Country.*** *28 U.S.C. § 1783* governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) ***Proof of Service.*** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Protecting a Person Subject to a Subpoena.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction--which may include lost earnings and reasonable attorney's fees--on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises--or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person--except that, subject to Rule 45(c)(3)(B)(iii), the person

may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information form sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii). [*Adopted Dec. 20, 1937, effective Sept. 16, 1938; amended Dec. 27, 1946, effective Mar. 19, 1948; Dec. 29, 1948, effective Oct. 20, 1949; Mar. 30, 1970, effective July 1, 1970; Apr. 29, 1980, effective Aug. 1, 1980; Apr. 29, 1985, effective Aug. 1, 1985; Mar. 2, 1987, effective Aug. 1, 1987; Apr. 30, 1991, effective Dec. 1, 1991; Apr. 25, 2005, effective Dec. 1, 2005; Apr. 12, 2006, effective Dec. 1, 2006; last amended April 30, 2007, effective December 1, 2007.*]

Committee Note of 2007 to Rule 45

The language of Rule 45 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The reference to discovery of "books" in former Rule 45(a)(1)(C) was deleted to achieve consistent expression throughout the discovery rules. Books remain a proper subject of discovery.

Former Rule 45(b)(1) required "prior notice" to each party of any commanded production of documents and things or inspection of premises. Courts have agreed that notice must be given "prior" to the return date, and have tended to converge on an interpretation that requires notice to the parties before the subpoena is served on the person commanded to produce or permit inspection. That interpretation is adopted in amended Rule 45(b)(1) to give clear notice of general present practice.

The language of former Rule 45(d)(2) addressing the manner of asserting privilege is replaced by adopting the wording of Rule 26(b)(5). The same meaning is better expressed in the same words.

Federal Rules of Evidence

Synopsis:

Selected Provisions of the Federal Rules of Evidence

Article V. Privileges

Rule 502. Attorney-client privilege and work product; limitations on waiver

Article X. Contents of Writings, Recordings, and Photographs

Rule 1001. Definitions

Rule 1002. Requirement of Original

Rule 1003. Admissibility of Duplicates

Rule 1004. Admissibility of Other Evidence of Contents

Text:

ARTICLE V
Privileges

Rule 502. Attorney-client privilege and work product; limitations on waiver

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure made in a Federal proceeding or to a Federal office or agency; scope of a waiver. When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent disclosure. When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of *Civil Procedure 26(b)(5)(B)*.

(c) Disclosure made in a State proceeding. When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a Federal proceeding; or

(2) is not a waiver under the law of the State where the disclosure occurred.

(d) Controlling effect of a court order. A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other Federal or State proceeding.

(e) Controlling effect of a party agreement. An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling effect of this rule. Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision.

(g) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial. *[Sept. 19, 2008, P.L. 110-322, § 1(a), 122 Stat. 3537.]*

Notes

Application of rule. Act Sept. 19, 2008, P.L. 110-322, § 1(c), 122 Stat. 3538, provides: "The amendments made by this Act [adding this rule] shall apply in all proceedings commenced after the date of enactment of this Act and, insofar as is just and practicable, in all proceedings pending on such date of enactment.".

Committee note. This new rule has two major purposes:

(1) It resolves some longstanding disputes in the courts about the effect of certain disclosures of communications or information protected by the attorney-client privilege or as work product--specifically those disputes involving inadvertent disclosure and subject matter waiver.

(2) It responds to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information. This concern is especially troubling in cases involving electronic discovery. *See, e.g., Hopson v. City of Baltimore, 232 F.R.D. 228, 244 (D.Md. 2005)* (electronic discovery may encompass "millions of documents" and to insist upon "record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation").

The rule seeks to provide a predictable, uniform set of standards under which parties can determine the consequences of a disclosure of a communication or information covered by the attorney-client privilege or work product protection. Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable. Moreover, if a federal court's confidentiality order is not enforceable in a state court then the burdensome costs of privilege review and retention are unlikely to be reduced.

The rule makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work product immunity as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.

The rule governs only certain waivers by disclosure. Other common-law waiver doctrines may result in a finding of waiver even where there is no disclosure of privileged information or work product. *See, e.g., Nguyen v. Excel Corp., 197 F.3d 200 (5th Cir. 1999)* (reliance on an advice of counsel defense waives the privilege with respect to attorney-client communications pertinent to that defense); *Ryers [Byers] v. Burleson, 100 F.R.D. 436 (D.D.C. 1983)* (allegation of lawyer malpractice constituted a waiver of confidential communications under the circumstances). The rule is not intended to displace or modify federal common law concerning waiver of privilege or work product where no disclosure has been made.

Subdivision (a). The rule provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. *See, e.g., In re United Mine Workers of America Employee Benefit Plans Litig., 159 F.R.D. 307, 312 (D.D.C. 1994)* (waiver of work product limited to materials actually disclosed, because the party did not deliberately disclose documents in an attempt to gain a tactical advantage). Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner. It follows that an inadvertent disclosure of protected information can never result in a subject matter waiver. claw back Rule 502(b). The rule rejects the result in *In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989)* , which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver.

The language concerning subject matter waiver--"ought in fairness"--is taken from Rule 106, because the animating principle is the same. Under both Rules, a party that makes a selective, misleading presentation that is unfair to the adversary opens itself to a more complete and accurate presentation.

To assure protection and predictability, the rules provides that if a disclosure is made at the federal level, the federal rule on subject matter waiver governs subsequent state court determinations on the scope of the waiver by that disclosure.

Subdivision (b). Courts are in conflict over whether an inadvertent disclosure of a communication or information protected as privileged or work product constitutes a waiver. A few courts find that a disclosure must be intentional to be a waiver. Most courts find a waiver only if the disclosing party acted carelessly in disclosing the communication or information protected under the attorney-client privilege or as work product constitutes a waiver without regard to the protections taken to avoid such a disclosure. *See generally Hopson v. City of Baltimore, 232 F.R.D. 228 (D. Md. 2005)* , for a discussion of this case law.

The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error. This position is in accord with the majority view on whether inadvertent disclosure is a waiver.

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985)* and *Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 332 (N.D. Cal. 1985)* , set out a multi-factor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which are dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production. Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

The rule applies to inadvertent disclosures made to a federal office or agency, including but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority. The consequences of waiver, and the concomitant costs of pre-production privilege review, can be as great with respect to disclosures to offices and agencies as they are in litigation.

Subdivision (c). Difficult questions can arise when 1) a disclosure of a communication or information protected by the attorney-client privilege or as work product is made in a state proceeding, 2) the communication or information is offered in a subsequent federal proceeding on the ground that the disclosure waived the privilege or protection, and 3) the state and federal laws are in conflict on the question of waiver. The Committee determined that the proper solution for the federal court is to apply the law that is most protective of privilege and work product. If the state law is more protective (such as where the state law is that an inadvertent disclosure can never be a waiver), the holder of the privilege or protection may well have relied on that law when making the disclosure in the state proceeding. Moreover, applying a more restrictive federal law of waiver could impair the state objective of preserving the privilege or work-product protection for disclosures made in state proceedings. On the other hand, if the federal law is more protective, applying the state law of waiver to determine admissibility in federal court is likely to undermine the federal objective of limiting the costs of production.

The rule does not address the enforceability of a state court confidentiality order in a federal proceeding, as that question is covered both by statutory law and principles of federalism and comity. *See 28 U.S.C. § 1738* (providing that state judicial proceedings "shall have the same full faith and credit in every court within the United States ... as they have by law or usage in the courts of such State ... from which they are taken."). *See also Tucker v. Ohtsu Tire & Rubber Co., 191 F.R.D. 495, 499 (D. Md. 2000)* (noting that a federal court considering the enforceability of a state confidentiality order is "constrained by principles of comity, courtesy, and ... federalism"). Thus, a state court order finding no waiver in connection with a disclosure made in a state court proceeding is enforceable under existing law in subsequent federal proceedings.

Subdivision (d). Confidentiality orders are becoming increasingly important in limiting the costs of privilege review and retention, especially in cases involving electronic discovery. But the utility of a confidentiality order in reducing discovery costs is substantially diminished if it provides no protection outside the particular litigation in which the order is entered. Parties are unlikely to be able to reduce the costs of pre-production review for privilege and work product if the consequence of disclosure is that the communications or information could be used by non-parties to the litigation.

There is some dispute on whether a confidentiality order entered in one case is enforceable in other proceedings. *See generally Hopson v. City of Baltimore, 232 F.R.D. 228 (D. Md. 2005)* , for a discussion of this case law. The rule provides that when a confidentiality order governing the consequences of disclosure in that case is entered in a federal proceeding, its terms are enforceable against non-parties in any federal or state proceeding. For example, the court order may provide for return of documents without waiver irrespective of the care taken by the disclosing party; the rule contemplates enforcement of "claw-back" and "quick peek" arrangements as a way to avoid the excessive costs of pre-production review for privilege and work product. *See Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 290 (S.D.N.Y. 2003)* (noting that parties may enter into "so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privilege documents"). The rule provides a party with a predictable protection from a court order--predictability that is needed to allow the party to plan in advance to limit the prohibitive costs of privilege and work product review and retention.

Under the rule, a confidentiality order is enforceable whether or not it memorializes an agreement among the parties to

the litigation. party agreement should not be a condition of enforceability of a federal court's order.

Subdivision (e). Subdivision (e) codifies the well-established proposition that parties can enter an agreement to limit the effect of waiver by disclosure between or among them. Of course such an agreement can bind only the parties to the agreement. The rule makes clear that if parties want protection against non-parties from a finding of waiver by disclosure, the agreement must be made part of a court order.

Subdivision (f). The protections against waiver provided by Rule 502 must be applicable when protected communications or information disclosed in federal proceedings are subsequently offered in state proceedings. Otherwise, the holders of protected communications and information, and their lawyers, could not rely on the protections provided by the Rule, and the goal of limiting costs in discovery would be substantially undermined. Rule 502(g) [*sic*] is intended to resolve any potential tension between the provisions of Rule 502 that apply to state proceedings and the possible limitations on the applicability of the Federal Rules of Evidence otherwise provided by Rules 101 and 1101.

The rule is intended to apply in all federal court proceedings, including court-annexed and court-ordered arbitrations, without regard to any possible limitations of Rules 101 and 1101. This provision is not intended to raise an inference about the applicability of any other rule of evidence in arbitration proceedings more generally.

The costs of discovery can be equally high for state and federal causes of action, and the rule seeks to limit those costs in all federal proceedings, regardless of whether the claim arises under state or federal law. Accordingly, the rule applies to state law causes of action brought in federal court.

Subdivision (g). The rule's coverage is limited to attorney-client privilege and work product. The operation of waiver by disclosure, as applied to other evidentiary privileges, remains a question of federal common law. Nor does the rule purport to apply to the *Fifth Amendment* privilege against compelled self-incrimination.

The definition of work product "materials" is intended to include both tangible and intangible information. *See In re Cendant Corp. Sec. Litig., 343 F.3d 658, 662 (3d Cir. 2003)* ("work product protection extends to both tangible and intangible work product").

ARTICLE X
Contents of Writings, Recordings, and Photographs

Rule 1001. Definitions

For purposes of this article the following definitions are applicable:

(1) ***Writings and recordings.*** "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) ***Photographs.*** "Photographs" include still photographs, X-ray films, video tapes, and motion pictures.

(3) ***Original.*** An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

(4) ***Duplicate.*** A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original. *(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1945.)*

Rule 1002. Requirement of Original

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress. *(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1946.)*

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. *(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1946.)*

Rule 1004. Admissibility of Other Evidence of Contents

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if--

(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue. *(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1946; Oct. 1, 1987.)*

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 2 PROCEDURAL GUIDE FOR CIVIL ACTIONS

1-2 California Forms of Pleading and Practice--Annotated 2.syn

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§ 2.61 Response to Post Trial Motions Challenging Verdict or Decision

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§ 2.63 Appeal

§ 2.64 Abstract of Judgment

§ 2.65 Enforcement of Judgment

§ 2.66 Satisfaction of Judgment

§§ 2.67-2.69 [Reserved]

§ 2.70 Statement of Decision

§ 2.71 Post Trial Motions Challenging Verdict or Decision

§ 2.72 Appeal

§ 2.73 Satisfaction of Judgment

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1-2 California Forms of Pleading and Practice--Annotated § 2.01

§ 2.01 Purpose of Guide

This procedural guide is intended as a general outline of the procedures an attorney should follow in a civil action. The guide provides an overview of pretrial procedures and trial motions for both plaintiff and defendant in a civil action, as well as posttrial procedures for the prevailing and non-prevailing parties. References are made to specific chapters for detailed procedural guides to be used for particular actions or procedures. Not every procedure set forth in this guide will be appropriate in every case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial MattersGeneral Overview

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1-2 California Forms of Pleading and Practice--Annotated § 2.02

§ 2.02 Scope of Guide; Proceedings Not Included

The scope of this guide is limited to civil actions, as distinguished from special proceedings [*see* discussion under Civil Actions and Special Proceedings--Distinguished, *below*]. It therefore does not cover the following special proceedings:

1. Mandate. For procedures in mandate proceedings, see Ch. 358, *Mandate and Prohibition* and Ch. 474, *Availability of Judicial Review of Agency Decision* through Ch. 474C, *Procedures in Reviewing Agency Decisions* .

2. Prohibition. For procedures to obtain a writ of prohibition, see Ch. 358, *Mandate and Prohibition* .

3. Certiorari (or review). For procedures to be followed in obtaining a writ of review or certiorari, see Ch. 492, *Review (Certiorari), Writ of.*

4. Habeas corpus. For procedures to obtain a writ of habeas corpus, see Ch. 292, *Habeas Corpus* .

5. Dissolution of marriage. For procedures in dissolution proceedings, see Ch. 221, *Dissolution of Marriage: Procedure* .

6. Legal separation. For procedures to obtain a legal separation, see Ch. 221, *Dissolution of Marriage: Procedure* .

7. Annulment. For procedures to obtain an annulment, see Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights* .

8. Unlawful or forcible detainer. For procedures in unlawful detainer and forcible detainer proceedings, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

9. Eminent domain. For procedures in eminent domain proceedings, see *Ch. 247, Eminent Domain, § 247.10 et seq.*.

10. Probate or contest of a will. For procedures in probate or contest of a will, see Ch. 444, *Probate: Will Contests* .

11. Adoption. For procedures in adoption proceedings, see Ch. 12, *Adoptions: Nature and Effect* , through Ch. 12E, *Adoptions: Attack on Decree* .

This guide does not cover small claims court actions, since generally an attorney may not represent a client in such an action [*see Code Civ. Proc. § 116.530*]. For discussion, procedure, and forms relating to small claims courts, see Ch. 526, *Small Claims* .

Legal Topics:

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

California Forms of Pleading and Practice--Annotated

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1-2 California Forms of Pleading and Practice--Annotated § 2.03

§ 2.03 Local Court Rules

The procedures set forth in this procedural guide are based on the applicable state statutes and California Rules of Court. Counsel should note, however, that many courts have local rules that may be also applicable to a particular procedure. Counsel should therefore be sure to ascertain whether or not the court in which he or she is proceeding has any such rules and, if so, to comply with those rules as well.

Failure to comply with local court rules could result in the imposition of sanctions [*see Cal. Rules of Ct., Rule 2.30*; *see also Bergman v. Rifkind & Sterling, Inc. (1991) 227 Cal. App. 3d 1380, 1382-1387, 278 Cal. Rptr. 583]* . For discussion of sanctions, see Ch. 510, *Sanctions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsRule Application & Interpretation

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1-2 California Forms of Pleading and Practice--Annotated § 2.04

§ 2.04 Trial Court Delay Reduction Rules

[1] Generally

The Trial Court Delay Reduction Act [*Gov. Code § 68600 et seq.*] requires all superior courts in California to eliminate delay in the progress and ultimate resolution of litigation [*Gov. Code §§ 68605.5, 68607, 68620(a)*]. The local court rules adopted under the Act significantly impact on the procedure the cases will follow.

Attorneys litigating actions governed by trial delay reduction programs should consult the rules directly. For further discussion of the local delay reduction rules, see Ch. 552, *Trial Court Delay Reduction* .

[2] Actions Governed by Rules

Trial court delay reduction programs do not apply to the following:

(1) Small claims [*Gov. Code § 68620(b)*].

(2) Unlawful detainer [*Gov. Code § 68620(b)*].

(3) Juvenile cases [*Gov. Code § 68608(a)*].

(4) Probate cases [*Gov. Code § 68608(a)*].

(5) Domestic relations cases [*Gov. Code § 68608(a)*].

A court's local rules may exclude from the court's delay reduction program cases that are assigned, based on subject matter, to a judge or judges for all purposes [*Gov. Code § 68608(a)*].

Local rules may identify additional cases or stages of cases that are not covered by that court's Trial Court Delay Reduction program. For example, Los Angeles excepts, among other things, eminent domain pretrial proceedings, pretrial proceedings in asbestos exposure cases, cases stayed by a bankruptcy, writs of mandate, uninsured motorist

cases, and other cases as may be designated by the Presiding Judge or Supervising Judge of a district [*see* Los Angeles Co. Super. Ct. Rules, Rule 7.2(b)].

[3] Service of Complaint and Proof of Service

Trial delay reduction rules significantly shorten the time in which a plaintiff is required to serve a complaint and file proof of service. Generally, a plaintiff must serve a complaint within three years of the complaint's filing, and proof of service must be filed within three years and 60 days of the filing [*see Code Civ. Proc. § 583.210*]. In comparison, delay reduction rules generally require that service of the complaint be completed and proof of service filed with the court 60 days after the filing of the complaint [*see, e.g.,* San Diego Co. Super. Ct. Rules, Div. II, Rule 2.5; *see also Gov. Code § 68616(a), (j)* (rules may not require shorter time period for service of complaint than 60 days after filing)].

Determine if county local rule requires special documents to accompany the complaint either at the time of filing or service.

[4] Pretrial Procedure

Although the rules vary from county to county, parties in delay reduction cases must be prepared to encounter accelerated pretrial procedures. For example, Los Angeles County requires the first status conference to be held not later than 180 days after the complaint is filed, and anticipates that substantial discovery will have been conducted by that time [Los Angeles Co. Super. Ct. Rules, Rule 7.9(a) (time set to hold conference at earliest time that case can be referred to arbitration under *Gov. Code § 68616(g)*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral OverviewCivil ProcedurePretrial MattersConferencesCase Management

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1-2 California Forms of Pleading and Practice--Annotated § 2.05

§ 2.05 Civil Actions and Special Proceedings

[1] Distinguished

There are two separate and distinct kinds of civil judicial remedies. They are (1) civil actions, and (2) special proceedings of a civil nature [*see Code Civ. Proc. §§ 20, 21*]. Both a civil action and a special proceeding of a civil nature are sometimes referred to as a "proceeding," although the term when applied to an action is normally preceded by the adjective "ordinary" [*see, e.g., Code Civ. Proc. § 22*]; hence, the term "ordinary proceeding" is synonymous with the term "civil action." Otherwise stated, a civil remedy may be either a civil action, which is an ordinary proceeding, or a special proceeding of a civil nature, sometimes shortened to "special proceeding," or simply to "proceeding" without a modifier.

A civil action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, or the redress or prevention of a wrong [*see Code Civ. Proc. §§ 22, 30*]. Every other civil remedy is a special proceeding [*see Code Civ. Proc. § 23*]. A civil action arises out of an obligation or an injury [*Code Civ. Proc. § 25*]. "Obligation" is defined in *Code Civ. Proc. § 26* and "injury" in *Code Civ. Proc. §§ 27-29*.

[2] Provisional Remedies Distinguished

Special proceedings should not be confused with provisional remedies, which are merely remedies ancillary or incidental to a pending civil action or special proceeding. There are five provisional remedies: (1) claim and delivery [*see Code Civ. Proc. § 511.010 et seq.*]; (2) temporary restraining orders and preliminary injunctions [*see Code Civ. Proc. § 525 et seq.*]; (3) attachment [*see Code Civ. Proc. § 481.010 et seq.*]; (4) receivership [*see Code Civ. Proc. § 564 et seq.*]; and (5) deposit in court [*see Code Civ. Proc. § 572 et seq.*].

[3] Governing Law

Civil actions are governed by the provisions of Part Two of the Code of Civil Procedure, entitled "Civil Actions," that is, by the provisions of *Code Civ. Proc. §§ 307-1062.10*. Special proceedings of a civil nature are, on the other hand, governed by the specific statutes creating the special proceeding. Numerous such proceedings are governed by the provisions of Part III of the Code of Civil Procedure, entitled "Special Proceedings," that is, by *Code Civ. Proc. §§*

1063-1822.59. The most common examples of special proceedings covered are:

- Mandate, prohibition, and certiorari proceedings [*see Code Civ. Proc. § 1067 et seq.*].

- Proceedings in unlawful detainer, forcible detainer, and forcible entry [*see Code Civ. Proc. § 1159 et seq.*].

- Eminent domain proceedings [*see Code Civ. Proc. § 1230.010 et seq.*].

- Contempt proceedings [*see Code Civ. Proc. § 1209 et seq.*].

- Arbitration proceedings [*see Code Civ. Proc. § 1280 et seq.*].

Common examples of special proceedings covered in a code other than the Code of Civil Procedure are proceedings under the Family Code [*see Fam. Code § 200 et seq.*]. Other common examples include proceedings in probate under the Probate Code [*see Prob. Code § 7000 et seq.*]. The important thing to note is that the provisions of Part Two of the Code of Civil Procedure apply only to civil actions and not to special proceedings of a civil nature, except as follows:

- A particular statute in Part Two may by its own terms apply to "civil actions" and "special proceedings of a civil nature" (in some statutes, shortened to "special proceedings" or simply to "proceedings"), in which event the statute will apply by its own force to both civil actions and special proceedings.

- The statutory provisions governing the particular special proceedings may incorporate specific statutory provisions from Part Two or may, by a blanket provision, incorporate the provisions of Part Two.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureRemediesProvisional RemediesGeneral Overview

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[Reserved]

§§ 2.06[Reserved]

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§ 2.10 Facts to Be Ascertained

Not all of the following facts will be relevant in all types of actions; this listing is only intended to be a general guide. In addition, not all of the facts will be ascertainable from the client in the initial interview. Subsequent interviews may be required or it may be necessary to ascertain the facts from another person, including the potential defendant, through discovery procedures.

1. Facts relating to plaintiff.

a. Name, address, home telephone number, sex, and age.

b. Aliases used (past or present).

c. Capacity.

d. Prior addresses.

e. Occupation.

f. Employment, including:
(1) Name, address and telephone number of present employer.

(2) Date employment commenced.

(3) Time and length of absences from work and reasons therefor.

(4) Gross and net earnings.

g. Prior employment with inclusive dates of absences, if possible, and reasons therefor.

h. Marital status. If married, name of spouse and address if different from that of plaintiff.

i. Prior marriages with reason for, and date of, termination of each.

j. Children. Identify by name, age, and sex, and, if not living with plaintiff, address.

k. If plaintiff sustained physical injury for which recovery is sought, prior illnesses and prior injuries, if any, together with names and addresses of each treating physician and hospital, a description of treatment given, and prognosis of each illness and injury.

l. Plaintiff's insurance coverage.

(1) Name and address of insurer(s) and agent(s).

(2) Type(s) and amount(s) of coverage.

(3) Whether any claim(s) were filed in connection with transaction or occurrence involved.

m. Plaintiff's prior criminal record, if any.

n. Plaintiff's military status, now and within the last 90 days [*see 50 U.S.C. App. §§ 522* (discretionary stay), 526 (tolling)].

o. Plaintiff's documents and platforms: paper, electronic, other.

2. Facts relating to cause of action. For specific facts to be ascertained in a particular action, see the chapter relating to particular cause of action.

a. Date and time.

b. Place.

c. Description of transaction or occurrence.

d. Names, capacities, and addresses of all parties involved.

e. Description of what each person did so far as plaintiff can recollect.

f. Any other facts relevant to cause of action.

3. Damages sustained by plaintiff.

For discussion and forms regarding damages generally, see Ch. 177, *Damages* .

a. Personal injuries [*see Civ. Code §§ 3281, 3333*]. For discussion and forms regarding personal injuries generally, see *Ch. 177, Damages. § 177.40 et seq.* For discussion and forms regarding personal injury damages in a particular action, see specific chapter for that action.

b. Emotional distress [*see Civ. Code § 3333*; *Molien v. Kaiser Foundation Hospitals (1980) 27 Cal. 3d 916, 930, 167 Cal. Rptr. 831, 616 P.2d 813* ; *State Rubbish etc. Assn. v. Siliznoff (1952) 38 Cal. 2d 330, 336-339, 240 P.2d 282]* . For discussion, procedure, and forms, see Ch. 362, *Mental Suffering and Emotional Distress* .

c. Spouse's loss of consortium [*see Civ. Code § 3333*; *Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 408, 115 Cal. Rptr. 765, 525 P.2d 669]* . For discussion, procedure, and forms, see Ch. 354, *Loss of Consortium* .

d. Wrongful death [*Code Civ. Proc. § 377.20 et seq.*]. For discussion, procedure, and forms, see Ch. 181, *Death and Survival Actions* .

e. Injury to or loss of personal property [*see Civ. Code §§ 3333, 3336, 3354*]. For discussion and forms regarding injury or loss of personal property generally, see Ch. 150, *Conversion* and Ch. 177, *Damages* . For discussion and forms regarding loss or injury to particular item, see specific chapter for that item.

f. Injury to real property [*see Civ. Code § 3333*]. For discussion and forms regarding injury to real property, see specific chapter for the appropriate cause of action, for example, Ch. 391, *Nuisance* or Ch. 550, *Trespass* .

g. Injury to reputation [*see Civ. Code §§ 43-48a*; *Code Civ. Proc. §§ 460-461*]. For discussion, procedure, and forms, see Ch. 340, *Libel and Slander* .

h. Injury to business relationships [*see Bus. & Prof. Code §§ 17200, 17500-17535*; *Civ. Code §§ 3294, 3333*]. For discussion and forms, see Ch. 565, *Unfair Competition* .

i. Invasion of privacy [*see Civ. Code §§ 3333, 3344, 3344.1*]. For discussion and forms, see Ch. 429, *Privacy* .

j. Breach of contract [*see Civ. Code §§ 3300-3318*]. For discussion and forms, see Ch. 140, *Contracts* , and Ch. 177, *Damages* .

4. Other relief desired by plaintiff.

a. Specific performance of a contract [*see Civ. Code §§ 3384-3395*]. For discussion, procedure, and forms, see Ch. 528, *Specific Performance* .

b. Reformation of a written instrument [*see Civ. Code §§ 3399-3402*]. For discussion, procedure, and forms, see Ch. 488, *Reformation of Instruments* .

c. Restitution based on rescission of a contract [*see Civ. Code §§ 1688, 1689, 1692*]. For discussion, procedure, and forms, see Ch. 490, *Rescission and Restitution* .

d. Injunctive or declaratory relief [*see* Civ. Code §§ 3420-3423, *Code Civ. Proc. §§ 525-534* (injunctive relief); *Code Civ. Proc. §§ 1060-1062a* (declaratory relief)]. For discussion, procedure, and forms regarding declaratory relief, see Ch. 182, *Declaratory Relief* ; for discussion, procedure, and forms regarding injunctive relief, see Ch. 303, *Injunctions* .

e. Cancellation of a written instrument [*see Civ. Code §§ 3412-3414*]. For discussion, procedure, and forms, see Ch. 107, *Cancellation of Instruments* .

f. Recovery of real property [*see Civ. Code § 3375*]. For discussion and forms to recover property fraudulently conveyed, see *Ch. 270, Fraudulent Conveyances, § 270.30 et seq.*; for discussion, procedure, and forms for redeeming property after it has been sold in execution of a writ of sale, see Ch. 254, *Executions and Enforcement of Judgments* .

g. Quiet title to property [*see Code Civ. Proc. § 760.010 et seq.*]. For discussion, procedure, and forms, see Ch. 482, *Quieting Title* .

h. Recovery of personal property [*see Civ. Code §§ 3379, 3380*]. For discussion, procedure, and forms, see Ch. 119, *Claim and Delivery* and Ch. 270, *Fraudulent Conveyances* .

i. Accounting. For discussion, procedure, and forms, see Ch. 7, *Accounting, Action for*.

j. Foreclosure of a lien. For discussion, procedure, and forms, see Ch. 342, *Liens and Wage Preferences* , and Ch. 361, *Mechanics' Liens* .

k. Foreclosure of a mortgage or trust deed [*see Civ. Code § 2931*; *Code Civ. Proc. §§ 725a-730.5*]. For discussion, procedure, and forms, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

l. Establishment of resulting trust [*see Civ. Code § 2223*]. For discussion and forms, see Ch. 562, *Trusts: Resulting Trusts* .

m. Establishment of constructive trust [*see Civ. Code § 2224*]. For discussion and forms, see Ch. 561, *Trusts: Constructive Trusts* .

n. Benefits under workers' compensation law [*see Lab. Code §§ 3200-6208*]. For discussion and forms, see Ch. 577, *Workers' Compensation* .

o. Establishment of receivership [*Code Civ. Proc. §§ 568-570*]. For discussion, procedure, and forms, see Ch. 486, *Receivers* .

5. Facts relating to each defendant.

a. Name, address, and telephone number of each potential defendant, whether an individual or a legal entity (such as corporation or governmental entity), and sex and approximate age of each potential individual defendant.

b. If defendant is a corporation, name and address of agent for service of process.

c. Occupation, including name and address of employer, of each individual defendant.

d. Employment or agency status, if any, of each individual defendant.

e. Marital status of each individual defendant.

f. Assets which might be used to satisfy future judgment.

g. Capacity of each potential defendant (e.g., minor, adult, trustee, conservator, guardian, executor, partnership, domestic corporation, foreign corporation).

h. Defendant's insurance coverage.

(1) Name and address of insurer(s) and agent(s).

(2) Type(s) and amount(s) of coverage.

(3) Whether any claims were filed in connection with the transaction or occurrence.

i. Defendant's military status, now and within the last 90 days [*see 50 U.S.C. App. §§ 522* (discretionary stay), *524* (stay of execution, vacation or stay of attachments), *526* (tolling)].

6. Facts relating to witnesses.

a. Name, address, and telephone number of each witness and of each person to whom any parties might have spoken about cause of action.

b. Sex and approximate age of each witness.

c. Occupation of each witness.

d. Marital status of each witness.

7. Other relevant facts.

a. Statements made by plaintiff to defendant, his or her agents, employees, or insurer, or other person present when cause of action arose, if any.

b. Statements made to plaintiff by defendant, his or her agents, employees, or insurer, or other persons, if any, including settlement offers.

c. Alcohol or drugs, if any, used by plaintiff or defendant at time cause of action arose.

d. Medical devices (e.g., eyeglasses or artificial limb) used by parties at time cause of action arose.

e. Physical condition of parties at time cause of action arose.

f. Prior criminal convictions, including crime, date and place of conviction, and penalty imposed for each:

(1) Sustained by defendant.

(2) Sustained by each witness.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureGeneral Overview

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§ 2.11 Documents to Be Obtained

Obtain all documents and papers relevant to cause of action, including:

1. Written instrument on which action is based. For listing of documents to be obtained when action is on contract, see Ch. 140, *Contracts* .

2. Relevant letters or other correspondence between parties.

3. Relevant written statements made by parties to others.

4. Insurance policies, if applicable.

5. Documents tending to show items or amounts of damages, if any.

6. Documents filed in any prior action between parties, or between party to this action and third party, that are relevant to this action.

7. Any other documents relevant to this action. For listing of documents to be obtained when cause of action arises out of a vehicle collision, see *Ch. 81A, Automobiles: Investigation, § 81A.30*.

8. Documentation on electronic storage systems, along with policies for retention of documents. For discussion of requirements to preserve documents and electronic information for purposes of litigation, see Ch. 195A, *Discovery: Discovery of Electronically Stored Information (E-Discovery)* and Ch. 199: *Discovery: Preservation of Evidence.*

Legal Topics:

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

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§ 2.12 Preliminary Determinations and Proceedings

1. Potential causes of action and defenses.

After ascertaining relevant facts [*see § 2.10*], obtaining pertinent documents [*see § 2.11*], and researching applicable law, determine:

a. All potential causes of action that plaintiff may have against defendant(s).

b. All potential defenses that may be asserted against plaintiff.

c. All potential cross claims that may be asserted against plaintiff.

2. Time limitation for filing action.

a. Applicable statute of limitations period.

Determine statute of limitations period applicable to each potential cause of action. For table of statutory limitation periods, see Ch. 345, *Limitation of Actions* .

b. Tolling of statute of limitations period.

Determine whether limitation period has been tolled by statutory provision or otherwise, including:

(1) Defendant's absence from state [*see Code Civ. Proc. § 351*].

(2) Plaintiff's minority [*see Code Civ. Proc. § 352*].

(3) Plaintiff's insanity [*see Code Civ. Proc. § 352*].

(4) Plaintiff's imprisonment on criminal charge or conviction for term less than life; tolling limited to two years [*see Code Civ. Proc. § 352.1*].

(5) Stay of commencement of action by injunction or statutory prohibition [*see Code Civ. Proc. § 356*].

(6) Defendant's fraudulent concealment of plaintiff's cause of action [*see Pashley v. Pacific Elec. Ry. Co. (1944) 25 Cal. 2d 226, 229-232, 153 P.2d 325]* .

(7) Defendant's military status, now and within the last 90 days [*see 50 U.S.C. App. §§ 522* (discretionary stay), *524* (stay of execution, vacation or stay of attachments), *526* (tolling)].

(8) Plaintiff's military status, now and within the last 90 days [*see 50 U.S.C. App. §§ 522* (discretionary stay), *526* (tolling)].

(9) Any other ground for tolling the running of limitation period for commencing action. For a discussion of provisions for tolling the statute of limitations, see Ch. 345, *Limitation of Actions* .

c. Laches period.

If plaintiff is seeking equitable relief, determine whether action may be barred at a date earlier than that set forth in applicable statute of limitations under doctrine of laches, that is, by a delay in commencing action that was prejudicial to the defendant [*see Conti v. Board of Civil Service Comm'rs (1969) 1 Cal. 3d 351, 359-360, 82 Cal. Rptr. 337, 461 P.2d 617]* .

3. Necessity for presentation of prior written claim.

a. Action against public entity or employee.

(1) Determine whether plaintiff's cause of action is one for which written claim must be presented to public entity before maintaining action [*see Gov. Code §§ 905-905.6, 945.4*]. For a discussion of when a claim must be presented, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

(2) If presentation of a claim is required but a claim has not previously been filed, prepare and file claim in manner and within the special time limits specified in *Gov. Code §§ 910-915.4*. For discussion, forms, and procedural guide relating to procedure for presenting a claim and obtaining relief when a timely claim has not been filed, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

b. Action against estate of decedent.

(1) Determine whether plaintiff's cause of action is one for which a written claim must be filed with the court and a copy of the claim mailed to the personal representative [*see Prob. Code § 9000 et seq.* (filing of claim)]. For discussion of when claims must be filed before maintaining an action against a decedent's estate, see Ch. 454, *Probate: Claims Against the Estate* .

(2) If filing of claim is required but a claim has not previously been filed, prepare and file claim in manner and within time limits specified in *Prob. Code § 9000 et seq.* For a form of claim, see Ch. 442, *Probate: Initiating Probate Administration* .

4. Plaintiff's capacity and standing to sue.

a. Generally.

Determine whether person bringing action is real party in interest [*see Code Civ. Proc. § 367*].

b. Minor, incompetent person, or person for whom conservator has been appointed.

(1) Determine whether guardian or conservator for plaintiff's person or estate has previously been appointed [*see Code Civ. Proc. § 372*] and if so whether he or she will appear on behalf of plaintiff in action or proceeding. For discussion, forms, and procedural guide relating to appointment of conservators and guardians, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians*, and Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators*.

(2) If plaintiff has no guardian or conservator, or if appointment of a guardian ad litem otherwise appears expedient, petition for appointment of guardian ad litem to appear on plaintiff's behalf, if one has not already been appointed [*see Code Civ. Proc. §§ 372*, *373*]. For discussion, forms, and procedural guide relating to appointment of guardians ad litem, see Ch. 291, *Guardians ad Litem* .

c. Unborn or unascertained persons.

(1) Determine whether under terms of written instrument or otherwise person or persons of designated class, who are unascertained or who are not in being, may be or may become legally interested in any real or personal property involved in the action or proceeding [*see Code Civ. Proc. § 373.5*].

(2) Request appointment of guardian ad litem to represent such persons, if appropriate [*see Code Civ. Proc. § 373.5*]. For discussion and forms pertaining to appointment of a guardian ad litem in such circumstances, see *Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, § 560.14*. For discussion, forms, and procedural guide relating to appointment of guardians ad litem in general, see Ch. 291, *Guardians ad Litem* .

d. Estate of decedent.

Determine whether person initiating action is personal representative or, if none, the decedent's successor in interest, and therefore entitled to bring action on behalf of decedent's estate [*see Code Civ. Proc. § 369*; *Prob. Code § 573*]. For discussion and forms pertaining to actions by personal representative of decedent to recover damages based on cause of action that accrued before decedent's death, see Ch. 181, *Death and Survival Actions* .

e. Express trust.

Determine whether person initiating action is trustee or other person authorized to bring action against

third parties on behalf of beneficiaries of trust [*see Code Civ. Proc. § 369*].

f. Owners' association.

(1) Determine if action is for damages to commonly owned lots, parcels, or areas or individually owned lots, parcels, or areas which owners' association is obligated to maintain, preserve, or repair occasioned by acts or omissions of others [*see Code Civ. Proc. § 383*].

(2) If so, determine whether person initiating action is owners' association established in a project consisting of [*see Code Civ. Proc. § 383*]:

(a) Condominiums, as defined in *Civ. Code § 783*;

(b) Community apartment project, as defined in *Bus. & Prof. Code § 11004*;

(c) Undivided interest subdivision project, as defined in Bus. & Prof. Code § 11001.1; or

(d) Planned development, as defined in *Bus. & Prof. Code § 11003*.

g. Class action.

For discussion, procedure, and forms regarding class actions, see Ch. 120, *Class Actions* .

Determine whether person initiating action is member of class of persons and whether [*see Code Civ. Proc. § 382*]:

(1) There is question of common or general interest of many persons, or

(2) Parties are numerous and it is impracticable to bring them all before the court.

h. Wrongful death.

For discussion, procedure, and forms regarding wrongful death actions, see Ch. 181, *Death and Survival Actions* .

Determine whether person who initiated action is or was either [*see Code Civ. Proc. § 377.60 et seq.*]:

(1) Entitled to succeed to property of decedent according to provisions of the Probate Code relating to intestate succession;

(2) Putative spouse, children of putative spouse, stepchildren, or parents, if dependent on decedent; or

(3) Minor residing at time of decedent's death and for previous 180 days in decedent's household and dependent on decedent for one-half or more of his or her support.

5. Potential disabilities to maintaining action.

a. Person transacting business under fictitious name.

(1) Determine whether plaintiff's action is based on contract made or transaction had

under fictitious business name [*see Bus. & Prof. Code § 17918*].

(2) If so, have plaintiff execute, file, and publish fictitious business name statement as required by *Bus. & Prof. Code §§ 17900-17930* if he or she has not done so previously [*see Bus. & Prof. Code § 17918*; *see also* discussion in Ch. 402, *Partnerships: Actions Between General Partners or Partnerships and Third Parties*].

b. Foreign corporation or limited liability company transacting intrastate business.

(1) If action arises out of intrastate business transacted by plaintiff corporation, ascertain whether it has qualified to transact business in California as required by *Corp. Code § 2105* or is exempted pursuant to *Corp. Code § 2102*. In case of foreign limited liability company, ascertain whether it has registered to transact intrastate business as required by *Corp. Code § 17451*.

(2) If plaintiff corporation has not qualified to transact business in California but is required to qualify, obtain a certificate of qualification from Secretary of State pursuant to *Corp. Code §§ 2105, 2106* before commencing action [*see Corp. Code § 2203(c)*]. For discussion, procedure, and forms for qualifying to do business, see Ch. 160, *Corporations: Capacity* . In case of foreign limited liability company, register with Secretary of State pursuant to *Corp. Code § 17451* before commencing action [*see Corp. Code § 17456(a)*].

c. Suspension of powers of domestic corporation or domestic or foreign limited liability company registered to transact intrastate business in California.

(1) Failure by to file biennual statement.

(a) Determine if plaintiff's powers have been suspended for failure to file an annual statement as required by *Corp. Code § 1502* (corporations) or *Corp. Code § 17060* (limited liability company) [*see Corp. Code §§ 2205(a), 17654(a)*].

(b) If plaintiff's powers have been suspended, file required statement. On filing, Secretary of State will certify fact that a statement has been filed to the Franchise Tax Board and corporation or LLC may be relieved from suspension unless it is held in suspension by the FTB by reason of *Rev. & Tax. Code § 23301* or *23301.5* [*see Corp. Code §§ 2205(d), 17654(d)*]. For discussion, procedure, and forms regarding suspension of corporate powers, see Ch. 160, *Corporations: Capacity* .

(2) Failure to pay state taxes.

(a) Determine whether plaintiff's powers have been forfeited or suspended for nonpayment of state taxes [*see Rev. & Tax Code § 23301*], for failure to file return [*see Rev. & Tax Code § 23301.5*], or for failure to file statement of exemption [*see Rev. & Tax. Code § 23775*].

(b) If plaintiff's powers have been suspended under *Rev. & Tax Code § 23301* or *23301.5*, obtain certificate of revivor from Franchise Tax Board by making written application therefor and by paying all taxes, additions to tax, penalties, interest, and any other amounts due [*see Rev. & Tax Code § 23305*; *see also Rev. & Tax Code § 23305b* (revivor of powers on partial payment of taxes if revivor will improve prospects for

recovery of full amount due); *Rev. & Tax Code § 23776* (relief from suspension)]. For discussion, procedure, and forms regarding suspension or forfeiture of powers, see Ch. 160, *Corporations: Capacity* .

d. Failure to obtain license.

(1) Determine whether cause of action arises out of activity requiring license. For discussion regarding when license required, see Ch. 104, *Building Contracts* , and Ch. 471B, *Licensing by Public Agencies* .

(2) Ascertain whether requirements of appropriate licensing statute have been met. For discussion regarding licensing statute requirements, see Ch. 104, *Building Contracts* , and Ch. 471B, *Licensing by Public Agencies* .

(3) If license required and licensing statute requirements have been met, obtain certificate from officer in charge of records of any agency in Department of Consumer Affairs [*see Bus. & Prof. Code § 101*].

(4) If license required and licensing statute requirements have not been met, determine whether object of statute requiring license is solely for revenue or for purpose of protection that would bar any action by plaintiff [*see Wood v. Krepps (1914) 168 Cal. 382, 386-387, 143 P. 691* ; *Mansfield v. Hyde (1952) 112 Cal. App. 2d 133, 139, 245 P.2d 577]* . For further discussion, see Ch. 104, *Building Contracts* , and Ch. 471B, *Licensing by Public Agencies* .

e. Party in military service.

(1) If ability of party in military service to prosecute or defend action is materially affected by reason of his or her military service, a stay is mandatory; otherwise it is discretionary [*see 50 U.S.C. App. § 522*]. For discussion, see Ch. 136, *Continuances* .

(2) Default of party in military service cannot be taken without appointment of counsel and giving of bond, and may later be set aside if prejudice is shown [*see 50 U.S.C. App. § 521*]. For discussion and forms, see Ch. 205, *Defaults and Default Judgments*, and Ch. 489, *Relief From Judgments and Orders*.

(3) Attachment, garnishment, or execution of judgment or order entered against party in military service may be stayed or vacated if his or her ability to comply with judgment or order is materially affected by reason of his or her military service [*see 50 U.S.C. App. § 524*]. For discussion and forms, see Ch. 62, *Attachment* , and Ch. 276, *Garnishment* .

(4) Enforcement of leases, installment contracts, and security agreements, including repossessions and foreclosures, other than under court order that may impose any conditions necessary to conserve interests of all parties, is misdemeanor and may be vacated [*50 U.S.C. App. § 531 et seq.*; *see Luke v. Mercantile Acceptance Corp. (1952) 111 Cal. App. 2d 431, 436-437, 244 P.2d 764* (repossession in violation of these provisions amounts to conversion)]. See discussion in *Ch. 89, Automobiles: Sales and Financing Under the Rees-Levering Act, § 89.29*; Ch. 127, *Consumer Contracts and Loans* , General Introduction; Ch. 333, *Landlord and Tenant: Eviction Actions*; Ch. 501, *Sales: Retail Installment Sales*, and Ch. 555, *Trust Deeds and Real Property Mortgages*.

6. Venue.

a. Determine county or counties in which action may be commenced and tried.

(1) General rule.

Except as otherwise provided by law, proper county is county in which defendant, or any defendant, resides at commencement of action [*see Code Civ. Proc. § 395(a)*].

(2) Action for injury to person or personal property or for wrongful death.

Proper county is either [*see Code Civ. Proc. § 395(a)*]:
(a) County where injury or injury causing death occurred, or

(b) County where defendant, or any defendant, resides at commencement of action.

(3) Action or proceeding against state or state department, institution, board, commission, bureau, officer, or other agency required or authorized by law to be commenced, tried, or removed to Sacramento County.

May be commenced and tried in any California city in which Attorney General has an office [*see Code Civ. Proc. § 401(1)*].

(4) Action or proceeding against county, city, or local agency.

(a) If brought by another county, city, or local agency, proper county is any county not a party to the action and in which city or local agency is not situated [*see Code Civ. Proc. § 394(a)*].

(b) Otherwise, proper county is defendant county, or county in which defendant city or local agency is situated [*see Code Civ. Proc. § 394(a)*].

(5) Certain actions against public officer or person especially appointed to execute officer's duties.

In action based on act done by public officer in virtue of his or her office, or against a person who, by officer's command or in officer's aid, did anything touching duties of officer, proper county is county in which cause of action, or some part of it, arose [*see Code Civ. Proc. § 393(b)*].

(6) Certain actions against personal representative, guardian, conservator, or trustee.

In action in which such person is sued in his or her official capacity on claim for payment of money or for recovery of personal property, proper county is county having jurisdiction of estate he or she represents, except as otherwise provided in *Prob. Code § 17005* pertaining to trustees [*Code Civ. Proc. § 395.1*; *see Prob. Code § 17005* (proceeding under the Trust Law, *Prob. Code § 15000 et seq.*, generally); *see also Prob. Code § 82* (definition of trust), *Prob. Code §§ 17300-17302* (testamentary trust subject to continuing court jurisdiction); for discussion, *see* Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts*].

(7) Action against corporation or association.

(a) Proper county is generally county where corporation's principal place of business is situated [*see Code Civ. Proc. § 395.5*].

(b) If action based on contract, proper county also includes county [*see Code Civ. Proc. § 395.5*]:

(i) Where contract was made or was to be performed,

(ii) Where obligation or liability arose, or

(iii) Where breach occurred.

(8) Action to recover or determine right to recover real property or an estate or interest in real property.

Proper county is county in which real property or some part of it is situated [*Code Civ. Proc. § 392(a)(1)*].

(9) Action for injury to real property.

Proper county is county in which real property or some part of it is situated [*Code Civ. Proc. § 392(a)(1)*].

(10) Action to foreclose lien or mortgage on real property.

Proper county is county in which real property or some part of it is situated [*Code Civ. Proc. § 392(a)(2)*].

(11) Action for partition of property.

(a) If subject of action is real property or real and personal property, proper county is that in which real property or some part of it is situated [*Code Civ. Proc. § 872.110(b)(1)*].

(b) If subject of action is personal property, proper county is either [*Code Civ. Proc. § 872.110(b)(2)*]:

(i) County in which personal property is principally located at commencement of action, or

(ii) County in which defendants, or any of them, reside at commencement of action.

(12) Action to recover a penalty or forfeiture imposed by statute.

(a) Proper county is generally county in which cause arose [*Code Civ. Proc. § 393(a)*].

(b) When penalty or forfeiture imposed for an offense committed on a lake, river, or other stream of water situated in two or more counties, action may be tried in any county bordering on the lake, river, or stream opposite to the place where the offense was committed [*Code Civ. Proc. § 393(a)*].

(13) Action on contract.

Proper county is either [*Code Civ. Proc. § 395(a)*]:

(a) County in which contract in fact was entered into,

(b) County where obligation was to be performed (county in which obligation was incurred is deemed to be county in which it was to be performed unless there is a special contract in writing to the contrary [*Code Civ. Proc. § 395(a)*]), or

(c) County where defendant or any defendant, resides at commencement of action.

(14) Action Under Unruh Retail Installment Sales Act (*Civ. Code § 1801 et seq.*).

Proper county is that in which [*Civ. Code § 1812.10*]:

(a) Contract was in fact signed by buyer;

(b) Buyer resided at time contract was entered into;

(c) Buyer resides at commencement of action; or

(d) Goods purchased pursuant to the contract have been so affixed to real property as to become a part thereof.

(15) Action under Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*).

Proper county is that in which [*Civ. Code § 2984.4*]:

(a) Contract or purchase order was in fact signed by buyer;

(b) Buyer resided at time contract or purchase order was entered into;

(c) Buyer resides at commencement of action; or

(d) Motor vehicle purchased pursuant to contract or purchase order is permanently garaged.

(16) Action on consumer obligations specified in Civ. Code § 395(b).

In action arising from an offer or provision of goods, services, loans, or extensions of credit intended primarily for personal, family, or household use (other than an obligation described in *Civ. Code § 1812.10* or *2984.4*) or an action arising from a transaction consummated as a proximate result of either an unsolicited telephone call made by a seller engaged in the business of consummating transactions of that kind or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller, the proper county is that in which the buyer or lessee [*Code Civ. Proc. § 395(b)*]:

(a) In fact signed contract;

(b) Resided at the time contract was entered into; or

(c) Resides at commencement of action.

(17) Action authorized by *Fam. Code § 7600 et seq.* to determine a parental relation.

(a) Proper county is generally that in which child resides [*Fam. Code § 7620(b)*; *Code Civ. Proc. § 395(a)*].

(b) If father is deceased, action may be brought in county in which proceedings for probate of his estate have been or could be brought [*Fam. Code § 7620(b)*].

(18) Action to enforce support obligation.

In action to enforce support obligation under *Fam. Code § 3900* (relating to parents' duty to support children), proper county is that in which child resides [*Code Civ. Proc. § 395(a)*].

(19) Defendant about to depart from state.

Action may be tried in any county where either of the parties resides or where service is made [*Code Civ. Proc. § 395(a)*].

(20) None of defendants resides in state.

Action may be tried in any county which plaintiff designates in complaint [*Code Civ. Proc. § 395(a)*].

(21) Defendants residing in state but county in which defendants reside unknown to plaintiff.

Action may be tried in any county which plaintiff designates in complaint [*Code Civ. Proc. § 395(a)*].

7. Subject matter jurisdiction. Determine the court in which action may or must be filed.

a. Unlimited civil case.

Unlimited civil cases are within jurisdiction of superior court [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85-86*]. For listing of limited civil cases, see Paragraph b, *below.* Superior court also has jurisdiction over certain actions and proceedings under specific statutory provisions, for example:

(1) All proceedings under Family Code [*Fam. Code § 200*].

(2) Proceedings regarding decedents' estates [*Prob. Code §§ 7050-7052*].

(3) Juvenile court proceedings [*Welf. & Inst. Code § 245*].

b. Limited civil case.

Limited civil cases are within the jurisdiction of the superior court [*Cal. Const., art. VI, § 10*].

The following types of civil actions and proceedings are limited civil cases:

(1) All cases at law in which demand, excluding interest, or value of property in controversy, amounts to $25,000 or less, unless case involves legality of any tax, impost, assessment, toll, or municipal fine [*Code Civ. Proc. § 86(a)(1)*].

(2) Actions for dissolution of partnership when total assets of partnership do not exceed $25,000 [*Code Civ. Proc. § 86(a)(2)*].

(3) Actions of interpleader when amount of money or value of property involved does not exceed $25,000 [*Code Civ. Proc. § 86(a)(2)*].

(4) Actions to cancel or rescind contract when relief is sought in connection with action to recover money not exceeding $25,000, or recover property of a value not exceeding

$25,000, paid or delivered under or in consideration of contract [*Code Civ. Proc. § 86(a)(3)*].

(5) Actions to revise a contract when relief is sought in action on contract, if court otherwise has jurisdiction of action [*Code Civ. Proc. § 86(a)(3)*].

(6) Actions to enforce and foreclose liens on personal property when amount of liens is $25,000 or less [*Code Civ. Proc. § 86(a)(5)*].

(7) Actions to enforce and foreclose, or petitions to release, liens of mechanics, materialmen, artisans, laborers, and of all other persons to whom liens are given under provisions of *Civ. Code § 3109 et seq.*, or to enforce and foreclose an assessment lien on a common interest development as defined in *Civ. Code § 1351*, when amount of liens is $25,000 or less, unless action affects property that is also affected by a similar pending action that is not a limited civil case, or when total amount of the liens sought to be foreclosed against the same property aggregates amount in excess of $25,000 [*Code Civ. Proc. § 86(a)(6)*].

(8) Actions for declaratory relief when brought [*Code Civ. Proc. § 86(a)(7)*; *see Code Civ. Proc. § 1060*]:

(a) By way of cross complaint as to a right of indemnity with respect to the relief demanded in the complaint or a cross complaint in an action or proceeding that is otherwise a limited civil case; or

(b) To conduct a trial after a nonbinding fee arbitration between an attorney and client, pursuant to *Bus. & Prof. Code § 6200 et seq.*, when the amount in controversy is $25,000 or less.

(9) Proceedings to issue temporary restraining orders and preliminary injunctions, to take accounts, and where necessary to preserve the property or rights of any party to a limited civil case [*Code Civ. Proc. § 86(a)(8)*].

(10) Proceedings to appoint a receiver pursuant to *Code Civ. Proc. § 564* (appointment of receiver) in a limited civil case [*Code Civ. Proc. § 86(a)(8)*].

(11) Actions to determine title to personal property seized in a limited civil case [*Code Civ. Proc. § 86(a)(8)*].

(12) Actions under *Code Civ. Proc. § 708.210 et seq.* for recovery of interest in personal property or to enforce liability of the debtor of a judgment debtor when interest adversely claimed is of value not exceeding $25,000 or debt denied does not exceed $25,000 [*Code Civ. Proc. § 86(a)(9)*].

(13) All arbitration related petitions filed [*Code Civ. Proc. § 86(a)(10)*]:

(a) Pursuant to *Code Civ. Proc. § 1292 et seq.*, except for uninsured motorist arbitration proceedings in accordance with *Ins. Code § 11580.2*, if the petition is filed before the arbitration award becomes final and the matter to be resolved by arbitration is a limited civil case under *Code Civ. Proc. § 86(a)(1)-(9)*, inclusive, or the petition is filed after the arbitration award becomes final and the amount of the award and all other rulings, pronouncements, and decisions made in the award are within *Code Civ. Proc. §*

86(a)(1)-(9), inclusive; or

(b) To confirm, correct, or vacate a fee arbitration award between an attorney and client that is binding or has become binding, pursuant to *Bus. & Prof. Code § 6200 et seq.*, when the arbitration award is $25,000 or less.

(14) Cases to try title to personal property when amount involved is not more than $25,000 [*Code Civ. Proc. § 86(b)(1)*].

(15) Cases when equity is pleaded as a defensive matter in any case that is otherwise a limited civil case [*Code Civ. Proc. § 86(b)(2)*].

(16) Proceedings to vacate judgment or order obtained in a limited civil case through extrinsic fraud, mistake, inadvertence, or excusable neglect [*Code Civ. Proc. § 86(b)(3)*].

8. Settlement value.

a. Ascertain amount that will compensate plaintiff for out-of-pocket expenses (special damages), costs of litigation, and attorney's fees.

b. Consider any subrogation and lien rights of any insurers and agencies providing benefits to plaintiff for losses caused by the accident.

c. Assess value of case as if there were no problems of law or evidence.

d. Consider any problems of law and evidence that might diminish probable recovery if case went to trial.

e. Assess minimum settlement value and negotiable settlement value.

9. Perpetuation of testimony and evidence.

If complaint cannot be filed immediately, initiate proceedings to perpetuate testimony under *Code Civ. Proc. § 2035.010 et seq.* [*see* Ch. 199, *Discovery: Preservation of Evidence* , for procedure and forms] and obtain court order authorizing [*see Code Civ. Proc. § 2035.050*]:

a. Depositions (and, if appropriate, physical, mental, or blood examinations) of any party or material witness whose testimony might be lost prior to due course of ordinary discovery, such as any person who is about to leave the state, or is in danger of death or incapacity.

b. Inspection, for copying or photographing, of any documents or property which might become lost or altered.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureVenueIndividual DefendantsCivil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedureClass ActionsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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A. Plaintiff's Guide

1-2 California Forms of Pleading and Practice--Annotated § 2.13

§ 2.13 Intervention

1. Permissive [*Code Civ. Proc. § 387(a)*].

For discussion, procedure, and forms, see Ch. 395, *Parties* .

a. Determine whether there is an action pending in which plaintiff, as third party, has an interest [*Code Civ. Proc. § 387(a)*]:
(1) In matter in litigation,

(2) In success of either of parties, or

(3) Against both parties.

b. Draft complaint in intervention [*Code Civ. Proc. § 387(a)*; for procedures for preparation of complaint, *see § 2.14*]:

(1) Joining plaintiff in claiming what is sought by original complaint,

(2) Uniting with defendant in resisting claims of plaintiff, or

(3) Demanding anything adversely to both plaintiff and defendant.

c. Apply for leave of court to file complaint [*Code Civ. Proc. § 387(a)*].

d. Serve in manner provided for service of summons or in manner provided by *Code Civ. Proc. §§ 1010-1020* [*Code Civ. Proc. § 387(a)*]:

(1) On parties to action or proceeding who have not appeared in same manner as on

commencement of an original action, and

(2) On attorneys of parties who have appeared or on party if he or she has appeared without an attorney.

2. Mandatory [*Code Civ. Proc. § 387(b)*]. For discussion, procedure, and forms, see Ch. 395, *Parties* .

a. If any provision of law confers unconditional right to intervene, prepare and file application to intervene [*see Code Civ. Proc. § 387(b)*].

b. If plaintiff is claiming interest relating to property or transaction that is subject of action and is so situated that disposition of action may as practical matter impair or impede ability to protect that interest, unless interest is adequately represented by existing parties, prepare and file application to intervene [*see Code Civ. Proc. § 387(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionRight to InterveneCivil ProcedurePartiesInterventionPermissive Interventions

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§ 2.14 Preparation of Complaint

1. Contents.

a. Capacity of plaintiff [*see Code Civ. Proc. §§ 367-377*].

b. Residence (generally optional, unless plaintiff is an entity, suing in a representative capacity, or it is necessary to establish proper venue or plaintiff's right to maintain action) [*see* e.g., *Civ. Code §§ 1812.10*, *2984.4*; *Code Civ. Proc. §§ 392-395.5*].

c. Name, capacity, and residence of defendant or each defendant where more than one [*see Civ. Code §§ 1812.10*, *2984.4*; *Code Civ. Proc. §§ 392-395.5*].

d. Fictitious name allegations, if appropriate [*see Code Civ. Proc. § 474*].

e. Agency allegations, if appropriate. For discussion, see Ch. 497, *Principal and Agent* .

f. Facts, other than residence of parties, showing proper venue, if required [*see Code Civ. Proc. § 396a*].

g. Facts constituting cause of action [*see Code Civ. Proc. § 425.10(a)*].

For allegations to be included in the complaint in a particular action, see the article relating to the specific substantive cause of action.

h. Demand for judgment for the relief to which the pleader claims he or she is entitled [*see Code Civ. Proc. § 425.10(b)*].

i. Joinder of causes of action.

Join any other causes of action of plaintiff or of any co-plaintiffs with cause of action against defendant(s) [*see Code Civ. Proc. § 427.10(a)*].

j. Joinder of parties.
(1) Permissive.
(a) Plaintiffs.

If desired, include all persons who want to and may be joined as plaintiffs pursuant to *Code Civ. Proc. § 378(a)*. For discussion, procedure, and forms, see Ch. 395, *Parties* .

(b) Defendants.

If desired, include all persons who may be joined as defendants pursuant to *Code Civ. Proc. § 379(a)*. For discussion, procedure, and forms, see Ch. 395, *Parties* .

(2) Compulsory.

(a) Join all persons who are required to be joined as parties pursuant to *Code Civ. Proc. § 389(a)*. For discussion, procedure, and forms, see Ch. 395, *Parties* .

(b) If consent of any person who should be made a plaintiff cannot be obtained, join him or her as defendant and state reasons in complaint [*see Code Civ. Proc. § 382*]. For discussion, procedure, and forms, see Ch. 395, *Parties* .

2. Drafting.

a. Comply with form, typing, paper, and style requirements of the California Rules of Court [*see Cal. Rules of Ct., Rule 2.100 et seq.*]. For discussion of form, typing, paper, and style requirements of the complaint, see Ch. 20, *Allegations Commonly Used* , Ch. 108, *Captions and Introductions* , and Ch. 123, *Complaints and Cross Complaints* .

b. Copies to be prepared.

(1) Original for filing.

(2) One or more copies for service on each defendant.

(3) Copy for office file.

(4) Copy for client, if desired.

(5) Additional copies as desired.

3. Signing.

Sign the complaint [*Code Civ. Proc. § 128.7*]. For further discussion, see Ch. 123, *Complaints and Cross Complaints* .

4. Verification.

Use affidavit or declaration to verify pleading [*Code Civ. Proc. §§ 2009, 2015.5*] if verification required or desired. For discussion and forms, see Ch. 572, *Verification* .

a. Have verification prepared by [*Code Civ. Proc. § 446*]:

(1) Plaintiff, if an individual,

(2) Counsel, if plaintiff is out of the county in which counsel has his or her office or for some cause is unable to verify it or when facts are within attorney's knowledge, or

(3) Officer of corporation, if plaintiff is a corporation.

b. Have the verification executed (signed) by the person making it [*Code Civ. Proc. § 446*].

c. Make following statements in verification [*Code Civ. Proc. § 446*]:

(1) That the same is true of his or her own knowledge, except as to matters which are therein stated on his or her information or belief, and as to those matters that he or she believes it to be true,

(2) If pleading verified by attorney or any other person except one of parties:
(a) Reasons why it is not made by one of parties, and

(b) That he or she has read pleading and that he or she is informed and believes the matters therein to be true and on that ground alleges that the matters stated therein are true.

5. Prepare any papers required to be filed with complaint or before complaint is served, for example:

a. Cal. Judicial Council Form CM-010, Civil Case Cover Sheet, required unless the case is in small claims court or is filed under the Probate Code, Family Law Code or Welare and Institutions Code [*see Cal. Rules of Ct., Rule 3.220*]. For discussion and an illustration of the form, see Ch. 123, *Complaints and Cross Complaints* .

b. Certificate of merit, which is to be filed on or before date the complaint is served on any defendant if action is for damages or indemnity arising out of professional negligence of architect, engineer, or land surveyor [*see Code Civ. Proc. § 411.35(a)*]. For discussion and forms, see Ch. 56, *Architects* .

c. Notice of Related Case, if counsel knows of a related action or proceeding pending in any state or federal court in California [*Cal. Rules of Ct., Rule 3.300* (duty applies when counsel files a case and thereafter whenever counsel learns of related action or proceeding)]. For discussion and forms, see Ch. 137, *Continuing Duties During Litigation* .

d. Notice of Stay, if the party has requested or caused a stay of proceedings [*Cal. Rules of Ct., Rule 3.650*]. For discussion and forms, see Ch. 137, *Continuing Duties During Litigation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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§ 2.15 Preparation of Summons

1. Proper summons.

Use the summons adopted by the California Judicial Council [*Gov. Code § 68511*; *see Cal. Rules of Ct., Rule 1.30 et seq.*].

2. Preparation of summons.

For discussion, procedure, and forms relating to preparation of the summons, see Ch. 518, *Service of Summons and Papers* . The following copies should be prepared:

a. One original for filing for each defendant to be served.

b. One or more copies for service on each defendant.

c. Office copy.

d. Additional copies as desired.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessSummonsContent & Form

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§ 2.16 Filing Complaint and Related Papers

1. Select court with proper venue and subject matter jurisdiction [*see § 2.12*, Paragraph (7)].

2. Deliver complaint and any related papers to clerk of court.

3. Pay filing fee [*see Gov. Code §§ 70611* (unlimited civil case), 70613 (limited civil case)].

4. Subsequently file any related papers that need not be filed with complaint, but that must be filed on or before date of service of complaint on any defendant [*see Code Civ. Proc. § 411.35(a)*; *see also § 2.14*, Paragraph (5), *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticePleadingsComplaintsFiling Fees

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§ 2.17 Provisional Remedies and Lis Pendens

1. Attachment.

If action is on claim or claims for money based on contract when total amount of claim or claims is fixed or readily ascertainable amount not less than $500 exclusive of costs, interest, and attorney's fees, and an order for right to attach and writ of attachment is desired to secure recovery on claim on which an attachment may be issued [*see Code Civ. Proc. § 483.010*], prepare, file, and serve application for order for right to attach and for writ of attachment with court in which action brought either at time of filing the complaint or at any time thereafter [*see Code Civ. Proc. §§ 483.010-483.020, 484.010, 484.020, 484.030, 485.210*]. For discussion, procedure, and forms, see Ch. 62, *Attachment* ; for forms of memoranda, see California Points and Authorities, Ch. 23, *Attachment* .

2. Claim and delivery.

If an action to recover personal property is brought, plaintiff asserts a present right to possession of the personal property, and immediate possession of the personal property is sought by plaintiff, prepare and file with court in which action is brought, at time of filing complaint or at any time thereafter, written application for writ of possession [*see Code Civ. Proc. § 512.010(a)*]. For discussion, procedure, and forms, see Ch. 119, *Claim and Delivery* .

3. Temporary restraining order and preliminary injunction.

If any of the grounds for injunctive relief enumerated in *Code Civ. Proc. § 526* exist, consider applying for temporary restraining order and/or preliminary injunction [*see Code Civ. Proc. § 527*]. For discussion, procedure, and forms, see Ch. 303, *Injunctions* .

4. Receivership.

If any of the grounds enumerated in *Code Civ. Proc. §§ 86(a)(8), 564,* or *565* exist, consider applying to court for appointment of receiver [*see Code Civ. Proc. § 566(b)*]. For discussion, procedure, and forms, see Ch. 486, *Receivers* .

5. Lis pendens.

If action concerns real property or title or right to possession of real property, consider filing notice of pendency of action in office of recorder in county where property is situated at the time of filing the complaint or at any time thereafter [*see Code Civ. Proc. § 405.20*]. For discussion and forms, see Ch. 348, *Lis Pendens* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersReal Property LawPriorities & RecordingLis Pendens

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1-2 California Forms of Pleading and Practice--Annotated § 2.18

§ 2.18 Issuance of Summons; Service of Summons, Complaint, and Case Questionnaire; Filing of Proof of Service; Maintenance of List of Parties

NOTE:
In actions conducted pursuant to the Trial Court Delay Reduction Act (*Gov. Code §§ 68600 et seq.*), local rules may affect the procedure for service of summons and complaint and for filing proof of service. For further discussion, see *§ 2.04*[3].

1. Issuance of summons.

Have one or more summons issued for each defendant by the clerk of the court in which the action is filed [*see Code Civ. Proc. § 412.10*].

2. Service of summons and complaint.

Have a copy of summons served on each defendant, together with a copy of the complaint, and if the plaintiff is designating the action or proceeding as a complex case, a copy of the Civil Case Cover Sheet [*see Code Civ. Proc. §§ 413.10-416.70*; *Cal. Rules of Ct., Rule 3.220*]. For procedure, see Ch. 518, *Service of Summons and Papers* .

3. Declaration of proof of service.

Prepare, or have prepared, a separate proof of service for each defendant served, have it executed, and file it with the court clerk [*see Code Civ. Proc. § 417.10 et seq.*]. For procedure and forms, see Ch. 518, *Service of Summons and Papers* .

4. Case questionnaire.

In limited civil case, if desired, serve case questionnaires with the complaint using forms approved by Judicial Council [*see Code Civ. Proc. § 93(a)*].

5. List of parties.

a. If more than two parties have appeared in case and are represented by different counsel and plaintiff is named first in complaint [*see Cal. Rules of Ct., Rule 3.254*]:

(1) Maintain a current list of the parties and the address for service of notice on each party.

(2) Furnish a copy of list on request to any party or to the court.

b. Each other party to action must [*Cal. Rules of Ct., Rule 3.254*]:

(1) Furnish the first-named plaintiff with his or her current address for service of notice when it first appears in the action.

(2) Furnish the first-named plaintiff with any changes in address for service of notice.

(3) Serve a copy of the list of parties at the time it serves an order, notice, or pleading on any party who has not yet appeared in the action.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticeService of ProcessSummonsIssuanceCivil ProceduresPleading & PracticeService of ProcessProofGeneral Overview

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§ 2.19 Default

1. Request for entry of default.

If service on defendant or cross defendant has been completed, and he or she does not answer, or otherwise appear in action as provided and within the time limits set forth in *Code Civ. Proc. § 585*, request entry of default [*see Code Civ. Proc. § 585*].

a. If amount of damages was not specified in complaint [*see Civ. Code § 3295(e)* (no claim for exemplary damages to state amount); *Code Civ. Proc. § 425.10(b)* (amount not to be specified in actions for personal injury or wrongful death)], serve defendant with statement of damages or statement reserving the right to seek punitive damages in the same manner as service of summons [*Code Civ. Proc. §§ 425.11(d)(1), 425.115(g)(1)*].

b. Prepare request for entry of default of defendant or cross defendant [*Code Civ. Proc. § 585*] and request court judgment if appropriate [*see Code Civ. Proc. § 585(b), (c), (e)*]. Attach written request for court determination of the amount of attorney's fees, if appropriate [*see Code Civ. Proc. § 585(a)*].

c. File the application and affidavit or declaration, together with proof of service of summons, if required [*see Code Civ. Proc. §§ 585, 585.5(a)*].

d. Request a hearing, if required [*see Code Civ. Proc. § 585*].

2. Oppose motion to set aside.

If defendant serves and files a motion to set aside the default or default judgment pursuant to *Code Civ. Proc. § 473* or *585.5(b)*, prepare a memorandum in opposition. For discussion, procedure, and forms, see Ch. 489, *Relief From Judgments and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultFailure to Pursue the CauseCivil ProcedurePretrial JudgmentsDefaultEntry of Default Judgments

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§ 2.20 Plaintiff's Response to Actions of Defendant

1. Response to demurrer to plaintiff's complaint.

a. Opposition to demurrer [*see Code Civ. Proc. § 430.10 et seq.*].

(1) Prepare a memorandum in opposition to demurrer [*see Cal. Rules of Ct., Rule 3.1113*]. For discussion and procedure, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* ; for memoranda, see specific chapters in California Points and Authorities and, generally, California Points and Authorities, Ch. 71 *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

(2) File with judge or clerk of court in which action has been commenced, either personally or by mail, fax, or electronic filing [*see Code Civ. Proc. §§ 465, 1005, 1010, 1010.6*].

(3) Serve copy on each party at least 9 court days before the hearing [*Code Civ. Proc. §§ 465, 1005(b), 1011-1013, 1015*; *Cal. Rules of Ct., Rule 3.1300(a)*]. The latest a paper may be filed to be deemed timely is at the close of business of the clerk's office on the day the paper is due [*Cal. Rules of Ct., Rule 3.1300(e)*]. No paper shall be rejected for filing on the ground that it was untimely submitted for filing. If the court, in its discretion, refuses to consider a late filed paper, the minutes or order is required to so indicate [*Cal. Rules of Ct., Rule 3.1300(d)*]. For discussion, procedure, and forms, see Ch. 518, *Service of Summons and Papers* .

(4) Prepare, or have prepared, proof of service [*see Code Civ. Proc. §§ 417.10 et seq., 1013a*]. For procedure and forms, see Ch. 518, *Service of Summons and Papers* .

(5) Appear at hearing on demurrer [*see Cal. Rules of Ct., Rule 3.1320(d)*].

(6) If demurrer sustained with leave to amend, amend complaint within time allowed by court and serve copy on adverse party to avoid dismissal [*see Code Civ. Proc. §§ 472, 472a(c), 581(f)(1)*]. For discussion, procedure, and forms, see Ch. 21, *Amended and Supplemental Pleadings* .

(7) If demurrer sustained without leave to amend or if plaintiff elects not to amend, resulting in dismissal of entire case [*see Code Civ. Proc. § 581(c)*], consider appealing [*see Code Civ. Proc. §§ 472c(a), 902-904.2*; *see also § 2.63*].

(8) If demurrer sustained as to only part of complaint without leave to amend but not resulting in dismissal of entire case, consider applying for writ of mandate for immediate review of decision sustaining demurrer [*see Code Civ. Proc. § 1067 et seq.*]. For discussion, procedure, and forms, see Ch. 358, *Mandate and Prohibition* .

(9) If demurrer overruled, continue with action as before [*see Code Civ. Proc. §§ 472a(b), 472b*].

b. Motion to strike all or portion of demurrer [*see Code Civ. Proc. § 435 et seq.*].

If demurrer contains any irrelevant, false, or improper matter, or was not drawn or filed in conformity with the laws of California, court rule, or court order:

(1) Prepare, file and serve notice of motion to strike all or a portion of demurrer [*see Code Civ. Proc. §§ 435(b), 436*]. For discussion and procedure, see Ch. 375, *Motions to Strike: Pleadings* .

(2) Attend hearing on motion and demurrer [*see Code Civ. Proc. 435(b)(3)*; *Cal. Rules of Ct., Rule 3.1322*].

(3) If demurrer is stricken and no answer is filed, court must allow answer to be filed on terms that are just [*Code Civ. Proc. § 472a(c)*].

2. Response to motions by defendant.

a. Generally.

If defendant has served and filed any responsive motions, such as a motion to strike the complaint, a motion for summary judgment, or a motion for change of venue [*see §§ 2.43, 2.47*]:

(1) Prepare a memorandum in opposition to each such motion [*see Cal. Rules of Ct., Rule 3.1113*], together with affidavits or declarations under penalty of perjury, if required. For procedure, see specific articles in this set pertaining to the particular type of motion, as well as Ch. 372, *Motions and Orders*; for memoranda see specific chapters in California Points and Authorities (Matthew Bender).

(2) File all papers opposing noticed motion with judge or clerk of court in which action has been commenced and serve copy on each party at least 9 court days before time appointed for hearing [*Code Civ. Proc. §§ 465, 1005(b), 1011-1013, 1015*; *Cal. Rules of Ct., Rule 3.1300(a)*]. For procedure, see Ch. 518, *Service of Summons and Papers* .

(3) Prepare, or have prepared, proof of service [*Code Civ. Proc. §§ 417.10-417.40, 1013a*]. For procedure and forms, see Ch. 518, *Service of Summons and Papers* .

(4) Appear at hearing.

b. Opposition to motion for summary judgment or summary adjudication.

If defendant has moved for summary judgment or summary adjudication, if desired, serve and file opposition to motion not less than 14 days preceding noticed or continued date of hearing, unless court for good cause orders otherwise [*see Code Civ. Proc. § 437c(b)(2)*]. For discussion, procedure, and forms, see Ch. 537, *Summary Judgment* .

c. Opposition to motion to strike complaint.

(1) Prepare opposition to motion as set forth in Paragraph a, *above.*

(2) If motion to strike whole complaint or portion thereof is granted with leave to amend, amend complaint within time allowed by court and serve copy on adverse party to avoid dismissal [*see Code Civ. Proc. §§ 472, 472a(c), 581(f)(4)*]. For discussion, procedure, and forms, see Ch. 21, *Amended and Supplemental Pleadings* .

(3) If motion to strike whole complaint is granted without leave to amend, or if plaintiff elects not to amend, resulting in dismissal of entire case [*see Code Civ. Proc. § 581(f)(3)*], consider appealing [*see Code Civ. Proc. §§ 472c, 902-904.2*; *see also § 2.63*].

3. Response to defendant's answer.

a. Demurrrer to answer.

(1) If answer contains any of the defects enumerated in *Code Civ. Proc. § 430.20*, demur to whole answer or any one or more of several defenses set up in answer [*see Code Civ. Proc. §§ 430.20, 430.30(a), 430.50(b), 430.60*; *Cal. Rules of Ct., Rule 3.1320*]. If plaintiff fails to demur to answer, he or she is deemed to have waived objection unless objection is that answer does not state facts sufficient to constitute defense [*Code Civ. Proc. § 430.80(b)*].

(2) Serve and file demurrer within 10 days after service of answer [*see Code Civ. Proc. § 430.40(b)*]. Serve and file notice of hearing with demurrer specifying hearing date in accordance with *Code Civ. Proc. § 1005* and *Cal. Rules of Ct., Rule 3.1320* [*Cal. Rules of Ct., Rule 3.1320*]. For discussion, procedure, and forms, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* ; for forms of memoranda, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

b. Motion to strike.

If answer contains any irrelevant, false, or improper matter, or was not drawn or filed in conformity with California laws, court rule, or order of court, move to strike all or a portion of answer [*see Code Civ. Proc. §§ 435(b), 436*] within 10 days after service of the answer [*see Code Civ. Proc. §§ 435(b)(1), 430.40(b)*; *see also Code Civ. Proc. § 1013* (extensions of time for response when moving papers are

served by mail, overnight delivery, or fax)]. For discussion and procedure, see Ch. 375, *Motions to Strike: Pleadings* ; for forms of memoranda, see California Points and Authorities, Ch. 160, *Motions to Strike* (Matthew Bender).

c. Motion to transfer to court having subject matter jurisdiction.

If answer asserts any matter beyond jurisdiction of court in which action was filed, prepare, file, and serve motion to transfer to court having subject matter jurisdiction [*see Code Civ. Proc. § 396*]. For procedure and forms, see Ch. 324, *Jurisdiction: Subject Matter Jurisdiction* ; for memoranda, see California Points and Authorities, Ch. 133, *Jurisdiction: Subject Matter Jurisdiction* (Matthew Bender).

4. Response to cross complaint, naming plaintiff as cross defendant, filed and served by defendant.

Prepare, serve, and file one or more of following responses within 30 days after service of cross complaint [*see Code Civ. Proc. § 432.10*]:

a. If cross complaint is not proper, that is, if it does not meet requirements of *Code Civ. Proc. §§ 428.10-428.70*, make motion to strike all or part [*see Code Civ. Proc. §§ 432.10, 435, 436*; *see also § 2.43*]. For details of procedure, see Ch. 375, *Motions to Strike: Pleadings* .

b. If cross complaint is proper but does not state a cause of action within jurisdiction of court:

(1) If there is no court in California that would have jurisdiction thereof, demur on ground that court lacks subject matter jurisdiction [*see Code Civ. Proc. § 430.10*; *see also § 2.43*, Paragraph (2), *below*]. If court sustains demurrer without leave to amend, it may dismiss the action [*see Code Civ. Proc. § 581(f)(1)*]. For details of procedure on demurrer, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

(2) If there is such a court, move to have action transferred to such court [*see Code Civ. Proc. § 396*; *see also § 2.43*, Paragraph (5), *below*]. For details of procedure and forms, see Ch. 324, *Jurisdiction: Subject Matter Jurisdiction* .

c. If cross complaint contains any of other defects enumerated in *Code Civ. Proc. § 430.10*, prepare, serve, and file demurrer to cross complaint with supporting memorandum [*see Code Civ. Proc. §§ 430.10, 430.30(a), 430.60, 432.10*; *Cal. Rules of Ct., Rule 3.1113*; *see also § 2.43*, Paragraph (2), *below*]. For details of procedure, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

d. Prepare, file, and serve answer to cross complaint [*see Code Civ. Proc. §§ 428.10-428.80, 432.10*; *see also § 2.43*, Paragraph (1), *below*] signed by plaintiffs (cross defendant's) attorney [*see Code Civ. Proc. §§ 128.7, 422.10*]. For discussion, procedure, and forms see Ch. 26, *Answers* , and Ch. 123, *Complaints and Cross Complaints* .

5. Response to request for statement of damages in superior court.

a. If defendant serves request for statement setting forth nature and amount of damages, serve responsive statement of damages within 15 days after service [*see Code Civ. Proc. § 425.11*; *see also Code Civ. Proc. § 1013* (extensions of time for response when moving papers are served by mail, overnight delivery, or fax)].

b. If no request is made for such statement, give notice to defendant of amount of special and general

damages sought to be recovered either [*see Code Civ. Proc. § 425.11*]:

(1) Before default may be taken; or

(2) In the event an answer is filed, at least 60 days prior to date set for trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProceduresSummary JudgmentOppositionGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsAnswers

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§ 2.21 Pretrial Motions

Consider following pretrial motions, as appropriate:

1. Countermotion to retain venue for convenience of witnesses.

When defendant has moved to transfer action to court designated as proper court for trial of action under *Code Civ. Proc. §§ 392-404.8* and court in which action was filed is preferred for convenience of witnesses, make countermotion to retain venue [*see Code Civ. Proc. § 396b(d)*]. For procedure and form, see Ch. 571, *Venue* , for further discussion, see California Points and Authorities, Ch. 238, *Venue* (Matthew Bender).

2. Motions for summary judgment and summary adjudication.

a. Grounds and time for making motion.
(1) Summary judgment.

When there is no defense to plaintiff's action or defendant's cross complaint lacks merit, move for summary judgment any time after 60 days have elapsed since general appearance in action or proceeding of each party against whom motion is directed or at such earlier time after general appearance as court, with or without notice and on good cause shown, may direct [*see Code Civ. Proc. § 437c(a), (c)*; *see also § 2.47*, Paragraph (3), *below*]. For procedure and forms, see Ch. 537, *Summary Judgment* ; for memoranda, see California Points and Authorities, Ch. 221, *Summary Judgments* (Matthew Bender).

(2) Summary adjudication of cause of action, affirmative defense, or issue of duty.

If it is contended that there is no defense to one or more causes of action within the action or that there is no merit to an affirmative defense as to any cause of action, or both,

or that one or more defendants owed a duty to the plaintiff or plaintiffs, move for summary adjudication, alone or as an alternative to a motion for summary judgment, as to that cause of action, defense, or issue, any time after 60 days have elapsed since general appearance in action or proceeding of each party against whom motion is directed or at such earlier time after general appearance as court, with or without notice and on good cause shown, may direct [*see Code Civ. Proc. § 437c(a), (f)*; *see also § 2.47*, Paragraph (3), *below*]. For procedure and forms, see Ch. 537, *Summary Judgment* ; for memoranda, see California Points and Authorities, Ch. 221, *Summary Judgments* (Matthew Bender).

b. Service.

Serve notice of motion and supporting papers on all other parties to action at least 75 days before time appointed for hearing (time increased by five days if mailed to address within California, 10 days if mailed to address outside California, and 20 days if mailed to address outside United States) [*see Code Civ. Proc. § 437c(a)*]. If the notice is served by facsimile transmission, Express Mail, or another method of delivery providing for overnight delivery, the required 75-day period of notice is increased by two court days [*Code Civ. Proc. § 437c(a)*].

c. Response to opposition.

If defendant has has served opposition to motion, determine if opposition was properly served (not less than 14 days preceding noticed or continued date of hearing). If opposition timely, file and serve reply to opposition not less than five days preceding noticed or continued date of hearing, unless court for good cause orders otherwise [*see Code Civ. Proc. § 437c(b)(2), (4)*].

3. Motion to join party.

If a third person is a party required to be joined under *Code Civ. Proc. § 389(a)* and has not been but can be joined, move for joinder [*see Code Civ. Proc. § 389(a)*]. For discussion, procedure, and forms regarding joining parties, see Ch. 395, *Parties* .

4. Motion for separate trial of affirmative defense.

When answer pleads any of several special defenses, such as action is barred by statute of limitations, res judicata, another action is pending on the same cause, consider moving to proceed to trial on the special defense before trial of any other issue in case [*see Code Civ. Proc. §§ 597, 597.5*]. For procedure and forms, see Ch. 3, *Abatement of Actions* and Ch. 345, *Limitation of Actions* ; for memoranda, see California Points and Authorities, Ch. 10, *Abatement and Survival of Actions* (Matthew Bender).

5. Motion for severance or consolidation.

a. When multiple actions are pending that involve common questions of law or fact, consider moving to have all actions consolidated [*see Code Civ. Proc. § 1048(a)*]. For procedure and forms, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* ; for memoranda, see California Points and Authorities, Ch. 45, *Consolidation and Severance of Actions* (Matthew Bender).

b. When separate trials will further convenience or avoid prejudice or will be conducive to expedition and economy, move for separate trial of any cause of action [*see Code Civ. Proc. § 1048(b)*]. For procedure and forms, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* ; for memoranda, see California Points and Authorities, Ch. 45, *Consolidation and Severance of Actions*

(Matthew Bender).

6. Motion to amend complaint or answer to cross complaint.

a. Amendment as matter of right.

If desired, amend any pleading once at any time before answer or demurrer is filed, or after demurrer and before trial of issue of law thereon. File amended pleading and serve on adverse party [*Code Civ. Proc. § 472*].

b. Leave to amend.

(1) If party desires to add or strike out name of any party, to correct mistake in name of party or any other mistake, or to amend pleading or proceeding in other particulars, and either pleading has been amended once by right, or answer or demurrer has been filed [*see Code Civ. Proc. § 472*], make motion to amend complaint or answer to cross complaint [*see Code Civ. Proc. §§ 473, 576*; *Cal. Rules of Ct., Rules 3.1324*]. For procedure and forms, see Ch. 21, *Amended and Supplemental Pleadings* ; for memoranda, see California Points and Authorities, Ch. 16, *Amended and Supplemental Pleadings* (Matthew Bender).

(2) If a motion to amend pleadings is made after filing of case management order [*see* Paragraph O(1)(d), *below*], couple motion with motion to amend case management order [*see Code Civ. Proc. § 576*; *Cal. Rules of Ct., Rule 3.730*; *see also* California Points and Authorities, Ch. 180, *Pretrial Proceedings* (Matthew Bender)].

c. Reclassification of case by filing amended complaint.

If an amendment changes the jurisdictional classification of the case [*see Code Civ. Proc. §§ 32.5, 85*] from that previously stated in the caption, simultaneously pay any reclassification fee [*see Code Civ. Proc. § 403.060*], and the clerk will promptly reclassify the case [*see Code Civ. Proc. § 403.020*].For procedure, see Ch. 324, *Jurisdiction: Subject Matter Jurisdiction* .

d. Reclassification of case by stipulation.

The parties may stipulate to reclassification of the case within the time allowed to respond to the initial pleading; a reclassification fee pursuant to *Code Civ. Proc. § 403.060* must be paid if the case is reclassified from limited to unlimited [*Code Civ. Proc. § 403.050*].

7. Motion to file a supplemental complaint or answer to cross complaint.

If plaintiff wishes to allege facts material to case occurring after former complaint or answer to cross complaint, make motion to file supplemental complaint or answer to cross complaint [*see Code Civ. Proc. § 464*]. For procedure and forms, see Ch. 21, *Amended and Supplemental Pleadings* ; for memoranda, see California Points and Authorities, Ch. 16, *Amended and Supplemental Pleading* (Matthew Bender).

8. Motion for judgment on the pleadings.

If answer fails to state facts sufficient to constitute a defense, prepare, file, and serve nonstatutory motion for judgment on the pleadings to test the sufficiency of the pleadings any time before final judgment is rendered [*see Code Civ. Proc. § 430.20(a)*; *MacIsaac v. Pozzo (1945) 26 Cal. 2d 809, 812-813, 161 P.2d 449* ; *Shabrick v. Moore (1961) 195 Cal.*

App. 2d 56, 59, 15 Cal. Rptr. 310] . For procedure and forms, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* ; for memoranda, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

9. Motion to dismiss cross complaint for failure to prosecute [*Code Civ. Proc. §§ 583.110-583.430*].

a. Dismissal for failure to serve summons on cross complaint.

(1) Discretionary

If cross complaint has been filed by defendant, and service of cross complaint (or summons if required) has not been made within two years after filing of cross complaint (except (a) when parties have stipulated to extend time, or (b) if summons is required, party against whom service would otherwise have to be made has made general appearance in action); prepare, file, and serve motion to dismiss [*see Code Civ. Proc. §§ 583.110, 583.410(a), 583.420(a)(1), (b)*]. For discussion, procedure, and forms, see Ch. 212, *Dismissal* .

(2) Mandatory

If cross complaint has been filed by defendant and cross complaint (or summons if required) has not been served within three years after filing of cross complaint, or proof of service of summons has not been filed within 60 days after time the summons and complaint must be served (except (a) when parties have stipulated to extend time, or (b) if summons is required, party against whom service would otherwise have to be made has made general appearance in action); prepare, file, and serve motion to dismiss [*see Code Civ. Proc. §§ 583.110, 583.210-583.250*]. For discussion, procedure, and forms, see Ch. 212, *Dismissal* .

b. Dismissal for failure to bring action to trial.

(1) Discretionary.

NOTE:
The court on its own motion or on motion of the defendant may dismiss an action for delay in prosecution if the action has not been brought to trial or conditionally settled within two years after the action was commenced against the defendant [*Cal. Rules of Ct., Rule 3.1340(a)*; *see also Code Civ. Proc. § 583.420(a)(2)(B)*]. However, if the court intends to dismiss the action on its own motion, the clerk must set a hearing on the dismissal and mail notice to all parties at least 20 days before the hearing date [*Cal. Rules of Ct., Rule 3.1340(b)*]. Although the Judicial Council did not define "defendant," as used in the Rule 372, it stated that the rule was adopted under *Code Civ. Proc. §§ 583.410(b)* and *583.420(a)(2)(B)* [*Cal. Rules of Ct., Rule 3.1340(a)*]. The word "defendant" as used in *Code Civ. Proc. § 583.410(a)* is defined by statute as including a cross defendant or other person against whom an action is commenced [*Code Civ. Proc. § 583.110(d)*].

If action on cross complaint is not brought to trial or conditionally settled within two years after it was filed [*see Code Civ. Proc. § 583.420(a)(2)(B)*; *Cal. Rules of Ct., Rule 3.1340*]:

(a) Prepare, file, and serve motion to dismiss action for want of prosecution at least 45

days before date set for hearing of motion [*see Code Civ. Proc. §§ 583.110, 583.420(a)(2)*; *Cal. Rules of Ct., Rules 3.1340, 3.1342*]. For discussion, procedure, and forms, see Ch. 212, *Dismissal* .

(b) If written opposition to motion served, within 15 days after service of written opposition, prepare, file, and serve response, supplemental memorandum, and affidavit or declaration in support of motion [Cal. Rules of Ct., Rule 373(c); *see also Code Civ. Proc. § 1013(a), (c), (e)* (extension of time to respond when served by mail, facsimile transmission, or overnight delivery)]. For discussion, procedure, and forms, see Ch. 212, *Dismissal* .

(2) Mandatory.

If action on cross complaint is not brought to trial within five years after plaintiff filed action (unless parties have stipulated to extend time), prepare, file, and serve motion to dismiss for want of prosecution [*see Code Civ. Proc. §§ 583.110, 583.310-583.360*]. For discussion, procedure, and forms, see Ch. 212, *Dismissal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral Overview

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§ 2.22 Discovery Procedure

Use those discovery procedures that are available and appropriate to the circumstances of the particular case to prepare for settlement negotiations and/or trial. For discussion, procedure, and forms relating to each type of discovery procedure, see Ch. 190-200. For discussion of requirements to preserve documents and electronic information for purposes of litigation, see Ch. 195A, *Discovery: Discovery of Electronically Stored Information (E-Discovery)* and Ch. 199: *Discovery: Preservation of Evidence*. For discussion, procedure, and forms relating to subpenas duces tecum, see Ch. 535, *Subpoena* . For points and authorities pertaining to each type of procedure, see California Points and Authorities, Ch. 80-89A (Matthew Bender). The following discovery devices are available in civil proceedings:

1. Discovery available.

a. Unlimited civil case.

(1) Written interrogatories to adverse party [*see Code Civ. Proc. § 2030.010 et seq.*].

(2) Requests to adverse party for admissions of genuineness of documents and of matters of fact [*see Code Civ. Proc. § 2033.010 et seq.*].

(3) Deposition of party or nonparty witness [*see Code Civ. Proc. §§ 2025.010-2029.010*].

(4) Production of writing or tangible thing by person being deposed; subpoena only required for nonparty [*see Code Civ. Proc. §§ 1985, 2020.010 et seq., 2025.280*].

(5) Demand for production, inspection, and copying of documents and things in the possession, custody, or control of any other party to the action within the scope permitted by *Code Civ. Proc. § 2017.020* (scope of discovery in civil actions), and subject to the restrictions set forth in *Code Civ. Proc. § 2019.010* (methods for discovery) [*see Code Civ. Proc. § 2031.010*].

(6) Demand for entrance on land or other property in the possession, custody, or control of any other party to the action for the purpose of inspecting, measuring, surveying, photographing, or sampling within the scope permitted by *Code Civ. Proc. § 2017.020* (scope of discovery in civil actions), and subject to the restrictions set forth in *Code Civ. Proc. § 2019.010* (methods for discovery) [*see Code Civ. Proc. § 2031.010*].

(7) Motion for order for mental, physical, or blood examination of party, agent, or person in custody or under legal control of party, to ascertain mental or physical condition or blood relationship that is in controversy [*see Code Civ. Proc. § 2032.010 et seq.*].

(8) Demand to exchange lists of expert witnesses and their reports and writings [*see Code Civ. Proc. § 2034.010 et seq.*].

b. Limited civil case.

(1) No more than a combination of 35 of the following [*see Code Civ. Proc. §§ 91, 94(a)*]:
(a) Interrogatories (with no subparts) pursuant to *Code Civ. Proc. § 2030.010 et seq.*].

(b) Demands to produce documents or other tangible things pursuant to *Code Civ. Proc. § 2031.010 et seq.*].

(c) Requests for admission (with no subparts) pursuant to *Code Civ. Proc. § 2033.010 et seq.*].

(2) One oral or written deposition pursuant to *Code Civ. Proc. §§ 2025.010-2028.080*, inclusive [*Code Civ. Proc. § 94(b)*].

(3) Subpoena duces tecum requiring person served to mail copies of pertinent documents, books, or records to serving party's counsel at a specified address, along with affidavit complying with *Evid. Code § 1561* (requirements for affidavit by custodian of records) [*see Code Civ. Proc. § 94(c)*].

(4) Physical, mental, or blood examinations pursuant to *Code Civ. Proc. § 2032.010 et seq.* [*see Code Civ. Proc. § 94(d)*].

(5) Identity of expert witnesses pursuant to *Code Civ. Proc. § 2034.010 et seq.* [*see Code Civ. Proc. § 94(e)*].

(6) Request for statement identifying witnesses and evidence [*see Code Civ. Proc. § 96*].

(7) Authorization for additional discovery.

(a) If additional discovery is necessary or desired, seek stipulation from adverse party [*see Code Civ. Proc. § 95(b)*]. For discussion, procedure, and forms regarding stipulation, see Ch. 533, *Stipulations* .

(b) If stipulation cannot be obtained, file noticed motion for one of following:
(i) Order authorizing additional discovery, on showing that moving party will be unable to prosecute or defend action effectively without such discovery [*see Code Civ.*

Proc. § 95(a)].

(ii) Order removing action from provisions of *Code Civ. Proc. §§ 90-100*, on showing that it is impractical to prosecute or defend the action within limitations set forth in those provisions [*see Code Civ. Proc. § 91(c)*].

2. Motions to compel further discovery.

a. Motion to compel response to case questionnaire (limited civil cases).

If defendant served case questionnaire with complaint [*see § 2.18*, Paragraph (4), *above*] and defendant fails to serve completed questionnaire, prepare, serve, and file motion to compel compliance with requirements of *Code Civ. Proc. § 93(a)* and *(b)* in accordance with *Code Civ. Proc. § 2023.010 et seq.* (misuse of discovery procedures sanctions generally) [*see Code Civ. Proc. § 93(e)* (limited civil cases)].

b. Motion to compel answers or further answers to interrogatories.

If a response or further responses to interrogatories are necessary, prepare, file, and serve motion for order requiring response or further response [*see Code Civ. Proc. § 2030.300*]. For discussion, procedure, and forms, see Ch. 194, *Discovery: Interrogatories* .

c. Motion for order compelling furnishing of medical reports.

(1) If adverse party or other person was examined under *Code Civ. Proc. § 2032.010 et seq.* and requested copy of report of examining physician or licensed clinical phychologist, request all like reports of any examination, previously or thereafter made, of same condition from party or person examined [*see Code Civ. Proc. § 2032.640*].

(2) If party or person examined refuses to deliver such reports, prepare, file, and serve motion for order compelling furnishing of medical reports [*see Code Civ. Proc. § 2032.240*]. For discussion, procedure, and forms, see Ch. 197, *Discovery: Physical and Mental Examinations* .

d. Motion to compel answer to deposition question.

If deponent refuses or fails to answer any question propounded on examination during taking of deposition, prepare, file, and serve motion to compel answer to deposition question [*see Code Civ. Proc. § 2025.480*]. For discussion, procedure, and forms, see Ch. 193, *Discovery: Depositions* .

e. Motion to compel production of books, documents, or other tangible things.

If deponent refuses or fails to produce at deposition any books, documents, or other tangible things under his or her control pursuant to subpena duces tecum, move to compel production [*see Code Civ. Proc. § 2025.480*]. For discussion, procedure, and forms, see Ch. 195, *Discovery: Inspection of Tangible Evidence* .

f. Motion to compel further answers to requests for admission.

If written objections to request under *Code Civ. Proc. § 2033.010 et seq.* have been filed, or answer is

deemed by requesting party not to be in compliance with requirements of *Code Civ. Proc. § 2033.010 et seq.*], make motion for order compelling answers or further answers to request [*see Code Civ. Proc. § 2033.010 et seq.*]. For discussion, procedure, and forms, see Ch. 196, *Discovery: Requests for Admissions* .

g. Motion to compel production or entry.

If adverse party refuses or fails to produce documents, papers, books, accounts, letters, photographs, objects, or tangible things or to permit inspection or entry after having been served with a request under *Code Civ. Proc. § 2031.010 et seq.*, move for order to compel compliance with request [*see Code Civ. Proc. §§ 2031.310, 2031.320*]. For discussion, procedure, and forms, see Ch. 195, *Discovery: Inspection of Tangible Evidence* .

h. Motion to compel production of electronically stored information (e-discovery).

If electronically stored information is not reasonably accessible because of undue burden or expense, the respondent may either object and force the requesting party to file a motion to compel [*see Code Civ. Proc. § 2031.210(a)(3)*. For discussion and forms related to e-discovery, see Ch. 195A, *Discovery: Discovery of Electronically Stored Information (E-Discovery)*.

3. Motions for sanctions.

a. Motion for monetary, issue, evidence, termination, or contempt sanction.

If a party engages in a misuse of a discovery method, the other party may make a motion for sanctions. A court may impose one or more of the following sanctions under *Code Civ. Proc. § 2023.030*: (1) monetary sanction, (2) issue sanction, (3) evidence sanction, (4) terminating sanction, and (5) contempt sanction. A court, after notice and an opportunity for hearing, may impose these sanctions against anyone engaging in conduct constituting a misuse of the discovery process. If a section governing a particular method of discovery authorizes a monetary sanction, the court must impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the sanction unjust [*Code Civ. Proc. § 2023.030*]; *see also Code Civ. Proc. § 2023.010* (illustrative list of conduct that constitutes misuse of discovery process)]. Each discovery method contains specific provisions regarding the extent of available sanctions as listed below.

(1) Discovery from nonparty [*see Code Civ. Proc. § 2020.240*].

(2) Oral depositions [*see Code Civ. Proc. §§ 2025.410-2025.480*].

(3) Deposition by written questions [*see Code Civ. Proc. §§ 2028.040, 2028.050*].

(4) Interrogatories [*see Code Civ. Proc. § 2030.090*].

(5) Inspection of documents [*see Code Civ. Proc. §§ 2031.060, 2031.310, 2031.320*].

(6) Physical examinations [*see Code Civ. Proc. §§ 2032.240, 2032.250, 2032.620*].

(7) Requests for admissions [*see Code Civ. Proc. §§ 2033.080, 2033.280, 2033.290*].

(8) Exchange of expert witness information [*see Code Civ. Proc. §§ 2034.250, 2034.470*

, 2034.610, 2034.710].

b. Motion to compel or limit discovery.

If a party fails to cooperate in a discovery method, the other party may make a motion to compel or to limit discovery. The motion must include a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by the motion. In granting or denying the motion, the court may impose monetary sanctions in favor of anyone who prevails, if the prevailing party did in fact engage in a reasonable and good faith attempt at an informal resolution of the issues presented by the motion [*see Code Civ. Proc. § 2023.010(i)*]. Each discovery method contains specific provisions for motions specific to itself as listed below.

(1) Oral depositions [*see Code Civ. Proc. §§ 2025.010-2025.480*].

(2) Deposition by written questions [*see Code Civ. Proc. §§ 2028.040, 2028.050*].

(3) Interrogatories [*see Code Civ. Proc. §§ 2030.290-2030.310*].

(4) Inspection of documents [*see Code Civ. Proc. §§ 2031.300-2031.320*].

(5) Physical examinations [*see Code Civ. Proc. §§ 2032.240, 2032.250*].

(6) Requests for admissions [*see Code Civ. Proc. §§ 2033.280, 2033.290*].

(7) Exchange of expert witness information [*see Code Civ. Proc. §§ 2034.250, 2034.300*].

(8) Electronically stored information (e-discovery) [*see Code Civ. Proc. § 2031.210 et seq.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMotions to Compel

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§ 2.23 Settlement Offer Under Code Civ. Proc. § 998

1. Service of offer.

To obtain benefit of sanctions under *Code Civ. Proc. § 998*, serve settlement offer on defendant not less than 10 days prior to trial [*see Code Civ. Proc. § 998(b)*]. For discussion, procedure, and forms, see Ch. 520, *Settlement and Release* .

2. Response to defendant's offer.

If offer is made by defendant, accept, if desired, within 30 days after offer is made or prior to trial whichever occurs first [*see Code Civ. Proc. § 998(b)(1), (2)*]. For discussion, procedure, and forms, see Ch. 520, *Settlement and Release* .

3. Notification of settlement. For discussion, procedure, and forms, see Ch. 520, *Settlement and Release* .

a. When offer to compromise is accepted, file offer with proof of acceptance with clerk or judge [*Code Civ. Proc. § 998(b)*].

b. If an entire case has been settled, immediately give court and any arbitrator written notice, as well as oral notice if hearing, conference, or trial is imminent [*Cal. Rules of Ct., Rule 3.1385*; for discussion and a form of notice, *see* Ch. 520, *Settlement and Release*].

4. Failure to accept.

If offer is not accepted and defendant fails to obtain a more favorable judgment, request costs of expert witnesses in addition to other recoverable costs [*see Code Civ. Proc. § 998(d)*]. For discussion, procedure, and forms, see Ch. 520, *Settlement and Release* .

Legal Topics:

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

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1-2 California Forms of Pleading and Practice--Annotated § 2.24

§ 2.24 Trial Setting and Settlement Procedures; Judicial Arbitration

1. Obtaining trial date.

NOTE:
In actions conducted pursuant to the Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*), local rules may affect the procedure for trial setting and settlement. For further discussion, see the Introduction, Trial Court Delay Reduction Rules.

For discussion, procedures, and forms, see Ch. 425, *Pretrial Proceedings*.

a. Case management conference date.
(1) Determine date for case management conference, notice of which must be given by the court no later than 45 days before the conference, unless otherwise ordered by the court [*Cal. Rules of Ct., Rule 3.722(b)*].

(2) If a different case management conference date is desired, request a more convenient date [*Cal. Rules of Ct., Rule 3.722(b)*].

b. Mandatory meet-and-confer requirement before case management conference.

(1) Mandatory meet-and-confer is required by no later than 30 calendar days before the case management conference, unless court orders another time period [*Cal. Rules of Ct., Rule 3.724*].

(2) Prepare to consider with opposing party the following issues: discovery disputes and setting discovery schedule; identify and, if possible, resolve any anticipated motions; identify uncontested facts and issues of case subject to stipulation; facts and issues in

dispute; narrowing of issues by eliminating claims or defenses; possible settlement; availability of parties and their attorneys for trial; and any other relevant matters [*Cal. Rules of Ct., Rule 3.724*].

c. Case management statement.

(1) Prepare, serve, and file case management statement on mandatory Cal. Judicial Council Form CM-110 [*Cal. Rules of Ct., Rule 3.725(c)*; for discussion and form, *see* Ch. 425, *Pretrial Proceedings*]. Items required in case management statement include: any related cases; complete service; additional parties or pleadings; whether a limited civil case; matter affect court's jurisdiction; alternative dispute resolution; settlement conferences; discovery issues and schedule; bifurcation; cross-complaints; statutory preference; jury trial demands; trial date; length of trial; nature of injuries; damages; relief sought; insurance coverage; any other relevant matters [*Cal. Rules of Ct., Rule 3.727*].

(2) Each party must file and a case management statement and serve it on all other parties in the case no later than 15 days before the case management conference or review date set by the court pursuant to *Cal. Rules of Ct., Rule 3.722* [*Cal. Rules of Ct., Rule 3.725(a)*].

(3) If any opposing parties agree, any two or more parties may file a joint case management statement [*Cal. Rules of Ct., Rule 3.725(b)*].

(4) If all parties agree to use of alternative dispute resolution (ADR), jointly complete and file with the court the ADR stipulation form provided by *Cal. Rules of Ct., Rule 3.221* [*Cal. Rules of Ct., Rule 3.726*].

d. Case management conference.

(1) Determine if the court has issued a case management order based on the written submissions of the parties and has excused the personal appearance of the parties at the case management conference [*Cal. Rules of Ct., Rule 3.722(d)*].

(2) Prepare for and attend case management conference and be prepared to discuss and commit to party's position on issues listed in *Cal. Rules of Ct., Rules 3.727-3.728* [*Cal. Rules of Ct., Rule 3.722(a)*].

(3) Attendance at case management conference is mandatory for counsel for each party, or if permitted, a telephonic appearance may be made under *Cal. Rules of Ct., Rule 3.670(c)(2)* [*Cal. Rules of Ct., Rule 3.722(c)*; *see* Ch. 372]. Check to see if personal appearance has been excused at the discretion of the court [*Cal. Rules of Ct., Rule 3.722(d)*]. If the action is a limited civil case, check for local rules that provide counsel and self-represented parties do not attend a case management conference, unless ordered to do so by the court [*Cal. Rules of Ct., Rule 3.722(e)*].

e. Mandatory settlement conference.

(1) A mandatory settlement conference may be held in all long cause matters. If a party wishes a settlement conference or an additional settlement conference, prepare the joint request of all parties for the conference. If the parties do not all agree, but a settlement

conference is desired, prepare a notice of motion for an order setting the case for a settlement conference [*see Cal. Rules of Ct., Rule 3.1380*]. For discussion, procedure, and forms, see Ch. 425, *Pretrial Proceedings* .

(2) Prepare a mandatory settlement conference statement containing a good faith settlement demand and an itemization of economic and noneconomic damages if representing plaintiff, or a good faith offer of settlement if representing defendant, set forth and discuss in detail all facts and law pertinent to the issues of liability and damages involved in the case as to that party and comply with any requirements imposed by local rule, submit the statement to the court and serve a copy on each party no later than five court days before the settlement conference [*Cal. Rules of Ct., Rule 3.1380(c)*]. For discussion, procedure, and forms, see Ch. 425, *Pretrial Proceedings* .

(3) Prepare for and with the party represented and other persons with authority to settle the case, as well as any person whose consent to settle is required for any reason, personally attend the conference, unless excused by the court for good cause [*Cal. Rules of Ct., Rule 3.1380(b)*]. For discussion of the effect of failure to comply with this requirement see Ch. 425, *Pretrial Proceedings* .

2. Motions concerning trial dates.

NOTE:
In actions conducted pursuant to the Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*), local rules may affect the availability of motions concerning trial dates. For further discussion, see the Introduction, Trial Court Delay Reduction Rules.

a. Motion for continuance before trial [*see Code Civ. Proc. §§ 594a-596*; *Cal. Rules of Ct., Rule 3.1332*]. For procedure and forms, see Ch. 136, *Continuances* and Ch. 425, *Pretrial Proceedings* ; for memoranda, see California Points and Authorities, Ch. 48, *Continuance and Advancement of Proceedings* , (Matthew Bender).

(1) Ascertain necessity for continuance [*see Code Civ. Proc. §§ 595, 595.3-595.4*; *Cal. Rules of Ct., Rule 3.1332(a)*].

(2) If possible, agree in writing to postponement of trial [*Code Civ. Proc. § 595.2*].

(3) If agreement not possible:
(a) Make motion before trial for continuance of trial date to judge supervising the master calendar or, if there is no master calendar, to the judge in whose department the case is pending immediately on ascertaining necessity for continuance, if the case has been assigned for all purposes to a specific judge or department, make the motion before the assigned judge or in the assigned department [*see Cal. Rules of Ct., Rule 3.1332(b)*].

(b) Serve notice on all other parties of trial, proceeding, or hearing [*see Code Civ. Proc. §§ 594a-596*; *Cal. Rules of Ct., Rule 3.1332(b)*].

b. Motion to advance, reset, or specially set case for trial [*Cal. Rules of Ct., Rule 3.1335*]. For discussion, procedure, and forms, see Ch. 425, *Pretrial Proceedings* ; for memoranda, see California Points and Authorities, Ch. 48, *Continuance and Advancement of Proceedings* (Matthew Bender).

c. Motion for preference.

(1) Plaintiff seventy years of age.

If plaintiff has reached 70 years of age and his or her health is such that a preference is necessary to prevent prejudicing his or her interest in the litigation, serve notice of motion for preference either with memorandum to set case management statement if plaintiff is serving the memorandum, or, 10 days after such service by any other party; or thereafter during pendency of action on application of plaintiff who reaches age of 70 years [*see Code Civ. Proc. § 36*; *Cal. Rules of Ct., Rule 3.727(12)*; *see also Code Civ. Proc. § 1013(a), (c), (e)* (extension of time to respond when served by mail, facsimile transmission, or overnight delivery)]. For discussion, procedure, and forms, see Ch. 425, *Pretrial Proceedings* .

(2) Plaintiff felony victim.

If action is one in which plaintiff is seeking damages that were alleged to have been caused by defendant during commission of a felony offense for which defendant has been criminally convicted, serve and file notice of motion for preference [*see Code Civ. Proc. § 37*]. For procedure and forms, see Ch. 425, *Pretrial Proceedings* .

3. Judicial arbitration or court-sponsored mediation.

NOTE:
In actions conducted pursuant to the Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*), local rules may affect the procedure for judicial arbitration. For further discussion, see the Introduction, under Trial Court Delay Reduction Rules.

Submission to judicial arbitration or an alternative mediation program is mandatory in many cases and may be undertaken voluntarily in any case [*see Code Civ. Proc. §§ 1141.11, 1141.12, 1730 et seq., 1775.3*].

a. The following civil actions are subject to mandatory judicial arbitration under *Code Civ. Proc. §§ 1141.10-1141.31* and *Cal. Rules of Ct., Rules 3.810 et seq.* [for discussion, procedure, and forms, see Ch. 36, *Judicial Arbitration*]:

(1) Any action in any court, regardless of the amount of controversy, on the stipulation of the parties [*Cal. Rules of Ct., Rule 3.811(a)(4)*; see *Code Civ. Proc. § 1141.12(a)*].

(2) On filing of an election by plaintiff, any action in any court in which plaintiff agrees that the arbitration award shall not exceed $50,000 [*Code Civ. Proc. § 1141.12(b)*; *Cal. Rules of Ct., Rule 3.811(a)(5)*].

(3) In each superior court with 18 or more judges, all actions in which the amount in controversy does not exceed $50,000 as to any plaintiff, other than limited civil cases [*Code Civ. Proc. § 1141.11(a)*; *Cal. Rules of Ct., Rule 3.811(a)(1)*].

(4) In a superior court with less than 18 judges, that so provides by local rule, all civil actions in which the amount in controversy does not exceed $50,000 [*Code Civ. Proc. § 1141.11(b)*; *Cal. Rules of Ct., Rule 3.811(a)(2)*].

(5) All limited civil cases in a court that so provides by local rule [*Cal. Rules of Ct., Rule 3.811(a)(3)*; *see Code Civ. Proc. § 1141.11(c), (d)*].

b. In Los Angeles County and in any other county that opts to apply *Code Civ. Proc. § 1775 et seq.*, when a case is subject to mandatory arbitration under *Code Civ. Proc. § 1141.10 et seq.*, the court may instead order it to mediation under *Code Civ. Proc. § 1775 et seq.* [*Code Civ. Proc. § 1775.3*; for discussion, procedure, and forms, *see* Ch. 37, *Judicially Mandated Civil Action Mediation*].

c. In other counties, local rule or practices establish programs to encourage alternative dispute resolution procedures [*see, e.g.*, San Francisco Uniform Local Ct. Rules, Rule 4.2].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedurePretrial MattersContinuancesCivil ProcedurePretrial MattersConferencesCase Management

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§ 2.25 Jury Trial

1. Demand.

a. If the action is one which may be tried by jury, determine whether to demand a jury trial. Demand is made using the mandatory Case Management Statement [Judicial Council Form CM-110], which must be filed and served on all parties no later than 15 days before the case management conference [*Cal. Rules of Ct., Rule 3.725*]. For discussion and a form of the Case Management Statement, see Ch. 425, *Pretrial Proceedings* .

b. Waiver of jury trial by a party after making a demand in unlimited civil cases is governed by *Code Civ. Proc. § 631(b).*

2. Deposit jury fees in court.

Deposit advance jury fees with clerk or judge [*see Code Civ. Proc. § 196*], 25 days prior to date set for trial [*Code Civ. Proc. § 631(b)*]. Failure to deposit advance jury fees may result in waiver of jury trial [*see Code Civ. Proc. § 631(d)(5)*]. Refund of deposited jury fees may be available in the event of settlement or continuance of the case [*see Code Civ. Proc. § 631.3*]. For discussion, see Ch. 322, *Juries and Jury Selection* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury TrialCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedureTrialsJury TrialsJury Demands

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§ 2.26 Jury Instructions

1. Initial instructions.

If jury trial is demanded, prepare and serve jury instructions covering law as disclosed by pleadings on opposing counsel and present to judge before first witness is sworn [*see Code Civ. Proc. § 607a*]. For procedure and forms, see Ch. 326, *Jury Instructions* .

2. Additional instructions.

Before commencement of argument, prepare, serve, and present to judge additional proposed jury instructions on questions of law developed by evidence and not disclosed by the pleadings [*see Code Civ. Proc. § 607a*]. For procedure and forms, see Ch. 326, *Jury Instructions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsSupplemental Instructions

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§ 2.27 Removing Judge

1. Challenges for cause.

a. If judge should be disqualified under *Code Civ. Proc. §§ 170-170.5*, file verified written statement objecting to hearing of matter or trial at the earliest practicable opportunity after discovery of facts constituting ground of the judge's disqualification, and before commencement of hearing or trial [*Code Civ. Proc. §§ 170.3(c)(1), 170.4(c)*]. For discussion, procedure and forms, see Ch. 317, *Judges* .

b. Serve copies of written statement on each party, or his or her attorney, who has appeared in action and on judge alleged in statement to be disqualifed [*Code Civ. Proc. § 170.3(c)(1)*]. For discussion, procedure and forms, see Ch. 317, *Judges* .

c. When statement of disqualification is filed pursuant to *Code Civ. Proc. § 170.3*, and judge files verified answer admitting or denying any or all allegations in statement within 10 days, obtain agreement from all parties who have appeared in the action or proceeding, within five days after notification of judge's answer, to have question of disqualification determined by particular judge. Failure to agree on a judge will result in assignment of judge by Chairman of the Judicial Council [*see Code Civ. Proc. § 170.3(c)(5)*].

d. When statement of disqualification is filed pursuant to *Code Civ. Proc. § 170.3*, and judge admits his or her disqualification, files written consent to disqualification, or fails to file his or her answer within 10 days, or it is determined after hearing that judge is disqualified, obtain agreement from all parties to action or proceeding that action or proceeding shall be heard and determined by particular judge who is not disqualified. Failure to agree on a judge will result in assignment of judge by presiding judge or Chairman of the Judicial Council [*see Code Civ. Proc. §§ 170.3(c)(6), 170.8*].

2. Peremptory challenges.

a. If any judge (other than a judge assigned to the case for all purposes), court commissioner, or referee of any superior of California is prejudiced against any party or attorney or interest of any party or attorney appearing in any action or proceeding involving a contested issue of law or fact, make oral or written motion without notice to remove him or her [*see Code Civ. Proc. § 170.6*]. For discussion and forms, see Ch. 317, *Judges* . Make motion:

(1) At least five days before date is set for trial or hearing, where judge, court commission, or referee is known at least 10 days before date set for trial or hearing.

(2) To judge supervising master calendar not later than time cause is assigned for trial, if directed to trial of cause where there is master calendar.

(3) Before expiration of 30 days from date of moving party's first appearance in action, if court in which action is pending is authorized to have no more than one judge and motion claims that duly elected or appointed judge of that court is prejudiced.

(4) Within 10 days after notice of all-purpose assignment, or within 10 days after making an appearance if the moving party has not yet appeared in the action, if motion is directed to trial of case assigned to a judge for all purposes.

NOTE:
If a trial court's decision is reversed on appeal and the trial judge in the prior proceeding is assigned to conduct a new trial on the matter, the motion must be made within 60 days after the party or the party's attorney has been notified of the assignment [*Code Civ. Proc. § 170.6(a)(2)*].

b. Submit supporting affidavit or declaration under penalty of perjury or an oral statement under oath that judge, court commissioner, or referee is prejudiced with motion [*see Code Civ. Proc. § 170.6*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 2 PROCEDURAL GUIDE FOR CIVIL ACTIONS
PART II. PROCEDURAL GUIDE: PRETRIAL PROCEDURES AND TRIAL MOTIONS
A. Plaintiff's Guide

1-2 California Forms of Pleading and Practice--Annotated § 2.28

§ 2.28 Motions in Limine

NOTE:
In actions conducted pursuant to the Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*), local rules may affect the procedure for motions in limine. For further discussion, see *§ 2.04*.

If limitation or exclusion of evidence or testimony is desired in anticipation of references by adverse counsel or witnesses that may be prejudicial and create a negative inference in jurors' minds, consider making motion in limine to judge outside presence of jury [*see Code Civ. Proc. § 128(a)(3), (8)*; *Evid. Code §§ 350, 352*; *Lemer v. Boise Cascade, Inc. (1980) 107 Cal. App. 3d 1, 9-12, 165 Cal. Rptr. 555]* . For discussion, procedure, and forms, see Ch. 373, *Motions in Limine* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersMotions in LimineExclusion of Evidence

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1-2 California Forms of Pleading and Practice--Annotated § 2.29

§ 2.29 Trial Motions

1. Motion for judgment.

If after defendant has completed his or her presentation of evidence in trial by court it appears that the evidence presented would support the granting of a motion for judgment, move for a judgment. Such motion may be made without waiving plaintiff's right to offer evidence in rebuttal to defendant's evidence or in support of plaintiff's defense to cross complaint in event motion is not granted [*see Code Civ. Proc. § 631.8*]. For discussion, procedure, and forms, see Ch. 389, *Nonsuit and Motion for Judgment* .

2. Motion for nonsuit.

After defendant has completed his or her opening statement regarding cross complaint, or after the presentation of his or her evidence in a trial by jury on cross complaint and it appears that evidence presented, or to be presented, supports the granting of a motion for nonsuit, make motion for judgment of nonsuit [*see Code Civ. Proc. § 581c*]. For discussion, procedure, and forms, see Ch. 389, *Nonsuit and Motions for Judgment* .

3. Motion for directed verdict.

If there is no evidence of sufficient substantiality to support a verdict in favor of defendant, make motion for directed verdict at conclusion of evidence [*see Frisk v. Merrihew (1974) 42 Cal. App. 3d 319, 325, 116 Cal. Rptr. 781* ; *De La Rosa v. City of San Bernardino (1971) 16 Cal. App. 3d 739, 742-743, 94 Cal. Rptr. 175* ; *Rooney v. Mutual Benefit H. & A. Assn. (1946) 74 Cal. App. 2d 885, 891, 170 P.2d 72]* . At the discretion of trial court, the motion may be made any time before case is submitted to jury [*see Gibson v. Southern Pacific Co. (1955) 137 Cal. App. 2d 337, 346, 290 P.2d 347]* . For further discussion, see Ch. 326A, *Jury Verdicts* .

4. Motion for mistrial.

If prejudicial misconduct of counsel, judge, or jurors prevents party from having fair trial, or if some legal or practical reason prevents trial from proceeding to completion, make motion for mistrial [*see Garden Grove School Dist. v. Hendler (1965) 63 Cal. 2d 141, 142-145, 45 Cal. Rptr. 313, 403 P.2d 721* ; *Scally v. Pacific Gas & Electric Co. (1972) 23 Cal. App. 3d 806, 814, 100 Cal. Rptr. 501* ; *Reimer v. Firpo (1949) 94 Cal. App. 2d 798, 801-802, 212 P.2d 23]* at time when claimed damage could be forestalled by appropriate court action [*see Horn v. Atchison, T. & S.F. R. Co. (1964) 61 Cal. 2d 602, 610, 39 Cal. Rptr. 721, 394 P.2d 561 , cert. denied, 380 U.S. 909 (1965)]* . For discussion, procedure, and forms, see Ch. 551, *Trial* , and California Civil Actions Pleading and Practice, Ch. 72, *Motions During and After Trial* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawPreverdict JudgmentsCivil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedurePretrial JudgmentsNonsuitsGeneral OverviewCriminal Law & ProcedureTrialsMotions for Mistrial

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[Reserved]

§§ 2.30[Reserved]

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B. Defendant's Guide

1-2 California Forms of Pleading and Practice--Annotated § 2.40

§ 2.40 Facts to Be Ascertained

1. Facts relating to defendant.

a. Name, address, telephone number of defendant.

b. Aliases used (past and present).

c. Capacity of defendant.

d. Additional facts, as desired, relating to defendant's stability and financial solvency:
(1) Employment status.

(2) Prior residences.

(3) Assets.

(4) Credit.

(5) Bank.

(6) Personal references.

e. Marital status. If married, name of spouse and address if different from that of defendant.

f. Defendant's insurance coverage.

(1) Name and address of insurer(s) and agent(s).

(2) Type(s) and amount(s) of coverage.

(3) Whether any claim(s) were filed in connection with transaction or occurrence involved.

2. Facts required for answer.

a. Date, manner, and place of service of complaint.

b. Allegations of complaint.

Ascertain which of the facts alleged in the complaint are true, which are false, and which ones defendant does not know the truth or falsity of.

c. Facts constituting affirmative defenses.

3. Facts relating to cross complaint.

Ascertain facts, if any, which might constitute the basis of a cross complaint against plaintiff, a codefendant, or both, or some person or entity not yet a party to the action or against both the plaintiff, or a codefendant, and others. For discussion and forms, see Ch. 123, *Complaints and Cross Complaints* .

Legal Topics:

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

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1-2 California Forms of Pleading and Practice--Annotated § 2.41

§ 2.41 Documents to Be Obtained

Counsel will want to obtain copies of the same documents as those listed for the plaintiff in *§ 2.11, above* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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1-2 California Forms of Pleading and Practice--Annotated § 2.42

§ 2.42 Preliminary Determinations and Proceedings

1. Default previously entered against defendant.

a. Preliminary determination.

Determine whether default judgment was entered against defendant.

b. Motion to set aside default.

(1) If default entered against defendant, determine whether one or more of following grounds for setting aside default and default judgment exist:

(a) Default resulted from mistake, inadvertence, surprise, excusable neglect, or fraud [*see Code Civ. Proc. § 473(b)*].

(b) Default resulted from defendant's lack of actual notice of action in time to defend [*see Code Civ. Proc. § 473.5*].

(c) Action was commenced in improper court under certain consumer protection statutes [*see Code Civ. Proc. § 585.5*].

(d) Military service materially affected defendant's ability to defend action [*see 50 U.S.C. App. § 521(g)(1)*].

(e) Judgment was obtained through fraud of plaintiff or mistake of defendant extrinsic to proceeding or action, or judgment is void [*see Olivera v. Grace (1942) 19 Cal. 2d 570, 575-576, 122 P.2d 564]* .

(2) If one or more of above grounds exist, prepare, file, and serve motion for relief from default and default judgment within applicable time limits set out in particular statutes. For discussion, procedure,

and forms, see Ch. 489, *Relief From Judgments and Orders* ; for points and authorities relating to motions to set aside default, see California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* (Matthew Bender).

c. Motion to set aside default combined with motions to quash, to stay or dismiss for inconvenient forum, or to dismiss for delay in prosecution.

If defendant whose default has been taken wishes to challenge the court's jurisdiction over his or her person [*Code Civ. Proc. § 418.10(a)(1), see* Paragraph 2, *below*], to obtain a stay or dismissal based on inconvenient forum [*Code Civ. Proc. § 418.10(a)(2), see* Paragraph 3, *below*], or to obtain dismissal for delay in prosecution under *Code Civ. Proc. § 583.110 et seq.* [*Code Civ. Proc. § 418.10(a)(3), see* Paragraph 4, *below*], join any of those motions with the *Code Civ. Proc. § 473* or *473.5* motion to set aside default. Motion to set aside default will not be deemed a general appearance if joined with a motion under *Code Civ. Proc. § 418.10* [*see Code Civ. Proc. § 418.10(d)*]. A defendant or cross-defendant may move to quash service of summons, move to stay or dismiss the action on the grounds of inconvenient forum, or move to dismiss for delay in prosecution under *Code Civ. Proc. § 418.10*, and simultaneously answer, demur, or move to strike the complaint or cross-complaint, without waiving a general appearance until entry of an order denying the motion [*Code Civ. Proc. § 418.10(e)(1)*]. If the motion made under *Code Civ. Proc. § 418.10* is denied and the defendant or cross-defendant petitions for a writ of mandate, the defendant or cross-defendant is not deemed to have generally appeared until the proceedings on the writ petition have finally concluded [*Code Civ. Proc. § 418.10(e)(2)*]. Failure to make a motion under *Code Civ. Proc. § 418.10* at the time of filing a demurrer or motion to strike constitutes a waiver of the issues of lack of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in prosecution [*Code Civ. Proc. § 418.10(e)(3)*]. For discussion, procedure and forms, see Ch. 212, *Dismissal* , and Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* ; for discussion and forms of memoranda relating to motions to set aside default and quash service of summons, see California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* , and Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* (Matthew Bender).

2. Court's jurisdiction over person of defendant.

a. Determine whether court has failed to obtain jurisdiction over person of defendant for one of the following reasons [*see Code Civ. Proc. §§ 410.50(a), 418.10(a)(1)*; for discussion, procedure, and forms, *see* Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances*].

(1) Failure to serve summons on defendant who has not made general appearance (that is, has not entered any pleadings or sought any affirmative relief from court) in action [*see Code Civ. Proc. § 410.50(a)*].

(2) Summons defectively served [*see Eagle Elec. Mfg. Co. v. Keener (1966) 247 Cal. App. 2d 246, 250, 55 Cal. Rptr. 444]* .

(3) Defect in summons served [*see Tresway Aero, Inc. v. Superior Court (1971) 5 Cal. 3d 431, 435, 96 Cal. Rptr. 571, 487 P.2d 1211]* .

(4) Defendant, nonresident served outside California, lacks sufficient contacts with state to justify court's exercise of in personam jurisdiction [*see, e.g., International Shoe Co. v. Washington (1945) 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95* ; *Arnesen v. Raymond Lee Organization, Inc. (1973) 31 Cal. App. 3d 991*].

b. If court failed to obtain jurisdiction over person of defendant for any of above reasons, on or before last day on which defendant is required to plead, or within such further time as court for good cause

allows, prepare, file, and serve motion to quash service of summons on ground of lack of jurisdiction of court over person of defendant [*see Code Civ. Proc. § 418.10(a)(1)*]. A defendant or cross-defendant may move to quash service of summons, move to stay or dismiss the action on the grounds of inconvenient forum, or move to dismiss for delay in prosecution under *Code Civ. Proc. § 418.10*, and simultaneously answer, demur, or move to strike the complaint or cross-complaint, without waiving a general appearance until entry of an order denying the motion [*Code Civ. Proc. § 418.10(e)(1)*]. If the motion made under *Code Civ. Proc. § 418.10* is denied and the defendant or cross-defendant petitions for a writ of mandate, the defendant or cross-defendant is not deemed to have generally appeared until the proceedings on the writ petition have finally concluded [*Code Civ. Proc. § 418.10(e)(2)*]. Failure to make a motion under *Code Civ. Proc. § 418.10* at the time of filing a demurrer or motion to strike constitutes a waiver of the issues of lack of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in prosecution [*Code Civ. Proc. § 418.10(e)(3)*]. For discussion, procedure and forms relating to motions to quash, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances*; for memoranda, see California Points and Authorities, Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* (Matthew Bender).

c. If motion to quash service of summons is denied, do one of the following:

(1) Petition for writ of mandate.

(a) Within 10 days after service of written notice of entry of order of court denying motion, or within such further time not exceeding 20 days as trial court may for good cause allow, and before pleading, consider petitioning appropriate reviewing court for writ of mandate to require trial court to enter order quashing service of summons [*see Code Civ. Proc. § 418.10(c)*]. If the motion made under *Code Civ. Proc. § 418.10* is denied and the defendant or cross-defendant petitions for a writ of mandate, the defendant or cross-defendant is not deemed to have generally appeared until the proceedings on the writ petition have finally concluded [*Code Civ. Proc. § 418.10(e)(2)*]. For discussion, procedure, and forms for reviewing denial of the motion by writ of mandate, see Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* . is denied and the defendant or cross-defendant petitions for a writ of mandate, the defendant or cross-defendant is not deemed to have

(b) If writ is denied, plead or respond to complaint within 10 days after service on defendant of written notice of final judgment in mandate proceeding, or within such additional time, not exceeding 20 days, as the court may for good cause allow [*see Code Civ. Proc. § 418.10(c)*; *see also Cal. Rules of Ct., Rule 8.490(2)* (if Supreme Court denies review of court of appeal denial of writ of mandate, defendant has 10 days to file responsive pleading after Supreme Court files its order)].

(2) Respond to complaint.

Plead or respond to complaint within 15 days after service on defendant of written notice of entry of order denying motion, or within such additional time, not exceeding 20 days, as the court may for good cause allow [*see Code Civ. Proc. § 418.10(b)*].

3. Inconvenient forum.

a. Determine whether a suitable alternative forum for trial exists and, if so, whether the litigants' private interests and the public interest favor retaining trial in California [*Stangvik v. Shiley, Inc. (1991) 54*

Cal. 3d 744, 751, 1 Cal. Rptr. 2d 556, 819 P.2d 14] .

b. If these factors favor litigation in another forum, prepare, file, and serve motion to stay or dismiss action on ground of inconvenient forum on or before last day of time to plead or within such further time as court may for good cause allow [*see Code Civ. Proc. § 418.10(a)(2)*]. A defendant or cross-defendant may move to quash service of summons, move to stay or dismiss the action on the grounds of inconvenient forum, or move to dismiss for delay in prosecution under *Code Civ. Proc. § 418.10*, and simultaneously answer, demur, or move to strike the complaint or cross-complaint, without waiving a general appearance until entry of an order denying the motion [*Code Civ. Proc. § 418.10(e)(1)*]. If the motion made under *Code Civ. Proc. § 418.10* is denied and the defendant or cross-defendant petitions for a writ of mandate, the defendant or cross-defendant is not deemed to have generally appeared until the proceedings on the writ petition have finally concluded [*Code Civ. Proc. § 418.10(e)(2)*]. Failure to make a motion under *Code Civ. Proc. § 418.10* at the time of filing a demurrer or motion to strike constitutes a waiver of the issues of lack of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in prosecution [*Code Civ. Proc. § 418.10(e)(3)*]. For discussion, procedure and forms, Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances*; for memoranda, see California Points And Authorities, , *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* (Matthew Bender).

c. If the motion to stay or dismiss action is denied by trial court, the options and procedure are the same as on denial of a motion to quash service of summons [*see Code Civ. Proc. § 418.10(b), (c)*]. See Paragraph (2)(c), *above.*

4. Delay in Prosecution

NOTE:
In actions conducted pursuant to the Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*), local rules affect the time limit for service of the complaint. For further discussion, see the Introduction, Trial Court Delay Reduction Rules.

a. Determine whether any of the grounds for mandatory or discretionary dismissal under *Code Civ. Proc. § 583.110 et seq.* exist:

(1) Summons not served within two years of commencement of action; discretionary dismissal [*Code Civ. Proc. §§ 583.410(a), 583.420(a)(1), (b)*].

(2) Summons not served within three years of commencement of action; mandatory dismissal [*Code Civ. Proc. §§ 583.110(f), 583.210 et seq.*].

(3) Action not brought to trial within two years after commencement; discretionary dismissal [*Code Civ. Proc. §§ 583.410, 583.420(a)(2)(B), (b)*; *Cal. Rules of Ct., Rule 3.1340*].

(4) Action not brought to trial within five years after commencement; mandatory dismissal [*Code Civ. Proc. §§ 583.310 et seq.*].

b. If any of these conditions exist, on or before last day on which defendant is required to plead, or within such further time as court for good cause allows, prepare, file, and serve motion to dismiss for delay in prosecution [*Code Civ. Proc. § 418.10(a)(3)*]. For discussion, procedure, and forms relating to

motions for dismissal, see Ch. 212, *Dismissal*].

c. If the motion to dismiss is denied by trial court, the options and procedure are the same as on denial of a motion to quash service of summons [*see Code Civ. Proc. § 418.10(b), (c)*]. See Paragraph (2)(c), *above.*

5. Defendant's capacity to defend action.

a. Minor, incompetent person, or person for whom conservator has been appointed.

(1) Determine whether guardian or conservator for defendant's person or estate has previously been appointed [*see Code Civ. Proc. § 372*] and if so whether he or she will appear on behalf of defendant in action. For discussion, forms, and procedural guide relating to appointment of conservators and guardians, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , and Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* .

(2) If defendant has no guardian or conservator, or if appointment of a guardian ad litem otherwise appears expedient, petition for appointment of guardian ad litem to appear on defendant's behalf [*see Code Civ. Proc. §§ 372, 373*]. For discussion, forms, and procedural guide relating to appointment of guardians ad litem, see Ch. 291, *Guardians Ad Litem* .

b. Unborn or unascertained persons.

(1) Determine whether, under terms of written instrument or otherwise, person or persons of designated class who are unascertained or who are not in being may be or may become legally interested in any real or personal property involved in the action or proceeding [*see Code Civ. Proc. § 373.5*].

(2) Request appointment of guardian ad litem to represent such persons, if appropriate [*see Code Civ. Proc. § 373.5*]. For discussion and forms pertaining to appointment of a guardian ad litem in such circumstances, see *Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, § 560.140*.. For discussion, forms, and procedural guide relating to appointment of guardians ad litem in general, see Ch. 291, *Guardians Ad Litem* .

6. Suspension of powers prohibiting business entity from defending action [*see Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp. (1957) 155 Cal. App. 2d 46, 49-50, 317 P.2d 649]* .

a. Failure by corporation or limited liability company to file biennual statement.

(1) Determine if defendant's corporate powers have been suspended for failure to file annual statement of general information and agent of service for process pursuant to *Corp. Code § 1502* (corporations) or *Corp. Code § 17060* (limited liability company) [*see Corp. Code §§ 2205(a), 17654(a)*].

(2) If defendant's powers have been suspended for failure to file statement required by *Corp. Code § 1502*, file required statement. On filing, Secretary of State will certify fact that a statement has been filed to the Franchise Tax Board and corporation or LLC may be relieved from suspension unless it is held in suspension by the FTB by reason of *Rev. &*

Tax. Code § 23301 or *23301.5* [*see Corp. Code §§ 2205(d), 17654(d)*]. For discussion, procedure, and forms regarding suspension of corporate powers, see Ch. 160, *Corporations: Capacity* .

b. Failure to pay state taxes.

(1) Determine whether defendant's powers have been forfeited or suspended for nonpayment of state taxes [*see Rev. & Tax Code § 23301*] or for failure to file return [*see Rev. & Tax Code § 23301.5*], or for failure to file statement of exemption [*see Rev. & Tax. Code § 23775*].

(2) If defendant's powers have been suspended under *Rev. & Tax Code § 23301*, *23301.5*, or *23775*, obtain certificate of revivor from Franchise Tax Board by making written application therefor and by paying all taxes, additions to tax, penalties, interest, and any other amounts due [*see Rev. & Tax. Code §§ 23305*, *23776*; *see also Rev. & Tax Code § 23305b* (revivor of powers on partial payment of taxes if revivor will improve prospects for recovery of full amount due)]. For discussion, procedure, and forms regarding suspension or forfeiture of powers, see Ch. 160, *Corporations: Capacity* .

7. Propriety of venue.

a. Improper county.

If action has been filed in county other than county designated as proper county for trial of action, prepare, file, and serve motion for change of venue [*see Code Civ. Proc. §§ 396b, 397(a)*]. For listing of proper counties in which to file in particular actions, see *§ 2.12*, Paragraph (6), *above.* For discussion, procedure, and forms, see Ch. 571, *Venue* .

b. Convenience of witnesses.

If convenience of witnesses and ends of justice would be promoted by changing county of trial, prepare, file and serve motion for change of venue [*see Code Civ. Proc. § 397(c)*]. For discussion, procedure, and forms, see Ch. 571, *Venue* .

c. Impartial trial cannot be had.

If defendant has reason to believe that impartial trial cannot be had in county designated for trial, prepare, file and serve motion for change of venue [*see Code Civ. Proc. § 397(b)*]. For discussion, procedure, and forms, see Ch. 571, *Venue* .

d. No judge of court qualified to act.

When from any cause there is no judge of court of designated county qualified to act, prepare, file and serve motion for change of venue [*see Code Civ. Proc. § 397(d)*]. For discussion, procedure, and forms, see Ch. 571, *Venue* .

8. Defects in complaint.

Examine complaint for defects [*see Code Civ. Proc. § 430.10*] which may subject it to demurrer if they appear on face of the complaint or from matter subject to judicial notice [*see Code Civ. Proc. § 430.30(a)*] or which may be raised by

answer otherwise [*see Code Civ. Proc. § 430.30(b)*].

a. Lack of subject matter jurisdiction [*Code Civ. Proc. § 430.10(a)*].

(1) Determine whether court lacks jurisdiction of subject matter of action. For listing of which court has jurisdiction over particular subject matter, see *§ 2.12*, Paragraph (7), *above*.

(2) If court lacks jurisdiction of subject matter of action and there is California court that has jurisdiction, prepare, file, and serve motion to have action transferred to proper court having subject matter jurisdiction [*see Code Civ. Proc. §§ 396, 430.30*; for procedure of motion to transfer, *see also § 2.43*, Paragraph (5), *below*] or demur to complaint [*see Code Civ. Proc. §§ 430.10(a), 430.30*; for procedure for demurrer, *see also § 2.43*, Paragraph(2), *below*]. For discussion, procedure, and forms relating to motion to transfer, Ch. 324, *Jurisdiction: Subject Matter Jurisdiction*; for discussion, procedures, and forms related to demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* ; for memoranda, see California Points and Authorities, Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* , and Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

b. Failure to state cause of action [*see Code Civ. Proc. § 430.10(e)*].

(1) Determinations.
(a) Determine whether complaint states facts sufficient to constitute cause of action [*Code Civ. Proc. § 430.10(e)*].

(b) Determine whether action is barred by statutes of limitation [*see Code Civ. Proc. §§ 312, 430.10(e)*; *California Safe Deposit & Trust Co. v. Sierra Valleys Ry. Co. (1910) 158 Cal. 690, 698, 112 P. 274]* . For table of periods of limitation, see Ch. 345, *Limitation of Actions* .

(c) Determine whether action barred by laches. For discussion and form relating to bar of laches, see Ch. 345, *Limitation of Actions* .

(d) Determine whether plaintiff stated cause of action but cause of action is in someone else [*see Code Civ. Proc. § 430.10(e)*; *Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 19-20, 108 P.2d 906]* .

(2) Raise objection by demurrer or answer [*see Code Civ. Proc. § 430.30*; *see also § 2.43*, Paragraphs (1) and (2), *below*]. Laches and statute of limitation are affirmative defenses which if not pleaded or otherwise properly raised are deemed waived [*see Getz v. Wallace (1965) 236 Cal. App. 2d 212, 213, 45 Cal. Rptr. 910* (statute of limitation); *Victor Oil Co. v. Drum (1920) 184 Cal. 226, 243, 193 P. 243* (laches)].

c. Legal capacity of plaintiff.

(1) Determine whether plaintiff has the legal capacity to sue [*see Code Civ. Proc. § 430.10(b)*; for listing of when plaintiff has capacity to sue and of potential disabilities, *see also § 2.12*, Paragraph (4), *above*].

(2) If plaintiff does not have capacity to sue, object by demurrer (not allowed in limited civil case [*see Code Civ. Proc. § 92(c)*]) or raise as affirmative defense in answer [*see Code Civ. Proc. § 430.30*; *see also § 2.43*, Paragraphs (1) and (2), *below*]. For discussion, procedure, and forms, see Ch. 3, *Abatement of Actions* .

d. Pleading uncertain or ambiguous and unintelligible.

(1) Determine whether pleading is certain or ambiguous and unintelligible [*Code Civ. Proc. § 430.10(f)*].

(2) If complaint uncertain or ambiguous and unintelligible, raise objections by demurrer (not allowed in limited civil case [*see Code Civ. Proc. § 92(c)*]) or answer [*see Code Civ. Proc. § 430.30*; *see also § 2.43*, Paragraphs (1) and (2), *below*].

e. Defect or misjoinder of parties [*Code Civ. Proc. § 430.10(d)*].

(1) Determine if there is if party who has not been joined but is required to be joined pursuant to *Code Civ. Proc. § 389(a)*, or whether person has been joined who is not permissible plaintiff pursuant to *Code Civ. Proc. § 378(a)* or permissible defendant under *Code Civ. Proc. § 379(a)*. For discussion regarding joining parties, see Ch. 395, *Parties* .

(2) If there is defect or misjoinder of parties, raise objection by demurrer (not allowed in limited civil case [*see Code Civ. Proc. § 92(c)*]) or raise as affirmative defense in answer [*see Code Civ. Proc. § 430.30*; *see also § 2.43*, Paragraphs (1) and (2), *below*]. For discussion, procedure, and forms, see Ch. 3, *Abatement of Actions* .

f. Another action pending between same parties on same cause of action [*Code Civ. Proc. § 430.10(c)*].

(1) Determine if there is another action pending, that has commenced but has not reached its final determination on appeal [*see Code Civ. Proc. § 1049*], between same parties on same cause of action where claim sued on in second action is such that final judgment in first one could be pleaded in bar as res judicata [*see Code Civ. Proc. § 430.10(c)*; *Lord v. Garland (1946) 27 Cal. 2d 840, 848-849, 168 P.2d 5]* .

(2) Raise objection by demurrer (not allowed in limited civil case [*see Code Civ. Proc. § 92(c)*]) or affirmative defense in answer [*see Code Civ. Proc. § 430.30*; *see also § 2.43*, Paragraphs (1) and (2), *below*]. For discussion, procedure, and forms, see Ch. 3, *Abatement of Actions* .

g. Oral, written, or implied contract.

(1) If action founded on contract, determine whether it can be ascertained from pleading whether contract is written, oral, or implied by conduct [*see Code Civ. Proc. § 430.10(g)*].

(2) If not ascertainable, raise objection by demurrer (not allowed in limited civil case [*see Code Civ. Proc. § 92(c)*]) or affirmative defense in answer [*see Code Civ. Proc. § 430.30*; *see also § 2.43*, Paragraphs (1) and (2), *below*].

h. Required certificate.

(1) Determine whether certificate was filed as required by *Code Civ. Proc. § 411.35* (indicating merit

to professional negligence action against architect, engineer, or land surveyor) [*see Code Civ. Proc. § 430.10(h)*].

(2) If certificate was not filed, raise objection by demurrer under *Code Civ. Proc. § 430.10* (not allowed in limited civil case under *Code Civ. Proc. § 92(c)*) or motion to strike under *Code Civ. Proc. § 435* [*Code Civ. Proc. § 411.35(g)*].

i. Jurisdictional classification of case.

(1) Determine whether caption of case misstates the jurisdictional classification of the case or fails to state that the case is a limited civil case [*see Code Civ. Proc. §§ 422.30(b), 403.040(a)*; *see also Code Civ. Proc. §§ 32.5, 85, 86* (limited civil cases)].

(2) If action is incorrectly classified, move for reclassification [*see Code Civ. Proc. § 403.040(a)*; *see also § 2.43*, Paragraph (6), *below*]. If still within the time to respond to the initial pleading and opposing party is willing to stipulate to a reclassification, file stipulation with the court and pay reclassification fee if reclassifying from limited to unlimited case [*Code Civ. Proc. § 403.050*].

j. Complex case designation of case.

(1) If Civil Case Cover Sheet served with the complaint designates the case as a complex case and the court has not previously declared the action to be a complex case, determine whether to counterdesignate the case as noncomplex [*see Cal. Rules of Ct., Rule 3.402(a)*]. A noncomplex counterdesignation must be done by filing a councounter civil case cover sheet designating action as complex no later than defendant's first appearance [*see Cal. Rules of Ct., Rule 3.402(a)*]. If no counterdesignating the case as noncomplex, determine whether to join in the complex case designation [*see Cal. Rules of Ct., Rule 3.402(c)*].

(2) If Civil Case Cover Sheet was not served with the complaint, or was served but does not designate the case as a complex case, determine whether to counterdesignate the case as complex [*see* Cal. Rules of Ct., Rules 981.2, 3.402(b)]. Complex counterrdesignation must be done by filing a counter civil case cover sheet designating action as complex no later than defendant's first appearance.

(3) For discussion of what constitutes a complex case and the court's power to designate the case as complex or noncomplex and to change that designation [*see Cal. Rules of Ct., Rules 3.400, 3.402, 3.403*], see *Ch. 425, Pretrial Proceedings, § 425.15*, and for an illustration of the civil case cover sheet, see *Ch. 123, Complaints and Cross Complaints, § 123.60*.

9. Potential affirmative defenses.

a. Determine whether there are potential affirmative defenses not appearing on face of complaint, including:

(1) Action barred under doctrine of res judicata [*see Code Civ. Proc. § 1908*].

(2) Action barred by failure to have asserted it by compulsory cross complaint in prior action [*see Code Civ. Proc. § 426.30(a)*].

(3) Substantive defenses to particular cause of action alleged. For list of affirmative

defense forms in this set, see the Table of Affirmative Defense Forms in Ch. 26, *Answers* .

b. Raise affirmative defense in the answer [*see Code Civ. Proc. §§ 430.30(b), 431.30(b)(2)*].

10. Potential grounds for striking whole or part of complaint [*see Code Civ. Proc. § 436*; for discussion, procedure, and forms regarding motions to strike, *see* Ch. 375, *Motions to Strike: Pleadings* ; *see also § 2.43*, Paragraph (3), *below*]. For potential grounds of striking whole complaint under the anti-SLAPP or anti-SLAPPback statutes [Code Civ. Proc. §§ 425.19-425.18], see Paragraph (11), *below*, and see *Ch. 376, Motions to Strike: Anti-SLAPP*].

a. Unlimited civil case.

(1) Determine if any part of complaint includes irrelevant, false, or improper matter [*see Code Civ. Proc. §§ 431.10(b), (c), 436(a)*].

(2) Determine whether complaint was drawn or filed in conformity with laws of California, court rule, or order of court [*see Code Civ. Proc. § 436(b)*].

b. Limited civil case.

Determine whether damages or relief sought are supported by allegations of the complaint [*see Code Civ. Proc. § 92(d)*].

11. Potential grounds for striking whole or part of complaint under the anti-SLAPP or anti-SLAPPback special motion to strike [Code Civ. Proc. §§ 425.19-425.18]; for discussion, procedure, and forms regarding motions to strike under the anti-SLAPP or anti-SLAPPback statutes, *see* Ch. 376, *Motions to Strike: Anti-SLAPP* ; *see also § 2.43*, Paragraph (4), *below*].

a. Complaint involves categories of protected conduct and is a meritless suit filed primarily to chill defendant's exercise of *First Amendment* rights subject to Anti-SLAPP provisions:

(1) Determine if complaint involves written or oral statement or writing made before official proceeding [*Code Civ. Proc. § 425.16(e)(1)*].

(2) Determine if complaint involves written or oral statement or writing made in connection with an issue under consideration or review in official proceeding [*Code Civ. Proc. § 425.16(e)(2)*].

(3) Determine if complaint involves written or oral statement made public place or forum in connection with issue of public interest law [*Code Civ. Proc. § 425.16(e)(3)*].

(4) Determine if complaint involves any other conduct in furtherance of exercise of constitutional right of petition or free speech [*Code Civ. Proc. § 425.16(e)(4)*].

b. Exceptions.

Determine whether exceptions to Anti-SLAPP motion apply [*Code Civ. Proc. § 425.17*].

(1) Action brought solely in the public interest or on behalf of the general public [*Code Civ. Proc. § 425.17(b)*].

(2) Action brought against a person primarily engaged in the business of selling or leasing goods or services [*Code Civ. Proc. § 425.17(c)*].

(3) Action brought against a person engaged in the dissemination of ideas, or brought against a person or entity based on the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work [*Code Civ. Proc. § 425.17(d)*].

c. Anti-SLAPPback.

Determine whether Anti-SLAPPback statute applies because cause of action alleges malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that was dismissed under Anti-SLAPP statute [*see Code Civ. Proc. § 425.18*].

12. Potential cause of action for cross complaint.

a. Compulsory.

(1) Determine whether defendant has cause of action against plaintiff related to cause of action asserted in plaintiff's complaint.

(2) Assert such action by way of cross complaint or be precluded from later asserting it in any other action [*see Code Civ. Proc. § 426.30(a)*; for discussion, procedure, and forms, *see* Ch. 123, *Complaints and Cross Complaints* ; *see also § 2.45, below*].

(3) If defendant fails to plead cause of action subject to requirements of *Code Civ. Proc. §§ 426.10-426.70* through oversight, inadvertence, mistake, neglect, or other cause, apply to court, at any time during course of action, for leave to amend pleading, or to file cross complaint [*see Code Civ. Proc. § 426.50*].

b. Permissive.

(1) Determine whether defendant has cause of action [*see Code Civ. Proc. § 428.10*]:
(a) Against any of parties who filed complaint.

(b) Against any person, whether or not such person is already party to action, if:
(i) Cause of action asserted arises out of same transaction, occurrence, or series of transactions or occurrences as cause brought against defendant, or

(ii) Cause of action asserts a claim, right, or interest in the property or controversy that is the subject of cause brought against defendant.

(2) Assert such action by way of cross complaint, if desired [*see Code Civ. Proc. § 428.10*]. For discussion, procedure, and forms, see Ch. 123, *Complaints and Cross Complaints* . For procedure, see *§ 2.45*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureVenueForum Non ConveniensCivil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil

ProceduresPretrial JudgmentsDefaultRelief From DefaultCivil ProceduresPretrial JudgmentsDefaultEntry of Default Judgments

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§ 2.43 Responses to Complaint

If defendant has not moved to quash service of summons, to stay or to dismiss the action for inconvenient forum, or to dismiss the action for delay in prosecution [*see Code Civ. Proc. § 418.10(a)(1)-(3)*; *see also § 2.42*, Paragraphs (2)-(4), *above*], prepare, serve, and file one or more of the responses listed below within 30 days of service of the complaint [*Code Civ. Proc. §§ 412.20(a)(3), 430.40*] to avoid default [*Code Civ. Proc. § 585(a)-(c)*]. A defendant or cross-defendant may move to quash service of summons, move to stay or dismiss the action on the grounds of inconvenient forum, or move to dismiss for delay in prosecution under *Code Civ. Proc. § 418.10*, and simultaneously answer, demur, or move to strike the complaint or cross-complaint, without waiving a general appearance until entry of an order denying the motion [*Code Civ. Proc. § 418.10(e)*]. If defendant unsuccessfully made one or more of the above motions, prepare, serve, and fileone or more of the responses listed below within the extended time to respond to the complaint [*see Code Civ. Proc. § 418.10(b), (c)*; *see also § 2.42*, Paragraph (2), *above*] to avoid default [*Code Civ. Proc. §§ 418.10(d), 585(a)-(c)*]. If defendant desires to counterdesignate the case as complex or noncomplex, prepare, serve, and file a counter civil case cover sheet no later than defendant's first appearance [*Cal. Rules of Court, Rule 3.402*; *see § 2.42*, Paragraph (8)(j), *above*].

NOTE:

Code Civ. Proc. § 418.10(a)(3) allows any motion to dismiss under *Code Civ. Proc. § 583.110-583.430* to be made within in the time for responding to the complaint to avoid default [*see Code Civ. Proc. § 418.10(a)(3), (d)*]. This would include motions for either discretionary or mandatory dismissal for failure to serve summons or for failure to bring to trial. *Code Civ. Proc. § 585(a)-(c)*, however, only refers to motions for mandatory dismissal for failure to serve summons (*Code Civ. Proc. § 583.210-583.250*) as forestalling default

The responses are as follows [*Code Civ. Proc. § 585(a)-(c)*]:

1. Answer to complaint.

a. Prepare, serve, and file answer admitting or denying allegations of complaint or

alleging new matter constituting defenses to complaint [*see Code Civ. Proc. § 431.30*; *see also § 2.42*, Paragraph (9), *above*]. For discussion, procedure, and forms, see Ch. 26, *Answers* ; for procedure and forms relating to service of answers, see Ch. 518, *Service of Summons and Papers* .

b. Verify the answer when:

(1) Complaint verified, except in limited civil case [*see Code Civ. Proc. §§ 92(b), 446*].

(2) State, any county thereof, city, school district, district, public agency, or public corporation, or any officer of the state, or of any county thereof, city, school district, district, public agency, or public corporation, in his or her official capacity, is the plaintiff unless either an admission of the truth of the complaint might subject the party to a criminal prosecution, or, a county, city, school district, district, public agency, or public corporation, or an officer of the state, or of any county thereof, city, school district, district, public agency, or public corporation, in his or her official capacity, is defendant [*see Code Civ. Proc. § 446*].

c. Filing fee.

Pay filing fee, at time of delivery of answer, to clerk of court for filing [*see Gov. Code §§ 70612* (unlimited civil cases), 70614 (limited civil cases)].

2. Demurrer [*Code Civ. Proc. §§ 430.10, 430.30(a)*].

a. If defects appear on face of complaint [*see § 2.42*, Paragraph (8), *above*], file demurrer separately, with answer [*see Code Civ. Proc. § 430.30(c)*], or together with motion to strike [*see Code Civ. Proc. § 435(b)*]. For procedure and forms, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

b. Serve and file notice of hearing with demurrer specifying hearing date in accordance with provisions of *Code Civ. Proc. § 1005* [*Cal. Rules of Ct., Rule 3.1320(c)*]. For procedure and forms relating to service of demurrers, see Ch. 518, *Service of Summons and Papers* .

c. Prepare, serve and file supporting memorandum [*see Cal. Rules of Ct., Rule 3.1113*].

d. Appear at hearing on demurrer [*see Cal. Rules of Ct., Rule 3.1320(f)*].

e. Following ruling on demurrer, if demurrer is not sustained and answer has not already been filed, file answer within 10 days unless otherwise ordered [*see Code Civ. Proc. § 472a(b)*; *Cal. Rules of Ct., Rule 3.1320(g)*]. If time to answer is given, the time given runs from the service of the notice of the decision or order, unless that notice is waived in open court and the waiver is entered in the minutes [*Code Civ. Proc. § 472b*].

f. If demurrer was directed to less than all of the causes of action of the complaint, move to strike, demur, or otherwise plead to remaining causes of action within 10 days after [*see Cal. Rules of Ct., Rule 3.1320(j)*]:

(1) Overruling of demurrer,

(2) Amendment of complaint or expiration of time to amend if demurrer is sustained with leave to amend, or

(3) Sustaining of demurrer if demurrer was sustained without leave to amend.

3. Motion to strike [*Code Civ. Proc. §§ 435-437*].

a. Serve and file motion to strike the whole or any part of complaint within time allowed to respond to pleading, and if demurrer isinterposed, concurrently therewith, if any of grounds enumerated in *Code Civ. Proc. § 436* exist [*see Code Civ. Proc. § 435(b)*; *Cal. Rules of Ct., Rule 3.1322*; *see also § 2.42*, Paragraph (10)]. For procedure and forms, see Ch. 375, *Motions to Strike: Pleadings* , Ch. 372, *Motions and Orders* , and Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* ; for memoranda, see California Points and Authorities, Ch. 160, *Motions to Strike* .

b. If notice of motion is filed without demurring, the time to answer is extended but not time to file demurrer [*Code Civ. Proc. § 435(c), (d)*].

c. If motion is denied and answer has not been filed, file answer within time allowed by court to avoid entry of default [*see Code Civ. Proc. §§ 472a(d), 586(a)(2)*].

d. If motion is granted in whole or in part, answer unstricken portion within time allowed by court to avoid entry of default [*see Code Civ. Proc. § 586(a)(3)*].

4. Special motion to strike under Anti-SLAPP and Anti-SLAPPBACK statutes [*Code Civ. Proc. §§ 425.16-425.18*].

a. Serve and file special Anti-SLAPP motion to strike within 60 days of the service of the complaint, or, per the discretion of the court, at a later time on terms the court deems proper; and the clerk of court must schedule the motion to be heard within 30 days of service of the motion unless the docket conditions of the court require a later hearing [*see Code Civ. Proc. § 425.16(f)*]. For procedure and forms, *see* Ch. 376, *Motions to Strike: Anti-SLAPP* ; for memoranda, see California Points and Authorities, Ch. 160, *Motions to Strike* .

b. Serve and file motion for specified discovery on Anti-SLAPP motion if good cause exists [*Code Civ. Proc. § 425.16(f)*].

c. Serve and file special Anti-SLAPPback motion to strike within 120 days of service of the complaint, or, per the court's discretion, within six months of service of the complaint; and the clerk of court must schedule the motion to be heard within 30 days of service of the motion unless the docket conditions of the court require a later hearing [*Code Civ. Proc. § 425.18(d)*].

d. Serve and file ex parte application for continuance to obtain necessary discovery on Anti-SLAPP motion if it appears facts are essential to justify opposition but cannot then be presented [*Code Civ. Proc. § 425.18(d)*].

5. Motion to transfer to court of proper venue under *Code Civ. Proc. § 396b*. For procedure and forms, see Ch. 571, *Venue* ; for memoranda, see California Points and Authorities, Ch. 238, *Venue* .

If the action or proceeding was commenced in a court having subject matter jurisdiction, but which is other than the court designated as the proper court for trial under the venue statutes [*see Code Civ. Proc. § 396b*; *see also § 2.12*, Paragraph (6), *above*]:

a. File notice of motion for order transferring action to proper court at time of filing answer, demur, or

motion to strike, or, without answering or demurring, within time otherwise allowed to respond to complaint, together with proof of service of copy of such papers, on adverse party [*Code Civ. Proc. § 396b(a)*].

b. If motion to transfer under *Code Civ. Proc. § 396b* denied, do one of following:

(1) Plead.

Unless otherwise ordered, move to strike, demur, or otherwise plead within 30 calendar days if response not previously filed [*see Code Civ. Proc. § 586(a)(6)(A)*; *Cal. Rules of Ct., Rule 3.1326*].

(2) Petition for writ of mandate.

Consider petitioning for writ of mandate to review order denying motion to change place of trial [*see Code Civ. Proc. § 400*].

(a) File petition in court of appeal in district in which court granting or denying motion is situated within 20 days (or 30 days if court grants extension) after service of written notice of order [*see Code Civ. Proc. § 400*].

(b) File copy of petition in trial court immediately after filing petition in court of appeal [*see Code Civ. Proc. § 400*].

(c) If petition denied, apply for leave to respond to complaint within a reasonable time [*see Code Civ. Proc. § 586(a)(6)(C)*].

d. If motion to transfer under *Code Civ. Proc. § 396b* is granted, respond to complaint within 30 days after mailing of notice of filing and case number by clerk of court to which action or proceeding is transferred or within time provided in *Code Civ. Proc. § 586(a)(6)(C)* to avoid default [*see Cal. Rules of Ct., Rule 3.1326*; *Code Civ. Proc. § 586(a)(6)(B)*].

6. Motion for reclassification under *Code Civ. Proc. § 403.040*. For procedure and forms, see Ch. 324, *Jurisdiction: Subject Matter Jurisdiction* .

a. If initial pleading misstated jurisdictional classification of case or failed to state that proceeding is limited civil case, within time allowed for responding to that pleading, prepare, file, and serve motion for reclassification as limited civil case or otherwise [*see Code Civ. Proc. § 403.040(a)*].

b. Also answer or otherwise respond to initial pleading; motion for reclassification does not extend time to amend, answer, or otherwise respond [*see Code Civ. Proc. § 403.040(a)*].

c. If motion is granted and neither party who filed pleading that erroneously classified case nor any other interested party timely pays the reclassification fee within 30 days after service of a reclassification order, move for dismissal of the action [*Code Civ. Proc. § 403.040(d)(3)*].

d. If motion is denied, consider petitioning for writ of mandate to review order [*see Code Civ. Proc. § 403.080*; *see also* Paragraph 4(b)(2), *above*].

(1) File petition in court of appeal in district in which court granting or denying motion is situated within 20 days (or 30 days if court grants extension) after service of written notice of order [*see Code Civ. Proc. § 403.080*].

(2) File copy of petition in trial court immediately after filing petition in court of appeal [*see Code Civ. Proc. § 403.080*].

7. Stipulation for reclassification under *Code Civ. Proc. § 403.050*. For procedure and forms, see Ch. 324, *Jurisdiction: Subject Matter Jurisdiction* .

a. If still within the time allowed to respond to the initial pleading, and opposing party is willing to stipulate to reclassification, prepare, file, and serve stipulation for reclassification [*see Code Civ. Proc. § 403.050(a)*].

b. If jurisdictional classification changes from a limited to an unlimited case due to stipulation, reclassification fee pursuant to *Code Civ. Proc. § 403.060* must be paid at the time the stipulation is filed [*see Code Civ. Proc. § 403.050(b)*].

8. Response to complaint in intervention.

If served with complaint in intervention, move, demur, or otherwise plead to complaint in same manner as to original complaint within 30 days after service [*see Code Civ. Proc. § 387(a)*; *see also* Paragraphs 1-4, *above*].

9. Case questionnaire.

If, in limited civil case, defendant is served case questionnaire, complete and serve case questionnaire on requesting plaintiff with answer [*see Code Civ. Proc. § 93(b)*].

10. Petition to Compel Arbitration.

A petition to compel arbitration pursuant to *Code Civ. Proc. § 1281.2* may be filed in lieu of filing an answer to a complaint. If the petition is denied, the defendant has 15 days from denial to plead the complaint [*Code Civ. Proc. § 1281.7*]. For procedure and forms relating to compelling arbitration, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*

11. Notice of Stay of Proceedings.

A notice of stay must be filed and served if the party has requested or caused a stay of proceedings on order of a federal or higher state court, due to contractual arbitration pursuant to *Code Civ. Proc. § 1281.4*, due to arbitration of attorney's fees pursuant to *Bus. & Prof. Code § 6201*, or due to an automatic stay caused by filing in another court, including a federal bankruptcy court [*Cal. Rules of Ct., Rule 3.650*]. For discussion and forms, see Ch. 137, *Continuing Duties During Litigation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureVenueMotions to TransferGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsAnswers

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§ 2.44 Cross Complaint

NOTE:
In actions conducted pursuant to the Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*), local rules may affect the procedure for cross complaints. For further discussion, see *§ 2.04*.

1. If seeking affirmative relief against plaintiff, codefendant, or third party, prepare, file, and serve cross complaint. If related cause of action not asserted against plaintiff by way of cross complaint, defendant laterprecluded from asserting it in any other action [*Code Civ. Proc. § 426.30(a)*; *see § 2.42*, Paragraph (12), *above*]. For procedure and forms relating to cross complaints, see Ch. 123, *Complaints and Cross Complaints* , and Ch. 518, *Service of Summons and Papers* .

2. Join any person as cross complainant or cross defendant, whether or not that person is already party to action, if joinder of that party would have been permitted by statutes governing joinder of parties had cross complaint been filed as independent action [*see Code Civ. Proc. § 428.20*].

3. If cross complaint against any of parties who filed complaint, file before or at same time as answer [*Code Civ. Proc. § 428.50(a)*].

4. If cross complaint is other than against parties who filed complaint, file at any time before court has set date for trial [*Code Civ. Proc. § 428.50(b)*].

5. If any cross complaint is not filed within time specified in *Code Civ. Proc. § 428.50(a)* or *(b)*, obtain leave of court to file [*see Code Civ. Proc. § 428.50(c)*].

6. Issuance of summons and service of summons and cross complaint.

a. When party to be served has not appeared.

Have summons on cross complaint issued and served on each party who has not appeared in action in same manner as on commencement of original action [*see Code Civ. Proc. § 428.60(1)*; for procedure and forms, *see* Ch. 518, *Service of Summons and Papers*]. Also serve a copy of the most recently amended complaint and any answers on cross defendants who have not previously appeared [*Cal. Rules of Ct., Rule 3.222*].

b. When party to be served has appeared.

For each party who has appeared in action, serve cross complaint on party's attorney or on party if he or she appeared without an attorney, in manner provided for service of summons or in manner provided in *Code Civ. Proc. §§ 1010-1020* [*Code Civ. Proc. § 428.60(2)*; for procedure and forms, *see* Ch. 518, *Service of Summons and Papers*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessSummonsGeneral OverviewCivil ProceduresPleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProceduresPartiesJoinderGeneral Overview

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§ 2.45 Subsequent Actions by Plaintiff or Cross Defendant Requiring Response by Defendant

1. Plaintiff's response to defendant's cross complaint.

a. If plaintiff or other cross defendant demurs to cross complaint [*see Code Civ. Proc. § 430.30(a)*] or moves to strike it [*Code Civ. Proc. § 435*], prepare, file, and serve on each party at least 9 court days before the hearing [*see Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(d)*] a memorandum in opposition to demurrer or motion. The latest a paper may be filed to be deemed timely is at the close of business of the clerk's office on the day the paper is due [*Cal. Rules of Ct., Rule 3.1300(e)*]. No paper shall be rejected for filing on the ground that it was untimely submitted for filing. If the court, in its discretion, refuses to consider a late filed paper, the minutes or order is required to so indicate [*Cal. Rules of Ct., Rule 3.1300(d)*]. For discussion, procedure, and forms relating to demurrers and motions to strike, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 375, *Motions to Strike: Pleadings* , and Ch. 376, *Motions to Strike: Anti-SLAPP* , respectively.

b. Answer to cross complaint.
(1) Demurrer.
(a) If plaintiff or other cross defendant answers cross complaint [*see Code Civ. Proc. § 430.30(b)*], determine if answer contains any of defects enumerated in *Code Civ. Proc. § 430.20*.

(b) If it does, file demurrer to answer within 10 days after service of answer [*Code Civ. Proc. § 430.40(b)*; *see also Code Civ. Proc. § 1013(a), (c), (e)* (extension of time to respond when served by mail, facsimile transmission, or overnight delivery)]. For discussion, procedure, and forms, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

(2) Motion to strike.

(a) If plaintiff or other cross defendant answers cross complaint [*see Code Civ. Proc. § 430.30(b)*], determine if answer contains any irrelevant, false, or improper matter, or is not drawn or filed in conformity with the laws of California, a court rule, or order of court [*see Code Civ. Proc. §§ 435(a)(2), (b)(2), 436*].

(b) If it does, move to strike all or part of answer [*see Code Civ. Proc. §§ 435, 436*; *see also § 2.42*, Paragraph (10) and *§ 2.43*, Paragraph (3)]. For discussion, procedure, and forms, see Ch. 375, *Motions to Strike: Pleadings* .

2. Other papers.

If plaintiff initiates ancillary proceedings or files any notices of motion to which defendant has not already responded [*see §§ 2.17, 2.18, above*], prepare, file, and serve appropriate responses thereto on each party at least 9 court days before time appointed for hearing [*see Code Civ. Proc. § 1005*; *Cal. Rules of Ct., Rule 3.1300(a)*]. The latest a paper may be filed is at the close of business of the clerk's office on the day the paper is due [*Cal. Rules of Ct., Rule 3.1300(e)*]. No paper shall be rejected for filing on the ground that it was untimely submitted for filing. If the court, in its discretion, refuses to consider a late filed paper, the minutes or order is required to so indicate [*Cal. Rules of Ct., Rule 3.1300(d)*]. For discussion, procedure, and forms, see Ch. 372, *Motions and Orders* .

3. Opposition to motion for summary judgment or summary adjudication of issues.

If plaintiff has moved for summary judgment or summary adjudication of issues, if desired, serve and file opposition papers, including statement of issues and disputed facts, not less than 14 days preceding noticed or continued date of hearing, unless court for good cause orders otherwise [*see Code Civ. Proc. § 437c(b)(2)*]. For discussion, procedure, and forms, see Ch. 537, *Summary Judgment* ; for points and authorities, see California Points and Authorities, Ch. 221, *Summary Judgments* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticePleadingsAnswers

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§ 2.46 Ancillary Proceedings

1. Interpleader.

a. If defendant is debtor and wishes to avoid multiplicity of suits and multiple liability on various claims made against him or her on one obligation, initiate proceeding to compel various claimants to interplead and litigate their claims among themselves [*see Code Civ. Proc. § 386(a), (b)*; for general procedure for preparing and filing complaints, *see § 2.14, 2.15, above*]. For discussion, procedure, and forms, see Ch. 314, *Interpleader* ; and for memoranda, *see* California Points and Authorities, Ch. 123, *Interpleader* (Matthew Bender).

b. When only relief sought against defendant is payment of stated amount of money alleged to be wrongfully withheld and defendant has no interest in the money claimed, prepare, file and serve application for order discharging him or her from liability and dismissing him or her from action on deposit of amount in dispute [*see Code Civ. Proc. § 386.5*]. For discussion, procedure, and forms, see Ch. 314, *Interpleader* .

2. Request for statement of damages (unlimited civil case).

a. When complaint is filed in unlimited civil action to recover damages for personal injury or wrongful death, at any time, prepare and serve on plaintiff request for statement setting forth nature and amount of damages being sought [*see Code Civ. Proc. § 425.11*]. For discussion, procedure, and forms, see Ch. 177, *Damages* .

b. If plaintiff does not serve response, petition court in which action is pending to order service of responsive statement [*see Code Civ. Proc. § 425.11*].

3. List of parties.

If more than two parties have appeared in case and are represented by different counsel, each other party to action must assist the first-named plaintiff in maintaining list of parties by [*see Cal. Rules of Ct., Rule 3.254; § 2 .18*, Paragraph (5), *above*]:

a. Furnishing the first-named plaintiff with the party's current address for service of notice when it first appears in the action.

b. Furnishing the first-named plaintiff with any changes in the party's address for service of notice.

c. Serving a copy of the list of parties at the time it serves an order, notice, or pleading on any party who has not yet appeared in the action.

Legal Topics:

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

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§ 2.47 Other Pretrial Motions

Consider following pretrial motions, as appropriate:

1. Motion to transfer to proper court under *Code Civ. Proc. § 396a* (limited civil cases).

a. In limited civil case subject to *Civ. Code §§ 1812.10* or *2984.4* or *Code Civ. Proc. § 395(b)*, if it appears from the complaint or affidavit, or otherwise, that action or proceeding was not commenced in proper court for trial thereof, prepare, file, and serve motion to transfer [*see Code Civ. Proc. § 396a*]. For discussion, procedure, and forms, see Ch. 571, *Venue* ; for memoranda, see California Points and Authorities, Ch. 238, *Venue* .

b. If motion granted, summons served prior to filing of action or proceeding in court to which it is transferred, and defendant has not appeared, answer or otherwise plead within applicable time period dating from service on defendant of written notice of filing in court to which transferred [*see Code Civ. Proc. § 396a*].

2. Motion for reclassification under *Code Civ. Proc. § 403.040(b)*.

a. If, after time allowed for responding to initial pleading has expired, it appears that the caption of the complaint, cross complaint, or other intitial pleading misstates the jurisdictional classification of case or mistakenly fails to state that the case is a limited civil case [*see Code Civ. Proc. §§ 32.5, 85*] and good cause exists for not seeking reclassification earilier, prepare, file, and serve motion for reclassification of the case as limited or unlimited civil case [*see Code Civ. Proc. § 403.040(b)*]. For procedure and forms, see Ch. 324, *Jurisdiction: Subject Matter Jurisdiction* . Note that if still within the time allowed to respond to the initial pleading, and opposing party is willing to stipulate to reclassification, the parties may stipulate to reclassification of the case; and if the jurisdictional classification changes from a limited to an unlimited case due to the

stipulation, a reclassification fee pursuant to *Code Civ. Proc. § 403.060* must be paid at the time the stipulation is filed [*see Code Civ. Proc. § 403.050*].

3. Motion to change place of trial under *Code Civ. Proc. § 397*.

a. If any of the reasons enumerated in *Code Civ. Proc. § 397* exist, prepare, file, and serve motion to change place of trial. For discussion, procedure, and forms, see Ch. 571, *Venue* ; for memoranda, see California Points and Authorities, Ch. 238, *Venue* . For procedure for change of venue under *Code Civ. Proc. § 396b*, see *§ 2.42*, Paragraphs (7) and *§ 2.43*, Paragraph (5).

b. If motion to change place of trial brought for reasons set forth in *Code Civ. Proc. § 397(b)-(e)*, pay costs and fees of transfer at time notice of motion is filed [*see Code Civ. Proc. § 399*].

4. Motion for summary judgment and summary adjudication of issues.

a. Grounds and time for making motion.
(1) Summary judgment.

If plaintiff's action has no merit and no triable issue of material fact exists, make motion for summary judgment any time after 60 days have elapsed since general appearance in action or proceeding of each party against whom motion is directed or at such earlier time after such general appearance as court, with or without notice and on good cause shown, may direct [*see Code Civ. Proc. § 437c(a), (c)*; *see also § 2.21*, Paragraph (2), *above*]. For procedure and forms, see Ch. 537, *Summary Judgment* ; for memoranda, see California Points and Authorities, Ch. 221, *Summary Judgments* .

(2) Summary adjudication of cause of action, claim for punitive damages, or issue of duty.

If it is contended that there is no merit to one or more causes of action within the action, or that there is no merit to a claim for damages under *Civ. Code § 3294* (that is, a claim for punitive damages), or that one or more defendants did not owe a duty to the plaintiff or plaintiffs, move for summary adjudication, alone or as an alternative to a motion for summary judgment, as to that cause of action, claim, or issue, any time after 60 days have elapsed since general appearance in action or proceeding of each party against whom motion is directed or at such earlier time after such general appearance as court, with or without notice and on good cause shown, may direct [*see Code Civ. Proc. § 437c(a), (f)*; *see also § 2.21*, Paragraph (2), *above*]. For procedure and forms, see Ch. 537, *Summary Judgment* ; for memoranda, see California Points and Authorities, Ch. 221, *Summary Judgments* .

b. Service.

Serve motion and supporting papers on all other parties to action at least 75 days before time appointed for hearing (time increased by five days if mailed to address within California, 10 days if mailed to address outside California, and 20 days if mailed to address outside United States) [*see Code Civ. Proc. § 437c(a)*].

c. Response to opposition.

If plaintiff has served opposition to defendant's motion, determine if opposition was properly served (not less than 14 days preceding noticed or continued date of hearing). If opposition timely, file and serve reply to opposition not less than five days preceding noticed or continued date of hearing, unless court for good cause orders otherwise [*see Code Civ. Proc. § 437c(b)(2), (4)*].

5. Motion to join party.

If a third person is a party required to be joined under *Code Civ. Proc. § 389(a)* and has not been but can be joined, move for joinder [*see Code Civ. Proc. § 389(a)*; *see also § 2.14*, Paragraph (1)(j)(2)(a), *above*]. For discussion, procedure, and forms regarding joining parties, see Ch. 395, *Parties* .

6. Motion for separate trial of affirmative defense [*see Code Civ. Proc. §§ 597, 597.5*; *see also § 2.21*, Paragraph (4), *above*]. For procedure and forms, see Ch. 3, *Abatement of Actions* and Ch. 345, *Limitation of Actions* ; for memoranda, see California Points and Authorities, Ch. 10, *Abatement and Survival of Actions* .

7. Motion for severance or consolidation [*see Code Civ. Proc. § 1048(a)*; *see also § 2.21*, Paragraph (5), *above*]. For procedure and forms, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* ; for memoranda, see California Points and Authorities, Ch. 45, *Consolidation and Severance of Actions* .

8. Motion to amend answer or cross complaint [*Code Civ. Proc. §§ 473, 576*; *Cal. Rules of Ct., Rule 3.1324*].

a. Amendment as matter of right.

(1) Answer.

If desired, amend answer once any time before demurrer filed or before trial of issue of law thereon [*see Code Civ. Proc. § 472*].

(2) Cross complaint.

If desired, amend cross complaint once at any time before demurrer or answer to cross complaint is filed, or after demurrer and before trial of issue of law thereon [*see Code Civ. Proc. § 472*].

(3) File amended pleading and serve on adverse party [*Code Civ. Proc. § 472*].

b. Leave to amend.

(1) If party desires to add or strike out name of any party, to correct mistake in name of party or any other mistake, or to amend answer or cross complaint in other particulars, and that pleading has been amended once by right, or demurrer to answer, or, answer or demurrer to cross complaint has been filed [*see Code Civ. Proc. § 472*], make motion to amend answer or cross complaint [*see Code Civ. Proc. §§ 473, 576*; *Cal. Rules of Ct., Rules 3.1324*]. For procedure and forms, see Ch. 21, *Amended and Supplemental Pleadings* ; for memoranda, see California Points and Authorities, Ch. 16, *Amended and Supplemental Pleadings* .

(2) If a motion to amend pleadings is made after filing of case management order [*see §*

2.24, Paragraph (O)(1)(d), *above*], couple motion with motion to amend case management order [*see Code Civ. Proc. § 576*; *Cal. Rules of Ct., Rule 3.730*; and California Points and Authoritites, Ch. 180, *Pretrial Proceedings*].

9. Motion to file supplemental answer or cross complaint [*Code Civ. Proc. § 464*].

If defendant wishes to allege facts material to case occurring after former answer or cross complaint, make motion to file supplemental answer or cross complaint [*see Code Civ. Proc. § 464*]. For procedure and forms, see Ch. 21, *Amended and Supplemental Pleadings* ; for memoranda, see California Points and Authorities, Ch. 16, *Amended and Supplemental Pleadings* .

10. Motion for judgment on the pleadings.

NOTE:
If the moving party demurred to the challenged pleading on the same ground as is the basis for the motion for judgment on the pleadings, this motion is not available unless the case law or statutes have materially changed since the moving party either unsucessfully demurred or failed to demur to the challenged pleading [*Code Civ. Proc. § 438(g)*]. Nor is the motion available after the later of the entry of a pretrial conference order or within 30 days of the date the action is initially set for trial, unless the court permits otherwise [*Code Civ. Proc. § 438(e)*].

If defendant has answered and time to demur to challenged pleading has expired [*Code Civ. Proc. § 438(f)*], and plaintiff, if the complaint states cause of action and answer fails to state facts sufficient to constitute a defense, or defendant, if the complaint fails to state a cause of action or the court lacks subject matter jurisdiction, may wish to prepare, file, and serve a motion for judgment on the pleadings [*Code Civ. Proc. § 438(c)*]. For procedure and forms, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* ; for memoranda, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

11. Motion to dismiss for failure to prosecute [*Code Civ. Proc. §§ 583.110-583.430*].

NOTE:
In actions conducted pursuant to the Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*), local rules affect the availability of a motion to dismiss for failure to prosecute. For further discussion, see the Introduction, Trial Court Delay Reduction Rules.

a. Dismissal for failure to serve summons on complaint.

(1) If service of summons on complaint not made within two years after commencement of action, unless parties have stipulated that time may be extended or defendant has made general appearance, prepare, file, and serve motion to dismiss [*see Code Civ. Proc. §§ 583.110(f), 583.410(a), 583.420(a)(1), (b)*]. For discussion, procedure, and forms, see Ch. 212, *Dismissal* .

(2) If service of summons on complaint not served within three years after commencement of action or proof of service of summons not filed within 60 days after time the summons and complaint must be served, unless parties have stipulated that time may be extended or defendant has made general appearance, prepare, file, and serve motion to dismiss [*see Code Civ. Proc. §§ 583.110(f), 583.210-583.250*]. For discussion, procedure, and forms, see Ch. 212, *Dismissal* .

b. Dismissal for failure to bring action to trial.

(1) Discretionary dismissal by court.

NOTE:
The court on its own motion or on motion of the defendant may dismiss an action for delay in prosecution if the action has not been brought to trial or conditionally settled within two years after the action was commenced against the defendant [*Cal. Rules of Ct., Rule 3.1340(a)*; *see also Code Civ. Proc. § 583.420(a)(2)(B)*]. However, if the court intends to dismiss the action on its own motion, the clerk must set a hearing on the dismissal and mail notice to all parties at least 20 days before the hearing date [*Cal. Rules of Ct., Rule 3.1340(b)*].

If action is not brought to trial or conditionally settled within two years after it was filed [*see Code Civ. Proc. § 583.420(a)(2)(B)*; *Cal. Rules of Ct., Rule 3.1340*]:

(a) Prepare, file, and serve motion to dismiss action for want of prosecution at least 45 days before date set for hearing of motion [*see Code Civ. Proc. § 583.420(a)(2)*; *Cal. Rules of Ct., Rules 3.1340, 3.1342*]. For discussion, procedure, and forms, see Ch. 212, *Dismissal* .

(b) If written opposition to motion served, within 15 days after service of written opposition, prepare, file, and serve response, supplemental memorandum, and affidavit or declaration in support of motion [*Cal. Rules of Ct., Rule 3.1342(c)*; *see also Code Civ. Proc. § 1013(a), (c), (e)* (extension of time to respond when served by mail, facsimile transmission, or overnight delivery)]. For discussion, procedure, and forms, see Ch. 212, *Dismissal* .

(2) Mandatory dismissal by court.

If action is not brought to trial within five years after plaintiff filed action, unless parties have stipulated to extend time, prepare, file, and serve motion to dismiss for want of prosecution [*see Code Civ. Proc. §§ 583.310-583.360*]. For discussion, procedure, and forms, see Ch. 212, *Dismissal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedurePretrial MattersConsolidation of ActionsCivil ProcedurePretrial MattersSeparate TrialsCivil ProcedureTrialsJudgment as Matter of LawPreverdict Judgments

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§ 2.48 Discovery

See *§ 2.22*.

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§ 2.49 Settlement Offer Under Code Civ. Proc. § 998

1. Service of offer.

To obtain benefit of sanctions under *Code Civ. Proc. § 998*, serve settlement offer on plaintiff not less than 10 days prior to trial [*see Code Civ. Proc. § 998(b)*]. For discussion, procedure, and forms, see Ch. 520, *Settlement and Release* .

2. Response to plaintiff's offer.

If offer is made by plaintiff, accept, if desired, within 30 days after offer is made or prior to trial whichever occurs first [*see Code Civ. Proc. § 998(b)*]. For discussion, procedure, and forms, see Ch. 520, *Settlement and Release* .

3. Notification of settlement. For discussion, procedure, and forms, see Ch. 520, *Settlement and Release* .

(a) When offer to compromise is accepted, file offer with proof of acceptance with clerk or judge [*Code Civ. Proc. § 998(b)(1)*].

(b) If an entire case is settled, the plaintiff must immediately give the court and any arbitrator written notice, as well as oral notice, if a hearing, conference, or trial is imminent [*Cal. Rules of Ct., Rule 3.1385*].

4. Failure to accept.

If offer is not accepted and plaintiff fails to obtain a more favorable judgment, request costs from time of offer [*see Code Civ. Proc. § 998(c), (e)*]. For discussion, procedure, and forms, see Ch. 520, *Settlement and Release* .

Legal Topics:

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

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§ 2.50 Trial Setting and Settlement Procedures; Judicial Arbitration

See *§ 2.24*.

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§ 2.51 Jury Trial

See *§ 2.25*.

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1-2 California Forms of Pleading and Practice--Annotated § 2.52

§ 2.52 Jury Instructions

See *§ 2.26*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview

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§ 2.53 Removing Judge

See *§ 2.27*.

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§ 2.54 Motions in Limine

See *§ 2.28*.

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§ 2.55 Trial Motions

1. Motion for judgment.

If after plaintiff has completed his or her presentation of evidence in trial by court it appears that the evidence presented would support the granting of a motion for judgment, move for a judgment. Such motion may be made without waiving defendant's right to offer evidence in support of his or her defense or in rebuttal in event motion is not granted [*see Code Civ. Proc. § 631.8*]. For discussion, procedure, and forms, see Ch. 389, *Nonsuit and Motions for Judgment* .

2. Motion for nonsuit.

After plaintiff has completed his or her opening statement, or after the presentation of his or her evidence in a trial by jury, if it appears that evidence presented, or to be presented, supports the granting of a motion for nonsuit, make motion for nonsuit [*see Code Civ. Proc. § 581c*]. For discussion, procedure, and forms, see Ch. 389, *Nonsuit and Motions for Judgment* .

3. Motion for directed verdict.

If there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff, make motion for directed verdict at conclusion of evidence [*see Frisk v. Merrihew (1974) 42 Cal. App. 3d 319, 325, 116 Cal. Rptr. 781* ; *De La Rosa v. City of San Bernardino (1971) 16 Cal. App. 3d 739, 742-743, 94 Cal. Rptr. 175* ; *Rooney v. Mutual Benefit H. & A. Assn. (1946) 74 Cal. App. 2d 885, 891, 170 P.2d 72]* . At the discretion of trial court, the motion may be made any time before case is submitted to jury [*see Gibson v. Southern Pacific Co. (1955) 137 Cal. App. 2d 337, 346, 290 P.2d 347]* . For further discussion, see Ch. 326A, *Jury Verdicts* .

4. Motion for mistrial.

See *§ 2.29*, Paragraph (4).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsMotions for MistrialCivil ProcedureTrialsJudgment as Matter of LawPreverdict JudgmentsCivil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedurePretrial JudgmentsNonsuitsGeneral Overview

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[Reserved]

§§ 2.56[Reserved]

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§ 2.60 Statement of Decision

1. Request for statement of decision.

If desired, make request for statement of decision within 10 days after court announces tentative decision, or, if trial has lasted less than one calendar day, or less than eight hours over more than one day, prior to submission of matter for decision [*see Code Civ. Proc. § 632*]. The court's tentative decision may provide that it will become the statement of decision unless within 10 days either party specifies controverted issues or makes proposals not covered in tentative decision [*see Cal. Rules of Ct., Rule 3.1590*]. For further discussion, procedure, and forms, see Ch. 529, *Statement of Decision* .

2. Proposal for contents.

Make proposal, if desired, as to content of statement of decision within 10 days of date of request for statement of decision [*see Code Civ. Proc. § 632*; *Cal. Rules of Ct., Rule 3.1590(d)*].

3. Preparation of requested statement.

If court has designated or notified party to prepare statement, prepare, serve, and submit proposed statement of decision and judgment within 15 days after time for filing proposals as to content of statement or within 15 days after notice, whichever is later [*see Cal. Rules of Ct., Rule 3.1590(e)*].

4. Response to failure by adverse party to prepare statement.

If proposed statement of decision and judgment are not served and submitted within time limit:

a. Prepare, serve, and submit to court proposed statement of decision and judgment, or

b. File notice of motion for order that statement of decision be deemed waived and serve

on all other parties [*Cal. Rules of Ct., Rule 3.1590(e)*].

5. Objections to proposed statement.

Serve and file objections to proposed statement of decision or judgment within 15 days after proposed judgment and statement of decision have been served [*Cal. Rules of Ct., Rule 3.1590(f)*].

Legal Topics:

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

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§ 2.61 Response to Post Trial Motions Challenging Verdict or Decision

1. Motion for judgment notwithstanding the verdict [*Code Civ. Proc. §§ 629, 659*; *see § 2.71*, Paragraph (1), *below*].

For discussion, procedure, and forms, see Ch. 371, *Motions After Trial* .

a. If adverse party moves for judgment notwithstanding the verdict, file points and authorities in opposition, if desired [*see Cal. Rules of Ct., Rule 3.1113*].

b. If judgment is entered pursuant to court's granting of motion for judgment notwithstanding the verdict, consider appealing judgment [*see Quintal v. Laurel Grove Hospital (1964) 62 Cal. 2d 154, 159, 41 Cal. Rptr. 577, 397 P.2d 161]* .

2. Motion for new trial [*Code Civ. Proc. §§ 655-663.2*; *see § 2.71*, Paragraph (2), *below*].

For discussion, procedure, and forms, see Ch. 371, *Motions After Trial* ; for memoranda, see California Points and Authorities, Ch. 155, *Motions After Trial* .

If motion for new trial made by non-prevailing party:

a. Prepare, file, and serve corresponding memorandum in reply within 10 days [*Cal. Rules of Ct., Rule 3.1600*].

b. When new trial granted and no appeal has been taken, if such action is not brought to trial within 3 years after entry of order granting new trial, except when parties have stipulated to extend time, non-prevailing defendant may wish to prepare, file and serve motion to dismiss [*see Code Civ. Proc. §§ 583.320(a)(2), 583.330, 583.360*; *see also Code Civ. Proc. § 583.420(a)(3)(B)* (discretionary dismissal for failure to bring action to

trial within two years of order granting new trial when no appeal taken)].

3. Motion to set aside and vacate judgment [*Code Civ. Proc. §§ 663, 663a*; *see § 2.72*. Paragraph (3), *below*].

For discussion, procedure, and forms, see Ch. 371, *Motions After Trial* ; for memoranda, see California Points and Authorities, Ch. 155, *Motions After Trial* .

a. If adverse party moves to set aside and vacate judgment, file points and authorities in opposition [*see Cal. Rules of Ct., Rule 3.1113*].

b. If motion to set aside or vacate judgment is granted, appeal [*see Code Civ. Proc. § 663a*; *Reeves v. Hutson (1956) 144 Cal. App. 2d 445, 450, 301 P.2d 264]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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§ 2.62 Judgment

1. Entry of judgment.

a. Jury trials.

Judgment is entered by clerk in conformity to verdict within 24 hours after rendition of verdict whether or not motion for judgment notwithstanding the verdict is pending, unless court orders case to be reserved for argument or further consideration, or grants stay of proceedings [*see Code Civ. Proc. § 664*].

b. Nonjury trials.

Judgment is entered by clerk in conformity to decision of court immediately on filing of decision [*see Code Civ. Proc. § 664*].

2. Preparation of judgment (nonjury trials).

a. If statement of decision is requested and court has designated or notified party to prepare statement of decision, prepare, serve and submit to court proposed judgment with proposed statement of decision within 15 days after expiration of time for filing proposals as to content of statement or within 15 days after notice, whichever is later [*see Cal. Rules of Ct., Rule 3.1590(e)*].

b. If statement of decision is not requested or has been waived, written judgment is required, and court has notified a party to prepare proposed judgment, prepare, serve, and submit proposed judgment within 10 days after notice [*see Cal. Rules of Ct., Rule 3.1590(g)*].

c. If statement of decision is not requested or has been waived and party wishes to object to judgment, serve and file objections thereto within 10 days after service of proposed judgment [*see Cal. Rules of Ct., Rule 3.1590(g)*].

d. If statement of decision has been served with judgment, serve and file objections to the judgment within 15 days after service of proposed statement of decision and judgment [*see Cal. Rules of Ct., Rule 3.1590(f)*].

3. Service of notice of entry of judgment.

In contested action or special proceeding, other than proceeding for dissolution of marriage, nullity of marriage, legal separation, or small claims action, a prevailing party represented by counsel must [*Code Civ. Proc. § 664.5(a)*]:

a. Prepare and mail a copy of the notice of entry of judgment to all parties who have appeared in the action or proceeding.

b. File original notice of entry of judgment together with proof of service by mail with court.

The clerk of the court must mail the notice of entry to all parties who have appeared in the action or proceeding when the prevailing party is not represented by counsel, or on order of the court [*Code Civ. Proc. § 664.5(b), (c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

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1-2 California Forms of Pleading and Practice--Annotated § 2.63

§ 2.63 Appeal

1. Preliminary determinations.

a. Party's right to appeal.

Determine whether party is aggrieved by judgment or order, that is, whether party has immediate, pecuniary, and substantial interest appearing on record which is injuriously affected by judgment or order [*see Code Civ. Proc. § 902*; *Slaughter v. Edwards (1970) 11 Cal. App. 3d 285, 291, 90 Cal. Rptr. 144]* .

b. Appealable judgment or order.

Determine whether an appeal may be taken from the particular type of judgment or order under *Code Civ. Proc. § 904.1* (appealable judgments and orders in unlimited civil cases) or 904.2 (appealable judgments and orders in limited civil cases).

2. Notice of appeal.

a. Judgments in unlimited civil cases.

For procedure and forms, see Ch. 42, *Appeal: Notice of Appeal* .

(1) Prepare notice of appeal [*see Cal. Rules of Ct., Rule 8.100*].

(2) Have notice signed by appellant or by his or her attorney [*see Cal. Rules of Ct., Rule 8.100*].

(3) Except as otherwise provided by *Code Civ. Proc. § 870* (relating to validation proceedings) or other statute, file notice of appeal with clerk of court from which appeal is

to be taken [*Cal. Rules of Ct., Rule 8.100*] on or before the earliest of the following dates, unless time is extended as provided in *Cal. Rules of Ct., Rule 8.108* (automatic extension of time for filing notice of appeal when motion for new trial, motion to vacate judgment, or motion for judg ment notwithstanding verdict has been served and filed) [*Cal. Rules of Ct., Rule 8.104(a)*]:

(a) 60 days after the date of mailing by the clerk of the court of a document entitled "notice of entry" of judgment;

(b) 60 days after the date of service of a document entitled "notice of entry" of judgment by any party on the party filing the notice of appeal, or by the party filing the notice of appeal; or

(c) 180 days after the date of entry of the judgment.

NOTE:
As used in *Cal. Rules of Ct., Rule 8.104(a), (e)*, "judgment" means "appealable order" if the appeal is from an appealable order [*Cal. Rules of Ct., Rule 8.104(f)*]. Mailing of entry of judgment by the court clerk, rather than a party represented by counsel, is not "pursuant to *Code Civ. Proc. § 664.5*" and does not trigger the 60-day period unless the mailing is ordered by the court [*In re Marriage of Kepley (1987) 193 Cal. App. 3d 946, 949-951, 238 Cal. Rptr. 691* (divided court)].

(4) Simultaneously deliver filing fee and any sum required by *Gov. Code § 68926.1* (clerk's transcript or index) [*Cal. Rules of Ct., Rule 8.100(b)(1), 8.104*]. Notice of appeal will, however, be accepted for filing even though filing fee is not paid [*see Cal. Rules of Ct., Rule 8.100(b)(3)*]. Payment of filing fee may also be excused if appellant is indigent [*see Cal. Rules of Ct., Rule 3.52*; *see also* Ch. 174, *Costs and Attorney's Fees*].

(5) After filing notice of appeal, and within 10 days after receiving from the clerk a notice to file Civil Case Information Sheet, prepare, serve, and file in the reviewing court a completed Civil Case Information Statement, attaching a copy of the judgment or appealed order that shows the date it was entered [*Cal. Rules of Ct., Rule 8.100(g)*].

b. Judgments in limited civil cases.

For procedure and forms, see Ch. 345A, *Limited Civil Cases* , and Ch. 42, *Appeal: Notice of Appeal* .

(1) If appeal is desired, prepare notice of appeal [*Cal. Rules of Ct., Rule 8.750(a)*].

(2) Have notice signed by appellant or by his or her attorney [*Cal. Rules of Ct., Rule 8.750(a)*].

(3) File notice with clerk of court within earliest of following, unless time is extended as provided in *Cal. Rules of Ct., Rule 8.752* (automatic extension of time for filing notice of appeal when motion for new trial or motion to vacate judgment has been served and filed) [*Cal. Rules of Ct., Rules 8.750(a), 8.751(a)*]:

(a) 30 days after the date of mailing by the clerk of the court of a document entitled "notice of entry" of judgment or appealable order,

(b) 30 days after the date of service of a document entitled "notice of entry" of judgment or appealable order by any party on the party filing the notice of appeal, or by the party filing the notice of appeal, or

(c) 90 days after the date of entry of the judgment

3. Notice of cross appeal.

When timely notice of appeal is filed, any other party may file notice of appeal [*see Cal. Rules of Ct., Rules 8.100(f)* (unlimited civil case), 8.750(d) (limited civil case)].

4. Defendant's motion for dismissal for failure to bring action to trial when case remanded following appeal.

When, after judgment, appeal has been taken and judgment reversed with cause remanded for new trial (or when appeal has been taken from order granting new trial and such order is affirmed on appeal), if action not brought to trial within 3 years from date on which remittitur is filed by clerk of trial court, prepare, file, and serve motion to dismiss [*Code Civ. Proc. §§ 583.320(a)(3), 583.360*; *see also Code Civ. Proc. § 583.420(a)(3)(C)* (discretionary dismissal for failure to bring action to trial within two years of remittitur of appeal which resulted in reversal and remand for new trial or affirmance of grant of new trial)]. For discussion, procedure, and forms, see Ch. 212, *Dismissal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsReviewabilityAdverse Determinations

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§ 2.64 Abstract of Judgment

If money judgment is rendered and not stayed by appeal [*see Code Civ. Proc. § 697.040(a)*], file abstract of judgment with county recorder of each county in which judgment debtor has or may acquire real property to create judgment lien on such property [*see Code Civ. Proc. §§ 674, 697.310, 697.340*], together with court-approved affidavit of identity if needed to identify any additional names by which the judgment debtor may be known that are not listed on the judgment [*see Code Civ. Proc. §§ 674(c), 680.135*]. For discussion, procedure, and forms, see Ch. 318, *Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewReal Property LawNonmortgage LiensJudgment Liens

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§ 2.65 Enforcement of Judgment

For discussion, procedure, and forms relating to enforcement of judgments (*Code Civ. Proc. §§ 680.010-724.260*), see Ch. 254, *Executions and Enforcement of Judgments* ; Ch. 276, *Garnishment* ; Ch. 294, *Homesteads* ; and Ch. 318, *Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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§ 2.66 Satisfaction of Judgment

1. When money judgment is satisfied, unless satisfied in full pursuant to writ [*Code Civ. Proc. § 724.030*], immediately file acknowledgement of satisfaction of judgment with court [*Code Civ. Proc. § 724.030*]. For discussion, procedure, and forms relating to satisfaction of judgment, see Ch. 318, *Judgments* .

2. If abstract of money judgment has been recorded with recorder of any county [*see § 2.64*] and judgment is satisfied, immediately do both of following [*Code Civ. Proc. § 724.040*]:

a. File acknowledgement of satisfaction of judgment with court.

b. Serve, personally or by mail, an acknowledgement of satisfaction of judgment on the judgment debtor.

3. If judgment has been satisfied and demand was served by non-prevailing party for acknowledgement pursuant to *Code Civ. Proc. § 724.050(a)*, comply with demand not later than 15 days after actual receipt of demand [*Code Civ. Proc. § 724.050(c)*; *see Code Civ. Proc. §§ 724.110(a)* (acknowledgement of partial satisfaction of judgment), *724.220(a)*, (c) (acknowledgement of satisfaction of matured installments under installment judgment); *see also Code Civ. Proc. § 1013* (extension of time to respond when served by mail, facsimile transmission, or overnight delivery)].

Legal Topics:

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

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[Reserved]

§§ 2.67[Reserved]

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1-2 California Forms of Pleading and Practice--Annotated § 2.70

§ 2.70 Statement of Decision

See *§ 2.60*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-2 California Forms of Pleading and Practice--Annotated § 2.71

§ 2.71 Post Trial Motions Challenging Verdict or Decision

1. Motion for judgment notwithstanding the verdict [*Code Civ. Proc. §§ 629, 659*].

For discussion, procedure, and forms, see *Ch. 371, Motions After Trial, § 357.30* et seq.; for memoranda, see California Points and Authorities, Ch. 155, *Motions After Trial* .

a. If trial is by jury, determine whether motion for directed verdict should have been granted had previous motion been made, that is, whether there is absence of substantial evidence in support of verdict [*see Code Civ. Proc. § 629*; *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 110, 120 Cal. Rptr. 681, 534 P.2d 377* ; *see also § 2.29*, Paragraph (3) and, *§ 2.55*, Paragraph (3)].

b. If so, consider preparing, filing, and serving motion for judgment notwithstanding the verdict either [*see Code Civ. Proc. §§ 629, 659*]:
(1) Before entry of judgment, or

(2) Within 15 days of date of earliest of:
(a) Mailing notice of entry of judgment by the clerk of court pursuant to *Code Civ. Proc. § 664.5*,

(b) Service on moving party by any other party of written notice of entry of judgment, or

(c) 180 days after entry of judgment.

c. If motion for judgment notwithstanding the verdict is denied, appeal [*see Code Civ. Proc. § 629*].

d. If judgment notwithstanding the verdict is granted then reversed on appeal:

(1) Determine whether or not to appeal from the reinstated verdict.

(2) If aggrieved party wishes to appeal, prepare, file, and serve notice of appeal from reinstated judgment within time limits of *Cal. Rules of Ct., Rules 8.100(a), 8.104(a)* dating from issuance of remittitur from appellate court [*see Lippert v. AVCO Community Developers, Inc. (1976) 60 Cal. App. 3d 775, 779, 131 Cal. Rptr. 730* ; *see also § 2.63,* Paragraph (D)].

2. Motion for new trial [*Code Civ. Proc. §§ 655-663.2*].

For discussion, procedure, and forms, see Ch. 371, *Motions After Trial* ; for memoranda, see California Points and Authorities, Ch. 155, *Motions After Trial* .

a. Determine if any of irregularities enumerated in *Code Civ. Proc. §§ 657* and *914* exist [*see Code Civ. Proc. §§ 657, 657.1, 914*].

b. If irregularities exist, prepare, file, and serve motion for new trial either [*Code Civ. Proc. § 659*]:

(1) Before entry of judgment; or

(2) Within 15 days of date of earliest of:
(a) Mailing notice of entry of judgment by clerk of court pursuant to *Code Civ. Proc. § 664.5,*

(b) Service on moving party by any other party of written notice of entry of judgment, or

(c) 180 days after entry of judgment.

c. Serve and file memorandum in support of the motion within 10 days of filing notice of intention to move for new trial [*Cal. Rules of Ct., Rule 3.1600*]. Failure to serve and file prescribed memorandum may result in court denying motion without a hearing on the merits [*Cal. Rules of Ct., Rule 3.1600(b)*].

3. Motion to set aside and vacate judgment [*Code Civ. Proc. §§ 663, 663a*].

For discussion, procedure, and forms, see Ch. 371, *Motions After Trial* ; for memoranda, see California Points and Authorities, Ch. 155, *Motions After Trial* .

a. Grounds for motion.

(1) Nonjury trial.

When judgment or decree is based on decision by court, determine whether there was incorrect or erroneous legal basis for decision not consistent with or not supported by facts [*see Code Civ. Proc. § 663(1)*].

(2) Jury trial.

When judgment or decree based on special verdict of jury determine if judgment or

decree is consistent with or supported by special verdict [*see Code Civ. Proc. § 663(2)*].

b. Time for making motion.

If either of the causes enumerated in *Code Civ. Proc. § 663* exist, prepare, file, and serve motion to set aside and vacate judgment or decree either [*Code Civ. Proc. § 663a*]:

(1) Before entry of judgment; or

(2) Within 15 days of the date of the earliest of:
(a) Mailing of notice of entry of judgment by the clerk of the court pursuant to *Code Civ. Proc. § 664.5*;

(b) Service on moving party by any other party of written notice of entry of judgment; or

(c) 180 days after entry of judgment.

c. If motion to set aside or vacate judgment denied, consider appealing from judgment [*see Socol v. King (1949) 34 Cal. 2d 292, 296, 209 P.2d 577]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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§ 2.72 Appeal

See *§ 2.63*.

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1-2 California Forms of Pleading and Practice--Annotated § 2.73

§ 2.73 Satisfaction of Judgment

1. If money judgment has been satisfied, prepare and serve personally or by mail demand in writing on judgment creditor that he or she do one or both of following [*see Code Civ. Proc. §§ 724.050(a), 724.110(a)* (demand for acknowledgment of partial satisfaction of judgment), 724.220 (demand for acknowledgment of satisfaction of matured installments under installment judgment); for discussion, procedure, and forms, see Ch. 318, *Judgments*]:

a. File acknowledgment of satisfaction of judgment with court, and/or

b. Execute, acknowledge, and deliver acknowledgment of satisfaction of judgment to person who made demand.

2. If judgment creditor does not comply with demand within 15 days after receipt of demand, apply to court on noticed motion for order requiring judgment creditor to comply with demand and for payment of statutory damages. Serve notice of motion, personally or by mail, on judgment creditor [*Code Civ. Proc. §§ 724.050(d), (e), 724.110(b), 724.230, 724.240*; *see also Code Civ. Proc. § 1013(a), (c), (e)* (extension of time to respond when served by mail, facsimile transmission, or overnight delivery)]. For discussion, procedure, and forms, see Ch. 318, *Judgments* .

Legal Topics:

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

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§ 3.91 When Action Is Premature

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[4] Lack of Capacity Distinguished

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§ 3.133 Text References

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§ 3.150 Related Matthew Bender Publications

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[1] FORM

[2] Use of Form

[3] Suspension of Capacity

[4] State Statutes

[5] California Rules of Court

[6] Decisions

[7] Text References

[8] Cross References

§ 3.251 Notice of Hearing on Demurrer [Cal. Rules of Ct., Rules 3.1100, 3.1320(c)]

[1] FORM

[2] Use of Form

[3] Notice of Hearing

[4] California Rules of Court

[5] Cross References

§ 3.252 Demurrer [Code Civ. Proc. § 430.30(a)] for Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Action by Minor by Guardian ad Litem [Code Civ. Proc. § 372(a)] Prior to Appointment [Code Civ. Proc. § 373]

[1] FORM

[2] Use of Form

[3] Incapacity of Minors

[4] State Statutes

[5] Decisions

[6] Text References

[7] Cross References

§ 3.253 Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Failure of Plaintiff Transacting Business Under Fictitious Name to Have Complied With Fictitious Name Statute [Bus. & Prof. Code § 17918]

[1] FORM

[2] Use of Form

[3] Cross References

§ 3.254 Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Minor Plaintiff Not Appearing by Guardian [Fam. Code § 6601; Code Civ. Proc. § 372(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 3.255 Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Corporate Plaintiff's Powers Suspended or Forfeited for Failure to File Required Corporate Information Statement [Corp. Code § 2205]

[1] FORM

[2] Use of Form

[3] California Points And Authorities

[4] State Statutes

[5] Decisions

§ 3.256 Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Corporate Plaintiff's Powers Suspended or Forfeited for Failure to Comply With Tax Statutes [Rev. & Tax Code §§ 23301, 23301.5, 23775]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Text References

[6] Cross References

§ 3.257 Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Foreign Corporation Suing on Intrastate Business Without Having Obtained Certificate of Qualification [Corp. Code § 2203(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

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[6] Cross References

§ 3.258 Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Powers of Plaintiff Limited Liability Company Suspended or Forfeited for Failure to Comply With Tax Statutes [Rev. & Tax. Code §§ 23301, 23301.5, 23305.5]

[1] FORM

[2] Use of Form

[3] Cross References

§ 3.259 Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Foreign Limited Liability Company Engaging in Intrastate Business in California Without Having Registered With Secretary of State [Corp. Code § 17456]

[1] FORM

[2] Use of Form

[3] California Legal Forms

[4] Cross References

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§ 3.280 Demurrer [Code Civ. Proc. § 430.30(a)]--Another Action Pending [Code Civ. Proc. § 430.10(c)]

[1] FORM

[2] Use of Form

[3] Judicial Notice of Court Records

[4] State Statutes

[5] California Rules of Court

[6] Local Court Rules

[7] Decisions

[8] Text References

[9] Cross References

§ 3.281 Interlocutory Judgment Abating Proceedings After Ruling on Demurrer [Code Civ. Proc. § 597]--Another Action Pending [Code Civ. Proc. § 430.10(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

§ 3.282 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Another Action Pending [Code Civ. Proc. § 430.10(c)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 3.284 Petition for Writ of Mandate [Code Civ. Proc. § 1086] to Dismiss Action or Stay Proceedings on Ground Action Pending in Another State

[1] FORM

[2] Use of Form

[3] State Statutes

[4] California Rules of Court

[5] Text References

[6] Cross References

§ 3.285 Notice of Motion [Code Civ. Proc. § 1010] to Stay Action on Ground Another Action Pending in Another State [Code Civ. Proc. § 430.10(c)]

[1] FORM

[2] Use of Form

[3] Request for Judicial Notice

[4] Cross References

§§ 3.286-3.299 [Reserved]

§ 3.300 Demurrer [Code Civ. Proc. § 430.30(a)] on Ground of Nonjoinder of Party [Code Civ. Proc. § 430.10(d)] Plaintiff [Code Civ. Proc. §§ 378, 389]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Text References

[5] Cross References

§ 3.302 Demurrer [Code Civ. Proc. § 430.30(a)] on Ground of Nonjoinder of Party [Code Civ. Proc. § 430.10(d)] Defendant [Code Civ. Proc. §§ 379, 389]

[1] FORM

[2] Use of Form

[3] Cross References

§ 3.303 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] on Ground of Nonjoinder of Party [Code Civ. Proc. § 430.10(d)] Defendant [Code Civ. Proc. §§ 379, 389]

[1] FORM

[2] Use of Form

[3] Cross References

§ 3.304 Demurrer [Code Civ. Proc. § 430.30(a)] on Ground of Misjoinder of Party [Code Civ. Proc. § 430.10(d)] Plaintiff [Code Civ. Proc. § 378]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Text References

[5] Cross References

§ 3.305 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] on Ground of Misjoinder of Party [Code Civ. Proc. § 430.10(d)] Plaintiff [Code Civ. Proc. § 378]

[1] FORM

[2] Use of Form

[3] Cross References

§ 3.306 Demurrer [Code Civ. Proc. § 430.30(a)] on Ground of Misjoinder of Party [Code Civ. Proc. § 430.10(d)] Defendant [Code Civ. Proc. § 379]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Text References

[5] Cross References

§ 3.307 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] on Ground of Misjoinder of Party [Code Civ. Proc. § 430.10(d)] Defendant [Code Civ. Proc. § 379]

[1] FORM

[2] Use of Form

[3] Cross References

§§ 3.308-3.319 [Reserved]

§ 3.320 Demurrer [Code Civ. Proc. § 430.30(a)] for Failure to State a Cause of Action [Code Civ. Proc. § 430.10(e)]--Action Prematurely Brought

[1] FORM

[2] Use of Form

[3] Filing or Presentation Prerequisite to Suit

[4] Decisions

[5] Text References

[6] Cross References

§ 3.321 Affirmative Defense [Code Civ. Proc. § 430.30(b)] of Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Action Prematurely Brought

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

§§ 3.322-3.339 [Reserved]

§ 3.340 Notice of Motion [Code Civ. Proc. § 1010]--For Separate Trial of Special Defense [Code Civ. Proc. § 597]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Text References

[5] Cross References

§ 3.341 Notice of Motion [Code Civ. Proc. § 1010]--For Separate Trial of Defense of Statute of Limitations in Medical Malpractice Action [Code Civ. Proc. § 597.5]

[1] FORM

[2] Use of Form

[3] Cross References

§ 3.342 Order [Code Civ. Proc. § 1003] Granting Motion for Separate Trial of Special Defense [Code Civ. Proc. §§ 597, 597.5]

[1] FORM

[2] Use of Form

[3] Cross References

§ 3.343 Interlocutory Judgment Abating Proceedings After Separate Trial of Special Defense [Code Civ. Proc. § 597]--Another Action Pending [Code Civ. Proc. § 430.10(c)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 3.344 Judgment [Code Civ. Proc. § 577] of Dismissal After Trial by Court [Code Civ. Proc. §§ 631-636] of Special Defense [Code Civ. Proc. § 597]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 3.345 Judgment [Code Civ. Proc. § 577] of Dismissal After Trial by Jury [Code Civ. Proc. §§ 607-630] of Special Defense [Code Civ. Proc. § 597]

[1] FORM

[2] Use of Form

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1-3 California Forms of Pleading and Practice--Annotated § 3.01

§ 3.01 Scope of Chapter

This chapter deals with objections to complaints or cross complaints on the ground that the plaintiff or cross complainant does not have legal capacity to sue [*see Code Civ. Proc. § 430.10(b)*].

This chapter includes forms that raise the objection by demurrer [§§ *3.250*, *3.252*], by affirmative defense in an answer [*see §§ 3.253 -3.257*], and a form of notice of hearing on demurrer [*see § 3.251*].

The forms deal with lack of capacity resulting from:

- Failure to file and publish a fictitious business name statement [§§ *3.250*, *3.253*].
- Failure to have a guardian ad litem for a plaintiff minor appointed [§§ *3.252*, *3.254*].
- Failure to file required corporate information statement with the Secretary of State [*see § 3.255*].
- Failure to pay corporate income or franchise taxes [*see § 3.256*].
- Failure of a foreign corporation to obtain a certificate of qualification [*see § 3.257*].

This chapter also deals with objections to a complaint or cross complaint on the ground that another action is pending between the same parties on the same cause of action [*see Code Civ. Proc. § 430.10(c)*]. It includes forms for raising this objection by demurrer [*see § 3.280*] and affirmative defense [*see § 3.282*], a form of interlocutory judgment after demurrer [*see § 3.281*], a form of petition for a writ of prohibition when the second action is pending in California [*see* § 3.283], and a form of petition for a writ of mandate when the second action is pending in another state [*see § 3.284*]. For a form of interlocutory judgment after a separate trial of the special defense, see *§ 3.343*.

This chapter also discusses defect or misjoinder of parties and includes forms for use in objecting to a complaint or cross complaint on the ground that a party has not been joined [*see §§ 3.300 -3.303*] and on the ground that a person has been joined who is not a permissible plaintiff [§§ *3.304*, *3.305*] or permissible defendant [§§ *3.306*, *3.307*]. For forms

involving substitution of parties, see Ch. 21, *Amended and Supplemental Pleadings* , Ch. 181, *Death and Survival Actions* , and Ch. 395, *Parties* .

This chapter also discusses and sets forth forms for use in objecting to a complaint or cross complaint that is filed before a cause of action has accrued or before a condition precedent to bringing the action has been met. It includes forms for use in raising the objection by demurrer [*see § 3.320*] and by affirmative defense [*see § 3.321*].

This chapter also discusses motions for the separate trial of defenses not involving the merits of the plaintiff's cause of action but constituting a bar or ground of abatement to the prosecution of the action. It contains forms of notice of motion for a separate trial of a defense [*see §§ 3.340* and *3.341*], a related order [*see § 3.342*], an interlocutory judgment abating action after separate trial of the defense that another action is pending [*see § 3.343*] and forms of judgment of dismissal after trial of a separate defense [§§ *3.344*, *3.345*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 3.02 Cross References

For forms and procedure for appointment of guardians of the estate, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* .

For forms and procedure for appointment of conservators of the estate, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* .

For forms and procedure for appointment of guardians ad litem, see Ch. 291, *Guardians ad Litem* .

For forms and procedure relating to the use of fictitious business names by partnerships, see Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties* .

For forms and procedure for appointment of personal representatives of decedents' estates, see Ch. 442, *Probate: Initiating Probate Administration* .

For a form of notice of motion to stay proceedings in a pending action until arbitration is completed, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

See generally Ch. 323, *Jurisdiction: Personal* , Ch. 324, *Jurisdiction: Subject Matter* , and Ch. 491, *Res Judicata* .

See generally Ch. 26, *Answers* ; Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* ; and Ch. 395, *Parties* .

For forms involving a writ of supersedeas to stay further proceedings in a trial court during the pendency of an appeal, see Ch. 43, *Appeal: Stay of Proceedings* .

For forms for use in medical malpractice actions, see Ch. 415, *Physicians: Medical Malpractice* .

See generally Ch. 425, *Pretrial Proceedings* , and Ch. 551, *Trial* .

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[Reserved]

§§ 3.03[Reserved]

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§ 3.10 Statutes

The grounds for objection to a complaint or cross complaint are enumerated in *Code Civ. Proc. § 430.10*.

Whether to raise such objections by demurrer or answer is governed by *Code Civ. Proc. § 430.30*.

The procedure for obtaining a separate trial of certain affirmative defenses is governed by *Code Civ. Proc. §§ 597, 597.5*.

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§ 3.11 Definitions

The terms "abatement" and "abate" are not defined by statute in California and neither has any specific application to a statutory procedure. The plea in abatement known to common law and recognized by statute in some states has no existence as a doctrine or remedy in California. The phrase is useful only as a description of the substance, purpose, and effect of a pleading, motion, order, or judgment [*Burnand v. Irigoyen (1943) 56 Cal. App. 2d 624, 628-629, 133 P.2d 3]* . In this descriptive sense the phrase "plea in abatement" is not unfamiliar in California decisions [*see Kelley v. Upshaw (1952) 39 Cal. 2d 179, 186-187, 246 P.2d 23* ; *Colvig v. RKO General, Inc. (1965) 232 Cal. App. 2d 56, 70, 42 Cal. Rptr. 473]* .

Generally, it refers to an objection to the place, mode, or time of asserting plaintiff's claim, but does not dispute the justness of that claim [*Nevills v. Shortridge (1905) 146 Cal. 277, 278, 79 P. 972* ; *Williams v. State of California (1976) 62 Cal. App. 3d 960, 964, 133 Cal. Rptr. 539]* . When the asserted ground for abatement is another action pending, a plea in abatement is essentially a request, not that an action be terminated, but that it be continued until such time as there has been a disposition of the first action [*Shuffer v. Board of Trustees (1977) 67 Cal. App. 3d 208, 217, 136 Cal. Rptr. 527]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 3.12 Raising Ground for Abatement

At common law a plea in abatement was a separate pleading filed prior to demurrer or answer. The California Code of Civil Procedure has abolished the separate pleading but allows the same kinds of objection to be raised by demurrer or answer [*Ostrowski v. Miller (1964) 226 Cal. App. 2d 79, 86, 37 Cal. Rptr. 790* ; *see Code Civ. Proc. § 430.10*]. A ground for abatement may be raised by demurrer when the defect appears on the face of the complaint or is evident from any matters of which the court must [*Evid. Code § 451*] or may [*Evid. Code § 452*] take judicial notice [*Code Civ. Proc. § 430.30(a)*]. When the defect does not appear on the face of the complaint or from matters of which the court must or may take judicial notice, it may be raised as an affirmative defense in an answer [*see Code Civ. Proc. §§ 430.30(b), 431.30(b)(2)*; *see generally* Ch. 26, *Answers*].

Legal Topics:

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

[1] On Demurrer

If the ground for abatement is raised by demurrer, the party filing the demurrer serves and files a notice of hearing that specifies a hearing date in accordance with *Code Civ. Proc. § 1005(b)*, relating to notices of motion. The hearing date must be not more than 35 days following the filing of the demurrer or on the first date available to the court thereafter [*Cal. Rules of Ct., Rule 3.1320(b)*; *see generally* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*].

Under *Code Civ. Proc. § 1005(b)*, unless otherwise ordered, a written notice of motion must be given at least 16 court days before the time appointed for the hearing and that if notice is served by mail, the 16-day period is increased by the following time periods: 5 calendar days if the place of mailing and address are within California, 10 calendar days if either the place of mailing or address is outside California but within the United States, and 20 calendar days if either the place of mailing or address is outside the United States. If the notice is served by facsimile transmission, Express Mail, or another method of overnight delivery, the required 16-day period of notice before the hearing is increased by two calendar days [*Code Civ. Proc. § 1005(b)*]. An extension of two court days, as opposed to calendar days, may apply in case of electronic service made pursuant to a local rule adopted under *Code Civ. Proc. § 1010.6* [*see Code Civ. Proc. § 1010.6(a)(6)*; for discussion, *see Ch. 518, Service of Summons and Papers, § 518.41 8*]. For good cause shown the court may order the hearing held on an earlier or later day on notice prescribed by the court [*Cal. Rules of Ct., Rule 3.1320(d)*].

[2] Separate Trial of Affirmative Defenses

If the defect is raised by answer, a separate trial on the abatement issue may be had either on the court's own motion or on the motion of any party [*Code Civ. Proc. §§ 597, 597.5*].

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§ 3.14 Waiver of Objection

If a party against whom a complaint or cross complaint has been filed fails to object, either by demurrer or answer, that party is deemed to have waived the objection [*Code Civ. Proc. § 430.80(a)*].

If a party against whom an answer has been filed fails to object to it by demurrer, that party is deemed to have waived the objection [*Code Civ. Proc. § 430.80(b)*].

Legal Topics:

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§ 3.15 Dilatory Nature of Plea

The ground for demurrer based on another action pending is sometimes called a dilatory plea [*Colvig v. RKO General, Inc. (1965) 232 Cal. App. 2d 56, 70, 42 Cal. Rptr. 473]* . An objection that constitutes a ground for an abatement is dilatory in its nature and is not favored [*see Lord v. Garland (1946) 27 Cal. 2d 840, 848, 168 P.2d 5* ; *Virgin v. State Farm Fire & Casualty Co. (1990) 218 Cal. App. 3d 1372, 1375, 267 Cal. Rptr. 704* (reversible error to grant summary judgment on ground that action was filed before claim had been denied by defendants, when defendants denied claim before hearing on summary judgment motion)]. This disfavor is reflected in the statutory provision that such objections are waived unless asserted at the earliest opportunity [*see Code Civ. Proc. § 430.80*] and in the reluctance of the courts to permit amending an answer in order to raise such an objection [*see Tingley v. Times Mirror (1907) 151 Cal. 1, 12, 89 P. 1097* ; *Vitug v. Griffin (1989) 214 Cal. App. 3d 488, 493, 262 Cal. Rptr. 588]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 3.16 Ruling on Demurrer

[1] Order

Unless otherwise ordered, following a ruling on a demurrer leave to answer or to amend within 10 days is deemed granted, except for actions in forcible entry, forcible detainer, or unlawful detainer in which case five calendar days is deemed granted [*Cal. Rules of Ct., Rule 3.1320(g)*]. If the demurrer is sustained, the court may grant leave to amend the pleading and fix the time within which such amendment is to be filed [*Code Civ. Proc. § 472a(c)*]. The court also has discretion to sustain the demurrer without leave to amend [*see Code Civ. Proc. §§ 472c, 581(f)(1), (2)*].

If the demurrer was to fewer than all causes of action, the defendant, unless otherwise ordered, has 10 days to move to strike, demur, or otherwise plead to the complaint or the remaining causes of action following (1) the overruling of the demurrer, (2) amendment of the complaint or the expiration of the time to amend if the demurrer was sustained with leave to amend, or (3) the sustaining of the demurrer if the demurrer was sustained without leave to amend [*Cal. Rules of Ct., Rule 3.1320(j)*].

[2] Interlocutory Judgment

If the demurrer is on the ground that there is another action pending, the court's order takes the form of an interlocutory judgment [*Code Civ. Proc. § 597*; *Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 791-792, 274 Cal. Rptr. 147* ; *see § 3.17*].

[3] Appeal

No appeal lies from orders sustaining a demurrer. Such orders are reviewable on appeal only from a judgment of dismissal entered pursuant to the court's orders with respect to the demurrer [*Vibert v. Berger (1966) 64 Cal. 2d 65, 67, 48 Cal. Rptr. 886, 410 P.2d 390* ; *Filmservice Laboratories, Inc. v. Harvey Bernhard Enterprises, Inc. (1989) 208 Cal. App. 3d 1297, 1300 n.1, 256 Cal. Rptr. 735]* .

An order sustaining a demurrer to only part of a complaint or answer may be claimed as error on appeal from the final

judgment in the action [*Code Civ. Proc. § 472c(b), (c)*].

An order overruling the demurrer is not appealable [*Code Civ. Proc. §§ 904-904.5*]. It may be reviewed on appeal from the final judgment, but to compel the demurring party to submit to an unwarranted trial of the cause, and then appeal from the judgment if adverse to him, would not afford a speedy or adequate relief. Consequently, a writ of prohibition may be used to test the jurisdiction of the lower court [*Adolph v. Municipal Court (1960) 181 Cal. App. 2d 198, 199, 5 Cal. Rptr. 212* ; *see Greene v. Superior Court (1951) 37 Cal. 2d 307, 310, 231 P.2d 821* ; *Tomales Bay etc. Corp. v. Superior Court (1950) 35 Cal. 2d 389, 392, 217 P.2d 968]* , or a writ of mandate may be used if the order overruling the demurrer is merely an abuse of discretion [*Simmons v. Superior Court (1950) 96 Cal. App. 2d 119, 132-133, 214 P.2d 844]* .

Legal Topics:

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§ 3.17 Entry of Interlocutory Judgment

If the defense of another action pending, or a demurrer based on another action pending pursuant to *Code Civ. Proc. § 430.10*, is sustained, and no other special defense is sustained, an interlocutory judgment must be entered in favor of the defendant to the effect that no trial of other issues shall be had until the final determination of the pending action. If the decision of the court is in favor of the plaintiff, trial of the other issues will thereafter be had either on the court's own motion or on the motion of any party, and judgment will be entered in the same manner and with the same effect as if all the issues in the case had been tried at one time. In this event, any and all decisions on the issue of another action pending, and all rulings on the trial of that issue, shall be deemed excepted to and may be reviewed on motion for a new trial or on appeal from the judgment [*Code Civ. Proc. § 597*].

Legal Topics:

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1-3 California Forms of Pleading and Practice--Annotated § 3.18

§ 3.18 Judgment and Appeal After Separate Trial

[1] Verdict for Defendant

If the objection is raised by affirmative defense, a separate trial may be ordered [*see Code Civ. Proc. § 597*], and the decision of the court, or the verdict of the jury, on any special defense so tried (other than the defense of another action pending) is in favor of the defendant pleading the defense, judgment for that defendant is entered, and no trial of other issues in the action is had unless the judgment is reversed on appeal or otherwise set aside or vacated [*Code Civ. Proc. § 597*].

If the defense of another action pending is sustained, and no other special defense is sustained, an interlocutory judgment is entered in favor of the defendant pleading that defense. The judgment is to the effect that no trial of other issues shall be had until the final determination of the other action [*Code Civ. Proc. § 597*].

The plaintiff may appeal from the interlocutory judgment in the same manner and within the same time as is provided by law for appeals from judgments [*Code Civ. Proc. § 597*].

[2] Verdict for Plaintiff

If the decision of the court, or the verdict of the jury, on a special defense tried separately is in favor of the plaintiff, trial of the other issues is had, and judgment is entered thereon in the same manner and with the same effect as if all the issues in the case had been tried at one time. In that event any and all decisions or verdicts on the special defense or defenses, and all rulings on the trial thereof, are deemed excepted to and may be reviewed on motion for a new trial or appeal from such judgment [*Code Civ. Proc. § 597*].

Legal Topics:

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[Reserved]

§§ 3.19[Reserved]

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§ 3.30 Governing Statutes

Lack of legal capacity to sue as a ground for objection to a complaint or cross complaint is set forth in *Code Civ. Proc. § 430.10(b)*.

Lack of capacity to sue resulting from failure to file and publish a fictitious business name statement is governed by *Bus. & Prof. Code §§ 17915, 17917, 17918*; from failure to obtain a certificate of qualification, by *Corp. Code §§ 2105, 2203(c)*; from failure to qualify as personal representative, by *Prob. Code §§ 2300-2322, 2326, 8400, 8402*; and from failure to comply with corporate tax statutes, by *Rev. & Tax. Code §§ 23301, 23301.5, 23775*.

The legal incapacity of minors, incompetents, and conservatees is governed by *Fam. Code § 6601* and *Code Civ. Proc. § 372*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 3 ABATEMENT OF ACTIONS
PART II. LEGAL BACKGROUND
B. Lack Of Capacity To Sue

1-3 California Forms of Pleading and Practice--Annotated § 3.31

§ 3.31 When Objection Is Proper

An objection on the ground of lack of capacity [*see Code Civ. Proc. § 430.10(b)*] questions only whether plaintiff is free from legal disabilities, such as infancy or insanity, and is improper to test whether the plaintiff has stated a cause of action in him or herself [*Klopstock v. Superior Court of San Francisco (1941) 17 Cal. 2d 13, 17-18, 108 P.2d 906]* . If plaintiff states a cause of action, but the cause of action is in someone else, the proper objection is failure to state a cause of action and not lack of capacity to sue [*see Code Civ. Proc. § 430.10(e)*; *Klopstock v. Superior Court of San Francisco (1941) 17 Cal. 2d 13, 19-20, 108 P.2d 906* ; *see also Samter v. Klopstock Realty Co. (1939) 31 Cal. App. 2d 532, 536, 88 P.2d 250]* . This distinction is significant because an objection on the ground of lack of capacity is waived if not seasonably raised, but an objection on the ground of failure to state a cause of action is not waived [*see Code Civ. Proc. § 430.80(a)*], and may be raised for the first time even on appeal [*see Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6* ; *Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 19-20, 108 P.2d 906]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePartiesCapacity of PartiesGeneral Overview

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§ 3.32 Pleading

Alleging that plaintiff has no legal capacity to sue [*see Code Civ. Proc. § 430.10(b)*] is only a legal conclusion. Without specifying the cause of the incapacity it tenders no issue of fact and the objection is waived [*Ontario State Bank v. Tibbits (1899) 80 Cal. 68, 69-70, 22 P. 66* ; *Kadota Fig Asso. of Producers v. Case-Swayne Co. (1946) 73 Cal. App. 2d 796, 805, 167 P.2d 518]* . Because the objection is a ground for abatement and dilatory, it is strictly construed and may not be pleaded on information and belief [*Home Owners' Loan Corp. v. Gordon (1939) 36 Cal. App. 2d 189, 192, 97 P.2d 845]* .

Legal Topics:

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§ 3.33 Grounds for Objection

[1] Suspension of Capacity

No person transacting business under a fictitious business name, or his assignee, may maintain any action on or on account of any contract made, or transaction had, in the fictitious business name in any court of California until the fictitious business name statement [*see Bus. & Prof. Code § 17913*] has been executed, filed, and published [*see Bus. & Prof. Code §§ 17914-17917*]. This requirement applies to individuals, partnerships and other associations, limited liablity companies, and corporations [*see Bus. & Prof. Code § 17902*].

The commencement of an action is not prohibited by *Bus. & Prof. Code § 17918*. It merely forbids the maintenance of the action until the certificate has been filed and the publication has been made. Before an action is finally dismissed on that ground, prior to the trial the plaintiff should be given an opportunity to comply with the statute if he or she so desires [*Kadota Fig Asso. of Producers v. Case-Swayne Co. (1946) 73 Cal. App. 2d 796, 804-805, 167 P.2d 518* (construing former *Civ. Code § 2468*, on which present *Bus. & Prof. Code § 17918* is based); *see § 3.250*; for forms of allegations of fictitious business names, see Ch. 20, *Allegations Commonly Used*].

[2] Incapacity of Minors

A minor may enforce his or her legal rights by civil action, or other legal proceedings, in the same manner as an adult, except that a guardian must conduct the action or proceeding [*Fam. Code § 6601*]. A party who is a minor must appear either by a guardian of his or her estate [*Prob. Code §§ 1440-1444*] or by a guardian ad litem appointed by the court in which the action is pending or by a judge of that court [*Code Civ. Proc. § 372(a)*].

An exception is provided so that a minor may obtain or oppose a request for specified protective orders guarding against harassment or violence without a guardian, counsel, or a guardian ad litem [*see Code Civ. Proc. § 372(b)*]. For discussion of this exception, see Ch. 293, *Harassment and Domestic Violence* . Effective January 1, 2009, the legislature has also provided an exception when the minor is the parent of a child who is the subject of proceedings, such as child dependency, parentage, or guardianship [*Code Civ. Proc. § 372(c)*].

Although a guardian ad litem is usually appointed before or at the time the complaint is filed, in which case the complaint will contain an allegation of the appointment, the code requires only that "the appointment must be made before the summons is issued, upon the application of the minor, if he be of the age of 14 years, or if under that age, upon the application of a relative or friend of the minor" [*Code Civ. Proc. § 373(a)*].

For a form of demurrer on the ground that no guardian ad litem has been appointed for a minor plaintiff, *see § 3.252* [*see generally* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*].

[3] Failure of Corporation to File Required Information Statement with Secretary of State

Every corporation must file an information statement with the Secretary of State within 90 days after the filing of its original articles and annually thereafter, a statement which includes the names and complete business or residence addresses of its incumbent directors, the number of vacancies on the board, if any, the names and addresses of its officers, the street address of its principal executive office, the mailing address of the corporation, a statement of the general type of business that constitutes the principal business activity of the corporation, and the name and address of a person in the state designated to received service of legal process upon the corporation [*Corp. Code § 1502(a)*]. If a corporation fails to file this statement, fails to file a statement for 24 months, and has been assessed a penalty under *Corp. Code § 2204* during that 24-month period, then the corporation is subject to suspension. A corporation suspended under *Corp. Code § 2205* for failure to file a required information statement is disabled from participating in litigation, including conducting discovery [*Palm Valley Homeowners Assn., Inc. v. Design MTC (2000) 85 Cal. App. 4th 553, 559-561, 102 Cal. Rptr. 2d 350]* .

If a corporation fails to file the required statement, fails to file a statement for 24 months, and has been assessed a penalty under *Corp. Code § 2204* during that 24-month period, then the corporation is subject to suspension. The Secretary of State must notify the corporation that "its corporate powers, rights, and privileges" will be suspended after an additional 60 days, if it fails to file a statement under *Corp. Code § 1502*. If the corporation fails to comply within 60 days, the Secretary of State certifies to the Franchise Tax Board that the corporation is suspended, and mails a notice to the suspended corporation. "[T]hereupon, except for the purpose of amending the articles of incorporation to set forth a new name, the corporate powers, rights, and privileges of the corporation are suspended." [*Corp. Code § 2205(c)*; *Palm Valley Homeowners Assn., Inc. v. Design MTC (2000) 85 Cal. App. 4th 553, 559-561, 102 Cal. Rptr. 2d 350]* .

For a form of affirmative defense on the ground of incapacity to sue due to failure to file the required information statement with the Secretary of State, see *§ 3.255* [*see generally* Ch. 26, *Answers*].

[4] Failure of Corporation to Comply With Tax Statutes

[a] Failure to Pay Tax

Except for the purposes of filing an application for exempt status or amending the articles of incorporation as necessary either to perfect that application or to set forth a new name, the corporate powers, rights, and privileges of a domestic corporation may be suspended for failure to pay any tax, penalty, or interest, or any portion thereof, when due [*Rev. & Tax. Code § 23301*; *see Timberline Inc. v. Jaisinghani (1997) 54 Cal. App. 4th 1361, 1365-1368, 64 Cal. Rptr. 2d 4* (suspended corporation cannot prosecute or defend action, appeal from adverse judgment, seek writ of mandate, or renew unsatisfied judgment); *see also Grell v. Laci Le Beau Corp. (1999) 73 Cal. App. 4th 1300, 1305-1306, 87 Cal. Rptr. 2d 358* (suspended corporation may be sued and is not protected against default judgment; statute of limitations continues to run while corporation is suspended; thus, when plaintiff's action was filed beyond limitations period while defendant was suspended, summary judgment in defendant's favor upheld based on statute of limitation defense even though defendant improperly filed demurrer while suspended when hearing on demurrer took place after corporate status was reinstated)].

On the same grounds, and with the same exceptions, the exercise of the corporate powers, rights, and privileges of a foreign corporation in this state may be forfeited [*Rev. & Tax. Code § 23301*; *see United Medical Management Ltd. v. Gatto (1996) 49 Cal. App. 4th 1732, 1741, 57 Cal. Rptr. 2d 600]* . *Rev. & Tax. Code § 23301* applies to a foreign taxpayer only if the taxpayer is qualified to do business in California, and a taxpayer that is required under *Corp. Code § 2105* to qualify to do business is not deemed to have qualified under *Rev. & Tax. Code § 23301* unless the taxpayer has in fact qualified with the California Secretary of State [*Rev. & Tax. Code § 23301.6*].

Forfeiture or suspension of a corporation's powers, rights, and privileges pursuant to *Rev. & Tax. Code § 23301* occurs and becomes effective only as expressly provided in *Rev. & Tax. Code § 23302* in conjunction with *Rev. & Tax. Code § 21020*, which requires notice prior to suspension of a taxpayer's corporate powers, rights, and privileges [*Rev. & Tax. Code § 23302(a)*]. The forfeiture or suspension becomes effective on receipt by the Secretary of State of the name of the delinquent corporation from the Franchise Tax Board [*Rev. & Tax. Code § 23302(c)*].

For a domestic corporation's powers, rights, and privileges to be suspended, or for the exercise of a foreign corporation's corporate powers, rights, and privileges in this state to be forfeited, pursuant to *Rev. & Tax. Code § 23301*, *23301.5*, or *23775*, the Franchise Tax Board must have mailed the corporation a notice of preliminary suspension that indicates that the corporation will be suspended by a date certain. The preliminary notice must be mailed to the corporation at least 60 days before the date certain [*Rev. & Tax Code §§ 21020*, *23302(b)*]. If the foregoing formalities have not been completed, the corporation will continue to have capacity to sue and defend, even though the corporation may in fact have failed to pay its taxes [*see Mediterranean Exports, Inc. v. Superior Court (1981) 119 Cal. App. 3d 605, 615, 617-618, 174 Cal. Rptr. 169]* .

The certificate of the Secretary of State is prima facie evidence of the fact of suspension or forfeiture [*Rev. & Tax Code § 23302(c)*]. A certificate of suspension or forfeiture from the Franchise Tax Board setting forth that the suspended or forfeited taxpayer has been notified of its liability for tax and that the tax has not been paid constitutes prima facie evidence of those facts [*Rev. & Tax. Code § 23305d*].

When a corporation's status only comes to light during litigation, the normal practice is for the trial court to grant a short continuance to enable a suspended corporation to effect reinstatement (by paying back taxes, interest and penalties) to defend itself in court [*see Timberline Inc. v. Jaisinghani (1997) 54 Cal. App. 4th 1361, 1366, 64 Cal. Rptr. 2d 4* (dicta)]. A suspended corporation does not have the power, however, to renew a valid, unsatisfied judgment [*Timberline Inc. v. Jaisinghani (1997) 54 Cal. App. 4th 1361, 1363, 1368, 64 Cal. Rptr. 2d 4]* .

For a form of affirmative defense on the ground of incapacity due to failure to file tax return, see *§ 3.256* [*see generally* Ch. 26, *Answers*].

[b] Failure to File Return

Except for purposes of filing an application for exempt status or amending the articles of incorporation as necessary either to perfect the application or to set forth a new name, and subject to *Rev. & Tax. Code § 23301.6*, the corporate powers, rights, and privileges of a domestic corporation may be suspended, and the exercise of the corporate powers, rights, and privileges of a foreign taxpayer in this state may be forfeited if the taxpayer fails to file a tax return required by the Corporation Tax Law (*Rev. & Tax. Code § 23001 et seq.*) [*Rev. & Tax. Code § 23301.5*].

Rev. & Tax. Code § 23301.5 applies to a foreign taxpayer only if the taxpayer is qualified to do business in California, and a taxpayer that is required under *Corp. Code § 2105* to qualify to do business is not deemed to have qualified under *Rev. & Tax. Code § 23301.5* unless the taxpayer has in fact qualified with the California Secretary of State [*Rev. & Tax. Code § 23301.6*].

Forfeiture or suspension of a corporation's powers, rights, and privileges pursuant to *Rev. & Tax. Code § 23301.5* occurs

and becomes effective only as expressly provided in *Rev. & Tax. Code § 23302* in conjunction with *Rev. & Tax. Code § 21020*, which requires notice prior to suspension of a taxpayer's corporate powers, rights, and privileges [*Rev. & Tax Code § 23302(a)*].

The certificate of the Secretary of State is prima facie evidence of the fact of suspension or forfeiture for failure to file a tax return as required by *Rev. & Tax. Code § 23301.5* [*Rev. & Tax. Code § 23302(c)*]. A certificate of the Franchise Tax Board setting forth that the suspended or forfeited taxpayer has been notified of its requirement to file a return and that the return has not been filed constitutes prima facie evidence of those facts [*Rev. & Tax. Code § 23305d*].

For of a form of affirmative defense on the ground of incapacity due to failure to file tax return, *see § 3.256*.

[c] Exempt Corporations

Except for the purpose of amending the articles of incorporation to set forth a new name, the corporate powers, rights, and privileges of an exempt domestic corporation may be suspended and the exercise of the corporate rights, powers, and privileges of a foreign exempt corporation in this state may be forfeited if the organization fails to file the annual return or statement required under *Rev. & Tax. Code § 23772* or *23774* (information returns) or pay any amount due under *Rev. & Tax. Code § 23703* or *23772* on or before the last day of the 12th month following the close of the taxable year [*Rev. & Tax. Code § 23775*].

Rev. & Tax. Code § 23774 only applies to a foreign corporation that is required under *Corp. Code § 2105* to qualify to do business in California if it has in fact qualified with the Secretary of State [*Rev. & Tax. Code § 23301.6*]. Suspension or forfeiture pursuant to *Rev. & Tax. Code § 23775* must be accomplished in accordance with the formalities set forth in *Rev. & Tax. Code § 23302* (*discussed under § 3.33 4 a*) [*Rev. & Tax. Code § 23302*].

[5] Failure of Limited Liability Company to Comply With Tax Statutes

Both foreign and domestic limited liability companies are subject to the provisions of *Rev. & Tax. Code § 23301 et seq.*, so the *discussion under § 3.33 4 a* and *b* applies to those organizations as well as to corporations [*Rev. & Tax. Code § 23305.5(a)*].

In applying those provisions to limited liability companies, the term "articles of incorporation" includes "articles of organization" [*Rev. & Tax. Code § 23305.5(b)*]. "Tax" includes the tax and fee imposed by *Rev. & Tax. Code §§ 17941* and *17942*, or former 23091 and 23092, respectively [*Rev. & Tax. Code § 23305.5(b)*].

[6] Failure of Foreign Corporation to Obtain Certificate of Qualification

A foreign corporation subject to *Corp. Code § 2100 et seq.* (qualification for transaction of intrastate business) that transacts intrastate business in California without complying with *Corp. Code § 2105* is not authorized to maintain any action or proceeding on any intrastate business so transacted in any California court until it has complied with *Corp. Code § 2105* and has paid to the Secretary of State a penalty of $250 in addition to the fees due for filing the statement and designation required by *Corp. Code § 2105*, and has filed with the clerk of the court in which the action is pending receipts showing the payment of the fees and penalty and all franchise taxes and any other taxes on business or property in California that should have been paid for the period during which it transacted intrastate business [*Corp. Code § 2203(c)*].

The certificate of qualification is obtained from the Secretary of State by filing a statement with the Secretary of State. The certificate includes information about the corporation, including its address and agent for service of process [*see Corp. Code § 2105*].

Even though a foreign corporation transacting intrastate business that has failed to qualify with the Secretary of State cannot *maintain* an action commenced prior to qualification until it complies with *Corp Code § 2203(c)*, it may nevertheless *commence or defend* a state court action. A defendant may raise lack of capacity to maintain an action arising out of intrastate business once a nonqualified foreign corporation commences an action regarding intrastate business. The defendant bears the burden of proving the following [*United Medical Management Ltd. v. Gatto (1996) 49 Cal. App. 4th 1732, 1740, 57 Cal. Rptr. 2d 600]* :

- The action arises out of the transaction of intrastate business by a foreign corporation and
- The foreign corporation commenced the action before qualifying to transact intrastate business.

If the defendant establishes the bar of the statute, the plaintiff must comply with *Corp. Code § 2203(c)*. Ordinarily, the matter should be stayed to permit compliance, and if the foreign corporation complies, by qualifying and paying fees, penalties, and taxes, it may maintain the action. If the foreign corporation fails to qualify the matter should be dismissed without prejudice [*United Medical Management Ltd. v. Gatto (1996) 49 Cal. App. 4th 1732, 1740, 57 Cal. Rptr. 2d 600]* .

Corp. Code § 2203(c), does not apply to actions commenced after qualification. Thus, a foreign corporation that qualifies to transact intrastate business after transacting, but before commencing an action on, intrastate business, may maintain the action without complying with *Corp. Code § 2203(c)* [*United Medical Management Ltd. v. Gatto (1996) 49 Cal. App. 4th 1732, 1736, 1740-1741, 57 Cal. Rptr. 2d 600]* .

Moreover, a foreign corporation that has qualified to do business does not forfeit its corporate powers merely because it has not paid taxes pursuant to *Rev. & Tax. Code § 23301*. The forfeiture of corporate powers occurs only at the time of the notice of forfeiture by the Franchise Tax Board. Thus, a foreign corporation is not prevented from bringing or defending an action by the mere failure to pay taxes [*United Medical Management Ltd. v. Gatto (1996) 49 Cal. App. 4th 1732, 1741, 57 Cal. Rptr. 2d 600]* . For further discussion of forfeiture or suspension of a corporation's powers, rights, and privileges pursuant to *Rev. & Tax. Code § 23301*, see *§ 3.33* 4 .

For a form of affirmative defense on the ground of incapacity based on the failure to obtain certificate of qualification, see *§ 3.257*.

[7] Failure of Foreign Limited Liability Company to Register

A foreign limited liability company transacting intrastate business in California is not authorized to maintain any action, suit, or proceeding in any California state court until it has registered in California [*Corp. Code § 17456(a)*; *see also Corp. Code § 17456(b)* ($20-a-day penalty, to maximum of $10,000, for doing business without registration)].

Registration is obtained by application to the Secretary of State for registration as a foreign limited liability company. The application will include, among other things, the address of the company's principal place of business in California, if any, and the name of its agent for the service of process [*Corp. Code § 17451*].

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[Reserved]

§§ 3.34[Reserved]

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§ 3.50 Governing Statutes

Objection to a complaint or cross complaint on the ground that another action is pending is set forth in *Code Civ. Proc. § 430.10(c)*.

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§ 3.51 Definition

A plea in abatement is essentially a request, not that an action be terminated, but that it be continued until such time as there has been a disposition of the first action [*Shuffer v. Board of Trustees (1977) 67 Cal. App. 3d 208, 217, 136 Cal. Rptr. 527]* .

An action is deemed to be pending from the time of its commencement until its final determination on appeal, or until the time for appeal has passed, unless judgment is satisfied sooner [*Code Civ. Proc. § 1049*].

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§ 3.52 Theory of Plea

Code Civ. Proc. § 430.10(c) provides that a defendant may raise as an affirmative defense that another action is pending between the same parties on the same cause of action. The theory underlying this defense is that the first action will normally provide an adequate remedy; therefore, the second action is unnecessary and vexatious [*Conservatorship of Pacheco (1990) 224 Cal. App. 3d 171, 175, 273 Cal. Rptr. 522]* .

If the prior action is pending in a court of competent jurisdiction in California, the subsequent action must be stayed [*see Scott v. Industrial Acci. Com. (1956) 46 Cal. 2d 76, 81, 293 P.2d 18* ; *Browne v. Superior Court (1940) 16 Cal. 2d 593, 597, 107 P.2d 1]* . If the prior action is pending in a federal court or in a court of another state, a stay of the subsequent California action is not a matter of right, but within the sound discretion of the trial court [*see Farmland Irrigation Co. v. Dopplmaier (1957) 48 Cal. 2d 208, 215, 308 P.2d 732* ; *Thomson v. Continental Ins. Co. (1967) 66 Cal. 2d 738, 747, 59 Cal. Rptr. 101, 427 P.2d 765]* .

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§ 3.53 Nature of Plea

Despite the benefits of abating unnecessary actions, the plea of another action pending is considered dilatory, is not judicially favored, and is successful only if it can be shown that both suits are (1) predicated on the same cause of action, (2) pending in the same jurisdiction, and (3) contested by the same parties [*Conservatorship of Pacheco (1990) 224 Cal. App. 3d 171, 176, 273 Cal. Rptr. 522* (involving the more liberal abatement provided in *Prob. Code § 2525*, relating to proceedings involving property claims by or against wards or conservatees); *but see Farmland Irrigation Co. v. Dopplmaier (1957) 48 Cal. 2d 208, 215, 308 P.2d 732* (prior acting pending in federal court in another state); *Leeds v. Superior Court (1965) 231 Cal. App. 2d 723, 724, 42 Cal. Rptr. 151* (prior action pending in another state court); *see also § 3.56*, stating that stay of California proceedings is not a matter of right, but of comity and within discretion of court)].

However, presumably because the backlog in many metropolitan trial courts has increased markedly in recent years, commentators have begun to question the jaundiced judicial view of pleas in abatement based on the claim of another action pending [*Conservatorship of Pacheco (1990) 224 Cal. App. 3d 171, 176, 273 Cal. Rptr. 522]* . For example, Witkin observes that (1) the negative judicial attitude seems most inappropriate in light of the fact that, when properly used, abatement prevents unnecessary duplication of litigation over the same claim, and relieves defendants of the burden of defending against a multiplicity of suits; (2) the plea is, on reflection, more meritorious than the favored pleas of the statute of limitations or laches; (3) when different courts are involved, abatement prevents the second court from interfering with the jurisdiction of the first; and (4) the plea in abatement can be used to expeditiously settle the question of priority of jurisdiction in the lower court [*Conservatorship of Pacheco (1990) 224 Cal. App. 3d 171, 176, 273 Cal. Rptr. 522* (citing Witkin, California Procedure, vol. 3, *Pleading*, § 1060 (3d ed. 1985))].

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§ 3.54 Similarity Between Actions Required

[1] Rule Against Splitting Cause of Action

The rule against splitting a cause of action is in part a rule of abatement and in part a rule of res judicata. When a plaintiff attempts to divide a primary right and enforce it in two suits, the primary rights theory prevents this result by either of two means [*Hamilton v. Asbestos Corp (2000) 22 Cal. 4th 1127, 1146, 95 Cal. Rptr. 2d 701, 998 P.2d. 403]* :

- If the first suit is still pending when the second is filed, the defendant in the second suit may plead that fact in abatement, that is, there is another action pending between the same parties on the same cause of action (which is a ground specified in *Code Civ. Proc. § 430.10* for objecting to a pleading); or

- If the first suit has terminated in a judgment on the merits adverse to the plaintiff, the defendant in the second suit may set up that judgment as a bar under the principles of res judicata.

For discussion of res judicata generally, *see* Ch. 491, *Res Judicata* .

[2] Issues That Might Have Been Litigated

An objection on the ground that another action is pending may be maintained only when the claim sued on in the second action is such that a final judgment in the first one could be pleaded in bar as a former adjudication [*Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 787-788, 274 Cal. Rptr. 147]* . As a general rule, a judgment is a bar as res judicata not only as to a subsequent action on the same matter actually determined, but also as to all issues that might have been litigated as incident to or essentially connected with the subject matter of the litigation and every matter coming within its legitimate purview. That which is adjudged in a former judgment is that which appears on its face to have been adjudged or that was actually and necessarily included therein or necessary thereto. When it affirmatively appears that an issue was not determined by the judgment, it obviously is not res judicata on that issue [*Lord v. Garland (1946) 27 Cal. 2d 840, 848-849, 168 P.2d 5]* .

[3] No Bar If Issues Not Germane

When it appears that a questioned issue in a subsequent action was neither germane to nor essentially connected with the actual issues that were raised in the former action, even though with propriety such issues might have been presented therein, the former action is not a bar [*Lord v. Garland (1946) 27 Cal. 2d 840, 848-849, 168 P.2d 5]* .

[4] No Bar If Separate Claims

Nor is the rule of res judicata applicable to rights, claims, or demands, which despite growing out of the same subject matter constitute separate or distinct causes of action, and which were not put in issue in the former action. Res judicata applies only to the facts and conditions as they existed at the time the judgment was rendered, or more correctly speaking, at the time the issues in the first action were made, and to the legal rights and relations of the parties as fixed by the facts determined by that judgment. When other facts or conditions intervene before the second suit, furnishing a new basis for the claims and defenses of the respective parties, the issues are no longer the same and the former judgment cannot be pleaded in bar of the second action [*Lord v. Garland (1946) 27 Cal. 2d 840, 848-849, 168 P.2d 5]* .

[5] Type of Relief Sought

Abatement is not proper when the relief sought in the second action cannot be afforded in the first action. Despite this rule, abatement is proper when the second action merely seeks a different type of relief that could be given in the first action on a cross complaint [*Lawyers Title Ins. Corp. v. Superior Court (1984) 151 Cal. App. 3d 455, 459-460, 199 Cal. Rptr. 1* (second action for damages as properly abated pending first action for declaratory relief)]. Where the pleading in a second case discloses the same parties and the same transaction and include additional theories of liability but the additional theories are not "different wrongs" that give rise to different primary rights, but rather different ways of committing the same wrongs, a demurrer will be sustained [*Bescos v. Bank of America (2003) 105 Cal. App. 4th 378, 397, 129 Cal. Rptr. 2d 423]* .

An attorney in a civil action who knows or learns of the existence of a related action or proceeding pending in any state or federal court in California is required to file and serve a Notice of Related Case. This duty applies when counsel files a case with knowledge of a related action or proceeding, and applies thereafter whenever counsel learns of a related action or proceeding [*Cal. Rules Ct., Rule 3.300(b)*]. For discussion and forms, see Ch. 137, *Continuing Duties During Litigation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

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1-3 California Forms of Pleading and Practice--Annotated § 3.55

§ 3.55 Prior Action Pending in California State Court

The pendency of a prior action in a California state court of competent jurisdiction, predicated on the same cause of action and between the same parties, constitutes a good ground for abatement of a later action in California either in the same court or in another state court of competent jurisdiction [*Simmons v. Superior Court (1950) 96 Cal. App. 2d 119, 122-123, 214 P.2d 844* ; *Lawyers Title Ins. Corp. v. Superior Court (1984) 151 Cal. App. 3d 455, 458, 199 Cal. Rptr. 1* ; *see also California Union Ins. Co. v. Trinity River Land Co. (1980) 105 Cal. App. 3d 104, 108-109, 163 Cal. Rptr. 802* (pendency of another action arising out of same transaction as ground to abate second, but never first, action)].

The first court to assume and exercise jurisdiction in a particular case acquires exclusive jurisdiction and a writ of prohibition [*see Code Civ. Proc. §§ 1102-1105*] may be used to restrain another court from proceeding if it is threatening to do so [*Scott v. Industrial Acci. Com. (1956) 46 Cal. 2d 76, 81, 293 P.2d 18* ; *Browne v. Superior Court (1940) 16 Cal. 2d 593, 597, 107 P.2d 1* ; *Myers v. Superior Court (1946) 75 Cal. App. 2d 925, 929-930, 172 P.2d 84]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & Preservation

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1-3 California Forms of Pleading and Practice--Annotated § 3.56

§ 3.56 Prior Action Pending in Other Court

[1] Stay as Matter of Comity

When an action is brought in a California state court involving the same parties and the same subject matter as an action already pending in a court of another jurisdiction, a stay of the California proceedings is not a matter of right, but is a matter of comity and within the sound discretion of the trial court. In exercising its discretion, the court should consider the importance of discouraging multiple litigation designed solely to harass an adverse party, and of avoiding unseemly conflicts with the courts of other jurisdictions. It should also consider whether the rights of the parties can best be determined by the court of the other jurisdiction because of the nature of the subject matter, the availability of witnesses, or the stage to which the proceedings in the other court have advanced [*Farmland Irrigation Co. v. Dopplmaier (1957) 48 Cal. 2d 208, 215, 308 P.2d 732* (prior action pending in federal court in another state); *Caifa Prof. Law Corp. v. State Farm Fire & Cas. Co. (1993) 15 Cal. App. 4th 800, 805-807 19 Cal. Rptr. 2d 138* (applying *Farmland Irrigation* criteria in affirming stay of action); *Leeds v. Superior Court (1965) 231 Cal. App. 2d 723, 724, 42 Cal. Rptr. 151* (prior action pending in another state court); *but see In re Hanley (1988) 199 Cal. App. 3d 1109, 1115-1116, 245 Cal. Rptr. 441* (stating in dictum that second court must abate its proceedings on demand)]. A discretionary ruling on whether to stay must take into consideration matters outside the pleadings, such as the seriousness of the threat of multiple and vexatious litigation, the convenience of the parties, the status of the foreign action, and the competing interests of the two forums [*Leadford v. Leadford (1992) 6 Cal. App. 4th 571, 575, 8 Cal. Rptr. 2d 9* (reversing order sustaining demurrer without leave to amend and staying action)]. Therefore, the issue is not properly raised on demurrer, but should be raised by a motion to obtain a stay, on which appropriate factual matter outside the pleadings may be submitted and considered [*Leadford v. Leadford (1992) 6 Cal. App. 4th 571, 575, 8 Cal. Rptr. 2d 9* ; *see § 3.285*].

[2] Federal Court

The fact that the previously filed action is pending in a federal court in California is one factor that may be considered by the state court in deciding to stay the state proceedings, since, in this situation, a stay will usually not work any hardship on plaintiff by forcing him or her to litigate in a distant place [*Thomson v. Continental Ins. Co. (1967) 66 Cal. 2d 738, 747, 59 Cal. Rptr. 101, 427 P.2d 765* ; *Caifa Prof. Law Corp. v. State Farm Fire & Cas. Co. (1993) 15*

Cal. App. 4th 800, 807, 19 Cal. Rptr. 2d 138 ; *see Gregg v. Superior Court (1987) 194 Cal. App. 3d 134, 136-138, 239 Cal. Rptr. 380* (court abused discretion in staying action when plaintiff was not party in related federal action)].

[3] Sister-State Court

When the parties are California residents, the California action was filed first, and California has greater interest in the matter, mandate is inappropriate to stay the California action even though the same matter is pending in another state [*Engle v. Superior Court (1956) 140 Cal. App. 2d 71, 83, 294 P.2d 1026]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationGovernmentsCourtsAuthority to Adjudicate

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1-3 California Forms of Pleading and Practice--Annotated § 3.57

§ 3.57 Exclusive Concurrent Jurisdiction

[1] Distinguished From Another Action Pending

Although similar in effect to the plea in abatement based on another action pending pursuant to *Code Civ. Proc § 430.10(c)*, the rule of exclusive concurrent jurisdiction may apply when the narrow grounds for a statutory plea of abatement do not exist [*Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 788, 274 Cal. Rptr. 147]* . Under this rule, if two trial courts of equal jurisdiction have concurrent jurisdiction over the subject matter and all parties involved in litigation, the first to assume jurisdiction has exclusive and continuing jurisdiction over the subject matter and all parties until such time as all necessarily related matters have been resolved [*Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 786-787, 274 Cal. Rptr. 147]* .

Unlike the statutory plea of abatement, the rule of exclusive concurrent jurisdiction does not require absolute identity of parties, causes of action or remedies sought in the initial and subsequent actions [*Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 788, 274 Cal. Rptr. 147]* .

[2] As Ground for Abatement

Like a statutory plea in abatement, the rule of exclusive concurrent jurisdiction may constitute a ground of abatement of the subsequent action. An order of abatement issues as a matter of right, not as a matter of discretion, when the conditions for its issuance exist [*People ex rel. Garamendi v. American Autoplan, Inc. (1993) 20 Cal. App. 4th 760, 772, 25 Cal. Rptr. 2d 192* ; *Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 787, 274 Cal. Rptr. 147]* . For discussion and a form of demurrer on the ground of exclusive concurrent jurisdiction, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 324, *Jurisdiction: Subject Matter* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent Jurisdiction

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1-3 California Forms of Pleading and Practice--Annotated § 3.58

§ 3.58 Abatement of Probate Petition for Conveyance or Transfer of Property

If a civil action is pending with respect to the subject matter of a petition filed under *Prob. Code § 850* for the conveyance or transfer of property claimed to belong to a decent, ward, conservatee, or other person, the petition may be abated pursuant to *Prob. Code § 854*. For further discussion, see Ch. 290A, *Guardianship and Conservator: Asset Management and Investment* , and Ch. 456, *Probate: Management of Assets* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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1-3 California Forms of Pleading and Practice--Annotated §§ 3.59-3.69

[Reserved]

§§ 3.59[Reserved]

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1-3 California Forms of Pleading and Practice--Annotated § 3.70

§ 3.70 Governing Statutes

Permissive joinder of plaintiffs is governed by *Code Civ. Proc. § 378*, permissive joinder of defendants by *Code Civ. Proc. § 379*, and compulsory joinder of parties by *Code Civ. Proc. § 389*. The ground of objection to a complaint or cross complaint that there is a defect or misjoinder of parties is set forth in *Code Civ. Proc. § 430.10(d)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPartiesJoinderPermissive JoinderCivil ProceduresPartiesJoinderMisjoinderCivil ProceduresPartiesJoinderCompulsory Joinder

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1-3 California Forms of Pleading and Practice--Annotated § 3.71

§ 3.71 Permissive Joinder of Plaintiffs

All persons may join in one action as plaintiffs if the following apply:

(1) They assert any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action [*Code Civ. Proc. § 378(a)(1)*]; or

(2) They have a claim, right, or interest adverse to the defendant in the property or controversy that is the subject of the action [*Code Civ. Proc. § 378(a)(2)*].

It is not necessary that each plaintiff be interested as to every cause of action or as to all relief prayed for. Judgment may be given for one or more of the plaintiffs according to their respective right to relief [*Code Civ. Proc. § 378(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPartiesJoinderPermissive Joinder

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1-3 California Forms of Pleading and Practice--Annotated § 3.72

§ 3.72 Permissive Joinder of Defendants

All persons may be joined in one action as defendants if either of the following is asserted against them:

(1) Any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action [*Code Civ. Proc. § 379(a)(1)*; *see Colusa Air Pollution Control Dist. v. Superior Court (1991) 226 Cal. App. 3d 880, 885-886, 277 Cal. Rptr. 110]* ; or

(2) A claim, right, or interest adverse to them in the property or controversy that is the subject of the action [*Code Civ. Proc. § 379(a)(2)*].

It is not necessary that each defendant be interested as to every cause of action or as to all relief prayed for. Judgment may be given against one or more defendants according to their respective liabilities [*Code Civ. Proc. § 379(b)*].

If the plaintiff is in doubt as to the person from whom he of she is entitled to redress, he or she may join two or more defendants, with the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined between the parties [*Code Civ. Proc. § 379(c)*; *see Colusa Air Pollution Control Dist. v. Superior Court (1991) 226 Cal. App. 3d 880, 885-886, 277 Cal. Rptr. 110]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedureParties JoinderPermissive Joinder

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1-3 California Forms of Pleading and Practice--Annotated § 3.73

§ 3.73 Unwilling Plaintiff Made Defendant

If the consent of anyone who should have been joined as plaintiff cannot be obtained, he or she may be made a defendant, in which event the reason he or she is being made a defendant is to be set forth in the complaint. However, when the question is one of a common or general interest of many persons, or when the parties are numerous, and it is impractical to bring them all before the court, one or more may sue or defend for the benefit of all [*Code Civ. Proc. § 382*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPartiesJoinderPermissive Joinder

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1-3 California Forms of Pleading and Practice--Annotated § 3.74

§ 3.74 Compulsory Joinder of Parties

[1] In General

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his or her absence complete relief cannot be accorded among those already parties, or (2) he or she claims an interest relating to the subject of the action and is so situated that the disposition of the action in his or her absence may (i) as a practical matter impair or impede his or her ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his or her claimed interest. If he or she has not been so joined, the court shall order that he or she be made a party [*Code Civ. Proc. § 389(a)*].

[2] Result When Joinder Impossible

If a person as described in *Code Civ. Proc. § 389(a)(1)* or *(2)* (*see § 3.74* 1) cannot be made a party, the court then determines whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross complainant will have an adequate remedy if the action is dismissed for nonjoinder [*Code Civ. Proc. § 389(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPartiesJoinderCompulsory Joinder

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1-3 California Forms of Pleading and Practice--Annotated § 3.75

§ 3.75 Nonjoinder of Indispensable Party

The California Law Revision Commission commented on *Code Civ. Proc. § 389* as amended in 1971 as follows [*Recommendation and Study Relating to Counterclaims and Cross-Complaints, Joinders of Cause of Action, and Related Provisions*, 10 Cal. L. Revision Comm'n Reports 535-536 (1971)]:

> When joinder cannot be accomplished, the circumstances must be examined and a choice made between proceeding with or dismissing the action. The adequacy of the relief that may be granted in a person's absence and the possibility of prejudice to either such person or the parties before the court are factors to be considered in making this choice. However, a person is regarded as indispensable only in the conclusory sense that, in his absence, the court has decided the action should be dismissed. Where the decision is to proceed, the court has the power to make a legally binding adjudication between the parties properly before it.
>
> Section 389 formerly attempted not only to avoid prejudice to the parties or absent person but also to promote the general convenience of the courts by preventing a multiplicity of suits. As revised, Section 389 takes a different approach; it limits compulsory joinder to those situations where the absence of a person may result in substantial prejudice to that person or to the parties already before the court. Citation. Section 389 was widely criticized because it formerly appeared to require joinder of parties merely for the general convenience of the courts by preventing a multiplicity of suits. Citations. However, an examination of the appellate cases decided since the convenience of the courts provision was added to Section 389 in 1957 discloses that the courts did not rely upon the provision; instead, the courts continued to apply the principles enunciated in *Bank of California, Nat'l Asso. v. Superior Court of San Francisco, 16 Cal. 2d 516, 106 P.2d 879 (1940)* .
>
> Under the former law, an indispensable party had to be joined in the action; until and unless he was, the court had no jurisdiction to proceed with the case. Citation. This absolute rule has been changed; however, practically speaking, the change is perhaps more one of emphasis. The guidelines provided in Section 389 are substantially those that have guided the courts for years. See *Bank of California v. Superior Court, 16 Cal.2d 516, 106 P.2d 879 (1940)* . These guidelines should require dismissal in the

same circumstances where formerly a person was characterized as indispensable.

Unlike other objections, an objection to a complaint or cross complaint on the ground that the court has no jurisdiction of the subject of the cause of action alleged in the pleading [*see Code Civ. Proc. § 430.10(a)*] is not deemed waived by failing to object to the pleading by demurrer or answer [*see Code Civ. Proc. § 430.80(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-3 California Forms of Pleading and Practice--Annotated §§ 3.76-3.89

[Reserved]

§§ 3.76[Reserved]

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E. Premature Actions

1-3 California Forms of Pleading and Practice--Annotated § 3.90

§ 3.90 Governing Law

The objection that an action is premature is not specifically enumerated as a ground for objection to a complaint or cross complaint under *Code Civ. Proc. § 430.10*, but is pleaded as the specific reason for plaintiff's failure to state a cause of action [*see Kelley v. Upshaw (1952) 39 Cal. 2d 179, 183-189, 246 P.2d 23* ; *Bank of Italy, etc., Assn. v. Bentley (1933) 217 Cal. 644, 658, 20 P.2d 940* ; *Landis v. Morrissey (1886) 69 Cal. 83, 87, 10 P. 258]* . Failure to state a cause of action is an objection that may be raised by demurrer or answer [*see Code Civ. Proc. §§ 430.10(e), 430.30*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsAnswers

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1-3 California Forms of Pleading and Practice--Annotated § 3.91

§ 3.91 When Action Is Premature

[1] Complaint Filed Before Accrual of Cause of Action

An action is prematurely brought when the cause of action alleged has not accrued at the time the complaint is filed [*see Landis v. Morrissey (1886) 69 Cal. 83, 84-87, 10 P. 258* (complaint for goods sold and delivered filed before payment was due)].

[2] Complaint Filed Before Condition Precedent Met

An action is also prematurely brought when a condition precedent to filing suit has not been met, even though a cause of action has accrued at the time the complaint is filed [*see Radar v. Rogers (1957) 49 Cal. 2d 243, 245-250, 317 P.2d 17* (tort action against decedent's estate prior to presentation and rejection of creditor's claim)].

[3] Action to Enforce Judgment Filed Before Final

The objection of prematurity also extends to an action to enforce a judgment in another action if the judgment is pending on appeal and hence is not final [*see Code Civ. Proc. §§ 916-923*; *Thriftimart, Inc. v. Superior Court (1962) 202 Cal. App. 2d 421, 424, 21 Cal. Rptr. 19]* . For forms involving a writ of supersedeas to stay further proceedings in a trial court during the pendency of an appeal, see Ch. 43, *Appeal: Stay of Proceedings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & Preservation

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1-3 California Forms of Pleading and Practice--Annotated § 3.92

§ 3.92 Waiver of Objection

[1] To Be Specifically Raised by Demurrer or Answer

The objection that an action is premature is waived unless seasonably pleaded [*Moore v. Fellner (1958) 50 Cal. 2d 330, 343, 325 P.2d 857* ; *see Virgin v. State Farm Fire & Casualty Co. (1990) 218 Cal. App. 3d 1372, 1376, 267 Cal. Rptr. 704]* . *Code Civ. Proc. § 430.10* does not specify prematurity of an action as a separate ground of objection, but traditionally the defense has been raised by answer or demurrer [*see Code Civ. Proc. § 430.30*] on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see Code Civ. Proc. § 430.10*]. However, the cause of the prematurity must be specified in the answer or demurrer and a bare allegation that the complaint fails to state facts sufficient to constitute a cause of action does not prevent the defense from being waived [*Kelley v. Upshaw (1952) 39 Cal. 2d 179, 183-187, 246 P.2d 23* ; *Fireman's Fund Indem. Co. v. Knorr (1953) 117 Cal. App. 2d 761, 762-767, 256 P.2d 1005]* .

[2] Defect in Existence When Defense Raised

As a consequence of being a disfavored objection in the nature of a "plea in abatement," the defect giving rise to the objection that an action is prematurely brought must still exist at the time the defense is pleaded, and if it does not still exist, the objection may be disregarded [*Moore v. Fellner (1958) 50 Cal. 2d 330, 343, 325 P.2d 857* ; *Radar v. Rogers (1957) 49 Cal. 2d 243, 250, 317 P.2d 17* (action prior to presentation and rejection of creditor's claim against estate as premature)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsAnswers

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1-3 California Forms of Pleading and Practice--Annotated §§ 3.93-3.109

[Reserved]

§§ 3.93[Reserved]

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F. Separate Trial Of Defenses

1-3 California Forms of Pleading and Practice--Annotated § 3.110

§ 3.110 Governing Statutes

Motions for the separate trial of defenses not involving the merits of the plaintiff's cause of action but constituting a bar or ground of abatement to the prosecution thereof are governed by *Code Civ. Proc. §§ 597, 597.5*. For discussion of other statutes authorizing a separate trial of issues, *see Ch. 425, Pretrial Proceedings, § 425.50 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePretrial MattersSeparate Trials

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F. Separate Trial Of Defenses

1-3 California Forms of Pleading and Practice--Annotated § 3.111

§ 3.111 Motion for Separate Trial

[1] Grounds for Motion for Separate Trial of Special Defense

When the answer pleads that the action is barred by the statute of limitations [*see Code Civ. Proc. § 312 et seq.*], or by a prior judgment [*see Code Civ. Proc. § 1908 et seq.*], or that another action is pending on the same cause of action [*see Code Civ. Proc. § 430.10(c)*; for discussion, *see 3.50* et seq.], or sets up any other defense not involving the merits of the plaintiff's cause of action but constituting a bar or ground of abatement to the prosecution thereof, the court may, either on its own motion or on the motion of any party, proceed to the trial of the special defense or defenses before the trial of any other issue in the case [*Code Civ. Proc. § 597*].

NOTE:
Abatement Is Discretionary. Unlike a motion for separate trial under *Code Civ. Proc. § 597.5* [*see § 3.114*], the granting of a motion under *Code Civ. Proc. § 597* is discretionary. Therefore, the motion may be opposed even though it falls within the class of defenses delineated in *Code Civ. Proc. § 597* [*see Kubon v. Kubon (1958) 51 Cal. 2d 229, 232-233, 331 P.2d 636]* .

For discussion and forms relating to the special defense of another action pending, see *§§ 3.50 et seq. and 3.280* et seq.

[2] Timing of Motion

If the case is one in which a pretrial conference is proper, the motion for a separate trial might be made orally at the pretrial conference. For forms and procedure for requesting a pretrial conference, see Ch. 425, *Pretrial Proceedings* .

NOTE:
Special Defense Not Waived. A special defense is not waived by failure to insist on a separate trial at the earliest possible opportunity [*see Kubon v. Kubon (1958) 51 Cal. 2d 229, 233, 331 P.2d 636]* .

[3] Filing Motion for Separate Trial of Special Defense

Follow generally the procedure for noticed motions [*see* Ch. 372, *Motions and Orders*]. Those procedures generally require the preparation and filing of:

(1) Notice of motion [for forms, *see §§ 3.340, 3.341*].

(2) Points and authorities supporting motion.

(3) Proposed order [for form, *see § 3.342*].

(4) Points and authorities supporting substantive defense.

CAUTION:
Distinguish Motion from Defense. The points and authorities in support of the motion are to be distinguished from the points and authorities in support of the special defense itself. The scope of the hearing on motion pursuant to *Code Civ. Proc. § 597* is whether or not the special defense pleaded is one for which a separate trial is available and, in the discretion of the court, such a separate trial should be permitted. The points and authorities supporting the substantive defense should be reserved until the separate trial is had.

In addition, prior to the hearing on the motion for a separate trial, local court procedure may require that an at issue memorandum or a memorandum to set be filed. These memoranda contain a demand for a jury trial that may be used when appropriate [for forms and procedure for completing and filing an at issue memorandum or a memorandum to set, *see* Ch. 425, *Pretrial Proceedings*].

CAUTION:
Request Jury Trial. Unless a jury is requested at the time the cause is set for trial, the right to a jury trial may be waived [*see Code Civ. Proc. § 631(d)(4)*]. If requesting jury trial, counsel should consult local practice to ascertain the procedure for making the request with respect to a separate trial of a special defense.

If the court grants the motion, prepare for the separate trial of the special defense. For forms relating to preparation for trial, *see* Ch. 190, *Discovery: Scope, Regulation, and Timing* , et seq., Ch. 425, *Pretrial Proceedings* , and Ch. 551, *Trial*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPretrial MattersSeparate Trials

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1-3 California Forms of Pleading and Practice--Annotated § 3.112

§ 3.112 Separate Trial

[1] Decision for Defendant

By statute, if the decision of the court, or the verdict of the jury, on any special defense tried separately, other than the defense of another action pending, is in favor of the defendant, judgment is entered and no trial of other issues in the action is had unless the judgment is reversed on appeal or otherwise set aside or vacated [*Code Civ. Proc. § 597*].

NOTE:

Procedure When Decision for Defendant Does Not Result In Dismissal. By its terms, *Code Civ. Proc. § 597* implies that if the decision or verdict on any special defense, other than the defense of another action pending, is in favor of defendant, the action is dismissed. There are, however, other special defenses, such as prematurity of an action, that may not properly result in a dismissal of the action on decision or verdict for defendant. A suggested procedure in such cases is as follows [*see Evans v. Horton (1953) 115 Cal. App. 2d 281, 287, 251 P.2d 1013]* :

(1) The court makes a minute order of the decision in defendant's favor,

(2) The parties proceed to trial on the remaining issues,

(3) Findings of fact and conclusions of law on all issues, if required, [*see Code Civ. Proc. §§ 632, 634*; and *Cal. Rules of Ct., Rule 3.1590*], including the special defense, are prepared by appropriate counsel, and

(4) Judgment is entered accordingly and the entire matter is reviewable on appeal.

If the defense of another action pending is sustained and no other special defense is sustained, an interlocutory judgment is entered in favor of the defendant to the effect that no trial of other issues shall be had until the final determination of the other action [*Code Civ. Proc. § 597*].

COMMENT:

Drafting Proposed Judgment. The defendant will likely be asked to draft a proposed judgment, including proposed findings of fact and conclusions of law, if desired [for discussion, *see Code Civ. Proc. §§ 632, 634*; *Cal. Rules of Ct., Rule 3.1590*].

For forms of findings of fact and conclusions of law, see Ch. 529, *Statement of Decision*].

Plaintiff may appeal from the interlocutory judgment in the same manner and within the same time as is now or may be hereafter provided by law for appeals from judgments [*Code Civ. Proc. § 597*].

For forms and procedure for appeals from judgments, see Ch. 40, *Appeal: An Overview* , et seq.

[2] Decision for Plaintiff

If the decision of the court, or the verdict of the jury, on the special defense or defenses tried separately is in favor of the plaintiff, trial of the other issues is had either on the court's own motion or on the motion of any party, and judgment is entered thereon in the same manner and with the same effect as if the issues in the case had been tried at one time [*Code Civ. Proc. § 597*].

NOTE:

Form and Timing of Motion. *Code Civ. Proc. § 597* does not specify the procedure or time for making this motion. Considerations such as the nature of the remaining issues, the amount of discovery necessary, and the court's calendaring procedure will dictate whether a noticed motion is necessary and whether the motion is properly brought before the same judge that presided at the trial of the special defense.

COMMENT:

Standing. Any party may move for trial of the other issues, and counsel may wish to consider any tactical advantages in doing so [*Code Civ. Proc. § 597*].

In that event any and all decisions or verdicts on the special defenses, and all rulings on the trial are deemed excepted to and may be reviewed on motion for a new trial or on appeal from the judgment [*Code Civ. Proc. § 597*].

COMMENT:

If Decision for Plaintiff Was Improper. If the decision of the court, or the verdict of the jury, is in favor of the plaintiff, consider petitioning for a writ of prohibition to prevent the court from further proceedings in the matter if the judgment in favor of plaintiff is improper. For discussion and forms for filing for a writ of prohibition, *see* Ch. 358, *Mandate and Prohibition* ; California Points And Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPretrial MattersSeparate Trials

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1-3 California Forms of Pleading and Practice--Annotated § 3.113

§ 3.113 Separate Trial of Special Defenses to Cross Complaint

The provisions of *Code Civ. Proc. § 597*, discussed throughout Part F, § 3.110 et seq., also apply to the trial of special defenses pleaded in an answer to a cross complaint or to a demurrer to a cross complaint based on another action pending pursuant to *Code Civ. Proc. § 430.10* [*Code Civ. Proc. § 597*].

If the decision of the court or the verdict of the jury on the special defense or defenses is in favor of the cross defendant, no further trial is had on the issues raised by the cross complaint, but trial of the other issues in the action is had either on the court's own motion or on the motion of any party, and after the trial of those issues such judgment is entered in the action as is justified by the decision or verdict on those other issues, considered in connection with the decision or verdict on the trial of the affirmative defense raised in the answer to the cross complaint [*Code Civ. Proc. § 597*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPretrial MattersSeparate TrialsCivil ProceduresPleading & PracticePleadingsComplaintsCross-Complaints

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1-3 California Forms of Pleading and Practice--Annotated § 3.114

§ 3.114 Medical Malpractice Actions

A special rule applies in actions against some health care professionals based on their alleged professional negligence or for rendering professional services without consent or for error or ommission in their practice, if the answer pleads that the action is barred by the statute of limitations. The rule applies in actions against the following professionals [*Code Civ. Proc. § 597.5*]:

(1) Physician or surgeon,

(2) Dentist,

(3) Registered nurse,

(4) Dispensing optician,

(5) Optometrist,

(6) Registered physical therapist,

(7) Podiatrist,

(8) Licensed psychologist,

(9) Osteopathic physician and surgeon,

(10) Chiropractor,

(11) Clinical laboratory bioanalyst,

(12) Clinical laboratory technologist, or

(13) Veterinarian.

The rule also applies to actions against a licensed hospital as the employer of any such person. In these cases, if any party so moves or the court on its own motion requires, the issues raised by the pleading of the statute of limitations must be tried separately and before any other issues in the case are tried. If the issue raised by the statute of limitations is finally determined in favor of the plaintiff, the remaining issues are then tried [*Code Civ. Proc. § 597.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPretrial MattersSeparate TrialsTortsMalpractice & Professional LiabilityHealthcare Providers

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1-3 California Forms of Pleading and Practice--Annotated §§ 3.115-3.129

[Reserved]

§§ 3.115[Reserved]

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A. Lack Of Capacity To Sue

1-3 California Forms of Pleading and Practice--Annotated § 3.130

§ 3.130 Related Matthew Bender Publications

For memoranda of points and authorities relating to forms in this part, see California Points and Authorities, Ch. 10, *Abatement and Survival of Actions*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedureParticiesCapacity of PartiesGeneral Overview

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1-3 California Forms of Pleading and Practice--Annotated § 3.131

§ 3.131 State Statutes

[1] Appointment of Personal Representatives

Guardian ad litem. *Code Civ. Proc. §§ 372-373.5*

Limited conservators for developmentally disabled adults. *Prob. Code §§ 1420, 1800-1844*

Guardian. *Prob. Code §§ 1510-1543, 2250-2258*

Conservator. *Prob. Code §§ 1800-1844*

Personal representative. *Prob. Code §§ 8400-8577*

[2] Corporations and Other Businesses

Failure to publish and file fictitious business name statement. *Bus. & Prof. Code § 17918*

Failure to file information statement. *Corp. Code § 1502*

Qualification of foreign corporation to transact intrastate business. *Corp. Code §§ 2105-2107, 2115(b), 2117, 2203(a), (b), 2204-2206*

Failure to file franchise tax return. *Rev. & Tax Code § 23301.5*

Forfeiture provisions of *Rev. & Tax. Code §§ 23301, 23301.5, 23775* as only applicable to foreign corporation required to qualify to do business [*see Corp. Code § 2105*] if it has in fact qualified with the Secretary of State. *Rev. & Tax. Code § 23301.6*

Revival of powers. *Rev. & Tax Code §§ 23305-23305c* (franchise tax)

Assumption of liability, a bond, deposit, or other security for taxpayer's liability that is acceptable to Franchise Tax Board as alternative to payment required for revivor or relief from voidability. *Rev. & Tax. Code § 23305.2*

Penalty for exercising corporate powers after suspension or forfeiture. *Rev. & Tax Code § 19719*

[3] Insane and Incompetent Persons

Capacity to contract. *Civ. Code §§ 38, 1556, 1557*

Liability for torts. *Civ. Code § 41*

Compromise of claim. *Prob. Code §§ 3600-3602, 3610-3612*

Judicial commitments. *Welf. & Inst. Code §§ 6250-6825*

[4] Minors

Actions by minors. *Code Civ. Proc. § 372*; *Fam. Code § 6601*

Minors defined. *Fam. Code § 6500*

Capacity to contract. *Fam. Code § 6701*

[5] Pleading

Lack of capacity as ground for objection. *Code Civ. Proc. § 430.10(b)*

Raising objection by demurrer or affirmative defense. *Code Civ. Proc. § 430.30*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePartiesFictitious NamesCivil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedurePartiesCapacity of PartiesExecutorsCivil ProcedurePartiesCapacity of PartiesRepresentatives

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A. Lack Of Capacity To Sue

1-3 California Forms of Pleading and Practice--Annotated § 3.132

§ 3.132 Decisions

[1] Allegations of Capacity

Unless governing statute states otherwise, complaint as not required to allege plaintiff's capacity to sue; if lack of capacity does not appear on face of complaint, it cannot be raised by demurrer, but is special plea in abatement. *Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 994 n.4, 277 Cal. Rptr. 517, 803 P.2d 370*

Appointment of guardian ad litem as necessary allegation in complaint brought in behalf of incompetent. *Security Loan etc. Co. v. Kauffman (1895) 108 Cal. 214, 222-223, 41 P. 467*

Failure to allege compliance with fictitious business name statutes as ground for demurrer. *Pleaters & Stitchers Assn. v. Davis (1934) 140 Cal. App. 403, 406, 35 P.2d 401*

Alleging compliance with Corp. Code § 6403 (qualification of foreign corporation; *now see Corp. Code § 2105*) as unnecessary for complaint to state cause of action. *H.D. Haley & Co. v. McVay (1924) 70 Cal. App. 438, 440, 233 P. 409*

[2] Definition

Lack of capacity as questioning whether plaintiff is free from legal disabilities. *Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 18-19, 108 P.2d 906*

[3] Grounds for Abatement

Failure to file information statement with Secretary of State required by *Corp. Code § 1502* as grounds for abatement. *Palm Valley Homeowners Assn., Inc. v. Design MTC (2000) 85 Cal. App. 4th 553, 559-561, 102 Cal. Rptr. 2d 350*

Defense of suspension of corporate powers as ground for abatement. *Traub Co. v. Coffee Break Service, Inc. (1967) 66 Cal. 2d 368, 370-371, 57 Cal. Rptr. 846, 425 P.2d 790* ; *Sade Shoe Co. v. Oschin & Snyder (1990) 217 Cal. App. 3d 1509, 1515, 266 Cal. Rptr 619*

Failure to comply with fictitious business name statutes as ground for abatement. *Kadota Fig Asso. of Producers v. Case-Swayne Co. (1946) 73 Cal. App. 2d 796, 798-805, 167 P.2d 518* (construing former *Civ. Code § 2468*; *now see Bus. & Prof. Code § 17918*)

[4] Lack of Capacity Distinguished

Lack of capacity as distinguished from lack of standing. *Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6* ; *Oakland Municipal Improvement League v. City of Oakland (1972) 23 Cal. App. 3d 165, 170, 100 Cal. Rptr. 29*

Lack of capacity as distinguished from failure to state cause of action in particular plaintiff. *Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 19, 108 P.2d 906*

[5] Pleading

Alleging that plaintiff has no capacity to sue, without specifying cause, as conclusion of law tendering no issue of fact. *Ontario State Bank v. Tibbits (1889) 80 Cal. 68, 69-70, 22 P. 66* ; *Kadota Fig Asso. of Producers v. Case-Swayne Co. (1946) 73 Cal. App. 2d 796, 805, 167 P.2d 518*

Objecting on ground of lack of capacity on information and belief as improper. *Home Owners' Loan Corp. v. Gordon (1939) 36 Cal. App. 2d 189, 192, 97 P.2d 845*

[6] Waiver

Revival of corporate powers prior to trial as sufficient. *Hall v. Citizens Nat. Tr. & Sav. Bank of Los Angeles (1942) 53 Cal. App. 2d 625, 631, 128 P.2d 545*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPartiesCapacity of PartiesGeneral OverviewCivil ProceduresPartiesFictitious NamesCivil ProceduresPartiesCapacity of PartiesGuardians

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1-3 California Forms of Pleading and Practice--Annotated § 3.133

§ 3.133 Text References

Witkin, California Procedure, vol. 4, *Pleading*, §§ 60-102; vol. 5, *Pleading*, §§ 923, 1056-1058 (4th ed. 1997)

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1-3 California Forms of Pleading and Practice--Annotated §§ 3.134-3.149

[Reserved]

§§ 3.134[Reserved]

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B. Another Action Pending

1-3 California Forms of Pleading and Practice--Annotated § 3.150

§ 3.150 Related Matthew Bender Publications

For memoranda of points and authorities relating to forms in this part, see California Points and Authorities, Ch. 10, *Abatement and Survival of Actions* , Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* and Ch. 133, *Jurisdiction: Subject Matter Jurisdiction* , Ch. 150, *Mandate and Prohibition*

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B. Another Action Pending

1-3 California Forms of Pleading and Practice--Annotated § 3.151

§ 3.151 State Statutes

Civil action brought by person allegedly injured or killed while or after committing specified crimes on property as abated during pendency of criminal action against plaintiff. *Civ. Code § 847(e)*

Another action pending as ground for objection to complaint. *Code Civ. Proc. § 430.10(c)*

Raising objection of another action pending by demurrer or affirmative defense. *Code Civ. Proc. § 430.30*

Procedure when defense of another action pending is raised in answer or demurrer. *Code Civ. Proc. § 597*

Action as pending from commencement to final determination on appeal. *Code Civ. Proc. § 1049*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrers

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1-3 California Forms of Pleading and Practice--Annotated § 3.152

§ 3.152 Decisions

[1] Allegations

Essential allegations of defense of another action pending. *California Trust Co. v. Gustason (1940) 15 Cal. 2d 268, 273, 101 P.2d 74*

[2] Determining Priority of Jurisdiction

Test of priority of jurisdiction as being service of summons and copy of complaint. *Robinson v. Superior Court (1962) 203 Cal. App. 2d 263, 267, 21 Cal. Rptr. 475* ; *see also Mungia v. Superior Court (1964) 225 Cal. App. 2d 280, 283, 37 Cal. Rptr. 285* ; *Apartments, Inc. v. Trott (1959) 172 Cal. App. 2d 7, 14, 342 P.2d 32* ; *Myers v. Superior Court (1946) 75 Cal. App. 2d 925, 930, 172 P.2d 84*

[3] Dismissal of Proceedings

Trial court's dismissal of proceedings with prejudice on ground another action was pending as improper when one action was dissolution proceeding between plaintiff and defendant husband and second proceeding included issue of property rights between plaintiff and other defendants who were not parties to dissolution; cause of action in second proceeding between plaintiff and defendant husband asserting community property interest as subject to abatement. *Beehler v. Beehler (1979) 100 Cal. App. 3d 376, 382-385, 161 Cal. Rptr. 30*

[4] Interlocutory Judgment

Interlocutory judgment as proper when defense of another action pending is established *Lord v. Garland (1946) 27 Cal. 2d 840, 851, 168 P.2d 5* ; *Ferreira v. Keller (1970) 4 Cal. App. 3d 292, 294-295, 84 Cal. Rptr. 253*

Provisions of *Code Civ. Proc. § 597* requiring interlocutory judgment when defense of another action pending is raised by answer as applying when defense is raise by demurrer. *Lord v. Garland (1946) 27 Cal. 2d 840, 851, 168 P.2d 5*

Plea in abatement essentially constitutes request, not for final judgment terminating action, but for interlocutory judgment continuing action until disposition of first action. *Lawyers Title Ins. Corp. v. Superior Court (1984) 151 Cal. App. 3d 455, 459, 199 Cal. Rptr. 1*

[5] Prior Action Pending in State Court

Superior court and administrative board as possessing concurrent jurisdiction to determine jurisdiction, but first-filed superior court action takes priority. *Aetna Casualty & Surety Co. v. Aceves (1991) 233 Cal. App. 3d 544, 552-554, 284 Cal. Rptr. 477*

Proceeding under *Corp. Code § 709* challenging validity of election of corporation directors was subject to abatement based on pending proceeding for dissolution of corporation when both actions depended on resolution of same issues. *Shahin v. Wawro (1982) 136 Cal. App. 3d 749, 754, 186 Cal. Rptr. 446*

[6] Similarity Between Actions

Where the pleading in a second case discloses the same parties and the same transaction and include additional theories of liability but the additional theories are not "different wrongs" that give rise to different primary rights, but rather different ways of committing the same wrongs, a demurrer will be sustained. *Bescos v. Bank of America (2003) 105 Cal. App. 4th 378, 397, 129 Cal. Rptr. 2d 423*

[7] Stay of Proceedings for Other Action Pending

When prior action is pending in federal court or court of another state, stay of subsequent action as discretionary and matter of comity. *Farmland Irrigation Co. v. Dopplmaier (1957) 48 Cal. 2d 208, 215, 308 P.2d 732* ; *Thomson v. Continental Ins. Co. (1967) 66 Cal. 2d 738, 747, 59 Cal. Rptr. 101, 427 P.2d 765*

When action is pending in California state court of competent jurisdiction, stay of subsequent state action as required. *Scott v. Industrial Acci. Com. (1956) 46 Cal. 2d 76, 81, 293 P.2d 18* ; *Browne v. Superior Court (1940) 16 Cal. 2d 593, 597, 107 P.2d 1*

Proper order on sustaining demurrer on ground of another action pending is not dismissal, but abatement of further proceedings pending termination of first action. *Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 788, 274 Cal. Rptr. 147*

Court's stay of state action based on related federal action that had been brought by attorney representing plaintiff in state action as abuse of discretion when plaintiff was not party to federal action and would have to retain new counsel to bring action in federal court. *Gregg v. Superior Court (1987) 194 Cal. App. 3d 134, 136-138, 239 Cal. Rptr. 380*

Order of abatement as issuing as matter of right, not discretion, when conditions for its issuance exist. *Lawyers Title Ins. Corp. v. Superior Court (1984) 151 Cal. App. 3d 455, 460, 199 Cal. Rptr. 1*

Stay by California court as proper where another action is pending in foreign state wherein at least a good portion of the issue should be concluded so that trial in California will be simplified. *Belnap Freight Lines, Inc. v. Petty (1975) 46 Cal. App. 3d 159, 163, 119 Cal. Rptr. 907*

Trial court as correctly refusing to stay trial of action seeking injunction preventing meat packer from selling underweight bacon, pending determination of similar action in different county. *Christensen v. Superior Court (1973) 32 Cal. App. 3d 749, 752-755, 108 Cal. Rptr. 459*

[8] Waiver of Defense

When defendant did not plead pendency of first action in abatement of second action, assuming later filing violated rule against splitting a cause of action, defendant waived defense. *Hamilton v. Asbestos Corp (2000) 22 Cal. 4th 1127, 1146, 95 Cal. Rptr. 2d 701, 998 P.2d. 403*

Plea of abatement of another action as pending as generally considered waived if not pleaded. *Hayworth v. City of Oakland (1982) 129 Cal. App. 3d 723, 728 n.2, 181 Cal. Rptr. 214*

[9] When Defense Is Available

Defense of another action pending as available only when judgment in prior action would bar as res judicata issues in second action. *Lord v. Garland (1946) 27 Cal. 2d 840, 848-849, 168 P.2d 5*

Test for sameness of causes of action. *Lord v. Garland (1946) 27 Cal. 2d 840, 848-849, 168 P.2d 5*

Motion for abatement as improperly denied on ground that first action for declaratory relief could not afford relief sought in second action for damages, since nothing prevented filing cross complaint for damages in first action. *Lawyers Title Ins. Corp. v. Superior Court (1984) 151 Cal. App. 3d 455, 459-460, 199 Cal. Rptr. 1*

Defense of another action pending as not available unless parties, issues, and causes of action are same. *Hayworth v. City of Oakland (1982) 129 Cal. App. 3d 723, 728 n.2, 181 Cal. Rptr. 214*

[10] Writ of Mandate

Mandate as inappropriate when parties are California residents, California action was filed first, and California has greater interest in the matter. *Engle v. Superior Court (1956) 140 Cal. App. 2d 71, 83, 294 P.2d 1026*

Writ of mandate as available to stay second action when prior action pending in court of another state. *Simmons v. Superior Court (1950) 96 Cal. App. 2d 119, 133, 214 P.2d 844* ; *see also* *Thomson v. Continental Ins. Co. (1967) 66 Cal. 2d 738, 747, 59 Cal. Rptr. 101, 427 P.2d 765*

[11] Writ of Prohibition

Writ of prohibition to restrain proceeding involving same parties and subject matter when another tribunal has just assumed jurisdiction. *Scott v. Industrial Acci. Com. (1956) 46 Cal. 2d 76, 81, 293 P.2d 18* ; *Browne v. Superior Court (1940) 16 Cal. 2d 593, 597, 107 P.2d 1*

Writ of prohibition as available to restrain second action when prior action is pending in California state court. *Greene v. Superior Court (1951) 37 Cal. 2d 307, 310, 231 P.2d 821* ; *Browne v. Superior Court (1940) 16 Cal. 2d 593, 597, 107 P.2d 1* ; *Lawyers Title Ins. Corp. v. Superior Court (1984) 151 Cal. App. 3d 455, 460, 199 Cal. Rptr. 1*

Nonidentical parties or remedies in two actions as not precluding application of exclusive concurrent jurisdiction rule if court can bring before it all necessary parties, litigate all issues, and grant all relief to which any party might be entitled. *Lawyers Title Ins. Corp. v. Superior Court (1984) 151 Cal. App. 3d 455, 460, 199 Cal. Rptr. 1* ; *Childs v. Eltinge (1973) 29 Cal. App. 3d 843, 850, 105 Cal. Rptr. 864* ; see *Myers v. Superior Court (1946) 75 Cal. App. 2d 925, 931, 172 P.2d 84*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPartiesCapacity of PartiesGeneral OverviewCivil ProceduresRemediesWritsCommon Law WritsProhibitionCivil ProceduresRemediesWritsCommon Law WritsMandamusCivil ProceduresJudgmentsEntry of JudgmentsStays of ProceedingsMultiple Claims & Parties

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B. Another Action Pending

1-3 California Forms of Pleading and Practice--Annotated § 3.153

§ 3.153 Text References

Witkin, California Procedure, vol. 5, *Pleading*, §§ 924, 1064 et seq. (4th ed. 1997)

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1-3 California Forms of Pleading and Practice--Annotated §§ 3.154-3.169

[Reserved]

§§ 3.154[Reserved]

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C. Defect Or Misjoinder Of Parties

1-3 California Forms of Pleading and Practice--Annotated § 3.170

§ 3.170 Related Matthew Bender Publications

For memoranda of points and authorities relating to forms in this part, see California Points and Authorities, Ch. 10, *Abatement and Survival of Actions* , Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 168, *Parties*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPartiesJoinderMisjoinder

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1-3 California Forms of Pleading and Practice--Annotated § 3.171

§ 3.171 State Statutes

[1] Grounds of Objection

Raising objection by demurrer or answer. *Code Civ. Proc. §§ 430.10, 430.30*

Lack of jurisdiction as ground of objection to complaint or cross complaint. *Code Civ. Proc. § 430.10(a)*

Defect or misjoinder as ground of objection to complaint or cross complaint. *Code Civ. Proc. § 430.10(d)*

[2] Joinder of Parties

Permissive joinder of plaintiffs. *Code Civ. Proc. § 378*

Permissive joinder of defendants. *Code Civ. Proc. § 379*

Compulsory joinder of parties. *Code Civ. Proc. § 389*

Joinder of persons having interest in property. *Code Civ. Proc. § 389.5*

[3] Method of Joinder

Unwilling plaintiff made defendant. *Code Civ. Proc. § 382*

Bringing in new parties by cross complaint. *Code Civ. Proc. §§ 428.10(b), 428.20*

[4] Waiver

Waiver of objection other than lack of jurisdiction if not raised by demurrer or answer. *Code Civ. Proc. § 430.80(a)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePartiesJoinderPermissive JoinderCivil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticePleadingsAnswers

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1-3 California Forms of Pleading and Practice--Annotated § 3.172

§ 3.172 Decisions

[1] Definition

Indispensable party defined. *Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 521, 106 P.2d 879* (decided under former *Code Civ. Proc. § 389* prior to its 1957 amendment)

[2] Indispensable Party

Person whose interest, duty, or rights will inevitably be affected by judgment as indispensable and, unless joined as party, will deprive court of jurisdiction to proceed. *Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 521, 106 P.2d 879* (decided under former *Code Civ. Proc. § 389*)

[3] Joinder as Jurisdictional

Nonjoinder of indispensable party as jurisdictional defect [*Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 522, 106 P.2d 879]* to be raised at any time during trial or on appeal. *Covarrubias v. James (1971) 21 Cal. App. 3d 129, 134-135, 98 Cal. Rptr. 257* ; *Guerra v. Packard (1965) 236 Cal. App. 2d 272, 294, 46 Cal. Rptr. 25* ; *Irwin v. City of Manhattan Beach (1964) 227 Cal. App. 2d 634, 637, 38 Cal. Rptr. 875*

[4] Misjoinder

Dismissal as proper when demurrer for misjoinder of plaintiffs sustained with leave to amend and no amendment filed. *Coleman v. Twin Coast Newspaper, Inc. (1959) 175 Cal. App. 2d 650, 654, 346 P.2d 488*

Leave to amend as proper when there is misjoinder of plaintiffs. *Adams v. Albany (1954) 124 Cal. App. 2d 639, 646, 269 P.2d 142*

[5] Necessary Party

Joinder of persons necessary but not indispensable to valid judgment in action as necessary to carry out policy of complete determination and to avoid multiplicity of suits. *Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 523, 106 P.2d 879* (decided under former *Code Civ. Proc. § 389*); *Peabody Seating Co. v. Superior Court (1962) 202 Cal. App. 2d 537, 544, 20 Cal. Rptr. 792* (decided under former *Code Civ. Proc. § 389*)

[6] Policy in Favor of Joinder

Policy in favor of joinder as promoting complete determination of action and avoiding multiplicity of suits. *Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 523, 106 P.2d 879* ; *Peabody Seating Co. v. Superior Court (1962) 202 Cal. App. 2d 537, 544, 20 Cal. Rptr. 792*

[7] Waiver

Waiver of defective joinder of plaintiffs. *Barnes v. Rockhold (1958) 160 Cal. App. 2d 393, 396, 325 P.2d 621*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePartiesJoinderMisjoinderCivil ProcedurePartiesJoinderIndispensable Parties

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1-3 California Forms of Pleading and Practice--Annotated § 3.173

§ 3.173 Text References

Witkin, California Procedure, vol. 5, *Pleading*, §§ 1062-1063 (4th ed. 1997)

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1-3 California Forms of Pleading and Practice--Annotated §§ 3.174-3.189

[Reserved]

§§ 3.174[Reserved]

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1-3 California Forms of Pleading and Practice--Annotated § 3.190

§ 3.190 Related Matthew Bender Publications

For memoranda of points and authorities relating to forms in this part, see California Points and Authorities, Ch. 10, *Abatement and Survival of Actions*

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1-3 California Forms of Pleading and Practice--Annotated § 3.191

§ 3.191 State Statutes

Objection for failure to state cause of action. *Code Civ. Proc. § 430.10(e)*

Raising objection by answer or demurrer. *Code Civ. Proc. § 430.30*

Separate trial of defense on grounds constituting abatement. *Code Civ. Proc. § 597*

Person charged with criminal offense by accusatory pleading as prohibited from suing peace officer or public entity employer for damages based on peace officer's conduct with relation to offense while charges are pending before trial court; exceptions; filing of claim with public entity as not prohibited, and time for filing claim pursuant to *Gov. Code § 911.2* as not tolled. *Gov. Code § 945.3*

Claim against public entity as prerequisite to suit. *Gov. Code § 945.4*

Claim against estate as barred if not filed with court; exceptions. *Prob. Code §§ 9002, 9150(b), 9390*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProceduresPretrial MattersSeparate TrialsCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsAnswers

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1-3 California Forms of Pleading and Practice--Annotated § 3.192

§ 3.192 Decisions

[1] Dismissal

Dismissal of action on ground of prematurity as not barring subsequent action after cause matures. *Nevills v. Shortridge (1905) 146 Cal. 277, 278, 79 P. 972*

[2] Failure to State Cause of Action

Prematurity as grounds for objection for failure to state cause of action. *Kelley v. Upshaw (1952) 39 Cal. 2d 179, 183-189, 246 P.2d 23* ; *Bank of Italy, etc., Assn. v. Bentley (1933) 217 Cal. 644, 658, 20 P.2d 940* ; *Landis v. Morrissey (1886) 69 Cal. 83, 87, 10 P. 258*

[3] Premature Actions

Tort action against decedent's estate prior to presentation and rejection of creditor's claim as premature. *Radar v. Rogers (1957) 49 Cal. 2d 243, 245-250, 317 P.2d 17*

Action on promissory note not yet due as premature. *Nevills v. Shortridge (1905) 146 Cal. 277, 278, 79 P. 972* ; *Gardner v. Shreve (1949) 89 Cal. App. 2d 804, 810, 202 P.2d 322*

Complaint for goods sold and delivered filed before payment due as premature. *Landis v. Morrissey (1886) 69 Cal. 83, 87, 10 P. 258*

Enactment of *Gov. Code § 946.6* as attempt by Legislature to eliminate trap for unwary and ignorant claimant against public entity and to alleviate harshness of strict compliance with claims presentation period by layperson. *Maisel v. San Francisco State University (1982) 134 Cal. App. 3d 689, 694-695, 184 Cal. Rptr. 694*

Arbitration award pending appeal as not enforceable by filing of new action. *Thriftimart, Inc. v. Superior Court (1962) 202 Cal. App. 2d 421, 424, 21 Cal. Rptr. 19*

Action to recover stolen property filed against estate before claim was presented as premature. *Fireman's Fund Indem. Co. v. Knorr (1953) 117 Cal. App. 2d 761, 766, 256 P.2d 1005*

Claim for salary bonus before date due as premature. *Berkowitz v. Palm Springs etc. La Quinta Dev. Co. (1940) 37 Cal. App. 2d 249, 251, 99 P.2d 372*

[4] Waiver

[a] Objection Untimely

Prematurity as waived unless seasonably raised. *Moore v. Fellner (1958) 50 Cal. 2d 330, 343, 325 P.2d 857* ; *Kelley v. Upshaw (1952) 39 Cal. 2d 179, 183-187, 246 P.2d 23* ; *Seches v. Bard (1932) 215 Cal. 79, 81, 8 P.2d 835*

Objection of prematurity interposed after defect has ceased to exist as improper. *Moore v. Fellner (1958) 50 Cal. 2d 330, 343, 325 P.2d 857*

Defense that action is prematurely brought as disfavored objection in nature of "plea in abatement" that must exist at time it is raised or be disregarded. *Radar v. Rogers (1957) 49 Cal. 2d 243, 250, 317 P.2d 17* ; see *Virgin v. State Farm Fire & Casualty Co. (1990) 218 Cal. App. 3d 1372, 1375, 267 Cal. Rptr. 704*

Objection of prematurity raised for first time on motion for nonsuit as improper. *Bollinger v. National Fire Ins. Co. (1944) 25 Cal. 2d 399, 405, 154 P.2d 399*

[b] Prematurity Not Specified

Affirmative defense that complaint fails to state cause of action without specifying prematurity and its cause as insufficient to raise objection and as waiver of defense. *Kelley v. Upshaw (1952) 39 Cal. 2d 179, 183-189, 246 P.2d 23*

Demurrer on ground that complaint fails to state cause of action without specifying cause of prematurity as insufficient to raise objection and as waiver of defense. *Fireman's Fund Indem. Co. v. Knorr (1953) 117 Cal. App. 2d 761, 762-767, 256 P.2d 1005*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsFailures to State Claims

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1-3 California Forms of Pleading and Practice--Annotated § 3.193

§ 3.193 Text References

Witkin, California Procedure, vol. 5, *Pleading*, § 1077 et seq. (4th ed. 1997)

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1-3 California Forms of Pleading and Practice--Annotated §§ 3.194-3.209

[Reserved]

§§ 3.194[Reserved]

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1-3 California Forms of Pleading and Practice--Annotated § 3.210

§ 3.210 Related Matthew Bender Publications

For memoranda of points and authorities relating to forms in this part, see California Points and Authorities, Ch. 10, *Abatement and Survival of Actions* , and Ch. 143, *Limitation of Actions* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePretrial MattersSeparate Trials

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1-3 California Forms of Pleading and Practice--Annotated § 3.211

§ 3.211 State Statutes

Motion for separate trial of special defense. *Code Civ. Proc. § 597*

Motion for separate trial of defense of statute of limitations in medical malpractice action. *Code Civ. Proc. § 597.5*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePretrial MattersSeparate Trials

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1-3 California Forms of Pleading and Practice--Annotated § 3.212

§ 3.212 Decisions

[1] Separate Trial

[a] In General

Failure to insist on separate trial of special defense does not constitute waiver of defense. *Kubon v. Kubon (1958) 51 Cal. 2d 229, 233, 331 P.2d 636*

"Answer" as used in *Code Civ. Proc. § 597* is broad enough to include demurrer. *Lord v. Garland (1946) 27 Cal. 2d 840, 850-851, 168 P.2d 5*

[b] Decision for Defendant

Judgment for defendant after trial of special defense is improper except when special defense constitutes bar to entire action. *Radar v. Rogers (1957) 49 Cal. 2d 243, 245-250, 317 P.2d 17* ; *Crofoot v. Crofoot (1955) 132 Cal. App. 2d 794, 795-799, 283 P.2d 283*

Procedure when decision is in favor of defendant on special defense that does not bar entire action. *Evans v. Horton (1953) 115 Cal. App. 2d 281, 287, 251 P.2d 1013*

[c] Decision for Plaintiff

Resolution in favor of plaintiff after bifurcated trial of either the existence of special defenses or the issue of liability is not final judgment and, therefore, is not appealable until all issues have been decided. *Menchaca v. Farmers Ins. Exchange (1976) 59 Cal. App. 3d 117, 124, 130 Cal. Rptr. 607*

Decision in favor of plaintiff after separate trial of special defense places case in same posture as if defense had never

been raised. *Woodhouse v. Pacific Elec. Ry. Co. (1952) 112 Cal. App. 2d 22, 25, 245 P.2d 701*

[2] Special Defenses

Even if special litigation committee defense did not meet prerequisites under *Code Civ. Proc. § 597* for bifurcation, authority for bifurcation concerning such defense exists under *Code Civ. Proc. § 1048(b)*; moreover, trial court's discretion to regulate order of proof under *Evid Code § 320* affords sufficient authority to order separate trial of affirmative defense. *Finley v. Superior Court (2000) 80 Cal. App. 4th 1152, 1162, 96 Cal. Rptr. 2d 128*

Neither official information privilege of *Evid. Code § 1040* nor any other evidentiary privilege is special defense separately triable under *Code Civ. Proc. § 597*. *Rubin v. City of Los Angeles (1987) 190 Cal. App. 3d 560, 574-575, 235 Cal. Rptr. 516*

Effect of separate trial of special defense directed to less than all causes of action. *Crofoot v. Crofoot (1955) 132 Cal. App. 2d 794, 798, 283 P.2d 283*

Compromise and release as special defense for separate trial by jury. *Jordan v. Guerra (1944) 23 Cal. 2d 469, 471-478, 144 P.2d 349* ; *Silver v. Shemanski (1949) 89 Cal. App. 2d 520, 530, 201 P.2d 418*

Illegality of contract as special defense for separate trial by jury. *McCarthy v. Superior Court (1946) 73 Cal. App. 2d 943, 944, 167 P.2d 744*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPretrial MattersSeparate TrialsCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsAnswers

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1-3 California Forms of Pleading and Practice--Annotated § 3.213

§ 3.213 Text References

Witkin, California Procedure, vol. 7, *Trial*, §§ 164-167 (4th ed. 1997)

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1-3 California Forms of Pleading and Practice--Annotated §§ 3.214-3.229

[Reserved]

§§ 3.214[Reserved]

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PART IV. PROCEDURAL CHECKLIST

1-3 California Forms of Pleading and Practice--Annotated § 3.230

§ 3.230 Moving Party's Checklist--Motion for Separate Trial of Special Defense

☐ Review the entire file, including opposing party's pleadings and all interrogatories and depositions [*see § 3.113*], to determine that the special defense as pleaded is one for which separate trial is available, such as [*see §§ 3.111[1], 3.114*]:

- ☐ The action is barred by the statute of limitations,
- ☐ The action is barred by a prior judgment,
- ☐ Another action is pending on the same cause of action, or
- ☐ Any other defense not involving the merits of the plaintiff's cause of action but constituting a bar or ground of abatement to the prosecution of the action.

☐ Determine that the defect constituting the bar or ground of abatement still exists.

☐ Determine whether to request jury trial of special defense, considering:

- ☐ Whether jury trial is available for the special defense.
- ☐ If so, whether trial by the court without jury is nonetheless more desirable.

CAUTION:
Request Jury Trial. Unless a jury is requested at the time the cause is set for trial, the right to a jury trial

may be waived [*see Code Civ. Proc. § 631(d)(4)*]. If requesting jury trial, counsel should consult local practice to ascertain the procedure for making the request with respect to a separate trial of a special defense.

- ☐ Tentatively select the most desirable trial date and several alternative dates. In doing so, consider:
  - ☐ Estimated length of trial.
  - ☐ Local court rules, if any.
- ☐ Determine the manner and time for making the motion.
- ☐ Prepare papers.
  - ☐ Notice of motion [for forms, *see §§ 3.340, 3.341*].
  - ☐ Points and authorities supporting motion.
  - ☐ Proposed order [for form, *see § 3.342*].
  - ☐ Points and authorities supporting substantive defense.
- ☐ If the motion is granted, present order to the judge for signature and prepare for trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPretrial MattersSeparate Trials

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1-3 California Forms of Pleading and Practice--Annotated § 3.231

§ 3.231 Opposing Party's Checklist--Motion for Separate Trial of Special Defense

☐ Review moving party's notice of motion, memorandum of points and authorities, and supporting affidavits or declarations and determine if opposition to the motion is appropriate.

☐ Review the applicable statute and the pleading in which the special defense was raised to determine whether the statutory requirements have been met.

☐ Review the entire case file, including interrogatories and depositions, to determine the source and nature of affidavits or declarations in opposition to the motion.

☐ Prepare papers in opposition to motion.

☐ Points and authorities.

☐ Declarations in support of opposition.

☐ Proposed order.

☐ If the motion is denied, an order denying the motion is usually prepared by opposing counsel.

☐ If the motion is granted, prepare for trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePretrial MattersSeparate Trials

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1-3 California Forms of Pleading and Practice--Annotated § 3.232

§ 3.232 Proceedings After Separate Trial of Special Defense

[1] Plaintiff's Checklist

☐ If the decision of the court, or the verdict of the jury, is in favor of the defendant, consider appealing from any final judgment entered thereon [*see § 3.112[1]*].

☐ If the decision of the court, or the verdict of the jury, is in favor of the plaintiff, move for trial of the remaining issues [*see § 3.112[2]*].

[2] Defendant's Checklist

☐ If the decision of the court, or the verdict of the jury, on the special defense, other than another action pending, is in favor of the defendant pleading it, prepare the appropriate written judgment, and if desired, findings of fact and conclusions of law [*see § 3.112[1]*].

☐ If the defense of another action pending is sustained, and no other special defense is sustained, prepare an interlocutory judgment [for form, *see § 3.343*] and present it to the court for signature [for discussion, *see § 3.112[1]*].

☐ If the decision of the court, or the verdict of the jury, is in favor of the plaintiff, consider [*see § 3.112[2]*]:

- ☐ Appealing the judgment, and
- ☐ Petitioning for writ of prohibition to prevent the court from futher proceedings in the matter pending appeal.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePretrial MattersSeparate Trials

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1-3 California Forms of Pleading and Practice--Annotated §§ 3.233-3.249

[Reserved]

§§ 3.233[Reserved]

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PART V. FORMS
A. Lack Of Capacity To Sue

1-3 California Forms of Pleading and Practice--Annotated § 3.250

§ 3.250 Demurrer [Code Civ. Proc. § 430.30(a)] for Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Failure of Plaintiff Suing in Fictitious Business Name to Allege Compliance With Fictitious Name Statute [Bus. & Prof. Code § 17918]

[1] FORM Demurrer [Code Civ. Proc. § 430.30(a)] for Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Failure of Plaintiff Suing in Fictitious Business Name to Allege Compliance With Fictitious Name Statute [Bus. & Prof. Code § 17918]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DEMURRER OF _____
vs.	)	[*name*] TO COMPLAINT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

Defendant demurs to the complaint herein on the following ground:

Plaintiff does not have legal capacity to sue in that it appears on the face of the complaint, on page

_____ [*number*], in line _____ [*number*], that plaintiff is a person transacting business under a fictitious business name, and, on page _____ [*number*], in line _____ [*number*], that this action is on a contract made by plaintiff under that fictitious business name. The complaint does not allege that plaintiff has filed and published the fictitious business name statement as is required by *Sections 17915* and *17917 of the Business and Professions Code*.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

CAUTION:
A supporting memorandum and a notice of hearing on the demurrer [*see § 3.251*] must be filed with this demurrer [*Cal. Rules of Ct., Rules 1.5(b), 3.1100, 3.1103(b), 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form is for use to demur to a complaint on the ground that the plaintiff lacks capacity to sue due to failure to comply with the fictitious business name statute. It is to be used when the lack of capacity appears on the face of the complaint [*see Code Civ. Proc. § 430.30(a)*]. The form may also be used if the demurrer is based on matters of which the court will take judicial notice [*see Evid. Code §§ 451, 452*]. If the lack of capacity to sue does not appear either on the face of the complaint or from matters of which the court may or must take judicial notice, the objection may be raised by answer [*see Code Civ. Proc. § 430.30(b)*; *see § 3.253*].

[3] Suspension of Capacity

No person transacting business under a fictitious business name, or his assignee, may maintain any action on or on account of any contract made, or transaction had, in the fictitious business name in any court of California until the fictitious business name statement [*see Bus. & Prof. Code § 17913*] has been executed, filed, and published [*see Bus. & Prof. Code §§ 17914-17917*; *see § 3.33* 1].

[4] State Statutes

Fictitious business name statutes. *Bus. & Prof. Code §§ 17900-17930*

Failure to comply with fictitious business name statutes as resulting in lack of capacity to sue. *Bus. & Prof. Code § 17918*

Lack of capacity to sue as ground of objection to complaint or cross complaint. *Code Civ. Proc. § 430.10(b)*

Raising objections by demurrer. *Code Civ. Proc. § 430.30*

[5] California Rules of Court

Demurrers. *Cal. Rules of Ct., Rules 3.1100, 3.1103(c), 3.1113(a), 3.1320*

[6] Decisions

When plea in abatement consisting of plaintiff's failure to file certificate of doing business under fictitious name pursuant to former Civ. Code §§ 2466, *2468* [*now see Bus. & Prof. Code §§ 17901-17930*] is raised for first time during trial, judgment on merits as not reversed. *Tyrone v. Kelley (1973) 9 Cal. 3d 1, 13-14, 106 Cal. Rptr. 761, 507 P.2d 65*

Distinction between lack of capacity to sue and failure to state cause of action. *Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 18, 108 P.2d 906*

Effect of failure to comply with fictitious business name statutes. *Kadota Fig Asso. of Producers v. Case-Swayne Co. (1946) 73 Cal. App. 2d 796, 798-805, 167 P.2d 518* (construing former *Civ. Code § 2468*; *now see Bus. & Prof. Code § 17918*)

Failure to allege compliance with fictitious business name statutes as ground for demurrer. *Pleaters & Stitchers Assn. v. Davis (1934) 140 Cal. App. 403, 406, 35 P.2d 401*

[7] Text References

Witkin, California Procedure, vol. 5, *Pleading*, § 1061 (4th ed. 1997)

[8] Cross References

See generally Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

For memoranda of points and authorities relating to this form, see California Points and Authorities, Ch. 10, *Abatement and Survival of Actions* , and Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers

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1-3 California Forms of Pleading and Practice--Annotated § 3.251

§ 3.251 Notice of Hearing on Demurrer [Cal. Rules of Ct., Rules 3.1100, 3.1320(c)]

[1] FORM Notice of Hearing on Demurrer [Cal. Rules of Ct., Rules 301, 325(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF HEARING ON DEMURRER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

To Plaintiff _____ [*name*] and to his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that the demurrer served and filed herewith has been set for hearing on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [Department _____ of] the above-entitled court, located at _____ [*name of building or street address or both*], in _____ [*city*], _____ County, California.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

This form is for use by the demurring defendant to give notice to the plaintiff of the time and place of the hearing on the demurrer [*see Cal. Rules of Ct., Rule 3.1320(e)*].

[3] Notice of Hearing

A party filing a demurrer must serve and file with it a notice of hearing specifying a hearing date in accordance with the provisions of *Code Civ. Proc. § 1005* [*Cal. Rules of Ct., Rule 3.1320(c)*; *see § 3.13* 1].

[4] California Rules of Court

Notice of hearing on demurrer. *Cal. Rules of Ct., Rules 3.1110, 3.1320*.

[5] Cross References

See also *§ 3.250*.

For an alternative form of notice of hearing on demurrer, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPartiesCapacity of PartiesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrers

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1-3 California Forms of Pleading and Practice--Annotated § 3.252

§ 3.252 Demurrer [Code Civ. Proc. § 430.30(a)] for Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Action by Minor by Guardian ad Litem [Code Civ. Proc. § 372(a)] Prior to Appointment [Code Civ. Proc. § 373]

[1] FORM Demurrer [Code Civ. Proc. § 430.30(a)] for Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Action by Minor by Guardian ad Litem [Code Civ. Proc. § 372(a)] Prior to Appointment [Code Civ. Proc. § 373]

[*Caption. See § 3.250 1* .]

Defendant demurs to the complaint herein on the following ground:

Plaintiff _____ [*name*] does not have legal capacity to sue in that it appears on the face of the complaint on page _____ lines _____ that plaintiff is a minor suing by _____ [*name*], as guardian ad litem, and the complaint fails to allege that _____ [*name*] has been appointed guardian ad litem by this court.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

CAUTION:
A supporting memorandum and a notice of hearing [*see § 3.251*] must be filed with this demurrer [*Cal. Rules of Ct., Rules 1.5(b), 3.1100, 3.1103(c), 3.1113(a)*. For discussion and forms, see Ch. 417, ***Points and Authorities*** .

[2] Use of Form

This form is for use to demur to a complaint when plaintiff lacks capacity to sue because he or she is a minor and the action is being prosecuted in his or her behalf by a guardian ad litem, and both facts appear on the face of the complaint, but the complaint fails to allege the appointment of the guardian ad litem by the court.

The form is based on the demurrer filed in *Crawford v. Neal (1880) 56 Cal. 321, 321-322* , in which it was held that the appointment of a guardian ad litem for a minor plaintiff is a traversable fact that must be affirmatively alleged in the complaint [*see also Security Loan etc. Co. v. Kauffman (1895) 108 Cal. 214, 222-223, 41 P. 467]* . However, *Code Civ. Proc § 373(a)* now provides that appointment of the guardian ad litem must be made before the summons is issued. A summons may be issued after the complaint is filed [*see Code Civ. Proc. § 412.10 et seq.*]. Therefore, counsel is advised before demurring on this ground to determine whether the guardian ad litem was appointed between the time the complaint was filed and the time the summons was issued. The court can easily take judicial notice of such a fact on a demurrer, arguably making the demurrer a frivolous tactic [*see Evid. Code § 452* (permissive judicial notice); *see also Code Civ. Proc. §§ 128.5* (sanctions for frivolous tactics in actions commenced prior to 1995), *128.7* (sanctions for frivolous tactics in actions commenced prior in 1995 through 2002), *128.7* (sanctions for frivolous tactics in actions commenced in 1995 through 2005 unless the legislature changes the ending date); *see* Ch. 510, *Sanctions*].

[3] Incapacity of Minors

A minor may enforce his legal rights by civil action, or other legal proceedings, in the same manner as a person of full age, except that a guardian must conduct the action or proceeding [*Code Civ. Proc. § 372(a)*; *Fam. Code § 6601*; *see Code Civ. Proc. § 372(b)* (exception for specified protective orders guarding against harassment and violence); for discussion, *see § 3.33* 2].

[4] State Statutes

Actions by minors. *Code Civ. Proc. § 372*; *Fam. Code § 6601*

Appointment of guardian ad litem. *Code Civ. Proc. § 373*

Minors defined. *Fam. Code § 6500*

Capacity to contract. *Fam. Code § 6701*

Appointment of guardian of estate of minor. *Prob. Code § 1510 et seq.*

[5] Decisions

Right of minor to disaffirm adjudication of rights in proceedings without guardian ad litem as continuing until barred by laches after his majority. *Gouanillou v. Industrial Acci. Com. (1920) 184 Cal. 418, 420, 193 P. 937*

When minority disclosed at time of trial, denial of defendant's motion to dismiss and appointment of guardian ad litem as proper. *In re Cahill (1887) 74 Cal. 52, 58, 15 P. 364* ; *In re Lisa M. (1986) 177 Cal. App. 3d 915, 920, 225 Cal. Rptr. 7*

Alleging appointment of guardian. *Crawford v. Neal (1880) 56 Cal. 321, 321-322* ; *see also Security Loan etc. Co. v. Kauffman (1895) 108 Cal. 214, 222-223, 41 P. 467*

[6] Text References

Witkin, California Procedure, vol. 4, *Pleading*, §§ 60-64; vol. 5, *Pleading*, § 1050 (4th ed. 1997)

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 357-361 (9th ed. 1987)

[7] Cross References

See also *§ 3.250*.

For forms relating to the appointment of guardians ad litem, see Ch. 291, *Guardians ad Litem*

For forms of complaints by minors, see Ch. 364, *Minors: Claims and Property of Minors*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPartiesCapacity of PartiesGuardiansCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrers

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1-3 California Forms of Pleading and Practice--Annotated § 3.253

§ 3.253 Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Failure of Plaintiff Transacting Business Under Fictitious Name to Have Complied With Fictitious Name Statute [Bus. & Prof. Code § 17918]

[1] FORM Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Failure of Plaintiff Transacting Business Under Fictitious Name to Have Complied With Fictitious Name Statute [Bus. & Prof. Code § 17918]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff does not have legal capacity to sue in that plaintiff is a person doing business under a fictitious business name, the action is on a contract made by plaintiff under that fictitious business name, and plaintiff has failed to publish and file the fictitious business name statement required by *Sections 17915* and *17917 of the Business and Professions Code*.

[2] Use of Form

This form is for use to raise an affirmative defense in an answer based on plaintiff's lack of capacity [*see Code Civ. Proc. § 430.30*]. The lack of capacity alleged is due to failure to comply with the fictitious business name statute. For forms and procedure to obtain a separate trial of the defense of lack of capacity, see *§ 3.340* et seq.

[3] Cross References

See also *§ 3.250*.

For forms of answers generally, see Ch. 26, *Answers* .

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1-3 California Forms of Pleading and Practice--Annotated § 3.254

§ 3.254 Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Minor Plaintiff Not Appearing by Guardian [Fam. Code § 6601; Code Civ. Proc. § 372(a)]

[1] FORM Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Minor Plaintiff Not Appearing by Guardian [Fam. Code § 6601; Code Civ. Proc. § 372(a)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff does not have legal capacity to bring this action, in that plaintiff is a minor, _____[*number*] years of age [as shown by a certified copy of plaintiff's certificate of birth, attached hereto as Exhibit "1" and made a part hereof], and this action is being prosecuted by plaintiff personally and not by a guardian of plaintiff's estate or by a guardian ad litem appointed by this court.

[2] Use of Form

This form is for inclusion in an answer as an affirmative defense when plaintiff lacks capacity to sue [*see Code Civ. Proc. § 430.10(b)*] because he or she is a minor [*see Fam. Code § 6500*] appearing personally in the action, rather than by a guardian of his estate or by a guardian ad litem appointed by the court in which the action is pending, or by a judge of that court [*see* Civ. Code § 372(a)]. For forms and procedure to obtain a separate trial of the defense of lack of capacity, see *§ 3.340* et seq.

[3] Cross References

See also *§ 3.252*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil

ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPartiesCapacity of PartiesGuardians

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1-3 California Forms of Pleading and Practice--Annotated § 3.255

§ 3.255 Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Corporate Plaintiff's Powers Suspended or Forfeited for Failure to File Required Corporate Information Statement [Corp. Code § 2205]

[1] FORM Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Corporate Plaintiff's Powers Suspended or Forfeited for Failure to File Required Corporate Information Statement [Corp. Code § 2205]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff does not have legal capacity to sue in that plaintiff is a _____ [domestic corporation whose powers, rights, and privileges have been suspended *or* foreign corporation the exercise of whose powers, rights, and privileges have been forfeited] pursuant to *Corporations Code Section 2205* for failure to file the required corporate information statement pursuant to *Corporations Code Section 1502(a).*

[2] Use of Form

This form is for use to include in an answer as an affirmative defense when the corporate plaintiff lacks capacity to sue (*see Code Civ. Proc. § 430.10(b)*) because it has failed to comply with *Corp. Code § 1502*. For forms and procedure for obtaining a separate trial of the defense of lack of capacity, see *§ 3.340 et seq.*

For discussion of suspension or forfeiture of corporate powers for failure to comply with corporate statutes, see *§ 3.33 3* .

[3] California Points And Authorities

For a memorandum of points and authorities relating to this form, see California Points and Authorities, *Corporations.*

[4] State Statutes

Suspension or forfeiture of corporate powers for failure to file required information statement with the Secretary of State. *Corp. Code § 2205*

[5] Decisions

Failure to file information statement required by *Corp. Code § 1502* causing suspension of corporate powers per *Corp. Code § 2205* prohibiting corporation from maintaining action, including conducting discovery. *Palm Valley Homeowners Assn., Inc. v. Design MTC (2000) 85 Cal. App. 4th 553, 559-561, 102 Cal. Rptr. 2d 350*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPartiesCapacity of PartiesGeneral Overview

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1-3 California Forms of Pleading and Practice--Annotated § 3.256

§ 3.256 Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Corporate Plaintiff's Powers Suspended or Forfeited for Failure to Comply With Tax Statutes [Rev. & Tax Code §§ 23301, 23301.5, 23775]

[1] FORM Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Corporate Plaintiff's Powers Suspended or Forfeited for Failure to Comply With Tax Statutes [Rev. & Tax Code §§ 23301, 23301.5, 23775]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff does not have legal capacity to sue in that plaintiff is a _____ [domestic corporation whose powers, rights, and privileges have been suspended *or* foreign corporation the exercise of whose powers, rights, and privileges have been forfeited] pursuant to Revenue and Taxation Code Section _____ [*23302* for failure to pay franchise taxes *or Rev. & Tax Code § 23301.5* for failure to file a tax return *or Rev. & Tax Code § 23775* for failure to file the annual _____ (information return *or* statement of exception) *or Rev. & Tax Code § 23775* for failure to timely pay any amount due under *Rev. & Tax Code § 23703* (relating to nonexempt charitable corporations) *or Rev. & Tax Code § 23772* (relating to records and return of exempt corporations and fees)].

[2] Use of Form

This form is for inclusion in an answer as an affirmative defense when the corporate plaintiff lacks capacity to sue [*see Code Civ. Proc. § 430.10(b)*] because it has failed to comply with *Rev. & Tax. Code § 23301*, *23301.5*, or *23775*. For forms and procedure for obtaining a separate trial of the defense of lack of capacity, see *§ 3.340* et seq.

The forfeiture provisions of *Rev. & Tax. Code §§ 23301*, *23301.5*, and *23775* only apply to a foreign corporation that is required under *Corp. Code § 2105* to qualify to do business in California if it has in fact qualified with the Secretary of State [*Rev. & Tax. Code § 23301.6*].

For discussion of suspension or forfeiture of corporate powers for failure to comply with tax statutes, see *§ 3.33* 4 .

[3] State Statutes

Suspension or forfeiture of corporate powers for failure to pay franchise taxes. *Rev. & Tax. Code § 23301*

Suspension or forfeiture of corporate powers for failure to file tax return. *Rev. & Tax. Code § 23301.5*

Forfeiture provisions of *Rev. & Tax. Code §§ 23301, 23301.5, 23571, 23775* as only applicable to foreign corporation required to qualify to do business [*see Corp. Code § 2105*] if it has in fact qualified with Secretary of State. *Rev. & Tax. Code § 23301.6*

Forfeiture or suspension pursuant to *Rev. & Tax. Code § 23301, 23301.5*, or *23775* as effective only as expressly provided in *Rev. & Tax. Code § 23302*. *Rev. & Tax. Code § 23302(a)*

Suspension or forfeiture of corporate powers as effective on transmission of name of delinquent taxpayer by Franchise Tax Board to Secretary of State. *Rev. & Tax. Code § 23302(c)*

Voidability of contracts made in California by taxpayer during time taxpayer's corporate powers, rights, and privileges are suspended or forfeited pursuant to *Rev. & Tax. Code § 23301, 23301.5*, or *23775*. *Rev. & Tax. Code § 23304.1*

Revival of suspended or forfeited powers. *Rev. & Tax. Code § 23305 et seq.*

Certificate of Franchise Tax Board as prima facie evidence of fact of suspension or forfeiture for failure to pay tax or file return. *Rev. & Tax. Code § 23305d*

Assumption of liability, bond, deposit, or other security for taxpayer's liability that is acceptable to Franchise Tax Board as alternative to payment required for revivor or relief from voidability. *Rev. & Tax. Code § 23305.2*

Penalty for exercising corporate power after suspension or forfeiture. *Rev. & Tax. Code § 19719*

[4] Decisions

Rule that revival of corporate powers validates corporation's earlier acts and permits it to proceed with action as applicable to matters occurring subsequent to judgment; suspension of defendant's corporate powers pursuant to *Rev. & Tax. Code § 23301* for nonpayment of taxes as not entitling plaintiff to have defendant's appeal dismissed, when defendant's corporate powers were revived by payment of taxes. *Peacock Hill Asso. v. Peacock Lagoon Constr. Co. (1972) 8 Cal. 3d 369, 371-374, 105 Cal. Rptr. 29, 503 P.2d 285*

Suspension of corporate powers after filing of action but before judgment as not depriving court of jurisdiction or rendering judgment void and subject to collateral attack after it has become final. *Traub Co. v. Coffee Break Service, Inc. (1967) 66 Cal. 2d 368, 371, 57 Cal. Rptr. 846, 425 P.2d 790*

Defense of lack of capacity of corporation to maintain action by reason of suspension of corporate powers for nonpayment of taxes as matter of abatement and strictly construed. *Traub Co. v. Coffee Break Service, Inc. (1967) 66 Cal. 2d 368, 370, 57 Cal. Rptr. 846, 425 P.2d 790*

Defense of suspension of corporate powers as failing if it appears at time of trial that matter of abatement no longer exists. *Hall v. Citizens Nat. Tr. & Sav. Bank of Los Angeles (1942) 53 Cal. App. 2d 625, 631, 128 P.2d 545*

Commencement of action by corporation during period of suspension of corporate powers as not a nullity and revival of corporate powers prior to interposition of plea as sufficient. *Hall v. Citizens Nat. Tr. & Sav. Bank of Los Angeles (1942) 53 Cal. App. 2d 625, 630, 128 P.2d 545*

[5] Text References

Ballantine & Sterling, California Corporation Laws, *Formation of Corporation*, § 54.09; *Records, Reports, Inspection Rights*, § 274.04; *Dissolution and Winding Up*, § 313.03; *Foreign Corporations*, §§ 391.03, 392.02; *Nonprofit Corporations*, § 427.04; *Franchise and Income Taxes*, §§ 474.03, 479.02

Witkin, California Procedure, vol. 4, *Pleading*, §§ 75-78 vol. 5 *Pleading*, § 1060 (4th ed. 1997)

Witkin, Summary of California Law, vol. 9, *Corporations*, §§ 225-227 (9th ed. 1987)

[6] Cross References

For a memorandum of points and authorities relating to this form, see California Points and Authorities, Ch. 52, *Corporations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-3 California Forms of Pleading and Practice--Annotated § 3.257

§ 3.257 Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Foreign Corporation Suing on Intrastate Business Without Having Obtained Certificate of Qualification [Corp. Code § 2203(c)]

[1] FORM Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Foreign Corporation Suing on Intrastate Business Without Having Obtained Certificate of Qualification [Corp. Code § 2203(c)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff does not have legal capacity to sue in that it is a foreign corporation transacting intrastate business in California and has not obtained a certificate of qualification from the Secretary of State of California. The action sued on in the complaint herein is based on the intrastate business so transacted.

[2] Use of Form

This form is for inclusion in an answer as an affirmative defense when the corporate plaintiff lacks capacity to sue [*see Code Civ. Proc. § 430.10(b)*] because it has failed to obtain a certificate of qualification from the Secretary of State of California [*see Corp. Code § 2105*], and the action is based on its intrastate business [*see Corp. Code § 2203(c)*]. For forms and procedure to obtain a separate trial of the defense of lack of capacity, see *§ 3.340* et seq.

The forfeiture provisions of *Rev. & Tax. Code §§ 23301, 23301.5*, and *23775* only apply to a foreign corporation that is required under *Corp. Code § 2105* to qualify to do business in California if it has in fact qualified with the Secretary of State [*Rev. & Tax. Code § 23301.6*].

For discussion of the effect of failure to obtain a certificate of qualification, see *§ 3.33* 6 .

[3] State Statutes

"Transact intrastate business" defined. *Corp. Code § 191*

Qualification of foreign corporation to transact intrastate business. *Corp. Code § 2105*

Failure to obtain certificate of qualification as resulting in lack of capacity to sue. *Corp. Code § 2203(c)*

[4] Decisions

Burden of proving that particular transaction was intrastate as on party pleading lack of capacity under former Corp. Code § 6801 (*now see Corp. Code § 2203(c)*. *Automotriz etc. De California v. Resnick (1957) 47 Cal. 2d 792, 794, 306 P.2d 1*

Assignee of foreign corporation as barred from suing if corporation would be barred for failure to comply with requirements for doing business in state. *Thorner v. Selective Cam Transmission Co. (1960) 180 Cal. App. 2d 89, 93, 4 Cal. Rptr. 409*

Alleging plaintiff's failure to comply with foreign corporation qualification statutes on information and belief as insufficient. *Home Owners' Loan Corp. v. Gordon (1939) 36 Cal. App. 2d 189, 192, 97 P.2d 845*

Alleging compliance with *Corp. Code § 2105* as unnecessary for complaint to state cause of action. *H.D. Haley & Co. v. McVay (1924) 70 Cal. App. 438, 440, 233 P. 409*

[5] Text References

Ballantine & Sterling, California Corporation laws, *Foreign Corporations*, §§ 391.02, 391.04

Witkin, California Procedure, vol. 4, *Pleading*, § 76 (4th ed. 1997)

Witkin, Summary of California Law, vol. 9, *Corporations*, §§ 228-235 (9th ed. 1987)

[6] Cross References

See also *§ 3.256*.

For legal forms relating to obtaining a certificate of qualification, see 3A California Legal Forms, ch. 12B, *Foreign Corporations*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePartiesCapacity of PartiesGeneral OverviewBusiness & Corporate LawForeign BusinessesNoncompliance

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A. Lack Of Capacity To Sue

1-3 California Forms of Pleading and Practice--Annotated § 3.258

§ 3.258 Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Powers of Plaintiff Limited Liability Company Suspended or Forfeited for Failure to Comply With Tax Statutes [Rev. & Tax. Code §§ 23301, 23301.5, 23305.5]

[1] FORM Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Powers of Plaintiff Limited Liability Company Suspended or Forfeited for Failure to Comply With Tax Statutes [Rev. & Tax. Code §§ 23301, 23301.5, 23305.5]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff does not have legal capacity to sue in that plaintiff is a _____ [domestic limited liability company whose powers, rights, and privileges have been suspended *or* foreign limited liability company the exercise of whose powers, rights, and privileges has been forfeited] pursuant to Revenue and Tax Code Section _____ [23302 for failure to pay taxes *or* 23301.5 for failure to file a tax return].

[2] Use of Form

This form is for inclusion in an answer as an affirmative defense when the plaintiff limited liability company lacks capacity to sue [*Code Civ. Proc. § 430.10(b)*] because it has failed to comply with *Rev. & Tax. Code § 23301* or *23301.5* [*see Rev. & Tax. Code § 23305.5*(application of *Rev. & Tax. Code § 23301 et seq.* to limited liability companies); for discussion see *§ 3.33 5*].

[3] Cross References

See also *§ 3.256*.

For discussion of service of process on limited liability companies, see Ch. 518, *Service of Summons and Papers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePartiesCapacity of PartiesGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesGeneral Overview

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A. Lack Of Capacity To Sue

1-3 California Forms of Pleading and Practice--Annotated § 3.259

§ 3.259 Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Foreign Limited Liability Company Engaging in Intrastate Business in California Without Having Registered With Secretary of State [Corp. Code § 17456]

[1] FORM Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Foreign Limited Liability Company Engaging in Intrastate Business in California Without Having Registered With Secretary of State [Corp. Code § 17456]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff does not have legal capacity to sue in that plaintiff is a foreign limited liability company transacting intrastate business in California without having registered with the California Secretary of State.

[2] Use of Form

This form is for inclusion in an answer as an affirmative defense when the plaintiff limited liability company lacks capacity to sue [*Code Civ. Proc. § 430.10(b)*] because it has failed to register with the California Secretary of State as required by *Corp. Code § 17451* [*Corp. Code § 17456*; for discussion see *§ 3.33 7*].

[3] California Legal Forms

For discussion and forms relating to the organization and registration of limited liability companies, see 4 California Legal Forms, ch. 12C, *Limited Liability Companies*

[4] Cross References

For related forms, *see §§ 3.257* and *3.258*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePartiesCapacity of PartiesGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesGeneral Overview

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1-3 California Forms of Pleading and Practice--Annotated §§ 3.260-3.279

[Reserved]

§§ 3.260[Reserved]

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B. Another Action Pending

1-3 California Forms of Pleading and Practice--Annotated § 3.280

§ 3.280 Demurrer [Code Civ. Proc. § 430.30(a)]--Another Action Pending [Code Civ. Proc. § 430.10(c)]

[1] FORM Demurrer [Code Civ. Proc. § 430.30(a)]--Another Action Pending [Code Civ. Proc. § 430.10(c)]

[*Caption. See § 3.250 1* .]

Defendant demurs to the complaint herein on the following ground:

1. There is another action pending in California between the same parties on the same cause of action.

2. It appears on the face of the complaint in this action that it was filed on _____ [*date*], that the parties are _____ [*name*], plaintiff, and _____ [*name*], defendant; that the cause of action is for _____ [*specify*] based on _____ [*describe the transaction or event*] [page _____, line _____]; and that the relief sought is _____ [*specify*] [page _____, line _____].

3. Presently pending in the _____ [*specify, e.g.*, Superior Court of California, County of _____ (*name*)] is Case No. _____, entitled _____ [*abbreviated heading*]. The court records of Case No. _____ are matters of which this court may take judicial notice and from their face it appears that Case No. _____ was filed on _____ [*date*]; that the parties are _____ [*name*], plaintiff, and _____ [*name*], defendant; that the cause of action is for _____ [*specify*] based on _____ [*describe the transaction*]; that the relief sought is _____ [*specify*]; and that summons was issued and served on _____ [*date*].

WHEREFORE, defendant prays that this court take judicial notice of the court records in Case No. _____, and grant an interlocutory judgment in favor of defendant to the effect that no trial of any issues in this action shall be had until final determination of Case No. _____, and for such other and

further relief as this court may deem proper.

_____ [*signature*]
Attorney for Defendant

CAUTION:

A supporting memorandum and a notice of hearing on the demurrer [*see § 3.251*] must be filed with this demurrer [*Cal. Rules of Ct., Rules 1.5(b), 3.1100, 3.1103(c), 3.1113(a)*; for discussion and forms, *see* Ch. 417, *Points and Authorities*].

Special demurrers are not allowed in limited civil cases [*see Code Civ. Proc. §§ 91(a), (d), 92(c)*; *Buss v. J.O. Martin Co. (1966) 241 Cal. App. 2d 123, 133, 50 Cal. Rptr. 206* (demurrer under *Code Civ. Proc. § 430.10(c)* as special demurrer)].

[2] Use of Form

This form is for use to demur to a complaint on the ground that another action is pending between the same parties on the same cause of action [*see Code Civ. Proc. § 430.10(c)*], and each of the facts on which the objection is based is apparent on the face of the complaint and from matters of which the court must [*see Evid. Code § 451*] or may [*see Evid. Code § 452*] take judicial notice [*see Code Civ. Proc. § 430.30(a)*]. To sustain the objection of another action pending, it is essential that the following be alleged [*see California Trust Co. v. Gustason (1940) 15 Cal. 2d 268, 273, 101 P.2d 74]* :

- That both actions are predicated on the same cause and what the cause of action is;
- That both actions are contested by the same parties [*see Code Civ. Proc. § 430.10(c)*];
- When the prior action was brought; and
- What relief was demanded in the prior action.

[3] Judicial Notice of Court Records

The court may take judicial notice of the records of any court of California, or any court of the United States, or any state of the United States [*Evid. Code § 452(d)*]. When a ground for abating an action appears on the face of the complaint or from matters of which the court may take judicial notice, the objection may be taken by demurrer [*Code Civ. Proc. § 430.30(a)*].

For the court to take judicial notice of the records of another pending action, the party making the request must furnish the court with sufficient information to enable it to take judicial notice of the matter [*see Evid. Code § 453(b)*]. If the prior action is pending in the same court, the entire court file may be available for presentation at the hearing on the demurrer. However, local court rules may require that a formal request be made of the clerk [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 9.16(b)]. If the prior action is pending in a different court, obtain certified copies of the pertinent documents from that court's file to accompany the supporting memorandum of points and authorities [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 9.16(c)].

[4] State Statutes

Another action pending as ground for objection. *Code Civ. Proc. § 430.10(c)*

Raising objection by demurrer or answer. *Code Civ. Proc. § 430.30*

When action is deemed pending. *Code Civ. Proc. § 1049*

[5] California Rules of Court

Demurrers. *Cal. Rules of Ct., Rules 3.1110, 3.1320*

[6] Local Court Rules

Judicial notice of court records. Los Angeles Co. Super. Ct. Rules, Rule 9.16

[7] Decisions

Essential allegations of defense of another action pending. *California Trust Co. v. Gustason (1940) 15 Cal. 2d 268, 273, 101 P.2d 74*

[8] Text References

Witkin, California Procedure, vol. 5, *Pleading*, § 1064 et seq. (4th ed. 1997)

[9] Cross References

For alternative forms of demurrer, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

For memoranda relating to this form, see California Points and Authorities, Ch. 10, *Abatement and Survival of Actions* , and Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers

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1-3 California Forms of Pleading and Practice--Annotated § 3.281

§ 3.281 Interlocutory Judgment Abating Proceedings After Ruling on Demurrer [Code Civ. Proc. § 597]--Another Action Pending [Code Civ. Proc. § 430.10(c)]

[1] FORM Interlocutory Judgment Abating Proceedings After Ruling on Demurrer [Code Civ. Proc. § 597]--Another Action Pending [Code Civ. Proc. § 430.10(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	INTERLOCUTORY JUDGMENT ABATING PROCEEDINGS
vs.	)	[*Code Civ. Proc. §§ 430.10(c), 597*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____

The demurrer of defendant _____ [*name*] to the complaint on the ground that there is another action pending between the same parties for the same cause, came on regularly for hearing by the court on this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*]. The court, having considered the evidence, both oral and documentary, including the papers and records on file herein

and the papers and records on file in Action No. _____, entitled _____[*abbreviated heading*] pending in _____ [*name of court*], finds:

1. Notice of the time and place of hearing has been given as required by law;

2. Case No. _____ entitled _____ [*abbreviated heading*], is presently pending in _____[*name of court*], was commenced prior to the within action, between the same parties, on the same cause of action, and seeks the same relief as the within action.

IT IS ORDERED AND ADJUDGED that all proceedings in this action are stayed until a final determination of _____ [*title of case*], No. _____, pending in _____ [*name of court*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The foregoing form of judgment is for use when a demurrer on the ground of another action pending [*see Code Civ. Proc. § 430.10(c)*] is sustained and the court grants defendant an interlocutory judgment abating any further proceeding until final determination of the prior action [*see Code Civ. Proc. § 597*].

For a detailed discussion of interlocutory judgments, see *§ 3.17*.

[3] State Statutes

Interlocutory judgment staying proceeding as entered when defense of another action pending is established. *Code Civ. Proc. § 597*

[4] Decisions

Provisions of *Code Civ. Proc. § 597* for interlocutory judgment staying proceedings when defense is raised by answer as applying when defense is raised by demurrer. *Lord v. Garland (1946) 27 Cal. 2d 840, 851, 168 P.2d 5*

Interlocutory judgment as proper when defense of another action pending is established. *Lord v. Garland (1946) 27 Cal. 2d 840, 851, 168 P.2d 5* ; *Ferreira v. Keller (1970) 4 Cal. App. 3d 292, 294-295, 84 Cal. Rptr. 253*

[5] Cross References

See also *§ 3.280*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrers

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1-3 California Forms of Pleading and Practice--Annotated § 3.282

§ 3.282 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Another Action Pending [Code Civ. Proc. § 430.10(c)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Another Action Pending [Code Civ. Proc. § 430.10(c)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that another action is pending between the same parties on the same cause of action. That action is Case No. _____, filed on _____ [*date*], in the _____ [*name of court*] by _____ [*name*], plaintiff, against _____ [*name*], defendant, alleging a cause of action for _____ [*specify*] based on _____ [*describe the transaction*], and seeking _____ [*specify relief sought*]. Summons was issued in said action and served on _____ [*date*]. [A certified copy of the complaint and a certified copy of the proof of service of summons are attached hereto as Exhibits "1" and "2," respectively, and made a part hereof.]

[2] Use of Form

The foregoing form is for inclusion in an answer as an affirmative defense when another action is pending between the same parties for the same cause [*see Code Civ. Proc. § 430.10(c)*]. For forms and procedure to obtain a separate trial on the defense of another action pending, see *§ 3.340* et seq.

[3] Cross References

See also *§ 3.280*.

For forms of answers generally, see Ch. 26, *Answers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & Preservation

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1-3 California Forms of Pleading and Practice--Annotated § 3.284

§ 3.284 Petition for Writ of Mandate [Code Civ. Proc. § 1086] to Dismiss Action or Stay Proceedings on Ground Action Pending in Another State

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. § 1086] to Dismiss Action or Stay Proceedings on Ground Action Pending in Another State

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
_____ APPELLATE DISTRICT

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
SUPERIOR COURT OF CALIFORNIA, COUNTY	)	PETITION FOR WRIT OF MANDATE
OF _____ [*name*],	)	[*Code Civ. Proc. § 1086*]
Respondent,	)	
_____ [*name*],	)	
Real Party in Interest.	)	
	)	

[*If in court of appeal and if related appeal is pending, add* RELATED APPEAL PENDING]

Petitioner alleges:

[1. *Allegation re related pending appeal; see* § 3.283, Paragraph 1.]

2. On or about _____ [*date*], _____ [*name*], the real party in interest herein, filed a complaint for _____ [*specify, e.g.,* damages for breach of contract] against petitioner in the respondent _____ [*name of court*] (hereinafter referred to as "respondent court"), entitled _____ [*title of action*], numbered _____. A copy of the complaint is attached hereto as Exhibit A and made a part hereof.

3. On or about _____ [*date*], petitioner filed an answer to the complaint which pleaded, among other things, that another action is pending between the same parties for the same cause in that _____ [*specify plaintiff in prior action, e.g.,* petitioner herein had filed on _____[*date*], and before the commencement of the present action, an action against the _____ [*specify defendant in prior action, e.g.,* real party in interest herein] for _____ [*specify, e.g.,* damages for breach of contract arising from the same transaction] in the _____ [*name of court*] of the State of _____, entitled _____ [*title of case*], numbered _____. A copy of the answer to the complaint is attached hereto as Exhibit B and made a part hereof.

4. The prior action in the State of _____ is now pending in the _____ [*name of court*] _____ [*specify stage of proceedings, e.g.,* on the active calendar awaiting pretrial conference]. Certified copies of the pleadings in the prior action are attached hereto and made a part hereof, marked exhibits as follows: _____ [*e.g.,* Exhibit C, Complaint for Damages for Breach of Contract; Exhibit D, Answer to Complaint].

5. Petitioner served and filed with his answer to the complaint in the present action a notice of motion to dismiss the present action or, in the alternative, to stay all proceedings therein, a declaration in support of the motion, and a memorandum of points and authorities in support of the motion, copies of which are attached hereto and made a part hereof, marked Exhibits E, F, and G, respectively.

6. Pursuant to the notice of motion, at a hearing held on _____ [*date*], petitioner moved for an order dismissing the present action or, in the alternative, staying all proceedings therein until the final determination of the prior action pending in the State of _____. Respondent court denied petitioner's motion in both respects. A copy of respondent court's minute order thereon dated _____ [*date*], is attached hereto as Exhibit H and made a part hereof.

7. The present action is continuing and progressing on the active calendar of respondent court. Further proceedings consisting of _____ [*specify, e.g.,* the taking of depositions noticed by the real party in interest] have been set for _____ [*date*].

8. Comity and the furtherance of justice require that respondent court be compelled to dismiss the present action or, in the alternative, to stay all proceedings therein until the final determination of the prior action pending in the State of _____, for each of the following reasons:

a. The court in the prior action acquired jurisdiction of the parties and of the subject of the action before commencement of the present action, and is empowered to fully determine all issues, and the prior action provides an ample remedy for the parties;

b. The present action interferes seriously and without warrant in the orderly prosecution of the prior action and with the jurisdiction of the court therein; it has imposed, and if not abated, will continue to impose substantial, unjust burdens on petitioner, and has caused, and if not abated, will continue to cause petitioner to incur substantial, needless expense of litigation and travel between courts;

c. Further proceedings have been set in the present action and if the action is not dismissed or all proceedings abated a multiplicity of actions will result;

d. Respondent court's denial of petitioner's motion was arbitrary, contrary to established principles of comity and justice, and an abuse of judicial discretion.

9. No appeal lies from the denial of petitioner's motion by respondent court. Petitioner has no plain, speedy, or adequate remedy in the ordinary course of law in that _____ [*state facts showing absence of adequate remedy at law*].

WHEREFORE, petitioner prays:

1. That a writ of mandate issue commanding respondent court to dismiss the present action, entitled _____ [*title of case*], numbered _____, or, in the alternative, to stay all proceedings therein until the final determination of the action in the _____ [*name of court*], State of _____, entitled _____[*title of case*], numbered _____, or to show cause before this court at a specified time and place why it has not done so.

2. For costs of this proceeding and such other and further relief as the court deems just.
Dated: _____.

_____ [*signature*]
Attorney for Petitioner

[*Verification. See § 3.283 1* .]

CAUTION:

A petition for writ of mandate must be verified [*Code Civ. Proc. § 1086*]. In addition, the petition must be accompanied by proof of service of a copy of the petition on the respondent and any real party in interest named in the petition [*Code Civ. Proc. § 1107*]. The form, content, page limitations, and other requirements of *Cal. Rules of Ct., Rule 8.204(c)(1)* and *(2)* apply to petitions for writ of mandate or prohibition [*Cal. Rules of Ct., Rule 8.490(a)*].

In addition, if the writ petition seeks review of a trial court ruling, it must also be accompanied by a record adequate to permit the review, including copies of the order or judgment, all documents and exhibits, and a transcript, as well as by an explanation of the urgency for a stay if requested [*Cal. Rules of Ct., Rule 8.486(a)(7), (c)*; *see also Cal. Rules of Ct., Rule 8.486(e)* (format for documents and exhibits)].

Points and authorities also customarily accompany a petition filed in a superior court, although they do not appear expressly to be required by statute or court rule [*but see Code Civ. Proc. § 1090*, referring to the proceeding as a "motion," and *Cal. Rules of Ct., Rule 3.1113(a)*, requiring points and authorities in support of a noticed motion]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

The foregoing form is a petition for a writ of mandate to compel a trial court to dismiss or stay an action when a prior action between the same parties based on the same cause of action is pending in another state [*see Code Civ. Proc. § 1086*; *Simmons v. Superior Court (1950) 96 Cal. App. 2d 119, 133, 214 P.2d 844]* .

[3] State Statutes

Award of costs in special proceedings. *Code Civ. Proc. § 1032*

Writ of mandate. *Code Civ. Proc. §§ 1084-1097, 1107, 1108*

[4] California Rules of Court

Form and contents of petition for writ of mandate filed in reviewing court. *Cal. Rules of Ct., Rule 8.486*

"Law and motion," as used in the Civil Law and Motion Rules [*Cal. Rules of Ct., Rules 3.1100-3.1370*], as applying to applications filed in superior courts for writs of mandate. *Cal. Rules of Ct., Rule 3.1103(a)(2)*

[5] Text References

Witkin, California Procedure, vol. 2, *Jurisdiction*, § 429 (4th ed. 1996)

[6] Cross References

See also *§§ 3.280*, 3.283.

For memoranda relating to a petition for a writ of mandate, see California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsMultiple Claims & Parties

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B. Another Action Pending

1-3 California Forms of Pleading and Practice--Annotated § 3.285

§ 3.285 Notice of Motion [Code Civ. Proc. § 1010] to Stay Action on Ground Another Action Pending in Another State [Code Civ. Proc. § 430.10(c)]

[1] FORM Notice of Motion [Code Civ. Proc. § 1010] to Stay Action on Ground Another Action Pending in Another State [Code Civ. Proc. § 430.10(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	NOTICE OF MOTION TO STAY ACTION
_____ [*name*],	)	Date: _____
Plaintiff,	)	Time: _____
vs.	)	Dept.: _____
_____ [*name*],	)	Judge: _____
Defendant.	)	Date Action Filed: _____
	)	Trial Date: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____

[*identify party, e.g.,* defendant] will move for an order staying the action. The motion will be made on the grounds that a prior action is pending between the same parties on the same cause of action in the State of _____.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the request for judicial notice served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*signature*]
Attorney for _____ [*moving party*]

CAUTION:
A supporting memorandum must be served and filed with the foregoing notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

The foregoing notice of motion is for use by a defendant to move for an order to stay an action on the grounds that a prior action is pending between the same parties on the same cause of action in another state [*Code Civ. Proc. § 430.10(c)*; *see Leadford v. Leadford (1992) 6 Cal. App. 4th 571, 575, 8 Cal. Rptr. 2d 9]* .

[3] Request for Judicial Notice

Certified copies of the pleadings in the action filed in the other state should be provided to the court in order to be judicially noticed [*see Evid. Code § 452* (permissive judicial notice of pleadings in any court)]. For further discussion of judicial notice, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[4] Cross References

See also *§ 3.340*.

For a general form of notice of motion, see Ch. 372, *Motions and Orders* .

For discussion and forms relating to the memorandum see Ch. 417, *Points and Authorities* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresJudgmentsEntry of JudgmentsStays of ProceedingsMultiple Claims & Parties

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[Reserved]

§§ 3.286[Reserved]

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C. Defect Or Misjoinder Of Parties

1-3 California Forms of Pleading and Practice--Annotated § 3.300

§ 3.300 Demurrer [Code Civ. Proc. § 430.30(a)] on Ground of Nonjoinder of Party [Code Civ. Proc. § 430.10(d)] Plaintiff [Code Civ. Proc. §§ 378, 389]

[1] FORM Demurrer [Code Civ. Proc. § 430.30(a)] on Ground of Nonjoinder of Party [Code Civ. Proc. § 430.10(d)] Plaintiff [Code Civ. Proc. §§ 378, 389]

[*Caption. See § 3.250 1* .]

Defendant demurs to the complaint on the following ground:

There is a nonjoinder of a party plaintiff in that it appears on the fact of the complaint [and from _____ (*specify*) of which this court may, and is hereby requested to take judicial notice] that _____ [*set forth each fact as it appears on the face of the complaint that supports each element necessary for compulsory joinder, e.g.:* the action is for the alleged wrongful death of plaintiff's husband and there is a minor child of plaintiff and decedent surviving who has not been made a party to this action].
Dated: _____.

_____ [*signature*]
Attorney for Defendant

CAUTION:

A supporting memorandum and a notice of hearing on the demurrer [*see § 3.251*] must be filed with this demurrer [*Cal. Rules of Ct., Rules 1.5(b), 3.1100, 3.1103(b), 3.1113(a)* for discussion and forms, *see* Ch. 417, *Points and Authorities*].

Special demurrers are not allowed in limited civil cases [*see Code Civ. Proc. §§ 91(a), (d), 92(c)*; *Buss v. J. Martin Co. (1966) 241 Cal. App. 2d 123, 133, 50 Cal. Rptr. 206* (all demurrers except failure to state cause of action and lack of subject matter jurisdiction as special demurrers)].

[2] Use of Form

This form is for use to demur to a complaint on the ground that a person whose joinder as a party plaintiff [*see Code Civ. Proc. § 378*] is required [*Code Civ. Proc. § 389*] has not been joined. It is to be used when the nonjoinder appears on the face of the complaint. The form may also be used if the demurrer is based on matters of which the court will take judicial notice [*Evid. Code §§ 451, 452*]. If the nonjoinder does not appear either on the face of the complaint or from matters of which the court may or must take judicial notice, the objection may be raised by answer [*see* § 3.301].

For discussion of nonjoinder of indispensable parties, see *§ 3.75*.

[3] State Statutes

Permissive joinder of parties plaintiff. *Code Civ. Proc. § 378*

Permissive joinder of parties defendant. *Code Civ. Proc. § 379*

Compulsory joinder of parties. *Code Civ. Proc. § 389*

Objection of misjoinder of parties. *Code Civ. Proc. § 430.10(d)*

Raising objections by demurrer or answer. *Code Civ. Proc. § 430.30(a)*

[4] Text References

Witkin, California Procedure, vol. 4, *Pleading*, §§ 155-192; vol. 5, *Pleading*, § 926 (4th ed. 1997)

[5] Cross References

For alternative forms of demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPartiesJoinderMisjoinderCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrers

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1-3 California Forms of Pleading and Practice--Annotated § 3.302

§ 3.302 Demurrer [Code Civ. Proc. § 430.30(a)] on Ground of Nonjoinder of Party [Code Civ. Proc. § 430.10(d)] Defendant [Code Civ. Proc. §§ 379, 389]

[1] FORM Demurrer [Code Civ. Proc. § 430.30(a)] on Ground of Nonjoinder of Party [Code Civ. Proc. § 430.10(d)] Defendant [Code Civ. Proc. §§ 379, 389]

Defendant demurs to the complaint on the following ground:

There is a nonjoinder of a party defendant in that it appears on the face of the complaint [and from _____ (*specify*) of which this court may, and is hereby requested to, take judicial notice] that _____ [*set forth each fact as it appears on the face of the complaint that supports each as it appears on the face of the complaint that supports each element necessary for compulsory joinder, e.g.:* this action is against the administrator of the estate of _____ (*name*), deceased, to enforce an alleged contract by which decedent agreed to leave his entire estate to plaintiff (page _____, line _____). The decedent is survived by _____ (*name*), his spouse and _____ (*name*), his son (page _____, line _____), who have not been joined in this action. As the heirs of the decedent his spouse and son have a right and interest in the subject matter of this action that may be adversely affected by a trial and judgment in their absence].
Dated: _____.

_____ [*signature*]
Attorney for Defendant

CAUTION:
A memorandum of points and authorities and a notice of hearing on the demurrer [*see § 3.251*] must be filed with the foregoing demurrer [*Cal. Rules of Ct., Rules 1.5(b), 3.1100, 3.1103(b), 3.1113(a)*]. For discussion and forms, *see* Ch. 417, *Points and Authorities* .

[2] Use of Form

The foregoing form is for use to demur to a complaint on the ground that a person whose joinder as a party defendant [*see Code Civ. Proc. § 379*] is required [*Code Civ. Proc. § 389*] has not been joined. It is to be used when the nonjoinder appears on the face of the complaint. The form may also be used if the demurrer is based on matters of which the court will take judicial notice [*Evid. Code §§ 451, 452*]. If the nonjoinder does not appear either on the face of the complaint or from matters of which the court may or must take judicial notice, the objection may be raised by answer [*see § 3.303*].

[3] Cross References

See also *§ 3.300*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPartiesJoinderMisjoinderCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrers

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1-3 California Forms of Pleading and Practice--Annotated § 3.303

§ 3.303 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] on Ground of Nonjoinder of Party [Code Civ. Proc. § 430.10(d)] Defendant [Code Civ. Proc. §§ 379, 389]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] on Ground of Nonjoinder of Party [Code Civ. Proc. § 430.10(d)] Defendant [Code Civ. Proc. §§ 379, 389]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that there is a nonjoinder of a party defendant. _____ [*Name*] is a person who is subject to service of process in that _____ [*specify, e.g.,* he/she presently resides in California]. His/Her joinder will not deprive this court of jurisdiction of the subject matter of this action in that _____ [*specify*]. _____ [In his/her absence complete relief cannot be accorded among those who are already parties *or* He/She claims an interest relating to the subject of this action and is so situated that the disposition of this action in his/her absence may _____ (as a practical matter impair or impede his/her ability to protect that interest *or* leave persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his/her claimed interest)] in that _____[*specify*].

[2] Use of Form

The foregoing form is for inclusion in an answer as an affirmative defense when objecting to the nonjoinder of a party [*see Code Civ. Proc. § 430.10(d)*] defendant whose joinder is required for a complete disposition of the action [*see Code Civ. Proc. §§ 379, 389*]. When the defect appears on the face of the complaint the objection may be raised by demurrer [*Code Civ. Proc. § 430.30(a)*; *see § 3.304*]. For forms and procedure to obtain a separate trial of the defense of nonjoinder of a party defendant, see *§ 3.340* et seq.

[3] Cross References

See also §§ 3.301, *3.302*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPartiesJoinderMisjoinder

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1-3 California Forms of Pleading and Practice--Annotated § 3.304

§ 3.304 Demurrer [Code Civ. Proc. § 430.30(a)] on Ground of Misjoinder of Party [Code Civ. Proc. § 430.10(d)] Plaintiff [Code Civ. Proc. § 378]

[1] FORM Demurrer [Code Civ. Proc. § 430.30(a)] on Ground of Misjoinder of Party [Code Civ. Proc. § 430.10(d)] Plaintiff [Code Civ. Proc. § 378]

[*Caption. See § 3.250 1* .]

Defendant demurs to the complaint herein on the following ground:

There is a misjoinder of plaintiffs herein, in that it appears on the face of the complaint that _____ [*set forth each fact as it appears on the face of the complaint, citing page and line number, that supports each element necessary to establish improper joinder*].

As is established by the allegations in the complaint, plaintiff _____ [*name*] is not a person who asserts a right to relief jointly, severally, or in the alternative, with other plaintiffs, in respect of or arising out of the same _____ [transaction *or* occurrence *or* series of transactions *or* series of occurrences)] and no question of law or fact common to all plaintiffs so joined will arise in this action; nor does plaintiff _____ [*name*] have a claim, right, or interest adverse to the defendant in the _____ [property *or* controversy] that is the subject of this action.
Dated: _____.

_____ [*signature*]
Attorney for Defendant

CAUTION:
A supporting memorandum and a notice of hearing on the demurrer [*see § 3.251*] must be filed with the foregoing demurrer [*Cal. Rules of Ct., Rules 1.5(b), 3.1100, 3.1103(b), 3.1113(a)*].

[2] Use of Form

The foregoing form is for use to demur to a complaint on the ground that a person has been joined as a party plaintiff who fails to satisfy the statutory provisions for permissive joinder of plaintiffs [*see Code Civ. Proc. § 378*]. It is to be used when the misjoinder appears on the face of the complaint. The form may also be used if the demurrer is based on matters of which the court will take judicial notice [*Evid. Code §§ 451, 452*]. If the misjoinder does not appear either on the face of the complaint or from matters of which the court may or must take judicial notice, the objection may be raised by answer [*see § 3.305*].

For discussion of misjoinder, see *§ 3.71*.

[3] State Statutes

Permissive joinder of plaintiffs. *Code Civ. Proc. § 378*

[4] Text References

Witkin, California Procedure, vol. 4, *Pleading*, §§ 160, 175-178, 294, 297; vol. 5, *Pleading*, §§ 922, 923,1058-1059 (4th ed. 1997)

[5] Cross References

See also *§ 3.300*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPartiesJoinderMisjoinderCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrers

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1-3 California Forms of Pleading and Practice--Annotated § 3.305

§ 3.305 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] on Ground of Misjoinder of Party [Code Civ. Proc. § 430.10(d)] Plaintiff [Code Civ. Proc. § 378]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] on Ground of Misjoinder of Party [Code Civ. Proc. § 430.10(d)] Plaintiff [Code Civ. Proc. § 378]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that there is a misjoinder of plaintiffs in that _____ [*name*] has been joined as a plaintiff but is not a person who asserts a right to relief jointly, severally, or in the alternative, with other plaintiffs, in respect of or arising out of the same _____ [transaction *or* occurrence *or* series of transactions *or* series of occurrences)] and no question of law or fact common to all plaintiffs so joined will arise in this action; nor does plaintiff _____ [*name*] have a claim, right, or interest adverse to the defendant in the _____ [property *or* controversy] that is the subject of this action.
Dated: _____.

_____ [*signature*]
Attorney for Defendant

[2] Use of Form

The foregoing form is for inclusion in an answer as an affirmative defense [*see Code Civ. Proc. § 431.30(b)(2)*] when objecting to the misjoinder of a party [*see Code Civ. Proc. § 430.10(d)*] plaintiff. When the defect appears on the face of the complaint the objection may be raised by demurrer [*Code Civ. Proc. § 430.30(a)*; *see § 3.304*]. For forms and procedure to obtain a separate trial of the defense of misjoinder of a party plaintiff, see *§ 3.340* et seq.

[3] Cross References

See also §§ 3.301, *3.304*.

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1-3 California Forms of Pleading and Practice--Annotated § 3.306

§ 3.306 Demurrer [Code Civ. Proc. § 430.30(a)] on Ground of Misjoinder of Party [Code Civ. Proc. § 430.10(d)] Defendant [Code Civ. Proc. § 379]

[1] FORM Demurrer [Code Civ. Proc. § 430.30(a)] on Ground of Misjoinder of Party [Code Civ. Proc. § 430.10(d)] Defendant [Code Civ. Proc. § 379]

[*Caption. See § 3.250 1* .]

Defendant demurs to the complaint herein on the following ground:

There is a misjoinder of defendants in that it appears on the face of the complaint that _____ [*set forth each fact as it appears on the face of the complaint that supports each element necessary to establish improper joinder*].

As established by the allegations in the complaint, defendant _____ [*name*] is not a person against whom plaintiff asserts _____ [a right to relief jointly, severally, or in the alternative, in respect of or arising out of the same _____ (transaction *or* occurrence *or* series of transactions *or* series of occurrences) with other defendants, nor is there any question of law or fact common to defendant _____ (*name*) and other persons that will arise in this action *or* a claim, right, or interest adverse to defendant _____ (*name*) in the _____ (property *or* controversy) that is the subject of this action].
Dated: _____.

_____ [*signature*]
Attorney for Defendant

CAUTION:
A supporting memorandum and a notice of hearing on the demurrer [*see § 3.251*] must be filed with the foregoing demurrer [*Cal. Rules of Ct., Rules 1.5(b), 3.1100, 3.1103(b), 3.1113(a)*]. For discussion and

forms, *see* Ch. 417, *Points and Authorities* .

[2] Use of Form

The foregoing form is for use to demur to a complaint on the ground that a person has been joined as a party defendant who fails to satisfy the statutory provisions for permissive joinder of plaintiffs [*see Code Civ. Proc. § 379*]. It is to be used when the misjoinder appears on the face of the complaint. The form may also be used if the demurrer is based on matters of which the court will take judicial notice [*Evid. Code §§ 451, 452*]. If the misjoinder does not appear either on the face of the complaint or from matters of which the court may or must take judicial notice, the objection may be raised by answer [*see § 3.307*].

For detailed discussion of misjoinder, see *§ 3.72*.

[3] State Statutes

Permissive joinder of defendants. *Code Civ. Proc. § 379*

[4] Text References

Witkin, California Procedure, vol. 4, *Pleading*, §§ 160, 176, 180-189, 191, 297; vol. 5, *Pleading*, §§ 925, 1062-1063 (4th ed. 1997)

[5] Cross References

See also *§ 3.300*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPartiesJoinderMisjoinderCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrers

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1-3 California Forms of Pleading and Practice--Annotated § 3.307

§ 3.307 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] on Ground of Misjoinder of Party [Code Civ. Proc. § 430.10(d)] Defendant [Code Civ. Proc. § 379]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] on Ground of Misjoinder of Party [Code Civ. Proc. § 430.10(d)] Defendant [Code Civ. Proc. § 379]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that there is a misjoinder of defendants in that _____ [*name*] has been joined as a defendant and he is not a person against whom plaintiff asserts _____ [a right to relief jointly, severally, or in the alternative, in respect of or arising out of the same (transaction *or* occurrence *or* series of transactions *or* series of occurrences) with other defendants, nor is there any question of law of fact common to defendant _____ (*name*) and other persons that will arise in this action *or* a claim, right, or interest adverse to defendant _____ (*name*) in the _____ (property *or* controversy) that is the subject of this action].

[2] Use of Form

The foregoing form is for inclusion in an answer as an affirmative defense [*see Code Civ. Proc. § 431.30(b)(2)*] when objecting to the misjoinder of a party [*see Code Civ. Proc. § 430.10(d)*] defendant. When the defect appears on the face of the complaint the objection may be raised by demurrer [*see Code Civ. Proc. § 430.30(a)*; *see § 3.306*]. For forms and procedure to obtain a separate trial of the defense of misjoinder of a party defendant, see *§ 3.340* et seq.

[3] Cross References

See also *§ 3.306*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPartiesJoinderMisjoinder

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1-3 California Forms of Pleading and Practice--Annotated §§ 3.308-3.319

[Reserved]

§§ 3.308[Reserved]

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D. Premature Actions

1-3 California Forms of Pleading and Practice--Annotated § 3.320

§ 3.320 Demurrer [Code Civ. Proc. § 430.30(a)] for Failure to State a Cause of Action [Code Civ. Proc. § 430.10(e)]--Action Prematurely Brought

[1] FORM Demurrer [Code Civ. Proc. § 430.30(a)] for Failure to State a Cause of Action [Code Civ. Proc. § 430.10(e)]--Action Prematurely Brought

[*Caption. See § 3.250 1* .]

Defendant demurs to the complaint herein on the following ground:

The complaint fails to state a cause of action in that it appears on the face of the complaint that plaintiff's cause of action is based on _____ [*state, e.g.*, an alleged unsecured claim against the estate of _____ (*name*), defendant, and the complaint fails to allege that a claim has been _____ (filed with the court *or* served on the personal representative of the estate *or* filed with the court and served on the personal representative of the estate) prior to commencement of the action].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

CAUTION:
A supporting memorandum and a notice of hearing on the demurrer [*see § 3.251*] must be filed with a demurrer [*Cal. Rules of Ct., Rules 1.5(b), 3.1100, 3.1103(b), 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

Special demurrers are not allowed in limited civil cases [*see Code Civ. Proc. §§ 91(a), (d), 92(c)*; *Buss*

v. J. O. Martin Co., Inc. (1966) 241 Cal. App. 2d 123, 133, 50 Cal. Rptr. 206 (demurrer under *Code Civ. Proc. § 430.10(f)* as special demurrer)].

[2] Use of Form

This form is for use to demur to a complaint that shows on its face that the action is premature. If the prematurity does not appear either on the face of the complaint, the objection may be raised by answer [*see § 3.321*]. The example set forth in brackets assumes that the complaint is based on a claim against an estate that is not secured by mortgage or lien and that the complaint fails to allege that a claim was filed with the court or served on the personal representative, or both, prior to commencement of the action [*see Prob. Code §§ 9002, 9150(b), 9391*].

[3] Filing or Presentation Prerequisite to Suit

Except as otherwise provided by statute, no holder of a claim against an estate may maintain an action on it unless the claim is first filed with the clerk of the court in which the probate estate is pending and is served on the personal representative of the estate, although if the claim has been allowed or rejected prior to service, service is not required [*see Prob. Code § 9150*]. Except as otherwise provided by statute, a claim that is not filed or presented is barred [*Prob. Code § 9002(b)*]. However, the holder of a mortgage or other lien on property in the decedent's estate, including but not limited to a judgment lien, may commence an action to enforce the lien against the subject property, without first filing a claim against the estate, but only if, in the complaint, the holder of the lien expressly waives all recourse against other property in the estate [*see Prob. Code § 9391*; *see also Prob. Code § 9390* (claim may not be necessary when decedent's liability is covered by insurance)].

[4] Decisions

Filing of supplemental complaint alleging presentation and rejection of creditor's claim after original complaint was filed as proper. *Radar v. Rogers (1957) 49 Cal. 2d 243, 245-250, 317 P.2d 17*

Failure to allege presentation or filing of creditor's claim as ground for demurrer for failure to state cause of action. *Kennedy v. Bank of America (1965) 237 Cal. App. 2d 637, 654, 47 Cal. Rptr. 154*

Objection of prematurity of action based on failure to present or file creditor's claim as waived by bare allegations that complaint fails to state facts sufficient to constitute cause of action. *Fireman's Fund Indem. Co. v. Knorr (1953) 117 Cal. App. 2d 761, 762-767, 256 P.2d 1005*

[5] Text References

R. Blaylock, B. Pearson, K. Schoknecht, and T. Stikker, eds., California Probate Practice, ch. 12, *Claims Against the Estate* (Matthew Bender)

Witkin, California Procedure, vol. 5, *Pleading*, § 1077 et seq. (4th ed. 1997)

[6] Cross References

See generally Ch. 206, *Demurrers and motions for Judgment on the Pleadings*.

For forms and procedures for filing and presenting creditors' claims against an estate, see Ch. 454, *Probate: Claims Against the Estate* .

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1-3 California Forms of Pleading and Practice--Annotated § 3.321

§ 3.321 Affirmative Defense [Code Civ. Proc. § 430.30(b)] of Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Action Prematurely Brought

[1] FORM Affirmative Defense [Code Civ. Proc. § 430.30(b)] of Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Action Prematurely Brought

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the action is premature and a cause of action is therefore not stated in that _____ [*allege basis of prematurity, e.g.,* the promissory note which is the basis of plaintiff's alleged cause of action against defendant was modified by the written extension agreement, attached hereto as Exhibit "1" and made a part hereof, by which plaintiff agreed to extend the time for payment to _____ (*date*), and defendant agreed to pay to plaintiff additional interest of _____ percent. This extension period has not yet expired.]
Dated: _____.

_____ [*signature*]
Attorney for Defendant

[2] Use of Form

This form is for inclusion in an answer as an affirmative defense when raising the objection that a complaint fails to state facts sufficient to constitute a cause of action [*see Code Civ. Proc. § 430.10(e)*] because it is prematurely brought [*see Kelley v. Upshaw (1952) 39 Cal. 2d 179, 181, 246 P.2d 23]* . When the defect appears on the face of the complaint the objection may be raised by demurrer [*Code Civ. Proc. § 430.30(a)*; *see § 3.320*]. For forms and procedure to obtain a separate trial on the defense of prematurity, see *§ 3.340* et seq.

[3] State Statutes

Objection based on matter not found on face of complaint or by judicial notice as raised by answer. *Code Civ. Proc. § 430.30(b)*

Separate trial of special defense constituting abatement. *Code Civ. Proc. § 597*

[4] Decisions

Payment period of promissory note extended by written agreement as ground for affirmative defense of prematurity. *Kelley v. Upshaw (1952) 39 Cal. 2d 179, 180-194, 246 P.2d 23*

[5] Cross References

See also *§ 3.320*.

For forms of answers generally, see Ch. 26, *Answers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State Claims

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1-3 California Forms of Pleading and Practice--Annotated §§ 3.322-3.339

[Reserved]

§§ 3.322[Reserved]

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E. Separate Trial Of Defenses

1-3 California Forms of Pleading and Practice--Annotated § 3.340

§ 3.340 Notice of Motion [Code Civ. Proc. § 1010]--For Separate Trial of Special Defense [Code Civ. Proc. § 597]

[1] FORM Notice of Motion [Code Civ. Proc. § 1010]--For Separate Trial of Special Defense [Code Civ. Proc. § 597]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION FOR SEPARATE TRIAL
Plaintiff,	)	OF SPECIAL DEFENSE
vs.	)	[*Code Civ. Proc. § 597*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

To _____ [*identify party, e.g.*, plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant] will move for an order that this action proceed to trial on the following special defense(s) to the _____ [complaint *or* cross complaint] herein before trial of any other issue in the case: _____[*set forth special defense(s)*]. The motion will be made on the grounds that the special defense(s), if established, will constitute a _____ [bar *or* ground of abatement] of the action, will eliminate the necessity for a lengthy trial, and will be in the interests of justice.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*signature*]
Attorney for _____ [*moving party*]

CAUTION:

A supporting memorandum is required to be served and filed with the foregoing notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, *see* Ch. 417, *Points and Authorities* .

[2] Use of Form

The foregoing notice of motion is for use by any party to move for separate trial of a special defense including the statute of limitations, res judicata, another action pending on the same cause of action, or any other defense not involving the merits of plaintiff's cause of action but constituting a bar or ground of abatement to the action [*see Code Civ. Proc. § 597*]. For discussion of the grounds for separate trial of a special defense see *§ 3.111*. For a form of notice of motion relating to the statute of limitations in a medical malpractice case, *see § 3.341*.

[3] State Statutes

Time for notice of motion. *Code Civ. Proc. § 1005(b)*

Requisites of written notice of motion; accompanying papers to be filed and served. *Code Civ. Proc. §§ 1005(b), 1010*

Motion deemed made on serving and filing of notice. *Code Civ. Proc. § 1005.5*

Prevailing party as required to give notice of court's decision or order granting or denying motion unless waived. *Code Civ. Proc. § 1019.5(a)*

[4] Text References

Witkin, California Procedure, vol. 7, *Trial*, §§ 164-167 (4th ed. 1997)

[5] Cross References

For a general form of notice of motion, see Ch. 372, *Motions and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePretrial MattersSeparate TrialsCivil ProcedurePleading & PracticeMotion PracticeGeneral Overview

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E. Separate Trial Of Defenses

1-3 California Forms of Pleading and Practice--Annotated § 3.341

§ 3.341 Notice of Motion [Code Civ. Proc. § 1010]--For Separate Trial of Defense of Statute of Limitations in Medical Malpractice Action [Code Civ. Proc. § 597.5]

[1] FORM Notice of Motion [Code Civ. Proc. § 1010]--For Separate Trial of Defense of Statute of Limitations in Medical Malpractice Action [Code Civ. Proc. § 597.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION FOR SEPARATE TRIAL
vs.	)	OF DEFENSE OF STATUTE OF LIMITATIONS IN
_____ [*name*],	)	MEDICAL MALPRACTICE ACTION
Defendant.	)	[*Code Civ. Proc. § 597.5*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

[*EITHER if action is against practitioner only*]

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant] will move for an order that this action proceed to trial on the special defense that the action is barred by the statute of limitations before trial of any other issue in the case. The motion will be made on the grounds that this action is against _____ [*name*] who is a(n) _____ [*specify occupation listed in Code Civ. Proc. § 597.5*], the action is based on the alleged _____ [professional negligence *or* rendering of professional services without consent *or* omission in his/her practice of _____ [*name*], and the answer herein pleads that the action is barred by the statute of limitations.

[*OR if action is against hospital only*]

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant] will move for an order that this action proceed to trial on the special defense that the action is barred by the statute of limitations before trial of any other issue in the case. The motion will be made on the grounds that this action is against _____ [*name of hospital*], which was at the time of the incident alleged in the complaint on file herein [, and still is,] a licensed hospital, the action is based on the alleged _____ [professional negligence *or* rendering of professional services without consent *or* omission in his/her practice of _____ [*name*], and the answer herein pleads that the action is barred by the statute of limitations.

[*OR if action is against practitioner and hospital*]

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant] will move for an order that this action proceed to trial on the special defense that the action is barred by the statute of limitations before trial of any other issue in the case. The motion will be made on the grounds that this action is against _____ [*name*] who is a(n) _____ [*specify occupation listed in Code Civ. Proc. § 597.5*] and _____ [*name of hospital*] which was at the time of the incident alleged in the complaint on file herein [, and still is,] a licensed hospital and his/her employer, the action is based on the alleged _____ [professional negligence *or* rendering of professional services without consent *or* omission in his practice of _____ [*name*], and the answer herein pleads that the action is barred by the statute of limitations.

[*CONTINUE*]

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*signature*]
Attorney for _____ [*moving party*]

CAUTION:
A supporting memorandum is required to be served and filed with the foregoing notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, *see* Ch. 417, *Points and Authorities* .

[2] Use of Form

The foregoing notice of motion is for use by any party to move for a separate trial when the special defense of the statute of limitations is sought in a medical malpractice action pursuant to *Code Civ. Proc. § 597.5*. For discussion of this special defense, see *§ 3.114*.

[3] Cross References

See also *§ 3.340*.

For alternative forms for use in medical malpractice actions, see Ch. 415, *Physicians: Medical Malpractice* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePretrial MattersSeparate TrialsTortsMalpractice & Professional LiabilityHealthcare ProvidersCivil ProcedurePleading & PracticeMotion PracticeGeneral Overview

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1-3 California Forms of Pleading and Practice--Annotated § 3.342

§ 3.342 Order [Code Civ. Proc. § 1003] Granting Motion for Separate Trial of Special Defense [Code Civ. Proc. §§ 597, 597.5]

[1] FORM Order [Code Civ. Proc. § 1003] Granting Motion for Separate Trial of Special Defense [Code Civ. Proc. §§ 597, 597.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER GRANTING SEPARATE TRIAL OF SPECIAL DEFENSE
vs.	)	[Code Civ. Proc. § _____ (597 *or* 597.5)]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

The motion of _____ [*identify party, e.g.*, plaintiff] for an order for a separate trial of the special defense(s) of _____[*specify*] came on regularly for hearing by the court on _____[*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and the separate trial of the special defense(s) of _____ [*specify*] be had before trial of other issues herein.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use in granting a motion for the separate trial of a special defense pursuant to *Code Civ. Proc. § 597* or *597.5*.

[3] Cross References

See also *§§ 3.340* and *3.341*.

For a general form of order, see Ch. 372, *Motions and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresPretrial MattersSeparate Trials

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1-3 California Forms of Pleading and Practice--Annotated § 3.343

§ 3.343 Interlocutory Judgment Abating Proceedings After Separate Trial of Special Defense [Code Civ. Proc. § 597]--Another Action Pending [Code Civ. Proc. § 430.10(c)]

[1] FORM Interlocutory Judgment Abating Proceedings After Separate Trial of Special Defense [Code Civ. Proc. § 597]--Another Action Pending [Code Civ. Proc. § 430.10(c)]

[*Caption, introduction. See § 3.250 1* .]

The trial of the special defense of another action pending between the same parties for the same cause, came on regularly for separate trial on _____[*date*], in _____ [Department *or* Division _____ of] this court, the Honorable _____[*name*], Judge, presiding, sitting without a jury. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*]. The court, having considered the evidence, both oral and documentary, including the papers and records on file herein and the papers and records on file in Case No. _____, entitled _____[*abbreviated heading*], pending in _____ [*name of court*], finds:

Case No. _____, entitled _____[*abbreviated heading*], is presently pending in _____ [*name of court*], and was commenced prior to the action herein; it is between the same parties, on the same cause of action, and seeks the same relief as the within action.

IT IS ORDERED AND ADJUDGED that all proceedings in this action are stayed until a final determination of Case No. _____, pending in _____ [*name of court*].
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The foregoing form is for use by defendant to draft an interlocutory judgment when the special defense of another action pending between the same parties on the same cause of action is sustained on the separate trial of the defense [*see Code Civ. Proc. §§ 430.10(c), 597*]. The form is used when no other special defense is sustained, and the court is entering an interlocutory judgment in defendant's favor to the effect that no trial of other issues shall be had until the final determination of the other action [*see Code Civ. Proc. § 597*].

[3] Cross References

See also *§§ 3.280, 3.281*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePretrial MattersSeparate Trials

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1-3 California Forms of Pleading and Practice--Annotated § 3.344

§ 3.344 Judgment [Code Civ. Proc. § 577] of Dismissal After Trial by Court [Code Civ. Proc. §§ 631-636] of Special Defense [Code Civ. Proc. § 597]

[1] FORM Judgment [Code Civ. Proc. § 577] of Dismissal After Trial by Court [Code Civ. Proc. §§ 631-636] of Special Defense [Code Civ. Proc. § 597]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	JUDGMENT OF DISMISSAL
Defendant.	)	
	)	
	)	

[*EITHER is statement of decision has been filed*]

The trial of the special defense of _____ [*specify, e.g.,* the statute of limitations] came on regularly for

separate trial on _____ [*date*], in _____ [Department *or* Division _____ of] this court, the Honorable _____[*name*], Judge, presiding, sitting without a jury. Plaintiff appeared by counsel _____ [*name*]. The court, having considered the evidence, both oral and documentary, and the matter having been submitted for decision, and the court, on request of _____ [plaintiff *or* defendant], having caused to be made and filed its written Statement of Decision;

[*OR if statement of decision was not requested*]

The trial of the special defense of _____ [*specify, e.g.,* the statute of limitations] came on regularly for separate trial on _____ [*date*], in _____ [Department *or* Division _____ of] this court, the Honorable _____[*name*], Judge, presiding, sitting without a jury. Plaintiff appeared by counsel _____ [*name*]. The court, having considered the evidence, both oral and documentary, and the matter having been submitted for decision, and Statement of Decision not having been requested;

[*OR if making statement of decision in judgment*]

The trial of the special defense of _____ [*specify, e.g.,* the statute of limitations] came on regularly for separate trial on _____ [*date*], in _____ [Department *or* Division _____ of] this court, the Honorable _____[*name*], Judge, presiding, sitting without a jury. Plaintiff appeared by counsel _____ [*name*]. The court, having considered the evidence, both oral and documentary, and the matter having been submitted for decision, the court finds that the allegations in defendant's _____ [*specify, e.g.,* first affirmative] defense are true and the defense of _____ [*specify, e.g.,* statute of limitations], which constitutes a complete bar to plaintiff's entire cause of action, has been established;

[*CONTINUE*]

IT IS ORDERED AND ADJUDGED that this action is dismissed with prejudice, that plaintiff takes nothing by this action, and that defendant recovers from plaintiff the costs of suit.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The foregoing form is for use as a judgment dismissing an action after a special defense has been sustained after separate trial by the court [*see Code Civ. Proc. § 597*]. For a form of judgment of dismissal after trial of the special defense by jury, *see § 3.345*.

[3] State Statutes

"Judgment" defined. *Code Civ. Proc. § 577*

Statement of decision explaining factual and legal basis for court's decision as to each of principal controverted issues as not required unless requested. *Code Civ. Proc. § 632*

[4] Cross References

For alternative forms of judgment, see Ch. 318, *Judgments* .

For forms of findings of fact and conclusions of law, see Ch. 529, *Statement of Decision* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePretrial MattersSeparate TrialsCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

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1-3 California Forms of Pleading and Practice--Annotated § 3.345

§ 3.345 Judgment [Code Civ. Proc. § 577] of Dismissal After Trial by Jury [Code Civ. Proc. §§ 607-630] of Special Defense [Code Civ. Proc. § 597]

[1] FORM Judgment [Code Civ. Proc. § 577] of Dismissal After Trial by Jury [Code Civ. Proc. §§ 607-630] of Special Defense [Code Civ. Proc. § 597]

[*Caption. See § 3.344 1* .]

The trial of the special defense of _____ [*specify e.g.*, illegality of the contract plaintiff on which plaintiff sued] came on regularly for separate trial on _____ [*date*], in _____[Department *or* Division _____ of] this court, the Honorable _____ [*name*], Judge, presiding. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

A jury of _____ [*number*] persons was regularly impaneled and sworn to try the special defense. Witnesses on the part of the plaintiff and defendant were sworn and examined. After the evidence, the argument of counsel, and instructions of the court, the jury retired to consider their verdict, subsequently returned to court, and being called, answered to their names and duly rendered their verdict in writing in favor of defendant.

WHEREFORE, IT IS ORDERED AND ADJUDGED that this action is dismissed with prejudice, that plaintiff takes nothing by this action, and that defendant recovers from plaintiff the costs of suit.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The foregoing form is for use as a judgment dismissing an action after a special defense has been sustained after

separate trial by jury [*see Code Civ. Proc. §§ 597, 607 et seq.*]. For a form of judgment of dismissal after trial of the special defense by the court, *see § 3.344*.

[3] Decisions

Illegality of contract as special defense for separate trial by jury. *McCarthy v. Superior Court (1946) 73 Cal. App. 2d 943, 944, 167 P.2d 744*

[4] Cross References

See also *§ 3.344*.

For forms relating to verdicts, see Ch. 326A, *Jury Verdicts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedurePretrial MattersSeparate TrialsCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 4 ABORTION AND BIRTH CONTROL METHODS

1-4 California Forms of Pleading and Practice--Annotated 4.syn

§ 4.syn Synopsis to Chapter 4: ABORTION AND BIRTH CONTROL METHODS

§ 4.01 Scope of Chapter

§ 4.02 Cross References

§§ 4.03-4.09 [Reserved]

§ 4.10 Definitions

[1] Abortion

[2] Fetus

[3] Pregnancy

[4] State

[5] Viability

§ 4.11 Constitutional Right to Abortion

[1] Fundamental Right

[2] Federal Constitution

[3] California Constitution

§ 4.12 Penalties for Illegal Abortion

§ 4.13 Reproductive Privacy Act

[1] Background; Repealed Legislation

[2] Guarantee of Fundamental Rights

[3] Performance of Unauthorized Abortion

§ 4.14 Refusal to Participate in Abortion

§ 4.15 Government Financial Assistance

§ 4.16 Minor's Right to Abortion Under Federal Law

[1] Parental Consent

[2] Parental Notice

§ 4.17 Minor's Right to Abortion Under State Law

§ 4.17A Freedom of Access to Clinics

[1] Acts Constituting a Misdemeanor

[2] Relationship Between State and Federal Laws

[3] Actions for Injunctive Relief, Damages, and Penalties

[4] Act May Not Be Construed for Certain Purposes

[5] Reproductive Rights Law Enforcement Act

§ 4.18 Sterilization

[1] Informed Consent Required

[2] Employment

[3] Nonmedical Selection Criteria Prohibited

[4] Prisoners

§ 4.19 Improperly Performed Abortion or Sterilization

[1] Personal Injury Action by Mother

[2] Wrongful Life Action by Child

[3] Wrongful Birth Action by Parents

§ 4.20 Misrepresentation of Fertility to Sexual Partner

§ 4.21 Notification of Right to Abortion

§§ 4.22-4.39 [Reserved]

§ 4.40 Federal Statutes

§ 4.41 State Statutes

[1] Abortion in General

[2] Minors

[3] Penal Provisions

[4] Sterilization

§ 4.42 Administrative Regulations

§ 4.43 Decisions

[1] Advertising

[2] Consent

[3] Definitions

[4] False Representations Regarding Birth Control

[4A] Freedom of Access to Clinics

[5] Freedom of Religion

[6] Government Financial Assistance

[6A] Licensing and Regulation

[6B] Notification of Right to Abortion

[7] Right of Privacy

[8] State Interests

[9] Standard of Care

[10] Sterilization

[11] Therapeutic Abortion Act

[12] Viability

§ 4.44 Attorney General Opinions

§ 4.45 Law Reviews

§ 4.46 Text References

§§ 4.47-4.59 [Reserved]

§ 4.60 Complaint for Damages for Medical Malpractice [Civ. Code § 3333], Battery [Civ. Code § 3333], and Breach of Contract [Civ. Code § 3300]--By Woman Against Surgeon--Unsuccessful Surgical Sterilization

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Damages

[a] Specification of Amount

[b] Measure

[6] Statute of Limitations for Malpractice

[7] Notice Required Prior to Commencing Action

[8] Cross References

§ 4.61 Petition for Writ of Mandate [Code Civ. Proc. § 1086] to Compel Admittance of Pregnant Woman to Local District Hospital for Abortion

[1] FORM

[2] Use of Form

[3] Verification

[4] Proof of Service

[5] Supporting Memorandum

[6] Mandate to Compel Admittance for Abortion

[7] Cross References

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Chapter 4 ABORTION AND BIRTH CONTROL METHODS
PART I. SCOPE

1-4 California Forms of Pleading and Practice--Annotated § 4.01

§ 4.01 Scope of Chapter

This chapter discusses the legal aspects of abortion and surgical sterilization. It contains a form of complaint for malpractice based on an unsuccessful surgical sterilization [*see § 4.60*] and a form of petition for writ of mandate to compel admittance of a pregnant woman to a local district hospital for an abortion [*see § 4.61*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityHealthcare ProvidersConstitutional LawSubstantive Due ProcessPrivacyPersonal DecisionsHealthcare LawActions Against Healthcare WorkersSurgeonsCivil ProcedureRemediesWritsCommon Law WritsMandamusCriminal Law & ProcedureCriminal OffensesHomicideCriminal AbortionGeneral Overview

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PART I. SCOPE

1-4 California Forms of Pleading and Practice--Annotated § 4.02

§ 4.02 Cross References

- For discussion of a minor's action for prenatal injuries and related form of complaint, see Ch. 367A, *Minors: Tort Actions* .

- For discussion of malpractice actions against doctors generally and related forms, see Ch. 415, *Physicians: Medical Malpractice* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityHealthcare ProvidersCivil ProcedurePartiesCapacity of PartiesGuardiansHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansTortsMalpractice & Professional LiabilityHealthcare Providers

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[Reserved]

§§ 4.03[Reserved]

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PART II. LEGAL BACKGROUND

1-4 California Forms of Pleading and Practice--Annotated § 4.10

§ 4.10 Definitions

[1] Abortion

The term "abortion" refers to either an induced or a spontaneous expulsion of the fetus from the womb before the fetus is capable of surviving [*see* Schmidt, Attorneys' Dictionary of Medicine (Matthew Bender)]. For purposes of the Reproductive Privacy Act [*Health & Safety Code § 123460 et seq.*; *see § 4.13*], "abortion" means any medical treatment intended to induce the termination of a pregnancy, except for the purpose of producing a live birth [*Health & Safety Code § 123464(a)*].

The term "therapeutic abortion," as used in the former California Therapeutic Abortion Act (former *Health & Safety Code § 123400 et seq.*), originally referred to an abortion induced to protect the health of a pregnant woman [*see Ballard v. Anderson (1971) 4 Cal. 3d 873, 879, 95 Cal. Rptr. 1, 484 P.2d 1345]* . The provisions of the former Act requiring that the pregnant woman's health be endangered were struck down as unconstitutionally vague in 1972 [*People v. Barksdale (1972) 8 Cal. 3d 320, 330-332, 338, 105 Cal. Rptr. 1, 503 P.2d 257* ; *see* discussion in *§ 4.13*]. Portions of the California Therapeutic Abortion Act, including the Act's name, were repealed in 2002 [*see* 2002 Stats., ch. 385, §§ 2-7] and replaced by the Reproductive Privacy Act [*Health & Safety Code § 123460 et seq.*, discussed in *§ 4.13*].

[2] Fetus

The question of what constitutes a fetus for purposes of determining whether a particular act may be considered an abortion is unsettled. One court has held that certain pregnancy termination methods that operate after fertilization but before implantation, such as the intrauterine device (IUD) and estrogen pregnancy prophylaxis (the "morning after" pill), are birth control methods rather than abortion [*Brownfield v. Daniel Freeman Marina Hospital (1989) 208 Cal. App. 3d 405, 413, 256 Cal. Rptr. 240* (cause of action may be stated for medical malpractice for failure to disclose availability of morning-after pill to rape victim)].

[3] Pregnancy

For purposes of the Reproductive Privacy Act [*Health & Safety Code § 123460 et seq.*, discussed in *§ 4.13*], the term

"pregnancy" means the human reproductive process, beginning with the implantation of an embryo [*Health & Safety Code § 123464(b)*].

[4] State

For purposes of the Reproductive Privacy Act [*Health & Safety Code § 123460 et seq.*, discussed in *§ 4.13*], "state" means the State of California, and every county, city, town and municipal corporation, and quasi-municipal corporation in the state [*Health & Safety Code § 123464(c)*].

[5] Viability

For purposes of the Reproductive Privacy Act [*Health & Safety Code § 123460 et seq.*, discussed in *§ 4.13*], the term "viability" means the point in a pregnancy when, in the good faith medical judgment of a physician, on the particular facts of the case before the physician, there is a reasonable likelihood of the fetus's sustained survival outside the uterus without the application of extraordinary medical measures [*Health & Safety Code § 123464(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityHealthcare ProvidersConstitutional LawSubstantive Due ProcessPrivacyPersonal DecisionsHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawTreatmentEnd-of-Life DecisionsAbortionRight to Privacy

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1-4 California Forms of Pleading and Practice--Annotated § 4.11

§ 4.11 Constitutional Right to Abortion

[1] Fundamental Right

A woman has a fundamental right to choose whether or not to bear a child, and this is a right to privacy which is protected by the United States Constitution [*Roe v. Wade (1973) 410 U.S. 113, 152-154, 93 S. Ct. 705, 35 L. Ed. 2d 147 , reh'g denied, 410 U.S. 959* ; *see Griswold v. Connecticut (1965) 381 U.S. 479, 483-486, 85 S. Ct. 1678, 14 L. Ed. 2d 510* ; *Planned Parenthood of Southeastern Pa. v. Casey (1992) 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674* ; *Stenberg v. Carhart (2000) 530 U.S. 914, 120 S. Ct. 2597, 147 L. Ed. 2d 743]* and the California Constitution [*Cal. Const., art. I, § 1*; *see Committee to Defend Reproductive Rights v. Myers (1981) 29 Cal. 3d 252, 262, 172 Cal. Rptr. 866, 625 P.2d 779* ; *People v. Belous (1969) 71 Cal. 2d 954, 963-964, 80 Cal. Rptr. 354, 458 P.2d 194 , cert. denied, 397 U.S. 915 (1970)]* .

Only a compelling state interest will justify limitations on the exercise of the right [*Roe v. Wade (1973) 410 U.S. 113, 155, 93 S. Ct. 705, 35 L. Ed. 2d 147 , reh'g denied, 410 U.S. 959* ; *see People v. Privitera (1979) 23 Cal. 3d 697, 702, 153 Cal. Rptr. 431, 591 P.2d 919 , cert. denied, 444 U.S. 949]* . No lesser standard applies to the rights of minors [*American Academy of Pediatrics v. Van de Kamp (1989) 214 Cal. App. 3d 831, 842-845, 263 Cal. Rptr. 46]* .

[2] Federal Constitution

Under the U.S. Constitution, during approximately the first trimester (three months) of pregnancy, the abortion decision and its effectuation must be left entirely to the pregnant woman and to the medical judgment of her attending physician. After the first trimester, the state may promote its interest in the health of the mother by regulating abortion procedure in ways reasonably related to maternal health [*Roe v. Wade (1973) 410 U.S. 113, 163-164, 93 S. Ct. 705, 35 L. Ed. 2d 147 , reh'g denied, 410 U.S. 959* ; *see Planned Parenthood of Missouri v. Danforth (1976) 428 U.S. 52, 61, 96 S. Ct. 2831, 49 L. Ed. 2d 788]* .; *see also Gonzales v. Carhart (2007) 550 U.S. 124, 127 S. Ct. 1610, 167 L. Ed. 2d 480, 2007 U.S. LEXIS 4338, *40* (before viability, state may not prohibit any woman from making ultimate decision to terminate her pregnancy and may not impose undue burden on this right by regulation purpose or effect of which is to place substantial obstacle in path of woman seeking abortion before fetus attains viability; however, regulations that do no more than create structural mechanism by which state, or parent or guardian of minor, may express profound respect for life of unborn are permitted if they are not substantial obstacle to woman's exercise of right to choose).

After the stage at which the fetus becomes viable, or able to live outside the mother's womb with or without artificial aid (usually placed at about seven months), the state may promote its interest in the potentiality of human life by regulating and even proscribing abortion, except if it is necessary for preserving the life or health of the mother [*Roe v. Wade (1973) 410 U.S. 113, 160, 163-164, 93 S. Ct. 705, 35 L. Ed. 2d 147 , reh'g denied, 410 U.S. 959]* . States may also require "viability testing" of an unborn child of possibly as few as 20 weeks' gestational age as an element of proscribing abortion after viability [*Webster v. Reproductive Health Serv. (1989) 492 U.S. 490, 513-521, 525-531, 537, 109 S. Ct. 3040, 106 L. Ed. 2d 410* (plurality opinion of Rehnquist, C.J., and opinions of O'Connor, J., and Scalia, J. concurring in result that statute requiring viability testing is not unconstitutional as long as physician is not required to deviate from appropriate standard of care)].

Applying the doctrine of the right to privacy, the United States Supreme Court has invalidated state laws that unconstitutionally restrict the exercise of the right to an abortion, such as:

- Statutes requiring spousal consent [*Planned Parenthood of Missouri v. Danforth (1976) 428 U.S. 52, 70, 96 S. Ct. 2831, 49 L. Ed. 2d 788]* .

- Mandatory 24-hour waiting periods [*City of Akron v. Akron Ctr. for Reproductive Health (1983) 462 U.S. 416, 449-451, 103 S. Ct. 2481, 76 L. Ed. 2d 687]* .

- Regulations requiring that women be counseled about the stages of fetal development and serious surgical complications before receiving an abortion [*Thornburgh v. American Coll. of Obst. & Gyn. (1986) 476 U.S. 747, 760-766, 106 S. Ct. 2169, 90 L. Ed. 2d 779* ; *see City of Akron v. Akron Ctr. for Reproductive Health (1983) 462 U.S. 416, 442-445, 103 S. Ct. 2481, 76 L. Ed. 2d 687* ; *see also § 4.16*].

- State law banning partial birth abortions [*Stenberg v. Carhart (2000) 530 U.S. 914, 120 S. Ct. 2597, 147 L. Ed. 2d 743]* .

The Court has upheld state laws requiring that only licensed physicians perform abortions [*see Mazurek v. Armstrong (1997) 520 U.S. 968, 117 S. Ct. 1865, 138 L. Ed. 2d 162* (plaintiffs challenging state statute requiring that abortion be performed only by licensed physician as undue burden on right to abortion did not establish fair likelihood of success so as to justify preliminary injunction against enforcement)] or provide information about abortions to patients [*Planned Parenthood of Southeastern Pa. v. Casey (1992) 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674]* .

The courts will not always invalidate state laws unconstitutionally restricting the exercise of a right to abortion if lower courts can fashion appropriate relief. Thus, for example, enforcing a statute that regulates minors' access to abortion would be unconstitutional in medical emergencies; however, the United States Supreme Court would not invalidate the statute entirely, because lower courts might be able to render narrower declaratory and injunctive relief [*Ayotte v. Planned Parenthood (2006) 546 U.S. 320, 126 S. Ct. 961, 967-969, 163 L. Ed. 2d 812]* .

With regard to federal laws regulating abortion, the Court has held that the Partial-Birth Abortion Ban Act of 2003 [*18 U.S.C. § 1531*], which proscribes certain abortions that occur in the second trimester of pregnancy involving intact extraction of the fetus, except for partial-birth abortion necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself, was not void for vagueness; did not impose an undue burden because its restrictions on second-trimester abortions were too broad, since the Act prohibited only intact extraction, not the procedure in which the fetus is removed in parts; and was not invalid on its face because it did not impose a substantial obstacle to late-term but previability abortions [*Gonzales v. Carhart (2007) 550 U.S. 124, 127 S. Ct. 1610, 167 L. Ed. 2d 480, 2007 U.S. LEXIS 4338, *41-*79]* .

[3] California Constitution

The California Constitution, which expressly guarantees the right to privacy, provides even greater protections for the right to abortion than those afforded by the United States Constitution and therefore legislative restrictions can be struck down on independent state constititutional grounds [*Cal. Const., art. 1, § 1*; *Committee to Defend Reproductive Rights v. Myers (1981) 29 Cal. 3d 252, 261-263, 172 Cal. Rptr. 866, 625 P.2d 779* ; *see American Academy of Pediatrics v. Van de Kamp (1989) 214 Cal. App. 3d 831, 839-842, 263 Cal. Rptr. 46* (federal authority construing federal right of privacy may be adopted if persuasive, but is not controlling); *see also § 4.15*].

The state privacy right protects against invasions of privacy by private citizens as well as by the state [*Chico Feminist Women's Health Center v. Scully (1989) 208 Cal. App. 3d 230, 241-242, 256 Cal. Rptr. 194* (noting that question of whether federal right of privacy is limited to protection from state action is unresolved)].

The state right of privacy also protects information about a citizen's participation in a medical procedure, including abortion. This right extends to all spheres in which the person has a reasonable expectation of privacy and supports injunctive relief prohibiting the disclosure of the identity of any person who seeks an abortion. However, there is no reasonable expectation of privacy on a public street, and the right of privacy does not protect against possible recognition in public places [*Chico Feminist Women's Health Center v. Scully (1989) 208 Cal. App. 3d 230, 242, 250, 256 Cal. Rptr. 194* (client's right of privacy does not justify enjoining all picketing at clinic where abortions are performed)].

For a general discussion of the scope of the right to privacy under the federal and state constitutions, see Ch. 429, *Privacy* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 4.12 Penalties for Illegal Abortion

Only a holder of a physician's or surgeon's certificate can perform a legal abortion [*Health & Safety Code § 123405*]. Performing or assisting at a surgical abortion without a valid license to practice as a physician and surgeon in California, or a certificate obtained in accordance with some other provision of law that authorizes him or her to perform or assist at a surgical abortion, is a crime [*Bus. & Prof. Code § 2253(b)*]. Criminal prosecution of nonphysicians who perform abortions has been held constitutional in light of a state's interest in protecting maternal health [*Connecticut v. Menillo (1975) 423 U.S. 9, 11, 96 S. Ct. 170, 46 L. Ed. 2d 152]* .

Participation in an abortion in violation of the Reproductive Privacy Act is a basis for professional discipline of physicians [*Bus. & Prof. Code § 2253(a)*], nurses and midwives [*Bus. & Prof. Code § 2761(c)*], physical therapists [*Bus. & Prof. Code § 2660(c)*], psychiatric technicians [Bus. & Prof. Code § 4521(c)], and vocational nurses [*Bus. & Prof. Code § 2878(c)*]. For discussion and forms relating to disciplinary proceedings against health care workers, see Ch. 414, *Physicians: Licensing and Discipline* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesHomicideCriminal AbortionPenaltiesHealthcare LawTreatmentEnd-of-Life DecisionsAbortionGeneral Overview

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§ 4.13 Reproductive Privacy Act

[1] Background; Repealed Legislation

Various portions of the former Therapeutic Abortion Act [former *Health & Safety Code § 123400 et seq.*] were held unconstitutional by both the United States and California Supreme Courts [*see, e.g., Simopoulos v. Virginia (1983) 462 U.S. 506, 516-519, 103 S. Ct. 2532, 76 L. Ed. 2d 755* (invalidating requirement of former *Health & Safety Code § 123405* that abortions be performed in hospitals); *Doe v. Bolton (1973) 410 U.S. 179, 193-195, 194-200, 93 S. Ct. 739, 35 L. Ed. 2d 201 , reh'g denied, 410 U.S. 959* (requirement of former *Health & Safety Code § 123405* that abortions be performed in hospitals and former *Health & Safety Code §§ 123405* and *123410* that abortion be approved by medical committee cannot be used to restrict woman's right to abortion at least in first trimester); *People v. Barksdale (1972) 8 Cal. 3d 320, 330-332, 338, 105 Cal. Rptr. 1, 503 P.2d 257* (striking down medical committee approval criteria of former *Health & Safety Code §§ 123405, 123415*, but upholding portions of Act [*see* former *Health & Safety Code § 123405*] requiring that abortions be performed only by holders of physician's and surgeon's certificates in accredited hospitals)].

In 2002, the California Legislature repealed portions of the Therapeutic Abortion Act, including the Act's name, and replaced them with the Reproductive Privacy Act [2002 Stats., ch. 385 (SB 1301); *Health & Safety Code § 123460 et seq.*]. The specific provisions of the former California Therapeutic Abortion Act that were repealed in 2002 are:

- Former *Health & Safety Code § 123400*, providing that § 123400 et seq. would be known and cited as the California Therapeutic Abortion Act [*see now Health & Safety Code § 123460*, providing that *§ 123460 et seq.* will be known and cited as the Reproductive Privacy Act].

- Former *Health & Safety Code § 123405*, providing the requirements for the performance of or assistance in the performance of an abortion [*see now Health & Safety Code § 123468*, providing for when performance of abortion is unauthorized].

- Former *Health & Safety Code § 123407*, providing for approval of an abortion by the committee of the medical staff on the ground the pregnancy resulted from rape or incest.

- Former *Health & Safety Code § 123410*, specifying the membership of the committee of the medical staff referred to in former *Health & Safety Code § 123407*.

- Former *Health & Safety Code § 123415*, defining "mental health" for purposes of former *Health & Safety Code § 123405*.

- Former *Health & Safety Code § 123430*, providing for a state maintained system for reporting therapeutic abortions.

Provisions of the former California Therapeutic Abortion Act that remain viable include the following:

- The protection against an employer, medical school, or hospital from requiring an employee, student, or physician to perform an abortion [*Health & Safety Code § 123420*; *see § 4.14*].

- The prohibition of the conditioning of any privileges or immunities or receipt of public benefits on submission to an abortion or surgical sterilization [*Health & Safety Code § 123425*; *see § 4.15*].

- The provision that the rights to medical treatment of an infant prematurely born alive in the course of an abortion must be the same as the rights of an infant of similar medical status prematurely born spontaneously [*Health & Safety Code § 123435*].

- The prohibition against experimentation on any live-aborted fetus, except to protect or preserve the life and health of the fetus [*Health & Safety Code § 123440*].

- The requirement, on pain of conviction of a misdemeanor, that lifeless fetal remains be interred or incinerated promptly at the conclusion of any experimentation or study, except in the case of a public or private educational institution [*Health & Safety Code §§ 7054.3, 123445*; *cf. Feminist Women's Health Center, Inc. v. Philibosian (1984) 157 Cal. App. 3d 1076, 1082, 1088-1091, 203 Cal. Rptr. 918 , cert. denied, 470 U.S. 1052 (1985)* (California *Establishment Clause* prohibits state from turning over aborted fetuses to private cemetery for purpose of religious burial by antiabortion group)].

- The provision governing performance of an abortion on an unemancipated minor [*Health & Safety Code § 123450*; *see § 4.17*].

[2] Guarantee of Fundamental Rights

The Reproductive Privacy Act provides that every individual possesses a fundamental right of privacy with regard to personal reproductive decisions [*Health & Safety Code § 123462*], and that it is the public policy of the State of California that:

- Every individual has the fundamental right to choose or refuse birth control [*Health & Safety Code § 123462(a)*].

- Every woman has the fundamental right to choose to bear a child or to choose and to obtain an abortion, except as specifically limited by the Act [*Health & Safety Code § 123462(b)*].

- The state may not deny or interfere with a woman's fundamental right to choose to bear a child or to choose to obtain an abortion except as specifically permitted by the Act [*Health & Safety Code § 123462(c)*].

The state may not interfere with a woman's right to choose or obtain an abortion prior to the fetus's viability [*Health & Safety Code § 123464(d)*; *see § 4.10[5]* ("viability" defined)], or when the abortion is necessary to protect the life or health of the woman [*Health & Safety Code § 123466*].

[3] Performance of Unauthorized Abortion

The performance of an abortion is unauthorized if either of the following is true:

- The person performing or assisting in performing the abortion is not a health care provider authorized to perform or assist in performing an abortion pursuant to *Bus. & Prof. Code § 2253* [*Health & Safety Code § 123468(a)*]; or

- The abortion is performed on a viable fetus [*see § 4.10[2], [5]* (definitions)], and both of the following are established:

  - In the good faith medical judgment of the physician, the fetus was viable [*Health & Safety Code § 123468(b)(1)*]; and

  - In the good faith medical judgment of the physician, continuation of the pregnancy posed no risk to life or health of the pregnant woman [*Health & Safety Code § 123468(b)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 4.14 Refusal to Participate in Abortion

State law provides that nonprofit hospitals or other facilities or clinics that are organized or operated by a religious organization, as well as their officers, employees, agents, and board members, are not liable for failure or refusal to provide abortion services [*Health & Safety Code § 123420(c)*; *but see Brownfield v. Daniel Freeman Marina Hospital (1989) 208 Cal. App. 3d 405, 413-414, 256 Cal. Rptr. 240* (estrogen pregnancy prophylaxis, "morning after" pill, is birth control procedure and not abortion, and thus statute does not insulate religious hospital from liability for medical malpractice for failure to provide rape victim with access to it)]. Under federal law, public as well as private hospitals may refuse to allow therapeutic abortions to be performed even though they provide care for childbirth [*Poelker v. Doe (1977) 432 U.S. 519, 521, 97 S. Ct. 2391, 53 L. Ed. 2d 528 , reh'g denied, 434 U.S. 880]* .

Individual health workers who refuse to participate in abortions are protected by the Therapeutic Abortion Act. Except in the case of medical emergency situations and spontaneous abortions, no employer or other person can require a physician, registered nurse, licensed vocational nurse, or any other person employed or with staff privileges at a health facility (hospital, facility, or clinic) to directly participate in the induction or performance of any abortion, if the employee or other person has filed a written statement with the employer or the hospital, facility, or clinic indicating a moral, ethical, or religious basis for refusal to participate in the abortion [*Health & Safety Code § 123420(a), (d)*].

Employees and staff of a health facility cannot be penalized or disciplined by reason of their lawful refusal to participate in an abortion and, conversely, employees and staff at a health facility that does not permit abortions to be performed cannot be penalized or disciplined for participating in abortions elsewhere. Although an employer can inquire whether an employee or prospective employee would refuse to participate in abortions, the employer cannot refuse to employ any person because of his or her lawful refusal to participate in an abortion, unless the person would be assigned in the normal course of business to work in those parts of the health facility where abortion patients are cared for [*Health & Safety Code § 123420(a)*].

The Act also prohibits a medical school, or other facility for the education or training of physicians, nurses, or other medical personnel, from refusing admission to a person or penalizing a person in any way because of the person's unwillingness to participate in the performance of an abortion for moral, ethical, or religious reasons. No health facility can refuse staff privileges to a physician because of his or her lawful refusal to participate in the performance of

abortion for moral, ethical, or religious reasons [*Health & Safety Code § 123420(b)*]. Violation of the provisions protecting the right of refusal is punishable as a misdemeanor [*Health & Safety Code § 123420*].

In addition to protection in employment and education, the Act provides that the refusal of a physician, nurse, or other person who refuses to participate or aid in the induction or performance of an abortion cannot form the basis of any claim for damages [*Health & Safety Code § 123420(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 4.15 Government Financial Assistance

Under federal law, federal and state legislatures constitutionally may prohibit the expenditure of public assistance funds to pay for the medical costs of abortions even if existing programs cover the costs of childbirth [*Harris v. McRae (1980) 448 U.S. 297, 315-318, 100 S. Ct. 2671, 65 L. Ed. 2d 784 , reh'g denied, 448 U.S. 917* (federal funds); *Maher v. Roe (1977) 432 U.S. 464, 467, 470-471, 97 S. Ct. 2376, 53 L. Ed. 2d 484 , reh'g denied, 448 U.S. 917* (state funds)]. States may also prohibit public employees from performing abortions within the scope of their employment and may prohibit the use of public facilities for the purpose of performing an abortion [*Webster v. Reproductive Health Serv. (1989) 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410, 428-431]* . The California Supreme Court, however, has struck down similar restrictions on Medi-Cal funding for abortions on independent state constitutional grounds [*Committee to Defend Reproductive Rights v. Myers (1981) 29 Cal. 3d 252, 256-258, 275-285, 172 Cal. Rptr. 866, 625 P.2d 779* (1978, 1979, and 1980 California Budget Acts); *see Committee to Defend Reproductive Rights v. Rank (1984) 198 Cal. Rptr. 630* (1983 Budget Act); *cf. Planned Parenthood Affiliates v. Swoap (1985) 173 Cal. App. 3d 1187, 1199-1201, 219 Cal. Rptr. 664* (1985-1986 Budget Act violates "single subject" requirement for legislation)].

The Therapeutic Abortion Act also provides that the receipt of public benefits, as well as other privileges and immunities, may not be lost or conditioned on either of the following [*Health & Safety Code § 123425*]:

- A person's refusal to have or consent to an abortion or surgical sterilization; or
- A person's decision to have or consent to an abortion or sterilization.

Further, California law places restrictions on the use of state funds received by family-planning clinics under *Welf. & Inst. Code § 14500 et seq.* No such funds may be used to perform abortions or to fund services ancillary to abortions, including, but not limited to, postabortion examinations. Clinics receiving state funds must also agree not to advertise, advocate, or promote abortion as a method of family planning, and not to receive referral fees for abortion services [*Welf. & Inst. Code § 14509*; *see Welf. & Inst. Code § 14500.5*].

The United States Supreme Court upheld the constitutionality of Health and Human Services (HHS) regulations promulgated in 1988, known as the "Gag Rule," which limited receipt of public funds by public or nonprofit private

entities engaged in abortion-related activities [*Rust v. Sullivan (1991) 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233, 262]* . The regulations narrowly defined family planning as preconceptual counseling, education, and general reproductive health care, and expressly excluded pregnancy, obstetric, and prenatal care [*42 C.F.R. § 59.2*]. Under the regulations, a project that received federal funds [former *42 C.F.R. § 59.9*]:

- Could not provide counseling on the use of abortion or referrals for abortions as a family planning method [former *42 C.F.R. § 59.8(a)(1)*], but had to refer every pregnant client to a provider who promoted the welfare of the mother and unborn child [*see* 42 C.F.R. § 29.8(a)(2)];

- Could not engage in activities that encouraged, promoted, or advocated abortion as a family planning method [former *42 C.F.R. § 59.10(a)*]; and

- Had to be organized physically and financially apart from prohibited abortion activities.

Effective July 1, 2000, the Gag Rule was revoked [*see 65 Fed. Reg. 41270]* . Under the current regulations, recipients of public funds must not provide abortion as a method of family planning [*42 C.F.R. § 59.5(a)(5)*]. However, they must offer pregnant women the opportunity to be provided information and counseling regarding pregnancy termination [*42 C.F.R. § 59.5(a)(5)(i)(C)*]. If requested to provide information and counseling, the funding recipient must provide neutral, factual information and nondirective counseling on each of the following options [*42 C.F.R. § 59.5(a)(5)(i)*]:

- Prenatal care and delivery;

- Infant care, foster care, or adoption; and

- Pregnancy termination.

The funding recipient must provide referral on request as to any of these options, except with regard to any options about which the pregnant woman indicates she does not wish to receive information and counseling [*42 C.F.R. § 59.5(a)(5)(ii)*]. Priority in the provision of services must be given to persons from low-income families [*42 C.F.R. § 59.5(a)(6)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 4.16 Minor's Right to Abortion Under Federal Law

[1] Parental Consent

Under the United States Constitution, a state may not impose any blanket law, without regard to the minor's maturity, that requires an unmarried minor to receive parental consent before obtaining an abortion [*Planned Parenthood of Missouri v. Danforth (1976) 428 U.S. 52, 72-74, 96 S. Ct. 2831, 49 L. Ed. 2d 788]* . If state legislation sets up an alternative procedure by which a minor who does not have her parents' consent can obtain judicial authorization for an abortion (judicial bypass), the law is unconstitutional absent some procedure by which the minor can demonstrate that she is sufficiently mature to make the abortion decision herself or that, despite her immaturity, an abortion would be in her best interests [*City of Akron v. Akron Ctr. for Reproductive Health (1983) 462 U.S. 416, 439-442, 103 S. Ct. 2481, 76 L. Ed. 2d 687* ; *Bellotti v. Baird (1979) 443 U.S. 622, 623-624, 99 S. Ct. 3035, 61 L. Ed. 2d 797 , reh'g denied, 444 U.S. 887]* .

The procedure must create an opportunity for case-by-case evaluations of the maturity of pregnant minors and assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained [*see* *City of Akron v. Akron Ctr. for Reproductive Health (1983) 462 U.S. 416, 441-442, 103 S. Ct. 2481, 76 L. Ed. 2d 687* ; *Bellotti v. Baird (1979) 443 U.S. 622, 643-644, 99 S. Ct. 3035, 61 L. Ed. 2d 797 , reh'g denied, 444 U.S. 887]* . A statute probably meets the federal standard if it can be fairly construed to require a court to grant a minor's petition for an abortion unless the court finds, after receiving evidence, that the minor is not mature enough to make her own decision, and as long as the statute ensures confidentiality and promptness of disposition [*see* *Planned Parenthood Ass'n v. Ashcroft (1983) 462 U.S. 476, 492-493, 503-504, 103 S. Ct. 2517* (separate opinions); *see also* *Thornburgh v. American Coll. of Obst. & Gyn. (1986) 476 U.S. 747, 758 n.9, 106 S. Ct. 2169, 90 L. Ed. 2d 779* (consent provision not reviewed)].

The Ninth Circuit has upheld a parental consent abortion statute with a judicial bypass provision. The court found the provision satisfied two constitutionally recognized rights of privacy: (1) the right to make fundamental life decisions; and (2) the right to avoid disclosure of personal information [*Planned Parenthood of S. Ariz. v. Lawall (9th Cir. 2002) 307 F.3d 783, 784-790]* .

[2] Parental Notice

State statutes that require only notice to a parent are not equivalent to those that require parental consent because they do not give anyone a veto power over a minor's abortion decision. Thus, it is a corollary to the greater intrusiveness of consent statutes that a state judicial bypass procedure that meets constitutional requirements under a consent statute will also suffice for a notice statute [*Ohio v. Akron Ctr. for Reproductive Health (1990) 497 U.S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405, 418]* .

Whether a judicial bypass procedure is constitutionally required in all parental notice statutes is undecided [*see Ohio v. Akron Ctr. for Reproductive Health (1990) 497 U.S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405, 418]* . State statutes requiring both one-parent and two-parent notice have been upheld on determining that the statutes contain constitutionally sufficient judicial bypass procedures [*see Ohio v. Akron Ctr. for Reproductive Health (1990) 497 U.S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405, 515-424* (statute requiring notice to or consent by one parent, or judicial bypass, or judicial inaction); *Hodgson v. Minnesota (1990) 497 U.S. 417, 110 S. Ct. 2926, 111 L. Ed. 2d 344, 377-378* (statute requiring notice to both parents made constitutional by inclusion of judicial bypass procedure)]. Further, a 48-hour waiting period after notifying a single parent has also been found to be constitutional [*Hodgson v. Minnesota (1990) 497 U.S. 417, 110 S. Ct. 2926, 111 L. Ed. 2d 344, 369-370]* . However, a state statute that requires that both parents be notified and that lacks a judicial bypass alternative does not reasonably further any legitimate state interest and is unconstitutional [*Hodgson v. Minnesota (1990) 497 U.S. 417, 110 S. Ct. 2926, 111 L. Ed. 2d 344, 370-373]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 4 ABORTION AND BIRTH CONTROL METHODS
PART II. LEGAL BACKGROUND

1-4 California Forms of Pleading and Practice--Annotated § 4.17

§ 4.17 Minor's Right to Abortion Under State Law

Before 1987, a pregnant minor could obtain, without parental consent, the same range of medical care relating to her pregnancy as a pregnant adult under the Therapeutic Abortion Act [*Ballard v. Anderson (1971) 4 Cal. 3d 873, 95 Cal. Rptr. 1, 484 P.2d 1345* ; *see* former *Civ. Code § 34.5*; for discussion of the Therapeutic Abortion Act generally, see *§ 4.13, above*]. This included the right to terminate her pregnancy [*American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 319-320, 66 Cal. Rptr. 2d 210, 940 P.2d 797* ; *see* *Doe v. Bolton (1973) 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201* ; *Roe v. Wade (1973) 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147* ; *People v. Barksdale (1972) 8 Cal. 3d 320, 332, 105 Cal. Rptr. 1, 503 P.2d 257]* .

In 1987, the Legislature enacted former *Health & Safety Code § 25958* [*now see Health & Safety Code § 123450*], prohibiting the performance of an abortion on an unemancipated minor, except in emergencies requiring immediate medical attention, without written consent from the minor and one of her parents or a legal guardian [*Health & Safety Code § 123450(a)*]. However, if both parents or a legal guardian refuse to give consent or the minor elects not to seek parental consent, the minor may petition for an order from the juvenile court waiving the parental consent requirement [*Health & Safety Code § 123450(b)*], in a "judicial bypass" proceeding [*American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 320-321, 66 Cal. Rptr. 2d 210, 940 P.2d 797]* .

After a hearing on the minor's petition, the court must grant the petition if it finds that the minor is sufficiently mature and informed to make a decision on her own regarding abortion and has consented to the abortion [*Health & Safety Code § 123450(c)(1)*], or, if the court finds that the minor is not sufficiently mature and informed, if the abortion is in her best interest [*Health & Safety Code § 123450(c)(2)*].

The statute also provides for appeal of the court's order [*Health & Safety Code § 123450(d)*], and criminal penalties for the knowing performance of an abortion on an unemancipated minor without complying with the statutory requirements [*Health & Safety Code § 123450(f)*].

The Judicial Council promulgated forms related to the judicial bypass proceeding [*see* former Judicial Council forms AB-100, AB-105, AB-110, AB-115, AB-120, AB-125, AB-130, revoked effective January 1, 1998]. Former *Health & Safety Code § 25958* and *Health & Safety Code § 123450* were never enforced because their application was stayed by

trial and appellate courts pending determination of their validity [*American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 314, 66 Cal. Rptr. 2d 210, 940 P.2d 797]* .

In 1997, in *American Academy of Pediatrics v. Lungren*, the California Supreme Court found that the parental consent requirement in former *Health & Safety Code § 25958* [*now see Health & Safety Code § 123450*] violates the California constitutional protection of privacy, *Cal. Const., art. I, § 1* [*American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 314, 361, 66 Cal. Rptr. 2d 210, 940 P.2d 797* (plurality opn. of George, C.J., conc. opn. of Kennard, J.)]. The Court recognized that the legislation generally, and the judicial bypass provisions specifically, were drafted to comply with requirements set forth by the United States Supreme Court in a series of decisions upholding the validity of abortion/parental consent laws [*American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 324-325, 66 Cal. Rptr. 2d 210, 940 P.2d 797* ; *see H. L. Matheson (1981) 450 U.S. 398, 408, 411, 101 S. Ct. 1164, 67 L. Ed. 2d 388* ; *Bellotti v. Baird (1979) 443 U.S. 622, 640, 99 S. Ct. 3035, 61 L. Ed. 2d 797* ; *see also discussion under § 4.16[1], above*]. However, the Court stated that the California constitutional right of privacy, embodied in explicit constitutional language [*Cal. Const., art. I, § 1*] not present in the federal Constitution, is broader and more protective of privacy than the federal constitutional right of privacy [*American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 326-328, 66 Cal. Rptr. 2d 210, 940 P.2d 797 (George, C.J., plurality opinion)* ; *see also American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 368, 66 Cal. Rptr. 2d 210, 940 P.2d 797* (Kennard, J., concurring); *Committee to Defend Reproductive Rights v. Myers (1981) 29 Cal. 3d 252, 172 Cal. Rptr. 866, 625 P.2d 779* (California constitutional right of privacy protects right of pregnant woman to choose abortion and provides greater protection of woman's right of choice than federal Constitution)]. For discussion of the California constitutional right of privacy generally, see *Ch. 429, Privacy, § 329.10* et seq.

The Court found that plaintiffs' claims in *American Academy of Pediatrics v. Lungren* satisfied the threshold requirements articulated in *Hill v. National Collegiate Athletic Association* for a cognizable state constitutional privacy claim by establishing all of the following [*American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 328-359, 368-383, 66 Cal. Rptr. 2d 210, 940 P.2d 797* (George, C.J., plurality opinion; Kennard, J., concurring); *see Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 26 Cal. Rptr. 2d 834, 865 P.2d 633* , discussed more extensively in Ch. 429, *Privacy*]:

- A specific, legally protected privacy interest, i.e., the interest in autonomy privacy, which includes a pregnant minor's right to choose whether to continue her pregnancy [*American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 332-337, 368-370, 66 Cal. Rptr. 2d 210, 940 P.2d 797* (George, C.J., plurality opinion; Kennard, J., concurring)];

- A pregnant minor's reasonable expectation of privacy in deciding whether to continue her pregnancy [*American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 338-339, 371-373, 66 Cal. Rptr. 2d 210, 940 P.2d 797* (George, C.J., plurality opinion; Kennard, J., concurring)]; and

- The seriousness of the invasion of the privacy interest, since the statute significantly intrudes on autonomy privacy by denying a pregnant minor the ability to obtain a medically safe abortion on her own [*American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 339, 373-375, 66 Cal. Rptr. 2d 210, 940 P.2d 797* (George, C.J., plurality opinion; Kennard, J., concurring)].

The Court then found that former *Health & Safety Code § 25958* [*now see Health & Safety Code § 123450*] intrudes on an interest fundamental to personal autonomy and is thus subject to scrutiny under the "compelling interest" test [*American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 330, 340-342, 375-376, 66 Cal. Rptr. 2d 210, 940 P.2d 797* (George, C.J., plurality opinion; Kennard, J., concurring)]. The Court then concluded that while the interests articulated by the state, i.e., protection of the health of a pregnant minor and protection of the minor's relationship with her parent, are compelling, the state failed to show that the legislation was necessary to further those interests [*American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 348-359, 376-383, 66 Cal. Rptr. 2d 210, 940 P.2d*

797 (George, C.J., plurality opinion; Kennard, J., concurring)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawSubstantive Due ProcessPrivacyPersonal DecisionsHealthcare LawTreatmentEnd-of-Life DecisionsAbortionRight to PrivacyHealthcare LawTreatmentEnd-of-Life DecisionsAbortionMinors

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1-4 California Forms of Pleading and Practice--Annotated § 4.17A

§ 4.17A Freedom of Access to Clinics

[1] Acts Constituting a Misdemeanor

Under the California Freedom of Access to Clinic and Church Entrances Act [*Pen. Code § 423 et seq.*], it is a misdemeanor to do either of the following:

- By force, threat of force, or physical obstruction that is a crime of violence, or by nonviolent physical obstruction, intentionally injure, intimidate, interfere with or attempt to injure, intimidate, or interfere with a person or entity because that person or entity is a reproductive health services client, provider, or assistant, or in order to intimidate a person or entity or class of persons or entities from becoming or remaining a reproductive health services client, provider, or assistant [*Pen. Code §§ 423.2(a), (c), 423.3*]; or

- Intentionally damage or destroy the property of a person, entity, or facility, or attempt to do so, because the person, entity, or facility is a reproductive health services client, provider, assistant, or facility [*Pen. Code §§ 423.2(e), 423.3*].

[2] Relationship Between State and Federal Laws

The California Act establishes concurrent state jurisdiction over conduct also prohibited by the federal Freedom of Access to Clinic Entrances Act of 1994 [*18 U.S.C. § 248*]. The federal Act provides for more severe misdemeanor penalties for first violations and felony-misdemeanor penalties for second and subsequent violations [*Pen. Code § 423.3(f)*]. State law enforcement agencies must cooperate with federal authorities in preventing, apprehending, and prosecuting these crimes and must seek federal prosecutions when appropriate [*Pen. Code § 423.3(f)*]. No person may be convicted for conduct in violation of *Pen. Code § 423.2* that was done on an occasion where the identical conduct on that occasion was the basis for a conviction of that person under the federal Act [*Pen. Code § 423.3(g)*].

[3] Actions for Injunctive Relief, Damages, and Penalties

A person aggrieved by a violation of *Pen. Code § 423.2(a), (c), (e)* may bring a civil action (1) to enjoin the violation,

(2) for compensatory and punitive damages, and (3) for the costs of suit and reasonable fees for attorneys and expert witnesses [*Pen. Code § 423.4(a)*]. With regard to compensatory damages, the plaintiff may elect, at any time before the rendering of a final judgment, to recover in lieu of actual damages $1,000 per exclusively nonviolent violation and $5,000 per any other violation, for each violation committed [*Pen. Code § 423.4(a)*]. The Attorney General, a district attorney, or a city attorney may bring an action to enjoin the violation, for compensatory damages to persons aggrieved by the violation, and for a civil penalty against each alleged violator. The amount of the penalty depends on whether the violation is nonviolent and whether it is a first violation [*Pen. Code § 423.4(b)*]. In imposing a civil penalty, the court must consider a prior violation of the federal Act or a prior violation of a statute of another jurisdiction that would constitute a violation of *Pen. Code § 423.2* as a prior violation of *§ 423.2* [*Pen. Code § 423.4(b)*].

In a criminal or civil proceeding for violation of *Pen. Code § 423.2(a), (c), (e)*, the court must take all action reasonably required, including granting restraining orders, to safeguard the health, safety, or privacy of either a reproductive health services client, provider, or assistant who is a party or witness in the proceeding, or a person who is a victim of, or at risk of becoming a victim of the prohibited conduct [*Pen. Code § 423.5(a)(1)*]. Restraining orders may prohibit or restrict the photographing of those persons when reasonably required to safeguard their health, safety, or privacy [*Pen. Code § 423.5(b)*]. The court may permit such an individual to use a pseudonym in a civil proceeding when reasonably required to safeguard the health, safety, or privacy of that individual [*Pen. Code § 423.5(c)*].

[4] Act May Not Be Construed for Certain Purposes

The California Freedom of Access to Clinic and Church Entrances Act may not be construed for any of the following purposes:

- To impair a constitutionally protected activity or activity protected by state or federal law [*Pen. Code § 423.6(a)*].

- To provide exclusive civil or criminal remedies or preempt or preclude a county, city, or city and county from passing a law providing a remedy for the commission of any prohibited acts or making those acts a crime [*Pen. Code § 423.6(b)*].

- To interfere with the enforcement of federal, state, or local laws regulating the performance of abortions or the provision of other reproductive health services [*Pen. Code § 423.6(c)*].

- To negate, supercede, or otherwise interfere with the operation of *Lab. Code § 1138 et seq.*, relating to unlawful acts arising during labor disputes [*Pen. Code § 423.6(d)*].

- To create additional civil or criminal remedies to limit existing civil or criminal remedies to redress an activity that interferes with the exercise of any other rights protected by the *First Amendment* or Cal. Const., art. I [*Pen. Code § 423.6(e)*].

- To preclude prosecution under both the Act and any other provision of law except as provided in *Pen. Code § 423.3(g)* [*Pen. Code § 423.6(f)*].

[5] Reproductive Rights Law Enforcement Act

Under the Reproductive Rights Law Enforcement Act [*Pen. Code § 13775 et seq.*], which remains in effect until January 1, 2014 [*Pen. Code § 13779*], the Attorney General must collect and analyze information related to anti-reproductive-rights crimes and publish the information on the Department of Justice Internet web site in a manner that distinguishes between crimes of violence [*Pen. Code § 13777(a)(1)*]. The Attorney General must also develop a plan to prevent, apprehend, prosecute, and report anti-reproductive-rights crimes [*Pen. Code § 13777(a)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsViolation of Protective OrdersApplication & IssuanceCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesRiot, Rout & Unlawful AssemblyElementsCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesDisruptive ConductDisorderly Conduct & Disturbing the PeaceElementsHealthcare LawTreatmentReproductive TechnologyAccess to ServicesCivil Rights LawCivil Rights ActsFreedom of Access to Clinic Entrances Act

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§ 4.18 Sterilization

[1] Informed Consent Required

Nontherapeutic surgical sterilization, which has been characterized as a form of family planning probably protected by the constitutional right to privacy, is legal as long as the patient gives informed consent [*Jessin v. County of Shasta (1969) 274 Cal. App. 2d 737, 748, 79 Cal. Rptr. 359* ; *see discussion under § 4.11, above*].

Licensing and certification regulations governing general acute care hospitals mandate that a sterilization may be performed only if the patient is at least 18 years old, or emancipated and has voluntarily given informed consent, and if at least 30 days, but not more than 180 days, have passed between the date of informed consent and the date of the sterilization, except in enumerated emergencies or when the patient requests a shorter waiting time in writing [*22 Cal. Code Reg. § 70707.1(a)*]. The requirements for informed consent include the following [*22 Cal. Code Reg. §§ 70707.3-70707.4*]:

- Orally advising the patient, with an interpreter if necessary, that he or she is free to withhold or withdraw consent to the procedure at any time before the sterilization without affecting the right to future care or treatment and without loss or withdrawal of any federal funded program benefits to which he or she might be otherwise entitled;
- Fully describing available alternative methods of family planning;
- Warning that the sterilization procedure is considered to be irreversible;
- Thoroughly explaining how the procedure is to be performed; and
- Obtaining a signed bilingual consent form provided by the Department of Health.

Under state regulations, informed consent for sterilization may not be obtained while an individual is seeking to obtain or obtaining an abortion or is in labor, or within 24 hours after birth or an abortion, or is under the influence of alcohol

or drugs [*22 Cal. Code Reg. § 70707.3(b)*].

When the conduct of a physician or other medical personnel in obtaining informed consent to a sterilization violates state regulations and the violation caused an injury to a person of the type and class for whom the regulations were enacted to protect, a presumption of negligence may arise [*see Evid. Code § 669*; *see also Cobbs v. Grant (1972) 8 Cal. 3d 229, 240-241, 104 Cal. Rptr. 505, 502 P.2d 1* (failure to obtain informed consent was basis for negligence action)]. For a discussion of informed consent and general principles of professional negligence, see Ch. 415, *Physicians: Medical Malpractice* .

For a discussion of when a conservator may consent to sterilization on behalf of a developmentally disabled adult, see *Ch. 285, Guardianship and Conservatorship: Care of Ward or Conservatee, § 285.47*.

[2] Employment

It is unlawful to require sterilization as a condition of employment [*Gov. Code § 12945.5*].

For discussion and forms for use in a complaint for violation of state civil rights laws, see Ch. 115, *Civil Rights: Employment Discrimination* .

[3] Nonmedical Selection Criteria Prohibited

No medical facility that performs sterilization operations for contraceptive purposes may require applicants to meet special nonmedical qualifications, such as age, marital status, number of natural children, or spousal consent, which are not imposed on individuals seeking other types of operations in the clinic [*Health & Safety Code §§ 1232* (clinics), *1258* (health facilities), *1459* (county hospitals), *32128.10* (local district hospitals); *Kritzer v. Citron (1950) 101 Cal. App. 2d 33, 38, 224 P.2d 808* (spousal consent)].

[4] Prisoners

Although some statutes providing for sterilization of certain convicted offenders remain on the books in California, it appears that only sterilization with informed consent is legal [*see Jessin v. County of Shasta (1969) 274 Cal. App. 2d 737, 748, 79 Cal. Rptr. 359* ; *cf. Penal Code § 645*]. A court may not require as a condition of probation, that a woman not conceive a child by reason of her conviction of child endangerment because less restrictive means are available to forestall future crimes [*People v. Pointer (1984) 151 Cal. App. 3d 1128, 1139-1140, 199 Cal. Rptr. 357]* .

For discussion of the civil rights, including the right to privacy of prisoners, see Ch. 114, *Civil Rights: Prisoners' Rights* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationGender & Sex DiscriminationEmployment PracticesGeneral OverviewHealthcare LawTreatmentPatient ConsentInformed Consent

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§ 4.19 Improperly Performed Abortion or Sterilization

[1] Personal Injury Action by Mother

A woman who has been surgically sterilized and later becomes pregnant may have a cause of action against her physician for negligence, battery based on absence of informed consent, breach of contract, negligent misrepresentation, and fraud [*see Custodio v. Bauer (1967) 251 Cal. App. 2d 303, 312-315, 59 Cal. Rptr. 463]* . An action may lie under standard negligence principles for injuries to a woman resulting from a physician's failure to follow established practice when performing any obstetrical procedure [*see Anderson v. Stump (1941) 42 Cal. App. 2d 761, 762, 768, 109 P.2d 1027]* .

For a form of complaint for damages for medical malpractice, battery, and breach of contract for an unsuccessful sterilization, see *§ 4.60*.

For discussion and forms relating to malpractice actions, see Ch. 415, *Physicians: Medical Malpractice* .

[2] Wrongful Life Action by Child

A child born as a result of an unsuccessful abortion has no cause of action in malpractice against the physicians who performed the abortion [*Stills v. Gratton (1976) 55 Cal. App. 3d 698, 706, 127 Cal. Rptr. 652]* . Special legislation immunizes parents of a child from any claim, including a claim by the child, that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive [*Civ. Code § 43.6(a)*; *see Turpin v. Sortini (1982) 31 Cal. 3d 220, 229, 182 Cal. Rptr. 337, 643 P.2d 954]* .

For a form of complaint for a wrongful life action by a child based on defendant's failure to inform of a substantial risk that the child would be born with genetic defects, see Ch. 367A, *Minors: Tort Actions* .

[3] Wrongful Birth Action by Parents

A mother who bears a child as a result of an unsuccessful abortion or sterilization may recover tort damages from a negligent physician, subject to offsets for the special benefits inherent in parent-child relationship and any amounts

chargeable to a plaintiff under her duty to mitigate damages [*Stills v. Gratton (1976) 55 Cal. App. 3d 698, 709, 127 Cal. Rptr. 652* (abortion); *Morris v. Frudenfeld (1982) 135 Cal. App. 3d 23, 36-37, 185 Cal. Rptr. 76* (tubal ligation)]. By statute, the failure or refusal of a parent to prevent the live birth of his or her child is not a defense in any action against a third party, and the failure or refusal cannot be considered in awarding damages in any such action [*Civ. Code § 43.6(b)*].

For discussion and forms relating to wrongful birth actions, see Ch. 415, *Physicians: Medical Malpractice* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityHealthcare ProvidersHealthcare LawTreatmentWrongful BirthHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansTortsNegligenceActionsWrongful BirthRemediesHealthcare LawTreatmentPatient ConsentInformed Consent

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§ 4.20 Misrepresentation of Fertility to Sexual Partner

A woman who suffers bodily injuries from an ectopic pregnancy has a cause of action for battery, as well as deceit, against her male sexual partner for his misrepresentation that he was sterile [*Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 374-376, 193 Cal. Rptr. 422]* . However, a man may not bring a wrongful birth action against a child's mother for falsely representing that she was using birth control when the damages that result from the fraud are the expenses of financially supporting the child and mental distress [*Stephen K. v. Roni L. (1980) 105 Cal. App. 3d 640, 645, 164 Cal. Rptr. 618* ; *see Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 378-379, 193 Cal. Rptr. 422* (public policy favors financial support of children)].

No cause of action exists for fraud when a man convinces a woman to have an abortion by falsely promising to impregnate her at some later date [*Perry v. Atkinson (1987) 195 Cal. App. 3d 14, 18-21, 240 Cal. Rptr. 402]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentWrongful BirthTortsBusiness TortsFraud & MisrepresentationActual FraudElementsTortsIntentional TortsAssault & BatteryElements of BatteryTortsNegligenceActionsWrongful BirthElements

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§ 4.21 Notification of Right to Abortion

Health & Safety Code § 123462 provides that every woman has the fundamental right to choose to bear a child or to choose and to obtain an abortion, except as specifically limited by *Health & Safety Code § 123460 et seq.* However, a doctor treating a pregnant woman with a seemingly normal pregnancy has no duty under *Health & Safety Code § 123462* to notify her of her right to an abortion [*see Barragan v. Lopez (2007) 156 Cal. App. 4th 997, 1004-1006, 68 Cal. Rptr. 3d 73* (where mother's pregnancy had progressed in normal fashion without evidence of potential complication or significant fetal anomaly or endangerment of mother's life by continuing pregnancy, it was undisputed that doctor did not owe mother duty to advise her of right to abortion under *Health & Safety Code § 123462(2)*)].

For discussion and forms relating to wrongful life actions by children generally, see *Ch. 367A, Minors: Actions by Minors § 367A.11*. For discussion and forms relating to wrongful birth actions by parents generally, see Ch. 415, *Physicians: Medical Malpractice* .

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[Reserved]

§§ 4.22[Reserved]

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§ 4.40 Federal Statutes

Freedom of Access to Clinics Entrances Act (FACE). *18 U.S.C. § 248*

Family Planning Services and Population Research Act of 1970. *42 U.S.C. §§ 300-300a-8*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawCivil Rights ActsFreedom of Access to Clinic Entrances Act

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§ 4.41 State Statutes

[1] Abortion in General

Participation in illegal abortion is grounds for discipline. *Bus. & Prof. Code § 2253(a)* (physicians); *Bus. & Prof. Code § 2761(c)* (nurses and midwives); *Bus. & Prof. Code § 2660(c)* (physical therapists); *Bus. & Prof. Code § 4521(c)* (psychiatric technicians); *Bus. & Prof. Code § 2878(c)* (vocational nurses)

Participation in surgical abortion without valid license to practice as physician and surgeon in California or certificate authorizing person to perform or assist at a surgical abortion, is crime. *Bus. & Prof. Code § 2253(b)*

Parent's failure or refusal to obtain abortion is neither basis for cause of action against parent nor basis for defense or reduction of damages in action against third party. *Civ. Code § 43.6*

Durable power of attorney for health care does not include power to consent to abortion. *Prob. Code § 4722*

Requirement that fetal tissue be interred or incinerated. *Health & Safety Code § 7054.3*

Requirement of participation in abortion by employee, medical student, or physician is misdemeanor. *Health & Safety Code § 123420*

Privileges, immunities, or receipt of public benefits may not be conditioned on submission to abortion. *Health & Safety Code § 123425*

Rights to medical treatment of infant prematurely born alive in course of abortion. *Health & Safety Code § 123435*

Storage of fetal remains during and disposition of remains at conclusion of research or experimentation. *Health & Safety Code § 123445*

Reproductive Privacy Act. *Health & Safety Code § 123460 et seq.*

Crime to interfere with or intimidate or intentionally damage or destroy property of reproductive health services client, provider, or assistant. *Pen. Code § 423 et seq.*

Civil action for interference with, intimidation, or intentional destruction of property of reproductive health services client, provider, or assistant. *Pen. Code § 423.4*

Reproductive Rights Law Enforcement Act. *Pen. Code § 13775 et seq.*

[2] Minors

Right of unmarried minor to consent to hospital, medical, and surgical care related to prevention or treatment of pregnancy, except for sterilization or abortion. *Fam. Code § 6925*

Requirement of parental consent before unemancipated pregnant minor may obtain abortion. *Health & Safety Code § 123450(a)* (held to violate California constitutional privacy protection in *American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 314, 361, 66 Cal. Rptr. 2d 210, 940 P.2d 797*)

Procedure to obtain court authorization for abortion in absence of parental consent. *Health & Safety Code § 123450(b), (c)* (held to violate California constitutional privacy protection in *American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 314, 361, 66 Cal. Rptr. 2d 210, 940 P.2d 797*)

Appeal. *Health & Safety Code § 123450(d)* (held to violate California constitutional privacy protection in *American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 314, 361, 66 Cal. Rptr. 2d 210, 940 P.2d 797*)

No fees or costs to be charged to minor, parents, or guardian. *Health & Safety Code § 123450(e)*

Misdemeanor for noncompliance with parental consent requirement. *Health & Safety Code § 123450(f)*

[3] Penal Provisions

Use of aborted product of conception for research experimentation or study prohibited. *Health & Safety Code § 123440*

Misdemeanor for person to knowingly perform abortion on unmarried or unemancipated minor if minor lacks required parental consent or court approval. *Health & Safety Code § 123450(f)*

Evidence necessary for conviction of illegal abortion. *Penal Code § 1108*

Use of arson or explosives to terrorize places or meetings dealing with abortion; fines and penalties. *Penal Code § 11413*

Death of fetus during assault; additional sentence. *Penal Code § 12022.9*

[4] Sterilization

Requirement of sterilization as condition of employment unlawful. *Gov. Code § 12945.5*

Special nonmedical qualifications for sterilizations prohibited. *Health & Safety Code § 1232* (clinics); *Health & Safety*

Code § 1258 (health facilities); *Health & Safety Code § 1459* (county hospitals); *Health & Safety Code § 32128.10* (local district hospitals)

Privileges, immunities, or receipt of public benefits may not be conditioned on submission to surgical sterilization. *Health & Safety Code § 123425*

Insured's reason for sterilization is not proper basis for disclaimer or limitation of insurance coverage for surgical sterilization. *Ins. Code § 10121(a)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentReproductive TechnologyAccess to ServicesCriminal Law & ProcedureCriminal OffensesHomicideCriminal AbortionPenaltiesHealthcare LawTreatmentEnd-of-Life DecisionsAbortionGeneral OverviewHealthcare LawTreatmentEnd-of-Life DecisionsAbortionRight to PrivacyHealthcare LawTreatmentEnd-of-Life DecisionsAbortionMinors

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§ 4.42 Administrative Regulations

Criteria for performance of sterilization under California Medical Assistance Program. *22 Cal. Code Reg. §§ 51305.1-51305.4*

Criteria for performance of sterilization in general acute care hospital. *22 Cal. Code Reg. §§ 70707.1, 70707.3-70707.8*

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§ 4.43 Decisions

[1] Advertising

First Amendment protection of free speech and press is not surrendered merely due to the commercial nature of newspaper advertisement concerning out-of-state abortion services. *Bigelow v. Virginia (1975) 421 U.S. 809, 819-822, 95 S. Ct. 2222, 44 L. Ed. 2d 600* (distinguishing *Valentine v. Chrestensen (1942) 316 U.S. 52, 62 S. Ct. 920, 86 L. Ed. 1262*)

[2] Consent

Parental or judicial consent statute is not unconstitutional when it could be fairly construed to require juvenile court to receive evidence on minor's maturity and grant petition unless it found minor was not mature enough to make her own decision. *Planned Parenthood Ass'n v. Ashcroft (1983) 462 U.S. 476, 492-493, 103 S. Ct. 2517, 76 L. Ed. 2d 733* (no plurality opinion)

Regulations requiring either parental or judicial consent to abortion by minor are unconstitutional when no procedure exists by which minor can demonstrate that she is sufficiently mature to make abortion decision herself or that, despite her immaturity, abortion would be in her best interests. *City of Akron v. Akron Ctr. for Reproductive Health (1983) 462 U.S. 416, 439-442, 103 S. Ct. 2481, 76 L. Ed. 2d 687* ; *see* *Bellotti v. Baird (1979) 443 U.S. 622, 643-644, 99 S. Ct. 3035, 61 L. Ed. 2d 797 , reh'g denied, 444 U.S. 887*

Massachusetts statute requiring parental or judicial consent for minors' abortions, despite maturity of minor, is unconstitutional. *Bellotti v. Baird (1979) 443 U.S. 622, 643-644, 651, 99 S. Ct. 3035, 61 L. Ed. 2d 797 , reh'g denied, 444 U.S. 887* (plurality opinion)

Mandatory notification of parents or guardian before minor can obtain abortion through judicial bypass is unconstitutional. *Bellotti v. Baird (1979) 443 U.S. 622, 649-651, 99 S. Ct. 3035, 61 L. Ed. 2d 797 , reh'g denied, 444 U.S. 887* (plurality opinion)

Spousal and parental consent provisions allowing absolute veto over abortion by minor are unconstitutional. *Planned Parenthood of Missouri v. Danforth (1976) 428 U.S. 52, 70, 74, 96 S. Ct. 2831, 49 L. Ed. 2d 788*

State law requiring written, informed consent to abortion from minor and her parent; written, informed consent from minor along with proof of her emancipation; court order; or presence of urgent medical emergency was invalid, when definition of "medical emergency" as sudden and unexpected physical condition which, in reasonable medical judgment of ordinarily prudent physician acting under circumstances and conditions then existing, was abnormal and so complicated medical condition of pregnant minor as to necessitate immediate causing or performing of abortion to prevent her death or because delay in causing or performing abortion would create serious risk of immediate, substantial, and irreversible impairment of a major physical bodily function of the patient, and excluding from definition any physical condition expected to occur in normal pregnancies of women of similar age, physical condition, and gestation or any condition predominantly psychological or psychiatric in nature, was unconstitutionally narrow and could not be saved by narrowing construction or selective invalidation; remainder of statute could not stand, because without any medical emergency exception, abortion regulation that could impede woman's access to medically necessary abortion is unconstitutional. *Planned Parenthood of Idaho, Inc. v. Wasden (9th Cir. 2004) 376 F.3d 908, 921-937*

Parental consent abortion statute with judicial bypass provision satisfied two constitutionally recognized rights of privacy: (1) right to make fundamental life decisions; and (2) right to avoid disclosure of personal information. *Planned Parenthood of S. Ariz. v. Lawall (9th Cir. 2002) 307 F.3d 783, 784-790*

Minor's informed consent to therapeutic abortion is sufficient authorization without necessity of parental consent. *Ballard v. Anderson (1971) 4 Cal. 3d 873, 884, 95 Cal. Rptr. 1, 484 P.2d 1345* (decided before 1987 amendment of former *Civ. Code § 34.5* [*now see Fam. Code § 6925*] and addition of former *Health & Safety Code § 25958* [*now see Health & Safety Code § 123450*], which require parental consent to abortion)

Parental consent requirement of former *Health & Safety Code § 25958* (*now see Health & Safety Code § 123450*) violates California constitutional protection of privacy. *American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 314, 361, 66 Cal. Rptr. 2d 210, 940 P.2d 797*

Doctrine of informed consent. *Berkey v. Anderson (1969) 1 Cal. App. 3d 790, 803-805, 82 Cal. Rptr. 67* (performance of myelogram)

Abortee has no cause of action for damages for illegal abortion against paramour who arranged for it when abortee consented to abortion. *Sayadoff v. Warda (1954) 125 Cal. App. 2d 626, 631, 271 P.2d 140*

Wife's consent is sufficient authorization of operation resulting in miscarriage; doctor is not liable to husband for failure to notify him or obtain his consent. *Rosenberg v. Feigin (1953) 119 Cal. App. 2d 783, 786, 260 P.2d 143*

Consent of patient alone is sufficient authorization for sterilization; consent of both husband and wife is not necessary. *Kritzer v. Citron (1950) 101 Cal. App. 2d 33, 38, 224 P.2d 808*

[3] Definitions

Abortion and miscarriage defined. *People v. Rankin (1937) 10 Cal. 2d 198, 202, 74 P.2d 71* ; *People v. Wilson (1942) 54 Cal. App. 2d 434, 448, 129 P.2d 149*

[4] False Representations Regarding Birth Control

Woman suffering injuries from ectopic pregnancy has cause of action for battery and deceit against male sexual partner for his misrepresentation that he was sterile. *Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 374-376, 193 Cal. Rptr. 422*

Claims of fraud and negligent misrepresentation against child's mother for falsely representing that she was taking birth control pills do not state cause of action in tort; privacy and general public policy considerations preclude courts' interference with birth control practices of partners in consensual sexual relationship. *Stephen K. v. Roni L. (1980) 105 Cal. App. 3d 640, 645, 164 Cal. Rptr. 618*

[4A] Freedom of Access to Clinics

Action under Hobbs Act by health care clinics performing abortions and pro-choice non-profit organization supporting legal availability of abortions against individuals and organizations engaging in pro-life, anti-abortion protest activities, on ground defendants had tried to disrupt activities at health care clinics performing abortions through violence and other unlawful activities, seeking damages and injunction forbidding defendants from engaging in activities anywhere in nation, was properly dismissed. Hobbs Act language prohibiting physical violence to any person or property in furtherance of plan or purpose to do anything in violation of Act referred to violence committed under plans or purposes affecting interstate commerce through robbery or extortion rather than violence committed pursuant to plans or purposes affecting interstate commerce. *Scheidler v. NOW, Inc. (2006) 547 U.S. 9, 126 S. Ct. 1264, 1270-1274, 164 L. Ed. 2d 10*

For purposes of action under federal Freedom of Access to Clinics Entrances Act (FACE) [*18 U.S.C. § 248*], which gives aggrieved persons right of action against whoever by "threat of force" intentionally intimidates person because person is or has been providing reproductive health services, district court properly adopted long-standing law on "true threats" to define "threat," jury properly found that defendant made statements to intimidate plaintiff-physicians, reasonably foreseeing that physicians would interpret statements as serious expression of intent to harm them because they provided reproductive health services, and verdict was supported by substantial evidence, when defendant was aware that "wanted"-type poster would likely be interpreted as serious threat of death or bodily harm by doctor in reproductive health services community who was identified on one, given previous pattern of "WANTED" posters identifying specific physician followed by that physician's murder and same was true of posting about plaintiffs on part of "Nuremberg Files" website where lines were drawn through names of doctors who provided abortion services and who had been killed or wounded. Thus, to this limited extent, defendant's conduct amounted to true threat and is not protected speech. *Planned Parenthood of the Colombia/Willamette, Inc. v. Am. Coalition of Life Activists (9th Cir. 2002) 290 F.3d 1058, 1077-1088*

[5] Freedom of Religion

District attorney's intention to turn over aborted fetuses to private cemetery where antiabortion group planned to hold religious burial service was properly enjoined as violation of state *constitution's establishment clause*. *Feminist Women's Health Center, Inc. v. Philibosian (1984) 157 Cal. App. 3d 1076, 1082, 1088-1091, 203 Cal. Rptr. 918 , cert. denied, 470 U.S. 1052 (1985)*

In requiring all students to pay fees and allocating portion of fees for abortions and abortion counseling for students, Regents of University of California did not violate nonpaying students' freedom of religion under *U.S. Const., Amends. I* and *XIV*, when students failed to show that university policy coerced their religious beliefs or violated their rights to practice their religion. *Erzinger v. Regents of University of California (1982) 137 Cal. App. 3d 389, 392-393, 187 Cal. Rptr. 164*

[6] Government Financial Assistance

Title XIX of the Social Security Act does not require states to fund cost of nontherapeutic abortions as condition of participation in Medicaid program. *Beal v. Doe (1977) 432 U.S. 438, 441, 97 S. Ct. 2366, 53 L. Ed. 2d 464*

State's (Connecticut) refusal to pay nontherapeutic abortion expenses under Medicaid program while subsidizing expenses of childbirth is not violation of equal protection. *Maher v. Roe (1977) 432 U.S. 464, 467, 97 S. Ct. 2376, 53 L. Ed. 2d 484*

Government restriction on payment for abortions for wives of members of uniformed services to abortions performed when life of mother would be endangered if fetus were carried to term, and refusal to pay for abortion of anencephalic fetus, did not violate mother's due process or equal protection rights, when restriction was reviewed under rational basis standard of review because it dealt with no suspect categories and did not impinge on any fundamental constitutional right, and its restrictions were rationally related to legitimate governmental interest in protecting potentiality of human life. *Doe v. United States (9th Cir. 2005) 419 F.3d 1058, 1062-1063*

Medi-Cal funding of childbirth expenses but not expenses for most abortions violates constitutional right of privacy of women citizens by coercing their choice. *Committee to Defend Reproductive Rights v. Myers (1981) 29 Cal. 3d 252, 284-285, 172 Cal. Rptr. 866, 625 P.2d 779*

Language in Budget Act of 1985-1986 restricting funding for family planning organizations providing abortion-related services and thereby amending provisions of Family Planning Act (*Welf. & Inst. Code §§ 14500-14508*), violates "single subject" requirement for legislation in *Cal. Const., art. IV, § 9* and is thus invalid. *Planned Parenthood Affiliates v. Swoap (1985) 173 Cal. App. 3d 1187, 1199-1201, 219 Cal. Rptr. 664*

[6A] Licensing and Regulation

Reasonable fact-finder could find that state statutory and regulatory scheme requiring licensing and regulation of any medical facility in which five or more first trimester abortions in any month or any second or third trimester abortions are performed was unnecessary and had effect of imposing substantial obstacle on women seeking abortion. Stigmatizing of abortion practice and usurping of providers' ability to exercise medical judgment were appropriate questions for district court to consider because plaintiffs presented expert testimony concerning effects of stigmatization of abortion on supply of abortion providers. Scheme did not violate equal protection rights of patients and doctors by discriminating between doctors who provide abortions and those who provide comparably risky medical procedures, because scheme survived rational basis review. Claim that scheme violated equal protection rights of women by discriminating between abortion, sought only by women, and comparably risky procedures sought by men, was not judicially cognizable separate from undue burden claim. Provision requiring licensees to ensure immediate access of director of state department of health services or director's designee to abortion clinic during hours of operation, for which no limit to permission for warrantless search appeared in regulation, giving officials access to entire clinic, was unconstitutional as violating providers' *Fourth Amendment* rights. Scheme also violated patients' constitutional informational privacy rights by allowing department to access unredacted patient medical records and retain copies in their offices, requiring providers to submit to private contractor copies of fetal ultrasound prints, and requiring incident reports to medical licensing board identifying patients by name without any requirement of nondisclosure by licensing board. Provision requiring licensee to ensure patient was afforded informed of rights to be treated with consideration, respect, and full recognition of patient's dignity and individuality was unconstitutionally vague. Regulatory scheme requiring that when abortions are performed in abortion clinic, physician with admitting privileges at hospital in state be present until all patients are stable and ready to leave recovery room, having effect of requiring admitting privileges for physicians at all but largest clinics because it required someone with admitting privileges to be physically present in

clinic when abortion was performed, was not unconstitutional delegation of authority to private hospital boards. *Tucson Woman's Clinic v. Eden (9th Cir. 2004) 371 F.3d 1173, 1181-1199*

[6B] Notification of Right to Abortion

In wrongful life action brought by twins born with cerebral palsy, doctor who treated mother did not owe mother duty to advise her of right to abortion under *Health & Safety Code § 123462(2)*, where, before twins became viable fetuses, there was no evidence they had any hereditary trait or other physiological condition that should have led doctor to predict they would be born impaired and mother's pregnancy progressed in normal fashion without any evidence of potential complication; and where, after twin fetuses became viable, there was no evidence of any significant fetal anomaly or endangerment of mother's life by continuing pregnancy, and, after mother began experiencing significant complications during her pregnancy, under *Health & Safety Code § 123468*, it would have been improper for doctor to advise mother that she had a right to abortion since fetuses were viable. *Barragan v. Lopez (2007) 156 Cal. App. 4th 997, 1004-1006, 68 Cal. Rptr. 3d 73*

[7] Right of Privacy

Partial-Birth Abortion Ban Act of 2003 [*18 U.S.C. § 1531*], proscribing abortions occurring in second trimester of pregnancy involving intact extraction of fetus, except for abortion necessary to save life of mother, was not unconstitutionally void for vagueness; did not impose undue burden because its restrictions on second-trimester abortions were too broad, since Act prohibited only intact extraction, not procedure in which fetus is removed in parts; and was not invalid on its face because it did not impose substantial obstacle to late-term but previability abortions. *Gonzales v. Carhart (2007)550U.S.124, 127 S. Ct. 1610, 167 L. Ed. 2d 480, 2007 U.S. LEXIS 4338, *41-*79* When state law required parental notification before performing abortion on pregnant minor, with no exception for medical emergencies, lower courts were not required to have invalidated law wholesale, because lower courts could issue declaratory judgment and injunction prohibiting statute's unconstitutional application. Supreme Court would remand for lower courts to determine whether to grant injunction prohibiting unconstitutional applications or to hold that consistency with legislative intent required invalidating statute *in toto*. *Ayotte v. Planned Parenthood (2006) 546 U.S. 320, 126 S. Ct. 961, 967-969, 163 L. Ed. 2d 812*

State law banning partial birth abortion, defined as procedure in which person performing abortion partially delivers vaginally living unborn child before killing unborn child and completing delivery, violates constitutional right of privacy, where law lacks exception for preservation of health of mother, and where law imposes undue burden on woman's ability to choose "dilation and evacuation" (D&E) abortion thereby unduly burdening right to choose abortion itself. *Stenberg v. Carhart (2000) 530 U.S. 914, 120 S. Ct. 2597, 147 L. Ed. 2d 743*

Right of privacy under *U.S. Const., Amend. XIV* is broad enough to encompass woman's decision to terminate pregnancy. *Roe v. Wade (1973) 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147* ; *People v. Belous (1969) 71 Cal. 2d 954, 963, 80 Cal. Rptr. 354, 458 P.2d 194 , cert. denied, 397 U.S. 915*

Under federal Constitution and Supreme Court precedent, Partial-Birth Abortion Ban Act of 2003 [*18 U.S.C. § 1531*; Pub. L. No. 108-105, 117 Stat. 1201], which subjected any physician who knowingly performed partial-birth abortion to civil and criminal penalties including up to two years of incarceration, was unconstitutional. Act lacked constitutionally required exception to preserve health of mother and imposed undue burden on women's ability to obtain previability abortions. Further, Act was unconstitutionally vague because it deprived physicians of fair notice of what it prohibited and encouraged arbitrary enforcement. In light of *Ayotte v. Planned Parenthood (2006) 546 U.S. 320, 126 S. Ct. 961, 163 L. Ed. 2d 812* , only appropriate remedy was to enjoin enforcement of Act. *Planned Parenthood Fed'n of Am., Inc. v. Gonzales (9th Cir. 2006) 435 F.3d 1163, 1171-1191*

Parental consent requirement of former *Health & Safety Code § 25958* (*now see Health & Safety Code § 123450*) violates California constitutional protection of privacy. *American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 314, 361, 66 Cal. Rptr. 2d 210, 940 P.2d 797*

Statutory provisions limiting Medi-Cal funding for abortions is unconstitutional invasion of privacy because they interfere with woman's right to decide whether to bear child and with fundamental interests in life, health, and ability to retain personal control over her body. *Committee to Defend Reproductive Rights v. Myers (1981) 29 Cal. 3d 252, 274-275, 172 Cal. Rptr. 866, 625 P.2d 779*

Under state law, minor's right to privacy is governed by less stringent "significant state interest" test. *Planned Parenthood Affiliates v. Van de Kamp (1986) 181 Cal. App. 3d 245, 277-281, 226 Cal. Rptr. 361*

[8] State Interests

State statute that requires that abortions be performed only by licensed physicians not likely to be found unconstitutional as undue burden on right to abortion. *Mazurek v. Armstrong (1997) 520 U.S. 968* ; *117 S. Ct. 1865, 138 L. Ed. 2d 162*

State may require that information be provided to abortion patients only by licensed physicians. *Planned Parenthood of Southeastern Pa. v. Casey (1992) 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674*

Requirement that second trimester abortions be performed in licensed clinics is reasonable means of furthering state's compelling interest in protecting woman's health and safety. *Simopoulos v. Virginia (1983) 462 U.S. 506, 516-519, 103 S. Ct. 2532, 76 L. Ed. 2d 755* ; *City of Akron v. Akron Ctr. for Reproductive Health (1983) 462 U.S. 416, 432-437, 103 S. Ct. 2481, 76 L. Ed. 2d 687*

State statute that makes attempted abortion criminal by any person does not violate of United States Constitution as applied to abortions performed by nonphysicians. *Connecticut v. Menillo (1975) 423 U.S. 9, 96 S. Ct. 170, 46 L. Ed. 2d 152, 155*

State has legitimate interest in protecting pregnant woman's health and fetus' potential human life at stages of pregnancy subsequent to first trimester. *Roe v. Wade (1973) 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147* ; *Doe v. Bolton (1973) 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201*

Right of marital and sexual privacy limits state's power to regulate use and distribution of contraceptives. *Eisenstadt v. Baird (1972) 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349* ; *Griswold v. Connecticut (1965) 381 U.S. 479, 485-486, 85 S. Ct. 1678, 14 L. Ed. 2d 510*

Bus. & Prof. Code § 601, prohibiting advertising or publication of information concerning obtaining of abortions, is unconstitutionally overbroad. *People v. Orser (1973) 31 Cal. App. 3d 528, 536-538, 107 Cal. Rptr. 458*

[9] Standard of Care

Pennsylvania statute requiring physician performing abortion to exercise that degree of professional care to preserve life of fetus which he or she would be required to exercise in order to preserve life of fetus intended to be born and to employ abortion technique that would provide best opportunity for fetus to be aborted alive, so long as different technique would not be necessary in order to preserve life of mother, is impermissibly vague. *Colautti v. Franklin (1978) 439 U.S. 379, 99 S. Ct. 675, 58 L. Ed. 2d 596, 610*

[10] Sterilization

Voluntary sterilization to limit size of family is not opposed by statute or public policy in *California. Jessin v. County of Shasta (1969) 274 Cal. App. 2d 737, 748, 79 Cal. Rptr. 359*

Pregnancy after sterilization operation is occasion for malpractice suit against doctor; theories of liability; measure of damages. *Custodio v. Bauer (1967) 251 Cal. App. 2d 303, 312-325, 59 Cal. Rptr. 463*

Statute of limitations on malpractice action for negligent sterilization operation commenced to run when plaintiff was put on inquiry and had means of discovering cause of action. *Bathke v. Rahn (1941) 46 Cal. App. 2d 694, 696, 116 P.2d 640*

[11] Therapeutic Abortion Act

Medical criteria for legal abortions under Therapeutic Abortion Act [*Health & Safety Code §§ 25950-25955.5*] are impermissibly vague in violation of due process clause of *U.S. Const., Amend. XIV*. *People v. Barksdale (1972) 8 Cal. 3d 320, 332, 105 Cal. Rptr. 1, 503 P.2d 257*

[12] Viability

Pennsylvania statute requiring that every person inducing or performing abortion make determination based on experience, judgment, or professional competence as to whether or not fetus is viable and if viable, then to follow prescribed standard of care, is unconstitutionally vague. *Colautti v. Franklin (1978) 439 U.S. 379, 99 S. Ct. 675, 58 L. Ed. 2d 596, 606*

Determination of whether particular fetus is viable differs with each pregnancy and is left to responsible attending physician to judge. *Planned Parenthood of Missouri v. Danforth (1976) 428 U.S. 52, 64-65, 96 S. Ct. 2831, 49 L. Ed. 2d 788*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechCommercial SpeechAdvertisingConstitutional LawSubstantive Due ProcessPrivacyPersonal DecisionsHealthcare LawTreatmentEnd-of-Life DecisionsAbortionGeneral OverviewHealthcare LawTreatmentEnd-of-Life DecisionsAbortionRight to PrivacyHealthcare LawTreatmentEnd-of-Life DecisionsAbortionMinors

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§ 4.44 Attorney General Opinions

Under California law, only licensed physician may perform abortion. *74 Ops. Cal. Att'y Gen. 101 (1991)*

Public school officials are authorized to excuse pupil from regularly scheduled classes to obtain medical services, including abortion, and are under no legal duty to notify parents or guardian of pupil so excused. *66 Ops. Cal. Att'y Gen. 244 (1983)*

Former *Health & Safety Code § 25953* (*now see Health & Safety Code § 123410*) proscription against all abortions after 20th week of pregnancy is unenforceable when fetus is not yet viable or abortion is necessary to preserve life or health of pregnant woman. *65 Ops. Cal. Att'y Gen. 261 (1982)*

Family planning clinic is required to withhold information concerning minor's physical condition or whereabouts from minor's parents or sheriff in search of minor unless disclosure is sought for purpose directly connected with administration of public social services. *60 Ops. Cal. Att'y Gen. 314 (1977)*

Welf. & Inst. Code § 10053.2 authorizes family planning services (including medical treatment) for any female minor if she is of childbearing age, is or was eligible for Medi-Cal or federally supported social services, or is member of family that is probable future recipient of financial aid within five years. *57 Ops. Cal. Att'y Gen. 551 (1974)*

Proscription against all abortions after 20th week of pregnancy in former *Health & Safety Code § 25953* of Therapeutic Abortion Act is constitutionally enforceable except as to abortions of nonviable fetuses and abortions necessary to preserve life or health of mother. *65 Ops. Cal. Att'y Gen. 261 (1982)*

Records concerning therapeutic abortion information on individual hospitals are available for public inspection. *55 Ops. Cal. Att'y Gen. 369, 369-371 (1972)*

Sterilization operations on prisoners. *53 Ops. Cal. Att'y Gen. 298, 298-299 (1970)* ; *15 Ops. Cal. Att'y Gen. 100, 101-104 (1950)*

Legal Topics:

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Constitutional LawSubstantive Due ProcessPrivacyPersonal DecisionsHealthcare LawTreatmentEnd-of-Life DecisionsAbortionGeneral OverviewHealthcare LawTreatmentEnd-of-Life DecisionsAbortionRight to PrivacyHealthcare LawTreatmentEnd-of-Life DecisionsAbortionMinors

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§ 4.45 Law Reviews

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Comment, *Eroding Roe: The Politics and Constitutionality of California's Parental Consent Abortion Statute, 20 Pac. L.J. 1167 (1989)*

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Note, *"Committee to Defend Reproductive Rights v. Myers:* Procreative Choice Guaranteed for All Women," *12 Golden Gate L. Rev. 691 (1982)*

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§ 4.46 Text References

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[Reserved]

§§ 4.47[Reserved]

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1-4 California Forms of Pleading and Practice--Annotated § 4.60

§ 4.60 Complaint for Damages for Medical Malpractice [Civ. Code § 3333], Battery [Civ. Code § 3333], and Breach of Contract [Civ. Code § 3300]--By Woman Against Surgeon--Unsuccessful Surgical Sterilization

[1] FORM Complaint for Damages for Medical Malpractice [Civ. Code § 3333], Battery [Civ. Code § 3333], and Breach of Contract [Civ. Code § 3300]--By Woman Against Surgeon--Unsuccessful Surgical Sterilization

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	
through _____,]	)	[Amount demanded _____ (exceeds
Defendant(s).	)	or does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Medical Malpractice)

FIRST COUNT
(Negligence)

1. At all times mentioned in this complaint, defendant was a physician and surgeon duly licensed to practice medicine and perform surgery in California, with offices in _____ County, California. At all times mentioned, defendant held himself/herself out to possess that degree of skill, ability, and learning common to medical practitioners in that community.

[2. *If there are multiple defendants and any defendant is sued as a principal on the basis of respondent superior, include an agency allegation, e.g.,* Defendant _____ (*name of agent*) is, and at all times mentioned was, the agent and employee of defendant _____ (*name of principal*), and in doing the things alleged in this complaint was acting within the scope of that agency.]

[3. *If there are defendants whose names and capacities are unknown, include a fictitious name allegation, e.g.,* Plaintiff is ignorant of the true names and capacities of defendant sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by such negligence.)]

4. On or about _____ [*date*], plaintiff consulted defendant as a physician seeking his/her advice as to whether plaintiff should become sterilized in order to prevent conception of children. [At such time plaintiff informed defendant that she was married and the mother of _____ (*number*) children.]

5. Defendant advised plaintiff that she should become sterilized and that she should undergo surgery known as _____ [*specify e.g.,* "salpingectomy," which involves the removal of portions of the fallopian tubes].

6. Plaintiff agreed and consented to have defendant perform such surgery on plaintiff for the express purpose of preventing pregnancy.

7. On _____ [*date*], at _____ [*name of hospital*] defendant performed a _____ [*e.g.,* salpingectomy] on plaintiff

8. In conducting the operation defendant failed to exercise reasonable care and skill possessed by other medical practitioners in his community and negligently and improperly _____ [*e.g.,* cut plaintiff's fallopian tubes without taking ordinary and necessary surgical measures to avoid the regeneration of those tubes].

9. As a proximate result of defendant's negligence, plaintiff became preganant and was caused to suffer great pain and discomfort during her pregnancy to her damage [in the sum of $_____].

10. As a further proximate result of defendant's negligence plaintiff, on _____ [*date*], [*specify, e.g.,* gave birth to her child] and thereby incurred medical, hospital, and surgical costs to her additional damage [in the sum of $_____].

[11. Prior to and until _____ [*date*], plaintiff was _____ (employed *or* employable) in her usual occupation (as _____ [*specify*]), and, as a further proximate result of defendant's negligence, and by reason of plaintiff's pregnancy, plaintiff was prevented from attending to such occupation from _____ [*date*], through _____ [*date*], and thereby suffered a loss of earning (to her

additional damage in the sum of $_____).]

[12. *Set forth other items of special damages, if any*.]

SECOND COUNT
(Negligent Nondisclosure)

1. Plaintiff refers to Paragraphs 1 through 7, inclusive, and 9 through 12, inclusive, of her FIRST COUNT and incorporates them herein.

2. At all times herein mentioned defendant negligently failed to inform plaintiff that the surgical procedure performed on her person was not fully reliable and that a possibility existed that she could thereafter become pregnant.

3. Without being informed that such possibility existed and that the operation was not fully reliable, plaintiff failed to use protective devices that would have avoided the conception of a child as herein mentioned.

THIRD COUNT
(Negligent Misrepresentation)

1. Plaintiff refers to Paragraphs 1 through 7, inclusive, and 9 through 12, inclusive, of her FIRST COUNT and incorporates them herein.

2. On or about _____ [*date*], defendant carelessly and negligently represented and advised plaintiff that she could engage in sexual intercourse after such surgery with safety and without fear or risk of becoming pregnant and that contraceptive devices would not be necessary to prevent conception.

3. Such representations were untrue, and defendant knew or, in exercising reasonable care and skill possessed by other medical practitioners in his community, should have known that they were untrue.

4. Plaintiff relied on such representations by defendant and engaged in sexual intercourse without the use of contraceptive devices, and as a proximate result thereof was caused to suffer the injuries herein alleged.

SECOND CAUSE OF ACTION
(Battery)

1. Plaintiff refers to Paragraphs 1 through 7, inclusive, of her FIRST CAUSE OF ACTION and incorporates them herein.

2. Defendant at all times herein mentioned failed to inform plaintiff of the several surgical procedures that would accomplish a complete sterilization.

3. In failing to properly advise plaintiff or to inform plaintiff of the several surgical procedures that would accomplish a complete sterilization, defendant deprived plaintiff of the opportunity to choose a form of sterilization that would accomplish her intentions.

4. Had plaintiff been properly advised and informed, she would not have consented to the surgical operation performed on her by defendant, and any consent given by plaintiff as to the operation performed on her by defendant did not

constitute a knowledgeable or informed consent and such operation constituted a battery on plaintiff's person.

5. As a proximate result of such battery, plaintiff became pregnant and was caused to suffer great pain and discomfort during her pregnancy to her damage [in the sum of $_____].

6. As a further proximate result of defendant's battery plaintiff, on _____ [*date*], _____ [*specify, e.g.*, gave birth to her child] and incurred medical, hospital, and surgical costs to her additional damage [in the sum of $_____].

7. [*Set forth other items of special damages, such as loss of earning. See Paragraph 11*].

THIRD CAUSE OF ACTION
(Breach of Contract)

1. 1. Plaintiff refers to the following Paragraphs of her FIRST CAUSE OF ACTION and incorporates them herein: Paragraphs 1 through 12, inclusive, of her FIRST COUNT, Paragraphs 1 through 3, inclusive, of her SECOND COUNT, and Paragraphs 1 through 4, inclusive, of her THIRD COUNT.

2. On or about _____ [*date*], plaintiff and defendant entered into _____ [a written *or* an oral] agreement wherein defendant agreed to sterilize plaintiff by a surgical operation in return for which plaintiff agreed to pay to defendant the sum of $_____. Defendant, as a physician and surgeon, represented to plaintiff that he/she possessed the ordinary training and skill possessed by physicians and surgeons practicing in his/her community and agreed that he/she would use such training, care, and skill in treating plaintiff and in performing the agreed surgery.

3. Defendant breached such agreement by failing to sterilize plaintiff and by failing to use such training, care, and skill in treating and operating on plaintiff as herein alleged.

4. Plaintiff has performed all of the conditions and things on her part to be performed under the agreement and has paid to defendant the sum of $_____, and, as a proximate result of defendant's breach of contract as herein alleged, has been damaged in that sum.

5. As a proximate result of defendant's breach of contract, plaintiff became preganant and has suffered damages in that she has incurred hospital and other incidental expenses in undergoing the aforementioned sterilization operation, all to plaintiff's further damage in the sum of $_____.

6. As a further proximate result of defendant's breach of contract, plaintiff has suffered additional damages in that she has incurred medical, hospital, and surgical costs and fees in undergoing treatment for her pregnancy in the sum of $_____.

[7. *Set forth any consequential damages.*]

WHEREFORE, plaintiff prays judgment as follows:

On the FIRST CAUSE OF ACTION:

1. For general damages [in the sum of $_____].

2. For special damages [in the sum of $_____].

On the SECOND CAUSE OF ACTION:

3. For general damages [in the sum of $_____].

4. For special damages [in the sum of $_____].

On the THIRD CAUSE OF ACTION:

5. For damages in the sum of $_____.

6. For costs of suit herein incurred.

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], as the plaintiff in this action, have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form of complaint in *[1], above*, is for use in an action for damages for an unwanted pregnancy against a physician who performed an unsuccessful surgical sterilization on the plaintiff. The complaint is based on the facts set forth in *Custodio v. Bauer (1967) 251 Cal. App. 2d 303, 59 Cal. Rptr. 463* .

[3] Allegations

The first cause of action is for negligent malpractice and alleges:

- Negligence in the performance of the operation (FIRST COUNT: Paragraphs 1-12);

- Negligent nondisclosure of the facts that the operation was not fully reliable and that there was risk that plaintiff could become pregnant without the use of contraceptives (SECOND COUNT; Paragraphs 1-3); and

- Negligent misrepresentation that plaintiff could engage in sexual intercourse after the surgery without the risk of becoming pregnant (THIRD COUNT; Paragraphs 1-4 [*Custodio v. Bauer (1967) 251 Cal. App. 2d 303, 311-314, 59 Cal. Rptr. 463]* .

The second cause of action is for battery and alleges:

- That defendant did not fully disclose to plaintiff other available forms of sterilization (Paragraph 2); and

- That, therefore, plaintiff did not give an informed consent to the operation performed (Paragraphs 3, 4) [*see Custodio v. Bauer (1967) 251 Cal. App. 2d 303, 312-313, 59 Cal. Rptr. 463* ; *see also Berkey v. Anderson (1969) 1 Cal. App. 3d 790, 803-805, 82 Cal. Rptr. 67* (discussing informed consent doctrine)].

The third cause of action is for breach of a contract to perform a sterilization operation and alleges that defendant failed to perform his/her obligations under the contract in failing to exercise the requisite care and skill [*Civ. Code § 1714(a)*] and in that the operations did not sterilize plaintiff (Paragraphs 1-4) [*see Custodio v. Bauer (1967) 251 Cal. App. 2d 303, 314-316, 59 Cal. Rptr. 463]* .

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Damages

[a] Specification of Amount

In an action brought to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages must be alleged [*Code Civ. Proc. § 425.10(a)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages, § 177.40 et seq.*, and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[b] Measure

The measure of damages for breach of contract obligations and for breach of noncontract obligations (e.g., tort actions) are set forth in *Civ. Code §§ 3300* and *3333*, respectively.

In an action for damages for an unsuccessful sterilization resulting in pregnancy, damages may include the outlay for the unsuccessful sterilization, mental suffering attendant to the unexpected pregnancy, pain and suffering due to physical complication, and costs for delivery of the child [*Custodio v. Bauer (1967) 251 Cal. App. 2d 303, 322-325, 59 Cal. Rptr. 463* (dictum)]. In any action for injury against a health care provider based on professional negligence, the injured plaintiff is entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damage [*Civ. Code § 3333.2(a)*]. However, in no such action can the amount of damages for noneconomic losses exceed $250,000 [*Civ. Code § 3333.2(b)*].

[6] Statute of Limitations for Malpractice

An action against a health care provider for injury or death based upon the provider's alleged professional negligence must be commenced within three years after the date of the injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered the injury, whichever occurs first [*see Bathke v. Rahn (1941) 46 Cal. App. 2d 694, 696, 116 P.2d 640]* . In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following [*Code Civ. Proc. § 340.5*]:

- Upon proof of fraud [*see Civ. Code § 1710*],
- Intentional concealment, or
- The presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person.

Actions by a minor must be commenced within three years from the date of the alleged wrongful act. Such time limitation must be tolled for minors for any period during which parent or guardian and defendant's insurer or health care provider have committed fraud or collusion in the failure to bring an action on behalf of the injured minor for professional negligence.

[7] Notice Required Prior to Commencing Action

Code Civ. Proc. § 364(a) requires ninety days prior notice as a prerequisite to an action against a health care provider for professional negligence. For discussion of this requirement, and a form of notice, see Ch. 415, *Physicians: Medical Malpractice* .

[8] Cross References

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative allegations as to capacity and residence of parties, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively.

See generally Ch. 58, *Assault and Battery* , Ch. 177, *Damages* , *§ 177.40 et seq.,* Ch. 269, *Fraud and Deceit,* Ch. 362, *Mental Suffering and Emotional Distress,* Ch. 380, *Negligence,* and Ch. 415, *Physicians: Medical Malpractice*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityHealthcare ProvidersTortsIntentional TortsAssault & BatteryElements of AssaultContracts LawBreachCauses of ActionElements of ClaimsHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawActions Against Healthcare WorkersSurgeons

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1-4 California Forms of Pleading and Practice--Annotated § 4.61

§ 4.61 Petition for Writ of Mandate [Code Civ. Proc. § 1086] to Compel Admittance of Pregnant Woman to Local District Hospital for Abortion

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. § 1086] to Compel Admittance of Pregnant Woman to Local District Hospital for Abortion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Petitioner,	)	PETITION FOR WRIT OF MANDATE
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Respondents.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	

_____

Petitioner alleges:

1. Respondent _____ [*name of hosptial district*] is, and at all times herein mentioned was, a local hospital district duly organized and existing under *Sections 32000 to 32492 of the Health and Safety Code*.

2. Respondent _____ [*name of hospital district*] at all times herein mentioned did, and still does, operate and maintain a general hospital known a _____ [*name*] in _____ County, California.

3. Respondent Board of Directors of _____ [*name of hospital district*] is the board of directors of such

district and respondents _____ [*names of directors*] are the duly elected, qualified, and acting members of such board.

4. Respondent _____ [*name of person or board in charge of hospital admissions*] is the _____ [agent *or* agency] of _____ [*name of hospital*] in charge of admittance of patients to such hospital.

5. On or about _____ [*date*], petitioner became pregnant and immediately consulted Dr. _____ [*name*], a physician and surgeon duly licensed by the State of California, regarding an abortion. After Dr. _____ [*name*] examined petitioner and determined that an abortion would be medically proper, petitioner chose to have an abortion performed by him.

6. Dr. _____ [*name*] is, and at all times herein mentioned was, on the medical staff of _____ [*name of hospital*] and is authorized to perform surgery there. Petitioner applied for admission to _____ [*name of hospital*] and complied with all of such hospital's rules regarding admission of patients.

7. On or about _____ [*date*], petitioner received notice that _____ [*name of hospital*] would not admit her for any surgery to terminate her pregnancy. Petitioner is informed and believes and thereon alleges that rules of _____ [*name of hospital*] established by respondents provide _____ [*set forth rules regarding abortion, e.g.,* that surgery to perform an abortion or to induce a miscarriage shall not be performed by any physician and surgeon on such hospital's staff]. Petitioner is informed and believes and thereon alleges that she is and was denied admission to _____ [*name of hospital*] pursuant to such rule.

8. Such rules are unreasonable, arbitrary, and capricious as applied to petitioner in that _____ [*specify, e.g.*, they have no reasonable relationship to protecting petitioner's health and serve no legitimate interest of the hospital]. Such rules infringe on petitioner's right to due process of law under the *Fourteenth Amendment of the United States Constitution* to choose to terminate her pregnancy and to obtain an abortion without being restricted by the State of California or its public agencies, including respondents, in the manner herein alleged.

9. Petitioner is informed and believes and thereon alleges that Dr. _____ [*name*] is ready and willing to perform an abortion on petitioner at _____ [*name of hospital*] and that the necessary facilities and attendants are available there to assist him in so doing, and that he is unable to do so only because of the hospital rules set forth herein.

10. Dr. _____ [*name*] is, and for the past _____ years has been, petitioner's private physician in whom petitioner has the utmost confidence. Petitioner has no confidence in any other physician to perform surgery on her for the termination of her pregnancy. Dr. _____ [*name*] is not on the medical staff of any hospital other than _____ [*name of hospital*] and no other hospital or surgical facilities are available to petitioner and Dr. _____ [*name*] for the performance of such surgery. Petitioner is in the _____ week of pregnancy and such surgery is a matter of serious urgency in that as petitioner's pregnancy approaches term the risk of harm to petitioner's life and health substantially increases with respect to both childbirth and abortion. Petitioner thus has no plain, speedy, and adequate remedy in the ordinary course of law.

WHEREFORE, petitioner prays:

1. That this court issue its alternative writ of mandate commanding respondents to admit petitioner to _____ [*name of hospital*] and allow Dr. _____ [*name*] to perform the surgery authorized by petitioner, or show cause before this court at a specified time and place why they have not done so.

2. That, on the hearing of this petition and the return thereof, if any, this court issue its peremptory writ of mandate commanding respondents to admit petitioner to _____ [*name of hospital*] and to allow Dr. _____ [*name*] to perform the surgery authorized by petitioner.

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This petition is used to compel a district hospital [*Health & Safety Code § 32000 et seq.*] to admit a patient for an abortion. It alleges:

- Petitioner's pregnancy and her decision, after consulting her physician, to have an abortion (Paragraph 5).
- Her application for admittance to the district hospital where her physician practices (Paragraph 6).
- Denial of her application based on hospital rules restricting or precluding abortion (Paragraph 7).
- The unconstitutionality of such rules (Paragraph 8).
- Absence of any plain, speedy, and adequate remedy in the ordinary course of law (Paragraph 10) [*see Code Civ. Proc. §§ 1085, 1086*].

Petitioner's right to an abortion as against unconstitutional restrictions imposed by a state agency such as a local hospital

district and the district's corresponding duty not to impose such restrictions are based on the decisions in *Roe v. Wade (1973) 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147* and *People v. Belous (1969) 71 Cal. 2d 954, 963, 80 Cal. Rptr. 354, 458 P.2d 194* .

If a petition for writ of mandate is filed in a court of appeal or the Supreme Court, rather than a superior court [*see Cal. Const., art. VI, § 10* (original jurisdiction in mandate proceedings)], and could have been filed in a lower court, it must explain why the reviewing court should issue the writ as an original matter [*Cal. Rules of Ct., Rule 8.486(a)(1)*].

Petitioner's physician would probably have standing to join in the action, both to represent the interests of his or her patients who seek abortions and to represent his or her own interest in practicing medicine [*see Ballard v. Anderson (1971) 4 Cal. 3d 873, 877, 95 Cal. Rptr. 1, 484 P.2d 1345* ; *Rosner v. Eden Township Hospital Dist. (1962) 58 Cal. 2d 592, 596-599, 25 Cal. Rptr. 551, 375 P.2d 431* (admission of physician to hospital staff); Willis v. Santa Ana etc. Hospital Assn. (1962) 58 Cal. 2d 806, 810, 26 Cal. Rptr. 640, 376 P.2d 568 (physician's right to practice his or her profession without unlawful or unjustified interference by hospital)].

[3] Verification

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*].

[4] Proof of Service

Proof of service on each respondent and real party in interest of a copy of a petition that seeks an alternative writ must accompany the petition when it is offered for filing except when, in its discretion and for good cause, the court has granted the application for the writ ex parte [*Code Civ. Proc. § 1107*; for a discussion of serving the petition, *see* Ch. 358, *Mandate and Prohibition*].

When no alternative writ is sought, proof of service of a copy of the petition need not accompany the application, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

[5] Supporting Memorandum

The petition should be accompanied by a supporting memorandum [*see Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(2), 3.1113(a)* (petition filed in superior court), 8.486(2) (petition filed as original proceeding in reviewing court)]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[6] Mandate to Compel Admittance for Abortion

A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station [*Code Civ. Proc. § 1085(a)*]. The writ must be issued in all cases where there is no plain, speedy, and adequate remedy in the ordinary course of law [*Code Civ. Proc. § 1086*]. Although there is apparently no appellate court ruling as to whether or not a petition for a writ of mandate is the appropriate remedy to compel an unwilling public hospital to admit an abortion patient, general principles, as well as use of the writ in comparable cases, indicates that it is the most suitable remedy [*see Ballard v. Anderson (1971) 4 Cal. 3d 873, 884, 95 Cal. Rptr. 1, 484 P.2d 1345* (mandate issued to compel abortion committee of hospital to determine whether minor petitioner met medical criteria for therapeutic abortion); *Rosner v. Eden Township Hospital Dist. (1962) 58 Cal. 2d 592, 596-599, 25 Cal. Rptr. 551, 375 P.2d 431* (mandate issued to compel district hospital to admit physician to staff)]. An injunction, on the other hand, would not seem to offer as quick a resolution of the controversy in most instances [*see Alvarez v. Eden Township Hospital Dist. (1961) 191 Cal. App. 2d 309, 312, 12 Cal. Rptr. 661* (persons seeking admission to hospital is not entitled to preliminary injunction absent showing of urgency and clear case of prospective injury)]. Alternatively, injunctive relief

may be sought to enjoin the hospital from refusing to admit a person seeking an abortion [*see Civ. Code §§ 3420-3422*; *Code Civ. Proc. §§ 525-527*]. However, due to delays that might ensue before the court is willing to rule on such an injunction and the fact that the court might be unwilling to issue a preliminary injunction in such a case, petition for writ of mandate would appear to be the preferred procedure.

[7] Cross References

See generally Ch. 295, *Hospitals* , and Ch. 358, *Mandate and Prohibition*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentFailures & Refusals to TreatGeneral OverviewConstitutional LawSubstantive Due ProcessPrivacyPersonal DecisionsHealthcare LawTreatmentReproductive TechnologyAccess to ServicesCivil ProcedureRemediesWritsCommon Law WritsMandamusHealthcare LawTreatmentEnd-of-Life DecisionsAbortionRight to Privacy

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Chapter 5 ABUSE OF MINORS AND ELDERLY

1-5 California Forms of Pleading and Practice--Annotated 5.syn

§ 5.syn Synopsis to Chapter 5: ABUSE OF MINORS AND ELDERLY

§ 5.01 Scope of Chapter

§ 5.02 Cross References

§§ 5.03-5.09 [Reserved]

§ 5.10 Governing Law

§ 5.11 Effective Date of Provisions

§ 5.12 Definition of Childhood Sexual Abuse

§ 5.13 Limitation Period

§ 5.14 Certificates of Merit

[1] Requirement and Contents of Certificate

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[1] FORM

[2] Use of Form

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[2] Use of Forms

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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PART I. SCOPE

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§ 5.01 Scope of Chapter

This chapter covers civil actions based on childhood sexual abuse and on abuse of elderly persons and dependent adults.

The chapter discusses civil actions based on childhood sexual abuse [*see § 5.10* et seq.], and contains the following related forms:

- A form of complaint for damages based on childhood sexual abuse [*see § 5.60[1]*].
- Forms of certificate of merit for use with the complaint [*see §§ 5.61[1]* and *5.62[1]*].
- A form for permission to substitute the name of the defendant for the fictitious designation [*see § 5.63[1]*].
- A form of an order permitting an amendment to substitute a named defendant for a fictitiously named defendant [*see § 5.64[1]*].

The chapter also discusses civil actions based on physical abuse, abductions, neglect, or fiduciary abuse of an elderly person or dependent adult [*see § 5.30* et seq.], and contains the following related forms:

- A form of complaint seeking damages based on this type of abuse [*see § 5.70[1]*].
- A form of a request for orders to stop elder or dependent adult abuse [*see § 5.71[1]*].
- A form of a notice of hearing and temporary restraining order [*see § 5.72[1]*].
- A form of a response to a request for orders to stop elder or dependent adult abuse [*see § 5.73[1]*].
- A form of an order after hearing restraining elder or dependent adult abuse [*see § 5.74[1]*].

- A form of a proof of service [*see § 5.75[1]*].
- A form for a request and order for reissuance of temporary restraining order [*see § 5.76[1]*].
- A form for proof of sale or turning in of firearms [*see § 5.77[1]*].
- A form for submitting confidential information to the California Law Enforcement Telecommunications System (CLETS) [*see § 5.78[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAssault & BatteryElements of AssaultTortsIntentional TortsAssault & BatteryElements of BatteryFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & Neglect

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§ 5.02 Cross References

The following chapters deal with potentially related causes of action:

- For discussion and forms relating to assault and battery generally, see Ch. 58, *Assault and Battery* .

- For discussion and forms regarding sexual battery under *Civ. Code § 1708.5*, sexual harassment, and forcible rape, see Ch. 58, *Assault and Battery* .

- For discussion and forms regarding conservatorship generally, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , through Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships* .

- For discussion and forms relating to harassment and domestic violence, see Ch. 293, *Harassment and Domestic Violence* .

- For discussion and forms relating to long-term health care facilities, and residential care facilities for the elderly, see Ch. 351, *Long-Term Health and Residential Care* .

- For discussion and forms relating to tort actions brought by minors generally, see Ch. 367A, *Minors: Tort Actions* .

- For discussion and forms relating to a child's actions against parents and a parent's actions for personal injuries to a minor child, see Ch. 394, *Parent and Child* .

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[Reserved]

§§ 5.03[Reserved]

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1-5 California Forms of Pleading and Practice--Annotated § 5.10

§ 5.10 Governing Law

Civil actions based on childhood sexual abuse, and the limitation period applicable to those actions, are governed by *Code Civ. Proc. § 340.1*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsTortsIntentional TortsAssault & BatteryElements of AssaultTortsIntentional TortsAssault & BatteryElements of BatteryFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectCriminal Law & ProcedureCriminal OffensesSex CrimesSexual AssaultAbuse of ChildrenElementsGovernmentsLegislationStatutes of LimitationsGeneral Overview

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1-5 California Forms of Pleading and Practice--Annotated § 5.11

§ 5.11 Effective Date of Provisions

Civil actions commenced on or after January 1, 1991, are subject to *Code Civ. Proc. § 340.1* as amended in 1990 and discussed in this part [*see Code Civ. Proc. § 340.1(p)*; *see also* Stats. 1990, ch. 1578]. Actions commenced prior to that date are governed by the former version of the statute, which provided for a three-year statute of limitations for actions based on conduct alleged to have occurred between a household or family member and a child, and which did not preclude courts from applying delayed discovery exceptions to the accrual of the cause of action [*see* Stats. 1986, ch. 914]. However, the amendments enacted in 1990 do apply to any action otherwise barred by the statute of limitations in effect before January 1, 1991, thereby reviving those causes of actions that had lapsed or technically expired under the law existing before January 1, 1991 [*Code Civ. Proc. § 340.1(r)* (enacted by Stats. 1994, ch. 288); *see also Code Civ. Proc. § 340.1(s)* (expressing legislative intent that amendments adding revival language apply to any action commenced on or after January 1, 1991)].

The 1994 amendments to *Code Civ. Proc. § 340.1* repealed the provision that had permitted the courts to apply equitable exceptions to the running of the applicable statute of limitations, including exceptions relating to delayed discovery of injuries, with respect to actions commenced before January 1, 1991 [*see* former *Code Civ. Proc. § 340.1(l)*]. The revival of actions barred under pre-1991 law permit a plaintiff whose action was filed after January 1, 1991, to maintain the action as long as the action is timely under the provisions of *Code Civ. Proc. § 340.1(a)* [*see Tietge v. Western Province of Servites, Inc. (1997) 55 Cal. App. 4th 382, 386*]; *see also § 5.13*].

Courts may allow claims to be filed under *Code Civ. Proc. § 340.1(b)(2)* (claims on or after a person's twenty-sixth birthday) [*see § 5.13*] that would otherwise be barred as of January 1, 2003, solely because the applicable statute of limitations has or had expired. These claims may be commenced within one year after January 1, 2003 [*Civ. Proc. § 340.1(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAssault & BatteryElements of AssaultTortsIntentional TortsAssault & BatteryElements of

BatteryFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectCriminal Law & ProcedureCriminal OffensesSex CrimesSexual AssaultAbuse of ChildrenElementsGovernmentsLegislationStatutes of LimitationsTime Limitations

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1-5 California Forms of Pleading and Practice--Annotated § 5.12

§ 5.12 Definition of Childhood Sexual Abuse

"Childhood sexual abuse," within the meaning of *Code Civ. Proc. § 340.1*, includes any act committed by the defendant against the plaintiff that occurred when the plaintiff was under the age of 18 years if the act would have have proscribed by the following Penal Code sections or by any prior California laws of similar effect at the time the act was committed [*Code Civ. Proc. § 340.1(e)*]:

- *Penal Code § 266j*, which proscribes transporting or otherwise making available to another person a child under the age of 16 for a lewd or lascivious purpose.

- *Penal Code § 285*, which proscribes incest, defined as fornication, adultery, or marriage between parents and children, ancestors and descendants of every degree, brothers and sisters of the half as well as the whole blood, uncles and nieces, or aunts and nephews [*see Fam. Code § 2200* (degrees of consanguinity)].

- *Penal Code § 286(b)(1), (2), (c)*, which proscribes sodomy with a minor.

- *Penal Code § 288(a), (b)*, which proscribes lewd or lascivious acts with persons under 14 years of age with the intent of sexual gratification.

- *Penal Code § 288a(b)(1), (2), (c)*, which proscribes oral copulation with a minor.

- *Penal Code § 289(h)-(j)*, which proscribes conduct with a minor involving the penetration of genital or anal openings of another person with a foreign object for the purpose of sexual gratification or abuse.

- *Penal Code § 647.6*, which proscribes child molestation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectCriminal Law & ProcedureCriminal OffensesSex CrimesSexual AssaultAbuse of ChildrenElements

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§ 5.13 Limitation Period

In an action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of the action must be within eight years of the date the plaintiff attains the age of majority (that is, by the plaintiff's twenty-sixth birthday) or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later, for any of the following actions [*Code Civ. Proc. § 340.1(a)*]:

- An action against any person for committing an act of childhood sexual abuse,

- An action for liability against any person or entity who owed a duty of care to the plaintiff, where a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff.

- An action for liability against any person or entity where an intentional act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff.

No action described in the second or third paragraph can be commenced on or after the plaintiff's twenty-sixth birthday [*Code Civ. Proc. § 340.1(b)(1)*]. However, effective January 1, 2003, a plaintiff may commence this type of action after the plaintiff's twenty-sixth birthday, if the person or entity knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and if the person or entity failed to take reasonable steps, and failed to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person, including, but not limited to, preventing or avoiding placement of that person in a function or environment in which contact with children is an inherent part of that function or environment [*Code Civ. Proc. § 340.1(b)(2)*]. Providing or requiring counseling is not sufficient, in and of itself, to constitute a reasonable step or reasonable safeguard [*Code Civ. Proc. § 340.1(b)(2)*].

This statutory language requires that the victim establish that a nonperpetrator defendant had actual knowledge, constructive knowledge, or was otherwise on notice that the perpetrator had engaged in past unlawful sexual conduct

with a minor and, despite this knowledge or notice, failed to take reasonable preventative steps or implement reasonable safeguards to avoid acts of future sexual conduct by the perpetrator [*Doe v. City of Los Angeles (2007) 42 Cal. 4th 531, 549, 67 Cal. Rptr. 3d 330, 169 P.3d 559]* . For these purposes, constructive knowledge exists if, after examining the facts in the nonperpetrator defendant's possession, a reasonable person of ordinary intelligence--or, in the particular circumstance, a person of superior intelligence--would have inferred that the perpetrator had prior unlawful sexual conduct with a minor or regarded it as so highly probable as to take action under the assumption that the perpetrator had done so [*Doe v. City of Los Angeles (2007) 42 Cal. 4th 531, 547, 67 Cal. Rptr. 3d 330, 169 P.3d 559]* . Constructive notice cannot be predicated on a duty to investigate. Rather, the defendant must have had actual notice of facts from which a reasonable person could infer the fact that abuse had taken place or was highly probable to have taken place [*Doe v. City of Los Angeles (2007) 42 Cal. 4th 531, 547, 67 Cal. Rptr. 3d 330, 169 P.3d 559* ; *Deutsch v. Masonic Homes of California, Inc. (2008) 164 Cal. App. 4th 748, 773, 80 Cal. Rptr. 3d 368*]. Similarly, constructive notice cannot be based on what the defendant *should* have noticed, but did not, even if plaintiff argues that the conduct was so pervasive and obvious that a reasonably attentive person would have noticed [*Deutsch v. Masonic Homes of California, Inc. (2008) 164 Cal. App. 4th 748, 773-774, 80 Cal. Rptr. 3d 368*].

A plaintiff seeking to take advantage of this provision may plead ultimate facts, including allegations based on information and belief, and is not required to plead detailed facts to support the claim that defendant possessed the requisite knowledge or notice, especially in cases in which plaintiff can plausibly allege that the nonperpetrator defendant withheld or concealed evidence of its knowledge or notice of the perpetrator's past unlawful sexual conduct [*Doe v. City of Los Angeles (2007) 42 Cal. 4th 531, 550-551, 67 Cal. Rptr. 3d 330, 169 P.3d 559]* . However, this relaxed pleading standard does not relieve plaintiff of the duty to allege facts supporting the claim that the nonperpetrating defendant had knowledge or notice of the specific perpetrator's *past unlawful sexual conduct* with a minor [*Doe v. City of Los Angeles (2007) 42 Cal. 4th 531, 552, 67 Cal. Rptr. 3d 330, 169 P.3d 559* ; *see, e.g., Doe v. Salesian Society (2008) 159 Cal. App. 4th 474, 480-481, 71 Cal. Rptr. 3d 565* (summary judgment properly granted for defendant society when plaintiffs failed to present evidence that any reports of abuse were made to defendant prior to abuse of plaintiffs)].

The language of *Code Civ. Proc. § 340.1(b)(2)* extending the limitations period beyond the plaintiff's 26th birthday in an action against a non-perpetrator who failed to take reasonable steps to protect plaintiff applies only against a non-perpetrator who is or was in a specified relationship with the perpetrator, that is, the perpetrator must have been an employee, volunteer, representative, or agent of the non-perpetrator defendant [*Doe v. City of Los Angeles (2007) 42 Cal. 4th 531, 544, 67 Cal. Rptr. 3d 330, 169 P.3d 559* ; *Joseph v. Johnson (2009) 178 Cal. App. 4th 1404, 1411, 101 Cal. Rptr. 3d 248]* . Demonstrating a special relationship under this subsection requires a showing that the third-party non-perpetrator exercised some control over the perpetrator's actions [*Joseph v. Johnson (2009) 178 Cal. App. 4th 1404, 1411, 101 Cal. Rptr. 3d 248* ; *Aaronoff v. Martinez-Senftner (2006) 136 Cal. App. 4th 910, 921, 39 Cal. Rptr. 3d 137]* . The requisite relationship does not include a marital relationship, even if some of the abuse committed occurred at the place of employment of one or both of the spouses [*Aaronoff v. Martinez-Senftner (2006) 136 Cal. App. 4th 910, 923, 39 Cal. Rptr. 3d 137]* .

In one case, the requisite control was not found when plaintiffs argued that a non-perpetrator spouse had delegated babysitting responsibilities to her husband, who then sexually abused the plaintiffs. The court rejected this claim, noting that plaintiffs had failed to allege an agency, volunteer, or employment relationship or that the non-perpetrator spouse otherwise had the right to control her husband's actions, notwithstanding the fact that she left the plaintiffs alone with her husband [*Joseph v. Johnson (2009) 178 Cal. App. 4th 1404, 1412, 101 Cal. Rptr. 3d 248]* . However, because the definition of "childhood sexual abuse" for these purposes includes conduct that would be a violation of *Penal Code § 266j*, which proscribes transporting or otherwise making available to another person a child under the age of 16 for a lewd or lascivious purpose [*Code Civ. Proc. § 340.1(e)*; *see § 5.12*], the court also concluded that an action for sexual abuse may be covered by the extended limitations period of *Code Civ. Proc. § 340.1(a)(1)* if brought against a person who has allegedly violated *Penal Code § 266j* [*Joseph v. Johnson (2009) 178 Cal. App. 4th 1404, 1414-1415, 101 Cal. Rptr. 3d 248]* .

Liability of a principal for the acts of an agent extends to the acts of an ostensible agent. Thus, a principal may be liable when the principal intentionally or through the lack of ordinary care causes a third person to believe another person is an agent even though that person is not actually employed by the principal [*Deutsch v. Masonic Homes of California, Inc. (2008) 164 Cal. App. 4th 748, 781-782, 80 Cal. Rptr. 3d 368*]. In addition, for purposes of establishing the requisite knowledge on the part of a principal, knowledge on the part of an agent may be imputed to the principal if the agent had a duty to report that information to the principal [*Santillan v. Roman Catholic Bishop of Fresno (2008) 163 Cal. App. 4th 4, 10-12, 77 Cal. Rptr. 3d 343* (triable issue existed as to whether cleric's housekeeper had duty to report to diocese that cleric was often alone in bedroom with plaintiffs when they were young boys)].

The 1990 amendments to *Code Civ. Proc. § 340.1* apply to any action otherwise barred by the statute of limitations in effect before January 1, 1991, thereby reviving those causes of actions that had lapsed or technically expired under the law existing before January 1, 1991 [*see Code Civ. Proc. § 340.1(r)* (enacted by Stats. 1994, ch. 288); *see also Code Civ. Proc. § 340.1(s)* (expressing legislative intent that amendments adding revival language apply to any action commenced on or after January 1, 1991)]. If the alleged childhood sexual abuse is part of a course of conduct that continues beyond childhood into adulthood, the enlarged limitations period of *Code Civ. Proc. § 340.1* applies. For a form of complaint based on childhood sexual abuse, see *§ 5.60[1]*.

The 2002 amendments to *Code Civ. Proc. § 340.1(b)* purport to apply to any action otherwise barred by the statute of limitations in effect before January 1, 2003, thereby reviving those causes of action that had lapsed or technically expired under the law existing before January 1, 2003 [*Civ. Proc. § 340.1(c)*]. However, the court of appeal has ruled that the Legislature's attempt to revive causes of action that were adjudicated to finality under the prior statute of limitations is a violation of the separation of powers doctrine, because the power to resolve cases conclusively by rendering dispositive judgments rests with the judiciary alone [*Perez v. Roe 1 (2006) 146 Cal. App. 4th 171, 188, 52 Cal. Rptr. 3d 762]* .

In addition, even if applied constitutionally to cases in which a judgment was not previously finalized, the revival period only extends to claims brought in the year 2003, and causes of actions are not revived if the claim has been litigated to finality on the merits in any court of competent jurisdiction prior to January 1, 2003 [*Civ. Proc. § 340.1(d)(1)*]. Actions also are not revived if: the plaintiff and the defendant have entered into a written, compromised settlement agreement; the plaintiff was represented by an attorney admitted to practice law in California at the time of the settlement agreement, and the plaintiff signed the agreement [*Civ. Proc. § 340.1(d)(2)*].

The 2003 revival provisions apply only to claims against third parties who fail to take steps to stop known abuse and do not apply to claims brought against the actual perpetrator of the sexual abuse [*Dutra v. Eagleson (2006) 146 Cal. App. 4th 216, 229, 52 Cal. Rptr. 3d 788* ; *Aaronoff v. Martinez-Senftner (2006) 136 Cal. App. 4th 910, 920-921, 39 Cal. Rptr. 3d 137]* . An actual complaint must be filed before the end of December 31, 2003, in order to take advantage of the 2003 revival period. Submitting only a written notice of intent to file a complaint in the future is insufficient [*Hightower v. Roman Catholic Bishop of Sacramento (2006) 142 Cal. App. 4th 759, 766-767, 48 Cal. Rptr. 3d 420]* .

A cause of action for childhood sexual abuse brought by a person over the age of 26 against a third-party nonperpetrator does not accrue until the plaintiff discovers that adult psychological problems were caused by childhood sexual abuse. Because the timeliness of a complaint is measured by the limitations period in effect at the time the complaint is filed, such a complaint brought after 2003 is governed by the post-2003 version of the statute of limitations. Thus, an action alleging post-2003 discovery of the cause of the psychological problems may be brought within three years of that discovery, even if the complaint may have been barred under an earlier version of the statute of limitations [*Quarry v. Doe 1 (2009) 170 Cal. App. 4th 1574, 1583-1584, 89 Cal. Rptr. 3d 640*].

Under the current version of *Code Civ. Proc. § 340.1(a)*, a cause of action for childhood sexual abuse brought by an adult over the age of 26 against a third-party nonperpetrator may be brought within three years of the date the plaintiff

the plaintiff discovers, or should have discovered, that adult psychological problems were caused by childhood sexual abuse [*see Code Civ. Proc. § 340.1(a)*]. However, court of appeal opinions are in disagreement as to whether this delayed discovery rule may be used to revive a cause of action against a third-party nonperpetrator that would otherwise have been time-barred under an earlier version of the statute of limitations that contained no delayed discovery provision. One court of appeal opinion held that because the timeliness of a complaint is measured by the limitations period in effect at the time the complaint is filed, such a complaint brought after 2003 is governed by the post-2003 version of the statute of limitations. Thus, under that approach, an action alleging post-2003 discovery of the cause of the psychological problems could be brought within three years of that discovery, even if the complaint may have been barred under an earlier version of the statute of limitations [*Quarry v. Doe 1 (2009) 170 Cal. App. 4th 1574, 1583-1584, 89 Cal. Rptr. 3d 640* (review granted June 10, 2009)]. However, another court of appeal opinion held that the current three-year delayed discovery rule does not apply retroactively and any cause of action that was time-barred under an earlier version of the statute of limitations that contained no delayed discovery provision remains time-barred if not revived by the filing of a 2003 lawsuit, even if the plaintiff did not discover until after 2003 that his or her psychological injury was caused by childhood sexual abuse [*K.J. v. Roman Catholic Bishop of Stockton (2009) 172 Cal. App. 4th 1388, 1399-1401, 92 Cal. Rptr. 3d 673* (review granted June 24, 2009); *see also Doe v. Roman Catholic Bishop of San Diego (2009) 178 Cal. App. 4th 1382, 1386, 101 Cal. Rptr. 3d 398*]. The issue is currently pending before the California Supreme Court [*see Quarry v. Doe 1 (2009) 170 Cal. App. 4th 1574, 1583-1584, 89 Cal. Rptr. 3d 640* (review granted June 10, 2009); *K.J. v. Roman Catholic Bishop of Stockton (2009) 172 Cal. App. 4th 1388, 1399-1401, 92 Cal. Rptr. 3d 673* (review granted June 24, 2009)].

For claims arising from conduct occurring before January 1, 2009, an action against a public entity stemming from an act of childhood sexual abuse is subject to the provisions and time limitations of the California Tort Claims Act. Therefore, the claim must first be presented to the public entity, and if rejected, the plaintiff has only six months after the rejection of the claim to file an action against the entity, regardless of the longer limitations period of *Code Civ. Proc. § 340.1* [*V.C. v. Los Angeles Unified Sch. Dist. (2006) 139 Cal. App. 4th 499, 510, 43 Cal. Rptr. 3d 103* ; *County of Los Angeles v. Superior Court (2005) 127 Cal. App. 4th 1263, 1269-1270, 26 Cal. Rptr. 3d 445* ; *see Gov. Code § 945.6*]. For purposes of determining when a claim against a public entity must be filed, a cause of action for childhood sexual abuse generally accrues at the time of the last molestation, at least in the absence of facts justifying application of the delayed discovery rule or equitable estoppel [*V.C. v. Los Angeles Unified Sch. Dist. (2006) 139 Cal. App. 4th 499, 510, 515-517, 43 Cal. Rptr. 3d 103* (delayed discovery and equitable estoppel not applicable under facts of case)]. Although the limitations period of *Code Civ. Proc. § 340.1* does not apply to these public entity cases, the language in that statute suggesting that in delayed discovery cases the cause of action accrues on the date that the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after plaintiff reached the age of majority was caused by the sexual abuse, can be used to determine the accrual date in an action against a public entity defendant when application of a delayed discovery rule is appropriate [*K.J. v. Arcadia Unified School Dist. (2009) 172 Cal. App. 4th 1229, 1242-1243, 92 Cal. Rptr. 3d 1*].

A plaintiff seeking to take advantage of the 2003 revival statute to pursue an action against a public entity must comply with the claims presentation requirement at the time the cause of action initially accrues [*Shirk v. Vista Unified School Dist. (2007) 42 Cal. 4th 201, 213, 64 Cal. Rptr. 3d 210, 164 P.3d 630]* .

A plaintiff seeking to file suit for damages for childhood sexual abuse pursuant to *Code of Civil Procedure Section 340.1* against a local public entity arising from conduct occurring on or after January 1, 2009, is not required to first file a claim with the local public entity within six months after accrual of the claim, as would generally be the case under the Tort Claims Act [*Gov. Code § 905(m)*]. For further discussion of the procedures and time limitations applicable to actions against public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

In addition to those rules generally governing the limitations period for actions for sexual abuse of a minor, *Code Civ. Proc. § 340.35* provides a special limitations period applicable to civil actions against abusers against whom a criminal action was filed pursuant to *Pen. Code § 803(f), (g),* or *(h),* if the criminal action was dismissed or overturned pursuant

to the United States Supreme Court's opinion in *Stogner v. California,* which held generally that revival of a criminal action after the criminal statute of limitations had expired was unconstitutional [*Code Civ. Proc. § 340.35(a)*; *see Stogner v. California (2003) 539 U.S. 607, 609, 123 S. Ct. 2446, 156 L. Ed. 2d 544]* . If *Code Civ. Proc. § 340.35* applies, an action for damages for sexual abuse against a minor must be brought before January 1, 2006, unless a longer limitations period is applicable [*Code Civ. Proc. § 340.35(b)*]. *Code Civ. Proc. § 340.35* applies regardless of whether the civil action was brought before January 1, 2005, the effective date of the statute, and revives any causes of action that had lapsed or expired under the law in effect prior to adoption of *Code Civ. Proc. § 340.35* [*Code Civ. Proc. § 340.35(c)*].

However, this statute of limitations does not apply if the civil claim has been litigated to finality on the merits prior to January 1, 2005, although termination of the case on the basis of the statute of limitations does not constitute litigation onthe merits for these purposes [*Code Civ. Proc. § 340.35(d)(2)*]. The statute also does not apply to a claim that was settled by a written compromise settlement agreement signed by the plaintiff, so long as the plaintiff was represented at the time by an attorney admitted to practice law in California [*Code Civ. Proc. § 340.35(d)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsTortsIntentional TortsAssault & BatteryElements of AssaultTortsIntentional TortsAssault & BatteryElements of BatteryFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectCriminal Law & ProcedureCriminal OffensesSex CrimesSexual AssaultAbuse of ChildrenGeneral Overview

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1-5 California Forms of Pleading and Practice--Annotated § 5.14

§ 5.14 Certificates of Merit

[1] Requirement and Contents of Certificate

Every plaintiff twenty-six years of age or older at the time the action is filed must file separate certificates of merit for each defendant named in the complaint [*Code Civ. Proc. § 340.1(g), (i)*].

Certificates of merit must be executed by the attorney for the plaintiff and by a licensed mental health practitioner selected by the plaintiff declaring, respectively, as follows, and setting forth the following facts that support the declaration [*Code Civ. Proc. § 340.1(n)*]:

- The attorney has reviewed the facts of the case, the attorney has consulted with at least one licensed mental health practitioner who is licensed to practice and practices in California and whom the attorney reasonably believes is knowledgeable of the relevant facts and issues involved in the particular action, and the attorney has concluded on the basis of the review and consultation that there is reasonable and meritorious cause for the filing of the action. The person consulted may not be a party to the litigation.

- The mental health practitioner consulted is licensed to practice andpractices in California and is not a party to the action, the practitioner is not treating and has not treated the plaintiff, and the practitioner has interviewed the plaintiff and is knowledgeable of the relevant facts and issues involved in the particular action, and has concluded, on the basis of his or her knowledge of the facts and issues, that, in his or her professional opinion, there is a reasonable basis to believe that the plaintiff had been subject to childhood sexual abuse.

- The attorney was unable to obtain the required consultation because a statute of limitations would impair the action and that the required certificates could not be obtained before the impairment of the action. Certificates executed under these circumstances must be filed within 60 days after filing the complaint.

One court of appeal opinion has suggested that if the certificates of merit, or the certificate explaining why they cannot be obtained prior to expiration of the statute of limitations, are not filed along with the complaint prior to expiration of the statute of limitations, then the action is subject to dismissal [*Doyle v. Fenster (1996) 47 Cal. App. 4th 1701, 1706-1707, 55 Cal. Rptr. 2d 327]* . However, another court of appeal opinion has specifically held that the 60-day post-complaint filing period applies to all of the certificates, including the certificate that explains the late filing, regardless of whether the statute of limitations has run before the certificates are filed [*McVeigh v. Doe I (2006) 138 Cal. App. 4th 898, 902, 42 Cal. Rptr. 3d 91]* .

For forms of certificate of merit executed by the plaintiff's attorney and the mental health practitioner, see *§ 5.61* and *§ 5.62*.

[2] Prohibition Against Serving Complaint on Defendants Before Certificate Found Meritorious

A complaint that is subject to the *Code Civ. Proc. § 340.1(g)* certificate of merit requirement [*see § 5.14[1*]] may not be served on the defendant or defendants until the court has reviewed the certificates of merit filed pursuant to *Code Civ. Proc. § 340.1(f)* and has found, in camera, based solely on those certificates of merit, that there is reasonable and meritorious cause for the filing of the action. At that time, the complaint may be served on the defendant or defendants. The duty to serve the defendant or defendants with process does not attach until that time [*Code Civ. Proc. § 340.1(j)*].

[3] Noncompliance

[a] Ground for Demurrer, Motion to Strike, and Disciplinary Proceedings

The failure to file certificates in accordance with *Code Civ. Proc. § 340.1* is a ground for a demurrer pursuant to *Code Civ. Proc. § 430.10* or a motion to strike pursuant to *Code Civ. Proc. § 435* [*Code Civ. Proc. § 340.1(l)*].

In addition, *Code Civ. Proc. § 340.1(k)* states that a violation of *Code Civ. Proc. § 340.1* may constitute unprofessional conduct and may be a ground for discipline against the attorney. Although *Code Civ. Proc. § 340.1(i)* refers to the entire statute, the Legislature probably intended it to apply only to the requirements regarding certificates of merit.

[b] Payment of Expenses to Successful Defendant

On the favorable conclusion of the litigation with respect to any defendant for whom a certificate of merit was filed or for whom a certificate ofmerit should have been filed, the court may, on motion of a party or on the court's own motion, verify compliance with *Code Civ. Proc. § 340.1* by requiring the attorney for the plaintiff who was required to execute the certificate to reveal the name, address, and telephone number of the consultant or consultants relied on by the attorney in preparation of the certificate of merit. The name, address, and telephone numbermust be disclosed to the trial judge in camera and in the absence of the moving party. If the court finds there has been a failure of compliance, it may order a party, a party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by the defendant for whom a certificate should have been filed [*Code Civ. Proc. § 340.1(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewTortsIntentional TortsAssault & BatteryElements of AssaultTortsIntentional TortsAssault & BatteryElements of BatteryFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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§ 5.15 Prohibition on Naming Defendants

[1] Applicability of Prohibition

In any action subject to *Code Civ. Proc. § 340.1(g)*--that is, an action in which the plaintiff is 26 years of age or older at the time the action is filed, no defendant may be named except by "Doe" designation in any pleadings or papers filed in the action until there has been a showing of corroborative fact as to the charging allegations against the defendant alleged to have committed an act or acts of childhood sexual abuse against the plaintiff [*Code Civ. Proc. § 340.1(m)*].

[2] Application to Substitute Named Defendant

At any time after the action is filed, the plaintiff may apply to the court for permission to amend the complaint to substitute the name of the defendant or defendants for the fictitious designation, as follows [*Code Civ. Proc. § 340.1(n)*]:

- The application must be accompanied by a certificate of corroborative fact executed by the attorney for plaintiff. The certificate must declare that the attorney has discovered one or more facts corroborative of one or more of the charging allegations against a defendant or defendants, and must set forth in clear and concise terms the nature and substance of thecorroborative fact. If the corroborative fact is evidenced by the statement of a witness or the contents of a document, the certificate of merit must declare that the attorney has personal knowledge of the witness's statement or of the contents of the document, and the identity and location of the witness or document must be included in the certificate. A fact is corroborative of an allegation if it confirms or supports the allegation. The opinion of any mental health practitioner concerning the plaintiff does not constitute a corroborative fact for purposes of this section.

- If the application to name a defendant is made before that defendant's appearance in the action, neither the application nor the certificate of corroborative fact by the attorney is served on the defendant or defendants, nor on any other party or their counsel of record.

- If the application to name a defendant is made after that defendant's appearance in the action, the

application must be served on all parties, with proof of service provided to the court, but the certificate of corroborative fact is not served on any party or their counsel of record.

For a form of application for permission to amend the complaint to substitute the name of the defendant for the fictitious designation, see *§ 5.63*.

[3] Court's Determination of Application

The court reviews the application and the certificate of corroborative fact in camera and, based solely on the certificate and any reasonable inferences to be drawn from the certificate, will, if one or more facts corroborative of one or more of the charging allegations against a defendant has been shown, order that the complaint may be amended to substitute the name of the defendant or defendants [*Code Civ. Proc. § 340.1(o)*]. The court must keep under seal and confidential from the public and all parties to the litigation other than the plaintiff, any and all certificates of corroborative fact filed under *Code Civ. Proc. § 340.1(m)* [*Code Civ. Proc. § 340.1(p)*].

For a form of an order permitting an amendment to the complaint alleging childhood sexual abuse to substitute a named defendant for a fictitious named defendant, see *§ 5.64*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSubstitutionsGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectCivil ProceduePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePartiesFictitious Names

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§ 5.16 Burden of Proof Not Affected

Nothing in *Code Civ. Proc. § 340.1* alters the otherwise applicable burden of proof, as defined in *Evid. Code § 115*, that a plaintiff has in a civil action subject to *Code Civ. Proc. § 340.1* [*Code Civ. Proc. § 340.1(f)*]. For discussion of *Evid. Code § 115*, see Ch. 551, *Trial* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSubstitutionsGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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[Reserved]

§§ 5.17[Reserved]

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1-5 California Forms of Pleading and Practice--Annotated § 5.30

§ 5.30 Governing Law

Civil actions based on abuse of elderly person or dependent adults are governed by *Welf. & Inst. Code § 15657 et seq.* Definitions applicable to actions under this statute are governed by *Welf. & Inst. Code § 15610 et seq.* Related reporting requirements are governed generally by *Welf. & Inst. Code § 15600 et seq.*, and reporting duties are specifically governed by *Welf. & Inst. Code § 15637*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsProtection From Abuse & NeglectFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & Neglect

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1-5 California Forms of Pleading and Practice--Annotated § 5.31

§ 5.31 Persons Protected

For the purposes of *Welf. & Inst. Code § 15600 et seq.*, regarding abuse of elders and dependent adults, an "elder" (or elderly person) is any person residing in California who is 65 years of age or older [*Welf. & Inst. Code § 15610.27*]. A "dependent adult" is any person residing in California, between the ages of 18 and 64, who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age [*Welf. & Inst. Code § 15610.23(a)*]. This definition also includes any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility [*Welf. & Inst. Code § 15610.23(b)*; *see Health & Safety Code §§ 1250, 1250.2, 1250.3* (definitions of facilities)]. The court of appeal has held that if this latter definition is met, a person qualifies as a dependent adult under the Elder Abuse statute even without evidence that the first definition applies, although the court provided no further analysis nor did it cite to any authority to support its conclusion [*Marron v. Superior Court (2003) 108 Cal. App. 4th 1049, 1066-1067, 134 Cal. Rptr. 2d 358]* .

The elder or dependent adult abuse statute only provides damages for injury to the elder or dependent adult. If an abused person protected by the statute dies, the surviving heirs cannot recover the remedies provided by the statute for their own injuries in a wrongful death action. However, the personal representative of the estate or the decedent's successor in interest may seek recovery for the injury done to elder or dependent adult [*Quiroz v. Seventh Ave. Ctr. (2006) 140 Cal. App. 4th 1256, 1282-1284, 45 Cal. Rptr. 3d 222]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsProtection From Abuse & NeglectFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & Neglect

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1-5 California Forms of Pleading and Practice--Annotated § 5.32

§ 5.32 Reporting Requirements

Health care providers, social service workers, members of the clergy, and community members in general are encouraged, and, in some cases, are required, to report incidents of abuse of an elderly person or dependent adult [*see Welf. & Inst. Code § 15601* (legislative intent regarding reporting requirements); *Welf. & Inst. Code § 15630 et seq.* (reporting provisions)]. Beginning January 1, 2007, officers and employees of financial institutions are required to report suspected financial abuse of an elder or a dependent adult [*see Welf. & Inst. Code § 15630.1*]. These reports are confidential, unless disclosure is specifically permitted by statute [*see Welf. & Inst. Code §§ 15633, 15633.5*].

Care custodians, health practitioners, members of the clergy, mandated reporters of suspected financial abuse, employees of an adult protective service agency, and local law enforcement agencies that report a known or suspected instance of abuse are immune from civil or criminal liability for any required or discretionary report authorized by statute. Others are also immune unless it is proven that a false report was knowingly made [*see Welf. & Inst. Code § 15634*]. For example, immunity was granted to a nurse who provided home care to an elderly person, to the doctor who learned of potential abuse from the nurse and made the actual report, and to the paramedics who acted on this report of abuse under the direction of either the doctor or the sheriff's department [*Easton v. Sutter Coast Hosp. (2000) 80 Cal. App. 4th 485, 491-496, 95 Cal. Rptr. 2d 316]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsProtection From Abuse & NeglectFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & Neglect

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1-5 California Forms of Pleading and Practice--Annotated § 5.33

§ 5.33 Conduct Prohibited

[1] Abuse Generally

The protection of elderly persons and dependent adults from abuse under *Welf. & Inst. Code § 15600 et seq.* concerns physical abuse, neglect, financial abuse, abandonment, isolation, abduction (as defined in *Welf. & Inst. Code § 15610.06*), or other treatment with resulting physical harm, pain, or mental suffering, or the deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering [*Welf. & Inst. Code § 15610.07*]. The definitions provided below are those that specifically relate to a cause of action under *Welf. & Inst. Code § 15657*, under which a plaintiff may recover statutorily provided fees and costs, although the other types of abuse are also defined under *Welf. & Inst. Code § 15610 et seq.*

Although the Elder Abuse statute provides its own definitions of such terms as "physical abuse," "neglect," and "recklessness," a trial court providing instructions to a jury does not commit reversible error by supplementing these definitions with instructions on the appropriate standards of care taken from state or federal regulations applicable to government enforcement actions [*Conservatorship of Gregory (2000) 80 Cal. App. 4th 514, 522-523, 95 Cal. Rptr. 2d 336]* .

In fact, given the similarity between traditional definitions of negligence and the statutory definition of neglect under the Elder Abuse statute [*see § 5.33[3*]], the court of appeal has held that it is reversible error for a trial court in an Elder Abuse action to refuse to instruct on negligence per se under *Evid. Code § 669* if the requirements for applying the negligence per se doctrine have been met [*Norman v. Life Care Ctrs. of Am., Inc. (2003) 107 Cal. App. 4th 1233, 1246-1248, 132 Cal. Rptr. 2d 765]* . In that case, for example, a negligence per se instruction was required because a nursing home had violated state regulations intended to protect the health and safety of facility residents, and evidence supported the conclusion that the regulatory violations were a substantial factor in causing the decedent's injuries and subsequent death [*Norman v. Life Care Ctrs. of Am., Inc. (2003) 107 Cal. App. 4th 1233, 1247-1248, 132 Cal. Rptr. 2d 765* ; *see 22 Cal. Code Reg. § 72311*].

A finding of past abuse may not be predicated on the manner in which the elder or dependent adult is questioned by

defendant's counsel during legal proceedings to ascertain whether defendant abused the adult in the past, even if counsel's conduct is rude or loud and the client does not take steps to prevent his or her attorney from utilizing such tactics [*Gdowski v. Gdowski (2009) 175 Cal. App. 4th 128, 137-138, 95 Cal. Rptr. 3d 799*].

[2] Physical Abuse

For the purposes of *Welf. & Inst. Code § 15600 et seq.*, regarding abuse of elders and dependent adults, "physical abuse" is defined as all of the following [*Welf. & Inst. Code §§ 15610.63, 15657*]:

- Assault, defined as an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another [*see Penal Code § 240*];

- Battery, defined as any willful and unlawful use of force or violence on the person of another [*see Penal Code § 242*];

- Assault with a deadly weapon or by any means of force likely to produce great bodily injury [*see Penal Code § 245*]; and

- Unreasonable physical constraint or prolonged or continual deprivation of food or water.

Physical abuse also encompasses sexual assault, which includes any of the following [*Welf. & Inst. Code § 15610.63(e)*]:

- Sexual battery, defined as touching an intimate part of plaintiff while plaintiff is unlawfully restrained (by defendant or another) against his or her will, for the purpose of sexual arousal, sexual gratification, or sexual abuse [*see Penal Code § 243.4*];

- Incest, defined as fornication, adultery, or marriage between parents and children, ancestors and descendants of every degree, brothers and sisters of the half as well as the whole blood, uncles and nieces, or aunts and nephews [*see Penal Code § 285* (criminal incest); *see also Fam. Code § 2200* (degrees of consanguinity)];

- Sodomy, defined as sexual conduct consisting of contact (however slight the penetration) between the penis of one person and the anus of another [*see Penal Code § 286*];

- Oral copulation, defined as the act of copulating the mouth of one person with the sexual organ or anus of another [*see Penal Code § 288a*];

- Penetration, however slight, of a genital or anal opening by a foreign object, substance, instrument, or device, for the purpose of sexual arousal, gratification, or abuse [*see Penal Code § 289*]; or

- Spousal rape, as defined in *Penal Code § 262*.

- Lewd or lascivious acts, as defined in *Pen. Code § 288(b)(2)*.

Sexual abuse also includes rape, committed either alone or in concert with another person. Rape is defined as an act of sexual intercourse accomplished with a person not the spouse of the defendant, under any of the following circumstances [*Penal Code §§ 261(a), 264.1* (rape, rape in concert, respectively); *see Welf. & Inst. Code § 15610.63(e)(2), (3)* (rape, rape in concert, respectively)]:

- When plaintiff is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to defendant;

- When it is accomplished against plaintiff's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury [*see Penal Code § 261(b), (c)* (definitions of duress and menace, respectively)];

- When plaintiff is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, administered by or with the privity of defendant;

- When plaintiff, with defendant's knowledge, is at the time unconscious of the nature of the act [*see Penal Code § 261(a)(4)(A)-(C)* (definition of "unconscious of the nature of the act")];

- When plaintiff submits under the belief that defendant is his or her spouse, and defendant intentionally induced this belief by any artifice, pretense, or concealment;

- When the act is accomplished against plaintiff's will by threatening to retaliate in the future against plaintiff or any other person, and there is a reasonable possibility that the defendant will execute the threat [*see Penal Code § 261(a)(6)* (definition of "threatening to retaliate")]; or

- When the act is accomplished against plaintiff's will by threatening to use the authority of a public official to incarcerate, arrest, or deport plaintiff or another, and plaintiff has a reasonable belief, whether true or not, that defendant is a public official, that is, a person employed by a governmental agency who has the authority, as part of that position, to incarcerate, arrest, or deport another.

Physical abuse also includes the use of a physical or chemical restraint or psychotropic medication under any of the following conditions [*Welf. & Inst. Code § 15610.63(f)*]:

- For punishment;

- For a period significantly beyond that for which the restraint or medication was authorized pursuant to the instructions of a physician licensed in California, who is providing medical care to the elderly person or dependent adult at the time the instructions are given; or

- For any purpose not consistent with that authorized by the physician.

[3] Neglect

For the purposes of *Welf. & Inst. Code § 15600 et seq.*, regarding abuse of elders and dependent adults, "neglect" is defined as either the negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise, or the negligent failure of the person themselves to exercise that degree of care that a reasonable person in a like position would exercise. Neglect includes, but is not limited to, all of the following [*Welf. & Inst. Code § 15610.57*]:

- Failure to assist in personal hygiene or in the provision of food, clothing, or shelter;

- Failure to provide medical care for physical and mental health needs;

- Failure to protect from health and safety hazards;

- Failure to prevent malnutrition or dehydration; and

- Failure of a person to provide the needs specified above, for themselves due to ignorance, illiteracy, incompetence, mental limitation, substance abuse, or poor health.

A health care provider may be liable for neglect under the statute even if some care is provided, for example, if the provider knows that it is supposed to be providing a certain type of care on a daily basis, but provides that level of care only sporadically, or there is otherwise a significant pattern of withholding portions or types of care. A "significant pattern" is one that involves repeated withholding of care and leads to the conclusion that the pattern was the result of choice or deliberate indifference [*Sababin v. Superior Court (2006) 144 Cal. App. 4th 81, 90, 50 Cal. Rptr. 3d 266]* . In addition to institutional health care facilities and other care custodians, a physician who treats elderly patients on an "as needed" basis may be liable for neglect under *Welf. & Inst. Code § 15600 et seq.* [*Mack v. Soung (2000) 80 Cal. App. 4th 966, 974, 95 Cal. Rptr. 2d 830]* . For example, a doctor had committed neglect under these provisions because he concealed the existence of a serious bedsore on a nursing home patient under his care, opposed the patient's hospitalization when circumstances indicated that hospitalization was medically necessary, and then gave notice of withdrawal as the patient's physician and abandoned her care when she became critically ill [*Mack v. Soung (2000) 80 Cal. App. 4th 966, 973, 95 Cal. Rptr. 2d 830]* .

An elderly person or dependent adult is not deemed to be neglected or abused within the meaning of *Welf. & Inst. Code § 15657* for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment [*Welf. & Inst. Code § 15610.57(b)*].

[4] Financial Abuse

For the purposes of *Welf. & Inst. Code § 15600 et seq.*, regarding abuse of elders and dependent adults, "financial abuse" is defined as a situation in which a person or entity does any of the following [*Welf. & Inst. Code § 15610.30(a)*]:

- Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.

- Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both.

- Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in *Civ. Code § 1575*.

A person or entity is deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult [*Welf. & Inst. Code § 15610.30(b)*]. In addition, a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an elder or dependent adult [*Welf. & Inst. Code § 15610.30(c)*].

For purposes of these provisions, a "representative" is a person or entity that is either a conservator, trustee, or other representative of the estate of an elder or dependent adult, or an attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney [*Welf. & Inst. Code § 15610.30(d)*].

Beginning in 2001, mentally impaired elder adults have additional statutory protections against financial abuse [*Prob. Code § 2950 et seq.*]. These protections are discussed in *§ 5.38*.

[5] Abduction

Under *Welf. & Inst. Code § 15600 et seq.*, "abduction" means removal from this state and the restraint from returning to this state, or simply the restraint from returning to this state, of any elder or dependent adult who does not have the capacity to consent to the removal or restraint. [*Welf. & Inst. Code § 15610.06*]. "Abduction" also includes removal from this state, or the restraint from returning to this state, of any conservatee, without the consent of the conservator or the court [*Welf. & Inst. Code § 15610.06*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsProtection From Abuse & NeglectFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & Neglect

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1-5 California Forms of Pleading and Practice--Annotated § 5.34

§ 5.34 Protective Placement of Endangered Adults

Under *Welf. & Inst. Code §§ 15700-15705.40*, an elder adult [*Welf. & Inst. Code § 15610.27* (defining "elder adult" as any person who is 65 years of age or older)], or a dependent adult [*Welf. & Inst. Code § 15610.23* (defining "dependent adult" as any person aged 18 to 64 who has mental or physical limitation that restricts person's ability to carry out normal activities or protect his or her rights)], who is at immediate risk of serious injury or death due to suspected abuse or neglect and who demonstrates the inability to protect himself or herself from the consequences of remaining in the situation or condition giving rise to the risk, may be placed into emergency protective custody by an authorized state or local law enforcement official, if no other option is available to mitigate the circumstances [*Welf. & Inst. Code § 15703(a)*]. An authorized official may also initiate adult protective proceedings [*Welf. & Inst. Code § 15703(b)*].

On taking the endangered adult into custody pursuant to *Welf. & Inst. Code §§ 15700-15705.40*, the officer must notify the superior court, the endangered person's next of kin, if appropriate, and adult protective services [*Welf. & Inst. Code § 15703(d)*]. The period of temporary emergency protective custody must not extend past the first court day that begins no later than 72 hours after the person is taken into temporary protective custody [*Welf. & Inst. Code § 15703.1(a)*]. After being taken into temporary emergency custody, the person must be transferred to an appropriate temporary residence [*see Welf. & Inst. Code § 15701.05*] pending the outcome of an investigation and a hearing [*Welf. & Inst. Code § 15703.1(b)*].

On a showing of clear and convincing evidence that probable cause exists to continue the temporary emergency protective custody, the court may order emergency protective services for the person for a period not to exceed 14 court days [*Welf. & Inst. Code §§ 15705.1, 15705.15(c)*]. The court must find that the adult is an endangered adult [*see Welf. & Inst. Code § 15701.25*], and that no other appropriate means are available to mitigate the situation [*Welf. & Inst. Code § 15705.1*]. The court may only order those services that are necessary to remove the emergency, and the services must be specifically designated in the emergency order. Emergency protective services cannot include hospitalization or a change of residence unless the court finds that the action is necessary and specifically approves it in its order [*Welf. & Inst. Code § 15705.15*]. The emergency order must also appoint a temporary conservator [*Welf. & Inst. Code § 15705.15(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsServicesFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsProtection From Abuse & Neglect

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§ 5.35 Damages, Costs, and Fees Recoverable

If it is proven by clear and convincing evidence that a defendant is liable for physical abuse or neglect against an elderly person or dependent adult, and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, in addition to all other remedies otherwise provided by law [*Welf. & Inst. Code § 15657*]:

- The court must award to the plaintiff reasonable attorney's fees and costs. The term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under *Welf. & Inst. Code § 15657 et seq.* [*see Welf. & Inst. Code § 15657.1* (factors for determination of attorney's fees and costs)]. This provision does not authorize the recovery of an award of fees to a trustee, however [*Sanders v. Lawson (2008) 164 Cal. App. 4th 434, 438-441, 78 Cal. Rptr. 3d 851*].

- The limitations imposed by *Code Civ. Proc. § 377.34* do not apply. (*Code Civ. Proc. § 377.34*, which concerns survival of actions, limits recoverable damages to losses sustained prior to death, and prohibits pain and suffering damages.) Recoverable damages, however, for noneconomic losses against a health care provider based on professional negligence are limited to $250,000 [*see Civ. Code § 3333.2*, discussed in Ch. 415, *Physicians: Medical Malpractice*].

- The standards set forth in *Civ. Code § 3294(b)*, regarding the imposition of punitive damages on an employer based on the acts of any employee, must be satisfied before any damages or attorney's fees permitted under *Welf. & Inst. Code § 15657* may be imposed against an employer [*see Civ. Code § 3294(b)*, discussed in *Ch. 177, Damages, § 177.40* et seq.].

Because liability for the requisite abuse or neglect must be shown by clear and convincing evidence, rather than the preponderance of the evidence standard generally applicable in civil cases, all elements of the abuse or neglect, including causation, are subject to that heightened burden of proof in order to establish eligibility for the heightened remedies available under the statute [*Perlin v. Fountain View Management, Inc. (2008) 163 Cal. App. 4th 657, 664-666, 77 Cal. Rptr. 3d 743*]. Some of these rules apply if the defendant is guilty of financial abuse, although

effective January 1, 2005, proof of financial abuse by a preponderance of the evidence, rather than clear and convincing evidence, is sufficient to justify an award of attorney's fees and costs [*Welf. & Inst. Code § 15657.5(a), (b), (d)*]. In addition, noneconomic damages in a case of financial abuse are not subject to the $250,000 limitation that generally applies to recovery for professional negligence against a health care provider [*see Welf. & Inst. Code § 15657.5*]. Finally, the standards of *Civ. Code § 3294(b)* apply in financial abuse cases only for the imposition of punitive damages and do not apply to the recovery of compensatory damages or attorney's fees or costs [*Welf. & Inst. Code § 15657.5(c)*].

Unlike a prevailing plaintiff, a prevailing defendant is not entitled to recover attorney's fees under these provisions. Moreover, if all causes of action arose from a single transaction, a prevailing defendant is not entitled to attorney's fees even if there are issues in common with other causes of action under which fees might be recovered [*Wood v. Santa Monica Escrow Co. (2007) 151 Cal. App. 4th 1186, 1189-1191, 60 Cal. Rptr. 3d 597]* .

A plaintiff who is awarded damages in an action for financial abuse is authorized to seek attachment against the defendant's property, and an attachment may be issued whether or not other forms of relief are demanded [*see Welf. & Inst. Code § 15657.01* (effective January 1, 2008)].

A person or entity that takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining the real or personal property of an elder or dependent adult when the elder or dependent adult lacks capacity pursuant to *Prob. Code § 812*, or is of unsound mind, but not entirely without understanding, pursuant to *Civ. Code § 39*, must, upon demand by the elder or dependent adult or a representative of the elder or dependent adult, return the property. If that person or entity fails to return the property, the elder or dependent adult is entitled to the remedies provided for financial abuse pursuant to *Welf. & Inst. Code § 15657.5*, including attorney's fees and costs [*Welf. & Inst. Code § 15657.6*]. However, these provisions do not apply to any agreement entered into by an elder or dependent adult when the elder or dependent adult had capacity [*Welf. & Inst. Code § 15657.6*].

Although *Civ. Code § 3294(b)* applies to the imposition of heightened damages and costs allowed by Elder Abuse Statute, this does not mean that the heightened damages and costs are considered punitive damages. For example, a public entity defendant, such as a publicly owned hospital, may be liable for these heightened damages and costs even though a public entity cannot be liable for punitive damages [*Marron v. Superior Court (2003) 108 Cal. App. 4th 1049, 1061-1066, 134 Cal. Rptr. 2d 358* ; *see Gov. Code § 818*].

The determination of what constitutes a reasonable attorney's fee is left to the discretion of the trial court. In setting a fee amount in an elder abuse case, the trial court may consider the value of the elder's estate [*Conservatorship of Levitt (2001) 93 Cal. App. 4th 544, 549, 113 Cal. Rptr. 2d 294* (no error to reduce attorney's requested fee amount based on value of elder's estate)].

When an action is brought under the Elder Abuse statute, the plaintiff is not required to comply with the pleading requirements of *Code Civ. Proc. § 425.13*, which applies generally to medical malpractice actions, to recover punitive damages from a health care provider. This is true partly because conduct supporting the recovery of heightened damages under the Elder Abuse statute must, by definition, be conduct that rises above mere negligence [*Covenant Care, Inc. v. Superior Court (2004) 32 Cal. 4th 771, 783-790, 11 Cal. Rptr. 3d 222, 86 P.3d 290* ; *see Code Civ. Proc. § 425.13*]. Moreover, if the gravamen of the complaint is a violation of the Elder Abuse Act, a plaintiff need not comply with *Code Civ. Proc. § 425.13* even if the plaintiff also alleges common law intentional torts [*Covenant Care, Inc. v. Superior Court (2004) 32 Cal. 4th 771, 790, 11 Cal. Rptr. 3d 222, 86 P.3d 290* ; *Country Villa Claremont Healthcare Ctr., Inc. v. Superior Court (2004) 120 Cal. App. 4th 426, 434-435, 15 Cal. Rptr. 3d 315]* . For discussion and forms regarding medical malpractice, see Ch. 415, *Physicians: Medical Malpractice* .

Although the procedural requirements of *Code Civ. Proc. § 425.13* do not apply to an action brought under the Elder Abuse Act, the similar procedural requirements of *Code Civ. Proc. § 425.14*, applicable when a plaintiff seeks to recover punitive damages from a religious corporation, do apply to a cause of action brought under the Elder Abuse Act.

Unlike *Code Civ. Proc. § 425.13*, which applies only when plaintiff seeks to recover for professional negligence, *Code Civ. Proc. § 425.14* applies whenever a plaintiff seeks punitive damages from a religious corporation, regardless of the nature of the conduct that forms the basis for the cause of action [*Little Co. of Mary Hospital v. Superior Court (2008) 162 Cal. App. 4th 261, 269-271, 75 Cal. Rptr. 3d 519* ; *see Code Civ. Proc. § 425.14*]. Thus, pursuant to *Code Civ. Proc. § 425.14*, if the defendant qualifies as a religious corporation, a claim for punitive damages can only be included after plaintiff obtains a court order allowing an amended pleading to include such a claim. In order to obtain such an order, plaintiff must establish, on the basis of supporting and opposing affidavits, that plaintiff will be able to establish eligibility for punitive damages through clear and convincing evidence [*Code Civ. Proc. § 425.14*].

For a form of complaint for damages based on abuse of an elderly person or dependent adult, see *§ 5.70*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCosts & Attorney FeesGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsProtection From Abuse & NeglectFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & Neglect

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1-5 California Forms of Pleading and Practice--Annotated § 5.36

§ 5.36 Actions Against Health Care Provider for Professional Negligence

Any cause of action for injury or damage against a health care provider, based on its alleged professional negligence, is governed by those laws that specifically apply to those professional negligence causes of action [*Welf. & Inst. Code § 15657.2*; *see Code Civ. Proc. § 340.5* (definition of health care provider)]. This provision applies notwithstanding the provisions of *Welf. & Inst. Code § 15657 et seq.* [*Welf. & Inst. Code § 15657.2*].

However, this does not mean that health care providers are exempt from liability under the elder abuse statute simply because the cause of action arises from the rendition of health care services [*Mack v. Soung (2000) 80 Cal. App. 4th 966, 975, 95 Cal. Rptr. 2d 830]* . For example, the heightened damages provided for under *Welf. & Inst. Code § 15657* are, by the terms of that statute, recoverable only for conduct that involves recklessness, oppression, fraud, or malice [*see Welf. & Inst. Code § 15657*; *see also § 5.35*]. Thus, that statute requires greater culpability than mere negligence, and a health care provider may be liable to the full extent of *Welf. & Inst. Code § 15657* if that greater culpability is proved [*Delaney v. Baker (1999) 20 Cal. 4th 23, 31-32, 82 Cal. Rptr. 2d 610, 971 P.2d 986]* . For discussion and forms regarding medical malpractice, see Ch. 415, *Physicians: Medical Malpractice* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersGeneral OverviewFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & NeglectTortsMalpractice & Professional LiabilityHealthcare Providers

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1-5 California Forms of Pleading and Practice--Annotated § 5.36A

§ 5.36A Statute of Limitations

The court of appeal has held that actions for the abuse of elderly or dependent adults brought under *Welf. & Inst. Code § 15600 et seq.* are governed by the two-year limitations period of *Code Civ. Proc. § 335.1*, which is generally applicable to actions for personal injury or wrongful death, rather than the limitations period for medical malpractice found in *Code Civ. Proc. § 340.5* [*Benun v. Superior Court (2004) 123 Cal. App. 4th 113, 124-127, 20 Cal. Rptr. 3d 26]* . The court followed California Supreme Court precedent in concluding that liability under the elder abuse statute, which is based on culpability that is greater than mere negligence [*see §§ 5.35, 5.36*], is not liability for "professional negligence," which would be required for the action to fall under the limitations period applicable to medical malpractice actions [*Benun v. Superior Court (2004) 123 Cal. App. 4th 113, 122-124, 20 Cal. Rptr. 3d 26]* .

Because an action under *Welf. & Inst. Code § 15600 et seq.* is governed by the two-year limitations period of *Code Civ. Proc. § 335.1*, the tolling provisions of *Code Civ. Proc. §§ 352* and *352.1* (for periods when a plaintiff is insane or imprisoned) may be applied to a cause of action under the elder abuse statute as well [*see Benun v. Superior Court (2004) 123 Cal. App. 4th 113, 125-126, 20 Cal. Rptr. 3d 26* ; *Code Civ. Proc. §§ 352, 352.1*].

Conversely, because the applicable limitations period is not the MICRA limitations period, the tolling provision of *Code Civ. Proc. § 364(d)*, which extends the limitations period in an action for professional negligence of a health care provider for 90 days after issuing a notice of intent to sue, does not apply to a cause of action for elder abuse [*Smith v. Ben Bennett, Inc. (2005) 133 Cal. App. 4th 1507, 1522-1526, 35 Cal. Rptr. 3d 612]* .

The elder or dependent adult abuse statute only provides damages for injury to the elder or dependent adult, while a wrongful death action provides damages for injury caused to the surviving heirs. Because the two actions seek recovery for different injuries, a cause of action asserted under the elder or dependent adult abuse statute does not "relate back" to a cause of action for wrongful death. Therefore, a plaintiff filing a wrongful death action following the death of an elder or dependent adult must state any survivor action, which would include an action brought under the elder or dependent adult abuse statute, within the applicable limitations period, or it will not be timely [*Quiroz v. Seventh Ave. Ctr. (2006) 140 Cal. App. 4th 1256, 1278-1279, 45 Cal. Rptr. 3d 222]* .

Unlike an action for physical abuse or neglect, an action for damages for financial abuse of an elder or dependent adult must be commenced within four years after the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered, the facts constituting the financial abuse [*Welf. & Inst. Code § 15657.7*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare ProvidersFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & NeglectGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 5.37 Concurrent Probate Jurisdiction

If a conservator has been appointed for plaintiff prior to the initiation of an action for abduction or abuse of an elderly person or dependent adult, the department of the superior court having jurisdiction over probate conservatorships has concurrent jurisdiction over civil actions and proceedings involving a claim for relief arising out of the abduction or abuse [*Welf. & Inst. Code § 15657.3(a)*; *see Prob. Code § 2200 et seq.* (jurisdiction and venue in conservatorship proceedings)]. The department of the superior court having jurisdiction over probate conservatorships may not grant relief under *Welf. & Inst. Code § 15657 et seq.* if the court determines that the matter should be determined in a civil action. In that instance, the court must transfer the matter to the general civil calendar of the superior court. The court need not abate any proceeding for relief pursuant to *Welf. & Inst. Code § 15657 et seq.* if it determines that the civil action was filed for the purpose of delay [*Welf. & Inst. Code § 15657.3(b)*].

A probate court may not dismiss a complaint brought under the Elder Abuse Act under these provisions. The statute only authorizes the court to transfer the case [*Conservatorship of Kayle (2005) 134 Cal. App. 4th 1, 6, 35 Cal. Rptr. 3d 671]* . Moreover, before the probate court may transfer a case to another court, the court must provide the parties with notice and an opportunity to be heard. To facilitate review, a record of the proceedings should also be created [*Conservatorship of Kayle (2005) 134 Cal. App. 4th 1, 6-7, 35 Cal. Rptr. 3d 671]* .

The death of the elderly person or dependent adult does not cause the court to lose jurisdiction of any claim for relief for abuse of that person [*Welf. & Inst. Code § 15657.3(c)*]. After the death of the elderly person or dependent adult, the right to maintain an action is transferred to the personal representative of the decedent [*Welf. & Inst. Code § 15657.3(d)(1)*; *see also Estate of Lowrie (2004) 118 Cal. App. 4th 220, 230-231, 12 Cal. Rptr. 3d 828* (successor representative of decedent's estate under terms of estate plan had standing to bring elder abuse action against current executor)].

If there is no personal representative, the right to maintain an action upon the death of the abused person may pass to any of the following, if the requirements of *Code Civ. Proc. § 377.32* are met [*Welf. & Inst. Code § 15657.3(d)(1)*]:

- An intestate heir whose interest is affected by the action.

- The decedent's successor in interest, as defined by *Code Civ. Proc. § 377.11*.

- An interested person, as defined by *Prob. Code § 48*, but not including a creditor or person who has a claim against the estate who is not an heir or beneficiary of the decedent's estate.

If the personal representative refuses to commence or maintain an action, or if the personal representative's family or an affiliate, as those terms are defined in *Prob. Code § 1064(c)*, is alleged to have committed the abuse, the persons described above have standing to bring the action. A court is not required to resolve the merits of an elder abuse action in order to determine if a plaintiff has standing under these provisions [*Welf. & Inst. Code § 15657.3(d)(2)*]. If two more persons, including the decedent's personal representative, claim to have standing under these provisions, the court, on petition or motion, may make any order concerning the parties that is appropriate to ensure the proper administration of justice pursuant to *Code Civ. Proc. § 377.33* [*Welf. & Inst. Code § 15657.3(e)* (effective January 1, 2008)].

Welf. & Inst. Code § 15657.3 does not affect the applicable statute of limitations for bringing an elder abuse action [*Welf. & Inst. Code § 15657.3(f)* (effective January 1, 2008); *see § 5.36A*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & NeglectEstate, Gift & Trust LawProbateProcedures in ProbateJurisdiction & VenueGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent Jurisdiction

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1-5 California Forms of Pleading and Practice--Annotated § 5.38

§ 5.38 Additional Protections Against Financial Abuse of Mentally Impaired Elder Adults

Beginning in 2001, mentally impaired elder adults have additional statutory protections against financial abuse [*Prob. Code § 2950 et seq.*; *see § 5.33[4*] regarding the definition of financial abuse]. The intent of these statutes is to enable law enforcement to intervene in a timely manner, in collaboration with the public guardian, to effectively protect mentally impaired elder adult victims of financial abuse and to recover their assets [*Prob. Code § 2950(a)*].

On receiving a signed declaration from a peace officer, a public guardian is authorized to rely on the information contained in the declaration to take immediate possession or control of the property of the elder person referred to in the declaration, and the public guardian may issue a written recordable certification of that fact as provided for in *Prob. Code § 2901* [*Prob. Code § 2952(c)(1)*]. The written recordable certification must substantially conform to the certification set forth in *Prob. Code § 2952(c)(1)*.

However, the mere issuance of the declaration does not require the public guardian either to take possession or control of property or to make a determination that the requirements for the appointment of a conservator are satisfied [*Prob. Code § 2952(c)(2)*].

A peace officer may also issue such a declaration if all of the following conditions are satisfied [*Prob. Code § 2952(a)*]:

- There is probable cause to believe that the elder person is substantially unable to manage his or her financial resources or to resist fraud or undue influence.

- There is a significant danger that the elder person will lose all or a portion of his or her property as a result of fraud or misrepresentations or the mental incapacity of the elder person.

- There is probable cause to believe that a crime is being committed against the elder person.

- The crime is connected to the inability of the elder person to manage his or her financial resources or to resist fraud or undue influence, and that inability is the result of deficits in the elder person's mental

functions.

- The peace officer has consulted with an individual qualified to perform a mental status examination.

The declaration filed by the peace officer must substantially conform to the declaration set forth in *Prob. Code § 2954*.

The authority provided to the public guardian includes the authority to deny use of, to deny access to, or prohibit residency in, the home of the elder by anyone who does not have a written rental agreement or other legal right to the use of, or access to, the residence. Subject to certain requirements, the public guardian also has the authority to terminate the occupancy of anyone living in the home of the elder person, and the authority to remove the occupant residing there [*Prob. Code § 2952(c)(3)*].

The public guardian must serve, or cause to be served, a copy of the issued certification on the elder person by mail within 24 hours after the execution of the certification, or as soon afterwards as is practical, in the manner provided in *Code of Civil Procedure Section 413.10* [*Prob. Code § 2952(c)(4)*]. Receipt of this certification constitutes sufficient acquittance to financial institutions and others in possession of an elder person's property to provide information and surrender the elder person's property to the public guardian. Any financial institution or other person who provides information or surrenders property pursuant to this section is discharged from any liability for any act or omission of the public guardian with respect to the property [*Prob. Code § 2952(c)(5)*].

A certification is valid for 15 days after the date of issuance. On ex parte petition to the superior court, the public guardian may seek additional 15-day certifications. The court msut grant that petition only if it determines that the additional certification is necessary to protect the elder from financial abuse and the elder's property from loss, injury, waste, or misappropriation [*Prob. Code § 2952(c)(7)*].

If the public guardian takes possession of an elder person's property under these provisions, the public guardian must attempt to find agents pursuant to the use of durable powers of attorney or successor trustees nominated in trust instruments, or other persons having legal authority under existing legal instruments, to manage the elder person's estate [*Prob. Code § 2952(d)(1)*]. If the public guardian is unable to find any appropriate person to manage the elder person's estate, the public guardian must attempt to find family members willing to manage the elder person's estate [*Prob. Code § 2952(d)(2)*]. Once a public guardian has taken possession or control of the property of an elder person, the public guardian must exercise reasonable care to ensure that the elder person's reasonable living expenses and legitimate debts are addressed as well as is practical under the circumstances [*Prob. Code § 2953(b)*]. However, a public guardian acting in good faith is not liable when taking possession or control of property under these provisions [*Prob. Code § 2952(c)(6)*].

A public guardian who has taken possession or control of the property of an elder person is entitled to petition a court of competent jurisdiction for the reasonable costs incurred by the public guardian for the protection of the person or the property, together with reasonable fees for services, including, but not limited to, reasonable attorneys' fees. These fees may be payable from the estate of the elder person if the person is not deemed competent by the court and if any of the following apply [*Prob. Code § 2953*]:

- The public guardian or someone else is appointed as the temporary or general conservator of the estate.

- An attorney-in-fact, under a durable power of attorney, or a trustee, takes steps, or is notified of the need to take steps, to protect the estate of the elder person.

- An action is brought against the alleged financial abuser by the elder person, his or her conservator, a trustee, a fiduciary, or a successor in interest of the elder person, arising from a harm that the public

guardian taking charge was intended to prevent or minimize.

For purposes of these statutory protections, a "peace officer" means a sheriff, deputy sheriff, municipal police officer, or a peace officer authorized under *Penal Code § 830.1(b)*, who is duly sworn under the requirements of state law and who satisfies any of the following requirements [*Prob. Code § 2951(f)*]:

- Within the last 36 months, the sheriff, deputy sheriff, municipal police officer, or peace officer has completed or participated as a lecturer in a financial abuse training program that is certified by the Commission on Peace Officer Standards and Training; or

- The sheriff, deputy sheriff, municipal police officer, or peace officer has consulted with a sheriff, deputy sheriff, municipal police officer, or peace officer who satisfied a financial abuse training program certified by the Commission on Peace Officer Standards and Training within the last 36 months, and has obtained that officer's signature on the declaration.

Any person identified as a victim in a declaration may bring an ex parte petition in the superior court for an order quashing the certification issued by the public guardian [*Prob. Code § 2953*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & Neglect

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Chapter 5 ABUSE OF MINORS AND ELDERLY
PART II. LEGAL BACKGROUND
B. Actions Based on Abuse of Elderly or Dependent Adults

1-5 California Forms of Pleading and Practice--Annotated § 5.39

§ 5.39 Limitations on Confidentiality of Settlement Agreements and Evidence of Abuse

Confidential settlement agreements are disfavored in civil actions involving facts that constitute a violation of the Elder Abuse statute [*Code Civ. Proc. § 2017.310(a)*]. Therefore the party seeking to enforce the provisions of a confidentiality agreement in this context must show one or more of the following [*Code Civ. Proc. § 2017.310(b)*]:

- The information is privileged under existing law;

- The information is not evidence of abuse of an elder or dependent adult as described in *Welf. & Inst. Code §§ 15610.30, 15610.57,* or *15610.63*; or

- There is a substantial probability that prejudice will result from the disclosure and the party's interest in the information cannot be adequately protected through redaction.

However, this does not prohibit the entry or enforcement of that part of a confidentiality agreement, settlement agreement, or stipulated agreement between the parties that requires the parties not to disclose the amount of any money paid in the settlement of a claim [*Code Civ. Proc. § 2017.310(e)*].

Similarly, in civil actions involving facts that constitute a violation of the Elder Abuse statute, any information acquired through discovery that is protected from disclosure by a stipulated protective order generally remains subject to the protective order unless the information is actually evidence of abuse of an elder or a dependent adult [*Code Civ. Proc. § 2017.320(a)*; *see Welf. & Inst. Code §§ 15610.30, 15610.57, 15610.63*]. If there is information that constitutes evidence of abuse, a party may file that particularized information with the court after redacting information that does not constitute evidence of abuse, although the party proposing to file the information must offer to meet and confer with the party from whom the information was obtained at least one week prior to filing that information with the court [*Code Civ. Proc. § 2017.320(b)*; *see also Code Civ. Proc. § 2017.320(c)* (filing party must give concurrent notice of filing and its basis to party from whom information was obtained)].

Information filed with the court remains confidential under any protective order for 30 days after the filing, and after

that period becomes a part of the public court record unless an affected party petitions the court and shows good cause for a court protective order [*Code Civ. Proc. § 2017.320(d)*]. To obtain a protective order for filed information, the affected party must show one or more of the following [*Code Civ. Proc. § 2017.320(e), (f)*]:

- The information is privileged under existing law;

- The information is not evidence of abuse of an elder or a dependent adult as described in *Welf. & Inst. Code §§ 15610.30, 15610.57,* or *15610.63*; or

- There is a substantial probability that prejudice will result from the disclosure, and the party's interest in the information cannot be adequately protected through redaction.

If the court denies the petition for a court protective order, the court is required to redact any information that is not evidence of abuse [*Code Civ. Proc. § 2017.320(g)*].

Even if these requirements are met, a defendant's name may not necessarily be redacted or sealed in information that is made available to the public [*Code Civ. Proc. §§ 2017.310(c), 2017.320(g)*]. In addition, these provisions do not apply to or otherwise affect a professional negligence action against a health care provider [*Code Civ. Proc. §§ 2017.310(f), 2017.320(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewGovernmentsCourtsCourt RecordsFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & Neglect

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B. Actions Based on Abuse of Elderly or Dependent Adults

1-5 California Forms of Pleading and Practice--Annotated §§ 5.40-5.49

[Reserved]

§§ 5.40[Reserved]

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PART III. RESEARCH GUIDE

1-5 California Forms of Pleading and Practice--Annotated § 5.50

§ 5.50 Related Matthew Bender Publications

For a form of memorandum of points and authorities regarding the delayed accrual of a cause of action under *Code Civ. Proc. § 340.1*, see California Points and Authorities, Ch. 143, *Limitation of Actions* (Matthew Bender)

For a form of memorandum of points and authorities regarding liability for sexual battery under *Civ. Code § 1708.5*, see California Points and Authorities, Ch. 21, *Assault and Battery* (Matthew Bender)

For memoranda of points and authorities regarding tort damages generally, see California Points and Authorities, Ch. 65, *Damages* , Pt. I (Matthew Bender)

For memoranda of points and authorities regarding intentional infliction of emotional distress, see California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress* (Matthew Bender)

For discussion of criminal provisions and civil remedies regarding child abuse generally, see C. Markey, ed., California Family Law Practice and Procedure, Ch. 64, pt. B (Matthew Bender)

For discussion of assault and battery generally, see N. Levy, M. Golden & L. Sacks, eds., California Torts, Ch. 41 (Matthew Bender)

For discussion of tort damages generally, recovery for pain and suffering, recovery for medical expenses, and punitive damages, see N. Levy, M. Golden & L. Sacks, eds., California Torts, Chs. 50, 51, 52, and 54 (Matthew Bender)

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1-5 California Forms of Pleading and Practice--Annotated § 5.51

§ 5.51 State Statutes

[1] Sexual Abuse of Minor

Civil actions for damages based on childhood sexual abuse. *Code Civ. Proc. § 340.1*

[2] Abuse of Elderly or Dependent Adult

Protection of mentally impaired elderly adults from financial abuse. *Prob. Code § 2950 et seq.*

Reporting provisions regarding abuse of elderly or dependent adults. *Welf. & Inst. Code § 15600 et seq.*

Definitions regarding abuse of elderly or dependent adults. *Welf. & Inst. Code § 15610 et seq.*

Civil actions for abuse of elderly or dependent adults. *Welf. & Inst. Code § 15657 et seq.*

Protective placement of endangered adults. *Welf. & Inst. Code § 15700 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsProtection From Abuse & NeglectFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & Neglect

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1-5 California Forms of Pleading and Practice--Annotated § 5.52

§ 5.52 Decisions

Welf. & Inst. Code § 15657.2 applies only to claims based on negligence of health care provider; health care provider liable for elder abuse may be liable in damages to full extent of *Welf. & Inst. Code § 15657* if greater culpability required by that statute is proved. *Delaney v. Baker (1999) 20 Cal. 4th 23, 31-32, 82 Cal. Rptr. 2d 610, 971 P.2d 986*

Costs and attorney fees properly awarded for financial abuse of elderly based on attorney's role in deceiving elderly woman into taking out large loan that she could not afford. *Wood v. Jamison (2008) 167 Cal. App. 4th 156, 164-165, 83 Cal. Rptr. 3d 877*

Statute of limitations in action for battery, assault, and intentional infliction of emotional distress committed while plaintiff was minor as tolled, despite plaintiff's partial recollection of abuse. *Sellery v. Cressey (1996) 48 Cal. App. 4th 538, 547*

Code Civ. Proc. § 340.1, setting forth period of limitations for actions based on sexual molestation of minor by household or family member, which by its terms is retroactive, as applying to revive otherwise time-barred causes of action, and plaintiff as having three years from age of majority to file lawsuit. *Liebig v. Superior Court (1989) 209 Cal. App. 3d 828, 831-835, 257 Cal. Rptr. 574*

Three-year tolling period provided in *Code Civ. Proc. § 340.1* as in addition to tolling during minority provided for in *Code Civ. Proc. § 352*. *Colleen L. v. Howard M. (1989) 209 Cal. App. 3d 542, 544-546, 257 Cal. Rptr. 263*

Neither *Code Civ. Proc. § 340.1* (providing three-year statute of limitations on civil actions for sexual molestation of minor by household or family member) nor *Code Civ. Proc. § 340.3* (providing that, in action for damages against defendant based on his or her commission of felony offense for which he or she has been convicted, time for commencement of action shall be within one year after judgment is pronounced) as applying to action against Boy Scouts brought more than one year after plaintiff reached majority, alleging sexual molestation by former scout leader when plaintiff was a minor, when scout leader was not a household or family member of plaintiff and scout leader's conviction arose not from any conduct with plaintiff, but from conduct with others. *Snyder v. Boy Scouts of Am., Inc.*

(1988) 205 Cal. App. 3d 1318, 1325-1326, 253 Cal. Rptr. 156

Code Civ. Proc. § 352, providing that if person entitled to bring action is insane at time cause of action accrued, time of such disability is not part of time limited for commencement of action, as not tolling statute in action alleging sexual molestation when plaintiff was a minor that resulted in post-traumatic syndrome; post-traumatic syndrome as not constituting insanity under *Code Civ. Proc. § 352*. *Snyder v. Boy Scouts of Am., Inc. (1988) 205 Cal. App. 3d 1318, 1324, 253 Cal. Rptr. 156*

Adult's action against step-grandfather for sexual molestation committed during time plaintiff was minor as tolled during her minority, but barred by statute of limitations thereafter when she filed suit four years and ten months after reaching majority. *DeRose v. Carswell (1987) 196 Cal. App. 3d 1011, 1015, 1020, 1031, 242 Cal. Rptr. 368*

In action against husband and wife for assault and battery and negligence arising out of husband's sexual molestation of three minor girls, allegations that wife knew of husband's prior history of molesting women and children, encouraged and invited minor plaintiffs to play in swimming pool while she was at work and husband was at home, and assured plaintiffs' parents that it was perfectly safe for children to play at her home, as sufficient to overcome demurrer to cause of action against wife for negligence. *Pamela L. v. Farmer (1980) 112 Cal. App. 3d 206, 207-212, 169 Cal. Rptr. 282*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAssault & BatteryGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsProtection From Abuse & NeglectFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & Neglect

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1-5 California Forms of Pleading and Practice--Annotated §§ 5.53-5.59

[Reserved]

§§ 5.53[Reserved]

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PART IV. FORMS
A. Actions Based on Sexual Abuse of Minor

1-5 California Forms of Pleading and Practice--Annotated § 5.60

§ 5.60 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for Childhood Sexual Abuse [Code Civ. Proc. § 340.1]

[1] FORM Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for Childhood Sexual Abuse [Code Civ. Proc. § 340.1]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], [a minor, by _____ (*name*), his/her guardian ad litem,] Plaintiff, vs. _____ [*name of defendant or, if certificates of merit are required pursuant to Code Civ. Proc. § 340.1(g), (h), set forth fictitious name, e.g.,* John Doe], and DOES I-_____, inclusive,] Defendant.	)))))))	NO. _____ COMPLAINT FOR DAMAGES (Childhood Sexual Abuse) [Amount demanded _____ (exceeds *or* does not exceed) $10,000] [LIMITED CIVIL CASE]

Plaintiff [, a minor, through his/her guardian ad litem,] alleges:

[1. For the purpose of this action, _____ (*name*) was appointed by the above-entitled court, and now is, guardian ad litem of plaintiff, a minor.]

2. Defendant _____ [*name of defendant or, if certificates of corroborative fact are required pursuant to Code Civ. Proc. § 340.1(g), (n), set forth fictitious name, e.g.,* John Doe] is an individual, and at all times herein

mentioned was a resident of _____ County, California. [On proper showing to the court in accordance with *Code of Civil Procedure Section 340.1(n)*, plaintiff will subsequently amend this complaint by inserting defendant's true name.]

[3. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes, and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged and that plaintiff's damages as herein alleged were proximately caused by those defendants.)]

FIRST CAUSE OF ACTION
(Childhood Sexual Abuse)

4. On or about _____ [*date*], at _____ [*location*] in _____ [*city*], California, defendant _____ [*name of defendant or, if certificates of corroborative fact are required pursuant to Code Civ. Proc. § 340.1(g), (n), set forth fictitious name, e.g.,* John Doe] _____ [*describe conduct, e.g.,* by means of threats of violence and the use of physical force, caused plaintiff to copulate his/her mouth with defendant's sexual organ]. On that date, plaintiff was _____ [*specify minority age, e.g.,* 12 years] of age.

5. Defendant's above-described acts constitute conduct proscribed in [prior California law now embodied in] Penal Code Section(s) _____ [266j *and/or* 285 *and/or* 286(b)(1) *and/or* 286(b)(2) *and/or* 286(c) *and/or* 288(a) *and/or* 288(b) *and/or* 288a(b)(1) *and/or* 288a(b)(2) *and/or* 288a(c) *and/or* 289(h) *and/or* 289(i) *and/or* 289(j) *and/or* 647.6 *or specify other provision*].

[6. Plaintiff did not discover that the _____ (psychological injury *and/or* illness) described herein was/were caused by the sexual abuse described above, until on or about _____ (*date*), a date within three years before the commencement of this action. Plaintiff could not have reasonably discovered the _____ (psychological injury *and/or* illness) until on or about that date because _____ (*specify reasons, e.g.,* plaintiff required extensive psychotherapy to understand the connection between the abuse alleged and the resultant effects on plaintiff, which therapy plaintiff did not successfully receive until that date).]

SECOND CAUSE OF ACTION
(Assault)

7. On or about _____ [*date*], at _____ [*location*] in _____ [*city*], California, defendant _____ [*name of defendant or, if certificates of corroborative fact are required pursuant to Code Civ. Proc. § 340.1(g), (n) regarding first cause of action, set forth fictitious name, e.g.,* John Doe] _____ [*describe conduct constituting assault, e.g.,* while alone with plaintiff, approached plaintiff in a physically threatening and menacing manner and threatened to kill plaintiff if he/she attempted to escape].

8. In doing the acts alleged above, defendant intended to cause or to place plaintiff in apprehension of _____ [harmful *and/or* offensive] contact with plaintiff's person.

9. As a result of defendant's acts alleged above, plaintiff, in fact, was placed in great apprehension of _____ [harmful *and/or* offensive] contact with plaintiff's person.

10. At no time did plaintiff consent to defendant's acts alleged above.

THIRD CAUSE OF ACTION
(Battery)

11. Immediately thereafter, defendant _____ [*name of defendant or, if certificates of corroborative fact are required pursuant to Code Civ. Proc. § 340.1(g), (n) regarding first cause of action, set forth fictitious name, e.g.,* John Doe] _____ [*describe conduct constituting battery, e.g.,* by means of threats of violence and the use of physical force, caused plaintiff to copulate his/her mouth with defendant's sexual organ].

12. In doing the acts alleged above, defendant acted with the intent to make a contact with plaintiff's person.

13. At no time did plaintiff consent to defendant's acts alleged above.

FOURTH CAUSE OF ACTION
(Intentional Infliction of Emotional Distress)

14. Plaintiff refers to and herein incorporates _____ [*specify incorporated allegations, e.g.,* Paragraphs 4 and 5 of the First Cause of Action, Paragraphs 7 through 10 of the Second Cause of Action, and Paragraphs 11 through 13 of the Third Cause of Action], as though fully set forth herein.

[15. _____ (*Allege any special relationship between the parties and/or defendant's knowledge of the plaintiff's particular susceptibility to emotional distress, e.g.,* At all relevant times, defendant was employed as plaintiff's babysitter and, as such, was in a position of authority over plaintiff's conduct and entrusted with the responsibility of caring for plaintiff's physical and emotional well-being.)]

16. Defendant _____'s [*name of defendant or, if certificates of corroborative fact are required pursuant to Code Civ. Proc. § 340.1(g), (n) regarding first cause of action, set forth fictitious name, e.g.,* John Doe] conduct was intentional and malicious and done for the purpose of causing plaintiff to suffer humiliation, mental anguish, and emotional and physical distress.

17. As a proximate result of the acts of defendant[s, and each of them], plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that the injuries will result in some permanent disability to him/her.] As a result of the injuries, plaintiff has suffered general damages.

18. As a further proximate result of the acts of defendant[s, and each of them], plaintiff developed and continues to suffer from _____ [*specify psychological injuries, e.g.,* severe chronic depression and frequent periodic episodes of insomnia, anxiety, and panic]. [Plaintiff is informed and believes, and thereon alleges, that the injuries will result in some permanent disability to him/her.]

19. As a further proximate result of the acts of defendant[s, and each of them], plaintiff developed and continues to suffer from _____ [*specify physical injuries, e.g.,* severe headaches, chronic physical fatigue, nausea, and dizziness]. [Plaintiff is informed and believes, and thereon alleges, that the injuries will result in some permanent disability to him/her.]

20. As a further proximate result of the acts of defendant[s, and each of them], plaintiff has been damaged in that he/she has been required to expend money and to incur obligations for psychotherapy and drugs reasonably required in the

treatment and relief of the injuries herein alleged.

21. As a further proximate result of the acts of defendant[s, and each of them], plaintiff has been damaged in that he/she has been required to expend money and to incur obligations for medical services and drugs reasonably required in the treatment and relief of the injuries herein alleged.

22. As a further proximate result of the acts of defendant[s, and each of them], plaintiff was prevented from attending to his/her usual occupation as a _____ [*specify occupation*], for a period of _____ [*specify*, *e.g.*, one year] and thereby lost earnings to his/her damage.

23. The above-described conduct of defendant[s, and each of them,] was willful and was intended to cause injury to the plaintiff. Plaintiff is therefore entitled to an award of exemplary or punitive damages.

WHEREFORE, plaintiff prays judgment on all four causes of action against defendant(s) as follows:

1. For general damages;

2. For medical and related expenses according to proof;

3. For lost earnings according to proof;

4. For punitive damages;

5. For interest as allowed by law;

6. For costs of suit incurred herein; and

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the [guardian ad litem representing] plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of complaint is for use to allege causes of action for damages based on childhood sexual abuse [*see Code Civ. Proc. § 340.1*]. It is adaptable for use by either a minor or adult plaintiff. If plaintiff is 26 years of age or older, the defendant must not be named in the complaint until an in camera hearing has been held and the court has determined that the required certificates of corroborative fact support the existence of a meritorious claim. For this purpose, optional language is available in the form to refer to the defendant by a fictitious name [*see Code Civ. Proc. § 340.1(g), (n)*]. In that case, the plaintiff should file an amended complaint to name the defendant after the court makes a determination in his or her favor [*see Code Civ. Proc. § 474*]. In addition to alleging a cause of action specifically arising from childhood sexual abuse as set forth in *Code Civ. Proc. § 340.1*, which incorporates conduct in violation of specific Penal Code provisions, this complaint also alleges causes of action for assault, battery, and intentional infliction of emotional distress based on the same conduct.

This form of complaint may be combined with allegations stating a cause of action for sexual battery under *Civ. Code § 1708.5, set out in Ch. 58, Assault and Battery, § 58.55*. In addition, if appropriate, it may also be combined with causes of action for sexual harassment and forcible rape, which are also *set out in Ch. 58, Assault and Battery, §§ 58.54, 58.56*.

[3] Allegations

The form of complaint alleges:

- Defendant's name, or defendant's designation by a fictitious name, and the basis for venue (Paragraph 2) [*see Code Civ. Proc. §§ 340.1(e), (l)* (prohibition against initial use of defendant's name if certificate of merit is required), 395 (venue)];

- A description of defendant's conduct constituting childhood sexual abuse (Paragraphs 4, 5) [*see Code Civ. Proc. § 340.1(e)*];

- A description of defendant's conduct supporting a cause of action for assault (Paragraphs 7-10) [*see Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 6-7, 146 P.2d 57]* ;

- A description of defendant's conduct supporting a cause of action for battery (Paragraphs 11-13) [*see Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 375, 193 Cal. Rptr. 422]* ; and

- A description of defendant's conduct supporting a cause of action for intentional infliction of emotional distress (Paragraphs 14-16).

The form also contains allegations of general damages (Paragraph 17); special damages for medical expenses (Paragraphs 18-21); special damages for lost earnings (Paragraph 22); and punitive damages (Paragraph 23) [*see Civ. Code § 3294*].

Optional allegations include:

- A statement regarding plaintiff's minority and appointment of a guardian ad litem (Paragraph 1) [*see Code Civ. Proc. § 372*];

- Fictitious names of additional defendants (Paragraph 3) [*see Code Civ. Proc. § 474*];

- Circumstances regarding plaintiff's delayed discovery of the connection between the abuse alleged and resultant psychological injuries or illness (Paragraph 6) [*see Code Civ. Proc. § 340.1(a)*]; and

- The existence of a special relationship between the parties and/or defendant's knowledge of the

plaintiff's particular susceptibility to emotional distress (Paragraph 15) [*see Alcorn v. Anbro Eng'g, Inc. (1970) 2 Cal. 3d 493, 498-499, 86 Cal. Rptr. 88, 468 P.2d 216* ; for discussion and forms regarding actions for intentional infliction of emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress*].

[4] Limitation Period

A plaintiff must commence an action for recovery of damages suffered as a result of childhood sexual abuse, within eight years of the date the plaintiff attains the age of majority (that is, by the plaintiff's twenty-sixth birthday) or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later, for any of the following actions [*Code Civ. Proc. § 340.1(a)*]:

- An action against any person for committing an act of childhood sexual abuse,

- An action for liability against any person or entity who owed a duty of care to the plaintiff, where a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff,

- An action for liability against any person or entity where an intentional act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff.

No action described in the second or third paragraph above can be commenced on or after the plaintiff's twenty-sixth birthday [*Code Civ. Proc. § 340.1(b)(1)*]. However, effective January 1, 2003, a plaintiff may commence this type of action after the plaintiff's twenty-sixth birthday, if the person or entity knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and if the person or entity failed to take reasonable steps, and failed to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person, including, but not limited to, preventing or avoiding placement of that person in a function or environment in which contact with children is an inherent part of that function or environment [*Code Civ. Proc. § 340.1(b)(2)*]. Providing or requiring counseling is not sufficient, in and of itself, to constitute a reasonable step or reasonable safeguard [*Code Civ. Proc. § 340.1(b)(2)*]. Total repression of all memory of the abuse is not necessary to toll the statute of limitations [*Sellery v. Cressey (1996) 48 Cal. App. 4th 538, 547]* .

If the plaintiff is 26 years of age or older, certificates of merit are required with respect to each defendant [*see Code Civ. Proc. § 340.1(g), (i)*]. For further discussion, see *§ 5.13*.

[5] Certificates of Merit

If the plaintiff is 26 years of age or older when the complaint is filed, he or she must file a certificate of merit executed by the attorney and a mental health practitioner with respect to each defendant, pursuant to *Code Civ. Proc. § 340.1(g)*. These certificates must accompany the complaint, unless the attorney was unable to obtain the mental health practitioner's certificate within the limitation period. In that case, the attorney's certificate must include a declaration regarding his or her inability to obtain the mental health practitioner's certificate without impairing the cause of action by the expiration of the limitation period. The mental health practitioner's certificate must then be filed within 60 days after filing the complaint [*see Code Civ. Proc. § 340.1(h)*].

One court of appeal opinion has suggested that if the certificates of merit, or the certificate explaining why they cannot be obtained prior to expiration of the statute of limitations, are not filed along with the complaint prior to expiration of the statute of limitations, then the action is subject to dismissal [*Doyle v. Fenster (1996) 47 Cal. App. 4th 1701, 1706-1707, 55 Cal. Rptr. 2d 327]* . However, another court of appeal opinion has specifically held that the 60-day

post-complaint filing period applies to all of the certificates, including the certificate that explains the late filing, regardless of whether the statute of limitations has run before the certificates are filed [*McVeigh v. Doe I (2006) 138 Cal. App. 4th 898, 902, 42 Cal. Rptr. 3d 91]* .

The complaint may not be served on the defendant or defendants until the court has reviewed the certificates of merit and has found, based solely on these certificates of merit, that there is reasonable and meritorious cause for the filing of the action [*Code Civ. Proc. § 340.1(j)*]. For further discussion, see *§ 5.14*. For forms of a certificate of merit executed by the plaintiff's attorney and the mental health practitioner, see *§ 5.61* and *§ 5.62*.

[6] Certificates of Corroborative Fact

In any action subject to *Code Civ. Proc. § 340.1(g)*, that is, in which the plaintiff is 26 years of age or older at the time the action is filed, nodefendant may be named except by "Doe" designation in any pleading or papers filed in the action until there has been a showing of corroborative fact as to the charging allegations against that defendant [*Code Civ. Proc. § 340.1(m)*]. For discussion of this requirement, see *§ 5.15[2]*. For a form of an application for permission to amend the complaint to substitute the name of the defendant for the fictitious designation, see *§ 5.63*.

[7] Verification

While verification of this complaint is not required, verification will require any answer to be verified also, if the action is an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[8] Cross References

For alternative allegations regarding agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For discussion and forms regarding amended complaints, see Ch. 21, *Amended and Supplemental Pleadings*

For discussion and forms regarding assault and battery generally, see Ch. 58, *Assault and Battery*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to tort damages, see *Ch. 177, Damages, § 177.40* et seq.

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers*

For discussion and forms regarding the appointment of a guardian ad litem to represent a minor, see Ch. 291, *Guardians ad Litem*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For discussion and forms regarding intentional infliction of emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAssault & BatteryElements of AssaultTortsIntentional TortsAssault & BatteryElements of BatteryFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectCivil ProceduresPleading & PracticePleadingsComplaintsRequirements

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PART IV. FORMS
A. Actions Based on Sexual Abuse of Minor

1-5 California Forms of Pleading and Practice--Annotated § 5.61

§ 5.61 Attorney's Certificate in Civil Action for Damages Based on Childhood Sexual Abuse [Code Civ. Proc. § 340.1]

[1] FORM Attorney's Certificate in Civil Action for Damages Based on Childhood Sexual Abuse [Code Civ. Proc. § 340.1]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	CERTIFICATE OF _____
John Doe,	)	[*name of plaintiff's attorney*]
Defendant.	)	
	)	
	)	

_____

I, _____ [*name*], declare:

1. I am the attorney for _____ [*name*], plaintiff in the above-entitled action.

[*EITHER*]

2. I have reviewed the facts of the above-entitled case, and have consulted with _____ [*specify number, e.g.,* two] licensed mental health practitioner(s) _____ [who is *or* each of whom is] licensed to practice and practices in California and whom I reasonably believe to be knowledgeable regarding the relevant issues involved in this action.

3. On the basis of this review and consultation, I have concluded that there is a reasonable and meritorious cause for filing this action.

[*OR*]

2. I was unable to obtain the required certificate of merit executed by a mental health practitioner for the purpose of ascertaining that there is a reasonable and meritorious cause for filing this action, because the applicable limitation period would have expired prior to the time when a consultation could be held and the certificate executed, which would have resulted in the impairment of this action.

[*CONTINUE*]

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of certificate is for execution by plaintiff's counsel in a civil action for damages based on childhood sexual abuse if certificatesof merit are required in the action [*see Code Civ. Proc. § 340.1(e)-(g)*; *see also § 5.61[3*]].

If certificates are required, one must be executed for each defendant [*Code Civ. Proc. § 340.1(i)*] and filed with a complaint based on *Code Civ. Proc. § 340.1*, such as that in *§ 5.60*.

Until the certificate of merit has been filed and reviewed by the court, and the court has found there to be reasonable and meritorious cause for the filing of the action, the complaint may not be served on the defendant [*Code Civ. Proc. § 340.1(j)*]. In addition, in actions subject to the certificate of merit requirement, the defendant may not be named except by "Doe" designation until permission to do so has been granted based on plaintiff's certificate of corroborative fact [*see Code Civ. Proc. § 340.1(g), (m)*]. Thus, this form refers to defendant in the caption by a fictitious name.

For discussion of the certificate of corroborative fact, see *§§ 5.15*, and *5.63[3]*. For a form of application to amend the complaint to name defendant, see *§ 5.63*.

If the first alternative Paragraphs 2 and 3 are used, the mental health practitioner's certificates should be filed at the same time. If the second alternative Paragraph 2 is used, the mental health practitioner's certificates must be filed within 60 days of the filing of the complaint and attorney's certificate. For a form of a mental health practitioner's certificate of merit, see *§ 5.62*.

[3] Requirement of Attorney's Certificate of Merit

A certificate of merit executed by the plaintiff's attorney must be filed for each defendant in a civil action for damages based on childhood sexual abuse, if the plaintiff is 26 years old or older [*see Code Civ. Proc. § 340.1(a), (g)-(i)*].

Legal Topics:

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

Family LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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PART IV. FORMS
A. Actions Based on Sexual Abuse of Minor

1-5 California Forms of Pleading and Practice--Annotated § 5.62

§ 5.62 Mental Health Practitioner's Certificate in Civil Action for Damages Based on Childhood Sexual Abuse [Code Civ. Proc. § 340.1]

[1] FORM Mental Health Practitioner's Certificate in Civil Action for Damages Based on Childhood Sexual Abuse [Code Civ. Proc. § 340.1]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
John Doe,	)	CERTIFICATE OF _____ [*name of mental health practitioner*]
Defendant.	)	
	)	
	)	

_____

I, _____ [*name*], declare:

1. I am a licensed _____ [*specify, e.g.,* psychotherapist] selected by the plaintiff in this action for the purpose of consultation.

2. I am licensed to practice and practice in California.

3. I am not a party to this action.

4. I have interviewed the plaintiff, and am knowledgeable of the relevant facts and issues involved in this action, and have concluded, on the basis of my knowledge of the facts and issues, that, in my professional opinion, there is a

reasonable basis to believe that the plaintiff has been subject to childhood sexual abuse.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of certificate should be executed by a mental health practitioner selected by the plaintiff as a consultant in a civil action for damages based on childhood sexual abuse if certificates of merit are required in the action [*see Code Civ. Proc. § 340.1(f)-(i)*].

If certificates are required, one must be executed for each defendant [*Code Civ. Proc. § 340.1(i)*].

Until the certificate of merit has been filed and reviewed by the court, and the court has found there to be reasonable and meritorious cause for the filing of the action, the complaint may not be served on the defendant[*Code Civ. Proc. § 340.1(j)*]. The certificate should be filed together with the complaint under *Code Civ. Proc. § 340.1*, such as the form in *§ 5.60[1]*, and the certificates of merit executed by the plaintiff's attorney, such as the form in *§ 5.61*, unless the attorney has declared an inability to obtain this certificate within the applicable limitation period. In that case, this certificate must be filed within 60 days of the filing of the complaint [*see Code Civ. Proc. § 340.1(h)(3)*].

In addition, in actions subject to the certificate of merit requirement, the defendant may not be named except by "Doe" designation until permission to do so has been granted based on plaintiff's certificate of corroborative fact [*see Code Civ. Proc. § 340.1(g), (m)*]. Thus, this form refers to defendant in the caption by a fictitious name. For discussion of the certificate of corroborative fact, see *§§ 5.15* and *5.63[3]*. For a form of application to amend the complaint to name defendant, see *§ 5.63*.

[3] Requirement of Mental Health Practitioner's Certificate

A certificate of merit executed by a mental health practitioner selected by the plaintifff must be filed for each defendant in a civil action for damages based on childhood sexual abuse, if the plaintiff is 26 years of age or older [*see Code Civ. Proc. § 340.1(a), (g)-(i)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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1-5 California Forms of Pleading and Practice--Annotated § 5.63

§ 5.63 Application for Permission to Amend Complaint to Substitute Name of Defendant for Fictitious Designation [Code Civ. Proc. § 340.1(n)]

[1] FORM Application for Permission to Amend Complaint to Substitute Name of Defendant for Fictitious Designation [Code Civ. Proc. § 340.1(l)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	APPLICATION FOR LEAVE TO AMEND COM-
vs.	)	PLAINT
_____ [*name*], [and DOES I	)	Date: _____
through _____,]	)	Time: _____
Defendants.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

Plaintiff applies for permission to amend the complaint in the above-entitled action to substitute for _____ [*specify fictitious name designation in complaint, e.g.,* John Doe] the name of defendant _____ [*name*]. The application is supported by the certificate of corroborative fact executed by _____ [*name of plaintiff's attorney who executed certificate*], which accompanies this application. _____ [*If the defendant has appeared in the action, add* Proof of service of this application is attached].

The certificate of corroborative fact that accompanies this application describes facts that corroborate the charging

allegation against defendant _____ [*name*] set forth in Paragraph(s) _____ [*specify complaint allegation(s) supported by certificate*].

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

This form of application is for use to request permission to amend the complaint in an action alleging childhood sexual abuse, brought by a plaintiff who was 26 years of age or older when the complaint was filed, to amend the complaint to substitute the defendant's name for the complaint's designation of a fictitiously named defendant [*see Code Civ. Proc. § 340.1(e), (l)*]. The application must be accompanied by a certificate of corroborative fact executed by the attorney for the plaintiff [*Code Civ. Proc. § 340.1(n)(1)*; *see §§ 5.15* and *5.63[3]* regarding the requisite contents of the certificate]].

If the defendant has not yet appeared in the action at the time the application is made, neither the application nor the certificate of corroborative facts may be served on the defendant or defendants, nor on any other party or their counsel of record [*Code Civ. Proc. § 340.1(n)(2)*]. If the application is made after that defendant's appearance in the action, the application must be served on all parties, with proof of service provided to the court, but the certificate of corroborative fact by the attorney may not be served on any party or their counsel of record [*Code Civ. Proc. § 340.1(n)(3)*].

[3] Certificate of Corroborative Facts

The application set out in this form must be accompanied by a certificate of corroborative fact executed by the attorney for plaintiff. The certificate must declare that the attorney has discovered one or more facts corroborative of one or more of the charging allegations against a defendant or defendants, and must set forth in clear and concise terms the nature and substance of the corroborative fact. If the corroborative fact is evidenced by the statement of a witness or the contents of a document, the certificate of merit must declare that the attorney has personal knowledge of the witness's statement or of the contents of the document, and the identity and location of the witness or document must be included in the certificate. A fact is corroborative of an allegation if it confirms or supports the allegation. The opinion of any mental health practitioner concerning the plaintiff does not constitute a corroborative fact for purposes of this requirement [*Code Civ. Proc. § 340.1(n)(1)*].

In drafting the certificate, counsel should detail the source of the corroborative evidence, and discuss how the evidence (and reasonable inferences that may be drawn from the evidence) supports specific allegations of the complaint that charge defendant with an act or acts of childhood sexual abuse against the plaintiff [*see Code Civ. Proc. § 340.1(n)-(o)* (contents of certificate and showing required for order)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectCivil ProcedurePartiesFictitious NamesCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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1-5 California Forms of Pleading and Practice--Annotated § 5.64

§ 5.64 Order Permitting Amendment to Complaint Alleging Childhood Sexual Abuse to Substitute Named Defendant for Fictitious Named Defendant [Code Civ. Proc. § 340.1(o)]

[1] FORM Order Permitting Amendment to Complaint Alleging Childhood Sexual Abuse to Substitute Named Defendant for Fictitious Named Defendant [Code Civ. Proc. § 340.1(m)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER GRANTING LEAVE TO AMEND COMPLAINT
vs.	)	Date: _____
_____ [*name*], [and DOES I through _____,]	)	Time: _____
Defendants.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

ORDER PERMITTING AMENDMENT TO COMPLAINT

It is hereby ordered that Plaintiff may amend the _____ [*if the complaint has been amended, specify, e.g.,* First Amended] complaint in the above-entitled action to substitute the name of _____ [*name of defendant*] for the fictitious designation _____ [*specify fictitious designation, e.g.,* John Doe] in Paragraph(s) _____ of that complaint.

By: _____ [*signature*]
_____ [*typed name*]
Judge, _____ [*name of court*]

[2] Use of Form

This form of order should be submitted along with the application *set forth in § 5.63[1]*, so that the judge may sign the order once he or she finds that the certificate of corroborative facts support the charging allegations.

[3] Cross References

For discussion of the procedure relating to orders in general, see Ch. 372, *Motions and Orders*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProceduresPartiesSubstitutionsGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectCivil ProceduresPartiesFictitious Names

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A. Actions Based on Sexual Abuse of Minor

1-5 California Forms of Pleading and Practice--Annotated §§ 5.65-5.69

[Reserved]

§§ 5.65[Reserved]

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Chapter 5 ABUSE OF MINORS AND ELDERLY
PART IV. FORMS
B. Actions Based on Abuse of Elderly or Dependent Adults

1-5 California Forms of Pleading and Practice--Annotated § 5.70

§ 5.70 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for Abuse of Elderly Person or Dependent Adult [Welf. & Inst. Code § 15657 et seq.]

[1] FORM Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for Abuse of Elderly Person or Dependent Adult [Welf. & Inst. Code § 15657 et seq.]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Abuse of _____
_____ [*name*], [and DOES I-	)	(Elderly Person *or* Dependent Adult))
_____, inclusive,]	)	[Amount demanded _____ (exceeds
Defendant.	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff resides in California and is _____ [_____ (*specify 65 or more*) years of age *or* _____ (*specify age between 18 and 64*) years of age and _____ (*specify disability, e.g.,* has Down's syndrome)].

2. Defendant _____ [*name*] _____ [is an individual and, at all times herein mentioned, was a resident of _____ County, California *or* is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California, _____ (*specify basis on which venue is established, e.g.,* with its principal place of business in _____ County, California) *or*

specify other basis for venue].

[3. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes, and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged and that plaintiff's damages as herein alleged were proximately caused by those defendants.)]

[*EITHER, to allege physical abuse*]

4. On or about _____ [*date*], at _____ [*location*] in _____ [*city*], California, defendant _____ [*name*] _____ [*describe conduct, e.g.,* pointed a loaded .45 caliber Colt revolver at plaintiff while plaintiff was bedridden and immobile and, by means of threatening to shoot and kill plaintiff, coerced plaintiff to copulate his/her mouth with defendant's sexual organ].

[5. Defendant's above-described conduct is proscribed by Penal Code Section(s) _____ [*specify, e.g.,* 245 and 288a, and therefore constitutes physical abuse as defined in *Welf. & Inst. Code Section 15610.63*.]

[*AND/OR, to allege neglect*]

6. On or about _____ [*date*], at _____ [*location*] in _____ [*city*], California, defendant _____ [*name*] _____ [*describe conduct, e.g.,* was entrusted with the sole custodial care of plaintiff, but failed to provide plaintiff with adequate food to prevent malnutrition, and plaintiff consequently developed and continues to suffer from malnutrition].

[*AND/OR, to allege financial abuse*]

7. Defendant _____ [*name*] at all relevant times _____ [was entrusted with the care and/or custody of plaintiff *or* stands in a position of trust to plaintiff in that he/she _____ (*specify, e.g.,* is the conservator for plaintiff)].

8. On or about _____ [*date*], at _____ [*location*] in _____ [*city*], California, defendant _____ [*name*] _____ [*describe conduct, e.g.,* without plaintiff's knowledge or consent, withdrew all funds from plaintiff's savings account numbered _____ in _____ (*name of financial institution*), in the amount of $_____, transferred those funds to his/her own personal account, and continues to use them for his/her personal use].

[*AND, to allege intentional infliction of emotional distress*]

9. Plaintiff refers to and herein incorporates _____ [*specify incorporated allegations, e.g.,* Paragraphs 4 through 8], as though fully set forth herein.

[10. _____ (*If appropriate, allege any special relationship between the parties and/or defendant's knowledge of the plaintiff's particular susceptibility to emotional distress, e.g.,* At all relevant times, defendant was employed as plaintiff's full-time personal nurse.)]

11. Defendant _____'s [*name*] conduct was intentional and malicious and done for the purpose of causing plaintiff to suffer humiliation, mental anguish, and emotional and physical distress.

[*CONTINUE*]

12. As a proximate result of the acts of defendant[s, and each of them], plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes, and thereon alleges, that the injuries will result in some permanent disability to him/her.] As a result of the injuries, plaintiff has suffered general damages.

13. As a further proximate result of the acts of defendant[s, and each of them], plaintiff developed and continues to suffer from _____ [*specify injuries, e.g.*, severe headaches, nausea, and insomnia].

14. As a further proximate result of the acts of defendant[s, and each of them], plaintiff has been damaged in that he/she has been required to expend money and to incur obligations for medical services and drugs reasonably required in the treatment and relief of the injuries herein alleged.

15. The above-described conduct of defendant[s, and each of them,] was willful and was intended to cause injury to the plaintiff. Plaintiff is therefore entitled to an award of exemplary or punitive damages.

WHEREFORE, plaintiff prays judgment against defendant(s) as follows:

1. For general damages;

2. For medical and related expenses according to proof;

3. For punitive damages;

4. For reasonable attorney's fees;

5. For interest as allowed by law;

6. For costs of suit incurred herein; and

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the [conservator representing] plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of complaint is for use to seek damages in an action based on abuse of an elderly person or dependent adult on grounds of physical abuse, neglect, and/or fiduciary abuse [*see Welf. & Inst. Code §§ 15610.30, 15610.57, 15610.63, 15657 et seq.*]. Although other grounds may constitute abuse of such a person, for example, abandonment as defined in *Welf. & Inst. Code § 15610.05*, they would not form the basis for recovery of statutorily provided fees and costs, which are sought in this form [*see Welf. & Inst. Code § 15657*; *see § 5.33[1*]; *see also § 5.70[4]*]. This form may be adapted for use to state different grounds for abuse, but, if physical abuse, neglect, or fiduciary abuse are not among them, the prayer must be modified accordingly. For discussion and forms regarding negligence actions generally, see Ch. 380, *Negligence* .

[3] Allegations

This form of complaint alleges:

- Plaintiff's status as an elderly person or dependent adult (Paragraph 1) [*see Welf. & Inst. Code §§ 15610.23, 15610.27*];

- The basis for venue (Paragraph 2) [*see Code Civ. Proc. §§ 395, 395.5*];

- A description of defendant's conduct constituting physical abuse of an elderly person or dependent adult (Paragraphs 4, 5) [*see Welf. & Inst. Code § 15610.63*];

- Defendant's conduct constituting neglect of an elderly person or dependent adult (Paragraph 6) [*see Welf. & Inst. Code § 15610.57*];

- Defendant's conduct constituting financial abuse an elderly person or dependent adult (Paragraphs 7, 8) [*see Welf. & Inst. Code § 15610.30*]; and

- Defendant's conduct supporting a cause of action for intentional infliction of emotional distress (Paragraphs 9-11).

The form also contains allegations of general damages (Paragraph 12); special damages (Paragraphs 13, 14); and punitive damages (Paragraph 15) [*see Civ. Code §§ 3294, 3333*; *see also Welf. & Inst. Code § 15657* (recklessness, oppression, fraud, or malice as basis for fees and costs)].

Optional allegations include:

- Fictitious names of additional defendants (Paragraph 3) [*see Code Civ. Proc. § 474*];

- A statement that the conduct constituting physical abuse is prohibited by one of the Penal Code provisions enumerated in *Welf. & Inst. Code § 15610(c)* (Paragraph 5); and

- The existence of a special relationship between the parties and defendant's knowledge of the plaintiff's particular susceptibility to emotional distress (Paragraph 10) [*see Alcorn v. Anbro Eng'g, Inc. (1970) 2 Cal. 3d 493, 498-499, 86 Cal. Rptr. 88, 468 P.2d 216]* . If Paragraph 7 is used, it may not be necessary to use Paragraph 10 to establish the special relationship.

[4] Attorney's Fees and Costs

Under *Welf. & Inst. Code § 15657*, attorney's fees and costs may be recovered in a successful action based on physical abuse or neglect of an elderly person or dependent adult if liability as well as recklessness, oppression, fraud, or malice is shown by clear and convincing evidence [*see Welf. & Inst. Code § 15657(a)*].

Effective January 1, 2005, proof of financial abuse by a preponderance of the evidence, rather than clear and convincing evidence, is sufficient to justify an award of attorney's fees and costs, and does not require additional proof that the defendant was guilty of recklessness, oppression, fraud, or malice [*Welf. & Inst. Code § 15657.5(a)*].

In cases of physical abuse or neglect, damages and attorney's fees permitted under *Welf. & Inst. Code § 15657* cannot be imposed against an employer unless the standards set forth in *Civ. Code § 3294(b)* regarding the imposition of punitive damages on an employer based on the acts of any employee are satisfied [*Welf. & Inst. Code §§ 15657(c)*]. However, the standards of *Civ. Code § 3294(b)* apply in financial abuse cases only for the imposition of punitive damages and do not apply to the recovery of compensatory damages or attorney's fees or costs [*Welf. & Inst. Code § 15657.5(c)*]. For further discussion, see *§ 5.35*.

[5] Restrictions Applicable to Health Care Provider Defendants

Damages for noneconomic losses that may be recovered from a health care provider based on professional negligence are limited to $250,000 [*Welf. & Inst. Code § 15657(b)*; *see Civ. Code § 3333.2*], although this restriction does not apply in a case of financial abuse [*see Welf. & Inst. Code § 15657.5*]. For further discussion, see *§ 5.35*.

In addition, a cause of action for injury or damage against a health care provider based on its alleged professional negligence is governed by those laws that specifically apply to those professional negligence causes of action, notwithstanding the provisions of *Welf. & Inst. Code § 15657 et seq.* [*Welf. & Inst. Code § 15657.2*; *see Code Civ. Proc. § 340.5* (definition of health care provider)].

However, a plaintiff bringing an action under the Elder Abuse statute is not required to comply with the pleading requirements of *Code Civ. Proc. § 425.13*, which applies generally to medical malpractice actions, to recover punitive damages from a health care provider [Covenant Care, Inc. *v. Superior Court (2004) 32 Cal. 4th 771, 776, 11 Cal. Rptr. 3d 222, 86 P.3d 290* ; *see Code Civ. Proc. § 425.13*]. Moreover, if the gravamen of the complaint is a violation of the Elder Abuse Act, a plaintiff need not comply with *Code Civ. Proc. § 425.13* even if the plaintiff also alleges common law intentional torts [*Covenant Care, Inc. v. Superior Court (2004) 32 Cal. 4th 771, 790, 11 Cal. Rptr. 3d 222, 86 P.3d 290* ; *Country Villa Claremont Healthcare Ctr., Inc. v. Superior Court (2004) 120 Cal. App. 4th 426, 434-435, 15 Cal. Rptr. 3d 315]* . For further discussion, see *§§ 5.35* and *5.36*.

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[7] Cross References

For cross references relating to complaints in general, see *§ 5.60[8]*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & NeglectCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

California Forms of Pleading and Practice--Annotated

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1-5 California Forms of Pleading and Practice--Annotated § 5.71

§ 5.71 Request for Orders to Stop Elder or Dependent Adult Abuse (Elder or Dependent Adult Abuse Prevention)--Cal. Judicial Council Form EA-100 [Welf. & Inst. Code § 15657.03]

[1] FORM Request for Orders to Stop Elder or Dependent Adult Abuse (Elder or Dependent Adult Abuse Prevention)--Cal. Judicial Council Form EA-100 [Welf. & Inst. Code § 15657.03]

Click here to view image.

[2] Use of Form

This form is a filled-in reproduction of the approved Judicial Council form of Request for Orders to Stop Elder or Dependent Adult Abuse under the elder or dependent adult abuse statute [*see Welf. & Inst. Code § 15657.03*; Cal. Judicial Council Form EA-100]. For a fillable version of this form in electronic format, see *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexis.com/forms.

This form is for use by a petitioner to obtain a protective or restraining order enjoining a party from abusing, intimidating, molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, destroying personal property of, contacting, either directly or indirectly, by mail or otherwise, or coming within a specified distance or disturbing the peace of the petitioner [*Welf. & Inst. Code § 15657.03(b)(1)*]. Effective January 1, 2010, other named family or household members, or a conservator of the petitioner, may also be protected by such an order, at the discretion of the court and on a showing of good cause [*Welf. & Inst. Code § 15657.03(b)(1)*]. The form may also be used to obtain an order excluding a party from the petitioner's residence or dwelling, unless legal or equitable title to, or lease of, the residence or dwelling is in the sole name of the party to be excluded or is in the name of the party to be excluded and any other party besides the petitioner [*Welf. & Inst. Code § 15657.03(b)(2)*]. A court may issue an ex parte order excluding a party from the petitioner's residence or dwelling only if [*Welf. & Inst. Code § 15657.03(d)(1)*]:

- Facts are shown sufficient for the court to ascertain that the party who will stay in the dwelling has a right under color of law to possession of the premises;

- The party to be excluded has assaulted or threatens to assault the petitioner, other named family or household member of the petitioner, or conservator of the petitioner; and

- Physical or emotional harm would otherwise result to the petitioner, other named family or household member of the petitioner, or conservator of the petitioner.

Other orders enjoining a party from specified behavior that the court determines is necessary to effectuate the orders described above may also be obtained [*Welf. & Inst. Code § 15657.03(b)(3)*]. Unless the case consists solely of financial abuse unaccompanied by force, threat, harassment, intimidation, or another form of abuse, the order issued pursuant to *Welf. & Inst. Code § 15657.03* must prohibit the person subject to it from owning, possessing, purchasing, receiving, or attempting to purchase or receive, a firearm [*Welf. & Inst. Code § 15657.03(o)(1), (2)*]. The order must also require this person to relinquish any firearms he or she owns or possesses, pursuant to *Code Civ. Proc. § 527.9* [*Welf. & Inst. Code § 15657.03(o)(3)*; *see also Welf. & Inst. Code § 15657.03(o)(4)* (*Pen. Code § 12021(g)* governs punishment of persons who attempt to acquire firearm in violation of order); *see generally § 5.77*]. If a party is enjoined under *Welf. & Inst. Code § 15657.03*, the court is also required to issue an order prohibiting the enjoined party from taking any action to obtain the addressor location of a protected party or a protected party's family members, caretakers, or guardian, unless the court finds that there is good cause not to issue that order [*Welf. & Inst. Code § 15657.04(a)*].

At least three copies of the petition should be made: an original to file with the court, a copy for each defendant, and a copy for the files of the plaintiff's attorney. A copy may also be made for the plaintiff.

There is no filing fee for a petition filed under *Welf. & Inst. Code § 15657.03* [*Welf. & Inst. Code § 15657.03(l)*].

For a sheet designed to provide general information to a plaintiff about whether a restraining order might be beneficial, see California Judicial Council Form EA-150-INFO, Can a Restraining Order to Prevent Elder or Dependent Adult Abuse Help Me?.

[3] Service on Respondent

On the filing of a Request for Orders to Stop Elder or Dependent Adult Abuse under *Welf. & Inst. Code § 15657.03*, the respondent must be personally served with a copy of the Request, a Notice of Hearing and Temporary Restraining Order, if any [*see § 5.72*], and any affidavits in support of the petition [*Welf. & Inst. Code § 15657.03(g)*]. The respondent may also be served with a blank Response to Request for Orders to Stop Elder or Dependent Adult Abuse form [*see § 5.73*].

Service must be made at least five days before the hearing, although the court may, on motion of the petitioner or on its own motion, shorten the time for service on the respondent [*Welf. & Inst. Code § 15657.03(g)*]. For further discussion of orders shortening time, see Ch. 524, *Shortening and Extension of Time* .

Service may not be made by the petitioner or any person to be protected by the court's orders [*see Code Civ. Proc. § 414.10*]. The person who performs service should complete the Judicial Council's approved form of Proof of Personal Service (Elder and Dependent Adult Abuse Prevention) [Cal. Judicial Council Form EA-140; *see § 5.75*]. For discussion of personal service of summons in civil actions, see Ch. 518, *Service of Summons and Papers* .

For a sheet designed to provide general information to a plaintiff about proof of service, see California Judicial Council Form EA-142-INFO, What is "Proof of Service"?.

[4] Filling in Petition

Identifying information for the petitioner and the person to be restrained must be provided in Items 1 through 6 of the

Request. Item 9 requires identifying information for the person to be restrained, such as height, weight, and date of birth. Item 7 requires information about prior court actions between the parties, if any, and whether there are any existing protective or restraining orders between the parties. Items 12 through 17 are used to indicate the nature of the orders sought from the court. In Item 11, or in an attached declaration, the petitioner must set forth details about the alleged abuse, including information about prior incidents as well as the most recent incident.

Item 21 should be used to request attorney's fees and costs. The prevailing party in an action brought under *Welf. & Inst. Code § 15657.03* may be awarded court costs and attorney's fees [*Welf. & Inst. Code § 15657.03(n)*].

To facilitate enforcement of the protective order, Item 18 should be used to indicate the law enforcement agency, or agencies, that must be given copies of the order. [*see Welf. & Inst. Code § 15657.03(m)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsProtection From Abuse & NeglectFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & NeglectCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsViolation of Protective OrdersApplication & Issuance

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1-5 California Forms of Pleading and Practice--Annotated § 5.72

§ 5.72 Notice of Hearing and Temporary Restraining Order (Elder or Dependent Adult Abuse Prevention)--Cal. Judicial Council Form EA-120 [Welf. & Inst. Code § 15657.03]

[1] FORM Notice of Hearing and Temporary Restraining Order (Elder or Dependent Adult Abuse Prevention)--Cal. Judicial Council Form EA-120 [Welf. & Inst. Code § 15657.03]

Click here to view image.

[2] Use of Form

This form is a filled-in reproduction of the approved Judicial Council form of Notice of Hearing and Temporary Restraining Order under the elder or dependent adult abuse statute [*see Welf. & Inst. Code § 15657.03*; Cal. Judicial Council Form EA-120].

This form may be obtained from any superior court county clerk. For a fillable version of this form in electronic format, see *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexis.com/forms.

This form of notice of hearing is for use by the petitioner to notify the respondent to appear at a hearing, and to specify the contents of any temporary restraining order granted until the time of the hearing. Upon the filing of a Request for Orders to Stop Elder or Dependent Adult Abuse [*see § 5.71*], a temporary restraining order may be issued under *Welf. & Inst. Code § 15657.03*, with or without notice, to prevent a recurrence of abuse, if an affidavit shows to the satisfaction of the court reasonable proof of a past act or acts of abuse of the petitioning elder or dependent adult [*Welf. & Inst. Code § 15657.03(c), (d)(1)*; *see Code Civ. Proc. § 527*; *see also Gdowski v. Gdowski (2009) 175 Cal. App. 4th 128, 137, 95 Cal. Rptr. 3d 799* (evidence of past abuse, even without evidence of continued or future abuse, will support issuing of protective order)].

If a temporary restraining order is granted by the court without notice to the respondent, the matter must be made returnable on an order requiring cause to be shown why a permanent order should not be granted, on the earliest day that the business of the court will permit, but no later than 20 days or, if good cause appears to the court, 25 days from the date the temporary restraining order is granted, unless the order is otherwise modified or terminated by the court [

Welf. & Inst. Code § 15657.03(d)(2)].

The respondent must be personally served with a copy of this Notice of Hearing and Temporary Restraining Order [*see § 5.72[3*]], as well as the Request for Orders to Stop Elder or Dependent Adult Abuse [*see § 5.71*], and any affidavits in support of the Petition [*Welf. & Inst. Code § 15657.03(g)*]. The respondent must also be served with a blank Response to Request for Orders to Stop Elder or Dependent Adult Abuse form [*see § 5.73*], and with a copy of the informational California Judicial Council Form EA-151-INFO, How Can I Respond to a Request for Orders to Stop Elder or Dependent Adult Abuse?. Service must be made at least five days before the hearing, although the court may, on motion of the petitioner or on its own motion, shorten the time for service on the respondent [*Welf. & Inst. Code § 15657.03(g)*]. For further discussion of orders shortening time, see Ch. 524, *Shortening and Extension of Time* . The person who performs service should complete the Judicial Council's approved form of Proof of Personal Service (Elder or Dependent Adult Abuse Prevention) [Cal. Judicial Council Form EA-140; *see § 5.75*].

If relevant to the case, the respondent must also be served with a blank copy of California Judicial Council Form EA-145, Proof of Firearms Turned In or Sold (Elder or Dependent Adult Abuse Prevention) [*see § 5.77*].

[3] Procedure If Court Grants Temporary Restraining Order

If the court grants a temporary restraining order, the court will order the petitioner or the attorney for the petitioner to deliver, or the clerk of the court to mail, a copy of the order and any subsequent proof of service, by the close of the business day on which the order was made, to each designated local law enforcement agency having jurisdiction over the residence of the petitioner, and to any additional law enforcement agencies within the court's discretion that are requested by the petitioner [*Welf. & Inst. Code § 15657.03(j)(1)*].

On request of the petitioner, a temporary restraining order that has been issued must be served on the respondent, whether or not the respondent has been taken into custody, by any law enforcement officer who is present at the scene of reported abuse involving the parties to the proceeding. The petitioner is required to provide the officer with an endorsed copy of the order and a proof of service, which the officer is required to complete and send to the issuing court [*Welf. & Inst. Code § 15657.03(j)(2)*].

The following copies of the order will be needed:

- An original to file with the court;
- A copy for each defendant;
- A copy for each law enforcement agency that is to be notified if a temporary restraining order is issued;
- A copy for the files of the petitioner's attorney; and
- A copy for the petitioner, if desired.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsTemporary Restraining OrdersPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsProtection From Abuse & NeglectFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & NeglectCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsViolation of Protective

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1-5 California Forms of Pleading and Practice--Annotated § 5.73

§ 5.73 Response to Request for Orders to Stop Elder or Dependent Adult Abuse (Elder or Dependent Adult Abuse Prevention)--Cal. Judicial Council Form EA-110 [Welf. & Inst. Code § 15657.03]

[1] FORM Response to Request for Orders to Stop Elder or Dependent Adult Abuse (Elder or Dependent Adult Abuse Prevention)--Cal. Judicial Council Form EA-110 [Welf. & Inst. Code § 15657.03]

Click here to view image.

[2] Use of Form

This form is a filled-in reproduction of the approved Judicial Council form of Response to Request for Orders to Stop Elder or Dependent Adult Abuse under the elder or dependent adult abuse statute [*see Welf. & Inst. Code § 15657.03*; Cal. Judicial Council Form EA-110].

This form may be obtained from any superior court county clerk. For a fillable version of this form in electronic format, see *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexis.com/forms.

This form is for use by a respondent to consent to or challenge any ex parte or temporary orders issued by a court under the elder or dependent adult abuse provisions. In Items 3 through 7, the respondent should either indicate whether he or she consents to each of the court's orders or indicate modifications to each order to which the respondent would consent. In Item 9, the respondent may also request attorney's fees and specified costs in the event he or she is successful in challenging the orders. The prevailing party in an action brought under *Welf. & Inst. Code § 15657.03* may be awarded court costs and attorney's fees [*Welf. & Inst. Code § 15657.03(n)*]. In Item 8, or in an attached declaration the respondent must set forth the facts supporting the response.

A copy of this response form must be filed with the court at least two days before the hearing date. There is no filing fee for a response filed under *Welf. & Inst. Code § 15657.03* [*Welf. & Inst. Code § 15657.03(l)*].

A copy of the response must also be served on the petitioner or the petitioner's attorney at least two days before the hearing date, unless the judge has shortened the time for service. For further discussion of orders shortening time, see

Ch. 524, *Shortening and Extension of Time* . Service may not be made by the respondent. The person who performs service should complete the Judicial Council's approved form of Proof of Service by Mail (Elder or Dependent Adult Abuse Prevention) [Cal. Judicial Council Form EA-141; *see § 5.75*].

For a sheet designed to provide general information to a respondent about how to respond to a request for protective orders, see California Judicial Council Form EA-151-INFO, How Can I Respond to a Request for Orders to Stop Elder or Dependent Adult Abuse?.

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsProtection From Abuse & NeglectFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & NeglectCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsViolation of Protective OrdersApplication & Issuance

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1-5 California Forms of Pleading and Practice--Annotated § 5.74

§ 5.74 Order After Hearing Restraining Elder or Dependent Adult Abuse (Elder or Dependent Adult Abuse Prevention)--Cal. Judicial Council Form EA-130 [Welf. & Inst. Code § 15657.03]

[1] FORM Order After Hearing Restraining Elder or Dependent Adult Abuse (Elder or Dependent Adult Abuse Prevention)--Cal. Judicial Council Form EA-130 [Welf. & Inst. Code § 15657.03]

Click here to view image.

[2] Use of Form

This form is a filled-in reproduction of the approved Judicial Council form of Order After Hearing Restraining Elder or Dependent Adult Abuse under the elder or dependent adult abuse statute [*see Welf. & Inst. Code § 15657.03*; Cal. Judicial Council Form EA-130]. For a fillable version of this form in electronic format, see *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexis.com/forms.

This form is for use by petitioner to set forth the court's protective orders issued after notice and a hearing in a case seeking a protective order under the elder and dependent adult abuse statute. A court may issue any of the orders set forth in *Welf. & Inst. Code § 15657.03(b)* [*Welf. & Inst. Code § 15657.03(e)*]. These orders are described in § 5.71[2]. In addition, after notice and a hearing, the court may issue an order excluding a person from a residence or dwelling if the court finds that physical or emotional harm would otherwise result to the petitioner, other named family or household member of the petitioner, or conservator of the petitioner [*Welf. & Inst. Code § 15657.03(e)*].

After notice and a hearing, a court issuing an order under *Welf. & Inst. Code § 15657.03* has the discretion to issue an order with a duration of up to three years, subject to termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party [*Welf. & Inst. Code § 15657.03(f)*]. These orders may be renewed on the request of a party, either for three years or permanently, without a showing of any further abuse since the issuance of the original order, subject to termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party [*Welf. & Inst. Code § 15657.03(f)*]. Failure to state the expiration date on the face of the form creates an order with a duration of three years from the date of issuance [*Welf. & Inst. Code § 15657.03(f)*].

The order should be completed and presented to the judge for his or her signature. After it is signed, it should be filed with the clerk. In the order, the court will require the person to be protected, or his or her attorney, to deliver a copy of the order to the appropriate law enforcement agencies by close of business on the day the order is issued [*see Welf. & Inst. Code § 15657.03(j)(1)*]. Service of the order on the respondent is not required if the respondent and the petitioner are both personally present at the hearing, if the person seeking the protective order is personally present at the hearing and presents proof of service on the respondent of the Request for Orders to Stop Elder or Dependent Adult Abuse and the Notice of Hearing and Temporary Restraining Order [*see §§ 5.71, 5.72*], or on written stipulation.

If a person named in an order, after a hearing, has not been served personally with the order, but has actual notice of the existence and substance of the order through personal appearance in court to hear the terms of the order, no additional proof of service is required for enforcement of the order [*Welf. & Inst. Code § 15657.03(i)(1)*]. If the respondent does not appear at the hearing, either personally or by counsel, but was personally served with an order and notice of hearing, and if the terms and conditions of the restraining order or protective orderare identical to the temporary restraining order (except for the duration of the order), then the restraining order or protective order may be served on the person by first-class mail sent to the most current address for the person available to the court [*Welf. & Inst. Code § 15657.03(i)(2)*].

Pursuant to *Gov. Code § 6103.2(b)(4)*, a petitioner is not required to pay a fee for law enforcement to serve a protective order [*Welf. & Inst. Code § 15657.03(m)*].

A trial court's issuance of a protective order under *Welf. & Inst. Code § 15657.03* may be reviewed for abuse of discretion. The factual findings necessary to support a protective order need only be supported by a preponderance of the evidence and are reviewed under the substantial evidence test [*Bookout v. Nielsen (2007) 155 Cal. App. 4th 1131, 1137, 67 Cal. Rptr. 3d 2]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsProtection From Abuse & NeglectFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & NeglectCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsViolation of Protective OrdersApplication & Issuance

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1-5 California Forms of Pleading and Practice--Annotated § 5.75

§ 5.75 Proof of Service (Elder or Dependent Adult Abuse Prevention)--Cal. Judicial Council Forms EA-140, EA-141 [Welf. & Inst. Code § 15657.03]

[1] FORMS Proof of Service (Elder or Dependent Adult Abuse Prevention)--Cal. Judicial Council Forms EA-140, EA-141 [Welf. & Inst. Code § 15657.03]

Click here to view image.

[2] Use of Forms

These forms are filled-in reproductions of the approved Judicial Council forms of Proof of Service under the elder or dependent adult abuse statute [*see Welf. & Inst. Code § 15657.03*; Cal. Judicial Council Forms EA-140, EA-141]. For a fillable version of this form in electronic format, see *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexis.com/forms.

The first form, Cal. Judicial Council Form EA-140, is for use by the petitioner to prove that the correct forms have been personally served on the respondent [*see §§ 5.71, 5.72*]. It should be filled in by the person who completes personal service on the respondent, and the original should be filed with the court. Service may not be made by the petitioner or any person to be protected by the court's orders. Under the law governing personal service in civil actions, service may be made by any person over 18 years of age other than the petitioner, including a licensed process server, or by the sheriff's department [*see Code Civ. Proc. § 414.10*]. For discussion of personal service of summons in civil actions, see Ch. 518, *Service of Summons and Papers* .

The second form, Cal. Judicial Council Form EA-141, may be used by a respondent to establish proof of service by mail of the completed response form or other documents [*see § 5.73*]. It should be filled in by the person who mails the documents to be served.

For a sheet designed to provide information to a plaintiff or respondent about how to serve papers and provide proof of service, see California Judicial Council Form EA-142-INFO, What is "Proof of Service"?.

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsProtection From Abuse & NeglectFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & NeglectCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsViolation of Protective OrdersApplication & IssuanceCivil ProcedurePleading & PracticeService of ProcessProofCertificates

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1-5 California Forms of Pleading and Practice--Annotated § 5.76

§ 5.76 Request and Order for Reissuance of Temporary Restraining Order (Elder or Dependent Adult Abuse Prevention)--Cal. Judicial Council Form EA-125 [Welf. & Inst. Code § 15657.03]

[1] FORM Request and Order for Reissuance of Temporary Restraining Order (Elder or Dependent Adult Abuse Prevention)--Cal. Judicial Council Form EA-125 [Welf. & Inst. Code § 15657.03]

Click here to view image.

[2] Use of Form

This form is a filled-in reproduction of the approved Judicial Council form of Request and Order for Reissuance of Temporary Restraining Order under the elder or dependent adult abuse statute [*see Welf. & Inst. Code § 15657.03*; Cal. Judicial Council Form EA-100]. For a fillable version of this form in electronic format, see *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexis.com/forms.

On the filing of an affidavit by the petitioner that the respondent could not be served within the time required by statute, the court may reissue any order previously issued and dissolved by the court for failure to serve the respondent [*Welf. & Inst. Code § 15657.03(h)*]. The reissued order must be made returnable on the earliest day that the business of the court will permit, but not later than 20 days or, if good cause appears to the court, 25 days after the date of reissuance [*Welf. & Inst. Code § 15657.03(h)*]. The reissued order must state on its face the date of expiration of the order [*Welf. & Inst. Code § 15657.03(h)*].

There is no filing fee for a petition seeking the reissuance of a protective order filed in a proceeding brought pursuant to the elder abuse statute [*Welf. & Inst. Code § 15657.03(l)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsTemporary Restraining OrdersPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsProtection From Abuse & NeglectFamily LawFamily Protection & WelfareElderly

PersonsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & NeglectCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsViolation of Protective OrdersApplication & Issuance

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1-5 California Forms of Pleading and Practice--Annotated § 5.77

§ 5.77 Proof of Firearms Turned In or Sold (Elder or Dependent Adult Abuse Prevention)--Cal. Judicial Council Form EA-145 [Welf. & Inst. Code § 15657.03]

[1] FORM Proof of Firearms Turned In or Sold (Elder or Dependent Adult Abuse Prevention)--Cal. Judicial Council Form EA-145 [Welf. & Inst. Code § 15657.03]

Click here to view image.

[2] Use of Form

This form is a filled-in reproduction of the approved Judicial Council form of Proof of Firearms Turned In or Sold under the elder or dependent adult abuse statute [*see Welf. & Inst. Code § 15657.03*; Cal. Judicial Council Form EA-145]. For a fillable version of this form in electronic format, see *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexis.com/forms.

This form is for use by a respondent to document that he or she has sold any firearms he or she owned to a licensed gun dealer, or has turned over any firearms he or she owned to law enforcement. Unless the case consists solely of financial abuse unaccompanied by force, threat, harassment, intimidation, or another form of abuse, an order issued pursuant to *Welf. & Inst. Code § 15657.03* must prohibit the person subject to the order from owning, possessing, purchasing, receiving, or attempting to purchase or receive, a firearm, and must also require this person to relinquish any firearms he or she owns or possesses, pursuant to *Code Civ. Proc. § 527.9* [*Welf. & Inst. Code § 15657.03(o)(1)-(3)*].

A respondent ordered to relinquish his or her firearms must do so within 24 hours after being served with the order. This receipt must then be filed with the court within 48 hours after being served with the order [*Code Civ. Proc. § 527.9(b)*]. Items 4 through 6 of the form must be filled in by the licensed gun dealer who purchases the firearms or by the law enforcement personnel who take possession of the firearms.

The respondent must file the completed form with the court clerk and should keep a completed copy for his or her records.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsProtection From Abuse & NeglectFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & NeglectCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsViolation of Protective OrdersApplication & Issuance

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1-5 California Forms of Pleading and Practice--Annotated § 5.78

§ 5.78 Confidential CLETS Information (Elder or Dependent Adult Abuse Prevention)--Cal. Judicial Council Form DV-260/CH-102/EA-102 [Welf. & Inst. Code § 15657.03]

[1] FORM Confidential CLETS Information (Elder or Dependent Adult Abuse Prevention)--Cal. Judicial Council Form DV-260/CH-102/EA-102 [Welf. & Inst. Code § 15657.03]

Click here to view image.

[2] Use of Form

This form is a filled-in reproduction of the approved Judicial Council form for providing confidential information to the California Law Enforcement Telecommunications System (CLETS), a statewide computer system, for use in enforcing a restraining order issued under the elder or dependent adult abuse statute or for use in locating a person to be restrained [*see Welf. & Inst. Code § 15657.03*; Cal. Judicial Council Form DV-260/CH-102/EA-102]. For a fillable version of this form in electronic format, see *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexis.com/forms.

The person who has successfully requested and been issued a restraining order under the elder and dependent adult statute is responsible for completing a copy of this form and submitting it to the court clerk, who will then send the form to CLETS. The form provides law enforcement agencies with identifying information about the person to be protected, as well information about the restrained person.

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsProtection From Abuse & NeglectFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & NeglectCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsViolation of Protective OrdersApplication & Issuance

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[2] Modification of Contract

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§ 6.30 Related Matthew Bender Publications

§ 6.31 State Statutes

§ 6.32 Decisions

[1] Accord and Satisfaction by Check

[2] Consideration

[3] Definition

[4] Elements

[5] Evidence

[6] Intent of Parties

[7] Judgment

[8] Pleading

[9] Proof

[10] Related Defenses

[11] Rescission

[12] Statutory Prohibition

[13] Summary Judgment

§ 6.33 Law Reviews

§ 6.34 Text References

§§ 6.35-6.39 [Reserved]

§ 6.40 Affirmative Defense of Accord and Satisfaction [Civ. Code §§ 1521-1523]--Oral Accord--General Form

[1] FORM

[2] Use of Form

[3] Cross References

§ 6.41 Affirmative Defense of Accord and Satisfaction [Civ. Code §§ 1521-1523]--Written Accord--General Form

[1] FORM

[2] Use of Form

[3] Cross References

§ 6.42 Affirmative Defense of Accord and Satisfaction [Civ. Code §§ 1521-1523]--Written Accord--Check [Civ. Code § 1526(a); Com. Code § 3311]

[1] FORM

[2] Use of Form

[3] Defense Asserted Under Commercial Code § 3311

[4] Cross References

§ 6.43 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] of Accord and Satisfaction [Civ. Code §§ 1521-1523]--Dispute Under Life Insurance Policy

[1] FORM

[2] Use of Form

[3] Cross References

§ 6.44 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] of Accord and Satisfaction [Civ. Code §§ 1521-1523]--Accord Substituting Payment of Shares of Stock for Money Debt

[1] FORM

[2] Use of Form

[3] Cross References

§ 6.45 Affirmative Defense of Accord and Satisfaction [Civ. Code §§ 1521-1523]--Accord Substituting Conveyance of Property for Money Owed

[1] FORM

[2] Use of Form

[3] Cross References

§ 6.46 Affirmative Defense of Part Performance of Obligation as Satisfaction [Civ. Code §§ 1524]--Acceptance in Writing

[1] FORM

[2] Use of Form

[3] Cross References

§ 6.47 Affirmative Defense of Part Performance of Obligation as Satisfaction [Civ. Code §§ 1524]--Pursuant to Written Agreement

[1] FORM

[2] Use of Form

[3] Cross References

§ 6.48 Complaint for Damages [Civ. Code §§ 3300-3302] for Breach of Accord Agreement [Civ. Code §§ 1521, 1522]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction

[5] Verification

[6] Cross References

§ 6.49 Complaint for Specific Performance [Civ. Code § 3384] to Compel Satisfaction of Accord [Civ. Code § 1522]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction

[5] Verification

[6] Cross References

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§ 6.01 Scope of Chapter

This chapter discusses accord and satisfaction and includes the following forms:

- Affirmative defenses of accord and satisfaction [*see §§ 6.40 -6.47*].
- Complaint for damages for breach of an accord agreement [*see § 6.48*].
- Complaint for specific performance to compel satisfaction of an accord [*see § 6.49*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAccord & SatisfactionPublic Contracts LawTerminationsAccord & SatisfactionCommercial Law (UCC)Negotiable Instruments (Article 3)EnforcementEffectsAccord & Satisfaction

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1-6 California Forms of Pleading and Practice--Annotated § 6.02

§ 6.02 Cross References

Chapters addressing related topics include:

- For forms for affirmative defense based on novation, see Ch. 140, *Contracts* .

- For forms for affirmative defense based on payment, settlement, or release, see Ch. 140, *Contracts* , and Ch. 520, *Settlement and Release* .

- For forms for use in making payment after commencement of an action, see Ch. 211, *Deposit in Court* .

- For alternative forms for defenses based on accord and satisfaction, see Ch. 385, *Negotiable Instruments* and Ch. 520, *Settlement and Release* .

- For forms for affirmative defenses to contract actions generally including payment, see Ch. 140, *Contracts* .

- For discussion and forms relating to composition agreements, including a form of affirmative defense that collection of a debt is barred by a composition agreement, see Ch. 307, *Insolvency* .

- For forms for use in compromise and settlement, see Ch. 520, *Settlement and Release* .

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[Reserved]

§§ 6.03[Reserved]

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§ 6.10 Governing Law

Accord and satisfaction are governed generally by *Civ. Code §§ 1521-1526*. An accord signifies an agreement between the parties; hence, the primary principles that govern the law of contracts are necessarily applicable: that is, proper subject matter, competent parties, mutual consent, and, except as provided in *Civ. Code § 1524*, [*see* § 6.13], consideration [*Moving Picture etc. Union v. Glasgow Theaters, Inc. (1970) 6 Cal. App. 3d 395, 402-403, 86 Cal. Rptr. 33* ; *see also* *Zuckerman v. Pacific Savings Bank (1986) 187 Cal. App. 3d 1394, 1405-1406, 232 Cal. Rptr. 458* (mutual consent requires proof that parties intended payment of amount less than debt owed to extinguish accrued indebtedness; unrelated procedural holding expressly overruled by Stats. 1990, ch. 1561, § 1); *Reid v. Overland Machined Products (1961) 55 Cal. 2d 203, 208, 10 Cal. Rptr. 819, 359 P.2d 251* (no accord and satisfaction possible in wage claim dispute since such a discharge would violate *Lab. Code § 206*, which prohibits conditional payment of wages); *B. & W. Engineering Co. v. Beam (1913) 23 Cal. App. 164, 170, 137 P. 624]* .

Tender of negotiable instruments, including checks, in full satisfaction of disputed or unliquidated claims is governed by *Com. Code § 3311*.

Com. Code § 1308(a), which provides that a party, who with explicit reservation of rights, assents to the performance offered by the other party does not prejudice the rights reserved, does not apply to an accord and satisfaction [*Com. Code § 1308(b)*; *Connecticut Printers, Inc. v. Gus Kroesen, Inc. (1982) 134 Cal. App. 3d 54, 59-61, 184 Cal. Rptr. 436]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAccord & SatisfactionCommercial Law (UCC)General Provisions (Article 1)Application & ConstructionConcurrent Performance & Reservation of RightsCommercial Law (UCC)Negotiable Instruments (Article 3)EnforcementEffectsAccord & Satisfaction

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§ 6.11 Definitions

An accord is an agreement to accept, in extinction of an obligation [*see Civ. Code §§ 1427, 1428*], something different from or less than that to which the person agreeing to accept is entitled [*Civ. Code § 1521*]. Acceptance, by the creditor, of the consideration of an accord extinguishes the obligation, and is called satisfaction [*Civ. Code § 1523*].

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§ 6.12 Execution of Accord Required

Though the parties to an accord are bound to execute it, it does not extinguish the obligation until it is fully executed [*Civ. Code § 1522*].

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§ 6.13 Part Performance as Extinguishing Obligation

Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing, in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation [*Civ. Code § 1524*].

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§ 6.14 Consideration

Except as provided in *Civ. Code § 1524* [*see § 6.13*], an accord and satisfaction, like any other valid contract, requires a consideration [*Western Concrete Structures Co. v. James I. Barnes Constr. Co. (1962) 206 Cal. App. 2d 1, 7-8, 23 Cal. Rptr. 506]* . Consideration may be found in the compromise of a dispute whether, in fact, the claim that is disputed is legally enforceable or not [*see Stub v. Belmont (1942) 20 Cal. 2d 208, 218, 124 P.2d 826]* . However, the dispute must be bona fide [*see Kelly v. David D. Bohannon Organization (1953) 119 Cal. App. 2d 787, 792, 260 P.2d 646]* , and an arbitrary refusal to pay a sum claimed, based on the mere pretense of the debtor, made for the obvious purpose of exacting terms which are inequitable and oppressive does not satisfy this requirement [*Berger v. Lane (1923) 190 Cal. 443, 448, 213 P. 45]* . Thus, for example, the payment of the exact amount of one invoice that is undisputed and in no way connected with another disputed invoice is not an accord and satisfaction as to the latter since there is no consideration for the accord [*Western Concrete Structures Co. v. James I. Barnes Constr. Co. (1962) 206 Cal. App. 2d 1, 7-8, 23 Cal. Rptr. 506]* .

Nevertheless, part performance of an obligation when expressly accepted by the creditor in writing, in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation [*Civ. Code § 1524*; *see also Civ. Code § 1541* (written release without new consideration)]. This is true when the underlying obligation is imposed by a judgment [*Schwartz v. Cal. Claim Service (1942) 52 Cal. App. 2d 47, 52-56, 125 P.2d 883* ; *see also Petroleum Collections Inc. v. Sulser (1968) 265 Cal. App. 2d Supp. 976, 976-979, 70 Cal. Rptr. 537* (accord and satisfaction found in acceptance of a check with a release endorsement for less than the amount of the judgment)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawConsiderationGeneral OverviewContracts LawPerformanceAccord & SatisfactionCommercial Law (UCC)Negotiable Instruments (Article 3)EnforcementEffectsAccord & Satisfaction

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§ 6.15 Checks

[1] With "Payment in Full" Notation

Two provisions govern tender of checks in full satisfaction of disputed or unliquidated claims: *Civ. Code § 1526(a)* and *Com. Code § 3311*. Although arguably the debtor has a greater burden of proof under *Com. Code § 3311*, especially if the creditor is an organization, the creditor's striking out the notation before it negotiates the check will defeat a claim of accord and satisfaction under *Civ. Code § 1526(a)*. Under *Com. Code § 3311*, the creditor's obtaining payment of the instrument is sufficient to discharge the disputed claim, unless it tenders repayment within 90 days after the instrument was paid [*Com. Code § 3311(a)(3), (c)(2)*]. This repayment option is not available to a creditor that is an organization which, within a reasonable time before the tender, notified the debtor to send communications concerning disputed debts to a designated person, office, or place [*Com. Code § 3311(c)(2)*]. Nor is it available if, before collecting the check, the creditor, or an agent of the creditor having direct responsibility with respect to the disputed obligation, knew the tender was intended as full satisfaction [*Com. Code § 3311(c), (d)*].

When the creditor is an organization and proves that within a reasonable time before the tender, it sent a conspicuous statement to the debtor that communications concerning disputed debts, including tenders of instruments as full satisfaction of a debt, are to be sent to a designated person, office, or place, the disputed debt will not be discharged unless the instrument or accompanying communication was received by that designated person, office, or place [*Com. Code § 3311(c)(1)*; *cf. Civ. Code § 1526(a)* (creditor's negotiation of check inadvertently or without knowledge of notation defeats accord); *but see Com. Code § 3311(d), below* (alternative proof for discharge)]. A disputed debt is discharged, however, if the debtor proves that, within a reasonable time before collection of the instrument was initiated, the creditor, or an agent of the creditor having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim [*Com. Code § 3311(d)*]. Discharge under *Com. Code § 3311(d)* is available even against an organizational creditor that gave notice where or to whom communications regarding disputed debts should be directed [*Com. Code § 3311(b)*].

Com. Code § 3311 is slightly broader in that it applies to tender of any instrument, while *Civ. Code § 1526(a)* applies only to checks and drafts.

Under *Civ. Code § 1526(a)*, when a claim is disputed or unliquidated and a check or draft is tendered by the debtor in settlement in full discharge of the claim, and the words "payment in full" or other words of similar meaning are notated on the check or draft, the acceptance of the check or draft does not constitute an accord and satisfaction if the creditor protests against accepting the tender in full payment by striking out or otherwise deleting that notation or if the acceptance of the check or draft was inadvertant or without knowledge of the notation [*Civ. Code § 1526(a)*; *see Berger v. Lane (1923) 190 Cal. 443, 451-453, 213 P. 45* (whether notation on check gave creditor notice and whether debt was disputed as questions of fact, thus nonsuit improper)]. Some questions remain unaddressed by *Civ. Code § 1526(a)*, such as whether a notation attached to the check, rather than on it is sufficient, and whether a protest other than striking out the notation will prevent an accord and satisfaction [*see, e.g., Potter v. Pacific Coast Lumber Co. (1951) 37 Cal. 2d 592, 597-598, 234 P.2d 16* (notation on accompanying voucher is sufficient; other protest does not prevent accord and satisfaction); *Besco Enterprises, Inc. v. Carole, Inc. (1969) 274 Cal. App. 2d 42, 44, 78 Cal. Rptr. 645* (creditor's retention of check without cashing it and prompt notification to debtor of rejection prevent accord and satisfaction)].

For a form for an affirmative defense of accord and satisfaction under *Civ. Code § 1526(a)*, see *§ 6.42*.

Under *Com. Code § 3311*, the debtor must also prove the following [*see* optional language in § 6.42]:

- The tender was in good faith [*Com. Code § 3311(a)(1)*; *see Com. Code § 3101(a)(4)* (honesty in fact and observance of reasonable commercial standards of fair dealing)];

- The dispute was bona fide [*Com. Code § 3311(a)(2)*]. This requirement was also imposed by cases decided prior to enactment of *Civ. Code § 1526* [*see, e.g., Potter v. Pacific Coast Lumber Co. (1951) 37 Cal. 2d 592, 597, 602, 234 P.2d 16* ; *Berger v. Lane (1923) 190 Cal. 443, 448, 453, 213 P. 45]* ; and

- The statement that the instrument is tendered in full satisfaction of the claim was conspicuous [*Com. Code § 3311(b)*; *see Com. Code § 1201(b)(10)* (statement qualifies as conspicuous if reasonable person against whom it is to operate ought to have noticed it; whether term is conspicuous is for decision by court)].

Com. Code § 3311(b) specifies that the statement that the instrument is tendered in full satisfaction of the claim may be on the instrument or on an accompanying written communication. Again, cases decided prior to enactment of *Civ. Code § 1526* considered a statement accompanying the check to be sufficient [*see, e.g., Potter v. Pacific Coast Lumber Co. (1951) 37 Cal. 2d 592, 597-598, 234 P.2d 16]* .

If there are two obligations on the part of the debtor to the creditor, one disputed and the other not disputed, the debtor transmits a check in the exact amount of the undisputed claim with the notation that "Acceptance of this check acknowledges payment in full of all moneys due to date and specifically cancels ... [the two obligations]," and the creditor cashes the check, there is no accord and satisfaction. The check is simply payment in full of the undisputed obligation, and there is no part performance of the disputed obligation and hence no consideration for its extinguishment [*Western Concrete Structures Co. v. James I. Barnes Constr. Co. (1962) 206 Cal. App. 2d 1, 6-7, 23 Cal. Rptr. 506]* . To have constituted an accord and satisfaction of the disputed claim, the check should have been in an amount greater than the amount of the undisputed claim.

If the claim is liquidated and undisputed, a check for less than the full amount of the claim tendered in full payment may discharge the claim under *Civ. Code § 1524* [*Petroleum Collections, Inc. v. Sulser (1968) 265 Cal. App. 2d Supp. 976, 976-979, 70 Cal. Rptr. 537* ; *Schwartz v. California Claim Service, Ltd. (1942) 52 Cal. App. 2d 47, 54-56, 125 P.2d 883]* .

[2] Tendered Pursuant to Composition or Extension Agreement

Notwithstanding *Civ. Code § 1526(a)*, the acceptance of a check or draft constitutes an accord and satisfaction if a check or draft is tendered pursuant to a composition or extension agreement between a debtor and its creditors pursuant to which all creditors of the same class are accorded similar treatment, and the creditor receives the check or draft with knowledge of the restriction [*Civ. Code § 1526(b)*]. A creditor is conclusively presumed to have knowledge of the restriction if a creditor either [*Civ. Code § 1526(b)*]:

- Has, previous to the receipt of the check or draft, executed a written consent to the composition or extension agreement; or

- Has been given, not less than 15 days or more than 90 days prior to receipt of the check or draft, notice in writing that a check or draft will be tendered with a restrictive endorsement and that acceptance and cashing of the check or draft will constitute an accord and satisfaction.

For purposes of *Civ. Code § 1526(b)(2)*, mailing the notice by first-class mail, postage prepaid, addressed to the address shown for the creditor on the debtor's books or such other address as the creditor may designate in writing constitutes notice [*Civ. Code § 1526(d)*].

[3] Tendered in Conjunction With Release of Claim

Notwithstanding *Civ. Code § 1526(a)*, the acceptance of a check or draft by a creditor constitutes an accord and satisfaction when the check or draft is issued pursuant to or in conjunction with a release of a claim [*Civ. Code § 1526(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAccord & SatisfactionCommercial Law (UCC)Negotiable Instruments (Article 3)EnforcementEffectsAccord & Satisfaction

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§ 6.16 Fraud, Duress, Menace, Undue Influence, Mistake

If the consent to an accord and satisfaction is obtained through fraud, duress, menace, undue influence, or mistake [*see Civ. Code § 1567, 1572*], the accord may be rescinded [*see Civ. Code § 1689(b)(1)*] by notice and restoration of the value received [*see Civ. Code §§ 1681, 1692*] since an accord and satisfaction is subject to the rules generally applicable to other agreements [*see Dobinson v. McDonald (1891) 92 Cal. 33, 37, 27 P. 1098* (fraud); *see also Rabinowitz v. Kandel (1969) 1 Cal. App. 3d 961, 965, 81 Cal. Rptr. 897* (primary principles governing law of contracts apply to accord and satisfaction)].

Even if a unilateral mistake is not discovered until after the nonmistaken party has fully performed the accord, rescission would be required if the nonmistaken party should have known that the mistake was made [*Bldg. Serv. Emp. Pension Tr. v. Amer. Bldg. Maint. (9th Cir. 1987) 828 F.2d 576, 578* (miscalculation of interest in demand letter determined under California law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAccord & SatisfactionContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawFormationAmbiguity & MistakeUnilateral MistakeContracts LawDefensesDuress & Undue InfluenceGeneral Overview

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§ 6.17 Payment of Uncontested Amount

It is the public policy of California, in the best interests of the taxpayer and the litigant, to encourage fair dealing and to promote justice by reducing litigated matters to the lowest level of jurisdiction. In case of a dispute over total money due on a contract where it is conceded by the parties that part of the money is due, the debtor may pay, without condition, the amount conceded to be due, leaving to the other party all remedies to which he might otherwise be entitled as to any balance claimed. If any conditions are attached to the payment, this rule is not deemed to limit the remedies available to the other party under other provisions of law on the original amount claimed [*Civ. Code § 1525*].

Civ. Code § 1525 does not limit the rights of the parties under accord and satisfaction and makes no substantive change in the law in effect prior to its enactment [*see* Comment, "Review of 1963 Code Legislation: Civil Code," 38 State BJ 636, 648 (1963)].

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§ 6.18 Related Transactions Distinguished

An accord and satisfaction may result from a disputed or nondisputed obligation arising out of contract or tort [*see* § 6.14]. The accord is itself a contract, but while the parties are bound to perform it, it does not extinguish the original obligation until it is performed, that is, until there is satisfaction [*Civ. Code §§ 1522, 1523*].

Being a contract, an accord usually must be supported by consideration (settlement of disputed claim), although some accords need not be, provided there is partial performance of the original obligation which the creditor accepts or agrees to accept in writing as satisfaction [*see Civ. Code § 1524*].

[1] Novation

A novation is also a contract [*Civ. Code § 1532*], requires consideration (mutual promises) [*see Bush v. Vernon (1955) 135 Cal. App. 2d 33, 37, 286 P.2d 903]* and, like an accord and satisfaction, may arise out of a disputed or nondisputed obligation arising out of contract or tort. Usually, however, it arises out of a nondisputed contract obligation [*see, e.g., Richardson v. Hislop (1930) 109 Cal. App. 440, 450, 293 P. 168]* .

A novation consists of the substitution of a new party to the original obligation for an old one [*Civ. Code § 1531(2), (3)*; *Alexander v. Angel (1951) 37 Cal. 2d 856, 860, 236 P.2d 561* ; *see also Civ. Code § 1533* for grounds of rescission of novation] or of a new obligation between the same parties with the intent to extinguish the old obligation [*Civ. Code § 1531(1)*; *see also Civ. Code § 1530*]. Hence, to the extent that it consists of the substitution of one obligation for another, it resembles an accord. The difference is that mere execution of an accord without satisfaction does not extinguish the underlying obligation, whereas the mere execution of the novation does [*see Gardiner v. Gaither (1958) 162 Cal. App. 2d 607, 620, 329 P.2d 22* , distinguishing a novation and executory accord on this ground; *but cf. Silvers v. Grossman (1920) 183 Cal. 696, 699, 192 P. 534* where the court, in failing to discuss novation, by way of dictum stated that an accord could provide either for performance of an act *or* the giving of a promise as consideration for the extinction of the obligation; *see also Everhardy v. Union Finance Co. (1931) 115 Cal. App. 460, 466, 1 P.2d 1024* (delivery of 100 shares of stock and promise to issue 300 more as accord and satisfaction)]. A novation, like an unsatisfied accord, is, however, an executory contract [*Beckwith v. Sheldon (1913) 165 Cal. 319, 323-324, 131 P. 1049]* . Whether a novation has taken place, or whether the agreement is an accord, is always dependent on the intention

of the parties [*Alexander v. Angel (1951) 37 Cal. 2d 856, 862, 236 P.2d 561* ; *Paykar Construction, Inc. v. Spilat Construction Corp. (2001) 92 Cal. App. 4th 488, 494, 111 Cal. Rptr. 2d 863* (subcontractor's settlement with property owners and acceptance of promissory note in lieu of original debt showed no intent to also substitute note for general contractor's obligation to subcontractor, particularly in light of subcontractor's dismissal of action against them without prejudice); *Goodman v. Citizens Life & Cas. Ins. Co. (1967) 253 Cal. App. 2d 807, 816, 61 Cal. Rptr. 682]* .

In consequence of a novation, the rights and duties of the parties are governed by the new agreement alone, and a failure to perform under it does not operate to revive the extinguished obligation [*Alexander v. Angel (1951) 37 Cal. 2d 856, 862, 236 P.2d 561* ; *Richardson v. Hislop (1930) 109 Cal. App. 440, 451, 293 P. 168]* .

For a form for an affirmative defense based on novation to an action for damages for breach of contract, see Ch. 140, *Contracts* .

[2] Modification of Contract

Contracts are subject to modification by the parties, and such modifications in limited particulars resemble both novation and accords and satisfaction [*see* *Parkside Realty Co. v. MacDonald (1913) 166 Cal. 426, 430, 137 P. 21* (alleged novation held modification of contract only); *Goodman v. Citizens Life & Cas. Ins. Co. (1967) 253 Cal. App. 2d 807, 816-817, 61 Cal. Rptr. 682]* .

An oral contract existing on January 1, 1977, may be altered by consent of the parties in writing without new consideration and is extinguished thereby to the extent of the alteration [former Civ. Code § 1697]. A written contract existing on January 1, 1977, may be altered by a written contract or by an executed oral agreement and not otherwise [former Civ. Code § 1698].

A contract not in writing made on and after January 1, 1977, may be modified in any respect by consent of the parties, in writing, without a new consideration, and is extinguished thereby to the extent of the modification [*Civ. Code § 1697*]. A contract in writing made on and after January 1, 1977, may be modified by a contract in writing [*Civ. Code § 1698(a)*] or by an oral agreement to the extent that the oral agreement is executed by the parties [*Civ. Code § 1698(b)*]. Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds must be satisfied if the contract as modified is within its provisions [*Civ. Code § 1698(c)*; *see Civ. Code § 1624* (statute of frauds)]. In an appropriate case, these rules do not preclude the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts [*Civ. Code § 1698(d)*; *see* Ch. 140, *Contracts* and Ch. 530, *Statute of Frauds*].

A modification of a contract is thus still a contract which alters an obligation under an existing contract. The preexisting obligation may or may not have been the subject of a dispute between the parties.

To the extent that a novation and an accord and satisfaction may arise out of a preexisting contractual liability, they resemble a modification. The modification, however, is limited to a part only of the underlying obligation [*Grant v. The Aerodraulics Co. (1949) 91 Cal. App. 2d 68, 74, 204 P.2d 683]* , whereas both an accord and a novation go to the whole obligation. To the extent that a modification extinguishes the underlying obligation, it resembles a novation. To the extent that it may require no new consideration, it resembles an accord and satisfaction under *Civ. Code § 1524* (acceptance in writing of part performance in satisfaction of obligation) and a written release [*see Civ. Code § 1541*].

[3] Compromise

A compromise is an agreement arrived at either in court or out of court which settles a dispute between the parties on what appears to them to be equitable terms, having regard to the uncertainty they are in regarding the facts or the law

and the facts together [Black's Law Dictionary (4th ed); *Kelly v. Steinberg (1957) 148 Cal. App. 2d 211, 219, 306 P.2d 955* ; *Putman v. Cameron (1954) 129 Cal. App. 2d 89, 94, 276 P.2d 102* ; for discussion of the effect of *Code Civ. Proc. § 998* on a party's failure to accept a compromise offer in a lawsuit, *see* Ch. 520, *Settlement and Release*].

A compromise and settlement agreement is therefore a form of accord and satisfaction [*see Stub v. Belmont (1924) 20 Cal. 2d 208, 217-218, 124P.2d 826]* or novation [*see Armstrong v. Sacramento Valley R. Co. (1919) 179 Cal. 648, 651, 178 P. 516]* , depending on the intention of the parties at the time of its execution as to its effect on the underlying obligation. The intention is ascertained from the terms of the agreement or, if the terms are ambiguous, from the terms of the agreement and the conduct of the parties or other evidence disclosing their intentions.

[4] Release

A release is the abandonment, relinquishment, or giving up of a right or claim to the person against whom it might have been demanded or enforced [*Pellett v. Sonotone Corp. (1945) 26 Cal. 2d 705, 711, 160 P.2d 783* ; In re Mission Ins. Co. (1995) 41 Cal. App. 4th 828, 838, 48 Cal. Rptr. 2d 209]. The right or claim relinquished may have arisen from either a tort or contract obligation.

Civ. Code § 1541 provides that an obligation is extinguished by a release therefrom given to the debtor by the creditor, on a new consideration, or in writing with or without consideration [*see also Civ. Code §§ 1542, 1543*].

A release therefore resembles a novation in that it extinguishes the underlying obligation, although no new contract results, and to the extent that no new consideration is required it resembles an accord and satisfaction under *Civ. Code § 1524* (acceptance in writing of part performance in satisfaction of obligation).

For forms for use in actions involving releases, see Ch. 520, *Settlement and Release* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAccord & SatisfactionTortsProcedureSettlementsReleasesValidityCommercial Law (UCC)Negotiable Instruments (Article 3)EnforcementEffectsAccord & SatisfactionContracts LawPerformanceNovationContracts LawTypes of ContractsSettlement Agreements

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[Reserved]

§§ 6.19[Reserved]

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1-6 California Forms of Pleading and Practice--Annotated § 6.30

§ 6.30 Related Matthew Bender Publications

For memoranda of points and authorities related to forms in this chapter, see California Points and Authorities, Ch. 11, *Accord and Satisfaction*

For transactional forms related to forms in this chapter, see California Legal Forms, Ch. 77, *Discharge of Obligations*

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1-6 California Forms of Pleading and Practice--Annotated § 6.31

§ 6.31 State Statutes

Obligation defined. *Civ. Code §§ 1427, 1428*

Accord defined. *Civ. Code § 1521*

Satisfaction defined. *Civ. Code § 1523*

Execution of accord required. *Civ. Code § 1522*

Acceptance of consideration of accord is satisfaction. *Civ. Code § 1523*

Part performance extinguishes obligation. *Civ. Code § 1524*

Payment of uncontested amount. *Civ. Code § 1525*

Checks. *Civ. Code § 1526*

Effect of tendering instrument with notation that it is in full satisfaction of unliquidated or disputed claim. *Com. Code § 3311*

Novation. *Civ. Code § 1530 et seq.*

Release. *Civ. Code § 1541 et seq.*

Rescission. *Civ. Code § 1688 et seq.*

Satisfaction of judgment. *Code Civ. Proc. § 675(a)*

Admissibility of offer to compromise. *Evid. Code § 1152*

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1-6 California Forms of Pleading and Practice--Annotated § 6.32

§ 6.32 Decisions

[1] Accord and Satisfaction by Check

Cashing check in satisfaction of judgment (case did not mention any notation on check) does not waive claim to postjudgment interest by application of *Civ. Code § 3290*, because that section only applies to interest as damages, not to postjudgment interest. *San Francisco Unified School Dist. v. San Francisco Classroom Teachers Assn. (1990) 222 Cal. App. 3d 146, 150, 272 Cal. Rptr. 38*

Creditor's act of cashing check with "payment in full" notation, other than inadvertently, with knowledge of notation, and without protest by striking out or otherwise deleting notice constitutes accord and satisfaction. *Potter v. Pacific Coast Lumber Co. (1951) 37 Cal. 2d 592, 597-598, 234 P.2d 16* ; *Russell v. Riley & Peterson (1927) 82 Cal. App. 728, 735-738, 256 P. 557*

Com. Code § 1308 (performance or acceptance under reservation of rights) does not abrogate rule of *Potter v. Pacific Coast Lumber Co. (1951) 37 Cal. 2d 592, 234 P.2d 16* , and accord and satisfaction is not defeated by notation on check tendered in "full payment" of amount due that payment was accepted "without prejudice and subject to final determination of amount due." *Connecticut Printers, Inc. v. Gus Kroesen, Inc. (1982) 134 Cal. App. 3d 54, 61, 184 Cal. Rptr. 436* ; cf. *Civ. Code § 1526(a)* (creditor's act of striking out "payment in full" notation before cashing check prevents accord and satisfaction)

Creditor receiving check as payment in full is not required to return it prior to demand therefor [*see Civ. Code § 1505*] as long as creditor gives notice of refusal to accept check and check does not constitute accord and satisfaction. *Besco Enterprises, Inc. v. Carole, Inc. (1969) 274 Cal. App. 2d 42, 44-45, 78 Cal. Rptr. 645*

No accord and satisfaction arises from cashing of check with "full settlement" notation when subsequent conduct of parties clearly shows they did not consider check final settlement. *Owens v. Noble (1946) 77 Cal. App. 2d 209, 215, 175 P.2d 241*

[2] Consideration

Accord and satisfaction, like any other valid contract, requires consideration. *Western Concrete Structures Co. v. James I. Barnes Constr. Co. (1962) 206 Cal. App. 2d 1, 7, 23 Cal. Rptr. 506* ; *Rogers v. Rogers (1942) 49 Cal. App. 2d 366, 369, 121 P.2d 819*

Consideration is not required in written agreement under *Civ. Code § 1524*. *Schwartz v. Cal. Claim Service (1942) 52 Cal. App. 2d 47, 53-55, 125 P.2d 883*

Accord and satisfaction is valid, when there is no writing as specified in *Civ. Code § 1524*, and when required to be founded on sufficient consideration. *Cloyne v. Levy (1915) 26 Cal. App. 637, 640, 148 P. 224*

Obligation is not extinguished by part performance unless expressly accepted by creditor in writing, in satisfaction, or rendered in pursuance of agreement in writing for that purpose. *Dobinson v. McDonald (1891) 92 Cal. 33, 37, 27 P. 1098*

Void contract is no basis for accord and satisfaction. *Burns v. Grosvenor Inglis Corp (1932) 120 Cal. App. 688, 695, 8 P.2d 546*

[3] Definition

Accord and satisfaction defined. *B. & W. Engineering Co. v. Beam (1918) 23 Cal. App. 164, 170, 137 P. 624*

Establishing accord and satisfaction of basic contract claim is a complete defense to all other claims of parties arising out of same theory of recovery. *Thompson v. Williams (1989) 211 Cal. App. 3d 566, 575-576, 259 Cal. Rptr. 518* (fraud, intentional and tortious interference with prospective business advantage, breach of implied covenant of and fair dealing in fiduciary obligations)

Accord and satisfaction in disability insurance claim. *Mathews v. Pacific Mut. Life Ins. Co. (1941) 47 Cal. App. 2d 424, 428-429, 118 P.2d 10*

[4] Elements

Elements of accord are (1) proper subject matter; (2) competent parties; (3) consent or meeting of minds of parties; (4) consideration. *Republic Indem. Co. v. Maier Brewing Co. (1967) 249 Cal. App. 2d 495, 499-500, 57 Cal. Rptr. 670* ; *Kelly v. David D. Bohannon Organization (1953) 119 Cal. App. 2d 787, 792, 260 P.2d 646* ; Moore v. Bartholomae Corp. (1945) *69 Cal. App. 2d, 474, 478, 159 P.2d 436* , *69 Cal. App. 2d 474, 159 P.2d 436*

Accord and satisfaction is required to be predicated on bona fide dispute. *Potter v. Pacific Coast Lumber Co. (1951) 37 Cal. 2d 592, 597, 234 P.2d 16* ; *Berger v. Lane (1923) 190 Cal. 443, 448, 213 P. 45* ; *Lapp-Gifford Co. v. Muscoy Water Co. (1913) 166 Cal. 25, 31, 134 P. 989* ; *Kelly v. David D. Bohannon Organization (1953) 119 Cal. App. 2d 787, 792, 260 P.2d 646*

Honest, not fraudulent, dispute between parties required for accord and satisfaction. *Potter v. Pacific Coast Lumber Co. (1951) 37 Cal. 2d 592, 597, 234 P.2d 16* ; *Kelly v. David D. Bohannon Organization (1953) 119 Cal. App. 2d 787, 792, 260 P.2d 646*

Plea of affirmative defense of accord and satisfaction as insufficient where it does not allege essential element of full performance of terms of accord. *Silvers v. Grossman (1920) 183 Cal. 696, 699, 192 P. 534* ; *Doran v. Dreyer (1956) 143 Cal. App. 2d 289, 291-292, 299 P.2d 661* .

Execution is required for accord and satisfaction. *Silvers v. Grossman (1920) 183 Cal. 696, 699, 192 P. 534*

Law of contracts is applicable to accord and satisfaction agreements. *Rabinowitz v. Kandel (1969) 1 Cal. App. 3d 961, 965, 81 Cal. Rptr. 897* ; *Whepley Oil Co. v. Associated Oil Co. (1935) 6 Cal. App. 2d 94, 112, 44 P.2d 670*

[5] Evidence

Evidence on whether there has been accord and satisfaction is not subject to objection that it violates rule that excludes evidence of offers of compromise [*Evid. Code § 1152*]. *Moving Picture etc. Union v. Glasgow Theaters, Inc. (1970) 6 Cal. App. 3d 395, 402, 86 Cal. Rptr. 33*

[6] Intent of Parties

Intent of parties determines existence of accord and satisfaction. *Creighton v. Gregory (1904) 142 Cal. 34, 41, 75 P. 569*

Obligation is not extinguished by part performance unless expressly accepted by creditor in writing, in satisfaction, or rendered in pursuance of agreement in writing for that purpose. *Dobinson v. McDonald (1891) 92 Cal. 33, 36-37, 27 P. 1098*

[7] Judgment

Satisfaction of judgment by accord and satisfaction [*see Code Civ. Proc. § 675(a)*]. *Schwartz v. Cal. Claim Service (1942) 52 Cal. App. 2d 47, 52-56, 125 P.2d 883*

[8] Pleading

Accord and satisfaction is required to be specially pleaded. *Hansen v. Fresno Jersey Farm Dairy Co. (1934) 220 Cal. 402, 409, 31 P.2d 359* ; *Owens v. Noble (1946) 77 Cal. App. 2d 209, 215, 175 P.2d 241* ; *B. & W. Engineering Co. v. Beam (1913) 23 Cal. App. 164, 177, 137 P. 624*

Where accord provides for giving of promise as consideration for extinction of obligation, giving and acceptance of such promsie in satisfaction of obligation is required to be averred in pleadings. *Silvers v. Grossman (1920) 183 Cal. 696, 699, 192 P. 534*

Facts constituting accord and satisfaction is required to be pleaded before it can be relied on as a defense. *Carpenter v. Markham (1916) 172 Cal. 112, 114, 155 P. 644*

Though accord and satisfaction and release are affirmative defenses which must be specially pleaded, they may be raised on motion for summary judgment even though they are not raised by answer. *Ramos v. City of Santa Clara (1973) 35 Cal. App. 3d 93, 96-97, 110 Cal. Rptr. 485*

Exceptions to requirement that accord and satisfaction be specially pleaded. *Riskas v. De La Montanya (1956) 145 Cal. App. 2d 636, 640, 302 P.2d 821* ; *Kinkle v. Fruit Growers Supply Co. (1944) 63 Cal. App. 2d 102, 111, 146 P.2d 8* ; *Russell v. Riley & Peterson (1927) 82 Cal. App. 728, 736, 256 P. 557* ; *B. & W. Engineering Co. v. Beam (1913) 23 Cal. App. 164, 177, 137 P. 624*

Allegation of unexecuted agreement for satisfaction of claim without allegation of agreement to accept defendant's mere promise to pay is an insufficient allegation of accord and satisfaction. *Silvers v. Grossman (1920) 183 Cal. 696, 699-700, 192 P. 534*

[9] Proof

Proof of both accord and satisfaction is necessary. *Berger v. Lane (1923) 190 Cal. 443, 447, 213 P. 45*

Accord agreement implied from circumstances. *Rankin v. Miller (1960) 179 Cal. App. 2d 133, 139, 3 Cal. Rptr. 496*

[10] Related Defenses

Novation distinguished from accord. *Gardiner v. Gaither (1958) 162 Cal. App. 2d 607, 630, 329 P.2d 22*

Effect of release in extinguishing cause of action. *Pellett v. Sonotone Corp. (1945) 26 Cal. 2d 705, 711, 160 P.2d 783*

Release of contractual obligation. *Moore v. Rogers (1958) 157 Cal. App. 2d 192, 193, 320 P.2d 524*

Compromise is settlement of differences by mutual concessions. *Isaacson v. City of Oakland (1968) 263 Cal. App. 2d 414, 421, 69 Cal. Rptr. 379*

Compromise and settlement treated as accord and satisfaction. *Stub v. Belmont (1942) 20 Cal. 2d 208, 218, 124 P.2d 826*

Unqualified agreement in writing to release existing debt for amount of bonds offered, when executed, is accord and satisfaction. *McAllister v. Drapeau (1939) 14 Cal. 2d 102, 111, 92 P.2d 911* ; *Morrison v. Landers (1943) 56 Cal. App. 2d 607, 613-614, 133 P.2d 34*

Check bearing endorsement stating clearly that it is accepted as complete discharge of debt is satisfaction. *Petroleum Collections Inc. v. Sulser (1968) 265 Cal. App. 2d Supp. 976, 979, 70 Cal. Rptr. 537*

[11] Rescission

Summary judgment based on accord and satisfaction is error if one party's unilateral mistake in demand letter should have been known to other party; triable question of fact exists regarding whether attorney for nonmistaken party should have known that amount of interest claimed in demand letter was based on miscalculation. *Bldg. Serv. Emp. Pension Tr. v. Amer. Bldg. Maint. (9th Cir. 1987) 828 F.2d 576, 578* (determined under California law)

[12] Statutory Prohibition

Conditional payment of wages does not constitute accord and satisfaction where prohibited by *Lab. Code § 206*. *Reid v. Overland Machined Products (1961) 55 Cal. 2d 203, 207-208, 10 Cal. Rptr. 819, 359 P.2d 251*

[13] Summary Judgment

Summary judgment is appropriate procedure to decide defense of accord and satisfaction. *Thompson v. Williams*

(1989) 211 Cal. App. 3d 566, 571, 259 Cal. Rptr. 518 ; *Ramos v. City of Santa Clara (1973) 35 Cal. App. 3d 93, 96, 110 Cal. Rptr. 485*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawConsiderationGeneral OverviewContracts LawPerformanceAccord & SatisfactionContracts LawPerformanceNovationTortsProcedureSettlementsReleasesValidityCommercial Law (UCC)Negotiable Instruments (Article 3)EnforcementEffectsAccord & Satisfaction

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§ 6.33 Law Reviews

Burnham, *Accord and Satisfaction in California: A Trap for the Unwary, 30 Santa Clara L. Rev. 473 (1990)*

Walter, *The Rise and Fall of U.C.C. Section 1-207 and the Full Payment Check--Checkmate? 21 Loy. L.A.L. Rev. 81 (1987)*

Smith, *Exceptions to Consideration Requirement in California, 12 Hastings L.J. 377 (1961)*

Comment, *Bankruptcy Discharges Note Accepted to Satisfy Nondischargeable Tort Claim, 1 Stan. L. Rev. 757 (1949)*

Note, *Accord and Satisfaction--Acceptance of Check Corresponding in Amount with Accompanying Statement, 1 Cal. L. Rev. 459 (1913)*

Note, *Accord and Satisfaction--Effect of Creditor's Cashing Check for Less Than Amount of Debt, 1 Cal. L. Rev. 257 (1913)*

Note, *Accord and Satisfaction: Executory Accord: Enforceability, 12 Cal. L. Rev. 411 (1924)*

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§ 6.34 Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 950-957, 959, 960 (10th ed. 2005)

Witkin, California Procedure, vol. 5, *Pleading*, § 1021 (4th ed. 1997)

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[Reserved]

§§ 6.35[Reserved]

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PART IV FORMS

1-6 California Forms of Pleading and Practice--Annotated § 6.40

§ 6.40 Affirmative Defense of Accord and Satisfaction [Civ. Code §§ 1521-1523]--Oral Accord--General Form

[1] FORM Affirmative Defense of Accord and Satisfaction [Civ. Code §§ 1521-1523]--Oral Accord--General Form
AS A [_____ (*if more than one, specify number, e.g.*, FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.*, SECOND) CAUSE OF ACTION], defendant alleges that:
1. Prior to _____ [*date*], a bona fide dispute existed between plaintiff and defendant as to _____ [*specify nature of dispute as to obligation, e.g.*, the amount] of the obligation set forth in the complaint on file herein. On or about _____ [*date*], plaintiff and defendant entered into an accord by the terms of which defendant orally agreed to _____ [*e.g.*, pay] and plaintiff orally agreed to accept from defendant the _____ [*e.g.*, sum of $_____] in full satisfaction and discharge of the oblgiation alleged in the complaint on file herein.
2. Pursuant to the accord and in full execution thereof, defendant on _____ [*date*], _____ [*specify e.g.*, paid] to plaintiff and plaintiff accepted from defendant _____ [*specify, e.g.*, the sum of $_____] in full satisfaction and discharge of the obligation alleged in the complaint on file herein.

[2] Use of Form

The form in *[1], above,* is for use as an affirmative defense [*see Code Civ. Proc. § 431.30(b)(2)*] in an answer to a complaint based on the breach of an obligation [*see Civ. Code §§ 1427, 1428* (obligation defined)] which has been extinguished by an oral accord and satisfaction [*see Civ. Code §§ 1521-1523*].

The form alleges (1) a disputed obligation and oral agreement between the parties thereto that the obligor pay or do and the obligee receive a sum of money less than or something different from that to which the obligee is entitled under the principal obligation (Paragraph 1) [*see Civ. Code § 1521* (accord defined); *B. & W. Engineering Co. v. Beam (1913) 23 Cal. App. 164, 170, 137 P. 624]* ; and (2) that pursuant to the accord the obligor paid or performed and the obligee accepted in full satisfaction and discharge of the obligation, the sum or other thing specified in the accord in full satisfaction thereof (Paragraph 2) [*see Civ. Code §§ 1522* (execution of accord is required), 1523 (satisfaction defined)]. Accord and satisfaction is required to be specially pleaded [*Hansen v. Fresno Jersey Farm DairyCo. (1934) 220 Cal.*

402, 409, 31 P.2d 359 ; *Owens v. Noble (1946) 77 Cal. App. 2d 209, 215, 175 P.2d 241* ; *B. & W. Engineering Co. v. Beam (1913) 23 Cal. App. 164, 177, 137 P. 624]* .

[3] Cross References

For discussion and general forms of answers in which affirmative defenses may be included, see Ch. 26, *Answers*

For a form of allegation of accord and satisfaction in discharge of a promissory note, see Ch. 385, *Negotiable Instruments*

For a form of allegation of accord and satisfaction in a compromise, see Ch. 520, *Settlement and Release*

For a memorandum of points and authorities related to this form, see California Points and Authorities, ch. 11, *Accord and Satisfaction*

Witkin, California Procedure, vol. 5, *Pleading*, § 1021 (4th ed. 1997)

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 950-957 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAccord & SatisfactionCivil ProcedurePleading & PracticePleadingsAnswers

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1-6 California Forms of Pleading and Practice--Annotated § 6.41

§ 6.41 Affirmative Defense of Accord and Satisfaction [Civ. Code §§ 1521-1523]--Written Accord--General Form

[1] FORM Affirmative Defense of Accord and Satisfaction [Civ. Code §§ 1521-1523]--Written Accord--General Form
AS A [_____ (*if more than one, specify number, e.g.*, FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.*, SECOND) CAUSE OF ACTION], defendant alleges that:
1. Prior to _____ [*date*], a bona fide dispute existed between plaintiff and defendant as to _____ [*specify e.g.*, the amount] of the obligation set forth in the complaint on file herein.
On _____ [*date*], plaintiff and defendant entered into a written accord to extinguish the obligation on the contract specified in plaintiff's complaint herein. A copy of the accord is attached hereto as Exhibit "1" and made a part hereof.
2. On or about _____ [*date*], in accordance with the terms of the accord and in full execution thereof, defendant _____ [*specify, e.g.*, paid] to plaintiff _____ [*specify, e.g.*, the sum of $_____] which plaintiff accepted from defendant in full satisfaction and discharge of the obligation alleged in the complaint on file herein.

[2] Use of Form

The form in *[1], above*, is for use as an affirmative defense [*see Code Civ. Proc. § 431.30(b)(2)*] in an answer to a complaint based on the breach of an obligation [*see Civ. Code §§ 1427, 1428*] which has been extinguished by an accord and satisfaction [*see Civ. Code §§ 1521-1523*].

The form alleges performance by the obligor and acceptance thereof by the obligee of an agreement in writing in full satisfaction of a preexisting disputed obligation [*see Civ. Code §§ 1521-1524*; *B. & W. Engineering Co. v. Beam (1913) 23 Cal. App. 164, 175, 137 P. 624]* . A copy of the accord agreement is attached as an exhibit.

[3] Cross References

For discussion and general forms of answers in which affirmative defenses may be included, see Ch. 26, *Answers*

For a memorandum of points and authorities related to this form, see California Points and Authorities, Ch. 11, *Accord and Satisfaction*

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 959, 960 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAccord & SatisfactionCivil ProcedurePleading & PracticePleadingsAnswers

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§ 6.42 Affirmative Defense of Accord and Satisfaction [Civ. Code §§ 1521-1523]--Written Accord--Check [Civ. Code § 1526(a); Com. Code § 3311]

[1] FORM Affirmative Defense of Accord and Satisfaction [Civ. Code §§ 1521-1523]--Written Accord--Check [Civ. Code § 1526(a); Com. Code § 3311]
AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:
1. The amount due on the alleged _____ [*specify obligation*] sued on herein was on and previous to _____ [*date*], in dispute. [*If defense is asserted under Com. Code § 3311, add: Com. Code § 3311* The amount of the claim was subject to a bona fide dispute.] On or about that date, plaintiff and defendant entered into an accord and satisfaction extinguishing the _____ [*specify obligation*] as follows: defendant on or about that date as maker executed to plaintiff as payee a check for the sum of $_____, drawn on the _____ [*specify bank*] of _____ [*city*], California, in which bank defendant had funds sufficient to pay the check. A copy of the check, front and back, as canceled and endorsed, is attached hereto as Exhibit "1" and made a part hereof. On the back of the check is the following language: "_____ [*specify, e.g.*], This check is tendered as payment in full of _____ (*specify obligation extinguished*)]." [*If defense is asserted under Com. Code § 3311, add: Com. Code § 3311* Defendant's tender of the check was made in good faith.]
2. Defendant placed the check and a letter of explanation in an envelope addressed to plaintiff and deposited it in the United States mail at _____ [*city*], California. A copy of the letter, signed by defendant and addressed to plaintiff, is attached hereto as Exhibit "2" and made a part herof. In the letter defendant stated that the enclosed check was tendered by defendant to plaintiff in full satisfaction and discharge of the _____ [*specify obligation*]. [*If defense is asserted under Com. Code § 3311, add either of the following: Com. Code § 3311* The statement that the check was tendered as full satisfaction of the claim was conspicuous *or* Within a reasonable time before collection of the check was initiated, plaintiff or plaintiff's agent with direct responsibility with respect to the disputed obligation knew that the instrument was tendered in full satisfaction of the claim.]

3. Plaintiff received, endorsed, and cashed the check, and it was paid by defendant's bank.

[2] Use of Form

The form in *[1], above,* is for use as an affirmative defense [*see Code Civ. Proc. § 431.30(b)(2)*] in an answer to a complaint based on the breach of an obligation [*see Civ. Code §§ 1427, 1428*] which has been extinguished by an accord and satisfaction [*Civ. Code §§ 1521, 1523*]. It is for use when the complaint is based on an unliquidated or disputed claim and when the accord and satisfaction is evidenced by the creditor having knowingly cashed a check bearing the notation "payment in full" or a similar notation [*Civ. Code § 1526(a)*; *see § 6.15[1]*]. If this defense is used in an answer to a complaint based on a liquidated and undisputed claim, it is governed by *Civ. Code § 1524* [*see §§ 6.46, 6.47* and *Schwartz v. Cal. Claim Service (1942) 52 Cal. App. 2d 47, 54-56, 125 P.2d 883* ; *see also Petroleum Collections Inc. v. Sulser (1968) 265 Cal. App. 2d Supp. 976, 976-979, 70 Cal. Rptr. 537]* .

This defense alleges:

- that a preexisting obligation was disputed and that defendant executed a check for a sum of money to plaintiff indicating that endorsement and payment of the check was to constitute satisfaction in full of the obligation (Paragraph 1) [*see Civ. Code § 1526(a)*].

- that defendant mailed the check to plaintiff with a letter stating that the check was tendered in full satisfaction and discharge of the obligation (Paragraph 2).

- that plaintiff received, endorsed, and cashed the check and that it was paid by defendant's bank (Paragraph 3).

[3] Defense Asserted Under Commercial Code § 3311

While *Civ. Code § 1526(a)* applies only to checks and drafts, *Com. Code § 3311* is slightly broader in that it applies to tender of any instrument [*see § 6.15[1]*]. Furthermore, a debtor arguably has a greater burden of proof under *Com. Code § 3311*. Under that section, the debtor must also prove the following:

- The tender was made in good faith (optional language in Paragraph 1) [*Com. Code § 3311(a)(1)*];

- The dispute was bona fide (optional language in Paragraph 1) [*Com. Code § 3311(a)(2)*]; and

- The statement that the instrument is tendered in full satisfaction of the claim was conspicuous (optional language in Paragraph 2) [*Com. Code § 3311(b)*; *see also Com. Code § 1201(b)(10)*].

A claim will not be discharged under *Com. Code § 3311(b)*, however, if the creditor is an organization which proves that within a reasonable time before the tender, it sent a conspicuous statement to the debtor that communications concerning disputed debts, including tenders of instruments as full satisfaction of a debt, were to be sent to a designated person, office, or place and the instrument or accompanying communication was not received by that designated person, office, or place [*Com. Code § 3311(c)(1)*]. In addition, the claim will not be discharged if the claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted [*Com. Code § 3311(c)(2)*]. However, a disputed debt is discharged if the debtor proves that, within a reasonable time before collection of the instrument was initiated, the creditor or an agent of the creditor having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim (optional language in Paragraph 4) [*Com. Code § 3311(d)*]. Discharge under *Com. Code § 3311(d)* is available even against an organizational creditor that gave notice where or to whom communications regarding disputed debts should be directed [*Com. Code § 3311(b)*].

[4] Cross References

For discussion and general forms for answers in which affirmative defenses may be included, see Ch. 26, *Answers*

For a form for an allegation of accord and satisfaction in discharge of note, see Ch. 385, *Negotiable Instruments*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAccord & SatisfactionCommercial Law (UCC)Negotiable Instruments (Article 3)EnforcementEffectsAccord & Satisfaction

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1-6 California Forms of Pleading and Practice--Annotated § 6.43

§ 6.43 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] of Accord and Satisfaction [Civ. Code §§ 1521-1523]--Dispute Under Life Insurance Policy

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] of Accord and Satisfaction [Civ. Code §§ 1521-1523]--Dispute Under Life Insurance Policy
AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:
1. It was provided in the policy of life insurance, Exhibit "A" in plaintiff's complaint herein, that if _____ [*name*], deceased, the insured therein named, committed suicide within the first two years of the term, the policy should be null and void.
2. After the death of _____ [*name*], and the furnishing by plaintiff to defendant of proof of loss, a dispute arose between plaintiff and defendant whether _____ [*name*] had committed suicide within the first two years of the policy.
3. Plaintiff and defendant entered into _____ [an oral *or* a written] accord in which defendant agreed to pay and plaintiff agreed to receive the sum of $_____ in full satisfaction and discharge of the claim. On or about _____ [*date*], defendant tendered to plaintiff pursuant to the accord and in full execution thereof, and plaintiff accepted the sum of $_____ in full satisfaction and discharge of the claim.

[2] Use of Form

The form in *[1], above,* is for use as an affirmative defense [*see Code Civ. Proc. § 431.30(b)(2)*] in an answer to a complaint based on the breach of an obligation [*see Civ. Code §§ 1427, 1428*] to pay benefits under a life insurance policy which has been discharged by an accord and satisfaction [*see Civ. Code §§ 1521-1523*].

The form alleges (1) a disputed preexisting obligation between the parties (Paragraphs 1, 2) [*see B. & W. Engineering Co. v. Beam (1913) 23 Cal. App. 164, 170, 137 P. 624]* , and (2) an accord and satisfaction pursuant to which a sum of money was paid by the obligor to the obligee (Paragraph 3) [*see Civ. Code §§ 1521-1524*].

[3] Cross References

For discussion and general forms of answers in which affirmative defenses may be included, see Ch. 26, *Answers*

See generally Ch. 308, *Insurance*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAccord & SatisfactionInsurance LawLife InsuranceGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers

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1-6 California Forms of Pleading and Practice--Annotated § 6.44

§ 6.44 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] of Accord and Satisfaction [Civ. Code §§ 1521-1523]--Accord Substituting Payment of Shares of Stock for Money Debt

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] of Accord and Satisfaction [Civ. Code §§ 1521-1523]--Accord Substituting Payment of Shares of Stock for Money Debt
AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:
1. Prior to _____ [*date*], a bona fide dispute existed between plaintiff and defendant as to [*specify e.g.*, the amount of the obligation set forth in the complaint herein]. On or about _____ [*date*], and after the performance by plaintiff of the contract set forth in the complaint, plaintiff and defendant entered into _____ [an oral *or* a written] accord whereby defendant agreed to give to plaintiff and plaintiff agreed to accept _____ [*number*] shares of the stock of _____ [*name of corporation*] as full satisfaction of the obligation due plaintiff under the original contract.
2. On or about _____ [*date*], defendant transferred and delivered to plaintiff the _____ [*number*] shares of stock of _____ [*name of corporation*] and plaintiff received and accepted them in full execution of the aforementioned accord and in full satisfaction and discharge of the amount due him under the contract set forth in the complaint herein.

[2] Use of Form

The form in *[1], above*, is for use as an affirmative defense [*see Code Civ. Proc. § 431.30(b)(2)*] in an answer to a complaint based on the breach of an obligation [*see Civ. Code §§ 1427, 1428*] to pay money where the obligation has been discharged by an accord and satisfaction [*see Civ. Code §§ 1521-1523*] substituting the transfer of a certain number of shares of stock for the money obligation.

The form alleges (1) a preexisting obligation and an agreement to accept a certain number of shares of stock in full satisfaction of that obligation (Paragraph 1) [*see Civ. Code §§ 1521*]; and (2) receipt by plaintiff of the shares of stock from defendant pursuant to the accord and in full execution thereof (Paragraph 2) [*see Civ. Code §§ 1522, 1523*]. Also, an executed agreement substituting payment of bonds for preexisting obligation is deemed accord and satisfaction [*McAllister v. Drapeau (1939) 14 Cal. 2d 102, 111, 92 P.2d 911]* .

The agreement between the parties resembles a novation in that it consists of the substitution of a new obligation for the old one [*see Civ. Code §§ 1531(1)*]. The distinction, however, is that the parties under this form were bargaining for *performance* of the new agreement and did not intend that the new agreement itself extinguish the obligation. Had the creditor agreed to accept the promise of the debtor of performance, in lieu of performance, in extinguishment of the original obligation, the agreement would have been a novation.

[3] Cross References

For discussion and general forms of answers in which affirmative defenses may be included, see Ch. 26, *Answers*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAccord & SatisfactionCivil ProcedurePleading & PracticePleadingsAnswers

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1-6 California Forms of Pleading and Practice--Annotated § 6.45

§ 6.45 Affirmative Defense of Accord and Satisfaction [Civ. Code §§ 1521-1523]--Accord Substituting Conveyance of Property for Money Owed

[1] FORM Affirmative Defense of Accord and Satisfaction [Civ. Code §§ 1521-1523]--Accord Substituting Conveyance of Property for Money Owed
AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:
1. After the making of _____ [*specify obligation sued on, e.g.,* promissory note], the subject of the complaint herein, a bona fide dispute arose between the plaintiff and defendant as to _____ [*specify*]. On _____ [*date*], for the purpose of resolving that dispute, _____ [an oral *or* a written] accord was entered into between plaintiff and defendant whereby defendant agreed to execute to plaintiff a deed to the following described real property, to wit: _____ [*description of real property*].
2. Thereafter, and on _____ [*date*], defendant executed and delivered to plaintiff the deed to the above described property. Plaintiff accepted the deed in full execution of the accord and in full satisfaction and discharge of the debt alleged in the complaint. [The deed was recorded on _____ [*date*], in [*specify book, page, and records of the county in which it was recorded*.)]

[2] Use of Form

The form in *[1], above,* is for use as an affirmative defense [*see Code Civ. Proc. § 431.30(b)(2)*] in an answer to a complaint based on the breach of an obligation [*see Civ. Code §§ 1427, 1428*] which has been extinguished by an accord and satisfaction [*see Civ. Code §§ 1521-1523*] by substituting a conveyance of property for the original obligation.

The form alleges (1) a disputed preexisting obligation and an agreement to accept execution of a deed of property by defendant to plaintiff in satisfaction thereof (Paragraph 1) [*see Civ. Code § 1521*]; and (2) receipt by plaintiff of an executed deed to the property pursuant to the accord in full execution thereof (Paragraph 2) [*see Civ. Code §§ 1522, 1523*].

[3] Cross References

For discussion and general forms of answers in which affirmative defenses may be included, see Ch. 26, *Answers*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAccord & SatisfactionCivil ProcedurePleading & PracticePleadingsAnswers

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1-6 California Forms of Pleading and Practice--Annotated § 6.46

§ 6.46 Affirmative Defense of Part Performance of Obligation as Satisfaction [Civ. Code §§ 1524]--Acceptance in Writing

[1] FORM Affirmative Defense of Part Performance of Obligation as Satisfaction [Civ. Code §§ 1524]--Acceptance in Writing
AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:
1. On or about _____ [*date*], defendant was obligated to plaintiff _____ [*specify obligation, e.g.,* in the sum of $_____]. On or about _____ [*date*], defendant tendered to plaintiff in full satisfaction of such obligation _____ [*specify part performance of obligation tendered in full satisfaction, e.g.,* the sum of $_____].
2. On or about _____ [*date*], plaintiff accepted in writing _____ [*e.g.,* the sum of $_____] as full satisfaction of the agreement. A copy of the acceptance is attached hereto as Exhibit "1" and made a part hereof.

[2] Use of Form

The form in *[1], above,* is for use as an affirmative defense [*see Code Civ. Proc. § 431.30(b)(2)*] in an answer to a complaint based on the breach of an obligation [*see Civ. Code §§ 1427, 1428*] wich has been extinguished by acceptance in writing by the obligee of part performance by the obligor in full satisfaction of the obligation [*see Civ. Code § 1524*].

The form alleges (1) a preexisting obligation and tender by the obligor of part performance of the obligation in full satisfaction thereof (Paragraph 1) and (2) acceptance by the obligee of the tender in writing in full satisfaction of the obligation (Paragraph 2) [*see Civ. Code § 1524* (part performance of obligation expressly accepted by creditor in writing extinguishes obligation)].

[3] Cross References

For discussion and general forms of answers in which affirmative defenses may be included, see Ch. 26, *Answers*

For a memorandum of points and authorities related to this form, see California Points and Authorities, Ch. 11, *Accord and Satisfaction*

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 959, 960 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAccord & SatisfactionCivil ProcedurePleading & PracticePleadingsAnswers

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1-6 California Forms of Pleading and Practice--Annotated § 6.47

§ 6.47 Affirmative Defense of Part Performance of Obligation as Satisfaction [Civ. Code §§ 1524]--Pursuant to Written Agreement

[1] FORM Affirmative Defense of Part Performance of Obligation as Satisfaction [Civ. Code §§ 1524]--Pursuant to Written Agreement
AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:
1. On or about _____ [*date*], defendant was obligated to plaintiff _____ [*specify, e.g.*, in the sum of $_____]. On or about _____ [*date*], defendant and plaintiff entered into a written agreement by which defendant agreed to tender, and plaintiff agreed to accept, part performance of that obligation, in full satisfaction and discharge thereof, as follows: _____ [*allege nature of part performance as set out in agreement*]. A copy of the agreement is attached hereto as Exhibit "1" and made a part hereof.
2. On or about _____ [*date*], pursuant to the agreement, defendant tendered to plaintiff, and plaintiff accepted _____ [*specify part performance agreed on*] in full satisfaction and discharge of the obligation.

[2] Use of Form

The form in *[1], above,* is for use as an affirmative defense [*see Code Civ. Proc. § 431.30(b)(2)*] in an answer to a complaint based on the breach of an obligation [*see Civ. Code §§ 1427, 1428*] when the obligation has been extinguished by acceptance by the obligee of part performance in full satisfaction thereof pursuant to an agreement in writing for that purpose [*see Civ. Code § 1524*].

The form alleges (1) a preexisting obligation and a written agreement between the parties that the obligee accept part performance of the obligation in full satisfaction thereof (Paragraph 1) and (2) acceptance by the obligee of the agreed part performance in full satisfaction of the preexisting obligation (Paragraph 2) [*see Civ. Code § 1524* (part performance of obligation rendered pursuant to agreement in writing extinguishes obligation)].

[3] Cross References

For discussion and general forms of answers in which affirmative defenses may be included, see Ch. 26, *Answers*

For a memorandum of points and authorities related to this form, see California Points and Authorities, Ch. 11, *Accord and Satisfaction*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAccord & SatisfactionCivil ProcedurePleading & PracticePleadingsAnswers

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1-6 California Forms of Pleading and Practice--Annotated § 6.48

§ 6.48 Complaint for Damages [Civ. Code §§ 3300-3302] for Breach of Accord Agreement [Civ. Code §§ 1521, 1522]

[1] FORM Complaint for Damages [Civ. Code §§ 3300-3302] for Breach of Accord Agreement [Civ. Code §§ 1521, 1522]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	
Plaintiff,	)	NO. _____
	)	COMPLAINT FOR DAMAGES
vs.	)	(Breach of Accord Agreement)
	)	[Amount demanded _____
_____ [*name*]	)	(exceeds *or* does not exceed) $10,000]
Defendant.	)	[LIMITED CIVIL CASE]
	)	
	)	

Plaintiff alleges:
1. Defendant is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence*].
2. _____ [*Set forth nature of obligation which was to be extinguished by accord agreement, e.g.*, On _____ (*date*), defendant purchased a _____ from plaintiff].
3. On or about _____ [*date*], a dispute arose between plaintiff and defendant regarding defendant's obligation to plaintiff in that _____ [*specify*]. On or about _____ [*date*], plaintiff and defendant entered into _____ [a written *or* an oral] accord agreement by the terms of which

defendant agreed to _____ [*specify, e.g.*], pay to plaintiff the sum of $_____] and plaintiff agreed to accept _____ [*specify, e.g.*, the payment of $_____] in full satisfaction and discharge of defendant's obligation to plaintiff. [A copy of the agreement is attached as Exhibit "A" and incorporated by reference.]
4. Since _____ [*date*] plaintiff has been willing and able to accept defendant's performance of the accord agreement in satisfaction and discharge of defendant's obligation. There are no other terms or conditions of the accord agreement to be performed by plaintiff. Although demanded by plaintiff defendant has failed and refused to perform the accord agreement.

WHEREFORE, plaintiff prays judgment as follows:
1. For damages in the sum of $_____.
2. For interest on that sum from and after _____ [*date*] at the legal rate.

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION [*Code Civ. Proc. §§ 446, 2015.5*]
I, _____ [*name*], am the plaintiff in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in *[1], above*, is for use as a complaint for damages for breach of an accord agreement. An accord is an agreement [*Civ. Code § 1521*] which the parties are bound to perform [*Civ. Code § 1522*] and is governed by contract law [*Motion Picture etc. Union v. Glasgow Theaters, Inc. (1970) 6 Cal. App. 3d 395, 402, 403 n.1, 86 Cal. Rptr. 33]* .

Since the original obligation is not extinguished by an accord until the creditor accepts the consideration for the accord [*see Civ. Code §§ 1522, 1523*], the creditor has the option to bring an action on the original obligation instead of this action on the accord.

[3] Allegations

The complaint alleges:

- The residence of the defendant (Paragraph 1) [*see Code Civ. Proc. § 395(a)* and Ch. 571, *Venue*].
- The nature of the obligation which was to be extinguished by the accord agreement (Paragraph 2).
- A dispute as to the obligation and the making of the accord agreement (Paragraph 3) [*see Civ. Code*

§ 1521].

- Plaintiff's willingness and ability to accept defendant's performance, that no other performance is due from plaintiff, and demand for and refusal of defendant's performance (Paragraph 4) [*see* generally Ch. 140, *Contracts*].

For a complaint seeking specific performance of an accord agreement, see *§ 6.49*.

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[5] Verification

While verification of this complaint is not required, verification will require any answer to also be verified, if the action is an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[6] Cross References

For alternative forms for complaints in contract actions, see Ch. 140, *Contracts*

For alternative forms for prayers and verification, see Ch. 420, *Prayers* , and Ch. 572, *Verification*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAccord & SatisfactionContracts LawBreachNonperformance

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1-6 California Forms of Pleading and Practice--Annotated § 6.49

§ 6.49 Complaint for Specific Performance [Civ. Code § 3384] to Compel Satisfaction of Accord [Civ. Code § 1522]

[1] FORM Complaint for Specific Performance [Civ. Code § 3384] to Compel Satisfaction of Accord [Civ. Code § 1522]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
	)	NO. _____
vs.	)	COMPLAINT FOR SPECIFIC PERFORMANCE
	)	(To Compel Satisfaction of Accord)
_____ [*name*],	)	
Defendant(s).	)	
	)	
	)	

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence*].
[*EITHER*]

2. On or about _____ [*date*], at _____ [*location*], defendant as payor, for full and adequate consideration, executed to plaintiff as payee, a promissory note of that date in the amount of

$_____, with interest at the rate of _____ percent per annum until paid. A copy of the promissory note is attached as Exhibit "A" and incorporated by reference.
[*OR*]

2. On or about _____ [*date*], at _____ [*location*], plaintiff and defendant entered into _____ [an oral *or* a written] agreement to _____ [*specify nature of original obligation*].

3. Thereafter, and on _____ [*date*], plaintiff and defendant entered into _____ [an oral *or* a written] accord, [a copy of which is attached as Exhibit "B" and incorporated by reference,] by the terms of which defendant agreed to _____ [*specify nature of defendant's obligation in the accord, e.g.,* deed to plaintiff certain real property generally described as _____ (*specify*)], and plaintiff agreed to accept the _____ [*specify nature of defendant's new obligation*] in full satisfaction and discharge of the _____ [*specify previous obligation discharged, e.g.,* note].

4. The consideration set forth in the accord is adequate in that _____ [*specify*]. The accord, as to the defendant, is just and reasonable in that _____ [*specify*]. Plaintiff has no adequate remedy in the ordinary course of law in that _____ [*specify*].

5. On _____ [*date*], plaintiff _____ [*specify plaintiff's full performance of all conditions precedent*] and demanded that defendant perform defendant's part of the accord. Defendant refused to do so and still refuses to do so.

WHEREFORE, plaintiff prays judgment as follows:
1. That defendant _____ [*specify obligation to be performed*].

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION
I, _____ [*name*], am the plaintiff in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

[2] Use of Form

The complaint in *[1], above,* is for use by a party to a preexisting obligation [*see Civ. Code §§ 1427, 1428*] to compel the other party to perform an accord entered into by both parties [*see Civ. Code § 1521 et seq.*].

[3] Allegations

The complaint alleges:

- The residence of the defendant and the place of execution of the accord (Paragraphs 1, 2) [*see Code Civ. Proc. § 395(a)*].

- A preexisting obligation based on full and adequate consideration (Paragraph 2).

- A subsequent agreement between the parties to the original agreement under which the obligor agreed to give and the obligee agreed to accept receive something different from or less that that to which the latter was entitled under the preexisting obligation (Paragraph 3) [*see Civ. Code § 1521*].

- That the consideration is adequate [*Civ. Code § 3391(1)*], the accord is just and reasonable as to the defendant [*Civ. Code § 3391(2)*], and plaintiff has no adequate remedy in the ordinary course of law (Paragraph 4) [*see Moving Picture etc. Union v. Glasgow Theaters, Inc. (1970) 6 Cal. App. 3d 395, 404 n.1, 86 Cal. Rptr. 33]* .

- That plaintiff has fully and fairly performed all the conditions precedent on plaintiff's part to the obligation and defendant refuses to perform (Paragraph 5) [*see Civ. Code § 3392*].

[4] Jurisdiction

The superior court has jurisdiction of an action for specific performance [*see Cal. Const. art. VI, § 10*].

The governing statutes do not expressly specify whether or not an action for specific performance can be a limited civil case [*see Code Civ. Proc. §§ 85, 86, 88*]. Specific performance is an equitable remedy [*see* Specific Performance Defined--Equitable Remedy, *above*], and since it is not included in the list of cases in equity that are limited civil cases [*see Code Civ. Proc. § 86(b)*], an action for specific performance will be an unlimited civil case unless it comes within one of the categories of cases in equity that are specifically designated as limited civil cases. These categories are the following [*Code Civ. Proc. § 86(b)*]:

- Cases to try title to personal property when the amount involved is not more than $25,000.

- Cases when equity is pleaded as a defensive matter in any case that is otherwise a limited civil case.

- Cases to vacate a judgment or order of the court obtained in a limited civil case through extrinsic fraud, mistake, inadvertence, or excusable neglect.

[5] Verification

While verification of this complaint is not required, verification will require any answer to be verified also, if the action is an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[6] Cross References

See generally Ch. 528, *Specific Performance*

For alternative forms for prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification*

For alternative forms for complaints and allegations for use in actions for specific performance, see Ch. 528, *Specific Performance*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAccord & SatisfactionContracts LawRemediesSpecific Performance

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§ 7.72 Allegations--Accounting Against Coowner of Personal Property for Lease Payments

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[2] Use of Form

[3] Affirmative Defenses

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[5] California Rules of Court

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[2] Use of Form

[3] Decisions

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§ 7.79 Stipulation [Code Civ. Proc. § 283(1)] and Interlocutory Judgment for Accounting and Reference [Code Civ. Proc. § 638]

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[3] State Statutes

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[5] Cross References

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[1] FORM

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§ 7.01 Scope of Chapter

This chapter discusses the equitable action of accounting. It includes a general form of complaint for accounting [*see § 7.60*], as well as separate forms of allegations for specific circumstances that may be incorporated into the complaint [*see §§ 7.61 -7.73*].

It also includes affirmative defenses to an action for accounting [*see §§ 7.74 -7.78*], a form of stipulation and interlocutory judgment for accounting and reference [*see § 7.79*], and a form of notice of motion and supporting declaration [*see § 7.80*] and order [*see § 7.81*] to take an accounting by reference.

For further discussion and forms relating to references generally, see Ch. 38, *Reference* .

For discussion and forms regarding accounting actions affecting specific relationships, see the following chapters:

- Ch. 103, *Brokers*.
- Ch. 122, *Community Property*.
- Ch. 160, *Corporations*.
- Ch. 249, *Employment Law: Termination and Discipline*.
- Ch. 250, *Employment Law: Wage and Hour Disputes*.
- Ch. 270, *Fraudulent Conveyances*.
- Ch. 334, *Landlord and Tenant: Claims for Damages*.
- Ch. 349, *Literary Property and Copyright*.

- Ch. 393, *Oil and Gas*.
- Ch. 397, *Partition*.
- Ch. 401, *Partnerships: Actions Between General Partners and Partnership*.
- Ch. 406, *Partnerships: Dissolution*.
- Ch. 427, *Principal and Agent*.
- Ch. 503, *Sales: Secured Transactions*.
- Ch. 560, *Trusts*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesEquitable AccountingsGeneral OverviewCivil ProcedureRemediesEquitable AccountingsElements

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§ 7.02 Cross References

For procedure and forms relating to reference, see Ch. 38, *Reference* .

For a form of complaint for accounting against a real estate broker, see Ch. 103, *Brokers* .

For a form of complaint for accounting by a corporation against a former officer, see *Ch. 167, Corporations: Directors and Management, § 167.50*.

For a form of complaint for accounting relating to a fraudulent transfer, see Ch. 270, *Fraudulent Conveyances* .

For a form of complaint for accounting by an insurance agent against an insurance company, see Ch. 308, *Insurance* .

For forms of complaint for accounting by a lessor against a lessee for rent based on a percentage of sales, see *Ch. 334, Landlord and Tenant: Claims for Damages, §§ 334.82, 334.83*.

For a form of complaint for accounting under federal copyright statutes, see Ch. 349, *Literary Property and Copyrights* .

For a form of complaint for accounting by a mine owner against a mine operator, see Ch. 363, *Mining* .

For a form of complaint for accounting by an actor against a motion picture producer, see Ch. 370, *Motion Pictures* .

For a form of complaint for accounting between coowners of oil and gas leases, see Ch. 393, *Oil and Gas* .

For forms of allegations and a prayer for accounting action, see Ch. 397, *Partition* .

For a form of complaint for accounting between partners, see Ch. 401, *Partnerships: Actions Between General Partners and Partnership* , Ch. 403, *Partnerships: Actions By and Against Dissociated Partners* , and Ch. 406, *Partnerships: Dissolution* .

For a form of complaint for accounting relating to a breach of a patent licensing agreement, see Ch. 411, *Patents and Inventions* .

For a form of complaint for accounting by a principal against an agent, see Ch. 427, *Principal and Agent* .

For a discussion relating to actions for accounting by a radio or television employee, see Ch. 484, *Radio and Television* .

For form of petition for accounting by a beneficiary of a trust against a trustee, see Ch. 560, *Trusts* .

For form of complaint for accounting on behalf of a nonprofit corporation against a director for an accounting, see Ch. 560, *Trusts* .

For form of complaint for accounting and constructive trust, see Ch. 560, *Trusts* .

For form of complaint for accounting and to establish a purchase-money resulting trust in real property, see Ch. 560, *Trusts* .

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[Reserved]

§§ 7.03[Reserved]

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§ 7.10 Governing Law

The right to an action for accounting is generally governed by case law. In addition, *Code Civ. Proc. §§ 638* and *639* authorize courts to direct an accounting by reference. Statutory law also imposes the duty to account under specific circumstances, for example, on the following persons or entities: employees [*Lab. Code § 2861*], partnerships [*Corp. Code § 16405*], spouses [*Fam. Code §§ 721(b), 1101*], and trustees [*Prob. Code §§ 16062, 16064*]. In cases not arising on a contract or judgment for recovery of money or damages only, after a plaintiff has applied for relief after entry of a default, a court may take an account or order a reference if necessary to enable the court to give a default judgment or carry a default judgment into effect [*see Code Civ. Proc. § 585(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 7.11 Nature of Accounting Action

[1] In General

An action for accounting lies in equity when the suit is for recovery of an amount that is unliquidated and unascertained and that cannot be determined without an accounting [*St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 359, 287 P.2d 387]* . An accounting usually is the striking of a balance between debits and credits showing a balance due, if any [*Peoples Finance etc. Co. v. Bowman (1943) 58 Cal. App. 2d 729, 734, 137 P.2d 729]* .

Accounting actions are governed by the general principles of equity, including the necessity of establishing the inadequacy of legal remedies [*San Pedro Lumber Co. v. Reynolds (1896) 111 Cal. 588, 596-597, 44 P. 309]* . When there is a fiduciary relationship between the parties or when accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable, an action in accounting is appropriate [*Civic Western Corp. v. Zila Industries, Inc. (1977) 66 Cal. App. 3d 1, 14, 135 Cal. Rptr. 915* ; *Kritzer v. Lancaster (1950) 96 Cal. App. 2d 1, 6-7, 214 P.2d 407]* .

[2] Action of Account Distinguished

The equitable action for accounting should be distinguished from the action of account. The latter exists under common law and has largely been supplanted by the theories of indebitatus assumpsit, constructive trust, and accounting. The action of account, however, is still recognized by California courts [*Pico v. Columbet (1859) 12 Cal. 414, 419* ; *Ripling v. Superior Court (1952) 112 Cal. App. 2d 399, 403-404, 247 P.2d 117]* . A distinguishing feature of the common law action of account is the right to trial by jury; in the equitable action for accounting there generally is no such right [*Hillman v. Stults (1968) 263 Cal. App. 2d 848, 876-877, 70 Cal. Rptr. 295* ; *see* further *discussion under § 7.21*].

A suit arises under the common law action of account when the offending party has been entrusted with property as a fiduciary and the entrustment bears with it an obligation to account. Consignment relationships and the duty of a trustee to pay money immediately and unconditionally to the beneficiary are examples of circumstances in which the action of account would lie. If there is a claim for account, the offended party has the option of suing either in law or in equity [*Ripling v. Superior Court (1952) 112 Cal. App. 2d 399, 403-404, 408, 247 P.2d 117]* .

For discussion and forms relating to indebitatus assumpsit and constructive trusts, see Ch. 121, *Common Counts* and Ch. 561, *Trusts: Constructive Trusts* .

[3] Account Stated Distinguished

Actions for accounting, which arise because the plaintiff does not know the amount due from the defendant, should be distinguished from disputes involving accounts stated, when the parties have agreed that a certain sum shall be paid and accepted in discharge of an obligation [*see Withers v. Matthews (1961) 192 Cal. App. 2d 139, 141, 13 Cal. Rptr. 165]* .

An account rendered is a form of account stated in which the agreement regarding the sum certain of the obligation is implied. When a party renders an account to another party, it becomes the duty of the recipient to make his or her objections to it within a reasonable time or the rendered account becomes an account stated [*Crane v. Stansbury (1916) 173 Cal. 631, 636, 161 P. 7]* .

The existence of either an account stated or an account rendered is a defense to an action for accounting, and is discussed further under § 7.18[4] and [5]. For further discussion and forms of complaints relating to an action for account stated, see Ch. 8, *Accounts Stated and Open Accounts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 7.12 Elements of Accounting Action

[1] In General

A complaint sufficiently states a cause of action in equity for an accounting by alleging (1) a relationship between the parties or other circumstances that require an accounting in equity (or, in other words, circumstances showing that legal remedies are inadequate); and (2) that an unknown balance is due that cannot not be ascertained without an accounting, the means of which are within the knowledge of the defendant [*see* Whann v. Doell (1923) 192 Cal. 680, 684, 221 P. 877 ; *Kritzer v. Lancaster (1950) 96 Cal. App. 2d 1, 7, 214 P.2d 407]* . For a general form of complaint for an accounting, see *§ 7.60*. For allegations for an accounting in specific circumstances, see *§§ 7.61 -7.73*.

The court may decree an accounting even though the complaint does not ask for such relief, consonant with the principle that when equity has acquired jurisdiction for one purpose it will retain that jurisdiction to the final adjustment of all differences of the parties arising from the cause of action presented [Swan v. Talbot (1907) 152 Cal. 142, 146-147, 94 P. 238] . Additionally, the plaintiff is not required to state facts that are peculiarly within the knowledge of the defendant [*Raymond v. Independent Growers, Inc. (1955) 133 Cal. App. 2d 154, 160, 284 P.2d 57]* .

[2] Relationship or Other Appropriate Circumstances

[a] Fiduciary Relationship

Legal remedies have been held to be inadequate, and therefore a suit in equity for accounting is proper, when a fiduciary relationship exists between the parties and the defendant has a duty to render an account [*San Pedro Lumber Co. v. Reynolds (1896) 111 Cal. 588, 596-597, 44 P. 309]* . In this situation, it may also be appropriate to allege both any oral or written agreement that provides the basis for the relationship, and the defendant's misconduct in breach of that relationship to defendant's gain and secret profit [*see* *Kritzer v. Lancaster (1950) 96 Cal. App. 2d 1, 7, 214 P.2d 407* (oral agreement)].

[b] Complicated Accounts

An alternative ground for establishing that legal remedies are inadequate exists when accounts are so complicated that

an ordinary legal action demanding a fixed sum is impracticable. Thus, an accounting cause of action may be sought in such cases when there is no fiduciary relationship between the parties [*see Civic Western Corp. v. Zila Industries, Inc. (1977) 66 Cal. App. 3d 1, 14, 135 Cal. Rptr. 915* (debtor's cross complaint for accounting against creditor)]. However, the mere existence of a complicated accounting relationship between the parties is insufficient by itself to permit the maintenance of an action for an accounting. To support an accounting, the plaintiff must also prove that the defendant committed some form of misconduct, violated a fiduciary duty, or otherwise owes money to the plaintiff [*see Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 593-594, 37 Cal. Rptr. 2d 653]* .

[c] Fraud

An action for an accounting may also lie in equity in cases of fraud as well as when there is a fiduciary relationship between the parties, and when the facts are peculiarly within the knowledge of one party [Swan v. Talbot (1907) 152 Cal. 142, 145, 94 P. 238 (gross inequality in values exchanged amounting to fraudulent imposition); *see Prince v. Harting (1960) 177 Cal. App. 2d 720, 733, 2 Cal. Rptr. 545]* .

[3] Unknown Balance Due From Defendant

The complaint must allege that there is an unknown balance due from the defendant that cannot be determined without an accounting. A complaint does not state a cause of action for accounting if all the facts necessary for the calculation of the amount sought are either alleged in the pleadings or can be alleged in supplemental pleadings [*see Kinley v. Thelen (1910) 158 Cal. 175, 183, 110 P. 513* ; *St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 359, 287 P.2d 387]* . For example, a complaint does not state a cause of action for accounting for an unknown amount of rents received by a defendant trustee when elsewhere in the complaint the plaintiff alleges the amount of monthly rent due under a lease agreement [*St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 356-357, 359, 287 P.2d 387]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesEquitable AccountingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesEquitable AccountingsElements

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§ 7.13 Particular Circumstances Appropriate for Accounting

[1] In General

Accountings have been ordered in a wide variety of circumstances. The following discussion of relationships and transactions is provided by way of example, and is not intended to be an exhaustive treatment. For additional examples of when accountings actions may be appropriate, see the referrals in § 7.40.

[2] Trusts

The availability of accounting in a trust is a well established procedure supported by statutory and case law [*Hillman v. Stults (1968) 263 Cal. App. 2d 848, 874, 70 Cal. Rptr. 295]* . Generally, a trustee has a duty to account at least annually, at the termination of the trust and on a change of the trustees, to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed [*see Prob. Code §§ 16062, 16064*]. If the proceeding is reasonably necessary for the protection of the interests of the trustee or beneficiary, a trustee or beneficiary may petition the court to settle accounts and pass on the acts of the trustee [*see Prob. Code § 17200(b)(5)*]. In addition, the settlor of a trust may, under the terms of the trust instrument, reserve the power to petition the court for a supervised accounting [*Patton v. Sherwood (2007) 152 Cal. App. 4th 339, 343-344, 61 Cal. Rptr. 3d 289* (settlor's reserved power to compel accounting includes right to object to accounting)]. The very object of an accounting action may be to ascertain how much has been realized and expended by the trustee, so as to determine whether the beneficiary is entitled to payment [*Green v. Brooks (1889) 81 Cal. 328, 333]* .

A remainder beneficiary, with no right to current trust distributions, generally does not have a right to receive the trustee's annual accounting [see *Prob. Code § 16062(a)*]. However, a remainder beneficiary may make a written request to the trustee for information about the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust relevant to the beneficiary's interest, including the terms of the trust [*Prob. Code § 16061*]. If the trustee does not comply with a reasonable request within 60 days, and no report or account had been made within the six months preceding the remainder beneficiary's request, then the remainder beneficiary may petition the court to compel the trustee to report information about the trust or to account [*Prob. Code § 17200(b)(7)*; *Esslinger v. Cummins (2006) 144 Cal. App. 4th 517, 523-528, 50 Cal. Rptr. 3d 538* ; *but see Esslinger v. Cummins (2006) 144 Cal. App. 4th 517, 529-532, 50 Cal. Rptr. 3d 538* (Bedsworth, Acting P.J., dissenting) (remainder

beneficiary who is not entitled to annual accounting under *Prob. Code § 16062* may obtain, under *Prob. Code §§ 16061* and *17200(b)(7)*, report of information that may include particular account, but not annual account)].

For further discussion relating to the duties of a trustee to account and a petition compelling a trustee to account, see Ch. 560, *Trusts* .

[3] Partnerships and Joint Ventures

A partner may maintain an action against the partnership or another partner for legal or equitable relief with an accounting regarding partnership business to enforce the partner's rights under the partnership agreement [*Corp. Code § 16405(b)(1)*].

He or she may also maintain an action against the partnership or another partner with an accounting to enforce the partner's rights under *Corp. Code § 16401 et seq.* (relations of partners to each other and to partnership), including all of the following [*Corp. Code § 16405(b)(2)*]:

- The partner's rights under *Corp. Code §§ 16401* (rights and liabilities of partners between themselves and partnership), 16403 (inspection of partnership books and records), or 16404 (partner's fiduciary duties to partnership).

- The partner's right on dissociation to have the partner's interest in the partnership purchased pursuant to *Corp. Code §§ 16701* (buy out of dissociated partner's interest) or 16701.5 (time limit for dissociation buy out), or to enforce any other right under *Corp. Code § 16601 et seq.* (partner's dissociation) or *Corp. Code § 16701 et seq.* (partner's dissociation when business not wound up).

- The partner's right to compel a dissolution and winding up of the partnership business under *Corp. Code § 16801* (events causing dissolution and winding up) or enforce any other right under *Corp. Code § 16801 et seq.* (winding up partnership business).

In addition, a partner may maintain an action with an accounting regarding partnership business to enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship [*Corp. Code § 16405(b)(3)*].

A right to an accounting upon a dissolution and winding up does not revive a claim barred by law [*Corp. Code § 16405(c)*].

The rights among joint venturers may also be adjusted in an action for accounting [*Stilwell v. Trutanich (1960) 178 Cal. App. 2d 614, 620, 3 Cal. Rptr. 285* ; *Martyn v. Leslie (1955) 137 Cal. App. 2d 41, 61, 290 P.2d 58]* .

For forms of allegations for use in a complaint for accounting among partners and joint venturers, see *§§ 7.61* and *7.62*, respectively.

For further discussion relating to the duties of a partner or joint venturer to account, see Ch. 401, *Partnerships: Actions Between General Partners and Partnership* , and Ch. 406, *Partnerships: Dissolution* .

[4] Domestic Relations

Each spouse's management and control of the community property, as well as all property transactions between the spouses, are governed by the rules applicable to fiduciary relationships between persons who have confidential relations with each other [*see Fam. Code §§ 721(b), 1100(e)*]. The spousal fiduciary relationship is subject to the same rights and

duties as those applicable to nonmarital business partners, as provided in *Corp. Code §§ 16403(a), (b)* (disclosure of information), 16403(c) (access to records), 16404(b), (g) (accounting), and 16405(b) (accounting) [*see Fam. Code §§ 721(b), 1100(e)* (citing former *Corp. Code §§ 15021, 15022*)].

For example, each spouse has a duty to account to the other spouse, and to hold as a trustee, any benefit or profit derived from any transaction that concerns community property and that is made by one spouse without the consent of the other spouse [*Fam. Code § 721(b)*; *see Corp. Code § 16404(b), (g)*]. For further discussion relating to actions for accounting on breach of fiduciary duties by a spouse, see Ch. 122, *Community Property* .

For discussion of *Corp. Code §§ 16403(a), (b), 16403(c), 16404(b), (g),* and *16405(b),* see *§ 7.13[3]*.

Apart from a spouse's duty to account for profits from community property transactions made without the other spouse's consent, an accounting may also be available when the spouse breaches other duties enumerated in *Fam. Code § 1100* and, by extension, in *Corp. Code §§ 16403(a), (b), 16403(c), 16404(b), (g),* and *16405(b)* [*see Fam. Code § 1100(e)*]. A spouse has a claim against the other spouse when a breach of the fiduciary duty [*see Fam. Code §§ 1100, 1102*] results in impairment to the claimant spouse's present undivided half interest in the community estate [*Fam. Code § 1101(a)*]. A court may order an accounting of the property and obligations of the parties to a marriage and to determine the rights of ownership in, the beneficial enjoyment of, or access to, community property, and the classification of all property of the parties to a marriage [*Fam. Code § 1101(b)*]. The accounting action may be brought either alone or in conjunction with filing an action for dissolution of marriage, legal separation, or nullity, or on the death of a spouse [*Fam. Code § 1101(f)*].

It appears that an action for accounting may also be available to unmarried cohabitants based on an implied partnership and joint venture agreement between them [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 677, 684, 134 Cal. Rptr. 815, 557 P.2d 106]* . As *discussed under § 7.13[3],* each partner has a right to a formal accounting as to partnership affairs [*Corp. Code §§ 16404(b), (g), 16405(b)*].

[5] Principal and Agent

An agent who is entrusted with the duty of receiving and disbursing monies and keeping accurate records of all transactions conducted by the agent is a fiduciary and may be compelled to render an accounting. In an action for accounting, the agent has the burden of proving that he or she paid to the principal or otherwise properly disposed of the money or other thing that the agent is proved to have received for the principal [*Kennard v. Glick (1960) 183 Cal. App. 2d 246, 250-251, 7 Cal. Rptr. 88* ; *see also* discussion and forms in Ch. 427, *Principal and Agent*].

[6] Employer and Employee

An employee is required by statute to render just accounts of all transactions in the course of his or her service, as often as is reasonable. The employee must also give prompt notice, without demand, of everything that the employee receives from the employer's account [*Lab. Code § 2861*]. For example, an employer may bring an action for an accounting to determine the amount of commissions actually received by an employee during the term of employment, and the percentage due the employer, if the employer is unable to state the number and dates of transactions conducted by the employee and the prices involved [*Sumner v. Nevin (1906) 4 Cal. App. 347, 351, 87 P. 1105]* .

An action for accounting may also lie on behalf of an employee against an employer. For example, if payment to an employee is alleged to be in the form of a percentage of moneys received by the employer, and the employee does not know what moneys have been received through his or her efforts, an accounting is the only method of arriving at the amount due [*Brea v. McGlashan (1934) 3 Cal. App. 2d 454, 460, 39 P.2d 877* ; for a form of allegations for use in complaint for accounting by employee against employer, *see § 7.65*].

For further discussion relating to the availability of an accounting to an employer or employee, see *Ch. 249, Employment Law: Termination and Discipline, § 249.35*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesEquitable AccountingsGeneral OverviewCivil ProcedureRemediesEquitable AccountingsTrustsCivil ProcedureRemediesEquitable AccountingsPartnershipsCivil ProcedureRemediesEquitable AccountingsElements

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§ 7.14 Statute of Limitations

[1] Determination of Governing Period

The statute of limitations that governs an action for accounting depends on whether the claim for accounting is the primary purpose of the action or whether it is merely incidental or ancillary to some other right basically in issue [*Jefferson v. J.E. French Co. (1960) 54 Cal. 2d 717, 718-719, 7 Cal. Rptr. 899, 355 P.2d 643]* . If the primary purpose of the action is for an accounting, or is otherwise based in equity, the four-year, "catch-all" limitation period of *Code Civ. Proc. § 343* applies [*Manok v. Fishman (1973) 31 Cal. App. 3d 208, 213, 107 Cal. Rptr. 266* ; *see Estate of Peebles (1972) 27 Cal. App. 3d 163, 166, 103 Cal. Rptr. 560*)]. Thus, an action for an accounting must be commenced within four years after the cause of action accrues [*see Code Civ. Proc. § 343*; for a form of affirmative defense based on the statute of limitations, *see § 7.74*].

The character of the action is to be determined from the allegations of the complaint, rather than from the relief demanded [*Bendien v. Solov (1949) 89 Cal. App. 2d 904, 907, 202 P.2d 372]* . Examples of different cases in which courts have examined the nature of the right sued on, notwithstanding any designation of an action as one for accounting, include the following:

- The action was based on duties arising out of an alleged fiduciary relationship of the parties, rather than out of an oral partnership agreement [*Manok v. Fishman (1973) 31 Cal. App. 3d 208, 213, 107 Cal. Rptr. 266* (four-year period under *Code Civ. Proc. § 343* governs)].

- The complaint set forth a cause of action for conversion by alleging the unauthorized transfer of stock and seeking redemption of the property sold or recovery of its value [*Bell v. Bank of California (1908) 153 Cal. 234, 242-244, 94 P. 889* (three-year period under former *Code Civ. Proc. § 338(3)* (*now see Code Civ. Proc. § 338(c)*) governs)].

- Allegations of the complaint set forth terms of an oral contract and breach, and thus an accounting was purely incidental to the main cause of action alleged [*Bendien v. Solov (1949) 89 Cal. App. 2d 904, 907, 202 P.2d 372* (two-year period for oral contracts under *Code Civ. Proc. § 339(1)* governs)].

- The primary purpose of the action was to recover money under an oral employment agreement whereby the plaintiff was to receive a percentage of the defendant's profits, and the accounting action was merely ancillary to perfection of the plaintiff's right under the oral contract [*Jefferson v. J.E. French Co. (1960) 54 Cal. 2d 717, 719, 7 Cal. Rptr. 899, 355 P.2d 643* (two-year period for oral contracts under *Code Civ. Proc. § 339(1)* governs)].

[2] Accrual of Cause of Action

When the applicable period of limitations is governed by *Code Civ. Proc. § 343*, the action for relief must be commenced within four years after the cause of action has accrued [*Code Civ. Proc. § 343*]. The period of limitations will not begin to run on a cause of action by the beneficiary of a fiduciary relationship against the fiduciary as long as the fiduciary relationship is not repudiated [*Estate of Clary (1928) 203 Cal. 335, 341, 264 P. 242* ; *Manok v. Fishman (1973) 31 Cal. App. 3d 208, 211, 107 Cal. Rptr. 266]* .

Accrual of a partner's right to an accounting is governed the law governing the underlying substantive right [*see Corp. Code § 16405(c)*]. The right to an accounting on a dissolution and winding up does not revive a claim barred by law [*Corp. Code § 16405(c)*].

For further discussion of periods of limitations generally, see Ch. 345, *Limitation of Actions* .

Legal Topics:

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

Superior courts have original jurisdiction in actions for accounting as unlimited civil cases [*see Code Civ. Proc § 88*; *Estate of Joslin (1958) 165 Cal. App. 2d 330, 347, 332 P.2d 151* (discussing general equity jurisdiction of superior courts)].

In a limited civil case (amount in controversy, exclusive of interest, is $25,000 or less) the superior court has jurisdiction to take accounts when necessary to preserve property or rights of any party [*Code Civ. Proc. § 86(a)(8)*; *but see Code Civ. Proc. § 580(b)(3)* (determination of title to real property)].

For discussion and forms relating to jurisdiction generally, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter* .

Legal Topics:

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

Actions are classified as either local or transitory for purposes of venue [*Brown v. Superior Court (1984) 37 Cal. 3d 477, 482 n.5, 691 P.2d 272]* . Generally a cause of action for accounting, standing alone, is transitory in nature, and may therefore be tried in the county in which the defendants, or some of them, reside at the commencement of the action [*Code Civ. Proc. § 395(a)*; *see* *Rosen v. Kessler (1956) 145 Cal. App. 2d 676, 680, 682-683, 303 P.2d 110]* .

An exception to this rule may apply when a defendant is sued in an official or representative capacity as a personal representative, guardian, conservator, or trustee on a claim for payment of money or for the recovery of personal property. In these cases, the county that has jurisdiction of the estate that the defendant represents, rather than the county in which the defendant resides, is the proper county for trial of the action [*Code Civ. Proc. § 395.1*].

If a plaintiff joins various causes of action, some of which are local in character, with a claim for accounting, which is transitory, the transient claim controls and the defendants have the right to have the case tried in the county of their residence [Rosen v. Kessler (1956) 145 Cal. App. 2d 676, 680, 682-683, 303 2 d 110].

If a complaint alleges a single cause of action that seeks both local and transitory relief, the character of the action for venue purposes will be determined by the main relief sought. If the main relief sought is personal, the action is transitory. If the main relief relates to rights in real property, the action is local [*Brown v. Superior Court (1984) 37 Cal. 3d 477, 482 n.5, 691 P.2d 272]* .

If the main relief sought is an accounting of operations on leased land, notwithstanding a formal allegation that plaintiff also claims some interest in the land, the nature of the action may be essentially personal and transitory and the defendant would be entitled to have the action tried in the county of his or her residence [*Neet v. Holmes (1942) 19 Cal. 2d 605, 611-612, 122 P.2d 557* ; *see also* *Hays v. Cowles (1943) 60 Cal. App. 2d 514, 516-517, 141 P.2d 26* (action for dissolution of partnership seeking relief in form of accounting and receivership; partition of real property was only incidental)]. On the other hand, relief in the form of an accounting may only be incidental to a local action affecting rights in land [*Dial v. Homestead Land Co (1919) 39 Cal. App. 479, 481, 179 P. 444* (accounting sought depended on determination of ownership of land and therefore was mere incident to main relief of recovery of real estate)].

For further discussion of venue generally, see Ch. 571, *Venue* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 7.17 Default Judgment

A plaintiff cannot obtain a default judgment for a specific amount of damages unless the defendant has been notified of the amount of damages sought [*see Code Civ. Proc. § 580*; *In re Marriage of Wells (1988) 206 Cal. App. 3d 1434, 1437, 254 Cal. Rptr. 185* (default judgment beyond amount specified in complaint is void); for further discussion, *see* Ch. 205, *Defaults and Default Judgments*]. This mandatory notice requirement conflicts with the principles of an accounting action. If a sum is specified in the complaint, then the plaintiff is not due any accounting but a default judgment is not available unless a sum *is* specified [*see Ely v. Gray (1990) 224 Cal. App. 3d 1257, 1262, 274 Cal. Rptr. 536]* . At least two courts of appeal have resolved this conflict by looking to the procedure for wrongful death and personal injury actions, in which a plaintiff is prohibited from stating the amount of damages in the complaint but must notify the defendant of the amount and nature of damages before a default may be taken [*see Code Civ. Proc. § 425.10, 425.11*]. By analogy, a plaintiff in an accounting action must give a postcomplaint and predefault notice to the defendant of the amount plaintiff will seek to prove due him or her if the defendant defaults. The notice must be given with adequate time for the defendant to respond before a default is entered [*Finney v. Gomez (2003) 111 Cal. App. 4th 527, 543-544, 3 Cal. Rptr. 3d 604* ; *Ely v. Gray (1990) 224 Cal. App. 3d 1257, 1263, 274 Cal. Rptr. 536]* . Another court of appeal, however, has held that in an action seeking to account for and value a former partner's partnership interest and for payment of that interest, notice of the specific amount claimed is not necessary if the partnership agreement gives the defendants the information necessary to calculate precisely their potential exposure on default [*Cassel v. Sullivan, Roche & Johnson (1999) 76 Cal. App. 4th 1157, 1163-1164, 90 Cal. Rptr. 2d 899]* . For a discussion of notice of damages in the context of personal injury or wrongful death actions, see Ch. 205, *Defaults and Default Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 7.18 Affirmative Defenses

[1] Lapse of Statutory Limitation Period

The statute of limitations that generally governs actions for accounting is *Code Civ. Proc. § 343* (providing a four-year period). The statute oflimitations that will govern any given case, however, depends on the nature of the right sued on. This is true notwithstanding any designation of an action as one for accounting or a prayer for relief that includes accounting [*Bendien v. Solov (1949) 89 Cal. App. 2d 904, 907, 202 P.2d 372* ; for further discussion, *see § 7.14*]. For a form of affirmative defense based on the statute of limitations, see *§ 7.74*.

[2] Laches

The equitable doctrine of laches may be available as a defense to an action for accounting if the plaintiff has filed the complaint within the period of limitations, but has delayed in doing so [*see Estate of Peebles (1972) 27 Cal. App. 3d 163, 166, 103 Cal. Rptr. 560]* . In addition to unreasonable delay by the plaintiff, the defendant must show that he or she was prejudiced by the delay, or that the plaintiff has acquiesced in the defendant's conduct [*Conti v. Board of Civil Service Commissioners (1969) 1 Cal. 3d 351, 362, 82 Cal. Rptr. 337, 461 P.2d 617* ; *Meigs v. Pinkham (1910) 159 Cal. 104, 111, 112 P. 883]* .

Whether the doctrine of laches will apply in a given action for accounting depends on the sound discretion of the court. Circumstances that are material to a determination that a claim is so stale that a court of equity will not enforce it include the following: considerable lapse of time; difficulty of doing entire justice when the original transactions have become obscure by time; loss of evidence; claim not made until after the death of those who could have explained the transaction; change in the value and character of the property; and considerations of public policy [*Bell v. Hudson (1887) 73 Cal. 285, 288-290, 14 P. 791]* .

For a form of affirmative defense based on laches, see *§ 7.75*.

[3] Unclean Hands

In general, a party who has acted wrongfully, dishonestly, or unfairly in bringing an action to court may be precluded

from obtaining equitable relief [*Seymour v. Cariker (1963) 220 Cal. App. 2d 300, 305, 33 Cal. Rptr. 727]* . Courts are not vigorous in compelling an accounting by a person defrauded at the request of the party guilty of the fraud [*American Copying Co. v. Lehmann (1907) 6 Cal. App. 1, 5, 91 P. 414]* .

[4] Account Stated

As discussed in *§ 7.12*, the plaintiff may not prevail on a claim for accounting unless the amount due from the defendant is unknown. If the parties have settled by agreement the amount owed on the account between them, the defendant may raise the matter of account stated by affirmative defense [*see Kinley v. Thelen (1910) 158 Cal. 175, 182-183, 110 P. 513]* . The agreement may, however, be attacked by the plaintiff on the grounds of fraud, deceit, misrepresentation, or other equitable ground [*see Loupias v. Rosen (1951) 102 Cal. App. 2d 781, 783, 228 P.2d 611]* . Additionally, even though the parties may mutually accept an accounting, the trial court may properly order another accounting concerning periods of time subsequent to that covered by the previous accounting [*Huntoon v. Hurley (1955) 137 Cal. App. 2d 33, 39, 290 P.2d 14* ; for further discussion of accounts stated, *see § 7.11[3]*]. For a form of affirmative defense based on account stated, see *§ 7.76*.

[5] Account Rendered

A variation of the account stated defense may be alleged if the defendant has rendered to the plaintiff accounts showing defendant's receipts and disbursements and the plaintiff has not challenged the truth of any item or objected to the accounts [*Guy Coburn, Inc. v. Tiffany P., Inc. (1940) 37 Cal. App. 2d 410, 414, 99 P.2d 569* ; for further discussion of accounts stated, *see § 7.11[3]*]. For a form of affirmative defense based on an account rendered, see *§ 7.77*.

[6] Accord and Satisfaction

The defendant may allege an accord and satisfaction as new matter constituting a defense. Thus, defendant may allege the execution of an agreement between the parties by which the plaintiff accepts something different or less than that to which he or she had been entitled, in exchange for the extinction of the obligation between them [*see Civ. Code §§ 1521-1525*]. For the principle of accord and satisfaction to apply in disposition of an unliquidated claim, however, there must be a "bona fide dispute" [*Potter v. Pacific Coast Lumber Co. (1951) 37 Cal. 2d 592, 597, 234 P.2d 16]* . For a form of affirmative defense based on an accord and satisfaction, see *§ 7.78*.

For a general discussion and forms relating to alleging accord and satisfaction as an affirmative defense, see Ch. 6, *Accord and Satisfaction*.

[7] Other Defenses

Since actions for accounting are equitable in nature and are governed largely by principles of equity, any other equitable defense, including estoppel or waiver, should be considered [*see James v. Kuhn (1932) 121 Cal. App. 69, 71, 8 P.2d 526]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 7.19 Cross Complaint for Accounting

Actions for accounting may be raised by cross complaint. A request for accounting in an answer is tantamount to a cross complaint for accounting [*see Brown v. Lee (1918) 38 Cal. App. 242, 244, 175 P. 907]* . An accounting may not granted, however, when it is dependent on other relief that is sought but denied. For example, an accounting was held not warrantedwhen the allegations in the cross complaint for accounting were predicated on a partition of property, and when the judgment granting the partition was reversed on appeal [*Schwartz v. Shapiro (1964) 229 Cal. App. 2d 238, 40 Cal. Rptr. 189]* .

Legal Topics:

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

A party seeking an accounting may conduct pretrial proceedings to discover evidence from the opposing party without first establishing a right to an accounting. A writ of mandate may issue to direct a trial court to require the opposing party to respond to the party's pretrial discovery requests when the trial court has abused its discretion by failing to enforce the party's right to discovery [*Hauk v. Superior Court (1964) 61 Cal. 2d 295, 298-299, 38 Cal. Rptr. 345, 391 P.2d 825]* . For further discussion and forms relating to pretrial discovery proceedings generally, see Ch. 190-200, *Discovery* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 7.21 Right to Jury Trial

Although the common law forms of action are abolished and law and equity are united in one forum, the right to a trial by jury is dependent on whether the action is one in which there was a common law right to a jury trial in 1850 [Interinsurance Exchange v. Savior (1975) 51 Cal. App. 3d 691, 693, 124 Cal. Rptr. 239 ; *Ripling v. Superior Court (1952) 112 Cal. App. 2d 399, 402, 247 P.2d 117]* . Historically, an action for accounting was cognizable only in equity and there was no right to a jury trial [*Hillman v. Stults (1968) 263 Cal. App. 2d 848, 877, 70 Cal. Rptr. 295* ; Tibbits v. Fife (1958) 162 Cal. App. 2d 568, 572, 328 P.2d 212] .

The mere existence of a remedy in equity cannot, however, operate to defeat a right to proceed at law in a trial by jury. It is only when the issues to be tried are exclusively equitable in nature that a suitor is deprived of the right to a jury trial. For example, when the plaintiff has the option of maintaining an action for accounting in equity or an action of account in law and elects to proceed at law, the action is triable before a jury [*Ripling v. Superior Court (1952) 112 Cal. App. 2d 399, 408-409, 247 P.2d 117]* . If the action is an ordinary suit at law for the recovery of a debt but requires a long account, the court has no power to or der an accounting by reference under *Code Civ. Proc. § 639(a)* because to do so would violate the right to a jury trial [*Grim v. Norris (1861) 19 Cal. 140, 142]* . However, a suit to impose a constructive trust, an accounting, and reconveyance based on a defendant's refusal to convey real property under an oral agreement to hold the land until directed to convey is purely equitable and a jury trial is not a matter of right [Tibbits v. Fife (1958) 162 Cal. App. 2d 568, 573, 328 P.2d 212] .

For further discussion of the availability of juries generally, see Ch. 322, *Juries and Verdicts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 7.22 Sequence of Procedures at Trial

The right to an accounting is a preliminary fact, the existence of which must be established before an accounting may be obtained [*see Evid. Code § 400, 403*; *Baxter v. Krieger (1958) 157 Cal. App. 2d 730, 732, 321 P.2d 879]* . This procedure is an exception to the general rule that the court in its discretion shall regulate the order of proof [*Evid. Code § 320*]. The allegations required to establish an action for accounting are discussed in *§ 7.12*.

The parties may enter into a stipulation for an order that an accounting be taken as an alternative to a trial on the issue [*see Schefski v. Anker (1932) 216 Cal. 624, 627, 15 P.2d 744* ; *Jackson v. Puget Sound Lumber Co. (1898) 123 Cal. 97, 100, 55 P. 788]* . For a form of stipulation and interlocutory judgment for an accounting and reference, see *§ 7.79*.

After the right to an accounting has been established, by trial or stipulation, the court may proceed to take the accounting from the evidence provided and render final judgment [*Baumann v. Harrison (1941) 46 Cal. App. 2d 84, 90-91, 115 P.2d 530]* . Note that while the plaintiff must first establish that he or she is entitled to an accounting, the court is not required to issue an interlocutory judgment to that effect before the accounting may be taken, although it may do so [Shefski v. Anker (1932) 216 Cal. 624, 627, 15 P.2d 744 ; Fredendall v. Shrader (1920) 45 Cal. App. 719, 725, 118 P. 719] . For a discussion relating to interlocutory judgments and the right to appeal, see *§ 7.25*.

If the court does not proceed to take the accounting, it may order the accounting, take it at a later time, and reserve jurisdiction as to final judgment [*see Degnan v. Morrow (1969) 2 Cal. App. 3d 358, 363, 82 Cal. Rptr. 557]* . If the court reserves jurisdiction, it may continue the case to a date certain to take the accounting or set forth a notice procedure to return the matter to calendar [*see Lacey v. Bertone (1949) 33 Cal. 2d 649, 653, 203 P.2d 755]* . If no provision is made to return the matter to calendar, counsel is advised to consult with the judge or the judge's clerk regarding an appropriate procedure to restore the matter to calendar, such as whether the parties may stipulate to a date that is acceptable to the court. For a discussion and forms relating to stipulations, see Ch. 533, *Stipulations* .

As an alternative to taking the accounting itself, the court may order that an accounting be taken by reference under *Code Civ. Proc. §§ 638-645.1* [*Baumann v. Harrison (1941) 46 Cal. App. 2d 84, 90-91, 115 P.2d 530* ; *see § 7.23*].

Legal Topics:

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

[1] Voluntary

A referee may be appointed to perform an accounting based on the agreement of the parties that has been filed with the clerk or judge orentered in the court's minutes. A referee may also be appointed on the motion of a party to a written contract or lease that provides that any controversy arising from the contract or lease must be heard by a referee, if the court finds that a reference agreement exists between the parties [*Code Civ. Proc. § 638*; *see Madison v. Moon (1957) 148 Cal. App. 2d 135, 145-146, 306 P.2d 15]* . The court may appoint the referee for the following purposes [*Code Civ. Proc. § 638(a), (b)*]:

(1) To hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision; and

(2) To ascertain a fact necessary to enable the court to determine an action or proceeding.

For forms of a stipulation for reference, a notice of motion and supporting papers, and an order appointing a referee, see *§§ 7.79 through 7.81*.

[2] Involuntary

When the parties do not consent to a reference the court may, on the application of any party, or on its own motion, direct a reference to take an accounting when the trial of an issue of fact requires the examination of a long account on either side, or when the taking of an account is necessary for the information of the court before judgment or for carrying a judgment or order into effect [*Code Civ. Proc. § 639(a)(1), (2)*]. The court's power to order an involuntary accounting by reference under *Code Civ. Proc. § 639*, however, is limited to proceedings in equity. To construe the section to permit a court to grant a reference in ordinary suits of law, even those involving long accounts, would abrogate the right to a jury trial under *Cal. Const., art. I, § 16* [*Grim v. Norris (1861) 19 Cal. 140, 142* ; *see also* Code Commissioner's Notes to *Code Civ. Proc. § 639*].

In cases of involuntary accounting by reference, the report of the referee has the effect of a special verdict and does not

become the decision of the court until the court adopts it [*Code Civ. Proc. § 645*].

For a form of notice of motion and supporting papers and an order for reference, see *§§ 7.80* and *7.81*.

For further discussion and forms relating to references, whether general or special or voluntary or involuntary, see Ch. 38, *Reference* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesEquitable AccountingsGeneral OverviewCivil ProcedureJudicial OfficersReferencesCivil ProcedureRemediesEquitable AccountingsElements

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1-7 California Forms of Pleading and Practice--Annotated § 7.24

§ 7.24 Disposition by Trial Court

The trial court's taking of the account must be sufficiently definite that a party appealing the decision may specify intelligibly the particulars in which the trial court's finding was not supported by evidence. A mere statement of the balance due in the trial court's statement of decision, without a reference and without an account of or exceptions being taken to specific items, is not a proper disposition of an accounting action [*Whann v. Doell(1923) 192 Cal. 680, 684-685, 221 P. 899* ; *Margolis v. Leonard & Holt (1928) 94 Cal. App. 716, 718, 271 P. 758]* .

The account, however, need not be stated in an accepted bookkeeping fashion. Any procedure or record from which it can be intelligently ascertained what the issues were regarding the controverted items and how these issues were disposed of by the trial court will suffice for this purpose, whether the matter appears from the findings, the decree, or a bill of exceptions [*Whann v. Doell (1923) 192 Cal. 680, 684, 221 P. 899* ; *Davis v. California Motors (1946) 73 Cal. App. 2d 241, 246-247, 166 P.2d 52]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureRemediesEquitable AccountingsGeneral OverviewCivil ProcedureRemediesEquitable AccountingsElements

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1-7 California Forms of Pleading and Practice--Annotated § 7.25

§ 7.25 Finality of Judgment

The right to appeal a judgment in an accounting action is wholly statutory, and generally an appeal lies only from a final judgment. No appeal lies from an interlocutory judgment unless it is of a type specified by statute [*see Code Civ. Proc. §§ 904.1, 904.2*; *see also Kinoshita v. Horio (1986) 186 Cal. App. 3d 959, 962-963, 231 Cal. Rptr. 241]* . Statutory law specifically permits an appeal from interlocutory judgments, orders, or decrees that determine the right to redeem and direct an accounting in actions to redeem real or personal property from a mortgage thereof, or a lien thereon [*see Code Civ. Proc. § 904.1(a)(8)*].

It is not the form of the decree that determines whether a particular decree is essentially interlocutory and nonappealable, but the substance and effect of the adjudication. A general test is whether no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree. If there are no such issues, that decree is final. But when there is anything further in the nature of judicial action on the part of the court that is essential to a final determination of the rights of the parties, the decree is interlocutory [*Lyon v. Goss (1942) 19 Cal. 2d 659, 669-670, 123 P.2d 11]* . This rule, however, must be adapted to the particular circumstances of the case [*Kinoshita v. Horio (1986) 186 Cal. App. 3d 959, 963, 231 Cal. Rptr. 241]* .

The judgment is not final, even though the court adjudicates the issues between the parties, if the court directs an accounting or refers the case to a referee to take an account subject to the court's approval [*Middleton v. Finney (1931) 214 Cal. 523, 525, 6 P.2d 938* ; Gunder v. Gunder (1929) 208 Cal. 559, 561-562, 282 P. 294] . A judgment directing the dissolution of a partnership and sale of assets is interlocutory if it does not provide the manner in which expenses assessed to the defendants are to be allocated among them [*Kinoshita v. Horio (1986) 186 Cal. App. 3d 959, 965, 231 Cal. Rptr. 241]* . A trial court's failure to refer an accounting to a referee does not create a final judgment because a reservation of further jurisdiction over the accounting will be inferred [*Degnan v. Morrow (1969) 2 Cal. App. 3d 358, 363, 82 Cal. Rptr. 557]* ._____

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil

ProcedureRemediesEquitable AccountingsGeneral OverviewCivil ProcedureRemediesEquitable AccountingsElements

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[Reserved]

§§ 7.26[Reserved]

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1-7 California Forms of Pleading and Practice--Annotated § 7.40

§ 7.40 Related Matthew Bender Publications

[1] California Points and Authorities

For memoranda of points and authorities relating to forms in this chapter, see California Points and Authorities, Ch. 12, *Accounting* , Ch. 170, *Partnerships and Joint Ventures* , Ch. 182, *Principal and Agent* , and Ch. 201, *Reference and Referees*

[2] Forms of Discovery

For forms of interrogatories for use in actions for accounting, see Bender's Forms of Discovery, *Accounting, Action for*

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1-7 California Forms of Pleading and Practice--Annotated § 7.41

§ 7.41 State Constitution

Residual jurisdiction of superior court. *Cal. Const., art. VI, § 10*

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-7 California Forms of Pleading and Practice--Annotated § 7.42

§ 7.42 State Statutes

[1] Appeal

Appeal from judgments. *Code Civ. Proc. §§ 904.1(a), 904.2(a)*

[2] Default

Accounting after default. *Code Civ. Proc. § 585(b)*

[3] Duty to Account

Spouses. *Fam. Code §§ 1100-1102*

Partners. *Corp. Code §§ 16404(b)(1), 16405*

Employees. *Lab. Code § 2861*

Trustees. *Prob. Code §§ 16060-16064, 17200(b)(7)*

[4] Jurisdiction

Jurisdiction over actions for accounting in limited civil cases. *Code Civ. Proc. § 86(a)(8)*

[5] Reference

Reference for accounting. *Code Civ. Proc. §§ 636, 638, 639*

[6] Venue

Venue of actions generally. *Code Civ. Proc. §§ 392-402*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureRemediesEquitable AccountingsGeneral OverviewCivil ProcedureJudicial OfficersReferencesCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral Jurisdiction

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1-7 California Forms of Pleading and Practice--Annotated § 7.43

§ 7.43 Decisions

[1] Appeal

Final judgment in action for account as appealable. *Kinoshita v. Horio (1986) 186 Cal. App. 3d 959, 962-963, 231 Cal. Rptr. 241*

Interlocutory judgment ordering accounting as not appealable. *Degnan v. Morrow (1969) 2 Cal. App. 3d 358, 362-363, 82 Cal. Rptr. 557*

[2] Defenses

Statute of limitations as defense to accounting action. *Jefferson v. J.E. French Co. (1960) 54 Cal. 2d 717, 718, 7 Cal. Rptr. 899, 355 P.2d 643*

Existence of account stated as defense to accounting action. *Kinley v. Thelen (1910) 158 Cal. 175, 182-183, 110 P. 513*

Laches as defense to accounting action. Estate of Peebles (1972) 27 Cal. App. 3d 163, 166, 103 Cal. Rptr. 166 ; *Freeman v. Donohoe (1923) 65 Cal. App. 65, 93-94, 223 P. 431*

Estoppel as defense to accounting action. *Fauda v. Fauda (1925) 72 Cal. App. 462, 465, 467, 237 P. 563*

[3] Discovery

Use of writs of mandate and prohibition to compel trial court to order discovery of facts relating to accounting. *Hauk v. Superior Court (1964) 61 Cal. 2d 295, 299, 38 Cal. Rptr. 345, 391 P.2d 825* ; *Ahern v. Superior Court (1952) 112 Cal. App. 2d 27, 32, 245 P.2d 568*

Plaintiff as entitled to information about subject matter of accounting before establishing right to accounting. *Hauk v. Superior Court (1964) 61 Cal. 2d 295, 298-299, 38 Cal. Rptr. 345, 391 P.2d 825*

[4] Elements

Accounting as available when fiduciary relationship or complicated accounts exist. *San Pedro Lumber Co. v. Reynolds (1896) 111 Cal. 588, 595-596, 44 P. 309* ; see *Kritzer v. Lancaster (1950) 96 Cal. App. 2d 1, 6-7, 214 P.2d 407* ; *Brea v. McGlashan (1934) 3 Cal. App. 2d 454, 460, 39 P.2d 877*

No cause of action for accounting stated in complaint if all facts necessary for calculation of amount sought are alleged in complaint or can be alleged in supplemental complaint and amount is certain. *St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 359, 287 P.2d 387*

[5] Equitable Nature of Action

Action for accounting as equitable. *Hillman v. Stults (1968) 263 Cal. App. 2d 848, 876, 70 Cal. Rptr. 295*

[6] Jurisdiction

When action essentially one in equity, complaint tenders issues conferring jurisdiction on superior court. *St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 361-362, 287 P.2d 387*

[7] Jury Trial

Trial by jury as matter of right when "gist of action" as framed by pleadings is such that issues raised would have been triable on the law side before 1850. *Ripling v. Superior Court (1952) 112 Cal. App. 2d 399, 402, 247 P.2d 117*

Jury trial as waived by stipulation for accounting when sole issue on trial is what errors or mistakes were made in alleged stated account and to take an account thereof. *First Nat. Bank v. Stansbury (1931) 118 Cal. App. 80, 84, 5 P.2d 13*

[8] Pleading

Pleader as not required to state facts peculiarly within knowledge of opposite party. *Hillman v. Stults (1968) 263 Cal. App. 2d 848, 869, 70 Cal. Rptr. 295*

Accounting as improper if complaint states sum certain. *St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 359, 287 P.2d 387*

Stipulation that accounting be taken as binding on parties. *First Nat. Bank v. Stansbury (1931) 118 Cal. App. 80, 84, 5 P.2d 13*

[9] Prejudgment Interest

Prejudment interest under *Civ. Code § 3287* as generally not allowed in accounting action. *Chesapeake Industries,*

Inc. v. Togova Enterprises, Inc. (1983) 149 Cal. App. 3d 901, 908-909, 197 Cal. Rptr. 348

[10] Procedure

Interlocutory judgment ordering accounting as proper after trial court ascertains plaintiff's right to accounting. *Degnan v. Morrow (1969) 2 Cal. App. 3d 358, 362-363, 82 Cal. Rptr. 557*

Trial court as not limited to figure stated by witness in taking accounting. *Esswein v. Rogers (1963) 216 Cal. App. 2d 91, 96-97, 30 Cal. Rptr. 738*

Plaintiff as entitled to default judgment based on accounting taken in open court against defendant who failed to respond to complaint. *Wyoming Pacific Oil Co. v. Preston (1959) 171 Cal. App. 2d 735, 748-750, 341 P.2d 732*

Right to accounting as required to be established before accounting is proper. *Baxter v. Krieger (1958) 157 Cal. App. 2d 730, 732, 321 P.2d 879*

Trial court as able to order reference for accounting or to take accounting itself. *Baxter v. Krieger (1958) 157 Cal. App. 2d 730, 732, 321 P.2d 879*

Trial court as empowered to take accounting after reference and rejection of referee's report. *Baumann v. Harrison (1941) 46 Cal. App. 2d 84, 90, 115 P.2d 530*

[11] Relief

Prayer for general relief as sufficient to allow accounting. *Fox v. Hall (1912) 164 Cal. 287, 290, 128 P. 749*

Damages as frequently allowed in accounting action when it is made to appear that property itself cannot be accounted for. *Wyoming Pacific Oil Co. v. Preston (1959) 171 Cal. App. 2d 735, 748, 341 P.2d 732*

Accounting as proper action in which to grant relief demanded by situation. *Keeble v. Brown (1954) 123 Cal. App. 2d 126, 133, 266 P.2d 569*

[12] Situations When Accounting Available

Remainder beneficiary of trust, who generally does not have right to receive trustee's annual accounting, may petition court to compel trustee to report information about trust or to account, if trustee does not respond to beneficiary's request for information. *Esslinger v. Cummins (2006) 144 Cal. App. 4th 517, 523-528, 50 Cal. Rptr. 3d 538*

Accounting as proper in trust. *McDaniel v. McDaniel (1969) 275 Cal. App. 2d 927, 944, 80 Cal. Rptr. 837* ; Hillman v. Stults (1968) 263 Cal. App. 3d 848, 874, 70 Cal. Rptr. 295

Accounting as proper between partners. *Mashon v. Haddock (1961) 190 Cal. App. 2d 151, 176, 11 Cal. Rptr. 865* ; *Prince v. Harting (1960) 177 Cal. App. 2d 720, 732-733, 2 Cal. Rptr. 545*

Accounting as proper between principal and agent. *Kennard v. Glick (1960) 183 Cal. App. 2d 246, 250-251, 7 Cal. Rptr. 88* ; *Raymond v. Independent Growers, Inc. (1955) 133 Cal. App. 2d 154, 160-161, 284 P.2d 57*

Accounting as proper between joint venturers. *Stilwell v. Trutanich (1960) 178 Cal. App. 2d 614, 620, 3 Cal. Rptr.*

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Accounting as proper between husband and wife. *Roy v. Roy (1938) 29 Cal. App. 2d 596, 603-605, 85 P.2d 223*

When accounting may be appropriate between employer and employee. *Brea v. McGlashan (1934) 3 Cal. App. 2d 454, 460, 39 P.2d 877* ; *Sumner v. Nevin (1906) 4 Cal. App. 347, 351, 87 P. 1105*

[13] Statute of Limitations

Two-year statute of limitations as governing action when primary purpose was to recover money under oral contract and accounting was merely ancillary. *Jefferson v. J.E. French Co. (1960) 54 Cal. 2d 717, 718-719, 7 Cal. Rptr. 899, 355 P.2d 643*

Four-year catch-all statute in *Code Civ. Proc. § 343* as applicable to action when duty to account is primary right. *Manok v. Fishman (1973) 31 Cal. App. 3d 208, 213, 107 Cal. Rptr. 266*

[14] Venue

If complaint alleges single cause of action but seeks both local and transitory relief, character of action for venue purposes as determined by main relief sought. *Brown v. Superior Court (1984) 37 Cal. 3d 477, 482 n. 5, 208 Cal. Rptr. 724, 691 P.2d 272*

Action for accounting as transitory. *Neet v. Holmes (1942) 19 Cal. 2d 605, 611-612, 122 P.2d 557*

Accounting action with several causes of action, some local and some transitory, as regarded as transitory for venue purposes. *Rosen v. Kessler (1956) 145 Cal. App. 2d 676, 683, 303 P.2d 110*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueIndividual DefendantsCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleGovernmentsLegislationStatutes of LimitationsTime LimitationsCivil ProcedureRemediesEquitable AccountingsElements

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[Reserved]

§§ 7.46[Reserved]

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PART IV. FORMS

1-7 California Forms of Pleading and Practice--Annotated § 7.60

§ 7.60 Complaint [Code Civ. Proc. § 425.10] for Accounting--General Form

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Accounting--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], [and DOES I	)	COMPLAINT FOR ACCOUNTING
through _____,]	)	
Defendants.	)	
	)	

_____

Plaintiff alleges:

[1. Plaintiff is, and at all times herein mentioned was, a resident of _____ County, California (*or other allegations of capacity or residence as necessary*).]

2. _____ [*Allege identity, capacity and residence of defendant(s), e.g.,* Defendant _____ (*name*) is, and at all times herein mentioned was, a corporation, organized and existing under the laws of California (with its principal place of business in _____ (*city*), _____ County, California].

[3. Defendants DOES I through _____, inclusive, are sued herein under fictitious names, their true names and capacities being unknown to plaintiff. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurences herein alleged and that plaintiff's damages as herein

alleged were proximately caused by such defendants.]

[4. _____ (*Agency allegation, if appropriate, e.g.,* (Plaintiff is informed and believes and thereon alleges that) (A)t all times herein mentioned each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of such agency and employment.]

5. _____ [*Allege relationship between plaintiff and defendant or other circumstances necessary to an accounting, e.g.,* On or about _____ [*date*], in _____ (*city*), _____ County, California, plaintiff and defendant entered into a written agreement whereby defendant undertook the sole charge and management of plaintiff's western division sales operations. Defendant's obligations under the agreement included the duty to care for and protect in all particulars the plaintiff's financial interests and property in connection with those operations, to provide periodic statements of accounts of all moneys and property from the operations, and to pay over to plaintiff all money received(. A true and correct copy of the agreement is attached hereto as Exhibit "A" and made a part hereof)].

6. _____ [*Specify transactions giving rise to accounting, e.g.,* _____ (Between _____ (*date*) and _____ (*date*) *or* Beginning on or about _____ (*date*)), in the course of the aforementioned charge and management, defendant has undertaken numerous sales transactions, and has received money, a portion of which is due to plaintiff(, pursuant to the terms of the management agreement hereinabove alleged)].

7. The amount of money due from defendant to plaintiff is unknown to plaintiff and cannot be ascertained without an accounting of the _____ [*specify, e.g.,* receipts and disbursements of the aforementioned operations]. [Plaintiff is informed and believes and thereon alleges that the amount owed, however, exceeds the sum of $_____.]

[8. On or about _____ (*date*), plaintiff demanded that defendant account for the aforementioned _____ (*specify, e.g.,* transactions) and pay the amount found due to plaintiff, but defendant has failed and refused, and continues to fail and refuse, to render the accounting and pay plaintiff. (A true and correct copy of plaintiff's demand letter is attached hereto as Exhibit "B" and made a part hereof.)]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an accounting between plaintiff and defendant;

2. For payment over to plaintiff of the amount due from defendant as a result of the account [and interest on that amount from and after _____ (*date*)];

[3. For reasonable attorney's fees in the amount of $_____, as provided in _____ (*specify, e.g.,* the management agreement between plaintiff and defendant);]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This is a general form of complaint for an accounting. The particular fact pattern set forth by way of example was adapted from the facts of *San Pedro Lumber Co. v. Reynolds (1896) 111 Cal. 588, 595-597, 44 P. 309* .

The accounting claim may stand alone or serve as a companion to other causes of action, such as conversion [*see Horan v. Consolidated etc. Min. Co. (1919) 41 Cal. App. 333, 338, 182 P. 813]* , or fraud or negligence [*see San Pedro Lumber Co. v. Reynolds (1896) 111 Cal. 588, 595-597, 44 P. 309]* .

[3] Allegations

This complaint includes optional paragraphs that allege the identity, capacity, and residence of the plaintiff and defendant (Paragraphs 1 and 2), fictitiously named defendants (Paragraph 3), and agency of the defendants (Paragraph 4).

Paragraph 5 of the complaint alleges the relationship between the parties or other circumstances that would permit a court of equity to maintain jurisdiction in an action for accounting, such as a fiduciary relationship between the parties, or circumstances that indicate that the accounts are too complicated to be dealt with in a court of law [*see San Pedro Lumber Co. v. Reynolds (1896) 111 Cal. 588, 595-597, 44 P. 309]* . The place where the contract was entered into may affect venue [*see Code Civ. Proc. § 395(a)* and *discussion under § 7.60[6]*]. The plaintiff is not required to state facts that are peculiarly within the knowledge of the defendant [*Raymond v. Independent Growers, Inc. (1955) 133 Cal. App. 2d 154, 160, 284 P.2d 57]* .

Paragraphs 6 and 7 of the complaint allege that there is an unknown amount due to plaintiff from defendant that cannot be determined without an accounting [*see Whann v. Doell (1923) 192 Cal. 680, 684, 221 P. 899]* . No cause of action for an accounting is stated if all the facts necessary for calculation of the amount sought are alleged in the complaint or can be alleged in a supplemental complaint and if the amount is certain [*St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 359, 287 P.2d 387]* .

Paragraph 8 provides an optional allegation that the plaintiff has demanded an accounting by the defendant that the defendant has refused [*see Bushnell v. McCauley (1857) 7 Cal. 421, 422* (discussing need for demand, but Court did not state whether action was one at law or in equity); *but see Keller Research Corp. v. Roquerre (S.D. Cal. 1951) 99 F.Supp. 964, 968* ; *Edgerton v. Armour & Co. (S.D. Cal. 1950) 94 F. Supp. 549, 557* (both cases applying California law, and stating that *Bushnell* applies to common law action of account, not to equitable action of accounting)]. A number of California courts have implied that a demand is not required [*see Wooster v. Nevills (1887) 73 Cal. 58, 61, 14 P. 390* ; *Kritzer v. Lancaster (1950) 96 Cal. App. 2d 1, 7, 214 P.2d 407* ; *Brea v. McGlashan (1934) 3 Cal. App. 2d 454, 460, 39 P.2d 877]* . The *Edgerton* court, however, suggested that a demand may be required if it is an integral part of the cause of action, as when the duty to pay or to do some act does not arise until after a demand, when it

appears that it would be unjust and inequitable to subject defendant to litigation without first notifying him or her of the claim, or when supported by the possibility of narrowing the issues or shortening the trial [*Edgerton v. Armour & Co. (S.D. Cal. 1950) 94 F. Supp. 549, 557* (dicta)]. Given the apparent uncertainty of this area, plaintiff should consider submitting a demand for an accounting to the defendant prior to bringing an action, and then alleging the fact that a demand was made and refused in the complaint.

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified [*Code Civ. Proc. §§ 92(b), 446*], and will also preclude a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction

The superior court has jurisdiction of unlimited civil cases as well as limited civil cases (*i.e.*, actions in which, generally, the amount in controversy, exclusive of interest, is $25,000 or less) [*Code Civ. Proc. §§ 85, 86(a)(1)*]. A limited civil case may include an accounting when it is necessary to the preserve the property or rights of any party to that case [*Code Civ. Proc. § 86(a)(8)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; Cal. Rules of Ct., Rule 201(f)(9), (10)].

For further discussion of jurisdiction over accounting actions, see *§ 7.15*.

[6] Venue

Generally, an action for accounting may be tried in the county in which the defendants, or some of them, reside at the commencement of the action [*Code Civ. Proc. § 395(a)*; *but see Code Civ. Proc. § 395.1* (venue in countyof jurisdiction of estate, rather than where defendant representative resides)]. When the complaint asserts a single cause of action but prays for various forms of relief, including an accounting, the true character of the action for venue purposes is determined by the main relief sought [*see Hays v. Cowles (1943) 60 Cal. App. 2d 514, 516-517, 519-520, 141 P.2d 26* ; *see § 7.16*].

An exception to the above general rule may apply to an accounting action that is founded on an obligation in which the defendant has contracted to perform in a particular county. In that case, the proper county for trial of an action founded on the obligation is (1) the county in which the obligation is to be performed, (2) the county in which the contract was entered into, or (3) the county in which the defendant resides [*Code Civ. Proc. § 395(a)*].

[7] Interest

Since an essential element in an action for accounting is that the amount due from the opposing party cannot be ascertained, the general rule is that if an accounting is required in order to arrive at a sum justly due, prejudgment interest under *Civ. Code § 3287* is not allowed [*Chesapeake Industries, Inc. v. Togova Enterprises, Inc. (1983) 149 Cal. App. 3d 901, 908, 197 Cal. Rptr. 348]* . The court in *Chesapeake Industries* indicated, however, that it did not preclude the possibility of prejudgment interest in an accounting action if equity demands such an award [*Chesapeake Industries, Inc. v. Togova Enterprises, Inc. (1983) 149 Cal. App. 3d 901, 909, 197 Cal. Rptr. 348]* .

[8] State Constitution

Jurisdiction of superior court. *Cal. Const., art. VI, § 10*

[9] State Statutes

Limited civil cases. *Code Civ. Proc. § 85, 85.1, 86*

Venue. *Code Civ. Proc. §§ 392, 395, 395.5*

Verification. *Code Civ. Proc. §§ 431.30(d), 446*

[10] Decisions

Fiduciary relationship or complicated accounts are circumstances permitting court of equity to maintain jurisdiction in action for accounting. *San Pedro Lumber Co. v. Reynolds (1896) 111 Cal. 588, 595-597, 44 P. 309*

Prejudgment interest is generally not allowed in action for accounting. *Chesapeake Industries, Inc. v. Togova Enterprises, Inc. (1983) 149 Cal. App. 3d 901, 908-909, 197 Cal. Rptr. 348*

Amount due from defendant that is unknown to plaintiff and unascertainable without an accounting is essential to action for accounting. *St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 359, 287 P.2d 387*

Plaintiff is not required to state facts that are peculiarly within knowledge of defendant. *Raymond v. Independent Growers, Inc. (1955) 133 Cal. App. 2d 154, 160, 284 P.2d 57*

[11] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used* .

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions* .

For discussion and forms relating to the format of complaints, *see* Ch. 123, *Complaints and Cross Complaints* .

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages* .

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter* .

For alternative forms of prayers, see Ch. 420, *Prayers* .

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers* .

For forms of allegations showing proper venue, see Ch. 571, *Venue* .

For alternative forms of verification, see Ch. 572, *Verification* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesEquitable AccountingsElements

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Chapter 7 ACCOUNTING, ACTION FOR
PART IV. FORMS

1-7 California Forms of Pleading and Practice--Annotated § 7.61

§ 7.61 Allegations--Accounting After Dissolution of Partnership [Corp. Code §§ 16404(b)(1), 16405(b), 16803, 16807]

[1] FORM Allegations--Accounting After Dissolution of Partnership [Corp. Code §§ 16404(b)(1), 16405(b), 16803, 16807]

1. On or about _____ [*date*], plaintiff and defendant entered into a written partnership agreement at _____ [*city*], California for the purpose of carrying on the business of _____ [*describe business*], under the name of _____ [*name of partnership*], with its principal place of business at _____ [*city*], California. A copy of the agreement is attached hereto as Exhibit "A" and made a part hereof.

[2. Thereafter and until about _____ [*date*], the partnership conducted the aforementioned business, acquired assets, and incurred liabilities resulting in an overall profit. On _____ [*date*], the partnership was dissolved by _____ [*specify, e.g.,* termination of the definite term specified in the partnership agreement]. Notice of the dissolution was published pursuant to the provisions of *Section 15035.5 of the Corporations Code*. The amount of assets and liabilities is unknown to plaintiff and cannot be ascertained without an accounting of the profits and losses that occurred during the operation of the business.]

3. The partnership agreement provides that _____ [*specify terms relating to division of profits, e.g.,* the profits of the partnership, as defined therein, must be divided equally between plaintiff and defendant].

4. _____ [*Set forth circumstances giving rise to accounting, e.g.,* Plaintiff is informed and believes and thereon alleges that beginning on or about _____ (*date*), defendent has not distributed to plaintiff his/her full share of the partnership profits. On or about _____ (*date*), plaintiff demanded that defendant remit to plaintiff the unpaid share, but defendant has failed and refused, and continues to fail and refuse to do so]. [Plaintiff is informed and believes and thereon alleges that the amount owed to plaintiff exceeds the sum of $_____.]

[5. On or about _____ (*date*), plaintiff demanded that defendant render an accounting of the profits

and losses of the partnership, but defendant has failed and refused, and continues to fail and refuse, to render the accounting.]

[2] Use of Form

These allegations are for use by a plaintiff in a complaint for accounting against a copartner when the partnership has ceased doing business and has been dissolved [*Corp. Code §§ 16405*; *see also* former *Corp. Code §§ 15022, 15029-15035.5*]. If these allegations are being used, they should replace Paragraphs 5-8 in § 7.60[1].

The notice provision in this form, stated in Paragraph 2, is only appropriate in an action for accounting after dissolution of a partnership which was subject to the Uniform Partnership Act (former *Corp. Code § 15001 et seq.*), as opposed to the Uniform Partnership Act of 1994 (*Corp. Code § 16100 et seq.*) at the time the partnership was dissolved. Thus, it should only be used if the partnership was formed prior to January 1, 1997, and was dissolved no later than either December 31, 1998, or if the partnership opted to be governed by the Uniform Partnership Act of 1994 earlier than January 1, 1999, no later than the date it so elected [*see Corp. Code § 16111*]. With respect to partnerships that have elected to be governed by the UPA of 1994, there is no publication of notice requirement analogous to *Corp. Code § 15035.5*.

With appropriate modifications these allegations may be used in conjunction with ancillary remedies, such as receivership, reference, and preliminary injunction. If the partnership is continuing, the action for accounting may be combined with an action for dissolution of partnership. For a discussion of these remedies and procedures, and forms of complaint for partnership an accounting, see Ch. 401, *Partnerships: Actions Between General Partners and Partnership* , Ch. 403, *Partnerships: Actions By and Against Dissociated Partners* , and Ch. 406, *Partnerships: Dissolution* .

[3] State Statutes

Duty of partner to account to partnership. *Corp. Code § 16404(b)(1)*

Partner's right to accounting. *Corp. Code § 16405*

[4] Decisions

Right to an accounting is established prima facie by fact of partnership dissolution. *Ferem v. Olson & Mahony (1917) 176 Cal. 652, 656, 169 P. 386*

When unfinished business is finished partly by surviving partners and partly by departing partners and other claims were litigated between them, no partner is required to pay claims before final adjudication of offsetting claims; proper procedure is to resolve all competing claims and then render net judgment. *Rosenfeld, Meyer & Susman v. Cohen (1987) 191 Cal. App. 3d 1035, 1049, 1063-1064, 237 Cal. Rptr. 14* (staying implementation of earlier judgments until last accounting resolved)

Dissolution and accounting of assets and liabilities are proper relief in termination of partnership. *Myers v. Washington (1963) 211 Cal. App. 2d 767, 770, 27 Cal. Rptr. 778*

All partners are necessary parties in action for dissolution of partnership and accounting. *Rudnick v. Delfino (1956) 140 Cal. App. 2d 260, 264-265, 294 P.2d 983*

Maintenance of separate action for accounting is permitted when earlier dissolution by mutual consent of partners. *Lytle v. Kroenke (1945) 67 Cal. App. 2d 596, 602, 154 P.2d 919*

[5] Text References

Witkin, California Procedure, vol. 5, *Pleading,* § 775 et seq. (4th ed. 1997)

Witkin, Summary of California Law, vol. 9, *Partnership,* § 48 et seq. (10th ed. 2005)

[6] Cross References

See also *§ 7.60*.

For a form of agreement dissolving a partnership and providing for accounting and settling of accounts, see California Legal Forms, Ch. 15, *General Partnerships*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionGeneral OverviewCivil ProcedureRemediesEquitable AccountingsPartnershipsCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesEquitable AccountingsElements

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Chapter 7 ACCOUNTING, ACTION FOR
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1-7 California Forms of Pleading and Practice--Annotated § 7.62

§ 7.62 Allegations--Accounting Among Joint Venturers for Reimbursement of Expenses

[1] FORM Allegations--Accounting Among Joint Venturers for Reimbursement of Expenses

1. On or about _____ [*date*], at _____ [*city*], California, plaintiff and defendant entered into _____ [a written *or* an oral] agreement for the purpose of working together in a joint venture involving _____ [*specify activity involved*]. [A copy of the agreement is attached hereto as Exhibit "A" and made a part hereof.]

2. Pursuant to the agreement and on or about _____ [*date*], _____ [*describe transaction, e.g.,* a voyage was made by the vessel _____ (*name*) to _____ (*location*) for the purpose of purchasing, transporting, and ultimately selling seafood products; the voyage was completed on or about _____ (*date*), when the vessel returned to _____ (*location*) and discharged its cargo].

3. Plaintiff is informed and believes and thereon alleges that the joint venture suffered financial losses. From and after _____ [*date*], plaintiff has paid numerous debts in the sum of $ _____ on account of the joint venture and expended sums of money for the benefit of the joint venture. The agreement provides that losses of the joint venture shall be borne equally by the principals thereof but defendant has failed and refused to pay the losses or to reimburse plaintiff for his/her share of the debts and expenditures. Additional claims have been made to plaintiff by alleged creditors of the joint venture.

4. Plaintiff does not have sufficient information about the sales or additional expenses, if any, of the joint venture but defendant has complete records of all such items. [On or about _____ (*date*), plaintiff demanded an accounting of such items from defendant and reimbursement of his/her share of the losses, but defendant has failed and refused and continues to fail and refuse to render an accounting and to pay his/her share of the losses of the joint venture.]

5. Plaintiff is entitled, therefore, to reimbursement as herein alleged in a sum that is unknown to plaintiff and cannot be ascertained without an accounting. [Plaintiff is informed and believes and thereon alleges that the sum to be reimbursed,

however, exceeds $_____.]

[2] Use of Form

The foregoing allegations are for use in a complaint for accounting among joint venturers. If these allegations are being used, they should replace Paragraphs 5-8 in § 7.60[1].

[3] Allegations

The foregoing form contains essential allegations to maintain an action for accounting against a coventurer, as follows: there was a joint venturerelationship between the parties (Paragraph 1); the joint venture incurred debts that were paid by the plaintiff, but defendant has refused to reimburse the share allocated to plaintiff by the joint venture agreement (Paragraphs 2, 3); and the amount owed to the plaintiff is unknown and cannot be ascertained without an accounting (Paragraphs 4, 5) [*Stilwell v. Trutanich (1960) 178 Cal. App. 2d 614, 620, 3 Cal. Rptr. 285]* .

[4] Decisions

Nature of relationship requiring accounting and that some balance is due plaintiff as only facts essential to complaint for accounting. *Stilwell v. Trutanich (1960) 178 Cal. App. 2d 614, 620, 3 Cal. Rptr. 285*

Omission of provision in joint venture agreement for sharing of losses as immaterial since law implies that losses are to be shared among parties in same proportion as division of profits. *Stilwell v. Trutanich (1960) 178 Cal. App. 2d 614, 619, 3 Cal. Rptr. 285*

Joint venture as undertaking by two or more persons jointly to carry out single enterprise for profit. *Stilwell v. Trutanich (1960) 178 Cal. App. 2d 614, 618, 3 Cal. Rptr. 285*

Joint venturers as having fiduciary relationship; accounting between joint venturers as proper. *Wyoming Pacific Oil Co. v. Preston (1959) 171 Cal. App. 2d 735, 747, 341 P.2d 732*

Resemblance between partnership and joint venture so close that rights between joint venturers as practically governed by same rules that govern partnerships. *Tufts v. Mann (1931) 116 Cal. App. 170, 178, 2 P.2d 500*

Joint venturer as having right to sue for an accounting of profits. *Tufts v. Mann (1931) 116 Cal. App. 170, 178, 2 P.2d 500*

[5] Text References

Witkin, California Procedure, vol. 5, *Pleading*, § 777 (4th ed. 1997)

Witkin, Summary of California Law, vol. 9, *Partnership*, § 9 et seq. (10th ed. 2005)

[6] Cross References

See also *§ 7.60*.

For discussion and forms relating to joint ventures generally, see *Ch. 400, Partnerships: Governing Statutes, § 400.15*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawJoint VenturesGeneral OverviewBusiness & Corporate LawJoint VenturesDissolution & Winding UpCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesEquitable AccountingsElements

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§ 7.63 Allegations--Accounting Against Former Officer by Association for Association Funds

[1] FORM Allegations--Accounting Against Former Officer by Association for Association Funds

1. At all times herein mentioned, plaintiff was an unincorporated [nonprofit] association composed of _____ [*generally describe membership*] for the purpose of _____ [*describe general purpose of organization*].

2. Plaintiff is governed by a constitution and bylaws pursuant to which officers, including a _____ [*set forth capacity of agent acting for association, e.g.,* treasurer], are elected. [Copies of the constitution and bylaws are attached hereto as Exhibits "A" and "B" respectively and made a part hereof.]

3. _____ [*Allege circumstances necessary to accounting, such as fiduciary relationship or complicated accounts, e.g.,* On or about _____ (*date*), defendant was duly elected treasurer of plaintiff and thereafter assumed the duties of such office and took possession of the books and money of plaintiff, and has ever since been, and still is, acting as treasurer].

4. _____ [*Set forth transaction on which suit for accounting is based, e.g.,* On taking office, defendant received the sum of $ _____ from plaintiff's former treasurer, and since that time has collected various sums of money as fees, dues, and contributions and has made disbursements of various sums of money for plaintiff's purposes. The constitution and bylaws of plaintiff provide that the treasurer is required to furnish an accounting of receipts and disbursements at plaintiff's annual meeting. Such annual meeting was held on _____ (*date*), but defendant failed and refused and continues to fail and refuse to furnish such an accounting].

5. Plaintiff is unable to determine the amounts received and disbursed by defendant without an accounting of the transactions during defendant's term as treasurer [, but is informed and believes and thereon alleges that the amount of plaintiff's funds in defendant's possession exceeds $ _____].

[6. On or about _____ (*date*), plaintiff, through its president _____ [*name*],

demanded an accounting of the funds in defendant's possession but defendant has failed and refused to render an accounting or to turn over the books, records, and money in his possession to plaintiff.]

[2] Use of Form

These allegations are for use in a complaint for an accounting by an unincorporated association against its treasurer. When using these allegations, Paragraphs 1-5 should replace Paragraphs 5-8 in § 7.60[1].

If an individual member of the association desires to bring an action for accounting, the member must comply with the requirements for maintenance of a derivative action under the Corporations Code [*see* Corp. Code§ 800(a)-(b); *see also Gieske v. Anderson (1888) 77 Cal. 247, 249, 19 P. 421* (suit against former treasurer of association for funds belonging to association was controversy in interest of all members)]. For forms of complaint relating to derivative actions against certain members of the managing body of an unincorporated association, see Ch. 61, *Associations and Clubs* .

An officer of an unincorporated association may be sued for an accounting when it is claimed that the assets of the organization are concealed and illegally expended [*Malone v. Superior Court (1953) 40 Cal. 2d 546, 550-551, 254 P.2d 517]* . An unincorporated association may sue in the name that it has assumed or by which it is known [*Code Civ. Proc. § 369.5(a)*].

[3] State Statutes

Capacity of unincorporated association to sue. *Code Civ. Proc. § 369.5(a)*

Member's derivative action against governing body of unincorporated association. *Corp. Code § 800(a)-(b)*

[4] Decisions

Action for accounting is available against officer of nonprofit corporation or unincorporated association. *Malone v. Superior Court (1953) 40 Cal. 2d 546, 550-551, 254 P.2d 517*

Action by current association treasurer against former treasurer for association funds was action for benefit of all members. *Gieske v. Anderson (1888) 77 Cal. 247, 249, 19 P. 421*

Injury to the corporation or whole body of shareholders is essential element of derivative action. *Starbird v. Lane (1962) 203 Cal. App. 2d 247, 255, 21 Cal. Rptr. 280*

[5] Cross References

See also *§ 7.60*.

For discussion and forms relating to fiduciary duties of officers, directors, and controlling shareholders of corporations, see Ch. 160, *Corporations: Directors and Management* .

For discussion and forms relating to actions between partners, see Ch. 401, *Partnerships: Actions Between General*

Partners and Partnership .

For a form of unincorporated association bylaws setting forth duties of treasurer relating to rendering of accounts, see California Legal Forms, Ch. 13.

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-7 California Forms of Pleading and Practice--Annotated § 7.64

§ 7.64 Allegations--Accounting Against Distributor by Manufacturer for Profits

[1] FORM Allegations--Accounting Against Distributor by Manufacturer for Profits

1. _____ [*Allege circumstances necessary to accounting, e.g.,* On or about _____ (*date*), plaintiff and defendant entered into _____ (a written *or* an oral) agreement whereby defendant agreed to act as distributor of _____ (*specify product*) manufactured by plaintiff in _____ (*specify location, e.g.,* _____ County, California). Under the terms of the agreement, defendant was obligated to sell plaintiff's product, receive payment therefor, deduct certain expenses, and pay to plaintiff _____ (*percentage*) of all profits. (A copy of the agreement is attached hereto as Exhibit "A" and made a part hereof.) (On or about _____ (*date*), by reason of the failure, neglect, and refusal of defendant to fulfill the terms of the agreement, plaintiff terminated the agreement by notice as provided in the agreement.)]

2. _____ [*Set forth transaction showing that some amount is owed to plaintiff, e.g.,* During the term of the agreement, and pursuant thereto, plaintiff delivered various quantities of _____ (*specify product*) to defendant. Plaintiff is informed and believes and thereon alleges that defendant sold a portion of the _____ (*specify product*) and received payment therefor, has expended certain sums for _____ (*specify, e.g.,* assembly and advertisement), and has realized a profit from the sales. Defendant, however, has not paid plaintiff's share of the profit as agreed].

3. The exact nature and extent of the sales, expenses, and inventory is unknown to plaintiff and cannot be determined without an accounting of the transactions of the parties. [Plaintiff is informed and believes and thereon alleges that his/her share of the profits exceeds $_____.]

[4. Plaintiff has demanded that defendant account for the _____ (*specify product*) delivered, pay plaintiff his/her share of the profits realized from the sales, and return the remaining inventory to plaintiff. Defendant has failed and refused, and continues to fail and refuse, to render such an accounting, pay such profits, or return such inventory.]

[2] Use of Form

The foregoing allegations are for use in a complaint for an accounting of profits by a manufacturer against its distributor [*see Beatty Safway Scaffold v. Skrable (1960) 180 Cal. App. 2d 650, 651, 4 Cal. Rptr. 543* (judgment for defendant on grounds that no agreement existed)]. When using these allegations, Paragraphs 1-4 should replace Paragraphs 5-8 in § 7.60[1].

Plaintiff should also consider the need of restraining the defendant from disposing of the inventory by adding appropriate allegations to thecomplaint and a request for injunctive relief to the prayer. For discussion and forms relating to injunctive relief, see Ch. 303, *Injunctions* .

[3] State Statutes

Judgment in action to recover possession of personal property. *Code Civ. Proc. § 667*

[4] Decisions

Whatever relationship of parties may have been, when contract provides for payment by one party to another of profits received, party receiving profits as having duty to account. *Nelson v. Abraham (1947) 29 Cal. 2d 745, 751, 177 P.2d 931*

Distributor as fiduciary to supplier in action for accounting. *Raymond v. Independent Growers, Inc. (1955) 133 Cal. App. 2d 154, 161, 284 P.2d 57*

[5] Cross References

See also *§ 7.60*.

For discussion and forms relating to the recovery of personal property, see Ch. 119, *Claim and Delivery* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesEquitable AccountingsElements

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1-7 California Forms of Pleading and Practice--Annotated § 7.65

§ 7.65 Allegations--Accounting Against Employer by Sales Manager for Commissions

[1] FORM Allegations--Accounting Against Employer by Sales Manager for Commissions

1. _____ [*Allege basis of employment relationship, e.g.,* On or about _____ (*date*), plaintiff and defendant entered into _____ (a written *or* an oral) contract whereby defendant employed plaintiff as the manager of _____ (*specify department or other description*) for the purpose of selling _____ (*describe product or service*)]. [A copy of the contract is attached hereto as Exhibit "A" and made a part hereof.]

2. _____ [*Set forth terms of contract showing employee's compensation to be in form of percentage of moneys received by employer, e.g.,* The contract provided that plaintiff was to receive _____ percent of the profits resulting from the sales _____ (*specify, e.g.,* of his/her department). The contract further provided that plaintiff's compensation will be based on an amount of profits to be determined by an accounting of _____ (*specify what sales would be considered and what expenses would be deducted*)].

3. _____ [*Allege performance entitling plaintiff to commission, e.g.,* Pursuant to the contract, plaintiff entered into the employment and diligently and faithfully rendered his/her services to defendant and performed all of the terms and conditions of the contract on his/her part to be performed. On _____ (*date*), plaintiff's employment was terminated by defendant].

4. _____ [*Set forth transaction showing that some amount is owed to plaintiff, e.g.,* Between _____ (*date*) and _____ (*date*), defendant entered into sales transactions with various persons and received a profit, a portion of which is due and owing to plaintiff. Defendant, however, has not accounted for the profits and has not paid plaintiff's share].

5. Plaintiff does not know the precise amount of profit on which to base his/her claim for compensation, because such profits can only be determined by an accounting of defendant's books and records. [Plaintiff is informed and believes and thereon alleges that defendant owes plaintiff compensation in excess of $_____.]

[6. Plaintiff has demanded an accounting by defendant of the transactions on which defendant's profits can be ascertained, and has demanded payment of the compensation due him/her based on such profits. Defendant has failed and refused, and continues to fail and refuse, to make such an accounting or to pay plaintiff the compensation due him/her.]

[2] Use of Form

The foregoing allegations are for use in a complaint for accounting by an employee whose compensation is based on profits of the employer.When using these allegations, Paragraphs 1-6 should replace Paragraphs 5-8 in § 7.60[1].

Ordinarily, in an action by an employee to recover wages owed, no accounting is necessary because the amount owed is a fixed sum, ascertainable by the employee. When the employee's compensation is alleged to be in the form of a percentage of the moneys received by the employer, however, and the complaint alleges that the plaintiff does not know what moneys had been received by the defendant, an accounting would be the only method of arriving at the amount due [*Nelson v. Abraham (1947) 29 Cal. 2d 745, 751, 177 P.2d 931* ; *Brea v. McGlashan (1934) 3 Cal. App. 2d 454, 460, 39 P.2d 877]* . The general rule that an agent cannot demand an accounting from his principal is subject to the modification that when the relation between the agent and the principal is of a fiduciary character or the transactions between them are so involved or complicated that the remedy at law is insufficient to administer complete justice, a court of equity will entertain a bill by an agent for an accounting [*Arbuckle v. Clifford F. Reid, Inc. (1931) 118 Cal. App. 272, 277, 4 P.2d 978]* .

Additionally, the relationship of the parties may be that of an employer and employee for one purpose, and that of partners or joint venturers for another purpose [*see* *Nelson v. Abraham (1947) 29 Cal. 2d 745, 751, 177 P.2d 931]* .

[3] Allegations

The plaintiff is not required to state facts that are peculiarly within the knowledge of the defendant. A complaint that alleges the employment (Paragraph 1), the manner of compensation (Paragraph 2), the performance of services showing some compensation to be due (Paragraph 3), and the fact that the correct amount cannot be ascertained without an accounting (Paragraphs 4, 5) is sufficient to bring an action for accounting [*Brea v. McGlashan (1934) 3 Cal. App. 2d 454, 460, 39 P.2d 877]* .

[4] Cross References

See also *§ 7.60*.

For discussion and forms relating to recovery of employee compensation, see Ch. 250, *Employment Law: Wage and Hour Disputes* .

For discussion and forms relating to actions by an agent against a principal, see Ch. 427, *Principal and Agent* .

For discussion and form of complaint for accounting by a principal against an agent, see Ch. 427, *Principal and Agent* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewCivil ProcedurePleading

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§ 7.66 Allegations--Accounting Against Attorney by Client for Amounts Collected From Accounts Receivable

[1] FORM Allegations--Accounting Against Attorney by Client for Amounts Collected From Accounts Receivable

1. _____ [*Allege plaintiff's ownership of accounts receivable, e.g.,* For approximately _____ years prior to _____ (*date*), plaintiff owned and operated a _____ (*specify type of business*) at _____, California. On _____ (*date*), plaintiff sold the business, reserving the right to collect all accounts receivable due to him/her as a result of his/her ownership and operation of the business].

2. On _____ [*date*], plaintiff's books of account showed that the total amount of accounts receivable was $_____.

3. _____ [*Allege circumstances necessary to accounting, such as fiduciary relationship or complicated accounts, e.g.,* On or about _____ (*date*), plaintiff retained defendant as his/her attorney to collect the amount of the accounts receivable from the various debtors and agreed to pay defendant _____ percent of any amounts collected as his/her fee]. [A copy of the fee agreement is attached hereto as Exhibit "A" and made a part hereof.]

4. _____ [*Set forth transaction showing that some amount is owed to plaintiff, e.g.,* Beginning _____ (*date*) until _____ (*date*), defendant collected accounts receivable from plaintiff's debtors. Defendant, however, has not paid over to plaintiff any amount of the collections].

5. The amount of the accounts receivable collected by defendant is unknown to plaintiff and cannot be ascertained without an accounting [, but plaintiff is informed and believes and thereon alleges that defendant has collected at least $_____].

[6. Plaintiff has demanded that defendant account for all amounts received by him/her and pay over such amounts to plaintiff less defendant's fees, but defendant has failed and refused, and continues to fail and refuse, to so account or pay

such amounts to plaintiff.]

[2] Use of Form

These allegations are for use in a complaint for accounting by a client against an attorney for accounts receivable collected by the attorney on the client's behalf. When using these allegations, Paragraphs 1-6 should replace Paragraphs 5-8 in § 7.60[1].

[3] State Statutes

Authority of attorney to receive money for client. *Code Civ. Proc. § 283*

[4] Decisions

Defendant agent in action for accounting as having burden of proving that he or she paid to the principal or otherwise disposed of money or other thingthat the agent received for the principal. *Kennard v. Glick (1960) 183 Cal. App. 2d 246, 251, 7 Cal. Rptr. 88*

[5] Text References

Witkin, Summary of California Law, vol. 3, *Agency and Employment*, § 113 (10th ed. 2005)

[6] Cross References

See also *§ 7.60*.

For discussion and forms relating to the attorney-client relationship generally, see Ch. 72, *Attorney Practice and Ethics* .

For discussion and forms relating to actions by principals against agents, see Ch. 427, *Principal and Agent* .

For form of contingent fee agreement for collections, see California Legal Forms, Ch. 86, *Agreements for Professional Services*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsClient FundsCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesEquitable AccountingsElements

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1-7 California Forms of Pleading and Practice--Annotated § 7.67

§ 7.67 Allegations--Accounting Against Stockbroker for Money Advanced to Invest

[1] FORM Allegations--Accounting Against Stockbroker for Money Advanced to Invest

1. At all times herein mentioned, defendant _____ [*name*] was a stockbroker engaged in the business of buying, selling, and trading securities for the accounts of customers, such as and including plaintiff.

2. _____ [*Allege circumstances necessary to accounting, such as fiduciary relationship or complicated accounts, e.g.,* On or about _____ (*date*), defendant approached and solicited plaintiff to permit defendant to invest plaintiff's money in securities that defendant represented were known to him/her to be safe and proven. On or about _____ (*date*), plaintiff and defendant entered into a(n) _____ (oral *or* written) agreement whereby defendant agreed to become the trusted agent of plaintiff and invest plaintiff's money in sound, nonspeculative securities for plaintiff's benefit. (A copy of the agreement is attached hereto as Exhibit "A" and made a part hereof.)]

3. On or about _____ [*date*], plaintiff deposited with defendant the sum of $_____ to be invested in accordance with the terms of the agreement.

4. _____ [*Set forth transaction showing that some amount is owed to plaintiff, e.g.,* Between _____ (*date*) and _____ (*date*), defendant bought and sold speculative and unsound securities with plaintiff's money for defendant's own gain and secret profit, resulting in a decrease of plaintiff's capital and money].

5. The amount of plaintiff's losses and defendant's secret profits are unknown to plaintiff, and cannot be ascertained without an accounting, the means of which are within the knowledge of defendant. [Plaintiff is informed and believes and thereon alleges the amount of plaintiff's loss is in excess of $ _____, and the amount of defendant's secret profits is in excess of $_____.]

[6. On or about _____ (*date*), plaintiff demanded that defendant render an accounting of all purchases and sales made with plaintiff's money, and all profits made by defendant from the use of plaintiff's money, and that

defendant pay over to plaintiff all sums to which plaintiff is entitled. Defendant, however, has failed and refused, and continues to fail and refuse, to render the account and pay plaintiff.]

[2] Use of Form

The foregoing allegations are for use in a complaint for accounting against a stockbroker for money deposited with the stockbroker for investments [*see Kritzer v. Lancaster (1950) 96 Cal. App. 2d 1, 7, 214 P.2d 407]* . When using these allegations, Paragraphs 1-6 should replace Paragraphs 5-8 in § 7.60[1].

With appropriate modifications, the foregoing allegations may be used in conjunction with other causes of action, such as fraud and breach of contract, and those provided for by statute and regulation under state and federal securities laws. For discussion relating to regulation of securities transactions by broker-dealers, see Ch. 515, *Securities and Franchise Regulation* .

[3] Allegations

A complaint for accounting by an investor against a stockbroker is sufficient to withstand a general demurrer if it alleges (1) a confidential relationship between the parties; (2) an oral (or written) agreement providing the basis for that relationship (Paragraphs 1-3); (3) defendant's misconduct in breach of that relationship to defendant's gain and secret profit (Paragraph 4); and (4) a resulting loss to plaintiff that cannot not be ascertained without an accounting, the means of which are within the knowledge of the defendants (Paragraph 5) [*see Whann v. Doell (1923) 192 Cal. 680, 684, 221 P. 899* ; *Kritzer v. Lancaster (1950) 96 Cal. App. 2d 1, 7, 214 P.2d 407]* .

[4] Decisions

Plaintiff as entitled to accounting against defendant who obtained title to plaintiff's stock in mine company by deceiving plaintiff into believing that defendant would sell the mine for plaintiff's benefit. *Wooster v. Nevills (1887) 73 Cal. 58, 61, 14 P. 390*

Stockbroker as owing fiduciary duty to customer, and intentional failure to disclose material fact as actionable fraud. *Black v. Shearson, Hammill & Co. (1968) 266 Cal. App. 2d 362, 367, 72 Cal. Rptr. 157*

[5] Text References

Witkin, Summary of California Law, vol. 3, *Agency and Employment*, § 46; vol. 5, *Torts*, §§ 794-795 (10th ed. 2005)

[6] Cross References

See also *§ 7.60*.

For discussion and forms relating to relationships with brokers generally, see Ch. 103, *Brokers* .

For discussion and forms relating to breach of contract generally, see Ch. 140, *Contracts* .

For discussion and forms relating to the duties of an agent to a principal, see Ch. 427, *Principal and Agent* .

For memoranda of points and authorities relating to relationships with brokers, see California Points and Authorities, Ch. 31, *Brokers and Salespersons* .

For forms of interrogatories in an action to recover a stockholder's purchase advances, see Bender's Forms of Discovery, *Brokers*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsCauses of Action & RemediesGeneral OverviewSecurities LawGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesEquitable AccountingsElements

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Chapter 7 ACCOUNTING, ACTION FOR
PART IV. FORMS

1-7 California Forms of Pleading and Practice--Annotated § 7.68

§ 7.68 Allegations--Accounting Against Escrow Agent for Real Property Sales Transaction

[1] FORM Allegations--Accounting Against Escrow Agent for Real Property Sales Transaction

1. During the period between _____ [*date*], and _____ [*date*], defendant acted as escrow agent in a transaction between plaintiff and _____ [*name*] involving _____ [*specify, e.g.,* the sale of real property commonly described as _____ (*describe*)].

2 As the escrow agent, defendant was authorized by plaintiff to _____ [*specify defendant's duty to plaintiff, e.g.,* receive from plaintiff sums of money for the purchase of the property and apply the full amount (less a fee for defendant's escrow services) to plaintiff's account]. Between _____ [*date*] and _____ [*date*], _____ [*specify receipt by defendant, e.g.,* defendant received from plaintiff the total sum of $ _____]. Plaintiff is informed and believes and thereon alleges that defendant _____ [*specify defendant's conduct on which the accounting is based, e.g.,* did not apply the full amount received to plaintiff's account].

3. The amount received by defendant in excess of the amount of disbursements [less defendant's fee for escrow services] is due and owing from defendant to plaintiff. [Plaintiff has demanded an accounting of the escrow transactions and payment of the amount due but defendant has failed and refused, and continues to fail and refuse, to render such accounting or to pay such sum.]

[2] Use of Form

The foregoing allegations are for use in a complaint for an accounting against an escrow agent for money received and disbursed for plaintiff's account in a real property sales transaction. If these allegations are being used, they should replace Paragraphs 5-8 in § 7.60[1].

[3] California Code of Regulations

Duty of escrow holder to provide each party to escrow written statement of account. *10 Cal. Code Reg. § 1741.3*

[4] Decisions

Escrow holder as fiduciary of all parties to escrow and liable for any breach of fiduciary duty. *Kirby v. Palos Verdes Escrow Co. (1986) 183 Cal. App. 3d 57, 64-65, 227 Cal. Rptr. 785*

[5] Cross References

See also *§ 7.60*.

For discussion and forms of complaint in actions against an escrow holder generally, see Ch. 253, *Escrows* .

For discussion and forms of complaint in actions for accounting by a principal against an agent, see Ch. 427, *Principal and Agent* .

For discussion of the duties and liabilities of escrow holders generally, see *California Real Estate Law and Practice, Ch. 91, §§ 91.10 -91.16, 91.127[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsReal Property LawBrokersFiduciary ResponsibilitiesCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesEquitable AccountingsElements

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1-7 California Forms of Pleading and Practice--Annotated § 7.69

§ 7.69 Allegations--Accounting Against Coowner of Real Property for Rents

[1] FORM Allegations--Accounting Against Coowner of Real Property for Rents

1. At all times herein mentioned, plaintiff and defendant were owners, as _____ [tenants in common *or* joint tenants], each of an undivided one half interest, of certain real property and improvements thereon consisting of _____ [*specify, e.g.,* an apartment house], commonly described as _____ [*street address and city*], California.

2. Between _____ [*date*], and _____ [*date*], defendant rented the property to third parties, and collected and received rents from them. [During such period, defendant also _____ (*set forth expenditures made for the necessary preservation of the property, e.g.,* made mortgage payments, paid taxes, and undertook necessary repairs).]

3. Plaintiff is informed and believes and thereon alleges that the amount defendant collected and received [, after allowance for expenditures necessarily made for the protection of the property,] exceeds defendant's share as coowner of the property. During the period hereinabove alleged, however, without plaintiff's knowledge or consent, defendant took plaintiff's share of the rents and appropriated them to his/her own use.

4. The amount received by defendant is unknown to plaintiff and cannot be ascertained without an accounting of the rents and profits collected by defendant [, but plaintiff is informed and believes and thereon alleges that the amount owed to plaintiff is in excess of $_____].

[5. Plaintiff has demanded an accounting of the rents and profits collected by defendant, but defendant failed and refused, and continues to fail and refuse, to so account.]

[2] Use of Form

These allegations are for use in a complaint for an accounting against a coowner of real property for rents received. If these allegations are being used, they should replace Paragraphs 5-8 in § 7.60[1].

One cotenant may maintain an action requiring the other cotenant to account for rents collected from their property from a third person to whom the property is leased. The action may be maintained in equity independent of a demand for partition of the property [*Howard v. Throckmorton (1881) 59 Cal. 79, 86, 89]* .

If the owners of the property have agreed regarding the use or disposition of the rents, that agreement should be alleged in the complaint. An action for an accounting may also be combined with an action for partition of the property [*see McWhorter v. McWhorter (1929) 99 Cal. App. 293, 296, 278 P. 454]* . An interlocutory judgment for partition, however, unlike an interlocutory judgment for accounting, is appealable [Code Civ. Proc.§ 904.1(a)(9); *see also Degnan v. Morrow (1969) 2 Cal. App. 3d 358, 364-366, 82 Cal. Rptr. 557]* .

[3] Cross References

See also *§ 7.60*.

For discussion and form of complaint for accounting incident to partition of real property, see Ch. 397, *Partition* .

For discussion of the right of a cotenant to income from real property generally, see *California Real Estate Law & Practice, Ch. 345, §§ 345.54 -345.55*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawLandlord & TenantRental Property ManagementCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesEquitable AccountingsElements

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1-7 California Forms of Pleading and Practice--Annotated § 7.70

§ 7.70 Allegations--Accounting Against Agent for Real Property Rents

[1] FORM Allegations--Accounting Against Agent for Real Property Rents

1. At all times herein mentioned, plaintiff was the owner of certain real property consisting of _____ [*specify, e.g.,* an apartment house] commonly described as _____ [*street address and city*], California.

2. At all times herein mentioned, plaintiff was entitled to the rents from the property.

3. On or about _____ [*date*], plaintiff and defendant entered into _____ [a written *or* an oral] agreement whereby defendant agreed _____ [*allege terms of agency relationship relating to defendant's duty to pay rents over to plaintiff, e.g.,* to collect the rents for the property, pay the costs of upkeep out of the rents, and pay over the balance of the rents to plaintiff. In consideration for such services, defendant was to receive $ _____ per month]. [A copy of the agreement is attached hereto as Exhibit "A" and made a part hereof.]

4. _____ [*Specify transaction(s) on which accounting action is/are based, e.g.,* Plaintiff is informed and believes and thereon alleges that from _____ (*date*), to _____ (*date*), defendant collected rents on the property and made disbursements for upkeep therefrom, but has failed and refused to pay over the balance of the rents to the plaintiff].

5. The amount that defendant collected and disbursed is unknown to plaintiff and cannot be ascertained without an accounting. [Plaintiff is informed and believes and thereon alleges that the amount owed to plaintiff by defendant is in excess of $_____.]

[6. Plaintiff has demanded an accounting from defendant and payment of the rents received over and above the amount paid for upkeep and for defendant's services. Defendant has failed and refused, and continues to fail and refuse, to render such an account and to pay over the amount due.]

[2] Use of Form

The foregoing allegations are for use in a complaint for accounting against an agent for real property rents. If these allegations are being used, they should replace Paragraphs 5-8 in § 7.60[1].

[3] Allegations

Paragraphs 1-3 allege the terms of the fiduciary relationship between the parties based on their respective capacities as principal and agent [*see Kennard v. Glick (1960) 183 Cal. App. 2d 246, 250, 7 Cal. Rptr. 88]* .

Paragraphs 4 and 5 allege that defendant owes the plaintiff some amount, but that the amount is unknown and cannot be ascertained without an accounting by the parties [*see Kinley v. Thelen (1910) 158 Cal. 175, 182-183, 110 P. 513]* . The complaint will not state a cause of action for accounting, however, when all the facts necessary for calculation of the amount sought are alleged or can be alleged in a supplemental complaint and the amount is certain. Thus, in the particular context of an accounting action based on rents received by the defendant, there was no cause of action for accounting when the complaint alleged that the defendant collected an unknown amount of rentals from a certain date, but also alleged that under the lease agreement the monthly rent was a certain sum [*St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 357, 359, 287 P.2d 387]* .

[4] Decisions

Agent as liable for conversion for failure to render account on demand. *Haigler v. Donnelly (1941) 18 Cal. 2d 674, 681, 117 P.2d 331*

[5] Cross References

See also *§ 7.60*.

For discussion and forms relating to actions by a principal against an agent, see Ch. 427, *Principal and Agent* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-7 California Forms of Pleading and Practice--Annotated § 7.71

§ 7.71 Allegations--Accounting Against Subdivider by Owner of Real Property for Proceeds of Sales

[1] FORM Allegations--Accounting Against Subdivider by Owner of Real Property for Proceeds of Sales

1. On or about _____ (*date*), plaintiff was the owner of a parcel of real property consisting of approximately _____ acres, situated in _____ County, California and described as follows: _____ [*provide legal description*].

2. _____ [*Allege circumstances necessary to accounting, e.g.,* On or about _____ (*date*), plaintiff and defendant entered into an agreement in writing by which defendant agreed to subdivide and improve plaintiff's property and to pay plaintiff certain amounts based on the sale of the property as subdivided. The agreement provides that the amounts to be paid to plaintiff by defendant are to be determined as follows: _____ (*set forth pertinent provisions of agreement*)]. [A copy of the agreement is attached hereto as Exhibit "A" and made a part hereof.]

3. _____ [*Set forth transaction showing that some amount is owed to plaintiff, e.g.,* Defendant thereafter subdivided and improved the property, sold the property as subdivided and improved to various purchasers, and received proceeds from the sales. Defendant has not, however, paid plaintiff's share as provided in the agreement. On or about _____ (*date*), plaintiff demanded payment from defendant, but defendant has failed and refused, and continues to fail and refuse, to pay plaintiff.]

4. The amount of the payments owed to plaintiff are unknown to plaintiff and can be determined only by an accounting of the sales receipts and the costs of subdividing and improving the property. [Plaintiff is informed and believes and thereon alleges that the amount due to plaintiff exceeds $_____.]

[5. Plaintiff has demanded such an accounting from defendant but defendant has failed and refused, and continues to fail and refuse, to render such an accounting.]

[2] Use of Form

The foregoing allegations are for use in a complaint for accounting by the owner of real property against a subdivider

for payments received from sales of the property. When using these allegations, Paragraphs 1-5 should replace Paragraphs 5-8 in § 7.60[1].

[3] Decisions

Action for accounting of parcels of land sold for account of owner. Semi-Tropic S. Assn. v. Johnson (1912) 163 Cal. 639, 642, 126 P. 488 (sustaining trial court's overruling of general demurrer)

[4] Cross References

See also *§ 7.60*.

For discussion and forms relating to breach of contract generally, see Ch. 140, *Contracts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-7 California Forms of Pleading and Practice--Annotated § 7.72

§ 7.72 Allegations--Accounting Against Coowner of Personal Property for Lease Payments

[1] FORM Allegations--Accounting Against Coowner of Personal Property for Lease Payments

1. At all times herein mentioned, plaintiff and defendant were the owners, in equal shares, of certain _____ [*generally de scribe personal property*]. The property is more particularly described in the schedule that is attached hereto as Exhibit "A" and made a part hereof.

2. At all times herein mentioned, the property was, and still is, in the possession of defendant.

3. Between _____ [*date*], and _____ [*date*], defendant leased the property to various persons and corporations for the benefit and on behalf of plaintiff and defendant, and received payments from such persons and corporations for use of the property. During this period, defendant also expended sums of money for the repair and maintenance of the property. The amount that defendant has received and expended is unknown to plaintiff and cannot be ascertained without an accounting.

4. As an owner of the property, plaintiff is entitled to one half of all payments received by defendant for use of the property, less defendent's expenses for repairs and maintenance. Defendant, however, has failed and refused, and continues to fail and refuse, to pay to plaintiff the amount that plaintiff is entitled to receive. [Plaintiff is informed and believes and thereon alleges that the amount owed to plaintiff by defendant exceeds $_____.]

[5. On or about _____ (*date*), plaintiff demanded of defendant that he/she account for all sums received and expended and that he/she make payment to plaintiff of plaintiff's portion. Defendant, however, has failed and refused, and continues to fail and refuse, to account and to pay plaintiff.]

[2] Use of Form

The foregoing allegations are for use in a complaint for accounting against a cotenant of personal property to recover plaintiff's share of lease payments received by the defendant. If these allegations are being used, they should replace Paragraphs 5-8 in § 7.60[1].

[3] Decisions

Findings as sufficient in action for accounting of defendant's management of joint personal property. *Conroy v. Waters (1901) 133 Cal. 211, 213, 65 P. 387*

[4] Text References

16 Cal. Jur. 3d Cotenancy and Joint Ownership §§ 33, 41

[5] Cross Reference

See also *§ 7.60*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesConcurrent OwnershipGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesEquitable AccountingsElements

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1-7 California Forms of Pleading and Practice--Annotated § 7.73

§ 7.73 Allegations--Accounting Against Motion Picture Producer by Copyright Owner for Profits

[1] FORM Allegations--Accounting Against Motion Picture Producer by Copyright Owner for Profits

1. _____ [*Allege nature of plaintiff's copyrights, e.g.,* On or about _____ (*date*), plaintiff purchased the motion picture rights to a book entitled "_____" (*title*), and since that time has been and still is the owner of such rights].

2. _____ [*Allege circumstances necessary to accounting, e.g.,* On or about _____ (*date*), plaintiff and defendant entered into a written agreement by which plaintiff assigned the motion picture rights to defendant. In consideration of the assignment, defendant agreed to pay plaintiff _____ (*summarize percentages of profits to be paid*)]. [A copy of the agreement is attached hereto as Exhibit "A" and made a part hereof.]

3. _____ [*Set forth transaction showing that some amount is owed to plaintiff, e.g.,* Thereafter defendant produced a motion picture, based on the book, entitled "_____" (*title*). The motion picture was released and exhibited to the public from _____ (*date*) to the present time, and as a result of such exhibition, defendant has received sums of money far in excess of the costs of its production, a portion of which is due and owing to plaintiff].

4. The exact amounts of money received by defendant and the exact costs of production are unknown to plaintiff and can be determined only by an accounting. [Plaintiff is informed and believes and thereon alleges that the profits realized to date on the motion picture are in excess of $ _____ and that plaintiff's share of such profits is in excess of $_____.]

[5. Plaintiff has demanded an accounting by defendant of the costs of production and the amounts received as a result of the production of the motion picture and that defendant pay plaintiff his/her share of all profits realized. Defendant has failed and refused, and continues to fail and refuse, to render such an accounting or to pay plaintiff the sums due him/her.]

[2] Use of Form

The foregoing allegations are for use in a complaint for accounting against a motion picture producer by a copyright owner. When using these allegations, Paragraphs 1-5 should replace Paragraphs 5-8 in § 7.60[1].

[3] Decisions

Action for accounting of profits of motion picture. *Guy Coburn, Inc. v. Tiffany P., Inc. (1940) 37 Cal. App. 2d 410, 411, 99 P.2d 569* (judgment for defendant on finding that accounts were rendered by defendant and received by plaintiff without objection); see alsoFineberg v. *Niekerk (1985) 175 Cal. App. 3d 935, 939, 221 Cal. Rptr. 106* (trial court properly treated action for accounting as one for declaratory relief)

[4] Cross References

See also *§ 7.60*.

For discussion and form of complaint for accounting based on federal copyright law, see Ch. 349, *Literary Property and Copyright* .

For discussion and forms relating to motion pictures generally, see Ch. 370, *Motion Pictures* .

For discussion and forms relating to infringement and dilution of trademarks and trade names, see Ch. 549, *Trademarks and Trade Names* .

For discussion and forms relating to trade secrets generally, see Ch. 565, *Unfair Competition* .

For legal forms relating to copyrights, see California Legal Forms, Ch. 103.

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawOwner RightsGeneral OverviewCivil ProceduresPleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesEquitable AccountingsElements

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1-7 California Forms of Pleading and Practice--Annotated § 7.74

§ 7.74 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2), (g)] to Action for Accounting--Statute of Limitation [Code Civ. Proc. §§ 312-365]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2), (g)] to Action for Accounting--Statute of Limitation [Code Civ. Proc. §§ 312-365]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

The action is barred _____ [by the provisions of (subdivision _____ of) Section _____ of the Code of Civil Procedure *or* in that _____ (*state facts establishing bar*)].

[2] Use of Form

The foregoing form of affirmative defense is for use in an answer to an action for accounting when the plaintiff has filed his or her claim after the period of limitations has expired [*see Code Civ. Proc. §§ 312-365*].

If the pleading shows on its face that the period of limitations has expired, the defendant may assert the defense either by demurrer or by answer. If the pleading does not show the defect, the bar of the statute must be pleaded by answer [*California Safe etc. Co. v. Sierra etc. Co. (1910) 158 Cal. 690, 698, 112 P. 274]* .

Notwithstanding the designation of an action as accounting, the governing statute of limitations depends on the primary purpose of the suit. For example, if the action is primarily one for breach of oral contract and the accounting cause of action is merely incidental, the two-year statute under *Code Civ. Proc. § 339(1)* controls, rather than the four-year catch-all statute of *Code Civ. Proc. § 343* [*Manok v. Fishman (1973) 31 Cal. App. 3d 208, 213, 107 Cal. Rptr. 266* ; *Bendien v. Solov (1949) 89 Cal. App. 2d 904, 907-908, 202 P.2d 372]* .

[3] Affirmative Defenses

An answer must contain a statement of any new matter constituting a defense [*Code Civ. Proc. § 431.30(b)(2)*]. The defenses must be separately stated, and the several defenses must refer to the causes of action that they are intended to answer in a manner by which they may be intelligibly distinguished [*Code Civ. Proc. § 431.30(g)*]. Each separately stated defense must be separately numbered [Cal. Rules of Ct., Rule 201(i)]. For a discussion and forms relating to answers and affirmative defenses generally, see Ch. 26, *Answers* .

[4] State Statutes

Action not otherwise provided for must be commenced within four years after cause of action accrued. *Code Civ. Proc. § 343*

Statement of new matter constituting defense as required in answer. *Code Civ. Proc. § 431.30(b)(2)*

Reference to causes of action as required in affirmative defense. *Code Civ. Proc. § 431.30(g)*

[5] California Rules of Court

Separate numeration of affirmative defenses as required. Cal. Rules of Ct., Rule 201(i)

[6] Cross References

See also *§ 7.60*.

For discussion and forms relating to the statutes of limitations generally, see Ch. 345, *Limitation of Actions* .

For a memoranda of points and authorities supporting and opposing general demurrer to complaint, raising the issue of statute of limitations, see California Points and Authorities, Ch. 143, *Limitation of Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsCivil ProcedureRemediesEquitable AccountingsElements

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1-7 California Forms of Pleading and Practice--Annotated § 7.75

§ 7.75 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2), (g)] to Action for Accounting--Laches

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2), (g)] to Action for Accounting--Laches

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

Plaintiff has inexcusably and unreasonably delayed the commencement of the action, to the prejudice of defendant, in that _____ [*specify how delay has prejudiced defendant, e.g.,* plaintiff has significantly delayed bringing his/her action until the transactions complained of have become obscured by time, the principal participants have died, and the evidence has been lost, and thus no correct account can be rendered and any conclusion to which the court can arrive must, at best, be conjectural].

[2] Use of Form

The foregoing form of affirmative defense based on laches is for use in an answer to an accounting action when the plaintiff has permitted his or her claim to become so stale that a court of equity will not enforce it because of laches [*Bell v. Hudson (1887) 73 Cal. 285, 288-290, 14 P. 791]* . Plaintiff's delay must be accompanied by either a showing of prejudice to defendant or by plaintiff's acquiescence to defendant's conduct [*Conti v. Board of Civil Service Commissioners (1969) 1 Cal. 3d 351, 362, 82 Cal. Rptr. 337, 461 P.2d 617]* .

If a bar of laches is apparent on the face of the complaint, the defense may be raised by demurrer [*see Code Civ. Proc. § 430.10(e)*; *Bell v. Hudson (1887) 73 Cal. 285, 289-290, 14 P. 791]* .

[3] Decisions

If no correct account can be rendered, and, under circumstances of case, it is too late to ascertain the controversy's merits, court as refusing to interfere whatever original justice of the claim. Garrity v. Miller (1928) 204 Cal. 454, 458, 298 P. 622

Demurrer as available when plaintiff delayed bringing action for accounting until death of surviving partner, a period of twenty-five years, and complaint failed to allege any lack of knowledge by plaintiff or impediment to bringing the action. *Bell v. Hudson (1887) 73 Cal. 285, 288-290, 14 P. 791*

[4] Text References

Witkin, Summary of California Law, vol. 13, *Equity*, §§ 16-19 (10th ed. 2005)

30 Cal. Jur. 3d Equity §§ 37-54

[5] Cross References

See also *§ 7.74*.

For a form of demurrer to a complaint for equitable relief, based on the theory of laches, see Ch. 345, *Limitation of Actions* .

For memoranda of points and authorities supporting contention that an action is barred by laches, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-7 California Forms of Pleading and Practice--Annotated § 7.76

§ 7.76 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2), (g)] to Action for Accounting--Account Stated

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2), (g)] to Action for Accounting--Account Stated

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

On or about _____ [*date*], at _____ [*city*], California, an account was stated _____ [orally *or* in writing] on the _____ [*specify, e.g.,* transaction] alleged in the complaint. In the statement, the parties agreed that _____ [*allege terms of stated account relating to defendant's obligation to plaintiff, e.g.,* no balance was found due to plaintiff from defendant *or* defendant was indebted to plaintiff in the sum certain of $_____]. [A copy of the account is attached hereto as Exhibit "1" and made a part hereof.]

[2] Use of Form

The foregoing form of affirmative defense is for use in an answer to an action for accounting when the parties have agreed that a certain sum is to be paid in settlement of the account between them [*see Kinley v. Thelen (1910) 158 Cal. 175, 182-183, 110 P. 513]* .

Essential to plaintiff's right to accounting is that some unknown balance is due from the defendant, and that the balance cannot be ascertained without an accounting [Kritzer v. Lancaster (1950) 96 Cal. App. 2d 1, 7, 215 P.2d 407] . Hence, the fact that the parties have fixed the amount of the obligation between them by agreement is a defense to the accounting action [*Kinley v. Thelen (1910) 158 Cal. 175, 182-183, 110 P. 513]* .

[3] Decisions

Account stated as affirmative defense to action for accounting. *Kinley v. Thelen (1910) 158 Cal. 175, 182-183, 110 P. 513*

Requirements of account stated defense. *California Milling Corp. v. White (1964) 229 Cal. App. 2d 469, 478-480, 40 Cal. Rptr. 301*

Accounting as available for periods not covered by account stated. *Huntoon v. Hurley (1955) 137 Cal. App. 2d 33, 39, 290 P.2d 14*

[4] Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 972-975 (10th ed. 2005)

1 Cal. Jur. 3d Accounts and Accounting §§ 32-59, 72

[5] Cross References

See also *§ 7.74*.

For a discussion and forms of complaints and affirmative defense relating to accounts stated, see Ch. 8, *Accounts Stated and Open Accounts* .

For a memorandum of points and authorities supporting the contention that no cause for accounting exists because of an account stated, see California Points and Authorities, Ch. 12, *Accounting* , Pt. II.

For forms of interrogatories for use in an accounting action when an account stated affirmative defense has been alleged, see Bender's Forms of Discovery, *Accounting, Action for*.

For forms of accounts stated, see California Legal Forms, Ch. 77.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedureRemediesEquitable AccountingsElements

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Chapter 7 ACCOUNTING, ACTION FOR
PART IV. FORMS

1-7 California Forms of Pleading and Practice--Annotated § 7.77

§ 7.77 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2), (g)] to Action for Accounting--Account Rendered

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2), (g)] to Action for Accounting--Account Rendered

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. Between _____ [*date*] and _____ [*date*], defendant kept true and accurate books of account showing all items of _____ [*specify, e.g.,* income and expense] in connection with _____ [*specify subject matter of litigation*].

2. On _____ [*date*], defendant delivered to plaintiff full, true, and accurate reports and accounts showing all items of _____ [*specify, e.g.,* income and expense] in connection with _____ [*specify subject matter of litigation*]. _____ [*Allege terms of account rendered relating to defendant's obligation to plaintiff, e.g.,* The reports and accounts show that no profits were realized from the transaction and that therefore no amount is due from defendant to plaintiff]. A copy of the reports and accounts delivered to plaintiff is attached hereto as Exhibit "1" and made a part hereof.

3. At no time did plaintiff object to the reports and accounts or to any of the items therein.

[2] Use of Form

The foregoing form is for use as an affirmative defense to an action for accounting when the defendant has rendered a true and accurate account and the plaintiff has failed to object [*see Code Civ. Proc. § 431.30(b)(2)*; *Guy Coburn, Inc. v. Tiffany P., Inc. (1940) 37 Cal. App. 2d 410, 414, 99 P.2d 569]* . If the complaint alleges that the defendant has not rendered an account, the allegation may be controverted by denial [*see Code Civ. Proc. § 431.30(b)(1)*]. A mere contention that there were no profits from a venture does not mitigate against the right of a plaintiff to an accounting, but evidence that shows accountings were rendered and not objected to constitutes a valid defense [*Guy Coburn, Inc. v. Tiffany P., Inc. (1940) 37 Cal. App. 2d 410, 414, 99 P.2d 569]* .

[3] Decisions

Length of time that must pass before account becomes stated as question of law for court. *Crane v. Stansbury (1916) 173 Cal. 631, 636-637, 161 P. 7* (delay of six months held unreasonable as matter of law on facts)

Failure of person to object to corrections of statement of account as not converting transaction to account stated when liability had been long andpersistently denied. Cowell v. Snyder (1915) 171 Cal. 291, 295, 152 P.2d 920

Excepting such items as debtor may designate to be objectionable, all others as admitted to be correct and account becomes stated as to them. *Lacy Mfg. Co. v. Gold Crown Mining Co. (1942) 52 Cal. App. 2d 568, 578, 126 P.2d 644*

Plaintiff as entitled to accounting even though defendant contends there are no profits; accountings rendered but not objected to as affirmative defense. *Guy Coburn, Inc. v. Tiffany P., Inc. (1940) 37 Cal. App. 2d 410, 414, 99 P.2d 569*

[4] Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 974-975 (10th ed. 2005)

1 Cal. Jur. 3d Accounts and Accounting §§ 32-59, 72

[5] Cross Reference

See also *§ 7.74*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedureRemediesEquitable AccountingsElements

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1-7 California Forms of Pleading and Practice--Annotated § 7.78

§ 7.78 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2), (g)] to Action for Accounting--Accord and Satisfaction [Civ. Code §§ 1521-1526]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2), (g)] to Action for Accounting--Accord and Satisfaction [Civ. Code §§ 1521-1526]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. On or about _____ [*date*], plaintiff and defendant entered into an accord, extinguishing the obligation that is the basis of the complaint, in which defendant agreed [orally *or* in writing] to pay plaintiff and plaintiff agreed _____ [*set forth consideration, e.g.,* to receive from defendant the sum of $_____] in full satisfaction and discharge of the obligation. [A copy of the agreement is attached hereto as Exhibit "1" and made a part hereof.]

2. Pursuant to the accord, defendant, on or about _____ [*date*], paid to plaintiff and plaintiff accepted from defendant the sum of $_____ in full satisfaction and discharge of the obligation.

[2] Use of Form

The foregoing form of affirmative defense is for use in an answer to an action for accounting when the parties have extinguished an obligation by accord and satisfaction [*Civ. Code §§ 1521-1526*].

An essential element of an accounting action is that some amount is due from the defendant. Thus, the defendant may allege as new matter constituting a defense in his or her answer that the parties entered into an accord to extinguish the obligation and that the accord had been satisfied as agreed [*see Whann v. Doell (1923) 192 Cal. 680, 684, 221 P. 899]*
.

[3] Allegations

Paragraph 1 alleges an accord. An accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled [*Civ. Code § 1521*].

Paragraph 2 alleges satisfaction. Though the parties to an accord are bound to execute it, the obligation is not extinguished until the parties fully execute the accord [*Civ. Code § 1522*]. Acceptance, by the creditor, of the consideration of an accord extinguishes the obligation, and is called a satisfaction [*Civ. Code § 1523*].

[4] State Statutes

Accord defined. *Civ. Code § 1521*

Obligation as not extinguished until accord fully executed. *Civ. Code § 1522*

Satisfaction defined. *Civ. Code § 1523*

When part performance constitutes satisfaction. *Civ. Code § 1524*

Effect of paying uncontested amount. *Civ. Code § 1525*

Effects of payment by check or draft. *Civ. Code § 1526*

[5] Cross References

See also *§ 7.74*.

For discussion and forms of accord and satisfaction as affirmative defense generally, see Ch. 6, *Accord and Satisfaction*.

For memoranda of points and authorities supporting the contention that the obligation sued on was extinguished by accord and satisfaction, see California Points and Authorities, Ch. 11, *Accord and Satisfaction*.

For forms of accord and satisfaction, see California Legal Forms, Ch. 77.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewContracts LawPerformanceAccord & SatisfactionCivil ProcedureRemediesEquitable AccountingsElements

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1-7 California Forms of Pleading and Practice--Annotated § 7.79

§ 7.79 Stipulation [Code Civ. Proc. § 283(1)] and Interlocutory Judgment for Accounting and Reference [Code Civ. Proc. § 638]

[1] FORM Stipulation [Code Civ. Proc. § 283(1)] and Interlocutory Judgment for Accounting and Reference [Code Civ. Proc. § 638]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	STIPULATION AND INTERLOCUTORY JUDG-
Defendant.	)	MENT FOR ACCOUNTING AND REFERENCE
	)	
	)	

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto and by their respective counsel that an interlocutory judgment ordering an accounting of _____ [*specify transaction that is the subject of the action*] be entered herein.

It is further stipulated that the interlocutory judgment provide as follows:

1. The accounting shall be taken by reference. The reference shall be conducted by _____ [*name(s), or* not more than three referees to be appointed by the court pursuant to *Section 640 of the Code of Civil Procedure*].

[*EITHER, if general reference pursuant to Code Civ. Proc. § 638(a)*]

2. The referee shall take an accounting and hear and determine each and all issues of fact and law and report a statement of decision to the court within 20 days after the conclusion of testimony. The decision shall be filed with the court and judgment shall be entered thereon in the same manner as if the action had been tried by this court.

[*OR, if special reference pursuant to Code Civ. Proc. § 638(b)*]

2. The referee shall take an accounting and ascertain the following facts necessary to enable the court to determine the action: _____ [*specify factual issues to be referred for determination, e.g.,* all receipts and expenditures by defendant on account of his/her dealings with or on behalf of plaintiff]. The referee shall report a statement of decision to the court within 20 days after the conclusion of testimony, and shall include in its statement the outstanding balance due between defendant and plaintiff, if any. The accounting shall be subject to the court's approval and adoption, and the court shall give final judgment as it may find appropriate.

[*CONTINUE*]

[3. The rate of compensation for the fees of the referee(s) shall be _____ (*specify rate*).]
Dated: _____.

_____ [*signature*]
Attorney for Plaintiff
_____ [*signature*]
Attorney for Defendant

INTERLOCUTORY JUDGMENT

[*EITHER, if stipulation identifies referee(s) to be appointed*]

IT IS SO ORDERED, ADJUDGED, AND DECREED.

[*OR, if stipulation provides for court to appoint referee(s*)]

IT IS ORDERED, ADJUDGED, AND DECREED.

IT IS FURTHER ORDERED that _____ [*name(s*)] be and is/are appointed as referee(s).
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of stipulation and interlocutory judgment is for use in obtaining an accounting by a referee without the necessity of a trial on the issue of whether the plaintiff is entitled to an accounting [*see Code Civ. Proc. § 638*]. Counsel should review local rules for pertinent format requirements [*see, e.g.*, Los Angeles Co. Super. Ct. Rules, Rule 8.97 (proposed judgment document must be separate from stipulation)].

If the parties have stipulated to a special reference under *Code Civ. Proc. § 638(b)*, counsel should consult local court rules and practices regarding an appropriate procedure, such as notice of motion or stipulation to set a date acceptable to the court, to restore the matter to calendar for final judgment after the special reference has been conducted.

[3] Stipulation

In general, an attorney has the authority to bind a client in any of the steps of an action by his or her agreement that is filed with the clerk, or entered in the court's minutes [*Code Civ. Proc. § 283(1)*]. Thus, the parties to an action shall be bound by their stipulation that an accounting be taken between them [*see Jackson v. Puget Sound Lumber Co. (1898) 123 Cal. 97, 100, 55 P. 788]* . A reference, either general or special, may also be ordered on the agreement of the parties filed with the court [*Code Civ. Proc. § 638*].

For further discussion and forms relating to stipulations generally, see Ch. 533, *Stipulations* .

[4] Reference

A general reference is a trial before a referee on all issues of fact and law [*see Code Civ. Proc. § 638(a)*; *Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 722, 269 P.2d 3]* . The decision of the referee stands as the decision of the court [*see Code Civ. Proc. §§ 638(a), 644*]. Review of a referee's decision in a general reference is the same as review of a trial court's decision [*Code Civ. Proc. § 645*].

A special reference is the appointment of a referee for the limited purpose of ascertaining a fact necessary to aid the court in reaching its decision [*see Code Civ. Proc. § 638(b)*; *Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 723, 269 P.2d 3]* . The decision of the referee has the effect of a special verdict that must be adopted by the court [*see Code Civ. Proc. §§ 638(b), 645*].

For general discussion and forms relating to references, including a notice of motion to adopt a referee's report in a special reference and objections to a special reference, see Ch. 38, *Reference* .

[5] State Statutes

Attorney as having authority to bind client in any steps of action by agreement filed with clerk or entered in court's minutes. *Code Civ. Proc. § 283(1)*

General or special reference as available on agreement of parties. *Code Civ. Proc. § 638*

Decision of referee in general reference as standing as decision of court. *Code Civ. Proc. § 644*

Decision of referee in special reference as having effect of special verdict. *Code Civ. Proc. § 645*

[6] Decisions

Parties' stipulation to entry of judgment granting plaintiffs recovery of sum from defendants. *Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 838, 840, 131 Cal. Rptr. 674*

Hearing as required when stipulation for judgment predicates entry of judgment on occurence of condition. *S.E.P. Associates, Inc. v. Peto (1975) 49 Cal. App. 3d 305, 308, 122 Cal. Rptr. 514*

[7] Cross References

See also *§ 7.60*.

For discussion and forms relating to stipulation to judgment, see Ch. 318, *Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureRemediesEquitable AccountingsElements

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1-7 California Forms of Pleading and Practice--Annotated § 7.80

§ 7.80 Proceedings for Appointment of Referee to Take Accounting [Code Civ. Proc. §§ 638, 639]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Appointment of Referee to Take Accounting [Code Civ. Proc. §§ 638, 639]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR REF-
vs.	)	ERENCE TO TAKE ACCOUNTING, SUPPORT-
_____ [*name*],	)	ING DECLARATION OF
Defendant.	)	_____ [*name*], AND MEMOR-
	)	ANDUM OF POINTS AND AUTHORITIES
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		[Trial Date: _____]

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____

[*specify party, e.g.,* plaintiff] will move for an order referring this action to _____ [*name(s) or* a referee *or* referees]

[*EITHER, if motion brought pursuant to Code Civ. Proc. § 638*]

to _____ [hear, try, and determine all of the issues in the action, whether of fact or of law, and to report a statement of decision thereon *or* to ascertain the following fact(s) that is/are necessary to enable the court to determine the action: _____ (*specify, e.g.,* the description and sum of all expenditures made for maintenance and repairs during the period defendant managed plaintiff's apartment complex)]. The motion will be made on the ground that the moving party is a party to a written _____ [contract *or* lease] providing that any controversy arising therefrom shall be heard by a reference.

[*OR, if motion brought under Code Civ. Proc. § 639(a)(1):*]

to _____ [examine the long account between the parties arising from _____ (*describe transaction that accounting is based on, e.g.,* defendant's management of plaintiff's apartment complex) and to hear and decide the whole issue *or* to report on the following question of fact involved in the long account between the parties: _____ (*specify, e.g.,* the description and sum of all expenditures made for maintenance and repairs during the period defendant managed plaintiff's apartment complex)]. The motion will be made on the ground that the trial of an issue of fact requires the examination of a long account on either side and _____ [plaintiff *or* defendant] does not consent to a reference.

[*OR, if motion brought under Code Civ. Proc. § 639(a)(2):*]

to take the account between the parties arising from _____ [*describe transaction that accounting is based on, e.g.,* defendant's management of plaintiff's funds deposited with defendant for investment on plaintiff's behalf]. The motion will be made on the ground that the taking of the account is necessary _____ [for the information of the court before judgment *or* for carrying a _____ (judgment *or* order) into effect] and _____ [plaintiff *or* defendant] does not consent to a reference.

[*CONTINUE*]

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s*)] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____.

_____ [*signature*]
Attorney for _____ [*moving party*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

[*EITHER, if motion made pursuant to Code Civ. Proc. § 638*]

2. On or about _____ [*date*], the parties to the above-entitled action entered into a written _____ [contract *or* lease]. Paragraph _____ [*number*] provides that any controversy arising therefrom shall be heard by a reference. A copy of the _____ [contract *or* lease] is attached hereto as Exhibit "_____," and made a part hereof.

3. A controversy has arisen from the _____ [contract *or* lease] in that _____ [*state facts showing controversy, e.g.,* plaintiff is informed and believes that defendant has received rents in excess of $ _____, a portion of which is due and owing to plaintiff. Defendant, however, has represented that the total rents received are only $_____].

[*OR, if motion brought under Code Civ. Proc. § 639(a)(1):*]

2. There exists between the parties a long account consisting of _____ [*state facts establishing long account on either side between plaintiff and defendant*].

3. _____ [*State issue requiring examination of long account, e.g,* An issue in this case is the total amount of rents plaintiff is entitled to recover from defendant as a consequence of the property management agreement entered into between the parties on _____ (*date*). Trial of the issue requires that the items of the long account existing between the parties be examined to determine the full and correct amount owed under the agreement. A copy of the agreement is attached hereto as Exhibit "_____," and made a part hereof].

[*OR, if motion brought under Code Civ. Proc. § 639(a)(2):*]

2. The taking of an account is necessary _____ [for the information of the court before judgment in this action in that _____ (*specify facts establishing necessity of account*) *or* to carry into effect the _____ (judgment *or* order) entered in favor of _____ (plaintiff *or* defendant) and against _____ (defendant *or* plaintiff) on _____ (*date*), (*identify if appropriate, e.g.,* and recorded in Judgment Book _____ at page _____ in the clerk's office of _____ County, California), in that _____ (*state facts establishing necessity of account*)].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

MEMORANDUM OF POINTS AND AUTHORITIES
[*Add memorandum of points and authorities supporting motion*]

Respectfully Submitted,
_____ [*signature*]
Attorney for _____ [*moving party*]

[2] Use of Form

This form of notice of motion and supporting declaration is for use to move the court for an order appointing a referee to take an accounting when the moving party is a party to a written contract or lease providing that any controversy arising therefrom be heard by reference [*see Code Civ. Proc. § 638*], or when the parties do not consent to a reference and either trial of an issue of fact requires the examination of a long account or the taking of an account is necessary for the information of the court or for carrying a judgment or order into effect [*see Code Civ. Proc. § 639(a)(1), (2)*].

A memorandum of points and authorities must be served and filed with the notice of motion [*see* Cal Rules of Court, Rules 301, 313(a); *Code Civ. Proc. §§ 1005(b), 1010*; for discussion and forms, *see* Ch. 417, *Points and Authorities*].

For further discussion and forms relating to obtaining a reference generally, see Ch. 38, *Reference* .

[3] State Statutes

Motion for reference by consent of parties. *Code Civ. Proc. § 638*

[4] Decisions

Interlocutory judgment as not condition precedent to order of reference for accounting under *Code Civ. Proc. § 638* on stipulation of parties. *Schefski v. Anker (1932) 216 Cal. 624, 627, 15 P.2d 744*

Order on stipulation of parties appointing referee to take and state account of all transactions between parties as not authorizing referee to try all issues of fact and law; trial court had power to set reference report aside. *Clark v. Millsap (1926) 197 Cal. 765, 784-785, 242 P. 918*

Referee's failure to dispose of issue referred to him in order on stipulation of parties based on *Code Civ. Proc. § 638(1)* as decision against law permitting review on appeal from order refusing new trial. *Clark v. Hewitt (1902) 136 Cal. 77, 79, 68 P. 303*

Trial court did not abuse ts discretion in electing to treat report of referee appointed under *Code Civ. Proc. § 638(2)* as evidence only in accounting action. *Dynair Electronics, Inc. v. Video Cable, Inc. (1976) 55 Cal. App. 3d 11, 20, 127 Cal. Rptr. 268*

[5] Cross References

See also *§§ 7.60* and *7.79*.

For alternative forms of affidavits and declarations, see Ch. 15, *Affidavits, Certificates, and Declarations* .

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions* .

For additional discussion and forms relating to written motions, see Ch. 372, *Motions and Orders* .

For memoranda of points and authorities supporting and opposing a motion for a reference, see California Points and Authorities, Ch. 201, *Reference and Referees* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureRemediesEquitable AccountingsElements

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1-7 California Forms of Pleading and Practice--Annotated § 7.81

§ 7.81 Proceedings for Appointment of Referee to Take Accounting [Code Civ. Proc. §§ 638, 639]--Order Granting Motion

[1] FORM Proceedings for Appointment of Referee to Take Accounting [Code Civ. Proc. §§ 638, 639]--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER APPOINTING REFEREE TO TAKE AC-
Defendant.	)	COUNTING
	)	
	)	

The motion of _____ [*identify party, e.g.*, plaintiff] for an order appointing a referee to take an accounting came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted [*if order granted pursuant to Code Civ. Proc. § 638, add* and that a reference agreement exists between the parties],

IT IS ORDERED that the motion be, and it hereby is, granted and that this matter be referred to _____ [*name(s*)] and he/she/they is/are hereby appointed as referee(s).

[*EITHER, if order granted pursuant to Code Civ. Proc. § 638:*]

The referee shall _____ [hear and determine _____ (any *or* all) of the issues in the action, whether of fact or of law *or* ascertain the following fact(s) necessary to enable the court to determine the action: _____ (*specify fact(s) to be determined*)]. The referee shall report the statement of decision in writing to the court within 20 days after the testimony is closed.

[*OR, if order granted pursuant to Code Civ. Proc. § 639(a)(1):*]

The referee shall _____ [hear and decide the whole issue of the account between the parties *or* shall report on the following specific question(s) of fact: _____ (*specify*)]. The referee(s) shall report the statement of decision in writing to the court within 20 days after the testimony is closed.

[*OR, if order granted pursuant to Code Civ. Proc. § 639(a)(2):*]

The referee shall take the account and shall report the statement of decision in writing to the court within 20 days after the testimony is closed.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use when the court grants a motion for reference under *Code Civ. Proc. § 638*, when the parties have agreed to the controversy being heard by reference, or under *Code Civ. Proc. § 639*, when the parties do not consent.

A reference may be ordered to the person or persons, not exceeding three, agreed on by the parties. If the parties do not agree, the court or judge must appoint one or more referees, not exceeding three, who reside in the county in which the action or proceeding is triable and against whom there is no legal objection. Alternatively, the reference may be made to a court commissioner of the county where the cause is pending [*Code Civ. Proc. § 640*].

The referee or commissioner must report his or her statement of decision in writing to the court within 20 days after the testimony is closed [*Code Civ. Proc. § 643*].

[3] State Statutes

Voluntary reference by court order. *Code Civ. Proc. § 638*

Involuntary reference by court order. *Code Civ. Proc. § 639*

Appointment of referee. *Code Civ. Proc. § 640*

[4] Cross References

See also *§ 7.80*.

For discussion and forms relating to motions and orders generally, see Ch. 372, *Motions and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 8 ACCOUNTS STATED AND OPEN ACCOUNTS

1-8 California Forms of Pleading and Practice--Annotated 8.syn

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§ 8.syn Synopsis to Chapter 8: ACCOUNTS STATED AND OPEN ACCOUNTS

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FOOTNOTES:
(n2)Footnote *.
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PART I. SCOPE

1-8 California Forms of Pleading and Practice--Annotated § 8.01

AUTHOR: Leslie Zablen Editorial Consultant Leslie Zablen is a practitioner in Emeryville, California. His practice includes debt collections, and general business law.

§ 8.01 Scope of Chapter

This chapter discusses and sets forth forms relating to actions based on an account stated and an open account. This chapter contains the following forms:

- Forms of complaints [*see §§ 8.40 -8.43*].
- Forms of affirmative defenses to an action based on an account stated [*see §§ 8.44 -8.45*].
- A form of an account stated affirmative defense to an action for breach of contract [*see § 8.46*].
- A form of complaint on an open book account or on a mutual, open, and current account [*see § 8.47*].
- For forms of defenses of accord and satisfaction and novation, see Ch. 6, *Accord and Satisfaction* , and Ch. 140, *Contracts* , respectively.

Legal Topics:

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

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1-8 California Forms of Pleading and Practice--Annotated § 8.02

AUTHOR: Leslie Zablen Editorial Consultant Leslie Zablen is a practitioner in Emeryville, California. His practice includes debt collections, and general business law.

§ 8.02 Cross References

- For forms involving accord and satisfaction, see Ch. 6, *Accord and Satisfaction* .
- For forms of complaints for an accounting and forms for use in appointing a referee to take an accounting, see Ch. 7, *Accounting, Action for*, and Ch. 38, *Reference* , respectively.
- For forms for use in actions involving assigned causes of action, see Ch. 60, *Assignments* .
- For forms for use in actions based on negotiable instruments, see Ch. 385, *Negotiable Instruments* .
- For forms for use in cancellation of an instrument, see Ch. 107, *Cancellation of Instruments* .
- For forms for use in actions involving common counts, see Ch. 121, *Common Counts* .
- For forms for use in actions under the Song-Beverly Credit Card Act of 1971, see Ch. 127, *Consumer Contracts and Loans* .
- For a procedural guide and forms for use in breach of contract actions, see Ch. 140, *Contracts* .
- For forms for use in seeking a declaration of rights under a written instrument, see Ch. 182, *Declaratory Relief* .
- For forms for use in actions to reform instruments, see Ch. 488, *Reformation of Instruments* .
- For forms for use in actions seeking specific performance of contracts, see Ch. 528, *Specific Performance* .

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PART I. SCOPE

1-8 California Forms of Pleading and Practice--Annotated §§ 8.03through 8.09

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[Reserved]

§§ 8.03[Reserved]

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1-8 California Forms of Pleading and Practice--Annotated § 8.10

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§ 8.10 Definition of Account Stated

[1] Agreed Balance of Account

An account stated is a form of novation [*see Civ. Code §§ 1530, 1531(1), 1532*]. It is an agreement between the parties that a certain sum shall be paid and accepted in discharge of an obligation. To constitute an account stated, the following facts must appear [*Truestone, Inc. v. Simi West Industrial Park II (1984) 163 Cal. App. 3d 715, 725, 209 Cal. Rptr. 757* ; *Withers v. Matthews (1961) 192 Cal. App. 2d 139, 141, 13 Cal. Rptr. 165]* :

- At the time of the statement, an indebtedness from one party to the other existed,

- A balance was then struck and agreed to be the correct sum owing from the debtor to the creditor, and

- The debtor expressly or impliedly promised to pay to the creditor the amount thus determined to be owing.

Hence, an account stated is an agreed balance of accounts; an account which has been examined and accepted by the parties. It implies an admission that the account is correct, and that the balance struck is due and owing from one party to the other [*Perry v. Schwartz (1963) 219 Cal. App. 2d 825, 829, 33 Cal. Rptr. 511* ; *see Truestone, Inc. v. Simi West Industrial Park II (1984) 163 Cal. App. 3d 715, 725, 209 Cal. Rptr. 757]* .

[2] Binding If No Timely Objection Made

When an account is rendered and retained beyond a reasonable time without objection, it is deemed accepted, conceded to be correct, and constitutes an account stated [*Atkinson v. Golden Gate Tile Co. (1913) 21 Cal. App. 168, 171, 131 P. 107* (citing cases)]. Put another way, when an account is rendered, it becomes the recipient's duty to object to it within a reasonable time and if he does not do so, the account becomes an account stated and the foundation of an

independent cause of action based on the account stated [*Crane v. Stansbury (1916) 173 Cal. 631, 636, 161 P. 7]* .

[3] Types of Accounts Which May Become the Subject of an Account Stated

Accordingly, any bill may be the subject of an account stated [*Trafton v. Youngblood (1968) 69 Cal. 2d 17, 25, 69 Cal. Rptr. 568, 442 P.2d 648* ; for a discussion of various kinds of credit accounts, see Project, "Resort to the Legal Process in Collecting Debts from High Risk Credit Buyers in Los Angeles--Alternative Methods for Allocating Present Costs," *14 U.C.L.A. L. Rev. 879, ns. 1, 2 (1967)*]. Examples of credit accounts which may become the subject of an account stated are:

- Book accounts [*see* *Zinn v. Fred R. Bright Co. (1969) 271 Cal. App. 2d 597, 604, 76 Cal. Rptr. 663* ; *R.E. Tharp, Inc. v. Miller Hay Co. (1968) 261 Cal. App. 2d 81, 85, 67 Cal. Rptr. 854* (finding however that under the facts no account was stated)].

- Mutual, open, and current accounts [*see* *Norton v. Larco (1866) 30 Cal. 126, 130]* .

- Bills for professional services, such as attorney's fees [*see* *Perry v. Schwartz (1963) 219 Cal. App. 2d 825, 829, 33 Cal. Rptr. 511* ; for further discussion, *see Ch. 72, Attorney Practice and Ethics, § 72.430 et seq.*].

- Bank statements [*see* Restatements of Contracts, § 422(1) Illustration 3].

- Bills on revolving accounts and credit cards [*see* California Debt Collection Practice (Cal. C.E.B. 1968), Ch. 5, *Complaint in Collection Actions* , *§ 5.16* and Project, "Resort to the Legal Process in Collecting Debts from High Risk Credit Buyers in Los Angeles--Alternative Methods for Allocating Present Costs," *14 U.C.L.A. L. Rev. 879, 891-892, n. 52 (1967)*; for forms relating to action under the Song-Beverly Credit Card Act of 1971 (*Civ. Code § 1747 et seq.*), *see* Ch. 127, *Consumer Contracts and Loans*].

[4] Account Stated and Book Account Distinguished

An account stated is different from an open book account in that with respect to an open book account, no balance on the account has been struck; the debtor has not impliedly or expressly agreed to a certain sum being owed [*see Code Civ. Proc. § 344*; *Parker v. Shell Oil Co. (1946) 29 Cal. 2d 503, 507, 175 P.2d 838* ; *Furlow Pressed Brick Co. v. Balboa Land & Water Co. (1921) 186 Cal. 754, 763, 200 P. 625* ; *Egan v. Bishop (1935) 8 Cal. App. 2d 119, 123, 47 P.2d 500]* . If a balance is struck in an open book account, the open account terminates by being converted into an account stated. The parties must have expressly assented to the correctness of the account or, at least, the debtor must have expressly or impliedly acknowledged that he or she owes the amount struck [*R.E. Tharp, Inc. v. Miller Hay Co. (1968) 261 Cal. App. 2d 81, 84, 67 Cal. Rptr. 854]* . For further discussion of termination of accounts, *see § 8.20[5]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesEquitable AccountingsElementsContracts LawPerformanceNovation

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1-8 California Forms of Pleading and Practice--Annotated § 8.11

AUTHOR: Leslie Zablen Editorial Consultant Leslie Zablen is a practitioner in Emeryville, California. His practice includes debt collections, and general business law.

§ 8.11 Sufficiency of Pleading

An account stated is a common count recognized as a sufficient pleading by case law [*see Ward Mfg. Co. v. Miley (1955) 131 Cal. App. 2d 603, 606, 281 P.2d 343* and Ch. 121, *Common Counts*].

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1-8 California Forms of Pleading and Practice--Annotated § 8.12

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§ 8.12 Bill of Particulars

The plaintiff need not set forth the items of the account in the complaint A defendant may be entitled to a bill of particulars [*see Code Civ. Proc. § 454*; for discussion, *see* Ch. 121, *Common Counts*] where a book account is pleaded, but not where an account stated is pleaded since, in the latter situation, the plaintiff is not required to prove the items of the account [*Auzerais v. Naglee (1887) 74 Cal. 60, 64-65, 15 P. 371]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesEquitable AccountingsElements

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1-8 California Forms of Pleading and Practice--Annotated § 8.13

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§ 8.13 Effect

The effect of an account stated is to establish prima facie the accuracy of the items without further proof and to constitute a new contract on which an action will lie [*Perry v. Schwartz (1963) 33 Cal. Rptr. 511]* .

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1-8 California Forms of Pleading and Practice--Annotated § 8.14

AUTHOR: Leslie Zablen Editorial Consultant Leslie Zablen is a practitioner in Emeryville, California. His practice includes debt collections, and general business law.

§ 8.14 Elements

[1] Acknowledgment of Debt, Agreement as to Amount, and Promise to Pay

An account stated requires that there be [*Block v. D.W. Nicholson Corp. (1947) 77 Cal. App. 2d 739, 746, 176 P.2d 739]* :

- An acknowledgment of a previous indebtedness;
- An agreement that the balance struck is correct; and
- A promise for the payment of that balance.

[2] Previous Indebtedness

An account stated requires that there be an acknowledgment of a previous indebtedness, since the previous indebtedness constitutes the consideration on which the new agreement is based [*Block v. D.W. Nicholson Corp. (1947) 77 Cal. App. 2d 739, 746, 176 P.2d 739]* . Accounts stated are not intended to create obligations independent of prior indebtedness; and the rendering of an account cannot create a liability where no liability existed before [*Trafton v. Youngblood (1968) 69 Cal. 2d 17, 26, 69 Cal. Rptr.568, 442 P.2d 648]* .

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1-8 California Forms of Pleading and Practice--Annotated § 8.15

AUTHOR: Leslie Zablen Editorial Consultant Leslie Zablen is a practitioner in Emeryville, California. His practice includes debt collections, and general business law.

§ 8.15 Defenses

[1] Contract Defenses Apply to Account Stated

An account stated, being a contract [*see Trafton v. Youngblood (1968) 69 Cal. 2d 17, 25, 69 Cal. Rptr. 568, 442 P.2d 648]* , is subject to other contract action defenses, for example, lack of consent [*Civ. Code §§ 1565-1579*], illegality [*Civ. Code §§ 1595-1599*], and lack of capacity [*Civ. Code § 1556*; *see also Fam. Code § 6500 et seq.* (minors) and *Civ. Code § 38 et seq.* (incompetents)].

However, parties cannot go behind an account stated and attack the original items of the account except on a proper averment of fraud, duress, or mistake [*Gardner v. Watson (1915) 170 Cal. 570, 574, 150 P. 994* ; *Coffee v. Williams (1894) 103 Cal. 550, 558-560, 37 P. 504* ; *Perry v. Schwartz (1963) 219 Cal. App. 2d 825, 829, 33 Cal. Rptr. 511* (fraud); *Lund v. Utter-McKinley Mortuaries (1960) 186 Cal. App. 2d 162, 168, 8 Cal. Rptr. 685* (general statement of rule); *Kinkle v. Fruit Growers Supply Co. (1944) 63 Cal. App. 2d 102, 114, 146 P.2d 8* (mistake)].

[2] Breach of Underlying Contract Not a Defense

Once the account has been stated, however, a subsequent breach of the underlying contract does not provide a defense [*S.O.S., Inc. v. Payday, Inc. (9th Cir. 1989) 886 F.2d 1081, 1091* (relying on *Gardner v. Watson (1915) 170 Cal. 570, 577, 150 P. 994* , and *Trafton v. Youngblood (1968) 69 Cal. 2d 17, 25, 69 Cal. Rptr. 568, 442 P.2d 648* , in deciding pendent state claim)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesGeneral OverviewCivil ProcedureRemediesEquitable AccountingsElements

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1-8 California Forms of Pleading and Practice--Annotated § 8.16

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§ 8.16 No Requirement of Writing

While some cases have indicated that an account stated must be in writing [*see Coffee v. Williams (1894) 103 Cal. 550, 556, 37 P. 504* (memorandum which appeared put together for further consideration held not to be account stated); *Merchants' Nat. Bank v. Carmichael (1918) 178 Cal. 446, 448, 173 P. 999* ; *Gardner v. Watson (1915) 170 Cal. 570, 574, 150 P. 994]* , it appears that it is not necessary that an account stated be written or arise out of written accounts [*Converse v. Scott (1902) 137 Cal. 239, 243, 70 P. 13* ; *Truestone, Inc. v. Simi West Industrial Park II (1984) 163 Cal. App. 3d 715, 726, 209 Cal. Rptr. 757* ; *Fleschler v. Strauss (1936) 15 Cal. App. 2d 735, 740, 60 P.2d 193]* ; *Bennett v. Potter (1919) 180 Cal. 736, 738-743, 183 P. 156* (attorney's fees); *Fleschler v. Strauss (1936) 15 Cal. App. 2d 735, 736-737, 60 P.2d 193* (attorney's fees)], or transactions betweenfamily members [*see Converse v. Scott (1902) 137 Cal. 239, 240-241, 70 P. 13* (transactions between brothers)].

An account stated, however, should show clearly and with certainty that it was intended to be a final settlement up to date. Whether these conditions exist is usually a question to be determined by the trier of fact from all the circumstances of the case and, in reaching that determination, reasonable inferences can be drawn in support of the claim of either party if there is any credible evidence warranting an inference [*see Fogarty v. McGuire (1959) 170 Cal. App. 2d 405, 409, 338 P.2d 992]* . Therefore, while an account stated may be oral, counsel should prepare the agreement in writing whenever possible.

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§ 8.17 Partial Settlement

A partial settlement is not a complete account stated or, as it is sometimes said, there may be an account stated as to a part of the financial relationship of the parties without arriving at a balance as to all of their monetary dealings. If the parties settle their financial relationship with respect to only part of the transactions, their agreement cannot be extended to cover all of their previous dealings without a contract, express or implied, to that effect [*California Milling Corp. v. White (1964) 229 Cal. App. 2d 469, 477-478, 40 Cal. Rptr. 301]* .

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1-8 California Forms of Pleading and Practice--Annotated § 8.18

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§ 8.18 Statute of Limitations

An action to recover on an account stated based on an account in writing (although the acknowledgment of the account stated need not be in writing) must be brought within four years after the action accrues [*Code Civ. Proc. § 337(2)*].

If the account stated is based on an account of only one item, the time begins to run from the date of that item, and if the account stated is based on an account of more than one item, the time begins to run from the date of the last item [*Code Civ. Proc. § 337(2)*]. However, if an account stated is based on a transaction on which the amount due is not settled, such as the rendition of attorney's services, the limitation period will apparently commence to run from the date the account is stated [*see Fleschler v. Strauss (1936) 15 Cal. App. 2d 735, 740, 60 P.2d 193]* .

The rationale for extending the limitations period beyond the two years accorded oral contracts is grounded on judicial acceptance of the enhanced reliability of record keeping in the context of a debtor-creditor relationship in which the parties are aware of the relationship and there is, in fact, an account between them. Conversely, there is no reason to extend the limitations period when the creditor acts in a self-serving manner by creating what is in effect a private record of an account without informing the debtor. There is also no reason to permit a creditor to bootstrap this private record into an account stated merely by mailing a summary of accounts allegedly due to the debtor and treating the debtor's silence as acceptance [*Maggio, Inc. v. Neal (1987) 196 Cal. App. 3d 745, 751-752, 241 Cal. Rptr. 883* ; *see also Filmservice Laboratories, Inc. v. Harvey Bernhard Enterprises, Inc. (1989) 208 Cal. App. 3d 1297, 1307-1308, 256 Cal. Rptr. 735* (no evidence that debtor agreed to forego oral contract and proceed on basis of existing account)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesEquitable AccountingsElementsGovernmentsLegislationStatutes of LimitationsTime Limitations

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1-8 California Forms of Pleading and Practice--Annotated § 8.19

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§ 8.19 Venue

A complaint based on an account stated should, and in some cases must [*see § 8.40 [2]*] allege where the account was stated for purposes of determining venue. An action on an account stated is not founded on the original item, but on the balance ascertained by the mutual consent of the parties. Thus, as there is a new contract pleaded in the complaint, the court ordinarily may not, for venue purposes, look to the old contract [*Tringali v. Vest (1951) 106 Cal. App. 2d 720, 721-723, 236 P.2d 171* ; *Crofts & Anderson v. Johnson (1950) 101 Cal. App. 2d 418, 421-422, 225 P.2d 594]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueIndividual DefendantsCivil ProcedureVenueCorporationsCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesEquitable AccountingsElements

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§ 8.20 Book Accounts and Mutual, Open, and Current Accounts

[1] Compared With Accounts Stated

Generally, like an action on an account stated, the significance of an action on a book account and on a mutual, open, and current account is that the action is brought on the account itself and not on the debts represented by the entries in the account. Once a book account or a mutual, open, and current account exists, the cause of action accrues from the date of the last entry in the account; the creditor is not required to sue on each separate debt. These accounts are different from accounts stated in that no balance on the accounts has been struck; the debtor has not impliedly or expressly agreed to a certain sum being owed [*see Code Civ. Proc. § 344*; *Parker v. Shell Oil Co. (1946) 29 Cal. 2d 503, 507, 175 P.2d 838* ; *Furlow P.B. Co. v. Balboa L. & W. Co. (1921) 186 Cal. 754, 763, 200 P. 625* ; *Egan v. Bishop (1935) 8 Cal. App. 2d 119, 123, 47 P.2d 500]* .

[2] Mutual, Open, and Current Accounts

[a] Defined

A mutual, open, and current account is an account between parties (1) consisting of reciprocal demands, (2) that has remained open by not becoming an account stated, and (3) that is current because it consists of different items of different dates [*Norton v. Larco (1866) 30 Cal. 126, 130]* . The reciprocal demands may involve (1) mutual credits between the parties, (2) an existing debt on one side which constitutes a credit on the other, or (3) an understanding that mutual debts shall be a satisfaction or setoff pro tanto between the parties. This understanding may be express or implied from the nature of the dealings between the parties and must show that the charges on each side are to extinguish those on the other side so that there exists but one indivisible liability arising from the series of transactions [*Parker v. Shell Oil Co. (1946) 29 Cal. 2d 503, 507, 175 P.2d 838* ; *Norton v. Larco (1866) 30 Cal. 126, 130]* . Some courts appear to presume such an understanding by defining a mutual, open, and current account as one which consists of reciprocal demands which would give to each party an offset against the other in an action by either [*see Gould v. Wood (1928) 205 Cal. 141, 143, 270 P. 183]* .

In any case, items other than cash must appear as credits on the account. An account consisting of items of charges on one side and payments merely on the other is not a mutual account. In other words, a simple contract in which services or goods are to be performed or delivered in return for cash payments does not give rise to a separate cause of action on a mutual, open, and current account. Unlike a book account, the party to whom the cash payments are made must also have received credits other than cash [*see Carter v. Canty (1919) 181 Cal. 749, 756, 186 P. 346* ; *Gould v. Wood (1928) 205 Cal. 141, 143, 270 P. 183]* .

A mutual, open, and current account need not be kept in any particular form, and it is immaterial which party keeps the account. It is not even necessary that there be any written entry of the various charges of the account [*Parker v. Shell Oil Co. (1946) 29 Cal. 2d 503, 513, 175 P.2d 838]* .

[b] Examples

- Sums due a plaintiff as real estate broker's commissions were considered part of a mutual, open, and current account where the defendant, the plaintiff's business associate, had purchased medical insurance and a desk on plaintiff's behalf, and the evidence supported the plaintiff's argument that the insurance and desk constituted reciprocal items, against his commissions [*Anderson v. Associated Inv. Co. (1963) 219 Cal. App. 2d 206, 212-216, 32 Cal. Rptr. 921* (upholding judgment of $29,421 even though the desk and insurance were valued at less than $800)].

- Another example of a mutual, open, and current account includes mutual demands arising out of a lease of personal or real property in which the lessor agreed to allow the lessee the reasonable value of his service, and commodities furnished as an offset to the rent [*Pedley v. Doyle (1918) 177 Cal. 284, 287, 170 P. 602* (holding that fact that indebtedness of one party was based on quantum meruit does not necessarily affect the existence of the account)], and mutual demands between an attorney and his client where the attorney rendered legal services for a period of seven years, purchasing goods at the same time on credit at his client's store [*Gould v. Wood (1928) 205 Cal. 141, 142, 270 P. 183* (upholding judgment of over $2,700 although items purchased cost $227.51)].

[3] Book Accounts

[a] Generally

A book account is a detailed statement constituting the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relationship [*Code Civ. Proc. § 337a*]. A book account can be a mutual, open, and current account [*see Gould v. Wood (1928) 205 Cal. 141, 142-143, 270 P. 183]* . However, it need not be mutual, that is, there is no requirement that the parties have made reciprocal demands on each other. The account may be based on cash payments alone if there are no credits to enter [*see Furlow P.B. Co. v. Balboa L. & W. Co. (1921) 186 Cal. 754, 763, 200 P. 625* ; *Santa Clara County v. Vargas (1977) 71 Cal. App. 3d 510, 517, 139 Cal. Rptr. 537* ; *Joslin v. Gertz (1957) 155 Cal. App. 2d 62, 66, 317 P.2d 155]* .

Accounts for the support of patients at state or county hospitals are defined by statute as book accounts [*see Code Civ. Proc. § 345*].

[b] Formation

[i] Agreement or Conduct of Parties

A book account is created by agreement or conduct of the parties. Merely recording a transaction in a book or incidentally keeping accounts under an express contract does not of itself create a book account. These types of

memoranda cannot be utilized under the guise of a book account as a device to extend the statute of limitations beyond the time it would run on the contractual obligation [*Tsemetzin v. Coast Federal Savings (1997) 57 Cal. App. 4th 1334, 1343-1344, 67 Cal. Rptr. 2d 726* (claim for rental arrearages based on written lease); *Maggio, Inc. v. Neal (1987) 196 Cal. App. 3d 745, 752, 241 Cal. Rptr. 883* ; *H. Russell Taylor's Fire Prevention Service, Inc. v. Coca Cola Bottling Corp. (1979) 99 Cal. App. 3d 711, 728, 160 Cal. Rptr. 411]* . However, once the parties to a written or oral contract expressly or impliedly agree that sums due under a contract will be the subject of a book account between them, even though the underlying contract making up the account may be subject to a two-year statute of limitations, the book account is subject to the four-year statute of limitations [*Code Civ. Proc. § 337(2)*], because the cause of action is not on the contract but on the account [*see Warda v. Schmidt (1956) 146 Cal. App. 2d 234, 237, 303 P.2d 762* ; *see also § 8.18*].

Thus, for example, a cause of action for breach of an installment contract accrues at the time that each installment is due. If, however, the contract was subject to a book account, the statute of limitations is tolled each time a new entry is made in the account [*see Furlow P.B. Co. v. Balboa L. & W. Co. (1921) 186 Cal. 754, 763, 200 P. 625]* .

A book account may be maintained by either the debtor or the creditor [*Gardner v. Rutherford (1943) 57 Cal. App. 2d 874, 884, 136 P.2d 48]* .

[ii] Form and Contents of Account

A book account must show both [*Code Civ. Proc. § 337a*]:

- The debits and credits in connection with the transaction or transactions between the creditor and the debtor.
- Against whom and in favor of whom the entries are made.

A single entry may reflect the establishment of an account between the parties [*Bailey v. Hoffman (1929) 99 Cal. App. 347, 350-352, 278 P. 498]* .

The account must be entered in the regular course of business as conducted by the creditor or debtor and kept in a reasonable permanent form and manner as follows [*Code Civ. Proc. § 337a*]:

- In a bound book;
- On a sheet or sheets fastened in a book or to a backing but detachable therefrom;
- On a card or cards of a permanent character; or
- In any other reasonable permanent form or manner.

There is no standard bookkeeping practice that must be followed, and it is immaterial whether the account be kept in one book or several, as long as they are permanent records and constitute a system of bookkeeping, as distinguished from mere private memoranda [*Costerisan v. Delong (1967) 251 Cal. App. 2d 768, 770, 59 Cal. Rptr. 803* ; *Egan v. Bishop (1935) 8 Cal. App. 2d 119, 122, 47 P.2d 500* (upholding lower court finding that attorney's docket of court cases and separate journal for office charges constituted book account although no single ledger account combined the entries made in the docket and journal)].

The account cannot consist of numerous loose pages not bound together in some substantial form [*Tabata v. Murane (1946) 76 Cal. App. 2d 887, 890, 174 P.2d 684]* . However, unfastened ledger sheets may constitute a book account if

the sheets containing the history of the transactions between the parties are maintained together as a unit, such as in a single folder, and kept on file in the company office [*see Costerisan v. Delong (1967) 251 Cal. App. 2d 768, 770, 59 Cal. Rptr. 803]* .

Generally, the book account should contain enough information to permit the striking of a balance to ascertain what sum is due the creditor [*Robin v. Smith (1955) 132 Cal. App. 2d 288, 291, 282 P.2d 135]* . Thus, the books must reveal more than merely a crediting of the debtor with certain payments. They should record the history of the transactions between the parties (or at least have this data attached to the ledger sheets [*see Costerisan v. Delong (1967) 251 Cal. App. 2d 768, 770, 59 Cal. Rptr. 803]* , and include the original indebtedness as well as the unpaid installments [*Gardner v. Rutherford (1943) 57 Cal. App. 2d 874, 886, 136 P.2d 48]* . The entries in the book ordinarily should be made at or near the time of the transactions to which they relate; there should be no long delay without satisfactory explanation. Nevertheless, an irregularity in that respect is not necessarily fatal to an action on a book account [*Warda v. Schmidt (1956) 146 Cal. App. 2d 234, 237, 303 P.2d 762]* .

[iii] Necessity That Account Remain Open

As is true with a cause of action on a mutual, open, and current account, a cause of action on a book account must be on an open book account. That is, the debt must be an unsettled debt arising from items of work and labor, goods sold and delivered, or other open transactions which are subject to future settlement and adjustment. Although an open book account can consist of one item, the item must be left open and undetermined by the parties [*Fresno Credit Bureau v. Batteate (1951) 102 Cal. App. 2d 545, 547, 227 P.2d 851]* .

However, settlement of some disputed items or a payment by one party of a sum corresponding in amount to certain charges against the party doesnot necessarily destroy what is otherwise an open, mutual, current account. Thus, for example, the fact that a debtor has made two payments exactly corresponding to the first two charges on an open book account does not necessarily infer that each charge was a separate item, nor does it destroy the openness and continuity of the account. In fact, in appropriate circumstances the balance due on an account stated may become an item in a succeeding open, mutual, current account [*Parker v. Shell Oil Co. (1946) 29 Cal. 2d 503, 510-511, 175 P.2d 838* ; *see Mercantile Trust Co. v. Doe (1914) 26 Cal. App. 246, 251, 146 P. 692]* .

[4] Characterization of Account

An account, including a mutual, open, current account is property, a chose in action [*see Civ. Code § 953*]. The owner of the account has the right to sell, transfer, or assign the account, subject to equities which might exist in favor of the other party to the account [*Pedley v. Doyle (1918) 177 Cal. 284, 287, 170 P. 602]* by virtue of the provisions of *Civ. Code § 955.1* (perfection of an assignment that does not create a security interest in the assigned account) [*see Com. Code § 9102(a)(2), (72)(D)* (for purposes of *Com. Code § 9101 et seq.*, governing various secured transactions, "secured party" can be person to whom accounts, as defined, have been sold); *see also Com. Code § 9109(d)(4)* (exemption for sale of accounts as part of sale of business)].

The account, as a chose in action, is also subject to attachment [*see Code Civ. Proc. § 487.010(c)(2)*].

[5] Termination of Account

[a] By Creation of Account Stated

If the balance is struck in an open book account or a mutual, open, and current account, the open account terminates by being converted into an account stated. The parties must have expressly assented to the correctness of the account or, at least, the debtor must have expressly or impliedly acknowledged that he or she owes the amount struck [*R.E. Tharp, Inc. v. Miller Hay Co. (1968) 261 Cal. App. 2d 81, 84, 67 Cal. Rptr. 854]* . In the case of a mutual, open, current account, if there are demands on each side, the striking of a balance is said to convert the setoff into payment, and from

the time the balance as ascertained by the parties is admitted to be due from one to the other, the account is at an end [*Norton v. Larco (1866) 30 Cal. 126, 130* ; *see Anderson v. Associated Inv. Co. (1963) 210 Cal. App. 2d 206, 214, 26 Cal. Rptr. 513]* .

[b] By Communicated Intent to Stop

Because any open account exists by virtue of the parties' understanding that their transactions will be the subject of an account, the account may also terminate if one party shows by some act communicated to the other that he or she no longer intends to deal that way [*see Groom v. Holm (1959) 176 Cal. App. 2d 310, 313, 1 Cal. Rptr. 410]* .

[c] By Change in Identity of Either Party

In addition, an open account may terminate if the transactions that are the subject of the account were not performed by or for the same party. Thus, for example, if by operation of law one party to the account dissolves and becomes a different entity, the account is terminated [*Davidson v. Tilden (1978) 86 Cal. App. 3d 283, 287-288, 150 Cal. Rptr. 194* (change of partner in partnership, automatically dissolving partnership, terminates book account; transactions between partners thereafter form the basis for second book account)].

[6] Statute of Limitations

An action to recover (1) on a book account, whether consisting of one or more entries, or (2) a balance due on a mutual, open, and current account, the items of which are in writing, must be brought within four years of the date of the last proven entry in the account on either side [*Code Civ. Proc. §§ 337(2), 344*; *Furlow P.B. Co. v. Balboa L. & W. Co. (1921) 186 Cal. 754, 763, 200 P. 625]* .

An action to recover on an account for the support of a patient at a state or county hospital must be brought within four years after the last date of service or the last date of payment [*Code Civ. Proc. § 345*].

Presumably, the two-year statute of limitations [*Code Civ. Proc. § 339*] applies to a cause of action on a mutual, open, and current account, the items of which are not in writing. No decisions have construed the language added to *Code Civ. Proc. § 337(2)* in 1947 [*see* Stats. 1947, ch. 809] which limits the application of the four-year statute to mutual, open, and current accounts the items which are in writing. However, the Legislature appeared to intend to change to two years the former four-year statute applicable to causes of action on mutual, open, and current accounts where the charges of the account were not in writing [*see Parker v. Shell Oil Co. (1946) 29 Cal. 2d 503, 513, 175 P.2d 838* ; *Schwindt v. Billiwhack Stock Farms (1941) 45 Cal. App. 2d 208, 210, 113 P.2d 902]* .

The rule that the statute of limitations begins to run from the time of the last entry in the account is subject to the qualification that the account must have remained open. If the account has been terminated either by the striking of a balance in the account or some other agreement that the parties will deal with each other in a different manner or by operation of law, then the statute begins to run from the date of the termination of the account [*Davidson v. Tilden (1978) 86 Cal. App. 3d 283, 287-288, 150 Cal. Rptr. 194* ; *Groom v. Holm (1959) 176 Cal. App. 2d 310, 313, 1 Cal. Rptr. 410]* .

Likewise, although a book account may be based on charges alone [*Bailey v. Hoffman (1929) 99 Cal. App. 347, 349, 278 P. 498]* , a creditor cannot change the applicable statutory period merely by entering a single charge in his or her books of account [*Merchants' Collection Agency v. Levi (1917) 32 Cal. App. 595, 596-597, 163 P. 870]* . The debtor must, in addition, begin to make payments on the account that are credited to him or her and leave a balance due, thereby indicating his or her desire and intent that the account should remain open [*Santa Clara County v. Vargas (1977) 71 Cal. App. 3d 510, 517-518, 139 Cal. Rptr. 537]* .

The fact that there is a lapse of time between payments on the account greater than the applicable period of limitation does not bar the cause of action, whether it is on an open book account, or a mutual, open, and current account [*Gardner v. Rutherford (1943) 57 Cal. App. 2d 874, 883, 136 P.2d 48]* .

As discussed above [*see § 8.20[1]*], once a book account or a mutual, open, and current account can be shown, the cause of action is on the account and not on the separate entries constituting the account. However, this distinction between the account itself and the debts represented by the entries of the account is inconsequential if all the transactions took place within the applicable period of limitation [*see Hansen v. Burford (1931) 212 Cal. 100, 107, 297 P. 908]* . Thus, for example, an action for the breach of a contract constituting a sale of goods within Article 2 of the Commercial Code may be brought within four years after the cause of action has accrued [*Com. Code § 2725*; Hachten v. Stewart (1974) 42 Cal. App. 2d Supp. 1, 2-3, 116 Cal. Rptr. 631] . The earlier attempts by plaintiffs to avoid the two-year statute of limitations contained in *Code Civ. Proc. § 339(1)* by pleading that suit was not on an oral contract but on an open book account has been obviated in the case of oral contracts for the sale of goods.

Where sums that become due under an express contract, such as rent under a lease, are not treated by the parties as items of an open account, one party cannot evade the bar of the statute of limitations by pleading an open, mutual, current account or book account [*see Parker v. Shell Oil Co. (1946) 29 Cal. 2d 503, 513, 175 P.2d 838]* .

[7] Pleading

In California, it is settled that the common counts may be used to state a cause of action on a book account or a mutual, open, and current account [*Carter v. Canty (1919) 181 Cal. 749, 751-752, 186 P. 346]* . Even though the complaint does not set out the items of the account, the complaint is not subject to a general demurrer or a special demurrer on the ground that it is ambiguous or uncertain. When the allegations are too general, the defendant's remedy is to demand a bill of particulars under *Code Civ. Proc. § 454* [*Pleasant v. Samuels (1896) 114 Cal. 34, 38, 45 P. 998* ; Division of Labor *Law Enforcement v. Barnes (1962) 205 Cal. App. 2d 337, 347, 23 Cal. Rptr. 55]* .

A copy of a bill of particulars must be delivered within 10 days of the defendant's written demand therefor. Otherwise, the plaintiff is precluded from giving evidence of the account [*Code Civ. Proc. § 454*; for further discussion and forms of bills of particulars, *see* Ch.121, *Common Counts*].

The remedies of open book account and mutual, open, and current account are often confused. If it is otherwise clear what transaction or transactions are being sued on and the elements of the account are proved at trial, the mislabeling of the complaint is not prejudicial to the defendant [*see King v. Etchebarren (1960) 181 Cal. App. 2d 802, 806, 5 Cal. Rptr. 624]* .

[8] Attorney's Fees

Except as otherwise provided by law or when waived by the parties to an agreement, in any action on a contract based on a book account as defined in *Code Civ. Proc. § 337a [see [3][a], above*], the party who is determined to be the party prevailing on the contract is entitled to reasonable attorney's fees, as provided below, in addition to other costs. The prevailing party on the contract is the party who recovered a greater relief in the action on the contract. The court may determine that there is no party prevailing on the contract for purposes of *Civ. Code § 1717.5* [*Civ. Code § 1717.5(a)*].

Reasonable attorney's fees awarded pursuant to *Civ. Code § 1717.5* for the prevailing party bringing the action on the book account must be fixed by the court in an amount that must not exceed the lesser of [*Civ. Code § 1717.5(a)*]:

- $800 for book accounts based on an obligation owing by a natural person for goods, money, or services that were primarily for personal, family, or household purposes; and

- $1,000 for all other book accounts to which *Civ. Code § 1717.5* applies; or

- 25 percent of the principal obligation owing under the contract.

For the party against whom the obligation on the book account was asserted in the action subject to *Civ. Code § 1717.5*, if that party is found to have no obligation owing on a book account, the court must award that prevailing party reasonable attorney's fees not to exceed $800 for book accounts based on an obligation owing by a natural person for goods, money, or services which were primarily for personal, family, or household purposes, or $1,000 for all other book accounts to which *Civ. Code § 1717.5* applies [*Civ. Code § 1717.5(a)*].

These attorney's fees are an element of the costs of the suit. If there is a written agreement between the parties signed by the person to becharged, the fees provided by *Civ. Code § 1717.5* may not be imposed unless that agreement contains a statement that the prevailing party in any action between the parties is entitled to the fees provided by *Civ. Code § 1717.5* [*Civ. Code § 1717.5(a)*].

The attorney's fees allowed pursuant to *Civ. Code § 1717.5* must be the lesser of [*Civ. Code § 1717.5(b)*]:

- The maximum amount allowed by *Civ. Code § 1717.5*;

- The amount provided by any default attorney's fee schedule adopted by the court applicable to the suit; or

- An amount as otherwise provided by the court.

Any claim for attorney's fees pursuant to *Civ. Code § 1717.5* in excess of the amounts set forth in the default attorney's fee schedule must be reasonable attorney's fees, as proved by the party, as actual and necessary for the claim that is subject to *Civ. Code § 1717.5* [*Civ. Code § 1717.5(b)*].

However, if the parties have entered into a written agreement that is signed by the person to be charged, attorney's fees under *Civ. Code § 1717.5* may not be imposed unless the agreement contains a statement that the prevailing party in any action between the parties is entitled to the fees provided by *Civ. Code § 1717.5* [*Civ. Code § 1717.5*].

Civ. Code § 1717.5 does not apply to any action in which an insurance company is a party. Moreover, an insurance company, surety, or guarantor is not liable under *Civ. Code § 1717.5*, in the absence of a specific contractual provision, for the attorney's fees and costs awarded a prevailing party against its insured [*Civ. Code § 1717.5(c)*]. *Civ. Code § 1717.5* also does not apply to any action in which a bank, a savings association, a federal association, a state or federal credit union, or a subsidiary, affiliate, or holding company of any one of those entities, or an authorized industrial loan company, a licensed consumer finance lender, or a licensed commercial finance company, is a party [*Civ. Code § 1717.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesGovernmentsLegislationStatutes of LimitationsTime LimitationsContracts LawFormationMeeting of MindsCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesEquitable AccountingsElements

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Chapter 8 ACCOUNTS STATED AND OPEN ACCOUNTS
PART II. LEGAL BACKGROUND

1-8 California Forms of Pleading and Practice--Annotated §§ 8.21through 8.29

AUTHOR: Leslie Zablen Editorial Consultant Leslie Zablen is a practitioner in Emeryville, California. His practice includes debt collections, and general business law.

[Reserved]

§§ 8.21[Reserved]

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1-8 California Forms of Pleading and Practice--Annotated § 8.30

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§ 8.30 California Points and Authorities

For memoranda of points and authorities relating to common counts generally, *see* California Points and Authorities, Ch. 43, *Common Counts and Bills of Particulars* (Matthew Bender)

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§ 8.31 State Statutes

Obligations in general. *Civ. Code § 1427 et seq.*

Contracts. *Civ. Code § 1549 et seq.*

Accord and satisfaction. *Civ. Code § 1521 et seq.*

Novation. *Civ. Code § 1530 et seq.*

Attorney's fees. *Civ. Code §§ 1717, 1717.5*

Interest as damages. *Civ. Code §§ 3287(a), 3289, 3290*

Statute of limitations. *Code Civ. Proc. § 337(2)*

Venue. *Code Civ. Proc. § 395(a)*

Damages for breach of obligation to pay money. *Civ. Code § 3302*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesGovernmentsLegislationStatutes of LimitationsTime LimitationsContracts LawFormationMeeting of MindsCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesEquitable

AccountingsElements

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§ 8.32 Decisions

[1] Account Stated Is a Contract

Account, when assented to, becomes new contract; action is not founded on original items, but on balance agreed to by parties. *Nilsson, Robbin, et al. v. Louisiana Hydrolec (9th Cir. 1988) 854 F.2d 1538, 1543* (applying California law and citing *Gleason v. Klamer (1980) 103 Cal. App. 3d 782, 786, 163 Cal. Rptr. 483*)

Account stated constitutes new contract which supersedes original contract; action is on new contract. *Jones v. Wilton (1938) 10 Cal. 2d 493, 498, 75 P.2d 593*

Promise to pay account stated implied from circumstances. *Mayberry v. Cook (1898) 121 Cal. 588, 590, 54 P. 95* ; *Auzerais v. Naglee (1887) 74 Cal. 60, 65, 15 P. 371*

Account stated is contract with consideration. *Hallford v. Baird (1938) 27 Cal. App. 2d 384, 389, 80 P.2d 1040*

[2] Bill of Particulars

Bill of particulars inapplicable to account stated. *Auzerais v. Naglee (1887) 74 Cal. 60, 65, 15 P. 371*

[3] Defense to Other Action

Party defending solely on theory of account stated unable to change theory after finding that no account was stated. *Trafton v. Youngblood (1968) 69 Cal. 2d 17, 29-30, 69 Cal. Rptr. 568, 442 P.2d 648*

Account stated interposed as defense to action on underlying transaction. *California Milling Corp. v. White (1964) 229 Cal. App. 2d 469, 476, 40 Cal. Rptr. 301* (holding no account was stated)

Account stated interposed as a defense where proof showed acceptance of payments by creditor without objection. *Fogarty v. McGuire (1959) 170 Cal. App. 2d 405, 411, 338 P.2d 992*

Payment of invoice and acceptance of payment asserted as account stated and defense to action on underlying transaction. *Levy v. Prinzmetal (1955) 286 P.2d 1023*

[4] Definition

Account stated is agreement, based on prior transactions, that items of account are true and balance struck is due and owing. *Trafton v. Youngblood (1968) 69 Cal. 2d 17, 25, 69 Cal. Rptr. 568, 442 P.2d 648*

In absence of agreement by debtor to forego oral contract and proceed on basis of account, invoices from creditor are not evidence of account and only memorializes oral contract. *Filmservice Laboratories, Inc. v. Harvey Bernhard Enterprises, Inc. (1989) 208 Cal. App. 3d 1297, 1307-1308, 256 Cal. Rptr. 735*

Account stated is agreement, based on prior transactions between parties, that items of account are true and that balance struck is due and owing; agreement necessary to establish account stated may be implied from circumstances. *Maggio, Inc. v. Neal (1987) 196 Cal. App. 3d 745, 752-753, 241 Cal. Rptr. 883* ; *H. Russell Taylor's Fire Prevention Service, Inc. v. Coca Cola Bottling Corp. (1979) 99 Cal. App. 3d 711, 726, 160 Cal. Rptr. 411*

"Account" defined. *Richmond Crane Rigging & Drayage Co. v. Liberty Nat. Bank (1972) 27 Cal. App. 3d 968, 974, 977, 104 Cal. Rptr. 277*

Account stated is compromise and final, conclusive acknowledgment of exact amount due after all credits and offsets. *Perry v. Schwartz (1963) 219 Cal. App. 2d 825, 829-830, 33 Cal. Rptr. 511*

Account stated is required to set forth exact amount owed. *Stark v. McAllister (1944) 65 Cal. App. 2d 577, 579, 151 P.2d 162*

[5] Elements

Necessity of preexisting indebtedness. *Trafton v. Youngblood (1968) 69 Cal. 2d 17, 26, 69 Cal. Rptr. 568, 442 P.2d 648* ; *Block v. D. W. Nicholson Corp. (1947) 77 Cal. App. 2d 739, 176 P.2d 739*

Common count of account stated is sufficient in *California. Ward Mfg. Co. v. Miley (1955) 131 Cal. App. 2d 603, 606, 281 P.2d 343*

Account stated is acknowledgment of prior debt, agreement that balance is correct, and promise to pay balance. *Block v. D. W. Nicholson Corp. (1947) 77 Cal. App. 2d 739, 746, 176 P.2d 739*

[6] Fraud, Duress, or Mistake

Right to jury trial on defense of fraud. *Kearney v. Bell (1911) 160 Cal. 661, 663, 117 P. 925*

Account stated that arises between attorney and former client after lawyer-client relationship has ended is not subject to

usual presumption of undue influence by fiduciary; law firm's threat to resort to legal action to collect unpaid bill does not subject former client to fraud, duress, coercion, or undue influence. *Gleason v. Klamer (1980) 103 Cal. App. 3d 782, 787, 789, 163 Cal. Rptr. 483* ; *see also Nilsson, Robbin, et al. v. Louisiana Hydrolec (9th Cir. 1988) 854 F.2d 1538, 1543* (applying California law and citing *Gleason* to dispense with usual presumption)

Defendant is required to plead falsity or erroneous nature of statement on which account is based to raise issue thereon. *Perry v. Schwartz (1963) 219 Cal. App. 2d 825, 829, 33 Cal. Rptr. 511*

Fraud, duress, or mistake is required to be pleaded to avoid legal effect of account stated. *Lund v. Utter-McKinley Mortuaries (1960) 186 Cal. App. 2d 162, 168, 8 Cal. Rptr. 685*

Suppression of pertinent and material facts by fiduciary is fraud sufficient to impeach showing of account stated. *Store of Happiness v. Carmona & Allen (1957) 152 Cal. App. 2d 266, 273, 312 P.2d 1104*

Defense of fraud is required to be specifically pleaded. *Clarkson v. Hoyt (1894) 36 P. 382, 4 Cal. Unrep. 547, 552*

[7] Open Book Account

Open book account is account with one or more items unsettled and includes account with dealings still continuing, in contrast to closed account, to which no further additions can be made on either side; "open" or "closed" nature of account is not determined by account balance per se, but by parties' expectations of future transactions between them. *Cochran v. Rubens (1996) 42 Cal. App. 4th 481, 485, 49 Cal. Rptr. 2d 672* ; *Gross v. Recabaren (1988) 206 Cal. App. 3d 771, 778, 253 Cal. Rptr. 820* ; *Mercantile Trust Co. v. Doe (1914) 26 Cal. App. 246, 253, 146 P. 692*

Open book account is not created by mere keeping of accounts; court is required to examine conduct of parties in context of their commercial dealing to determine whether they agreed transactions would be carried as open book account. *Maggio, Inc. v. Neal (1987) 196 Cal. App. 3d 745, 752, 241 Cal. Rptr. 883* ; *H. Russell Taylor's Fire Prevention Service, Inc. v. Coca Cola Bottling Corp. (1979) 99 Cal. App. 3d 711, 728, 160 Cal. Rptr. 411*

[8] Partial Account Stated

Account stated as to some financial transaction between parties is not necessarily account stated as to all transactions. *California Milling Corp. v. White (1964) 229 Cal. App. 2d 469, 477-478, 40 Cal. Rptr. 301*

[9] Proof

Promissory note is evidence of account stated. *Hammond L. Co. v. Richardson Bldg. etc. Co. (1930) 209 Cal. 82, 87, 285 P. 851*

Account stated does not supersede speciality such as promissory note or bond for money. *Bennett v. Potter (1919) 180 Cal. 736, 745, 183 P. 156* ; *Rio Linda Poultry Farms v. Fredericksen (1932) 121 Cal. App. 433, 435, 9 P.2d 262*

Evidence is admissible on underlying transactions to determine whether account stated was made but not to determine correctness of such transactions. *Coffee v. Williams (1894) 103 Cal. 550, 558-559, 37 P. 504*

When statement is rendered to debtor and no reply is made within reasonable time, law implies agreement that account is correct, but failure to reply does not establish account stated when debtor did not know he or she was indebted or that creditor was maintaining account. *Maggio, Inc. v. Neal (1987) 196 Cal. App. 3d 745, 753, 241 Cal. Rptr. 883* (debtor

believed amounts were advances against bonus)

No book account is established when only evidence of such an account is plaintiff's declaration that he kept running account of rent arrearages, and basic claim for rental arrearages rests on express written contract. *Tsemetzin v. Coast Federal Savings (1997) 57 Cal. App. 4th 1334, 1343-1344, 67 Cal. Rptr. 2d 726*

No book account is established when there was no evidence of agreement or conduct of parties that loans would be carried as book account. *Maggio, Inc. v. Neal (1987) 196 Cal. App. 3d 745, 752, 241 Cal. Rptr. 883*

Check from debtor to creditor, uncashed prior to creditor's death, is evidence of account stated. *Zinn v. Fred R. Bright Co. (1969) 271 Cal. App. 2d 597, 600, 76 Cal. Rptr. 663*

Evidence that defendant consistently denied liability and maintained that transactions were not covered by underlying contract controverts existence of account stated. *R.E. Tharp, Inc. v. Miller Hay Co. (1968) 261 Cal. App. 2d 81, 84, 67 Cal. Rptr. 854*

Evidence that debtor was not reticent in negotiating amount due prior to date of alleged account stated and made no objection thereafter is corroborative of agreement to account stated. *Withers v. Matthews (1961) 192 Cal. App. 2d 139, 143, 13 Cal. Rptr. 165*

Open book account is previous indebtedness sufficient as basis for account stated. *Joslin v. Gertz (1957) 155 Cal. App. 2d 62, 67-68, 317 P.2d 155*

Account stated if amount is not specified but can be ascertained from totals of figures then in existence. *Metropolitan Water Dist. v. Adams (1943) 57 Cal. App. 2d 574, 576-577, 134 P.2d 882*

[10] Requirement of Writing; Statute of Frauds

Writing is required when underlying transaction is based on written contract. *Bennett v. Potter (1919) 180 Cal. 736, 743-744, 183 P. 156*

Account stated is not required to be in writing. *Converse v. Scott (1902) 137 Cal. 239, 240-241, 70 P. 13* ; *see also Bennett v. Potter (1919) 180 Cal. 736, 738-743, 183 P. 156* ; *Fleschler v. Strauss (1936) 15 Cal. App. 2d 735, 740, 60 P.2d 193* ; *Truestone,Inc. v. Simi West Industrial Park II (1984) 163 Cal. App. 3d 715, 726, 209 Cal. Rptr. 757*

Oral agreement regarding dates and amounts of payment under original contract does not automatically constitute account stated. *Biltmore Press v. Usadel (1970) 6 Cal. App. 3d 896, 901, 86 Cal. Rptr. 233*

Account stated when payment not to be made within one year is within statute of frauds. *Mitchell v. Fleming (1926) 77 Cal. App. 241, 246, 246 P. 152*

Contract void because of statute of frauds is insufficient basis for account stated. *Swim v. Juhl (1925) 72 Cal. App. 363, 365-366, 237 P. 552*

[11] Venue

Complaint on account stated is required to allege place of stating account for venue purposes. *Tringali v. Vest (1951) 106 Cal. App. 2d 720, 721-722, 236 P.2d 171* ; *Crofts & Anderson v. Johnson (1950) 101 Cal. App. 2d 418, 421-422, 225 P.2d 594* ; *see also Ward Mfg. Co. v. Miley (1955) 131 Cal. App. 2d 603, 607-608, 281 P.2d 343*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewContracts LawStatutes of FraudsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesEquitable AccountingsElementsContracts LawDefensesGeneral Overview

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1-8 California Forms of Pleading and Practice--Annotated § 8.33

AUTHOR: Leslie Zablen Editorial Consultant Leslie Zablen is a practitioner in Emeryville, California. His practice includes debt collections, and general business law.

§ 8.33 Text References

Debt Collection Practice in California, ch.3, *Filing Debt Collection Actions*, §§ 3.13-3.20, 3.23, 3.25 (Cal CEB 2d. ed 2000)

Witkin, California Procedure Vol. 3, *Actions*, § 503 (statute of limitations); Vol. 4, *Pleading*, §§ 396, 526, 1020 (4th ed. 1996)

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 972-975 (10th ed. 2005)

Restatement of Contracts, *Discharge by Account Stated*, § 422

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1-8 California Forms of Pleading and Practice--Annotated §§ 8.34through 8.39

AUTHOR: Leslie Zablen Editorial Consultant Leslie Zablen is a practitioner in Emeryville, California. His practice includes debt collections, and general business law.

[Reserved]

§§ 8.34[Reserved]

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1-8 California Forms of Pleading and Practice--Annotated § 8.40

AUTHOR: Leslie Zablen Editorial Consultant Leslie Zablen is a practitioner in Emeryville, California. His practice includes debt collections, and general business law.

§ 8.40 Complaint for Damages [Civ. Code § 3302] on Account Stated--General Form

[1] FORM Complaint for Damages [Civ. Code § 3302] on Account Stated--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Account Stated)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, a resident of _____ [*city*], _____ County, California [*or allege other capacity and residence of defendant*].

2. On or about _____ [*date*], at _____ [*city*], California, an account was stated _____ [orally *or* in writing] by and between plaintiff and defendant and on such statement a balance of $_____ was found due to plaintiff from defendant. Defendant agreed to pay to plaintiff said balance. [A copy of the account is attached hereto as Exhibit "A" and made a part hereof.]

3. Although demanded by plaintiff from defendant, neither all nor any part of the agreed balance has been paid.

4. There is now due, owing, and unpaid from defendant to plaintiff the sum of $_____, together with interest thereon at the rate of _____ percent per year from and after _____ [*date account was stated*].

[5. Plaintiff has incurred attorney's fees in connection with this matter, in an amount to be determined at trial, which fees plaintiff is entitled to recover from defendant _____ (pursuant to agreement *or, if a book account* pursuant to *Civil Code Section 1717.5*).]

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____.

2. For interest on such sum at the rate of _____ percent per year from and after _____ [*date account was stated*].

[3. For attorney's fees in an amount to be determined at trial.]

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff, _____ [*party's name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The complaint in *[1], above*, is for use in an action based on an account stated. An account stated is frequently pleaded as an alternative to an action based on the transaction underlying the account stated, since if the account stated is not proved and an amendment of the pleadings is not allowed, plaintiff may be barred from recovery by the statute of limitations [*see, e.g., Trafton v. Youngblood (1968) 69 Cal. 2d 17, 29-30, 69 Cal. Rptr. 568, 442 P.2d 648]* .

The complaint alleges the following:

- The defendant's residence (Paragraph 1), to show venue [*see Code Civ. Proc. § 395(a)*]. Venue may also be laid by alleging the place where the account was stated (Paragraph 2) [*see Code Civ. Proc. § 395(a)* and *Crofts & Anderson v. Johnson (1950) 101 Cal. App. 2d 418, 421, 225 P.2d 594]* .

- The date the account was stated (Paragraph 2) [*Code Civ. Proc. § 337(2)* (statute of limitations on written accounts)], that a balance was struck, and that defendant agreed to pay that balance [*see Block v. D.W. Nicholson Corp. (1947) 77 Cal. App. 2d 739, 746, 176 P.2d 739]* .

- Plaintiff's demand and defendant's failure to pay (Paragraph 3).

- The amount due on the date of filing the complaint (Paragraph 4).

For a discussion of oral and written accounts stated, *see § 8.16*.

In any action or proceeding subject to the provisions of the Unruh Retail Installment Sales Act (*Civ. Code § 1801 et seq.*) or the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*), or in a limited civil case subject to the provisions of *Code Civ. Proc. § 395(b)* concerning consumer obligations, the plaintiff must file, concurrently with the complaint, an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) stating facts showing that the action has been commenced in the proper court for the trial of the action or proceeding, and that the action is subject to the provisions of *Civ. Code § 1812.10* or *2984.4*, or of *Code Civ. Proc. § 395(b)*. In lieu of an affidavit or declaration, the required facts may be stated in a complaint verified by the oath of the plaintiff or of his or her attorney [*Civ. Code § § 1812.10(c), 2984.4(c)*; *Code Civ. Proc. § 396a(a)*]. In cases subject to *Civ. Code § 1812.10* or *2984.4*, however, the facts may not be stated on information or belief when they are stated in a verified complaint [*Civ. Code § § 1812.10(c), 2984.4(c)*]. When an affidavit or declaration is filed with the complaint, a copy must be served with the summons [*Civ. Code § § 1812.10(c), 2984.4(c)*; *Code Civ. Proc. § 396a(a)*]. In such actions plaintiff may allege parts of the underlying transaction to satisfy this requirement [*see, e.g.,* Form at *§ 8.42[1]*].

[3] Verification

While verification of this complaint is not required, verification will require any answer also to be verified, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[4] Cross References:

For a complaint by an assignee based on account stated, *see* Ch. 60, *Assignments*

For alternative forms for captions and introductions, *see* Ch. 108, *Captions and Introductions*

For discussion and forms for use in pleading other common counts, *see* Ch. 121, *Common Counts*

For alternative forms for prayers and verifications, *see* Ch. 420, *Prayers* , and Ch. 572, *Verification*

Legal Topics:

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

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1-8 California Forms of Pleading and Practice--Annotated § 8.41

AUTHOR: Leslie Zablen Editorial Consultant Leslie Zablen is a practitioner in Emeryville, California. His practice includes debt collections, and general business law.

§ 8.41 Complaint for Damages [Civ. Code § 3302] on Account Stated--Alternate Form

[1] FORM Complaint for Damages [Civ. Code § 3302] on Account Stated--Alternate Form

[*Caption, introduction. See Form at § 8.40[1]*.]

1. [*Capacity and residence of defendant. See Form at § 8.40 [1], Paragraph 1*.]

2. Within four years last past, at _____ [*city*], California, an account was stated in writing by and between plaintiff and defendant, wherein it was agreed that defendant was indebted to plaintiff in the sum of $_____.

3. Neither all nor any part of that sum has been paid, although demand therefor has been made, and there is now due, owing, and unpaid, the sum of $_____, with interest thereon at the rate of _____ percent per annum from _____ [*date*].

[4. Plaintiff has incurred attorney's fees in connection with this matter, in an amount to be determined at trial, which fees plaintiff is entitled to recover from defendant _____ (pursuant to agreement *or, if a book account* pursuant to *Civil Code Section 1717.5*).]

[*Prayer. See Form at § 8.40 [1]*.]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff, _____ [*party's name*]

[*Verification, if desired. See Form at § 8.40 [1], and discussion at § 8.40[3].*]

[2] Use of Form

The complaint in [1], *above*, is for use on a written account stated as an alternative to the form at *§ 8.40 [1]*. This complaint is in a somewhat shorter form, does not recite the exact date on which the account was stated, and does not include a copy of the account.

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1-8 California Forms of Pleading and Practice--Annotated § 8.42

AUTHOR: Leslie Zablen Editorial Consultant Leslie Zablen is a practitioner in Emeryville, California. His practice includes debt collections, and general business law.

§ 8.42 Complaint for Damages [Civ. Code § 3302] on Account Stated--Attorney's Fees

[1] FORM Complaint for Damages [Civ. Code § 3302] on Account Stated--Attorney's Fees

[*Caption, introduction. See Form at § 8.40[1].*]

1. [*Capacity and residence of defendant. See Form at § 8.40 [1], Paragraph 1.*]

2. Between _____ [*date*] and _____ [*date*], plaintiff performed services for defendant by representing defendant as his attorney in various legal matters and advanced and paid out sums of money for the account and benefit of defendant, all at defendant's instance and request.

3. On or about _____ [*date*], at _____ [*city*], California, an account was stated in writing by and between plaintiff and defendant and on such statement a balance of $_____ was found due from defendant to plaintiff and defendant agreed to pay such balance. A copy of the account is attached hereto as Exhibit "A" and made a part hereof.

4. Neither all nor any part of the agreed balance has been paid although a demand therefor has been made.

5. There is now due, owing, and unpaid from defendant to plaintiff the sum of $_____ together with interest thereon at the rate of _____ percent per year from and after _____ [*date*]

[6. Prior to or at the time of service of the summons in this action, plaintiff mailed to defendant written notice pursuant to *Bus. & Prof. Code § 6201*, which includes a statement of defendant's right to request arbitration of the aforementioned legal fees.]

[*Prayer. See Form at § 8.40 [1].*]

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff, _____ [*party's name*]

[*Verification, if desired. See Form at § 8.40 [1], and discussion at § 8.40[3].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use as a complaint based on an account stated between an attorney and a client for legal services rendered and sums advanced on the client's behalf. There appears to be no requirement that the underlying transaction be pleaded in an action based on an account stated but its inclusion may satisfy the requirements of *Civ. Code §§ 1812.10*, *2984.4*, and *Code Civ. Proc. § 396a*, discussed in *§ 8.40[2]*.

Optional paragraph no. 6 of the complaint is not mandatory, but recites the plaintiff's (attorney's) compliance with *Bus. & Prof. Code § 6201*, which requires the attorney, except in an action filed in small claims court, and subject to certain other exceptions, to forward a written notice to the client prior to or at the time of service of the summons in any action against the client for recovery of fees, costs, or both. The written notice must include a statement of the client's (defendant's) right to arbitration under Article 13 [*Bus. & Prof. Code § 6201(a)*]. Failure to give this notice is a ground for dismissal of the action [*Bus. & Prof. Code § 6201(a)*]. For further discussion of a client's right to arbitrate, *see Ch. 72, Attorney Practice and Ethics, § 72.430* et seq.; for a form of notice of client's right to arbitration, *see Ch. 72, Attorney Practice and Ethics, § 72.430* et seq., Form 100.

[3] Cross References

For discussion of fee collection, including ethical consideration, see *Ch. 72, Attorney Practice and Ethics, § 72.430* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesEquitable AccountingsElements

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1-8 California Forms of Pleading and Practice--Annotated § 8.43

AUTHOR: Leslie Zablen Editorial Consultant Leslie Zablen is a practitioner in Emeryville, California. His practice includes debt collections, and general business law.

§ 8.43 Complaint for Damages [Civ. Code § 3302] on Written Account Stated--Securities Transactions

[1] FORM Complaint for Damages [Civ. Code § 3302] on Written Account Stated--Securities Transactions

[*Caption, introduction. See Form at § 8.40 [1].*]

1. At all times herein mentioned, plaintiff was engaged, at _____ [*city*], California, in business as a securities broker, buying and selling securities of various kinds on the orders and for the accounts of customers.

2. On or about _____ [*date*], plaintiff and defendant entered into an oral agreement wherein defendant employed plaintiff to buy and sell various securities for him from time to time. Plaintiff accepted such employment and agreed to buy and sell various securities as instructed by defendant.

3. Thereafter and between _____ [*date*] and _____ [*date*], plaintiff, under the defendant's instructions, purchased and sold various securities for the defendant's account and expended sums of money for the purchases and received sums of money for the sales. By reason of these purchases and sales, and according to the agreement between plaintiff and defendant, defendant became indebted to plaintiff for commissions earned thereon by plaintiff.

4. On or about _____ [*date*], at _____ [*city*], California, an account was stated in writing by and between plaintiff and defendant and on that statement a balance of $_____ was found due from defendant to plaintiff, and defendant agreed to pay such balance. [A copy of the account is attached hereto as Exhibit "A" and made a part hereof.]

5. Although demanded by plaintiff from defendant, neither all nor any part of the agreed balance has been paid.

6. There is now due, owing, and unpaid from defendant to plaintiff the sum of $_____ together with interest thereon at the rate of _____ percent per year from and after _____ [*date*], and attorney's fees in the amount of $_____.

[*Prayer. See Form at § 8.40 [1]*.]

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff, _____ [*party's name*]

[*Verification, if desired. See Form at § 8.40 [1], and discussion at § 8.40[3]*.]

[2] Use of Form

See *§ 8.40 [2]* for discussion of general form complaint for damages on account stated. For discussion of broker commissions, and forms for use in actions to recover broker commissions, see Ch. 103, *Brokers* .

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1-8 California Forms of Pleading and Practice--Annotated § 8.44

AUTHOR: Leslie Zablen Editorial Consultant Leslie Zablen is a practitioner in Emeryville, California. His practice includes debt collections, and general business law.

§ 8.44 Affirmative Defense to Action Based on Account Stated--Fraud [Civ. Code § 1572]

[1] FORM Affirmative Defense to Action Based on Account Stated--Fraud [Civ. Code § 1572]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. On or about _____ [*date*], plaintiff, intending to induce defendant to agree to the account stated referred to in plaintiff's complaint as Exhibit "A," stated and represented to defendant that _____ [*specify false statements*].

2. Plaintiff's statements were false and fraudulent and were known to plaintiff to be false and fraudulent when made. In truth and in fact _____ [*specify true statements of facts which plaintiff falsely represented*].

3. On or about _____ [*date*], defendant agreed to the account stated in reliance on the statements and representations made by plaintiff and believing them to be true.

4. Defendant was ignorant of the true facts at the time of agreeing to the account due to _____ [*specify how defendant could have been ignorant of the facts*]. Defendant would not have so agreed if such truth were known. [On learning of the misrepresentation, defendant _____ (*specify action taken by defendant*).]

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an action based on an account stated. Actual fraud consists in any of the following acts, committed by a party to a contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract [*Civ. Code § 1572*]:

- The suggestion, as a fact, of that which is not true, by one who does not believe it to be true.

- The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true.

- The suppression of that which is true, by one having knowledge or belief of the fact.

- A promise made without any intention of performing it.

- Any other act fitted to deceive.

[3] Contents of Form

This form alleges the following:

- Plaintiff's false statement and that plaintiff intended to induce defendant to agree to the account (Paragraph 1).

- That plaintiff's statement was false and known to plaintiff to be false (Paragraph 2).

- Defendant's reliance on the false statement (Paragraph 3).

- That defendant was ignorant of the true fact and would not have entered into the account stated if the true fact were known (Paragraph 4).

Although an account stated may be impeached for fraud, the burden is on the party seeking to impeach it to set out in its pleading the particular facts constituting the fraud relied on. It is not sufficient to aver fraud in general terms; the fact constituting the fraud must be alleged. Thus, a pleading which alleges theaccount stated and that shortly thereafter the defendant ascertained that the statements were false should point out wherein or in what particular they were false. The pleading should also show particulars of amounts, dates, and sources of items of which defendant was ignorant at the time of the account stated and how the defendant could have been ignorant of the facts at the time of settlement [*Clarkson v. Hoyt (1894) 36 P. 382, 4 Cal. Unrep. 547, 552-553* ; *see also Kearney v. Bell (1911) 160 Cal. 661, 669-670, 117 P. 925]* .

[4] Cross References

For general discussion and forms of answers, *see* Ch. 26, *Answers*

For forms of defenses to contract actions generally, *see* Ch. 140, *Contracts*

See generally Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewContracts LawDefensesFraud & MisrepresentationIntentional FraudCivil ProcedureRemediesEquitable AccountingsElements

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1-8 California Forms of Pleading and Practice--Annotated § 8.45

AUTHOR: Leslie Zablen Editorial Consultant Leslie Zablen is a practitioner in Emeryville, California. His practice includes debt collections, and general business law.

§ 8.45 Affirmative Defense to Action Based on Account Stated--Mutual Mistake of Fact [Civ. Code § 1577]

[1] FORM Affirmative Defense to Action Based on Account Stated--Mutual Mistake of Fact [Civ. Code § 1577]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. On or about _____ [*date*], the time at which plaintiff alleges an account was stated, both plaintiff and defendant were unconsciously _____ [forgetful *or* ignorant] of the fact that _____ [*specify fact constituting the mistake*]. That fact was material to the account which was being stated.

2. If defendant had known of that fact he would not have agreed to the account and he agreed to the account under such mistake of fact. Defendant was _____ [forgetful *or* ignorant] of this fact due to _____ [*specify how mistake was not due to the neglect of a legal duty*].

[2] Use of Form

The form of affirmative defense in *[1], above*, is for use in an action based on an account stated. The defense alleges that, on the date of the account stated, both parties were unconsciously ignorant or forgetful of a fact material to the account (Paragraph 1) [*see Civ. Code § 1577(1)*], that the defendant would not have entered the account stated if the mistake were known, and that the mistake was not caused by the neglect of a legal duty on the part of the defendant (Paragraph 2) [*see Civ. Code § 1577*]. Mistake may also be based on a belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing [*Civ. Code § 1577(2)*].

[3] Cross References

For forms alleging defenses to contract actions on the grounds of unilateral and mutual mistake, *see* Ch. 140, *Contracts*

For additional references, see *§ 8.44[4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesEquitable AccountingsElementsContracts LawFormationAmbiguity & MistakeMutual Mistake

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1-8 California Forms of Pleading and Practice--Annotated § 8.46

AUTHOR: Leslie Zablen Editorial Consultant Leslie Zablen is a practitioner in Emeryville, California. His practice includes debt collections, and general business law.

§ 8.46 Account Stated Affirmative Defense to Action for Breach of Contract

[1] FORM Account Stated Affirmative Defense to Action for Breach of Contract

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that after the dates of the transactions alleged in plaintiff's complaint and on or about _____ [*date*], an account was stated _____ [orally *or* in writing] between plaintiff and defendant wherein it was agreed that defendant was indebted to plaintiff in the sum of $_____. [A copy of the account is attached hereto as Exhibit "1" and made a part hereof.]

[2] Use of Form

The form of affirmative defense in *[1], above,* is for use in an action based on the transaction underlying the account stated. When alleging an account stated as a defense, defendant should also consider alleging defenses and possible cross complaints based on the underlying transaction, since, if an account stated is not proved and an amendment to the pleadings is not allowed, he or she may be unable to prove those defenses or cross complaints [*see Trafton v. Youngblood (1968) 69 Cal. 2d 17, 29-30, 69 Cal. Rptr. 568, 442 P.2d 648]* .

If the amount of the account stated has been paid, the proper defense would appear to be an account stated and payment or an accord and satisfaction, depending on whether the acount stated represented the actual sum due or was a compromised sum [*see Civ. Code §§ 1521-1524* and Ch. 6, *Accord and Satisfaction.*].

[3] Cross References

For forms alleging accord and satisfaction as a defense, *see* Ch. 6, *Accord and Satisfaction*

For forms of defense based on novation of a contract, *see* Ch. 140, *Contracts*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewContracts LawBreachGeneral OverviewCivil ProcedureRemediesEquitable AccountingsElements

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Chapter 8 ACCOUNTS STATED AND OPEN ACCOUNTS
PART IV. FORMS

1-8 California Forms of Pleading and Practice--Annotated § 8.47

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§ 8.47 Complaint for Money on Open Book Account [Code Civ. Proc. § 337a] or on Mutual, Open, and Current Account

[1] FORM Complaint for Money on Open Book Account [Code Civ. Proc. § 337a] or on Mutual, Open, and Current Account

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONEY
_____ [*name*],	)	(_____ [Book Account *or* Mutual,
Defendant.	)	Open, and Current Account])
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See Form at § 8.40 [1], Paragraph 1* .]

2. Within _____ [two *or* four] years last past, defendant became indebted to plaintiff on an _____ [open book *or* mutual, open, and current] account for money due in the sum of $_____ for _____ [*specify services performed, and/or goods delivered, e.g.,* goods, wares, and merchandise sold and delivered by plaintiff to defendant] at his/her special instance and request [and for which defendant agreed to pay the above sum]. [A copy of this account is attached hereto as Exhibit A and made a part hereof.]

3. Neither the whole nor any part of the above sum has been paid [except for the sum of $_____,] although a demand therefor has been made, and there is now due, owing, and unpaid the sum of $_____ [, with interest thereon at the rate of _____ percent per annum from _____ (*date*)].

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____;

[2. For interest on this sum at the rate of _____ percent per year from and after _____ (*date*);]

3. For costs of suit herein incurred;

[4. For reasonable attorney's fees _____ (of $_____ *or* according to proof);] and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff, _____ [*party's name*]

[*Verification, if desired. See Form at § 8.40 [1], and discussion at § 8.40[3]* .

[2] Use of Form

The complaint in *[1], above,* is for use in an action either on an open book account or a mutual, open, and current account. The action must be brought within four years of the last entry in the account if the items of the account are in writing [*Code Civ. Proc. § 337(2)*; *Furlow Pressed Brick Co. v. B. & L. & Water Co. (1921) 186 Cal. 754, 763]* .

[3] Contents of Form

The complaint is in the form of a common count, a permissible and common form of pleading a complaint on an open book account or a mutual, open, and current account [*see Carter v. Canty (1919) 181 Cal. 749, 751-752, 186 P. 346]* .

It simply alleges that within two or four years of the filing of the complaint, defendant became indebted to plaintiff on an open book account or a mutual, open, and current account for services performed for or goods delivered to defendant (Paragraph 3) [*see Carter v. Canty (1919) 181 Cal. 749, 751, 186 P. 346* ; *R.E. Tharp, Inc. v. Miller Hay Co. (1968) 261 Cal. App. 2d 81, 83, n. 1, 67 Cal. Rptr. 854* ; *see also Pedley v. Doyle (1918) 177 Cal. 284, 287, 170 P. 602* (holding that quantum meruit may be basis for mutual, open, and current account)].

The plaintiff need not set forth the items of the account in the complaint. However, on the defendant's written demand, the plaintiff must deliver to the defendant a copy of the account, (or a bill of particulars), or the plaintiff will be precluded from giving evidence of the account [*see Code Civ. Proc. § 454*; *Burton v. Santa Barbara Nat. Bank (1966) 247 Cal. App. 2d 427, 432, 55 Cal. Rptr. 529]* .

In addition, the complaint alleges the sum due on the account, the plaintiff's demand for this sum, and the interest due on this sum (Paragraph 4). Generally, interest may not be recovered on an account that remains open and unliquidated [*see Burge v. Michael (1963) 213 Cal. App. 2d 780, 784, 29 Cal. Rptr. 290]* . However, interest may be recovered if the amount due is a liquidated sum that could be ascertained prior to judgment by reference to a contract or some well established value plus computation [*see Civ. Code § 3287*; *Schmidt v. Waterford Winery, Ltd. (1960) 177 Cal. App. 2d 28, 34-35, 1 Cal. Rptr. 874]* . Interest may also be recovered if custom, usage, or a statutory provision permits it or if there is an express or implied contract between the parties which requires it [*see Burge v. Michael (1963) 213 Cal. App. 2d 780, 784, 29 Cal. Rptr. 290]* . In any case, a person entitled to recover under a judgment based on a cause of action in contract when the claim was unliquidated is entitled to recover interest from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed [*Civ. Code § 3287(b)*; *see Lewis C. Nelson & Sons, Inc. v. Clovis Unified School District (2001) 90 Cal. App. 4th 64, 73, 108 Cal. Rptr. 2d 715* (holding that *Civ. Code § 3287(b)* is applicable to the public entities described in *Civ. Code § 3287(a)*)].

Depending on the circumstances, attorney's fees may be recoverable by the prevailing party [*see Civ. Code § 1717.5*; *see also Civ. Code § 1717*]. For further discussion, *see § 8.20[8]*.

[4] Cross References

For discussion and forms of common counts and bills of particulars, *see* Ch. 121, *Common Counts*

For general discussion of mutual, open and current accounts, *see* Schapiro, "Mutual, Open and Current Accounts, Book Accounts, Accounts Stated, and the Statute of Limitations," *11 Cal. L. Rev. 12 (1922)*

Legal Topics:

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

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1-9 California Forms of Pleading and Practice--Annotated 9.syn

§ 9.syn Synopsis to Chapter 9: ACKNOWLEDGMENTS

§ 9.01 Scope of Chapter

§ 9.02 Cross References

§§ 9.03-9.09 [Reserved]

§ 9.10 Governing Statutes

§ 9.11 Purpose of Acknowledgment

[1] Acknowledgment as Prima Facie Evidence

[2] Recording

[3] Recording as Constructive Notice

§ 9.12 Officers Who Take Proof or Acknowledgments

[1] In California

[2] Outside California but Within United States

[3] Outside United States

[4] By Deputy

[5] By Military Officers

§ 9.13 Taking of Acknowledgment by Interested Party Prohibited

§ 9.14 Liability of Notary

§§ 9.15-9.29 [Reserved]

§ 9.30 Governing Statutes

§ 9.31 Definitions

§ 9.32 Verification Distinguished

§ 9.33 Officer's Duty to Identify Person Acknowledging

[1] In General

[2] Personal Knowledge

[3] Satisfactory Evidence

§ 9.34 Liability for Failure to Ascertain Identity

§ 9.35 Effect of Perjury

§ 9.36 Statutory Forms

§ 9.37 Acknowledgment of Instrument Executed by Corporation or Unincorporated Entity

§ 9.38 Seal and Signature

§§ 9.39-9.49 [Reserved]

§ 9.50 Governing Statutes

§ 9.51 Limitation on Use of Proof of Execution

§ 9.52 Proof of Execution of Instrument

[1] Who May Prove

[2] Proof by Subscribing Witness

[3] Proof of Handwriting

[a] When Available

[b] Facts That Prove Handwriting

[4] Certificate of Proof of Execution

[5] Power of Officer Taking Proof

[6] Proof of Execution by Civil Action

§ 9.53 Defective Acknowledgment

[1] General Effect

[2] Clerical Errors and Omissions

[3] Correcting Defective Certificate by Civil Action

[4] Defects Cured by Lapse of Time

§§ 9.54-9.69 [Reserved]

§ 9.70 California Legal Forms

§ 9.71 State Statutes

[1] Acknowledgment of Specific Instruments

[2] Deeds of Trust and Mortgages

[3] Marriage Documents

[4] Miscellaneous

[5] Certificates of Acknowledgment

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§ 9.72 Decisions

[1] Contents of Acknowledgment

[2] Definitions

[3] Duty to Identify Party

[4] Foreign Acknowledgments

§ 9.73 Law Reviews

§ 9.74 Text References

§§ 9.75-9.89 [Reserved]

§ 9.90 State Statutes

[1] Certificate of Proof

[2] Civil Actions

[3] Method of Proof

[4] Powers of Officers

[5] Time Lapse as Cure

§ 9.91 Decisions

[1] Civil Actions

[2] Clerical Errors and Omissions

[3] Correction

[4] Ineffective for Notice

[5] Defective Certificates

[6] Officer Beneficially Interested

[7] Perjury by Subscribing Witness

[8] Validity of Unacknowledged Instrument

§ 9.92 Text References

§§ 9.93-9.109 [Reserved]

§ 9.110 Certificate of Acknowledgment--Statutory General Form [Civ. Code § 1189]

[1] FORM

[2] Use of Form

[3] Seal and Signature

[4] State Statutes

[5] Decisions

[6] Text References

§ 9.111 Certificate of Acknowledgment--Instrument Executed by Member of Armed Forces or Spouse--Statutory Form [Civ. Code § 1183.5]

[1] FORM

[2] Use of Form

[3] Text References

[4] Cross References

§ 9.112 Certificate of Acknowledgment--Instrument Executed by an Individual--Statutory Form [Former Civ. Code § 1189]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 9.113 Certificate of Acknowledgment--Instrument Executed by a Corporation--Statutory Form [Former Civ. Code §§ 1190, 1190.1]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 9.114 Certificate of Acknowledgment--Instrument Executed by Partnership--Statutory Form [Former Civ. Code § 1190a]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

§ 9.115 Certificate of Acknowledgment--Instrument Executed by Public Entity--Statutory Form [Former Civ. Code § 1191]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 9.116 Certificate of Acknowledgment--Instrument Executed by Attorney in Fact--Statutory Form [former Civ. Code § 1192]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

§§ 9.117-9.129 [Reserved]

§ 9.130 Certificate of Proof of Execution [Civ. Code § 1200]--Proof by Subscribing Witness to Unacknowledged Instrument [Civ. Code §§ 1195-1197]

[1] FORM

[2] Use of Form

[3] Seal and Signature

[4] State Statutes

[5] Decisions

§ 9.131 Certificate of Proof of Execution [Civ. Code § 1200]--Proof of Handwriting [Civ. Code §§ 1195, 1198, 1199]

[1] FORM

[2] Use of Form

[3] Proving Execution by Proof of Handwriting

[4] Facts Necessary to Prove Handwriting

[5] Cross References

§ 9.132 Complaint [Code Civ. Proc. § 425.10] for Proof of Execution of Deed [Civ. Code § 1203]

[1] FORM

[2] Use of Form

[3] Verification

[4] Cross References

[5] State Statutes

§ 9.133 Judgment [Code Civ. Proc. § 577] Proving Execution of Unacknowledged Instrument [Civ. Code § 1204]

[1] FORM

[2] Use of Form

[3] Recording Judgment

[4] Cross References

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1-9 California Forms of Pleading and Practice--Annotated § 9.01

§ 9.01 Scope of Chapter

This chapter discusses and contains the form of certificate of acknowledgment appropriate for all nonmilitary acknowledgments taken on or after January 1, 1991 [*see § 9.110*] and a form of certificate of acknowledgment by a person serving in or with the armed forces or the spouse of such a person [*see § 9.111*].

An acknowledgment provided prior to January 1, 1993, and conforming to applicable provisions of the former law [*see* former *Civ. Code §§ 1189, 1190, 1190a, 1190.1, 1191, 1192*, as repealed by Stats. 1990, ch. 335] has the same force and effect as if those sections had not been repealed [*Civ. Code § 1189(d)*]. Thus, this part has retained discussion and forms of the particularized forms of certificates of acknowledgment required under prior law for instruments executed by an individual [*see § 9.112*], by a corporation [*see § 9.113*], by a partnership [*see § 9.114*], by a public entity [*see § 9.115*], and by an attorney in fact [*see § 9.116*].

This chapter also discusses proof of execution of unacknowledged instruments. It contains forms of certificates of proof on evidence of a subscribing witness to the instrument [*see § 9.130*] and on evidence of the handwriting of a party to the instrument [*see § 9.131*], and forms of complaint [*see § 9.132*] and judgment [*see § 9.133*] for use in a civil action to obtain that proof.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceAuthenticationSelf-AuthenticationReal Property LawDeedsExecution FormalitiesReal Property LawFinancingMortgages & Other Security InstrumentsFormalitiesContracts LawTypes of ContractsContracts Under Seal

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1-9 California Forms of Pleading and Practice--Annotated § 9.02

§ 9.02 Cross References

For forms of affidavits, certificates, and declarations, see generally Ch. 15, *Affidavits, Certificates, and Declarations*

For forms involving the qualifications, duties, and liabilities of notaries, see Ch. 390, *Notaries Public*

For forms of verifications, see Ch. 572, *Verification*

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[Reserved]

§§ 9.03[Reserved]

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1-9 California Forms of Pleading and Practice--Annotated § 9.10

§ 9.10 Governing Statutes

Certificates of acknowledgment and proof of execution of unacknowledged instruments are governed by *Civ. Code § 1180 et seq.* Authentication and proof of writings generally are governed by *Evid. Code § 1400 et seq.* The requirement that an instrument be acknowledged or proved by a subscribing witness or by proof of handwriting before it can be recorded is set forth in *Gov. Code § 27287*.

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1-9 California Forms of Pleading and Practice--Annotated § 9.11

§ 9.11 Purpose of Acknowledgment

[1] Acknowledgment as Prima Facie Evidence

A certificate of the acknowledgment of a writing other than a will, or a certificate of the proof of a writing, is prima facie evidence of the facts recited in the certificate and the genuineness of the signature of each person by whom the writing purports to have been signed, if the certificate meets the requirements of *Civ. Code § 1180 et seq.* [*Evid. Code § 1451*; *see Lillard v. Walsh (1959) 172 Cal. App. 2d 674, 678, 342 P.2d 82]* .

[2] Recording

Generally before an instrument may be recorded, its execution is required to be acknowledged by the person executing it, or if executed by a corporation, by its president or secretary or other person executing it on behalf of the corporation, or proved by a subscribing witness or by proof of handwriting and the acknowledgment or proof certified as required by *Civ. Code § 1180 et seq.* [*Gov. Code § 27287*; *see Farmers' Exchange Bank v. Purdy (1900) 130 Cal. 455, 457, 62 P. 738* ; *see also Civ. Code §§ 1195, 1198, 1199* (proof of unacknowledged instrument; proof of handwriting)].

[3] Recording as Constructive Notice

Every conveyance of real property, or an estate for years therein, acknowledged or proved and certified and recorded as prescribed by law from the time it is filed with the recorder for record is constructive notice of its contents to subsequent purchasers and mortgagees. A certified copy of any recorded conveyance may be recorded in any other county and when so recorded it has the same force and effect as though it was of the original conveyance. If the original conveyance has been recorded in any county in which the property is not situated, a certified copy of that recorded conveyance may be recorded in the county where the property is situated with the same force and effect as if the original conveyance had been recorded in that county [*Civ. Code § 1213*].

Legal Topics:

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

EvidenceAuthenticationSelf-AuthenticationReal Property LawDeedsExecution FormalitiesReal Property LawFinancingMortgages & Other Security InstrumentsFormalitiesContracts LawTypes of ContractsContracts Under Seal

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1-9 California Forms of Pleading and Practice--Annotated § 9.12

§ 9.12 Officers Who Take Proof or Acknowledgments

[1] In California

The proof or acknowledgment of an instrument may be made any place in California before a justice, a retired justice, a clerk of the Supreme Court or of any court of appeal, a judge or a retired judge of a superior court, or the Secretary of the Senate or Chief Clerk of the Assembly [*Civ. Code § 1180*], or a notary public [*Civ. Code § 1181*].

Proof of execution or acknowledgment of an instrument may be made within the county or city and county in California in which the officer specified below was elected, or appointed, before any of the following [*Civ. Code § 1181*]:

- A clerk of a superior court.
- A county clerk.
- A court commissioner.
- A judge or retired judge of a municipal court.
- A district attorney.
- A clerk of a board of supervisors.
- A city clerk.
- A county counsel.
- A city attorney.

- Secretary of the Senate.
- Chief Clerk of the Assembly.

[2] Outside California but Within United States

Proof of execution or acknowledgment of an instrument may be made outside California, but within the United States, and within the jurisdiction of the officer, before any of the following [*Civ. Code § 1182*]:

- A justice, judge, or clerk of any court of record of the United States.
- A justice, judge, or clerk of any court of record of any state.
- A commissioner appointed by the Governor or Secretary of State of California for that purpose [*see* former *Gov. Code §§ 8300-8307*, repealed by Stats. 1971, ch. 1611 (operative on the same effective date as statutes generally enacted at the 1975 regular session)].
- A notary public.
- Any other officer of the state where the acknowledgment is made authorized by its laws to take proof of execution or acknowledgment.

[3] Outside United States

The proof of execution or acknowledgment of an instrument may be made outside the United States, before any of the following [*Civ. Code § 1183*]:

- A minister, commissioner, or charge d'affaires of the United States, resident and accredited in the country where the proof or acknowledgment is made.
- A consul, vice consul, or consular agent of the United States, resident in the country where the proof or acknowledgment is made.
- A judge of a court of record of the country where the proof of execution or acknowledgment is made.
- Commissioners appointed by the Governor or Secretary of State of California for that purpose [*see* former *Gov. Code §§ 8300-8307*, repealed by Stats. 1971, ch. 1611 (operative on the same effective date as statutes generally enacted at the 1975 regular session)].
- A notary public.

If the proof or acknowledgment is made before a notary public, the signature of the notary public must be proved or acknowledged (1) before a judge of a court of record of the country where the proof or acknowledgment is made, or (2) by any American diplomatic officer, consul general, consul, vice consul, or consular agent, or (3) by an apostille (certification) affixed to the instrument pursuant to the terms of The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents (effected at The Hague, October 5, 1961) [*Civ. Code § 1183*; see also *Estate of Chichernea (1967) 66 Cal. 2d 83, 86 n.2, 57 Cal. Rptr. 135, 424 P.2d 687* (authentication of foreign certificates)].

[4] By Deputy

When any of the officers mentioned in *Civ. Code §§ 1180-1183* (discussed *above*) are authorized by law to appoint a deputy, the acknowledgment or proof of execution may be taken by the deputy, in the name of his or her principal [*Civ. Code § 1184*].

[5] By Military Officers

Any officer on active duty or performing inactive-duty training in the armed forces having the general powers of a notary public under *10 U.S.C. § 936* or *1044a* (Pub. L. Nos. 90-632 and 101-510) and any successor statutes may perform all notarial acts for any person serving in the armed forces of the United States, wherever he or she may be, or for any spouse of a person serving in the armed forces, wherever he or she may be, or for any person eligible for legal assistance under laws and regulations of the United States, wherever he or she may be, for any person serving with, employed by, or accompanying the armed forces outside the United States and outside the Canal Zone, Puerto Rico, Guam, and the Virgin Islands, and any person subject to the Uniform Code of Military Justice outside of the United States [*Civ. Code § 1183.5*].

Any instrument acknowledged by any such officer or any oath or affirmation made before such officer is not rendered invalid by the failure to set forth the place of execution or acknowledgment. No seal or authentication of the officer's certificate of acknowledgment or of any jurat signed by that officer is required, but the officer taking the acknowledgment must endorse it or attach to it a certificate substantially in a form authorized by the laws of California or in the format set forth in *Civ. Code § 1183.5* [*Civ. Code § 1183.5*; *see § 9.111*].

The recitals contained in any certificate or jurat of a military officer specified in *Civ. Code § 1183.5* are prima facie evidence of their truth, and any certificate of acknowledgment, oath, or affirmation purporting to have been made by any commissioned officer of the Army, Air Force, Navy, Marine Corps, or Coast Guard, notwithstanding the omission of any specific recitals in it, constitutes presumptive evidence of the existence of the facts necessary to authorize the acknowledgment, oath, or affirmation to be taken by the certifying officer pursuant to *Civ. Code § 1183.5* [*Civ. Code § 1183.5*].

For further discussion of certificates, and a form of jurat of a commissioned officer in military service, see Ch. 15, *Affidavits, Certificates, and Declarations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceAuthenticationSelf-AuthenticationGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsEmployees & OfficialsGovernmentsCourtsCourt Personnel

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§ 9.13 Taking of Acknowledgment by Interested Party Prohibited

Because of the probative force accorded to certificates of acknowledgment [*see Evid. Code § 1451*], public policy forbids the taking of an acknowledgment by a person directly interested, financially or beneficially, in the transaction [*Lee v. Murphy (1897) 119 Cal. 364, 370, 51 P. 549* ; *Merced Bank v. Rosenthal (1893) 99 Cal. 39, 47-48, 31 P. 849]* . One who is not pecuniarily or beneficially interested in the transaction evidenced by the instrument is not disqualified to take the acknowledgment merely because he or she is acting as the agent or attorney for the party who is beneficially interested [*Chapman v. Hicks (1919) 41 Cal. App. 158, 164, 182 P. 336]* .

A recorded instrument that is invalid due to the fact that acknowledgment was taken by an interested person does not give notice to third parties [*Lee v. Murphy (1897) 119 Cal. 364, 370, 51 P. 549* ; *Rolando v. Everett (1946) 72 Cal. App. 2d 629, 631-632, 165 P.2d 33* ; *but see Civ. Code § 1207* (defects cured after one year)].

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§ 9.14 Liability of Notary

A notary public and the sureties on his or her official bond are liable for the notary's official misconduct or neglect to the persons injured thereby for all the damages sustained [*Gov. Code § 8214*]. An officer who has taken an acknowledgment pursuant to *Civ. Code § 1185* is presumed to have operated in accordance with the provisions of law [*Civ. Code § 1185(c)*]. To render the notary liable for damages for a false acknowledgment it is necessary that his or her act in taking an acknowledgment be the proximate cause of the damage sustained [*Joost v. Craig (1901) 131 Cal. 504, 505-511, 63 P. 840]* . A party who files an action for damages based on the failure of the officer to establish the proper identity of the person making the acknowledgment has the burden of proving the negligence or misconduct of the officer [*Civ. Code § 1185(d)*]. The misconduct or neglect of the notary need not be the sole proximate cause of the loss. The right of action is not dependent on a showing that the acts of others have not contributed to the injury, or defeated by a showing that they have so contributed, if it appears that the party defrauded relied on the notary's certificate. On the other hand, if notwithstanding the negligence of the notary, the intervening negligence of another is the direct cause of the loss, the notary is not liable [*Burck v. Buchen (1941) 46 Cal. App. 2d 741, 747, 116 P.2d 958]* .

Whether a plaintiff must allege reliance on the defective certificate depends on the relation of the plaintiff to the transaction. Reliance may in some cases be an essential aspect of proximate cause as, for example, when the plaintiff is a grantee. In other situations, reliance may be indirect; for example, a grantor who relies on record title, an essential link of which is a falsely acknowledged conveyance, and sustains injury resulting from a sale to innocent third parties may recover damages from the notary without a showing of reliance on the particular false acknowledgment [*see McDonald v. Plumb (1970) 12 Cal. App. 3d 374, 375-379, 90 Cal. Rptr. 822* ; *Greeninger v. New Amsterdam Cas. Co. (1957) 152 Cal. App. 2d 645, 646, 313 P.2d 607]* .

For further discussion of the laws applicable to notaries public and forms of complaint against a notary public for damages for a false certificate of acknowledgment, see Ch. 390, *Notaries Public* .

Legal Topics:

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

GovernmentsState & Territorial GovernmentsEmployees & OfficialsContracts LawTypes of ContractsGuaranty ContractsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployeesGovernmentsCourtsCourt Personnel

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[Reserved]

§§ 9.15[Reserved]

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1-9 California Forms of Pleading and Practice--Annotated § 9.30

§ 9.30 Governing Statutes

Certificates of acknowledgment are governed by *Civ. Code §§ 1183.5, 1185-1190,* and *1193*. Officers authorized to take acknowledgments are set forth in *Civ. Code §§ 1180-1184* [*see § 9.12*].

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1-9 California Forms of Pleading and Practice--Annotated § 9.31

§ 9.31 Definitions

An acknowledgment is a formal declaration, usually oral, by a party executing an instrument of the fact of execution [*Blaisdell v. Leach (1894) 101 Cal. 405, 409, 35 P. 1019]* . A certificate of acknowledgment is a formal declaration in writing by an authorized officer [*see Civ. Code §§ 1180-1184*] before whom the acknowledgment was made that the party who executed the instrument made the acknowledgment in the officer's presence and was proven (or known by the officer, if the acknowledgment was made before a military officer) to be the person whose name is subscribed to the instrument [*see Civ. Code §§ 1183.5, 1189*; *see also* former *Civ. Code § 1192*].

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1-9 California Forms of Pleading and Practice--Annotated § 9.32

§ 9.32 Verification Distinguished

An acknowledgment is to be distinguished from a verification. A verification is a formal declaration that the contents of an instrument, usually a pleading, are true [*see Code Civ. Proc. § 446*]. When it is made in affidavit form [*see Code Civ. Proc. § 2009*], the officer [*see Code Civ. Proc. § 2093*] who administers the oath affixes his or her certificate, called a jurat [*see People v. McDaniels (1903) 141 Cal. 113, 115, 74 P. 773]* , setting forth the date and place of verification and that it was done under oath or solemn affirmation [*see Code Civ. Proc. §§ 2093-2097*]. For forms of verifications, see Ch. 572, *Verification* .

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1-9 California Forms of Pleading and Practice--Annotated § 9.33

§ 9.33 Officer's Duty to Identify Person Acknowledging

[1] In General

The acknowledgment of an instrument must not be taken unless the officer taking it has satisfactory evidence that the person making the acknowledgment is the individual who is described in and who executes the instrument [*Civ. Code § 1185(a)*].

[2] Personal Knowledge

Effective January 1, 2008, the general statutory authorization for an officer to take an acknowledgment based on his or her personal knowledge of the individual making the acknowledgment [*see former Civ. Code § 1185(a), (b)*] was repealed. Now, unless the acknowledgment is made before a military officer, an acknowledgment may be taken only on the basis of satisfactory evidence of the identity of the individual making the acknowledgment [*Civ. Code §§ 1183.5, 1185(a), 1189(a)(1)*; *see* [3], *below*].

If an acknowledgment is made before an officer who is on active duty or performing inactive-duty training in the armed forces, and who has the general powers of a notary public under federal law [*see 10 U.S.C. §§ 936, 1044a*], the officer may take the acknowledgment based on his or her personal knowledge of the individual making the acknowledgment [*Civ. Code § 1183.5*].

[3] Satisfactory Evidence

Satisfactory evidence means the absence of any information, evidence, or other circumstances that would lead a reasonable person to believe that the person making the acknowledgment is not the individual he or she claims to be and any one of the following [*Civ. Code § 1185(b)*]:

(1) The oath or affirmation of a credible witness personally known to the officer, and whose identity is proven to the officer on presentation of any document satisfying the requirements of paragraph (3) or (4), below, that the person making the acknowledgment is personally known to the witness and that each of the following are true: (a) the person

making the acknowledgment is the person named in the document; (b) the person making the acknowledgment is personally known to the witness; (c) it is the reasonable belief of the witness that the circumstances are such that it would be very difficult or impossible for that person to obtain another form of identification; (d) the person making the acknowledgment does not possess any of the identification documents named below in paragraphs (3) and (4); and (e) the witness does not have a financial interest in the document being acknowledged and is not named in the document;

(2) The oath or affirmation under penalty of perjury of two credible witnesses, whose identities are proven to the officer on presentation of any document satisfying the requirements of paragraph (3) or (4), below, that each listed above in paragraph (1) is true;

(3) Reasonable reliance on the presentation to the officer of any one of the following, if the document is current or has been issued within five years: (a) an identification card or driver's license issued by the California Department of Motor Vehicles, or (b) a passport issued by the United States Department of State;

(4) Reasonable reliance on the presentation of any one of the following, provided that a document specified in (a) through (f), inclusive, is either current or has been issued within five years and contains a photograph and description of the person named on it, is signed by the person, bears a serial or other identifying number, and, in the event that the document is a passport, has been stamped by the United States Citizenship and Immigration Services of the Department of Homeland Security: (a) a passport issued by a foreign government, (b) a driver's license issued by another state or by a Canadian or Mexican public agency authorized to issue drivers' licenses, (c) an identification card issued by another state, (d) an identification card issued by any branch of the Armed Forces of the United States, (e) an inmate identification card issued by the Department of Corrections and Rehabilitation, if the inmate is in custody, or (f) an employee identification card issued by an agency or office of the State of California or by an agency or office of a city, county, or city and county in California.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsEmployees & OfficialsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployeesGovernmentsCourtsCourt Personnel

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1-9 California Forms of Pleading and Practice--Annotated § 9.34

§ 9.34 Liability for Failure to Ascertain Identity

An officer who has taken an acknowledgment pursuant to *Civ. Code § 1185* is presumed to have operated in accordance with the provisions of law [*Civ. Code § 1185(c)*]. A notary public who fails to obtain satisfactory evidence of the identity of a person making an acknowledgment [*see Civ. Code § 1185(b)(1)(A)*] is subject to a civil penalty of up to $10,000. An action to impose the penalty may be brought by the Secretary of State in an administrative proceeding, or by any public prosecutor in superior court, and an order of judgment for the penalty is enforceable as a civil judgment [*Civ. Code § 1185(b)(1)(B)* (public prosecutor must inform Secretary of State of imposition of penalty)].

In addition, a failure to have established the proper identity of the person making the acknowledgment as required by the statute will result in the officer's liability for any resulting damage if the acknowledgment is false [*Joost v. Craig (1901) 131 Cal. 504, 507, 63 P. 840]* . A party who files an action for damages for failure to establish the proper identity of the acknowledging person, however, has the burden of proving the negligence or misconduct of the officer [*Civ. Code § 1185(d)*]. For forms relating to the duty and liability of notaries, see Ch. 390, *Notaries Public* .

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1-9 California Forms of Pleading and Practice--Annotated § 9.35

§ 9.35 Effect of Perjury

Any person convicted of perjury under *Civ. Code § 1185* forfeits any financial interest in the document being acknowledged [*Civ. Code § 1185(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceAuthenticationGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawFinancingMortgages & Other Security InstrumentsFormalitiesCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesPerjuryGeneral Overview

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1-9 California Forms of Pleading and Practice--Annotated § 9.36

§ 9.36 Statutory Forms

An officer taking the acknowledgment of an instrument must endorse on it or attach to it a certificate substantially in the form prescribed by *Civ. Code § 1183.5* if the acknowledgment is taken before a military officer, or by *Civ. Code § 1189* in all other cases [*Civ. Code §§ 1183.5, 1188*; *see §§ 9.110, 9.111*]. Any certificate of acknowledgment taken outside California in accordance with the laws of the place where the acknowledgment is made is sufficient in California [*Civ. Code § 1189(b)*].

A notary public who willfully states as true any material fact that he or she knows to be false is subject to a civil penalty of up to $10,000. An action to impose the penalty may be brought by the Secretary of State in an administrative proceeding, or by any public prosecutor in superior court, and an order of judgment for the penalty is enforceable as a civil judgment [*Civ. Code § 1189(a)(2)* (public prosecutor must inform Secretary of State of imposition of penalty)].

Note, however, that if the acknowledgment is provided prior to January 1, 1993, and conforms to the applicable provisions of the following former statutes, as repealed by Stats. 1990, ch. 335, it will have the same force and effect as if those sections had not been repealed [*Civ. Code § 1189(d)*]:

- Former *Civ. Code § 1189*--individual acknowledgment [*see § 9.112*].
- Former *Civ. Code §§ 1190, 1190.1*--corporate acknowledgment [*see § 9.113*].
- Former *Civ. Code § 1190a*--partnership acknowledgment [*see § 9.114*].
- Former *Civ. Code § 1191*--public entity acknowledgment [*see § 9.115*].
- Former *Civ. Code § 1192*--acknowledgment by attorney in fact [*see § 9.116*].

With respect to documents that are to be filed in another state or jurisdiction, a California notary public may complete any acknowledgment form as may be required in that other state or jurisdiction on a document, provided that the form

does not require the notary to determine or certify that the signer holds a particular representative capacity or to make any other determinations and certifications that are not allowed by California law [*Civ. Code § 1189(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGoverning Documents & ProceduresGeneral OverviewBusiness & Corporate LawForeign BusinessesGeneral OverviewEvidenceAuthenticationGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityOral & Written AuthorityGovernmentsCourtsCourt Personnel

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1-9 California Forms of Pleading and Practice--Annotated § 9.37

§ 9.37 Acknowledgment of Instrument Executed by Corporation or Unincorporated Entity

A certificate of acknowledgment of an instrument executed on behalf of an incorporated or unincorporated entity by a duly authorized person in the form specified in *Civ. Code § 1189* [*see § 9.110*] is prima facie evidence that the instrument is the duly authorized act of the entity named in the instrument and shall be conclusive evidence thereof in favor of any good faith purchaser, lessee, or encumbrancer [*Civ. Code § 1190*]. "Duly authorized person," with respect to a domestic or foreign corporation, includes the president, vice president, secretary, and assistant secretary of the corporation [*Civ. Code § 1190*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-9 California Forms of Pleading and Practice--Annotated § 9.38

§ 9.38 Seal and Signature

Officers taking and certifying acknowledgments, or proof of instruments for record, must authenticate their certificates by affixing thereto their signatures, followed by the names of their offices; also, their seals of office, if by the laws of the state or country where the acknowledgment or proof is taken, or by authority of which they are acting, they are required to have official seals [*Civ. Code § 1193*].

Legal Topics:

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

§§ 9.39[Reserved]

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1-9 California Forms of Pleading and Practice--Annotated § 9.50

§ 9.50 Governing Statutes

Proof of execution of unacknowledged instruments is governed by *Civ. Code §§ 1195-1204* and *1207*. The officers authorized to take proof of execution are set forth in *Civ. Code §§ 1180-1184* [*see § 9.12*].

Legal Topics:

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

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1-9 California Forms of Pleading and Practice--Annotated § 9.51

§ 9.51 Limitation on Use of Proof of Execution

Proof of the execution of a grant deed, mortgage, deed of trust, quitclaim deed, or security agreement is not permitted under *Gov. Code § 27287* (recording of instruments). Proof of the execution of a trustee's deed or deed of reconveyance, however, is permitted [*Civ. Code § 1195(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-9 California Forms of Pleading and Practice--Annotated § 9.52

§ 9.52 Proof of Execution of Instrument

[1] Who May Prove

Proof of the execution of an instrument, when not acknowledged, may be made by any of the following persons [*Civ. Code § 1195(a)*]:

(1) The party executing it, or any one of multiple parties executing it;

(2) A subscribing witness; or

(3) Other witnesses, in cases mentioned in *Civ. Code § 1198* (execution established by proof of handwriting).

Although *Civ. Code § 1195* provides that proof of execution of an unacknowledged instrument may be made by the party executing it, no suggestion is made regarding when that procedure should be followed. Inasmuch as the statutes do not specify the time for making an acknowledgment, an instrument apparently may be acknowledged at any time after execution.

[2] Proof by Subscribing Witness

If the proof of the execution of an unacknowledged instrument is by a subscribing witness, the witness must be proved to be a subscribing witness by the oath of a credible witness who provides the officer with any document satisfying the requirements for proving the identity of a person making an acknowledgment of an instrument (*see § 9.33[3]*) [*Civ. Code § 1196*; *see Civ. Code § 1185(b)(3), (4)* (satisfactory documentation of identity of person making acknowledgment)].

The subscribing witness must prove that the person whose name is subscribed to the instrument as a party is the person described in it, and that such person executed it, and that the witness subscribed his or her name thereto as a witness [*Civ. Code § 1197*].

The evidence of the subscribing witness is given to the officer under oath and, if false, will support a prosecution for perjury [*see People v. Walker (1967) 247 Cal. App. 2d 554, 559-564, 55 Cal. Rptr. 726 , cert. denied, 389 U.S. 824, 88 S. Ct. 60, 19 L. Ed. 2d 77]* .

For a certificate of proof of execution on evidence by the subscribing witness, *see § 9.130*.

[3] Proof of Handwriting

[a] When Available

The execution of an instrument may be established by proof of the handwriting of the party and of a subscribing witness, if there is one, in the following cases [*Civ. Code § 1198*]:

1. When the parties and all the subscribing witnesses are dead;

2. When the parties and all the subscribing witnesses are nonresidents of the State;

3. When the place of their residence is unknown to the party desiring the proof, and cannot be ascertained by the exercise of due diligence;

4. When the subscribing witness conceals himself or herself, or cannot be found by the officer by the exercise of due diligence in attempting to serve the subpeona or attachment; or

5. In case of the continued failure or refusal of the witness to testify, for the space of one hour, after his or her appearance.

When the subscription of a witness is not necessary to the validity of the instrument, the clear implication of the wording of *Civ. Code § 1198* is that proof of the handwriting of the party executing the instrument is sufficient [*Follmer v. Rohrer (1910) 158 Cal. 755, 759, 112 P. 544* (action pursuant to *Civ. Code § 1203* for judgment proving instrument)].

For a certificate of proof of execution by proof of handwriting, *see § 9.131*.

[b] Facts That Prove Handwriting

The evidence taken regarding handwriting must satisfactorily prove to the officer the following facts [*Civ. Code § 1199*]:

1. The existence of one or more of the conditions mentioned in *Civ. Code § 1198* [*§ 9.52[3]*];

2. That the witness testifying knew the person whose name purports to be subscribed to the instrument as a party, and is well acquainted with that person's signature, and that the signature is genuine;

3. That the witness testifying personally knew the person who subscribed the instrument as witness, and is well acquainted with that person's signature, and that the signature is genuine; and

4. The place of residence of the witness.

[4] Certificate of Proof of Execution

An officer taking proof of the execution of any instrument must, in his or her certificate endorsed on the instrument or

attached to it, set forth all the matters required by law to be done or known by the officer, or proved before the officer on the proceeding [*see Civ. Code §§ 1196, 1199*, discussed in *§§ 9.52[2]* and *9.52[3][b]*], together with the names of all the witnesses examined before the officer, their places of residence respectively, and the substance of their testimony [*Civ. Code § 1200*].

[5] Power of Officer Taking Proof

For discussion of what officers may take proof of execution of an instrument, see *§ 9.12*. Officers authorized to take the proof of instruments are authorized in those proceedings to do the following [*Civ. Code § 1201*]:

1. Administer oaths or affirmations, as prescribed in *Code Civ. Proc. § 2093* [*see generally* Ch. 392, *Oath and Affirmation*];

2. Employ and swear interpreters;

3. Issue subpenas, as prescribed in *Code Civ. Proc. § 1986* [*see generally* Ch. 535, *Subpoena*]; and

4. Punish for contempt, as prescribed in *Code Civ. Proc. §§ 1991, 1993, 1994* [*see generally* Ch. 535, *Subpoena*].

The civil damages and forfeitures to the party aggrieved are prescribed in *Code Civ. Proc. § 1992* [*Civ. Code § 1201*; *see* Ch. 535, *Subpoena*].

[6] Proof of Execution by Civil Action

Any person interested under an instrument entitled to be proved for record may institute an action in the superior court against the proper parties to obtain a judgment proving the instrument [*Civ. Code § 1203*]. The circumstances under which a civil action to prove execution of an instrument would be preferred to obtaining a certificate of proof [*see Civ. Code §§ 1195-1200*, discussed in *§ 9.52*] are not set forth in the statutes. If the substantive rights of the parties to the unacknowledged instrument are being litigated, however, an action pursuant to *Civ. Code § 1203* to prove the instrument is appropriate [*see Follmer v. Rohrer (1910) 158 Cal. 755, 756-759, 112 P. 544* (delivery of unacknowledged deed contested); *see also § 9.132*].

A certified copy of the judgment proving the instrument is then attached to the instrument and is entitled to be recorded with the same effect as if acknowledged [*Civ. Code § 1204*; *see Gov. Code § 27287* (recording of instruments)].

Legal Topics:

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

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1-9 California Forms of Pleading and Practice--Annotated § 9.53

§ 9.53 Defective Acknowledgment

[1] General Effect

A defectively acknowledged instrument is valid as between the parties [*Johndrow v. Thomas (1947) 31 Cal. 2d 202, 206, 187 P.2d 681* ; *Kirsch v. Barnes (N.D. Cal. 1957) 153 F. Supp. 260, 263]* . Because an acknowledgment is not essential to the instrument's validity, an unacknowledged deed still operates to convey title [*Osterberg v. Osterberg (1945) 68 Cal. App. 2d 254, 261-262, 156 P.2d 46]* . Nevertheless, a certificate of acknowledgment must be in substantially the form that is prescribed by statute [*Civ. Code §§ 1183.5, 1188, 1189(a)*]. One which is not substantially in that form is fatally defective and, when recorded, does not give notice to subsequent purchasers for value [*Rolando v. Everett (1946) 72 Cal. App. 2d 629, 631-632, 165 P.2d 33* (certificate in form in former *Civ. Code § 1189* as fatally defective when partnership acknowledgment required certificate in former *Civ. Code § 1190a* form); *but see Civ. Code § 1207* (curing defect, omission, or informality in certificate of acknowledgment after one year; discussed in *§ 9.53[4*])].

[2] Clerical Errors and Omissions

Certificates of acknowledgment are to be construed liberally. If words of equivalent import to those of the statute were employed, the certificate is sufficient. The certificate is not to be vitiated by unsubstantial clerical errors or omission of words not essential to an intelligent understanding of its meaning [*Reed v. Bank of Ukiah (1905) 148 Cal. 96, 101-102, 82 P. 845* ; *Favello v. Bank of America etc. Assn. (1938) 24 Cal. App. 2d 342, 345, 74 P.2d 1057]* . Technical construction is to be avoided whenever the words are reasonably susceptible of an interpretation that will give meaning to all of its clauses and make it legally effective [*Favello v. Bank of America etc. Assn. (1938) 24 Cal. App. 2d 342, 345, 74 P.2d 1057]* .

[3] Correcting Defective Certificate by Civil Action

In taking the acknowledgment, the officer acts judicially. If he or she errs in certifying an acknowledgment duly made, or makes a defective or false certificate, the officer taking the acknowledgment cannot alter or amend it, because, after taking the acknowledgment and delivering the return, the officer's functions cease, and he or she is discharged from all

further authority [*Wedel v. Herman (1881) 59 Cal. 507, 514]* .

When the acknowledgment or proof of the execution of an instrument is properly made, but defectively certified, any party interested may have an action in the superior court to obtain a judgment correcting the certificate [*Civ. Code § 1202*]. A certified copy of the judgment proving the instrument is then attached to the instrument and is entitled to be recorded with the same effect as if acknowledged [*Civ. Code § 1204*; *see Gov. Code § 27287* (recording of instruments)].

[4] Defects Cured by Lapse of Time

One year after any instrument affecting the title to real property has been copied into the proper book of record, kept in the office of any county recorder, that instrument imparts notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument, or in the certificate of acknowledgment thereof, or the absence of any such certificate. Duly certified copies of the record of any such instrument may be read in evidence with like effect as copies of an instrument duly acknowledged and recorded, provided that if such copying in the proper book of record occurred within five years prior to the trial of the action, it is first shown that the original instrument was genuine [*Civ. Code § 1207*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceAuthenticationGeneral OverviewReal Property LawDeedsExecution Formalities

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[Reserved]

§§ 9.54[Reserved]

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1-9 California Forms of Pleading and Practice--Annotated § 9.70

§ 9.70 California Legal Forms

For forms of certificates of acknowledgment for use with grant deeds, see California Legal Forms, ch. 27 Deeds, Conveyancing, Dedication, and Homesteads, (Matthew Bender)

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§ 9.71 State Statutes

[1] Acknowledgment of Specific Instruments

Satisfaction of judgment. *Code Civ. Proc. § 724.060*

[2] Deeds of Trust and Mortgages

Revocation of power of attorney to execute mortgage. *Civ. Code § 1216*

Assignment of power of sale in mortgage or trust deed. *Civ. Code § 2932.5*

Power of attorney to execute mortgage. *Civ. Code § 2933*

Deeds of trust. *Civ. Code § 2952*

Mortgages. *Civ. Code § 2952*

[3] Marriage Documents

Marital settlement agreements. Former *Civ. Code § 5134* (applying to agreements executed prior to January 1, 1986); *Fam. Code §§ 1502, 1503* (applying to agreements executed on or after January 1, 1986)

[4] Miscellaneous

Oil and gas leases. *Civ. Code § 1219*

Contracts re sale of trees or timber. *Civ. Code § 1220*

Transfers of wines or brandies. *Civ. Code § 3440.1(d)*

Articles of incorporation. *Corp. Code § 200(b)*

[5] Certificates of Acknowledgment

Military acknowledgment. *Civ. Code § 1183.5*

Certificate of acknowledgment generally. *Civ. Code §§ 1188, 1189*; *see also* former *Civ. Code §§ 1189-1192* (forms of acknowledgment conforming to prior law remain valid if provided before January 1, 1993)

Seal and signature of officer as necessary to authenticate certificate. *Civ. Code § 1193*

[6] Duties of Officer

Identity of party making acknowledgment as required to be ascertained by officer before whom acknowledgment is made. *Civ. Code § 1185*

[7] Perjury

Penalty for perjury by witness to acknowledgment. *Civ. Code § 1185(e)*

Irregularities in administering oath as insufficient defense to perjury charge. *Penal Code § 121*; *see Penal Code § 118* (definition of perjury)

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceAuthenticationGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawFinancingMortgages & Other Security InstrumentsFormalitiesGovernmentsCourtsCourt PersonnelCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesPerjuryGeneral Overview

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1-9 California Forms of Pleading and Practice--Annotated § 9.72

§ 9.72 Decisions

[1] Contents of Acknowledgment

Requisites of acknowledgment are personal appearance of maker, maker's acknowledgment that he or she signed instrument, and officer's personal knowledge that maker is person he or she claims to be. *Transamerica Title Ins. Co. v. Green (1970) 11 Cal. App. 3d 693, 700, 89 Cal. Rptr. 915*

Contents of acknowledgments. *Favello v. Bank of America etc. Assn. (1938) 24 Cal. App. 2d 342, 343-345, 74 P.2d 1057*

[2] Definitions

Jurat defined. *People v. McDaniels (1903) 141 Cal. 113, 115, 74 P. 773*

Definition of acknowledgment is formal declaration of fact of execution. *Blaisdell v. Leach (1894) 101 Cal. 405, 409, 35 P. 1019*

[3] Duty to Identify Party

Officer's duty to ascertain identity of party acknowledging instrument. *Anderson v. Aronsohn (1919) 181 Cal. 294, 295-300, 184 P. 12* ; *Transamerica Title Ins. Co. v. Green (1970) 11 Cal. App. 3d 693, 700, 89 Cal. Rptr. 915* ; *Thomas v. Speck (1941) 47 Cal. App. 2d 512, 516* ; *Homan v. Wayer (1908) 9 Cal. App. 123, 126, 98 P. 80*

Liability of officer for failure to ascertain identity of person acknowledging. *Joost v. Craig (1901) 131 Cal. 504, 508, 63 P. 840*

[4] Foreign Acknowledgments

Chain of authenticating certificates of foreign notary's signature in acknowledgment taken outside *United States. Estate of Chichernea (1967) 66 Cal. 2d 83, 86 n.2, 57 Cal. Rptr. 135, 424 P.2d 687*

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceAuthenticationGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)EnforcementProof of SignatureGovernmentsCourtsCourt Personnel

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§ 9.73 Law Reviews

Maxwell, *The Hidden Defect in Acknowledgment and Title Security, 2 UCLA L. Rev. 83 (1954)*

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1-9 California Forms of Pleading and Practice--Annotated § 9.74

§ 9.74 Text References

Witkin, Summary of California Law, vol. 12, *Real Property*, §§ 283-290 (10th ed. 2005)

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1-9 California Forms of Pleading and Practice--Annotated §§ 9.75-9.89

[Reserved]

§§ 9.75[Reserved]

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1-9 California Forms of Pleading and Practice--Annotated § 9.90

§ 9.90 State Statutes

[1] Certificate of Proof

Contents of certificate of proof of execution. *Civ. Code § 1200*

[2] Civil Actions

Correction of defective certificate of proof by civil action. *Civ. Code § 1202*

Proof of execution by civil action. *Civ. Code § 1203*

Effect of judgment. *Civ. Code § 1204*

[3] Method of Proof

Who may offer proof of execution. *Civ. Code § 1195*

By subscribing witness. *Civ. Code §§ 1196, 1197*

By proof of handwriting. *Civ. Code §§ 1198, 1199*

[4] Powers of Officers

Officers authorized to take proof of execution as having power to summon and swear witnesses. *Civ. Code § 1201*

[5] Time Lapse as Cure

Defects in execution or certificate of acknowledgment of instrument affecting title to real property as cured one year after instrument recorded. *Civ. Code § 1207*; *see also Civ. Code §§ 1205, 1206* (instruments acknowledged before 1872)

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1-9 California Forms of Pleading and Practice--Annotated § 9.91

§ 9.91 Decisions

[1] Civil Actions

Civil action to prove deed. *Follmer v. Rohrer (1910) 158 Cal. 755, 756-759, 112 P. 544*

[2] Clerical Errors and Omissions

Clerical errors and omissions as not vitiating certificate if its words are susceptible of interpretation that will give it legal effect. *Favello v. Bank of America etc. Assn. (1938) 24 Cal. App. 2d 342, 345, 74 P.2d 1057*

Irregularity in date of certificate of acknowledgment as not fatal. *Brown v. Title Ins. etc. Co. (1921) 51 Cal. App. 65, 69, 196 P. 114*

[3] Correction

Officer as not able to alter or amend acknowledgment after taking it and delivering return. *Wedel v. Herman (1881) 59 Cal. 507, 514*

[4] Ineffective for Notice

Invalid acknowledgment as preventing recorded instrument from giving notice to third parties. *Lee v. Murphy (1897) 119 Cal. 364, 370, 51 P. 549* (officer taking acknowledgment interested party); *Rolando v. Everett (1946) 72 Cal. App. 2d 629, 631-632, 165 P.2d 33* (certificate not in substantial compliance with statutory form); *but see Civ. Code § 1207* curing defects by lapse of one year from recording

[5] Defective Certificates

Construing certificates of acknowledgment liberally as policy of law. *Reed v. Bank of Ukiah (1905) 148 Cal. 96, 101-102, 82 P. 845* ; *Favello v. Bank of America etc. Assn. (1938) 24 Cal. App. 2d 342, 345, 74 P.2d 1057*

[6] Officer Beneficially Interested

Corporate party's employee and stockholder as officer taking acknowledgment as not invalidating instrument. *First National Bank v. Merrill (1914) 167 Cal. 392, 396, 139 P. 1066*

Invalidity of acknowledgment when officer before whom it is taken is beneficially interested party to instrument. *Lee v. Murphy (1897) 119 Cal. 364, 370, 51 P. 549* ; *Merced Bank v. Rosenthal (1893) 99 Cal. 39, 47, 31 P. 849*

Deputy county clerk of county that benefits from instrument as officer taking acknowledgment as not invalidating instrument. *Markowitz v. Carpenter (1949) 94 Cal. App. 2d 667, 670-671, 211 P.2d 617*

Attorney in fact for grantee as officer taking acknowledgment as not invalidating deed. *Chapman v. Hicks (1919) 41 Cal. App. 158, 164, 182 P. 336*

[7] Perjury by Subscribing Witness

False evidence given by subscribing witness to obtain certificate of proof of execution as punishable as perjury. *People v. Walker (1967) 247 Cal. App. 2d 554, 559-564, 55 Cal. Rptr. 726 , cert. denied, 389 U.S. 824, 88 S. Ct. 60, 19 L. Ed. 2d 77*

[8] Validity of Unacknowledged Instrument

Defectively acknowledged instrument as valid between parties. *Johndrow v. Thomas (1947) 31 Cal. 2d 202, 206, 187 P.2d 681* ; *Kirsch v. Barnes (ND Cal. 1957) 153 F. Supp. 260, 263*

Validity of acknowledgment taken before grantee. *Merced Bank v. Rosenthal (1893) 99 Cal. 39, 47, 31 P. 849* ; *Ramsey v. California Packing Corp. (1921) 51 Cal. App. 517, 523, 201 P. 481*

Deed without acknowledgment as valid to convey title. *Osterberg v. Osterberg (1945) 68 Cal. App. 2d 254, 261-262, 156 P.2d 46*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesPerjuryGeneral OverviewEvidenceAuthenticationGeneral OverviewEvidenceAuthenticationSelf-AuthenticationReal Property LawDeedsExecution FormalitiesReal Property LawFinancingMortgages & Other Security InstrumentsFormalities

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1-9 California Forms of Pleading and Practice--Annotated § 9.92

§ 9.92 Text References

Witkin, Summary of California Law, vol. 12, *Real Property*, §§ 283-290 (10th ed. 2005)]

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[Reserved]

§§ 9.93[Reserved]

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1-9 California Forms of Pleading and Practice--Annotated § 9.110

§ 9.110 Certificate of Acknowledgment--Statutory General Form [Civ. Code § 1189]

[1] FORM Certificate of Acknowledgment--Statutory General Form [Civ. Code § 1189]

State of California,)
County of _____.) ss.
)
)

_____

On _____ [*date*] before me, _____ [*name and title of officer taking acknowledgment*], personally appeared _____ [*name(s) of person(s) signing instrument*], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] _____ [is *or* are] subscribed to the within instrument and acknowledged to me that _____ [he *or* she *or* they] executed the same in _____ [his *or* her *or* their] authorized capacities, and that by _____ [his *or* her *or* their] signature[s] on the instrument the person[s], or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: _____ (*Seal*)
_____ [*Name of officer*]

[2] Use of Form

This is the statutory form that must be used for any certificate of acknowledgment taken within California, other than an acknowledgment made before a military officer [*Civ. Code §§ 1188, 1189(a)(1)*; *see Civ. Code § 1183.5*]. For a form of acknowledgment made before a military officer, see *§ 9.111*.

Effective January 1, 2008, this statutory form was amended to reflect the repeal of the former provisions authorizing an officer to take an acknowledgment based on his or her personal knowledge of the individual making the acknowledgment [*see former Civ. Code §§ 1185(a), (b), 1189(a)*]. Under current law, unless the acknowledgment is made before a military officer, an acknowledgment may be taken only on the basis of satisfactory evidence of the identity of the individual making the acknowledgment [*Civ. Code §§ 1183.5, 1185(a), 1189(a)(1)*; *see § 9.33[3]*]. A notary public who fails to obtain satisfactory evidence of the identity of a person making an acknowledgment [*see Civ. Code § 1185(b)(1)(A)*], or who willfully states as true any material fact that he or she knows to be false, is subject to a civil penalty of up to $10,000 [*Civ. Code §§ 1185(b)(1)(B), 1189(a)(2)*; see *§§ 9.34, 9.36*].

Acknowledgments provided prior to January 1, 1993, are valid if they conform to provisions in effect at that time [*Civ. Code § 1189(d)*; *see* former *Civ. Code §§ 1189-1192*, repealed by Stats. 1990, ch. 335; *see also § 9.36*].

Any acknowledgment taken outside California in accordance with the laws of the place where the acknowledgment is made is also sufficient in California [*Civ. Code § 1189(b)*].

[3] Seal and Signature

Officers taking and certifying acknowledgments must authenticate their certificates by affixing thereto their signatures, followed by the names of their offices, and their seals, if by the laws of the state or county where the acknowledgment is taken, or by the authority of which they are acting, they are required to have official seals [*Civ. Code § 1193*].

[4] State Statutes

Officers authorized to take acknowledgments in *California. Civ. Code §§ 1180, 1181, 1183.5, 1184*

Requirement of acknowledgments. *Civ. Code §§ 1188, 1189(a)*

Officer's official seal and name of office as required in certificate of acknowledgment. *Civ. Code § 1193*

[5] Decisions

Formal requisites of certificate of acknowledgment. *Reed v. Bank of Ukiah (1905) 148 Cal. 96, 101-102, 82 P. 845* ; *Emeric v. Alvarado (1891) 90 Cal. 444, 478, 27 P. 356* ; *Thomas v. Speck (1941) 47 Cal. App. 2d 512, 517, 118 P.2d 365* ; *Favello v. Bank of America etc. Assn. (1938) 24 Cal. App. 2d 342, 343-345, 74 P.2d 1057*

[6] Text References

Witkin, Summary of California Law, vol. 12, *Real Property*, §§ 283-287 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceAuthenticationSelf-AuthenticationReal Property LawDeedsExecution FormalitiesReal Property

LawFinancingMortgages & Other Security InstrumentsFormalitiesContracts LawTypes of ContractsContracts Under Seal

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§ 9.111 Certificate of Acknowledgment--Instrument Executed by Member of Armed Forces or Spouse--Statutory Form [Civ. Code § 1183.5]

[1] FORM Certificate of Acknowledgment--Instrument Executed by Member of Armed Forces or Spouse--Statutory Form [Civ. Code § 1183.5]

On _____ [*date*], before me _____ [*name*], the undersigned officer, personally appeared _____ [*name*] _____ [known to me *or* satisfactorily proven] to be _____ [serving in or with the armed forces of the United States *or* the spouse of a member of the armed forces of the United States *or* a person serving with, employed by, or accompanying the armed forces of the United States outside the United States and outside the Canal Zone, Puerto Rico, Guam, and the Virgin Islands], and to be the person whose name is subscribed to the within instrument, and acknowledged that he/she executed the same. The undersigned does further certify that he/she is at the date of this certificate a commissioned officer of the rank stated below and is in the active service of the armed forces of the United States, having the general powers of a notary public under the provisions of Section 936 or 1044a of Title 10 of the United States Code (Pub. L. Nos. 90-632 and 101-510). Dated: _____.

_____ [*signature*]

_____
[*Rank and branch of service of officer, and capacity in which signed*]

[2] Use of Form

This form, or its substantial equivalent, is for use when the acknowledgment is of an instrument executed by a person, or the spouse of a person, serving in or with the armed forces of the United States, wherever located, when the acknowledgment is made before a military officer specified in *Civ. Code § 1183.5* [*Civ. Code § 1183.5*].

Any instrument acknowledged by any officer of the armed forces specified in *Civ. Code § 1183.5* is not rendered

invalid by failure to state therein the place of acknowledgment. No seal or authentication of the officer's certificate of acknowledgment is necessary, when the foregoing statutory form is used [*Civ. Code § 1183.5*].

If the above form of acknowledgment is attached to an affidavit, a prescribed jurat by a military officer must also be attached. For a form of jurat that meets the statutory requirements, see Ch. 15, *Affidavits, Certificates, and Declarations* [*see Civ. Code § 1183.5*].

[3] Text References

Witkin, Summary of California Law, vol. 12, *Real Property*, §§ 288-290 (10th ed. 2005)

[4] Cross References

For a related form, *see § 9.110*.

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1-9 California Forms of Pleading and Practice--Annotated § 9.112

§ 9.112 Certificate of Acknowledgment--Instrument Executed by an Individual--Statutory Form [Former Civ. Code § 1189]

[1] FORM Certificate of Acknowledgment--Instrument Executed by an Individual--Statutory Form [Former Civ. Code § 1189]

	)	
	)	ss.
State of _____,	)	
County of _____.	)	

_____

On this _____ day of _____ in the year _____, before me, _____ [*name and quality of officer*], personally appeared _____ [*name(s)*], _____ [personally known to me *or* proved to me on the basis of satisfactory evidence] to be the person(s) whose name(s) is/are subscribed to this instrument, and acknowledged that he/she/they executed it.
Dated: _____.

_____ [*signature*]

_____ [*name of office*]

_____ [*seal of office*]

CAUTION:

This form of acknowledgment is the form set forth in former *Civ. Code §§ 1189*, as repealed by Stats. 1990, ch. 335. Acknowledgments in this form remain valid only if provided prior to January 1, 1993 [

Civ. Code § 1189(d)]. See *§ 9.110* for the form of acknowledgment for use on and after January 1, 1993.

[2] Use of Form

This form of acknowledgment was the statutory form required on or before December 31, 1990, when the instrument was executed by an individual or individuals [*see* former *Civ. Code § 1189*]. An acknowledgment in this form or its substantial equivalent remains valid if it was provided before January 1, 1993 [*Civ. Code § 1189(d)*].

[3] State Statutes

Current statutory form of acknowledgment for use on and after January 1, 1991. *Civ. Code §§ 1188, 1189(a)*

Transition provisions applicable to Stats. 1990, chs. 335, 1070. *Civ. Code § 1189(d)*

Former statutory form of individual acknowledgment. Former *Civ. Code § 1189*

[4] Cross References

For a related form, *see § 9.110*.

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1-9 California Forms of Pleading and Practice--Annotated § 9.113

§ 9.113 Certificate of Acknowledgment--Instrument Executed by a Corporation--Statutory Form [Former Civ. Code §§ 1190, 1190.1]

[1] FORM Certificate of Acknowledgment--Instrument Executed by a Corporation--Statutory Form [Former Civ. Code §§ 1190, 1190.1]

State of _____,)
County of _____.) ss.
)

_____

On _____ [*date*], before me, _____ [*name and quality of officer*], personally appeared _____ [*name*], _____ [personally known to me *or* proved to me on the basis of satisfactory evidence] to be the person who executed the within instrument _____ [as president *or* as secretary *or* on behalf] of the corporation therein named, and acknowledged to me that the corporation executed it [pursuant to _____ (its bylaws *or* a resolution of its board of directors)].
Dated: _____.

_____ [*signature*]

_____ [*name of office*]

_____ [*seal of office*]

CAUTION:
This form of acknowledgment is the form set forth in former *Civ. Code §§ 1190* and *1190.1*, as repealed by Stats. 1990, ch. 335. Acknowledgments in this form remain valid only if provided prior to January 1,

1993 [*Civ. Code § 1189(d)*]. See *§ 9.110* for the form of acknowledgment for use on and after January 1, 1993.

[2] Use of Form

This form of acknowledgment was the statutory form required on or before December 31, 1990, when the instrument was executed by a corporation and acknowledged by its president or secretary or other person on behalf of the corporation [*see* former *Civ. Code § 1190*]. An acknowledgment in this form or its substantial equivalent remains valid if it was provided before January 1, 1993 [*Civ. Code § 1189(d)*].

If the document was executed by the president, vice president, secretary or assistant secretary of the corporation, recital of the optional provision in brackets at the end of the paragraph is prima facie evidence that the instrument, other than an instrument transferring substantially all of a corporation's assets, is the act of the corporation, and that it was duly executed pursuant to authority duly given by its bylaws or the board of directors. The optional provision is conclusive evidence of such matters in favor of any good-faith purchaser, lessee, or encumbrancer [*see* former *Civ. Code § 1190.1*].

[3] State Statutes

Current statutory form of acknowledgment for use on and after January 1, 1991. *Civ. Code §§ 1188, 1189(a)*

Transition provisions applicable to Stats. 1990, chs. 335, 1070. *Civ. Code § 1189(d)*

Former statutory form of corporate acknowledgment. Former *Civ. Code § 1190*

Former statutory form of recital as creating evidence of due execution. Former *Civ. Code § 1190.1*

[4] Cross References

For a related form, *see § 9.110*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGoverning Documents & ProceduresGeneral OverviewEvidenceAuthenticationSelf-AuthenticationBusiness & Corporate LawCorporationsDirectors & OfficersGeneral Overview

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1-9 California Forms of Pleading and Practice--Annotated § 9.114

§ 9.114 Certificate of Acknowledgment--Instrument Executed by Partnership--Statutory Form [Former Civ. Code § 1190a]

[1] FORM Certificate of Acknowledgment--Instrument Executed by Partnership--Statutory Form [Former Civ. Code § 1190a]

State of _____,)
County of _____.) ss.
)

_____

On _____ [*date*], before me, _____ [*name and quality of officer*], personally appeared _____ [*name*], _____ [personally known to me *or* proved to me on the basis of satisfactory evidence] to be the person that executed this instrument on behalf of the partnership, and acknowledged to me that the partnership executed it.
Dated: _____.

_____ [*signature*]

_____ [*name of office*]

_____ [*seal of office*]

CAUTION:

This form of acknowledgment is the form set forth in former *Civ. Code § 1190a*, as repealed by Stats. 1990, ch. 335. Acknowledgments in this form remain valid only if provided prior to January 1, 1993 [*Civ. Code § 1189(d)*]. See *§ 9.110* for the form of acknowledgment for use on and after January 1, 1993.

[2] Use of Form

This form of acknowledgment was the statutory form required on or before December 31, 1990, when the instrument was executed by a partnership [*see* former *Civ. Code § 1190a*]. An acknowledgment in this form or its substantial equivalent remains valid if it was provided before January 1, 1993 [*Civ. Code § 1189(d)*].

[3] State Statutes

Current statutory form of acknowledgment for use on and after January 1, 1991. *Civ. Code §§ 1188, 1189(a)*

Transition provisions applicable to Stats. 1990, chs. 335, 1070. *Civ. Code § 1189(d)*

Former statutory form of acknowledgment of execution of instrument by partnership. Former *Civ. Code § 1190a*

[4] Decisions

Necessity of conforming to statutory form for acknowledgment of instrument executed by partnership. *Rolando v. Everett (1946) 72 Cal. App. 2d 629, 631-632, 165 P.2d 33*

[5] Cross References

For a related form, *see § 9.110*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsGeneral OverviewEvidenceAuthenticationSelf-AuthenticationBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityOral & Written Authority

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1-9 California Forms of Pleading and Practice--Annotated § 9.115

§ 9.115 Certificate of Acknowledgment--Instrument Executed by Public Entity--Statutory Form [Former Civ. Code § 1191]

[1] FORM Certificate of Acknowledgment--Instrument Executed by Public Entity--Statutory Form [Former Civ. Code § 1191]

State of _____,)
County of _____.) ss.
)

_____

On _____ [*date*], before me, _____ [*name and quality of officer*], personally appeared _____ [*name*], _____ [personally known to me *or* proved to me on the basis of satisfactory evidence] to be the person who executed this instrument as _____ [*title of officer*] of _____ [*name of the public corporation, agency, or political subdivision*], and acknowledged to me that the _____ [public corporation *or* agency *or* political subdivision] executed it.
Dated: _____.

_____ [*signature*]

_____ [*name of office*]

_____ [*seal of office*]

CAUTION:
This form of acknowledgment is the form set forth in former *Civ. Code § 1191*, as repealed by Stats. 1990, ch. 335. Acknowledgments in this form remain valid only if provided prior to January 1, 1993 [

Civ. Code § 1189(d)]. See *§ 9.110* for the form of acknowledgment for use on and after January 1, 1993.

[2] Use of Form

This form of acknowledgment was the statutory form required on or before December 31, 1990, when the instrument was executed by a public entity [*see* former *Civ. Code § 1191*]. An acknowledgment in this form or its substantial equivalent remains valid if it was provided before January 1, 1993 [*Civ. Code § 1189(d)*].

[3] State Statutes

Current statutory form of acknowledgment for use on and after January 1, 1991. *Civ. Code §§ 1188, 1189(a)*

Transition provisions applicable to Stats. 1990, chs. 335, 1070. *Civ. Code § 1189(d)*

Former statutory form of acknowledgment of instrument executed by public corporation, agency, or political subdivision. Former *Civ. Code § 1191*

[4] Cross References

For a related form, *see § 9.110*.

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1-9 California Forms of Pleading and Practice--Annotated § 9.116

§ 9.116 Certificate of Acknowledgment--Instrument Executed by Attorney in Fact--Statutory Form [former Civ. Code § 1192]

[1] FORM Certificate of Acknowledgment--Instrument Executed by Attorney in Fact--Statutory Form [former Civ. Code § 1192]

	)	
	)	ss.
State of _____,	)	
County of _____.	)	

_____

On _____ [*date*], before me, _____ [*name and quality of officer*], personally appeared _____ [*name*], _____ [personally known to me *or* proved to me on the basis of satisfactory evidence] to be the person whose name is subscribed to this instrument as the attorney in fact of _____ [*name*], and acknowledged to me that he/she subscribed the name of _____ [*name*] thereto as principal, and his/her own name as attorney in fact.
Dated: _____.

_____ [*signature*]

_____ [*name of office*]

_____ [*seal of office*]

CAUTION:
This form of acknowledgment is the form set forth in former *Civ. Code § 1192*, as repealed by Stats.

1990, ch. 335. Acknowledgments in this form remain valid only if provided prior to January 1, 1993 [*Civ. Code § 1189(d)*]. See *§ 9.110* for the form of acknowledgment for use on and after January 1, 1993.

[2] Use of Form

This form of acknowledgment was the statutory form required on or before December 31, 1990, when the instrument was executed by an attorney in fact for a party to the instrument [*see* former *Civ. Code § 1192*]. An acknowledgment in this form or its substantial equivalent remains valid if it was provided before January 1, 1993 [*Civ. Code § 1189(d)*].

[3] State Statutes

Current statutory form of acknowledgment for use on and after January 1, 1991. *Civ. Code §§ 1188, 1189(a)*

Transition provisions applicable to Stats. 1990, chs. 335, 1070. *Civ. Code § 1189(d)*

Former statutory form of acknowledgment of instrument executed by attorney in fact. Former *Civ. Code § 1192*

[4] Decisions

Attorney in fact distinguished from attorney at law. *People ex rel. Dept. of Public Works v. Malone (1965) 232 Cal. App. 2d 531, 537, 42 Cal. Rptr. 888*

Attorney in fact as person holding power of attorney. *County of L.A. v. Stuyvesant Ins. Co. (1964) 227 Cal. App. 2d 428, 431, 38 Cal. Rptr. 713*

[5] Cross References

For a related form, *see § 9.110*.

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A. Certificates of Acknowledgment

1-9 California Forms of Pleading and Practice--Annotated §§ 9.117-9.129

[Reserved]

§§ 9.117[Reserved]

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B. Proof of Unacknowledged Instruments

1-9 California Forms of Pleading and Practice--Annotated § 9.130

§ 9.130 Certificate of Proof of Execution [Civ. Code § 1200]--Proof by Subscribing Witness to Unacknowledged Instrument [Civ. Code §§ 1195-1197]

[1] FORM Certificate of Proof of Execution [Civ. Code § 1200]--Proof by Subscribing Witness to Unacknowledged Instrument [Civ. Code §§ 1195-1197]

State of _____,)
County of _____.)
_____

On _____ [*date*], before me, the undersigned, a notary public for the state, personally appeared _____ [*subscribing witness's name*], proved to me _____ [on the basis of satisfactory evidence *or* on the oath of _____ (*credible witness's name)*, whose own identity was proved to me on the basis of satisfactory evidence,] to be the person whose name is subscribed to the within instrument, as a witness thereto, who, being by me duly sworn, deposed and said that he/she was present and saw _____ [*name(s) of principal(s)*], the same person(s) described in and whose name(s) is/are subscribed to the within and annexed instrument in his/her/their authorized capacity(ies) as (a) party(ies) thereto, execute the same, and that said affiant subscribed his/her name to the within instrument as a witness at the request of _____ [*name(s) of principal(s)*].

WITNESS my hand and official seal.

_____ [*signature*]

_____ [*name of office*]

_____ [*seal of office*]

[2] Use of Form

This form is for use as a proof of execution of an unacknowledged instrument by a subscribing witness [*see Civ. Code §§ 1195-1197*; *see § 9.52[2]*]. The form is for use when the instrument was not acknowledged at the time of execution, but was subscribed by a witness who thereafter provides the authorized officer [*Civ. Code §§ 1180-1184*] satisfactory proof of his or her identity, either by providing the requisite documentation or by the oath of a credible witness whose own identity is established by the requisite documentation [*see Civ. Code § 1196*; *see also Civ. Code § 1185(b)(3), (4)* (satisfactory documentation of identity)].

Any certificate for proof of execution taken within California may be in the form set forth in *Civ. Code § 1195(c)* (reflected in this form). Use of other, substantially similar forms is not precluded [*Civ. Code § 1195(c)*].

The subscribing witness must prove (1) the person whose name is subscribed to the instrument as a party is the person described in it, (2) that such person executed it, and (3) that the witness subscribed his or her name to the instrument as a witness [*Civ. Code § 1197*]. The officer then certifies the instrument by completing the foregoing form, setting forth the names of all witnesses examined before him or her, the proof required by *Civ. Code §§ 1196* and *1197*, and the name and place of residence of the subscribing witness [*Civ. Code § 1200*; *see also People v. Walker (1967) 247 Cal. App. 2d 554, 559-564, 55 Cal. Rptr. 726 , cert. denied, 389 U.S. 824, 88 S. Ct. 60, 19 L. Ed. 2d 77]* .

This form complies with *Civ. Code § 1196*, which was amended effective January 1, 2009, to delete a former provision authorizing the officer rely on his or her personal knowledge of a witness's identity [*see Civ. Code § 1196*, as amended by Stats. 2008, ch. 67, § 2]. The statutory version of this form [*see Civ. Code § 1195(c)*], however, was not amended to reflect the change in *Civ. Code § 1196*.

[3] Seal and Signature

Officers taking and certifying proof of execution of instruments must authenticate their certificates by affixing thereto their signatures, followed by the names of their offices, and their seals of office if, by the laws of the state or country where the proof of execution is taken or by the authority of which they are acting, they are required to have official seals [*Civ. Code § 1193*].

[4] State Statutes

Unacknowledged instrument as may be proved by subscribing witness. *Civ. Code § 1195(a)(2)*

[5] Decisions

False evidence of subscribing witness given officer to obtain certificate of proof of unacknowledged deed as perjury. *People v. Walker (1967) 247 Cal. App. 2d 554, 559-564, 55 Cal. Rptr. 726 , cert. denied, 389 U.S. 824, 88 S. Ct. 60, 19 L. Ed. 2d 77*

Legal Topics:

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

California Forms of Pleading and Practice--Annotated

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1-9 California Forms of Pleading and Practice--Annotated § 9.131

§ 9.131 Certificate of Proof of Execution [Civ. Code § 1200]--Proof of Handwriting [Civ. Code §§ 1195, 1198, 1199]

[1] FORM Certificate of Proof of Execution [Civ. Code § 1200]--Proof of Handwriting [Civ. Code §§ 1195, 1198, 1199]

State of _____,)
County of _____.)
_____

On _____ [*date*], before me, _____ [*name and quality of officer*], personally appeared _____ [*name of witness*], _____ [who was personally known to me *or* whose identity was proved by the oath of _____ (*name*), a credible witness]; and having been duly sworn, gave the following testimony:

1. _____ [*Specify condition mentioned in Civ. Code § 1198, e.g.,* The parties (and the subscribing witnesses) to the within instrument are dead];

[2. The witness, _____ (*name*), knew _____ (*name*), whose name purports to be subscribed to the within instrument as a party, and is well acquainted with his/her signature; his/her signature as a party to the within instrument is genuine;]

[3. The witness, _____ (*name*), testified to personal knowledge of _____ (*name*), the person who subscribed the within instrument as witness, and is well acquainted with his/her signature; his/her signature as subscribing witness in the within instrument is genuine.]

4. The place of residence of the witness, _____ [*name*], is _____ [*street*],

_____ [*city*], _____ [*state*].
Dated: _____.

_____ [*signature*]

_____ [*name of office*]

_____ [*seal of office*]

[2] Use of Form

The foregoing form is for use as a proof of unacknowledged instrument by testimony of a person who knows the handwriting of a party or a subscribing witness, if any [*see Civ. Code §§ 1195(a)(3), 1198, 1199*]. The contents of a certificate of proof of execution are governed by *Civ. Code § 1200*.

[3] Proving Execution by Proof of Handwriting

The execution of an instrument may be established by proof of the handwriting of the party and of a subscribing witness, if there is one, in the following cases [*Civ. Code § 1198*]:

(1) When the parties and all the subscribing witnesses are dead;

(2) When the parties and all the subscribing witnesses are nonresidents of the state;

(3) When the place of their residence is unknown to the party desiring the proof, and cannot be ascertained by the exercise of due diligence;

(4) When the subscribing witness conceals himself or herself, or cannot be found by the officer in the exercise of due diligence in attempting to serve the subpoena or attachment; or

(5) In case of the continued failure or refusal of the witness to testify, for the space of one hour, after his or her appearance.

The example set forth in the foregoing form in the bracketed paragraphs is based on the first case, when the parties and subscribing witnesses are dead.

[4] Facts Necessary to Prove Handwriting

The evidence under *Civ. Code § 1198* must satisfactorily prove to the officer the following facts [*Civ. Code § 1199*]:

(1) The existence of one or more of the conditions mentioned in *Civ. Code § 1198*;

(2) That the witness testifying knew the person whose name purports to be subscribed to the instrument as a party, is well acquainted with his or her signature, and that the signature is genuine;

(3) That the witness testifying personally knew the person who subscribed the instrument as witness, is well acquainted with his or her signature, and that the signature is genuine; and

(4) The place of residence of the witness.

[5] Cross References

For a related form, see *§ 9.130*.

Legal Topics:

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

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1-9 California Forms of Pleading and Practice--Annotated § 9.132

§ 9.132 Complaint [Code Civ. Proc. § 425.10] for Proof of Execution of Deed [Civ. Code § 1203]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Proof of Execution of Deed [Civ. Code § 1203]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	COMPLAINT FOR PROOF OF EXECUTION OF
[and DOES I through _____,]	)	DEED
Defendants.	)	
	)	
	)	

Plaintiff alleges:

1. Defendants _____ [*names*] are the heirs of _____ [*name of grantor*], who died intestate on _____ [*date*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I though _____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

3. On _____ [*date in deed*], the decedent was the owner of the real property located at _____ [*street address and city*], more particularly described as _____ [*legal description*].

4. The decedent conveyed the real property to plaintiff by executing and delivering a grant deed, a true and correct copy of which is attached as Exhibit "A" and made a part hereof. The deed was not acknowledged and not recorded. There were no subscribing witnesses to the deed.

5. As grantee under the deed, plaintiff is a person interested under an unacknowledged instrument entitled to be proved for record.

WHEREFORE, plaintiff prays judgment as follows:

1. Proving execution of the unacknowledged deed of which Exhibit "A" is a true and correct copy;

2. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

The foregoing form of complaint is for use in an action by a person interested under a deed to obtain a judgment proving acknowledgment of the deed. The action is brought in the superior court [*see Civ. Code § 1203*].

The foregoing form is based on the fact situation in *Follmer v. Rohrer (1910) 158 Cal. 755, 756-759, 112 P. 544* . In that case, plaintiff brought the action to have himself declared the owner of the real property over the claims of defendant heirs at law, who defended the suit by denying delivery of the deed. A request that the deed be proved so as to entitle it to be recorded was joined with the primary cause of action.

[3] Verification

Verification of this complaint is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. § 446*] and precludes a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[4] Cross References

For a related form, see *§ 9.130*.

For forms for use in quieting title to real property, see Ch. 482, *Quieting Title*

[5] State Statutes

Judgment of proof of execution. *Civ. Code § 1204*

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceAuthenticationGeneral OverviewReal Property LawDeedsExecution Formalities

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1-9 California Forms of Pleading and Practice--Annotated § 9.133

§ 9.133 Judgment [Code Civ. Proc. § 577] Proving Execution of Unacknowledged Instrument [Civ. Code § 1204]

[1] FORM Judgment [Code Civ. Proc. § 577] Proving Execution of Unacknowledged Instrument [Civ. Code § 1204],

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	JUDGMENT PROVING DEED
Defendants.	)	
	)	
	)	

This action came on regularly for trial this date, [in _____ (Department *or* Division) _____] of this court, the Honorable _____ [*name*], Judge, presiding, sitting without a jury. Plaintiff appearing by attorney _____ [*name*], defendants appearing by attorney _____ [*name*], evidence both oral and documentary having been presented by both parties, and the cause having been argued and submitted for decision,

THE COURT FINDS

1. That _____ [*name of grantor*] died on _____ [*date*], and there is no subscribing witness to the deed that is the subject of this action;

2. That _____ [*name of witness*] resides at _____ [*street address and city*], was well

acquainted with _____ [*name of grantor*] and his/her signature, and recognized the signature of the grantor affixed to the deed that is the subject of this action as the genuine signature of _____ [*name of grantor*].

THEREFORE IT IS ORDERED that the grant deed dated _____, naming _____ [*name*] as grantor and _____ [*name*] as grantee of the real property located at _____ [*street address and city*], more particularly described as _____ [*legal description*], was duly executed in all particulars as required by law and is proved.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The foregoing form of judgment is for use in a civil action in superior court to prove execution of an unacknowledged instrument involving a deed to real property [*see Civ. Code §§ 1203, 1204*].

[3] Recording Judgment

A certified copy of the judgment in a proceeding instituted under *Civ. Code § 1203* [*see § 9.132*], showing the proof of the instrument, and attached thereto, entitles that instrument to be recorded, with like effect as if acknowledged [*Civ. Code § 1204*].

[4] Cross References

For a related form, se e *§ 9.132*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 10.syn Synopsis to Chapter 10: ACT OF GOD

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§ 10.11 Act of God Defined

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[2] "Force Majeure" Distinguished

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[2] Exception in Case of Common Carriers

§ 10.13 Anticipated Natural Occurrences

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§ 10.30 Related Matthew Bender Publications

§ 10.31 State Constitution

§ 10.32 Federal Statutes

§ 10.33 State Statutes

[1] General Principles

[2] Alcoholic Beverages

[3] Contracts

[4] Taxes

[5] Transportation

§ 10.34 Decisions

[1] Definitions

[2] Examples

[a] Fire

[b] Unusual Forces of Nature

[c] Weather

[i] Drought

[ii] Heat

[iii] Ice

[iv] Lightning

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[3] Jury Functions

[4] Personal Wrongdoing Concurring With Nature

§ 10.35 Law Reviews

§§ 10.36-10.39 [Reserved]

§ 10.40 Affirmative Defense--Irresistible, Superhuman Cause [Civ. Code § 1511(2)]--General Form

[1] FORM

[2] Use of Form

[3] Cross References

§ 10.41 Affirmative Defense--Irresistible, Superhuman Cause [Civ. Code § 1511(2)]--Weather Causing Airplane to Crash

[1] FORM

[2] Use of Form

[3] Cross References

§ 10.42 Affirmative Defense--Irresistible, Superhuman Cause [Civ. Code § 1511(2)]--Performance of a Building Contract Prevented

[1] FORM

[2] Use of Form

[3] Cross References

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PART I. SCOPE

1-10 California Forms of Pleading and Practice--Annotated § 10.01

§ 10.01 Scope of Chapter

This chapter discusses and provides forms relating to affirmative defenses based on act of God, or irresistible, superhuman cause. These two terms are equivalent in meaning [*see Ryan v. Rogers (1892) 96 Cal. 349, 353, 31 P. 244*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewContracts LawPerformanceImpossibility of PerformanceFrustration of Purpose

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1-10 California Forms of Pleading and Practice--Annotated § 10.02

§ 10.02 Cross References

For forms of affirmative defense based on unavoidable accident and act of God, see Ch. 16, *Airplanes and Airports* .

For a form of affirmative defense based on prevention of performance, see Ch. 140, *Contracts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceImpossibility of PerformanceFrustration of PurposeCivil ProcedureEquityMaximsGeneral Overview

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[Reserved]

§§ 10.03[Reserved]

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1-10 California Forms of Pleading and Practice--Annotated § 10.10

§ 10.10 Governing Statutes

Irresistible, superhuman cause as a defense to an action based on a breach of an obligation is governed by *Civ. Code § 1511(2)*; as a defense to actions involving damage to freight in transport by a common carrier, it is governed by *Civ. Code §§ 2194, 2195*.

The maxim that no man is responsible for what no man can control is found in *Civ. Code § 3526*.

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1-10 California Forms of Pleading and Practice--Annotated § 10.11

§ 10.11 Act of God Defined

[1] Irresistible, Superhuman Cause

"Irresistible, superhuman cause" is equivalent in meaning to "act of God" and refers to natural causes whose effects cannot be prevented by the exercise of prudence, diligence, and care and the use of those appliances which one's situation renders it reasonable to employ [*Ryan v. Rogers (1892) 96 Cal. 349, 353, 31 P. 244* ; *Mancuso v. Southern Cal. Edison Co. (1991) 232 Cal. App. 3d 88, 103-104, 283 Cal. Rptr. 300*]. Act of God excludes the idea of human agency [*London G. & A. Co., Ltd. v. Indus. Acc. Com. (1927) 202 Cal. 239, 246, 259 P. 1096* ; *Mancuso v. Southern Cal. Edison Co. (1991) 232 Cal. App. 3d 88, 103-104, 283 Cal. Rptr. 300* ; *Conlin v. Coyne (1937) 19 Cal. App. 2d 78, 87, 64 P.2d 1123*].

[2] "Force Majeure" Distinguished

"Force majeure," or the Latin "vis major," is not necessarily limited to the equivalent of an act of God. The test is whether under the particular circumstances there was such an insuperable interference occurring without the party's intervention as could not have been prevented by the exercise of prudence, diligence, and care. Unlike act of God, "force majeure" does not exclude the idea of human agency [*Pacific Vegetable Oil Corp. v. C.S.T., Ltd. (1946) 29 Cal. 2d 228, 238, 174 P.2d 441* (war as "force majeure"); *Mathes v. City of Long Beach (1953) 121 Cal. App. 2d 473, 477, 263 P.2d 472*].

[3] Unavoidable Accident Distinguished

The so-called defense of unavoidable accident is nothing more than a denial by the defendant of negligence, or a contention that his negligence, if any, was not the proximate cause of the injury [*Butigan v. Yellow Cab Co. (1958) 49 Cal. 2d 652,658-659, 49 Cal. 2d 652, 659, 320 P.2d 500*]. The defense of unavoidable accident may embrace an act of God in some situations, but the terms are not synonymous [*see* *Clarke v. Michals (1970) 4 Cal. App. 3d 364, 371, 84 Cal. Rptr. 507*].

[4] Impossibility of Performance Distinguished

The defense of legal impossibility in a contract action is satisfied when an obligation is impracticable, though not literally impossible, to perform, that is, when it can only be performed at an excessive and unreasonable cost, disproportionate to the cost contemplated when the contract was made. Such impracticability may be the result of purely human acts, such as a court judgment [*see City of Vernon v. City of Los Angeles (1955) 45 Cal. 2d 710, 719-720, 290 P.2d 841*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewContracts LawPerformanceImpossibility of PerformanceImpracticabilityContracts LawPerformanceImpossibility of PerformanceFrustration of Purpose

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1-10 California Forms of Pleading and Practice--Annotated § 10.12

§ 10.12 Act of God as Defense

[1] Applies in Tort and Contract

The want of performance of a legal duty arising from tort or contract [*Civ. Code §§ 1427, 1428, 1708*], or an offer of performance, in whole or in part, or any delay therein, is excused when it is prevented or delayed by an irresistible, superhuman cause, unless the parties have expressly agreed to the contrary [*Civ. Code § 1511(2)*; *see also Com. Code § 2613* (casualty to goods without fault of either party)].

[2] Exception in Case of Common Carriers

Unless the consignor accompanies the freight and retains exclusive control thereof, an inland common carrier of property is liable, from the time that he accepts until he relieves himself from liability pursuant to Civ. Code §§ 2118-2121 (obligation of carrier of freight) for the loss or injury thereof from any cause whatever, except, among others, any irresistible, superhuman cause [*Civ. Code § 2194*] and even then he is liable if his want of ordinary care exposes the property to the causes of the loss [*Civ. Code § 2195*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTortsIntentional TortsDefensesGeneral OverviewTortsNegligenceDefensesGeneral OverviewContracts LawPerformanceImpossibility of PerformanceFrustration of Purpose

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1-10 California Forms of Pleading and Practice--Annotated § 10.13

§ 10.13 Anticipated Natural Occurrences

Even major natural phenomena are not acts of God when they are reasonably to be antitipated in the areas and at the times in which they strike. For example, act of God may include floods or extraordinary freshets but not such high water as is reasonably to be antitipated at certain times of the year [*Ryan v. Rogers(1892) 96 Cal. 349, 353, 31 P. 244*]. A rain storm which is merely of unusual intensity is not an act of God. That a rain established a record for volume in inches in a given region does not make it unforeseeable, since rainfall is foreseeable in most places. Expected heavy rain at no point becomes an act of God due to its unusual volume [*Southern Pacific Co. v. City of Los Angeles (1936) 5 Cal. 2d 545, 549, 55 P.2d 847*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-10 California Forms of Pleading and Practice--Annotated § 10.14

§ 10.14 Fire

Fire does not come within the definition of act of God unless caused by lightning or some other superhuman agency [*Ahlgren v. Walsh (1916) 173 Cal. 27, 35-36, 158 P. 748* (dictum); *Fay v. Pacific Improv. Co. (1892) 93 Cal. 253, 262, 28 P. 943*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewContracts LawPerformanceImpossibility of PerformanceFrustration of Purpose

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1-10 California Forms of Pleading and Practice--Annotated § 10.15

§ 10.15 Concurring Human Wrongdoing

A loss which happened in any way through the intervention of man is not the result of an act of God [*see London G. & A. Co., Ltd. v. Indus. Acc. Com. (1927) 202 Cal. 239, 246, 259 P. 1096*]; even if there is an act of God causing an injury, it is no defense to an action for breach of an obligation if human negligence combines with it as a proximate cause [*Dufour v. Henry J. Kaiser Co. (1963) 215 Cal. App. 2d 26, 29, 29 Cal. Rptr. 871* ; *see also Kell v. Jansen (1942) 53 Cal. App. 2d 498, 502, 127 P.2d 1033*].

Thus, to make out a defense of act of God in an action for breach of a contract to deliver goods, defendant must plead that an ordinarily prudent person would not have taken steps to guard against delay by reason thereof and that there was no other route available by which to deliver the goods except that which was rendered unusuable by the claimed act of God [*Ryan v. Rogers (1892) 96 Cal. 349, 353, 31 P. 244*].

The benefit of the rule that no one is responsible for damages caused by act of God does not inure to a person who could have avoided the damage by complying with his or her contract [*Holt Manufacturing Co. v. Thornton (1902) 136 Cal. 232, 235, 68 P. 708* (high winds which occurred would not have prevented performance of a contract if performance had begun on the day specified in the contract)]. A carrier is liable for spoilage of goods entrusted to it, though heavy rain led to the spoilage by delaying shipment, where negligent refrigeration also contributed to the spoilage [*see Newmark v. Pacific Freight Lines (1945) 67 Cal. App. 2d 548, 549, 552-554, 155 P.2d 68*].

One who by unwarranted physical means provides for a change in the drainage of his land, causing another to suffer injury, is not entitled to attribute the logical consequences of his engineering to heavy rains, though they also contributed to the injury [*Newman v. City of Alhambra (1918) 179 Cal. 42, 44-45, 175 P. 414* ; *Sturges v. Charles L. Harney, Inc. (1958) 165 Cal. App. 2d 306, 320, 331 P.2d 1072* (heavy rains as not act of God)].

Legal Topics:

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

§§ 10.16[Reserved]

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1-10 California Forms of Pleading and Practice--Annotated § 10.30

§ 10.30 Related Matthew Bender Publications

For memoranda of points and authorities related to forms in this chapter, see California Points and Authorities, Ch. 50, *Contracts*

For forms of interrogatories for use in actions involving acts of God, see 3 Bender's Forms of Discovery, *Collisions, Salvage and Towage*

Hanna, California Law of Employee Insuries and Workmen's Compensation (2d ed), Vol. 2, Ch. 10, *Arise Out of Employment--Proximate Causation*, § 10.06

Kreindler, Aviation Accident Law, Vol. 1, Ch. 3, *Liability of Airlines*, § 3.13[4]

Personal Injury Actions Defenses, Damages, Vol. 12, *Electricity and Lighting and Power Companies*, § 6; Vol. 21, *Negligence*, §§ 1.06, 4.04; Vol. 26, *Signs and Signboards*, § 4.03; *Storms*, §§ 1.01, 4

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1-10 California Forms of Pleading and Practice--Annotated § 10.31

§ 10.31 State Constitution

Legislature has power to authorize local reassessment or assessment where taxable property damaged or destroyed by major misfortune or calamity in subsequently proclaimed disaster area. *Cal. Const., art. XIII, § 15*

Work time of mechanics or workmen on public works is not to exceed eight hours per day except in extraordinary emergencies that endanger life or property. *Cal. Const., art. XIV, § 2*

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-10 California Forms of Pleading and Practice--Annotated § 10.32

§ 10.32 Federal Statutes

Rate or rates of customs duty on articles removed from port by act of God. *19 U.S.C. § 1315*

Act of God which destroys or otherwise renders beer unmerchantable before transfer of title thereto as relieving brewer of tax liability on such beer. *I.R.C. § 5056*

Liability for discharge of oil or hazardous substances into or on waters and shorelines if discharge caused by act of God. *33 U.S.C. § 1321*

Act of God as making limitations on hours of railroad employees inapplicable. 49 U.S.C. § 21102

Persons responsible for vessel as not liable for losses arising from acts of God *46 U.S.C. § 30706(b)(2)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-10 California Forms of Pleading and Practice--Annotated § 10.33

§ 10.33 State Statutes

[1] General Principles

Obligation as legal duty arising from contract or operation of law. *Civ. Code §§ 1427, 1428*

Everyone as bound, without contract, to abstain from injuring another's person or property or infringing on his rights. *Civ. Code § 1708*

No man as responsible for that which no man can control. *Civ. Code § 3526*

Want of or delay in performance of obligation as excused by irresistible, superhuman cause. *Civ. Code § 1511(2)*

[2] Alcoholic Beverages

Transferability without fee of alcoholic beverage license of one whose licensed premises were destroyed as result of act of God. *Bus. & Prof. Code § 24082*

[3] Contracts

Liability of inland common carrier of property for loss or injury to freight caused by any irresistible superhuman cause. *Civ. Code §§ 2194(4), 2195*

Rights of buyer where identified goods suffer casualty without fault of either party. *Com. Code § 2613*

[4] Taxes

Reassessment of property damaged or destroyed, without owner's or possessor's fault by a major misfortune or

calamity. *Rev. & Tax Code §§ 155.1*, 170 (county taxes)

[5] Transportation

Limitations on driving hours of persons transporting others for compensation as not applicable in case of an act of God. *Veh. Code § 21702(c)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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1-10 California Forms of Pleading and Practice--Annotated § 10.34

§ 10.34 Decisions

[1] Definitions

Irresistible, superhuman cause under *Civ. Code § 1511(2)* is equivalent in meaning to act of God and refers to natural causes whose effects cannot be prevented by exercise of prudence and care. *Ryan v. Rogers (1892) 96 Cal. 349, 353, 31 P. 244*

"Force majeure" or Latin "vis major" are not necessarily limited to the equivalent of act of *God. Pacific Vegetable Oil Corp. v. C.S.T., Ltd. (1946) 29 Cal. 2d 228, 238, 174 P.2d 441* ; *Mathes v. City of Long Beach (1953) 121 Cal. App. 2d 473, 477, 263 P.2d 472*

Defense of inevitable or unavoidable accident is denial by defendant of negligence or of negligence as proximate cause of injury. *Butigan v. Yellow Cab Co. (1958) 49 Cal. 2d 652, 658-659, 320 P.2d 500* (disallowing most unavoidable accident jury instructions); *see Clarke v. Michals (1970) 4 Cal. App. 3d 364, 371, 84 Cal. Rptr. 507* ; *Creamer v. Cerrato (1934) 1 Cal. App. 2d 441, 443-445, 36 P.2d 1094* (*dictum*); *Graham v. Consolidated M. T. Co. (1931) 112 Cal. App. 648, 650, 651, 297 P. 617*

Contract defense of impossibility is satisfied when obligation impracticable to perform. *City of Vernon v. City of Los Angeles (1955) 45 Cal. 2d 710, 719-720, 290 P.2d 841* (impracticability due to court judgment)

[2] Examples

[a] Fire

Fire as not coming within definition of act of God unless caused by lightning or some other superhuman agency. *Ahlgren v. Walsh (1916) 173 Cal. 27, 35-36, 158 P. 748* (*dictum*); *Fay v. Pacific Improv. Co. (1892) 93 Cal. 253, 262, 28 P. 943*

"Damage by the elements" is equivalent of act of God; destruction of wheat by fire of incendiary origin as negativing idea that destruction was caused by act of God. *Pope v. Farmers' Union etc. Co. (1900) 130 Cal. 139, 141, 62 P. 384*

[b] Unusual Forces of Nature

Airline as not liable for plane crash injuries when crash was caused by violence of unusual forces of nature which defendant could not guard against. *Johnson v. Western Air Exp. Corp. (1941) 45 Cal. App. 2d 614, 628, 114 P.2d 688* ; *but see Small v. Transcontinental & Western Air (1950) 96 Cal. App. 2d 408, 410-411, 216 P.2d 36*

Earthquake as act of *God. London G. & A. Co., Ltd. v. Indus. Acc. Com. (1927) 202 Cal. 239, 246, 259 P. 1096* ; *Ahlgren v. Walsh (1916) 173 Cal. 27, 35, 158 P. 748*

[c] Weather

[i] Drought

Extraordinary drought, including hot winds, not attributable to any fault by seller, as excusing his performance of contract to sell specific varieties of fruit. *Ontario Deciduous Fruit Growers' Asso. v. Cutting Fruit Packing Co. (1901) 134 Cal. 21, 23, 25, 66 P.28*

[ii] Heat

Extraordinary heat conditions, with no fault by grower, as relieving him from contractual obligation to supply grapes under specific fact situation. *Squillante v. California Lands, Inc. (1935) 5 Cal. App. 2d 89, 90, 42 P.2d 81*

[iii] Ice

Ice on bridge, not unusual in area near bridge (even if never on bridge itself), as not warranting act of God instruction to jury. *Clarke v. Michals (1970) 4 Cal. App. 3d 364, 370-371, 84 Cal. Rptr. 507* (auto collision)

[iv] Lightning

Lightning as act of God on showing that lightning, or at least its particular intensity, was so unusual that neither it, nor harm it caused, could have been reasonably anticipated; dismissal of act of God defensive claim in tort action merely because electric storms are foreseeable as error. *Mancuso v. Southern Cal. Edison Co. (1991) 232 Cal. App. 3d 88, 104-105, 283 Cal. Rptr. 300*

[v] Rainstorms and Floods

Rainstorm merely of unusual intensity is not act of God which supersedes original negligence; expectable heavy rain at no point becomes act of God due to its unusual volume. *Southern Pacific Co. v. City of Los Angeles (1936) 5 Cal. 2d 545, 549, 55 P.2d 847* ; *see also Inyo Chemical Co. v. Los Angeles (1936) 5 Cal. 2d 525, 535, 55 P.2d 850* ; *but see Dufour v. Henry J. Kaiser Co. (1963) 215 Cal. App. 2d 26, 29, 29 Cal. Rptr. 871*

Rainstorm merely of unusual intensity as not act of God. *Ely v. Bottini (1960) 179 Cal. App. 2d 287, 294, 3 Cal. Rptr. 756* ; *Sturges v. Charles L. Harney, Inc. (1958) 165 Cal. App. 2d 306, 320, 331 P.2d 1072* ; *Mitchell v. City of Santa*

Barbara (1941) 48 Cal. App. 2d 568, 572, 120 P.2d 131 (*dictum*)

Act of God includes floods or extraordinary freshets but not high water that is reasonably to be anticipated at certain times of year. *Ryan v. Rogers (1892) 96 Cal. 349, 353, 31 P. 244*

[vi] Windstorms

Windstorm of somewhat more than average intensity as warranting implied finding that falling trees were not act of God. *Mattos v. Mattos (1958) 162 Cal. App. 2d 41, 43, 328 P.2d 269* (*dictum*)

Irresistible, superhuman cause under *Civ. Code § 2194* (liability of carriers) as not including windstorm not of unusual character or abnormal violence. *Stockton etc. Co. v. California etc. Co. (1909) 10 Cal. App. 197, 200, 101 P. 541* (*dictum*)

Act of God as not including high wind of force above average for that time of year when wind is neither hurricane nor of such unheard of violence as to be beyond all contemplation or expectation. *Holt Manufacturing Co. v. Thornton (1902) 136 Cal. 232, 235, 68 P. 708* (*dictum*)

Sudden whirlwind, not subject to anticipation or control, was proximate cause of fire damage, rather than negligent care of fire, and precluded liability. *McVay v. Central California Inv. Co. (1907) 6 Cal. App. 184, 188-189, 91 P. 745*

[3] Jury Functions

Jury's province includes determination of whether pilot, exercising highest degree of care, was unable to do things required by flight procedure because of act of *God. Johnson v. Western Air Exp. Corp. (1941) 45 Cal. App. 2d 614, 628, 114 P.2d 688*

Jury as required to determine as fact whether injury was caused by act of God; its conclusion, if reasonably supported by evidence, is conclusive on appeal. *Conlin v. Coyne (1937) 19 Cal. App. 2d 78, 87, 64 P.2d 1123*

[4] Personal Wrongdoing Concurring With Nature

Loss which happened in any way through intervention of man is not act of *God. London G. & A. Co., Ltd. v. Indus. Acc. Com. (1927) 202 Cal. 239, 246, 259 P. 1096*

Negligent tortfeasor may not escape responsibility simply because another act--either innocent occurrence such as act of God or other negligent conduct--may also have been a cause of the injury. Henry v. Superior Court (2008) 160 Cal. App. 4th 440, 449, 72 Cal. Rptr. 3d 808

Liability results if one's negligence combines with act of God to proximately cause injury. *Dufour v. Henry J. Kaiser Co. (1963) 215 Cal. App. 2d 26, 29, 29 Cal. Rptr. 871* ; *see also Kell v. Jansen (1942) 53 Cal. App. 2d 498, 502, 127 P.2d 1033*

Injunction obtained by private litigant is not irresistible, superhuman cause under *Civ. Code § 1511(2)* which will excuse contract performance. *Sample v. Fresno Flume etc. Co. (1900) 129 Cal. 222, 227, 61 P. 1085* (*dictum*)

Benefit of rule that no one is responsible for damages caused by act of God does not inuring to one who could have avoided damage by complying with his or her contract. *Holt Manufacturing Co. v. Thornton (1902) 136 Cal. 232,*

235, 68 P. 708 (breach was in commencing harvesting)

Carrier was liable for spoilage of goods entrusted to it when spoilage caused both by heavy rain delaying shipment and negligent refrigeration. *Newmark v. Pacific Freight Lines (1945) 67 Cal. App. 2d 548, 549, 552-554, 155 P.2d 68*

One who by unwarranted physical means provides for change in his land's drainage, helping to cause injury, is not entitled to act of God defense based on heavy rains. *Newman v. City of Alhambra (1918) 179 Cal. 42, 44-45, 175 P. 414* ; *Sturges v. Charles L. Harney, Inc. (1958) 165 Cal. App. 2d 306, 320, 331 P.2d 1072* (heavy rains as not act of God)

Negligence in gold dredging operations, combining with unprecedented flood to destroy property, resulted in liability. *Kell v. Jansen (1942) 53 Cal. App. 2d 498, 502, 127 P.2d 1033*

Legal Topics:

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1-10 California Forms of Pleading and Practice--Annotated § 10.35

§ 10.35 Law Reviews

Adair and Iungerich, *Insuring the Earthquake Hazard*, 47 L.A. Bar B. 155 (1972)

Prosser, *Proximate Cause in California, 38 Calif. L. Rev. 369 (1950)*

Taylor, Robinson, and McKnight, *Earthquakes and Title Boundaries*, 47 L.A. Bar B. 137 (1972)

Watson, *Impairment of Purchase-Money Security by Disaster and the Antideficiency Legislation: The Sounds of Silence*, 47 L.A. Bar B. 146 (1972)

Comment, *Earthquake: A Fault in the Law of Real Property, 6 U.S.F. L. Rev. 386 (1972)*

Comment, *Act of God: What Constitutes, 7 Calif. L. Rev. 115 (1919)*

Fasoylro, *Invoking the Act of God Defense*, Envt'l & Energy & Poly J. 1 (2009)

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[Reserved]

§§ 10.36[Reserved]

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1-10 California Forms of Pleading and Practice--Annotated § 10.40

§ 10.40 Affirmative Defense--Irresistible, Superhuman Cause [Civ. Code § 1511(2)]--General Form

[1] FORM Affirmative Defense--Irresistible, Superhuman Cause [Civ. Code § 1511(2)]--General Form

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the _____ [*specify type of alleged tort damage or alleged breach of contract due to nonperformance, want of offer of performance, or delay in performance or offer of performance, e.g.,* property damage, failure to deliver crops] alleged in the complaint herein, if any, was the result of no human intervention but was solely caused by an irresistible, superhuman cause which no one could reasonably be expected to anticipate and whose effects could not be prevented by the exercise of prudence, diligence, and care. This aforementioned irresistible, superhuman cause was _____ [*specify, e.g.,* a violent wind of such unheard of violence and hurricane force as to be beyond all contemplation or expectation *or* an unprecedented flood]. It caused the injuries alleged in the complaint, if any, in the following way: _____ [*specify, e.g.,* it made it impossible to reach the place where, at a time specified in the contract alleged in the complaint, delivery was to be made].

[2] Use of Form

The form set out in *[1], above,* is an affirmative defense [*Code Civ. Proc. § 431.30(b)(2)*] based on an irresistible, superhuman cause or act of God [*see Civ. Code §§ 1511, 2194, 2195, 3526*].

The act of God used as an example in the form is the occurrence of hurricane force winds, or winds of such unheard of violence as to be beyond all contemplation or expectation [*see Holt Manufacturing Co. v. Thornton (1902) 136 Cal. 232, 235, 68 P. 708* (dictum)].

[3] Cross References

For discussion of act of God, see *§ 10.10 et seq.*

For discussion and forms of answers generally, see Ch. 26, *Answers*

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1-10 California Forms of Pleading and Practice--Annotated § 10.41

§ 10.41 Affirmative Defense--Irresistible, Superhuman Cause [Civ. Code § 1511(2)]--Weather Causing Airplane to Crash

[1] FORM Affirmative Defense--Irresistible, Superhuman Cause [*Civ. Code § 1511(2)*]--Weather Causing Airplane to Crash

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the crash of defendant's aircraft, which plaintiff herein alleges to have caused plaintiff's injuries, if any, was not caused by any human agency, negligent or otherwise, but resulted solely from an irresistible, superhuman cause which no one could reasonably be expected to anticipate, guard against, or resist, and whose effects could not be prevented by the exercise of prudence, diligence, and care. This aforementioned irresistible, superhuman cause was _____ [*specify, e.g.,* the violence of the elements as manifested in a sudden and unforeseeable downdraft of air], which caused the injuries, if any, alleged in the complaint in the following way: _____ [*specify, e.g.,* it caused the airplane to sink and hit a mountain peak].

[2] Use of Form

The form set out in [1], *above*, is an affirmative defense [*Code Civ. Proc. § 431.30(b)(2)*] based on irresistible, superhuman cause, or act of God, for use by defendants in actions alleging injuries resulting from a plane crash injuries [*see Civ. Code § 1511(2)*]. The form is based on the facts in *Johnson v. Western Air Exp. Corp. (1941) 45 Cal. App. 2d 614, 114 P.2d 688* .

An airline is not liable for plane crash injuries if the crash was caused by the violence of elements alone [*Johnson v. Western Air Exp. Corp. (1941) 45 Cal. App. 2d 614, 628, 114 P.2d 688* ; *but see Small v. Transcontinental & Western Air (1950) 96 Cal. App. 2d 408, 410-411, 216 P.2d 36* (duty of pilot to take precautions when it is possible to determine or even suspect that under certain conditions downdrafts are likely or possible; affirming award for plaintiff passenger when seatbelt sign was not illuminated during rough flight)].

[3] Cross References

For further discussion and references, see *§ 10.40*

For a form of affirmative defense, based on act of God, for use in an action involving damage to an airplane, see Ch. 16, *Airplanes and Airports*

Personal Injury Actions Defenses, Damages, *Airplanes and Airports*, §§ *4.04*, *6*

Legal Topics:

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1-10 California Forms of Pleading and Practice--Annotated § 10.42

§ 10.42 Affirmative Defense--Irresistible, Superhuman Cause [Civ. Code § 1511(2)]--Performance of a Building Contract Prevented

[1] FORM Affirmative Defense--Irresistible, Superhuman Cause [*Civ. Code § 1511(2)*]--Performance of a Building Contract Prevented

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1.Defendant has duly performed all the conditions of the contract as set forth in plaintiff's complaint on his/her part to be performed, except so far as he has been prevented from doing so by the irresistible, superhuman cause alleged below.

2._____ [*Specify performance prior to irresistible, superhuman cause, e.g.,* Defendant commenced performance of the contract on or about _____ (*date*), and by _____ (*date*) had erected the frame and exterior walls and roof of the building which defendant had agreed to build for plaintiff].

3.On or about _____[*date*], the portions of the building that had already erected were destroyed by an irresistible, superhuman cause, namely _____ [*e.g.,* an earthquake], which no one could reasonably be expected to anticipate, guard against, or resist, and whose effects could not be prevented by the exercise of prudence, diligence, and care. The destruction of the building was in no way caused by human intervention or negligence.

4.As a result of the destruction of the building so far as then erected, defendant was compelled to commence the erection of the building a second time, and on or about _____[*date*], defendant completed erecting the building in accordance with the contract set forth in the complaint. However, as a result of the irresistible, superhuman cause, defendant was unable to complete the erection of the building by _____[*date*], the date set forth as the deadline for completion in the contract. This failure to erect the building by the time specified is the breach of contract complained of by plaintiff in his complaint.

[2] Use of Form

The form set out in *[1], above*, is an affirmative defense [*Code Civ. Proc. § 431.30(b)(2)*] to an action for damages based on breach of contract, for use when defendant's performance was delayed past the time for performance by an irresistible, superhuman cause and plaintiff has refused to extend time for performance despite request for an extension [*see Civ. Code § 1511(2)*].

The factual example used in the form is earthquake [*London G. & A. Co., Ltd. v. Indus. Acc. Com. (1927) 202 Cal. 239, 246, 259 P. 1096* (worker's compensation award upheld because defective construction contributed to collapse of building in earthquake); *Ahlgren v. Walsh (1916) 173 Cal. 27, 35, 158 P. 748* (dictum)].

[3] Cross References

For further discussion and references, see *§ 10.40*

Legal Topics:

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Chapter 11 ADJOINING LANDOWNERS

1-11 California Forms of Pleading and Practice--Annotated 11.syn

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§ 11.02 Cross References

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§ 11.12 Statutes of Limitations

§ 11.13 Venue

§ 11.14 Jurisdiction

§§ 11.15-11.19 [Reserved]

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[3] Nuisance

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[2] Action for Injunction

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[ii] Proof of Irreparable Injury to Defendant; Injury to Public

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[1] FORM

[2] Use of Form

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[6] Cross References

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[1] FORM

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[1] FORM

[2] Use of Form

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[5] Jurisdiction and Venue

[6] Cross References

§ 11.74 Complaint to Abate Private Nuisance [Code Civ. Proc. § 731] and for Damages--Change in Grade of Adjoining Land Causing Soil and Debris Deposits on Plaintiff's Property

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction and Venue

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[1] FORM

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[4] Verification

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction and Venue

§ 11.92 Complaint for Damages--Removal of Lateral Support [Civ. Code § 832]--Excavation of Adjoining Land Below Standard Depth of Foundations Causing Injury to Plaintiff's Building [Civ. Code § 832(4)]--Against Owner of Excavated Land and Contractor

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction and Venue

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[1] FORM

[2] Use of Form

[3] Allegations

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[5] Jurisdiction and Venue

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction and Venue

[6] Statute of Limitations

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[9] No Claim Necessary

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[12] Attorney's, Appraisal, and Engineering Fees

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[1] FORM

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[3] Allegations

[4] Verification

[5] Jurisdiction and Venue

§§ 11.96through 11.99 [Reserved]

§ 11.100 Complaint for Damages and Permanent Injunction [Code Civ. Proc. § 526; Civ. Code § 3422] Requiring Adjoining Owner to Take Some Action With Respect to Party Wall--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction and Venue

[6] Cross References

§ 11.101 Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527(a),(c)], and Permanent Injunction [Code Civ. Proc. § 526; Civ. Code Civ. § 3422] to Restrain Adjoining Owner From Activity That Affects Party Wall

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification Required If Basis for Temporary Restraining Order

[5] Service Required

David P. Lanferman n*

FOOTNOTES:
(n4)Footnote *.
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Chapter 11 ADJOINING LANDOWNERS
PART I. SCOPE

1-11 California Forms of Pleading and Practice--Annotated § 11.01

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§ 11.01 Scope

This chapter discusses property rights of adjoining landowners. The discussion and related forms of pleadings are divided into the following parts:

- Encroachments and other interferences with the use of real property [*see §§ 11.20* et seq., (discussion) *11.70 et seq.* (forms)].
- Lateral and subjacent support [*see §§ 11.30* et seq. (discussion), *11.90 et seq.* (forms)].
- Party walls [*see §§ 11.40* et seq. (discussion), *11.100* (forms)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersGeneral OverviewReal Property LawAdjoining LandownersLateral & Subjacent Support

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1-11 California Forms of Pleading and Practice--Annotated § 11.02

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§ 11.02 Cross References

- For coverage and forms relating to the rights and remedies of a good faith improver, who may or may not be an adjoining landowner, see Ch. 279, *Good Faith Improver of Real Property* .

- For forms for use in actions to quiet title based on adverse possession, or to establish the right to a prescriptive easement, see Ch. 13, *Adverse Possession* .

- For forms for use in actions concerning boundaries and fences, see Ch. 101, *Boundaries* , and Ch. 266, *Fences* .

- For forms for use in actions to enforce restrictive covenants, see *Ch. 184, Deeds, § 184.60* et seq.

- For forms for use in actions involving easements, see Ch. 240, *Easements* .

- For forms for use in actions for ejectment, see Ch. 241, *Ejectment* .

- For discussion and forms relating to inverse condemnation, see *Ch. 247, Eminent Domain, § 247.190* et seq.

- For coverage of injunctions and related forms, see Ch. 303, *Injunctions* .

- For discussion and forms relating to giving notice of pendency of an action concerning real property, see Ch. 348, *Lis Pendens* .

- For a complaint that can be adapted for use for maintenance of a spite fence, and for forms regarding nuisances generally, see Ch. 391, *Nuisance* .

- For a complaint for trespass against a factory for depositing soot and other particles on nearby land, see Ch. 418, *Pollution and Environmental Matters*.

- For complaints for use in personal injury actions based on negligence for maintaining a dangerous condition on adjoining land, see Ch. 421, *Premises Liability* .

- For forms for use in actions against public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

- For forms regarding trespass generally, see Ch. 550, *Trespass* .

- For an allegation that may be used in a complaint against an adjoining landowner to seek the cost of restoration of ornamental trees that exceeds the diminution in value of the property caused by the destruction of the trees, see Ch. 550, *Trespass* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersGeneral Overview

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1-11 California Forms of Pleading and Practice--Annotated §§ 11.03through 11.09

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[Reserved]

§§ 11.03[Reserved]

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A. General Principles

1-11 California Forms of Pleading and Practice--Annotated § 11.10

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§ 11.10 Governing Statutes

Rights and obligations of landowners generally are governed by *Civ. Code §§ 818-846.5*. The statutes governing nuisances are contained in *Civ. Code §§ 3479-3503* and in *Code Civ. Proc. § 731*. Venue of actions concerning real property is governed by *Code Civ. Proc. § 392(a)(1)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueIndividual DefendantsCivil ProcedureVenueCorporationsReal Property LawAdjoining LandownersGeneral Overview

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1-11 California Forms of Pleading and Practice--Annotated § 11.11

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§ 11.11 "Adjoining Landowner" Defined

"Adjoining landowners" are those whose lands have the same or coincident boundaries [*see Marin Mun. Water Dist. v. Northwestern Pac. R.R. Co. (1967) 253 Cal. App. 2d 83, 93, 61 Cal. Rptr. 520* (definining "adjoining")].

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1-11 California Forms of Pleading and Practice--Annotated § 11.12

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§ 11.12 Statutes of Limitations

No action for the recovery of real property, or for the recovery of the possession of real property, can be maintained unless it appears that the plaintiff, or his or her ancestor, predecessor, or grantor, was seized or possessed of the property in question within five years before the commencement of the action [*Code Civ. Proc. § 318*]. Additionally, no cause of action or defense arising out of the title to real property or to rents or profits out of real property is effectual unless it appears that the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of the person, was seized or possessed of the premises within five years before the commencement of the act in respect to which the action is prosecuted or the defense is made [*Code Civ. Proc. § 319*].

Actions on a written instrument, such as a party wall agreement, must be brought within four years [*Code Civ. Proc. § 337(1)*]. For a complaint for damages and permanent injunction with regard to a party wall, see *§ 11.100*; for a complaint for a temporary restraining order and preliminary injunction with regard to a party wall, see *§ 11.101*.

Actions for trespass on or injury to real property must be brought within three years [*Code Civ. Proc. § 338(b)*].

Actions for inverse condemnation must be brought within three years [*Code Civ. Proc. § 338(j)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime

LimitationsReal Property LawAdjoining LandownersLateral & Subjacent Support

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1-11 California Forms of Pleading and Practice--Annotated § 11.13

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§ 11.13 Venue

Subject to the power of the court to transfer actions and proceedings as provided in *Code Civ. Proc. § 392 et seq.*, the county in which all or part of the real property that is the subject of an action is situated is the proper county for the trial of the following actions [*Code Civ. Proc. § 392(a)(1)*]:

- For the recovery of the real property.
- For the recovery of an estate or interest in the real property.
- For the determination in any form of the right or interest in the real property.
- For injuries to the real property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueIndividual DefendantsCivil ProcedureVenueCorporationsReal Property LawAdjoining LandownersGeneral Overview

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1-11 California Forms of Pleading and Practice--Annotated § 11.14

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§ 11.14 Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*]. The court trying a limited civil case has limited equity jurisdiction, not including the power to issue permanent injunctions except as otherwise authorized by statute [*see Code Civ. Proc. §§ 85, 86(a)(8), (b), 580(b)(2)*]. They do not have jurisdiction to try title or the right to possession of real property, except when the issue is a defensive matter in a case properly within their jurisdiction [*see Code Civ. Proc. §§ 85, 86(b), 580(b)(3)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionAmount in ControversyReal Property LawAdjoining LandownersGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral Jurisdiction

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1-11 California Forms of Pleading and Practice--Annotated §§ 11.15-11.19

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[Reserved]

§§ 11.15[Reserved]

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1-11 California Forms of Pleading and Practice--Annotated § 11.20

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§ 11.20 Definitions

Webster's Seventh New Collegiate Dictionary defines the term "encroach" as "to enter by gradual steps or by stealth into thepossession or rights of another." As between adjoining landowners, an encroachment is essentially a projection of a building, structure, or other thing on one tract of land onto, or into the airspace above, another tract of land.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersEncroachments

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1-11 California Forms of Pleading and Practice--Annotated § 11.21

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§ 11.21 General Rights and Duties

[1] Basic Rules

Two basic rules applicable to adjoining landowners are (1) that the owner of land in fee has the right to the surface and to everything permanently situated beneath or above it [*Civ. Code § 829*], and (2) that one must so use his or her own rights as not to infringe on the rights of another [*Civ. Code § 3514*; *Katenkamp v. Union Realty Co. (1936) 6 Cal. 2d 765, 774, 59 P.2d 473]* .

[2] Trespass

Generally, any unprivileged invasion of the property of another, whether direct or indirect, constitutes a trespass. Liability, however, will result only if the trespass is intentional, negligent, or the result of extrahazardous activity. If none of these elements is present, liability for a trespass will not be imposed even if harm is suffered [*Gallin v. Poulou (1956) 140 Cal. App. 2d 638, 642, 643, 645, 295 P.2d 958* ; *see also* Restatement of Torts (2d), §§ *158, 165, 166* (1965)].

Actual harm is not an element of liability when the trespass is intentional [*see* Restatement of Torts (2d), §§ *158, 163* (1965)], but is a necessary element when the trespass results from negligence or extrahazardous activity [*Gallin v. Poulou (1956) 140 Cal. App. 2d 638, 642, 295 P.2d 958* (dicta); *see also Restatement of Torts (2d), § 165 (1965)*].

[3] Nuisance

[a] Defined

A "nuisance" includes anything that is injurious to health (including, but not limited to, the illegal sale of controlled substances), or is indecent or offensive to the senses, or an obstruction of the free use of property, so as to interfere with the comfortable enjoyment of life or property [*Civ. Code § 3479*]. If it affects an entire community or neighborhood, or any considerable number of persons, it may be a public nuisance [*Civ. Code § 3480*]; if not, it is a private nuisance [*Civ. Code § 3481*]. Anything done under the express authority of a statute cannot be deemed a nuisance [*Civ. Code § 3482*].

[b] Persons Entitled to Bring Action

Any person whose property is injuriously affected or whose personal enjoyment is lessened by a nuisance may bring an action to enjoin or abate the nuisance and to recover damages [*Code Civ. Proc. § 731*]. A civil action may be brought in the name of the people of the State of California to abate a public nuisance by the district attorney or by the city attorney [*Code Civ. Proc. § 731*]. A private person may maintain an action for a public nuisance only if it is specially injurious to him or her [*Civ. Code § 3493*], that is, if he or she shows injury to his or her person or property of a character different in kind from that suffered by the general public [*Frost v. City of Los Angeles (1919) 181 Cal. 22, 24-25, 183 P. 342]* . Under certain conditions, a person may abate a nuisance by removing or destroying it, provided he or she does not breach the peace or cause unnecessary injury [*Civ. Code § 3495* (public nuisance); *Civ. Code §§ 3502, 3503* (private nuisance)].

PRACTICE TIP: Contamination or Other Environmental Damage.

Appellate courts have increasingly recognized the availability of private nuisance actions as a means of pursuing claims for damages for chemical contamination of property, or similar environmental harm to property, against adjoining landowners, tenants, and predecessors in title [*see, e.g.,* *Mangini v. Aerojet General Corp. (1996) 12 Cal. 4th 1087, 51 Cal. Rptr. 2d 272, 912 P.2d 1220* ; *McCoy v. Gustafson (2009) 180 Cal. App. 4th 56, 85, -- Cal. Rptr. 3d --* ; *Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App. 4th 334, 341-343, 23 Cal. Rptr. 2d 377*]. *By David P. Lanferman*

[c] Liability

Nuisance is a field of tort liability rather than a type of tortious conduct; that it is not a separate tort but a species of damage occasioned by conduct that is tortious because it falls into the usual categories of tort liability [*Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 372-373, 82 Cal. Rptr. 689]* . However, it seems that strict liability may be imposed as to conduct that falls within the statutory definition of nuisance [*see Civ. Code § 3479*], and that fault is not an actual element of liability [*see* *Sturges v. Charles L. Harney, Inc. (1958) 165 Cal. App. 2d 306, 318, 331 P.2d 1072]* .

PRACTICE TIP:

Due Care No Defense to Nuisance. A nuisance is determined by the consequences, rather than by the nature, of the defendant's conduct. It is no defense that the activity was conducted with due care, or even with great care [*see* *Judson v. L.A. Suburban Gas Co. (1910) 157 Cal. 168, 173, 106 P. 581]* . Thus, an activity that might be acceptable in one location may be a nuisance in another. *By David P. Lanferman*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersGeneral OverviewTortsPremises Liability & PropertyGeneral OverviewReal Property LawTortsNuisanceTypesPrivate NuisanceReal Property LawAdjoining LandownersEncroachmentsReal Property LawTortsTrespass to Real Property

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§ 11.22 Encroachments

[1] General Rules

An encroachment on an adjoining tract of land constitutes a trespass [*see Rankin v. DeBare (1928) 205 Cal. 639, 641, 271 P. 1050]* , while an encroachment into the airspace above land has been held to constitute a nuisance and not a trespass [*Kafka v. Bozio (1923) 191 Cal. 746, 750, 218 P. 753* ; *Case v. Sisich (1929) 97 Cal. App. 106, 110, 275 P. 492]* . The *Restatement of Torts (2d), § 159 (1965)*, however, takes the position that a trespass may be committed on, beneath, or above the surface of the earth, except that aircraft flights may constitute a trespass only if they enter the immediate reaches of the airspace next to the land, and interfere substantially with the use and enjoyment of the land.

[2] Trees

[a] Ownership and Status as Nuisance

Trees whose trunks stand wholly on the land of one owner belong exclusively to him or her even though their roots may grow into the land of another [*Civ. Code § 833*]. Trees whose trunks stand partly on the land of two or more coterminous owners belong to them in common [*Civ. Code § 834*]. A tree whose branches or roots encroach over or on the land of another may constitute a nuisance [*Grandona v. Lovdal (1886) 70 Cal. 161, 162, 11 P. 623* (branches and roots); *Stevens v. Moon (1921) 54 Cal. App. 737, 740, 202 P. 961* (roots)] if harm is or will be caused thereby [*Stevens v. Moon (1921) 54 Cal. App. 737, 742, 202 P. 961]* .

[b] Abatement of Nuisance and Damages

The owner of the land encroached on may abate the nuisance by cutting off the overhanging branches or destroying the encroaching roots, or he or she may bring action against the owner or occupant of the land on which the tree grows for damages and abatement [*Grandona v. Lovdal (1886) 70 Cal. 161, 162, 11 P. 623* ; *Bonde v. Bishop (1952) 112 Cal. App. 2d 1, 7, 245 P.2d 617]* . In general, however, the duty to act reasonably tempers any right to remove a tree that presents a nuisance to adjoining property, and there is no absolute right to sever tree roots from a neighbor's tree [*Booska v. Patel (1994) 24 Cal. App. 4th 1786, 1791-1792, 30 Cal. Rptr. 2d 241]* . In abating the nuisance without court action, the injured landowner may not cut the tree down or cut its branches or roots beyond the extent to which they encroach on his or her land [*Grandona v. Lovdal (1886) 70 Cal. 161, 162, 11 P. 623]* or he or she will be liable for any resulting damages [*Fick v. Nilson (1950) 98 Cal. App. 2d 683, 685, 220 P.2d 752* ; *see also Anderson v. Weiland (1936) 12 Cal. App. 2d 730, 732, 55 P.2d 1242]* . For wrongful injuries to timber, trees, or underwood on the land of another, or removal of these entities, damages may be assessed at three times the sum that would compensate for the actual detriment [*Civ. Code § 3346*; *Code Civ. Proc. § 733*].

For a complaint that may be used in an action to compel an adjoining landowner to remove encroaching roots and branches, see *§ 11.75*.

PRACTICE TIP:

Evidence of Encroachment. A party seeking to abate an encroaching tree would be prudent to consider taking the following steps before doing any cutting: (1) consulting with an arborist or similar expert as to the condition of the tree; and (2) documenting the extent of the encroachment by appropriate photographs and measurements. *By David P. Lanferman*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceTypesPrivate NuisanceReal Property LawAdjoining LandownersEncroachmentsReal Property LawTortsTrespass to Real Property

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PART II. LEGAL BACKGROUND
B. Encroachments and Other Interferences With Use of Real Property

1-11 California Forms of Pleading and Practice--Annotated § 11.23

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§ 11.23 Remedies

[1] Action for Damages

[a] Basis of Determining Damages

A landowner who suffers any detriment [*see Civ. Code § 3282* (detriment defined)] as a proximate result of a trespass or nuisance encroachment may bring an action for damages [*see Civ. Code § 3281* (right to recover damages for detriment suffered from unlawful act or omission of another), and *Civ. Code § 3333* (measure of damages for breach of noncontractual obligations); *see also Code Civ. Proc. § 28* (injury to property defined), and *Code Civ. Proc. § 731* (action for damages for nuisance)]. In the absence of substantial detriment, or "actual damages," nominal damages may be awarded [*Civ. Code § 3360*] when the encroachment constitutes an intentional trespass [*McKean v. Alliance Land Co. (1927) 200 Cal. 396, 399*].If the encroachment is not a trespass and liability is predicated on nuisance, substantial harm must be established as an element of liability [*Stevens v. Moon (1921) 54 Cal. App. 737, 742, 202 P. 961]* . The same rule would probably apply when the encroachment is a trespass resulting from negligent or extrahazardous activity [*see § 11.21[2]*].

[b] Damages When Injury Is Permanent

When an injury is of a permanent nature, all damages, past and prospective, are recoverable in one action that accrues when the injury is suffered or the trespass is committed [*Rankin v. DeBare (1928) 205 Cal. 639, 641, 271 P. 1050* ; *Tracy v. Ferrera (1956) 144 Cal. App. 2d 827, 828, 301 P.2d 905* ; *Bertram v. Orlando (1951) 102 Cal. App. 2d 506, 507-509, 227 P.2d 894]* . Thus, a building constructed on a permanent foundation with no thought of moving it elsewhere is regarded to be of a "permanent nature" so that if it encroaches on adjoining land the entire cause of action

for past as well as prospective damages accrues when the trespass occurs [*Castelletto v. Bendon (1961) 193 Cal. App. 2d 64, 66-67, 13 Cal. Rptr. 907* ; *Mattos v. Mattos (1958) 162 Cal. App. 2d 41, 43, 328 P.2d 269* (dictum); *see also Troeger v. Fink (1958) 166 Cal. App. 2d 22, 27-28, 332 P.2d 779]* . Depreciation in value of the property caused by the encroachment would be the measure of damages for permanent injury [*Spaulding v. Cameron (1952) 38 Cal. 2d 265, 270, 239 P.2d 625]* .

Maintenance of an encroachment that may be discontinued at any time is a continuing trespass or nuisance for which successive actions will lie; each repetition or continuance amounts to another wrong giving rise to a new cause of action [*Kafka v. Bozio (1923) 191 Cal. 746, 751-752, 218 P. 753* (building that encroached on adjoining airspace by progressively leaning over adjoining land held to be continuing nuisance); *Mattos v. Mattos (1958) 162 Cal. App. 2d 41, 43, 328 P.2d 269* (trees fallen from defendant's property onto plaintiff's land held to be continuing nuisance)]. In doubtful cases it is recognized that plaintiff should have an election to treat the encroachment as either permanent or continuing [*Spaulding v. Cameron (1952) 38 Cal. 2d 265, 268, 239 P.2d 625]* .

[c] Damages for Future Injury

Plaintiff may not recover damages for future injury when the court finds that an encroachment is continuing and orders abatement [*Spaulding v. Cameron (1952) 38 Cal. 2d 265,268-269, 239 P.2d 625* ; *see also Polin v. Chung Cho (1970) 8 Cal. App. 3d 673, 678, 87 Cal. Rptr. 591]* . Conversely, the injured party may elect to sue for past and prospective damages and, in that case, he or she is deemed to have waived the invasion and consented to the presence of the encroachment on his or her land [*Slater v. Shell Oil Co. (1943) 58 Cal. App. 2d 864, 869-870, 137 P.2d 713]* .

[d] Exemplary or Punitive Damages

Exemplary or punitive damages may be awarded under *Civ. Code § 3294* if a defendant is guilty of malice or oppression in encroaching on plaintiff's property [*see Barnes v. Berendes (1903) 139 Cal. 32, 38, 69 P. 491, 72 P. 406* (defendant maliciously refused to remove encroachment); *see also Griffin v. Northridge (1944) 67 Cal. App. 2d 69, 76, 153 P.2d 800]* .

[2] Action for Injunction

[a] When Injunction Will Issue

In general, an injunction will issue to prevent a wrongful act if the continuance of the act will, in time, ripen into an easement and deprive plaintiff of the use of his or her property or some part of it [*City of Dunsmuir v. Silva (1957) 154 Cal. App. 2d 825, 827, 317 P.2d 653* ; *see also Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 201, 323 P.2d 1001* ; *Civ. Code §§ 3420-3423* and *Code Civ. Proc. § 525 et seq.* (statutes governing preventive relief by injunction)]. In an action against an adjoining landowner for encroaching on plaintiff's property, a permanent injunction is ordinarily available [*Brown Derby Hollywood Corp. v. Hatton (1964) 61 Cal. 2d 855, 858, 40 Cal. Rptr. 848, 395 P.2d 896]* .

For a complaint for a permanent injunction to compel the removal of an encroaching structure, and for compensatory, exemplary, and punitive damages, see *§ 11.70*. For an affirmative defense to an action for a permanent injunction, see *§ 11.72*.

[b] Doctrine of Balancing Conveniences

[i] Denial of Injunction and Award of Damages to Plaintiff

When an encroachment causes very slight injury [*see McKean v. Alliance Land Co. (1927) 200 Cal. 396, 399, 253 P. 134]* and was innocently made, and when the cost of removal would be great compared to the inconvenience caused

plaintiff by continuance of the encroachment, the court may, in its discretion, denythe injunction and compel the plaintiff to accept damages [*Brown Derby Hollywood Corp. v. Hatton (1964) 61 Cal. 2d 855, 858, 40 Cal. Rptr. 848, 395 P.2d 896]* . This rule is often cited as the doctrine of balancing of conveniences [*see Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 200, 323 P.2d 1001* ; *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 562-564, 250 P.2d 660]* .

In the *Christensen* case, the court commented [*Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 562-563, 250 P.2d 660]* :

> In order to deny the injunction, certain factors must be present: 1. Defendant must be innocent--the encroachment must not be the result of defendant's willful act, and perhaps not the result of defendant's negligence. In this same connection the court should weigh plaintiff's conduct to ascertain if he or she is in any way responsible for the situation. 2. If plaintiff will suffer irreparable injury by the encroachment, the injunction should be granted regardless of the injury to defendant, except, perhaps, where the rights of the public will be adversely affected. 3. The hardship to defendant by the granting of the injunction must be greatly disproportionate to the hardship caused plaintiff by the continuance of the encroachment and this fact must clearly appear in the evidence and must be proved by the defendant.

[ii] Proof of Irreparable Injury to Defendant; Injury to Public

When a court balances conveniences to determine whether an injunction, otherwise warranted, should be withheld, its action approaches an exercise of the right of eminent domain in favor of a private person. Thus, proof of irreparable injury to the defendant has been said to be a necessary element of a defense based on balancing of conveniences [*Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 200, 323 P.2d 1001* (holding that deprivation of a substantial benefit to defendant as a result of an injunction falls short of imposition of substantial hardship)].

An additional reason for denying an injunction arises when injury would result to the public if the injunction is granted [*Ukhtomski v. Tioga Mutual Water Co. (1936) 12 Cal. App. 2d 726, 728-729, 55 P.2d 1251]* .

[iii] Protecting Defendant by Granting Easement

When the court applies the doctrine of balancing of conveniences and awards plaintiff damages in lieu of an injunction, it is within the court's power to protect the defendant in the use of an encroaching building by granting defendant an easement [*Ukhtomski v. Tioga Mutual Water Co. (1936) 12 Cal. App. 2d 726, 728-729, 55 P.2d 1251* ; *see Baglione v. Leue (1958) 160 Cal. App. 2d 731, 735-736, 325 P.2d 471* ; *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 563, 250 P.2d 660* ; *see also Hirshfield v. Schwartz (2001) 91 Cal. App. 4th 749, 766-767, 110 Cal. Rptr. 2d 861* ; *Donnell v. Bisso Brothers (1970) 10 Cal. App. 3d 38, 46-47, 88 Cal. Rptr. 645]* .

[3] Self Help

A person injured by a private nuisance may abate it by removing, or, if necessary, destroying the thing that constitutes the nuisance, without committing a breach of the peace or doing unnecessary injury [*Civ. Code § 3502*]. However, the duty to act reasonably tempers any right to self help [*see Booska v. Patel (1994) 24 Cal. App. 4th 1786, 1791-1792, 30 Cal. Rptr. 2d 241* (severance of roots of neighbor's tree)].

PRACTICE TIP:

> **Precautions Before Exercising Self Help.** In view of the possibility, if not likelihood, of a retaliatory cross-action, a party should exercise caution by taking some or all of the following steps before exercising self-help remedies: (1) providing the encroaching neighbor with written requests for relief, which should explain the need for abatement; (2) giving the neighbor an opportunity to alleviate the situation voluntarily; and (3) photographing, measuring, and documenting in other appropriate ways the

offending encroachment. *By David P. Lanferman*

[4] Good Faith Improver Remedies Unavailable

The statutes governing judicial remedies available to a good faith improver [*see Code Civ. Proc. § 871.1 et seq.*] do not affect the rules of law that determine the relief, if any, to be granted when a person constructs on his or her own land an improvement that encroaches on adjoining land [*Code Civ. Proc. § 871.6*]. A similar limitation applies to the applicability of the statutory right to remove improvements affixed to the land of another. This right is available to a person who affixed the improvements while acting in good faith and erroneously believing that he or she had a right to do so. However, it does not affect or qualify the law with regard to the circumstances under which a court of equity will refuse to compel removal of an encroachment [*see Civ. Code § 1013.5*]. For coverage of the foregoing remedies, see Ch. 279, *Good Faith Improver of Real Property* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceTypesPrivate NuisanceReal Property LawAdjoining LandownersEncroachmentsReal Property LawTortsTrespass to Real PropertyReal Property LawTortsNuisanceRemediesInjunctionsGeneral OverviewReal Property LawTortsNuisanceRemediesDamagesCompensatory Damages

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1-11 California Forms of Pleading and Practice--Annotated § 11.24

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§ 11.24 Statute of Limitations

The three-year statute of limitations provided in *Code Civ. Proc. § 338(b)* is applicable to actions involving trespass encroachments [*Rankin v. DeBare (1928) 205 Cal. 639, 640-641, 271 P. 1050]* and, apparently, nuisance encroachments [*see Mattos v. Mattos (1958) 162 Cal. App. 2d 41, 43, 328 P.2d 269]* . Actions for inverse condemnation must be brought within three years [*Code Civ. Proc. § 338(j)*].

One court of appeal decision declined to follow the cases holding that an action for a mandatory injunction seeking to enjoin a permanent encroachment must be instituted within three years from the inception of the encroachment under *Code Civ. Proc. § 338(b)* [*Harrison v. Welch (2004) 116 Cal. App. 4th 1084, 1096, 11 Cal. Rptr. 3d 92]* . That court concluded that an action to enjoin an encroachment is one to recover possession of property and therefore is subject to the five-year limitations period in *Code Civ. Proc. §§ 318* and *321*, and does not expire unless and until the encroacher's use of the property ripens into either title by adverse possession or a prescriptive easement [*Harrison v. Welch (2004) 116 Cal. App. 4th 1084, 1095-1096, 11 Cal. Rptr. 3d 92* ; *see Kapner v. Meadowlark Ranch Assn. (2004) 116 Cal. App. 4th 1182, 1189, 11 Cal. Rptr. 3d 138* (action against cotenant who improperly excluded other cotenants from part of cotenancy was action for possession subject to five-year statute of limitations; cotenant could not establish exclusive prescriptive easement and failed to establish adverse possession)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersEncroachmentsTortsPremises Liability & PropertyTrespassDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsTime Limitations

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1-11 California Forms of Pleading and Practice--Annotated §§ 11.25through 11.29

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[Reserved]

§§ 11.25[Reserved]

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1-11 California Forms of Pleading and Practice--Annotated § 11.30

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§ 11.30 Governing Law

The right of each coterminous landowner to lateral support from adjoining land is governed by *Civ. Code § 832*. The right of a surface owner of land to subjacent support is governed by common law [*see Marin Mun. Water Dist. v. Northwestern Pac. R.R. Co. (1967) 253 Cal. App. 2d 83, 89, 61 Cal. Rptr. 520]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersLateral & Subjacent Support

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1-11 California Forms of Pleading and Practice--Annotated § 11.31

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§ 11.31 Definitions

Support is "lateral" when the supported and supporting lands are divided by a vertical plane. Support is "subjacent" when the supported land is above and the supporting land is beneath it [*Marin Mun. Water Dist. v. Northwestern Pac. R.R. Co. (1967) 253 Cal. App. 2d 83, 89, 61 Cal. Rptr. 520]* .

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1-11 California Forms of Pleading and Practice--Annotated § 11.32

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§ 11.32 Lateral Support

[1] Landowners' Entitlement to Lateral Support

Coterminous landowners, that is, landowners having the same or coincident boundaries [*Marin Mun. Water Dist. v. Northwestern Pac. R.R. Co. (1967) 253 Cal. App. 2d 83, 93, 61 Cal. Rptr. 520]* , are entitled to the lateral support their lands receive from adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations for purposes of construction or improvement under the conditions set forth in *Civ. Code § 832* [*see [2], [3], below*].

Forms and related comments concerning lateral and subjacent support are *set forth in §§ 11.90 -11.95*. A notice of intent to excavate is presented in *§ 11.90*. For a complaint for damages and permanent injunction for removal of lateral support, see *§ 11.91*. Additional complaints for damages for removal of lateral support are *found in §§ 11.92* and *11.93*. A complaint in inverse condemnation by a private landowner against a city for the city's excavation of an adjoining public street is presented in § 11.94. Finally, a complaint for damages for the removal of subjacent support, by a surface owner against a subsurface owner, is *found in § 11.95*.

[2] Right to Excavate; Conditions

An owner of adjoining land has a right to make proper and usual excavation for purposes of construction or improvement under the following conditions [*Civ. Code § 832*]:

- Any owner of land or his or her tenant intending to make or to permit an excavation must give reasonable notice to the owner or owners of adjoining lands and of buildings or other structures, stating

the depth to which the excavation is intended to be made, and when the excavation will begin [*Civ. Code § 832(1)*].

- In making any excavation, ordinary care and skill must be used, and reasonable precautions must be taken to sustain the adjoining land as such, without regard to any building or other structure that may be on the land, and there is no liability for damage done to any building or other structure by reason of the excavation, except as otherwise provided or allowed by law [*Civ. Code § 832(2)*].

- If at any time it appears that the excavation is to be of a greater depth than are the walls or foundations of an adjoining building or other structure, and is to be so close as to endanger the building or other structure in any way, then the owner of the building or other structure must be allowed at least 30 days, if he or she so desires, in which to take measures to protect the building or structure from any damage, or in which to extend the foundations of the building or structure. In addition, for the same purposes, he or she must be given reasonablelicense to enter on the land on which the excavation is to be or is being made [*Civ. Code § 832(3)*].

- If the excavation is intended to be or is deeper than the standard depth of foundations (which depth is defined to be a depth of nine feet below the adjacent curb level) at the point where the joint property line intersects the curb, and if on the land of the coterminous owner there is any building or other structure the wall or foundation of which goes to standard depth or deeper, then the owner of the land on which the excavation is being made (i) must protect the adjoining land and any building or other structure on the land from any damage by reason of the excavation, without cost to the owner of the property, and (ii) will be liable to the property owner for any such damage, except minor settlement cracks in buildings or other structures. Notwithstanding the foregoing, this duty to protect adjoining land and buildings does not apply unless the owner of the land on which the excavation is being made is given the necessary license to enter on the adjoining land [*Civ. Code § 832(4)*].

[3] Common Law and Statute Affecting Common Law

Every owner of land, under common law, is entitled to lateral support of that land in its natural state from every other coterminous owner. This is an absolute right incident to the land itself [*Puckett v. Sullivan (1961) 190 Cal. App. 2d 489, 494, 12 Cal. Rptr. 55]* . Although the common law right to lateral support pertains to property in its natural state, improvements on land that do not materially increase the lateral weight and pressure do not absolve an adjoining owner of his or her common law liability for removal of lateral support of the land [*Wharam v. Investment Underwriters (1943) 58 Cal. App. 2d 346, 349-350, 136 P.2d 363]* .

The effect of *Civ. Code § 832* is that an adjoining landowner is freed from the absolute common law duty to protect the lateral support of his or her neighbor's land and is permitted to make "proper and usual" excavations on his or her land for construction or improvement if the conditions provided in the statute are satisfied [*Wharam v. Investment Underwriters (1943) 58 Cal. App. 2d 346, 349, 136 P.2d 363* (leading case); *Puckett v. Sullivan (1961) 190 Cal. App. 2d 489, 494-495, 12 Cal. Rptr. 55* ; *see also Marin Mun. Water Dist. v. Northwestern Pac. R. R. Co. (1967) 253 Cal. App. 2d 83, 90-91, 61 Cal. Rptr. 520* (dictum)]. When the conditions contained in *Civ. Code § 832* are not complied with, the common law absolute duty to protect adjoining land in its natural state from lateral support damage applies [*Wharam v. Investment Underwriters (1943) 58 Cal. App. 2d 346, 349-350, 136 P.2d 363]* .

[4] Noncontiguous Land and Liability for Negligence

Although *Civ. Code § 832* only pertains to the right of a coterminous landowner to lateral support, the right to lateral support is not confined to adjoining lands, but extends to property separated by intervening parcels owned by other persons. Liability for removal of the support is based on negligence [*Puckett v. Sullivan (1961) 190 Cal. App. 2d 489,*

495, 12 Cal. Rptr. 55] .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawAdjoining LandownersLateral & Subjacent SupportTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesReasonable Care

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§ 11.33 Subjacent Support

At common law, when one person owns the surface of land and another the subjacent land, the owner of the surface is entitled to have it remain in its natural condition, without subsidence by reason of the subsurface owner's withdrawal of subjacent support. The common law obligation of subjacent support is analogous to that of lateral support, and is an absolute obligation [*Marin Mun. Water Dist. v. Northwestern Pac. R. R. Co. (1967) 253 Cal. App. 2d 83, 89, 61 Cal. Rptr. 520]* . Because the liability for withdrawal of subjacent support is absolute, the person making the excavation is liable without regard to negligence; transfer of the property does not relieve the person who removed the support from liability [*Platts v. Sacramento Northern Ry. (1988) 205 Cal. App. 3d 1025, 1030-1031, 253 Cal. Rptr. 269]* .

The statutory rules affecting one's right to support from another's land, set forth in *Civ. Code § 832* [*see § 11.32*], have been held to apply only to lateral support and not to subjacent support. Though *Civ. Code § 832* expressly acknowledges that an owner is entitled to the "lateral and subjacent" support his or her land receives, it governs only the support received by the land of a "coterminous" owner from "adjoining" land. The statute applies only to lateral support obligations existing between surface owners, and to excavations on the land and not underneath it [*Marin Mun. Water Dist. v. Northwestern Pac. R. R. Co. (1967) 253 Cal. App. 2d 83, 91-96, 61 Cal. Rptr. 520]* .

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1-11 California Forms of Pleading and Practice--Annotated § 11.34

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§ 11.34 Accrual of Cause of Action

A cause of action for lateral support damage emanates from subsidence of the plaintiff's land, not from the excavation alone. Thus, a separate cause of action arises from each new subsidence [*Bellman v. County of Contra Costa (1960) 54 Cal. 2d 363, 369, 5 Cal. Rptr. 692, 353 P.2d 300]* . The same rule applies to a cause of action for subjacent support damage: the surface owner's cause of action against the subsurface owner arises when the land subsides, not when the excavation is made [*Platts v. Sacramento Northern Ry. (1988) 205 Cal. App. 3d 1025, 1029, 253 Cal. Rptr. 269* ; *Marin Mun. Water Dist. v. Northwestern Pac. R. R. Co. (1967) 253 Cal. App. 2d 83, 96, 61 Cal. Rptr. 520]* .

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C. Lateral and Subjacent Support

1-11 California Forms of Pleading and Practice--Annotated § 11.35

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§ 11.35 Parties

[1] Plaintiffs

The person who owns the land at the time of lateral support damage may bring suit to recover the damage even though excavating on the adjoining property was done during previous ownership [*Conlin v. Coyne (1937) 19 Cal. App. 2d 78, 89, 64 P.2d 1123]* . A lessee of the damaged premises may sue the adjoining landowner for lateral support damage and recover the amount of his or her rent as damages [*Barrows v. Wm. Simpson Constr. Co. (1929) 102 Cal. App. 254, 258-259, 283 P. 100]* .

[2] Defendants

Whoever deprives a landowner of his or her support for his or her land, other than as provided in *Civ. Code § 832* [*see § 11.32*], performs an unlawful act. The general rule is that all who unite in these acts are wrongdoers and are liable for damages caused. A landowner cannot by any contract with an independent contractor relieve himself or herself of duties resting on him or her as an owner of real property; both the landowner and the contractor may be held jointly liable for damage caused by removal of lateral support [*Green v. Berge (1894) 105 Cal. 52, 58-59, 38 P. 539* ; *Wharam v. Investment Underwriters (1943) 58 Cal. App. 2d 346, 351, 136 P.2d 363* ; *see also Peak v. Richmond Elementary Sch. Dist. (1958) 161 Cal. App. 2d 366, 368-369, 326 P.2d 860* (architect subject to liability as an excavator)]. Nevertheless, a successor in interest to a person who removed lateral support from adjoining property is not liable for the removal of the support [*Platts v. Sacramento Northern Ry. (1988) 205 Cal. App. 3d 1025, 1030, 253 Cal. Rptr. 269* ; *Lee v. Takao Bldg. Development Co. (1985) 175 Cal. App. 3d 565, 568-569, 220 Cal. Rptr. 782]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyGeneral Premises LiabilityGeneral OverviewReal Property LawAdjoining LandownersLateral & Subjacent Support

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1-11 California Forms of Pleading and Practice--Annotated §§ 11.36through 11.39

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[Reserved]

§§ 11.36[Reserved]

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1-11 California Forms of Pleading and Practice--Annotated § 11.40

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§ 11.40 Governing Statutes

The right to use a wall as a party wall is an easement, pursuant to *Civ. Code § 801(12)*. The statute of limitations for an action to enforce a written agreement is found in *Code Civ. Proc. § 337*. Applicable statutes governing venue include *Code Civ. Proc. §§ 392* and *395* [*see § 11.46*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueIndividual DefendantsCivil ProcedureVenueCorporationsGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawAdjoining LandownersLateral & Subjacent Support

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1-11 California Forms of Pleading and Practice--Annotated § 11.41

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§ 11.41 Definition

A party wall is mutually used by adjoining landowners as a wall between their adjoining buildings [*see McCarthy v. Mutual Relief Ass'n. (1889) 81 Cal. 584, 586, 22 P. 933]* . As such, the wall serves as a support or foundation for each of the owner's structures [*see Nippert v. Warneke (1900) 128 Cal. 501, 504, 61 P. 96]* . A party wall may stand equally or partly on each adjoining parcel of land, or it may stand wholly on one of them [*Tate v. Fratt (1896) 112 Cal. 613, 618, 44 P. 1061]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersParty Walls

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1-11 California Forms of Pleading and Practice--Annotated § 11.42

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§ 11.42 Creation

A party wall may be created by an express agreement [*see Western etc. Co. v. Knickerbocker (1894) 103 Cal. 111, 116-117, 37 P. 192* ; *see also Frowenfeld v. Casey (1903) 139 Cal. 421, 423-425, 73 P. 152]* . In addition, an existing wall may become a party wall by the conveyance or severance of the property on which it stands, or by its encroachment on adjoining property [*Nippert v. Warneke (1900) 128 Cal. 501, 504, 61 P. 96* ; *see Guttenberger v. Woods (1876) 51 Cal. 523, 524]* . Also, a landowners's acquiescence to the adjacent landowner's use of a division wall may estop the landowner from denying that the division wall is a party wall [*Bank of Escondido v. Thomas et al. (1895) 41 P. 462, 5 Cal. Unrep. 94, 97-98]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesEquitable EstoppelElementsReal Property LawAdjoining LandownersEncroachmentsReal Property LawAdjoining LandownersParty Walls

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1-11 California Forms of Pleading and Practice--Annotated § 11.43

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§ 11.43 Owner's Rights

[1] Ownership

Each landowner owns that portion of the wall that is on his, her, or its property, and owns an easement in the part located on the adjoining property [*McCarthy v. Mutual Relief Ass'n. (1889) 81 Cal. 584, 586, 22 P. 933* ; *see Civ. Code § 801(12)*].

[2] Increasing Height or Width of Wall

Either owner may increase the height of the party wall if the increase can be made without (1) injury to the adjoining building, or (2) impairment to the strength of the wall or the value of the cross easements [*Frowenfeld v. Casey (1903) 73 P. 152* ; *Tate v. Fratt (1896) 112 Cal. 613, 618, 44 P. 1061]* . When the agreement specifies that the wall will be a certain height, however, neither owner may increase the height without the other's consent [*Henne v. Lankershim (1905) 146 Cal. 70, 72-73, 79 P. 591* ; *Frowenfeld v. Casey (1903) 139 Cal. 421, 425, 73 P. 152]* . Similarly, when the agreement specifies a particular width, an extension of the wall at a different width, even if made pursuant to requirements of legislation enacted subsequent to the agreement, is a violation of the agreement [*Equitable B. & L. Ass'n. v. Wolfangle (1931) 111 Cal. App. 119, 123, 295 P. 388]* .

[3] Sharing Costs of Wall

An owner may have a right to recover a share of the cost of erecting or maintaining the wall if the agreement so provides [*Watkins v. Glas (1907) 5 Cal. App. 68, 75, 89 P. 840* ; *see Scott v. Lippman (1940) 40 Cal. App. 2d 317, 320, 104 P.2d 715* ; *Anaheim Odd Fellows' Hall Asso. v. Mitchell (1907) 6 Cal. App. 431, 433, 92 P. 331]* . When one

owner extends the wall in violation of the agreement, however, and the extension provides no benefit to the other owner, the owner who does not benefit will not be liable for any portion of the cost [*Equitable Bldg. & Loan Asso. v. Wolfangle (1931) 111 Cal. App. 119, 122, 295 P. 388]* .

An easement for the use of a party wall carries with it no interest in the land [*see Walner v. City of Turlock (1964) 230 Cal. App. 2d 399, 404, 41 Cal. Rptr. 29]* . Therefore, unless the party wall agreement expressly indicates a different result, an easement for the use of the wall terminates when the building supported by the wall is destroyed [*Cohen v. Adolph Kutner Co. (1918) 177 Cal. 592, 597, 171 P. 424* ; *Walner v. City of Turlock (1964) 230 Cal. App. 2d 399, 404, 41 Cal. Rptr. 29]* . In addition, the easement is extinguished if, because of the economic obsolescence of the building, it is economically disadvantageous for one landowner to continue to maintain the wall and to be subject to the easement of the adjoining landowner [*Walner v. City of Turlock (1964) 230 Cal. App. 2d 399, 405, 408, 41 Cal. Rptr. 29]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersEasementsReal Property LawAdjoining LandownersParty Walls

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§ 11.44 Remedies

A party may bring a contract action to enforce a party wall agreement, or to collect damages for breach of the agreement. For example, an owner may bring an action against the adjoining owner to recover a portion of the costs of building or maintaining the wall, pursuant to the agreement, and the cause of action is assignable [*Watkins v. Glas (1907) 5 Cal. App. 68, 75, 89 P. 840]* . As another example, a lessee may seek to recover damages resulting from the lessor's breach of a party wall agreement with the adjoining owner [*see Lawrence Barker, Inc. v. Briggs (1952) 39 Cal. 2d 654, 660-661, 248 P.2d 897* (cross complaint by lessee for damages to his or her business located on the leased property, caused by lessor's failure to maintain party wall, pursuant to party wall agreement with adjoining landowner)].

A party may also seek either recovery for property damage or an injunction. For example, if the adjoining owner destroys or impairs the value of the party wall, the damaged owner may seek to recover for the damage to his, her, or its property [*see Nippert v. Warneke (1900) 128 Cal. 501*]. If one owner threatens to increase the height of the wall, the adjoining owner may seek an injunction to prevent it [*see Henne v. Lankershim (1905) 146 Cal. 70, 70, 73, 79 P. 591* ; *Frowenfeld v. Casey (1903) 139 Cal. 421, 422, 425, 73 P. 152]* . An injunction will not be granted, however, if it would exceed the scope of the party wall agreement [*see Walner v. City of Turlock (1964) 230 Cal. App. 2d 399, 408, 41 Cal. Rptr. 29]* . Thus, an injunction permanently prohibiting removal of a wall, which has deteriorated over time, exceeds the scope of the easement conveyed in the first place [*Walner v. City of Turlock (1964) 230 Cal. App. 2d 399, 408, 41 Cal. Rptr. 29]* . In addition, an injunction against increasing the height of a wall, when the increased height would not impair either the wall's value or the adjoining building, would exceed the scope of an agreement that had not specified a particular height [*see Tate v. Fratt (1896) 112 Cal. 613, 617-618, 44 P. 1061]* .

A complaint for damages and a permanent injunction compelling the defendant to prepare some act with regard to a

party wall agreement is *set forth in § 11.100*. A complaint for a temporary restraining order, preliminary injunction, and permanent injunction restraining the defendant from performing some act that affects a party wall is presented in *§ 11.101*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsReal Property LawAdjoining LandownersParty Walls

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§ 11.45 Statute of Limitations

If the action is one for a money judgment, and arises from the party wall agreement, it is a personal action rather than a real property action [*Scott v. Lippman (1940) 40 Cal. App. 2d 317, 320, 104 P.2d 715* ; *Anaheim Odd Fellows' Hall Asso. v. Mitchell (1907) 6 Cal. App. 431, 433, 92 P. 331]* . Therefore, when the party wall agreement is in writing, the statute of limitations for an action on the contract is four years, as provided by *Code Civ. Proc. § 337*, which applies to actions on written instruments [*Lawrence Barker, Inc. v. Briggs (1952) 39 Cal. 2d 654, 661, 248 P.2d 897]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawAdjoining LandownersParty Walls

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§ 11.46 Venue

When the subject matter of the action is real property, the superior court in the county in which the property, or some part of it, is situated is the proper court to hear the case [*Code Civ. Proc. § 392(a)(1)*]. When the action is based on the party wall agreement itself, however, venue may be in the county in which the defendant resides rather than the county in which the wall is located [*see Anaheim Odd Fellows' Hall Asso. v. Mitchell (1907) 6 Cal. App. 431, 433, 92 P. 331]* . Thus, when the action is one for a money judgment against defendant, pursuant to a party wall contract, it is a personal rather than a real property action, and the defendant is entitled to a trial in the county where he or she resides at the commencement of the action [*Scott v. Lippman (1940) 40 Cal. App. 2d 317, 320-321, 104 P.2d 715* ; *Anaheim Odd Fellows' Hall Asso. v. Mitchell (1907) 6 Cal. App. 431, 433, 92 P. 331* ; *see also Code Civ. Proc. § 395* (venue generally; residence of defendant)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueCorporationsCivil ProcedureVenueGeneral OverviewCivil ProcedureVenueIndividual DefendantsReal Property LawAdjoining LandownersParty Walls

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1-11 California Forms of Pleading and Practice--Annotated §§ 11.47through 11.59

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[Reserved]

§§ 11.47[Reserved]

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§ 11.60 Related Matthew Bender Publications

[1] Encroachments and Other Interferences With Use of Real Property

For forms of interrogatories for use in actions involving encroachments and nuisances, see Bender's Forms of Discovery, *Real Property*, Subpart I, *Adjoining Landowners*

[2] Lateral and Subjacent Support

For forms of interrogatories for use in actions involving removal of lateral support, see Bender's Forms of Discovery, *Real Property*, Subpart I, *Adjoining Landowners*

[3] Party Walls

For forms of party wall agreements, see California Legal Forms, Ch. 28B, *Party Walls and Boundary Agreements*

For discussion of the rights and liabilities of adjoining landowners with respect to party walls, see *California Real Estate Law and Practice, Ch. 383, Adjoining Landowners' Relations, §§ 383.30 -383.35*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersEncroachmentsReal Property LawAdjoining LandownersLateral & Subjacent

SupportReal Property LawAdjoining LandownersParty Walls

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§ 11.61 State Statutes

[1] Civil Code

Easement appurtenant for more than natural support from adjacent land. *Civ. Code § 801*

Easements as including right to use wall as party wall. *Civ. Code § 801(12)*

Rights and obligations of landowners generally. *Civ. Code § 818 et seq.*

Rights and duties of coterminous owners concerning lateral support. *Civ. Code § 832*

Notice of intent to excavate. *Civ. Code § 832(1)*

Right of adjoining owner to enter excavation site to take measures to protect his or her land and buildings; conditions imposed on right to excavate below depth of adjoining building or structure. *Civ. Code § 832(3)*

Duty of excavator to protect adjoining land and buildings if given license to enter, where excavation to be below standard depth; standard depth of foundations defined. *Civ. Code § 832(4)*

Common ownership of boundary trees. *Civ. Code §§ 833, 834*

Eminent domain to gain temporary access to adjoining land to repair or reconstruct real property. *Civ. Code § 1002*

Accretion and alluvion. *Civ. Code § 1014*

Right to reclaim land carried away by sudden action of river or stream. *Civ. Code § 1015*

Attorney's fees provided for in contract as item of costs of suit. *Civ. Code § 1717*

Exemplary and punitive damages. *Civ. Code § 3294*

Compensatory damages generally for breach of obligation not arising from contract. *Civ. Code § 3333*

Compensatory damages for wrongful use or occupation of land. *Civ. Code § 3334*

Right to injunction when necessary to prevent multiplicity of judicial proceedings. *Civ. Code § 3422(3)*; *Code Civ. Proc. § 526(a)(6)*

Damages for injury to trees. *Civ. Code § 3346*; *Code Civ. Proc. § 733*

Injunctive relief generally. *Civ. Code § 3420 et seq.*; *Code Civ. Proc. § 525 et seq.*

Nuisance. *Civ. Code § 3479 et seq.*; *Code Civ. Proc. § 731*

Obstruction to free use of property is nuisance; nuisance defined. *Civ. Code § 3479*

Private nuisance defined. *Civ. Code § 3481*

Liability of subsequent owner of property for nuisance created by former owner. *Civ. Code § 3483*

Abatement does not prejudice right to damages. *Civ. Code § 3484*

Relief as to private nuisance. *Civ. Code § 3501*

Abatement of private nuisance. *Civ. Code §§ 3502, 3503*; *Code Civ. Proc. § 731*

Duty not to infringe on rights of others. *Civ. Code § 3514*

[2] Code of Civil Procedure

Limited civil cases. *Code Civ. Proc. §§ 85-86*

Statutes of limitations: Time to commence action for recovery of real property. *Code Civ. Proc. § 318*

Possession within five years is required to be shown to assert cause of action or defense arising out of title to real property, or to rents or profits out of real property. *Code Civ. Proc. § 319*

Statute of limitations for action based on written instrument. *Code Civ. Proc. § 337*

Time to commence action for trespass or for injury to real property. *Code Civ. Proc. § 338(b)*

Time to commence action for inverse condemnation. *Code Civ. Proc. § 338(j)*

Venue of actions concerning real property. *Code Civ. Proc. § 392*

Lis pendens: notice of pending action concerning real property. *Code Civ. Proc. §§ 405.2, 405.20-405.24*

Action to abate nuisance. *Code Civ. Proc. § 731*

Recovery of costs. *Code Civ. Proc. § 1032*

Items that may or may not be recovered as costs. *Code Civ. Proc. § 1033.5*

Award of costs in inverse condemnation proceeding. *Code Civ. Proc. § 1036*

Jurisdiction and venue of condemnation suits is in superior court of county in which property is situated. *Code Civ. Proc. §§ 1250.010-1250.030*

Right to interest from date of damage. *Code Civ. Proc. § 1268.310*

Reimbursement of litigation expenses and costs in eminent domain proceeding. *Code Civ. Proc. §§ 1268.610-1268.720*

Request to permit entry on land to conduct discovery. *Code Civ. Proc. § 2031(a)*

[3] Streets and Highways Code

Encroachments and injuries to state highways; liability; actions by Department of Public Works. *Sts. & Hy. Code § 720 et seq.*

Encroachments and injuries to county highways; liability; actions by road commissioner. *Sts. & Hy. Code § 1480 et seq.*

Jurisdiction of municipality over public street within city limits. *Sts. & Hy. Code § 1921*

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§ 11.62 Decisions

[1] General Provisions

Public entity and not subdivider is liable in subsequent inverse condemnation action when public entity approves and accepts public improvement by subdivider; action by property owners against city for damages resulting from landslide is one for inverse condemnation; property owners are constitutionally entitled to be free of costs. *Blau v. City of Los Angeles (1973) 32 Cal. App. 3d 77, 82-89, 107 Cal. Rptr. 727*

[2] Encroachments and Other Interferences With Use of Real Property

[a] Accrual of Action; Permanency of Encroachment

Action accruing when injury is suffered or trespass is committed when injury is of permanent nature. *Rankin v. DeBare (1928) 205 Cal. 639, 641, 271 P. 1050* ; *Tracy v. Ferrera (1956) 144 Cal. App. 2d 827, 828, 301 P.2d 905* ; *Bertram v. Orlando (1951) 102 Cal. App. 2d 506, 507-509, 227 P.2d 894*

Maintenance of encroachment that may be discontinued or abated at any time constitutes continuing trespass or nuisance for which successive actions will lie. *Kafka v. Bozio (1923) 191 Cal. 746, 751-752, 218 P. 753* ; *Mattos v. Mattos (1958) 162 Cal. App. 2d 41, 43, 328 P.2d 269*

Action to enjoin encroachment is one to recover possession of property subject to five-year limitations period in *Code Civ. Proc. §§ 318* and *321*, not three-year period in *Code Civ. Proc. § 338*, and does not expire unless and until

encroacher's use of property ripens into either title by adverse possession or prescriptive easement. *Harrison v. Welch (2004) 116 Cal. App. 4th 1084, 1095-1096, 11 Cal. Rptr. 3d 92*

Encroaching building constitutes permanent trespass; entire cause of action accrues when trespass initially occurs. *Castelletto v. Bendon (1961) 193 Cal. App. 2d 64, 66-67, 13 Cal. Rptr. 907* ; *Mattos v. Mattos (1958) 162 Cal. App.2d 41, 43, 328 P.2d 269* (dictum); *see also Troeger v. Fink (1958) 166 Cal. App. 2d 22, 27-28, 332 P.2d 779*

[b] Plaintiff's Election

Plaintiffs have election in doubtful cases to treat encroachment as permanent and sue in one action for past and prospective damages, or to treat it as continuing trespass or nuisance. *Spaulding v. Cameron (1952) 38 Cal. 2d 265, 268-269, 239 P.2d 625* ; *see also Polin v. Chung Cho (1970) 8 Cal. App. 3d 673, 678, 87 Cal. Rptr. 591*

Plaintiff is not entitled to recover damages for future injury caused by encroachment when he or she elects to seek, and court grants, injunction. *Spaulding v. Cameron (1952) 38 Cal. 2d 265, 268-269, 239 P.2d 625*

Plaintiff, by electing to sue for past and prospective damages, is deemed to have waived invasion and consented to continued occupancy of land. *Slater v. Shell Oil Co. (1943) 58 Cal. App. 2d 864, 870, 137 P.2d 713*

[c] Damages

Exemplary and punitive damages [*Civ. Code § 3294*] are recoverable for malicious and oppressive encroachment. *Barnes v. Berendes (1903) 139 Cal. 32, 38, 69 P. 491, 72 P. 406* ; *Griffin v. Northridge (1944) 67 Cal. App. 2d 69, 76, 153 P.2d 800*

Business losses are recoverable for trespass encroachment. *Barnes v. Berendes (1903) 139 Cal. 32, 35-38, 69 P. 491, 72 P. 406*

Damages for nuisance encroachment properly include compensation for mental suffering based on invasion of right to peaceful enjoyment of property. *Altvater v. Breckenridge (1959) 174 Cal. App. 2d 790, 796, 345 P.2d 358*

Whether damage results from trespass is question of fact. *Strauss v. Kunin (1958) 156 Cal. App. 2d 558, 567, 319 P.2d 783*

Allowance of damages to plaintiffs for time spent cleaning up debris from tree encroaching on their property constitute special rather than general damages, required to be specially pleaded. *Bonde v. Bishop (1952) 112 Cal. App. 2d 1, 5, 245 P.2d 617*

[d] Double Recovery

In suit to abate nuisance and for damages, plaintiff is not entitled both to abatement and to full diminution in market value of property caused by probable continuation of nuisance; that would constitute double recovery. *Spaulding v. Cameron (1952) 38 Cal. 2d 265, 268-269, 239 P.2d 625*

Plaintiff in action to enjoin encroachment as nuisance is not entitled to damages in addition to injunction when trial court found no temporary decrease in value or use of property. *Pahl v. Ribero (1961) 193 Cal. App. 2d 154, 164-165, 14 Cal. Rptr. 174*

Plaintiff who elects to sue for past and prospective damages for trespass has consented to continued occupancy of his or her land and is precluded by that election from later suing for ejectment. *Slater v. Shell Oil Co. (1943) 58 Cal. App. 2d 864, 869-870, 137 P.2d 713* (former judgment for damages, including loss of value of land, held to bar action for ejectment)

[e] Defenses

Three-year statute of limitations [*see* former *Code Civ. Proc. § 338(2)*; *now see Code Civ. Proc. § 338(b)*] is applicable to action for damages and injunction to remove encroachment. *Rankin v. DeBare (1928) 205 Cal. 639, 640-641, 271 P. 1050* ; *Tracy v. Ferrera (1956) 144 Cal. App. 2d 827, 828, 301 P.2d 905* ; *Bertram v. Orlando (1951) 102 Cal. App. 2d 506, 507-509, 227 P.2d 894*

Freedom from negligence does not protect landowner from liability for nuisance for injury to neighbor's land caused by escaping waters. *Shields v. Wondries (1957) 154 Cal. App. 2d 249, 254, 316 P.2d 9*

Building permit does not grant authority to encroach on easement rights of adjoining landowner. *City of Dunsmuir v. Silva (1957) 154 Cal. App. 2d 825, 828, 317 P.2d 653*

Prejudicial delay is necessary element of defense of laches; lapse of considerable period of years does not of itself constitute laches as matter of law. *Balestrieri v. Sullivan (1956) 142 Cal. App. 2d 332, 343, 298 P.2d 688*

Laches must be specifically pleaded as affirmative defense. *Balestrieri v. Sullivan (1956) 142 Cal. App. 2d 332, 343, 298 P.2d 688*

Implied consent by plaintiff to encroachment is defense to trespass action. *Strodel v. Wilcox (1955) 137 Cal. App. 2d 781, 785-786, 291 P.2d 95*

[f] Injunction

Right to injunction to remove encroachment. *Brown Derby Hollywood Corp. v. Hatton (1964) 61 Cal. 2d 855, 858, 40 Cal. Rptr. 848, 395 P.2d 896*

Trial court properly may rely on present use and nature of plaintiff's land in ascertaining whether there is irreparable injury from encroaching building when plaintiff did not contend that any of its present plans were hampered by encroachment. *Brown Derby Hollywood Corp. v. Hatton (1964) 61 Cal. 2d 855, 860, 40 Cal. Rptr. 848, 395 P.2d 896*

Injunctive relief for plaintiff city was not incumbent on trial court, but rather was discretionary, when basement wall encroached on public easement. *City of Berkeley v. Gordon (1968) 264 Cal. App. 2d 461, 467-468, 70 Cal. Rptr. 716*

[g] Balancing of Conveniences

Court is entitled in its discretion to deny injunction and award damages when encroachment does not irreparably injure plaintiff, was innocently made, and cost of removal was great compared to inconvenience to plaintiff. *Brown Derby Hollywood Corp. v. Hatton (1964) 61 Cal. 2d 855, 858, 40 Cal. Rptr. 848, 395 P.2d 896*

One is required to use his or her own property in manner that does not unnecessarily damage property of others. *Katenkamp v. Union Realty Co. (1936) 6 Cal. 2d 765, 774, 59 P.2d 473*

Necessary findings in applying doctrine of balancing of conveniences. *D'Andrea v. Pringle (1966) 243 Cal. App. 2d 689, 695-699, 52 Cal. Rptr. 606*

Reservation by court of jurisdiction to afford plaintiff relief on change of circumstances when court denies injunction in applying balancing of conveniences doctrine. *Pahl v. Ribero (1961) 193 Cal. App. 2d 154, 158, 14 Cal. Rptr. 174* (court refers to procedure used by trial court without passing on propriety)

Court of equity has power to protect defendants in use of encroaching building, incident to balancing of conveniences and awarding plaintiffs damages for encroachment, by granting defendants' easement. *Baglione v. Leue (1958) 160 Cal. App. 2d 731, 735, 325 P.2d 471* ; *Ukhtomski v. Tioga Mutual Water Co. (1936) 12 Cal. App. 2d 726, 729, 55 P.2d 1251* ; *see also Donnell v. Bisso Brothers (1970) 10 Cal. App. 3d 38, 46-47, 88 Cal. Rptr. 645* (easement awarded plaintiff who innocently encroached on defendant's land)

Necessary elements of doctrine of balancing of conveniences. *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 562-563, 250 P.2d 660* ; *see also Dolske v. Gormley (1962) 58 Cal. 2d 513, 520-521, 25 Cal. Rptr. 270, 375 P.2d 174* ; *Pahl v. Ribero (1961) 193 Cal. App. 2d 154, 163, 14 Cal. Rptr. 174*

[h] Hardship

Irreparable hardship to defendant if injunction is imposed constitutes necessary element in maintaining balancing of conveniences defense. *Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 200, 323 P.2d 1001* (dictum)

Phrase "irreparable injury" as used in some cases refers to substantial hardship encroacher must endure when balanced against lesser hardship to plaintiff. *Hirshfield v. Schwartz (2001) 91 Cal. App. 4th 749, 761, 110 Cal. Rptr. 2d 861*

Cost of removal of encroachment is relevant to issue of defendant's hardship in applying doctrine of balancing of conveniences. *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 565, 250 P.2d 660*

[i] Lack of Innocence

Encroachment is willful if defendant knows he or she is building on plaintiff's land and acts without good faith belief that he or she has right to do so. *Brown Derby Hollywood Corp. v. Hatton (1964) 61 Cal. 2d 855, 859, 40 Cal. Rptr. 848, 395 P.2d 896*

Proceeding with construction of encroachment after being informed of impending injunction suit destroys any claim of innocence and precludes application of doctrine of balancing conveniences. *Altvater v. Breckenridge (1959) 174 Cal. App. 2d 790, 798, 345 P.2d 358* ; *City of Dunsmuir v. Silva (1957) 154 Cal. App. 2d 825, 828, 317 P.2d 653*

Whether trespass was willful is question of fact. *Strauss v. Kunin (1958) 156 Cal. App. 2d 558, 567, 319 P.2d 783*

Court is not entitled to balance conveniences when encroachment is intentional. *Strodel v. Wilcox (1955) 137 Cal. App. 2d 781, 785, 291 P.2d 95* ; *see also Agmar v. Solomon (1927) 87 Cal. App. 127, 138-139, 261 P. 1029*

Doctrine of balancing of conveniences is not to be applied if negligence of defendant was sole proximate cause of encroachment. *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 564, 250 P.2d 660*

[j] Injury to Trees

Duty to act reasonably tempers any right to remove tree that presents nuisance to adjoining property; there is no absolute right to sever tree roots from neighbor's tree. *Booska v. Patel (1994) 24 Cal. App. 4th 1786, 1791-1792, 30 Cal. Rptr. 2d 241*

Treble damages under *Code Civ. Proc. § 733* for cutting down or injuring any tree or timber on land of another is warranted only on establishing that wrongful act was willful and malicious. *Fick v. Nilson (1950) 98 Cal. App. 2d 683, 685, 220 P.2d 752*

[k] Nuisance

Encroachment on airspace above adjoining land is nuisance rather than trespass. *Kafka v. Bozio (1923) 191 Cal. 746, 750, 218 P. 753* ; *Meyer v. Metzler (1875) 51 Cal. 142, 144* ; *Case v. Sisich (1929) 97 Cal. App. 106, 110, 275 P. 492*

Duty to act reasonably tempers any right to remove tree that presents nuisance to adjoining property; there is no absolute right to sever tree roots from neighbor's tree. *Booska v. Patel (1994) 24 Cal. App. 4th 1786, 1791-1792, 30 Cal. Rptr. 2d 241*

Nature of nuisance liability. *Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 372-373, 82 Cal. Rptr. 689* ; *Sturges v. Charles L. Harney, Inc. (1958) 165 Cal. App. 2d 306, 318, 331 P.2d 1072*

Basement walls extending under public sidewalk and constituting encroachment with regard to city's planned improvements does not constitute public nuisance within meaning of *Civ. Code § 3479* when city had made no determination that basement constituted obstruction to sidewalk or street and when it did not in fact obstruct traffic. *City of Berkeley v. Gordon (1968) 264 Cal. App. 2d 461, 465-467, 70 Cal. Rptr. 716*

Whether particular use is nuisance depends on facts of each case, such as nature of use, extent and frequency of injury, and effect on enjoyment of health and property. *Shields v. Wondries (1957) 154 Cal. App. 2d 249, 255, 316 P.2d 9*

Substantial harm is basic requirement in law of private nuisance; gravity of harm must be weighted against utility of defendant's conduct. *Shields v. Wondries (1957) 154 Cal. App. 2d 249, 255, 316 P.2d 9*

Maintenance of defendants' premises without proper gutters or drainage so as to deflect rain water from defendants' premises onto plaintiffs' premises constitutes continuing nuisance. *Tracy v. Ferrera (1956) 144 Cal. App. 2d 827, 828-829, 301 P.2d 905*

Maintenance of pipes and furnaces on defendants' premises so as to cause emission of noxious odors and fumes on plaintiffs' property constitutes continuing nuisance. *Tracy v. Ferrera (1956) 144 Cal. App. 2d 827, 828-829, 301 P.2d 905*

[l] Public Nuisance

When private cause of action lies for injury caused by public nuisance. *Frost v. City of Los Angeles (1919) 181 Cal. 22, 24-25, 183 P. 342*

Remedies available to landowner injured by encroaching roots and branches of trees on adjoining land. *Grandona v. Lovdal (1886) 70 Cal. 161, 162, 11 P. 623* ; *Bonde v. Bishop (1952) 112 Cal. App. 2d 1, 7, 245 P.2d 617* ; *Fick v. Nilson (1950) 98 Cal. App. 2d 683, 685, 220 P.2d 752* ; *Crance v. Hems (1936) 17 Cal. App. 2d 450, 451-452, 62 P.2d 395* ; *Anderson v. Weiland (1936) 12 Cal. App. 2d 730, 732, 55 P.2d 1242*

Substantial harm is necessary to maintain nuisance action to abate encroaching branches and roots. *Grandona v. Lovdal (1889) 78 Cal. 611, 617-618, 21 P. 366* ; *Stevens v. Moon (1921) 54 Cal. App. 737, 740, 742, 202 P. 961*

Encroaching roots and branches do not constitute nuisance by interfering with use of land that was never attempted nor desired. *Grandona v. Lovdal (1889) 78 Cal. 611, 617, 21 P. 366*

Portions of trees covering substantial area of plaintiff's land and appreciably restricting use to which it is normally devoted constitutes nuisance under *Civ. Code § 3479*, justifying action for abatement under *Code Civ. Proc. § 731*. *Mattos v. Mattos (1958) 162 Cal. App. 2d 41, 43, 328 P.2d 269*

Encroaching tree limbs constituted nuisance when there was constant dropping of small branches on plaintiff's roof and yard, and constant work was required to keep plaintiff's premises clean from debris. *Bonde v. Bishop (1952) 112 Cal. App. 2d 1, 4, 245 P.2d 617*

[m] Self Help

Self help in removing encroachment on city's easement followed by action by city against owner of encroachment for reasonable costs of removal is available remedy. *City of Berkeley v. Gordon (1968) 264 Cal. App. 2d 461, 468, 70 Cal. Rptr. 716*

[n] Trespass

Liability for trespass generally. *Gallin v. Poulou (1956) 140 Cal. App. 2d 638, 642-645, 295 P.2d 958*

[o] Prescriptive Easement

Property owner could not assert exclusive prescriptive easement for improvements he enclosed on parcel held in common with other owners; such claim was in nature of adverse possession, which property owner failed to establish. *Kapner v. Meadowlark Ranch Assn. (2004) 116 Cal. App. 4th 1182, 1187, 11 Cal. Rptr. 3d 138*

Homeowner who placed woodshed and landscaping on neighbor's property made exclusive use of land's surface and therefore could not acquire prescriptive easement, but had to meet requirements for adverse possession. *Harrison v. Welch (2004) 116 Cal. App. 4th 1084, 1094, 11 Cal. Rptr. 3d 92*

Interest created to protect encroacher's use of neighbor's land was not subject to limitations of prescriptive easements, but was properly created to protect encroaching party pursuant to court's equitable powers. *Hirshfield v. Schwartz (2001) 91 Cal. App. 4th 749, 770, 110 Cal. Rptr. 2d 861*

Exclusive prescriptive easement that effectively amounts to ownership may not be awarded in simple residential boundary dispute if encroaching landowner is unable to meet requirements for outright adverse possession. *Mehdizadeh v. Mincer (1996) 46 Cal. App. 4th 1296, 1300, 54 Cal. Rptr. 2d 284*

Exclusive prescriptive easement doctrine has no application in simple backyard dispute involving property fenced by one party and claimed to be owned by another. *Silacci v. Abramson (1995) 41 Cal. App. 4th 676, 681-682, 48 Cal. Rptr. 2d 493*

[3] Lateral and Subjacent Support

[a] Accrual of Action

Cause of action for removal of lateral support emanates from subsidence, not from excavation alone; separate cause of action arises from each new subsidence. *Bellman v. County of Contra Costa (1960) 54 Cal. 2d 363, 369, 5 Cal. Rptr. 692, 353 P.2d 300*

Surface owner's cause of action against subsurface owner for loss of subjacent support caused by excavation arises when land subsides, not when excavation is made. *Marin Mun. Water Dist. v. Northwestern Pac. R. R. Co. (1967) 253 Cal. App. 2d 83, 96, 61 Cal. Rptr. 520*

[b] Acts of God

Owner of excavated land is not liable for injuries to adjoining land sustained by action of elements or acts of God unless negligence contributed to injuries. *Conlin v. Coyne (1937) 19 Cal. App. 2d 78, 90, 64 P.2d 1123*

Occasional heavy rainfall is hazard that should be anticipated and against which precautions should be taken to avoid injury to land by removal of lateral support. *Conlin v. Coyne (1937) 19 Cal. App. 2d 78, 86, 64 P.2d 1123*

[c] Damages

Decrease in market value of plaintiff's property due to fear by prospective buyers of future slides is not proper element of damages in suit for threatened removal of lateral support when injunction was granted. *Rhodes v. San Mateo Investment Co. (1955) 130 Cal. App. 2d 116, 118, 278 P.2d 447*

Lessee of injured premises is entitled to recover rent as damages for removal of lateral support. *Barrows v. Wm. Simpson Constr. Co. (1929) 102 Cal. App. 254, 258-259, 283 P. 100*

[d] Definitions

"Adjoining," as used in *Civ. Code § 832*, defined as touching or bounding at some point or line. *Marin Mun. Water Dist. v. Northwestern Pac. R. R. Co. (1967) 253 Cal. App. 2d 83, 93, 61 Cal. Rptr. 520*

"Coterminous," as used in *Civ. Code § 832*, defined as having same or coincident boundaries. *Marin Mun. Water Dist. v. Northwestern Pac. R. R. Co. (1967) 253 Cal. App. 2d 83, 93, 61 Cal. Rptr. 520*

Lateral and subjacent support distinguished and defined. *Marin Mun. Water Dist. v. Northwestern Pac. R. R. Co. (1967) 253 Cal. App. 2d 83, 89, 61 Cal. Rptr. 520*

[e] Right to Lateral Support

Civ. Code § 832 relieves excavating surface owner from absolute duty, under common law, to provide lateral support to land of coterminous owner, provided he or she gives notice of excavation and exercises ordinary care in excavating. *Marin Mun. Water Dist. v. Northwestern Pac. R. R. Co. (1967) 253 Cal. App. 2d 83, 90-91, 61 Cal. Rptr. 520*

Civ. Code § 832 applies only between coterminous surface land owners, and only to their mutual obligation of lateral support; the statute does not apply between surface and subsurface owners. *Marin Mun. Water Dist. v. Northwestern Pac. R. R. Co. (1967) 253 Cal. App. 2d 83, 91-92, 61 Cal. Rptr. 520*

[f] Notice

Common law absolute duty to protect adjoining land in natural state from sliding into excavation is applicable, rather than relaxed duty under *Civ. Code § 832*, when notice requirements of *Civ. Code § 832* are not satisfied. *Wharam v. Investment Underwriters, Inc. (1943) 58 Cal. App. 2d 346,349-350, 136 P.2d 363*

Purpose of notice requirement under *Civ. Code § 832* is to give adjacent landowner opportunity to protect his or her property from possible damage if he or she so desires. *First National Bank v. Villegra (1891) 92 Cal. 96, 99, 28 P. 97*

Duty under Civ. Code § 832of giving notice of intent to excavate is inapplicable to contractor and subcontractor who were not owners of adjoining land. *Cassell v. McGuire & Hester (1960) 187 Cal. App. 2d 579, 593, 10 Cal. Rptr. 33*

Actual knowledge of excavation does not dispense with notice requirement of *Civ. Code § 832*. *McIvor v. Mercer-Fraser Co. (1946) 76 Cal. App. 2d 247, 252-253, 172 P.2d 758*

[g] Due Care

Allegations and proof of negligence in conducting excavations is necessary to support claim for damages for removal of lateral support when suitable notice under *Civ. Code § 832* was given. *Nippert v. Warneke (1900) 128 Cal. 501, 503-504, 61 P. 96*

Fact that prior owner of excavated land was negligent in permitting bulkhead, which was constructed to afford lateral support to adjoining land, to decay, does not excuse subsequent owner from liability for continuing negligence. *Sager v. O'Connell (1944) 67 Cal. App. 2d 27, 33, 153 P.2d 569*

[h] Improvements

Landowner proposing to excavate who goes to expense of supporting adjoining owner's building to protect it from falling on its excavated lot is not entitled to recover those expenses from adjoining owner in absence of contract. *First National Bank v. Villegra (1891) 92 Cal. 96, 99, 28 P. 97* ; *Cornet Stores v. Security Trust etc. Bank (1953) 120 Cal. App. 2d 852, 853-854, 262 P.2d 77*

Owner of building does not have duty under *Civ. Code § 832* to protect tenants from collapse of building caused by properly conducted excavations on adjoining land. *Carty v. Blauth (1915) 169 Cal. 713, 717, 147 P. 949*

Common law right to subjacent support is not lost by imposition of structures unless downward pressure of artificial weight of structure contributes to subsidence; contributing factor of weight of structure as matter of defense with burden of proof on defendant. *Marin Mun. Water Dist. v. Northwestern Pac. R. R. Co. (1967) 253 Cal. App. 2d 83, 97, 61 Cal. Rptr. 520*

Improvements on land that do not materially increase lateral weight and pressure do not absolve adjoining owner of common law liability for removal of lateral support of land in "natural state." *Wharam v. Investment Underwriters, Inc. (1943) 58 Cal. App. 2d 346, 350, 136 P.2d 363*

[i] Lateral Support

Owner of land does not have absolute right at common law to lateral support of his or her land in its natural state from

land of every coterminous owner. *Wharam v. Investment Underwriters (1943) 58 Cal. App. 2d 346, 349, 136 P.2d 363* (leading case); *Puckett v. Sullivan (1961) 190 Cal. App. 2d 489, 495-496, 12 Cal. Rptr. 55*

[j] Noncoterminous Owners

Liability for damages for removal of lateral support of noncoterminous land rests on negligence. *Puckett v. Sullivan (1961) 190 Cal. App. 2d 489, 495, 12 Cal. Rptr. 55*

[k] Subjacent Support

Common law right of subjacent support is closely analogous to that of lateral support. *Marin Mun. Water Dist. v. Northwestern Pac. R. R. Co. (1967) 253 Cal. App. 2d 83, 89, 61 Cal. Rptr. 520*

Owner of surface is entitled at common law to have it remain in natural condition without subsidence by reason of subsurface owner's withdrawal of subjacent support. *Marin Mun. Water Dist. v. Northwestern Pac. R. R. Co. (1967) 253 Cal. App. 2d 83, 89, 61 Cal. Rptr. 520*

Surface owner as entitled to have it remain in natural condition without subsidence by reason of withdrawal of land or minerals under surface by subjacent owners. *Empire Star Mines Co. v. Butler (1944) 62 Cal. App. 2d 466, 534, 145 P.2d 49*

[l] Substituted Support

Person who withdraws support that has been substituted for naturally necessary support of adjoining land is liable for subsidence of land dependent on support withdrawn, in absence of superseding cause or other reasons for relieving him or her. *Sager v. O'Connell (1944) 67 Cal. App. 2d 27, 32, 153 P.2d 569*

[m] Parties

All who unite in depriving landowner of lateral support are wrongdoers responsible in damages. *Green v. Berge (1894) 105 Cal. 52, 58, 38 P. 539* (holding contractor and landowner jointly liable); *Peak v. Richmond Elementary Sch. Dist. (1958) 161 Cal. App. 2d 366, 368-369, 326 P.2d 860* ; *Wharam v. Investment Underwriters (1943) 58 Cal. App. 2d 346, 351, 136 P.2d 363*

Individuals acting independently in excavating and removing earth supporting plaintiff's land are jointly liable when acts of each concurred in proximately causing subsidence of plaintiff's property. *Puckett v. Sullivan (1961) 190 Cal. App. 2d 489, 495-496, 12 Cal. Rptr. 55*

Person who owns land at time of damage is proper party to sue even though excavation was made during previous ownership. *Conlin v. Coyne (1937) 19 Cal. App. 2d 78, 89, 64 P.2d 1123*

Joint liability of coowners of land for removal of lateral support of adjoining land. *Conlin v. Coyne (1937) 19 Cal. App. 2d 78, 89, 64 P.2d 1123*

Lessee of damaged premises has right to sue adjoining landowner for removal of lateral support; rent is permissible element of damages under *Civ. Code § 3333* (damages for tort). *Barrows v. Wm. Simpson Constr. Co. (1929) 102 Cal. App. 254, 258-259, 283 P. 100*

[n] Public Entities

Compensation under *Cal. Const., art. I, § 14* (*now see Cal. Const., art. I, § 19*) on inverse condemnation theory is allowable against public entity for physical injury to property even though injury would not be actionable at common law if inflicted by private adjoining owner. *Holtz v. Superior Court (1970) 3 Cal. 3d 296, 308-309, 90 Cal. Rptr. 345, 475 P.2d 441*

Public entities are subject to strict liability on inverse condemnation theory for damage to real property caused to coterminous landowner by excavation work deliberately designed and constructed. *Holtz v. Superior Court (1970) 3 Cal. 3d 296, 302, 90 Cal. Rptr. 345, 475 P.2d 441*

[4] Party Walls

[a] Creation

Creation of party wall by severance or conveyance of property. *Nippert v. Warneke (1900) 128 Cal. 501, 504, 61 P. 96*

Acquiescence to use of wall estops owner from denying existence of party wall. Bank of Escondido v. Thomas et al. (1895) 5 CU 94, 97-98, *41 P. 462*

Encroachment of wall on adjacent owner's property creates right to use wall as party wall. *Guttenberger v. Woods (1876) 51 Cal. 523, 524*

[b] Contract Actions

Cross complaint by lessee for damages from lessor's breach of party wall agreement. *Lawrence Barker, Inc. v. Briggs (1952) 39 Cal. 2d 654, 661, 248 P.2d 897*

Action by adjoining landowner for payment of half of construction cost of party wall. *Watkins v. Glas (1907) 5 Cal. App. 68, 70-72, 75, 89 P.840*

[c] Property Damage

Action for damage done to party wall by adjacent owner. *Nippert v. Warneke (1900) 128 Cal. 501, 504-505, 61 P. 96*

[d] Increasing Height

Agreement between adjoining owners precludes raising height of wall without consent of other owner. *Henne v. Lankershim (1905) 146 Cal. 70, 72-73, 79 P. 591*

Action by one owner of party wall to enjoin other owner from increasing its height. *Frowenfeld v. Casey (1903) 139 Cal. 421, 422, 73 P. 152*

Right to increase height of party wall. *Tate v. Fratt (1896) 112 Cal. 613, 618 44 P. 1061*

[e] Interfering With Wall

Action for damages for interfering with adjoining owner's side of wall. *McCarthy v. Mutual Relief Ass'n (1889) 81 Cal. 584, 586, 22 P. 933*

[f] Termination of Easement

Destruction or obsolescence of building terminates easement. *Walner v. City of Turlock (1964) 230 Cal. App. 2d 399, 404-408, 41 Cal. Rptr. 29*

California Forms of Pleading and Practice--Annotated

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PART III. RESEARCH GUIDE

1-11 California Forms of Pleading and Practice--Annotated § 11.63

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§ 11.63 Law Reviews

[1] Encroachments and Other Interferences With Use of Real Property

California Supreme Court Survey, Williams, *Boundaries, 22 Pepperdine L. Rev. 1675, 1680 (May 1995)*

Coskran, *Cats: An Interpretation of "Reasonableness' in Four Acts,* 9(4) California Real Property Journal 12 (Fall, 1994)

Comment, *Obstruction of Sunlight as a Private Nuisance, 65 Calif. L. Rev. 94 (1977)*

Comment, *An Economic Analysis of Land Use Conflicts, 21 Stan L Rev 293 (1969)*

Note, *Equity--Overhanging Branches as a Nuisance--Right to Injunctive Relief and Damages, 24 So Cal. L Rev 199 (1951)*

Equity: Balancing Conveniences: Eminent Domain, 25 Calif L Rev 245 (1937)

Comment, *Vendor and Purchaser: Marketable Title: Slight Encroachment Does Not Render Title Defective, 19 Calif L Rev 647 (1931)*

Comment, *Equity: Mandatory Injunction for Removal of Encroachment on Land: Code Pleading: Res Adjudicata, 10 Calif L Rev 169 (1922)*

[2] Lateral and Subjacent Support

Comment, *The Right to the Subjacent Support of Oil and Gas, 49 Calif. L. Rev. 354 (1961)*

Comment, *Lateral Support, 6 Stan. L. Rev. 104 (1953)*

Comment, *Adjoining Landowners: California Civil Code Section 832: Lateral Support, 20 Calif. L. Rev. 62 (1931)*

California Forms of Pleading and Practice--Annotated

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 11 ADJOINING LANDOWNERS
PART III. RESEARCH GUIDE

1-11 California Forms of Pleading and Practice--Annotated § 11.64

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§ 11.64 Text References

[1] General Provisions

Witkin, Summary of California Law, vol. 12, *Real Property*, §§ 373-381 (10th ed. 2005)

Restatement of Torts (2d), §§ *157-215* (1965)

Restatement of Torts, §§ 817-864 (1939)

2 C.J.S., *Adjoining Landowners*, §§ 9-57

I Am. Jur. 2d, *Adjoining Landowners*, §§ 40-89, 119-137

[2] Encroachments and Other Interferences With Use of Real Property

Witkin, Summary of California Law, vol. 12, *Real Property*, §§ 374-381; vol. 13, *Equity*, §§ 167-173, 159; vol. 6, *Torts*, §§ 1726-1739 (10th ed. 2005)

Prosser and Keeton on Torts, ch. 3, *Intentional Interference With Property*, § 13; ch. 4, *Defenses to Intentional Interference With Person or Property*, §§ 16-18; ch. 10, *Owners and Occupiers of Land*, § 57; ch. 15, *Nuisance*, §§ 87-91 (West 5th ed. 1984)

Restatement of Torts (2d), §§ *157-215* (1965)

Restatement of Torts, §§ 822-840 (1939)

2 C.J.S., *Adjoining Landowners*, §§ 40-57

66 C.J.S., *Nuisances*, § 118

1 Am. Jur. 2d, *Adjoining Landowners*, §§ 119-137

[3] Lateral and Subjacent Support

Witkin, Summary of California Law, vol. 12, *Real Property*, §§ 377-381 (10th ed. 2005)

Restatement of Torts, §§ 817-821 (1939)

2 C.J.S., *Adjoining Landowners*, §§ 30-39

1 Am. Jur. 2d, *Adjoining Landowners*, §§ 40-89

[4] Party Walls

Miller and Starr, California Real Estate 2d, vol. 5, *Adjoining Landowners*, §§ 14:36-14:39 (Bancroft-Whitney Co., 1989)

Bowman, Ogden's Revised California Real Property Law, vol. 1, § 13.14 (Cal CEB 1974)

69 C.J.S., *Party Walls*, § 1 et seq.

59A Am. Jur. 2d, *Party Walls*, § 1 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersEncroachmentsReal Property LawAdjoining LandownersLateral & Subjacent SupportReal Property LawAdjoining LandownersParty Walls

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Chapter 11 ADJOINING LANDOWNERS
PART III. RESEARCH GUIDE

1-11 California Forms of Pleading and Practice--Annotated §§ 11.65through 11.69

AUTHOR: David P. Lanferman Editorial Consultant David P. Lanferman is a founding partner in the law firm of Lanferman, Fisher & Hashimoto in Fremont, California. He is a member of the Editorial Board of the California Real Estate Reporter (Matthew Bender), and is past Chair of the Real Estate Section of the Alameda County Bar Association. Mr. Lanferman is a graduate of the University of California, Davis (Phi Beta Kappa) and the University of California, Hastings College of the Law.

[Reserved]

§§ 11.65[Reserved]

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 11 ADJOINING LANDOWNERS
PART IV. FORMS
A. Encroachments and Other Interferences With Use of Real Property

1-11 California Forms of Pleading and Practice--Annotated § 11.70

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§ 11.70 Complaint for Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526] to Compel Removal of Encroaching Structure and for Compensatory and Exemplary and Punitive [Civ. Code § 3294] Damages--By Landowner Against Adjoining Landowner

[1] FORM Complaint for Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526] to Compel Removal of Encroaching Structure and for Compensatory and Exemplary and Punitive [Civ. Code § 3294] Damages--By Landowner Against Adjoining Landowner

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR PERMANENT INJUNCTION
_____ [*name*],	)	AND DAMAGES
Defendant.	)	(Removal of Encroaching Structure)
	)	
	)	

Plaintiff alleges:

FIRST COUNT

(Willful Trespass)

1. Plaintiff is, and at all times mentioned in this complaint was, the owner and in possession and control of that real property situated in _____ County, known as _____ [*street*], _____ [*city*], California, and more particularly described as follows: _____ [*give legal description*].

2. Defendant is, and at all times mentioned in this complaint was, the owner and in possession and control of that real property situated in _____ County, known as _____ [*street*], _____ [*city*], California, and more particularly described as follows: _____ [*give legal description*].

3. The above-described properties of plaintiff and defendant adjoin each other at plaintiff's _____ [*specify, e.g.,* north] and defendant's _____ [*specify, e.g.,* south] boundaries.

[4. *If the names of any defendants are unknown, include fictitious name allegation, e.g.,* Plaintiff is ignorant of the true names and capacities of defendants sued in this complaint as DOES I-_____, inclusive, and therefore sues these defendants by the fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and on that basis alleges that each of the fictitiously named defendants is responsible in some manner for the construction, maintenance, ownership, or existence of the encroachment on plaintiff's land as alleged in this complaint.)]

[5. *If there are multiple defendants and any defendant is sued on the principal of respondeat superior, include agency allegation, e.g.,* At all times mentioned in this complaint defendants _____ (*names*) were the agents and employees of the remaining defendants, and, in doing the things alleged in this complaint, were acting within the scope of the agency.]

6. On or about _____ [*date*], defendant caused a certain structure consisting of a _____ [*describe, e.g.,* garage] to be built on the _____ [*e.g.,* southeast] portion of his or her property. The structure encroaches and trespasses on plaintiff's property by extending over the previously mentioned boundary between plaintiff's and defendant's properties and onto plaintiff's land without plaintiff's consent. The encroachment covers an area of approximately _____ square feet of plaintiff's land.

7. Defendant willfully and intentionally caused the structure to encroach on plaintiff's property as described in this complaint and knew that he or she was building on plaintiff's property without any good faith belief that he or she had a right to do so.

8. The area of plaintiff's land encroached on by defendant's structure is approximately _____ [*specify*]. The value of the use of the area of land is $_____ per _____ [*e.g.,* month]. As a proximate result of the encroachment plaintiff has suffered and will continue to suffer damages for loss of use of the area in the sum of $_____ per _____ [*e.g.,* month] as long as the encroachment remains on his or her land.

9. In causing the structure to encroach on plaintiff's property, defendant acted maliciously and oppressively toward plaintiff in that _____ [*e.g.,* at all times prior to, during, and after defendant caused the structure to encroach on plaintiff's property, defendant had knowledge of the location of the previously mentioned common boundary line and that the structure would and did encroach on plaintiff's property as described in this complaint, but in willful and conscious disregard of plaintiff's rights defendant caused the structure to be built and maintained in a manner that it encroaches on plaintiff's property]. Plaintiff therefore claims exemplary and punitive damages.

10. Unless defendant is compelled to remove the encroachment from plaintiff's land, plaintiff will suffer irreparable

injury in that _____ [*specify, e.g.,* a continuation of the encroachment will ripen into a prescriptive easement].

SECOND COUNT
(Negligent Trespass)

1. Plaintiff incorporates in this Second Count Paragraphs 1-7, inclusive, and Paragraph 10 of his/her First Count.

2. In causing the structure to encroach on plaintiff's property as described in this complaint, defendant acted negligently and carelessly and in complete disregard of the true location of the boundary line between plaintiff's and defendant's properties.

3. As a proximate result of the negligence and the resulting trespass, plaintiff has suffered damages from the loss of use of the property encroached on in the sum of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For a permanent injunction compelling defendant to remove the encroachment described in this complaint from plaintiff's property and to restore plaintiff's property to its condition immediately prior to the encroachment.

2. For general damages.

3. For exemplary and punitive damages.

4. For costs of suit incurred by this complaint.

5. For other and further relief as the court deems proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].

_____ [*signature*]

[2] Use of Form

This form is a complaint for use in an action for a permanent injunction to compel removal of an encroachment and for damages.

If there is a dispute over title to the area of the encroachment, an additional cause of action could be joined to quiet title to the property [*see Code Civ. Proc. §§ 427.10* (permissive joinder of causes of action), 760.010 et seq. (quiet title action) and Ch. 482, *Quieting Title*].

For a general discussion of encroachments and their removal, see *§ 11.20* et seq.

[3] Allegations

The complaint in *[1], above,* alleges in the first count the following:

- The property interest of plaintiff and a description of the premises (First Count, Paragraph 1).

- The property interest of defendant and a description of the premises (First Count, Paragraph 2).

- The adjacent position of the premises (First Count, Paragraph 3).

- The existence of the encroachment (First Count, Paragraph 6).

- That the encroachment was placed on plaintiff's property willfully and intentionally (First Count, Paragraph 7) [*see Brown Derby Hollywood Corp. v. Hatton (1964) 61 Cal. 2d 855, 858-859, 40 Cal. Rptr. 848, 395 P.2d 896* (right to injunction when encroachment is willful)].

  PRACTICE TIP:
  Danger of Prescriptive Rights. Because the existence or possibility of prescriptive rights being asserted by the encroaching party requires that the encroaching or prescriptive claimant act with "hostile intent" or under "claim of right," the plaintiff should carefully consider how he or she characterizes the defendant's intent in constructing the encroachment. An allegation that the encroaching party acted with a wrongful, hostile, or malicious intent could improve the defendant's ability to claim rights by prescription [for coverage of prescriptive easements, see Ch. 13, *Adverse Possession*].
  By David P. Lanferman

- Damages caused by the encroachment (First Count, Paragraph 8).

- That defendant's actions were malicious and oppressive toward plaintiff (First Count, Paragraph 9).

- Irreparable injury that may be suffered by plaintiff as grounds for the injunction if the encroachment is a trespass (First Count, Paragraph 10) [*see Code Civ. Proc. § 526(a)(2)* (grounds for injunction); *see Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 201, 323 P.2d 1001* (equity will enjoin any act that, if continuous, will give rise toan easement); *Pearson v. Baldwin (1954) 125 Cal. App. 2d 670, 673, 270 P.2d 866]* .

If the encroachment is a nuisance rather than a trespass, the injunction may issue without alleging any special grounds [

see Code Civ. Proc. § 731]. For additional general discussion on trespass, see Ch. 550, *Trespass* .

The complaint in *[1], above,* alleges in the second count, in the alternative, that the encroachment was placed on plaintiff's property negligently (Second Count, Paragraph 2) [*see Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 564, 250 P.2d 660* (right to injunction where encroachment is negligent)].

[4] Verification

Verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified)]. However, if the complaint is verified, the defendant must file a verified answer [*Code Civ. Proc. § 446(a)*] and cannot make a general denial [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

An action seeking a permanent injunction must be brought in the superior court and may not be a limited civil case except as otherwise authorized by statute [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86, 580(b)(2)*]. For coverage of issues relating to venue and jurisdiction, see *§§ 11.13* and *11.14*, respectively. For a complete discussion of jurisdiction and related issues, see Ch. 323, *Jurisdiction, Inconvenient Forum, and Appearances* .

[6] Cross References

For alternative fictitious name allegations and agency allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch.108, *Captions and Introductions*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively

For other related forms for use in actions for injunction and trespass actions, see Ch. 303, *Injunctions* , and Ch. 550, *Trespass*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPermanent InjunctionsReal Property LawAdjoining LandownersEncroachmentsCivil ProcedureRemediesDamagesPunitive DamagesCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesDamagesCompensatory Damages

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Chapter 11 ADJOINING LANDOWNERS
PART IV. FORMS
A. Encroachments and Other Interferences With Use of Real Property

1-11 California Forms of Pleading and Practice--Annotated § 11.71

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§ 11.71 Complaint to Abate Private Nuisance [Code Civ. Proc. § 731] and for Damages--Structure on Adjoining Land Encroaching on Plaintiff's Airspace

[1] FORM Complaint to Abate Private Nuisance [Code Civ. Proc. § 731] and for Damages--Structure on Adjoining Land Encroaching on Plaintiff's Airspace

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR ABATEMENT OF PRIVATE
_____ [*name*],	)	NUISANCE AND DAMAGES
Defendant.	)	(Structure on Adjoining Land Encroaching on
	)	Plaintiff's Airspace)
	)	

Plaintiff alleges:

1. [*Ownership and possession of described property by plaintiff. See § 11.70[1], Paragraph 1.*]

2. [*Ownership and possession of described property by defendant. See § 11.70[1], Paragraph 2.*]

3. [*Property of plaintiff adjoins property of defendant. See § 11.70[1], Paragraph 3.*]

[4. *Fictitious name allegation, if appropriate. See § 11.70[1], Paragraph 4.*]

[5. *Agency allegation, if appropriate. See § 11.70[1], Paragraph 5.*]

6. On or about _____ [*date*], defendant caused a structure to be built on his/her property at the previously mentioned boundary between plaintiff's and defendant's property, consisting of _____ [*describe structure, e.g.,* a two-story dwelling]. The structure was built in such a manner that it encroaches on the airspace over plaintiff's land in that _____ [*describe encroachment, e.g.,* the eaves of the dwelling] extend over the previously mentioned boundary line and over plaintiff's property at a height of _____ [*e.g.,* 10 feet], a depth of _____ [*e.g.,* 10 feet], and for a distance along the boundary of _____ [*e.g.,* 10 feet].

7. The encroachment has caused injury to plaintiff in that it constitutes an obstruction to the free use of plaintiff's property so as to interfere with the comfortable enjoyment of life and property in the following ways: _____ [*set forth supporting facts, e.g.,* plaintiff has certain improvements on his/her property close to the previously mentioned boundary line, consisting of a one-story dwelling house that he/she desires to enlarge by addinga second story level. The previously mentioned encroachment is directly above the portion of plaintiff's dwelling that plaintiff desires to enlarge and within the area of the proposed second story. Unless the encroachment is removed plaintiff will be unable to make the desired enlargement].

8. The encroachment is a nuisance and has injured plaintiff by obstructing plaintiff's free use of his/her property as alleged above, all to plaintiff's damage in the sum of $_____.

9. _____ [*Allege special damages, if any, e.g.,* On or about _____ (*date*), when plaintiff first desired to enlarge his/her dwelling he/she obtained an estimate from a licensed building contractor of the cost of materials and labor to do so in the sum of $_____. The estimate was effective for a period of _____ (*e.g.,* two months). Plaintiff would have had the work done by the contractor within the effective period of the estimate if plaintiff had not been hindered in so doing by defendant's encroachment. The effective date of the previously mentioned estimate has now expired and plaintiff is now unable to have the same work done for less than $_____, wherefore plaintiff has been damaged by the encroachments in the sum of $_____].

10. On or about _____ [*date*], plaintiff notified defendant of the encroachment and of _____ [*manner in which encroachment is injuring plaintiff, e.g.,* the fact that the encroachment was interfering with plaintiff's desired improvements and enlargement of his/her dwelling]. Plaintiff demanded that the encroachment be removed. Defendant nevertheless refused, and continues to refuse, to remove the encroachment.

11. Defendant's encroachment on plaintiff's land constitutes a nuisance and plaintiff is therefore entitled to an injunction pursuant to *Code of Civil Procedure Section 731* to compel defendant to abate the nuisance.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a permanent injunction compelling defendant to remove from plaintiff's airspace the encroachment described in this complaint and to restore the airspace to plaintiff's use and enjoyment.

2. For damages.

3. For costs of suit incurred by this complaint.

4. For other and further relief as the court deems proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 11.70[1].*]

[2] Use of Form

This form is a complaint used in an action to compel removal of a structure on adjoining land that encroaches on plaintiff's airspace.

In this complaint, because the encroachment is not on the land but in the airspace above the land, the action is one to abate a nuisance rather than one to enjoin a trespass [*see Kafka v. Bozio (1923) 191 Cal. 746, 750, 218 P. 753* ; *Case v. Sisich (1929) 97 Cal. App. 106, 110, 275 P. 492* ; *see also §§ 11.21[2], [3], 11.22[1]*]. As an alternative to seeking abatement of the encroachment, plaintiff could sue for permanent damages caused by the encroachment and include an alternative count for that suit in the same complaint, although an election between the two inconsistent remedies would ultimately be required [*see Spaulding v. Cameron (1952) 38 Cal. 2d 265, 269, 239 P.2d 625* ; *see also Slater v. Shell Oil Co. (1943) 58 Cal. App. 2d 864, 869-870, 137 P.2d 713]* .

For a discussion of the remedies for encroachments, see *§ 11.23*.

[3] Allegations

The complaint in *[1], above,* alleges (1) ownership and control of the respective adjoining properties by plaintiff and defendant (Paragraphs 1-3); (2) a description of the encroachment (Paragraph 7); and (3) facts showing that the encroachment is a nuisance as defined in *Civ. Code § 3479* (Paragraph 7) [*see Code Civ. Proc. § 731* (action to enjoin or abate a nuisance)].

[4] Verification

Verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified)]. However, if the complaint is verified, the defendant is required to file a verified answer [*Code Civ. Proc. § 446(a)*] and is precluded from making a general denial [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

An action seeking a permanent injunction must be brought in the superior court and may not be a limited civil case except as otherwise authorized by statute [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86, 580(b)(2)*]. For coverage of issues relating to venue and jurisdiction, see *§§ 11.13* and *11.14*, respectively. For a complete discussion of

jurisdiction and related issues, see Ch. 323, *Jurisdiction, Inconvenient Forum, and Appearances* .

[6] Cross References

For forms for use in nuisance actions generally, see Ch. 391, *Nuisance*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceTypesPrivate NuisanceReal Property LawAdjoining LandownersEncroachmentsReal Property LawTortsNuisanceRemediesDamagesCompensatory DamagesCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesDamagesCompensatory Damages

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A. Encroachments and Other Interferences With Use of Real Property

1-11 California Forms of Pleading and Practice--Annotated § 11.72

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§ 11.72 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Permanent Injunction to Compel Removal of Encroachment--Doctrine of Balancing of Conveniences

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Permanent Injunction to Compel Removal of Encroachment--Doctrine of Balancing of Conveniences

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. In encroaching on plaintiff's land as alleged in this complaint, defendant acted innocently, in good faith, and in the belief that the portion of property encroached on belonged to defendant. Prior to causing the encroachment defendant relied on information from a surveyor licensed by the State of California and from maps and boundary descriptions showing that the land belonged to defendant. Plaintiff did not at any time until after completion of the encroachment object to its existence, nor did he/she inform defendant that the subject land belonged to plaintiff.

2. _____ [*Set forth facts showing that hardship to defendant if injunction is granted would be greatly disproportionate to hardship to plaintiff if injunction is denied, e.g.,* The cost of removal of the encroachment would be $_____, which greatly exceeds any damage to plaintiff's property caused by its continuance. The encroachment does not seriously interfere with plaintiff's use or enjoyment of his/her property, whereas its removal would cause defendant's property to become unsightly and would substantially limit defendant's use and enjoyment of his/her land and property in the following respects: _____ (*specify*)].

3. Plaintiff will not suffer irreparable injury as a result of the continued presence of the encroachment in that _____ [*set forth supporting facts, e.g.*, the presence of the encroachment enhances the value of plaintiff's property and has not caused, nor will it cause, depreciation of its saleable value, nor does it limit or preclude any present or future use of plaintiff's property].

[2] Use of Form

This form is a defense to be asserted in an action seeking an injunction to compel removal of an encroachment, when (1) the encroachment was neither intentionally nor negligently placed on plaintiff's property, and (2) defendant seeks to limit plaintiff to pecuniary compensation because of the relative hardship to defendant in removing the encroachment.

Affirmative relief may be sought in conjunction with this defense, by way of cross complaint [*see Code Civ. Proc. §§ 425.10* (contents of cross complaint), 431.30(c) (affirmative relief may not be claimed by way of answer)] to protect defendant in his or her continued use of the encroachment. This relief has frequently been in the form of an easement grantedby the court [*see Ukhtomski v. Tioga Mutual Water Co. (1936) 12 Cal. App. 2d 726, 728-729, 55 P.2d 1251* ; *see also Hirshfield v. Schwartz (2001) 91 Cal. App. 4th 749, 766-767, 110 Cal. Rptr. 2d 861* ; *Baglione v. Leue (1958) 160 Cal. App. 2d 731, 735-736, 325 P.2d 471* ; *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 563, 250 P.2d 660* ; Ch. 13, *Adverse Possession*], but may not exceed what is reasonably necessary to protect defendant [*Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 563, 250 P.2d 660* (holding that court should have awarded easement instead of fee title to encroached land); *see § 11.23[2][b][iii]*].

For complaints seeking the removal of encroachments, see *§§ 11.70, 11.71*. Encroachments and related topics are *covered in § 11.20* et seq. For a discussion of actions for injunctions, see *§ 11.23[2]*.

[3] Allegations

The form in *[1], above*, alleges (1) defendant's innocence (Paragraph 1), (2) the disproportionate hardship to defendant if he or she is compelled to remove the encroachment (Paragraph 2), and (3) the absence of irreparable injury to plaintiff if the encroachment is permitted to continue (Paragraph 3) [*see Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 562-563, 250 P.2d 660* (leading case); *Brown Derby Hollywood Corp. v. Hatton (1964) 61 Cal. 2d 855, 858, 40 Cal. Rptr. 848, 395 P.2d 896]* .

[4] Verification

Verification of the complaint to which this defense is a response is not required [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified)]. However, if the complaint is verified, the defendant is required to file a verified answer [*Code Civ. Proc. § 446(a)*] and is precluded from making a general denial [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewReal Property LawAdjoining LandownersEncroachmentsCivil ProceduresPleading & PracticePleadingsAnswersCivil ProceduresRemediesInjunctionsPermanent Injunctions

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A. Encroachments and Other Interferences With Use of Real Property

1-11 California Forms of Pleading and Practice--Annotated § 11.73

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§ 11.73 Complaint to Abate Private Nuisance [Code Civ. Proc. § 731] and for Damages--Water Overflowing and Seeping From Adjoining Property Onto Plaintiff's Property--Natural Watercourse Obstructed

[1] FORM Complaint to Abate Private Nuisance [Code Civ. Proc. § 731] and for Damages--Water Overflowing and Seeping From Adjoining Property Onto Plaintiff's Property--Natural Watercourse Obstructed

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR ABATEMENT OF PRIVATE
_____ [*name*],	)	NUISANCE AND DAMAGES
Defendant.	)	(Water Overflowing and Seeping From Adjoining
	)	Property Onto Plaintiff's Property; Natural Water-
	)	course Obstructed)

Plaintiff alleges:

1. [*Ownership and possession of described property by plaintiff. See § 11.70[1], Paragraph 1.*]

2. [*Ownership and possession of described property by defendant. See § 11.70[1], Paragraph 2.*]

3. [*Property of plaintiff adjoins property of defendant. See § 11.70[1], Paragraph 3.*]

[4. *Fictitious name allegation, if appropriate. See § 11.70[1], Paragraph 4.*]

[5. *Agency allegation, if appropriate. See § 11.70[1], Paragraph 5.*]

6. _____ [*Describe natural watercourse, e.g.,* A creek channel runs through and across defendant's property from the _____ (*e.g.,* east) boundary to the _____ (*e.g.,* west) boundary thereof. Prior to _____ (*date of obstruction*), rain waters flowed through the channel while it was in its natural condition in a _____ (*e.g.,* westerly) direction. So long as the channel was in its natural condition, the rain waters did not enter on plaintiff's property or land lying to the _____ (*e.g.,* south) thereof].

7. Since _____ [*date*], defendant has maintained, and still maintains, a _____ [*source of obstruction, e.g.,* driveway on his/her property that crosses the previously mentioned creek channel at a location on defendant's property]. In maintaining the _____ [*e.g.,* road] defendant has caused the rain waters to become obstructed and diverted from their natural watercourse down a grade and slope onto plaintiff's land andproperty. Defendant has failed and neglected, and still fails and neglects, to provide proper facilities, or any facilities, for handling the diverted waters so as to prevent their overflowage and seepage onto plaintiff's property and the resulting damage to plaintiff.

8. During the period from _____ [*date*], through and including _____ [*date that is within three years prior to filing complaint*], waters were diverted onto plaintiff's property and land from and away from their natural watercourse on defendant's property. The waters greatly exceeded the waters that would normally have flowed on plaintiff's land and property during the period had the diversion and obstruction not occurred.

9. As a proximate result of the diversion of water, plaintiff's land and properties were injured in that _____ [*describe actual damage caused by diversion, e.g.,* the waters seeped and overflowed into and through plaintiff's dwelling house causing damage to the house and to the furnishings in the house] all to plaintiff's damage in the sum of $_____.

10. The maintenance by defendant of the previously described obstruction to the natural watercourse has obstructed plaintiff's free use of his/her land and property so as to interfere with the comfortable enjoyment of life and property and thus constitutes a nuisance in that _____ [*set forth supporting facts, e.g.,* plaintiff's use and enjoyment of his/her land and property is continuously threatened with flooding, damage, and destruction from the waters being diverted from defendant's land, and plaintiff's property has been injured as alleged above].

11. On or about _____ [*date*], plaintiff notified defendant of the waters flowing onto plaintiff's land from defendant's property and the resulting damage caused by the waters, and demanded that defendant remove the obstruction from the natural watercourse and restore it to its natural condition or that he/she provide proper facilities to prevent waters from flowing onto plaintiff's land and property. Defendant refused and still refuses to comply with the demand.

12. Defendant's obstruction of the watercourse constitutes a nuisance and plaintiff is thereby entitled to an injunction pursuant to *Code of Civil Procedure Section 731* to compel defendant to remove the obstruction.

WHEREFORE plaintiff prays judgment against defendant as follows:

1. For a permanent injunction enjoining and restraining defendant from permitting waters diverted from the natural watercourse to overflow and to seep onto plaintiff's land and property and to cause damage to plaintiff's land and property.

2. For damages in the sum of $_____.

3. For costs of suit incurred in this complaint.

4. For other and further relief as the court deems proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 11.70[1].*]

[2] Use of Form

This form is a complaint for use in an action (1) to enjoin as a nuisance the diversion of waters from their natural watercourse on adjoining land that causes seepage and overflowage of the waters onto plaintiff's land, and (2) to obtain damages for any resulting injury.

If a temporary restraining order is sought, it must appear from facts shown by verified complaint, or by affidavit (or declaration under penalty of perjury executed in California [*Code Civ. Proc. § 2015.5*]), that great or irreparable injury would result to plaintiff [*Code Civ. Proc. § 527*]. For forms for use generally in actions for an injunction, see Ch. 303, *Injunctions* .

When a natural watercourse, or system of drainage, is obstructed, the party maintaining the obstruction is under a continuing duty to provide proper facilities for handling the waters of the stream so as to prevent damage to the property of others. The duty is to avoid interrupting the natural habits of the stream so as to cause an overflow beyond that which would have occurred in the absence of the obstruction [*Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 374, 82 Cal. Rptr. 689]* .

For coverage of general rights and duties relating to a nuisance, see *§ 11.21[3]*. For discussion of injunctions as a remedy for a nuisance, see *§ 11.23[2]*.

[3] Allegations

The complaint in *[1], above*, alleges (1) the ownership by plaintiff and defendant of the respective adjoining lands (Paragraphs 1-3), (2) the nuisance maintained on defendant's land (Paragraphs 7 and 8), and (3) the injury to plaintiff caused by the nuisance (Paragraphs 9 and 10) [*see Civ. Code § 3479* (defining nuisance); *Code Civ. Proc. § 731* (action to enjoin or abate nuisance); *Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 372-373, 82 Cal. Rptr. 689* (obstruction of natural watercourse as nuisance)].

An alternative count for damages on the theory of negligence could be included as a separate count [*see § 11.70[1]*, Second Count; *see also Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 372-373, 82 Cal. Rptr. 689]* .

[4] Verification

Verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to beverified)]. However, if the complaint is verified, the defendant is required to file a verified answer [*Code Civ. Proc. § 446(a)*] and is precluded from making a general denial [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

An action seeking a permanent injunction must be brought in the superior court and may not be a limited civil case except as otherwise authorized by statute [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86, 580(b)(2)*]. For coverage of issues relating to venue, see *§ 11.13*, and for coverage of issues relating to jurisdiction, see *§ 11.14*. For a complete discussion of jurisdiction and related issues, see Ch. 323, *Jurisdiction, Inconvenient Forum, and Appearances* .

[6] Cross References

For forms for use in actions involving water damage to property, see Ch. 421, *Premises Liability*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceTypesPrivate NuisanceReal Property LawAdjoining LandownersEncroachmentsReal Property LawAdjoining LandownersWaterCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

California Forms of Pleading and Practice--Annotated

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 11 ADJOINING LANDOWNERS
PART IV. FORMS
A. Encroachments and Other Interferences With Use of Real Property

1-11 California Forms of Pleading and Practice--Annotated § 11.74

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§ 11.74 Complaint to Abate Private Nuisance [Code Civ. Proc. § 731] and for Damages--Change in Grade of Adjoining Land Causing Soil and Debris Deposits on Plaintiff's Property

[1] FORM Complaint to Abate Private Nuisance [Code Civ. Proc. § 731] and for Damages--Change in Grade of Adjoining Land Causing Soil and Debris Deposits on Plaintiff's Property
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR ABATEMENT OF PRIVATE
_____ [*name*],	)	NUISANCE AND DAMAGES
Defendant.	)	(Change in Grade of Adjoining Land Causing Soil
	)	and Debris Deposits on Plaintiff's Property)
	)	

Plaintiff alleges:

1. [*Ownership and possession of described property by plaintiff. See § 11.70[1], Paragraph 1.*]

2. [*Ownership and possession of described property by defendant. See § 11.70[1], Paragraph 2.*]

3. [*Property of plaintiff adjoins property of defendant. See § 11.70[1], Paragraph 3.*]

[4. *Fictitious name allegation, if appropriate. See § 11.70[1], Paragraph 4.*]

[5. *Agency allegation, if appropriate. See § 11.70[1], Paragraph 5.*]

6. On or about _____ [*date*], defendant caused the grade of his/her land adjoining plaintiff's land to be raised _____ [*specify in inches or feet*], causing defendant's land to be _____ [*specify in inches or feet*] higher than the adjoining land of plaintiff. In so doing defendant failed and still fails to provide facilities to prevent slippage of soil, dirt, and debris from his/her land onto plaintiff's adjoining land as a result of the raised grade.

7. As a proximate result of raising the grade on defendant's land, soil, dirt, and debris have fallen from defendant's land onto plaintiff's adjoining land and have become deposited on that land.

8. In raising the grade of his/her land and in failing to prevent slippage of soil, dirt, and debris resulting from raising the grade, defendant has obstructed and still obstructs plaintiff's free use of his/her land and property so as to interfere with plaintiff's comfortable enjoyment of life and property, and is thus maintaining a nuisance in that _____ [*set forthsupporting facts, e.g.,* plaintiff desires to landscape and develop the portion of his/her land encroached on as a flower nursery but is prevented and obstructed in doing so as long as the soil, dirt, and debris from defendant's land is deposited and continues to be deposited on plaintiff's land].

9. As a proximate result of defendant's acts alleged in this complaint and during the period from _____ [*date*], to and including _____ [*date*], plaintiff has suffered injury to his/her land and property in that _____ [*describe damage*], all to plaintiff's damage in the sum of $_____.

10. On or about _____ [*date*], plaintiff notified defendant that the soil, dirt, and debris from his/her property were deposited on plaintiff's land as a result of the increased grade described above, and demanded that the matter be removed and that facilities be provided to prevent additional slippage. Defendant refused and still refuses to comply with plaintiff's demand.

11. Defendant's acts as alleged above constitute a nuisance and plaintiff is therefore entitled to an injunction pursuant to *Code of Civil Procedure Section 731* to compel defendant to abate the nuisance.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a permanent injunction enjoining the nuisance alleged in this complaint and compelling defendant to maintain his/her land so as to prevent soil, dirt, and debris from slipping and falling on plaintiff's property.

2. For damages in the sum of $_____.

3. For costs of suit incurred by this complaint.

4. For other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 11.70[1].*]

[2] Use of Form

This form is a complaint used to abate a nuisance consisting of slippage and deposit of soil, dirt, and debris onto plaintiff's land from adjoining land as the result of an increase in grade of the adjoining land.

For coverage of general rights and duties relating to a nuisance, see *§ 11.21[3]*. For discussion of injunctions as a remedy for a nuisance, see *§ 11.23[2]*.

[3] Allegations

The complaint in *[1], above,* alleges (1) the ownership of adjoining land by plaintiff and defendant (Paragraphs 1-3); and (2) the nuisance causedby the increase in grade of defendant's land (Paragraphs 7-8) [*see Civ. Code § 3479* (defining nuisance); *Code Civ. Proc. § 731* (action to abate nuisance); *Kennedy v. Rosecrans Gardens, Inc. (1952) 114 Cal. App. 2d 87, 90, 249 P.2d 593]* .

[4] Verification

Verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified)]. However, if the complaint is verified, the defendant is required to file a verified answer [*Code Civ. Proc. § 446(a)*] and is precluded from making a general denial [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

An action seeking a permanent injunction must be brought in the superior court and may not be a limited civil case except as otherwise authorized by statute [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86, 580(b)(2)*]. For coverage of issues relating to venue and jurisdiction, see *§§ 11.13* and *11.14*, respectively. For a complete discussion of jurisdiction and related issues, see Ch. 323, *Jurisdiction, Inconvenient Forum, and Appearances* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceTypesPrivate NuisanceReal Property LawAdjoining LandownersEncroachmentsReal Property LawTortsNuisanceRemediesDamagesCompensatory DamagesCivil ProceduresPleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesDamagesCompensatory Damages

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 11 ADJOINING LANDOWNERS
PART IV. FORMS
A. Encroachments and Other Interferences With Use of Real Property

1-11 California Forms of Pleading and Practice--Annotated § 11.75

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§ 11.75 Complaint to Abate Private Nuisance [Code Civ. Proc. § 731] and for Damages--Encroaching Roots and Branches From Trees Located on Adjoining Land

[1] FORM Complaint to Abate Private Nuisance [Code Civ. Proc. § 731] and for Damages--Encroaching Roots and Branches From Trees Located on Adjoining Land

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR ABATEMENT OF PRIVATE
_____ [*name*],	)	NUISANCE AND DAMAGES
Defendant.	)	(Removal of Encroaching Roots and Branches)
	)	
	)	

Plaintiff alleges:

1. [*Ownership and possession of described property by plaintiff. See § 11.70[1], Paragraph 1.*]

2. [*Ownership and possession of described property by defendant. See § 11.70[1], Paragraph 2.*]

3. [*Property of plaintiff adjoins property of defendant. See § 11.70[1], Paragraph 3.*]

[4. *Fictitious name allegation, if appropriate. See § 11.70[1], Paragraph 4.*]

[5. *Agency allegation, if appropriate. See § 11.70[1], Paragraph 5.*]

6. There is situated and growing on defendant's land a _____ [*type of tree, e.g.*, eucalyptus] tree, _____ feet in height and _____ feet in circumference. The tree is located _____ [*either* at *or* near] the boundary described above between plaintiff's and defendant's property and it is so maintained by defendant that its branches and roots are permitted to encroach on plaintiff's property, causing the damage described in this complaint.

7. The encroaching branches and roots from defendant's tree constitute a continuous hazard and nuisance by obstructing plaintiff's free use of his/her land and property so as to interfere with plaintiff's comfortable enjoyment of life and property in that _____ [*set forth supporting facts, e.g.*, plaintiff lives in constant fear of injury to his/her person and property from falling branches and is deprived of and obstructed in using many areas of his/her land for growing plants and shrubs by reason of the roots of defendant's tree].

8. During the period from _____ [*date*], to and including _____ [*date*], plaintiff has suffered injuries to his/her property as a proximate result of the encroaching branches and roots from defendant's tree in that _____ [*describe damage, e.g.*, heavy branches have broken from the tree and fallen on the roof of plaintiff's dwelling; the roots have grown through the soil and earth on plaintiff's land, breaking and cracking paved walkways, and withdrawing the moisture and food constituents from plaintiff's soil, causing plaintiff's plants and vegetation to become starved and die], all to plaintiff's damage in the sum of $_____.

9. On or about _____ [*date*], plaintiff notified defendant that the branches and roots from his/her tree were encroaching on plaintiff's land and property constituting a nuisance and causing damage to plaintiff. At the same time plaintiff demanded that the branches and roots be removed from plaintiff's property and that defendant maintain his/her tree so as not to permit the branches or roots from the tree to encroach on or damage plaintiff's land and property. Defendant refused and still refuses to comply with plaintiff's demand.

10. Defendant's encroachment on plaintiff's land constitutes a nuisance and plaintiff is therefore entitled to an injunction pursuant to *Code of Civil Procedure Section 731* to compel defendant to remove the encroachment.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a permanent injunction enjoining the nuisance caused by defendant's tree and compelling defendant to permanently maintain his/her tree so as not to encroach on or cause damage to plaintiff's land and property.

2. For general damages in the sum of $_____.

3. For costs of suit incurred by this complaint.

4. For other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 11.70[1].*]

[2] Use of Form

This form is a complaint used in an action to compel an adjoining landowner (1) to remove offensive roots and branches of his or her tree from plaintiff's property, and (2) to maintain the tree so that its roots and branches do not continue to encroach on plaintiff's property. It also seeks damages for any injury caused by the roots and branches.

To the extent that encroaching tree branches are a nuisance as defined in *Civ. Code § 3479*, the person over whose land they extend is entitled to cut them off or maintain an action for damages and abatement againstthe owner of the land on which they grow. He or she may not, however, cut down the tree nor cut the branches beyond the extent to which they overhang his or her soil [*Grandona v. Lovdal (1886) 70 Cal. 161, 162, 11 P. 623* ; *Bonde v. Bishop (1952) 112 Cal. App. 2d 1, 7, 245 P.2d 617* ; *see also Parsons v. Luhr (1928) 205 Cal. 193, 197, 270 P. 443* (tree branches as nuisance)]. The same rule applies to a nuisance due to the growth of roots of trees that extend into the land of another, withdrawing moisture and food constituents required in the growing of crops [*Stevens v. Moon (1921) 54 Cal. App. 737, 740, 202 P. 961]* or other vegetation [*Parsons v. Luhr (1928) 205 Cal. 193, 197, 270 P. 443]* .

Encroaching roots and branches do not constitute a nuisance if they do not injuriously affect plaintiff's property or lessen his or her personal enjoyment. He or she can, nevertheless, cut them off or trim them at his or her pleasure [*Grandona v. Lovdal (1889) 78 Cal. 611, 617-618, 21 P. 366]* . To maintain an action to abate the nuisance caused by encroaching roots and branches, plaintiff must show that he or she is or will be damaged by the acts complained of [*Stevens v. Moon (1921) 54 Cal. App. 737, 742, 202 P. 961]* .

For coverage of general rights and duties relating to encroaching trees, see *§ 11.22*[2].

[3] Allegations

The complaint in [1], *above*, alleges (1) the ownership of the adjoining lands by plaintiff and defendant (Paragraphs 1-3), (2) the existence and location of the subject tree on defendant's land (Paragraph 6), and (3) the encroaching roots and branches of the tree causing injury to plaintiff and constituting a nuisance (Paragraphs 7-8) [*see Civ. Code § 3479*; *Grandona v. Lovdal (1886) 70 Cal. 161, 162, 11 P. 623* ; *Bonde v. Bishop (1952) 112 Cal. App. 2d 1, 7, 245 P.2d 617* (suits to enjoin encroaching roots and branches as nuisance)].

[4] Verification

Verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified)]. However, if the complaint is verified, the defendant is required to file a verified answer [*Code Civ. Proc. § 446(a)*] and is precluded from making a general denial [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

An action seeking a permanent injunction must be brought in the superior court and may not be a limited civil case except as otherwise authorized by statute [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86, 580(b)(2)*]. For

coverage of issues relating tovenue, see *§ 11.13*, and for coverage of issues relating to jurisdiction, see *§ 11.14*. For a complete discussion of jurisdiction and related issues, see Ch. 323, *Jurisdiction, Inconvenient Forum, and Appearances*
.

[6] Cross References

For a complaint against an adjoining landowner for treble damages for destruction of ornamental trees, see Ch. 550, *Trespass*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceTypesPrivate NuisanceReal Property LawAdjoining LandownersEncroachmentsReal Property LawTortsNuisanceRemediesDamagesCompensatory DamagesCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesDamagesCompensatory Damages

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 11 ADJOINING LANDOWNERS
PART IV. FORMS
A. Encroachments and Other Interferences With Use of Real Property

1-11 California Forms of Pleading and Practice--Annotated §§ 11.76-11.89

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[Reserved]

§§ 11.76[Reserved]

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 11 ADJOINING LANDOWNERS
PART IV. FORMS
B. Lateral and Subjacent Support

1-11 California Forms of Pleading and Practice--Annotated § 11.90

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§ 11.90 Notice of Intent to Excavate [Civ. Code § 832]

[1] FORM Notice of Intent to Excavate [Civ. Code § 832]

TO: _____ [*name*]
_____ [*street*]
_____ [*city*], California

NOTICE IS HEREBY GIVEN that the undersigned intends to make an excavation on the premises _____ [*either* owned *or* leased] by him/her at _____ [*address*], California.

The excavation will begin on _____ [*date*], and is intended to extend to a depth of _____ feet.

[*EITHER, if the excavation is intended to be of a greater depth than the walls or foundations of any adjoining building or*
other structure, and is to be so close as to endanger the building or other structure, the following may be included:]

You are hereby given permission to enter the land where the excavation will be conducted and to take measures to protect your land and buildings within _____ (*period of at least 30 days*) from this notice.

[*OR, if the excavation is intended to be or is deeper than the standard depth of foundations, defined as nine feet below*

adjacent curb level (Civ. Code § 832(4)), and a wall or foundation of a building or structure on adjoining land goes to standard depth or deeper, the following may be included:]

The undersigned requests your permission to enter the premises at _____ (*address*) in order to protect your land and any building or structure on the land whose foundation goes to standard depth or deeper. Any necessary work will be done without cost to you.
Dated: _____.

_____ [*signature*]

[2] Use of Form

This form is used to give notice to the owner of adjoining lands of an intention to excavate. It is given by the owner of the land or his or her lessee intending to excavate, and states when the excavating will begin and the intended depth of the excavation [*see Civ. Code § 832(1)*]. If the excavation is deeper than the walls or foundations of any adjoining building or other structure, and is to be so close as to endanger the building or other structure, the notice should also give permission to the adjoining owner to enter the land to be excavated and allow him or her at least 30 days in which to take measures to protect his or her land and buildings [*see Civ. Code § 832(3)*]. If the excavation is intended to be or is deeper than the standard depth of foundations (nine feet), and a wall or foundation of a building or structure on adjoining land goes to standard depth or deeper, the notice should request permission to enter the adjoining premises in order to protect the land and building without cost to the adjoining owner [*see Civ. Code § 832(4)*].

Any owner of land or the owner's lessee who intends to make or permit an excavation is required to give reasonable notice to the owner or owners of adjoining lands and of buildings or other structures, stating the depth to which the excavation is intended to be made, and when the excavating will begin [*Civ. Code § 832(1)*]. The giving of this notice is a substantial, rather than formal, requirement [*McIvor v. Mercer-Fraser Co. (1946) 76 Cal. App. 2d 247, 252, 172 P.2d 758]* . The purpose of the notice is to give the adjacent landowner an opportunity to protect his or her property from possible damage if he or she so desires [*First National Bank v. Villegra (1891) 92 Cal. 96, 99, 28 P. 97]* . Actual knowledge of the excavation by the injured landowner does not dispense with the notice requirement [*McIvor v. Mercer-Fraser Co. (1946) 76 Cal. App. 2d 247, 252-253, 172 P.2d 758]* .

For additional coverage of the right to excavate and conditions governing the excavation, see *§ 11.32[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersLateral & Subjacent Support

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 11 ADJOINING LANDOWNERS
PART IV. FORMS
B. Lateral and Subjacent Support

1-11 California Forms of Pleading and Practice--Annotated § 11.91

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§ 11.91 Complaint for Damages and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526]--Removal of Lateral Support [Civ. Code § 832]--General Form

[1] FORM Complaint for Damages and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526]--Removal of Lateral Support [Civ. Code § 832]--General Form
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AND PERMAN-
_____ [*name*],	)	ENT INJUNCTION
Defendant.	)	(Removal of Lateral Support)
	)	
	)	

Plaintiff alleges:

1. Plaintiff is, and at all times mentioned in this complaint was, the owner and in possession and control of that real

property situated in _____ County, known as _____ [*street*], _____ [*city*], California, more particularly described as follows: _____ [*legal description*]. [Situated on the property are certain improvements consisting of _____ (*describe*).]

2. Defendant is, and at all times mentioned in this complaint was, the owner and in possession and control of that real property located at _____ [*street*], _____ [*city*], _____ County, California, more particularly described as follows: _____ [*legal description*].

3. The above-described properties of plaintiff and defendant adjoin each other at plaintiff's _____ [*e.g.*, north] and defendant's _____ [*e.g.*, south] boundaries, and plaintiff is a coterminous owner with relation to defendant's adjoining land.

[4. *If the names of any defendants are unknown, include a fictitious name allegation, e.g.,* Plaintiff is ignorant of the true names and capacities of defendants sued in this complaint as DOES I-_____, inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and therefore alleges that each of the fictitiously named defendants is responsible in some manner for the control and maintenance of the premises at _____ [*address of excavated land*] or for the excavation on the property as alleged in this complaint.)]

[5. *If there are multiple defendants and one defendant is sued on the principal of respondent superior, include an agency allegation, e.g.,* At all times mentioned in this complaint, defendants _____ (*names*) were the agents and employees of the remaining defendants, and, in doing the things alleged in this complaint, were acting within the scope of the agency.]

6. At all times mentioned in this complaint, plaintiff's land, in its natural state, was receiving and continues to receive lateral support from defendant's adjoining land, except to the extent that the support was removed and damaged by the excavations alleged in this complaint.

7. During the period from _____ [*date*], to _____ [*date*], excavations were conducted on defendant's property with his/her knowledge, consent, and direction.

8. [*Allege one or more of the following:*]

The excavations were not proper or usual excavations for the purpose of construction or improvement in that _____ [*set forth supporting facts*].

[*OR*]

Defendant failed to give plaintiff _____ [any *or* reasonable] notice stating the depth to which the excavation was intended to be made and when the excavating would begin.

[*OR*]

Defendant failed to exercise ordinary care and skill in making the excavations and failed to take _____ [any *or* reasonable] precautions to sustain the adjoining land of plaintiff in its natural state.

[*CONTINUE*]

9. As a proximate result of the excavating conducted _____ [*either* without notice *or* in the negligent manner alleged in this complaint] plaintiff's land was deprived of its lateral support, and since _____ [*date within three years of filing suit*], plaintiff's earth and soil have subsided and slipped into the excavation [and plaintiff's improvements have cracked and settled], causing damage to plaintiff in the sum of $_____.

10. The excavations alleged in this complaint threaten to cause further subsidence of plaintiff's earth and soil on his/her land and, unless defendant is enjoined and compelled by the court to take reasonable precautions to sustain plaintiff's land, plaintiff will have to commence a multiplicity of lawsuits against defendant to secure damages for each subsidence.

WHEREFORE, plaintiff prays judgment against defendant as follows;

1. For a permanent injunction enjoining defendant from removing plaintiff's lateral support and compelling him/her to restore the support to plaintiff's adjoining land.

2. For damages in the sum of $_____.

3. For costs of suit incurred by this complaint.

4. For other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].

_____ [*signature*]

[2] Use of Form

This form is a complaint for use in an action for damages and a permanent injunction to prevent removal of lateral support.

If a temporary restraining order is sought as well, it must appear from facts shown by verified complaint, or by affidavit

(or declaration under penalty of perjury executed in California [*Code Civ. Proc. § 2015.5*]), that great or irreparable injury would result to plaintiff before the matter can be heard on notice [*Code Civ. Proc. § 527(c)(1)*; *see* Ch. 303, *Injunctions* (forms for use generally in suits for injunction)].

For coverage of lateral support, see *§ 11.32*. For discussion of the accrual of a cause of action for lateral support damages, see *§ 11.34*.

[3] Allegations

The complaint in *[1], above,* alleges the following:

- A description of the respective properties owned by plaintiff and defendant (Paragraphs 1-2).

- The status of plaintiff and defendant as coterminous and adjacent landowners (Paragraph 3) [*see* Paragraphs 4 (fictitious defendants), 5 (multiple defendants in agency relationship)].

PRACTICE TIP:

Certificate of Merit. The plaintiff may, in any action of this type, name as defendants all parties who combine to change the grading or remove support [*see § 11.35[2]*]. If the plaintiff names any architects, surveyors, or engineers as defendants, plaintiff's counsel should determine whether *Code Civ. Proc. § 411.35* requires the filing of a "certificate of merit" before the date of service of the complaint or cross-complaint on any defendant orcross-defendant. This statute would also apply to any cross-action for indemnity by, for example, a defendant landowner against his or her consultants [for coverage of certificates of merit, *see* Ch. 56, *Architects*]. *By David P. Lanferman*

- The fact that plaintiff's land receives lateral support from defendant's adjoining land (Paragraph 6) [*see Civ. Code § 832*].

- The excavations undertaken on defendant's land (Paragraph 7).

- That the excavating was not of the type permitted by *Civ. Code § 832* or was not done in the manner prescribed by that statute (Paragraph 8) [*see Civ. Code § 832(1), (2)*; *Nippert v. Warneke (1900) 128 Cal. 501, 503-504, 61 P. 96* (necessity of alleging negligence where suitable notice of intent to excavate was given to plaintiff); *Wharam v. Investment Underwriters (1943) 58 Cal. App. 2d 346, 349-350, 136 P.2d 363* (common law absolute duty to protect support of adjoining land applicable where notice is not given)].

- The removal of lateral support from plaintiff's land causing subsidence of his or her earth and soil (Paragraph 9) [*see Civ. Code § 832*].

- Threats of future subsidence from the excavation as cause for an injunction to prevent a multiplicity of suits (Paragraph 10) [*see Civ. Code § 3422(3)*; *Code Civ. Proc. § 525(a)(6)*].

If the removal of lateral support causes an obstruction to the free use of plaintiff's property so as to interfere with the comfortable enjoyment of life or property it would constitute a nuisance and an additional count could be included for abatement [*see Civ. Code § 3479*; *Code Civ. Proc. § 731*; *see also* Ch. 391, *Nuisance*].

[4] Verification

Verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified)]. However, if the complaint is verified, the defendant is required to file a verified answer [*Code Civ. Proc. § 446(a)*] and is precluded from making a general denial [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

An action seeking a permanent injunction must be brought in the superior court and may not be a limited civil case except as otherwise authorized by statute [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86, 580(b)(2)*]. For coverage of issues relating to venue, see *§ 11.13*, and for coverage of issues relating to jurisdiction, see *§ 11.14*. For a complete discussion of jurisdiction and related issues, see Ch. 323, *Jurisdiction, Inconvenient Forum, and Appearances* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPermanent InjunctionsReal Property LawAdjoining LandownersLateral & Subjacent SupportReal Property LawTortsNuisanceRemediesDamagesCompensatory DamagesCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesDamagesCompensatory Damages

California Forms of Pleading and Practice--Annotated

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 11 ADJOINING LANDOWNERS
PART IV. FORMS
B. Lateral and Subjacent Support

1-11 California Forms of Pleading and Practice--Annotated § 11.92

AUTHOR: David P. Lanferman Editorial Consultant David P. Lanferman is a founding partner in the law firm of Lanferman, Fisher & Hashimoto in Fremont, California. He is a member of the Editorial Board of the California Real Estate Reporter (Matthew Bender), and is past Chair of the Real Estate Section of the Alameda County Bar Association. Mr. Lanferman is a graduate of the University of California, Davis (Phi Beta Kappa) and the University of California, Hastings College of the Law.

§ 11.92 Complaint for Damages--Removal of Lateral Support [Civ. Code § 832]--Excavation of Adjoining Land Below Standard Depth of Foundations Causing Injury to Plaintiff's Building [Civ. Code § 832(4)]--Against Owner of Excavated Land and Contractor

[1] FORM Complaint for Damages--Removal of Lateral Support [Civ. Code § 832]--Excavation of Adjoining Land Below Standard Depth of Foundations Causing Injury to Plaintiff's Building [Civ. Code § 832(4)]--Against Owner of Excavated Land and Contractor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Removal of Lateral Support)
Defendants.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. [*Ownership and possession of described property by plaintiff. See § 11.91[1], Paragraph 1.*]

2. [*Ownership and possession of described property by defendant. See § 11.91[1], Paragraph 2.*]

3. [*Property of plaintiff adjoins property of defendant. See § 11.91[1], Paragraph 3.*]

[4. *Fictitious name allegation, if appropriate. See § 11.91[1], Paragraph 4.*]

[5. *Agency allegation, if appropriate. See § 11.91[1], Paragraph 5.*]

6. At all times mentioned in this complaint, plaintiff's land, in its natural state, received lateral support from the adjoining land of defendant _____ [*name of owner*], except as the support was removed and damaged by the excavations alleged in this complaint.

7. There is situated on plaintiff's property a _____ [building *or* structure], the _____ [wall *or* foundation] of which extends [more than] nine feet below the adjacent curb level at the point where the joint property line between the adjoining properties of plaintiff and defendant _____ [*name of owner*] intersects the curb. The _____ [building *or* structure] is _____ [*describe, e.g.,* a two-story dwelling with stucco exterior walls].

8. On or about _____ [*date*], plaintiff received notice from defendant _____ [*name of owner*] stating that he/she intended to excavate on his/her property to a depth of _____ feet, which is [more than] nine feet below the adjacent curb level at the point where the joint property line between the adjoining properties of plaintiff and defendant _____ [name of owner] intersects the curb. The notice also stated that the excavating would begin on _____ [*date*].

9. In response to the notice, plaintiff gave permission and license to defendant _____ [*name of owner*] and his/her agents and contractors to enter plaintiff's adjoining land to protect the previously mentioned _____ [building *or* structure] belonging to plaintiff. Plaintiff informed defendant _____ [*name of owner*] of the depth of the _____ [wall *or* foundation] of the _____ [building *or* structure].

10. Notwithstanding that plaintiff informed defendant _____ [*name of owner*] of the depth of plaintiff's _____ [building *or* structure] and gave the previously mentioned license to enter plaintiff's adjoining land to protect the _____ [building *or* structure], defendant _____ [*name of owner*] and his/her agents and contractors failed to protect plaintiff's _____ [building *or* structure] from possible damage from the excavation.

11. On or about _____ [*date*], defendant _____ [*name of contractor*], with the knowledge and consent of defendant _____ [*name of owner*] and at his/her direction, commenced excavating on the property of defendant _____ [*name of owner*] and continued the excavating until _____ [*date*]. Plaintiff is informed and believes and on that basis alleges that the excavation extends more than nine feet below the adjacent curb level at the point where the joint property line between the adjoining properties of plaintiff and defendant _____ [*name of owner*] intersects the curb.

12. The excavation proximately caused plaintiff's land in its natural state to lose its lateral support, and, on or about _____ [*date*], plaintiff's earth and soil were caused by the excavation to slip and subside, resulting in injury to plaintiff's land and _____ [building *or* structure] in that _____ [*describe injury, e.g.,* the building became settled, cracked, and moved from its foundation], to plaintiff's damage in the sum of

$_____.

WHEREFORE, plaintiff prays judgment against defendants and each of them as follows:

1. For damages in the sum of $_____.

2. For costs of suit incurred by this complaint.

3. For other and further relief as the court deems proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 11.91[1].*]

[2] Use of Form

This form is a complaint for use in an action against a landowner and his or her contractor for damages to a building or structure caused by an excavation that goes deeper than the standard depth of foundations, defined in *Civ. Code § 832(4)*.

If an excavation is intended to be or is deeper than the standard depth of foundations, which is defined to be nine feet below the adjacent curb level at the point where the joint property line intersects the curb, and if there is any building or structure having a wall or foundation of standard depth or deeper on the land of the coterminous owner, then the owner of the land on which the excavation is being made is required, if given the necessary license to enter the adjoining land, to protect the adjoining land and any building or structure, without cost to its owner, from any damage by reason of the excavation, and is liable to the owner of the property for any damage except minor settlement cracks [*Civ. Code § 832(4)*]. It is noteworthy that negligence does not appear to be an element of liability under this rule; the excavator is liable under the circumstances specified if he or she merely fails to protect the adjoining owner's land and building or structure, given the license to do so, and damage is caused by the excavation [*see* Witkin, Summary of California Law, vol. 12, *Real Property*, § 379 (10th ed. 2005)].

For coverage of lateral support, see *§ 11.32*. For discussion of the accrual of a cause of action for lateral support damages, see *§ 11.34*.

[3] Allegations

The complaint in *[1], above,* alleges the following:

- A description of the adjoining properties owned by plaintiff and defendant landowner respectively and the status of plaintiff and defendant landowner as coterminous landowners (Paragraphs 1-3).

- That plaintiff's land receives lateral support from the adjoining land (Paragraph 6).

- That plaintiff has a building or structure on his or her land that has a wall or foundation that is as deep or deeper than the standard depth of foundations, nine feet (Paragraph 7).

- That plaintiff granted defendant owner a license to enter plaintiff's land to protect the land and the building or structure described (Paragraph 9).

- That defendant owner failed to protect plaintiff's land and building or structure from possible damage from the excavation (Paragraph 10) [*see Civ. Code § 832(4)*].

- That defendant owner's land was excavated with his or her knowledge, consent, and direction by defendant contractor to a depth below the standard depth of foundations (Paragraph 11) [*see Green v. Berge(1894) 105 Cal. 52, 57-59, 38 P. 539* (contractor and landowner held jointly liable for damage caused by excavation)].

- That the excavation caused removal of plaintiff's lateral support and injury to his or her building or structure other than minor settlement cracks (Paragraph 12) [*see Civ. Code § 832(4)*].

Any negligence on the part of defendant landowner or contractor in conducting the excavation and failing to protect plaintiff's building or structure and lateral support may be alleged as an alternate count. For a complaint for damages and permanent injunction for removal of lateral support, see *§ 11.91*.

[4] Verification

Verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified)]. However, if the complaint is verified, the defendant is required to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446(a)*] and is precluded from making a general denial in superior court and some limited civil cases [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

For coverage of issues relating to venue, see *§ 11.13*, and for coverage of issues relating to jurisdiction, see *§ 11.14*. For a complete discussion of jurisdiction and related issues, see Ch. 323, *Jurisdiction, Inconvenient Forum, and Appearances* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPermanent InjunctionsReal Property LawAdjoining LandownersLateral & Subjacent SupportReal Property LawTortsNuisanceRemediesDamagesCompensatory DamagesCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesDamagesCompensatory Damages

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 11 ADJOINING LANDOWNERS
PART IV. FORMS
B. Lateral and Subjacent Support

1-11 California Forms of Pleading and Practice--Annotated § 11.93

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§ 11.93 Complaint for Damages--Removal of Lateral Support [Civ. Code § 832]--Excavation of Adjoining Land Extending Deeper Than Foundation of Adjoining Building [Civ. Code § 832(3)]

[1] FORM Complaint for Damages--Removal of Lateral Support [Civ. Code § 832]--Excavation of Adjoining Land Extending Deeper Than Foundation of Adjoining Building [Civ. Code § 832(3)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Removal of Lateral Support)
_____ [*name*],	)	[Amount demanded _____
Defendants.	)	(exceeds *or* does not exceed) $10,000]
	)	
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. [*Ownership and possession of described property by plaintiff. See § 11.91[1], Paragraph 1.*]

2. [*Ownership and possession of described property by defendant. See § 11.91[1], Paragraph 2.*]

3. [*Property of plaintiff adjoins property of defendant. See § 11.91[1], Paragraph 3.*]

[4. *Fictitious name allegation, if appropriate. See § 11.91[1], Paragraph 4.*]

[5. *Agency allegation, if appropriate. See § 11.91[1], Paragraph 5.*]

6. At all times mentioned in this complaint, plaintiff's land, in its natural state, received lateral support from the adjoining land of defendant, except as the support was removed and damaged by the excavations alleged in this complaint.

7. Situated on plaintiff's land described in this complaint is a _____ [building *or* structure] having a _____ [a wall *or* a foundation] that extends _____ feet deep. The _____ [*either* building *or* structure] is _____ [*describe, e.g.,* a two-story dwelling with stucco exterior walls]. It is located _____ [*distance*] feet from the joint property line between plaintiff's and defendant's respective properties, and _____ feet from the excavations described in this complaint.

8. On or about _____ [*date*], defendant notified plaintiff that excavation would be made on defendant's property to a depth of _____ feet, commencing _____ [*date*].

9. The excavations were to be deeper than plaintiff's [wall *or* foundation] and so close as to endanger plaintiff's _____ [building *or* structure] in the following respects: _____ [*specify*].

10. Immediately on receipt of defendant's notice, plaintiff informed defendant that the excavations would be deeper than the _____ [wall *or* foundation] of plaintiff's _____ [building *or* structure] and would endanger it as described in this complaint. Plaintiff informed defendant of his/her desire to _____ [take measures to protect *or* extend the foundation of] the _____ [building *or* structure], and in connection with that demanded to be afforded _____ days and license to enter defendant's land to _____ [*allege any necessary acts showing that the license demanded is reasonable*] for that purpose. Defendant failed and refused to grant the amount of time plaintiff requested, or even 30 days, and failed and refused to grant plaintiff license to enter defendant's property.

11. During the period from _____ [*date*], until _____ [*date*], excavations were made on defendant's land and property with his/her knowledge and consent and at his/her direction. Plaintiff is informed and believes and on that basis alleges that the excavations are of a depth of _____ feet, which is _____ feet deeper than the _____ [wall *or* foundation] of plaintiff's _____ [building *or* structure] described in this complaint. The excavations are so close to plaintiff's _____ [building *or* structure] as to endanger it.

12. The excavation proximately caused plaintiff's land in its natural state to become deprived of its lateral support, and on or about _____ [*date within three years of filing suit*] plaintiff's earth and soil were caused by the excavation to slip and subside resulting in injury to plaintiff's land and _____ [building *or* structure] in that _____ [*describe injury*], all to plaintiff's damage in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendants and each of them as follows:

1. For damages in the sum of $_____.

2. For costs of suit incurred by this complaint.

3. For other and further relief as the court deems proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 11.91[1].*]

[2] Use of Form

This form is a complaint for building damage caused by removal of lateral support. It may be used in an action against a landowner who (1) excavatesbelow the depth of a wall or foundation of an adjoining building or structure, and (2) fails to grant the owner of the adjoining structure (a) at least 30 days to protect his or her structure, and (b) a license to enter the excavation site for that purpose. This form would not be used if the excavation is to be deeper than the standard depth (nine feet) of foundations and if the adjoining building or structure goes to that depth or deeper. In that case, the *form in § 11.92* should be used.

One of the conditions imposed on the right of an adjoining landowner to make excavations is that if at any time it appears that the excavation is to be of a greater depth than are the walls or foundations of any adjoining building or other structure, and is to be so close as to endanger the building or other structure in any way, then the owner of the building or other structure must be allowed at least 30 days in which to take measures to protect the building or structure from any damage, or to extend the foundations of the structure. For that purpose, the owner must be given reasonable license to enter on the land on which the excavation is to be or is being made [*Civ. Code § 832(3)*].

For specific coverage of lateral support, see *§ 11.32*. For discussion of the accrual of a cause of action for lateral support damages, see *§ 11.34*.

[3] Allegations

The complaint in *[1], above,* alleges the following:

- The relationship between plaintiff and defendant as coterminous owners with a description of their respective adjoining properties (Paragraphs 1-3).

- The fact that plaintiff's land receives lateral support from defendant's land (Paragraph 6).

- A description of the building or structure on plaintiff's land, the depth of its wall or foundation, and its proximity to the joint property line and excavations (Paragraph 7).

- Defendant's notice of the intended excavations (Paragraph 8).

- The fact that the excavations would be deeper than plaintiff's wall or foundation and would be so close as to endanger it (Paragraph 9).

- Defendant's failure to grant plaintiff at least 30 days in which to protect his or her structure or to extend its foundation and defendant's failure to grant plaintiff reasonable license to enter the excavation site for that purpose (Paragraph 10).

- The performance of the excavation (Paragraph 11).

- The resulting damage to plaintiff's lateral support and structure (Paragraph 12) [*see Civ. Code § 832(3)*].

Negligence occurring in performance of the excavation may be included as an alternative count [*see § 11.91*]. Any party who participates in the excavation may be joined as a defendant [*see § 11.92*].

[4] Verification

Verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified)]. However, if the complaint is verified, the defendant is required to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446(a)*] and is precluded from making a general denial in superior court actions and some limited civil cases [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

For coverage of issues relating to venue and jurisdiction, see *§§ 11.13, 11.14*, respectively. For a complete discussion of jurisdiction and related issues, see Ch. 323, *Jurisdiction, Inconvenient Forum, and Appearances* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersLateral & Subjacent SupportReal Property LawTortsNuisanceRemediesDamagesCompensatory DamagesCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesDamagesCompensatory Damages

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 11 ADJOINING LANDOWNERS
PART IV. FORMS
B. Lateral and Subjacent Support

1-11 California Forms of Pleading and Practice--Annotated § 11.94

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§ 11.94 Complaint [Code Civ. Proc. § 1230.040] in Inverse Condemnation [Calif. Const., art. I, § 19]--Action by Private Landowner Against City--Excavation of Adjoining Public Street Causing Removal of Lateral Support and Injury to Buildings

[1] FORM Complaint [Code Civ. Proc. § 1230.040] in Inverse Condemnation [Calif. Const., art. I, § 19]--Action by Private Landowner Against City--Excavation of Adjoining Public Street Causing Removal of Lateral Support and Injury to Buildings

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Inverse Condemnation)
City of _____ [*name*],	)	[Amount demanded _____
Defendant.	)	(exceeds *or* does not exceed) $10,000]
	)	
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff is, and at all times mentioned in this complaint was, the owner and in possession and control of that real property located at _____ [*street address*], _____ [*city*], in _____ County, California, more particularly described as follows: _____ [*give legal description*]. Situated on the property are certain improvements consisting of _____ [*describe*].

2. Defendant is, and at all times mentioned in this complaint was, a municipal corporation organized and existing under and by virtue of the [constitution and] laws of California, and is situated in _____ County. At all times mentioned in this complaint, Defendant maintained control over the public streets within its limits.

3. [*Fictitious name allegation, if appropriate. See § 11.91[1], Paragraph 4.*]

4. [*Agency allegation, if appropriate. See § 11.91[1], Paragraph 5.*]

5. At all times mentioned in this complaint, _____ [*name of street*] was a public street within the limits of defendant city, having a common boundary with and adjoining plaintiff's land and property described in this complaint.

6. Plaintiff's land in its natural state receives, and at all times mentioned in this complaint did receive, lateral support from _____ [*name of street*].

7. During the period from _____ [*date*], until _____ [*date*], excavations were made on _____ [*name of street*] with the knowledge and consent and at the direction of defendant.

8. Plaintiff is informed and believes and on that basis alleges that the excavations, and the manner in which they were undertaken, were deliberately designed and constructed for the purpose of improving _____ [*name of street*] for public use and benefit.

9. The excavations proximately caused plaintiff's land in its natural state to be deprived of its lateral support. On or about _____ [*date*], as a direct result of the excavation, the earth, soil, and improvements on plaintiff's land subsided, slipped, cracked and settled, all to plaintiff's damage in the sum of $_____.

10. Plaintiff has incurred and will incur attorney's, appraisal, and engineering fees because of this proceeding.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the amount of $_____, with interest on that amount at the legal rate from the date of the damages.

2. For reasonable attorney's, appraisal, and engineering fees according to proof.

3. For costs of suit incurred by this complaint; and

4. For other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 11.91[1].*]

[2] Use of Form

This form is a complaint for use in an inverse condemnation action against a city for lateral support damage caused by street excavations.

For specific coverage of lateral support, see *§ 11.32*. For discussion of the accrual of a cause of action for lateral support damages, see *§ 11.34*.

[3] Allegations

The complaint in *[1], above,* alleges the following:

- Plaintiff's ownership of property (Paragraph 1).
- Defendant's control and maintenance of the public street where the excavations were conducted (Paragraphs 2 and 5) [*see Sts. & Hy. Code § 1921*].
- That plaintiff's land receives lateral support from the adjoining street (Paragraph 6).
- That the excavations were made with the consent and at the direction of the city (Paragraph 7).
- That the excavations were deliberately designed and constructed for public use (Paragraph 8).
- That injury resulted from the excavations due to the removal of lateral support (Paragraph 9).
- That costs and attorney's fees were incurred (Paragraph 9) [*see Cal. Const., art. I, § 19*; *Holtz v. Superior Court (1970) 3 Cal. 3d 296, 302, 90 Cal. Rptr. 345, 475 P.2d 441]* .

Alternatively, a cause of action or additional count may be alleged in a proper case against a public entity for lateral support liability under *Civ. Code § 832* [*see Porter v. City of Los Angeles (1920) 182 Cal. 515, 520, 189 P. 105* ; *Holtz v. Superior Court (1970) 3 Cal. 3d 296, 300-301, 90 Cal. Rptr. 345, 475 P.2d 441]* . For forms of complaints and discussion concerning these types of allegations, see *§§ 11.91 -11.93*.

[4] Verification

Verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified)]. However, if the complaint is verified, the defendant is required to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446(a)*] and is precluded from making a general denial in superior court actions and in some limited civil cases [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

Jurisdiction of the subject matter of an action for inverse condemnation is based on the amount in controversy set forth in the complaint. The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*].

In an action for injury to property based on inverse condemnation against the state, the county in which the property is located is the proper county for the trial of the action [*Gov. Code § 955*]. In an action for injury to property based on inverse condemnation against a county, or a city and county, city, or local agency, the court in the county, or city and county, or the county in which the city or local agency is located, is the proper court for trial of the action [*Code Civ. Proc. § 394(a)*].

For coverage of issues relating to venue and jurisdiction, see *§§ 11.13* and *11.14*, respectively. For a complete discussion of jurisdiction and related issues, see Ch. 323, *Jurisdiction, Inconvenient Forum, and Appearances* .

[6] Statute of Limitations

Actions for inverse condemnation commenced must be brought within three years [*Code Civ. Proc. § 338(j)*].

[7] Accrual of Cause of Action

If the basis of the cause of action for inverse condemnation is a taking by construction of a public improvement on plaintiff's land, the cause of action accrues when the construction is complete, not when the original trespass took place [*Mosesian v. County of Fresno (1972) 28 Cal. App. 3d 493, 500-502, 104 Cal. Rptr. 655* ; *see Pierpont Inn, Inc. v. State of California (1969) 70 Cal. 2d 282, 286-294, 74 Cal. Rptr. 521, 449 P.2d 737]* . If the damage was caused by a public improvement that is not on plaintiff's land, the cause of action accrues when the damage occurs, not when the improvement was made [*Frustuck v. City of Fairfax (1963) 212 Cal. App. 2d 345, 375, 28 Cal. Rptr. 357]* . In that case, the cause of action does not accrue until the damage is sufficiently appreciable to a reasonable person [*Mehl v. People ex rel. Dept. of Pub. Wks. (1975) 13 Cal. 3d 710, 717, 119 Cal. Rptr. 625, 532 P.2d 489]* . If the damage is continuing, plaintiff can recover for all damages incurred within the limitation period, even though earlier damage may be barred by the statute [*Bellman v. County of Contra Costa (1960) 54 Cal. 2d 363, 368-369, 5 Cal. Rptr. 692, 353 P.2d 300* ; *Amador Valley Investors v. City of Livermore (1974) 43 Cal. App. 3d 483, 489-490, 117 Cal. Rptr. 749]* .

[8] Service of Process

Service of summons in actions against the state must be made on the Attorney General. On claims arising out of work done by the Department of Transportation or the Department of Water Resources, service can also be made on the relevant Director [*Gov. Code §§ 955.4, 955.6, 955.8*]. Service on other public entities may be made on the clerk, secretary, president, presiding officer, or other head of its governing body [*Code Civ. Proc. § 416.50*]. Information about the proper person to serve can be obtained from the Roster of Public Agencies [*see Gov. Code § 53051*] on file with the county clerk. For further discussion of service on public agencies, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[9] No Claim Necessary

No claim against a public entity is required to be filed to maintain an action under *Cal. Const., art. I, § 19* against a public entity for the taking of, or damage to, private property [*Gov. Code § 905.1*].

PRACTICE TIP:

Claim Required for Other Causes of Action. If the plaintiffseeks to allege other related tort causes of

action (for example, negligence, trespass, or nuisance) against a defendant public agency, *Gov. Code § 945.4* may require compliance with the claims filing protocol set forth in the California Torts Claim Act [*Gov. Code § 810 et seq.*; for coverage of this procedure, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*]. *By David P. Lanferman*

[10] Right to Jury Trial

The constitutionally mandated right to jury trial in eminent domain actions [*Cal. Const., art. I, § 19*] applies to inverse condemnation actions [*Highland Realty Co. v. City of San Rafael (1956) 46 Cal. 2d 669, 683-684, 298 P.2d 15]* . The right to jury trial only extends to the issue of compensation, however, not to the issue of whether or not there has been a taking for which the entity is liable [*People v. Ricciardi (1943) 23 Cal. 2d 390, 402, 144 P.2d 799]* . Thus, the issue of whether there has been a substantial impairment of access must be affirmatively decided by the court before the issue of damages is presented to the jury [*Orpheum Bldg. Co. v. San Francisco Bay Area Rapid Transit Dist. (1978) 80 Cal. App. 3d 863, 868, 146 Cal. Rptr. 5]* .

[11] Costs

In any inverse condemnation proceeding, the court rendering judgment for the plaintiff by awarding compensation, or the attorney representing the public entity who effects a settlement of the proceeding, must determine and award, or allow to the plaintiff, as part of the judgment or settlement, a sum that will, in the court's opinion, reimburse the plaintiff for his or her reasonable costs, disbursements, and expenses. These include reasonable attorney's, appraisal, and engineering fees actually incurred because of the proceeding in the trial court or in any appellate proceeding in which the plaintiff prevails on any issue in that proceeding [*Code Civ. Proc. § 1036*].

[12] Attorney's, Appraisal, and Engineering Fees

Cases have held that if attorney's fees are awarded pursuant to a statute rather than by contract, they are recoverable as costs. Consequently, they would not need to be pleaded, but the court could award them as costs [*see T.E.D. Bearing Co. v. Walter E. Heller & Co. (1974) 38 Cal. App. 3d 59, 62, 112 Cal. Rptr. 910* ; *Beneficial Standard Properties, Inc. v. Scharps (1977) 67 Cal. App. 3d 227, 232, 136 Cal. Rptr. 549]* . Some older cases, however, characterized attorney's fees allowed under a statute as being separate and distinct from costs [*see Schallert-Ganahl L. Co. v. Neal (1892) 94 Cal. 192, 193, 29 P. 622* (action to foreclose mechanics' lien under former Code Civ. Proc. § 1195); *Cirimele v. Shinazy (1954) 124 Cal. App.2d 46, 52, 268 P.2d 210* (attorney's fees not included in costs, the award of which is precluded under *Code Civ. Proc. § 1025*, when proper tender)].

The language of *Code Civ. Proc. § 1036* providing for costs, including attorney's, appraisal, and engineering fees, incurred in an inverse condemnation proceeding in the trial court, or in any appellate proceeding in which the plaintiff prevails on any issue in the proceeding, supports the position that these litigation costs are costs. However, no case has stated clearly that the litigation costs can be awarded based solely on a request for costs in the prayer. Therefore, an allegation that the fees were incurred and are recoverable should be included in a complaint for inverse condemnation (*see* Paragraph 10).

[13] Inverse Condemnation Suit for Street Excavations

Private property is not to be taken or damaged for public use without just compensation to the owner [*Cal. Const., art. I, § 19*]. A public entity is subject to strict liability on inverse condemnation theory for damage to real property caused to a coterminous landowner by excavation work that was deliberately designed and constructed [*Holtz v. Superior Court (1970) 3 Cal. 3d 296, 300-302, 90 Cal. Rptr. 345, 475 P.2d 441]* .

[14] Cross References

For a general form of complaint for inverse condemnation, see Ch. 247, *Eminent Domain*

For forms for use in actions against public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawAdjoining LandownersLateral & Subjacent SupportReal Property LawInverse CondemnationGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesDamagesCompensatory Damages

California Forms of Pleading and Practice--Annotated

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 11 ADJOINING LANDOWNERS
PART IV. FORMS
B. Lateral and Subjacent Support

1-11 California Forms of Pleading and Practice--Annotated § 11.95

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§ 11.95 Complaint for Damages--Removal of Subjacent Support--Action by Surface Owner Against Subsurface Owner--General Form

[1] FORM Complaint for Damages--Removal of Subjacent Support--Action by Surface Owner Against Subsurface Owner--General Form
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Removal of Subjacent
_____ [*name*],	)	Support)
Defendants.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. Plaintiff is, and at all times mentioned in this complaint was, the owner and in possession and control of that real property situated at _____ [*street address*], _____ [*city*], in _____ County, California, more particularly described as _____ [*legal description*].

2. Defendant is, and at all times mentioned in this complaint was, the owner of _____ [*describe defendant's subsurface interest*]. The land subject to defendant's interest is situated beneath and subjacent to plaintiff's land.

[3. *Fictitious name allegation, if appropriate. See § 11.91[1], Paragraph 4.*]

[4. *Agency allegation, if appropriate. See § 11.91[1], Paragraph 5.*]

5. During the period commencing on or about _____ [*date*], until _____ [*date*], defendant caused certain excavations to be made on his/her property in an area subjacent to the previously mentioned property owned by plaintiff, which excavations are described as follows: _____ [*describe*].

6. At all times prior to _____ [*date*], when the excavations were made, plaintiff's land in its natural state was receiving subjacent support from the land excavated on by defendant.

7. On or about _____ [*date*], as a proximate result of the excavations, plaintiff's land was deprived of its subjacent support and the earth and soil on the land settled and subsided into defendant's excavations, all to plaintiff's damage in the sum of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____.

2. For costs of suit incurred by this complaint.

3. For other and further relief as the court deems proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 11.91[1].*]

[2] Use of Form

This form is a complaint for use in an action for damages for injury to real property caused by removal of subjacent support.

When one person owns the surface of land and another the subjacent land, the owner of the surface is entitled to have it remain in its natural condition without subsidence by reason of the subsurface owner's withdrawal of subjacent support.

The obligation of subjacent support is an absolute obligation and is unaffected by *Civ. Code § 832* (allowing excavations in limited situations), which governs lateral support only [*Marin Mun. Water Dist. v. Northwestern Pac. R.R. Co. (1967) 253 Cal. App. 2d 83, 89, 61 Cal. Rptr. 520]* .

For additional coverage of subjacent support, see *§ 11.33*. For discussion of the accrual of a cause of action for subjacent support damages, see *§ 11.34*.

[3] Allegations

The complaint in *[1], above*, alleges the following: (1) a description of the respective surface and subsurface rights of plaintiff and defendant (Paragraphs 1-2); (2) that the defendant caused excavations to be made on the subsurface land owned by him or her (Paragraph 5); (3) that the surface land owned by the plaintiff received its subjacent support from the subsurface land excavated on by defendant (Paragraph 7); and (4) that the excavations caused removal of the plaintiff's subjacent support, damaging the plaintiff's property (Paragraph 7) [*see Marin Mun. Water Dist. v. Northwestern Pac. R.R. Co. (1967) 253 Cal. App. 2d 83, 89, 61 Cal. Rptr. 520]* .

[4] Verification

Verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified)]. However, if the complaint is verified, the defendant is required to file a verified answer in a superior court action other than a limited civilcase [*Code Civ. Proc. §§ 92(b), 446(a)*] and is precluded from making a general denial in superior court actions and in some limited civil cases [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

For coverage of issues relating to venue and jurisdiction, see *§§ 11.13* and *11.14*, respectively. For a complete discussion of jurisdiction and related issues, see Ch. 323, *Jurisdiction, Inconvenient Forum, and Appearances* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersLateral & Subjacent SupportReal Property LawInverse CondemnationGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesDamagesCompensatory Damages

California Forms of Pleading and Practice--Annotated

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 11 ADJOINING LANDOWNERS
PART IV. FORMS
B. Lateral and Subjacent Support

1-11 California Forms of Pleading and Practice--Annotated §§ 11.96through 11.99

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[Reserved]

§§ 11.96[Reserved]

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 11 ADJOINING LANDOWNERS
PART IV. FORMS
C. Party Walls

1-11 California Forms of Pleading and Practice--Annotated § 11.100

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§ 11.100 Complaint for Damages and Permanent Injunction [Code Civ. Proc. § 526; Civ. Code § 3422] Requiring Adjoining Owner to Take Some Action With Respect to Party Wall--General Form

[1] FORM Complaint for Damages and Permanent Injunction [Code Civ. Proc. § 526; Civ. Code § 3422] Requiring Adjoining Owner to Take Some Action With Respect to Party Wall--General Form
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AND FOR PER-
_____ [*name*],	)	MANENT INJUNCTION
Defendant.	)	(Action Concerning Party Wall To Be Taken By Ad-
	)	joining Owner)
	)	

Plaintiff alleges:

1. Plaintiff is, and at all times mentioned in this complaint was, a resident of _____ County, California

[*or allege other capacity and residence*].

2. Defendant is, and at all times mentioned in this complaint was, a resident of _____ County, California [*or allege other capacity and residence*].

3. At all times mentioned in this complaint, plaintiff and defendant were owners of adjoining lands located at _____ [*street addresses*], _____ [*city*], California. On the lands, there were/are two buildings owned by plaintiff and defendant, respectively, and each building is/was supported by a wall standing between them. The wall is located _____ [*specify, e.g.*, equally on lands of plaintiff and defendant, *or* entirely on land of defendant], and owned _____ [*specify, e.g.*, equally by both parties, *or* by defendant, subject to plaintiff's easement for use of the wall].

4. On or about _____ [*date*], plaintiff and defendant entered into a written contract, providing _____ [*specify terms of contract, e.g.*, that they would be jointly responsible for repairing and maintaining the wall, and for sharing the costs of doing so]. A copy of the agreement is attached to this complaint as Exhibit A and made a part of this complaint.

5. On or about _____ [*date*], _____ [*allege specific facts regarding the condition of defendant's part of the wall, e.g.*, defendant tore downhis/her/its building adjacent to plaintiff's building, leaving the wall exposed, resulting in sagging and cracking of defendant's part of the wall].

6. Plaintiff requested that defendant _____ [*specify particular act or acts of defendant that plaintiff seeks to compel, e.g.*, repair and strengthen the wall to protect it from being damaged by weather], but defendant refused and continues to refuse to do so.

7. At all times mentioned by this complaint, plaintiff was and is, ready, willing, and able to preform his/her/its part of the contract to _____ [*specify terms of contract, e.g.*, repair the wall and contribute to costs of repair], and has so informed defendant, but defendant has refused, and continues to refuse either to _____ [*specify acts of defendant authorized by contract that plaintiff seeks to compel, e.g.*, repair the wall] or to allow plaintiff to enter defendant's property so that plaintiff might do so.

8. _____ [*Allege damages, if any have been incurred, e.g.*, As a proximate result of defendant's damage to his/her/its part of the wall and refusal to repair it, plaintiff's building has been damaged by lack of an adequate support on the side on which the wall shared with defendant is located, and has been damaged by cracks already appearing. The cracks continue to widen and spread so as to cause further weakening and damage in the amount of $_____. (Plaintiff will be further damaged in like manner so long as defendant's failure and refusal to repair the wall continues. The full amount of the damage is not now known to plaintiff, and plaintiff will amend the complaint to state the amount when it becomes known to him/her/it, or on proof of the amount)].

9. Defendant's failure and refusal to act, unless and until enjoined by order of this court, will cause great and irreparable injury in that _____ [*specify particular facts that will constitute great and irreparable injury, e.g.*, the wall is continuing to crack and erode, causing further weakening of plaintiff's building].

10. Plaintiff has no adequate remedy at law for this injury in that _____ [*specify facts in addition to those previously alleged, showing the inadequacy of any legal remedy, especially monetary damages, e.g.*, due to increased sagging and cracking, plaintiff's building may lose its support entirely, and plaintiff may not be able to save the building from collapse].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a permanent injunction requiring defendant to _____ [*specify each of the acts, courses of conduct, and conditions defendant is to be commanded to do or undertake, e.g.*, repair the wall at all points and places damaged because of defendant's removal of his/her/its building, or in the alternative, to allow plaintiff or his/her/its employees or agents to come on to defendant's land not later than _____ [*date*], to effect the repairs on the wall];

2. For damages in the sum of $_____, plus damages in further sums as may be sustained and are ascertained before final judgment on this complaint;

3. For costs of suit incurred by this complaint [including reasonable attorney's fees as determined by the court (*if the fees are provided for in the party wall contract*)]; and

4. For any other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 11.91[1].*]

[2] Use of Form

This form is a complaint for use by a plaintiff seeking damages and a permanent mandatory injunction compelling the defendant to perform some act or acts with regard to a party wall agreement. Counsel should note that the Judicial Council has developed and approved an official form of complaint for breach of contract, the use of which is optional [*see Code Civ. Proc. § 425.12*].

For discussion of the rights of the owner of a party wall, see *§ 11.43*. For discussion of remedies, see *§ 11.44*.

[3] Allegations

The complaint in *[1], above*, alleges the following: (1) residency of the plaintiff (Paragraph 1) and the defendant (Paragraph 2); (2) the ownership of the property subject to the complaint (Paragraph 3); (3) the existence of a contract between the plaintiff and defendant (Paragraph 4); (4) the defendant's actions with regard to his or her property (Paragraph 5); (5) the plaintiff's request to the defendant concerning the defendant's property in relation to the plaintiff's property (Paragraph 6); (6) the plaintiff's willingness to abide by and perform the terms of the contract between himself or herself and the defendant (Paragraph 7); (7) the damages suffered by the plaintiff (Paragraph 8); (8) the result of the defendant's failure to act (Paragraph 9); and (9) the plaintiff's lack of an adequate remedy at law (Paragraph 10).

[4] Verification

Verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified)]. However, if the complaint is verified, the defendant is required to file a verified answer [*Code Civ. Proc. § 446(a)*] and is precluded from making a general denial [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

An action seeking a permanent injunction must be brought in the superior court and may not be a limited civil case except as otherwise authorized by statute [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86, 580(b)(2)*]. For coverage of issues relating to venue and jurisdiction, see *§§ 11.13* and *11.14*, respectively. For a complete discussion of jurisdiction and related issues, see Ch. 323, *Jurisdiction, Inconvenient Forum, and Appearances* .

[6] Cross References

For further discussion of complaints in contract actions and forms of complaint for recovery of damages pursuant to contract, see Ch. 140, *Contracts*

For more detailed discussion, procedures, and forms relating to obtaining injunctions and temporary restraining orders, and for alternative forms relating to injunctions, see Ch. 303, *Injunctions*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPermanent InjunctionsReal Property LawAdjoining LandownersParty WallsCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesDamagesCompensatory Damages

California Forms of Pleading and Practice--Annotated

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Volume 1: New Developments thru Adjoining Landowners-Chs. 1-11
Chapter 11 ADJOINING LANDOWNERS
PART IV. FORMS
C. Party Walls

1-11 California Forms of Pleading and Practice--Annotated § 11.101

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§ 11.101 Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527(a),(c)], and Permanent Injunction [Code Civ. Proc. § 526; Civ. Code Civ. § 3422] to Restrain Adjoining Owner From Activity That Affects Party Wall

[1] FORM Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527(a),(c)], and Permanent Injunction [Code Civ. Proc. § 526; Civ. Code Civ. § 3422] to Restrain Adjoining Owner From Activity That Affects Party Wall

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR TEMPORARY RESTRAINING
_____ [*name*],	)	ORDER, PRELIMINARY AND PERMANENT IN-
Defendant.	)	JUNCTIONS
	)	(Restrain Adjoining Owner From Activity That Af-
	)	fects Party Wall)

Plaintiff alleges:

1. Plaintiff is, and at all times mentioned in this complaint was, a resident of _____ County, California [*or allege other capacity and residence*].

2. Defendant is, and at all times mentioned in this complaint was, a resident of _____ County, California [*or allege other capacity and residence*].

3. At all times mentioned in this complaint, plaintiff and defendant were owners of adjoining lands located at _____ [*street addresses*], _____ [*city*], California.

4. On or about _____ [*date*], plaintiff and defendant entered into a written contract, providing _____ [*specify terms of contract, e.g.*, that the parties were to construct, on the boundary line of their adjoining properties, a party wall high enough and wide enough to support two _____ (*number*)-story buildings, one to be constructed by each party on each of the two properties]. A copy of the agreement is attached to this complaint as Exhibit A and made a part of this complaint.

5. _____ [*Allege, if appropriate, facts showing compliance with contract, and facts establishing status quo that plaintiff seeks to maintain, e.g.*, On or about _____ (*date*), plaintiff constructed a _____ (*number*)-story building on plaintiff's property, and as part of that building, also constructed the party wall in accordance with the agreement with defendant. The party wall forms one of the sides of plaintiff's building, and acts as partial support for it. Plaintiff was duly reimbursed by defendant for onehalf of the construction costs of the wall as defendant's contribution toward the costs of the party wall, in accordance with the contract].

6. On or about _____ [*date*], _____ [*allege specific facts showing act that defendant is doing, causing to be done, or threatening to do or cause to be done, that constitutes an infringement on, or interference with, plaintiff's rights and interests under the party wall agreement, e.g.*, defendant notified plaintiff that defendant had hired an architect to design a building _____ (*number*) stories higher than plaintiff's building, to be constructed on defendant's land, with the party wall to be utilized as one side of defendant's proposed building, to act as partial support for it. On that date, defendant further notified plaintiff that defendant was going to extend the party wall higher to act as the side support of the extra _____ (*number*) stories of defendant's proposed building].

7. _____ [*Allege, if appropriate, plaintiff's demand that defendant stop his/her/its actual or threatened conduct, defendant's refusal, and the resulting necessity for prompt judicial action to protect plaintiff, e.g.*, On or about _____ [*date*], (and a number of times since then,) plaintiff notified defendant in writing that plaintiff did not agree to defendant's increasing the height of the party wall, and that plaintiff would hold defendant to the written agreement, set out in Exhibit A, to limit the height of the wall to the height necessary to support a _____ (*number*)-story building on each property, and no more. Defendant stated to plaintiff (by his/her/its letter of _____ [*date*], attached to this complaint as Exhibit B and made a part of it,) that he/she/it intends to go forward with construction of the proposed building, and to increase the height of the party wall contrary to the written agreement, against plaintiff's will, and without plaintiff's express or implied consent].

8. Defendant's [threatened] acts, unless and until enjoined and restrained by order of this court, will cause great and irreparable injury to plaintiff in that _____ [*specify particular facts constituting great and irreparable injury, e.g.*, neither plaintiff's building, nor the party wall, was originally constructed in anticipation of extending the height of the wall, and the adjoining building and the increase in height of the wall by defendant will weaken it and cause great damage to plaintiff's building for lack of proper support].

9. Plaintiff has no adequate remedy at law for the injuries _____ [currently being suffered *or* that are threatened] in that _____ [*specify facts in addition to those previously alleged that tend to show the*

inadequacy of any legal remedy, especially monetary damages, that plaintiff might pursue, e.g., defendant's threatened construction could cause plaintiff's building to collapse completely].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an order requiring defendant to show cause, if any, why he/she/it should not be enjoined as set forth in this complaint during the pendency of this action.

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction requiring defendant to refrain from _____ [*specify each of the acts, courses of conduct, and conditions defendant is to be prohibited from doing, continuing, or maintaining, e.g.,* constructing any building on his/her/its property higher than _____ (*number*) stories while using the party wall as one side of the building and in partial support of the building].

3. For costs of suit incurred in this complaint.

4. For other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 11.91[1].*]

[2] Use of Form

This form is a complaint for use by a plaintiff seeking a prohibitory injunction restraining the defendant from performing some act that affects the party wall or interferes with plaintiff's interest in the wall. It is for use in requesting a temporary restraining order and a preliminary injunction, as well as a permanent injunction.

For coverage of the rights of the owner of a party wall, see *§ 11.43*. For discussion of related remedies, see *§ 11.44*.

[3] Allegations

The complaint in *[1], above,* alleges the following: (1) the residency of the plaintiff (Paragraph 1) and the defendant (Paragraph 2); (2) the ownership of the property subject to the complaint (Paragraph 3); (3) the existence of a contract between the plaintiff and defendant (Paragraph 4); (4) the defendant's actions with regard to his or her property (Paragraph 5); (5) the plaintiff's request to the defendant concerning the defendant's property in relation to the plaintiff's property (Paragraph 6); (6) the damages suffered by the plaintiff (Paragraph 7); (7) the result of the defendant's failure to act (Paragraph 8); and (8) the plaintiff's lack of an adequate remedy at law (Paragraph 9).

[4] Verification Required If Basis for Temporary Restraining Order

If the complaint is to be used as a basis for obtaining a temporary restraining order, it must be verified [*Code Civ. Proc. § 527(c)(1)*]. When a temporary restraining order is sought without formal notice, the applicant or the applicant's attorney is required to certify to the court under oath that (1) within a reasonable time prior to the application he or

sheinformed the opposing party (or the opposing party's attorney, if any) of the time and the location the application would be made; or (2) he or she in good faith attempted to inform the opposing party (or attorney), but was unable to do so, specifying the efforts made to do so; or (3) for reasons specified, he or she should not be required to inform the opposing party (or attorney) [*Code Civ. Proc. § 527(c)(2)*]. Otherwise, a temporary restraining order may be obtained on the basis of affidavit or declaration under penalty of perjury, showing that sufficient grounds exist for the order [*Code Civ. Proc. §§ 2015.5, 527(c)(1)*]. For a form of certification, as well as other forms for use in obtaining a temporary restraining order, see Ch. 303, *Injunctions* .

[5] Service Required

The party who obtained the temporary restraining order must, within five days from the date the order is issued or two days before the hearing, whichever is earlier, serve on the opposing party (1) a copy of the complaint if not previously served, (2) the order to show cause stating the date, time, and place of the hearing, (3) any affidavits to be used in the application, and (4) a copy of the points and authorities in support of the application. The court may for good cause, on the applicant's motion or on its own motion, shorten the time required for service on the opposing party [*Code Civ. Proc. § 527(d)(2)*]. When the matter first comes up for hearing, if service has not been effected as stated above, the court will dissolve the temporary restraining order [*Code Civ. Proc. § 527(d)(3)*]. However, on the filing of an affidavit by the applicant that the opposing party could not be served within the required time, the court may reissue any temporary restraining order previously issued [*Code Civ. Proc. § 527(d)(5)*].

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[c] Inheritance Rights

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[4] Equitable Adoption

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§ 12.54 Law Reviews

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§ 12.01 Scope of Chapter

This chapter discusses the nature and effect of adoption proceedings, including their effects on the parent-child relationship, inheritance rights, immigration and naturalization, and income taxation. It also discusses equitable adoption and surrogacy birth arrangements that involve an adoption.

Procedures for freeing a minor for adoption through termination of the parental rights of the natural parents are discussed in Ch. 12A. The procedure for the adoption of unmarried minors is discussed in Ch. 12B, and the procedure for the adoption of adults is discussed in Ch. 12C. Adoption records and confidentiality are discussed in Ch. 12D. Postadoption attack on an adoption decree is discussed in Ch. 12E.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresEquitable AdoptionFamily LawPaternity & SurrogacySurrogacyGeneral Overview

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§ 12.02 Cross References

For discussion and forms concerning the establishment of a guardianship over a child, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , through Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships* . For discussion of the adoption of children who have been adjudged dependents of the juvenile court, see Ch. 328, *Juvenile Courts: Dependency Proceedings* (§§ 328.198, 328.199). For discussion and forms concerning parental rights and duties, and child custody jurisdictional issues, see Chapter 394, *Parent and Child* .

For a full discussion of the Indian Child Welfare Act (*25 U.S.C. § 1901 et seq.*), see Kirkland, Luvey & Richmond, california family law practice and procedure, 2nd ed., Ch. 176 (Matthew Bender).

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[Reserved]

§§ 12.03[Reserved]

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§ 12.10 Governing Law

The procedure for adoption, unknown at common law, is entirely statutory [*Adoption of McDonald (1954) 43 Cal. 2d 447, 452, 274 P.2d 860]* . The statutes governing adoptions of unmarried minors are set forth in *Fam. Code § 8500 et seq.* Adoptions of adults and married minors are governed by *Fam. Code § 9300 et seq.*

Adoption proceedings are special proceedings [*Adoption of Pierce (1971) 15 Cal. App. 3d 244, 252, 93 Cal. Rptr. 171* ; *Adoption of Thevenin (1961) 189 Cal. App. 2d 245, 251, 11 Cal. Rptr. 219]* and are not governed by provisions of the Code of Civil Procedure governing civil actions [*see Code Civ. Proc. § 307 et seq.*]. However, specific provisions from that code may be incorporated into adoption proceedings by statute or case law [*see, e.g.,* *Adoption of Emery (1961) 191 Cal. App. 2d 428, 431-432, 12 Cal. Rptr. 685* (allowing adoption decrees to be set aside under *Code Civ. Proc. § 473* for mistake, inadvertence, surprise, or excusable neglect)].

Legal Topics:

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

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§ 12.11 Effect of 1994 and 1991 Revisions of Adoption Statutes

Effective January 1, 1994, statutes relating to adoption were incorporated into the Family Code and revised as necessary to further the goal begun in a 1991 revision [*see* Stats. 1992, ch. 162; *Fam. Code § 8500 et seq.*]. Effective July 1, 1991, California adoption laws were revised [*see* Stats. 1990, ch. 1363] to reorganize the adoption statutes and to repeal obsolete references [*see* former *Civ. Code § 220.10(b)*]. In making these revisions, the Legislature expressly did not intend to make any substantive or procedural changes in prior law [*see* former *Civ. Code § 220.10(a)*]. Rather, the legislative purpose was to improve readability, to provide logical sequencing and create separate units (four articles and a chapter) for agency, independent, intercountry, stepparent and adult adoptions, and to clarify definitions [*see* former *Civ. Code § 220.10(c)*]. The intent was to make the adoption law more easily understood and usable by the Department of Social Services, adoption agencies, the courts, persons working in adoptions, and the public in general [*see* former *Civ. Code § 220.10(d)*].

The Legislature further expressly did not intend to lose legislative history or judicial precedent applicable to prior law [*see* former *Civ. Code § 220.10(e)*]. Thus, cases construing prior law and regulations promulgated under prior law continue to accurately reflect the law of adoption in California.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12.12 Construction of Adoption Statutes

The main purpose of California's adoption statutes is the promotion of the welfare of children by the legal recognition and regulation of the consummation of the parent-child relationship. The statutes are to be liberally construed with a view to effect their objects and to promote justice [*Adoption of Barnett (1960) 54 Cal. 2d 370, 377, 6 Cal. Rptr. 562, 354 P.2d 18* ; *County of Los Angeles v. Superior Court (1969) 2 Cal. App. 3d 1059, 1064, 82 Cal. Rptr. 882]* .

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§ 12.13 Definition of Adoption

Adoption is a court procedure whereby the adopting parent assumes a parent-child relationship with the child of another, the effect of which is to sever the previously existing parent-child relationships between the child and its natural parents [*Marshall v. Marshall (1925) 196 Cal. 761, 766, 239 P. 36* ; *In re Darling (1916) 173 Cal. 221, 223-224, 159 P. 606* ; *see Fam. Code §§ 8616, 8617, 9305, 9306*; *see also § 12.17*]. The legal effects of the parent-child relationship are discussed in Ch. 394, *Parent and Child* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12.14 Kinds of Adoptions

An unmarried minor child may be adopted by any adult person subject to the rules prescribed by statute [*Fam. Code § 8600*], in any of four statutory categories of adoptions of unmarried minors in California (*see* Ch. 12B):

1. Independent adoption, in which the child is placed directly in an adoptive home by the child's natural parent or parents with or without the assistance of a third party, such as an attorney [*see Fam. Code § 8800 et seq.*];

2. Stepparent adoption, in which the spouse or domestic partner [*Fam. Code §§ 297, 9000(b)*] of a child's natural parent seeks to adopt the child [*see Fam. Code § 9000 et seq.*; *see also Fam. Code § 297.5(d)* (operative January 1, 2005); *Sharon S. v. Superior Court (2003) 31 Cal. 4th 417, 422 n.2, 437-438, 2 Cal. Rptr. 3d 699, 73 P.3d 554* (recognizing "second-parent" adoption)];

3. Agency adoption, in which the child is placed in an adoptive home by a licensed adoption agency after relinquishment by, or other termination of parental rights of, the child's natural parent or parents [*see Fam. Code § 8700 et seq.*]; and

4. Intercountry adoption, in which the child to be adopted is born in a foreign country [*see Fam. Code § 8900 et seq.*].

In addition, California law permits the adoption of adults and married minors [*see Fam. Code § 9300 et seq.*], discussed in Ch. 12C.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAdoption of AdultsFamily LawAdoptionProceduresAgency AdoptionFamily LawAdoptionProceduresPrivate AdoptionFamily LawAdoptionProceduresIntrafamily AdoptionFamily LawAdoptionProceduresStepparent Adoption

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§ 12.15 Equitable Adoption

In addition to the types of adoptions permitted by statute, the doctrine of equitable adoption has been judicially developed to avoid injustice to a child who was never formally adopted [*see* *Estate of Furia (2002) 103 Cal. App. 4th 1, 5, 126 Cal. Rptr. 2d 384* ; *Estate of Bauer (1980) 111 Cal.App. 3d 554, 560, 168 Cal. Rptr. 743* ; *Estate of Wilson (1980) 111 Cal. App. 3d 242, 246, 168 Cal. Rptr. 533]* . The doctrine allows a person who was accepted and treated as a natural or adopted child, and as to whom adoption was promised or contemplated but never performed, to share in inheriting the property of the equitable "parent" [*Estate of Ford (2004) 32 Cal. 4th 160, 8 Cal. Rptr. 3d 541, 82 P.3d 747]* . An equitable adoption will be found if there is an agreement to adopt and subsequent objective conduct indicating mutual recognition of an adoptive parent and child relationship to such an extent that, in equity and good conscience, an adoption should be deemed to have taken place [*Mingo v. Heckler (9th Cir. 1984) 745 F.2d 537, 539-540* ; *Estate of Bauer (1980) 111 Cal. App. 3d 554, 560, 168 Cal. Rptr. 743]* . The doctrine relies on an oral, executed contract in which the parents and child agree that the child should be adopted, and the child performs the contract, which results in a form of equitable estoppel. If such a contract is determined to exist and has been performed, justice and equity decree that the adoptive relationship must necessarily exist [*Reynolds v. City of Los Angeles (1986) 176 Cal. App. 3d 1044, 1050-1051, 222 Cal. Rptr. 517]* .

Although California decisions have explained equitable adoptions as the specific enforcement of a contract to adopt, the doctrine rests less on ordinary rules of contract law than on considerations of fairness and intent [*Estate of Ford (2004) 32 Cal. 4th 160, 8 Cal. Rptr. 3d 541, 82 P.3d 747]* . However, the doctrine of equitable adoption does not recognize an estoppel arising merely from the existence of a family relationship between the alleged parent and child. For example, while a person with whom the purported parent had a close, caring, and enduring relationship may be seen as more deserving of inheritance from the parent than the parent's heirs whose personal relationships with the parent may have been more attenuated, the doctrine of equitable estoppel is not a means of compensating the person for services rendered to the parent or a device for avoiding unjust enrichment of other, more distant relatives who will succeed to the estate under the intestacy statutes. Absent proof of an intent to adopt, a court must follow the statutory law of intestate succession [*Estate of Ford (2004) 32 Cal. 4th 160, 8 Cal. Rptr. 3d 541, 82 P.3d 747]* .

Intent to adopt may be shown by proof of an unperformed express agreement or promise to adopt. It may also be shown by proof of other acts or statements directly showing that the decedent intended the claimant to be, or to be treated as, a

legally adopted child, such as an invalid or unconsummated attempt to adopt, the decedent's statement of his or her intent to adopt, or the decedent's representation to the claimant or to the community at large that the claimant was the decedent's natural or legally adopted child. In addition to a statement or act by the decedent that unequivocally shows the decedent's intent to adopt, the claimant must show that the decedent acted consistently with that intent by forming with the claimant a close and enduring family relationship that must persist up to, or at least not be repudiated by the decedent before, the decedent's death. These elements must be shown by clear and convincing evidence [*Estate of Ford (2004) 32 Cal. 4th 160, 8 Cal. Rptr. 3d 541, 82 P.3d 747]* .

Prob. Code § 6450 et seq., governing parent and child relationships for the purpose of intestate succession, do not affect or limit application of the doctrine of equitable adoption for the benefit of a child or the child's issue [*Prob. Code § 6455*; *see Prob. Code § 6414(a)*]. For example, in contrast to *Prob. Code § 6454*, which requires the existence of a legal barrier to adoption for purpose of determining entitlement to intestate succession, there is no such requirement under the doctrine of equitable adoption [*Estate of Furia (2002) 103 Cal. App. 4th 1, 5-6, 126 Cal. Rptr. 2d 384]* . The doctrine applies to individuals who, although having filled the place of a natural born child, through inadvertence or fault, have not been legally adopted, as long as the evidence establishes an intent to adopt [*Estate of Furia (2002) 103 Cal. App. 4th 1, 5, 126 Cal. Rptr. 2d 384]* .

The doctrine, however, will only recognize an agreement between persons who are not incapacitated from entering into a contract. Thus, the child who is being adopted must be old enough to consent and agree to be adopted and to abide in that capacity [*Reynolds v. City of Los Angeles (1986) 176 Cal. App. 3d 1044, 1050-1051, 222 Cal. Rptr. 517* (two-day-old minor as incapable of entering into contract without indication that contract was later made when minor could have comprehended it); *see Estate of Radovich (1957) 48 Cal. 2d 116, 118-124, 308 P.2d 14* ; *Estate of Rivolo (1961) 194 Cal. App. 2d 773, 775-778, 15 Cal. Rptr. 268* (child was old enough to consent and agree to be adopted)].

The agreement may be made with someone other than the child, as long as the agreement is for the benefit of the child, not for the benefit of the parents of persons making the agreement [*Estate of Wilson (1980) 111 Cal. App. 3d 242, 245, 168 Cal. Rptr. 533* ; *Estate of Grace (1948) 88 Cal. App. 2d 956, 966, 200 P.2d 189]* . Courts have recognized inheritance rights based on a contract to adopt made between a child's parent or relative and a decedent who had promised to adopt the child [*see Steinberger v. Young (1917) 175 Cal. 81, 83-84, 165 P. 432* ; *Estate of Rivolo (1961) 194 Cal. App. 2d 773, 777, 15 Cal. Rptr. 268]* . The contractual right of an equitably adopted child to a portion of an intestate "parent's" estate does not extend to third parties [*Estate of Furia (2002) 103 Cal. App. 4th 1, 5-6, 126 Cal. Rptr. 2d 384* (equitably adopted child could not inherit property from testate "grandparent" whose will directed that property should go to "surviving issue" of her children)].

Legal Topics:

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

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§ 12.16 Surrogacy Contracts

[1] Validity and Enforceability

[a] Background

Couples who desire but who are unable to bear children are increasingly turning to the use of surrogates, often paying substantial sums of money in exchange for a function of the birth process that they lack. The parties enter into a contract under which a surrogate mother agrees to provide the function and renounce any parental rights that she might otherwise be entitled to in exchange for monetary consideration. The California Supreme Court, in a case not involving adoption, has upheld the basic validity and enforceability of surrogacy contracts against the argument that they are in violation of public policy [*Johnson v. Calvert (1993) 5 Cal. 4th 84, 95-97, 19 Cal. Rptr. 2d 494, 851 P.2d 776* ; *cf. Matter of Baby M. (N.J. 1988) 109 N.J. 396, 537 A.2d 1227]* .

If the surrogate later changes her mind and refuses to fulfill her obligations under the contract, the courts must first determine the rights of the parties under existing statutory law. Then the court must consider the effect of the contract on those rights [*see Johnson v. Calvert (1993) 5 Cal. 4th 84, 93, 95, 19 Cal. Rptr. 2d 494, 851 P.2d 776]* .

[b] Gestational Surrogacy

Two kinds of surrogate arrangements have come before the California courts. Surrogacy arising from *in vitro* fertilization (the laboratory fertilization of a woman's egg and implantation in the uterus of another, or "gestational surrogacy") [*see Johnson v. Calvert (1993) 5 Cal. 4th 84, 105, 19 Cal. Rptr. 2d 494, 851 P.2d 776* (opinion of Kennard, J., dissenting)] has been resolved by the California Supreme Court as a question of parentage under the Uniform Parentage Act [*Fam. Code § 7650*] in a manner that does not invoke the adoption process [*see Johnson v. Calvert (1993) 5 Cal. 4th 84, 88-93, 19 Cal. Rptr. 2d 494, 851 P.2d 776]* . This kind of surrogacy arrangement is discussed in Ch. 412, *Paternity* .

[c] Biological Surrogacy

[i] Definition and Concept

"Biological surrogacy" is the name given to an arrangement for conception in which the child is the product of the egg of the surrogate mother and the sperm of the intended father [*see In re Marriage of Moschetta (1994) 25 Cal. App. 4th 1218, 1221-1222, 30 Cal. Rptr. 2d 893* (labelled as "traditional surrogacy" by court)]. In this case, the surrogate is unquestionably the biological mother of the child--both genetically and through parturition--and no determination of maternity is required [*In re Marriageof Moschetta (1994) 25 Cal. App. 4th 1218, 1222, 1224-1226, 30 Cal.Rptr. 2d 893* (finding Uniform Parentage Act to be inapplicable)]. Under the typical agreement, the surrogate agrees to acknowledge the father's paternity and surrender the child for a stepparent adoption by the father's wife, the intended mother of the child [*see Adoption of Matthew B. (1991) 232 Cal. App. 3d 1239, 1252, 284 Cal. Rptr. 18]* .

[ii] Issues Posed by Withdrawal of Consent

However, the outcome of the stepparent adoption, and thus the legal parentage of the child, is not assured under this procedure. Under California law, a stepparent adoption requires first the filing of a petition [*Fam. Code § 9000(a)*], and then the signing of parental consent before a public officer, who must immediately file the consent with the clerk of the court where the petition is filed [*Fam. Code § 9003(a)*; *see* Part IV]. The statutes contemplate that the petition and (surrogate mother's) consent cannot be filed until after the child is born, because the petition must state the child's gender and date of birth [*see Fam. Code § 9000(c)*; *cf. 22 Cal. Code Reg. § 35099* (in independent adoption, mother's consent generally may not be taken until after she is discharged from hospital)]. The surrogate mother can frustrate the stepparent adoption process by refusing to sign a consent to the adoption, or by signing a consent and then seeking to withdraw it.

If the surrogate signs her consent after the birth of the child and then attempts to withdraw it, the question may be resolved according to the best interests of the child under the adoption statutes [*Adoption of Matthew B. (1991) 232 Cal. App. 3d 1239, 1255-1259, 284 Cal. Rptr. 18* ; *see Fam. Code § 9005* (petition to withdraw consent to stepparent adoption, discussed further in Ch. 12B)]. However, if the surrogate changes her mind before she formally consents to the adoption, her claim to parenthood may only be defeated if the surrogacy agreement is specifically enforceable [*In re Marriage of Moschetta (1994) 25 Cal. App. 4th 1218, 1222, 30 Cal. Rptr. 2d 893* ; *see also In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1422, 72 Cal. Rptr. 2d 280* (reviewing *Moschetta* and stating that in order for surrogate mother in biological surrogacy "not to be the lawful mother she would have to give the child up for adoption")]. With a few statutory exceptions (*see* Ch. 12A), a natural parent's consent is a jurisdictional prerequisite to an adoption, regardless of the child's best interests [*Adoption of Matthew B. (1991) 232 Cal. App. 3d 1239, 1259 n.9, 284 Cal. Rptr. 18* ; *but see In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1423, 72 Cal. Rptr. 2d 280* (rejecting "adoption default" paradigm that adoption is required in all surrogacies when intended parent lacks biological connection to child)]. Therefore, the issue is whether there is a nonstatutory exception to the consent requirement arising from contract.

In *In re Marriage of Moschetta (1994) 25 Cal. App. 4th 1218, 1228-1231, 30 Cal. Rptr. 2d 893* , the first court to confront the issue found no such nonstatutory exception [*In re Marriage of Moschetta (1994) 25 Cal. App.4th 1218, 1228-1231, 30 Cal. Rptr. 2d 893]* . Without reaching the question of whether public policy forbids the enforcement of such a contract, the court simply held that the contract afforded no basis to dispense with the statutory consent requirements under adoption law. If there is no parental consent, there can be no adoption [*In re Marriage of Moschetta (1994) 25 Cal. App. 4th 1218, 1222, 1231, 30 Cal. Rptr. 2d 893* ; *but see In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1422-1423, 72 Cal. Rptr. 2d 280* (distinguishing between specifically enforcing surrogacy contract that requires surrogate mother to consent to stepparent adoption, and enforcing parenting intent expressed in contract by court's dispensing with need for stepparent adoption altogether, by declaring intended mother as legal mother without necessity of adoption)].

However, it is unclear whether *Moschetta's* treatment of biological surrogacies survives *In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280* , which was decided by the same appellate panel. Although not itself

a biological surrogacy case, *Buzzanca* affirmed *Moschetta's* view that in order for a surrogate mother in a biological surrogacy not to be the lawful mother she would have to give the child up for adoption [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1422, 72 Cal. Rptr. 2d 280]* . Nevertheless, *Buzzanca* held that an intended mother--who with her husband had contracted for a surrogate to be implanted with fertilized ovum from anonymous sperm and egg donors--was the child's legal mother, and the surrogate mother (who in that case did not claim parental rights and was genetically unrelated to the child) had no parental status at all despite giving birth to the child. Under this analysis, no adoption by the intended mother was necessary because she was already a legal parent. The *Buzzanca* court distinguished *Moschetta* on the ground that *Moschetta* involved the claim of a woman who gave birth to the child, provided the egg, and wanted the child enough to go to court to seek custody. The only other possible mother in *Moschetta* was a woman who did not give birth, did not contribute genes, and who gave up her claim to custody [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1422, 72 Cal. Rptr. 2d 280]* . But the intended mother's disinterest was not stressed in *Moschetta*, which relied primarily on the surrogate's status as genetic and birth mother. It is not clear why the *Buzzanca* court felt that the status of "intended parent," by which the intended mother in *Buzzanca* completely displaced the birth mother, could not also displace the parental status of a woman in a traditional surrogacy who is both the biological and birth mother. There is little logic to an analysis that "intended parent" trumps the claims of a mother who carried and bore the child, but not the claims of a genetic mother who carried and bore the child. The *Buzzanca* court acknowledged that it did not consider, in *Moschetta*, whether the intended mother was the legal mother [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1422, 72 Cal. Rptr. 2d 280]* .

Moschetta may not be authority for how to analyze the traditional surrogacy situation in a contested case involving claims of a surrogate resisted by both intended parents who continue to want custody. Faced with a traditional biological surrogacy as in *Moschetta*, but with the intended mother willing to assume the parental role, use of the "intended parent" concept from *Buzzanca* might force the conclusion that a surrogate mother, despite being both the genetic and birth mother, would have no parental rights, and that the intended mother would be declared the legal mother. On the other hand, following the more cautious approach of *Johnson v. Calvert (1993) 5 Cal. 4th 84, 19 Cal. Rptr. 2d 494, 851 P.2d 776* , use of an "intended parent" concept only as a tie breaker between persons with claims to parentage as either the genetic or birth mother, rather than as an independent basis for parentage, may prevail. Accordingly, *Buzzanca* authority may, arguably, be limited to situations in which the surrogate makes no claim to parental rights, in which the issue is whether one or both of the intended parents can escape parental rights and leave the child partially or wholly without parents willing to undertake parental responsibility.

[iii] Effect of Criminal Statute

Another possible limitation on specific enforcement of an agreement to sign a consent form is the public policy expressed in *Penal Code § 273(a)*, which makes it a misdemeanor to pay money or anything of value to a parent for the consent or cooperation of the parent to a subsequent adoption of the child (*see* Ch. 12B). A court has noted that surrogate contracts may be contrary to this policy, which is to prevent the brokering of children as commodities [*see Sherwyn v. Department of Social Services (1985) 173 Cal. App. 3d 52, 57, 218 Cal. Rptr. 778]* . In *Johnson v. Calvert*, the Supreme Court found *Penal Code § 273* to be no bar to *in vitro* fertilization surrogacy, noting that because it does not involve adoption, it is not subject to adoption statutes [*Johnson v. Calvert (1993) 5 Cal. 4th 84, 95-96, 19 Cal. Rptr. 2d 494, 851 P.2d 776]* . However, the issue has not been addressed in the biological surrogacy context. In *Moschetta*, the court found no reason to look behind the basic consent requirement of the adoption statutes, and therefore did not consider any policy-based arguments, such as whether enforcement would offend *Penal Code § 273* (*In re Marriage of Moschetta (1994) 25 Cal. App. 4th 1218, 1228-1231, 30 Cal. Rptr. 2d 893*); *see also In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1413, 72 Cal. Rptr. 2d 280* (intent expressed in surrogacy contract was held to establish legal parentage in intended parents, neither of whom was genetically related to child). Surrogacy that requires a subsequent adoption might invoke the public policy of the statute. However, the Supreme Court's language suggests that this policy addresses only payments made with regard to children who have already been conceived [*Johnson v. Calvert (1993) 5 Cal. 4th 84, 96, 19 Cal. Rptr. 2d 494, 851 P.2d 776]* . Payments made in consideration for the conception functions involved in surrogacy may not be within the purview of the statute, whether they arise in a

parentage or an adoption setting.

Surrogacy by artificial insemination also involves a possible need for an adoption by the father [*see Fam. Code § 7613(b)*; *Sherwyn v. Department of Social Services (1985) 173 Cal. App. 3d 52, 55, 218 Cal. Rptr. 778]* . For further discussion, see [2], *below*, and Ch. 412, *Paternity*.

[iv] Implications for Postadoption Contact Agreements

In surrogate arrangements requiring an adoption, the adoptive parent or parents and the birth relatives, including the birth parent or parents, may enter into a postadoption contact agreement (formerly described as a "kinship adoption agreement") providing for an "achievable level of continuing contact [between the child and the birth relative(s)] when contact is beneficial to the [child] and the agreements are voluntarily entered into[.]" [*Fam. Code § 8616.5(a), (b)*; *but cf. In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1413, 72 Cal. Rptr. 2d 280* (surrogate who was not genetically related to child was not "parent" of child; it is unclear how this holding would affect ability of surrogate to enter into postadoption contact agreement)]. The terms and enforcement of the postadoption contact agreement are governed by *Fam. Code § 8714.7*, which provides that unless there is an existing relationship between the child and the birth relative, the terms of the postadoption contact agreement are limited to the sharing of information about the child [*Fam. Code § 8616.5(b)(3)*].

[d] If Neither Intended Parent Is Biological Parent

One unusual case involved a surrogate arrangement in which neither of the intended parents would be a biological parent of the child (insemination of the surrogate with both ovum and sperm from anonymous donors). When the marriage of the intended parents dissolved, the husband alleged that the contract was unenforceable and that the child was not a "child of the marriage" for whom support could be ordered in a dissolution proceeding [*see Fam. Code §§ 2010(c), 3600* (jurisdiction to award child support in proceeding for dissolution of marriage)]. On writ proceedings, the court did not fully determine that the surrogacy contract was enforceable and thus, the source of parental rights and obligations. Instead, it analogized to paternity actions [*see Carbone v. Superior Court (1941) 18 Cal. 2d 768, 117 P.2d 872]* and found that the surrogacy contract was sufficient to establish paternity by a preponderance of the evidence, which in turn was sufficient to support a temporary support order without a conclusive showing of paternity. The court found that under *Johnson v. Calvert*, it was likely that the intention of the parties would be given effect under the facts at issue because otherwise, the child could be left without any legal parent [*Jaycee B. v. Superior Court (1996) 42 Cal. App. 4th 718, 723-730, 49 Cal. Rptr. 2d 694* ; *cf. Alexandria S. v. Pacific Fertility Medical Center, Inc. (1997) 55 Cal. App. 4th 110, 114, 64 Cal. Rptr. 2d 23* (husband's written consent, although uncertified, is sufficient to establish legal paternity under *Fam. Code § 7613(a)*)].

The same parties again came before the appellate court in the course of their marital dissolution proceeding, after a trial court ruled that they were not the child's lawful parents, and that the husband, therefore, did not have a duty of support. In that later case, *In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280* , the appellate court found that both of the divorcing spouses were the lawful parents, and imposed a child support duty on the husband. In so doing, the opinion took the "intended parent" concept far beyond the confines of *Johnson v. Calvert (1993) 5 Cal. 4th 84, 19 Cal. Rptr. 2d 494, 851 P.2d 776* and may have implications for other surrogacy situations [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280]* .

In concluding that the intended parents, who began dissolution proceedings before the birth of the child, were the lawful parents, the appellate court reasoned that the child "would never have been born had not [wife] and [husband] both agreed to have a fertilized egg implanted in a surrogate. ... The same rule which makes a husband the lawful father of a child born because of his consent to artificial insemination should be applied here--by the same parity of reasoning that guided our Supreme Court in the first surrogacy case, *Johnson v. Calvert (1993) 5 Cal. 4th 84, 19 Cal. Rptr. 2d 494, 851 P.2d 776* to both husband and wife" [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1412-1413, 72*

Cal. Rptr. 2d 280] . Thus, the court observed, "[e]ven though neither [wife] nor [husband] are [sic] biologically related to [the child], they are still her lawful parents given their initiating role as the intended parents in her conception and birth" [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1428, 72 Cal. Rptr. 2d 280]* . This reasoning appears to elevate the "intended parent" concept from the status of a "tie-breaker" in *Johnson v. Calvert* to an independent ground of parentage for a father genetically unrelated to the child, and for a mother who neither gave birth to the child nor supplied the ovum.

The *Buzzanca* court, finding that paternity can be imposed on a husband under *Fam. Code § 7613* as well as under *Fam. Code § 7611(a), (b), (c)(1),* and *(c)(2),* reasoned by analogy that the Uniform Parentage Act does not limit the methods of establishing maternity to giving birth and genetics, and thus does not compel finding the surrogate to be the legal mother [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1415-1422, 72 Cal. Rptr. 2d 280]* . The court found that the doctrine of estoppel applied to the facts, although it declined to predicate the decision solely on estoppel, instead relying on UPA paternity statutes that embody the estoppel principle [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1421, 72 Cal. Rptr. 2d 280]* . The divorcing wife who was the intended mother was deemed, by analogy, to be situated similarly to a husband who consents to artificial insemination of his wife under *Fam. Code § 7613*; and, by analogy to a husband whose paternity is recognized under Fam. Code § 7613, her motherhood could be established under the UPA by virtue of her consent to the surrogacy [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1421-1426, 72 Cal. Rptr. 2d 280]* . The same reasoning, the court found, compelled the conclusion that the divorcing husband (and intended father) be declared the child's legal father [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1426, 72 Cal. Rptr. 2d 280]* .

Buzzanca noted that *Johnson v. Calvert* had stated in dicta that, in the situation in which neither the gestator nor the woman who provided the ovum for fertilization is willing to assume custody of the child after birth, a rule recognizing the intending parents as the child's legal, natural parents should best promote certainty and stability [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1424, 72 Cal. Rptr. 2d 280* ; *see Johnson v. Calvert (1993) 5 Cal. 4th 84, 94-95, 19 Cal. Rptr. 2d 494, 851 P.2d 776]* . *Johnson*, the *Buzzanca* court reasoned, is not limited to contests between the woman who gave birth and the woman who contributed the ovum, but applies to any situation in which a child would not have been born but for the efforts of the intended parents [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1424-1426, 72 Cal. Rptr. 2d 280]* .

The *Buzzanca* court also distinguished *In re Marriage of Moschetta (1994) 25 Cal. App. 4th 1218, 30 Cal. Rptr. 2d 893* , which held that a surrogacy contract was unenforceable and that the surrogate ("the mother both by birth and genes") was the legal mother unless she consented to an adoption. *Moschetta* concerned whether a surrogacy contract is specifically enforceable to transfer parental rights. Because the intended mother in *Moschetta* had disclaimed parental rights, that court never considered whether by her participation in the arrangement causing the child's birth she might have a basis for parenthood. The *Buzzanca* opinion explained that it was not enforcing the surrogate contract, but rather making a legal determination based on the intent expressed in the contract [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1422-1423, 72 Cal. Rptr. 2d 280]* . The *Buzzanca* court additionally stated that the anonymous ovum donor had no claim to parenthood [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1421-1422, 72 Cal. Rptr. 2d 280]* .

Moreover, the wife's (and intended mother's) alleged promises to her then-husband (and the intended father) that she would assume all responsibility for the child were also found to make no difference as to the intended father's lawful paternity. The court noted that it is well established that parents cannot, by agreement, limit or abrogate a child's right to support [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1426-1429, 72 Cal. Rptr. 2d 280]* . Apparently, even if Mr. Buzzanca never intended to be a parent, he has been deemed the child's father despite his lack of biological relationship, because his cooperation in the surrogacy arrangement made him an "intended parent" despite his subjective, actual intentions. The opinion did not clarify why the surrogate mother's disinclination to assume custody effectively removed her as a possible legal parent, but the parties' agreement that Mr. Buzzanca would have no parental responsibilities was nugatory.

Portions of the *Buzzanca* opinion seem to endorse the "intended parent" doctrine as displacing, in surrogacy situations, the traditional bases of parentage of genetics or giving birth. This may reflect that certain issues were not before the court. The surrogate mother's potential rights were never truly argued [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1421, 72 Cal. Rptr. 2d 280]* . The trial court, in fact, accepted a stipulation that the surrogate, and her husband, were not the "biological parents" of the child [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1413, 72 Cal. Rptr. 2d 280]* . *Buzzanca* may provide little guidance in situations in which the surrogate is also the genetic mother, or when she seeks custody. The court also implored the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction, in order to bring some predictability to the field [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1428, 72 Cal. Rptr. 2d 280]* .

Courts have additionally held that the "intended parent" concept, as applied to motherhood, is employed only as a tie-breaker when two women have equal claims by "genetic consanguinity" and childbirth. And when there is no such tie, as in a case in which a woman had neither a gestational or genetic relationship to a child, it is not applied [*Robert B. v. Susan B. (2003) 109 Cal. App. 4th 1109, 1115-1116, 135 Cal. Rptr. 2d 785]* . In that instance, a court refused to extend *Buzzanca* to a case in which (1) a woman had no genetic or gestational relationship to the child, and no status comparable to that of a presumed father under *Fam. Code § 7611(d)*, and *(2)* another woman asserted a legally recognized claim [*Robert B. v. Susan B. (2003) 109 Cal. App. 4th 1109, 1116-1117, 135 Cal. Rptr. 2d 785]* .

[2] Effect of Fam. Code § 7613 (Artificial Insemination)

Under *Fam. Code § 7613(b)*, the donor of semen provided to a licensed physician and surgeon or to a licensed sperm bank for use in artificial insemination or in vitro fertilization of a woman other than the donor's wife is not the legal father of the child. This rule is based on the assumption that the child is wanted by the woman giving birth (and her husband, if any) and not by the donor (and his wife, if any). It establishes the intent of the parties with regard to parental rights in the anonymous-donor, sperm-bank context.

However, the rule may be a legal bar to establishing paternity in a surrogacy arrangement that involves the artificial insemination of the intended father's sperm [*see, e.g.,* *Adoption of Matthew B. (1991) 232 Cal. App. 3d 1239, 1252, 284 Cal. Rptr. 18* ; *but see* *In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280]* . If the donor is conclusively not the child's father under *Fam. Code § 7613(b)*, then he and his wife must both adopt the child to obtain parental rights [*see* *Sherwyn v. Department of Social Services (1985) 173 Cal. App. 3d 52, 55, 218 Cal. Rptr. 778* (decided under predecessor statute); *but see* *In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280]* . Also, if the surrogate is married, the presumptions of paternity involving children of a marriage may apply [*see Fam. Code §§ 7540, 7611(a)* (discussed in ch. 412); *Sherwyn v. Department of Social Services (1985) 173 Cal. App. 3d 52, 57, 218 Cal. Rptr. 778* (decided under predecessor statute); *but see* *In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280]* .

California courts have not ruled directly on how *Fam. Code § 7613* may affect surrogacy arrangements. In *Adoption of Matthew B. (1991) 232 Cal. App. 3d 1239, 284 Cal. Rptr. 18* , the issue was tendered by the surrogate mother, who changed her mind and wanted to withdraw her consent to the adoption by the donor's wife. The court did not address the issue because it was raised by way of collateral attack after the time for appeal had expired, and the court held that, as no jurisdictional issue was involved, collateral attack was not available [*Adoption of Matthew B. (1991) 232 Cal. App. 3d 1239, 1267-1272, 284 Cal. Rptr. 18]* .

However, in dictum, the court noted that the presumption against the donor should not be applied in a surrogacy arrangement. The mother's conduct should equitably estop her from relying on the presumption to preclude the donor's paternity [*Adoption of Matthew B. (1991) 232 Cal. App. 3d 1239, 1272-1273, 284 Cal. Rptr. 18* ; *see also* *In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280]* . The court also stated that an interpretation of the statute that precluded the donor from seeking to establish his paternity would be unconstitutional. The court

analogized to cases finding the conclusive presumption of paternity of *Fam. Code § 7540* to be unconstitutional under some circumstances because the donor's constitutional right to rear his own child was not counterbalanced by any legitimate state interest [*Adoption of Matthew B. (1991) 232 Cal. App. 3d 1239, 1273, 284 Cal. Rptr. 18]* . For discussion of the conclusive presumption of paternity, including constitutional issues, *see* Ch. 412.

In *Sherwyn v. Department of Social Services (1985) 173 Cal. App. 3d 52, 218 Cal. Rptr. 778* , attorneys involved in establishing surrogacy arrangements brought a declaratory relief action challenging the constitutionality of the predecessor statute and the state's implementing adoption policies. The court found that there was no justiciable controversy [*Sherwyn v. Department of Social Services (1985) 173 Cal. App. 3d 52, 57-59, 218 Cal. Rptr. 778]* . In dictum, the court expressed its "grave doubts" about the statute's applicability to surrogate arrangements involving married couples, and about any bar arising from the conclusive presumption of paternity of *Fam. Code § 7540* if the surrogate mother is married and her husband has agreed to the arrangement [*Sherwyn v. Department of Social Services (1985) 173 Cal. App. 3d 52, 59, 218 Cal. Rptr. 778* ; *see also In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280]* .

The California Supreme Court's broad acceptance of surrogacy contracts in *Johnson v. Calvert (1993) 5 Cal. 4th 84, 19 Cal. Rptr. 2d 494, 851 P.2d 776* lends support for the dicta in *Matthew B.* and *Sherwyn* that *Fam. Code § 7613* should not be applied in surrogacy arrangements involving artificial insemination. *Subsequently, in In re Marriage of Moschetta (1994) 25 Cal. App. 4th 1218, 30 Cal. Rptr. 2d 893* , the court did not reach or even address the issue. While finding that the refusal of the surrogate to give her consent as required by adoption law was fully dispositive of her maternity, there was no discussion of the sperm donor's paternity, and no facts were set forth on which it could be determined whether *Fam. Code § 7613(b)* might apply [*see In re Marriage of Moschetta (1994) 25 Cal. App. 4th 1218, 1223, 30 Cal. Rptr. 2d 893]* . The opinion states that the surrogate became pregnant through artificial insemination. There is no mention of whether the procedure was performed by a licensed physician. Note that the holding of *In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280, 72 Cal. Rptr. 2d 280*-- that a genetically unrelated, intended father is a child's legal father in a surrogate situation--clearly implies that *Fam. Code § 7613* will be no bar to an intended father's establishing paternity when he is also a donor of the fertilizing sperm [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 72 Cal. Rptr. 2d 280]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewFamily LawAdoptionProceduresGeneral OverviewFamily LawPaternity & SurrogacySurrogacyAssisted Reproduction ParentageFamily LawPaternity & SurrogacySurrogacyAgreements

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Volume 2: Adoptions thru Airplanes and Airports-Chs. 12-17
Chapter 12 ADOPTIONS: NATURE AND EFFECT
PART II. LEGAL BACKGROUND

2-12 California Forms of Pleading and Practice--Annotated § 12.17

§ 12.17 Effect of Adoption on Parent-Child Relationship

After adoption, the person or persons adopting and the person adopted have towards each other the legal relation of parent and child and have all the rights and are subject to all the duties of that relationship [*Fam. Code § 8616*]. The supplanted parent or parents are, from the time of adoption, relieved of all parental duties toward and all responsibilities for the one adopted and have no rights over him or her [*Fam. Code § 8617*; *but cf. People v. Mora (1996) 51 Cal. App. 4th 1349, 1353-1356, 59 Cal. Rptr. 2d 801* (termination of parents' parental rights and adoption of child did not preclude biological father's conviction for battering "the mother of his child" under *Penal Code § 273.5*)]. This is true in the adoption of an adult or a married minor [*see Fam. Code § 9306*] as well as in the adoption of an unmarried minor. In a stepparent adoption, of course, only the noncustodial parent is supplanted; the custodial parent retains his or her parental rights with regard to the child [*Marshall v. Marshall (1925) 196 Cal. 761, 766-767, 239 P. 36* ; *see Fam. Code § 8548*].

By its terms, *Fam. Code § 8617* relieves birth parents of their duties toward and all responsibility for the adopted child, and assures adoptive parents of exclusive parental control by ending the birth parents' right over the child from the time of the adoption. It thus affords all the parties to the ordinary adoption an incentive for concluding it. However, the parties to an independent adoption may waive the benefits of Section 8617 when a birth parent intends and desires to coparent with another adult who has agreed to adopt the child and share parental responsibilities [*Sharon S. v. Superior Court (2003) 31 Cal. 4th 417, 427, 2 Cal. Rptr. 3d 699, 73 P.3d 554]* .

The adopting parent is liable for the support of the adopted child [*Estate of Ballou (1919) 181 Cal. 61, 64, 183 P. 440* ; *see In re Marriage of Ayo (1987) 190 Cal. App. 3d 442, 446-447, 235 Cal. Rptr. 458]* , and the supplanted parent is no longer liable for support [*Mitchell v. Brown (1912) 18 Cal. App. 117, 120-121, 122 P. 426]* . The duty of child support is discussed in Ch. 394, *Parent and Child* . Likewise, the adopting parents acquire the exclusive right to the custody of the adopted child [*see In re Santos (1921) 185 Cal. 127, 132, 195 P. 1055* ; *Huffman v. Grob (1985) 172 Cal. App. 3d 1153, 1157, 218 Cal. Rptr. 659]* . Custody and visitation rights are discussed in Ch. 220, *Dissolution of Marriage and Related Proceedings* , Pt. III, "Child Custody."

Because adopted persons, including adults, are "children" of the adopting person by reason of California law and public policy, adopted persons qualify as "issue" of the adopting person as used in the adopting person's will or trust [

Ehrenclou v. MacDonald (2004) 117 Cal. App. 4th 364, 372, 12 Cal. Rptr. 3d 411 , 12 Rptr. 3d 411]. However, unless the legal relationship between an adopted person and an adopting person embraces all of the mutual rights and duties of a parent and child, the adopted person is *not* the "issue" of the adopting person under California law [*Ehrenclou v. MacDonald (2004) 117 Cal. App. 4th 364, 372-373, 12 Cal. Rptr. 3d 411* (adults adopted under Colorado's adult adoption statute did not qualify as "issue" of person adopting them because, under that statute, they did not stand in relation to parent as children but only as parent's heirs at law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionChild RightsGeneral OverviewFamily LawChild SupportObligationsGeneral OverviewFamily LawParental Duties & RightsDutiesCare & Control of ChildrenFamily LawAdoptionProceduresAdoption of Adults

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Chapter 12 ADOPTIONS: NATURE AND EFFECT
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2-12 California Forms of Pleading and Practice--Annotated § 12.18

§ 12.18 Effect of Adoption on Visitation Rights

[1] Family of Deceased Birth Parent

Although certain relatives of a deceased parent may have visitation rights with a child [*see Fam. Code § 3102(a)*], adoption terminates these visitation rights unless the adoptive parent is a stepparent or grandparent [*Fam. Code § 3102(c)*; *Huffman v. Grob (1985) 172 Cal. App. 3d 1153, 1157, 218 Cal. Rptr. 659]* , or there is a postadoption contact agreement [*see Fam. Code § 8714.7*; *see also* [3], *below*].

[2] Nonparents Granted Visitation by Juvenile Court

If a dependent child of the juvenile court is adopted, the juvenile court's jurisdiction over the child terminates [*Welf. & Inst. Code § 366.3(a)*]. At that time, the juvenile court may make certain additional orders, which are transferred to the general jurisdiction of the superior court, either to an existing family law file or as the basis for opening a new file [*see Welf. & Inst. Code § 362.4*].

These may include visitation orders if the juvenile court determines that it would be in the best interests of the child to continue visitation with a nonparent. Thus, the juvenile court may impose visitation ordered even though the child has been adopted [*In re Hirenia C. (1993) 18 Cal. App. 4th 504, 518-520, 22 Cal. Rptr. 2d 443]* . For further discussion of the adoption of children who have been adjudged dependents of the juvenile court, see Ch. 328, *Juvenile Courts: Dependency Proceedings* (§§ 328.198, 328.199).

[3] Postadoption Contact Agreement

From January 1, 1998, through December 31, 2000, adopting parents and birth relatives, and a child could enter into "kinship adoption agreements" to permit continuing contact between the adopting parents and the child [*see* Stats. 1997, ch. 793; Stats. 2000, ch. 910]. These agreements were only authorized when the adopting parent was a specified relative of the child or a relative of the child's half sibling.

Operative January 1, 2001, the Legislature amended the statute (now renumbered as *Fam. Code § 8616.5*), and recast "kinship adoption agreements" as "postadoption contact agreements," and extended the availability of such agreements

to nonrelative adopting parents, if the agreement is found to be voluntarily entered into by the parties and in the child's best interest at the time the adoption petition was granted. The postadoption contact agreement must be filed with the adoption petition [*Fam. Code § 8714(c)*]. If there is an existing relationship between the child and the birth relative, the terms of the postadoption contact agreement may include provisions for visitation between the child and the birth parents or other birth relatives (including siblings), and the child's Indian tribe if the case is governed by the Indian Child Welfare Act (ICWA) (*25 U.S.C. § 1901 et seq.*) [*Fam. Code § 8616.5(b)(2)(A)*]. They may also include provisions for future contact between the child, birth parents, other birth relatives (including siblings), and the adoptive parents and, in cases governed by the ICWA, the child's Indian tribe [*Fam. Code § 8616.5(b)(2)(B)*]. If there is no existing relationship between the child and the birth relative, the terms of the postadoption contact agreement are limited to the sharing of information about the child [*Fam. Code § 8616.5(b)(3)*]. A child who is 12 years of age or older is considered a party to the kinship adoption agreement and must consent in writing to the terms of the agreement, unless the court finds by a preponderance of evidence that the agreement is in the best interests of the child [*Fam. Code § 8616.5(d)*].

For further discussion of postadoption contact agreements, see Ch. 12B, *Adoptions: Unmarried Minors* .

[4] Postadoptive Sibling Visitation for Dependent Children

Provisions in the Family and Welfare and Institutions Codes seek to facilitate postadoptive contact between children who were adopted after being adjudged juvenile court dependents and their siblings. These provisions reflect a strong legislative intent to maintain sibling relationships both during the dependency period and after the adoption of a dependent child [Stats. 1998, ch. 1072; *see Fam. Code § 8715*; *Welf. & Inst. Code §§ 366.29, 16002, 16501*]. A placing agency's adoption report must describe what plan, if any, exists for facilitation of postadoptive contact between the child and his or her siblings or half-siblings [*Fam. Code § 8715(b)*]. In addition, preadoptive training for prospective adoptive parents must include information about the importance of sibling relationships to the child, as well as encouraging the prospective adoptive parents to plan for facilitating postadoptive contact between the child and siblings [*Welf. & Inst. Code § 16002(3)*].

If prospective adoptive parents express a willingness to facilitate postadoptive sibling contact, a court granting the adoption may, with their consent, include in the adoption order provisions for them to facilitate such contact [*Welf. & Inst. Code § 366.29*]. However, the continuing validity of an adoption is not contingent on postadoptive contact, nor does such an order impair the adoptive parents' ability to change residence within or outside the state [*Welf. & Inst. Code § 366.29(a)*]. If the adoptive parents later determine that the ordered contact poses a threat to the health, safety, or well-being of the adopted child, they may terminate the contact after written notification to the court specifying their reasons [*Welf. & Inst. Code § 366.29(b)*]. No specific procedure to enforce the contact provisions is provided.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionChild RightsGeneral OverviewFamily LawAdoptionProceduresGeneral OverviewFamily LawChild CustodyVisitationAwardsThird PartiesGeneral OverviewFamily LawChild CustodyVisitationAwardsGeneral Overview

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§ 12.19 Effect of Adoption on Existing Guardianship

A guardianship of the person terminates on the person's adoption [*Prob. Code § 1600(b)*; *see In re Santos (1921) 185 Cal. 127, 132, 195 P. 1055]* .

A guardian of the estate of a minor will not necessarily be removed after adoption of the minor because a parent has no control over the property of the child [*Fam. Code § 7502*]. In appropriate circumstances, the court decreeing adoption of a minor may order that an existing guardianship of the estate of the minor continue in effect to manage the child's property [*see, e.g., In re Santos (1921) 185 Cal. 127, 132, 195 P. 1055]* . However, it might be appropriate to petition in the guardianship proceeding to remove the existing guardian and to have the adopting parent appointed as guardian.

Guardianship of minors is discussed in Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , through Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservator ships*. Consolidation of concurrent adoption and guardianship proceedings is discussed in Ch. 12B.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawGuardiansRemoval & Termination

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2-12 California Forms of Pleading and Practice--Annotated § 12.20

§ 12.20 Effect of Adoption on Inheritance Rights

[1] Intestate Succession

[a] Adoptees

For the purpose of determining intestate succession to estates of decedents who died on or after January 1, 1985 [*see Prob. Code § 6414(a)*], the parent-child relationship exists between an adopted person and the adopting parent or parents [*Prob. Code § 6450(b)*].

In general, for purposes of intestate succession, an adoption severs the parent-child relationship between the adoptee and his or her natural parents [*Prob. Code § 6451(a)*]. However, an adopted person may continue to inherit through his or her natural parent if (1) the natural parent and adopted person lived together at any time as parent and child, or the natural parent was married to or cohabited with the other natural parent at the time the child was conceived and died before the birth of the child, and (2) the adoption was by the spouse of either of the natural parents (that is, a stepparent) or after the death of either of the natural parents [*Prob. Code § 6451(a)*].

Neither a natural parent nor a relative of a natural parent (except for a wholeblood brother or sister of an adopted person or the issue of such a brother or sister) inherits from or through an adopted person on the basis of a parent-child relationship between the adopted person and the natural parent that satisfies (1) and (2) above, unless the adoption is by the spouse or surviving spouse of that parent (stepparent adoption) [*Prob. Code § 6451(b)*]. For purposes of these rules, a prior adoptive parent-child relationship is treated as a natural parent-child relationship [*Prob. Code § 6451(c)*].

[b] Stepchildren and Foster Children: Legal Barrier to Adoption

A stepchild may inherit from a stepparent or foster parent only if (1) the relationship began during the child's minority and continued throughout the parties' joint lifetimes; and (2) it is established by clear and convincing evidence that the stepparent or foster parent would have adopted the person but for a legal barrier [*Prob. Code § 6454*; *see* Parent and Child Relationship for Intestate Succession (1993) 23 Cal. L. Revision Comm'n Reports 1012 (Commission Comment to *Prob. Code § 6454*)].

The stepparent-stepchild relationship required is one in which the stepparent has assumed the role of de facto parent in a family setting [*see Estate of Claffey (1989) 209 Cal. App. 3d 254, 257-259, 257 Cal. Rptr. 197]* . Whether the foster parent-foster child relationship is limited by the definition of "foster child" contained in *Health and Safety Code § 1527*, which requires a placement in a licensed foster home, or broadly encompasses other de facto parent-child relationships has not been decided [*see Estate of Cleveland (1993) 17 Cal. App. 4th 1700, 1712 n.14, 22 Cal. Rptr. 2d 590]* .

If an attempt to legally adopt a stepchild or foster child was made and there is evidence that a legal barrier existed at that time, it may be inferred that the adoption failed because of the barrier. However, evidence that the attempt was aborted for nonlegal reasons, such as a change of heart, lack of funds, or mere lethargy, may overcome the inference [*Estate of Lind (1989) 209 Cal. App. 3d 1424, 1436, 257 Cal. Rptr. 853]* . In addition, a legal barrier that existed when an adoption was attempted must have continued until *the death* of the stepparent or foster parent [*Estate of Joseph (1998) 17 Cal. 4th 203, 70 Cal. Rptr. 2d 619, 627, n.7, 949 P.2d 472* (*disapproving, to extent inconsistent*, *Estate of Stevenson (1992) 11 Cal. App. 4th 852, 14 Cal. Rptr. 2d 250*); *Estate of Furia (2002) 103 Cal. App. 4th 1, 4, 126 Cal. Rptr. 2d 384]* .

Although refusal to give consent by a child's natural parents is the most common legal barrier to adoption [*see Estate of Cleveland (1993) 17 Cal. App. 4th 1700, 1708 n.10, 22 Cal. Rptr. 2d 590* (listing other possible legal barriers)], parental consent is not needed once a child reaches adulthood (*see* Ch. 12C, *Adoptions: Adults and Married Minors*). If the decedent died after the prospective heir reached majority, the lack of parental consent would not constitute a "legal barrier" to the adoption that satisfies *Prob. Code § 6454* [*see Estate of Joseph (1998) 17 Cal. 4th 203, 70 Cal. Rptr. 2d 619, 949 P.2d 472* ; *Estate of Furia (2002) 103 Cal. App. 4th 1, 4-5, 126 Cal. Rptr. 2d 384]* . One legal barrier that may satisfy *Prob. Code § 6454* even after a child reaches majority is the child's refusal to consent to the adoption [*Fam. Code §§ 8602, 9320*]. The issue of whether an inheritance claim by a foster child could be defeated by evidence that the child could have been adopted during minority *without* parental consent is unresolved [*see Estate of Stevenson (1992) 11 Cal. App. 4th 852, 864-865, 14 Cal. Rptr. 2d 250* (refusing to reach issue, but suggesting it can be raised by proper pleading; *disapproved on other grounds*, in *Estate of Joseph (1998) 17 Cal. 4th 203, 70 Cal. Rptr. 2d 619, 627, 949 P.2d 472*)].

An individual who cannot inherit under *Prob. Code § 6454* may assert inheritance rights under *Prob. Code § 6455* on the ground that he or she was equitably adopted by the intestate decedent [*see § 12.15*]. Equity does not grant an equitably adopted child a right to inherit. Instead, it creates a legal fiction that an adoption has occurred and grants the equitable child a portion of the intestate decedent's estate as the measure of the consideration due for fulfilling the duties of a child. This grant emanates from a contractual right, not a right of inheritance under the Probate Code [*Estate of Ford (2004) 32 Cal. 4th 160, 8 Cal. Rptr. 3d 541, 82 P.3d 747* ; *Estate of Furia (2002) 103 Cal. App. 4th 1, 5-6, 126 Cal. Rptr. 2d 384]* . In contrast, if *Prob. Code § 6454*'s requirements are met, the individual acquires a right to inherit not only from the parent, but also through the parent [*Estate of Furia (2002) 103 Cal. App. 4th 1, 6, 126 Cal. Rptr. 2d 384]* .

[c] Decedents Dying Before January 1, 1985

For estates of decedents who died before 1985, prior law applies [*see Prob. Code § 6414(a)*]. Under former *Prob. Code § 257*, an adopted child is deemed a descendant of one who has adopted him or her, the same as a natural child, for all purposes of succession by, from, or through the adopting parent the same as a natural parent. An adopted child does not succeed to the estate of a natural parent if the relationship between them has been severed by adoption, nor does the natural parent succeed to the estate of the adopted child, nor does the adopted child succeed to the estate of a relative of the natural parent, nor does any relative of the natural parent succeed to the estate of an adopted child [*see Estate of Garey (1963) 214 Cal. App. 2d 39, 42, 29 Cal. Rptr. 98]* .

Thus, under former *Prob. Code § 257*, even if a child was adopted after the death of his or her natural parent, that child would not inherit through the natural parent's relatives [*see Estate of Garey (1963) 214 Cal. App. 2d 39, 40, 53, 29*

Cal. Rptr. 98 ; *see also Estate of Serventi (1961) 190 Cal. App. 2d 514, 514-515, 12 Cal. Rptr. 206]* . Furthermore, whole-blood siblings do not inherit through a sibling who had been previously adopted by third parties [*Estate of Dolan (1959) 169 Cal. App. 2d 628, 629, 337 P.2d 498]* .

Under former *Prob. Code § 257*, a stepchild who was not adopted by the stepparent does not take by succession from the estate of the stepparent and does not affect the size of the surviving spouse's interest [*see California State Auto. Ass'n Inter-Ins. Bureau v. Jacobson (1972) 24 Cal. App. 3d 850, 853, 101 Cal. Rptr. 366]* .

Some holdings under prior law may, but have not been determined to, apply under current law. Under case law interpreting former *Prob. Code § 257*, adoption by a third party did not divest a child of vested rights to succeed to property from a deceased natural parent. Thus, if a surviving child had vested rights to a deceased natural parent's property, that child could still inherit the property of the deceased parent, even if the decedent's estate had not been administered when the child was adopted [*see Estate of Pillsbury (1917) 175 Cal. 454, 459, 166 P. 11]* . From the moment of adoption, however, an adopted person could not acquire any further rights to succeed to property from or through a natural parent [*see* former *Prob. Code § 257*].

[2] Class Gifts

[a] Current Law

An issue that may arise in the interpretation of a dispositive instrument, such as a will or trust, involves a devise to a class of "children" or "issue" without indicating whether the term includes adopted children. Because the intent of the testator as expressed in the instrument is to be given effect the careful drafter will, of course, avoid the problem by defining the terms carefully to expressly include or exclude actual or potential adoptees [*see Prob. Code § 21102(a)* (intention of testator controls legal effect of dispositions made in will, and statutory rules of construction apply only if intent is not indicated by will)]. If the terms are not defined, transfers by will, trust, deed, or other instrument are controlled by *Prob. Code § 21115* [*see Prob. Code § 21101*; *see also Prob. Code § 21140* (rules of construction apply to all instruments regardless of when they were executed); *but see Newman v. Wells Fargo Bank (1996) 14 Cal. 4th 126, 134, 59 Cal. Rptr. 2d 2, 926 P.2d 969* (no mention of *Prob. Code § 21115* in determining whether adopted child remained in class of issue)].

Former *Prob. Code § 6152*, the predecessor statute to *Prob. Code § 21115*, applied only to wills, and only to testators dying on or after January 1, 1985. Wills executed by testators dying before that date were construed under the law applicable before that date [*see Prob. Code § 6103*; *Estate of Heard (1957) 49 Cal. 2d 514, 521-522, 319 P.2d 637* ; *Estate of Pierce (1948) 32 Cal. 2d 265, 269, 196 P.2d 1* ; *Estate of McCallen (1975) 53 Cal. App. 3d 142, 152, 125 Cal. Rptr. 645* ; *Estate of McCormack (1969) 2 Cal. App. 3d 492, 497-499, 82 Cal. Rptr. 651]* . Legislation in 1994 [Stats. 1994, ch. 806, § 41] repealed former *Prob. Code §§ 6140-6179*. and reenacted those provisions as *Prob. Code § 21101 et seq.* now applicable to transfers by all instruments, not just wills [*see Prob. Code § 21101*] and regardless of the date of death of the transferor [*see Prob. Code § 21140*]. Therefore, it is theoretically possible that a will that was not governed by former *Prob. Code § 6152* because the testator died before January 1, 1985 is now governed by *Prob. Code § 21115*.

Under *Prob. Code § 21115(a)*, adopted persons, and their issue if appropriate to the class, are included in terms of class gift or relationship in accordance with the rules for determining relationship and inheritance rights for purposes of intestate succession. Thus, adoptees are generally considered as the children of their adopting parents and not of their natural parents for purposes of determining who is a member of a class [*see Prob. Code § 6451*; [1], *above*].

However, there are exceptions to this general rule. In construing a transfer by a transferor who is not the adoptive parent, a person adopted by the adoptive parent is not considered the child of that parent unless the person lived while a minor (either before or after the adoption) as a regular member of the household of the adopting parent or of that

parent's parent, brother, sister, or surviving spouse [*Prob. Code § 21115(b)*]. Thus, for example, a devise by a grandparent to a class of grandchildren would not include a person who was adopted as an adult by the testator's child unless the cohabitation requirement is met [*see, e.g., Estate of Joslyn (1995) 38 Cal. App. 4th 1428, 1438-1440, 45 Cal. Rptr. 2d 616* (cohabitation requirement met)]. This exception probably represents some change from prior law with regard to adult adoptions [*see Abramovic v. Brunken (1971) 16 Cal. App. 3d 719, 721-722, 94 Cal. Rptr. 303* ; *Estate of McCormack (1969) 2 Cal. App. 3d 492,498-499, 82 Cal. Rptr. 651]* .

There is a similar exception with regard to children and their natural parents. In construing a devise by a testator who is not a natural parent, a person born to the natural parent is not considered the child of that parent unless the person lived, while a minor, in the household of the natural parent or of that parent's parent, brother, sister, spouse, or surviving spouse [*Prob. Code § 21115(b)*]. Put another way, a person apparently is considered the child of a natural parent if he or she lived in one of the specified households, even if he or she was subsequently adopted. However, the otherwise applicable rule of intestacy is that the adoption terminates this parent-child relationship in all but a narrow range of exceptions [*see Prob. Code § 6451* (discussed in [1], *above*)].

If *Prob. Code § 21115(b)* applies to adoptees and is construed to place all who meet the shared-household condition within the class, then the adoption would not necessarily terminate the parent-child relationship. For example, an adoptee who lived with a natural parent for any time at all before being placed for adoption would still be within the class of children of that parent. Also, a child who is removed from the custody and control of his or her parents under juvenile court law [*see Welf. & Inst. Code § 300 et seq.*] and ultimately adopted remains in the class of children of the natural parents. It is questionable whether this is the true legislative intent of the statute [*see Estate of Goulart (1963) 222 Cal. App. 2d 808, 819-824, 35 Cal. Rptr. 465* (discussed in [3], *below*)].

If the decedent dies intestate, the rules for determining intestate succession under *Prob. Code § 21115* are those in effect at the time the transfer is to take effect in enjoyment [*Prob. Code § 21115(d)*].

[b] Applicability of Prior Law

It would appear that if the testator's intent is not expressed in the instrument [*see Prob. Code § 21102*], *Prob. Code § 21115* presents the applicable law for determining the inclusion of an adoptee in a class of children or issue [*see* [a], *above*]. Further, it would seem that section 21115 applies to any dispositive instrument, regardless of when it was executed [*see Prob. Code §§ 21101* (part applies to a will, trust, deed, and any other instrument), 21140 (part applies to all instruments, regardless of when they were executed; *but cf. Prob. Code § 21115(d)* (if decedent dies intestate, rules for determining intestate succession under *Prob. Code Section 21115* are those in effect at time transfer is to take effect in enjoyment)]. Former *Prob. Code § 6152*, the predecessor statute to *Prob. Code § 21115*, applied only to wills, and only to testators dying on or after January 1, 1985. Wills executed by testators dying before that date were construed under the law applicable before that date [*see Prob. Code § 6103*; *Estate of Heard (1957) 49 Cal. 2d 514, 521-522, 319 P.2d 637* ; *Estate of Pierce (1948) 32 Cal. 2d 265, 269, 196 P.2d 1* ; *Estate of McCallen (1975) 53 Cal. App. 3d 142, 152, 125 Cal. Rptr. 645* ; *Estate of McCormack (1969) 2 Cal. App. 3d 492, 497-499, 82 Cal. Rptr. 651* ; Stats. 1994, ch. 806, § 41 repealed former *Prob. Code §§ 6140-6179* and reenacted those provisions as *Prob. Code § 21101 et seq.*].

Nevertheless, in 1996, the California Supreme Court decided *Newman v. Wells Fargo Bank*, which seems to be squarely within *Prob. Code § 21115*, and neither the majority nor the dissent even mentioned that statute. The Court held that in construing a will that created a class of "issue" of the testator's children, the law of intestacy in effect in 1972 when the will was executed determined whether a grandchild who had been adopted by his stepfather remained in the class of the issue of the testator's children. The testator's son was the adoptee's biological father [*Newman v. Wells Fargo Bank (1996) 14 Cal. 4th 126, 134-136, 59 Cal. Rptr. 2d 2, 926 P.2d 969* (disagreeing with *Joslyn* to extent it stood for proposition that legislative change in public policy that is enacted after testatory's death may fairly be deemed to reflect testator's intent); *see also Estate of Joslyn (1995) 38 Cal. App. 4th 1428, 1435-1440, 45 Cal. Rptr. 2d 616* (testator

executed will in 1937 and died in 1949; court reached result provided by *Prob. Code § 21115* without mentioning statute)]. The Court agreed that the testator's intent as expressed in the will would apply under *Prob. Code § 21102*, but found no intent expressed therein with regard to adopted grandchildren [*Newman v. Wells Fargo Bank (1996) 14 Cal. 4th 126, 134-136, 59 Cal. Rptr. 2d 2, 926 P.2d 969]* . But instead of then determining the adoptee's status under § 21115, the Court applied the presumption that a testator is aware of the public policy reflected in the statutory definitions of the terms used in a will at the time the will is executed and to intend that those definitions be followed in construction of the will unless a contrary intent is expressed in the will [*Newman v. Wells Fargo Bank (1996) 14 Cal. 4th 126, 136-138, 59 Cal. Rptr. 2d 2, 926 P.2d 969]* . Finally, it held that the law to which the court must look to find the presumed intent of a testator with regard to adopted children is the law in effect when a will is executed [*Newman v. Wells Fargo Bank (1996) 14 Cal. 4th 126, 139, 59 Cal. Rptr. 2d 2, 926 P.2d 969]* .

Although it did not mention *Prob. Code § 21115(a)*, the majority found that whether an adoptee was within a class was to be in accordance with the laws of intestacy, which is the basic rule of section 21115(a) [*Newman v. Wells Fargo Bank, 14 Cal. 4th 126, 59 Cal. Rptr. 2d 2, 926 P.2d 969]* . But the 1972 law of intestacy was determinative. Because, under that law, a stepparent adoption severed the right of the adoptee to inherit from the natural parent, the adoptee was not within the class of "children" or "issue" in the will [*Newman v. Wells Fargo Bank (1996) 14 Cal. 4th 126, 142, 59 Cal. Rptr. 2d 2, 926 P.2d 969* ; *see* former *Prob. Code § 257*, discussed in *§ 12.20[1][c]*]. Had section 21115(b) been applied, the adoptee would have been within the class because he had lived, while a minor, as a regular member of the household of the natural parent (the testator's child) for four years [*Newman v. Wells Fargo Bank (1996) 14 Cal. 4th 126, 144, 59 Cal. Rptr. 2d 2, 926 P.2d 969* (opinion of Kennard, J., dissenting)].

Thus, *Newton* is strong authority for the proposition that the inclusion of adoptees within a class of children or issue is to be based on the law in effect at the time of execution of the instrument. But the failure of the Court to consider the effect of *Prob. Code §§ 21115* and *21140* leaves the matter in considerable doubt.

If the testator dies without a will, the rules for determining intestate succession under *Prob. Code § 21115* are those in effect at the time the transfer is to take effect in enjoyment [*Prob. Code § 21115(d)*].

[3] Antilapse Statute

The rules of *Prob. Code § 21115(a)* and *(b)* (*see* [2], *above*) also apply to California's antilapse statute [*Prob. Code § 21115(c)(1), (2)*; *see Prob. Code § 21110* (antilapse statute)]. Under the antilapse statute (applicable only if there is no expressed contrary intention or substitute disposition in the dispositive instrument) [*see Prob. Code § 21102(b)*], if a transferee who is "kindred" of the transferor or of the transferor's surviving, deceased, or former spouse predeceases the transferor, the "issue" of the deceased transferee take in his or her place [*see Prob. Code § 21110*]. If an adoptee would be the child of his or her adoptive parent for purposes of a class gift, he or she is also "kindred" and "issue" under the antilapse statute [*see Prob. Code § 21115(c)(1), (2)*].

Prob. Code § 21110 applies to transfers by will, trust, deed, or any other instrument, regardless of the date executed or the date of death of the transferor [*Prob. Code §§ 21101, 21140*]. Former *Prob. Code § 6147*, the predecessor anti-lapse statute, applied only to wills and to testators dying on or after January 1, 1985. Former Prob. Code § 92 applied to testators who died before that date [*see Estate of Goulart (1963) 222 Cal. App. 2d 808, 819-824, 35 Cal. Rptr. 465* ; *Estate of Esposito (1943) 57 Cal. App. 2d 859, 863, 135 P.2d 167* ; *Estate of Tibbetts (1941) 48 Cal. App. 2d 177, 178, 119 P.2d 368]* .

[4] Family Allowance and Exempt Property

Although the right to succeed to a decedent's property as heirs vests in the decedent's surviving children at the moment of death, the same is not true as to the rights of surviving minor children to claim a family allowance [*see Prob. Code § 6540 et seq.*] or to have exempt property (for example, a homestead) [*see Prob. Code § 6520 et seq.*] set apart from the

estate for their benefit. Therefore, if a decedent's surviving children are adopted by another before any such application is made, they lose their standing to claim a family allowance or to have exempt property set apart. After the adoption, they are no longer the decedent's surviving children but are the children of someone else [*see Estate of Pillsbury (1917) 175 Cal. 454, 458-459, 166 P. 11]* .

The personal representative may be chargeable with dereliction of duty if, knowing that the decedent's children are about to be adopted, he or she fails to apply for whatever family allowance or distribution of exempt property the children are then entitled to have. However, if the children are adopted before the personal representative's appointment, he or she cannot be blamed for their loss if no application was made. In that event, the judge decreeing the adoption may be guilty of a dereliction of his or her duty to determine whether adoption is in the children's best interest, but it is unlikely that the children would then get any relief unless fraud can be shown [*see Estate of Pillsbury (1917) 175 Cal. 454, 459-460, 166 P. 11]* .

[5] Pretermitted Heirs

Subject to certain exceptions, if a decedent who died on or after January 1, 1998, fails to provide in the testamentary instruments for a child adopted after all the instruments are executed, the omitted child must receive a share of the estate equal to what he or she would have received had the decedent died intestate, without executing any testamentary instruments [*Prob. Code §§ 21620, 21630*; *see Estate of Mowry (2003) 107 Cal. App. 4th 338, 341,131 Cal. Rptr. 2d 855* (daughter was adopted before execution of decedent's will, and did not qualify for treatment as omitted heir under *Prob. Code § 21620*)]. However, a child adopted after the execution of all of the decedent's testamentary instruments does not receive a share of the estate if any of the following is established [*Prob. Code § 21621*]:

- The decedent intentionally failed to provide for the child in the testamentary instruments, and the intent appears from the instruments;

- The decedent had one or more children and devised or otherwise directed the disposition of substantially all the estate to the other parent of the omitted child; or,

- The decedent provided for the child by transfer outside of the estate passing by the decedent's testamentary instruments, and the intention that the transfer be in lieu of a provision in said instruments is shown by statements of the decedent or from the amount of the transfer or by other evidence.

Former *Prob. Code §§ 6570* and *6571* still apply to testators dying between January 1, 1985, and December 31, 1997 [*Prob. Code § 21630* (applicable date of current law); former *Prob. Code § 6580* (applicable date of prior law)]. Former sections 6570 and 6571 were similar to current law, but referred to omissions from a "will" rather than "testamentary instruments."

Former Prob. Code § 90 applies to testators dying before January 1, 1985 [*Prob. Code § 21630* (applicable date of current law); former *Prob. Code § 6580* (applicable date of prior law); *see Estate of Turkington (1983) 147 Cal. App. 3d 590, 592, 195 Cal. Rptr. 178]* . Under this statute, an adopted child who was omitted from a will does not receive a share as a pretermitted heir if the child was provided for by any settlement, had an equal proportion bestowed on him or her by way of advancement, or if it appears from the will that the omission was intentional.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionChild RightsInheritance RightsEstate, Gift & Trust LawIntestacyDescent & DistributionEstate, Gift & Trust LawWillsPretermitted HeirsAdopted ChildrenEstate, Gift & Trust LawWillsFailure of BequestsAntilapse Statutes

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§ 12.21 Effect of Adoption on Immigration Status

For purposes of the immigration statutes [*8 U.S.C. § 1101 et seq.*], a "child" who is eligible for classification as an immediate relative of a United States citizen includes a child adopted while under the age of 16 years if he or she has been in the legal custody of, and has resided with, the adopting parent or parents for at least two years, either before or after the adoption [*8 U.S.C. § 1101(b)(1)(E)*]. Such a child can also include an "orphan" (broadly defined) under 16 years of age adopted abroad by a citizen and spouse, or by an unmarried citizen at least 25 years of age who personally saw the child before or during the adoption proceedings or a child under 16 years of age who is coming to the United States for adoption [*8 U.S.C. § 1101(b)(1)(F)*]. These definitions are significant because an immediate relative of a United States citizen is immediately eligible for an immigrant visa and does not have to enter the country under a quota [*8 U.S.C. § 1151(a), (b)*]. However, adoption severs the legal relationship for immigration purposes between an adopted child and the natural parents and siblings [*8 U.S.C. § 1101(b)(1)(E)*; *Young v. Reno (9th Cir. 1997) 114 F.3d 879, 883-887]* .

Intercountry adoptions of orphans are briefly discussed in Ch. 12B. Immigration of adopted children is fully discussed in Gordon, Mailman, & Yale-Loehr, Immigration law and procedure (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12.22 Effect of Adoption on United States Citizenship

[1] Naturalization

An adopted child, born outside the United States, may be naturalized if he or she is under the age of 18 years and one or both parents is a United States citizen, either by birth or naturalization, at the time of petitioning. No particular period of residence or physical presence in the United States is required if the child is residing in the United States, in the custody of an adoptive parent, pursuant to a lawful admission for permanent residence [*8 U.S.C. § 1433(a), (b)*].

The child must comply with all of the requirements for citizenship through naturalization [*8 U.S.C. § 1421 et seq.*] and must not be otherwise disqualified [*see 8 U.S.C. §§ 1424-1426, 1429*]. If the child is very young, he or she may be presumed to be of good moral character, attached to the principles of the Constitution, and well disposed to the "good order and happiness" of the United States [*8 U.S.C. § 1433(a)*].

If the adoptive parent does not obtain a naturalization decree before the adopted alien child attains the age of 18 years, the child must petition on his or her own behalf for naturalization [*see 8 U.S.C. § 1445(b)* (18 years as minimum age for petitioner)].

If an adopted child has one adoptive parent who is a United States citizen and another alien parent who is subsequently naturalized, the naturalization of the parent automatically confers citizenship on the adopted child in certain situations [*see 8 U.S.C. § 1431(b)*]. In addition, if an adopted alien child is born outside the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship, the child may automatically become a citizen on the naturalization of his or her parents if specified conditions are met [*see 8 U.S.C. § 1432(b)*].

Naturalization of adopted children is fully discussed in Gordon, Mailman, & Yale-Loehr, Immigration law and procedure (Matthew Bender).

[2] Loss of Citizenship

Neither adoption of or by an alien nor adopting or being adopted outside the United States is among the acts and conditions specified in the expatriation laws as proving a citizen's voluntary surrender or abandonment of United States

citizenship [*see 8 U.S.C. §§ 1101-1105a, 1101(a)(21), (22), 1481*-1489]. Therefore, adoption in California of a United States citizen by aliens did not cause the adopted citizen, who was a minor, to lose his United States citizenship [*Cabrillos v. Angel (9th Cir. 1922) 278 F. 174, 175]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresForeign Adoption

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2-12 California Forms of Pleading and Practice--Annotated § 12.23

§ 12.23 Effect of Adoption on Income Tax Liability

[1] "Dependent" Status

With respect to whether a person is the taxpayer's "dependent" for state and federal income tax purposes, family relationships are to be determined as though a legally adopted child of an individual is the individual's natural child [*I.R.C. § 152(f)(1)(B)*; *Rev. & Tax. Code § 17056*]. However, a taxpayer's adopted child or adoptive parent who is not a citizen or national of the United States [*see I.R.C. § 152(b)(3)* ("citizen or national"); *Rev. & Tax. Code § 17056*] cannot be the taxpayer's "dependent" unless either (a) he or she meets a residence test [*see I.R.C. § 152(b)(3)* (United States or contiguous country); *Rev. & Tax. Code § 17056*], or (b) in the case of an adopted child, he or she was a member of the taxpayer's household [*see I.R.C. § 152(b)(5)*; *Rev. & Tax. Code § 17056*], with the taxpayer's home as his or her principal place of abode, for the taxable year, and the taxpayer is a citizen or national of the United States [*I.R.C. § 152(b)(3)* ("citizen or national"); *Rev. & Tax. Code § 17056*].

A member of an individual's household who was placed with the individual by an authorized placement agency for legal adoption by that individual [*see McLeod v. United States (S.D. Ala. 1967) 276 F. Supp. 213, 214-216]* also is considered as the individual's natural child for the purpose of ascertaining whether a person is the taxpayer's dependent for income tax purposes [*I.R.C. § 152(f)(1)(B)*; *Rev. & Tax. Code § 17056*].

[2] Treatment of Adoption Expenses and Related Financial Assistance

[a] Income Exclusion Under Employer's Adoption Assistance Program

The Internal Revenue Code excludes from the gross income of an employee amounts received from an employer's "adoption assistance program" for qualified adoption expenses up to $10,000 incurred in taxable years beginning after December 31, 2001 [*I.R.C. § 137(a), (b)*]. The exclusion is reduced as the taxpayer's adjusted gross income exceeds $150,000 [*I.R.C. § 137(b)(2)*]. Note that particular rules apply with respect to adoption of a child with "special needs" (as further defined hereafter) [*I.R.C. § 137(b)(2)*]. An "adoption assistance program" is a separate written plan of an employer for the exclusive benefit of its employees, meeting specified requirements, including plans under *10 U.S.C. § 1052* (armed forces) and *14 U.S.C. § 514* (Coast Guard) [*I.R.C. § 137(c)*]. "Qualified adoption expenses" are the reasonable and necessary adoption fees, court costs, attorneys fees and other expenses that are directly related to, and

the principal purpose of which is for, the legal adoption of an eligible child by the taxpayer, and that are not in violation of state or federal law, nor incurred in a surrogate parenting arrangement or stepparent adoption [*I.R.C. § 137(c)* (referring to *I.R.C. § 23(d)*]. A "special needs" child is any child whom a state has determined cannot or should not be returned to the home of the parents, or for whom a state has determined that there exists a specific factor or condition (such as ethnic background, age, membership in a minority or sibling group, medical condition, or physical, mental, or emotional handicaps) that makes it reasonable to conclude the child cannot be placed with adoptive parents without providing adoption assistance [*I.R.C. §§ 23(d)(3), 137(d)*].

[b] Tax Credit for Adoption Expenses

There is a federal tax credit of up to $10,000 for qualified adoption expenses paid or incurred to adopt a child. In the case of adoption of a child with special needs (as defined in [a], *above*), the credit is $10,000, regardless of actual expenses incurred, in taxable years after December 31, 2002. Additionally, for the taxable year during which the adoption of a child with special needs becomes final, the taxpayer is treated as having paid an amount equal to actual qualified adoption expenses in excess (if any) of $10,000 with respect to such adoption for that year, and all prior taxable years [*I.R.C. § 23(a)*]. Adoptive parents should consult their tax adviser to determine to what extent the credit is available. "Qualified adoption expenses" are defined in [a], *above*. Limitations include that: (1) the credit is reduced as the taxpayers' (couples must file joint returns) adjusted gross income exceeds $150,000; (2) no credit is allowed for expenses reimbursed under an "employer's adoption assistance" program [*see* [a], *above*]; and (3) no credit is allowed for any expense that is otherwise a deduction or credit [*I.R.C. § 23*]. If the adoption is of a child who is not a citizen or resident of the United States, the credit is not allowed until the adoption becomes final [*I.R.C. § 23(e)*].

[c] Deduction of Adoption Expenses Under Prior Law

For taxable years beginning after December 31, 1996, through December 31, 2001, a federal tax credit was allowed for up to $5,000 ($6,000 for a "special needs" child) for qualified adoption expenses paid or incurred in a taxable year. The amount of credit allowable was reduced as income exceeded $75,000 [*see* former *I.R.C. § 23(a), (b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawChild SupportTaxationTax LawFederal Income Tax ComputationDependent & Personal Exemptions (IRC secs. 151-153)Family LawAdoptionProceduresForeign Adoption

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§ 12.24 Effect of Foreign Adoption

An adoption decree made in another state generally must be recognized and given effect in California under the full faith and credit clause of the United States Constitution [U.S. *Const., art. IV, § 1*; *see Estate of Hart (1984) 165 Cal. App. 3d 392, 395-397, 209 Cal. Rptr. 272* ; *Estate of Morris (1943) 56 Cal. App. 2d 715, 723, 133 P.2d 452]* . Similarly, under the doctrine of comity, a decree of adoption of a foreign country must generally be given effect in California [*see Estate of O'Dea (1973) 29 Cal. App. 3d 759, 773-774, 105 Cal. Rptr. 756]* . However, a foreign adoption decree may be collaterally attacked under some circumstances [*see Estate of Smith (1948) 86 Cal. App. 2d 456, 467, 195 P.2d 842* ; *Estate of Hampton (1942) 55 Cal. App. 2d 543, 551-552, 131 P.2d 565]* . For discussion, see Ch. 12E.

A judgment need only be given the effect it had in the state in which it was made. Therefore, if a proceeding in another state only gave the person the status of legal heir, the person does not have the status of child in California [*Estate of Grace (1948) 88 Cal. App. 2d 956, 959-962, 200 P.2d 189]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresForeign AdoptionConstitutional LawRelations Among GovernmentsFull Faith & Credit

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§ 12.25 Effect of Adoption on Right to Bring Wrongful Death Action

While a "child" of the decedent may bring a wrongful death action [*see Code Civ. Proc. § 377.60* (wrongful death actions)], under the provisions of the Probate Code governing intestate succession, an adoption generally severs the parent-child relationship between an adopted person and a birth parent of the adopted person [*Prob. Code § 6451(a)*; *see § 12.20*]. Because wrongful death actions are based on inheritance rights, this rule bars wrongful death actions by an adopted child for the death of a birth parent, and presumably by a birth parent for the death of an adopted child [*Phraner v. Cote Mark, Inc. (1997) 55 Cal. App. 4th 166, 169-170, 63 Cal. Rptr. 2d 740* ; *see also Buchea v. United States (9th Cir. 1998) 154 F. 3d 1114* (adoption of child pursuant to tribal custom by maternal grandparents, which was recognized by the State of Alaska, barred child from suing under federal Tort Claims Act and Alaska Wrongful Death Act for postadoption death of natural father)].

The general rule that adoption terminates the parent-child relationship between the adoptee and the birth parents does not apply if both of the following requirements are satisfied [*Prob. Code § 6451(a)*; *see § 12.20*]:

- The birth parent and the adopted person lived together at any time as parent and child, or the birth parent was married to or cohabiting with the other birth parent at the time the person was conceived and died before the person's birth; and

- The adoption was by the spouse of either of the birth parents or after the death of either of the birth parents.

Thus, it may reasonably be presumed that there is no bar to a wrongful death action by an adoptee or birth parent for the death of the other if all of the conditions of this exception are met.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsWrongful Death & Survival ActionsPotential PlaintiffsFamily LawAdoptionChild RightsInheritance RightsFamily LawAdoptionProceduresForeign AdoptionEstate, Gift & Trust LawIntestacyAdopted Children

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[Reserved]

§§ 12.26[Reserved]

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§ 12.50 Related Matthew Bender Publications

Gordon, Mailman, & Yale-Loehr, Immigration law and procedure (Matthew Bender)

Hollinger, Adoption law and practice (Matthew Bender)

Kirkland, Lurvey & Richmond, California family law practice and procedure, 2d ed., ch. 170 et seq. (Matthew Bender)

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§ 12.51 Federal Statutes

Definition of "children" entitled to classification as immediate relatives and immigrant visas. *8 U.S.C. § 1101(b)(1)(E), (F)*

Naturalization of adopted children. *8 U.S.C. § 1433*

Adopted child as dependent of taxpayer. *I.R.C. § 152*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportTaxationImmigration LawImmigrantsFamily-Sponsored ImmigrantsTax LawFederal Income Tax ComputationDependent & Personal Exemptions (IRC secs. 151-153)Family LawAdoptionProceduresForeign Adoption

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§ 12.52 State Statutes

[1] General Adoption Law

Adoption of unmarried minors. *Fam. Code § 8600 et seq.*

Definitions. *Fam. Code § 8500 et seq.*

Name and status of adopted child. *Fam. Code §§ 8616, 8618*

Status of birth parents. *Fam. Code § 8617*

Relative adoptions and post adoption contact agreements. *Fam. Code §§ 8714.5, 8714.7(c)*

Adoption of adults and married minors. *Fam. Code § 9300 et seq.*

Agency adoptions. *Fam. Code § 8700 et seq.*

Provisions of *Fam. Code § 7645 et seq.* for setting aside or vacating judgment of paternity do not establish basis for termination of any adoption, and do not affect any obligation of adoptive parent to adoptive child. *Fam. Code § 7648.8*

[2] Inheritance

Rights of adopted persons to class gifts and under anti-lapse statute. *Prob. Code § 6152*

Intestate succession rights of adopted persons. *Prob. Code § 6450 et seq.*

After-adopted child as pretermitted heir. *Prob. Code § 6570*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionChild RightsInheritance RightsFamily LawAdoptionProceduresAdoption of AdultsFamily LawAdoptionProceduresAgency AdoptionEstate, Gift & Trust LawIntestacyAdopted Children

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§ 12.53 Decisions

[1] Adoption Proceedings

Procedure for adoption as entirely statutory. *Adoption of McDonald (1954) 43 Cal. 2d 447, 452, 274 P.2d 860*

Adoption as proceeding by which adopting parent assumes parental relationship toward child of another. *Marshall v. Marshall (1925) 196 Cal. 761, 766, 239 P. 36*

Adoption proceedings as special proceedings in which written findings are not required. *Adoption of Pierce (1971) 15 Cal. App. 3d 244, 252, 93 Cal. Rptr. 171* ; *Adoption of Thevenin (1961) 189 Cal. App. 2d 245, 251, 11 Cal. Rptr. 219*

Summary judgment procedure [*Code Civ. Proc. § 437c*] as applicable to adoption proceedings. *Adoption of Backhaus (1962) 209 Cal. App. 2d 13, 20, 25 Cal. Rptr. 581*

[2] Effect of Adoption

[a] Parent-Child Relationship

Adoptive parent's duty of support for adopted child as same as for natural child and as continuing despite adoptive parent's divorce from child's natural parent. *In re Marriage of Ayo (1987) 190 Cal. App. 3d 442, 446-447, 235 Cal. Rptr. 458*

Relatives of minor's deceased mother as having no legal basis on which to claim visitation rights with minor after minor's adoption, under former Civil Code provisions superseded by *Fam. Code § 3102(c)*; *Fam. Code §§ 3020* and *3100* as not conferring discretionary authority to grant visitation rights to former relatives of adopted minor if *Fam. Code § 3102* would bar visitation. *Huffman v. Grob (1985) 172 Cal. App. 3d 1153, 1157, 218 Cal. Rptr. 659*

Visitation rights of grandparents under *Fam. Code § 3102* (visitation rights of deceased person's parents) as not

affected by adoption of child by stepparent. *Roquemore v. Roquemore (1969) 275 Cal. App. 2d 912, 913-916, 80 Cal. Rptr. 432*

[b] Foreign Decree

Oklahoma decision finding valid adoption as entitled to full faith and credit in California and adopted child as not entitled to intestate share of estate of his natural father, a California decedent. *Estate of Hart (1984) 165 Cal. App. 3d 392, 396-399, 209 Cal. Rptr. 272*

[c] Inheritance Rights

Adoption of adult niece, one of two nieces mentioned in will, after execution of will, as making adopted niece a pretermitted heir [former Prob. Code § 90; *now see Prob. Code § 6570*], who is entitled to entire estate. *Estate of Turkington (1983) 147 Cal. App. 3d 590, 594, 195 Cal. Rptr. 178*

Descendants of testator's daughter as including children adopted by daughter 21 years after testator's death if evidence showed testator had understanding of trend to equalize treatment of adopted children and no intent shown to limit meaning. *Estate of Huntington (1976) 58 Cal. App. 3d 197, 203-208, 129 Cal. Rptr. 787*

Adopted adult children of testator's daughter as not "children" of daughter under testator's will if adult adoptions were not allowed in California when will was written. *Williams v. Ward (1971) 15 Cal. App. 3d 381, 385, 93 Cal. Rptr. 107*

Adoption of child of deceased city employee by its stepfather as not affecting child's entitlement to rights under deceased father's pension. *Malone v. City of Los Angeles (1954) 126 Cal. App. 2d 447, 450-452, 272 P.2d 796*

[3] Second-Parent Adoption

Nonmarital partner of child's biological parent as entitled to adopt child (in so-called second-parent adoption) by complying with statutory procedures for independent adoption (including obtaining finding by court that adoption is in child's best interests), even when biological parent does not agree to termination of his or her parental rights. *Sharon S. v. Superior Court (2003) 31 Cal. 4th 417, 425-427, 2 Cal. Rptr. 3d 699, 73 P.3d 554*

Second parent not entitled to attorney's fee award under private attorney general doctrine (*Code Civ. Proc. § 1021.5*), because she had strong, objectively ascertainable private interest in bringing proceeding, which justified burdens in bringing it; costs of proceeding were not out of proportion to second parent's personal stake in outcome of proceeding. *Adoption of Joshua S. (2005) 132 Cal. App. 4th 561, 566-570, 33 Cal. Rptr. 3d 776*

[4] Equitable Adoption

Doctrine of equitable adoption as allowing person who was accepted and treated as natural or adopted child, and as to whom adoption was promised or contemplated but never performed, to share in inheriting property of equitable "parent." *Estate of Ford (2004) 32 Cal. 4th 160, 8 Cal. Rptr. 3d 541, 82 P.3d 747*

Equitable adoption claimant as not required to prove all elements of enforceable contract to adopt, but must demonstrate existence of direct expression by deceased parent of intent to adopt the claimant. *Estate of Ford (2004) 32 Cal. 4th 160, 8 Cal. Rptr. 3d 541, 82 P.3d 747*

Doctrine as applying to individuals who, although having filled place of natural born child, through inadvertence or fault, have not been legally adopted, so long as evidence establishes intent to adopt. *Estate of Furia (2002) 103 Cal. App. 4th 1, 5, 126 Cal. Rptr. 2d 384*

Equitable adoption as connoting agreement between persons who are not otherwise incapacitated from entering into contract and as inapplicable to relationship between adult man and minor he raised, but never formally adopted, because minor was incapable of entering into contract when man first took custody and record showed no indication that contract was later made when minor could have comprehended it. *Reynolds v. City of Los Angeles (1986) 176 Cal. App. 3d 1044, 1050-1051, 222 Cal. Rptr. 517*

[5] Statutory Construction

Adoption statutes as liberally construed. *San Diego County Dep't of Public Welfare v. Superior Court of San Diego County (1972) 7 Cal. 3d 1, 15, 101 Cal. Rptr. 541, 496 P.2d 453* ; *Adoption of Barnett (1960) 54 Cal. 2d 370, 377-378, 6 Cal. Rptr. 562, 354 P.2d 18*

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§ 12.54 Law Reviews

Horton, *Inheritance Rights of Children Born as a Result of a Surrogacy Contract: The World Turned Upside Down,* 18 CEB Estate Planning and Probabte Reporter 172 (June 1997).

Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter? 38 U.C.L.A. L. Rev. 917 (1991)*

Comment, *Contracts to Bear a Child, 66 Cal. L. Rev. 611 (1978)*

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§ 12A.syn Synopsis to Chapter 12A: ADOPTIONS: TERMINATION OF PARENTAL RIGHTS

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[5] Right to Notice and Opportunity to Be Heard

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§ 12A.50 When Consent of Birth Parent Is Not Required

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[j] Intervention

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§§ 12A.106-12A.109 [Reserved]

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§ 12A.111 Notice of Alleged or Possible Paternity [Fam. Code §§ 7662, 7664]

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§ 12A.112 Proceeding Under Uniform Parentage Act to Terminate Parental Rights of Alleged Natural Father--Petition [Fam. Code § 7662]

[1] FORM

[2] Use of Form

§ 12A.113 Proceeding Under Uniform Parentage Act to Terminate Parental Rights of Alleged Natural Father--Notice of Hearing [Fam. Code § 7667]

[1] FORM

[2] Use of Form

§ 12A.114 Proceeding Under Uniform Parentage Act to Terminate Parental Rights of Alleged Natural Father--Order Terminating Parental Rights [Fam. Code § 7664(b)]

[1] FORM

[2] Use of Form

§ 12A.115 Proceeding Under Uniform Parentage Act to Terminate Parental Rights of Alleged Natural Father--Judgment of Paternity, Parental Rights, and Custody [Fam. Code §§ 7637, 7664]

[1] FORM

[2] Use of Form

§§ 12A.116-12A.129 [Reserved]

§ 12A.130 Citation to Birth Parent to Appear at Adoption Hearing [Fam. Code § 8604]

[1] FORM

[2] Use of Form

§ 12A.131 Proceeding to Declare Minor Free From Parental Custody and Control--Complete Petition With Allegation of Abandonment [Fam. Code § 7822]

[1] FORM

[2] Use of Form

§ 12A.132 Proceeding to Declare Minor Free From Parental Custody and Control--Allegation of Felony Conviction [Fam. Code § 7825]

[1] FORM

[2] Use of Form

§ 12A.133 Proceeding to Declare Minor Free From Parental Custody and Control--Allegation of Certified Developmental Disability or Mental Illness [Fam. Code § 7826]

[1] FORM

[2] Use of Form

§ 12A.134 Proceeding to Declare Minor Free From Parental Custody and Control--Allegation of Mental Disability [Fam. Code § 7827]

[1] FORM

[2] Use of Form

§ 12A.135 Proceeding to Declare Minor Free From Parental Custody and Control--Citation to Custodian [Fam. Code § 7880]

[1] FORM

[2] Use of Form

§ 12A.136 Proceeding to Declare Minor Free From Parental Custody and Control--Citation to Parent or Other Relative [Fam. Code § 7881]

[1] FORM

[2] Use of Form

§ 12A.137 Proceeding to Declare Minor Free From Parental Custody and Control--Application and Declaration for Publication of Citation [Fam. Code § 7882]

[1] FORM

[2] Use of Form

[3] Service by Publication

§ 12A.138 Proceeding to Declare Minor Free From Parental Custody and Control--Order for Publication of Citation [Fam. Code § 7882]

[1] FORM

[2] Use of Form

§ 12A.139 Proceeding to Declare Minor Free From Parental Custody and Control--Findings and Judgment [Fam. Code §§ 7893, 7894]

[1] FORM

[2] Use of Form

§ 12A.140 Removal of Parent From State Prison to Attend Proceedings Under Fam. Code § 7800 et seq. [Penal Code § 2625]--Declaration of Parent [Code Civ. Proc. § 2015.5]

[1] FORM

[2] Use of Form

[3] Prisoner's Right to Attend Proceedings

§ 12A.141 Removal of Parent From State Prison to Attend Proceedings Under Fam. Code § 7800 et seq. [Penal Code § 2625]--Order for Prisoner's Appearance at Hearing Affecting Prisoner's Parental Rights and Waiver of Appearance--Judicial Council Form JV-450

[1] FORM

[2] Use of Form

[3] Transmission and Execution of Order

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2-12A California Forms of Pleading and Practice--Annotated § 12A.01

§ 12A.01 Scope of Chapter

This chapter discusses the various means, voluntary and involuntary, by which a minor may be freed for adoption through the termination of the parental rights of his or her birth parents. Involuntary termination of parental rights through so-called abandonment proceedings and under the Uniform Parentage Act [*Fam. Code § 7600 et seq.*], including notice and citation requirements, are considered in detail. This chapter also includes related forms [*see § 12A.110* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral OverviewFamily LawParental Duties & RightsTermination of RightsVoluntary Termination

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§ 12A.02 Cross References

The procedures for taking the voluntary consent of a birth parent to an independent or stepparent adoption are discussed in Ch. 12B, *Adoptions: Unmarried Minors* . Also discussed in Ch. 12B, *Adoptions: Unmarried Minors* , are procedures for voluntarily relinquishing a child to a licensed adoption agency for an agency adoption. For detailed consideration of the termination of parental rights of the birth parents of a dependent child of the juvenile court, see Ch. 328, *Juvenile Courts: Dependency Proceedings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresPrivate AdoptionFamily LawAdoptionProceduresStepparent AdoptionFamily LawDelinquency & DependencyDependency ProceedingsFamily LawParental Duties & RightsConsentGeneral Overview

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[Reserved]

§§ 12A.03[Reserved]

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2-12A California Forms of Pleading and Practice--Annotated § 12A.10

§ 12A.10 Governing Law

Statutes in California's adoption law that provide for the termination of parental rights include *Fam. Code § 8604* (when consent of natural parent is required), *Fam. Code § 8617* (adoption terminates rights of birth parents), and *Fam. Code § 8700* (relinquishment of child to agency). In addition, parental rights may be terminated under *Fam. Code § 7800 et seq.* and under the Uniform Parentage Act [*see Fam. Code § 7660 et seq.*]. Termination of the rights of parents of children who are adjudged dependents of the juvenile court after 1988 is governed by *Welf. & Inst. Code § 366.26*, which is discussed in Ch. 328, *Juvenile Courts: Dependency Proceedings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawParental Duties & RightsGeneral OverviewFamily LawParental Duties & RightsConsentGeneral OverviewFamily LawParental Duties & RightsTermination of RightsGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act

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2-12A California Forms of Pleading and Practice--Annotated § 12A.11

§ 12A.11 Definition of "Birth Parents"

Under California adoption law, a "birth parent" means the biological parent of the child to be adopted, or in the case of a child previously adopted, the adoptive parent [*Fam. Code § 8512*; *cf. Fam. Code §§ 8604, 8606* (which assume that "presumed father" under *Fam. Code § 7611* will necessarily be "birth parent")]. Obviously, a child has two birth parents, the birth mother and the birth father. The identity of the birth mother is usually not an issue; she is the person who gives birth to the child, an event that is usually physically perceived and officially recorded [*but see Fam. Code § 7650* (proceeding under Uniform Parentage Act to determine existence or nonexistence of mother-child relationship; discussed in Ch. 412, *Paternity*); *Johnson v. Calvert (1993) 5 Cal. 4th 84, 19 Cal. Rptr. 2d 494, 851 P.2d 776* (gestational surrogacy); *In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1413, 72 Cal. Rptr. 2d 280* (finding, in *Jaycee B.* situation involving contract for surrogate to be implanted with fertilized ovum from anonymous sperm and ovum donors, that intended parents (contracting parties) were legal parents, despite lack of biological relationship); *Jaycee B. v. Superior Court (1996) 42 Cal. App. 4th 718, 720, 49 Cal. Rptr. 2d 694]* . However, the identity and rights of the birth father are often major issues in determining whether an adoption may proceed (*see 12A.15[2], below*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionGeneral OverviewFamily LawParental Duties & RightsGeneral OverviewFamily LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act

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2-12A California Forms of Pleading and Practice--Annotated § 12A.12

§ 12A.12 Types of Proceedings for Terminating Parental Rights

There are six procedures by which a minor may be freed for adoption under California law. Two of these procedures are voluntary, in that the birth parent agrees to the adoption, either (1) by relinquishing the child to a licensed adoption agency for adoptive placement [*see* Fam. Code §§ 8606(d), (e), 8700, discussed § 12A.14[2] and in Ch. 12B, *Adoptions: Unmarried Minors*]; or (2) by consenting to the adoption of the child after an independent adoptive placement or pursuant to a stepparent adoption [*see Fam. Code §§ 8606(d), (e), 8801.3(c)(5), 8814, 9003*, discussed in *§ 12A.14[3]*, and in Ch. 12B].

Four of the procedures involve the involuntary termination of parental rights, either:

1. Through a determination in the adoption matter under *Fam. Code §§ 8604* and *8606(c)* that the consent of a noncustodial birth parent is not required because he or she has,for a period of one year, willfully failed to communicate with and to support the child although able to do so, or has deserted the child without provision for identification of the child (*see* Subpart C);

2. Through a determination under the Uniform Parentage Act (UPA) that it is in the best interests of the child that the parental rights of the child's alleged natural father (*see § 12A.15[2]*) be terminated and that therefore his consent to the adoption is not required [*see Fam. Code § 7664(b)*; Subpart B];

3. Pursuant to a proceeding under *Fam. Code § 7800* to declare the child free from the custody and control of the parent [*see Fam. Code § 8606(a)*; Subpart D]; or

4. Pursuant to a juvenile court proceeding to terminate the parental rights of the parents of a dependent child of the juvenile court [*see Fam. Code § 8606(a)*; *Welf. & Inst. Code § 366.26* (applicable only to children adjudged dependents after 1988)]. For discussion of this proceeding, see Ch. 328, *Juvenile Courts: Dependency Proceedings* .

Additionally, a minor who has been freed for adoption under the law of another jurisdiction may be adopted in

California without the consent of the birth parents [*Fam. Code § 8606(a), (b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral OverviewFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationAbandonmentFamily LawParental Duties & RightsTermination of RightsVoluntary Termination

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2-12A California Forms of Pleading and Practice--Annotated § 12A.13

§ 12A.13 General Rule Regarding When Child Is Free for Adoption

From the procedures and their statutory bases discussed above in *§ 12A.12*, a general rule of when a minor is free for adoption may be extracted, although the rule is not expressly set forth in any California statute: a minor child may not be adopted without the concurrence of both birth parents unless the parental rights of a nonconcurring parent are terminated, either in a prior judicial proceeding or in a proceeding in the adoption matter.

Legal Topics:

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

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§ 12A.14 Voluntary Termination of Parental Rights

[1] Nomenclature

As a point of nomenclature, under California's adoption statutes, a birth parent "relinquishes" a child to an adoption agency for placement in an agency adoption [*see Fam. Code § 8700*]. In the case of an independent or stepparent adoption, a birth parent "consents" to the adoption [*see Fam. Code §§ 8814, 9003*].

However, in an agency adoption, the failure or refusal of both birth parents to join in the relinquishment raises the issue of whether the nonrelinquishing birth parent's "consent" to the adoption is required. Thus, *Fam. Code §§ 7660 et seq.* and *8604-8606*, which determine when a birth parent's consent is and is not required (*see* subparts B and C), apply to all kinds of adoptions, including agency adoptions. Throughout this part, the terms "consent," "consenting," and "nonconsenting" are used to refer to a birth parent's concurrence or nonconcurrence to termination of his or her parental rights and to the adoption, regardless of the kind of adoption involved.

[2] Relinquishment of Child to Agency

The consent of a birth parent to an adoption is not necessary if the parent has relinquished the child for adoption to a licensed adoption agency under California law or under the law of another jurisdiction [*Fam. Code § 8606(d)*]. The filing with the California Department of Social Services of a certified copy of the relinquishment to a licensed California adoption agency terminates all parental rights and responsibilities of the relinquishing parent [*Fam. Code § 8700(j)*]. However, in a "directed" agency adoption, in which the relinquishment names the persons by whom adoption is intended, the birth parent has certain rights, including rescission of the relinquishment, if the designated placement is disrupted before the adoption is completed [*Fam. Code § 8700(g), (h)*]. The procedures for taking a relinquishment and for revoking or rescinding a relinquishment are discussed in Ch. 12B, *Adoptions: Unmarried Minors* .

[3] Consent to Independent or Stepparent Adoption

If a child has been placed independently for adoption (that is, directly by a birth parent rather than by an agency) [*Fam. Code § 8801(a)*], the placing birth parent signs a consent to the adoption at the time of placement as part of the adoption

placement agreement [*Fam. Code § 8801.3(b), (c)(5)*]. The nonplacing birth parent may sign an adoption consent in the presence of an agent of the Department of Social Services or a delegated county adoption agency [*Fam. Code § 8814(a)*]. The statute does not prohibit obtaining this consent before the *Fam. Code § 8801.3* placement for adoption, but it may be impossible to secure the cooperation of the Department or delegated county adoption agency unless a petition for adoption has been filed [*see Fam. Code § 8802(a)* (describing persons who may file adoption petition without a preexisting § 8801.3 placement for adoption)]. Similarly, in a stepparent adoption, the birth parent who is being supplanted by the adopting stepparent may sign a consent form [*see Fam. Code § 9003*]. In both cases, the adoption decree terminates the parental rights of the consenting birth parent [*Fam. Code § 8617*].

For discussion of the manner of taking consent, withdrawal of consent, and setting aside consent in an independent or stepparent adoption, see Ch. 12B, *Adoptions: Unmarried Minors* .

[4] Incapacity

A birth parent who is a minor has the right to consent to an independent adoption of the child or to relinquish the child to the Department of Social Services or an agency for adoption. The consent or relinquishment is not subject to revocation by reason of minority [*Fam. Code §§ 8700(b), 8814(d)*].

If a parent's consent is otherwise required for a child's adoption, there is no exception made for the parent's legal incompetency. Because, as a general rule, incompetent persons cannot give consent, or surrender or forfeit any rights [*see, e.g., Civ. Code §§ 38, 1556* (capacity to contract)], the incompetence of a parent whose consent is necessary would bar adoption of his or her unmarried minor child unless there is a ground to terminate that parent's rights over the child, or unless a conservator is authorized by the court to give such consent on behalf of the birth parent conservatee. For discussion of such possible grounds under *Fam. Code § 7826*, see *§ 12A.68[3]*. For discussion of the refusal by the Department of Social Services or a licensed adoption agency to accept a parent's consent or relinquishment because of alleged incompetency, see Ch. 12B, *Adoptions: Unmarried Minors* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionConsentAdoption AgenciesFamily LawAdoptionConsentMinor ParentsFamily LawAdoptionProceduresPrivate AdoptionFamily LawAdoptionProceduresStepparent AdoptionFamily LawParental Duties & RightsTermination of RightsVoluntary Termination

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§ 12A.15 Involuntary Termination of Parental Rights

[1] Drastic Remedy

Parenting is a fundamental right and, accordingly, is disturbed only in extreme cases of persons acting in a fashion incompatible with parenthood. Thus, the involuntary termination of the parent-child relationship by state action must be viewed as a drastic remedy that should be resorted to only in extreme cases [*In re Carmaleta B. (1978) 21 Cal. 3d 482, 489, 146 Cal. Rptr. 623, 579 P.2d 514* ; *In re Baby Girl M. (2006) 135 Cal. App. 4th 1528, 1538, 38 Cal. Rptr. 3d 484* ; *see* *Stanley v. Illinois (1972) 405 U.S. 645, 649-659, 92 S. Ct. 1208, 31 L. Ed. 2d 551* ; *but cf.* *In re Jasmon O. (1994) 8 Cal. 4th 398, 419, 33 Cal. Rptr. 2d 85, 878 P.2d 1297* (juvenile dependency proceeding); *In re Bridget R. (1996) 41 Cal. App. 4th 1483, 49 Cal. Rptr.2d 507* (voluntary placement; both holding that right of child to continue in stable and secure home can trump parents' fundamental right)].

[2] Classification of Birth Fathers

[a] Presumed Fathers

The rights of a nonconsenting birth father with regard to a proposed adoption depend on whether he is a "presumed" father under the Uniform Parentage Act (UPA). Under the UPA, fathers are classified as "alleged," "biological," and "presumed" fathers [*Gabriel P. v. Suedi D. (2006) 141 Cal. App. 4th 850, 855, 46 Cal. Rptr. 3d 437]* . The UPA presumptions of paternity, which are discussed in Ch. 412, *Paternity* , generally depend on a marriage to the birth mother (even if the marriage was previously terminated or legally invalid) or on father-child cohabitation [*see Fam. Code § 7611*; *see also Fam. Code § 7550 et seq.* (Uniform Act on Blood Tests to Determine Paternity)]. A presumption of paternity may now also arise by the mere execution of a declaration by the mother and a man who agree that he is the father of the child [*see Fam. Code §§ 7570 et seq., 7611(a),* discussed in Ch. 412, *Paternity*]. A presumed father has greater rights than an alleged or biological father [*Gabriel P. v. Suedi D. (2006) 141 Cal. App. 4th 850, 855, 46 Cal. Rptr. 3d 437* ; *In re Eric E. (2006) 137 Cal. App. 4th 252, 255, 39 Cal. Rptr. 3d 894* ; *see* [b], *below*].

The California Supreme Court has noted that the statutory term "presumed father" is problematic. A man's parentage of a child may be undisputed and legally proved, but he may nevertheless fail to be a presumed father [*Adoption of*

Kelsey S. (1992) 1 Cal. 4th 816, 824 n.3, 4 Cal. Rptr. 2d 615, 823 P.2d 1216] . Even a judgment of paternity does not necessarily give a biological father all of the rights of presumed father status with regard to adoption [*Adoption of Michael D. (1989) 209 Cal. App. 3d 122, 130-132, 256 Cal. Rptr. 884* ; *see also* *Robert J. v. Leslie M. (1997) 51 Cal. App. 4th 1642, 1646, 59 Cal. Rptr. 2d 905* (adjudicated father lacks standing to bring UPA action for nonpaternity because he is not presumed father); *cf.* *George M. v. Superior Court (1988) 201 Cal. App. 3d 755, 758-760, 247 Cal. Rptr. 330* (judgment creating legitimacy under law of another state entitles biological father to status of presumed father under California law with regard to termination of parental rights)]. Conversely, even if paternity is denied and legally disproved, a man may be a presumed father under the UPA [*Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 824 n.3, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* ; *see also* *In re Zacharia D. (1993) 6 Cal. 4th 435, 450 n.18, 453, 24 Cal. Rptr. 2d 751, 862 P.2d 751* ; *Librers v. Black (2005) 129 Cal. App. 4th 114, 124-127, 28 Cal. Rptr. 3d 188* (mother's live-in boyfriend may qualify as child's presumed father by virtue of receiving child into his home and openly holding child out as his natural child); *In re Elijah V. (2005) 127 Cal. App. 4th 576, 586-587, 25 Cal. Rptr. 3d 774* (mother's husband was child's conclusively presumed father under *Fam. Code § 7540* even though he was not child's biological father); *In re A.A. (2003) 114 Cal. App. 4th 771, 788-789, 7 Cal. Rptr. 3d 755* (determination in dependency case that one man is child's biological father does not necessarily defeat another man's presumed father status under *Fam. Code § 7611*)].

A man can also be deemed a child's legal father despite his having no genetic relationship to the child, and his wife the child's legal mother even though she has no genetic relationship, and did not give birth, to the child, when the child was conceived and born pursuant to a surrogacy agreement the spouses initiated [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1413, 72 Cal. Rptr. 2d 280]* . Because the child in that situation is deemed a "child of the marriage," the father will likely have all the rights of a presumed father, although not strictly meeting any of the statutory presumptions, but no reported decision has yet so held.

[b] Alleged Natural Fathers

There is no universally used term to describe a biological father who cannot meet any of the UPA presumptions of paternity. A man who may be the father of a child, but whose biological paternity has not been established, or in the alternative, who has not achieved presumed father status, is an "alleged" father; and the term "alleged natural father" is used throughout this chapter to refer to this category of "nonpresumed" biological, birth, or natural fathers [*see* In re Zacharia D. 1993) *6 Cal. 4th 435, 449 n.15, 24 Cal. Rptr. 2d 751, 862 P.2d 751* ; *see also* *Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 824 n.3, 4 Cal. Rptr. 2d 615* ; *Gabriel P. v. Suedi D. (2006) 141 Cal. App. 4th 850*]. "Alleged natural father" is used in adoption regulations to refer to a man who alleges that he is, or who is alleged to be, the biological father of a child, but who does not qualify under any of the statutory presumptions of paternity [*see 22 Cal. Code Reg. § 35000(a)(9)*]. The term is not used in the adoption statutes. Rather, it is derived from the UPA, which uses "natural father" to refer to a child's biological father, whether or not his paternity is presumed [*see Fam. Code § 7610(b)*]. The California Supreme Court has used the term "natural father" to mean a biological father who does not qualify as a presumed father [*see* *Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 824 n.3, 4 Cal. Rptr. 2d 615, 823 P.2d 1216]* .

Note that some fathers may not readily fall into the "alleged" or "presumed categories," leaving further areas for judicial or legislative resolution [*see* *In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1428-1429, 72 Cal. Rptr. 2d 280* (finding intended parents under surrogacy contract to be child's legal parents without necessity of child's adoption by either)]. For example, in *Adoption of Kelsey S.*, the California Supreme Court suggested that a parental relationship does not result from nonconsensual sexual relations, even if the man otherwise is a presumed father [*Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 849 n.14, 4 Cal. Rptr. 2d 615, 823 P.2d 1216]* . *Fam. Code § 7611.5* provides that there is no presumed father status if the child is conceived as the result of a sexual assault, and *Fam. Code § 7825(b)* allows a mother to terminate the father's rights when the child is conceived as a result of a violation of forcible rape for which the father was convicted. However, the father of a child who is conceived as a result of *voluntary* unlawful sexual intercourse (because the mother is under age 18) is not disqualified from asserting a constitutional right to withhold his consent to the adoption of his child [*In re Kyle F. (2003) 112 Cal. App. 4th 538, 541, 5 Cal. Rptr. 3d 190]* . Such a

father is also not precluded from claiming presumed father status by virtue of *Fam. Code § 7611.5*, unless he was convicted of a violation of *Pen. Code § 261.5*, and the mother was under age 15 and the father was 21 years of age or older at the time the child was conceived [*In re Kyle F. (2003) 112 Cal. App. 4th 538, 542, 5 Cal. Rptr. 3d 190]* .

[3] Rights of Nonconsenting Birth Mothers and Presumed Fathers

In general, if a child has a presumed father under the Uniform Parentage Act (UPA) [*see Fam. Code § 7611, [2], above*], the consent of both parents must be obtained before the child may be adopted [*Fam. Code § 8604(a)*; *Fam. Code §§ 8604(a), (b), 8606* refer also to "birth parent," creating ambiguity if presumed father is not biological father]. A child having no presumed father cannot be adopted without the consent of his or her mother. Consent is required only from living parents [*Fam. Code § 8605*].

A presumed father's consent is not required for a child's adoption unless he became a presumed father under *Fam. Code §§ 7540-7541*, *7570-7577*, or *7611(a)-(c)* before the mother's consent became irrevocable or before her parental rights were terminated [*Fam. Code § 8604(a)*].

The need for the consent of a presumed father is recognized in the Uniform Parentage Act at *Fam. Code § 7660*, which affords presumed fathers their rights under the adoption statutes. A presumed father must be given notice of the adoption proceeding unless his relationship to the child previously has been terminated or determined by a court not to exist, or the father voluntarily relinquished or consented to the adoption of the child [*see Fam. Code § 7660*; *see also George M. v. Superior Court (1988) 201 Cal. App. 3d 755, 759, 247 Cal. Rptr. 330* (child previously legitimated under Arizona law); *cf. Fam. Code § 7664(c)*]. A presumed father may waive the right to notice of any adoption proceeding by executing a form developed by the department before an authorized representative of the department, an authorized representative of a licensed public or private adoption agency, or a notary public or other person who is authorized to perform notarial acts. The waiver may be validly executed before or after the child's birth. Once signed, no notice, relinquishment for, or consent to the adoption of the child is required from the father for the adoption to proceed. The waiver must be voluntary and informed, and without undue influence [*Fam. Code § 7660.5*].

If a presumed father whose consent is required under *Fam. Code §§ 8604* and *8606* refuses to consent, his parental rights must be terminated under *Fam. Code § 7800 et seq.* before the adoption can be completed. If that is impossible, the presumed father, in essence, has a veto power over the adoption by withholding his consent. In the absence of a termination of rights, the "parental preference doctrine," now embodied in *Fam. Code §§ 3040* and *3041*, applies to the presumed father; this requires a finding that parental custody would be detrimental to the child as a condition precedent to granting custody to a nonparent [*see In re Baby Boy V. (2006) 140 Cal. App. 4th 1108, 1119, 45 Cal. Rptr. 3d 198* (when presumed father comes forward and offers to provide emotional and financial support and home for child, father's interests must be considered, as well as child's interests, in determining whether adoption should go forward); *Adoption of Daniele G. (2001) 87 Cal. App. 4th 1392, 1401-1402, 1408, 105 Cal. Rptr. 2d 341* (guardianship should have been awarded to couple with whom child had resided since birth); *George M. v. Superior Court (1988) 201 Cal. App. 3d 755, 759, 247 Cal. Rptr. 330]* . Note that *Fam. Code § 7807(a)* provides that the parental preference doctrine is inapplicable to parental rights termination proceedings under *Fam. Code § 7800 et seq.* The parental preference doctrine is discussed in Ch. 223, *Dissolution of Marriage: Child Custody* .

Similarly, if a father initiates an agency or independent placement for adoption, the mother's consent is required as provided in the adoption statutes, and she is entitled to notice of the adoption proceedings unlessher relationship to the child previously has been terminated by a court or the mother relinquished the child or consented to the adoption [*see Fam. Code § 7661*]. As with a father, the parental rights of a nonconsenting mother from whom consent is required must be terminated for an adoption to be completed; otherwise, the mother has a veto power by withholding her consent. The mother also is normally entitled to the parental preference.

[4] Rights of Nonconsenting Alleged Natural Fathers

The right of an alleged natural father to defeat an adoption by withholding his consent has been a subject of major dispute of constitutional dimensions throughout the United States, including California [*see Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* (and cases cited therein)]. California's adoption statutes grant no rights whatsoever to alleged natural fathers with regard to the adoption of their biological children [*see Fam. Code § 8604* (consent requirements extend only to mothers and presumed fathers)]. However, the Uniform Parentage Act (UPA) provides them with some rights, although they are far fewer than the rights of mothers and presumed fathers under the adoption statutes [*see Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 824-825, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* ; *see also § 12A.15[3], above*].

Under the UPA, an alleged natural father is entitled to notice of adoption proceedings and a right to be heard [*see Fam. Code § 7662*]. However, the determinative standard is the best interests of the child, and the alleged natural father is afforded no parental preference to the custody of the child over the prospective adoptive parents [*Fam. Code § 7664(b)*; *see In re Shereece B. (1991) 231 Cal. App. 3d 613, 622, 282 Cal. Rptr. 430]* .

This operation of California's adoption statutes and the UPA has been held to violate the constitutional rights to due process and equal protection of some, but not all, alleged natural fathers [*see Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 849, 4 Cal. Rptr. 2d 615, 823 P.2d 1216]* . The constitutional issues, and the procedures to determine the rights of an alleged natural father under the UPA, are considered in detail in Subpart B, *below.*

[5] Right to Notice and Opportunity to Be Heard

Notice to a birth parent and opportunity to be heard is constitutionally required with regard to any proceeding that may result in the involuntary termination of his or her parental rights [*see Armstrong v. Manzo (1965) 380 U.S. 545, 550, 85 S. Ct. 1187, 14 L. Ed. 2d 62* ; *In re B.G. (1974) 11 Cal. 3d 679, 688-689, 114 Cal. Rptr. 444, 523 P.2d 244*]. Lack of notice is also a jurisdictional defect [*Estate of O'Dea (1973) 29 Cal. App. 3d 759, 773, 105 Cal. Rptr. 756* ; *see* Ch. 12B, *Adoptions: Unmarried Minors* (discussion of jurisdiction in adoption proceedings)].

Notice (or citation) is required by California statutes in all such proceedings [*see Fam. Code §§ 7660 et seq., 7880-7882, 8604, 8605*; *see also Welf. & Inst. Code § 366.26* (termination of parental rights under juvenile court law)]. Notice must be reasonably calculated, under all the circumstances, to apprise of the pendency of the proceeding and to afford an opportunity to present objections [*In re Melinda J. (1991) 234 Cal. App. 3d 1413, 1418, 286 Cal. Rptr. 239]* . The notice must be adequate to advise of the specific issues that the parent must meet to avoid the termination of his or her rights [*In re Jay R. (1983) 150 Cal. App. 3d 251, 259-260, 197 Cal. Rptr. 672]* .

Service by publication is sufficient only if a person's whereabouts remains unknown despite reasonably diligent inquiry. The term "reasonable diligence" denotes a thorough, systematic investigation and inquiry conducted in good faith. If the party conducting the investigation ignores the most likely means of finding the defendant, the service is invalid even if the affidavit of diligence is otherwise sufficient [*David B. v. Superior Court (1994) 21 Cal. App. 4th 1010, 1016, 26 Cal. Rptr. 2d 586]* . Nevertheless, it has been held that, at least under some circumstances, the legislature may, consistent with due process, provide that a judgment terminating parental rights may not be set aside, changed, or modified for any reason including lack of reasonable diligence in locating a parent [*David B. v. Superior Court (1994) 21 Cal. App. 4th 1010, 1016, 26 Cal. Rptr. 2d 586* (construing juvenile court dependency law, *Welf. & Inst. Code § 366.26(i)*, and finding no due process violation after balancing rights of parent and child, in part because of significant period of time that it takes dependency case to reach point where judgment terminating parental rights is entered)].

The United States Supreme Court has limited the scope of the federal due process clause and has held that notice need not be given to some alleged natural fathers [*see Lehr v. Robertson (1983) 463 U.S. 248, 256-265, 103 S. Ct. 2985, 77 L. Ed. 2d 614* ("putative father registry" by which alleged natural father may affirmatively request notice of any adoption proceeding is sufficient)]. Nevertheless, California law provides for notice to any alleged natural father who

can be identified and located [*see Fam. Code § 7666(a)*].

For further discussion of notice requirements applicable under the various statutory procedures, see *§§ 12A.32*, and *12A.52[2]*, and *12A.71*. For a form that may be used generally to give notice of a pending adoption proceeding, see *§ 12A.110[1]*.

[6] Right to Counsel

Appointment of counsel is specifically provided for by statute in proceedings to terminate parental rights under *Fam. Code § 7800 et seq.* [*see Fam. Code § 7860 et seq.*, discussed in *§ 12A.79*]. The Uniform Parentage Act (*see* Subpart B, *below*) does not expressly require appointment of counsel for a parent whose rights may be terminated, but provides for a continuance to allow the court to appoint counsel [*see Fam. Code § 7668(a)*]. *Fam. Code §§ 8604-8606* (*see* Subpart C, *below*) do not mention a right to counsel.

Despite the presence or absence of statutory provisions, appointment of counsel for indigent parents may be required by the due process clauses of the United States and California Constitutions [*see Lassiter v. Department of Social Services (1981) 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640* ; *Salas v. Cortez (1979) 24 Cal. 3d 22, 27-34, 154 Cal. Rptr. 529, 593 P.2d 226]* . In *In re Jay R.* [*In re Jay R. (1983) 150 Cal. App. 3d 251, 197 Cal. Rptr. 672]* , the court of appeal held that before parental rights may be terminated, the California Constitution [*see Cal Const., art. I, § 7*] requires that counsel be appointed for a parent who cannot afford counsel [*In re Jay R. (1983) 150 Cal. App. 3d 251, 261-265, 197 Cal. Rptr. 672* (finding California Constitutional protection broader)]. Although the case involved a stepparent adoption and alleged abandonment under former *Civ. Code § 224* [*now see Fam. Code § 8604(b)*], the constitutional principles that compelled the court to conclude that appointed counsel is required would appear to apply to any proceeding in which parental rights might be terminated [*but cf. In re Bryce C. (1995) 12 Cal. 4th 226, 233, 48 Cal. Rptr. 2d 120, 906 P.2d 1275* (without determining exact parameters of state constitutional right, California Supreme Court refused to require appointment of counsel in all cases for respondent parents in appeal of order refusing to terminate parental rights; *In re Joshua B. (1996) 48 Cal. App. 4th 1676, 56 Cal. Rptr. 2d 556* (appellate court is not required to appoint counsel for a *respondent* indigent parent in dependency appeal)]. Courts have also found a constitutional right to counsel in proceedings to terminate parental rights under what is now *Fam. Code § 7820 et seq.* (former *Civ. Code § 232*) [*see In re James S. (1991) 227 Cal. App. 3d 930, 936, 278 Cal. Rptr. 295* ; *In re Christina P. (1985) 175 Cal. App. 3d 115, 129 n.5, 220 Cal. Rptr. 525* (finding right under federal Constitution and expressing no opinion whether right under state constitution is more expansive); *see also In re Isaac J. (1992) 4 Cal. App. 4th 525, 531, 6 Cal. Rptr. 2d 65* ; *but see In re Curtis S. (1994) 25 Cal. App. 4th 687, 691-693, 30 Cal. Rptr. 2d 739* , discussed below and in § 12A.79[2] (no constitutional right to counsel on appeal in proceeding initiated by private party)].

However, the due process clause of the United States Constitution does not require the appointment of counsel in every case. The trial court must evaluate and balance three elements in determining due process requirements; the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. The determination is to be made on a case-by-case basis [*Lassiter v. Department of Social Services (1981) 452 U.S. 18, 27-32, 101 S. Ct. 2153, 68 L. Ed. 2d 640* , *reh'g denied, 453 U.S. 927* ; *see U.S. Const. amends. V, XIV*; *see also In re Ronald R. (1995) 37 Cal. App. 4th 1186, 1195-1197, 44 Cal. Rptr. 2d 22* ; *In re Andrew S. (1994) 27 Cal. App. 4th 541, 548, 32 Cal. Rptr. 2d 670* ; *cf. M.L.B. v. S.L.J. (1996) 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473, 489-493* (due process and equal protection prohibit state from conditioning right to appeal termination of parental rights on prepayment of costs of preparing record)].

California law, which requires a parent to appear before counsel must be appointed, is constitutional [*In re Angela R. (1989) 212 Cal. App. 3d 257, 276-277, 260 Cal. Rptr. 612* ; *see Fam. Code § 7860*]. However, the appearance requirement may not apply if a parent is absent due to circumstances beyond his or her control (for example, incarceration) and has notified the authorities of his or her desire to oppose the matter [*see In re Rodriguez (1973) 34 Cal. App. 3d 510, 513-514, 110 Cal. Rptr. 56* ; *Adoption of Hinman (1971) 17 Cal. App. 3d 211, 216, 94 Cal. Rptr.*

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The California Supreme Court has held that an indigent parent who appeals the termination of his or her parental rights has a right to appointed counsel. In *In re J.W. (2002) 29 Cal. 4th 200, 202, 126 Cal. Rptr. 2d 897, 57 P.3d 363* , the Court, interpreting *Fam. Code § 7895*, held that any indigent parent appealing a judgment terminating parental rights in a proceeding to free a child from parental custody and control is entitled to counsel. In addition, *Fam. Code § 7895* applies whether or not the child is a juvenile court dependent. Although the language of § 7895 seems to restrict the right to appellate counsel to actions in which the child is a dependent of the juvenile court, the Court examined legislative history and other evidence of legislative intent in concluding that the Legislature did not intend for § 7895 to deny appellate counsel to the parents of children who are not dependents of the juvenile court [*In re J.W. (2002) 29 Cal. 4th 200, 209-211, 126 Cal. Rptr. 2d 897, 57 P.3d 363* (distinguishing *In re Bryce C. (1995) 12 Cal. 4th 226, 48 Cal. Rptr. 2d 120, 906 P.2d 1275* , which involved indigent *respondent* to appeal of judgment that refused to terminate parental rights and found no absolute right to appointed counsel in successfully resisting termination, though appellate court had discretion to appoint counsel); *cf. Fam. Code Section 7895* providing for appointed appellate counsel "[u]pon appeal from a judgment freeing a child who is a dependent child of the juvenile court from parental custody and control"].

The child has a right to appointed separate counsel on appeal of a juvenile dependency judgment terminating parental rights in situations in which a conflict of interest exists with counsel for the governmental entity, or on a showing that the best interests of the child require the assignment of separate counsel. Otherwise, appointment of separate counsel on appeal for the minor is not mandatory [*In re Mary C. (1995) 41 Cal. App. 4th 71, 79, 48 Cal. Rptr. 2d 346* (also suggesting that same right exists on appeal from *Fam. Code § 7800* proceedings by virtue of *Fam. Code § 7861*)].

An indigent parent may constitutionally waive the right to counsel [*In re Justin L. (1987) 188 Cal. App. 3d 1068, 1073-1076, 233 Cal. Rptr. 632* ; *see Fam. Code § 7862*; *but see In re James S. (1991) 227 Cal. App. 3d 930, 936, 278 Cal. Rptr. 295* (disagreeing to extent *Justin L.* suggests that there is no due process right to counsel in former *Civ. Code § 232* proceedings)]. However, mere acquiescence is not a waiver; a waiver must be knowing and intelligent [*In re Laura H. (1992) 8 Cal. App. 4th 1689, 1695, 11 Cal. Rptr. 2d 285* ; *but see In re Gilberto M. (1992) 6 Cal. App. 4th 1194, 1200, 8 Cal. Rptr. 2d 285* , criticized in *Laura H., 8 Cal. App. 4th 1689, 1695 n.7, 11 Cal. Rptr. 2d 285]* . A knowing and intelligent waiver of the right to counsel cannot be found solely from a parent's failure or refusal to cooperate with appointed counsel, and it is error to discharge counsel because of the parent's noncooperation [*In re Nalani C. (1988) 199 Cal. App. 3d 1017, 1028, 245 Cal. Rptr. 264* (expressing preference for requiring counsel to proceed without parent present rather than granting counsel's motion to withdraw)].

If appointment of counsel for the parent is constitutionally required, the parent is entitled to effective assistance of counsel [*In re James S. (1991) 227 Cal. App. 3d 930, 935-936, 278 Cal. Rptr. 295* ; *see In re Andrew B. (1995) 40 Cal. App. 4th 825, 853, 47 Cal. Rptr. 2d 604* (relying on this rationale to hold that *Wende* review is required in juvenile dependency appeals)]. Denial of effective assistance at trial is an issue that may be properly presented to a reviewing court. If counsel's ineffective representation of parent has resulted in inappropriate termination of parent-child relationship, both parent and child may have interest in restoration [*In re Krystle D. (1994) 30 Cal. App. 4th 1778, 1808-1809, 37 Cal. Rptr. 2d 132* ; *In re Issac J. (1992) 4 Cal. App. 4th 525, 531-532, 6 Cal. Rptr. 2d 65]* . Effective assistance may be denied if counsel improperly fails to summon a court reporter [*In re Christina P. (1985) 175 Cal. App. 3d 115, 129-130, 220 Cal. Rptr. 525* (termination reversed since clerk's transcript revealed substantial likelihood of insufficient evidence and no conceivable purpose existed for failure to summon reporter)]. A trial court's denial of travel expenses to an indigent parent does not constitute a denial of effective assistance of counsel. An indigent parent is not entitled to travel expenses to a hearing to free the child from parental custody [*see In re Cleopatra D. (1987) 193 Cal. App. 3d 694, 697-698, 238 Cal. Rptr. 426]* . Further, the child's interest in bringing custody determinations to finality mandate that the failure of counsel to properly effect an appeal may not constitute grounds for a collateral attack on a judgment terminating parental rights [*In re Issac J. (1992) 4 Cal. App. 4th 525, 532, 6 Cal. Rptr. 2d 65]* . For further discussion of collateral attacks on adoption and adoption-related judgments, see Ch. 12E, *Adoptions: Attack on Decree* .

Whether the right to effective assistance of counsel requires an appellate court to conduct a " *Wende* review" [*see People v. Wende (1979) 25 Cal. 3d 436, 158 Cal. Rptr. 839, 600 P.2d 1071* ; *see also Anders v. California (1967) 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493]* of the trial record--to determine whether any factual or legal issues exist even if appointed counsel raises no specific issues in the appellate brief--has now been resolved by the California Supreme Court. In *In re Sade C.*, the Court held that *Wende* review *does not* apply to an indigent parent's appeal from a judgment or order, obtained by the state, that adversely affects the parent's custody of a child or status as the child's parents. The Court found that the prophylactic procedures needed in criminal cases to protect an indigent criminal defendant's right to the assistance of counsel are limited in their applicability and should not be extended to indigent parents' appeals in dependency cases [*In re Sade C. (1996) 13 Cal. 4th 952, 984-994, 55 Cal.Rptr. 2d 771, 920 P.2d 716]* . Further, there is no right to a discretionary *Wende* review in light of *Sade C.* [*In re Sara H. (1977) 52 Cal. App. 4th 198, 201, 60 Cal. Rptr. 2d 434* ; *cf. County of Kern v. Dillier (1999) 69 Cal. App. 4th 1412, 82 Cal. Rptr. 2d 318* (no right to *Wende* review for indigent father appealing judgment establishing paternity and child support obligation)].

[7] Standard of Proof

Proof by clear and convincing evidence is required by statute in a proceeding to free a child from parental custody and control under *Fam. Code § 7800 et seq.* [*Fam. Code § 7821*; *In re Baby Girl M. (2006) 135 Cal. App. 4th 1528, 1538, 38 Cal. Rptr. 3d 484]* . Other proceedings that may result in the termination of parental rights do not specify this, or any other standard of proof [*see Fam. Code §§ 7664, 8604(b), 8606*], and an argument is plausible that a requirement of proof by clear and convincing evidence is not required [*see Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 824, 849-850, 4 Cal. Rptr. 2d 615, 823 P. 2d 1216* (upholding statutory scheme of *Fam. Code § 7664* for terminating rights of alleged fathers without expressly requiring proof by clear and convincing evidence)].

Nevertheless, there is authority that the clear-and-convincing-evidence standard of proof is constitutionally required in a proceeding that results in the termination of parental rights, and until further legislative or judicial clarification is given, it should not be assumed that a lesser standard will apply in those other proceedings. Under this view, due process compels that this higher standard be satisfied before the state may permanently terminate a parent's fundamental right to the companionship, care, custody, and management of his or her children [*Santosky v. Kramer (1982) 455 U.S. 745, 768-769, 102 S. Ct. 1388, 71 L. Ed. 2d 599* ; *see In re Gladys L. (2006) 141 Cal. App. 4th 845, 849, 46 Cal. Rptr. 3d 434* (due process prohibits termination of parental rights in dependency proceeding when allegations that parent is unfit are not supported by clear and convincing evidence); *Guardianship of Stephen G. (1995) 40 Cal. App. 4th 1418, 1422-1432, 47 Cal. Rptr. 2d 409* (*Cynthia D.*, cited hereafter, does not imply that standard of proof in guardianship actions constitutionally could be less than "clear and convincing evidence", rejecting contrary implication in *Guardianship of Diana B. (1994) 30 Cal. App. 4th 1766, 36 Cal. Rptr. 2d 447* ; *but see Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 253-256, 19 Cal. Rptr. 2d 698, 851 P.2d 1307* (lesser standard is constitutional within context of California's overall statutory system for asserting dependency jurisdiction, removing child from home, and ultimately terminating parental rights if reunification is not accomplished)]. For further discussion see *§ 12A.66*, and Kirkland, Luvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Ch. 171 (§ 171.06[7]) (Matthew Bender).

A court may not declare an *Indian child* free from the custody or control of a parent unless the court finds, by clear and convincing evidence, that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and these efforts have been unsuccessful [*see Welf. & Inst. Code § 361.7*], and also finds, *beyond a reasonable doubt*, that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child [*Fam. Code § 7892.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselAppointmentsConstitutional LawBill of RightsFundamental RightsProcedural Due

ProcessGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofClear & Convincing ProofFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act

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PART II. LEGAL BACKGROUND
A. General Principles and Terminology

2-12A California Forms of Pleading and Practice--Annotated § 12A.16

§ 12A.16 Effect of Lack of Consent

If a parent's consent is required but not given, the court ordinarily has no jurisdiction to grant the adoption [*see Adoption of Barnett (1960) 54 Cal. 2d 370, 377, 6 Cal. Rptr. 562, 354 P.2d 18* ; *In re Brittany H. (1988)198 Cal. App. 3d 533, 553, 243 Cal. Rptr. 763]* . Nevertheless, if a court decrees an adoption without the required parental consent, the judgment is merely *voidable* and not void for all purposes [*see Walter v. August (1960) 186 Cal. App. 2d 395, 397-398, 8 Cal. Rptr. 778* ; *Estate of Smith (1948) 86 Cal. App. 2d 456, 468, 195 P.2d 842* ; *see also Fam. Code § 9102(a)* (limitations period of one year in bringing action to vacate adoption on any basis except fraud); *Adoption of Berman (1975) 44 Cal. App. 3d 687, 694, 118 Cal. Rptr. 804]* .

Jurisdiction in adoption matters is discussed further in Ch. 12B, *Adoptions: Unmarried Minors*. For further discussion of setting aside void or voidable adoptions, see Ch. 12E, *Adoptions: Attack on Decree* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionConsentBiological ParentsFamily LawAdoptionInvalid AdoptionsFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral Overview

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§ 12A.17 Notice Requesting Updated Address Information

Whenever the parental rights of a birth parent are terminated under *Fam. Code § 7660 et seq.* or § 7800 et seq, or under *Welf. & Inst. Code § 366.26*, the Department of Social Services, or its delegated county adoption agency, or the licensed adoption agency to which a child was relinquished must send a written notice to the birth parent, if his or her address is known. The statement must contain the following statement [*Fam. Code §§ 8703, 8819*]: "You are encouraged to keep this agency informed of your current address in order to permit a response to any inquiry concerning medical or social history made by or on behalf of the child who was the subject of the court action [*sic*] terminating parental rights."

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral Overview

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§ 12A.18 Effect of Indian Child Welfare Act

The Indian Child Welfare Act (ICWA) [*25 U.S.C. § 1901 et seq.*] imposes additional jurisdictional, procedural, and substantive requirements if a proceeding for termination of parental rights involves an Indian (Native American) child [*see 25 U.S.C. § 1903(1)*; *see also Adoption of Lindsay C. (1991) 229 Cal. App. 3d 404, 407, 415, 280 Cal. Rptr.194* (ICWA applies to adoption matter in which it is alleged that parent's consent is not necessary under former Civil Code provisions superseded by *Fam. Code § 8606*; *In re Crystal K. (1990) 226 Cal. App. 3d 655, 665-666, 276 Cal. Rptr. 619* (ICWA applies to proceeding under former Civil Code provisions superseded by *Fam. Code § 7800 et seq.* to declare minor free from parental custody and control, discussed in Subpart D, *below*)].

For example, special notice requirements apply [*see Fam. Code § 180*], and special findings must be made before parental rights to an Indian child may be terminated [*see Fam. Code § 7892.5*]. If the child is an Indian child and an allegation is made that parental custody would be detrimental to the child, before making an order granting custody to a person or persons other than a parent, over the parent's objection, the court must apply the evidentiary standards prescribed in the ICWA [*Fam. Code § 3041(e)*].

For further discussion of the ICWA, see Ch. 12B, *Adoptions: Unmarried Minors* , and Kirkland, Luvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Ch. 176 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawParental Duties & RightsConsentGeneral OverviewFamily LawParental Duties & RightsTermination of RightsGeneral OverviewGovernmentsNative AmericansAuthority & JurisdictionGovernmentsNative AmericansIndian Child Welfare ActPublic Health & Welfare LawSocial ServicesNative Americans

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[Reserved]

§§ 12A.19[Reserved]

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2-12A California Forms of Pleading and Practice--Annotated § 12A.30

§ 12A.30 Historical and Constitutional Background of Uniform Parentage Act

Historically, the biological father of a child born outside of a marital relationship had no rights with regard to the child [*see* Note, *Not Necessarily in the Best Interests of the Child: In re Baby Girl M., 20 U.S.F. L. Rev. 701, 703 (1986)*]. This view continues to be reflected superficially in California adoption law, which essentially gives "presumed" fathers the same rights as mothers, but gives no rights at all to alleged natural fathers [*see Fam. Code §§ 8604, 8605*; *see also Dawn D. v. Superior Court (1998) 17 Cal. 4th 932, 72 Cal. Rptr. 2d 871, 952 P.2d 1139* (no constitutional violation in denying biological father standing to challenge paternity of child born to mother married to another man at time of conception); *Miller v. Miller (1998) 64 Cal. App. 4th 111, 74 Cal. Rptr. 2d 797* ; *Rodney F. v. Karen M. (1998) 61 Cal. App. 4th 233, 71 Cal. Rptr. 2d 399]* .

In 1972, the United States Supreme Court rejected the historical rule and held that the father of an illegitimate child was entitled to a hearing on his fitness to retain custody of his children after the death of the mother. In so holding, the court found that the right to rear one's own biological children was a cognizable and substantial right that extended to all parents, and was within the protection of the due process and *equal protection clauses* of *U.S. Const., Amend. XIV*, absent a powerful, countervailing state interest [*Stanley v. Illinois (1972) 405 U.S. 645, 649-659, 92 S. Ct. 1208, 31 L. Ed. 2d 551]* .

In 1975, California enacted the Uniform Parentage Act (UPA; *Fam. Code § 7600 et seq.*), which, in part, addressed the *Stanley* holding. The UPA supplements the adoption statutes by addressing the rights of alleged natural fathers.

The UPA abandoned the legal concept of illegitimacy and replaced it with certain presumptions of paternity [*see Fam. Code § 7611*, discussed in *§ 12A.15[2]*]. The UPA grants natural fathers different rights depending on whether their paternity is or is not presumed [*see Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 824-825, 4 Cal. Rptr. 2d 615, 823 P.2d 1216]* . Under its current language, a child with a presumed father (or a father as to whom the child is legitimate under prior California law or the law of another jurisdiction) cannot be adopted without the consent of the father unless some other ground exists to terminate his parental rights [*Fam. Code § 7660*; *see Fam. Code §§ 8604, 8606*; *see also* Subpart A under--Rights of Nonconsenting Birth Mothers and Presumed Fathers, *above*]. A child with only an alleged natural father may be adopted over the opposition of the father if the court determines that the adoption is in the child's

best interests [*Fam. Code § 7664(b)*; *see § 12A.15[4]*].

This operation of California's adoption statutes and the UPA has been held to violate the constitutional rights to due process and equal protection of some, but not all, alleged natural fathers [*see Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 849, 4 Cal. Rptr. 2d 615, 823 P.2d 1216]* . These issues are fully discussed in *§ 12A.34[7]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewConstitutional LawEqual ProtectionGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act

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§ 12A.31 Inquiry to Identify Natural Father

On the filing of a petition for adoption, in an effort to identify the natural father, the court must cause inquiry to be made of the mother and any other appropriate person by the Department of Social Services, a licensed county adoption agency or the licensed adoption agency to which the child is to be relinquished. In the case of stepparent adoption, at the option of the board of supervisors, the inquiry is made by a licensed county adoption agency, the county department designated by the board of supervisors to administer the public social services program, or the county probation department [*Fam. Code § 7663(a)*]. Matters that must be addressed by the inquiry include the following [*Fam. Code § 7663(b)*]:

1. Whether the mother was married at the time of the child's conception or at any time thereafter;

2. Whether the mother was cohabiting with a man at the time of the child's conception or birth;

3. Whether the mother has received support payments or promises of support with respect to the child or in connection with her pregnancy; or

4. Whether any man has formally or informally acknowledged or declared his possible paternity of the child [*see In re Baby Boy V. (2006) 140 Cal. App. 4th 1108, 1115-1119, 45 Cal. Rptr. 3d 198* (department cannot ignore parental rights of man who comes forward and claims to be child's father, either in interests of efficiency or in misguided effort to act in child's best interests)].

A report of the investigating department or agency's findings must be made to the court [*Fam. Code § 7663(c)*]. If, after the inquiry, the court is unable to identify the natural father or any possible natural father, and no person has appeared claiming to be the natural father and claiming custodial rights, the court must enter an order terminating the unknown natural father's parental rights with reference to the child [*Fam. Code § 7665*]. For discussion of the rights of any man identified as the natural father, see *§§ 12A.33 -12A.34*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12A.32 Notice of Pendency of Adoption Proceeding

[1] Ways of Giving Notice

The constitutionally required notice to an identified alleged natural father of a proposed or pending adoption of his child [*see Armstrong v. Manzo (1965) 380 U.S. 545, 550, 85 S. Ct. 1187, 14 L. Ed. 2d 62* ; *Estate of O'Dea (1973) 29 Cal. App. 3d 759, 773, 105 Cal. Rptr. 756* ; *see also* discussion in *§ 12A.15[5]*] may be met in one of two ways: by giving a notice of alleged paternity, or by giving notice of the adoption proceeding [*see Fam. Code §§ 7630, 7662, 7664, 7666*].

[2] Notice of Alleged Paternity

Notice must be given to any man that he is alleged to be or could be the father of a child to be adopted (or placed or relinquished for adoption) at any time before or after the birth of the child [*see Fam. Code §§ 7662, 7664(a)*]. This notice must be given even if the child has a presumed father [*see Fam. Code § 7631*, discussed in *§ 12A.33[2]*]. Notice must be given in the manner required by *Fam. Code § 7666* [*Fam. Code §§ 7662(a)(2), 7664(a)*]. For a form to give notice of alleged paternity and for discussion of the manner of service, see *§ 12A.111[1]*.

An alleged father who receives this notice should, within 30 days from the date of service of the notice or the date of birth, whichever is later, bring an action under the Uniform Parentage Act [*Fam. Code § 7631*; *see* discussion in *§ 12A.33*] to declare the existence of the father-child relationship between himself and the child [*see Fam. Code §§ 7662, 7664*]. The failure to bring a parentage action in a timely manner has two effects. First, no further notice of any adoption proceeding is required [*Fam. Code § 7664(a)*]. Second, no separate petition to terminate his parental rights is required [*Fam. Code § 7662(a)(2)*; *see § 12A.34[1]*]. If he fails to appear in the adoption matter, or if he appears but fails to claim parental rights, his parental rights with reference to the child must be terminated in the adoption matter [*Fam. Code § 7664(a)*; *see In re Andrew W. (1991) 232 Cal. App. 3d 1286, 1291, 284 Cal. Rptr. 38]* . However, the 30-day period is not a limitation period or jurisdictional requirement. If the man files his parentage action after 30 days, but before his parental rights have been terminated, his parental rights are still to be determined on the merits under the appropriate statutory and constitutional standards [*In re Andrew V. (1991) 232 Cal. App. 3d 1286, 1290-1292, 284 Cal. Rptr. 38* ; *see § 12A.34[6], [7]*].

Nevertheless, one factor to be considered is whether the man has taken prompt legal action to seek custody of the child under *Fam. Code § 7630* [*Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 849, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* ; *see § 12A.34[7][b]*]. If the man files his parentage action after 30 days, but *after* an order has been issued terminating his parental rights, the court may exercise its discretion to deny his motion to set aside the order, if it finds that he failed to act in a timely manner, and there is no showing of mistake, inadvertence, surprise, excuse or neglect [*Adoption of Aaron H. (2000) 84 Cal. App. 4th 786, 790, 101 Cal. Rptr. 2d 45* (presumed father failed to take action within 30-day period; explanation that he was not sure it was his baby was insufficient to set aside order terminating his parental rights)]. Thus, the action should be filed within the 30-day period if at all possible.

The alleged father may execute a written form developed by the department to waive notice, to deny his paternity, to relinquish the child for adoption, or to consent to the child's adoption [*Fam. Code § 7662(a)(3)*; *see § 12A.15[3]*]. The birth father may validly execute a waiver or denial of paternity before or after the child's birth. Once signed, no notice of, relinquishment for, or consent to the child's adoption is required from the birth father for the adoption to proceed [*Fam. Code § 7662(b)*].

[3] Notice of Adoption Proceeding

If a notice of alleged or possible paternity has not been given [*see* discussion in [2], *above*], any man who has been identified to the satisfaction of the court as a possible father under *Fam. Code § 7663* [*see* discussion in *§ 12A.31*] must be given notice of the adoption matter [*Fam. Code § 7664(a)*]. The *form in § 12A.110[1]* may be adapted to use for this purpose.

[4] Manner of Service

Notice must be given in accordance with the provisions of the Code of Civil Procedure for the service of process in a civil action [*Fam. Code § 7666(a)*; *see Code Civ. Proc. § 413.10 et seq.*]. The notice must be given at least 10 days before the date stated in the notice [*Fam. Code § 7666(a)*]. Publication or posting of the notice is not required. Proof of giving the notice must be filed with the court before the adoption petition may be heard [*Fam. Code § 7666(a)*]. If a person identified as the natural father or a possible natural father cannot be located, or his whereabouts are unknown or cannot be ascertained, the court may issue an order dispensing with notice to that person [*Fam. Code § 7666(b)*; *see Fam. Code §§ 7662(a)(2), 7664*; *see also 22 Cal. Code Reg. § 35033*]. However, reasonable diligence is required in attempting to locate a parent, and this requirement is of constitutional dimension [*David B. v. Superior Court (1994) 21 Cal. App. 4th 1010, 1016, 26 Cal. Rptr. 2d 586]* .

For further discussion, see *§ 12A.15[5]*.

Legal Topics:

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§ 12A.33 Alleged Natural Father's Action to Establish Paternity

[1] Child With No Presumed Father

Whether or not he has first been served with notice of his alleged paternity [*see* discussion in *§ 12A.32[2]*], a man alleging himself to be the natural father of a child with no presumed father may bring an action to establish the existence of his father-child relationship with respect to the child [*Fam. Code § 7630(c)*; *see In re Jerred H. (2004) 121 Cal. App. 4th 793, 799, 17 Cal. Rptr. 3d 481* (individual seeking presumed father status is precluded from bringing proceeding under *Fam. Code § 7630* if parental rights have been terminated under *Welf. & Inst. Code § 366.26*)]. In such an action, the alleged natural father may be awarded custody of the child as against any prospective adoptive parents [*see Fam. Code § 7637*; *Jermstad v. McNelis (1989) 210 Cal. App. 3d 528, 545-552, 258 Cal. Rptr. 519]* . The action must be consolidated with a proceeding under *Fam. Code § 7662* [*see § 12A.34[1]*] to terminate his parental rights pursuant to an adoption. His rights are to be determined in the consolidated proceeding according to the standards of *Fam. Code § 7664* [*Fam. Code § 7630(d)*; *see* discussions in *§ 12A.34[6], [7]*]. For forms for use in such an action, see Ch. 412, *Paternity* .

If any prospective adoptive parent who has physical custody of the child, or any licensed California adoption agency that has legal custody of the child, has not been joined as a party to an action to determine the existence of a father-child relationship, or an action for custody by the alleged natural father, the court must join the prospective adoptive parent or licensed California adoption agency as a party on application or on its own motion, without the necessity of a motion for joinder. A joined party is not required to pay a fee in connection with this action [*Fam. Code § 7630(e)(1)*]. If a man brings an action to determine paternity and custody of a child who he has reason to believe is in the physical or legal custody of an adoption agency, or of one or more persons other than the child's mother who are prospective adoptive parents, then he must serve his entire pleading on and give notice of all proceedings to the adoption agency or the prospective adoptive parents, or both [*Fam. Code § 7630(e)(2)*].

A party to an assisted reproduction agreement may also bring an action at any time to establish a parent-child relationship consistent with the intent expressed in the agreement [*Fam. Code § 7630(f)*].

One court has stated that parental rights may be terminated under *Fam. Code § 7630* even if there is no adoption pending nor consolidation with a proceeding under *Fam. Code § 7662* [*In re Shereece B. (1991) 231 Cal. App. 3d 613, 620-621, 282 Cal. Rptr. 430]* . The court further stated that the controlling former Civil Code section (superseded by *Fam. Code § 7637*), providing that a judgment or order determining the existence or nonexistence of the parent-child relationship under the UPA may contain any other provision in the best interests of the child, authorizes termination of parental rights in any *Fam. Code § 7630* proceeding. Under the court's language, parental rights could be terminated in a UPA proceeding on a finding that it was in the best interests of the child, even if no adoption were proposed. [*In re Shereece B. (1991) 231 Cal. App. 3d 613, 621, 282 Cal. Rptr. 430* ; *see also* Ch. 412, *Paternity*].

The court's finding of jurisdiction is arguably dictum because, in *Shereece B.*, there had been an adoptive placement and a proceeding to terminate parental rights had been initiated, although no petition for adoption had yet been filed [*In re Shereece B. (1991) 231 Cal. App. 3d 613, 621, 282 Cal. Rptr. 430]* . Therefore, counsel for a father in a *Fam. Code § 7630(c)* paternity proceeding not involving an adoption may wish to challenge the court's jurisdiction to terminate his parental rights, despite *Shereece B.*

[2] Child With Presumed Father

If a birth mother relinquishes her child for adoption or consents to adoption of her child, or proposes to do either, and the child has a presumed father under the Uniform Parentage Act (UPA) [*see Fam. Code § 7611*, discussed in *§ 12A.15[2]*], a man who is not a presumed father may bring an action under the UPA for the purpose of declaring that he (rather than the presumed father) is the natural father of the child. The commencement of this action suspends any pending proceeding in connection with the adoption of the child until a judgment in the action is final. The action must be brought within 30 days after the later of (1) the date of the birth of the child, or (2) the date on which the man is served with a notice that he is, or could be, the father of the child [*Fam. Code § 7631*; *see Fam. Code § 7666* (manner of service); *see also Adoption of Aaron H. (2000) 84 Cal. App. 4th 786, 791, 101 Cal. Rptr. 2d 45* (presumed father failed to take action within 30-day period; explanation that he was not sure it was his baby was insufficient to set aside order terminating his parental rights)]. One court described the statutory scheme as follows. A biological father who is not a presumed father can petition the court to establish his legal status as the child's father [*Fam. Code §§ 7630, 7631*], but the petition of the child's mother or the prospective adoptive parents to terminate his parental rights will be granted unless he proves it is in the child's best interest that the adoption not proceed [*see Adoption of Alexander M. (2001) 94 Cal. App. 4th 430, 438, 114 Cal. Rptr. 2d 218* ; *see also Fam. Code §§ 7662(a), 7664*]. A nonpresumed father's right to bring an action to establish his paternity is broader in the adoption context than otherwise; ordinarily, a nonpresumed father lacks standing to challenge the paternity of a man presumed to be a father under *Fam. Code § 7611(a), (b)*, and *(c)* [*Fam. Code § 7635(a)*; *see also Dawn D. v. Superior Court (1998) 17 Cal. 4th 932, 72 Cal. Rptr. 2d 871, 952 P. 2d 1139* (no constitutional violation in denying biological father standing to challenge paternity of child when child has presumed father under *Fam. Code § 7611(a)*)]. However, the trial court's determination is frequently that the child's interests are better served by a third party adoption than by granting custody to the unwed natural father [*see Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 824, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* ; *Adoption of Alexander M. (2001) 94 Cal. App. 4th 430, 438, 114 Cal. Rptr. 2d 218]* .

Fam. Code § 7631 allows a man to establish that he is the child's natural father and rebut the presumption that the legal husband is the natural father. Once he establishes that he is the natural father, the man can attempt to prove he has demonstrated a full commitment to his parental responsibilities so as to be entitled to the benefit of the detriment to the child standard under *Fam. Code § 3401*. If he is unable to do so, he must prove that retention of his parental rights, rather than adoption, is in the child's best interest [*Adoption of Alexander M. (2001) 94 Cal. App. 4th 430, 441, 114 Cal. Rptr. 2d 218]* .

An action under *Fam. Code § 7631* is not available in cases "coming within the provisions of" *Fam. Code § 7540* [*Fam. Code § 7631*; *see Rodney F. v. Karen M. (1998) 61 Cal. App. 4th 233, 71 Cal. Rptr. 2d 399* ; *see also Miller v. Miller (1998) 64 Cal. App. 4th 111, 74 Cal. Rptr. 2d 797*]. Section 7540 sets forth a presumption that a child born to a married

woman who is cohabiting with her husband, who is neither impotent nor sterile, is a child of the marriage. This presumption was once conclusive under all circumstances, but now may be rebutted by blood tests if the alleged natural father can persuade the mother or the child's guardian ad litem to file the motion for blood tests (since the alleged father has no standing to file such a motion) [*see Fam. Code § 7541(a)-(d)*, discussed in Ch. 412, *Paternity*]. Presumably, an action under *Fam. Code § 7631* is foreclosed only in cases in which the presumption remains conclusive against the alleged natural father.

Legal Topics:

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2-12A California Forms of Pleading and Practice--Annotated § 12A.34

§ 12A.34 Proceeding to Terminate Alleged Natural Father's Rights

[1] When Required

If a mother relinquishes for or consents to (or proposes to relinquish for or consent to) an adoption of a child who does not have a presumed father or if such a child otherwise becomes the subject of an adoption proceeding, a separate petition to terminate the parental rights of an alleged natural father may be required [*Fam. Code § 7662(a)*; *see Fam. Code § 7664(c)* (nothing in *Fam. Code § 7600 et seq.* changes rights of presumed father); *see also In re Shereece B. (1991) 231 Cal. App. 3d 613, 618-620, 282 Cal.Rptr. 430* (statute applies if child is placed for adoption, regardless of whether mother voluntarily consented to placement and regardless of whether adoption proceedings have already been commenced)]. Such a petition must be filed unless one of the following exceptions exists [*Fam. Code § 7662(a)*]:

1. The alleged father, in writing, has denied paternity, waived his right to notice, voluntarily relinquished the child for adoption, or consented to the adoption [*see 22 Cal. Code Reg. §§ 35108* (independent adoptions), 35128(e) (agency adoptions); see also *§ 12A.15[3]*];

2. The father's relationship to the child has been previously terminated or determined not to exist by the court; or

3. After service of notice [*see Fam. Code § 7666*] that he is alleged to be or may be the father, he fails to bring a timely action under *Fam. Code § 7630(c)* to establish his paternity [*Fam. Code § 7662*; *see also Adoption of Aaron H. (2000) 84 Cal. App. 4th 786, 791, 101 Cal. Rptr. 2d 45* (presumed father failed to take action within 30-day period; explanation that he was not sure it was his baby was insufficient to set aside order terminating his parental rights); *see* discussion in *§ 12A.33[1]*].

The birth father may validly execute a waiver or denial of paternity before or after the child's birth. Once signed, no notice of, relinquishment for, or consent to the child's adoption is required from the birth father for the adoption to proceed [*Fam. Code § 7662(b)*].

Use of this procedure affords the father his constitutional rights to notice of the adoption proceeding [*In re Tricia M. (1977) 74 Cal. App. 3d 125, 132-133, 141 Cal. Rptr. 554* ; *see* discussion in *§ 12A.15[5]*].

[2] Commencement of Proceeding

A petition to terminate the parental rights of an alleged natural father may be brought by the agency or person to whom the child has been or is to be relinquished, by the mother, by the person having physical or legal custody of the child, or by the prospective adoptive parent [*Fam. Code § 7662(a)*]. Thus, for example, the petitioners for adoption may file a UPA termination within adoption petition [*see, e.g., Fam. Code § 7662*; *George M. v. Superior Court (1988) 201 Cal. App. 3d 755, 757, 247 Cal. Rptr. 330]* . For a form for this petition, see *§ 12A.112[1]*. There is no additional filing fee [*Fam. Code § 7670*].

If the alleged father has filed a complaint to establish his paternity under *Fam. Code § 7630(c)* [*see* discussion in *§ 12A.33[1]*], the action is to be consolidated with the petition under *Fam. Code § 7662* to terminate his parental rights [*Fam. Code § 7630(d)*].

The petition must be set for hearing not more than 45 days after filing and completion of service or after the entry of an order dispensing with notice of the proceedings [*Fam. Code § 7667(a)*].

[3] Notice

Notice of the proceeding on the petition to terminate parental rights should be given to each man, identified to the satisfaction of the court as possibly being the natural father of the child [*see Fam. Code §§ 7664, 7666, 7667(a)*]. The notice must be given at least 10 days before the date stated in the notice [*Fam. Code § 7666(a)*]. For a form for this notice, see *§ 12A.113[1]*. However, notice need not be given to a person identified as the natural father or possible natural father who cannot be located or whose whereabouts are unknown or cannot be ascertained [*see Fam. Code § 7666* (with respect to whom court may issue order dispensing with notice)].

Fam. Code § 7664(a) provides that notice need not be given to a man who has been served with a notice of alleged paternity [*see* discussion in *§ 12A.32[2]*] and who has failed to bring an action to declare the existence of a father and child relationship within the time required by law. However, under these circumstances, no petition to terminate the man's parental rights need be filed at all [*see Fam. Code § 7662(a)(2)*, discussed in *§ 12A.34[1]*].

As with all matters related to adoption, it is in the best interests of the petitioners that the matter be heard as expeditiously as possible. Counsel for petitioners may avoid a continuance [*see* [4], *below*] by giving notice sufficiently far in advance to allow time for the alleged natural father to obtain counsel and prepare for the hearing, if he so desires.

[4] Calendar Precedence and Continuance

Hearing on a petition to terminate the parental rights of an alleged natural father has precedence over all other civil matters on the date set for trial except a proceeding to terminate parental rights under *Fam. Code § 7800* [*Fam. Code § 7667(b)*]. The court may continue the matter for not more than 30 days as necessary to appoint counsel and to enable counsel adequately to prepare for the case or for other good cause [*Fam. Code § 7668(a)*; *see* discussion in *§ 12A.15[6]*].

To obtain a continuance, written notice must be filed within two court days of the date set for the hearing, together with affidavits or declarations detailing specific facts showing that a continuance is necessary. However, the court, for good cause shown, may entertain an oral motion for a continuance. Continuances may be granted only on a showing of good cause. Neither a stipulation between counsel or the convenience of the parties is, in and of itself, good cause. A continuance may be granted only for that period shown to be necessary by the evidence considered at the hearing on the

motion. Whenever any continuance is granted, the facts proven that require the continuance must be entered on the minutes of the court [*Fam. Code § 7668(b)-(d)*].

[5] Procedure at Hearing

If any man who was given notice as the identified natural father or possible natural father of the child fails to appear, or appears but fails to claim parental rights, his parental rights with reference to the child must be terminated [*Fam. Code § 7664(a)*]. If the natural father or a man representing himself to be the natural father claims parental rights, the court must first determine if he is the father. If the court finds that a man claiming parental rights is not the father, it must order that the man's consent is not required for an adoption. If the court finds that the man is the father, it must then proceed to consider whether or not his parental rights should be terminated and the adoption allowed to proceed [*see Fam. Code § 7664(b)*]. The statutory standards by which the court is to be guided under the UPA are discussed in [6], *below*. Constitutional considerations that overlay the determination are discussed in [7], *below*.

[6] Standards for Terminating Parental Rights Under Uniform Parentage Act

In a proceeding under the Uniform Parentage Act (UPA) to terminate the parental rights of an alleged natural father, the court must determine if it is in the best interests of the child that the father retain his parental rights or that the adoption of the child be allowed to proceed. In making the determination, the court may consider all relevant evidence, including the efforts made by the father to obtain custody, the age and previous placement of the child, and the effects of a change of placement on the child. If the court finds that it is in the best interests of the child that the father be allowed to retain his parental rights, it must order that his consent is necessary for an adoption. Otherwise, the court must order that the adoption may proceed without the father's consent. Such a finding terminates all parental rights and responsibilities with respect to the child [*Fam. Code § 7664(b)*; *see Fam. Code § 7630(d)* (standards of *Fam. Code § 7664* apply in nonpresumed father's paternity action); *Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 824, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* (standard is essentially child's best interest; alleged fathers often lose); *see also In re Sabrina H. (1990) 217 Cal. App. 3d 702, 707, 711, 266 Cal. Rptr. 274]* .

Fam. Code § 3041, which prohibits an award of custody to a nonparent over a parent unless the court finds that parental custody would be detrimental to the child, does not apply to a proceeding to terminate an alleged natural father's rights under the UPA [*Fam. Code § 7664(b)*]. For discussion of constitutional limitations on this standard, see [7], *below*. For a form for an order terminating parental rights, see *§ 12A.114[1]*. For a form for a judgment of paternity and parental rights, awarding custody of the child to the alleged natural father, see *§ 12A.115[1]*.

[7] Constitutional Limitations

[a] Due Process and Equal Protection

The right to rear one's own biological children extends to all parents, and is within the protection of the federal due process and *equal protection clauses*, absent a powerful, countervailing state interest [*Stanley v. Illinois (1972) 405 U.S. 645, 649-659, 92 S. Ct. 1208, 31 L. Ed. 2d 551* ; *see U.S. Const., amend. XIV*]. The significance of the biological connection is that it offers the natural father an opportunity that no other man possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development [*Lehr v. Robertson (1983) 463 U.S. 248, 261-262, 103 S. Ct. 2985, 77 L. Ed. 2d 614]* .

Thus, the California Supreme Court has held that the provisions of the UPA for determining the parental rights of alleged natural fathers (*see* [6], *above*) violate the federal constitutional guarantees of equal protection and due process of some unwed fathers. California law is unconstitutional to the extent that the statutes allow a mother unilaterally to preclude her child's biological father from becoming a presumed father and thereby allow the state to terminate his parental rights on nothing more than a showing of the child's best interests. If an unwed father promptly comes forward

and demonstrates a full commitment to his parental responsibilities, emotional, financial, and otherwise, his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent (*see* [c], *below*). Absent such a showing, the child's well-being is presumptively best served by continuation of the father's parental relationship. Similarly, if the father has come forward to grasp his parental responsibilities, his parental rights are entitled to equal protection as those of the mother [*Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 849, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* ; *see Caban v. Mohammed (1979) 441 U.S. 380, 388-394, 99 S. Ct. 1760, 60 L. Ed. 2d 297* ; *In re Baby Boy V. (2006) 140 Cal. App. 4th 1108, 1118, 45 Cal. Rptr. 3d 198* ; *Adoption of Daniele G. (2001) 87 Cal. App. 4th 1392, 1395, 105 Cal. Rptr. 2d 341* ; *see also In re Jesusa V. (2004) 32 Cal. 4th 588, 610-611, 10 Cal. Rptr. 3d 205, 85 P.3d 2* (man who has taken no steps to formalize role as child's father before dependency petition filed has not sufficiently or timely demonstrated full commitment to parental responsibilities to merit constitutional protection); *In re Ariel H. (1999) 73 Cal. App. 4th 70, 73-74, 86 Cal. Rptr. 2d 125* (father who fails to timely demonstrate full parental commitment is not entitled to constitutional protection; father not excused from promptly assuming parental responsibilities by fact he is a minor)]. This holding applies to all cases not final as of February 20, 1992, but does not extend to cases in which final decrees of adoption were entered before that date [*Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 851-852, 4 Cal. Rptr. 2d 616, 823 P.2d 1216]* .

[b] Determination of Constitutionally Protected Status

The UPA's distinction between alleged natural fathers and presumed fathers is constitutionally invalid only to the extent that it is applied to an unwed father who has sufficiently and timely demonstrated a full commitment to his parental responsibilities. The statutory scheme is constitutional as applied to a father who has failed to make such a showing [*Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 849-850, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* ; *see Lehr v. Robertson (1983) 463 U.S. 248, 262, 103 S. Ct. 2985, 77 L. Ed. 2d 614* ; *Quilloin v. Walcott (1978) 434 U.S. 246, 252-256, 98 S. Ct. 549, 54 L. Ed. 2d 511* , *reh'g denied, 435 U.S. 918* ; *see also In re Shereece B. (1991) 231 Cal. App. 3d 613, 623-624, 282 Cal. Rptr. 430* ; *In re Sabrina H. (1990) 217 Cal. App. 3d 702, 709-710, 266 Cal. Rptr. 274]* . Thus, in a proceeding to terminate the parental rights of an alleged natural father under *Fam. Code § 7664*, the threshold inquiry is whether the father is in the constitutionally protected class (a *Kelsey* father).

A court must consider all factors relevant to that determination. The father's conduct both before and after the child's birth must be considered. Once he knows or reasonably should know of the pregnancy, he must promptly attempt to assume his parental responsibilities as fully as the mother will allow and his circumstances permit. In particular, the father must demonstrate a willingness himself to assume full custody of the child, not merely to block adoption by others. A court should also consider the father's public acknowledgement of paternity, payment of pregnancy and birth expenses commensurate with his ability to do so, and prompt legal action to seek custody of the child under *Fam. Code § 7630(c)* [*Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 849, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* ; *see In re Zacharia D. (1993) 6 Cal. 4th 435, 450* , Cal. Rptr. 2d 751, *862 P.2d 751* ; *see also Fam. Code § 7570 et seq.* (declaration of paternity), discussed in Ch. 412, *Paternity*].

In *Adoption of Michael H.* [*Adoption of Michael H. (1995) 10 Cal. 4th 1043, 43 Cal. Rptr. 2d 445, 898 P.2d 891]* , the California Supreme Court clarified that the above standard is not a balancing test. The case involved a father who initially agreed to adoptive planning but changed his mind before birth, and thereafter was unrelenting in his pursuit of parental rights and responsibilities. In denying him constitutionally protected status, the Court held that the requirement that the father must promptly attempt to assume parental responsibilities, even before the birth of the child, is a mandatory condition precedent. The Court emphasized that important social policies are advanced by requiring the father to make a firm commitment during pregnancy, stating that without the requirement that the unwed father manifest his interest promptly, parties to an adoption proceeding would have no assurance that the adoption was permanent [*Adoption of Michael H. (1995) 10 Cal. 4th 1043, 1055-1056, 43 Cal. Rptr. 2d 445, 898 P.2d 891]* .

A father may be entitled to constitutionally protected status when his attempts to demonstrate a commitment to the child are unilaterally frustrated by the child's mother [*Adoption of O.M. (2008) 169 Cal. App. 4th 672, 87 Cal. Rptr. 3d 135]*

. But a father is not entitled to *Kelsey* status when he is unable to demonstrate a commitment to the child through his own voluntary involvement in criminal behavior that leads to his incarceration [*Adoption of O.M. (2008) 169 Cal. App. 4th 672, 87 Cal. Rptr. 3d 135]* .

The Family Code denies *Kelsey* status to the natural father of a child if either (1) the child was conceived as a result of an act in violation of *Penal Code § 261* (rape), and the father was convicted of the violation, or (2) the child was conceived as a result of an act in violation of *Penal Code § 261.5* (statutory rape), the father was convicted of the violation, and the mother was under the age of 15 years and the father was 21 years of age or older at the time of conception [*Fam. Code § 7611.5*; *see Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 849 n.14, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* (father as not constitutionally protected)].

[c] Fitness Inquiry

If a court finds that an alleged natural father is in the constitutionally protected class, it must then consider the further question of whether he is unfit as a parent. The inquiry is to be conducted under the standards of *Fam. Code § 7800 et seq.* (*see* Subpart D, *below*), which requires a finding of unfitness by clear and convincing evidence [*see Fam. Code §§ 7821, 7892(c)*]. Unfitness is to be determined as of the time of the inquiry [*Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 849-851, 4 Cal. Rptr. 2d 615, 823 P.2d 1216]* .

In holding that this fitness inquiry must be conducted, the California Supreme Court has added a requirement that does not apply to mothers and presumed fathers. The court appears to have misread *Fam. Code § 8606*. This statute does not provide for any fitness inquiry for mothers and presumed fathers under *Fam. Code § 7800 et seq.* as a component of an adoption proceeding. It does set forth circumstances under which their consent to adoption is not required (*see* Subpart C, *below*). However, its only reference to *Fam. Code § 7800 et seq.* is a statement that if parental rights were terminated under those provisions, consent to adoption is not required [*see Fam. Code § 8606(a)*]. Thus, there remains some question as to whether it is constitutional to hold *Kelsey* fathers to standards not required of mothers and other presumed fathers, should the court be persuaded that it has indeed misread the law applicable to those parents.

Further, *Fam. Code § 7800 et seq.* provides few grounds for terminating parental rights that would apply to a *Kelsey* father. One of the grounds in that provision of the Family Code require that the child have been a dependent of the juvenile court as a condition precedent to proceeding [*see Fam. Code § 7823(a)(2)*]. Another requires proof of intent to abandon the child [*see Fam. Code § 7822*], which obviously would not apply to a *Kelsey* father. The grounds that might apply are (1) conviction of a felony that proves unfitness [*see Fam. Code § 7825*], (2) previous declaration of developmental disability or mental illness [*see Fam. Code § 7826*] and (3) evidence of mental disability supported by the testimony of two experts [*see Fam. Code § 7827*]. These grounds are all discussed in detail in Subpart D, *below.*

Thus, a fitness inquiry under *Fam. Code § 7800 et seq.* involves a very stringent standard that must be supported by specific facts involving criminal conduct or developmental or mental disability. Evidence that the man may have character defects from which it might be speculated that he will prove unfit as a parent is not sufficient [*cf. In re Kimberly F. (1997) 56 Cal. App. 4th 519, 532, 65 Cal. Rptr. 2d 495* ("the government cannot take away--or refuse to give you back--your children because some psychologist applies unflattering labels to your personality")].

[d] Custody

An alleged natural father who has filed an action to declare his own paternity under the UPA (*see § 12A.33*) may be granted custody of the child [*see Fam. Code § 7637*]. However, the determination that he qualifies as a *Kelsey* father establishes only that he has the right to withhold consent to adoption; it does not guarantee him the child's custody [*In re Bridget R. (1992) 49 Cal. Rptr. 2d 507]* .

Whether a trial court may grant custody to the prospective adoptive parents, even though the adoption may not proceed,

is unclear. Dicta in *Kelsey* suggests that a custody determination based on the best interests of the child may be made even if the adoption cannot proceed [*Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 851, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* (not considering possible effect of *Fam. Code § 8804(c)*); *see In re Bridget R. (1996) 41 Cal. App. 4th 1483, 1502-1507, 49 Cal. Rptr. 2d 507* (child has constitutional right to remain in placement that is stable and permanent; this interest can outweigh rights of biological parents)]. However, if an adoption may not proceed because a required consent is not given, *Fam. Code § 8804(c)* requires that the child be returned to a birth parent, subject to the provisions of *Fam. Code § 3041*. Section 3041 provides that before making an order granting custody to a person other than a parent, over a parent's objection, the court must find that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the best interest of the child [*Fam. Code § 3041(a)*]. The current and more expansive concept of "detriment to the child" in *Fam. Code § 3041* may well provide persons who have been providing a stable home for the child for a substantial time period (such as prospective adoptive parents) a greater avenue for claiming at least temporary custody [*see Fam. Code § 3041(c), (d)*].

[8] Stay of Other Proceedings

All proceedings affecting a child under *Fam. Code § 3000 et seq.* or under *Fam. Code § 7500 et seq.* are stayed pending a final determination of proceedings to terminate a father's parental rights under *Fam. Code § 7662* [*Fam. Code § 7662(c)*]. However, *Fam. Code § 7662* does not limit a court's jurisdiction under *Fam. Code §§ 6240-6389* with respect to domestic violence orders [*Fam. Code § 7662(d)*].

[9] Appeal

Any order requiring or dispensing with a father's consent for the adoption of a child is conclusive and binding on the father. It may be appealed in the same manner as an order of the juvenile court ordering a person to be a ward of that court [*Fam. Code § 7669(a)*]. After making the order, the court may not set aside, change, or modify the order [*Fam. Code § 7669(b)*]. In consolidated proceedings under *Fam. Code § 7630(c)*, the applicable time is within 60 days after the rendition of the judgment or making of the order dispensing with the father's consent [*Cal. Rules of Ct., Rule 8.480(b)*; *Mauro B. v. Superior Court (1991) 230 Cal. App. 3d 949, 955-956, 281 Cal. Rptr. 507]* . If the judgment or order is pronounced in open court, the time for appeal begins to run from that time, rather than from the time when the judgment is entered [*Mauro B. v. Superior Court (1991) 230 Cal. App. 3d 949, 955-956, 281 Cal. Rptr. 507]* . It would appear that the appeal has precedence over all other cases [*see Cal. Rules of Ct., Rule 8.480(e)*; *Mauro B. v. Superior Court (1991) 230 Cal. App. 3d 949, 957, 281 Cal. Rptr. 507]* . An appellant who is unable to afford counsel on appeal is entitled to a free transcript of the oral proceedings, insofar as such a transcript is necessary for an effective appeal [*see M.L.B. v. S.L.J. (1996) 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473, 488-492* (appellate review of judgment terminating parental rights cannot constitutionally be conditioned on ability to prepay preparation costs of record on appeal); *see also Welf. & Inst. Code § 800(d)* (free transcript to indigent appellant in juvenile wardship proceedings)]. For discussion of appeals in juvenile court wardship proceedings, see Ch. 329, *Juvenile Courts: Delinquency Proceedings* .

If the proceeding was contested, the party submitting the judgment must prepare and mail copies of a notice of entry of judgment to the parties who appeared in the proceeding, and file the original notice of entry of judgment together with a proof of service by mail on the other parties [*Code Civ. Proc. § 664.5(a)*]. However, if the prevailing party was not represented by counsel, the clerk of the court must mail the notice of entry of judgment to all parties [*Code Civ. Proc. § 664.5(b)*]. Even if the proceeding was not contested, the party preparing the judgment should give notice of the court's decision or order to all parties or their attorneys [*Code Civ. Proc. § 1019.5*]. Note that *Cal. Rules of Ct., Rule 8.480* contains provisions for confidentiality of records and briefs on appeal and permit the court to limit or prohibit public admission to hearings [*Cal. Rules of Ct., Rule 8.480(g)*; *see also § 12A.77[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewConstitutional LawEqual ProtectionGeneral OverviewFamily LawAdoptionProceduresGeneral OverviewFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationUnfitness

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2-12A California Forms of Pleading and Practice--Annotated §§ 12A.35-12A.49

[Reserved]

§§ 12A.35[Reserved]

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2-12A California Forms of Pleading and Practice--Annotated § 12A.50

§ 12A.50 When Consent of Birth Parent Is Not Required

[1] Prior Determination

Fam. Code § 8606 is a provision of California's adoption law that enumerates various circumstances under which the consent of a birth parent to an adoption is not required. Most of these circumstances are reflective of other laws; that is, if a birth parent's rights have been validly terminated in some other preceding, in California or elsewhere, the consent of that parent is no longer necessary. Among these circumstances are the following [*Fam. Code § 8606*]:

(1) If the child has been judicially freed from the custody and control of the birth parent under *Fam. Code § 7800 et seq.*, discussed in Subpart D, *below;*

(2) If the birth parent's rights have been terminated in a juvenile court proceeding under *Welf. & Inst. Code § 366.26*, discussed in Ch. 328, *Juvenile Courts: Dependency Proceedings ;*

(3) If the birth parent's rights have been terminated by order of the court of another jurisdiction, pursuant to any law of that jurisdiction authorizing the order;

(4) If the birth parent has voluntarily surrendered the right to custody and control of the child in a judicial proceeding in another jurisdiction pursuant to any law of that jurisdiction; and

(5) If the birth parent has validly relinquished the child to an agency for adoption [*see Fam. Code § 8700*, discussed in *§ 12A.14[2]*, and in Ch. 12B, *Adoptions: Unmarried Minors*], or has relinquished the child for adoption to a licensed adoption agency in another jurisdiction under the law of that jurisdiction [*Fam. Code § 8606*].

Although it is not mentioned in *Fam. Code § 8606*, a proceeding under the Uniform Parentage Act [*see Fam. Code § 7600*, discussed in Subpart B, *above*] is another proceeding, the result of which may be a determination that the consent of an alleged natural father is not required [*see Fam. Code § 7664(b)*].

[2] Abandonment

In addition to the above circumstances there are two additional grounds involving parental abandonment of the child on which the consent of a birth parent may be dispensed with. They are the following:

(1) If one birth parent has been awarded the child's custody or holds custody by agreement of the birth parents, and the other birth parent willfully fails to communicate with and to support the child for one year, while able to do so [*Fam. Code § 8604(b)*; *see* Willful Failure to Communicate and Support, *below*)]; or

(2) If a birth parent has deserted the child without provision for his or her identification [*Fam. Code § 8606(c)*].

The above two grounds for dispensing with consent are not based on any prior determination in another proceeding. If a petitioner for adoption intends to rely on one of these grounds, the petition should so allege, and the matter is to be determined in the adoption proceeding itself [*see In re Jay R. (1983) 150 Cal. App. 3d 251, 257-258, 197 Cal. Rptr. 672]* .

For forms of allegations regarding grounds for dispensing with a birth parent's consent to an adoption, to be included in a petition for adoption, see Ch. 12B, *Adoptions: Unmarried Minors* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionConsentExceptionsFamily LawDelinquency & DependencyDependency ProceedingsFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationAbandonmentFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationNonsupport

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§ 12A.51 Parents to Whom Fam. Code §§ 8604 and 8606 Apply

The abandonment grounds of *Fam. Code §§ 8604* and *8606* apply to "birth parents." A "birth parent" is defined as a biological parent, unqualified by any distinction between presumed and alleged natural fathers [*see Fam. Code § 8512*, discussed in *§§ 12A.11*, *12A.15[2]*]. Thus, the abandonment grounds to dispense with consent would seem to apply to both presumed and alleged natural fathers. (The former Civil Code section superseded by *Fam. Code §§ 8604* and *8606* was construed as applicable only to presumed fathers [*see Adoption of Michael D. (1989) 209 Cal. App. 3d 122, 130, 256 Cal. Rptr. 884]* .)

Whether *Fam. Code §§ 8604* and *8606* actually apply to all birth fathers is not clear. The definition of "birth parent" was introduced in a statutory reorganization that was not intended to make any substantive or procedural changes in prior law [*see* discussion in Ch. 12]. If the standards for dispensing with consent set forth in *Fam. Code §§ 8604* and *8606* apply to all natural fathers, they must be in addition to (rather than in lieu of) the less extensive rights of alleged natural fathers under the Uniform Parentage Act (UPA), which permits termination of parental rights on a showing that termination is in the best interests of the child [*see Fam. Code § 7664(b)*, discussed in Subpart B].

The UPA expressly extends the scope of *Fam. Code §§ 8604* and *8606* to certain birth parents. If only one birth parent has relinquished the child to an agency or placed the child for an independent adoption, the other birth parent is entitled to the rights provided under adoption law if the other parent is the mother, a presumed father, or a father as to whom the child is legitimate under prior California law or the law of another jurisdiction [*Fam. Code §§ 7660*, *7661*]. The effect of this statute is to preclude the use of the less protective UPA procedure with regard to these birth parents.

As noted in § 12A.50[2], Fam. Code § 8604 authorizing termination of parental rights for willful failure to communicate with and support the child applies if one parent has been awarded custody by judicial decree or has custody by agreement of the parents. The statute does not distinguish between legal and physical custody, or between sole and joint custody. One court has held that the term refers only to physical custody and that sole and exclusive legal custody, with all its incidents, is not required [*Adoption of Van Anda (1976) 62 Cal. App. 3d 189, 194-196, 132 Cal. Rptr. 878]* . However, another court has held that the statute requires that one parent have sole custody of the child in order to dispense with the consent of the other parent. Further, this court seems to have considered an order giving the

parties joint legal custody, with primary physical custody to one parent and visitation to the other as not one for sole custody so as to permit proceedings under the statute [*In re Allison H. (1991) 230 Cal. App. 3d 154, 158-160, 281 Cal. Rptr. 178* ; *cf. Adoption of Van Anda (1976) 62 Cal. App. 3d 189, 191, 194-196, 132 Cal. Rptr. 878* (award of actual physical custody to one parent and visitation rights to other as within statute)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionConsentExceptionsFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationAbandonmentFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationNonsupportFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act

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2-12A California Forms of Pleading and Practice--Annotated § 12A.52

§ 12A.52 Willful Failure to Communicate and Support

[1] Elements

If one birth parent has been awarded custody of a child by judicial decree or has custody by agreement of the birth parents, the consent of the other (living) birth parent is not necessary if, for a period of one year, the noncustodial parent willfully failed to communicate with and to pay for the care, support, and education of, the child, although able to do so [*Fam. Code § 8604(b)*; *see Adoption of Thevenin (1961) 189 Cal. App. 2d 245, 251, 11 Cal. Rptr. 219* (period of abandonment must occur after custody has been awarded or surrendered)]. In other words, the consent of a living parent is not necessary if his or her conduct respecting the child has been, for a period of one year after losing or surrendering custody to the other parent, tantamount to abandonment [*Adoption of Van Anda (1976) 62 Cal. App. 3d 189, 193, 132 Cal. Rptr. 878* ; *see Adoption of Easley (1966) 240 Cal. App. 2d 821, 824-825, 50 Cal. Rptr. 33]* .

This standard of *Fam. Code § 8604(b)* is not the same as the abandonment standard under *Fam. Code § 7822* for freeing a child from parental custody and control, which is discussed in *§ 12A.68[1]*. The former requires only a showing of willful failure to communicate with and support the child; the latter requires a showing of intent to abandon the child [*In re Jay R. (1983) 150 Cal. App. 3d 251, 258, 197 Cal. Rptr. 672]* . Further, under *Fam. Code § 8604(b)*, the noncustodial parent must *both* fail to communicate with *and* fail to support the child for the one-year period. Thus, a noncustodial parent's consent remains necessary if he or she maintains communication with the child, even if he or she does not provide any child support [*see Adoption of Murray (1978) 86 Cal. App. 3d 222, 224-227, 150 Cal. Rptr. 58]* . Under *Fam. Code § 7822*, it need only be shown that the parent *either* failed to support *or* failed to communicate for the specified period, if the requisite intent to abandon is present [*In re Jay R. (1983) 150 Cal. App. 3d 251, 258, 197 Cal. Rptr. 672]* .

Proof of the fact of failure to support or communicate with the child is prima facie evidence that the failure was willful and without lawful excuse [*Fam. Code § 8604(c)*; *see In re Jay R. (1983) 150 Cal. App. 3d 251, 263, 197 Cal. Rptr. 672]* . The burden then shifts to the parent to prove that he or she did not willfully fail to provide for, or communicate with, the child, or was unable to do so [*In re Jay R. (1983) 150 Cal. App. 3d 251, 263, 197 Cal. Rptr. 672]* . Ultimately, the petitioners bear the burden of proof by clear and convincing evidence [*In re Jay R. (1983) 150 Cal.*

App. 3d 251, 265, 197 Cal. Rptr. 672] . The court may disregard token efforts by the birth parent or parents to support or communicate with the child [*Fam. Code § 8604(c)*].

Whether a person is able to communicate or pay support appears to be a question of fact. A parent who is able to communicate or pay at various times during the year but who fails to do so will not necessarily be found to have "willfully failed" to have performed these acts. A combination of factors, such as illness, remarriage, other children, and financial difficulties, making communication or payment difficult might suffice to negate the allegation of ability to communicate or pay [*see Adoption of Smith (1969) 270 Cal. App. 2d 605, 609, 75 Cal. Rptr. 900]* .

Fam. Code § 3041, which in part requires a specific finding of detriment to the child in any proceeding in which the court refuses to award custody to a parent, does not apply to proceedings to establish willful failure to communicate and support. Such a proceeding is not one involving the custody of a child within the meaning of *Fam. Code § 3020 et seq.* [*Adoption of Christopher S. (1987) 197 Cal. App. 3d 433, 439-440, 242 Cal. Rptr. 866* (stepparent adoption decided under prior but substantially similar law)].

A failure to support need not be for the year immediately preceding the filing of the petition for adoption. A willful failure during a more remote period may be considered, particularly if that period is followed by one during which there is a continued failure to support, even if the latter failure is not willful [*Adoption of Christopher S. (1987) 197 Cal. App. 3d 433, 440-441, 242 Cal. Rptr. 866]* . However, evidence of past delinquency may be deemed to be irrelevant because of remoteness if there is evidence of more recent proper parental conduct that, on balance, negates the indication of abandonment [*see Adoption of Coffee (1976) 59 Cal. App. 3d 593, 598 n.5, 130 Cal. Rptr. 887]* . Further, principles of res judicata and collateral estoppel apply to past conduct. If evidence of parental behavior has been considered in a prior proceeding and the court has determined that the parent was not at fault, the same conduct cannot be subsequently tendered as evidence of abandonment [*In re Allison H. (1991) 230 Cal. App. 3d 154, 160, 281 Cal. Rptr. 178* (finding in family law proceeding that mother had interfered with father's custodial rights and that continuing and frequent contact with father was in child's best interests was res judicata as to allegations that father's conduct during same period constituted abandonment)].

A parent who becomes unable to communicate with, or to pay for the care, support, and education of, the child because of the parent's own voluntary conduct is not guilty of a willful failure if he or she can show that there was no intent to avoid parental duties. Thus, for example, if a parent is unable to pay support because of incarceration, he or she is not guilty of willful failure to pay support if there is no evidence that he or she intended to avoid payment by getting arrested [*Adoption of Coffee (1976) 59 Cal. App. 3d 593, 599, 130 Cal. Rptr. 887]* .

If the noncustodial parent has willfully failed to pay for the care, support, and education of the child for one year, he or she cannot cure the defect by a subsequent involuntary payment of support arrearages [*Adoption of Van Anda (1976) 62 Cal. App. 3d 189, 193-194, 132 Cal. Rptr. 878]* .

Note that a noncustodial parent who loses his or her right of consent to the adoption is not excused from any existing child support obligation, until or unless the adoption is final, or his or her parental rights are terminated [*In re Marriage of Dunmore (2000) 83 Cal. App. 4th 1, 4-5, 98 Cal. Rptr. 2d 885* ; *see County of Ventura v. Gonzales (2001) 88 Cal. App. 4th 1120, 1122-1125, 106 Cal. Rptr. 2d 461* (order terminating parental rights severs parent-child relationship and deprives court of authority to order payment of child support)].

[2] Citation Requirement

If willful failure to support and communicate is relied on as an exception to the consent requirement, the noncustodial parent must have been timely cited to appear in the matter [*Fam. Code § 8604(b)*]. Failure to comply with this citation requirement is a constitutional due process violation [*In re Jay R. (1983) 150 Cal. App. 3d 251, 259, 197 Cal. Rptr. 672* ; *see Armstrong v. Manzo (1965) 380 U.S. 545, 550-552, 85 S. Ct. 1187, 14 L. Ed. 2d 62* ; *see also* discussion in *§*

12A.15[5]]. The cited parent may appear and be heard on any material issue or require the petitioner to prove that the statutory standard has been met [*Adoption of Burton (1956) 147 Cal. App. 2d 125, 134, 305 P.2d 185* ; *see In re Jay R. (1983) 150 Cal. App. 3d 251, 263, 197 Cal. Rptr. 672]* .

The parent must be informed of the specific factual allegations supporting the charge. It is sufficient to attach a copy of the adoption petition to the citation notice [*see In re Jay R. (1983) 150 Cal. App. 3d 251, 259-260, 197 Cal. Rptr. 672* (stepparent adoption decided under prior but substantially similar law)].

If the cited parent fails to appear, an affidavit (or declaration [*see Code Civ. Proc. § 2015.5*]) should be filed setting forth facts showing that the parent is not in the military service, or that the petitioner is unable to determine whether the parent is in the military service [*50 U.S.C. App. § 521(b)*]. If the cited parent is in the military service and does not appear, he or she may be entitled to relief from the court's judgment under the Servicemembers Civil Relief Act [*see 50 U.S.C. App. § 521(g)*].

The citation must be served in the manner of serving a summons in a civil action [*Fam. Code § 8604(b)*; *see Code Civ. Proc. § 413.10 et seq.* (manner of serving summons)]. Service of process is discussed in Ch. 518, *Service of Summons and Papers* .

The form of citation is not prescribed by statute. However, in order to afford the cited parent adequate notice of the proceeding, it should at least state the nature of the hearing, the time and place set for the hearing, reliance on willful failure to support and communicate as the ground for dispensing with consent, and the entitlement of the parent to appointed counsel if he or she is indigent (*see § 12A.15[6]*). It should also make reference to the adoption petition, a copy of which should be served with the citation [*see In re Jay R. (1983) 150 Cal. App. 3d 251, 259-260, 265, 197 Cal. Rptr. 672]* .

Citations are usually drafted as commands to appear and show cause, and they are issued by the clerk. For a form of citation, see *§ 12A.130[1]*.

Legal Topics:

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

§§ 12A.53[Reserved]

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§ 12A.60 Nature of Proceeding

Fam. Code § 7800 et seq. establishes a procedure to free a child from the custody and control of his or her natural parents (hereafter called a "Section 7800 proceeding"). "Freeing a child from parental custody and control" is simply another way of "terminating parental rights" [*see Fam. Code §§ 7800, 7803*].

The Family Code refers to "a proceeding" [*see Fam. Code §§ 7802, 7820*], and Section 7800 proceedings are not civil actions. Therefore, the provisions of the Code of Civil Procedure that are generally applicable to civil actions do not apply [*see In re Angela R. (1989) 212 Cal. App. 3d 257, 273, 260 Cal. Rptr. 612* (procedures on default); *In re Mark K. (1984) 159 Cal. App. 3d 94, 100-104, 205 Cal. Rptr. 393* (summary judgment)].

Legal Topics:

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§ 12A.61 Purpose; Relation to Adoption

The purpose of a proceeding under *Fam. Code § 7800* is to serve the welfare and best interests of a child by providing the stability and security of an adoptive home if these conditions are otherwise missing from the child's life [*Fam. Code § 7800*; *see In re Brittany H. (1988) 198 Cal. App. 3d 533, 548, 243 Cal. Rptr. 763]* .

If parental custody and control is terminated in a Section 7800 proceeding, the child may be placed for adoption without parental consent [*Fam. Code § 8606(a)*; *see Scott v. Family Ministries (1976) 65 Cal. App. 3d 492, 502, 135 Cal. Rptr. 430]* . Thus, a Section 7800 proceeding seeks to pave the way for adoption or other normal custody arrangements by terminating the parental rights of birth parents [*see In re Shannon W. (1977) 69 Cal. App. 3d 956, 962, 138 Cal. Rptr. 432]* . The legislative intent underlying the proceeding is to extend adoption services to children residing in foster homes at public expense (often dependent children of the juvenile court) by providing a legal action as an alternative to parental consent [*see In re Eugene W. (1972) 29 Cal. App. 3d 623, 629, 105 Cal. Rptr. 736]* .

Although it is clear that the purpose of a Section 7800 proceeding is to facilitate adoption [*see In re Marriage of O'Connell (1978) 80 Cal. App. 3d 849, 854, 146 Cal. Rptr. 26]* , the absolute legal relationship between the two acts is a subject of some dispute. The view that there is no absolute requirement for Section 7800 proceedings to be in support of an underlying adoption has judicial support [*see In re Marcel N. (1991) 235 Cal. App. 3d 1007, 1011-1013, 1 Cal. Rptr. 2d 240]* . There is no absolute requirement that an adoptive home be found, or that the child at least be found to be adoptable, before parental rights may be terminated in a Section 7800 proceeding [*In re Laura F. (1983) 33 Cal. 3d 826, 837, 191 Cal. Rptr. 464, 662 P.2d 922* ; *see In re Jonathan R. (1989) 211 Cal. App. 3d 1214, 1222, 259 Cal. Rptr. 863* (parental rights terminated despite any evidence that child was adoptable)]. Further, the dismissal of an underlying adoption petition does not necessarily require reversal of a judgment terminating parental rights [*In re Randi D. (1989) 209 Cal. App. 3d 624, 627-628, 257 Cal. Rptr. 421* ; *cf. In re Ronald V. (1993) 13 Cal. App. 4th 1803, 1806, 17 Cal. Rptr. 2d 334* (juvenile court termination order cannot be vacated by modification if adoptive placement falls through)]. On the other hand, a finding that the child's prospects for adoption are slight may support a finding that severance would not be in the child's best interests, even though the parents may be unable to care properly for the child [*In re Michael G. (1983) 147 Cal. App. 3d 56, 61, 194 Cal. Rptr. 745]* .

The failure to legally and absolutely bind the two proceedings has been the subject of some criticism. One court of appeal justice, in dissent, has argued that it defies logic to terminate the parental rights of a natural parent after the underlying stepparent adoption had been dismissed by the petitioning stepfather. In his view, there should be no termination of parental rights except in support of an underlying adoption matter [*In re Randi D. (1989) 209 Cal. App. 3d 624, 631-634, 257 Cal. Rptr. 421* (Wallin, J., dissenting)]. This view finds some support in dicta in a California Supreme Court concurring opinion [*In re Elise K. (1982) 33 Cal. 3d 138, 139-151, 187 Cal. Rptr. 483, 654 P.2d 253* (Bird, C.J., concurring); *but see Fam. Code § 8616.5* (possibility of preserving visitation and contact rights under kinship adoption agreement); for further discussion, *see* Ch. 12B, *Adoptions: Unmarried Minors*]. Note, however, that at least one of the statutory grounds for terminating a father's rights--rape of the mother causing the conception of the child--does not contemplate an adoption [*Fam. Code § 7825(b)*].

The view that parental rights should only be terminated in support of an adoption is also reflected in juvenile court law. With regard to dependent children of the juvenile court, there is a statutory requirement that the juvenile court find that the child is likely to be adopted before it may authorize the initiation of a parental rights termination proceeding [*see Welf. & Inst. Code § 366.26(c)(1)* (requiring finding of adoptability by clear and convincing evidence as condition precedent to terminating parental rights in juvenile court); *see also In re Amelia S. (1991) 229 Cal. App. 3d 1060, 1063-1066, 280 Cal. Rptr. 503* (termination of parental rights under *Welf. & Inst. Code § 366.26*, reversed because of lack of clear and convincing evidence that children were likely to be adopted)].

Legal Topics:

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§ 12A.61A Relation to Guardianship

A proceeding to have a child declared free from the custody and control of one or both parents may be brought in a guardianship proceeding under *Fam. Code § 7800 et seq.*, if all of the following requirements are satisfied [*Prob. Code § 1516.5(a)*]:

- Neither parent has legal custody of the child.
- The child has been in the guardian's physical custody for at least two years.
- The court finds that the child would benefit from being adopted by the guardian. In making this determination, the court must consider all factors relating to the child's best interest, including, but not limited to, the nature and extent of the relationship between the child and the birth parent, the child and the guardian (and the guardian's family members), and the child and any siblings or half-siblings.

The court must appoint a court investigator or other qualified professional to investigate each of these factors, and the investigator's or professional's findings on these issues must be included in the written report required by *Fam. Code § 7851* [*Prob. Code § 1516.5(b)*].

The rights afforded a parent, including the rights to notice and counsel, provided by *Fam. Code § 7800 et seq.*, apply in the proceeding [*Prob. Code § 1516.5(c)*].

These provisions do not apply if the child is a dependent of the juvenile court or is an Indian child [*Prob. Code § 1516.5(d)*].

The California Supreme Court has held that *Prob. Code § 1516.5* is constitutional [*Guardianship of Ann S. (2009) 45 Cal. 4th 1110, 1118, 1126-1127, 1136, 90 Cal. Rptr. 3d 701, 202 P.3d 1089]* . Although due process generally requires some showing of parental unfitness before rights are terminated to protect the parent's fundamental interest in child custody, a showing of current unfitness is not always necessary when a court terminates parental rights. Because

parental rights can be terminated under *Prob. Code § 1516.5* only when the parent has failed to exercise any custodial responsibility for a two-year period, it makes little sense to require a showing that the parent is currently unfit. As a guardianship continues for an extended period, the child develops in interest in a stable, continuing placement, and the guardian acquires a recognized interest in the child's care and custody. Therefore, *Prob. Code § 1516.5* appropriately requires that the court balance all of the familial interests in deciding what is best for the child [*Guardianship of Ann S. (2009) 45 Cal. 4th 1110, 1118, 1128-1136, 90 Cal. Rptr. 3d 701, 202 P.3d 1089]* .

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§ 12A.62 Effect of Order

A declaration of freedom from parental custody and control terminates all parental rights and responsibilities with regard to the child, including the duty of support and the right of visitation [*Fam. Code § 7800, 7803*; *see In re Christy L. (1986) 187 Cal. App. 3d 753, 757, 232 Cal. Rptr. 184* ; *In re Robert J. (1982) 129 Cal. App. 3d 894, 904, 181 Cal. Rptr. 188* (visitation); *Fam. Code § 7825(b)* (mother's right to bring Section 7800 proceeding to terminate parental rights of father convicted of rape (which resulted in child's conception) without requiring that there be any planned or pending adoption); *see § 12A.68[2]*].

Legal Topics:

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§ 12A.63 Relation to Juvenile Court Proceedings

Although *Fam. Code § 7800* proceedings are appropriate under some circumstances, many of the grounds for termination of parental rights in the statute require that the child previously have been adjudged a dependent of the juvenile court [*see Fam. Code § 7823(b)*, discussed in *§ 12A.68*]. For children adjudged dependents of the juvenile court before January 1, 1989, prior law provided that at a permanency planning hearing, the court had to authorize the appropriate county or state agency to initiate Section 7800 proceedings if the minor was found to be adoptable and other express requirements were met [*see* former *Welf. & Inst. Code § 366.25(d)*]. Thus, referral for a Section 7800 proceeding under general superior court jurisdiction formerly was the final procedure invoked by the juvenile court on a determination that reunification with the natural parents had been unsuccessful and that adoption was the appropriate permanent plan [*see Jones T. v. Superior Court (1989) 215 Cal. App. 3d 240, 249, 264 Cal. Rptr. 4]* .

This referral of a matter from juvenile court jurisdiction to general jurisdiction for a Section 7800 proceeding no longer applies to parents of a minor adjudged to be a dependent child of the juvenile court [*see Welf. & Inst. Code §§ 300, 360(d)*]. Amendments to the Welfare and Institutions Code that became operative January 1, 1999, eliminated the distinction between minors adjudged dependents before or after January 1, 1989--so that the same juvenile court procedures now apply without regard to the date of dependency adjudication [*Welf. & Inst. Code § 366.26(a)*; *but cf. Fam. Code § 7808* (still distinguishing dependents adjudicated on or after January 1, 1989, in possible oversight by Legislature)]. Thus, procedures for terminating parental rights of children who have been adjudicated as dependents under *Welf. & Inst. Code § 360(c)* are subject to *Welf. & Inst. Code § 366.26*. Under that statute, *Fam. Code §§ 8604-8606*, inclusive, and *Fam. Code § 8700*, or *Fam. Code § 7660 et seq.* specify the exclusive procedures for the termination of parental rights with regard to, or establishing legal guardianship for, a child while that child is a dependent of the juvenile court [*Welf. & Inst. Code § 366.26(a)*].

Section 7800 proceedings differ from juvenile court proceedings, in which actual custody of the child is usually affected and custody orders are of a temporary nature. Section 7800 proceedings are designed to make further court supervision of the child unnecessary [*see In re Shannon W. (1977) 69 Cal. App. 3d 956, 961-962, 138 Cal. Rptr. 432* ; *see also In re Kristin B. (1986) 187 Cal. App. 3d 596, 604, 232 Cal. Rptr. 36]* . And, although findings may have been made in an earlier juvenile court proceeding that relate to issues in the Section 7800 proceeding, the parties are not precluded from

reexamining the same issues at the Section 7800 hearing [*see In re Carmaleta B. (1978) 21 Cal. 3d 482, 493, 146 Cal. Rptr. 623, 579 P.2d 514* ; *Jones T. v. Superior Court (1989) 215 Cal. App. 3d 240, 251-252, 264 Cal. Rptr. 4* ; *In re Nathaniel P. (1989) 211 Cal. App. 3d 660, 668-673, 259 Cal. Rptr. 555* ; *see also In re Johnny M. (1991) 229 Cal. App. 3d 181, 189-191, 279 Cal. Rptr. 693* (due process requires that parent be afforded contested permanency planning hearing; right to contested hearing under *Fam. Code § 7820 et seq.* as insufficient protection of due process rights)]. Further, a Section 7800 proceeding may be brought without any order from the juvenile court authorizing or directing the action, and, in fact, may be brought while the dependency proceedings are still pending. Thus, it may supersede the dependency matter [*In re Jasmon O. (1994) 8 Cal. 4th 398, 412, 33 Cal. Rptr. 2d 85, 878 P.2d 1297]* . However, a superior court that denies a petition to free a child from parental custody and control, however, has no jurisdiction to order immediate return of the minor to its parents if dependency proceedings are pending in juvenile court, because the order would directly interfere with the juvenile court's jurisdiction [*In re Christina L. (1981) 118 Cal. App. 3d 737, 745, 173 Cal. Rptr. 722]* .

Legal Topics:

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§ 12A.64 Parents to Whom Fam. Code § 7800 Applies

Except with regard to children who are dependents of the juvenile court [*see Welf. & Inst. Code § 366.26*], none of the provisions of *Fam. Code § 7800 et seq.* describe the class of parent to whom it applies [*see Adoption of Michael D. (1989) 209 Cal. App. 3d 122, 132, 256 Cal. Rptr. 884]* . Thus, it may be assumed to apply to mothers, presumed fathers, and alleged natural fathers alike. One court has inferred, however, that *Fam. Code § 7800 et seq.* applies only to parents who have, or at one time had, custody or control of the child [*see Adoption of Michael D. (1989) 209 Cal. App. 3d 122, 131-132, 256 Cal. Rptr. 884]* .

Resort to a Section 7800 proceeding is not necessary if one of the other statutory procedures for terminating parental rights applies [*Adoption of Michael D. (1989) 209 Cal. App. 3d 122, 129-132, 256 Cal. Rptr. 884* ; *see* discussion in *§ 12A.12*]. Thus, for example, a Section 7800 proceeding is not necessary with regard to an alleged natural father, whose rights may be terminated under the less-stringent standards of the Uniform Parentage Act [*see Fam. Code § 7600 et seq.*, discussed in Subpart B, *above*].

In light of these limitations and alternative procedures, particularly the inapplicability of Section 7800 proceedings with regard to juvenile court dependents [*see* discussion in *§ 12A.63*], the role of Section 7800 proceedings in freeing a child for adoption has decreased substantially and will continue to decrease. Section 7800 proceedings continue to be useful to take advantage of the six-month period to establish abandonment by both parents [*see Fam. Code § 7822*, discussed in *§ 12A.68*]. They also continue to be useful with regard to grounds that are unconnected to juvenile court dependency and for which no other statute provides for termination of parental rights, primarily conviction of a felony or developmental or mental disability [*see Fam. Code §§ 7825, 7826*, discussed in *§ 12A.68[2], [3]*].

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§ 12A.65 Construction of Provisions

[1] Liberal Construction

Family Code provisions governing Section 7800 proceedings are to be construed liberally to serve and protect the interests and welfare of the child [*Fam. Code § 7801*]. The liberal construction required does not mean that in each case the statute must be liberally construed to terminate the parent-child relationship, but rather that the determinative factor in each case must be the welfare of the child [*In re Michael G. (1983) 147 Cal. App. 3d 56, 61, 194 Cal. Rptr. 745]* . Family Code provisions mandating parental preference in awarding custody of a child and requiring a finding that parental custody would be detrimental as a condition precedent to an award to a nonparent [*Fam. Code §§ 3020, 3022, 3040-3043, 3409*] do not apply to a Section 7800 proceeding to free a child from parental control [*Fam. Code § 7807(a)*]. *Fam. Code § 3409*, governing the effect of participation in custody proceeding on personal jurisdiction, is also inapplicable in proceedings to free a child from parental control [*Fam. Code § 7807(a)*].

Note that Specified provisions governing child custody, support orders, and prevention of domestic violence are stayed pending a final determination of the proceedings to free a child from parental control [*Fam. Code § 7807(b)*].

[2] Best Interests of Child

If termination of the parental relationship would not be in the best interests of the child, the court is justified in denying the petition, even though one or more of the grounds for termination are established [*In re Marcel N. (1991) 235 Cal. App. 3d 1007, 1014, 1 Cal. Rptr. 2d 240* ; *In re Michael G. (1983) 147 Cal. App. 3d 56, 60-61, 194 Cal. Rptr. 745* (finding that termination would not be in best interests of developmentally disabled child despite finding that child came within descriptions of former Civil Code provisions superseded by *Fam. Code §§ 7826* and *7827*); *see Fam. Code §§ 7890, 7892(a), (b), (d)* (in all termination proceedings, court must act in the best interests of the child)]. However, if termination is in the child's best interests, the trial court lacks discretion to refuse to terminate parental rights merely to give the child's parent another chance to reform [*In re Emily L. (1989) 212 Cal. App. 3d 734, 741, 260 Cal. Rptr. 810]* . Shifting the focus from the minor's welfare to the parent's rehabilitation ignores the law's overriding concern for the child's need for a permanent home [*In re Emily L. (1989) 212 Cal. App. 3d 734, 743, 260 Cal. Rptr. 810* ; *see Fam. Code §§ 7800, 7890*].

A court does not have jurisdiction to approve a stipulation requiring a parent to terminate his or her parental rights. The court is to be guided by the best interests of the child and not by an agreement of the parents [*see In re Marriage of Goodarzirad (1986) 185 Cal. App. 3d 1020, 1027-1030, 230 Cal. Rptr. 203]* .

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§ 12A.66 Standard of Proof Required

Findings in a proceeding to terminate a parent-child relationship under any provisions of *Fam. Code § 7800 et seq.* must be supported by clear and convincing evidence [*Fam. Code §§ 7821, 7892(c)*; *In re Laura F. (1983) 33 Cal. 3d 826, 839, 191 Cal. Rptr. 464, 662 P.2d 922* ; *In re Angelia P. (1981) 28 Cal. 3d 908, 919, 171 Cal. Rptr. 637, 623 P.2d 198* ; *In re Jacqueline G. (1985) 165 Cal. App. 3d 582, 585, 211 Cal. Rptr. 827* ; *In re Mark K. (1984) 159 Cal. App. 3d 94, 101, 205 Cal. Rptr. 393* ; *In re Paula P. (1981) 123 Cal. App. 3d 734, 749, 176 Cal. Rptr. 708]* . This standard of proof allows a parent to present evidence on issues that were determined against him or her in a prior juvenile court hearing under a lesser standard [*In re Nathaniel P. (1989) 211 Cal. App. 3d 660, 668-673, 259 Cal. Rptr. 555]* . Termination of parental rights under *Fam. Code § 7800 et seq.* must rest on present circumstances as well as on past acts [*In re Marcel N. (1991) 235 Cal. App. 3d 1007, 1014, 1 Cal. Rptr. 2d 240]* .

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§ 12A.67 Least Detrimental Alternative

Before the parent-child relationship can be severed in a Section 7800 proceeding, the court must also find that it is not in the best interest of the child to return to the custody of the natural parents and that termination of parental rights is the least detrimental alternative available to protect the welfare of the child [*Jones T. v. Superior Court (1989) 215 Cal. App. 3d 240, 251, 264 Cal. Rptr. 4* ; *In re R.S. (1985) 167 Cal. App. 3d 946, 956-957, 213 Cal. Rptr. 690* ; *see In re Angelia P. (1981) 28 Cal. 3d 908, 918-919, 171 Cal. Rptr. 637, 623 P.2d 198]* . The least detrimental alternative must be viewed from the standpoint of the child, not of the parent [*In re Jasmon O. (1994) 8 Cal. 4th 398, 427-428, 33 Cal. Rptr. 2d 85, 878 P.2d 1297* ; *see also In re Teneka W. (1995) 37 Cal. App. 4th 721, 728, 43 Cal. Rptr. 2d 666* ; *In re Cody W. (1994) 31 Cal. App. 4th 221, 227-231, 36 Cal. Rptr. 2d 848* (least detrimental alternative determination arises at initial stages of dependency proceeding; it does not mean that court must consider guardianship or foster care over adoption at permanent plan selection stage)].

The court must review the alternative custodial arrangements available if the parent were to retain parental rights, and must determine that each would be more detrimental to the child's welfare than termination of the parent's rights. The court must weigh the parental interest in rehabilitation and eventual reunification against the interest of the child in a secure environment. The court must carefully explore all reasonable alternatives to severing the parent-child relationship, such as child protective services and temporary foster care pending efforts to rehabilitate the parents, unless they would result in serious psychological harm to the child. However, an express finding that termination of parental rights is the least detrimental alternative is not required [*In re Jasmon O. (1994) 8 Cal. 4th 398, 427, 33 Cal. Rptr. 2d 85, 878 P.2d 1297]* .

If the court determines that available resources are inadequate to rehabilitate the parent to a level at which he or she will be able to assume responsibility for the child, it becomes inimical to the child's welfare to delay efforts to seek permanent adoptive placement. From the child's viewpoint, the consensus of expert opinion holds that it is most important to avoid multiple placements for children between six months and three years of age [*In re David B. (1979) 91 Cal. App. 3d 184, 196, 154 Cal. Rptr. 63* ; *see In re R.S. (1985) 167 Cal. App. 3d 946, 955-958, 213 Cal. Rptr. 690]* .

If there is no reasonable possibility of reunification, parents may present long-term guardianship as a less drastic alternative to termination of parental rights and adoption in abandonment proceedings [*Jones T. v. Superior Court (1989) 215 Cal. App. 3d 240, 251-252, 264 Cal. Rptr. 4* (but holding that juvenile court is not required to consider it before authorizing commencement of abandonment proceedings)]. If the current custodians are willing either to adopt the child or to serve as long-term guardians, it does not appear that the court is required to deny termination of parental rights and adoption in favor of guardianship. While guardianship is more stable than foster care, it is not irrevocable, and thus falls short of the secure and permanent placement afforded by adoption [*see In re Teneka W. (1995) 37 Cal. App. 4th 721, 728, 43 Cal. Rptr. 2d 666* ; *Jones T. v. Superior Court (1989) 215 Cal. App. 3d 240, 250-251, 264 Cal. Rptr. 4* ; *see also In re Cody W. (1994) 31 Cal. App. 4th 221, 227-231* (least detrimental alternative determination arises at initial stages of dependency proceeding; it does not mean that court must consider guardianship or foster care over adoption at permanent plan selection stage)]. Further, the court may consider the potential disruptive effect on the child's life that might arise because of continued litigation of custody and visitation [*see In re Jasmon O. (1994) 8 Cal. 4th 398, 427, 33 Cal. Rptr. 2d 85, 878 P.2d 1297]* .

Courts have differed over whether there is a duty to explore placing a child with a relative as a less drastic alternative to terminating parental rights. It has been held that only reunification services designed to reunite the natural parents with the child are required and that there is no duty to consider placement with a member of the child's extended family as a less drastic alternative [*In re Raymond H. (1985) 175 Cal. App. 3d 556, 561-562, 221 Cal. Rptr. 165* ; *see In re Solomon L. (1987) 190 Cal. App. 3d 1106, 1114, 236 Cal. Rptr. 2]* . Other courts have been disturbed by the failure to explore placement with blood relatives and have stated that this failure violates the rule that severing parental ties should be the least detrimental alternative for the child [*see In re Melicia L. (1988) 207 Cal. App. 3d 51, 55, 254 Cal. Rptr. 541* ; *In re Terry E. (1986) 180 Cal. App. 3d 932, 947, 225 Cal. Rptr. 803]* .

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§ 12A.68 Grounds

[1] Abandonment

A proceeding may be brought for the purpose of having any child under the age of 18 years declared free from the custody and control of either or both parents if any of the following circumstances have occurred [*Fam. Code §§ 7820, 7822(a)*]:

(1) The child has been left without provision for his or her identification by the child's parent or parents.

(2) The child has been left by both parents or the sole parent in the care and custody of another person for a period of six months without any provision for the child's support, or without communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child.

(3) One parent has left the child in the care and custody of the other parent for a period of one year without providing for the child's support, or without communication from the parent, with the intent on the part of the parent to abandon the child.

In those cases in which the child has been left without provision for identification and the whereabouts of the parents are unknown, a petition may be filed after the 120th day following the discovery of the child. The petition may not be heard until the 180th day following the discovery of the child [*Fam. Code § 7822(c)*].

The acts of the parent or parents must be done with the intent to abandon the child. A failure to provide identification, a failure to provide support, or a failure to communicate is presumptive evidence of the intent to abandon [*Fam. Code § 7822(b)*]. An intent to abandon the child permanently is not required; it is sufficient if the parent had intent to abandon during the statutory period [*In re Amy A. (2005) 132 Cal. App. 4th 63, 68, 33 Cal. Rptr. 3d 298* ; *In re Daniel M., III (1993) 16 Cal. App. 4th 878, 20 Cal. Rptr. 2d 291]* .

The fact that a parent has not communicated with a child or that the parent intended to abandon the child does not

become material unless the parent has "left" the child within the meaning of *Fam. Code § 7822* [*In re Amy A. (2005) 132 Cal. App. 4th 63, 68, 33 Cal. Rptr. 3d 298]* . A parent leaves a child by voluntarily surrendering the child to another person's care and custody; actual desertion is not required for a finding of abandonment [*In re Amy A. (2005) 132 Cal. App. 4th 63, 68-69, 33 Cal. Rptr. 3d 298* ; *see Adoption of Allison C. (2008) 164 Cal. App. 4th 1004, 1011-1016, 79 Cal. Rptr. 3d 742* (father voluntarily surrendered child's custody and care to mother during time he was incarcerated); *In re Michael R. (2006) 137 Cal. App. 4th 126, 143, 39 Cal. Rptr. 3d 773* (placement of child with adoption agency does not by itself establish prima facie case of abandonment)]. Thus, for example, a parent "leaves" the child, even when the other parent moves away with the child, when the parent makes no effort to maintain contact with the child or to exercise his or her visitation rights under an existing custody order [*In re Amy A. (2005) 132 Cal. App. 4th 63, 70-72, 33 Cal. Rptr. 3d 298* (biological father's rights were properly terminated so that child could be adopted by stepfather); cf. *In re Jacklyn F. (2003) 114 Cal. App. 4th 747, 754-756, 7 Cal. Rptr. 3d 768* (mother did not "leave" child when custody was awarded to grandparents after mother had been absent for only three days, and after custody award mother attempted to stay involved with child)].

If, in the opinion of the court, the evidence indicates that the parent or parents have made only token efforts to support or communicate with the child, the court may declare the child abandoned by a parent or parents [*Fam. Code § 7822(b)*; *see, e.g., In re Brittany H. (1988) 198 Cal. App. 3d 533, 548, 243 Cal. Rptr. 763* (intent to abandon, not intent to exercise parental right, is controlling); *In re B.J.B. (1986) 185 Cal. App. 3d 1201, 1212-1213, 230 Cal. Rptr. 332* (alleged father saw child only once in six-year period and gave child's mother unspecified amount of money only on that one occasion); *In re Raymond H. (1985) 175 Cal. App. 3d 556, 563-564, 221 Cal. Rptr. 165* (intent to abandon child inferred from father's minimal visits with child over three-year period)]. The questions of whether an intent to abandon exists, and whether it existed for the required period, are questions of fact for the trial court, to be determined on all the facts and circumstances of the case [*In re Randi D. (1989) 209 Cal. App. 3d 624, 629, 257 Cal. Rptr. 421* ; *see In re Jacklyn F. (2003) 114 Cal. App. 4th 747, 7 Cal. Rptr. 3d 768* (requirements for abandonment under *Fam. Code § 7822* were not met because minor was not "left" in custody of another for time period required by statute)].

The court may still declare the child abandoned, even when a guardian has been appointed for the child, when the parent or parents have failed to communicate with or support the child, as discussed, *above* [*see Fam. Code § 7822(b)*].

When the parent has agreed for the child to be in the physical custody of another person or persons for adoption and has not signed an adoption placement agreement under *Fam. Code § 8801.3*, a consent to adoption under *Fam. Code § 8814*, or a relinquishment to a licensed adoption agency under *Fam. Code § 8700*, evidence of the adoptive placement will not, in itself, preclude the court from finding an intent on the part of the parent to abandon the child [*Fam. Code § 7822(d)*]. When the parent has placed the child for adoption under *Fam. Code § 8801.3*, consented to adoption under *Fam. Code § 8814*, or relinquished the child to a licensed adoption agency under *Fam. Code § 8700*, and has then either revoked the consent or rescinded the relinquishment but has not taken reasonable action to obtain custody of the child, evidence of the adoptive placement will not, in itself, preclude the court from finding an intent on the part of the parent to abandon the child [*Fam. Code § 7822(d)*].

If the parent of an *Indian child* has transferred physical care, custody, and control of the child to an Indian custodian, that action may not be deemed to constitute abandonment of the child unless the parent manifests the intent to abandon the child by failing to substantially comply with any obligations assumed by the parent in his or her agreement with the Indian custodian despite the custodian's objection to the noncompliance, or by failing to resume physical care, custody, and control of the child on the custodian's request [*Fam. Code § 7822(e)*].

There is a similar but separate standard for terminating parental rights under *Fam. Code § 8604* for conduct amounting to abandonment. For a comparison of the two abandonment standards, see *§ 12A.52[1]*. For a form of petition alleging that a child should be freed from parental custody and control because of abandonment, see *§ 12A.131[1]*.

[2] Conviction of Felony

A *Fam. Code § 7800* proceeding may be instituted if the child's parent or parents are convicted of a felony if the facts of the crime are of a nature that prove the unfitness of the parent or parents to have future custody of the child [*Fam. Code § 7825(a)*]. In making this determination, the court may consider the parent's criminal record before the felony conviction to the extent this record demonstrates a pattern of behavior substantially related to the child's welfare or the parent's ability to exercise custody and control regarding the child [*Fam. Code § 7825(a)(2)*].

The application of *Fam. Code § 7825* has generally been limited to cases in which a parent commits a heinous felony offense, often against a family member, which in and of itself demonstrates that the parent will be forever unfit to have any measure of custody of his or her children [*In re Baby Girl M. (2006) 135 Cal. App. 4th 1528, 1532, 1542, 38 Cal. Rptr. 3d 484]* . Parental rights may be terminated under this statute only when the parent's unfitness is demonstrated by the facts underlying the felony conviction. The mere existence of a felony conviction is not sufficient to prove parental unfitness, and exposure to a lengthy period of incarceration is also insufficient by itself to authorize termination of parental rights. When a parent's fitness is called into question by factors other than the facts underlying a felony conviction, the courts must apply other statutory provisions relating to the child's welfare, which contain more gradual termination procedures and include procedural safeguards that are not afforded by *Fam. Code § 7825* [*In re Baby Girl M. (2006) 135 Cal. App. 4th 1528, 1533, 1540-1542, 38 Cal. Rptr. 3d 484]* . A court is not precluded from considering other factors, such as the parent's criminal record, history of substance abuse, or history of domestic violence. These factors may inform the court's evaluation of the facts underlying the parent's felony conviction, but they cannot themselves form the basis for terminating the parent's rights under *Fam. Code § 7825* [*In re Baby Girl M. (2006) 135 Cal. App. 4th 1528, 1543, 38 Cal. Rptr. 3d 484]* .

There is no requirement that the children be present when the felony occurs or that they be in current danger. The purpose of *Fam. Code § 7825* is to prevent future harm, and the court considers the circumstances of the felony to determine if it is likely that future harm may result to the child if the parental rights are not terminated [*In re Arthur C. (1985) 176 Cal. App. 3d 442, 445-446, 222 Cal. Rptr. 388]* . Termination on the grounds of a felony conviction must be supported by proof that the parent has not been or cannot be rehabilitated during incarceration so that when the parent is released from prison, he or she would be unable to properly care for the child [*In re Terry E. (1986) 180 Cal. App. 3d 932, 950-953, 225 Cal. Rptr. 803]* .

The term "convicted," in the present context, is limited to final judgments [*In re Sonia G. (1984) 158 Cal. App. 3d 18, 24, 204 Cal. Rptr. 498]* . For a form for an allegation that a child should be freed from parental custody and control because of a felony conviction, see *§ 12A.132[1]*.

The mother of a child who was conceived as a result of a rape may bring a *Fam. Code § 7800* proceeding against the father if he was convicted of that violation [*see Penal Code § 261* (*Penal Code § 261* does not include statutory rape)]. The conviction creates a "conclusive presumption" that the father is unfit to have custody or control of the child [*Fam. Code § 7825(b)*]. It is not completely clear whether the court has any discretion to deny termination if, for example, it finds that termination is not the "least detrimental alternative" or not in the child's best interests.

[3] Developmental Disability or Mental Illness

A child may be declared free from the custody and control of a parent who has been declared by a court of competent jurisdiction, wherever situated, to be developmentally disabled or mentally ill. In such a case, the Director of Mental Health or the Director of Developmental Services, or his or her equivalent, if any, in the state or county in which the parent resides or is hospitalized, and the superintendent of the hospital in which the parent is an inmate or patient, must certify that the parent is not capable of supporting or controlling the child in a proper manner [*Fam. Code § 7826*; *see In re Anthony P. (2000) 84 Cal. App. 4th 1112, 1116, 101 Cal. Rptr. 2d 423* (proceeding to terminate parental rights is not preempted by Title II of Americans with Disabilities Act)].

A child may also be freed from the custody and control of a mentally disabled parent if the parent is likely to remain so disabled in the foreseeable future [*Fam. Code § 7827(b)*]. As used in *Fam. Code § 7827*, the term "mentally disabled" means that the parent suffers any mental incapacity or disorder that renders him or her unable to adequately care for and control the child [*Fam. Code § 7827(a)*]. The evidence of any two experts is required to support a finding under this subdivision. Each of the experts must be either a physician and surgeon certified either by the American Board of Psychiatry and Neurology or under *Welf. & Inst. Code § 6750*, or a licensed psychiatrist who has a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders. The court also has discretion to call a licensed marriage and family therapist, or a licensed clinical social worker of requisite experience (who is not the adoption service provider of the child) if the court determines that this testimony is in the best interest of the child and is warranted by the circumstances of the particular family or parenting issues involved [*Fam. Code § 7827(c)*; *see In re Micah S. (1988) 198 Cal. App. 3d 557, 562-563, 243 Cal. Rptr. 756* ; *see also In re Catherine S. (1991) 230 Cal. App. 3d 1253, 1258, 281 Cal. Rptr. 746* (reliance on testimony of unlicensed expert cannot be harmless error)].

Fam. Code § 7827 is not the exclusive means for terminating the parental rights of a mentally disabled person [*In re Christina L. (1992) 3 Cal. App. 4th 404, 415 n.8, 4 Cal. Rptr. 2d 680* (finding sufficient evidence to support termination)]. However, if the fundamental inadequacy of the parent is a developmental disability, it must be demonstrated under any of the subdivisions of *Fam. Code § 7820 et seq.* that the court explored alternatives to termination, such as services offered by the state for developmentally disabled persons [*In re Victoria M. (1989) 207 Cal. App. 3d 1317, 1333, 255 Cal. Rptr. 498]* .

If the parent resides in another state or in a foreign country, the evidence required by *Fam. Code § 7827* may be supplied by the affidavits (or declarations under *Code Civ. Proc. § 2015.5*) of two experts each of whom must be either (1) a physician or surgeon who is a resident of that state or foreign country, and who has been certified by a medical organization or society of that state or foreign country to practice psychiatric or neurological medicine; or (2) a licensed psychologist who has a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders and who is licensed in that state or authorized to practice in that country [*Fam. Code § 7827(d)*].

If the rights of a parent are sought to be terminated pursuant to *Fam. Code § 7827* and the parent has no attorney, the court must appoint an attorney for the parent pursuant to *Fam. Code § 7860 et seq.* whether or not a request for the appointment is made by the parent [*Fam. Code § 7827(e)*].

The statutory standard of inability to support or control the child in a proper manner because of mental illness or developmental disability refers to the control that parents ordinarily exercise and implies the usual incidents of exercise of control over the child. The court must find, from clear and convincing evidence, that (1) the mental illness or disability is settled, in that it will continue for an indefinite period regardless of medical treatment available to the parent, and (2) the immediate severance of the parental relationship is the least detrimental alternative available to protect the welfare of the child [*In re Mark K. (1984) 159 Cal. App. 3d 94, 106, 205 Cal. Rptr. 393* ; *In re David B. (1979) 91 Cal. App. 3d 184, 192, 154 Cal. Rptr. 63* ; *see In re Micah S. (1988) 198 Cal. App. 3d 557, 560, 243 Cal. Rptr. 756]* . Due process requires that a trial court or the Department of Social Services must explore alternatives to termination of parental rights and find them inadequate to protect the minor, otherwise termination may not be ordered under *Fam. Code § 7827* [*In re R.S. (1985) 167 Cal. App. 3d 946, 958, 967-968, 213 Cal. Rptr. 690]* .

In using the terms "mental illness" and "mental deficiency" in the former Civil Code section superseded by *Fam. Code § 7827*, the Legislature intended to embody the concepts of mentally ill and mentally deficient persons then set forth in *Welf. & Inst. Code §§ 5550* and *5590* [*see In re Carmaleta B. (1978) 21 Cal. 3d 482, 490 n.7, 146 Cal. Rptr. 623, 579 P.2d 514* ; *In re David B. (1979) 91 Cal. App. 3d 184, 193, 154 Cal. Rptr. 63]* . After the 1983 amendment of the former Civil Code section, the standards for termination under that section were eased so as not to require a showing of mental illness as formulated by prior case law [*In re Amie M. (1986) 180 Cal. App. 3d 668, 672-673, 225 Cal. Rptr.*

645] . The 1983 substitution of "mentally disabled" in place of "mental deficiency or mental illness" was not unconstitutionally vague [*In re Christina A. (1989) 213 Cal. App. 3d 1073, 1077-1078, 261 Cal. Rptr. 903]* .

For a form for an allegation that a child should be freed from parental custody and control because of certified developmental disability or mental illness, see *§ 12A.133[1]*. For a form for an allegation that a child should be freed from parental custody and control because of other mental disability, see *§ 12A.134[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral OverviewFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationAbandonmentFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationDisabilityFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationIncarceration

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§ 12A.69 Jurisdiction and Venue

Subject matter jurisdiction over *Fam. Code § 7800* proceedings is in the superior court [*Fam. Code § 200*]. Venue is proper in the county in which the minor resides, in the county in which the minor is found, or in any county in which any of the acts that are set forth in *Fam. Code § 7820* are alleged to have occurred [*Fam. Code § 7845*; *see* discussion in *§ 12A.68*].

Apart from these statutory requirements for jurisdiction and venue, it is somewhat unclear whether there must also be jurisdiction in a Section 7800 proceeding under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The current UCCJEA defines a "child custody proceeding" to include a proceeding for termination of parental rights [*Fam. Code § 3402(d)*], and this is consistent with prior case law under the former UCCJA [*see In re Gloria F. (1989) 212 Cal. App. 3d 576, 582, 260 Cal. Rptr. 706]* . However, the UCCJEA expressly does not govern "an adoption proceeding" [*Fam. Code § 3403*], and *Fam. Code § 7807* makes the former UCCJA declaration requirements [*see* former *Fam. Code § 3043*] inapplicable to Section 7800 proceedings. Pending any further legislative or judicial clarification, it is suggested that counsel assume that the UCCJEA will apply, on the basis of the specific statutory authorization [*Fam. Code § 3402(d)*] and include a declaration that complies with its provisions in the first pleading [*see Fam. Code § 3429*].

For further discussion of the UCCJEA, see Ch. 394, *Parent and Child* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureVenueIndividual DefendantsFamily LawChild CustodyEnforcementUniform Child Custody Jurisdiction & Enforcement ActFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral Overview

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§ 12A.70 Who May Institute Proceeding

Any interested person may petition to have a minor declared free from parental custody and control of either or both parents [*Fam. Code § 7841*; *but see Fam. Code § 7825(b)* (only mother may bring proceeding against father if child was conceived by rape)]. There is no filing fee [*Fam. Code § 7806*; *see Gov. Code § 26857*].

A Section 7800 proceeding may also be instituted by a licensed adoption agency, the Department of Social Services, a county welfare department, a county adoption agency, a county probation department planning adoptive placement of a child with a licensed adoption agency, or the Department of Social Services acting as an adoption agency in counties not served by a county adoption agency [*Fam. Code § 7840(a)*]. If requested by any of the state or county agencies mentioned above, the county counsel, or if there is no county counsel, the district attorney, is required, in a proper case, to institute the proceeding [*Fam. Code § 7840(c)*].

Foster parents of a minor who is the subject of the termination proceeding are proper parties to bring a petition, even though the issue is not whether the court should remove the minor from foster care, but whether the natural parents' rights should be permanently severed [*In re Connie M. (1986) 176 Cal. App. 3d 1225, 1232-1233, 1240, 222 Cal. Rptr. 673]* .

Foster parents who are "de facto" parents may also have standing to intervene in a Section 7800 proceeding, but their right to intervene must be decided on a case-by-case basis. In determining the propriety of intervention, the court may consider a foster parent's day-to-day care of the minor and the unique vantage point that a foster parent may present to the court. These same factors should be applied even if the foster parent is also a blood relative of the minor, such as a grandparent [*see* *In re Kristin B. (1986) 187 Cal. App. 3d 596, 608, 232 Cal. Rptr. 36]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionRight to InterveneFamily LawAdoptionProceduresGeneral OverviewFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral Overview

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§ 12A.71 Citation

[1] To Custodian

On the filing of the petition, a citation must be served on any person having the custody and control of the minor or on the person whom the minor is with [*Fam. Code § 7880(a)*]. The citation requires the person or persons to appear with the minor at a time and place stated in it, unless the minor is under the age of 10, in which case the minor's appearance is required only on order of the court after necessity being shown [*Fam. Code § 7880(b)*]. No responsive pleading is required [*In re Angela R. (1989) 212 Cal. App. 3d 257, 273, 260 Cal. Rptr. 612]* . For a form for a citation to a custodian, see *§ 12A.135[1]*.

Service of the citation must be made at least 10 days before the time stated for the appearance [*Fam. Code § 7880(c)*]. Failure without reasonable cause to appear or to bring the minor before the court as required by the citation constitutes contempt [*see Fam. Code § 7883*].

[2] To Parent or Other Relative

The father or mother of a minor who is the subject of a *Fam. Code § 7800* proceeding must be notified of the proceedings by service of citation if his or place of residence is known to the petitioner. If the person's residence is not known, citation must be served on the grandparents and adult brothers, sisters, uncles, aunts, and first cousins of the child, if any, and if their residences and relationships to the child are known to the petitioner [*Fam. Code § 7881(a)*].

For a form for use as a citation to a parent or other relative, see *§ 12A.136[1]*. For forms for use with regard to service of citation by publication under *Fam. Code § 7882*, see *§§ 12A.137, 12A.138*. For discussion of the constitutional scope of notice requirements in proceedings to terminate parental rights, see *§ 12A.15[5]*.

[3] Service by Publication

If the child's father or mother cannot with reasonable diligence otherwise be served, or if his or her residence is unknown to the petitioner, the petitioner must file an affidavit in order to obtain substituted service by publication. The

affidavit must state the name of the father or mother and his or her place of residence, if known, or that place of residence is unknown [*Fam. Code § 7882(a)*]. The court must then order that service be made by publication of the citation. The notice must be published once a week for four successive weeks in the newspaper most likely to give notice to the parent [*Fam. Code § 7882(b)*; *see Gov. Code § 6064*]. For a form of citation by publication, see *§ 12A.138[1]*.

[4] Notice to Prisoners

In any proceeding under *Fam. Code § 7800 et seq.* seeking the termination of parental rights of a prisoner, the superior court of the county in which the proceeding is pending must order that notice of any court proceeding be transmitted to the prisoner [*Penal Code § 2625*; *see In re Barry W. (1993) 21 Cal. App. 4th 358, 365-371, 26 Cal. Rptr. 2d 161* (reviewing history of statute)]. The form of citation in § 12A.136[1] may be adapted for this purpose. Service of notice must be made under *Fam. Code § 7881* [*Penal Code § 2625*].

The term "prisoner" includes any individual in custody in a state prison, in the California Rehabilitation Center, or in a county jail, or who is a ward of the Department of the Youth Authority. It also includes any individual who, on a verdict or finding that he or she was insane at the time of committing an offense, or mentally incompetent to be tried or adjudged to punishment, is confined in a state hospital or in any other public or private treatment facility [*Penal Code § 2625*].

On receipt of a statement from the prisoner or his or her attorney indicating the prisoner's desire to be present during the court's proceedings, the court must issue an order for the transportation of the prisoner from the institution to the court. No *Fam. Code § 7800* proceeding may be adjudicated without the physical presence of the prisoner or the prisoner's attorney, unless the court has before it a knowing waiver of the right of physical presence signed by the prisoner, or an affidavit (declaration) [*see Code Civ. Proc. § 2015.5*] signed by the warden, superintendent, or other person in charge of the institution, stating that the prisoner has, by express statement or action, indicated an intent not to appear at the proceeding [*Penal Code § 2625*; *see In re Rikki D. (1991) 227 Cal. App. 3d 1624, 1628-1631, 278 Cal. Rptr. 565* (affidavit is not required if prisoner's attorney is present)].

A transportation order on the request of the prisoner is mandatory only in regard to *Fam. Code § 7800* proceedings (and juvenile court proceedings under *Welf. & Inst. Code § 300* (dependency) and 366.26 (termination of parental rights)). In any other proceeding in which a prisoner's parental rights are subject to adjudication, a transportation order *may* be made by the court [*Penal Code § 2625*; *see In re Barry W. (1993) 21 Cal. App. 4th 358, 369 n.7, 26 Cal. Rptr. 2d 161* ; for related forms, *see §§ 12A.140 -12A.141*]. Whether due process or equal protection might require that a prisoner whose parental rights are subject to termination in some other proceeding [*see, e.g., Fam. Code §§ 7664, 8604(b)*] have a right to attend the proceedings has not been addressed by the courts.

Finally, on and after January 1, 1997, a court may not order the removal and production of a prisoner sentenced to death, whether or not that sentence is being appealed, in any action or proceeding in which the prisoner's parental rights are subject to adjudication [*Pen. Code § 2625(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewFamily LawAdoptionProceduresGeneral OverviewFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral Overview

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§ 12A.72 When Petition Must Be Heard

Notwithstanding any other provision of law, a *Fam. Code § 7800* proceeding must be set for trial not more than 45 days after filing notification therefor and completion of service thereon in the manner prescribed by law for the service of civil process [*Fam. Code § 7870(b)*; *see § 12A.71*]. The matter then has precedence over all other civil matters on the date set for trial [*Fam. Code § 7870(b)*]. The court may continue the proceeding as provided in *Fam. Code § 7864* in order to appoint counsel and to enable counsel to become acquainted with the case [*see Fam. Code § 7870(c)*, discussed in *§ 12A.79*].

It is the public policy of California that judicial proceedings to declare a child free from parental custody and control be fully determined as expeditiously as possible [*Fam. Code § 7870(a)*; *see In re Emily L. (1989) 212 Cal. App. 3d 734, 743, 260 Cal. Rptr. 810* ; *but see In re Micah S. (1988) 198 Cal. App. 3d 557, 563, 243 Cal. Rptr. 756* (hearing on five separate days over 10-month period did not violate parents' statutory or due process rights given lack of prejudice to them)]. Nevertheless, the periods in *Fam. Code §§ 7870* and *7871* are not jurisdictional. A parent may waive the right to a speedy hearing by conduct or by failing to object to continuances [*see In re Walter P. (1991) 228 Cal. App. 3d 113, 126-127, 278 Cal. Rptr. 602]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral Overview

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§ 12A.73 Motion for Continuance

In order to obtain a motion for a continuance of a hearing in a *Fam. Code § 7800* proceeding, written notice must be filed within two court days of the date set for the hearing, together with affidavits or declarations detailing specific facts showing that a continuance is necessary, unless the court for good cause entertains an oral motion for continuance. Continuances will be granted only on a showing of good cause. Neither a stipulation between counsel nor the convenience of the parties is, in and of itself, a good cause [*Fam. Code § 7871(a), (b)*].

A continuance may be granted only for that period shown to be necessary by the evidence considered at the hearing on the motion. Whenever any continuance is granted, the facts proven that require the continuance must be entered in the minutes of the court [*Fam. Code § 7871(c)*]. A trial court need not order a continuance on its own initiative in the absence of a written motion by a party if there is no showing of good cause as required by *Fam. Code § 7871* [*In re Jacqueline G. (1985) 165 Cal. App. 3d 582, 591, 211 Cal. Rptr. 827]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersContinuancesFamily LawAdoptionProceduresGeneral OverviewFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral Overview

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§ 12A.74 Review of Juvenile Court File

In a *Fam. Code § 7800* proceeding, the judge may take judicial notice of facts asserted in findings and orders in a prior juvenile court proceeding, but cannot take judicial notice of the entire juvenile court file. A court may take judicial notice of the existence of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments. Thus, a court cannot take judicial notice of hearsay allegations, such as reports of doctors or social workers, as being true, just because they are part of a juvenile court record or file [*In re Amber D. (1991) 235 Cal. App. 3d 718, 724, 286 Cal. Rptr. 751* ; *In re David C. (1984) 152 Cal. App. 3d 1189, 1204-1205, 200 Cal. Rptr. 115]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceJudicial NoticeAdjudicative FactsGeneral OverviewFamily LawAdoptionProceduresGeneral OverviewFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral OverviewGovernmentsCourtsCourt Records

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§ 12A.75 Investigator's Report

On the filing of a petition under *Fam. Code § 7841*, the court clerk, in accordance with the direction of the court, immediately notifies the juvenile probation officer, a qualified court investigator, licensed clinical social worker, licensed marriage and family therapist, or the county department designated by the board of supervisors to administer the public services program, who immediately investigates the circumstances of the minor and the circumstances allegedly bringing him or her within *Fam. Code § 7820 et seq.* (*see* discussion in *§ 12A.68*) [*Fam. Code § 7850*]. The probation officer, investigator, or department must provide to the court a written investigation report and a recommendation to the court of the proper disposition to be made in the proceeding in the best interests of the minor [*Fam. Code § 7851(a)*]. The report must include all of the following [*Fam. Code § 7851(b)*]:

(1) A statement that the person making the report explained to the minor the nature of the legal proceeding to end parental custody and control;

(2) A statement of the minor's feelings and thoughts concerning the pending proceeding;

(3) A statement of the minor's attitude towards his or her parent or parents, and particularly whether or not the minor would prefer living with his or her parent or parents; and

(4) A statement that the minor was informed of his or her right to attend the hearing on the petition and the minor's feelings concerning attending the hearing.

Preparation of the report is mandatory under all circumstances, including those instances in which petitions are filed by a public agency under *Fam. Code § 7840* [*In re Linda W. (1989) 209 Cal. App. 3d 222, 226-227, 257 Cal. Rptr. 52]* . The court must receive the report into evidence and read and consider its contents in rendering its judgment [*Fam. Code § 7851(d)*]. If, however, the age, or the physical, emotional, or other condition of the minor precludes his or her meaningful response to the required explanations, inquiries, and information, a description of the condition will satisfy the requirements [*Fam. Code § 7851(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral Overview

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§ 12A.76 Petitioner's Liability for Costs

The petitioner (except a public agency or nonprofit organization) is liable for all reasonable costs up to a statutory limit incurred in connection with the petition, including, but not limited to, costs incurred for the investigation. The court may defer, waive, or reduce the costs if payment would cause an economic hardship that would be detrimental to the welfare of the child [*Fam. Code § 7851.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewFamily LawAdoptionProceduresGeneral OverviewFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral Overview

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§ 12A.77 Confidentiality of Petition and Reports

[1] In General

Only court personnel, the minor who is the subject of a *Fam. Code § 7800* proceeding, his parents or guardian, the attorneys for the parties, and such other persons as may be designated by the judge of the superior court may inspect the petition and reports of the probation officer or county department designated by the board of supervisors to administer the public social services program [*Fam. Code § 7805(a)*].

In any proceeding before the court of appeal or Supreme Court to review a judgment or order entered in a *Fam. Code § 7800* proceeding, the superior court record and briefs filed by the parties may be inspected only by court personnel, by any party to the proceeding, by the attorneys for the parties, and by such other persons as may be designated by the presiding judge of the court before which the matter is pending [*Fam. Code § 7805(b)*; *see Cal. Rules of Ct., Rule 8.480(g)*].

[2] Disclosure to Welfare Agencies

Notwithstanding the confidentiality provisions of *Fam. Code § 7805(a)* [*see* discussion in *§ 12A.77[1]*] or any other provision of law, the superior court and the probation officer may furnish information pertaining to a petition under *Fam. Code § 7800 et seq.* to the Department of Social Services, any county welfare department, any public welfare agency, or any private welfare agency licensed by the Department of Social Services whenever it is believed that the welfare of the child will be promoted thereby [*Fam. Code § 7805(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral OverviewGovernmentsCourtsCourt Records

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2-12A California Forms of Pleading and Practice--Annotated § 12A.78

§ 12A.78 Appointment of Representative of Minor

In any proceeding to declare a minor free from the custody and control of his or her parents, the court may appoint some suitable party to act on the minor's behalf, and may order further notice of the proceedings given as it deems proper [*Fam. Code § 7804*].

In addition, assistance to the minor, his or her family, and the court is authorized by the Court-Appointed Special Advocate (CASA) program, which is to be implemented in selected counties on an experimental basis under the direction of the Judicial Council [*see Welf. & Inst. Code § 100 et seq.*]. A CASA is a volunteer who may be appointed in a proceeding to terminate parental rights to custody and control [*Welf. & Inst. Code § 102(b)*]. The role of the CASA is (1) to provide independent, factual information to the court regarding the case; (2) to represent the best interests of the child involved and to consider the best interests of the family; and (3) at the request of the court, to monitor cases to which he or she has been appointed to ensure that the court's orders have been fulfilled [*Welf. & Inst. Code § 102(c)*]. A CASA does not have to be either an attorney or a social worker, but may be anyone who has demonstrated an interest in children and their welfare [*Welf. & Inst. Code § 103(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12A.79 Appointment of Counsel

[1] For Minor

At the beginning of the proceeding the court must consider whether or not the interests of the minor require appointment of counsel [*Fam. Code §§ 7860, 7861*]. If the court finds that the minor's interests do need protection, the court must appoint counsel to represent the minor, whether or not the minor can afford counsel. The minor is not to be in court unless the minor so requests or the court so orders [*Fam. Code § 7861*]. The court may appoint either the public defender or private counsel [*Fam. Code § 7860*]. The court may continue the proceeding for not more than 30 days as necessary to appoint counsel and to enable counsel to become acquainted with the case [*Fam. Code § 7864*].

The court must affirmatively consider the question and exercise its discretion [*In re Mario C. (1990) 226 Cal. App. 3d 599, 606, 276 Cal. Rptr. 548]* . The California Supreme Court has stated that the focus should be on whether the dispute between the adversary parties will protect all of the interests of the child. If the court finds that a child has separate interests not protected in the contest between the adversaries, the court must exercise its discretion by appointing separate counsel [*In re E. (1978) 21 Cal. 3d 349, 354, 146 Cal. Rptr. 604, 579 P.2d 495*]. Appellate courts have stated that the court *must* exercise its discretion to appoint counsel for a minor absent a showing that counsel is not required to protect the child's interests [*Adoption of Jacob C. (1994) 25 Cal. App. 4th 617, 625* (error to fail to appoint counsel in matter in which adversaries were the two parents, and one was barred from participating because of contempt); *see In re Mario C. (1990) 226 Cal. App. 3d 599, 606, 276 Cal. Rptr. 548* ; *Adoption of Michael D. (1989) 209 Cal. App. 3d 122, 135, 256 Cal. Rptr. 884]* .

Although *Fam. Code § 7860* does not specifically preclude the appointment of the district attorney to represent the minor, the most appropriate counsel is the public defender or private counsel. If the parents are represented by the public defender, private counsel is the more appropriate choice to represent the minor, rather than the district attorney [*In re David C. (1984) 152 Cal. App. 3d 1189, 1206, 200 Cal. Rptr. 115* ; *see also Los Angeles County Dept. of Children, etc. Services v. Superior Court (1996) 51 Cal. App. 4th 1257, 1264-1275, 59 Cal. Rptr. 2d 613* (refusing to require appointment of county counsel as dual representative of county and child in all dependency proceedings because of likelihood of conflict of interest between county and child)].

If a Section 7800 proceeding is instituted by a public agency on behalf of a child who has been a dependent of the juvenile court under *Welf. & Inst. Code § 300* for a number of years, counsel for the public agency may be able to represent the child's interests adequately. Thus, it is not necessarily an abuse of discretion to fail to appoint independent counsel for the children [*see In re Laura F. (1983) 33 Cal. 3d 826, 840, 191 Cal. Rptr. 464, 662 P.2d 922* ; *see also In re Mario C. (1990) 226 Cal. App. 3d 599, 606, 276 Cal. Rptr. 548* (but court expressed reservations that counsel for petitioner is in best position to represent interests of child in all cases); *In re Rico W. (1986) 179 Cal. App. 3d 1169, 1178, 225 Cal. Rptr. 472* ; *cf. In re Mary C. (1995) 41 Cal. App. 4th 71, 48 Cal. Rptr. 2d 346* (same logic applies in determining whether to appoint counsel for child on appeal)].

The failure to appoint separate counsel for the minor does not require reversal in the absence of a miscarriage of justice. The standard is whether the failure has resulted in prejudice to the rights and interests of the children [*In re Mario C. (1990) 226 Cal. App. 3d 599, 606-607, 276 Cal. Rptr. 548* ; *see In re E. (1978) 21 Cal. 3d 349, 354, 146 Cal. Rptr. 604, 579 P.2d 495* ; *see also In re Elizabeth M. (1991) 232 Cal. App. 3d 553, 567-568, 283 Cal. Rptr. 483* (involving appointment of separate counsel for children with varying interests)]. Thus, if a delay occurs in the appointment of counsel that prevents appointment "at the commencement of proceedings," but there is no evidence of a miscarriage of justice, the delay does not require reversal of the judgment terminating parental rights [*In re Brittany H. (1988) 198 Cal. App. 3d 533, 555, 243 Cal. Rptr. 763]* .

[2] For Parent

If a parent appears without counsel and is unable to afford counsel, the court must appoint the public defender or private counsel to represent the parent, unless the parent knowingly and intelligently waives representation [*Fam. Code § 7862*]. The same counsel may not be appointed to represent both the minor and his or her parent [*Fam. Code § 7860*]. There is no express statutory prohibition on the same attorney representing *both parents*, though conflicting interests may require that each have separate counsel. The existence of a conflict of interest would implicate the California Rules of Professional Conduct and the duty to maintain inviolate a client's confidences, as well as the parent's right to competent counsel [*see In re Mary C. (1995) 41 Cal. App. 4th 71, 76, 48 Cal. Rptr. 2d 346]* . The court may continue the proceeding for not more than 30 days, as necessary, to appoint counsel and to enable counsel to become acquainted with the case [*Fam. Code § 7864*]. A parent's right to counsel in termination proceedings is grounded in the constitutional principles of procedural due process. For further discussion, see *§ 12A.15[6]*.

[3] Attorney's Fees

If the court appoints private counsel pursuant to *Fam. Code § 7860*, counsel must receive a reasonable sum for compensation and expenses, the amount of which is determined by the court. The sum determined must be paid by the real parties in interest, other than the minor, in the proportions as the court deems just. If, however, the court finds that any of the real parties in interest are unable to afford counsel, the amount must be paid out of the county general fund [*Fam. Code § 7863*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12A.80 Minor's Attendance; Hearing Minor in Chambers

The child shall not be present in court unless the child requests to be present or the court orders the child to be present [*Fam. Code § 7861*]. The court must inform the child of the right to attend the hearing [*Fam. Code § 7891(b)*].

Testimony of the minor may be taken in chambers and outside the presence of the minor's parent if the parent's attorney is present and any of the following circumstances exist: (1) the court determines that testimony in chambers is necessary to ensure its truthfulness; (2) the minor is likely to be intimidated by a formal courtroom setting; or (3) the minor is afraid to testify in front of his or her parents [*Fam. Code § 7892(a)*]. The court is not required to hear testimony in order to establish that one or more of these circumstances exists [*In re Amber D. (1991) 235 Cal. App. 3d 718, 722-723, 286 Cal. Rptr. 751]* . Any waiver of a parent's right to have counsel present in chambers must be knowingly and intelligently made by the parent personally, not by the attorney [*see In re Laura H. (1992) 8 Cal. App. 4th 1689, 1695-1696, 11 Cal. Rptr. 2d 285]* . Counsel for the minor may, however, waive the in-camera hearing [*Fam. Code § 7891(b)*].

After testimony in chambers, a parent may elect to have the court reporter read the testimony or have it summarized by his or her counsel [*Fam. Code § 7892(d)*]. These rules apply to guardians of the minor as well as parents [*Fam. Code § 7892(b)*].

If the minor is 10 years or older, unless unable to attend because of confinement in an institution or residence due to illness or other incapacity, he or she must be heard in chambers on at least the following matters [*Fam. Code § 7891(a), (c)*; *see* Adoption of Jacob C. (1994) 25 Cal. App. 4th617, 626, *30 Cal. Rptr. 590* (court's failure to interview child was erroneous)]:

(1) The minor's feelings and thoughts concerning the custody proceeding about to take place;

(2) The minor's feelings and thoughts about his or her parent or parents; and

(3) The minor's preference as to custody [*see Fam. Code § 3042*].

This evidence may not be brought in through the hearsay testimony of another witness [*In re Nathaniel P. (1989) 211 Cal. App. 3d 660, 673-674, 259 Cal. Rptr. 555]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12A.81 Exclusion of Public

Unless requested by the minor concerning whom the petition has been filed and any parent or guardian present, the public is not admitted to a *Fam. Code § 7800* proceeding. The judge may nevertheless admit the persons he or she deems to have a direct and legitimate interest in the particular case or the work of the court [*Fam. Code § 7884*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12A.82 Conclusiveness of Judgment Freeing Minor From Parental Custody and Control

Any order and judgment declaring a minor free from the custody and control of a parent in a *Fam. Code § 7800* proceeding is conclusive and binding on the minor, the parent or parents, and all other persons who were served with citation by publication or otherwise as set forth in *Fam. Code §§ 7880-7882*, discussed in *§ 12A.71* [*Fam. Code § 7894(a)*]. After making the order and judgment, the court has no power to set aside, change, or modify it. That lack of power is not to be construed, however, to limit the right to appeal from the order and judgment [*Fam. Code § 7894(b), (c)*]. Furthermore, *Fam. Code § 7894* does not bar collateral attacks by persons who have not been given proper notice and does not override the inherent power of a court to overturn judgments obtained by fraud [*see In re Olivia A. (1986) 181 Cal. App. 3d 237, 241-243, 226 Cal. Rptr. 382* ; *see also In re David H. (1995) 33 Cal. App. 4th 368, 381, 39 Cal. Rptr. 2d 313]* . For a form for a judgment freeing a minor from parental custody and control under *Fam. Code § 7800 et seq.*, see *§ 12A.139[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral Overview

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2-12A California Forms of Pleading and Practice--Annotated § 12A.83

§ 12A.83 Appeal of Judgment Freeing Minor From Parental Custody and Control

[1] Applicable Rules

The granting or the denial of a *Fam. Code § 7800* petition may be appealed [*In re Emily L. (1989) 212 Cal. App. 3d 734, 740, 260 Cal. Rptr.810* (appeal by Department of Social Services and minor from order denying petition); *see Code Civ. Proc. § 904.1*]. The notice of appeal must be filed within 60 days after the making of an appealable order, or if the matter was heard by a referee who was not sitting as a temporary judge, within 60 days after the order becomes final under *Cal. Rules of Ct., Rule 8.540* [*Cal. Rules of Ct., Rule 8.482(f)*]. If the order is pronounced in open court, the time to appeal from the order begins to run when the order is pronounced [*In re Alyssa H. (1994) 22 Cal. App. 4th 1249, 1252, 27 Cal. Rptr. 2d 809]* .

The rules governing appeals from the superior court in criminal cases are applicable to all appeals from juvenile court and any appeal in a proceeding under *Fam. Code § 7800 et seq.*, unless otherwise expressly provided [*see Cal. Rules of Ct., Rules 8.480, 8.482*] or the application of a particular rule would be clearly impracticable or inappropriate [*Cal. Rules of Ct., Rule 8.480(a)*; *see In re A.M. (1989) 216 Cal. App. 3d 319, 321-322, 264 Cal. Rptr. 666* (application of judicially created criminal "constructive filing" doctrine held inappropriate); *see also In re Issac J. (1992) 4 Cal. App. 4th 525, 530-534, 6 Cal. Rptr. 2d 65]* . *Cal. Rules of Ct., Rule 8.482* contains special rules for appeals in proceedings under *Fam. Code § 7800 et seq.* [*see Cal. Rules of Ct., Rule 8.482(j)*].

The general rule in civil matters, that sufficiency of the evidence cannot be reviewed on an appeal from a default judgment, does not apply to an appeal of a judgment or order terminating parental rights. Because the fundamental right of a parent to the custody of his or her children is involved, rules on appeal that provide special protections are appropriate. Thus, a parent may fail to appear at the hearing and still attack on appeal the sufficiency of the evidence on which the termination of rights is based [*In re Matthew S. (1988) 201 Cal. App. 3d 315, 320, 247 Cal. Rptr. 100* ; *but see In re Clarissa H. (2003) 105 Cal. App. 4th 120, 122, 129 Cal. Rptr.2d 223* (under *Fam. Code § 7894*, judgment terminating parental rights may not be reversed on ground it was taken by default, it can only be reviewed on appeal for sufficiency of evidence or error)]. However, sufficient evidence to support any ground for termination of parental rights under *Fam. Code § 7820 et seq.* is sufficient to support the judgment terminating parental rights [*see In re Steven A.*

(1991) 230 Cal. App. 3d 349, 351-354, 281 Cal. Rptr. 335 ; *see also In re Clarissa H. (2003) 105 Cal. App. 4th 120, 126, 129 Cal. Rptr. 2d 223* (default judgment terminating parental rights was affirmed as father did not challenge sufficiency of evidence; he argued that trial court did not make abandonment finding by clear and convincing statement, but court's minute order expressly states it did so)].

Confidentiality of records and briefs on appeal [*see Fam. Code § 7805(b)*; *Cal. Rules of Ct., Rule 8.480(f)*] is discussed in *§ 12A.77*.

[2] Appointment of Counsel on Appeal

On appeal from a judgment freeing a minor who is a dependent child of the juvenile court from parental custody and control, the appellate court must appoint counsel for the appellant. On motion by the appellant and a finding that the appellant is unable to afford counsel, the appellate court must appoint counsel for the indigent appellant, and the appellant's counsel must be provided with a free copy of the reporter's and clerk's transcript. All of these costs must be a charge against the court [*Fam. Code § 7895(b)*; *see M.L.B. v. S.L.J. (1996) 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473, 489-493* (indigent appellant cannot constitutionally be required to prepay costs of preparing record on appeal as condition to pursuing appeal)].

The California Supreme Court has held that *Fam. Code § 7895* does not require the appointment of counsel on appeal in all cases for *respondent* parents who were successful at trial in resisting termination of parental rights. However, appellate courts have the discretion to appoint counsel for a respondent parent on request, and counsel should be appointed if the appearance of counsel may reasonably affect the ultimate decision. Factors to consider are the nature of the ruling below, the complexity of the issues raised, whether the appellate court contemplates a decision adverse to the parent, and the consequences of any potential adverse ruling [*In re Bryce C. (1995) 12 Cal. 4th 226, 233-234, 48 Cal. Rptr. 2d 120, 906 P.2d 1275]* .

In addition, the California Supreme Court has held that an indigent parent who *appeals the termination* of his or her parental rights has a right to appointed counsel. *The Supreme Court in In re J.W. (2002) 29 Cal. 4th 200, 202, 126 Cal. Rptr. 2d 897, 57 P.3d 363* , interpreting *Fam. Code § 7895*, held that any indigent parent appealing a judgment terminating parental rights in a proceeding to free a child from parental custody and control is entitled to counsel. *Fam. Code § 7895* applies regardless of whether the child is a juvenile court dependent. Although the language of § 7895 seems to restrict the right to appellate counsel to actions in which the child is a dependent of the juvenile court, the Court examined legislative history and other evidence of legislative intent in concluding that the Legislature did not intend for § 7895 to deny appellate counsel to the parents of children who are not dependents of the juvenile court [*In re J.W. (2002) 29 Cal. 4th 200, 208, 126 Cal. Rptr. 2d 897, 57 P.3d 363* (distinguishing *In re Bryce C. (1995) 12 Cal. 4th 226, 48 Cal. Rptr. 2d 120, 906 P.2d 1275* , which involved indigent *respondent* to appeal of judgment that refused to terminate parental rights and found no absolute right to appointed counsel in successfully resisting termination, though appellate court had discretion to appoint counsel)].

The child *may* have a right to appointed counsel on appeal, separate from counsel for any governmental agency or other party [*In re Mary C. (1995)41 Cal. App. 4th 71, 79, 48 Cal. Rptr. 2d 346]* . Although the case so holding, *In re Mary C.*, arose in the context of an appeal from a *Welf. & Inst. Code § 366.26* termination, the opinion equated the dependency situation to the *Fam. Code § 7800* proceeding. The court did not define the precise parameters of the right, but identified two situations in which separate counsel should be appointed. The first, in which appointment is mandatory, is when a conflict of interest exists between the child and the child protective agency or its lawyer. It would seem that the same logic should apply to a conflict between the child's interest and those of private petitioners in a *Fam. Code § 7800* proceeding. The second situation, in which appointment of counsel is appropriate, is on a showing that the child's best interest requires such appointment, and this includes situations in which the appellate court is not satisfied with the quality of briefing by the governmental agency [*In re Mary C. (1995) 41 Cal. App. 4th 71, 79, 48 Cal. Rptr. 2d 346]* . However, it is not clear how the appellate court determines the child's best interest for purposes of deciding

whether to appoint counsel prior to hearing the appeal, without reaching issues involved in the appeal. The *Mary C.* court declined to appoint separate counsel for the minor, finding no conflict of interest or other sufficient circumstances necessitating separate counsel, despite "an extensive letter brief" of the child's trial counsel in favor of separate counsel on appeal. The court noted that in the trial court the child's counsel agreed with the position of the governmental agency supporting termination, and that it was apparent from the brief of the governmental agency that no conflict or other factor existed requiring appointment of counsel for the minor. The announced criteria, so construed, seem close to proclaiming that separate counsel should be appointed, if on first review the appellate court believes there is a significant possibility of reversal of the order terminating parental rights, and otherwise not.

The reporter's and clerk's transcripts must be prepared and transmitted immediately after the notice of appeal is filed, at state expense and without advance payment of fees. If the appellant is able to afford counsel, the state may seek reimbursement from the appellant for the cost of the transcripts under *Gov. Code §§ 68630-68641* as though the appellant had been granted permission to proceed in forma pauperis [*Fam. Code § 7895(c)*; *see Gov. Code §§ 68630-68641*]. As a corollary to the transcript right, an indigent parent may state a cognizable claim of error based on denial of effective assistance of counsel if his or her appointed counsel improperly fails to summon a court reporter for the proceeding [*In re Christina P. (1985) 175 Cal. App. 3d 115, 129-130, 220 Cal. Rptr. 525]* .

If counsel on appeal for a parent whose rights were terminated finds no appealable issues, the appellate court need not, and should not, undertake independent review of the record to determine whether any issues exist which might result in reversal [*In re Sade C. (1996) 13 Cal. 4th 952, 55 Cal. Rptr. 2d 771, 920 P. 2d 716* ; *In re Sara H. (1997) 52 Cal. App. 4th 198, 201, 60 Cal. Rptr. 2d 434]* .

[3] Consideration of Prior Dependency Proceedings

Under former law, *Fam. Code § 7800* proceedings could be filed as a result of a juvenile court order after a permanency planning hearing for a dependent child [*see* former *Welf. & Inst. Code § 366.25(i)* (statute applied only to minors adjudged dependents before 1989)]. This order was not itself appealable but could be reviewed by writ. Error in the juvenile court proceeding that resulted in the order could be reviewed on appeal from the judgment freeing the minor from parental custody and control if the purported error was of such magnitude as to infect the outcome of the ensuing termination proceeding or if the alleged defect undermined the juvenile court's initial jurisdictional finding [*In re Jasmon O. (1994) 8 Cal. 4th 398, 413-414, 33 Cal. Rptr. 2d 85, 878 P.2d 1297* ; *In re Angela R. (1989) 212 Cal. App. 3d 257, 264, 260 Cal. Rptr. 612* ; *see In re Kristin B. (1986) 187 Cal. App. 3d 596, 605, 232 Cal. Rptr. 36]* . However, because legislation operative January 1, 1999, eliminated any remaining differences in procedures for termination of parental rights of dependent children and made them subject to the Welfare and Institutions Code--regardless of whether the chldren were adjudicated as dependents before or after January 1, 1989--the above appeal consideration should no longer be a factor, as discussed in *§ 12A.63* [*Welf. & Inst. Code § 366.26(a)*; *but cf. Fam. Code § 7808* (still distinguishing dependents adjudicated on or after January 1, 1989, in possible oversight by Legislature)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselAppointmentsCivil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsReviewabilityTime LimitationsFamily LawDelinquency & DependencyDependency ProceedingsFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral Overview

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2-12A California Forms of Pleading and Practice--Annotated § 12A.84

§ 12A.84 Appointment of Guardian or Reference to Agency for Adoption

If the court by order or judgment declares a minor free from the custody and control of both parents in a *Fam. Code § 7800* proceeding, or of one parent if the other no longer has custody and control, the court must at the same time either appoint a guardian of the minor or at the request of the State Department of Social Services or a licensed adoption agency, or if the court finds it is in the minor's best interests, refer the minor to a licensed adoption agency for adoptive placement by the agency [*Fam. Code § 7893(a)*].

No petition for adoption may be heard, however, until the natural parent's appellate rights have been exhausted [*Fam. Code § 7893(b)(3)*]. The agency is responsible for the care of the minor, and is entitled to the exclusive custody and control of the minor at all times until a petition for adoption has been granted. After such a referral, no petition for a guardianship may be filed without the agency's consent [*Fam. Code § 7893(b)(1), (2)*]. The court may not substitute its judgment for that of the agency in determining the appropriate adoptive placement. The agency's placement may only be reviewed for abuse of discretion [*see Department of Social Services v. Superior Court (1997) 58 Cal. App. 4th 721, 732-734, 68 Cal. Rptr. 2d 239* (construing virtually identical language in *Welf. & Inst. Code § 366.26(j)* and *Fam. Code § 8704(a)*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAgency AdoptionFamily LawGuardiansAppointmentFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral Overview

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2-12A California Forms of Pleading and Practice--Annotated § 12A.85

§ 12A.85 Res Judicata or Collateral Estoppel

A judgment in favor of a parent in a *Fam. Code § 7800* proceeding is not necessarily res judicata and does not necessarily bar a subsequent *Fam. Code § 7800* proceeding to free the same minor from the custody and control of the same parent. A second proceeding may be brought based on events during a different period and different issues not actually litigated in the prior proceeding. The petitioner is collaterally estopped only from relitigating facts and issues determined in the first proceeding [*see In re Walter P. (1991) 228 Cal. App. 3d 113, 125-126, 278 Cal. Rptr. 602]* . However, res judicata also bars relitigation of parental conduct that has been considered in any prior proceeding in which the court determined that the parent was not at fault [*see In re Allison H. (1991) 230 Cal. App. 3d 154, 160-162, 281 Cal. Rptr. 178* (finding in family law proceeding that mother had interfered with father's custodial rights and that continuing and frequent contact with father was in child's best interests was res judicata as to allegations that father's conduct during same period constituted abandonment)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral Overview

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[Reserved]

§§ 12A.86[Reserved]

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§ 12A.100 Cross References

For forms for use in paternity actions, see Ch. 412, *Paternity*

For forms and procedures for use in service of summons and papers, see Ch. 518, *Service of Summons and Papers*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawPaternity & SurrogacyGeneral Overview

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§ 12A.101 Federal Statutes

Indian Child Welfare Act procedures regarding termination of parental rights. *25 U.S.C. § 1901 et seq.*

Affidavit of nonmilitary service on default. *50 U.S.C. App. § 521(b)*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsNative AmericansIndian Child Welfare ActPublic Health & Welfare LawSocial ServicesNative Americans

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2-12A California Forms of Pleading and Practice--Annotated § 12A.102

§ 12A.102 State Statutes

[1] Adoption Law

Definition of "birth parents." *Fam. Code § 8512*

When natural parent's consent to adoption is required. *Fam. Code §§ 8604-8606*

Adoption as terminating parental rights of birth parents. *Fam. Code § 8617*

Termination of parental rights by relinquishing child to adoption agency. *Fam. Code § 8700*

Notice requesting updated address information. *Fam. Code §§ 8703, 8819*

[2] Freedom From Parental Custody and Control

Grounds. *Fam. Code § 7820 et seq.*

When petition must be heard. *Fam. Code § 7870*

Continuances. *Fam. Code § 7871*

Construction of statutes. *Fam. Code § 7801*

Effect of order. *Fam. Code § 7803*

Proceeding by state or county agencies or by licensed adoption agency. *Fam. Code § 7840*

Proceeding by interested person. *Fam. Code § 7841*

Confidential nature of petition and reports. *Fam. Code § 7805*

Disclosure of information to welfare agencies. *Fam. Code § 7805(c)*

Citations. *Fam. Code § 7880*

Exclusion of public from proceedings. *Fam. Code § 7884*

Violation of citation as contempt. *Fam. Code § 7883*

Appointment of person to act on behalf of minor. *Fam. Code § 7804*

Appointment of counsel. *Fam. Code §§ 7668(a), 7895*

Right to free trial transcript on appeal. *Fam. Code § 7895*

Order and judgment as conclusive and binding. *Fam. Code § 7894*

Appointment of guardian. *Fam. Code § 7893(a)(1)*

Reference to adoption agency for placement. *Fam. Code § 7893(a)(2)*

Required findings when child is Indian child. *Fam. Code § 7892.5*

Prohibition against extension of time on appeal. *Code Civ. Proc. § 45*

Reference from juvenile court for initiation of proceedings. *Welf. & Inst. Code § 366.25(d)(1)*

[3] Uniform Parentage Act

Presumptions of paternity. *Fam. Code §§ 7540 et seq., 7611, 7612*

Action to establish paternity. *Fam. Code §§ 7630-7634*

Custody order in action to establish parentage. *Fam. Code § 7637*

Proceeding to determine existence of mother-child relationship. *Fam. Code § 7650*

Proceeding to determine parental rights of alleged natural father. *Fam. Code § 7660 et seq.*

No additional filing fee. *Fam. Code § 7670*

Date of hearing; motion for continuance. *Fam. Code §§ 7667(a), 7668(a)*

[4] Juvenile Court Law

Termination of rights of parents of child adjudged dependent of the juvenile court. *Welf. & Inst. Code § 366.26*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselAppointmentsFamily LawAdoptionConsentGeneral OverviewFamily LawAdoptionProceduresGeneral OverviewFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act

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§ 12A.103 California Rules of Court

General appellate rules. *Cal. Rules of Ct., Rule 8.480*

Special rules in *Fam. Code § 7800* appeals. *Cal. Rules of Ct., Rule 8.482*

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-12A California Forms of Pleading and Practice--Annotated § 12A.104

§ 12A.104 Decisions

[1] Freedom From Parental Custody and Control Under Fam. Code § 7800 et seq.

[a] Abandonment

Required state of mind as general intent to abandon and not intent to abandon in favor of specific individual or couple. *In re Brittany H. (1988) 198 Cal. App. 3d 533, 548, 243 Cal. Rptr. 763*

Considerations of child's interest and welfare do not come into play if court makes factual determination that parents had no subjective intent to abandon their child; custody and control as not properly terminated when no abandonment occurred, even when custody with prospective adoptive parents would be in child's best interest. *In re Baby Boy S. (1987) 194 Cal. App. 3d 925, 933-934, 240 Cal. Rptr. 60* ; *but see In re Neal (1968) 265 Cal. App. 2d 482, 490, 71 Cal. Rptr. 300* (former Civil Code provisions superseded by *Fam. Code §§ 7801* and *7890* as requiring consideration of child's best interests before determination of abandonment issue)

Court as required to make factual determination on issue of abandonment before considering best interest and welfare of child pursuant to former Civil Code provisions superseded by *Fam. Code §§ 7801* and *7890*. *In re Baby Boy S. (1987) 194 Cal. App. 3d 925, 933-934, 240 Cal. Rptr. 60* ; *but see In re Neal (1968) 265 Cal. App. 2d 482, 490, 71 Cal. Rptr. 300* (former Civil Code provisions superseded by *Fam. Code §§ 7801* and *7890* as requiring consideration of child's best interests before determination of abandonment issue)

Presumption of intent to abandon arising from evidence of parent's failure to identify, support, or communicate for six months as rebutted by evidence that attorney, while acting in dual capacity representing both parties to adoption in spite of conflict of interest, failed to fully inform natural parents of their legal rights. *In re Baby Boy S. (1987) 194 Cal. App. 3d 925, 930-933, 240 Cal. Rptr. 60*

Whether or not intent to abandon exists and whether or not it has existed for statutory period as questions of fact. *In re B.J.B. (1986) 185 Cal. App. 3d 1201, 1212, 230 Cal. Rptr. 332* ; *In re Raymond H. (1985) 175 Cal. App. 3d 556, 564, 221 Cal. Rptr. 165*

Abandonment as requiring physical absence from child; intent to abandon and neglect as insufficient if parent living in same household with child. *In re Justin G. (1984) 151 Cal. App. 3d 526, 529-530, 198 Cal. Rptr. 717*

Parent's relationship with live-in nonspouse as irrelevant with respect to charge of abandonment and neglect of children under former Civil Code provisions superseded by *Fam. Code § 7822*. *In re Jack H. (1980) 106 Cal. App. 3d 257, 268, 165 Cal. Rptr. 646*

Offer by natural parent to permit adoption of child as not of itself proving intent to abandon child. *Adoption of R.R.R. (1971) 18 Cal. App. 3d 973, 985, 96 Cal. Rptr. 308*

Parent as not failing to communicate with child with intent to abandon when relatives had undertaken care of child willingly and mother lacked ability to support. *Adoption of R.R.R. (1971) 18 Cal. App. 3d 973, 984-985, 96 Cal. Rptr. 308*

Presumption of intent to abandon on grounds of failure to support or communicate for six months as not rebutted by token evidence of support or communication. *Adoption of Oukes (1971) 14 Cal. App. 3d 459, 466, 92 Cal. Rptr. 390*

Presumption that parent intended to abandon child as arising when parent failed to support or communicate with child for period prescribed in former Civil Code provisions superseded by *Fam. Code § 7822(b)*. *In re Neal (1968) 265 Cal. App. 2d 482, 488, 71 Cal. Rptr. 300*

[b] Alcoholism or Drug-Related Disability

Trial court as properly concluding under former Civil Code provisions superseded by *Fam. Code § 7824* that child's mother had present drug-related disability on finding she was "hopelessly addicted to drugs," had used drugs while pregnant knowing them to be harmful to unborn child, and was unable to overcome addiction with or without various rehabilitation programs. *In re Solomon L. (1987) 190 Cal. App. 3d 1106, 1113, 236 Cal. Rptr. 2*

[c] Alternatives to Termination of Parent and Child Relationship

Parental rights of developmentally disabled person as not terminable without clear and convincing evidence that termination is in best interests of child despite availability of specially designed reunification services. *In re Victoria M. (1989) 207 Cal. App. 3d 1317, 1329-1331, 255 Cal. Rptr. 498*

Judicial failure to explore placement of child with relatives as violation of rule that severing parental ties should be least detrimental alternative for child. *In re Melicia L. (1988) 207 Cal. App. 3d 51, 55, 254 Cal. Rptr. 541*

Trial court as required in former Civil Code provisions superseded by *Fam. Code § 7800* proceeding to consider less drastic alternatives to total severance of parental rights. *In re Micah S. (1988) 198 Cal. App. 3d 557, 560-561, 243 Cal. Rptr. 756* ; *In re Jack H. (1980) 106 Cal. App. 3d 257, 270-271, 165 Cal. Rptr. 646*

Trial court, which carefully weighed alternative dispositions for child, as properly finding that termination of parental rights was in child's best interest given evidence of parental drug abuse and long-term incarceration, although guardianship was less drastic alternative. *In re Solomon L. (1987) 190 Cal. App. 3d 1106, 1114, 236 Cal. Rptr. 2*

Failure of court to consider less drastic alternatives before terminating parent-child relationship under former Civil Code provisions superseded by *Fam. Code § 7800* as not automatically depriving it of jurisdiction to hear petition. *In re Lynna B. (1979) 92 Cal. App. 3d 682, 701, 155 Cal. Rptr. 256*

[d] Best Interests of Child

Trial court's express refusal to find that custody award to parent would be detrimental to child as reversible error, despite court's finding that grounds for termination of parental rights exist under former Civil Code provisions superseded by *Fam. Code § 7822*. *In re B.J.B. (1986) 185 Cal. App. 3d 1201, 1205, 1208, 230 Cal. Rptr. 332*

Stipulation requiring noncustodial father to waive custody rights and to execute documents to terminate parental rights in yet-to-be-filed action under former Civil Code provisions superseded by *Fam. Code § 7800* as void for attempting to divest court of custody jurisdiction and for being unauthorized confession of judgment. *In re Marriage of Goodarzirad (1986) 185 Cal. App. 3d 1020, 1028-1030, 230 Cal. Rptr. 203*

Court as not required to make express finding that termination of parental rights is the least detrimental alternative for the child; finding that award of child to parent would be detrimental to child while award to nonparent is in child's best interests as sufficient. *In re Rico W. (1986) 179 Cal. App. 3d 1169, 1176, 225 Cal. Rptr. 472*

Court as required to find that award of custody to parent would be detrimental to child and that award of custody to nonparent is required to serve best interest of child, before awarding custody to nonparent in proceeding to declare child free from parental control. *In re David C. (1984) 152 Cal. App. 3d 1189, 1203, 200 Cal. Rptr. 115*

Interest sought to be protected as welfare of child in proceeding to declare child free of parental custody and control on ground of mother's habitual intemperance. *In re Sherman M. (1974) 39 Cal. App. 3d 40, 44, 113 Cal. Rptr. 847*

[e] Counsel

Indigent parent's due process right to appointment of attorney in proceeding to terminate parental rights as to be determined on case-by-case basis. *Lassiter v. Department of Social Services (1981) 452 U.S. 18, 24-32, 101 S. Ct. 2153, 68 L. Ed. 2d 640*

Failure to appoint separate counsel for minor as not requiring reversal in absence of miscarriage of justice. *In re Brittany H. (1988) 198 Cal. App. 3d 533, 555, 243 Cal. Rptr. 763*

Former Civil Code provisions superseded by *Fam. Code § 7827*, relating to developmentally disabled or mentally ill parents, as permitting parent to waive right to counsel; right to knowingly and intelligently waive representation, under former Civil Code provisions superseded by *Fam. Code §§ 7860* and *7862*, as not constitutional right, and thus error in denying right to self-representation as analyzed under ordinary principles of harmless error. *In re Justin L. (1987) 188 Cal. App. 3d 1068, 1074-1078, 233 Cal. Rptr. 632*

Former Civil Code provisions superseded by *Fam. Code §§ 7860* and *7861* as permitting but not mandating appointment of independent counsel to represent minor's interests during hearing brought by public agency to free child from parental custody and control; determination must be made whether counsel for agency can adequately represent child's interests. *In re Rico W. (1986) 179 Cal. App. 3d 1169, 1178, 225 Cal. Rptr. 472*

Judgment terminating parental rights for denial of effective assistance of counsel as required to be reversed because indigent parents' appointed counsel failed to summon court reporter, clerk's transcript revealed substantial likelihood of insufficient evidence to sustain petition, and no conceivable rational tactical purpose existed for failure to summon reporter. *In re Christina P. (1985) 175 Cal. App. 3d 115, 129-130, 220 Cal. Rptr. 525*

Importance of counsel for child in proceeding under former Civil Code provisions superseded by *Fam. Code § 7800 et*

seq. to be truly independent in order to protect child's interests; counsel as not to act as mouthpiece either for child or for governmental agency. *In re David C. (1984) 152 Cal. App. 3d 1189, 1207-1208, 200 Cal. Rptr. 115*

Natural father imprisoned in another state as having no right to self-representation in hearing under former Civil Code provisions superseded by *Fam. Code § 7800 et seq.* when he was unable to appear at hearing. *In re Gary U. (1982) 136 Cal. App. 3d 494, 500, 186 Cal. Rptr. 316*

Failure to appoint counsel for child in proceeding under former Civil Code provisions superseded by *Fam. Code § 7800 et seq.* to declare child free from custody and control of parent as constituting error in absence of showing on issue of need for independent counsel for minor. *In re Jack H. (1980) 106 Cal. App. 3d 257, 269-270, 165 Cal. Rptr. 646*

Appointment of counsel for indigent parent in proceeding to declare children free from his or her control as mandatory under former Civil Code provisions superseded by *Fam. Code §§ 7860* and *7862* unless waived. *In re Rodriguez (1973) 34 Cal. App. 3d 510, 513-515, 110 Cal. Rptr. 56*

Indigent parent as not required to be physically present at hearing in order to be provided with counsel under former Civil Code provisions superseded by *Fam. Code §§ 7860* and *7862*. *Adoption of Hinman (1971) 17 Cal. App. 3d 211, 216-217, 94 Cal. Rptr. 487*

Appointment of counsel to represent father at emancipation/adoption hearing as not required when evidence does not show indigence required by former Civil Code provisions superseded by *Fam. Code § 7862* and father did not request counsel. *Adoption of Hinman (1971) 17 Cal. App. 3d 211, 216-217, 94 Cal. Rptr. 487*

[f] Discovery of Records

Trial court as properly conducting in camera inspection of mother's brother's delinquency file to determine which portions were relevant and discoverable in proceeding to terminate mother's parental rights under former Civil Code provisions replaced by *Fam. Code § 7800 et seq.* *In re Maria V. (1985) 167 Cal. App. 3d 1099, 1101-1105, 213 Cal. Rptr. 733*

[g] Felony Conviction

Parental rights may be terminated under *Fam. Code § 7825* only when parent's unfitness is demonstrated by facts underlying the felony conviction; mere existence of felony conviction is not sufficient to prove parental unfitness. *In re Baby Girl M. (2006) 135 Cal. App. 4th 1528, 1533, 1540-1542, 38 Cal. Rptr. 3d 484*

Violent nature of father's second degree murder of mother and his use of alcohol as sufficient to uphold finding of unfitness; evidence as also supporting finding that award of custody to father would be detrimental and not in best interests of children because he would not be released from prison until 1992 and children had developed close relationship with foster parents. *In re Mark V. (1986) 177 Cal. App. 3d 754, 757-762, 225 Cal. Rptr. 460*

Prevention of future harm as purpose of former Civil Code provisions superseded by *Fam. Code § 7825*, under which court considers circumstances of felony to determine likelihood of future harm if parental rights are not terminated, but as not requiring that children be present when felony occurs or that they be in current danger. *In re Arthur C. (1985) 176 Cal. App. 3d 442, 445-446, 222 Cal. Rptr. 388*

Convictions for voluntary manslaughter of wife in presence of children and for involuntary manslaughter of another person, committed four months later, as sufficient basis for termination of father's parental rights when both homicides and two other previous criminal convictions were associated with excessive use of alcohol. *In re Sarah H. (1980) 106*

Cal. App. 3d 326, 328-330, 165 Cal. Rptr. 61

Determination that father was unfit parent upheld when father was serving prison sentence for voluntary manslaughter of child's mother and court had considered both violent nature of felony and father's use of alcohol as indication of unfitness. *In re Geoffrey G. (1979) 98 Cal. App. 3d 412, 421, 159 Cal. Rptr. 460*

Previous criminal conduct as proper consideration in determining parental fitness; former Civil Code provisions superseded by *Fam. Code § 7825* (conviction of felony as warranting proceeding to declare minor free from parental custody or control) as constitutional. *Adoption of D.S.C. (1979) 93 Cal. App. 3d 14, 24-28, 155 Cal. Rptr. 406*

[h] Hearing Minor in Chambers

Conference between trial judge and child to determine child's preference as to custody as required if child is of sufficient age and capacity to reason so as to form intelligent preference as to custody. *In re Jack H. (1980) 106 Cal. App. 3d 257, 269, 165 Cal. Rptr. 646*

[i] Indian Child Welfare Act

Court satisfies its initial and continuing duty to inquire into child's status as an Indian child by asking parents at each hearing to disclose membership in any Indian tribe; if no disclosure is made, court may properly conclude that Indian Child Welfare Act (ICWA) [*25 U.S.C. § 1901 et seq.*] does not apply. *In re E.H. (2006) 141 Cal. App. 4th 1330, 1334, 46 Cal. Rptr. 3d 787*

When proper notice has been given to BIA, court is not required to suspend proceedings because a parent belatedly comes forward and claims to have Indian heritage. *In re Joseph P. (2006) 140 Cal. App. 4th 1524, 1531, 45 Cal. Rptr. 3d 591*

In proceedings to declare Indian child free from parental custody and control, order terminating parental rights was reversed because of failure of county department of human services to give notice of proceeding to tribe, as required by *25 U.S.C. § 1912(a)*; court has sua sponte duty to ensure compliance with notice requirements. *In re H.A. (2002) 103 Cal. App. 4th 1206, 128 Cal. Rptr. 2d 12*

In proceedings to declare Indian child free from parental custody and control, child protection service's failure to provide notice of proceedings to mother did not require remand when mother participated in proceedings; ICWA does not require that parents receive copies of documents sent to tribe; further, mother did not have standing to raise claim that biological father had not received notice. *In re Jeffrey A. (2002) 103 Cal. App. 4th 1103, 127 Cal. Rptr. 2d 314*

In proceedings to declare Indian child (not domiciled on reservation) free from parental custody and control, transfer to tribal court required absent good cause for state court to retain jurisdiction; good cause as established if case is at advanced stage when petition for transfer is filed and petitioner did not file promptly after receiving notice of proceedings, or if evidence necessary to decide case could not be adequately presented in tribal court without undue hardship to parties or witnesses, or if retention of jurisdiction is in child's best interests. *In re Robert T. (1988) 200 Cal. App. 3d 657, 662-667, 246 Cal. Rptr. 168*

In proceedings to declare minor free from parental custody and control pursuant to former Civil Code provisions superseded by *Fam. Code § 7800 et seq.*, when evidence presented that child might be Indian child subject to ICWA (requiring that notice of involuntary custody proceedings and right to intervene be given to Indian child's tribe)], trial court as required to notify tribe and seek its determination of child's Indian status before deciding that act does not apply and failure to do so as prejudicial error. *In re Junious M. (1983) 144 Cal. App. 3d 786, 792, 796, 193 Cal. Rptr. 40*

[j] Intervention

Foster parents who are "de facto" parents as having standing to intervene in proceeding to terminate parental rights based on their day-to-day care of minor and unique vantage point for presenting evidence concerning minor to court. *In re Kristin B. (1986) 187 Cal. App. 3d 596, 608, 232 Cal. Rptr. 36*

[k] Mental Illness or Developmental Disability

Americans with Disabilities Act [*42 U.S.C. § 12131 et seq.*] as not precluding court from terminating parental rights of mentally disabled person. *In re Anthony P. (2000) 84 Cal. App. 4th 1112, 1115-1117, 101 Cal. Rptr. 2d 423*

Exploration of reunification services specially designed to assist developmentally disabled parent as required before termination of parental rights. *In re Victoria M. (1989) 207 Cal. App. 3d 1317, 1329-1331, 255 Cal. Rptr. 498*

Trial court as properly terminating parental rights on ground of mental illness given overwhelming evidence that parents suffered mental disorders that rendered them unable to adequately care for and control child and there was no realistic possibility of family reunification. *In re Micah S. (1988) 198 Cal. App. 3d 557, 562-563, 243 Cal. Rptr. 756*

Trial court or Department of Social Services as required by due process to explore alternatives to termination of parental rights and find them inadequate to protect minor before termination may occur in proceeding under former Civil Code provisions superseded by *Fam. Code § 7827*. *In re R.S. (1985) 167 Cal. App. 3d 946, 958, 967-968, 213 Cal. Rptr. 690*

Former Civil Code provisions superseded by Fam. Code § 7826as not unconstitutionally vague or overbroad by absence of limit as to when parent was declared mentally ill or how long parent is likely to so remain, or by failure to require causal relationship between parent's inability to care for child and parent's mental illness. *In re Mark K. (1984) 159 Cal. App. 3d 94, 105-106, 205 Cal. Rptr. 393*

Summary judgment as improper for proceedings under former Civil Code provisions superseded by *Fam. Code §§ 7826* and *7827* because special proceeding involved that also requires speedy trial under former Civil Code provisions superseded by *Fam. Code § 7870 et seq.*. *In re Mark K. (1984) 159 Cal. App. 3d 94, 102-103, 205 Cal. Rptr. 393*

Statutory test sanctioning termination of parental custody if incapable of supporting or controlling child in proper manner due to mental illness as not unconstitutionally vague and incapable of objective application. *In re Heidi T. (1978) 87 Cal. App. 3d 864, 871, 151 Cal. Rptr. 263*

Former Civil Code provisions superseded by *Fam. Code § 7826* as not unconstitutionally vague in failing to define "proper manner," "mental deficiency," and "mental illness." *In re Baby Boy T. (1970) 9 Cal. App. 3d 815, 817-818, 88 Cal. Rptr. 418*

[l] Relationship to Other Proceedings

Superior court as having jurisdiction to hear petition under former Civil Code provisions superseded by *Fam. Code § 7800 et seq.* but as lacking jurisdiction to order immediate return of child to parents when dependency proceeding pending simultaneously in juvenile court. *In re Christina L. (1981) 118 Cal. App. 3d 737, 744-745, 173 Cal. Rptr. 722*

[m] Standard of Proof

Proof by clear and convincing evidence is required in proceeding to free child from parental custody and control under *Fam. Code § 7800 et seq.* *In re Baby Girl M. (2006) 135 Cal. App. 4th 1528, 1538, 38 Cal. Rptr. 3d 484*

Due process prohibits termination of parental rights in dependency proceeding when allegations that parent is unfit are not supported by clear and convincing evidence. *In re Gladys L. (2006) 141 Cal. App. 4th 845, 849, 46 Cal. Rptr. 3d 434*

[n] Statement of Decision

Findings of fact and conclusions of law (now supplanted by statement of decision) as required by due process and basic fairness if properly requested by party in proceeding under former Civil Code provisions superseded by *Fam. Code § 7800 et seq.* to have child declared free of parental custody and control. *In re Rose G. (1976) 57 Cal. App. 3d 406, 416-417, 129 Cal Rptr. 338*

[o] Travel Expenses

Indigent parent as not having constitutional right to travel expenses to hearing to free child from his or her parental custody. *In re Cleopatra D. (1987) 193 Cal. App. 3d 694, 697-698, 238 Cal. Rptr. 426*

[p] Visitation

Judgment pursuant to former Civil Code provisions superseded by *Fam. Code § 7800 et seq.* as terminating right of parental visitation pending appeal unless trial court in its discretion stays judgment. *In re Christy L. (1986) 187 Cal. App. 3d 753, 757-758, 232 Cal. Rptr. 184* (applying *Code Civ. Proc. § 917.7*)

[2] Notice

Mother as lacking standing to raise issue of defective service of citation on alleged father. *In re Jenelle C. (1987) 197 Cal. App. 3d 813, 818, 243 Cal. Rptr. 89*

Policy of former Civil Code provisions superseded by *Fam. Code §§ 7880* and *7891* as not requiring attendance of young children at hearing except in exceptional circumstances. *In re Jenelle C. (1987) 197 Cal. App. 3d 813, 818, 243 Cal. Rptr. 89*

Finality of determination that minor is free from parental control as compelled when agency filing petition exercised reasonable diligence in attempting to locate address and whereabouts of those then known as parents of minor, even though service by publication failed to notify natural father of proceeding. *In re Manuel J. (1984) 150 Cal. App. 3d 513, 521, 197 Cal. Rptr. 777*

Notice by publication as satisfying due process requirements even though real name of natural father not known or used in publication and father therefore did not receive notice of proceeding to free minor from parental control. *In re Manuel J. (1984) 150 Cal. App. 3d 513, 520-521, 197 Cal. Rptr. 777*

Compliance with former Civil Code provisions superseded by *Fam. Code §§ 7880* and *7882*, requiring showing of due diligence to locate and serve parent in proceeding to declare child free from parental control, as prerequisite to order for service on parent by publication. *In re Beebe (1974) 40 Cal. App. 3d 643, 646, 115 Cal. Rptr. 322*

Citation to adoption hearing required if custody has been given to one parent. *Adoption of Thevenin (1961) 189 Cal. App. 2d 245, 250, 11 Cal. Rptr. 219*

Citation to noncustodial parent as affording parent opportunity to contest adoption and to show adoption would not be in child's best interests. *Adoption of Burton (1956) 147 Cal. App. 2d 125, 134, 305 P.2d 185*

Nonresidence of parent as not excusing failure to give notice, although constructive notice permissible if parent's residence unknown. *Estate of Hampton (1942) 55 Cal. App. 2d 543, 562, 131 P.2d 565*

Notice, actual or constructive, to parent in abandonment proceeding as required by due process. *Estate of Hampton (1942) 55 Cal. App. 2d 543, 560, 131 P.2d 565*

Mere fact that petition alleges that parent neglected or abandoned minor child as not dispensing with right to notice of proceeding. *Estate of Hampton (1942) 55 Cal. App. 2d 543, 559, 131 P.2d 565*

Judgment of abandonment of child and judgment of adoption predicated thereon as set aside if court order allowing service of citation by publication was based on petitioner's fraudulent affidavit regarding whereabouts of child's natural parents. *Wells v. Zenz (1927) 83 Cal. App. 137, 139-141, 256 P. 484*

[3] Right to Hearing

In proceeding to remove custody of children from father, due process and equal protection under *U.S. Const., Amend. XIV* as denied where state law affords right to hearing to married father, but not to unwed father. *Stanley v. Illinois (1972) 405 U.S. 645, 658, 92 S. Ct. 1208, 31 L. Ed. 2d 551*

Proceeding to declare existence of parent-child relation as not necessarily in rem and personal jurisdiction over parent required when purpose of proceeding is to enforce some personal obligation on parent. *Hartford v. Superior Court (1956) 47 Cal. 2d 447, 453-454, 304 P.2d 1*

[4] Uniform Parentage Act

Effect of prior determination of parentage in adoption proceeding. *Adoption of Bonner (1968) 260 Cal. App. 2d 17, 23, 66 Cal. Rptr. 812* ; *Adoption of Stroope (1965) 232 Cal. App. 2d 581, 583-585, 43 Cal. Rptr. 40*

Child as not prevented from contesting prior determination of parentage to which child was not party. *Adoption of Stroope (1965) 232 Cal. App. 2d 581, 582-585, 43 Cal. Rptr. 40*

[5] Willful Failure to Support and Communicate

[a] In General

Whether parent has failed to communicate with child within meaning of former Civil Code provisions superseded by *Fam. Code § 8604* as question of fact. *Adoption of Smith (1969) 270 Cal. App. 2d 605, 608-609, 75 Cal. Rptr. 900*

Testimony of natural mother, who did not have custody of child, respecting alleged actions of communication or attempts to communicate with child as not binding on court. *Adoption of Easley (1966) 240 Cal. App. 2d 821, 825, 50 Cal. Rptr. 33*

"Token communication" of parent as not type of communication contemplated under former Civil Code provisions superseded by *Fam. Code § 8604*. *Adoption of Easley (1966) 240 Cal. App. 2d 821, 824, 50 Cal. Rptr. 33*

Parent's right to withhold consent to adoption as not restored after termination under former Civil Code provisions superseded by *Fam. Code § 8604* merely because parent subsequently obtains custody or accepts responsibility for such child. *Adoption of Thevenin (1961) 189 Cal. App. 2d 245, 250, 11 Cal. Rptr. 219* ; *Adoption of Burton (1956) 147 Cal. App. 2d 125, 131-134, 305 P.2d 185*

Circumstances indicating whether father had willfully failed to provide for son. *In re Hickson (1940) 40 Cal. App. 2d 89, 92, 104 P.2d 411*

[b] One-Year Period

No requirement that one-year period of neglect specified in former Civil Code provisions superseded by *Fam. Code § 8604* occur immediately before filing adoption petition. *In re Jay R. (1983) 150 Cal. App. 3d 251, 263, 197 Cal. Rptr. 672* ; *Adoption of Smith (1969) 270 Cal. App. 2d 605, 608, 75 Cal. Rptr. 900* (neglect by mother); *Adoption of Burton (1956) 147 Cal. App. 2d 125, 136, 305 P.2d 185* (neglect by father)

One-year period of neglect specified in former Civil Code provisions superseded by *Fam. Code § 8604* as required to occur after custody is awarded to other parent. *Adoption of Thevenin (1961) 189 Cal. App. 2d 245, 251, 11 Cal. Rptr. 219* ; *Adoption of Burton (1956) 147 Cal. App. 2d 125, 133, 305 P.2d 185*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselAppointmentsFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral OverviewFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationAbandonmentFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationDisabilityFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act

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§ 12A.105 Law Reviews

Bernstein, *Termination of Parental Rights on the Basis of Mental Disability: A Problem in Policy and Interpretation, 22 Pac. L.J. 1155 (1991)*

Note, *Constitutional Rights of Unwed Fathers: Is Equal Protection Equal for Unwed Fathers? 19 Sw. U.L. Rev. 1087 (1990)*

Comment, *The Unwed Father's Custody Claim in California: When Does The Parental Preference Doctrine Apply? 17 Pepperdine L. Rev. 969 (1990)*

Note, *Not Necessarily in the Best Interests of the Child: In Re Baby Girl M., 20 U.S.F. L. Rev. 701 (1986)*

Comment, *Appointing Counsel for the Child in Actions to Terminate Parental Rights, 70 Calif. L. Rev. 481 (1982).*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawEqual ProtectionScope of ProtectionFamily LawParental Duties & RightsGeneral OverviewFamily LawParental Duties & RightsTermination of RightsGeneral OverviewFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationDisability

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[Reserved]

§§ 12A.106[Reserved]

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2-12A California Forms of Pleading and Practice--Annotated § 12A.110

§ 12A.110 Notice of Pending Adoption Proceeding [Fam. Code §§ 7660, 7661, 7664, 7666]

[1] FORM Notice of Pending Adoption Proceeding [Fam. Code §§ 7660, 7661, 7664, 7666]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Adoption Petition of _____ [*name(s)*], Adopting Parent[s].	))))))	NO. _____ NOTICE OF ADOPTION PROCEEDING

To _____[*name*]:

NOTICE IS HEREBY GIVEN that on _____[*date*], _____[*names of petitioners*] filed the attached petition in the above-entitled court for adoption by them of your minor child _____[*name of child*], born _____[*date*], at _____[*place*]. You may refer to the petition for further particulars.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Use of Form

This form is for use to give notice of the pendency of an adoption proceeding to a birth parent who has not yet consented to the adoption or joined in the relinquishment of the child to an adoption agency for adoptive placement. This form may be used with regard to a birth mother, a presumed father as that term is defined in the Uniform Parentage Act [*see Fam. Code § 7611*], a man to whom the child is legitimate under prior California law or the law of another jurisdiction, or an alleged natural father [*see Fam. Code §§ 7660, 7664*]. It may be adapted for use to notify any other person of the pending adoption. For discussion of the constitutional scope of notice requirements with regard to proceedings in which parental rights may be terminated, see *§ 12A.15[5]*.

This form may be used to give notice of the adoption, regardless of the particular nature of the proceeding involved. However, notice requirements are also supplemented by statutory citation requirements with regard to particular hearings under the various procedures [*see Fam. Code §§ 7880 et seq., 8604*]. For forms for citations, see *§§ 12A.130[1], 12A.135[1]*, and *12A.136[1]*.

For discussion of service of this notice on an alleged natural father under *Fam. Code § 7666*, see *§ 12A.111[2]*.

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2-12A California Forms of Pleading and Practice--Annotated § 12A.111

§ 12A.111 Notice of Alleged or Possible Paternity [Fam. Code §§ 7662, 7664]

[1] FORM Notice of Alleged or Possible Paternity [Fam. Code §§ 7662, 7664]

To _____[*name of alleged birth father*]:

_____[*Name of birth mother*] alleges that you _____ [are *or* might be] the natural (biological) father of _____[*name of child*], a minor child born on _____[*date*] to _____[*name of birth mother*], in _____[*birthplace of child*]. _____[*Name of child*] is to be placed for adoption.

If you wish to establish that you are the natural father of _____[*name of child*], you must bring an action to establish your paternity within 30 days after the date of service of this notice.

If you wish to obtain further information about your legal rights with respect to _____[*name of child*], you should consult a licensed attorney, other than the undersigned.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Use of Form

This form is for use to give notice of alleged or possible paternity to a man whose parental rights must be terminated under the Uniform Parentage Act before a child may be placed for adoption. This form would normally be used if a birth mother has relinquished her child to an agency for adoptive placement or has independently placed the child for adoption. In such a case, the adoption may not proceed until the parental rights of the child's natural father have been terminated [*see Fam. Code § 7660 et seq.*].

This form is for use only with regard to an alleged father who is not a presumed father as defined in the Uniform Parentage Act (UPA) [*see Fam. Code § 7611*]. The parental rights of a presumed father may not be terminated under the UPA [*see Fam. Code §§ 7660, 7664*]. For discussion of the parental rights of presumed fathers, see *§ 12A.15[2]*. For discussion of the effect of giving notice, see *§ 12A.32[2]*.

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2-12A California Forms of Pleading and Practice--Annotated § 12A.112

§ 12A.112 Proceeding Under Uniform Parentage Act to Terminate Parental Rights of Alleged Natural Father--Petition [Fam. Code § 7662]

[1] FORM Proceeding Under Uniform Parentage Act to Terminate Parental Rights of Alleged Natural Father--Petition [Fam. Code § 7662]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Adoption Petition of _____ [*name(s)*], Adopting Parent[s].	))))))	NO. _____ PETITION TO TERMINATE PARENTAL RIGHTS

Petitioners respectfully represent:

1. Petitioners have physical custody of _____[*name of child*], a minor child born on _____[*date*], at _____[*place*]. _____[*Name of birth mother*], the mother of _____[*name of child*], has placed the child with petitioners and consented to their adoption of the child.

2. Petitioners have filed in the above-entitled proceeding a petition for the adoption of the child.

3. Petitioners are informed and believe and on that basis represent that the child has no presumed father within the

meaning of *Family Code Section 7611* Petitioner hereby incorporates that allegation by reference, as though fully set forth.

4. On _____[*date*], the _____[*name of agency*], the licensed adoption agency delegated to investigate matters regarding the adoption petition, reported in writing to the court the following facts: _____ [*specify facts concerning identity and status of child's birth father, e.g.,* (1) that _____ (*name of birth mother*) had named _____ (*name of alleged birth father*) as the natural father of the child; (2) that _____ (*name of birth mother*) was neither married to nor cohabiting with _____ (*name of alleged birth father*) at the time of the child's conception; (3) that _____ (*name of birth mother*) informed _____ (*name of alleged birth father*) that she was pregnant with his child immediately on learning that fact, but has never given him formal written notice of his alleged paternity; (4) that since informing him of his alleged paternity, _____ (*name of birth mother*) has neither seen nor heard from _____ (*name of birth father*); and (5) that she has no reason to believe that he intends to acknowledge his paternity, to seek custody of the child, to support the child, or to otherwise attempt to exercise parental rights with regard to the child]. Petitioner hereby incorporates the agency's report by reference, as though fully set forth.

5. It is in the best interests of the child that the parental rights of _____[*name of alleged birth father*] be terminated so that the adoption may be granted because _____ [*specify, e.g.,* _____ (*name of alleged birth father*) has accepted no responsibility with regard to the child nor indicated that he is willing or able to provide a suitable home for the child. In contrast, petitioners stand ready and able to accept the child into their home and treat her, in all respects, as their lawful child].

6. The hearing will be held on a date as determined pursuant to *Family Code Section 7667*, which will be separately noticed.

WHEREFORE, petitioners pray that the court (1) enter an order determining that _____[*name of alleged birth father*]is the natural father of the child _____[*name of child*]; and (2) order that the parental rights of _____[*name of alleged birth father*] with reference to the child are terminated and that his consent is not required for her adoption by petitioners.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____[*name of petitioner*], am one of the petitioners in this matter. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein represented on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____[*signature*]

[2] Use of Form

The foregoing form is for use by the prospective adoptive parents as a petition under *Fam. Code § 7662* to terminate the parental rights of an alleged natural father so that the adoption may proceed without his consent. For further discussion of proceedings on such a petition, see *§ 12A.30* et seq.

The petition must either specify the date of the hearing or state that a hearing will be held on a date within the required time, which will be separately noticed [*Fam. Code § 7667(a)*; *see* Paragraph 6]. There are no further statutorily required substantive allegations of the petition. However, the purpose of the proceeding is to obtain a judicial determination with respect to the natural father's identity, a determination that his consent is not required, and an order terminating his parental rights. While the allegations will vary with the particular facts presented, common allegations may include the following:

(1) The status under which the petitioner is bringing the petition, for example, as a person with custody of the child (Paragraph 1);

(2) That a petition for adoption is pending and the particulars of the petition (Paragraph 2);

(3) That the child does not have a "presumed father" under the Uniform Parentage Act [*see* Fam. Code *§ 7611, Fam. Code* § 7662] (Paragraph 3);

(4) The name of the man who has been identified as the natural father of the child and whose parental rights are sought to be terminated and the facts on which he has been identified [*see Fam. Code § 7663*] (Paragraph 4); and

(5) The facts that will establish that termination of the father's parental rights and the adoption are in the best interests of the child (Paragraphs 4 and 5).

A petition filed with the court under the Family Code must be verified [*Fam. Code § 212*; *see also Code Civ. Proc. § 446* (verification of pleadings)].

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2-12A California Forms of Pleading and Practice--Annotated § 12A.113

§ 12A.113 Proceeding Under Uniform Parentage Act to Terminate Parental Rights of Alleged Natural Father--Notice of Hearing [Fam. Code § 7667]

[1] FORM Proceeding Under Uniform Parentage Act to Terminate Parental Rights of Alleged Natural Father--Notice of Hearing [Fam. Code § 7667]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Adoption Petition of _____ [*name(s)*], Adopting Parent[s].	))))))	NO. _____ NOTICE OF HEARING

To _____[*name of alleged natural father*]:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in Department _____ of the above-entitled court, located at _____[*address*], the court will hear the petition of _____[*names of petitioners*] for a determination of whether you are the natural father of _____[*name of child*], a minor child, born _____[*date*], at _____[*place*] to _____[*name of birth mother*], and if so, whether your consent is required for her adoption by petitioners. If the court determines that your consent is not required, your parental rights with reference to the child will be terminated.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Use of Form

This form is for use to give notice to an alleged natural father of the date of hearing on a petition to terminate his parental rights and allow an adoption to proceed without his consent. If the date for hearing is not set forth in the petition to terminate parental rights, it must be separately noticed [*see Fam. Code § 7667(a)*]. The notice must be given at least 10 days before the date stated in the notice [*Fam. Code § 7666(a)*].

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2-12A California Forms of Pleading and Practice--Annotated § 12A.114

§ 12A.114 Proceeding Under Uniform Parentage Act to Terminate Parental Rights of Alleged Natural Father--Order Terminating Parental Rights [Fam. Code § 7664(b)]

[1] FORM Proceeding Under Uniform Parentage Act to Terminate Parental Rights of Alleged Natural Father--Order Terminating Parental Rights [Fam. Code § 7664(b)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Adoption Petition of _____ [*name(s)*], Adopting Parent[s].	))))))	NO. _____ ORDER TERMINATING PARENTAL RIGHTS

This matter came on regularly for hearing on _____[*date*], in Department _____ of the above-entitled court before the Honorable _____[*name of judge*], Judge of the Superior Court. Petitioners _____[*names*] appeared in person and through their counsel, _____[*name*]. _____[*Name of alleged natural father*], the man identified in the inquiry report filed herein by the _____[*name of agency*] as the natural father of the child, appeared in person and through his counsel, _____[*name*].

The court received testimony and documentary evidence. Having considered the evidence and arguments of counsel, the court finds and concludes as follows:

1. All notices of this proceeding were timely and properly served.

2. _____[*Name of child*] is an unmarried minor child who was born on _____[*date*] to _____[*name of birth mother*], at _____[*place*] and is the subject of an adoption petition in this proceeding.

3. The child has no presumed father under *Family Code Section 7611*.

4. _____[*Name of alleged natural father*] is the above child's natural father.

5. _____ [*Specify facts supporting order terminating parental rights, e.g.,* _____ (*name of alleged natural father*) claims only parental rights and does not now seek nor has he ever sought legal and physical custody of the child. He has provided no support for the care and maintenance of the child since her birth].

6. The child has been in the constant physical custody and care of petitioners _____[*names*] since his/her birth, where he/she is well cared for.

7. It is not in the child's best interest that _____[*name of alleged natural father*] retain his parental rights over the child.

8. It is in the best interests of the child that this adoption matter be allowed to proceed.

WHEREFORE, IT IS ORDERED that:

1. The adoption of _____[*name of child*] may proceed;

2. The consent of her natural father, _____[*name*] is not required for her adoption, and the consent of her mother alone is sufficient for that purpose; and

3. The parental rights of _____[*name of alleged natural father*] are hereby terminated with reference to _____[*name of child*].
Dated: _____.

_____[*signature*]
Judge of the Superior Court

[2] Use of Form

This form is for use as an order terminating the parental rights of an alleged natural father after hearing in an adoption matter [*see Fam. Code § 7664(b)*]. For discussion of the statutory and constitutional standards that the court must apply in determining whether to terminate the father's parental rights, see *§§ 12A.34[6], [7]*.

The order may include the findings that the court makes in terminating a natural father's parental rights. It may also include the specific factual bases for findings with respect to whether the adoption should proceed. These might include, for example, findings describing the efforts, if any, that the father made to obtain custody, or findings describing why the age and previous placement of the child require that the adoption proceed [*see Fam. Code § 7664(b)*].

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2-12A California Forms of Pleading and Practice--Annotated § 12A.115

§ 12A.115 Proceeding Under Uniform Parentage Act to Terminate Parental Rights of Alleged Natural Father--Judgment of Paternity, Parental Rights, and Custody [Fam. Code §§ 7637, 7664]

[1] FORM Proceeding Under Uniform Parentage Act to Terminate Parental Rights of Alleged Natural Father--Judgment of Paternity, Parental Rights, and Custody [Fam. Code §§ 7637, 7664]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____[*name*],	)	JUDGMENT OF PATERNITY AND PARENTAL RIGHTS
Defendant. CONSOLIDATED WITH In the Matter	)	
of the Adoption Petition of_____	)	
[*name(s)*], Adopting Parent[s].	)	

This proceeding in the above-consolidated matters came on regularly for hearing on _____[*date*], in Department _____ of the above-entitled court before the Honorable _____[*name*], Judge of the Superior Court. _____[*Names of petitioners for adoption*], petitioners in the above-entitled adoption matter, appeared in person and through their counsel, _____[*name*]. _____[*Name of natural father*], plaintiff in the above-entitled paternity action filed under *Family Code Section 7630* and the man identified in the inquiry report filed in the adoption matter by the _____[*name of agency*] as the natural father of the child named below, appeared in person and through his counsel,_____[*name*]. _____[*Name of birth mother*], mother of the child named below and defendant in the paternity action, _____ [*specify, e.g.*, did not appear, having previously

filed her stipulation that _____ (*name of natural father*) is the natural father of _____ (*name of child*)].

The court received testimony and documentary evidence. Having considered the evidence and arguments of counsel, the court finds and concludes as follows:

1. All notices of this proceeding were timely and properly served.

2. _____[*Name of child*] is an unmarried minor child who was born _____[*date*], at _____[*place*], and is the subject of an adoption petition in this proceeding.

3. The child has no presumed father under *Family Code Section 7611*.

4. Immediately after the birth of the child, _____[*name of natural father*] acknowledged his paternity.

5. Immediately after being informed that the child's mother intended to place the child for adoption with petitioners _____[*names*], _____[*name of natural father*] requested that he be awarded custody of the child and filed the above-entitled paternity action for that purpose.

6. At no time has _____[*name of natural father*] ever indicated that he would consent to the proposed adoption of the child, relinquish the child for adoption, or agree to the termination of his parental rights with reference to the child.

7. Petitioners _____[*names*] accepted the temporary custody of the child and took the child into their home knowing that _____[*name of natural father*] would not consent to the adoption and that his consent might be required in order for the adoption to proceed.

8. _____[*Name of natural father*] has done all that he could reasonably be expected to do, under the circumstances, to demonstrate his commitment to his parental responsibilities.

9. _____[*Name of natural father*] is fit to exercise parental and custodial responsibilities with regard to his child, _____[*name*].

WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that:

1. _____[*Name of natural father*] is the natural father of the child _____[*name of child*].

2. _____[*Name of natural father*] shall retain parental rights with reference to _____[*name of child*], and no adoption of _____[*name of child*] may be decreed without his consent.

3. Custody of the minor child _____[*name of child*] is awarded to _____[*name of natural father*], subject to further order of the court with regard to the child's support, surname, visitation rights, attorneys' fees, and other matters that the court may deem appropriate.

4. Petitioners _____[*names*] shall forthwith deliver the child _____[*name of child*] to _____[*name of natural father*].
Dated: _____.

_____[*signature*]
Judge of the Superior Court

[2] Use of Form

This form is for use as a judgment in favor of an alleged natural father after hearing on a petition to terminate his parental rights [*see Fam. Code § 7664(b)*]. This judgment is for use in consolidated adoption and paternity proceedings, in which a nonpresumed father may establish his paternity and thus block any adoption from proceeding without his consent [*see Fam. Code § 7630*]. For forms for use in bringing an action to establish paternity, see Ch. 412, *Paternity*

This judgment is for use in a case in which an alleged natural father establishes his paternity and also establishes that he has done all that he could reasonably be expected to do, under the circumstances, to demonstrate his commitment to his parental responsibilities with regard to the child. In such a case, the father's parental rights are constitutionally protected, and no adoption may proceed without his consent [*Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 849-851, 4 Cal. Rptr. 2d 615, 823 P.2d 1216]* . The father may also be awarded custody of the child [*see Fam. Code § 7637*; *In re Sabrina H. (1990) 217 Cal. App. 3d 702, 709-710, 266 Cal. Rptr. 274]* . For further discussion of the grounds on which a court might determine to make this order, see *§ 12A.34[6], [7]*.

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[Reserved]

§§ 12A.116[Reserved]

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B. Proceedings Under Adoption Law and Involving Freedom From Parental Custody and Control

2-12A California Forms of Pleading and Practice--Annotated § 12A.130

§ 12A.130 Citation to Birth Parent to Appear at Adoption Hearing [Fam. Code § 8604]

[1] FORM Citation to Birth Parent to Appear at Adoption Hearing [Fam. Code § 8604]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
Adoption Petition of	)	CITATION
_____ [*name(s)*],	)	
Adopting Parent[s].	)	
	)	

THE PEOPLE OF THE STATE OF CALIFORNIA

To _____[*name*]:

YOU ARE HEREBY CITED to appear at _____[*time*] on _____[*date*], in Department _____ of the above-entitled court, located at _____[*address*]. At that time and place, you must show cause why the petition of _____[*names of petitioners*] to adopt your minor child, _____[*name of child*], should not be granted without your consent in the above-entitled proceeding, on the ground that you have abandoned that child. The above-referenced adoption petition alleges that, for a period of one year after _____[*date*], you willfully failed to communicate with, and to pay for the care, support, and education of, the above-named child, although able to do so. A copy of that petition is attached hereto.

YOU ARE FURTHER ADVISED that if you appear at the above hearing and wish to have legal counsel but are unable to afford counsel, the court will appoint counsel on your behalf.

_____[*date*]

_____[*name*], Clerk
By_____ [*name*], Deputy

[2] Use of Form

This form is for use as a citation to a noncustodial birth parent to appear at a hearing on a petition for adoption. The citation alleges that the parent's consent to the adoption is not required because the parent has "abandoned" the child within the meaning of *Fam. Code § 8604*. For discussion of this abandonment standard, see *§ 12A.52[1]*. This citation is constitutionally required [*In re Jay R. (1983) 150 Cal. App. 3d 251, 259, 197 Cal. Rptr. 672* ; *see §§ 12A.15[5], 12A.52[2]*].

If abandonment under *Fam. Code § 8604* is to be relied on as a ground to dispense with consent, it should be pleaded in the petition for adoption [*see In re Jay R. (1983) 150 Cal. App. 3d 251, 259-260, 197 Cal. Rptr. 672]* .

The citation must be served in the manner provided by law for service of a summons in a civil action [*Fam. Code § 8604(b)*; *see generally Code Civ. Proc. § 415.10 et seq.*]. For discussion and forms, see Ch. 518, *Service of Summons and Papers* .

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2-12A California Forms of Pleading and Practice--Annotated § 12A.131

§ 12A.131 Proceeding to Declare Minor Free From Parental Custody and Control--Complete Petition With Allegation of Abandonment [Fam. Code § 7822]

[1] FORM Proceeding to Declare Minor Free From Parental Custody and Control--Complete Petition With Allegation of Abandonment [Fam. Code § 7822]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Petition of _____ [*name(s)*] to Declare _____ [*name*], a Minor, to Be Free From the Custody and Control of _____ [*name(s)*].	))))))))))	NO. _____ PETITION TO DECLARE MINOR FREE FROM PARENTAL CUSTODY AND CONTROL

Petitioner respectfully represents:

1. Petitioner is _____ [*identify agency, if petitioner is an agency authorized to initiate proceedings, or if petitioner is an interested person within the meaning of Fam. Code § 7841 set forth facts showing interest, e.g.,* the maternal grandmother of the minor child _____ (*name*) and seeks to adopt him/her on termination of his/her parents' rights to custody and control].

2. _____[*Name of child*] is an unmarried minor child who was born on _____[*date*], and is a resident of _____[*city*], _____ County, California.

[*EITHER*]

3. The sole living parent of the child is _____[*name*], who resides at _____[*street address and city*], California.

[*OR*]

3. _____[*Name*] is the parent who has custody of the child and resides at _____ [*street address and city*], California. _____ [The whereabouts of the child's _____ (*other parent, e.g.,* father) are unknown *or* The child's _____ (*other parent, e.g.,* father) resides at _____ (*street address, city and state or county*)].

[*OR*]

3. The father and mother of the child are _____ [*name*] and _____ [*name*], respectively, and reside at _____ [*street address, city, state or county*].

[*EITHER*]

4. The child has been left without provision for his/her identification by his/her parent(s).

[*OR*]

4. The child has been left by _____ [both of his/her parents *or* his/her sole parent] in the care and custody of _____[*name*], who is not the child's parent, for a period of six months, beginning _____[*date*], and ending _____[*date*], _____ [without any provision for the child's support *and/or* without communication from the absent parent(s)] with the intent on the part of the parent(s) to abandon the child.

[*OR*]

4. The child has been left by _____[*name of parent*] in the care and custody of _____[*name of other parent*] for a period of one year, beginning _____[*date*], and ending _____[*date*], _____ [without any provision for the child's support *and/or* without communication from the absent parent] with the intent on the part of _____[*name of absent parent*] to abandon the child.

WHEREFORE, petitioner prays judgment as follows:

1. For an order declaring that the minor child _____[*name*] is free from the custody and control of

_____[*name(s) of birth parent(s)*] and terminating all of his/her/their rights and responsibilities with regard to the child;

2. For an order appointing _____[*name of petitioner*] to act, under the provisions of *Family Code Section 7893*, as guardian of the minor child; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

VERIFICATION
[*See § 12A.112[1].*]

[2] Use of Form

This form is for use in a proceeding to free a child from parental custody and control on the ground of abandonment [*see Fam. Code § 7822*]. For discussion of this ground for terminating parental rights, see *§ 12A.68[1]*. This form may be used by any "interested person" petitioner [*see Fam. Code § 7841*], or by a licensed adoption agency, the state Department of Social Services, a county welfare department, a county adoption department, or a county probation department [*see Fam. Code § 7840*]. An "interested person" is anyone who has a direct interest in the action and includes a person who has filed or who intends to file within a period of six months an adoption petition under *Fam. Code §§ 8714, 8802,* or *9000* [*Fam. Code § 7841(b)*].

In an appropriate case, this form may be adapted to allege additional or different grounds for terminating parental rights under *Fam. Code § 7820 et seq.* For forms of allegations of other grounds for terminating parental rights, which may be included in addition to or in lieu of Paragraph 4 of this form, see *§§ 12A.132 -12A.134*.

Some counties provide their own printed petitions. It is suggested that counsel check with the clerk of the superior court in the county in which the proceeding is to be initiated to ascertain the appropriate caption and whether a preferred form of petition exists. Verification of petitions is required by statute [*Fam. Code § 212*].

It is presently unclear whether a declaration under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA--*Fam. Code § 3400 et seq.*) must be included with the petition, as discussed in *§ 12A.69*. Pending any further legislative or judicial clarification, it is suggested that counsel assume that the UCCJEA will apply, on the basis of specific statutory authorization [*Fam. Code § 3402(d)*] and include a declaration that complies with its provisions in the first pleading [*see Fam. Code § 3429*; *see Ch. 221, Dissolution of Marriage: Procedure, § 221.312*].

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2-12A California Forms of Pleading and Practice--Annotated § 12A.132

§ 12A.132 Proceeding to Declare Minor Free From Parental Custody and Control--Allegation of Felony Conviction [Fam. Code § 7825]

[1] FORM Proceeding to Declare Minor Free From Parental Custody and Control--Allegation of Felony Conviction [Fam. Code § 7825]

On or about _____[*date*], _____[*name of parent*] was convicted of violating _____[*specify Penal Code or other criminal statute(s) violated*], _____ [*describe offense, e.g.,* abusing or endangering the health of a child], a felony, and sentenced to prison for _____[*set forth term of imprisonment*]. By reason of this conviction, _____[*name of parent*] is unfit to have the future custody and control of his/her minor child, _____[*name*].

[2] Use of Form

This form is for use as an allegation in a petition to declare a minor free from parental custody and control on the ground of conviction of a felony [*see Fam. Code § 7825*]. In an appropriate case, this allegation may be inserted in addition to, or in lieu of, Paragraph 4 in the form of petition set forth in Form 8. For discussion of this ground for terminating parental rights, see *§ 12A.68[2]*.

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2-12A California Forms of Pleading and Practice--Annotated § 12A.133

§ 12A.133 Proceeding to Declare Minor Free From Parental Custody and Control--Allegation of Certified Developmental Disability or Mental Illness [Fam. Code § 7826]

[1] FORM Proceeding to Declare Minor Free From Parental Custody and Control--Allegation of Certified Developmental Disability or Mental Illness [Fam. Code § 7826]

On or about _____[*date*], _____[*name of parent*] was declared to be _____ [developmentally disabled *or* mentally ill] by the _____ [*e.g.*, Superior Court of California, County of _____], in _____[*title of case*], Case No. _____. Statements by the Director of _____ [Mental Health *or* Developmental Services *or specify equivalent official in other state*] [and the superintendent of _____ (*name of hospital, if any, in which parent is inmate or patient*)] certifying that the parent is _____ [developmentally disabled *or* mentally ill] and will not be capable of supporting and controlling the child in a proper manner are attached hereto as Exhibit A and made a part hereof by reference.

[2] Use of Form

This form is for use as an allegation in a petition to declare a minor free from parental custody and control on the ground of certified developmental disability or mental illness [*see Fam. Code § 7826*]. In an appropriate case, this allegation may be inserted in addition to, or in lieu of, Paragraph 4 in the form of petition *set forth in § 12A.131[1]*. For discussion of this ground for terminating parental rights, see *§ 12A.68[3]*.

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2-12A California Forms of Pleading and Practice--Annotated § 12A.134

§ 12A.134 Proceeding to Declare Minor Free From Parental Custody and Control--Allegation of Mental Disability [Fam. Code § 7827]

[1] FORM Proceeding to Declare Minor Free From Parental Custody and Control--Allegation of Mental Disability [Fam. Code § 7827]

The child's parent _____[*name*] suffers from a mental incapacity or disorder that renders him/her unable to care for and control the child. _____ [*If appropriate, add:* Evidence of this mental disability is supplied by _____ (*set forth names of two experts and qualifications of each, e.g.,* (*name*), a physician certified by the American Board of Psychiatry and Neurology and _____(*name*), a psychologist who has a doctoral degree in psychology and five years postgraduate experience in the diagnosis and treatment of emotional and mental disorders) and is attached hereto as Exhibits A and B and made a part hereof by reference.]

[2] Use of Form

This form is for use as an allegation in a petition to declare a minor free from parental custody and control on the ground of mental disability [*see Fam. Code § 7827*]. In an appropriate case, this allegation may be inserted in addition to, or in lieu of, Paragraph 4 in the form of petition *set forth in § 12A.131[1]*. For discussion of this ground for terminating parental rights, see *§ 12A.68[3]*.

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2-12A California Forms of Pleading and Practice--Annotated § 12A.135

§ 12A.135 Proceeding to Declare Minor Free From Parental Custody and Control--Citation to Custodian [Fam. Code § 7880]

[1] FORM Proceeding to Declare Minor Free From Parental Custody and Control--Citation to Custodian [Fam. Code § 7880]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of	)	
the Petition of	)	
_____ [*name(s)*]	)	NO. _____
to Declare	)	CITATION TO CUSTODIAN
_____ [*name*],	)	
a Minor, to Be Free From	)	
the Custody and Control of	)	
_____ [*name(s)*].	)	
	)	

THE PEOPLE OF THE STATE OF CALIFORNIA

To _____[*name*]:

By order of this court you are hereby cited and required to appear with _____[*name of child*] before the judge presiding in Department _____ of this court on _____[*date*], at _____[*time*], then and there to show cause, if any you have, why _____[*name of child*] should not be declared free of the custody and control of _____[*name of parent*].

Your failure, without reasonable cause, to appear and to bring _____[*name of child*] with you and to abide by the order of this court will constitute a contempt of this court.

_____[*date*].

_____ Clerk

[*seal*]

By _____, Deputy Clerk

[2] Use of Form

This citation is for use in a proceeding to declare a minor free from the custody and control of one or both parents under *Fam. Code § 7800 et seq.* The citation is issued to any person having the custody and control of the minor or the person with whom the minor lives, and requires the person to appear with the minor at a time and place stated in the citation [*see Fam. Code § 7880(a)*]. It also advises the person on whom the citation is served that failure, without reasonable cause, to comply with directions of the court constitutes a contempt [*see Fam. Code § 7883*]. The minor need not appear if he or she is under the age of 10, except on order of the court after necessity being shown [*see Fam. Code §§ 7880, 7891*].

This form assumes that the person having custody and control of the minor is not a parent whose parental rights are the subject of the petition. For example, an adoption agency may petition to terminate the parental rights of a child who is in a foster home. In a *Fam. Code § 7800* proceeding, it would be unusual for the parent to still have custody of the child. In most cases, the parent has abandoned the child or the child has been made a dependent of the juvenile court and removed from the home [*see Fam. Code § 7820 et seq.*]. The *form in § 12A.136[1]* is for use to cite the parent whose rights are at issue in the proceeding.

Service of the citation is required to be made at least 10 days before the time stated therein for the appearance [*Fam. Code § 7880(c)*]. While service of the citation must be made in a manner prescribed by law for service of civil process, *Fam. Code § 7880* does not specify the manner of service [*Fam. Code § 7880(c)*]. Counsel is advised to have the citation personally served, if possible.

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2-12A California Forms of Pleading and Practice--Annotated § 12A.136

§ 12A.136 Proceeding to Declare Minor Free From Parental Custody and Control--Citation to Parent or Other Relative [Fam. Code § 7881]

[1] FORM Proceeding to Declare Minor Free From Parental Custody and Control--Citation to Parent or Other Relative [Fam. Code § 7881]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Petition of _____ [*name(s)*] to Declare _____ [*name*], a Minor, to Be Free From the Custody and Control of _____ [*name(s)*].	))))))))))	NO. _____ CITATION TO PARENT

THE PEOPLE OF THE STATE OF CALIFORNIA

To _____[*name*]:

By order of this court you are hereby advised that you may appear before the judge presiding in Department _____ of this court on _____[*date*], at _____[*time*], then and there

to show cause, if any you have, why _____[*name of child*] should not be declared _____ [free from your custody and control *or* free from the custody and control of _____ (*name of parent*)] for the purpose of freeing _____[*name of child*] for placement for adoption.

The following information concerns rights and procedures that relate to this proceeding for the termination of custody and control of _____[*name of child*] as set forth in *Family Code Section 7860 et seq.*:

1. At the beginning of the proceeding the court will consider whether or not the interests of _____[*name of child*] require the appointment of counsel. If the court finds that the interests of _____[*name of child*] do require such protection, the court will appoint counsel to represent him/her, whether or not he/she is able to afford counsel. _____[*Name of child*] will not be present in court unless he/she so requests or the court so orders.

2. If a parent of _____[*name of child*] appears without counsel and is unable to afford counsel, the court must appoint counsel for the parent, unless the parent knowingly and intelligently waives the right to be represented by counsel. The court will not appoint the same counsel to represent both _____[*name of child*] and his/her parent.

3. The court may appoint either the public defender or private counsel. If private counsel is appointed, he or she will receive a reasonable sum for compensation and expenses, the amount of which will be determined by the court. That amount must be paid by the real parties in interest, but not by the minor, in such proportions as the court believes to be just. If, however, the court finds that any of the real parties in interest cannot afford counsel, the amount will be paid by the county.

4. The court may continue the proceeding for not more than 30 days as necessary to appoint counsel and to enable counsel to become acquainted with the case.
Dated: _____.

_____[*name*], Clerk

[*seal*]

By:_____[*signature*]
Deputy Clerk

[2] Use of Form

This form is a citation for use to give notice to the parents of a minor child of proceedings to terminate parental rights with regard to the child under *Fam. Code § 7820 et seq.* [*see Fam. Code § 7881*]. If a parent's place of residence is not known to the petitioner, the grandparents and adult brothers, sisters, uncles, aunts, and first cousins of the child must be notified of the proceedings by service of a citation, advising them that they may appear at the time and place stated in the citation. No citation is required with regard to a parent who has relinquished the child to an adoption agency or consented to an independent or stepparent adoption. If the purpose of the proceedings is to free the child for placement for adoption, the citation must so state [*Fam. Code § 7881(a)-(c)*].

The notice must advise the person or persons served of the rights and procedures set forth in *Fam. Code § 7860 et seq.* (appointment and compensation of counsel in proceedings for termination of parental custody and control). For a discussion of the provisions of *Fam. Code § 7860 et seq.*, see *§ 12A.79*.

The citation must be served in the manner provided by law for the service of summons in a civil action [*see Code Civ. Proc. § 415.10 et seq.*; *see also* Ch. 518, *Service of Summons and Papers*]. For service of citation by publication, see *§ 12A.137*. Service must be made at least 10 days before the time stated therein for the appearance [*Fam. Code § 7881(d)*].

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2-12A California Forms of Pleading and Practice--Annotated § 12A.137

§ 12A.137 Proceeding to Declare Minor Free From Parental Custody and Control--Application and Declaration for Publication of Citation [Fam. Code § 7882]

[1] FORM Proceeding to Declare Minor Free From Parental Custody and Control--Application and Declaration for Publication of Citation [Fam. Code § 7882]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Petition of _____ [*name(s)*] to Declare _____ [*name*], a Minor, to Be Free From the Custody and Control of _____ [*name(s)*].	))))))))))	NO. _____ APPLICATION AND DECLARATION FOR PUBLICATION OF CITATION

Application is hereby made for an order directing service of the citation in this proceeding on _____[*name of parent*] by publication in _____[*name of newspaper*], which is a newspaper of general circulation in this state most likely to give the aforementioned person notice of the pendency of this proceeding. In support of this application, I, _____[*name*], declare:

1. I am the attorney for the petitioners herein. The parents of the minor child, _____[*name*], who is the

subject of this proceeding, are _____[*names*].

[*EITHER*]

2. A citation has heretofore been issued to serve notice of the proceedings herein on _____[*name of parent*] and to advise him/her that he/she may appear at the time and place stated in the citation. _____[*Name of parent*] could not with reasonable diligence be served pursuant to *Family Code Section 7881* because _____[*specify attempts at service and reason attempts were not successful*].

[*OR*]

2. The place of residence and the whereabouts of _____[*name of parent*] are unknown to declarant [and to the petitioner in this proceeding]. The following attempts were made to locate _____[*name of parent*]: _____[*specify facts within declarant's knowledge*].

[*CONTINUE*]

WHEREFORE, petitioner prays that the court issue its order directing service of the citation on _____[*name*] by publication in _____ [*name of newspaper*] once a week for four successive weeks as provided in *Family Code Section 7882*.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Use of Form

This application and declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*] is for use in a proceeding to terminate parental rights under *Fam. Code § 7800 et seq.* if the child's mother or father cannot with reasonable diligence be served with citation under *Fam. Code § 7881* and service by publication is sought.

[3] Service by Publication

If the father or mother of the minor, or any person alleged to be or claiming to be the father or mother cannot, with reasonable diligence, be served with a citation as provided for in *Fam. Code § 7881*, or if his or her place of residence is not known to the petitioner, the petitioner or his or her agent or attorney must make and file an affidavit (or declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5*]), and state therein the name of the father or mother or alleged father or mother and his or her place or residence, if known to the petitioner, and the name of the father or mother or alleged father or mother whose place of residence is unknown to the petitioner. The affidavit (declaration) should also name the newspaper that is most likely to give actual notice to the parents or alleged parents [*Fam. Code § 7882(b)*].

A showing of reasonable diligence to locate and serve the parent is a prerequisite to any order for service by publication. The term "reasonable diligence" denotes a thorough, systematic investigation and inquiry conducted in good faith. If the

party conducting the investigation ignores the most likely means of finding the parent, the service is invalid, even if the affidavit of diligence is otherwise sufficient [*David B. v. Superior Court (1994) 21 Cal. App. 4th 1010, 1016, 26 Cal. Rptr. 2d 586]* . The petitioner must show not only that the parent cannot with reasonable diligence be served in the prescribed manner but also that his or her residence cannot be discovered by due diligence. An allegation that the address is unknown will not satisfy this requirement [*In re Beebe (1974) 40 Cal. App. 3d 643, 645-646, 115 Cal.Rptr. 322]* .

If the facts relating to the attempts to locate and serve the person to be cited are not within the knowledge of the attorney, they should be deleted from the application and declaration and included in affidavits (or declarations [*Code Civ. Proc. § 2015.5*]) by persons with personal knowledge.

If one or both of the parents of the minor are unknown or if the name of either or both of the minor's parents is uncertain, then that fact must be set forth in the declaration [*see Fam. Code § 7882(a)*]. In such a case, appropriate modification of this declaration will be required.

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§ 12A.138 Proceeding to Declare Minor Free From Parental Custody and Control--Order for Publication of Citation [Fam. Code § 7882]

[1] FORM Proceeding to Declare Minor Free From Parental Custody and Control--Order for Publication of Citation [Fam. Code § 7882]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Petition of _____ [*name(s)*] to Declare _____ [*name*], a Minor, to Be Free From the Custody and Control of _____ [*name(s)*].	)))))))))	NO. _____ ORDER FOR PUBLICATION OF CITATION

[*EITHER*]

On reading the declaration of _____[*name*] on file herein and it satisfactorily appearing to me therefrom that the residence of _____[*name*], the _____ [*specify relationship, e.g.,* mother] of the minor who is the subject of the petition filed herein, is unknown to petitioner,

[*OR*]

On reading the declaration of _____[*name*] on file herein and it satisfactorily appearing to me therefrom that the residence of _____[*name*], the _____ [*specify relationship, e.g.,* mother] of the minor who is the subject of the petition filed herein, is _____ [unknown to plaintiff *or specify address*], that a citation was duly issued out of this court in this matter, and that _____[*name*] could not after reasonable diligence be served as provided for in *Family Code Section 7881*, for the reasons contained and mentioned in the declaration of _____[*name*] herein,

[*CONTINUE*]

IT IS ORDERED that service of the citation in this matter be made on _____[*name*] by publication in _____[*name of newspaper*], which is hereby designated as the newspaper most likely to give notice to _____[*name*]. Publication is to be made at least once each week for four successive weeks.

[IT IS FURTHER ORDERED that a copy of the citation be forthwith served on _____ (*name*) by mail by deposit in the post office properly addressed and with the postage thereon fully prepaid, directed to him/her at his/her place of residence.]
Dated: _____.

_____[*signature*]
Judge of the Superior Court

[2] Use of Form

This form is for use as an order to permit service of a citation by publication with regard to a parent whose parental rights are sought to be terminated in a *Fam. Code § 7800* proceeding [*see Fam. Code § 7882*]. The order is to direct publication once a week for four successive weeks and that, when the residence of a parent or alleged parent is known, a copy of the citation is to be served on the parent or alleged parent by mail by deposit in the post office properly addressed and with the postage thereon fully prepaid, directed to the parent or alleged parent at his or her place of residence. If publication is ordered, service of a copy of the citation in the manner provided for in *Fam. Code § 7881* [*see § 12A.136[1]*] is equivalent to publication and deposit in the post office [*Fam. Code § 7882(b), (c)*]. Service is complete at the expiration of the time prescribed by the order for publication or when service is made as provided for in *Fam. Code § 7881*, whichever event occurs first [*Fam. Code § 7882(e)*].

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2-12A California Forms of Pleading and Practice--Annotated § 12A.139

§ 12A.139 Proceeding to Declare Minor Free From Parental Custody and Control--Findings and Judgment [Fam. Code §§ 7893, 7894]

[1] FORM Proceeding to Declare Minor Free From Parental Custody and Control--Findings and Judgment [Fam. Code §§ 7893, 7894]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Petition of _____ [*name(s)*] to Declare _____ [*name*], a Minor, to Be Free From the Custody and Control of _____ [*name(s)*].	))))))))))	NO. _____ JUDGMENT DECLARING MINOR FREE FROM PARENTAL CUSTODY AND CONTROL

The petition of _____[*name*], for a judgment declaring _____[*name*], a minor, free from the custody and control of _____[*name of parent(s)*], came on regularly for hearing on _____[*date*], petitioner appearing by counsel _____[*name*] and _____ [*specify other appearances, e.g.,* _____ (*name of parent*) appearing by counsel _____(*name*)]. The court having examined petitioner, [the child,] and other witnesses, and other evidence both oral and documentary having been introduced, and good cause appearing therefor, the court finds:

1. Notice of the hearing on the petition was given by citation to _____[*name(s) of birth parent(s) whose rights are subject of petition*] as prescribed by *Family Code Section 7881*;

2. The _____ [*investigating officer, e.g.,* juvenile probation officer] of _____ County, California, has filed a written report of his/her investigation of the circumstances of the child as required by *Family Code Section 7851*, in which he/she recommends that _____[*name of child*] be declared free from the custody and control of _____[*name of parent*].

3. There is clear and convincing evidence that _____[*name of child*] should be declared free from the custody and control of his/her _____ [father *or* mother *or* parents], _____[*name(s)*], pursuant to *Family Code Section 7820 et seq.*, in that _____ [*specify facts constituting ground, e.g.,* _____ (*name of parent*) has left the child in the care and custody of petitioner for a period of over one year without any provision for the child's support, with the intent to abandon the child].

[4. The child is adoptable. _____ (*If appropriate, add:* A petition for his/her adoption was filed by _____ (*names of petitioners*) on _____ (*date*) in the Superior Court of California, _____ County, case number _____.)]

5. It is in the best interests of the child that he/she be declared free from the custody and control of his _____ [father *or* mother *or* parents], _____[*name(s)*], and there is no less detrimental alternative to provide for the child's best interests.

WHEREFORE IT IS ORDERED that the child _____[*name*] is freed from the custody and control of _____[*name(s) of parent(s)*] and that _____ [_____ (*name of guardian*) is hereby appointed guardian of the child *or* the child is referred to _____ (*name of licensed adoption agency*) for adoptive placement by the agency].
Dated: _____.

_____[*signature*]
Judge of the Superior Court

[2] Use of Form

This form is for use as a judgment declaring that a minor child is free from the custody and control of a birth parent. For discussion of the effect of the judgment under *Fam. Code § 7894*, see *§ 12A.82*. For discussion of appointment of a guardian to take custody of the child or referral to an adoptive agency for custody and placement under *Fam. Code § 7893*, see *§ 12A.84*. Findings of fact are required in a proceeding under *Fam. Code § 7800 et seq.* only if they are requested by a party to the proceeding [*In re Marcel N. (1991) 235 Cal. App. 3d 1007, 1013, 1 Cal. Rptr. 2d 240]* .

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Volume 2: Adoptions thru Airplanes and Airports-Chs. 12-17
Chapter 12A ADOPTIONS: TERMINATION OF PARENTAL RIGHTS
PART IV. FORMS
B. Proceedings Under Adoption Law and Involving Freedom From Parental Custody and Control

2-12A California Forms of Pleading and Practice--Annotated § 12A.140

§ 12A.140 Removal of Parent From State Prison to Attend Proceedings Under Fam. Code § 7800 et seq. [Penal Code § 2625]--Declaration of Parent [Code Civ. Proc. § 2015.5]

[1] FORM Removal of Parent From State Prison to Attend Proceedings Under Fam. Code § 7800 et seq. [Penal Code § 2625]--Declaration of Parent [Code Civ. Proc. § 2015.5]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Petition of _____ [*name(s)*] to Declare _____ [*name*], a Minor, to Be Free From the Custody and Control of _____ [*name(s)*].	))))))))))	NO. _____ DECLARATION OF _____ [*name*] AND REQUEST TO ATTEND HEARING OF INCARCERATED PARENT

I, _____[*name*], declare:

I am a parent of the minor who is the subject of the above-entitled proceedings. I am presently incarcerated in _____[*name of state penal or mental health institution*] at _____, California. I wish to be present during all court proceedings to be held in this matter. I therefore request that this court order my removal from the above-named facility and my production before this court for the purpose of attending these proceedings.

I declare under penalty of perjury that the foregoing is true and correct.
Dated: _____.

_____[*signature*]

[2] Use of Form

This declaration is for use by a person who is incarcerated in a penal institution or in a state hospital or criminally committed to a public or private treatment facility for the mentally disordered if that person's minor child is the subject of a proceeding under *Fam. Code § 7800 et seq.* to declare the minor free from parental custody and control [*see Penal Code § 2625*].

[3] Prisoner's Right to Attend Proceedings

In any proceeding under *Fam. Code § 7800 et seq.* seeking the termination of parental rights of a prisoner, the superior court of the county in which the proceeding is pending must order that notice of any court proceeding be transmitted to the prisoner [*Penal Code § 2625*; *see In re Barry W. (1993) 21 Cal. App. 4th 358, 365-371, 26 Cal. Rptr. 2d 161* (reviewing history of statute)]. The form of citation in § 12A.130[1] may be adapted for this purpose. Service of notice must be made under *Fam. Code § 7881* [*Penal Code § 2625*].

The term "prisoner" includes any individual in custody in a state prison, in the California Rehabilitation Center, or in a county jail, or who is a ward of the Department of the Youth Authority. It also includes any individual who, on a verdict or finding that he or she was insane at the time of committing an offense, or mentally incompetent to be tried or adjudged to punishment, is confined in a state hospital or in any other public or private treatment facility [*Penal Code § 2625*].

On receipt of a statement from the prisoner or his or her attorney indicating the prisoner's desire to be present during the court's proceedings, the court must issue an order for the transportation of the prisoner from the institution to the court. No Section 7800 proceeding may be adjudicated without the physical presence of the prisoner or the prisoner's attorney, unless the court has before it a knowing waiver of the right of physical presence signed by the prisoner, or an affidavit (declaration) [*see Code Civ. Proc. § 2015.5*] signed by the warden, superintendent, or other person in charge of the institution, stating that the prisoner has, by express statement or action, indicated an intent not to appear at the proceeding [*Penal Code § 2625*; *see In re Rikki D. (1991) 227 Cal. App. 3d 1624, 1628-1631, 278 Cal. Rptr. 565* (affidavit is not required if prisoner's attorney is present)]. However, on and after January 1, 1997, a court may not order the removal and production of a prisoner sentenced to death, whether or not that sentence is being appealed, in any action or proceeding in which the prisoner's parental rights are subject to adjudication [*Fam. Code § 2625(g)*].

A transportation order on the request of the prisoner is mandatory only in regard to *Fam. Code § 7800* proceedings and juvenile court proceedings under *Welf. & Inst. Code §§ 300* (dependency) and 366.26 (termination of parental rights). In any other proceeding in which a prisoner's parental rights are subject to adjudication, a transportation order *may* be made by the court [*Penal Code § 2625*; *see In re Barry W. (1993) 21 Cal. App. 4th 358, 369 n.7, 26 Cal. Rptr. 2d 161]* . Whether due process or equal protection might require that a prisoner whose parental rights are subject to termination in some other proceeding [*see, e.g., Fam. Code §§ 7664, 8604(b)*] have a right to attend the proceedings has not been addressed by the courts.

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2-12A California Forms of Pleading and Practice--Annotated § 12A.141

§ 12A.141 Removal of Parent From State Prison to Attend Proceedings Under Fam. Code § 7800 et seq. [Penal Code § 2625]--Order for Prisoner's Appearance at Hearing Affecting Prisoner's Parental Rights and Waiver of Appearance--Judicial Council Form JV-450

[1] FORM Removal of Parent From State Prison to Attend Proceedings Under Fam. Code § 7800 et seq.

Click here to view image.

[2] Use of Form

This form is an illustrative version of the approved Judicial Council form of Order for Prisoner's Appearance at Hearing Affecting Prisoner's Parental Rights and Waiver of Appearance [Judicial Council Form JV-450]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form is for use as an order to direct the production of a prisoner in a penal institution or mental facility for the criminally mentally disordered to the court in which a proceeding is pending for the termination of the parental rights of the prisoner, to declare the prisoner's child a dependent of the court, to order the child into foster care, or appoint a legal guardian for the child [*see Penal Code § 2625*; *see also* Fam. Code § 7800 et seq., Welf. & Inst. Code §§ 300, 366.26]. The form of the order is specified in *Penal Code § 2625*.

If the prisoner does not wish to personally attend the hearing, but does wish to appear through counsel, the "Waiver of Appearance" box in the caption, the check-off box in Paragraph 4, and related boxes above and in Paragraph 7(a) should be marked. Paragraph 7(b) would additionally be marked if the prisoner requests the appointment of counsel.

However, if the prisoner neither wishes to appear personally or through counsel, he or she may formally waive that right by marking Paragraph 7(c), in addition to the other waiver boxes preceding Paragraph 7. Whenever a formal waiver is made (of either personal appearance or appearance through counsel), the prisoner must sign and date the form below Paragraph 7. Note that when a prisoner does not wish to sign the formal waiver, but through words or conduct indicates

that he or she does not wish to attend the hearing, a correctional official can make a declaration to that effect in Paragraph 9 of the form.

[3] Transmission and Execution of Order

A copy of the order must be transmitted to the warden of the prison or other person in charge of the institution not less than 48 hours before the order is to be executed. The order must be executed by the sheriff of the county in which it is made, whose duty it is to bring the prisoner before the proper court, to safely keep him or her, and when his or her presence is no longer required, to return him or her to the institution from which he or she was taken. The expense of executing the order is a proper charge against, and is to be paid by, the county in which the order is made. A prisoner so removed from an institution remains in the constructive custody of the person in charge of the institution [*Penal Code § 2625*].

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Volume 2: Adoptions thru Airplanes and Airports-Chs. 12-17
Chapter 12B ADOPTIONS: UNMARRIED MINORS

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[1] FORM

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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[2] Use of Form

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[1] FORM

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[1] FORM

[2] Use of Form

§ 12B.362 SDSS FORM--Revocation of Relinquishment

[1] FORM

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[1] FORM

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[2] Use of Form

[3] Contents of Form

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

§ 12B.383 Parental Notification of Indian Status--Cal. Judicial Council Form ICWA-020

[1] FORM

[2] Use of Form

§ 12B.384 Notice of Child Custody Proceeding for Indian Child [25 U.S.C. § 1901 et seq.]--Cal. Judicial Council Form ICWA-030

[1] FORM

[2] Use of Form

§ 12B.385 Attachment to Notice of Child Custody Proceeding for Indian Child [25 U.S.C. § 1901 et seq.]--Cal. Judicial Council Form ICWA-030(A)

[1] FORM

[2] Use of Form

§ 12B.386 Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child [25 U.S.C. § 1901 et seq.]--Cal. Judicial Council Form ICWA-040

[1] FORM

[2] Use of Form

§ 12B.387 Notice of Petition and Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction--Cal. Judicial Council Form ICWA-050

[1] FORM

[2] Use of Form

§ 12B.388 Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction--Cal. Judicial Council Form ICWA-060

[1] FORM

[2] Use of Form

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Chapter 12B ADOPTIONS: UNMARRIED MINORS
PART I. SCOPE

2-12B California Forms of Pleading and Practice--Annotated § 12B.01

§ 12B.01 Scope of Chapter

This chapter discusses the considerations and procedures, and contains forms, that are applicable to the adoption of an unmarried minor. It includes an in depth discussion of independent (*see* Part II, Subpart B), stepparent (*see* Part II, Subpart C), and agency (*see* Part II, Subpart D) adoptions. It also presents a brief overview of intercountry, interstate, and Native American (Indian) adoptions (*see* Part II, Subpart E). Related forms are set forth in Part IV.

This chapter also briefly discusses the requirement of the consent of birth parents to an adoption (*see* Part II, Subpart B).

Legal Topics:

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

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§ 12B.02 Cross References

For discussion of the substantive law of termination of parental rights in cases in which parental consent cannot be obtained, see Ch. 12A, *Adoptions: Termination of Parental Rights* . Procedures for adult adoptions are discussed in Ch. 12C, *Adoptions: Adults and Married Minors* . Amendment and inspection of adoption records, and collateral attack on adoption decrees are discussed in Chs. 12D, *Adoptions: Amendment and Inspection of Records* and 12E, *Adoptions: Attack on Decree* , respectively. For a complete discussion of adoption procedures for Native American (Indian) children, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Ch. 176 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionDisclosuresAdoption RecordsFamily LawAdoptionProceduresGeneral OverviewFamily LawParental Duties & RightsConsentGeneral OverviewFamily LawParental Duties & RightsTermination of RightsGeneral Overview

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[Reserved]

§§ 12B.03[Reserved]

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§ 12B.10 Governing Law

General provisions that apply to all kinds of adoptions of unmarried minors, whether independent, stepparent, agency, and intercountry, are set forth in *Fam. Code §§ 8500 et seq.* and *8600 et seq.* Some procedures that apply to more than one, but not all, of the different kinds of adoptions are set forth in the provisions governing agency adoptions [*Fam. Code § 8700 et seq.*], independent adoptions [*Fam. Code § 8800 et seq.*], intercountry adoptions [*Fam. Code § 8900 et seq.*], and stepparent adoptions [*Fam. Code § 9000 et seq.*].

Legal Topics:

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

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§ 12B.11 Primary Distinctions Between Agency and Independent Adoptions

Most persons seeking to adopt a child must decide whether to pursue an agency adoption or an independent adoption. In an agency adoption, the California Department of Social Services (referred to hereafter as "the department") or a licensed adoption agency has obtained the legal custody of a child, usually through relinquishment by the parents (*see § 12B.170*). The department or agency then places the child with a prospective adoptive family [*see Fam. Code § 8506* (definition of "agency adoption")]. The parental rights of the natural parents are terminated by the agency, usually before placement [*see 22 Cal. Code Reg. §§ 35128, 35199*]. However, there is a waiting period before the adoption may be finalized during which the department or agency monitors the placement and retains the right to attempt to remove the child from the prospective adoptive home [*see Fam. Code § 8521*; *22 Cal. Code Reg. § 35203(c)*].

Agency waiting lists for "adoptable" children are long, and the wait is often a matter of years. For this reason, many prospective adoptive parents elect to pursue an independent adoption, usually at very substantial cost.

In an independent adoption, there is no agency involvement in the placement [*see Fam. Code § 8524* (definition of "independent adoption")]. A direct connection is often made between a birth mother or parents wishing to place a child for adoption and prospective adoptive parents. A third party, such as an attorney, also might make the connection [*see generally Fam. Code § 8800*]. Physical possession of the child is usually given to the adoptive family at birth, and a petition for adoption is filed shortly thereafter [*see Fam. Code § 8802*]. If a birth parent's consent is required, as is usually the case [*see Fam. Code § 8604*], the parent may revoke that consent within 30 days unless he or she signs a waiver of the right to revoke earlier [*see Fam. Code § 8814.5(b)* (providing that consent may not be revoked after waiver of right to revoke has been signed, or after 90 days, beginning on date consent was signed, whichever comes first)]. Within 180 days after receiving 50 percent of the fee, the department or county adoption agency must investigate the proposed adoption and, after the remaining balance of the fee is paid, submit to the court a full report of the facts disclosed by its inquiry with a recommendation regarding the granting of the petition [*Fam. Code § 8807(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAgency AdoptionFamily LawAdoptionProceduresPrivate Adoption

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§ 12B.12 Role of Adoption Agencies Generally

[1] Function

A number of private organizations and some county governments operate agencies that are licensed by the Department of Social Services to provide adoption services [*see Fam. Code § 8530*]. They are generally engaged in placing children in foster homes and facilitating adoption of children whose parents are deceased, have abandoned them, have been judicially deprived of their custody and control, or have relinquished them to the agency for adoption. Agencies not only place adoptable children with prospective parents but also take part, if necessary, in making a child eligible for adoption, assisting prospective parents and their attorneys with adoption proceedings, and reporting to the court on proposed adoptions. In addition, adoption agencies frequently give advice and assistance to birth parents who contemplate giving up their children for adoption.

[2] Kinds of Adoption Agencies

Adoption agencies are of two kinds: full-service and noncustodial. A full-service adoption agency is any licensed entity engaged in the business of providing adoption services that does all of the following: (1) assumes care, custody, and control of a child through relinquishment of the child to the agency or involuntary termination of parental rights to the child; (2) assesses the birth parents, prospective adoptive parents, or child; (3) places children for adoption; and (4) supervises adoptive placements. Private full-service adoption agencies must be organized and operated on a nonprofit basis [*Fam. Code § 8521*].

A noncustodial adoption agency is any licensed entity engaged in the business of providing adoption services that does all of the following: (1) assesses the prospective adoptive parents; (2) cooperatively matches children who are freed for adoption and are under the care, custody, and control of a licensed adoption agency with assessed and approved prospective adoptive applicants; and (3) cooperatively supervises adoptive placements with a full-service adoption agency, but does not disrupt a placement or remove a child from a placement. Private noncustodial adoption agencies must be organized and operated on a nonprofit basis [*Fam. Code § 8533*].

Additional requirements are imposed on agencies that provide intercountry adoption services [*see Fam. Code §§ 8521(b), 8533(b), 8900, 8900.5*; *see also § 12B.234[1]*].

[3] Regulation and General Limitations on Activities

Both private and public adoption agencies are licensed by the Department of Social Services under the Community Care Facilities Act [*see Health & Safety Code § 1500 et seq.* (Community Care Facilities Act)]. Adoption agencies may not accept money or other valuable consideration for placing children with prospective parents for adoption. Nor may an adoption agency pay money or give any other valuable consideration for the relinquishment of children [*see Penal Code §§ 181, 273*]. For further discussion of criminal conduct relating to adoptions, see *§ 12B.14*.

Legal Topics:

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

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§ 12B.13 Eligibility to Adopt

[1] In General

California's adoption statutes place almost no limitations on eligibility to adopt a minor child. Qualified by an age differential requirement, discussed *below*, any unmarried minor may be adopted by any adult person [*Fam. Code § 8600*; *see In re T.S. (2003) 113 Cal. App. 4th 1323, 1328, 7 Cal. Rptr. 3d 173* (older age of prospective adoptive parents is not legal impediment to adoption of child)].

In general, a person adopting a child must be at least 10 years older than the person adopted [*Fam. Code § 8601(a)*]. However, the court may approve an adoption without regard to age differential if the prospective adoptive parent is (1) a stepparent; or (2) a married sister, brother, aunt, uncle, or first cousin, if both spouses are petitioning to adopt. The court must be satisfied that the adoption is in the best interest of the parties and is in the public interest [*Fam. Code § 8601(b)*].

A prospective adoptive parent's older age is not a legal impediment to adoption, in the absence of evidence that the person's age and physical condition would make the person unable to adequately care for the child [*In re T.S. (2003) 113 Cal. App. 4th 1323, 7 Cal. Rptr. 3d 173* (grandparents, ages 58 and 61, were not precluded by their ages from adopting their grandchildren)].

A parent may not adopt his or her own child, and a proceeding to do so is a nullity. If, however, a parent is supplanted by adoption, he or she may thereafter reacquire by a subsequent adoption the status of parent with respect to the child [*see Marshall v. Marshall (1925) 196 Cal. 761, 765-767, 239 P. 36]* .

The citizenship of either party is immaterial [*see, e.g., Cabrillos v. Angel (9th Cir. 1922) 278 F. 174, 175* (adoption of citizen by alien)]. If the child is an alien, however, the question of whether he or she is free for adoption may depend on foreign law [*see Adoption of Backhaus (1962) 209 Cal. App. 2d 13, 16, 25 Cal. Rptr. 581]* , and whether the child may obtain an immigrant visa to lawfully enter the United States as the child of a citizenis governed by federal immigration

law. For further discussion, see *§ 12B.233*.

An unmarried person is eligible to adopt [*Department of Social Welfare v. Superior Court (1969) 1 Cal. 3d 1, 5, 81 Cal. Rptr. 345, 459 P.2d 897* ; *see § 12B.55[2]*]. In addition, there is no express statutory prohibition on two unmarried persons jointly petitioning to adopt the same child. An informal policy, however, was observed for a number of years in which the Department of Social Services would not recommend approval of a child's adoption by an unmarried couple. In late 1999, California's governor issued a statement indicating that this informal policy would no longer be observed, and thus, there is no current official barrier to such an adoption. This policy extends to couples of both the same and of the opposite sex.

[2] Adoption by Domestic Partners and Related Guardianship Proceedings

Commencing January 1, 2002, an unmarried person who is in a relationship recognized as a "domestic partnership," as defined in *Fam. Code § 297*, and who desires to adopt a child of his or her domestic partner may do so by using the procedures that apply to stepparent adoptions [*Fam. Code § 9000(b), (g)*; *see §§ 12B.130 -12B.145*]. The consent requirements applicable to stepparent adoptions, that is, consent by the birth parents (and the child if over 12 years of age), also apply to adoption by a domestic partner [*see § 12B.135*].

As of January 1, 2005, registered domestic partners have the same rights and obligations with respect to a child of either of them as spouses do. The rights and obligations of former or surviving registered domestic partners with respect to a child of either of them are also the same as those of former or surviving spouses [*Fam. Code § 297.5(d)*].

Because the above domestic partner provisions are largely (though not exclusively) directed at same gender couples, they appear to be an affirmation of a growing practice of permitting a same gender partner to adopt the children of his or her partner with the partner's consent.

So-called "second-parent adoptions" in cases of cohabitants (whether registered as domestic partners or not) have been authorized by case authority. These are independent adoptions in which a child born to (or legally adopted by) one cohabitant is adopted by his or her nonbiological or nonlegal second parent, with the consent of the legal parent and without changing this parent's rights and responsibilities. As a result of the adoption, the child has two legal parents who have equal legal status in terms of their relationship with the child [*Sharon S. v. Superior Court (2003) 31 Cal. 4th 417, 422 n.2, 437-438, 2 Cal. Rptr. 3d 699, 73 P.3d 554]* . In addition, pursuant to statute, a registered domestic partner may use the procedure for stepparent adoption [*see Fam. Code § 9000*].

By contrast, in an earlier case in which a nonmarital partner sought visitation with her former partner's biological child, whom she had helped raise, the court held that the nonmarital partner lacked standing to bring a proceeding under the Uniform Parentage Act to establish visitation rights because she was not related to the child [*West v. Superior Court (1997) 59 Cal. App. 4th 302, 306, 69 Cal. Rptr. 2d 160]* .

Courts have differed with respect to whether a nonmarital partner may bring a guardianship proceeding. One appellate court upheld the denial of a guardianship petition filed by a woman who was seeking visitation rights with the children of her former lesbian partner with whom she had previously lived. The court concluded that there is no statutory authority for a limited guardianship providing for visitation rights to a nonparent, and that the issue is one that must be addressed by the Legislature. It also concluded that although the petitioner exhibited characteristics of a de facto parent during her relationship with her former partner, absent any legislative or case authority granting a nonparent visitation rights over the objection of the biological parent and in the absence of any showing of detriment to the child, the court could not grant visitation rights [*Guardianship of Z.C.W. (1999) 71 Cal. App. 4th 524, 528, 84 Cal. Rptr. 2d 48]* . By contrast, another appellate court held that the plaintiff's status as a nonparent did not preclude her from filing a guardianship petition concerning a child who was born to the plaintiff's former domestic partner while they were living in the same household as a couple. However, as a nonparent, she was required to meet a heavy burden before her

petition may be granted, namely, demonstrating by clear and convincing evidence that parental custody is detrimental to the child. Because of the strong preference for parental custody and this heavy evidentiary burden, the court concluded that a guardianship petition is an intrusive and limited remedy not easily adapted to achieving the plaintiff's goal--to protect the child from psychological harm and to maintain her relationship with the child [*Guardianship of Olivia J. (2000) 84 Cal. App. 4th 1146, 1161-1162, 101 Cal. Rptr. 2d 364* (suggesting that legislative solution is needed)]. Thus, while guardianship remains a technical possibility, a heavy burden must be met to overcome parental objection. For further discussion of guardianship of the person, see *Ch. 280, Guardianship and Conservatorship: Appointment of Guardians, § 280.20* et seq.

In a case in which a woman donated her eggs so that her lesbian partner could bear a child through in vitro fertilization and in which they orally agreed that only the birth mother would be the child's legal parent unless and until there was a formal adoption, the court held that the first woman did not qualify as a parent under the Uniform Parentage Act (*Fam. Code §§ 7600-7730*). The court based its holding on the parties' intent, as evidenced by their agreement, and the fact that the woman (egg donor) had signed a donor consent form in which she waived any parental rights; thus, she did not have a right to custody of or visitation with the child over thebirth mother's objection [K.M. v. E.G. *(2004) 118 Cal. App. 4th 477, 489, 13 Cal. Rptr. 3d 136]* . The court rejected the woman's contention that she should be recognized as a legal coparent because she played a joint parental role with the birth mother in raising the child. It noted that the appellate courts have consistently held that the domestic partner of a child's natural mother does not qualify as a parent under the UPA despite the parental role the partner played in the child's life [K.M. v. E.G. *(2004) 118 Cal. App. 4th 477, 13 Cal. Rptr. 3d 136]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawCohabitationDomestic PartnersDuties & Rights

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§ 12B.14 Criminal and Other Prohibited Conduct Relating to Adoption

[1] Unlicensed Person Advertising or Providing Adoption Services

[a] Criminal Penalties

Any unlicensed person or organization that advertises in any periodical or newspaper, by radio, or other public medium, that the person or organization will place children for adoption, or accept, supply, provide, or obtain children for adoption is guilty of a misdemeanor. It is also a misdemeanor for an unlicensed person or organization to cause any advertisement to be published in, or by, any public medium soliciting, requesting, or asking for any child or children for adoption [*Fam. Code § 8609(a)*].

It is a misdemeanor for any person, other than a birth parent, to place any child for adoption if that person is not licensed to perform adoptive placement. The same prohibition applies to any unlicensed organization, association, or corporation [*Fam. Code § 8609(b)*].

To "place for adoption" means, in the case of an independent adoption, the selection of a prospective adoptive parent or parents for a child by the birth parent or parents and the completion of an adoptive placement agreement on a form prescribed by the Department of Social Services by the birth parents placing the child with prospective adoptive parents [*Fam. Code § 8539* (operative January 1, 1995)]. A "prospective adoptive parent" is a person who has filed or intends to file a petition to adopt a child [*see Fam. Code § 8600 et seq.*] who has been or who is to be placed in his or her physical care [*Fam. Code § 8542*]. For further discussion of adoptive placement in independent adoptions, see *§ 12B.90* et seq.

[b] Civil Regulation of Adoption Facilitators

On and after January 1, 1997, "adoption facilitators" are subject to the provisions of *Fam. Code § 8623 et seq.*, a violation of which is subject to a civil, monetary penalty [*see Fam. Code § 8633* (providing for penalty of $1,000 or amount of the contract fees, whichever is greater)]. "Adoption facilitators" are persons or organizations not licensed as California adoption agencies that either (1) *advertise* for the purpose of (a) soliciting partiesto an adoption, (b) locating

children for an adoption, or (c) acting as an intermediary to an adoption; or that (2) *charge a fee* or other valuable consideration for services rendered relating to an adoption [*see Fam. Code § 8623*]. Adoption facilitators must obtain local business licenses and be bonded [*Fam. Code § 8636*]. However, attorneys who provide these services are subject only to the "provisions of law regulating the practice of law" rather than those set out in *Fam. Code § 8623 et seq.* [*Fam. Code § 8637*].

The Family Code sets forth specific requirements for advertisements by adoption facilitators, including mandatory disclosures and certain limitations on content, typefaces, and television volume. It expressly prohibits adoption facilitators from implying in documents, advertising, or other communications that they are licensed adoption agencies [*see Fam. Code §§ 8625, 8626*]. Facilitators must also disclose in writing to the prospective adoptive parents all information that is provided to the facilitator by the birth parents concerning a particular child [*Fam. Code § 8628*].

Agreements with adoption facilitators must be in writing, signed by all parties represented by the facilitator, and be orally explained by the facilitator to birth parents and prospective adoptive parents. The Family Code establishes mandatory provisions to be included in the contracts, as well as a 72-hour revocation period. The contracts are subject to general contract law, but in actions to revoke or enforce them a prevailing party may recover reasonable attorney's fees and costs [*see Fam. Code §§ 8627, 8629, 8631, 8632, 8634*]. Any person aggrieved by violations of *Fam. Code § 8623 et seq.* may also bring a civil action for damages, rescission, or for any other civil or equitable remedy [*Fam. Code § 8638*].

Fees paid to an adoption facilitator, as well as fees or expenses paid by a facilitator to a third party, must be reported to a trial court (in a related adoption proceeding) in the adoption accounting report, as "adoption-related" expenses [*Fam. Code § 8630*].

[2] Paying or Receiving Consideration

It is a misdemeanor for any person or agency to pay or to offer to pay, or to receive, money or anything of value to a parent for a placement for adoption, or for consent to an adoption. However, fees paid for adoption services to the California Department of Social Services, to licensed adoption agencies, to adoption service providers, as defined by statute, or to attorneys for adoption legal services, are excluded from the prohibition [*Penal Code § 273(a)*]. In addition, it is not unlawful to pay or receive the maternity-connected medical or hospital expenses and necessary living expenses of the mother before and during confinement as an act of charity, as long as the payment is not contingent on the placement of the child for adoption, consent to adoption, or cooperation in the completion of an adoption [*Penal Code § 273(a), (b)*].

Similarly, it is a misdemeanor for any parent to obtain the foregoing financial benefits with the intent to receive them without completing anadoption, or without consenting to an adoption, of his or her child [*Penal Code § 273(c)*]. It is also a misdemeanor for any parent to obtain maternity-connected medical and living expenses from two or more prospective adoptive families or persons if either parent knowingly fails to disclose to those families or persons that there are other prospective adopting families or persons interested in adopting the child and knowingly accepts the financial benefits, if the aggregate amount exceeds the reasonable maternity-connected medical and living expenses of the mother [*Penal Code § 273(d)*].

A general penal statute prohibiting the sale and assumption of ownership over human beings establishes a term of imprisonment for conduct that may pertain to adoption [*see Penal Code § 181*]. A natural parent who demands money or other consideration in exchange for giving consent to adoption may be convicted of a felony under this statute [*People v. Daniel (1987) 195 Cal. App. 3d 623, 626-628, 241 Cal. Rptr. 3]* .

[3] Wrongful Concealment or Removal of Minor

Except in the case of a stepparent adoption, there are restrictions on concealing a child or removing a child from the county in which the proceeding to adopt the child is pending [*see Fam. Code §§ 8713, 8803, 8910*]. In an agency or intercountry adoption, the child may not be removed from the county by any person other than the petitioners for adoption for any period without the written consent of the agency to which the child has been relinquished for adoption [*Fam. Code § 8713(a)*] or that has placed the child for intercountry adoption [*Fam. Code § 8910(a)*].

A violation of any of these restrictions constitutes a violation of *Penal Code § 280* [*Fam. Code §§ 8713(d), 8803(c), 8910(d)*]. Neither these prohibitions under adoption law nor *Penal Code § 280* may be construed to render lawful any act that is unlawful under any other applicable provision of law [*Fam. Code §§ 8713(e), 8803(d), 8910(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewFamily LawAdoptionInvalid AdoptionsFamily LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresAgency Adoption

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§ 12B.15 Consent Requirements

[1] Birth Parents

A child's birth parents must both either agree to the adoption of their child, or there must be a ground, with regard to each, to dispense with the consent requirement or to terminate his or her parental rights with regard to the child [*see Fam. Code §§ 7660 et seq., 8604-8606, 8700 et seq.*]. These grounds are discussed in detail, and appropriate forms are provided, in Ch. 12A, *Adoptions: Termination of Parental Rights*. The procedures by which a birth parent may voluntarily consent to an independent adoption or stepparent adoption, or voluntarily relinquish a child for an agency adoption, are discussed in Subparts B, C, and D, respectively, *below.* A "birth parent" is a child's biological parent, or, in the case of achild previously adopted, the adoptive parent [*Fam. Code § 8512*]. For discussion of obtaining consent of the Department of Social Services or a delegated county adoption agency when the consent of a birth parent or parents is not necessary, see *§ 12B.101* [*see Fam. Code § 8816*].

[2] Child

A prospective adoptive child who is over the age of 12 years must consent to his or her adoption [*Fam. Code § 8602*]. For a form for the consent of the child, which is combined with consent of the adopting parents, see *§ 12B.301[1]*.

[3] Petitioner's Spouse

A married person who is not lawfully separated from his or her spouse may not adopt a child without the spouse's consent, provided that the spouse has the legal capacity to consent [*Fam. Code § 8603*]. "Lawful" denotes something that, in its substance, is sanctioned or permitted by law, as distinguished from conformity to positive rules of law [*Stauter v. Carithers (1921) 185 Cal. 160, 163, 196 P. 37]* . In that it is lawful for spouses to live apart from each other, regardless of their legal status, physical separation is probably all that is required, rather than a decree of legal separation [*see Fam. Code § 2310*] or a written separation agreement [*see Fam. Code § 3580*].

For a form for spousal consent, which is combined into a form for consent of the adopting parents and a child age 12 or

over, see *§ 12B.301[1]*.

[4] Child's Guardian

The consent of a child's legal guardian is not required for an adoption to be valid [*In re Santos (1921) 185 Cal. 127, 131, 195 P. 1055]* . A guardianship of the person terminates on the person's adoption [*Prob. Code § 1600(b)*; *see In re Santos (1921) 185 Cal. 127, 132, 195 P. 1055]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionConsentGeneral OverviewFamily LawAdoptionConsentBiological ParentsFamily LawAdoptionConsentChildrenFamily LawParental Duties & RightsTermination of RightsVoluntary Termination

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§ 12B.16 Financial Assistance and Tax Relief for Adoptive Parents

[1] Financial Assistance

An Adoption Assistance Program has been developed to facilitate the adoption of certain children who are otherwise unlikely to be adopted (generally, "special needs" children). The program involves governmental payments to the adopting parents for reasonable nonrecurring expenses incurred as a result of the adoption, and limited additional payments based on need and circumstances. For further discussion of this program, see *§ 12B.184* [*see Welf. & Inst. Code § 16115 et seq.*; *22 Cal. Code Reg. § 35325 et seq.*; *see also Fam. Code § 8545*].

[2] Tax Relief

There is a limited exclusion from income for monies received under an employer's adoption assistance program, as well as to provide a limited tax credit for adoption expenses. As amended by the Economic Growth and Tax Relief Reconciliation Act of 2001, this law excludes from the gross income of an employee amounts received from an employer's "adoption assistance program" for qualified adoption expenses up to $10,000 [*I.R.C. § 137*]. In addition, there is a federal tax credit of up to $10,000 for qualified adoption expenses, subject to particular rules that apply with respect to adoption of a child with "special needs" [*I.R.C. § 23*]. The provisions of the Economic Growth and Tax Relief Reconciliation Act of 2001 that established the above dollar limits are currently scheduled to expire December 31, 2010, in the absence of legislation that extends or otherwise alters that date. For further discussion of this program, see Chapter 12.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionGeneral OverviewFamily LawAdoptionExpensesTax LawFederal Taxpayer GroupsIndividualsCredits (IRC secs. 21-26, 30-33, 42, 48, 53)

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§ 12B.17 Relative Adoptions

[1] Purpose, Definitions, Applicability

Fam. Code § 8714.5 provides special procedures for "relative adoptions." A relative is any adult who is related to the child or the child's half-sibling by blood or affinity, including all relatives whose status is preceded by the words "step," "great," "great-great," or "grand," or the spouse of any of these persons, even if the marriage was terminated [*Fam. Code § 8714.5(h)*].

The legislative intent in providing for relative adoptions is to remove barriers to adoption by relatives of children in, or at risk of entering, the dependency system [*Fam. Code § 8714.5(a)(1)*]. This goal is to be achieved by empowering families, including extended families, to care for their own children whenever possible, by preserving existing family relationships and thereby causing the least disruption to the child and the family, and by recognizing the importance of sibling and half-sibling relationships [*Fam. Code § 8714.5(a)(2)*].

The statutory provisions for relative adoptions are placed in Chapter 2 of Part 2 of the Family Code, which governs agency adoptions of unmarried minors (*see* Pt. D). This placement might be viewed as reflecting a legislative intent to limit relative adoptions to agency adoptions, in which the child is in the legal custody of an agency either by parental relinquishment or as a result of an order of the juvenile court in a dependency matter. However, there is nothing textual in the statutes that would exclude a relative adoption that is not an agency adoption, for example, an independent adoption or a stepparent adoption [*see Fam. Code § 8714.5*].

[2] Petition, Hearing, and Decree

A relative who desires to adopt a child may file a petition for adoption in his or her county of residence or in the county in which the child wasfreed for adoption by the juvenile court [*Fam. Code § 8714.5(b)*]. For a relative adoption of a child who has been adjudged a dependent child of the juvenile court, the petition may be filed in the juvenile court [*Welf. & Inst. Code § 366.26(e)*]. If an agency has the care and custody of a child due to relinquishment or the child's being freed for adoption, only the relative with whom the child was placed can petition for adoption [*Fam. Code §*

8704(b)].

Any postadoption contact agreement (*see § 12B.18*) must be attached to and filed with the petition for adoption [*Fam. Code § 8714.5(d)*]. There is no express prohibition on entering into a postadoption contact agreement after the petition has been filed, but before the final hearing. However the investigating agency must be notified so that it can address the issue in its report [*see Fam. Code § 8715(c)*].

The adoption petition form required for use by the Judicial Council has been recast as an "Adoption Request," operative January 1, 2003. Statutory requirements for the caption and contents of a petition in a relative adoption remain as stated in *Fam. Code § 8714.5*, however. In construing those requirements, counsel should keep in mind that the revised form is styled in a manner that differs somewhat from that originally contemplated by the statute. The caption of the relative adoption petition must be in the name of the relative petitioner, as is usual for adoptions. However, the petition must state the child's name, sex, and date of birth [*Fam. Code § 8714.5(e)*]. In contrast, in nonrelative agency adoptions, the petition does not state the child's preadoption name [*see Fam. Code § 8714(d)*].

If the child is the subject of a guardianship petition, the adoption petition must so state. It must include the caption and docket number, or have attached a copy of the letters of guardianship or temporary guardianship. The petitioner must notify the court of any petition for adoption. The guardianship proceedings must be consolidated with the adoption proceedings, and the consolidated case must be heard and decided in the court in which the adoption is pending [*Fam. Code § 8714.5(f)*]. For a general discussion of guardianship of the person, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* .

The State Department of Social Services or licensed agency, in its report on the adoption, must address whether the postadoption contact agreement was entered into voluntarily, and whether it is in the best interest of the child [*Fam. Code § 8715(c)*]. At the hearing on the petition, the court must determine whether the agreement is in the best interest of the child [*Fam. Code § 8616.5(b)(1)*].

The order of adoption may contain the name the child had before the adoption if requested by the adopting relative, or by the child if 12 years or older [*Fam. Code § 8714.5(g)*]. Also, the certificate of adoption may contain the name of the child's birth parents [*Fam. Code § 8614*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresIntrafamily AdoptionFamily LawAdoptionProceduresStepparent Adoption

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§ 12B.18 Postadoption Contact ("Contact After Adoption") Agreements

[1] Purpose, Definitions, and Applicability

Fam. Code § 8616.5 provides for postadoption contact agreements (also known as "contact after adoption agreements," and formerly known as kinship adoption agreements). A postadoption contact agreement is a written agreement to permit "an achievable level of continuing contact" between the birth relatives, including the birth parent or parents, and the child, when contact is beneficial to the child and the agreement is voluntarily entered into. A postadoption contact agreement is potentially available to adoptive parents who are either relatives or nonrelatives of the child [*see Fam. Code § 8616.5(a)*; *see Welf. & Inst. Code § 366.26(a)* (*Fam. Code § 8616.5* applies and is available to all dependent children meeting its requirements if postadoption contact agreement has been entered into voluntarily)]. In the discussion that follows, these agreements are referred to as "postadoption contact agreements," in keeping with the current statutory language, but counsel should note that both the applicable rule of court and the current Judicial Council forms now refer to such agreements as "contact after adoption agreements" [*See Cal. Rules of Ct., Rule 5.400*; Cal. Judicial Council Form Adopt-310 et seq.].

The statutory provisions for postadoption agreements are placed in Chapter 2 of Part 2 of the Family Code, which governs agency adoptions of unmarried minors (*see* Pt. D). This placement might be viewed as reflecting a legislative intent to limit postadoption contact agreements to agency adoptions, in which the child is in the legal custody of an agency either by parental relinquishment or as a result of an order of the juvenile court in a dependency matter. However, there is nothing textual in the statutes that would exclude a postadoption contact agreement in an adoption that is not an agency adoption, for example, an independent adoption or a stepparent adoption [*see Fam. Code § 8616.5*]. In fact, *Fam. Code § 8616.5(b)(1)* provides that "[n]othing in the adoption laws of this state shall be construed to prevent the adopting parent or parents, the birth relatives, including the birth parent or parents, and the child from voluntarily entering into a written agreement to permit continuing contact between the birth relatives, including the birth parent or parents, and the child if the agreement is found by the court to have been entered into voluntarily and to be in the best interests of the child at the time the adoption petition is granted."

[2] Contents of Agreement

Unless a child has an existing relationship with a birth relative, a postadoption contact agreement consists only of the sharing of information about the child [*Fam. Code § 8616.5(b)(3)*]. This ensures that the child and the adoptive parents are not subjected to continuing contact with birth relatives with whom the child had no relationship at the time of adoption.In all other cases, a postadoption contact agreement is limited to, but need not include all of, the following provisions [*Fam. Code § 8616.5(b)(2)*]:

1. For visitation between the child and a birth parent or parents and other birth relatives, including siblings, and the child's Indian tribe if the case is governed by the Indian Child Welfare Act (ICWA) (*25 U.S.C. § 1901 et seq.*);

2. For future contact between a birth parent and other birth relatives, including siblings, and the child or adoptive parents, and in cases governed by the ICWA, the child's Indian tribe; and

3. For the sharing of information about the child in the future.

A postadoption contact agreement must contain, in bold type, the following warnings [*Fam. Code § 8616.5(e)*]:

1. After the adoption petition has been granted by the court, the adoption cannot be set aside due to the failure of an adopting parent, a birth parent, a birth relative, or the child to follow the terms of this agreement or a later change to this agreement (*see* [5], *below*).

2. A disagreement between the parties or litigation brought to enforce or modify the agreement shall not affect the validity of the adoption and shall not serve as a basis for orders affecting the custody of the child.

3. A court will not act on a petition to change or enforce this agreement unless the petitioner has participated, or attempted to participate, in good faith in mediation or other appropriate dispute resolution proceedings to resolve the dispute.

[3] Child as Party; Agreement Voluntary; Best Interests Finding

The child to be adopted is considered a party to the postadoption contact agreement. The child must consent to the agreement if 12 years of age or older, unless the court finds by a preponderance of the evidence that the agreement, as written, is in the best interest of the child. If dependency proceedings are pending, the child must be represented by an attorney for purposes of consent to the postadoption contact agreement [*Fam. Code § 8616.5(d)*]. The agreement must be found by the court to have been entered into voluntarily and to be in the best interests of the child at the time the adoption petition is granted [*Fam. Code § 8616.5(b)(1)*].

[4] Petition and Hearing

Any postadoption contact agreement must be attached to and filed with the petition for adoption [*Fam. Code §§ 8714, 8714.5(d), 8802(a)(3), 8912(e), 9000(f)*]. There is no express prohibition on entering into a postadoption contact agreement after the petition has been filed, but before the final hearing. However, when the child has been adjudged to be a dependentor has been freed for adoption, the investigating agency must be notified so that it can address the issue in its report [*see Fam. Code § 8715*].

The State Department of Social Services or licensed agency, in its report on the adoption, must address whether the postadoption contact agreement was entered into voluntarily, and whether it is in the best interest of the child [*Fam. Code § 8715*]. At the hearing on the petition, the court must determine whether the agreement is in the best interest of

the child [*Fam. Code § 8616.5(b)(1)*].

[5] Enforcement of Agreement; Effect of Breach on Validity of Adoption

Enforcement of a postadoption contact agreement is under the continuing jurisdiction of the court that granted the adoption. If the child was a dependent child of the juvenile court, juvenile court jurisdiction is terminated [*Fam. Code § 8616.5(f)*].

The court may not order compliance with the agreement absent a finding that the party seeking enforcement or modification participated, or attempted to participate, in good faith in mediation or other appropriate dispute resolution proceedings regarding the conflict before filing of the enforcement action. The court must also find that enforcement is in the best interests of the child. Documentary evidence or offers of proof may serve as the basis for the court's decision, and no testimony or evidentiary hearing is required. The court may not order further investigation or evaluation by any public or private agency or individual unless it finds by clear and convincing evidence that the best interest of the child may be protected or advanced only by such inquiry, and that the inquiry will not disturb the stability of the child's home to the detriment of the child [*Fam. Code § 8616.5(f)*]; the court may not award money damages as a result of the filing of a civil action for enforcement [*Fam. Code § 8616.5(g)*]. Nor may it set aside a decree of adoption, rescind a relinquishment, or modify an order to terminate parental rights or any other prior order due to the failure of any party to comply with the postadoption contact agreement, as originally written or modified [*Fam. Code § 8616.5(k)*; *see Cal. Rules of Ct., Rule 5.400(k)*].

Before issuing an order of adoption in a proceeding involving an Indian child, the court may, on petition of the birth parent, birth relative, or Indian tribe, order the parties to engage in family mediation services for the purpose of reaching a postadoption contact agreement if the prospective adoptive parent fails to negotiate in good faith to enter into an agreement, after having agreed to enter into negotiations; the parties' failure to reach an agreement is not, in and of itself, proof of bad faith [*Fam. Code § 8616.5(k)(1)*]. Before issuing the order of adoption, if the parties fail to negotiate in good faith to enter into a postadoption contract agreement during the negotiations, described above, the court may modify prior orders or issue new orders as necessary to ensure the best interest of the Indian child is met, including, but not limited to, requiring parties to engage in further family mediation services for the purpose of reaching a postadoption contact agreement, initiating guardianship proceedings in place of adoption, or authorizing a change of adoptive placement for the child [*Fam. Code § 8616.5(k)(2)*].

[6] Modification or Termination of Agreement

A postadoption contact agreement may be modified or terminated if all parties, including the child if 12 years or older at the time of the requested modification or termination, have signed a modified contact agreement, or signed a Judicial Council answer form (*see § 12B.322*) indicating agreement with a request to modify or terminate, and the agreement or form is filed with the court that granted the petition of adoption [*Fam. Code § 8616.5(h)(1)*; *Cal. Rules of Ct. Rule 5.400(i)*]. The consent of the child may be dispensed with if the court finds by a preponderance of the evidencethat the agreement, as written, is in the best interest of the child [*Fam. Code § 8616.5(d)*]. It is not clear if a child who was formerly a dependent child of the juvenile court must be represented by counsel for purposes of a consent to a modification of the postadoption contact agreement [*see Fam. Code § 8616.5(d)*]. However, it appears that counsel is not necessarily required to be appointed for a child who was formerly a dependent because *Cal. Rules of Ct., Rule 5.400(e)* indicates that an attorney who represents a dependent child for purposes of participation in and consent to the agreement, "is required to represent the child only until the adoption is decreed and dependency terminated."

A postadoption contact agreement may also be modified or terminated if the court finds all of the following [*Fam. Code § 8616.5(h)(2)*]:

1. The modification or termination is necessary to serve the best interests of the child;

2. There has been a change of circumstances since the original agreement was executed and approved by the court; and

3. The party seeking enforcement or modification participated, or attempted to participate, in good faith in mediation or other appropriate dispute resolution proceedings regarding the conflict before seeking court approval of the proposed modification or termination.

Documentary evidence or offers of proof may serve as the basis for the court's decision. No testimony or evidentiary hearing is required. The court may not order further investigation or evaluation by any public or private agency or individual unless it finds by clear and convincing evidence that the best interests of the child may be protected or advanced only by such inquiry, and that the inquiry will not disturb the stability of the child's home to the detriment of the child [*Fam. Code § 8616.5(h)*].

[7] Costs and Fees; Judicial Council Forms

All costs and fees of mediation or other appropriate dispute resolution proceedings must be borne by each party, excluding the child. A party other than the child who is found by the court to have failed to comply without good cause with an existing post adoption contact agreement must bear all the costs and fees of litigation. Otherwise, costs and fees of litigation are to be borne by the party filing the action to modify or enforce the agreement [*Fam. Code § 8616.5(i)*]. Under *Cal. Rules of Ct., Rule 5.400(j)*, the fee for filing the actual petition to enforce, modify or terminate the agreement must not exceed the fee for the filing of an adoption petition.

Mandatory Judicial Council forms for use in enforcing, modifying, or terminating a postadoption contact agreement are set forth in *§ 12B.321 -12B.323*. A mandatory Judicial Council Form postadoption contactagreement is *set forth in § 12B.320*. The Judicial Council forms now refer to such agreements as "contact after adoption" agreements.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionDisclosuresAdoption RecordsFamily LawAdoptionProceduresGeneral Overview

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[Reserved]

§§ 12B.19[Reserved]

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§ 12B.30 Jurisdiction and Venue

[1] General Jurisdiction, Venue, and Filing Provisions

Subject matter jurisdiction over adoptions is in the superior court [*Fam. Code § 200*], and venue generally is in the county in which the petitioner resides, based on the several statutes that permit a petitioner to file an adoption petition in the county of the petitioner's residence [*Fam. Code §§ 8714(a)* (agency adoptions), 8714.5(b) (relative adoptions), 8802(a) (independent adoptions), 8912(a) (intercountry adoptions), 9000(a) (stepparent adoptions)].

However, a number of other statutory provisions also address the place of filing. *Fam. Code § 9211* permits an adoption petition to be filed in the county in which any of the following applies: (a) a petitioner lives, (b) the minor child lives, or (c) an office of an agency that placed the minor is located. This provision applies to interstate adoptions if the prospective adoptive parent(s) reside outside of California [*Fam. Code § 9212(a)*]. In addition, if the petitioner is not a California resident, an adoption petition may be filed in the county in which the birth parent(s) resided when a relinquishment of parental rights for the purpose of adoption was signed (agency adoptions); or in the county in which the placing birth parent(s) resided when the adoption placement agreement was signed, or the county in which the placing birth parent(s) resided when the petition was filed (independent adoptions) [*Fam. Code §§ 8714(a), 8802(a)(1)*].

A petition to adopt a child who was adjudged a dependent child of the juvenile court and thereafter freed for an agency adoption by the juvenile court may be filed in either the county where the prospective adoptive parents reside or the county where the child was freed for adoption [*Fam. Code §§ 8714(a), 8714.5(b)*]. The petition may be filed in the juvenile court, in which case, it must be heard in the juvenile court [*Welf. & Inst. Code § 366.26(e)*].

Adoption proceedings have been viewed as quasi in rem, requiring, as an element of subject matter jurisdiction, that either the adopted person or the adopting parents be domiciled in California [*Estate of Smith (1948) 86 Cal. App. 2d 456, 468, 195 P.2d 842* ; *see Walter v. August (1960) 186 Cal. App. 2d 395, 397-398, 8 Cal. Rptr. 778]* . However, jurisdiction once acquired is not lost if one of the adopting parents, through death or dissolution of the marriage, ceases to be a petitioner [*Adoption of Barnett (1960) 54 Cal. 2d 370, 376-377, 6 Cal. Rptr. 562, 354 P.2d 18* ; *but see*

Adoption of R.R.R. (1971) 18 Cal. App. 3d 973, 985 n.3, 96 Cal. Rptr. 308 (suggesting that natural parents would have to modify their consent to allow adoption by one parent)].

The first superior court to exercise jurisdiction over the matter of the custody of a minor child retains exclusive jurisdiction over the subject matter of the child's custody, and another superior court is precluded from exercising jurisdiction to terminate a biological parent's parental rights to the child and allow the child to be adopted by a stepparent [*Adoption of Lauren D. (2007) 156 Cal. App. 4th 499, 506, 67 Cal. Rptr. 3d 325]* . This does not mean, however, that an interested party is forever foreclosed from proceeding in any court but the one in which jurisdiction first attached. If, for example, a change of residence makes it desirable that a court in another county have jurisdiction to modify the order, this objective may be attained by a change of venue [*Adoption of Lauren D. (2007) 156 Cal. App. 4th 499, 506, 67 Cal. Rptr. 3d 325]* .

[2] Specific Jurisdictional Requirements; Other State Proceedings

Under *Fam. Code § 9210*, a California court has jurisdiction over a proceeding for the adoption of a minor if any of the following applies:

- Immediately before commencement of the proceeding, the minor lived in California with a parent, a guardian, a prospective adoptive parent, or another person acting as a parent, for at least six consecutive months, excluding periods of temporary absence or, in the case of a minor under six months of age, lived in California with any of those individuals from soon after birth and substantial evidence is available in California concerning the minor's present or future care.

- Immediately before commencement of the proceeding, the prospective adoptive parent lived in California for at least six consecutive months, excluding periods of temporary absence, and substantial evidence is available in California concerning the minor's present or future care.

- The agency that placed the minor for adoption is located in California, and (1) the minor and his or her parents, or the minor and the prospective adoptive parent, have a significant connection with California, and (2) substantial evidence is available in California concerning the minor's present and future care.

- The minor and the prospective adoptive parent are physically present in California, and the minor has been abandoned or it is necessary in an emergency to protect the minor because he or she has been subjected to or threatened with mistreatment or abuse or is otherwise neglected.

- It appears that no other state would have jurisdiction under requirements substantially in accordance with the foregoing, or another state has declined to exercise jurisdiction on the ground that California is the more appropriate forum to hear a petition for adoption of the minor and substantial evidence is available in California concerning the minor's present and future care.

However, a California court may not exercise jurisdiction over an adoption proceeding if, at the time the adoption petition is filed, a proceeding concerning the custody or adoption of the minor is pending in a court of another state exercising jurisdiction substantially in conformity with California law, unless that court stays the proceeding because California is a more appropriate forum or for another reason [*Fam. Code § 9210(b)*]. If a court of another state has issued a decree or order concerning the custody of a minor who may be the subject of an adoption proceeding in California, a California court may not exercise jurisdiction over the adoption proceeding unless: (1) the requirements for modifying an order of a court of another state are met, the court of another state does not have jurisdiction over an adoption proceeding substantially in conformity with the bases for jurisdiction described above, or the court of another state has declined to assume jurisdiction over proceedings for adoption; and (2) the California court has jurisdiction

over the adoption proceeding, as described above [*Fam. Code § 9210(c)*]. "A court of another state" includes, in the case of an Indian child, a tribal court that has and exercises jurisdiction over a custody proceeding involving the child [*Fam. Code § 9210(d)*]. The above provisions apply to interstate adoptions if the prospective adoptive parents reside outside California [*Fam. Code § 9212(a)*].

[3] UCCJEA and PKPA

Traditionally, the subject matter jurisdiction requirements of the (now former) Uniform Child Custody Jurisdiction Act [*see* former *Fam. Code § 3400 et seq.*], and the federal Parental Kidnapping Prevention Act (*28 U.S.C. § 1738A*) were held applicable to adoption proceedings [*Adoption of Zachariah K. (1992) 6 Cal. App. 4th 1025, 1032-1034, 8 Cal. Rptr. 2d 423* ; *Souza v. Superior Court (1987) 193 Cal. App. 3d 1304, 1309, 238 Cal. Rptr. 892]* . However, California adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA--*Fam. Code § 3400 et seq.*), operative January 1, 2000, which expressly excludes "an adoption proceeding or a proceeding pertaining to authorization for emergency medical care for a child" from its provisions [*Fam. Code § 3403*]. The PKPA may still apply, however, because of its general preemptive effect over custody proceedings, but the extent of its application to adoption proceedings is unclear, given that the UCCJEA is generally considered to have more fully harmonized the former UCCJA with the PKPA. For a general discussion of these statutes, see Ch. 394, *Parent and Child* .

Nevertheless, because California has enacted *Fam. Code § 9210 et seq.*, part of the Uniform Adoption Act, in apparent response to the lack of jurisdictional application of the UCCJEA to adoptions, the issue of potential PKPA applicability may now be of lesser importance, given that Section 9210 sets forth specific jurisdictional requirements to resolve interstate issues that affect adoption.

Other special jurisdiction-related issues may arise with respect to interstate, intercountry, and Native American (Indian) adoptions. For a general discussion of these adoptions, see *§ 12B.230* et seq.

[4] Effect of Failure to Meet Jurisdictional Requirements

It is said that all statutory requirements for an adoption are jurisdictional, and unless they are met, the proceeding for adoption is insufficient, the court is without power to approve it, and there is no lawful adoption [*Estate of Sharon (1918) 179 Cal. 447, 454, 177 P. 283* ; *In re Brittany H. (1988) 198 Cal. App. 3d 533, 553, 243 Cal. Rptr. 763]* . Thus, for example, the failure to obtain a required consent is a jurisdictional defect [*Adoption of Barnett (1960) 54 Cal. 2d 370, 377, 6 Cal. Rptr. 562, 354 P.2d 18* ; *In re Brittany H. (1988) 198 Cal. App. 3d 533, 553, 243 Cal. Rptr. 763* ; *see § 12B.15[1]*; *see also* Ch. 12A, *Adoptions: Termination of Parental Rights*].

[5] Personal Jurisdiction and Notice

Personal jurisdiction requirements in adoptions are not clearly established in that there are no defendants on whom summons must be served. However, it has been said that because personal rights are involved, it is necessary to secure personal jurisdiction over the birth parents in order to terminate these rights (assuming that these rights were not validly terminated in a prior proceeding) [*see Estate of Smith (1948) 86 Cal. App. 2d 456, 468, 195 P.2d 842* ; *see also § 12B.33*; Ch. 12A, *Adoptions: Termination of Parental Rights*]. Thus, the failure to give a required notice to a birth parent is a jurisdictional defect [*see Estate of Hampton (1942) 55 Cal. App. 2d 543, 562-563, 567, 131 P.2d 565]* . Presumably, compliance with the statutory notice or citation requirements is sufficient to obtain this personal jurisdiction [*see Fam. Code §§ 8604, 8605, 7660 et seq.*, discussed in Ch. 12A, *Adoptions: Termination of Parental Rights*].

For a discussion of the effect of lack of jurisdiction on the validity of an adoption decree, see Chapter 12E, *Adoptions: Attack on Decree* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureVenueIndividual DefendantsFamily LawAdoptionProceduresGeneral OverviewFamily LawChild CustodyEnforcementUniform Child Custody Jurisdiction & Enforcement Act

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§ 12B.31 Filing Fees

Adoption is among the proceedings for which the clerk may not charge a fee for service rendered [*see Gov. Code § 26857*]. There is a fee that must be paid at the time of filing that is forwarded to the Registrar of Vital Statistics to defray the costs of preparing and maintaining official records [*see Health & Safety Code § 103730* (specifying amount of fee)]. Except in stepparent adoptions, there are fees payable directly to agencies to compensate for their services [*see Fam. Code §§ 8716, 8810, 8907*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsFiling FeesFamily LawAdoptionProceduresGeneral Overview

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§ 12B.32 Notice of Pendency of Proceeding to Department of Social Services

Generally, when a petition for an adoption of an unmarried minor is filed, the court clerk must immediately give written notice to the Department of Social Services, at Sacramento, of the pendency of the proceeding and of any subsequent action taken [*Fam. Code §§ 8714(b), 8714.5(c), 8802(a),*8912(a)]. For a copy of the department's form for this notice, see *§ 12B.310[1]*. There is no such notice requirement in the case of a stepparent adoption [*see Fam. Code § 9000 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsRequirementsCivil ProceduresPleading & PracticeService of ProcessGeneral OverviewFamily LawAdoptionProceduresGeneral OverviewGovernmentsCourtsClerks of Court

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§ 12B.33 Notice to Birth Parents

Unless a birth parent has voluntarily consented to the adoption of his or her child or has voluntarily relinquished the child to an agency for adoptive placement, he or she must be given notice of adoption proceedings with regard to the child [*see Fam. Code § 7660 et seq.*]. This notice is both a jurisdictional requirement [*see Estate of Hampton (1942) 55 Cal. App. 2d 543, 562-563, 567, 131 P.2d 565]* , and is compelled by state and federal due process requirements [*see Armstrong v. Manzo (1965) 380 U.S. 545, 550, 85 S. Ct. 1187, 14 L. Ed. 2d 62* ; *Estate of O'Dea (1973) 29 Cal. App. 3d 759, 773, 105 Cal. Rptr. 756]* .

The manner of giving notice to birth parents is discussed, and appropriate forms are provided, in Ch. 12A, *Adoptions: Termination of Parental Rights*. Procedures for obtaining voluntary consent to an independent or stepparent adoption are discussed in Subparts B and C, respectively, *below.* Procedures for obtaining the voluntary relinquishment of a child to an agency for adoptive placement are discussed in Subpart D, *below.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewFamily LawAdoptionConsentBiological ParentsFamily LawParental Duties & RightsTermination of RightsGeneral Overview

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§ 12B.34 Report of Birth Parents' and Child's Medical History

[1] Requirement

Except in stepparent adoptions, the adoption agency to which a child has been relinquished, or the agency that is investigating an independent adoption, must obtain a written medical report on the child's medical background and, if available and as far as ascertainable, the medical background of the child's biological parents. The report must contain all known diagnostic information, including current medical reports on the child, psychological evaluations, and scholastic information, as well as all known information regarding the child's developmental history and family life [*Fam. Code §§ 8706, 8817*; *22 Cal. Code Reg. § 35094*; *cf., Fam. Code, § 8628*]. Note, in addition, that birth parents are now permitted to provide a blood sample, which will be stored by a laboratory under contract with the State Department of Health Services for 30 years after the adoption, for the purpose of providing blood samples on which DNA testing can later be done at the request of the adoptive parents or the adopted child [*Fam. Code §§ 8706(c), 8817(d), 8909(c)*].

In the case of an agency or intercountry adoption, the report must be submitted to the prospective adoptive parents, who must give written acknowledgment of receipt, before the child may be placed for adoption [*Fam. Code §§ 8706(a), 8909(a)*]. In an independent adoption, the report must be submitted to, and receipt acknowledged by, the prospectiveadoptive parents as part of the agency investigation [*Fam. Code § 8817(c)*]. In practice, the adoption service provider will have collected and transmitted this information; the adoption placement agreement signed by the birth parents and the prospective adoptive parents at the time of placement includes a required statement that the adoptive parents have been informed of the basic health and social history of the birth parents [*Fam. Code § 8801.3(c)(4)*].

The Department of Social Services is required by statute to adopt regulations specifying the form and content of the medical report. In addition to any other material that may be required by the department, the form must include inquiries designed to elicit information on any illness, disease, or defect of a genetic or hereditary nature. All licensed adoption agencies must cooperate with and assist the department in devising a plan that will effectuate the effective and discreet transmission to adopted persons or prospective adoptive parents of pertinent medical information reported to the department or its delegated agency, on the request of the person reporting the medical information [*Fam. Code §*

8608].

[2] Agency Liability for Nondisclosure of Medical Information

An adoption agency is not the guarantor of an infant's future health and is not liable for mere negligence in providing information regarding the health of a prospective adopted person [*Michael J. v. Los Angeles County Dept. of Adoptions (1988) 201 Cal. App. 3d 859, 874-875, 247 Cal. Rptr. 504* ; *Richard P.v. Vista Del Mar Child Care Service (1980) 106 Cal. App. 3d 860, 866-867, 165 Cal. Rptr. 370]* . However, the failure to disclose a material fact within the agency's knowledge may give rise to a cause of action based on intentional misrepresentation or fraudulent concealment. The agency may be liable if it fails to make a good-faith full disclosure of known material facts concerning existing or past conditions of the child's health [*Michael J. v. Los Angeles County Dept. of Adoptions (1988) 201 Cal. App. 3d 859, 874-875, 247 Cal. Rptr. 504]* . Neither provisions for statutory immunity [*see Gov. Code §§ 818.8, 822.2*] nor public policy considerations preclude such a tort action in a proper case. However, it must be shown that the adopting parents relied on the incomplete medical record rather than seeking their own evaluation of the child [*Richard P. v. Vista Del Mar Child Care Service (1980) 106 Cal. App. 3d 860, 866, 165 Cal. Rptr. 370]* .

For discussion of setting aside an adoption on the ground of a preexisting developmental disability or mental illness [*see Fam. Code § 9100*], see Ch. 12E, *Adoptions: Attack on Decree* .

Legal Topics:

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

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§ 12B.35 Petitioner's Report of Expenditures

Except in stepparent adoptions in which one birth or adoptive parent retains custody of the child, the petitioner for adoption must file with thecourt a full accounting report of all disbursements of anything of value made, or agreed to be made, by the petitioner or on the petitioner's behalf in connection with the following [*Fam. Code § 8610*]:

(1) The birth of the child;

(2) Placement of the child with the petitioners;

(3) Any medical or hospital care received by the child's birth mother or by the child in connection with his or her birth;

(4) Any other expenses of either birth parent of the child; and

(5) Any other expenses of the adoption, including, for example, fees paid to any "adoption facilitator" and any fees or expenses the adoption facilitator paid to any third party [*Fam. Code § 8630*; *see § 12B.14[1][b]*].

For a form of adopting parents' adoption expenses, see *§ 12B.311[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionGeneral OverviewFamily LawAdoptionExpenses

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§ 12B.36 Court Approval to Remove Child From County

[1] When Required

Court approval is sometimes required before a child who is the subject of an adoption proceeding (except a stepparent adoption) may be removed from the county in which the adoption is pending [*see Fam. Code §§ 8713(b), 8803(a), 8910(b)*; *see also § 12B.14[4]*].

Court approval is not required if the child is to be absent for a period of not more than 30 days, provided that a notice of recommendation of denial of petition has not been personally served on the petitioners, or the court has not issued an order prohibiting the removal of the child from the county pending consideration of (1) the suitability of the petitioners, (2) the care provided the child, or (3) the availability of the legally required parental or agency consents to adoption [*Fam. Code §§ 8713(c)(1), 8803(b)(1), 8910(c)(1)*]. Court approval is also not required if the child has been returned to and remains in the custody and control or his or her birth parent or parents [*Fam. Code §§ 8713(c)(2), 8803(b)(2), 8910(c)(2)*].

Court approval is not required in an agency adoption if written consent for the removal of the child is obtained from the Department of Social Services or from the agency responsible for the child [*Fam. Code § 8713(c)(3)*]. It is not required in an intercountry adoption if written consent is obtained from the responsible agency [*Fam. Code § 8910(c)(3)*]. In an independent adoption, there is no similar statutory exception allowing removal by obtaining the consent of the investigating agency [*see Fam. Code § 8803(a)*].

[2] Procedural Requirements

If it is necessary to obtain the court's approval to remove the child from the county, the petitioner must first give written notice of intent to obtainpermission to the Department of Social Services (except in an intercountry adoption), or to the licensed adoption agency responsible for child, or to the delegated agency conducting the investigation of an independent adoption [*see § 12B.312[1]*]. On proof of giving that notice, permission may be granted by the court if, within 15 days from and after the date of giving notice, no objections have been filed with the court by the department

or agency [*Fam. Code §§ 8713(b)(2), 8803(a)(2), 8910(b)(2)*].

If objections are filed, on the request of the petitioners, the court must immediately set the matter for hearing. The court must then give reasonable notice of the hearing to the objector, the petitioners, and any party requesting permission for the child's removal (if other than the petitioners). Notice must be by certified mail, return receipt requested, to the address of each as shown in the records of the adoption proceeding. On a finding that the objections are without good cause, the court may grant the requested permission for removal, subject to any limitations that appear to be in the best interests of the child [*Fam. Code §§ 8713(b)(2), 8803(a)(2), 8910(b)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12B.37 Consolidation With Guardianship Proceedings

If the child to be adopted is also the subject of any guardianship proceeding, the two matters must be consolidated, and the consolidated case must be heard and decided in the court in which the adoption is pending. The adoption petition must either include the caption and docket number of the guardianship petition or have attached a copy of the letters of guardianship or temporary guardianship. The petitioners for adoption must notify the court of any petition for guardianship filed subsequent to the adoption petition [*Fam. Code §§ 8714(e), 8714.5(f), 8802(d), 8912(c), 9000(d)*].

In general, adoption is to be preferred to guardianship. However, guardianship may be considered for a child who has been relinquished to an agency for adoption, but who is not likely to be placed with an adoptive family [*San Diego County Dep't of Public Welfare v. Superior Court of San Diego County (1972) 7 Cal. 3d 1, 11-14, 101 Cal. Rptr. 541, 496 P.2d 453* ; *Guardianship of Henwood (1958) 49 Cal. 2d 639, 644-646, 320 P.2d 1]* .

For discussion of guardianship proceedings generally, see *Ch. 280, Guardianship and Conservatorship: Appointment of Guardians, §§ 280.60 -280.70*. For discussion of procedures for consolidating actions, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

Legal Topics:

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

§§ 12B.38[Reserved]

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§ 12B.50 Privacy

All superior court hearings in adoption proceedings must be held in private. The court must exclude all persons except the officers of the court, the parties, their witnesses, counsel, and representatives of the agencies present to perform their official duties [*Fam. Code § 8611*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-12B California Forms of Pleading and Practice--Annotated § 12B.51

§ 12B.51 Examination of Parties

With certain exceptions discussed in *§ 12B.52*, the person or persons desiring to adopt a child, and the child proposed to be adopted, must appear before the court at the hearing on the adoption petition [*see Fam. Code §§ 8718, 8823, 8913, 9007*]. The court must examine all persons appearing before it. The examination of each person must be conducted separately but in the physical presence of each other person or persons unless the court, in its discretion, orders otherwise [*Fam. Code § 8612(a)*; *see In re Williams (1894) 102 Cal. 70, 80, 36 P. 407* (statutory requirement for separate examination of parties as directory, not mandatory)]. If the child is not over the age of 12 years and the child's consent is, therefore, not necessary [*see Fam. Code § 8602*, discussed in *§ 12B.15[2]*], the court is not required to examine the child [*In re Johnson (1893) 98 Cal. 531, 538-539, 33 P. 460* ; *In re Fahlman (1927) 84 Cal. App. 248, 252, 257 P. 893]* .

The court may, in its discretion, cause an examination of a prospective adoptive parent, other interested party, or witness to be made on deposition, as it deems necessary. The deposition must be taken on commission under the Code of Civil Procedure, and its expense must be borne by the petitioners [*Fam. Code § 8613(c)*]. Subject to the usual limitations on the reach of a subpoena [*see Code Civ. Proc. § 1989*], the court may require the appearance of any person whose testimony would assist the court in determining whether the petition should be granted [*see In re Adoption of Bewley (1914) 167 Cal. 8, 10, 138 P. 689]* .

For general discussion of procedures relating to depositions, see Ch. 190-200, *Discovery* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12B.52 Appearance by Counsel

If it is impossible or impracticable for either prospective adoptive parent to make an appearance in person, and these circumstances are established by clear and convincing documentary evidence, the court has the discretion to waive the personal appearance of the prospective adoptive parent. In such event, an appearance may be made for the prospective adoptive parent by counsel, commissioned and empowered in writing for that purpose; the power of attorney may be incorporated in the adoption petition [*Fam. Code § 8613.5(a)(1), (b)*]. The court may not waive a personal appearance by the prospective adoptive parent if the circumstances that make his or her appearance impossible or impracticable are temporary in nature or of a short duration [*Fam. Code § 8613.5(a)(2)*].

If a prospective adoptive parent is permitted to appear by counsel, the court has the discretion to order this individual's deposition [*Fam. Code § 8613.5(c)*]. If neither prospective adoptive parent is required to appear, then the child proposed to be adopted need not appear in person, but may appear through counsel [*Fam. Code § 8613.5(f)*]. If no party appears, the court may not make an order of adoption until after a report has been filed with the court under *Fam. Code §§ 8715, 8807, 8914,* or *9001* [*Fam. Code § 8613.5(g)*].

If a prospective adoptive parent is commissioned or enlisted in the military service, or auxiliary thereof, of the United States, or of any of its allies, or is engaged in service on behalf of any governmental entity of the United States, or in the American Red Cross, or in any other recognized charitable or religious organization, so that it is impossible or impracticable, because of his or her absence from California, or otherwise, for him or her to make an appearance in person, and the circumstances are established by satisfactory evidence, the appearance may be made for the prospective adoptive parent by his or her counsel, if counsel is commissioned and empowered in writing so to do [*see § 12B.313[1]*]. The power of attorney may be incorporated in the petition for adoption [*Fam. Code § 8613(a)*]. The provisions of *Fam. Code § 8613* are equally applicable tothe spouse of a prospective adoptive parent who resides with the prospective adoptive parent outside of California [*Fam. Code § 8613(e)*].

If, under *Fam. Code § 8613,* neither prospective adoptive parent need appear before the court, the child proposed to be adopted need not appear. If the law otherwise requires that the child execute any document during the course of the

hearing, the child may do so by and through counsel [*Fam. Code § 8613(f)*].

If none of the parties appears, no order of adoption may be made by the court until after an investigative report has been filed with the court [*Fam. Code § 8613(g)*; *see Fam. Code §§ 8715, 8807, 8914, 9001* (investigative report)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12B.53 Disqualification of Judge

No judge or justice may sit or act as such in an adoption proceeding if he or she is disqualified for any of the reasons specified in *Code Civ. Proc. § 170.1* [*see, e.g., Adoption of Richardson (1967) 251 Cal. App. 2d 222, 232-238, 59 Cal. Rptr. 323* (judge biased against petitioners; judgment denying petition reversed)]. For discussion of the procedure and forms used in disqualifying a judge, see Ch. 317, *Judges* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12B.54 Opposition

[1] Nature of Proceeding

In a technical sense, adoption proceedings are quasi in rem and are not true adversary proceedings [*see In re Jay R. (1983) 150 Cal. App. 3d 251, 263, 197 Cal. Rptr. 672* ; *Adoption of Thevenin (1961) 189 Cal. App. 2d 245, 252, 11 Cal. Rptr. 219]* . There is no statutory procedure established for filing responsive pleadings to the adoption petition itself, nor for a formal contest of the petition [*see Adoption of Lenn E. (1986) 182 Cal. App. 3d 210, 219, 227 Cal. Rptr. 63]* . Nevertheless, the adoption hearing may have all the incidents of an adversary proceeding [*see Hubbard v. Superior Court (1961) 189 Cal. App. 2d 741, 750, 11 Cal. Rptr. 700]* , and parties have been permitted to file opposing papers and to be heard in opposition [*see, e.g., In re Fahlman (1927) 84 Cal. App. 248, 249-250, 257 P. 893* (child's maternal grandparents appeared at adoption hearing and "filed an opposition to the granting of the petition")].

Adversary adoption proceedings commonly arise under several circumstances. First, the investigating agency in an independent adoption or the agency that originally placed the child with the petitioners in an agency adoption may recommend that the adoption not be granted. These conflicts are discussed in Subparts B and D, *below*, respectively.

Second, the adoption may be contested by a birth parent who does not consent to the adoption. In the case of an alleged natural father, theadversary hearing is the adjunct proceeding to terminate his parental rights under the Uniform Paternity Act [*see Fam. Code §§ 7662, 7664*, discussed in Ch. 12A, *Adoptions: Termination of Parental Rights* ; *see also Fam. Code § 8512* ("birth parent" defined)]. However, a man who is not a presumed father may bring an action to establish his legal status as the child's father, the commencement of which suspends adoption proceedings [*Fam. Code § 7631*; *see Adoption of Alexander M. (2001) 94 Cal. App. 4th 430, 438, 114 Cal. Rptr. 2d 218* (comprehensive discussion of statutory scheme)]. In the case of a mother or presumed father whose parental rights have not been previously terminated and whose consent is alleged not to be necessary on any of the grounds of *Fam. Code § 8606*, the adoption hearing is the forum in which the issue of whether consent is or is not required is adjudicated [*see In re Jay R. (1983) 150 Cal. App. 3d 251, 263, 197 Cal. Rptr. 672]* . The standards on which the court must rule under this statute are discussed in Chapter 12A, *Adoptions: Termination of Parental Rights* . A challenge based on the Indian Child

Welfare Act to the validity of consents or relinquishments in a pending adoption can be brought in a separate action under the ICWA [*In re Bridget R. (1996) 41 Cal. App. 4th 1483, 1498, 49 Cal. Rptr. 2d 507* (action by birth parents and tribe to invalidate relinquishments); *see 25 U.S.C. § 1901 et seq.*], as discussed in Subpart E, subdivision 3. For a detailed analysis of issues under the Indian Child Welfare Act, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Ch. 176 (Matthew Bender).

Third, the adoption may be contested by a nonparent, usually a family member of a birth parent, who seeks custody himself or herself [*see, e.g.,* *Adoption of Lenn E. (1986) 182 Cal. App. 3d 210, 227 Cal. Rptr. 63* ; *cf.* *Mullins v. State of Oregon (9th Cir., 1995) 57 F.3d 789* (dismissing federal civil rights action brought by grandparents)]. In some cases, there may actually be concurrent petitions pending for the adoption of the same child by different petitioners [*see, e.g., In re Fahlman (1927) 84 Cal. App. 248, 250, 257 P. 893* ; *see § 12B.54[4]*]. Finally, in rare instances, the court may interpose its objections to the adoption even though no other person or agency is opposed [*see, e.g.,* *Adoption of Richardson (1967) 251 Cal. App. 2d 222, 59 Cal. Rptr. 323* (despite favorable agency recommendation, judge believed that "deaf mutes" should not be allowed to adopt hearing child)].

[2] Appearance by Persons Opposed to Adoption

Technically, there are no parties to an adoption other than the petitioners, and the custodial agency in the case of an agency adoption [*see Fam. Code § 8506*]. However, other persons or agencies may claim an interest in the proceeding and thus be afforded standing to appear in, appeal, or move to set aside an adoption [*see* *Reeves v. Bailey (1975) 53 Cal. App. 3d 1019, 1022-1023, 126 Cal. Rptr. 51* (grandparents); *Adoption of Emery (1961) 191 Cal. App. 2d 428, 432, 12 Cal. Rptr. 685* (investigating agencyin independent adoption); *but see* *Adoption of Berman (1975) 44 Cal. App. 3d 687, 691-695, 118 Cal. Rptr. 804* (grandparents, who are not statutorily entitled to notice of adoption proceedings, may not attack decree on ground of lack of notice)]. Standing to attack an adoption decree is discussed further in Ch. 12E, *Adoptions: Attack on Decree*.

Fam. Code § 8612(a) appears to contemplate the court's taking of testimony of interested persons [*see* *In re Adoption of Bewley (1914) 167 Cal. 8, 10, 138 P. 689* (duty of court to examine witnesses familiar with circumstances of child's birth and previous custody)]. Further, a court has inherent power to hear evidence from witnesses who are not necessarily parties. Notions of fairness, viewed from the standpoint of the best interests of the child, should allow the trial court to hear and consider evidence from nonstatutory sources [*Adoption of Lenn E. (1986) 182 Cal. App. 3d 210, 216, 227 Cal. Rptr. 63]* .

[3] Intervention

In at least one case involving extraordinary facts, a court permitted persons who opposed the adoption to formally intervene in the adoption proceeding. In that case, the child's father had been convicted of murdering the mother. The trial court granted the maternal grandmother and her husband leave to intervene and oppose an adoption petition filed by the paternal grandparents. The court of appeal held that the trial court properly granted intervention under the circumstances and that the maternal grandparents had standing to appeal the decree of adoption [*Adoption of Lenn E. (1986) 182 Cal. App. 3d 210, 218-220, 227 Cal. Rptr. 63* ; *cf.* *Reeves v. Bailey (1975) 53 Cal. App. 3d 1019, 1022, 126 Cal. Rptr. 51* (grandparents had standing, without formal intervention, to attack order of adoption on ground of fraud)].

Intervention in general is governed by *Code Civ. Proc. § 387*. For a general discussion of intervention, see Ch. 395, *Parties* , Pt. II.

[4] Concurrent Petitions

Opposition may occur if two petitions to adopt the same child are filed and are pending concurrently, either in different courts [*see, e.g.,* *In re Fahlman (1927) 84 Cal. App. 248, 250, 257 P. 893]* , or in the same court [*see, e.g.,* *Adoption*

of Berth (1947) 79 Cal. App. 2d 221, 179 P.2d 572] . If the petitions have been filed in the same court, the court may proceed to hear the petitions separately, even if they will otherwise be scheduled for hearing on the same date. There is apparently no requirement that the petitions must be consolidated for hearing or otherwise joined and tried together [*see Adoption of Berth (1947) 79 Cal. App. 2d 221, 223-224, 179 P.2d 572* (petitions heard consecutively by same judge, who denied first and granted second)], although consolidation is possible at the discretion of the court [*see Code Civ. Proc. § 1048*].

If the petitions have been filed in different counties, the attorney should consider motions to change venue and to consolidate the proceedings, or to obtain a stay in one proceeding and intervention in the other. Arguably, the county in which the child actually resides is the logical venue if there are concurrent petitions; however, no reported decision has expressly so held.

For discussion of the procedure for consolidation and coordination of actions in general, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12B.55 Basis of Court's Decision

[1] Best Interest of Child

The court may grant a petition for adoption if it is satisfied that the interest of the child will be promoted by the adoption, that is, that the adoption is in the child's best interests [*Fam. Code § 8612(c)*; *In re Santos (1921) 185 Cal. 127, 131, 195 P. 1055* ; *Adoption of Michelle T. (1975) 44 Cal. App. 3d 699, 704, 117 Cal. Rptr. 856*)]. The best-interests requirement overrides the statutory standards for dispensing with a birth parent's consent under *Fam. Code §§ 7660 et seq.* and *8604-8606*, discussed in Ch. 12A, *Adoptions: Termination of Parental Rights* . Even if these standards have been met, the court may still deny the adoption if it determines that the adoption is not in the child's best interests [*see* *Adoption of Thevenin (1961) 189 Cal. App. 2d 245, 250, 11 Cal. Rptr. 219]* .

The concept of "best interests" is relative. The question is not whether a particular set of circumstances is in the best interests of the child, but whether a particular set of circumstances relative to an alternative set of circumstances is in the best interests of the child [*Adoption of Michelle T. (1975) 44 Cal. App. 3d 699, 707, 117 Cal. Rptr. 856]* . In determining the best interests, the court may be required, in some cases, to determine which of several alternatives is the least detrimental to the child. Factors such as stability or continuity in a good environment are obviously critical to a child's interest [*see* *Adoption of Michelle T. (1975) 44 Cal. App. 3d 699, 706-708, 117 Cal. Rptr. 856]* .

The matter of adoption rests in the sound discretion of the court. The court's decision will not be disturbed on appeal without a clear showing of abuse of discretion [*see* *In re Adoption of Bewley (1914) 167 Cal. 8, 10, 138 P. 689* (commenting that "very grave abuse of discretion" must exist to reverse denial of adoption petition); *Adoption of Pierce (1971) 15 Cal. App. 3d 244, 252, 93 Cal. Rptr. 171* ; *Adoption of Thevenin (1961) 189 Cal. App. 2d 245, 251, 11 Cal. Rptr. 219]* . However, it is an abuse of discretion to deny a petition on speculation as to a petitioner's instability based solely on events that occurred many years previously [*Adoption of Lingol (1951) 107 Cal. App. 2d 457, 459-460, 237 P.2d 57]* .

[2] Marital Status

The right to adopt is not limited by the petitioner's marital status [*see 22 Cal. Code Reg. § 35011(a)(2)*]. For discussion of contrasting rules concerning stepparent adoptions and the right of unmarried domestic partners to use stepparent procedures, see *§ 12B.130* et seq. [*see Fam. Code §§ 297, 9000(b), (g)*].

Occasionally, married petitioners may terminate their marriage after placement but before the adoption is finalized. In such a case, one of the petitioners may elect to proceed with the adoption as a single parent while the other abandons the adoption [*see, e.g., County of Los Angeles v. Superior Court (1969) 2 Cal. App. 3d 1059, 1061, 82 Cal. Rptr. 882]* .

The divorce of an adopting parent, alone, is not a ground to deny the adoption. Rather, the effect of the divorce is but one of the several factors to be considered by the trial court in the determination of the best interests of the child [*see County of Los Angeles v. Superior Court (1969) 2 Cal. App. 3d 1059, 1065, 82 Cal. Rptr. 882* ; *see also Department of Social Welfare v. Superior Court (1969) 1 Cal. 3d 1, 6, 81 Cal. Rptr. 345, 459 P.2d 897* ; *Adoption of Barnett (1960) 54 Cal. 2d 370, 376-379, 6 Cal. Rptr. 562, 354 P.2d 18]* .

[3] Petitioners' Physical and Mental Health

The existence of a physical handicap on the part of a petitioner for adoption is a material, but not determinative, factor in considering whether the adoption should be granted. A petition should not be denied because of a petitioner's physical handicap unless the evidence shows that, in all probability, the petitioner will be unable to rear the minor suitably [*see Adoption of Richardson (1967) 251 Cal. App. 2d 222, 224-238, 59 Cal. Rptr. 323* (deaf petitioners)].

The court may also properly receive evidence on the question of whether a petitioner is mentally and emotionally stable within the limits of reasonably "normal" behavior and may deny a petition if the evidence supports the conclusion that the petitioner is, or likely will become, mentally or emotionally unstable [*see Adoption of Schroetter (1968) 261 Cal. App. 2d 365, 368-369, 67 Cal. Rptr. 819]* .

[4] Age

Age disparity is a proper consideration in determining qualification for adoption of a particular child. However, it may not be used to automatically exclude the petitioners as adoptive parents. Rather, it must be weighed and considered in conjunction with other factors [*Adoption of Michelle T. (1975) 44 Cal. App. 3d 699, 703-710, 117 Cal. Rptr. 856* (error to deny adoption solely because petitioners were 70 and 54 years of age); *Adoption of Driscoll (1969) 269 Cal. App. 2d 735, 736-737, 75 Cal. Rptr. 382* (no abuse of discretion to deny petition when petitioners were 61 and 58 and evidence of ill health was presented)].

[5] Family Relationship

Although the California Legislature has expressed its intent to remove barriers to adoption by relatives of children who are in, or at risk of entering, the dependency system, and to preserve existing family relationships in adoptions [*see Fam. Code § 8714.5(a)*; Relative Adoptions and Kinship Adoption Agreements, in Subpart A of Part II, *above*], the adoption statutes give no automatic preference to relatives over other persons petitioning to adopt [*but see Fam. Code § 8710* (placement preference for relatives in agency adoptions), discussed in Subpart D, *below*]. The best interests of the child are the only consideration. Thus, as between competing concurrent petitions, there is no preference for blood relatives over nonrelatives [*In re Fahlman (1927) 84 Cal. App. 248, 250-251, 257 P. 893]* . Nevertheless, in determining the best interests of the child, the court may consider the effect of any blood relationship that exists between the child and the petitioners for adoption, and adoption by a relative has been favored by some courts [*see, e.g., Adoption of Berth (1947) 79 Cal. App. 2d 221, 224-225, 179 P.2d 572* ; *see also Adoption of Lenn E. (1986) 182 Cal. App. 3d 210, 220, 227 Cal. Rptr. 63* (blood relation was one of several factors in permitting intervention in adoption proceeding)].

The court may consider the impact of adoption on the right of the child to inherit by intestacy from blood relatives [*see Reeves v. Bailey (1975) 53 Cal. App. 3d 1019, 1023 n.3, 126 Cal. Rptr. 51* (grandparent adoption results in loss of half of child's possible lines of inheritance)]. If the financial benefits of maintaining certain inheritance rights make it in the best interests of the child that adoption be denied, the petitioners may be appointed as the child's guardians in a probate proceeding [*In re Jacqueline G. (1985) 165 Cal. App. 3d 582, 596-597, 211 Cal. Rptr. 827]* . For discussion of the effect of adoption on inheritance rights, see Ch. 12.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresIntrafamily Adoption

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§ 12B.56 Execution of Adoption Agreement

The adopting petitioners must execute or acknowledge a written agreement that the child will be treated in all respects as their lawful child [*Fam. Code § 8612(b)*; *see § 12B.301[1]*]. Courts generally prefer that the adoption agreement be executed at the hearing, and the governing statute appears to imply that execution or acknowledgment is to take place then [*see Fam. Code § 8612(b)*].

If the prospective adoptive parent is permitted to appear by counsel [*see § 12B.52*], the agreement may be executed and acknowledged by the counsel for the absent party, or may be executed by the absent party before a notary public, or by any other person authorized to take acknowledgments [*Fam. Code § 8613(b)*; *see Civ. Code §§ 1183, 1183.5*].

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§ 12B.57 Decree of Adoption

[1] Contents

If satisfied that the interests of that child will be promoted by the adoption, the court may make and enter an order of adoption of the child by the petitioners [*Fam. Code § 8612(c)*]. The document is referred to in the statutes as an "order of adoption." It is commonly referred to as a "decree of adoption," and is, in effect, a judgment [*see Adoption of Bird (1960) 183 Cal. App. 2d 140, 144-146, 6 Cal. Rptr. 675]* . Thereafter, the child and the adoptive parents sustain toward each other the legal relationship of parent and child and have all the rights and are subject to all the duties of that relation [*Fam. Code § 8616*]. The order of adoption must contain the adopted name of the child, but may not contain the name that the child had before adoption except in a relative adoption, in which the order may contain the child's prior name if requested by the adopting relative or by the child if 12 years or older [*Fam. Code §§ 8714(e), 8714.5(g), 8802(e), 8912(d), 9000(e*); *see § 12B.17[4]*].

[2] Preparation, Presentation, and Entry

Although the practice may vary in some courts, an adoption decree is generally prepared by the petitioner's attorney for submission to the court at the time of hearing. The trial judge will execute the decree at the conclusion of the hearing, unless the matter is taken under submission. The judge will then present it to the court clerk for filing and entry as a judgment. However, the petitioner's attorney should take into consideration local practice and rules of court in determining the process for filing and entry. For an illustrative version of the mandatory Judicial Council form of order of adoption, see *§ 12B.303[1]*.

An adoption decree is not effective until it is entered as a judgment [*Adoption of Bird (1960) 183 Cal. App. 2d 140, 144-146, 6 Cal. Rptr. 675* ; *see Code Civ. Proc. § 664*]. Entry is a ministerial act by the clerk and is deemed made when the signed decree is filed with the clerk for entry [*see Code Civ. Proc. § 664*; *Cal. Rules of Ct., Rule 3.1590*); *Brown v. Superior Court (1925) 70 Cal. App. 732, 735, 234 P. 409]* .

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§ 12B.58 Change of Name

An adopted child may but is not required to take the family name of the adopting parent [*see Fam. Code § 8618*]. If the adopted child is old enough to have an established identity, a change of name because of adoption might not necessarily be in the child's best interests.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12B.59 Contents of Court File

The petition, relinquishment or consent, agreement, order, report to the court from any investigating agency, and any power of attorney and deposition must be filed in the office of the clerk of the court [*Fam. Code § 8613(d)*].

For discussion of access to adoption records, see Ch. 12D, *Adoptions: Amendment and Inspection of Records* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionDisclosuresAdoption RecordsGovernmentsCourtsClerks of Court

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[Reserved]

§§ 12B.60[Reserved]

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§ 12B.70 Governing Law

Independent adoptions are governed by *Fam. Code § 8800 et seq.* as well as the Family Code provisions applicable to all adoptions [*see Fam. Code §§ 8500 et seq., 8600 et seq.*]. Regulations regarding independent adoptions are found in *22 Cal. Code Reg. § 35079 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12B.71 Summary of Independent Adoptions Procedures Applicable to Petitions Filed Before January 1, 1995

Major revisions to independent adoption procedures became operative on January 1, 1995 [*see* Stats. 1993, ch. 758]. The new procedures apply to all petitions for independent adoption that are filed on or after that date. Petitions filed before, and pending on January 1, 1995, are still governed by the law in effect on December 31, 1994 [*see* Stats. 1993, ch. 758, § 17]. This section summarizes the law applicable to petitions filed before 1995. The remainder of this Subpart describes the law governing independent adoptions beginning January 1, 1995.

Under prior law, a birth parent's consent to the adoption is not given until after the child has been released to the prospective adoptive parents. The birth parent retains all responsibility for the child's custody and control until the court issues its adoption decree. The birth parent also retains the right to reclaim the child at any time before signing the consent to adoption [*In re Timothy W. (1990) 223 Cal. App. 3d 437, 442, 272 Cal. Rptr. 906* ; *In re Baby Boy M. (1990) 221 Cal. App. 3d 475, 478-479, 272 Cal. Rptr. 27* ; *Rogers v. Platt (1988) 199 Cal. App. 3d 1204, 1207-1208, 245 Cal. Rptr. 532* ; *see* former *Fam. Code § 8804(c), (d)* (repealed January 1, 1995)].

Nevertheless, the birth parent may authorize the hospital to release the child to the prospective adoptive parents soon after birth and before consent is signed on Form AD 22 (*see § 12B.75*). A birth parent who changes his or her mind and refuses to consent [*see, e.g., In re Baby Boy M. (1990) 221 Cal. App. 3d 475, 479, 272 Cal. Rptr. 27]* may execute Department of Social Services Form AD 20, Refusal to Consent to Adoption.

The rights of a birth parent whose consent is required and who refuses to give that consent are virtually absolute. The statutory mandate for return is unequivocal, and there is no discretion to consider whether the child has bonded with the prospective adoptive family or which family will provide a better home [*In re Timothy W. (1990) 223 Cal. App. 3d 437, 445-446, 272 Cal. Rptr. 906* ; *In re Baby Boy M. (1990) 221 Cal. App. 3d 475, 485, 272 Cal. Rptr. 27* ; *but cf. In re Bridget R. (1996) 41 Cal. App. 4th 1483, 1515-1521, 49 Cal. Rptr. 2d 507* (custody hearing required despite ICWA mandate to return child to birthparents)]. The adoption may not proceed [*Fam. Code § 8604(a)*], and the child must be returned to the care and custody of the birth parent [former *Fam. Code § 8804(c), (d)* (repealed January 1, 1995)].

There is no statutory time limit within which the birth parent must act to reclaim the child. However, if the birth parent fails to act within six months of birth, he or she risks having his or her parental rights terminated on the ground of legal abandonment [*see Fam. Code § 7822(a)* (discussed in Ch. 12A, *Adoptions: Termination of Parental Rights*)]. The birth parent's signing of Form AD 20 (Refusal to Consent) tolls any period of potential abandonment [*In re Timothy W. (1990) 223 Cal. App. 3d 437, 446, 272 Cal. Rptr. 906* ; *In re Baby Boy M. (1990) 221 Cal. App. 3d 475, 481-483, 272 Cal. Rptr. 27]* , and is sufficient to compel the return of the child. There is no requirement that the birth parent demand return of the child directly from the adoptive parents [*In re Timothy W. (1990) 223 Cal. App. 3d 437, 446 n.2, 272 Cal. Rptr. 906* ; *In re Baby Boy M. (1990) 221 Cal. App. 3d 475, 485, 272 Cal. Rptr. 27]* .

Different standards are involved if a birth parent refuses to consent to adoption after independent placement, not because he or she wants the child returned to his or her custody, but rather to make a different independent adoptive placement [*see, e.g., In re Brittany H. (1988) 198 Cal. App. 3d 533, 542-543, 243 Cal. Rptr. 763]* , or to relinquish the child to an agency for an agency adoption [*see, e.g., San Diego County Dep't of Public Welfare v. Superior Court of San Diego County (1972) 7 Cal. 3d 1, 6, 101 Cal. Rptr. 541, 496 P.2d 453]* . The refusal of a birth parent to consent to an adoption after independent placement in order to make a different independent placement can support a finding of abandonment as a ground to terminate his or her parental rights [*In re Brittany H. (1988) 198 Cal. App. 3d 533, 547-551, 243 Cal. Rptr. 763* ; *see Fam. Code § 7822* (discussed in Ch. 12A, *Adoptions: Termination of Parental Rights*)]. If the parent refuses to consent and then relinquishes the child to an agency for a new adoptive placement, the relinquishment establishes a ground to dispense with consent [*see Fam. Code § 8606(d)* (discussed in Ch. 12A, *Adoptions: Termination of Parental Rights*)]. The petition of the original adoptive parents may still be granted on a showing that the adoption is in the best interests of the child [*San Diego County Dep't of Public Welfare v. Superior Court of San Diego County (1972) 7 Cal. 3d 1, 15-16, 101 Cal. Rptr. 541, 496 P.2d 453* (construing substantially similar prior law)].

However, once consent has been given, it may not be withdrawn except with court approval [former *Fam. Code § 8815(a), (f)* (repealed January 1, 1995)]. If the court finds that withdrawal of the consent to adoption is reasonable, in view of all the circumstances, and will be in the best interests of the child, the court must approve it and dismiss the adoption petition [former *Fam. Code § 8815(d), (f)* (repealed January 1, 1995)]. The court must then order the child restored to the care and custody of the birth parent [former *Fam. Code § 8804(c), (d)* (repealed January 1, 1995); *cf. In re Bridget R. (1996) 41 Cal. App. 4th 1483, 1515-1521, 49 Cal. Rptr. 2d 507* (requiring custody hearing to consider best interests of the children if birthparents' voluntary relinquishments were invalid under ICWA)]. Otherwise, the court must deny the withdrawal and act on the adoption petition [*see* former *Fam. Code § 8815(d), (f)* (repealed January 1, 1995)].

Relevant factors in considering the best interests of the child with regard to withdrawal of consent include, but are not limited to, the child's age, the extent of bonding with the prospective adoptive parents, the extent of bonding or the potential to bond with the birth parents, and the ability of a birth parent to provide adequate and proper care and guidance to the child [former *Fam. Code § 8815(d), (f)* (repealed January 1, 1995); *see Adoption of Matthew B. (1991) 232 Cal. App. 3d 1239, 1263-1266, 284 Cal. Rptr. 18]* . The court may compare and judge the quality of life that the child may anticipate in the respective homes [*In re Timothy W. (1990) 223 Cal. App. 3d 437, 445, 272 Cal. Rptr. 906]* . It is not necessary to prove fraud, duress, or coercion [*Adoption of Jennie L. (1980) 111 Cal. App. 3d 422, 430-431, 168 Cal. Rptr. 695* ; *Guardianship of Baby Boy M. (1977) 66 Cal. App. 3d 254, 268-272, 135 Cal. Rptr. 866* (construing prior but substantially similar law)].

In determining whether to approve withdrawal of consent, the parental-preference standard [*see Fam. Code §§ 3040, 3041* (parent is preferred custodian of child, and court may not award custody to nonparent over parent unless it finds that parental custody would be detrimental)] has been held not to apply [*see Adoption of Jennie L. (1980) 111 Cal. App. 3d 422, 429-430, 168 Cal. Rptr. 695* ; *cf. In re B.G. (1974) 11 Cal. 3d 679, 694-699, 114 Cal. Rptr. 444, 523 P.2d 244* (parental preference applies in all custody proceedings; decided under former *Civ. Code § 4600(c)*)]. In structuring the Family Code, the Law Revision Commission and the legislature did not include adoption proceedings

among those to which the parental preference doctrine is expressly made applicable [*see Fam. Code § 3021*]. Even if the doctrine is applied, detriment may be found solely on the ground that it would be detrimental to the child to uproot him or her from the adoptive home and to grant custody to a parent with whom the child has had little or no contact [*In re Volkland (1977) 74 Cal. App. 3d 674, 679-680, 141 Cal. Rptr. 625* ; *In re Reyna (1976) 55 Cal. App. 3d 288, 302-303, 126 Cal. Rptr. 138* ; *see Guardianship of Marino (1973) 30 Cal. App. 3d 952, 956-961, 106 Cal. Rptr. 655]* . For further discussion if the parental preference doctrine, see Ch. 394, *Parent and Child* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12B.72 Selection of Prospective Adoptive Parents

The primary aspect that distinguishes an independent adoption from an agency adoption is that the placement of the child in the prospective adoptive home is made by the birth parents rather than by an adoption agency [*see Fam. Code §§ 8539, 8801(a)*]. The selection of prospective adoptive parents is to be made personally by a birth parent of the child and may not be delegated to an agent. The act of selection must be based on personal knowledge of the prospective adoptive parents [*Fam. Code § 8801(a)*].

"Personal knowledge" includes, but is not limited to, substantially correct knowledge of all of the following regarding the prospective adoptive parents [*Fam. Code § 8801(b)*]:

- Their full legal names, ages, religion, race or ethnicity;
- Length of current marriage and number of previous marriages;
- Employment;
- Whether other children or adults reside in the home;
- Whether there are other children who do not reside in their home and the child support obligations for these children and any failure to meet these obligations;
- Any health conditions curtailing their normal daily activities or reducing their normal life expectancies;
- Any convictions for crimes other than minor traffic violations;
- Any removals of children from their care due to child abuse or neglect; and

- Their general area of residence or, on request, their address.

Both of the child's birth parents may place the child directly with a person or couple whom they know and select. If one parent has custody of the child, that parent may directly place the child with prospective adoptive parents, subject to obtaining the other parent's consent to adoption or following other prescribed procedures that dispense with the consent requirement, as discussed in Ch. 12A, *Adoptions: Termination of Parental Rights* .

Placement of a child for adoption requires completion of an adoptive placement agreement on a form prescribed by the department [*Fam. Code § 8539*; *see Fam. Code § 8801.3*]. Adoption placement agreements are discussed in *§ 12B.93*.

If a child has been relinquished to the California Department of Social Services or a licensed adoption agency for adoptive placement, an independent adoption of that child is no longer possible. Only the prospective adoptive parents with whom the child has been placed by the department or agency may file a petition for adoption of that child [*see Fam. Code § 8704(b)*]. For discussion of agency adoptions, see Subpart D.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12B.73 Dual Representation of Birth and Adoptive Parents

An attorney's dual representation of both the birth and prospective adoptive parents of a child is permitted subject to stringent limitations [*see Fam. Code § 8800*]. Notwithstanding any other provisions of the law, it is unethical for an attorney to undertake the representation of both the prospective adopting parents and the birth parents of a child in any negotiations or proceedings in connection with an adoption unless a written consent is obtained from both parties [*Fam. Code § 8800(d)*]. In the initial communication between the attorney retained by or representing the prospective adoptive parents and the birth parents, or as soon thereafter as is reasonable but before obtaining any written consent for dual representation, the attorney must advise the birth parents of their rights regarding independent counsel and that it is possible to waive independent representation [*Fam. Code § 8800(g)*; *see Fam. Code § 8800(f)* (birth parent may have separate counsel to advise them fully of adoptive procedures and legal rights)]. For a form for an agreement for dual representation of both the prospective adoptive parents and the birth parents, see *§ 12B.330[1]*.

On the petition or motion of any party, or on motion of the court, the court may appoint an attorney to represent the birth parent or parents in negotiations or proceedings in connection with the child's adoption [*Fam. Code § 8800(e)*]. The court may award attorneys' fees and costs for just cause, based on the ability of the parties to pay [*Fam. Code § 8800(f)*].

The attorney retained by or representing the prospective adoptive parents must inform them in writing that a birth parent may revoke consent to the adoption and that any moneys expended in negotiations or proceedings in connection with the child are not reimbursable. The prospective adoptive parents must sign a statement to indicate their understanding of this information [*Fam. Code § 8800(h)*]. Such a written provision and statement are included in § 12B.330[1].

Whether or not written consent is obtained, multiple representation should be avoided whenever a birth parent displays the slightest reason for the attorney to believe any controversy might arise. If a conflict occurs, it is the duty of the attorney to withdraw promptly from the case, advise the parties to retain independent counsel, refrain from taking positions in opposition to any of the former clients, and thereafter maintain an impartial, fair, and open attitude toward the new attorneys [*Fam. Code § 8800(c)*].

Courts have not viewed multiple representation kindly when disputes have arisen between birth and prospective adoptive parents. Several opinions have chastised attorneys for continuing to represent the interests of the prospective adoptive parents (who are paying substantial attorneys' fees) against the birth parents after a birth parent has changed his or her mind and refused to consent to the adoption [*see* *In re Timothy W. (1990) 223 Cal. App. 3d 437, 447, 272 Cal. Rptr. 906* (attorney presumably advised adoptive parents to refuse to relinquish child); *In re Baby Boy S. (1987) 194 Cal. App. 3d 925, 931-933, 240 Cal. Rptr. 60* (attorney failed to advise birth parents of right to independent counsel and of right to have child returned)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12B.74 Birth Parents' Request for Payment of Expenses

Any request by a birth parent for the prospective adoptive parents to pay his or her attorney's fees, the medical fees and expenses, counseling fees, or the birth mother's living expenses must be in writing. The birth parent must provide the prospective adoptive parents with written receipts for any money received. In turn, the prospective adoptive parents must provide the receipts to the court when the accounting report required by *Fam. Code § 8610* (*see § 12B.311*) is filed [*Fam. Code § 8812*; *see § 12B.311*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12B.75 Release of Child to Adoptive Parents by Medical Facility

It is common practice in an independent adoption for the birth mother to deliver the child to the prospective adoptive parents immediately after birth. However, no health facility [*see Health & Safety Code § 1250*] may surrender the physical custody of a child under 16 years to any person unless the surrender is authorized in writing by the parent (and certain other persons prescribed by statute who would not ordinarily be involved in this context) [*Health & Safety Code § 1283(a)*]. Thus, before a hospital will release a child to the prospective adoptive parents, a parent must execute a written consent to release on Department of Social Services Form AD 22, Health Facility Minor Release Report (*see § 12B.331[1]*).

As is made clear on the face of the form [*see Fam. Code § 8607*], execution of Form AD 22 is not itself a consent to adoption. The consent of a birth parent who is placing the child for adoption is included in the adoption placement agreement, which must be signed before the child is deemed to have been placed for adoption [*Fam. Code § 8801.3(b)(5)*; *see § 12B.90*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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12B.76 Care and Custody of Child Pending Adoption

During the pendency of a proceeding for an independent adoption, the legal right to custody and control of the child remains with the child's birth parent or parents, even though the prospective parents usually have actual physical custody [*see Fam. Code § 3010*; *Guardianship of Baby Boy M. (1977) 66 Cal. App. 3d 254, 271, 135 Cal. Rptr. 866]* . Furthermore, the child's parent or parents must bear ultimate financial responsibility for the child's care [*see Fam. Code § 3900*], although the prospective adoptive parents customarily assume the financial obligations incident to their care of the child.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12B.77 Postadoption Contact ("Contact After Adoption") Agreement

Nothing in California's adoption laws prevents the adopting parents, the birth relatives (including the birth parents), and the child from entering into a written agreement to permit continuing contact between the birth relatives (including the birth parents), and the child, if the agreement is found by the court to have been entered into voluntarily and to be in the best interests of the child at the time the adoption petition is granted [*Fam. Code § 8616.5(b)(1)*]. The Judicial Council forms and court rules now refer to these agreements as "contact after adoption" agreements. However, under the authorizing statute, such an agreement is called a "postadoption contact agreement," and, operative January 1, 2001, is available in relative and nonrelative adoptions alike [*see* Stats. 2000, ch. 910]. From January 1, 1998, through December 31, 2000, "postadoption contact agreements" were known as "kinship adoption agreements," and were only available in relative adoptions]. Although the provisions for postadoption contact agreements are set forth in Chapter 2 of Part 2 of the Fam. Code governing agency adoptions, there is nothing in the text of the statutes that would prohibit such an agreement in an independent adoption [*see Fam. Code § 8616.5*].

If the petitioner has entered into a postadoption contact agreement with the birth parent, the agreement, signed by the participating parties, must be attached to and filed with the petition for adoption [*Fam. Code § 8802(a)(3)*; *see Fam. Code § 8616.5(c)*].

Legal Topics:

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

§§ 12B.78[Reserved]

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§ 12B.90 Placement for Adoption

Beginning January 1, 1995, a child may not be considered to have been "placed for adoption" until (1) each birth parent placing the child for adoption has been advised of his or her rights, and if desired, provided with counseling [*Fam. Code § 8801.3(a), (e)*; *see § 12B.92*], and (2) each prospective adoptive parent, each birth parent placing the child for adoption, and the "adoption service provider" [*see Fam. Code § 8502*, discussed in *§ 12B.91*] has signed an "adoption placement agreement" on a form prescribed by the California Department of Social Services [*Fam. Code §§ 8539, 8801.3(b)(5)*; *see § 12B.93*; *see § 12B.332[1]*]. Both or only one birth parent may place the child for adoption [*see Fam. Code § 8801.3(a), (b)*]. If only one birth parent places the child, the consent of the other birth parent must be obtained subsequently [*see Fam. Code § 8814*, discussed § 12B.95] unless his or her parental rights have been terminated or grounds can be established to dispense with consent (*see* Ch. 12A, *Adoptions: Termination of Parental Rights*).

The legal significance of failing to meet the statutory requirements for placement is not totally clear from the statutes. While the child is not "deemed" to be placed for adoption with the prospective adoptive parents [*see Fam. Code § 8801.3(b)(5)*], it appears that a hospital may release the child to the prospective adoptive parents (*see § 12B.75*), even if the adoption placement agreement has not yet been signed. However, no decree of adoption may be granted until all required consents have been given [*see Fam. Code § 8604(a)*], and the consent of a parent who is placing the child for adoption is a component of the agreement [*see Fam. Code § 8801.3(c)(5)*, discussed in *§ 12B.93*]. Although an adoption placement agreement is not a condition precedent to the filing of a petition for adoption in all cases, it appears that most prospective adoptive parents cannot file a petition unless the child has been placed with them for adoption as required by statute [*see Fam. Code § 8802(a)*, discussed in *§ 12B.110[1]*].

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§ 12B.91 Adoption Service Provider

The independent adoption procedures operative January 1, 1995 revolve around a position called an "adoption service provider." An adoption service provider may be any of the following [*Fam. Code § 8502(a)*]:

(1) A licensed private adoption agency;

(2) An individual who has presented satisfactory evidence to the department that he or she is a licensed clinical social worker who also has a minimum of five years of experience providing professional social services while employed by a licensed California adoption agency or the department;

(3) In a state other than California, or a country other than the United States, an adoption agency licensed or otherwise approved under the laws of that state, or an individual who is licensed or otherwise certified as a clinical social worker under the laws of that state or country; or

(4) An individual who has presented satisfactory evidence to the department that he or she is a licensed marriage and family therapist who has a minimum of five years experience providing professional adoption casework services while employed by a licensed California adoption agency or the department.

Independent legal counsel for the birth parent may serve as an adoption service provider if the requirements discussed below are met [*see Fam. Code § 8502(b)*]. Independence requires that there be no contractual relationship with the adoptive parents, attorney for the adoptive parents, or any other individual or organization performing any type of services for the adoptive parents [*see Fam. Code §§ 8502(b), 8801.5(e)*].

In the case of a birth parent located in California, independent counsel may serve as the adoption service provider if at least three adoption service providers are not reasonably available. In the case of a birth parent located outside of California or outside of the United States, independent counsel may serve if the parent has contacted at least three potential adoption service providers and been unsuccessful in obtaining the services of an adoption services provider

who is reasonably available and willing to provide services. "Reasonably available" means that an adoption service provider is all of the following [*Fam. Code § 8502(b)*]:

(1) Available within five days for an advisement of rights [*see Fam. Code § 8801.5*] or within 24 hours for the signing of the adoption placement agreement [*see Fam. Code § 8801.3(b)(3)*];

(2) Within 100 miles of the birth mother;

(3) Available for a cost not exceeding $500 to make an advisement of rights and to witness the signing of the placement agreement.

If an attorney acts as adoption service provider, the fee to make an advisement of rights and to witness the signing of the placement agreement may not exceed $500 [*Fam. Code § 8502(c)*].

The adoption service provider owes a very high duty of care to the birth parent being advised, regardless of who pays the provider's fees. The duty of care specifically does not include a duty to investigate information provided by the birth parents, prospective adoptive parents, or their attorneys or agents [*Fam. Code § 8801.7(c)*].

No adoption service provider may have a contractual relationship with prospective adoptive parents, an attorney or representative for prospective adoptive parents, or any individual or organization providing services of any type to prospective adoptive parents for which the adoptive parents are paying a fee, except as relates to the payment of the fees for the advising and counseling of the birth parents [*Fam. Code § 8801.7(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12B.92 Advisement of Rights and Counseling

Each birth parent placing the child for adoption must be advised of his or her rights by an adoption service provider at least 10 days before signing the adoption placement agreement. However, the adoption service provider may find exigent circumstances, which must be set forth in the adoption placement agreement [*Fam. Code §§ 8801.3(b)(1), 8801.5(a)*]. It is not clear whether the exigent circumstances may justify dispensing with the advisement of rights entirely, or only justify not meeting the 10-day requirement. Note that while the adoption placement agreement may not be signed until the time of discharge from the hospital, that is, after the birth of the child [*see Fam. Code § 8801.3(b)(2)*], the requirement that the advisement of rights take place at least ten days before the agreement is signed means that it should be done before birth.

The birth parent must be advised of his or her rights in a face-to-face meeting in which the birth parent may ask questions and have questions answered [*Fam. Code § 8801.5(b)*]. The department must prescribe the format and process for advising birth parents of their rights, the content of which must include, but not be limited to, the following [*Fam. Code § 8801.5(c)*]:

(1) The alternatives to adoption;

(2) The alternative types of adoption, including a description of the full procedures and timeframes involved in each type;

(3) The full rights and responsibilities of the birth parent with respect to adoption, including the need to keep the department informed of his or her current address in case of a medical emergency requiring contact and of providing a full health history;

(4) The right to separate legal counsel paid for by the prospective adoptive parents on the request of the birth parent [*see Fam. Code § 8800*];

(5) The right to a minimum of three separate counseling sessions, each to be held on different days, to be paid for by the prospective adoptive parents upon the request of the birth parents.

If the offer of counseling is accepted, each counseling session must be not less than 50 minutes in duration. The counseling may be provided by an adoption service provider or by a licensed psychotherapist [*see Evid. Code § 1010*] as elected by the person [*Fam. Code § 8801.5(d)*]. The advisement and counseling fees must be paid by the prospective adoptive parents at the request of the birth parent [*Fam. Code § 8801.5(f)*].

The counselor owes a duty of care to the birth parent being counseled, similar to the duty of care established by a psychotherapist-patient relationship, regardless of who pays the fees of the counselor. No counselor may have a contractual relationship with the adoptive parents, an attorney for the adoptive parents, or any other individual or an organization performing any type of services for the adoptive parents and for which the adoptive parents are paying a fee, except as relates to payment of the birth parents' fee [*Fam. Code § 8801.5(e)*]. The failure to fulfill advisement and counseling duties may not be construed as a basis for setting aside the consent or the adoption, but may give rise to a cause of action for malpractice or negligence against those professionals or agencies serving as adoption service providers that are responsible for fulfilling the duties [*Fam. Code § 8801.5(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12B.93 Adoption Placement Agreement

The adoption service provider, each prospective adoptive parent, and each birth parent placing the child must sign an adoption placement agreement on a form prescribed by the department [*Fam. Code § 8801.3(b)*]. The consent of the parent or parents placing the child for adoption is a component of the agreement [*Fam. Code § 8801.3(c)(5)*].

The agreement may not be signed by either the birth parents or the prospective adoptive parents until the time of discharge of the birth mother from the hospital. However, if the birth mother remains hospitalized for a period longer than the hospitalization of the child, the agreement may be signed by all parties at the time of or after the child's discharge from the hospital but before the birth mother's discharge from the hospital if her competency to sign is verified by her attending physician and surgeon before she signs the agreement [*Fam. Code § 8801.3(b)(2)*].

The birth parents and prospective adoptive parents must sign the agreement in the presence of an adoption service provider [*Fam. Code § 8801.3(b)(3)*]. If the birth parent is not located in California, the adoption placement agreement must be signed before an adoption service provider or a notary or other person authorized to perform notarial acts in the state where the birth parent is located [*Fam. Code § 8801.3(b)(6)*]. The adoption service provider who witnesses the signatures must keep the original of the adoption placement agreement and immediately forward it and supporting documentation as required by the department to the department or delegated county adoption agency [*Fam. Code § 8801.5(b)(4)*].

The adoption placement agreement must be on a form prescribed by the department containing statutory requirements [*Fam. Code § 8801.3(b), (c)*]. It must also meet the requirements of the Interstate Compact on the Placement of Children [*Fam. Code § 8801.3(d)*; *see Fam. Code § 7901*, discussed in Subpt. E]. The department's form is *set forth in § 12B.332[1]*. The attorney should not draft an alternate form even if it contains the required contents.

Special rules apply with respect to American Indian children. When a parent seeks to execute an adoption placement agreement under *Fam. Code § 8801.3*, and there is information that the child is, or may be, an Indian child, the Department must obtain specified information about the child, the child's family members, and the child's tribe, and

must send a special notice to any parent and any custodian of the child, and to any tribe of which the child is, or may be, a member or eligible for membership [*Fam. Code § 8620(a)(2), (3)(A)*; *see* § 12B.273[7]].

Legal Topics:

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§ 12B.94 Postplacement Interview; Return of Child

The adoption service provider must offer to interview the birth parent after the placement of the child with the prospective adoptive parents. The interview must occur within 10 working days after the placement of the child for adoption and must include a consideration of any concerns or problems the birth parent has with the placement, a readvisement of the rights of the birth parent, and the taking of the health and social history of the birth parent, if not taken previously [*Fam. Code § 8801.7(a)*].

The adoption service provider must immediately notify the department or delegated county adoption agency if the birth parent is not interviewed after placement, or if there are any concerns regarding the placement. If the birth parent wishes to revoke the consent (*see § 12B.96*), the adoption service provider must assist the birth parent in obtaining the return of the child [*Fam. Code § 8801.7(b)*].

Legal Topics:

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§ 12B.95 Consent of Parent Not Placing Child for Adoption

[1] Generally

The consent to an adoption of a birth parent who did not place the child for adoption (*see § 12B.90*) must be signed in the presence of an agent of the department or of a delegated county adoption agency on a form prescribed by the department (such as the department's Form AD 1A, reproduced in § 12B.334[1]). The consent must be filed with the clerk of the appropriate superior court [*Fam. Code § 8814(a)* (excepting from its requirements provisions of *Fam. Code § 7662*, concerning termination of father's parental rights)]. The consent of a birth parent who is a minor is not subject to revocation by reason of minority [*Fam. Code § 8814(d)*].

Of course, the consent of the birth parent may not be required because his or her parental rights have previously been terminated or there are grounds to dispense with consent [*see Fam. Code §§ 7660 et seq., 8604-8606*]. These grounds are considered in detail in Ch. 12A, *Adoptions: Termination of Parental Rights* .

Parental consent is obtained in the course of the official department or agency investigation [*see 22 Cal. Code Reg. § 35095*; *see also § 12B.111*]. If the agency fails or refuses to accept the parent's consent within certain time limits, it may be obtained in a court proceeding [*see Fam. Code § 8820* (discussed in *§ 12B.95[4]*)].

[2] Parent Outside of California

If the birth parent is located outside of California for an extended period of time unrelated to the adoption at the time of signing the consent, the consent may be signed before a notary or other person authorized to perform notarial acts. In that case, the consent of the department or of the delegated county adoption agency is also necessary [*Fam. Code § 8814(c)*; *see § 12B.101*].

If the department or an agency initiates the consent, the official form will be sent to an accredited agency having jurisdiction over the place where the parent is located, with instructions to have it executed and returned. On verification that there is no accredited agency available to obtain consent, the consent form must be sent directly to the consenting

parent [*see 22 Cal. Code Reg. § 35113*]. By contrast, if a request for consent directed to a parent in another state has not been initiated by the department or agency, the consent must be accepted if it is properly notarized and is completed on a form that contains the same contents as that prescribed by the Department of Social Services [*see 22 Cal. Code Reg. § 35111*].

[3] Effect of Consent by Parent Claiming Entitlement to Sole Custody

If the written consent of a birth parent who did not place the child for adoption recites that the person giving it is entitled to the sole custody of the child and is duly acknowledged before an agent of the Department of Social Services or a delegated county adoption agency, it is prima facie evidence of the right of the person making it to the sole custody of the child and that person's sole right to consent [*Fam. Code § 8814(b)*]. The evidentiary effect is to raise a rebuttable presumption with respect to sole custody and the need for the consent of the other birth parent [*see Evid. Code § 602*]. But despite this presumption, both constitutional principles [*see Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 849, 4 Cal. Rptr. 2d 615, 823 P. 2d 1216]* and statutes [*see Fam. Code §§ 7660 et seq., 8604, 8605*] require that both parents consent unless a ground for dispensing with consent and terminating parental rights is established (*see* Ch. 12A, *Adoptions: Termination of Parental Rights*). The forms of consent presently prescribed by the department for use by natural parents in California do not contain any representations concerning the parent's entitlement to sole custody (*see, e.g.,* Form 56).

[4] Agency's Failure or Refusal to Accept Consent Within 180 Days of Filing

The birth parent or parents, or the petitioner, may appeal if for a period of 180 days from the date of paying 50 percent of the fee, or on the expiration of any extension of the period the court has granted, the California Department of Social Services or delegated county adoption agency fails or refuses to accept the consent of the birth parent or parents to the adoption [*Fam. Code § 8820(a)(1)*]. The birth parent or parents, or the petitioner, may also appeal in a case in which the consent of the department or delegated county adoption agency is required and the department or agency fails or refuses to file or give its consent to the adoption after full payment has been received [*Fam. Code § 8820(a)(2)*].

The 180-day period coincides with the period within which the investigating agency's report must be submitted to the court [*see Fam. Code § 8807(a)* (discussed in *§ 12B.111*)]. Therefore, the procedure of *Fam. Code § 8820* may be used either if the agency does not complete its investigation and report on time, or if it refuses to accept a consent for reasons stated in the report.

In determining whether to appeal the investigating agency's refusal to accept a birth parent's consent, the ground for the agency's position is the important consideration. If the case worker is exercising discretion on the basis of his or her conclusion that the adoption is not in the best interests of the child, [*see, e.g., San Diego County Dep't of Public Welfare v. Superior Court of San Diego County (1972) 7 Cal. 3d 1, 9-10, 101 Cal. Rptr. 541, 496 P.2d 453]* , an appeal is an effective way to have the matter reviewed by the court in the most timely manner. On the other hand, if the case worker determines that there is a legal bar to accepting consent, for example, that the birth parent lacks the mental capacity to give a valid consent [*see 22 Cal. Code Reg. § 35097(a)* (discussed in *§ 12B.100[2]*)], the matter is unlikely to be resolved by appeal. In such a case, the appropriate approach is to determine if there is a ground to dispense with the consent of the birth parent or to terminate his or her parental rights (*see* Ch. 12A, *Adoptions: Termination of Parental Rights*).

[5] Effect of Refusal to Consent; Return of Child

If the consent of a birth parent who did not place the child for adoption is required but not given, the adoption may not proceed, [*Fam. Code § 8604(a)*], and the child must be restored to the care and custody of the birth parent or parents subject to the provisions of *Fam. Code § 3041* [*Fam. Code § 8804(c)*].

There is no statutory time limit within which the birth parent must act to reclaim the child. However, if the birth parent fails to act within six months of birth, he or she risks having his or her parental rights terminated on the ground of legal abandonment [*see Fam. Code § 7822(a)* (discussed in Ch. 12A, *Adoptions: Termination of Parental Rights*)]. Also, a birth father who is not a presumed father [*see Fam. Code §§ 7611, 8604(a)*] must promptly come forward and demonstrate a full commitment to his parental responsibilities in order to receive constitutional protection of the right to withhold consent to the adoption [*see Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 849, 4 Cal. Rptr. 2d 615, 823 P. 2d 1216* , discussed in Ch. 12A, *Adoptions: Termination of Parental Rights*].

The birth parent's signing of Form AD 20 (Refusal to Consent to Adoption; *see § 12B.335[1]*) tolls any period of potential abandonment [*In re Timothy W. (1990) 223 Cal. App. 3d 437, 446, 272 Cal. Rptr. 906* ; *In re Baby Boy M. (1990) 221 Cal. App. 3d 475, 481-483, 272 Cal. Rptr. 27]* and is sufficient to compel the return of the child. There is no requirement that the birth parent demand return of the child directly from the adoptive parents [*In re Timothy W. (1990) 223 Cal. App. 3d 437, 446 n.2, 272 Cal. Rptr. 906* ; *In re Baby Boy M. (1990) 221 Cal. App. 3d 475, 485, 272 Cal. Rptr. 27]* .

Legal Topics:

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§ 12B.96 Revocation of Consent; Return of Child

After a consent to the adoption is signed, a birth parent may revoke his or her consent within 30 days by signing and delivering a written statement of revocation and request for return of the child to the department or delegated county adoption agency. This 30-day period applies both to a parent who has placed the child for adoption [*see Fam. Code § 8801.3*; § 12B.90] and to a parent who did not place the child for adoption [*Fam. Code § 8814.5(a)(1)*; *see Fam. Code § 8814*; § 12B.95]. The department's form of Revocation of Consent is *set forth in § 12B.336[1]*. Note, however, that the revocation of consent need not be made on a department form or in the presence of any department or agency employee or other adoption service provider [*see Fam. Code § 8814.5(a)(1)*].

If a birth parent revokes consent and requests return of the child before the time when a revocable consent becomes permanent, as provided in *Fam. Code § 8814.5*, the child must be immediately returned to the birth parent or parents so requesting [*Fam. Code § 8815(b)*; *but cf. In re Bridget R. (1996) 41 Cal. App. 4th 1483, 1515-1521, 49 Cal. Rptr. 2d 507* (custody hearing required despite ICWA mandate to return child to birthparents)]. Note that there is an apparent conflict in the statutes regarding whether any consideration may be given to the fitness of the parent or parents to whom the child is to be returned. Under *Fam. Code § 8815(c)*, if the prospective adoptive parents with whom the child has been placed have concerns that the birth parent or parents requesting return of the child are unfit or present a danger of harm to the child, their only option is to report their concerns to the investigating adoption agency and the appropriate child welfare agency. These concerns may not be a basis for failure to immediately return the child [*Fam. Code § 8815(c)*]. However, under *Fam. Code § 8804(c)*, if a birth parent revokes consent as specified in *Fam. Code § 8814.5*, the court must order the child restored to the custody of the birth parent or parents, but subject to the provisions of *Fam. Code § 3041*--which opens the possibility of a court awarding custody to a nonparent on the basis that granting custody to a parent would be detrimental to the child and granting custody to the nonparent is required to serve the best interest of the child [*Fam. Code § 8804(c)*].

A parent who has revoked consent may *reinstate* consent by means of a written statement. After revoking consent, in cases in which the birth parent or parents *have not* regained custody, or the birth parent or parents have failed to make efforts to exercise their rights under *Fam. Code § 8815(b)* (requesting return of the child), a written statement

reinstating the original consent may be signed and delivered to the department or delegated agency--in which case the revocation of consent will be void and a the remainder of the original 30-day period will commence. However, in cases in which the birth parent or parents *have regained custody*, or made efforts to exercise their rights to request return of the child on delivery of such a statement to the department or delegated county adoption agency, the revocation of consent will be void and a new 30-day period will commence. The birth mother must be informed of the operational timelines associated with these provisions at the time of signing of the statement reinstating the original consent [*Fam. Code § 8814.5(a)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12B.97 Waiver of Right to Revoke Consent

Before the 30-day period for revoking consent expires, a birth parent may sign a waiver of the right to revoke consent. If a valid waiver of the right to revoke is signed, the consent may not be revoked [*Fam. Code § 8814.5(b)*]. An adoption service provider may assist the birth parent in "any activity where the primary purpose of that activity is to facilitate the signing of the waiver" (of right to revoke consent) with the Department of Social Services, a delegated county agency, or a judicial officer. The adoption service provider or any other person designated by the birth parent or parents may also be present to provide support to that parent or parents at any interview in connection with signing of the waiver, except when the interview is conducted by independent legal counsel for the birth parent or parents [*Fam. Code § 8814.5(a)(2)(B)*].

The waiver must be signed on a form prescribed by the department [*see § 12B.337[1]*] in the presence of a representative of the department or delegated county adoption agency, a judicial officer of a court of record if the birth parent is represented by independent legal counsel, or an adoption service provider if the birth parent or parents are represented by independent legal counsel. The adoption service provider must ensure that the waiver is delivered to the department, the petitioners, or their counsel no earlier than the end of the business day following the signing of the waiver. It must inform the birth parent that during this time period, he or she may request that the waiver be withdrawn and that, if he or she makes that request, the waiver must be withdrawn [*Fam. Code § 8814.5(a)(2)(A)*].

The waiver of the right to revoke consent may not be signed until an interview has been completed by the department or delegated county adoption agency unless the waiver of the right to revoke consent is signed in the presence of a judicial officer of a court of record or an adoption service provider. If the waiver is signed in the presence of a judicial officer, the interview and the witnessing of the signing of the waiver must be conducted by the judicial officer. If the waiver is signed in the presence of an adoption service provider, the interview must be conducted by the independent legal counsel for the birth parent or parents, and the waiver must be reviewed by the independent legal counsel who must counsel the birth parent or parents about the nature of the intended waiver and must sign and deliver to the birth parent or parents and the department a certificate in the form specified in *Fam. Code § 8814.5(a)(2)(C)*. Within 10 working days of a request made after the department or the delegated county adoption agency has received a copy of the petition

for the adoption and the names and addresses of the persons to be interviewed, the department or the delegated county adoption agency must interview, at the department or agency office any birth parent requesting to be interviewed [*Fam. Code § 8814.5(a)(2)(C)*].

The interview, and the witnessing of the signing of a waiver of the right to revoke consent of a birth parent residing outside of California or located outside of California for an extended period of time unrelated to the adoption may be conducted in the state where the birth parent is located, by any of the following [*Fam. Code § 8814.5(a)(2)(C)*]:

(1) A representative of a public adoption agency in that state.

(2) A judicial officer in that state if the birth parent is represented by independent legal counsel.

(3) An adoption service provider.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionConsentBiological ParentsFamily LawAdoptionConsentRevocationFamily LawAdoptionProceduresPrivate AdoptionFamily LawParental Duties & RightsTermination of RightsVoluntary Termination

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§ 12B.98 Permanent Consent; Equitable Motion to Set Aside

If 30 days pass and consent is not revoked (*see § 12B.96*), or if a waiver of the right to consent is signed before 30 days (*see § 12B.97*), the consent becomes permanent and may no longer be revoked or withdrawn [*Fam. Code § 8814.5(a)(3), (b)*; *but see Fam. Code § 8814.5(a)(1)* (special provisions for reinstating consent after revocation)]. At that point, the birth parent has no further statutory remedy to attempt to block the adoption; there is no longer any statutory procedure by which a consent once given may be withdrawn with judicial approval if found to be in the best interests of the child [*see Fam. Code § 8815(a)*; *cf.* § 12B.71 (prior law)].

However, proof that a consent was obtained by mistake, fraud, duress, undue influence, or coercion renders the consent invalid and deprives the court of jurisdiction to grant the adoption [*see Arnold v. Howell (1950) 98 Cal. App. 2d 202, 206-208, 219 P.2d 854]* . Such a jurisdictional defect may be raised by any appropriate equitable motion or proceeding, before or after a decree of adoption is entered [*see Arnold v. Howell (1950) 98 Cal. App. 2d 202, 206-208, 219 P.2d 854]* . Under prior law, it has been held that the court's consideration in such a case is not constrained by the statutory requirements for withdrawal of consent [*see Guardianship of Baby Boy M. (1977) 66 Cal. App. 3d 254, 271-272, 135 Cal. Rptr. 866* ; *see also Adoption of Alexander S. (1988) 44 Cal. 3d 857, 861-862, 245 Cal. Rptr. 1, 750 P.2d 778* (in which Supreme Court noted and stressed trial court's distinction between rescission of consent on grounds of coercion, duress, or undue influence, and withdrawal of consent under former statutory standards)].

Therefore, it may be possible for a birth parent to bring an equitable motion to set aside, revoke, or withdraw consent on the grounds of mistake, fraud, duress, undue influence, or coercion after the consent has become permanent under the statutes. For further discussion, see Ch. 12E, *Adoptions: Attack on Decree* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefFamily LawAdoptionConsentBiological ParentsFamily LawAdoptionConsentRevocationFamily LawAdoptionProceduresPrivate AdoptionFamily LawParental Duties &

RightsTermination of RightsVoluntary Termination

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2-12B California Forms of Pleading and Practice--Annotated § 12B.99

§ 12B.99 Interview by Department or Agency

The department or delegated county adoption agency must interview the petitioners within 45 working days, excluding legal holidays, after the filing of the adoption petition [*Fam. Code § 8808(a)*].

The department or agency must interview all persons from whom consent is required and whose addresses are known as soon as 50 percent of the fee has been paid to the department or agency. The interview with the placing parent or parents must include, but not be limited to, a discussion of any concerns or problems that the parent has with the placement and, if the placing parent was not interviewed as provided in *Fam. Code § 8801.7*, the content required in that interview. At the interview, the agency must give the parent an opportunity to sign either a statement revoking consent, or a waiver of the right to revoke consent, as provided in *Fam. Code § 8814.5* [*Fam. Code § 8808(b)*].

To facilitate the interview, at the same time the petition is filed with the court, the petitioners must file with the district office of the department or with the county adoption agency responsible for the investigation of the adoption, a copy of the petition, 50 percent of the fee, and the names, addresses, and telephone numbers of all parties to be interviewed, if known [*Fam. Code § 8808(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionConsentBiological ParentsFamily LawAdoptionProceduresPrivate AdoptionFamily LawParental Duties & RightsTermination of RightsVoluntary Termination

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2-12B California Forms of Pleading and Practice--Annotated § 12B.100

§ 12B.100 Prerequisites to Consent

[1] Generally

Under prior law, all required consents were obtained in the course of the agency investigation after the child was placed for adoption. Under the law operative January 1, 1995, the consent of a parent who is placing the child for adoption must be included in the adoption placement agreement, which is to be executed at the time of discharge from the hospital [*see Fam. Code § 8801.3(b)(2), (c)(5), (e)*, discussed in *§ 12B.93*]; only the consent of a parent who is not placing the child for adoption is to be obtained later [*see Fam. Code § 8814*, discussed in *§ 12B.95*]. Therefore, many of the concerns about the validity of consent that were previously addressed in the post-placement investigation must now be addressed by the adoption service provider in the course of executing the adoption placement agreement.

The investigating agency (and presumably now also the adoption service provider) should take a parent's consent only if it appears that the adoption should proceed [*see 22 Cal. Code Reg. § 35095*]. Under its statutory duty to ascertain whether the child is a proper subject for adoption, the agency must determine that the consent is knowingly and voluntarily given. Under its duty to determine whether the proposed home is suitable for the child, the agency has the discretion to refuse to accept the consent if it determines that the adoption is not in the best interest of the child [*San Diego County Dep't of Public Welfare v. Superior Court of San Diego County (1972) 7 Cal. 3d 1, 9-10, 101 Cal. Rptr. 541, 496 P.2d 453* (construing prior but substantially similar law); *see Fam. Code § 8806*].

The agency representative must also verify that a birth parent personally placed the child with the prospective adoptive parents [*see Fam. Code § 8801(a)*, discussed in *§ 12B.72*]. If the agency determines that the placement was not lawful, it must advise the birth parent that the placement was improper and file a preliminary court report [*22 Cal. Code Reg. § 35095(b)(6)*].

[2] Capacity

The agency representative must determine that the consenting birth parent has the ability to understand the nature, content, and effect of signing a consent to adoption [*see 22 Cal. Code Reg. § 35109*]. If the representative questions the

parent's capacity to consent, the consent may be accepted only if an evaluation by a physician or clinical psychologist establishes that the parent has the ability to understand the nature, content, and effect of signing a consent to adoption [*22 Cal. Code Reg. § 35097(a)*]. Special procedures must be followed to obtain the consent of a birth parent who is a patient in, or on leave from, a psychiatric facility or under psychiatric treatment for mental illness, or under a conservatorship, or if there is otherwise a question of the mental competency of the parent [*see 22 Cal. Code Reg. § 35101 et seq.*].

[3] Required Statements and Disclosures

[a] Statement of Understanding

Documentation of a birth parent's understanding of the information required to give consent is accomplished by having the parent sign a "statement of understanding" [*see 22 Cal. Code Reg. § 35095*]. Its extensive contents are prescribed by regulation and essentially summarize the law of independent adoptions [*see 22 Cal. Code Reg. § 35095.1*].

For a reproduction of the Department of Social Service's form of Statement of Understanding, see *§ 12B.333[1]*. For a reproduction of the department's form of consent to adoption, see *§ 12B.334[1]*.

[b] Right to Information on Status of Child

On or before the time a consent to adoption is signed, the birth parent signing the consent must be advised verbally and in writing by the department or the delegated county adoption agency, that he or she may, at any time in the future, request from the department or agency all known information about the status of the child's adoption, except for personal, identifying information about the adoptive family. The birth parent must be advised that this information includes, but is not limited to, all of the following: (1) whether the child has been placed for adoption; (2) the approximate date on which an adoption was completed; and (3) if the adoption was not completed or was vacated for any reason, whether adoptive placement of the child is again being considered [*Fam. Code § 8813*]. For further discussion of access to information regarding adoptions, see Ch. 12D, *Adoptions: Amendment and Inspection of Records* .

[c] Statement Regarding Future Communication and Confidentiality

A statement must be presented to the birth parents at the time the consent to adoption is signed (and to prospective adoptive parents at the time of the home study) that, in a clear and concise manner, in words calculated to assure the confidence of the birth parents in the integrity of the adoption process, must communicate to the birth parent of a child who is the subject of an adoption petition all of the following facts [*Fam. Code § 8818(a)*]:

> (1) It is in the best interest of the child that the birth parents keep the department informed of any health problems that the parent develops that could affect the child.
>
> (2) It is extremely important that the birth parent keep his or her address current with the department in order to permit a response to any inquiries to the department or delegated county adoption agency concerning medical or social history.
>
> (3) *Fam. Code § 9203* authorizes a person who has been adopted and who attains the age of 21 to petition the department to obtain the name and address of his or her birth parents. Therefore, it is of the utmost importance that the birth parent indicate whether or not he or she wishes his or her name and address to be so disclosed by checking the appropriate box provided on the form.
>
> (4) The birth parent may change his or her decision as to whether or not he or she wishes his or her name and address disclosed, at any time, by sending a notarized letter to that effect, by certified mail, return

receipt requested, to the department.

(5) The consent will be filed in the office of the clerk of the court in which the adoption takes place. The file is not open to inspection by any persons other than the parties to the adoption proceedings, their attorneys, and the department, except on order of the judge of the superior court.

Confidentiality and procedures for obtaining information concerning completed adoptions are discussed in Ch. 12D, *Adoptions: Amendment and Inspection of Records* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionConsentBiological ParentsFamily LawAdoptionProceduresPrivate AdoptionFamily LawParental Duties & RightsTermination of RightsVoluntary Termination

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§ 12B.101 Official Consent in Certain Cases

In all independent adoptions in which the consent of the birth parent or parents is not necessary [*see Fam. Code §§ 7600 et seq., 7800 et seq., 8604-8606*, discussed in Ch. 12A, *Adoptions: Termination of Parental Rights*], the Department of Social Services or the delegated county adoption agency must, before the hearing of the petition, file its consent to the adoption with the clerk of the superior court of the county in which the petition is filed. That consent may not be given unless the child's welfare will be promoted by the adoption [*Fam. Code § 8816*].

However, this official consent is not indispensable [*see Adoption of McDonald (1954) 43 Cal. 2d 447, 457, 274 P.2d 860]* . If the department or agency fails or refuses to consent, the statutory provisions of *Fam. Code § 8820* apply [*see* discussion in *§ 12B.112*], and the court may grant the adoption petition without the consent if it deems that the child's welfare will be promoted by adoption [*Fam. Code § 8820(c)*].

Legal Topics:

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

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[Reserved]

§§ 12B.102[Reserved]

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§ 12B.110 Filing of Adoption Petition

[1] Persons Who May Petition for Independent Adoption

A petition for an independent adoption of a child may be filed by any of the following who desires to adopt a child [*Fam. Code § 8802(a)*]:

(1) An adult who is related to the child or the child's half sibling by blood or affinity, including all relatives whose status is preceded by the words "step," "great," "great-great," or "grand," or the spouse of any of these persons, even if the marriage was terminated by death or dissolution;

(2) A legal guardian who has been the child's legal guardian for more than one year; or, if the court has found under *Fam. Code § 7822* that the child was abandoned, a legal guardian who has been the child's legal guardian for more than six months; or, if the birthparent nominated the guardian for a purpose other than adoption for a specified time period, or if the guardianship was established under *Welf. & Inst. Code § 360*, the guardianship must have been in existence for at least three years;

(3) A person named in the will of a deceased parent as an intended adoptive parent if the child has no other parent;

(4) A person with whom a child has been placed for adoption.

Note that the above limitations on who may petition for adoption are more restrictive than prior law [*cf.* former *Fam. Code § 8802(a)*, repealed January 1, 1995 ("A person desiring to adopt a child may, for that purpose, file a petition ... ")]. If the child has not been "placed for adoption" in the manner required by law [*see Fam. Code § 8801.3*, discussed in *§ 12B.90*], the prospective adoptive parents may not petition for adoption unless they fall within categories 1, 2, or 3, *above*.

Persons not designated in *Fam. Code § 8802(a)* lack standing to file a petition for an independent adoption [*In re Michael R. (2006) 137 Cal. App. 4th 126, 137-138, 39 Cal. Rptr. 3d 773*) (long-term caretaker may proceed with adoption only after obtaining guardianship of child; rejecting contention that under *Fam. Code § 7822*) any person who has cared for child for six months should have standing to file adoption petition)].

[2] Jurisdiction, Venue, and Notice to Department

The petition is to be filed in county where the petitioner resides [*Fam. Code § 8802(a)*]. Alternative locations of filing are provided by statute and are discussed in *§ 12B.30* [*see Fam. Code §§ 8802(a)(1), 9211*]. All jurisdiction under the Family Code is in the superior court [*Fam. Code § 200*]. For further discussion of jurisdictional requirements in adoption matters, see *§ 12B.30*. The court clerk must immediately notify the California Department of Social Services at Sacramento in writing of the pendency of the proceeding and of any subsequent action taken [*Fam. Code § 8802(a)*; § 12B.310[1]].

For a form of a petition of adoption, now termed an "adoption request" that may be adopted for use in an independent adoption, see *§ 12B.302[1]*.

[3] Time Limitations

No express time limitations are provided by statute for filing a petition for independent adoption relative to the birth of the child who is sought to be adopted. Filing the adoption petition starts the period within which the investigating adoption agency must interview the petitioners and all persons whose consent is required [*see Fam. Code § 8808*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureVenueIndividual DefendantsFamily LawAdoptionProceduresPrivate AdoptionFamily LawGuardiansGeneral Overview

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§ 12B.111 Investigation and Report

[1] Duty to Investigate and Report

Within 180 days after receiving 50 percent of the fee, the department or county adoption agency must investigate the proposed adoption and, after the remaining balance of the fee is paid, submit to the court a full report of the facts disclosed by its inquiry with a recommendation regarding the granting of the petition. The court may allow such additional time for the filing of the reports as in its discretion it may see fit, after at least five days' notice to the petitioners and opportunity for the petitioners to be heard with respect to the request for additional time [*Fam. Code § 8807(a), (c)*].

If the investigation establishes that there is a serious question concerning the suitability of the petitioners or the care provided the child or the availability of the consent to adoption, the report must be filed immediately [*Fam. Code § 8807(b)*; *see Adoption of Michelle T. (1975) 44 Cal. App. 3d 699, 703, 117 Cal. Rptr. 856* (agency must shorten 180-day period in which to submit full report of facts disclosed by inquiry)]. A preliminary report must be filed immediately if there is a serious question as to whether the placement of the child for adoption was made according to law [*22 Cal. Code Reg. § 35123(f)*; *see Fam. Code § 8801.3*]. Proceedings after a negative investigative report has been filed are discussed further in § 12B.112.

If there are concurrent petitions pending for adoption of the same child [*see* discussion in *§ 12B.54[4]*], the respective investigating agencies must exchange information on the petitions, determine which of the petitioners will best meet the needs of the child, and report to the court [*see 22 Cal. Code Reg. § 35079(b)*].

The report must contain a summary of the pertinent facts disclosed by the investigation, an evaluation of these facts, and a recommendation regarding the disposition of the adoption petition. The information included in the report must be current and substantiated in the case record [*22 Cal. Code Reg. § 35123*]. The agency must submit a complete report of the facts discovered; that is, the report must be comprehensive to the extent of the investigation, even if the investigation is not complete. It may not be pared down to set forth only adverse facts [*Adoption of Michelle T. (1975)*

44 Cal. App. 3d 699, 703-704, 117 Cal. Rptr. 856] .

If the petitioner resides in a state other than California, an updated and current home study report conducted and approved by a licensed adoption agency or other authorized resource in that state must be reviewed and endorsed by the department or agency, if the standards and criteria established for a home study report in the other state are substantially commensurate with the home study standards and criteria established in California's adoption regulations [*Fam. Code § 8807(d)*].

[2] Required Documentation and Role of Counsel

The petitioner's attorney may be able to help reduce the time required for the investigation by furnishing the investigator with all required documentation. This documentation includes release-of-information authorizations, medical reports, school reports, letters of reference, criminal records, and a certificates that each adult in the household is free from communicable tuberculosis [*see 22 Cal. Code Reg. § 35087*].

[3] Assessments of Petitioners and Child

[a] Assessment Requirements

The investigating agency must make a written assessment of the petitioners to determine their suitability as adoptive parents [*22 Cal. Code Reg. § 35081*]. An interview must be conducted in the home of the petitioners as soon as possible, but no later than 30 days after the receipt of a copy of the adoption petition [*22 Cal. Code Reg. § 35083(a)(1)*]. Each petitioner must be interviewed separately, and they must also be interviewed jointly [*22 Cal. Code Reg. § 35083(a)(2), (3)*]. The agency must also interview any other adults who live in the home and have contact with all children who live in the home [*22 Cal. Code Reg. § 35083(a)(4)*].

The assessment of the petitioners will involve the following matters relating to the petitioners' suitability as adoptive parents [*22 Cal. Code Reg. § 35089*]:

(1) Obtaining the following identifying information on the petitioners and any children or adults residing in their home:

(a) Name, date of birth, and sex;

(b) Current address and telephone number;

(c) Blood relationship to child to be adopted, if any;

(d) Race and ethnic background;

(e) Religion;

(f) Current employment information;

(g) Verification of marital status and verification of termination of any previous marriages; and

(h) Personal and biological relationship of the petitioners to any other individuals residing in their home.

(2) Evaluation of the following for the petitioner and any children and adults residing in their home:

(a) General characteristics;

(b) Feelings and attitudes that may affect the adoption;

(c) Social background;

(d) Educational background;

(e) Financial stability; and

(f) Adequacy of housing.

(3) Evaluation of the full state criminal record, if any, of the petitioners, and the Federal Bureau of Investigation criminal record, if any, if a petitioner has resided in California for less than two years or if information gathered in the assessment has given the agency reason to believe that the petitioner may have committed a crime in another jurisdiction [*see Fam. Code § 8811*; *22 Cal. Code Reg. § 35087(a)(8)*].

The investigating agency must obtain a medical report on each petitioner, made on the basis of an examination that was conducted no earlier than six months before the petition was filed. This requirement must be waived if the petitioners are members of a religion that relies on faith and prayer for healing [*22 Cal. Code Reg. § 35087(a)(3)*].

The investigating agency must also assess the child. This assessment must include the child's background, development, health [*see Fam. Code §§ 8806, 8817* (requirement of medical report on child and birth parents, discussed in *§ 12B.34*], religion, readiness for adoption and willingness to be adopted if appropriate, adjustment in the petitioners' home, and any other examinations and reports, as necessary [*22 Cal. Code Reg. § 35093*].

[b] Preplacement Evaluation by Private Agency

Prospective adoptive parents can be certified as suited to be adoptive parents by a preplacement evaluation conducted by a licensed private or public adoption agency of the state of the petitioners' residency. [*Fam. Code § 8811.5(a)*]. The evaluation is conducted pursuant to standards for investigations of independent adoptions by the department. The fee for a preplacement evaluation must be commensurate with the fees charged by the department or delegated county investigating agency for a comparable investigation [*Fam. Code § 8811.5(b)*]. An initial or renewal certification is valid for one year--that is, the evaluation must be completed no more than one year before the signing of an adoption placement agreement [*Fam. Code § 8811.5(c)*].

[4] Interviews of Persons Whose Consent Is Required

It is the duty of the department or delegated agency to accept required parental consents if it finds that the proposed adoptive home is suitable for the child [*see Fam. Code § 8806*]. Persons whose consent is required must generally be interviewed within 45 working days after the date the petition was filed [*see Fam. Code § 8808*]. For further discussion of the available procedures if the investigating agency refuses to accept a consent [*see Fam. Code § 8820*], see *§ 12B.95[4]*.

[5] Fingerprints and Criminal Record

The Department of Social Services or its delegated county adoption agency must require all persons filing a petition to

adopt a child to be fingerprinted, and must secure from an appropriate law enforcement agency any criminal record of that person to determine whether the person has ever been convicted of a crime other than a minor traffic violation. The department or agency may also secure the full criminal record, if any, of those persons. Any criminal record must be taken into consideration in evaluating a prospective adoptive parent. An assessment of the effects of any criminal history on the ability of a prospective adoptive parent to provide adequate and proper care and guidance to the child must be included in the report to the court [*Fam. Code § 8811(a), (b)*].

Under no circumstances may the department or agency give final approval for an adoptive placement in any home where the prospective adoptive parent or any adult living in the prospective adoptive home has a felony conviction that occurred within the last five years for physical assault, battery, or a drug- or alcohol-related offense, or a felony conviction for child abuse or neglect, spousal abuse, crimes against a child, including child pornography, or for a crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault and battery [*Fam. Code § 8811(c)*].

Any fee charged by a law enforcement agency for fingerprinting or for checking or obtaining the criminal record of the petitioner must be paid by the petitioner. However, the department or agency may defer, waive, or reduce the fee (1) if payment would cause economic hardship to the adoptive parents that is detrimental to the child's welfare, (2) if the child has been in the foster care of the prospective adoptive parents for at least one year, or (3) if necessary for the placement of a "special needs child" [*Fam. Code § 8811(d)*]. A "special needs child" is one whose adoption without financial assistance would be unlikely because of adverse parental background; ethnic background; race; color; language; membership in a sibling group that should remain intact; mental, physical, medical, or emotional handicaps; or age of three years or more [*Fam. Code § 8545*].

[6] Copy of Report to Petitioner

Whenever any report or findings are submitted to the court by the investigating agency, a copy of the report or findings, whether favorable or unfavorable, must be given to the petitioner's attorney of record, if any. If the petitioner has no attorney of record, the copy must be given to the petitioner [*Fam. Code § 8821*]. No specific time limit is prescribed for giving copies of reports to petitioners or attorneys.

[7] Fee to Fund Independent Adoption Programs

Whenever a petition is filed in an independent adoption for the adoption of a child, the petitioners must pay a nonrefundable fee to the Department of Social Services or to its delegated county adoption agency for the cost of investigating the adoption petition. Fifty percent of the payment must be made to the Department or adoption agency at the time the adoption petition is filed, and the remaining balance must be paid no later than the date determined by the department or agency [*Fam. Code § 8810(a)*]. The amount of the fee is $4,500 for petitions filed on or after October 1, 2008 [*Fam. Code § 8810(a)(1)*]. For petitioners who have a valid preplacement evaluation at the time of filing a petition under *Fam. Code § 8811.5*, the fee is $1,550 for a postplacement evaluation under *Fam. Code §§ 8806* and *8807* [*Fam. Code § 8810(a)(2)*].

The Department or adoption agency may reduce the fee to not less than $500 if the prospective adoptive parents are very low income according to the income limits published by the Department of Housing and Community Development, and making the required payment would be detrimental to the child's welfare [*Fam. Code § 8810(c)*].

Revenues produced by fees collected by the department must be used, when appropriated by the Legislature, to fund only the state program for independent adoptions. Revenues produced by fees collected by a delegated county adoption agency must be used by the county to fund the county program for independent adoptions [*Fam. Code § 8810(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresPrivate Adoption

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2-12B California Forms of Pleading and Practice--Annotated § 12B.112

§ 12B.112 Judicial Review of Adverse Investigative Findings

If the Department of Social Services or the delegated county adoption agency finds that the petitioner's home is not suitable for the child or that the required consents are not available and recommends that the petition be denied, or if the petitioners desire to withdraw the petition and the Department or agency recommends that the petition be denied, the county clerk must immediately on receipt refer the report to the court for review. On receipt of the report, the court must set a date for a hearing of the adoption petition and must give reasonable notice of the hearing to the Department of Social Services or delegated county adoption agency, the petitioners, and the birth parents, by certified mail, return receipt requested, to the address of each as shown in the proceeding [*Fam. Code § 8822(a), (b)*]. The department or delegated county agency must appear to represent the child at the hearing [*Fam. Code § 8822(c)*]. Failure of the court to hold a trial-like evidentiary hearing is a violation of the Family Code subject to reversal [*Adoption of Baby Girl B (1999) 74 Cal. App. 4th 43, 55, 87 Cal. Rptr. 2d 569* (affording petitioner opportunity to respond to department's recommendation that petition be denied does not satisfy statutory requirement of evidentiary hearing); *Fam. Code § 8822(b)*].

Unless the reason for the negative recommendation is that a required consent is not available, the court is not bound to follow the department or agency recommendation. It may grant the petition if it finds the adoption to be in the best interests of the child [*Adoption of McDonald (1954) 43 Cal. 2d 447, 456-457, 274 P.2d 860* ; *Adoption of Backhaus (1962) 209 Cal. App. 2d 13, 19-20, 25 Cal. Rptr. 581* (both construing substantially similar prior law)].

If a birth parent whose consent is required has refused to give that consent and demanded the return of the child [*see Fam. Code § 8814*, discussed in *§ 12B.95[5]*] or if a birth parent revokes his or her consent within the 30-day period allowed by law [*see Fam. Code § 8814.5*, discussed in *§ 12B.96*], the petition must be denied and the child returned to the birth parent [*Fam. Code § 8804(c)*]. There is no discretion to consider the best interests of the child [*In re Timothy W. (1990) 223 Cal. App. 3d 437, 445-446, 272 Cal. Rptr. 906* ; *In re Baby Boy M. (1990) 221 Cal. App. 3d 475, 485, 272 Cal. Rptr. 27* (both construing substantially similar prior law); *but cf. In re Bridget R. (1996) 41 Cal. App. 4th 1483, 1515-1521, 49 Cal. Rptr. 2d 507* (custody hearing required if relinquishments are invalid despite ICWA mandate to return child to birthparents)].

If the department or agency recommends that the petition be denied, it must file a full report with the court recommending a suitable future custodial plan for the child [*Fam. Code § 8804(a)*]. If the court sustains the recommendation of the department or agency that the petition be denied and the child removed from the home (on grounds other than the birth parent's refusal to consent), the court must commit the child to the care of the department or agency, whichever made the recommendation, in order to arrange another adoptive placement or to make a suitable plan [*Fam. Code § 8805*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewFamily LawAdoptionConsentBiological ParentsFamily LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresPrivate Adoption

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2-12B California Forms of Pleading and Practice--Annotated § 12B.113

§ 12B.113 Petitioner's Dismissal or Withdrawal of Petition

A petitioner for adoption may move to withdraw the adoption petition or to dismiss the proceeding [*see Fam. Code § 8804(a)*]. While proceedings on the motion are required, the purpose is to make future arrangements for the child. Notwithstanding withdrawal or dismissal, the court may retain jurisdiction over the child for the purpose of making any order for the child's custody as the court may deem to be in the best interests of the child [*Fam. Code § 8804(b)*].

On the filing of a motion to dismiss or withdraw, the clerk must immediately notify the Department of Social Services at Sacramento of that action. The department or its delegated county adoption agency must file a full report with the court recommending a suitable plan for the child. The department or agency must appear before the court for the purpose of representing the child [*Fam. Code § 8804(a)*].

If the reason that the petition is dismissed or withdrawn is that a birth parent has refused to give a required consent [*see Fam. Code § 8814*, discussed in *§ 12B.95[5]*], or if a birth parent revokes his or her consent within the 90-day period allowed by law [*see Fam. Code § 8814.5*, discussed in *§ 12B.96*], and has demanded return of the child, the court must order the child restored to the care and custody of the birth parent or parents subject to the provisions of *Fam. Code § 3041* [*Fam. Code § 8804(c)*].

If the child is not to be returned to a birth parent, the court must commit the child to the care of the department or delegated agency to arrange another adoptive placement or to make a suitable custodial plan [*Fam. Code § 8805*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresPrivate Adoption

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2-12B California Forms of Pleading and Practice--Annotated § 12B.114

§ 12B.114 Setting Adoption Petition for Hearing

Unless a hearing has already occurred because of the filing of an investigative report recommending denial of the petition [*see Fam. Code § 8822*, discussed in *§ 12B.112*], the petitioners' attorney should schedule a hearing. The hearing should be set promptly after the investigative report is filed or as soon thereafter as the petition is ready to be heard.

In selecting a hearing date, notice or citation requirements must be considered [*see Fam. Code §§ 8604-8606*, discussed in Ch. 12A, *Adoptions: Termination of Parental Rights*]. By the time a petition receiving a favorable recommendation in the investigative report is set for hearing, all necessary parental consents should have been obtained, or have been determined to be unnecessary, or parental rights of a nonconsenting parent should have been terminated, as discussed in Ch. 12A, *Adoptions: Termination of Parental Rights* .

For discussion of procedures applicable to adoption hearings generally, see *§ 12B.50* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresPrivate Adoption

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2-12B California Forms of Pleading and Practice--Annotated §§ 12B.115-12B.129

[Reserved]

§§ 12B.115[Reserved]

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2-12B California Forms of Pleading and Practice--Annotated § 12B.130

§ 12B.130 Governing Law

Stepparent adoptions are specifically governed by Division 13, Part 2, Chapter 5 of the Family Code [*Fam. Code § 9000 et seq.*]. Part 1 and Chapter 1 of Part 2 of the same Division contain statutory provisions applicable to all adoptions, including independent adoptions [*see Fam. Code §§ 8500 et seq., 8600 et seq.*].

Legal Topics:

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

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2-12B California Forms of Pleading and Practice--Annotated § 12B.131

§ 12B.131 "Stepparent" Defined

A stepparent adoption is an adoption of a child by a stepparent, in which the birth parent who is the spouse of the adopting stepparent retains his or her custody and control of the child [*Fam. Code § 8548*]. The stepparent must be the lawful spouse of the child's birth parent who will retain parental rights, as opposed to a person in some other relationship with the parent, such as an unmarried cohabitant [*see Adoption of Bird (1960) 183 Cal. App. 2d 140, 147, 6 Cal. Rptr. 675]* . An unmarried cohabitant's adoption of the minor child of the other cohabitant would be handled asa general independent adoption, and would follow the procedures discussed in Subpart B, *above* [*see Sharon S. v. Superior Court (Annette F.) (2003) 31 Cal. 4th 417, 422 n.2, 437-438, 2 Cal. Rptr. 3d 699, 73 P.3d 554* ; *see also § 12B.13[2]*]. Counsel in a surrogacy situation should also review a 1998 case that held divorcing parents to be the legal parents of a child who was conceived through implantion into a surrogate mother of fertilized ovum from anonymous donors, to see if the intended parents are the legal parents, and no stepparent adoption is necessary [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1428-1429, 72 Cal. Rptr. 2d 280* ; *see § 12.16*].

A stepparent adoption may also be a relative adoption that would support a postadoption contact agreement if that right applies outside of agency adoptions [*see Fam. Code § 8616.5(c)*]. For further discussion, *see § 12B.145*.

Legal Topics:

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

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2-12B California Forms of Pleading and Practice--Annotated § 12B.132

§ 12B.132 Considerations in Stepparent Adoptions

A stepparent adoption involves elements that are different in nature from those present in which persons who seek to adopt a child are not related to the child by blood or affinity [*see Adoption of Bird (1960) 183 Cal. App. 2d 140, 147, 6 Cal. Rptr. 675]* . The child is often older than is the case with other kinds of adoptions. The purpose of the adoption is usually to legally confirm a parent-child relationship that already exists in fact. The child has almost always been in his or her custodial situation for some time, living with the custodial parent and the adopting stepparent. Therefore, a determination of the suitability of the adoptive home is not really needed. Further, a denial of the adoption petition does not result in the removal of the child from the home [*see* ten Broek, *California's Adoption Law and Programs, 6 Hastings L.J. 261, 268 (1955)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresStepparent Adoption

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2-12B California Forms of Pleading and Practice--Annotated § 12B.133

§ 12B.133 Age of Prospective Parent

The generally applicable requirement that a adopting adult be at least 10 years older than the child adopted [*see Fam. Code § 8601(a)*, discussed in *§ 12B.13*] may be waived by the court in a stepparent adoption if the court determines that the adoption is in the best interests of the parties and is in the public interest [*Fam. Code § 8601(b)*].

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For related research and practice materials, see the following legal topics:
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2-12B California Forms of Pleading and Practice--Annotated § 12B.134

§ 12B.134 Effect on Inheritance

Unlike other adoptions, a stepparent adoption does not always terminate the child's right of inheritance by intestacy from and through the parent whose rights are being terminated. Generally, if the birth parent and child lived together at any time during the child's minority, the parent-child relationship continues to exist for the purposes of intestate succession [*see Prob. Code § 6451(a)*]. This matter is discussed further in Ch. 12. Consent forms promulgated by the Department of Social Services [*see § 12B.350[1]*] are required to give notice of this effect to the parent who is giving up parental rights [*see Fam. Code § 9004*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawIntestacyAdopted ChildrenFamily LawAdoptionChild RightsInheritance RightsFamily LawAdoptionProceduresStepparent AdoptionFamily LawParental Duties & RightsTermination of RightsGeneral Overview

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§ 12B.135 Consent Requirements

[1] Petitioner's Spouse

A stepparent may not adopt his or her stepchild without the consent of the birth parent to whom he or she is married [*see Fam. Code § 8603*, discussed in *§ 12B.15[3]*]. Conceptually, that parent must consent both as a parent and as a spouse of a petitioner for adoption [*see Fam. Code §§ 8603-8606*].

[2] Noncustodial Parent

The consent of the noncustodial birth parent is the important concern in any stepparent adoption, because his or her parental rights will be terminated pursuant to the adoption [*see Fam. Code §§ 8548, 8617*; *Adoption of Christopher S. (1987) 197 Cal. App. 3d 433, 242 Cal. Rptr. 866]* . In this regard, a stepparent adoption involves the same consent requirements as any other kind of adoption. These requirements are discussed in detail in Ch. 12A, *Adoptions: Termination of Parental Rights* .

Generally, if the noncustodial parent is the child's mother or presumed father [*see Fam. Code § 7611*, discussed in Ch. 12A, *Adoptions: Termination of Parental Rights*], his or her consent is required unless a statutory ground to dispense with the consent requirement can be established [*see Fam. Code §§ 8604-8606*]. These exceptions, the most common of which is willful failure to communicate with and support the child for a period of one year, are discussed in Ch. 12A, *Adoptions: Termination of Parental Rights* . If the father was married to and cohabiting with the mother at the time of conception, he is a presumed father [*see Fam. Code §§ 7540, 7611*], and his consent is required absent proof of a statutory ground to dispense with it. Thus, it is not generally possible after a dissolution of marriage for the custodial parent's new spouse to adopt a child of the previous marriage without the consent of the noncustodial parent, as long as the noncustodial parent has maintained some contact with the child [*see, e.g., In re Hickson (1940) 40 Cal. App. 2d 89, 91-93, 104 P.2d 411]* .

If the noncustodial parent is not a presumed father, the procedures of the Uniform Parentage Act [*see Fam. Code § 7660 et seq.*] must be followed to terminate his parental rights or to proceed with the adoption without his consent. The parental rights of any birth parent may also be terminated under *Fam. Code § 7800 et seq.* These procedures are

discussed in Ch. 12A, *Adoptions: Termination of Parental Rights* .

[3] Child

If the stepchild to be adopted is over the age of 12 years, his or her consent to the adoption is required [*Fam. Code § 8602*]. For further discussion of this requirement and a sample form of written consent, see *§§ 12B.13[2], 12B.300[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionConsentBiological ParentsFamily LawAdoptionConsentChildrenFamily LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresStepparent Adoption

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§ 12B.136 Petition to Adopt

Any stepparent who desires to adopt a child of his or her spouse may for that purpose petition the superior court of the county of his or her residence [*Fam. Code § 9000(a)*]. Jurisdiction and venue in adoption matters are discussed further in § 12B.30. For a mandatory Judicial Council form of petition for adoption that may be adapted for use in stepparent adoptions, see *§ 12B.301[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewFamily LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresStepparent Adoption

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§ 12B.137 Investigation and Report

Neither the Department of Social Services nor licensed county adoption agencies are involved in the investigation of stepparent adoptions. Rather, a probation officer, qualified court investigator, licensed clinical social worker, licensed marriage family therapist, or, at the option of the county board of supervisors, the county welfare department in the county in which the proceeding for adoption is pending must investigate a stepparent adoption [*Fam. Code § 9001(a)*]. A qualified court investigator is a superior court investigator with the same minimum qualifications as a probation officer or county welfare worker who is designated to conduct stepparent adoption investigations [*Fam. Code § 8543*]. No order of adoption may be made by the court until after the investigating officer has filed a report and recommendation and it has been considered by the court [*Fam. Code § 9001(a)*].

No home study of the petitioner's home is required unless ordered by the court. The agency conducting the investigation or any interested person may request the court to order a home study or the court may order such a study on its own motion. A "home study" means a physical investigation of the premises where the child is residing [*Fam. Code § 9001(b), (c)*].

The adopting stepparent is liable for all reasonable costs incurred in connection with the adoption, including but not limited to, costs incurred in the investigation, up to a statutory maximum amount [*see Fam. Code § 9002*]. The court, probation officer, qualified court investigator, or county welfare department may defer, waive, or reduce the fee for costs if payment would cause economic hardship to the prospective adoptive parent that would be detrimental to the welfare of the adoptive child [*Fam. Code § 9002*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-12B California Forms of Pleading and Practice--Annotated § 12B.138

§ 12B.138 Manner of Obtaining Consent

In a stepparent adoption, the consent of either or both parents must be signed in the presence of a notary public, court clerk, probation officer, qualified court investigator, or county welfare department staff member of any county in California. The person before whom it is signed must immediately file the consent with the clerk of the superior court of the county where the petition is filed. The clerk must immediately notify the investigating officer of the same county. If the birth parent of a child to be adopted is outside the State of California at the time of signing consent, his or her consent may be signed before a notary or another person authorized to perform notarial acts [*Fam. Code § 9003(a), (b)*].

A birth parent who is a minor has the right to sign a consent for the adoption of the birth parent's child and the consent is not subject to revocation by reason of the minority [*Fam. Code § 9003(d)*].

Consent must be given on a form prescribed by the Department of Social Services [*see Fam. Code § 9004*]. The department has promulgated several forms for use to obtain parental consent in stepparent adoptions. The various forms suit particular circumstances, such as a parent's presence in, or absence from, California, or service in the armed forces. Form AD 2A, Stepparent Adoption: Consent to Adoption by Parent Giving Custody to Husband or Wife of Other Parent, is reproduced as § 12B.350[1].

An acknowledged consent form that recites that the person giving it is entitled to sole custody of the child is prima facie evidence of the right of the person making it to the sole custody of the child and that person's sole right to consent [*Fam. Code § 9003(c)*]. However, statutory requirements must be met [*see Fam. Code §§ 7600 et seq., 7800 et seq., 8604, 8605*] before the adoption may proceed without the consent of a birth parent.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionConsentBiological ParentsFamily LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresStepparent Adoption

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§ 12B.139 Withdrawal of Parental Consent

Once given, consent of a birth parent to the adoption of the child by the stepparent may not be withdrawn except with court approval [*Fam. Code § 9005(a)*]. The procedures and standards regarding withdrawal of consent in a stepparent adoption are essentially the same as those that applied under prior law in an independent adoption [*compare Fam. Code § 9005* (stepparent adoptions) *with* former *Fam. Code § 8815* (before revision operative January 1, 1995); *see* Summary of Independent Adoptions Procedures Applicable to Petitions Filed Before January 1, 1995, in Subpart A of Part III, *above*]. A request for approval of withdrawal of consent may be made by motion, or the birth parent seeking to withdraw consent may file a petition for approval of withdrawal of consent with the clerk of court where the adoption petition is pending. The motion or petition must be in writing, and must set forth the reasons for withdrawal of consent. Otherwise, it may be in any form [*Fam. Code § 9005(a)*]. No fee is to becharged for the filing of the request for approval to withdraw consent [*Fam. Code § 9005(a)*].

The court clerk must set the matter for hearing and must give notice at least 10 days before the time set for the hearing, to the probation officer, qualified court investigator, or county welfare department, to the prospective adoptive parent, and the birth parent or parents by certified mail, return receipt requested, to the address of each as shown in the proceeding [*Fam. Code § 9005(b)*].

Before the hearing, the probation officer, qualified court investigator or county welfare department must file a full report with the court. During the hearing, he or she must appear to represent the interests of the child [*Fam. Code § 9005(c)*].

The parties may appear in person or with counsel at the hearing. The hearing must be held in chambers. However, the court reporter, whose fee shall be paid from county treasury upon court order, shall report the proceedings. The court must approve withdrawal of the consent if it finds that withdrawal is reasonable in view of all the circumstances and is in the child's best interest. Otherwise, the court must withhold its approval [*Fam. Code § 9005(d)*].

Consideration of the child's best interest must include, but is not limited to, an assessment of the child's age the extent of bonding with the prospective adoptive parent, the extent of bonding or the potential to bond with the birth parent, and

ability of the birth parent to provide adequate and proper care and guidance to the child [*Fam. Code § 9005(d)*].

Once the court approves the withdrawal of consent, the adoption proceeding must be dismissed [*Fam. Code § 9005(d)*]. A court order granting or withholding approval of a motion or petition for withdrawal of consent to stepparent adoption may be appealed in the same manner as an order of the juvenile court declaring a person to be a ward of the court [*Fam. Code § 9005(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionConsentBiological ParentsFamily LawAdoptionConsentRevocationFamily LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresStepparent Adoption

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2-12B California Forms of Pleading and Practice--Annotated § 12B.140

§ 12B.140 Withdrawal or Dismissal of Petition

If the petitioner moves to withdraw the petition for the adoption or to dismiss the proceeding, the clerk of the court in which the proceeding is pending must immediately notify the probation officer, the qualified court investigator, or county welfare department of that action [*Fam. Code § 9006(a)*]. In addition, if a birth parent has refused to give a required consent, the petition must be dismissed [*Fam. Code § 9006(b)*]. However, since a stepparent adoption seldom involves any change in the child's legal or physical custodial arrangement, the investigator is not required to take any steps regarding the custody of the child on receiving notice that the petition has been withdrawn.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewFamily LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresStepparent Adoption

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2-12B California Forms of Pleading and Practice--Annotated § 12B.141

§ 12B.141 No Restrictions on Child's Travel

There are no statutory restrictions on the removal of the child from the county during the pendency of a stepparent adoption [*cf. Fam. Code §§ 8713, 8803, 8910*, discussed in *§ 12B.14[3]*]. Thus, if the petitioner, the custodial parent, and the child are all living together, there are no restrictions on the child's travel pending adoption.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresStepparent AdoptionFamily LawChild CustodyGeneral Overview

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2-12B California Forms of Pleading and Practice--Annotated § 12B.142

§ 12B.142 No Report of Expenditures

There is no requirement that a report of expenditures [*see § 12B.35*] be filed in a stepparent adoption in which one birth or adoptive parent retains custody of the child [*see Fam. Code § 8610(c)*].

Legal Topics:

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

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2-12B California Forms of Pleading and Practice--Annotated § 12B.143

§ 12B.143 Setting Adoption Petition for Hearing

Once the investigation report has been filed [*see § 12B.137*], the petition may be set for hearing [*see Fam. Code § 9001*]. For further discussion of setting a hearing, see *§ 12B.114*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-12B California Forms of Pleading and Practice--Annotated § 12B.144

§ 12B.144 Visitation Rights of Deceased Parent's Family

If an unemancipated minor's birth parent is deceased, the children, parents, and grandparents of the deceased parent may be granted visitation rights with the child [*Fam. Code § 3102(a)*], and these rights may be continued after the child has been adopted by a stepparent [*Fam. Code § 3102(c)*]. The court must find that visitation rights would be in the best interests of the child [*Fam. Code § 3102(a)*]. In making this determination, except when granting visitation rights to a grandparent, the court must consider the amount of personal contact between the visiting persons and the child before the application for the order for visitation [*Fam. Code §§ 200, 3102(b)*].

However, any visitation rights granted to the parents of the child's noncustodial birth parent may be terminated by a stepparent's adoption of the child [*Lopez v. Martinez (2000) 85 Cal. App. 4th 279, 283-288, 102 Cal. Rptr. 2d 71* (once adoption petition is granted stepparent becomes child's parent for all purposes)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresStepparent AdoptionFamily LawChild CustodyVisitationGeneral OverviewFamily LawChild CustodyVisitationAwardsThird PartiesGrandparents

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2-12B California Forms of Pleading and Practice--Annotated § 12B.145

§ 12B.145 Postadoption Contact ("Contact After Adoption") Agreement

Nothing in California's adoption laws prevents the adopting parents, the birth relatives (including the birth parents), and the child from entering into a written agreement to permit continuing contact between the birth relatives (including the birth parents), and the child, if the agreement is found by the court to have been entered into voluntarily and to be in the best interests of the child at the time the adoption petition is granted [*Fam. Code § 8616.5(b)(1)*]. The Judicial Council forms and court rules now refer to these agreements as "contact after adoption" agreements. However, under the authorizing statute, such an agreement is called a "postadoption contact agreement," and effective January 1, 2001, is available in relative and nonrelative adoptions alike [*see* Stats. 2000, ch. 910]. From January 1, 1998, through December 31, 2000, "postadoption contact agreements" were known as "kinship adoption agreements," and were only available in relative adoptions. Although the provisions for postadoption contact agreements are set forth in Chapter 2 of Part 2 of the Fam. Code governing agency adoptions, there is nothing in the text of the statutes that would prohibit such an agreement in an independent adoption [*see Fam. Code § 8616.5*].

If the petitioner has entered into a postadoption contact agreement with the birth parent, the agreement, signed by the participating parties, must be attached to and filed with the petition for adoption [*Fam. Code § 9000(f)*; *see Fam. Code § 8616.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresStepparent Adoption

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2-12B California Forms of Pleading and Practice--Annotated §§ 12B.146-12B.159

[Reserved]

§§ 12B.146[Reserved]

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2-12B California Forms of Pleading and Practice--Annotated § 12B.160

§ 12B.160 Governing Law

Agency adoptions are specifically governed by Division 13, Part 2, Chapter 2, of the Family Code [*Fam. Code § 8700 et seq.*]. Part 1 and Chapter 1 of Part 2 of the same Division contain statutory provisions applicable to all adoptions, including agency adoptions [*see Fam. Code §§ 8500 et seq., 8600 et seq.*]. Regulations regarding independent adoptions are found in *22 Cal. Code Reg. § 35128 et seq.*

Legal Topics:

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

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2-12B California Forms of Pleading and Practice--Annotated § 12B.161

§ 12B.161 Roles of Attorney and Agency

In agency adoptions, the attorney for the prospective adoptive parents has traditionally served primarily as a monitor and facilitator of the process. However, the attorney's role in dealing with agencies is an evolving one. Amendments to procedures for independent adoptions that became operative in 1995 have made independent adoptions more cumbersome, from the attorney's perspective [*see* Summary of Independent Adoptions Procedures Applicable to Petitions Filed Before January 1, 1995, Subpart A, Part III, *above*]. The ease with which agencies can comply with requirements of the Interstate Compact on the Placement of Children [*see § 12B.251*], for example, have made the use of agency procedures, especially "identified adoptions," another option available to complete an adoption. Similarly, "attorney assisted adoptions" are recognized by many agencies in which the attorney performs a role very similar to that in an independent adoption, with the agency's role more confined to such traditional functions as evaluation, supervision, and the taking of relinquishments of the birth parents. Thus, while the attorney's role differs in agency situations, the roles traditionally played have begun to blur, and the discussion that follows should be viewed in this context.

In an agency adoption, the relationship between the agency and the prospective adoptive parents is more extensive than in an independent adoption. The agency has selected the attorney's clients as prospective adoptive parents, has placed the child in their home, and is supervising the placement on an ongoing basis. Therefore, the agency case worker is in a position to provide much of the nonlegal advice and support needed by the parents. Further, the agency has the responsibility of freeing the child for adoption by resolving all issues related to the birth parents [*see 22 Cal. Code Reg. § 35128*, discussed in *§ 12B.163*] so that the attorney need not be directly concerned with matters such as relinquishment, consent, and termination of parental rights.

In an agency adoption, the assessment of the prospective adoptive parents is completed while they are applicants to adopt, that is, before a child is actually placed in their home for adoption [*see 22 Cal. Code Reg. § 35180 et seq.*, discussed in *§ 12B.188*]. Thus, the attorney will assist in compiling all of the information required for the assessment [*see 22 Cal. Code Reg. § 35180 et seq.*] only in cases in which persons seeking to adopt through an agency seek legal services at the application stage, which is not common, considering the significant time that usually passes between

application and placement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAgency AdoptionFamily LawAdoptionProceduresInterstate AdoptionLegal EthicsClient RelationsGeneral Overview

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2-12B California Forms of Pleading and Practice--Annotated § 12B.162

§ 12B.162 Agency Custody

[1] In General

The Department of Social Services or a licensed adoption agency receives a child for adoptive placement in one of several ways. First, the child may be relinquished to the department or an agency by one or both birth parents [*see Fam. Code § 8700(a)*, discussed in Subpart 2, *below*]. Second, the child may be referred to the agency by the juvenile court after the parental rights of the birth parents have been terminated pursuant to juvenile court child dependency law [*see Welf. & Inst. Code § 366.26(i)* (applicable to minors adjudged dependents of juvenile court after 1988)]. Termination of parental rights in juvenile court is considered in detail in Ch. 328, *Juvenile Courts: Dependency Proceedings* . Third, the child may have been ordered into the custody of the agency because one or both parents is deceased [*see Fam. Code § 8705(a)*, discussed in *§ 12B.162[2]*]. Fourth, the child may be referred to the agency for adoptive placement after the child is declared free from the custody and control of both parents (or of one parent if the other no longer has custody and control) [*Fam. Code § 7893*].

The department or licensed adoption agency to which a child has been freed for adoption by either relinquishment or termination of parental rights is responsible for the care of the child and is entitled to the exclusive custody and control of the child until an order of adoption has been granted [*Fam. Code § 8704(a)*; *cf. Fam. Code § 7893(b)(1)*]. The agency has the exclusive right to select the home for both temporary care and adoptive placement, subject only to review by the court for abuse of discretion [*In re Harry N. (2001) 93 Cal. App. 4th 1378, 1395-1398, 114 Cal. Rptr. 2d 46* (juvenile court order keeping minor placed with foster parents reversed when DSS recommended adoption by parental aunt and uncle); *Los Angeles County Dept. of Children and Family Services v. Superior Court (1998) 62 Cal. App. 4th 1, 9-10, 72 Cal. Rptr. 2d 369* ; *Department of Social Services v. Superior Court (1997) 58 Cal. App. 4th 721, 732-734, 68 Cal. Rptr. 2d 239]* .

[2] Action for Custody of Child With Deceased Parents

If, in the case of a child in the custody of a public agency or licensed adoption agency, it has been established that the persons whose consent to the adoption of that child is required by law are deceased, an action may be brought by the

Department of Social Services or a licensed adoption agency to request the court to make an order establishing that the requesting agency has the right to custody and control of the child and the authority to place the child for adoption. The agency bringing the action must provide notice of the action, in such form as prescribed by the court, to all known relatives of the child up to and including the third degree of lineal and collateral consanguinity [*Fam. Code § 8705(a)*]. This action may not be brought if a guardian of the person of the child has been appointed pursuant to nomination by a will [*Fam. Code § 8705(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAgency AdoptionFamily LawChild CustodyAwardsLegal CustodyGeneral Overview

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2-12B California Forms of Pleading and Practice--Annotated § 12B.163

§ 12B.163 Freeing Child for Adoption

In agency adoptions, a birth parent voluntarily gives up his or her rights with regard to the child to be adopted by "relinquishing" the child to an agency rather than by "consenting" to the adoption [*see Fam. Code § 8700(a)*, discussed in Subpart 2, *below*]. A valid relinquishment, under California law or the law of any other jurisdiction, makes further consent to the adoption by the relinquishing parent unnecessary [*see Fam. Code § 8606(e)*]. However, consent becomes an issue if only one birth parent agrees to relinquish the child [*Adoption of Daniele G. (2001) 87 Cal. App. 4th 1392, 1401-1408, 105 Cal. Rptr. 2d 341* (unwed biological father has constitutionally protected interest in opportunity to form relationship with child, and therefore may block adoption proceedings)]. Whether an agency adoption may proceed in such a case depends on whether the legal relationship between the child and the nonrelinquishing parent can be terminated [*see 22 Cal. Code Reg. § 35128*].

The agency to whom the child has been relinquished by only one birth parent has the responsibility of terminating the parental rights of the other parent [*see 22 Cal. Code Reg. § 35128*]. The department requires that the child be freed for adoption by a subsequent relinquishment by the nonrelinquishing parent, or by court action terminating parental rights [*see 22 Cal. Code Reg. § 35128*]. These proceedings are discussed in Ch. 12A, *Adoptions: Termination of Parental Rights* . The agency must identify and attempt to contact, if possible, all parents who may have a potential legal claim to the child [*22 Cal. Code Reg. § 35128*].

Although an adoption can be granted by an order dispensing with a parent's consent [*Fam. Code §§ 8604-8606*], the regulations contemplate an order terminating parental rights [*see 22 Cal. Code Reg. §§ 35128, 35199*].

Termination of the parental rights of an alleged natural (not presumed) father under the Uniform Parentage Act may be easier than terminating the rights of a nonrelinquishing mother or presumed father [*see Fam. Code §§ 7662, 7664*]. These proceedings are discussed in Ch. 12A, *Adoptions: Termination of Parental Rights* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionConsentBiological ParentsFamily LawAdoptionProceduresAgency AdoptionFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral OverviewFamily LawParental Duties & RightsTermination of RightsVoluntary Termination

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2-12B California Forms of Pleading and Practice--Annotated §§ 12B.164-12B.169

[Reserved]

§§ 12B.164[Reserved]

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2-12B California Forms of Pleading and Practice--Annotated § 12B.170

§ 12B.170 Effect of Relinquishment

The filing of a relinquishment document with the Department of Social Services terminates the relinquishing parent's rights and responsibilities with regard to the child [*Fam. Code § 8700(j)*; *see Fam. Code § 8700(g)*; for discussion, *see § 12B.172*]. Legal custody of the child then vests in the agency [*Guardianship of Baby Boy M. (1977) 66 Cal. App. 3d 254, 270, 135 Cal. Rptr. 866* ; *see Fam. Code § 8704*, discussed in *§ 12B.162*]. No further consent by the relinquishing parent to an adoption is required [*see Fam. Code § 8606(e)*].

Relinquishment also affects the process of petitioning for a change of name for minors age 12 years or older. If an agency has custody of a relinquished child in that age group who desires to change his or her name, the petition for change of name must be signed both by the child and the adoption agency *Code Civ. Proc. § 1276(d)*]. For a discussion of procedure and forms suitable for use in a change of name proceeding, see Ch. 377, *Name, Change of.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAgency AdoptionFamily LawParental Duties & RightsTermination of RightsVoluntary Termination

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2-12B California Forms of Pleading and Practice--Annotated § 12B.171

§ 12B.171 Services Before Accepting Relinquishment

Before accepting a relinquishment from a birth parent, an adoption agency must provide a minimum of two face-to-face interviews over a period of two or more days. During these interviews, the agency must explain the purpose of the agency and the services it provides. It must provide a sample copy of the Statement of Understanding [*see § 12B.361[1]*] and relinquishment document [*see § 12B.360[1]*] at the first interview [*22 Cal. Code Reg. § 35129 et seq.* (requirements for advisements and interviews); *Fam. Code § 8700(d)* (same counseling and advisement services must precede taking relinquishment from out-of-state parent)]. The documents may be signed at the end of the second interview [*Tyler v. Children's Home Society (1994) 29 Cal. App. 4th 511, 530, 35 Cal. Rptr. 2d 291]* .

Before accepting a parent's relinquishment, the agency must also provide counseling to the parent [*22 Cal. Code Reg. § 35129(a)(2)*]. The counseling is intended to assist the parent to understand his or her feelings about relinquishing the child for adoption and the long range implications of relinquishment, and also to assist the parent freely to make his or her choice regarding relinquishment of the child to the agency for adoption [*22 Cal. Code Reg. § 35129(a)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAgency AdoptionFamily LawParental Duties & RightsTermination of RightsVoluntary Termination

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2-12B California Forms of Pleading and Practice--Annotated § 12B.172

§ 12B.172 Conditional Relinquishment; Identified Adoption

A birth parent who is relinquishing a child for adoption to the Department of Social Services or to a licensed adoption agency may name in the relinquishment form the person or persons with whom the parent intends that the child be placed for adoption [*Fam. Code § 8700(f)*]. If the child is not then placed in the home of the named persons, or the child is later removed from that home before the adoption decree is granted, the department or agency must give the birth parent notice of the decision not to place the child in that home or to remove the child from the home. The notice must be given by certified mail, return receipt requested, within 72 hours after the decision [*Fam. Code § 8700(g)*; *22 Cal. Code Reg. § 35156(a)*]. The birth parent then has 30 days from the date of mailing to rescind the relinquishment [*Fam. Code § 8700(h)*; *see § 12B.175[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAgency AdoptionFamily LawParental Duties & RightsTermination of RightsVoluntary Termination

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2-12B California Forms of Pleading and Practice--Annotated § 12B.173

§ 12B.173 Procedure for Accepting Relinquishments

[1] In General

Relinquishment must be by a written statement, signed by two subscribing witnesses and acknowledged before an authorized official of the Department of Social Services or the licensed adoption agency to which the child is being relinquished [*Fam. Code § 8700(a)*]. The witnesses must be at least 18 years of age [*22 Cal. Code Reg. § 35151*].

The relinquishment must be signed and acknowledged on forms provided by the department [*22 Cal. Code Reg. § 35143*; *see 22 Cal. Code Reg. § 35145* (required contents and list of applicable forms)]. One of these forms, AD 501 for use by a birth mother or presumed father who is a resident of California and of the same county in which the agency is located, is reproduced as § 12B.360[1]. The parent must be given a copy of the completed relinquishment document [*22 Cal. Code Reg. § 35151*].

If the relinquishing birth parent resides outside of California and the child is being, or will be, cared for and is, or will be, placed for adoption by the department or a licensed adoption agency, the birth parent may relinquish the child to the department or agency by a written statement signed before a notary on a form prescribed by the department, and previously signed by an authorized official of the department or agency. The form must signify the willingness of the department or agency to accept the relinquishment [*Fam. Code § 8700(c)*].

If a relinquishing parent and child reside outside California and the child will be cared for and placed for adoption by the department or a licensed adoption agency, the relinquishing parent may relinquish the child to the department or agency by a written statement signed by that parent [*Fam. Code § 8700(d)*]. Before signing the relinquishment, the parent must have received from a representative of an agency licensed or approved to provide adoption services under the laws of the parent's state of residence the same counseling and advisement services as if the parent resided in California [*Fam. Code § 8700(d)(1)*]. The relinquishment must be signed before a representative of an agency licensed or approved to provide adoption services under the laws of the parent's state of residence if possible or before a licensed social worker on a form prescribed by the department, and previously signed by an authorized official of the department

or agency, that signifies the department's or agency's willingness to accept the relinquishment [*Fam. Code § 8700(d)(2)*].

Although not presently reflected in the department's relinquishment forms, there is a statutory provision that if a duly acknowledged relinquishment recites that the person making it is entitled to the sole custody of the child, it is prima facie evidence of that person's right to sole custody and sole right to relinquish [*Fam. Code § 8700(a)*]. However, the statutory requirements of *Fam. Code §§ 7600 et seq.*, *7800 et seq.*, and *8604-8606*, discussed in Ch. 12A, *Adoptions: Termination of Parental Rights* , must be met before the adoption may proceed without the consent of a birth parent who does not join in the relinquishment [*see* discussion in *§ 12B.163*].

[2] Relinquishment Only After Child Is Born

An agency may accept a relinquishment only after the child is born. Furthermore, a mother's relinquishment of a newborn may be accepted only after she has been medically discharged from the hospital after childbirth. However, if the mother is hospitalized more than five days, a relinquishment may be taken if the mother's attending physician signs a written statement that she is not suffering from a known physical or mental impairment that would preclude the mother's ability to relinquish the child for adoption [*22 Cal. Code Reg. § 35139*].

[3] Prior Determinations

[a] Capacity

A birth parent who is a minor may relinquish his or her child for adoption to the Department of Social Services or to a licensed agency. The relinquishment is not subject to revocation by reason of the birth parent's minority [*Fam. Code § 8700(b)*].

An agency may accept a relinquishment only if it determines that the parent has the ability to understand the content, nature, and effect of signing the relinquishment. If the agency representative's observation or knowledge of the parent's history or current condition indicates that the parent may not have this ability, he or she must refer the parent to a licensed physician or to a licensed clinical psychologist for an evaluation of the parent's ability to understand. An evaluation is indicated under circumstances including, but not limited to, the following: (1) the parent is receiving public assistance on account of mental illness or developmental disability, or (2) the parent has received psychiatric treatment or medication for mental illness or disease in the past two years [*22 Cal. Code Reg. § 35135(a)(5)*].

The agency may accept the relinquishment only if the evaluation establishes the parent's ability to understand the content, nature, and effect of signing the relinquishment. It must be accepted no later than 30 days after the evaluation is completed. If the parent has a court-appointed conservator, a relinquishment may not be accepted unless the order appointing the conservator specifically allows the parent to relinquish his or her child for adoption [*22 Cal. Code Reg. § 35137*].

[b] Other Matters

Before accepting a parent's relinquishment of a child for adoption, the agency must determine that the parent has chosen the plan of adoption for the child and freely chooses to relinquish the child. It must also determine that the agency is able to place the child for adoption, whether the child is subject to the provisions of the Indian Child Welfare Act [*25 U.S.C. § 1901 et seq.*, discussed in *§ 12B.270* et seq.], and that the parent has received the required counseling [*22 Cal. Code Reg. § 35135*; *see* discussion in *§ 12B.171*].

[4] Required Statements and Disclosures

[a] Statement of Understanding

A companion form, called a Statement of Understanding, must be signed before the relinquishment form is signed [*see 22 Cal. Code Reg. §§ 35149, 35351*]. Its extensive contents are prescribed by regulation and essentially summarize the law of agency adoptions [*see 22 Cal. Code Reg. §§ 35152.1, 35152.2*]. If the Statement of Understanding is signed in California, it must be signed in the presence of an agency representative and two witnesses at least 18 years of age. Other procedures apply if it is signed outside of California. The parent must be given a copy of the signed form [*22 Cal. Code Reg. § 35149*]. A Department of Social Services form of a Statement of Understanding is reproduced in § 12B.361[1].

[b] Right to Information on Status of Child

On or before the time when a relinquishment is signed, the birth parent signing the relinquishment must be advised verbally and in writing by the Department of Social Services or the licensed adoption agency, that he or she may, at any time in the future, request from the department or agency all known information about the status of the child's adoption, except for personal, identifying information about the adoptive family. The birth parent must be advised that this information includes, but is not limited to, all of the following: (1) whether the child has been placed for adoption; (2) the approximate date that an adoption was completed; and (3) if the adoption was not completed or was vacated for any reason, whether adoptive placement of the child is again being considered [*Fam. Code § 8701*].

[c] Statements Regarding Future Communication and Confidentiality

A statement must be presented to the birth parents at the time the relinquishment is signed (and to prospective adoptive parents at the time of the home study) that, in a clear and concise manner, in words calculated to assure the confidence of the birth parents in the integrity of the adoption process, must communicate to the birth parent of a child who is the subject of an adoption petition all of the following facts [*Fam. Code § 8702*]:

> (1) It is in the best interest of the child that the birth parents keep the Department of Social Services or agency to which the child was relinquished informed of any health problems that the parent develops that could affect the child.
>
> (2) It is extremely important that the birth parent keep his or her address current with the department in order to permit a response to any inquiries to the department or licensed adoption agency concerning medical or social history.
>
> (3) *Fam. Code § 9203* authorizes a person who has been adopted and who attains the age of 21 to petition the department to obtain the name and address of his or her birth parents. Consequently, it is of the utmost importance that the birth parent indicate whether or not he or she wishes his or her name and address to be so disclosed by checking the appropriate box provided on the form.
>
> (4) The birth parent may change his or her decision as to whether or not he or she wishes his or her name and address disclosed, at any time, by sending a notarized letter to that effect, by certified mail, return receipt requested, to the department or to the licensed adoption agency that joined in the adoption petition.
>
> (5) The relinquishment will be filed in the office of the clerk of the court in which the adoption takes place. The file is not open to inspection by any persons other than the parties to the adoption proceedings, their attorneys, and the department, except on order of the judge of the superior court.

Confidentiality and procedures for obtaining information concerning completed adoptions are discussed in Ch. 12D, *Adoptions: Amendment and Inspection of Records* .

When the parental rights of a birth parent are terminated under *Fam. Code § 7800 et seq.*, discussed in Ch. 12A, *Adoptions: Termination of Parental Rights* , the Uniform Parentage Act [*see Fam. Code § 7660 et seq.*, discussed in Ch. 12A, *Adoptions: Termination of Parental Rights*], or juvenile court dependency law [*see Welf. & Inst. Code §§ 366.25, 366.26*, discussed in Ch. 328, *Juvenile Courts: Dependency Proceedings*], the licensed adoption agency or the Department of Social Services must send a written notice to the birth parent, if his or her address is known, that contains the following statement: "You are encouraged to keep this agency informed of your current address in order to permit a response to any inquiry concerning medical or social history made by or on behalf of the child who was the subject of the court action terminating parental rights" [*Fam. Code § 8703*].

[5] Holding Period and Filing Relinquishment

A relinquishment is not final and effective to terminate parental rights until a certified copy of the relinquishment is sent to and filed with the Department of Social Services [*Fam. Code § 8700(e)(1), (j)*; *see 22 Cal. Code Reg. § 35000(f)(3)* (DSS regulations define "filing" as "receipt and acknowledgment")]. Therefore, a relinquishing parent is permitted to indicate whether the relinquishment form is to be filed with the Department of Social Services immediately or only after a "holding period" of up to 30 days [*see 22 Cal. Code Reg. § 35141*]. The parent may wish to request such a holding period in order to give further thought to the matter of relinquishment and adoption.

The licensed adoption agency must send the certified copy of the relinquishment by certified mail, return receipt requested, or by overnight courier or messenger, with proof of delivery, to the department no earlier than the end of the business day following its signing. The agency must inform the birth parent that during this time period, he or she may request that the relinquishment be withdrawn and that, if he or she makes the request, the relinquishment will be withdrawn [*Fam. Code § 8700(e)(1)*].

There may be an extended holding period beyond 30 days if questions about the right of the other parent to the custody of the child have not been resolved [*22 Cal. Code Reg. § 35141*; *see* discussion in *§ 12B.163*]. The regulation would appear to require that the agency and parent agree to any such extended holding period. However, unless there is a judicial determination that the nonrelinquishing parent's consent is not required or that his or her parental rights are to be terminated, no adoption may be granted [*see Fam. Code §§ 7660 et seq., 8604-8606*, discussed in Ch. 12A, *Adoptions: Termination of Parental Rights* ; *see also 22 Cal. Code Reg. § 35128*]. If the relinquishment is filed with the department anyway, it would appear that the relinquishing parent's rights are terminated, even though there will be no adoption [*see Fam. Code § 8700(h), (j)*]. The nonrelinquishing parent might obtain custody of the child, but the child would have no other legal parent.

Within 10 working days of the expiration of any holding period, or within 10 working days after execution if no holding period is requested, the agency must submit the relinquishment and Statement of Understanding to the department for filing. The agency must certify in writing that the parent did not request return of the child during any holding period. Any psychiatric or psychological evaluation and conservator's statement must also be submitted. The relinquishing parent must receive a copy of the filed relinquishment form [*22 Cal. Code Reg. § 35151(a)(3)(D)*].

The relinquishment is final 10 business days after the department receives the filing unless the department sends written acknowledgment of receipt of the relinquishment before the expiration of the 10-day period (at which time the relinquishment is final), or a longer period of time is necessary due to a pending court action or some other cause beyond the department's control [*Fam. Code § 8700(e)(1)*]. After the relinquishment is final, it may be rescinded only by the mutual consent of the department or licensed adoption agency to which the child was relinquished and the birth parent or parents who relinquished the child [*Fam. Code § 8700(e)(2)*].

Notwithstanding *Fam. Code § 8700*, the court may uphold the validity of an otherwise defective relinquishment when there is substantial compliance with the statute and the relinquishment was valid, that is, a knowing, intelligent waiver

of parental rights [*Adoption of Baby D. (2001) 93 Cal. App. 4th 1, 11, 112 Cal. Rptr. 2d 760* (valid relinquishment despite DSS finding it was defective because birth mother inadvertently failed to initial box 20 on form generated Statement of Understanding)].

[6] Required Notices for Dependent Child

If a child relinquished by a parent has been found to be a dependent child of the juvenile court, or if dependency proceedings are pending, the Department or agency accepting the relinquishment must provide written notice of the relinquishment within five court days to the following [*Fam. Code § 8700(i)*]:

- The juvenile court having jurisdiction of the child;
- The child's attorney, if any; and
- The relinquishing parent's attorney, if any.

[7] Required Notices for Indian Child

The Department of Social Services, a licensed adoption agency, or adoption service provider must ask the child and the child's parent or custodian whether the child is, or may be, a member of, or eligible for membership in an Indian tribe or whether the child has been identified as a member of an Indian organization [*Fam. Code § 8620(a)(1)*]. If there is any oral or written information that indicates that the child is, or may be, an Indian child, the Department must obtain specified information about the child, the child's family members, and the child's tribe, and must send a notice, including this information, and a request for confirmation of the child's Indian status to any parent and any custodian of the child, and to any tribe of which the child is, or may be, a member or eligible for membership [*Fam. Code § 8620(a)(2), (3)(A*); *see § 12B.271*].

The notice must be sent by registered or certified mail, return receipt requested, to all tribes of which the child may be a member or eligible for membership [*Fam. Code § 8620(d)(1)-(3)*]. Notice must be sent whenever there is reason to believe the child may be an Indian child, and for every hearing thereafter, including, but not limited to, the hearing at which the final adoption order is to be granted [*Fam. Code § 8620(d)(5)*]. For further discussion of adoption of Indian children, see *§§ 12B.270, 12B.271*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionDisclosuresAdoption AgenciesFamily LawAdoptionIndian Child Welfare ActFamily LawAdoptionProceduresAgency AdoptionFamily LawDelinquency & DependencyDependency ProceedingsFamily LawParental Duties & RightsTermination of RightsVoluntary Termination

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§ 12B.174 Revocation of Relinquishment

Revocation is an action taken by the parent who has signed a relinquishment to nullify the relinquishment *before* it has been filed with the Department of Social Services [*22 Cal. Code Reg. § 35000(r)(11)*]. Revocation generally occurs during a holding period before the agency submits the relinquishment to the department for filing [*see* discussion in *§ 12B.173[5]*].

An oral or written declaration by a relinquishing parent that he or she wishes to revoke the relinquishment and have the child returned must be treated as an expression of intent to revoke the relinquishment if it is made before the relinquishment is filed with the Department of Social Services. On receipt of the declaration, the agency must cease all adoptive planning for the child and give the parent the revocation form prescribed by the department [*see § 12B.362[1]*]. The agency must also advise the parent that he or she has 14 days from the date on which the agency provided the form within which to provide the agency with a written request for revocation and specify the date by which the form must be completed and returned to the agency [*22 Cal. Code Reg. § 35153*].

Subject to the exceptions discussed below, the agency must return the child to the relinquishing parent who gave physical custody of the child to the agency within seven working days following receipt of the parent's completed revocation form. If the other parent joined in the relinquishment, he or she must be notified immediately that the child is being returned to the revoking parent [*22 Cal. Code Reg. § 35155*]. If a relinquishment is revoked by a parent who did not give physical custody of the child to the agency, the agency must initiate court proceedings to determine custody of the child and whether a plan for adoption may proceed. If the other parent has also relinquished the child, that parent must be notified immediately of the revocation and the initiation of court proceedings [*22 Cal. Code Reg. § 35157*].

If the agency suspects that the parents to whom the child is to be returned have endangered the physical or mental health of a child by abuse or neglect, the agency must immediately file a Suspected Child Abuse Report (Form SS 8572) [*22 Cal. Code Reg. §§ 35153.1, 35155*]. If the relinquishment is revoked by a parent of a child who is a dependent child of the court or the subject of a juvenile court petition, the agency shall notify the supervising county welfare department; unless the child was detained, or was a dependent child in out-of-home care, the child must be returned to the

relinquishing parent who gave physical custody of the child to the agency [*22 Cal. Code Reg. § 35159*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresAgency AdoptionFamily LawParental Duties & RightsTermination of RightsVoluntary Termination

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§ 12B.175 Rescission of Relinquishment

[1] By Mutual Agreement of Parent and Agency

Rescission is an action taken by mutual agreement of the relinquishing parent and the agency that accepted the relinquishment to nullify the relinquishment after it has been filed with the Department of Social Services [*22 Cal. Code Reg. § 35000(r)(8)*; *see Fam. Code § 8700(h)*]. Absent such a mutual rescission, the relinquishment is final on filing to terminate the parental rights of the relinquishing parent [*Fam. Code § 8700(h), (i)*; *but see* discussion in *§ 12B.176*].

An oral or written declaration by a relinquishing parent that he or she wishes to revoke the relinquishment and have the child returned must be treated as a request for rescission if it is made after the relinquishment is filed with the department [*22 Cal. Code Reg. § 35169(b)*]. On receipt of the declaration, the agency must cease all adoptive planning for the child and give the parent the rescission form prescribed by the department [*see § 12B.363[1]*]. The agency must also specify the date by which the form must be completed and returned to the agency and inform the parent that if the form is not completed and returned to the agency by that date, the request for rescission will be nullified [*22 Cal. Code Reg. § 35169(b)(1)*].

In considering a request to rescind, the agency must provide the parent with an opportunity to present the reason for rescission and the parent's plan for the care of the child. It must also consider the child's needs, the adequacy of the parent's plan, and the public and community resources and services available to assist the parent in caring for the child [*22 Cal. Code Reg. § 35170(a)*].

If the agency agrees to rescind the relinquishment, it must mutually agree with the parent regarding the time and place for return of the child, which must be within seven days from the time when the decision to rescind is made. If the other parent also relinquished the child, the agency must inform him or her that he or she may also rescind the relinquishment. The agency must also notify the department of the rescission within three working days [*22 Cal. Code Reg. § 35170(b)*].

If the agency knows or reasonably suspects the parent has endangered the physical or mental health of the child by

abuse or neglect, the agency must contact the appropriate child protective agency and file a Suspected Child Abuse Report (Form SS 8572) [*22 Cal. Code Reg. § 35170(b)(1)(A)(2)*; *Penal Code § 11166(a)*].

When the child whose relinquishment is rescinded is a dependent of the juvenile court, the juvenile court with jurisdiction, the child's attorney, and the relinquishing parent's attorney must be notified of the agency's decision to rescind the relinquishment, and the agency must make a recommendation regarding the return of the child [*22 Cal. Code Reg. § 35170(b)(1)(B)*]. Further placement of the child would be determined in the juvenile court.

If the agency's decision is not to rescind the relinquishment, the agency director or his or her designee must review the decision. Within three days, a copy of the decision must be sent to the department, and to the rescinding parent together with the reasons for the agency's decision. If the child was a dependent of the juvenile court, the agency must notify the juvenile court and the attorneys for the child and the relinquishing parent of the request to rescind the relinquishment and the agency's decision not to rescind [*22 Cal. Code Reg. 35170(c)*].

[2] On Failure of Identified Adoption

If a relinquishing birth parent specifies the name of the person or persons with whom he or she wants the child to be placed, and the child is not placed with (or later is removed from the home of) those persons, the birth parent has a right of rescission [*see Fam. Code § 8700(f)-(j)*, discussed in *§ 12B.172*]. The Department of Social Services or agency that accepted the relinquishment must rescind the relinquishment if the parent rescinds within 30 days after the mailing of notice of the decision not to place the child with the identified persons or to remove the child from that home [*Fam. Code § 8700(h)(1)*; *see 22 Cal. Code Reg. § 35170(d)* (procedures that department or agency must follow to rescind reliquishment)]. If the birth parent does not rescind within 30 days, the department or agency must select other adoptive parents for the child [*Fam. Code § 8700(h)(2)*]. If the birth parent and the department or agency wish to identify a different person or persons during the 30-day period with whom the child is intended to be placed, the initial relinquishment must be rescinded and a new relinquishment identifying the persons must be completed [*Fam. Code § 8700(h)(3)*].

If the child was a dependent of the juvenile court, the agency must notify the juvenile court, and the attorneys for the child and the relinquishing parent that the relinquishment has been rescinded [*22 Cal. Code Reg. 35170(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesRescission & RedhibitionGeneral OverviewFamily LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresAgency AdoptionFamily LawParental Duties & RightsTermination of RightsVoluntary Termination

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§ 12B.176 Equitable Action to Set Aside Relinquishment

Despite the statutory language that a relinquishment may be rescinded only by the mutual consent of the agency and parent [*see Fam. Code § 8700(e)*, discussed in *§ 12B.175*], a parent may bring an action or proceeding to set aside a relinquishment for cause [*Tyler v. Children's Home Society (1994) 29 Cal. App. 4th 511, 529, 35 Cal. Rptr. 2d 291* ; *Brooks v. Los Angeles County Bureau of Adoptions (1963) 218 Cal. App. 2d 732, 733-734, 32 Cal. Rptr. 466* ; *see Fiske v. Director, Dep't of Public Welfare (1951) 107 Cal. App. 2d 31, 36-37, 236 P.2d 427]* . Such an action is a nonstatutory equitable proceeding [*Guardianship of Baby Boy M. (1977) 66 Cal. App. 3d 254, 271, 135 Cal. Rptr. 866* , and the granting or withholding of equitable relief is a matter within the discretion of the court [*Tyler v. Children's Home Society (1994) 29 Cal. App. 4th 511, 529, 35 Cal. Rptr. 2d 291]* . Grounds for rescission include fraud, misrepresentation, duress, undue influence, or constructive fraud [*see Tyler v. Children's Home Society (1994) 29 Cal. App. 4th 511, 548-551, 35 Cal. Rptr. 2d 291* (relinquishment may be set aside for constructive fraud on proof that parents were mislead to their prejudice, but facts failed to show any prejudice); *In re Cheryl E. (1984) 161 Cal. App. 3d 587, 599-602, 207 Cal. Rptr. 728* (misrepresentation that mother could get child back within one year); *Brooks v. Los Angeles County Bureau of Adoptions (1963) 218 Cal. App. 2d 732, 734, 32 Cal. Rptr. 466* ; *see also Civ. Code §§ 1566, 1567* (duress, menace, fraud, undue influence, or mistake vitiates consent in contract law); *Fiske v. Director, Dep't of Public Welfare (1951) 107 Cal. App. 2d 31, 36-37, 236 P.2d 427]* .

In such an action, the best interests of the child are not necessarily the overriding consideration or even at issue [*Tyler v. Children's Home Society (1994) 29 Cal. App. 4th 511, 541, 35 Cal. Rptr. 2d 291* ; *In re Cheryl E. (1984) 161 Cal. App. 3d 587, 603, 207 Cal. Rptr. 728]* . An adoption agency may not be permitted to abridge a birth parent's fundamental right to raise his or her own children free from unwarranted state intrusion [*see In re Carmaleta B. (1978) 21 Cal. 3d 482, 489, 146 Cal. Rptr. 623, 579 P.2d 514]* by deceitful acts, solely because, in the view of the agency, the acts are in the best interests of the child [*In re Cheryl E. (1984) 161 Cal. App. 3d 587, 606, 207 Cal. Rptr. 728]* .

However, there is a strong public policy in favor of giving effect to relinquishments because of the disruptive effect that rescission will have on the child and on the adoptive parents [*Tyler v. Children's Home Society (1994) 29 Cal. App.*

4th 511, 529, 35 Cal. Rptr. 2d 291] . Therefore, the principle of liberal construction of adoption laws in order to promote the welfare of children applies to relinquishments [*Tyler v. Children's Home Society (1994) 29 Cal. App. 4th 511, 551, 35 Cal. Rptr. 2d 291]* . It must be the conduct of the adoption agency that constitutes cause to set aside the relinquishment. Duress or fraud by a third party is sufficient grounds only if the agency was in some way connected with, or at least knew of, the conduct [*see* *Hall v. Department of Adoptions (1975) 47 Cal. App. 3d 898, 902-903, 121 Cal. Rptr. 223]* . If fraud is alleged as the basis for rescission, the facts that constitute the fraud must be specifically pleaded [*Hall v. Department of Adoptions (1975) 47 Cal. App. 3d 898, 904, 121 Cal. Rptr. 223]* . The facts must show that the parent would not have relinquished the child but for the fraud or undue influence [*Tyler v. Children's Home Society (1994) 29 Cal. App. 4th 511, 529, 35 Cal. Rptr. 2d 291]* .

Noncompliance with the regulations governing agency adoptions and relinquishment does not automatically vitiate a relinquishment. Noncompliance will constitute a ground for a birth parent's unilateral rescission of a relinquishment, regardless of the lack of fraudulent intent, only if it rises to the level of constructive fraud; that is, if the violation causes prejudice to the relinquishing parents that affects their decision to relinquish. The parent bears the burden of proving all aspects of constructive fraud, including prejudice [*Tyler v. Children's Home Society (1994) 29 Cal. App. 4th 511, 529, 35 Cal. Rptr. 2d 291]* .

If both parents have relinquished the child and one parent subsequently attempts to set aside the relinquishment, the other parent is an indispensable party to the proceeding. That parent's rights and responsibilities regarding the child will be affected by the resolution of the matter [*see* *Hall v. Department of Adoptions (1975) 47 Cal. App. 3d 898, 905-906, 121 Cal. Rptr. 223]* .

For a form for a complaint in equity to set aside a relinquishment, see *§ 12B.364[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefFamily LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresAgency AdoptionFamily LawParental Duties & RightsTermination of RightsVoluntary Termination

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[Reserved]

§§ 12B.177[Reserved]

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2-12B California Forms of Pleading and Practice--Annotated § 12B.180

§ 12B.180 Photo-Listing Service

The Department of Social Services is required by statute to establish a statewide photo-listing service to serve all licensed adoption agencies in the state as a means of recruiting adoptive families for children who have been legally freed, and whose case plan goal is adoption. The photo-listing service must maintain a book that contains a photograph and description of all such children. Registration of children with the photo-listing service and notification by the licensed adoption agency of changes in a child's photo-listing status must be reflected in the book within 30 working days of receipt of the registration or notification [*Fam. Code § 8707*; *see 22 Cal. Code Reg. §§ 35017, 35019*].

The photo-listing service must be provided to all licensed adoption agencies; adoption support groups; and state, regional, or national photo-listings or exchanges requesting copies of the photo-listing service [*Fam. Code § 8707(c)*]. Licensed adoption agencies must send a recent photograph and description of each legally freed child to the photo-listing service within 15 working days of the time a child is legally freed for adoption. When adoption has become the case plan goal for a particular child, the agency may photo list that child before the child's becoming legally freed for adoption [*Fam. Code § 8707(d)*].

All legally freed children for whom adoption is the case plan must be photo-listed, unless deferred [*Fam. Code § 8707(d)*]. A child must be deferred from the photo-listing service if that child's foster parents or other identified individuals who have applied to adopt the child are meeting the adoption agency's requests for required documentation and are cooperating in the completion of a home study being conducted by the agency [*Fam. Code § 8707(e)*]. A child who is 12 years old, or older, may be deferred from the photo-listing service if the child does not consent to being adopted [*Fam. Code § 8707(f)*].

The department must review semiannually the photo-listing status of children registered with the photo listing service and those whose registration has been deferred [*Fam. Code § 8707(i)*; *22 Cal. Code Reg. § 35019(d)*]. Within 15 working days following a one-year period in which a child is listed in the book, the agency must submit a revised description and photograph of that child [*Fam. Code § 8707(g)*]. Licensed adoption agencies must notify the photo-listing service, by telephone, of any adoptive placements or of significant changes in the child's photo-listing

status within two working days of that change [*Fam. Code § 8707(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresAgency Adoption

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2-12B California Forms of Pleading and Practice--Annotated § 12B.181

§ 12B.181 Consideration of Race, Ethnicity, and Location

Federal law entitled "Removal of Barriers to Interethnic Adoption" requires that an agency or entity that receives federal funds and is involved in adoption or foster care placements may not: (1) deny to any person the opportunity to become an adoptive or a foster parent on the basis of the race, color, or national origin of the person, or of the child; or (2) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child [Pub. L. 104-188, § 1808 (amending *42 U.S.C. §§ 671, 674*, 996b, and repealing *42 U.S.C. § 5115a*]. States must bring their programs into compliance by January 1, 1997 [*42 U.S.C. § 671(a)(18)*]. State programs that are found to violate the requirement, or that fail to implement a corrective program within 6 months, face reduction in federal aid [*42 U.S.C. § 674(d)(1)*]. Other entities may be required to repay all funds of federal origin received from the State [*42 U.S.C. § 674(d)(2)*].

The "Removal of Barriers to Interethnic Adoption" legislation repealed and replaced the substantially similar federal Multiethnic Placement Act of 1994 (MEPA) [former *42 U.S.C. § 5115a*]. MEPA had previously qualified the first prohibition listed above by the initial word categorically, and limited the violation to a denial solely on the basis of race, and the like. In MEPA, the second prohibition listed above was worded slightly differently, and also limited to denials or discrimination solely on the basis of race, and the like. Further, MEPA expressly allowed consideration of the cultural, ethnic, or racial background of the child, and the capacity of the prospective adoptive parents to meet the needs of a child of that background, as one of a number of factors in determining a placement decision [former *42 U.S.C. § 5115a(a)(2)*]. The intent of the Removal of Barriers legislation appears to be to require adoption and foster care placement decisions to be even more color-blind than was permitted under MEPA. The legislation states it has no effect on the Indian Child Welfare Act [Pub. Law 104-88, § 1808(c)(3)].

Guidelines under MEPA had found violations of MEPA in common practices such as ethnic matching requirements, or placement preferences based on the child's race, culture or ethnicity [*see, e.g.*, pre-1996 *Fam. Code §§ 8708, 8709* (agency adoptions); *see also* pre-1996 *Fam. Code § 7950 et seq.* ("Priorities for Foster Care Placement")]. Such practices should continue to be prohibited under the Removal of Barriers legislation.

California repealed its race, color and ethnic background placement preference statutes to conform its legislation to MEPA requirements [Stats. 1995, ch. 884]. The replacement legislation virtually tracked the wording of MEPA [*Fam. Code §§ 8708, 8709* (agency adoptive placements); *Fam. Code §§ 7950* (foster care placements)]. Further revision in the California statutory plan and the related regulations [*Fam. Code § 8711.5*] will be necessary to conform California prohibitions on racial and ethnic discrimination in making adoptive and foster care placements to the requirements of the Removal of Barriers legislation.

Any individual aggrieved by a violation of the prohibitions of the Removal of Barriers legislation may bring a civil action in any United States district court within 2 years after the violation. [*42 U.S.C. § 674(d)(3)*]. The Removal of Barriers prohibitions are also codified in the Civil Rights portion of Title 42 of the United States Code as prohibited conduct for any person or government that is involved in adoption or foster care placements [*42 U.S.C. § 1996b*]. Noncompliance is deemed to constitute a violation of Title VI of the Civil Rights Act of 1964 [*42 U.S.C. § 2000d et seq.*].

Apart from these provisions, neither the Department of Social Services nor any licensed adoption agency to which a child has been freed for adoption may delay or deny the placement of a child for adoption solely because the approved prospective adoptive family resides outside the jurisdiction of the agency. For out-of-state prospective parents, however, the agency may consider whether the other state's standards substantially meet the standards and criteria established in California adoption regulations [*Fam. Code § 8708(a)(3)*].

Family Code § 8708, prohibiting discrimination in placement, does not affect the application of the Indian Child Welfare Act (*25 U.S.C. § 1901 et seq.*) [*Fam. Code § 8708(b)*; *see §§ 12B.270 -12B.271*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresAgency Adoption

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§ 12B.182 Religious Matching

The child's religious background may be considered in determining an appropriate adoptive placement [*Fam. Code § 8709(a)*; *see Scott v. Family Ministries (1976) 65 Cal. App. 3d 492, 505-506, 135 Cal. Rptr. 430]* . This provision does not affect the application of the Indian Child Welfare Act (*25 U.S.C. § 1901 et seq.*) [*Fam. Code § 8709(b)*; *see §§ 12B.270, 12B.271*].

However, an agency may not go beyond matching and specify the religious affiliation of the adoptive home. A policy that denies an opportunity to adopt to persons because of their religion violates the *free exercise clause* of the *U.S. Const., amend. I* [*Scott v. Family Ministries (1976) 65 Cal. App. 3d 492, 505-506, 135 Cal. Rptr. 430]* . This constitutional limitation applies to private, religiously affiliated adoption agencies, as well as to public agencies. In placing children for adoption, a private agency is acting for and on behalf of the state [*Scott v. Family Ministries (1976) 65 Cal. App. 3d 492, 507, 135 Cal. Rptr. 430]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of ReligionFree Exercise of ReligionFamily LawAdoptionIndian Child Welfare ActFamily LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresAgency AdoptionFamily LawAdoptionProceduresPrivate Adoption

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2-12B California Forms of Pleading and Practice--Annotated § 12B.183

§ 12B.183 Marital Status

An adoption agency must inform unmarried applicants that the ability to adopt is not limited by the applicant's marital status [*22 Cal. Code Reg. § 35011(a)(2)*]. Historically, however, there has been considerable agency opposition to placing children in single-parent homes [*see, e.g., County of Los Angeles v. Superior Court (1969) 2 Cal. App. 3d 1059, 1061, 82 Cal. Rptr. 882]* . This resistance is lessening, at least with regard to placement of "special needs" children [*see* discussion in *§ 12B.184*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresAgency Adoption

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2-12B California Forms of Pleading and Practice--Annotated § 12B.184

§ 12B.184 Adoption Assistance Program

An Adoption Assistance Program is administered by the Department of Social Services to facilitate the adoption of children with special needs [*see Welf. & Inst. Code § 16115 et seq.*; *22 Cal. Code Reg. § 35325 et seq.*]. A child is eligible for program benefits if certain conditions are satisfied [*see Welf. & Inst. Code § 16120*], one being that the child's adoptive placement without financial assistance to the adopting family would be unlikely because of the child's membership in a sibling group that should remain intact or by virtue of race, ethnicity, color, language, age of three years or more, or parental background of a medical or behavioral nature that can be determined the adversely affect the development of the child [*Welf. & Inst. Code § 16120(b)(1)*; *see Fam. Code § 8545* (definition of "special-needs child" for purposes of Family Code division on adoption)].

The program involves governmental payments to the adopting parents for the adoption of special-needs children. Payments include an amount for the reasonable nonrecurring expenses incurred in completing the adoption [*see Welf. & Inst. Code § 16120.1*; *22 Cal. Code Reg. § 35352*]. The adopting parents may also receive further payments based on need and circumstances, not to exceed the foster care maintenance payment and any applicable specialized care increment that the child received while placed in a foster home [*Welf. & Inst. Code § 16121(a)(1)*; *see Welf. & Inst. Code § 11461* (foster care placement); *see also 42 U.S.C. § 673* (Adoption Assistance and Child Welfare Act of 1980)].

For comprehensive discussion of adoption assistance for children with special needs, see Adoption Law and Practice, vol. 2, ch. 9 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionExpensesFamily LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresAgency Adoption

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2-12B California Forms of Pleading and Practice--Annotated § 12B.185

§ 12B.185 Rights of Relatives and Foster Parents

If a child is being considered for adoption, the department or agency must first consider placement in the home of a relative [*Fam. Code § 8710(a)*; *see also Fam. Code § 8714.5(a)* (legislative intent to remove barriers to adoption by relatives of children who are, or who are at risk of becoming, dependent children, and to preserve existing family relationships, including extended families); *cf. Mullins v. State of Oregon (9th Cir. 1995) 57 F.3d 789* (no constitutional right of grandparent, on basis of biological connection alone, to preferential adoptive placement of grandchild)]. However, if a relative is not available, or if placement with an available relative is not in the child's best interests, or if placement would permanently separate the child from other siblings who are being considered for adoption or who are in foster care and an alternative placement would not require the permanent separation, then the child's foster parents or parent must be considered [*Fam. Code § 8710*].

Postadoption contact agreements, which provide for enforceable privileges of postadoption continued contact between the birth relatives (including the birth parents), the adopting parents, and the child are permitted if found by the court to have been entered into voluntarily and to be in the best interests of the child [*Fam. Code § 8616.5*; *see § 12B.18*]. With the adoptive parents' consent, provisions for postadoptive contact with the child's siblings are also permitted in adoptions of dependent children of the juvenile court [*see Fam. Code § 8715(c)*; *Welf. & Inst. Code §§ 366.29, 16002, 16501*].

Foster parents are not entitled to exclusive second preference after relatives; they must be considered along with all other prospective adoptive parents [*Fam. Code § 8710(a)*; *see Jinny N. v. Superior Court (1987) 195 Cal. App. 3d 967, 973, 241 Cal. Rptr. 95]* . Further, the following conditions must be present: (1) the child must have been in foster care for a period of more than four months; (2) the child must have substantial emotional ties to the foster parents; (3) the child's removal from the foster parents would be seriously detrimental to the child's well being; and (4) the foster parents must have made a written request to be considered to adopt the child [*Fam. Code § 8710(a)*].

In the case of an Indian child, the department or agency must consider the placement preferences and standards set out in subdivisions (c) through (i) of *Welfare and Institutions Code Section 361.31*, including placement with a member of

the child's extended family, other members of the child's tribe, or another Indian family, or placement according to the order of preference established by the tribe [*see Fam. Code § 8710(a)*]. If the foster parents or other prospective adoptive parents do not fall within these placement preferences, they may only be considered if the court finds, by clear and convincing evidence, that good cause exists to deviate from the placement preferences [*Fam. Code § 8710(b)*].

These statutory rights of foster parents do not apply to a child who has been adjudged to be a dependent of the juvenile court [*Fam. Code § 8704(e)*; *see Welf. & Inst. Code § 300*]. However, juvenile court law provides an even stronger preference for adoption by a foster parent or by the child's current caretaker [*see Welf. & Inst. Code §§ 366.25(g), 366.26(k), (n)*]. For further discussion, see Ch. 328, *Juvenile Courts: Dependency Proceedings* .

The conversion of a foster care arrangement to an adoptive placement does not necessarily require that the foster parents and agency execute an adoptive placement agreement [*see § 12B.191*]. If it is clear from its words and conduct that the agency is treating the placement as one for adoption, the foster parents are entitled to all of the rights and remedies of prospective adoptive parents [*Jinny N. v. Superior Court (1987) 195 Cal. App. 3d 967, 971-973, 241 Cal. Rptr. 95]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresAgency AdoptionFamily LawParental Duties & RightsGeneral Overview

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2-12B California Forms of Pleading and Practice--Annotated § 12B.186

§ 12B.186 No Duty of Placement to Child

Despite the many statutory and regulatory requirements placing duties on adoption agencies with regard to adoptive placement, an adoption agency has no duty to a child in its custody to place him or her in an adoptive home. Thus, there can be no tort liability in negligence for the failure to successfully place a child for adoption [*see Smith v. Alameda County Social Services Agency (1979) 90 Cal. App. 3d 929, 935-939, 153 Cal. Rptr. 712]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresAgency AdoptionTortsNegligenceDutyGeneral Overview

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2-12B California Forms of Pleading and Practice--Annotated § 12B.187

§ 12B.187 Assessment of Child

An adoption agency must assess each child accepted for adoption services [*22 Cal. Code Reg. § 35127.2*]. The scope of the assessment is far more extensive than the scope of the required child assessment in an independent adoption [*see* discussion in *§ 12B.111[3]*] because the agency must determine the most appropriate adoptive placement and disclose as much information as possible to the prospective adopting family about the child [*compare 22 Cal. Code Reg. §§ 35127.1-35127.3 with 22 Cal. Code Reg. § 35093*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-12B California Forms of Pleading and Practice--Annotated § 12B.188

§ 12B.188 Assessment of Applicants

An adoption agency must require a written application before conducting an assessment of an applicant to adopt [*22 Cal. Code Reg. § 35177*]. The agency must assess each applicant in order to determine the applicant's suitability as a prospective adoptive parent. An applicant may be disapproved at any point in the assessment process [*22 Cal. Code Reg. § 35177(e)*].

The assessment must include at least one interview with the applicant in his or her home. Each applicant must be interviewed separately and also jointly in the case of joint applications. Each individual in the applicants' household must also be interviewed [*22 Cal. Code Reg. § 35181(a)(2)(D)*]. An abbreviated assessment is allowed whenever the applicant has successfully completed another adoption in California within the prior five years and the prior assessment is available to the agency, or when the applicant is the child's current care giver, licensed or certified as a foster family home, and has cared for the child under the supervision of an adoption or child welfare agency for at least six months [*22 Cal. Code Reg. § 35183*].

Matters to be covered in the assessment [*see 22 Cal. Code Reg. §§ 35181* (full assessment), 35183 (abbreviated assessment)] and required documentation [*see 22 Cal. Code Reg. § 35195*] are similar to the requirements in independent adoptions [*see* discussion in *§ 12B.111*]. Fingerprints and criminal records are similarly required [*see Fam. Code § 8712*; *22 Cal. Code Reg. § 35184*].

If the applicant is a foster parent with whom the child has lived for at least six months or a relative caregiver who has had an ongoing and significant relationship with the child, an assessment or home study of the applicant may, at the discretion of the department or agency, require only the following, unless a court with jurisdiction over the child orders otherwise [*Fam. Code § 8730*]:

1. A criminal records check of the applicant as provided in *Fam. Code § 8712(a)*;

2. A determination that the applicant has sufficient financial stability to support the child and ensure that

any adoption assistance program payment or other government assistance to which the child is entitled is used exclusively to meet the child's needs;

3. A determination that the applicant has not abused or neglected the child while the child has been in his or her care, and has fostered the healthy growth and development of the child;

4. A determination that it is unlikely the applicant will abuse or neglect the child in the future, and that the applicant can protect the child, ensure necessary care and supervision, and foster the child's healthy growth and development;

5. A determination that the applicant can address racial and cultural issues that may affect the child's well-being; or

6. An interview with the applicant, with each individual residing in the home, and with the child.

If the applicant is a foster parent, the assessment or home study may not be initiated until the child has resided in the applicant's home for at least six months [*Fam. Code § 8731*]. A report of a medical examination of the applicant must be included in the assessment, unless the department or agency determines that this report is unnecessary based on other available information. The assessment must require certification that the applicant and each adult residing in the applicant's home has been tested for communicable tuberculosis [*Fam. Code § 8732*].

If the petitioner resides in a state other than California, an updated and current home study report conducted and approved by a licensed adoption agency or other authorized resource in that state must be reviewed and endorsed by the department or agency, if the standards and criteria established for a home study report in the other state are substantially commensurate with the home study standards and criteria established in California's adoption regulations [*Fam. Code § 8715(e)*].

Under no circumstances may the department or agency give final approval for an adoptive placement in any home where the prospective adoptive parent or any adult living in the prospective adoptive home has a felony conviction that occurred within the last five years for physical assault, battery, or a drug- or alcohol-related offense, or a felony conviction for child abuse or neglect, spousal abuse, crimes against a child, including child pornography, or for a crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault and battery [*Fam. Code § 8712(c)*].

Legal Topics:

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§ 12B.189 Notification of Agency's Decision

After completing the required assessment [*see § 12B.188*], the adoption agency must provide the applicant with written notification of its decision regarding an adoptive placement of a child with him or her. A must provide the applicant with written notification of its decision regarding an adoptive placement of a child with him or her. A favorable notice must include identification of age, race, gender, and characteristics of children considered for placement. An unfavorable notice must include identification of the factors that led to the agency's decision. The applicant must be informed of the agency's grievance review procedure [*see § 12B.202[4]*] and of the right to file a grievance within 30 days of receipt of the decision [*22 Cal. Code Reg. § 35177(g)(1), (h)*]. For discussion of prohibitions on denial of, or delays in, adoptive placement on the basis of race, color, or ethnic background of a child or prospective adoptive parent, see *§ 12B.181*].

Legal Topics:

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2-12B California Forms of Pleading and Practice--Annotated § 12B.190

§ 12B.190 Time of Placement

An adoption agency generally may not place a child for adoption until the child has been legally freed for adoption by relinquishment or other termination of parental rights [*22 Cal. Code Reg. § 35199*; *see 22 Cal. Code Reg. § 35128*, discussed in *§ 12B.163*]. There is an exception if all of the following circumstances exist [*22 Cal. Code Reg. § 35199*]: (1) the child is placed in an assessed and approved home with the approval of the administrator; (2) the birth mother and presumed father, if any, have signed a relinquishment for adoption and the relinquishments have been filed; and (3) an action to terminate the rights of any alleged natural father under the Uniform Parentage Act, discussed in Ch. 12A, *Adoptions: Termination of Parental Rights* , is pending.

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-12B California Forms of Pleading and Practice--Annotated § 12B.191

§ 12B.191 Adoptive Placement Agreement and Other Reports

After a decision is reached by an adoption agency and adoptive parents regarding the placement of a child, the agency and the adoptive parents must enter into a written agreement that sets forth the rights and responsibilities of the agency and adoptive parents [*see 22 Cal. Code Reg. § 35201*]. However, the failure to formally execute an adoptive placement agreement does not automatically deprive the applicants of legal status as prospective adoptive parents, if it is clear from the agency's actions that it is treating a placement as one for adoption [*Jinny N. v. Superior Court (1987) 195 Cal. App. 3d 967, 971-973, 241 Cal. Rptr. 95]* .

Before or at the time of placement, the agency must give the prospective adoptive parents the required medical background report and obtain a written statement from them acknowledging receipt of the report [*22 Cal. Code Reg. § 35195(a)*; *see Fam. Code § 8706*; *Tyler v. Children's Home Society (1994) 29 Cal. App. 4th 511, 537-538, 35 Cal. Rptr. 2d 291* (noncompliance does not prejudice relinquishing parents); *see also § 12B.34*]. It must also provide a written report that sets forth the information gathered in the assessment of the child [*22 Cal. Code Reg. § 35195*; *see § 12B.187*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-12B California Forms of Pleading and Practice--Annotated § 12B.192

§ 12B.192 Interstate Placements

The Interstate Compact on the Placement of Children [*Fam. Code § 7900 et seq.*; *Cal. Rules of Ct. Rule 5.616* (juvenile court placements)] applies if an agency desires to bring a child to, or send a child from, California for an adoptive placement [*see Fam. Code § 7901*, art. 3]. For discussion of the general procedures for interstate placement of children, see *§ 12B.250* et seq.

Note that neither the Department of Social Services nor a licensed adoption agency to which a child has been freed for adoption may delay or deny the placement of a child for adoption solely because the prospective approved adoptive family resides outside its jurisdiction. An "approved adoptive family" means a family approved under the California adoptive applicant assessment standards. If the adoptive applicant assessment was conducted in another state according to that state's standards, the California placing agency must determine whether the standards of the other state substantially meet California's standards [*Fam. Code § 8708(c)*].

When there is no adoptive placement plan for a child with an approved adoptive family within the Department's or licensed adoption agency's jurisdiction, the Department or agency must register the child with a statewide exchange system that interjurisdictionally matches waiting children and approved adoptive families [*Fam. Code §§ 8710.1, 8710.2*]. In addition, if the Department or agency has approved a family for adoption and that family may be appropriate for placement of a child who has been adjudged a dependent child of the juvenile court, the Department or agency must register the family with the statewide exchange system [*Fam. Code § 8710.3*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-12B California Forms of Pleading and Practice--Annotated §§ 12B.193-12B.199

[Reserved]

§§ 12B.193[Reserved]

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2-12B California Forms of Pleading and Practice--Annotated § 12B.200

§ 12B.200 Six-Month Supervision Period

The adoption agency must supervise the adoptive placement [*see 22 Cal. Code Reg. § 35203(c)*]. The supervisory period may not be less than six months unless one of the following exceptions applies [*see 22 Cal. Code Reg. § 35203(c)*]: (1) the prospective adoptive parent has successfully completed the adoption of another child in California in the past five years; (2) the prospective adoptive parent is in the military service of the United States or is employed by the American Red Cross, and completion of the six-month supervisory period would delay completion of an adoption that the agency has determined should be completed; or (3) the child is a foster child of the prospective adoptive parent in a foster care placement supervised by an agency, in which case the supervisory period may be shortened by the same number of months that the child was in foster care with the family.

During the supervisory period, the agency must conduct a minimum of four interviews with the prospective adoptive parents and the child [*22 Cal. Code Reg. § 35203(d)*]. The number of interviews may be reduced if one of the above exceptions to the six-month supervisory period applies [*22 Cal. Code Reg. § 35203(d)(1)*]. At least one interview must be in the home with the child and the adopting family, and this requirement may not be waived under any circumstances [*22 Cal. Code Reg. § 35203(d)(2)*].

Legal Topics:

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2-12B California Forms of Pleading and Practice--Annotated § 12B.201

§ 12B.201 Removal of Child From County

In no event, nor for any period, may a child who has been relinquished for adoption be removed from the county in which the child was placed by any person who has not petitioned to adopt the child without first obtaining the written consent of the Department of Social Services or the licensed adoption agency responsible for the child [*Fam. Code § 8713(a)*]. This prohibition applies to the prospective adoptive parents before they file their petition for adoption [*see* discussion in *§ 12B.211*] and to all other persons both before and after filing. After filing, there is a procedure for the petitioners to obtain court approval to remove the child if the agency objects [*see Fam. Code § 8713(b)*]. For discussion of this procedure, see *§ 12B.36*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-12B California Forms of Pleading and Practice--Annotated § 12B.202

§ 12B.202 Termination of Placement Before Adoption Petition Is Filed

[1] Right of Agency to Terminate Placement

Any placement for temporary care or for adoption made by the Department of Social Services or by a licensed adoption agency may be terminated at the discretion of the department or agency at any time before the granting of an order of adoption. However, once an adoption petition has been filed, court approval is required [*Fam. Code § 8704(a), (b)*; *see § 12B.215*].

Nevertheless, an agency may not arbitrarily terminate an adoptive placement. Due process [*see U.S. Const., amend. XIV*] requires that the prospective adoptive parents be given notice of the termination of placement [*see § 12B.202[2]*] and an opportunity to be heard at a time when the deprivation can still be prevented [*C.V.C. v. Superior Court (1973) 29 Cal. App. 3d 909, 914-918, 106 Cal. Rptr. 123]* . This constitutional right is almost certainly applicable to placement terminations by private adoption agencies, which have been held to be exercising delegated state power with regard to agency adoptions [*see* Scott v. Family Ministries (1976) 65Cal. App. 3d 492, 506-507, *135 Cal. Rptr. 430* ; *see also Tyler v. Children's Home Society (1994) 29 Cal. App. 4th 511, 545, 35 Cal. Rptr. 2d 291]* .

Regulations provide for a right to be heard through a grievance review procedure [*see 22 Cal. Code Reg. §§ 35207, 35233-35239*, discussed in *§ 12B.202[4]*].

[2] Prior Notice

Unless the agency believes that the child is in imminent danger, it must give the prospective adoptive parents seven days' prior written notice of the termination of placement [*22 Cal. Code Reg. § 35207(b)*; *see C.V.C. v. Superior Court (1973) 29 Cal. App. 3d 909, 914-918, 106 Cal. Rptr. 123* (notice constitutionally required); *see also § 12B.202[1]*]. A prior regulatory definition of "imminent danger" was broadly construed to include the risk of injury or projected danger that existed because a prospective adoptive parent was likely to flee with the child if given notice of removal [*see Marten v. Thies (1979) 99 Cal. App. 3d 161, 171-172, 160 Cal. Rptr. 57* (construing former 22 Cal. Code Reg. § 30684(b)(2); child in "imminent danger" is one whose health and safety are in jeopardy)].

The notice must state the agency's reasons for terminating the placement and the specific conditions that led to the agency's decision to remove the child. The notice must also inform them of their right to a grievance review [*22 Cal. Code Reg. § 35207(b)*; *see § 12B.202[4]*].

[3] Removal of Child From Home

If the department or licensed adoption agency terminates the placement, the child must be returned promptly to the physical custody of the agency [*Fam. Code § 8704(a)*]. If necessary, the agency may bring a habeas corpus proceeding to compel return of the child [*see, e.g., C.V.C. v. Superior Court (1973) 29 Cal. App. 3d 909, 912, 106 Cal. Rptr. 123]* . In a directed or identified placement in which the relinquishment names the prospective adoptive parents, the relinquishing parents must be notified of the right to rescind the relinquishment and reclaim the child under *Family Code Section 8700(g), (h)* [*see 22 Cal. Code Reg. § 35297(c)*].

Nevertheless, case law strongly suggests that, except in the case of a child in imminent danger, the prospective adoptive parents must be afforded their due process rights before the child is removed from the home [*see C.V.C. v. Superior Court (1973) 29 Cal. App. 3d 909, 917-918, 106 Cal. Rptr. 123]* . The regulations also provide that notice be given stating the reasons for removal at least seven days prior to removal if the agency has no reason to believe the child is in imminent danger [*see 22 Cal. Code Reg. § 35207(b)*], but do not require that the grievance procedure be completed before the child may be removed [*see 22 Cal. Code Reg. §§ 35233, 35237, 35239*]. This suggests that even without any continuances, a decision may not be forthcoming in the ordinary course of the grievance procedure until more than 7 weeks after the removal. If an adoption petition has been filed, a court hearing is used to seek review of the request to remove the child, rather than the grievance procedure [*Fam. Code § 8704(b)*].

If the child is removed, there is no statutory or regulatory restriction on the agency's making a new adoptive placement before all hearing and review rights have been exhausted. Nevertheless, such a placement has been labeled "precipitate and unfortunate" by one court [*C.V.C. v. Superior Court (1973) 29 Cal. App. 3d 909, 913 n.1, 106 Cal. Rptr. 123]* .

[4] Grievance Review Hearing

[a] Reviewable Grievances

Administrative regulations require adoption agencies to provide a grievance review hearing for applicants and prospective adoptive parents to resolve disputes over any action taken by the agency before a petition for adoption is filed [*see 22 Cal. Code Reg. § 35233*]. The adoptive placement agreement must include a statement regarding this procedure [*22 Cal. Code Reg. § 35201(b)(1)(G)*].

A "grievance" is a written complaint about any procedures, actions, or determinations made by an agency before the filing of an adoption petition [*22 Cal. Code Reg. § 35000(g)(1)*]. A grievance is not reviewable if it is based solely on any of the following [*22 Cal. Code Reg. § 35233(a)(2)*]:

(1) Any action of the agency in compliance with a court order;

(2) A question regarding the validity of a statute or regulation; or

(3) Any issue for which a state hearing is available under *Welf. & Inst. Code § 10950* (relating to applications for, or receipt of, aid from county governments).

[b] Procedure on Request for Review

An applicant or prospective adoptive parent may obtain grievance review by making a written request within 30 days of

the date of the action that is the subject of the complaint. The request must be signed by the grievant or his or her authorized representative, and must state specifically the facts surrounding the action complained of. The request must be submitted to the agency that took the action unless the grievance concerns an action taken by a licensed private adoption agency based on the FBI criminal record, in which case the request must be submitted to the Department of Social Services [*22 Cal. Code Reg. § 35233*].

The agency must schedule the grievance review hearing to be held within 10 working days from the date on which the written request is received by the agency. Notice of the date, time, and place for the hearing must be sent to all parties to the grievance review no less than five working days before the hearing [*22 Cal. Code Reg. § 35235*].

The hearing must be conducted by a "grievance review agent" in a nonadversary atmosphere insofar as possible [*22 Cal. Code Reg. § 35237*]. A grievance review agent is a person or panel designated by the director of the agency to conduct the grievance review and render a recommended decision to the director [*22 Cal. Code Reg. § 35000(g)(2)*]. The parties, their authorized representatives, if any, and the witnesses while testifying are the only persons authorized to be present at the hearing unless all parties and the grievance review agent agree to the presence of other persons. The agency must provide for the recording of the hearing [*22 Cal. Code Reg. § 35237*].

If the grievance review agent determines that additional evidence or witnesses are necessary in order to make a recommenda tion, the hearing must be continued for a period not to exceed 10 working days [*22 Cal. Code Reg. § 35237*]. Otherwise, the agent must make a written recommendation to the agency director within five working days after completion of the hearing. The director must then make a written decision within five working days of receipt of the recommendation, based on the evidence presented at the hearing. The written decision must summarize the facts and issues involved and make specific findings regarding the issues. It must be sent to each party to the grievance, to each authorized representative of each party, if any, and to the department [*22 Cal. Code Reg. § 35239*].

[c] Judicial Review

Some form of judicial review of an agency's termination of an adoptive placement is constitutionally required by due process [*C.V.C. v. Superior Court (1973) 29 Cal. App. 3d 909, 918-920, 106 Cal. Rptr. 123* ; *see* discussion in *§ 12B.202[1]*]. An agency's decision after a grievance review hearing is subject to judicial review by writ of mandate [*see Marten v. Thies (1979) 99 Cal. App. 3d 161, 164, 160 Cal. Rptr. 57]* . However, the court has no jurisdiction to consider an adoption petition that was not filed by the prospective adoptive parents until after the placement was terminated [*Rodriguez v. Superior Court (1971) 18 Cal. App. 3d 510, 512, 95 Cal. Rptr. 923]* .

In light of the mandatory administrative grievance review, it would seem that the proper vehicle for judicial review of an adoptive placement termination is administrative mandate under *Code Civ. Proc. § 1094.5*. Despite the opportunity for a later judicial hearing, the prospective parents should attack the agency's decision on all possible grounds in the grievance review hearing. The general rule of administrative mandate is that an aggrieved person may not raise a question on judicial review that was not presented to the agency [*see Morris v. Unemployment Ins. Appeals Bd. (1973) 34 Cal. App. 3d 1002, 1008, 110 Cal. Rptr. 630]* . For a form for a petition for a writ of administrative mandate, see *§ 12B.365[1]*. For general discussion of administrative mandate and appropriate forms, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewFamily LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresAgency Adoption

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4. Supervision of Adoptive Placement

2-12B California Forms of Pleading and Practice--Annotated §§ 12B.203-12B.209

[Reserved]

§§ 12B.203[Reserved]

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2-12B California Forms of Pleading and Practice--Annotated § 12B.210

§ 12B.210 Right to Petition for Adoption

No petition may be filed to adopt a child who has been relinquished to the Department of Social Services or a licensed adoption agency, or who has been declared free from the custody and control of either or both birth parents and referred to the department or agency for adoptive placement, by anyone except the prospective adoptive parents with whom the child has been placed for adoption by the department or agency [*Fam. Code § 8704(b)*; *see Adoption of Runyon (1969) 268 Cal. App. 2d 918, 921, 74 Cal. Rptr. 514* (prior identical statute held constitutional)]. If a petition for adoption of such a child is filed by someone other than a person with whom the child has been placed for adoption, the agency must immediately file a court report and include a request that the adoption petition be dismissed [*see 22 Cal. Code Reg. § 35213*].

If a child has been placed with a married couple, either spouse has standing to petition for adoption without being joined by the other. Thus, if spouses separate after an adoptive placement and only one wishes to complete the adoption, the other spouse need not be joined in the proceeding [*County of Los Angeles v. Superior Court (1969) 2 Cal. App. 3d 1059, 1062-1066, 82 Cal. Rptr. 882]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewFamily LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresAgency Adoption

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2-12B California Forms of Pleading and Practice--Annotated § 12B.211

§ 12B.211 Time to File Petition and Joinder of Agency

An agency adoption is defined as one (other than an intercountry adoption) in which the Department of Social Services or an agency licensed by the department is a party to, or joins in, the petition for adoption [*Fam. Code § 8506*]. Further, by regulation, the placing agency must join in the petition, but only if it first approves and consents to the adoption [*see 22 Cal. Code Reg. § 35211*]. This generally will not be until after the six-month supervisory period is completed [*see 22 Cal. Code Reg. § 35203*, discussed in *§ 12B.200*]. The regulations contemplate that the agency's Consent and Joinder (form AD 824) [*see 22 Cal. Code Reg. § 35001(a)(37)*] will be filed together with the report to the court [*see 22 Cal. Code Reg. § 35211(c)(8)*], which is only filed after the prospective adoptive parents have filed an adoption petition [*see 22 Cal. Code Reg. § 35211(a)*].

Note that the petition for adoption may be filed immediately after the placement for adoption, which usually is marked by the signing of an adoptive placement agreement [*see 22 Cal. Code Reg. § 35201*]. Because the filing of an adoption petition affords the prospective adoptive parents greater protection under *Fam. Code § 8704* against the agency's removal of the child, there is reason to file the petition promptly on placement. When that is not done, if any problems with the agency are anticipated or develop, the petition should be filed at once.

A formal pleading of joinder is not required. If the agency approves the adoption and offers no timely objection to the filing of the petition, it may be said to have joined in the petition [*see Jinny N. v. Superior Court (1987) 195 Cal. App. 3d 967, 972-973 n.4, 241 Cal. Rptr. 95]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewFamily LawAdoptionConsentAdoption AgenciesFamily LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresAgency Adoption

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2-12B California Forms of Pleading and Practice--Annotated § 12B.212

§ 12B.212 Petition to Adopt

The prospective adoptive parents with whom the child has been placed [*see Fam. Code § 8704(b)*, discussed in *§ 12B.210*] initiate the proceeding by filing a petition in the superior court in the county of their residence. A petition to adopt a child who was adjudged a dependent child of the juvenile court and thereafter freed for adoption by the juvenile court (*see* Ch. 328, *Juvenile Courts: Dependency Proceedings*) may be filed in either the county where the prospective adoptive parents reside or the county where the child was freed for adoption [*Fam. Code § 8714(a)*]. If the petitioner has entered into a postadoption contact agreement with the birth parent under *Fam. Code § 8616.5*, the agreement, signed by the parties must be attached to and filed with the petition [*Fam. Code § 8714(c)*].

The clerk of court must immediately give written notice to the Department of Social Services at Sacramento of the pendency of the action and of any subsequent action taken [*Fam. Code § 8714(b)*; *see 12B.310[1]*]. For a form of petition that may be adopted for use in an agency adoption, see *§ 12B.302[1]*. Jurisdiction and venue in adoption matters are discussed in *§ 12B.30*. Notice requirements to birth parents are discussed in Ch. 12A, *Adoptions: Termination of Parental Rights* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewFamily LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresAgency AdoptionFamily LawDelinquency & DependencyDependency Proceedings

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2-12B California Forms of Pleading and Practice--Annotated § 12B.213

§ 12B.213 Consent of Agency and Report

If, after the supervisory period, the adoption agency approves the adoption, it must file a report with the court recommending the adoption, join in the petition [*see* discussion in *§ 12B.211*], and give its consent to the adoption [*22 Cal. Code Reg. § 35211*; *see Fam. Code § 8715*]. If the report is submitted by an agency, the Department of Social Services may also submit a report [*Fam. Code § 8715*]. A copy of the report must be given to the petitioners, or to their attorney [*Fam. Code § 8717*; *see 22 Cal. Code Reg. § 35211(c)*].

A standardized consent and joinder form has been promulgated by the Department of Social Services [*see* Department of Social Services Form AD 824]. It may be used for official purposes only. Some agencies may have their own forms of joinder and consent.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionConsentAdoption AgenciesFamily LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresAgency Adoption

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2-12B California Forms of Pleading and Practice--Annotated § 12B.214

§ 12B.214 Payment of Fees

Whenever a petition for an agency adoption is filed, the county adoption agency or the Department of Social Services may, at the time of filing a favorable report in the superior court, require the petitioners to pay to the agency, as agent of the state, or to the department, a fee in an amount set by statute [*see Fam. Code § 8716*]. The agency or the department may defer, waive, or reduce the fee if its payment would cause economic hardship to the prospective adoptive parents detrimental to the welfare of the adopted child, if the child has been in the foster care of the prospective adoptive parents for at least one year, or if necessary for the placement of a special needs child [*Fam. Code § 8716*].

There is also a fee that must be paid at the time of filing and forwarded by the clerk to the State Registrar of Vital Statistics [*see* discussion in *§ 12B.31*]. If the agency fee is waived and its statement of waiver is filed with the petition, this fee is also waived [*Health & Safety Code § 103730*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsFiling FeesFamily LawAdoptionExpensesFamily LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresAgency Adoption

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2-12B California Forms of Pleading and Practice--Annotated § 12B.215

§ 12B.215 Opposition of Agency After Petition Is Filed

[1] In General

Even though only the prospective adoptive parents with whom the agency placed the child may file a petition for adoption [*Fam. Code § 8704(b)*], the agency sometimes opposes the petition [*see, e.g. County of Los Angeles v. Superior Court (1969) 2 Cal. App. 3d 1059, 1061, 82 Cal. Rptr. 882* (agency originally approved adoption, but withdrew consent after petitioners filed for divorce)]. This is uncommon, because the most usual practice is for the petition, and the agency's court report and Consent and Joinder, to be filed at about the same time, at the end of the supervision period.

[2] Termination of Placement

After a petition for adoption has been filed, the Department of Social Services or licensed adoption agency may no longer remove the child from the home of the prospective adoptive parents without the approval of the court [*Fam. Code § 8704(b)*]. The grievance review hearing procedure [*see* discussion in *§ 12B.202[4]*] is then inapplicable [*see 22 Cal. Code Reg. § 35233* (permitting grievance review with respect to child for whom adoption petition has *not* been filed)].

To terminate the placement, the department or agency must bring a motion supported by affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) stating the grounds on which removal is sought. Notice must be given to the prospective adoptive parents [*Fam. Code § 8704(b)*].

[3] Effect of Revocation of Consent

The consent of the adoption agency that placed the child in the home of the petitioners is not a prerequisite to an agency adoption, and revocation of agency consent does not deprive the court of jurisdiction to consider the petition [*see Fam. Code § 8704(b)*; *Adoption of McDonald (1954) 43 Cal. 2d 447, 460, 274 P.2d 860]* . If the Department of Social Services or adoption agency refuses to consent to the adoption by the petitioners, the court may nevertheless order the

adoption if it finds that the refusal to consent is not in the best interests of the child [*Fam. Code § 8704(b)*]. For discussion of factors that the court may consider in determining the best interests of the child, see *§ 12B.55*.

If the agency solicits and confirms a foster parent as a prospective adoptive parent, the foster parent is entitled to the rights of a prospective adoptive parent in an agency adoption. If after an agency petition for adoption has been filed the agency determines that the foster parent adoption is not in the best interests of the child, its remedy is to oppose the petition on its merits. The agency may not obtain the dismissal of the petition and foreclose judicial consideration of whether the adoption is in the best interests of the child [*Jinny N. v. Superior Court (1987) 195 Cal. App. 3d 967, 971-973, 241 Cal. Rptr. 95]* .

[4] Review of Agency Recommendation and Hearing

If the findings of the Department of Social Services or the licensed adoption agency are that the home of the petitioners is not suitable for the child or that the required agency consents are not available and it recommends that the petition be denied, the county clerk, on receipt of the report, must immediately refer it to the superior court for review. On receipt of the reports, the court must set a date for a hearing of the petition and must give reasonable notice of the hearing to the department or agency, the petitioners, and, if necessary, the birth parents. Notice must be by certified mail, return receipt requested, to the address of each as shown in the proceeding. The department or the agency must appear to represent the child [*Fam. Code § 8720*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewFamily LawAdoptionConsentAdoption AgenciesFamily LawAdoptionConsentRevocationFamily LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresAgency Adoption

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2-12B California Forms of Pleading and Practice--Annotated § 12B.216

§ 12B.216 Petitioners' Dismissal or Withdrawal of Petition

If the petitioners move to withdraw the petition for the adoption or to dismiss the proceeding, the clerk of the court in which the proceeding is pending must immediately notify the Department of Social Services at Sacramento of the action [*Fam. Code § 8719*]. Although *Fam. Code § 8720* can be construed to require a hearing and court approval to dismiss or withdraw the petition, in reality the petitioners will be allowed to withdraw their petition. The court will not force an unwanted child on persons who change their minds about an adoption.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewFamily LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresAgency Adoption

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2-12B California Forms of Pleading and Practice--Annotated §§ 12B.217-12B.229

[Reserved]

§§ 12B.217[Reserved]

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2-12B California Forms of Pleading and Practice--Annotated § 12B.230

§ 12B.230 Governing Law

Intercountry adoptions are primarily controlled by the visa eligibility requirements of federal immigration law [*see 8 U.S.C. § 1101(b)(1)(F)*; *8 C.F.R. § 204.3*]. State intercountry adoption procedures are set forth in the Family Code [*Fam. Code § 8900 et seq.*], in addition to statutory provisions applicable to all adoptions, including intercountry adoptions [*see Fam. Code §§ 8500 et seq., 8600 et seq.*]. State regulations regarding intercountry adoptions are found in *22 Cal. Code Reg. § 35241 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresForeign AdoptionFamily LawAdoptionProceduresInterstate Adoption

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2-12B California Forms of Pleading and Practice--Annotated § 12B.231

§ 12B.231 Intercountry Adoption Defined

Under California law, an "intercountry adoption" is the adoption of a foreign-born child for whom federal law makes a special immigration visa available [*see § 12B.233*]. It includes the completion of an adoption in the child's native country or in California [*Fam. Code § 8527*].

Legal Topics:

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

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2-12B California Forms of Pleading and Practice--Annotated § 12B.232

§ 12B.232 Required INS Determinations

Child eligibility for immigration to the United States is governed by federal immigration law. Unless the child is eligible for an immigrant visa through classification as an immediate relative (child) of a United States citizen, the child may not lawfully enter the United States [*see 8 U.S.C. §§ 1101(b)(1)(F), 1151(b)(2)(A)(i)*].

The processing and adjudication of an adoption case by the Immigration and Naturalization Service (INS) involves two distinct determinations [*8 C.F.R. § 204.3(a)(2)*]. The first is on the ability of the prospective adoptive parents to provide a proper home environment and their suitability as parents (*see § 12B.234[2]*). The second concerns whether the child is an "orphan" as defined by statute (*see § 12B.233*).

The first determination is usually made on the basis of an advanced processing application [*8 C.F.R. § 204.3(a)(2)*], which may be submitted to the INS before any particular child has been identified for adoption [*8 C.F.R. § 204.3(c)*]. The second determination is made on the submission of the petition to classify the child as an immediate relative who is thereby eligible for a visa [*8 C.F.R. § 204.3(a)(2), (b)* (definition of "orphan petition")]. The two determinations may be made at one time if the child has been identified before the process is begun [*see 8 C.F.R. § 204.3(a)(2)*].

Detailed procedures relevant to both determinations are set forth in federal immigration regulations, primarily *8 C.F.R. § 204.3*. For more detailed discussion, see Gordon, Mailman & Yale-Loeht, Immigration Law and Procedure (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresForeign AdoptionImmigration LawImmigrantsFamily-Sponsored Immigrants

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2-12B California Forms of Pleading and Practice--Annotated § 12B.233

§ 12B.233 Child Eligibility for Immigrant Visa

Under the immigration statutes, a child who is eligible for an immigration visa as an immediate relative must be an unmarried person who is under the age of 16 at the time the petition for classification is filed. The child must also be either (1) an orphan because of the death, disappearance of, abandonment or desertion by, or separation from or loss of both parents; or (2) a child for whom the sole or surviving parent is incapable of providing the proper care, and has in writing irrevocably released the child for emigration to the United States and adoption [*8 U.S.C. § 1101(b)(1)(F)*]. All of the component terms of the statutory definition of "orphan" are further defined in more detail by regulation [*see 8 C.F.R. § 204.3(a)*], and evidence of the child's status as an orphan is required [*see 8 C.F.R. § 204.3(d)(1)(ii)*].

Further, the child must either (1) have been adopted abroad by a United States citizen and his or her spouse jointly, or by an unmarried United States citizen at least 25 years of age, who personally saw and observed the child before or during the adoption proceedings; or (2) be coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least 25 years old, who have complied with the preadoption requirements, if any, of the child's proposed residence [*8 U.S.C. § 1101(b)(1)(F)*]. Whether the adoption is to be finalized abroad or in the United States may depend on the law of the situs of the child's birth, which may control whether a child will be allowed to emigrate from the native country for the purpose of adoption abroad.

As further requirements, the United States Attorney General must be satisfied that proper care will be furnished the child if admitted to the United States. No natural parent or previous adoptive parent of the child may, by virtue of the parentage, be accorded any right, privilege, or status under Ch. 12 of Title 8 of the United States Code, governing immigration and nationality [*8 U.S.C. § 1101(b)(1)(F)*]. Nor are the adopted child's biological siblings entitled to an immigration preference as siblings of a citizen [*Young v. Reno (9th Cir. 1997) 114 F.3d 879, 883-887]* .

Note that visa eligibility under the above requirements does not include a foreign-born child with two parents who are willing to surrender the child to a United States citizen for emigration and adoption [*see 8 C.F.R. § 204.3(b)* (definition of abandonment; a relinquishment or release by birth parents to prospective adoptive parents or for specific adoption does not constitute abandonment)]. However, if such a child under the age of 16 years is adopted abroad by a United

States citizen, he or she becomes their "child," within the meaning of immigration law, after two years during which the child has been in the legal custody of, and has resided with the adopting parents [*see 8 U.S.C. § 1101(b)(1)(E)*; *see also § 12B.236*].

The adoptive parents must provide evidence that the child was adopted abroad or that they have, or a person or entity working on their behalf has, custody of the child for emigration and adoption in accordance with the laws of the child's country [*8 C.F.R. § 204.3(d)(1)(iv)*; *see 8 C.F.R. § 204.3(a)* (definition of "foreign sending country")]. Further, a visa may be denied if the prospective adoptive parents, or a person or entity working on their behalf, have given or will give money or other consideration, either directly or indirectly to any individual or entity, as payment for the child or as an inducement to release the child. This prohibition does not extend to the reasonable cost of necessary activities such as administrative, court, legal, translation, or medical services related to the adoption [*8 C.F.R. § 204.3(i)*]. For more complete discussion of immigration law requirements regarding adopted children, see Gordon, Mailman, & Yale-Loeht, Immigration Law and Procedure (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresForeign AdoptionImmigration LawImmigrantsFamily-Sponsored Immigrants

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2-12B California Forms of Pleading and Practice--Annotated § 12B.234

§ 12B.234 Role of California Adoption Agencies

[1] Relationship With Foreign Agencies

Intercountry adoption services in California must be exclusively provided by private adoption agencies that are licensed by the Department of Social Services specifically to provide these services [*Fam. Code § 8900*]. These agencies must meet specified licensing requirements [*see Fam. Code §§ 8521(b), 8533(b), 8900, 8900.5*; *see also Fam. Code § 8921* (requirements for adoption facilitators)]. These agencies must also work only with domestic and foreign agencies with whom they have written agreements that specify the responsibilities of each. The agreements may not violate any federal or California statute or regulation [*Fam. Code § 8905*]. Foreign agencies with whom California agencies have a written agreement must be authorized to place children for intercountry adoption under the laws of their country [*22 Cal. Code Reg. § 35243*]. The agency abroad is responsible for obtaining children who are legally free for adoption under the laws of its country [*see 22 Cal. Code Reg. § 35297(a)(1)*], and who are eligible under United States immigration law [*see* discussion in *§ 12B.233*].

[2] Home Study and Assessment of Applicants

A home study of the prospective adoptive parents must be completed before the INS will approve a visa petition for the child [*8 C.F.R. § 204.3(c)(2), (d)*; *see 8 C.F.R. § 204.3(e)* (required contents of home study), (h) (adjudication)]. If the child is to reside in California, the home study must be made by an entity that is licensed under California law, whether or not the adoption is to be completed abroad or in California [*8 C.F.R. § 204.3*(a) (definition of "home study preparer")].

For adoptions to be completed in California, or if readoption is required (*see § 12B.236[2]*), California's preadoption requirements must be met [*8 C.F.R. § 204.3(f)(1)*]. Under California law, a California adoption agency is responsible for the assessment of applicants, whether or not the adoption is to be finalized in California or abroad [*Fam. Code §§ 8902, 8904*; *see 22 Cal. Code Reg. § 35257 et seq.*]. Interview requirements [*see 22 Cal. Code Reg. § 35263*], matters to be discussed with the applicants [*see 22 Cal. Code Reg. §§ 35265, 35267*], required documentation [*see 22 Cal. Code Reg. § 35195*], and notification requirements [*see 22 Cal. Code Reg. § 35273*] are similar to the requirements in

independent and agency adoptions [*see* discussion in Subparts B and D, *above*]. Fingerprints and criminal records are similarly required [*see Fam. Code § 8908*]. The grievance review procedure [*see 22 Cal. Code Reg. § 35233 et seq.*, discussed in *§ 12B.202[4]*] applies to persons whose applications are not approved [*22 Cal. Code Reg. § 35273(b)*].

Under no circumstances may a licensed adoption agency give final approval for an adoptive placement in any home where the prospective adoptive parent or any adult living in the prospective adoptive home has a felony conviction that occurred within the last five years for physical assault, battery, or a drug- or alcohol-related offense, or a felony conviction for child abuse or neglect, spousal abuse, crimes against a child, including child pornography, or for a crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault and battery [*Fam. Code § 8908(c)*].

[3] Medical Background Report

In an intercountry adoption, the California agency is required to submit the medical background report on the child and birth parents to the prospective adoptive parents [*Fam. Code § 8909(a)*]. This report is discussed in *§ 12B.34*.

The California agency must attempt to obtain documentation of the required information from the agency abroad that is responsible for the child [*22 Cal. Code Reg. §§ 35279, 35291*]. If the information is unavailable, the California agency must document the reasons for the unavailability [*22 Cal. Code Reg. §§ 35281, 35293*].

[4] Other Required Actions

For cases in which a child is emigrating from California to another convention country, the California agency must perform a background study on the child, obtain all required consents, give due consideration to the child's wishes or opinions (if the child is 12 years of age or older) before determining that an intercountry adoption is in the child's best interests, and transmit to the State Department or accredited bodies of the convention country the child background study, proof that the necessary consents have been obtained, and the reasons for its determination that the placement is in the child's best interests [*Fam. Code § 8924(a)*]. The agency must also comply with all placement standards set forth in *22 C.F.R. § 96.54* for children emigrating from California to a convention country [*Fam. Code § 8924(b)*].

[5] Agency Fees

The costs incurred by licensed adoption agencies pursuant to intercountry adoption programs must be funded by fees charged by those agencies for the required services. The agency's fee schedule must be approved by the Department of Social Services initially and whenever it is altered [*Fam. Code § 8907*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionExpensesFamily LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresAgency AdoptionFamily LawAdoptionProceduresForeign Adoption

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2-12B California Forms of Pleading and Practice--Annotated § 12B.235

§ 12B.235 Adoptions Finalized in California

[1] Custody and Financial Responsibility

For adoptions to be finalized in California, once the visa is issued and the child arrives in California, the agency assumes all responsibilities for the child, including care, custody, and control, as if the child had been relinquished for adoption in California [*Fam. Code § 8903(a)*]. There is an exception if the native country requires and has given full guardianship to the prospective adoptive parents, in which case they assume all responsibilities, including care, custody, control, and financial support [*Fam. Code § 8903(b)*]. Further, the agency and the prospective adoptive parents may enter into an agreement to share or transfer financial responsibility for the child [*Fam. Code § 8906*].

If the prospective adoptive parents or agency fail to meet their responsibility for the care, custody, control, and financial responsibility of the child and the child becomes a dependent of the juvenile court under *Welf. & Inst. Code § 300*, discussed Ch. 328, *Juvenile Courts: Dependency Proceedings*, the state must assume responsibility for the cost of care for the child. If the child becomes a dependent of the court and, for any reason, is ineligible for Aid for Dependent Children under *Welf. & Inst. Code § 14005.1* and loses Medi-Cal eligibility, the child is deemed eligible for Medi-Cal under *Welf. & Inst. Code § 14005.4*. The State Director of Health Services then has the authority to provide payment for the medical services to the child that are necessary to meet the child's needs [*Fam. Code § 8903(c)*].

[2] Placement, Supervision, and Petition

Once the child arrives for adoption in California, an intercountry adoption proceeds much as any other agency adoption. The agency places the foreign-born child in the approved home and supervises the placement [*see Fam. Code § 8902(b), (c)*]. These matters are governed by regulations [*see Fam. Code § 8901* (Department of Social Services must adopt regulations to administer intercountry adoption program)], which essentially mirror the regulations for agency adoptions [*see 22 Cal. Code Reg. § 35297 et seq.*, discussed in Subpt. D, *above*]. There are similar restrictions on removing the child from the county in which the adoption proceeding is pending [*see Fam. Code § 8910*, discussed in *§ 12B.36*].

Unlike other agency adoptions, however, in an intercountry adoption, as a condition of placement, the prospective adoptive parents must file a petition to adopt the child within 30 days after placement [*Fam. Code § 8911*]. The agency is not required to join in the petition, but if it joins in the petition or otherwise is a party to the adoption, it must submit a full report of the facts of the case to the court [*Fam. Code § 8914*]. The supervisory period is six months in most cases [*see 22 Cal. Code Reg. § 35303*].

For forms of petition for adoption and decree of adoption that may be adapted for use in intercountry adoptions, see Forms 31 and 38, respectively.

[3] Report to Court

The adoption agency must submit a report to the court on the adoptive placement with a recommendation regarding the petition [*Fam. Code §§ 8902(d), 8914*; *see 22 Cal. Code Reg. §§ 35315, 35317* (contents of report)]. The Department of Social Services may also submit a report [*Fam. Code § 8914*]. A copy of the report, whether the recommendation is favorable or unfavorable, must be given to the attorney for the petitioners, if any, or to the petitioners [*Fam. Code § 8915*].

The report must be submitted within 180 days of placement unless time is extended by the court [*22 Cal. Code Reg. § 35313*]. However, whenever the agency has a question concerning the suitability of the petitioners or the care provided to the child, it must immediately file the report. A question regarding the suitability of the petitioners or the care provided to the child must be documented in the report. The agency must recommend either that the court give it direction regarding the situation giving rise to the agency's question, or that the petition be denied [*22 Cal. Code Reg. § 35319*].

[4] Withdrawal of Petition

If the petitioners move to withdraw the petition for the adoption or to dismiss the proceeding, the clerk of the court in which the proceeding is pending must immediately notify the Department of Social Services at Sacramento of that action. Notwithstanding the withdrawal or dismissal by the petitioners, the court may retain jurisdiction over the child for the purpose of making any order or orders for its custody as the court may deem to be in the best interests of the child [*Fam. Code § 8916*].

[5] Review of Negative Report and Hearing

If the findings of the adoption agency are that the home of the petitioners is not suitable for the child and it recommends that the petition be denied, the county clerk, on receipt of the report, must immediately refer it to the superior court for review. On receipt of the report, the court must set a date for a hearing of the petition and must give reasonable notice of the hearing to the agency and the petitioners by certified mail, return receipt requested, to the address of each as shown in the proceeding [*Fam. Code § 8917(a), (b)*]. The agency must appear at the hearing to represent the child [*Fam. Code § 8917(c)*].

[6] Custodial Plan

If the petitioners move to withdraw or dismiss the petition, or if the agency recommends denial of the petition, the agency must file a full report with the court recommending a suitable custodial plan for the child [*Fam. Code § 8916(a)*]. At the hearing, if the court sustains the recommendation that the child be removed from the home of petitioners because the agency has recommended denial or the petitioners desire to withdraw the petition, or the court dismisses the petition, the court must commit the child to the care of the agency to arrange another adoptive placement or to make a suitable custodial plan [*Fam. Code § 8918*]. Federal immigration law does not expressly require automatic revocation of the child's visa and immediate return to his or her native country [*see 8 C.F.R. §§ 205.1, 205.2*; *see also 8 C.F.R. § 204.3(k)(3)*]. However, approval of an orphan-classification petition must be revoked if the INS becomes

aware of information that would have resulted in denial had it been known at the time of adjudication [*8 C.F.R. § 204.3(h)(14)*]. It is not clear whether this mandatory revocation applies only to matters that were not disclosed at the time of approval, or also to subsequent events, such as the denial of the petition for adoption.

[7] Adoption of Related Children Living Abroad

By statute, California agencies that provide intercountry services for adoptions to be finalized in California must provide services to applicants seeking to adopt related children living in foreign countries. The Legislature has declared its recognition that these children have a compelling need for adoptive placement with their relatives [*Fam. Code § 8902(e)*]. Nevertheless, such children are eligible for an immigrant visa for adoption by a relative in California only if they meet the eligibility requirements of federal immigration law. Children who have two living parents, or whose sole living parent is capable of providing for the child are not eligible for a visa [*see 8 U.S.C. § 1101(b)(1)(F)*, discussed in *§ 12B.233*]. Therefore, the California Legislature's recognized compelling need must be construed as extending only to eligible children. As such, it should be viewed as an exhortation to the licensed agencies to quickly approve applications in those cases.

[8] Visitation

A child who was adopted as part of a sibling group, and who has been separated from his or her siblings because of readoption by a California resident, may petition the court to enforce any visitation agreement to which the siblings' separate adoptive families subscribed before the child's readoption. If there is no agreement, the child may petition the court to order visitation [*Fam. Code § 8920(a)*]. The term "sibling" means full-siblings and half siblings [*Fam. Code § 8920(c)*]. "Readoption" means the process by which a child who belongs to a foreign-born sibling group that was adopted together through an intercountry adoption is subsequently adopted by a different set of adoptive parents who are California residents [*Fam. Code § 8920(d)*].

The court may order enforcement of the visitation agreement or grant visitation rights if it finds that visitation is in the child's best interest [*Fam. Code § 8920(a)*]. In making a finding that enforcement of a visitation agreement or the granting of visitation rights is in the child's best interest, the court must consider the nature and extent of the child's sibling relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shares significant common experiences or has close and strong bonds with a sibling, and whether ongoing contact with a sibling is in the child's best interest, including the child's long-term interest [*Fam. Code § 8920(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresAgency AdoptionFamily LawAdoptionProceduresForeign AdoptionFamily LawChild CustodyVisitationAwardsThird PartiesGeneral Overview

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§ 12B.236 Adoptions Finalized in Foreign Country

[1] Adoptions Determined Sufficient by INS

California adoption law defines intercountry adoptions to include adoptions completed in the child's native country [*Fam. Code § 8527*]. California law provides that for adoptions that will be finalized in a foreign country, the licensed adoption agency must provide all of the following services: (1) assessment of the suitability of the applicant's home, (2) certification to the Immigration and Naturalization Service (INS) that California's adoption requirements have been met, and (3) readoption services as required by the Immigration and Naturalization Service [*Fam. Code § 8904*]. However, immigration regulations do not require certification that state requirements have been met in the case of a child whose foreign adoption is determined to be valid by the INS [*see 8 C.F.R. § 204.3(f)*].

California adoption regulations do not attempt to assert any state role over an adoption finalized abroad once the parents and child arrive in or return to California. Regulations regarding placement [*see 22 Cal. Code Reg. § 35297(a)*] and supervision [*see 22 Cal. Code Reg. § 35299*] exclude adoptions completed abroad from their scope.

California probably has no role in an adoption finalized in a foreign country by a United States citizen for which an immigrant visa may be issued under *8 U.S.C. § 1101(b)(1)(E)*, discussed in *§ 12B.233*. A visa under this provision requires that the adopted child (not necessarily an orphan) have been in the legal custody of, and have resided with, the adopting parents for a two-year period. There are no other requirements, such as a home study or a favorable agency recommendation, that might give California some say as to whether an immigrant visa should be granted.

A California resident who adopts a child through an intercountry adoption that is finalized in a foreign country may readopt the child in California, even if readoption is not required by the INS [*Fam. Code § 8919(b)*; *see § 12B.236[2]*].

[2] Adoptions Determined Insufficient and Requiring Readoption

Even if a child has been adopted abroad under the laws of the foreign country, the INS may require that the child be processed as coming to the United States to be adopted [*see 8 C.F.R. § 204.3(f)(2)*]. This may be the case if the

petitioners did not or will not personally see the child before or during the adoption proceeding, or if the adoption will not be, or was not, full and final [*8 C.F.R. § 204.3(f)(2)*; *see 8 U.S.C. § 1101(b)(1)(F)*]. In such a case, the child must be readopted in the United States [*see 8 C.F.R. § 204.3(d)(1)(iv)(B)*(*4*)], and all California preadoption requirements must be met [*8 C.F.R. § 204.3(d)(1)(iv)(B)*(*3*); *see § 12B.235*].

California law requires readoption of a child whose intercountry adoption was finalized in a foreign country if it is required by the Department of Homeland Security [*Fam. Code § 8919(a)*]. The readoption must include, but is not limited to, at least one postplacement in-home visit, the filing of an adoption petition under *Fam. Code § 8912* (*see § 12B.301[1]*), an intercountry adoption court report, accounting reports, the home study report, and the final adoption order. If the adoptive parents have already completed a home study as part of their adoption process, a copy of that study must be submitted in place of a second home study. No readoption order may be granted unless the court receives a copy of the home study report previously completed for the international finalized adoption by an adoption agency authorized to provide intercountry adoption services under *Fam. Code § 8900*. The court must consider postplacement visits and the previously completed home study when deciding whether to grant or deny the petition for readoption [*Fam. Code § 8919(a)*].

A California resident who adopts a child through an intercountry adoption that is finalized in a foreign country having adoption standards that meet or exceed those of California, as certified by the Department of Social Services, may readopt the child in California if (1) the readoption includes at least one postplacement in-home visit, (2) the adoption was finalized in accordance with the laws of the foreign country, and (3) the resident has filed a petition to readopt that includes a copy of the child's birth certificate and visa, and a copy of the decree, order, or certificate of adoption evidencing finalization of the adoption in the foreign country, and has provided a certified translation of any of these documents that are not in English [*Fam. Code § 8919(c)(1), (2)*]. A court that denies a petition for readoption must summarize its reasons for doing so on the record [*Fam. Code § 8919(c)(3)*].

Each state resident who adopts a child through an intercountry adoption that is finalized in a foreign country may obtain a birth certificate in California in accordance with the provisions of *Health & Safety Code § 103450* [*Fam. Code § 8919(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresForeign Adoption

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§ 12B.237 Naturalization

Lawful immigration and adoption by a United States citizen does not automatically make the child a United States citizen. Rather, the child must be naturalized [*see 8 U.S.C. § 1433(a)*]. There is no durational residency requirement for an adopted child who is residing in the United States in the custody of the adoptive parents pursuant to a lawful admission for permanent residence [*8 U.S.C. § 1433(b)*]. Therefore, the naturalization petition may be submitted as soon as the adoption is finalized. Naturalization is discussed further in Ch. 12.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresForeign AdoptionImmigration LawNaturalizationEligibilityGeneral Overview

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§ 12B.238 Adoption Certificate or Custody Declaration

A Hague adoption certificate or, in outgoing cases, a Hague custody declaration, obtained under Part 97 of Title 22 of the Code of Federal Regulations, must be recognized as a final valid adoption for purposes of all state and local laws [*Fam. Code § 8925*].

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§ 12B.239 Postadoption Contact ("Contact After Adoption") Agreement

Nothing in California's adoption laws prevents the adopting parents, the birth relatives (including the birth parents), and the child from entering into a written agreement to permit continuing contact between the birth relatives (including the birth parents) and the child, if the agreement is found by the court to have been entered into voluntarily and to be in the best interests of the child at the time the adoption petition is granted [*Fam. Code § 8616.5(b)(1)*]. The Judicial Council forms and court rules now refer to these agreements as "contact after adoption" agreements. However, under the authorizing statute, such an agreement is called a "postadoption contact agreement" [*see* Statutes 2000, ch. 910].

If the petitioner has entered into a postadoption contact agreement with the birth parent, the agreement, signed by the participating parties, must be attached to and filed with the petition for adoption [*Fam. Code § 8912(e)*; *see Fam. Code § 8616.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationGeneral OverviewFamily LawAdoptionProceduresGeneral OverviewFamily LawAdoptionProceduresForeign Adoption

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[Reserved]

§§ 12B.240[Reserved]

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§ 12B.250 Governing Law

Interstate adoptions are primarily subject to the Interstate Compact on the Placement of Children, which is set forth in Fam. Code § 7901 and associated statutes and court rules [*see Fam. Code §§ 7900, 7902 et seq.*; *Cal. Rules of Ct., Rule 5.616*].

Legal Topics:

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

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2-12B California Forms of Pleading and Practice--Annotated § 12B.251

§ 12B.251 Application of Interstate Compact on the Placement of Children

California has adopted the Interstate Compact on the Placement of Children [*see Fam. Code § 7901*; *see also Cal. Rules of Ct., Rule 5.616*], which governs adoption of minor children between states that have entered into the Compact [*Fam. Code § 7900*]. The Compact applies both when children are brought into California and when they are sent from California to other participating states. In particular, it applies to adoption agencies, individuals, and others, who are termed "sending agencies" under the Compact. A "sending agency" may be a party state, a subdivision or court of such a state, or a person, corporation, association, charitable agency, or other entity that sends, brings, or causes to be sent or brought, any child to another party state [*Fam. Code § 7901*, art. 2(b)].

A "receiving state" under the Compact is the state to which a child is sent, brought, or caused to be sent or brought, whether by public authorities or private persons or agencies, and whether for placement with state or local public authorities or for placement with private agencies or persons [*Fam. Code § 7901*, art. 2(c)].

The Compact does not apply to the following [*Fam. Code § 7901*, art. 8]:

(1) The sending or bringing of a child into a receiving state by his or her parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or guardian and leaving the child with any such relative or nonagency guardian in the receiving state; or

(2) Any placement, sending, or bringing of a child into a receiving state pursuant to any other interstate compact to which both the state from which the child is sent or brought and the receiving state are party, or to any other agreement between such states that has the effect of law.

A child who is born in this state and placed for adoption in this state with a resident of this state is not subject to the provisions of the compact [*Fam. Code § 7907.5(a)*]. A child who is born in this state and placed for adoption with a person who is not a resident of this state is, however, subject to the provisions of the compact, regardless of whether the adoption petition is filed in this state. In interstate placements, this state isdeemed the sending state for any child who is

born here [*Fam. Code § 7907.5(b)*].

It is not clear whether the compact applies to independent adoptions between private parties [*see Adoption of Zachariah K. (1992) 6 Cal. App. 4th 1025, 1038, 8 Cal. Rptr. 2d 423]* . A birth parent who privately surrenders a child for adoption to prospective adoptive parents in another state would seem to fall within the definition of "sending agency" [*Fam. Code § 7901*, art. 2(b)]. *Fam. Code § 8801.3(d)* requires that the adoption placement agreement meet the requirements of the Interstate Compact on the Placement of Children [*Fam. Code § 8801.3(d)*]. However, the adoptive parents might be, by decree, or otherwise, considered "nonagency guardians" within the exclusion of Article 8(a) [*see Adoption of Zachariah K. (1992) 6 Cal. App. 4th 1025, 1038, 8 Cal. Rptr. 2d 423]* .

The Interstate Compact on the Placement of Children contains additional provisions regarding the placement of children in out-of-state group homes [*see Fam. Code §§ 7911-7912*].

The Department of Social Services assumes that the ICPC applies to private adoptions. Unless the placement for adoption is with a relative within the ICPC exclusions, it is recommended that counsel satisfy the ICPC requirements before allowing the child (or the pregnant birth mother) to cross state lines for the adoption placement. Most other states also interpret the ICPC as applying to private adoptions. A failure to obtain approval from the Compact Administrators of the involved states may expose the parties to criminal penalties, greatly complicate the adoption process, and potentially invalidate the relinquishment or consent to adoption.

Legal Topics:

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

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§ 12B.252 Jurisdiction Under Compact

Under the interstate compact, the sending agency retains sufficient jurisdiction over the child to determine all matters in relation to the custody, supervision, care, treatment, and disposition of the child that it would have had if the child had remained in the sending agency's state, until the child is adopted, reaches majority, becomes self-supporting, or is discharged with the concurrence of the appropriate authority [*see Fam. Code § 7904* (in California, "appropriate authority" is Department of Social Services)] in the receiving state. This jurisdiction also includes the power to effect or cause the return of the child or the child's transfer to another location and custody under law [*Fam. Code § 7901*, art. 5(a)].

For purposes of an interstate adoption placement, "jurisdiction" as used in *Fam. Code § 7901*, art. 5 means "jurisdiction over or legal responsibility for the child" [*Fam. Code § 7908.5* (statute merely makes technical clarification, not substantive change)].

Specific jurisdictional requirements set forth in *Fam. Code § 9210* apply to interstate adoptions if the prospectiveadoptive parents reside outside of California [*Fam. Code § 9212(a)*]. These requirements were apparently enacted in response to California's earlier passage of the UCCJEA, which removed references to adoption that formerly were contained in the UCCJA (discussed hereafter).

Before California's repeal of the Uniform Child Custody Jurisdiction Act (UCCJA), and enactment of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA--*Fam. Code § 3400 et seq.*), operative January 1, 2000, case law held that retention of jurisdiction under the compact should be yielded if another jurisdiction was a more convenient forum under the (now former) UCCJA [*In re Gloria F. (1989) 212 Cal. App. 3d 576, 586-588, 260 Cal. Rptr. 706]* . Because the UCCJEA now expressly excludes adoptions from its provisions, it would appear that this holding no longer obtains [*see Fam. Code § 3404*]. For further discussion of the UCCJEA, see Ch. 394, *Parent and Child* .

However, the federal Parental Kidnapping Prevention Act (PKPA; *28 U.S.C. § 1738A*) preempts state law on the issue of jurisdiction by a state to render a valid custody decree. Therefore, jurisdictional provisions of the interstate compact

cannot take precedence over any conflicting provisions in the PKPA [*Adoption of Zachariah K. (1992) 6 Cal. App. 4th 1025, 1036, 1038, 8 Cal. Rptr. 2d 423]* . For further discussion of the PKPA, see Ch. 394, *Parent and Child* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresInterstate AdoptionFamily LawChild CustodyEnforcementUniform Child Custody Jurisdiction & Enforcement ActFamily LawChild CustodyInterferenceParental Kidnapping Prevention ActFamily LawChild CustodyJurisdictionGeneral Overview

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§ 12B.253 General Procedures Under the Compact

Under the Compact, before sending, bringing, or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption, the sending agency must furnish the appropriate public authorities [*see Fam. Code § 7903* (in California, the Department of Social Services)] in the receiving state with written notice of the intention to send, bring, or place the child in the receiving state [*Fam. Code § 7901*, art. 3(b)]. The notice must contain the following information [*Fam. Code § 7901*, art. 3(b)]:

(1) The name, date, and place of birth of the child;

(2) The identity and address or addresses of the parents or legal guardian;

(3) The name and address of the person, agency, or institution to whom or with which the sending agency proposes to send, bring, or place the child; and

(4) A full statement of the reasons for the proposed action and evidence of the authority pursuant to which the placement is proposed to be made.

Any public officer or agency in a receiving state that is in receipt of such a notice may request of the sending agency, or any other appropriate officer or agency of, or in, the sending agency's state, and is entitled to receive therefrom, such supporting or additional information as it may deem necessary under the circumstances to carry out the purpose and policy of the Compact [*Fam. Code § 7901*, art. 3(c)]. The child must not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities [*see Fam. Code § 7903* (in California, the Department of Social Services)] in the receiving state notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child [*see Fam. Code § 7901*, art. 3(d); *see also In re Eli F. (1989) 212 Cal. App. 3d 228, 239, 260 Cal. Rptr. 453* (juvenile court placement order reversed for failure to comply with required procedures)].

Within 60 days of receiving a request from another state to conduct a study of a home environment for purposes of assessing the safety and suitability of placing a child in the home, a county child welfare agency must conduct and complete the study, and return a report to the requesting state on the results of the study, which must address the extent to which placement in the home would meet the child's needs [*Fam. Code § 7901.1(a)*].

The sending agency will continue to have financial responsibility for the support and maintenance of the child during the period of placement [*see Fam. Code § 7902* (financial responsibility initially determined under *Fam. Code § 7901*, art. 5; but if partial or complete default of performance thereunder, provisions of other state laws possibly invoked)]. However, these provisions will not defeat a claim of jurisdiction by a receiving state sufficient to deal with an act of delinquency or crime committed therein [*see Fam. Code § 7901*, art. 5(a); *see also Fam. Code §§ 7901*, art. 6, 7908 (relating to institutional care of delinquent children)].

A placement in violation of the Compact constitutes a violation of the laws of both the sending and receiving states and is also grounds for suspension or revocation of any license, permit, or other legal authorization held by the sending agency that allows it to place or care for children [*see Fam. Code § 7901*, art. 4]. A placement by court order in violation of the Compact's requirements may be reversed on appeal [*see In re Eli F. (1989) 212 Cal. App. 3d 228, 239, 260 Cal. Rptr. 453]* .

A Compact administrator has the power to promulgate rules and regulations to carry out the terms and provisions of the Compact [*see Fam. Code § 7901*, art. 7; *22 Cal. Code Reg. § 35400 et seq.*]. The Compact administrator must not grant approval of an interstate placement of a child for adoption if the placement is in violation of either *Fam. Code § 8801(a)* (improper placement of child for independent adoption, discussed in *§ 12B.90*) or *Penal Code § 273* (paying parent for adoption of child, discussed in *§ 12B.14[2]*) [*Fam. Code § 7910*]. However, no provision of law restricting out-of-state placement of children for adoption is applicable to placements made pursuant to the Compact [*Fam. Code § 7907*].

In order to obtain consent for the interstate placement, the ICPC form 100A is filed with the sending state by the sending agency (who is usually the birth mother in an independent placement), together with the other information required by the sending and receiving states [*see 22 Cal. Code Reg. §§ 35401 et seq.* (California regulations)]. The California Department of Social Services also publishes a pamphlet to guide ICPC applications. Outside California, the Compact Administrator may be contacted to ascertain that state's requirements. A preplacement home study of the prospective adoptive parents will be necessary [*22 Cal. Code Reg. §§ 35401, 35403, 35407, 35409*]. The approval process may take up to several weeks.

For agency adoptions, California has delegated the tasks of the Compact Administrator to the licensed agency [*22 Cal. Code Reg. §§ 35401, 35403*]. As a result, obtaining ICPC approval in agency adoptions is normally automatic. For independent adoptions, the tasks of the Compact Administrator have been delegated to the county adoption agency, or the local adoptions branch of the Department of Social Services, whichever would investigate an adoption in that county [*22 Cal. Code Reg. §§ 35407, 35409*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresInterstate AdoptionFamily LawAdoptionProceduresPrivate AdoptionFamily LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyFoster Care

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[Reserved]

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§ 12B.270 Indian Child Welfare Act

Adoption of American Indian children is subject to both federal and California law. Federal provisions concerning custody proceedings involving unmarried Indian children [*see 25 U.S.C. § 1903(4)* ("Indian child" defined)] are contained in *25 U.S.C. § 1901 et seq.*, which is a portion of the Indian Child Welfare Act of 1978 (ICWA) [Pub. L. No. 95-608]. An "Indian child" is a child who is either (1) a member of an Indian tribe, or (2) eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe [*see In re Shane G. (2008) 166 Cal. App. 4th 1532, 1539, 83 Cal. Rptr. 3d 513* (agency's inquiry produced no information that child was Indian child); *In re Jose C. (2007) 155 Cal. App. 4th 844, 849, 66 Cal. Rptr. 3d 355* (child's membership in tribe or biological parent's membership in tribe is requirement for child to qualify as Indian child)] The term "Indian tribe" under the ICWA only includes federally recognized tribes [*25 U.S.C. § 1903(4), (8)*; *In re Jonathon S. (2005) 129 Cal. App. 4th 334, 339, 28 Cal. Rptr. 3d 495*); *see In re A.C. (2007) 155 Cal. App. 4th 282, 287, 65 Cal. Rptr. 3d 767* (notice of proceedings need not be sent to tribe that is not federally recognized)]. A non-Indian parent has rights under the ICWA, which defines "parent" to include any biological parent or parents of an Indian child [*25 U.S.C. § 1903(9)*; *In re Jonathon S. (2005) 129 Cal. App. 4th 334, 339, 28 Cal. Rptr. 3d 495*) (non-Indian mother had standing to raise contention that notice of proceeding to terminate parental rights to child was not given in accordance with ICWA)].

The ICWA provides for tribal jurisdiction over certain Indian child custody proceedings and includes transfer to state courts in appropriate cases [*see 25 U.S.C. § 1911(a), (b)*; *see Adoption of Hannah S. (2006) 142 Cal. App. 4th 988, 993, 48 Cal. Rptr. 3d 605* , (only child custody proceedings excluded from ICWA are custody disputes resulting from divorce proceedings between parents of Indian child and placements of Indian children as result of juvenile delinquency proceedings; judicial creation of additional exceptions of any kind are not permitted); *In re M.A. (2006) 137 Cal. App. 4th 567, 572, 576, 40 Cal. Rptr. 3d 439* (transfer of juvenile dependency proceeding to tribal court when no statutory "good cause" to reject transfer was shown and neither parent objected to transfer; Interior Department's approval of tribal court is *not* required)].

It also contains procedures for notice of, and appointed counsel in, a state court proceeding involving foster care placement or termination of parental rights, as well as for placement of Indian children [*see 25 U.S.C. §§ 1912(a), (b),*

1913, 1915; *In re Shane G. (2008) 166 Cal. App. 4th 1532, 1538, 83 Cal. Rptr. 3d 513* (notice need not be given when there is insufficient reason to believe child is Indian child); *Justin L. v. Superior Court (2008) 165 Cal. App. 4th 1406, 1410, 81 Cal. Rptr. 3d 884* (noting that remand for limited purpose of ICWA notice compliance "is all too common" and that "prevalence of inadequate notice remains disturbingly high"); *In re I.G. (2005) 133 Cal. App. 4th 1246, 1254, 35 Cal. Rptr. 3d 427*) (emphasizing importance of strict compliance with ICWA notice requirements, and noting that noncompliance with ICWA has been continuing problem in state court proceedings); *In re X.V. (2005) 132 Cal. App. 4th 794, 799* , *33 Cal. Rptr. 3d 893* (ICWA's notice requirements are intended to ensure child's tribe will have opportunity to assert its rights to intervene in proceedings, irrespective of position of child's parents or state agency); *In re S.B. (2005) 130 Cal. App. 4th 1148, 1154, 30 Cal. Rptr. 3d 726* (ICWA applies to any state court proceeding involving foster care or adoptive placement of, or termination of parental rights to, an Indian child); *In re D.T. (2003) 113 Cal. App. 4th 1449, 5 Cal. Rptr. 3d 893* (failure to give adequate notice requires reversal of order terminating birth parent's parental rights); *In re Karla C. (2003) 113 Cal. App. 4th 166, 6 Cal. Rptr. 3d 205* ; *see also* *Nicole K. v. Superior Court (2007) 146 Cal. App. 4th 779, 783, 53 Cal. Rptr. 3d 251* (notice sent to tribe at incorrect address is inadequate); *In re Merrick V. (2004) 122 Cal. App. 4th 235, 241-242, 19 Cal. Rptr. 3d 490* (case remanded with directions for court to assure compliance with ICWA's notice requirements and California case law interpreting ICWA, when county health and human services agency that filed dependency petitions did not submit to court proof of notice to tribe or to *BIA); In re Miguel E. (2004) 120 Cal. App. 4th 521, 550, 15 Cal. Rptr. 3d 530* (case remanded for compliance with ICWA when notice was apparently sent to wrong tribe, no notice was sent to BIA, there was no indication notices were sent by registered mail with return receipt requested, and notices omitted much of required information); *Cal. Rules of Ct., Rule 5.481(a)(4)* (required inquiry)]. For the form of notice, see *§ 12B.384*.

The Indian status of the child need not be certain to invoke the notice requirement of the ICWA; because the question of membership rests with each Indian tribe, when the court knows or has reason to believe the child may be an Indian child, notice must be given to the particular tribe in question or the Secretary of the Interior [*Nicole K. v. Superior Court (2007) 146 Cal. App. 4th 779, 783, 53 Cal. Rptr. 3d 251* ; *In re Joseph P. (2006) 140 Cal. App. 4th 1524, 1529, 45 Cal. Rptr. 3d 591* ; In re Francisco W. 2006) *139 Cal. App. 4th 695, 701, 43 Cal. Rptr. 3d 171* ; *In re S.B. (2005) 130 Cal. App. 4th 1148, 1154, 30 Cal. Rptr. 3d 726*); *In re O.K. (2003) 106 Cal. App. 4th 152, 156-158, 130 Cal. Rptr. 2d 276* ; *see* *In re Robert A. (2007) 147 Cal. App. 4th 982, 989, 55 Cal. Rptr. 3d 74* (suggestion of Indian ancestry is sufficient to trigger notice requirement); *but see* *In re Jose C. (2007) 155 Cal. App. 4th 844, 848, 66 Cal. Rptr. 3d 355* (enrollment of child or parents in tribe is not prerequisite for giving notice)]. The circumstances under which a court has reason to believe that a child is an Indian child include, but are not limited to, the following [*In re O.K. (2003) 106 Cal. App. 4th 152, 156, 130 Cal. Rptr. 2d 276* ; *Cal. Rules of Ct., Rule 5.481(a)(5)*]:

- Any party to the case, Indian tribe, Indian organization or public or private agency informs the court that the child is an Indian child.

- Any public or state-licensed agency involved in child protection services or family support has discovered information that suggests that the child is an Indian child.

- The child who is the subject of the proceeding gives the court reason to believe he or she is an Indian child.

- The residence or the domicile of the child, his or her biological parents, or the Indian custodian is known by the court to be or is shown to be a predominantly Indian community.

- An officer of the court involved in the proceeding has knowledge that the child may be an Indian child.

A court satisfies its initial and continuing duty to inquire into a child's status as an Indian child by asking the parents at each hearing to disclose membership in any Indian tribe. In such event, it is incumbent on each parent to disclose any

Indian ancestry. If no disclosure is made, the court may properly conclude that the ICWA does not apply [*In re E.H. (2006) 141 Cal. App. 4th 1330, 1334, 46 Cal. Rptr. 3d 787* ; *see In re A.B. (2008) 164 Cal. App. 4th 832, 839-840, 79 Cal. Rptr. 3d 580* (when both biological parents deny any Indian heritage, there is no tribe to notify of the proceedings, but when parent indicates he or she may have Indian heritage, it is preferable to err on side of giving notice)].

If the court has reason to know that the proceedings involve an Indian child, it has a duty to give the requisite notice itself or to ensure the social service's agency's compliance with the notice requirements [*Justin L. v. Superior Court (2008) 165 Cal. App. 4th 1406, 1410, 81 Cal. Rptr. 3d 884* ; *In re X.V. (2005) 132 Cal. App. 4th 794, 801, 33 Cal. Rptr. 3d 893* ; *see In re Aaron R. (2005) 130 Cal. App. 4th 697, 707, 29 Cal. Rptr. 3d 921* (grandmother's brief allusion to her membership in Indian historical association, which was not itself a tribe, did not give court reason to know child might be an Indian child)]. This duty is sua sponte, because notice is intended to protect the interests of Indian children and tribes despite the parents' inaction [*In re X.V. (2005) 132 Cal. App. 4th 794, 801, 33 Cal. Rptr. 3d 893]* .

Notice must be sent to all tribes of which the child may be a member or eligible for membership. The notice must include the names of the child's ancestors and other known identifying information, and be sent by registered mail, return receipt requested [*In re Francisco W. (2006) 139 Cal. App. 4th 695, 702, 43 Cal. Rptr. 3d 171* ; *In re Brooke C. (2005) 127 Cal. App. 4th 377, 384, 25 Cal. Rptr. 3d 590]* . If the identity or location of the child's tribe cannot be determined, notice of the proceedings need only be given to the Bureau of Indian Affairs (BIA).

No proceeding involving the custody of an Indian child may be held until at least 10 days after receipt of notice by the child's parent, Indian custodian, tribe, or the BIA [*Cal. Rules of Ct., Rule 5.482(a)(1)*; *In re X.V. (2005) 132 Cal. App. 4th 794, 800, 33 Cal. Rptr. 3d 893* ; *In re S.B. (2005) 130 Cal. App. 4th 1148, 1154, 30 Cal. Rptr. 3d 726*)]. If a tribe responds indicating that the child is eligible for membership if certain steps are followed, the court must proceed as if the child is an Indian child and direct the appropriate individual or agency to provide active efforts to secure tribal membership for the child [*Cal. Rules of Ct., Rule 5.482(c)*; *see Cal. Rules of Ct., Rule 5.484(c)* (affect efforts that must be undertaken)]. If neither the tribe nor the BIA provides a determinative response within 60 days after receiving the notice, the court may determine that the ICWA does not apply to the proceedings [*Cal. Rules of Ct., Rule 5.482(d)(1)*; *In re Francisco W. (2006) 139 Cal. App. 4th 695, 703, 43 Cal. Rptr. 3d 171* ; *In re Jasmine G. (2005) 127 Cal. App. 4th 1109, 1118, 26 Cal. Rptr. 3d 394]* . The court must reverse its determination and must apply the ICWA prospectively if a tribe or the BIA subsequently confirms that the child is an Indian child [*Cal. Rules of Ct., Rule 5.482(d)(1)*]. Based on the petition or other information, if the court knows or has reason to know at any time that the child is an Indian child, it must proceed as if the child were an Indian child [*Cal. Rules of Ct., Rule 5.482(d)(2)*]. Otherwise, the court is not required to delay the proceedings until a response to the notice is received [*Cal. Rules of Ct., Rule 5.482(d)(3)*].

The notices, return receipts, and response of the BIA and the tribes must be filed with the court [*Cal. Rules of Ct., Rule 5.482(b)*; *In re Robert A. (2007) 147 Cal. App. 4th 982, 989, 55 Cal. Rptr. 3d 74* ; *In re X.V. (2005) 132 Cal. App. 4th 794, 800, 33 Cal. Rptr. 3d 893* ; *Alicia B. v. Superior Court (2004) 116 Cal. App. 4th 856, 865, 11 Cal. Rptr. 3d 1* ; *see In re Mary G. (2007) 151 Cal. App. 4th 184, 211, 59 Cal. Rptr. 3d 703* (all responses must be filed)]. The court may not rely on mere representations that proper notice was given; there must be a court record of the notice documents [In re Glorianna K. (2005) *125 Cal. App. 4th 1443, 1449, 24 Cal. Rptr. 3d 582]* .

When proper notice is not given under the ICWA, a court's order terminating parental rights is voidable [*Justin L. v. Superior Court (2008) 165 Cal. App. 4th 1406, 1410, 81 Cal. Rptr. 3d 884* ; *In re Glorianna K. (2005) 125 Cal. App. 4th 1443, 1449, 24 Cal. Rptr. 3d 582]* . However, a failure to comply with the notice provisions of the ICWA may be held to be harmless error when the child's tribe has actually participated in the proceedings or when, even if notice had been given, the child would not have been found to be an Indian child and, therefore, the substantive provisions of the ICWA would not have applied [*In re S.B. (2005) 130 Cal. App. 4th 1148, 1158, 30 Cal. Rptr. 3d 726* ; *see In re Cheyanne F. (2008) 164 Cal. App. 4th 571, 577, 79 Cal. Rptr. 3d 189* (deficiencies in ICWA notice are generally prejudicial, but may be deemed harmless when there is no basis to conclude that including omitted information would

have produced different results concerning child's Indian heritage)]. Moreover, when proper notice has been given to the BIA, a court is not required to suspend the proceedings because a parent belatedly comes forward and claims to have Indian heritage [*In re Joseph P. (2006) 140 Cal. App. 4th 1524, 1531, 45 Cal. Rptr. 3d 591]* .

The notice requirements are mandatory and cannot be waived by the parties [*In re Justin S. (2007) 150 Cal. App. 4th 1426, 1435, 59 Cal. Rptr. 3d 376* ; *In re Robert A. (2007) 147 Cal. App. 4th 982, 989, 55 Cal. Rptr. 3d 74*].

In any child custody proceeding, the court may not order placement of an Indian child unless it finds by clear and convincing evidence that continued custody with the parent or Indian custodian is likely to cause the child serious emotional or physical damage, and considers evidence regarding the prevailing social and cultural standards of the child's tribe, including that tribe's family organization and child-rearing practices [*25 U.S.C. § 1912(e)*; *Cal. Rules of Ct., Rule 5.484(a)*; *Adoption of Hannah S. (2006) 142 Cal. App. 4th 988, 994, 48 Cal. Rptr. 3d 605* ; *In re S.B. (2005) 130 Cal. App. 4th 1148, 1155, 30 Cal. Rptr. 3d 726*]. This is because the ICWA presumes that it is in the best interests of an Indian child to retain tribal ties and cultural heritage and in the interest of the tribe to preserve its future generations, a most important resource [*In re A.B. (2008) 164 Cal. App. 4th 832, 838, 79 Cal. Rptr. 3d 580*]. Testimony by a qualified expert witness is required before a court may order a child placed in foster care or may terminate parental rights [*25 U.S.C. § 1912(e), (f)*; *Cal. Rules of Ct., Rule 5.484(a)(1)*]. A stipulation by the parent, Indian custodian, or tribe, or a failure to object, may waive the requirement of producing evidence as to the likelihood of serious damage only if the court is satisfied that the person or tribe has been fully advised of the requirements of the ICWA and has knowingly, intelligently, and voluntarily waived them. The stipulation must also be in writing [*Cal. Rules of Ct., Rule 5.484(a)(2)*].

A court may only terminate parental rights to an Indian child or declare an Indian child free of the custody and control of one or both parents if the court finds by clear and convincing evidence that active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family were made, and determines, based on evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that the continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child [*25 U.S.C. § 1912(f)*; *Cal. Rules of Ct., Rule 5.485(a)*]. A court may not terminate parental rights to an Indian child or declare the child free from the custody and control of one or both parents if the court finds a compelling reason for determining that termination of parental rights would not be in the child's best interest, for example, if termination of parental rights would substantially interfere with the child's connection to his or her tribal community or the child's tribal membership rights, or if the child's tribe has identified guardianship, long-term foster care with a fit and willing relative or another planned permanent living arrangement for the child [*Cal. Rules of Ct., Rule 5.485(b)*].

On the petition of an Indian child, a parent from whose custody an Indian child has been removed, of the Indian child's tribe, any court of competent jurisdiction must invalidate any action for foster care placement or termination of parental rights that violated the notice provision or any of the substantive provisions of the ICWA [*25 U.S.C. § 1914*; *Cal. Rules of Ct., Rule 5.486*].

For a detailed consideration of the Indian Child Welfare Act, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2d ed., Vol. 5, Ch. 176 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionIndian Child Welfare ActFamily LawAdoptionProceduresGeneral Overview

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§ 12B.271 California Adoption Law

California law regarding the adoption of Indian children is largely contained in *Fam. Code §§ 170-185, 3041(e), 7822(e), 7892.5, 8606.5, 8619, 8619.5,* and *8620,* and in *22 Cal. Code Reg. § 35353 et seq.* *Fam. Code § 8619* requires the Department of Social Services adopt rules and regulations to assure that a parent of Indian ancestry who seeks to relinquish a child for adoption provides sufficient information to the Department of Social Services so that a certificate of degree of Indian blood can be obtained from the Bureau of Indian Affairs. Obtaining this information will, among other things, determine the adopted person's eligibility to receive services or benefits because of his or her status as an Indian [*see Fam. Code § 8619*].

Special notice provisions apply under the Family Code if a parent is seeking to relinquish a child under *Fam. Code § 8700* or to execute an adoption placement agreement under *Fam. Code § 8801.3* and there is information that the child is, or may be, an Indian child [*see Fam. Code §§ 180, 8620(a)(1)*]. The notice must describe the nature of the proceeding and advise the recipient of the Indian tribe's right to intervene in the proceeding on its own behalf or on behalf of a tribal member relative of the child [*Fam. Code § 8620(a)(3)(B)*]. For discussion of this notice, see *§ 12B.173[7]*.

If a child who is the subject of an adoption proceeding after being relinquished for adoption under *Fam. Code § 8700* is an Indian child, the child's Indian tribe may intervene in that proceeding on behalf of a tribal member relative of the child [*Fam. Code § 8620(c)*].

In addition, state courts must comply with the Indian Child Welfare Act of 1978 (ICWA--*25 U.S.C. 1901 et seq.*) in all Indian child custody proceedings [*see Fam. Code § 175*]. For example, if the child is an Indian child and an allegation is made that parental custody would be detrimental to the child, before making an order granting custody to a person or persons other than a parent, over the parent's objection, the court must apply the evidentiary standards prescribed in the ICWA [*Fam. Code § 3041(e)*].

Consent to adoption given by an Indian child's parent is not valid unless the consent is executed in writing at least 10

days after the child's birth and recorded before a judge, and the judge certifies that the terms and consequences of the consent were fully explained in detail in English and were fully understood by the parent or that they were interpreted into a language that the parent understood [*Fam. Code § 8606.5(a)*]. The parent may withdraw his or her consent to the adoption for any reason at any time before entry of a final decree of adoption, and the child must be returned to the parent [*Fam. Code § 8606.5(b)*]. After entry of a final decree of adoption, a parent may withdraw consent to the adoption on the grounds that consent was obtained through fraud or duress, and may petition the court to vacate the decree. On finding that consent was obtained through fraud or duress, the court must vacate the decree and return the child to the parent, as long as the adoption has not been in effect for more than two years [*Fam. Code § 8606.5(c)*].

A presumed father's waiver of the right to notice of the adoption proceeding under *Fam. Code § 7660* must be executed in accordance with the requirements of voluntary adoptions set forth in *25 U.S.C. § 1913*, and does not affect the rights of any tribe from which the child or the presumed father may be descended to notification of, or participation in, adoption proceedings as provided by the ICWA [*Fam. Code § 7660.5*]. Notice that a waiver has been executed must be given to any known federally recognized Indian tribe or tribes from which the child or the presumed father may be descended, as required by the ICWA [*Fam. Code § 7660.5*].

The department or agency must consider the placement preferences and standards set out in subdivisions (c) through (i) of *Welfare and Institutions Code Section 361.31*, including placement with a member of the child's extended family, other members of the child's tribe, or another Indian family, or placement according to the order of preference established by the tribe [*see Fam. Code § 8710(a)*; *Cal. Rules of Ct., Rule 5.484(b)*]. If the prospective adoptive parents do not fall within these placement preferences, they may only be considered if the court finds, by clear and convincing evidence, that good cause exists to deviate from the placement preferences [*Fam. Code § 8710(b)*].

Before issuing an order of adoption in a proceeding involving an Indian child, the court may, on petition of the birth parent, birth relative, or Indian tribe, order the parties to engage in family mediation services for the purpose of reaching a postadoption contact agreement if the prospective adoptive parent fails to negotiate in good faith to enter into an agreement, after having agreed to enter into negotiations; the parties' failure to reach an agreement is not, in and of itself, proof of bad faith [*Fam. Code § 8616.5(k)(1)*]. Before issuing the order of adoption, if the parties fail to negotiate in good faith to enter into a postadoption contract agreement during the negotiations, described above, the court may modify prior orders or issue new orders as necessary to ensure the best interest of the Indian child is met, including, but not limited to, requiring parties to engage in further family mediation services for the purpose of reaching a postadoption contact agreement, initiating guardianship proceedings in place of adoption, or authorizing a change of adoptive placement for the child [*Fam. Code § 8616.5(k)(2)*].

The clerk of the court that enters a final order of adoption concerning an Indian child must provide the Secretary of the Interior (or his or her designee) with a copy of the order within 30 days of the date of the order, along with any information necessary to show the child's name and tribal affiliation, the biological parents' names and addresses, the adoptive parents' names and addresses, and the identity of the agency having files or information relating to this adoptive placement [*Fam. Code § 9208(a)*; *Cal. Rules of Ct., Rule 5.487(a)*]. If the court records contain an affidavit of the biological parents that their identity remain confidential, the court must include that affidavit with the other information [*Fam. Code § 9208(b)*; *Cal. Rules of Ct., Rule 5.487(b)*].

When a final decree of adoption of an Indian child has been vacated or set aside, or the adoptive parent voluntarily consents to termination of his or her parental rights to the child, a biological parent or prior Indian custodian may petition for return of custody, and the court must grant the petition unless it is shown that return of custody is not in the child's best interests [*Fam. Code § 8619.5*].

On application of an Indian individual who has reached the age of 18 years and who was the subject of an adoptive placement, the court that entered the final decree of adoption must inform that individual of the tribal affiliation (if any) and of the individual's biological parents, and must provide any other information as may be necessary to protect any

rights flowing from the individual's tribal relationship, including tribal membership rights or eligibility for federal or tribal programs or services available to Indians [*Fam. Code § 9209(a)*]. If the court records contain an affidavit of the biological parents that their identity remain confidential, the court must inform the individual that the Secretary of the Interior may, on request, certify to the individual's tribe that the individual's parentage and other circumstances of birth entitle the individual to membership under the criteria established by the tribe [*Fam. Code § 9209(b)*].

The California Code of Regulations provides for a certification procedure with respect to Indian ancestry, for an adoption study, specific advisements to be provided to the child's natural parents, and the method of relinquishment and consent [*see 22 Cal. Code Reg. § 35357 et seq.*]. It also specifies the method by which parental rights may be terminated, the information required to be given to prospective adoptive parents, and the method of placement of the child [*see 22 Cal. Code Reg. § 35375 et seq.*].

In the absence of a signed relinquishment or consent, parental rights over an Indian child may be terminated only by a legal action that complies with the ICWA [*22 Cal. Code Reg. §§ 35373, 35377*].

The Interstate Compact on the Placement of Children does not apply to any placement, sending, or bringing of an Indian child into another state under a transfer of jurisdiction to a tribal court under the ICWA [*Fam. Code § 7907.3*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewGovernmentsNative AmericansIndian Child Welfare Act

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§ 12B.280 Federal Statutes

Eligibility of adopted children for immigrant visa as immediate relative of United States Citizen. *8 U.S.C. § 1101(b)(1)(E), (F)*

Adoption of Indian children under Indian Child Welfare Act. *25 U.S.C. § 1901 et seq.*

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§ 12B.281 State Statutes

[1] Adoption in General

Definitions. *Fam. Code § 8500 et seq.*

Required age differential. *Fam. Code § 8601*

Consent of child. *Fam. Code § 8602*

Consent of spouse of adopting parent. *Fam. Code § 8603*

Accounting of expenditures. *Fam. Code § 8610*

Hearings to be private. *Fam. Code § 8611*

Personal appearance required. *Fam. Code §§ 8718, 8823, 8913, 9007*

Examination of parties. *Fam. Code § 8612*

Appearance by counsel. *Fam. Code § 8613*

Adoption facilitators. *Fam. Code §§ 8632.5, 8639*

Removal of child from county. *Fam. Code §§ 8713, 8803, 8910*

Subject matter jurisdiction; venue; notice to Department of Social Services; consolidation with guardianship matter. *Fam. Code §§ 8714, 8802, 8912, 9000*

Provisions of *Fam. Code § 7645 et seq.* for setting aside or vacating judgment of paternity do not establish basis for

termination of any adoption, and do not affect any obligation of adoptive parent to adoptive child. *Fam. Code § 7648.8*

[2] Costs and Fees

Agency fees. *Fam. Code §§ 8716, 8810, 8907*

Court fees. *Gov. Code § 26857*

Registrar of Vital Statistics fee. *Health & Safety Code § 103730*

[3] Independent Adoptions

Attorney and client relationship; mutual representation; written consent. *Fam. Code § 8800*

Birth parents to personally select adoptive parents. *Fam. Code § 8801(a)*

Petition for adoption. *Fam. Code § 8802*

Concealment or removal of child from county during pendency of adoption proceedings. *Fam. Code § 8803*

Withdrawal of petition. *Fam. Code § 8804*

Commitment of child to department or county agency on removal from adoptive home. *Fam. Code § 8805*

Duty to accept consent; determination of suitability of adoption. *Fam. Code § 8806*

Duty to investigate. *Fam. Code § 8807*

Interviews. *Fam. Code § 8808*

Fees. *Fam. Code § 8810*

Fingerprints and criminal records. *Fam. Code § 8811*

Status of adopted child. *Fam. Code § 8813*

Consent to adoption. *Fam. Code § 8814*

Period for revocation of consent (after 1994). *Fam. Code § 8814.5*

Consent withdrawal procedure (before 1995) or revocation procedure (after 1994). *Fam. Code § 8815*

Cases when birth parent's consent not required; departmental or agency consent. *Fam. Code § 8816*

Medical reports. *Fam. Code § 8817*

Written notice to birth parent requesting updated medical and address information. *Fam. Code § 8818*

Appeal of adverse agency action or decision; submission of report by agency. *Fam. Code § 8820*

Petitioner to receive copy of report. *Fam. Code § 8821*

Review of agency recommendation; hearing date; representation of child at hearing. *Fam. Code § 8822*

Personal appearance required. *Fam. Code § 8823*

Required authorization of parent or legal custodian before surrender by health facility of physical custody of minor under 16. *Health & Safety Code § 1283*

[4] Stepparent Adoptions

Relative adoptions and postadoption contact agreements. *Fam. Code §§ 8616.5, 8714.5*

Petition for stepparent adoption. *Fam. Code § 9000*

Investigation. *Fam. Code § 9001*

Stepparent's liability for costs of adoption; hardship exception. *Fam. Code § 9002*

Consent. *Fam. Code § 9003*

Consent form to contain notice regarding inheritance rights. *Fam. Code § 9004*

Withdrawal of consent. *Fam. Code § 9005*

Withdrawal of petition. *Fam. Code § 9006*

Personal appearance required. *Fam. Code § 9007*

[5] Agency Adoptions

Relinquishment of child for adoption; written statement. *Fam. Code § 8700*

Inquiries regarding status of adoption. *Fam. Code § 8701*

Written notice to birth parent requesting updated medical information and address information. *Fam. Code § 8702*

Written notice to birth parents requesting updated address information. *Fam. Code § 8703*

Responsibility of agency. *Fam. Code § 8704(a)*

Right to custody of minor whose guardians are deceased. *Fam. Code § 8705*

Medical report. *Fam. Code § 8706*

Photo-listing service. *Fam. Code § 8707*

Prohibited discrimination in placement. *Fam. Code § 8708*

Consideration of religious background in determining appropriate placement. *Fam. Code § 8709*

Placement with foster parents. *Fam. Code § 8710*

Application of placement preference rules. *Fam. Code § 8711*

Fingerprints and criminal records. *Fam. Code § 8712*

Removal of child from county during adoptive placement or after petition filed. *Fam. Code § 8713*

Petition for adoption. *Fam. Code § 8714*

Payment of fee in agency adoption. *Fam. Code § 8716*

Submission of agency report to court. *Fam. Code § 8715*

Copy of report to petitioner. *Fam. Code § 8717*

Court appearance required. *Fam. Code § 8718*

Withdrawal of petition. *Fam. Code § 8719*

Review of agency recommendation; hearing date; representation of child at hearing. *Fam. Code § 8720*

Adoption Assistance Program. *Welf. & Inst. Code § 16115 et seq.*

State adoption services. *Welf. & Inst. Code § 16130*

State welfare services for children. *Welf. & Inst. Code § 16500 et seq.*

[6] Intercountry, Interstate, and Native American (Indian) Adoptions

Indian Child Welfare Act. *25 U.S.C. § 1901 et seq.*

Requirement that state courts comply with Indian Child Welfare Act. *Fam. Code § 175*

Required notice in child custody proceeding involving Indian child. *Fam. Code § 180*

Parental consent to adoption of Indian child. *Fam. Code § 8606.5*

Petition for return of custody of Indian child. *Fam. Code § 8619.5*

Inquiry about whether child is or may be member of Indian tribe. *Fam. Code § 8620*

License for intercountry adoptions required. *Fam. Code § 8900*

State Department of Social Services authority to promulgate regulations. *Fam. Code § 8901*

Adoption agency services for adoptions finalized in *California. Fam. Code § 8902*

Care and custody of child upon leaving native country. *Fam. Code § 8903*

Adoption agency services for adoptions finalized in foreign country. *Fam. Code § 8904*

Written agreements between adoption agencies required. *Fam. Code § 8905*

Agreement to share or transfer financial responsibility for child not barred. *Fam. Code § 8906*

Fees. *Fam. Code § 8907*

Fingerprints and criminal records. *Fam. Code § 8908*

Written medical reports. *Fam. Code § 8909*

Concealment or removal of child from county during pendency of adoption proceedings. *Fam. Code § 8910*

Petition to adopt as condition of placement. *Fam. Code § 8911*

Petition for adoption. *Fam. Code § 8912*

Personal appearance required. *Fam. Code § 8913*

Agency to submit report. *Fam. Code § 8914*

Petitioner to receive copy of report. *Fam. Code § 8915*

Withdrawal of petition. *Fam. Code § 8916*

Review of agency recommendation; hearing date; representation of child at hearing. *Fam. Code § 8917*

Commitment of child to care of agency upon removal from adoptive home. *Fam. Code § 8918*

Visitation with separated siblings. *Fam. Code § 8920*

Registration requirements for adoption facilitators. *Fam. Code § 8921*

Complaints against accredited adoption agencies. *Fam. Code § 8923*

Actions that must be taken when child is emigrating from California to another country. *Fam. Code § 8924*

Effect of Hague adoption certificate or custody declaration. *Fam. Code § 8925*

Interstate Compact on Placement of Children. *Fam. Code § 7901*

Secretary of Interior entitled to copy of order concerning adoption of Indian child. *Fam. Code § 9208*

Information to be provided to Indian child on reaching majority. *Fam. Code § 9209*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAgency AdoptionFamily LawAdoptionProceduresForeign AdoptionFamily LawAdoptionProceduresInterstate AdoptionFamily LawAdoptionProceduresPrivate AdoptionFamily LawAdoptionProceduresStepparent Adoption

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§ 12B.282 Federal Regulations

Classification of adopted child as immediate relative of United States citizen. *8 C.F.R. § 204.1 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Immigration LawImmigrantsFamily-Sponsored Immigrants

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§ 12B.283 State Regulations

Independent adoptions. *22 Cal. Code Reg. § 35079 et seq.*

Agency adoptions. *22 Cal. Code Reg. § 35127.1 et seq.*

Intercountry adoptions. *22 Cal. Code Reg. § 35241 et seq.*

Adoption Assistance Program. *22 Cal. Code Reg. § 35325 et seq.*

Adoption of Indian children. *22 Cal. Code Reg. § 35353 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12B.284 California Rules of Court

Compliance with Indian Child Welfare Act [*25 U.S.C. § 1901 et seq.*] in proceedings involving custody of Indian children. *Cal Rules of Ct., Rules 5.480-5.487*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionIndian Child Welfare Act

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§ 12B.285 Decisions

[1] Adoption in General

[a] Abuse of Discretion

No abuse of discretion when trial court denied adoption petition of older guardians who had cared for child from birth and granted petition of younger out-of-state relatives, even though court's action was contrary to agency report and desires of child. *Adoption of Berth (1947) 79 Cal. App. 2d 221, 224-225, 179 P.2d 572*

Court as assumed to have found everything necessary to support its judgment if findings were waived. *In re Campbell (1935) 9 Cal. App. 2d 622, 623, 51 P.2d 138*

[b] Adoption Agreement

Enforceability of adoption agreements. *Estate of Grace (1948) 88 Cal. App. 2d 956, 962-966, 200 P.2d 189*

[c] Consent of Spouse

Married person granted interlocutory decree of divorce as lawfully separated from her husband within meaning of former Civil Code provisions superseded by *Fam. Code § 8603* and able to adopt child without his consent. *Stauter v. Carithers (1921) 185 Cal. 160, 163, 196 P. 37* (woman); *Adoption of Shook (1954) 129 Cal. App. 2d 287, 289, 276 P.2d 839* (man) Joint adoption petition of husband and wife as proper. *In re Williams (1894) 102 Cal. 70, 77, 36 P. 407*

[d] Infirmity of Petitioners

Effect of advanced age of adoptive parents. *San Diego County Dep't of Public Welfare v. Superior Court of San*

Diego County (1972) 7 Cal. 3d 1, 16, 101 Cal. Rptr. 541, 496 P.2d 453 ; *Adoption of Driscoll (1969) 269 Cal. App. 2d 735, 737, 75 Cal. Rptr. 382*

Effect of poor health of adopting parents. *Adoption of Driscoll (1969) 269 Cal. App. 2d 735, 737, 75 Cal. Rptr. 382*

Effect of adoptive parents' emotional problems. *Adoption of Schroetter (1968) 261 Cal. App. 2d 365, 368-369, 67 Cal. Rptr. 819* ; *Adoption of Lingol (1951) 107 Cal. App. 2d 457, 459-460, 237 P.2d 57*

Petitioners as denied due process and equal protection under *U.S. Const., amend. XIV* because petition for adoption was denied on sole ground that petitioners were deaf-mute persons. *Adoption of Richardson (1967) 251 Cal. App. 2d 222, 239-240, 59 Cal. Rptr. 323*

[e] Interest of Child

Court's primary concern in adoption proceeding as determining best interests of child; question of clean hands in proceeding involving writ of mandate as subordinate thereto. *San Diego County Dep't of Public Welfare v. Superior Court of San Diego County (1972) 7 Cal. 3d 1, 9, 101 Cal. Rptr. 541, 496 P.2d 453*

[f] Jurisdiction

Adoption proceeding as essentially in rem; jurisdiction of subject matter and essential parties as not lost because one adopting parent, through death or divorce, ceases to be petitioner. Adoption of Barnett (1960) 54 Cal. 2d370, 376-377, *6 Cal. Rptr. 562, 354 P.2d 18* (independent adoption); *see also* *County of Los Angeles v. Superior Court (1969) 2 Cal. App. 3d 1059, 1061-1063, 82 Cal. Rptr. 882* (agency adoption; amended petition as single parent applicant filed one week after complaint for divorce)

California court as having jurisdiction, which attached at time petition was filed, in adoption proceeding when children were residents of California. *Morrisette v. Superior Court (1965) 236 Cal. App. 2d 597, 599, 46 Cal. Rptr. 153* ; *Adoption of Burton (1956) 147 Cal. App. 2d 125, 130, 305 P.2d 185*

[g] Multiple Petitions

When adoption proceedings were commenced by different parties in two different counties, fact that children had lived most of their life in one county as not determinative of which county should have preference. *Morrisette v. Superior Court (1965) 236 Cal. App. 2d 597, 602, 46 Cal. Rptr. 153*

Paternal grandparents seeking to adopt grandchildren in their custody as not having preference over maternal grandparents also seeking to adopt children. *Morrisette v. Superior Court (1965) 236 Cal. App. 2d 597, 601, 46 Cal. Rptr. 153*

When two adoption petitions were filed in different counties, writ of prohibition as proper to restrain second proceeding until completion of hearing on first petition. *Morrisette v. Superior Court (1965) 236 Cal. App. 2d 597, 600-601, 46 Cal. Rptr. 153*

When two petitions for adoption of same child are pending, and court denies first petition, court as not required to wait until those petitioners have exhausted their appellate remedies before granting second petition. *Adoption of Berth (1947) 79 Cal. App. 2d 221, 223, 179 P.2d 572*

[h] Statement of Decision

Adoption proceedings as not actions but special proceedings not requiring findings (now supplanted by statement of decision). *In re Helen J. (1973) 31 Cal. App. 3d 238, 243-244, 107 Cal. Rptr. 106*

[i] Who May Adopt

Natural mother divorced from child's natural father as not able to adopt their natural child for purpose of severing parental relationship between child and its father. *Marshall v. Marshall (1925) 196 Cal. 761, 766, 239 P. 36*

[2] Idependent Adoptions

[a] Consent

[i] In General

Consent to adoption as waiving important statutory rights; such waiver as required to be voluntary and knowing, intelligent act done with awareness of circumstances and consequences. *San Diego County Dep't of Public Welfare v. Superior Court of San Diego County (1972) 7 Cal. 3d 1, 10, 101 Cal. Rptr. 541, 496 P.2d 453*

Consent of natural parents, when required by statute, as jurisdictional prerequisite to adoption. *Adoption of Barnett (1960) 54 Cal. 2d 370, 377, 6 Cal. Rptr. 562, 354 P.2d 18*

Requirement of modification of consent when adoptive parents to whom original consent was given were divorced and one adoptive parent proceeded alone. *Adoption of R.R.R. (1971) 18 Cal. App. 3d 973, 985 n.3, 96 Cal. Rptr. 308*

Freeing child from control of parent as prerequisite to adoption of that child without consent of parent. *Adoption of Hinman (1971) 17 Cal. App. 3d 211, 215, 94 Cal. Rptr. 487*

[ii] Signing and Filing

Generally, consent of parent as required to be signed before agent of Department of Social Services or in open court. *Adoption of Parker (1948) 31 Cal. 2d 608, 613-614, 191 P.2d 420*

Consent signed in presence of agent of Department of Social Services as not effective until accepted. *Adoption of Parker (1948) 31 Cal. 2d 608, 613, 191 P.2d 420*

[iii] Pre-1995 Withdrawal

Parental preference standard of former Civil Code provisions superseded by *Fam. Code § 3040* applicable in custody disputes, as not applying in proceeding under former Civil Code provisions superseded by *Fam. Code § 8815* to withdraw consent to adoption because statutory standard is whether or not withdrawal is reasonable and in best interests of child. *Adoption of Jennie L. (1980) 111 Cal. App. 3d 422, 429-430, 168 Cal. Rptr. 695*

Mother as entitled to transcripts prepared at county expense on appeal from order denying her motion to withdraw her consent to adoption. *Smith v. Superior Court (1974) 41 Cal. App. 3d 109, 113, 115 Cal. Rptr. 677*

In proceedings on petition to withdraw consent, whether consent was obtained under mistake, fraud, or undue influence and best interests of child as factual questions for trial court. *Adoption of Schroetter (1968) 261 Cal. App. 2d 365, 371, 67 Cal. Rptr. 819* ; *Adoption of Pitcher (1951) 103 Cal. App. 2d 859, 864, 230 P.2d 449*

Natural father who subsequently legitimates child as able to petition to withdraw consent of mother on court approval. *Adoption of Laws (1962) 201 Cal. App. 2d 494, 501, 20 Cal. Rptr. 64*

Motion for new trial in proceeding to withdraw consent. *Adoption of Curtis (1961) 195 Cal. App. 2d 179, 184, 15 Cal. Rptr. 331*

On appeal from denial of petition to withdraw consent, trial court as assumed to have considered agency report filed pursuant thereto if no contrary showing appeared in record. *Adoption of Curtis (1961) 195 Cal. App. 2d 179, 182, 15 Cal. Rptr. 331*

Former Civil Code provisions superseded by *Fam. Code § 8815* as vesting in trial court discretion to allow withdrawal of consent and exercise thereof as not to be interfered with on appeal without clear showing of abuse. *Adoption of Curtis (1961) 195 Cal. App. 2d 179, 181, 15 Cal. Rptr. 331*

[b] Custody

Restoring child to custody of parent after adoption petition dismissed. *Adoption of Cox (1962) 58 Cal. 2d 434, 439-442, 24 Cal. Rptr. 864, 374 P.2d 832*

Legal custody of child in independent adoption as remaining in natural parent unless and until adoption is granted. *Adoption of Driscoll (1969) 269 Cal. App. 2d 735, 738-739, 75 Cal. Rptr. 382*

[c] Petition

Petitioners who were not selected by adoption agency as not prohibited from filing petition for independent adoption of child before child's relinquishment to agency. *San Diego County Dep't of Public Welfare v. Superior Court of San Diego County (1972) 7 Cal. 3d 1, 14-15, 101 Cal. Rptr. 541, 496 P.2d 453*

[3] Stepparent Adoptions

Standard to be applied in determining facts relating to parent's willful neglect of child in stepparent adoption proceeding under former Civil Code provisions superseded by *Fam. Code § 8604* as proof by clear and convincing evidence. *In re Jay R. (1983) 150 Cal. App. 3d 251, 265, 197 Cal. Rptr. 672*

In stepparent adoption proceeding under former Civil Code provisions superseded by *Fam. Code § 8604* when petitioner alleges noncustodial parent's consent is unnecessary because of his or her wilful failure to communicate with and provide for child for period of one year, noncustodial parent as required to be informed of specific factual allegations supporting petition; citation simply ordering appearance as inadequate notice of issues to be met. *In re Jay R. (1983) 150 Cal. App. 3d 251, 260, 197 Cal. Rptr. 672*

Due process as requiring appointment of counsel for indigent noncustodial parent accused of neglect in stepparent adoption proceedings if indigence is demonstrated and appointment of counsel is requested. *In re Jay R. (1983) 150 Cal. App. 3d 251, 260, 197 Cal. Rptr. 672*

Sole issue in stepparent adoption proceeding under former Civil Code provisions superseded by *Fam. Code § 8604*, other than child's best interests, as whether noncustodial parent had ability to communicate with and provide for child but wilfully failed to do so for period of one year; distinguishing abandonment procedure pursuant to former Civil Code provisions superseded by *Fam. Code § 7800 et seq.* *In re Jay R. (1983) 150 Cal. App. 3d 251, 258, 197 Cal. Rptr. 672*

Adoption by stepparent as not invalidated by annulment of marriage. *Adoption of Jason R. (1979) 88 Cal. App. 3d 11, 16, 151 Cal. Rptr. 501*

Grandparents as lacking standing to attack stepparent adoption; grandparents as not required to be given notice of adoption proceeding. *Adoption of Berman (1975) 44 Cal. App. 3d 687, 691-695, 118 Cal. Rptr. 804*

Nature of stepparent adoption. *Adoption of Bird (1960) 183 Cal. App. 2d 140, 147, 6 Cal. Rptr. 675*

[4] Agency Adoptions

[a] Guardianship

Appointment of guardian for child after child has been relinquished to licensed adoption agency as improper unless extraordinary circumstances indicate it is in child's best interest. *San Diego County Dep't of Public Welfare v. Superior Court of San Diego County (1972) 7 Cal. 3d 1, 12-13, 101 Cal. Rptr. 541, 496 P.2d 453* ; *Guardianship of Henwood (1958) 49 Cal. 2d 639, 644-646, 320 P.2d 1*

Trial court as not in error in failing to limit inquiry in guardianship proceeding (when adoption is also pending) to whether agency is unfit or adoption improbable. *Terzian v. Superior Court (1970) 10 Cal. App. 3d 286, 291-292, 88 Cal. Rptr. 806*

[b] Interest of Child

Once child has been relinquished, sole determination of court on petition for adoption properly filed as whether or not granting petition will promote welfare, and is in best interests, of child. *San Diego County Dep't of Public Welfare v. Superior Court of San Diego County (1972) 7 Cal. 3d 1, 16, 101 Cal. Rptr. 541, 496 P.2d 453*

[c] Proper Petitioners

Trial court as not required to dismiss adoption petition because petitioners with whom relinquished child was placed for adoption were divorced after adoption petition was filed and one petitioner filed amended petition as single parent applicant. *County of Los Angeles v. Superior Court (1969) 2 Cal. App. 3d 1059, 1063-1065, 82 Cal. Rptr. 882*

Former Civil Code provisions superseded by *Fam. Code § 8704*, prohibiting anyone but prospective adoptive parents selected by agency to which child was relinquished from petitioning to adopt child, as constitutional. *Adoption of Runyon (1969) 268 Cal. App. 2d 918, 921, 74 Cal. Rptr. 514*

Adoption petition by foster parents with whom child was placed as barred under former Civil Code provisions superseded by *Fam. Code § 8704(c)* after agency removed child and placed it in home of prospective adoptive parents. *Adoption of Runyon (1969) 268 Cal. App. 2d 918, 920, 74 Cal. Rptr. 514*

[d] Relinquishment

Relinquishment signed by natural mother as not invalidated because it was obtained during pendency of guardianship proceedings. *San Diego County Dep't of Public Welfare v. Superior Court of San Diego County (1972) 7 Cal. 3d 1, 9, 101 Cal. Rptr. 541, 496 P.2d 453*

Former Civil Code provisions superseded by *Fam. Code § 2346*, authorizing nunc pro tunc entry judgment of dissolution, as not invalidating relinquishment made before entry of final judgment; relinquishment as vested right. *Adoption of Graham (1962) 58 Cal. 2d 899, 904-905, 27 Cal. Rptr. 163, 377 P.2d 275*

Certified copy of relinquishment as not required to be filed immediately after it is signed. *Adoption of Pior (1954) 43 Cal. 2d 472, 475, 274 P.2d 637*

If relinquishment was signed by parent but not filed with Department of Health (now Department of Social Services), parent as still entitled to custody of child. *Adoption of Pior (1954) 43 Cal. 2d 472, 475, 274 P.2d 637*

Relinquishment of custody as valid when mother agreed to do so in exchange for visitation rights with her children. *In re Ruby T. (1986) 181 Cal. App. 3d 1201, 1204, 227 Cal. Rptr. 8*

Order of court declaring relinquishment "null and void" as proper when misrepresentation of fact led petitioner to believe relinquishment was not final. *Fiske v. Director, Dep't of Public Welfare (1951) 107 Cal. App. 2d 31, 37, 236 P.2d 427*

[e] Responsibility of Agency

County agency as immune from liability for negligence in selecting abusive adoptive parents for orphans but as not immune from liability for negligence in transferring children's funds to adoptive parents. Ronald S. v. County of San Diego (1993) 16 Cal. App. th 887, *20 Cal. Rptr. 2d 418*

Adoption agency as having no duty to warn natural parent of genetic disease of adoptive child, and parent may not maintain wrongful death action against person who fails to take affirmative action to protect against peril person did not create, unless a special relationship, generally involving dependency or reliance, gives rise to duty to act. *Olson v. Children's Home Society (1988) 204 Cal. App. 3d 1362, 1367, 252 Cal. Rptr. 11*

Adoption agency as required to make good faith, full disclosure of material facts concerning existing or past conditions of the adopted person's health. *Michael J. v. Los Angeles County Dept. of Adoptions (1988) 201 Cal. App. 3d 859, 875, 247 Cal. Rptr. 504*

Adoption agency as liable for intentional misrepresentation or fraudulent concealment regarding adopted person's medical condition. *Michael J. v. Los Angeles County Dept. of Adoptions (1988) 201 Cal. App. 3d 859, 872, 875, 247 Cal. Rptr. 504*

Agency as not liable to adoptive parents for negligent misrepresentation or breach of warranty if child later found not to be in good health. *Richard P. v. Vista Del Mar Child Care Service (1980) 106 Cal. App. 3d 860, 866-868, 165 Cal. Rptr. 370*

Minor as having no cause of action against agency for agency's negligent or intentional failure to take reasonable steps to bring about minor's adoption. *Smith v. Alameda County Social Services Agency (1979) 90 Cal. App. 3d 929, 935-939, 153 Cal. Rptr. 712*

[f] Right to Petition and Other Relief

Prospective adoptive parents with whom child had resided on probationary basis as not precluded from petitioning to adopt child because they signed agreement that they would not petition without consent of local agency. *Adoption of McDonald (1954) 43 Cal. 2d 447, 461, 274 P.2d 860*

[g] Termination of Placement

Cause for removal without notice as existing not only if there is immediate physical danger, but also whenever there is risk of injury or potential danger to child's health or safety. *Marten v. Thies (1979) 99 Cal. App. 3d 161, 171, 160 Cal. Rptr. 57*

Agency order to terminate adoptive placement as reviewable administrative order under *Code Civ. Proc. §§ 1084* and *1085* (mandate). *Rodriguez v. Superior Court (1971) 18 Cal. App. 3d 510, 513, 95 Cal. Rptr. 923*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionConsentBiological ParentsFamily LawAdoptionProceduresAgency AdoptionFamily LawAdoptionProceduresPrivate AdoptionFamily LawAdoptionProceduresStepparent AdoptionFamily LawParental Duties & RightsTermination of RightsVoluntary Termination

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§ 12B.286 Law Reviews

Comment, *Homosexual Parenting: Child Custody and Adoption, 22 U.C. Davis L. Rev. 1009 (1989)*

Note, *Voluntary Adoptions Under the Indian Child Welfare Act of 1978: Balancing the Interests of Children, Families, and Tribes, 63 S. Cal. L. Rev. 213 (1989)*

Lezin, *Will Baby Make Three?* 5(1) Cal. Law. 29 (1985)

Comment, *Cinderella Revisited, 10 San Fern. V.L. Rev. 103 (1982)*

Krones, *Stimulation of Independent Adoptions--A Sensible Approach to Eradicating the Black Market Baby,* 13(3) Bev. Hills. B.J. 147 (1979)

Funk, *Law and Procedure in Intercountry Adoptions by California Residents, 8 U.C. Davis L. Rev. 241 (1975)*

Aulik, *Stepparent Custody: An Alternative to Stepparent Adoption, 12 U.C. Davis L. Rev. 604 (1979)*

Comment, *Due Process and the Adoptive Parent, 15 Santa Clara Law. 161 (1974)*

Note, *C.V.C. v. Superior Court: Court Versus Adoption Agency Control of Agency Adoptions Before a Petition for Adoption Is Filed, 26 Hastings L.J. 312 (1974)*

ten Broek, *California's Adoption Law and Programs, 6 Hastings L.J. 261 (1955)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewFamily

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Volume 2: Adoptions thru Airplanes and Airports-Chs. 12-17
Chapter 12B ADOPTIONS: UNMARRIED MINORS
PART III. RESEARCH GUIDE

2-12B California Forms of Pleading and Practice--Annotated §§ 12B.288-12B.299

[Reserved]

§§ 12B.288[Reserved]

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2-12B California Forms of Pleading and Practice--Annotated § 12B.300

§ 12B.300 How to Adopt a Child in California--Cal. Judicial Council Form ADOPT-050

[1] FORM How to Adopt a Child in California--Cal. Judicial Council Form ADOPT-050

Click here to view image.

[2] Use of Form

This form is an illustration of the Judicial Council's instructional form entitled "How to Adopt a Child in California" [Cal. Judicial Council Form ADOPT-050]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

This form is designed to inform an adopting parent of (1) the forms that need to be completed and filed with the court in connection with the adoption, (2) the social worker report that will be filed with the court, and (3) the adoption hearing. Page 1 applies to stepparent/domestic partner adoptions, and page 2 applies to independent, agency, of international adoptions. This form is not filed with the court.

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2-12B California Forms of Pleading and Practice--Annotated § 12B.301

§ 12B.301 Adoption Agreement--Cal. Judicial Council Form ADOPT-210

[1] FORM Petitioner Consent and Agreement to Adoption--Cal. Judicial Council Form ADOPT-210

Click here to view image.

[2] Use of Form

This form is an is an illustration of the mandatory Judicial Council form of Adoption Agreement (renamed from "Petitioner Consent and Agreement to Adoption") [Cal. Judicial Council Form ADOPT-210]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

This form is designed to enable the petitioning adopting parent(s) to meet the statutory requirements of (1) agreeing to adopt the child who is the subject of the adoption proceeding and of treating the child in all respects as a natural child of the adopting parent(s), (2) obtaining the agreement to the adoption by the spouse or domestic partner of the adopting parent, and (3) obtaining the child's agreement to the adoption if the child is 12 years of age or older [*see Fam. Code §§ 8602-8606, 8612(b), 9000(b)*]. It also enables a child of 12 years of age or older to request contact with siblings after an adoption is finalized.

The form should not be signed by the petitioning adoptive parent(s) or the child until they are in the presence of the judicial officer hearing the matter. Local rules of practice should be consulted concerning any particular requirements or procedures concerning the signing [*cf. Estate of Sharon (1918) 179 Cal. 447, 455, 177 P. 283* (under prior statute, necessary consents of petitioners or child had to be signed in judge's presence)].

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2-12B California Forms of Pleading and Practice--Annotated § 12B.302

§ 12B.302 Adoption Request--Cal. Judicial Council Form ADOPT-200

[1] FORM Petition for Adoption--Cal. Judicial Council Form ADOPT-200

Click here to view image.

[2] Use of Form

This form is an illustration of the mandatory Judicial Council form of Adoption Request [Cal. Judicial Council Form ADOPT-200], for use in the adoption of unmarried minors in independent, stepparent (including domestic partner), agency, and intercountry adoptions. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

In completing the form, the type of adoption proceeding should be indicated by marking the appropriate check-off box in Paragraph 2. Identifying information concerning the petitioning adopting parent(s) and the child are set forth in Paragraphs 1 and 3. If the adoption is an independent, relative, or stepparent or domestic partner adoption, the child's name before adoption should be set forth in paragraph 4. If a guardianship over the child has been established, Paragraph 5 should be completed, and a copy of the letters of guardianship should be attached. If the child is a dependent of the juvenile court, the county in which the dependency proceeding was filed and the case number must be set forth in Paragraph 6. American Indian children should be identified by marking the check-off box "Yes" in Paragraph 7, and attaching the Judicial Council form of Adoption of Indian Child [Cal. Judicial Council Form ADOPT-220]. The birth parents' names (if known) should be specified in Paragraph 8.

Paragraph 9 should be completed for an agency adoption. Paragraph 10 should be completed for an independent adoption, and a copy of the adoption placement agreement should be attached. Paragraph 11 should be completed for a stepparent or domestic partner adoption.

If the consent of the birth mother or the presumed father is unnecessary, the appropriate boxes in Paragraph 14 should

be checked and the statutory exception to the consent requirement should be indicated. If the parental rights of the birth mother, presumed father, or biological father have been terminated, the appropriate boxes in paragraph 15 should be checked, and a copy of the order should be attached (if available). If the child was conceived by artificial insemination, Paragraph 12 should be checked. If the adopting parents are requesting that the court terminate the parental rights of the birth mother, presumed father, or biological father, the appropriate box(es) in Paragraph 16 should be checked.

The appropriate box(es) in Paragraph 17 should be checked if the birth mother, presumed father, or biological father has not contacted the child for one year. The appropriate box(es) in Paragraph 18 should be checked if the birth mother, presumed father, or biological father has died.

Each petitioning adopting parent and the attorney for the adopting parent must execute the adoption request.

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2-12B California Forms of Pleading and Practice--Annotated § 12B.303

§ 12B.303 Adoption Order--Cal. Judicial Council Form ADOPT-215

[1] FORM Order of Adoption--Cal. Judicial Council Form ADOPT-215

Click here to view image.

[2] Use of Form

This form is an illustrative version of the mandatory Judicial Council form of Adoption Order [Cal. Judicial Council Form ADOPT-215], for use in proceedings to adopt unmarried minors. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

The form consists of three parts. The first part is completed by the petitioning adopting parent(s). The same identifying information concerning the adopting parent(s) that is set forth in Paragraph 1 of the Adoption Request (*see § 12B.302*) must be included in Paragraph 1 of the order. Identifying information concerning the child is set forth in Paragraph 3, including the child's name after adoption. If the adoption is an agency adoption, the name of the agency must be specified in Paragraph 4. Paragraph 6 must be completed to indicate the persons present in court at the adoption hearing.

The second part of the form is completed by the judge or, at the judge's request, may be completed by the adopting parent(s) following the hearing and submitted to the judge for signature. The appropriate boxes in Paragraph 7 should be marked to indicate the child's agreement to the adoption if the child is 12 years of age or older. The appropriate boxes in Paragraph 9 should be checked in the case of a relative adoption, when the relative or the child who is 12 years of age or older desires to indicate the child's name before adoption in the order [*see Fam. Code § 8714.5(g)*]. The appropriate box in Paragraph 11 should also be marked when there is a contact after adoption agreement. If the child is an American Indian child, the box in Paragraph 10 should be marked. The child's name after adoption should be specified in Paragraph 12.

The third part of the form is the clerk's certificate of mailing, which is completed only in the case of an adoption of an American Indian child. It certifies that the clerk has mailed copies of the adoption request, adoption order, adoption of Indian child and contact after adoption agreement, to the Bureau of Indian Affairs.

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2-12B California Forms of Pleading and Practice--Annotated §§ 12B.304-12B.309

[Reserved]

§§ 12B.304[Reserved]

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2-12B California Forms of Pleading and Practice--Annotated § 12B.310

§ 12B.310 Notice to Department of Social Services of Pending Adoption Proceeding [Fam. Code §§ 8714(b), 8802(a), 8912(a)]--CDSS Form

[1] FORM Notice to Department of Social Services of Pending Adoption Proceeding [Fam. Code §§ 8714(b), 8802(a), 8912(a)]--SDSS Form

Click here to view image.

[2] Use of Form

This form is the Department of Social Services Form (AD 3) for use for the court clerk to give the department notice of the filing of an adoption petition. Such a notice is required in all adoption matters [*see Fam. Code §§ 8714(b), 8802(a), 8912(a)*] except stepparent adoptions [*see Fam. Code § 9000 et seq.*].

Use of the department's form is not required by statute, but is highly recommended. Typically, the court clerk will expect the petitioner's attorney to prepare the notice, ready for the clerk's use, when the petition is filed. Counsel should check with the court clerk as to where a copy of the form may be obtained.

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2-12B California Forms of Pleading and Practice--Annotated § 12B.311

§ 12B.311 Adoptions Expenses--Cal. Judicial Council Form ADOPT-230

[1] FORM Accounting Report--Adoptions--Cal. Judicial Council Form ADOPT-230

Click here to view image.

[2] Use of Form

This form is an illustration, of the mandatory Judicial Council form of Adoption Expenses [Cal. Judicial Council Form ADOPT-230], for use as the petitioning adopting parent(s)' report of expenditures, which must be prepared in any adoption matter except a stepparent adoption. The report must be submitted to the court on or before the date set by the court for the hearing on the adoption request, unless an extension of time is granted by the court. It must be made under penalty of perjury [*see Fam. Code § 8610(a)*]. This form is available in electronic format in *LexisNexis Automated California Judicial Council Forms*.

[3] Contents of Report

The report of expenditures must be itemized in detail and show the services relating to the adoption or to the placement of the child for adoption that were received by the petitioning adoptive parent(s) (petitioners), by either birth parent of the child, by the child, or by any other person for whom payment was made by or on behalf of the petitioners. The report must also include the dates of each payment, the names and addresses of each attorney, doctor, hospital, licensed adoption agency, or other person or organization who received any funds of the petitioners in connection with the adoption or the placement of the child with them, or participated in any way in the handling of those funds, either directly or indirectly [*Fam. Code § 8610(b)*]. In addition, the amount of fees paid to an adoption facilitator in connection with the adoption, and any fees or expenses the adoption facilitator paid to any third party must also be included in the report of expenditures [*Fam. Code § 8630*]. In an independent adoption, the written receipts provided by the birthparents for payments by the adoptive parents of attorney's fees, medical expenses, counseling fees, or the birth mother's living expenses should be attached to the report [*Fam. Code § 8812*]. The report is not required for stepparent adoptions [*Fam. Code § 8610(c)*].

Because of space limitations on the form, additional pages should be attached, as needed to fully explain items listed on the form.

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2-12B California Forms of Pleading and Practice--Annotated § 12B.312

§ 12B.312 Notice of Intent to Obtain Court Approval to Remove Child From County [Fam. Code §§ 8713(b), 8803(a), 8910(b)]

[1] FORM Notice of Intent to Obtain Court Approval to Remove Child From County [Fam. Code §§ 8713(b), 8803(a), 8910(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Adoption Petition of _____ [*name(s)*], Adopting Parent[s].	))))))	NO. _____ NOTICE OF INTENT TO OBTAIN COURT APPROVAL TO REMOVE CHILD FROM COUNTY

NOTICE IS HEREBY GIVEN that petitioner(s) _____[*name(s)*] intend to request and obtain a court order permitting them to remove the child, _____[*name*], whose adoption is at issue in the above-entitled proceeding from the County of _____ for _____ days, beginning _____[*date*]. Approval is sought on the ground that the removal of the child is reasonable and for the purpose of _____ [*specify, e.g.,* permitting the child to accompany petitioners on a vacation tour of Europe].

If no objection is filed with the court within 15 days after the date of service of this notice, the order may be granted without further proceeding.
Dated: _____.

_____ [*firm name, if any*]

_____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner[s]

[2] Use of Form

This form is for use in giving advance written notice to the appropriate custodial or investigating agency of intent to obtain the court's permission to remove a child from the county in which an adoption is pending. Court permission to remove the child from the county is required in all adoption matters except stepparent adoptions [*see Fam. Code §§ 8713(b), 8803(a), 8910(b)*]. For further discussion, see *§ 12B.36*.

[3] Procedure

Only proof that notice has been given need be filed with the court. No noticed motion procedure is required. The burden is then on the department or agency to file its objections with the court, which then places the burden on the persons seeking removal to request the court to set the matter for hearing. On receiving such a request, the court must set a hearing [*see Fam. Code §§ 8713(b), 8803(a), 8910(b)*].

The notice should set forth sufficient facts as to why the person wishes to take the child out of the county to allow the agency to determine whether it has any objection. A notice that lacks any factual support is more likely to be objected to. The petitioners should ascertain from the court clerk whether any appearance is required by local rule or practice if no objections have been filed.

The petitioner may wish to submit a proposed order to the court for signature, even though the court may rule by minute order. Local practice and rules should be confirmed with the court clerk in that regard. Once the order is signed, the petitioner should obtain a certified copy of it and keep it in his or her possession while out of the county with the child, in the event that the child's presence there is officially questioned.

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2-12B California Forms of Pleading and Practice--Annotated § 12B.313

§ 12B.313 Power of Attorney for Appearance by Counsel [Fam. Code § 8613]

[1] FORM Power of Attorney for Appearance by Counsel [Fam. Code § 8613]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Adoption Petition of _____ [*name(s)*], Adopting Parent[s].	))))))	NO. _____ POWER OF ATTORNEY FOR APPEARANCE BY COUNSEL

I/We, _____[*name(s) of petitioner(s)*], hereby appoint _____[*name of counsel*], my/our lawful attorney in fact, to appear in my/our name, place, and stead, in any hearing or other proceeding on my/our petition to adopt _____[*name of child*], Proceeding No. _____, now pending before the Superior Court, County of _____.

I/We _____ [am *or* are] _____ [*specify, e.g.,* commissioned in the military service of the United States], and it is impossible or impracticable for me/us to appear in person because _____ [*specify, e.g.,* I am absent from the State of California].

[*If desired, add EITHER*]

I/We also empower my/our attorney in fact, _____[*name of counsel*], to execute or acknowledge an

agreement in writing that states that _____[*name of child*] will be treated in all respects as my/our lawful child.

[*OR*]

I/We hereby agree with the State of California and with the minor child that he/she will be adopted and treated in all respects as my/our own lawful child.
Dated: _____.

_____ [*firm name, if any*]

_____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner[s]

On _____[*date*], before me _____[*name of acknowledging officer*], the undersigned officer, personally appeared _____[*name(s) of petitioner(s)*], who _____ [is *or* are] _____ [known to me *or* satisfactorily proven to me] _____ [to be serving in or with the armed forces of the United States *or* to be the spouse of a member of the armed forces of the United States] and to be the person(s) whose name(s) _____ [is *or* are] subscribed to the foregoing power of attorney [and adoption agreement] and acknowledged that he/she/they executed the same. The undersigned does further certify that he/she is, at the date of this certificate, a commissioned officer of the rank stated below and is in the active service of the armed forces of the United States.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

_____ [*serial number, rank and branch*

of service of officer, and capacity in which signed]

[2] Use of Form

This form is for use as a power of attorney authorizing appearance by counsel in an adoption matter on behalf of a petitioner for whom, because of serving in the armed forces or the American Red Cross or for some other specified reason, a personal appearance is impossible or impracticable because of absence from California [*see Fam. Code § 8613(a)*]. The attorney may execute an adoption agreement [*see § 12B.300[1]*] on behalf of the absent petitioner [*see Fam. Code § 8613(b)*], or the adoption agreement may be included with the power of attorney [*see Fam. Code § 8613(a)*].

The law does not provide that the power of attorney should bear an acknowledgment, but it is recommended that the petitioner's signature be acknowledged. The certificate of acknowledgment will be taken as prima facie evidence of the facts recited in it and of the genuineness of the petitioner's signature [*Evid. Code § 1451*]. If a combined form of power of attorney and adoption agreement is used, the petitioner's signature should be acknowledged by a notary public or

other person authorized to take acknowledgments [*Fam. Code § 8613(b)*; *see Civ. Code §§ 1183, 1183.5* (authority of officers in foreign countries and military officers to take acknowledgments)]. An acknowledgment can be given by an officer in the armed services who has the general powers of a notary public [*Civ. Code § 1183.5*]. For forms of acknowledgment, see Ch. 9, *Acknowledgments* .

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2-12B California Forms of Pleading and Practice--Annotated §§ 12B.314-12B.319

[Reserved]

§§ 12B.314[Reserved]

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2-12B California Forms of Pleading and Practice--Annotated § 12B.320

§ 12B.320 Contact After Adoption Agreement [Fam. Code § 8616.5]--Cal. Judicial Council Form ADOPT-310

[1] FORM Kinship Adoption Agreement [Fam. Code § 8714.7]--Cal. Judicial Council Form ADOPT-310

Click here to view image.

[2] Use of Form

This form is an illustration of the mandatory Judicial Council form of Contact After Adoption Agreement, which has been adopted for use in adoptions by relatives or nonrelatives [*see generally* Cal. Judicial Council Form ADOPT-310; *Fam. Code §§ 8616.5, 8714.5*; *Welf. & Inst. Code § 366.26*; *Cal. Rules of Ct., Rule 5.400*]. For discussion of postadoption contact agreements *see § 12B.17*. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

The agreement must be attached to and filed with the petition for adoption [*Fam. Code §§ 8616.5(c), 8714(c), 8714.5(d), 8802(a)(3), 8912(e), 9000(f)*]. All parties to the agreement must sign and date it, including the child who is the subject of the adoption if he or she is at least 12 years of age [*see Fam. Code § 8616.5(d)*; *Cal. Rules of Ct., Rule 5.400*]. The agreement is subject to the approval of the court at the time of the adoption hearing. The court will only approve the agreement if it finds that doing so is in the best interests of the child [*Fam. Code § 8616.5(b)(1)*; *Cal. Rules of Ct., Rule 5.400(c)*]. The court that grants an adoption petition and approves a postadoption contact agreement must retain jurisdiction over the agreement [*Fam. Code § 8616.5(f)*; *Cal. Rules of Ct., Rule 5.400(h)*].

Once a decree of adoption is entered, the court may not set it aside, rescind any relinquishment, modify or set aside any order terminating parental rights, or modify or set aside any other orders related to granting the adoption petition, on the ground of a failure of any party to comply with a postadoption contact agreement or of any later modification of it [*Fam. Code § 8616.5(k)*; *Cal. Rules of Ct., Rule 5.400(k)*]. The remedy for noncompliance is to seek to enforce, modify, or terminate the agreement [*Fam. Code § 8616.5(f), (h)*; *Cal. Rules of Ct., Rule 5.400(h), (i)*; *see § 12B.321[1]*].

Identifying information concerning the adopting parent(s) and the child is set forth in Paragraph 1 and 2. The persons who may have contact with the child after adoption are listed in Paragraph 3 by name, relationship to the child, and type of contact. If the agreement is confidential, in place of the person's name, specify "Confidential." Types of contact other than telephone, letter, visits, shared information, and e-mail, must be explained in an attachment to the agreement. An illustrative attachment follows the agreement form. If the adopting parent(s) and the persons who may have contact with the child after adoption have signed a written agreement about this contact, a copy of the agreement should be attached, and the number of pages specified in Paragraph 4.

This form contains also the mandatory warnings of a postadoption contact agreement [*see Fam. Code § 8616.5(e)*].

For further discussion, *see § 12B.17[2]*.

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2-12B California Forms of Pleading and Practice--Annotated § 12B.321

§ 12B.321 Request to: Enforce, Change, End Contact After Adoption Agreement [Fam. Code § 8616.5]--Cal. Judicial Council Form ADOPT-315

[1] FORM Petition for Enforcement, Modification, or Termination of Kinship Adoption Agreement [Fam. Code §§ 8714.7]--Cal. Judicial Council Form ADOPT-315

Click here to view image.

[2] Use of Form

This form is the mandatory Judicial Council form of Request to: Enforce, Change, End Contact After Adoption Agreement [Cal. Judicial Council Form ADOPT-315; *see Fam. Code § 8616.5*; *Cal. Rules of Ct., Rule 5.400(h), (i)*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

The form should not be used until the petitioning adoptive parents first participated in, or attempted to participate in, good faith mediation or other appropriate dispute resolution with the other parties to the agreement [*see Fam. Code § 8616.5(e)(3)*]. The form will not be accepted for filing unless it is accompanied by (1) a copy of Cal. Judicial Council Form ADOPT-310 (Contact After Adoption Agreement), (2) a copy of the agreement, and (3) proof of service of the petition and a blank response form [*see § 12B.322[1]*], showing service on each party to the agreement, including the child [*Cal. Rules of Ct., Rule 5.400(i)*]. Therefore, the form contemplates service of a copy of the petition and its attachments, along with the blank response form, prior to filing the original petition in court. Note that a court rule also provides that "[t]he form must not be accepted for filing unless completed in full, with documentary evidence attached of participation in, or attempts to participate in, mediation or other appropriate dispute resolution" [*Cal. Rules of Ct., Rule 5.400(h), (i)*].

For related discussion, see *§ 12B.18[5], [6]*.

In addition to requiring basic identifying information about the petitioning adopting parent(s) and child (Paragraphs 1-2), the form contains checkoff boxes by which counsel can indicate whether the petition (now termed a "request") is being brought to enforce, modify, or terminate an existing contact after adoption agreement (Paragraph 3). The name and relationship to the child of each person who signed the agreement must be specified in Paragraph 4. A copy of the agreement must be attached to the request, along with a copy of any signed, written agreement about contact after adoption, and proof of service of the request and a blank answer form [*see § 12B.322*] on each person listed in Paragraph 4 (Paragraph 5). If any of these persons was not served, an explanation must be attached to the request (Paragraph 6). If the persons who signed the contact after adoption agreement agree with the request, the box in Paragraph 6(b) should be marked. The requested relief must be specified in Paragraph 8. The form must be signed by the adopting parent(s).

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2-12B California Forms of Pleading and Practice--Annotated § 12B.322

§ 12B.322 Answer to Request to: Enforce, Change, End Contact After Adoption Agreement [Fam. Code § 8616.5]--Cal. Judicial Council Form ADOPT-320

[1] FORM Response to Petition for Enforcement, Modification, or Termination of Postadoption Contact Agreement [Fam. Code §§ 8714.7]--Cal. Judicial Council Form ADOPT-320

Click here to view image.

[2] Use of Form

This form is the mandatory Judicial Council form of Answer to Request to: Enforce, Change, End Contact After Adoption Agreement [Cal. Judicial Council Form ADOPT-320]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

The form is to be used by any party to a contact after adoption agreement who disagrees with the relief sought in a request to enforce, modify, or terminate the agreement. According to the printed notice in that request, the answer form must be filed with the court within 30 days after receiving the request. The answer may be used to indicate agreement with the request (Paragraph 4(a)), or to indicate opposition to the request (Paragraph 4(b)).

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2-12B California Forms of Pleading and Practice--Annotated § 12B.323

§ 12B.323 Judge's Order to: Enforce, Change, End Contact After Adoption Agreement [Fam. Code §§ 8616.5]--Cal. Judicial Council Form ADOPT-325

[1] FORM Order on Petition for Enforcement, Modification, or Termination of Postadoption Contact Agreement [Fam. Code §§ 8714.7]--Cal. Judicial Council Form ADOPT-325

Click here to view image.

[2] Use of Form

This form is the mandatory Judicial Council form of Judge's Order to: Enforce, Change, End Contact After Adoption Agreement [Cal. Judicial Council Form ADOPT-325]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

The form contains checkoff boxes by which counsel can indicate whether the order pertains to a request to enforce, modify, or end an existing contact after adoption agreement. That selection will, in turn, determine which of several paragraphs are completed to state the court's ruling on the petition (Paragraphs 4-6). Standard findings are included in the preprinted order.

If the court takes the matter under submission and orders an investigation or evaluation, the appropriate checkoff boxes in Paragraph 7 must be marked, and counsel must also mark the boxes indicating the scope of the investigation or evaluation, the agency to whom it is referred, who will bear the costs, when the report is to be completed and when the court will render a decision or hold a further hearing (Paragraph 7(c)-(g)). An evaluation or investigation will only be ordered, however, if the court finds by clear and convincing evidence that (1) the best interests of the child may be protected or advanced by that inquiry, and (2) the inquiry will not disturb the stability of the child's home to the child's detriment [*Fam. Code § 8616.5(f), (h)*; *Cal. Rules of Ct., Rule 5.400(h)*]. Monetary damages must be ordered by the court [*Fam. Code § 8616.5(g)*; *Cal. Rules of Ct., Rule 5.400(h)*]. For related discussion, see *§ 12B.18[5], [6]*.

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2-12B California Forms of Pleading and Practice--Annotated §§ 12B.324-12B.329

[Reserved]

§§ 12B.324[Reserved]

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2-12B California Forms of Pleading and Practice--Annotated § 12B.330

§ 12B.330 Attorney-Client Agreement for Dual Representation
[Fam. Code § 8800]

[1] FORM Attorney-Client Agreement for Dual Representation
[Fam. Code § 8800]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
Adoption Petition of	)	AGREEMENT FOR DUAL REPRESENTATION
_____ [*name(s)*],	)	
Adopting Parent[s].	)	
	)	

RECITALS

This agreement is entered into among _____[*name of attorney*] (Attorney); _____[*name of proposed adoptive mother*] and _____[*name of proposed adoptive father*] (together, Adoptive Parents); and _____[*name of birth mother*] and _____[*name of birth father*] (together, Birth Parents). This agreement is entered into to provide legal representation for Adoptive Parents and Birth Parents with regard to the proposed adoption by Adoptive Parents of the natural child of Birth Parents. This child is due to be born approximately _____[*date*]. Birth Parents intend to sign an adoption placement agreement no earlier than 10 days after the release of the birth mother from the hospital and will then release this child into the temporary custody of Adoptive Parents.

DISCLOSURES

1. Birth Parents understand that they have a right to have an independent attorney advise and represent them in the adoption proceedings and that Adoptive Parents may be required to pay the reasonable attorney's fees, up to a maximum of $500 (unless a higher fee is agreed to by the parties) for that representation.

2. Birth Parents may waive their right to an independent attorney and may be represented by Attorney.

3. Adoptive Parents understand that if either Birth Parent either subsequently refuses to consent to the adoption or revokes his or her consent to the adoption as permitted by California law, Attorney is required by California law to withdraw as counsel for all parties, to refrain from taking positions in opposition to any party to this agreement, and to maintain an impartial, fair, and open attitude toward any new attorney for any party.

4. If either Birth Parent changes his or her mind and refuses to consent to the adoption within a reasonable time after the birth of the child, or revokes his or her consent within 90 days of the date on which it is given, California law requires Adoptive Parents to return the child to the custody of Birth Parents. In such a case, Adoptive Parents understand that any moneys expended in negotiations or proceedings in connection with the child's adoption are not reimbursable.

WAIVER

5. Birth Parents hereby acknowledge that they fully understand their right to be represented by counsel other than counsel representing Adoptive Parents, and hereby waive the right of representation by an independent attorney.

6. Adoptive Parents understand that all moneys expended, including attorney's fees, are not reimbursable should the adoption not be completed because Birth Parents refuse to consent or revoke their consent to the adoption.

AGREEMENT FOR REPRESENTATION

7. Attorney agrees to represent Adoptive Parents and Birth Parents with regard to the adoption for as long as all parties agree that the adoption should proceed. Pursuant to this legal representation, Attorney agrees to take all acts necessary to complete the adoption, including, but not limited to the following: _____[*specify*]. Under this agreement, Attorney is not required to take any of the following acts: _____ [*specify, e.g.,* provide any assistance to any party after entry of a decree of adoption regarding disclosure of any information contained in the court file of the adoption or the file of any agency regarding the adoption].

ATTORNEY'S FEES

8. In consideration for the legal representation provided for in Paragraph 6, Attorney shall receive a fee of $_____, to be paid _____ [*specify, e.g.,* entirely by Adoptive Parents, 50 percent as an advance, due on the execution of this agreement by all parties to it, and 50 percent on the granting of a decree of adoption by the court, or the dismissal of the proceedings]. Attorney's right to receive this fee is not contingent on the completion of the adoption and the granting of a decree of adoption.

[OTHER PAYMENTS]

[9. _____ (*Set forth any other payments that are required to be made, e.g.,* Adoptive Parents shall pay to Birth Parents the reasonable maternity-connected medical and hospital expenses and necessary living expenses of Birth Parents preceding and during confinement, in a sum not to exceed $_____. Birth Parents' right to receive this payment is not contingent on the placement with Adoptive Parents of the child for adoption, consent to adoption, or cooperation in the completion of an adoption).]

[*Include other appropriate provisions as required by facts of case and circumstances of parties.*]

Agreed to on the dates set forth below:

_____[*date*]

_____ [*signature*]

Attorney

_____[*date*]

_____ [*signature*]

Adoptive Mother

_____[*date*]

_____ [*signature*]

Adoptive Father

_____[*date*]

_____ [*signature*]

Natural Mother

_____[*date*]

_____ [*signature*]

Natural Father

[2] Use of Form

This form is for use as a complete attorney-client agreement for dual representation of prospective adoptive parents and birth parents with regard to a proposed independent adoption. The form contains both the statutory requirements of

Fam. Code § 8800(d), discussed *below*, and other provisions applicable to the three-sided relationship among attorney, birth parents, and prospective adoptive parents.

The provision disclosing the attorney's obligations if an actual conflict of interest occurs (Paragraph 3) is based on *Fam. Code § 8800(a)* [*see* discussion in *§ 12B.73*].

The provision disclosing the legal obligation of the adoptive parents to return the child to the birth parents should a birth parent subsequently revoke his or her consent or refuse to consent to the adoption (Paragraph 4) is based on *Fam. Code § 8804(c)* (*see* discussion in *§§ 12B.95[5]*, *12B.96*). The provisions disclosing that moneys expended are not reimbursable should a birth parent subsequently refuse to take the necessary steps to complete the adoption (Paragraphs 4, 6) meet the requirements of *Fam. Code § 8800(h)*. The provision for payment of maternity-related expenses (Optional Paragraph 8) is drafted to meet the statutory requirements of *Penal Code § 273* [*see § 12B.14[2]*].

[3] Required Contents

If written consent for dual representation is obtained, it must include all of the following [*Fam. Code § 8800(d)*]:

(1) A notice to the birth parents of their right to have an independent attorney advise and represent them in the adoption proceedings, and that the adoptive parents may be required to pay the reasonable attorney's fees up to a maximum of $500 (unless a higher fee is agreed to by the parties) for that representation (Paragraph 1);

(2) A notice to the birth parents that they may waive their right to an independent attorney, and may be represented by the attorney representing the adoptive parents (Paragraph 2);

(3) A waiver by the birth parents of representation by an independent attorney (Paragraph 5); and

(4) An agreement that the attorney representing the adoptive parents will represent the birth parents (Paragraph 6).

[4] Filing Requirement

The consent for dual representation must be filed with the court before the filing of the birth parent's consent to adoption [*Fam. Code § 8800(i)*]. Therefore, counsel may wish to draft two separate documents, one containing the statutory requirements of *Fam. Code § 8800(d)* and another containing the other matters, which will not be filed.

The consent of the placing birth parent is now contained in the adoption placement agreement if the child was placed for an independent adoption (*see § 12B.332[1]*). The adoption placement agreement must be attached to the petition [*Fam. Code § 8802(a)(2)*]. Thus, the consent to dual representation must be filed with the petition for adoption.

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2-12B California Forms of Pleading and Practice--Annotated § 12B.331

§ 12B.331 Health Facility Minor Release Report--CDSS Form AD22

[1] FORM Health Facility Minor Release Report--CDSS Form

Click here to view image.

[2] Use of Form

This form is the California Department of Social Services four-part Form AD-22, Health Facility Minor Release Report. A birth mother must execute this form before a health facility may release the child to the adoptive parents (*see § 12B.75*). The original should be mailed to the State Department of Social Services in Sacramento. Copies go to the hospital file, the birth parent, and the person who receives the minor.

All forms adopted by the department authorizing the release of an infant from a health facility to the custody of persons other than a person entitled to custody [*see Fam. Code § 3010*] and authorizing these other persons to obtain medical care for the child must contain a statement, in boldface type, delineating the various types of adoptions available, and the birth parents' right with regard to them. The statement must include an explanation of rights with regard to revocation of consent to adoption and a statement regarding the authority of a court to declare that a child who has been placed for adoption may be declared abandoned by a birth parent under *Fam. Code § 7822* after six months [*Fam. Code § 8607*].

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2-12B California Forms of Pleading and Practice--Annotated § 12B.332

§ 12B.332 Independent Adoption Placement Agreement and Transmittal--CDSS Forms 924, 930

[1] FORMS Independent Adoption Placement Agreement and Transmittal--CDSS Form

Click here to view image.

[2] Use of Forms

This form is the California Department of Social Services form of Independent Adoption Placement Agreement (AD 924), for use in independent adoptions [*see Fam. Code § 8801.3(b), (c)*]. Also included is the department's form of Independent Adoption Placement Agreement Transmittal (AD 930), by which the adoption service provider forwards the original and supporting documentation to the department or its delegated county adoption agency [*see Fam. Code § 8801.3(b)(4)*].

The adoption placement agreement may be signed at the hospital when the newborn child is released to the prospective adoptive parents for placement, or any time thereafter [*see Fam. Code § 8801.3(b)(2)*; *see also § 12B.331[1]* (Health Facility Minor Release Report)]. It must be signed by each birth parent who is placing the child for adoption and by each prospective adoptive parent in the presence of an adoption service provider [*see Fam. Code § 8801.3(b)(3)*], who must also sign [*see Fam. Code § 8801.3(b)*]. For further discussion, see *§§ 12B.91, 12B.93*.

[3] Required Contents of Adoption Placement Agreement

The adoption placement agreement must include all of the following [*see Fam. Code § 8801.3(c)*]:

(1) A statement that the birth parent received the advisement of rights [*see Fam. Code § 8801.5*] and the date on which it was received;

(2) A statement that the birth parent understands that the placement is for the purpose of adoption and that if the birth parent takes no further action, on the 31st day after signing the agreement, it will become a permanent and irrevocable consent to the adoption;

(3) A statement that the birth parent signs the agreement having personal knowledge of certain facts regarding the prospective adoptive parents [*see Fam. Code § 8801*];

(4) A statement that the adoptive parents have been informed of the basic health and social history of the birth parents; and

(5) A consent to the adoption, which may be revoked within 30 days [*see Fam. Code § 8814.5*].

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2-12B California Forms of Pleading and Practice--Annotated § 12B.333

§ 12B.333 Statement of Understanding--CDSS Form AD 926

[1] FORM Statement of Understanding--CDSS Form

Click here to view image.

[2] Use of Form

This form is the California Department of Social Services form of Statement of Understanding for use by a parent who places the child with the adoptive parents by signing an adoption placement agreement (Form AD 926). Variations of the form for use with a birth parent who did not place the child for adoption are AD 887 (Parent Who Gave Physical Custody of the Child to the Petitioner(s)), AD 887A (Parent Who Did Not Give Physical Custody of the Child to the Petitioner(s)) and AD 887B (Alleged Natural Father).

Form AD 887 would be used with a birth parent who gave her or his child to a prospective adoptive parent, but did not execute an adoption placement agreement. Designated relatives, a legal guardian, or a person nominated by will may adopt a child without entering into an adoption placement agreement [*see Fam. Code § 8802(a)*, discussed in *§ 12B.110[1]*].

The statement of understanding assures that the birth parent has the information about the law of independent adoptions needed to give a valid consent. Therefore, it is to be presented to the parent before consent is signed [*see 22 Cal. Code Reg. § 35095*]. In the case of a parent who is placing the child for adoption, it must be presented by the adoption service provider before the adoption placement agreement is signed [*see Fam. Code § 8801.3*].

Different forms are used if the child is an Indian child who comes within the provisions of the federal Indian Child Welfare Act [*see* Department of Social Services forms AD 899, AD 899A, AD 899C, AD 899D, AD 900, AD 900A, AD 900B, AD 927; *see generally 25 U.S.C. § 1901 et seq.*].

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2-12B California Forms of Pleading and Practice--Annotated § 12B.334

§ 12B.334 Parental Consent to Adoption--CDSS Form AD 1A

[1] FORM Parental Consent to Adoption--CDSS Form

Click here to view image.

[2] Use of Form

This form is Department of Social Services Form AD 1A, Consent to Adoption by Parent(s) in California [*see Fam. Code § 8814(a)*]. The consent of a birth parent who places the child for adoption must be contained in an adoption placement agreement executed at the time when the child is ready to be released from the hospital [*see Fam. Code § 8801.3(b), (c)(5), (e)*; *see also § 12B.332[1]*]. After that date, use of this form should be limited to a birth parent who did not place the child for adoption [*see Fam. Code § 8814*].

This form is reproduced here for informational purposes and may be used only by authorized state or county personnel. It must be signed by the consenting parent in the presence of an agent of the department or county adoption agency [*Fam. Code § 8814(a)*]. If the consenting parent does not understand the English language, a form in the parent's native language must be used if one is available from the department. If unavailable, the English version must be translated into the consenting parent's language [*22 Cal. Code Reg. § 35003*].

The prescribed statement is specific in referring to adoption by the petitioner or petitioners named in the form. Thus, the scope of the birth parents' consent is limited to the persons listed in the form as prospective adoptive parents, as opposed to giving a general consent to have the child adopted by anyone [*see Fam. Code § 8806* (limited to adoption by petitioners); *see also Adoption of Driscoll (1969) 269 Cal. App. 2d 735, 739, 75 Cal. Rptr. 382* (consent to adoption by named prospective parent not equivalent to general consent); *but see Adoption of Barnett (1960) 54 Cal. 2d 370, 377-379, 6 Cal. Rptr. 562, 354 P.2d 18* (consent to adoption by named spoused effective, on the facts, for adoption by one spouse alone)]. When taking the consent, the department or agency representative must not cover or delete the names of the adopting parents on the consent form [*22 Cal. Code Reg. § 35109*].

The California Department of Social Services has prescribed other forms of parental consent for official use that are

designed to apply in special situations. For example, there are forms of consent for a parent residing outside of California [*see* AD 1C, California Department of Social Services]; for a parent who is in the armed forces outside California [*see* AD 1F, California Department of Social Services]; for a presumed father who denies being the biological father [*see* AD 165 (inside California), AD 166 (outside California, California Department of Social Services]; and for an alleged natural father [*see* AD 594, California Department of Social Services].

Different forms are used if the child is an Indian child who comes within the provisions of the federal Indian Child Welfare Act [*see* Department of Social Services forms AD 859, AD 861, AD 925; *see generally 25 U.S.C. § 1901 et seq.*].

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2-12B California Forms of Pleading and Practice--Annotated § 12B.335

§ 12B.335 Refusal to Consent to Adoption--CDSS Form AD 20

[1] FORM Refusal to Consent to Adoption--CDSS Form

Click here to view image.

[2] Use of Form

This form is the Department of Social Services Form AD 20, Refusal to Consent to Adoption. Use of this form is limited to a birth parent who did not place the child for adoption [*see Fam. Code § 8814*]. For further discussion, see *§ 12B.95*.

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2-12B California Forms of Pleading and Practice--Annotated § 12B.336

§ 12B.336 Revocation of Consent--CDSS Form AD 928

[1] FORM Consent--CDSS Form

Click here to view image.

[2] Use of Form

This form is a reproduction of the California Department of Social Services three-part form of Revocation of Consent (AD 928) for use in an independent adoption. This form may be executed by a birth parent who placed the child for adoption and executed an adoption placement agreement containing her or his consent to the adoption, or by a birth parent who did not place the child for adoption, but subsequently consented to the adoption [*Fam. Code § 8814.5(a)*; *see Fam. Code §§ 8801.3, 8814*]. The original is filed with the court in the adoption proceeding, with copies to the birth parent executing the form and to the adoption agency investigation file.

Use of the department's form is not required [*compare Fam. Code § 8814.5(a)(1) with Fam. Code § 8814.5(a)(2)* (consent need only be written; waiver of right to revoke must be on form prescribed by department)]. However, a parent who wishes to revoke his or her consent to an adoption must sign and deliver a written statement of revocation to the department or delegated county adoption agency within 30 days of the date on which he or she signed the consent [*Fam. Code § 8814.5(a)(1)*]. For further discussion of revocation of consent, see *§ 12B.96*.

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2-12B California Forms of Pleading and Practice--Annotated § 12B.337

§ 12B.337 Waiver of Right to Revoke Consent--CDSS Form AD 929

[1] FORM Waiver of Right to Revoke Consent--CDSS Form

Click here to view image.

[2] Use of Form

This form is a reproduction of the California Department of Social Services three-part Form of Waiver of Right to Revoke Consent (AD 929) for use in an independent adoption. This form may be executed by a birth parent who placed the child for adoption and executed an adoption placement agreement containing her or his consent to the adoption, or by a birth parent who did not place the child for adoption, but subsequently consented to the adoption [*Fam. Code § 8814.5(a)*; *see Fam. Code §§ 8801.3, 8814*]. The original is filed with the court in the adoption proceeding, with copies to the birth parent executing the form and to the adoption agency investigation file. Use of the department's form is required [*Fam. Code § 8814.5(a)(2)* (waiver of right to revoke must be on form prescribed by department)].

Subject to certain exceptions, a waiver of the right to revoke consent must be signed in the presence of a representative of the department or delegated county adoption agency and only after the department or agency has completed an interview with the birth parent [*see Fam. Code § 8814.5(a)(2)*]. For further discussion, see *§ 12B.97*.

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[Reserved]

§§ 12B.338[Reserved]

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2-12B California Forms of Pleading and Practice--Annotated § 12B.350

§ 12B.350 Consent to Adoption by Parent Giving Custody to Husband or Wife or Domestic Partner of Other Parent--CDSS Form AD 2B

[1] FORM SDSS FORM--Consent to Adoption by Parent Giving Custody to Husband or Wife of Other Parent

Click here to view image.

[2] Use of Form

This form is Department of Social Services Form AD 2B, for use to obtain consent of the noncustodial birth parent or parents, or domestic partner of a parent, in a stepparent adoption. This form is to be signed in the presence of a county clerk, probation officer, qualified court investigator or county welfare department staff member by the noncustodial parent who is being supplanted by the adoption [*see Fam. Code § 9003*]. If the birth parent of a child to be adopted is outside California at the time of the signing of the consent, the consent may be signed by a notary or other persons authorized to perform notarial acts [*Fam. Code § 9003(b)*]. For further discussion of obtaining consent in a stepparent adoption, see *§ 12B.138*.

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[Reserved]

§§ 12B.351[Reserved]

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2-12B California Forms of Pleading and Practice--Annotated § 12B.360

§ 12B.360 Relinquishment [Fam. Code § 8700]--CDSS Form AD 501

[1] FORM SDSS FORM--Relinquishment [Fam. Code § 8700]

Click here to view image.

[2] Use of Form

This form is a reproduction of Department of Social Services Form AD 501, a general form of relinquishment for use by a birth parent in California to relinquish his or her child to an adoption agency for adoptive placement. A relinquishment must be on a form prescribed by the Department of Social Services [*22 Cal. Code Reg. § 35143*]. The relinquishment must be signed before two subscribing witnesses at least 18 years of age and acknowledged before an authorized official of the department or of a licensed adoption agency to which the child is being relinquished [*Fam. Code § 8700(a)*; *22 Cal. Code Reg. § 35151*]. For further discussion of relinquishments, see *§ 12B.173*.

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2-12B California Forms of Pleading and Practice--Annotated § 12B.361

§ 12B.361 Statement of Understanding--CDSS Form 885C

[1] FORM SDSS FORM--Statement of Understanding

Click here to view image.

[2] Use of Form

This form is a reproduction of Department of Social Services Form AD 885C, Statement of Understanding, Agency Adoptions Program [*see 22 Cal. Code Reg. § 35147*]. The statement of understanding must be signed by the birth parent in the presence of two witnesses and a representative of the agency that placed the child for adoption before signing the relinquishment [*see 22 Cal. Code Reg. § 35149(a)(3)*].

The version of the form reproduced here is for use by the parent who gave physical custody of the child to the prospective adoptive parents. Variations of the form are AD 887A (Parent Who Did Not Give Physical Custody of the Child to the Petitioner(s)) and AD 887B (Alleged Natural Father).

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2-12B California Forms of Pleading and Practice--Annotated § 12B.362

§ 12B.362 SDSS FORM--Revocation of Relinquishment

[1] FORM SDSS FORM--Revocation of Relinquishment

Click here to view image.

[2] Use of Form

This form is a reproduction of Department of Social Services Form AD 4317, Revocation of Relinquishment. It is for use in an agency adoption by a parent who has relinquished his or her child for adoption and now wishes to revoke that relinquishment. It applies to situations in which the relinquishment has not yet been filed with the Department of Social Services, and therefore is not yet final [*see 22 Cal. Code Reg. § 35153*; *see also Fam. Code § 8700(e)* (relinquishment as of no effect until certified copy is filed with department)]. For further discussion, see *§ 12B.174*.

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2-12B California Forms of Pleading and Practice--Annotated § 12B.363

§ 12B.363 Rescission Request and Rescission of Relinquishment [Fam. Code § 8700(d), (g)]--CDSS Form AD 508

[1] FORM SDSS FORM--Rescission Request and Rescission of Relinquishment

Click here to view image.

[2] Use of Form

This form is a reproduction of Department of Social Services Form AD 508, for use in an agency adoption by an agency and a parent in order to rescind that parent's relinquishment of his or her child for adoption. It applies to situations in which the relinquishment has already been filed with the Department of Social Services [*see Fam. Code § 8700(d)*; *22 Cal. Code Reg. § 35169*]. For further discussion, see *§ 12B.175*.

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2-12B California Forms of Pleading and Practice--Annotated § 12B.364

§ 12B.364 Birth Parent's Complaint in Equity to Set Aside Relinquishment of Child--Misrepresentation of Agency

[1] FORM Birth Parent's Complaint in Equity to Set Aside Relinquishment of Child--Misrepresentation of Agency

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT TO SET ASIDE RELINQUISH-
Defendant.	)	MENT OF CHILD FOR ADOPTION
	)	
	)	

_____

Plaintiff alleges:

1. Plaintiff _____[*name*] is the birth _____ [mother *or* father] of _____[*name*], a minor child, born _____[*date*] in _____[*place*].

2. On _____[*date*], plaintiff executed her/his written relinquishment of the above child to _____[*name of adoption agency*], a licensed adoption agency, for adoptive placement. _____ [*If appropriate, add:* A true copy of this relinquishment document is attached as Exhibit A to this complaint and made a part hereof.]

3. On _____[*date*], the above-named adoption agency filed a certified copy of this relinquishment form with the State Department of Social Services, as required by *Family Code Section 8700*.

4. Plaintiff executed this relinquishment document because _____[*name of agency employee*], an employee and agent of defendant, represented to plaintiff _____ [*specify misrepresentation, e.g.,* that the child would only be placed for "open" adoption and that plaintiff would retain the right to have an ongoing relationship with the child, including, but not limited to a right of continued visitation with the child throughout the child's minority].

5. The representations made by defendant were in fact false. The true facts were that _____ [*specify, e.g.,* defendant has no right or ability to compel an adoptive family to grant open adoption, and that once an adoption is decreed, plaintiff will have no enforceable right to visitation or any other relationship with the child. Defendant has, in fact, placed the child for adoption with a family that refuses to afford plaintiff any visitation rights or other contact with the child].

6. When defendant made these representations, it knew them to be false, or had no reasonable ground for believing them to be true. These representations were made by defendant with the intent to deceive plaintiff and with the intent to induce plaintiff to execute her/his relinquishment of the child.

7. At the time these representations were made, and at the time when plaintiff executed her/his relinquishment of the child,plaintiff was ignorant of the falsity of defendant's representations and believed them to be true. In reliance on these representations, plaintiff was induced to, and did execute the relinquishment document. Had plaintiff known the actual facts, she/he would not have relinquished the child for adoption. Plaintiff's reliance on defendant was justified because _____ [*specify, e.g.,* plaintiff is a minor who has not yet graduated from high school and has no knowledge of adoption laws and procedures. Defendant, as an adoption agency providing counseling and other adoption-related services, had a confidential relationship with and fiduciary duties toward plaintiff, and is required by law to provide complete and accurate information to persons such as plaintiff with regard to the legal effects of relinquishing a child for adoption].

8. On _____[*date*], [immediately on learning the true facts,] plaintiff gave written notice to defendant of her/his desire to rescind her/his relinquishment. Thereafter, plaintiff executed her/his formal rescission of relinquishment on the proper State Department of Social Services form within 14 days of receipt of the form, as required by *Title 22, California Code of Regulations, Section 35169*. On _____[*date*], defendant notified plaintiff in writing that it would not consent to a mutual rescission of the relinquishment. A true copy of defendant's notice is attached to this complaint as Exhibit _____ and made a part hereof. Plaintiff has no further administrative remedy to obtain the return of her/his child.

9. Unless defendant is immediately subject to mandatory injunctive relief requiring it to deliver the child to plaintiff, plaintiff will suffer great and irreparable injury arising from the deprivation of the right to custody of the child and other parental rights. Further, the child will suffer great and irreparable injury from remaining in a custodial arrangement in which he/she may bond with persons who are not entitled to his/her custody. Plaintiff has no adequate remedy at law for these injuries.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. That plaintiff's relinquishment of her/his child _____[*name*] to defendant be declared to be null and void and that the same be vacated and set aside;

2. For an order requiring the defendant to show cause, if any it has, why it should not be enjoined as hereinafter set forth, during the pendency of this action;

3. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all ordering defendant to

immediately return the child to the legal and physical custody of plaintiff, and enjoining defendant, its agents and employees, and all persons acting under, in concert with, or for them, from enforcing any right to custody of the child that arises from the relinquishment referred to herein;

4. For costs of suit herein incurred;

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____[*name*], am the plaintiff in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

CERTIFICATION OF NOTICE

I hereby certify that _____ [on _____ (*date*), I informed defendant of the time and place where the foregoing application for a temporary restraining order would be made *or* in good faith I attempted to inform defendant of the time and place where the foregoing application for a temporary restraining order would be made, by _____(*specify efforts*), but I was unable to do so *or* notice to defendant of the foregoing application for a temporary restraining order should not be required for the reason that _____ (*specify*)].

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*firm name, if any*]

_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[2] Use of Form

This form is a complaint to set aside a birth parent's relinquishment of his or her child to an adoption agency for adoptive placement. Such an action is a nonstatutory equitable proceeding [*Guardianship of Baby Boy M. (1977) 66 Cal. App. 3d 254, 271, 135 Cal. Rptr. 866]* .

This form is for use after the relinquishment form has been filed with the Department of Social Services [*see Fam. Code § 8700(d)*] but before a decree of adoption has been entered. After a decree is entered, a parent must proceed by motion or action to have the decree set aside [*see Adoption of Sewall (1966) 242 Cal. App. 2d 208, 218-221, 51 Cal. Rptr. 367]* . Setting aside a decree of adoption is discussed, and forms are provided, in Ch. 12E, *Adoptions: Attack on Decree*.

This complaint alleges as grounds for the action the agency's misrepresentation of fact with regard to the relinquishment. For further discussion of grounds for setting aside a relinquishment, see *§ 12B.176*. For further discussion of the essential allegations of intentional or negligent misrepresentation, see Ch. 269, *Fraud and Deceit* .

This complaint alleges compliance with administrative regulations providing for the mutual rescission of a relinquishment by the parent and agency, and the agency's refusal to rescind the relinquishment (Paragraph 8) [*see 22 Cal. Code Reg. §§ 35169, 35170*]. Compliance with this procedure has not yet been held to be an essential exhaustion of administrative remedies, but is recommended in any event.

[3] Mandatory Injunction

This complaint seeks injunctive relief compelling the return of the child to the parent (Prayer, Paragraph 3). As such, the prayed-for injunctive relief is mandatory (requiring defendant to do a particular act), rather than prohibitory (restraining them from doing an act) [*see People v. Mobile Magic Sales, Inc. (1979) 96 Cal. App. 3d 1, 13, 157 Cal. Rptr. 749]* . Preliminary mandatory injunctive relief is rarely granted; a very urgent case is required [*Alvarez v. Eden Township Hospital Dist. (1961) 191 Cal. App. 2d 309, 312, 12 Cal. Rptr. 661]* . Nevertheless, it should always be sought if the child has been placed in a prospective adoptive home. Because of the probability of parent-child bonding, the longer the child remains in the home, the less likely a court may be to eventually order the child removed from the home. If the child has not yet been placed for adoption, the plaintiff should seek a prohibitory injunction enjoining the agency from making a placement during the pendency of the action. For further discussion of the procedures for obtaining injunctive relief, see Ch. 303, *Injunctions* .

[4] Verification

A complaint seeking a temporary restraining order and showing therein, rather than in an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]), that sufficient grounds exist is required to be verified [*see Code Civ. Proc. § 527*].

[5] Certification of Notice Regarding Temporary Restraining Order

Whenever a temporary restraining order is sought without formal notice, the applicant or the applicant's attorney is required to certify to the court under oath that either (1) within a reasonable time before the application he or she informed the opposing party (or his or her attorney, if any) of the time and place where the application would be made, or (2) he or she in good faith attempted to inform the opposing party (or attorney) but was unable to do so, specifying the efforts made to do so, or (3) for reasons specified he or she should not be required to inform the opposing party (or attorney) [*see Fam. Code § 240 et seq.*].

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Chapter 12B ADOPTIONS: UNMARRIED MINORS
PART IV. FORMS
D. Agency Adoptions

2-12B California Forms of Pleading and Practice--Annotated § 12B.365

§ 12B.365 Petition for Writ of Administrative Mandate [Code Civ. Proc. § 1094.5] to Restrain Agency From Terminating Adoptive Placement

[1] FORM Petition for Writ of Administrative Mandate [Code Civ. Proc. § 1094.5] to Restrain Agency From Terminating Adoptive Placement

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*names*],	)	
Petitioners,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR WRIT OF MANDATE
Respondent.	)	
	)	
	)	

Petitioners respectfully represents:

1. Petitioners _____[*name*] and _____[*name*] are the prospective adoptive parents of _____[*name of child*].

2. Respondent _____[*name of agency*] is a licensed adoption agency that accepts custody of relinquished and other children, assesses applicants for adoption, and makes adoptive placements of children in the homes of approved applicants.

3. On _____[*date*], respondent placed the above-named child in petitioners' home for the purposes of adoption by petitioners.

4. On _____[*date*], respondent served petitioners with notice that the adoptive placement was being terminated under the authority of *Family Code Section 8704* and demanded that the child be returned to the physical custody of respondent. [The child was removed from petitioners' home on _____ (*date*)].

5. On _____[*date*], petitioners made a written request to respondent for a grievance review under the authority of *Title 22, California Code of Regulations, Section 35233*.

6. On _____[*date*], a hearing was held, as required by *Title 22, California Code of Regulations, Section 35235*, and evidence was presented, as required by *Title 22, California Code of Regulations, Section 35237*, to determine whether grounds exist to terminate the adoptive placement and to remove the child from petitioners' home. Petitioners' attended the hearing and presented evidence that the adoptive placement should not be terminated.

7. On _____[*date*], _____[*name*], the director of respondent agency, in the exercise of his/her discretion, determined that sufficient facts exist to support the termination of the adoptive placement and denied petitioners' grievance in writing, pursuant to *Title 22, California Code of Regulations, Section 35239*. A copy of the director's written decision is attached as Exhibit _____ to this petition and made a part hereof.

8. Respondent's director's decision is invalid for the following reasons: _____[*in lettered subparagraphs, set forth all facts and legal conclusions that support continuance of adoptive placement, such as the following*]

[a. The sole ground on which the adoptive placement was terminated was that petitioners' are affiliated with no religious group and have stated their intent to respondent that the child shall not be baptized into any religion and shall not receive religious instruction of any kind. The director found that it was in the best interests of the child that he/she receive religious instruction, and that petitioners' refusal to provide it constituted sufficient grounds to terminate the placement.]

[b. Respondent's acts are in violation of petitioners' constitutional rights under the *Free Exercise Clause of the First Amendment to the United States Constitution*, which protects petitioners' right not to practice any religion from coercive state action.]

9. The grievance review proceedings were recorded by respondent, as required by *Title 22, California Code of Regulations, Section 35237(a)(1)*. The recording method used was _____ [*specify, e.g.*, audio cassette recording]. _____ [*If appropriate, add:* Petitioners have obtained a transcript of the grievance review proceedings, which is attached as Exhibit _____ to this petition.]

[10. _____ (*If appropriate, add:* Petitioners have the following relevant evidence that was not presented at the hearing: _____ (*describe completely*). This evidence could not be produced at the hearing because _____(*specify why, in the exercise of reasonable diligence, petitioners could not produce evidence*). This evidence shows that _____(*specify, e.g.*, that petitioners are proper and fit persons to adopt the child).]

11. Petitioners meet all of the qualifications and criteria for adoptive parents as established by law.

12. Petitioners have no further administrative remedy under law and have no other plain and speedy remedy in the ordinary course of the law in that no administrative appeal can be taken from the decision of the director of respondent agency.

13. Due to respondent's arbitrary and capricious acts, petitioners have become and are obligated to personally pay

attorney's fees to their counsel _____[*name*].

WHEREFORE, petitioners pray judgment as follows:

1. For a peremptory writ of mandate directing respondent to set aside its decision of _____[*date*] terminating the adoptive placement of _____[*name of child*] in petitioners' home [and to order the return of the child to petitioners' home], or in the alternative, to show cause why a peremptory writ of mandate to the same effect should not be issued;

2. For a temporary restraining order, and preliminary and permanent injunctions _____ [restraining respondent from removing the child from petitioners' home *or* ordering respondent to return the child to petitioners' home];

3. For attorney's fees in an amount not to exceed $ _____[*specify statutory limit under Gov. Code § 800*];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

_____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner[s]

VERIFICATION

I, _____[*name*], am the one of the petitioners in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

This form is for use as a petition for a writ of administrative mandate to compel an adoption agency that has placed a child with petitioners and then terminated the adoptive placement to continue with the adoption [*see Code Civ. Proc. § 1094.5*]. This form is for use after petitioners have exhausted their rights to administrative grievance review under *22 Cal. Code Reg. § 35233 et seq.* For discussion of the grievance review procedure, see *§ 12B.202[4]*. Petitions for administrative mandate are considered in detail, and additional possible form provisions are provided, in Ch. 474, *Availability of Judicial Review of Agency Decisions*, et seq.

[3] Administrative Mandate

Before the adoption of the administrative grievance review procedure, the method to review an agency's termination of an adoptive placement was by traditional mandate [*see Code Civ. Proc. §§ 1084, 1085*; *Rodriguez v. Superior Court (1971) 18 Cal. App. 3d 510, 513, 95 Cal. Rptr. 923]* . In light of the subsequent regulations requiring mandatory administrative review, it appears that the proper vehicle for review is now administrative mandate under *Code Civ. Proc. § 1094.5*. Administrative mandate is the remedy to review a final administrative decision made as a result of a proceeding in which, by law, a hearing must be given, evidence must be taken, and discretion in the determination of facts is vested in the reviewing agency or officer [*Code Civ. Proc. § 1094.5(a)*; *see C.V.C. v. Superior Court (1973) 29 Cal. App. 3d 909, 918, 106 Cal. Rptr. 123]* . The grievance review procedure would appear to meet all of these criteria [*see 22 Cal. Code Reg. §§ 35235, 35237, 35239* (agency must provide hearing; evidence must be received at hearing; final decision rests in discretion of agency director)].

The inquiry in an administrative mandate proceeding extends to the questions of whether the respondent agency has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence [*Code Civ. Proc. § 1094.5*]. These standards are more fully considered in Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq. The court is required to exercise its independent judgment on the evidence to determine whether the agency's decision to terminate the placement was justified by the best interests of the child [*C.V.C. v. Superior Court (1973) 29 Cal. App. 3d 909, 918-920, 106 Cal. Rptr. 123* ; *see Marten v. Thies (1979) 99 Cal. App. 3d 161, 167, 160 Cal. Rptr. 57]* .

[4] Attorneys' Fees

Attorneys' fees up to a statutory limit are available in a proceeding for administrative mandate if petitioners prevail and establish that the agency acted in an arbitrary or capricious manner (Paragraph 14) [*see Gov. Code § 800*]. For further discussion, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

[5] Verification

A petition for writ of mandate must be verified [*see Code Civ. Proc. § 1086*].

Furthermore, this petition prays for injunctive relief either restraining the agency from removing the child from petitioners' home or ordering the agency to return the child, if the child has already been removed. A complaint seeking a temporary restraining order and showing therein, rather than in an affidavit (declaration [*Code Civ. Proc. § 2015.5*]), that sufficient grounds exist is required to be verified [*see Code Civ. Proc. § 527*]. For further discussion of the procedures to obtain injunctive relief, see Ch. 303, *Injunctions* .

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[Reserved]

§§ 12B.366[Reserved]

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2-12B California Forms of Pleading and Practice--Annotated § 12B.380

§ 12B.380 Adoption of Indian Child [25 U.S.C. § 1901 et seq.]--Cal. Judicial Council Form ADOPT-220

[1] FORM Attachment to Petition for Adoption--Adoption of Indian Child

Click here to view image.

[2] Use of Form

This form is the mandatory Judicial Council form of Adoption--Adoption of Indian Child [Cal. Judicial Council Form ADOPT-220], for use in providing identifying information concerning a Native American (Indian) child who is the subject of an adoption. The form is designed to be attached to the Judicial Council's form of adoption request [*see § 12B.302[1]*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Contents of Form

The form requires that counsel set forth identifying information concerning the child, his or her biological parents and grandparents, as well as the child's tribal affiliation and, if known, his or her tribal enrollment number (Paragraphs 2-7). It also requires that the names and addresses of the adoptive parents and of any agency having relevant information about the adoptive placement (Paragraphs 1, 8). The name and relationship to the child of each other person who has information about the child's Indian ancestry must be set forth in Paragraph 9. It also requires a statement of information about whether parental rights of the biological parents have been terminated involuntarily by court action or voluntarily relinquished (Paragraph 10). If voluntary relinquishment of the child has taken place, a separate Judicial Council form of Parent of Indian Child Agrees to End Parental Rights [Cal. Judicial Council Form ADOPT-225] must either have been already filed in the proceeding or be attached to the form illustrated above. The voluntary termination form is illustrated in § 12B.381[1].

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2-12B California Forms of Pleading and Practice--Annotated § 12B.381

§ 12B.381 Parent of Indian Child Agrees to End Parental Rights [25 U.S.C. § 1901 et seq.]--Cal. Judicial Council Form ADOPT-225

[1] FORM Consent to Termination of Parental Rights and Certification--Adoption of an Indian Child [25 U.S.C. § 1901 et seq.]--Cal. Judicial Council Form ADOPT-225

Click here to view image.

[2] Use of Form

This form is an illustration of the mandatory Judicial Council form of Parent of Indian Child Agrees to End Parental Rights [Cal. Judicial Council Form ADOPT-225]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

The form is designed to enable a biological parent of an Indian child to (1) consent to the termination of his or her parental rights over the child, or to the child's adoption, (2) to express a preference for placement of the child with particular persons as adoptive parents, and (3) to represent that he or she understands the nature of the relinquishment, and of various associated rights (*see* Paragraphs 5), including the right to withdraw consent prior to entry of an order terminating parental rights or of adoption [*see 25 U.S.C. § 1913*]. While the form may be filed in the adoption proceeding either by itself, or as an attachment to the form entitled Adoption of Indian Child [*see § 12B.380[1]*], it apparently must be signed *at the time of the adoption hearing*, before the judicial officer who hears the adoption proceeding [*see 25 U.S.C. § 1913(a)*].

The form also contains a certification, to be signed by the judicial officer at the time of hearing, that the parent who executed the consent form did so in writing before that officer, that the terms and consequences were explained in detail to the parent, and that he or she understood them--both in the sense of grasping the consequences and understanding the language (English, or through an interpreter).

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2-12B California Forms of Pleading and Practice--Annotated § 12B.382

§ 12B.382 Indian Child Inquiry Attachment--Cal. Judicial Council Form ICWA-010(A)

[1] FORM Indian Child Inquiry Attachment--Cal. Judicial Council Form ICWA-010(A)

Click here to view image.

[2] Use of Form

This form is an illustration of the mandatory Judicial Council form of Indian Child Inquiry Attachment [Cal. Judicial Council Form ICWA-010(A)]. This form is available in an interactive, electronic format in *LexisNexis[(R)] Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format is also available at *www.lexisone.com* at no charge.

This form must be completed by a party who is seeking a foster-care placement, guardianship, conservatorship, custody placement under *Fam. Code § 3041*, declaration freeing a child from the custody or control of one or both parents, termination of parental rights, or adoption, when the proceeding involves an Indian child [*Cal. Rules of Ct., Rules 5.480, 5.481(a)(1)*]. This form must be attached to the petition unless the party is filing a subsequent petition, and there is no new information [*Cal. Rules of Ct., Rule 5.481(a)(1)*].

The petitioning party must ask the child, if the child is old enough, and the parents, Indian custodian, or legal guardians whether the child is or may be an Indian child [*Cal. Rules of Ct., Rule 5.481(a)(1)*]. California Judicial Council Form ICWA-005-INFO provides information on completing the Indian Child Inquiry Attachment.

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2-12B California Forms of Pleading and Practice--Annotated § 12B.383

§ 12B.383 Parental Notification of Indian Status--Cal. Judicial Council Form ICWA-020

[1] FORM Parental Notification of Indian Status--Cal. Judicial Council Form ICWA-020

Click here to view image.

[2] Use of Form

This form is an illustration of the mandatory Judicial Council form of Parental Notification of Indian Status [Cal. Judicial Council Form ICWA-020]. This form is available in an interactive, electronic format in *LexisNexis[(R)] Automated California Judicial Council Forms,* which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format is also available at *www.lexisone.com* at no charge.

This form must be completed by an Indian child's parent, Indian custodian, or guardian. At the initiation of any guardianship, conservatorship, proceeding for custody under *Fam. Code § 3041*, proceeding to terminate parental rights, proceeding to declare a child free of the custody and control of one or both parents, or adoption proceeding that involves an Indian child, the court must order the parent, Indian custodian, or guardian, if available, to complete this form [*Cal. Rules of Ct., Rules 5.480, 5.481(a)(2)*]. When the parent, custodian, or guardian does not appear at the first hearing, or is unavailable at the initiation of the proceeding, the court must order the person or entity that has the inquiry duty to use reasonable diligence to find and inform the parent, custodian, or guardian that the court has ordered this individual to complete the Parental Notification of Indian Status form [*Cal. Rules of Ct., Rule 5.481(a)(3)*].

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2-12B California Forms of Pleading and Practice--Annotated § 12B.384

§ 12B.384 Notice of Child Custody Proceeding for Indian Child [25 U.S.C. § 1901 et seq.]--Cal. Judicial Council Form ICWA-030

[1] FORM Notice of Child Custody Proceeding for Indian Child [25 U.S.C. § 1901 et seq.]--Cal. Judicial Council Form ICWA-030

Click here to view image.

[2] Use of Form

This form is an illustration of the mandatory Judicial Council form of Notice of Child Custody Proceeding for Indian Child [Cal. Judicial Council Form ICWA-030]. This form is available in an interactive, electronic format in *LexisNexis[(R)] Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format is also available at *www.lexisone.com* at no charge.

If it is known or there is reason to know that an Indian child is involved in a guardianship or conservatorship proceeding, proceeding for custody under *Fam. Code § 3041*, proceeding to terminate parental rights, proceeding to declare a child free of the custody and control of one or both parents, or adoption proceeding, the social worker, petitioner, or the court in a probate guardianship or conservatorship proceeding in which the petitioner is unrepresented must send this form to the parent or legal guardian and Indian custodian of the Indian child, and to the child's tribe, as specified in *Fam. Code § 180, Prob. Code § 1460.2*, and *Welf. & Inst. Code § 224.2* [*Cal. Rules of Ct., Rule 5.481(b)(1)*].

If it is known or there is reason to know that an Indian child is involved in a wardship proceeding under *Welf. & Inst. Code §§ 601* and *602 et seq.*, and the probation officer has determined that it is probable the child will be entering foster care, or if the child is already in foster care, the probation officer must send this form to the parent or legal guardian, Indian custodian, and the child's tribe in accordance with *Welf. & Inst. Code § 727.4(a)(2)* [*Cal. Rules of Ct., Rule 5.481(b)(2)*].

Circumstances that may provide reason to know the child is an Indian child the following [*Cal. Rules of Ct., Rule 5.481(a)(5), (b)(3)*]:

- The child or a person having an interest in the child, including an Indian tribe, an Indian organization, an officer of the court, a public or private agency, or a member of the child's extended family, informs or otherwise provides information suggesting that the child is an Indian child to the court, the county welfare agency, the probation department, the licensed adoption agency or adoption service provider, the investigator, the petitioner, or any appointed guardian or conservator;

- The residence or domicile of the child, the child's parents, or an Indian custodian is, or was, in a predominantly Indian community; or

- The child or the child's family has received services or benefits from a tribe or services that are available to Indians from tribes or the federal government, such as the U.S. Department of Health and Human Services, Indian Health Service, or Tribal Temporary Assistance to Needy Families benefits.

If the social worker, probation officer, licensed adoption agency, adoption service provider, investigator, or petitioner knows or has reason to know that an Indian child is or may be involved, that person or entity must [Cal. Rules of Ct., Rule 5.841(a)(4)]:

- Interview the parents, Indian custodian, and extended family members to gather the information that is required to complete the Notice of Child Custody Proceeding for Indian Child;

- Contact the Bureau of Indian Affairs and the California Department of Social Services for assistance in identifying the names and contact information of the tribes in which the child may be a member or eligible for membership; and

- Contact the tribes and any other person that reasonably can be expected to have information about the child's membership status or eligibility.

California Judicial Council Form ICWA-005-INFO provides information on determining whether a child is an Indian child and, if so, on notifying the appropriate parties.

Notice to an Indian child's tribe must be sent to the tribal chairperson, unless the tribe has designated another agent for service [Cal. Rules of Ct., Rule 5.841(b)(4)].

The proof of notice filed with the court must include Form ICWA-030, with pages 9 and 10 completed and signed, return receipts, and any responses received from the Bureau of Indian Affairs and tribes [Cal. Rules of Ct., Rule 5.842(b)].

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2-12B California Forms of Pleading and Practice--Annotated § 12B.385

§ 12B.385 Attachment to Notice of Child Custody Proceeding for Indian Child [25 U.S.C. § 1901 et seq.]--Cal. Judicial Council Form ICWA-030(A)

[1] FORM Attachment to Notice of Child Custody Proceeding for Indian Child [25 U.S.C. § 1901 et seq.]--Cal. Judicial Council Form ICWA-030(A)

Click here to view image.

[2] Use of Form

This form is an illustration of the optional Judicial Council form of Attachment to Notice of Child Custody Proceeding for Indian Child [Cal. Judicial Council Form ICWA-030(A)]. This form is available in an interactive, electronic format in *LexisNexis[(R)] Automated California Judicial Council Forms,* which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format is also available at *www.lexisone.com* at no charge.

This form should be completed and attached to Cal. Judicial Council Form ICWA-030 [*see § 12B.384*] to set forth the names and addresses of additional Indian tribes that have been served with notice of the proceedings.

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2-12B California Forms of Pleading and Practice--Annotated § 12B.386

§ 12B.386 Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child [25 U.S.C. § 1901 et seq.]--Cal. Judicial Council Form ICWA-040

[1] FORM Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child [25 U.S.C. § 1901 et seq.]--Cal. Judicial Council Form ICWA-040

Click here to view image.

[2] Use of Form

This form is an illustration of the optional Judicial Council form of Notice of Designation of Tribal Representative and Notice of Intervention in a Court Proceeding Involving an Indian Child [Cal. Judicial Council Form ICWA-040]. This form is available in an interactive, electronic format in *LexisNexis[(R)] Automated California Judicial Council Forms,* which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format is also available at *www.lexisone.com* at no charge.

This form may be filed by an Indian child's tribe and Indian custodian to give notice of their intent to intervene in a pending child custody proceeding involving an Indian child [*Cal. Rules of Ct., Rule 5.482(e)*].

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2-12B California Forms of Pleading and Practice--Annotated § 12B.387

§ 12B.387 Notice of Petition and Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction--Cal. Judicial Council Form ICWA-050

[1] FORM Notice of Petition and Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction--Cal. Judicial Council Form ICWA-050

Click here to view image.

[2] Use of Form

This form is an illustration of the optional Judicial Council form of Notice of Petition and Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction [Cal. Judicial Council Form ICWA-050]. This form is available in an interactive, electronic format in *LexisNexis[(R)] Automated California Judicial Council Forms,* which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format is also available at *www.lexisone.com* at no charge.

An Indian child's parent, Indian custodian, or tribe may request transfer of a case involving custody of the child to the tribal court of the child's tribe, either orally or in writing, or by filing this form [*Cal. Rules of Ct., Rule 5.483(c)*].

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2-12B California Forms of Pleading and Practice--Annotated § 12B.388

§ 12B.388 Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction--Cal. Judicial Council Form ICWA-060

[1] FORM Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction--Cal. Judicial Council Form ICWA-060

Click here to view image.

[2] Use of Form

This form is an illustration of the optional Judicial Council form of Order on Petition to Transfer Case Involving an Indian Child to Tribal Jurisdiction [Cal. Judicial Council Form ICWA-060]. This form is available in an interactive, electronic format in *LexisNexis[(R)] Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format is also available at *www.lexisone.com* at no charge.

This form may be used as the court's final order on a petition to transfer a case involving an Indian Child to Tribal Jurisdiction [*Cal. Rules of Ct., Rule 5.483(g)*; *see § 12B.387*]. If the court grants the petition, the order must include all contact information for the designated tribal court representative [*Cal. Rules of Ct., Rule 5.483(h)(3)*].

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[1] FORM

[2] Use of Form

§ 12C.51 Consent of Spouse of Adopting Parent [Fam. Code § 9301]

[1] FORM

[2] Use of Form

§ 12C.52 Adoption Agreement [Fam. Code § 9320]

[1] FORM

[2] Use of Form

§ 12C.53 Petition for Approval of Adoption Agreement [Fam. Code § 9321(b)]

[1] FORM

[2] Use of Form

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§ 12C.54 Order of Adoption of Adult or Married Minor [Fam. Code § 9328(b)]

[1] FORM

[2] Use of Form

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2-12C California Forms of Pleading and Practice--Annotated § 12C.01

§ 12C.01 Scope of Chapter

This chapter discusses the procedures for adoption of an adult or a married minor. Included are sample forms for use in these proceedings and a discussion of the primary reasons for such adoptions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAdoption of Adults

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2-12C California Forms of Pleading and Practice--Annotated § 12C.02

§ 12C.02 Cross References

For discussion of the adoption of unmarried minors, see Ch. 12B, *Adoptions: Unmarried Minors* . For discussion of the substantive law of termination of parental rights in cases in which parental consent cannot be obtained, see Ch.12A, *Adoptions: Termination of Parental Rights* . Amendment and inspection of adoption records, and collateral attack on adoption decrees are discussed in Chs. 12D, *Adoptions: Amendment and Inspection of Records* and 12E, *Adoptions: Attack on Decree* , respectively. For a complete discussion of adoption procedures for Native American (Indian) children, see Kirkland, Luvey & Richmond, california family law practice and procedure, 2nd ed., Ch. 176 (Matthew Bender).

Legal Topics:

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

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[Reserved]

§§ 12C.03[Reserved]

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2-12C California Forms of Pleading and Practice--Annotated § 12C.10

§ 12C.10 Governing Law

The procedures for the adoption of an adult or a married minor are set forth in *Fam. Code § 9300 et seq.* Because the procedure for the adoption of an adult or married minor is purely statutory, there can be no adoption except by compliance with statutory formalities [*see Estate of Taggart (1923) 190 Cal. 493, 498-500, 213 P. 504* (decided before enactment of statutes permitting adult adoption in California and rejecting adoption by estoppel)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAdoption of Adults

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§ 12C.11 Adoptions of Adults and Minors Compared

It is considerably easier to adopt an adult or a married minor than an unmarried minor. There are two significant differences between the adoption of an unmarried minor and the adoption of an adult or married minor.

(1) No parental consent is required for the adoption of an adult or a married minor [*see Fam. Code §§ 9300, 9302(b)*, discussed in *§ 12C.15*], and notice is not even required to be served on a natural parent [*see Fam. Code § 9323*, discussed in *§ 12C.19*].

(2) No investigation by any agency or public officer is generally required, although the court has discretion to order such an investigation if the circumstances warrant it [*see Fam. Code § 9325*, discussed in *§ 12C.20*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionGeneral OverviewFamily LawAdoptionConsentBiological ParentsFamily LawAdoptionConsentLegal GuardiansFamily LawAdoptionProceduresAdoption of Adults

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§ 12C.12 Reasons for Adult Adoption

The reported cases on adult adoptions have generally involved adoptions undertaken for the purpose of comprising a class of "children" or "issue" who are to take under a will or trust [*see, e.g., Estate of Moulton (1976) 63 Cal. App. 3d 1, 133 Cal. Rptr. 500* ; *Abramovic v. Brunken (1971) 16 Cal. App. 3d 719, 94 Cal. Rptr. 303* ; *Williams v. Ward (1971) 15 Cal. App. 3d 381, 93 Cal. Rptr. 107* ; *Estate of McCormack (1969) 2 Cal. App. 3d 492, 82 Cal. Rptr. 651* ; *Adoption of Sewall (1966) 242 Cal. App. 2d 208, 51 Cal. Rptr. 367* ; *see also § 12C.13[3]*]. However, there may be less mercenary reasons for an adult adoption that do not come to the attention of the appellate courts. For example, the parties may wish to legally establish a parent-child relationship that has existed in fact but could not be completed during the child's minority because a natural parent whose consent was required for adoption would not give it. Such a situation might arise with regard to a stepparent, a foster parent, or a relative functioning as a de facto parent [*see Estate of Joseph (1998) 17 Cal. 4th 203, 212, 70 Cal. Rptr. 2d 619, 949 P.2d 472* (decedent's failure to adopt foster child or stepchild as adult may disqualify child from inheriting as child who would have been adopted by the decedent "but for a legal barrier")].

Under federal immigration law, only children who were under the age of 16 years when adopted [*see 8 U.S.C. § 1101(b)(1)(E)*] or at the time when an "orphan" adoption petition was filed for classification as an immediate relative [*see 8 U.S.C. § 1101(b)(1)(F)*] are entitled to obtain an immigrant visa. Thus, the lawful entry of an adult alien into the United States cannot be accomplished by an adult adoption. Immigration aspects of adoption are discussed further in Ch. 12, *Adoptions: Nature and Effect*. Intercountry adoptions of minors are discussed in Ch. 12B, *Adoptions: Unmarried Minors* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAdoption of Adults

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§ 12C.13 Effect of Adult Adoption

[1] On Parent-Child Relationship

After adoption, the adopting parent and adopted person sustain toward each other the legal relation of parent and child. They have all the rights and are subject to all of the duties of that relation [*Fam. Code § 9305*; *see* Ch. 394, *Parent and Child* (discussion of parent-child support obligations with regard to adults)]. The natural parents of the adopted person are relieved of all parental duties towards and all responsibility for the adopted person from the time of adoption. They have no further rights over the adopted person [*Fam. Code § 9306(a)*], except in the case of a step-parent adoption [*Fam. Code § 9306(b)*].

Thus, any support obligation that a natural parent may have toward his or her adult child [*see Fam. Code § 3910*, discussed in Ch. 394, *Parent and Child*] is terminated by the adoption and potentially transferred to the adopting parent. However, when adults are adopted, the usual duty of support [*see Fam. Code §§ 3900, 4000*], as distinguished from one arising from extraordinary circumstances [*see Fam. Code § 3910(a)*], is not assumed by the adopting parent [*Williams v. Ward (1971) 15 Cal. App. 3d 381, 386, 93 Cal. Rptr. 107]* .

[2] Intestate Succession

For the purpose of determining intestate succession by, through, or from a person, the relationship of parent and child includes the relationship between an adopting parent and adopted person [*Prob. Code § 6450(b)*]. Subject to certain exceptions, adoption terminates inheritance rights by intestate succession arising from the blood relationship between the adopted person and his or her natural family [*see Prob. Code § 6451*]. For further discussion, see Ch. 12, *Adoptions: Nature and Effect* , Through Ch. 12E, Adoptions: Attack on Decree.

Nothing in the statutes differentiates between persons adopted as adults and persons adopted as minors. Thus, courts have assumed that they have the same rights [*see Estate of Moulton (1976) 63 Cal. App. 3d 1* ; *Estate of Goulart (1963) 222 Cal. App. 2d 808, 819-824, 35 Cal. Rptr. 465* (both decided under prior law)].

[3] Inclusion in Class of Children or Issue

[a] Rule of Prob. Code § 21115

Prob. Code § 21115 appears to govern the construction of wills, trusts, and other instruments with regard to adult adoptees and class gifts unless the intention of the transferor is expressed in the instrument [*see Prob. Code §§ 21101, 21102*]. The statute applies to all instruments, regardless of when they were executed, and regardless of the date of death of the testator or other transferor [*Prob. Code § 21140*]. Former *Prob. Code § 6152*, the predecessor statute to *Prob. Code § 21115*, applied only to wills, and only to testators dying on or after January 1, 1985. Wills executed by testators dying before that date were construed under the law applicable before that date [*see Prob. Code § 6103*; *Estate of Heard (1957) 49 Cal. 2d 514, 518-523, 319 P.2d 637* ; *Estate of Pierce (1948) 32 Cal. 2d 265, 269, 196 P.2d 1* ; *Estate of McCallen (1975) 53 Cal. App. 3d 142, 152, 125 Cal. Rptr. 645* ; *Estate of McCormack (1969) 2 Cal. App. 3d 492, 497-499, 82 Cal. Rptr. 651]* . 1994 legislation [Stats. 1994, ch. 806, § 41] repealed former *Prob. Code §§ 6140-6179* and reenacted those provisions as *Prob. Code § 21101 et seq.*, now applicable to transfers by all instruments, not just wills [*see Prob. Code § 21101*] and regardless of the date of death of the transferor [*see Prob. Code § 21140*]. Therefore, it is theoretically possible that a will that was not governed by former *Prob. Code § 6152* because the testator died before January 1, 1985 is now governed by *Prob. Code § 21115* [*but see Newman v. Wells Fargo Bank (1996) 14 Cal. 4th 126, 59 Cal. Rptr. 2d 2, 926 P.2d 969* ; *Estate of Joslyn (1995) 38 Cal. App. 4th 1428, 45 Cal. Rptr. 2d 616]* .

Under *Prob. Code § 21115*, the rules of intestacy (*see* [2], *above*) apply to determine whether adopted persons are included in a gift to a class, such as to a class of "children" or "issue" [*Prob. Code § 21115(a)*; *see also Prob. Code §§ 21114, 21115(c)(3)* (other testamentary terms to which rules apply)]. Thus, adoptees, whether adopted as minors or adults, are generally considered as the children of their adopting parents for purposes of determining who is a member of a class [*Prob. Code §§ 21115(a), 6450(b)*; *see Estate of Heard (1957) 49 Cal. 2d 514, 522, 319 P.2d 637* ; *Estate of McCallen (1975) 53 Cal. App. 3d 142, 152, 125 Cal. Rptr. 645* (prior common law in accord with regard to children adopted as minors); *see also* Ch. 12, *Adoptions: Nature and Effect, Through Ch. 12E:, Adoptions: Attack on Decree*].

There is, however, a statutory exception that operates to reverse this rule with regard to some adult adoptions. In construing a devise by a testator who is not the adoptive parent, a person adopted by the adoptive parent is not considered the child of that parent unless the person lived, while a minor (either before or after the adoption), as a regular member of the household of the adopting parent, or of that parent's parent, brother, sister, or surviving spouse [*Prob. Code § 21115(b)*]. For example, if testator T devises a life estate to his son S with remainder to the children of S, a person adopted by S as an adult is within the class only if the cohabitation requirement is met [*but see Estate of Joslyn (1995) 38 Cal. App. 4th 1428, 1438-1440, 45 Cal. Rptr. 2d 616]* .

The statute appears to establish a conclusive presumption as to the testator's intent with regard to adult adoptees and the class, depending on the cohabitation requirement. If the requirement is met, the adult adoptee is included; if not, he or she is excluded. As so construed, the statute would change the prior common law rule, under which the actual intent of the testator controlled to determine who was within a class [*Williams v. Ward (1971) 15 Cal. App. 3d 381, 384, 93 Cal. Rptr. 107]* , and extrinsic evidence of the relationship, if any, between the testator and the adult adoptee was admissible to show intent [*see Estate of McCormack (1969) 2 Cal. App. 3d 492, 498-499, 82 Cal. Rptr. 651]* . Under current law, the statute applies unless the testator's intent is expressed in the instrument [*Prob. Code § 21102*].

Note that the cohabitation requirement extends to persons who lived during their minority in the household of the adopting parent's spouse, even if the spouse was not married to (and the child never resided with) the adopting parent during the minority of the child [*see Prob. Code § 21115(b)*]. Thus, under the above example, S might marry W and adopt W's adult child C after the death of the testator. Despite the fact that S and C never lived in the same household during the minority of C, and even if T never met C during his lifetime, C would still be a member of the class of the children of S based on C's cohabitation during minority with his or her natural parent W. Such a result would be highly unlikely under the prior common law [*see Abramovic v. Brunken (1971) 16 Cal. App. 3d 719, 721-722, 94 Cal. Rptr. 303* ; *Estate of McCormack (1969) 2 Cal. App. 3d 492, 498-499, 82 Cal. Rptr. 651* ; *but see Estate of Moulton (1976) 63 Cal. App. 3d 1, 6-8, 133 Cal. Rptr. 500* (stepdaughter included who was 10 at time of marriage and adopted 30 years

later)].

If the testator dies without a will, the rules for determining intestate succession under *Prob. Code § 21115* are those in effect at the time the transfer is to take effect in enjoyment [*Prob. Code § 21115(d)*].

[b] Applicability of Prior Law

Under prior law, courts were to take into account the general body of law and public policy in existence when the will was executed, including judicial decisions, intestacy succession laws, and other statutes, and impute knowledge of this law and policy to the testator [*In re Estate of Pittman (1980) 104 Cal. App. 3d 288, 292-293, 163 Cal. Rptr. 527]* . Also, extrinsic evidence of the relationship, if any, between the testator and the adult adoptee was admissible to show intent [*see Estate of McCormack (1969) 2 Cal. App. 3d 492, 498-499, 82 Cal. Rptr. 651]* . The prevailing view was that it was highly unlikely that a testator would intend to favor a person on the basis of a parent-child relationship that was created long after the execution of the instrument (and maybe even long after the testator's death), and that bore little or no similarity to the parent-child relationship created by the adoption of a minor [*see Abramovic v. Brunken (1971) 16 Cal. App. 3d 719, 722-723, 94 Cal. Rptr. 303* ; *Williams v. Ward (1971) 15 Cal. App. 3d 381, 384-385, 385 n.1, 93 Cal. Rptr. 107* ; *Estate of McCormack (1969) 2 Cal. App. 3d 492, 498-499, 82 Cal. Rptr. 651]* . There was, however, an exception for adult adoptees who had actually been taken into the adoptive parent's home and family as minors and who were reared by the adoptive parent *in loco parentis* [*Estate of Pittman (1980) 104 Cal. App. 3d 288, 294-295, 163 Cal. Rptr. 527]* . Thus, the results reached in looking for the testator's intent under prior law closely approximated the result seemingly compelled by *Prob. Code § 21115*.

Despite the fact that *Prob. Code § 21115* applies to all instruments, regardless of when they were executed [*Prob. Code § 21140*], courts, including the California Supreme Court, have either failed to note or ignored the statute and decided cases under prior law. In 1996, the Supreme Court decided *Newman v. Wells Fargo Bank*, a case involving the adoption of a minor that would seem to be squarely within *Prob.Code § 21115*, and neither the majority nor the dissent even mentioned that statute. The Court held that in construing a will that created a class of "issue" of the testator's children, the law of intestacy in effect in 1972 when the will was executed determined whether a grandchild who had been adopted by his stepfather remained in the class of the issue of the testator's children. The testator's son was the adoptee's biological father [*Newman v. Wells Fargo Bank (1996) 14 Cal. 4th 126, 129, 59 Cal. Rptr. 2d 2, 926 P.2d 969]* . The Court agreed that the testator's intent as expressed in the will would apply under *Prob. Code § 21102*, but found no intent expressed therein with regard to adopted grandchildren [*Newman v. Wells Fargo Bank (1996) 14 Cal. 4th 126, 134-136, 59 Cal. Rptr. 2d 2, 926 P.2d 969]* . Instead of then determining the adoptee's status under § 21115, the Court applied the presumption that a testator is aware of the public policy reflected in the statutory definitions of the terms used in a will at the time the will is executed and to intend that those definitions be followed in construction of the will unless a contrary intent is expressed in the will [*Newman v. Wells Fargo Bank (1996) 14 Cal. 4th 126, 136-138, 59 Cal. Rptr. 2d 2, 926 P.2d 969]* . Finally, it held that the law to which the court must look to find the presumed intet of a testator with regard to adopted children is the law in effect when a will is executed [*Newman v. Wells Fargo Bank (1996) 14 Cal. 4th 126, 139, 59 Cal. Rptr. 2d 2, 926 P.2d 969]* .

Although it did not mention *Prob. Code § 21115(a)*, the majority was of the view that whether an adoptee was within a class was to be in accordance with the laws of intestacy, which is the basic rule of § 21115(a) [*Newman v. Wells Fargo Bank (1996) 14 Cal. 4th 126, 138-139, 59 Cal. Rptr. 2d 2, 926 P.2d 969* . It would seem that the rule of *Prob. Code § 21115(b)* should have applied because the court was construing a transfer by a transferor who was not the adoptee's natural parent]. But it was the 1972 law of intestacy that was determinative. Because under that law, a stepparent adoption severed the right of the adoptee to inherit from the natural parent [*see* former *Prob. Code § 257*], the adoptee was not within the class of "children" or "issue" in the will [*Newman v. Wells Fargo Bank (1996) 14 Cal. 4th 126, 142, 59 Cal. Rptr. 2d 2, 926 P.2d 969]* . Had *Prob. Code § 21115(b)* been applied, the adoptee would have been within the class because he had lived, while a minor, as a regular member of the household of the natural parent (the testator's child) for four years [*Newman v. Wells Fargo Bank (1996) 14 Cal. 4th 126, 144, 59 Cal. Rptr. 2d 2,*

926 P.2d 969 (opinion of Kennard, J., dissenting)].

Also, in *Estate of Joslyn*, the court reached the exact result provided for by *Prob. Code § 21115* without mentioning its existence. The testator executed her will in 1937 and her codicil in 1945 without mentioning adoptees in any manner. She died in 1949. In 1964, one of her children adopted an adult stepdaughter who had been a member of his household as a minor and with whom he had had a legitimate parent-child relationship. The court conducted a laborious search of the stautory law and public policy of two states and three generations in search of the testator's intent, finally determining that the adult adoptee should be included in the class. It held that children reared within the family, even though not adopted until adulthood, were compatible with the intent of the testator in creating the class gift [*Estate of Joslyn (1995) 38 Cal. App. 4th 1428, 1438-1440, 45 Cal. Rptr. 2d 616]* . In *Newman*, the Supreme Court disagreed with the court in *Joslyn* to the extent that it stood for the proposition that a legislative change in public policy that is enacted after the death of a testator may fairly be deemed to reflect the intent of the testator [*see Newman v. Wells Fargo Bank (1996) 14 Cal. 4th 126, 140, 59 Cal. Rptr. 2d 2, 926 P.2d 969]* . The court could have simply noted the lack of any express indication of intent in the will and then applied the statute.

The court went on to reject a limitation expressed in a prior case that an adult adoptee who had been a member of the adopting parent's household as a minor should be deemed to come within the class only if it is shown that the purpose of the adoption was not to diminish or defeat the income and remainder interests of other beneficiaries [*Estate of Pittman (1980) 104 Cal. App. 3d 288, 295, 163 Cal. Rptr. 527]* . The court held that an adopted stepchild should not have to refute an element of financial gain in order to come within the class because a valid reason for establishing a legally-recognized parent-child relationship between adults is to ensure the orderly transfer of the family estate. The acknowledgment of an additional child necessarily diminishes the estate of any other children. Again, this is the result that would have ensued had the court simply applied *Prob. Code § 21115*.

Thus, *Newman* and *Joslyn* are strong authority for the proposition that the inclusion of adoptees within a class of children or issue is to be based on the law in effect at the time of execution of the instrument. But the failure of either court to consider the effect of *Prob. Code §§ 21115* and *21140* leaves the matter in considerable doubt.

[c] Antilapse Statute

The rules of *Prob. Code § 21115(a)* and *(b)* also apply to California's antilapse statute [*Prob. Code § 21115(c)(1),(2)*; *see Prob. Code § 21110* (antilapse statute)]. Thus, if an adopted adult is a "child" for the purposes of a class gift, he or she is also a "kindred" devisee [*see Prob. Code § 21110(c)*] and "issue" of a deceased devisee [*see Prob. Code § 21110(a)*] within the meaning of the antilapse statute [*Prob. Code § 21115(c)(1), (2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionChild RightsGeneral OverviewFamily LawAdoptionChild RightsInheritance RightsFamily LawAdoptionProceduresAdoption of AdultsEstate, Gift & Trust LawWillsBeneficiariesClass GiftsEstate, Gift & Trust LawWillsFailure of BequestsAntilapse Statutes

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2-12C California Forms of Pleading and Practice--Annotated § 12C.14

§ 12C.14 Persons Who May Adopt and Be Adopted

Subject to the statutory limitations discussed below, any adult person or married minor child may be adopted by any other adult person [*Fam. Code § 9300*]. However, no person may adopt more than one unrelated adult person within one year of his or her adoption of another unrelated adult unless the person to be adopted is the sibling by birth of a previously adopted person, or unless the person to be adopted is disabled or physically handicapped. No person may adopt an unrelated adult person within one year of any adoption of an unrelated adult by his or her spouse, unless the person to be adopted is the sibling by birth of a previously adopted person [*Fam. Code § 9303*].

The adopting parent must be older that the adopted person, but there is no express age differential [*Fam. Code § 9320*; *cf. Fam. Code § 8601* (10-year age differential generally required to adopt minor)]. One may not adopt his or her spouse [*Fam. Code § 9320(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAdoption of Adults

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2-12C California Forms of Pleading and Practice--Annotated § 12C.15

§ 12C.15 Consent Requirements

A married person who is not lawfully separated from his or her spouse can neither adopt an adult nor be adopted as an adult without the consent of his or her spouse, if the spouse is capable of giving the consent [*Fam. Code §§ 9301, 9302(a)*]. Likewise, a married minor cannot be adopted without the consent of his or her spouse [*Fam. Code §§ 9300(b), 9302(a)*]. For forms for spousal consent, see §§ 12C.50, 12C.51.

Fam. Code §§ 9301 and *9302* do not expressly require that the spouses be separated pursuant to a decree of legal separation [*see Fam. Code § 2310*] or a written separation agreement [*see Fam. Code § 3580*]. In general, "lawful" denotes something that, in its substance, is sanctioned or permitted by law, as distinguished from conformity to positive rules of law [*see Stauter v. Carithers (1921) 185 Cal. 160, 163, 196 P. 37]* . In that it is lawful for spouses to live apart from each other, regardless of their legal status, it appears that spouses who have physically separated withoutan intent to reunify can probably adopt an adult or be adopted by an adult without the consent of the other spouse.

Neither the consent of a birth parent of the adopted person, nor of the Department of Social Services, nor of any other person is required [*Fam. Code § 9302(b)*].

If a husband and wife jointly seek to adopt an adult, it may be assumed that each consents to adoption of the person in question by the other [*see, e.g., In re Williams (1894) 102 Cal. 70, 79, 36 P. 407]* . Nevertheless, jointly adopting spouses may sign reciprocal written statements of consent.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAdoption of Adults

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2-12C California Forms of Pleading and Practice--Annotated § 12C.16

§ 12C.16 Adoption Agreement

The adopting parent and the adopted person must execute a written adoption agreement. The agreement must set forth that the parties agree to assume toward each other the legal relation of parent and child, and to have all of the rights and be subject to all of the duties and responsibilities of that relation [*Fam. Code § 9320*]. For a form for an adoption agreement, see *§ 12C.52[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAdoption of Adults

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2-12C California Forms of Pleading and Practice--Annotated § 12C.17

§ 12C.17 Petition for Court Approval

The adoption agreement must be approved by a decree of adoption of the superior court of the county in which either the adopting parent or the adopted person resides [*Fam. Code §§ 9320(a), 9321*]. To obtain court approval, the adopting parent and the proposed adopted person may jointly file a petition [*Fam. Code § 9321(a)*]. Although not expressly considered in the statutes, the right of a married couple to petition jointly to adopt an adult or unmarried minor may be inferred from the language that an "adult may be adopted by another adult" [*Fam. Code § 9300(a)*] and a "married minor may be adopted in the same manner as an adult" [*Fam. Code § 9300(b)*]. In such a case, there would be three petitioners: the two spouses and the adopted person. For a form for a petition, see *§ 12C.53*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAdoption of Adults

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2-12C California Forms of Pleading and Practice--Annotated § 12C.18

§ 12C.18 Filing Fees

Adoption is among the proceedings for which the clerk may not charge a fee for service rendered [*see Gov. Code § 26857*]. There is a small fee that must be paid at the time of filing that is forwarded to the Registrar of Vital Statistics to defray the costs of preparing and maintaining official records [*see Health & Safety Code § 103730* (specifying amount of fee)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAdoption of Adults

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2-12C California Forms of Pleading and Practice--Annotated § 12C.19

§ 12C.19 Notice

Except in the case of an adoption involving the adoption of a developmentally disabled person [*see Fam. Code § 9326*, discussed in *§ 12C.21*], there are no specific notice requirements regarding an adult adoption. However, the court may require notice of the time and place of the hearing to be served on any interested persons, who may appear and object to the proposed adoption [*Fam. Code § 9323*]. There is no statutory definition of who is an "interested person."

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAdoption of Adults

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§ 12C.20 Investigation

Except in the case of an adoption involving a developmentally disabled person [*see Fam. Code §§ 9326, 9327,* discussed in *§ 12C.21*], no investigation or report to the court by any public officer or agency is required. However, the court may require the county probation officer or the Department of Social Services to investigate the circumstances of the proposed adoption and to report and make a recommendation to the court before the hearing [*Fam. Code § 9325*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAdoption of Adults

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2-12C California Forms of Pleading and Practice--Annotated § 12C.21

§ 12C.21 Developmentally Disabled Adopted Person

The person seeking to adopt an adult must give notice of the hearing to the director of the regional center for the developmentally disabled, established pursuant to Chapter 5 of Division 4.5 of the Welfare and Institutions Code [*see Welf. & Inst. Code § 4620 et seq.*], and to any living birth parents or adult children of the proposed adopted person if both of the following circumstances exist [*Fam. Code § 9326*]:

(1) The proposed adopted person is an adult with developmental disabilities.

(2) The person seeking to adopt is a provider of board and care, treatment, habilitation, or other services to persons with developmental disabilities, or is a spouse or employee of a provider.

The adopting parent must mail or personally serve the notice and a copy of the petition at least 30 days before the day of the hearing on the petition [*Fam. Code § 9326*]. In such a case (unless the adopting parent and adopted person are related), the regional center for the developmentally disabled must file a written report with the court regarding the suitability of the proposed adoption in meeting the needs of the proposed adopted person, and regarding any known previous adoption by the petitioner [*Fam. Code § 9327*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare LawSocial ServicesMentally Ill & Mentally Retarded IndividualsGeneral OverviewFamily LawAdoptionProceduresAdoption of Adults

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§ 12C.22 Hearing

[1] Setting, Privacy, and Appearances

The court clerk must fix a time and place for a hearing on the petition, once it is filed [*Fam. Code § 9322*]. The hearing may be open to the public at the discretion of the court [*Fam. Code § 9307*].

Both the adopting parent and the adopted person must personally appear at the hearing unless an appearance is impossible, in which case an appearance may be made for either or both by counsel. The counsel must be empowered in writing to make the appearance [*Fam. Code § 9324*]. For a form for a power of attorney authorizing counsel to appear for a party, see *§ 12B.313[1]*.

[2] Examination and Evidence

At the hearing, the court must examine the parties, or the counsel of any party not present in person. The court may consider evidence, oral or written, whether or not it is in conformity with the Evidence Code [*Fam. Code § 9328(a), (c)*].

Subject to the usual limitations on the reach of a subpoena [*see Code Civ. Proc. § 1989* (subpoena may compel attendance if witness is a resident in the state at the time it is served)], the court may require the appearance of any person able to give evidence that would assist the court in determining whether to grant the petition [*see In re Adoption of Bewley (1914) 167 Cal. 8, 10, 138 P. 689* (information from all proper sources should be sought)].

[3] Grounds for Approving or Disapproving Agreement

If the court is satisfied that the adoption is in the best interests of the parties and in the public interest, and that there is no reason why the petition should not be granted, it must approve the agreement of adoption and make an order of adoption declaring that the adopted person is the child of the adopting parent. Otherwise, the court must withhold approval of the agreement and deny the petition [*Fam. Code § 9328(b)*].

Reasons that might persuade the court to deny the petition might include the following:

(1) The fact that the prospective adopted person is seeking to evade a support duty with regard to a natural parent [*see Fam. Code §§ 4400, 4401* (duty of adult child to support indigent parent), discussed in Ch. 394, *Parent and Child*];

(2) Evidence of emotional or mental instability on the part of either party, or evidence of fraud, coercion, or undue influence exercised by either party in securing the other's consent to the adoption [*see Adoption of Sewall (1966) 242 Cal. App. 2d 208, 211, 217-222, 51 Cal. Rptr. 367]* ; or

(3) A purely economic motive, such as to comprise or enter a class of "children" or "issue" referred to in a will or trust provision [*see Estate of Moulton (1976) 63 Cal. App. 3d 1, 8 n.2, 133 Cal. Rptr. 500* (court found motive to be proper); *see also § 12C.13[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAdoption of Adults

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2-12C California Forms of Pleading and Practice--Annotated § 12C.23

§ 12C.23 Change of Name

The adopted person may, but is not required to, take the family name of the adopting parent [*Fam. Code § 9304*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawName ChangesGeneral OverviewFamily LawAdoptionProceduresAdoption of Adults

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2-12C California Forms of Pleading and Practice--Annotated § 12C.24

§ 12C.24 Confidentiality of Court Records

The governing statutes [*Fam. Code § 9300 et seq.*] make no provision for restricting access to the records of the court in a proceeding for adoption of an adult or a married minor. In the reorganization of adoption law effective January 1, 1994 [*see* discussion in Ch. 12, *Adoptions: Nature and Effect*], the statutory provisions regarding disclosure of information [*Fam. Code § 9200 et seq.*] were placed in the Family Code part governing adoption of unmarried minors. Therefore, it appears that these statutory limitations on access to and disclosure of information in adoption files (which are discussed in Ch. 12D, *Adoptions: Amendement and Inspection of Records*) do not apply to adult adoptions.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCourt RecordsFamily LawAdoptionDisclosuresAdoption Records

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§ 12C.25 Termination of Parent-Child Relationship Created by Adult Adoption

Any person adopted under *Fam. Code § 9300 et seq.* may file a petition to terminate the relationship of parent and child created by the adoption. The petition must indicate the name and address of the petitioner, the name and address of the adoptive parent, the date and place of the adoption, and the circumstances on which the petition is based. Notice must be given to the adopting parent [*Fam. Code § 9340(a)*].

If the adoptive parent consents in writing to the termination, an order terminating the relationship of parent and child may be issued by the court without further notice [*Fam. Code § 9340(b)*]. If the adoptive parent does not consent to the termination, a verified, written response must be filed within 30 days after the date of mailing of the notice, and the matter must be set for hearing. The court may require an investigation by the county probation officer or the Department of Social Services [*Fam. Code § 9340(c)*]. The hearing may be open to the public at the discretion of the court [*Fam. Code § 9307*].

A statutory motion to terminate an adult adoption under *Fam. Code § 9340* (available only to the adopted person and not to the adopting parent) should be distinguished from a proceeding to vacate, set aside, or collaterally attack the adoption on a ground such as incapacity, fraud, misrepresentation, coercion, duress, or undue influence. Such a proceeding is available to the adopting parent during his or her lifetime [*see Adoption of Sewall (1966) 242 Cal. App. 2d 208, 211, 219-222, 51 Cal. Rptr. 367]* . For further discussion, see Ch. 12E, *Adoptions: Attack on Decree* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAdoption of Adults

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2-12C California Forms of Pleading and Practice--Annotated § 12C.26

§ 12C.26 Recognition of Out-of-State Adult Adoption Decree

California will give full faith and credit to an out-of-state adult adoption decree that was valid where rendered even if the procedures followed are different from those prescribed by California law [*see Estate of Morris (1943) 56 Cal. App. 2d 715, 720-723, 133 P.2d 452* (decided before California statutes permitted adult adoptions)]. Full faith and credit attaches even if there were some minor irregularities in the out-of-state proceeding, provided they are not sufficient to subject the foreign decree to collateral attack in the state where it was rendered [*see Estate of Stanford (1957) 49 Cal. 2d 120, 142, 315 P.2d 681]* . However, California will refuse to recognize, and will permit collateral attack on, any adoption decree, including an adult adoption decree of a sister state or foreign country, if it was obtained in violation of the due process clauses of the state and federal constitutions [*Estate of O'Dea (1973) 29 Cal. App. 3d 759, 773, 105 Cal. Rptr. 756* ; *see Armstrong v. Manzo (1965) 380 U.S. 545, 550, 85 S. Ct. 1187, 14 L. Ed. 2d 62]* . For further discussion, see Ch. 12E, *Adoptions: Attack on Decree* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawRelations Among GovernmentsFull Faith & CreditFamily LawAdoptionProceduresAdoption of Adults

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[Reserved]

§§ 12C.27[Reserved]

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§ 12C.40 State Statutes

Adoption of adult or married minor. *Fam. Code § 9300*

Adoption of adults limited; exceptions. *Fam. Code § 9303*

Name and status of adopted adult. *Fam. Code § 9304, 9305*

Status of natural parents. *Fam. Code § 9306*

Adoption agreement. *Fam. Code § 9320*

Petition for approval of adoption agreement. *Fam. Code § 9321*

Hearing on petition. *Fam. Code § 9328*

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§ 12C.41 Decisions

Adults adopted by testator's daughter as not "children" of daughter under testator's will when adult adoptions were not allowed in California at time will was written. *Williams v. Ward (1971) 15 Cal. App. 3d 381, 385, 93 Cal. Rptr. 107*

Attacking adult adoption decree. *Adoption of Sewall (1966) 242 Cal. App. 2d 208, 226, 51 Cal. Rptr. 367*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAdoption of Adults

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2-12C California Forms of Pleading and Practice--Annotated § 12C.42

§ 12C.42 Law Reviews

Comment, *Adult Adoption: A "New" Legal Tool for Lesbians and Gay Men, 14 Golden Gate L. Rev. 667 (1984)*

ten Broek, *California's Adoption Law and Programs, 6 Hastings L.J. 261, 263*-265, (1955)

Legal Topics:

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Family LawAdoptionProceduresAdoption of Adults

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2-12C California Forms of Pleading and Practice--Annotated §§ 12C.43-12C.49

[Reserved]

§§ 12C.43[Reserved]

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2-12C California Forms of Pleading and Practice--Annotated § 12C.50

§ 12C.50 Consent of Spouse of Adopted Person [Fam. Code § 9302]

[1] FORM Consent of Spouse of Adopted Person [Fam. Code § 9302]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Adoption of _____ [*name*], _____ [An Adult Person *or* A Married Minor].	)))))))	NO. _____ CONSENT OF SPOUSE OF ADOPTED PERSON

I, _____[*name of spouse*], hereby state that I was married to _____[*name of adopted person*], _____ [an adult person *or* a married minor], on _____[*date*], and that we remain married and are not lawfully separated. I hereby consent to the adoption of my _____ [husband *or* wife] by _____[*name of adopting parent*].
Dated: _____.

_____ [*signature*]

[2] Use of Form

This form is for use by the spouse of an adopted person to give his or her consent to the adoption. Spousal consent is required if the adopted person is married [*Fam. Code §§ 9300(b), 9302(a)*]. For further discussion, see *§ 12C.15*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-12C California Forms of Pleading and Practice--Annotated § 12C.51

§ 12C.51 Consent of Spouse of Adopting Parent [Fam. Code § 9301]

[1] FORM Consent of Spouse of Adopting Parent [Fam. Code § 9301]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Adoption of _____ [*name*], _____ [An Adult Person *or* A Married Minor].	)))))))	NO. _____ CONSENT OF SPOUSE OF ADOPTING PARENT

_____

I, _____[*name of spouse of adopting parent*], hereby state that I was married to _____[*name of adopting parent*] on _____[*date*], and that we remain married and are not lawfully separated. I hereby consent to the adoption of _____[*name of adopted person*], _____ [an adult person *or* a married minor], by my _____ [husband *or* wife] _____[*name*].
Dated: _____.

_____ [*signature*]

[2] Use of Form

This form is for use by the spouse of an adopting parent to give his or her consent to the adoption. The consent of the spouse of the adopting parent is required if the adopted person is an adult or a married minor [*Fam. Code §§ 9300(b), 9301*]. For further discussion, see *§ 12C.15*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-12C California Forms of Pleading and Practice--Annotated § 12C.52

§ 12C.52 Adoption Agreement [Fam. Code § 9320]

[1] FORM Adoption Agreement [Fam. Code § 9320]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Adoption of _____ [*name*], _____ [An Adult Person *or* A Married Minor].	)))))))	NO. _____ ADOPTION AGREEMENT

_____[*Name of adopting parent*], age _____, who lives at _____[*address and city*], and _____[*name of adopted person*], age _____, who lives at _____[*address and city*], have entered into the following agreement:

WHEREAS, _____[*name of adopting parent*] wishes to adopt _____[*name of adopted person*], and _____[*name of adopted person*] wishes to be adopted by _____[*name of adopting parent*],

THEREFORE, the parties agree as follows:

1. To assume toward each other the legal relation of parent and child, and to have all the duties and responsibilities of that relation;

2. To file a joint petition in the Superior Court of California, County of _____, praying for approval of

this Agreement of Adoption by issuance of a decree of adoption.
Dated: _____.

_____ [*signature*]

Adopting Parent

_____ [*signature*]

Adopted Person

[2] Use of Form

This form is for use as an agreement between an adopted person and adopting parent for an adult adoption [*see Fam. Code §§ 9301, 9302, 9320*]. It may also be used for the adoption of a married minor [*see Fam. Code §§ 9300(b), 9301, 9302(a)*].

The agreement must be in writing and be executed by the person adopting and the person to be adopted. It must set forth that the parties agree to assume toward each other the legal relation of parent and child, and to have all of the rights and be subject to all of the duties and responsibilities of that relation [*Fam. Code § 9320(b)*]. It would appear that the agreement may be submitted for court approval either by attaching a copy as an exhibit to the parties' joint petition for approval of adoption agreement [*see Fam. Code § 9321(b)*; § 12C.53[1]] or by incorporating the agreement into the petition itself, unless local practice requires a separate document.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAdoption of Adults

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Chapter 12C ADOPTIONS: ADULTS AND MARRIED MINORS
PART IV. FORMS

2-12C California Forms of Pleading and Practice--Annotated § 12C.53

§ 12C.53 Petition for Approval of Adoption Agreement [Fam. Code § 9321(b)]

[1] FORM Petition for Approval of Adoption Agreement [Fam. Code § 9321(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Adoption of _____ [*name*], _____ [An Adult Person *or* A Married Minor].	))))))	NO. _____ PETITION FOR APPROVAL OF ADOPTION AGREEMENT

_____

Petitioners allege:

1. Petitioner _____[*name of adopted person*] is _____ [an adult person *or* a married minor], who is_____ years of age, born on _____[*date*], in _____[*place of birth*], and now residing at _____[*address*]. Petitioner _____[*name of adopted person*] _____ [is single *or* was married to _____ (*name of adopted person's spouse*) on _____ (*date*) in _____ (*place*) and is still married to _____ (and not *or* but) lawfully separated from _____ (*name of adopted person's spouse*)].

2. Petitioner _____[*name of adopting parent*] is an adult person who is _____ years of age, born on _____[*date*], in _____[*place of birth*], and now residing at _____[*address*]. Petitioner _____[*name of adopting parent*] _____ [is single *or* was married to _____ (*name of adopting parent's spouse*) on _____ (*date*), in _____ (*place*) and is still married to _____ (and not *or* but) lawfully

separated from _____ (*name of adopting parent's spouse*)].

3. On or about _____[*date*], petitioners entered into and executed a written adoption agreement in which petitioner _____[*name of adopting parent*] agreed to adopt petitioner _____[*name of adopted person*], petitioner _____[*name of adopted person*] agreed to be adopted by petitioner _____[*name of adopting parent*], and both petitioners agreed to assume towards each other the legal relation of parent and child and to have all the rights and be subject to all the duties and responsibilities of that relation. A copy of the Adoption Agreement is attached hereto as Exhibit A and made a part hereof.

[4. The spouse of _____ (*name of adopted person*), _____ (*name of spouse*), has duly consented in writing to the adoption sought herein. A copy of his/her consent is attached hereto as Exhibit B and made a part hereof.]

[5. The spouse of _____ (*name of adopting parent*), _____ (*name of spouse*), has duly consented in writing to the adoption sought herein. A copy of his/her consent is attached hereto as Exhibit C and made a part hereof.]

6. Petitioner _____[*name of adopting parent*] desires to adopt petitioner _____[*name of adopted person*], and petitioner _____[*name of adopted person*] desires to be so adopted.

[7. Petitioner _____ (*name of adopted person*) is a _____ (*kindred relationship, if any, e.g.,* stepdaughter) of petitioner _____ (*name of adopting parent*).]

8. Petitioner _____[*name of adopting parent*] has known _____[*name of adopted person*] _____ [*specify length and nature of relationship between parties, e.g.,* for 10 years. Petitioner _____ (*name of adopted person*) came to live with petitioner _____ (*name of adopting parent*) at the age of 14 when her mother married petitioner, and resided in his home until her marriage. No adoption was completed during the minority of _____ (*name of adopted person*) because the birth father would not give his consent to the adoption].

9. _____ [*State reasons why adoption is sought and is in best interests of the parties and the public, e.g.,* Petitioners seek this adoption in order to establish in law a relationship that exists in fact, and because it is in their best interests that petitioners have between them the legal rights and obligations of parent and child, including rights relating to inheritance and duties of support. This adoption is in the public interest for the same reasons, and particularly because it will create legal duties of support between the petitioners and thereby reduce the likelihood of either petitioner becoming a public charge in the future].

[10. The names and addresses of the living parents and adult children of petitioner _____ (*name of adopted person*) are as follows: _____.]

[11. _____ (*Name of adopting parent or of spouse of adopting parent*) has previously adopted _____ (*name of previous adult adopted person*), an adult person, on _____ (*date of previous adoption*) at _____ (*place of previous adoption*).]

12. Petitioner _____[*name of adopted person*] wishes to _____ [continue to be known by that name *or* be known by the name of _____(*new name*)].

WHEREFORE, petitioners pray that the court permit all persons concerned in this matter to attend and be heard, and that the court examine all persons appearing before it as required by law, and if satisfied that the best interests of the

parties and the public interest will be promoted by the proposed adoption, grant the petition, approve the agreement of adoption, and make a decree that _____[*name of adopted person*] hasbeen duly and legally adopted by petitioner _____[*name of adopting parent*].
Dated: _____.

_____ [*signature*]

Adopting Parent

_____ [*signature*]

Adopted Person

VERIFICATION

I, _____[*name of adopting parent*], am one of the petitioners in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

This form is for use as a petition for the adoption of an adult or a married minor [*see Fam. Code §§ 9300-9302, 9321(b)*].

The Judicial Council has not prescribed forms for use in adult adoption proceedings, although it has prescribed a mandatory form for adoption of unmarried minors, as discussed in Ch. 12B, *Adoptions: Unmarried Minors* . However, local court rules may require certain forms or suggest certain language. Counsel should ascertain whether such forms have been adopted in the county in which the petition will be filed.

Note that this form assumes that the attorney represents both petitioners. Because this is a joint representation, the attorney should secure written informed consent from each client [*Cal. Rules Prof. Conduct Rule 3-310(C)*], and carefully explain to each client the effects of adoption on inheritance rights, support obligations, the parent-child relationship with the child's natural parents, and the like.

[3] Contents

The caption should contain the name of each petitioner. In describing the nature of the document, counsel should indicate the character of the proceeding [*see Cal. Rules of Ct., Rule 2.111*] by specifying that it is a petition for approval of adoption agreement adoption.

The petition for adoption must state the following matters: (1) the length and nature of the relationship between the person seeking to adopt andthe proposed adopted person (Paragraph 8); (2) the degree of kinship between them, if any (Paragraph 7); (3) the reason why the adoption is sought (Paragraph 9); (4) a statement as to why the adoption would be

in the best interests of the prospective adoptive parent, the proposed adopted person, and the public (Paragraph 9); (5) the names and addresses of any living birth parents or adult children of the proposed adopted person (paragraph 10); and (6) whether the prospective adoptive parent or prospective adoptive person's spouse has previously adopted any other adult person and, if so, the names of any such person, together with the date and place of the adoption (Paragraph 11) [*Fam. Code § 9321(b)*].

The petition should also allege the date of birth, marital status, and place of residence of each petitioner (Paragraphs 1 and 2). Date of birth is important to show that the adopted person is an adult and that the adopting parent is older than the adopted person [*see Fam. Code §§ 9300(a), 9320(a)*]. Marital status is relevant to indicate whether spousal consent is required (Paragraphs 4 and 5) [*see Fam. Code §§ 9301, 9302*] and that a minor adopted person is married [*see Fam. Code § 9300(b)*]. Place of residence shows that the petition has been filed in the proper court, that is, one in which either petitioner resides [*see Fam. Code § 9321(a)*].

[4] Prayer and Verification

To conform to the governing statute, the prayer should ask that the court "approve the agreement of adoption, and make a decree of adoption declaring that the person adopted is the child of the person adopting" [*Fam. Code § 9328(b)*]. The prayer should specify the name by which the adopted person will be known after adoption, even if there will be no change of name [*see Fam. Code § 9304*]. All petitions filed under the Family Code must be verified [*Fam. Code § 212*; *see also Code Civ. Proc. § 446*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAdoption of Adults

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PART IV. FORMS

2-12C California Forms of Pleading and Practice--Annotated § 12C.54

§ 12C.54 Order of Adoption of Adult or Married Minor [Fam. Code § 9328(b)]

[1] FORM Order of Adoption of Adult or Married Minor [Fam. Code § 9328(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Adoption of _____ [*name*], _____ [An Adult Person *or* A Married Minor].	)))))))	NO. _____ ORDER OF ADOPTION

The petition of _____[*name of adopting parent*] and _____[*name of adopted person*] for adoption came on regularly to be heard on _____[*date*], in Department No. _____ of this court, before the Honorable _____[*name*], Judge of the Superior Court. Both petitioners appeared along with their attorney _____[*name*]. _____ [*If appropriate, add:* _____ (*Name*), the spouse of petitioner _____ (*name of adopted person*), appeared.] _____ [*If appropriate, add:* _____ (*Name*), the spouse of petitioner _____ (*name of adopting parent*) (also) appeared.] The court, having examined the petitioners, and received and considered the testimony and documentary evidence and arguments of counsel, finds as follows:

1. Petitioner _____[*name of adopting parent*] has attained the age of majority and is older than petitioner _____[*name of adopted person*].

2. Petitioner _____[*name of adopted person*] is _____ [an adult *or* a married minor].

3. Petitioner(s) _____[*name(s) of adopting parent and/or adopted person*] _____ [is a resident *or* are residents] of _____ County, California.

4. On or about _____[*date*], petitioners entered into a written agreement by which petitioner _____[*name of adopting parent*] agreed to adopt petitioner _____[*name of adopted person*], and the latter agreed to be adopted by the former, and the petitioners agreed to assume toward each other the relation of parent and child;

[5. _____ (*Name*), the spouse of petitioner _____ (*name of adopted person*), has consented in writing to the adoption herein.]

[6. _____ (*Name*), the spouse of petitioner _____ (*name of adopting parent*), has consented in writing to the adoption herein.]

7. The court is satisfied and finds that the adoption will be for the best interest of the parties and in the public interest, and that there is no reason why the petition should not be granted.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the petition herein be, and it hereby is, granted and approved and petitioner _____[*name of adopted person*] is hereby adopted by petitioner _____[*name of adopting parent*], and the former shall hereafter be regarded and treated in all respects as the lawful child of the latter [and shall be known as _____ (*new name, if any*)].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The foregoing form is for use as an order of adoption of an adult or a married minor [*see Fam. Code § 9328(b)*].

The petitioners' counsel should prepare an order of adoption and present it to the judge at the close of the hearing. The law does not require that the order state any findings; but because a judgment should be self-sustaining, findings should be included. The order will not be effective until it is entered [*Code Civ. Proc. § 664*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresAdoption of Adults

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2-12D California Forms of Pleading and Practice--Annotated 12D.syn

§ 12D.syn Synopsis to Chapter 12D: ADOPTIONS: AMENDMENT AND INSPECTION OF RECORDS

§ 12D.01 Scope of Chapter

§ 12D.02 Cross References

§§ 12D.03-12D.09 [Reserved]

§ 12D.10 Governing Law

§ 12D.11 Report of Adoption to Vital Statistics Bureau

§ 12D.12 Amendment of Birth Certificate

[1] Adoption in California

[a] Existing Record of In-State Birth

[b] Missing Record of In-State Birth

[c] Out-of-State Birth

[2] Adoption Outside California

[3] New Birth Certificate

[a] Contents

[b] Action to Include Name of Deceased Person

[c] Subsequent Amendment

[d] Fee for Issuance or Certified Copy

[4] Previous Birth Certificate

[a] Effect of Amendment

[b] Correction at Local Level

[c] Maintenance Under Seal

§ 12D.13 Certificate of Adoption

§ 12D.14 Inspection of Birth Records of State Registrar

§ 12D.15 Confidentiality of Court Records

§ 12D.16 Department and Agency Records

[1] Confidentiality

[2] Disclosure of Information

[a] In General

[b] Release of Medical Background Report

[c] Disclosure of Identity of Birth Parent and Adopted Person

[d] Disclosure to Juvenile Court, Agencies and Others

[3] Release of Information on Adopted Person's Sibling

[4] Contact Arranged by Department or Agency

[5] Release of Personal Property

§§ 12D.17-12D.29 [Reserved]

§ 12D.30 State Statutes

[1] Amendment of Birth Records After Adoption

[2] Inspection of Court and Agency Records

§ 12D.31 Decisions

§ 12D.32 Law Reviews

§§ 12D.33-12D.39 [Reserved]

§ 12D.40 Court Report of Adoption [Health & Safety Code § 102625]--SDH Form VS 44

[1] FORM

[2] Use of Form

[3] Contents of Report

§ 12D.41 Petition to Inspect Sealed Birth Record of State Registrar [Health & Safety Code § 102705]

[1] FORM

[2] Use of Form

§ 12D.42 Petition for Inspection of Court Records of Adoption Proceeding [Fam. Code § 9200]

[1] FORM

[2] Use of Form

§ 12D.43 Petition to Delete Names of Birth Parents From Court Records Before Inspection [Fam. Code § 9200(b)]

[1] FORM

[2] Use of Form

§ 12D.44 Waiver of Rights to Confidentiality of Adoption Records for Siblings [Fam. Code § 9205]--CDSS Form AD 904A

[1] FORM

[2] Use of Form

§ 12D.45 Request for Appointment of Confidential Intermediary [Fam. Code § 9205]--Cal Judicial Council Form ADOPT-330

[1] FORM

[2] Use of Form

§ 12D.46 Order for Appointment of Confidential Intermediary [Fam. Code § 9205]--Cal Judicial Council Form ADOPT-331

[1] FORM

[2] Use of Form

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PART I. SCOPE

2-12D California Forms of Pleading and Practice--Annotated § 12D.01

§ 12D.01 Scope of Chapter

This chapter discusses postadoption procedures regarding official records, and contains related official and attorney-drafted forms. It discusses the amendment of an adopted child's birth records with the State Registrar of Vital Statistics. It also considers the inspection of the birth records of the State Registrar, the inspection of court records regarding an adoption matter, and inspection of adoption records of the Department of Social Services and licensed adoption agencies.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCourt RecordsFamily LawAdoptionDisclosuresAdoption Records

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PART I. SCOPE

2-12D California Forms of Pleading and Practice--Annotated § 12D.02

§ 12D.02 Cross References

For discussion of collateral attack on adoption decrees, see Ch. 12E, *Adoptions: Attack on Decree* . Procedures for adoption are discussed in Chs. 12B, *Adoptions: Unmarried Minors* , and 12C, *Adoptions: Adults and Married Minors* . For a complete discussion of adoption procedures for Native American (Indian) children, see Kirkland, Luvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Ch. 176 (Matthew Bender).

Legal Topics:

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

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2-12D California Forms of Pleading and Practice--Annotated §§ 12D.03-12D.09

[Reserved]

§§ 12D.03[Reserved]

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PART II. LEGAL BACKGROUND

2-12D California Forms of Pleading and Practice--Annotated § 12D.10

§ 12D.10 Governing Law

The procedures for disclosure of information contained in court records, records of the Department of Social Services, and adoption agency records are set forth in Division 13, Part 2, Chapter 6 of the Family Code [*Fam. Code § 9200 et seq.*]. Procedures for amending birth records after adoption are set forth in *Health & Safety Code § 102625 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionDisclosuresAdoption RecordsFamily LawAdoptionDisclosuresAdoption Agencies

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2-12D California Forms of Pleading and Practice--Annotated § 12D.11

§ 12D.11 Report of Adoption to Vital Statistics Bureau

Within five days after a decree of adoption has been entered, the clerk is required to send a "Court Report of Adoption" (Department of Health Form VS-44) to the Registrar of Vital Statistics in Sacramento [*Health & Safety Code § 102625*; *see § 12D.40[1]*]. The governing statute does not specifically limit this reporting requirement to adoptions of unmarried minors. Thus, a report is required in any adoption case, including one for adoption of an adult or a married minor, whether or not the adopted person desires the issuance of a new birth certificate.

Legal Topics:

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

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PART II. LEGAL BACKGROUND

2-12D California Forms of Pleading and Practice--Annotated § 12D.12

§ 12D.12 Amendment of Birth Certificate

[1] Adoption in California

[a] Existing Record of In-State Birth

If the adopted person was born in California, and there is a record of the birth, the Registrar of Vital Statistics will establish a new birth certificate on receiving the clerk's report of the adoption [*see § 12D.40[1]*], unless the report instructs the registrar that the existing record is not to be amended [*Health & Safety Code §§ 102635, 102640*].

[b] Missing Record of In-State Birth

If the adopted person was born in California, but there is no record of the birth, the clerk's report of adoption will be treated as an application for delayed birth registration [*see Health & Safety Code § 102525 et seq.*], provided that the clerk's report states the date and place of birth [*Health & Safety Code § 102690*].

[c] Out-of-State Birth

If the adopted person was born in another state, the District of Columbia, a territory of the United States, or Canada, the state registrar will forward the court clerk's report of adoption to the registration authority for the place of birth [*Health & Safety Code § 102630*]. If the adopted person was born outside of the United States, its territories, or Canada, the clerk's report of adoption will be treated as an application for delayed birth registration [*see Health & Safety Code § 102525 et seq.*], provided that the clerk's report states the date and place of birth [*Health & Safety Code § 102695*].

[2] Adoption Outside California

If a person born in California is adopted outside the state, a report of adoption from any court of record having jurisdiction in the place of adoption will be handled by the registrar in the same way as the clerk's report for a person adopted in California [*Health & Safety Code §§ 102635, 102690*; *see* discussion in [1], *above*].

[3] New Birth Certificate

[a] Contents

The new birth certificate will not indicate that the subject is an adopted person. It will be indistinguishable from an ordinary birth certificate and will bear the subject's name after adoption, the adoptive parents' names, and the date and place of birth, unless, in an adoption by an unmarried person, the adoptive parent elects to have the birth certificate state "Single Parent Adoption" [*Health & Safety Code § 102650*]. If the adopting parents request, the name and address of the hospital or other place where the birth occurred will be omitted [*Health & Safety Code § 102645*]. If a child has been adopted by an unmarried person, the new certificate will, if the adopting parent so requests, reflect that it is a single-parent adoption [*Health & Safety Code § 102650*].

[b] Action to Include Name of Deceased Person

If both adopting parents were in the home at the time of the initial placement of a child for adoption, but one died before the adoption was completed, the amended birth certificate may include the names of both adopting parents [*Health & Safety Code § 102660*]. An action may be brought in the superior court of the county in which the petitioner resides for the purpose of obtaining a court order directing the State Registrar to issue such a certificate [*see Fam. Code § 8615(a)*]. Alternatively, the inclusion may be requested in the adoption proceeding [*Fam. Code § 8615(b)*]. The inclusion of the name of a deceased person on a birth certificate issued pursuant to a court order does not affect any matter of testate or intestate succession, and is not competent evidence on the issue of the relationship between the adopted child and the deceased person in any action or proceeding [*Fam. Code § 8615(c)*].

[c] Subsequent Amendment

At any time after issuance of a new birth certificate, another amended certificate may be issued, at the request of an adoptive parent, omitting the name and address of the hospital or other place where the birth occurred or the city or county where the birth occurred [*Health & Safety Code § 102675*]. An amended birth record may also be subsequently amended to conform with a court order that an adoptive parent's deceased spouse's name be included, as a parent [*Health & Safety Code § 102670*; *see Fam. Code § 8615* (authorizing proceeding for such order)].

[d] Fee for Issuance or Certified Copy

A new birth certificate will be issued without charge [*Health & Safety Code § 102710*], except that a fee will be required for subsequent amendment to conform the amended record with a later court order that an adoptive parent's deceased spouse's name be included [*Health & Safety Code §§ 102670, 103705*]. There is a fee prescribed for amending a birth record after adoption [*see Health & Safety Code § 103710*], but it will have been paid or waived when the petition for adoption was filed [*see Health & Safety Code § 103730*]. A fee is charged for a certified copy of a birth certificate [*Health & Safety Code § 103625*].

[4] Previous Birth Certificate

[a] Effect of Amendment

The new birth certificate supplants any birth certificate previously registered for the child and is the only birth certificate open to public inspection without a court order [*Health & Safety Code §§ 102680*. 102705].

[b] Correction at Local Level

When a new birth certificate is established for an adopted person, the Registrar of Vital Statistics must require the local registrar and county recorder whose records contain copies of the previous birth certificate to forward those copies to the registrar (who will file them with the original) or, if that is impracticable, to seal those copies and forward a verified statement of this action to the registrar [*Health & Safety Code § 102685*].

[c] Maintenance Under Seal

The previous birth record will be maintained as part of the records of the state registrar, along with copies of it forwarded from the local registrar and county recorder, and along with the clerk's report of adoption [*see § 12D.40[1]*]. It is open to public inspection only on a court order [*Health & Safety Code §§ 102700, 102705*]. For discussion of inspection of these records, see *§ 12D.14*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawPaternity & SurrogacyBirth CertificatesAlterationsFamily LawAdoptionDisclosuresAdoption RecordsGovernmentsCourtsClerks of Court

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2-12D California Forms of Pleading and Practice--Annotated § 12D.13

§ 12D.13 Certificate of Adoption

On the request of the adoptive parents or the child, a clerk of the superior court may issue a certificate of adoption that states the date and place of adoption, the birthday of the child, the name of the adoptive parents, and the name that the child has taken. Unless the child has been adopted by a stepparent, or other relative [*see Fam. Code § 8616.5(c)* (persons considered as "relatives" for purposes of relative adoption), the certificate may not state the name of the birth parents of the child [*Fam. Code § 8614* (amended, operative January 1, 1998, to add exception for adoption by relative; *Fam. Code § 9200(c)*, previously identical in wording to § 8614, was not amended)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsClerks of CourtFamily LawAdoptionGeneral Overview

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2-12D California Forms of Pleading and Practice--Annotated § 12D.14

§ 12D.14 Inspection of Birth Records of State Registrar

The state registrar's sealed birth record of an adopted person may be opened for inspection only on order of the superior court. Anyone seeking such an order must file a verified petition in the superior court in the county where the adopted person resides or in the county where the adoption was decreed. The petitioner must set forth facts showing both "necessity" and "good and compelling cause" for issuance of the order [*Health & Safety Code § 102705*]. For a form for a petition to inspect birth records of the State Registrar, see *§ 12D.41[1]*.

The clerk will send a copy of the petition to the Department of Social Services, which must send a copy of all records and information that it has concerning the adopted person to the court. The names and addresses of the natural parents must be deleted. The court must review the records before making its decision [*Health & Safety Code § 102705*].

The decision is entirely within the court's discretion. If the petition is by or on behalf of an adopted person who has attained the age of majority, the court must give this fact great weight, but this fact alone does not require granting of the petition. The names and addresses of the natural parents will not be disclosed unless the petitioner shows a need for this information to assist in establishing a legal right [*Health & Safety Code § 102705*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedurePostconviction ProceedingsExpungement

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2-12D California Forms of Pleading and Practice--Annotated § 12D.15

§ 12D.15 Confidentiality of Court Records

The petition for adoption, relinquishment or consent, agreement, order, report to the court from any investigating agency, any power of attorney, and any deposition filed in the office of the clerk of the court an adoption proceeding must not be open to inspection by anyone other than the parties to the proceeding, their attorneys, and the Department of Social Services, except on the written authority of a superior court judge. A judge may not authorize anyone to inspect any of these documents, or any portion of them, unless there are exceptional circumstances and "for good cause approaching the necessitous." The petitioner may be required to pay the clerk's expenses of preparing copies of the documents to be inspected [*Fam. Code § 9200(a)*; *see Hubbard v. Superior Court (1961) 189 Cal. App. 2d 741, 747-748, 11 Cal. Rptr. 700* (explaining legislative policy in favor of confidentiality)]. For a form for a petition to inspect court records, see *§ 12D.42[1]*.

On written request of any party to the proceeding and on the order of the court, the county clerk may not provide any of the above documents for inspection or copying to any other person unless the name of the birth parents of the child or any information tending to identify the birth parents is deleted from the documents or copies [*Fam. Code § 9200(b)*]. For a form of petition to delete all information identifying the birth parents, see *§ 12D.43[1]*.

Fam. Code § 9200 does not specify who is a "party to the proceeding" for the purpose of examining an adoption court file. Decisions viewing "parties" expansively with regard to rights to appeal or attack the decree [*see, e.g., In re Jay R. (1983) 150 Cal. App. 3d 251, 257 n.2, 197 Cal. Rptr. 672* (birth parent); *Adoption of Martin (1946) 76 Cal. App. 2d 133, 134, 172 P.2d 552* (grandparent); *see also* Ch. 12E, *Adoptions: Attack on Decree*] may not control, given the protective policy behind the confidentiality requirement [*see In re Maria V. (1985) 167 Cal. App. 3d 1099, 1104, 213 Cal. Rptr. 733]* . Most likely, an adopted minor is not a party to the proceeding for his or her own adoption within the meaning of the statute [*see Fam. Code §§ 8714(c), 8802(c), 8912(b), 9000(c)* (caption to adoption petition must contain names of petitioning adopting parents but not name of child)]. For discussion of an adopted person's right to obtain information about his or her own adoption, see *§ 12D.16[2]*.

The court's disposition of the adoption petition makes no difference with regard to the confidentiality of the file. The records in a case in which the petition for adoption was denied have the same protected status as those in a case in which the petition was granted [*Hubbard v. Superior Court (1961) 189 Cal. App. 2d 741, 752, 11 Cal. Rptr. 700]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCourt RecordsGovernmentsCourtsClerks of CourtFamily LawAdoptionGeneral OverviewFamily LawAdoptionDisclosuresGeneral Overview

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§ 12D.16 Department and Agency Records

[1] Confidentiality

The adoption records of the Department of Social Services or of the licensed adoption agency that was involved in an adoption are confidential [*22 Cal. Code Reg. § 35049(b)*; *see 22 Cal. Code Reg. § 35047* (contents of adoption case record); *see also Fam. Code § 9201(a)*]. However, they are only conditionally privileged if subpoenaed pursuant to judicial proceeding, and information may be disclosed if fundamental interests are at stake [*In re Maria V. (1985) 167 Cal. App. 3d 1099, 1104, 213 Cal. Rptr. 733* (approving court's in-camera inspection and limited disclosure in proceeding to terminate parental rights under *Fam. Code § 7800 et seq.*)]. They are also subject to limited rights of disclosure [*see Fam. Code §§ 9202, 9203*, discussed under [2], *below*].

[2] Disclosure of Information

[a] In General

Family Code provisions on the disclosure of information [*see Fam. Code § 9200 et seq.*] were enacted for several purposes. One purpose is to ensure that complete medical background information of an adopted person and an adopted person's birth parents will be transmitted to the adopting parents at the time of adoptive placement [*see Fam. Code §§ 8608(b), 8706, 8817, 8909*]. This requirement is discussed in Ch. 12B, *Adoptions: Unmarried Minors* . Another purpose is to ensure that medical background information is available to the adopted person when he or she reaches 18 years of age or when he or she presents a certified copy of the person's marriage certificate [*see Fam. Code § 9202(a)*]. This is discussed in [b], *below.* In addition, the Family Code establishes a procedure by which birth parents who gave up a child for adoption and the adopted child, on reaching age 21, may obtain information about each other, including current addresses, based on their mutual consent and waiver of confidentiality [*see Fam. Code § 9203(a)*]. The procedure is discussed in [c], *below.*

For discussion of liability for misrepresentation of a child's medical condition, see Ch. 12B, *Adoptions: Unmarried Minors* .

[b] Release of Medical Background Report

Notwithstanding any other provision of law, the Department of Social Services, or the licensed adoption agency that prepared a medical background report on an adopted child and his or her birth parents [*see Fam. Code §§ 8706, 8817, 8909*, discussed in Ch. 12B, *Adoptions: Unmarried Minors*] must provide a copy of the report on the request of any of the following persons: (1) a person who has been adopted and who has attained the age of 18 years, (2) a person who has been adopted and who presents a certified copy of his or her marriage certificate, or (3) the adoptive parent of a person under the age of 18 who has been adopted. The report must be provided in the manner that the department has prescribed by regulation [*Fam. Code § 9202(a)*; *see 22 Cal. Code Reg. § 35051*]. A person who is denied access to a medical report pursuant to the regulations may petition the superior court for review of the reasonableness of the department's or agency's decision [*Fam. Code § 9202(b)*]. The names and addresses of any persons contained in the report must be removed from the report unless the person requesting the report has previously received the information pursuant to *Fam. Code § 9203(a)*, discussed in [c], *below* [*Fam. Code § 9202(c)*].

[c] Disclosure of Identity of Birth Parent and Adopted Person

Disclosure to an adopted person of the names of his or her birth parents, or to a birth parent of the adopted name of his or her natural child, requires the consent of the person whose identity is requested [*Fam. Code § 9203(a)(1)*]. The provisions of *Fam. Code § 9203* apply only to those adoptions in which the relinquishment for adoption or consent to adoption was signed, or the birth parent's rights were involuntarily terminated by court action, on or after January 1, 1984 [*Fam. Code § 9203(g)*].

On request of a person who has been adopted and who has attained the age of 21, the Department of Social Services or a licensed adoption agency must disclose the identity of a birth parent, and the most current address of the birth parent as shown in the records of the department or agency, if the birth parent has consented to the disclosure in writing. Similarly, on request of a birth parent of a person who has been adopted and who has attained the age of 21, the department or agency must disclose the adopted name of the adopted person and his or her most current address as shown in the records of the department or licensed adoption agency if the adult adopted person has indicated in writing, pursuant to a registration program developed by the department, that he or she wishes his or her name and address to be disclosed [*Fam. Code § 9203(a)(1), (2)*].

The department or agency also must disclose the identity of a birth parent, and his or her most current address as shown in the records of the department or agency, on the request of the adoptive parent of an adopted person under the age of 21 if the department or agency finds that a medical necessity or other extraordinary circumstance justifies the disclosure. However, even disclosure to the adoptive parents on account of medical necessity or other extraordinary circumstances is prohibited if the birth parent has indicated that he or she does not wish his or her name or address to be disclosed [*Fam. Code § 9203(a)(3), (c)*; *22 Cal. Code Reg. § 35057*].

The right to maintain or waive confidentiality must be disclosed to a birth parent when a relinquishment for or consent to adoption is signed [*Fam. Code §§ 8702(a)(3), 8818(a)(3)*]. The birth parent may change his or her decision at any time by sending a notarized letter to that effect, by certified mail, return receipt requested, to the department or agency [*Fam. Code §§ 8702(a)(4), 8818(a)(4)*]. The birth parent must sign a form at the time of relinquishment or consent on which he or she checks a box indicating waiver, nonwaiver, or uncertainty as to future disclosure of his or her identity to the child [*Fam. Code §§ 8702(b), 8818(b)*].

The form of request must be prescribed by the department, and must provide for an affidavit to be executed by the requester that to the best of his or her knowledge he or she is an adopted person, or the birth parent of an adopted person, or the adoptive parent of an adopted person. The department may adopt regulations requiring any additional means of identification from a requester as it deems necessary [*see 22 Cal. Code Reg. §§ 35049-35065*]. The request must advise an adopted person that if he or she so consents, his or her adoptive parents will be notified of the filing of the request before the release of the name and address of his or her birth parent [*Fam. Code § 9203(b)*].

The department may forward requests for information to any licensed adoption agency that was a party to the adoption [*Fam. Code § 9203(d)*; *see Fam. Code § 8506* (agency is party to agency adoption); *see also* discussion of agency adoptions in Ch. 12B, *Adoptions: Unmarried Minors*]. The department must either respond to a request for information or forward the request to an agency within 20 working days of its receipt of the request [*Fam. Code § 9203(d)*].

The department or licensed adoption agency may charge a reasonable fee in an amount established by department regulation to cover the costs of processing requests for information. However, the fees must be waived for persons receiving public assistance [*Fam. Code § 9203(f)*].

[d] Disclosure to Juvenile Court, Agencies and Others

Except as otherwise permitted or required by statute, neither the Department of Social Services (DSS) nor a licensed adoption agency shall release information that would identify persons who receive or have received, adoption services [*Fam. Code § 9201(a)*]. Notwithstanding this general rule, employees of the DSS and licensed adoption agencies must release to the DSS at Sacramento any requested information, including identifying information, for the purpose of record-keeping and monitoring, evaluation, and regulation of the provision of adoption services [*Fam. Code § 9201(b)*].

Before a child is placed for adoption, the DSS or licensed adoption agency, may, on written request of both a birth and prospective adoptive parent, arrange for contact between the birth and prospective adoptive parents that may include the sharing of identifying information regarding these parents [*Fam. Code § 9201(c)*].

The DSS and any licensed adoption agency may, on written authorization for the release of specified information by the subject of that information, share information regarding a prospective adoptive parent or birth parent with other social service agencies, including the DSS and other licensed adoption agencies, or providers of health care (as defined by the Civil Code) [*Fam. Code § 9201(d)*].

Notwithstanding any other provision of law, the Department of Social Services and any licensed adoption agency may furnish information relating to an adoption petition or to a child in the custody of the DSS or any licensed adoption agency to any of the following, whenever it is believed that the welfare of the child will be promoted by the release [*Fam. Code § 9201*]:

(1) The juvenile court;

(2) Any county welfare department;

(3) Any public welfare agency;

(4) Any private welfare agency licensed by the Department of Social Services;

(5) Any provider of foster care services;

(6) Any potential adoptive parent; or

(7) Any provider of health care (as defined in the Civil Code).

Furthermore, the DSS and any licensed adoption agency may make adoption case records, including identifying information, available for research purposed, provided that the research will not result in the disclosure of identity of the child or parties to the adoption to anyone other than the entity conducting the research [*Fam. Code § 9201(f)*].

[3] Release of Information on Adopted Person's Sibling

Notwithstanding any other provision of law, the Department of Social Services or an adoption agency that joined in a petition for an agency adoption must release to both an adopted person and the adopted person's sibling each other's name and address if prescribed criteria are met. The department or agency may charge a reasonable fee for providing this service [*see Fam. Code § 9205(a), (b)*]. The term "sibling" means a biological sibling, half-sibling, or step-sibling of the adoptee [*Fam. Code § 9205(h)*; *Cal. Rules of Ct., Rule 5.410(b)(6)*]. The term "adoptee" means any person adopted under California law [*Cal. Rules of Ct., Rule 5.410(b)(1)*].

For release of this information, both the adopted person and the sibling must be at least 18 years old and have filed his or her current address and a written request for contact with any sibling that is known to him or her with the department or agency. Also, the adopted person must have filed and, if applicable, the sibling must also have filed, a written waiver of rights regarding disclosure of his or her respective name and address to a sibling. On inquiry and proof that a person is a sibling of an adopted person who has filed a waiver, the department or agency may advise him or her that such a waiver has been filed by the adopted person [*Fam. Code § 9205(a), (b)*; *see 22 Cal. Code Reg. § 35063*]. An adopted person may revoke this waiver by giving written notice to that effect to the Department of Social Services or agency [*Fam. Code § 9205(c)*].

The department must adopt a form for the request for sibling information [*Fam. Code § 9205(d)*; *see § 12D.44[1]*].

The department may not solicit the execution of a waiver authorizing disclosure of sibling information. However, the department must announcethe availability of the procedure, using a means of communication appropriate to effectively inform the public [*Fam. Code § 9205(e)*].

An adoptee or sibling who is under 18 years of age may file with the department or adoption agency a written waiver of confidentiality for the release of his or her name, address, and telephone number. An adoptee must have the adoptive parent's consent, and a sibling must have a legal parent's or guardian's consent. A sibling, who is under the jurisdiction of the dependency court and who has no legal parent or guardian able or available to provide consent, must have the consent of the dependency court [*Fam. Code § 9205(f)*; *Cal. Rules of Ct., Rule 5.410(b)(7), (8), (c)*].

An adoptee or sibling who seeks contact with the other for whom no waiver is on file may petition the court to appoint a confidential intermediary to help locate the other sibling [*Fam. Code § 9205(g)*; *Cal. Rules of Ct., Rule 5.410(d)*]. The sibling who is requesting contact must file a petition [*see* Cal. Judicial Council Form Adopt-330; *see also § 12D.45*] and submit a blank order [*see* Cal. Judicial Council Form Adopt-331; *see also § 12D.46*] to the court that finalized the adoption of either sibling [*Cal. Rules of Ct., Rule 5.410(b)(9), (10), (d)(1)(A)*]. If the sibling who is requesting contact is under 18 years of age, the petition must be filed through the sibling's duly appointed guardian ad litem under *Code Civ. Proc. § 373* or through the sibling's attorney [*Cal. Rules of Ct., Rule 5.410(d)(1)(B)*]. If the sibling being sought is the adoptee, the intermediary must be the department or licensed adoption agency that provided adoption services. If the sibling being sought was formerly under the jurisdiction of the juvenile court, but is not an adoptee, the intermediary must be the department, the county child welfare agency that provided services to the dependent child, or the licensed adoption agency that provided adoption services to the sibling seeking contact, as appropriate [*Fam. Code § 9205(g)*; *see Cal. Rules of Ct., Rule 5.410(b)(4), (d)(2)(B), (4)*]. If the court finds that the licensed adoption agency that conducted the adoption is unable, due to economic hardship, to serve as the intermediary, then the agency must provide all records related to the adoptee or the sibling to the court and the court must appoint any one of the following who agrees to serve as an alternate confidential intermediary: (1) a CASA volunteer or program staff member; (2) a court-connected mediator; (3) an adoption service provider under *Fam. Code § 8502(a)*; (4) an attorney; or (5) another California licensed adoption agency or the California Department of Social Services' Adoptions Support Bureau when no other individuals are available [*Fam. Code § 9205(g)*; *Cal. Rules of Ct., Rule 5.410(b)(5), (d)(2)(C), (D)*]. The court must grant the petition unless it finds that it would be detrimental to the adoptee or the sibling with whom contact is sought. In making this determination, the court may consider any and all relevant information, including, but not limited

to, a review of the court file [*Fam. Code § 9205(g)*; *Cal. Rules of Ct., Rule 5.410(d)(2)(A)*]. The intermediary must have access to all records of the adoptee or the sibling (including the court adoption file and department or adoption agency files of either sibling), and must make all reasonable efforts to locate and attempt to obtain the consent of the adoptee, the sibling, or the adoptive or birth parent, as required to make the authorized disclosure. The confidential intermediary must notify any located adoptee, sibling, or adoptive or birth parent that consent is optional, not required by law and does not affect the status of the adoption [*Fam. Code § 9205(g)*; *Cal. Rules of Ct., Rule 5.410(d)(3)(A)*]. When an individual denies a request for consent, the confidential intermediary may not make any further attempts to obtain consent. The confidential intermediary may use the information found in the records of the adoptee or the sibling for authorized purposes only, and may not disclose this information without authorization [*Fam. Code § 9205(g)*; *Cal. Rules of Ct., Rule 5.410(d)(3)(B), (C)*].

[4] Contact Arranged by Department or Agency

Notwithstanding any other provision of law, if an adult adopted person and his or her birth parent have each filed a written consent with the Department of Social Services or licensed adoption agency, the department or agency may arrange for contact between those persons [*Fam. Code § 9204(a)*; *see 22 Cal. Code Reg. § 35065.1(a)* (agency "shall arrange for contact ... as required by" governing code section); *see also Fam. Code § 9201(c)*]. However, the department must announce the availability of the present method of arranging contact among an adult adopted person and his or her birth parent using means of communication appropriate to effectively inform the public [*Fam. Code § 9203(e)*].

The written consent must be in the form prescribed by the department [*Fam. Code § 9204(b)*].

[5] Release of Personal Property

Notwithstanding any other provision of law, the Department of Social Services and any licensed adoption agency must release any letters, photographs, or other items of personal property in their possession on written request of any of the following parties [*Fam. Code § 9206(a)*]:

(1) The adopted person, provided that he or she has become 18 years old;

(2) The adoptive parent or parents, on behalf of an adopted person under the age of 18 years, as long as instructions to the contrary have not been made by the depositor of the property; or

(3) The birth parent or parents.

All identifying names and addresses must be deleted from these items before delivery to the person requesting them [*Fam. Code § 9206(b)*]. The term "photograph" means a photograph of the person depositing the photograph or a photograph of the person making the request for the release [*Fam. Code § 9206(f)*].

Any letters, photographs, or other items of personal property deposited on or after January 1, 1985, must be accompanied by a release form or similar document signed by the person depositing the material, specifying to whom the material may be released. At its discretion, the department or agency has the right to refuse for deposit items of personal property that, because of value or bulk, would pose storage problems [*Fam. Code § 9206(c)*].

Only the following photographs deposited before 1985 may be released: (1) photographs of the adopted person that the adopted person has requested; or (2) photographs that have been deposited by the adoptedperson, an adoptive parent or parents, or the birth parent or parents, and for which there is a letter or other document on file indicating that person's consent to release of the photographs [*Fam. Code § 9206(d)*].

The department or agency may charge a fee to cover the actual costs of any services required with regard to the release

of personal property in excess of normal postadoption services provided by the department or agency. The department must develop a fee schedule that is to be implemented by the department and agencies in assessing charges to persons who deposit the material or to whom the material is released. The fee may be waived by the department or agencies if it is established that financial hardship exists [*Fam. Code § 9206(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCourt RecordsFamily LawAdoptionDisclosuresAdoption AgenciesFamily LawAdoptionDisclosuresAdoption Records

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[Reserved]

§§ 12D.17[Reserved]

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§ 12D.30 State Statutes

[1] Amendment of Birth Records After Adoption

Inclusion of name of deceased petitioner for adoption on new birth certificate. *Fam. Code § 8615*; *Health & Safety Code § 102660*

Report of adoption. *Health & Safety Code § 102625*

Out-of-state births. *Health & Safety Code § 102630*

Establishment of new birth certificate. *Health & Safety Code § 102635*

New birth certificate not established on request of adopting parent. *Health & Safety Code § 102640*

Contents and form of new birth certificate. *Health & Safety Code § 102645*

Single-parent adoption; contents of birth certificate. *Health & Safety Code § 102650*

Preparation of additional amended record; fee. *Health & Safety Code § 102670*

Deletions from amended birth certificate. *Health & Safety Code § 102675*

Effect of amended certificate on previous birth certificate. *Health & Safety Code § 102680*

Transmittal or sealing of local registrar's copies of original birth certificate. *Health & Safety Code § 102685*

New birth certificate for child born in California and having no original birth record. *Health & Safety Code § 102690*

New birth certificate for child born outside of United States, its territories, or Canada. *Health & Safety Code § 102695*

Filing court report of adoption with original birth record. *Health & Safety Code § 102700*

[2] Inspection of Court and Agency Records

Limited access to adoption-related documents. *Fam. Code § 9200*

Release of information to designated entities when in interest of adopted child. *Fam. Code § 9201*

Release of medical report to adopted child or adoptive parent. *Fam. Code § 9202*

Disclosure of identity of birth parent. *Fam. Code § 9203*

Consent for Department of Social Services to arrange for contact between adult adopted person and birth parents. *Fam. Code § 9204*

Release of information on adopted person's sibling. *Fam. Code § 9205*

Release of letters, photographs, or other personal property. *Fam. Code § 9206*

Inspection of birth records and information on court order. *Health & Safety Code § 102705*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawPaternity & SurrogacyBirth CertificatesGeneral OverviewFamily LawAdoptionDisclosuresAdoption RecordsFamily LawAdoptionGeneral OverviewFamily LawParental Duties & RightsConsentGeneral Overview

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§ 12D.31 Decisions

Confidentiality provisions of former Civil Code provisions superseded by *Fam. Code § 9200* as not absolute. *Terzian v. Superior Court (1970) 10 Cal. App. 3d 286, 294, 88 Cal. Rptr. 806*

In guardianship proceedings, files of agency to which child was relinquished for adoption as not to be opened until prima facie showing has been made that adoption procedure is not running its proper course. *Terzian v. Superior Court (1970) 10 Cal. App. 3d 286, 294, 88 Cal. Rptr. 806*

State agency regulations providing that records of adoption agencies should be confidential as proper since former Civil Code provisions superseded by *Fam. Code § 9200*, making court records confidential, would be futile if agency files were not also closed. *Terzian v. Superior Court (1970) 10 Cal. App. 3d 286, 292-293, 88 Cal. Rptr. 806*

Court in guardianship proceeding as not in error in ordering investigation by probation department if it might be necessary to inspect adoption agency's files. *Terzian v. Superior Court (1970) 10 Cal. App. 3d 286, 291-292, 88 Cal. Rptr. 806*

California courts as not required to open files that are confidential pursuant to former Civil Code provisions superseded by *Fam. Code § 9200* if party seeking information intends to collaterally attack adoption decree in another state and no defect appears on face of record in California proceedings. *Hubbard v. Superior Court (1961) 189 Cal. App. 2d 741, 752, 11 Cal. Rptr. 700*

Files closed pursuant to former Civil Code provisions superseded by *Fam. Code § 9200* as not closed to parties to adoption proceeding or their attorneys. *Hubbard v. Superior Court (1961) 189 Cal. App. 2d 741, 750-752, 11 Cal. Rptr. 700*

Cloture of adoption proceedings pursuant to former Civil Code provisions superseded by *Fam. Code § 9200* as not to be broken except in exceptional circumstances and for good cause. *Hubbard v. Superior Court (1961) 189 Cal. App. 2d 741, 748, 11 Cal. Rptr. 700*

Order granting or denying inspection of records closed under former Civil Code provisions superseded by *Fam. Code § 9200* as reversible only on showing that superior court abused discretion. *Hubbard v. Superior Court (1961) 189 Cal. App. 2d 741, 748, 11 Cal. Rptr. 700*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCourt RecordsFamily LawAdoptionDisclosuresAdoption RecordsCivil ProcedureCounselGeneral OverviewFamily LawAdoptionDisclosuresGeneral Overview

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§ 12D.32 Law Reviews

Comment, *Adoptees' Equal Protection Rights, 28 U.C.L.A. L. Rev. 1314 (1981)*

Green, *Do the Adopted Have a Right To Know?* 1(3) Family Advocate 25 (1979)

Kilbanoff, *Genealogical Information in Adoption: The Adoptee's Quest and the Law, 11 Fam.* L.Q. 185 (1977)

Comment, *Discovery Rights of the Adoptee--Privacy Rights of the Natural Parent: A Constitutional Dilemma, 4 San Fern. V. L. Rev. 65 (1975)*

Legal Topics:

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

§§ 12D.33[Reserved]

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2-12D California Forms of Pleading and Practice--Annotated § 12D.40

§ 12D.40 Court Report of Adoption [Health & Safety Code § 102625]--SDH Form VS 44

[1] FORM Court Report of Adoption [Health & Safety Code § 102625]--SDH Form VS 44

Click here to view image.

[2] Use of Form

This form is Department of Health Services VS 44, Court Report of Adoption. It is for use by the clerk of the court in which an adoption is decreed to provide information to the State Registrar of Vital Statistics from which an amended birth certificate will be prepared [*see Health & Safety Code § 102625*].

In the case of adoption of an unmarried minor, a copy of the report form will be filled out by the adoption agency, if any, or the official investigator, and delivered to the court clerk. If the adoption petition is granted, the clerk will complete the form by adding the data about the court proceeding and will then mail it to the State Registrar.

Information to be recorded on the form will be obtained by interviewing the parties or may be supplied by counsel. A client should be advised as to what information and instructions to give when interviewed. Counsel should check the report form for accuracy promptly after the decree is filed.

In the case of adoption of an adult or a married minor, counsel for the petitioners should obtain a blank copy of the report form, fill out all parts except the lines to be completed by the clerk, and deliver it to the clerk when the petition is filed. Blank copies of the form are available from the Department of Health Services, Office of State Registrar, in Sacramento.

[3] Contents of Report

The report form has space (lines 1A-7C) to record the following information, which the registrar will use to locate the existing birth record (if any) for the purpose of sealing it:

(1) Name of the adopted child before adoption (that is, the name that would appear on any existing birth record);

(2) Sex of the child;

(3) Date and place (hospital, if any, and address) of birth;

(4) Name of the physician or other person attending the birth; and

(5) Names of the "natural" parents.

The parents' names should be given as they would appear on any existing birth record. The form calls for the "natural" parents' names, but if the adopted child was previously adopted and the existing birth record shows the name of an adoptive parent, that name, instead of the name of the child's biological parent, should be given [*see Fam. Code § 8512* ("birth parent" means the biological parent, or, in the case of a child previously adopted, the adoptive parent)].

The report form also provides space (lines 8A-13) to record the full names, states of birth, and dates of birth of the child's legal parents after adoption. In most cases, these will be the two adopting parents. However, in a stepparent adoption, the custodial birth parent retains his or her parental rights; thus, he or she is the natural parent whose information should be entered. The registrar will use this information to amend the existing birth record (if any), provided that the parent or parents by adoption want the existing record amended.

The report form also provides space for certain instructions to the registrar regarding amendment of the existing birth record and issuance of a new birth certificate. An existing birth record is not required to be amended if the adoptive parent or parents request that it not be amended (line 14) [*Health & Safety Code §§ 102635, 102640*]. In the case of adult adoptions, the parties frequently decide against issuance of a new birth certificate.

The name and address of the hospital or other place where the adopted child was born will be omitted from the amended record if the registrar is so instructed (line 15) [*see Health & Safety Code § 102645*].

One of the parents must sign the report form to verify the information recorded on it (line 16A). The report form also has space to record the adoption agency or state or local governmental agency that investigated or handled the case (lines 18A, 18B), the name and address of counsel (lines 19A, 19B), and the person (parent or attorney) to whom a certified copy of the new birth certificate should be sent. The new name of the child, as set forth in the decree of adoption, is to be entered by the clerk in the clerk's certification part of the form (line 21).

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2-12D California Forms of Pleading and Practice--Annotated § 12D.41

§ 12D.41 Petition to Inspect Sealed Birth Record of State Registrar [Health & Safety Code § 102705]

[1] FORM Petition to Inspect Sealed Birth Record of State Registrar [Health & Safety Code § 102705]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
Petition of	)	PETITION TO INSPECT SEALED BIRTH RE-
_____ [*name*].	)	CORD OF ADOPTED PERSON
	)	

_____

Petitioner respectfully represents:

1. Petitioner, _____[*name*], was born on _____[*date*], in _____[*place*], and currently resides at _____[*address*].

2. On _____[*date*], in Case No. _____, entitled _____, _____ [this court *or identify court in which adoption was decreed*] entered a judgment decreeing that petitioner is the child of _____[*names of adopting parents*].

3. _____ [*Specify facts showing necessity of inspection, e.g.,* There is now pending in _____ (*specify court*), a proceeding for the admission to probate of the will of _____ (*name*), deceased, providing in part as follows: "I believe that _____ (*name of petitioner*), who was born on or about _____ (*date*) and whose address last known to me was _____, is the natural daughter of my late beloved son _____ (*name*) and that he relinquished her for adoption in California sometime in _____ (*date*). If _____ (*name of petitioner*) can establish to the satisfaction of the court having jurisdiction over the administration of my estate that she is in fact the daughter

whom my son relinquished for adoption, I give to her one-half of my entire estate"].

4. Petitioner is informed and believes and thereon alleges that the Registrar of Vital Statistics of the State of California maintains under seal a record of petitioner's birth showing _____ [*specify information, e.g.,* that petitioner's natural father was _____ (*name*)].

5. Petitioner has no means of _____ [*specify, e.g.,* establishing that she is the natural daughter of _____ (*name*) and, therefore, no means of establishing her rights, if any, under the will of _____ (*name*) hereinabove mentioned], other than by reference to the above record of petitioner's birth, if such a record exists.

WHEREFORE, petitioner prays for an order directing the Registrar of Vital Statistics of the State of California to allow inspection by petitioner of such records as the Registrar maintains relating to petitioner and that the Registrar be directed not to remove the name of petitioner's birth parents from those records before opening them for petitioner's inspection.
Dated: _____.

_____ [*firm name, if any*]

_____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner[s]

VERIFICATION

I, _____[*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to matters therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

This form is for use as a petition to inspect sealed birth records of the State Registrar of Vital Statistics that have been amended to reflect the adoption of a child [*see Health & Safety Code § 102705*]. The petition must be verified. It may be filed in the superior court of the county of residence of the adopted child or in the superior court that granted the decree of adoption [*Health & Safety Code § 102705*]. For further discussion, see *§ 12D.14*.

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2-12D California Forms of Pleading and Practice--Annotated § 12D.42

§ 12D.42 Petition for Inspection of Court Records of Adoption Proceeding [Fam. Code § 9200]

[1] FORM Petition for Inspection of Court Records of Adoption Proceeding [Fam. Code § 9200]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
Adoption Petition of	)	PETITION TO INSPECT RECORDS
_____ [*names*],	)	
Adopting Parent[s].	)	
	)	

_____

1. I, _____[*name*], am the _____ [*relationship to parties to adoption, if any, e.g.,* adopted person] in this matter.

2. On _____[*date*], a decree of adoption was entered in this matter, decreeing _____[*name of adopted person*] to be the adopted child of _____[*names of adoptive parents*].

3. _____ [*Specify all facts establishing necessity for inspecting court records, using more than one paragraph if necessary, e.g.,* I am approximately one and one-half months pregnant. Based on discussions with my obstetrician, I am informed and believe and thereon allege that my fetus may be afflicted with Raymond's Syndrome, a genetic disorder that usually manifests itself after birth and causes severe mental retardation, blindness, and premature death. If this disorder is diagnosed in my fetus, I intend to have an abortion. Based on discussions with my obstetrician, I am further informed and believe and thereon allege that an accurate diagnosis of my fetus' condition depends on tracing my genetic ancestry, which involves discovering the identity of my birth mother. Unless the court allows me to promptly inspect the confidential court records in this matter, I will be unable to discover my mother's identity within a

period in which I may safely and legally have an abortion].

WHEREFORE, petitioner prays for an order directing the clerk of the court to allow inspection and copying by petitioner of the confidential court records in this matter, including the names of the birth parents.
Dated: _____.

_____ [*firm name, if any*]

_____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner[s]

[*Verification. See § 12D.41[1]*]

[2] Use of Form

This form is for use as a verified petition to inspect the court records of an adoption matter [*see Fam. Code § 9200*; *see also Fam. Code 212* (all petitions under Fam. Code must be verified)]. It is for use by a nonparty to the adoption, which presumably includes the adopted person. For further discussion, see *§ 12D.15*.

Under *Fam. Code § 9200*, the written "authority" of a judge of the superior court is required in order to inspect sealed court adoption records. No particular procedures are set forth to obtain this authority. A petition or motion for a court order may reasonably be assumed to effect the statute. Counsel should consult local court rules and procedures to determine if there are any specific local requirements in the county where the adoption proceeding was filed. All petitions filed under the Family Code must be verified [*Fam. Code § 212*; *see also Code Civ. Proc. § 446*].

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2-12D California Forms of Pleading and Practice--Annotated § 12D.43

§ 12D.43 Petition to Delete Names of Birth Parents From Court Records Before Inspection [Fam. Code § 9200(b)]

[1] FORM Petition to Delete Names of Birth Parents From Court Records Before Inspection [Fam. Code § 9200(b)]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

In the Matter of the Adoption Petition of _____ [*names*], Adopting Parent[s].	))))))	NO. _____ PETITION TO DELETE NAMES OF BIRTH PARENTS FROM COURT RECORDS TO BE INSPECTED

Petitioners respectfully represent:

1. Petitioners _____[*names*] are the adoptive parents of _____[*name*] and parties to this matter.

2. A petition has been filed by _____[*name*], the _____ [*specify status, e.g.,* adopted person] in this matter to inspect the court records on file in the matter.

3. Petitioners do not want the names of the birth parents of the adopted person, or any information tending to identify them, to be disclosed to any nonparty, including the adopted person.

WHEREFORE: Petitioners hereby pray for a court order, pursuant to *Family Code Section 9200*, directing the clerk of the court not to provide for inspection or copying any of the documents that are listed below to any nonparty, unless the

names of the birth parents of the adopted person, and all information tending to identify those parents, are first deleted from the documents.
Dated: _____.

_____ [*firm name, if any*]

_____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner[s]

[*Verification. see § 12D.41[1]*]

[2] Use of Form

This form is for use as a verified petition for a court order directing the clerk not to provide sealed court records for inspection unless all information identifying or tending to identify the adopted person's birth parents is first deleted [*see Fam. Code § 9200(b)*; *see also Fam. Code § 212*(all petitions under Fam. Code must be verified)]. It is for use to respond to a petition to inspect sealed court adoption records [*see § 12D.42[2]*].

It is not clear from *Fam. Code § 9200*whether the right of a party (that is, the adopting parents) to prevent disclosure of the identity of the birth parents to a nonparty (that is, the adopted person) is absolute, or whether the court has discretion to permit disclosure on a showing of necessity [*see Fam. Code § 9200(b)*]. For this reason, the objecting parties may wish to set forth any facts that support nondisclosure in their petition.

All petitions filed under the Family Code must be verified [*Fam. Code § 212*; *see also Code Civ. Proc. § 446*].

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2-12D California Forms of Pleading and Practice--Annotated § 12D.44

§ 12D.44 Waiver of Rights to Confidentiality of Adoption Records for Siblings [Fam. Code § 9205]--CDSS Form AD 904A

[1] FORM SDSS FORM--Waiver of Rights to Confidentiality of Adoption Records for Siblings [Fam. Code § 9205]

Click here to view image.

[2] Use of Form

This form is the Department of Social Services form for use to waive confidentiality of the adoption records of the department or a licensed adoption agency for the purpose of allowing release of identifying information between an adult adopted person and his or her natural siblings [*see Fam. Code § 9205*]. Both the adopted person and the sibling must execute the form before information may be released [*Fam. Code § 9205(a)*; *see 22 Cal. Code Reg. § 35063*].

The form must provide for an affidavit to be executed by persons seeking to employ the procedure that, to the best of his or her knowledge, he or she is an adopted person or a sibling of an adopted person. The form must also contain a notice of an adopted person's rights to revoke waiver and a statement that information will be disclosed only if there is a currently valid waiver on file with the department or agency [*Fam. Code § 9205(c), (d)*]. For further discussion, see *§ 12D.16[3]*.

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2-12D California Forms of Pleading and Practice--Annotated § 12D.45

§ 12D.45 Request for Appointment of Confidential Intermediary [Fam. Code § 9205]--Cal Judicial Council Form ADOPT-330

[1] FORM Request for Appointment of Confidential Intermediary [Fam. Code § 9205]--Cal Judicial Council Form ADOPT-330

Click here to view image.

[2] Use of Form

This form is an illustration of the mandatory Judicial Council form of Request for Appointment of Confidential Intermediary [Cal. Judicial Council Form ADOPT-330]. This form is available in an interactive, electronic format in *LexisNexis[(R)] Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format is also available at *www.lexisone.com* at no charge.

This form may be used by an adoptee or sibling who seeks contact with the other to petition the court to appoint a confidential intermediary to help locate the other sibling [*Fam. Code § 9205(g)*; *Cal. Rules of Ct., Rule 5.410(d)*]. The sibling who is requesting contact must file a petition and submit a blank order [*see* Cal. Judicial Council Form Adopt-331; *see also § 12D.46*] to the court that finalized the adoption of either sibling [*Cal. Rules of Ct., Rule 5.410(b)(9), (10), (d)(1)(A)*]. If the sibling who is requesting contact is under 18 years of age, the petition must be filed through the sibling's duly appointed guardian ad litem under *Code Civ. Proc. § 373* or through the sibling's attorney [*Cal. Rules of Ct., Rule 5.410(d)(1)(B)*].

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2-12D California Forms of Pleading and Practice--Annotated § 12D.46

§ 12D.46 Order for Appointment of Confidential Intermediary [Fam. Code § 9205]--Cal Judicial Council Form ADOPT-331

[1] FORM Order for Appointment of Confidential Intermediary [Fam. Code § 9205]--Cal Judicial Council Form ADOPT-331

Click here to view image.

[2] Use of Form

This form is an illustration of the mandatory Judicial Council form of Order for Appointment of Confidential Intermediary [Cal. Judicial Council Form ADOPT-331]. This form is available in an interactive, electronic format in *LexisNexis[(R)] Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format is also available at *www.lexisone.com* at no charge.

This form must be submitted to the court with the Request for Appointment of Confidential Intermediary [*Cal. Rules of Ct., Rule 5.410(b)(9), (10), (d)(1)(A)*; *see § 12D.45*].

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2-12E California Forms of Pleading and Practice--Annotated 12E.syn

§ 12E.syn Synopsis to Chapter 12E: ADOPTIONS: ATTACK ON DECREE

§ 12E.01 Scope of Chapter

§ 12E.02 Cross References

§§ 12E.03-12E.09 [Reserved]

§ 12E.10 Governing Law

§ 12E.11 Appeal From Judgment

[1] Review by Writ Preferred

[2] Persons Entitled to Appeal

[3] Stay; Supersedeas

§ 12E.12 Motion to Vacate Decree Made Within Six Months of Entry

§ 12E.13 Equitable Motion or Action to Vacate Decree

[1] Nature of Remedy

[2] Persons Entitled to Relief

[3] Grounds for Attack

[a] Lack of Jurisdiction

[b] Fraud, Duress, or Mistake

[c] Best Interests of Child

[d] Breach of Postadoption Contact Agreement

[e] Effect of Lack of Postadoption Sibling Contact if Dependent Adopted

[4] Limitation Period; Laches

[5] Effect of Vacating Decree on Parental Rights of Birth Parents

[6] Effect of Vacating Decree on Adoption Agency

[7] Procedure

[a] Jurisdiction and Venue

[b] Relief

§ 12E.14 Collateral Attack

[1] Direct and Collateral Attack Distinguished

[2] Grounds for Collateral Attack

[3] Decree of Other Jurisdiction

[4] Habeas Corpus

§ 12E.15 Setting Aside Adoption for Child's Mental Illness or Developmental Disability

§§ 12E.16-12E.29 [Reserved]

§ 12E.30 State Statutes

§ 12E.31 Decisions

[1] Collateral Attack

[2] Equitable Action to Set Aside Decree

[3] Full Faith and Credit

[4] Habeas Corpus

[5] Parties

[6] Review by Writ

[7] Standard of Appellate Review

[8] Statute of Limitations

§ 12E.32 Law Reviews

§§ 12E.33-12E.39 [Reserved]

§ 12E.40 Notice of Motion for Relief From Decree of Adoption Taken Through Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473]

[1] FORM

[2] Use of Form

§ 12E.41 Birth Parent's Complaint in Equity [Code Civ. Proc. § 425.10] to Set Aside Decree of Adoption and for Injunctive Relief [Code Civ. Proc. § 526]--Fraudulently Induced Consent

[1] FORM

[2] Use of Form

[3] Mandatory Injunction

[4] Verification

[5] Certification Regarding Notice

§ 12E.42 Judgment Vacating Decree of Adoption [Code Civ. Proc. § 577]

[1] FORM

[2] Use of Form

[3] Restoration of Parental Rights

[4] Custody of Child

§ 12E.43 Petition to Set Aside Adoption of Developmentally Disabled or Mentally Ill Child [Fam. Code § 9100]

[1] FORM

[2] Use of Form

§ 12E.44 Order Granting Petition to Set Aside Adoption of Developmentally Disabled or Mentally Ill Child [Fam. Code § 9101]

[1] FORM

[2] Use of Form

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PART I. SCOPE

2-12E California Forms of Pleading and Practice--Annotated § 12E.01

§ 12E.01 Scope of Chapter

This chapter discusses and contains forms pertaining to the various procedures by which an adoption decree may be challenged or set aside after it has been entered, including by appeal, by motion to vacate under *Code Civ. Proc. § 473*, by equitable motion or action to vacate, by collateral attack, and by statutory motion to set aside the adoption of a developmentally disabled child under *Fam. Code § 9100.*

Legal Topics:

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

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2-12E California Forms of Pleading and Practice--Annotated § 12E.02

§ 12E.02 Cross References

Procedures for adoption are discussed in Chs. 12B, *Adoptions: Unmarried Minors* , and 12C, *Adoptions: Adults and Married Minors* . For discussion of procedures to amend or inspect adoption records, see Ch. 12D, *Adoptions: Amendment and Inspection of Records* . Proceedings by which to terminate parental rights to permit adoption are discussed in Ch. 12A, *Adoptions: Termination of Parental Rights* . For a complete discussion of adoption procedures for Native American (Indian) children, see Kirkland, Luvey & Richmond, california family law practice and procedure, 2nd ed., Ch. 176 (Matthew Bender).

Legal Topics:

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

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PART I. SCOPE

2-12E California Forms of Pleading and Practice--Annotated §§ 12E.03-12E.09

[Reserved]

§§ 12E.03[Reserved]

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PART II. LEGAL BACKGROUND

2-12E California Forms of Pleading and Practice--Annotated § 12E.10

§ 12E.10 Governing Law

Statutes governing vacation of adoption are found in Division 13, Part 2, Chapter 6 of the Family Code [*Fam. Code § 9100 et seq.*]. A motion to vacate an order or judgment within six months of entry on grounds of mistake, inadvertence, surprise, or excusable neglect is governed by *Code Civ. Proc. § 473*. Case law governs equitable proceedings, by motion or action, to set aside a decree of adoption.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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2-12E California Forms of Pleading and Practice--Annotated § 12E.11

§ 12E.11 Appeal From Judgment

[1] Review by Writ Preferred

Normal appellate procedures [*see Code Civ. Proc. § 904.1*] are generally inadequate in adoption matters because of the delays involved. By the time the appeal is ready to be heard, the child will have been in his or her custodial home for such a long period that an appellate court will be hesitant to disturb the status quo. Further, there is a strong policy in favor of placing the child in a permanent and stable environment as soon as possible [*see San Diego County Dep't of Public Welfare v. Superior Court of San Diego County (1972) 7 Cal. 3d 1, 9, 101 Cal. Rptr. 541, 496 P.2d 453]* . Thus, a temporary placement for the duration of the appeal process is not really an option.

For this reason, review by extraordinary writ is looked on favorably in adoption matters. A writ of mandate [*see Code Civ. Proc. § 1084*] or prohibition [*see Code Civ. Proc. § 1102*] is considered a proper proceeding to test the jurisdiction of the superior court to decide an adoption [*San Diego County Dep't of Public Welfare v. Superior Court of San Diego County (1972) 7 Cal. 3d 1, 9, 101 Cal. Rptr. 541, 496 P.2d 453]* . In this regard, it is sometimes said that the statutory requirements for an adoption are jurisdictional [*see Estate of Sharon (1918) 179 Cal. 447, 454, 177 P. 283* ; *In re Brittany H. (1988) 198 Cal. App. 3d 533, 553, 243 Cal. Rptr. 763]* . Counsel for a party to an adoption proceeding who is aggrieved by an order or decree of the superior court may attempt to characterize the court's act as in excess of its jurisdiction and seek immediate review by extraordinary writ [*see, e.g., Jinny N. v. Superior Court (1987) 195 Cal. App. 3d 967, 969, 241 Cal. Rptr. 95* (dismissal of petition for agency adoption after agency refused to consent reviewed by writ of mandate; court did not discuss any jurisdictional issue)]. However, if the judgment or order is appealable, review by writ should be sought before the period for appeal has expired [*see Mauro B. v. Superior Court (1991) 230 Cal. App. 3d 949, 956-957, 281 Cal. Rptr. 507]* . For discussion of the writs of mandate and prohibition and appropriate forms, see Ch. 358, *Mandate and Prohibition* .

[2] Persons Entitled to Appeal

A party aggrieved by the judgment in a special proceeding, such as adoption, may appeal from it by filing a notice of appeal within the prescribed period [*Code Civ. Proc. §§ 902, 904.1*; *Cal. Rules of Ct., Rules 8.100, 8.104, 8.108* (manner of and time for filing appeal)]. Technically, the petitioners may be the only parties to an adoption matter [*see Fam. Code §§ 8714(c), 8802(c), 8912(b), 9000(c)* (caption to adoption petition must contain names of petitioning

adopting parents but not name of child); *see also Fam. Code §§ 9321(a), 9324* (in adult adoption, adopted person and adopting person are both petitioners)]. There are no express statutory procedures for filing responsive pleadings to oppose the adoption [*but see Adoption of Lenn E. (1986) 182 Cal. App. 3d 210, 218-220, 227 Cal. Rptr. 63* (allowing grandparents to intervene under unique circumstances)]. Nevertheless, individuals and agencies have often been permitted to appear and present evidence in opposition to the adoption and to appeal from a decree of adoption.

A natural parent who must be cited to appear in a stepparent adoption [*see Fam. Code §§ 8604, 8605*] has been afforded the right to oppose the petition and to appeal from the decree of adoption [*see In re Jay R. (1983) 150 Cal. App. 3d 251, 257 n.2, 197 Cal. Rptr. 672* ; *Adoption of Coffee (1976) 59 Cal. App. 3d 593, 595-596, 130 Cal. Rptr. 887* ; *see also Adoption of Pierce (1971) 15 Cal. App. 3d 244, 246-247, 93 Cal. Rptr. 171* (appeal from denial of motion to vacate decree by natural father alleging legal status of presumed father so that his consent to adoption was required)]. Also, a licensed adoption agency that placed the child for adoption but subsequently withdrew its consent has been allowed to appeal the decree [*see Adoption of McDonald (1954) 43 Cal. 2d 447, 451-452, 274 P.2d 860]* , and the Department of Social Services has been afforded the status of "objector" to an adoption and permitted to appeal [*see Adoption of S. (1951) 107 Cal. App. 2d 211, 213, 236 P.2d 821]* . In none of these cases was the standing of the nonparty appellant to appear and appeal questioned.

The standing of nonparent relatives has presented greater difficulty. In several older cases, grandparents were afforded the right to appeal a decree of adoption without consideration of their standing to do so [*see Adoption of Martin (1946) 76 Cal. App. 2d 133, 134, 172 P.2d 552* ; *In re Fahlman (1927) 84 Cal. App. 248, 250, 257 P. 893]* . However, in a more recent case, the court held that grandparents have no standing to contest a stepparent adoption [*see Adoption of Berman (1975) 44 Cal. App. 3d 687, 691-695, 118 Cal. Rptr. 804* ; *but see Adoption of Lenn E. (1986) 182 Cal. App. 3d 210, 215-220, 227 Cal. Rptr. 63* (trial court's grant of intervention to maternal grandparents affirmed); *Reeves v. Bailey (1975) 53 Cal. App. 3d 1019, 1022-1023, 126 Cal. Rptr. 51* (grandparents have standing to appeal on ground of fraud but not on ground of lack of notice)].

[3] Stay; Supersedeas

In the case of a proceeding for adoption of an unmarried minor, the perfecting of an appeal from the judgment (whether granting or denying the petition) does not automatically stay proceedings insofar as the judgment affects the custody of the minor [*see Code Civ. Proc. § 917.7*]. However, the superior court may grant a stay pending appeal or for some other appropriate period [*Code Civ. Proc. §§ 917.7, 918*], and the appellate court may issue a writ of supersedeas in an appropriate case [*see, e.g., Adoption of Pierce (1970) 5 Cal. App. 3d 316, 318-321, 85 Cal. Rptr. 104* (writ issued to compel evidentiary hearing on continuation of appellant's visiting rights with daughter that were suspended in adoption proceeding)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsReviewabilityTime LimitationsFamily LawAdoptionProceduresGeneral OverviewFamily LawAdoptionConsentGeneral Overview

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2-12E California Forms of Pleading and Practice--Annotated § 12E.12

§ 12E.12 Motion to Vacate Decree Made Within Six Months of Entry

Code Civ. Proc. § 473 provides that within a reasonable period, but in no event more than six months, after entry of the judgment in a civil action, the party against whom the judgment was rendered may move to have the judgment vacated if it was rendered against the party because of his or her "mistake, inadvertence, surprise, or excusable neglect" [*Code Civ. Proc. § 473*]. This statute has been held applicable in an adoption proceeding. It has also been held to permit a parent who is not a party to move for vacation of a judgment decreeing the adoption of his or her child if the parent's consent was obtained by material misrepresentation, that is, extrinsic fraud [*In re Yoder (1926) 199 Cal. 699, 701, 251 P. 205* ; *see In re Bartholomew (1938) 29 Cal. App. 2d 343, 347, 84 P.2d 199* (motion used by parent, but without success on merits)].

If a motion made under *Code Civ. Proc. § 473* is denied, the order denying the motion may be appealed [*In re Yoder (1926) 199 Cal. 699, 702-703, 251 P.205* ; *see Code Civ. Proc. § 904.1(a)(2)* (order made after appealable judgment is itself appealable)]. For a form for a notice of motion under *Code Civ. Proc. § 473*, see *§ 12E.40[1]*. For further discussion of this procedure, see Ch. 489, *Relief From Judgments and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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Volume 2: Adoptions thru Airplanes and Airports-Chs. 12-17
Chapter 12E ADOPTIONS: ATTACK ON DECREE
PART II. LEGAL BACKGROUND

2-12E California Forms of Pleading and Practice--Annotated § 12E.13

§ 12E.13 Equitable Motion or Action to Vacate Decree

[1] Nature of Remedy

A decree of adoption may be attacked in equity either by a motion brought in the original adoption matter or by an independent action to vacate the decree [*see Adoption of Sewall (1966) 242 Cal. App. 2d 208, 218-221, 51 Cal. Rptr. 367]* . Such a motion or action might be brought by the petitioner [*see, e.g., Adoption of Jason R. (1979) 88 Cal. App. 3d 11, 14, 151 Cal. Rptr. 501* (stepfather petitioner moved to set aside decree, alleging fraud of mother)], by a nonparty who appeared and actively opposed the adoption proceeding [*see, e.g., Adoption of Pierce (1971) 15 Cal. App. 3d 244, 248, 93 Cal. Rptr. 171* (motion by natural father, alleging that his consent was required)], or by a nonparty who did not participate in the adoption hearing for some reason such as lack of notice [*see, e.g., Reeves v. Bailey (1975) 53 Cal. App. 3d 1019, 1020-1024, 126 Cal. Rptr. 51* (action by grandparents, alleging lack of notice and fraud)]. For further discussion of who may bring the motion or action, see [2], *below.*

A prior motion to vacate the decree in the trial court is not a prerequisite to an equitable action to vacate [*Baker v. Baker (1933) 217 Cal. 216, 217, 18 P.2d 61]* . However, if the aggrieved person elects to proceed by motion, the denial of the motion is appealable [*Coughlin v. Coughlin (1954) 129 Cal. App. 2d 294, 295, 276 P.2d 844* ; *see Estate of Partridge (1968) 261 Cal. App. 2d 58, 61, 67 Cal. Rptr. 433* (nonparty may obtain review of judgment by moving to set aside judgment and then appealing from denial of motion)]. On failure to appeal, the denial becomes res judicata with regard to any subsequent action to set aside the decree [*Coughlin v. Coughlin (1954) 129 Cal. App. 2d 294, 295, 276 P.2d 844]* . For a form for a complaint to bring a separate equitable action to vacate an adoption, see *§ 12E.41[1]*.

[2] Persons Entitled to Relief

The availability of a procedure by which a nonparty may obtain review of an adoption decree does not necessarily entitle the nonparty to review on the merits. The appellate court may dismiss the appeal if it finds that the nonparty has no standing to attack the decree [*see Adoption of Berman (1975) 44 Cal. App. 3d 687, 691-695, 118 Cal. Rptr. 804* (grandparents have no standing to attack stepparent adoption)].

Although no case has actually equated standing to attack an adoption decree with standing to appeal the decree [*see* discussion in *§ 12E.11[2]*], the results have been essentially parallel. Thus, birth parents have been permitted to attack

the decree on various grounds [*see* *Sweeney v. Bowles (1961) 188 Cal. App. 2d 196, 10 Cal. Rptr. 240* (attack by independent action on ground of lack of notice in termination of parental rights proceeding); *Arnold v. Howell (1950) 98 Cal. App. 2d 202, 207, 219 P.2d 854* (attack by independent action on grounds of invalid or fraudulently obtained consent); *see also* discussion in *§ 12E.14[2]*]. Also, a county adoption agency has been allowed to attack the decree [*see Adoption of Emery (1961) 191 Cal. App. 2d 428, 430-432, 12 Cal. Rptr. 685* (attack by motion on ground of petitioner's misrepresentations in investigation)].

The question of the standing of grandparents has been addressed on appeals directly from the decree and on appeals of denied motions or actions to vacate without distinguishing the particular avenue by which the issue reached the court [*see* *Adoption of Lenn E. (1986) 182 Cal. App. 3d 210, 215-220, 227 Cal. Rptr. 63* (on direct appeal from judgment); *Reeves v. Bailey (1975) 53 Cal. App. 3d 1019, 1022-1023, 126 Cal. Rptr.51* (on appeal from demurrer in independent action to vacate decree); *Adoption of Berman (1975) 44 Cal. App. 3d 687, 691-695, 118 Cal. Rptr. 804* (on appeal from denial of motion to vacate decree)]. For further discussion of this issue, see *§ 12E.11[2]*.

A petitioner has been permitted to attack his stepparent adoption decree on the ground that the spouse-natural parent induced the adoption by misrepresentation [*see* *Adoption of Jason R. (1979) 88 Cal. App. 3d 11, 14, 151 Cal. Rptr. 501]* . Further, it has been held that the adopting parent of an adult adopted person may attack a decree of adoption, and that in light of such a right, the parent's heirs may attack the decree after the parent's death [*Adoption of Sewall (1966) 242 Cal. App. 2d 208, 219-222, 51 Cal. Rptr. 367]* .

[3] Grounds for Attack

[a] Lack of Jurisdiction

Lack of subject matter jurisdiction renders an adoption decree void for all purposes and subject to attack by parties or by strangers to the decree [*Estate of Smith (1948) 86 Cal. App. 2d 456, 468, 195 P.2d 842]* . It is said that all statutory requirements for an adoption are jurisdictional, and unless they are met, the proceeding for adoption is insufficient, the court is without power to approve it, and there is no lawful adoption [*Estate of Sharon (1918) 179 Cal. 447, 454, 177 P. 283* ; *In re Brittany H. (1988) 198 Cal. App. 3d 533, 553, 243 Cal. Rptr. 763]* . Thus, for example, the failure to obtain a required consent is a jurisdictional defect [*Adoption of Barnett (1960) 54 Cal. 2d 370, 377, 6 Cal. Rptr. 562, 354 P.2d 18* ; *In re Brittany H. (1988) 198 Cal. App. 3d 533, 553, 243 Cal. Rptr. 763]* .

Personal jurisdiction requirements in adoptions are not clearly established in that there are no defendants on whom summons must be served. However, because personal rights are involved, it is necessary to secure personal jurisdiction over the birth parents in order to terminate these rights (assuming that these rights were not validly terminated in a prior proceeding) [*see* *Estate of Smith (1948) 86 Cal. App. 2d 456, 468, 195 P.2d 842]* . The failure to give a required notice to a birth parent is both a jurisdictional defect and a violation of due process [*see* *Armstrong v. Manzo (1965) 380 U.S. 545, 550, 85 S. Ct. 1187, 14 L. Ed. 2d 62* (notice to birth parent is required by federal due process, and adoption decreed in absence of notice must be set aside); *Estate of Hampton (1942) 55 Cal. App. 2d 543, 562-563, 567, 131 P.2d 565]* . However, a lack of notice to and consent by a natural parent does not render the decree void for all purposes. Rather, the decree is voidable and only subject to attack by any person not served, actually or constructively, and by a minor adopted person [*Walter v. August (1960) 186 Cal. App. 2d 395, 397-398, 8 Cal. Rptr. 778* ; *Estate of Smith (1948) 86 Cal. App. 2d 456, 468, 195 P.2d 842]* . Persons who participated in the proceeding, those claiming through them, or strangers to theproceeding may not attack an adoption decree on the basis of a lack of notice to someone else, if the court had subject matter jurisdiction [*Estate of Smith (1948) 86 Cal. App. 2d 456, 468, 195 P.2d 842]* .

Jurisdictional requirements in adoption matters are discussed further in Ch. 12B, *Adoptions: Unmarried Minors*.

[b] Fraud, Duress, or Mistake

The traditional rule is that a final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired on the ground of fraud or mistake only if the alleged fraud or mistake is extrinsic rather than intrinsic. Fraud or mistake is extrinsic if it deprives one of an opportunity to present his or her case to the court [*Westphal v. Westphal (1942) 20 Cal. 2d 393, 397, 126 P.2d 105* ; *see generally* Ch. 489, *Relief From Judgments and Orders*]. Thus, the setting aside of a decree of adoption would require a showing of lack of jurisdiction or extrinsic fraud or mistake if the traditional rule were to be applied [*see, e.g., Wells v. Zenz (1927) 83 Cal. App. 137, 140-143, 256 P. 484* (lack of notice due to fraud involving omissions in declaration in support of service by publication)].

But because adoption involves the welfare of children, adherence to a distinction between extrinsic and intrinsic fraud in adoption cases has not been controlling. The usual equity requirement of extrinsic fraud does not apply to adoption proceedings, and an adoption decree may be set aside if consent is obtained through fraud, duress, or mistake, without further need to inquire into the character of the fraud [*Arnold v. Howell (1950) 98 Cal. App. 2d 202, 206-208, 219 P.2d 854* ; *see Walter v. August (1960) 186 Cal. App. 2d 395, 398, 8 Cal. Rptr. 778* (lack of natural parents' consent does not make decree void, but only subject to attack by parents or child); *but see In re David H. (1995) 33 Cal. App. 4th 368, 381-383, 39 Cal. Rptr. 2d 313* (adhering to distinction between intrinsic and extrinsic fraud in motion to set aside termination of parental rights under juvenile court law)]. Further, an adopting parent of an adult adopted person may vacate a decree of adoption on the grounds of his or her own mental incompetence or the adopted person's duress or undue influence [*Adoption of Sewall (1966) 242 Cal. App. 2d 208, 218-221, 51 Cal. Rptr. 367* (parent's heirs accede to his rights on his death)].

[c] Best Interests of Child

In one case, a decree of adoption was vacated solely because it was in the best interests of the child [*see Adoption of Jason R. (1979) 88 Cal. App. 3d 11, 151 Cal. Rptr. 501]* . The case involved a stepparent adoption and a subsequent annulment of the marriage between the stepparent and the custodial birth parent. The applicability of such a rule beyond these unusual facts is doubtful, given the policy in support of finality of judgments [*see In re Issac J. (1992) 4 Cal. App. 4th 525, 535* (only under most compelling circumstances should postjudgment events be considered)]. If nothing more than the best interests of the child is required to set aside an adoption, an adoption might be subject to attack at any time on the basis of changed circumstances [*see Adoption of Bird (1960) 183 Cal. App. 2d 140, 6 Cal. Rptr. 675* (natural mother died between date on which court granted stepfather petition and date on which judgment was entered)]. Such a situation would blur the distinction between the legal establishment of the parent-child relationship involved in adoption and the related but separate question of the custody of the child.

[d] Breach of Postadoption Contact Agreement

In relative adoptions in which a postadoption contact agreement provides for continuing contact between the birth relatives and the adoptive parents and the child [*see Fam. Code § 8616.5*], a decree of adoption may not be set aside, nor a relinquishment rescinded, nor an order terminating parental rights or any other prior court order in the adoption modified, because of the failure of a party to comply with any or all of the original or modified terms of the agreement [*Fam. Code § 8616.5(k)*]. Warnings must be included in the postadoption contact agreement that (1) after the adoption has been granted, the adoption cannot be set aside due to a failure of a party to follow the terms of the agreement; and (2), a disagreement between the parties or litigation brought concerning the agreement shall not affect the adoption nor serve as a basis for orders affecting custody of the child [*Fam. Code § 8616.5(e)*].

It remains to be seen whether the inability to set aside an adoption for failure to perform under a postadoption contact agreement also insulates the adoption from an attack grounded in fraud on a theory that the placement was induced by the false promise of the agreement, which the adoptive parents never intended to perform.

[e] Effect of Lack of Postadoption Sibling Contact if Dependent Adopted

After an adoption of a dependent child of the juvenile court in which, with the consent of the adoptive parent or parents, the order of adoption includes provisions to facilitate postadoptive sibling contact [*see Welf. & Inst. Code § 366.29*], the continuing validity of the adoption is not contingent on the postadoptive contact [*see Welf. & Inst. Code § 366.29(a)*]. Thus, it appears that a failure to allow the contact provided for in the order would not be a ground on which to set aside the adoption.

[4] Limitation Period; Laches

Any action or proceeding of any kind to vacate, set aside, or otherwise nullify a decree of adoption on any ground except fraud must be commenced within one year after entry of the decree [*Fam. Code § 9102(a)*].If the alleged ground is fraud, the action or proceeding must be commenced within three years after entry of the decree [*Fam. Code § 9102(b)*; *see Walter v. August (1960) 186 Cal. App. 2d 395, 398-400, 8 Cal. Rptr. 778* (upholding constitutionality of former statute)].

Similar prior law (former *Civ. Code § 227(d)*) has been construed as applying only to adoptions of unmarried minors [*Adoption of Sewall (1966) 242 Cal. App. 2d 208, 222-226, 51 Cal. Rptr. 367]* . It applies only to actions or proceedings that directly attack the adoption decree. It does not apply to assertions of the invalidity of the decree in a collateral proceeding [*Estate of O'Dea (1973) 29 Cal. App. 3d 759, 774-775, 105 Cal. Rptr. 756* (heirship proceeding); *see* discussion in *§ 12E.14*].

Although the periods specified in the statute have been characterized as periods of limitation [*see Estate of O'Dea (1973) 29 Cal. App. 3d 759, 774-775, 105 Cal. Rptr. 756]* , it is not clear whether they are subject to suspension because of minority, insanity, or other reasons under *Code Civ. Proc. § 350 et seq.* [*compare Adoption of Sewall (1966) 242 Cal. App. 2d 208, 222-226, 51 Cal. Rptr. 367* (implying no suspension possible) *with Walter v. August (1960) 186 Cal. App. 2d 395, 400, 8 Cal. Rptr. 778* (surmising suspension might be possible in appropriate case)].

In cases in which the statute does not apply (for example, adult adoptions), the limitation period begins to run when the fraud that gives right to vacate the decree is or reasonably should be discovered [*Adoption of Sewall (1966) 242 Cal. App. 2d 208, 226, 51 Cal. Rptr. 367]* .

Because the proceeding is equitable, the plaintiff or moving party may be denied relief on the ground of laches. Laches consists of an unreasonable delay in commencing the action (even if the period of limitation has not expired), accompanied by the plaintiff's acquiescence in the acts complained of or prejudice to the defendant. Lapse of time is not as important as whether prejudice to the defendant has resulted. If the delay in commencing the action has caused no detriment to the defendant, his or her plea of laches will be disregarded [*see generally Conti v. Board of Civil Service Commissioners (1969) 1 Cal. 3d 351, 359-360, 82 Cal. Rptr. 337, 461 P.2d 617* (defining laches and citing numerous cases); *Brown v. State Personnel Board (1941) 43 Cal. App. 2d 70, 79, 110 P.2d 497]* .

[5] Effect of Vacating Decree on Parental Rights of Birth Parents

In some adoptions, the parental rights of the birth parents are terminated in a separate proceeding before the decree of adoption is granted [*see Fam. Code § 7800 et seq.*, discussed in Ch. 12A, *Adoptions: Termination of Parental Rights* ; *Welf. & Inst. Code §§ 366.25, 366.26*, discussed in Ch. 328, *Juvenile Courts: Dependency Proceedings*]. In an agency adoption, the filing of a properly executed relinquishment form with the Department of Social Services terminates the parental rights of the birth parents by operation of law [*see Fam. Code § 8700(j)*]. If the birth parents' parental rights were previously terminated in a separate proceeding by one of the above means, the vacation of the decree of adoption presumably would not automatically reinstate those rights [*see In re Randi D. (1989) 209 Cal. App. 3d 624, 627-628, 257 Cal. Rptr. 421* (dismissal of petition for adoption does not require reversal of judgment terminating parental rights)]. However, there is some judicial authority for the proposition that termination of parental rights and adoption

are interdependent acts, and that the abandonment of an adoption should reinstate parental rights, particularly if the result is that otherwise the child will be left with no parent or guardian and will become a ward of the court [*see In re Elise K. (1982) 33 Cal. 3d 138, 145-151, 187 Cal. Rptr. 483, 654 P.2d 253* (dicta of Bird, C.J., concurring); *In re Randi D. (1989) 209 Cal. App. 3d 624, 631-634, 257 Cal. Rptr. 421* (Wallin, J., dissenting); *see also Welf. & Inst. Code § 366.26(c)(1)* (requiring finding of adoptability for termination of parental rights with regard to dependent child of juvenile court; fact that child is not yet placed in preadoptive home or with relative or foster family prepared to adopt child is not basis for court to conclude that it is unlikely child will be adopted)]. For this reason, it is probably wise to join the natural parents, if possible, as defendants in any action to vacate a decree of adoption.

If the birth parents' rights were not previously terminated by one of the above means, they are terminated by the decree of adoption [*see Fam. Code § 8617*], through a finding that consent has either been validly given or is not required [*see Fam. Code §§ 7664, 8604-8606*, discussed in Ch. 12A, *Adoptions: Termination of Parental Rights*]. In such a case, the vacation of the decree of adoption should have the effect of reinstating those parental rights, along with the duties and obligations that go along with the rights [*see Adoption of Jason R. (1979) 88 Cal. App. 3d 11, 17, 151 Cal. Rptr. 501* ; *see also Fam. Code § 3900* (duty of parent to support child)]. If a birth parent is not the party seeking to vacate the decree, and he or she continues to desire to relinquish these rights and avoid these duties, his or her interests may be impeded or impaired if the decree is vacated in his or her absence. Therefore, the birth parents may be essential parties subject to compulsory joinder in an equitable action to vacate the decree [*see generally Code Civ. Proc. § 389*]. The same may be true of the birth parents of an adult child for whom a duty of support may exist [*see Fam. Code §§ 3901, 3910* (circumstances under which parent may owe duty of support to adult child); *see also* Ch. 394, *Parent and Child*].

[6] Effect of Vacating Decree on Adoption Agency

In an agency adoption [*see generally* discussion in Ch. 12B, *Adoptions: Unmarried Minors*], the Department of Social Services or a licensed adoption agency to which a child has been freed for adoption, either by relinquishment or termination of parental rights, is responsible for the care of the child and is entitled to the exclusive custody and control of the childuntil a final decree of adoption is granted [*Fam. Code § 8704(a)*]. Thus, the vacation of a decree of adoption would restore the agency's rights and duties of custody and control, including its right to select the succeeding home placement of the child [*Department of Social Services v. Superior Court (1997) 58 Cal. App. 4th 721, 68 Cal. Rptr. 2d 239]* . For this reason, the placing agency should be joined as a defendant in an equitable action to set aside an agency adoption.

[7] Procedure

[a] Jurisdiction and Venue

Because subject matter jurisdiction over adoptions is in the superior court [*see Fam. Code §§ 200, 8714(a), 8802(a), 8912(a), 9000(a), 9321(a)*], an equitable action to set aside an adoption decree should be brought in the superior court as other than a limited civil case [*see Code Civ. Proc. §§ 85, 86*]. A judgment rendered by the superior court in one county may be invalidated by that in another county [*see Young v. The Young Holdings Corp., Ltd. (1938) 27 Cal. App. 2d 129, 146-147, 80 P.2d 723]* . Therefore, the general venue rules of the Code of Civil Procedure may apply [*see Code Civ. Proc. § 395*]. However, adoption has been viewed as a quasi-in rem proceeding [*see Walter v. August (1960) 186 Cal. App. 2d 395, 397-398, 8 Cal. Rptr. 778]* . Therefore, the best practice is probably to bring the action in the superior court of the county where the child is domiciled.

At least prior to January 1, 2000, when the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA-- *Fam. Code § 3400 et seq.*) became operative, if a child was not domiciled in California, the jurisdiction of California courts to vacate the decree could be controlled by the (now former) Uniform Child Custody Jurisdiction Act [*see* former *Fam. Code § 3400 et seq.*], as well as by the federal Parental Kidnapping Prevention Act of 1980 [*see 28 U.S.C. § 1738A*].

This is because the vacation of a decree of adoption is arguably a "modification decree" within the meaning of those statutes [*see 28 U.S.C. § 1738A(b)(5)*; former *Fam. Code § 3402(g)* (modification decree is a custody decree that modifies or replaces a prior decree, whether made by the court that rendered the prior decree or by another court)].

However, on and after January 1, 2000, the UCCJEA expressly excludes adoptions from its coverage [*Fam. Code § 3403*], and would appear, therefore, to no longer apply to collateral attack on an adoption decree. The extent to which the PKPA may continue to apply is presently unclear. For further discussion of these laws, see Ch. 394, *Parent and Child* .

[b] Relief

Because the action is equitable, the court may give any relief consistent with the case made out by the plaintiff or moving party. The plaintiff should plead whatever facts can be proved, in addition to the defect in the decree, to support complete relief. The jurisdiction of equity to afford appropriate relief from void or voidable judgments generally on a showing of proper circumstances is well settled [*see Caldwell v. Taylor (1933) 218 Cal. 471, 475, 23 P.2d 758]* .

If the child is an unmarried minor, the question of custody may arise. The vacation of a decree of adoption that restores the parental rights of the birth parents [*see* [5], *above*] does not require the court to return the child to a birth parent if it is in the child's best interests that the adopting family retain custody. However, before the court may give custody of an unmarried minor child to someone other than a parent without the parent's consent, the court must find that giving custody to the parent would be detrimental to the child and giving custody to a nonparent would be in the child's best interest [*Fam. Code § 3041*; *see In re G. (1974) 11 Cal. 3d 679, 695-696, 114 Cal. Rptr. 444, 523 P.2d 244* ; *In re Reyna (1976) 55 Cal. App. 3d 288, 295-296, 126 Cal. Rptr. 138* (former Civil Code section superseded by *Fam. Code § 3041*applies in any proceeding, not just proceeding under earlier Family Law Act, in which custody of child is at issue)]. If, before the adoption proceeding, custody and control of the child's natural parents were validly terminated in a proceeding pursuant to *Fam. Code § 7800 et seq.* [*see* discussion in Ch. 12A, *Adoptions: Termination of Parental Rights*], the custody of the child should be returned to the court-appointed guardian [*see Fam. Code § 7893(a)(1)*].

Various postjudgment proceedings may also have occurred that should be reversed or nullified after the adoption decree is vacated. Primarily, if the child's birth certificate was amended [*see* discussion in Ch. 12D, *Adoption: Amendment and Inspection of Records*], it should be amended again to restore the original record. For a form for an order vacating a decree of adoption, see *§ 12E.42[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 12E.14 Collateral Attack

[1] Direct and Collateral Attack Distinguished

A direct attack is a proceeding instituted for the specific purpose of vacating, reversing, or otherwise attacking a judgment. Examples include a motion for new trial, a motion to vacate the judgment, an appeal, an independent action in equity to vacate the judgment, and proceedings for certiorari or other writs. By contrast, a collateral attack is made not in a proceeding brought for the specific purpose of attacking the judgment, but in some other proceeding having a different purpose. It is an attempt to avoid the effect of the judgment in some other context [*Gonzales v. State of California (1977) 68 Cal. App. 3d 621, 632, 137 Cal. Rptr. 681]* .

Adoption decrees are commonly attacked collaterally in a probate proceeding in which the invalidity of the parent-child relationship that wasestablished by the adoption is asserted [*see, e.g.,* *Estate of O'Dea (1973) 29 Cal. App. 3d 759, 761, 105 Cal. Rptr. 756* (petition to determine heirship filed by adopted person in estate of natural mother, alleging invalidity of adoption decree); *Estate of Hampton (1942) 55 Cal. App. 2d 543, 547, 567-568, 131 P.2d 565]* . Adherence to the distinction between direct and collateral attack has not been universally observed, and motions to vacate judgments have often been referred to as collateral attacks [*see, e.g.,* *Becker v. S.P.V. Construction Co. (1980) 27 Cal. 3d 489, 492-493, 165 Cal. Rptr. 825, 612 P.2d 915* ; *Adoption of Jason R. (1979) 88 Cal. App. 3d 11, 14, 151 Cal. Rptr. 501]* .

[2] Grounds for Collateral Attack

Collateral attack is proper to contest a judgment void on its face for lack of personal or subject matter jurisdiction or for the granting of relief that the court has no power to grant [*Armstrong v. Armstrong (1976) 15 Cal. 3d 942, 950, 126 Cal. Rptr. 805, 544 P.2d 941* ; *see generally* discussion in Ch. 12B, *Adoptions: Unmarried Minors*]. Whether other equitable grounds that would be sufficient to vacate the decree in an independent action or motion, such as fraud, could be asserted in a collateral attack appears not to have been addressed by any reported California appellate decision. It has been held that the ineffective assistance of counsel in failing to perfect an appeal is not a proper ground for collateral attack [*In re Issac J. (1992) 4 Cal. App. 4th 525, 531-532, 6 Cal. Rptr. 2d 65* (judgment freeing child from parental custody and control under former Civil Code section superseded by *Fam. Code § 7800 et seq.*)].

The invalidity of a former California judgment must appear on the face of the record, and if the invalidity or lack of

jurisdiction does not so appear, it will be presumed in favor of the judgment [*Gonzales v. State of California (1977) 68 Cal. App. 3d 621, 632, 137 Cal. Rptr. 681]* . The record, or judgment roll, includes the pleadings, proofs of service, findings or verdict, and judgment [*Swain v. Swain (1967) 250 Cal. App. 2d 1, 10, 58 Cal. Rptr. 83]* . However, a foreign judgment may be collaterally attacked with extrinsic evidence [*Estate of Smith (1948) 86 Cal. App. 2d 456, 467, 195 P.2d 842* ; *see Estate of O'Dea (1973) 29 Cal. App. 3d 759, 765, 105 Cal. Rptr. 756* (Canadian divorce decree collaterally attacked by private legislative bill declaring adoption decree to have been entered without jurisdiction); *see also* [3], *below*].

[3] Decree of Other Jurisdiction

Under rules of conflict of laws and principles of comity, the status of adoption is determined by the laws of the jurisdiction where the adoption was effected [*Estate of O'Dea (1973) 29 Cal. App. 3d 759, 774, 105 Cal. Rptr. 756]* . The full faith and credit clause of the United States Constitution requires one state to recognize the validity of the judicial orders, decrees, and judgments of sister states [*see* U.S. *Const., art. IV, § 1*]. Comity extends the same recognition to other foreign jurisdictions [*see Estate of O'Dea (1973) 29 Cal. App. 3d 759, 773-774, 105 Cal. Rptr. 756]* . Thus, it has been stated that one state may not consider a collateral attack on a decree of adoption entered in another state on any ground, jurisdictional or otherwise [*Hubbard v. Superior Court (1961) 189 Cal. App. 2d 741, 749-751, 11 Cal. Rptr. 700* (involving attempted collateral attack on California decree in New York)].

Nevertheless, California courts have permitted collateral attacks on the adoption decrees of other jurisdictions in several cases. It has been held that the jurisdiction of a sister state to enter a decree of adoption may be questioned collaterally in another state, notwithstanding the full faith and credit clause and notwithstanding the jurisdictional recitals in the judgment [*Estate of Hampton (1942) 55 Cal. App. 2d 543, 552, 131 P.2d 565]* . If it appears that no notice was given to a birth parent, the decree is void for lack of jurisdiction and as a violation of due process [*Estate of Hampton (1942) 55 Cal. App. 2d 543, 552-563, 131 P.2d 565* (upholding collateral attack by adopted person); *see also Estate of O'Dea (1973) 29 Cal. App. 3d 759, 773, 105 Cal. Rptr. 756* (same rule applies to adoption decrees of foreign countries)].

This rule applies whether or not notice is required by the jurisdiction in which the adoption was decreed because notice to a birth parent is indispensable under the due process clause [*Estate of Martin (1948) 86 Cal. App. 2d 474, 477, 195 P.2d 839* ; *see Armstrong v. Manzo (1965) 380 U.S. 545, 550, 85 S. Ct. 1187, 14 L. Ed. 2d 62* ; *see generally* discussion in Ch. 12A, *Adoptions: Termination of Parental Rights*]. However, a defect in personal jurisdiction may only be raised by the adopted person or by a person over whom the court was required to, but did not have, personal jurisdiction. Persons over whom the court had jurisdiction, persons claiming through them, or strangers to the proceeding may not collaterally attack the decree if the court had jurisdiction over the subject matter [*Estate of Smith (1948) 86 Cal. App. 2d 456, 467-468, 195 P.2d 842]* .

The Full Faith and Credit Clause establishes the prima facie validity of a sister-state adoption decree. The burden is on the person attacking the decree to establish its invalidity. If a jurisdictional defect does not affirmatively appear on the face of the record, extrinsic evidence must be presented [*Estate of Smith (1948) 86 Cal. App. 2d 456, 467, 195 P.2d 842]* .

[4] Habeas Corpus

An adoption may be attacked by a writ of habeas corpus brought by the person who is entitled to custody of the child if the decree of adoption is void [*see, e.g., Ex parte Clark (1891) 87 Cal. 638, 640, 25 P. 967* (overruled on other grounds in *Adoption of Barnett (1960) 54 Cal. 2d 370, 378, 6 Cal. Rptr. 562, 354 P.2d 18*); *but see Lycoming County Children's Services (1982) 458 U.S. 502, 513-514, 102 S. Ct. 3231, 73 L. Ed. 2d 928* (federalhabeas corpus is not available as a remedy in child custody matters)]. Habeas corpus is a form of collateral attack in that its purpose is to obtain custody of the child from another, but the granting of the writ requires that the court refuse to recognize the validity of a decree of adoption [*see Adoption of Alexander S. (1988) 44 Cal. 3d 857, 866-867, 245 Cal. Rptr. 1, 750*

P.2d 778] .

Habeas corpus is not a substitute for appeal and is not generally available to attack an appealable order from which no appeal was taken. Habeas corpus may not be used to collaterally attack a final nonmodifiable judgment in an adoption-related action if the trial court had jurisdiction to render the final judgment [*Adoption of Alexander S. (1988) 44 Cal. 3d 857, 865, 866-868, 245 Cal. Rptr. 1, 750 P.2d 778* (parent seeking to withdraw consent may not seek habeas corpus after failing to pursue appeal after motion was denied); *In re Issac J. (1992) 4 Cal. App. 4th 525, 531-535, 6 Cal. Rptr. 2d 65]* . Thus, the grounds for relief from an adoption decree through habeas corpus are the jurisdictional grounds generally required for collateral attack [*see* [2], *above*]. For discussion of the procedure for bringing a habeas corpus proceeding, see Ch. 292, *Habeas Corpus* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionProceduresGeneral OverviewFamily LawAdoptionInvalid AdoptionsConstitutional LawRelations Among GovernmentsFull Faith & CreditCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsFamily LawChild CustodyEnforcementHabeas Corpus Relief

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§ 12E.15 Setting Aside Adoption for Child's Mental Illness or Developmental Disability

If any child adopted pursuant to California law shows evidence of a developmental disability or mental illness after the adoption decree is final, the adopting parents may petition the court that granted the adoption to have the adoption set aside. The disability or mental illness must have resulted from conditions that existed before the adoption, of which the adopting parents had no knowledge before the entry of the decree. The conditions must be of such extent that the child cannot be relinquished to an adoption agency on the grounds that the child is considered unadoptable [*Fam. Code § 9100(a)*; *see Adoption of Katherine A. (1982) 135 Cal. App. 3d 200, 204, 185 Cal. Rptr. 101* (court must expressly find that child is not adoptable); *see also Adoption of Kay C. (1991) 228 Cal. App. 3d 741, 747-757, 278 Cal. Rptr. 907* (upholding constitutionality of statute)].

The petition must be filed within five years after the entry of the decree of adoption [*Fam. Code § 9100(b)*; *see Adoption of Katherine A. (1982) 135 Cal. App. 3d 200, 203, 185 Cal. Rptr. 101]* . In the case of a joint adoption by husband and wife, one parent may petition to set aside the adoption with regard to him or her, leaving the parent-child relationship to continue with respect to the other parent. The other is, however, an indispensable party [*Department of Social Welfare v. Superior Court (1969) 1 Cal. 3d 1, 4-6, 81 Cal. Rptr. 345, 459 P.2d 897* (adopting parents subsequently divorced)].

The clerk of court must immediately notify the Department of Social Services of the action. Within 60 days after notice, the department must file a full report with the court and must appear before the court for the purpose of representing the adopted child [*Fam. Code § 9100(c)*].

The granting of the petition is within the discretion of the court, even if all of the statutory requirements are present. Factors to be considered include the welfare of the child; the extent, nature, and duration and prognosis of the disability; the degree of dependency; the length of time of the adoption; and the bonds of affection or attachment. If only one adopting parent petitions, the court should also consider the effect of any divorce of the parents, the sources of support for the child that may be available to the nonpetitioning parent, and the ability of that parent to care for the needs of the child [*Department of Social Welfare v. Superior Court (1969) 1 Cal. 3d 1, 6, 81 Cal. Rptr. 345, 459 P.2d 897]* .

If the decree of adoption is set aside, the court must direct the district attorney, the county counsel, or the county

department of social welfare to take appropriate proceedings under the Welfare and Institutions Code, presumably, to have the child declared a dependent of the court under *Welf. & Inst. Code § 300* [*see generally* Ch. 328, *Juvenile Courts: Dependency Proceedings*]. The court may also make orders relative to the care, custody, or confinement of the child, pending the proceedings, as it sees fit [*Fam. Code § 9101(a)*]. The county in which the proceedings for adoption occurred is and remains liable for the support of the child until the child is able to support himself or herself [*Fam. Code § 9101(b)*]. Thus, it seems clear that the granting of a *Fam. Code § 9100*petition does not reestablish the parental rights of the natural parents.

For a form for a petition to set aside an adoption under *Fam. Code § 9100*, see *§ 12E.43[1]*. For a form for the order setting aside the adoption under that statute, see *§ 12E.44[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawDelinquency & DependencyDependency ProceedingsCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewFamily LawAdoptionProceduresGeneral OverviewGovernmentsCourtsClerks of CourtFamily LawParental Duties & RightsGeneral Overview

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[Reserved]

§§ 12E.16[Reserved]

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§ 12E.30 State Statutes

Vacating adoption when child developmentally disabled or mentally ill. *Fam. Code § 9100*

Commencement of guardianship proceedings; support of child. *Fam. Code § 9101*

Limitation period for proceedings to vacate adoption. *Fam. Code § 9102*

Motion to set aside judgment entered as result of mistake, inadvertence, surprise, or excusable neglect. *Code Civ. Proc. § 473*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseFamily LawAdoptionProceduresGeneral Overview

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§ 12E.31 Decisions

[1] Collateral Attack

Extrinsic evidence as proper to prove existence of facts necessary for validity of proceeding because there is no statute requiring such facts to appear in record. *In re Williams (1894) 102 Cal. 70, 78, 36 P. 407*

In collateral attack on adoption decree, oral evidence that petitioners resided in county in which decree was entered as proper when decree did not state petitioners' residence. *In re Williams (1894) 102 Cal. 70, 77, 36 P. 407*

Petitioner, or heirs claiming under him, as estopped to deny existence of parent-child relation when adoption petition showing that court had jurisdiction over adoption proceeding was false. *In re Williams (1894) 102 Cal. 70, 77, 36 P. 407*

Under rules of conflict of laws and principles of comity, status of adoption as determined by laws of jurisdiction where adoption is effected, and rules of inheritance as determined by laws of jurisdiction of decedent's domicile at time of death. *Estate of O'Dea (1973) 29 Cal. App. 3d 759, 774, 105 Cal. Rptr. 756*

Collateral estoppel as preventing petitioner in adoption proceeding from attacking divorce decree between him and his former wife awarding custody of child to wife when he had opportunity to litigate parentage of child but failed to do so. *Adoption of Bonner (1968) 260 Cal. App. 2d 17, 23, 66 Cal. Rptr. 812*

Lack of notice of adoption proceeding as denial of natural parent's right to procedural due process, which may be raised in collateral attack by such parent or child; other parties with proper notice as not able to raise such defect in collateral attack. *Estate of Smith (1948) 86 Cal. App. 2d 456, 469, 195 P.2d 842* ; *see Adoption of Sewall (1966) 242 Cal. App. 2d 208, 216, 51 Cal. Rptr. 367*

Collateral attack of adoption decree of other state as permitted in California if decree shows on its face that no notice was given to natural father. *Estate of Martin (1948) 86 Cal. App. 2d 474, 475-477, 195 P.2d 839*

[2] Equitable Action to Set Aside Decree

Adoption decrees as subject to being set aside on ground of extrinsic fraud. *Adoption of Sewall (1966) 242 Cal. App. 2d 208, 217-220, 51 Cal. Rptr. 367*

Adoption decrees as subject to being set aside under *Code Civ. Proc. § 473* for mistake inadvertence, surprise, or excusable neglect. *Adoption of Emery (1961) 191 Cal. App. 2d 428, 431-432, 12 Cal. Rptr. 685*

Adoption decree in stepparent adoption as subject to being set aside when natural parent, spouse of petitioner, died before entry of decree but court was not informed before such entry. *Adoption of Bird (1960) 183 Cal. App. 2d 140, 147, 6 Cal. Rptr. 675*

Decree of adoption as permitted to be vacated on the grounds that would entitle court to vacate any other order or decree. *Adoption of Bird (1960) 183 Cal. App. 2d 140, 145, 6 Cal. Rptr. 675*

Adoption decree set aside on basis of fraud because service of citation by publication was based on affidavit that parents' whereabouts unknown when affiant knew how to reach them. *Wells v. Zenz (1927) 83 Cal. App. 137, 141, 256 P. 484*

[3] Full Faith and Credit

Oklahoma Supreme Court decision finding valid adoption by an Oklahoma stepfather as entitled to full faith and credit in *California. Estate of Hart (1984) 165 Cal. App. 3d 392, 396-397, 209 Cal. Rptr. 272*

California courts as generally required to give full faith and credit to adoption decree of another state. *Estate of Smith (1948) 86 Cal. App. 2d 456, 467, 195 P.2d 842* ; *Estate of Morris (1943) 56 Cal. App. 2d 715, 723, 133 P.2d 452*

[4] Habeas Corpus

Writ of habeas corpus used to reclaim custody of child relinquished to adoption agency. *In re Newman (1960) 187 Cal. App. 2d 377, 379-383, 9 Cal. Rptr. 746*

[5] Parties

One parent as allowed to petition under former Civil Code provisions superseded by *Fam. Code § 9100* to have decree of adoption set aside as to him after marriage of joint adoptive parents has terminated by divorce. *Department of Social Welfare v. Superior Court (1969) 1 Cal. 3d 1, 6, 81 Cal. Rptr. 345, 459 P.2d 897*

Adoptive parents as indispensable parties to proceeding attacking adoption decree or seeking to set it aside. *Department of Social Welfare v. Superior Court (1969) 1 Cal. 3d 1, 4-5, 81 Cal. Rptr. 345, 459 P.2d 897*

Derivative right of heir or personal representative of deceased adopting parent to attack adoption decree. *Adoption of Sewall (1966) 242 Cal. App. 2d 208, 220, 51 Cal. Rptr. 367*

Interest of county welfare department in adoptions as sufficient to allow it to petition court to set aside adoption decree on basis that petitioners madefraudulent misrepresentations to agency. *Adoption of Emery (1961) 191 Cal. App. 2d 428, 432-436, 12 Cal. Rptr. 685*

[6] Review by Writ

Extraordinary relief (petition for writ of prohibition or mandate) as available in adoption proceeding because normal appellate procedures are inadequate to provide speedy and complete relief. *San Diego County Dep't of Public Welfare v. Superior Court of San Diego County (1972) 7 Cal. 3d 1, 9, 101 Cal. Rptr. 541, 496 P.2d 453* ; *Greene v. Superior Court (1951) 37 Cal. 2d 307, 310, 231 P.2d 821*

[7] Standard of Appellate Review

Trial judge's decision in adoption proceedings as involving wide discretion and decree not to be set aside without showing clear abuse of discretion. *Adoption of Smith (1969) 270 Cal. App. 2d 605, 609, 75 Cal. Rptr. 900*

[8] Statute of Limitations

Limitation in former Civil Code provisions superseded by *Fam. Code § 9102* on period for attacking decree of adoption as not applicable to adult adoptions. *Adoption of Sewall (1966) 242 Cal. App. 2d 208, 226, 51 Cal. Rptr. 367*

Limitation period for setting aside adoption decree on ground of extrinsic fraud as beginning when fraud is or reasonably should be discovered. *Adoption of Sewall (1966) 242 Cal. App. 2d 208, 220-226, 51 Cal. Rptr. 367* (adult adoption); *but see Walter v. August (1960) 186 Cal. App. 2d 395, 398-400, 8 Cal Rptr. 778*

Former Civil Code provisions superseded by *Fam. Code § 9102* as prohibiting attack on decree of adoption of minor child after five years. *Walter v. August (1960) 186 Cal. App. 2d 395, 398-400, 8 Cal. Rptr. 778*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawAdoptionProceduresGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewFamily LawChild CustodyEnforcementHabeas Corpus Relief

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§ 12E.32 Law Reviews

Note, *Annulment of Adoption Decrees on Petition of Adoptive Parents*, 22 J. Fam. L. 549 (1984)

Levy & Duncan, *Constitutional Implications of Adoption Revocation Statutes, 8 Pac. L.J. 611 (1977)*

Note, *Persons --Adoption Decrees-- Collateral Attack Thereon, 22 S. Cal. L. Rev. 199 (1949)*

Note, *Adoption: Validity of Decree Awarded Without Notice to Natural Parents, 31 Calif. L. Rev. 325 (1943)*

Legal Topics:

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

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[Reserved]

§§ 12E.33[Reserved]

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§ 12E.40 Notice of Motion for Relief From Decree of Adoption Taken Through Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473]

[1] FORM Notice of Motion for Relief From Decree of Adoption Taken Through Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
In the Matter of the	)	Hearing Date: _____
Adoption Petition of	)	Time: _____
_____ [*name(s)*],	)	Location: _____
Adopting Parent[s].	)	NOTICE OF MOTION AND MOTION FOR RE-
	)	LIEF FROM JUDGMENT

To _____[*name(s) of petitioner(s)*] and to _____[*name*], his/her/their attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*] at _____[*time*], or as soon thereafter as the matter may be heard, in Department _____ of this court, _____[*name of moving party*], the _____ [*status of moving party with regard to child, e.g.,* the birth father] of the child whose adoption is the subject of this matter, will move for an order to vacate and set aside the decree of adoption entered herein. The motion will be made on the grounds that the decree was taken against _____[*name of moving party*] through his/her _____ [mistake *or* inadvertence *or* surprise *or* excusable neglect *or combination thereof*].

The motion will be based on this notice of motion, on the declaration of _____[*name*] and the

memorandum of points and authorities served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

_____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party*]

[2] Use of Form

This form is for use as a notice of motion for relief from judgment (decree of adoption) based on mistake, inadvertence, surprise, or excusable neglect [*see Code Civ. Proc. §§ 473(b), 1003, 1010*]. Such a motion may be made in an adoption matter [*see Adoption of Emery (1961) 191 Cal. App. 2d 428, 431-432, 12 Cal. Rptr. 685]* . For further discussion, see *§ 12E.12*.

A motion for relief from an adoption decree appears not to be a "law and motion" proceeding within the meaning of the California Rules of Court [*see Cal. Rules of Ct., Rules 3.1100, 3.1103(a)* (defining proceedings subject to rules)], and would therefore not be subject to the provisions of those rules governing the format of papers and requiring a memorandum of points and authorities to accompany notices of motion [*see Cal. Rules of Ct., Rules 3.1110, 3.1113*]. Nevertheless, it is strongly recommended that counsel serve and file a memorandum of points and authorities with the notice of motion, along with affidavits or declarations establishing the grounds for relief under *Code Civ. Proc. § 473(b)*.

For further discussion of proceedings under *Code Civ. Proc. § 473(b)*, see Ch. 489, *Relief From Judgments and Orders* . For motion practice, see Ch. 372, *Motions and Orders* .

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2-12E California Forms of Pleading and Practice--Annotated § 12E.41

§ 12E.41 Birth Parent's Complaint in Equity [Code Civ. Proc. § 425.10] to Set Aside Decree of Adoption and for Injunctive Relief [Code Civ. Proc. § 526]--Fraudulently Induced Consent

[1] FORM Birth Parent's Complaint in Equity [Code Civ. Proc. § 425.10] to Set Aside Decree of Adoption and for Injunctive Relief [Code Civ. Proc. § 526]--Fraudulently Induced Consent

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	COMPLAINT TO SET ASIDE DECREE OF AD-
Defendant[s].	)	OPTION
	)	
	)	

_____

Plaintiff alleges:

1. Plaintiff _____[*name*] is the birth _____ [mother *or* father] of _____[*name*], a minor child, who was born on _____[*date*] at _____[*place*].

2. On _____[*date*], a decree of adoption was entered in _____ [this court *or specify court in which adoption was granted*] in proceeding No. _____, entitled _____[*title of adoption proceeding*], wherein defendant(s) _____[*name(s)*], as petitioner(s), adopted the above-named child of plaintiff. A true copy of that decree is attached as Exhibit A to this complaint and is incorporated herein by reference as if fully set forth at this point.

3. The above decree of adoption was entered pursuant to plaintiff's written consent, signed in the presence of _____[*name*], an employee of the _____[*name of investigating agency*], in conformity with the procedural requirements of Family Code Section _____ [8814 *or* 9003]. A true copy of this consent is attached as Exhibit B to this complaint and is incorporated herein by reference as if fully set forth at this point.

4. _____ [*Set forth representations of defendants or others that induced plaintiff to consent to adoption, e.g.,* Before plaintiff agreed to the adoption of the child by defendants and gave written consent as alleged above, _____ (*name*), counsel who was representing both plaintiff and defendants at the time, represented to plaintiff that as an unwed teenage father, he would never be granted custody of his child, and unless he consented to the adoption, the child would be made a dependent child of the juvenile court and placed in an orphanage. _____ (*Name*) further represented to plaintiff that if he would consent to the adoption of the childby defendants, his parental rights and responsibilities would not actually be affected in any way regardless of the technical legal effect of the adoption, that plaintiff would be permitted to exercise visitation rights with the child, and that he would be permitted a parental role in the care and upbringing of the child].

5. _____[*Name*] made these representations to plaintiff, knowing them to be false, for the purpose of inducing plaintiff to consent to the adoption of the child by defendants. In truth, _____ [*set forth actual facts, e.g.,* no grounds existed on which the child could have been made a dependent child of the court. Before the decree of adoption was entered, plaintiff was entitled to establish his paternity and seek custody of the child under the Uniform Parentage Act. Defendants had no intention of granting plaintiff parental rights, including visitation, with the child, and once the adoption was decreed, plaintiff had no further legal recourse to establish parental rights].

6. At the time these representations were made, and at the time when plaintiff executed his/her consent to the adoption, plaintiff was ignorant of the falsity of _____'s [*name(s)*] representations and believed them to be true. In reliance on the fraudulently made representations, plaintiff did agree to the adoption and sign the form of consent to adoption filed in the adoption matter. Had plaintiff known the true facts, he/she would not have consented to the adoption.

7. Plaintiff's reliance on _____[*name of person making misrepresentations*] was justified because _____ [*specify, e.g.,* plaintiff is a minor who has not yet graduated from high school and has no knowledge of adoption or child welfare laws and procedures. _____ (*Name*), as an attorney at law representing plaintiff, had a confidential relationship with and fiduciary duties toward plaintiff, and should reasonably have been expected to provide complete and accurate information to clients with regard to adoption].

8. Unless defendant(s) _____ [is *or* are] immediately subject to mandatory injunctive relief requiring him/her/them to deliver the child to plaintiff, plaintiff will continue to suffer great and irreparable injury arising from the continued deprivation of his/her right to custody of the child and other parental rights. Further, the child will suffer great and irreparable injury from continuing to remain in a home where he/she will bond with defendant(s), even though he/she/they _____ [is *or* are] not entitled to the child's custody. Plaintiff has no adequate remedy at law for these injuries.

WHEREFORE, plaintiff prays judgment against defendant(s) as follows:

1. That the decree of adoption [and the order declaring the aforementioned minor free of the custody and control of plaintiff], and all proceedings appertaining thereto, be declared to be null and void and that the same be vacated and set aside;

2. For an order requiring the defendant(s) to show cause, if any he/she/they _____ [has *or* have], why he/she/they should not be enjoined as hereinafter set forth, during the pendency of this action;

3. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all ordering defendant(s) to immediately return the child to the legal and physical custody of plaintiff, and enjoining defendant(s), and all persons acting under, in concert with, or for him/her/them, from enforcing any right to custody of the child that arises from the adoption referred to herein;

4. For costs of suit herein incurred;

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____[*name*], am the plaintiff in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

CERTIFICATION REGARDING NOTICE

I hereby certify that _____ [on _____ (*date*), I informed defendant of the time and place where the foregoing application for a temporary restraining order would be made *or* in good faith I attempted to inform defendant of the time and place where the foregoing application for a temporary restraining order would be made, by _____ (*specify efforts*), but I was unable to do so *or* notice to defendant of the foregoing application for a temporary restraining order should not be required for the reason that _____ (*specify*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*firm name, if any*]

_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[2] Use of Form

This form is a complaint in equity to set aside an adoption decree on the ground that the consent of the plaintiff birth parent was obtained by fraudulent misrepresentation. For further discussion of grounds for setting aside a decree of adoption, see *§ 12E.13[3]*. For further discussion of the essential allegations of intentional or negligent misrepresentation, see Ch. 269, *Fraud and Deceit* .

[3] Mandatory Injunction

This complaint seeks injunctive relief compelling the return of the child to the parent (Paragraph 8). As such, the prayed-for injunctive relief is mandatory (requiring defendants to do a particular act), rather than prohibitory (restraining them from doing an act) [*see People v. Mobile Magic Sales, Inc. (1979) 96 Cal. App. 3d 1, 13, 157 Cal. Rptr. 749]* . Preliminary mandatory injunctive relief is rarely granted; a very urgent case is required [*Alvarez v. Eden Township Hospital Dist. (1961) 191 Cal. App. 2d 309, 312, 12 Cal. Rptr. 661]* . Nevertheless, it should always be sought in an action to set aside an adoption. Because of parent-child bonding, the longer the child remains in the adoptive home, the less likely a court may be to eventually order the child removed from the home. For further discussion of the procedures for obtaining injunctive relief, see Ch. 303, *Injunctions* .

[4] Verification

A complaint seeking a temporary restraining order and showing therein, rather than in an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]), that sufficient grounds exist is required to be verified [*see Code Civ. Proc. § 527*].

[5] Certification Regarding Notice

Whenever a temporary restraining order is sought without formal notice, the applicant or the applicant's attorney is required to certify to the court under oath that (1) within a reasonable period before the application he or she informed the opposing party (or his or her attorney, if any) of the time and place where the application would be made; (2) he or she in good faith attempted to inform the opposing party (or attorney) but was unable to do so, specifying the efforts made to do so; or (3) for reasons specified he or she should not be required to inform the opposing party (or attorney) [*Code Civ. Proc. § 527*].

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2-12E California Forms of Pleading and Practice--Annotated § 12E.42

§ 12E.42 Judgment Vacating Decree of Adoption [Code Civ. Proc. § 577]

[1] FORM Judgment Vacating Decree of Adoption [Code Civ. Proc. § 577]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	JUDGMENT SETTING ASIDE DECREE OF AD-
Defendant[s].	)	OPTION
	)	
	)	

_____

The complaint of _____[*name of plaintiff*] to set aside and vacate the decree of adoption entered in _____[*name of court*] proceeding No. _____, entitled _____[*title of adoption proceeding*] came on regularly to be heard on _____[*date*], in this court. Plaintiff appeared in person and by counsel _____[*name*]. _____[*Specify other appearances*]. The court having heard the evidence and the matter being duly submitted for decision, and good cause appearing therefor, the court finds and determines that the decree of adoption heretofore made on _____[*date*] was procured by fraud and misrepresentation practiced by _____ [*identify person making representations, e.g.*, counsel for petitioners for adoption, defendants herein] on plaintiff, in that _____[*state facts constituting fraud*]. By reason of the foregoing;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. The decree of adoption entered on _____[*date*] in _____[*name of court*] proceeding No. _____, entitled _____[*title of adoption proceeding*] is hereby

vacated and set aside;

[2. The order terminating the parental rights of _____ (*name of plaintiff*) with regard to _____ (*name of child*) contained in the above decree is also vacated and set aside, and _____ (*name of plaintiff*) is and always has been the lawful _____ (father or mother) of _____ (*name of child*).]

3. The name of the child who was the subject of the adoption proceedings is declared to be and to always have been _____[*original name of child*], the child's original birth certificate shall be restored, and any new birth certificate issued for the child showing his name to be _____[*adoptive name*] shall be canceled forthwith and be of no force or effect.

4. _____ [*Specify custody orders, e.g.,* The child shall be delivered forthwith to plaintiff, who shall have the legal and physical custody of thechild pending further order of the court in an appropriate proceeding brought for that purpose].

5. Plaintiff shall recover costs herein taxed at $ _____.

[6. _____ (*Specify any other appropriate relief*).]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form of judgment is for use in setting aside a decree of adoption rendered due to fraud or misrepresentation [*see Arnold v. Howell (1950) 98 Cal. App. 2d 202, 206-208, 219 P.2d 854]* . For a form for a complaint to set aside a decree of adoption, see *§ 12E.41[1]*. For further discussion of the grounds for setting aside the decree, see *§ 12E.13[3]*. For further consideration of judgments, see Ch. 318, *Judgments* .

[3] Restoration of Parental Rights

The judgment setting aside the adoption must also address the status of the parental rights of the birth parents, particularly if only one parent has attacked the decree. If parental rights were terminated expressly or by operation of law in the adoption decree [*see Fam. Code § 8617*], the judgment setting aside the decree should specify that parental rights are restored. If parental rights were previously terminated in another proceeding [*see, e.g., Fam. Code § 7800 et seq.*; *Welf. & Inst. Code § 366.26*], the final judgment of that proceeding must also be set aside before parental rights are restored [*see In re Randi D. (1989) 209 Cal. App. 3d 624, 627-628, 257 Cal. Rptr. 421]* . For further discussion, see *§ 12E.13[5]*.

[4] Custody of Child

A judgment that vacates a decree of adoption must address the custody of the child. While the court undoubtedly has the equitable authority to grant custody immediately to the plaintiff [*see Caldwell v. Taylor (1933) 218 Cal. 471, 475, 23 P.2d 758]* , further proceedings may be necessary to determine the proper custodial arrangement. Such a proceeding might be one for guardianship under *Prob. Code § 1510*, discussed in *Ch. 280, Guardianship and Conservatorship: Appointment of Guardians, §§ 280.60 -280.70* dependency proceedings under *Welf. & Inst. Code § 300*, discussed in Ch. 328, *Juvenile Courts: Dependency Proceedings* , or proceedings under the Uniform Parentage Act to establish

paternity and custody of the child [*see Fam. Code §§ 7630, 7631, 7634*; *see also* discussion in Ch. 12A, *Adoptions: Termination of Parental Rights*]. In an agency adoption, vacation of the decree would restore custody of the child to the agency that made the adoptive placement [*see Fam. Code § 8704(a)*, discussed in the § 12E.13[6]].

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PART IV. FORMS

2-12E California Forms of Pleading and Practice--Annotated § 12E.43

§ 12E.43 Petition to Set Aside Adoption of Developmentally Disabled or Mentally Ill Child [Fam. Code § 9100]

[1] FORM Petition to Set Aside Adoption of Developmentally Disabled or Mentally Ill Child [Fam. Code § 9100]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
Adoption Petition of	)	PETITION TO VACATE DECREE OF ADOPTION
_____ [*name(s)*],	)	(Developmental Disability or Mental Illness)
Adopting Parent[s].	)	
	)	

_____

Petitioner(s) respectfully represent(s):

1. Petitioner(s), _____[*name(s)*], filed a petition for adoption in the above-entitled proceeding on _____[*date*] [in which _____ (*name of adoption agency*) was joined].

2. A decree of adoption in the above-entitled proceeding was signed by _____[*name*], Judge of the Superior Court, and was filed on _____[*date*], and entered on _____[*date*], in _____ [*e.g.*, Judgment Book _____, Page _____].

3. In the period since the aforementioned decree of adoption was entered, the child who was the subject of the adoption proceeding has shown signs of _____ [developmental disability *or* mental illness] in that _____[*specify all facts that establish condition, in successively numbered paragraphs, if necessary*].

4. Petitioner(s) _____ [has *or* have] consulted with _____[*name of professional qualified to diagnose developmental disability or mental illness in young children*], who has advised petitioner(s) that

the child's _____ [developmental disability *or* mental illness] is the result of conditions that existed before the adoption.

5. Because of the above facts, _____[*name of adoption agency*], through its _____ [*e.g.*, director] _____[*name*], has advised petitioner(s) that were the child now to be relinquished to the agency, he/she would be considered unadoptable.

6. Petitioner(s) had no knowledge or notice of the child's _____ [developmental disability *or* mental illness] before the entry of the decree of adoption.

WHEREFORE, petitioner(s) pray(s) that the decree of adoption entered on _____[*date*] in this matter be set aside and for such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

_____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner[s]

[*Verification. See § 12E.41[1]*.]

[2] Use of Form

This form of verified petition is for use in setting aside the adoption of a developmentally disabled or mentally ill child [*see Fam. Code § 9100*; *see also Fam. Code 212*(all petitions under Fam. Code must be verified)]. It alleges the adoption of the minor (Paragraphs 1, 2), that the minor has since shown signs of developmental disability or mental illness (Paragraph 3), that the disability or illness is the result of conditions that existed before the adoption (Paragraph 4), that the child cannot be relinquished to an adoption agency on the grounds that the minor is considered unadoptable (Paragraph 5), and that petitioners had no previous knowledge of the disability or illness (Paragraph 6).

The petition must be filed with the court that granted the petition for adoption [*Fam. Code § 9100(a)*]. The statute does not address whether the petition should be filed as a postjudgment paper in the adoption matter or as a separate action. Local rules should be consulted for any applicable procedures. All petitions filed under the Family Code must be verified [*Fam. Code § 212*; see also *Code Civ. Proc. § 446*]. For further discussion, see *§ 12E.15*.

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2-12E California Forms of Pleading and Practice--Annotated § 12E.44

§ 12E.44 Order Granting Petition to Set Aside Adoption of Developmentally Disabled or Mentally Ill Child [Fam. Code § 9101]

[1] FORM Order Granting Petition to Set Aside Adoption of Developmentally Disabled or Mentally Ill Child [Fam. Code § 9101]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Adoption Petition of _____ [*name(s)*], Adopting Parent[s].	))))))	NO. _____ ORDER VACATING DECREE OF ADOPTION (Developmental Disability or Mental Illness)

The petition of _____[*name(s) of petitioner(s)*] for an order setting aside the decree of adoption of _____[*name of child*], entered herein on _____[*date*], came on regularly for hearing by the court on this date. Petitioners appeared by counsel _____[*name*]. The State Department of Social Services appeared on behalf of the child, _____[*name*], through counsel _____[*name*], and filed a full report as required by law.

The court received testimony and documentary evidence. Having considered the evidence, including the report of the Department of Social Services, and the arguments of counsel, the court finds that the allegations of the petition are true and that good cause exists for relief under *Family Code Section 9100*.

IT IS ORDERED that:

1. The decree entered herein on _____[*date*] is vacated and set aside pursuant to *Family Code Section*

9100.

2. From and after the date of entry of this order, _____[*name of child*] shall not be, and is not, the child of _____[*name(s) of petitioner(s)*], and shall henceforth be known by his former name, _____[*name*].

3. Custody of _____[*name of child*] is hereby awarded to _____ [the State Department of Social Services *or specify agency*], pending further order of this court.

4. The _____ County counsel shall commence appropriate proceedings under the Welfare and Institutions Code respecting the care and custody of _____[*name of child*].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use as an order vacating a decree of adoption on account of the child's preexisting developmental disability or mental illness [*see Fam. Code § 9100*]. If a decree of adoption is set aside under *Fam. Code § 9101*, the court must direct the appropriate county authority to initiate dependency proceedings under the Welfare and institutions Code. The court should also make appropriate custody orders. The county in which the adoption was decreed is responsible for the child until he or she becomes self-supporting [*see Fam. Code § 9101*]. For further discussion, see the §§ 12E.15, 12E.43[2].

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Chapter 13 ADVERSE POSSESSION

2-13 California Forms of Pleading and Practice--Annotated 13.syn

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by William M. Hensley
Editorial Consultant n*

FOOTNOTES:
(n6)Footnote *.

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PART I. SCOPE

2-13 California Forms of Pleading and Practice--Annotated § 13.01

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§ 13.01 Scope

This chapter discusses adverse possession and prescriptive use of real property. The chapter contains the following forms:

- A complaint to quiet title based on adverse possession [§ 13.40].
- A demurrer, based on the statute of limitation, for use by an adverse possessor, against a complaint to quiet title by the holder of the legal title [§ 13.41].
- An affirmative defense to such a complaint, based on the statute of limitation [§ 13.42].
- A complaint to quiet title to a prescriptive easement appurtenant [§ 13.43].
- A judgment quieting title based on adverse possession or prescriptive use [§ 13.44].
- An allegation for use in a complaint in the nature of ejectment, that the defendant will acquire a prescriptive easement unless enjoined from trespassing on the plaintiff's land [§ 13.45].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawAdverse PossessionProcedureReal Property LawLimited Use RightsEasementsCreationEasement by Prescription

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§ 13.02 Cross References

For discussion and a form of complaint relating to the rights and remedies of a good-faith improver, acting under the mistaken belief that the improver is the owner, of land owned by another, see Ch. 11, *Adjoining Landowners* , Pt. IV.

For discussion and a form of affirmative defense of adverse possession to a complaint to establish a boundary, see Ch. 101, *Boundaries* .

For discussion and forms relating to dedication of land to the public, see Ch. 183, *Dedication* .

For discussion and a form of notice of pendency of an action to quiet title in an adverse possessor, see Ch. 348, *Lis Pendens* .

For discussion and forms for use in actions to quiet title generally, see Ch. 482, *Quieting Title* .

For discussion and forms for use in actions involving prescriptive rights to water, see Ch. 575, *Waters* .

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[Reserved]

§§ 13.03[Reserved]

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2-13 California Forms of Pleading and Practice--Annotated § 13.10

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§ 13.10 Governing Statutes

Occupancy by adverse possession is governed by Civ. Code §§ 1006 and 1007. Title by adverse possession is governed by Code Civ. Proc. §§ 321-328.5. Prescriptive easements are governed additionally by Civ. Code §§ 801 et seq. and 1008. Actions to quiet title based on adverse possession are governed by Code Civ. Proc. §§ 760.010-764.070. Venue of actions relating to real property is governed by Code Civ. Proc. § 392.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawAdverse PossessionProcedureReal Property LawLimited Use RightsEasementsCreationEasement by Prescription

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PART II. LEGAL BACKGROUND

2-13 California Forms of Pleading and Practice--Annotated § 13.11

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§ 13.11 Definitions

Adverse possession is possession that is, as to the true owner, wrongful, without his or her authority, consent, or permission [Beckett v. Petaluma (1915) 171 Cal. 309, 316, 153 P. 20]. Possession is ordinarily synonymous with occupancy and is defined as "having and holding or retaining ... property in one's power or control" [Nathan v. Dierssen (1905) 146 Cal. 63, 66, 79 P. 739].

Prescription in its broadest sense means the effect of lapse of time in the creation or extinguishment of a property interest, whether corporeal or incorporeal [*see* Civ. Code §§ 1006-1008]. The word is usually applied to the creation of incorporeal interests, that is, easements [*see* Civ. Code §§ 813, 1008], servitudes, or the like, by use without permission over time, whereas adverse possession refers to the acquisition and extinguishment of corporeal interests [*see* Code Civ. Proc. §§ 321-326]. The one deals with an adverse right of use, the other with title to the land acquired by adverse possession [Cleary v. Trimble (1964) 229 Cal. App. 2d 1, 6, 39 Cal. Rptr. 776].

Title may be defined generally as a person's legal or equitable ownership interest in property [*see* generally Estate of Baldwin (1943) 21 Cal. 2d 586, 591-592, 134 P.2d 259; Adams v. Hopkins (1904) 144 Cal. 19, 33, 77 P. 712; California v. Walker (1939) 33 Cal. App. 2d 18, 20, 90 P.2d 854; Smith v. Bank of America etc. Ass'n (1936) 14 Cal. App. 2d 78, 85-86, 57 P.2d 1363].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawLimited Use RightsEasementsCreationEasement by Prescription

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PART II. LEGAL BACKGROUND

2-13 California Forms of Pleading and Practice--Annotated § 13.12

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§ 13.12 Title by Adverse Possession

[1] Proof of Title

To establish title by adverse possession, the claimant must prove the following facts [*see, e.g.*, Dimmick v. Dimmick (1962) 58 Cal. 2d 417, 421-422, 24 Cal. Rptr. 856, 374 P.2d 824]:

- The claimant occupied the land for a minimum period by actual occupancy in circumstances providing reasonable notice to the owner (in other words, open and notorious occupancy) [*see § 13.14*].

- The claimant's occupancy was continuous and uninterrupted for five years (prescriptive occupancy) [*see § 13.15*].

- The claimant's occupancy was under color of title or claim of right (proprietary occupancy) [*see § 13.16*].

- The claimant's occupancy was exclusive and hostile to the owner's title (hostile occupancy) [*see § 13.17*].

- The claimant together with predecessors and grantors paid all taxes levied and assessed on the property during the prescriptive period [*see § 13.18*].

[2] Action to Quiet Title

[a] Claimant's Right of Action

The Code of Civil Procedure authorizes an action to establish a claimant's title against adverse claims to real property

[Code Civ. Proc. § 761.020(a)], known as a quiet title action. For a form of complaint, see *§ 13.40*. For general discussion and additional forms, see Ch. 482, *Quieting Title* .

Unless the claimant proves each of the elements [*see* [1], *above*] by the evidence in the quiet title action, the claimant has not proved a title by adverse possession [Dimmick v. Dimmick (1962) 58 Cal. 2d 417, 421-422, 24 Cal. Rptr. 856, 374 P.2d 824; *see* Laubisch v. Roberdo (1954) 43 Cal. 2d 702, 706, 277 P.2d 9; West v. Evans (1946) 29 Cal. 2d 414, 417, 175 P.2d 219; Kunza v. Gaskell (1979) 91 Cal. App. 3d 201, 210, 154 Cal. Rptr. 101; Harvey v. Nurick (1968) 268 Cal. App. 2d 213, 214-215, 74 Cal. Rptr. 94].

[b] Failure or Omission to Sue

California law does not require a claimant to bring any kind of action to perfect the title acquired by adverse possession [*see* Comstock v. Finn (1936) 13 Cal. App. 2d 151, 155, 56 P.2d 957]. Therefore, a quiet title action based on adverse possession cannot be barred by the doctrine laches [*see* Marriage v. Keener (1994) 26 Cal. App. 4th 186, 31 Cal. Rptr. 2d 511]. Moreover, the claimant could await an ejectment action by the holder of the legal title [*see* Ch. 241, *Ejectment*] and then defend with a counterclaim to quiet title based on the adverse possession [*see* Code Civ. Proc. § 321; *see, e.g.,* Grimm v. Curley (1872) 43 Cal. 250, 252-253].

[c] Jury Trial

Whether the claimant's occupancy amounted to adverse possession is a question of fact [Kendrick v. Klein (1944) 65 Cal. App. 2d 491, 496, 150P.2d 955] on which the claimant is entitled to a jury trial [Arciero Ranches v. Meza (1993) 17 Cal. App. 4th 114, 124-126, 21 Cal. Rptr. 2d 127 (prescriptive easement)].

PRACTICE TIP:

Summary Judgment Still Available. Notwithstanding that occupancy is a factual question, summary judgment/adjudication is still available in the right circumstances. Under amendments to Code Civ. Proc. § 437c, as amplified by case law, a plaintiff may still obtain judgment if his or her case for occupancy is proven by competent evidence on all elements of the adverse possession claim. Once this has been done, the burden shifts to the defendant/record owner to rebut the adverse possession claimant's title claim through evidence establishing there is a triable issue of fact. Unless the defendant comes forward with such a rebuttal showing, a plaintiff would be entitled to summary judgment or summary adjudication. Code Civ. Proc. § 437c(p)(1), (2). *By William M. Hensley*

For forms of jury instructions for use in an action to quiet title based on adverse possession, see California Forms of Jury Instruction, Ch. 63, *Acquiring Title to Real Property*, pt. C (Matthew Bender).

[3] Property Exempt From Adverse Possession

No possession by any person, firm, or corporation, no matter how long continued, of any land, water, water right, easement, or other property whatsoever, ever ripens into any title, interest, or right against the owner, in the following cases [Civ. Code § 1007]:

- The property is dedicated to a public use by a public utility [*see, e.g.,* Southern Pac. Co. v. Hyatt (1901) 132 Cal. 240, 241-244, 64 P. 272 (railroad right-of-way); Breidert v. Southern Pac. Co. (1969) 272 Cal. App. 2d 398, 407, 77 Cal. Rptr. 262].

- The property is dedicated to or owned by the state or any public entity [*see, e.g.,* City of Berkeley v. Gordon (1968) 264 Cal. App. 2d 461, 464-465, 70 Cal. Rptr. 716 (private owner who extended his basement under city street could not acquire prescriptive title to extended area); *cf.* City of Los Angeles v. Coffey (1966) 243 Cal. App. 2d 121, 125, 52 Cal. Rptr. 218 (prescriptive ownership rights as to

specific parcel cease to exist on acquisition of parcel by public entity)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury TrialReal Property LawAdverse PossessionGeneral OverviewReal Property LawLimited Use RightsEasementsCreationEasement by PrescriptionReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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Volume 2: Adoptions thru Airplanes and Airports-Chs. 12-17
Chapter 13 ADVERSE POSSESSION
PART II. LEGAL BACKGROUND

2-13 California Forms of Pleading and Practice--Annotated § 13.13

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§ 13.13 Prescriptive Easements

[1] Proof of Prescriptive Easement

[a] Elements

The elements that must be proved to establish a prescriptive easement are basically the same as to establish title by adverse possession [Taormino v. Denny (1970) 1 Cal. 3d 679, 686, 83 Cal. Rptr. 359, 463 P.2d 711; Mesnick v. Caton (1986) 183 Cal. App. 3d 1248, 1260-1261, 228 Cal. Rptr. 779; *see § 13.12[1]*], but there are some slight modifications arising from the essential difference between an easement (which confers a right of use) and a title (which confers the right of possession) [*see* [b]-[d], *below*].

[b] Proprietary Use

To establish a prescriptive easement the claimant's use must be proprietary but need not be exclusive [*see, e.g.,* Applegate v. Ota (1983) 146 Cal. App. 3d 702, 709-710, 194 Cal. Rptr. 331 (exclusive use is not required as long as use is under claim of right; use by family, friends, and business invitees is evidence that use is adverse)]. A prescriptive easement may exist even though the easement is also used by the landowner [Marangi v. Domenici (1958) 161 Cal. App. 2d 552, 557, 326 P.2d 527] or by others [Sufficool v. Duncan (1960) 187 Cal. App. 2d 544, 549, 9 Cal. Rptr. 763], including the public [O'Banion v. Borba (1948) 32 Cal. 2d 145, 151, 195 P.2d 10].

The phrase "claim of right" does not require a belief or claim that the use is legally justified--it simply means that the property was used without permission of the land's owner. Thus, landowners and their tenants who used a bank parking lot to receive deliveries to a restaurant established a prescriptive easement for deliveries over the lot, even though one tenant testified that he did not believe he had the right to use the bank's property and never claimed the right [Felgenhauer v. Soni (2004) 121 Cal. App. 4th 445, 450, 17 Cal. Rptr. 3d 135].

PRACTICE TIP:

Claimant Must Distinguish Himself or Herself From Public. Although a prescriptive easement can be created in favor of a claimant where the land is used by the public, the claimant must establish his or her right to use the easement from his or her own proprietary use as distinguished from use as a general member of the public. *By William M. Hensley*

[c] Continuous Use

Continuous use of an easement over a long period of time without the landowner's interference is presumptive evidence of the existence of a prescriptive easement. The burden then shifts to the landowner to establish that the use was permissive [Applegate v. Ota (1983) 146 Cal. App. 3d 702, 708-709, 194 Cal. Rptr. 331; MacDonald Properties, Inc. v. Bel-Air Country Club (1977) 72 Cal. App. 3d 693, 702-703, 140 Cal. Rptr. 367].

Adverse use may be deemed to be continuous if the claimant has used the easement only when he or she needed it, but not otherwise [Hesperia Land etc. Co. v. Rogers (1890) 83 Cal. 10, 11, 23 P. 196 (irrigation ditch); Twin Peaks Land Co. v. Briggs (1982) 130 Cal. App. 3d 587, 593-594, 181 Cal. Rptr. 25 (use of road for access from time to time when needed for prescriptive period); Reinsch v. City of Los Angeles (1966) 243 Cal. App. 2d 737, 747, 52 Cal. Rptr. 613].

When a divorced husband and wife owned adjacent parcels of property and their sons lived on the mothers' parcel, the sons' use of a road over the father's parcel did not establish an easement by prescription that could be enforced by a subsequent owner of the property. The sons' use was an accommodation to the family, and therefore a presumption of adverseness did not arise from the son's open, notorious, and continuous use of the road [*Grant v. Ratliff (2008) 164 Cal. App. 4th 1304, 1310, 79 Cal. Rptr. 3d 902*]. In *Grant*, the court noted that there appears to be a split of authority as to whether there is a presumption that open, notorious, and continuous use of another's land is adverse to the owner [*Grant v. Ratliff (2008) 164 Cal. App. 4th 1304, 1308, 79 Cal. Rptr. 3d 902* ; *compare O'Banion v. Borba (1948) 32 Cal. 2d 145, 149, 195 P.2d 10* ("There seems to be no apparent reason for discussing the matter from the standpoint of presumptions. For the trial court the question is whether the circumstances proven do or do not justify an inference showing the required elements.") *and Warsaw v. Chicago Metallic Ceilings, Inc. (1984) 35 Cal. 3d 564, 570, 199 Cal. Rptr. 773, 676 P.2d 584* ("continuous use of an easement over a long period of time without the landowner's interference is presumptive evidence of its existence and in the absence of evidence of mere permissive use it will be sufficient to sustain a judgment")]. *Grant* concluded that *Warsaw* did not override *O'Banion*, but that in any event, the evidence that the alleged adverse users were the landowner's sons traveling to and from their former family home was more than sufficient to rebut a presumption affecting the burden of producing evidence, and even sufficient to rebut a presumption affecting the burden of proof [*Grant v. Ratliff (2008) 164 Cal. App. 4th 1304, 1309-1310, 79 Cal. Rptr. 3d 902*].

[d] Payment of Taxes

The payment of property taxes [*see § 13.18*] is not required to establish a prescriptive easement [*see, e.g.,* Holmes v. Harlan (1982) 138 Cal. App. 3d 209, 213-215, 187 Cal. Rptr. 708 (prescriptive easement established when disputed strip was occupied, cultivated, and improved even though adverse possession was not established because taxes were not paid)], unless the easement itself is separately assessed [Gilardi v. Hallam (1981) 30 Cal. 3d 317, 322, 178 Cal. Rptr. 624, 636 P.2d 588; Taormino v. Denny (1970) 1 Cal. 3d 679, 686 n.3, 83 Cal. Rptr. 359, 463 P.2d 711; Glatts v. Henson (1948) 31 Cal. 2d 368, 372, 188 P.2d 745].

PRACTICE TIP:

Payment of Taxes Required for "Exclusive" Prescriptive Easement. Four decisions in the prescriptive easement area, Mehdizadeh v. Mincer (1996) 46 Cal. App. 4th 1296, 54 Cal. Rptr. 2d 284, Silacci v. Abramson (1996) 45 Cal. App. 4th 558, 53 Cal. Rptr. 2d 37, Kapner v. Meadowlark Ranch Assn. (2004) 116 Cal. App. 4th 1182, 1187, 11 Cal. Rptr. 3d 138, and Harrison v. Welch (2004) 116 Cal.

App. 4th 1084, 1094, 11 Cal. Rptr. 3d 92, have rejected the notion that there can be an "exclusive" prescriptive easement granting the equivalence of title ownership. Those courts have concluded that payment of taxes is required and that the claimant should pursue an adverse possession claim if the equivalence of ownership (or exclusive occupancy) is sought. *By William M. Hensley*

[e] Prescription Against Public Body

If a public body holds an easement, a private person may not acquire that easement by prescription [*see* Civ. Code § 1007]; however, prescription is not barred when the public body holds only a license [Guerra v. Packard (1965) 236 Cal. App. 2d 272, 284, 46 Cal. Rptr. 25]. Regarding the difference between an easement and a license, see Ch. 240, *Easements* .

Because the purpose of the doctrine prohibiting adverse possession of public property is to protect a public entity from loss of publicly owned rights through suffering an encroachment, it has no application to the loss of rights of an underlying private owner. Thus, Civ. Code § 1007 did not bar the implied dedication of a public easement for a right-of-way and recreation along an irrigation district canal and a road used by the district to access the canal and adjacent facilities. Prescription against the landowner was not barred even though the irrigation district maintained and operated the canal pursuant to a written easement of record [Friends of the Trails v. Blasius (2000) 78 Cal. App. 4th 810, 827, 93 Cal. Rptr. 2d 193].

[f] Terminating Easement by Nonuse

A prescriptive easement may be extinguished or terminated by nonuse of the easement by the owner for the five-year period prescribed for acquiring the right of use [Civ. Code §§ 811, 1007; Code Civ. Proc. § 321; Zimmer v. Dykstra (1974) 39 Cal. App. 3d 422, 434, 114 Cal. Rptr. 380].

[2] Financial Aspects of Use

[a] Effect of User's Attempt to Pay

Use during the prescriptive period without interference by the owner is sufficient even though the user made attempts during the period to purchase a granted easement [Warsaw v. Chicago Metallic Ceilings, Inc. (1984) 35 Cal. 3d 564, 571-572, 199 Cal. Rptr. 733, 676 P.2d 584].

[b] Compensation for Taking Not Required

When the plaintiff has acquired a prescriptive easement, the court cannot require the plaintiff to pay anything for the easement to the defendant. The title acquired is complete and sufficient and compensation to the defendant is not necessary [Warsaw v. Chicago Metallic Ceilings, Inc. (1984) 35 Cal. 3d 564, 571-572, 199 Cal. Rptr. 733, 676 P.2d 581].

PRACTICE TIP:

Settlement of Prescriptive Easement Disputes Through Payment for Ceded Land. Even though a prescriptive easement claimant who prevails through a judgment owes no compensation for the taken land, this practitioner has found that many easement disputes can be settled when the prescriptive easement claimant pays the fair market value of the land at issue (or less) to the other party. Such a payment frequently avoids expensive litigation for both sides. *By William M. Hensley*

[c] Duty to Maintain Easement

The easement's owner ordinarily has the duty to keep the easement in repair [Reinsch v. City of Los Angeles (1966) 243

Cal. App. 2d 737, 747, 52 Cal. Rptr. 613 (prescriptive easement)].

[3] Scope of Prescriptive Easement

[a] Limited to Original Use

The scope of a prescriptive easement is limited to the uses made during the prescriptive period [O'Banion v. Borba (1948) 32 Cal. 2d 145, 155, 195P.2d 10; Hannah v. Pogue (1944) 23 Cal. 2d 849, 854-855, 147 P.2d 572 (no right to change easement's location even if beneficial to landowner)]. However, the easement may be changed or enlarged by different or additional use for another prescriptive period [Hill v. Allan (1968) 259 Cal. App. 2d 470, 485, 66 Cal. Rptr. 676; *see* [c], *below*].

[b] Secondary Easements

Every easement includes "secondary easements" consisting of the right to do those things that are necessary to the full enjoyment of the easement. This right is limited and must be exercised in a reasonable manner so as not to place an undue burden on, go beyond the boundaries of, or make any changes, in the servient tenement [Costa v. Fawcett (1962) 202 Cal. App. 2d 695, 702, 21 Cal. Rptr. 143 (prescriptive easement)].

[c] Expansion by Additional Use

In determining whether a particular use is within the scope of a prescriptive easement, a comparison is made between that use and the use by which the easement was created, considering the physical character of the land, the purpose of the easement, and the relative burden on the servient tenement [Pipkin v. Der Torosian (1973) 35 Cal. App. 3d 722, 727, 111 Cal. Rptr. 46]. The needs that result from a normal evolution in the use of the dominant tenement and the extent to which the satisfaction of those needs may increase the burden on the servient tenement also are considered. The new use resulting from normal development, however, must be consistent with the pattern formed by the adverse use by which the easement was created [Hill v. Allan (1968) 259 Cal. App. 2d 470, 484, 66 Cal. Rptr. 676].

If a change in use is merely one of degree, imposing no greater burden on the servient tenement, the right to use the easement is not affected. A substantial change in the nature of the use--one that increases the burden on the servient tenement--is not allowed, however. For example, a driveway easement acquired by prescription and used for residential and farming purposes cannot subsequently be used in connection with the operation of a trailer park, since the change in use would involve a change in the physical objects passing over the road and consequently would constitute a substantial change increasing the burden on the servient tenement [Gaither v. Gaither (1958) 165 Cal. App. 2d 782, 785, 786, 332 P.2d 436; *see* Pipkin v. Der Torosian (1973) 35 Cal. App. 3d 722, 728, 111 Cal. Rptr. 46; *see also* Cushman v. Davis (1978) 80 Cal. App. 3d 731, 735-737, 145 Cal. Rptr. 791].

[d] Exclusive Prescriptive Easement

Although one court has held that a prescriptive easement can be exclusive [*see* Otay Water Dist. v. Beckwith (1991) 1 Cal. App. 4th 1041, 1047, 3 Cal. Rptr. 2d 223], it is doubtful that an exclusive prescriptive easement can exist [*see* Pasadena v. California-Michigan etc. Co. (1941) 17 Cal. 2d 576, 578-579, 110 P.2d 983]. Adverse use can lead to either a prescriptive easement, which confers no exclusive right of use, or, with the payment of taxes [*see § 13.18*], a title by adverse possession, which does confer an exclusive right of use. However, a court's recognizing a so-called exclusive prescriptive easement would be equivalent to determining a title by adverse possession even though one of the requirements--to pay taxes--was not met [*see* Raab v. Casper (1975) 51 Cal. App. 3d 866, 876, 877, 124 Cal. Rptr. 590 (unlimited use or enjoyment is in effect ownership of fee, not easement); *see also* Mehdizadeh v. Mincer (1996) 46 Cal. App. 4th 1296, 1308, 54 Cal. Rptr. 2d 284; Silacci v. Abramson (1996) 45 Cal. App. 4th 558, 564, 53 Cal. Rptr. 2d 37; Kapner v. Meadowlark Ranch Assn. (2004) 116 Cal. App. 4th 1182, 1187, 11 Cal. Rptr. 3d 138; Harrison v. Welch (2004) 116 Cal. App. 4th 1084, 1094, 11 Cal. Rptr. 3d 92]. The concept of an exclusive prescriptive easement appears

to be simply a misbegotten attempt to apply one of the rules governing relations between a landowner and the owner of an easement [*see, e.g.,* Otay Water Dist. v. Beckwith (1991) 1 Cal. App. 4th 1041, 1047, 3 Cal. Rptr. 2d 223], that the landowner may not unreasonably interfere with the established use to which the easement is dedicated [*see, e.g.,* Scruby v. Vintage Grapevine, Inc. (1995) 37 Cal. App. 4th 697, 43 Cal. Rptr. 2d 810; City of McCann v. Los Angeles (1978) 79 Cal. App. 3d 112, 116, 144 Cal. Rptr. 696; *cf.* Civ. Code § 809 (owner of dominant tenement may maintain action to enforce easement appurtenant); *see generally* Ch. 240, *Easements*].

PRACTICE TIP:

No "Fencing Easements" Allowed. Mehdizadeh v. Mincer (1996) 46 Cal. App. 4th 1296, 54 Cal. Rptr. 2d 284 and Silacci v. Abramson (1996) 45 Cal. App. 4th 558, 53 Cal. Rptr. 2d 37 are two of the most important prescriptive easement decisions of import in the last few years. This practitioner used *Silacci* to defeat a "fencing easement" claim when the claimant had not paid taxes and wanted to obtain adverse possession under the prescriptive easement rubric. Since *Mehdizadeh* and *Silacci*, two more decisions have rejected prescriptive easement claims [*see* Kapner v. Meadowlark Ranch Assn. (2004) 116 Cal. App. 4th 1182, 1187, 11 Cal. Rptr. 3d 138; Harrison v. Welch (2004) 116 Cal. App. 4th 1084, 1094, 11 Cal. Rptr. 3d 92]. These decisions are powerful tools for preventing prescriptive easement claimants from obtaining ownership rights without paying taxes on the parcels at issue. *By William M. Hensley*

[4] Prescription by Owner of Granted Easement

The grant of an easement does not preclude the grantee's acquisition of greater rights of use by prescription [Kerr Land & Timber Co. v. Emmerson (1965) 233 Cal. App. 2d 200, 228, 43 Cal. Rptr. 333]. Acts of dominion inconsistent with permissive use may show a hostile claim [*see* Gaut v. Farmer (1963) 215 Cal. App. 2d 278, 284, 30 Cal. Rptr. 94 (repair); LeDeit v. Ehlert (1962) 205 Cal. App. 2d 154, 163, 22 Cal. Rptr. 747]. However, use of an easement within the scope of the landowner's expressed or implied permission cannot be adverse [*see* Carroll v. Agliano (1947) 80 Cal. App. 2d 46, 47, 180 P.2d 747 (signs as evidence of permission to use roadway)].

PRACTICE TIP:

Express Easement Usually Precludes Prescriptive Easement Claim. Although an express easement is not mutually exclusive of a prescriptive easement, it is this practitioner's experience that courts are loathe to find a prescriptive easement when there is an express one. Rather, courts tend to find that a "prescriptive" use is within the purview of the express easement. *By William M. Hensley*

[5] Landowner's Prevention of Easements

[a] Posting Notice

No use by any person or persons, no matter how long continued, of any land, ever ripens into an easement by prescription, if the landowner posts at each entrance to the property, or at intervals of not more than 200 feet along the boundary, a sign reading substantially as follows [Civ. Code § 1008; *see* Civ. Code § 1009 (protection for landowners making land available for public use)]:

"Right to pass by permission, and subject to control, of owner: *Section 1008, Civil Code*"

To be legally operative, the "permission to pass" sign must be posted by the landowner or by the landowner's authorized agent [*Aaron v. Dunham (2006) 137 Cal. App. 4th 1244, 1252, 41 Cal. Rptr. 3d 32* (posting by tenant of "permission to pass" sign on private road did not prevent acquisition of prescriptive easement because sign was not posted by property owner or owner's authorized agent)].

For a form of notice, see *California Legal Forms, Ch. 28A, Easements and Licenses, § 28A.236* (Matthew Bender).

[b] Recording Notice

The holder of record title to land may record in the office of the recorder of any county in which any part of the land is situated and may serve by registered mail on the user a description of the land and a statutory notice to the effect that any use of the land is by permission and subject to the owner's control. Thereafter, in any judicial proceeding involving the issue of whether or not any user has a prescriptive right, the recorded and served notice is conclusive evidence that subsequent use of the land during the time the notice is in effect by any user for any purpose, other than a use expressly allowed by a written or recorded map, agreement, deed, or dedication, is permissive [Civ. Code § 813; *see* Civ. Code § 1009 (protection for landowners making land available for public use)]. For a form of notice, see *California Legal Forms, Ch. 28A, Easements and Licenses, § 28A.234* (Matthew Bender).

[c] Enjoining Adverse Use

Even though the immediate damage is not appreciable, an injunction may be issued to prohibit the continuance of a wrongful act or trespass that, if continued, would ripen into a prescriptive easement [Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 201, 323 P.2d 1001; Lindsay-Strathmore I. Dist. v. Superior Ct. (1920) 182 Cal. 315, 327, 187 P. 1056] or would expand an existing easement [Bartholemew v. Stuheli (1948) 86 Cal. App. 2d 844, 856, 195 P.2d 824 (injunction to prevent overburdening of existing easement and to prevent use from ripening into larger prescriptive easement)]. For allegations that a landowner may use in such a case, see *§ 13.45*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewReal Property LawLimited Use RightsEasementsCreationEasement by Prescription

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§ 13.14 Open and Notorious Occupancy

[1] Notice to True Owner

[a] Requirement to Give Notice

The would-be adverse possessor is required to show his or her occupancy in such a way that the holder of the legal title (the true owner) has reasonable notice of the occupant's claiming the property as his or her own [Dimmick v. Dimmick (1962) 58 Cal. 2d 417, 421, 24 Cal. Rptr. 856, 374 P.2d 824; West v. Evans (1946) 29 Cal. 2d 414, 417, 175 P.2d 219; Ikola v. Goff (1973) 31 Cal. App. 3d 872, 877, 107 Cal. Rptr. 663].

[b] Occupancy Sufficient to Give Notice

In determining the sufficiency of acts to constitute open and notorious occupancy of the land in question, courts may consider the land's character, the locality, and the community's customs. It is generally sufficient to occupy and use the land in the manner that owners of land of like character in the vicinity normally occupy and use their property [Landini v. Day (1968) 264 Cal. App. 2d 278, 282-283, 70 Cal. Rptr. 260].

Further, to satisfy the notice requirement for adverse possession, the occupancy must be sufficiently open and notorious to notify an ordinarily prudent owner of its existence, unless the owner is otherwise actually notified of the facts [Saecker v. Cohn (1919) 180 Cal. 151, 156, 179 P. 890; Sevenman v. Long Bell Lumber Co. (1954) 129 Cal. App. 2d 528, 533-534, 277 P.2d 510]. Clandestine occupancy is not sufficient [Unger v. Mooney (1883) 63 Cal. 586, 595; Meier v. Meier (1945) 71 Cal. App. 2d 502, 505, 162 P.2d 950].

[c] Knowledge of Adverse Claim Not Necessary

Actual knowledge by the owner of the adverse claim is not required; occupancy that is so open, visible, and notorious as

to raise a presumption of an adverse claim is the equivalent of actual knowledge [Chapman v. Sky L'Onda etc. Water Co. (1945) 69 Cal. App. 2d 667, 678-679, 159 P.2d 988; Wood v. Davidson (1944) 62 Cal. App. 2d 885, 889-890, 145 P.2d 659]. Thus, in one case, claimants who fenced in the subject property, irrigated it, maintained structures on it, and paid property taxes satisfied the "open and notorious" requirement for adverse possession so that the owner, who was in Ireland, was presumed to have had notice of the adverse claim [*Nielsen v. Gibson (2009) 178 Cal. App. 4th 318, 327, 100 Cal. Rptr. 3d 335*].

The fact that the true owner is unaware of his or her ownership is irrelevant [Sorensen v. Costa (1948) 32 Cal. 2d 453, 461, 196 P.2d 900].

[2] Occupancy by Tenant as Inuring to Claimant

The adverse claimant need not directly occupy the property. Occupancy by a tenant holding under the claimant is deemed to be occupancy by the claimant [Code Civ. Proc. § 326; Palin v. Sweitzer (1937) 8 Cal. 2d 329, 331, 65 P.2d 351; Weyse v. Biedebach (1927) 86 Cal. App. 712, 721-722, 261 P. 1086].

[3] Permitted Occupant Must Become Usurper

An occupant with the true owner's permission, such as the holder of a granted easement [*see generally* Ch. 240, *Easements*], can become an adverse possessor only on giving the true owner clear and actual notice of claiming the title [Johnson v. Ocean Shore Railroad Co. (1971) 16 Cal. App. 3d 429, 436, 94 Cal. Rptr. 68] or on beginning to use the property in a way so inconsistent with the scope of the permitted use, and consistent with a claim of title, that the true owner has constructive notice of the adverse claim [Southern Pac. Co. v. City & County of San Francisco (1964) 62 Cal. 2d 50, 54-55, 41 Cal. Rptr. 79, 396 P.2d 383; People v. Ocean Shore R.R. Co. (1948) 32 Cal. 2d 406, 415-416, 196 P.2d 570].

An isolated or insignificant act may not be sufficient to give the true owner constructive notice of an adverse claim [*see, e.g.,* Southern Pac. Co. v. City & County of San Francisco (1964) 62 Cal. 2d 50, 56, 41 Cal. Rptr. 79, 396 P.2d 383 (appearance on assessment rolls as assessee did not give constructive notice of claim of ownership)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawLimited Use RightsEasementsCreationEasement by Prescription

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§ 13.15 Prescriptive Occupancy

[1] Requirement and Effect

Occupancy of real property for five years--which is the period prescribed by law as sufficient to bar an action for recovery of the property [*see* Code Civ. Proc. § 318]--confers a title to the property, denominated a title by prescription, that is sufficient against all [Civ. Code § 1007], provided the property is not exempt from prescription [*see § 13.12[3]*]. However, in any action for the recovery of real property:

- The person establishing a legal title to the property is presumed to have been in possession for the five-year period preceding commencement of the action [Code Civ. Proc. § 321]. In other words, the holder of the legal title is presumptively the holder of the most recent title-by-prescription, which is sufficient against all [*but see* Gwin v. Calegaris (1903) 139 Cal. 384, 387-388, 73 P. 851 (purchaser whose offer required perfect or record title was not required to accept title depending on adverse possession)].

- Occupancy of the property during that period by any other person is deemed to have been under and in subordination to the legal title, unless it appears that the property has been held and possessed adversely to the legal title for five years before the action's commencement [Code Civ. Proc. § 321]. In other words, the presumption that the legal title holder has the superior title-by-prescription is conclusively rebutted, and a prior title-by-prescription held by the adverse claimant is established--sufficient against all, including the legal title holder--by proof of adverse possession for five years [*see, e.g.,* Langford v. Poppe (1880) 56 Cal. 73, 75, *appeal dismissed,* 104 U.S. 770, 26 L. Ed. 922 (1882)].

The prescriptive-occupancy period need not be the five-year period immediately preceding the commencement of the

action; any five-year period of adverse possession suffices [*see* Civ. Code § 1007; Southern Pac. R.R. Co. v. Whitaker (1895) 109 Cal. 268, 273, 41 P. 1083; Webber v. Clarke (1887) 74 Cal. 11, 19, 15 P. 431]. Also, occupancy for that period must have been continuously adverse but need not have been solely by the claimant (and tenants under the claimant); occupancy by the claimant together with predecessors and grantors (and their tenants) suffices [*see* [3], *below* (tacking periods of occupancy)].

Whether the property was adversely possessed for the five-year period asserted by the claimant depends on the nature of the occupancy. That is, whether the occupancy was open and notorious [*see § 13.14*], proprietary [*see § 13.16*], and hostile to the legal title [*see § 13.17*].

[2] Occupancy for Less Than Prescriptive Period

Occupancy for any period less than the five-year prescriptive period confers a title sufficient against all except the state and those having title by prescription, accession, transfer, will, or succession. However, a title by occupancy, which has not ripened into a title by prescription, is not a sufficient interest in the property to enable the occupant or his or her privies to commence or maintain an action to quiet title [Civ. Code § 1006].

[3] Tacking Periods of Occupancy

[a] Adverse Possession Cases

The claimant's period of occupancy, if less than five years, may be "tacked" to the period of the claimant's grantor or immediate predecessor, and that period may be tacked to the next preceding period in the claimant's line of succession, and so on, as necessary to make an aggregate occupancy period of five years or longer [*see* Code Civ. Proc. § 318; Meier v. Meier (1945) 71 Cal. App. 2d 502, 506, 162 P.2d 950; *see, e.g.,* Von Neindorff v. Schallock (1937) 21 Cal. App. 2d 44, 48, 68 P.2d 278 (claimant had deed describing property and identifying previous owner, whose occupancy period was added to claimant's)].

[b] Privity as Essential

To tack one person's period of occupancy to that of another, some form of privity must exist between the successive occupants. This requirement is based on the theory that the several occupancies must be so connected that each occupant can go back to the original entry or holding as a source of title. The successive occupants must claim through and under their predecessors, not independently, so as to make a continuous holding period. Without privity there may be an immediate succession of occupancies but not a continuity of possession [San Francisco v. Fulde (1869) 37 Cal. 349, 353-354].

The privity necessary to support the tacking of successive occupancies may arise from any connecting relationships that will prevent a break in the adverse possession. A deed to the claimant, describing the property claimed [*see* Von Neindorff v. Schallock (1937) 21 Cal. App. 2d 44, 48, 68 P.2d 278 (deed cannot create privity if claimed property is not within bounds of legal description in deed)], establishes sufficient privity to permit tacking the grantor's period of occupancy to the claimant's period [Meier v. Meier (1945) 71 Cal. App. 2d 502, 506, 162 P.2d 950; Saner v. Knight (1927) 86 Cal. App. 347, 351-352, 260 P. 942]. However, no written transfer or agreement is necessary. In a case when possession of the land in question was actually transferred to each successive occupant during the five-year period, even though by deeds mistakenly describing land adjacent to the land claimed, the requirement for five-year continuous occupancy was met [Sorensen v. Costa (1948) 32 Cal. 2d 453, 461, 463-464, 196 P.2d 900].

In addition to privity based on conveyances and transfers, privity has been held to exist between ancestor and heir [Meier v. Meier (1945) 71 Cal. App. 2d 502, 506, 162 P. 950] and between family members [Park v. Powers (1935) 2 Cal. 2d 590, 594-595, 42 P.2d 75] (sometimes called privity of blood).

PRACTICE TIP:

Privity Arising From Nonhostile Relationships. It would be logical and reasonable to contend (although there are no California cases so holding) that the necessary privity must exist between others, such as spouses or a life tenant and the remainderman [*see* Restatement of Property § 464; Powell on Real Property, § 413 (Matthew Bender)], whose relationships are held normally to preclude the possibility of hostile occupancy as between themselves [*see § 13.17[3]*]. *By Publisher's Editorial Staff*

[c] Prescriptive Easement Cases

Tacking periods of use so as to establish a prescriptive easement [*see* generally *§ 13.13*] can be compared to tacking periods of occupancy so as to establish title by adverse possession [*see, e.g.,* McMorris v. Pagano (1944) 63 Cal. App. 2d 446, 450, 146 P.2d 944 (plaintiff and predecessors in interest used passageway for access to garage for more than 20 years)]. Successive periods of use may be tacked only if they are continuous and adverse. Tacking may not include any period during which the use was permissive [Guerra v. Packard (1965) 236 Cal. App. 2d 272, 287, 46 Cal. Rptr. 25].

[4] Tolling Statute of Limitation

[a] Filing of Action

Ordinarily, the filing of an action, either by the person asserting a prescriptive right or by the person against whom the five-year period is running, will interrupt the running of the prescriptive period, and the statute will be tolled while the action is pending. An action that has been dismissed or abandoned does not continue to interrupt the running of the prescriptive period [Yorba v. Anaheim Union Water Co. (1953) 41 Cal. 2d 265, 270, 259 P.2d 2; *see* Knoke v. Swan (1935) 2 Cal. 2d 630, 632, 42 P.2d 1019; Dong Chun Len v. Luke Kow Lee (1935) 7 Cal. App. 2d 194, 196, 45 P.2d 827 (unsuccessful action leading to no change of possession did not toll running of statute of limitation)].

[b] Minority or Insanity

If a person entitled to commence an action for recovering real property, or for recovering the possession of real property, is, at the time title first descends or accrues, either a minor or insane, the time, not exceeding 20 years, during which the disability continues is not deemed any portion of the five-year period limited for the action's commencement. However, the action may be commenced within five years after the disability ceases, or after the death of the person entitled, who dies under the disability. The action may not be commenced after that period [Code Civ. Proc. § 328].

When adverse possession commences against a minor owner of property, the owner has until five years after he or she attains majority to recover the property [Akley v. Bassett (1922) 189 Cal. 625, 643-644, 209 P. 576; Westphal v. Arnoux (1921) 51 Cal. App. 532, 535, 197 P. 395].

However, when a trustee is barred by the statute of limitation from quieting title as against an adverse possessor, the cestui que trust, or beneficiary, is likewise barred, even though an infant [Patchett v. Pacific Coast Ry. Co. (1893) 100 Cal. 505, 509-510, 35 P. 73]. In addition, if adverse possession against the ancestor begins before his or her death, the statute of limitation is not tolled even though the heir is a minor [Westphal v. Arnoux (1921) 51 Cal. App. 532, 535, 197 P. 395].

[c] Imprisonment

If a person entitled to commence an action for recovering real property, or for recovering the possession of real property, is, at the time the title first descends or accrues, imprisoned on a criminal charge, or in execution on conviction of a criminal offense, for a term less than life, the time, not exceeding two years, during which imprisonment continues is not deemed any portion of the five-year period limited for the action's commencement. However, the action may be commenced within five years after the imprisonment ceases, or after the death of the person entitled, who dies

while imprisoned. The action may not be commenced after that period [Code Civ. Proc. § 328.5].

[5] Effect of Reentry by Owner

Reentry on the land by the legal owner will interrupt adverse possession if it is open, notorious, and under claim of right and equal in dignity and character to that required to begin an adverse possession [Smith v. Southern Pac. R.R. Co. (1934) 1 Cal. 2d 272, 275, 34 P.2d 713; Kendrick v. Klein (1944) 65 Cal. App. 2d 491, 496, 150 P.2d 955].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawLimited Use RightsEasementsCreationEasement by Prescription

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§ 13.16 Proprietary Occupancy

[1] Requirement for Claim of Title

The property adversely claimed must be occupied "under claim of title" [*see* Code Civ. Proc. §§ 322, 324]. The acts of occupancy and use that are sufficient to constitute adverse possession will depend on the nature of the claim of title. The claim may be founded on a written instrument, and is said to be based on color of title [*see* [2], *below*], or not founded on a written instrument [*see* [3], *below*].

[2] Occupancy Under Color of Title

[a] Occupancy Sufficient for Adverse Possession

When the claim of title is based on a written instrument purporting to be a conveyance or on a judgment or decree, it is said to be under color of title [Sorensen v. Costa (1948) 32 Cal. 2d 453, 458, 196 P.2d 900; Wilson v. Atkinson (1888) 77 Cal. 485, 489, 20 P. 66 (color of title is apparent title, which is not legal title because of some defect)]. Continued occupancy "of the property included in such instrument, decree, or judgment, or of some part of the property," for the prescribed five-year period is sufficient to establish adverse possession (other requirements being met) if any of the following conditions are satisfied [Code Civ. Proc. §§ 322, 323(1)-(3)]:

- The property has been usually cultivated or improved.
- The property has been protected by a substantial enclosure.
- Although not enclosed, the property has been used for any of these uses:
    - The supply of fuel.

- The supply of fencing timber for the purposes of husbandry.
- Pasturage.
- The occupant's ordinary use [*see* [c], *below*].

If the property is a known farm or single lot that has been partly improved, any portion that may have been left not cleared, or not enclosed according to the usual course and custom of the adjoining country, is not deemed to have been occupied for the same period as the part improved and cultivated [Code Civ. Proc. § 323(4)].

If the property consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract [Code Civ. Proc. § 322].

[b] Occupant's Good Faith

The occupant under color of title must enter and hold the land in good faith, believing the conveyance or judgment to be valid. Knowledge that it is void will vitiate the claim of title, but the knowledge must be actual knowledge of a vitiating fact, rather than knowledge based on the instrument's legal construction. Without such actual knowledge, even a tax deed void on its face may qualify as color of title [Wilson v. Atkinson (1888) 77 Cal. 485, 487, 492-494, 20 P. 66].

Knowledge that would vitiate the claim of title may be imputed from an agent to a corporation claiming title by adverse possession [*see* Nutting v. Herman Timber Co. (1963) 214 Cal. App. 2d 650, 658, 29 Cal. Rptr. 754; *see also* Yuba River Sand Co. v. Marysville (1947) 78 Cal. App. 2d 421, 427, 430, 177 P.2d 642].

[c] Occupant's "Ordinary Use"

"The ordinary use of the occupant" [*see* Code Civ. Proc. § 323(3)] means a use that is appropriate considering the location and character of the property. If only slight use can ordinarily be made of the property, then occupancy to the extent of that use is sufficient [*see, e.g.,* Posey v. Bay Point Realty Co. (1932) 214 Cal. 708, 712, 7 P.2d 1020 (refuge for livestock during part of the year)]. However, if the claimant makes only slight use of the property because of some extraneous reason such as illness, distance, or other business, that use is not sufficient as "ordinary use" [Klein v. Caswell (1948) 88 Cal. App. 2d 774, 779, 199 P.2d 689].

The concept of "the ordinary use of the occupant" allows for continuity of possession even if actual occupancy is not constant; for example, normal intervals between occupancies by tenants would not be taken as evidence that the claimant's possession was not continuous [Montgomery & Mullen Lumber Co. v. Quimby (1912) 164 Cal. 250, 253, 254, 128 P. 402; Newman v. Cornelius (1970) 3 Cal. App. 3d 279, 290, 83 Cal. Rptr. 435].

[3] Occupancy Under Claim of Right

Adverse possession under claim of right means occupancy of the land under a claim of title, exclusive of any other right [*see § 13.17*], that is not founded on a written instrument or any judgment or decree [*see* Code Civ. Proc. § 324; Brown v. Berman (1962) 203 Cal. App. 2d 327, 329, 21 Cal. Rptr. 401]. Only the land actually so occupied, and no other, is deemed to have been adversely possessed [Code Civ. Proc. § 324]. For the purpose of establishing adverse possession under claim of right, land is deemed to have been possessed and occupied only in one of the following cases [Code Civ. Proc. § 325]:

- The claimant protected the land by a substantial enclosure [*see, e.g.,* Palin v. Sweitzer (1937) 8 Cal. 2d 329, 331, 65 P.2d 351 (fence, plus natural barriers, is sufficient enclosure)].

- The claimant cultivated the land in a usual way [*see, e.g.,* Los Angeles Co. v. Pacific Elec. Ry. Co. (1928) 93 Cal. App. 512, 514, 269 P. 767 (occupancy at all times and seasons appropriate to regular and usual cultivation is sufficient)] or improved the land [*see, e.g.,* Gray v. Walker (1910) 157 Cal. 381, 385, 108 P. 278 (maintaining existing improvements is sufficient)].

Although the occupant must claim a title, the claim need not be based on a good faith belief in the title [*see* Brown v. Berman (1962) 203 Cal. App. 2d 327, 329, 21 Cal. Rptr. 401] or may be based mistakenly on a deed that does not describe the land being occupied [*see* Sorensen v. Costa (1948) 32 Cal. 2d 453, 458-460, 196 P.2d 900].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawLimited Use RightsEasementsCreationEasement by Prescription

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§ 13.17 Hostile Occupancy

[1] Nature of Hostility

The claimant must occupy the property not only under claim of title [*see § 13.16*] but also "exclusive of any other right" [*see* Code Civ. Proc. §§ 322, 324]. This is the requirement of hostility. The claimant's possession must be unaccompanied by any recognition, express or inferrable from the circumstances, of the right in the holder of the legal title [*see* Sorensen v. Costa (1948) 32 Cal. 2d 453, 459, 196 P.2d 900; Kunza v. Gaskell (1979) 91 Cal. App. 3d 201, 210-211 154 Cal. Rptr. 101]. To be considered hostile, the acts relied on must operate as an invasion of the right of the holder of the legal title [Laubisch v. Roberdo (1954) 43 Cal. 2d 702, 706, 277 P.2d 9].

[2] Mistake

Mistaken occupancy can be the basis for adverse possession. For instance, when a person occupies part of a neighboring lot based on an erroneous survey, the requisite hostility exists [Gilardi v. Hallam (1981) 30 Cal. 3d 317, 322-326, 178 Cal. Rptr. 624, 636 P.2d 588; *see* Newman v. Cornelius (1970) 3 Cal. App. 3d 279, 289, 83 Cal. Rptr. 435 (mistaken belief that United States owned property was no bar to adverse possession as against all others)]. Occupancy based on mistake was not hostile, however, when substantial evidence established that the occupan t recognized the record owner's potential claim and expressly or implicitly intended not to claim the occupied land if the record title was held by another [Mesnick v. Caton (1986) 183 Cal. App. 3d 1248, 1259, 228 Cal. Rptr. 779].

PRACTICE TIP:

Importance of Not Communicating With Record Owner. In mistaken occupancy cases (usually involving an erroneous survey), it is critical that the adverse claimant not communicate with the record owner or others in a way that indicates the claimant intends to respect the actual legal boundaries. This practitioner beat an adverse possession claim based on admissions a claimant made to other neighbors negating he had any hostility to the record owner's title despite an erroneous survey. *By William M.*

Hensley

[3] Relationships Negating Hostility

[a] Spouses

Adverse possession cannot exist between spouses during coverture [Madden v. Hall (1913) 21 Cal. App. 541, 550, 132 P. 291].

[b] Life Tenant and Remainderman

A life tenant cannot establish title by adverse possession as against a remainderman, since the remainderman cannot assert a right of possession or attack the life tenant's possession until after the termination of the life estate [Missionary Soc'y v. Bank of America (1936) 15 Cal. App. 2d 682, 684-686, 59 P.2d 1060; *see* Civ. Code § 741 (protecting future interests)].

[c] Mortgagor and Mortgagee

A mortgagor cannot be in adverse possession as against the mortgagee until the mortgagor openly and notoriously denies the mortgagee's rights after the mortgagee's right to possession arises [*see* Comstock v. Finn (1936) 13 Cal. App. 2d 151, 156-158, 56 P.2d 957].

[d] Vendor and Purchaser

Where entry into occupancy of land by a purchaser under an executory contract is in subordination to the legal title of the vendor and in accordance with the terms of the contract, the purchaser's occupancy cannot become adverse until in some manner the purchaser repudiates the vendor's title and asserts an exclusive right outside the contract. In that case, actual or constructive notice of the repudiation must be given to the vendor [Beagle v. Hanks (1954) 125 Cal. App. 2d 298, 300, 270 P.2d 113; *see* Perry v. Bedford (1965) 238 Cal. App. 2d 6, 14-15, 47 Cal. Rptr. 461 (no adverse possession by conditional vendor as against purchaser, in absence of explicit disclaimer of relationship)].

[e] Cotenants

Exclusive occupancy by a cotenant generally is deemed to be with the permission of the other cotenants. It does not become adverse until the other tenants have actual or constructive notice that the cotenant in occupancy is hostile. This notice must be by acts of ownership of the most open, notorious, and unequivocal character; the evidence must be stronger than what would be required to establish adverse possession by a stranger [West v. Evans (1946) 29 Cal. 2d 414, 418, 175 P.2d 219; Akley v. Bassett (1922) 189 Cal. 625, 641-642, 209 P. 576; Wilkerson v. Thomas (1953) 121 Cal. App. 2d 479, 487, 263 P.2d 678]. However, when the cotenancy does not arise until after one of the cotenants has entered into possession under an instrument purporting to convey the whole title to him or her, the above rules do not apply [Akley v. Bassett (1922) 189 Cal. 625, 641-642, 209 P. 576; Zolezzi v. Michelis (1948) 86 Cal. App. 2d 827, 830-831, 195 P.2d 835].

A plaintiff who held title to property as tenants in common with his niece and sought to quiet title based on adverse possession failed to carry his burden of proving ouster [*Preciado v. Wilde (2006) 139 Cal. App. 4th 321, 325, 42 Cal. Rptr. 3d 792]* . The niece testified that she had no notice that the plaintiff wanted to interfere with her right to possession and title. The plaintiff admitted he had never excluded his niece from the property, never restricted her access, or informed her he was challenging her ownership. The plaintiff constructed fences, but admitted they were not designed to exclude family members. In addition, some of the changes to the property made by the plaintiff were remote in time or involved only a small area, while other changes were not initiated by the plaintiff until after he had consulted the niece or her father, which refuted the plaintiff's claim of hostility [*Preciado v. Wilde (2006) 139 Cal. App. 4th 321,*

325-326, 42 Cal. Rptr. 3d 792] .

The cotenant in occupancy may record a deed to the property, and that act would be notice of hostility if he or she knew nothing of the existence of the other cotenants when his or her exclusive occupancy began [Johns v. Scobie (1939) 12 Cal. 2d 618, 624, 86 P.2d 820], but probably not otherwise [*see* West v. Evans (1946) 29 Cal. 2d 414, 418, 175 P.2d 219]. A cotenant out of occupancy does not have any duty of surveillance of public records so as to ensure that a cotenant in occupancy is not acquiring adverse rights [Wilkerson v. Thomas (1953) 121 Cal. App. 2d 479, 488, 263 P.2d 678].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 13.18 Payment of Taxes

[1] Requirement to Pay Taxes

[a] Statutory Requirement

In no case is title by adverse possession considered established under any sections of the Code of Civil Procedure unless it is shown that the claimant together with predecessors and grantors paid all state, county, and municipal taxes that were levied and assessed on the land during the five-year prescriptive period [Code Civ. Proc. § 325].

[b] Both Levy and Assessment Essential

The taxes that must have been paid are only the taxes that were both *levied* and *assessed* during the prescriptive period [*see* Allen v. McKay & Co. (1898) 120 Cal. 332, 335, 52 P. 828; Brown v. Clark (1891) 89 Cal. 196, 201-202, 26 P. 801; Smith v. Byer (1960) 179 Cal. App. 2d 118, 120-121, 3 Cal. Rptr. 645 ("levied" refers to act of board of supervisors or city council; "assessed" refers to assessor's act)]. Those taxes must have been paid even if not actually due and payable until after the end of the period [Smith v. Byer (1960) 179 Cal. App. 2d 118, 120-121, 3 Cal. Rptr. 645].

[c] Actual Payment Essential

If the adverse claimant offered to pay taxes, but the tax collector refused to accept payment because the taxes had already been paid by another (the true owner), the claimant failed to meet the taxpaying requirement [Glowner v. de Alvarez (1909) 10 Cal. App. 194, 195-196, 101 P. 432]. On the other hand, if the adverse claimant had the land assessed and paid the taxes levied on it, the fact that the land was also assessed to another (the true owner), who also paid the taxes, is immaterial [Kendrick v. Klein (1944) 65 Cal. App. 2d 491, 497, 150 P.2d 955; *see* Cummings v. Laughlin (1916) 173 Cal. 561, 564-565, 160 P. 833].

[d] Burden of Proof

The burden is on the adverse claimant to show either that no taxes were levied and assessed or that the claimant (together with predecessors and grantors) paid the taxes that were levied and assessed [Glatts v. Henson (1948) 31 Cal. 2d 368, 372, 188 P.2d 745].

PRACTICE TIP:

Taxation Exceptions. There are a couple of exceptions to the general rule that adverse claimants are required to pay taxes. This practitioner has litigated one case in which he was successful in prosecuting an adverse possession claim on behalf of an irrigation district, which does not have to meet the taxation payment requirement. In addition, school districts are exempt from meeting this element of an adverse possession claim. *By William M. Hensley*

[2] Unusual Facts

[a] Assessor's Error

When the claimant, by constructing buildings or other improvements or fences, visibly occupied a disputed strip of land along the boundary with an adjacent parcel, the California Supreme Court inferred that the assessor did not base assessments on the record boundary but valued the land and improvements visibly occupied by each landowner. Thus, it was shown that the claimant paid taxes levied and assessed on the disputed strip even though taxes on that strip were not clearly assessed to the claimant [Gilardi v. Hallam (1981) 30 Cal. 3d 317, 326-327, 178 Cal. Rptr. 317, 636 P.2d 588].

[b] Delinquency and Redemption

Redemption is a payment of taxes meeting the statutory requirement when, while the redeemer and successors in interest are in undisturbed occupation of the property, taxes on the property in question become delinquent, a sale takes place, and a redemption is made, and this is done in good faith [Owsley v. Matson (1909) 156 Cal. 401, 405, 104 P. 983].

[c] Misdescription on Tax Roll

As long as the adverse claimant paid the taxes actually levied and assessed on the property occupied, a misdescription of the property on the tax assessment roll or in the tax receipts will not generally affect the efficacy of the payments for purposes of adverse possession [Sorensen v. Costa (1948) 32 Cal. 2d 453, 466, 467, 196 P.2d 900].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawLimited Use RightsEasementsCreationEasement by PrescriptionTax LawState & Local TaxesAdministration & ProceedingsAssessments

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[Reserved]

§§ 13.19[Reserved]

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§ 13.30 Related Matthew Bender Publications

For points and authorities supporting and opposing a motion for a new trial, supporting and opposing a motion for summary judgment, and supporting a general demurrer to the complaint, in a quiet title action based on adverse possession, see California Points and Authorities, ch. 13, *Adverse Possession* (Matthew Bender)

For further discussion of adverse possession and related topics, see California Real Estate Law and Practice, ch. 343, *Easements, Profits and Licenses* , ch. 360, *Adverse Possession* , and ch. 370, *Quieting Title* (Matthew Bender)

For forms of interrogatories for use in actions involving a claim of adverse possession, see 1 Bender' s Forms of Discovery, *Adverse Possession* (Matthew Bender)

For general discussion of adverse possession, see Powell on Real Property, ch. 91, *Adverse Possession* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawLimited Use RightsEasementsCreationEasement by PrescriptionReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 13.31 Federal Statutes

Statute allowing United States to be named defendant in action to adjudicate title to real property is not to be construed to permit suits against United States based on adverse possession. 28 U.S.C. § 2409a(g)

Patent to mining claim may be obtained, in absence of adverse claims, by person holding and working it for period prescribed by statute of limitation for mining claims of state where claim is situated, but right does not impair any lien attaching before issuance of patent. 30 U.S.C. § 38

Secretary of Interior may issue patent for tract of public land held by adverse possessor under claim or color of title. 43 U.S.C. §§ 1068-1068b

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawLimited Use RightsEasementsCreationEasement by PrescriptionReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Act

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§ 13.32 State Statutes

[1] Definitions

Title by occupancy. Civ. Code § 1006

Title by prescription described and limited. Civ. Code § 1007

[2] Evidence

Person who exercises acts of ownership over property is presumptive owner. Evid. Code § 638

Proof of adverse possession overcomes certificate of purchase or location, in dispute over ownership of land. Evid. Code § 1604

[3] Future Interests

Protecting future interests. Civ. Code § 741

[4] Payment of Taxes

Declaration that person in occupancy desires to be assessed because of intention to take by adverse possession must be filed to insert occupant's name along with true owner's name on tax rolls. Rev. & Tax. Code § 610(a), (b)(3)

[5] Prescriptive Easements

Servitude acquired by enjoyment is extinguished by nonuse. Civ. Code § 811(4)

Recording notice of consent to use land. Civ. Code § 813

Prescription, generally. Civ. Code §§ 1006-1009

Prescriptive easement barred by periodic posting of signs. Civ. Code § 1008

Title to land used by city inhabitants as cemetery for five years is vested in them, and land is to be used as public cemetery. Health & Safety Code § 8126

[6] Quieting Title and Recovering Property

[a] Generally

Person entitled to specific real property is entitled to recover it by either judgment for possession or judgment requiring other party to perfect title and deliver possession. Civ. Code § 3375

Authorization and procedure for quiet title actions. Code Civ. Proc. § 760.010 et seq.

In action to recover property, plaintiff is entitled to recover damages for withholding property if right to recover property exists when action is commenced and terminates during pendency of action. Code Civ. Proc. § 740

Amount by which good faith improver's improvements enhance value of land is required to be set off against damages for withholding property. Code Civ. Proc. § 741; *see* Code Civ. Proc. § 871.1 ("good faith improver" defined)

Clearing title to property where cloud results from proposed dedication not accepted for 25 years. Code Civ. Proc. § 771.010 et seq.

Determining contest between persons claiming same school land. Pub. Res. Code § 7362

[b] By Adverse Possessor

Adverse possession not founded on written instrument, judgment, or decree is limited to land actually occupied. Code Civ. Proc. § 324

Right of person to possession of real property is not impaired or affected by descent resulting from death of one in possession of property. Code Civ. Proc. § 327

[c] Different Names

Determining identity of person taking title in one name and deeding or satisfying lien in another name. Code Civ. Proc. § 770.010 et seq.

[7] Recovery Actions and Statutes of Limitation

Plaintiff in action to recover real property is required to show that he or she, or his or her ancestor, predecessor, or grantor, was possessed of premises within five years before commencement of action. Code Civ. Proc. § 318

When entry on real estate is deemed sufficient. Code Civ. Proc. § 320

Occupancy of real property by one who is not legal title holder is subordinate to legal title, unless property was adversely possessed for five years before action to recover property was commenced. Code Civ. Proc. § 321

Adverse possession under written instrument, judgment, or decree. Code Civ. Proc. §§ 322, 323

Requisites for adverse possession not founded on written instrument, judgment, or decree. Code Civ. Proc. § 325

Adverse possession by landlord through occupancy by tenant. Code Civ. Proc. § 326

[8] Transactions Involving Adversely Possessed Land

Anyone claiming title to real property in adverse possession of another is entitled to transfer it with same effect as if in actual possession. Civ. Code § 1047

Mortgage can be created on property held adversely to mortgagor. Civ. Code § 2921

Minority, insanity, or imprisonment for less than life term, tolls statute of limitation in action involving title to realty. Code Civ. Proc. §§ 328, 328.5

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawLimited Use RightsEasementsCreationEasement by PrescriptionReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

California Forms of Pleading and Practice--Annotated

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Volume 2: Adoptions thru Airplanes and Airports-Chs. 12-17
Chapter 13 ADVERSE POSSESSION
PART III. RESEARCH GUIDE

2-13 California Forms of Pleading and Practice--Annotated § 13.33

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§ 13.33 Decisions

[1] Adverse Possession

[a] Generally

Right of possession in executor or administrator was barred by adverse possession in same way as right of possession in any other trustee. Webb v. Winter (1902) 135 Cal. 455, 457, 67 P. 691

When there was judgment for plaintiff in ejectment action and eviction of defendant under this action, defendant was precluded from later asserting adverse possession based on events before judgment. Breon v. Robrecht (1897) 118 Cal. 469, 471-473, 51 P. 33

Adverse possessor has right equal to that of actual title holder to place tenant in possession of the property and collect rent from that tenant; thus, adverse possessor could not be found guilty of grand theft as to rent received, but was subject to obligation under Civ. Code § 890 to apply that rent to mortgage encumbrance. People v. Lapcheske (1999) 73 Cal. App. 4th 571, 576, 86 Cal. Rptr. 2d 565

No title by adverse possession arose when possession was not hostile because parties agreed to have disputed boundary area surveyed and they acquiesced in results of survey; when there was confusion as to boundary of land and occupancy under mistake was without intention to claim land of another, intention was to claim only to true line wherever it may be, and occupancy was not adverse. Ikola v. Goff (1973) 31 Cal. App. 3d 872, 875-879, 107 Cal. Rptr. 663

[b] By Private and Municipal Corporations

Adverse possession by corporation was defense to ejectment suit. Lawrence v. Ballou (1875) 50 Cal. 258, 264

Railroad was entitled to acquire fee title by adverse possession. California v. Ocean Shore R.R. Cal. (1948) 32 Cal. 2d 406, 415, 196 P.2d 570

[2] Claim of Title

[a] Generally

One is entitled to adversely possess as against private persons even if there is superior title in governmental entity. Allen v. McKay & Co. (1898) 120 Cal. 332, 338, 52 P. 828 (federal claims to tidelands); Abar v. Rogers (1972) 23 Cal. App. 3d 506, 513, 100 Cal. Rptr. 344; LeFevre v. Borwick (1953) 116 Cal. App. 2d 786, 789, 254 P.2d 626

[b] Color of Title

Deed from partners conveying interest in partnership property, including adversely claimed land, did not change possession by grantee into claim founded on written instrument. Allen v. McKay (1903) 139 Cal. 94, 102, 72 P. 713

[c] Claim of Right

[i] Constructive Possession

Without color of title, constructive possession is insufficient to show adverse possession, and only land actually possessed is subject to acquisition by adverse possession. Mattes v. Hall (1913) 21 Cal. App. 552, 558, 132 P. 295

[ii] Enclosures

Substantial enclosure requirement of Code Civ. Proc. § 325 is satisfied by employing natural barriers for completing enclosure, provided they are effective as part of actual enclosure. Mountain Club v. Pinney (1924) 67 Cal. App. 225, 246, 227 P. 630

Fencing land is insufficient alone to establish adverse possession under claim of right; evidence of actual occupancy is required. Mattes v. Hall (1913) 21 Cal. App. 552, 560-561, 132 P. 295

[3] Continuous Occupancy

[a] Generally

Infrequent visits to land are not sufficient to establish adverse possession under Code Civ. Proc. §§ 322, 323, if owner would not be put on notice of hostile claim. Wareham v. Randolph (1960) 184 Cal. App. 2d 218, 224-225, 7 Cal. Rptr. 483 (three visits in five or six years)

Even though land can be put to little or scant use, adverse claimant is not excused from exercising these acts of occupancy as would give notice of hostility. Sevenman v. Long Bell Lumber Co. (1954) 129 Cal. App. 2d 528, 533, 277 P.2d 510 (acts of occupancy scarcely averaged one day a year)

Continuity of possession is not interrupted by temporary periods of vacancy, not evincing any intention of

abandonment of possession. Merrill v. Hooper (1932) 125 Cal. App. 80, 84, 13 P.2d 786

[b] Easements

If servient-tenement owner recognizes adverse claimant's right to control location of easement, ensuring change of easement route by mutual consent carries forward existing prescriptive rights. Zunino v. Gabriel (1960) 182 Cal. App. 2d 613, 618, 6 Cal. Rptr. 514

[4] Hostility

[a] Generally

Declarations of adverse claimant about claim made while in occupancy and before action was commenced were admissible verbal acts tending to show adverseness of possession. Weller v. Chavarria (1965) 233 Cal. App. 2d 234, 245, 43 Cal. Rptr. 364

Doctrine of agreed boundary is incompatible with adverse possession rule, since one acquiring title under former enters into occupancy by permission of adjoining landowner. Janes v. LeDeit (1964) 228 Cal. App. 2d 474, 488-489, 39 Cal. Rptr. 559

[b] Cotenants

Whether cotenant's possession was open, notorious, and hostile to other cotenants so as to achieve ouster is question of fact. Weller v. Chavarria (1965) 233 Cal. App. 2d 234, 248, 43 Cal. Rptr. 364 (maintaining road and signs was insufficient to oust)

[c] Heirs and Administrator of Estate

When one of decedent's heirs claimed he had established adverse possession of parcel formerly owned by decedent, period in which that heir acted as executor of estate could not be considered in determining whether five-year limitations period had run. Estate of Seifert (2005) 128 Cal. App. 4th 64, 68, 26 Cal. Rptr. 3d 560

Heirs or transferees of heirs were not able to possess property in estate, pending completion of administration, in hostility to estate. Marsh v. Edelstein (1970) 9 Cal. App. 3d 132, 138-139, 88 Cal. Rptr. 26

Administrator was not barred from acquiring prescriptive title to estate assets, after probate court purported to finally dispose of assets and furnished administrator, as individual, with color of title. Satariano v. Galletto (1944) 66 Cal. App. 2d 813, 816-817, 153 P.2d 201

[d] Liens and Foreclosure

Grantee of one holding property subject to mortgage, when conveyance was made during pendency of foreclosure suit, held pendente lite (subject to suit's outcome), not adversely. Dobbins v. Economic Gas Co. (1920) 182 Cal. 616, 638-639, 189 P. 1073

[e] Litigants

When spouse remained in possession despite judicial decree awarding property to other spouse, occupying spouse's possession was subordinate to other spouse until express notice was given of adverse claim. Buic v. Buic (1992) 5 Cal. App. 4th 1600, 1605, 7 Cal. Rptr. 2d 738

After decree in quiet title action vested title, losing party's continued possession was not adverse unless express notice of adverse claim was brought home to owner. Jaffray v. Mies (1947) 80 Cal. App. 2d 291, 293, 181 P.2d 672

[f] Prescriptive Easements

Dominant-tenement owner's improvement of easement does not automatically extinguish easement or show permissive use. Walner v. City of Turlock (1964) 230 Cal. App. 2d 399, 411, 41 Cal. Rptr. 29

Posted sign near claimed easement reading "Private Entrance, Revocable to Pass at any Time," did not preclude prescription when user did not believe sign applied to him. Pratt v. Hodgson (1949) 91 Cal. App. 2d 401, 403, 405, 204 P.2d 934

[g] Vendor and Purchaser

Possession while possessor had option to purchase was not deemed adverse, absent clear notice to optionor of adverse claim. Chapman v. Sky L'Onda etc. Water Co. (1945) 69 Cal. App. 2d 667, 674-675, 159 P.2d 988

That grantor (father) remained in possession of premises after grant to his children was not evidence of adverse possession. Tully v. Tully (1902) 137 Cal. 60, 66, 69 P. 700

When grantor held over after conveyance and then conveyed to second grantee larger area than he had left, second grantee and successors were able to adversely possess such area under Code Civ. Proc. §§ 322, 323. Harvey v. Berry (1927) 201 Cal. 74, 77-79, 255 P. 509

[5] Payment of Taxes

[a] Generally

Payment of taxes and mistaken belief of ownership did not establish adverse possession when there was no substantial enclosure nor any usual cultivation or improvement. Safwenberg v. Marquez (1975) 50 Cal. App. 3d 301, 123 Cal. Rptr. 405

Code Civ. Proc. § 325 does not require that taxes be paid with money obtained from sources other than property adversely claimed. Kraemer v. Kraemer (1959) 167 Cal. App. 2d 291, 310, 334 P.2d 675

Issue of whether taxes have been paid is issue for trier of fact, not matter of law. Finley v. Yuba County Water Dist. (1979) 99 Cal. App. 3d 691, 698, 160 Cal. Rptr. 423

PRACTICE TIP:

Uncontroverted Tax Payment Issue May Still Allow for Summary Judgment/Adjudication.

Language from older cases may be deceptive as far as summary judgment/adjudication availability is concerned. Under Code Civ. Proc. § 437c(p), a plaintiff may get judgment, as a matter of law, in situations when uncontroverted evidence of tax payment is accepted by the law-and-motion judge. Thus,

under the right circumstances, an unrebutted, competent factual showing may make the issue one for resolution at a pre-trial stage as a matter of law. *By William M. Hensley*

[b] Burden of Proof

Burden is on adverse claimant of fee title to show that no taxes were assessed or that if they were assessed, claimant paid them. Glatts v. Henson (1948) 31 Cal. 2d 368, 372, 188 P.2d 745

[6] Possession and Use

Facts pertaining to adverse claimant's family's occupancy before start of running of statute of limitation were material to character of claimant's possession. Park v. Powers (1935) 2 Cal. 2d 590, 594-595, 42 P.2d 75

[7] Prescriptive Easement

[a] Limits on Scope

Holder of prescriptive easement is not allowed to alter place, mode, or manner of its enjoyment substantially, but immaterial change is not barred. Ward v. Monrovia (1940) 16 Cal. 2d 815, 821, 108 P.2d 425

Property owner could not assert exclusive prescriptive easement for improvements he enclosed on parcel held in common with other owners; such claim was in nature of adverse possession, which property owner failed to establish. Kapner v. Meadowlark Ranch Assn. (2004) 116 Cal. App. 4th 1182, 1187, 11 Cal. Rptr. 3d 138

Homeowner who placed woodshed and landscaping on neighbor's property made exclusive use of land's surface and therefore could not acquire prescriptive easement, but had to meet requirements for adverse possession. Harrison v. Welch (2004) 116 Cal. App. 4th 1084, 1094, 11 Cal. Rptr. 3d 92

Easement by prescription for passage of cattle and horses did not include right of passage for motorcycles when only use of motorcycles had been clandestine. Connolly v. McDermott (1984) 162 Cal. App. 3d 973, 977-999, 208 Cal. Rptr. 796

Easement in nature of profit a prendre to take nuts from trees included right to enter on land to care for trees but ended when trees die. Costa v. Fawcett (1962) 202 Cal. App. 2d 695, 702-703, 21 Cal. Rptr. 143

[b] Prevention by Injunction

Prescriptive easement could be acquired by use of defendant's driveway to gain access to plaintiff's parking, and proper remedy was injunction to force removal of newly constructed fence. Bennett v. Lew (1984) 151 Cal. App. 3d 1177, 1183-1187, 199 Cal. Rptr. 241

[c] Relation to Easement by Necessity

Use of way by necessity does not ripen into easement by prescription, at least while necessity continues. Martinelli v. Luis (1931) 213 Cal. 183, 184-185, 1 P.2d 980

[d] Requirement to Use Land

Third party was able to acquire prescriptive rights in land subject to limited easement by maintaining nonconforming use for necessary period. Faus v. City of Los Angeles (1967) 67 Cal. 2d 350, 362, 62 Cal. Rptr. 193, 431 P.2d 849

Award of prescriptive easement that precluded owner's access to disputed property was error when adequate legal description was available. Mehdizadeh v. Mincer (1996) 46 Cal. App. 4th 1296, 54 Cal. Rptr. 2d 284

Constructing fence around neighbor's property and using property as backyard did not entitle user to exclusive prescriptive easement when all elements of adverse possession were not established. Silacci v. Abramson (1996) 45 Cal. App. 4th 558, 53 Cal. Rptr. 2d 37, 39

Principles of easement by prescription were used to establish public rights in mean high tide mark at Lake Tahoe. Fogerty v. State of California (1986) 187 Cal. App. 3d 224, 238-240, 231 Cal. Rptr. 810

Lack of use of disputed property not only prevents prescriptive easement from arising but also precludes its enforceability. Mesnick v. Caton (1986) 183 Cal. App. 3d 1248, 1261, 228 Cal. Rptr. 779

Prescriptive easement requires use of claimed easement, and mistakenly fencing neighbor's property without using it was not sufficient to establish easement. Mesnick v. Caton (1986) 183 Cal. App. 3d 1248, 1261-1262, 228 Cal. Rptr. 779

Fact of use and not of trespass is significant element in establishing easement by prescription, so that only use need be open and notorious. Dooley's Hardware Mart v. Trigg (1969) 270 Cal. App. 2d 337, 341, 75 Cal. Rptr. 745

One is entitled to use real property both as member of public and under private prescriptive easement. Morse v. Miller (1954) 128 Cal. App. 2d 237, 249-250, 275 P.2d 545

[e] Tenant's Use Adverse to Landlord

Prescriptive easement is not available against landlord because landlord, who is not in possession, cannot bring action to prevent use that establishes easement, and reversionary interest of landlord cannot be defeated by actions of tenant. Dietrich Internat. Truck Sales v. J.S. & J. Services, Inc. (1992) 3 Cal. App. 4th 1601, 1608-1610, 5 Cal. Rptr. 2d 388

[f] Treatment of Easement in Bankruptcy Case

Fact that claimant of prescriptive easement in property of debtor in bankruptcy knew that parcel was being sold and did not file objection or otherwise participate in bankruptcy court hearings authorizing sale was not sufficient to imply consent necessary under 11 U.S.C. § 363(f)(2) for bankruptcy court to sell property free of liens and encumbrances; subsequent state court action by claimant against purchaser was not barred by res judicata. Scheidel v. Lister (1986) 182 Cal. App. 3d 657, 661-667, 227 Cal. Rptr. 510

Hostility inherent in claim of prescriptive easement did not establish bona fide dispute necessary under 11 U.S.C. § 363(f)(4) for bankruptcy court to sell property of estate free of liens and encumbrances, when right to easement had not been asserted by claimant or rejected by debtor in bankruptcy before sale. Scheidel v. Lister (1986) 182 Cal. App. 3d 657, 663, 227 Cal. Rptr. 510

[g] Use by Mistake

Occupancy of easement by mistake was sufficient to be adverse and created easement by prescription. Otaly Water Dist. v. Beckwith (1991) 1 Cal. App. 4th 1041, 1046, 3 Cal. Rptr. 2d 233

[h] Use Equivalent to Public Taking

Aviation easement was acquired by prescription when noise, vibration, fumes, fuel particles, and inconvenience interfered with use and enjoyment of property to extent that amounted to taking. Baker v. Burbank-Glendale-Pasadena Airport Authority (1990) 220 Cal. App. 3d 1602, 1609, 270 Cal. Rptr. 337

[8] Property Exempt From Adverse Possession

[a] Public Property

Statutory provisions on adverse possession do not apply to property devolved to public use. California v. Chambers (1951) 37 Cal. 2d 552, 556-557, 233 P.2d 557

Title by prescription cannot be acquired against city or other public body on land dedicated for public use. Oakland v. Burns (1956) 46 Cal. 2d 401, 406, 296 P.2d 333 (airport land); City of Berkeley v. Gordon (1968) 264 Cal. App. 2d 461, 464-465, 70 Cal. Rptr. 716 (basement under street)

Civ. Code § 1007, prohibiting acquisition of title to public property by adverse possession, eliminates statute of limitation as defense in action by city for recovery of land. Noble v. Merchants Nat'l Realty Corp. (1967) 248 Cal. App. 2d 48, 51, 56 Cal. Rptr. 253

[b] Public Use

Property held for public use is not subject to acquisition by adverse possession. Mosk v. Summerland Spiritualist Ass'n (1964) 225 Cal. App. 2d 376, 381, 37 Cal. Rptr. 366

[9] Quiet Title Actions

[a] Generally

Nature of actions. Thomson v. Thomson (1936) 7 Cal. 2d 671, 681, 62 P.2d 358

Action to quiet title to easement against known defendants sued by fictitious names, on false pretense that names are unknown, does not stop statute of limitation [Code Civ. Proc. § 318] from running. Noble v. Merchants Nat'l Realty Corp. (1967) 248 Cal. App. 2d 48, 51, 56 Cal. Rptr. 253

[b] Judgment

Injunction in judgment is modifiable, given changed conditions, when it is no longer essential to preserve prescriptive easement recognized in judgment. Little v. Schwartz (1960) 182 Cal. App. 2d 594, 599-601, 6 Cal. Rptr. 40

Legal Topics:

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

Tax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawLimited Use RightsEasementsCreationEasement by PrescriptionReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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PART III. RESEARCH GUIDE

2-13 California Forms of Pleading and Practice--Annotated § 13.34

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§ 13.34 Law Reviews

Note, *Warsaw v. Chicago Metallic Ceilings, Inc.: Compensation for Prescriptive Easements, 19 Loy. L.A. L. Rev. 111 (1985)*

Note, *Adverse Possession of Abandoned Urban Housing, 7 Loyola L. Rev. 30 (1974)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawLimited Use RightsEasementsCreationEasement by Prescription

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§ 13.35 Text References

Miller & Starr, Current Law of California Real Estate, vol. 5, ch. 16, *Adverse Possession* (2d ed., 1989)

Witkin, Summary of California Law, vol. 12, *Real Property*, §§ 212-235 (10th ed., 2005)

Restatement of Property §§ 457-465

2, 2A C.J.S., *Adverse Possession*, §§ 1-342

28A C.J.S., *Easements*, §§ 14-51

3 Am. Jur. 2d, *Adverse Possession*, §§ 1-322

28 Am. Jur. 2d, *Easements and Licenses in Real Property*, §§ 45-73

Legal Topics:

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[Reserved]

§§ 13.36[Reserved]

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Volume 2: Adoptions thru Airplanes and Airports-Chs. 12-17
Chapter 13 ADVERSE POSSESSION
PART IV. FORMS

2-13 California Forms of Pleading and Practice--Annotated § 13.40

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§ 13.40 Complaint to Quiet Title to Real Property [Code Civ. Proc. §§ 760.020(a), 761.020]--Title by Adverse Possession [Code Civ. Proc. §§ 321-325]

[1] FORM Complaint to Quiet Title to Real Property [Code Civ. Proc. §§ 760.020(a), 761.020]--Title by Adverse Possession [Code Civ. Proc. §§ 321-325]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO QUIET TITLE TO REAL PROPERTY
_____ [*name(s) of known defendant(s)*], _____ [*if person required to be named as defendant is dead, and plaintiff knows identity of personal representative, add:* and _____ (*name*), as _____ (*description, e.g.,* Executor *or* Administrator With Will Annexed) of the Estate of _____ (*name*), Deceased,] _____ [*if person required to be named as defendant is believed by plaintiff to be dead but plaintiff does not know identity of personal representative, and/or if plaintiff wishes to include unknown successors of known decedent, add:* and the testate and intestate successors of _____ (*name of decedent*), _____ (deceased *or* believed to be	)	(Adverse Possession)

deceased), and all persons claiming by, through, or under such _____ (decedent *or* person),] _____ [*if unknown defendants are included, add:* and all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud on plaintiff's title thereto,] [and DOES I through _____,]
Defendant(s).

Plaintiff alleges:

1. Plaintiff _____ [*if not an individual, allege:* is _____ (*capacity*) and] owns the fee simple title to real property situated in _____ County, California, _____ [*if appropriate, add:* commonly known as _____ (*street address or other common designation*) and] described as follows ("the Property"): _____ [*legal description*].

2. Plaintiff's title is based on plaintiff's actual, open, notorious, exclusive, hostile, and adverse possession of the Property for five years preceding the commencement of this action, together with plaintiff's payment of all taxes assessed against the Property for the same five years.

3. _____ [*Allege each known defendant's identity and capacity, if necessary.*]

4. Defendant _____ [*name*] claims an interest in the Property as the holder of the legal title, which interest is adverse to plaintiff.

5. [Plaintiff is informed and believes and thereon alleges that] [D]efendant _____ [*name*] claims an interest in the Property as _____ [*specify, e.g.,* the holder of a lien representing an unsatisfied judgment against _____ (*name of judgment debtor*), a former owner of the Property, which interest is adverse to plaintiff. The abstract of judgment was recorded on _____ (*date*) in the Official Records of the County of _____, Book/Reel _____, page/image _____ (and appears as exception number _____ on the title report issued by _____ [*name of title insurance company or abstractor*] on _____ [*date*], a copy of which is attached and made a part of this complaint)].

[6. The claim of _____ (*name of defendant*) is _____ (unknown *or* uncertain *or* contingent). (*If lack of knowledge, uncertainty, or contingency is caused by transfer to unborn or unascertained person or class member, or by transfer of contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, allege:* _____[*name*], age _____, is the person who would be entitled to assert an adverse claim if _____ [*describe contingency*] had occurred before the commencement of this action.) (*If such person is subject to a legal disability, allege:* Such person is subject to _____ [*specify legal disability*].)]

[7. Defendants designated as "the testate and intestate successors of _____ (*name of deceased person*), (believed to be) deceased, and all persons claiming by, through, or under such _____ (decedent *or* person)" ("the Successor Defendants") claim some right, title, estate, lien, or interest in the Property adverse to

plaintiff's title, and their claim constitutes a cloud on plaintiff's title.]

[8. Defendants designated as "all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud on plaintiff's title thereto" ("the Unknown Defendants") claim rights, titles, estates, liens, or interests in the Property adverse to plaintiff's title, and their claims constitute a cloud on plaintiff's title.]

[9. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____ and therefore sues those defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants claims some right, title, estate, lien, or interest in the Property adverse to plaintiff's title, and their claims constitute a cloud on plaintiff's title.]

10. Plaintiff is seeking to quiet title against all adverse claims of defendant(s) ("the Adverse Claims"), to wit:

[a. The claims of the fictitiously named defendants described in Paragraph 9;]

[b. The claims of the Unknown Defendants described in Paragraph 8, whether or not any such claim is known to plaintiff;]

[c. The claims of the Successor Defendants described in Paragraph 7;]

[d. The unknown, uncertain, or contingent claims, if any, of defendant _____ (*name*) described in Paragraph 6;]

e. The claim of defendant _____ [*name of defendant*] described in Paragraph 5; and

f. The claim of defendant _____ [*name of defendant*] as holder of the legal title.

11. The Adverse Claims are without any right whatever. Defendants have no right, title, estate, lien, or interest whatever in the Property adverse to plaintiff's title [except _____ (*set forth any claims that plaintiff admits are valid, e.g.,* the utility easement held by Pacific Gas and Electric Company)].

12. Plaintiff seeks to quiet title as of _____ [*date*]. [That date should be the effective date because _____ (*if date is other than date complaint is filed, allege why determination as of that date is sought*).]

WHEREFORE, plaintiff prays for judgment as follows:

1. That plaintiff is the _____ [*specify interest claimed, e.g.,* owner in fee simple] of the Property and that _____ [no defendant has any *or* defendant has no] interest in the Property adverse to plaintiff;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is a complaint for use by a person seeking to quiet title to real property based on adverse possession. It may be necessary to file an affidavit with the complaint, if an adverse claimant is dead [*see* [4][b], *below*].

PRACTICE TIP:

Obtaining Title Report. The plaintiff may wish to obtain a title report before commencing the action. If the plaintiff intends to add unknown persons as defendants [*see* [4], *below*], an examination of the record title and an inspection of the property will be necessary [*see* Code Civ. Proc. § 762.060(b)]. Also, the court may order the plaintiff to obtain a title report and keep it available for inspection and copying by the parties [Code Civ. Proc. § 762.040(b)]. *By Publisher's Editorial Staff*

[3] Allegations

The statutes governing quiet title actions [*see* generally Code Civ. Proc. § 760.010 et seq.] prescribe that the complaint must include the following allegations [Code Civ. Proc. § 761.020]:

- A description of the property that is the subject of the action. The description must include both the legal description and the street address or common designation, if any (Paragraph 1).

- The title of the plaintiff as to which a determination is sought and the basis of the title. The complaint must allege the specific facts constituting the adverse possession (Paragraph 2).

  - To establish a title by adverse possession, the plaintiff must prove payment of taxes and occupancy that is open, notorious, continuous, hostile to the true owner, and under a claim of title [Mesnick v. Caton (1986) 183 Cal. App. 3d 1248, 1258, 228 Cal. Rptr. 779; *see* Code Civ. Proc. §§ 322-325].

  - The title that an occupant gains by merely occupying the land for less than the period required for adverse possession is not sufficient to maintain a quiet title action [*see* Civ. Code §§ 1006, 1007].

- The adverse claims to the title of the plaintiff against which a determination is sought (Paragraphs 3 through 11).

  - If the claim or the share or quantity of the claim of a person required to be named as a defendant is unknown, uncertain, or contingent, the plaintiff must state this in the complaint. If the lack of knowledge, uncertainty, or contingency is caused by a transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, the plaintiff must also state in the complaint, as far as is known to the plaintiff, the name, age, and legal disability, if any, of the person in being who would be entitled to the claim if the contingency, on which the claim depends, had occurred before the action's commencement (Paragraph 6) [Code Civ. Proc. § 762.020(b)].

  - If the plaintiff admits the validity of any adverse claim, the complaint must state this (Paragraph 11) [Code Civ. Proc. § 762.060(c)].

- The date as of which the determination is sought. If the determination is sought as of a date other than the date the complaint is filed, the complaint must include a statement of the reasons why a determination as of that other date is sought (Paragraph 12).

- A prayer for the determination of the plaintiff's title against the adverse claims.

[4] Selection of Defendants

[a] Who Must Be Made Defendants

The plaintiff must name as defendants all persons having claims adverse to the plaintiff's title and against which a determination is sought [Code Civ. Proc. § 762.010].

The court on its own motion may, and on the motion of any party must, make appropriate orders for the joinder of additional parties as necessary or proper [Code Civ. Proc. § 762.040(a)].

[b] Decedents and Personal Representatives

If a person required to be named as a defendant is dead, the plaintiff must either join the personal representative as a defendant [Code Civ. Proc. § 762.030(a)] or state, in an affidavit filed with the complaint, that the person is required to be named as a defendant, but the person is dead (or is believed by the plaintiff to be dead), and the plaintiff knows of no personal representative [Code Civ. Proc. § 762.030(b)(1)]. In that event the plaintiff may join as defendants "the testate and intestate successors of [*name of person required to be named as defendant*], deceased [*or* believed to be deceased], and all persons claiming by, through, or under such decedent [*or* person]" [Code Civ. Proc. § 762.030(b)(2), (3)].

[c] Unknown Defendants

The plaintiff may name as defendants "all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to the plaintiff's title, or any cloud upon the plaintiff's title thereto," naming them in that manner [Code Civ. Proc. § 762.060(a)]. If unknown defendants are named, the plaintiff must take care to name as defendants all persons having adverse claims that are of record or known to the plaintiff or reasonably apparent from an inspection of the property [Code Civ. Proc. § 762.050(b)].

PRACTICE TIP:

Binding Unknown Claimants to Judgment. Naming unknown defendants and serving them by publication [*see* [7], *below*] will entitle the plaintiff to an *in rem* judgment against all persons known and unknown who were parties to the action and all persons not parties to the action and unknown to the plaintiff who had a claim that was not recorded when the complaint or required lis pendens [*see* [8], *below*] was filed [Code Civ. Proc. § 764.030]. *By Publisher's Editorial Staff*

[d] Fictitious Defendants

Testate and intestate successors and persons unknown could be designated as "DOE" defendants, although that is not recommended because it would depart from the statutory language of Code Civ. Proc. §§ 762.030(b)(2), (3) and 762.060 by which those defendants are to be designated [*see* [b], [c], *above*] and so could limit the *in rem* effect of the judgment [*see* Code Civ. Proc. § 764.030(b)]. However, fictitious defendants may be named as "DOE" defendants under Code Civ. Proc. § 474, since rules governing civil actions generally are applicable in quiet title actions unless they are inconsistent with quiet title provisions [*see* Code Civ. Proc. § 760.060].

[5] Verification

The complaint must be verified [Code Civ. Proc. § 761.020].

[6] Jurisdiction and Venue

The superior court has jurisdiction of quiet title actions [Code Civ. Proc. § 760.040(a)]. The actions are not limited civil cases [Code Civ. Proc. §§ 85, 86]. Subject to the power of the court to transfer actions, the proper county for the trial of an action to quiet title to real property is the county in which the real property, or part of it, is located [Code Civ. Proc. § 760.050(a)].

[7] Service of Summons

The form, content, and manner of the service of summons is the same as in civil actions, generally [Code Civ. Proc. § 763.010(a)]. The procedure for service of summons is set forth in Ch. 518, *Service of Summons and Papers* . Unknown defendants may be served by publication and posting [Code Civ. Proc. § 763.010(b)]. The requirements for service by publication and posting are discussed in Ch. 482, *Quieting Title* .

[8] Lis Pendens

Immediately on commencing a quiet title action, the plaintiff must file a lis pendens in the office of the county recorder of each county in which any real property described in the complaint is located [Code Civ. Proc. § 761.010(b)]. The lis pendens gives constructive notice of the pendency of the action to subsequent purchasers or encumbrancers [Code Civ. Proc. § 405.24]. For discussion and forms of lis pendens, see Ch. 348, *Lis Pendens* .

[9] Cross References

For alternative allegations as to agency, capacity, and residence of parties, as well as fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to quiet title actions, see Ch. 482, *Quieting Title*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers* , Pt. I

For forms of allegations showing proper venue, see Ch. 571, *Venue* , Pt. I

For alternative forms of verification, see Ch. 572, *Verification*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdverse PossessionElements of Adverse ClaimsCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsReal Property LawNonmortgage LiensGeneral Overview

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Volume 2: Adoptions thru Airplanes and Airports-Chs. 12-17
Chapter 13 ADVERSE POSSESSION
PART IV. FORMS

2-13 California Forms of Pleading and Practice--Annotated § 13.41

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§ 13.41 Demurrer--Quiet Title Action by Holder of Legal Title Barred by Statute of Limitation [Code Civ. Proc. § 318]

[1] FORM Demurrer--Quiet Title Action by Holder of Legal Title Barred by Statute of Limitation [Code Civ. Proc. § 318]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name of defendant*] [et al.],	)	DEMURRER TO COMPLAINT
Defendant(s).	)	
	)	

Defendant demurs to the complaint on the following ground:

The complaint does not state facts sufficient to constitute a cause of action in that it appears on the face of the complaint that the action is barred by the provisions of Code of Civil Procedure Section 318.

NOTICE IS HEREBY GIVEN that this demurrer has been set for hearing on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in _____ [_____ (Department *or* Division) _____ of] the above-entitled court, located at

_____ [*address*], _____ [*city*], California.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Use of Form

[a] Ground for Demurrer

The form in [1], *above*, is for use in objecting by demurrer to a complaint (or cross complaint) by which the plaintiff, as holder of the legal title, seeks to quiet title to the real property, or eject the defendant from possession of the real property, that the defendant owns by adverse possession [*see* Civ. Code § 1007; Code Civ. Proc. §§ 318, 321-325]. The demurrer is based on the ground that the plaintiff's pleading does not state facts sufficient to constitute a cause of action [Code Civ. Proc. § 430.10(e)] because the action is barred by the statute of limitation [*see* Code Civ. Proc. § 318].

[b] Defect Apparent on Face of Complaint

When a complaint shows on its face that the cause of action is barred by the statute of limitation, a demurrer on the ground of failure to state a cause of action is acceptable, but the statute must be pleaded as well [Bank of America etc. Ass'n v. Ames (1936) 18 Cal. App. 2d 311, 313-315, 63 P.2d 1208]. The defect must appear on the face of the complaint (or cross complaint), otherwise the objection must be taken in the answer [*see § 13.42*] instead of a demurrer [*see* Code Civ. Proc. § 430.30(a), (b)].

[3] Supporting Papers

The defendant is required to serve and file with the demurrer a notice of hearing [*Cal. Rules of Ct., Rule 3.1320(c), (d)*], which may be included in the demurrer as shown in this form. A memorandum in support of the demurrer is not required [*see Cal. Rules of Ct., Rules 3.1113(a), 3.1320*].

[4] Cross References

For memoranda supporting the relief sought in this form, see California Points and Authorities, Ch. 13, *Adverse Possession* (Matthew Bender)

For alternative forms of demurrer and a form of notice of hearing, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

For a general form of demurrer to an action barred by the statute of limitation, see Ch. 345, *Limitation of Actions*

For general discussion and forms relating to memoranda supporting and opposing motions, see Ch. 417, *Points and Authorities*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdverse PossessionElements of Adverse ClaimsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrers

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2-13 California Forms of Pleading and Practice--Annotated § 13.42

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§ 13.42 Affirmative Defense--Quiet Title Action by Holder of Legal Title Barred by Statute of Limitation [Code Civ. Proc. § 318]--Adverse Possession by Defendant

[1] FORM Affirmative Defense--Quiet Title Action by Holder of Legal Title Barred by Statute of Limitation [Code Civ. Proc. § 318]--Adverse Possession by Defendant

AS A [_____ [*if more than one, specify number, e.g.,* FIRST] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

[*EITHER*]

The cause of action alleged in the complaint is barred by Code of Civil Procedure Section 318.

[*OR*]

Defendant held and possessed the property, described in the complaint, adversely to plaintiff's title, for five years before the commencement of this action.

[2] Use of Form

The form in [1], *above*, is an affirmative defense [*see* Code Civ. Proc. § 431.30(b)(2)] for use in the answer to a complaint (or cross complaint) by which the plaintiff, as holder of the legal title, seeks to quiet title to the real property, or eject the defendant from possession of the real property, that the defendant owns by adverse possession [*see* Civ. Code § 1007; Code Civ. Proc. §§ 318, 321-325]. The bar of the statute of limitation may be pleaded either by reference

to the statute [*see* Code Civ. Proc. § 458], as in the first alternative, or by alleging all of the facts necessary to establish that the action is barred [*see* Brown v. World Church (1969) 272 Cal. App. 2d 684, 691, 77 Cal. Rptr. 669], as in the second alternative. For a form of demurrer asserting the bar of the statute of limitation, see *§ 13.41*.

PRACTICE TIP:

Cross Complaint to Quiet Title. If answering a complaint, the defendant should consider filing a cross complaint to quiet title to the property by adverse possession under Code Civ. Proc. § 761.040 [*see § 13.40*], since otherwise a quiet title action by the defendant may be barred [*see* Code Civ. Proc. § 426.30(a) (compulsory cross complaint)]. *By Publisher's Editorial Staff*

[3] Defendant's Burden of Pleading and Proof

In every action for the recovery of real property (that is, a quiet title action) or the possession of real property (an ejectment action), the person establishing a legal title to the property is presumed to have been in possession within the five-year limitation period prescribed by Code Civ. Proc. § 318, and the occupancy of the property by any other person is deemed to have been under and in subordination to the legal title, unless it appears that the property has been held and possessed adversely to the legal title for five years before the action's commencement [Code Civ. Proc. § 321; *see* Webber v. Clarke (1887) 74 Cal. 11, 19, 15 P. 431 (these five years need not be those immediately preceding action's commencement); *see also* Gerhard v. Stephens (1968) 68 Cal. 2d 864, 904, 69 Cal. Rptr. 612, 442 P.2d 692 (laches does not bar quiet title action against adverse possessor if defendant fails to demonstrate that he or she was in adverse possession of property during period of delay)].

The burden is on the defendant to plead and prove title by adverse possession if the plaintiff pleads and proves legal title [Schoenfeld v. Pritzker (1967) 257 Cal. App. 2d 117, 121-122, 64 Cal. Rptr. 592; Guerra v. Packard (1965) 236 Cal. App. 2d 272, 288, 46 Cal. Rptr. 25 (prescriptive easement)]. Pleading the statute of limitation is a good pleading of the defendant's prescriptive right [Patchett v. Webber (1926) 198 Cal. 440, 451, 245 P. 422; Alhambra Water Co. v. Richardson (1887) 72 Cal. 598, 600-601, 14 P. 379]. Evidence of adverse possession is admissible under a pleading of Code Civ. Proc. § 318 in the answer to a quiet title complaint by the holder of the legal title [Hagely v. Hagely (1886) 68 Cal. 348, 352, 9 P. 305]; however, evidence of adverse possession is not admissible if the answer merely denies the complaint's allegations [Warden v. Bailey (1933) 133 Cal. App. 383, 388-389, 24 P.2d 192; *see* McCreery v. Duane (1877) 52 Cal. 262, 263 (ejectment action)] or alleges merely that the defendant was entitled to possess the property for five years before the action's commencement [McCreery v. Sawyer (1877) 52 Cal. 257, 262 (ejectment action)].

[4] Cross References

For alternative forms of affirmative defenses, see generally Ch. 26, *Answers* , and Ch. 482, *Quieting Title*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewReal Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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2-13 California Forms of Pleading and Practice--Annotated § 13.43

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§ 13.43 Complaint to Quiet Title to Real Property [Code Civ. Proc. §§ 760.020(a), 761.020]--Prescriptive Easement [Civ. Code § 1007; Code Civ. Proc. §§ 322-325]--By Owner of Easement Against Landowner [Civ. Code § 809]

[1] FORM Complaint to Quiet Title to Real Property [Code Civ. Proc. §§ 760.020(a), 761.020]--Prescriptive Easement [Civ. Code § 1007; Code Civ. Proc. §§ 322-325]--By Owner of Easement Against Landowner [Civ. Code § 809]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s) of known defendant(s)*], _____ [*if person required to be named as defendant is dead, and plaintiff knows identity of personal representative, add:* and _____ (*name*), as _____ (*description, e.g.,* Executor *or* Administrator With Will Annexed) of the Estate of _____ (*name*), Deceased,] _____ [*if person required to be named as defendant is believed by plaintiff to be dead but plaintiff does not know identity of personal representative, and/or if plaintiff wishes to include unknown successors of known decedent, add:* and the testate and intestate successors of	)	COMPLAINT TO QUIET TITLE TO EASEMENT (Prescription)

_____ (*name of decedent*),
_____ (deceased *or* believed to be deceased), and all persons claiming by, through, or under such _____ (decedent *or* person),] _____ [*if unknown defendants are included, add:* and all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud on plaintiff's title thereto,]
[and DOES I through _____,]
Defendant(s).

Plaintiff alleges:

1. Plaintiff _____ [*if not an individual, allege:* is _____ (*capacity*) and] owns an easement that burdens real property situated in _____ County, California, _____ [*if appropriate, add:* commonly known as _____ (*street address or other common designation*) and] described as follows ("the Property"): _____ [*legal description*]. The easement is particularly described as follows ("the Easement"): _____ [*legal description*].

2. Plaintiff's title is based on plaintiff's actual, open, notorious, exclusive, hostile, and adverse use of the Easement for five years preceding the commencement of this action.

3. _____ [*Allege each known defendant's identity and capacity, if necessary.*]

4. Defendant _____ [*name*] claims an interest in the Easement as the holder of the legal title to the Property, which interest is adverse to plaintiff.

5. [Plaintiff is informed and believes and thereon alleges that] [D]efendant _____ [*name*] claims an interest in the Easement as _____ [*specify, e.g.,* the holder of a lien representing an unsatisfied judgment against _____ (*name of judgment debtor*), a former owner of the Property, which interest is adverse to plaintiff. The abstract of judgment was recorded on _____ (*date*) in the Official Records of the County of _____, Book/Reel _____, page/image _____ (and appears as exception number _____ on the title report issued by _____ [*name of title insurance company or abstractor*] on _____ [*date*], a copy of which is attached and made a part of this complaint)].

[6. The claim of _____ (*name of defendant*) is _____ (unknown *or* uncertain *or* contingent). (*If lack of knowledge, uncertainty, or contingency is caused by transfer to unborn or unascertained person or class member, or by transfer of contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, allege:* _____ [*name*], age _____, is the person who would be entitled to assert an adverse claim if _____ [*describe contingency*] had occurred before the commencement of this action.) (*If such person is subject to a legal disability, allege:* Such person is subject to _____ [*specify legal disability*].)]

[7. Defendants designated as "the testate and intestate successors of _____ (*name of deceased person*),

(believed to be) deceased, and all persons claiming by, through, or under such _____ (decedent *or* person)" ("the Successor Defendants") claim some right, title, estate, lien, or interest in the Easement adverse to plaintiff's title, and their claim constitutes a cloud on plaintiff's title.]

[8. Defendants designated as "all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud on plaintiff's title thereto" ("the Unknown Defendants") claim rights, titles, estates, liens, or interests in the Easement adverse to plaintiff's title, and their claims constitute a cloud on plaintiff's title.]

[9. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____ and therefore sues those defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants claims some right, title, estate, lien, or interest in the Easement adverse to plaintiff's title, and their claims constitute a cloud on plaintiff's title.]

10. Plaintiff is seeking to quiet title against all adverse claims of defendant(s) ("the Adverse Claims"), to wit:

[a. The claims of the fictitiously named defendants described in Paragraph 9;]

[b. The claims of the Unknown Defendants described in Paragraph 8, whether or not any such claim is known to plaintiff;]

[c. The claims of the Successor Defendants described in Paragraph 7;]

[d. The unknown, uncertain, or contingent claims, if any, of defendant _____ (*name*) described in Paragraph 6;]

e. The claim of defendant _____ [*name of defendant*] described in Paragraph 5; and

f. The claim of defendant _____ [*name of defendant*] as holder of the legal title.

11. The Adverse Claims are without any right whatever. Defendants have no right, title, estate, lien, or interest whatever in the Easement adverse to plaintiff's title [except _____ (*set forth any claims that plaintiff admits are valid, e.g.,* the utility easement held by Pacific Gas and Electric Company)].

12. Plaintiff seeks to quiet title as of _____ [*date*]. [That date should be the effective date because _____ (*if date is other than date complaint is filed, allege why determination as of that date is sought*).]

WHEREFORE, plaintiff prays for judgment as follows:

1. That plaintiff is the owner of the Easement and that _____ [no defendant has any *or* defendant has no] interest in the Easement adverse to plaintiff;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification. See § 13.40[1].*]

[2] Use of Form

The form in [1], *above*, is a complaint to quiet title to a prescriptive easement. The facts necessary to establish a prescriptive easement are basically the same as the elements of adverse possession, but there is no requirement that taxes be paid [Taormino v. Denny (1970) 1 Cal. 3d 679, 686, 83 Cal. Rptr. 359, 463 P.2d 711; Mesnick v. Caton (1986) 183 Cal. App. 3d 1248, 1260-1261, 228 Cal. Rptr. 779; *see § 13.13[1]*]. For a discussion of a quiet title complaint based on adverse possession, see *§ 13.40[2] -[8]*.

PRACTICE TIP:

Judicial Hostility to Exclusive Prescriptive Easement Claims. This form should only be used in those cases involving *true* prescriptive easements. As explained in § 13.13[3][d], the courts have shown judicial hostility towards extending prescriptive easement treatment to situations effectively giving ownership rights to claimants, especially in the context of residential fence enclosure disputes. The form complaint here should not be used when the claimant is seeking to obtain ownership rights through prescriptive easement when there is no showing that taxes were paid. *By William M. Hensley*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsCreationEasement by PrescriptionReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 13.44 Judgment Quieting Title--Adverse Possession or Prescriptive Use [Code Civ. Proc. § 764.010 et seq.]

[1] FORM Judgment Quieting Title--Adverse Possession or Prescriptive Use [Code Civ. Proc. § 764.010 et seq.]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s) of known defendant(s)*], _____ [*if person required to be named as defendant is dead, and plaintiff knows identity of personal representative, add:* and _____ (*name*), as _____ (*description, e.g.,* Executor *or* Administrator With Will Annexed) of the Estate of _____ (*name*), Deceased,] _____ [*if person required to be named as defendant is believed by plaintiff to be dead but plaintiff does not know identity of personal representative, and/or if plaintiff wishes to include unknown successors of known decedent, add:* and the testate and intestate successors of _____ (*name of decedent*), _____ (deceased *or* believed to be deceased), and all persons claiming by, through, or under such _____ (decedent *or* per-	)	JUDGMENT QUIETING TITLE

son),] _____ [*if unknown defendants are included, add:* and all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud on plaintiff's title thereto,]
Defendant(s).

_____

The above-entitled cause came on regularly for trial on _____[*date*], in _____ [_____ (Department *or* Division) _____ of] this court, the Honorable _____ [*name*], Judge, presiding. Plaintiff appeared by attorney, _____ [*name*], and defendant appeared by attorney, _____ [*name*].

Witnesses having been called and sworn, and evidence, both oral and documentary, having been introduced on behalf of the parties, and the court having heard and considered the same and argument of counsel, and the cause having been submitted for decision, and the court being fully advised in the premises, and _____ [the court having heretofore made its statement of decision *or* no statement of decision having been requested], and the court having carefully considered the same and having ordered judgment to be entered in accordance therewith;

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED:

1. Title to the _____ [*if judgment quiets title to easement, add:* easement that is particularly described in Exhibit B attached to and made a part of this judgment ("the Easement"), which burdens the] real property, situated in _____ County, that is particularly described in Exhibit A attached to and made a part of this judgment ("the Property"), is vested in plaintiff _____ [*if judgment quiets title to fee, add:* as owner in fee simple absolute], and has been vested in plaintiff continuously from _____ [*date*].

2._____ [*name of defendant*] has no right, title, estate, lien, or interest whatever in or to the _____ [Easement *or* Property], or any part of it, adverse to plaintiff.

3. All other persons claiming any right, title, estate, lien, or interest have no right, title, estate, lien, or interest whatever in or to the _____ [Easement *or* Property], or any part of it, adverse to plaintiff.

4. Plaintiff's title to the _____ [Easement *or* Property], and to each and every part of it, be forever quieted against any and all adverse claims of all defendants [*if unknown defendants, add:* known and unknown], and all defendants be forever barred from asserting any claim whatsoever in or to the _____[Easement *or* Property], or any part of it, adverse to plaintiff.

5. Plaintiff be awarded costs in the sum of $_____.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use as a judgment in favor of the plaintiff in an action to quiet title to a fee acquired by adverse possession or title to a prescriptive easement.

[3] Trial and Judgment

[a] Evidentiary Hearing as Required

The court must examine into the plaintiff's title and determine the plaintiff's title against the claims of all defendants. The court must not enter judgment by default but must in all cases require evidence of the plaintiff's title and hear such evidence as may be offered regarding the claims of any of the defendants, other than claims that the plaintiff, in the complaint, admits are valid. The court must render judgment in accordance with the evidence [Code Civ. Proc. § 764.010].

Whenever the court orders service by publication [*see § 13.40[7]*], the court, before hearing the case, must require proof that the summons has been served, posted, and published as required and that a lis pendens [*see § 13.40[8]*] has been filed [Code Civ. Proc. § 763.040].

[b] Unambiguous Property Description Essential

The judgment in a quiet title action should be certain and specific. An impossible, wrong, or uncertain description of the property or easement, or the absence of a description, renders the judgment void [Newport v. Hatton (1924) 195 Cal. 132, 156, 231 P. 987 (quiet title judgment based on tax sale); Newman v. Cornelius (1970) 3 Cal. App. 3d 279, 284, 83 Cal. Rptr. 435 (judgment quieting title to mining claims unclear as to location of claims); *see* Guerra v. Packard (1965) 236 Cal. App. 2d 272, 296, 46 Cal. Rptr. 25 (judgment quieting title to easement by prescription)].

PRACTICE TIP:

Copy of Description From Title Insurance Policy. Some lawyers believe that the risk of a potentially fatal error in the description in the judgment is minimized by using the property's legal description copied from a title insurance policy. *By Publisher's Editorial Staff*

[4] Effect of Judgment

[a] Parties and Uncognizable Claimants Are Bound

The judgment in the action will be *in rem*, binding and conclusive on all of the following persons, regardless of any legal disability [Code Civ. Proc. § 764.030]:

- All persons known and unknown who were parties to the action and who have any claim to the property, whether present or future, vested or contingent, legal or equitable, several or undivided.

- Except as provided in Code Civ. Proc. § 764.045 [*see* [b], *below*], all persons who were not parties to the action and who have any claim to the property that was not of record at the time the lis pendens was filed [*see § 13.40[8]*] or, if none was filed, at the time the judgment was recorded.

[b] Cognizable Claimants Are Not Bound

Except to the extent provided in Code Civ. Proc. § 1908 (relating to the conclusiveness and effect of a judgment, generally), the judgment does not affect a claim to the property or part of the property by any person who was not a party to the action if either of the following conditions were satisfied at the time the lis pendens was filed [*see § 13.40[8]*] or, if none was filed, at the time the judgment was recorded [Code Civ. Proc. § 764.045]:

- The claim was of record.
- The claim was actually known to the plaintiff or would have been reasonably apparent from an inspection of the property.

However, a claimant may be bound by the judgment if the claim was acquired from a party after the action's commencement and with actual knowledge of the action [*see* Code Civ. Proc. § 1908(a)(2)].

[c] Good Faith Purchaser May Rely on Judgment

Any relief granted in a subsequent action or proceeding directly or collaterally attacking the judgment in the quiet title action, whether based on lack of actual notice to a party or otherwise, would not impair the rights of a purchaser or encumbrancer for value of the property acting in reliance on the judgment without knowledge of any defects or irregularities in the judgment or action [Code Civ. Proc. § 764.060]. Nothing in Code Civ. Proc. § 764.045(b) may be construed to impair the rights of a good faith purchaser or encumbrancer for value dealing with the plaintiff or the plaintiff's successors in interest [Code Civ. Proc. § 764.045(b)].

[5] Costs

If the defendant disclaimed in the answer any interest or estate in the property involved, or suffered judgment to be taken without an answer, the plaintiff may not recover costs [Code Civ. Proc. § 761.030(b)]. However, if the defendant filed an answer denying all of the allegations of the complaint and then disclaimed any interest in the property, costs are properly entered against the defendant [McMorris v. Pagano (1944) 63 Cal. App. 2d 446, 452, 146 P.2d 944 (prescriptive easement)].

Except as otherwise expressly provided by statute, the prevailing party is entitled as a matter of right to recover costs [Code Civ. Proc. § 1032(b)]. "Prevailing party" is defined as including the following [Code Civ. Proc. § 1032(a)(4)]:

- The party with a net monetary recovery;
- A defendant in whose favor a dismissal is entered;
- A defendant when neither party obtains any relief; and
- A defendant as against the plaintiffs who do not recover any relief against that defendant.

When any party recovers other than monetary relief and in situations other than as specified, the "prevailing party" is determined by the court, and in that case, the court in its discretion, may allow costs or not and may apportion costs between the parties on the same or adverse sides in accordance with rules adopted by the Judicial Council under Code Civ. Proc. § 1034 [Code Civ. Proc. § 1032(a)(4)].

[6] Cross References

For a discussion of the statutes governing costs, the Judicial Council Rules, and forms for use in requesting costs, see *Ch. 174, Costs and Attorney's Fees, § 174.10* et seq.

For an alternative form of judgment quieting title, see Ch. 482, *Quieting Title*

For discussion and forms relating to statements of decision, see Ch. 529, *Statement of Decision*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewReal Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawLimited Use RightsEasementsCreationEasement by PrescriptionReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

California Forms of Pleading and Practice--Annotated

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Volume 2: Adoptions thru Airplanes and Airports-Chs. 12-17
Chapter 13 ADVERSE POSSESSION
PART IV. FORMS

2-13 California Forms of Pleading and Practice--Annotated § 13.45

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§ 13.45 Allegations in Complaint--Defendant Will Acquire Prescriptive Easement [Civ. Code § 1007] Unless Enjoined From Trespassing on Plaintiff's Land

[1] FORM Allegations in Complaint--Defendant Will Acquire Prescriptive Easement [Civ. Code § 1007] Unless Enjoined From Trespassing on Plaintiff's Land

1. Defendant claims an easement _____ [*specify, e.g.,* to take wood and minerals *or* to use a right of way], which defendant asserts is a burden on plaintiff's land previously described in this complaint. Under claim of ownership of the easement, defendant has entered plaintiff's land without plaintiff's permission and _____ [*describe acts, e.g.,* driven through the land and taken wood from it without plaintiff's consent], and defendant threatens to continue those acts.

2. Defendant's acts, if they are permitted to continue, will cause great and irreparable injury to plaintiff because defendant threatens to acquire a prescriptive easement over plaintiff's land. Plaintiff has no adequate remedy at law for the continuing injury caused by defendant's acts. Damages will be inadequate if plaintiff must yield to an easement to defendant over plaintiff's land. The only other remedy that plaintiff could have before a prescriptive easement is created by defendant would be to commence serial actions for damages each time defendant trespasses on plaintiff's land, which would result in a multiplicity of actions.

[2] Use of Form

The form in [1], *above*, contains allegations for use in a complaint for an injunction against trespasses on the plaintiff's land to prevent the creation of a prescriptive easement [*see* Civ. Code §§ 1007, 3422; Code Civ. Proc. § 526; *see also § 13.13[5][c]*].

[3] Landowner's Request for Injunction

[a] Right to Relief

Even if no other harm is shown, an injunction is properly granted to prohibit the continuation of acts that obstruct a landowner's free use of the land, if those acts might otherwise ripen into a prescriptive easement [Vestal v. Young (1905) 147 Cal. 715, 719, 82 P. 381; *see* Lindsay-Strathmore I. Dist. v. Superior Ct. (1920) 182 Cal. 315, 327, 187 P. 1056; Bartholomew v. Staheli (1948) 86 Cal. App. 2d 844, 856, 195 P.2d 824 (injunction to prevent overburdening of existing prescriptive easement and creation of larger prescriptive easement)].

[b] Tolling Effect of Complaint

Filing a complaint that seeks appropriate injunctive relief ordinarily interrupts the running of the prescriptive period, which remains suspended while the action is pending [Yorba v. Anaheim Union Water Co. (1953) 41 Cal. 2d 265, 270, 259 P.2d 2; Knoke v. Swan (1935) 2 Cal. 2d 630, 632, 42 P.2d 1019; Welsher v. Glickman (1969) 272 Cal. App. 2d 134, 137-138, 77 Cal. Rptr. 141].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewReal Property LawLimited Use RightsEasementsCreationEasement by PrescriptionCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

California Forms of Pleading and Practice--Annotated

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Chapter 14 ADVERTISING

2-14 California Forms of Pleading and Practice--Annotated 14.syn

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[1] FORM

[2] Use of Form

[3] California Constitution

[4] Decisions

[5] Cross References

§ 14.71 Affirmative Defense--Action to Compel Compliance With Advertising Sign Ordinance--Enforcement of Ordinance Constitutes Taking of Private Property Without Compensation in Violation of Due Process Guarantee [U.S. Const., amend. XIV; Cal. Const., art. I, §§ 7, 19]

[1] FORM

[2] Use of Form

[3] Federal Constitution

[4] California Constitution

[5] California Statutes

[6] Decisions

[7] Cross References

§ 14.72 Affirmative Defense--Action to Compel Compliance With Advertising Sign Ordinance--Immunity in Action by Private Party [Bus. & Prof. Code § 5466]

[1] FORM

[2] Use of Form

[3] California Statutes

[4] Cross References

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Chapter 14 ADVERTISING
PART I. SCOPE

2-14 California Forms of Pleading and Practice--Annotated § 14.01

§ 14.01 Scope of Chapter

This chapter discusses actions, remedies, and penalties available under California statutes defining and prohibiting false, misleading, and deceptive advertising. It also discusses regulation of outdoor and on-premises commercial advertising. The chapter includes the following forms:

- A complaint for injunction and restitution for violation of false advertising statutes [*see § 14.60*].
- A complaint, allegation, and affirmative defense for use in an action for damages for negligent or intentional fraud [Forms 2, 3, 10].
- A complaint for losses, expenses, and a statutory penalty for failing to disclose a limitation on the quantity of an advertised article available for sale to any one customer [*see § 14.63*].
- Complaints for damages for false advertising of prizes or gifts [Forms 5, 6].
- A complaint for damages for invasive advertising by e-mail messages sent in violation of an e-mail service provider's policy (which may be the policy of an entity, such a corporation or firm, that maintains an internal e-mail system) [*see § 14.66*].
- A complaint for the recovery of actual and statutory damages from a person who sent unsolicited e-mail (spam) advertising to or from California in violation of the law [*see § 14.67*].
- Affirmative defenses to actions by a local government to compel compliance with an outdoor advertising ordinance [*see §§ 14.69 -14.71*].

For discussion of regulation of advertising by attorneys, see Ch. 72, *Attorney Practice and Ethics* . For forms for use in consumer's actions generally, see Ch. 127, *Consumer Contracts and Loans* . For forms for use in actions concerning sale of consumer goods, see Ch. 500, *Sales: Sales Under the Commercial Code* through Ch. 504, *Sales: Consumers Legal Remedies Act* . For discussion and forms related to actions under *Civ. Code §§ 3344* and *3344.1* for the

unauthorized use of a person's name, likeness, voice, or signature, see Ch. 429, *Privacy* .

For discussion relating to proceedings before the Federal Trade Commission and other advertising topics not discussed in this set, see Rosden, The Law of Advertising, Parts V--VIII (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionFalse AdvertisingState RegulationAntitrust & Trade LawConsumer ProtectionFalse AdvertisingU.S. Federal Trade CommissionCommercial Law (UCC)Sales (Article 2)Subject MatterGoodsGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesGeneral Overview

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2-14 California Forms of Pleading and Practice--Annotated § 14.02

§ 14.02 Cross References

For a complaint by an association to enjoin use of plaintiff's name in misleading advertising by a rival group, see Ch. 61, *Associations and Clubs* .

For an allegation of express warranty resulting from an advertisement of beauty products, see Ch. 77, *Barbering and Cosmetology* .

For discussion and a form relating to discrimination in advertising of housing, see Ch. 117, *Civil Rights: Housing Discrimination* .

For forms for use in consumer actions, see Ch. 127, *Consumer Contracts and Loans* .

For forms alleging entitlement to treble damages when defendant is not licensed, see Ch. 177, *Damages* .

For discussion and forms relating to libel and trade libel, see Ch. 340, *Libel and Slander* .

For a complaint for breach of contract and confidence in use of an idea, see Ch. 349, *Literary Property and Copyright* .

For a complaint for invasion of privacy based on use of plaintiff's name or likeness in advertising, see Ch. 429, *Privacy* .

For a complaint by a broadcasting station for payment for advertising, see Ch. 484, *Radio and Television* .

For a complaint to enjoin broadcasting of advertisements after notification to stop, see Ch. 484, *Radio and Television* .

For a complaint for unfair competition, see Ch. 565, *Unfair Competition* .

Legal Topics:

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

TortsIntentional TortsDefamationRemediesGeneral OverviewCommunications LawPrivacyGeneral OverviewTortsIntentional TortsInvasion of PrivacyRemediesCopyright LawSubject MatterAudiovisual Works & Motion PicturesTelevision Broadcasts

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[Reserved]

§§ 14.03[Reserved]

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PART II. LEGAL BACKGROUND

2-14 California Forms of Pleading and Practice--Annotated § 14.10

§ 14.10 Governing Statutes

Statutes governing false or misleading advertising generally are contained in Bus. & Prof. Code*§ 17500 et seq. Bus. & Prof. Code* §§ 17200 and 17203, 17204 authorize an action for unfair competition against a person or business that engages in false or misleading advertising. Consumer remedies for certain deceptive advertising practices are set forth in *Civ. Code §§ 1770(a), 1780, 1781. Civ. Code § 3345* trebles a discretionary civil penalty in any other statute in an action brought by, on behalf of, or for the benefit of, senior citizens or disabled persons to redress unfair or deceptive acts or practices or unfair methods of competition. Billboard and other outdoor advertising is regulated by *Bus. & Prof. Code § 5200 et seq.*

A contract for the placement of advertising does not involve the sale of goods under Division 2 of the Commercial Code, which therefore has no application to a case involving or arising from such a contract [*Wall Street Network, Ltd. v. New York Times Co. (2008) 164 Cal. App. 4th 1171, 1186-1187, 80 Cal. Rptr. 3d 6* (contract obligated one party to place popup ads at web sites of its marketing partners, and then to relay to other party certain information provided by potential customers who responded to those ads; party that placed those ads could not argue that Commercial Code was applicable based on party's theory that it was delivering goods when it relayed that information, since that party was only providing service)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionFalse AdvertisingState RegulationAntitrust & Trade LawConsumer ProtectionFalse AdvertisingGeneral Overview

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California Forms of Pleading and Practice--Annotated

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Volume 2: Adoptions thru Airplanes and Airports-Chs. 12-17
Chapter 14 ADVERTISING
PART II. LEGAL BACKGROUND

2-14 California Forms of Pleading and Practice--Annotated § 14.11

§ 14.11 Government Regulation of Advertising

[1] Exercise of State's Police Power

Under the police power reserved to the states by *U.S. Const., amend. X*, the exercise of the right to advertise commercially is subject to state and local government regulation that reasonably relates to the public health, safety, morals, or general welfare [*see Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 858, 164 Cal. Rptr. 510, 610 P.2d 407 , rev'd on First Amendment grounds, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)* (billboards)]. In reviewing legislation for the purpose of testing its propriety as an exercise of the police power, the power of the court is limited to determining whether the subject of the legislation is within the state's power and, if so, to determine whether the means adopted to accomplish the result are reasonably designed for that purpose, and have a real and substantial relation to the objects sought to be attained. It is presumed that the legislative body acted within its powers; the burden is on those attacking the statute to make a showing that it is unconstitutional [*Serve Yourself Gas etc. Assn. v. Brock (1952) 39 Cal. 2d 813, 817-818, 249 P.2d 545]* .

Before 1975, when the United Supreme Court extended *First Amendment* protection to commercial speech in *Bigelow v. Virginia (1975) 421 U.S. 809, 818, 95 S. Ct. 2222, 44 L. Ed. 2d 600* , the only constitutional restraints on governmental regulation of advertising, other than the prohibition against arbitrary exercise of the police power, were the principles of equal protection and due process. For example, the equal protection guarantee mandates that classification of advertising for purposes of regulation cannot be made arbitrarily, but must be based on natural, intrinsic, or constitutional distinctions that suggest reasons for and justify the particular legislation [*Carlin v. City of Palm Springs (1971) 14 Cal. App.3d 706, 712, 92 Cal. Rptr. 535]* . For application of the principles of equal protection and due process to governmental regulation of outdoor advertising, see the discussion in *§ 14.19[1][b]*.

[2] First Amendment Protection for Commercial Speech

Commercial speech is not stripped of *First Amendment* protection merely because of its commercial nature, although commercial speech may be made subject to more stringent governmental regulation than noncommercial speech [*Va. Pharmacy Bd. v. Va. Consumer Council (1976) 425 U.S. 748, 770-773, 96 S. Ct. 1817, 48 L. Ed. 2d 346* ; *Bigelow v. Virginia (1975) 421 U.S. 809, 818, 95 S. Ct. 2222, 44 L. Ed. 2d 600]* . The *First Amendment* protects commercial speech that concerns lawful activity and is not misleading. A governmental restriction on otherwise protected

commercial speech is valid under *U.S. Const., amend. I*, only if it (1) seeks to implement a substantial governmental interest, (2) directly advances that interest, and (3) reaches no farther than necessary to accomplish the given objective [*Posadas de Puerto Rico Assoc. v. Tourism Co. (1986) 478 U.S. 328, 340, 106 S. Ct. 2968, 92 L. Ed. 2d 266* ; *Central Hudson v. Public Serv. Comm'n (1980) 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341]* . The dispositive test often will be whether the governmental restriction reaches beyond what is necessary. The government has the burden of proving that its restriction, such as an ordinance banning signs, is narrowly tailored to achieve the desired objective. A relevant consideration for a court is whether there are numerous and obvious alternatives that would be less burdensome on affected persons, such as local merchants, than the existing restriction. If that restriction is not a neutral restriction based on time, place, and manner of advertisin,g but rather is content-based--for instance, banning all signs except certain ones described according to their content--it indicates that the government has not carefully calculated the costs and benefits associated with the burden on speech imposed by its restriction [*Ballen v. City of Redmond (9th Cir. 2006) 466 F.3d 736, 742-744* (ordinance banning all portable signs except certain ones was unconstitutional; merchant, who was thus prohibited from advertising by portable sandwich-board sign in front of store and who sued for relief under *42 U.S.C. § 1983*, was entitled to recover substantial attorney's fees in addition to nominal damages and injunction)].

Although in some contexts the California free speech clause, *Cal. Const., art. I, § 2*, is more inclusive than the *U.S. Const., amend. I*, there is no indication that the California Constitution affords pure commercial speech greater protection than that accorded by the *U.S. Const., amend. I* [*People v. Superior Court (Olson) (1979) 96 Cal. App. 3d 181, 195, 157 Cal. Rptr. 628]* .

For application of these general principles to governmental regulation of billboard advertising, see discussion in *§ 14.19[1][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsPolice PowerConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechCommercial SpeechAdvertisingGovernmentsLocal GovernmentsPolice PowerConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechCommercial SpeechGeneral Overview

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2-14 California Forms of Pleading and Practice--Annotated § 14.12

§ 14.12 False and Misleading Advertising

[1] General Prohibition Under Bus. & Prof. Code § 17500

Bus. & Prof. Code § 17500 makes it unlawful for any person, firm, corporation, or association, or an employee thereof, to make or disseminate or cause to be made or disseminated, either to the public in California or from California to the public in any state, any statement concerning real or personal property or services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition of the property or services, if the statement (1) is untrue or misleading, (2) is known, or by the exercise of reasonable care should be known, to be untrue or misleading, and (3) is made or disseminated or caused to be made or disseminated with intent directly or indirectly to dispose of the property, to perform the services, or to induce the public to enter into any obligation relating thereto. The prohibition extends to statements in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the internet. It is also unlawful for any person, firm, or corporation to make or disseminate, or cause to be made or disseminated, any such statement as part of a plan or scheme with the intent not to sell the personal property or services so advertised at the price stated therein, or as so advertised. Violation of the statute is a misdemeanor [*Bus. & Prof. Code § 17500*].

The prohibition in *Bus. & Prof. Code 17500* against untrue or misleading advertising extends to the use of oral statements [*People v. Bestline Prod., Inc. (1976) 61 Cal. App. 3d 879, 906-909, 132 Cal. Rptr. 767]* . A statement is untrue or misleading for purposes of *Bus. & Prof. Code § 17500* if members of the public are *likely* to be deceived. Actual deception or confusion is not required. Therefore, a violation of the statute is actionable without individualized proof of deception, reliance, and injury [*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 211, 197 Cal. Rptr. 783, 673 P.2d 660* ; *see § 14.43[8]*]. On the other hand, when it is evident that no likelihood of deception could be shown, there is no actionable violation of the statute, and a defendant should be entitled to summary judgment [*Wayne v. Staples, Inc. (2006) 135 Cal. App. 4th 466, 484, 37 Cal. Rptr. 3d 544* (retailer was entitled to summary judgment in consumer's action asserting violation of statute, since retailer clearly disclosed price of service and retailer's omission to reveal that price included 100 percent profit margin was not misleading or deceptive)].

Bus. & Prof. Code § 17500 will not support a claim, based on false or misleading advertising, against a savings association (or any other financial institution) that is subject to regulation by the federal Office of Thrift Supervision (OTS). Through its regulations in 12 C.F.R. Part 560, the OTS occupies the entire field of lending regulation for federal savings associations. Federal savings associations may extend credit as authorized under federal law, including 12 C.F.R. Part 560 without regard to state laws purporting to regulate or otherwise affect their credit activities [*12 C.F.R. § 560.2(a)*]. Examples of state laws that are thus preempted include state laws purporting to impose requirements regarding disclosure and advertising [*12 C.F.R. § 560.2(b)(9)*]. Because a claim under *Bus. & Prof. Code § 17500* based on false or misleading advertising would be "entirely based on ... [the defendant's] disclosures and advertising," *Bus. & Prof. Code § 17500* would be, in that case, a law of the kind listed in the OTS regulations as intended to be preempted. Therefore, *Bus. & Prof. Code § 17500* as applied in such a case would be preempted by federal law [*Silvas v. E*Trade Mortgage Corp. (9th Cir. 2008) 514 F.3d 1001, 1006*].

[2] Creates Duty of Reasonable Care

The prohibition in *Bus. & Prof. Code § 17500* against false or misleading advertising extends to negligent as well as intentional dissemination of such advertising [*People v. Forest E. Olson, Inc. (1982) 137 Cal. App. 3d 137, 140, 186 Cal. Rptr. 804]* . The statute establishes a duty of reasonable care that is not satisfied by unquestioning reliance on representations made by others. The duty of care is breached by a failure to verify and investigate representations when facts are present that would put a reasonable person on notice that the representations are possibly false [*People v. Forest E. Olson, Inc. (1982) 137 Cal. App. 3d 137, 139, 186 Cal. Rptr. 804]* . On the other hand, the statute does not impose strict liability on an owner of a business who has no knowledge of and did not participate in an employee's illegal conduct [*People v. Regan (1979) 95 Cal. App. 3d Supp. 1, 4 , 157 Cal. Rptr. 62]* .

[3] Equivalent to Unfair Competition

As used in the unfair competition law [*Bus. & Prof. Code § 17200 et seq.*], "unfair competition" means and includes unfair, deceptive, untrue, or misleading advertising and any act prohibited by *Bus. & Prof. Code § 17500 et seq.*, the false advertising laws [*Bus. & Prof. Code § 17200*]. Therefore, the remedies available to competitors and consumers under the unfair competition laws are applicable to actions for false advertising [*see Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 209-210, 197 Cal. Rptr. 783, 673 P.2d 660]* .

For a complaint that is based on false advertising and incorporates a cause of action for unfair competition, see *§ 14.60*. For discussion and forms relating to statutory unfair competition generally, see Ch. 565, *Unfair Competition* .

[4] Other Theories of Recovery

[a] Fraud

False and misleading advertising may constitute the tort of fraudulent misrepresentation, negligent misrepresentation, or fraudulent concealment [*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 215-221, 197 Cal. Rptr. 783, 673 P.2d 660* ; *see Civ. Code § 1710(1), (2), (3)*]. The elements of intentional fraud generally are [*Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1108, 252 Cal. Rptr. 122, 762 P.2d 46* ; *see Civ. Code § 1710(1)*]:

- A misrepresentation;
- Knowledge of its falsity;
- Intent to induce reliance on the misrepresentation;
- Justifiable reliance; and

- Resulting damage.

Negligent fraud arises from making the misrepresentation with no reasonable ground for believing it to be true [*Civ. Code § 1710(2)*]. Fraudulent concealment includes concealment of a fact by one who gives information of other facts that are likely to mislead in the absence of communication of the concealed fact [*Civ. Code § 1710(3)*].

If the misrepresentation in an advertisement is mere "puffing," or a statement of opinion, there cannot be liability for fraud [*see Hauter v. Zogarts (1975) 14 Cal. 3d 104, 111, 120 Cal. Rptr. 681, 534 P.2d 377]* . However, courts are narrowing the scope of "puffing" in favor of injured consumers, especially when the misrepresentation concerns safety [*see Hauter v. Zogarts (1975) 14 Cal. 3d 104, 112, 120 Cal. Rptr. 681, 534 P.2d 377]* . If the defendant had superior knowledge regarding the subject matter of the representations, and the other party is so situated that he or she may reasonably rely on that supposed superior knowledge or special information, the representations may be construed as fact, not opinion [*Toole v. Richardson-Merrell, Inc. (1967) 251 Cal. App. 2d 689, 706, 60 Cal. Rptr. 398* (manufacturer's oral and written statements to physicians and advertisements in medical journals concerning safety of drug)].

In an action for fraud based on false advertising, the element of intent is satisfied by alleging facts that show that defendant made the misrepresentations with the intention of inducing the public to purchase defendant's product or services [*see Wennerholm v. Stanford Univ. Sch. of Med. (1942) 20 Cal. 2d 713, 716, 128 P.2d 522]* .

The element of justifiable reliance requires that the plaintiff allege that he or she saw and relied on the defendant's advertisements [*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 218-219, 197 Cal. Rptr. 783, 673 P.2d 660]* . Although generally there is a strict requirement that fraud be pleaded factually and specifically, this requirement may be relaxed when circumstances make specific pleading impossible and impractical, such as when many television commercials appear in a long-term advertising campaign and the defendant, not the plaintiff, has information concerning the time, place, and content of each commercial [*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 217-218, 197 Cal. Rptr. 783, 673 P.2d 660]* .

Unlike a statutory action for false advertising [*see* [1], *above*], damages to an individual plaintiff must be pleaded to state a cause of action for fraud [*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 219-220, 197 Cal. Rptr. 783, 673 P.2d 660]* .

For a complaint for damages for intentional and negligent fraud in advertising, see *§ 14.61*. For a form for an affirmative defense based on "puffing," see *§ 14.68*. For further discussion and forms relating to actions for fraud generally, see Ch. 269, *Fraud and Deceit* .

[b] Consumer Legal Remedies Act

The Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*) provides remedies to consumers in the form of damages, including punitive damages, and attorneys' fees for particular kinds of false advertising practices [*see Civ. Code §§ 1770(a), 1780(a)*,(e)]. The Act contains special procedural requirements, including a requirement that the consumer notify a potential defendant of the alleged violation at least 30 days before commencing an action for damages [*Civ. Code § 1782*] and special hearing and notice requirements for class actions [*Civ. Code § 1781*; *see Clemons v. Western Photo Camera Hut (1981) 117 Cal. App. 3d 392, 394-396, 172 Cal. Rptr. 782* (class action brought for violation of *Bus. & Prof. Code §§ 17533.8, 17537* and *Civ. Code § 1770*)].

The unlawful advertising practices prohibited by the Act include the following:

- Passing off goods or services as those of another [*Civ. Code § 1770(a)(1)*];

- Misrepresenting the source, sponsorship, approval, or certification of goods or services [*Civ. Code § 1770(a)(1)*];

- Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have [*Civ. Code § 1770(a)(5)*];

- Representing that goods or services are of a particular standard, quality or grade if they are not [*Civ. Code § 1770(a)(7)*];

- Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions [*Civ. Code § 1770(a)(13)*];

- Advertising goods or services with intent not to sell them as advertised [*Civ. Code § 1770(a)(9)*];

- Advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity [*Civ. Code § 1770(a)(10)*];

- Advertising unassembled furniture without certain information required by statute [*see Civ. Code § 1770(a)(11), (12)*]; and

- Advertising that a product is being offered at a specific price plus a specific percentage of that price, unless (1) the total price is set forth in the advertisement, which may include, but is not limited to, shelf tags, displays, and media advertising, in a size larger than any other price in that advertisement, and (2) the specific price plus a specific percentage of that price represents a markup from the seller's costs or from the wholesale price of the product; except in the case of in-store advertising by businesses that are open only to members or by certain cooperative organizations if more than 50 percent of purchases are made at the specific price set forth in the advertisement [*Civ. Code § 1770(a)(20)*].

For a detailed discussion of the Consumers Legal Remedies Act, its procedural requirements, and related forms, see Ch. 504, *Sales: Consumers Legal Remedies Act* .

[c] Breach of Warranty

When a manufacturer engages in advertising in order to bring its goods and their quality to the attention of the public and thus to create a consumer demand, the representations made constitute an express warranty running directly to a buyer who purchases in reliance on the representations [*Gherna v. Ford Motor Co. (1966) 246 Cal. App. 2d 639, 652, 55 Cal. Rptr. 94]* . Therefore, when misrepresentations are made in advertising, labels, or disseminated literature, the advertiser may be held liable for damages for personal injuries suffered by a consumer who relies on the express warranty [*see Lane v. C. A. Swanson & Sons (1955) 130 Cal. App. 2d 210, 211, 216, 278 P.2d 723* (newspaper advertisements stating that defendant's boned chicken had "no bones")].

For discussion and forms relating to liability on an express warranty, see Ch. 502, *Sales: Warranties*.

[d] Strict Products Liability

A plaintiff who suffers personal injuries as a result of using a defective product as directed in the manufacturer's advertisements may be able to recover under a theory of products liability, or strict liability in tort. Even if the plaintiff does not read and rely on false or misleading advertising statements but suffers personal injuries as a result of using a defective product, he or she can recover in strict liability on a showing that he or she was injured while using the

product in the way it was intended to be used and as a result of a defect in design and manufacture of which plaintiff was not aware that made it unsafe for its intended use [*Greenman v. Yuba Power Products, Inc. (1963) 59 Cal. 2d 57, 64, 27 Cal. Rptr. 697, 377 P.2d 897* (plaintiff relied on manufacturer's brochure attesting to "ruggedness" of power lathe)].

For discussion and forms relating to strict products liability, see Ch. 460, *Products Liability* .

[e] Federal Trademark Law

Federal trademark law provides remedies for false or misleading advertising. The Lanham Act [*15 U.S.C. § 1051 et seq.*] creates civil liability for commercial advertising or promotions that misrepresent the nature, characteristics, qualities, or geographic origin of the advertiser's goods, services, or commercial activities, or of the goods, services, or commercial activities of another person, such as a competitor [*see 15 U.S.C. § 1125(a)(1)(B)*]. Remedies available for violation of the statute include both an injunction and monetary relief, consisting of defendant's profits, plaintiff's damages, costs, and, in exceptional cases, reasonable attorney's fees [*15 U.S.C. § 1116(a)* (injunction), *15 U.S.C. § 1117(a)* (monetary relief)]. For further discussion of the Lanham Act and its application to false advertising, see Ch. 549, *Trademarks and Trade Names* .

False credit advertising is specifically prohibited by the federal Truth-in-Lending Act (*15 U.S.C. § 1601 et seq.*). For further discussion, see Ch. 501, *Sales: Retail Installment Sales* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationGeneral OverviewTrademark LawFederal Unfair Competition LawFalse AdvertisingPufferyAntitrust & Trade LawConsumer ProtectionFalse AdvertisingLanham ActAntitrust & Trade LawConsumer ProtectionFalse AdvertisingState RegulationTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral Overview

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§ 14.13 Types of False and Misleading Advertising

[1] Unadvertised Limitations on Quantity of Sales

[a] In General

It is unlawful for any person, firm, corporation, or association to falsely advertise the quantity of any article that will be sold to any one customer on demand in a single transaction, and willfully or negligently to fail to disclose in the advertisement any restriction that is in fact put on the quantity of the article that is sold or offered for sale to any one customer on demand in a single transaction [*Bus. & Prof. Code § 17500.5(a)*]. This prohibition does not affect any right a seller may have to refuse to extend credit to a customer, and is not applicable to a customer purchasing for resale [*Bus. & Prof. Code § 17500.5(c)*].

The Consumers Legal Remedies Act makes a person liable to a consumer for advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity [*see Civ. Code §§ 1770(j), 1780*]. For further discussion of prohibitions and remedies under the Act, see *§ 14.12[4][b]*.

[b] Damages Recoverable by Individual Plaintiff

Anyone who, by means of a false or negligent advertisement or publicity prohibited by *Bus. & Prof. Code § 17500.5(a)*, induces any individual retail purchaser and consumer to enter any place of business designated in the advertisement or publicity seeking to buy an advertised article in any quantity then available for sale on the premises, is liable to each such person so induced and refused for his or her resulting losses and expenses, and the additional sum of $50 [*Bus. & Prof. Code § 17500.5(b)*]. This liability applies only to actions brought in the name of, and on behalf of, a single plaintiff and are not applicable in multiple plaintiff or class actions [*Bus. & Prof. Code § 17500.5(d)*].

For a form for a complaint based on *Bus. & Prof. Code § 17500.5* for losses, expenses, and the statutory penalty, see *§ 14.63*.

[2] Advertised "Former Price"

No price may be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price within three months immediately preceding the publication of the advertisement, or unless the date when the alleged former price did prevail is clearly, exactly, and conspicuously stated in the advertisement. The worth or value of any thing advertised is the prevailing market price, wholesale if the offer is at wholesale, retail if the offer is at retail, at the time of publication of such advertisement in the locality wherein the advertisement is published [*Bus. & Prof. Code § 17501*].

[3] Misrepresentation of Control, Character, or Volume of Business

No person may state, in an advertisement of his or her goods, that he or she is a producer, manufacturer, processor, wholesaler, or importer, or that he or she owns or controls a factory or other source of supply of goods, when such is not the fact, and no person may in any other manner misrepresent the character, extent, volume, or type of his or her business [*Bus. & Prof. Code § 17505*].

[4] Deceptive Pricing

The general prohibition of *Bus. & Prof. Code § 17500* includes a provision making it unlawful to advertise personal property or services as part of a plan or scheme with the intent not to sell the property or services so advertised at the price stated therein, or as so advertised [*see discussion under § 14.43[7]*].

It is also unlawful for any person, firm, corporation, or association to make an advertising claim or representation pertaining to more than one article of merchandise or type of service, within the same class of merchandise or service, if any price set forth in the claim or representation does not clearly and conspicuously identify the article of merchandise or type of service to which it relates. Disclosure of the relationship between the price and particular article of merchandise or type of service by means of an asterisk or other symbol, and corresponding footnote, does not meet the requirement of clear and conspicuous identification when the particular article of merchandise or type of service is not represented pictorially [*Bus. & Prof. Code § 17507*].

It is also unlawful for a retail seller, when selling a consumer good or service that is sold only in multiple units and that is advertised by price, to advertise those goods or services at any price other than the price of the minimum multiple unit in which they are offered [*Bus. & Prof. Code § 17504(a)*]. However, a retail seller may advertise a consumer good or service for sale at a single unit price if the goods or services are sold only in multiple units and not in single units, as long as the advertisement also discloses, at least as prominently, the price of the minimum multiple unit in which they are offered [*Bus. & Prof. Code § 17504(b)*]. Consumer goods and services are articles or services obtained for use primarily for personal, family, or household purposes, but do not include food items [*Bus. & Prof. Code § 17504(c), (d)*]. Retail sellers include any person, partnership, corporation, firm, joint stock company, association, or organization engaged in business in California and selling consumer goods or services to retail buyers [*see Bus. & Prof. Code § 17504(a), (e)*].

[5] Transaction Conditioned on Sale or Lease of Different Product or Service

Any advertisement, including any advertisement over the internet, soliciting the purchase or lease of a product or service (or any combination of product and service), requiring as a condition of sale the purchase or lease of a different product or service (or any combination of product and service), must conspicuously disclose the price of all such products or services in the advertisement [*Bus. & Prof. Code § 17509(a)*]. This does not affect the provisions of *Bus. & Prof. Code §§ 16726* and *16727* regarding unlawful buying arrangements [*Bus. & Prof. Code § 17509(a)*]; for discussion, see Ch. 565, *Unfair Competition* .

Certain contractual plans or arrangements, however, are exempt from the disclosure requirement. *Bus. & Prof. Code § 17509(a)* does not apply to contractual plans or arrangements in which the seller periodically provides the consumer

with a form or announcement card that the consumer may use to instruct the seller not to ship merchandise offered by the seller [*Bus. & Prof. Code § 17509(b)*]. For this exemption to apply, the seller must comply with the following requirements [*Bus. & Prof. Code § 17509(b)(1)*]:

- The instructions not to ship merchandise must be printed on the form or card in type as large as all other instructions and terms stated on it.

- The form or card must specify a "mailing date" by which it must be mailed by the consumer or a "return date" by which it must be received by the seller to prevent shipment of merchandise.

- The consumer must be afforded at least 10 days in which to mail the form or card. The seller must mail the form or card either at least 25 days before the return date or at least 20 days before the mailing date, or provide a mailing date at least 10 days after receipt by the consumer.

- The form or card must be preaddressed to the seller to serve as a postal reply card, or must be accompanied by a return envelope addressed to the seller.

- On the membership contract or application form or on the same page and immediately adjacent to the contract or form (and in clear and conspicuous language), the material terms of the plan or arrangement must be disclosed, including the following:

  - That aspect of the plan under which the subscriber must notify the seller, in the manner provided for by the seller, if the subscriber does not wish to purchase or receive the selection;

  - Any obligation assumed by the subscriber to purchase a minimum quantity of merchandise;

  - The right of a contract-complete subscriber to cancel his or her membership at any time; and

  - Whether billing charges will include an amount for postage and handling.

The disclosure requirement also does not apply to other contractual plans or arrangements not covered under *Bus. & Prof. Code § 17509(a)*, such as continuity plans, subscription arrangements, standing-order arrangements, supplements, and series arrangements under which the seller periodically ships merchandise to a consumer who has consented in advance to receive that merchandise on a periodic basis [*Bus. & Prof. Code § 17509(b)(2)*].

Finally, *Bus. & Prof. Code § 17509* does not apply to the publisher of any newspaper, periodical, or other publication, to any radio or television broadcaster, or to the owner or operator of any cable, satellite, or other medium of communication who broadcasts or publishes, including over the internet, an advertisement or offer in good faith without knowledge of its violation of *Bus. & Prof. Code § 17509(a)* [*see Bus. & Prof. Code § 17509(c)*].

[6] Factual Claims and Brand Comparisons

It is unlawful for any person doing business in California and advertising to consumers in California to make any false or misleading advertising claim, including claims that (1) purport to be based on factual, objective, or clinical evidence, (2) compare the product's effectiveness or safety to that of other brands or products, or (3) purport to be based on any fact [*Bus. & Prof. Code § 17508(a)*]. The Director of Consumer Affairs, the Attorney General, or, with prior notice to the Attorney General, any city attorney, or any district attorney may, within one year of the last day on which the

advertising claims were made, make a written request that the advertiser substantiate the claims. In response to the request, the person on whose behalf the claims are made must provide evidence of the facts on which the advertising claims are based [*Bus. & Prof. Code § 17508(b)*]. If the advertiser fails to respond by adequately substantiating the claim within a reasonable time, or if the public official has reason to believe that the advertising claim is false or misleading, the public official may do either or both of the following: (1) seek an immediate termination or modification of the claim in accordance with *Bus. & Prof. Code § 17535*, and*(2)* disseminate to California consumers information concerning the truth of the claims or why they are misleading, taking due care to protect legitimate trade secrets [*Bus. & Prof. Code § 17508(c)*; *see Bus. & Prof. Code § 17508(f)* (public official's burden of proof to establish violation); for remedies under *Bus. & Prof. Code § 17535*, see *§ 14.43[8]*].

With *Bus. & Prof. Code § 17508*, the Legislature established an administrative procedure by which prosecuting authorities may demand substantiation of advertising claims. The statute, however, is expressly applicable only to prosecuting authorities. Private plaintiffs are not authorized to demand substantiation for advertising claims [*National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc. (2003) 107 Cal. App. 4th 1336, 1345, 1348, 133 Cal. Rptr. 2d 207* (holding that it would be inappropriate to shift burden of proof to defendant in private plaintiff false advertising action when private plaintiff is not authorized by statute to seek substantiation of advertising claim from defendant)].

A newspaper publisher or radio or television broadcaster is not liable for publishing or broadcasting advertising claims that violate *Bus. & Prof. Code § 17508(a)* unless the publisher or broadcaster is the person making the claims [*Bus. & Prof. Code § 17508(e)*].

Violation of *Bus. & Prof. Code § 17508(a)* is not a misdemeanor, but otherwise the relief provided for violation of the statute is in addition to any other relief that may be sought for a violation of the false advertising statutes contained in *Bus. & Prof. Code § 17500 et seq.* [*Bus. & Prof. Code § 17508(d)*]. If the advertising claims also violate both *Bus. & Prof. Code § 17500* [*see § 14.12[1]*] and *Bus. & Prof. Code § 17508*, however, the court may only impose a civil penalty under *Bus. & Prof. Code § 17536* for the violation of one or the other statute, but not for both [*Bus. & Prof. Code § 17508(g)*; for imposition of civil penalties under *Bus. & Prof. Code § 17536*, the *discussion in § 14.44[1][b]*].

[7] Use of "Made in U.S.A."

It is unlawful for any person, firm, corporation, or association to sell or offer for sale in California any merchandise if there appears on the merchandise or its container the words "Made in U.S.A.," "Made in America," "U.S.A.," or similar words, and the merchandise or any article, unit, or part thereof has been entirely or substantially made, manufactured, or produced outside of the United States [*Bus. & Prof. Code § 17533.7*; *Colgan v. Leatherman Tool Group, Inc. (2006) 135 Cal. App. 4th 663* (fact that product may have been designed, processed, and assembled in United States would not prevent conclusion that some part of it was substantially made, manufactured, or produced outside United States; tools were unlawfully claimed to be "Made in U.S.A." since significant working parts were investment cast, fineblanked, formed, hardened, cut, forged, polished, or machined in various foreign countries and plier jaws that were investment cast in Mexico had letters "USA" stamped onto them); *see Benson v. Kwikset Corp. (2007) 152 Cal. App. 4th 1254, 1268-1269, 62 Cal. Rptr. 3d 284 , reh'g granted, depublished,* 2004 Cal. App. Lexis 1274 (statute is not unconstitutional; does not have a chilling effect on constitutionally protected speech, and is not void for vagueness)].

Merchandise has been "substantially made, manufactured, or produced outside the United States" when foreign operations, processes, or activities employed to create the merchandise are found to be considerable in either amount, value, or worth. When the merchandise consists of two or more physical elements or pieces, *Bus. & Prof. Code § 17533.7* applies to any distinct component of the merchandise that is necessary for its proper use or operation [*Benson v. Kwikset Corp. (2007) 152 Cal. App. 4th 1254, 1272-1273, 62 Cal. Rptr. 3d 284 , reh'g denied,* 2007 Cal. App. LEXIS 1229 (screws and pins made in Taiwan were distinct components clearly necessary to proper use or operation of lockset because without them one could not install or operate that product; partial assembly of lockset latches in Mexico

was part of manufacturing process)].

[8] Used, Defective, or "Seconds" Merchandise

It is unlawful for any person, firm, or corporation, in any newspaper, magazine, circular, form letter, or any open publication, published, distributed, or circulated in California, including over the internet, or on any billboard, card, label, or other advertising medium, or by means of any other advertising device, to advertise, call attention to, or give publicity to the sale of any merchandise that is secondhand or used merchandise, that is defective in any manner, that consists of articles or units or parts known as "seconds," or blemished merchandise, or that has been rejected by the manufacturer as not first class, unless there is conspicuously displayed directly in connection with the name and description of that merchandise and each specifie d article, unit, or part of it, a direct and unequivocal statement, phrase, or word that clearly indicates that the merchandise or each article, unit, or part so advertised is secondhand, used, defective, or consists of "seconds," or is blemished merchandise, or has been rejected by the manufacturer, as the fact may be [*Bus. & Prof. Code § 17531*].

[9] Labeling as Products of Blind Workers

No goods or articles that are determined by label, symbol, trade name, or name of the manufacturer to indicate they are made by blind workers may be delivered or offered for sale in California unless at least 75 percent of the total hours of direct labor of producing the goods have been performed by workers who are blind, as defined in *Bus. & Prof. Code § 17521(a)* [*Bus. & Prof. Code § 17522*; *see Bus. & Prof. Code § 17523* (contents of labels)].

[10] Surplus Materials

Advertising surplus materials, as defined in the Federal Surplus Property Act of 1944 [*50 U.S.C. § 1622 et seq.*], is unlawful unless there is conspicuously displayed directly in connection with the name and description of the merchandise a direct unequivocal statement clearly indicating that the merchandise advertised is or consists of surplus materials [*Bus. & Prof. Code § 17531.5*]. It is also unlawful to sell or offer for sale any surplus materials if words, such as "Army" or "Navy," are used that tend to lead the purchasing public to believe, contrary to fact, that the offering establishment has some official relationship to the United States government, or that all of the articles sold or offered are surplus materials, or that they are of a higher quality and lower prices than obtainable elsewhere [*Bus. & Prof. Code § 17533.5*].

[11] Prizes or Gifts

[a] In General

It is unlawful for any person to use the term "prize" or "gift" or other similar term in any manner that would be untrue or misleading [*Bus. & Prof. Code § 17537(a)*]. This general prohibition includes, but is not limited to, an offer of a conditional prize as part of an advertising plan (discussed in *§ 14.13[12][b] below*) and an offer of a conditional gift in certain circumstances (discussed in *§ 14.13[12][b]*). A person who violates *Bus. & Prof. Code § 17537* is liable in a civil action for damages [*Bus. & Prof. Code § 17537.4*; *see* the discussion in *§ 14.13[12][b], [d]*].

In addition, it is generally unlawful for any person to offer by mail, by telephone, in person, or by any other means or in any other form, including over the internet, a prize or gift, with the intent to offer a sales presentation, without disclosing at the time of the offer of the prize or gift, in a clear and unequivocal manner, the intent to offer the sales presentation [*Bus. & Prof. Code § 17533.8(a)*]. An advertiser who violates this prohibition is subject to an injunction, the general remedy for violations or proposed violations of the false advertising statutes [*see Bus. & Prof. Code § 17535*; *see* the discussion in *§ 14.18[2][a]*]. The prohibition does not apply, however, to a media publisher, broadcaster, or owner who broadcasts or publishes, including over the internet, an advertisement or offer in good faith, without knowledge that it violates the statute [*see Bus. & Prof. Code § 17533.8(b)*].

It is specifically unlawful for any person, or an employee, agent, or independent contractor employed or authorized by that person, to offer, as part of an advertising program, any incentive as an inducement to the recipient to visit a location, to attend a sales presentation, or to contact a sales agent in person, by telephone, or by mail, unless the offer meets statutory disclosure and other requirements [*see Bus. & Prof. Code § 17537.1(a)*; *see also* discussion in *§ 14.13[12][e]*. A person who violates *Bus. & Prof. Code § 17537.1*] is liable in a civil action for damages [*Bus. & Prof. Code § 17537.4*; *see* discussion in *§ 14.13[12][d]*].

Contests in which money or other valuable consideration may be solicited and the winning of prizes offered are regulated by Bus. & Prof. Code*§ 17539 et seq. Bus. & Prof. Code* § 17539.1(a) states what constitutes unfair acts or practices in relation to contests, but it does not apply to an advertising plan or program regulated by and in compliance with *Bus. & Prof. Code § 17537.1* [*Bus. & Prof. Code § 17539.1(b)*; *see* discussion in *§ 14.13[12][e]*].

[b] Conditional Prizes

It is unlawful to notify any person by any means, as a part of an advertising plan or program, that he or she has won a prize and that, as a condition of receiving the prize, he or she must pay any money or purchase or rent any goods or services [*Bus. & Prof. Code § 17537(a), (b)*].

If a person making an offer subject to *Bus. & Prof. Code § 17537*, or any employee or agent of such a person, violates any provision of *Bus. & Prof. Code § 17537*, the recipient of the offer who is damaged by the violation may bring a civil action against the person making the offer for, and may be awarded, treble damages. The court may award reasonable attorney's fees to the prevailing party [*Bus. & Prof. Code § 17537.4*]. For a complaint for a violation of *Bus. & Prof. Code § 17537*, see *§ 14.64*.

[c] Conditional Gifts

[i] When Unlawful

It is unlawful for any person to use the term "gift" or other similar term in any manner that would be untrue or misleading [*Bus. & Prof. Code § 17537(a)*]. Under certain circumstances, this general prohibition includes, but is not limited to, notifying a person by any means that he or she will receive a gift and that, as a condition of receiving the gift, he or she must pay any money, or purchase or lease (including rent) any goods or services, when specified conditions exist [*Bus. & Prof. Code § 17537(b), (c)*]. Unlike the prohibition against conditional prize offers, *Bus. & Prof. Code § 17537(c)* makes conditional gift offers unlawful only when specified conditions exist, as discussed in *§ 15.13[12][c][ii]-[vi]* [*see Bus. & Prof. Code § 17537(c)(1)-(5)*].

A violation of *Bus. & Prof. Code § 17537* is a misdemeanor [*Bus. & Prof. Code §§ 17537(e)*].

[ii] Excessive Shipping or Handling Charges

A conditional gift offer is unlawful if the shipping charge, depending on the method of shipping used, exceeds either (1) the average cost of postage or the average charge of a delivery service in the business of delivering goods of like size, weight, and kind for shippers other than the offeror of the gift for the geographic area in which the gift is being distributed, or (2) the exact amount for shipping paid to an independent fulfillment house or an independent supplier, either of which is in the business of shipping goods for shippers other than the offeror of the gift [*Bus. & Prof. Code § 17537(c)(1)*]. A conditional gift offer is also unlawful if the handling charge (1) is not reasonable, or (2) exceeds the actual cost of handling, or (3) exceeds the greater of $3 in any transaction or 80 percent of the actual cost of the gift item to the offeror or its agent [*Bus. & Prof. Code § 17537(c)(2)*].

[iii] Overcharge for Goods or Services

A conditional gift offer is unlawful if any goods or services that must be purchased or leased by the offeree of the gift in order to obtain the gift could have been purchased through the same marketing channel in which the gift was offered for a lower price without the gift items at or proximate to the time the gift was offered [*Bus. & Prof. Code § 17537(c)(3)*]. The marketing channel is the method of retail distribution, including, but not limited to, catalog sales, mail order, telephone sales, and in-person sales at retail outlets [*Bus. & Prof. Code § 17537(d)(1)*].

[iv] Majority of Sales or Leases Involve Offer

A conditional gift offer is unlawful if, of the total sales or leases made by the gift offeror (1) within the preceding year, (2) through the marketing channel in which the gift is offered or through in-person sales at retail outlets, and (3) of the type of goods or services that must be purchased or leased in order to obtain the gift item, the majority was made in conjunction with the offer of a gift [*Bus. & Prof. Code § 17537(c)(4)*].

[v] False Claim That Offeree Was "Specially Selected"

A conditional gift offer is unlawful if the gift offeror represents that the offeree has been specially selected in any manner, unless (1) the representation is true, and (2) the offeree made a purchase from the gift offeror within the six-month period before the gift offer was made or has a credit card issued by, or a retail installment account with, the gift offeror [*Bus. & Prof. Code § 17537(c)(5)*].

[vi] General Merchandise Retailers

The prohibition against conditional gift offers applies to a general merchandise retailer, which is any person or entity, regardless of the form of organization, that has continually offered for sale or lease more than 100 different types of goods or services to the public in California throughout a period exceeding five years [*see Bus. & Prof. Code §§ 17537(c), (d)(2)*].

In addition to the generally applicable prohibition on excessive handling charges, it is unlawful for a general merchandise retailer who offers a conditional gift to impose a handling charge exceeding the actual amount for handling that is paid to an independent fulfillment house or supplier, either of which is in the business of handling goods for businesses other than the general merchandise retailer [*Bus. & Prof. Code § 17537(c)(2)(D)*].

Under certain circumstances, a general merchandise retailer is not subject to *Bus. & Prof. Code § 17537(c)(4)*, which makes a conditional gift offer unlawful when similar offers constitute the majority of the offeror's sales or leases. The prohibition does not apply to a gift offer made by a general merchandise retailer in conjunction with the sale or lease through mail order of goods or services (excluding catalog sales) if the following conditions exist [*Bus. & Prof. Code § 17537(c)(4)*]:

- The goods or services are of a type unlike any other type of goods or services sold or leased by the general merchandise retailer at any time during the period beginning six months before and continuing six months after the gift offer;
- The gift offer does not extend for a period of more than two months; and
- The gift offer is not untrue or misleading in any manner.

[d] Civil Action for Treble Damages

If a person making an offer subject to *Bus. & Prof. Code §§ 17537* or *17537.1(a)*, or any employee or agent of such a person, violates any provision of *Bus. & Prof. Code §§ 17537* or *17537.1*, the recipient of the offer who is damaged by

the violation may bring a civil action against the person making the offer for, and may be awarded, treble damages. The court may award reasonable attorney's fees to the prevailing party [*Bus. & Prof. Code § 17537.4*]. For a form of complaint for a violation of *Bus. & Prof. Code § 17537*, see *§ 14.64*.

[e] Inducement to Visit Location, Attend Sales Presentation, or Contact Sales Agent

[i] Restrictions

It is unlawful for any person, or an employee, agent, or independent contractor employed or authorized by that person, by any means, as part of an advertising plan or program, to offer any incentive as an inducement to the recipient to visit a location, to attend a sales presentation, or to contact a sales agent in person, by telephone, or by mail, unless the offer clearly and conspicuously discloses in writing, in readily understandable language, all of the information below [*Bus. & Prof. Code § 17537.1(a)*].

Disclosures that must appear on the front or first page of the offer include the following [*Bus. & Prof. Code § 17537.1(a)(1)*]:

- The name and street address of the owner of the real or personal property or the provider of the services that are the subject of the visit, sales presentation, or contact with a sales agent. If the offer is made by an agent or independent contractor employed or authorized by the owner or provider, or is made under a name other than the true name of the owner or provider, the name of the owner or provider shall be more prominently and conspicuously displayed than the name of the agent, independent contractor, or other name.

- A general description of the business of the owner or provider identified pursuant to paragraph (A), and the purpose of any requested visit, sales presentation, or contact with a sales agent, which must include a general description of the real or personal property or services that are the subject of the sales presentation and a clear statement, if applicable, that there will be a sales presentation and the approximate duration of the visit and sales presentation.

- If the recipient is not assured of receiving any particular incentive, a statement of the odds of receiving each incentive offered or, in the alternative, a clear statement describing the location in the offer where the odds can be found. The odds must be stated in whole Arabic numbers in a format such as: "1 chance in 100,000" or "1:100,000." The odds and, when applicable, the alternative statement describing their location must be printed in a type size that is at least equal to that used for the standard text on the front or first page of the offer.

- A clear statement, if applicable, that the offer is subject to specific restrictions, qualifications, and conditions and a statement describing the location in the offer where the restrictions, qualifications, and conditions may be found. Both statements must be printed in a type size that is at least equal to that used for the standard text on the front or first page of the offer.

Disclosures that must appear in the offer, but need not appear on the front or first page of the offer, include the following [*Bus. & Prof. Code § 17537.1(a)(2)*]:

- Unless the odds are disclosed on the front or first page of the offer, a statement of the odds of receiving each incentive offered, printed in the size and format set forth in *Bus. & Prof. Code § 17537.1(a)(1)(C)*.

- All restrictions, qualifications, and other conditions that must be satisfied before the recipient is

entitled to receive the incentive, including but not limited to (1) any deadline by which the recipient must visit the location, attend the sales presentation, or contact the sales agent in order to receive an incentive, and (2) any other conditions, such as a minimum age qualification, a financial qualification, or a requirement that, if the recipient is married, both husband and wife must be present in order to receive the incentive. Any financial qualifications must be stated with a specificity sufficient to enable the recipient to reasonably determine his or her eligibility.

- A statement that the owner or provider identified pursuant to *Bus. & Prof. Code § 17537.1(a)(1)(A)* reserves the right to provide a raincheck, or a substitute or like incentive, if those rights are reserved.

- A statement that a recipient who receives an offered incentive may request and will receive evidence showing that the incentive provided matches the incentive randomly or otherwise selected for distribution to that recipient.

- All other rules, terms, and conditions of the offer, plan, or program.

In addition, it is unlawful for any person making an offer subject to *Bus. & Prof. Code § 17537.1(a)*, or any employee, agent, or independent contractor employed or authorized by that person, to do any of the following [*Bus. & Prof. Code § 17537.1(g)*]:

- Use any printing styles, graphics, layouts, text, colors, or formats on envelopes or on the offer that implies, creates an appearance, or would lead a reasonable person to believe that the offer originates from or is issued by or on behalf of a government or public agency, public utility, public organization, insurance company, credit reporting agency, bill collecting company, or law firm, unless the same is true.

- Misrepresent the size, quantity, identity, value, or qualities of any incentive.

- Misrepresent in any manner the odds of receiving any particular incentive.

- Represent directly or by implication that the number of participants has been significantly limited or that any person has been selected to receive a particular incentive unless that is the fact.

- Label any offer a notice of termination or notice of cancellation.

- Misrepresent, in any manner, the offer, plan, program or the affiliation, connection, association, or contractual relationship between the person making the offer and the owner or provider, if they are not the same.

[ii] Randomly Selected Recipients

If the major incentives are awarded or given at random, by the assignment of a number to the items, that number must be actually assigned by the party contractually responsible for doing so. The person making an offer subject to *Bus. & Prof. Code § 17537.1(a)*, or the offeror's agent, employee, independent contractor, must maintain records showing that the winning numbers or opportunity to receive the incentives have been deposited in the mail or otherwise made available to recipients in accordance with the odds disclosure statement required by *Bus. & Prof. Code § 17537.1(a)(1)(C)*. The records must be maintained for a period of one year after the date the offer is made. Postal receipt records, affidavits of mailing, or a list of winners or recipients of the major incentives satisfy the recordkeeping requirement. The records must be made available to the Attorney General within 30 days after written request for them [*Bus. & Prof. Code § 17537.1(h)*].

[iii] Failure to Provide Prize or Gift

It is unlawful for any person making an offer subject to *Bus. & Prof. Code § 17537.1(a)*, or any employee, agent, or independent contractor employed or authorized by that person, to offer any incentive when the person knows or has reason to know that the offered item will not be available in a sufficient quantity based on the reasonably anticipated response to the offer [*Bus. & Prof. Code § 17537.1(b)*].

In addition, it is unlawful for any person making an offer subject to *Bus. & Prof. Code § 17537.1(a)*, or any of the offeror's employees, agents, or independent contractors, to fail to provide any offered incentive that any recipient who has responded to the offer in the manner specified in the offer, who has performed the requirements disclosed in the offer, and who has met the qualifications described in the offer is entitled to receive. Failure to provide the incentive is not unlawful, however, if the offered incentive is not reasonably available and the offer discloses the reservation of a right to provide a raincheck, or a like or substitute incentive, if the offered incentive is unavailable [*Bus. & Prof. Code § 17537.1(c)*].

If the person making an offer subject to *Bus. & Prof. Code § 17537.1(a)* is unable to provide an offered incentive because of limitations of supply, quantity, or quality that were not reasonably foreseeable or controllable by the person making the offer, the offeror must inform the recipient of the recipient's right to receive a raincheck for the incentive offered, unless the offeror knows or has reasonable basis for knowing that the incentive will not be reasonably available. The offeror must also inform the recipient of the recipient's right to receive at least one of the following additional options: (1) a like incentive of equivalent or greater retail value or a raincheck; (2) a substitute incentive of equivalent or greater retail value; or (3) a raincheck for the like or substitute incentive [*Bus. & Prof. Code § 17537.1(d)*].

If a raincheck is provided, the offeror must, within a reasonable time, and in no event later than 80 days, deliver the agreed incentive to the recipient's address without additional cost or obligation to the recipient, unless the incentive for which the raincheck is provided remains unavailable because of limitations of supply, quantity, or quality not reasonably foreseeable or controllable by the offeror. In that case, the offeror must, not later than 30 days after the expiration of 80 days, deliver a like incentive of equal or greater retail value. If a like incentive is not reasonably available to the offeror, a substitute incentive of equal or greater retail value must be provided [*Bus. & Prof. Code § 17537.1(e)*].

[iv] Other Deceptive and Unfair Trade Practices

When used as part of an advertising plan or program defined in *Bus. & Prof. Code § 17537.1*, the following acts constitute deceptive and unfair trade practices [*Bus. & Prof. Code § 17537.2*]:

- When, to utilize the incentive, the recipient is requested to pay any money to any person or entity named or referred to in the offer or to purchase, to rent, or otherwise to pay that person or entity for any product or service including a deposit, whether returnable or not, whether payment is for an item, a service, shipping, handling, insurance or payment for anything. However, if the offered incentive is a certificate or coupon redeemable for transportation, accommodations, recreation, vacation, entertainment, or like services, the offer may place a condition on the use of the incentive that requires the recipient to pay directly to the direct provider of services a refundable deposit, not to exceed $50, to reserve space availability or admission, only if the deposit will be returned immediately on the recipient's arrival at the location of the direct provider. Further, if government-imposed taxes directly related to the service being provided are not included in the incentive, the offer itself, in close proximity to the description of the incentive, must disclose those government-imposed taxes that will be the recipient's responsibility and their approximate dollar amount. A deposit may be collected from the recipient to cover the cost of those government-imposed taxes [*Bus. & Prof. Code § 17537.2(a)*]. This prohibition aldo does not apply to an incentive constituting an opportunity to stay at a hotel or other resort

accommodations at a discount from the standard rate for the hotel or resort accommodations if [*Bus. & Prof. Code § 17537.2(f)*]:

- The fee to utilize the incentive and the requirement, if any, to attend a sales presentation are clearly and conspicuously disclosed in close proximity to the description of the offered incentive;

- A statement appears in close proximity to the description of the offered incentive in substantially the following form: "The recipient is responsible for payment of any government-imposed taxes directly related to the service being provided d any personal expenses incurred when utilizing this offer";

- The accommodations to be occupied are within a 20-mile radius of the property on which the accommodations offered for sale are located or, if not within that radius, the accommodations offered for sale are managed and operated by the manager and operator of the accommodations to be occupied or an affiliate [*Corp. Code § 150*] or a franchisee [*Bus. & Prof. Code § 20002*] of the manager and operator, and the manager and operator of the accommodations offered for sale, or of the accommodations to be occupied, is an issuer or subsidiary of an issuer that has a security listed on a national securities exchange or designated as a national market system security on an interdealer quotation system by the National Association of Security Dealers, Inc., and the exchange or interdealer quotation system has been certified by the Commissioner of Corporations under *Corp. Code § 25100(o)*. A subsidiary of an issuer that qualifies under this exception does not itself qualify under this paragraph unless 60 percent or more of the voting power of its shares is owned by the qualifying issuer or issuers; and

- The offer of any additional incentive, if made in conjunction with the original incentive, complies with *Bus. & Prof. Code § 17537.1*, is typically and customarily included in a vacation package (and may include transportation, dining, entertainment, or recreation), and clearly and conspicuously discloses, in close proximity to the offer's description of the additional incentive, the fee and additional requirements, if any, to use the additional incentive.

- Stating or implying in the offer that the recipient is one of a selected group to receive one or more of a group of incentives, without clearly and conspicuously disclosing in close proximity to the statement or implied statement of selection the total number of persons in that select group or the odds of receiving the incentives. Statements of selection that require such disclosure include such phrases as "you are a finalist," "we are sending this to a limited number of people," "either you or another named person has won the major prize," and "if you do not respond your incentive will be given to someone else" [*Bus. & Prof. Code § 17537.2(b)*].

- Stating or implying in the offer that the recipient is likely to receive one or more of the offered incentives because other named people have already received other named incentives, unless the offer clearly and conspicuously discloses in close proximity to the statement the recipient's odds of receiving the identified incentive [*Bus. & Prof. Code § 17537.2(c)*].

- When the solicitation states or implies that the recipient is likely to receive an incentive that has a normal retail price that is higher than that of another named incentive unless that statement is true. A list of incentives implies that the incentives are in descending or ascending order of value unless the solicitation clearly and conspicuously negates the implication in close proximity to the list [*Bus. & Prof.*

Code § 17537.2(d)].

- Describing an incentive in an untrue or misleading manner, including descriptions that imply that the incentive is of greater fair market value or of a different kind or nature than a recipient would be led to believe from a reasonable reading of the offer or that lists the recipient's name in close proximity to a specific incentive unless the offer clearly and conspicuously discloses immediately next to the recipient's name the recipient's odds of receiving the specific incentive.

[v] Treble Damages

If a person making an offer subject to *Bus. & Prof. Code § 17537.1(a)*, or any employee or agent of such a person, violates any provision of *Bus. & Prof. Code § 17537.1*, the recipient of the offer who is damaged by the violation may bring a civil action against the person making the offer for, and may be awarded, treble damages. The court may award reasonable attorney's fees to the prevailing party [*Bus. & Prof. Code § 17537.4*]. For a form of complaint for a violation of *Bus. & Prof. Code § 17537.1*, see *§ 14.65*.

[12] Coupons

It is unlawful for any person to offer a coupon, as defined, that is untrue or misleading in any manner [*Bus. & Prof. Code § 17537.11(a)*], or that describes the coupon as free, a gift or prize, or uses words of similar import, if the recipient has to pay money or buy goods or services to obtain or use the coupon and the person offering the coupon, or anyone honoring the coupon, made the majority of his or her sales during the preceding year in connection with one or more similarly described coupons [*Bus. & Prof. Code § 17537.11(b)*].

[13] Real Estate

It is unlawful for any person, firm, corporation, or association, or any employee or agent of such an entity, to make or disseminate any statement or assertion of fact in a newspaper, circular, form letter, or other publication published or circulated, including over the internet, in any language in California concerning the extent, location, ownership, title, or other characteristic, quality, or attribute of any real estate located in California or elsewhere, that is known to him or her to be untrue and that is made or disseminated with the intention of misleading. This rule is not construed to hold the publisher of any newspaper or any job printer liable for any such publication unless the publisher or printer has an interest either as owner or agent in the real estate so advertised [*Bus. & Prof. Code § 17530*].

Civil and criminal penalties for violation of *Bus. & Prof. Code § 17530* are mutually exclusive [*Bus. & Prof. Code § 17536(e)*; *see Bus. & Prof. Code § 17536* (civil penalties), *discussed under § 14.44[7][a][i]*].

[14] Unassembled Toys

Every manufacturer, wholesaler, jobber, distributor, or other person who packages children's toys for sale to any retailer is required to clearly state on the outside of the package that the toy is unassembled if that is the case. If children's toys are packaged outside California, the first wholesaler, jobber, distributor, or other person who has possession or control of the toys in California in the course of distribution or marketing for sale to any retailer may not further distribute or market the toys if they are unassembled unless and until the outside of each package clearly states that the toys are unassembled [*Bus. & Prof. Code § 17531.1*].

[15] Newspapers and Periodicals

It is unlawful for any proprietor or publisher of any newspaper or periodical, including any newspaper or periodical published over the internet, willfully and knowingly to misrepresent the circulation of the newspaper or periodical for the purpose of securing advertising or other patronage [*Bus. & Prof. Code § 17533*].

[16] Charitable Solicitations

California law requires that prior to any solicitation or sales solicitation for charitable purposes the solicitor or seller must make certain written disclosures to the prospective donor or purchaser. The required disclosures include (1) the non-tax-exempt status of the soliciting organization or fund, if the organization or fund for which the money or funds are being solicited does not have a charitable tax exemption under both federal and state law, and (2) the percentage of the total gift or purchase price that may be deducted as a charitable contribution under both federal and state law [*see Bus. & Prof. Code § 17510.3(a)*]. Individual volunteers making nonsales solicitations and volunteers under 18 years of age are exempted from the full disclosure requirement [*see Bus. & Prof. Code § 17510.3(c), (d)*]. However, it appears that the validity of several provisions of the disclosure requirement is in doubt in light of the United Supreme Court's decision in *Riley v. National Federation of Blind (1988) 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669* , in which the court struck down a state's charitable solicitations statute that required professional fundraisers to disclose to potential donors, before an appeal for funds, the percentage of charitable contributions collected during the previous 12 months that were actually turned over to charity. The court held that the statute was a content-based regulation that impermissibly burdened free speech [*Riley v. National Federation of Blind (1988) 487 U.S. 781, 795, 798-801, 108 S. Ct. 2667, 101 L. Ed. 2d 669]* .

[17] Telephone Solicitations

[a] In General

Telephonic sellers, as defined in *Bus. & Prof. Code § 17511.1*, are required to register with the Department of Justice. Registration and filing requirements are set forth in *Bus. & Prof. Code §§ 17511.3, 17511.4*, and *17511.6*. They are also required to make the following disclosures to each prospective purchaser at the time the solicitation is made and before consummation of any sales transaction [*see Bus. & Prof. Code § 17511.5*]:

- If the seller represents or implies that the purchaser will receive an item free of charge, then the seller's address and the address from which the call is made; the manner of selecting items the purchaser is to receive; the odds that the purchaser will receive the described item; and the number of individuals who, during the preceding 12 months, have actually received the item having the greatest value and the item with the smallest odds of being received and all rules, regulations, terms, and conditions a prospective purchaser must meet in order to receive the item. In addition, each time the telephonic seller makes reference to an item or items, he or she must state that no purchase is necessary, and that a purchaser of goods will have no greater chance of receiving the more valuable item or items than a person who does not purchase. The seller must state, in a manner enabling a consumer to copy the information, the method, including the telephonic seller's address, for obtaining without purchase the item or items or for a chance to obtain the item or items. The provisions of *Bus. & Prof. Code § 17537.2* (discussed in *§ 14.13[12][e][iv]*) apply to all offers.

- If the seller offers any metal, stone, or mineral, then the seller's address and the address from which the call is made; the address and name of the owner of the premises where the offered item will be kept; and information specified by statute to substantiate any claim as to the earning or profit potential of the offered item.

- If the seller offers an interest in oil, gas, or mineral fields, wells, or exploration sites, then the seller's address and the address from which the call is made; the seller's ownership interest in the field, well, or site; the total number of interests to be sold in the field, well, or site; the credentials of any investigator of the field, well, or site; and information specified by statute to substantiate any claim as to the earning or profit potential of the purchase.

- If the seller represents that office equipment or supplies being offered are offered at prices below those usually charged, then the seller's address; the address from which the call is made; and the name of each manufacturer of each item represented for sale in which the prospective purchaser expresses interest.

- If the solicitation is a "home solicitation contract" [*see Civ. Code § 1689.5* (home solicitation contract defined)], the seller must inform the buyer orally that (1) the buyer has the right to cancel the contract or offer until midnight of the third business day after the day on which the buyer receives the product ordered or the notice of confirmation of services ordered; and (2) a written notice of cancellation will be sent with the product ordered or, in the case of services ordered, the written notice of cancellation will accompany the notice of confirmation, that will be sent to the buyer immediately after the telephonic agreement to purchase those services. This right of cancellation begins to run from the date of the buyer's receipt of the product ordered, or in the case of services ordered, from the buyer's receipt of the notice of confirmation of services ordered.

The seller also must provide the buyer with a written notice of cancellation (in duplicate, in specified language and type size, with no other information or statement) that will accompany and be attached to any product sent to the buyer in response to a telephone solicitation, or in the case of services ordered, will accompany the notice of confirmation of the agreement [*Bus. & Prof. Code § 17511.5(e)(2)*].

In addition to any other remedies allowed by law, criminal penalties are set forth in *Bus. & Prof. Code § 17511.9* for any person, including but not limited to the seller, a salesperson, agent, or representative of the seller, or an independent contractor, who willfully violates *Bus. & Prof. Code § 17511 et seq.*, who directly or indirectly employs any device, scheme, or artifice to deceive in connection with the offer or sale by any telephonic seller, or who willfully, directly, or indirectly, engages in any act, practice, or course of business that operates or would operate as a fraud or deceit on any person in connection with a sale by any telephonic seller [*see Bus. & Prof. Code § 17511.10* (criminal remedies not exclusive)]. In addition, any salesperson who solicits prospective purchasers on behalf of a telephonic seller who is not currently registered is guilty of a misdemeanor [*Bus. & Prof. Code § 17511.8*].

In any civil proceeding alleging a violation of *Bus. & Prof. Code § 17511 et seq.*, the burden of proving an exemption or an exception from a definition is on the person claiming it, and, in any criminal proceeding, the burden of producing evidence to support a defense based on an exemption or an exception from a definition is on the person claiming it [*Bus. & Prof. Code § 17511.1(f)*].

A person who sends a solicitation by mail that solicits a recipient to consent to receive information via telephone, where that recipient's telephone number is not listed on the national "do not call" registry established and maintained by the Federal Trade Commission, as described in *16 C.F.R. § 310.4(b)(1)(iii)(B)*, must include in the solicitation a clear and conspicuous disclosure of the following information [*Bus. & Prof. Code § 17514(a)*]:

- Identification of the name of the sender of the mailing and of the entity that is requesting permission to call;

- The telephone number to which calls are to be placed; and

- Notice that the recipient may be contacted by a telephone solicitor.

A violation of *Bus. & Prof. Code § 17514(a)* is not a crime, notwithstanding *Bus. & Prof. Code § 17534*; however, all available civil remedies that are applicable to a violation of *Bus. & Prof. Code § 17514(a)* may be employed [*Bus. & Prof. Code § 17514(b)*].

Telephonic sellers may also be subject to liability under the Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*) if they disseminate an unsolicited prerecorded telephone message without first obtaining the consent of the listener [*see Civ. Code § 1771(v)*].

For discussion of legal remedies under the Consumer Legal Remedies Act and of the regulation of home solicitation practices by *Bus. & Prof. Code § 17500.3*, see Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* .

[b] Information-Access Service Business

In addition to the regulation of telephonic sellers by *Bus. & Prof. Code § 17511 et seq.*, regulations of the information-access service business are set forth in *Bus. & Prof. Code §§ 17539.5-17539.6*. "Information-access service" is defined as any telecommunications service that permits individuals to access a telephone number and for which the caller is assessed, by virtue of placing or completing the call, a charge that is greater than, or in addition to, the charge for the call's transmission. Information-access service includes telephone numbers with the prefix 900 or 976 [*Bus. & Prof. Code § 17539.5(a)(6)*]. The regulations provide a detailed list of unlawful practices, such as soliciting callers by using an automatic dialing device, requiring callers to call more than one 900 number to receive goods or services represented in the initial solicitation, and advertising that the information-access service is free [*see Bus. & Prof. Code § 17539.5(b)*].

The regulations also make it unlawful for any person to solicit or sell an information-access service without making the required disclosures, including an accurate description of the service; the name, address, and non-900 telephone number of the information provider; and the cost of the call [*see Bus. & Prof. Code § 17539.5(c)*]. In addition, the solicitation or sale of an information-access service in any manner related to a sweepstakes is prohibited [*Bus. & Prof. Code § 17539.5(d)*; *see Bus. & Prof. Code § 17539.5(a)(12)* ("sweepstakes" defined)]. An information provider who operates a sweepstakes in California through the use of a 900 number must register with the Department of Justice within 10 days after causing any advertisement for the sweepstakes to be directed to any person in California [*Bus. & Prof. Code § 17539.55(a)*]. The registration must include all required information, including each 900 number used in the sweepstakes, the information provider's name and address, and a copy of the sweepstakes' official rules [*see Bus. & Prof. Code § 17539.55(b)*]. The information provider must pay an annual registration fee of $50 for each 900 number used for sweepstakes purposes [*Bus. & Prof. Code § 17539.55(c)*]. It is unlawful for any information provider that operates a sweepstakes to make reference to the fact that the information provider is registered with the Department of Justice, or in any other manner imply that the registration represents approval of the sweepstakes by the Department of Justice [*Bus. & Prof. Code § 17539.55(d)*].

The law exempts a regional telephone operating company, interexchange carrier, or local telephone company operating in those capacities that, in good faith, telecommunicates an information-access program without knowledge that the program or related advertising violates *Bus. & Prof. Code §§ 17539.5-17539.6* [*Bus. & Prof. Code § 17539.5(k)*].

Finally, any broadcast or print advertisement or notice that contains a 900 number must be written or spoken in the same language as the language used in a recorded message or by a live operator of the 900 number call [*Bus. & Prof. Code § 17539.6*].

[18] Water Treatment Devices

[a] In General

In connection with a sale, lease, or rental, or an offer to sell, lease, or rent, or any other disposition of, a water treatment device [*see Bus. & Prof. Code § 17577.1(b)* (definition)] for use on residential real property primarily for personal, family, or household purposes, it is unlawful to do any of the following [*Bus. & Prof. Code § 17577.2*]:

- Use untrue or misleading statements regarding the presence of contaminants in water or the performance of a water treatment device;

- Use graphics, endorsements, or testimonials in an untrue or misleading manner;

- Perform precipitation tests other than to demonstrate hardness or nonhealth-related characteristics of the consumer's water;

- Make performance claims regarding a device that has not been certified by the State Department of Health Services [*see People ex rel. Brown v. PuriTec (2007) 153 Cal. App. 4th 1524, 1528, 64 Cal. Rptr. 3d 270* (provision did not violate *U.S. Constitution's Commerce Clause* or *First* Amendment, as applied to health claims made by non-California defendant on its website, concerning uncertified water treatment devices that it offered for sale to California consumers)]; or

- Fail to disclose the importance of proper maintenance, including replacement of filters and screens.

A contract or offer for the sale, lease, or rental of a water treatment device that is "subject to approval" is deemed a home solicitation contract or offer as defined in *Civ. Code § 1689.5(a)*, regardless of where the contract or offer is made. Such an offer or contract is subject to *Civ. Code § 1689.5 et seq.* if the contract or offer arises out of a scheduled presentation to promote the sale, lease, or rental of a water treatment device to a person invited to attend the presentation at a location other than a private residence [*Bus. & Prof. Code § 17577.3(a)*]. Therefore, a homeowner who enters a transaction for the acquisition of a water treatment device has the right to cancel the transaction within three days of its consummation [*see Civ. Code § 1689.6*; *Bus. & Prof. Code § 17577.3(b)*]. For discussion and forms relating to home solicitation contracts, see Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* .

No contract or offer for the sale, lease, or rental of a home water treatment device may provide for a purchase money lien, other than a mechanic's lien, on real property. Any lien taken in violation of this provision is void and unenforceable [*Bus. & Prof. Code § 17577.5*].

[b] Civil Action for Damages

In addition to any other rights and remedies provided by law, any buyer, lessee, or renter of a water treatment device may bring an action against any person who violates *Bus. & Prof. Code § 17577 et seq.* for recovery of actual damages, exemplary damages, reasonable attorney's fees and costs, and appropriate equitable relief [*Bus. & Prof. Code § 17577.6(a), (b)*]. The action must be commenced within three years of the discovery of the alleged violation [*Bus. & Prof. Code § 17577.6(c)*]. Any waiver of *Bus. & Prof. Code § 17577 et seq.* is void and unenforceable as contrary to public policy [*Bus. & Prof. Code § 17577.6(d)*].

[19] Live Musical Performance by Group

No person may advertise or conduct a live musical performance or production through the use of a false, deceptive, or misleading affiliation, connection, or association between a performing group and a recording group unless at least one of the following conditions is satisfied [*Bus. & Prof. Code § 17537.12(c)*; *see Bus. & Prof. Code § 17537.12(b)* (definitions of "performing group" and "recording group"); *see also Bus. & Prof. Code § 17537.12(a)* (this code section may be cited as Truth in Music Advertising Act)]:

- The performing group is the authorized registrant and owner of a federal service mark for the group registered in the U.S. Patent and Trademark Office.

- At least one member of the performing group was previously a member of the recording group and has a legal right by virtue of use or operation under the group name without having abandoned the name or affiliation of the group.

- The live musical performance or production is identified in all advertising and promotion as a salute or tribute, and the name of the vocal or instrumental group performing is not so closely related or similar to that used by the recording group that it would tend to confuse or mislead the public.

- The advertising does not relate to a live musical performance or production taking place in California.

- The performance or production is expressly authorized by the recording group.

[20] Automatic Purchase Renewals

[a] Legislative Intent

It is the intent of the Legislature to end the practice of ongoing charging of consumer credit or debit cards or third party payment accounts without the consumers' explicit consent for ongoing shipments of a product or ongoing deliveries of service [*Bus. & Prof. Code § 17600*]. On and after December 1, 2010 [*Bus. & Prof. Code § 17606*], the provisions discussed in *§ 14.13[20][b] -[g]* are applicable.

[b] Prohibited Acts

It is unlawful for any business making an automatic renewal or continuous service offer [*see § 14.13[20][c]*] to a consumer in California to do any of the following [*Bus. & Prof. Code § 17602(a)*]:

- Fail to present the automatic renewal offer terms [*see § 14.13[20][c]*] or continuous service offer terms in a clear and conspicuous manner [*see § 14.13[20][c]*] before the subscription or purchasing agreement is fulfilled and in visual proximity, or in the case of an offer conveyed by voice, in temporal proximity, to the request for consent to the offer;

- Charge the consumer's credit or debit card or the consumer's account with a third party for an automatic renewal or continuous service without first obtaining the consumer's affirmative consent to the agreement containing the automatic renewal offer terms or continuous service offer terms; or

- Fail to provide an acknowledgment that includes the automatic renewal or continuous service offer terms, cancellation policy, and information regarding how to cancel in a manner that is capable of being retained by the consumer.

If the offer includes a free trial, the business must also disclose in the acknowledgment how to cancel and allow the consumer to cancel before the consumer pays for the goods or services [*Bus. & Prof. Code § 17602(a)(3)*]. This disclosure may be made after completion of the initial order [*Bus. & Prof. Code § 17602(d)(1)*].

[c] Definitions

"Automatic renewal" means a plan or arrangement in which a paid subscription or purchasing agreement is automatically renewed at the end of a definite term for a subsequent term [*Bus. & Prof. Code § 17601(a)*].

"Automatic renewal offer terms" means the following clear and conspicuous disclosures [*Bus. & Prof. Code § 17601(b)*]:

- That the subscription or purchasing agreement will continue until the consumer cancels;

- The description of the cancellation policy that applies to the offer;

- The recurring charges that will be charged to the consumer's credit or debit card or payment account with a third party as part of the automatic renewal plan or arrangement, and that the amount of the charge may change, if that is the case, and the amount to which the charge will change, if known;

- The length of the automatic renewal term or that the service is continuous, unless the length of the term is chosen by the consumer; and

- The minimum purchase obligation, if any.

"Clear and conspicuous" or "clearly and conspicuously" means in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from the surrounding text of the same size by symbols or other marks, in a manner that clearly calls attention to the language. In the case of an audio disclosure, "clear and conspicuous" and "clearly and conspicuously" means in a volume and cadence sufficient to be readily audible and understandable [*Bus. & Prof. Code § 17601(c)*].

"Consumer" means any individual who seeks or acquires, by purchase or lease, any goods, services, money, or credit for personal, family, or household purposes [*Bus. & Prof. Code § 17601(d)*].

"Continuous service" means a plan or arrangement in which a subscription or purchasing agreement continues until the consumer cancels the service [*Bus. & Prof. Code § 17601(e)*].

[d] Obligations

A business making automatic renewal or continuous service offers must, prior to the completion of the initial order for the automatic renewal or continuous service, provide a toll free telephone number, electronic mail address, a postal address only when the seller directly bills the consumer, or another cost effective, timely, and easy to use mechanism for cancellation that must be described in the acknowledgment specified in *Bus. & Prof. Code § 17601(a)(3)* as discussed in *§ 14.13[20][b]* [*Bus. & Prof. Code § 17602(b), (d)*].

In the case of a material change in the terms of the automatic renewal or continuous service offer that has been accepted by a consumer in California, the business must provide the consumer with a clear and conspicuous notice of the material change and provide information regarding how to cancel in a manner that is capable of being retained by the consumer [*Bus. & Prof. Code § 17602(c)*]. The notice and information must be provided prior to implementation of the material change [*Bus. & Prof. Code § 17602(d)(2)*].

[e] Unordered Goods Are Gifts

In any case in which a business sends any goods, wares, merchandise, or products to a consumer, under a continuous service agreement or automatic renewal of a purchase, without first obtaining the consumer's affirmative consent [*see Bus. & Prof Code § 17602*], the goods, wares, merchandise, or products are deemed to be an unconditional gift to the consumer, who may use or dispose of them in any manner he or she sees fit without any obligation whatsoever on the consumer's part to the business, including, but not limited to, bearing the cost of, or responsibility for, shipping any goods, wares, merchandise, or products to the business [*Bus. & Prof. Code § 17603*].

[f] Civil Liability

All available civil remedies that apply to a violation of *Bus. & Prof. Code § 17600 et seq.* may be employed [*Bus. & Prof. Code § 17604(a)*]; however, if a business complies with the provisions of *Bus. & Prof. Code § 17600 et seq.* in good faith, it is not subject to civil remedies [*Bus. & Prof. Code § 17604(b)*]. Notwithstanding *Bus. & Prof. Code § 17534* [*see § 14.17*], a violation of *Bus. & Prof. Code § 17600 et seq.* is not a crime [*Bus. & Prof. Code § 17604(a)*].

[g] Exemptions

The following are exempt from the requirements of *Bus. & Prof. Code § 17600 et seq.* [*Bus. & Prof. Code § 17605*]:

- Any service provided by a business or its affiliate where either the business or its affiliate is doing business pursuant to a franchise issued by a political subdivision of the state or a license, franchise, certificate, or other authorization issued by the California Public Utilities Commission (CPUC);

- Any service provided by a business or its affiliate where either the business or its affiliate is regulated by the CPUC, the Federal Communications Commission, or the Federal Energy Regulatory Commission;

- Any entity regulated by the Department of Insurance;

- Alarm company operators, as defined in *Bus. & Prof. Code § 7590.2*, and regulated pursuant to *Bus. & Prof. Code § 7590 et seq.*;

- A bank, bank holding company, or the subsidiary or affiliate of either, or a credit union or other financial institution, licensed under state or federal law; and

- Service contract sellers and service contract administrators regulated by the Bureau of Electronic and Appliance Repair pursuant to *Bus. & Prof. Code § 9855 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionTelemarketingAntitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationAntitrust & Trade LawConsumer ProtectionFalse AdvertisingLanham ActAntitrust & Trade LawConsumer ProtectionFalse AdvertisingState RegulationAntitrust & Trade LawConsumer ProtectionDeceptive Labeling & PackagingState Regulation

California Forms of Pleading and Practice--Annotated

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Volume 2: Adoptions thru Airplanes and Airports-Chs. 12-17
Chapter 14 ADVERTISING
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2-14 California Forms of Pleading and Practice--Annotated § 14.14

§ 14.14 Miscellaneous Advertising Regulations

False or misleading representations made in the solicitation of sales or orders of energy conservation products or services, including over the internet, are unlawful, and are subject to the measure of damages provided by *Bus. & Prof. Code § 17500.3(c)* [*see Bus. & Prof. Code § 17537.5*].

Specified statements in connection with the offering or performance of a homestead filing service, as defined, are misleading and unlawful [*see Bus. & Prof. Code § 17537.6*].

Using certain terms that refer to a dealer's, manufacturer's, or distributor's cost for a motor vehicle in an advertisement for the sale or lease of a vehicle is unlawful [*see Bus. & Prof. Code § 17537.7*].

Making any untrue or misleading statement in any manner is unlawful in connection with the offering or performance of a homeowners' exemption filing service [*see Bus. & Prof. Code § 17537.8*] or an assessment appeal application filing service [*see Bus. & Prof. Code § 17537.9*].

Disclosures required to be made in any advertisement by a seller concerning an open-end credit plan are set forth in *Bus. & Prof. Code § 17538.7(a)-(c)*. It is unlawful for a seller to advertise terms that actually are not or will not be arranged or offered by the creditor [*Bus. & Prof. Code § 17538.7(d)*].

Travel promotions, including advertising the availability of air or sea transportation, are governed by *Bus. & Prof. Code § 17540 et seq.*

Fraudulent advertising of coal is prohibited by *Bus. & Prof. Code § 17532*.

False or misleading advertising by motels and motor courts is governed by *Bus. & Prof. Code § 17560 et seq.*

It is unlawful to offer for sale or trade any article represented as made by authentic American Indian labor or workmanship unless the basic article was produced wholly by American Indian labor or workmanship [*see Bus. & Prof. Code § 17569*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionFalse AdvertisingLanham ActAntitrust & Trade LawConsumer ProtectionFalse AdvertisingState Regulation

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§ 14.15 Invasive Advertising Practices

[1] In General

California law regulates three general types of invasive advertising practices. One type is telephone solicitation [*see Bus. & Prof. Code § 17590 et seq.*], discussed in *§ 14.15[5]*. The second is the practice of sending unsolicited advertising messages to e-mail accounts (discussed in *§ 14.15[2][a]*) as well as to wireless communication access points that can receive text messages, specifically cell phone numbers and pager numbers (discussed in *§ 14.15[4]*). Third, California law regulates unsolicited advertisements sent to fax machines, discussed in *§ 14.15[6]*.

[2] Unsolicited E-Mail Advertising

[a] California Statutory Scheme

Former *Bus. & Prof. Code § 17538.4*, governing unsolicited commercial e-mail advertising, was repealed effective January 1, 2004. However, a cause of action in existence before that date will be governed by the law that was in effect when that cause of action arose [*see* Stats. 2003, ch. 487, § 4; *see also Ferguson v. Friendfinders, Inc. (2002) 94 Cal. App. 4th 1255, 1266, 1269, 115 Cal. Rptr. 2d 258* (holding that former *Bus. & Prof. Code § 17538.4* did not violate dormant commerce clause of United States Constitution)]. The former statute was replaced with a law creating an "opt-in" scheme for regulating unsolicited commercial e-mail [*see Bus. & Prof. Code § 17529 et seq.*]. Under that scheme, it is unlawful to advertise to or from a California e-mail address in an unsolicited commercial e-mail [*Bus. & Prof. Code § 17529.2(a), (b)*]; that is, an e-mail as to which the recipient neither (1) has provided direct consent to receive advertisements from the advertiser, nor (2) has a preexisting or current business relationship with the advertiser [*Bus & Prof. Code § 17529.1(o)*; *see Bus. & Prof. Code § 17529.1*(*l*) (defining preexisting or current business relationship)]. Thus, the California statute is an "opt-in" statute; that is, one that generally requires the recipient take some affirmative step before a sender may lawfully send unsolicited commercial e-mail messages to the recipient [*see § 14.15[2][c], below*].

In contrast, the federal CAN-SPAM Act of 2003 [*see* Pub. L. No. 108-187, *discussed under § 14.15[3][a], below*] takes an "opt-out" approach to spam. Under the California law, marketers would have to prove the "direct consent" of the recipients either in response to a clear and conspicuous request for the consent or on the recipient's own initiative [*see*

Bus. & Prof. Code § 17529.1(d)]. The federal act simply requires a business to stop sending e-mails to those who request to be removed from a list [*see 15 U.S.C. § 7704(a)(3), (4)*].

[b] Preemption by Federal Law

It appears probable that the California opt-in law has been preempted by the federal CAN-SPAM Act of 2003 [*see* Pub. L. No. 108-187, 107 Stat. 2669, *discussed under § 14.15[3][a], below*]. The CAN-SPAM Act generally provides that it supersedes any statute, regulation, or rule of a state or political subdivision that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached to such a message [*15 U.S.C. § 7707(b)(1)*]. It appears probable, therefore, that the federal statute preempts all or at least most of the California legislation. Since the California legislation remains in effect, however, and since preemption has not yet been judicially confirmed, the California requirements are discussed in detail below.

Although the CAN-SPAM Act's text, in excluding state laws from preemption, refers to state laws that prohibit "falsity or deception in any portion of a commercial electronic mail message or information attached thereto" [*15 U.S.C. § 7707(b)(1)*], the Ninth Circuit has concluded (in a case involving Washington's Commercial Electronic Mail Act) that it must interpret the quoted language as saving from preemption "only" state statutes, rules, and regulations "that target *fraud or deception*" [*Gordon v. Virtumundo, Inc. (9th Cir. 2009) 575 F.3d 1040, 1061* (original emphasis)]. In the Ninth Circuit's view, a state law respecting e-mail is preempted to the extent that the law creates liability for anything less than fraud [*Gordon v. Virtumundo, Inc. (9th Cir. 2009) 575 F.3d 1040, 1063* (CAN-SPAM Act "left the individual states free to extend traditional tort theories such as ... fraud or deception to commercial e mail communication")]. This does not address the question of whether a state law is preempted if, assuming that it is appropriately limited to creating liability only for fraud, the law mandates an "opt-in" standard rather than the "opt-out" standard adopted in the CAN-SPAM Act.

[c] Proscription Against Sending to or From California

Under the California statute, notwithstanding any other provision of law, a person or entity may not initiate or advertise in an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertise in an unsolicited commercial e-mail advertisement sent to a California electronic mail address [*Bus. & Prof. Code § 17529.2(b)*; *see Bus. & Prof. Code § 17529.2(c)* (provisions of *Bus. & Prof. Code § 17529.2* are severable)]. Conversely, notwithstanding any other provision of law, a person or entity may not initiate or advertise in an unsolicited commercial e-mail advertisement from California or advertise in an unsolicited commercial e-mail advertisement sent from California [*Bus. & Prof. Code § 17529.2(a)*; *see Bus. & Prof. Code § 17529.2(c)* (provisions of *Bus. & Prof. Code § 17529.2* are severable)].

These prohibitions do not limit or restrict the adoption, implementation, or enforcement by a provider of internet access service of a policy of declining to transmit, receive, route, relay, handle, or store certain types of electronic mail messages [*Bus. & Prof. Code § 17529.3*].

[d] Definitions

"Initiate" means to transmit or cause to be transmitted a commercial e-mail advertisement or assist in the transmission of a commercial e-mail advertisement by providing electronic mail addresses where the advertisement may be sent, but does not include the routine transmission of the advertisement through the network or system of a telecommunications utility or an electronic mail service provider through its network or system [*Bus. & Prof. Code § 17529.1(i)*; *see § 14.67[5]*].

"Commercial e-mail advertisement" means any electronic mail message initiated for the purpose of advertising or

promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit [*Bus. & Prof. Code § 17529.1(c)*]. An "unsolicited commercial e-mail advertisement" is a commercial e-mail advertisement sent to a recipient who meets both of the following criteria [*Bus. & Prof. Code § 17529.1(o)*]:

- The recipient has not expressly consented to receive e-mail advertisements from the advertiser, either in response to a clear and conspicuous request for the consent or at the recipient's own initiative [*Bus. & Prof. Code § 17529.1(d), (o)*].

- The recipient does not have a preexisting or current business relationship with the advertiser promoting the lease, sale, rental, gift offer, or other disposition of any property, goods, services, or extension of credit [*Bus. & Prof. Code § 17529.1(o)*].

"Recipient" means the addressee of an unsolicited commercial e-mail advertisement. If an addressee of an unsolicited commercial e-mail advertisement has one or more e-mail addresses to which an unsolicited commercial e-mail advertisement is sent, the addressee must be deemed to be a separate recipient for each e-mail address to which the e-mail advertisement is sent [*Bus. & Prof. Code § 17529.1(m)*].

"Preexisting or current business relationship," as used in connection with the sending of a commercial e-mail advertisement, means that the recipient has made an inquiry and has provided his or her e-mail address, or has made an application, purchase, or transaction, with or without consideration, regarding products or services offered by the advertiser. Commercial e-mail advertisements sent pursuant to the exemption provided for a preexisting or current business relationship must provide the recipient of the commercial e-mail advertisement with the ability to "opt-out" from receiving further commercial e-mail advertisements by calling a toll-free telephone number or by sending an "unsubscribe" e-mail to the advertiser offering the products or services in the commercial e-mail advertisement. This opt-out provision does not apply to recipients who are receiving free e-mail service with regard to commercial e-mail advertisements sent by the provider of the e-mail service [*Bus. & Prof. Code § 17529.1(l)*; *see Bus. & Prof. Code § 17529.1(a)* (definition of advertiser)].

A "California electronic mail address" (or "California e-mail address") is any of the following [*Bus. & Prof. Code § 17529.1(b)*; *see Bus. & Prof. Code § 17529.1(f)-(h)* (definitions for electronic mail, electronic mail address, and electronic mail service provider)]:

- An e-mail address furnished by an electronic mail service provider that sends bills for furnishing and maintaining that e-mail address to a mailing address in California.

- An e-mail address ordinarily accessed from a computer located in California.

- An e-mail address furnished to a resident of California.

[e] Unlawful Acts

It is unlawful for any person or entity to:

- Collect electronic mail addresses posted on the internet if the purpose of the collection is for the electronic mail addresses to be used to do a proscribed activity, *below* [*Bus. & Prof. Code § 17529.4(a)*; *see Bus. & Prof. Code §§ 17529.1(k), 17538(e)(6)* (definition of internet)];

- Use an electronic mail address obtained by using automated means based on a combination of names, letters, or numbers to do a proscribed activity, *below* [*Bus. & Prof. Code § 17529.4(b)*]; or

- Use scripts or other automated means to register for multiple electronic mail accounts from which to do, or to enable another person to do, a proscribed activity, *below* [*Bus. & Prof. Code § 17529.4(c)*].

The proscribed activities referred to in the preceding paragraph are:

- Initiating or advertising in an unsolicited commercial e-mail advertisement from California, or advertising in an unsolicited commercial e-mail advertisement sent from California [*Bus. & Prof. Code § 17529.4(a)(1), (b)(1), (c)(1)*].

- Initiating or advertising in an unsolicited commercial e-mail advertisement to a California electronic mail address, or advertising in an unsolicited commercial e-mail advertisement sent to California electronic mail address [*Bus. & Prof. Code § 17529.4(a)(2), (b)(2), (c)(2)*].

It is unlawful, and a misdemeanor [*Bus. & Prof. Code § 17529.5(c)*], for any person or entity to advertise using a commercial e-mail advertisement either sent from California or sent to a California electronic mail address under any of the following circumstances:

- The commercial e-mail advertisement contains or is accompanied by a third person's domain name without the permission of the third person [*Bus. & Prof. Code § 17529.5(a)(1)*; *see Bus. & Prof. Code § 17529.1(e)* (domain name is alphanumeric designation that is registered with or assigned by any domain name registrar as part of electronic address on internet)].

- The commercial e-mail advertisement contains or is accompanied by falsified, misrepresented, or forged header information. This paragraph does not apply to truthful information used by a third party who has been lawfully authorized by the advertiser to use that information [*Bus. & Prof. Code § 17529.5(a)(2)*].

- The commercial e-mail advertisement has a subject line that a person knows would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message [*Bus. & Prof. Code § 17529.5(a)(3)*].

Nothing in *Bus. & Prof. Code § 17529 et seq.* limits or restricts the adoption, implementation, or enforcement by a provider of internet access service of a policy of declining to transmit, receive, route, relay, handle, or store certain types of electronic mail messages [*Bus. & Prof. Code § 17529.3*].

[f] Cause of Action for Damages

In addition to any other remedies provided by *Bus. & Prof. Code § 17529 et seq.* or by any other provisions of law, a recipient of an unsolicited commercial e-mail advertisement transmitted in violation of *Bus. & Prof. Code § 17529 et seq.*, or an electronic mail service provider, or the attorney general, may bring an action against an entity that violates any provision of *Bus. & Prof. Code § 17529 et seq.* to recover either or both of the following [*Bus. & Prof. Code § 17529.8(a)(1)*]:

- Actual damages.

- Liquidated damages of $1,000 for each unsolicited commercial e-mail advertisement transmitted in violation of *Bus. & Prof. Code § 17529.2* [*see § 14.15[2][c]*], *above*, up to $1,000,000 per incident.

However, if the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent unsolicited commercial e-mail advertisements that are in violation of *Bus. &*

Prof. Code § 17529 et seq., the court must reduce the liquidated damages recoverable to a maximum of $100 for each unsolicited commercial e-mail advertisement, or a maximum of $100,000 per incident [*Bus. & Prof. Code § 17529.8(b)*].

"Incident" means a single transmission or delivery to a single recipient or to multiple recipients of unsolicited commercial e-mail advertisement containing substantially similar content [*Bus. & Prof. Code § 17529.1(j)*].

The recipient, an electronic mail service provider, or the attorney general, if the prevailing plaintiff, may also recover reasonable attorney's fees and costs [*Bus. & Prof. Code § 17529.8(a)(2)*].

In addition to any other remedies provided by any other provision of law, the Attorney General, an electronic mail service provider, or a recipient of an unsolicited commercial e-mail advertisement [*see Bus. & Prof. Code § 17529.1* (definition)] may bring an action against a person or entity that violates any provision of *Bus. & Prof. Code § 17529.5*. The person or entity bringing the action (1) may recover actual damages as well as liquidated damages of $1,000 for each unsolicited commercial e-mail advertisement transmitted in violation of *Bus. & Prof. Code § 17529.5*, up to $1,000,000 per incident, and (2) if prevailing as plaintiff, may also recover reasonable attorney's fees and costs [*Bus. & Prof. Code § 17529.5(b)(1)*]. If the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent unsolicited commercial e-mail advertisements that are in violation of *Bus. & Prof. Code § 17529.5*, the court must reduce the liquidated damages to a maximum of $100 for each unsolicited commercial e-mail advertisement, or a maximum of $100,000 per incident [*Bus. & Prof. Code § 17529.5(b)(2)*].

A person who has brought an action under *Bus. & Prof. Code § 17529.5* may not bring an action against the same defendant under *Bus. & Prof. Code § 17529.8* or under *Bus. & Prof. Code § 17538.45* [*see § 14.15[3][i] below*], for the same commercial e-mail advertisement [*see Bus. & Prof. Code § 17529.1(c)* (definition)], and a person who has brought an action under *Bus. & Prof. Code § 17529.8* or *17538.45* may not bring an action against the same defendant under *Bus. & Prof. Code § 17529.5* for the same commercial e-mail advertisement [*Bus. & Prof. Code § 17529.5(b)(3)*].

[g] Immunity for Service Providers

There is no cause of action against an electronic mail service provider that is only involved in the routine transmission of the unsolicited commercial e-mail advertisement over its computer network [*Bus. & Prof. Code § 17529.8(a)(3)*]. "Routine transmission" means the transmission, routing, relaying, handling, or storing of an electronic mail message through an automatic technical process. "Routine transmission" does not include the sending, or the knowing participation in the sending, of unsolicited commercial e-mail advertisements [*Bus. & Prof. Code § 17529.1(n)*].

There is no cause of action under *Bus. & Prof. Code § 17529.5* against an electronic mail service provider that is involved only in the routine transmission of the e-mail advertisement over its computer network [*Bus. & Prof. Code § 17529.5(b)(1)*].

[h] Severability of Provisions

The provisions of *Bus. & Prof. Code § 17529 et seq.* [*see § 14.15[2][c], above*] are severable. If any provision of *Bus. & Prof. Code § 17529 et seq.* or its application is held invalid, that invalidity will not affect any other provision or application that can be given effect without the invalid provision or application [*Bus. & Prof. Code § 17529.9*; *see Bus. & Prof. Code § 17529* (statement of legislative findings)].

[3] CAN-SPAM Act of 2003

[a] Application and Purpose

A federal law, the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 [Pub. L. No. 108-187], also known as the CAN-SPAM Act of 2003, effective January 1, 2004, supersedes any California statute or state or local regulation or rule that expressly regulates the use of electronic mail to send commercial messages, except to the extent that the statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached to it [*15 U.S.C. §§ 7701, 7707(b)(1)*]. As *discussed in § 14.15[2][b], above,* it appears probable that the federal law preempts the comparable California requirements, except to the limited extent discussed below.

Congress made numerous specific findings in support of the CAN-SPAM act [*see 15 U.S.C. § 7701(a)(1)-(12)*]. On the basis of those findings, Congress determined that (1) there is a substantial government interest in regulating commercial electronic mail on a nationwide basis, (2) senders of commercial electronic mail should not mislead recipients as to the source or content of that mail, and (3) recipients of commercial electronic mail have a right to decline to receive additional commercial electronic mail from the same source [*15 U.S.C. § 7701(b)*]. To that end, the law has three principal purposes:

- Enacting *18 U.S.C. § 1037,* which criminalizes fraud and related activity in connection with electronic mail, as a means of prohibiting predatory and abusive commercial e-mail, commonly known as "spam" [*see, e.g.,* Pub. L. No. 108-187, § 4(c)(1) (sense-of-Congress statement about "spam" as method of choice for distributing pornography, perpetrating fraudulent schemes, and introducing viruses, worms, and Trojan horses into personal and business computer systems)].

- Implementing other protections for users of commercial electronic mail [*see 15 U.S.C. § 7704*; *see also § 14.15[3][g], below*].

- Suppressing the promotion of businesses by electronic mail with false or misleading transmission information [*see 15 U.S.C. § 7705*; *see also § 14.15[3][h], below*].

Although the CAN-SPAM Act generally supersedes state and local regulations, it does not apply to the following extent:

- *Other California laws.* It does not preempt the applicability of California laws that are not specific to electronic mail (including trespass, contract, and tort laws) or other California laws to the extent that those laws relate to acts of fraud or computer crime [*15 U.S.C. § 7707(b)(2)*; *see, e.g., Powers v. Pottery Barn, Inc. (2009) 177 Cal. App. 4th 1039, 1041, 99 Cal. Rptr. 3d 693* (Song Beverly Credit Card Act of 1971, *Civ. Code § 1747 et seq.,* is not preempted)].

- *Policies of internet service providers.* Nothing in the federal law has any effect on the lawfulness or unlawfulness, under any other provision of law, of the adoption, implementation, or enforcement by a provider of internet access service of a policy of declining to transmit, route, relay, handle, or store certain types of electronic mail messages [*15 U.S.C. § 7707(c)*].

- *FTC's enforcement power.* Nothing in the federal law affects in any way the FTC's authority to bring enforcement actions under the Federal Trade Commission Act for materially false or deceptive representations or unfair practices in commercial electronic mail messages [*15 U.S.C. § 7707(a)(2)*].

- *FCC's oversight of communications.* Nothing in the federal law precludes or overrides the applicability of the FCC's telemarketing rules prescribed under the Telemarketing and Consumer Fraud and Abuse Prevention Act [*see 15 U.S.C. § 6102*] or the applicability of *47 U.S.C. § 227,* concerning restrictions on the use of telephone equipment [*15 U.S.C. § 7712(a)*]. Moreover, the FCC is directed to promulgate rules to protect consumers from unwanted mobile service commercial messages [*15 U.S.C. §*

7712(b)-(d)].

- *Enforcement of federal anti-obscenity laws.* Nothing in the federal law impairs the enforcement of any federal criminal statute, particularly the statutes respecting the following [*15 U.S.C. § 7707(a)(1)*]:

  - Obscene or harassing telephone calls in interstate or foreign communications [*see 47 U.S.C. § 223*].

  - Restriction of access by minors to materials that are commercially distributed by means of the internet and that are harmful to minors [*see 47 U.S.C. § 231*].

  - Obscenity in general [*see 18 U.S.C. § 1460 et seq.*].

  - Sexual exploitation and other abuse of children [*see 18 U.S.C. § 2251 et seq.*].

[b] Definitions

The definitions included in this section apply to the requirements of the CAN-SPAM Act:

"Affirmative consent," when used with respect to a "commercial electronic mail message," means that the "recipient" expressly consented to receive the message, either in response to a clear and conspicuous request for consent or at the recipient's own initiative. If the message is from a person to whom the recipient did not communicate the consent, the recipient must have been given clear and conspicuous notice at the time the consent was communicated that the recipient's "electronic mail address" could be transferred to that other person for the purpose of "initiating" commercial electronic mail messages [*15 U.S.C. § 7702(1)*].

"Commercial electronic mail message" means any "electronic mail message" the primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on a website operated for a commercial purpose) [*15 U.S.C. § 7702(2)*]. The term does not include a "transactional or relationship message" [*15 U.S.C. § 7702(2)(B)*]. The FTC is directed to issue regulations defining the relevant criteria to facilitate the determination of the primary purpose of an electronic mail message [*15 U.S.C. § 7702(2)(C)*]. The inclusion of a reference to a commercial entity or a link to the website of a commercial entity in an electronic mail message does not, by itself, cause the message to be treated as a commercial electronic mail message for purposes of the anti-spam act if the contents or circumstances of the message indicate a primary purpose other than commercial advertisement or promotion of a commercial product or service [*15 U.S.C. § 7702(2)(D)*].

"Domain name" means any alphanumeric designation that is registered with or assigned by any domain name registrar, domain name registry, or other domain name registration authority as part of an electronic address on the internet [*15 U.S.C. § 7702(4)*].

"Electronic mail address" means a destination, commonly expressed as a string of characters, consisting of a unique user name or mailbox (commonly referred to as the local part) and a reference to an internet domain (commonly referred to as the domain part), whether or not displayed, to which an electronic mail message can be sent or delivered [*15 U.S.C. § 7702(5)*].

"Electronic mail message" means a message sent to a unique electronic mail address [*15 U.S.C. § 7702(6)*].

"Header information" means the source, destination, and routing information attached to an electronic mail message, including the originating domain name and originating electronic mail address, and any other information that appears in the line identifying, or purporting to identify, a person initiating the message [*15 U.S.C. § 7702(8)*].

"Initiate," when used with respect to a commercial electronic mail message, means to originate or transmit the message or to "procure" the origination or transmission of the message, but does not include actions that constitute "routine conveyance" of the message. More than one person may be considered to have initiated a message [*15 U.S.C. § 7702(9)*].

"Internet" means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, composing the interconnected world-wide network of networks that employ the transmission-control protocol/internet protocol (TCP/IP), or any predecessor or successor protocols to that protocol, to communicate information of all kinds by wire or radio [*15 U.S.C. § 7702(10)*; Pub. L. 105-277, div. C, tit. XI, § 1105(4) (Oct. 21, 1998)].

"Internet access service" means a service that enables users to access content, information, electronic mail, or other services offered over the internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. The term does not include telecommunications services [*15 U.S.C. § 7702(11)*; *47 U.S.C. § 231(e)(4)*].

"Materially," when used with respect to false or misleading header information, includes the alteration or concealment of header information in a manner that would impair the ability of an internet access service processing the message on behalf of a "recipient," a person alleging a violation of the anti-spam act, or a law enforcement agency, to identify, locate, or respond to a person who initiated the electronic mail message or to investigate the alleged violation, or the ability of a recipient of the message to respond to a person who initiated the electronic message [*15 U.S.C. § 7704(a)(6)*].

"Procure," when used with respect to the initiation of a commercial electronic mail message, means intentionally to pay or provide other consideration to, or induce, another person to initiate the message on one's behalf [*15 U.S.C. § 7702(12)*].

"Protected computer" means a computer that is used in or affects interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States [*15 U.S.C. § 7702(13)*; *18 U.S.C. § 1030(e)(2)(B)*].

"Recipient," when used with respect to a commercial electronic mail message, means an authorized user of the electronic mail address to which the message was sent or delivered. If a recipient of a commercial electronic mail message has any electronic mail address in addition to the address to which the message was sent or delivered, the recipient is to be treated as a separate recipient with respect to each additional address. If an electronic mail address is reassigned to a new user, the new user is not to be treated as a recipient of any commercial electronic mail message sent or delivered to that address before it was reassigned [*15 U.S.C. § 7702(14)*].

"Routine conveyance" means the transmission, routing, relaying, handling, or storing, through an automatic technical process, of an electronic mail message for which another person has identified the recipients or provided the recipient addresses [*15 U.S.C. § 7702(15)*].

Generally, "sender," when used with respect to a commercial electronic mail message, means a person who initiates the message and whose product, service, or web site is advertised or promoted by the message [*15 U.S.C. § 7702(16)(A)*]. If an entity operates through separate lines of business or divisions and holds itself out to the recipient throughout the message as that particular line of business or division rather than as the entity of which the line of business or division is a part, then the line of business or the division is to be treated as the sender of the message for purposes of the CAN-SPAM Act [*15 U.S.C. § 7702(16)(B)*].

"Sexually oriented material" means any material that depicts "sexually explicit conduct" [*see 18 U.S.C. § 2256* (definition)], unless the depiction constitutes a small and insignificant part of the whole, the remainder of which is not primarily devoted to sexual matters [*15 U.S.C. § 7704(d)(4)*].

"Transactional or relationship message" means an electronic mail message the primary purpose of which is any of the following [*15 U.S.C. § 7702(17)(A)*]:

- To facilitate, complete, or confirm a commercial transaction that the recipient has previously agreed to enter into with the sender;

- To provide warranty information, product recall information, or safety or security information with respect to a commercial product or service used or purchased by the recipient;

- To provide information directly related to an employment relationship or related benefit plan in which the recipient is currently involved, participating, or enrolled;

- To deliver goods or services, including product updates or upgrades, that the recipient is entitled to receive under the terms of a transaction that the recipient has previously agreed to enter into with the sender; or

- To provide any of the following with respect to a subscription, membership, account, loan, or comparable ongoing commercial relationship involving the ongoing purchase or use by the recipient of products or services offered by the sender:

    - Notification concerning a change in the terms or features.

    - Notification of a change in the recipient's standing or status.

    - At regular periodic intervals, account balance information or other type of account statement.

The FTC, by regulation, may modify the preceding definition to expand or contract the categories of messages that are treated as transactional or relationship messages for purposes of the CAN-SPAM Act, to the extent that the modification is necessary to accommodate changes in electronic mail technology or practices and accomplish the purposes of the act [*15 U.S.C. § 7702(17)(B)*].

[c] FTC Regulations

The FTC is empowered to issue regulations implementing the law. No regulation can require the inclusion of any specific words, characters, marks, or labels in a commercial electronic mail message, nor can a regulation require that a mandated identifier [*see 15 U.S.C. § 7704(a)(5)(A)*] be included in any particular part of a mail message (such as the subject line or body) [*15 U.S.C. § 7711*].

[d] Do-Not-E-Mail Registry

The FTC is directed to submit to Congress a plan and a timetable for establishing a nationwide marketing Do-Not-E-Mail registry, which the FTC may establish and implement at any time more than nine months after enactment of the law [*15 U.S.C. § 7708*].

[e] FTC Reports to Congress

The FTC is directed to submit to Congress a detailed analysis of the effectiveness and enforcement of the federal law over a two-year period and the need (if any) for Congress to modify the law [*15 U.S.C. § 7709(a)*]. Further, the FTC is directed to submit (1) within nine months, a report on how to implement a reward scheme for enforcement of the law and (2) within 18 months, a plan for requiring commercial electronic mail to be identifiable from its subject line, whether by means of compliance with Internet Engineering Task Force Standards, or by the use of the characters "ADV" in the subject line, or by some other comparable identifier; or, in lieu of a plan, an explanation of any concerns the FTC has that cause the FTC to recommend against such a plan [*15 U.S.C. § 7710*].

[f] Enforcement

[i] Recipients of Spam; Internet Access Service Providers

Recipients of spam do not have any enforcement rights under the CAN-SPAM Act of 2003. Congress intended that the rights of recipients should be vindicated and protected by Internet access service providers, to a limited extent (see below), and by federal and state agencies and officials [*see § 14.15[3][f][ii], below; see also Gordon v. Virtumundo, Inc. (9th Cir. 2009) 575 F.3d 1040, 1049* ("We surmise that Congress's intent was to limit enforcement actions to those best suited to detect, investigate, and, if appropriate, prosecute violations of the CAN-SPAM Act--those well-equipped to efficiently and effectively pursue legal actions against persons engaged in unlawful practices and enforce federal law for the benefit of all consumers")].

An Internet access service provider that is adversely affected by specified violations of the CAN-SPAM Act has a right to sue for injunctive relief, damages, and attorney's fees [*see 15 U.S.C. § 7706(g)*]. The action may be commenced "in any district court of the United States with jurisdiction over the defendant" [*15 U.S.C. § 7706(g)(1)*].

In any private action claiming CAN-SPAM Act violations, a threshold issue is whether the plaintiff meets the statutory standing requirements, that is, (1) whether the plaintiff is an "Internet access service" provider and (2) whether the plaintiff was "adversely affected by" actionable statutory violations [*Gordon v. Virtumundo, Inc. (9th Cir. 2009) 575 F.3d 1040, 1048-1049* ("Beyond that, however, the statutory standing provision read as a whole is ambiguous")].

As to whether the plaintiff is an "Internet access service" provider, while Congress did not intend to limit standing to providers of fee-for-service operations, it did intend to exclude plaintiffs who did not provide the actual, bona fide service of a legitimate operation [*Gordon v. Virtumundo, Inc. (9th Cir. 2009) 575 F.3d 1040, 1049* (Congress's clear intention to restrict private actions must guide proper standing analysis)]. The statutory definition of "Internet access service" [*15 U.S.C. § 7702(11)*; *see § 14.15[3][b], above*] is ambiguous. The Ninth Circuit has not yet clarified that definition by setting forth a general test or defining the outer bounds of what it means to be a provider of "Internet access service," but the court has concluded in one case that the plaintiff did not fit any reasonable definition of that term [*Gordon v. Virtumundo, Inc. (9th Cir. 2009) 575 F.3d 1040, 1052* (plaintiff was registered owner of domain name and had merely created e-mail accounts, which were hosted on leased servers, for himself, his wife, and some other individuals; moreover, this minimal effort to be "provider" of "Internet access service" lacked any hallmarks of bona fide service by e-mail provider; in fact, plaintiff was self-styled "professional plaintiff" who had commenced many civil anti-spam actions)].

The requirement that the plaintiff must be "adversely affected" by an actionable statutory violation does not encompass the ordinary inconveniences experienced by consumers and end-users who unwillingly deal with spam. Congress had in mind harms that might befall Internet service providers such as network crashes, higher bandwidth utilization, and increased costs for hardware and software upgrades, network expansion, and additional personnel. At minimum, the harm must be both real and of the type experienced by ISPs. While the harm need not be significant in the sense that it is grave or serious, the harm must be of significance to a bona fide provider of Internet access service--something beyond the mere annoyance of spam and greater than the negligible burdens typically borne by such a provider in the

ordinary course of business. In most cases, evidence of some combination of operational or technical impairments and related financial costs attributable to unwanted commercial e-mail would suffice [*Gordon v. Virtumundo, Inc. (9th Cir. 2009) 575 F.3d 1040* (court should "take an especially hard look at the cited harm if it suspects at the outset that a plaintiff is not operating a bona fide Internet access service, as is the case here")].

To give the statutory text meaning, moreover, there must be, at bare minimum, a demonstrated relationship between purported harms and the type of e mail practices regulated by the CAN-SPAM Act, that is, a showing that the identified concerns are linked in some meaningful way to unwanted spam and, in turn, represent actual harm. The e mails at issue in a particular case must, at the very least, have contributed to a larger, collective spam problem that caused ISP-type harms [*Gordon v. Virtumundo, Inc. (9th Cir. 2009) 575 F.3d 1040, 1054*]. It remains an open question whether a private-action plaintiff must allege and prove that the defendant's particular e-mails caused ISP-type harms. The Ninth Circuit has not been presented with that issue but is "troubled by the possibility" that imposing a direct-causation requirement, although not inconsistent with the statutory text, might create an unworkable standard for private-plaintiff standing, given the impracticability of tracing a harm to a specific e-mail or batch of e-mails [*Gordon v. Virtumundo, Inc. (9th Cir. 2009) 575 F.3d 1040, 1054*].

The threshold issue of standing should not pose a high bar for the legitimate service operations contemplated by Congress. In some civil actions--when, for example, well-recognized ISPs or plainly legitimate Internet access service providers file suit--adequate harm might be presumed because any reasonable person would agree that such entities dedicate considerable resources to and incur significant financial costs in dealing with spam. When, on the other hand, a private plaintiff's status as an Internet access service provider is questionable and reasonably contested, courts should not only inquire into the plaintiff's purported Internet-related service operations but also closely examine the alleged harms attributable to spam. A district court must review the individual characteristics of the plaintiff in each case and make a reasoned decision whether a purported provider is truly the type of bona fide Internet access service provider adversely affected by commercial e-mail messaging that Congress envisioned when it enacted the CAN-SPAM Act [*Gordon v. Virtumundo, Inc. (9th Cir. 2009) 575 F.3d 1040, 1054-1055*].

[ii] Federal and State Agencies and Officials

Generally, the law is to be enforced by the FTC under the Federal Trade Commission Act [*see 15 U.S.C. § 57a(a)(1)(B)*], as if a violation of the CAN-SPAM Act were an unfair or deceptive act or practice [*15 U.S.C. § 7706(a), (d)*]. However, enforcement against many various kinds of federally regulated (or related) businesses will be undertaken by the several regulatory agencies instead of the FTC; for instance, the FDIC will enforce the law against banks and savings associations, and the SEC will enforce it against securities brokers and dealers, investment companies, and investment advisers [*see 15 U.S.C. § 7706(b), (c)*].

The California Insurance Commissioner is empowered to enforce the law against insurance companies that are subject to regulation by the Department of Insurance, but the FTC will have this power whenever the Insurance Commissioner fails to use it [*see 15 U.S.C. § 7706(b)(6)*].

Except to enforce section 6 of the CAN-SPAM Act [*see § 14.15[3][h], below*], the California Attorney General or any other appropriate state official or agency, "as *parens patriae,* may bring a civil action on behalf of the residents of the State in a district court of the United States of appropriate jurisdiction," suing for an injunction, actual damages, and statutory damages [*see 15 U.S.C. § 7706(f)(1)-(3)*] as well as attorney's fees [*15 U.S.C. § 7706(f)(4)*]. The FTC or another appropriate federal regulatory agency may intervene in the action and then will be entitled to be heard on all matters arising in the action; may force a change of venue; and may file petitions for appeal [*15 U.S.C. § 7706(f)(5)*]. No action by the attorney general or another state official or agency may be commenced against a defendant or respondent in a civil action or administrative proceeding already underway by the FTC or another federal regulatory agency [*15 U.S.C. § 7706(f)(8)*].

[g] Protection Provisions

[i] False or Misleading Transmission Information

It is unlawful for any person to initiate the transmission, to a protected computer, of a commercial electronic mail message, or a transactional or relationship message, that contains, or is accompanied by, header information that is materially false or materially misleading. For this purpose [*15 U.S.C. § 7704(a)(1)*]:

- Header information that is technically accurate but includes an originating electronic mail address, domain name, or internet protocol address the access to which for purposes of initiating the message was obtained by means of false or fraudulent pretenses or representations is materially misleading.

- A "from" line (the line identifying or purporting to identify a person initiating the message) that accurately identifies any person who initiated the message is not considered materially false or materially misleading.

- Header information is materially misleading if it fails to identify accurately a protected computer used to initiate the message because the person initiating the message knowingly uses another protected computer to relay or retransmit the message for purposes of disguising its origin.

[ii] Deceptive Subject Headings

It is unlawful for any person to initiate the transmission to a protected computer of a commercial electronic mail message if such person has actual knowledge, or knowledge fairly implied on the basis of objective circumstances, that a subject heading of the message would be likely to mislead a recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the message (consistent with the criteria used in enforcement of *15 U.S.C. § 45*, which is part of the Federal Trade Commission Act) [*15 U.S.C. § 7704(a)(2)*].

[iii] Return Address in Commercial Electronic Mail

It is unlawful for any person to initiate the transmission to a protected computer of a commercial electronic mail message that does not contain, clearly and conspicuously displayed, a functioning return electronic mail address or other internet-based mechanism, commonly called an opt-out mechanism, that [*15 U.S.C. § 7704(a)(3)(A)*]:

- A recipient may use to submit, in a manner specified in the message, a reply electronic mail message or other form of internet-based communication requesting not to receive future commercial electronic mail messages from that sender at the electronic mail address where the message was received; and

- Remains capable of receiving such messages or communications for at least 30 days after the transmission of the original message.

The person initiating a commercial electronic mail message may comply with the requirement for an opt-out mechanism by providing a list or menu from which the recipient may choose the specific types of commercial electronic mail messages the recipient wants to receive or does not want to receive from the sender, if the list or menu includes an option under which the recipient may choose not to receive any commercial electronic mail messages from the sender [*15 U.S.C. § 7704(a)(3)(B)*].

A return electronic mail address or other mechanism does not fail to satisfy the requirement for an opt-out mechanism if it is unexpectedly and temporarily unable to receive messages or process requests because of a technical problem beyond the control of the sender, if the problem is corrected within a reasonable period [*15 U.S.C. § 7704(a)(3)(C)*].

[iv] Transmission of Commercial Electronic Mail After Objection

If a recipient makes a request using an opt-out mechanism [*see § 14.15[3][g][iii]*] not to receive some or any commercial electronic mail messages from the sender, then [*15 U.S.C. § 7704(a)(4)(A)*]:

- It is unlawful for the sender to initiate the transmission to the recipient, more than 10 business days after receiving the request, of a commercial electronic mail message that falls within the scope of the request.

- It is unlawful for any person acting on behalf of the sender to initiate the transmission to the recipient, more than 10 business days after the receipt of the request, of a commercial electronic mail message with actual knowledge, or knowledge fairly inferred on the basis of objective circumstances, that the message falls within the scope of the request.

- It is unlawful for any person acting on behalf of the sender to assist in initiating the transmission to the recipient, through the provision or selection of addresses to which the message will be sent, of a commercial electronic mail message with actual knowledge, or knowledge fairly inferred on the basis of objective circumstances, that the message would violate either of the foregoing proscriptions.

- It is unlawful for the sender, or any other person who knows that the recipient has made such a request, to sell, lease, exchange, or otherwise transfer or release the electronic mail address of the recipient (including through any transaction or other transfer involving mailing lists bearing the electronic mail address of the recipient) for any purpose other than compliance with the anti-spam act or other provision of law.

However, these proscriptions do not apply if there is affirmative consent by the recipient subsequent to the request [*15 U.S.C. § 7704(a)(4)(B)*].

The FTC has power to modify, by regulation, the 10-business-day period mentioned above, if the FTC determines that a different period would be more reasonable [*15 U.S.C. § 7704(c)*].

[v] Identifier, Opt-Out Mechanism, and Physical Address in Commercial Electronic Mail

It is unlawful for any person to initiate the transmission of any commercial electronic mail message to a protected computer unless the message provides all of the following [*15 U.S.C. § 7704(a)(5)(A)*]:

- Clear and conspicuous identification that the message is an advertisement or solicitation.

- Clear and conspicuous notice of the opportunity, using the mandated opt-out mechanism [*see § 14.15[3][g][iii]*], to decline to receive further commercial electronic mail messages from the sender.

- A valid physical postal address of the sender.

However, this proscription does not apply to the transmission of a commercial electronic mail message if the recipient has given prior affirmative consent to receipt of the message [*15 U.S.C. § 7704(a)(5)(B)*].

[vi] Aggravated Violations

Acts and practices that are classified as aggravated violations of the CAN-SPAM Act are described below. In a civil action by the California Attorney General or another state official or agency, or by an internet access service provider,

to enforce the anti-spam act [*see 15 U.S.C. § 7706(f), (g)*; *see also § 14.19[3][f]*], treble damages may be awarded for an aggravated violation [*see 15 U.S.C. § 7706(f)(3)(C), (g)(3)(C)*].

Address Harvesting and Dictionary Attacks. It is unlawful for any person to initiate the transmission, to a protected computer, of a commercial electronic mail message that is unlawful [*see 15 U.S.C. § 7704(a)*; *see also § 14.15[3][g]*], or to assist in the origination of such a message through the provision or selection of addresses to which the message will be transmitted, if the person had actual knowledge, or knowledge fairly inferred on the basis of objective circumstances, of either of the following facts [*15 U.S.C. § 7704(b)(1)(A)*]:

- The electronic mail address of the recipient was obtained using an automated means from a website or proprietary online service operated by another person, and the website or online service included, at the time the address was obtained, a notice stating that the operator of the website or online service will not give, sell, or otherwise transfer addresses maintained by the website or online service to any other person for the purposes of initiating, or enabling others to initiate, electronic mail messages.

- The electronic mail address of the recipient was obtained using an automated means that generates possible electronic mail addresses by combining names, letters, or numbers into numerous permutations.

This proscription does not create an ownership or proprietary interest in any electronic mail addresses [*15 U.S.C. § 7704(b)(1)(B)*].

Automated Creation of Multiple Electronic Mail Accounts. It is unlawful for any person to use scripts or other automated means to register for multiple electronic mail accounts or online user accounts from which to transmit to a protected computer, or enable another person to transmit to a protected computer, a commercial electronic mail message that is unlawful [*15 U.S.C. § 7704(b)(2)*; *see 15 U.S.C. § 7704(a)* (unlawful messages); *see also § 14.15[3][g]*].

Relay or Retransmission Through Unauthorized Access. It is unlawful for any person knowingly to relay or retransmit a commercial electronic mail message that is unlawful [*see 15 U.S.C. § 7704(a)*; *see also § 14.15[3][g]*] from a protected computer or computer network that the person has accessed without authorization [*15 U.S.C. § 7704(b)(3)*].

Additional Activities. The FTC is empowered to use its rulemaking authority to specify additional activities or practices that are classified as aggravated violations, if the FTC determines that those activities or practices are contributing substantially to the proliferation of commercial electronic mail messages that are unlawful [*15 U.S.C. § 7704(c)*].

[vii] Commercial Electronic Mail Containing Sexually Oriented Material

No person may initiate, in or affecting interstate commerce, the transmission, to a protected computer, of any commercial electronic mail message that includes sexually oriented material unless the person both [*15 U.S.C. § 7704(d)(1)*]:

- Includes in the subject heading of the message certain marks or notices prescribed by the FTC [*see 15 U.S.C. § 7704(d)(3)*]; and

- Makes provision so that the matter in the message that is initially viewable, when the message is opened by any recipient and without any further actions by the recipient:

  - Includes only those marks or notices, to the extent required or authorized, and the information required to be included in the message pursuant to *15 U.S.C. § 7704(a)(5)* [*see § 14.15[3][v]*]; and

- Includes nothing more except instructions on how to access, or a mechanism to access, the sexually oriented material.

However, the above proscription does not apply to the transmission of an electronic mail message if the recipient has given prior affirmative consent to receipt of the message [*15 U.S.C. § 7704(d)(2)*].

[h] Businesses Promoted With False or Misleading Transmission Information

It is unlawful for a person to promote, or allow the promotion of, that person's trade or business, or goods, products, property, or services sold, offered for sale, leased or offered for lease, or otherwise made available through that trade or business, in a commercial electronic mail message the transmission of which is in violation of *15 U.S.C. § 7704(a)(1)* of the CAN-SPAM Act [*see § 14.15[3][g]*] if that person meets all of the following criteria [*15 U.S.C. § 7705(a)*]:

- The person knows, or should have known in the ordinary course of that person's trade or business, that the goods, products, property, or services sold, offered for sale, leased or offered for lease, or otherwise made available through that trade or business were being promoted in such a message;

- The person received or expected to receive an economic benefit from the promotion; and

- The person took no reasonable action to prevent the transmission or to detect the transmission and report it to the FTC.

Generally, a third person who provides goods, products, property, or services to another person that violate the foregoing proscription is not to be held liable for the violation [*15 U.S.C. § 7705(b)(1)*]. However, liability for a violation will be imputed to such a third person who owns, or has a greater than 50 percent ownership or economic interest in, the trade or business of the person who committed the violation. Also, liability for a violation will be imputed to such a third person who (1) has actual knowledge that goods, products, property, or services are promoted in a commercial electronic mail message the transmission of which is in violation of section 5(a)(1) of the CAN-SPAM Act and (2) receives, or expects to receive, an economic benefit from the promotion [*15 U.S.C. § 7705(b)(2)*].

Only the FTC may enforce the foregoing provisions of the CAN-SPAM Act; enforcement through a civil action by the California Attorney General or another state official or agency or a civil action by an internet access service provider [*see 15 U.S.C. § 7706(f), (g)*; *see also § 14.19[3][c]*] will not be allowed [*see 15 U.S.C. § 7706(c)*].

[i] Violation of E-Mail Service Provider's Policy

Under *Bus. & Prof. Code § 17538.45*, no registered user [*see Bus. & Prof. Code § 17538.45(a)(5)*] of any electronic mail service provider [*see Bus. & Prof. Code § 17538.45(a)(3)*] may use or cause to be used that electronic mail service provider's equipment located in California in violation of that electronic mail service provider's policy prohibiting or restricting the use of its service or equipment for the initiation of unsolicited electronic mail advertisements [*Bus. & Prof. Code § 17538.45(b)*]. No individual, corporation, or other entity may use or cause to be used, by initiating an unsolicited electronic mail advertisement, any electronic mail service provider's equipment located in California in violation of that electronic mail service provider's policy prohibiting or restricting the use of its equipment to deliver unsolicited electronic mail advertisements to its registered users [*Bus. & Prof. Code § 17538.45(c)*].

Note, however, that *Bus. & Prof. Code § 17538.45* may be preempted by the federal CAN-SPAM Act of 2003 [*see* P.L. 108-187, 107 Stat. 2669, discussed in *§ 14.15[3][a]*]. The preemption provisions of the CAN-SPAM Act apply to any California statute that expressly regulates the use of electronic mail to send commercial messages, except to the extent that the statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached to it [*15 U.S.C. § 7707(b)(1)*]. However, the federal preemption provisions do not affect the

lawfulness or unlawfulness of the adoption, implementation, or enforcement by internet access service providers of a policy of declining to transmit, route, relay, handle, or store certain types of electronic mail messages [*15 U.S.C. § 7707(c)*].

An electronic mail service provider may not sue a specific defendant under both *Bus. & Prof. Code § 17529.8* [§ 14.15[2][f]] and *Bus. & Prof. Code § 17538.45* for the same unsolicited commercial electronic mail advertisement [*Bus. & Prof. Code § 17538.45(f)(4)*]. For a form for a complaint for violation of this statute, see *§ 14.66*.

For purposes of *Bus. & Prof. Code § 17538.45*, an unsolicited electronic mail advertisement is any electronic mail message, the principal purpose of which is to promote, directly or indirectly, the sale or other distribution of goods or services to the recipient, that is (1) addressed to a recipient with whom the initiator does not have an existing business or personal relationship and (2) not sent at the request of or with the express consent of the recipient [*see Bus. & Prof. Code § 17538.45(a)(1), (2)*]. "Initiation" of an unsolicited electronic mail advertisement refers to the action by the initial sender of the electronic mail advertisement. It does not refer to the actions of any intervening electronic mail service provider that may handle or retransmit the electronic message [*Bus. & Prof. Code § 17538.45(a)(4)*].

An electronic mail service provider is not required to create a policy prohibiting or restricting the use of its equipment for the initiation or delivery of unsolicited electronic mail advertisements [*Bus. & Prof. Code § 17538.45(d)*]. However, nothing in *Bus. & Prof. Code § 17538.45* limits or restricts the rights of an electronic mail service provider under *47 U.S.C. § 230(c)(1)*, or any decision of an electronic mail service provider to permit or to restrict access to or use of its system, or any exercise of its editorial function [*Bus. & Prof. Code § 17538.45(e)*].

[4] Unsolicited Text Message to Cell Phone, Pager, or Similar Device

Generally, no person, entity conducting business, candidate, or political committee in California may transmit, or cause to be transmitted, a text message advertisement to a mobile telephony services handset (i.e., a cell phone or similar device; *see* definition *below*), pager, or two-way messaging device that is equipped with short-message capability or any similar capability allowing the transmission of text messages. A "text message advertisement" is a message, the principal purpose of which is to promote the sale of goods or services, or to promote a political purpose or objective, to the recipient, and consisting of advertising material for the lease, sale, rental, gift offer, or other disposition of any realty, goods, services, or extension of credit, or advertising material for political purposes [*Bus. & Prof. Code § 17538.41(a)(1)*]. This proscription applies when a text message advertisement is transmitted to a number assigned for mobile telephony service, pager service, or two-way messaging service to a California resident [*Bus. & Prof. Code § 17538.41(a)(2)*].

References to "mobile telephony services" (a term in use at the Public Utilities Commission and the Federal Communications Commission) mean commercially available interconnected mobile phone services that provide access to the public switched telephone network (PSTN) via mobile communication devices employing radio wave technology to transmit calls, including cellular radiotelephone, broadband Personal Communications Services (PCS), and digital Specialized Mobile Radio (SMR) [*Bus. & Prof. Code § 17538.41(g)*].

The general prohibition referred to above does not apply to any of the following:

- Text messages transmitted at the direction of a person or entity offering mobile telephony service, pager service, or two-way messaging service if the subscriber is offered an option to not receive those text messages [*Bus. & Prof. Code § 17538.41(b)*].

- Text messages transmitted by a business, candidate, or political committee that has an existing relationship with the subscriber if the subscriber is offered an option not to receive text messages from that business, candidate, or political committee [*Bus. & Prof. Code § 17538.41(c)*].

- Text messages transmitted by an affiliate of a business (that is, any company that controls, is controlled by, or is under common control with, another company) that has an existing relationship with the subscriber, but only if the subscriber has provided consent to the business with which the subscriber has that relationship to receive text messages from affiliates of that business [*Bus. & Prof. Code § 17538.41(d)*].

- Electronic mail messages that are forwarded, without the knowledge of the sender, to a mobile telephony services handset, pager, or two-way messaging device [*Bus. & Prof. Code § 17538.41(e)*].

A person or entity offering mobile telephony service, pager service, or two-way messaging service has no obligation to control the transmission of a text message unless the message is transmitted at the direction of that person or entity [*Bus. & Prof. Code § 17538.41(f)*].

[5] Unwanted Telephone Solicitations

[a] Definitions

[i] Subscriber

For the purposes of *Bus. & Prof. Code § 17590 et seq.* (providing for a California do-not-call list), a residential or wireless telephone subscriber is referred to as a subscriber [*Bus. & Prof. Code § 17590(a)*]. The legislature has declared that the act of becoming a subscriber should not undermine or lessen a person's right of privacy as guaranteed under *Cal. Const. art. I, § 1* [*Bus. & Prof. Code § 17590(b)*]; and there is a compelling state interest to protect the privacy of residential and wireless telephone subscribers who wish to avoid unsolicited and unwanted telephone solicitations [*Bus. & Prof. Code § 17590(a)*; *see Bus. & Prof. Code § 17590(c)* (intent of legislature is to provide for California do-not-call registry by referring to, and adopting, all California telephone numbers on FTC's national do-not-call registry)].

[ii] Do-Not-Call List

"Do-not-call list" means the California telephone numbers on the national do-not-call registry established and maintained by the FTC, as described in *16 C.F.R. § 310.4(b)(1)(iii)(B)* (in the FTC's telemarketing sales rule). A do-not-call list is current if it was obtained from the FTC no more than three months before the date a call is made [*Bus. & Prof. Code § 17592(a)(2)*].

[iii] Telephone Solicitor

A "telephone solicitor" is any person or entity who, on his or her own behalf or through salespersons or agents, announcing devices, or otherwise, makes or causes a telephone call to be made to a California telephone number and thereby does any of the following [*Bus. & Prof. Code § 17592(a)(1)*]:

- Seeks to offer a prize or to rent, sell, exchange, promote, gift, or lease goods or services or documents that can be used to obtain goods or services [*Bus. & Prof. Code § 17592(a)(1)(A)*];

- Offers or solicits or seeks to offer or solicit any extension of credit for personal, family, or household purposes [*Bus. & Prof. Code § 17592(a)(1)(B)*];

- Seeks marketing information that will or may be used for the direct solicitation of a sale of goods or services to the subscriber [*Bus. & Prof. Code § 17592(a)(1)(C)*];

- Seeks to sell or promote any investment, insurance, or financial services [*Bus. & Prof. Code §*

17592(a)(1)(D)]; or

- Seeks to make any telephone solicitation or attempted telephone solicitation as described in *Bus. & Prof. Code § 17511.1* (defining "telephonic seller") [*Bus. & Prof. Code § 17592(a)(1)(E)*].

A person or entity does not necessarily qualify as a telephone solicitor if the products or services of the person or entity are sold or marketed by an independent contractor whose business practices are not controlled by the person or entity [*Bus. & Prof. Code § 17592(b)*].

[b] Unlawful Acts

It is unlawful for any person to do any of the following [*Bus. & Prof. Code § 17591*]:

- Use the do-not-call list for any purpose other than to comply with *Bus. & Prof. Code § 17590 et seq.* or applicable federal laws;

- Deny or interfere in any way, directly or indirectly, with a subscriber's right to place a California telephone number on the do-not-call list;

- Cause a subscriber to participate in and be included on the do-not-call list without the subscriber's knowledge or consent;

- Sell or lease the do-not-call list to a person other than a telephone solicitor (nor may a telephone solicitor sell or lease the do-not-call list); or

- Charge a fee to place a California telephone number on the do-not-call list.

It is unlawful for a telephone solicitor, either directly or indirectly, to persuade a subscriber with whom it has an established business relationship to place his or her telephone number on the do-not-call list, if the solicitation has the effect of preventing competitors from contacting that solicitor's customers [*Bus. & Prof. Code § 17591*].

[c] Prohibited Acts

No person or entity that sells, leases, exchanges, or rents telephone solicitation lists may include in those lists those telephone numbers that appear on the current do-not-call list, except that this prohibition does not apply to lists used for directory assistance and numbers published in telephone directories that list substantially all publicly available telephone numbers in a specific geographic area [*Bus. & Prof. Code § 17592(d)*].

Except for telephone calls described in *Bus. & Prof. Code § 17592(e)* [*see § 14.15[4][d]*], beginning on the 31st day after the FTC makes its first do-not-call list available to telephone solicitors, no telephone solicitor may call any telephone number on the then-current do-not-call list and do any of the following [*Bus. & Prof. Code § 17592(c)*]:

- Seek to offer a prize or to rent, sell, exchange, promote, gift, or lease goods or services or documents that can be used to obtain goods or services [*Bus. & Prof. Code § 17592(c)(1)*];

- Offer or solicit or seek to offer or solicit any extension of credit for personal, family, or household purposes [*Bus. & Prof. Code § 17592(c)(2)*];

- Seek marketing information that will or may be used for the direct solicitation of a sale of goods or services to the subscriber [*Bus. & Prof. Code § 17592(c)(3)*];

- Seek to sell or promote any investment, insurance, or financial services [*Bus. & Prof. Code § 17592(c)(4)*]; or

- Seek to make any telephone solicitation or attempted telephone solicitation as described in *Bus. & Prof. Code § 17511.1* (defining "telephonic seller") [*Bus. & Prof. Code § 17592(c)(5)*].

[d] Permitted Contacts With Persons on Do-Not-Call List

[i] In General

The general prohibitions [*see § 14.15[4][c]*] do not apply to:

- Telephone calls made in connection with the collection of a debt or the offer by a creditor to the subscriber of an extension of credit to pay a delinquent obligation owed by the subscriber to that creditor [*Bus. & Prof. Code § 17592(e)(3)*];

- A telephone call made solely to verify that a subscriber, and not an unauthorized third person, has terminated an established business relationship [*Bus. & Prof. Code § 17592(e)(6)*];

- Telephone calls made by a tax-exempt charitable organization [*Bus. & Prof. Code § 17592(e)(7)*]; or

- A telephone call made for the purpose of soliciting a donation without the purchase of goods or services [*Bus. & Prof. Code § 17592(e)(8)*].

Nothing in *Bus. & Prof. Code § 17592* prohibits a telephone solicitor from contacting by mail a subscriber whose telephone number appears on the "do not call" list to obtain the subscriber's express written permission [*see* [ii], *below*] allowing the telephone solicitor to make the calls, described in § 14.15[4][c], that are generally prohibited [*Bus. & Prof. Code § 17592(f)(1)*]. An express written permission must include a clear and conspicuous disclosure of all of the following, except where there is an established business relationship [*Bus. & Prof. Code § 17592(f)(2)*]:

- Identification of the name of the sender of the mailing and of the entity that is requesting permission to call;

- The subscriber's telephone number to which the calls may be placed;

- The signature of the subscriber authorizing the call; and

- Notice that the subscriber may be contacted by a telephone solicitor or someone calling on behalf of the specific party identified in the request for permission, even if the subscriber's telephone number is listed on the federal "do not call" registry.

When there is an established business relationship, as defined under state or federal law, between a subscriber and a telephone solicitor, express written permission is not required [*Bus. & Prof. Code § 17592(f)(3)*]. In any dispute regarding whether a subscriber has provided express written permission, the telephone solicitor has the burden of proving that the subscriber has provided that permission by producing the original or a facsimile document, signed by the subscriber, evidencing that permission [*Bus. & Prof. Code § 17592(f)(4)*].

[ii] Calls Made Pursuant to Express Agreement

The general prohibitions [*see § 14.15[4][c]*] do not apply to telephone calls made pursuant to the express agreement, in writing, of the subscriber to place calls to that California telephone number. This written agreement must clearly evidence the person's authorization that calls made by or on behalf of a specific party may be placed to that California telephone number, and must include the signature of that person. In any dispute regarding whether a subscriber has provided this express written permission, the telephone solicitor has the burden of proving that the subscriber has provided this permission by producing either (1) the original or a facsimile document, signed by the subscriber, evidencing that permissions or (2) an advertisement by the subscriber. "Express agreement" does not include any consent or permission included in any contract of adhesion [*Bus. & Prof. Code § 17592(e)(1)*].

[iii] Calls Made Pursuant to Express Request

The general prohibitions [*see § 14.15[4][c]*] do not apply to telephone calls made pursuant to the express request of the subscriber. "Express request" may include a telephone call from a person or entity who has been provided the subscriber's telephone number and name as a referral from a solicitor with which the subscriber has an established business relationship, if that solicitor has obtained the subscriber's express request for the referral [*Bus. & Prof. Code § 17592(e)(2)*].

"Express request" does not include any consent or permission included in any contract of adhesion. A telephone call is presumed not to be made at the express request of a subscriber if one of the following occurs, as applicable [*Bus. & Prof. Code § 17592(e)(2)*].

- The call is made 30 business days after the last date the subscriber contacted a business with the purpose of inquiring about the potential purchase of goods or services [*Bus. & Prof. Code § 17592(e)(2)(A)*].

- The call is made 30 business days after the last date the subscriber consented to be contacted [*Bus. & Prof. Code § 17592(e)(2)(B)*].

- The call is made after the subscriber has requested that no further telephone calls be made to him or her [*Bus. & Prof. Code § 17592(e)(2)(C)*].

- The call is made 30 business days after a product or service becomes available where the subscriber has made a request to the business for that product or service that is not then available, and requests a call when the product or service becomes available [*Bus. & Prof. Code § 17592(e)(2)(D)*].

[iv] Calls Made Because of Established Business Relationship

The general prohibitions [*see § 14.15[4][c]*] do not apply to telephone calls made to a subscriber if the telephone solicitor has an established business relationship with the subscriber. "Established business relationship" means a relationship between a seller and a subscriber based on the subscriber's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the 18 months immediately preceding the date of a telemarketing call. If a subscriber purchases or obtains a product or service through a licensed agent or broker, an established business relationship is created with the licensed agent or broker individually, apart from and in addition to, any established business relationship that may have been created by a licensed agent or broker acting on behalf of another, and the licensed agent or broker is a telephone solicitor [*Bus. & Prof. Code § 17592(e)(4)*; *see § 14.15[4][a][iii]*].

An established business relationship does not exist between the subscriber and any separate legal entity associated with the telephone solicitor not acting as an agent or vendor on behalf of the telephone solicitor, unless the separate legal entity shares the brand name of a business with which the subscriber has an otherwise established business relationship.

If the subscriber instructs the telephone solicitor to place the subscriber on the telephone solicitor's list pursuant to *16 C.F.R. § 310.4(b)(1)(iii)(A)* (in the FTC's telemarketing sales rule) and *47 C.F.R. § 64.1200* (the FCC's restrictions on telephone solicitation), that instruction is binding on the entity with which the subscriber has the established business relationship, and on any entity that has the shared brand name, and on all other entities that share that brand name, none of whom may initiate further telephone solicitation calls to that subscriber. Separate legal entities include, but are not limited to, any parent company or entity, any subsidiary company or entity, any partnership or copartner, any joint venture or venturer, association member, or co-member, or any affiliated company or entity [*Bus. & Prof. Code § 17592(e)(4)*].

[v] Calls Made by Individual Entrepreneur or Very Small Business

The general prohibitions [*see § 14.15[4][c]*] do not apply to telephone calls made by an individual businessperson or a small business if the following conditions are satisfied [*Bus. & Prof. Code § 17592(e)(5)*].

- The individual businessperson or small business employs no more than five full-time or part-time employees or independent contractors.

- The individual businessperson or a principal of the small business makes the telephone calls himself or herself for the sale of goods or services offered by that individual businessperson or small business.

- The telephone calls are made to subscribers within a 50-mile radius of the location of the individual businessperson or small business.

The services offered by the individual businessperson or small business cannot be telemarketing services. Any independent contractor or employee with whom an individual businessperson or a small business is required to have a written independent contractor or employment agreement, pursuant to a regulatory scheme to ensure regulatory accountability of the independent contractor or employee, are not counted against the total referenced above [*Bus. & Prof. Code § 17592(e)(5)*].

[e] Enforcement

[i] Action for Injunction and Civil Penalty

The attorney general, a district attorney, or a city attorney may bring a civil action in any court of competent jurisdiction against a telephone solicitor to enforce *Bus. & Prof. Code § 17590 et seq.* and to obtain the following remedies [*Bus. & Prof. Code § 17593(a)*]:

- An order to enjoin the violation;

- A civil penalty of up to the penalty amount that the FTC may seek pursuant to *15 U.S.C. § 45(m)(1)(A)* as specified in *16 C.F.R. § 1.98*; or

- Any other relief that the court deems proper.

[ii] Small Claims Action

Any person who has received a telephone solicitation that is prohibited by *Bus. & Prof. Code § 17592* [*see § 14.15[4][c]*], or whose telephone number was used in violation of *Bus. & Prof. Code § 17591*, may bring a civil action in small claims court for an injunction or order to prevent further violations. If a person obtains an injunction or order, and service of the injunction or order is properly effected, a person who thereafter receives further solicitations in violation of the injunction or order within 30 days after service of the initial injunction or order, may file a subsequent

action in small claims court seeking enforcement of the injunction or order and a civil penalty to be awarded to the person in an amount up to $1,000. A person's claims may not be aggregated to establish jurisdiction in a court other than small claims court. A defendant is not required to appear personally, but may appear by affidavit or by written instrument [*Bus. & Prof. Code § 17593(b)*].

[iii] Other Remedies

The rights, remedies, and penalties established by *Bus. & Prof. Code § 17590 et seq.* are in addition to the rights, remedies, or penalties established under other laws [*Bus. & Prof. Code § 17593(c)*].

[iv] Affirmative Defense

It is an affirmative defense to any action brought under *Bus. & Prof. Code § 17590 et seq.* that the violation was accidental and in violation of the telephone solicitor's policies and procedures and telemarketer instruction and training [*Bus. & Prof. Code § 17593(d)*].

[f] Confidentiality of Information

Any information regarding any California telephone number that appears on the do-not-call list in the possession of the attorney general, whether obtained from the FTC or submitted to the attorney general by a subscriber for inclusion in the do-not-call list, may not be disclosed pursuant to a request made under the California Public Records Act [*Gov. Code § 6250 et seq.*] and also is privileged under *Evid. Code § 1040* (creating a privilege for official information) [*Bus. & Prof. Code § 17594*]. However, the attorney general is not prevented from providing a certificate stating whether a specific telephone number was on the do-not-call list that was effective on the specified date or range of dates in response to [*Bus. & Prof. Code § 17594*]:

- An inquiry from any law enforcement agency that is investigating, prosecuting, or responding to an allegation of a violation of *Bus. & Prof. Code § 17590 et seq.* [*Bus. & Prof. Code § 17594(a)*]; or

- An inquiry from an individual who is investigating or litigating an alleged violation of *Bus. & Prof. Code § 17590 et seq.* and who seeks the certificate regarding his or her telephone number or to an inquiry from the person who is responding to the allegation [*Bus. & Prof. Code § 17594(b)*].

[g] Unlawful Contracts

A contract for the purchase of goods or services primarily for personal, family, or household use, that is made with a consumer located in California and made in connection with a telephone solicitation (whether made in or from outside California) is unlawful if, with respect to that telephone solicitation, the telemarketer is in violation of *16 C.F.R. § 310.4(a)(6)(i)* or has not complied with *16 C.F.R. § 310.5(a)(5)* (both of which are in the FTC's telemarketing sales rule) as published at *68 Fed. Reg. 4580 (Jan. 29, 2003)* . This applies only to entities that are subject to the FTC's telemarketing sales rule as published there, and it does not apply to any transaction exempted under *16 C.F.R. § 310.6* of that rule [*Civ. Code § 1670.6*].

[6] Unsolicited Advertisement Received by Fax

[a] Scope of Regulation

Bus. & Prof. Code § 17538.43 regulates unsolicited advertising by sending messages to fax machines, called "telephone facsimile machines" in the statute. A fax machine is any equipment that has the capacity to do either or both of the following [*Bus. & Prof. Code § 17538.43(a)(1)*]:

- Transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line; and

- Transcribe text or images, or both, from an electronic signal received over a regular telephone line onto paper.

An unsolicited advertisement is any material advertising the commercial availability or quality of any property, goods, or services that is transmitted to any person or entity without that person's or entity's prior express invitation or permission. Prior express invitation or permission may be obtained for a specific or unlimited number of advertisements and may be obtained for a specific or unlimited period of time [*Bus. & Prof. Code § 17538.43(a)(2)*].

[b] Remedies for Harmful Fax Advertising

It is unlawful for a person or entity, if either the person or entity or the recipient is located in California, to use any fax machine, computer, or other device to send, or cause another person or entity to use such a device to send, an unsolicited advertisement to a fax machine [*Bus. & Prof. Code § 17538.43(b)(1)*]. In addition to any other remedy provided by law, including a remedy provided by the Telephone Consumer Act [*see 47 U.S.C. § 227 et seq.*], a person or entity may bring an action seeking the following relief [*Bus. & Prof. Code § 17538.43(b)(2)*]:

- Injunctive relief against further violations;

- Actual damages or statutory damages of $500 per violation, whichever amount is greater; or

- Both injunctive relief and damages.

If the court finds that the defendant willfully or knowingly violated *Bus. & Prof. Code § 17538.43(b)*, the court, in its discretion, may increase the award to equal not more than three times the amount otherwise available as actual or statutory damages [*Bus. & Prof. Code § 17538.43*].

[c] Duty to Disclose Sender's Identity and Related Facts

It is unlawful for a person or entity, if either the person or entity or the recipient is located in California, to initiate any communication using a fax machine that does not clearly mark, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the following [*Bus. & Prof. Code § 17538.43(c)(1)*]:

- The date and time sent.

- An identification of the business, other entity, or individual sending the message.

- The telephone number of the sending machine or of the business, other entity, or individual.

It is unlawful for a person or entity, if either the person or entity or the recipient is located in California, to use a computer or other electronic device to send any message via a fax machine unless it is clearly marked, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, to show the information listed above [*Bus. & Prof. Code § 17538.43(c)(2)*].

[d] Exemption for Faxes Sent by Tax-Exempt Organizations to Members

The statute prohibiting unsolicited advertising fax transmissions does not apply to a fax sent by or on behalf of a professional or trade association that is a tax-exempt nonprofit organization and in furtherance of the association's

tax-exempt purpose to a member of the association, provided that all of the following conditions are satisfied [*Bus. & Prof. Code § 17538.43(d)*]:

- The member voluntarily provided the association the fax number to which the fax was sent.

- The fax is not primarily for the purpose of advertising the commercial availability or quality of any property, goods, or services of third parties.

- The member to whom the fax is sent has not requested that the association stop sending faxes for the purpose of advertising the commercial availability or quality of any property, goods, or services of third parties.

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionTelemarketingComputer & Internet LawCensorshipState StatutesComputer & Internet LawOnline AdvertisingSpam EmailComputer & Internet LawPrivacy & SecurityState RegulationCommunications LawPrivacyTelemarketing & Consumer Fraud & Abuse Prevention Act

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§ 14.16 Grey Market Goods

Every retail dealer who offers "grey market goods" for sale or for lease of more than four months is required to make conspicuous, specified disclosures in any advertisement of those goods [*Civ. Code § 1797.82*; *see Civ. Code § 1797.8(b)* ("sale" defined)]. "Grey market goods" are consumer goods, bearing a trademark, that are imported through channels other than the manufacturer's authorized distributor and which are not accompanied by the manufacturer's express written warranty [*Civ. Code § 1797.8(a)*]. The required disclosures, which must also be conspicuously posted at the product's point of display and affixed to the product or to its package, generally put the consumer on notice that the manufacturer's normal warranties do not apply to the goods [*see Civ. Code § 1797.81*]. A seller who does not comply with the disclosure requirement is liable to the buyer who returns the product for a refund, or for credit on credit purchases, if the product purchases has not been used in a manner inconsistent with any printed instructions the seller provided [*Civ. Code § 1797.85*]. Furthermore, noncompliance constitutes unfair competition under *Bus. & Prof. Code § 17200*, grounds for rescission under *Civ. Code § 1689*, and an unfair method of competition or deceptive practice under *Civ. Code § 1770* [*Civ. Code § 1797.86*]. Although the grey-market statute does not expressly state that failure to make the required disclosures constitutes a violation of *Bus. & Prof. Code § 17500*, such nondisclosure clearly falls within the general statutory prohibition of *Bus. & Prof. Code § 17500* (discussed in *§ 14.12[1]*), which prohibits misleading advertising.

For discussion of *Bus. & Prof. Code § 17200*, see Ch. 565, *Unfair Competition* . For discussion of rescission under *Civ. Code § 1689*, see Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionFalse AdvertisingState RegulationAntitrust & Trade LawConsumer ProtectionLikelihood of ConfusionFalse Designation of OriginAntitrust & Trade LawConsumer ProtectionGeneral Overview

California Forms of Pleading and Practice--Annotated

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§ 14.17 Criminal Sanctions

Any person, firm, corporation, partnership, or association, or any employee or agent, who violates the False Advertising Law [*Bus. & Prof. Code § 17500 et seq.*] is guilty of a misdemeanor [*Bus. & Prof. Code § 17534*; *but see Bus. & Prof. Code § 17508(d)*, discussed in *§ 14.13[7]*]. In addition, particular statutes prohibiting false advertising expressly state that violation of the statute is a misdemeanor and specify maximum fines and terms of imprisonment [*see, e.g.*, *Bus. & Prof. Code §§ 17500* (general prohibition), 17531 ("seconds" merchandise), 17537(e) (conditional prizes or gifts)].

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§ 14.18 Action for Statutory False Advertising and Unfair Competition

[1] By Attorney General or Private Plaintiff

Remedies for violations or proposed violations of the false advertising statutes [*Bus. & Prof. Code § 17500 et seq.*] are provided for in *Bus. & Prof. Code § 17535*. This statute provides that an action for an injunction may be brought by any person who has suffered injury in fact and has lost money or property as a result of a violation of the False Advertising Law; but the plaintiff may pursue representative claims or relief on behalf of others only if the plaintiff meets that standing requirement and complies with *Code Civ. Proc. § 382* concerning class-action certification [*Bus. & Prof. Code § 17535*; *see Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 215, 197 Cal. Rptr. 783, 673 P.2d 660]* . A "person" for purposes of the statute includes any individual, partnership, firm, association, or corporation [*Bus. & Prof. Code § 17506*]. The action may also be prosecuted by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in the name of the people of California on their own complaint or on the complaint of any board, officer, person, corporation, or association [*Bus. & Prof. Code § 17535*].

Both private persons and prosecuting authorities bear the burden of proving the advertising claims to be false or misleading. Prosecuting authorities, but not private plaintiffs, have the administrative power to request advertisers to substantiate advertising claims before bringing actions for false advertisement [*see Bus & Prof. Code § 17508*; § 14.13[7]], but the prosecuting authorities retain the burden of proof in the false advertising actions [*National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc. (2003) 107 Cal. App. 4th 1336, 1344-1345, 1348, 133 Cal. Rptr. 2d 207* (holding that it would be inappropriate to shift burden of proof to defendant in private plaintiff false advertising action when private plaintiff is not authorized by statute to seek substantiation of advertising claim from defendant)].

Remedies for violations or proposed violations of the unfair competition statutes, including false advertising, are provided for in *Bus. & Prof. Code §§ 17203* and *17204* [*see Bus. & Prof. Code § 17200* (false advertising is unfair competition)]. Private actions for injunctions are authorized, as well as actions brought by the Attorney General and other specified public officers. For further discussion of remedies under the unfair competition statutes (*Bus. & Prof. Code § 17200 et seq.*), see Ch. 565, *Unfair Competition* .

[2] Remedies

[a] Injunction

Any person, corporation, firm, partnership, joint stock company, or any other association or organization that violates or proposes to violate the false advertising statutes (*Bus. & Prof. Code § 17500 et seq.*) may be enjoined by any court of competent jurisdiction [*Bus. & Prof. Code § 17535*]. All that is needed to state a cause of action for injunctive relief is an allegation that members of the public are likely to be deceived [*see, e.g., Day v. AT&T Corp. (1998) 63 Cal. App. 4th 325, 335-337, 74 Cal. Rptr. 2d 55* (action that sought only to enjoin misleading practices in advertising of phone card rates and sought no monetary recovery did not come within federal "filed rate doctrine" of *47 U.S.C. § 203* and stated cause of action under *Bus. & Prof. Code §§ 17200, 17500*)]. Allegations of actual deception, reasonable reliance, and damages are not necessary [*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 211, 197 Cal. Rptr. 783, 673 P.2d 660]* . If the unlawful advertising practice has already ceased, an injunction will not issue without a showing that past violations will probably recur [*People v. Toomey (1985) 157 Cal. App. 3d 1, 20, 203 Cal. Rptr. 642]* .

Claims for injunctive relief under *Bus. & Prof. Code § 17500* are not subject to arbitration [*Cruz v. Pacificare Health Systems, Inc. (2003) 30 Cal. 4th 303, 307, 316, 133 Cal. Rptr. 2d 58, 66 P.3d 1157* (finding an inherent conflict between arbitration and underlying purpose of statutes designed to prevent further harm to the public at large)]. In *Cruz v. Pacificare Health Systems, Inc.* [*Cruz v. Pacificare Health Systems, Inc. (2003) 30 Cal. 4th 303, 307, 316, 133 Cal. Rptr. 2d 58, 66 P.3d 1157]* , the California Supreme Court extended its earlier holding in *Broughton v. Cigna Healthplans of California* [*Broughton v. Cigna Healthplans of California (1999) 21 Cal. 4th 1066, 1082, 90 Cal. Rptr. 2d 334, 988 P.2d 67* ; for discussion of *Broughton; see Ch. 504, Sales: Consumers Legal Remedies Act, § 504.13[2]*], regarding non-arbitrability of public injunctions under the Consumers Legal Remedies Act [*Civ. Code § 1770*], to include claims to enjoin unfair competition under *Bus. & Prof. Code § 17200 et seq.* and misleading advertising under *Bus. & Prof. Code § 17500 et seq.* For discussion and forms for initiating or resisting arbitration pursuant to an arbitration agreement between the parties, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

Any person who intentionally violates an injunction issued under *Bus. & Prof. Code § 17535* is liable for a civil penalty of up to $6,000 for each violation, or up to $6,000 per day in some circumstances. The penalty may be assessed and recovered in an action brought by the Attorney General or by any district attorney, county counsel, or city attorney [*see Bus. & Prof. Code § 17535.5*].

For a complaint to enjoin false or misleading advertising, see *§ 14.60*.

[b] Restitution and Other Equitable Remedies

As a further remedy for violation of the false advertising statutes, *Bus. & Prof. Code § 17535* authorizes a court to make such orders or judgments, including the appointment of a receiver, as may be necessary to (1) prevent the use or employment of any practices that violate *Bus. & Prof. Code § 17500 et seq.*, or*(2)* restore to any person in interest any money or property acquired by unlawful practices [*Bus. & Prof. Code § 17535*; *see People v. Superior Court (1973) 9 Cal. 3d 283, 286-287, 107 Cal. Rptr. 192, 507 P.2d 1400* (1972 amendment adding remedy of restitution only clarified inherent powers of court)]. The court is authorized to award restitution without individualized proof of deception, reliance, and injury if it determines that such a remedy is necessary to prevent the use or employment of the unfair advertising practices [*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 211, 197 Cal. Rptr. 783, 673 P.2d 660]* .

For a complaint for restitution of money paid as a result of false or misleading advertising, see *§ 14.60*.

[c] Damages Generally Not Available

Bus. & Prof. Code § 17535, which provides remedies for violations of *Bus. & Prof. Code § 17500 et seq.*, does not expressly authorize recovery of damages by private individuals. Therefore, private relief is limited to actions for injunctive relief under *Bus. & Prof. Code § 17535*, and only the specified public officers may recover the civil penalties [*Chern v. Bank of America (1976) 15 Cal. 3d 866, 875, 127 Cal. Rptr. 110, 544 P.2d 1310]* .

Damages are also unavailable under *Bus. & Prof. Code § 17203*, which authorizes an action for acts of unfair competition, including false advertising, and is nearly identical to *Bus. & Prof. Code § 17535* [*see Bus. & Prof. Code § 17200*; *Heller v. Norcal Mutual Ins. Co. (1994) 8 Cal. 4th 30, 45, 32 Cal. Rptr. 2d 200, 876 P.2d 999* ; *Bank of the West v. Superior Court (1992) 2 Cal. 4th 1254, 1266, 1270-1271* & n.7, *2 Cal. 4th 1254, 833 P.2d 545* (holding that disgorgement of wrongfully obtained money under *Bus. & Prof Code § 17203* does not constitute damages covered by an insurance policy); for further discussion, *see* Ch. 565, *Unfair Competition*].

Damages are expressly authorized in some instances, however. Several of the false advertising statutes making particular acts unlawful also provide for a private right of action to recover damages [*see, e.g., Bus. & Prof. Code § 17500.5(b)* (unadvertised limitations on quantity of sales, *discussed in § 14.13[2]*); *Bus. & Prof. Code § 17537.4* (conditional prizes or gifts, *discussed in § 14.13[12][e][v]*); *Bus. & Prof. Code § 17577.6* (water treatment devices, *discussed in § 14.13[19][b]*)].

In addition, damages may be available to a plaintiff who has a cause of action for fraud [*see Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 219-220, 197 Cal. Rptr. 783, 673 P.2d 660* ; *see also § 14.12[4]*].

[d] Civil Penalties

[i] In General

Any person who violates any provision of the false advertising statutes (*Bus. & Prof. Code § 17500 et seq.*) is liable for a civil penalty not to exceed $2,500 for each violation. The penalty is recoverable in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney, county counsel, or city attorney in any court of competent jurisdiction [*Bus. & Prof. Code § 17536(a)*]. The statute authorizes penalties up to $2,500 for *each person* to whom the advertiser made misrepresentations [*People v. Superior Court (1973) 9 Cal. 3d 283, 289, 107 Cal. Rptr. 192, 507 P.2d 1400]* . Therefore, for example, a single false or misleading publication in a newspaper advertisement constitutes a minimum of one violation with as many additional violations as there are persons who read the advertisement, or who responded to the advertisement by purchasing the advertised product or service or by making inquiries concerning the advertised product or service [*People v. Superior Court (1979) 96 Cal. App. 3d 181, 198, 157 Cal. Rptr. 628]* . In determining the reasonableness of a penalty, the court must consider all pertinent factors, including the kind of misrepresentations or deceptions, whether they were intentionally made or the result of negligence, the number of people reached by the advertising medium, the nature and extent of the public injury, and the size and wealth of the advertising enterprise [*People v. Superior Court (1979) 96 Cal. App. 3d 181, 198, 157 Cal. Rptr. 628]* .

In assessing a civil penalty, a court must consider any one or more of the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth [*Bus. & Prof. Code § 17536(b)*; *see* Stats. 1992, ch. 430, § 6 (1992 amendment was not intended to change decisional law regarding the methods of determining the number of violations on which an award of civil penalties is based)].

Bus. & Prof. Code §§ 17205 (unfair competition) and 17534.5 (false advertising) provide that the remedies under their respective statutory schemes are cumulative. Therefore, a person whose false or misleading representations violate both the false advertising statutes and the unfair competition statutes may be liable for penalties under *both Bus. & Prof.*

Code §§ 17206 and *17536* for *each* violation [*People v. Toomey (1985) 157 Cal. App. 3d 1, 21-22, 203 Cal. Rptr. 642* ; for further discussion of civil penalties under *Bus. & Prof. Code § 17206, see Ch. 565, Unfair Competition, § 565.10* et seq.]. The remedies provided by *Bus. & Prof. Code §§ 17536* and *17534* are mutually exclusive, however, as applied to the penalties for acts in violation of *Bus. & Prof. Code § 17530* [*Bus. & Prof. Code § 17536(e)*; *see also § 14.43[18]*].

[ii] Treble Penalty for Senior or Disabled Plaintiff

In an action brought by, on behalf of, or for the benefit of, senior citizens or disabled persons to redress unfair or deceptive acts or practices or unfair methods of competition in which the trier of fact is authorized by a statute to impose a fine, a civil penalty or other penalty, or any remedy to punish or deter, the amount of which is left to the trier of fact's discretion, the penalty may be trebled in accordance with *Civ. Code § 3345(b)* [*Civ. Code § 3345*; *see Civ. Code § 1761(f), (g)* ("senior citizen" and "disabled person" defined)]. *Civ. Code § 3345(b)* sets forth factors that the trier of fact must consider in determining the amount of the penalty and provides that, if one or more of the required findings are made, the trier of fact may impose a penalty up to three times greater than authorized amount. For a discussion of the finding required to justify a treble penalty under *Civ. Code § 3345(b)*, see Ch. 504, *Sales: Consumers Legal Remedies Act* .

[3] Time for Bringing Action

Bus. & Prof. Code § 17535, which authorizes an action by a public official or private person for an injunction or restitution, contains no express limitation period. However, an action on a liability created by statute must be commenced within three years [*Code Civ. Proc. § 338(a)*]. To determine when the cause of action accrues, a useful analogy may be found in the statute of limitations governing actions brought under *Bus. & Prof. Code § 17536*, which is discussed below. That action must be brought by a public official within three years, and the cause of action is not deemed to have accrued until discovery of the facts constituting grounds for commencing the action [*Code of Civ. Proc. § 338(h)*].

An action brought to enforce any cause of action for unfair competition under *Bus. & Prof. Code § 17200 et seq.* must be commenced within four years after the cause of action accrued [*Bus. & Prof. Code § 17208*]. Because *Bus. & Prof. Code § 17200* provides that a violation of the false advertising statutes constitutes unfair competition, the limitation period applicable to an action brought under *Bus. & Prof. Code § 17203* and based on false or misleading advertising is four years. In addition, it could be argued that the specific limitation period for unfair competition should govern over the general limitation period applied to actions under the false advertising statutes, resulting in a four-year limitation period for action for *Bus. & Prof. Code § 17535*.

When a public official brings an action under *Bus. & Prof. Code § 17536* to recover civil penalties for violation of *Bus. & Prof. Code § 17500 et seq.* (false advertising), the action must be commenced within three years. The cause of action is not deemed to have accrued until the discovery by the aggrieved party, the Attorney General, the district attorney, the county counsel, the city prosecutor, or the city attorney of the facts constituting grounds for commencing the action [*Code Civ. Proc. § 338(h)*].

[4] Class Actions

A private plaintiff--that is, a person who has suffered injury in fact and has lost money or property as a result of a violation of the Unfair Competition Law or the False Advertising Law--may pursue representative claims or relief on behalf of others only if the plaintiff complies with *Code Civ. Proc. § 382* concerning class-action certification [*Bus. & Prof. Code §§ 17203, 17204, 17535*].

If the class action seeks restitution of money obtained through a defendant's use of false or misleading advertising, the trial court can order restitution without proof that an individual class member was deceived by the advertising, as long

as the court determines that such a remedy is necessary to deter future violations of the unfair trade practice statute or to foreclose the defendant's retention of any ill-gotten gains [*Fletcher v. Security Pac. National Bank (1979) 23 Cal. 3d 442, 454, 153 Cal. Rptr. 28, 591 P.2d 51* (applying former *Bus. & Prof. Code § 17535* before amendment expressly authorizing restitution)]. For discussion of required allegations to obtain an injunction, see *§ 14.18[2][a]*.

For discussion of *Code Civ. Proc. § 382*, the statute governing class actions generally, and for complaints and notices relating to class actions, see Ch. 120, *Class Actions* . The Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*] imposes special procedural requirements for class actions [*see Civ. Code § 1781*; *see also* Ch. 504, *Sales: Consumers Legal Remedies Act*].

[5] Exceptions From Liability

[a] Media

The provisions of *Bus. & Prof. Code § 17500 et seq.* do not apply to any visual or sound radio broadcasting station, to any internet service provider or commercial online service, or to any publisher of a newspaper, magazine, or other publication who broadcasts or publishes, including over the internet, an advertisement in good faith, without knowledge of its false, deceptive, or misleading character [*Bus. & Prof. Code § 17502*]. The provisions include prohibitions against the following:

- Unadvertised limitations on quantity of sales [*Bus. & Prof. Code § 17500.5*].
- Certain statements as to "former price" [*Bus. & Prof. Code § 17501*].
- Deceptive pricing of goods or services sold only in multiple units [*Bus. & Prof. Code § 17504*].
- Misrepresentation of control, character, or volume of business [*Bus. & Prof. Code § 17505*].
- Deceptive pricing of different articles of merchandise or types of service within the same class of merchandise or service [*Bus. & Prof. Code § 17507*].
- Certain factual claims and brand comparisons [*Bus. & Prof. Code § 17508*].
- Certain transactions conditioned on the sale or lease of a different product or service [*Bus. & Prof. Code § 17509*].

In addition, particular false advertising statutes exempt from their terms publishers or broadcasters who act in good faith [*see* Bus. & Prof. Code § 17533.8, discussed in *§ 14.44[7][a][i]*], or publishers who have no interest in the property advertised [*see Bus. & Prof. Code § 17530*, discussed in *§ 14.43[18]*].

[b] Political Election Campaign Practices

The false advertising statutes [*Bus. & Prof. Code § 17500 et seq.*] do not apply to political election campaign practices [*O'Connor v. Superior Court (1986) 177 Cal. App. 3d 1013, 1014, 1019-1020, 223 Cal. Rptr. 357]* . Because it is the context in which the speech is made, rather than the status of the speaker, that determines whether or not speech is protected under the *First Amendment*, these statutes are inapplicable to regulate conduct in a political campaign even when the conduct arises in the arguably commercial context of statements made about a candidate for political office by a paid political consulting firm [*O'Connor v. Superior Court (1986) 177 Cal. App. 3d 1013, 1018-1019, 223 Cal. Rptr. 357]* . The complete and carefully limited scheme of election regulation and enforcement provided by the Legislature in the express penal provisions of the Elections Code do not include a private cause of action for damages and injunctive

relief based on false and misleading statements made in an election campaign. Thus, it is apparent that the Legislature recognized that any attempt at wholesale regulation of, or government intrusion into, the content of political literature is constitutionally impermissible [*O'Connor v. Superior Court (1986) 177 Cal. App. 3d 1013, 1019-1020, 223 Cal. Rptr. 357* ; *see* Elec. Code § 29000 et seq.; *see also* Ch. 243, *Elections*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechPolitical SpeechGovernmentsLegislationStatutes of LimitationsTime LimitationsAntitrust & Trade LawConsumer ProtectionFalse AdvertisingState RegulationBanking LawConsumer ProtectionState LawRemedies

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§ 14.19 Billboards and Other Outdoor Advertising

[1] Constitutional Limits on Government Regulation

[a] Right to Free Speech

The extent to which the *First Amendment* allows government to restrict outdoor advertising was first addressed by the *United States Supreme Court in Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800* . The advertising restriction consisted of a local ordinance that banned all outdoor advertising signs, with the exception of (1) "on-site" signs, or signs that were located on the premises where the advertised goods or services were made or sold, and (2) a group of other very limited exceptions such as commemorative historical plaques and temporary political campaign signs. After the California Supreme Court held, in *Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 866-871, 164 Cal. Rptr. 510, 610 P.2d 407* , that the ordinance neither exceeded the city's police power nor violated *U.S. Const., amend. I*, the United States Supreme Court struck down the ordinance on *First Amendment* grounds, but a majority was unable to agree on the rationale for its decision. A plurality concluded that the ordinance could constitutionally ban all off-site commercial signs to achieve the goals of traffic safety and improved aesthetics [*Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490, 507, 512, 101 S. Ct. 2882, 69 L. Ed. 2d 800* (plurality opinion of White, J.)]. However, billboards can carry noncommercial, as well as commercial, messages. Therefore, the plurality found that the ordinance was invalid because it exempted *on-site* commercial signs from the general ban without making any comparable exception for on-site signs carrying noncommercial messages, thereby impermissibly "affording a greater degree of protection to commercial than to noncommercial speech" [*Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490, 513, 101 S. Ct. 2882, 69 L. Ed. 2d 800]* . The plurality also found the ordinance unconstitutional because it permitted some off-site signs carrying certain types of *noncommercial* messages, such as historic plaques, thereby impermissibly choosing "the appropriate subjects for public discourse" [*Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490, 514-515, 101 S. Ct. 2882, 69 L. Ed. 2d 800]* .

Two other Justices concurred in the judgment but reached their conclusion on the ground that the city failed to demonstrate that the ordinance directly furthered the asserted interest in traffic safety or that the city's interest in aesthetics was substantial enough in the commercial and industrial areas of the city to justify the prohibition of billboards there [*Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490, 528-534, 101 S. Ct. 2882, 69 L. Ed. 2d 800* (concurring opinion of Brennan, J.)]. They also disagreed with the plurality's view that an ordinance totally banning

commercial billboards, but allowing noncommercial billboards, would be constitutional because such an ordinance would give city officials the right, before approving a billboard, to determine whether the proposed message is commercial or noncommercial [*Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490, 536-540, 101 S. Ct. 2882, 69 L. Ed. 2d 800* (concurring opinion of Brennan, J.)].

Three Justices dissented in separate opinions, each expressing the view that the city's ban on billboards was justified by its interest in traffic safety and aesthetic improvement and that the limited exceptions contained in the ordinance did not offend the *First Amendment* [*Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490, 548-555, 555-569, 569-570, 101 S. Ct. 2882, 69 L. Ed. 2d 800* (dissenting opinions of Burger, C.J.; Stevens, Rehnquist, JJ.)]. One Justice asserted that an aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community [*Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490, 570, 101 S. Ct. 2882, 69 L. Ed. 2d 800* (dissenting opinion of Rehnquist, J.)]. Another justice asserted that a total ban on billboards to improve the quality of the environment is permissible as long as the ordinance is wholly impartial, without bias in favor of one point of view or another, and the overall market for communication remains open for the communication of ideas [*Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490, 552-553, 101 S. Ct. 2882, 69 L. Ed. 2d 800* (dissenting opinion of Stevens, J.)].

Therefore, it appears that, despite the emergence of three distinct schools of thought in *Metromedia*, a majority of the United States Supreme Court expressly concluded that a city's interest in safety and aesthetics justified an absolute ban on all commercial, off-site outdoor signs. One appellate California has concluded that such a ban on off-site commercial signs is constitutionally valid, even if it allows a city official to determine what is commercial and what is noncommercial speech. The court reasoned that city officials have sufficient guidance from the various court decisions relating to billboards and commercial speech with which to make that determination [*City of Salinas v. Ryan Outdoor Advertising, Inc. (1987) 189 Cal. App. 3d 416, 429-430, 234 Cal. Rptr. 619]* .

The plurality in *Metromedia* held that an outdoor advertising ban cannot impermissibly discriminate between different types of *noncommercial* messages [*Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490, 514-515, 101 S. Ct. 2882, 69 L. Ed. 2d 800* (plurality opinion of White, J.)]. One California court of appeal has subsequently applied this principle to an ordinance that banned all off-site signs, thereby permitting on-site signs, without regard to whether the signs were commercial or noncommercial. The court concluded that such a content-neutral ban on *all* off-site signs is justified by the city's interests in reducing traffic hazards and improving aesthetics [*City and County of San Francisco v. Eller Outdoor Advertising (1987) 192 Cal. App. 3d 643, 659, 237 Cal. Rptr. 815]* . However, the court held that the ordinance was facially invalid because it exempted from the off-site ban certain signs such as historic plaques, temporary political posters, and temporary signs of a patriotic, religious, charitable, or civic character. The exemptions for many, but not all, categories of signs displaying noncommercial speech impermissibly discriminated based on the content of the noncommercial speech [*City and County of San Francisco v. Eller Outdoor Advertising (1987) 192 Cal. App. 3d 643, 662, 237 Cal. Rptr. 815* (upholding ordinance with saving construction)].

For a form of affirmative defense for use in an action by a local government seeking to enforce an outdoor advertising ordinance that violates the owner's free speech rights, see *§ 14.69*.

[b] Due Process and Equal Protection

Before the United Supreme Court ruled in *Bigelow v. Virginia (1975) 421 U.S. 809, 818, 95 S. Ct. 2222, 44 L. Ed. 2d 600* , that commercial speech is entitled to some *First Amendment* protection, state and local regulation of billboards and other outdoor advertising was typically challenged on the ground that the regulating entity had exceeded the police power reserved to the states by *U.S. Const., amend. X*. In reviewing legislation for the purpose of testing its propriety as an exercise of the police power, the court determines whether the subject of the legislation is within the state's power and, if so, whether the means adopted to accomplish the result are reasonably designed for that purpose, and have a real and substantial relation to the objects sought to be attained [*Serve Yourself Gas etc. Assn. v. Brock (1952) 39 Cal. 2d 813, 817-818, 249 P.2d 545]* . The California Supreme Court has made clear that, under this standard, the goals of

eliminating traffic hazards and improving the appearance of a city are proper objectives for the exercise of the city's police power, and an ordinance that virtually eliminates billboards designed to be viewed from streets and highways bears a reasonable relationship to those objectives [*Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 855, 859, 164 Cal. Rptr. 510, 610 P.2d 407* , *rev'd* on *First Amendment* grounds, *453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)]* .

In addition, federal and state equal protection guarantees require that classification of advertising for purposes of regulation must not be arbitrarily made, but must be based on natural, intrinsic, or constitutional distinctions that suggest reasons for and justify the particular legislation [*see* *Carlin v. City of Palm Springs (1971) 14 Cal. App. 3d 706, 712, 92 Cal. Rptr. 535]* . **A sign company's right to equal protection also mandates even-handed enforcement of legal requirements for erecting billboards. For instance, if a city has in force a procedure for granting a permit after construction of a billboard has been commenced (where normally a sign company must obtain a permit before beginning construction), then the city may not arbitrarily refuse to follow that procedure in a particular case, as a tactical maneuver to prevent erection of a billboard [** ***Valley Outdoor, Inc. v. City of Riverside (9th Cir. 2006) 446 F.3d 948, 956]*** **.**

Finally, due process requires that a local government may not require the removal of outdoor advertising without either (1) payment of just compensation, or (2) the allowance of a reasonable amortization period, commensurate with the owner's investment [*Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 881-882, 164 Cal. Rptr. 510, 610 P.2d 407* , *rev'd* on *First Amendment* grounds, *453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)* ; *Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 1396-1400, 285 Cal. Rptr. 335]* . A sign owner who challenges an amortization period has the burden of proving that the period is unreasonable as applied to the particular sign [*Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 1396, 285 Cal. Rptr. 335]* , taking into account the cost of the billboard, its depreciated value, remaining useful life, length and remaining term of the lease under which it is maintained, and the harm to the pubic if the structure remains standing beyond the prescribed amortization period. A one-year period is generally unreasonable, with the possible exception of signs that have been fully depreciated for federal income tax purposes. In contrast, amortization periods ranging from two years and eight months to three years have been upheld [*see, e.g.,* *Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 883-884, 164 Cal. Rptr. 510, 610 P.2d 407* , *rev'd* on *First Amendment* grounds, *453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)* ; *see also* *Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 1402, 285 Cal. Rptr. 335* (other factors to be considered)].

For forms of affirmative defense for use in an action by a local government seeking to enforce an outdoor advertising ordinance that violates the owner's right to equal protection or due process, see *§§ 14.70 -14.71*.

[c] Fifth Amendment "Takings" Challenge

Since First Lutheran Church v. Los Angeles County (1987) 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 , and *Nollan v. California Coastal Comm'n (1987) 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed.2d 677* (hereinafter " *First English*" and " *Nollan*," discussed in Ch. 247, *Eminent Domain* and Ch. 579, *Zoning and Planning*), the reasonableness test of an amortization period for discontinuance of nonconforming signs has taken on aspects of the traditional *Fifth Amendment* (U.S.) "takings" challenge [*Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 1399, 1401, 285 Cal. Rptr. 335]* . This analysis seems to apply not only to the sign, but also to the land on which it is situated [*see* *Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 1402, 285 Cal. Rptr. 335* (at least when interest of owner of real property on which nonconforming sign is located is at issue)].

Without a reasonable amortization period, the ordinance goes too far and becomes a "taking" rather than a valid noncompensable regulatory action. A taking occurs if the owner has been deprived of "all economically viable use of the property" [*Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 1399, 1401, 285 Cal. Rptr. 335]* . In order for an amortization period to be upheld as a reasonable alternative to compensation, it is not necessary

that the nonconforming property have no value at the end of the termination period [*Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 1396-1397, 285 Cal. Rptr. 335]* .

An amortization period does not automatically immunize a land-use ordinance from a takings challenge. Thus, the amortization period cannot be viewed in isolation but is only one of the facts that the court should consider in defining the character of the government action as a valid regulation or a compensable taking [*Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 1400, 285 Cal. Rptr. 335* (citing *Georgia Outdoor Advertising, Inc. v. City of Wayneville (4th Cir. 1990) 900 F.2d 783, 786-787* (only previous case applying *First English* criteria in context of amortization vs. compensation issue)]. To survive a takings challenge under *Nollan*, the interest sought to be advanced by a land-use ordinance or regulation, including those with legitimate aesthetic purposes, must be substantially advanced by the regulation [*Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 1401, 285 Cal. Rptr. 335* (ordinance substantially and directly advanced TRPA's legitimate interest in maintaining natural scenic quality of region)]. The issue of taking versus an amortization period as an alternative to compensation requires a fully developed factual record with regard to the specific property and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances, and often cannot be determined from a joint stipulation of facts or on a motion for summary judgment [*Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 1401-1402, 1401 n.25, 285 Cal. Rptr. 335]* .

Thus, although allowance of an amortization period does not establish the validity of an ordinance as a matter of law, it is one of the relevant facts to be considered in determining the character of the governmental action. Other factors to be considered include the following [*Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 1402, 285 Cal. Rptr. 335]* :

- The number of billboards that can economically be used for permitted advertising and the number that are economically useless.
- The terms of leases for billboard locations.
- The land owned for billboard locations and whether it has any other economic use;
- The cost of the billboards that can and cannot be used.
- The depreciation taken on the billboards and their actual life expectancy.
- The income expected during the amortization period, and when a challenge is brought after expiration of the amortization period, the income earned through the time of judicial resolution.
- The salvage value of the billboards that cannot be used.
- The percentage of affected signs compared to remaining signs in the owner's business unit.
- The relative value of affected and remaining signs.
- Whether the amortization period is reasonable.
- Any other facts the court deems relevant.

[2] Federal and State Restrictions

[a] In General

Billboard advertising is regulated by both federal and state law. The Highway Beautification Act of 1965 (*23 U.S.C. §§ 131, 136, 319*) restricts outdoor advertising by tying the allotment of federal highway funds to specific controls that individual states should impose on the placement of advertising signs, displays, and devices along interstate or primary highways [*23 U.S.C. § 131(b)*]. The Act generally encourages the states to prohibit such advertising within 660 feet of any interstate or primary highway or, if outside of urban areas, anywhere in view of an interstate or primary highway, except for displays advertising the sale or lease of property on which they are located or advertising activities conducted on the property on which the displays are located [*see 23 U.S.C. § 131(c)*]. The Act permits certain signs consistent with customary use to be erected and maintained along highways in commercial and industrial areas [*23 U.S.C. § 131(d)*].

The Highway Beautification Act, including its just compensation provisions, does not fully occupy the field, is not mandatory, and does not preempt conflicting state laws [*Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 1386-1387, 1390, 285 Cal. Rptr. 335* (however, land within TRPA, an agency created by multistate compact approved by Congress, would be limited exception to HBA anyway)].

In California, the Outdoor Advertising Act [*Bus. & Prof. Code §§ 5200-5486*] regulates outdoor advertising. The provisions of the California Act generally apply to advertising located in unincorporated areas of the state and advertising located near interstate or primary highways [*see Bus. & Prof. Code § 5271*; *but see Bus. & Prof. Code § 5274* (limited application to on-premises advertising display for business center adjacent to or visible from interstate or primary highway); *see also Bus. & Prof. Code § 5275* (Director of Transportation is precluded from regulating noncommercial, protected speech contained within any advertising display authorized by, or exempted from, Outside Advertising Act)]. Like the federal Highway Beautification Act, the California law generally prohibits the placement of outdoor advertising displays within 660 feet from the edge of the right of way of an interstate or primary highway, or, if outside of an urban area or within that portion of an urban area that is not a business area, anywhere in view of an interstate or primary highway, except for displays that advertise the sale or lease of property on which they are located or that advertise activities conducted on the property on which the displays are located [*see Bus. & Prof. Code §§ 5405, 5408.1, 5271*]. The California law makes additional exceptions for electronic message displays and for displays advertising the locations of farm produce outlets [*Bus. & Prof. Code §§ 5405, 5405.5*]. Temporary political signs are prohibited within 660 feet of a landscaped freeway [*Bus. & Prof. Code § 5405.3*]. In business areas, outdoor advertising displays are permitted within 660 feet of an interstate or primary highway if they conform to the size, spacing, and lighting requirements set forth in *Bus. & Prof. Code § 5408* [*see Bus. & Prof. Code §§ 5408, 5408.1*].

The Outdoor Advertising Act also generally prohibits advertising displays on property adjacent to a section of "landscaped freeway" if the display is designed to be viewed primarily by persons traveling on the main-traveled way of the landscaped freeway [*Bus. & Prof. Code § 5440*]. However, this prohibition does not apply to advertising displays used exclusively to designate the name of the occupant of the premises, or to advertise goods manufactured or produced, or services rendered, on the property where the display is placed [*Bus. & Prof. Code § 5442*; *see People ex rel. Dept. of Transportation v. Maldonado (2001) 86 Cal. App. 4th 1225, 1230-1233, 104 Cal. Rptr. 2d 66* (affirming trial court's judgment enjoining property owner from violations of *Bus. & Prof. Code § 5440*; challenged advertising did not fall within *Bus. & Prof. Code § 5442* exception)].

The California Act's limitations also include a requirement that the name of the person owning or maintaining the advertising structure be plainly displayed thereon [*see Bus. & Prof. Code § 5400*], specification of wind resistance [*see Bus. & Prof. Code § 5401*], prohibition of obscene words or pictures on advertising displays [*see Bus. & Prof. Code § 5402*], and prohibition of displays that create an unsafe condition [*see Bus. & Prof. Code § 5403*]. In addition, the Act makes it unlawful for any person to place or cause to be placed, or to maintain or cause to be maintained, any advertising display without the lawful permission of the owner or lessee of the property on which the display is located [*Bus. & Prof. Code § 5460*].

[b] Preemption

The federal Highway Beautification Act does not prohibit a state from establishing standards imposing stricter limitations [*23 U.S.C. § 131(k)*]. The California Act's regulations governing advertising displays within view of state highways in unincorporated areas preempt local regulation of such displays [*see Bus. & Prof. Code § 5270*]. No city, county, or city and county may allow an advertising display to be placed or maintained in violation of the California Act, which in general applies only to advertising located in unincorporated areas of the state and advertising located near interstate or primary highways [*Bus. & Prof. Code § 5230*; *see Bus. & Prof. Code § 5271* (application of Act)]. However, preemption by the California Act is limited and selective [*see generally Viacom Outdoor, Inc. v. City of Arcata (2006) 140 Cal. App. 4th 230, 236-241, 44 Cal. Rptr. 3d 300* (overview of nature and extent of preemption by California Act)]. Local governing bodies may enact ordinances imposing restrictions on roadside advertising displays if the restrictions are equal to or greater than those imposed by the Act [*Bus. & Prof. Code § 5230*]. Local bodies may also enact ordinances requiring licenses and permits, in addition to those imposed by the Act, for the placing of advertising displays in view of any highway within its boundaries [*Bus. & Prof. Code § 5231*]. For instance, a local building permit could be required, not only for erecting a new billboard, but also for reconstructing a billboard if it has been destroyed or substantially damaged [*Viacom Outdoor, Inc. v. City of Arcata (2006) 140 Cal. App. 4th 230, 243-244, 246, 44 Cal. Rptr. 3d 300* (California Act cannot be deemed either expressly or implicitly to displace traditional regulatory power of cities and counties, and therefore it does not preempt city's efforts to enforce permit requirements of its building code and sign code)].

Under statutory provisions conferring on cities power to regulate public nuisances [*Gov. Code § 38771 et seq.*], the legislative body of a city may regulate the exhibition, posting, or carrying of advertisements on the street, and on buildings and other structures [*Gov. Code § 38774(a)*] and the suspension of advertisements over public places [*Gov. Code § 38774(b)*]. In addition, the legislative body of any county or city by ordinance may regulate signs and billboards under its statutory power to enact zoning ordinances [*Gov. Code § 65850(b)*]. It appears that *Gov. Code § 38774*, which authorizes local government to regulate advertising by general ordinance, conflicts with *Gov. Code § 65850(b)* because local government cannot regulate advertising under *Gov. Code § 65850(b)* unless it complies with the special procedures applicable to the enactment of zoning ordinances [*see Gov. Code § 65850 et seq.* (adoption of zoning regulations); *see also City of Escondido v. Desert Outdoor Advertising, Inc. (1973) 8 Cal. 3d 785, 789-790, 106 Cal. Rptr. 172, 505 P.2d 1012* (*Gov. Code § 38774* does not conflict with former zoning law, which contained no express reference to advertising signs and billboards), *disapproved on other grounds in San Diego Bldg. Contractors Assn. v. City Council (1974) 13 Cal. 3d 205, 216 n.6, 118 Cal. Rptr. 146, 529 P.2d 570* (rejecting idea that statutory procedures are constitutionally required)]. For discussion of enactment procedures applicable to zoning ordinances generally, see Ch. 579, *Zoning and Planning* .

[c] Enforcement

A violation of the California Outdoor Advertising Act is a misdemeanor [*Bus. & Prof. Code § 5464*]. In addition, all advertising displays that violate the Act are public nuisances and may be removed by any public employee as provided in the Act [*Bus. & Prof. Code § 5461*]. A legislatively declared public nuisance constitutes a nuisance per se, against which an injunction may issue without allegation or proof of irreparable injury [*People ex rel. Dep't of Transportation v. Outdoor Media Group (1993) 13 Cal. App. 4th 1067, 1076, 17 Cal. Rptr. 2d 19* ; *People ex rel. Dept. Pub. Wks. v. Adco Advertisers (1973) 35 Cal. App. 3d 507, 511, 110 Cal. Rptr. 849]* . Thus, when the advertiser admits it has not obtained permits to erect or maintain the billboards, entry of summary judgment on a Caltrans complaint for an injunction requiring removal of the signs is proper, even though a cross complaint is pending alleging their permits were wrongfully denied. Nor is grant of an injunction precluded by Caltrans' past practice of issuing permits retroactively for previously-constructed signs [*People ex rel. Dep't of Transportation v. Outdoor Media Group (1993) 13 Cal. App. 4th 1067, 1076-1079, 17 Cal. Rptr. 2d 19]* . Nevertheless, dismissal of the cross complaint in that situtation is improper [*People ex rel. Dep't of Transportation v. Outdoor Media Group (1993) 13 Cal. App. 4th 1067, 1083, 17 Cal. Rptr. 2d 19*].

A conditional use permit of a specific duration for a billboard, coupled with a written agreement between the city and the owner requiring the owner to remove the billboard on the expiration of the permit, does not confer a fundamental vested right in continued use and maintenance of the billboard [*Metropolitan Outdoor Advertising Corp. v. City of Santa Ana (1994) 23 Cal. App. 4th 1401, 1403-1404, 28 Cal. Rptr. 2d 664]* .

In addition, the Department of Transportation is authorized to remove and destroy any advertising display placed or maintained in violation of the Act after 30 days written notice is forwarded by mail to the permit-holder at his or her last known address. If no permit has been issued, a copy of the notice must be forwarded by mail to the display owner, property owner, or advertiser at his or her last known address. Temporary displays may be summarily removed and destroyed. The Director or an authorized agent may enter on private property for the purpose of removing and destroying unlawful displays [*Bus. & Prof. Code § 5463*]. While the statute is silent on whether there is an opportunity to correct a violation after notice, the Director has interpreted the statute to provide an opportunity to object to the notice of violation, request a hearing, correct the violation, remove the display, or appeal the notice to the Director [*4 Cal. Code Reg. § 2441*; *see Pallco Enterprises, Inc. v. Beam (2005) 132 Cal. App. 4th 1482, 1493, 34 Cal. Rptr. 3d 490* (this administrative interpretation is not clearly erroneous and is proper)].

Billboards and billboard permits are protectible property interests and accordingly, due process requirements must be met before Caltrans can remove or destroy an advertising display [*Traverso v. People ex rel. Dept. of Transportation (1993) 6 Cal. 4th 1152, 1163, 26 Cal. Rptr. 2d 217, 864 P.2d 488]* . Although *Bus. & Prof. Code § 5463* does not expressly provide for a hearing, the California Supreme Court determined that a 10-day notice period (as formerly prescribed by *Bus. & Prof. Code § 5463*) was adequate to satisfy due process requirements. The Court determined that, although 10 days is a short period, it is sufficient to impart notice to the sophisticated entities that engage in outdoor advertising. In addition, the right to a hearing may be inferred when there is some language from which a hearing requirement may be implied. The Court found that the 10-day period served only the purpose of allowing the billboard owner time to investigate and contest Caltrans' determination of a violation [*Traverso v. People ex rel. Dept. of Transportation (1993) 6 Cal. 4th 1152, 1163-1167, 26 Cal. Rptr. 2d 217, 864 P.2d 488]* .

Advertising displays that violate the Act but that were in compliance with state and local law when erected cannot be removed without the payment of compensation [*see Bus. & Prof. Code § 5412*]. For a discussion of the institution of civil proceedings to compel the removal of such displays, see *§ 14.19[3][d]*.

Notwithstanding any other provision of law, as to an advertising display in place as of August 12, 2004, a cause of action for the erection or maintenance of an advertising display that violates the Outdoor Advertising Act or the laws of a local governmental entity may not be brought by a private party against an advertising display that has been in continuous existence in its current location for a period of five years. However, if the advertising display has been illegally modified, the cause of action for the illegal modification may be brought by a private party if it is filed within five years of the date the modification was made [*Bus. & Prof. Code § 5466(a)*]. This does not apply, however, to a cause of action that is brought by a governmental entity and is based on the erection or maintenance of an advertising display that violates the Outdoor Advertising Act or the laws of the governmental entity [*Bus. & Prof. Code § 5466(b)*].

[d] Compensation for Restriction or Removal

[i] In General

The federal Highway Beautification Act provides for just compensation to be paid on the removal of outdoor advertising signs, displays, and devices that were lawfully erected under state law. The owner of the sign is entitled to compensation for his or her interest in the sign, and the owner of the real property on which the sign is located is entitled to compensation for the right to erect and maintain such signs on his or her property [*23 U.S.C. § 131(g)*].

However, the HBA does not mandate the statutory payment of just compensation, but merely provides a powerful

incentive for doing so. Thus, no private cause of action for compensation may be inferred from the HBA [*National Advertising Co. v. City of Ashland Or. (9th Cir. 1982) 678 F.2d 106, 109* ; *Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 1390, 285 Cal. Rptr. 335* (note, however, that TRPA, as agency created by multistate compact approved by Congress, would be limited exception to HBA anyway)].

Under California's Outdoor Advertising Act, compensation must be paid for the compelled removal of, or for limitations placed on the customary maintenance or use of, advertising displays that were "lawfully erected" [*Bus. & Prof. Code § 5412*]. "Lawfully erected" means advertising displays that were erected in compliance with state laws and local ordinances in effect at the time of their erection or that were subsequently brought into full compliance with state laws and local ordinances, except that the term does not apply to any advertising whose use is modified after erection in a manner that causes it to become illegal. There is a rebuttable presumption pursuant to *Evid. Code § 606* that an advertising display is lawfully erected if it has been in existence for a period of five years or longer without the owner having received written notice during that period from a governmental entity stating that the display was not lawfully erected [*Bus. & Prof. Code § 5216.1*]. The compensation provisions of *Bus. & Prof. Code § 5412* do not apply to displays that were erected pursuant to a written agreement with a government entity providing for the removal of displays after a fixed time [*Metropolitan Outdoor Advertising Corp. v. City of Santa Ana (1994) 23 Cal. App. 4th 1401, 1405, 28 Cal. Rptr. 2d 664]* .

Legislative intent is not clear as to what sort of governmental action could trigger the duty to pay compensation under the statutory proscription against an advertising display's "customary maintenance or use be[ing] limited" by a governmental entity without the payment of compensation [*see Bus. & Prof. Code § 5412*]. The California Supreme Court has concluded that the statute does not encompass every governmental action with the effect of restricting a billboard's customary maintenance or use, including actions that incidentally impair a billboard's visibility. For instance, roadway beautification projects that may affect the visibility of nearby billboards, but are not undertaken for the purpose of limiting the customary maintenance or use of the displays, do not trigger the statutory compensation requirement [*Regency Outdoor Advertising, Inc. v. City of Los Angeles (2006) 39 Cal. 4th 507, 525-528, 46 Cal. Rptr. 3d 742, 139 P.3d 119]* .

The Act also exempts local entities from the compensation requirement when a city, county, or city and county requires the removal of certain types of advertising displays in residential or agricultural areas [*see Bus. & Prof. Code §§ 5412.1-5412.3*]. As with the HBA, there is a limited exception to the OAA's statutory compensation requirement for the land within the Tahoe Region, which is governed instead by the Tahoe Regional Planning Agency, an entity formed by a multistate compact approved by Congress [*Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 1390-1392, 285 Cal. Rptr. 335]* .

State compensation is payable to the owner or owners of the advertising display and to the owner or owners of the land on which the display stands [*Bus. & Prof. Code § 5412*]. A government entity's requirement that a lawfully erected display be removed as a condition or prerequisite for the issuance or continued effectiveness of a permit, license, or other approval for any use, structure, development, or activity other than a display constitutes a compelled removal requiring compensation under *Bus. & Prof. Code § 5412,* unless the permit, license, or approval is requested for the construction of a building or structure that cannot be built without physically removing the display [*Bus. & Prof. Code § 5412.6*]. This compensation requirement is applicable whether or not the government entity that compels removal has the power of eminent domain. For instance, the owner of a billboard is entitled to compensation when the Coastal Commission, which lacks the power of eminent domain, requires removal of the billboard as a condition of a construction permit issued to the landowner, and the landowner duly terminates the billboard lease in order to effect removal (and removal is not actually necessary to proceeding with the permitted construction) [*Patrick Media Group, Inc. v. California Coastal Com. (1992) 9 Cal. App. 4th 592, 601-604, 11 Cal. Rptr. 2d 824* ; *cf. Pub. Res. Code § 30010* (compensation required whenever administration of Coastal Act permit provisions results in taking or damaging of private property for public use)]. For discussion of the billboard owner's remedy when the responsible government entity rejects a claim for compensation, and for related forms, see Ch. 474, *Availability of Judicial Review of Agency*

Decisions , et seq. regarding a petition for administrative mandate [*Patrick Media Group, Inc. v. California Coastal Com. (1992) 9 Cal. App. 4th 592, 606, 11 Cal. Rptr. 2d 824]* .

The Director of the Department of Transportation may elect to negotiate the amount of compensation to be paid on removal of an advertising display with the person entitled to it. If the negotiations are unsuccessful, or if the director elects not to negotiate, civil proceedings to compel the removal of the display may be instituted and are to be conducted under the procedure for eminent domain provided in *Code Civ. Proc. § 1230.010 et seq.* [*Bus. & Prof. Code §§ 5413, 5414*]. For forms for use in eminent domain proceedings generally, see Ch. 247, *Eminent Domain* .

[ii] Displays in Residential or Agricultural Areas

A city, county, or city and county can require removal of an advertising display in a residential or agricultural area *without compensation* if the display meets all the following requirements [*see Bus. & Prof. Code § 5412.1*]:

- It is located within an area shown as residential or agricultural on a local general plan as of the date an ordinance or regulation that incorporates the provisions of *Bus. & Prof. Code § 5412.1, 5412.2,* or *5412.3* is either enacted or becomes applicable to the area;

- It is located within an area zoned for residential or agricultural use either on the date the removal requirement is adopted or becomes applicable to the area;

- It is not located within 660 feet from the edge of the right-of-way of an interstate or primary highway with its copy visible from the highway and is not placed or maintained beyond 660 feet from the edge of the right-of-way of an interstate or primary highway with the purpose of its message being read from the main traveled way;

- It is not required to be removed because of an overlay zone, combining zone, or any other special zoning district whose primary purpose is the removal or control of signs; and

- It is allowed to remain in existence for a specified amortization period after the enactment or amendment after January 1, 1983, of any ordinance or regulation necessary to bring the entity requiring removal into compliance with *Bus. & Prof. Code § 5412,* and after giving notice of the removal requirement.

The amortization period varies in accordance with the fair market value of the sign and is longer in unincorporated agricultural areas than in residential or incorporated agricultural areas [*compare Bus. & Prof. Code § 5412.3 with Bus. & Prof. Code §§ 5412.1, 5412.2*].

[3] Inverse Condemnation Issues

In support of a complaint for inverse condemnation, a billboard owner must demonstrate that the government has taken or damaged a cognizable property right. However, a billboard owner cannot establish that property has been taken or damaged merely by showing that government action somewhat decreased the market value of the billboard--for instance, the planting of trees on government-owned land pursuant to a beautification plan, which resulted in reduced visibility of the billboard from a nearby road. Owners and occupiers of roadside property do not possess a "right to be seen" that requires the payment of compensation for municipal landscaping efforts having no injurious effect on any property rights other than the claimed right to visibility. When an impairment of a billboard's visibility is the sole harm alleged from a municipal landscaping project occurring on city-owned property, eminent domain and inverse condemnation principles do not require the payment of compensation [*Regency Outdoor Advertising, Inc. v. City of Los Angeles (2006) 39 Cal. 4th 507, 513, 516, 523, 46 Cal. Rptr. 3d 742, 139 P.3d 119* (billboard owner, complaining

of reduced visibility of billboards after city carried out beautification plan by planting trees on city property alongside major street and on median strip, had no inverse condemnation claim)].

For discussion of inverse condemnation generally, and related forms, see *Ch. 247, Eminent Domain, § 247.190* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsEminent Domain & TakingsGovernmentsState & Territorial GovernmentsPolice PowerGovernmentsPublic ImprovementsBridges & RoadsReal Property LawTortsNuisanceTypesPublic NuisanceConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechCommercial SpeechAdvertising

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§ 14.20 On-Premises Advertising

[1] State Restrictions

"On-premises advertising" means any structure, housing, sign, device, figure, statuary, painting, message placard, or other display or part of a display that was designed to have a useful life of 15 years or more and that advertises the name or business of the owner or occupant of the premises on which the display is located, or advertises the business conducted, services available or rendered, or the goods produced, sold, or available for sale on the property where the display is located [*Bus. & Prof. Code § 5490(b)*; *see Bus. & Prof. Code § 5490(g)* (term includes on-premises advertising display located within boundaries of development project defined by *Gov. Code § 65928*]. It does not include advertising displays used exclusively for outdoor advertising pursuant to the Outdoor Advertising Act [*Bus. & Prof. Code § 5490(d)*].

An on-premise advertising display is illegal if any of the following applies [*Bus. & Prof. Code § 5499.1(a)*]:

- It was erected without first complying with all ordinances and regulations in effect at the time of its construction.

- It was legally erected but its use has ceased, or the structure on which the display is placed has been abandoned by its owner, not maintained, or not used to identify or advertise an ongoing business for a period of not less than 90 days.

- It was legally erected but later became nonconforming as a result of the adoption of an ordinance, when the amortization period for the display provided by the ordinance rendering the display nonconforming has expired, and conformance has not been accomplished.

- It is a danger to the public or is unsafe.

- It is a traffic hazard not created by relocation of streets or highways or by acts of the city or county.

Legally erected but nonconforming displays for which the applicable amortization period has not expired are not illegal [*Bus. & Prof. Code § 5490(e)*].

[2] Removal of Illegal Display

The legislative body of a city or county, by resolution, may declare an illegal on-premises advertising display located within its jurisdiction to be a public nuisance and abate it [*Bus. & Prof. Code § 5499.2(a)*]. The procedure for declaring displays to be nuisances and abating them is set forth in *Bus. & Prof. Code §§ 5499.2-5499.7*, and includes the posting of notice of the resolution and a meeting at which objections may be heard [*see Bus. & Prof. Code §§ 5499.2-5499.7*]. The enforcement officer may enter the property to abate the nuisance [*Bus. & Prof. Code § 5499.8*], the property owner may remove the display at his or her own expense [*Bus. & Prof. Code § 5499.9*], or the legislative body may hire a contractor to abate it [*Bus. & Prof. Code § 5499.11*]. The city or county may also impose a special assessment on the parcels on which the display was located to recoup its costs [*Bus. & Prof. Code §§ 5499.9-5499.14*].

[3] Compensation for Removal or Restriction

Generally no city or county ordinance may compel the removal or abatement, or limit the customary maintenance, use, or repair, of any on-premises advertising display without the payment of fair and just compensation [*Bus. & Prof. Code § 5491*]. Certain ordinances and regulations are exempt from the compensation requirement [*see Bus. & Prof. Code §§ 5494-5498*]. Fair and just compensation is presumed to consist of payment of the fair market value of the on-premises display as of the date written notice is given to the owner of the display requiring conformance or removal of the display, or by payment of the actual cost to the owner of replacing the illegal display with a conforming on-premises display [*Bus. & Prof. Code §§ 5492, 5493*]. Fair market value is defined as the actual cost of removing the display, the cost of repairing any damage to the real property or improvements as a result of removal, and the cost as of the date of the notice of duplicating the advertising display required to be removed [*see Bus. & Prof. Code § 5492*].

[4] City or County Ordinances

No city or county may require removal of an on-premises advertising display on the basis of its height or size by requiring conformance with an ordinance or regulation if special topographic circumstances would result in a material impairment of visibility of the display or the owner's or user's ability to adequately and effectively continue to communicate with the public through the use of the display [*Bus. & Prof. Code § 5499*]. *Bus. & Prof. Code § 5499* imposes a two-part test [*Denny's v. City of Agoura Hills (1997) 56 Cal. App. 4th 1312, 66 Cal. Rptr. 2d 382* (construing *Bus. & Prof. Code § 5499* and holding that plaintiffs' preexisting business signs were protected under from city signage ordinance)]:

- Whether the local ordinance requires removal of a sign based on its height or size.

- Whether special topographic circumstances cause a conforming sign to be materially less visible or less effective at communicating the owner's message to the public.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsEminent Domain & TakingsReal Property LawTortsNuisanceTypesPublic NuisanceReal Property LawZoning & Land UseNonconforming Uses

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[Reserved]

§§ 14.21[Reserved]

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2-14 California Forms of Pleading and Practice--Annotated § 14.40

§ 14.40 Federal Constitution

Freedom of speech. *U.S. Const., amend. I*

No denial of equal protection of law; no deprivation of property without due process of law. *U.S. Const., amend. XIV*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechCommercial SpeechAdvertisingConstitutional LawEqual ProtectionScope of Protection

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§ 14.41 California Constitution

Right to acquire, possess, and protect property as inalienable right. *Cal. Const., art. I, § 1*

Freedom of speech. *Cal. Const., art. I, § 2(a)*

No denial of equal protection of law; no deprivation of property without due process of law. *Cal. Const., art. I, § 7*

Private property not to be taken or damaged for public use without just compensation. *Cal. Const., art. I, § 19*

Power of cities and counties to make and enforce ordinances and regulations not in conflict with general laws. *Cal. Const., art. XI, § 7*

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2-14 California Forms of Pleading and Practice--Annotated § 14.42

§ 14.42 Federal Statutes

Corporations, national banks, and labor organizations are prohibited from paying for any cable, satellite, or broadcast communication that refers to candidate for federal office and that is transmitted or broadcasted within 30 days of federal primary election or 60 days of federal general election in jurisdiction in which that candidate is running for office ("electioneering communication"). *2 U.S.C. § 441b* (held unconstitutional on its face in *Citizens United v. Federal Election Comm'n (2010) -- U.S. --, 130 S. Ct. 876, 175 L. Ed. 2d 753, 2010 U.S. LEXIS 766, at *93)*

Remedies for false or misleading advertising. *15 U.S.C. §§ 1116(a), 1125(a)(1)(B)* (injunction), *15 U.S.C. §§ 1117(a), 1125(a)(2)* (treble damages)

Requirement of health warning label on cigarettes. *15 U.S.C. § 1331*

State or local law may impose specific bans or restrictions on time, place, and manner, but not content, of advertising or promotion of cigarettes. *15 U.S.C. § 1334(c)*

Prohibition against cigarette advertising on television. *15 U.S.C. § 1335*

CAN-SPAM Act of 2003. *15 U.S.C. § 7701 et seq.*

Fraud and related activity in connection with electronic mail. *18 U.S.C. § 1037*

Control of outdoor advertising under Highway Beautification Act of 1965. *23 U.S.C. §§ 131, 135, 136, 319*

Legal Topics:

For related research and practice materials, see the following legal topics:
Trademark LawFederal Unfair Competition LawFalse AdvertisingGeneral OverviewTrademark LawFederal Unfair Competition LawLanham ActRemediesTrademark LawFederal Unfair Competition LawTrade Dress ProtectionGeneral OverviewComputer & Internet LawOnline AdvertisingSpam EmailGovernmentsFederal GovernmentElections

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2-14 California Forms of Pleading and Practice--Annotated § 14.43

§ 14.43 California Statutes

[1] Advertising by Mail

Requirement that advertisements and promotional materials disclose legal name under which business is done and complete street address from which it is actually conducted when business uses post office box, private mail box, or street address for site that receives mail or is telephone answering service in sale or offering for sale of consumer goods. *Bus. & Prof. Code § 17538.5(a)*; *see Bus. & Prof. Code § 17538.5(b)* (exceptions)

[2] Agricultural Products

False or misleading advertising of poisons unlawful. *Food & Agric. Code § 12991(d)*

Advertising of agricultural commodities grown in *California. Food & Agric. Code §§ 58889, 58889.1*

False or misleading advertising of dairy products as unfair practice. *Food & Agric. Code § 61381*

Advertising and promotion of dairy products by Dairy Council. *Food & Agric. Code §§ 64181, 64183*

[3] Businesses and Professions

[a] Alcohol

Signs advertising alcoholic beverages. *Bus. & Prof. Code § 25612*

Advertising of distilled spirits appealing to minors prohibited. *Bus. & Prof. Code § 25664*

[b] Barbers

Unlawful advertising by barbers. *Bus. & Prof. Code §§ 6573, 6573.5*

[c] Carriers

Advertising services of limousines and other charter-party carriers. *Pub. Util. Code §§ 5371.5, 5371.6, 5386, 5386.5, 5413.5, 5414.5*

[d] Cemeteries

False advertising by cemetery is misdemeanor and ground for suspension and revocation of license. *Bus. & Prof. Code §§ 9683-9686*

[e] Contractors

Unlawful advertising by contactors. *Bus. & Prof. Code §§ 7027, 7027.1, 7099.10*

[f] Cosmetology

Advertising by school of cosmetology. *Bus. & Prof. Code § 7397*

[g] Day Care

Advertising by licensed residential care facilities. *Health & Safety Code § 1514*

[h] Detectives

Advertising by private detectives. *Bus. & Prof. Code §§ 7534, 7535*

[i] Embalmers

False or misleading advertising by funeral director or embalmer is ground for disciplinary action. *Bus. & Prof. Code § 7693*

[j] Furniture and Bedding

False advertising concerning upholstered furniture, bedding, and beds. *Bus. & Prof. Code § 19151*

[k] Healing Arts

[i] In General

Unlawful advertising of prices and fees by or concerning services of members of healing arts professions. *Bus. & Prof. Code §§ 651-652.5*

[ii] Dentists

Certain advertising by dentist is unprofessional conduct. *Bus. & Prof. Code §§ 650.2, 1680(f), (h), (i), (k), (l), (aa)*

[iii] Nurses

Unlawful advertising by nurse is unprofessional conduct subject to disciplinary action. *Bus. & Prof. Code §§ 2761, 2878*

[iv] Opticians

Unlawful advertising by dispensing opticians. *Bus. & Prof. Code § 2556*

[v] Optometrists

Certain advertising by optometrist is unlawful or unprofessional. *Bus. & Prof. Code §§ 3128-3130*

[vi] Pharmacies

Display of pharmacy sign on or within building. *Bus. & Prof. Code § 4391*

[vii] Physicians

Certain advertising by member of medical profession is unprofessional conduct. *Bus. & Prof. Code §§ 2271, 2272*

[viii] Psychologists

False advertising [*see Bus. & Prof. Code § 4989.49* (definition of advertising)] is ground for suspension or revocation of educational psychologist's license. *Bus. & Prof. Code § 4989.54(e)*

[ix] Social Workers

False advertising [*see Bus. & Prof. Code § 4992.2* (definition of advertising)] is ground for denial, suspension, or revocation of clinical social worker's license. *Bus. & Prof. Code § 4992.3(q)*

[x] Therapists

Unlawful advertising by physical therapist is ground for revoking license. *Bus. & Prof. Code § 2660(a)*

[l] Homestead Filing Service

Misleading statements by homestead filing service prohibited. *Bus. & Prof. Code § 17537.6*

[m] Horse Racing

Advertising horse race predictions. *Bus. & Prof. Code § 19664*

[n] Industrial Loan Companies

Regulation of advertising by industrial loan companies relating to membership in Thrift Guaranty Corporation of *California. Fin. Code § 18506*

[o] Insurance

Certain insurance advertising is misdemeanor. *Ins. Code § 703.5*

Advertising securities issued by insurers. *Ins. Code §§ 828-830*

Unauthorized Insurers False Advertising Process Act. *Ins. Code §§ 1620.1-1620.7*

[p] Nursing Homes

Advertising by licensed residential care facilities. *Health & Safety Code § 1514*

[q] Pest Control

False advertising by pest control operator is ground for disciplinary action. *Bus. & Prof. Code § 8648*

Advertising that pest control work has been done is unlawful unless work was done by licensed person. *Bus. & Prof. Code § 8552*

[r] Plumbers

Licensed plumbing contractor is required to display name, business address, and contractor's license number on each side of commercial business vehicles. *Bus. & Prof. Code § 7029.5*

[s] Public Utilities

Prohibition on advertising by public utilities in bills sent to customers or subscribers. *Pub. Util. Code § 453(d)*

[t] Veterinarians

False or misleading advertising by veterinarian is ground for suspension or revocation of license. *Bus. & Prof. Code §*

4883(f)

[u] Watches

Advertisement of secondhand watches. *Bus. & Prof. Code § 21508*

[4] Consumers Legal Remedies Act

Unlawful advertising of consumer goods and services under Consumers Legal Remedies Act (*Civ. Code § 1750 et seq.*). *Civ. Code § 1770(a)*

Consumer remedies. *Civ. Code §§ 1780, 1781*

Corrective action by person charged. *Civ. Code § 1782*

[5] Definitions

"Advertising" defined. *Bus. & Prof. Code §§ 7027.1, 4980.03(e)*; *Corp. Code §§ 25002*; *Health & Safety Code § 109885*

"Person" defined for application of false advertising laws. *Bus. & Prof. Code § 17506*

[6] Employment

Advertisement concerning investment and sale of stock or interest in business as part of consideration for employment is unlawful. *Lab. Code § 407*; *Corp. Code § 408(c)* (exceptions)

Advertising for employees during trade dispute. *Lab. Code § 973*

False or misleading advertising of compensation or commissions for employment as salesperson, broker, or agent is misdemeanor. *Lab. Code §§ 976, 977*

[7] False and Misleading Advertising

[a] In General

False or misleading advertising is unlawful. *Bus. & Prof. Code § 17500*

[b] Particular Applications

Certain public communications by persons licensed in specified healing arts containing false, fraudulent, misleading, or deceptive statement or claim are unlawful; matters that may be included in advertising by any such person. *Bus. & Prof.*

Code § 651

Home solicitations. *Bus. & Prof. Code § 17500.3*

Unadvertised restrictions on quantities of articles advertised for sale. *Bus. & Prof. Code § 17500.5*

Statements regarding former price. *Bus. & Prof. Code § 17501*

Immunity for broadcasters and publisher acting in good faith. *Bus. & Prof. Code § 17502*

Deceptive pricing of goods or services sold in multiple units. *Bus. & Prof. Code § 17504*

Statements regarding ownership or control and character of business. *Bus. & Prof. Code § 17505*

Deceptive pricing pertaining to more than one article or service. *Bus. & Prof. Code § 17507*

Factual claims and brand comparisons. *Bus. & Prof. Code § 17508*

Transaction conditioned on purchase or lease of different product or service. *Bus. & Prof. Code § 17509*

Charitable solicitations. *Bus. & Prof. Code § 17510 et seq.*

Telephonic sellers. *Bus. & Prof. Code § 17511 et seq.*

Mislabeling articles as made by blind. *Bus. & Prof. Code § 17520 et seq.*

Misleading statements concerning real estate. *Bus. & Prof. Code § 17530*

Unlawful disclosure of tax information. *Bus. & Prof. Code § 17530.5*

Nondisclosure that merchandise is secondhand, used, defective, "seconds," or factory rejects. *Bus. & Prof. Code § 17531*

Nondisclosure that packaged toys are unassembled. *Bus. & Prof. Code § 17531.1*

Nondisclosure and misrepresentation concerning surplus materials. *Bus. & Prof. Code §§ 17531.5, 17533.5*

Labeling of television picture tubes. *Bus. & Prof. Code §§ 17531.6-17531.9*

Misrepresentation regarding sales of coal. *Bus. & Prof. Code § 17532*

Misrepresentation regarding circulation of newspaper or periodical for securing advertising or patronage. *Bus. & Prof. Code § 17533*

Mislabeling as "Made in U.S.A." *Bus. & Prof. Code § 17533.7*

Nondisclosures regarding prize or gift offers. *Bus. & Prof. Code §§ 17533.8, 17537*

Disclosure requirements relating to sale of tear gas. *Bus. & Prof. Code § 17533.9*

Misrepresentation regarding sale or order of energy conservation products or services. *Bus. & Prof. Code § 17537.5*

Offenses of sales or lease business conducted by catalog, mail order, telephone, Internet, or other telecommunications device. *Bus. & Prof. Code §§ 17538-17538.5*

Terms required to be disclosed in advertisements for credit under open-end credit plans. *Bus. & Prof. Code § 17538.7*

Unlawful practices by information-access service business. *Bus. & Prof. Code §§ 17539.5-17539.6*

False or misleading advertising concerning motel and motor court rate signs. *Bus. & Prof. Code § 17560 et seq.*

Mislabeling articles as made by American Indians. *Bus. & Prof. Code § 17569 et seq.*

Nondisclosure of owner's name and address on vending machine. *Bus. & Prof. Code § 17570 et seq.*

Prohibition against advertising product for sale if it is intended to entice consumer into transaction different from that originally represented. *Bus. & Prof. Code § 12024.6*

Communication simulating legal process in consumer debt collection. *Civ. Code § 1788.16*

[8] Remedies

Remedies or penalties are cumulative. *Bus. & Prof. Code § 17534.5*

Action for injunction and restitution for false advertising. *Bus. & Prof. Code § 17535*

Civil penalties for violation of injunction. *Bus. & Prof. Code § 17535.5*

Action by public official for civil penalties for false advertising. *Bus. & Prof. Code § 17536*

Treble penalty in action brought by, on behalf of, or for benefit of senior citizens or disabled persons to redress unfair or deceptive acts or practices or unfair methods of competition. *Civ. Code § 3345*

Recovery of treble damages and costs and attorney's fees at discretion of court when unlicensed person causes injury or damage to another while providing goods or performing services for which specified licenses are required. *Code Civ. Proc. § 1029.8*

Appointment of receiver in action by Attorney General in name of people of State of *California. Gov. Code § 12527*

Action for false advertising under *Bus. & Prof. Code § 17536* as subject to three year period of limitations. *Code Civ. Proc. § 338(h)*

[9] Food and Drugs

Advertising sale of steroids. *Bus. & Prof. Code § 17533.10*

False and unlawful advertising of food, drugs, devices, and cosmetics. *Health & Safety Code § 110390 et seq.*

False or misleading advertising of pet foods. *Health & Safety Code §§ 113045, 113050, 113075*

[10] Insurance

Disclosures required for sale of damage waiver in connection with rental of passenger vehicle. *Civ. Code § 1936(g)*

Unfair business practice for health insurance agents or brokers and various parties engaged in solicitation of health care service plans to engage in cold lead advertising when marketing Medicare product. *Health & Safety Code § 1361.1*; *Ins. Code § 790.037*

Disclosures required in advertisements for term life insurance directed to individuals 55 years of age or older. *Ins. Code § 10127.8*

[11] Internet

Unsolicited e-mail advertising (spam) sent to or from California is proscribed. *Bus. & Prof. Code § 17529 et seq.*

Violation of e-mail service provider's policy is proscribed. *Bus. & Prof. Code § 17538.45*

[12] Local Government Powers

Power of city and county to enact ordinances restricting advertising display adjacent to highway. *Bus. & Prof. Code §§ 5230, 5231, 5366*

Power of city to regulate outdoor advertising under public nuisance laws (*Gov. Code § 38771 et seq.*) by ordinance. *Gov. Code § 38774*

Power of county or city to regulate signs and billboards by zoning ordinance. *Gov. Code § 65850(b)*

[13] Lottery

Advertising lottery ticket sales office is misdemeanor. *Penal Code § 323*

[14] Motor Vehicles and Fuel

Advertising practices concerning motor vehicle fuel. *Bus. & Prof. Code § 13530 et seq.*

Advertisement indicating official connection with Department of Motor Vehicles is unlawful without authority. *Veh. Code § 25*

Advertising concerning horsepower rating. *Veh. Code §§ 9950, 9952*

False advertising by licensed automobile dealers is unlawful. *Veh. Code § 11713*

Dealer required to display manufacturer's information label on trucks with gross weight rating of 8,500 pounds or less. *Veh. Code § 24013.5*

False advertising prohibited as to motor vehicle pollution control devices. *Veh. Code § 27156*

[15] Obscene Matter

Advertising obscene matter is misdemeanor. *Penal Code § 311.5*

[16] Outdoor Advertising

Outdoor Advertising Act. *Bus. & Prof. Code § 5200 et seq.*

Compensation for removal of displays. *Bus. & Prof. Code §§ 5412-5414*

Remedies for noncompliance with Outdoor Advertising Act. *Bus. & Prof. Code § 5460 et seq.*

Regulation of on-premises advertising displays. *Bus. & Prof. Code § 5490 et seq.*

[17] Privacy

Unauthorized use of name, photograph, or likeness in advertising. *Civ. Code § 3344*

[18] Real Estate

Unlawful advertising concerning real estate. *Bus. & Prof. Code §§ 10139-10140.6, 17530*

False or misleading advertising by real estate licensees regarding real estate loans or contracts. *Bus. & Prof. Code § 10235*

Unlawful advertising regarding mineral, oil, or gas property. *Bus. & Prof. Code § 10512*

False or misleading advertising concerning subdivided lands. *Bus. & Prof. Code § 11022*

Regulation of signs advertising real property for sale, lease or exchange. *Civ. Code §§ 712, 713*

[19] Restrictions on Advertising Proscribed

Trade or professional association, state agency, state board, or state commission prohibited from enacting any rule, regulation, or code of professional ethics that restricts or prohibits advertising not in violation of *Bus. & Prof. Code § 17500* or any other provision of law. *Bus. & Prof. Code § 17500.1*

[20] Securities

Advertisement defined for purposes of Corporate Securities Law of 1968 (*Corp. Code § 25000 et seq.*). *Corp. Code § 25002*

Regulation of advertising of securities by Commissioner of Corporations. *Corp. Code §§ 25300-25302*

[21] Telephone Solicitation

Unsolicited and unwanted telephone solicitation. *Bus. & Prof. Code § 17590 et seq.*

[22] Tobacco

Regulation of advertising of smokeless tobacco products regarding unavailability to minors. *Bus. & Prof. Code § 17537.3*

[23] Trademarks

When mark is infringed in, or as part of, paid advertising matter in newspaper, magazine, or other similar periodical, or in electronic communication [*see 18 U.S.C. § 2510(12)* (definition)], remedies of mark owner against innocent publisher or distributor of that newspaper, magazine, or other similar periodical or electronic communication are confined to injunction against presentation of that advertising matter in future issues of that newspaper, magazine, or other similar periodical or in further transmissions of that electronic communication. *Bus. & Prof. Code § 14245(b)(2)*

Advertising or promotion that permits consumers to compare goods or services is not cause of action for injunctive relief by owner of famous and distinctive mark that is featured in such advertising. *Bus. & Prof. Code § 14247(b)(1)(A)*

[24] Trespass

Unauthorized placing or maintaining advertisement on public property is misdemeanor. *Penal Code § 556*

Unauthorized placing or maintaining advertisement on private property of another is misdemeanor. *Penal Code § 556.1*

Unauthorized placing or maintaining advertisement on public or private property is public nuisance. *Penal Code § 556.3*

Maliciously affixing advertisement to property of another without consent of owner is misdemeanor. *Penal Code § 602(f)*

[25] Unfair Competition

False and misleading advertising is unfair competition. *Bus. & Prof. Code § 17200*

Action for injunction and restitution for acts of unfair competition. *Bus. & Prof. Code §§ 17203, 17204*

Remedies or penalties cumulative. *Bus. & Prof. Code § 17205*

Action by public official for civil penalties for violation of *Bus. & Prof. Code §§ 17200-17208*. *Bus. & Prof. Code § 17206*

Action for violation of injunction. *Bus. & Prof. Code § 17207*

Statute of limitations for action for unfair competition. *Bus. & Prof. Code § 17208*

[26] Water Treatment Devices

Restrictions on claims concerning water treatment devices. *Bus. & Prof. Code § 17577 et seq.*

[27] Weapons

Advertising for sale of weapon or device the possession of which is prohibited by *Penal Code §§ 12020, 12220, 12280,* or advertising sale of handgun ammunition designed primarily to penetrate metal or armor [*see Penal Code § 12323(b)* (definition)], is prohibited. *Penal Code § 12020.5*

License to sell firearms is subject to forfeiture because of advertising, by sign on premises that is visible to passersby, for sale or transfer of concealable firearm. *Penal Code § 12071(b)(4)*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsPolice PowerAntitrust & Trade LawConsumer ProtectionTelemarketingComputer & Internet LawOnline AdvertisingSpam EmailAntitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationAntitrust & Trade LawConsumer ProtectionFalse AdvertisingState Regulation

California Forms of Pleading and Practice--Annotated

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Chapter 14 ADVERTISING
PART III. RESEARCH GUIDE

2-14 California Forms of Pleading and Practice--Annotated § 14.44

§ 14.44 Decisions

[1] Actions for False and Misleading Advertising Under False Advertising and Unfair Competition Statutes

[a] In General

Bus. & Prof. Code § 17500 contains broad language that has been broadly interpreted by California courts. *Audio Fidelity, Inc. v. High Fidelity Recordings, Inc. (1960) 283 F.2d 551, 554*

Any statement that is deceptive or merely misleading, even though made without intent to deceive, violates *Bus. & Prof. Code § 17500*, irrespective of statement's truth or falsity. *Audio Fidelity, Inc. v. High Fidelity Recordings, Inc (1960) 283 F.2d 551, 555* ; *People ex rel. Mosk v. Lynam (1967) 253 Cal. App. 2d 959, 965-966 61 Cal. Rptr. 800*

Claims for injunctive relief under *Bus. & Prof. Code § 17500* are not subject to arbitration; holding in *Broughton v. Cigna Healthplans of California (1999) 21 Cal. 4th 1066, 1082, 90 Cal. Rptr. 2d 334, 988 P.2d 67* , regarding non-arbitrability of public injunctions under Consumers Legal Remedies Act, should be extended to include claims to enjoin unfair competition under *Bus. & Prof. Code § 17200 et seq.* and misleading advertising under *Bus. & Prof. Code § 17500 et seq.* *Cruz v. Pacificare Health Systems, Inc. (2003) 30 Cal. 4th 303, 307, 316, 133 Cal. Rptr. 2d 58, 66 P.3d 1157*

Description of advertising scheme is sufficient to allege false or misleading advertising in that scheme; pleading exact language of every deceptive statement is not necessary. *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 211, 197 Cal. Rptr. 783, 673 P.2d 660*

Statement of cause of action for false or misleading advertising requires only allegation that members of public are likely to be deceived, but not allegations of actual deception, reasonable reliance, or damage. *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 211, 197 Cal. Rptr. 783, 673 P.2d 660*

Under *Bus. & Prof. Code § 17500*, statement is false or misleading if members of public are likely to be deceived, because both *Bus. & Prof. Code § 17500* and former *Civ. Code § 3369* (*now see Bus. & Prof. Code § 17200*) afford protection against probability or likelihood, as well as actuality, of deception or confusion. *Chern v. Bank of America (1976) 15 Cal. 3d 866, 876, 127 Cal. Rptr. 110, 544 P.2d 1310*

Under *Bus. & Prof. Code § 17500*, deceptive intent of disseminator and knowledge of customer are both irrelevant. *Chern v. Bank of America (1976) 15 Cal. 3d 866, 876, 127 Cal. Rptr. 110, 544 P.2d 1310*

Civil action by People alleging deceptive advertising and seeking penalties provided in *Bus. & Prof. Code § 17536* (deceptive advertising) and *Bus. & Prof. Code § 17206* (unfair competition, formerly set out in *Civ. Code § 3370.1*) does not violate defendant's privilege against self-incrimination. *People v. Superior Court (Kaufman) (1974) 12 Cal. 3d 421, 433, 115 Cal. Rptr. 812, 525 P.2d 716*

Burden of proving that false advertising claims were false or misleading properly rests with plaintiff; it would be inappropriate to shift burden of proof to defendant in private plaintiff false advertising action when private plaintiff is not authorized by statute to seek substantiation of advertising claim from defendant. *National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc. (2003) 107 Cal. App. 4th 1336, 1345, 1348, 133 Cal. Rptr. 2d 207*

Bus. & Prof. Code § 17500 requires only likelihood of confusion, not individual proof of actual deception or confusion. *People v. Dollar Rent-A-Car Systems, Inc. (1989) 211 Cal. App. 3d 119, 128-129, 259 Cal. Rptr. 191*

Trial court's directed verdict in favor of defendants in civil action for misleading advertising was error when evidence showed that although no individual employee connected with ad campaign had actual knowledge of misrepresentations, knowledge was imputed to defendants since three employees had information among them to prove that ads were misleading. *People v. Forest E. Olson, Inc. (1982) 137 Cal. App. 3d 137, 139-140, 186 Cal. Rptr. 804*

Statement that is deceptive or merely misleading violates *Bus. & Prof. Code § 17500*, irrespective of truth or falsity, or absence of intent to deceive. *People ex rel. Mosk v. Lynam (1967) 253 Cal. App. 2d 959, 966, 61 Cal. Rptr. 800*

[b] Civil Penalties

Bus. & Prof. Code § 17536 authorizes civil penalty, up to maximum amount, for each person to whom advertiser made misrepresentations. *People v. Superior Court (1973) 9 Cal. 3d 283, 288-289, 107 Cal. Rptr. 192, 507 P.2d 1400*

Evidence of number of solicitations mailed and of defendant's wealth was properly considered in determining civil penalty for false advertising under *Bus. & Prof. Code § 17536*. *People v. Morse (1993) 21 Cal. App. 4th 259, 271-272, 25 Cal. Rptr. 2d 816* .

$100,000 penalty was justified by evidence of 500,000 misleading and deceptive contracts over four-year period and 1,500 false repair invoices. *People v. Dollar Rent-A-Car Systems, Inc. (1989) 211 Cal. App. 3d 119, 132, 259 Cal Rptr. 191*

Imposition of civil penalty for each violation is mandatory. *People v. Custom Craft Carpets, Inc. (1984) 159 Cal. App. 3d 676, 686, 206 Cal. Rptr. 12*

Advertiser whose false advertisement violates *Bus. & Prof. Code § 17205* (unfair competition) and *Bus. & Prof. Code § 17534.5* (false advertising) is liable for penalties under *Bus. & Prof. Code §§ 17206* and *17536* for each violation. *People v. Toomey (1984) 157 Cal. App. 3d 1, 21-22, 203 Cal. Rptr. 642*

Factors to be considered in determining reasonableness of civil penalty. *People v. Superior Court (Olson) (1979) 96 Cal. App. 3d 181, 198, 157 Cal. Rptr. 628* .

Defendant's finances are relevant and subject to discovery in action charging false and misleading advertising and unfair business practices. *People v. Superior Court (1973) 35 Cal. App. 3d 710, 712-714, 111 Cal. Rptr. 14*

[c] Class Actions

Bus. & Prof. Code §§ 17204 and *17535* authorize filing of action by any person on behalf of general public. *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 215, 197 Cal. Rptr. 783, 673 P.2d 660*

In class action for injunctive relief under *Bus. & Prof. Code §§ 17203* and *17535*, plaintiff is not required to plead exact language of every deceptive statement if plaintiff describes scheme to mislead customers and alleges that each misrepresentation to each customer conformed to that scheme. *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 212-213, 197 Cal. Rptr. 783, 673 P.2d 660*

In class action for injunctive relief and restitution under *Bus. & Prof. Code § 17535*, language of statute was unquestionably broad enough to authorize trial court to order restitution without requiring showing of individual class member's lack of knowledge of fraudulent practice in each transaction. *Fletcher v. Security Pac. National Bank (1979) 23 Cal. 3d 442, 451, 153 Cal. Rptr. 28, 591 P.2d 51*

Right of trial court to use procedural provisions of Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*] in consumer's class actions brought under other laws. *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 820, 94 Cal. Rptr. 796, 484 P.2d 964*

Even if plaintiffs established, class-wide, that drug manufacturer misrepresented cardiovascular risks of drug in manner that was likely to deceive plaintiffs and their prescribing physicians, no plaintiff would be able to recover without first identifying proper comparator drug, cost of which would provide actual value to patient of drug received; trial court properly concluded that issue of proper comparator was patient-specific issue, incorporating patient's medical history, treatment needs, and drug interactions, and that, therefore, restitution could not be computed on class-wide basis. *In re Vioxx Class Cases (2009) 180 Cal. App. 4th 116, 136, 103 Cal. Rptr. 3d 83*

In view of requirements for standing and representative actions under False Advertising Law [*see Bus. & Prof. Code § 17535*, as amended by Proposition 64 in 2004], relief--in particular, restitution--cannot extend beyond named parties, and attorney's fees cannot be recovered by successful plaintiffs, unless trial court certifies action as class action.

Harper v. 24 Hour Fitness, Inc. (2008) 167 Cal. App. 4th 966, 975-976, 84 Cal. Rptr. 3d 532

[d] Criminal Penalties

Strict criminal liability is not imposed by *Bus. & Prof. Code § 17500*; business owner is not criminally responsible for employee's clear violation without evidence of knowledge or control of employee's activities. *People v. Regan (1979) 95 Cal. App. 3d Supp. 1, 4 , 157 Cal. Rptr. 62*

[e] Federal Preemption

Frequent flyer claims against airline under state consumer fraud law, but not breach of contract claims, were preempted by provision of Airline Deregulation Act, former 49 U.S.C. § 1305(a)(1) (later reenacted without substantive change as *49 U.S.C. § 41713(b)(1)*). *American Airlines, Inc. v. Wolens (1995) 513 U.S. 219, 226-229, 232-233, 115 S. Ct. 817, 130 L. Ed. 2d 715*

Consumer's false and misleading advertising cause of action against national bank, which was predicated in part on bank's violation of federal banking laws and regulations concerning required disclosures and prohibited misleading or misrepresentative advertising, was not preempted by federal law. *Smith v. Wells Fargo Bank (2005) 135 Cal. App. 4th 1463, 1487-1488, 38 Cal. Rptr. 3d 653* Federal statute *47 U.S.C. § 332(c)(3)(A)*, which prohibits states from regulating rates charged by a wireless telephone service provider, does not preempt a state court from awarding monetary relief based on false advertising; "rate regulation" refers to direct price controls, and section does not disclose Congressional intent to preempt state court monetary awards that require determination of value of services provided but that do not directly regulate rates. *Spielholz v. Superior Court (2001) 86 Cal. App. 4th 1366, 1373-1376*

Action against telephone carriers and phone card retailers that sought only to enjoin misleading practices in advertising of phone card rates and sought no monetary recovery did not come within federal "filed rate doctrine" set forth in *47 U.S.C. § 203* and action could proceed under *Bus. & Prof. Code §§ 17200, 17500*); plaintiffs could not seek to recover money from respondents, as net effect of imposing monetary sanction would be to effectuate rebate, a matter which is strictly of federal concern under Federal Communications Act and therefore barred by filed rate doctrine. *Day v. AT&T Corp. (1998) 63 Cal. App. 4th 325, 335-337, 74 Cal. Rptr. 2d 55*

Action against interstate air carrier under *Bus. & Prof. Code §§ 17200 et seq.* and *17500* and *Civ. Code § 1770(m)* for false and misleading advertising was not preempted by former 49 U.S.C. § 1305 because federal statute provides only for exclusive federal regulation of interstate air carrier's rates, routes, or services, not manner in which they are advertised, and former statutes do not otherwise conflict with federal legislation or constitute undue burden on interstate commerce. *People v. Western Airlines (1984) 155 Cal. App. 3d 597, 600-601, 202 Cal. Rptr. 237*

[f] Persons Liable

Majority shareholder and chief executive officer who was responsible for ambiguous written contracts and misleading presentations of selling agents was personally liable for violations of *Bus. & Prof. Code §§ 17200* and *17500*. *People v. Dollar Rent-A-Car Systems, Inc. (1989) 211 Cal. App. 3d 119, 132, 259 Cal. Rptr. 191*

[g] Political Campaigns

Broadly drawn state statutory prohibitions against false or misleading commercial advertising are inapplicable to regulate statements made in course of political campaign, even when statements are prepared and made by paid political consultant. *O'Connor v. Superior Court (1986) 177 Cal. App. 3d 1013, 1019-1020, 223 Cal. Rptr. 357* (*Bus. & Prof. Code §§ 17200 et seq.* and *17500 et seq.* are inapplicable to political election campaign practices)

[h] Standing

Organizational plaintiffs acting on behalf of general public have standing to sue concerning public advertising campaign alleged to be false and misleading. *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 215, 197 Cal. Rptr. 783, 673 P.2d 660*

[2] Actions for False and Misleading Advertising Under Other Theories for Recovery

Cause of action for violation of consumer statutes and intentional and negligent fraud based on fraudulent advertisement of children's breakfast cereals. *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 209-221, 197 Cal. Rptr. 783, 673 P.2d 660*

Strict requirement that fraud be pleaded factually and specifically is relaxed when circumstances make specific pleading impossible and impractical; in such cases, plaintiff is able to allege that he or she acted in response to advertising campaign, even if plaintiff cannot recall specific advertisements. *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 216-219, 197 Cal. Rptr. 783, 673 P.2d 660*

Cause of action for personal injuries based on fraudulent advertisement of drug. *Wennerholm v. Stanford Univ. Sch. of Med. (1942) 20 Cal. 2d 713, 715-716, 128 P.2d 522*

Absent endorsement or sponsorship for economic gain, publisher of advertisement has no duty to investigate safety of advertised product and no liability for injuries sustained from use of product. *Walters v. Seventeen Magazine (1987) 195 Cal. App. 3d 1119, 1121-1122, 241 Cal. Rptr. 101*

Cause of action for personal injuries based on advertising endorsement of defective product. *Hanberry v. Hearst Corp. (1969) 276 Cal. App. 2d 680, 683, 81 Cal. Rptr. 519*

[3] Billboards and Other Outdoor Advertising

[a] Classification of Signs

Ordinance permitting all on-site and many, but not all, categories of off-site noncommercial signs was facially invalid discrimination prohibited by *First Amendment*; however, ordinance was saved by construing it to allow all noncommercial off-site signs. *City and County of San Francisco v. Eller Outdoor Advertising (1987) 192 Cal. App. 3d 643, 662-665, 237 Cal. Rptr. 815*

Whether purpose of outdoor sign is to advertise or merely to identify owner's property is issue to be determined on basis of objective facts and on reading text of sign in light of existing physical circumstances rather than on basis of owner's subjective intent. *People ex rel. Dept. of Transportation v. Harris (1982) 128 Cal. App. 3d 264, 269, 180 Cal.*

Rptr. 148

Hotel rate signs and nonrate signs have no constitutional distinction to justify prohibition of rate signs under exercise of police power. *Carlin v. City of Palm Springs (1971) 14 Cal. App. 3d 706, 714, 92 Cal. Rptr. 535*

Ordinance classifying and regulating moving signs as opposed to flashing signs, was unconstitutional, being based on no natural intrinsic or constitutional distinction. *City of Santa Barbara v. Modern Neon Sign Co. (1961) 189 Cal. App. 2d 188, 193, 11 Cal. Rptr. 57*

[b] Compensation for Removal

Compensation provisions of *Bus. & Prof. Code § 5412* were inapplicable to display that was erected pursuant to written agreement with government entity providing for removal of display after fixed time. *Metropolitan Outdoor Advertising Corp. v. City of Santa Ana (1994) 23 Cal. App. 4th 1401, 1405, 28 Cal. Rptr. 2d 664*

Conditional use permit of specific duration for billboard, coupled with written agreement requiring owner to remove billboard on expiration of permit, did not confer fundamental vested right in continued use and maintenance of billboard. *Metropolitan Outdoor Advertising Corp. v. City of Santa Ana (1994) 23 Cal. App. 4th 1401, 1403-1404, 28 Cal. Rptr. 2d 664*

Even though billboard was nonconforming and subject to removal at time owner purchased it, under 1978 amendments to Federal Highway Beautification Act, owner was entitled to compensation for removal of sign that was covered by Act; California Outdoor Advertising Act [*Bus. & Prof. Code § 5200 et seq.*] requires compensation whenever taking, as defined by federal Act, occurs. *City of Salinas v. Ryan Outdoor Advertising, Inc. (1987) 189 Cal. App. 3d 416, 426, 234 Cal. Rptr. 619*

[c] Delegation of Discretion

Ordinance did not unconstitutionally delegate policy-making to city director because it specified standards, including compatibility with surroundings, and standards for abstract concepts like aesthetics are difficult to articulate. *Rodriguez v. Solis (1991) 1 Cal. App. 4th 495, 507-511, 2 Cal. Rptr. 2d 50*

[d] Scope of Permissible Restrictions

Trial court properly granted motion for summary judgment against billboard owner because owner could not prove claims that Outdoor Advertising Act, as amended by addition of *Bus. & Prof. Code § 5275* in 2008, is overbroad and vague, is enforced by imposition of unconstitutional prior restraints, violates equal protection, and violates suppression doctrine and substantive due process; and billboard owner could not show that trial court's injunction, barring him from engaging in offsite advertising on his billboard, effectively barred him from exercising his *First Amendment* right of free speech. *Maldonado v. Morales (9th Cir. 2009) 556 F.3d 1037, 1046-1048*

Advertising display was not located in "business area" within definition of *Bus. & Prof. Code § 5205* and so was not exempt from ban on displays within 660 feet of highway because area was not zoned for commercial activity, although commercial activities were allowed by issuance of conditional use permits. *United Outdoor Advertising Co., Inc. v. Business, Transportation & Housing Agency (1988) 44 Cal. 3d 242, 244-248, 242 Cal. Rptr. 738, 746 P.2d 877*

Restrictions on commercial outdoor advertising to advance substantial governmental interests of traffic safety and appearance of city were proper object for exercise of police power. *Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 858-865, 164 Cal. Rptr. 510, 610 P.2d 407 , rev'd on other grounds, 453 U.S. 490 (1981)*

Power of city under *Gov. Code § 38774(a)* to enact ordinance prohibiting placing or maintaining signs or billboards on property adjacent to freeway and declaring such to be public nuisance. *City of Escondido v. Desert Outdoor Advertising, Inc. (1973) 8 Cal. 3d 785, 787-788, 106 Cal. Rptr. 172, 505 P.2d 1012*

Removal of nonconforming outdoor advertising billboards under zoning ordinance was required to await expiration of reasonable amortization period in order to permit plaintiff owner to recover original cost. *National Advertising Co. v. County of Monterey (1970) 1 Cal. 3d 875, 880, 83 Cal. Rptr. 577, 464 P.2d 33* ; *National Advertising Co. v. County of Monterey (1962) 211 Cal. App. 2d 375, 381, 27 Cal. Rptr. 136*

Ordinance banning all mobile billboard advertising (except on buses and taxicabs), which had no definition of advertising, was applicable equally to both commercial and noncommercial speech and was not unconstitutional as applied to nonprofit organization's vehicle that, while on city streets, presented messages, in both videos and sound recordings, against cruelty to animals. *Showing Animals Respect & Kindness v. City of West Hollywood (2008) 166 Cal. App. 4th 815, 819-825, 83 Cal. Rptr. 3d 134*

Trial court properly sustained Caltrans demurrer to individual's action seeking to revive, renew, or have reissued permits for billboards that were canceled during the 1970s; causes of action were barred by statutes of limitation and by *Bus. & Prof. Code § 5360(b)* providing that permits not renewed after 1993 are deemed revoked. *Traverso v. Department of Transportation (2001) 87 Cal. App. 4th 1142, 1143, 105 Cal. Rptr. 2d 179*

Property owner violated Outdoor Advertising Act's restriction on displays adjacent to "landscaped freeway" [*Bus. & Prof. Code §§ 5440, 5442*] when all lessees of billboard used it to advertise goods or services provided at other sites; fact that billboard lease included lease of office in building at billboard site did not transform lessees into occupants for purposes of the *Act. Dep't of Transportation v. Maldonado (2001) 86 Cal. App. 4th 1225, 1230-1233, 104 Cal. Rptr. 2d 66*

City spacing ordinance requiring 600 foot space between off-site signs of particular size located on same side of same street was inapplicable to billboard that was not on same side of same street as an existing sign. *Van Wagner Communications, Inc. v. City of Los Angeles (2000) 84 Cal. App. 4th 499, 511, 100 Cal. Rptr. 2d 922*

Caltrans is not authorized by *Bus. & Prof. Code § 5358* to condition issuance of billboard permit on demonstrated compliance with local zoning ordinances; language requiring Caltrans to grant permit for billboard only if billboard will not be in violation "of any other state law" was inapplicable to local ordinances. *Traverso v. People ex rel. Dept. of Transportation (1996) 46 Cal. App. 4th 1197, 1210, 54 Cal. Rptr. 2d 434*

New permit for billboard is required under Outdoor Advertising Act if owner relocates billboard for any reason and regardless of whether new location is negligible distance from old location. *People ex rel. Dep't of Transportation v. Ad Way Signs, Inc. (1993) 14 Cal. App. 4th 187, 196-197, 17 Cal. Rptr. 2d 496* ; *People ex rel. Dept. of Transportation*

v. Ad Way, Inc. (1992) 8 Cal. App. 4th 309, 314-315, 11 Cal. Rptr. 2d 407

Traffic hazards and beautification were sufficient fundamental interests to require prohibition of all off-site signs. *City and County of San Francisco v. Eller Outdoor Advertising (1987) 192 Cal. App. 3d 643, 659, 237 Cal. Rptr. 815*

Restriction of off-site commercial billboards to specified zoning districts was permissible; no constitutional issue was raised by economic impact of permitted locations. *City of Salinas v. Ryan Outdoor Advertising, Inc. (1987) 189 Cal. App. 3d 416, 432-433, 234 Cal. Rptr. 619*

Injunction to compel removal of outdoor advertising billboards on ground that billboards constitute public nuisance was in violation of Outdoor Advertising Act [*Bus. & Prof. Code § 5200 et seq.*]. *People ex rel. Dept. Pub. Wks. v. Adco Advertisers (1973) 35 Cal. App. 3d 507, 511-512, 110 Cal. Rptr. 849*

Reasonable regulation of signs and billboards was valid exercise of police power. *Carlin v. City of Palm Springs (1971) 14 Cal. App. 3d 706, 712, 92 Cal. Rptr. 535*

Enforcement of advertising sign ordinance to require defendants to bring nonconforming signs into compliance without allowing reasonable amortization period was unconstitutional taking of property without compensation and without due process of law. *City of Santa Barbara v. Modern Neon Sign Co. (1961) 189 Cal. App. 2d 188, 195, 11 Cal. Rptr. 57*

[e] Summary Judgment

Fact that permit was not renewed did not determine that it had been revoked because statute does not provide for automatic revocation for failure to pay renewal fee; thus, summary judgment was improper. *People ex rel. Dep't of Transportation v. Ad Way Signs, Inc. (1993) 14 Cal. App. 4th 187, 198-200, 17 Cal. Rptr. 2d 496*

Owner's admission to interrogatory that Department had canceled permit is not sufficient for entry of summary judgment on that issue when there is credible evidence on both sides of issue. *People ex rel. Dep't of Transportation v. Ad Way Signs, Inc. (1993) 14 Cal. App. 4th 187, 200-201, 17 Cal. Rptr. 2d 496*

On city's motion for summary judgment, when opposing party's declarations were not disputed by city, trial court erred in considering constitutionality of sign ordinance as question of fact so as to deny summary judgment; constitutionality of ordinance was matter of law that should have been resolved by trial court on motion for summary judgment. *City and County of San Francisco v. Eller Outdoor Advertising (1987) 192 Cal. App. 3d 643, 657-658, 237 Cal. Rptr. 815*

[f] Dispute Between Landowner and Billboard Owner

Lessor was entitled, under *Civ. Code § 3334(b)*, to recover billboard owner's profit from advertising on billboard during period of billboard owner's wrongful occupancy of land after lease expired. *Bailey v. Outdoor Media Group (2007) 155 Cal. App. 4th 778, 787-789, 796, 66 Cal. Rptr. 3d 322*

[4] Contract Formation

Advertisements are mere preliminary invitations that create no power of acceptance in recipient. *Foremost Pro Color, Inc. v. Eastman Kodak Co. (9th Cir. 1983) 703 F.2d 534, 539*

Envelope offering free prize "just for opening envelope" was offer for unilateral contract; contract was accepted when recipient opened envelope, but notice of performance was required to be given by recipient to advertiser in order to claim prize or state cause of action for damages for breach of contract. *Harris v. Time, Inc. (1987) 191 Cal. App. 3d 449, 455-458, 237 Cal. Rptr. 584*

[5] Definitions

"Advertisement" defined. *People v. McKean (1925) 76 Cal. App. 114, 118, 243 P. 898*

[6] Federal Law

Prohibition against "electioneering communications"--that is, candidate-focused advertisements paid for by corporations, national banks, or labor organizations and transmitted by cable or satellite communication or broadcasted within specified period before federal election [*2 U.S.C. § 441b*]--is unconstitutional. *Citizens United v. FEC (2010) 130 S. Ct. 876, 913, 175 L. Ed. 2d 753*

Although jurisdiction of Federal Trade Commission extended to California Dental Association, abbreviated or "quick look" analysis by federal appeals court was no t sufficient to justify finding that certain advertising restrictions adopted by Association violated antitrust laws. *California Dental Assoc. v. FTC (1999) 526 U.S. 756, 119 S. Ct. 1604, 143 L. Ed. 2d 935, 944, 950*

In challenge by California tree fruit growers, handlers, and processors to validity of various regulations contained in marketing orders under Agricultural Marketing Agreement Act (*7 U.S.C. § 601 et seq.*), which imposed assessments including cost of generic advertising of California fruit, imposition of assessments held not to violate *First Amendment*. *Glickman v. Wileman Brothers & Elliott, Inc. (1998) 521 U.S. 457, 117 S. Ct. 2130, 138 L. Ed. 2d 585*

Section 5(b) of Public Health Cigarette Smoking Act of 1969 [*15 U.S.C. § 1334(b)*] preempts state law damage claims against cigarette manufacturers and sellers for fraudulent misrepresentation based on state statute or on allegation that advertising "neutralized" warnings required by Act, but does not preempt state law damage claims for conspiracy to misrepresent or conceal health hazards of smoking. *Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504, 524-530, 112 S. Ct. 2608, 120 L. Ed. 2d 407*

Enforcement of National Association of Attorneys General guidelines through state's consumer protection laws to regulate air fare advertising and frequent flyer programs is preempted by Airline Deregulation Act, specifically 49 U.S.C. § 1305(a)(1). *Morales v. Trans World Airlines, Inc. (1992) 504 U.S. 374, 391, 112 S. Ct. 2031, 119 L. Ed. 2d 157*

Mere funding connection between excise tax imposed on tobacco industry and government-sponsored advertising campaign against tobacco industry, in absence of any claim that tax or advertising is unconstitutional, does not violate *First Amendment*. *R.J. Reynolds Tobacco Co. v. Shewry (9th Cir. 2005) 423 F.3d 906, 914*

15 U.S.C. § 45 authorizes Federal Trade Commission to determine standard of and to prohibit deceptive advertising practices. *Sterling Drug, Inc. v. F.T.C. (9th Cir. 1984) 741 F.2d 1146, 1148-1150*

Federal Trademark Act [*15 U.S.C. § 1125(a)*] authorizes damaged party to bring civil action based on false description or representation in connection with goods and services; Act was applied to false advertising regarding goods and services of advertiser in interstate commerce. *U-Haul Int'l, Inc. v. Jartran, Inc. (9th Cir. 1982) 681 F.2d 1159, 1160-1162*

Statute of limitation for action in California court under Telephone Consumer Protection Act of 1991 (TCPA) [*47 U.S.C. § 227*] is *28 U.S.C. § 1658* (four years), not *Code Civ. Proc. § 338* (three years), because (1) TCPA does not clearly indicate otherwise, (2) California principles regarding limitation of actions do not necessarily favor shorter period under state statute, as opposed to longer period under federal statute, and (3) policy for disposition on merits is as strong as policy favoring disposition of stale claims. *Sznyter v. Malone (2007) 155 Cal. App. 4th 1152, 1168, 66 Cal. Rptr. 3d 633*

Action under TCPA [*see 47 U.S.C. § 227(b)(3)(A)-(C)*], which restricts unsolicited facsimile (fax) advertisements, may be maintained in state court because California Legislature has not prohibited those suits despite fact that TCPA permits states to prohibit private TCPA actions in their courts; TCPA is constitutional and TCPA claims may be brought as class action. *Kaufman v. ACS Systems, Inc. (2003) 110 Cal. App. 4th 886, 890, 2 Cal. Rptr. 3d 296*

Under *23 U.S.C. § 131(b)*, billboard angled so that its copy could not be read from interstate highway was exempt from provisions of *Federal Highway Beautification Act. City of Salinas v. Ryan Outdoor Advertising, Inc. (1987) 189 Cal. App. 3d 416, 425, 234 Cal. Rptr. 619*

[7] Free Speech

[a] Commercial Messages

[i] In General

Restriction may be upheld only if it advances substantial governmental interest advanced and goes no further than is necessary to effect that interest. Rodriguez v. *Solis (1991) 1 Cal. App. 4th 495, 513, 2 Cal. Rptr. 2d 50*

Commercial speech is protected by *First Amendment* but also is subject to reasonable time, place, and manner restrictions. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council (1976) 425 U.S. 748, 770, 771, 96 S. Ct. 1817, 48 L. Ed. 2d 346*

Compelling advertiser, found to have previously misled public, to substantiate future advertising claims was constitutionally permissible. *People v. Custom Craft Carpets, Inc. (1984) 159 Cal. App. 3d 676, 683, 206 Cal. Rptr. 12*

State has substantial interest with respect to regulation of advertising in protecting members of public from merchants who would deceive and cheat them. *People v. Custom Craft Carpets, Inc. (1984) 159 Cal. App. 3d 676, 683, 206 Cal. Rptr. 12*

[ii] Content Restrictions

Township ordinance that prohibited posting of "For Sale" and "Sold" signs on real estate was violation of *First Amendment*. *Linmark Associates, Inc. v. Willingboro (1977) 431 U.S. 85, 91-97, 97 S. Ct. 1614, 52 L. Ed. 2d 155*

Abortion advertisement having commercial purpose but containing factual material of clear public interest was protected by *First Amendment* from state law forbidding such advertisements. *Bigelow v. Virginia (1975) 421 U.S. 809, 822-824, 95 S. Ct. 2222, 44 L. Ed. 2d 600*

First Amendment protection of free speech and press is not surrendered merely due to commercial nature of newspaper advertisement concerning out-of-state abortion services. *Bigelow v. Virginia (1975) 421 U.S. 809, 819-822, 95 S. Ct. 2222, 44 L. Ed. 2d 600*

Statute and regulations prohibiting unlicensed persons from using terms "accounting" and "accountant" are constitutionally valid when potential was established for misleading public, who generally presume those terms indicate individual offering services is licensed. *Moore v. California State Bd. of Accountancy (1992) 2 Cal. 4th 999, 1020-1025, 9 Cal. Rptr. 2d 358, 831 P.2d 798*

Fact that ordinance limits owner to one sign on property was not impermissible favoring of commercial over noncommercial speech; ordinance was not required to define commercial and noncommercial speech, since case law has adequately done so. *City of Salinas v. Ryan Outdoor Advertising, Inc. (1987) 189 Cal. App. 3d 416, 428-429, 234 Cal. Rptr. 619*

Ordinance prohibiting advertisement intended to promote sale of drug paraphernalia did not violate constitutional guarantee of free speech merely because such advertisement encouraged criminal activity. *Bamboo Brothers v. Carpenter (1982) 133 Cal. App. 3d 116, 132, 183 Cal. Rptr. 748*

State prohibition against intentional or negligent dissemination of false and misleading commercial advertising did not violate *First Amendment*. *People v. Superior Court (1979) 96 Cal. App. 3d 181, 191, 195, 157 Cal. Rptr. 628* (upholding civil penalties for violation of *Bus. & Prof. Code §§ 17200* and *17500*)

Publication of beneficial information about drugs or treatments was protected by constitutional guarantees of free speech and press. *In re Schillaci (1961) 196 Cal. App. 2d 591, 594, 16 Cal. Rptr. 757*

[iii] Time, Place, and Manner Restrictions

Ban on all off-site, commercial outdoor signs was permissible to achieve goals of traffic safety and improved aesthetics. *Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490, 507, 512, 570, 101 S. Ct. 2882, 69 L. Ed. 2d 800* (plurality opinion of White, J.; dissenting opinion of Rehnquist, J.)

Ordinance prohibiting off-site commercial billboards while permitting on-site commercial billboards was proper; only restriction was that noncommercial messages must be permitted where commercial messages are permitted.

Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490, 512-517, 101 S. Ct. 2882, 69 L. Ed. 2d 800 ; *City of Salinas v. Ryan Outdoor Advertising, Inc. (1987) 189 Cal. App. 3d 416, 430-432, 234 Cal. Rptr. 619*

Ordinance banning all off-site commercial advertising, with exception of advertising placed on bus stop benches and shelters by agency that won open-bid contract to furnish and maintain benches and shelters in exchange for exclusive right to place advertising, was not unconstitutional under *First Amendment*. *Metro Lights, L.L.C. v. City of Los Angeles (9th Cir. 2009) 551 F.3d 898, 900, 914*

Ban on all off-site signs, whether commercial or noncommercial, was permitted because regulation is content-neutral. *City and County of San Francisco v. Eller Outdoor Advertising (1987) 192 Cal. App. 3d 643, 660-661, 237 Cal. Rptr. 815*

City ordinance prohibiting parking of vehicle on street to display it for sale was violation of *First Amendment* because, although it supported significant municipal interests, it was not necessary to achieve those interests. *People v. Moon (1978) 89 Cal. App. 3d Supp. 1, 5-6 , 152 Cal. Rptr. 704*

[b] Political Messages

City operating public rapid transit system and selling advertising space for car cards on its vehicles was not required by *First* and *Fourteenth Amendments* to accept paid political advertising on behalf of candidate for public office. *Lehman v. Shaker Heights (1974) 418 U.S. 298, 299, 302, 94 S. Ct. 2714, 41 L. Ed. 2d 770*

City's ordinance that prohibited "throw[ing] or deposit[ing] any commercial or noncommercial advertisement in or upon any vehicle" violated free-speech rights, under California Constitution, of individual who tried to distribute leaflets, which expressed disagreement with immigration policy, by placing them under windshield wipers of parked cars; city could not show that ordinance was "narrowly tailored" to advance its asserted interests to prevent littering, promote esthetic values, and prevent unauthorized use of private property. *Klein v. City of San Clemente (9th Cir. 2009) 584 F.3d 1196, 1207*

Ordinance prohibiting posting of political signs on public property within city was not overly broad in contravention of *First Amendment* rights. *Sussli v. San Mateo (1981) 120 Cal. App. 3d 1, 10, 173 Cal. Rptr. 781*

[8] Types of False and Misleading Advertising

[a] Alcohol

Application of *Bus. & Prof. Code § 25503(h)* to restrict advertising of alcoholic beverages on supermarket shopping carts did not violate *First Amendment* under standards of *Central Hudson v. Public Serv. Comm'n (1980) 447 U.S. 557, 563-566, 100 S. Ct. 2343, 65 L. Ed. 2d 341* . *Actmedia, Inc. v. Stroh (9th Cir. 1986) 830 F.2d 957, 965-968*

[b] Automobile Dealers

Department of Motor Vehicles properly revoked appellant's automobile dealer's license for violations of *Veh. Code § 11713(m)* (prohibiting licensed dealer from allowing another to use name, books, and license for selling vehicles) and

Veh. Code § 11705(a)(3) (knowingly making false statements or concealing material facts in applications for vehicle registration); *Veh. Code § 11713(m)* is not unconstitutionally vague. *Valiyee v. Department of Motor Vehicles (1999) 74 Cal. App. 4th 1026, 1032-1034, 88 Cal. Rptr. 2d 508*

Regulations promulgated by Department of Motor Vehicles in connection with *Veh. Code § 11713*, penalizing misleading statements of automobile dealers and their employees, were valid. *Ford Dealers Ass'n v. Department of Motor Vehicles (1982) 32 Cal. 3d 347, 356-369, 185 Cal. Rptr. 453, 650 P.2d 328*

[c] Charitable Solicitors

Commercial fundraisers intentionally deceived public by inaccurate and misleading solicitation, reporting, and accounting techniques in violation of Uniform Supervision of Trustees for Charitable Purposes Act [*Gov. Code § 12580 et seq.*] and charitable solicitation statutes [*Bus. & Prof. Code § 17510 et seq.*]. *People v. Orange County Charitable Services (1999) 73 Cal. App. 4th 1054, 1074, 87 Cal. Rptr. 2d 253*

[d] Gasoline Dealers

Bus. & Prof. Code § 13470.5, requiring gasoline dealer advertising price per liter to also display price per gallon, was not preempted by federal law [*15 U.S.C. §§ 204, 205a*-205k] making use of metric system lawful. *People v. Choi (1985) 167 Cal. App. 3d Supp. 6, 9-10 , 213 Cal. Rptr. 205*

[e] Misleading Language

Use of double-meaning words in advertising was misleading. *Garvai v. Board of Chiropractic Exmrs. (1963) 216 Cal. App. 2d 374, 379, 31 Cal. Rptr. 187* ; *Smulson v. Board of Dental Examiners (1941) 47 Cal. App. 2d 584, 590, 118 P.2d 483*

Advertising that member of medical profession is specialist was misleading and unprofessional when member had no special training or experience in field of alleged specialty. *Gustason v. Bd. of Osteopathic Exmrs. (1935) 10 Cal. App. 2d 436, 438-440, 51 P.2d 1106*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsEminent Domain & TakingsAntitrust & Trade LawConsumer ProtectionTelemarketingConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechCommercial SpeechAdvertisingConstitutional LawSupremacy ClauseFederal PreemptionAntitrust & Trade LawConsumer ProtectionFalse AdvertisingState Regulation

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§ 14.45 Attorney General Opinions

[1] Advertising by Professionals

Advertising by dentists. *64 Ops. Cal. Att'y Gen. 782 (1981)*

[2] False Advertising

Bus. & Prof. Code § 17531 requires merchandise to be advertised as "secondhand" or "used" even if used, worn, or sampled for only short time and returned by consumer to retailer in like-new condition, unless such use is for inspection purposes only. *81 Ops. Cal. Att'y Gen. 161 (1998)*

Bus. & Prof. Code § 17500 was violated when public was likely to be misled by statement that money contributed "goes directly to charity" when in fact it would be used for advertising and lobbying activities on behalf of peace officers' union. *66 Ops. Cal. Att'y Gen. 40, 50 (1983)*

Misleading advertising by service stations. *43 Ops. Cal. Att'y Gen. 174 (1964)*

Meaning of term "prevailing market price" as used in *Bus. & Prof. Code § 17501* (statements as to former price). *30 Ops. Cal. Att'y Gen. 127 (1957)*

False advertising by dry cleaners. *29 Ops. Cal. Att'y Gen. 175, 176 (1957)* ; *28 Ops. Cal. Att'y Gen. 277 (1956)*

New automobile sold by authorized dealer to used car dealer must not be advertised as "new" automobile. *12 Ops. Cal. Att'y Gen. 159 (1948)*

[3] Horse Racing

Constitutionality of *Bus. & Prof. Code § 19664* restricting advertisements concerning horse race predictions. *50 Ops. Cal. Att'y Gen. 117 (1967)*

[4] Labels

Label was advertisement within meaning of *Bus. & Prof. Code § 17508*; applicability of section must be determined on individual basis. *58 Ops. Cal. Att'y Gen. 297 (1975)*

[5] Labor Practices

Newspaper violated Fair Employment Practices Act (superseded by California Fair Employment and Housing Act [*see Gov. Code § 12900 et seq.*]) by printing "Help Wanted" ads in columns segregated by sex. *55 Ops. Cal. Att'y Gen. 53 (1972)*

[6] Outdoor Advertising

Power of county to adopt zoning ordinances removing certain advertising displays without payment of compensation was not prohibited by fact that Highway Beautification Act of 1965 regulates such displays [*23 U.S.C. § 131(g)*]. *55 Ops. Cal. Att'y Gen. 1 (1972)*

Outdoor Advertising Act [*Bus. & Prof. Code § 5200 et seq.*] was applicable to signs relating to political campaigns. *50 Ops. Cal. Att'y Gen. 3, 4 (1967)*

Right of county to enact ordinance prohibiting billboards within distance of freeways in unincorporated areas. *21 Ops. Cal. Att'y Gen. 43 (1953)*

[7] Political Advertising

Penal Code § 556 (prohibiting placement of advertising on public property) applies only to commercial advertising, not to campaign signs of candidates for public office. *70 Ops. Cal. Att'y Gen. 296 (1987)*

[8] Professions

Certified acupuncturist not licensed as physician or surgeon under Medical Practice Act was prohibited from using initials "O.M.D." or title "Oriental Medical Doctor" without additional information, in advertising acupuncture practice. *71 Ops. Cal. Att'y Gen. 54 (1988)*

Unlicensed building designer was not allowed to advertise by sign, card, or other device as being a specific type of member of *American Institute of Building Designers. 58 Cal. Op. Att'y Gen. 892 (1975)*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsPolice PowerAntitrust & Trade LawConsumer ProtectionFalse AdvertisingState Regulation

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§ 14.46 Law Reviews

Craswell, *Regulating Deceptive Advertising: The Role of Cost-Benefit Analysis, 64 S. Cal. L. Rev. 550 (1991)*

Spahn, *What You Should Know About Commercial Speech*, 37(6) Prac. Law. 15 (1991)

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§ 14.47 Text References

Rosden, The Law of Advertising, parts I, IV, X--XI (Matthew Bender)

Witkin, Summary of California Law, vol. 4, *Sales*, § 336-398 (10th ed. 2005)

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[Reserved]

§§ 14.48[Reserved]

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PART IV. FORMS

2-14 California Forms of Pleading and Practice--Annotated § 14.60

§ 14.60 Complaint for Temporary Restraining Order, Preliminary and Permanent Injunctions [Bus. & Prof. Code §§ 17203, 17535; Civ. Code § 3422; Code Civ. Proc. §§ 526, 527] and Restitution [Bus. & Prof. Code §§ 17203, 17535]--Untrue or Misleading Advertising [Bus. & Prof. Code § 17500] and Unfair Competition [Bus. & Prof. Code § 17200]

[1] FORM Complaint for Temporary Restraining Order, Preliminary and Permanent Injunctions [Bus. & Prof. Code §§ 17203, 17535; Civ. Code § 3422; Code Civ. Proc. §§ 526, 527] and Restitution [Bus. & Prof. Code §§ 17203, 17535]--Untrue or Misleading Advertising [Bus. & Prof. Code § 17500] and Unfair Competition [Bus. & Prof. Code § 17200]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR PRELIMINARY AND PER-
[and DOES I through _____,]	)	MANENT INJUCTIONS AND RESTITUTION
Defendant(s).	)	(Untrue or Misleading Advertising and Unfair Com-
	)	petition)
	)	

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Untrue or Misleading Advertising)

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a corporation organized and

existing under the laws of the State of California with its principal place of business in _____ [*city*], _____ County, California [*or allege other capacity and residence of defendant as appropriate*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleges were proximately caused by their conduct.)]

[3. (Plaintiff is informed and believes and thereon alleges that) (D)efendant _____ (*name*) was, at all times herein mentioned, the _____ (*specify position, e.g.,* advertising agent) of defendant _____ (*name*), was acting as the agent of defendant _____ (*name*), and in doing the things herein alleged was acting within the course and scope of such agency and with the permission and consent of defendant _____ (*name*). (Defendant is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California with its principal place of business in _____ [*city*], _____ County, California.)]

4. At all times herein mentioned, defendant _____ [*specify defendant's business, e.g.,* owned and operated a retail store known as "_____" (*name*) and located at _____ (*street address and city*), _____ County, California], in which defendant engaged in the _____ [*specify sale, lease or other disposal of real or personal property, or performance of services, e.g.,* retail sale of handbags and luggage]. [Defendant has filed and published the fictitious business name statement as required by *Business and Professions Code Sections 17910-17917*.]

5. Beginning on or about _____[*date(s)*] and continuing to the present time, defendant has engaged in advertising to the public, including plaintiff, and offering for _____ [*specify sale, lease or other disposal of real or personal property, or performance of services, e.g.,* sale certain luggage known as "_____" (*brand name*)]. The advertising consists of _____ [*specify advertising medium, e.g.,* consecutive weekly advertisements published in a daily newspaper, "_____" (*name of newspape* r)]. The advertisements are disseminated to and received by the public _____ [in California *or* in _____ (*name of state*) from California].

6. Defendant has engaged in the advertising herein alleged with the intent to directly or indirectly _____ [dispose of the property *or* perform the services] described herein and/or to induce the public to enter into an obligation relating to _____ [the property *or* the services] described herein.

7. Defendant's advertising was untrue or misleading and likely to deceive the public in that _____ [*specify one or more untrue or misleading statements concerning the advertised property or service, or concerning any circumstance or matter of fact connected with defendant's proposed disposition of the property or defendant's proposed performance of the service, e.g.,* it states that defendant's entire stock of "_____" (*brand name*) luggage is currently on sale at 50% off of the manufacturer's recommended retail price. However, the advertisements fail to state that the luggage consists of the manufacturer's rejects, or "seconds," which are of a quality inferior to the manufacturer's first-line regular quality luggage. Furthermore, the advertisements fail to state, or to imply, that the luggage is anything other than the manufacturer's first-line regular quality merchandise being offered for sale at a substantial discount in price]. [A true and correct copy of defendant's _____ (*specify advertising, e.g.,* newspaper advertise ments) is attached hereto, marked Exhibit "_____," and incorporated by reference.]

8. In making and disseminating the statement(s) herein alleged, defendant knew, or by the exercise of reasonable care should have known, that the statement(s) was/were untrue or misleading and so acted in violation of *Business and*

Professions Code Section 17500. _____ [Defendant's advertising further violates _____ (*specify one or more of remaining false-advertising statutes, Bus. & Prof. Code §§ 17500.5-17577.6, and allege facts showing violation of specified statute*)].

9. Plaintiff has suffered injury in fact and has lost _____ [money *or* property] as a result of the violation[s] alleged above in this complaint, in that _____ [*specify, e.g.,* plaintiff bought four items of the advertised luggage at the advertised price without knowing that the items were not in fact the manufacturer's first-line regular quality luggage].

10. Unless restrained by this court, _____[*specify grounds for injunctive relief, e.g.,* defendant _____ (*name*) will continue to engage in untrue and misleading advertising, as alleged above, in violation of *Business and Professions Code Section 17500* (and in violation of _____ [*specify one or more of remaining false advertising statutes, Bus. & Prof. Code §§ 17500.5-17577.6*]), thus tending to render judgment in the instant action ineffectual]. Plaintiff has no adequate remedy at law in that _____[*specify, e.g.,* defendant _____ (*name*) will continue to engage in untrue and misleading advertising, as alleged above, in violation of *Business and Professions Code Section 17500* (and in violation of _____ [*specify one or more of remaining false advertising statutes, Bus. & Prof. Code §§ 17500.5-17577.6*), thus engendering a multiplicity of judicial proceedings]).

SECOND CAUSE OF ACTION
(Unfair Competition)

11. Plaintiff refers to and incorporates herein Paragraphs 1 through 10 of the First Cause of Action.

12. Defendant's advertising, as alleged above, constitutes unfair competition in violation of *Business and Professions Code Section 17200*.

WHEREFORE, plaintiff prays judgment against defendant [s, and each of them,] as follows:

1. For an order requiring defendant _____[*name*] to show cause why he/she/it should not be enjoined as hereinafter set forth, during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant and his/her/its agents, servants, and employees, and all persons acting under, in concert with, or for him/her/it from:

Making, disseminating, or causing to be made or disseminated _____ [*specify public, e.g.,* before the public in this state], in any newspaper, other publication, or advertising device, by public outcry or proclamation, or in any other manner whatever, any statement concerning _____ [*specify product, e.g.,* the "_____" (*specify brand name*) luggage] sold in "_____" [*name of defendant's store*], or concerning any circumstance or matter of fact connected with the proposed performance thereof, that is untrue or misleading, and that is known, or by the exercise of reasonable care should be known, to be untrue or misleading;

3. For an order requiring defendant _____ [*name*] to _____ [*specify mode of restitution, e.g.,* accept a return of the rejected luggage purchased by plaintiff and to refund to plaintiff the purchase price of $_____ paid for the reject luggage];

4. For costs of suit incurred herein; and

5. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

CAUTION:

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 7 L.R.R.M. (BNA) 686(1940) 16 Cal. 2d 369; Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 199 Cal. App. 3d 1, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

[2] Use of Form

This complaint is for use by a plaintiff to state a cause of action for restitution and injunctive relief for false advertising and for unfair competition based on violation of *Bus. & Prof. Code § 17500*, the general statutory prohibition on false or misleading advertising. The complaint includes a cause of action for unfair competition because any violation of *Bus. & Prof. Code § 17500 et seq.* (regulation of advertising) is, by definition, unfair competition under *Bus. & Prof. Code § 17200* [*Bus. & Prof. Code § 17200*; *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 210, 197 Cal. Rptr. 783, 673 P.2d 660]* .

The form may be used to incorporate a cause of action based on violation of any of the remaining false advertising statutes, *Bus. & Prof. Code § 17500.5 et seq.* [*see §§ 14.63 -14.65*].

The form may also be combined, when appropriate, with a form of complaint for damages for fraud based on false advertising [*see §§ 14.61 -14.62*] or a form of complaint for damages under the Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*). Counsel should note that an action brought under the Consumers Legal Remedies Act is subject to special procedural requirements, which are discussed in Ch. 504, *Sales: Consumers Legal Remedies Act* .

Finally, the form may be adapted for use by plaintiffs bringing a class action for injunctive relief and restitution under *Bus. & Prof. Code §§ 17500, 17531*, and *17200* [*see Bus. & Prof. Code §§ 17203, 17535*, and *§ 14.18[4]*]. For a general discussion and forms relating to class actions, see Ch. 120, *Class Actions* .

[3] Allegations

The complaint states two causes of action. The first is for untrue or misleading advertising, and alleges:

- The identity, capacity, and principal place of business of defendant, if not sued as an individual (Paragraph 1) [*see Bus. & Prof. Code § 17500*].

- The fictitious names of defendants sued pursuant to *Code Civ. Proc. § 474*, if applicable (Paragraph 2).

- An agency or employment relationship between defendants, if applicable (Paragraph 3).

- That defendant made or disseminated an advertisement for the sale of a product or performance of a service before the public in California, or made and disseminated an advertisement from California before the public in any state (Paragraphs 4, 5) [*see Bus. & Prof. Code § 17500*].

- Defendant's intent, directly or indirectly, to dispose of the advertised property or perform the advertised service or to induce the public to enter into any obligation concerning it (Paragraph 6) [*Bus. & Prof. Code § 17500*].

- The untrue or misleading nature of statements in the advertisement (Paragraph 7) [*Bus. & Prof. Code § 17500*].

- Defendant's knowledge, or reason to know, the statements were untrue or misleading (Paragraph 8) [*Bus. & Prof. Code § 17500*; *see People v. Forest E. Olson, Inc. (1982) 137 Cal. App. 3d 137, 139, 186 Cal. Rptr. 804]* .

- Facts showing that the plaintiff was injured in fact and lost money or property as a result of the alleged violations [*Bus. & Prof. Code § 17535*; *see Bus. & Prof. Code §§ 17203, 17204* (same requirement for obtaining relief under unfair competition law)].

- Grounds for injunctive relief (Paragraph 10) [*see Bus. & Prof. Code § 17535*; *Civ. Code § 3422(3)* (permanent relief); *see Code Civ. Proc. § 526 (a)(1), (3)*, and*(6)* (preliminary relief)].

The second cause of action for unfair competition incorporates the allegations of the first cause of action (Paragraph 11), and then alleges that defendant's acts constitute unfair competition under *Bus. & Prof. Code § 17200* (Paragraph 12).

For further discussion and forms relating to injunctive relief and unfair competition in general, see Ch. 303, *Injunctions* , and Ch. 565, *Unfair Competition* , respectively.

[4] Jurisdiction

An action seeking permanent injunctive relief is in the jursdiction of the superior court and is not a limited civil case [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*].

[5] Statute of Limitations

Bus. & Prof. Code § 17535, which authorizes an action by a public official or private person for an injunction or restitution, contains no express limitation period. Therefore, it appears that such an action comes under the general three-year limitation period for actions based on a liability created by statute [*see Code Civ. Proc. § 338(a)*]. However, an action brought to enforce any cause of action for unfair competition under *Bus. & Prof. Code § 17200 et seq.* must be commenced within four years after the cause of action accrued [*Bus. & Prof. Code § 17208*]. Therefore, the second cause of action in the complaint, which incorporates the first cause of action, has a four-year limitation period. It appears that the entire action may be brought within four, rather than three, years. For further discussion of the statutes affecting the limitation period, see *§ 14.18[3]*.

[6] Pleading Exact Language of Advertising Not Required

Plaintiff need not plead the exact language of every deceptive statement. It is sufficient to describe a scheme to mislead customers, and to allege that each misrepresentation to each customer conforms to that scheme [*Committee on Children's Television, Inc. v. General Foods Corp. (1983)35 Cal. 3d 197, 211-213, 197 Cal. Rptr. 783, 673 P.2d 660* (class action involving numerous television commercials)].

[7] Allegations of Actual Deception, Reasonable Reliance, and Damage Not Required for Class-Action Relief

A court may order restitution without individualized proof of deception, reliance, and injury if the court determines that restitution is necessary to prevent the use or employment of practices prohibited by *Bus. & Prof. Code § 17500 et seq.* [*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 211, 197 Cal. Rptr. 783, 673 P.2d 660* ; *Fletcher v. Security Pacific National Bank (1979) 23 Cal. 3d 442, 453, 153 Cal. Rptr. 28, 591 P.2d 51]* .

[8] Injunctive Relief May Require Showing that Unlawful Practices Will Continue

Ordinarily injunctive relief is not available when the allegedly false or misleading advertising has ceased. However, a showing that past violations will probably recur is sufficient to warrant the issuance of an injunction [*People v. Toomey (1985) 157 Cal. App. 3d 1, 20, 203 Cal. Rptr. 642* (permanent injunction properly issued when defendant continued to sell different products using same deceptive marketing techniques and also violated terms of preliminary injunction)].

[9] Other Equitable Relief

In addition to an injunction and restitution, *Bus. & Prof. Code § 17535* authorizes a court to make any orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by defendant of any practices that violate the false advertising statutes. When appropriate, relief may include a requirement that defendant establish a fund to be used to provide refunds to purchasers and maintain records of complaints, refunds, and customer correspondence [*see People v. Toomey (1985) 157 Cal. App. 3d 1, 20-21, 203 Cal. Rptr. 642]* .

A court's power under *Bus. & Prof. Code §§ 17203* and *17535* is sufficient to allow it to require a warning to be placed on product packaging when necessary to correct or avoid the fraudulent and deceptive consequences of prior advertising [*Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy (1992) 4 Cal. App. 4th 963, 973-975, 6 Cal. Rptr. 2d 193]* .

[10] Notification Requirement

When a violation of *Bus. & Prof. Code § 17200 et seq.* is alleged or the application or construction of *Bus. & Prof. Code § 17200 et seq.* is in issue in any proceeding in the California Supreme Court, a California court of appeal, or the appellate department of a superior court, each person filing a brief or petition with the court in that proceeding must

serve, within three days of filing with the court, a copy of that brief or petition on the Attorney General, directed to the attention of the Consumer Law Section at a service address designated on the Attorney General's official web site for service of papers under *Bus. & Prof. Code § 17209* or, if no service address is designated, at the Attorney General's office in San Francisco, and on the district attorney of the county in which the lower court action or proceeding was originally filed. On the Attorney General's or district attorney's request, each person who has filed any other document, including all or a portion of the appellate record, with the court in addition to a brief or petition must provide a copy of that document without charge to the Attorney General or the district attorney within five days of the request. The time for service may be extended by the Chief Justice or presiding justice or judge for good cause shown. No judgment or relief, temporary or permanent, may be granted or opinion issued until proof of service of the brief or petition on the Attorney General and district attorney is filed with the court [*Bus. & Prof. Code § 17209*].

[11] California Statutes

Violation of *Bus. & Prof. Code § 17500 et seq.* (prohibited advertising practices) is unfair competition. *Bus. & Prof. Code § 17200*

Action brought to enforce any cause of action *Bus. & Prof. Code § 17200 et seq.* (unfair competition) required to be commenced within four years after cause of action accrued. *Bus. & Prof. Code § 17208*

Injunctive and other equitable relief, including restitution, available in actions for violation of Bus. & Prof. Code*§ 17500 et seq. Bus. & Prof. Code* §§ 17203, 17204, 17535

Relief available under *Bus. & Prof. Code § 17203* is cumulative to remedies available under all other laws. *Bus. & Prof. Code § 17205*

Untrue or misleading advertising prohibited. *Bus. & Prof. Code § 17500*

Action on liability created by statute must be commenced within three years. *Code Civ. Proc. § 338(a)*

Action brought under *Bus. & Prof. Code § 17536* (civil penalties) must be commenced within three years. *Code Civ. Proc. § 338(h)*

[12] Decisions

Claims for injunctive relief under *Bus. & Prof. Code § 17500* are not subject to arbitration; holding in *Broughton v. Cigna Healthplans of California (1999) 21 Cal. 4th 1066, 1082, 90 Cal. Rptr. 2d 334, 988 P.2d 67* , regarding non-arbitrability of public injunctions under Consumers Legal Remedies, extended to include claims to enjoin unfair competition under *Bus. & Prof. Code § 17200 et seq.* and misleading advertising under *Bus. & Prof. Code § 17500 et seq.* *Cruz v. Pacificare Health Systems, Inc. (2003) 30 Cal. 4th 303, 307, 316, 133 Cal. Rptr. 2d 58, 66 P.3d 1157*

In class action for injunctive relief under *Bus. & Prof. Code §§ 17203, 17535*, plaintiff is not required to plead exact language of every deceptive statement if plaintiff describes scheme to mislead customers and alleges that each misrepresentation to each customer conforms to that scheme. *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 212-213, 197 Cal. Rptr. 783, 673 P.2d 660*

In class action for injunctive relief and restitution under *Bus. & Prof. Code § 17535*, language of *Bus. & Prof. Code § 17535* is unquestionably broad enough to authorize trial court to order restitution without requiring showing of individual class member's lack of knowledge of fraudulent practice in each transaction. *Fletcher v. Security Pacific National Bank (1979) 23 Cal. 3d 442, 451, 452, 153 Cal. Rptr. 28, 591 P.2d 51*

Burden of proving that false advertising claims were false or misleading properly rests with plaintiff; it would be inappropriate to shift burden of proof to defendant in private plaintiff false advertising action when private plaintiff is not authorized by statute to seek substantiation of advertising claim from defendant. *National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc. (2003) 107 Cal. App. 4th 1336, 1345, 1348, 133 Cal. Rptr. 2d 207*

Action that sought only to enjoin misleading practices in advertising of phone card rates and sought no monetary recovery did not implicate federal "filed rate doctrine" [*47 U.S.C. § 203*] and stated cause of action under *Bus. & Prof. Code §§ 17200, 17500*. *Day v. AT&T Corp. (1998) 63 Cal. App. 4th 325, 335-337, 74 Cal. Rptr. 2d 55*

Consumers' class action for injunction of false advertising and damages for breach of contract arising from opening envelope that offered free prize "just for opening envelope" although interior required recipient to subscribe to receive prize was properly dismissed even though claims were technically correct, because law disregards trifles (*Civ. Code § 3533*). *Harris v. Time, Inc. (1987) 191 Cal. App. 3d 449, 455-458, 237 Cal. Rptr. 584* .

[13] Cross References

For a comprehensive procedural guide that chronologically outlines procedures in a typical civil action brought in California state court, see Ch. 2, *Procedural Guide for Civil Actions*

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For allegations showing proper venue, see Ch. 571, *Venue*

For alternative verification forms, see Ch. 572, *Verification*

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2-14 California Forms of Pleading and Practice--Annotated § 14.61

§ 14.61 Complaint for Damages [Civ. Code §§ 3294, 3333]--False Advertising--Negligent or Intentional Misrepresentation of Fact [Civ. Code §§ 1709, 1710]

[1] FORM Complaint for Damages [Civ. Code §§ 3294, 3333]--False Advertising--Negligent or Intentional Misrepresentation of Fact [Civ. Code §§ 1709, 1710]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff(s),	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Fraud)
through _____,]	)	[Amount demanded _____ (exceeds
Defendant(s).	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Negligent Misrepresentation)

[1. *Identity and capacity of defendant. see § 14.60, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. see § 14.60, Paragraph 2.*]

[3. *Agency allegation, if appropriate. see § 14.60, Paragraph 3.*]

4. At all times herein mentioned, defendant was engaged in the [manufacturing, marketing, distributing for sale, selling, and] advertising of _____ [*specify product or service advertised, e.g.,* a breakfast cereal bearing the name "_____"] to the public.

5. On or about _____ [*specify, e.g.,* January 1988 to August 1989], defendant represented to the public, including plaintiff(s), by means of advertisements _____ [published *or* broadcast] _____ [*specify advertising medium, e.g.,* on television station _____ (*identify station*)], that _____[*specify representations of fact, e.g.,* "_____" (*name of cereal*), when eaten in moderate amounts, would reduce the risk of heart disease in adults]. A _____ [true and correct copy *or* representative selection] of defendant's advertisements is attached as Exhibit "_____."

6. Defendant's representations were untrue in that _____[*specify, e.g,* an average male adult would in fact need to consume _____ (*amount*) of defendant's breakfast cereal per day to achieve any appreciable reduction in the risk of heart disease].

7. Defendant made the representations herein alleged with the intention of inducing the public to purchase defendant's _____[*specify product or service, e.g.,* breakfast cereal].

8. On or about _____ [*specify, e.g.,* January 1988 to August 1990], plaintiff saw, believed, and relied on defendant's advertising representations and, in reliance on them, purchased _____[*specify product or service, e.g.,* approximately one _____ (*size*) box of defendant's breakfast cereal per week].

9. At the time defendant made the misrepresentations herein alleged, defendant had no reasonable grounds for believing the representations to be true.

10. As a proximate result of defendant's negligent misrepresentations, plaintiff was induced to spend a total of $ _____ on defendant's _____ [*specify product or service, e.g.,* breakfast cereal].

[11. As a further proximate result of defendant's negligent misrepresentations, plaintiff suffered personal injury in the following respects: _____(*specify, e.g.,* plaintiff has suffered an increase rather than a reduction in his cholesterol level, is at increased risk for disabling heart disease, and has incurred medical expenses for treatment of his condition).]

SECOND CAUSE OF ACTION
(Intentional Misrepresentation)

12. Plaintiff refers to and herein incorporates Paragraphs 1-8, inclusive, of the First Cause of Action.

13. At the time defendants made the representations herein alleged, defendants knew the representations were false.

[14. Defendant made the misrepresentations herein alleged with the intention of depriving plaintiff of property or legal rights or otherwise causing injury, and was guilty of fraud.]

15. As a proximate result of defendant's intentional misrepresentations, plaintiff was induced to spend a total of $ _____ on defendant's _____ [*specify product or service, e.g.,* breakfast cereal].

[16. As a further proximate result of defendant's intentional misrepresentations, plaintiff suffered personal injury in the following respects: _____(*specify, e.g.,* plaintiff has suffered an increase rather than a reduction in his cholesterol level, is at increased risk for disabling heart disease, and has incurred medical expenses for treatment of his

condition).]

WHEREFORE, plaintiff prays judgment against defendant [s, and each of them,] as follows:

1. For general damages in the sum of $ _____;

2. For damages for _____ [*specify*] in the sum of $_____;

[3. For punitive damages;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. see § 14.60.*]

[2] Use of Form

This complaint is for use in an action for negligent or intentional misrepresentation in advertising [*see Civ. Code § 1710(1), (2)*; *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 215-221, 197 Cal. Rptr. 783, 673 P.2d 660]* .

This form may be combined with a complaint for injunctive relief and restitution for violation of the false advertising statutes [*see Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 209-221, 197 Cal. Rptr. 783, 673 P.2d 660* ; *see also § 14.60*]. It may also be combined, when appropriate, with form of complaint for damages under the Consumers Legal Remedies Act (*Civ. Code § 1750 et seq.*). Counsel should note that an action brought under the Consumers Legal Remedies Act is subject to special procedural requirements, which are discussed in *§ 14.43[4]* and in Ch. 504, *Sales: Consumers Legal Remedies Act*.

Finally, this form may be adapted for use by plaintiffs bringing a class action for damages [*see Code Civ. Proc. § 382*; for general discussion and forms relating to class actions, see Ch. 120, *Class Actions*].

[3] Allegations

The first cause of action in this complaint is for negligent misrepresentation and alleges:

- The identity, capacity, and principal place of business of defendant, if not sued as an individual (Paragraph 1)

- The fictitious names of defendants sued pursuant to *Code Civ. Proc. § 474*, if applicable (Paragraph 2)

- An agency or employment relationship between defendants, if applicable (Paragraph 3)

- Defendant's misrepresentation of fact to plaintiff (Paragraphs 4-6) [*Civ. Code § 1710(1)*; *Hauter v.*

Zogarts (1975) 14 Cal. 3d 104, 111, 120 Cal. Rptr. 681, 534 P.2d 377] .

- Defendant's intent to induce reliance (Paragraph 7) [*see Wennerholm v. Stanford Univ. Sch. of Med. (1942) 20 Cal. 2d 713, 716, 128 P.2d 522]* .

- Plaintiff's justifiable reliance (Paragraph 8) [*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 218-219, 197 Cal. Rptr. 783, 673 P.2d 660]* .

- Defendant's negligence (Paragraph 9) [*Civ. Code § 1710(1)*]; and

- Plaintiff's damages (Paragraph 10) [*Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 219-220, 197 Cal. Rptr. 783, 673 P.2d 660]* .

The second cause of action, which is for intentional misrepresentation, incorporates the allegations of the first cause of action and also alleges (1) defendant's knowledge of the falsity of the representations (Paragraph 13) [*Civ. Code § 1710(1)*]; (2) defendant's fraudulent intent, as a basis of a request for punitive damages (Paragraph 13) [*Civ. Code § 3294(a), (c)*].

[4] Statute of Limitations

The statute of limitations for an action for fraud is three years from the time the cause of action accrues [*Code Civ. Proc. § 338(d)*]. For discussion of how accrual of a cause of action for fraud is affected by delayed discovery of the fraud, see Ch. 269, *Fraud and Deceit* .

[5] Damages

For a discussion of the amount and type of damages recoverable in an action for fraud, see Ch. 269, *Fraud and Deceit* .

[6] Verification

Verification of this complaint is not required, but verification of the complaint requires the defendant to file a verified answer in an action in superior court other than a limited civil case [*Code Civ. Proc. §§ 92, 446*] and precludes a general denial in superior court and some limited civil cases [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[7] California Statutes

Liability for damages for fraud. *Civ. Code § 1709*

Elements of intentional fraud. *Civ. Code § 1710(1)*

Elements of negligent fraud. *Civ. Code § 1710(2)*

Elements of fraudulent concealment. *Civ. Code § 1710(3)*

Punitive damages for fraud. *Civ. Code § 3294(a), (c)(3)*

Compensatory damages generally. *Civ. Code § 3333*

Compensatory damages for fraud. *Civ. Code § 3343*

Statute of limitations for fraud. *Code Civ. Proc. § 338(d)*

[8] Decisions

Elements of intentional fraud generally. *Molko v. Holy Spirit Ass'n (1988) 46 Cal. 3d 1092, 1108, 252 Cal. Rptr. 122, 762 P.2d 46*

Cause of action for violation of consumer statutes and intentional and negligent fraud based on fraudulent advertisement of children's breakfast cereals. *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 209-221, 197 Cal. Rptr. 783, 673 P.2d 660*

Strict requirement that fraud be pleaded factually and specifically are relaxed when circumstances make specific pleading impossible and impractical; in such cases, plaintiff may allege that he or she acted in response to advertising campaign, even if plaintiff cannot recall specific advertisements. *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 216-219, 197 Cal. Rptr. 783, 673 P.2d 660*

Cause of action for personal injuries based on fraudulent advertisement of drug. *Wennerholm v. Stanford Univ. Sch. of Med. (1942) 20 Cal. 2d 713, 715-716, 128 P.2d 522*

[9] Cross References

For discussion and forms relating to fraud generally, see Ch. 269, *Fraud and Deceit*

See also Comments and References to § 14.60.

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2-14 California Forms of Pleading and Practice--Annotated § 14.62

§ 14.62 Allegation--Negligent Endorsement of Defective Product

[1] FORM Allegation--Negligent Endorsement of Defective Product

1. At all times herein mentioned, defendant was engaged in the endorsement of _____ [*describe defective product, e.g.,* women's shoes] by means of _____ [*specify form of endorsement, e.g.,* a seal entitled "Family Journal Consumers' Guaranty Seal"], which represents that _____ [*set forth relevant portions of endorsement, e.g.,* the products and services endorsed are good ones and the advertising claims made for them are truthful].

2. On or about _____ [*date(s)*], defendant's endorsement as herein alleged was made to the public, including plaintiff(s), by means of advertisements _____ [published *or* broadcast] _____ [*specify advertising medium, e.g.,* in "Family Journal Magazine"]. A _____ [true and correct copy *or* representative selection] of defendant's endorsement is attached hereto as Exhibit "_____." In so advertising and endorsing _____ [*describe defective product, e.g.,* the women's shoes], defendant represented that this product bearing defendant's endorsement had been examined, tested, and inspected by defendant and were of good quality and safe for their intended uses.

3. Plaintiff is informed and believes and thereon alleges that the use of defendant's endorsement was paid for by _____ [*name of advertiser*] and that defendant endorsed _____[*describe defective product*] for its own economic gain.

[2] Use of Form

This allegation is for insertion in *see § 14.61* in lieu of Paragraphs 4 and 5 in that form. The allegation is for use in an action for negligent misrepresentation against one who advertises and endorses the quality and fitness of a defective product [*see Hanberry v. Hearst Corp. (1969) 276 Cal. App. 2d 680, 682, 81 Cal. Rptr. 519]* .

[3] Allegations

This form alleges (1) defendant's business of endorsing the quality of consumer products (Paragraph 1); and (2) that in

its endorsement defendant represented to plaintiff that the product had been examined, tested, and inspected by defendant and was of good quality and safe for its intended uses (Paragraph 2) [*see Hanberry v. Hearst Corp. (1969) 276 Cal. App. 2d 680, 683-684, 81 Cal. Rptr. 519]* ; and defendant made the endorsement for his or her own economic gain (Paragraph 3) [*see Hanberry v. Hearst Corp. (1969) 276 Cal. App. 2d 680, 683, 81 Cal. Rptr. 519]* .

[4] Decisions

Absent endorsement or sponsorship for economic gain, publisher of advertisement has no duty to investigate safety of advertised product and no liability for injuries sustained from use of product. *Walters v Seventeen Magazine (1987) 195 Cal. App. 3d 1119, 1121-1122, 241 Cal. Rptr. 101*

Product endorser is liable to purchaser who relies on endorsement and is injured because product is defective and not as represented in endorsement. *Hanberry v. Hearst Corp. (1969) 276 Cal. App. 2d 680, 683, 81 Cal. Rptr. 519*

[5] Cross References

For discussion and forms relating to strict liability in tort for the manufacture and sale of defective products, see Ch. 460, *Products Liability* .

See also Comments and References to § 14.61.

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2-14 California Forms of Pleading and Practice--Annotated § 14.63

§ 14.63 Complaint for Losses, Expenses, and Penalty for Unlawful Advertising--False Advertisement of Quantity of Article to Be Sold to Single Customer in Single Transaction [Bus. & Prof. Code § 17500.5]

[1] FORM Complaint for Losses, Expenses, and Penalty for Unlawful Advertising--False Advertisement of Quantity of Article to Be Sold to Single Customer in Single Transaction [Bus. & Prof. Code § 17500.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff(s),	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AND PENALTY
_____ [*name*], [and DOES I	)	(False Advertisement)
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Identity and capacity of defendant. see § 14.60, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. see § 14.60, Paragraph 2.*]

[3. *Agency allegation, if appropriate. see § 14.60, Paragraph 3.*]

4. At all times herein mentioned, defendant was engaged in the [manufacturing, marketing, distributing for sale, and] retail sale and advertising of _____[*specify product or service, e.g.,* home entertainment equipment, including videocassette tapes,] to the public.

5. On or about _____ [*date(s)*], defendant represented to the public, including plaintiff(s), by means of advertisements _____ [published *or* broadcast] _____ [*specify advertising medium, e.g.,* in "The Blackacre Times," a daily newspaper], that _____ [*specify misrepresentation concerning quantity of article advertised, e.g.,* high-quality videocassette tapes were for sale for one day only, on _____(*date*), for a price of $3.50 per tape]. The advertisement contained no statement that there was a restriction on the quantity of the article that would be sold to any one customer on his or her demand in a single transaction. [A true and correct copy of defendant's advertisement is attached hereto as Exhibit "_____."]

6. On or about _____ [*date(s)*], plaintiff, in response to the advertisement of defendant herein alleged, entered defendant's place of business seeking to buy _____ [*specify quantity of advertised article, e.g.,* 100 videocassette tapes]. Defendant refused to sell to plaintiff the article at the price advertised in the quantity plaintiff wished to buy. Plaintiff alleges on information and belief that the article in that quantity was then available for sale on the premises.

7. In doing the acts herein alleged, defendant _____[willfully *or* negligently] failed to include in the advertisement a statement that a restriction was in fact put on the quantity of the article that would be sold to any one customer on his or her demand in a single transaction.

8. As a result of defendant's false representation by advertisement of the quantity of the article to be sold, plaintiff incurred losses and expenses in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant [s, and each of them,] as follows:

1. For losses and expenses in the amount of $ _____;

2. For the sum of $50 pursuant to *Section 17500.5(b) of the Business and Professions Code*;

3. For costs herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired*]

[2] Use of Form

This complaint is for use by plaintiff to recover losses, expenses, and a penalty for false advertising against a seller who willfully or negligently fails to include in an advertisement a restriction that is in fact put on the quantity of any article offered for sale to any one customer on demand in a single transaction [*Bus. & Prof. Code § 17500.5(a), (b)*]. The form is not for use by a customer who purchases for resale or who is refused credit by a seller who otherwise may lawfully do so [*Bus. & Prof. Code § 17500.5(c)*].

The form may be combined with a general complaint for injunction and restitution under *Bus. & Prof. Code §§ 17535,* and *17203* for violation of the false advertising laws [*see § 14.60*].

[3] Allegations

This complaint alleges:

- The identity, capacity, and principal place of business of defendant, if not sued as an individual (Paragraph 1)

- The fictitious names of defendants sued pursuant to *Code Civ. Proc. § 474*, if applicable (Paragraph 2)

- An agency or employment relationship between defendants, if applicable (Paragraph 3);

- Defendant's business of advertising and retail sale of the advertised article (Paragraph 4) [*see Bus. & Prof. Code § 17500.5(b)*].

- Defendant's false representation concerning the quantity of the article that would be sold to any one customer on his or her demand in a single transaction, and defendant's willful or negligent failure to include in the advertisement a statement that there is in fact a quantity restriction (Paragraphs 5 and 7) [*Bus. & Prof. Code § 17500.5(a)*].

- Plaintiff's inducement to enter defendant's business seeking to buy the article and defendant's refusal to sell the article at the price advertised in any quantity available for sale on the premises (Paragraph 6) [*Bus. & Prof. Code § 17500.5(b)*]; and

- Losses and expenses incurred by plaintiff (Paragraph 8) [*Bus. & Prof. Code § 17500.5(b)*].

[4] Statute of Limitations

Bus. & Prof. Code § 17500.5 does not specify the limitation period within which an action brought under the statute must be commenced. Therefore, it appears that such an action comes under the general three-year limitation period for actions based on a liability created by statute [*see Code Civ. Proc. § 338(a)*]. For further discussion, see the Comments to *see § 14.60*.

[5] Action by Individual Consumer Only

An action under *Bus. & Prof. Code § 17500.5* can only be brought in the name of, and on behalf of, a single plaintiff and not as multiple plaintiff or class actions [*Bus. & Prof. Code § 17500.5(d)*]. The cause of action is available to any individual retail purchaser and consumer [*Bus. & Prof. Code § 17500.5(b)*].

Counsel should note that a class action may be brought under the Consumers Legal Remedies Act (*Civ. Code § 1750 et seq.*), which makes a person liable to a consumer for advertising goods or services with the intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity [*see Civ. Code §§ 1770(j), 1780, 1781*]. An action brought under the Consumers Legal Remedies Act is subject to special procedural requirements, which are discussed in *§ 14.43[4]* and in Ch. 504, *Sales: Consumers Legal Remedies Act*.

[6] Cross References

See also Comments and References to § 14.60.

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§ 14.64 Complaint for Damages [Bus. & Prof. Code § 17537.4] for Unlawful Advertising--Offer of Conditional Prize or Gift [Bus. & Prof. Code § 17537]

[1] FORM Complaint for Damages [Bus. & Prof. Code § 17537.4] for Unlawful Advertising--Offer of Conditional Prize or Gift [Bus. & Prof. Code § 17537]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Unlawful Offer of Prize or Gift)
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Identity and capacity of defendant. see § 14.60, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. see § 14.60, Paragraph 2.*]

[3. *Agency allegation, if appropriate. see § 14.60, Paragraph 3.*]

4. At all times herein mentioned, defendant(s) owned and operated a business known as "_____" [*name of business*] located at _____ [*street address, city, county, and state*], in which defendant(s) _____ [*specify type of business, e.g.,* provided photographic film processing services and sold photographic equipment and supplies].

[*EITHER*]

5. On or about _____ [*date*], defendant(s) notified plaintiff that he/she had won _____[*identify prize, e.g.,* a free camera and 100 free rolls of film] as a "prize" and that, as a condition of receiving the prize, plaintiff had to pay money or purchase or rent goods or services. The offer was made to plaintiff at _____ [*street address, city, county, and state*] by means of _____ [*specify means of offer, e.g.,* a letter mailed to plaintiff's residence] and was part of an advertising plan or program of defendant(s). A _____ [true and correct copy *or* declaration by plaintiff that recites the verbal contents] of defendant's/defendants' offer is attached as Exhibit "_____."

[*OR*]

5. On or about _____ [*date*], defendant(s) notified plaintiff that he/she would receive _____[*identify gift, e.g.,* a camera and 100 rolls of film] as a "gift" and that, as a condition of receiving the gift, plaintiff had to pay money, or purchase or lease goods or services. The notification was made to plaintiff at _____ [*street address, city, county, and state*] by means of _____ [*specify, e.g.,* a letter mailed to plaintiff's home address]. A _____[true and correct copy *or* declaration by plaintiff that recites the verbal contents] of defendant's/defendants' offer is attached as Exhibit "_____."

6. In notifying plaintiff that he/she had received the "gift," _____ [*allege existence of one or more conditions specified in Bus. & Prof. Code § 17537(c), e.g.,* defendant represented that plaintiff had been specially selected and _____ (the representation was untrue *or* plaintiff made no purchase from defendant within the six-month period before the offer was made and had no credit card issued by defendant or retail installment account with defendant].

[*OR*]

5. On or about _____ [*date*], defendant(s) notified plaintiff that he/she would receive _____[*identify item, e.g.,* a free camera and 100 free rolls of film] as _____ [*specify term similar to a "prize" or "gift," e.g.,* an award] in a manner that was untrue and misleading, in that _____[*specify how communication was untrue or misleading, e.g.,* defendant failed to inform plaintiff that, as a condition of receiving the award, plaintiff had to agree in writing to pay defendant to develop the film]. The notification was made by means of _____ [*specify, e.g.,* a letter mailed to plaintiff's home address]. A _____ [true and correct copy *or* declaration by plaintiff that recites the verbal contents] of defendant's/defendants' offer is attached as Exhibit "_____."

[*CONTINUE*]

6/7. As a result of defendant's/defendants' violation of *Section 17537 of the Business and Professions Code* in the manner described above, plaintiff has been damaged in that _____ [*describe actual damages*], in the sum of $ _____.

WHEREFORE, plaintiff prays judgment against defendant [s, and each of them,] as follows:

1. For three times the amount of actual damages in the sum of $ _____;

2. For reasonable attorney's fees;

3. For costs herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. see § 14.60.*]

[2] Use of Form

This complaint is for use by a private plaintiff to bring an action for treble damages and attorney's fees against a person, or the employee or agent of a person, who violates *Bus. & Prof. Code § 17537* when making an offer subject to that statute [*Bus. & Prof. Code § 17537.4*]. An offer of a "prize" is subject to *Bus. & Prof. Code § 17537* when it is part of an advertising plan or program and notifies the recipient that he or she must pay money or purchase or rent goods or services as a condition of receiving the prize [*Bus. & Prof. Code § 17537(b)*]. An offer of a "gift" is subject to *Bus. & Prof. Code § 17537* when it notifies the recipient that he or she must pay money or purchase or lease goods or services as a condition of receiving the gift, and one of the other statutorily specified conditions exist [*Bus. & Prof. Code § 17537(c)*; for further discussion, *see § 14.13[12][c]*].

This form may be combined with a general form of complaint for injunction and restitution under *Bus. & Prof. Code §§ 17535* and *17203* for violation of the false advertising laws [*see § 14.60*]. For a form alleging unlawful advertising as an inducement to visit a location, attend a sales presentation, or contact a sales agent, see *§ 14.65*.

[3] Allegations

This complaint alleges:

- The identity, capacity, and principal place of business of defendant, if not sued as an individual (Paragraph 1).

- The fictitious names of defendants sued pursuant to *Code Civ. Proc. § 474*, if applicable (Paragraph 2).

- An agency or employment relationship between defendants, if applicable (Paragraph 3).

- That defendant owned and operated a business (Paragraph 4).

- That defendant notified plaintiff by some means, as part of an advertising plan or program, that plaintiff had won a "prize" and that, as a condition of receiving the prize, plaintiff had to pay money or purchase or rent goods or services (first alternative Paragraph 5) [*Bus. & Prof. Code § 17537(b)*].

- That defendant notified plaintiff by some means that plaintiff would receive a "gift" and that, as a condition of receiving the gift, plaintiff had to pay money or purchase or lease goods or services, and one of the conditions specified by statute existed (second alternative Paragraphs 5-6) [*Bus. & Prof. Code §*

17537(c)].

- That defendant used a term similar to "prize" or "gift" in a manner that was untrue or misleading (third alternative Paragraph 5) [*Bus. & Prof. Code § 17537(a)*].

- That the offer was made to plaintiff in a particular location (three alternative Paragraphs 5-6) [*see Code Civ. Proc. §§ 395(a), 395.5* (venue)].

- That plaintiff was damaged by defendant's violation of *Bus. & Prof. Code § 17537* (Paragraph 6/7) [*Bus. & Prof. Code § 17537.4*].

[4] Statute of Limitations

Bus. & Prof. Code § 17537.2 does not specify the limitation period within which an action brought under the statute must be commenced. Therefore, it appears that such an action comes under the general three-year limitation period for actions based on a liability created by statute [*see Code Civ. Proc. § 338(a)*]. For further discussion, see *§ 14.60*.

[5] California Statutes

Attorney General authorized to bring action for violation of Bus. & Prof. Code*§ 17500 et seq. Bus. & Prof. Code* §§ 17535 (injunction), 17536(a) (civil penalty)

Use of term "prize," "gift," or other similar term in untrue or misleading manner is unlawful. *Bus. & Prof. Code § 17537(a)*

Notification of person as part of advertising plan or program that he or she has won conditional prize as unlawful. *Bus. & Prof. Code § 17537(b)*

Notification of person that he or she will receive conditional gift is unlawful when specified statutory conditions exist. *Bus. & Prof. Code § 17537(c)*

Definitions. *Bus. & Prof. Code § 17537(d)*

Criminal penalties. *Bus. & Prof. Code § 17537(e)*

Civil action for treble damages and reasonable attorney's fees for violation of *Bus. & Prof. Code § 17537. Bus. & Prof. Code § 17537.4*

[6] Decisions

Defendant's sales letter that implied that consumer was to receive gift, award, or prize and only contained disclaimer to this implication in much smaller print on fourth page of materials violated, among other statutes, *Bus. & Prof. Code 17537. People v. Columbia Research Corp. (1977) 71 Cal. App.3d 607, 610-611, 139 Cal. Rptr. 517 , cert. denied, 434 U.S. 904* (upholding injunction)

[7] Cross References

See also Comments and References to § 14.60.

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Volume 2: Adoptions thru Airplanes and Airports-Chs. 12-17
Chapter 14 ADVERTISING
PART IV. FORMS

2-14 California Forms of Pleading and Practice--Annotated § 14.65

§ 14.65 Complaint for Damages [Bus. & Prof. Code § 17537.4] for Unlawful Advertising--Inducement to Visit Location, Attend Sales Presentation, or Contact Sales Agent [Bus. & Prof. Code § 17537.1]

[1] FORM Complaint for Damages [Bus. & Prof. Code § 17537.4] for Unlawful Advertising--Inducement to Visit Location, Attend Sales Presentation, or Contact Sales Agent [Bus. & Prof. Code § 17537.1]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Unlawful Inducement in Advertisement)
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Identity and capacity of defendant. see § 14.60, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. see § 14.60, Paragraph 2.*]

[3. *Agency allegation, if appropriate. see § 14.60, Paragraph 3.*]

4. At all times herein mentioned, defendant(s) owned and operated a business known as "_____" [*name of business*] located at _____ [*street address, city, county, and state*], in which defendant(s) _____ [*specify type of business, e.g.,* provided gambling, restaurant services, and stage entertainment to the public].

5. On or about _____ [*date*], defendant(s) offered plaintiff _____ [*specify incentive, e.g.,* a packet of vacation certificates purportedly valuing $250] as an inducement to plaintiff _____ [to visit _____(*specify location, e.g.,* defendant's gambling casino located at _____ (*street address, city, and state*)) *or* to attend a sales presentation *or* to contact a sales agent in person, by telephone, or by mail].

6. The offer was made to plaintiff at _____[*street address, city, county, and state*] by means of _____ [*specify means of offer, e.g.,* a letter, brochure, and certificates mailed to plaintiff's residence] and was part of an advertising plan or program of defendant(s). A _____[true and correct copy *or* declaration by plaintiff which recites the verbal contents] of defendant's/defendants' offer is attached as Exhibit "_____."

[*EITHER*]

7. Defendant's/Defendants' offer did not clearly and conspicuously disclose in writing, in readily understandable language, each of the disclosures required by *Section 17537.1(a) of the Business and Professions Code*.

[*AND/OR*]

8. Defendant(s), or an employee or agent of, or independent contractor authorized by, defendant(s), _____ [*specify representation made in violation of Bus. & Prof. Code § 17537.1(g); e.g.,* represented by implication that the number of participants in defendant's/defendants' advertising plan or program was significantly limited when in fact similar offers were made to hundreds of thousands of people across the country].

[*AND/OR*]

9. Plaintiff responded to the offer in the manner specified therein, performed the requirements disclosed in the offer, and met the qualifications described in the offer.

10. Defendant(s), or an employee or agent of, or independent contractor authorized by, defendant(s), failed to provide _____[*specify offered incentive, e.g.,* a free double room for two nights in a first-class hotel].

[11. Defendant(s), or an employee or agent of, or independent contractor authorized by, defendant(s), knew or had reason to know that the offered item would not be available in a sufficient quantity based on the reasonably anticipated response to the offer.]

[12. Defendant's/defendants' offer did not disclose the reservation of a right to provide a raincheck, or a like or substitute item, if the offered item was unavailable.]

[13. Defendant(s) did not inform plaintiff of plaintiff's right to receive a raincheck for the item offered or of the right to receive one of the options provided for in *Section 17537.1(d) of the Business and Professions Code*.]

[*AND/OR, if raincheck was provided*]

14. On or about _____ [*date*], defendant(s) provided plaintiff a raincheck because the offered item was

unavailable. Defendant(s) subsequently failed to deliver to plaintiff's address, without additional cost or obligation, either the agreed item or a like or substitute item of equal or greater value within the time requirements of *Section 17537.1(e) of the Business and Professions Code*.

[*CONTINUE*]

15. As a result of defendant's/defendants' violation of *Section 17537.1 of the Business and Professions Code* in the manner described above, plaintiff has been damaged in that _____ [*describe actual damages*], in the sum of $ _____.

WHEREFORE, plaintiff prays judgment against defendant [s, and each of them,] as follows:

1. For three times the amount of actual damages in the sum of $ _____;

2. For reasonable attorney's fees;

3. For costs herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. see § 14.60.*]

[2] Use of Form

This complaint is for use by a private plaintiff to bring an action for damages against a person, or the employee or agent of a person, who violates *Bus. & Prof. Code § 17537.1* when making an offer subject to *Bus. & Prof. Code § 17537.1(a)* [*Bus. & Prof. Code § 17537.4*]. An offer of any incentive is subject to *Bus. & Prof. Code § 17537.1(a)* when it is made as part of an advertising plan or program and as an inducement to the recipient to visit a location, to attend a sales presentation, or to contact a sales agent in person, by telephone, or by mail [*see Bus. & Prof. Code § 17537.1(a)*].

This form may be combined with the general complaint for injunction and restitution under *Bus. & Prof. Code § 17535* and *Bus. & Prof. Code § 17203* for violation of the false advertising laws illustrated in *see § 14.60*. For a form alleging unlawful advertising in relation to a conditional offer of gifts or prizes, see *§ 14.64*.

[3] Allegations

This complaint alleges:

- The identity, capacity, and principal place of business of defendant, if not sued as an individual (Paragraph 1).

- The fictitious names of defendants sued pursuant to *Code Civ. Proc. § 474*, if applicable (Paragraph 2).

- An agency or employment relationship between defendants, if applicable (Paragraph 3).

- That defendant owned and operated a business (Paragraph 4).

- That defendant offered plaintiff by some means, as part of an advertising plan or program, an incentive as an inducement to plaintiff to visit a location, to attend a sales presentation, or to contact a sales agent (Paragraphs 5-6) [*Bus. & Prof. Code § 17537.1(a)*].

- That the offer was made to plaintiff in a particular location (Paragraph 6) [*see Code Civ. Proc. §§ 395(a), 395.5* (venue)].

- That the offer did not clearly and conspicuously disclose in writing, in readily understandable language, each of the disclosures required by *Bus. & Prof. Code § 17537.1(a)* (Paragraph 7) [*Bus. & Prof. Code § 17537.1(a)*].

- That defendant, or defendant's employee, agent, or independent contractor, made a representation in violation of *Bus. & Prof. Code § 17537.1(g)* (Paragraph 8) [*Bus. & Prof. Code § 17537.1(g)*].

- That defendant, or defendant's employee, agent, or independent contractor, failed to provide the offered item even though plaintiff responded to the offer in the manner specified therein, performed the requirements disclosed in the offer, and met the qualifications described in the offer (Paragraphs 9-10) [*Bus. & Prof. Code § 17537.1(c)*].

- That plaintiff was damaged by defendant's violation of *Bus. & Prof. Code § 17537.1* (Paragraph 15) [*Bus. & Prof. Code § 17537.4*].

Optional Paragraphs 11-13 may be used either together or individually, as appropriate, when plaintiff anticipates that defendant will assert that the offered item was not reasonably available. These paragraphs allege that:

- Defendant, or defendant's employee, agent, or independent contractor, knew or had reason to know that the offered item would not be available in a sufficient quantity based on the reasonably anticipated response to the offer (optional Paragraph 11) [*Bus. & Prof. Code § 17537.1(b)*].

- Defendant's offer did not disclose the reservation of a right to provide a raincheck, or a like or substitute item, if the offered item was unavailable (optional Paragraph 12) [*Bus. & Prof. Code § 17537.1(c)*].

- Defendant did not inform plaintiff of plaintiff's right to receive a raincheck for the item offered or of the right to receive one of the options provided for in *Bus. & Prof. Code § 17537.1(d)* (optional Paragraph 13) [*Bus. & Prof. Code § 17537.1(d)*].

Paragraph 14, which is for use when defendant provided a raincheck in lieu of the offered item, alleges that defendant failed to deliver to plaintiff's address, without additional cost or obligation, either the agreed item or a like or substitute item of equal or greater value within the time requirements of *Bus. & Prof. Code § 17537.1(e)* [*Bus. & Prof. Code § 17537.1(d)*].

[4] Statute of Limitations

Bus. & Prof. Code § 17537.4 does not specify the limitation period within which an action brought under the statute must be commenced. Therefore, it appears that such an action comes under the general three-year limitation period for

actions based on a liability created by statute [*see Code Civ. Proc. § 338(a)*]. For further discussion, see *§ 14.60*.

[5] Request for Evidence

An additional allegation may be included under *Bus. & Prof. Code §§ 17537.1(f)* and *17537.4* when defendant fails to provide, at plaintiff's request, sufficient evidence showing that the item defendant provided to plaintiff matched the item selected for distribution to plaintiff.

[6] California Statutes

Offer of prize or gift without disclosure of intent to offer sales presentation is unlawful. *Bus. & Prof. Code § 17533.8*

Attorney General is authorized to bring action for violation of Bus. & Prof. Code*§ 17500 et seq. Bus. & Prof. Code* §§ 17535 (injunction), 17536(a) (civil penalty)

Offer of incentive, including prize, gift, money, or other item of value, as inducement to recipient to visit location, to attend sales presentation, or to contact sales agent is unlawful unless specified written disclosures are made. *Bus. & Prof. Code § 17537.1(a)*

Offer is unlawful when offeror, employee, agent, or independent contractor knows or has reason to know offered item will be unavailable. *Bus. & Prof. Code § 17537.1(b)*

Failure to provide item after recipient conforms with offer is unlawful unless item is not reasonably available and offer discloses reservation of right to provide raincheck. *Bus. & Prof. Code § 17537.1(c)*

Circumstances under which offeror is required to inform recipient of right to receive raincheck; additional options. *Bus. & Prof. Code § 17537.1(d)*

Requirements for delivery of item, or like or substitute item, after offeror provides raincheck. *Bus. & Prof. Code § 17537.1(e)*

Request for evidence that recipient's item matches item selected for distribution. *Bus. & Prof. Code § 17537.1(f)*

Specified misrepresentations concerning offer, item, or program are unlawful. *Bus. & Prof. Code § 17537.1(g)*

Maintenance of records showing items were distributed in accordance with statement of odds. *Bus. & Prof. Code § 17537.1(h)*

Recipient of offer subject to *Bus. & Prof. Code § 17537* or *17537.1(a)* is entitled to bring civil action against offeror, employee, or agent for treble damages; attorney's fees available to prevailing party. *Bus. & Prof. Code § 17537.4*

[7] Cross References

See also Comments and References to §§ 14.60 and 14.65.

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Volume 2: Adoptions thru Airplanes and Airports-Chs. 12-17
Chapter 14 ADVERTISING
PART IV. FORMS

2-14 California Forms of Pleading and Practice--Annotated § 14.66

§ 14.66 Complaint for Damages--Violation of E-Mail Service Provider's Policy Against Unsolicited E-Mail Advertising [Bus. & Prof. Code § 17538.45]

[1] FORM Complaint for Damages--Violation of E-Mail Service Provider's Policy Against Unsolicited E-Mail Advertising [Bus. & Prof. Code § 17738.45]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Unsolicited E-Mail Advertising)
_____ [*name(s)*],	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed)
	)	$10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

[1. *Identity and capacity of defendant. see § 14.60, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. see § 14.60, Paragraph 2.*]

[3. *Agency allegation, if appropriate. see § 14.60, Paragraph 3.*]

4. Plaintiff is _____ [*describe plaintiff as business, or organization qualified to do business, in California*]. Plaintiff has approximately _____ [*number*] employees who are California residents, for

whom plaintiff provides the ability to send and receive electronic mail (hereafter called e-mail) through equipment located in California. For that purpose plaintiff is an intermediary in sending and receiving e-mail. Each of those employees maintains an e-mail address with plaintiff, in the general form of _____ [*specify, e.g.,* "surname.initial@plaintiff.name.com"*(and use actual domain name in lieu of "plaintiff.name.com" in this example)*].

5. On _____ [*date*] plaintiff sent to defendant _____ [*specify, e.g.,* both an e-mail message addressed to _____ (*specify*) and a registered letter addressed to defendant at _____ (*specify*)] stating that plaintiff has a policy against employees receiving unsolicited e-mail advertising at their e-mail addresses maintained with plaintiff and further stating that any unsolicited e-mail advertising sent to any e-mail address ending with _____ [*specify plaintiff's domain name as used in e-mail addresses, e.g.,* "@plaintiff.name.com"] would use plaintiff's equipment located in California, or would cause that equipment to be used.

6. On or about _____ [*subsequent date*] defendant had actual notice of plaintiff's policy and the fact that plaintiff's equipment in California would be used as described in the preceding paragraph. Nevertheless, starting on or about that date and continuing more or less daily since then, defendant has initiated numerous e-mail messages, the principal purpose of which is to promote, directly or indirectly, the sale or other distribution of goods or services to the recipients, and defendant has used plaintiff's equipment located in California, or caused that equipment to be used, for delivering the messages to many of plaintiff's employees. Each of the messages has been addressed to a recipient with whom defendant does not have an existing business or personal relationship. None of the messages has been sent at the recipient's request of or with the recipient's express consent. Representative examples of the messages are attached as Exhibits _____ through _____.

WHEREFORE, plaintiff prays judgment against defendant[s and each of them] as follows:

1. For statutory damages of $50 for each unsolicited e-mail advertisement received at _____ [*specify e-mail addresses or use generic form of address, e.g.,* any e-mail address ending with "@plaintiff.name.com"] in violation of plaintiff's policy, pursuant to Business and Professions Code Section 17548.45;

2. For reasonable attorney's fees and costs of suit incurred herein; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. see § 14.60.*]

CAUTION:

Bus. & Prof. Code § 17538.45 **appears to be preempted by the federal CAN-SPAM Act of 2003 [*see*** P.L.108-187, 107 Stat. 2669, discussed in *§ 14.15[3]*]. The preemption provisions of the CAN-SPAM Act apply to any California statute that expressly regulates the use of electronic mail to send commercial messages, except to the extent that the statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached to it [*15*

U.S.C. § 7707(b)(1)]. However, the federal preemption provisions do not affect the lawfulness or unlawfulness of the adoption, implementation, or enforcement by internet access service providers of a policy of declining to transmit, route, relay, handle, or store certain types of electronic mail messages [*15 U.S.C. § 7707(c)*]. The precise effect of the CAN-SPAM Act on *Bus. & Prof. Code § 17538.45* has not yet been judicially determined.

[2] Use of Form

This complaint is for use by an e-mail service provider (including any entity, such as a corporation or firm, maintaining an internal e-mail system) for damages based on invasive e-mail advertising contrary to *Bus. & Prof. Code § 17538.45*.

[3] Damages for Unsolicited E-mail

No individual, corporation, or other entity may use or cause to be used, by initiating an unsolicited electronic mail advertisement, any electronic mail service provider's equipment located in this state in violation of that electronic mail service provider's policy prohibiting or restricting the use of its equipment to deliver unsolicited electronic mail advertisements to its registered users [*Bus. & Prof. Code § 17538.45(c)*].

In addition to any other action available under law, any electronic mail service provider whose policy on unsolicited electronic mail advertisements is violated as provided in *Bus. & Prof. Code § 17538.45* may bring a civil action to recover the actual monetary loss suffered by that provider by reason of that violation, or liquidated damages of $50 for each electronic mail message initiated or delivered in violation of *Bus. & Prof. Code § 17538.45*, up to a maximum of $25,000 per day, whichever amount is greater [*Bus. & Prof. Code § 17538.45(f)(1)*].

This complaint seeks only statutory damages. Proof of actual damages would be difficult in any case, and normally the actual damages would not exceed the maximum obtainable statutory damages.

[4] Requirement that Defendant Be Aware of Service Provider's Policy

The electronic mail service provider must establish as an element of the cause of action that before the alleged violation, the defendant had actual notice of both the electronic mail service provider's policy on unsolicited electronic mail advertising and also the fact that the defendant's unsolicited electronic mail advertisements would use or cause to be used the electronic mail service provider's equipment located in California [*Bus. & Prof. Code § 17538.45(f)(3)(A)*]. In this regard, the legislature has found that with rapid advances in internet technology, and electronic mail technology in particular, internet service providers are already experimenting with embedding policy statements directly into the software running on the computers used to provide electronic mail services in a manner that displays the policy statements every time an electronic mail delivery is requested. While the state of the technology does not support such a finding at present, the legislature believes that, in a given case at some future date, a showing that notice was supplied via electronic means between the sending and receiving computers could be held to constitute actual notice to the sender [*Bus. & Prof. Code § 17538.45(f)(3)(B)*].

[5] Allegations

The following allegations are essential for a claim for damages under *Bus. & Prof. Code § 17538.45*:

- The plaintiff is an electronic mail service provider [Paragraph 4]. Any "business or organization qualified to do business in California that provides registered users the ability to send or receive electronic mail through equipment located in this state and that is an intermediary in sending or receiving electronic mail" is an electronic mail service provider [*Bus. & Prof. Code § 17538.45(a)(3)*]. A registered user is "any individual, corporation, or other entity that maintains an electronic mail address with an electronic mail service provider" [*Bus. & Prof. Code § 17538.45(a)(5)*]. These definitions are

patently broad enough to cover the case of the usual business internal e-mail system; that is, a system provided by a "business or organization qualified to do business" in California, through "equipment located in" California, for the purpose of being "an intermediary in ... receiving electronic mail" addressed to individuals (employees) who "maintain[] an electronic mail address with" the business (employer).

- The defendant had actual notice of both (1) the plaintiff's policy on unsolicited electronic mail advertising and also (2) the fact that the defendant's unsolicited electronic mail advertisements would use, or cause to be used, the plaintiff's equipment located in California [*Bus. & Prof. Code § 17538.45(f)(3)(A)*; *see* Paragraphs 5, 6]. The complaint should not state that the defendant had "actual or constructive" notice, since if the defendant had only constructive notice, there would be no cause of action, and the complaint would be demurrable.

- The defendant initiated an unsolicited electronic mail advertisement and, in connection with it, used, or caused to be used, the plaintiff's equipment located in California, in violation of the plaintiff's policy prohibiting or restricting the use of its equipment to deliver unsolicited electronic mail advertisements to its registered users [*Bus. & Prof. Code § 17538.45(c)*; *see* Paragraph 6]. The defendant must be the initial sender of the advertisement [*Bus. & Prof. Code § 17538.45(a)(4)*]. An electronic mail advertisement is an electronic mail message, the principal purpose of which is to promote, directly or indirectly, the sale or other distribution of goods or services to the recipient [*Bus. & Prof. Code § 17538.45(a)(1)*]. It is "unsolicited" if it is both (1) addressed to a recipient with whom the defendant does not have an existing business or personal relationship and (2) not sent at the request of or with the express consent of the recipient [*Bus. & Prof. Code § 17538.45(a)(2)*].

[6] Attorney's Fees

In an action for damages under *Bus. & Prof. Code § 17538.45*, the court may award reasonable attorney's fees to a prevailing party [*Bus. & Prof. Code § 17538.45(f)(2)*].

[7] Cause of Action for Injunctive Relief

Any act prohibited by *Bus. & Prof. Code § 17500 et seq.* constitutes unfair competition [*Bus. & Prof. Code § 17200*] and, as such, may be enjoined in an action maintained by a public attorney or by any any person who has suffered injury in fact and has lost money or property as a result of the unfair competition [*Bus. & Prof. Code §§ 17203, 17204, 17535*].

[8] Cross References

See also Comments and References to §§ 14.60 and 14.61.

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§ 14.67 Complaint for Damages--Receipt of Unsolicited E-Mail Advertising [Bus. & Prof. Code § 17529.8]

[1] FORM Complaint for Damages--Receipt of Unsolicited E-Mail Advertising [Bus. & Prof. Code § 17529.8]

[*Caption. See § 14.66.*]

Plaintiff alleges:

[1. *Identity and capacity of defendant. See § 14.60, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 14.60, Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 14.60, Paragraph 3.*]

4. Plaintiff [is a resident of California and] has an electronic mail address ("plaintiff's e-mail address") _____ [*if plaintiff is not California resident, add:* that is furnished by an electronic mail service provider that sends bills for furnishing and maintaining that electronic mail address to a mailing address in California *or* that is ordinarily accessed from a computer located in California].

5. On at least _____ [*number*] occasions starting _____ [*date*], defendant[s jointly or severally] transmitted a commercial e-mail advertisement ("the advertisement") to plaintiff's e-mail address, or caused the advertisement to be transmitted, or assisted in the transmission of the advertisement by providing electronic mail addresses where the advertisement may be sent.

6. On each such occasion, the advertisement was initiated for the purpose of advertising or promoting the lease, sale, rental, gift offer, or other disposition of property, goods, services, or an extension of credit.

7. On each such occasion, the advertisement either (a) contained or was accompanied by falsified, misrepresented, obscured, or forged header information or (b) had a subject line that a person knows would be likely to mislead a

recipient, acting reasonably under the circumstances, about a material fact regarding the contents or subject matter of the advertisement or (c) contained or was accompanied by a third person's domain name without the permission of the third person.

8. On each such occasion, plaintiff did not have a pre-existing or current business relationship with [any of the] defendant[s] and had not expressly consented to receive e-mail advertisements from [any of the] defendant[s], either in response to a request for the consent or at plaintiff's own initiative.

9. _____ [*Allege facts supporting claim for actual damages proximately caused by receipt of advertisement as described in preceding paragraphs*].

WHEREFORE, plaintiff prays judgment against defendant[s and each of them] as follows:

1. For actual damages in the sum of $_____;

2. For statutory damages in the sum of $1,000,000 or less, but at least $1,000, according to proof;

3. For reasonable attorney's fees and costs of suit incurred herein; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. see § 14.60.*]

CAUTION:

Although it has not yet been judicially determined, it appears probable that *Bus. & Prof. Code § 17529 et seq.* have been preempted by the federal CAN-SPAM Act of 203 [*see* P.L. 108-187, 107 Stat. 2669, discussed in *§ 14.15[3]*]. Potential users of this form should be aware of the probability of federal preemption.

[2] Use of Form

This complaint is for use by any person who received unsolicited e-mail (spam) advertising sent to or from California in violation of *Bus. & Prof. Code § 17529 et seq.* [*see § 14.15[2][c]*]. In addition to any other remedies provided by *Bus. & Prof. Code § 17529 et seq.* or by any other provisions of law, the recipient may bring an action against an entity that violates any provision of *Bus. & Prof. Code § 17529 et seq.* to recover either or both of the following [*Bus. & Prof. Code § 17529.8(a)(1)*]:

- Actual damages;

- Liquidated damages of $1,000 for each unsolicited commercial e-mail advertisement transmitted in violation of *Bus. & Prof. Code § 17529.2*, up to $1,000,000 per incident.

"Incident" means a single transmission or delivery to a single recipient or to multiple recipients of unsolicited commercial e-mail advertisement containing substantially similar content [*Bus. & Prof. Code § 17529.1(j)*].

An action may also be brought by an electronic mail service provider or the attorney general [*Bus. & Prof. Code § 17529.8(a)(1)*].

[3] Limitation on Damages

If the court finds that the defendant established and implemented, with due care, practices and procedures reasonably designed to effectively prevent unsolicited commercial e-mail advertisements that are in violation of *Bus. & Prof. Code § 17529 et seq.*, the court must reduce the liquidated damages recoverable to a maximum of $100 for each unsolicited commercial e-mail advertisement, or a maximum of $100,000 per incident [*Bus. & Prof. Code § 17529.8(b)*].

[4] Attorney's Fees

The plaintiff, if the prevailing party, may recover reasonable attorney's fees and costs [*Bus. & Prof. Code § 17529.8(a)(2)*].

[5] Immunity for Service Providers

There is no cause of action against an electronic mail service provider that is only involved in the routine transmission of the unsolicited commercial e-mail advertisement over its computer network [*Bus. & Prof. Code § 17529.8(a)(3)*]. "Routine transmission" means the transmission, routing, relaying, handling, or storing of an electronic mail message through an automatic technical process. "Routine transmission" does not include the sending, or the knowing participation in the sending, of unsolicited commercial e-mail advertisements [*Bus. & Prof. Code § 17529.1(n)*].

[6] Cross References

See also Comments and References to § 14.60.

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Chapter 14 ADVERTISING
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2-14 California Forms of Pleading and Practice--Annotated § 14.68

§ 14.68 Affirmative Defense--Action for Damages for Negligent or Intentional Misrepresentation of Fact [Civ. Code §§ 1709, 1710]--Advertisement Was Mere "Puffing"

[1] FORM Affirmative Defense--Action for Damages for Negligent or Intentional Misrepresentation of Fact [Civ. Code §§ 1709, 1710]--Advertisement Was Mere "Puffing"

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. The representation that _____ [*specify representations of fact, e.g.,* defendant's real estate would be an excellent investment if plaintiff were to purchase it and receive the rents contemplated by defendant], which was made in advertisements disseminated by defendants on or about _____[*date*], by means of _____ [*specify advertising medium, e.g.,* newspaper advertisements in _____ (*name of newspaper*)], was a statement of opinion rather than a statement of fact, and therefore was mere "puffing."

2. At the time defendant made the statement of opinion herein alleged, defendant in fact held that opinion.

3. The statement of opinion made by defendant as herein alleged was not expressed in a manner implying that the opinion had a factual basis that in fact did not exist.

4. The statement of opinion made by defendant as herein alleged contained no representation concerning the safety of any product or service of defendant.

5. The statement of opinion made by defendant as herein alleged was not based on any superior knowledge or special information of defendant such that plaintiff could have reasonably relied on the statement of opinion.

[2] Use of Form

This affirmative defense is for use by defendant in an answer to a complaint for damages for fraud based on false advertising. The form may not be used in answer to a complaint alleging fraud by a negligent endorser [*see § 14.62*]

because, by representing to the public that he or she possesses superior knowledge and special information concerning the product endorsed, the endorser is liable for misrepresentations of either fact or opinion [*see Hanberry v. Hearst Corp. (1969) 276 Cal. App. 2d 680, 686, 81 Cal. Rptr. 519]* .

This form alleges that the representation made in defendant's advertising was a statement of opinion, not of fact (Paragraph 1) [*see Civ. Code § 1710(1), (2)*; *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 111, 120 Cal. Rptr.681, 534 P.2d 377]* . In addition, the form anticipates the exceptional circumstances under which courts have treated expressions of opinion as misrepresentations of fact, and so also alleges:

- That defendant did in fact hold the opinion (Paragraph 2) [*Pacesetter Homes, Inc. v. Brodkin (1970) 5 Cal. App. 3d 206, 211, 85 Cal. Rptr. 39]* .

- That the opinion was not expressed in a manner implying a factual basis that did not exist (Paragraph 3) [*Pacesetter Homes, Inc. v. Brodkin (1970) 5 Cal. App. 3d 206, 211, 85 Cal. Rptr. 39]* .

- That the representation did not concern the safety of defendant's product or services (Paragraph 4) [*see Hauter v. Zogarts (1975) 14 Cal. 3d 104, 112, 120 Cal. Rptr. 681, 534 P.2d 377]* .

- That defendant did not have superior knowledge or special information regarding the subject matter of the representations (Paragraph 5) [*Pacesetter Homes, Inc. v. Brodkin (1970) 5 Cal. App. 3d 206, 211, 85 Cal. Rptr. 39* ; *see Toole v. Richardson-Merrell, Inc. (1967) 251 Cal. App. 2d 689, 706, 60 Cal. Rptr. 398]* .

[3] Decisions

Mere "puffing" is not a basis for liability for fraud in advertising. *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 111, 120 Cal. Rptr. 681, 534 P.2d 377*

Seller's representation that real property would be excellent investment "if you receive the rents as we contemplate" constituted an opinion concerning future estimated rentals, not representation of fact. *Pacesetter Homes, Inc. v. Brodkin (1970) 5 Cal. App. 3d 206, 211, 85 Cal. Rptr. 39*

Exceptional circumstances resulting in expressions of opinion being treated as misrepresentations include (1) person expressing opinion does not in fact entertain it; (2) opinion amplifies false representations of fact; (3) opinion is express in manner implying factual basis that does not exist; and (4) expression of opinion is made by party possessing superior knowledge. *Pacesetter Homes, Inc. v. Brodkin (1970) 5 Cal. App. 3d 206, 211, 85 Cal. Rptr. 39*

Representations construed as fact when defendant drug manufacturer, who advertised in medical journals concerning drug's safety, had superior knowledge regarding subject matter of representations, and when plaintiff was so situated that she could reasonably rely on supposed superior knowledge or special information. *Toole v. Richardson-Merrell, Inc. (1967) 251 Cal. App. 2d 689, 706-707, 60 Cal. Rptr. 398*

[4] Cross References

For discussion and general forms for answers and affirmative defenses, see Ch. 26, *Answers*

See also Comments and References to § 14.61.

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2-14 California Forms of Pleading and Practice--Annotated § 14.69

§ 14.69 Affirmative Defense--Action to Compel Compliance With Advertising Sign Ordinance--Ordinance Impermissibly Infringes on Protected Speech [U.S. Const., amend. I; Cal. Const., art. I, § 2]

[1] FORM Affirmative Defense--Action to Compel Compliance With Advertising Sign Ordinance--Ordinance Impermissibly Infringes on Protected Speech [U.S. Const., amend. I; Cal. Const., art. I, § 2]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. _____ [*Cite ordinance*], which plaintiff seeks to enforce against defendant, makes unlawful the _____ [*specify restriction, e.g.,* maintenance of off-site outdoor advertising displays] while allowing the _____ [*specify, e.g.,* maintenance of on-site outdoor advertising displays].

2. The ordinance exempts _____ [*specify signs carrying noncommercial messages e.g.,* historical plaques and temporary political posters], but not all noncommercial signs, from its prohibition against the _____[*specify restriction, e.g.,* maintenance of off-site outdoor advertising displays].

3. The allowance of some, but not all, noncommercial outdoor advertising displays constitutes a content-based restriction on noncommercial speech in violation of the free speech guarantees of the *First Amendment to the United States Constitution* and of *Article I, Section 2, of the Constitution* of the State of California.

[2] Use of Form

This affirmative defense is for use by the owner of a sign to contest an action by a local government seeking to enforce an unconstitutional advertising sign ordinance. The specific ground of unconstitutionality alleged is that the ordinance restricts some, but not all, signs that do or might carry noncommercial messages, thus violating the free speech guarantees of *U.S. Const., amend. I,* and of *Cal. Const., art. I, § 2* [*see Metromedia, Inc. v. San Diego (1981) 453 U.S. 490, 513, 536-540, 101 S. Ct. 2882, 69 L. Ed. 2d 800* (plurality opinion of White, J.; concurring opinion of *Brennan, J.); City and County of San Francisco v. Eller Outdoor Advertising (1987) 192 Cal. App. 3d 643, 660-661, 237 Cal. Rptr. 815]* .

[3] Decisions

Ban on all off-site, commercial outdoor signs is permissible to achieve goals of traffic safety and improved aesthetics. *Metromedia, Inc. v. San Diego (1981) 453 U.S. 490, 507, 512, 570, 101 S. Ct. 2882, 69 L. Ed. 2d 800* (plurality opinion of White, J.; dissenting opinion of Rehnquist, J.)

Commercial speech is protected by *First Amendment* but also is subject to reasonable time, place, and manner restrictions. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council (1976) 425 U.S. 748, 770, 771, 96 S. Ct. 1817, 48 L. Ed. 2d 346*

Ordinance that is facially invalid under *U.S. Const., amends. I, XIV*, due to exception for political signs may be construed constitutionally by severing exception. *Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 1403-1409, 285 Cal. Rptr. 335*

Ban on all off-site signs, whether commercial or noncommercial, is permitted because such regulation is content-neutral. *City and County of San Francisco v. Eller Outdoor Advertising (1987) 192 Cal. App. 3d 643, 660-661, 237 Cal. Rptr. 815*

Ordinance that prohibits offsite commercial billboards while permitting onsite commercial billboards is proper; *First Amendment* requires only that noncommercial messages be permitted when commercial messages are permitted. *City of Salinas v. Ryan Outdoor Advertising, Inc. (1987) 189 Cal. App. 3d 416, 430-432, 234 Cal. Rptr. 619*

[4] Cross References

For discussion and forms relating to an action for declaratory relief to test the constitutionality of a statute or ordinance, see Ch. 182, *Declaratory Relief*

For forms for use in actions involving enforcement of statutes and ordinances generally, see Ch. 531, *Statutes and Ordinances*

See also References to *see § 14.68*.

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2-14 California Forms of Pleading and Practice--Annotated § 14.70

§ 14.70 Affirmative Defense--Action to Compel Compliance With Advertising Sign Ordinance--Ordinance Makes Arbitrary Classification in Violation of Equal Protection Guarantee [U.S. Const., amend. XIV; Cal. Const., art. I, § 7]

[1] FORM Affirmative Defense--Action to Compel Compliance With Advertising Sign Ordinance--Ordinance Makes Arbitrary Classification in Violation of Equal Protection Guarantee [U.S. Const., amend. XIV; Cal. Const., art. I, § 7]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. _____ [*Cite ordinance*], which plaintiff seeks to enforce against defendant, makes unlawful the _____ [*specify, e.g.,* placement and maintenance of moving signs] while allowing the _____ [*specify, e.g.,* placement and maintenance of flashing signs].

2. There is no natural intrinsic, or constitutional distinction between _____ [*specify, e.g.,* moving signs] and _____[*specify, e.g.,* flashing signs] in that _____[*set forth supportive facts, e.g.,* flashing signs can be and have been designed, constructed, and placed in compliance with such ordinance so as to produce an optical illusion of movement that has the same visual effect on the public and those driving on and using the public streets as the moving signs prohibited by the ordinance].

3. The allowance of _____ [*specify, e.g.,* flashing signs] and prohibition of _____[*specify, e.g.,* moving signs] under the ordinance is unconstitutional in violation of the *Due Process Clause of the Fourteenth Amendment of the United States Constitution* and of *Article I, Section 7(a), of the Constitution* of the State of California in its operation and effect on defendant in that it is based on an arbitrary and unreasonable classification having no reasonable relation to the public health, safety, welfare, and morals.

[2] Use of Form

This affirmative defense is for use by the owner of a sign to contest an action by a local government seeking to enforce

an unconstitutional advertising sign ordinance. The specific ground of unconstitutionality alleged is that the ordinance makes a classification in prohibiting defendant's signs while allowing other signs (Paragraph 1) that has no natural, intrinsic, or constitutional distinction (Paragraph 2), rendering such classification arbitrary and unreasonable in violation of *U.S. Const., amend. XIV*, and of *Cal. Const., art. I, § 7(a)* [*see City of Santa Barbara v. Modern Neon Sign Co. (1961) 189 Cal. App. 2d 188, 193, 11 Cal. Rptr. 57]* .

[3] California Constitution

Power of cities and counties to make and enforce ordinances and regulations not in conflict with general laws. *Cal. Const., art. XI, § 7*

[4] Decisions

Hotel rate signs and nonrate signs have no constitutional distinction to justify prohibition of rate signs under exercise of police power. *Carlin v. City of Palm Springs (1971) 14 Cal. App. 3d 706, 714, 92 Cal. Rptr. 535*

Unconstitutionality of sign ordinance, arbitrarily classifying and prohibiting moving signs, is defense to action to compel compliance. *City of Santa Barbara v. Modern Neon Sign Co. (1961) 189 Cal. App. 2d 188, 192-193, 11 Cal. Rptr. 57*

To raise constitutional question in pending case, party is required to show that his or her rights are affected by portion of law he or she attacks. *City of Santa Barbara v. Modern Neon Sign Co. (1961) 189 Cal. App. 2d 188, 200, 11 Cal. Rptr. 57*

Ordinance classifying and prohibiting distribution of handbills or other advertising matter relating to photographs taken of passersby on public way is based on arbitrary and unreasonable classification and void. *Portnoy v. Hohmann (1942) 50 Cal. App. 2d 22, 24, 122 P.2d 533*

[5] Cross References

See also References to §§ 14.68 and 14.69.

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2-14 California Forms of Pleading and Practice--Annotated § 14.71

§ 14.71 Affirmative Defense--Action to Compel Compliance With Advertising Sign Ordinance--Enforcement of Ordinance Constitutes Taking of Private Property Without Compensation in Violation of Due Process Guarantee [U.S. Const., amend. XIV; Cal. Const., art. I, §§ 7, 19]

[1] FORM Affirmative Defense--Action to Compel Compliance With Advertising Sign Ordinance--Enforcement of Ordinance Constitutes Taking of Private Property Without Compensation in Violation of Due Process Guarantee [U.S. Const., amend. XIV; Cal. Const., art. I, §§ 7, 19]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. Defendant's advertising sign, which is the subject of this action, was erected at its present site on or about _____ [*date*], prior to the enactment of _____ [*cite ordinance sought to be enforced*]. At that time and thereafter until the ordinance was enacted on _____ [*date*], defendant's sign was lawfully erected, placed, and maintained in full compliance with all laws of the State of California, [and City and] County of _____ [, and City of _____]. [Defendant obtained a permit to erect, place, and maintain the sign from the _____ (*specify agency issuing permit*) in accordance with then existing ordinances.]

2. As it is presently maintained, defendant's sign has a depreciated value of $ _____ and a remaining useful life of approximately _____ years. The entire value of the sign to defendant depends wholly and entirely on the continued use in the same manner, fashion, and style as it is currently maintained.

3. Enforcement of the ordinance against defendant as sought by plaintiff will require defendant to _____ [remove *or* alter] the sign so that it will become valueless as an advertising medium for defendant's business.

4. Plaintiff has offered no payment, and the ordinance makes no provision for payment, to defendant in compensation for the loss of value that defendant will incur as a result of _____ [removing *or* altering] the sign.

[*EITHER*]

5. The ordinance makes no provision for an amortization period, applicable to defendant, during which defendant may recover all or a portion of the value of the sign before defendant is required to _____ [remove *or* alter] the sign.

[*OR*]

5. _____ [*Cite section of ordinance*] of the ordinance provides that: _____ [*set forth amortization provision(s) of ordinance*]. By the terms of the ordinance, defendant is required to _____ [remove *or* alter] the nonconforming sign after a period of _____ [*length of amortization period prescribed by ordinance*] had passed from the date of enactment of the ordinance. This period is unreasonable as applied to defendant because it has not allowed defendant to recover the remaining depreciated value of the sign as alleged above. Furthermore, the public will suffer only minimal harm if defendant's sign remains _____ [standing *or* unaltered] beyond the prescribed amortization period in order that defendant receive the full value of defendant's investment in the sign.

[*CONTINUE*]

6. Enforcement of the ordinance against defendant in the manner sought by this action will constitute an unlawful taking and damaging of private property without just compensation or due process of law in violation of *United States Constitution, Amendment XIV*, and *Article I, Sections 7(a)* and *19, of the Constitution* of the State of California.

[2] Use of Form

This affirmative defense is for use by the owner of a sign to contest an action by a local government seeking to enforce an unconstitutional advertising sign ordinance. The specific ground of unconstitutionality alleged is that enforcement of the ordinance constitutes an unconstitutional taking of private property because the ordinance does not provide for either (1) payment of just compensation, or (2) the allowance of a reasonable amortization period, commensurate with the owner's investment.

The form alleges that prior to enactment of the ordinance defendant's sign was lawfully erected and maintained (Paragraph 1), the value and remaining useful life of the sign as currently maintained (Paragraph 2), that enforcement of the ordinance will cause defendant to lose such value (Paragraph 3), that there has been no offer to compensate defendant for the loss of value (Paragraph 4), that either there is no amortization period provided in the statute, or that the amortization period provided is unreasonable as applied to defendant (alternative Paragraphs 5), and that enforcement of the ordinance constitutes an unlawful taking without just compensation or due process of law (Paragraph 6) [*see U.S. Const., amend. XIV*; *Cal. Const., art. I, §§ 7, 19*; *Metromedia, Inc. v. San Diego (1980) 26 Cal. 3d 848, 881-882, 164 Cal. Rptr. 510, 610 P.2d 407 , rev'd on First Amendment grounds, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)]* .

The substance of this form could be used as the basis of affirmative relief for compensation under the law of inverse condemnation if the sign owner elects to comply with the ordinance. Such relief could not be asserted by answer to a complaint, however [*Code Civ. Proc. § 431.30(c)*], but may be claimed in a complaint or cross complaint [*see Code Civ. Proc. § 425.10*]. For a complaint for inverse condemnation, see Ch. 247, *Eminent Domain* .

Counsel may wish to modify this form to assert a violation of *U.S. Const., amend. V*, or for use by the owner of the real property on which the billboard is located if that property will have no viable economic use after the termination. For discussion, see *§ 14.19[2]*.

[3] Federal Constitution

States are prohibited from depriving persons of property without due process of law. *U.S. Const., amend. XIV*

[4] California Constitution

No person to be deprived of property without due process of law. *Cal. Const., art. I, § 7(a)*

Private property is not to be taken or damaged for public use without just compensation. *Cal. Const., art. I, § 19*

[5] California Statutes

Eminent domain proceedings. *Code Civ. Proc. § 1230.010 et seq.*

[6] Decisions

Due process guarantee prevents local government from requiring removal of outdoor advertising without either (1) payment of just compensation, or (2) the allowance of a reasonable amortization period, commensurate with the owner's investment, has passed. *Metromedia, Inc. v. San Diego (1980) 26 Cal. 3d 848, 881-882, 164 Cal. Rptr. 510, 610 P.2d 407 , rev'd on First Amendment grounds, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)*

Although reasonableness of amortization period as applied to particular sign depends on facts peculiar to that sign, one-year amortization period is generally unreasonable on its face. *Metromedia, Inc. v. San Diego (1980) 26 Cal. 3d 848, 882-883, 164 Cal. Rptr. 510, 610 P.2d 407 , rev'd on First Amendment grounds, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)*

Sign owner has burden of proving that amortization period is unreasonable as applied to particular sign, taking into account cost of sign, its depreciated value, remaining useful life, length and remaining term of lease under which it is maintained, and harm to pubic if sign remains standing beyond prescribed amortization period. *Metromedia, Inc. v. San Diego (1980) 26 Cal. 3d 848, 884, 164 Cal. Rptr. 510, 610 P.2d 407 , rev'd on First Amendment grounds, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)*

Removal of nonconforming outdoor advertising billboards under zoning ordinance is required to await expiration of reasonable amortization period in order to permit plaintiff owner to recover original cost. *National Advertising Co. v. County of Monterey (1970) 1 Cal. 3d 875, 880, 83 Cal. Rptr. 577, 464 P.2d 33* ; *see also National Advertising Co. v. County of Monterey (1962) 211 Cal. App. 2d 375, 381, 27 Cal. Rptr. 136*

Enforcement of advertising sign ordinance to require defendants to bring nonconforming signs into compliance without allowing reasonable amortization period is unconstitutional taking of property without compensation and without due process of law. *City of Santa Barbara v. Modern Neon Sign Co. (1961) 189 Cal. App. 2d 188, 194, 11 Cal. Rptr. 57*

[7] Cross References

See also References to §§ 14.68 and 14.69.

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2-14 California Forms of Pleading and Practice--Annotated § 14.72

§ 14.72 Affirmative Defense--Action to Compel Compliance With Advertising Sign Ordinance--Immunity in Action by Private Party [Bus. & Prof. Code § 5466]

[1] FORM Affirmative Defense--Action to Compel Compliance With Advertising Sign Ordinance--Immunity in Action by Private Party [Bus. & Prof. Code § 5466]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

Defendant's advertising sign, which is the subject of this action, was in place as of August 12, 2004, and has been in continuous existence in its current location since _____ [*date more than five years before action was commenced*]. A cause of action for the erection or maintenance of defendant's advertising display, on the ground that it violates the laws of a local governmental entity, may not be brought by a private party, pursuant to *Business and Professions Code Section 5466*.

[2] Use of Form

This affirmative defense is for use by the owner of a sign to contest an action by a private party seeking to enforce an advertising sign ordinance. Notwithstanding any other provision of law, as to an advertising display in place as of August 12, 2004, a cause of action for the erection or maintenance of an advertising display that violates the Outdoor Advertising Act or the laws of a local governmental entity may not be brought by a private party against an advertising display that has been in continuous existence in its current location for a period of five years. However, if the advertising display has been illegally modified, the cause of action for the illegal modification may be brought by a private party if it is filed within five years of the date the modification was made [*Bus. & Prof. Code § 5466(a)*]. This does not apply, however, to a cause of action that is brought by a governmental entity and is based on the erection or maintenance of an advertising display that violates the Outdoor Advertising Act or the laws of the governmental entity [*Bus. & Prof. Code § 5466(b)*].

[3] California Statutes

Immunity for advertising sign in place as of August 12, 2004, and at current location for period of five years, in suit by private party. *Bus. & Prof. Code § 5466*

[4] Cross References

See also references to §§ 14.68 and 14.69.

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2-15 California Forms of Pleading and Practice--Annotated 15.syn

§ 15.syn Synopsis to Chapter 15: AFFIDAVITS, CERTIFICATES, AND DECLARATIONS

§ 15.01 Scope of Chapter

§ 15.02 Cross References

§ 15.03 Governing Statutes

§§ 15.04-15.09 [Reserved]

§ 15.10 Affidavit

§ 15.11 Declaration Under Penalty of Perjury

§ 15.12 Certificate

§ 15.13 Acknowledgment and Certificate of Acknowledgment Distinguished

§ 15.14 Who May Make

[1] Any Competent Witness With Knowledge of Facts

[2] On Behalf of Business Entity

§ 15.15 Who May Take

§ 15.16 Foreign Affidavit

[1] Affidavit Taken in Another State

[2] Affidavit Taken in Foreign Country

[3] Certificate Authenticating Foreign Affidavit

§ 15.17 Formalities of Affidavit

[1] Venue

[2] Defective or Missing Title

[3] Oath or Affirmation

[4] Signature of Affiant

[5] Jurat

§ 15.18 Seal

§ 15.19 Use of Affidavits or Declarations

[1] Authorized Uses

[2] Not Used to Prove Facts Directly in Controversy in Action

§ 15.20 Content of Affidavit or Declaration

[1] Personal Knowledge of Facts

[2] Facts Stated on Information and Belief

[3] Conclusions of Law and Ultimate Facts

[4] Chief Test for Sufficiency

§ 15.21 Contents When Used With Noticed Motions

§ 15.22 Perjury and Attempted Perjury

§§ 15.23-15.39 [Reserved]

§ 15.40 State Statutes

[1] Affidavits

[2] Certificates

[3] Declaration Under Penalty of Perjury

[4] Notaries

[5] Officers Authorized to Administer Oaths

[6] Perjury

[7] Seals

§ 15.41 Decisions

[1] Acknowledgement Distinguished

[2] Affidavit as Evidence

[3] Conflict Between Testimony and Declaration

[4] Conclusions, Opinions, and Ultimate Facts

[5] Form and Content of Affidavits

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[7] Form and Content of Declarations

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[5] Cross References

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[2] Use of Form

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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2-15 California Forms of Pleading and Practice--Annotated § 15.01

§ 15.01 Scope of Chapter

This chapter discusses the form and content of affidavits, certificates, and declarations under penalty of perjury. It includes the following forms:

- Affidavits that may be executed in California [*see § 15.50*] or outside California [*see §§ 15.51, 15.52*].
- Certificates authenticating affidavits taken outside California [*see §§ 15.53, 15.54*].
- Introductory clause related to oath or affirmation [*see § 15.55*].
- Jurats [*see §§ 15.56, 15.57*].
- Declarations under penalty of perjury [*see §§ 15.58 -15.62*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-15 California Forms of Pleading and Practice--Annotated § 15.02

§ 15.02 Cross References

For forms relating to acknowledgments, oaths and affirmations, and verification, see the following chapters:

- Ch. 9, *Acknowledgments*.
- Ch. 392, *Oath and Affirmation*.
- Ch. 572, *Verification*.

For forms involving notaries, see Ch. 390, *Notaries Public* .

For forms of certificates of service by mail by an attorney or court clerk, see Ch. 518, *Service of Summons and Papers* .

For forms of declaration supporting a motion generally, see Ch. 372, *Motions and Orders* , and for forms of declarations supporting particular motions, see the chapter relating to the motion.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 15.03 Governing Statutes

Affidavits are governed generally by *Code Civ. Proc. §§ 2003, 2009-2012*. Foreign affidavits are governed by *Code Civ. Proc. §§ 2013-2015* and military affidavits by *Civ. Code § 1183.5*.

Certificates are governed generally by *Code Civ. Proc. § 1013a(2)* (attorney's certificate of service by mail), *Code Civ. Proc. § 1013a(4)* (clerk's certificate by mail), and *Code Civ. Proc. § 2015.3* (sheriff's, marshal's, and superior court clerk's certificate).

Code Civ. Proc. § 2015.5 authorizes the use of declarations under penalty of perjury in lieu of affidavits and certificates.

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2-15 California Forms of Pleading and Practice--Annotated §§ 15.04-15.09

[Reserved]

§§ 15.04[Reserved]

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2-15 California Forms of Pleading and Practice--Annotated § 15.10

§ 15.10 Affidavit

An affidavit is a written statement under oath, made without notice to the adverse party [*Code Civ. Proc. § 2003*]. It is one of three ways to take the testimony of a witness [*Code Civ. Proc. § 2002*]. The other two methods are by deposition, which does require notice to adverse parties to permit cross examination [*Code Civ. Proc. §§ 2002, 2004*], and by oral examination in the presence of the court or jury [*Code Civ. Proc. §§ 2002, 2005*]. For forms of affidavits, see *§§ 15.50 -15.52*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-15 California Forms of Pleading and Practice--Annotated § 15.11

§ 15.11 Declaration Under Penalty of Perjury

Code Civ. Proc. § 2015.5 renders a declaration under penalty of perjury the legal equivalent of an affidavit [*People v. Griffini (1998) 65 Cal. App. 4th 581, 587, 76 Cal. Rptr. 2d 590]* .

Code Civ. Proc. § 2015.5 provides that whenever, under any law of California or under any rule, regulation, order, or requirement made pursuant to the law of California, any matter is required or permitted to be supported, by the sworn statement, declaration, verification, certificate, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), the matter may with like force and effect be supported by the person's unsworn written declaration [*Code Civ. Proc. § 2015.5*].

The declaration must recite that it is declared by the person to be true under penalty of perjury, be subscribed by him or her and [*Code Civ. Proc. § 2015.5*]:

- If executed in California, state the date and place of execution [for a form, *see § 15.58*], or

- If executed at any place, within or without California, state the date of execution and that it is so declared under the laws of the State of California [for forms, *see §§ 15.59 -15.62*].

For a declaration to comply with the requirements of *Code Civ. Proc. § 2015.5*, the declaration must either state on its face that it was executed in California or state that it is declared under the laws of the state of California [*Kulshrestha v. First Union Commerical Corp. (2004) 33 Cal. 4th 601, 618, 15 Cal. Rptr. 3d 793, 93 P.3d 386* (declaration signed outside California must state they were made "under the laws of the State of California" in order to satisfy section 2015.5 and to be used as evidence)].

"Subscribe" means signed by oneself with his or her hand [*In re Marriage of Reese & Guy (1999) 73 Cal. App. 4th 1214, 1222, 87 Cal. Rptr. 2d 339* (attorney's custom of signing declarations under penalty of perjury on behalf of clients and witnesses improper)]. There is no compliance with *Code Civ. Proc. § 2015.5* where a transcript reflects that a witness was asked verbally by plaintiff's investigator, at the end of a telephone conversation, if his or her statements

were true and correct under penalty of perjury [*Stockinger v. Feather River Community College (2003) 111 Cal. App. 4th 1014, 1026-1027, 4 Cal. Rptr. 3d 385]* .

In some circumstances, a declaration that is not subscribed in compliance with *Code Civ. Proc. § 2015.5* may be deemed harmless error if another properly subscribed declaration is concurrently filed with the defective declaration [*see Hearn v. Howard (2009) 177 Cal. App. 4th 1193, 1204, 99 Cal. Rptr. 3d 642* (where declaration of due diligence neither indicated that it was executed in California nor provided that it was executed under penalty of perjury under the laws of the State of California, the defect was found to be harmless where the declaration was attached to, expressly referenced in, and filed with the proof of service, which was properly executed under penalty of perjury under the laws of the State of California)].

Legal Topics:

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

A certificate is a written testimony to the truth of any fact [*People v. Griffini (1998) 65 Cal. App. 4th 581, 586-587, 76 Cal. Rptr. 2d 590]* . An affidavit or declaration under penalty of perjury which certifies to the truth or authenticity of something is sometimes called a certificate [*see Code Civ. Proc. § 2015.5*].

The term certificate frequently refers to the written statement of an officer of the court which, unless an affidavit or declaration under penalty of perjury is expressly required, need not be made under oath or under penalty of perjury [*see Code Civ. Proc. § 1013a(2)* (attorney's certificate proving service); *Code Civ. Proc. § 1013a(4)* (clerk's certificate proving service); *Code Civ. Proc. § 2015.3* (certificate of sheriff, marshal, or court clerk as being of same force and effect as affidavit)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 15.13 Acknowledgment and Certificate of Acknowledgment Distinguished

An acknowledgment is not a written statement under oath as is an affidavit [*see Civ. Code §§ 1180-1193*; *Code Civ. Proc. § 2003*]. An acknowledgment is an oral statement by a person who has executed an instrument that he or she is the person who executed the instrument. It is made to an officer authorized to take acknowledgments [*see Civ. Code §§ 1180-1184*] who coincidentally may also be authorized to administer oaths [*see § 15.15*]. The officer then affixes his or her certificate of acknowledgment [*see Civ. Code § 1188* and Ch. 9, *Acknowledgments*]. The certificate of acknowledgment is a recitation that a particular person appeared before the certifying officer and acknowledged that he or she executed the document to which the certificate is attached [*see Civ. Code § 1189* (required form of acknowledgment; forms in former *Civ. Code §§ 1189-1192* remain valid for acknowledgments provided before January 1, 1993)]. It is not a jurat and is in no way the equivalent of an affidavit or even a declaration made under penalty of perjury pursuant to *Code Civ. Proc. § 2015.5* [*Palm Springs Alpine Estates, Inc. v. Superior Court (1967) 255 Cal. App. 2d 883, 888, 63 Cal. Rptr. 618]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-15 California Forms of Pleading and Practice--Annotated § 15.14

§ 15.14 Who May Make

[1] Any Competent Witness With Knowledge of Facts

By analogy to *Evid. Code § 700*, which provides that except as otherwise provided by statute, every person, irrespective of age, is qualified to be a witness, any person is qualified to make an affidavit [*McLellan v. McLellan (1972) 23 Cal. App. 3d 343, 359-360, 100 Cal. Rptr. 258]* . Persons who are incapable of expressing themselves concerning the matter so as to be understood (directly or through interpretation by one who can understand) and persons who are incapable of understanding the duty of a witness to tell the truth are disqualified [*Evid. Code § 701*]. For futher discussion of witnesses, see Ch. 551, *Trial* .

Generally, an affidavit, or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*], is made by any person competent to swear to, or affirm the truth of, the facts contained in it [*see Code Civ. Proc. §§ 2003, 2094*; *see Evid. Code § 702*] and who is capable of being prosecuted for perjury if those facts are false [*see Mack v. Superior Court (1968) 259 Cal. App. 2d 7, 10, 66 Cal. Rptr. 280* (test of sufficiency of affidavit); *see also In re Marriage of Reese & Guy (1999) 73 Cal. App. 4th 1214, 1223, 87 Cal. Rptr. 2d 339* (oath or declaration must be in form that would allow criminal sanctions if material declared to be true is not true or is not known to be true)].

Under certain circumstances, however, the person authorized to make a particular affidavit (declaration) is specified by statute [*see, e.g., Code Civ. Proc. § 2010* (proof of publication by printer); *Code Civ. Proc. § 1013a(1)* (proof of mailing by person residing or working in county of mailing and over 18)].

[2] On Behalf of Business Entity

Subject to the requirements of the articles of incorporation and bylaws, an affidavit or declaration on behalf of a corporation may be made by any one of its officers or agents [*Old Settlers Investment Co. v. White (1910) 158 Cal. 236, 246, 110 P. 922]* , as directed by the board of directors [*see Civ. Code § 1190.1*; *Corp. Code §§ 207(a), 300(a)*].

In the case of a partnership, it has been held that one of the partners must make an affidavit or declaration on behalf of the partnership [*Gee Chong Pong v. Harris (1918) 38 Cal. App. 214, 217-218, 175 P. 806]* . The modern trend has been to treat partnerships and other unincorporated associations as legal entities [*see Code Civ. Proc. §§ 369.5, 416.40*].

Therefore, in the case of a partnership or unincorporated association, it would seem that an affidavit or declaration could be executed in its behalf by a general manager or officer, if authorized by the partnership or unincorporated association.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 15.15 Who May Take

An affidavit to be used before any court, judge, or officer of California may be taken before any officer authorized to administer oaths [*Code Civ. Proc. § 2012*]. Officers authorized to administer oaths include every court, every judge or retired judge, every clerk of any court, every justice or retired justice, every notary public, every shorthand reporter certified under *Bus. & Prof. Code §§ 8020-8027*, and every officer or person authorized to take testimony in any action or proceeding, or to decide on evidence [*Code Civ. Proc. § 2093*]. Certain commissioned military officers are authorized to administer oaths to persons serving in or with the armed forces of the United States or their spouses [*Civ. Code § 1183.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-15 California Forms of Pleading and Practice--Annotated § 15.16

§ 15.16 Foreign Affidavit

[1] Affidavit Taken in Another State

An affidavit taken in a state other than California, to be used in California, may be taken before a commissioner appointed by the Governor of California to take affidavits and depositions in such other state, or before any notary public in that state, or before any judge or clerk of a court of record having a seal [*Code Civ. Proc. § 2013*].

[2] Affidavit Taken in Foreign Country

An affidavit taken in a foreign country to be used in this state, may be taken before an ambassador, minister, consul, vice consul, or consular agent of the United States, or before any judge of a court of record having a seal in such foreign country [*Code Civ. Proc. § 2014*].

[3] Certificate Authenticating Foreign Affidavit

When an affidavit is taken before a judge or a court in a state other than California, or in a foreign country, the genuineness of the signature of the judge, the existence of the court, and the fact that the judge is a member that court, must be certified by the clerk of the court, under the court's seal [*Code Civ. Proc. § 2015*; *see §§ 15.53, 15.54*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-15 California Forms of Pleading and Practice--Annotated § 15.17

§ 15.17 Formalities of Affidavit

[1] Venue

A recitation of the state and county of execution, called the venue, traditionally appears in an affidavit as an introductory phrase followed by "ss," which is an abbreviation for "scilicet" and means "to wit" [*see* Black's Law Dictionary (4th ed)]. The absence of a statement of venue does not invalidate an otherwise sufficient affidavit [*County Bank v. Jack (1906) 148 Cal. 437, 440, 83 P. 705]* .

[2] Defective or Missing Title

An affidavit without the title of the action or proceeding in which it is made, or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refers to such action or proceeding [*Code Civ. Proc. § 1046* (civil action or proceeding); *Penal Code § 1401* (criminal action)].

[3] Oath or Affirmation

The oath or affirmation is made before an officer authorized to administer oaths [*see, e.g., Code Civ. Proc. § 2093*], unless this requirement is dispensed with by statute [*see, e.g., Code Civ. Proc. § 2015.6* (unsworn written affirmation by personal representative made under penalty of perjury in lieu of oath of office)]. The oath or affirmation (or a declaration) may be administered by receiving an affirmative response to one of the following questions [*Code Civ. Proc. § 2094(a)*]:

- "Do you solemnly state that the evidence you shall give in this issue [or matter] shall be the truth, the whole truth, and nothing but the truth, so help you God?"

- "Do you solemnly state, under penalty of perjury, that the evidence that you shall give in this issue or matter shall be the truth, the whole truth, and nothing but the truth?"

In the alternative to the forms prescribed in *Code Civ. Proc. § 2094(a)*, the court may administer an oath or affirmation (or declaration) in an action or proceeding in a manner that is calculated to awaken the persons's conscience and impress

the person's mind with the duty to tell the truth. The court must satisfy itself that the person testifying understands that his or her testimony is being given under penalty of perjury [*Code Civ. Proc. § 2094(b)*].

For discussion of use of an unsworn written declaration under penalty of perjury, *see § 15.11, above*.

[4] Signature of Affiant

Absent a statute or a rule of court requiring it, the affiant's signature to an otherwise regular affidavit is not necessary, although it is customarily included [*City of Petaluma v. White (1907) 152 Cal. 190, 195, 92 P. 177* ; *Pacific States S. & L. Co. v. Hoffman (1933) 134 Cal. App. 601, 602, 25 P.2d 1006]* .

[5] Jurat

A jurat is a certificate of the officer who administered the oath that the affiant subscribed and swore to the affidavit before him or her [*United States v. McDermott (1890) 140 U.S. 151, 153, 11 S. Ct. 746, 35 L. Ed. 391* ; *see §§ 15.56, 15.57*]. In addition to certifying that the affidavit was made under oath, the purpose of the signature of the officer to the jurat is to witness the signature of the affiant to the affidavit [*People v. McDaniels (1903) 141 Cal. 113, 115, 74 P. 773]* and to evidence the fact that the affidavit was made before a duly authorized officer [*Reavis v. Cowell (1880) 56 Cal. 588, 589-591]* . Because an affidavit by definition is a written declaration under oath [*see Code Civ. Proc. § 2003*] made before an officer authorized to administer oaths [*see Code Civ. Proc. § 2012*], a jurat is an indispensable element of an affidavit [*see People v. United Bonding Ins. Co. (1969) 272 Cal. App. 2d 441, 443, 77 Cal. Rptr. 310]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-15 California Forms of Pleading and Practice--Annotated § 15.18

§ 15.18 Seal

A public seal in California is a stamp or impression made by a public officer with an instrument provided by law, to attest the execution of an official document [*see Code Civ. Proc. § 1931*; *see also Code Civ. Proc. §§ 14, 1930*]. Generally, an affidavit made before a judge or clerk of a court in California need not be under seal [*see Code Civ. Proc. § 153*]. However, if an affidavit is made in California before a notary public, his or her jurat is required to be sealed [*Gov. Code §§ 14, 8207*]. If an affidavit is made in a foreign state or country before a judge or court clerk, it would seem that the jurat of the judge or clerk is to be sealed [*see Code Civ. Proc. §§ 2013, 2014*]. However, the absence of the seal of the officer before whom the affidavit was made is an irregularity that does not invalidate an otherwise valid affidavit [*Reclamation District v. Snowball (1911) 160 Cal. 695, 697, 117 P. 905, 118 P. 514]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-15 California Forms of Pleading and Practice--Annotated § 15.19

§ 15.19 Use of Affidavits or Declarations

[1] Authorized Uses

Affidavits (or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*]) may be used in a variety of situations [*Code Civ. Proc. § 2009*]:

- To verify a pleading or a paper in a special proceeding.
- To prove the service of a summons, notice, or other paper in an action or special proceeding.
- To obtain a provisional remedy.
- To obtain the examination of a witness.
- To obtain a a stay of proceedings.
- In uncontested proceedings, to establish a record of birth.
- As evidence on a motion.
- In any other case expressly permitted by statute.

Code Civ. Proc. § 2009 was not intended to change the general rules of evidence by substituting voluntary ex parte affidavits or declarations for the testimony of a witness. The section applies to matters of procedure, to matters collateral, ancillary, or incidental to an action or proceeding. It has no relation to proof of facts that are in issue in the case, and that it is necessary to establish to sustain a cause of action [*Lacrabere v. Wise (1904) 141 Cal. 554, 556-557, 75 P. 185]* .

[2] Not Used to Prove Facts Directly in Controversy in Action

Affidavits and declarations fall within the statutory definition of hearsay evidence [*see Evid. Code § 1200(a)*]. Therefore, except as provided by law [*see, e.g., Code Civ. Proc. §§ 417.10, 1013a, 2009*; for discussion, *see* [1], *above*] they are not admissible in evidence [*Evid. Code § 1200(b)*; *see Estate of Fraysher (1956) 47 Cal. 2d 131, 135, 301 P.2d 848* ; *Estate of Horman (1968) 265 Cal. App. 2d 796, 805, 71 Cal. Rptr. 780]* .

At the trial of an action, a witness may be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine [*Evid. Code § 711*; *but see Evid. Code § 712* use of affidavit in criminal proceeding as evidence of the technique used in taking blood samples)]. The use of an affidavit or declaration precludes cross examination and therefore the general statute authorizing their use [*Code Civ. Proc. § 2009*] does not apply to the proof of facts that are directly in controversy in the action [*Lacrabere v. Wise (1904) 141 Cal. 554, 556-557, 75 P. 185* (holding fact not proved by affidavit; opposing party had objected to admission of affidavit)]. In that case, it is error to admit an affidavit or declaration in evidence over obejection [*Estate of Fraysher (1956) 47 Cal. 2d 131, 135, 301 P.2d 848* (affirming judgment based on affidavits when used by both parties and not objected to in trial court)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-15 California Forms of Pleading and Practice--Annotated § 15.20

§ 15.20 Content of Affidavit or Declaration

[1] Personal Knowledge of Facts

An affidavit, or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*], must normally set forth facts within the personal knowledge of the affiant or declarant, and show that the affiant or declarant, if sworn as a witness, would be comptent to testify to the facts stated [*see Code Civ. Proc. §§ 2002, 2003* (*discussed under § 15.10*); *Evid. Code § 702(a)* (testimony inadmissible unless the witness has personal knowledge), *Evid. Code § 702(b)* (personal knowledge may be shown by any otherwise admissible evidence, including the witness's own testimony), *Evid. Code § 1200(b)* (except as otherwise provided by law, hearsay evidence is inadmissible)].

[2] Facts Stated on Information and Belief

Some statutes expressly allow an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) to be made on information and belief [*see, e.g., Code Civ. Proc. §§ 431.30(d)* (denial of allegations of complaint in civil actions), 446 (verification of pleadings in civil actions)]. The verification of a petition for writ of mandate (a special proceeding), on the other hand, must be based on personal knowledge [*Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 204-205, 151 Cal. Rptr. 721* ; *see also City of Santa Cruz v. Municipal Court (1989) 49 Cal. 3d 74, 87, 260 Cal. Rptr. 520, 776 P.2d 222]* .

In the absence of statutory authority to the contrary, an affidavit (declaration) to be used as evidence must normally be positive, direct, and not based on hearsay [*see Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 204, 151 Cal. Rptr. 721]* . And an affidavit (declaration)based on information and belief is generally disregarded as incompetent evidence [*Franklin v. Nat C. Goldstone Agency (1949) 33 Cal. 2d 628, 631, 204 P.2d 37* ; *Kellett v. Kellett (1934) 2 Cal. 2d 45, 48, 39 P.2d 203]* . However, if a statute requires expressly or by implication a statement that by its very nature can be made only on information and belief, an affidavit (declaration) in that form may be sufficient. Affidavits (declarations) on information and belief may also be sufficient in a variety of contexts in which the facts would otherwise be difficult or impossible to establish [*City of Santa Cruz v. Municipal Court (1989) 49 Cal. 3d 74, 87, 260 Cal. Rptr. 520, 776 P.2d 222]* . Thus, it is incorrect to suggest that a statute that requires the filing of an affidavit necessarily implies a requirement of personal knowledge on the part of the affiant, and it is a common legislative as well as judicial practice to allow the filing of affidavits on information and belief [*City of Santa Cruz v.*

Municipal Court (1989) 49 Cal. 3d 74, 88, 260 Cal. Rptr. 520, 776 P.2d 222] .

[3] Conclusions of Law and Ultimate Facts

The opinions and conclusions of an affiant (or declarant) [*Code Civ. Proc. § 2015.5*]) are considered insufficient and generally disregarded [*Tri-State Mfg. Co. v. Superior Court (1964) 224 Cal. App. 2d 442, 445, 36 Cal. Rptr. 750]* . Alleging necessary ultimate facts in the language of the statute that sets forth what must be proved is also insufficient [*Tilton v. Russek (1916) 171 Cal. 731, 736, 154 P. 860]* , as are conclusions of law [*Taylor v. Randall (1855) 5 Cal. 79, 80]* . What must be set forth are evidentiary facts within the personal knowledge of the affiant [*see Ware v. Stafford (1962) 206 Cal. App. 2d 232, 238, 24 Cal. Rptr. 153]* , except to the extent that statements on information and belief are permitted [*see* [2], *above*].

A declaration that is conclusory in nature is insufficient to establish the nonexistence of any triable issue of material fact, and thus may not serve as a basis for granting summary judgment [*Johnson v. Superior Court (2006) 143 Cal. App. 4th 297, 308, 49 Cal. Rptr. 3d 52]* .

[4] Chief Test for Sufficiency

The chief test of the sufficiency of an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) is whether it is so clear and certain that an indictment for perjury could be sustained on it if it were found to be false [*Mack v. Superior Court (1968) 259 Cal. App. 2d 7, 10, 66 Cal. Rptr. 280]* . However, if a statement is not required to be under oath in the first place, a false statement under oath or penalty of perjury does not give rise to prosecution for perjury [*People v. Barajas (1969) 273 Cal. App. 2d 750, 751-752, 78 Cal. Rptr. 647]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyLay WitnessesPersonal KnowledgeEvidenceDocumentary EvidenceWritingsGeneral OverviewEvidenceAuthenticationGeneral Overview

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§ 15.21 Contents When Used With Noticed Motions

Although there are exceptions, an affidavit or declaration is normally presumed to state matters personally known to the affiant or declarant and lacks evidentiary value, in a variety of contexts, when based on information and belief or on hearsay [City of Santa Cruz v. Municipal Court (1989) 49Cal. 3d 74, 87-89, *49 Cal. 3d 74, 260 Cal. Rptr. 520, 776 P.2d 222* ; *see* discussion in *§ 15.20*].

With regard to motions, some statutes expressly require that affidavits or declarations filed on a motion be based on personal knowledge [*see, e.g., Code Civ. Proc. § 437c(d)* (motion for summary judgment)]. Other statutes permit facts to be shown by information or belief [*see, e.g., Code Civ. Proc. § 482.040* (application for attachment orders)]. Still other statutes are silent as to whether the affidavits or declarations submitted on a motion must be based on personal knowledge or may be made on information and belief [*see, e.g., Code Civ. Proc. §§ 418.10* (motions to quash service of a summons for lack of jurisdiction or to stay or dismiss an action for inconvenient forum), 2009 (general statute, authorizing the use of affidavits on a motion); *see City of Santa Cruz v. Municipal Court (1989) 49 Cal. 3d 74, 260 Cal. Rptr. 520, 776 P.2d 222* (a motion under *Evid. Code § 1043*, relating to discovery or disclosure of peace officer personnel records, may be made on information and belief)].

With respect to those statutes that are silent as to whether the affidavit or declaration must be based on personal knowledge, unless the facts come within one of the exceptions discussed in *§ 15.20[2]*, the prudent practice would be to submit affidavits or declarations based on personal knowledge; and, if two or more affidavits or declarations are required to establish the facts necessary to support or oppose the motion, to obtain and submit as many as are necessary to show all the facts by personal knowledge. Furthermore, it might save time later if documents to be attached to the affidavits or declarations are properly authenticated [*see Evid. Code § 1400 et seq.* (writings); *see also Evid. Code §§ 1151-1158* (specific matters), 1200 et seq. (hearsay rule and exceptions)].

On the other hand, by analogy to *Evid. Code § 702*, an affidavit or declaration setting forth facts on information and belief is competent evidence unless an objection is interposed on the ground that the affiant or declarant has no personal knowledge of the matter [*McLellan v. McLellan (1972) 23 Cal. App. 3d 343, 359-360, 100 Cal. Rptr. 258* ; *see Evid. Code § 702* (stating personal knowledge requirement, but also providing that, *against the objection of any party*, personal knowledge must be shown before the witness may testify concerning the matter)]. Moreover, hearsay or other

incompetent evidence in an affidavit or declaration received without a proper objection or motion to strike is to be regarded as competent evidence in support of the subsequent order [*Flood v. Simpson (1975) 45 Cal. App. 3d 644, 649, 119 Cal. Rptr. 675* ; *see also Kroopf v. Guffey (1986) 183 Cal. App. 3d 1351, 1358-1360, 228 Cal. Rptr. 807* (motion to quash service of summons may be heard and determined on unobjected to hearsay affidavits)].

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§ 15.22 Perjury and Attempted Perjury

Perjury is committed by every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may by law of the State of California be administered, willfully and contrary to the oath, states as true any material matter which he or she knows to be false [*Pen. Code § 118*].

For purposes of establishing the crime of perjury, *Pen. Code § 124* provides that the making of a deposition, affidavit or certificate is deemed to be complete from the time when it is delivered by the accused to any other person, with the intent that it be uttered or published as true. For depositions, affidavits, and certificates, it is the finality of the writing and its delivery, and not merely speaking the false words, which constitutes an essential element of the crime of perjury, and the mere making of the affidavit or giving testimony at a deposition cannot constitute the crime of perjury [*Collins v. Superior Court (2001) 89 Cal. App. 4th 1244, 1247, 108 Cal. Rptr. 2d 123* (purportedly false deposition taken under oath but not signed and delivered), citing *People v. Robles (1897) 117 Cal. 681, 682, 49 P. 1042* (allegedly false affidavit not delivered by defendant)]. This delivery requirement also applies to declarations under penalty of perjury [*People v. Griffini (1998) 65 Cal. App. 4th 581, 594-595, 76 Cal. Rptr. 2d 590* (relying on *Code Civ. Proc. § 2015.5*, which renders declaration legal equivalent of affidavit; false state application for registration as a private security guard signed and given to company but not delivered to state)].

As of December 2001, California case law recognizes the crime of attempted perjury [*People v. Post (2001) 94 Cal. App. 4th 467, 482, 114 Cal. Rptr. 2d 356]* (quoting Justice Black: "All perjured relevant testimony is at war with justice"). While demonstrably untrue deposition testimony taken under oath cannot support a perjury conviction where the deposition is neither signed nor delivered, it will support a conviction for attempted perjury [*People v. Post (2001) 94 Cal. App. 4th 467, 480-484, 114 Cal. Rptr. 2d 356]* (attempted perjury issue raised by appellate court, perjury conviction reduced to attempted perjury, and court urges Legislature to adopt federal standard that the crime of perjury is complete once a materially false statement is spoken at a deposition). By establishing the new crime of attempted perjury, the question remains whether the abrogation of the delivery requirement of *Pen. Code § 124* of *Post* is restricted to undelivered false deposition testimony or if the making of false affidavits, certificates, and declarations without delivering them will support an attempted perjury conviction.

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[Reserved]

§§ 15.23[Reserved]

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§ 15.40 State Statutes

[1] Affidavits

Requirement of intelligible references to action in which affidavit is filed. *Code Civ. Proc. § 1046*; *Penal Code § 1401*

Affidavit as statement in writing under oath. *Code Civ. Proc. § 2003*

Affidavits taken in sister state. *Code Civ. Proc. § 2013*

Affidavits taken in foreign country. *Code Civ. Proc. § 2014*

Certificate authenticating foreign affidavit. *Code Civ. Proc. § 2015*

Written affirmation in lieu of oath. *Code Civ. Proc. § 2015.6*

Contents of jurat of federal civil service employee appointed as notary on military reservation. *Gov. Code § 8203.5*

[2] Certificates

Proof of service by mail by certificate of member of state bar or clerk of court of record. *Code Civ. Proc. § 1013a(2), (4)*

Certificate of sheriff, marshal, or superior court clerk has same effect as affidavit. *Code Civ. Proc. § 2015.3*

Contents of certification of copy of writing. *Evid. Code § 1531*

Certification of false jury list as felony. *Penal Code § 117*

[3] Declaration Under Penalty of Perjury

Form and content of declaration under penalty of perjury. *Code Civ. Proc. § 2015.5*

[4] Notaries

Notaries in general. *Gov. Code § 8200 et seq.*

[5] Officers Authorized to Administer Oaths

County board of supervisors. *Gov. Code § 25006*

County officers and deputies. *Gov. Code § 24057*

Court commissioners. *Code Civ. Proc. § 259(d)*

Executive officers of *California. Gov. Code § 1225*

Judicial officers. *Code Civ. Proc. § 177(4)*; *Gov. Code § 1225*

Jury commissioners. *Code Civ. Proc. § 196(a)*

Justices of California Supreme Court. *Code Civ. Proc. §§ 128(a)(7), 179(3)*

Justices of court of appeal. *Code Civ. Proc. §§ 128(a)(7), 179(3)*

Judges of superior court. *Code Civ. Proc. §§ 128(a)(7), 179(3)*

Labor commissioner. *Lab. Code § 92*

Legislative committee members. *Gov. Code § 9404*

Members of California Legislature. *Gov. Code § 1225*

Military officers. *Civ. Code § 1183.5*

Notary public. *Gov. Code § 8205(a)(3)*

Officers in administrative proceedings. *Gov. Code § 11528*

[6] Perjury

Certification of false jury list as felony. *Penal Code § 117*

False testimony in affidavit or false declaration as perjury. *Penal Code §§ 118, 118a*

Commission of perjury as complete on delivery of false affidavit. *Penal Code § 124*

False statements by officer or agent of public utility under oath as felony. *Pub. Util. Code § 2114*

[7] Seals

Seal defined. *Code Civ. Proc. § 1931*; *see also Code Civ. Proc. §§ 14, 1930*

Papers required to be sealed. *Code Civ. Proc. § 153*; *Gov. Code §§ 14, 8207*

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§ 15.41 Decisions

[1] Acknowledgement Distinguished

Certificate of acknowledgement as not equivalent of jurat, affidavit, or declaration under penalty of perjury. *Palm Springs Alpine Estates, Inc. v. Superior Court (1967) 255 Cal. App. 2d 883, 888, 63 Cal. Rptr. 618*

[2] Affidavit as Evidence

Affidavits as not usable in evidence unless authorized by statute. *Estate of Fraysher (1956) 47 Cal. 2d 131, 135, 301 P.2d 848* ; *Estate of Horman (1968) 265 Cal. App. 2d 796, 805, 71 Cal. Rptr. 780*

Rule that trial judge is not required to accept as true sworn testimony of witness, even in absence of evidence directly contradicting it, as applying to affidavit. *Bank of America v. Salinas Nissan, Inc. (1989) 207 Cal. App. 3d 260, 274, 254 Cal. Rptr. 748*

Affidavits as competent evidence where authorized by statute or where not objected to on proper grounds by party against whom they are offered. *Safeway Stores, Inc. v. City of Burlingame (1959) 170 Cal. App. 2d 637, 646, 339 P.2d 933*

Use of affidavit as precluding cross examination and, therefore, as unavailable to prove facts directly in controversy in action. *Lacrabere v. Wise (1904) 141 Cal. 554, 556-557, 75 P. 185* ; *see also Eagle Oil & Ref. Co. v. Prentice (1942) 19 Cal. 2d 553, 556, 122 P.2d 264* (summary judgment pursuant to *Code Civ. Proc. § 437c*)

Affidavits as not in nature of best evidence by which to prove issuable facts. *Lacrabere v. Wise (1904) 141 Cal. 554, 556, 75 P. 185*

[3] Conflict Between Testimony and Declaration

Trier of fact as not required to accept as true sworn testimony of witness where there is variance between testimony of witness and his declaration. *Kaslavage v. West Kern County Water Dist. (1978) 84 Cal. App. 3d 529, 535, 148 Cal. Rptr. 729*

[4] Conclusions, Opinions, and Ultimate Facts

A declaration that is conclusory in nature is insufficient to establish the nonexistence of any triable issue of material fact, and thus may not serve as a basis for granting summary judgment. *Johnson v. Superior Court (2006) 143 Cal. App. 4th 297, 308, 49 Cal. Rptr. 3d 52*

Affidavit or declaration setting forth conclusions, opinions, or ultimate facts only as ordinarily insufficient evidence. *Fuller v. Goodyear Tire & Rubber Co. (1970) 7 Cal. App. 3d 690, 693, 86 Cal. Rptr. 705*

Opinions and conclusions in affidavit as incompetent evidence. *Mack v. Superior Court (1968) 259 Cal. App. 2d 7, 10, 66 Cal. Rptr. 280* (affidavit containing conclusion); *Tri-State Mfg. Co. v. Superior Court (1964) 224 Cal. App. 2d 442, 445, 36 Cal. Rptr. 750* (affidavit containing opinions and conclusions)

Affidavits drawn in conclusionary terms as insufficient to create conflict in facts. Petri Cleaners, Inc. v. Automotive Employees, etc., Local No. 88 *(1960) 53 Cal. 2d 455, 469 n. 5, 45 L.R.R.M. (BNA) 2664, 2 Cal. Rptr. 470, 349 P.2d 76*

Language of statute repeated in affidavit as ultimate fact and incompetent. *Tilton v. Russek (1916) 171 Cal. 731, 736, 154 P. 860*

Clear and certain statement of facts and circumstances as required to prove ultimate facts in issue. *Ware v. Stafford (1962) 206 Cal. App. 2d 232, 238, 24 Cal. Rptr. 153*

[5] Form and Content of Affidavits

Introductory phrases, such as affiant's title, which precede sworn statement as not under oath. *Old Settlers Investment Co. v. White (1910) 158 Cal. 236, 246, 110 P. 922*

Date of affidavit as presumed to be same as date of its presentation. *Bank of Venice v. Hutchinson (1912) 19 Cal. App. 219, 222, 125 P. 252*

Absence of venue as not invalidating otherwise sufficient affidavit. *County Bank v. Jack (1906) 148 Cal. 437, 440, 83 P. 705* ; *Reavis v. Cowell (1880) 56 Cal. 588, 590-591*

Affidavit with title of action missing or defective as valid where affidavit intelligibly refers to action. *Watt v. Bradley (1892) 95 Cal. 415, 417, 30 P. 557* ; *McCrary v. Beaudry (1885) 67 Cal. 120, 122, 7 P. 264*

Signature of affiant as not required absent statute or rule of court. *City of Petaluma v. White (1907) 152 Cal. 190, 195, 92 P. 177* ; *Pacific States S. & L. Co. v. Hoffman (1933) 134 Cal. App. 601, 602, 25 P.2d 1006*

Absence of seal as irregularity which does not invalidate otherwise sufficient affidavit. *Reclamation District v. Snowball (1911) 160 Cal. 695, 697, 117 P. 905, 118 P. 514*

[6] Jurat

Jurat as essential part of affidavit. *People v. United Bonding Ins. Co. (1969) 272 Cal. App. 2d 441, 443, 77 Cal. Rptr. 310*

Jurat as certificate of officer who administered oath that affiant subscribed and swore to affidavit before him. *United States v. McDermott (1890) 140 U.S. 151, 153, 11 S. Ct. 746, 35 L. Ed. 391* ; *People v. McDaniels (1903) 141 Cal. 113, 115, 74 P. 773*

Jurat as certificate evidencing fact that affidavit was properly made before duly authorized officer. *Reavis v. Cowell (1880) 56 Cal. 588, 589-591* ; *Hoffman v. City of Palm Springs (1959) 169 Cal. App. 2d 645, 650, 337 P.2d 521*

Affidavit subscribed and sworn to before officer outside jurisdiction for which he was appointed as being nullity incapable of correction by amendment. *Fairbanks, Morse & Co. v. Getchell (1910) 13 Cal. App. 458, 462, 110 P. 331*

Notary's certification that affidavit was subscribed and sworn to as prima facie evidence that it was made under oath. *People v. McDaniels (1903) 141 Cal. 113, 114-116, 74 P. 773*

[7] Form and Content of Declarations

For a declaration to comply with the requirements of *Code Civ. Proc. § 2015.5*, the declaration must either state on its face that it was executed in California or state that it is declared under the laws of the state of California *Kulshrestha v. First Union Commerical Corp. (2004) 33 Cal. 4th 601, 618, 15 Cal. Rptr. 3d 793, 93 P.3d 386* (declaration signed outside California must state they were made "under the laws of the State of California" in order to satisfy section 2015.5 and to be used as evidence)

End of document is preferred, if not required, place for recitation that declaration is under penalty of perjury. *People v. Pierce (1967) 66 Cal. 2d 53, 59, 56 Cal. Rptr. 817, 423 P.2d 969*

Where declaration of due diligence neither indicated that it was executed in California nor provided that it was executed under penalty of perjury under the laws of the State of California, the defect was found to be harmless where the declaration was attached to, expressly referenced in, and filed with the proof of service, which was properly executed under penalty of perjury under the laws of the *State of California. Hearn v. Howard (2009) 177 Cal. App. 4th 1193, 1204, 99 Cal. Rptr. 3d 642*

"Subscribe" means signed by oneself with his or her hand; attorney's custom of signing declarations under penalty of perjury on behalf of clients and witnesses improper. *In re Marriage of Reese & Guy (1999) 73 Cal. App. 4th 1214, 1222, 87 Cal. Rptr. 2d 339*

Failure to recite that facts in declaration are true is inconsequential to sufficiency of declaration under penalty of perjury. *Pacific Air Lines, Inc. v. Superior Court (1965) 231 Cal. App. 2d 587, 588-589, 42 Cal. Rptr. 68*

Venue stated in form usually used for affidavit as satisfying place of execution requirement of *Code Civ. Proc. § 2015.5* (declaration). *McCauley v. Superior Court (1961) 190 Cal. App. 2d 562, 564-565, 12 Cal. Rptr. 119*

[8] Incorporation by Reference

Incorporation by reference of papers on file is appropriate in affidavit for use in same action. *Newport v. City of Los Angeles (1960) 184 Cal. App. 2d 229, 234, 7 Cal. Rptr. 497* (motion for summary judgment)

[9] Information and Belief

Affidavits made solely on information and belief, except where allowed by statute, are unavailing for any purpose. *Gay v. Torrance (1904) 145 Cal. 144, 151, 78 P. 540*

Allegations on information and belief in affidavit as hearsay, to be disregarded. *Franklin v. Nat C. Goldstone Agency (1949) 33 Cal. 2d 628, 631, 204 P.2d 37* ; *Kellett v. Kellett (1934) 2 Cal. 2d 45, 48, 39 P.2d 203* ; *Tracy v. Tracy (1963) 213 Cal. App. 2d 359, 362, 28 Cal. Rptr. 815* ; *Jeffers v. Screen Extras Guild, Inc. (1955) 134 Cal. App. 2d 622, 623, 286 P.2d 30* ; *see also West Romaine Corp. v. Cal. State Bd. of Pharmacy (1968) 266 Cal. App. 2d 901, 906-907, 72 Cal. Rptr. 569*

Information and belief allegation in affidavit as prima facie evidence where facts required by statute are necessarily outside affiant's personal knowledge. *Brown v. Happy Valley Fruit Growers (1939) 206 Cal. 515, 520, 274 P. 977* (allegations re third party's intent required by statute)

Statements in affidavit are presumed to be made on personal knowledge of affiant. *Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 106, 95 Cal. Rptr. 516, 485 P.2d 1132*

Code Civ. Proc. § 446, providing for verification of pleading on information and belief, applies to pleadings that join issues but not where verification or affidavit is to be used as evidence of facts. *Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 204, 151 Cal. Rptr. 721*

[10] Motions

Motions are normally heard on affidavits alone. *Crocker Citizens Nat. Bank v. Knapp (1967) 251 Cal. App. 2d 875, 880, 60 Cal. Rptr. 66*

[11] Perjury

Affidavit is complete for purpose of prosecution for perjury when delivered to any other person with intent that it be published as true. *People v. Pierce (1967) 66 Cal. 2d 53, 60, 56 Cal. Rptr. 817, 423 P.2d 969* (declaration under penalty of perjury); *see also Penal Code § 124*

A declaration that was not signed under penalty of perjury is not admissible evidence as required to support a summary judgment motion. *Gonzalez v. Kalu (2006) 140 Cal. App. 4th 21, 26, 43 Cal. Rptr. 3d 866*

There is no compliance with *Code of Civil Procedure section 2015.5* where a transcript reflects that a witness was asked verbally by plaintiff's investigator, at the end of a telephone conversation, if his or her statements were true and correct under penalty of perjury. *Stockinger v. Feather River Community College (2003) 111 Cal. App. 4th 1014, 1026-1027, 4 Cal. Rptr. 3d 385*

While demonstrably untrue deposition testimony taken under oath cannot support a perjury conviction where the deposition is neither signed nor delivered, it will support a conviction for attempted perjury. *People v. Post (2001) 94 Cal. App. 4th 467, 480-484, 114 Cal. Rptr. 2d 356* (crime of attempted perjury recognized in California as of December, 2001)

Before a party may be convicted of perjury in making a false affidavit, he must either use the affidavit for a purpose contemplated by *Penal Code § 118*, or deliver it to some one for such use. *Collins v. Superior Court (2001) 89 Cal.*

App. 4th 1244, 1247, 108 Cal. Rptr. 2d 123 , citing *People v. Robles (1897) 117 Cal. 681, 682, 49 P. 1042*

Whole point of permitting declaration under perjury, in lieu of sworn statement, is to help insure that declarations contain truthful factual representation and are made in good faith; oath or declaration must be in form that criminal sanctions of perjury might apply when material so declared to be true, are in fact not true or are not known to be true. *In re Marriage of Reese & Guy (1999) 73 Cal. App. 4th 1214, 1223, 87 Cal. Rptr. 2d 339*

Purpose of declaration under penalty of perjury is to assure good faith in statements of party signing declaration; indictment for perjury as permissible when declaration is false. *Self-Insurers' Security Fund v. ESIS, Inc. (1988) 204 Cal. App. 3d 1148, 1160, 251 Cal. Rptr. 693*

False statement under oath or penalty of perjury as not giving rise to prosecution for perjury where statement was not required to be under oath in the first place. *People v. Barajas (1969) 273 Cal. App. 2d 750, 751-752, 78 Cal. Rptr. 647*

[12] Presumption on Appeal

In review on appeal of order made on affidavits factual conflicts as resolved in favor of respondent. *Fuller v. Lindenbaum (1938) 29 Cal. App. 2d 227, 230, 84 P.2d 155*

[13] Sufficiency

Sufficiency of affidavit as tested by whether it has been drawn in such manner that perjury could be charged thereon if any material allegation contained therein is false. *Mack v. Superior Court (1968) 259 Cal. App. 2d 7, 10, 66 Cal. Rptr. 280* ; *Borders v. Civil Service Commission (1963) 211 Cal. App. 2d 678, 684, 27 Cal. Rptr. 490* ; *Hoffman v. City of Palm Springs (1959) 169 Cal. App. 2d 645, 648-649, 337 P.2d 521*

Sufficiency of affidavit as tested by same rules as applicable to oral testimony. *Mayo v. Beber (1960) 177 Cal. App. 2d 544, 551, 2 Cal. Rptr. 405* ; *Jeffers v. Screen Extras Guild, Inc. (1955) 134 Cal. App. 2d 622, 623, 286 P.2d 30*

Officer or agent of corporation as proper person to make affidavit in behalf of corporation. *Old Settlers Investment Co. v. White (1910) 158 Cal. 236, 246, 110 P. 922*

Partner as proper person to make affidavit in behalf of partnership. *Gee Chong Pong v. Harris (1918) 38 Cal. App. 214, 217-218, 175 P. 806*

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§ 15.42 Attorney General Opinions

Code Civ. Proc. § 2093 and *Gov. Code § 1225* as constitutional in requiring Commission on Judicial Performance to issue certifications under specified conditions. *70 Ops. Cal. Att'y Gen. 113 (1987)*

Notary public as not obligated to ascertain validity of title "attorney-at-law." *60 Ops. Cal. Att'y Gen. 133 (1977)*

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2-15 California Forms of Pleading and Practice--Annotated § 15.43

§ 15.43 Law Reviews

Garvey, *The Attorney's Affidavit in Litigation Proceedings*, *31 Stan. L. Rev. 191 (1979)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 15.44 Text References

Witkin, California Procedure, vol. 6, *Provisional Remedies*, §§ 2, 3; vol. 6, *Proceedings Without Trial*, § 39 (4th ed. 1997)

Legal Topics:

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

§§ 15.45[Reserved]

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2-15 California Forms of Pleading and Practice--Annotated § 15.50

§ 15.50 Affidavit for Execution and Use in California--Skeletal Form

[1] FORM Affidavit for Execution and Use in California--Skeletal Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	AFFIDAVIT OF _____
_____ [*name*],	)	[*name*] IN _____ [*either*
Defendant.	)	SUPPORT OF *or* OPPOSITION TO]
	)	_____
	)	[*specify*]

_____

	)	
State of California	)	ss.
[City and] County of _____	)	

_____ [*Name*], being [first] duly sworn [on his/her oath deposes and] says:

_____ [*Set forth facts within affiant's personal knowledge, avoiding allegations on information and belief unless permitted or required by statute. If appropriate to the particular use for which the affidavit is being made, include additional facts so that it affirmatively shows that, if sworn as a witness, affiant can competently testify to the contents of the affidavit.*]

_____ [*signature of affiant*]

Subscribed and sworn to before me on _____ [*date*].

_____ [*signature of officer*]
_____ [*typed name of officer*]
_____ [*officer, e.g.*, Notary Public]
[*Seal*]

[2] Use of Form

The skeletal form in [1], *above*, illustrates the various parts of the affidavit. It is included as a guide for drafting affidavits to be executed in California.

[3] Format and Contents of Affidavit

An affidavit is required to be in writing and to be made under oath [*Code Civ. Proc. § 2003*]. An affidavit should have a title, but an affidavit without a title or with a defective title is still valid and effective if it intelligibly refers to the action or proceeding in which it is made [*Code Civ. Proc. § 1046* (civil actions or special proceedings); *Penal Code § 1401* (criminal actions)]. An affidavit also contains a recitation of the place of execution, called the venue [Black's Law Dictionary (4th ed); *see also County Bank v. Jack (1906) 148 Cal. 437, 440, 83 P. 705* (effect of absence of venue)].

The body of the affidavit contains a statement of the necessary and related facts [*see Ware v. Stafford (1962) 206 Cal. App. 2d 232, 238, 24 Cal. Rptr. 153]* . An affidavit based on information and belief is generally disregarded as incompetent evidence [*Franklin v. Nat C. Goldstone Agency (1949) 33 Cal. 2d 628, 631, 204 P.2d 37]* , unless a statute requires a statement which by its very nature can be made only on information and belief [*Brown v. Happy Valley Fruit Growers (1929) 206 Cal. 515, 520, 274 P. 977]* . Likewise, opinions and conclusions of an affiant are considered insufficient and generally disregarded [*Tri-State Mfg. Co. v. Superior Court (1964) 224 Cal. App. 2d 442, 445, 36 Cal. Rptr. 750]* .

A jurat appears at the end of the affidavit, certifying that the affidavit was made under oath [*People v. McDaniels (1903) 141 Cal. 113, 114-116, 74 P. 773]* and that the oath was administered by a person with authority to do so [*Reavis v. Cowell (1880) 56 Cal. 588, 589-591]* .

[4] Cross References

For forms of oaths and affirmations, see Ch. 392, *Oath and Affirmation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDocumentary EvidenceWritingsGeneral OverviewEvidenceAuthenticationGeneral OverviewEvidenceTestimonyLay WitnessesPersonal Knowledge

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2-15 California Forms of Pleading and Practice--Annotated § 15.51

§ 15.51 Affidavit to Be Executed in Sister State for Use in California--Skeletal Form

[1] FORM Affidavit to Be Executed in Sister State for Use in California--Skeletal Form

[*Caption. See § 15.50[1]*.]

State of _____ [County *or* Parish *or other*] of _____))) ss.

_____ [*Name*], being duly sworn, says:

_____ [*Set forth facts. See § 15.50[1]*.]

[*Seal*] _____ [*signature of officer*]
_____ [*typed name of officer*]
_____ [*office, e.g.*, Notary Public]

[2] Use of Form

The skeletal form in [1], *above*, is for use in drafting an affidavit to be executed in a state other than California for use before a court, judge, or state officer of California. For discussion of the form and content of an affidavit, see *§ 15.50[3], [4]*.

When an affidavit is taken before a judge or a court in another state, the genuineness of the signature of the judge, the existence of the court, and the fact that the judge is a member of that court must be certified by the clerk of the court,

under the court's seal [*Code Civ. Proc. § 2015*; *see § 15.53[1]*].

[3] Who May Take Affidavit

An affidavit taken in another state of the United States, to be used in California, may be taken before any notary public in another state or before any judge or clerk of a court of record having a seal [*Code Civ. Proc. § 2013*]. *Code Civ. Proc. § 2013* also provides that such an affidavit may be taken before a commissioner appointed by the Governor of California to take such affidavits.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewEvidenceAuthenticationGeneral OverviewGovernmentsCourtsCourt Personnel

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2-15 California Forms of Pleading and Practice--Annotated § 15.52

§ 15.52 Affidavit to Be Executed in Foreign Country for Use in California--Skeletal Form

[1] FORM Affidavit to Be Executed in Foreign Country for Use in California--Skeletal Form

[*Caption. See § 15.50[1].*]

In the _____ [*type of government of foreign country, e.g.*, Republic *or* Kingdom *or* Dominion] of _____ [*name of country*], _____ [*political subdivision of country, e.g.*, Province *or* State] of _____ [*name of subdivision*]	))))))))	ss.

_____ [*Name*] makes the following statement under oath:

_____ [*Set forth facts. See § 15.50 [1].*]

_____ [*signature of affiant*]

Subscribed and sworn to before me on _____[*date*].

_____ [*signature of officer*]

_____ [*name of officer*]

[*Seal*]

_____ [*office, e.g.*, Judge
of the _____ Court of
_____ (*political subdivision*)
_____ (*type of government*) of
_____ (*name of country*)]

[2] Use of Form

The skeletal form of affidavit in [1], *above*, is for use as a guide in drafting an affidavit for execution in a foreign country for use before a court, judge, or state officer of California. For discussion of the form and content of an affidavit, see *§ 15.50[3], [4]*.

When an affidavit is taken before a judge or a court in a foreign country, the genuineness of the signature of the judge, the existence of the court, and the fact that the judge is a member of that court must be certified by the clerk of the court, under that court's seal [*Code Civ. Proc. § 2015*; *see § 15.53[1]*].

[3] Who May Take Foreign Affidavit

An affidavit taken in a foreign country to be used in California may be taken before an ambassador, minister, consul, vice consul, or consular agent of the United States, or before any judge of a court of record having a seal in that foreign country [*Code Civ. Proc. § 2014*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyLay WitnessesPersonal KnowledgeEvidenceDocumentary EvidenceWritingsGeneral OverviewEvidenceAuthenticationGeneral Overview

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PART IV. FORMS

2-15 California Forms of Pleading and Practice--Annotated § 15.53

§ 15.53 Certificate Authenticating Foreign Affidavit Taken Before Judge of Foreign State or Country

[1] FORM Certificate Authenticating Foreign Affidavit Taken Before Judge of Foreign State or Country

[*Caption. See § 15.50[1].*]

[*Venue. See §§ 15.51 [1], 15.52[1].*]

I, _____ [*name*], certify that:

I am the clerk of the _____ [*name of court*].

On _____ [*date*], the date the affidavit of _____ [*name of affiant*], a true and correct copy of which is attached, was subscribed and sworn to before _____ [*name of judge*], _____ [*name of court*] was in existence as a court of record having a seal. At that time _____ [*name of judge*] was a member of this court and his/her signature affixed to the affidavit is genuine.

Dated: _____
[*Seal*] _____
[*signature of clerk*]

[2] Use of Form

The form of certificate in [1], *above*, is for use in authenticating an affidavit subscribed and sworn to before a judge of a court of record in a foreign state or country [*see Code Civ. Proc. §§ 2013-2015*; for forms of affidavits, *see §§ 15.51* and *15.52*].

[3] Certificate Authenticating Foreign Affidavit

When an affidavit is taken before a judge in another state, or in a foreign country, the genuineness of the signature of the judge, the existence of the court, and the fact that the judge is a member of that court, must be certified by the clerk of that court, under the court's seal [*Code Civ. Proc. § 2015*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewEvidenceTestimonyLay WitnessesPersonal KnowledgeEvidenceDocumentary EvidenceWritingsGeneral OverviewEvidenceAuthenticationGeneral OverviewGovernmentsCourtsCourt Personnel

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PART IV. FORMS

2-15 California Forms of Pleading and Practice--Annotated § 15.54

§ 15.54 Certificate Authenticating Foreign Affidavit Taken Before Clerk of Court of Sister State

[1] FORM Certificate Authenticating Foreign Affidavit Taken Before Clerk of Court of Sister State

[*Caption. See § 15.50[1].*]

[*Venue. See §§ 15.51 [1], 15.52[1].*]

I, _____ [*name*], certify that:

I am the clerk of _____ [*name of court*].

On _____ [*date*], the date the within affidavit of _____ [*name of affiant*], a correct copy of which is attached, was subscribed and sworn to, _____ [*name of court*] was in existence as a court of record having a seal.

Dated: _____.
[*Seal*] _____
[*signature of clerk*]

[2] Use of Form

The form of certificate in [1], *above*, is for use in authenticating an affidavit subscribed and sworn to before the clerk of a court of record in a foreign state [*see Code Civ. Proc. §§ 2013, 2015*; for forms of affidavit, *see §§ 15.51* and *15.52*].

[3] Certificate Authenticating Foreign Affidavit

When an affidavit is taken before any clerk of a court of record having a seal [*see Code Civ. Proc. § 2013*] in a foreign

state, the existence of that court must be certified by the clerk of that court, under the seal of that court [*Code Civ. Proc. § 2015*; *see also § 15.53[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewEvidenceTestimonyLay WitnessesPersonal KnowledgeEvidenceDocumentary EvidenceWritingsGeneral OverviewEvidenceAuthenticationGeneral OverviewGovernmentsCourtsCourt Personnel

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2-15 California Forms of Pleading and Practice--Annotated § 15.55

§ 15.55 Introductory Clause Related to Oath or Affirmation

[1] FORM Introductory Clause Related to Oath or Affirmation

[*EITHER*]

_____ [*Name of affiant*], being first duly sworn [on his/her oath], deposes and says: _____ [*set forth facts*].

[*OR*]

_____ [*Name of affiant*] does solemnly swear that: _____ [*set forth facts*].

[*OR*]

_____ [*Name of affiant*] does solemnly affirm that: _____ [*set forth facts*].

[*OR*]

Comes now the affiant, _____ [*name*], and, being first duly sworn, deposes and says: _____ [*set forth facts*].

[*OR*]

_____ [*Name of affiant*] makes the following statement under oath: _____ [*set forth*

facts].

[*OR*]

_____ [*Name of Affiant*] solemnly states that: _____ [set forth facts].

[2] Use of Form

The form of alternative statements in [1], *above*, takes into account the oath or affirmation [*see Code Civ. Proc. § 2094*] and is for use in an affidavit in introducing the facts to be alleged by the affiant.

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2-15 California Forms of Pleading and Practice--Annotated § 15.56

§ 15.56 Jurat of Oath or Affirmation

[1] FORM Jurat of Oath or Affirmation

[*EITHER*]

Subscribed and sworn to before me this _____ day of _____ [*date*].
[*Seal*] _____ [*signature of officer*]
_____ [*typed name of officer*]
_____ [*office*]

[*OR*]

Subscribed and affirmed before me this _____ day of _____ [*date*].
[*Seal*] _____ [*signature of officer*]
_____ [*typed name of officer*]
_____ [*office*]

[2] Use of Form

The form of alternative jurats in [1], *above*, concerning the oath or affirmation [*see Code Civ. Proc. § 2094*] is for use by the officer administering the oath or affirmation to set forth that fact at the end of the affidavit [*see § 15.50 [3]*]. For discussion of the manner of administering the oath or affirmation, *see § 15.17[3]*.

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2-15 California Forms of Pleading and Practice--Annotated § 15.57

§ 15.57 Jurat of Commissioned Officer in Military Service

[1] FORM Jurat of Commissioned Officer in Military Service

Subscribed and sworn to before me on this _____ day of _____ [*month and year*].

_____ [*signature of officer*]
_____ [*rank, branch of service, and capacity in which officer signed*]

[2] Use of Form

The form in [1], *above*, is prescribed by *Civ. Code § 1183.5* as the jurat of a commissioned officer taking the affidavit of a person serving in or with the armed forces of the United States located within or outside of California, or any spouse of a member of the armed forces located within or outside of California.

[3] Power to Administer Oath

Any officer on active duty or performing inactive-duty training in the armed forces having the general powers of a notary public pursuant to *10 U.S.C. §§ 936* or *1044a* (Pub. L. Nos. 90-936, 101-510) and any successor statutes may perform all notarial acts for any of the following [Civ. Code. § 1183.5]:

- Any person serving in the United States armed forces, wherever he or she may be.
- The spouse of any person serving in the armed forces, wherever he or she may be.
- Any person eligible for legal assistance under laws and regulations of the United States, wherever he or she may be.
- Any person serving with, employed by, or accompanying the armed forces outside the United States and outside the Canal Zone, Puerto Rico, Guam, and the Virgin Islands.

- Any person subject to the Uniform Code of Military Justice outside of the United States.

[4] Omissions and Presumptions

The failure to state the place of execution in an affidavit taken before a military officer does not render it invalid. The recitals in a certificate or jurat of a military officer are prima facie evidence of their truth, and any oath or affirmation purporting to have been made by any commissioned officer of the Army, Air Force, Navy, Marine Corps, or Coast Guard constitutes presumptive evidence of the existence of the facts necessary to authorize the taking of the oath or affirmation by the officer, notwithstanding the omission of any specific recitals [*Civ. Code § 1183.5*].

[5] Cross References

For discussion of the format and contents of an affidavit, see *§ 15.50[3]*.

For forms of acknowledgment before a military officer, see Ch. 9, *Acknowledgments*

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-15 California Forms of Pleading and Practice--Annotated § 15.58

§ 15.58 Declaration Under Penalty of Perjury For Execution and Use in California--Skeletal Form

[1] FORM Declaration Under Penalty of Perjury For Execution and Use in California--Skeletal Form

[*Caption. See § 15.50[1].*]

I, _____ [*name*], state:

_____ [*Set forth facts. See § 15.50[1].*]

I declare under penalty of perjury that the foregoing is true and correct.

_____ [*date and place*]..... _____ [*signature*]

[2] Use of Form

The skeletal form in [1], *above*, is for use in drafting a declaration under penalty of perjury, to be used in lieu of an affidavit [*see Code Civ. Proc. § 2015.5*]. This form is only appropriate if the declaration is signed in California [*see Code Civ. Proc. § 2015.5*]. For a form that may be used whether or not it is signed in California, see *§ 15.59*.

[3] Declaration in Lieu of Affidavit

Whenever under any law, rule, regulation, order, or requirement of California, any matter is required or permitted to be supported, evidenced, established, or proved by affidavit, a declaration under penalty of perjury in substantially the same form may be executed with the same force, and effect as an affidavit [*Code Civ. Proc. § 2015.5*; *see also §§ 15.50[2], [3], 15.59[2]*].

Legal Topics:

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

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2-15 California Forms of Pleading and Practice--Annotated § 15.59

§ 15.59 Declaration Under Penalty of Perjury to Be Executed Within or Without California for Use in California

[1] FORM Declaration Under Penalty of Perjury to Be Executed Within or Without California for Use in California

I, _____ [*name*], state:

_____ [*Set forth facts. See § 15.50[1].*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form of declaration in [1], *above*, is for use whenever California law requires or permits a declaration to be used in lieu of an affidavit [*see § 15.58[2], [3]*]. The last paragraph is in the form suggested by *Code Civ. Proc. § 2015.5* for certifications or declarations executed anywhere within or without California for use in California [*Code Civ. Proc. § 2015.5*].

A person who, while outside of California, executes such a declaration for use in California, is subject to prosecution for perjury in the jurisdictional territory in California in which the act, transaction, matter, action, or proceeding in relation to which the certification or declaration was made occurs [*Penal Code §§ 118(a), 777b*].

For a declaration to comply with the requirements of *Code Civ. Proc. § 2015.5*, the declaration must either state on its face that it was executed in California or state that it is declared under the laws of the state of California [*Kulshrestha v. First Union Commerical Corp. (2004) 33 Cal. 4th 601, 618, 15 Cal. Rptr. 3d 793, 93 P.3d 386* (declaration signed outside California must state they were made "under the laws of the State of California" in order to satisfy section 2015.5 and to be used as evidence)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-15 California Forms of Pleading and Practice--Annotated § 15.60

§ 15.60 Declaration Under Penalty of Perjury for Execution and Use Within or Outside of California--Alternative Form

[1] FORM Declaration Under Penalty of Perjury for Execution and Use Within or Outside of California--Alternative Form

_____ [I, _____ (*name*), declare *or* The undersigned declares,] under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is an alternative form of declaration under penalty of perjury to be used in lieu of an affidavit. It may be used within or outside of California [*Code Civ. Proc. § 2015.5*].

Before using this form, counsel should note that, while this form is similar to the statutory form set out in *Code Civ. Proc. § 2015.5*, the text of the *form in § 15.59* more closely tracks the statutory form, and counsel may prefer to use it for that reason.

For a declaration to comply with the requirements of *Code Civ. Proc. § 2015.5*, the declaration must either state on its face that it was executed in California or state that it is declared under the laws of the state of California. [*Kulshrestha v. First Union Commerical Corp. (2004) 33 Cal. 4th 601, 618, 15 Cal. Rptr. 3d 793, 93 P.3d 386* (declaration signed outside California must state they were made "under the laws of the State of California" in order to satisfy section 2015.5 and to be used as evidence)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesPerjuryGeneral

OverviewEvidenceAuthenticationGeneral OverviewEvidenceDocumentary EvidenceGeneral Overview

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2-15 California Forms of Pleading and Practice--Annotated § 15.61

§ 15.61 Declaration Under Penalty of Perjury for Execution Within or Outside of California--Judicial Council Form MC-030

[1] FORM Declaration Under Penalty of Perjury for Execution Within or Outside of California--Judicial Council Form MC-030

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative filled-in reproduction of the Judicial Council approved form of declaration under penalty of perjury for optional use when California law requires a matter to be established by affidavit or declaration and the declaration is to be filed or submitted to the court and not to be attached to other papers.

The fact situation illustrated is based on *Evid. Code §§ 1560, 1561*, relating to the production of business records by a nonparty to the action. The form may be executed at any place within or outside of California [*see Code Civ. Proc. § 2015.5*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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2-15 California Forms of Pleading and Practice--Annotated § 15.62

§ 15.62 Declaration Under Penalty of Perjury for Execution Within or Outside of California--Declaration to Be Attached to Another Document--Judicial Council Form MC-031

[1] FORM Declaration Under Penalty of Perjury for Execution Within or Outside of California--Declaration to Be Attached to Another Document

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative filled-in reproduction of the Judicial Council approved form of declaration under penalty of perjury for use when California law requires or permits use of an affidavit or declaration in support of a proceeding and the declaration is to be attached to another court paper, such as a notice of motion. The form should be attached to another document that requires a declaration but does not contain one. It may be executed at any place within or outside of California [*see Code Civ. Proc. § 2015.5*].

The fact situation illustrated is a motion to dismiss an action under *Code Civ. Proc. § 583.360(a)* for failure to bring the action to trial within five years after it was commenced [*see Code Civ. Proc. § 583.310*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesPerjuryGeneral OverviewEvidenceAuthenticationGeneral OverviewEvidenceDocumentary EvidenceGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 2: Adoptions thru Airplanes and Airports-Chs. 12-17
Chapter 16 AIRPLANES AND AIRPORTS

2-16 California Forms of Pleading and Practice--Annotated 16.syn

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.syn Synopsis to Chapter 16: AIRPLANES AND AIRPORTS

§ 16.01 Scope of Chapter

§ 16.02 Air Carrier Versus General Aviation Accidents

[1] Air Carrier Accidents

[2] General Aviation Accidents

§ 16.03 Cross References

§§ 16.04-16.09 [Reserved]

§ 16.10 Applicable Law

[1] Jurisdiction, Choice of Forum, and Venue

[2] State Versus Federal Substantive Law

[3] Choice of State Law in Airplane Accident Cases

[4] General Aviation Revitalization Act of 1994

[5] Governmental Contractor Immunity

[6] Airline Deregulation Act

[7] California State Statutes Relating to Aircraft Operation

§ 16.11 Negligence in Aviation Cases

[1] Proof of Negligence in General

[2] Duty of Care

[a] Ordinary Care

[b] Utmost Care--Common Carriers

[3] Breach of Duty of Care

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[1] FORM

[2] Use of Form

[3] Contents of Form

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[1] FORM

[2] Use of Form

[3] Contents of Form

[4] Specification of Damages

[5] Cross References

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[1] FORM

[2] Use of Form

[3] Specification of Damages

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[1] FORM

[2] Use of Form

[3] Specification of Damages

[4] Cross References

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[1] FORM

[2] Use of Form

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[1] FORM

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[1] FORM

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[1] FORM

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[1] FORM

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

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[1] FORM

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[3] Specification of Damages

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Specification of Damages

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[1] FORM

[2] Use of Form

[3] Specification of Damages

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[1] Form

[2] Use of Form

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[4] Number of Pages and Use of Attachments

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[1] FORM

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[1] FORM

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

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[1] FORM

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[1] FORM

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

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[1] FORM

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Specification of Damages

[4] Verification

[5] Cross References

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[1] FORM

[2] Use of Form

[3] Specification of Damages

[4] Cross References

§ 16.92 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Patron Against Airpark Operator--Defective Stepladder Provided for Patron's Use

[1] FORM

[2] Use of Form

[3] Specification of Damages

[4] Ensuing Liability

[5] Cross References

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Volume 2: Adoptions thru Airplanes and Airports-Chs. 12-17
Chapter 16 AIRPLANES AND AIRPORTS
PART I. SCOPE

2-16 California Forms of Pleading and Practice--Annotated § 16.01

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§ 16.01 Scope of Chapter

This chapter discusses the law of torts as it applies in cases involving aviation. General theories of liability for personal injury or wrongful death in the context of airplane accidents are discussed, including various methods of establishing negligence as well as strict products liability. The chapter also briefly discusses airport liability for nuisance and inverse condemnation, air carrier liability for miscellaneous passenger complaints such as overbooking and loss of luggage, and issues relating to aviation insurance. In addition, certain procedural aspects of aviation tort law, as well as choice of law problems, are discussed.

The chapter includes forms of complaint for use in wrongful death actions [§ 16.40] and in negligence actions involving a variety of factual situations [§§ 16.41-16.45, 16.47, 16.49-16.55]. Also included is a complaint for damages in both negligence and breach of contract for loss of luggage and refusal to carry plaintiff [§ 16.46], and a complaint for breach of contract and indemnity [§ 16.48]. In addition, the chapter includes an illustrative Judicial Council form of answer [§ 16.70], and allegations of affirmative defenses for use in a variety of situations [§§ 16.71-16.82]. Finally, the chapter includes forms of complaint for use by passengers against airport operators (as well as against an airline, as appropriate) for injuries suffered at the airport [§§ 16.90-16.91].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawAir TransportationCommercial AirlinesGeneral OverviewTortsTransportation TortsAir TransportationGeneral Overview

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PART I. SCOPE

2-16 California Forms of Pleading and Practice--Annotated § 16.02

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§ 16.02 Air Carrier Versus General Aviation Accidents

[1] Air Carrier Accidents

Litigation arising from major air carrier accidents, involving injury or death to hundreds of people, has generated what amounts to its own body of law and procedures under the federal rules for multidistrict litigation [*see 28 U.S.C.S. § 1407*]. Under the multidistrict litigation procedures, the average practitioner representing a plaintiff will not actively participate in discovery, as the court will appoint a committee of experienced aviation lawyers who will act on behalf of all plaintiffs. In addition, the defense of the airline and the manufacturers will be controlled by insurance companies whose attorneys are experienced in such litigation. Thus, a detailed discussion focusing on major carrier accidents is omitted from this chapter [*see* Kreindler, Aviation Accident Law, Ch. 3 (Matthew Bender), for in-depth discussion of this type of litigation]. Many of the substantive rules of liability discussed in this chapter, however, apply to both major airline litigation and litigation involving privately-owned aircraft.

[2] General Aviation Accidents

In 2005, there were 1,670 accidents involving general aviation [N.T.S.B. Annual Review of Aircraft Accident Data, U.S. General Aviation, Calendar Year 2005 (2009)]. The substantive law applicable to these accidents is generally the same as that which applies to accidents on the ground [*see Pub. Util. Code § 21404*]. However, aviation, unlike many earthbound pursuits, is highly regulated by the federal government. The Federal Air Regulations [14 C.F.R. Part 1 et seq.] detail the obligations of pilots, controllers, mechanics, and manufacturers. Familiarity with the Federal Air Regulations is essential to the preparation of general aviation cases.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceGeneral OverviewTortsTransportation TortsAir TransportationGeneral Overview

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Chapter 16 AIRPLANES AND AIRPORTS
PART I. SCOPE

2-16 California Forms of Pleading and Practice--Annotated § 16.03

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.03 Cross References

For discussion of general principles pertaining to negligence, see Ch. 380, *Negligence* .

For discussion of the liability of common carriers generally, see Ch. 109, *Carriers*

Liability for nuisance is discussed in Ch. 391, *Nuisance*

For discussion and forms relating to tort claims and actions against state and local public entities are covered in Ch. 464, *Public Entities and Officers: California Tort Claims Act*

For discussion of strict liability for ultrahazardous activities, see Levy, Golden, & Sacks, California Torts, Ch. 7 (Matthew Bender)

For forms involving airports as public utilities, see Ch. 480, *Public Utilities*

For detailed treatment of aviation accident law, see Kreindler, Aviation Accident Law (Matthew Bender)

Legal Topics:

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

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PART I. SCOPE

2-16 California Forms of Pleading and Practice--Annotated §§ 16.04-16.09

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

[Reserved]

§§ 16.04[Reserved]

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Chapter 16 AIRPLANES AND AIRPORTS
PART II. LEGAL BACKGROUND

2-16 California Forms of Pleading and Practice--Annotated § 16.10

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.10 Applicable Law

[1] Jurisdiction, Choice of Forum, and Venue

Aviation cases are controlled by the same choice of forum and venue considerations as any other tort action in a state-court system. Issues of forum non conveniens may arise. In addition, since many aircraft are of foreign manufacture, and the manufacturer may be state owned, basic jurisdictional issues of foreign sovereign immunity may need to be considered. For discussion of these issues, see Ch. 323, *Jurisdiction: Personal* , and Ch. 571, *Venue* . In a major air disaster, it is highly likely that the federal Multi-District Litigation procedures will be used and all cases arising from an accident will be removed by the Judicial Panel, pursuant to the Manual for Complex Litigation, to a chosen district court for all purposes other than trial. The Judicial Panel will usually choose the court nearest to the site of the accident.

If more than one case arises in California from the same accident, questions of consolidation of actions (for two or more actions in the same court), and of coordination of actions (if actions have been properly filed in different jurisdictions) will usually arise. Consolidation is usually granted as a matter of routine. In coordination actions, the Judicial Council will appoint a superior court judge to determine if coordination is appropriate (it usually is) and to recommend which court should receive the coordinated cases. In coordination determinations deference is usually given to the site of the accident if one of the cases has been filed there [*see Code Civ. Proc. § 404 et seq*; Cal. Rules Ct., Rule 3.501 et seq.].

[2] State Versus Federal Substantive Law

The application of state tor law to aviation cases is limited by federal preemption of aviation in the area of safety regulations, regulation of rates, routes, and services, the existence of a federal statute of repose exempting the manufacturers of general aviation aircraft from liability, and bars against suing government contractors and against suits brought by governmental employees [*see World Airways, Inc. v. Intern. Broth., Etc. (9th Cir. 1978) 578 F.2d 800, 803* ; *Pub. Util. Code § 21404*; *see also Cummins v. Sky Cruisers, Inc. (1976) 59 Cal. App. 3d 983, 986-988, 130 Cal. Rptr. 897* (ownership for purposes of determining vicarious liability determined by state law)]. There is no federal common law of aviation [*see, e.g, Rogers v. Ray Gardner Flying Service (5th Cir. 1970) 435 F.2d 1389, 1394]* . However, the

government contractor defense, discussed below, is an example of how federal common law can affect aviation. The same statutory [*see, e.g., Civ. Code § 1714(a)* (general duty of care)] and case law thatapplies to torts in other fields applies to aviation [*Pub. Util. Code § 21404*; *Nachsin v. De La Bretonne (1971) 17 Cal. App. 3d 637, 639, 95 Cal. Rptr. 227* ; *Spaulding v. United States (9th Cir. 1972) 455 F.2d 222, 226]* . Although the Federal Air Regulations [14 C.F.R. Part 1et seq.] do not directly create tort liability, they are like the provisions of the Vehicle Code in that they provide "rules of the road" that establish standards of care and a basis for presuming negligence [*Rudelson v. United States (C.D. Cal. 1972) 431 F. Supp. 1101, 1107 , aff'd, 602 F.2d 1326* ; *Stevens v. Cessna Aircraft Co. (1981) 115 Cal. App. 3d 431, 433, 170 Cal. Rptr. 925* ; for discussion of presumption of negligence, *see § 16.11*[2][b]]. An attorney handling an aviation matter should realize that aircraft operated by the U.S. government, state governments, or local governments, are generally "public aircraft" as defined by the Federal Aviation Act, and are by definition not subject to many, if not most, of the Federal Air Regulations.

Although there is no general federal substantive tort law that directly applies to aviation cases, liability for injuries sustained on international flights is governed by treaties, such as the Warsaw Convention [Warsaw Convention, 49 Stat. 3000, T.S. 876 (1934), reprinted as note following *49 U.S.C.S. § 40105*], which have the force of law [*see United States v. Belmont (1937) 301 U.S.324, 330-332, 57 S. Ct. 758, 81 L. Ed. 1134]* . The Federal Tort Claims Act [*see 28 U.S.C.S. §§ 1291, 1346(b), 1402(b), 1504, 2110, 2401(b), 2401, 2402, 2411, 2412, 2671*-2680; for a discussion of litigation under the Federal Tort Claims Act, *see The Ins and Outs of Filing a Claim Under The Federal Tort Claims Act*, 45 J. of Air Law and Commerce 41 (1979); *see also* Moore's Federal Practice, Ch. 8, *General Rules of Pleading* (3rd ed. Matthew Bender) (pleading claim against United States); Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies (Matthew Bender)] governs tort claims against the United States, but applies substantive state law in determining liability [*28 U.S.C.S. 1346(b)*; *Rayonier, Inc. v. United States (1957) 352 U.S. 315, 318-319, 77 S. Ct. 374, 1 L. Ed. 2d 354]* .

Finally, although there is no general federal substantive law, the practitioner should realize that the majority of aviation related cases are federal, and that these cases may be persuasive in state court, especially if there is little state case law on significant issues.

[3] Choice of State Law in Airplane Accident Cases

Choice of law problems often occur in airplane accident cases, due to the fact that flights often cross state lines and plaintiffs and defendants are often not residents of the same state, or may be foreign. This section discusses California's treatment of choice of law issues under the principles of governmental interest analysis. California's choice of law rules apply to cases filed in California in both state court actions and federal court actions based on diversity of citizenship [*see* In re Aircrash in Bali Indonesia on April 22, 1974 *(9th Cir. 1982) 684 F.2d 1301, 1307* ; *Browne v. McDonnell Douglas Corp. (N.D. Cal. 1980) 504 F. Supp. 514, 516 , aff'd, 698 F.2d 370 (9th Cir. 1982)]* . For a discussion of choice of law issues under approaches used in other jurisdictions, see Kreindler, Aviation Accident Law, Ch. 2 (Matthew Bender).

As a general rule, a court will apply the law of the forum, even in cases with foreign parties or other foreign connections, unless one of the parties shows that the law of another state is more appropriate [*Hurtado v. Superior Court (1974) 11 Cal. 3d 574, 579-580, 114 Cal. Rptr. 106, 522 P.2d 666* ; *Beech Aircraft Corp. v. Superior Court (1976) 61 Cal. App. 3d 501, 522, 132 Cal. Rptr. 541* ; *see Steering Committee v. U.S. (9th Cir. 1993) 6 F.3d 572* (applying California law in suit against Mexican airline)]. In order to determine which state's law applies in cases of conflict, California uses the "governmental interest analysis" approach [*Offshore Rental Co. v. Continental Oil Co. (1978) 22 Cal. 3d 157, 164-165, 148 Cal. Rptr. 867, 583 P.2d 721* ; *Bernhard v. Harrah's Club (1976) 16 Cal. 3d 313, 316-318, 128 Cal. Rptr. 215, 546 P.2d 719* ; *Hurtado v. Superior Court (1974) 11 Cal. 3d 574, 579-580, 114 Cal. Rptr. 106, 522 P.2d 666* ; *see* In re Aircrash in Bali Indonesia on April 22, 1974 *(9th Cir. 1982) 684 F.2d 1301, 1307]* . Under this approach, California will apply its own substantive law unless it is shown that another state has a greater interest in having its laws applied [*Hurtado v. Superior Court (1974) 11 Cal. 3d 574, 581, 114 Cal. Rptr. 106,*

522 P.2d 666 ; *see also* In re Paris Air Crash of March 3, 1974 *(C.D. Cal. 1975) 399 F. Supp. 732, 745* (stating that if choice of law is between California law and foreign law and interests are equal, California law will apply)].

Of course, if the laws of the two states are identical, no choice is required [*Hurtado v. Superior Court (1974) 11 Cal. 3d 574, 580, 114 Cal. Rptr. 106, 522 P.2d 666]* . Furthermore, if only one state has a valid interest in the application of its laws to the controversy (sometimes called a "false conflict" situation), that state's law applies [*Hurtado v. Superior Court (1974) 11 Cal. 3d 574, 580, 114 Cal. Rptr. 106, 522 P.2d 666]* . However, if a conflict of governmental interests exists, that is, if more than one state has an interest in applying its law, the choice of law is determined by a "comparative impairment" approach [*Offshore Rental Co. v. Continental Oil Co. (1978) 22 Cal. 3d 157, 164-165, 148 Cal. Rptr. 867, 583 P.2d 721]* . Under this approach, the court seeks to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state [*Offshore Rental Co. v. Continental Oil Co. (1978) 22 Cal. 3d 157, 164-165, 148 Cal. Rptr. 867, 583 P.2d 721]* .

In cases in which the standard of care varies between interested jurisdictions, the court will look to the basic governmental policies involved. Rules related to tort liability in the area of negligence or products liability generally are based on a dual policy of compensating plaintiffs who have been injured by a violation of the standard of care, and deterring the conduct of defendants who violate that standard [*Reyno v. Piper AircraftCo. (3d Cir. 1980) 630 F.2d 149, 167 , rev'd on other grounds, 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)]* . As a general rule, the state of residence of the manufacturer of a defective product has a strong interest in the application of its products liability rules [In re Paris Air Crash of March 3, 1974 *(C.D. Cal. 1975) 399 F. Supp. 732, 745-747* ; *see also Reyno v. Piper Aircraft Co. (3d Cir. 1980) 630 F.2d 149, 167-168 , rev'd on other grounds, 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)]* . In *Beech Aircraft Corp. v. Superior Court (1976) 61 Cal. App. 3d 501, 523, 132 Cal. Rptr. 541* , a California court of appeal suggested that California products liability rules should be applied to cases in which the defendant is a California resident, regardless of the place of the crash or the status of the plaintiffs. Similarly, in a case in which an aircrash in Yugoslavia was allegedly due in part to a defective design of the plane by the manufacturer in California, a federal district court held that California products liability law applied [*Browne v. McDonnell Douglas Corp. (N.D. Cal. 1980) 504 F. Supp. 514, 517-518 , aff'd, 698 F.2d 370 (9th Cir. 1982)]* .

It is often important in aviation accident cases to determine which state's wrongful death statute applies. In resolving this issue, the courts follow the interest analysis approach and apply the law of the jurisdiction with the greatest interest in the outcome [*see Hurtado v. Superior Court (1974) 11 Cal. 3d 574, 584, 114 Cal. Rptr. 106, 522 P.2d 666]* . Wrongful death statutes express three basic governmental interests: (1) they are designed to compensate plaintiffs, (2) to the extent that they limit damages to a stated amount, they are designed to protect defendants from large verdicts, and (3) they are designed to deter the wrongful conduct of defendants [*see Hurtado v. Superior Court (1974) 11 Cal. 3d 574, 584, 114 Cal. Rptr. 106, 522 P.2d 666]* . As a general rule, these policies are local in nature. Thus, the state is concerned with deterring wrongful conduct within its border, compensating resident plaintiffs, and protecting local business [*Browne v. McDonnell Douglas Corp. (N.D. Cal. 1980) 504 F. Supp. 514, 517 , aff'd 698 F.2d 370 (9th Cir. 1982)* ; *see Hurtado v. Superior Court (1974) 11 Cal. 3d 574, 582-586, 114 Cal. Rptr. 106, 522 P.2d 666]* .

The doctrine of res ipsa loquitur, which may vary from jurisdiction to jurisdiction, is also important in aviation accident cases where proof of fault may be difficult due to lack of evidence [*see* discussion in *§ 16.11*[5]]. A federal case has held that under California law, the application of res ipsa loquitur is procedural and thus the law of the forum should always apply [*see United Air Lines, Inc. v. Wiener (9th Cir. 1964) 335 F.2d 379, 390-391]* . It should be noted, however, that under developing choice of law rules, procedural rules may now be subject to governmental interest analysis in the same manner as rules that are clearly substantive in nature [*see Hawley v. Beech Aircraft Corp. (10th Cir. 1980) 625 F.2d 991, 993-994* ; *Ashland Chemical Co. v. Provence (1982) 129 Cal. App. 3d 790, 793-794, 181 Cal. Rptr. 340]* .

In determining choice of law issues, each issue of substantive law must be analyzed separately [*Beech Aircraft Corp. v. Superior Court (1976) 61 Cal. App. 3d 501, 518 , 132 Cal. Rptr. 541]* . It is thus possible that the law of different

states will apply to different issues within a single action [*see Reyno v. Piper Aircraft Co. (3d Cir. 1980) 630 F.2d 149, 167 , rev'd on other grounds, 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981)* (applying California conflicts law)].

As a general rule, procedural issues are governed by the law of the forum regardless of whether another state's substantive law applies [*Pfingsten v. Westenhaver (1952) 39 Cal. 2d 12, 19, 244 P.2d 395* (rules of evidence governed by forum law); *Marquis v. St. Louis-San Francisco Ry. Co. (1965) 234 Cal. App. 2d 335, 341, 44 Cal. Rptr. 367]* . Although older case law holds that the period of limitation is a procedural matter governed by the law of the forum [*see Grant v. McAuliffe (1953) 41 Cal. 2d 859, 865, 264 P.2d 944]* , it appears that later authority has analyzed conflicts of limitation periods under an interest analysis approach [*see Hawley v. Beech Aircraft Corp. (10th Cir. 1980) 625 F.2d 991, 993-994* ; *Ashland Chemical Co. v. Provence (1982) 129 Cal. App. 3d 790, 793-794, 181 Cal. Rptr. 340]* .

Although the place of the wrong is no longer controlling for the purposes of choice of law, it is a relevant consideration, and with respect to regulating conduct within its borders, the place of the wrong is of prime importance [*Hernandez v. Burger (1980) 102 Cal. App. 3d 795, 799-804, 162 Cal. Rptr. 564]* .

The interest analysis approach may apply to conflicts with the laws of foreign nations as well as states [*Hurtado v. Superior Court (1974) 11 Cal. 3d 574, 580 fn. 2, 114 Cal. Rptr. 106, 522 P.2d 666]* .

[4] General Aviation Revitalization Act of 1994

The General Aviation Revitalization Act of 1994 ("GARA") [Pub.L. 103-298, 108 Stat. 1552, codified as *49 U.S.C.S. § 40101* Note] became effective on August 17, 1994. GARA specifically preempts any state law to the extent that the law permits a civil action to be brought in a situation barred by GARA [GARA, § 2(d)]. GARA acts as a statute of repose to bar civil actions against the manufacturer of an aircraft, or of a new component, system, subassembly, or other part of an aircraft. GARA bar applies when the accident from which the claim arises occurred more than 18 years after the delivery of the aircraft, part or component. GARA bars suits for damages for death or injury involving a general aviation aircraft [GARA §§ 2(a), 3(3)]. The date on which the 18 year period begins depends on the circumstances under which the aircraft is placed in the stream of commerce and may be difficult to determine in practice. There are also a number of exceptions to the GARA bar. For example, GARA does not bar written warranty actions [GARA § 2(b)(4)], nor does it bar actions brought by people who are not on board the aircraft at the time of the accident [GARA § 2(b)(3)], or are passengers for the purpose of receiving medical or other emergency treatment [GARA § 2(b)(2)].

GARA applies only to aircraft holding an FAA type or airworthiness certificate, with a maximum seating capacity of less than 20 passengers per the aircraft's certification [GARA § 2(c)]. GARA does not apply to accidents that occur when the aircraft is engaged in scheduled passenger-carrying operations [GARA § 2(c)].

GARA does not apply to a situation in which a claimant pleads with specificity that the manufacturer knowingly made misrepresentations to, or concealed facts from, the FAA and the concealed material is related to the cause of the accident [GARA § 2(b)(1); *see, e.g., Butler v. Bell Helicopter Textron, Inc. (2003) 109 Cal. App. 4th 1073, 1082-1087, 135 Cal. Rptr. 2d 762* (exception for concealing facts applied even though concealed facts concerned part failures on military aircraft not subject to jurisdiction of FAA)]. However, if a claim against the original aircraft manufacturer is otherwise barred, the limitations period of GARA may not be avoided merely through the artful pleading practice of labeling the claim as a failure to warn claim [*Campbell v. Parker-Hannifin Corp. (1999) 69 Cal. App. 4th 1534, 1546-1547, 82 Cal. Rptr. 2d 202* (claim against aircraft manufacturer could not avoid statute of repose based on theory that manufacturer failed to warn of defective replacement parts)].

A successor manufacturer who takes over the duties and obligations of a product line from the original manufacturer is protected from suit after expiration of the 18-year period of repose to the same extent as the original manufacturer would be [*Burroughs v. Precision Airmotive Corp. (2000) 78 Cal. App. 4th 681, 692-695, 93 Cal. Rptr. 2d 124]* .

Moreover, GARA preempts any state-law tort claim brought against a successor corporation that is based on a duty that is imposed under federal law, including a claim alleging a failure to warn [*Burroughs v. Precision Airmotive Corp. (2000) 78 Cal. App. 4th 681, 698-699, 93 Cal. Rptr. 2d 124]* .

GARA, therefore, essentially precludes any product liability, crashworthiness, or similar suits against general aviation and helicopter manufacturers if the aircraft is more than 18 years old. However, a new limitations period may be triggered when component parts are replaced [*see* GARA § 2(a)], although any such period affects only an action against the manufacturer of the component part and does not extend to an action against the original aircraft manufacturer [*Campbell v. Parker-Hannifin Corp. (1999) 69 Cal. App. 4th 1534, 1545-1546, 82 Cal. Rptr. 2d 202]* . Moreover, the court of appeal has held that the replacement of less than all the components of a system does not trigger a new limitations period under GARA with respect to defects in those parts of the system that were not replaced [*Hiser v. Bell Helicopter Textron, Inc. (2003) 111 Cal. App. 4th 640, 651, 4 Cal. Rptr. 3d 249]* . It does not appear, however, that GARA provides any bar against suing those in the chain of distribution of the product, and there is concern that GARA will evolve into a burden shifting statute.

There are a number of questions that await resolution in California with regard to GARA. For example, how does GARA interact with apportionment of fault under Proposition 51 (*Civ. Code § 1431 et seq.*)? Can a trier of fact jury compare the fault of the manufacturer as a tortfeasor? Should the jury be informed of the reason for a manufacturer's absence due to GARA? Can the manufacturer be an "empty chair" for the defense? These, and perhaps other issues, await resolution.

[5] Governmental Contractor Immunity

The "government contractor" defense is an affirmative defense arising in situations where the defendant, who must show that his or her actions were pursuant to U.S. governmental specifications or contract, has been sued for personal injuries and/or property damage. The test for the defense is set forth in *Boyle v. United Technologies Corp., (1988) 487 U.S. 500, 108 S.Ct. 2510, 101 L.Ed. 2d. 442* .

In *Boyle*, a wrongful death action was brought by the co-pilot's estate, alleging that the co-pilot drowned because the emergency escape hatch of his helicopter opened outward and could not be opened against water pressure as the helicopter sank. The Supreme Court held that the procurement of equipment by the United States is an area of "uniquely federal interest," and that "a few areas, involving 'uniquely federal interest,' [citation omitted] are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts--so-called 'federal common law' " [*Boyle v. United Technologies Corp. (1988) 487 U.S. 500, 504, 108 S.Ct. 2510, 101 L.Ed. 2d. 442]* .

The Court set forth three conditions that the contractor must demonstrate to evoke the defense in cases involving the liability for design defects for military equipment (including aircraft). These are [*Boyle v. United Technologies Corp. (1988) 487 U.S. 500, 512, 108 S.Ct. 2510, 101 L.Ed. 2d. 442]* :

- The United States approved reasonably precise specifications;
- The equipment conformed to those specifications; and
- The supplier warned the United States about the dangers in the use of the equipment that were known to the supplier, but not to the United States.

The Court explained that the first two prongs of the test ensure that the defense is applicable because it involves an area in which the discretionary functions of the government would be frustrated absent the defense. The Court noted that the third prong was necessary to create a disincentive for manufacturers to withhold information [*Boyle v. United*

Technologies Corp. (1988) 487 U.S. 500, 504, 108 S. Ct. 2510, 101 L. Ed. 2d. 442] . The application of the *Boyle* test is shown in *Sundstrom v. McDonnell Douglas Corp. (1993 N.D. Cal.) 816 F. Supp. 587* , a wrongful death case alleging a design defect in the ejection seat of an F-16C fighter aircraft.

The government contract defense set forth in *Boyle* has been held to apply to design defects in nonmilitary equipment, as in a case in which a shipyard painter sued the paint manufacturer for injuries alleged to have occurred while painting Navy ships [*see, e.g., Garner v. Santoro (1989 5th Cir.) 865 F.2d 629* ; *see also Burgess v. Colorado Serum Co. Inc. (11th Cir. 1985) 772 F.2d 844* (involving injury to veterinarian due to accidental injection of cattle vaccine originally developed by government)]. In the Ninth Circuit, however, the Court of Appeals rejected the government contractor defense in a nonmilitary setting, another painting case involving a painter working on a civilian federal dam [*Nielsen v. George Diamond Vogel Paint Co. (9th Cir. 1990) 892 F.2d 1450]* . In *Jackson v. Deft, Inc. (1990) 223 Cal. App. 3d 1305, 273 Cal. Rptr. 214* , yet another shipyard painting case, the court reversed a summary judgment granted on the government contractor defense and preserved state causes of action for failure-to-warn. In struggling with the breadth of application, the courts are mindful of the concepts of sovereign immunity articulated in the Federal Tort Claims Act and the application of the *Feres* doctrine [*see § 16.15*[2][b]].

Thus, in cases involving a military aircraft that was designed to government specifications, the defense will probably apply. However, if the aircraft was an original civil design, later purchased by the military, the defense may not apply, particularly if failure to provide adequate warning is at issue [*Jackson v. Deft, Inc. (1990) 223 Cal. App. 3d 1305, 1318-1319, 273 Cal. Rptr. 214]* . The same arguments can be made for aircraft components such as engines.

[6] Airline Deregulation Act

The Airline Deregulation Act of 1978 (ADA) provides limitations on state court actions. The preemption clause of ADA prohibits a state (except Alaska) or other political entity from enacting or enforcing a law or regulation relating to rates, routes, or services of an air carrier [*49 U.S.C.S. § 41713*].

There has been a growing body of law attempting to expand the scope of that preemption, and thereby limit state court causes of action. For example, a plaintiff's claim that airline personnel failed to stop or identify a passenger who opened an overhead bin, injuring plaintiff, was preempted by the ADA [*Costa v. American Airlines (C.D. Cal. 1995) 892 F. Supp. 237]* . The California Public Utilities Commission's regulation of the trucking side of an airfreight operation was deemed preempted as well [*Federal Exp. Corp. v. California Public Utilities Com'n. (9th Cir. 1991) 936 F.2d 1075]* .

On the other hand, there are cases that seem factually similar, but in which no preemption has been found. The Ninth Circuit has held that the ADA does not preempt claims dealing with the dispensing of food and drinks or flight attendant assistance, or passengers' commonplace injury claims [*Charas v. Trans World Airlines, Inc. (9th Cir. 1998) 160 F.3d 1259, 1266]* . The California court of appeal has relied on this Ninth Circuit precedent to hold that Congress did not intend to preempt state court negligence claims based on injury caused by falling luggage [*Vinnick v. Delta Airlines, Inc. (2001) 93 Cal. App. 4th 859, 868-869, 113 Cal. Rptr. 2d 471* ; *see also Hodges v. Delta Airlines, Inc. (5th Cir. 1995) 44 F.3d 334, 340]* . Another California court opinion has held that the ADA does not preempt the personal injury action of a passenger who was battered by another passenger while onboard a flight [*Romano v. American Trans Air (1996) 48 Cal. App. 4th 1637, 1641, 56 Cal. Rptr. 2d 428]* . Yet another has held that personal injury or discrimination actions based on the refusal to transport a passenger are not preempted [*Aquino v. Asiana Airlines, Inc. (2003) 105 Cal. App. 4th 1272, 1285, 130 Cal. Rptr. 2d 223]* . These cases seem to represent an emerging, prevailing view that the ADA does not preempt commonplace personal injury suits.

The United States Supreme Court has also distinguished contract claims from other claims arising under state law, on the grounds that contract actions merely enforce private obligations, in contrast to state-imposed obligations [*American Airlines, Inc. v. Wolens (1995) 513 U.S. 219, 228-233, 115 S. Ct. 817, 130 L. Ed. 2d 715]* . However, if the dispute is at its heart a contractual dispute, the ADA preempts an action to recover state law tort damages for the bad

faith refusal to perform under the contract [*Power Stds. Lab, Inc. v. Federal Express Corp. (2005) 127 Cal. App. 4th 1039, 1048-1049, 26 Cal. Rptr. 3d 202* (no recovery for airline carrier's bad faith delay in paying for damage to transported goods)].

[7] California State Statutes Relating to Aircraft Operation

In addition to the federal statutes regarding the operation of aircraft, the California State Aeronautics Act [*Pub. Util. Code § 21001 et. seq.*] establishes the basic structure for management of aircraft and aircraft accidents within California. In contrast to other states, California does not have an active aviation management program, and many of the elements of the Aeronautics Act are implemented on paper only.

Of particular interest to practitioners are the limits of liability for owners found in *Pub. Util. Code § 21404.1* that limit the liability of an owner, bailee of an owner, or personal representative of a decedent not arising from a situation of master-servant or principal-agent to $15,000 per person, and $30,000 in one accident for personal injury and limit property damage to $5,000. Further, punitive damages are only allowed as a result of the personal conduct of the owner, bailee, or personal representative [*Pub. Util. Code § 21404.1(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsTransportation TortsAir TransportationGeneral OverviewCivil ProcedureFederal & State InterrelationshipsChoice of LawForum & PlaceCivil ProcedureVenueGeneral OverviewCivil ProcedureFederal & State InterrelationshipsFederal Common LawPreemptionCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral Overview

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Chapter 16 AIRPLANES AND AIRPORTS
PART II. LEGAL BACKGROUND

2-16 California Forms of Pleading and Practice--Annotated § 16.11

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§ 16.11 Negligence in Aviation Cases

[1] Proof of Negligence in General

General rules of negligence normally apply in aviation accident cases [*Mittelman v. Seifert (1971) 17 Cal. App. 3d 51, 68, 94 Cal. Rptr. 654* ; *see Pub. Util. Code § 21404*]. The elements of actionable negligence are a legal duty to use due care, breach of that duty, and the breach as proximate or legal cause of the resulting injury [*United States Liab. Ins. Co. v. Haidinger-Hayes, Inc. (1970) 1 Cal. 3d 586, 594, 83 Cal. Rptr. 418, 463 P.2d 770]* . For a complete discussion of issues relating to proof of negligence, see Ch. 380, *Negligence* .

[2] Duty of Care

[a] Ordinary Care

Under California law generally, every person is liable for an injury occasioned to another by his or her lack of ordinary care or skill in the management of his or her property or person [*Civ. Code § 1714(a)*; *see generally* discussion in Ch. 380, *Negligence*]. While ordinary care is normally defined as the care of a reasonable, prudent person under similar circumstances [*Kopfinger v. Grand Central Pub. Market (1964) 60 Cal. 2d 852, 857, 37 Cal. Rptr. 65, 389 P.2d 529]* , this definition is not adequate for most aviation cases. Air personnel (including pilots, mechanics, air traffic controllers, and other Federal Aviation Administration (F.A.A.) certificate holders) [14 C.F.R. § 61] have knowledge, skills, and experience beyond those of the "ordinary person," and are expected to exercise care commensurate with that special knowledge, skill, and experience [*see Allred v. Bekins Wide World Van Services (1975) 45 Cal. App. 3d 984, 989, 120 Cal. Rptr. 312]* . In essence they are experts, and as such are required to exercise the ordinary skill and competence of an ordinary person within their field of expertise [*see Gagne v. Bertran (1954) 43 Cal. 2d 481, 489, 275 P.2d 15* (test hole driller); *Ales v. Ryan (1936) 8 Cal. 2d 82, 107, 64 P.2d 409* (physicians as experts); *Lindner v. Barlow, Davis, & Wood (1962) 210 Cal. App. 2d 660, 665, 27 Cal. Rptr. 101* (accountants as experts)]. While there are few cases, the minimum standard applied is generally that of compliance with Federal Air Regulations [*Stevens v. Cessna Aircraft Co. (1981) 115 Cal. App. 3d 431, 434, 170 Cal. Rptr. 925* ; *see also* discussion in [3][b], *below*]. Violation of good operating practices as specified in the Aeronatical Information Manual (published by the U.S. Dept.

of Transportaion, Federal Aviation Administration) can be evidence of a lack of due care, but does not give rise to a presumption of negligence [*Diamond v. Grow (1966) 243 Cal. App. 2d 396, 401, 52 Cal. Rptr. 265]* .

[b] Utmost Care--Common Carriers

Civ. Code § 2100 provides that common carriers owe their passengers the duty of utmost care. While this duty is substantially higher than ordinary care, it does not impose absolute liability, and the carrier is not an insurer of the passenger's safety [*Simmons v. F.W. Woolworth Co. (1958) 163 Cal. App. 2d 709, 710, 329 P.2d 999]* . The law applicable to common carriers generally is discussed in detail in Ch. 109, *Carriers* .

The test of a common carrier is whether there is a general undertaking to transport the public at large for hire [*Samuelson v. Public Utilities Com. (1951) 36 Cal. 2d 722, 729-733, 227 P.2d 256* ; *see Dziura v. California Aviation Service, Inc. (1970) 4 Cal. App. 3d 191, 197, 84 Cal. Rptr. 191* (flight school not common carrier as matter of law under facts of case)]. In aviation cases, a major issue is often whether the operator is a common or private carrier. While scheduled airlines are clearly common carriers, the status of charter operators and air taxis is sometimes uncertain [*see Roberts v. Trans World Airlines (1964) 225 Cal. App. 2d 344, 352, 37 Cal. Rptr. 291* ; *see also Executive Aviation, Inc v. National Ins. Underwriters (1971) 16 Cal. App. 3d 799, 805, 94 Cal. Rptr. 347* (common carrier airline may become private carrier for certain purposes)]. When a carrier contracts to render a special service for a group of individuals, it becomes a private carrier [*Hopkins v. Yellow Cab Co. (1952) 114 Cal. App. 2d 394, 398, 250 P.2d 330* (cab company common carrier as private carrier for purposes of transporting handicapped children to school under contract with school board); *see* discussion in Ch. 109, *Carriers* , General Introduction]. In *Gradus v. Hanson Aviation, Inc.* [*Gradus v. Hanson Aviation, Inc. (1984) 158 Cal. App. 3d 1038, 1047-1049, 205 Cal. Rptr. 211]* , the court held that the defendant, who was engaged in the charter and lease business, was not a private carrier as a matter of law.

For discussion of the liability of a carrier under *Civ. Code § 2101* relating to unsafe vehicles, see *§ 16.12*[2].

[3] Breach of Duty of Care

[a] Generally

[i] Pilots

In the air, as on the ground, the duty of care is breached by failing to exercise the care of a reasonable person under the circumstances [*Spaulding v. United States (9th Cir. 1972) 455 F.2d 222, 226* ; *Sanbutch Properties, Inc. v. United States (N.D. Cal. 1972) 343 F. Supp. 611, 613-614* ; *see* discussion in [2][a], *above*]. Determining the proper standard of care requires almost constant reference to the Federal Air Regulations in the case of pilots and mechanics and to the various official manuals in the case of air traffic controllers, weather briefers, and other government employees. As discussed in [b], *below*, while the violation of a statute or regulation may give rise to a presumption of negligence, the violation of a manual directive or good operating practice is only evidence of negligence [*Diamond v. Grow (1966) 243 Cal. App. 2d 396, 401, 52 Cal. Rptr. 265* ; *McDaniel v. United States (N.D. Cal. 1982) 553 F. Supp. 910, 916]* . A pilot may breach the duty of care by either operating a plane in a negligent manner [*see Robart v. Brehmer (1949) 92 Cal. App. 2d 830, 831-833, 207 P.2d 898* (failing to avoid a collision at takeoff)], or by exceeding his or her capabilities as demonstrated by license limitations [*Hall v. Osell (1951) 102 Cal. App. 2d 849, 851-852, 228 P.2d 293* (pilot violation of ceiling and cloud license requirements as cause of accident)].

A pilot has a duty to plan his or her flight and obtain all available information about it [*14 C.F.R. § 91.103*]. Breaches of this duty include failing to obtain weather forecasts, failing to properly compute the amount of fuel necessary, and failing to ascertain the expected performance of the aircraft given the conditions prevalent at the time. Aircraft performance varies depending on the load, the elevation of the airport, the runway surface (pavement or grass), the runway slope, the direction and velocity of the wind, and the temperature. The pilot can predict the performance by reference to the FAA approved pilot's operating handbook that must be aboard the aircraft at all times [*14 C.F.R. §*

91.9(b)(1)].

Once airborne, the pilot has a duty to maintain vigilance so as to avoid colliding with other aircraft [*14 C.F.R. § 91.113(b)*; *Rudelson v. United States (9th Cir. 1979) 602 F.2d 1326, 1330* (no exception for blind spot under facts of case); *see also Steering Committee v. U.S. (9th Cir. 1993) 6 F.3d 572, 576-580* (pilots were "vigilant" notwithstanding lack of evasive action before midair collision; "vigilance" of pilots under *14 C.F.R. § 91.113(b)* denotes care that reasonably prudent pilot would exercise under circumstances; reasonably prudent pilot is required to search thoroughly and diligently for other aircraft, scanning sky with such frequency, and responding with such precision, as possible)]. Only when in instrument due to meteorological conditions (flying in clouds) under an instrument flight plan does this duty become exclusively that of the air traffic controllers, and if the weather permits visual contact with other aircraft, even on an instrument flight plan the pilot retains his or her duty of vigilance [*14 C.F.R. § 91.113(b)*]. A pilot is not required to see an aircraft that his or her own aircraft's structure makes impossible to see. For example, a helicopter pilot is not obliged to see an overtaking aircraft approaching from above and behind [*Nakajima vs. United States (11th Cir. 1992) 965 F.2d 987]* .

Pilots must operate within the privileges granted by their certificate and ratings. Among the most common accidents are thse that occur when pilots who lack an instrument rating continue into weather below visual minimums [*see 14 C.F.R. § 91.155(a)*; *Spaulding v. United States (9th Cir. 1972) 455 F.2d 222, 227]* .

Pilots must avoid wake turbulence (the often violent turbulence caused by the passage of heavy aircraft) [*see Sanbutch Properties, Inc. v. United States (N.D. Cal. 1972) 343 F. Supp. 611, 616]* , and land obstructions [*see McDaniel v. United States (N.D. Cal. 1982) 553 F. Supp. 910, 915-916]* . As a general rule, when natural conditions such as wind or turbulence combine with pilot negligence to produce an accident, the pilot is liable [*see Halbert v. Berlinger (1954) 127 Cal. App. 2d 6, 16-17, 273 P.2d 274]* . In addition, the violation of any of the numerous provisions contained in the Aeronatical Information Manual may be evidence of pilot negligence [*see McDaniel v. United States (N.D. Cal. 1982) 553 F. Supp. 910, 915-916]* . In *Mittelman v. Seifert (1971) 17 Cal. App. 3d 51, 68-81, 94 Cal. Rptr. 654* , the court found as a matter of law that a pilot's violation of a number of aerial flight rules constituted not only negligence, but willful misconduct.

[ii] Ground Personnel

Ground aviation personnel, such as air traffic controllers and aircraft mechanics, may be liable for an airplane accident [*see Spaulding v. United States (9th Cir. 1972) 455 F.2d 222, 226]* . For example, an air traffic controller may be liable for negligent failure to give all information in the controller's manual (FAA Order 7110.65), and in addition, for failure to give warnings not in the manuals when there is an immediate and extreme danger [*see Spaulding v. United States (9th Cir. 1972) 455 F.2d 222, 226]* . Air traffic controllers may also be liable for failing to warn pilots of other traffic [*Mattschei v. United States (9th Cir. 1979) 600 F.2d 205, 208* ; *but see Hamilton v. United States (9th Cir. 1974) 497 F.2d 370, 374-375* (air traffic controller as not negligent under facts of case)] and of wake turbulence [*Lightenburger v. United States (9th Cir. 1972) 460 F.2d 391]* . Flight service specialists may be liable for negligent delivery of current weather information or for miscommunication of a forecast [*see Spaulding v. United States (9th Cir. 1972) 455 F.2d 222, 227]* . For a further discussion of the liability of F.A.A. personnel, see *§ 16.15*.

[iii] Manufacturers

The manufacturer of an airplane may be liable for negligence in design or manufacturing defect which is the proximate cause of an airplane accident [*see Elsworth v. Beech Aircraft Corp. (1984) 37 Cal. 3d 540, 551, 208 Cal. Rptr. 874, 691 P.2d 630]* . In the alternative, a manufacturer may be liable under a strict products liability theory [*see McGee v. Cessna Aircraft Co. (1983) 139 Cal. App. 3d 179, 187-191, 188 Cal. Rptr. 542* , discussed in *§ 16.12*]. For discussion of theories under which manufacturers may be held liable for injuries caused by defective products, see Cotchett and Cartwright, California Products Liability Actions, Ch. 2 (Matthew Bender).

[b] Violation of Statutes, Regulations, and Official Manuals

[i] Statutes and Regulations

Under the doctrine of negligence per se, the failure of a person to exercise due care may be presumed if the person violated a statute, ordinance, or regulation [*see Evid. Code § 669(a)*; for a complete discussion of the doctrine of negligence per se, *see* Ch. 380, *Negligence*]. In the context of aviation injuries, the applicable state statutes are found in the Aeronautics Act [*see Pub. Util. Code § 21001 et seq.*]. Violation of one of the provisions of the act may in an appropriate case give rise to a presumption of negligence [*see Ayer v. Boyle (1974) 37 Cal. App. 3d 822, 828, 112 Cal. Rptr. 636* ; *Evid. Code § 669(a)*]. For example, *Pub. Util. Code § 21407.1* makes it unlawful to operate an aircraft while under the influence of alcohol or drugs or any combination of alcohol and drugs, or to operate an aircraft while having an alcohol blood content of 0.04 percent or more. (This also a violation of *14 C.F.R. § 91.17*.) Because flying while intoxicated violates a statute, a presumption of negligence arises [*see Evid. Code § 660(a)*; for discussion relating to the violation of a statute as proof of negligence, *see* Ch. 380, *Negligence*]. Case law governing the award of punitive damages against intoxicated motor vehicle drivers, which may be useful by analogy, are discussed in Ch. 19, *Alcoholic Beverages: Civil Liabilities* .

In addition, the Federal Air Regulations [14 C.F.R. Part 1 et seq.] provide a comprehensive set of rules governing virtually every aspect of aviation. Aircraft [14 C.F.R. Parts 23-31], airports [*14 C.F.R. § 151.1 et seq.*], mechanics [*14 C.F.R. §§ 65.71-65.95*], pilots [14 C.F.R. Parts 61, 91], controllers [*14 C.F.R. §§ 65.31-65.50*], parachutists and parachute riggers [*14 C.F.R. §§ 65.111-65.133*, 105], and even unmanned rockets and balloons [14 C.F.R. Part 101] are all intensely regulated. The regulations are often very specific. For example, pilots are told what they must do before each flight [*14 C.F.R. § 91.103*], how much fuel they must have [*14 C.F.R. §§ 91.151, 91.167*], what altitudes to use [*14 C.F.R. §§ 91.119, 91.159, 91.177, 91.179*], who has the right of way [*14 C.F.R. § 91.113*], and what the speed limit is [*14 C.F.R. § 91.117*]. Additionally, pilots are required to maintain vigilance so as to see and avoid other aircraft [*14 C.F.R. § 91.113(b)*; *see Steering Committee v. U.S. (9th Cir. 1993) 6 F.3d 572, 576-580* ("vigilance" under regulation denotes care that reasonably prudent pilot would exercise under circumstances; reasonably prudent pilot is required to search thoroughly and diligently for other aircraft, scanning sky with such frequency, and responding with such precision, as possible)]. The violation of a Federal Air Regulations will normally entitle the plaintiff to a negligence per se instruction under *Evid. Code § 669* [*see Elsworth v. Beech Aircraft Corp. (1984) 37 Cal. 3d 540, 547-553, 208 Cal. Rptr. 874, 691 P.2d 630]* .

The Federal Air Regulations were designed for the purpose of protecting those who fly in airplanes or those affected by their flight [*see Elsworth v. Beech Aircraft Corp. (1984) 37 Cal. 3d 540, 551, 208 Cal. Rptr. 874, 691 P.2d 630]* . The violation of these regulations may raise a presumption of negligence [*see Rudelson v. United States (C.D. Cal. 1972) 431 F. Supp. 1101, 1107 , aff'd 602 F.2d 1326 (1979)* ; *Evid. Code § 669(a)*]. However, not every violation of a Federal Air Regulation creates a presumption of negligence. The violation must have proximately caused the damage in question [*Evid. Code § 669(a)(2)*]. For example, unless a violation of the regulations requiring licensing and annual inspections of aircraft [*see 14 C.F.R. §§ 47.3(b), 91.405*; *see also Pub. Util. Code § 21411*] caused the accident, such a violation will not create a presumption of negligence [*Ayer v. Boyle (1974) 37 Cal. App. 3d. 822, 828, 112 Cal. Rptr. 636]* . In addition, the damage must be of a type the regulation was designed to prevent [*Evid. Code § 669(a)(3)*], and the plaintiff must be within the class of persons for whose protection the regulation was adopted [*Evid. Code § 669(a)(4)*]. Furthermore, the fact that the regulations hold a pilot in command directly responsible for the safety of the flight [*14 C.F.R. § 91.3(a)*] does not mean that the pilot is strictly liable in the event of an accident [*Foss v. United States (9th Cir. 1980) 623 F.2d 104, 106]* .

The doctrine of negligence per se may also be used in products liability cases. Violation by a manufacturer of one of the safety regulations of the F.A.A. [*see 14 C.F.R. §§ 21.1-35.47*] may give rise to a presumption of negligence in the design or manufacture of the aircraft [*see Elsworth v. Beech Aircraft Corp. (1984) 37 Cal. 3d 540, 547-551, 208 Cal. Rptr. 874, 691 P.2d 630* ; *McGee v. Cessna Aircraft Co. (1983) 139 Cal. App. 3d 179, 186-190, 188 Cal. Rptr. 542]* .

The fact that the F.A.A. has certified the airplane design as safe does not preempt the state from presuming negligence based on a violation of the regulations [*see Elsworth v. Beech Aircraft Corp. (1984) 37 Cal. 3d 540, 547-551, 208 Cal. Rptr. 874, 691 P.2d 630]* .

[ii] Violation of Official Manuals

Government manuals give detailed instructions on how pilots, air traffic controllers, flight service specialists, and medical and flight examiners should perform their duties. Another type of manual that specifies standards of care, the breach of which can be negligence, is the operation or maintenance manual of a certificated facility. These manuals are individually prepared by flight schools, repair shops, air taxis, and airlines, subject to F.A.A. review and approval. The manuals set forth in great detail how the operation is to be run, what inspection and review procedures will be followed, and which employees will have what duties [*see, e.g., 14 C.F.R. §§ 135.21-135.23*]. Failure of the certificate holder to comply with its own manual is a violation of Federal Air Regulations [14 C.F.R § 135.5].

Technically, the manuals are not regulations and thus cannot form the basis for presuming negligence [*Diamond v. Grow (1966) 243 Cal. App. 2d 396, 401, 52 Cal. Rptr. 265]* . Violation of a manual directive or good operating practice is only evidence of negligence [*Diamond v. Grow (1966) 243 Cal. App. 2d 396, 401, 52 Cal. Rptr. 265* ; *McDaniel v. United States (N.D. Cal. 1982) 553 F. Supp. 910, 916]* . For example, violation of good operating practices as specified in the Aeronatical Information Manual can be evidence of a lack of due care by a pilot, but does not give rise to a presumption of negligence [*Diamond v. Grow (1966) 243 Cal. App. 2d 396, 401, 52 Cal. Rptr. 265]* .

[c] Effect of Administrative Actions

Federal Air Regulations are enforced by administrative actions under *49 U.S.C.S. § 44709*. The F.A.A. can seek suspension or revocation of a certificate or a civil penalty. The aviator may appeal to the National Transportation Safety Board (N.T.S.B.) and have the matter heard by an N.T.S.B. administrative law judge with a right of appeal to the full N.T.S.B. under *49 U.S.C.S. § 1133(1)* [*see* 49 C.F.R. Part 821].

Because it is very difficult to have an accident without violating the Federal Air Regulations, many cases (when the pilot survives) will result in a certificate action by the F.A.A. Counsel on both sides should be aware of such cases. No California appellate decision has ever held that a certificate action by the F.A.A. is sufficiently judicial in nature to constitute a basis for collateral estoppel on the issue of the violation in a subsequent civil trial [*see People v. Sims (1982) 32 Cal. 3d 468, 477-490, 186 Cal. Rptr. 77, 651 P.2d 321* (collateral estoppel effect of administrative hearings in general)]. However, one federal court of appeals, applying Indiana law, has held that collateral estoppel may apply in such a situation [*Bowen v. United States (7th Cir. 1978) 570 F.2d 1311, 1322-1323]* . No other court has followed *Bowen*.

In any event, the hearings are useful both as a source of prior testimony and for discovery of percipient and expert witnesses. Live testimony of current N.T.S.B. officials in civil actions is prohibited [*see* 49 C.F.R. § 849.5], although their testimony may be made available through depositions or written interrogatories [*see Loftleidir Icelandic Airlines, Inc. v. McDonnell Douglas Corp. (1984) 158 Cal. App. 3d 83, 90-95, 204 Cal. Rptr. 358]* . In addition, the testimony of former N.T.S.B officials may be limited [*see Loftleidir Icelandic Airlines, Inc. v. McDonnell Douglas Corp. (1984) 158 Cal. App. 3d 83, 90-95, 204 Cal. Rptr. 358]* .

Administrative hearings before the N.T.S.B. can provide useful interpretation of Federal Air Regulations and insight into the meaning of words of art used in the Regulations. A searchable database of N.T.S.B. decisions rendered since 1992 may be found on the N.T.S.B. website at http://www.ntsb.gov/. Older cases may be found in bound volumes available in many law libraries. These older volumes are also available for purchase from the U.S. Department of Commerce. The FAA also has adminstrative procedures to enforce civil penalties [*14 C.F.R. § 13.201 et seq.*]; these cases are harder to obtain but are being published by Clark Boardman Callaghan.

[d] Expert Witnesses

Although there are no cases that expressly require expert testimony to establish a breach of the duty of care of aviation personnel, as a practical matter such a witness is required in all but the simplest case. In cases in which the determination of whether or not an accident was the result of negligence must be based on technical understanding beyond the common knowledge among laypersons, expert testimony may be necessary to a finding of fault [*cf. Tomei v. Henning (1967) 67 Cal. 2d 319, 322, 62 Cal. Rptr. 9, 431 P.2d 633* (requiring expert testimony to to establish presumption of negligence in medical malpractice case)].

The testimony of experts in aviation accident cases is competent evidence even though it embraces their opinions on the ultimate facts in issue [*Mittelman v. Seifert (1971) 17 Cal. App. 3d 51, 69, 94 Cal. Rptr. 654]* . An opinion based on speculation or even the law of probabilities is entitled to no weight, however, against direct evidence [*Roberts v. Trans World Airlines (1964) 225 Cal. App. 2d 344, 354, 37 Cal. Rptr. 291]* .

An expert is entitled to base an opinion on matter ordinarily relied on by such experts whether or not the matter is admissible [*Buckwalter v. Airline Training Center (1982) 134 Cal. App. 3d 547, 553-554, 184 Cal. Rptr. 659]* . If there is no direct evidence as to the matter in issue, experts are granted greater latitude to rely on circumstantial evidence [*Buckwalter v. Airline Training Center (1982) 134 Cal. App. 3d 547, 553-554, 184 Cal. Rptr. 659* (holding that due to lack of more direct evidence, expert should have been allowed to rely on pilot's training records in constructing probable flight path of airplane)].

[4] Proximate Cause

Recovery for negligence is available only if the act of the defendant was the proximate cause of the injuries to plaintiff [*see Rudelson v. UnitedStates (C.D. Cal. 1972) 431 F. Supp. 1101, 1107* , *aff'd 602 F.2d 1326 (1979)]* . Generally, proximate cause is found when a natural and continuous sequence produces the injury, or is a substantial factor in producing the injury, and without which the injury would not have occured [*see Rudelson v. United States (C.D. Cal. 1972) 431 F. Supp. 1101, 1107* , *aff'd 602 F.2d 1326 (1979)]* . For discussion of proximate cause, see Ch. 380, *Negligence* .

Aircraft accidents usually have more than one cause, and usually more than one party is at fault. It thus is often found that actions of a number of different parties each constituted a proximate cause of a collision. For example, in *Rudelson v. United States (C.D. Cal. 1972) 431 F. Supp. 1101* , *aff'd 602 F.2d 1326 (1979)* , a case involving a mid-air collision of two airplanes, the court held that the negligence of both pilots as well as that of the air traffic controller were proximate causes of the accident [*see Rudelson v. United States (C.D. Cal. 1972) 431 F. Supp. 1101, 1107-1109* , *aff'd 602 F.2d 1326 (1979)* ; *see also USAir Inc. v. U.S. Dept. of Navy (9th Cir. 1994) 14 F.3d 1410, 1413* (flight attendant's negligence in opening overhead compartment, allowing unstable luggage to fall out, was not superseding cause, under California law, to passenger's negligence in storing luggage in a precarious, unstable position; each person's negligence was concurrent or contributing cause)]. In such cases, principles of comparative negligence and indemnity apply. Comparative negligence is discussed in [6], *below*, and in Ch. 380, *Negligence*. For general discussion of comparative indemnity, see Ch. 300, *Indemnity and Contribution* .

[5] Res Ipsa Loquitur

The doctrine of res ipsa loquitur has been codified as a presumption affecting the burden of producing evidence [*see Evid. Code § 646*]. This doctrine, which is discussed in detail in Ch. 380, *Negligence* , is applicable when the accident is of such a nature that it can be said, in light of past experience, that the accident probably was the result of negligence by someone and that the defendant is probably the one responsible [*Newing v. Cheatham (1975) 15 Cal. 3d 351, 359, 124 Cal. Rptr. 193, 540 P.2d 33]* .

The doctrine of res ipsa loquitur can be very helpful to plaintiff in establishing fault in cases of aviation accidents. The leading case is *Newing v. Cheatham* [*Newing v. Cheatham (1975) 15 Cal. 3d 351, 124 Cal. Rptr. 193, 540 P.2d 33* ; *see also Kohler v. Aspen Airways, Inc. (1985) 171 Cal. App. 3d 1193, 1198-1202, 214 Cal. Rptr. 720* (listing numerous res ipsa loquitur cases involving aviation accidents)], in which the aircraft departed in clear weather with the pilot and three passengers aboard. The wreck of the plane was later found in the mountains of Mexico with all occupants deceased. There was no solid evidence of the cause of the plane crash. The front seat occupants of the plane smelled of alcohol, however, and the local authorities who investigated the wreckage believed that the aircraft had run out of fuel [*Newing v. Cheatham (1975) 15 Cal. 3d 351, 355-358, 124 Cal. Rptr. 193, 540 P.2d 33]* . Suit was brought by the heirs of the passengers, claiming pilot negligence. At trial, there was considerable dispute over the reliability of the investigation, but the court entered a directed verdict in favor of the plaintiff on the issue of liability based on the doctrine of res ipsa loquitur [*Newing v. Cheatham (1975) 15 Cal. 3d 351, 355-358, 124 Cal. Rptr. 193, 540 P.2d 33]* .

The California Supreme Court upheld the action of the trial court. It stated that under the facts surrounding the crash, it seemed reasonably clear that the accident would not have taken place in the absence of negligence [*Newing v. Cheatham (1975) 15 Cal. 3d 351, 361, 124 Cal. Rptr. 193, 540 P.2d 33]* . The Court then applied the traditional three-part test necessary to establish the application of the doctrine of res ipsa loquitur. Under this test, the plaintiff must establish (1) that the accident is of a type that ordinarily does not occur in the absence of negligence, (2) that the accident must be caused by an instrument or agency in the exclusive control of the defendant, and (3) that the accident must not have been due to any voluntary action or contribution on the part of the plaintiff [*Newing v. Cheatham (1975) 15 Cal. 3d 351, 359, 124 Cal. Rptr. 193, 540 P.2d 33* ; for discussion of the doctrine of res ipsa loquitur, *see* Ch. 380, *Negligence*]. After applying this test to the facts of the case, the Court held that the trial court had properly granted a directed verdict on the issue of negligence [*Newing v. Cheatham (1975) 15 Cal. 3d 351, 359-364, 124 Cal. Rptr. 193, 540 P.2d 33]* . In reaching this conclusion, the Court noted that there was no evidence of any external cause such as weather or a midair collision and that the defendant owner-pilot would bear responsibility for any mechanical defect [*Newing v. Cheatham (1975) 15 Cal. 3d 351, 361-363, 124 Cal. Rptr. 193, 540 P.2d 33]* .

The result of *Newing* is that the defendant pilot (or his or her legal representative) will, as a practical matter, normally have to carry the burden of producing evidence that the cause of the accident was other than the pilot's negligence.

The doctrine of res ipsa loquitur does not apply, however, when the defendant does not have exclusive control of the airplane [*see Parker v. James Granger, Inc. (1935) 4 Cal. 2d 668, 674-676, 52 P.2d 226* (plane equipped with dual controls)]. The application of the doctrine to mid-air collisions is also somewhat uncertain. In *Gotcher v. Metcalf (1970) 6 Cal. App. 3d 96, 102-104, 85 Cal. Rptr. 566* , a divided court held that res ipsa loquitur could not be applied to a mid-air collision in which the plaintiff sued the party responsible for one of the planes, but not the other. The court's holding was limited, however, to situations in which it was equally probable that the person responsible for the other plane, rather than the defendant, was at fault in causing the accident [*see Gotcher v. Metcalf (1970) 6 Cal. App. 3d 96, 102-104, 85 Cal. Rptr. 566]* . The dissent argued that the doctrine should apply when the evidence warrants a finding by the jury that it was more probable than not that the collision could have been avoided by the defendant, regardless of the fault of the other pilot [*see Gotcher v. Metcalf (1970) 6 Cal. App. 3d 96, 107-111, 85 Cal. Rptr. 566* (Gargano, J., dissenting)]. When the defendant is a common carrier, however, the doctrine of res ipsa loquitur applies to all mid-air collisions [*see Irwin v. Pacific Southwest Airlines (1982) 133 Cal. App. 3d 709, 715-716, 184 Cal. Rptr. 228* ; *see also Dieterle v. Yellow Cab Co. (1939) 34 Cal. App. 2d 97, 100-101, 93 P.2d 171* (motor vehicle accident)]. This is apparently because a common air carrier, unlike a private pilot, is under a duty to exercise the utmost care to avoid collisions [*see Irwin v. Pacific Southwest Airlines (1982) 133 Cal. App. 3d 709, 715-716, 184 Cal. Rptr. 228* ; *see also* discussion in *§ 16.11*[2] [b]; for general discussion of duties of common carriers, *see* Ch. 109, *Carriers*]. The doctrine of res ipsa loquitur also dos not normally apply in aviation cases in which the accident was caused by air turbulence [*Kohler v. Aspen Airways, Inc. (1985) 171 Cal. App. 3d 1193, 1198-1202, 214 Cal. Rptr. 720]* .

When res ipsa loquitur applies, a defendant has alternative methods by which to rebut the presumption of negligence. The first method is by offering a satisfactory explanation of the accident, which shows that it was caused by a reason

other than his or her negligence [*Roberts v. Trans World Airlines (1964) 225 Cal. App. 2d 344, 352, 37 Cal. Rptr. 291]* . Under this method, the presumption of negligence is not rebutted by an explanation based on theory or conjecture. In order to overcome the presumption of negligence, an explanation must offer a definite cause for the accident [*Roberts v. Trans World Airlines (1964) 225 Cal. App. 2d 344, 352-354, 37 Cal. Rptr. 291* (testimony by expert witness that accident probably was caused by "wind shear" was not sufficient to rebut presumption of negligence)]. The second method is by showing such care in all respects that it necessarily follows that the accident could not have happened from want of care, but must have been due to some unpreventable cause [*Roberts v. Trans World Airlines (1964) 225 Cal. App. 2d 344, 352, 37 Cal. Rptr. 291]* . The presumption of negligence may be rebutted under this method by showing that the defendant complied in all respects with reasonable safety procedures [*Roberts v. Trans World Airlines (1964) 225 Cal. App. 2d 344, 352-354, 37 Cal. Rptr. 291]* .

[6] Negligent Entrustment

There are few cases on the issue of negligent entrustment of aircraft. Under the doctrine of negligent entrustment, an aircraft owner may be liable if he or she provides an aircraft to a person with knowledge (or reason to know) that the person is incompetent to operate it [*see White v. Inbound Aviation (1999) 69 Cal. App. 4th 910, 920, 82 Cal. Rptr. 2d 71* ; *Johnson v. Central Aviation Corp. (1951) 103 Cal. App. 2d 102, 111-112, 229 P.2d 114* ; *see also Mettelka v. Superior Court (1985) 173 Cal. App. 3d 1245, 1247-1250, 219 Cal. Rptr. 697* (co-owner of automobile may be liable for negligent entrustment of automobile to other owner); *Perez v. G. & W. Chevrolet, Inc. (1969) 274 Cal. App. 2d 766, 768, 79 Cal. Rptr. 287* (negligent entrustment of automobile); for a discussion of negligent entrustment of motor vehicles, *see Ch. 82, Automobiles: Causes of Action, § 82.11*]. This is to be contrasted with the vicarious liability of an owner for the negligent acts of a pilot, under which the owner is liable even if he or she was not personally negligent [*see White v. Inbound Aviation (1999) 69 Cal. App. 4th 910, 930-931, 82 Cal. Rptr. 2d 71* ; *Nachsin v. De La Bretonne (1971) 17 Cal. App. 3d 637, 639-640, 95 Cal. Rptr. 227* ; *Pub. Util. Code §§ 21404, 21404.1*. *see* discussion in *§ 16.11*[8]; *see also* Ch. 427, *Principal and Agent* , for discussion of vicarious liability in general].

As a general rule, liability under a theory of negligent entrustment must be based on evidence that the owner knew, or in the exercise of reasonable care should have known, that the operator was incompetent to operate the vehicle or craft in question [*see Perez v. G. & W. Chevrolet, Inc. (1969) 274 Cal. App. 2d 766, 768, 79 Cal. Rptr. 287* (negligent entrustment of automobile)]. In aviation, documentary proof of incompetency, on which liability for negligent entrustment may be based, is complicated. A pilot certificate is issued for life unless suspended or revoked [*14 C.F.R. § 61.19*]. However, before carrying passengers, a pilot must meet certain recent proficiency requirements including three landings and takeoffs within the last 90 days in the same category and class of aircraft [*14 C.F.R. § 61.57(a)*]. Likewise, if the flight is to be at night, the three landings and takeoffs must be accomplished at night [*14 C.F.R. § 61.57(b)*]. There are additional requirements for instrument flying, complex aircraft, or high performance aircraft [*14 C.F.R. §§ 61.31(e), (f)*, 61.57(c), (d)]. Thus, it appears that the owner of an aircraft who lends or rents his or her aircraft to another must at least review the pilot's certificate and log book to see that the entries are consistent with the mission proposed, although no cases in California establish such a rule.

A pilot is not necessarily "competent" to fly an aircraft merely because he or she was licensed to fly an aircraft of that type [*White v. Inbound Aviation (1999) 69 Cal. App. 4th 910, 921, 82 Cal. Rptr. 2d 71]* . The purpose or destination of the flight may be considered when determining competency. In one case, for example, an aircraft rental company was liable for negligent entrustment of an aircraft, although the pilot was licensed and legally qualified to fly the aircraft. Liability was based on evidence that the rental company knew that the young, inexperienced pilot would be flying into a challenging and dangerous high altitude airport surrounded by mountains, although, contrary to industry practice, the pilot had not been tested on high altitude takeoffs and landings [*White v. Inbound Aviation (1999) 69 Cal. App. 4th 910, 921-923, 82 Cal. Rptr. 2d 71]* .

The owner may also be required to review the potential user's medical certificate. While the pilot's certificate need not be renewed, all pilots must take and pass a medical examination at intervals dependent upon the grade certificate and

the type of operation conducted. Private pilots, who may not conduct commercial operations, must take and pass a third class medical examination every five years, or every two years after reaching the age of 40 [*14 C.F.R. §§ 61.3(c)(1), 61.23(a)(3)(i),* (d)(3)]. Commercial pilots must take and pass a more rigorous second class medical examination every year [*14 C.F.R. § 61.23(d)(2)(i)*]. Airline transport pilots must take and pass a first class medical examination every 12 months, or every six months if the pilot was 40 or older on the date of examination for the most recent medical certificate [*14 C.F.R. § 61.23(a)(1),* (d)(1)]. Holders of advanced ratings may exercise the privileges of lower ratings on expired medical certificates so long as the period since expiration does not exceed the normal period of expiration for the certificate they would otherwise require for the privileges being exercised [*see 14 C.F.R. § 61.23*]. Thus, an airline captain holding an airline transport pilot certificate and a first class medical certificate, may fly as a private pilot for two years after taking his or her first class medical exam, even though the first class certificate would expire after six months.

[7] Comparative Fault

An aircraft accident seldom has one cause, but is most frequently the result of a series of problems that ultimately overcome the capability of the pilot to avoid the trouble. For this reason, aviation cases typically have numerous defendants and the jury must apportion fault among them. There are no special rules for aviation cases. General principles of comparative fault and comparative indemnity apply [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *American Motorcycle Assn. v. Superior Court (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899* ; *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858, 532 P.2d 1226* , discussed in Ch. 380, *Negligence*]. In addition, under the rule of *Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 734-738, 144 Cal. Rptr. 380, 575 P.2d 1162* , liability is apportioned in cases of strict products liability. In some cases, liability must be apportioned between the manufacturer of a defective product and a negligent pilot or other party. In other cases, apportionment of liability requires a comparison between the negligence of pilots, who are each charged with responsibility for the safety of their flight by Federal Air Regulations [*14 C.F.R. § 91.3(a)*] and others who may provide information, guidance, or instruction to the pilot such as air traffic controllers [*Spaulding v. United States (9th Cir. 1972) 455 F.2d 222, 226-228]* .

[8] Vicarious Liability of Aircraft Owners

[a] Aircraft Maintenance--Nondelegable Duties

An unanswered question in California is whether or not the doctrine of vicarious liability arising from nondelegable duties applies to aircraft. The doctrine has been applied most frequently to automobile brake failure cases [*see Maloney v. Rath (1968) 69 Cal. 2d 442, 446, 71 Cal. Rptr 897, 445 P.2d 513* ; *Clark v. Dziabas (1968) 69 Cal. 2d 449, 451, 71 Cal. Rptr. 901, 445 P.2d 517]* . As a general rule, a person who employs an independent contractor is not vicariously liable for the torts of the contractor [*see Anderson v. Chancellor Western Oil Dev. Corp. (1975) 53 Cal. App. 3d 235, 239, 125 Cal. Rptr. 640* ; *see also* discussion in Ch. 427, *Principal and Agent*]. The doctrine of vicarious liability arising from nondelegable duties is an exception to this rule. In essence, it provides that one who carries on an activity that threatens serious injury unless the instrumentality is carefully maintained is vicariously liable for the negligence of the independent contractor who actually did the maintenance [Rest. Torts 2d §§ 423, 424; *Maloney v. Rath (1968) 69 Cal. 2d 442, 447-448, 71 Cal. Rptr. 897, 445 P.2d 513]* .

While there is no case that applies the doctrine to aviation, the doctrine of nondelegable duties may someday be applied to the negligent maintenance of an aircraft by an independent contractor of the owner. Flying is an activity in which negligent maintenance can easily result in serious or fatal injuries, and Federal Air Regulations state, in part, that the owner or operator of an aircraft is primarily responsible for maintaining that aircraft in an airworthy condition [*14 C.F.R. § 91.403(a)*]. It should be noted, however, that aircraft mechanics must be licensed and are subject to strict regulatory control in the performance of their work. Public safety therefore may not require the same degree of legal protection from certificated aircraft mechanics as it does from automobile mechanics, who are not generally subject to

such rigid regulatory control.

[b] Statutory Vicarious Liability for Negligent for Wrongful Act of Pilot

Pub. Util. Code § 21404 provides, in part, that the owner of an aircraft is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the aircraft, whether in the business of the owner or otherwise, by any person using or operating the aircraft with the express or implied permission of the owner [*Pub. Util. Code § 21404*]. This statute abrogates the common law rule that held that the negligence of a permissive user of a vehicle could not be imputed to an owner [*see, e.g., Boyd v. White (1954) 128 Cal. App. 2d 641, 647-648, 276 P.2d 92]* .

The Code limits the vicarious liability of aircraft owners under *Pub. Util. Code § 21404* to $15,000 for death of or injury to one person in any one accident, $30,000 for death of or injury to more than one person in any one accident, and $5,000 for property damage in any one accident [*Pub. Util. Code § 21404.1(a)*]. The owner is not liable under the statute for punitive damages imposed on the operator of the aircraft [*Pub. Util. Code § 21404.1(b)*]. However, the owner is not immune from liability for punitive damages that are imposed on the owner for his or her own wrongful conduct [*Pub. Util. Code § 21404.1(b)*]. The Aircraft Financial Responsibility Act [*Pub. Util. Code §§ 24230-24410*] mandates insurance coverage, within limits, and requires that owners provide to renters a certificate that at least discloses the amount of insurance, if any, available [*Pub. Util. Code § 24362*]. Insurance is not required for claims by passengers. The failure of the owner to provide such a certificate to a renter does not, however, create a cause of action against the owner in favor of the passengers of the person who rented the airplane (or their heirs) [*Franks v. Amelia Reid Aviation (1985) 163 Cal. App. 3d 1207, 1209-1210, 210 Cal. Rptr. 127]* .

The limit on the vicarious liability of aircraft owners set forth in *Pub. Util. Code § 21404.1* applies only when the owner bears no independent responsibility for the accident, other than mere ownership of the aircraft. These limits do not apply if the owner is independently negligent, either through maintenance, entrustment, or other affirmative act or omission [*see Pub. Util. Code §§ 21404.1, 21405*; *Gradus v. Hanson Aviation, Inc. (1984) 158 Cal. App. 3d 1038, 1047-1049, 205 Cal. Rptr. 211* (owner liable for failure to inspect helicopter); *see also White v. Inbound Aviation (1999) 69 Cal. App. 4th 910, 930-931, 82 Cal. Rptr. 2d 71* (limits applied to owner's vicarious liability for pilot's negligence, but not to owner's liability for damages apportioned to negligent entrustment by aircraft rental company)]. In addition, the limits do not apply when the owner is vicariously liable for the acts of another under the common law doctrine of respondeat superior [*see Pub. Util. Code § 21404.1(a)*]. For a full discussion of vicarious liability, see Ch. 427, *Principal and Agent* . For discussion of vicarious liability under a similarly worded statute that applies to owners of motor vehicles [*see Veh. Code § 17150*], see *Ch. 82, Automobiles: Causes of Action, § 82.16*.

While California courts have held that ownership of an aircraft is determined by the California statutes and the common law governing the ownership of chattels and not by the federal registry [*Cummins v. Sky Cruisers, Inc. (1976) 59 Cal. App. 3d 983, 986-988, 130 Cal. Rptr. 897]* , the United States Supreme Court has held that the contents of the federal registry govern, at least when the rights of innocent third party purchasers are at stake [*see Philko Aviation, Inc. v. Shacket (1982) 462 U.S. 406, 103 S. Ct. 2476, 76 L. Ed. 2d 678, 681-685]* . How this will affect California vicarious liability where ownership is disputed is unclear.

[9] Property Damage Claims Against Manufacturers of Damaged Product

Claims for property damage, made against the manufacturer of the damaged product, often arise in aircraft cases. The basic rule in California is that such claims are available [*Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 19, 45 Cal. Rptr. 17, 403 P.2d 145* ; *see also Aris Helicopters, Ltd. v. Allison Gas Turbine (9th Cir 1991) 932 F.2d 825, 827-828* (summarizing California law on this issue)].

Manufacturers have attempted to eliminate such claims by requiring waivers of claims for negligence in the purchase

contracts. So long as they are not ambiguous, such clauses will be upheld [*Philippine Airlines Inc. v. McDonnell Douglas Corp. (1987) 189 Cal. App. 3d 234, 234 Cal. Rptr. 423]* . Similarly, liability for strict product liability can be disclaimed in a commercial setting [*Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 262 Cal. Rptr. 716]* . However, the scope of negligence will be narrowly construed. For example, in *Continental Airlines v. McDonnell Douglas Corp. (1989) 216 Cal. App. 3d 388, 264 Cal. Rptr. 779* , the court rejected the manufacturer's attempt to avoid liability following a landing gear failure on a DC-10 following a runway over-run despite a clause in the purchase contract waiving all claims for negligence. Continental had sued for fraud and negligent misrepresentation citing sales brochures touting the crash worthiness of the gear. The court held that negligent misrepresentation is a form of fraud, and, relying on *Civ. Code § 1668*, voided that portion of the contract on the grounds that a contract can not exempt a party from a claim for fraud.

[9A] Notification Concerning Damage Likely to Affect Airworthiness

Any person who causes damage that may reasonably be expected to affect the airworthiness of an aircraft must either [*Pub. Util. Code § 24450*]:

- Locate and notify the owner or person in charge of the aircraft of his or her name and address, and, on request, present his or her driver's license or pilot's license for identification purposes; or

- Leave a written notice giving the person's name, address, and telephone number, and a statement of the circumstances of the damage, in a conspicuous place on the aircraft, and without unnecessary delay notify the nearest FAA safety representative.

Violation of the notification requirement is a misdemeanor, punishable by imprisonment of up to six months, or a fine of up to $1,000, or both [*Pub. Util. Code § 24451*].

[10] Death on the High Seas Act

Occassionally aircraft crash in the ocean, more than 3 miles from shore. Such cases are controlled by the Death on the High Seas Act [*46 U.S.C.S. § 30301 et seq.*], which has far different, and far more restricted, recoverable damages than California's wrongful death statute [*Code Civ. Proc. § 377.40 et seq.*]. For discussion of the Act, see Ch. 100, *Boats and Boating* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsNegligenceProofViolations of LawStatutesTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsNegligenceCausationProximate CauseGeneral OverviewTortsNegligenceStandards of CareSpecial CareCommon Carriers

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Chapter 16 AIRPLANES AND AIRPORTS
PART II. LEGAL BACKGROUND

2-16 California Forms of Pleading and Practice--Annotated § 16.12

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.12 Strict Liability

[1] International Flights

Under the Warsaw Convention and the Montreal Agreement [*see* discussion in *§ 16.17*], an airline on an international flight may be held liable for an injury to a passenger even though the airline was in no way negligent [*Day v. Trans World Airlines (2d Cir. 1975) 528 F.2d 31, 33* ; *see* *Air France v. Saks (1985) 470 U.S. 392, 105 S. Ct. 1338, 84 L. Ed. 2d 289, 300-302* (stating that airline liability is absolute in sense that airline cannot defend claim on ground that it took all necessary measures to avoid injury)]. Airlines on domestic flights, while held to the standard of utmost care, are not absolutely liable for passenger safety [*Roberts v. Trans World Airlines (1964) 225 Cal. App. 2d 344, 352, 37 Cal. Rptr. 291* ; *see* discussion in *§ 16.11*[2][b]].

Whether a passenger is on an international flight or a domestic flight is determined by the ticketing for the flight, not the points of takeoff and landing for the specific flight on which the accident occurs. For a "domestic" flight between New York and San Francisco, some of the passengers may be domestic (non-Warsaw) and other passengers may be on tickets covered by the Warsaw Convention. For example, if one passenger was flying only from New York to San Francisco, their flight would clearly be domestic and therefore the Warsaw Convention would not apply. If another passenger's ticket was from London to San Francisco (from the territory of one Warsaw signatory to another) and the New York to San Francisco flight was a segment of the trip, then they would be on an international flight covered by the Warsaw Convention. Therefore, two passengers on the same flight may have entirely different abilities to bring a strict liability claim against the airline operating the aircraft.

[2] Common Carrier Liability for Unsafe Vehicles Under Civil Code Section 2101

Civ. Code § 2101, when read literally, appears to hold common carriers absolutely liable for the safety of the vehicle used to provide carriage. The statute provides that a common carrier is bound to provide vehicles which are safe and fit for the purposes to which they are put, and is not excused for default in this respect by any degree of care [*Civ. Code § 2101*; *see* discussion in Ch. 109, *Carriers*].

Early cases suggested that this is not a standard of absolute liability. In 1891, the California Supreme Court, in a case involving a railroad, held that *Civ. Code § 2101* enjoins the carrier to provide safe and fit vehicles, and declares that it is not excused for default in this respect by any degree of care; the section must not receive a construction so absolute as to practically prohibit railroad passenger traffic, or such useful and common convenience as a mixed accommodation train [*Fisher v. Southern Pacific Railroad Co. (1891) 89 Cal. 399, 406, 26 P. 894]* . Since then several courts have refused to hold common carriers absolutely liable for safety defects [*see, e.g.,* *Greyhound Lines, Inc. v. Superior Court (1970) 3 Cal. App. 3d 356, 358-360, 83 Cal. Rptr. 343]* , but none has confronted the statutory issue squarely [*see Nelson v. American Airlines, Inc. (1968) 263 Cal. App. 2d 742, 748, 70 Cal. Rptr. 33]* . At this point, the courts have held it is not error to refuse to instruct on *Civ. Code § 2101* [*Powell v. Dell-Air Aviation, Inc. (1968) 268 Cal. App. 2d 451, 456-458, 74 Cal. Rptr. 3]* , nor to instruct on both *Civ. Code §§ 2100* (common carrier's duty of utmost care) and 2101 despite the potential conflict between the sections [*see* *Gradus v. Hanson Aviation, Inc. (1984) 158 Cal. App. 3d 1038, 1049-1050, 205 Cal. Rptr. 211]* , but the issue is far from settled and should not be overlooked in cases involving airlines or other common carriers.

In dealing with an accident, the attorney should be aware of the type of operation being conducted. Many helicopter, corporate, or other light aircraft operations are performed for hire under 14 C.F.R. Part 135. Part 135 covers Air Taxi operations, and these are "common carrier" operations as defined by Advisory Circular 120-12A [*Woolsey v. NTSB (5th Cir. 1993) 993 F.2d 516]* .

[3] Ultrahazardous Activities

Aviation is not currently deemed to be an ultrahazardous activity under California law, and it is thus not subject to strict liability on that basis [*Boyd v. White (1954) 128 Cal. App. 2d 641, 653-655, 276 P.2d 92* ; *Johnson v. Central Aviation Corp. (1951) 103 Cal. App. 2d 102, 111, 229 P.2d 114* ; *see* *Southern Cal. Edison Co. v. Coleman (1957) 150 Cal. App. 2d Supp. 829, 830-831* , *310 P.2d 504]* . The issue has been consistently raised, however, with respect to certain aviation operations, most prominently crop dusting. Several other jurisdictions have held crop dusting to be an ultrahazardous activity under Restatement (Second) of Torts § 520 [*see* *Loe v. Lenhardt (1961) 227 Or. 242, 362 P.2d 312, 318* ; *Langan v. Valicopters, Inc. (1977) 88 Wash. 2d 855, 567 P.2d 218, 223* ; *see also* Ch. 380, *Negligence*].

There is no California case that has held crop dusting to be an ultrahazardous activity. In *SKF Farms v. Superior Court (1984) 153 Cal. App. 3d 902, 905-906, 200 Cal. Rptr. 497* , the court declined to sustain a demurrer to a complaint that raised an ultrahazardous activity cause of action, stating that the trial court failed to fully apply the factual analysis required by Restatement (Second) of Torts § 520. The court also specifically refused to hold that crop dusting is ultrahazardous as a matter of law [*SKF Farms v. Superior Court (1984) 153 Cal. App. 3d 902, 906 n.2, 200 Cal. Rptr. 497]* . It is therefore possible that a court will find crop dusting to be ultrahazardous if the facts meet the test of the Restatement [*see* Restatement (Second) of Torts § 520].

For further discussion of strict liability for ultrahazardous activities, see Ch. 380, *Negligence* .

[4] Manufacturer of Defective Product

The vast majority of aviation cases involve at least the claim that the accident was caused by a defect in a product, either the aircraft itself or some component part thereof. However, as noted above, the General Aviation Revitalization Act of 1994 [*see § 16.10*[4]], and the government contractor defense [*see § 16.10*[5]], may limit the ability to sue the manufacturer. In addition, while the Federal Aviation Act [*see 49 U.S.C.S. § 40101 et seq.*] itself contains no express preemption clause, it may impliedly preempt a products liability action against a manufacturer if the specific part or component alleged to be defective is the subject of pervasive federal regulation [*Martin ex rel. Heckman v. Midwest Exp. Holdings (9th Cir. 2009) 555 F.3d 806, 811-812* (action based on defective airstairs not preempted when stairs not pervasively regulated)].

For plaintiffs whose recovery against the operator is limited by the Warsaw Convention, claims of product defect or negligent design by the manufacturer or component supplier may be plaintiff's only hope for adequate compensation. If a defective product is a substantial factor in causing the harm to the plaintiff, the manufacturer may be liable under a theory of strict products liability [*see McGee v. Cessna Aircraft Co. (1983) 139 Cal. App. 3d 179, 190-191, 188 Cal. Rptr. 542* (providing comprehensive review of aircraft crashworthiness cases)]. The number of potential defendants in this regard can be large because general aviation aircraft are made up of components manufactured by different companies. For example, air frame manufacturers typically do not manufacture engines and vice versa. Likewise, the various electronic instruments are generally each manufactured by separate companies. For a complete discussion of products liability law, see Cotchett and Cartwright, California Products Liability Actions (Matthew Bender).

Aviation product cases often emphasize crashworthiness, that is, the ability of an aircraft to withstand some of the foreseeable consequences of a crash. Under a crashworthiness theory, manufacturers have been held liable for failing to provide aircraft which protect the occupants in survivable accidents. The cases typically involve inadequate seatbelts or seat structures, flammable or hazardous interior materials, and unsafe fuel systems [*see McGee v. Cessna Aircraft Co. (1983) 139 Cal. App. 3d 179, 184-190, 188 Cal. Rptr. 542* (providing comprehensive review of aircraft crashworthiness cases)].

In addition to the classic concept of products, the charts and navigational materials prepared for pilots subject their publishers to strict products liability. In *Brocklesby v. U.S. (9th Cir. 1985) 767 F.2d 1288* , the Ninth Circuit ruled that an aircraft navigation chart, printed by a private publisher based on government data, was a "product" within the meaning of strict product liability in California [*Brocklesby v. U.S. (9th Cir. 1985) 767 F.2d 1288* ; *accord, Fluor Corp. v. Jeppesen & Co. (1985) 170 Cal. App. 3d 468, 216 Cal.Rptr. 68]* .

The practitioner should also be aware of the regulatory environment for the certification of aircraft. A manufacturer can be held liable for failing to meet the design, construction, or performance requirements of the Federal Aviation Administration [*Elsworth v. Beech Aircraft Corp. (1984) 37 Cal. 3d 540, 547-552, 208 Cal. Rptr. 874, 691 P.2d 630* ; *see also McGee v. Cessna Aircraft Co. (1983) 139 Cal. App. 3d 179, 185-186, 188 Cal. Rptr. 542]* . While these standards [*see* 14 C.F.R. Parts 23, 25, 27] are minimum standards, there have been cases in which the plaintiff was able to demonstrate that the aircraft did not meet even these standards and was thus able to recover. In some cases this has been on a theory of strict liability and in others on negligence per se [*see Elsworth v. Beech Aircraft Corp. (1984) 37 Cal. 3d 540, 547-552, 208 Cal. Rptr. 874, 691 P.2d 630* (upholding jury instructions on doctrine of negligence per se where manufacturer allegedly failed to adhere to F.A.A. design requirements notwithstanding fact that type certificate was issued by *F.A.A.); McGee v. Cessna Aircraft Co. (1983) 139 Cal. App. 3d 179, 186-191, 188 Cal. Rptr. 542]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawAir TransportationWarsaw ConventionGeneral OverviewTortsProducts LiabilityStrict LiabilityTortsProducts LiabilityManufacturing DefectsTortsNegligenceStandards of CareSpecial CareCommon Carriers

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2-16 California Forms of Pleading and Practice--Annotated § 16.13

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.13 Airport Liability

[1] Towers and Unicom Operators

Airports can be divided into two major classifications: controlled and uncontrolled. Controlled airports are defined as those having an operating control tower [*14 C.F.R. § 91.126(d)*], and uncontrolled airports are all others [*14 C.F.R. § 91.126(d)*]. Airport control towers have historically been operated by the United States government, and the tower personnel are employed by the Federal Aviation Administration. Therefore, if there is an error in the control of air traffic, the party liable is the United States and not the airport management, which does not employ the tower personnel and has no direct control over the tower operation [*see Rudelson v. United States (C.D. Cal. 1972) 431 F. Supp. 1101, 1107 , aff'd 602 F.2d 1326 (1979)]* .

There is a small but growing trend for nonfederal control towers, which are towers operated by private companies using personnel licensed by the F.A.A., but who are employed by private corporations or the airport management itself to provide the same service that an F.A.A. control tower would provide [*see* 14 C.F.R. § 91.87(c)]. There are no cases in California arising out of errors by nonfederal control tower personnel, but it seems safe to assume that the standards governing these controllers would be the same as those governing F.A.A. employees. For discussion of the law applicable to federally-employed controllers, see *§ 16.15*[1][a].

At uncontrolled airports, there is often a two-way radio service called Unicom. This is officially described as an airport advisory service [Aeronatical Information Manual, P 4-9]. The Unicom operator is generally a businessperson on the field who operates either a flight school, fixed base operation (FBO), or fuel concession. An F.A.A. flight service station, if located on the field, will provide similar service. While FAA flight service stations usually tape record their radio communications, Unicom operators virtually never do.

The Unicom operator is not permitted to provide air traffic control, but may only report information given to him by other aircraft. Aircraft are encouraged but are not required to make a radio call to the Unicom operator on approaching the airport to advise of their position and to request information concerning the airport. The Unicom operator will

usually provide information regarding the current wind, the runway that the wind favors, and whether any other airplanes have reported that they are in the approach pattern.

The pilot of the approaching aircraft thereafter reports its position periodically as he or she makes the approach to landing. Other aircraft calling in are advised of these reports, but there is no attempt made by the Unicom operator to provide any sequencing, warnings, or control. Often the Unicom operator is in an office and is unable to see the airport environment. It is not required that pilots communicate with the Unicom operator, nor that the Unicom operator even have his or her radio turned on at any given time. Pilots are urged to use the Unicom frequency (or the Common Traffic Advisory Frequency (CTAF) at airports with a tower when the tower is closed) to communicate with each other to advise each other of their position even when no one is operating the Unicom base on the ground [*see* U.S. Dept. of Transportation, F.A.A. Aeronatical Information Manual, Paragraph 4-9].

Because one of the attractions of an uncontrolled field is the lack of a need for a radio, usage of the Unicom is often spotty, incomplete, or ignored entirely. While there are few cases to provide guidance, it is safe to assume that the Unicom operator will be held to the same standards of care as any other person in that he or she is not obliged to render a service, but when he or she does so, he or she should do so in a careful manner [*see, e.g., Schwartz v. Helms Bakery Limited (1967) 67 Cal. 2d 232, 238, 60 Cal. Rptr. 510, 430 P.2d 68]* . One would expect a Unicom operator to be held liable, for example, for negligence in inaccurately relaying information transmitted to him or her, or for providing incorrect information concerning the status of the runway if he or she volunteers to provide that information.

[2] Tie Downs and Hangers

Airport operators often provide tie down or hanger facilities for resident and transient aircraft. A tie down is nothing more than an anchor point with which a pilot may use ropes or chains to attach the aircraft to the ground to prevent it from being disturbed by strong winds. In general practice, the airport provides the anchor point on the ground as well as the ropes or chains. The practice varies regarding who has the responsibility (between the pilot and the airport operator) to secure the aircraft to the tie down. At smaller airports or privately rented tie down areas, the pilot will have the responsibility for securing the aircraft using the materials furnished by the airport operator. At large airports, often the concessionaire with the aircraft parking rights will need to move the aircraft about the field and will take control of the aircraft much as in a valet parking lot for automobiles.

In the former situation, the law only requires that ordinary care be exercised so that the materials furnished must be safe and adequate for the purpose [*see Odle v. Dunbar (1955) 129 Cal. App. 2d 466, 470, 277 P.2d 418]* . In the latter category, a bailment is generally created, and the usual laws of bailment apply [*see Gordon H. Ball, Inc. v. Parreira (1963) 214 Cal. App. 2d 697, 29 Cal. Rptr. 679* ; *Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 850, 88 Cal. Rptr. 39]* . If the bailment is for mutual benefit, as would be the case in the typical situation, the bailee is held to a standard of ordinary care [*see Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 850, 88 Cal. Rptr. 39]* .

When aircraft are sheltered in group hangers, it is almost always the responsibility of the operator to move the aircraft within the hanger, so a bailment is created [*cf. Gordon H. Ball, Inc. v. Parreira (1963) 214 Cal. App. 2d 697, 29 Cal. Rptr. 679* ; *Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 850, 88 Cal. Rptr. 39]* . Many airports will provide individual hanger space. In that case, the situation is more analogous to the rental of a building or other facility than it is to a bailment.

[3] Lighting, Obstructions, Markings, and Clear Zones

A potential source of liability for airport operators may involve the lighting, marking, obstructions, and clear zones on and around the airport. While the Federal Aviation Administration provides guidelines [*see 14 C.F.R. Parts 77,* 151-169], it is the responsibility of the airports to properly light and mark the airport, protect against obstructions, and maintain clear zones [*see generally* Kreindler, Aviation Accident Law, Ch. 9 (Matthew Bender)].

The clear zone presents the most difficult problem. The Federal Air Regulations provide certain standards for approach and departure corridors as well as lateral protection along runway sidelines [*14 C.F.R. Part 77*]. In general, the regulations provide for a 20 to 1 slope at either end of the runway and a 5 to 1 slope along the sides, which is to be kept free of obstructions to allow for the safe arrival and departure of aircraft [*14 C.F.R. § 77.25*]. However, the F.A.A. has no power to compel local governments to enforce such guidelines or to themselves prevent the construction of nonconforming buildings or towers. In the case of a county-owned airport, often it can protect its clear zone by zoning ordinances which mirror the federal regulations. In the case of privately-held airports, it is often impossible for the airport owner to enforce the restriction on its neighbors without the active cooperation of local government. A tort liability problem may arise when an aircraft arriving or departing at an airport strikes an obstruction that falls within the clear zone area. Resolution of the issue of the county government's liability may revolve around the power of the county government to enforce the protection of the clear zone as to whether or not it is liable to the pilot or occupants of the aircraft.

In the case of transmitting towers, the Federal Communications Commission (F.C.C.), which regulates such towers, has cooperated with the F.A.A. by refusing to issue licenses to operators of communications antennas that violate clear zones or that are otherwise hazardous to air navigation. The F.C.C. is not, however, required to do this and will occasionally deviate from this standard. Thus, the F.A.A. and airport operator are generally without power to prevent erection of these structures in airport clear zones.

The tort liability of airport operators for obstructions on the ground or defective marking or lighting is governed by the same general rules that are applicable to the operator of any other premises [for a general discussion of premises liability, *see* Ch. 421, *Premises Liability*], but F.A.A. regulations may set forth the applicable standard of care.

[4] Nuisance and Inverse Condemnation

Aircraft noise and vibration cases are the single largest source of liability claims made to airport operators, particularly airports that permit large, jet-powered aircraft to land and take off. The cases sound in inverse condemnation, nuisance, and trespass, and may involve violations of federal and local noise control regulations. For a complete discussion of the torts of nuisance and trespass, see Ch. 391, *Nuisance* , and Ch. 550, *Trespass* . The United States Supreme Court has held that local governments cannot impose operational limits on airports, as that function had been preempted by federal law [*City of Burbank v. Lockheed Air Terminal (1973) 411 U.S. 624, 640, 93 S. Ct. 1854, 36 L. Ed. 2d 547]* .

An airport is not a nuisance per se, but it may be a nuisance in fact because of improper operation or unsuitable location or both [*see Anderson v. Souza (1952) 38 Cal. 2d 825, 838, 243 P.2d 497]* . Although the aviation industry is subject to heavy federal regulation, the doctrine of preemption does not prohibit a suit against an airport under a theory of nuisance or an action against an airport owned by a public entity for inverse condemnation [*Greater Westchester Homeowners Asso. v. Los Angeles (1979) 26 Cal. 3d 86, 93-102, 160 Cal. Rptr. 733, 603 P.2d 1329]* .

In one case, which involved both property and personal injury damages due to noise, vibration, and fumes from the operation of defendant's airport, the court upheld both a nuisance count and a negligence count for essentially the same harm [*Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 937-940, 101 Cal. Rptr. 568, 496 P.2d 480]* . In another case, the court affirmed a finding that a municipal owner of an airport was liable under a theory of inverse condemnation for a taking or damaging of property due to airport operation [*Aaron v. City of Los Angeles (1974) 40 Cal. App. 3d 471, 483-484, 115 Cal. Rptr. 162]* . Public entities are entitled to condemn aircraft noise easements to protect against noise damage actions [*see Code Civ. Proc. § 1240.110(a)*; *Greater Westchester Homeowners Asso. v. Los Angeles (1979) 26 Cal. 3d 86, 99, 160 Cal. Rptr. 733, 603 P.2d 1329]* .

An injunction is not a permissible remedy in a nuisance action against an airport that is operating within its proper zone, except in an action by the state [*see Code Civ. Proc. § 731a*]. In addition, as long as an airport is within a permissible

zone, it may not be deemed a nuisance without proof of the employment of unnecessary and injurious methods of operation [*see Code Civ. Proc. § 731a*]. If an airport has been in existence for three years, there is a rebuttable presumption that the airport is not a nuisance [*see Code Civ. Proc. § 731b*].

[5] Federal Preemption of State-Law Tort Action Against Airport

A claim against the owner of an airport, based on allegedly unsafe airport navigation facilities that are federally regulated and controlled, is preempted by federal law) [*Bethman v. City of Ukiah (1989) 216 Cal. App. 3d 1395, 1405, 265 Cal. Rptr. 539]* . Inasmuch as the Federal Aviation Administration and the United States Secretary of Transportation have exclusive authority to regulate and control an airport's navigation facilities, the airport owner, for example, a municipality, has no degree of control over factors inherent in those facilities, and therefore cannot be held liable in negligence for conditions that meet federal standards yet are alleged to be inadequate in a state-law action [*Bethman v. City of Ukiah (1989) 216 Cal. App. 3d 1395, 1408, 265 Cal. Rptr. 539* (decided under Federal Aviation Act of 1958 (*see* former 49 U.S.C.S. § 1301 et seq.; *now see 49 U.S.C.S. § 40101 et seq.*))].

The scope of preemption does not include those aspects of an airport that are outside exclusive federal domain, for example, state or municipal regulation of the location and environmental impacts of airports, safety of ground maintenance facilities, and the manufacture of aircraft [*see Elsworth v. Beech Aircraft Corp. (1984) 37 Cal. 3d 540, 549-550, 208 Cal. Rptr. 874, 691 P.2d 630* ; *see also Bethman v. City of Ukiah (1989) 216 Cal. App. 3d 1395, 1406, 265 Cal. Rptr. 539]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceStandards of CareReasonable CareReasonable PersonTransportation LawInterstate CommerceEminent Domain ProceedingsTortsTransportation TortsAir TransportationGeneral OverviewTransportation LawInterstate CommerceFederal PreemptionTransportation LawAir TransportationAirports & Airways Development Act

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§ 16.14 Experimental Aircraft, Homebuilts, Ultralights, and Parachutes

[1] In General

While it was once accurate that homebuilt aircraft (the government prefers the term "amateur built") and ultralight aircraft were on the fringe of the aviation mainstream, they are now more in the mainstream of general (non-airline) aviation. It can be argued that federal regulators have failed to adequately deal with the increasing proliferation of homebuilts.

The decrease in the production of smaller general aviation aircraft that took place in the 1980s and 1990s resulted in an increase in the number and sophistication of homebuilt aircraft. Many are now sold as sophisticated "kits" that allow the buyer to meet the criteria of homebuilding by assembling the aircraft from a kit. The issue of whether the builder can hire others to actually perform the construction and/or assembly, and how much can be done, is an open issue. The regulations require that "a major portion" of the fabrication or assembly be done by "persons who undertook the construction project solely for their own education or recreation" [*14 C.F.R. 21.191(g)*].

Because production of cheaper general aviation aircraft fell to nearly zero, demand drove the price of used aircraft up dramatically. The increased costs of aircraft, and the increased regulation of flying, resulted not only in an increase in homebuilts, but also in an increased interest in ultralight aircraft. The current situation is one where many of the homebuilts, employing modern production techniques such as composite construction materials, outperform the commercially manufactured single-engine aircraft, few of which are still being produced.

The law applicable to homebuilts, experimental aircraft, ultralights and parachutes is the same as for any other aviation activity except that it is less regulated.

Certification of homebuilt aircraft is governed by *14 C.F.R. § 21.191(g)*. Generally speaking, the aircraft will be certified for flight if the owner/builder built more than 50% of the aircraft. Part 21 of the Federal Air Regulations restricts the use and operation of these aircraft and provides for inspection by federal officials [*14 C.F.R. § 21.191*].

Ultralights, which for a long time were ignored by federal regulations, are now covered by Part 103 of the Federal Air Regulations [14 C.F.R. Part 103; *see 14 C.F.R. § 21.191*], which essentially provides an exemption from the certification regulations for this category of aircraft. An ultralight is defined as a single occupant vehicle, used for recreation or sport purposes only, which does not have an airworthiness certificate, and which weighs less than 254 pounds empty and carries less than five gallons of fuel, if powered, or weighs less than 155 pounds, if unpowered. Aircraft with greater capability must be certificated like any other aircraft [*14 C.F.R. § 103.1*].

Certification of experimental aircraft is governed by *14 C.F.R. § 21.191*. Experimental aircraft are those used for research and development, conducting flight tests, crew training, exhibitions, air racing, and the like [*14 C.F.R. § 21.191(a)-(f)*]. Large commercial and ex-military aircraft may fall into the experimental category. Aircraft may also be licensed in restricted and limited categories [*14 C.F.R. § 21.184-21.189*].

Parachutes and parachuting are regulated by Part 105 of the Federal Air Regulations [14 C.F.R. Part 105], which restricts the packing and maintenance of parachutes and provides rules for sport parachuting.

One quirk in the regulations is that the pilot in command of an aircraft is held responsible to enforce the regulations concerning proper packing of parachutes [*14 C.F.R. § 105.43*]. This may lead to an unanticipated result that the otherwise innocent pilot of an aircraft may be found liable for a defectively packed parachute because the pilot failed to ascertain that the chute had been packed by a certificated person within the required period of time [*14 C.F.R. § 105.43(a)*].

[2] Assumption of the Risk and Pre-Accident Releases

The California Supreme Court has reaffirmed that, under *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 119 Cal. Rptr. 858, 532 P.2d 1226* , assumption of the risk, to the extent that it is applied to a situation in which the defendant has breached a duty owed to the plaintiff, has been subsumed within comparative negligence [*Knight v. Jewett (1992) 3 Cal. 4th 296, 310, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (secondary assumption of risk)]. On the other hand, if the plaintiff's assumption of the risk was such that it relieved the defendant of a duty of care to prevent the injury, the cause of action is barred [*Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (primary assumption of risk)]. For discussion of the doctrine of assumption of the risk, see Ch. 380, *Negligence* .

Pre-accident release clauses in contracts may be relied on by defendants in an attempt to avoid liability. Such clauses, which purport to exculpate a party from future negligence, are strictly construed against the party attempting to avoid liability [*see Powers v. Superior Court (1987) 196 Cal. App. 3d 318, 321-322, 242 Cal. Rptr. 55* (two exculpatory provisions, one in ultralight rental agreement and one in realty waiver and release, with different but not conflicting language, may both be valid); *Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd. (1983) 147 Cal. App. 3d 309, 317-320, 195 Cal. Rptr. 90* ; *Celli v. Sports Car Club of America, Inc. (1972) 29 Cal. App. 3d 511, 518-519, 105 Cal. Rptr. 904]* .

Releases are subject to public policy limitations, particularly when there is a disparity of bargaining power between the plaintiff and the defendant [*see Tunkl v. Regents of University of California (1963) 60 Cal. 2d 92, 98-101, 32 Cal. Rptr. 33, 383 P.2d 441* ; *but see Hulsey v. Elsinore Parachute Center (1985) 168 Cal. App. 3d 333, 341-344, 214 Cal. Rptr. 194* (upholdng validity of release signed by first-time parachute jumper because parachute jump school is not essential public service and jump school had no decisive bargaining advantage)].

In a wrongful death action, the issue of whether or not a release by the decedent can bar the action has been an issue in controversy. One line of cases held that the releasor could bind himself or herself and therefore would be barred from bringing a personal injury accident against the released party or parties if the release was not obtained under conditions violative of public policy. However, this line of cases held that the release was not binding against the survivors and

therefore a wrongful death action could be brought regardless of the release [*see Madison v. Superior Court (1988) 203 Cal. App. 3d 589, 250 Cal. Rptr. 299]* .

It appears that the modern trend in California is that a release can act to bar a wrongful death action. In *Paralift, Inc. v. Superior Court (1993) 23 Cal. App. 4th 748, 29 Cal. Rptr. 2d 177* , a release signed three years before the fatal jump was held binding in a wrongful death action brought by the heirs of a skydiver. As mentioned above, the relative bargaining power of the releasee and releasor are relevant in determining if a release is valid. For example, it is well established that a "common carrier" cannot compel passengers to release the carrier from liability [*Curtiss-Wright Flying Service v. Glose (3rd Cir. 1933) 66 F.2d 710]* .

For a further discussion of assumption of risk and the effect of releases from liability, see Ch. 380, *Negligence* , and Ch. 520, *Settlement and Release* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesExculpatory ClausesGeneral OverviewTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsWrongful Death & Survival ActionsDefensesGeneral OverviewTransportation LawAir TransportationRegistration

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Chapter 16 AIRPLANES AND AIRPORTS
PART II. LEGAL BACKGROUND

2-16 California Forms of Pleading and Practice--Annotated § 16.15

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§ 16.15 Liability of the United States

[1] Activities Creating Liability

[a] Air Traffic Control

The F.A.A. operates three categories of air traffic control facilities: towers, approach controls, and en route air traffic control centers. The tower provides visual separation and assists in the orderly flow of air traffic in and around airports. It provides sequencing to all aircraft operating within controlled air space and on the ramps and runways of the field itself [*see 14 C.F.R. §§ 91.126(d), 91.127(c)*]. An approach control, generally a radar facility, provides radar sequencing of aircraft in the airport environment from 25 to 50 miles from the airport up to, but not including, the traffic pattern at the airport itself. The air route traffic control center (ARTCC) provides separation of aircraft on instrument flight plans in the en route stage of flight. The radar facilities at centers and approach controls are primarily responsible for separation of aircraft operating under instrument flight rules. Instrument aircraft are those operating in weather that does not permit visual separation. All air carrier flights are conducted under instrument flight rules, regardless of the weather. The pilots operating in instrument flight conditions rely on the center to prevent collisions with other instrument aircraft. The centers and approach controls will also, on request and on a time available basis, provide advisories to aircraft operating in visual conditions (that is, aircraft not operating under instrument flight rules) of other aircraft that might pose a collision risk.

The United States government, which employs most air traffic control personnel, is subject to liability under the doctrine of respondeat superior for the torts of its employees [*Rudelson v. United States (C.D. Cal. 1972) 431 F. Supp. 1101, 1107 , aff'd 602 F.2d 1326 (1979)* ; *see also* Ch. 427, *Principal and Agent* , for a general discussion of vicarious liability]. Not all towers are staffed by government employees. There is increasing use of non-federal controlers working for private contractors providing air traffic services at FAA facilities. In California these non-federal towers include those at San Luis Obispo, Salinas, Modesto, and Santa Maria airports.

Air traffic control personnel (whether they work for the FAA or a private contractor) are under a duty to exercise ordinary care in their work [*McDaniel v. United States (N.D. Cal. 1982) 553 F. Supp. 910, 916]* . Air traffic controllers

are required to transmit all information required by the manuals [*see Spaulding v. United States (9th Cir. 1972) 455 F.2d 222, 226]* . In addition, they must give warnings beyond those specified in the manuals when an immediate and extreme danger exists, when a dangerous condition is known only to federal personnel, and when the controller is better qualified or in a better position than the pilot to evaluate the situation [*see Spaulding v. United States (9th Cir. 1972) 455 F.2d 222, 226 n.8*].

The liability of air traffic control, whether radar or visual, approach control or tower, usually arises from mid-air collisions. Cases hold that in visual weather, the pilots and air traffic controllers are concurrently responsible for separation [*see Spaulding v. United States (9th Cir. 1972) 455 F.2d 222, 226* ; *Hamilton v. United States (N.D. Cal. 1971) 343 F. Supp. 426, 432* , aff'd *497 F.2d 370, 374 (1974)* ; *McDaniel v. United States (N.D. Cal. 1982) 553 F. Supp. 910, 916]* . A radar facility that is able to see a potential traffic conflict and fails to advise or take other actions to avoid it may also be liable for negligence [*see Rudelson v. United States (C.D. Cal. 1972) 431 F. Supp. 1101, 1107-1108 , aff'd 602 F.2d 1326 (1979)]* .

With the increasing popularity of jumbo jetliners such as the Boeing 747, the McDonnell Douglas DC-10, and the Lockheed L-1011, a new threat has been posed to light aircraft in the form of wake turbulence. These large aircraft create horizontal air vortices, called "wing tip vortices," which are sufficient to cause a complete loss of control or even structural damage to an aircraft following below and behind the large airliner [The Aeronatical Information Manual, P 7-3, provides an excellent introduction to the theory of wake turbulence]. Air traffic control towers are required to provide warnings of possible wake turbulence to small aircraft when such turbulence is reasonably foreseeable, and to provide minimum separation standards for instrument aircraft following behind heavy jets [*see, e.g., Lightenburger v. United States (9th Cir. 1972) 460 F.2d 391, 394* ; *Richardson v. United States (N.D. Cal. 1974) 372 F. Supp. 921, 926]* . However, there is no absolute duty on the part of air traffic control to warn of wake turbulence, and the pilot of a small plane is under a duty to be aware of the hazards of wake turbulence [*Sanbutch Properties, Inc. v. United States (N.D. Cal. 1972) 343 F. Supp. 611, 616]* .

There are numerous cases and regulations on the respective duties of pilots and controllers [*see, e.g., 14 C.F.R. §§ 91.3* (pilot has final responsibility for aircraft), 91.111(a) (pilot must keep distance from other craft), 91.113(b) (pilot must keep vigilant watch); *Irwin v. Pacific Southwest Airlines (1982) 133 Cal. App. 3d 709, 716, 184 Cal. Rptr. 228* ; *United Air Lines, Inc. v. Wiener (9th Cir. 1964) 335 F.2d 379, 389* ; *Mattschei v. United States (9th Cir. 1979) 600 F.2d 205, 208]* . As a general rule, the federal courts tend to place the primary responsibility for an aviation accident on the pilot [*see Spaulding v. United States (9th Cir. 1972) 455 F.2d 222, 226* ; *Mattschei v. United States (9th Cir. 1979) 600 F.2d 205, 208* ; *Hamilton v. United States (9th Cir. 1974) 497 F.2d 370, 374-375* ; *Hall v. Osell (1951) 102 Cal. App. 2d 849, 851-852, 228 P.2d 293]* . For example, a pilot's breach of his or her duty to be aware of his or her location or altitude and the weather conditions is normally deemed to be the proximate cause of an accident, rather than any breach of duty by air traffic control personnel to warn a pilot of such an unsafe condition [*see McDaniel v. United States (N.D. Cal. 1982) 553 F. Supp. 910, 915-916* ; *Sanbutch Properties, Inc. v. United States (N.D. Cal. 1972) 343 F. Supp. 611, 616]* . In *McDaniel v. United States (N.D. Cal. 1982) 553 F. Supp. 910, 915-916* , the court held that the failure of an air traffic controller to transmit a discretionary advisory or warning to a pilot of the hazard of wake turbulence when the traffic controller was engaged in higher priority duties was not the proximate cause of an accident when the pilot should have been aware of the tubulence. Federal courts have also applied the "discretionary function" doctrine to immunize air traffic controllers from certain acts of liability, such as for negligence in their exercise of judgment over airport design, creation departure procedures for airports, night lighting, or test flights [*see, e.g., West v. Federal Aviation Admin. (9th Cir. 1987) 830 F.2d 1044, 1047-1049* ; *see also United States v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) (1984) 467 U.S. 797, 813-814, 104 S. Ct. 2755, 81 L. Ed. 2d 660* ("discretionary function" doctrine)]. For further discussion, see [2][a], *below*.

[b] Weather Briefing

Thus far, meteorology has been considered a sufficiently inexact science so that errors in forecasting have not given rise

to tort liability. On the other hand, the government does have the responsibility to correctly transmit forecasts and, more importantly, to accurately report existing weather and to relay that information to pilots [*see Spaulding v. United States (9th Cir. 1972) 455 F.2d 222, 227* ; *but see Budden v. United States (8th Cir 1993) 15 F.3d 1444, 1450-1451* (pilot's conduct in flying into bad weather was sole proximate cause of injury, superseding potential negligence of failure to advise pilot of nature of weather conditions)].

[c] Certification of Airmen and Aircraft

Plaintiffs have long argued that since the federal government takes an active role in certifying aircraft and airmen, it should bear liability should such certification proves erroneous, such as when an inadequate air frame or pilot escapes detection. The United States Supreme Court has held that the government is not liable for such conduct and that certification falls within the discretionary function exception to the Federal Tort Claims Act [*United States v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) (1984) 467 U.S. 797, 104 S. Ct. 2755, 81 L. Ed. 2d 660, 678* ; *see 28 U.S.C.S. § 2680(a)*; *see also Nat. Gas Pipeline Co. v. United States (9th Cir. 1984) 742 F.2d 502, 504]* .

Just because an FAA employee is involved in a certification process does not provide complete immunity. In *Hayes v. United States (5th Cir 1990) 899 F.2d 438* , the court held that an FAA inspector conducting a check ride was liable for negligence in asking an applicant for a pilot's certificate to attempt a failed manuever a second time, which attempt ended in a crash. The court rejected the FAA's assertion of the discretionary function defense holding that the inspector was not making policy but merely carrying out his day to day function.

The FAA relies heavily on designees to perform certification functions. These are private individuals, not employed by the government, who are *designated* to conduct check rides for pilot's licenses (Designated Pilot Examiners), conduct physical examinations for airmen's medical certificates (Aviation Medical Examiners), certify that aircraft designs meet airworthiness standards (Designated Engineering Representatives), and conduct the required annual inspection of aircraft to assure continued airworthiness (Authorized Inspectors). They are employed by those seeking certification, but must follow the federal guidelines. The courts have held that these individuals are not government employees and do not expose the United States to liability under *respondeat superior* [*see, e.g., Leone v. United States (2nd Cir. 1990) 910 F.2d 46]* .

[2] Defenses Available to United States

[a] Discretionary Function Immunity

The United States is immune from tort liability when it exercises a discretionary function [*28 U.S.C.S. § 2680(a)*]. Although the Federal Tort Claims Act provides for a limited waiver of the federal government's immunity to allow suits against federal employees, that waiver of immunity does not apply to any claim that is based on the exercise of or failure to exercise or perform a discretionary function or duty [*see 28 U.S.C.S. §§ 1346(b), 2671*-2680]. This "discretionary function" exception is applied whenever the employee has exercised his or her discretion by acting as a regulator of the conduct of private individuals for social, political, or economic considerations [*United States v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) (1984) 467 U.S. 797, 813-814,104 S. Ct. 2755, 81 L. Ed. 2d 660]* , including those of safety [*West v. Federal Aviation Admin. (9th Cir. 1987) 830 F.2d 1044, 1047-1049]* . Thus, the "discretionary function" has been applied to immunize the certification of aircraft [*United States v. S. A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines) (1984) 467 U.S. 797, 813-814, 104 S. Ct. 2755, 81 L. Ed. 2d 660]* , as well as to immunize FAA employees from negligence in their exercise of judgment over departure procedures for airports, night lighting, or test flights [*West v. Federal Aviation Admin. (9th Cir. 1987) 830 F.2d 1044, 1047-1049*].

[b] *Feres* Doctrine

The military services operate numerous aviation facilities, and active members of the military service often operate civil aircraft. In 1952, the United States Supreme Court held in *Feres v. United States (1950) 340 U.S. 135, 146, 71 S. Ct.*

153, 95 L. Ed. 152 , that the Federal Tort Claims Act did not apply to military personnel acting incident to their military service. The *Feres* doctrine applies regardless of the status of the alleged tortfeasor. Thus, the doctrine precluded the widow of a Coast Guard helicopter pilot killed while on a rescue mission from suing the United States under the Federal Tort Claims Act even though the complaint alleged that a civilian FAA flight controller negligently caused her husband's death [*United States v. Johnson (1987) 481 U.S. 681, 107 S. Ct. 2063, 95 L. Ed. 2d 648, 655-657]* . In addition, the *Feres* doctrine precludes liability of a government contractor for strict products liability when the United States set or approved the design specifications for an aircraft [*McKay v. Rockwell Intern. Corp. (9th Cir. 1983) 704 F.2d 444, 448-449]* .

The *Feres* doctrine has been extended to include servicemen injured or killed while operating aircraft in United States Air Force aero clubs. The clubs are non-appropriated instrumentalities of the Air Force and only active-duty military personel may be members. The clubs otherwise operate much like civilian flying clubs and are used for personal, pleasure flying by servicemen. In *Walls v. United States (7th Cir 1987) 832 F.2d 93* , the court held that even the though the soldier was on leave or off duty he was still considered to be on active duty and subject to military discipline. He could not have been a member of the aero club without being part of the Air Force and thus his participation was directly related to his military status [*see also Herreman v. United States (7th Cir 1973) 476 F.2d 234, 235]* .

[3] Suits Against the United States--Federal Tort Claims Act

In any suit involving the federal government as a defendant, the plaintiff must comply with the provisions of the Federal Tort Claims Act [*28 U.S.C.S. §§ 1291, 1346(b), 1402(b), 1504, 2110, 2401(b), 2401, 2402, 2411, 2412, 2671*-2680]. In general, the Federal Tort Claims Act provides a limited waiver of sovereign immunity for tort claims against the United States and establishes the procedure for perfecting such claims. Because of the substantial involvement of the United States in aviation from air traffic control to dissemination of weather information, a large number of aviation tort cases include the United States as a defendant.

The Federal Tort Claims Act provides that the United States will be liable for acts and omissions of its employees in the same manner and under the same circumstances as a private person [*28 U.S.C.S. § 1346(b)*]. The law to be applied will be the law of the state in which the act or omission occurred or in which the accident took place [*28 U.S.C.S. § 1346(b)*; *Rayonier, Inc. v. United States (1957) 352 U.S. 315, 318-319, 77 S. Ct. 374, 1 L. Ed. 2d 354]* .

Before suit can be filed, a claim must be presented to the agency involved [*28 U.S.C.S. § 2675(a)*]. If the claim is rejected, the injured party is entitled to bring action against the United States. The suit must be filed in the United States District Court for the district in which the plaintiff resides or in which the accident took place [*28 U.S.C.S. § 1402(b)*]. The Federal Tort Claims Act does not allow for trial by jury, and thus any case against the United States will be tried to the court [*see 28 U.S.C.S. § 2402*].

For a more complete discussion, see Moore's Federal Practice,--Civil, Ch. 105 (Matthew Bender), and Jayson, Handling Federal Tort Claims: Administrative and Judicial Remedies (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesGovernmental & Nonprofit LiabilityFeres DoctrineGovernmentsFederal GovernmentClaims By & AgainstTortsPublic Entity LiabilityLiabilityFederal Tort Claims ActExclusions From LiabilityDiscretionary FunctionsTransportation LawAir TransportationAirports & Airways Development ActTortsPublic Entity LiabilityLiabilityFederal Tort Claims ActGeneral Overview

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2-16 California Forms of Pleading and Practice--Annotated § 16.16

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§ 16.16 State and Local Government Liability

Many airports in California are operated by local governments, mainly counties. The liability of a local public entity in the capacity of airport operator is governed by the same rules that apply to any other governmental entities [*see Gov. Code § 810 et seq.*; *see also* Ch. 464, *Public Entities and Officers: California Tort Claims Act*]. In practice, such liability is limited by the fact that the public entity normally lacks control over the actual operation of aircraft using the airport except, in some cases, in the hanger or ramp areas. The operation of aircraft on the surface at tower-controlled airports is controlled by the federal regulations [*see* 14 C.F.R. § 91.87], as are fields that lack a control tower [14 C.F.R. § 91.89].

The primary area of state and local government liability arises from two sources. The first is obstructions in the airport environment that violate the clear zone requirements of Federal Air Regulation part 77 [*14 C.F.R. § 77*; *see also § 16.13*[3]]. The second is collisions between county operated vehicles, most notably fuel trucks, and aircraft. A third, and increasingly controversial, area of governmental liability for the operation of airports concerns an airport's liability for noise from aircraft. For a discussion of an airport's liability for nuisance and inverse condemnation based on airport noise, see *§ 16.13*[4].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral OverviewTransportation LawAir TransportationAirports & Airways Development Act

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§ 16.17 Warsaw Convention and Montreal Convention of 1999

[1] Warsaw Convention and Subsequent Amendments

[a] Scope and Constitutionality

For injuries occurring prior to November 4, 2003, the liability of airlines operating on international flights is governed by the Warsaw Convention and its subsequent amendments [Warsaw Convention, 49 Stat. 3000, T.S. 876 (1934), reprinted as note following *49 U.S.C.S. § 40105*]. The Warsaw Convention is an international treaty, which preempts local laws [*P. T. Airfast Services, Indonesia v. Superior Court (1983) 139 Cal. App. 3d 162, 166, 188 Cal. Rptr. 628* ; *see O'Rourke v. Eastern Air Lines, Inc. (E.D. N.Y. 1982) 553 F. Supp. 226, 228]* .

The Montreal Agreement [C.A.B. Agreement 18900; *see 31 Fed. Reg. 7302 (1966)* (containing complete text of agreement); the important provisions of the Montreal Agreement are outlined in a 1966 order of the Civil Aeronautics Board, which is printed following the text of the Warsaw Convention following *49 U.S.C.S. § 40105*], which contains several major modifications of the Warsaw Convention, is an agreement of international air carriers reached in private agreement with the participation of the United States Department of State [*see* In re Aircrash in Bali Indonesia on April 22, 1974 *(9th Cir. 1982) 684 F.2d 1301, 1305]* . The Agreement applies to international transportation, as defined in the Warsaw Convention, on airlines signatory to the agreement, provided that the intended journey includes a point of departure or agreed stopping place in the United States [Montreal Agreement, C.A.B. Agreement 18900, *31 Fed. Reg. 7302 (1966)* ; *see* In re Aircrash in Bali Indonesia on April 22, 1974 *(9th Cir. 1982) 684 F.2d 1301, 1305]* .

As discussed in [d], *below*, the Warsaw Convention and the Montreal Agreement limit the liability of air carriers to a certain amount. The constitutionality of the Warsaw Convention has been challenged in an attempt to circumvent these limits. In *In re Aircrash in Bali Indonesia on April 22, 1974* [In re Aircrash in Bali Indonesia on April 22, 1974 *(9th Cir. 1982) 684 F.2d 1301, 1308-1312]* , the United States Court of Appeals for the Ninth Circuit analyzed the constitutionality of the Convention, but ultimately did not decide the issue. The court stated that while the arguments of the plaintiffs against the constitutionality of the Convention were substantial, it could not find the treaty unconstitutional if another remedy existed that would provide the plaintiffs with full compensation [In re Aircrash in Bali Indonesia on

April 22, 1974 *(9th Cir. 1982) 684 F.2d 1301, 1310]* . The court then held that the impairment of the plaintiffs' claim by the Convention was potentially a taking by the United States government [In re Aircrash in Bali Indonesia on April 22, 1974 *(9th Cir. 1982) 684 F.2d 1301, 1310]* . However, in *Trans World Airlines v. Franklin Mint Corp. (1984) 466 U.S. 243, 104 S. Ct. 1776, 80 L. Ed. 2d 273* , the United States Supreme Court, rejecting a prospective ruling by the United States Court of Appeals for the Second Circuit, upheld the validity of Warsaw Convention's limits for *loss of cargo*. The holding of the Court in *Franklin Mint* would also seem to overrule a federal district court decision that had held that the personal injury limits of the Warsaw Convention are invalid [*In re Aircrash at Kimpo International Airport (C.D. Cal. 1983) 558 F. Supp. 72, 75*]. This is due to the fact that the district court based its opinion on the declaration of the lower court in *Franklin Mint*, which was subsequently rejected by the Supreme Court.

The Warsaw Convention does not govern the liability of potential defendants other than air carriers [*see* In re Paris Air Crash of March 3, 1974 *(C.D. Cal. 1975) 399 F. Supp. 732, 747]* . As a result, the litigation of almost every major aircraft accident involving the Warsaw Convention results in claims against manufacturers of the aircraft and/or its components in an attempt to get around the Warsaw Convention's limitations on damages recoverable. In addition, there are frequent attempts to use the exception to liability limits set forth in Article 25 of the Convention that lifts the liability limits of Article 22 in the event of willful misconduct by the carrier. For example, cases involving the Soviet shootdown of Korean Airlines Flight 007 and the terrorist bombing of Pan American's Flight 103 near Lockerbie, Scotland have resulted in findings of willful misconduct against the carrier.

The following brief summary of the current state of the law is not meant to be exhaustive. For a comprehensive treatment of the Warsaw Convention and its progeny, see Kreindler, Aviation Accident Law, Ch. 10 (Matthew Bender).

[b] Applicability

[i] International Flights

The Warsaw Convention applies only to international transportation [Warsaw Convention, Art. 1, 49 Stat. 3000, T.S. 876 (1934), reprinted as note following *49 U.S.C.S. § 40105*]. This is defined as a flight which, according to the contract between the passenger and the airline, begins in one country that has signed the treaty and ends in another [Warsaw Convention, Art. 1(2), 49 Stat. 3000, T.S. 876 (1934), reprinted as note following *49 U.S.C.S. § 40105*]. In addition, an international flight occurs if the flight commences and terminates in a country that has signed the treaty if there is a stopover in any other country [Warsaw Convention, Art. 1(2), 49 Stat. 3000, T.S. 876 (1934), reprinted as note following *49 U.S.C.S. § 40105*]. Flights that have intermediate stops within the same country are international flights even if the crash occurred before a border was crossed [*see Stratis v. Eastern Air Lines, Inc. (2d Cir. 1982) 682 F.2d 406, 409-414]* . The general rule is that the nature of the flight is determined by the ticket held by the passengers [*see* Warsaw Convention, Art. 1(2), 49 Stat. 3000, T.S. 876 (1934), reprinted as note following *49 U.S.C.S. § 40105*; *see also Stratis v. Eastern Air Lines, Inc. (2d Cir. 1982) 682 F.2d 406, 409-414]* . This can lead to the result that passengers flying on a domestic leg of an international flight will have different remedies from those whose ultimate destination was a foreign country.

The Montreal Agreement applies to an international flight if the intended journey includes a point of departure or agreed stopping place in the United States [Montreal Agreement, C.A.B. Agreement 18900, *31 Fed. Reg. 7302 (1966)* ; *see* In re Aircrash in Bali Indonesia on April 22, 1974 *(9th Cir. 1982) 684 F.2d 1301, 1305]* .

An extremely important issue in dealing with the Warsaw Convention is whether the Convention provides the exclusive remedy in situations where it applies. The Supreme Court has added definition to the term "accident" as used in Article 17, but the Court failed to address the issue of whether, if a claim is caused by an Article 17 "accident," the Convention provides the exclusive remedy [*see Air France v. Saks (1995) 470 U.S. 392, 105 S. Ct. 1338, 84 L. Ed. 2d 289]* . Various other courts have held that a state law cause of action can be brought if the claim does not result from an Article 17 "accident" [*see, e.g., Tandon v. United Air Lines (S.D.N.Y. 1996) 926 F. Supp. 366]* . In one case, a federal district

court in New York concluded that Warsaw Convention was the exclusive remedy in an aircraft accident and that state law causes of action were preempted [*Jack v. Trans World Airlines, Inc. (N.D.Cal. 1993) 820 F. Supp. 1218]* .

[ii] Scope of Coverage

The Warsaw Convention provides that an air carrier is liable for damages sustained in any accident in which the passenger sustains bodily injury as long as the injury occurred on board the aircraft or in the course of any of the operations of embarking or disembarking [Warsaw Convention, Art. 17, 49 Stat. 3000, T.S. 876 (1934), reprinted as note following *49 U.S.C.S. § 40105*].

An accident is defined as any unexpected or unusual event or happening that is external to the passenger [*Air France v. Saks (1985) 470 U.S. 392, 105 S. Ct. 1338, 84 L. Ed. 2d 289, 301-302* (issue of whether injury resulted from accident is for trier of fact if there is contradictory evidence)]. Thus, the term "accident" is broadly defined, and may cover injuries resulting from a hijacking [*see Day v. Trans World Airlines (2d Cir. 1975) 528 F.2d 31]* , as well as cases in which a passenger slips and falls [*Bradfield v. Transworld Airlines, Inc. (1979) 88 Cal. App. 3d 681, 684-687, 152 Cal. Rptr. 172* ; *see Williams v. Fidelity & Cas. Co. of New York (E.D. La. 1977) 442 F. Supp. 455, 456-457]* . The term has also been applied to a flight attendant's refusal to assist an asthmatic passenger, who was sensitive to secondhand cigarette smoke, in finding a different seat farther away from the smoking section, which refusal resulted in the passenger's death from a severe asthma attack. In that case, the trial court concluded as a factual matter that the attendant's refusal to assist under the circumstances was unexpected and unusual, and the United States Supreme Court held that this refusal was as much a cause of the passenger's death as the ambient cigarette smoke [*Olympic Airways v. Husain (2004) 540 U.S. 644, 652-656, 124 S. Ct. 1221, 157 L. Ed. 2d 1146]* .

Although the term accident must be flexibly applied, it does not cover situations in which an injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft [*Air France v. Saks (1985) 470 U.S. 392, 105 S. Ct. 1338, 84 L. Ed. 2d 289, 301-302]* . For example, although an airline may properly be held liable for a passenger's loss of hearing due to a sudden dive of the plane, causing an abrupt change in air pressure, it is not liable for such an injury in the absence of proof that the air pressure in the plane was abnormal in some way [*Air France v. Saks (1985) 470 U.S. 392, 105 S. Ct. 1338, 84 L. Ed. 2d 289, 301-302]* . Similarly, neither the development of deep vein thrombosis during a long flight [*Rodriquez v. Ansett Australia, Ltd. (9th Cir. 2004) 383 F.3d 914, 917*], nor the failure to warn of its risk [*Twardowski v. American Airlines, Inc. (9th Cir. 2008) 535 F.3d 952, 958* ; *Caman v. Continental Airlines, Inc. (2006) 455 F.3d 1087, 1092*], is an event for purposes of establishing an "accident" under the Warsaw Convention.

The term "bodily injury" contemplates a narrow definition that excludes purely mental injuries [*Eastern Airlines, Inc. v. Floyd (1991) 499 U.S. 530, 542-553, 111 S. Ct. 1489, 113 L. Ed. 2d 569]* . For this reason, passengers aboard an international airline flight who suffer mental distress as a result of being informed that the engines have failed, and that the airplane will crash-land in the ocean, have no cause of action under the Warsaw Convention if the plane recovers power and ultimately lands safely at the airport without causing any physical injuries [*Eastern Airlines, Inc. v. Floyd (1991) 499 U.S. 530, 542-553, 111 S. Ct. 1489, 113 L. Ed. 2d 569]* . Similarly, recovery for Post Traumatic Stress Disorder ("PTSD"), a physiological disorder defined in the American Psychiatric Association's Diagnostic and Statistical Manual, DSM-IV may not be allowed under the Warsaw convention in situations in which there is no discernable physical injury [*Doe v. United Airlines (2008) 160 Cal. App. 4th 1500, 1512-1513, 73 Cal. Rptr. 3d 541*]. The term "bodily injury" also does not extend to physical conduct by another, however offensive, that does not result in some physical injury [*Doe v. United Airlines (2008) 160 Cal. App. 4th 1500, 1514, 73 Cal. Rptr. 3d 541*].

In determining whether a person is in the process of embarking or debarking, the control of the airline, as well as the place of the injury and the activity the passenger was engaged in at the time, are all important factors [*see Evangelinos v. Trans World Airlines, Inc. (3d Cir. 1977) 550 F.2d 152, 155-158]* . As a general rule, the passenger falls under the control of the airline and thus, under the protection of the Warsaw Convention, when he or she surrenders the ticket or

takes the last act necessary prior to actually boarding the aircraft [*see Day v. Trans World Airlines (2d Cir. 1975) 528 F.2d 31, 34-35* ; *see also Aquino v. Asiana Airlines, Inc. (2003) 105 Cal. App. 4th 1272, 1280-1281, 130 Cal. Rptr. 2d 223* (plaintiffs were not engaged in embarking when they were in common passenger area attempting to check in, had not passed through security, and had not yet checked luggage or received boarding passes)]. Disembarking is normally completed after the passenger leaves the plane and reaches a safe place in the terminal [*see MacDonald v. Air Canada (1st Cir. 1971) 439 F.2d 1402, 1404-1405]* . It is thus not necessary for the passenger to actually be on board the airplane for the Warsaw Convention to apply [*Day v. Trans World Airlines (2d Cir. 1975) 528 F.2d 31]* .

The Warsaw Convention also governs cases of injury or loss of luggage or goods during an international flight [Warsaw Convention, Art. 18, 49 Stat. 3000, T.S. 876 (1934), reprinted as note following *49 U.S.C.S. § 40105*; *see also Johnson v. American Airlines, Inc. (9th Cir. 1987) 834 F.2d 721, 723-725* (action in California state court against airline for negligent infliction of emotional distress and loss of property, stemming from damage to dead body's remains incurred during international flight from California to Ireland, as preempted by Warsaw Convention, which applies to all international air transportation of "goods" performed by aircraft for hire; plaintiffs did not have standing to sue because funeral homes, not plaintiffs, were signatories to air waybill)].

[iii] Notice Requirement

Passengers often seek to avoid the damage limitation of the Warsaw Convention [*see* [d], *below*] to achieve the higher verdicts available through the American tort litigation system. One of the most frequent avenues of escape from the Warsaw Convention is the notice requirement, which requires that before an airline can rely on the limits of the Warsaw Convention, it must notify the passenger of the limits before the journey begins [Warsaw Convention, Art. 3(1)(e), (2), 49 Stat. 3000, T.S. 876 (1934), reprinted as note following *49 U.S.C.S. § 40105*; 14 C.F.R. § 221.175(a)]. While virtually all airplane tickets include some form of notification on the back side, some courts have been most liberal in allowing plaintiffs to avoid these limitations and seek redress under conventional negligence theories [*see* In re Air Crash Disaster at Warsaw, Poland (2d Cir. [N.Y.] 1983) *705 F.2d 85, 89-90* (avoiding application of damage limits where type size on ticket too small)].

[c] Standard of Care and Defenses

Under the Warsaw Convention, as unmodified, there is a rebuttable presumption of negligence when a passenger is injured during an international flight [Warsaw Convention, Art. 17, 49 Stat. 3000, T.S. 876 (1934), reprinted as note following *49 U.S.C.S. § 40105*; *see* In re Aircrash in Bali Indonesia on April 22, 1974 *(9th Cir. 1982) 684 F.2d 1301, 1305]* . The Montreal Agreement has changed this rule with respect to flights starting and stopping in the United States to provide that an airline is liable without regard to fault for injuries during an international flight [*see* Montreal Agreement, C.A.B. Agreement 18900; *31 Fed. Reg. 7302 (1966)* ; In re Aircrash in Bali Indonesia on April 22, 1974 *(9th Cir. 1982) 684 F.2d 1301, 1305* ; *see also Air France v. Saks (1985) 470 U.S. 392, 105 S. Ct. 1338, 84 L. Ed. 2d 289, 301-302* (stating that airline liability is absolute in sense that airline cannot defend claim on ground that it took all necessary measures to avoid injury)]. However, it appears that comparative negligence by a passenger, which was available as a defense under the original Warsaw Convention [*see* Warsaw Convention, Art. 21, 49 Stat. 3000, T.S. 876 (1934), reprinted as note following *49 U.S.C.S. § 40105* (providing that defense available in same manner as under state law)], is available under the Montreal Agreement as well [*see Bradfield v. Transworld Airlines, Inc. (1979) 88 Cal. App. 3d 681, 685, 152 Cal. Rptr. 172* ; *Windbourne v. Eastern Air Lines, Inc. (E.D. N.Y. 1979) 479 F. Supp. 1130, 1141]* .

[d] Limited Damages

[i] Amounts and Constitutionality

Under the original Warsaw Convention, liability for injury was limited to approximately $8,300. This was raised in the Hague Protocol (to which the United States does not adhere) to roughly $16,600 [In re Aircrash in Bali Indonesia on

April 22, 1974 *(9th Cir. 1982) 684 F.2d 1301, 1305]* . Under the Warsaw Convention as modified by the Montreal Agreement, damages for personal injury or wrongful death are limited to $75,000 [Montreal Agreement, C.A.B. Agreement 18900; *31 Fed. Reg. 7302 (1966)* ; *see* In re Aircrash in Bali Indonesia on April 22, 1974 *(9th Cir. 1982) 684 F.2d 1301, 1305]* . As noted in [a], *above*, the constitutionality of these limits is uncertain [*compare* In re Aircrash in Bali Indonesia on April 22, 1974 *(9th Cir. 1982) 684 F.2d 1301, 1308-1312* (impairment of the plaintiffs' claim by the Convention limits was potentially compensable under theory of taking) *with Trans World Airlines v. Franklin Mint Corp. (1984) 466 U.S. 243, 104 S. Ct. 1776, 80 L. Ed. 2d 273, 278* (upholding limits on liability for lost cargo under Warsaw Convention)].

Recently there have been major changes underway in the limitations on liability under the Warsaw Convention. These changes are occurring not due to changes to the Warsaw Convention protocols made by the signatory governments, but from either unilateral decisions of the signatory states such as Japan to waive liability limitations, or from agreements by the carriers themselves to waive the liability limits.

The Intercarrier Agreement on Passenger Liability was adopted unanimously at the October 1995 IATA Conference in Kuala Lumpur and purports to waive the liability limitations subject to various provisions set forth in the Agreement related to where suit may commence, and other procedural provisions.

[ii] Avoidance of Warsaw Limits: Willful Misconduct

Willful misconduct of an airline removes the liability ceiling and subjects the airline to unlimited damages [Warsaw Convention, Art. 25, 49 Stat. 3000, T.S. 876 (1934), reprinted as note following *49 U.S.C.S. § 40105*; *see* In re Aircrash in Bali Indonesia on April 22, 1974 *(9th Cir. 1982) 684 F.2d 1301, 1305-1306]* . Willful misconduct may also prevent an airline from claiming protection under the Warsaw Convention, thus subjecting it to suit in state court [*see Johnson v. American Airlines, Inc. (9th Cir.1987) 834 F.2d 721, 724* (although Convention provides that carrier is not entitled to avail itself of Convention provisions if damage was caused by willful misconduct, exemption does not apply when plaintiffs pleaded negligence rather than willful misconduct in original complaint)]. Willful misconduct may include acts of reckless disregard for the consequences [*Maschinenfabrik Kern, A.G. v. Northwest Airlines (N.D. Ill. 1983) 562 F. Supp. 232, 240]* . Willful misconduct is an issue for the trier of fact [In re Pago Pago Aircrash of Jan. 30, 1974 *(C.D. Cal. 1976) 419 F. Supp. 1158, 1160]* .

[iii] Damages Limitation Unaffected by Inadequate Liability Limitation Notice

The United States Supreme Court has held that an air carrier's failure to provide an adequate statement that the transportation is subject to the rules relating to liability of the Warsaw Convention is not grounds for refusing to apply the damages limitation of the Warsaw Convention as a sanction [*see Chan v. Korean Air Lines, Ltd. (1989) 490 U.S. 122, 109 S. Ct. 1676, 104 L. Ed. 2d 113, 123-127]* . In the case before it, the air carrier had delivered the required statement on its passenger tickets in eight-point rather than 10-point type. The Court stated that neither the Convention nor the Montreal Agreement provided for the elimination of the liability limitation as a sanction for failure to provide the proper notice, and that as long as the ticket itself was delivered, defective notice would not cause the carrier to lose the benefit of the damages limitation [*see Chan v. Korean Air Lines, Ltd. (1989) 490 U.S. 122, 109 S. Ct. 1676, 104 L. Ed. 2d 113, 123-127]* .

[2] Montreal Convention of 1999

[a] Replacement of Warsaw Convention

The "Convention for the Unification of Certain Rules for International Carriage by Air signed at Montreal Convention on 28 May 1999" (a copy may be obtained at http://www.dot.gov/ost/ogc) provides a comprehensive revision and consolidation of many of the provisions of the Warsaw Convention, particularly with regard to damages and jurisdiction. This convention, generally referred to as the Montreal Convention of 1999, went into effect under its own

terms on November 4, 2003, after the United States became the thirtieth nation to file an instrument of ratification. As of mid-2004, there were 34 ratified parties to the Convention, including other nations such as Japan, Canada, and Mexico, although the European Union had not yet ratified the Convention. The Montreal Convention of 1999 is not an amendment to the Warsaw Convention, but a new agreement that replaces the Warsaw Convention and its various amendments [*Ehrlich v. Am. Airlines, Inc. (2d Cir. 2004) 360 F.3d 366, 371 n.4*].

Unlike the Warsaw Convention, which was designed originally to limit airline liability for injuries, the Montreal Convention of 1999 is designed to ensure fair and adequate compensation for injured passengers. The Montreal Convention makes the airline liable for injury up to a certain amount, although the airline may be absolved from liability for damages beyond that base amount if the airline proves that it did not cause the accident [Montreal Convention, Art. 21 (1999); *see* [c], *below*].

[b] Applicability

The Montreal Convention of 1999 applies to "international carriage" performed under contract for carriage by an "aircraft for reward," and to gratuitous carriage by aircraft provided by an "air transport undertaking" [Montreal Convention, Art. 1, § 1 (1999)]. Under the definition of "international carriage," the Montreal Convention applies to the same types of international flights as did the Warsaw Convention--that is, flights that, according to the contract between the airline and the passenger, either begin in one country that has ratified the agreement and end in another country that has also ratified the agreement, or begin and end in a single country that has ratified the agreement with an agreed stopover in any other country [*see* Montreal Convention, Art. 1, § 2 (1999)]. Carriage by several airlines in succession is considered one undivided carriage, if it was the intent of the parties that the transportation would be regarded as a single operation [Montreal Convention, Art. 1, § 3 (1999)]. So long as these conditions for applicability are met, carriage that is provided by a ratifying nation or other public body is generally covered by the Montreal Convention [*see* Montreal Convention, Art. 2 (1999)].

[c] Limits on Liability

Under the Montreal Convention of 1999, the airline is presumed liable for damages sustained if a passenger dies or suffers bodily injury while on the aircraft or in the course of embarking or disembarking [Montreal Convention, Art. 17, § 1 (1999)]. The Convention also provides for liability for loss of or damage to baggage under specified conditions, as well as for the loss of or damage to cargo and for delays in transportation [*see* Montreal Convention, Arts. 17-19 (1999)].

Despite these general provisions for liability, the Montreal Convention imposes limits on an airline's liability. For example, the Convention provides for a comparative negligence defense applicable to all damage claims under the Convention. Therefore, if the passenger's negligence or other wrongful act or omission contributed to the damage claimed, the airline's liability will be reduced by the percentage of fault allocated to that passenger [Montreal Convention, Art. 20 (1999)].

Subject to this comparative negligence defense [Montreal Convention, Art. 20 (1999)], in claims for the death of or injury to passengers not exceeding 100,000 Special Drawing Rights for each passenger, an airline does not otherwise have the right to limit its liability [Montreal Convention, Art. 21, § 1 (1999)]. A "special drawing right" (SDR) is a monetary exchange unit calculated by the International Monetary Fund [Montreal Convention, Art. 23, § 1 (1999)], and current exchange rates are available at the Fund's web site, www.imf.org. As of mid-2004, 100,000 SDRs were equivalent to about $150,000 in U.S. dollars. Article 23 of the Convention provides further rules for calculating and converting SDRs [Montreal Convention, Art. 23 (1999)].

For injury or death claims above 100,000 SDRs per passenger, an airline may be exonerated from liability in excess of that amount if it proves either that the damage was not caused by the negligence or other wrongful act or omission of

the airline or its servants or agents, or that the damage was caused solely by the negligence or other wrongful act or omission of a third party [Montreal Convention, Art. 21 (1999)]. Therefore, unlike under the Warsaw Convention, a plaintiff is not required to prove willful misconduct to recover an amount in excess of the base damages cap [*see* [1][d][ii], *above*]. The Montreal Convention does not allow the recovery of punitive damages or other noncompensatory damages [Montreal Convention, Art. 29 (1999)]. The Convention also places specified limits on liability for damage caused to damage or cargo, and for damage caused by delay [*see* Montreal Convention, Art. 22 (1999)].

If an action is brought against servants or agents of the airline arising out of damage within the coverage of the Convention, these servants and agents are entitled to invoke the full conditions and liability limits of the Convention, so long as they prove they acted within the scope of their employment [Montreal Convention, Art. 30, § 1 (1999)]. In those cases, the aggregates of the amounts recoverable from the airline and its servants and agents may not exceed the limits specified in the Convention [Montreal Convention, Art. 30, § 2 (1999)]. However, except for claims relating to cargo damage, a servant or agent who acts with intent to cause damage, or recklessly and with knowledge that damage will probably result, is not protected by the limits and conditions of the Convention [Montreal Convention, Art. 30, § 3 (1999)].

Although the Montreal Convention provides that passengers must be notified in advance of the applicability of the liability limits of the Convention, failure to comply with this notice requirement does not affect the applicability of the Convention or its liability limits [Montreal Convention, Art. 9 (1999)].

An airline is free to contract with passengers to provide for higher limits of liability than those specified in the Convention [Montreal Convention, Art. 25 (1999)]. However, any contractual provision attempting to relieve the airline of liability, or to fix a lower limit of liability than what is specified in the Convention, is void, although in those instances other provisions of the contract that do not run afoul of the terms of the Convention may still be enforced [Montreal Convention, Art. 26 (1999)]. All actions that fall within the scope of the Montreal Convention are subject to its conditions and limitations, regardless of whether the action is brought under the Convention, under contract law, or under tort law [Montreal Convention, Art. 29 (1999)].

[d] Jurisdiction

Under the Montreal Convention of 1999, an action for damages must be brought in the territory of a ratifying nation in one of the following jurisdictions [Montreal Convention, Art. 33 (1999)]:

- The domicile of the airline.
- The airline's principal place of business.
- The place where the airline has a place of business and through which the contract for carriage was made.
- The place of destination.
- If the action is for damages for death or injury to a passenger, the principal and permanent residence of the passenger, so long as the airline operates passenger services in that jurisdiction, either on its own planes or on the planes of another carrier through a commercial agreement, and the airline conducts its business from premises leased or owned by the airline or by another airline with which the airline has a commercial agreement.

The parties to the carriage contract may also stipulate in writing that any dispute relating to the liability of the carrier under the Convention will be settled through arbitration, although arbitration must still take place in one of the

jurisdictions described above [Montreal Convention, Art. 34, § 1 (1999)].

[e] Statute of Limitations

A plaintiff must bring an action under the Montreal Convention of 1999 within two years after the date of arrival at the destination, the date the aircraft ought to have arrived, or the date on which the carriage stopped, calculated according to the laws of the court with jurisdiction over the action [Montreal Convention, Art. 35 (1999)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsTransportation LawAir TransportationWarsaw ConventionGeneral OverviewInternational LawTreaty InterpretationParticular TreatiesWarsaw Convention

California Forms of Pleading and Practice--Annotated

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Volume 2: Adoptions thru Airplanes and Airports-Chs. 12-17
Chapter 16 AIRPLANES AND AIRPORTS
PART II. LEGAL BACKGROUND

2-16 California Forms of Pleading and Practice--Annotated § 16.18

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.18 Airline Passenger Complaints

[1] Denial of Boarding

Airlines routinely provide reservations for more passengers than there are seats on the aircraft. The airline tries to compute how many no-shows will occur on each flight, and then overbooks sufficient seats to allow a full airplane on each flight. The predictions occasionally miscarry and more passengers with confirmed reservations present themselves for boarding than the aircraft can accommodate. A judicial remedy was first established when a gate agent attempting to deal with an overbooked flight made perhaps the worst decision in the history of customer relations by electing to bump consumer activist Ralph Nader. In *Nader v. Allegheny Airlines (1976) 426 U.S. 290, 292-307, 96 S. Ct. 1978, 48 L. Ed. 2d 643* , the United States Supreme Court established a judicial remedy for denied boarding.

The Department of Transportation has since established regulations for airlines to follow in such circumstances. These regulations have been held not to pre-empt certain state law remedies, and a passenger may decline the airline's offer of cash or free tickets and file suit [*West v. Northwest Airlines (9th Cir. 1993) 995 F.2d 148, 151]* . The federal Airline Degregulation Act (*49 U.S.C.S. § 41713(b)*) may also preempt some disputes, depending on the legal theory on which the dispute rests [*see American Airlines v. Wolens (1995) 513 U.S. 219, 232-233, 115 S. Ct 817, 130 L. Ed. 2d 715* (breach of contract claims were not preempted, but action under state consumer fraud statute was preempted); *Margolis vs. United Airlines (E.D. Mich. 1993) 811 F. Supp 318* ; *see* discussion in *§ 16.10*[6]].

In addition, federal law authorizes an airline to refuse to transport a passenger if the carrier believes that passenger is or might be inimical to safety [*49 U.S.C.S. § 44902*]. However, although an airline has broad discretion under this statute in deciding when to refuse to transport a passenger for safety reasons, an airline's refusal to transport can give rise to a claim for damages if the refusal is arbitrary or capricious [*Rubin v. United Air Lines, Inc. (2002) 96 Cal. App. 4th 364, 378, 117 Cal. Rptr. 2d 109* (airline's refusal to transport passenger was reasonable)].

[2] Lost Luggage

Airlines attempt to limit their baggage liability by the contract printed on the ticket. Although the courts will enforce

such limitations, they will hold the carrier strictly to its published tariff rules. For example, a passenger sued for loss of her late husband's ashes, which had been checked as luggage. The airline was not entitled to partial summary judgment to limit its exposure to $1,250, its published tariff, because it had breached its own rule--that valuables should be carried on rather than checked--by not allowing the passenger to carry the remains as carry-on luggage (the package met all size requirements) [*Coughlin v. Trans World Airlines, Inc. (9th Cir. 1988) 847 F.2d 1432]* .

In another human remains case, in which the plaintiff claimed emotional distresss arising from the alleged mishandling of a corpse and casket, the airline was entitled to summary judgment because it established that it had complied with its tariff. The plaintiff had been properly notified of the tariff and had not taken the opportunity to declare a higher valuation than the $0.50 per pound provided on the airbill [*Reece v. Delta Air Lines, Inc. (D. Me. 1990) 731 F. Supp. 1131]* .

Even in factually compelling cases, the courts have enforced the tariff. In one cae, for example, Federal Express lost a blood sample necessary to match bone marrow for a waiting 13-year-old cancer patient. The lost sample prevented a timely bone marrow transplant, and the child died. Because Federal Express had presented the shipper with the opportunity to declare a higher value, the court limited the plaintiffs' damages to that printed on the waybill: $100 [*Hampton v. Federal Express (8th Cir. 1990) 917 F.2d 1119*], When that opportunity has not been available the courts have allowed recovery of the full value of the goods [*Welliver v. Federal Express (S.D. N.Y. 1990) 737 F. Supp. 205]* .

[3] Injuries Due to Falling Carry-On Bags

Many frequent flyers, apparently believing that there are two kinds of luggage, carry-on and lost, routinely bring as much luggage on board as possible. While FAA regulations require airlines to limit the size, number, and weight of carry-on luggage [*14 C.F.R. § 121.589*], the overhead bins are often filled to and beyond capacity. Periodically, luggage falls from the bin and injures a passenger.

The courts have been reluctant to hold airlines liable for such claims, despite the high duty of care imposed on air carriers [*see § 16.11*[2][b]]. In *Haley v. United Airlines (D. Md. 1989) 728 F. Supp 374* , a passenger rushing to get up before the plane had stopped at the gate opened a bin, allowing a briefcase to fall and strike another passenger. The court held that the airline had met its duty of care, because the flight attendants had made the proper announcements warning passengers to remain seated and had attempted to stop the eager passenger from opening the bin [*Haley v. United Airlines (D. Md. 1989) 728 F. Supp 374* ; *see also Ginter v. TWA (3rd Dept. 1989) 148 A.D. 2d 787, 538 N.Y.S.2d 638, 1989 N.Y. App. Div. LEXIS 2137* (plaintiff had failed to prove negligence when airline established that luggage in question complied with size and weight limitations, that flight attendants had made proper announcements, and had ensured that bins were closed prior to flight)].

The Ninth Circuit has held that it is a jury question whether or not the airline has a duty to install netting in the overhead bins given numerous prior reports of falling bags or whether the standard pre-landing warnings given by the flight attendants are sufficient [*Andrews v. United Airlines (9th Cir. 1994) 24 F.3d 39]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawAir TransportationCommercial AirlinesGeneral OverviewCivil ProcedureFederal & State InterrelationshipsFederal Common LawPreemptionTransportation LawInterstate CommerceFederal PreemptionTransportation LawCarrier Duties & LiabilitiesGeneral Overview

California Forms of Pleading and Practice--Annotated

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§ 16.19 Aviation Insurance

Aviation insurance, while similar in broad concept to that available for automobiles, contains many differences of which counsel should be aware [*see* Ch. 308, *Insurance* , and California Insurance Law and Practice, Ch. 41, *Liability Insurance in General* (Matthew Bender), for a discussion of liability insurance in general; for discussion of aviation insurance, see California Insurance Law and Practice, Ch. 45, *Aviation Insurance* (Matthew Bender)]. The typical coverages available under an aviation policy are public liability for personal injury, public liability for property damage, first-party hull coverage, and medical payments. The public liability for personal injury may either include or exclude coverage for claims made by passengers, or may have lower liability limits for claims by passengers.

The first-party hull coverage is analogous to automobile collision insurance, but will often have a split deductible which is higher or lower depending upon whether or not the aircraft is in motion at the time of the loss.

The most significant differences between aircraft insurance and automobile insurance are that there is no required policy language and that the omnibus clause which provides coverage to permissive users is not nearly as broad for aircraft insurance. Typically, in policies on individually owned aircraft, renter pilots, or anyone else using the aircraft under the terms of a rental agreement or other compensatory scheme, are not insureds under the primary policy unless the rental agreement or lease is expressly disclosed to the company. Likewise, permissive users are often not insured under the hull provisions, and the insurance company reserves the right to subrogate against a permissive user who damages the aircraft. In addition, several classes of permissive users are routinely excluded, such as those in aviation businesses providing pilot or flight instruction services and mechanics on test flights.

Apart from insurance available to aircraft owners, policies are available to hanger keepers and maintenance facilities, and these policies are similar to garage keepers' policies. The lack of coverage to renter pilots has created "non-ownership coverage," which provides renter and other nonowner pilots with coverage while flying airplanes owned by others. These coverages may contain both personal liability and protection for claims by a subrogating hull insurer. The Public Utilities Code requires that renters be advised of the coverage available to them [*see Pub. Util. Code § 24362*]. There is no requirement, however, that the insurance be provided by the owner. The Code also requires that

renters either have insurance or post a bond in the event of an accident [*see Pub. Util. Code §§ 24326, 24327, 24350, 24362(b)*]. Such insurance need not cover claims by guest passengers [*Pub. Util. Code § 24351(c)*; *see Grubb v. Ranger Ins. Co. (1978) 77 Cal. App. 3d 526, 532, 143 Cal. Rptr. 558]* . Similarly, the insurance or bond need not cover any liability for bodily injury or death associated with skydiving or sport parachuting, if the injury or death is solely related to the hazardous risks associated with those activities [*Pub. Util. Code § 24351(d)*].

Primary aviation liability policies generally come in two types. The first provides a relatively low coverage per occupant ($100,000 is typical) with a total occurrence coverage equal to the number of seats (often excluding the pilot seat) times the occupant limit. A second common limit is a high combined single limit (typically $1,000,000), which may or may not have a lower sublimit (typically $100,000) for claims made by passengers. It is rare to find primary insurance coverage for general aviation aircraft exceeding $1,000,000. Excess insurance is, however, readily available.

Aviation policies are substantially more restrictive than automobile policies. These restrictions are found in three areas. First, the pilot warranty clause will limit, either expressly by name or at least by qualifications, the pilots who may operate the aircraft without voiding the policy. California courts have enforced pilot warranty clauses so long as the restrictions are unambiguous [*National Ins. Underwriters v. Carter (1976)17 Cal. 3d 380, 385, 131 Cal. Rptr. 42, 551 P.2d 362]* . The failure of the pilot to have a current medical certificate as required by the policy can bar coverage even without a causal connection between the pilot's health and the accident [*National Union Fire Insurance Co. v. Estate of Meyer (1987) 192 Cal. App. 3d 866, 872, 237 Cal. Rptr. 632]* .

The use of the aircraft may be limited to a particular stated F.A.A. category or use, and the violation of the use provision need not be causally related to the accident to bar coverage [*Ins. Code § 11584*; *Middlesex Mutual Ins. Co. v. Bright (1980) 106 Cal. App. 3d 282, 165 Cal. Rptr. 45* ; *see also Roberts v. Underwriters at Lloyds London (S.D. Idaho 1961) 195 F. Supp. 168, 171]* . Policies also require that the aircraft be either the specific aircraft insured or a temporary substitute aircraft used for a limited period of time, unlike auto insurance aviation policies do not cover an aircraft owner regardless of what airplane is being flown.

Aviation policies inevitably require that the aircraft have a current airworthiness certificate and have complied with the other Federal Air Regulations concerning airworthiness [*see Ins. Code § 11584*; *Threlkeld v. Ranger Insurance Co. (1984) 156 Cal. App. 3d 1, 6-8, 202 Cal. Rptr. 529]* . California law generally prohibits exclusion of losses simply because a Federal Air Regulation was violated, except that certain regulations pertaining to the qualifications of the pilot or the aircraft or the use of the aircraft (as noted above) are specifically excluded from this restriction [*Ins. Code § 11584*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBusiness InsuranceAviation InsurancePropertyInsurance LawBusiness InsuranceAviation InsurancePassengers

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PART II. LEGAL BACKGROUND

2-16 California Forms of Pleading and Practice--Annotated § 16.20

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.20 September 11 Victim Compensation Fund of 2001

On September 11, 2001, terrorists hijacked four airplanes bound for California from the East Coast. Two, designated as American Airlines Flight 11 and United Airlines Flight 175, were flown into the twin towers of the World Trade Center in New York City, destroying both buildings and killing approximately 3,000 people. Another, designated as American Airlines Flight 77, was flown into the Pentagon in Arlington, Virginia, killing approximately 200 people. The fourth, designated as United Airlines Flight 93, crashed in a field near Shanksville, Pennsylvania, killing all on board, after the passengers apparently overpowered the hijackers.

Eleven days after the attacks, Congress enacted and the President signed the Air Transportation Safety and System Stabilization Act [Pub. L. No. 107-42 (H.R. 2926), 115 Stat. 230 (Sept. 22, 2001), codified at *49 U.S.C.S. § 40101* note]. Along with compensating air carriers for losses incurred as a result of the attacks, the bill established the "September 11 Victim Compensation Fund of 2001" [Title IV of Pub. L. No. 107-42, §§ 401-409, 115 Stat. 237-241]. On December 19, 2001, the Department of Justice filed interim final regulations governing administration of the Fund, which allowed the Fund to begin operating and to pay benefits [September 11th Victim Compensation Fund of 2001; *Interim Final Rule, 66 Fed. Reg. 66273-66291 (Dec. 21, 2001)* , published at 28 C.F.R. Part 104]. Final regulations were published on March 13, 2002 [September 11th Victim Compensation Fund of 2001; *Final Rule, 67 Fed. Reg. 11233-11247 (Mar. 13, 2002)* , amending certain sections of 28 C.F.R. Part 104].

The purpose of the September 11th Victim Compensation Fund is "to provide compensation to any individual (or relative of a deceased individual) who was physically injured or killed as a result of the terrorist--related aircraft crashes of September 11, 2001" [Pub. L. No. 107-42, § 403]. Eligibility for benefits is limited to (1) the personal representatives of those, other than the hijackers, on board the hijacked planes; (2) those who were physically present at the World Trade Center, the Pentagon, or the Shanksville, Pennsylvania crash site at the time of the crashes, within 12 hours after the crash, or, in the case of rescue workers, 96 hours after the crash, and who suffered personal injury as a result of the crash; and (3) the personal representatives of those physically present at the crash sites who died as a result of the crashes [Pub. L. No. 107-42, § 405(c)(2); *28 C.F.R. § 104.2(a), (b), (e)*]. Those claiming physical injury must verify with contemporaneous medical records that they received medical treatment within 24 hours of injury or rescue, or

within 72 hours for those victims unable to receive medical attention immediately or to realize the extent of their injuries [*28 C.F.R. § 104.2(c)*]. They must also show that they either suffered physical disability, incapacity, or disfigurement, or were hospitalized as an in-patient for at least 24 hours [*28 C.F.R. § 104.2(c)*]. Those suffering only emotional distress are not eligible for compensation.

The Fund is intended to provide a no-fault administrative remedy as an alternative to tort litigation arising from the crashes. Accordingly, in making compensation determinations, the Fund is not to consider negligence or any other theory of liability [Pub. L. No. 107-42, § 405(b)(2)]. In addition, anyone seeking compensation under the Fund waives the right to file suit in any state or federal court for damages suffered as a result of the crashes, except for actions to recover collateral source obligations or suits against those knowingly involved in the hijackings or other terrorist acts [Pub. L. No. 107-42, §§ 405(c)(3)(B)(I), 408(c); *28 C.F.R. § 104.61(a)*]. The exception allowing suits against the terrorists responsible for the attacks did not appear in the interim final regulations, nor does it expressly appear in the waiver provision in § 405(c)(3)(B) of the Act, despite the statement in the final regulations to the contrary [*see 28 C.F.R. § 104.21(d)*]. Any claimant who has filed such an action must have withdrawn it by March 21, 2002, to retain eligibility under the Fund [Pub. L. No. 107-42, § 405(c)(3)(B)(ii); *28 C.F.R. § 104.61(b)*].

An injured party or personal representative who decides to forgo compensation under the Fund and pursue a tort action instead must file the action in the United States District Court for the Southern District of New York, pursuant to an exclusive federal cause of action for damages [Pub. L. No. 107-42, § 408(b)]. Borrowing the Federal Tort Claim Act's choice-of-law scheme, the Act provides that tort suits must be governed by the substantive law, including choice of law principles, of the state in which the crash occurred, unless inconsistent with or preempted by federal law [Pub. L. No. 107-42, § 408(b)(2)]. The liability of any air carrier for all such tort claims is limited to the amount of liability insurance coverage that it maintains [Pub. L. No. 107-42, § 408(a)].

Those choosing to pursue administrative compensation from the Fund must submit a claim by December 22, 2003 [Pub. L. No. 107-42, § 405(a)(3); *28 C.F.R. § 104.62*]. Only one claim may be filed by an injured person or on behalf of a decedent [Pub. L. No. 107-42, § 405(c)(3)(A)]. A claim is deemed "filed" for purposes of the two-year limitations period when a Claims Evaluator for the Fund determines that the claimant has submitted a substantially complete "Eligibility Form," or, if the claimant does not submit an "Application for Advanced Benefits" along with the Eligibility Form, when the Claims Evaluator determines that the claimant has submitted a substantially complete "Personal Injury Compensation Form" or "Death Compensation Form" along with the Eligibility Form [*28 C.F.R. § 104.21(a)*]. If the Claims Evaluator does not deem the forms submitted to be complete, and therefore "filed," the Evaluator must notify the claimant of any deficiency [*28 C.F.R. § 104.31(a)*]. These provisions raise the possibility that a claim will be found untimely, even if submitted by the due date, because insufficient information was provided before the deadline of December 22, 2003.

A copy of the Eligibility Form and Application for Advanced Benefits may be obtained by calling (202) 305-1352 or (888) 714-3385, or may be obtained on-line at www.usdoj.gov/victimcompensation. The Personal Injury Compensation Form and Death Compensation Form will also be available through these sources. Claimants are required to provide proof of eligibility--that is, proof that they or their decedents were in the area of the crashes and suffered injury or death--as well as tax returns for the years 1998, 1999, and 2000, and information as to any funds received from collateral sources of compensation [Pub. L. No. 107-42, § 405(a)(2)(B); *28 C.F.R. §§ 104.31(b)(3), 104.31(c)(1)*]. Claimants may also submit other evidence that they deem relevant to the determination of their economic and noneconomic losses [*28 C.F.R. § 104.31(c)*; *28 C.F.R. § 104.31(c)(2)*].

The information submitted by the claimant will be used by the Special Master administering the Fund, or the Special Master's designee, to calculate a presumed award for economic and noneconomic loss [*28 C.F.R. §§ 104.43-104.46*]. The Special Master has issued Presumed Economic and Noneconomic Loss Tables to guide this process, and to give potential claimants an idea of the awards they are likely to receive. These tables, which may be accessed at http://www.usdoj.gov/victimcompensation/vc_matrices.pdf, set forth a number of assumptions as to wage growth,

expected work life, consumption factors, and the long-term, risk-free interest rate. Noneconomic losses are presumed to be $250,000 for decedents, plus an additional $100,000 for the spouse and each dependent of the deceased victim [*28 C.F.R. § 104.44*]. For example, the presumed award for a 45-year-old married decedent with two dependent children, earning $100,000 per year, is approximately $1.8 million.

Claimants may opt for one of two procedural tracks. Under "Track A," a Claims Evaluator will determine the claimant's eligibility and the amount of the presumed award within 45 days after the claim is filed. The claimant may then either accept the presumed award as the final determination, or request a hearing before the Special Master or the Special Master's designee [*28 C.F.R. § 104.31(b)(1)*]. Under "Track B," the Claims Evaluator will notify the claimant of eligibility but will not calculate a presumed award, and the claim will proceed directly to a hearing [*28 C.F.R. § 104.31(b)(2)*]. Thus, under both tracks, the claimant will have a chance at some point to present evidence specific to his or her particular situation that calls for an award different from the presumed award, and there is no cap placed on the compensation that can be received.

As required by the enabling statute, the amount of any award must be reduced by any compensation received from a collateral source, such as life insurance, death benefits, pension funds, or payments by government agencies [Pub. L. No. 107-42, § 405(b)(6); *28 C.F.R. § 104.47(a)*]. Charitable donations are not considered collateral sources subject to this offset [*28 C.F.R. § 104.47(b)*]. The awards are not subject to federal taxation [*26 U.S.C.S. § 139(f)*].

The determination of the Special Master following a hearing is final and is not subject to review or appeal [Pub. L. No. 107-42, § 405(b)(3); *28 C.F.R. §§ 104.31(b)(2), 104.33(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsTransportation TortsAir TransportationVictim Compensation Funds

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[Reserved]

§§ 16.21[Reserved]

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§ 16.30 Related Matthew Bender Publications

California Points and Authorities, Ch. 33, "Carriers" (Matthew Bender)

N. Levy, M. Golden & L. Sacks, eds., California Torts, Ch. 21 (Matthew Bender)

L. Kreindler, Aviation Accident Law (Matthew Bender)

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2-16 California Forms of Pleading and Practice--Annotated § 16.31

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.31 Federal Statutes

Warsaw Convention. 49 Stat. 3000

Montreal Agreement. CAB 18,900

Liability of United States for acts of its employees. *28 U.S.C.S. §§ 1346(a), 2671*-2680

Death on the High Seas Act. *46 U.S.C.S. § 30301 et seq.*

Air Transportation Safety and System Stabilization Act. *49 U.S.C.S. § 40101*

Legal Topics:

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AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.32 State Statutes

[1] Duties of Carriers

Care required of carriers of persons without reward. *Civ. Code § 2096*

Care required by carriers of persons for reward. *Civ. Code § 2100*

Air carriers as bound to provide safe and fit vehicles. *Civ. Code § 2101*

Prohibition against overcrowding or overloading cars. *Civ. Code § 2102*

Accommodations and treatment of passengers. *Civ. Code § 2103*

Space for nonsmoking passengers on passenger air carrier. *Pub. Util. Code § 561*

[2] Liability

Liability of aircraft owner, bailee, or pilot for death or injury to passengers; limitation on liability. *Pub. Util. Code §§ 21404, 21404.1, 21405*

Liability of public entity for torts. *Gov. Code §§ 810-996.6*

[3] Operation of Aircraft

Lawfulness of flight or landing by aircraft. *Pub. Util. Code § 21403*

Operation of aircraft in reckless or careless manner as unlawful; standards considered. *Pub. Util. Code § 21407*

Operation of aircraft in air, on ground, or in water, while under influence of intoxicating liquor or narcotics as unlawful. *Pub. Util. Code § 21407.5*

Noise standards governing aircraft as based on level of noise acceptable to reasonable person. *Pub. Util. Code § 21669*

[4] Penal Provisions

Discharge of firearms at aircraft as felony. *Penal Code § 247*

Attaching burning material to balloon as misdemeanor. *Penal Code § 384g*

Sightseeing at scene of disaster as misdemeanor. *Penal Code § 402*

Aircraft as subject to being burglarized. *Penal Code § 459*

Stealing, taking, or operating aircraft without consent of owner as felony. *Penal Code § 499d*

Tampering or removing parts from aircraft as misdemeanor. *Penal Code § 625b*

Jurisdiction of offenses committed on aircraft in transit. *Penal Code § 783*

[5] Pest Control

Operators of airplanes engaged in pest control as required to hold certificate of qualification or apprentice certificate. *Food & Agric. Code § 11901*

Airplanes used to spread pesticides as not required to procure liability insurance. *Pub. Util. Code § 5504*

Use of pesticides as required to be in such manner as to prevent substantial drift to other crops. *Food & Agric. Code § 12976*

[6] Presumptions

Res ipsa loquitur presumption. *Evid. Code § 646*

Violation of statute, ordinance, or regulation as negligence per se. *Evid. Code § 669*

[7] Service of Process

Service of process on nonresident corporation. *Corp. Code § 2117(b)*

[8] State Regulations

Passenger air carriers as regulated by the PUC. *Pub. Util. Code §§ 2739-2769.5*

State Aeronautics Act. *Pub. Util. Code §§ 21001-21694*

Commercial air operators as required to procure adequate insurance. *Pub. Util. Code § 5503*

Reduced insurance required of certain noncommercial air operators. *Pub. Util. Code § 5503.5*

[9] Warranties

Breach of express warranty in sale of goods. *Com. Code § 2313*

Breach of implied warranty in sale of goods. *Com. Code § 2315*

[10] Airport Districts

[a] Formation

Contents and publication of resolution of intention to form airport district by board of supervisors. *Pub. Util. Code §§ 22151-22153*

Protests to formation of airport districts; necessity of filing. *Pub. Util. Code § 22201*

Resolution of formation of airport district after election; conditions. *Pub. Util. Code §§ 22256-22258*

Completion of formation of airport district. *Pub. Util. Code § 22259*

[b] Internal Organization

Internal organization of airport districts. *Pub. Util. Code §§ 22401-22443*

[c] Powers and Duties

Powers and duties of airport districts. *Pub. Util. Code §§ 22551-22557*

Airport district as empowered to collect rentals, tolls, and fees for use of aerial facilities. *Pub. Util. Code § 22556*

Taxation by board of supervisors to pay for indebtedness incurred by formation of airport district. *Pub. Util. Code §§ 22901-22908*

Power of airport district to lease mining rights. *Pub. Res. Code § 7056*

Sale or lease of municipal airports to city. *Gov. Code §§ 37440-37444*

[11] Airport Land Use Commission

Airport Land Use Commission; creation; tenure; restrictions. *Pub. Util. Code § 21670 et seq.*

Power and duties of Airport Land Use Commission. *Pub. Util. Code § 21674*

Action against county or Airport Land Use Commission to enjoin zoning decision affecting land within one mile of public airport. *Pub. Util. Code § 21679*

[12] Eminent Domain

Eminent domain generally. *Code Civ. Proc. § 1230.010 et seq.*

Acquisition of airspace to eliminate hazards or prevent imposition of excessive noise. *Pub. Util. Code § 21652*

Removal or relocation of airport hazards. *Pub. Util. Code § 21653*

[13] Limousines

Scope of permissible regulation by governing board of airport of charter party carriers operating limousines on airport property. *Pub. Util. Code § 5371.4(b)-(d)*

[14] Nuisance

Acts constituting nuisance. *Civ. Code § 3479*

Purpose of State Aeronautics Act as including protection against excessive noise. *Pub. Util. Code § 21002(g)*

Remedies for nuisance. *Code Civ. Proc. § 731*

Necessary and reasonable operation of airport in area expressly zoned to permit such operation as not subject to injunctive restriction except in action to abate public nuisance. *Code Civ. Proc. § 731a*

Presumption that airport is not nuisance. *Code Civ. Proc. § 731b*

Noise regulations; guidelines for advisory committee and Public Utilities Commission. *Pub. Util. Code §§ 21669.1, 21669.2*

[15] Operation of Airport

Operation of airports by state is public and governmental function. *Pub. Util. Code § 21004*

Operation of airport by local agency. *Gov. Code §§ 50001, 50474, 50474.5*

[16] Penal Provisions

Knowingly making false report to airline employee of placement of bomb. *Penal Code §§ 17(a), 148.1*

Knowingly possessing firearms or other specified weapons in any sterile area of airport. *Penal Code § 171.5*

Trespass to restricted area of airport. *Penal Code § 602(u)*

Peddling or selling goods on airport property without permission. *Penal Code § 602.4*

Release of objects which might be ingested by aircraft engine or which might obstruct pilot's view. *Pub. Util. Code § 21646*

Violations of noise standards; fines; enforcement by county in which airport is situated. *Pub. Util. Code § 21669.4*

[17] Regulation of Airports

State Aeronautics Act. *Pub. Util. Code § 21001 et seq.*

Development of aeronautics in state; cooperation with federal government, political subdivisions within state, and others. *Pub. Util. Code § 21241*

Rule making power of Department of Aeronautics consistent with federal legislation. *Pub. Util. Code § 21243*

Wire strike education and prevention. *Pub. Util. Code § 21504 et seq.*

Regulation of airports. *Pub. Util. Code § 21661 et seq.*

Protection against aircraft noise. *Pub. Util. Code § 21002(g), 21661 et seq.*

Regulation of airport obstructions. *Pub. Util. Code §§ 21655-21660*

Airport planning. *Pub. Util. Code § 21701 et seq.*

Managing airport facilities and granting airport concessions. *Pub. Util. Code § 21690.5 et seq.*

Authority of county board of supervisors over airports. *Gov. Code § 26020*

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawInterstate CommerceEminent Domain ProceedingsTransportation LawAir TransportationAirportsGeneral OverviewTransportation LawAir TransportationNoise ControlTransportation LawAir TransportationAirports & Airways Development ActTransportation LawCarrier Duties & LiabilitiesGeneral Overview

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2-16 California Forms of Pleading and Practice--Annotated § 16.33

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.33 Decisions

[1] Damages

Measure of damages for negligent injury to personal property (airplane) as reasonable market value of property destroyed. *Shook v. Beals (1950) 96 Cal. App. 2d 963, 974, 217 P.2d 56*

[2] Defenses

Release signed by passengers 30 minutes before taking sightseeing tour over Santa Barbara was enforced as defense to suit for injuries suffered when plane malfunctioned; no public policy reason existed for not enforcing release, as public interest was not implicated by activity of sightseeing tours. *Booth v. Santa Barbara Biplane Tours, LLC (2008) 158 Cal. App. 4th 1173, 1179, 70 Cal. Rptr. 3d 660*

Availability of defense of contributory negligence to defendant air carrier in action by passenger. *Dziura v. California Aviation Service, Inc. (1970) 4 Cal. App. 3d 191, 197-198, 84 Cal. Rptr. 191*

Action of plaintiff as required to be as reprehensible as that of defendant to constitute defense to willful misconduct. *Dziura v. California Aviation Service, Inc. (1970) 4 Cal. App. 3d 191, 198, 84 Cal. Rptr. 191*

Passenger as not contributorily negligent in riding with pilot where pilot was experienced expert licensed to operate plane and able to determine if weather conditions permitted safe trip. *Doyle v. Hamren (1966) 246 Cal. App. 2d 733, 737, 55 Cal. Rptr. 84*

Victim's actual knowledge of particular danger (knowledge of magnitude of risk involved) as necessary element of proof in doctrine of assumption of risk. *Vierra v. Fifth Avenue Rental Service (1963) 60 Cal. 2d 266, 271, 32 Cal. Rptr. 193, 383 P.2d 777* (plaintiff injured by piece of flying metal from tool)

Requirement of actual appreciation of known danger in defense of assumption of risk. *Dziura v. California Aviation Service, Inc. (1970) 4 Cal. App. 3d 191, 202, 84 Cal. Rptr. 191*

[3] Ground Accidents

Liability for collisions of aircraft on ground. *Johnson v. Central Aviation Corp. (1951) 103 Cal. App. 2d 102, 110-111, 229 P.2d 114* ; *Robart v. Brehmer (1949) 92 Cal. App. 2d 830, 833, 207 P.2d 898*

Mere fact airplane crashes into field as not subjecting owner of field to any liability for plane's safekeeping; pilot as responsible to owner for any damage caused by crash, but not for trespass. *Gordon H. Ball, Inc. v. Parreira (1963) 214 Cal. App. 2d 697, 702, 29 Cal. Rptr. 679*

Owner of field in which airplane crashes as having right to lien [*Code Civ. Proc. § 1208.61*] for storage and safekeeping of airplane. *Gordon H. Ball, Inc. v. Parreira (1963) 214 Cal. App. 2d 697, 703, 29 Cal. Rptr. 679*

Owner of field as implied bailee of downed airplane, bound to exercise reasonable care for safekeeping, where such owner refuses to permit removal of the airplane until damages are paid. *Gordon H. Ball, Inc. v. Parreira (1963) 214 Cal. App. 2d 697, 704-705, 29 Cal. Rptr. 679*

[4] Jurisdiction

State court as having in personam jurisdiction over financing institution conducting financing of purchase and sale of aircraft within state. *Michigan Nat. Bank v. Superior Court (1972) 23 Cal. App. 3d 1, 6, 99 Cal. Rptr. 823*

[5] Interest in Aircraft

Federal law as preempting inconsistent state law in area of recordation of interests in aircraft and components. *International Atlas Services, Inc. v. Twentieth Century Aircraft Co. (1967) 251 Cal. App. 2d 434, 440, 59 Cal. Rptr. 495*

[6] International Travel

Effect of Montreal Agreement [CAB 18,900] on Warsaw Convention [49 Stat. 3000]. *Mathias v. Pan--American World Airways, Inc. (W.D. Pa. 1971) 53 F.R.D. 447, 449 n.4*

[7] Liability

[a] Ordinary Rules Apply

Ordinary rules of negligence as applicable to airplane accident cases. *Boyd v. White (1954) 128 Cal. App. 2d 641, 651, 276 P.2d 92*

[b] Crop Dusting

Liability for negligent crop dusting. *Lenk v. Spezia (1949) 95 Cal. App. 2d 296, 300, 213 P.2d 47* ; *Miles v. A. Arena & Co. (1937) 23 Cal. App. 2d 680, 683, 73 P.2d 1260* ; *see also Adams v. Henning (1953) 117 Cal. App. 2d 376, 378,*

255 P.2d 456

[c] Ground Personnel

Federal air traffic controller as required to give all information and warnings specified in his or her manuals, and in certain situations to give warnings beyond those manuals. *Spaulding v. United States (9th Cir. 1972) 455 F.2d 222, 226*

Standard of care required of ground personnel. *Spaulding v. United States (9th Cir. 1972) 455 F.2d 222, 226*

[d] Manufacturers, Retailers, Bailors

Requirements for imposing strict liability in tort. *Greenman v. Yuba Power Products, Inc. (1963) 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 377 P.2d 897* (against manufacturer for defective power tool); *Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 263, 37 Cal. Rptr. 896, 391 P.2d 168* (against retailer for defective auto)

Aircraft manufacturer as liable for negligence in producing defective product. *North American Aviation v. Hughes (9th Cir. 1957) 247 F.2d 517, 521*

Liability of aircraft manufacturer for breach of warranties. *Delta Air Lines, Inc. v. Douglas Aircraft Co. (1956) 238 Cal. App. 2d 95, 98, 47 Cal. Rptr. 518* (express warranty); *Lindberg v. Coutches (1959) 167 Cal. App. 2d Supp. 828, 831 , 334 P.2d 701* (implied warranty)

Doctrine of strict liability in tort as applicable to bailors and lessors of personal property. *Price v. Shell Oil Co. (1970) 2 Cal. 3d 245, 253, 85 Cal. Rptr. 178, 466 P.2d 722*

[e] Owner

Civil remedy based on imputed negligence against owner of plane not provided by Federal Aviation Act [former 49 U.S.C.S. §§ 1301-1542]. *Nachsin v. De La Bretonne (1971) 17 Cal. App. 3d 637, 638, 639, 95 Cal. Rptr. 227*

Evidence of compensation or tangible benefit flowing to, or authorization by, employer as necessary to avoid directed verdict in favor of defendant on issue of whether negligent pilot was acting within scope of employment. *Broyles v. Jess (1962) 201 Cal. App. 2d 841, 846-847, 20 Cal. Rptr. 355*

[f] Pilot

Pilot as directly and finally responsible for operation of aircraft, but as dependent on ground personnel for those facts that are material to operation of plane. *Spaulding v. United States (9th Cir. 1972) 455 F.2d 222, 226*

Recovery by passenger from pilot on basis of negligence. *Doyle v. Hamren (1966) 246 Cal. App. 2d 733, 739, 55 Cal. Rptr. 84*

[g] Property Damage

Shipper's action against air carrier for property damage as barred by failure to present timely claim when shipper failed to make written claim for destroyed goods within seven days of receipt of shipment and notice of claim limitation in

carrier's air tariff and in Warsaw Convention (49 Stat. 3000); fact that shipper did not receive actual notice of limitation period as not violative of due process. *Talei v. Pan American World Airways (1982) 132 Cal. App. 3d 904, 909-911, 183 Cal. Rptr. 532*

[8] Passenger's Valuables

Air carrier as entitled to limit its liability for loss or destruction of luggage only if it allows passenger to protect luggage by either carrying it on board or purchasing excess valuation insurance; ticket agent's refusal to allow widow to carry husband's cremated remains on board as violative of foregoing rule and of tariff requiring that valuables be personally carried by passenger, and as rendering unenforceable tariff's limitation on airline's liability. *Coughlin v. Trans World Airlines, Inc. (9th Cir. 1988) 847 F.2d 1432, 1433-1434*

[9] Res Ipsa Loquitur

[a] Availability and Elements

Res ipsa loquitur applied as matter of law to wrongful death action arising out of airplane crash. *Newing v. Cheatham (1975) 15 Cal. 3d 351, 364, 124 Cal. Rptr. 193, 540 P.2d 33*

Application of doctrine if airplane has dual controls. *Parker v. James Granger Inc. (1935) 4 Cal. 2d 668, 675-676, 52 P.2d 226* ; *Ayer v. Boyle (1974) 37 Cal. App. 3d 822, 828-829, 112 Cal. Rptr. 636*

Doctrine as unavailable in action regarding injury arising from encounter with air turbulence. *Kohler v. Aspen Airways, Inc. (1985) 171 Cal. App. 3d 1193, 1202, 214 Cal. Rptr. 720*

Elements of doctrine of res ipsa loquitur. *Gotcher v. Metcalf (1970) 6 Cal. App. 3d 96, 102, 85 Cal. Rptr. 566*

Unavailability of res ipsa loquitur in action involving midair plane crash where plaintiff sues only one of two pilots. *Gotcher v. Metcalf (1970) 6 Cal. App. 3d 96, 104, 85 Cal. Rptr. 566*

Availability of res ipsa loquitur in action against carrier for personal injuries suffered by passenger. *Roberts v. Trans World Airlines (1964) 225 Cal. App. 2d 344, 351-352, 37 Cal. Rptr. 291*

[b] Rebutting Presumption

Evidence of specific negligence by defendants as not depriving plaintiff of res ipsa loquitur presumption; presumption of negligence raised by violation of statute as coexisting with res ipsa loquitur presumption. *Mittelman v. Seifert (1971) 17 Cal. App. 3d 51, 80, 94 Cal. Rptr. 654*

Alternative methods of rebutting res ipsa loquitur presumption. *Roberts v. Trans World Airlines (1964) 225 Cal. App. 2d 344, 352, 37 Cal. Rptr. 291* ; *see also Mittelman v. Seifert (1971) 17 Cal. App. 3d 51, 80, 94 Cal. Rptr. 654*

Conjecture or speculation by defendant as insufficient to rebut res ipsa loquitur presumption. *Roberts v. Trans World Airlines (1964) 225 Cal. App. 2d 344, 353-355, 37 Cal. Rptr. 291*

Evidence that airline employees conformed with standard operating procedures as not per se rebutting res ipsa loquitur presumption since carrier's own rules do not fix standard of care. *Roberts v. Trans World Airlines (1964) 225 Cal. App. 2d 344, 356, 37 Cal. Rptr. 291*

Necessity of substantial evidence to rebut res ipsa liquitur presumption to support defense verdict on appeal. *Roberts v. Trans World Airlines (1964) 225 Cal. App. 2d 344, 353, 37 Cal. Rptr. 291*

[10] Standard of Care

Common carrier by air as required to use utmost care for safe carriage of passengers. *Smith v. O'Donnell (1932) 215 Cal. 714, 720, 12 P.2d 933*

Operation of unlicensed aircraft [*Pub. Util. Code § 21411*] as creating rebuttable presumption of failure to exercise due care; proof thereof as shifting burden of proof to defendant [*Evid. Code § 669*]. *Ayer v. Boyle (1974) 37 Cal. App. 3d 822, 828, 112 Cal. Rptr. 636*

Evidence of custom in industry or business as not establishing standard of care in aircraft accidents. *Diamond v. Grow (1966) 243 Cal. App. 2d 396, 401-402, 52 Cal. Rptr. 265*

Standard of care required of private aircraft operators as ordinary care. *Boyd v. White (1954) 128 Cal. App. 2d 641, 651, 276 P.2d 92* ; also *Robart v. Brehmer (1949) 92 Cal. App. 2d 830, 832-833, 207 P.2d 898*

[11] State Regulation

State Aeronautics Act (*Pub. Util. Code § 21001 et seq.*) as not improper delegation of legislative power. *People v. Valenti (1984) 153 Cal. App. 3d Supp. 35, 37-39 , 200 Cal. Rptr. 862*

[12] Violation of Statutes and Regulations

Jury finding that airplane design violated FAA regulations as sufficient to impose liability on manufacturer based on presumption of negligence [*Evid. Code § 669(a)*], notwithstanding FAA certification of compliance with standard. *Elsworth v. Beech Aircraft Corp. (1984) 37 Cal. 3d 540, 549-552, 208 Cal. Rptr. 874, 691 P.2d 630*

Application of California law's presumption of negligence [*Evid. Code § 669*] for violation of FAA design standard in action against manufacturer of airplane as not preempted by federal law when application of state law neither poses irreconcilable conflict with federal standard nor frustrates objectives of federal law. *Elsworth v. Beech Aircraft Corp. (1984) 37 Cal. 3d 540, 549-550, 208 Cal. Rptr. 874, 691 P.2d 630*

Violations of applicable state or federal flight rules as bearing on existence of negligence or willful misconduct; general law of negligence as applying to any matter not covered by specific law or applicable regulation. *Mittelman v. Seifert (1971) 17 Cal. App. 3d 51, 68, 94 Cal. Rptr. 654*

Negligence per se as not established by evidence of noncompliance with advisory safety orders of federal agency. *Diamond v. Grow (1966) 243 Cal. App. 2d 396, 400, 52 Cal. Rptr. 265*

Compliance with FAA regulations as element of proof to overcome res ipsa loquitur presumption. *Roberts v. Trans World Airlines (1964) 225 Cal. App. 2d 344, 357, 37 Cal. Rptr. 291*

[13] Wrongful Death

Federal court jurisdiction as concurrent with state jurisdiction to hear Death on High Seas Act (DOHSA; *46 U.S.C.S. § 30301 et seq.*) actions; thus, state court has jurisdiction to hear cause of action under DOHSA for accidents occurring more than one marine league from shore; however, state statutes as preempted by DOHSA whenever it applies. *Offshore Logistics v. Tallentire (1986) 477 U.S. 207, 221, 232-233, 106 S. Ct. 2485 91 L. Ed. 2d 174*

Flight attendants actively working on aircraft that crashed as not receiving "transportation as passengers" within meaning of Warsaw Convention, *49 U.S.C.S. § 40105*, so that personal representatives not entitled to bring wrongful death action against airline. In re Mexico City Aircrash of October 31, 1979 *(9th Cir. 1983) 708 F.2d 400, 417*

In wrongful death action against owner of rented airplane that crashed, summary adjudication of no liability as proper in cause of action for negligence per se based on owner's noncompliance with *Pub. Util. Code § 24362* (requiring written notice of insurance coverage), because owner had met minimum insurance requirements of *Pub. Util. Code § 24350* and had filed certificate of insurance, so that, under *Pub. Util. Code § 24243(f)*, notice requirements of *Pub. Util. Code § 24362* were not applicable. *Franks v. Amelia Reid Aviation (1985) 163 Cal. App. 3d 1207, 1209-1210, 210 Cal. Rptr. 127*

Meretricious spouse (unmarried cohabitant) is not heir who may bring action for wrongful death under former *Code Civ. Proc. 377* (*now see Code Civ. Proc. § 377.60*). *Harrod v. Pacific Southwest Airlines, Inc. (1981) 118 Cal. App. 3d 155, 157, 173 Cal. Rptr. 68* (action for wrongful death of person killed in airplane crash)

Former *Code Civ. Proc. § 377* (*now see Code Civ. Proc. § 377.60*) as only statute creating right to cause of action for wrongful death, limiting recovery to heirs of decedent. *Knowlton v. Pacific Southwest Airlines (1980) 113 Cal. App. 3d 152, 154, 169 Cal. Rptr. 668* (employer as having no cause of action under former *Code Civ. Proc. § 377* (*now see Code Civ. Proc. § 377.60*) for death of employee)

[14] Airport as Public Utility

Municipally owned airport as public utility. *Stagg v. Municipal Court (1969) 2 Cal. App. 3d 318, 322, 82 Cal. Rptr. 578* ; *City & County of San Francisco v. Western Air Lines, Inc. (1962) 204 Cal. App. 2d 105, 130, 22 Cal. Rptr. 216*

[15] Duties and Liability of Airport

Liability of owner or operator of airport as governed by general rules of negligence. *Pignet v. City of Santa Monica (1938) 29 Cal. App. 2d 286, 287, 84 P.2d 166*

Duty to provide safe premises. *Gray v. America West Airlines, Inc. (1989) 209 Cal. App. 3d 76, 85-88, 256 Cal. Rptr. 877* ; *Strong v. Chronicle Pub. Co. (1939) 34 Cal. App. 2d 335, 339-340, 93 P.2d 649*

Complaint for damages for injury to lessee's property by airport fire as not subject to general demurrer by defendant public entity when it charges nonpublic entity with negligent conduct in starting fire and public entity defendant with permitting dangerous condition of storage of gasoline and other highly combustible chemicals on its property without fire protection, with notice of such condition, and alleges such dangerous condition to be nuisance. *Vedder v. County of Imperial (1974) 36 Cal. App. 3d 654, 658-661, 111 Cal. Rptr. 728*

Duty to keep runways free from obstructions. *Pignet v. City of Santa Monica (1938) 29 Cal. App. 2d 286, 288, 84 P.2d 166* ; *Miller v. County of Contra Costa (1951) 106 Cal. App. 2d 304, 306, 235 P.2d 76*

[16] Eminent Domain and Inverse Condemnation

Actual diminution in value of property due to frequent low takeoffs as entitling landowner to compensation under theory of inverse condemnation. *United States v. Causby (1946) 328 U.S. 256, 261, 66 S. Ct. 1062, 90 L. Ed. 1206* ; *City of Oakland v. Nutter (1970) 13 Cal. App. 3d 752, 762-763, 92 Cal. Rptr. 347* ; *Sneed v. County of Riverside (1963) 218 Cal. App. 2d 205, 210, 32 Cal. Rptr. 318*

Municipality is not liable for inverse condemnation when interference is so insubstantial that it does not result in measurable diminution of property's market value. *Andrews v. County of Orange (1982) 130 Cal. App. 3d 944, 961-962, 182 Cal. Rptr. 176*

In action against municipal airport for inverse condemnation for damages to vacant property caused by noise from aircraft overflights, statute of limitations commenced to run on date plaintiff attempted to sell property rather than on date when noise from overflying aircraft stabilized. *Smart v. City of Los Angeles (1980) 112 Cal. App. 3d 232, 235-239, 169 Cal. Rptr. 174*

Cause of action based on avigation easement obtained by defendant city without just compensation. *Sneed v. County of Riverside (1963) 218 Cal. App. 2d 205, 209, 32 Cal. Rptr. 318*

Counties as empowered to obtain air easements through eminent domain proceedings to protect approaches to airports [former Code Civ. Proc. §§ 1239.2, 1239.4]. *Sneed v. County of Riverside (1963) 218 Cal. App. 2d 205, 208, 32 Cal. Rptr. 318*

[17] Federal and State Regulation

Citizens' group consisting mainly of persons who live under flight paths of airport, whose purpose is to reduce airplane noise and danger by balancing service among two other nearby airports, as having standing to challenge constitutionality of statutory condition to transfer of operating control of two airports from federal government to local governments; statutory condition as creation of review board composed of members of Congress, having veto power over municipal board of directors; invalidation of condition would prevent enactment of proposed airport plan, implementation of which would would result in personal injury to them that is fairly traceable to review board's veto power; inasmuch as invalidation of veto power will prevent enactment of plan, requested relief as likely to redress group's alleged injury. *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise (1991) 501 U.S. 252, 263-266, 111 S. Ct. 2298, 115 L. Ed. 2d 236*

Statutory condition to transfer of operating control of two airports in Washington D.C. area from federal government to local governments, consisting of creation of review board composed of members of Congress having veto power over municipal board of directors, as unconstitutional violation of separation-of-powers doctrine, despite provision that members of Congress serve in their individual capacities, as representatives of users of airports, and despite fact that condition was created by state government. *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise (1991) 501 U.S. 252, 266-276 . 111 S. Ct. 2298, 115 L. Ed. 2d 236*

Federal preemption of right of city to enforce local ordinance prohibiting aircraft takeoffs at certain times. *City of Burbank v. Lockheed Air Terminal (1973) 411 U.S. 624, 638-639, 93 S. Ct. 1854, 36 L. Ed. 2d 547*

Pub. Util. Code §§ 21690.5-21690.10 and *Gov. Code §§ 50470, 50474* as comprehensive scheme enunciating state policy to displace competition at municipal airports; airport facilities leased by city prohibiting lessee's sale of petroleum products at price in excess of that charged by city as protected by state action immunity and as not illegal restraint of trade. *California Aviation, Inc. v. City of Santa Monica (9th Cir. 1986) 806 F.2d 905, 907-908*

No conflict as existing between *Pub. Util. Code § 21690.8* grant of authority to fix prices and Emergency Petroleum Allocation Act (*15 U.S.C.S. §§ 751-760*) as long as price fixed under authority of *Pub. Util. Code § 21690.8* does not exceed federal guideline; thus, no preemption issue as presented. *California Aviation, Inc. v. City of Santa Monica (9th Cir. 1986) 806 F.2d 905, 908-909*

Pub. Util. Code §§ 21690.5-21690.10 as extending retroactive immunity to lease signed before enactment that fixed price of petroleum products. *California Aviation, Inc. v. City of Santa Monica (9th Cir. 1986) 806 F.2d 905, 909*

Federal law as not preempting all airport noise reduction ordinances enacted by municipal airport proprietor. *Santa Monica Airport Ass'n v. City of Santa Monica (9th Cir. 1981) 659 F.2d 100, 104*

Federal law as not preempting action for nuisance against city operating airport based on airport noise. *Greater Westchester Homeowners Asso. v. Los Angeles (1979) 26 Cal. 3d 86, 93-100, 160 Cal. Rptr. 733, 603 P.2d 1329*

State law negligence or other personal injury tort actions brought against airlines as not preempted by federal law if they do not interfere with federal regulation of rates, routes, and services. *Romano v. American Trans Air (1996) 48 Cal. App. 4th 1637, 1644-1646, 56 Cal. Rptr. 2d 428* .

Federal law as preempting action for damages based on state tort law against city in city's capacity as owner of airport, when claim of dangerous condition of property is based on airport navigation facilities that, as matter of law, are regulated, approved, and controlled pursuant to Federal Aviation Act of 1958 (former 49 U.S.C.S. § 1301 et seq.) and its corresponding federal regulations. *Bethman v. City of Ukiah (1989) 216 Cal. App. 3d 1395, 1398, 1407-1409, 265 Cal. Rptr. 539*

Federal regulation of airports engaged in interstate or foreign commerce; state regulation of intrastate operations of airports. *Strother v. Pacific Gas & Elec. Co. (1949) 94 Cal. App. 2d 525, 532-534, 211 P.2d 624*

Doctrine of federal preemption in regulation of air traffic. *Stagg v. Municipal Court (1969) 2 Cal. App. 3d 318, 321, 82 Cal. Rptr. 578*

Neighboring community as having standing to sue under Airport and Airway Development Act [49 U.S.C.S. §§ 1701-1742], where city and federal government enter grant agreement for improvement of airport. *City of Inglewood v. City of Los Angeles (9th Cir. 1972) 451 F.2d 948, 955*

[18] Municipal Regulation

Municipal ordinance requiring franchisees and lessees at city-owned airport to pay workers "no less than the prevailing rate of wage" as invalid when ordinance was impliedly inconsistent with original lease and use agreements and when city, by charter, had vested its limited proprietary powers over airport in Airports Commission. *Air Cal, Inc. v. City and County of San Francisco (9th Cir. 1989) 865 F.2d 1112, 1115*

[19] Nuisance

Nuisance cause of action against municipality for personal injuries and emotional distress caused by aircraft noise as not preempted by federal air space regulation. *Greater Westchester Homeowners Asso. v. Los Angeles (1979) 26 Cal. 3d 86, 93-100, 160 Cal. Rptr. 733, 603 P.2d 1329* ; *Smart v. City of Los Angeles (1980) 112 Cal. App. 3d 232, 239, 169 Cal. Rptr. 174*

Nuisance action against airport as not precluded by *Civ. Code § 3482*, providing that things done under express

authority of statute cannot be nuisance, because statute does not authorize maintaining airport that is so noisy as to be nuisance. *Greater Westchester Homeowners Asso. v. Los Angeles (1979) 26 Cal. 3d 86, 100-102, 160 Cal. Rptr. 733, 603 P.2d 1329*

Liability for nuisance based on *Civ. Code § 3479* as not barred because defendant is governmental unit. *Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 937, 101 Cal. Rptr. 568, 496 P.2d 480* ; see also *Mulloy v. Sharp Park Sanitary Dist. (1958) 164 Cal. App. 2d 438, 441, 330 P.2d 441*

Public policy of state as against restrictions or interference with operations of airports which meet federal standards. *Loma Portal Civic Club v. American Airlines, Inc. (1964) 61 Cal. 2d 582, 589-590, 39 Cal. Rptr. 708, 394 P.2d 548*

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2-16 California Forms of Pleading and Practice--Annotated § 16.34

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.34 Attorney General Opinions

Jurisdiction of county airport land use commission as limited by county boundaries. *74 Ops. Cal. Att'y Gen. 58 (1991)*

Airport land use commission as having reasonable time to adopt airport use plan for each airport within its jurisdiction, with only judicial remedies being those contained in *Pub. Util. Code § 21679*. *71 Ops. Cal. Att'y Gen. 213 (1988)*

County Airport Land Use Commission as empowered by former *Pub. Util. Code § 21674(5)* to zone land in vicinity of airports to uses compatible with airports, subject to override by requisite majority of governing body of city or county. *63 Ops. Cal. Att'y Gen. 641 (1980)*

Pub. Util. Code § 21404 as not imposing liability on holders of security interest and lessors under leases executed as part of plan to finance purchase of aircraft for negligence of person operating it. *52 Ops. Cal. Att'y Gen. 199, 201 (1969)*

Legal Topics:

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AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.35 Law Reviews

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§ 16.37 Aviation Texts and Manuals

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PART IV. FORMS

2-16 California Forms of Pleading and Practice--Annotated § 16.40

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.40 Complaint for Damages for Wrongful Death of Airline Passenger [Code Civ. Proc. § 377.60]--By Entitled Person(s) Against Airline [Civ. Code § 2338]--Crash Resulting From Airline's Negligence [Civ. Code § 1714(a)]

[1] FORM Complaint for Damages for Wrongful Death of Airline Passenger [Code Civ. Proc. § 377.60]--By Entitled Person(s) Against Airline [Civ. Code § 2338]--Crash Resulting From Airline's Negligence [Civ. Code § 1714(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*], [as	)	
_____ (*specify capacity, e.g.*, Per-	)	NO. _____
sonal Representative of the Estate of	)	COMPLAINT FOR DAMAGES
_____ (*name*), Deceased,]	)	(Wrongful Death)
Plaintiff(s),	)	[LIMITED CIVIL CASES]
vs.	)	
_____ [*name*], [and DOES I	)	
through _____,]		
Defendant(s).		

_____

Plaintiff(s) alleges/allege:

1. _____ [Plaintiff(s) *or* The person(s) listed below] is/are entitled to bring an action for the wrongful death of _____ [*name of decedent*] (hereinafter "decedent") pursuant to *Code of Civil Procedure Section 377.60*, based on his/her/their relationship to decedent, as follows:

Name(s)	Relationship to Decedent
_____	_____

_____ _____
_____ _____

[_____ (*If one or more persons are required to establish additional facts, such as that there is no surviving spouse, domestic partner, child, or issue of deceased child or that the person was dependent on decedent, in order to be entitled to bring a wrongful death action under Code Civ. Proc. § 377.60, specify facts that satisfy applicable requirement*).]

[*ADD, if decedent's personal representative is maintaining action on behalf of one or more entitled persons*]

Plaintiff _____ [*name*] is the duly appointed, qualified, and acting personal representative of the estate of decedent, and brings this action on behalf of _____ [all of the above-listed persons entitled to bring a cause of action for the wrongful death of decedent *or* the following person(s) entitled to bring an action for the wrongful death of decedent: _____ (*specify person(s) on whose behalf personal representative is maintaining action*)].

2. Defendant _____ [*name of airline*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of California, with its principal place of business in _____ County, California, and doing business as a [common] carrier of persons for reward [*or allege other capacity and residence*].

[3. Plaintiff(s) is/are ignorant of the true names and capacities of defendants sued herein as DOES I--V, inclusive, and therefore, sues these defendants by such fictitious names. Plaintiff(s) will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff(s) is/are informed and believes/believe and thereon alleges/allege that each of such fictitiously named defendants is [negligently] responsible in some manner for the occurrences herein alleged, and that injuries as herein alleged were proximately caused by defendants' acts.)]

4. At all times herein mentioned, _____ [*names of agents and employees*] [were residents of _____ County, California and] were the agents and employees of defendant _____ [*airline*], and, in doing all of the things hereinafter mentioned, were acting within the scope of their authority and employment as such agents and employees and with the permission and consent of defendant _____ [*airline*].

5. On or about _____ [*date*], defendant _____ [*airline*] operated a certain _____ [*type*] airplane, number _____ [*aircraft number*], on a flight from _____ [*starting point*] to _____ [*destination*]. Decedent was on board the airplane at the time as a passenger for reward. The airplane was at that time under the exclusive control and management of defendants, and each of them.

6. While the airplane was flying in the vicinity of and above _____ County, California, defendant _____ [*airline*] and its agents and employees, negligently owned, piloted, maintained, operated, and controlled the airplane thereby causing the airplane [to burst into flames and] to crash to the ground.

7. As a proximate result of the negligence of defendant _____ [*airline*] and of its agents and employees, as alleged above, and the resulting [fire and] crash, decedent was killed.

8. Immediately prior to his death, decedent was _____ [an adult *or* a minor] person, age

_____ [*years*] [in good physical and mental condition] [, and was a faithful and dutiful _____(husband *or* wife)] [and the sole source of plaintiff's support].

9. As a proximate result of the negligence of defendant _____ [*airline*] and of its agents and employees, and the decedent's death, plaintiff(s) has/have been deprived of the society, comfort, protection, services, and support of decedent and thereby has/have sustained pecuniary loss, all to his/her/their damage.

10. As a further proximate result of the negligence of defendant _____ [*airline*] and of its agents and employees, and the decedent's death, plaintiff(s) has/have _____ [paid *or* incurred] funeral and burial expenses and seeks/seek recovery thereof.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages;

2. For funeral and burial expenses;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a surviving spouse against an airline carrier of passengers for reward to recover damages for wrongful death of plaintiff's spouse resulting from defendant's negligent operation of an airplane.

[3] Contents of Form

The complaint alleges:

- The identity of persons entitled under the statute to bring a wrongful death cause of action and their relationship to the decedent and, if the action is brought by the personal representative of the decedent's

estate on behalf of these entitled persons, the capacity of the personal representative to do so (Paragraph 1) [*see Code Civ. Proc. § 377.60*].

- The identity and capacity of the defendant and its agents and employees and any fictitiously named defendants (Paragraphs 2-4).

- A legal duty of care pursuant to *Civ. Code § 2100* (Paragraph 5).

- A breach of duty (Paragraph 6).

- Injury to plaintiff's decedent proximately caused by such breach (Paragraph 7).

- General damages (pecuniary loss) [*see Fields v. Riley (1969) 1 Cal. App. 3d 308, 313, 81 Cal. Rptr. 671]* and funeral expenses (Paragraphs 8-10) [*see Adams v. Southern Pacific Co. (1935) 4 Cal. 2d 731, 743-744, 53 P.2d 121]* .

The allegation in Paragraph 6 that the accident occurred over California is not required to maintain the action. However, if the action arises from an accident on the high seas (more than three nautical miles from shore), it must be brought under the Death on the High Seas Act [*see 46 U.S.C.S. § 30301 et seq.*].

If the plaintiff is a minor, a guardian ad litem must be appointed for the purposes of the action, unless the minor already has a guardian [*see Code Civ. Proc. § 372(a)*]. For discussion and forms relating to appointment of a guardian ad litem generally, see Ch. 291, *Guardians ad Litem* .

[4] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[5] Wrongful Death Action

When the death of a person is caused by the wrongful act of negligence of another, certain persons, or a personal representative on their behalf, may bring an action for damages against the person causing the death and any other person responsible (or their personal representatives) [*Code Civ. Proc. § 377.60*]. *Code Civ. Proc. § 377.60* permits decedent's surviving spouse, domestic partner, children, and issue of deceased children to bring a wrongful death action without qualification and permits others to bring an action under specified circumstances. For forms of allegations establishing that specific classes of persons are entitled to bring a wrongful death action, including allegations that are required of plaintiffs who are not the decedent's surviving spouse, domestic partner, children, or issue of deceased

children, see Ch. 181, *Death and Survival Actions* . If the plaintiff is a minor, a guardian ad litem must be appointed for the purposes of the action, unless the minor already has a guardian [*see Code Civ. Proc. § 372(a)*]. For discussion and forms relating to appointment of a guardian ad litem generally, see Ch. 291, *Guardians ad Litem* .

In a wrongful death action, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under *Code Civ. Proc. § 377.34* (survival actions). The court must determine the respective rights in an award of the persons entitled to assert the cause of action [*Code Civ. Proc. § 377.61*].

[6] Survival Action

A cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent's successor in interest, subject to *Prob. Code § 7000 et seq.* (governing succession to property on death of owner), and an action may be commenced by the decedent's personal representative or, if none, by the decedent's successor in interest [*Code Civ. Proc. § 377.30*]. In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement [*Code Civ. Proc. § 377.34*].

An action under *Code Civ. Proc § 377.30* (survival actions) may be joined with a wrongful death action arising out of the same wrongful act or neglect [*Code Civ. Proc. § 377.62(a)*]. In addition, a wrongful death action and an action under *Code Civ. Proc § 377.31* (action commenced by decedent prior to death and continued by personal representative) arising out of the same wrongful act or neglect may be consolidated for trial as provided in *Code Civ. Proc. § 1048* [*Code Civ. Proc. § 377.62(b)*]. For discussion, procedure, and forms, see Ch. 181, *Death and Survival Actions* .

[7] Joinder of Parties Defendant

Plaintiff may join as a party defendant any agent or employee of the airline whose negligence proximately caused or contributed to decedent's death, since everyone is responsible for the consequences of his or her own wrong [*see Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 74, 38 Cal. Rptr. 490* (involving negligent operation of motor vehicle and subsequent medical malpractice)]. Moreover, an employer who is held liable under the doctrine of respondeat superior has the right of recoupment against his or her negligent employee [*Continental Cas. Co. v. Phoenix Constr. Co. (1956) 46 Cal. 2d 423, 428, 296 P.2d 801* ; *Popejoy v. Hannon (1951) 37 Cal. 2d 159, 173, 231 P.2d 484]* .

But, unless the employee is financially able to pay any judgment that might be obtained or unless there is some persuasive reason other than the mere obtaining of a judgment against him or her for doing so, such as, for example, if the joinder of the agent or employee as a defendant is necessary for venue purposes [*see Code Civ. Proc. §§ 395, 395.2, 395.5*], it is seldom to the plaintiff's advantage, in a jury trial at least, to join the agent or employee as a defendant. A jury, for whatever reason, might be disposed to award a larger judgment against a large airline than it would award against a mere agent or employee of that airline.

On the contrary, it is usually to the defendant's advantage, rather than that of the plaintiff, that its agent or employee be joined, and the employer will frequently seek to have him or her joined by filing a cross complaint for declaratory relief [*see Code Civ. Proc. § 86(a)(7), 1060*] for indemnity [*see, e.g., Linday v. American President Lines, Ltd. (1963) 214 Cal. App. 2d 146, 147-149, 29 Cal. Rptr. 465* (cross complaint by employer against employee for intentional tort); *Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 75, 77, 38 Cal. Rptr. 490* (cross complaint by original tortfeasor, the driver of a vehicle, against subsequent tortfeasors (doctors and hospital) and cross complaint by one doctor against his agents for medical malpractice)] to secure the benefit of any sympathetic feelings the jury might entertain towards the employee in fixing the amount of judgment.

[8] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[9] Cross References

For alternative allegaations as to capacity and residence of parties, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms of complaints for wrongful death and survival actions, see Ch. 181, *Death and Survival Actions*

For discussion and forms relating to appointment of a guardian ad litem, see Ch. 291, *Guardians ad Litem*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsTransportation TortsAir TransportationGeneral OverviewTortsWrongful Death & Survival ActionsGeneral Overview

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Volume 2: Adoptions thru Airplanes and Airports-Chs. 12-17
Chapter 16 AIRPLANES AND AIRPORTS
PART IV. FORMS

2-16 California Forms of Pleading and Practice--Annotated § 16.41

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.41 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Airline [Civ. Code § 2338]--Passenger Injured by Falling Ceiling Light

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Airline [Civ. Code § 2338]--Passenger Injured by Falling Ceiling Light

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Negligence)
[and DOES I through _____,]	)	[LIMITED CIVIL CASES]
Defendant(s).	)	
	)	
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 16.40[1], Paragraph 2.*]

2. [*Fictitious name allegation, if appropriate. See § 16.40[1], Paragraph 3.*]

3. [*Agency allegation, if appropriate. See § 16.40[1], Paragraph 4.*]

4. On or about _____ [*date*], at or about the hour of _____ [*time of accident*],

plaintiff was a paying passenger on a passenger flight that left from _____ [*starting point*] at about _____ [*departure time*] with a destination of _____ [*destination*]. At that time and place defendants so carelessly and negligently owned, operated, maintained, and controlled the airplane as to cause a ceiling light to fall from the airplane, striking plaintiff violently on his/her _____ [*describe, e.g.*, right front forehead].

[5. At all times herein mentioned, defendant _____, through its agents and employees, had exclusive control and management of the airplane, and the falling of the ceiling light and resulting damages as set forth below are such that in the ordinary course of things they would not have occurred if defendants had exercised ordinary care in the maintenance and operation of the airplane; because of the exclusive control and management, defendants are possessed of superior, if not exclusive, access to information concerning the precise cause of the accident, and plaintiff relies on the negligence of defendants as inferred from the general situation alleged in this complaint.]

6. As a proximate result of the negligence of defendants and plaintiff's injuries as alleged above, plaintiff was caused great physical and mental pain and suffering and plaintiff is informed and believes and thereon alleges that the injuries will result in some permanent disability, all to his/her general damage.

7. As a further proximate result of the negligence of the defendants plaintiff has incurred and will continue to incur medical and related expenses, the full amount of which is not now known. Plaintiff will move to amend this complaint to allege such amount when ascertained.

8. As a further proximate result of the negligence of defendant _____ [*airline*], and of its agents and employees, plaintiff was prevented from attending to his/her usual occupation as a _____ [*state occupation*] for a period of _____ [*number of days, weeks, or months*] [to the date of the filing of this complaint], and thereby lost earnings.

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages according to proof.

2. For medical and related expenses according to proof.

3. For loss of earnings according to proof.

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 16.40[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a passenger against a carrier of passengers for reward to recover damages for personal injuries based on negligence.

[3] Contents of Form

The form alleges:

- The identity and capacity of the defendant and its agents and employees and any fictitiously named defendants (Paragraphs 1-3).

- The duty owed by defenant to plaintiff, and breach of duty, including reliance on res ipsa loquitur (Paragraphs 4-5) [*see Civ. Code §§ 1714(a), 2100*; *Evid. Code § 646*(res ipsa loquitur presumption); *Nelson v. American Airlines, Inc. (1968) 263 Cal. App. 2d 742, 745-746, 70 Cal. Rptr. 33* (res ipsa loquitur in action by passenger injured when plane nosed down sharply requires defendant to show either definite cause of accident unconnected with his or her alleged negligence or such care as would imply accident due to unknown, unpreventable cause)].

- Injury to plaintiff proximately caused by such breach and damages (Paragraphs 6-8).

[4] Specification of Damages

A complaint for personal injuries may not state the amount of actual or punitive damages sought to be recovered [*Code Civ. Proc. § 425.10(b)*]. For forms for use in ascertaining damages sought in such personal injury actions, see Ch. 177, *Damages* .

[5] Cross References

For additional discussion and references related to complaints, see *§ 16.40*[2] et seq.

Kreindler, Aviation Accident Law, Ch. 3, *Liability of Airlines* , §§ 3.06-3.12 (Matthew Bender)

Witkin, California Procedure, vol. 3, *Actions*, § 161 (4th ed. 1996)

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 923-929 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
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PART IV. FORMS

2-16 California Forms of Pleading and Practice--Annotated § 16.42

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.42 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Airline [Civ. Code § 2338]--Failure to Warn Passenger to Fasten Seat Belt in Rough Weather

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Airline [Civ. Code § 2338]--Failure to Warn Passenger to Fasten Seat Belt in Rough Weather

[*Caption. See § 16.41[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 16.40[1], Paragraph 2.*]

[2. *Fictitious name allegation, if appropriate. See § 16.40[1], Paragraph 3.*]

3. On or about _____ [*date*], plaintiff was a passenger for reward on a certain _____ [*type*] airplane, No. _____ [*registration number*], operated by, and under the exclusive control of defendant and of its agents, servants, and employees, on defendant's flight No. _____ [*flight number*], from _____ [*starting point*] to _____ [*destination point*].

4. The airplane was equipped with seat belts at each seat for the safety of passengers, and with a sign at the front of the airplane reading "Fasten Seat Belts," which was to be illuminated by defendant's agents, servants, and employees to warn and direct passengers to fasten their seat belts for their safety when the airplane was taking off and landing and when advisable for their safety by reason of climatic conditions or otherwise.

5. Plaintiff was not an experienced air traveler and relied on defendant and its agents, servants, and employees to warn

and direct him to fasten his seat belt when necessary for his safety and protection.

6. While the airplane was flying over _____ [*location*], California, the air and weather through which it was flying became rough and turbulent. Defendant and its agents, servants, and employees then and there negligently, recklessly, carelessly, and unlawfully failed to warn or direct plaintiff to fasten his seat belt, either by illuminating the sign reading "Fasten Seat Belts" or by any other means, and failed to take any other precautions for the safety of plaintiff, with the result that plaintiff was thrown out of his seat and to the floor of the airplane.

7. As a proximate result of defendant's negligence, recklessness, carelessness, and unlawful conduct as aforesaid, and by reason of plaintiff's being thrown from his seat to the floor of the airplane, plaintiff was hurt and injured in his health, strength, and activity, sustaining _____ [*describe injuries*], all to his damage.

8. [*Medical and incidental expenses. See § 16.41[1], Paragraph 7.*]

9. [*Loss of earnings. See § 16.41[1], Paragraph 8.*]

[*Prayer. See § 16.41[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 16.40[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use to recover damages for personal injuries based on negligence by an airline passenger against an airline consisting of the failure of defendant's agents and employees to warn the plaintiff to fasten his seat belt in rough weather [*see Small v. Transcontinental & Western Air (1950) 96 Cal. App. 2d 408, 410-411, 216 P.2d 36* (airline liable for failure to turn on "Fasten Seat Belt" sign in rough weather); *cf. Powell v. Dell-Air Aviation, Inc. (1968) 268 Cal. App. 2d 451, 455-458, 74 Cal. Rptr. 3* (judgment for defendants was proper in action for injuries sustained during air turbulence where evidence showed seat belt was loosely fastened)]. For discussion of the allegations of a complaint for personal injury, see *§ 16.41(2) et seq.*

[3] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the

complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-16 California Forms of Pleading and Practice--Annotated § 16.43

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.43 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Airline [Civ. Code § 2338] and Its Agents [Civ. Code § 2343]--Leading Plaintiff Passenger to Believe Plane Was Going to Crash

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Airline [Civ. Code § 2338] and Its Agents [Civ. Code § 2343]--Leading Plaintiff Passenger to Believe Plane Was Going to Crash

[*Caption. See § 16.41[1].*]

Plaintiff alleges:

1. Defendant _____ [*airline*] is, and at all times herein mentioned was, a corporation organized and existing under the laws of _____ [*state or foreign country*], and authorized to do business in California as a commercial air carrier of passengers for hire. Its principal place of business in California is at _____, _____ County. [*Or, allege other capacity and residence.*] Defendant _____ [*airline*], at all times herein mentioned, owned, maintained, and operated the airplane referred to in this complaint.

2. At all times herein mentioned, defendants _____, _____, and _____ [*names*] were the agents, servants, and employees of defendant _____ [*airline*], and in doing the things herein alleged were acting within the course and scope of their employment.

[3. *Fictitious name allegation, if appropriate. See § 16.40[1], Paragraph 3.*]

4. On or about _____ [*date*], plaintiff purchased from defendant _____ [*airline*] a ticket by which plaintiff contracted with defendant for a round trip flight to _____ [*destination point*],

and return to _____ [*starting point*], California.

5. Pursuant to the ticket, plaintiff was a paying passenger _____ [going *or* returning] to _____ [*city*], California on defendant _____'s [*airline*] flight number _____. The flight departed from _____ [*starting point*] at approximately _____ [*departure time*] on _____ [*date*].

6. On the [return] flight when the airplane was approximately _____ [*e.g.*, 45 minutes] flight time outside of _____ [*destination*], California and over the State of California, defendants, and each of them, so carelessly, recklessly, and negligently maintained, owned, operated, and controlled the airplane so as to lead plaintiff to believe that it was in mechanical trouble and that it was going to crash, when in fact the airplane was not in mechanical trouble and was not going to crash.

7. As a proximate result of the carelessness, recklessness, and negligence of defendants, and each of them, as herein alleged, plaintiff was caused great grievous mental suffering, anguish, and anxiety, and suffered severe shock to his nerves and nervous system and suffered other injuries [the exact nature and extent of which are unknown at this time to plaintiff who prays leave to amend the complaint to allege the same when ascertained] all to his general damage.

8. [*Medical and incidental expenses. See § 16.41[1], Paragraph 7.*]

9. [*Loss of earnings. See § 16.41[1], Paragraph 8.*]

[*Prayer. See § 16.41[1]*].

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 16.40[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a passenger against a defendant airline and its employees to recover damages for shock to the nervous system based on negligence. The form is adapted from the complaint filed in *Vanoni v. Western Airlines (1967) 247 Cal. App. 2d 793, 794, 56 Cal. Rptr. 115* and names the employees as defendants. For discussion of whether the employees should be joined as parties defendant, see the notes to § 16.40[2] et seq.

[3] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[4] Cross References

For discussion and forms relating to actions for negligent infliction of emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress*

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-16 California Forms of Pleading and Practice--Annotated § 16.44

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.44 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Airline [Civ. Code § 2338]--Fall of Passenger Due to Pitching of Airplane

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Airline [Civ. Code § 2338]--Fall of Passenger Due to Pitching of Airplane

[*Caption. See § 16.41[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 16.40[1], Paragraph 2, and § 16.43[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 16.40[1], Paragraph 3.*]

3. On or about _____ [*date*], defendant _____ [*airline*] undertook and agreed, as a common air carrier, for a consideration paid by plaintiff to transport and convey the plaintiff from _____ [*starting point*] to _____ [*destination point*] on defendant's Flight No. _____ [*number*]. In accordance with that agreement, plaintiff boarded one of the defendant's airplanes to be so conveyed.

4. At all times mentioned herein, the airplane on which plaintiff was riding as a passenger for hire, was within the exclusive maintenance, control, operation, and management of defendant _____ [*airline*], and of its agents, servants, and employees. While plaintiff was a passenger on Flight No. _____ [*number*] between _____ [*starting point*] and _____ [*destination point*], defendant _____ [*airline*] and its agents, servants, and employees so carelessly and negligently controlled, operated, and managed the airplane that the airplane pitched violently about and dropped out from under plaintiff and by reason thereof, as plaintiff emerged from the restroom, he was thrown against a coat rack and then thrown backwards

to the deck of the airplane with great force and violence, thereby causing plaintiff severe personal injuries.

5. As a proximate result of the carelessness and negligence of defendant _____ [*airline*], and of its agents, servants, and employees, as aforesaid, and the resulting fall by plaintiff, plaintiff was injur ed in his health, strength, and activities, and suffered, among other things, _____ [*describe injuries*], all to his general damage.

6. [*Medical and incidental expenses. See § 16.41[1], Paragraph 7.*]

7. [*Loss of earnings. See § 16.41[1], Paragraph 8.*]

[*Prayer. See § 16.41[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 16.40[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a passenger against a defendant airline to recover damages based on negligence.

For general discussion and cross references relating to complaints for wrongful death and personal injuries, see *§§ 16.40*[2] et seq. and 16.41[2] et seq.

[3] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual damages demanded [*Code Civ. Proc. § 425.10(b)*]. No claim for punitive damages may state an amount sought [*Civ. Code § 3295(e)*; *Code Civ. Proc. § 425.10(b)*]. Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For forms and procedure for use in requesting notice of the specific amount sought, see Ch. 177, *Damages* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsNegligenceActionsGeneral OverviewTortsTransportation TortsAir TransportationGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 2: Adoptions thru Airplanes and Airports-Chs. 12-17
Chapter 16 AIRPLANES AND AIRPORTS
PART IV. FORMS

2-16 California Forms of Pleading and Practice--Annotated § 16.45

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.45 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Airline [Civ. Code § 2338] and Its Agents [Civ. Code § 2343]--Fall of Passenger in Washroom Caused by Sudden Drop of Airplane

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Airline [Civ. Code § 2338] and Its Agents [Civ. Code § 2343]--Fall of Passenger in Washroom Caused by Sudden Drop of Airplane

[*Caption. See § 16.41[1].*]

Plaintiff alleges:

FIRST CAUSE OF ACTION

1. [*Capacity and residence of defendants. See § 16.40[1], Paragraph 2, and § 16.43[1], Paragraphs 1, 2.*]

3. [*Fictitious name allegation, if appropriate. See § 16.40[1], Paragraph 3.*]

4. On or about _____ [*date*], plaintiff was a fare paying passenger on an airplane owned and operated by defendant _____ [*airline*], as the airplane was flown under the control of defendants, and each of them, from _____ [*starting point*] to _____ [*destination point*].

5. At that time, defendant _____ [*name*] was the pilot of the plane and was acting in the course and scope of his/her employment with defendant _____ [*airline*]; while the airplane was in flight between _____ [*starting point*] and _____ [*destination point*], it dropped in such a precipitous and sudden manner that plaintiff was caused to be thrown about violently, sustaining the injuries hereinafter set out.

6. Plaintiff is informed and believes, and on that ground alleges, that defendants _____ [*airline*] and _____ [*pilot*], and each of them, negligently caused the airplane to drop in this precipitous and sudden manner, causing injury to the plaintiff as set out below.

7. As a proximate result of the negligence of defendants, and each of them, plaintiff incurred the following injuries: _____ [*describe injuries*], all to his general damage.

8. [*Medical and incidental expenses. See § 16.41[1], Paragraph 7.*]

9. [*Loss of earnings. See § 16.41[1], Paragraph 8.*]

SECOND CAUSE OF ACTION

1. Plaintiff incorporates Paragraphs 1 through 5 and 7 through 9 of the First Cause of Action as though set forth fully herein.

2. Plaintiff is informed and believes, and on that ground alleges, that defendants _____ [*airline*] and _____ [*pilot*], and each of them, knew, or, in the exercise of that high degree of care for plaintiff's safety owed by them to the plaintiff herein, should have known, that the airplane would drop in a sudden and precipitous manner. Defendants, and each of them, failed to warn the plaintiff that such would occur, with the result that the plaintiff was not prepared for the dropping and was caused injury as hereinabove set out.

THIRD CAUSE OF ACTION

1. Plaintiff incorporates Paragraphs 1, 3 through 5, and 7 through 9 of the First Cause of Action as though set forth fully herein.

2. Defendant _____ [*airline*] knew that its airplanes were subject to sudden dropping in flight and also knew that passengers aboard its airplanes were likely to be in the rest room of the airplane at the time such dropping occurred. Defendant in the exercise of the degree of care owed by it to its passengers should have anticipated that passengers would be thrown against the washbowls and commodes located therein.

3. At the time of the dropping of the airplane, plaintiff was in the rest room aboard the plane; the dropping of the airplane caused the plaintiff to be thrown with violent force against the washbowl and commode located therein, and the washbowl and commode were of a hard substance and not covered with any padding of any sort.

4. Although defendant _____ [*airline*] knew that passengers were likely to be thrown against the washbowl and commode located in the plane, it had negligently failed to cover the hard substance of which the washbowl and commode were made with any padding. Defendant's negligence was the proximate cause of injuries received by the plaintiff as set out herein.

FOURTH CAUSE OF ACTION

1. Plaintiff incorporates Paragraphs 1, 3 through 5, and 7 through 9 of the First Cause of Action and Paragraphs 2 through 4 of the Third Cause of Action as though set forth herein.

2. At all times herein mentioned, defendant _____ [*name*] was the flight attendant aboard the plane and was acting within the course and scope of his/her employment with defendant _____ [*airline*].

3. When the airplane was stationary on the ground in _____ [*location*], plaintiff told defendant _____ [*name of flight attendant*] that he/she wanted to use the rest room; defendant, acting in the course and scope of her employment with defendant _____ [*airline*], refused to let him/her use the rest room and told plaintiff that it would be safe to use the rest room when the plane was in the air; plaintiff relied on defendant _____'s [*name of flight attendant*] assurance that it would be safe to use the rest room when the airplane was in the air.

4. In fact the use by plaintiff of the rest room while the airplane was in the air was not safe for the plaintiff by virtue of the facts set out in Paragraphs 2, 3, and 4 of plaintiff's Third Cause of Action, incorporated herein.

5. Plaintiff's injuries as set out herein were caused by his/her reliance on the negligent statement of defendant _____ [*name of flight attendant*] and that negligent statement was made by defendant _____ [*name of flight attendant*] in the course and scope of her employment with defendant _____ [*airline*]. This statement was the proximate cause of the injuries received by the plaintiff as set out herein.

[*Prayer. See § 16.41[1]*.]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 16.40[1]*.]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a passenger against a defendant airline and its agents to recover damages based on negligence and, as in *form in § 16.43*, illustrates the joinder of the airline's employees as defendants. For discussion of whether the employees should be joined as defendants, see *§ 16.40*[7].

[3] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual damages demanded [*Code Civ. Proc. § 425.10(b)*]. No claim for punitive damages may state an amount sought [*Civ. Code § 3295(e)*; *Code Civ. Proc. § 425.10(b)*]. Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For forms and procedure for use in requesting notice of the specific amount sought, see Ch. 177, *Damages* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsNegligenceActionsGeneral OverviewTortsTransportation TortsAir TransportationGeneral Overview

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Chapter 16 AIRPLANES AND AIRPORTS
PART IV. FORMS

2-16 California Forms of Pleading and Practice--Annotated § 16.46

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.46 Complaint for Damages [Civ. Code §§ 3300, 3333] for Negligence [Civ. Code §§ 1714(a), 2100, 2195] and Breach of Contract--By Passenger Against Airline [Civ. Code § 2338] and Ticket Agency [Civ. Code § 2343]--Refusal to Carry Plaintiff and for Loss of Luggage

[1] FORM Complaint for Damages [Civ. Code §§ 3300, 3333] for Negligence [Civ. Code §§ 1714(a), 2100, 2195] and Breach of Contract--By Passenger Against Airline [Civ. Code § 2338] and Ticket Agency [Civ. Code § 2343]--Refusal to Carry Plaintiff and for Loss of Luggage

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____, [*name*]	)	
Plaintiff	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____, [*name*]	)	(Negligence; Breach of Contract)
Defendants.	)	[LIMITED CIVIL CASES]
	)	
	)	

Plaintiff alleges:

FIRST CAUSE OF ACTION

1. At all times herein mentioned, defendants _____ [*names*] were and are corporations engaged, in California and elsewhere, in the business of common carriers by air of passengerers and goods; at all times herein mentioned, defendant _____ [*name of ticket agency*] was and is a corporation organized and existing

under the laws of California, at all times herein mentioned was acting as the duly authorized and constituted agent and representative of the other defendants herein, and maintained and now maintains an office, among other places, in _____ [*city*], California [*or allege other capacities and residences of defendants*].

[2. *Fictitious name allegation, if appropriate. See § 16.40[1], Paragraph III.*]

3. Plaintiff applied to defendant _____ [*ticket agency*] on _____ [*date*], at its office in _____ [*city*], California for a ticket for transportation from _____ [*starting point*] to _____ [*destination*]. Plaintiff was issued a ticket, numbered _____ [*number*], and he/she paid for the ticket; the ticket was for a flight from _____ [*starting point*] to _____ [*changeover point*] via defendant _____ [*airline*]; at the same time and place, defendant _____ [*ticket agency*] also issued to plaintiff a connecting carrier ticket for transportation from _____ [*changeover point*] to _____ [*destination*] via defendant _____ [*airline*].

4. On _____ [*date*], at _____ [*departure point*] Airport, plaintiff delivered to defendant _____ [*ticket agency*] two pieces of baggage containing certain medicines, clothing, jewelry, money, and other valuables, and was given baggage checks therefor; the baggage was delivered to that defendant, then and there acting as the duly authorized agent of defendant carriers, for carriage to _____ [*changeover point*] and thereafter to _____ [*destination*], and for redelivery to plaintiff, and such carriage and such obligation of redelivery was then and there undertaken by defendants.

5. At all times herein mentioned, plaintiff suffered from _____ [*specify illness*] and required the use of the medicine contained in the baggage for the maintenance of his/her life and health.

6. On _____ [*date*], at _____ [*departure point*] Airport, plaintiff boarded a plane owned, maintained, and operated by defendant _____ [*airline*] and was transported to _____ [*changeover point*].

7. On his/her arrival at _____ [*changeover point*], plaintiff went to the office there of defendant _____ [*ticket agency*], presented his ticket, and inquired as to his/her time of departure for _____ [*destination*]; plaintiff was informed of the departure time and presented himself/herself at the designated departure gate shortly before the designated time; at that time, plaintiff was informed by an employee of defendant _____ [*airline*], who was attending the departure gate in the course and scope of his employment, that plaintiff's seat on the flight had been sold and that he could not board the plane.

8. At that time and place plaintiff demanded of defendants, and each of them, the return of his/her baggage and told defendants' employees of his/her need for the medicines contained therein; defendants, and each of them, then and there failed and refused to return the baggage.

9. By reason of the failure and refusal of defendant _____ [*ticket agency*] and defendants _____ [*airlines*] to comply with their agreement and undertaking with plaintiff, plaintiff was deprived of the necessary medicine which was in his/her baggage; plaintiff became ill, required the attention and services of a physician, was deprived of his/her planned vacation, and had to return home, and plaintiff suffered great discomfort, annoyance, and vexation, both of body and mind.

10. By reason of the foregoing, plaintiff has suffered damages.

SECOND CAUSE OF ACTION

1. Plaintiff refers to and incorporates herein Paragraphs 1 through 9 of his First Cause of Action.

2. Thereafter, on or about _____ [*date*], one of plaintiff's luggage cases, and a portion of the contents, were redelivered to him/her, at _____ [*city of departure*], but despite [numerous] demand[s] therefor, defendants, and each of them, have failed, neglected, and refused, and continue to fail, neglect, and refuse, to redeliver to plaintiff the balance of plaintiff's luggage, and defendants, and each of them, have thereby breached the contract of carriage; the value of the luggage and its contents, delivery of which is refused, was and is $_____; and plaintiff is thereby damaged in that amount.

THIRD CAUSE OF ACTION

1. Plaintiff refers to and incorporates herein Paragraphs 1 through 9 of his First Cause of Action and Paragraph 2 of his Second Cause of Action.

2. Defendants, and each of them, so negligently conducted themselves and so misbehaved in regard to the carriage that a portion of the luggage was lost to plaintiff; the value of the lost luggage and its contents was and is $_____; by reason of the premises plaintiff has been damaged in the sum of $_____.

[*Prayer. See § 16.41[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 16.40[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a passenger to recover damages for negligence and breach of contract from airlines and a ticket agency. It alleges the failure of one airline to carry plaintiff [*see Civ. Code § 2169* (duty of carrier to serve public)] and loss of plaintiff's baggage [*see Civ. Code §§ 2194, 2195* (carrier's liability for safe transportation of goods)].

[3] Text References

Witkin, Summary of California Law, vol. 13 *Personal Property*, §§ 177-184 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTransportation LawCarrier Duties & LiabilitiesDamagesTortsNegligenceActionsGeneral OverviewTortsTransportation TortsAir TransportationGeneral Overview

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Chapter 16 AIRPLANES AND AIRPORTS
PART IV. FORMS

2-16 California Forms of Pleading and Practice--Annotated § 16.47

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.47 Complaint for Damages for Wrongful Death of Airline Passenger [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a)] and Strict Liability--By Entitled Person(s) Against Manufacturer and Airline--Midair Fire and Crash

[1] FORM Complaint for Damages for Wrongful Death of Airline Passenger [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a)] and Strict Liability--By Entitled Person(s) Against Manufacturer and Airline--Midair Fire and Crash

[*Caption. See § 16.40[1].*]

Plaintiff(s) alleges/allege:

FIRST CAUSE OF ACTION

(Strict Liability)

1. [*Capacity of plaintiff(s). See § 16.40[1], Paragraph 1.*]

2. Defendant _____ [*name of manufacturer*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of California, with its principal office for the transaction of business in this state in _____ County [*or allege other capacity and residence*].

3. Defendant _____ [*name of manufacturer*] is, and at all times herein mentioned was, engaged in the manufacturing, designing, assembling, and selling of aircraft for use by members of the general public, and [plaintiff is informed and believes, and thereon alleges, that], as a part of its business, defendant designed, manufactured, and

assembled the specific _____ [*type of airplane*] airplane, Registration No. _____ [*number*], hereinafter referred to as "the airplane."

4. [*Fictitious name allegation, if appropriate. See § 16.40[1], Paragraph 3.*]

5. At all times herein mentioned, the airplane manufactured, designed, and assembled by defendant _____ [*name of manufacturer*] was used for the purpose for which it was designed and intended to be used, namely, transporting persons and property from one place to another in the air by operation of a pilot.

6. Defendant _____ [*name of manufacturer*] at all times herein mentioned knew, or should have known, that the airplane would be used without inspection for defects by the decedent.

7. At the time it was placed on the market and delivered by defendant _____ [*manufacturer*] to _____ [*airline*], the airplane was defective [as a result of the defendant's failure to give directions or warnings as to its use to prevent it from being defective] and unsafe for its intended purpose in that _____ [*state defect or the reason that failure to direct or warn as to use of product made it defective*].

8. On or about _____ [*date*], at or about _____ [*time of accident*], decedent was a passenger for reward on the airplane, operated by _____[*airline*], on its flight from _____ [*departure point*] to _____ [*destination*].

9. On or about _____ [*date*], while the plane was in the vicinity of _____ [*location*], during the course of the flight and as a proximate result of the defect herein described, the airplane [suddenly] crashed to the ground.

10. As a proximate result of the defect herein described and the resulting crash, decedent suffered injuries that resulted in his/her death.

11. Immediately prior to death, decedent was _____ [an adult *or* a minor] person, age _____ [in good physical and mental condition] [and was a faithful and dutiful _____ (husband *or* wife)] [and the sole source of support for plaintiff(s)].

12. As a proximate result of the defect in the airplane manufactured by defendant, and the death of the decedent, plaintiff(s) has/have been deprived of the society, comfort, protection, services, and support of the decedent and thereby has/have sustained pecuniary loss, to his/her/their damage.

13. As a further proximate result of the defect in the airplane manufactured by defendant, and the death of decedent, plaintiff(s) has/have incurred [and paid] funeral and burial expenses to his/her/their further damage.

SECOND CAUSE OF ACTION

(Negligence)

14. Plaintiff(s) herein incorporates Paragraphs 1, 4, 7, 8, and 11 of the First Cause of Action.

15. Defendant _____ [*airline*] is, and at all times mentioned herein was, a corporation duly organized and existing under the laws of California, with its principal place of business in _____ County, California, and doing business as a [common] carrier of persons for reward [*or allege other capacity and residence*].

16. Defendant _____ [*airline*] and its agents, servants, and employees so carelessly and negligently controlled, maintained, and operated the airplane on which decedent was a passenger that, while the airplane was flying in the vicinity of _____ [*location*], California, it was caused to crash to the ground.

17. As a proximate result of the negligence of defendant _____ [*airline*], and of its agents, servants, and employees, and the resulting crash, as alleged above, decedent suffered injuries that resulted in his/her death.

18. As a further proximate result of the negligence of defendant _____ [*airline*] and its agents, servants, and employees, and the resulting crash and death of the decedent, plaintiff(s) has/have been deprived of the society, comfort, protection, services, and support of the decedent and thereby has/have sustained pecuniary loss, to his/her/their damage.

19. As a further proximate result of the negligence of defendant _____ [*airline*] and of its agents, servants, and employees, and resulting crash and death of the decedent, plaintiff(s) has/have incurred [and paid] funeral and burial expenses.

[*Prayer. See § 16.40[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 16.40[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action under *Code Civ. Proc. § 377.60* for damages for the wrongful death of an airline passenger. The first cause of action is based on strict liability in tort [*see Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 127-129* ns.5-9, *104 Cal. Rptr. 433, 501 P.2d 1153* ; *see also* Ch. 460, *Products Liability*]. The second cause of action is based on negligence by the airline. For discussion of joinder of a wrongful death action with a survival action, see *§ 16.40*[7].

If the plaintiff is a minor, a guardian ad litem must be appointed for the purposes of the action, unless the minor already has a guardian [*see Code Civ. Proc. § 372(a)*]. For discussion and forms relating to appointment of a guardian ad litem generally, see Ch. 291, *Guardians ad Litem* .

[3] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages*, and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesDamagesTortsNegligenceActionsGeneral OverviewTortsTransportation TortsAir TransportationGeneral OverviewTortsWrongful Death & Survival ActionsGeneral OverviewTortsStrict LiabilityGeneral Overview

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2-16 California Forms of Pleading and Practice--Annotated § 16.48

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.48 Complaint for Damages [Civ. Code §§ 3287, 3300] for Breach of Contract and Indemnity--By Airline Against Maintenance Company--Loss of Airplane and Liability to Passengers

[1] FORM Complaint for Damages [Civ. Code §§ 3287, 3300] for Breach of Contract and Indemnity--By Airline Against Maintenance Company--Loss of Airplane and Liability to Passengers

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES; BREACH OF
_____ [*name(s)*],	)	CONTRACT
Defendant(s).	)	(Indemnity)
	)	[LIMITED CIVIL CASES]
	)	

_____

Plaintiff alleges:

1. Defendant _____ [*name of maintenance company*] is, and at all times mentioned herein was, a corporation duly organized and existing under the laws of California, with its principal place of business in _____ County, California [*or allege other capacity and residence*].

2. At all times herein mentioned, defendant _____ [*maintenance company*] was engaged in the business of manufacturing, repairing, altering, and reconditioning airplanes.

3. At all times herein mentioned, plaintiff was, to the knowledge of the defendant, engaged in a business of common air

carrier of passengers for reward.

4. On or about _____ [*date*], plaintiff was the owner and operator of a certain _____ [*type*] airplane, No. _____ [*registration number*], hereinafter referred to as "the airplane."

5. The airplane was manufactured and sold by the defendant for use as a transport plane for carrying passengers for reward.

6. The defendant held itself out to be fully qualified and equipped to inspect, repair, alter, and recondition airplanes of the type and model of the airplane.

7. At all times mentioned herein, the airplane was, to the knowledge of the defendant, used and to be used by the plaintiff for carrying passengers for reward.

8. On or about _____ [*date*], plaintiff and defendant entered into _____ [an oral *or* a written] contract [, a copy of which is attached hereto, marked Exhibit A, and made a part hereof]. The contract provided that for a valuable consideration to be paid by plaintiff, defendant agreed to and would inspect, repair, and overhaul the airplane and put the airplane in all respects in first class condition [and make certain alterations therein] defendant undertaking to use all due and reasonable care inspecting, servicing, repairing, overhauling, and rendering the airplane in first-class condition, and in determining and deciding on the replacement of such parts as were dangerous, improper, or insufficient for use in the airplane, and installing safe, proper, and sufficient parts in replacement thereof.

9. The defendant failed and omitted to perform its contract as aforesaid in the following respects: _____ [*specify, e.g.*,

a. It failed and omitted to ascertain that the airplane was equipped with propeller hubs of the type, model, and composition designated and known as Design No. _____ (*identification number of design*) which propeller hubs were, to the knowledge of the defendant, unsafe and improper for continued use in the airplane.

b. It failed and omitted to change the propeller hubs to a safe and proper type or to install safe and proper propeller hubs in the airplane.

c. It failed and omitted to properly and carefully inspect the propeller hubs with which the airplane was equipped.

d. It failed and omitted to ascertain that the propeller hub of the right outboard motor was defective, insufficient, improper, and unsafe.

e. It failed and omitted to replace the propeller hub of the right outboard motor with a sufficient and proper hub.

f. It failed and omitted to notify the plaintiff of the presence in the airplane of propeller hubs that, to its knowledge, were dangerous, defective, and improper for use therein.

g. It failed and omitted to recommend and install in the airplane safe and proper propeller hubs.]

The plaintiff has duly performed its contract with defendant herein, and on redelivery to the plaintiff of the airplane duly paid the amount demanded by defendant for its services.

10. After the redelivery to plaintiff of the airplane by the defendant on or about _____ [*date*], and without any knowledge on the part of the plaintiff of the _____ [*specifiy defect, e.g.*, insufficiency, inadequacy, and weakness of the propeller hubs], and relying on the superior knowledge and skill of the defendant in

inspecting, repairing, and overhauling the airplane, plaintiff used and operated the airplane for carrying passengers from _____ [*date*], until on or about _____ [*date*].

11. On or about _____ [*date*] at or near _____ [*location of accident*], while the airplane was being operated by the plaintiff in the carriage of passengers for reward, and while the plaintiff was flying and operating the airplane _____ [*describe accident, e.g.*, the hub of the right outboard propeller fractured and broke and, by reason thereof, the right outboard motor tore loose from its mountings,] causing the airplane to crash and become a total loss. _____ [*Number*] of passengers who were then in the airplane, as well as the two pilots employed by the plaintiff who were in charge of the airplane, were killed in the crash.

12. The destruction of the airplane and the death of the pilots and passengers were due to the failure on the part of the defendant properly to perform its contract as aforesaid, and were the proximate consequence and result of the defendant's breach of the agreement.

13. The airplane was of the reasonable value of $_____ [*amount*] at the time of its destruction.

14. As a proximate result of the failure on the part of defendant properly to perform its agreement as aforesaid, the plaintiff became liable for and was required and compelled to pay or incur the payment of the sum of $_____ as damages for the death of the passengers in the plane, and to expand or incur expenses for legal and other services in connection therewith in the sum of $_____. Plaintiff has duly demanded payment to it of said sum by defendant, but defendant has failed and refused, and continues to fail and refuse, to pay said sum or any part thereof.

15. As a result of the foregoing plaintiff has sustained damage.

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____.

2. For interest on said sum for and after _____ [*date*].

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 16.40[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by an airline to recover damages from a maintenance company for the loss of an airplane and for indemnification of liability to passengers killed in the crash of the airplane. Indemnification is based on breach of implied contractual promise to perform work in a reasonably safe manner [*Aerojet General Corp. v. D. Zelinsky & Sons (1967) 249 Cal. App. 2d 604, 609, 57 Cal. Rptr. 701]* .

[3] Cross References

For general information and cross references relating to complaints, see *§ 16.40*[2] et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawAir TransportationMaintenance & SafetyContracts LawContract Conditions & ProvisionsIndemnityCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsContracts LawBreachCauses of ActionBreach of Warranty

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2-16 California Forms of Pleading and Practice--Annotated § 16.49

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.49 Complaint for Damages for Wrongful Death of Airplane Passenger [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a); Pub. Util. Code § 21405]--By Entitled Person(s) Against Owner and Operator of Airplane--Collision on Runway

[1] FORM Complaint for Damages for Wrongful Death of Airplane Passenger [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a); Pub. Util. Code § 21405]--By Entitled Person(s) Against Owner and Operator of Airplane--Collision on Runway

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
[as _____ (*specify capacity, e.g.,*	)	
Personal Representative of the Estate of	)	NO. _____
_____ (*name*), Deceased,]	)	COMPLAINT FOR DAMAGES
Plaintiff,	)	(Wrongful Death)
vs.	)	[LIMITED CIVIL CASES]
_____ [*name*],	)	
[and DOES I through _____,]	)	
Defendant(s).	)	

Plaintiff(s) alleges/allege:

1. [*Capacity of plaintiff. See § 16.40[1], Paragraph 1.*]

2. At all times herein mentioned, a certain _____ [*type*] airplane was owned and operated by defendants in connection with _____ [*specify type of business*]. During all of the times herein

mentioned, the airplane was being operated by defendant _____ [*name*] for and on behalf of himself and the other defendants in connection with the business. Defendant _____ [*name*] is a resident of _____ County, California. [*Or allege other capacity and residence of defendants.*]

3. [*Fictitious name allegation, if appropriate. See § 16.40[1], Paragraph 3.*]

4. On or about _____ [*date*], at about _____ [*time*], decedent was a passenger in a certain _____ [*type*] airplane that was waiting in and on _____ [*name*] Airport, in _____ [*location*], California. At that time and place, defendants, and each of them, so negligently and carelessly piloted and operated the _____ [*type*] airplane as to cause the _____[*type*] airplane violently to collide with the _____ [*type*] airplane in which decedent was riding. As a proximate result of the collision and of the negligent and careless piloting and operation of the _____ [*type*] airplane by defendants, and each of them, decedent suffered injuries that resulted in his death.

5-8. [*Injuries and damages. See § 16.40[1], Paragraphs 8-10.*]

[*Prayer. See § 16.40[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 16.40[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action under *Code Civ. Proc. § 377.60* for damages for wrongful death of an airplane passenger injured in a collision on an airport runway, pursuant to *Pub. Util. Code § 21405* [*see Pub. Util. Code § 21407* (careless or reckless operation of aircraft unlawful; federal statutes and regulations as standards for safe operation); *see also Boyd v. White (1954) 128 Cal. App. 2d 641, 651, 276 P.2d 92* (liability of owner or operator of airplane for injuries inflicted on another)]. The named defendants are the owner and operator of the other airplane.

If the plaintiff is a minor, a guardian ad litem must be appointed for the purposes of the action, unless the minor already has a guardian [*see Code Civ. Proc. § 372(a)*]. For discussion and forms relating to appointment of a guardian ad litem generally, see Ch. 291, *Guardians ad Litem* .

[3] Cross References

For general information and cross references relating to wrongful death complaints, see *§ 16.40*[2] et seq.

Kreindler, Aviation Accident Law, Ch. 4, *Liability of Owners and Operators of Private Aircraft* , § 4.08 (Matthew Bender)

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 923, 925 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceStandards of CareReasonable CareGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsTransportation TortsAir TransportationGeneral OverviewTortsWrongful Death & Survival ActionsGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 2: Adoptions thru Airplanes and Airports-Chs. 12-17
Chapter 16 AIRPLANES AND AIRPORTS
PART IV. FORMS

2-16 California Forms of Pleading and Practice--Annotated § 16.50

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.50 Complaint for Damages [Civ. Code § 3333] for Injury to Property Based on Negligence [Civ. Code § 1714(a); Pub. Util. Code § 21405]--By Owner of Aircraft Against Owner and Pilot of Another Aircraft--Collision on Runway

[1] FORM Complaint for Damages [Civ. Code § 3333] for Injury to Property Based on Negligence [Civ. Code § 1714(a); Pub. Util. Code § 21405]--By Owner of Aircraft Against Owner and Pilot of Another Aircraft--Collision on Runway

SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____

_____, [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____, [*name*],	)	(Negligence)
Defendants.	)	[LIMITED CIVIL CASES]
	)	
	)	

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence*].

2. At all times herein mentioned defendant _____ [*name*], was the agent of defendant _____ [*name*], and in doing the things hereinafter alleged was acting in the scope of the agency and with the permission and consent of his codefendant.

[3. *Fictitious name allegation, if appropriate. See § 16.40[1], Paragraph III.*]

4. At all times herein mentioned the _____ [*name*] Airport was and now is located in _____ [*city*], California.

5. At all times herein mentioned, plaintiff was the owner of a certain _____ [*type*] airplane, Serial No. _____ [*number*] and at all times herein mentioned, the airplane was piloted, driven, and operated by _____ [*name of pilot*], and was engaged in the plaintiff's business.

6. At all times mentioned defendant _____ [*name*] was the owner of a certain airplane, Serial No. _____ [*number*]. The airplane was piloted and operated by defendant _____ [*name of pilot*], with the consent and knowledge of defendant _____ [*name of owner*].

7. On or about _____ [*date*], at the _____ [*name*] Airport in _____ [*city*], California, defendants, and each of them, did so carelessly, recklessly, and negligently own and operate the _____ [*type*] airplane, Serial No. _____ [*number*] belonging to the defendant _____ [*name of oowner*] as to cause the airplane to collide with and damage the _____ [*type*] airplane, Serial No. _____ [*number*] belonging to plaintiff.

8. As a proximate result of the negligence of the defendants, and each of them, and the resulting collision, the airplane belonging to plaintiff was damaged in the sum of $_____ which sum was the reasonable cost of necessary repairs to plaintiff's airplane.

[*Prayer. See § 16.48[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 16.40[1].*]

[2] Use of Form

The form of complaint in [2], *above*, is for use by the owner of an airplane to recover damages from the owner and operator of another airplane for injury to property caused by a collision on a runway.

[3] Cross References

For general information and cross references relating to complaints, see *§§ 16.40*[2] et seq. and 16.41[2] et seq.

Kreindler, Aviation Accident Law, Ch. 4, *Liability of Owner and Operator of Private Aircraft* , § 4.08 (Matthew Bender)

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 923-932 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 16 AIRPLANES AND AIRPORTS
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2-16 California Forms of Pleading and Practice--Annotated § 16.51

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.51 Complaint for Damages [Civ. Code §§ 3300, 3333, 3336] for Loss of Airplane--By Bailor of Airplane Against Bailee for Breach of Bailment [Civ. Code § 1836], Negligence [Civ. Code § 1714(a)], and Conversion

[1] FORM Complaint for Damages [Civ. Code §§ 3300, 3333, 3336] for Loss of Airplane--By Bailor of Airplane Against Bailee for Breach of Bailment [Civ. Code § 1836], Negligence [Civ. Code § 1714(a)], and Conversion

SUPERIOR COURT OF CALIFORNIA,
county of _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Breach of Contract; Negligence; Conversion)
Defendant(s).	)	[LIMITED CIVIL CASES]
	)	
	)	

_____

Plaintiff alleges:

FIRST COUNT

(Breach of Contract)

1. [*Capacity and residence of defendant. See § 16.50[1], Paragraph 1.*]

[2. *Agency allegation, if appropriate. See § 16.40[1], Paragraph 4.*]

[3. *Fictitious name allegation, if appropriate. See § 16.40[1], Paragraph 3.*]

4. At all times herein mentioned plaintiff was the owner and entitled to the possession of a certain _____ [*type*] airplane, Registration No. _____ [*number*].

5. On _____ [*date*], at _____ [*city*], California, at the request of defendant and for his sole benefit, plaintiff delivered possession of the airplane to defendant who promised and agreed to return the same to plaintiff in sound condition on or before _____ [*date*].

6. On _____ [*date*], plaintiff demanded that defendant return the airplane, and since that date, plaintiff has continued to so demand. Defendant failed and refused to return the airplane on the date and continues to fail and refuse to do so.

7. At all times herein mentioned the fair and reasonable value of the airplane together with extra equipment contained thereon, was $_____ [*amount*] and by reason of the failure and refusal of defendant to return the airplane, plaintiff has been damaged in that sum.

8. At the time of this occurrence, the airplane was in use in the business of the plaintiff. As a proximate result of defendant's failure and refusal to return the airplane, as aforesaid, plaintiff suffered a business loss and in addition was deprived of the use of the airplane to his further damage in the sum of $_____.

SECOND COUNT

(Negligence)

1. Plaintiff herein incorporates Paragraphs 1 through 5 of the First Count.

2. On or about _____ [*date*], defendant negligently operated the airplane, negligently flew the same in a locality for operation in which the airplane was not equipped, and negligently undertook to fly the airplane in a manner and under conditions with respect to which defendant was not qualified. As a proximate result of defendant's negligence, the airplane was destroyed on _____ [*date*].

3. At all times herein mentioned the fair and reasonable value of the airplane, together with extra equipment contained thereon, was $_____ [*amount*], and as a proximate result of defendant's negligence, as aforesaid, plaintiff has been damaged in that sum.

4. At the time of the occurrence the airplane was in use in the business of the plaintiff. As a proximate result of defendant's negligence, as aforesaid, plaintiff sustained a business loss and in addition was deprived of the use of the aircraft to his further damage.

THIRD COUNT

(Conversion)

1. Plaintiff herein incorporates Paragraphs 1 through 5 of the First Count.

2. Defendant further promised and agreed, at the aforementioned time and place, that he would not operate the airplane beyond _____ [*number*] miles from _____ [*agreed location*].

3. Contrary to the agreement defendant operated the airplane to a point at or over _____ [*location*], which is more than _____ [*number*] miles from _____ [*agreed location*], and then and there wrecked and destroyed the same, and converted the same to his own use.

4. At all times herein mentioned the fair and reasonable value of the airplane, together with extra equipment contained therein, was $_____ [*amount*], and by reason of defendant's conversion, as aforesaid, plaintiff has been damaged in that sum.

5. At the time of the occurrence the airplane was in use in the business of plaintiff. As a proximate result of defendant's conversion of the airplane to his own use, as aforesaid, plaintiff sustained a business loss and in addition was deprived of the use of the airplane to his further damage.

[*Prayer. See § 16.48[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 16.40[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by the bailor of an airplane to recover damages from the bailee based on three theories [*see Civ. Code §§ 1836, 3300* (liability for damage to bailed property); *Martin Sch. of Aviation v. Bank of America (1957) 48 Cal. 2d 689, 694, 312 P.2d 251* ; *Odle v. Dunbar (1954) 129 Cal. App. 2d 466, 470, 277 P.2d 418* ; *Hall v. Osell (1951) 102 Cal. App. 2d 849, 852, 228 P.2d 293]* :

- Breach of the bailment contract.
- Negligence.
- Conversion.

Under the third theory, or count, expenses incurred in pursuit of the property may also be recovered [*see Civ. Code § 3336*].

Damages for loss of use of the plane are available in addition to damages for the value of the plane [*Reynolds v. Bank of America (1959) 53 Cal. 2d 49, 50, 51, 345 P.2d 926]* .

[3] Cross References

For general information and cross references relating to complaints, see *§ 16.40*[2] et seq.

Witkin, Summary of California Law, vol. 13, *Personal Property*, §§ 156-186 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailmentsTortsNegligenceStandards of CareReasonable CareGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsTransportation TortsAir TransportationGeneral OverviewTortsIntentional TortsConversionGeneral Overview

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2-16 California Forms of Pleading and Practice--Annotated § 16.52

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.52 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence--By Guest in Airplane Against Pilot--Airplane Crash

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence--By Guest in Airplane Against Pilot--Airplane Crash

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR
_____ [*name*],	)	DAMAGES
Defendant(s).	)	(Negligence)
	)	[LIMITED CIVIL CASES]
	)	

_____

Plaintiff alleges:

FIRST COUNT

1. [*Capacity and residence of defendant. See § 16.50[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 16.40[1], Paragraph 3.*]

3. On or about _____ [*date*], defendant was the owner of a certain _____ [*make*]

Model _____ airplane, Serial Number _____ [, F.A.A. Registration Mark _____].

4. On or about _____ [*date*], defendant invited plaintiff to accompany him on a flight from _____ [*starting point*] to _____ [*destination*] in the airplane. Plaintiff accepted defendant's invitation and became a passenger on the flight.

5. During the flight the airplane was under the exclusive control, operation, and maintenance of defendant who was the pilot in command. [On or about _____ [*date*], defendant was a duly licensed airplane pilot; plaintiff was not a pilot and had never taken flying lessons.]

6. On or about _____ [*date*] while the airplane was in flight in the vicinity of and above _____ [*location*], defendant so negligently, recklessly, carelessly, and unlawfully piloted, controlled, operated, and maintained the airplane that it was caused to, and then and there did, suddenly crash into the ground.

7. As a proximate result of defendant's negligence, recklessness, carelessness, and unlawful conduct, and by reason of the resulting crash, plaintiff sustained the following injuries: _____ [*describe injuries*], all to his damage.

8. [*Medical and incidental expenses. See § 16.41[1], Paragraph 7.*]

9. [*Loss of earnings. See § 16.41[1], Paragraph 8.*]

SECOND COUNT

1. Plaintiff refers to Paragraphs 1 through 5 of the First Count herein, and by reference makes them a part hereof.

2. Prior to _____ [*date of crash*], defendant performed and supervised repairs to the airplane in an attempt to restore it and put it in a safe, operable condition so that it could be inspected and licensed by the Federal Aviation Administration as being safe and fit to be flown. Prior to said date, the airplane had last been inspected and licensed by the Federal Aviation Administration on _____ [*date*].

3. On or about _____ [*date*], the airplane was inspected by the Federal Aviation Administration and found to be unlicensed, the repairs to the airplane incomplete, and the airplane unsafe to be flown.

4. On _____ [*date of crash*], the airplane was in a defective, unsafe, and improper condition to be flown by reason of the failure and neglect of defendant to make the required and necessary repairs to the airplane in order for it to be inspected, approved, and licensed by the Federal Aviation Administration as being safe and fit to be flown.

5. On _____ [*date of crash*], and while plaintiff was a passenger in the airplane over the vicinity of _____ [*location*], the airplane crashed to the ground.

6. As a direct and proximate result of the negligent, careless, unlawful conduct of defendant, and by reason of the resulting crash, plaintiff sustained the following injuries: _____ [*describe injuries*], all to plaintiff's damage.

7. [*Medical and incidental expenses. See § 16.41[1], Paragraph 7.*]

8. [*Loss of earnings. See § 16.41[1], Paragraph 8*.]

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages according to proof.

2. For medical and related expenses according to proof.

3. For loss of earnings according to proof.

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 16.40[1]*.]

[2] Use of Form

The form of complaint in [1], *above*, may be used in an action for damages resulting from an airplane crash. This form assumes the owner and pilot of the airplane are the same defendant. The First Count is based on a general allegation of negligence, and the Second Count is based on defendant's violation of *Pub. Util. Code § 21411* and *14* C.F.R. § 47.3(b) (licensing statutes and regulations). A defendant's violation of such a statute or regulation creates a rebuttable presumption of failure to exercise due care, and shifts the burden of proof to the defendant under *Evid. Code § 669* [*Ayer v. Boyle (1974) 37 Cal. App. 3d 822, 828, 112 Cal. Rptr. 636]* .

The form is adapted from the complaint filed in *Ayer v. Boyle (1974) 37 Cal. App. 3d 822, 112 Cal. Rptr. 636* .

For general information and cross references relating to wrongful death and personal injury complaints, see *§§ 16.40*[2] et seq. and 16.41[2] et seq.

[3] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281*, *3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[4] Guest Statute

The airplane "guest statute" [*Pub. Util. Code § 21406*] barring a right of action for personal injuries not resulting from defendant's intoxication or willful misconduct was repealed by the Legislature in 1973 following the automobile guest statute being declared unconstitutional in *Brown v. Merlo (1973) 8 Cal. 3d 855, 863, 106 Cal. Rptr. 388, 506 P.2d 212* . The application of *Pub. Util. Code § 21406* prior to its repeal has also been held unconstitutional [*Ayer v. Boyle (1974) 37 Cal. App. 3d 822, 824, 112 Cal. Rptr. 636]* . Therefore, a guest in an airplane may state a cause of action based on negligence [*Ayer v. Boyle (1974) 37 Cal. App. 3d 822, 828, 112 Cal. Rptr. 636]* .

[5] Willful Misconduct

Allegations of willful misconduct [for a form of allegation, *see § 16.53*] may be substituted for Paragraphs 5-7 of the First Count in this complaint or be stated as a separate count. Such allegations, while not now required by statute, may be directed to stripping the defendant of the defense of contributory negligence and invoking the legal consequences of an intentional tort [*see Mahoney v. Corralejo (1974) 36 Cal. App. 3d 966, 973, 112 Cal. Rptr. 61]* . As a general rule, contributory negligence on the part of an injured plaintiff is no defense to an action based on a claim of the defendant's willful misconduct. However, willful misconduct of the plaintiff will ordinarily bar an action for willful misconduct of the defendant [*Williams v. Carr (1968) 68 Cal. 2d 579, 583-584, 68 Cal. Rptr. 305, 440 P.2d 505]* . In addition, a discharge in bankruptcy will not release a debtor from liability on a debt or judgment for willful and malicious injury by the debtor to another entity or to the property of another entity [*see 11 U.S.C.S. §§ 101(15), 523(a)(6)*; Collier, Bankruptcy, §§ 17.17, 17.26A (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceStandards of CareReasonable CareGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsTransportation TortsAir TransportationGeneral Overview

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2-16 California Forms of Pleading and Practice--Annotated § 16.53

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.53 Allegations for Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Willful Misconduct--By Guest in Airplane Against Pilot--Airplane Crash

[1] FORM Allegations for Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Willful Misconduct--By Guest in Airplane Against Pilot--Airplane Crash

1. During the flight, and while the airplane was in the vicinity of and over _____ [*location*], defendant _____ [*name*] then and there became intoxicated from excessive use of alcoholic liquor, and began to pilot the airplane in so reckless and willful a manner and with such wanton disregard for plaintiff's safety that the airplane was caused to then and there crash into the ground. Further, and more particularly, defendant was guilty of willful misconduct as follows:

a. Operating the airplane only a few yards above houses, wires, buildings, and other ground installations, and too close to the ground and the installations for the safety of the airplane and its passengers, including plaintiff;

b. Engaging in acrobatics, "stunting," and other unsafe maneuvers;

c. Willfully operating the airplane in such a manner that it went into a stall and spin so that he/she was unable to control the airplane or prevent its crashing to the ground, all contrary to the objections and remonstrances of plaintiff and contrary to the rules and regulations of the Civil Aeronautics Administration duly promulgated.

2. As a proximate result of the willful misconduct of defendant, and by reason of the resulting crash of the airplane, plaintiff sustained the following injuries: _____ [*describe injuries*], all to his/her damage.

[2] Use of Form

The allegations in [1], *above*, are for use in a complaint by a guest injured in an airplane crash to recover damages for personal injuries from the defendant pilot based on the willful misconduct of the defendant. The allegations may be substituted for Paragraphs 5-7 of the First Count in of the form of complaint in § 16.52, or may be included in that form

as the basis of a separate count.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsIntentional TortsGeneral OverviewTortsTransportation TortsAir TransportationGeneral Overview

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2-16 California Forms of Pleading and Practice--Annotated § 16.54

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.54 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Airline--Trip and Fall by Passenger Boarding Airplane

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Airline--Trip and Fall by Passenger Boarding Airplane

[*Caption. See § 16.41[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 16.40[1], Paragraph 2.*]

2. [*Fictitious name allegation, if appropriate. See § 16.40[1], Paragraph 3.*]

3. At all times herein mentioned, defendant was and now is a common air carrier of passengers for hire on regular schedules, over definite designated routes, including the route to be traveled by plaintiff as hereinafter alleged, soliciting the patronage of the traveling public, and advertising schedules for routes, times of leaving, and rates of fare.

4. On or about _____ [*date*], plaintiff purchased from defendant, through its officers, agents, representatives, and employees, a ticket from _____ [*starting point*] to _____ [*destination point*], on Flight No. _____ [*number*], scheduled to leave _____ [*location*] on _____ [*date*], at approximately _____ [*departure time*], and paid defendant therefor the sum of $_____, the sum requested.

5. At the time and place the flight was called, defendant, through its officers, agents, representatives, and employees, received plaintiff as a passenger on the flight and plaintiff proceeded to board the _____ [*type*] airplane of defendant.

6. Defendant had agreed to carry plaintiff safely and was bound thereby to furnish suitable and proper means whereby plaintiff could safely enter the airplane of defendant.

7. Plaintiff boarded the airplane by [*specify, e.g.,* walking up a metal stairway, on wheels, placed outside and against the airplane. On the top step of the stairway, defendant, acting through its officers, agents, employees, and representatives, negligently had placed a mat of fibrous material that protruded and extended over the edge of the top step on the stairway side. Defendant, through its officers, agents, employees, and representatives, knew or should have known, that the mat made the top step higher than the other steps, and that it protruded and extended over the edge of the top step, but negligently failed to advise plaintiff thereof].

8. At the time and place while plaintiff was boarding the _____ [*type*] airplane, on Flight No. _____ [*number*], as a proximate result of the negligence of defendant, plaintiff stumbled and fell, proximately causing plaintiff to sustain the following injuries: _____ [*describe injuries*], all to his/her general damage.

9. [*Medical and incidental expenses. See § 16.41[1], Paragraph 7.*]

10. [*Loss of earnings. See § 16.41[1], Paragraph 8.*]

[*Prayer. See § 16.41[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 16.40[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a passenger to recover damages from an airline for personal injuries suffered in a fall on a boarding ramp caused by its negligence.

For general information and cross references relating to personal injury complaints, see *§ 16.41*[2] et seq.

[3] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-16 California Forms of Pleading and Practice--Annotated § 16.55

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.55 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Airline--Slip and Fall on Loading Ramp by Debarking Passenger

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Airline--Slip and Fall on Loading Ramp by Debarking Passenger

[*Caption. See § 16.41[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 16.40[1], Paragraph 2.*]

2. [*Fictitious name allegation, if appropriate. See § 16.40[1], Paragraph 3.*]

3. At all times herein mentioned, defendant was a carrier of passengers for reward and was the owner of a certain _____ [*type*] aircraft used to carry passengers from place to place and of the loading and unloading ramps necessary for passengers to gain ingress and egress from the aircraft.

4. At all times herein mentioned, plaintiff was a passenger for hire aboard the aircraft hereinbefore described.

5. On or about _____ [*date*], at the defendant's landing facility located in _____ [*location*], plaintiff was attempting to alight from the airplane by means of the loading and unloading ramp, and, at that time and place, defendant so negligently maintained the loadingng ramp in a dangerous condition by allowing grease and other substances to remain thereon that plaintiff slipped and fell on the ramp and suffered serious and grievous injuries.

6. As a proximate result of the negligence of the defendant, and the resulting accident, plaintiff sustained the following

injuries: _____ [*describe injuries*], all to his damage.

7. [*Medical and incidental expenses. See § 16.41[1], Paragraph 7.*]

8. [*Loss of earnings. See § 16.41[1], Paragraph 8.*]

[*Prayer. See § 16.41[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 16.40[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a passenger to recover damages from an airline for personal injuries suffered in a fall from a debarking ramp caused by the airline's negligence.

For general information and cross references relating to personal injury complaints, see *§ 16.41[2] et seq.*

[3] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual damages demanded [*Code Civ. Proc. § 425.10(b)*]. No claim for punitive damages may state an amount sought [*Civ. Code § 3295(e)*; *Code Civ. Proc. § 425.10(b)*]. Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For forms and procedure for use in requesting notice of the specific amount sought, see Ch. 177, *Damages* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsNegligenceStandards of CareReasonable CareReasonable PersonTortsTransportation TortsAir TransportationGeneral Overview

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2-16 California Forms of Pleading and Practice--Annotated §§ 16.56-16.69

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

[Reserved]

§§ 16.56[Reserved]

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2-16 California Forms of Pleading and Practice--Annotated § 16.70

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.70 Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12]--Answer [Code Civ. Proc. § 431.30] to Complaint [Code Civ. Proc. § 431.10] for Damages [Civ. Code § 3333] for Personal Injury, Property Damage, Wrongful Death [Cal. Judicial Council Form PLD-PI-003]

[1] Form Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12]--Answer [Code Civ. Proc. § 431.30] to Complaint [Code Civ. Proc. § 431.10] for Damages [Civ. Code § 3333] for Personal Injury, Property Damage, Wrongful Death [Cal. Judicial Council Form PLD-PI-003]

Click here to view image.

[2] Use of Form

This form is the Judicial Council Answer form for use in responding to a complaint based on personal injury, property damage, or wrongful death. The Judicial Council approved this form effective January 1, 1982, with a nonsubstantive revision effective January 1, 2007. Use of the form is optional [*see Code Civ. Proc. § 425.12*; *Cal. Rules of Ct., Rule 1.35(b)*]. Before using this form, counsel should verify whether or not it has been modified.

For general information relating to the use of Judicial Council answer forms, see Ch. 26, *Answers* . For a complete set of Judicial Council forms in electronic fillable format, see *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexis.com/forms.

[3] General Denial

The defendant may make a general denial if the complaint is not verified or if the complaint is subject to *Code Civ. Proc. § 90 et seq.* (limited civil cases generally) [*Code Civ. Proc. § 431.30(d)*], or if the demand or the value of the property in controversy does not exceed $1,000 [*Code Civ. Proc. § 431.40(a)*]. The Judicial Council has adopted a form of general denial for this purpose [*Code Civ. Proc. § 431.40(c)*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at

no charge.

[4] Number of Pages and Use of Attachments

The total number of pages submitted must be indicated in Paragraph 1. Each attachment should comply with the form requirements of *Cal. Rules of Ct., Title 2, Div. 2, Ch. 1*, and should contain the short title of the case and a space for the case number at the top [*see Cal. Rules of Ct., Rule 1.45(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceStandards of CareReasonable CareReasonable PersonCivil ProcedurePleading & PracticePleadingsAnswersTortsTransportation TortsAir TransportationGeneral OverviewTortsWrongful Death & Survival ActionsGeneral Overview

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2-16 California Forms of Pleading and Practice--Annotated § 16.71

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.71 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Negligence of Plaintiff--Pilot as Plaintiff

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Negligence of Plaintiff--Pilot as Plaintiff

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that any and all events and happenings in connection with the accident complained of in plaintiff's complaint and the resulting injuries and damages, if any, referred to therein, were proximately caused and contributed to by the negligence of plaintiff in the operation of his _____ [*type*] airplane [, for the reason that plaintiff did not exercise ordinary care on his own behalf in the management and maintenance of the airplane in that _____ (*specify*)].

[2] Use of Form

The form of affirmative defense of plaintiff's negligence in [1], *above*, may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint by a pilot for damages resulting from an airplane accident. It alleges plaintiff was negligent about those matters alleged in the complaint, the negligence proximately caused and contributed to his injury, and facts on which defendant relies to support his defense [*see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226* (comparative negligence established)].

An owner's liability for aircraft collisions is determined by th rules of law applicable to torts on land [*Pub. Util. Code § 21405*].

[3] Cross References

For the format of affirmative defenses in an answer, see Ch. 26, *Answers*

For an alternate form of affirmative defense of plaintiff's negligence, see Ch. 380, *Negligence*

See generally California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-16 California Forms of Pleading and Practice--Annotated § 16.72

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.72 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Negligence of Plaintiff--Pilot as Plaintiff's Decedent

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Negligence of Plaintiff--Pilot as Plaintiff's Decedent

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the accident mentioned in plaintiff's complaint, and whatever damage, if any, has been sustained by plaintiff by reason thereof, were proximately caused and concurrently contributed to by the negligence, recklessness, and carelessness of _____ [*name*], plaintiff's decedent, in that, at the time and place of the alleged accident, _____ [*name of plaintiff's decedent*] operated and controlled the aircraft in such a negligent, reckless, and careless manner as to cause the same to lose altitude and to collide with the earth.

[2] Use of Form

The form of affirmative defense in [1], *above*, of plaintiff's negligence may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint for damages for wrongful death by the surviving heirs of a pilot killed in an airplane accident.

[3] Cross References

For cross references relating to affirmative defenses, see *§ 16.71*[3].

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-16 California Forms of Pleading and Practice--Annotated § 16.73

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.73 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Negligence of Plaintiff--Passenger Misadvising and Interfering With Pilot

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Negligence of Plaintiff--Passenger Misadvising and Interfering With Pilot

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff, during the flight referred to in the complaint, gave improper advice and instructions to the pilot of the airplane and interfered with the operation of the airplane by the pilot and shouted at and pounded on the pilot, and such acts by plaintiff proximately contributed to any and all consequences alleged to have been sustained by plaintiff.

[2] Use of Form

The form of affirmative defense of plaintiff's negligence in [1], *above*, may be set forth in an answer [*Code Civ. Proc. § 431.30*] to a complaint by a passenger seeking damages for injuries resulting from an airplane accident. It alleges improper instructions to the pilot and interference with the operation of the airplane as acts of negligence by the plaintiff passenger. In an action for wrongful death arising out of an airplane crash, a passenger was not negligent where the evidence failed to show that he had the practical knowledge to determine whether the trip was safe or that he attempted to operate airplane [*Doyle v. Hamren (1966) 246 Cal. App. 2d 733, 737-738, 55 Cal. Rptr. 84]* .

[3] Cross References

For cross references relating to affirmative defenses, see *§ 16.71*[3]

Witkin, California Procedure, vol. 5, *Pleading*, § 1029 (4th ed. 1997)

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 923-932 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-16 California Forms of Pleading and Practice--Annotated § 16.74

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.74 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Negligence of Pilot and Control Tower Operator

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Negligence of Pilot and Control Tower Operator

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. At all times herein mentioned and prior to the accident in question, _____ [*name of pilot*] was an agent of the plaintiff and as such agent was operating the airplane described in paragraph _____ [*number*] of the complaint, and at all times herein mentioned the control tower and its employees, particularly on the date and at the time of the accident, were agents, servants, and employees of the plaintiff and operating under the direction and control of the plaintiff.

2. Under and by virtue of the rules and customs of the airport and of the Civil Aeronautics Authority in charge of the flight of airplanes in and around airports and in the air throughout the United States and the operation of airplanes in general, the parking of an airplane on or near the runway of an airport without immediately moving the same out of the runway and into a proper place for storage, was forbidden. Contrary to the rules and regulations, the agent of the plaintiff, _____ [*name of pilot*], did knowingly violate the rule and did park the _____ [*type*] airplane on or near the runway of the _____ [*name*] Airport just prior to the accident sued on by the plaintiff in plaintiff's complaint, and continued to park the airplane there for some time thereafter and until the time of the accident, contrary to the rules.

3. The tower which was controlled by the agents, servants, and employees of the plaintiff also controlled the incoming and outgoing traffic at the airport and the actions of the owners and pilots of airplanes at the airport, and the agents, servants, and employees of the plaintiff in the tower knew that _____ [*name of pilot*] had improperly parked and kept his _____ [*type*] airplane on the runway at the airport and continued to permit him to

park the airplane, and despite this knowledge ordered the defendant's employee, _____ [*name*], who was piloting the _____ [*type*] airplane belonging to the defendant _____ [*name*] to land on the runway where the airplane of the plaintiff was parked, and to proceed up the runway to the proper place to store and park the _____ [*type*] airplane, well knowing that the airplane piloted by _____ [*name of defendant's agent*] was one which prevented the pilot from looking directly forward on the runway on which he was proceeding or on any runway on the ground because of the nature of the construction of the airplane with its nose up in the air hiding from view the ground directly ahead of the airplane as it proceeded, and negligently failed to warn _____ [*name of defendant's agent*] of the parking of the _____ [*type of plaintiff's airplane*] thereon; and despite this knowledge the tower at the field operated by the agents, servants, and employees of the plaintiff or under their direction and control, negligently ordered _____ [*name of defendant's agent*] to proceed on the runway, and _____ [*name of plaintiff's agent*] did negligently continue to park his airplane on the runway, and such negligence on the part of plaintiff, its agents, servants, and employees proximately caused and contributed to the accident and damages to plaintiff's property.

[2] Use of Form

The form of affirmative defense of negligence in [1], *above*, may be set forth in an answer [*Code Civ. Proc. § 431.30*] to a complaint for damages resulting from an airplane accident. It alleges the negligence of other pilots and the control tower operator [United States v. Douglas Aircraft Co. (9th Cir. [Cal] 1948) *169 F.2d 755, 758* (action of air traffic control tower as negligence)].

[3] Cross References

For cross references relating to affirmative defenses, see *§ 16.71*[3]

Witkin, California Procedure, vol. 5, *Pleading*, § 1029(4th ed. 1997)

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 1331, 1357 (10th ed. 2005)

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2-16 California Forms of Pleading and Practice--Annotated § 16.75

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.75 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Assumption of Risk--Airplane Accident

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Assumption of Risk--Airplane Accident

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. Plaintiff was familiar with the weather conditions and with the equipment and instruments of the airplane at the times and places referred to in the complaint. Plaintiff consented to the operation of the airplane at the times and places referred to in the complaint and under the conditions then existing and consented to each and all of the things done in the course of the operation of the airplane at these times and places.

2. At all times relevant on and before the date of the accident alleged herein, plaintiff knew the hazards involved in _____ [*set out what plaintiff did, e.g.,* riding in aircraft under adverse weather conditions] and had full knowledge of the condition existing and appreciated the danger thereof.

3. Plaintiff voluntarily assumed the risks in _____ [*set out what plaintiff did, e.g.,* riding in aircraft under adverse weather conditions], and his assumption of the risks was the sole proximate cause of his alleged injuries and damages, if any.

[2] Use of Form

The form of defense of assumption of the risk in [1], *above*, may be set forth in an answer [*Code Civ. Proc. § 431.30*] to a complaint by a plaintiff for damages based on negligence arising from the operation of an airplane. The answer alleges consent by the plaintiff to the defendant's operation of the plane pursuant to *Civ. Code § 3515* (Paragraph 1), and the elements of assumption of risk, i.e., knowledge and appreciation of the particular danger and the magnitude of the risk involved and assumption thereof (Paragraphs 2, 3) [*Vierra v. Fifth Avenue Rental Service (1963) 60 Cal. 2d 266, 271, 32 Cal. Rptr. 193, 383 P.2d 777* (flying metal from tool)].

The adoption of comparative negligence may have merged the type of assumption of risk illustrated by the facts of this form into the general scheme of assessment of liability in proportion to negligence. That is, where plaintiff unreasonably undertakes to encounter a specific known risk imposed by defendant's negligence and even encounters the risk in a prudent manner, his recovery is not barred but merely reduced in proportion to his own negligence. However, if the defendant can prove that plaintiff agreed to relieve him of an obligation of reasonable conduct, plaintiff's recovery is barred [*see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 829, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

[3] Cross References

For cross references relating to affirmative defenses, see *§ 16.71*[3]

Witkin, California Procedure, vol. 5, *Pleading*, § 1030 (4th ed. 1997)

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 1281-1282, 1284-1294 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-16 California Forms of Pleading and Practice--Annotated § 16.77

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.77 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Unavoidable Accident

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Unavoidable Accident

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the accident mentioned in plaintiff's complaint, and whatever damage, if any, has been sustained by plaintiff, by reason thereof, were the result of an inevitable and unavoidable accident, so far as this answering defendant is concerned.

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer [*Code Civ. Proc. § 431.30*] to a complaint based on negligence arising out of an airplane accident.

[3] Text References

For cross references relating to affirmative defenses, see *§ 16.71*[3]

Witkin, Summary of California Law, vol. 6, *Torts*, § 1192 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
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2-16 California Forms of Pleading and Practice--Annotated § 16.78

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.78 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action for Value of Plane Destroyed While Bailed to Decedent--Negligence of Plaintiff--Plaintiff Negligent in Permitting Decedent to Take Plane

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action for Value of Plane Destroyed While Bailed to Decedent--Negligence of Plaintiff--Plaintiff Negligent in Permitting Decedent to Take Plane

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff was familiar with the qualifications of _____ [*name*] decedent to operate the airplane and if decedent negligently operated the airplane or negligently flew the same in a locality for operation in which the airplane was not equipped, or negligently undertook to fly the airplane in a manner and under conditions with respect to which he was not qualified, as alleged in the complaint, the plaintiff was negligent in permitting decedent to take and operate the airplane, and that negligence on the part of plaintiff proximately contributed to the loss of the airplane and any damage alleged to have been sustained by plaintiff.

[2] Use of Form

The form of affirmative defense of plaintiff's negligence in [1], *above,* may be set forth in an answer [*Code Civ. Proc. § 431.30*] to a complaint by a plaintiff to recover damages for loss of bailed property. It alleges plaintiff was negligent in permitting the unqualified decedent to fly the airplane, and that such negligence proximately caused the accident.

[3] Cross References

For cross references relating to affirmative defenses, see *§ 16.71*[3].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceStandards of CareReasonable CareReasonable PersonCivil ProceduresPleading & PracticeDefenses,

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2-16 California Forms of Pleading and Practice--Annotated § 16.79

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.79 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action for Value of Plane Destroyed While Bailed to Decedent--Negligence of Plaintiff--Plaintiff Negligent in Furnishing Defective, Improperly Equipped Plane

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action for Value of Plane Destroyed While Bailed to Decedent--Negligence of Plaintiff--Plaintiff Negligent in Furnishing Defective, Improperly Equipped Plane

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff was negligent in furnishing _____ [*name of decedent*], decedent, with an airplane which was defective and not properly equipped, and such negligence on the part of plaintiff proximately contributed to the loss of the airplane and any damage alleged to have been sustained by plaintiff.

[2] Use of Form

The form of affirmative defense of plaintiff's negligence in [1], *above*, may be set forth in an answer to a complaint by plaintiff to recover for damages for loss of bailed property. It alleges plaintiff was negligent in furnishing a defective, improperly equipped airplane to the decedent bailee.

[3] Cross References

For cross references relating to affirmative defenses, see *§ 16.71*[3]

Witkin, California Procedure, Vol. 5, *Pleading*, § 1029 (4th ed. 1997)

Legal Topics:

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

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2-16 California Forms of Pleading and Practice--Annotated § 16.80

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.80 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action for Value of Plane Destroyed While Bailed to Decedent--Exercise of Sufficient Care by Gratuitous Bailee

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action for Value of Plane Destroyed While Bailed to Decedent--Exercise of Sufficient Care by Gratuitous Bailee

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that at the time the airplane was given into the possession of _____ [*name*], by plaintiff, it was received by him as a gratuitous bailee and he exercised that degree of care required of a gratuitous bailee at all times.

[2] Use of Form

The form of affirmative defense in [1], *above*, may be set forth in an answer to a complaint by a plaintiff for damages to bailed property against a gratuitous bailee. It alleges that defendant exercised the degree of care required of a gratuitous bailee, pursuant to *Civ. Code § 1846* (slight care).

[3] Cross References

For cross references relating to affirmative defenses, see *§ 16.71*[3]

Witkin, Summary of California Law, vol. 13, *Personal Property*, § 163 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceStandards of CareReasonable CareReasonable PersonCivil ProcedurePleading & PracticeDefenses,

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2-16 California Forms of Pleading and Practice--Annotated § 16.81

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.81 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action for Value of Plane Destroyed While Bailed to Decedent--Bailment for Plaintiff's Benefit and Release From Liability

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action for Value of Plane Destroyed While Bailed to Decedent--Bailment for Plaintiff's Benefit and Release From Liability

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff as bailor or depositor gave possession of the airplane to defendant, and the latter accepted it as a voluntary bailment or deposit, for the benefit of the plaintiff as bailor or depositor; at the time of the deposit, plaintiff and defendant entered into _____ [*either* a written *or* an oral] contract whereby plaintiff agreed to hold defendant harmless from liability for negligence in the bailment of the airplane.

[2] Use of Form

The form of affirmative defense in [1], *above*, may be set forth in an answer to a complaint by a plaintiff against a bailee for damages arising from destruction of the bailed property. It alleges the bailment was voluntary and for the benefit of the bailor and that plaintiff released the bailee from liability for negligence by contract [*see Continental Mfg. Corp. v. Underwriters at Lloyds London (1960) 185 Cal. App. 2d 545, 550, 555, 8 Cal. Rptr. 276* (bailee's release by contract from liability for negligence)].

[3] Cross References

For cross references relating to affirmative defenses, see *§ 16.71*[3].

Legal Topics:

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

TortsNegligenceStandards of CareReasonable CareReasonable PersonCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewTortsTransportation TortsAir TransportationGeneral OverviewTortsNegligenceActionsNegligent Entrustment

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Chapter 16 AIRPLANES AND AIRPORTS
PART IV. FORMS

2-16 California Forms of Pleading and Practice--Annotated § 16.82

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.82 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Limitation on Liability--Plaintiff Injured in Crash of Airline Engaged in International Travel

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Limitation on Liability--Plaintiff Injured in Crash of Airline Engaged in International Travel

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that a written contract of transportation between plaintiff and defendant under which the transportation described in the complaint was performed was subject to the rules relating to liability established by _____ [*specify applicable international convention, e.g.,* the Convention for Unification of Certain Rules Relating to International Transportation by Air signed at Warsaw], and adhered to by the United States, and that the rules of the Convention limit the liability of defendant to plaintiff for personal injuries, if any there be, to the sum of _____ [*specify sum to which applicable international convention limits liability*].

[2] Use of Form

The form of affirmative defense in [1], *above*, may be set forth in an answer to a complaint for damages arising from an airplane crash by a plaintiff engaged in "international transportation" as defined and governed by the Warsaw Convention [49 Stat. 3000], or "international carriage," as defined in the Montreal Convention of 1999.

The proviso of the Warsaw Convention limiting liability of an airline company does not apply if the passenger tickets embodying limitation are not delivered sufficiently in advance of flight so that the passenger may, if he or she wishes, obtain additional insurance [Warren v. Flying Tiger Line, Inc. (9th Cir. [Cal] 1965) *352 F.2d 494, 498]* . No such waiver of the limitations on liability for failure to notify exists under the Montreal Convention [*see* Montreal Convention, Art. 9 (1999)].

[3] Cross References

For cross references relating to affirmative defenses, see *§ 16.71*[3]

Kreindler, Aviation Accident Law, Ch. 10 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawAir TransportationWarsaw ConventionGeneral OverviewTortsNegligenceStandards of CareReasonable CareReasonable PersonCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewTortsTransportation TortsAir TransportationGeneral Overview

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2-16 California Forms of Pleading and Practice--Annotated § 16.83

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.83 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Limitation of Liability by Baggage Check Under Warsaw Convention [49 Stat. 3000]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Limitation of Liability by Baggage Check Under Warsaw Convention [49 Stat. 3000]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. On or before _____ [*date*], a baggage check was issued by the defendant, _____ [*name*], to the decedent for each article of baggage tendered by him for transportation in accordance with the contract hereinabove set forth, other than such articles as were retained in the personal custody and control of the decedent; the total weight of the decedent's baggage covered by the checks was _____ [*weight*]; a duplicate of each of the checks was likewise issued by the defendant and retained in its custody; the checks were all in writing, each in the same form, and contained the number of the decedent's passage ticket, together with the following provisions:

"Transportation hereunder is subject to the rules relating to liability established by the Convention of Warsaw of 12th October, 1929, unless under the provisions of the Identification Coupon of the above-numbered ticket the transportation under the Flight Coupon(s) of such ticket is not subject to such rules relating to liability."

2. In accordance with the aforesaid agreement, the rights of the parties herein were and are governed by and subject to the rules relating to liability established by the Convention, the conditions and requirements of which were in all respects duly complied with by the defendant, _____ [*name*]. Defendant and its agents took all necessary measures to avoid the damage claimed by the plaintiffs, except for such measures as were impossible for it or them to exercise; and the defendant claims exemption from, and limitation of, liability in accordance with the rules relating to liability for loss of, or damage to, baggage, established by the Convention and referred to in Paragraph I, above.

[2] Use of Form

The form of affirmative defense in [1], *above*, may be set forth in an answer to a complaint for loss of baggage by a plaintiff engaged in "international transportation" as defined and governed by the Warsaw Convention. Recoverable loss is 250 francs per kilogram of property lost [49 Stat. 3000]. The text of the Warsaw Convention may be found at *49 U.S.C.S. § 40105*.

[3] Cross References

For additional discussion of the Warsaw Convntion and cross references, see § 16.67[2] et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawAir TransportationWarsaw ConventionGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesDamages

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2-16 California Forms of Pleading and Practice--Annotated §§ 16.84-16.89

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

[Reserved]

§§ 16.84[Reserved]

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2-16 California Forms of Pleading and Practice--Annotated § 16.90

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.90 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Owner of Airplane Against Municipal Airport [Gov. Code § 815.2]--Obstruction Near Runway

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Owner of Airplane Against Municipal Airport [Gov. Code § 815.2]--Obstruction Near Runway

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Negligence)
Defendant.	)	
	)	
	)	

1. At all times herein mentioned, defendant _____ [*name*] was and now is a political subdivision of the state of California, duly created, organized and existing under and by virtue of the laws of the state.

[2. *Fictitious name allegation, if appropriate. See § 16.40[1], Paragraph 3.*]

3. At all times herein mentioned, defendant owned, operated and maintained in _____ County, California, a certain airport for public use. The airport was more commonly known and designated as _____ [*name*] Field. At that field, defendant operated and maintained a certain runway area, No. _____ [*number of runway*], which was designated by defendant as a runway on which descending airplanes should land.

4. On or about _____ [*date*], plaintiff owned a certain _____ [*type*] airplane, bearing identification No. _____ [*number*], and was operating the same at and over the airport.

5. At that time and place, defendant negligently operated, maintained, and conducted the airport and particularly the area immediately adjacent to runway No. _____ [*number*], by placing or piling, and allowing to remain along the edge of the runway, a pile or mound of dirt, proximately resulting in the runway being rendered unsafe, unfit, dangerous, and hazardous to persons and airplanes descending and landing thereon.

6. By reason of the carelessness and negligence of defendant and as a proximate result thereof, on _____ [*date*], while plaintiff was effecting a landing of his airplane, it came in contact with and struck the mound or pile of dirt as a proximate result of which, the airplane crashed, proximately resulting in the wrecking of the airplane and proximately resulting in plaintiff's being rendered sick, sore, lame, disabled and disordered, both externally and internally, and proximately causing plaintiff to suffer grave and serious personal injuries, more particularly described as follows, to wit: _____ [*describe injuries*], all to his damage.

7. [*Medical and incidental expenses. See § 16.41[1], Paragraph 7.*]

8. [*Loss of earnings. See § 16.41[1], Paragraph 8.*]

9. Immediately prior to the happening of the accident, the reasonable market value of the plaintiff's airplane was $_____ [*amount*]. Immediately after the happening of the accident and collision, the reasonable market value of the plaintiff's airplane was $_____ [*amount*] and no more. By reason thereof, plaintiff has been damaged.

10. On or about _____ [*date*], and prior to the commencement of this action, plaintiff presented to defendant his claim for the damages sought in this action. A copy of the claim is attached hereto as Exhibit "'A" and made a part hereof.

11. On or about _____ [*date*], defendant _____ [rejected the claim in its entirety *or* allowed the claim in the amount of $_____ and rejected it as to the remainder].

[*Prayer. See § 16.48.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 16.40[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by the owner of an airplane to recover from a municipal airport damages based on negligence [*see Pignet v. City of Santa Monica (1938) 29 Cal. App. 2d 286, 287, 84 P.2d 166* ; *Coleman v. Oakland (1930) 110 Cal. App. 715, 719-720* (liability of cities operating airports);. *Miller v. County of Contra Costa (1951) 106 Cal. App. 2d 304, 307, 235 P.2d 76* (standard of care in airport cases involving maintenance of runways)].

The form includes allegations that the plaintiff complied with the requirements for filing a tort claim against the public

entity that owns and operates the airport (Paragraphs 10-11) [*see Gov. Code §§ 905, 905.2*; for discussion of claims against public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*].

[3] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Cross References

For discussion and cross references relating to personal injury complaints generally, see *§ 16.41*[2] et seq.

Kreindler, Aviation Accident Law, Ch. 9, *Liability of Airport Owner and Operator* , § 9.05 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsNegligenceStandards of CareReasonable CareReasonable PersonTortsTransportation TortsAir TransportationGeneral OverviewTransportation LawAir TransportationAirports & Airways Development Act

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2-16 California Forms of Pleading and Practice--Annotated § 16.91

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.91 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Airline Passenger Against Airport and Airline--Fall on Ramp by Passenger

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Airline Passenger Against Airport and Airline--Fall on Ramp by Passenger

[*Caption. See § 16.90[1].*]

Plaintiff alleges:

1. At all times herein mentioned, defendant _____ [*name of public entity that owns airport*], hereinafter referred to as defendant _____ [*specify, e.g.,* Ocean County], was the owner of certain land premises known as the _____ [*name of airport*] Airport, located in _____, California.

2. [*Capacity and residence of defendant airline. See § 16.40[1], Paragraph 2, and § 16.43[1], Paragraph 1.*]

[3. *Fictitious name allegations, if appropriate. See § 16.40[1], Paragraph 3.*]

4. Prior to _____ [*date of accident*], defendant _____ [*name of entity, e.g.,* Ocean County] leased to defendant _____ [*name of airline*], a common carrier, hereinafter referred to as defendant airline, for the operation of its aircraft transportation system and accommodation of passengers, certain parts, facilities, and services of the airport, including all means of access from the waiting room in the terminal to the loading ramps to defendant airline's airplanes, and on that date defendant airline was in possession and control thereof.

5. In the lease from defendant _____ [*specify, e.g.,* Ocean County] to defendant airline it was provided that defendant _____ [*specify, e.g.,* Ocean County] reserved the right to enter into and on

the premises leased to defendant airline for the purpose of making such repairs or alterations therein as might be necessary for the safety and preservation thereof.

6. On the above date and long prior thereto the access ramp to loading gate number _____ [*number*], and particularly the threshold through to the north door of the waiting room to the ramp was, and had been permitted to remain, in a dangerous and defective condition for use by passengers in that a board on the threshold had become worn and unfastened at one end and a hole or depression and a rough and irregular surface had developed.

7. Defendants knew, or in the exercise of ordinary care should have known, of this dangerous and defective condition of the threshold, but defendants negligently, carelessly, and unlawfully permitted the threshold to be and remain in the dangerous and defective condition.

8. At or about _____ [*time of accident*] on _____ [*date of accident*], plaintiff was a passenger for hire on defendant airline's flight number _____[*number*]. Defendant airline and its agents, servants, and employees directed plaintiff to use the access ramp number _____ [*number*], to reach the plane. Because of the negligence and unlawful conduct of defendants, and each of them, in constructing, maintaining, and repairing, or failing to repair, the threshold, as above stated, plaintiff was caused to and did trip and fall at the threshold.

9. As a proximate result of the negligence of defendants, and each of them, and by reason of the fall so negligently caused by defendants, plaintiff sustained the following injuries: _____ [*describe injuries*], all to his/her damage.

10. [*Medical and incidental expenses. See § 16.41[1], Paragraph 7.*]

11. [*Loss of earnings. See § 16.41[1], Paragraph 8.*]

12. On or about _____ [*date*], plaintiff presented to defendant _____ [*specify public entity, e.g.,* Ocean County] a claim for the damages sought in this action. A copy of the claim is attached hereto as Exhibit "A" and made a part hereof. On or about _____ [*date*], defendant _____ [*specify, e.g.,* Ocean County] _____ [rejected the claim in its entirety *or* allowed the claim in the amount of $_____ and rejected it as to the remainder].

[*Prayer. See § 16.41[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification if desired. See § 16.40[1].*]

[2] Use of Form

The form of complaint in [2], *above*, is for use by a passenger to recover from an airport and an airline company damages for personal injuries based on negligence in maintaining an access ramp in an airport.

The form includes allegations that the plaintiff complied with the requirements for filing a tort claim against the public entity that owns and operates the airport (Paragraph 12) [*see Gov. Code §§ 905, 905.2*; for discussion of claims against

public entities, *see* Ch. 464, *Public Entities and Officers: California Tort Claims Act*].

[3] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual damages demanded [*Code Civ. Proc. § 425.10(b)*]. No claim for punitive damages may state an amount sought [*Civ. Code § 3295(e)*; *Code Civ. Proc. § 425.10(b)*]. Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For forms and procedure for use in requesting notice of the specific amount sought, see Ch. 177, *Damages* .

[4] Cross References

For discussion and cross references relating to personal injury complaints generally, see *§ 16.41*[2] et seq.

For discussion of complaints against an airport, see *§ 16.90*[2] et seq.

Witkin, California Procedure, vol. 4, *Pleading*, § 548 (4th ed. 1997)

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 1113-1115, 1117 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsNegligenceStandards of CareReasonable CareReasonable PersonTortsTransportation TortsAir TransportationGeneral Overview

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2-16 California Forms of Pleading and Practice--Annotated § 16.92

AUTHOR: By Peter Axelrod, J.D. and George M. Moore, J.D.

§ 16.92 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Patron Against Airpark Operator--Defective Stepladder Provided for Patron's Use

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Patron Against Airpark Operator--Defective Stepladder Provided for Patron's Use

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Negligence)
Defendant(s).	)	[LIMITED CIVIL CASES]
	)	
	)	

_____

Plaintiff alleges:

1. At all times herein mentioned, defendant was, and is, a corporation organized and existing under the laws of California with its principal office in _____County. [*Or allege other capacity and residence.*]

[2. *Fictitious name allegation, if appropriate. See § 16.40[1], Paragraph 3.*]

3. [*Agency allegation, if appropriate. See § 16.40[1], Paragraph 4.*]

4. At all times herein mentioned, defendant _____ [*name*] was engaged in the business of operating an

airpark, located in _____, California, wherein, on the payment of consideration, the defendant provided space, equipment, and facilities for the use and convenience of airplane owners who desired to store and maintain airplanes at the defendant's place of business.

5. In connection with defendant's place of business, defendant provided a stepladder for persons maintaining aircraft on the premises for use of the person in climbing on and about their airplanes while servicing and maintaining them. The stepladder was so carelessly and negligently maintained and allowed to become so defective that it was incapable of supporting the weight of an ordinary individual in the use for which it was to be put. Such defect was not open and obvious.

6. On or about _____ [*date*], plaintiff stored his airplane at the airpark, paying a valuable consideration therefor.

7. On or about _____ [*date*], plaintiff obtained from defendant the stepladder for the purpose of cleaning his airplane.

8. Then and there, plaintiff climbed to the _____ [*e.g.*, third] step of the ladder, which due to its defective condition and defendant's negligence, broke, causing plaintiff to fall to the ground, resulting in the following injuries: _____ [*describe injuries*], all to his damage.

9. [*Medical and incidental expenses. See § 16.41[1], Paragraph 7.*]

10. [*Loss of earnings. See § 16.41[1], Paragraph 8.*]

[*Prayer. See § 16.41[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 16.40[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by the patron of an airpark against the airpark operator for damages based on negligence arising from a defective stepladder provided for the patron's use in servicing and maintaining his or her aircraft [*see Quinn v. Whiteman Airport Co. (1955) 132 Cal. App. 2d 374, 376, 282 P.2d 88* (no liability to patron of airpark for injuries resulting from use of defective ladder belonging to airpark when defective condition of ladder is open and obvious)].

[3] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not

known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[4] Ensuing Liability

The fact situation used in this form may give rise to a cause of action based on strict liability in tort against the airpark operator as bailor or lessor of the stepladder [*see Price v. Shell Oil Co. (1970) 2 Cal. 3d 245, 249-250, 85 Cal. Rptr. 178, 466 P.2d 722]* or against the manufacturer, retailer, or others in the chain of distribution, and counsel will want to consider the feasibility of such an action [*see generally* Ch. 460, *Products Liability*].

[5] Cross References

For discussion and cross references relating to personal injury complaints generally, see *§ 16.41*[2] et seq.

For discussion of complaints against an airport, see *§ 16.90*[2] et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsNegligenceStandards of CareReasonable CareReasonable PersonTortsTransportation TortsAir TransportationGeneral OverviewTransportation LawAir TransportationAirports & Airways Development Act

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Volume 3: Alcoholic Beverage Licenses thru Answers-Chs. 18-29
Chapter 18 ALCOHOLIC BEVERAGE LICENSES

3-18 California Forms of Pleading and Practice--Annotated 18.syn

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.syn Synopsis to Chapter 18: ALCOHOLIC BEVERAGE LICENSES

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FOOTNOTES:
(n12)Footnote *. * Solomon, Saltsman & Jamieson is a law firm located in Los Angeles, Calif., specializing in alcoholic beverage control matters, land use planning, constitutional law, and civil litigation. Ralph Barat Saltsman, a partner, is a graduate of Loyola Law School, and Stephen Warren Solomon, a partner, is a graduate of U.C.L.A. Law School.

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Chapter 18 ALCOHOLIC BEVERAGE LICENSES
PART I. SCOPE

3-18 California Forms of Pleading and Practice--Annotated § 18.01

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§ 18.01 Scope of Chapter

This chapter discusses and contains forms for use in license proceedings under the Alcoholic Beverage Control Act (*Bus. & Prof. Code § 23000 et seq.*).

The chapter contains the following forms:

- Forms for use in proceedings for the issuance of licenses [*see §§ 18.50, 18.51*].

- Forms for use in proceedings relating to the suspension or revocation of licenses [*see §§ 18.55 -18.59*].

- Forms for use in proceedings relating to the administrative review of decisions by the Department of Alcoholic Beverage Control [*see §§ 18.65 -18.67*].

- Forms for use in proceedings relating to judicial review of denial, suspension, or revocation of licenses [*see §§ 18.70 -18.72*].

- A form to compel the Department of Alcoholic Beverage Control to perform administrative duties [*see § 18.80*].

- Forms to recover sums due:

  - A form of complaint for recovery of illegally collected excise taxes that were paid under protest [*see § 18.85*].

  - A form of complaint for restitution by a transferee of a license against the transferor and business/escrow holder, after disapproval of the transfer by the Department of

Alcoholic Beverage Control [*see § 18.86*].

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3-18 California Forms of Pleading and Practice--Annotated § 18.02

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§ 18.02 Cross References

- For discussion and forms for use in actions for injuries caused by intoxicated persons, *see* Ch. 19, *Alcoholic Beverages: Civil Liability* .

- For discussion and forms for use in actions to abate a building or place used for unlawful selling or serving alcoholic liquor as a nuisance, *see* Ch. 19, *Alcoholic Beverages: Civil Liability* .

- For a complaint in interpleader by an escrow agent holding funds in connection with transfer of a liquor license, *see* Ch. 253, *Escrows* .

- For forms for use in proceedings for commitment of inebriates, *see* Ch. 304, *Insane and Other Incompetent Persons.*

- For a procedural guide and forms for use generally in proceedings before administrative agencies, see Ch. 473, *Public Agency Adjudication* , et seq.

- For a procedural guide and forms for use in certiorari proceedings, *see* Ch. 492, *Review (Certiorari), Writ of.*

- For a complaint for damages and injunction to restrain a retailer from selling alcoholic beverages below the fair trade price, *see* Ch. 565, *Unfair Competition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicenses

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3-18 California Forms of Pleading and Practice--Annotated §§ 18.03-18.09

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[Reserved]

§§ 18.03[Reserved]

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3-18 California Forms of Pleading and Practice--Annotated § 18.10

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.10 Governing Law

Transportation and importation of alcoholic beverages into any state, territory, or possession of the United States in violation of the local laws of those entities is prohibited by *U.S. Const., amend. XXI, § 2* [*see Granholm v. Heald (2005) 544 U.S. 460, 492, 125 S. Ct. 1885, 1907, 161 L. Ed. 2d 796* (*U.S. Const., amend. XXI, § 2* does not allow states to regulate wine shipments on terms that discriminate in favor of in-state producers)]. Interstate transportation of alcoholic beverages for possession, use, or sale in violation of state or territorial laws is prohibited by *27 U.S.C. § 122*. Intoxicating liquors transported into any state or territory become subject to the laws of that state or territory under *27 U.S.C. § 121*. Interstate commerce laws affecting alcoholic beverages are contained in *27 U.S.C. §§ 201-211*. Laws governing customs inspection and branding of imported liquors are contained in *19 U.S.C. §§ 467, 468*.

The State of California has the exclusive power, subject to the United States internal revenue laws, to license and regulate the manufacture, sale, purchase, possession, and transportation of alcoholic beverages within the state under *Cal. Const., art. XX, § 22*. That provision also establishes the Department of Alcoholic Beverage Control as the agency authorized to license the manufacture, importation, and sale of alcoholic beverages in the state, and to collect license fees in accordance with laws enacted by the state Legislature. Legislation providing for licensing and regulation of alcoholic beverages is contained in the Alcoholic Beverage Control Act (*Bus. & Prof. Code § 23000 et seq.*).

Statutory provisions that govern the transfer or exchange of liquor licenses are contained in *Bus. & Prof. Code §§ 24070-24082*. Provisions regarding transferability of licenses for certain purposes and between certain parties are set forth in *Bus. & Prof. Code §§ 24070.1-24071.1*.

Statutes applying to administrative proceedings generally are contained in *Gov. Code § 11500 et seq.* Administrative regulations governing those licenses and proceedings are set forth in *4 Cal. Code Reg. §§ 1-145, 178 et seq.*

Legal Topics:

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

GovernmentsState & Territorial GovernmentsLicensesTransportation LawInterstate CommerceFederal PowersConstitutional LawProhibitionCriminal Law & ProcedureCriminal OffensesIntoxicating LiquorsGeneral Overview

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3-18 California Forms of Pleading and Practice--Annotated § 18.11

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§ 18.11 Application for License

[1] Requirements Generally

Applications for licenses are made to the Department of Alcoholic Beverage Control on a prescribed form, and must be accompanied by information that the Department requires to assist it in determining whether the applicant and the premises qualify for a license [*Bus. & Prof. Code § 23950*]. The requirements for the contents of an application are set forth in *Bus. & Prof. Code §§ 23951-23954*. The application must be accompanied, at the time of filing, by the necessary application fees [*Bus. & Prof. Code §§ 23954.5-23957*].

[2] Posting of Notice

After filing an application to engage in the sale of any alcoholic beverage at any premises, the applicant must post a notice of intention to commence in a conspicuous place at the entrance to the premises. No license may be issued for the premises until the notice has been posted for at least 30 consecutive days [*Bus. & Prof. Code § 23985*].

If the application is for a retail license at a premises that is not currently licensed, or is licensed for a different retail license, the applicant must also [*Bus. & Prof. Code § 23985.5*]:

- Mail notification of the application to every resident of real property within a 500-foot radius of the premises for which the license is to be issued; and

- Submit proof of compliance to the Department of Alcoholic Beverage Control prior to license approval.

If the application was for an on sale license (a license to sell alcoholic beverages for consumption on the licensed premises [*Bus. & Prof. Code §§ 23396, 23396.5, 23399*]), the applicant must publish a notice of the application in a newspaper of general circulation and file an affidavit of publication with the Department [*Bus. & Prof. Code § 23986(a)*; *Code Civ. Proc. § 2015.5*; *see also Code Civ. Proc. § 2010* (proof of publication by printer)].

Any applicant for an on-sale or off-sale license at a premises that is located in a census tract that has an undue concentration of licenses must cause a notice of the application to be published in a newspaper of general circulation other than a legal or trade publication [*Bus. & Prof. Code § 23986(b)*; *see Bus. & Prof. Code § 23958.4(a)(2), (3)* (definition of "undue concentration of licenses")].

The publication must be made in the city in which the premises are situated. If the premises are not in a city, the publication must be made in a newspaper of general circulation nearest the premises where the business is to be conducted. The form of the notice shall be prescribed by the Department. An affidavit of publication must be filed with the Department before a license is issued [*Bus. & Prof. Code § 23986(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicenses

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3-18 California Forms of Pleading and Practice--Annotated § 18.12

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.12 Investigation of License Applicants

When the Department of Alcoholic Beverage Control receives the applicable fee and an application for a license or for the transfer of a license, it makes a thorough investigation to determine whether the applicant and the premises qualify for a license and whether the applicant has complied with the provisions of *Bus. & Prof. Code § 23000 et seq.* Investigation includes all matters connected with the application that may affect the public welfare and morals. The Department may deny an application for a license if issuance of the license would tend to create a law enforcement problem, or if issuance would result in or add to an undue concentration of licenses, and the applicant fails to show that public convenience or necessity would be served by issuance [*Bus. & Prof. Code § 23958*; *see Bus. & Prof. Code § 23958.4(b)* (exceptions); *see also Bus. & Prof. Code § 23958.4(a), (c)* (definitions)].

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3-18 California Forms of Pleading and Practice--Annotated § 18.13

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.13 Protest Against License

[1] Procedure

A person may file a protest against issuance of a license at any office of the Department of Alcoholic Beverage Control within 30 days from the first date of posting the notice of intention to engage in the sale of alcoholic beverages at the premises, within 30 days of the mailing of the notification pursuant to *Bus. & Prof. Code § 23985.5*, or within 30 days of the mailing of the notices of the Department of Alcoholic Beverage Control to public officials as required by *Bus. & Prof. Code § 23987*, whichever is later [*Bus. & Prof. Code § 24013(a)*]. The time within which a local law enforcement agency may file a protest may be extended by the period prescribed in section *Bus. & Prof. Code § 23987*, pursuant to a request made under that section [*Bus. & Prof. Code § 24013(a)*].

The protest must state the name of the applicant, the exact address of the proposed premises, and must be signed by the protestant [Department of Alcoholic Beverage Control Publication ABC-510-A (11/03)].

For a form of protest against issuance of license, *see § 18.50*.

A protest by any person other than an employee of the Department or a public officer must be verified. Verification may be on information and belief [*Bus. & Prof. Code § 24014*]. For a form of verification, *see § 18.70[1]*.

[2] Grounds

The protest must set forth the particular ground of objection, and also specify the facts that support these objections [Department of Alcoholic Beverage Control Publication ABC-510-A (11/03)].

A city or county does not have the right to make a general or blanket protest against the policy of issuing licenses [*San Diego v. State Board of Equalization (1947) 82 Cal. App. 2d 453, 464-465, 186 P.2d 166]* . A city or county official, school official, church representative, or other interested person who desires to protest the granting of a license in a specific case is required by law to state in the protest a valid ground of denial relating to the particular application [

San Diego v. State Board of Equalization (1947) 82 Cal. App. 2d 453, 464-465, 186 P.2d 166] .

Some of the grounds of protest which could relate to public welfare and morals are as follows [Department of Alcoholic Beverage Control Publication ABC-510-A (11/03); *see SP Star Enterprises, Inc. v. City of Los Angeles (2009) 173 Cal. App. 4th 459, 474-477, 93 Cal. Rptr. 3d 152* (looking at factors to deny license)]:

- The premises are located within the immediate vicinity of a school, church, hospital, or children's public playground and the normal operation of the licensed premises would interfere with their respective functions. It will be necessary to establish specifically the detrimental factors which would affect the facility. However, mere proximity to such consideration points is not sufficient grounds in and of itself to support a denial.

- The premises are located in a residential area, and the normal operation of the licensed premises would interfere with the quiet enjoyment of their property by the residents of the area. It will be necessary to identify specifically how the residents will be affected.

- Licensing the premises would create a public nuisance as defined in *Penal Code § 370*. The specific facts leading to this conclusion must be stated.

- Issuance of the license to the premises would tend to create a law enforcement problem or aggravate an already existing police problem.

- Issuance of the license to the premises would result in or add to undue concentration of licenses.

- Licensing the premises would be contrary to the provisions of a valid zoning ordinance.

- The applicant is not the true or sole owner of the business to be licensed. It will be necessary to present evidence and/or testimony as to the true ownership.

- The applicant has been convicted of a felony or of a crime involving moral turpitude, or of one of the offenses listed in *Bus. & Prof. Code § 24200(b)* (Alc. Bev. Control Act).

- The applicant has a record of chronic insobriety.

- The applicant has a police record that disqualifies him/her for a license.

[3] Hearing

A hearing must be held on a valid protest so as to afford the applicant the right to meet the objections with whatever appropriate evidence he or she may have available [Department of Alcoholic Beverage Control Publication ABC-510-A (11/03)]. The mere submission of a protest against issuance of a particular license does not complete the matter. The protestant must attend the hearing to present testimony and/or evidence to substantiate the protest [Department of Alcoholic Beverage Control Publication ABC-510-A (11/03)].

The applicant bears the burden of proof regarding the applicant's eligibility for a liquor license from the start of the application process until the Department makes a final determination [*Coffin v. Alcoholic Bev. Control Appeals Bd. (2006) 139 Cal. App. 4th 471, 473, 43 Cal. Rptr. 3d 420]* .

Any hearing held in response to a protest must be held no later than 60 days after receipt of the protest by the State Office of Administrative Hearings [*Bus. & Prof. Code § 24015*].

The applicant must be furnished with a statement of issues to be determined at the hearing, which must set forth the specific objection or objections to the granting of the license [Department of Alcoholic Beverage Control Publication ABC-510-A (11/03)]..

[4] Rejection of Protest

The Department may reject any protest at any time before a hearing, except a protest by a public agency or a public official or protests by the governing body of a city or county, at any time after determining that the protest is false, vexatious, or without reasonable or probable cause [*Bus. & Prof. Code § 24013*].

If the Department rejects a protest and issues a license, a protestant whose protest has been rejected may, within 10 days after the issuance of the license, file an accusation with the Department alleging the grounds of protest as a cause for revocation of the license, and the Department will then hold a hearing as provided in the Administrative Procedure Act [*Bus. & Prof. Code § 24013*]. This procedure does not restrict any right that the individual making the protest might have to any judicial proceeding [*Bus. & Prof. Code § 24013*].

If, after investigation, the Department recommends issuance of a license notwithstanding a protest by a public agency, public official, or the governing body of a city or county, the Department must notify that agency, official, or governing body in writing of its determination and its reasons for the determination, in conjunction with the notice of hearing provided to the protestant according to the Administrative Procedure Act [*Bus. & Prof. Code § 24013*; *see also Gov. Code § 11509*; § 18.16[2], for discussion relating to notice].

[5] Withdrawal of Application

If an application is withdrawn as a result of any protest being filed opposing issuance of the license, the applicant may not refile an application for the same location for a period of one year from the date of the withdrawal [*Bus. & Prof. Code § 24013.1*]. Furthermore, all verified protests filed against the issuance of the license remain valid against any subsequent applications filed for the premises for a period of one year from the date of withdrawal [*Bus. & Prof. Code § 24013.2*].

[6] Interim Retail Permit

The Department of Alcoholic Beverage Control, in its discretion, may issue an interim retail permit to an applicant for any retail license to operate the premises during the period an application for a license is pending, and when all of the following conditions exist [*Bus. & Prof. Code § 24044.5*]:

- The application has been protested.
- The Department has made a determination based upon its investigation that the license should be issued.
- The applicant for the interim retail permit has filed with the Department an application for issuance of a license at the premises to himself or herself.
- The application for the interim permit is accompanied by a fee of $100.

An interim retail permit is for a period not to exceed 120 days, and may be extended at the discretion of the Department for an additional 120 day period upon payment of an additional fee of $100 and compliance with all conditions set forth in *Bus. & Prof. Code § 24045.5* [*Bus. & Prof. Code § 24044.5(b)*]. An interim retail permit may be canceled or

suspended summarily at any time if the Department determines that good cause for the cancellation or suspension exists [*Bus. & Prof. Code § 24044.5(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceTypesPublic NuisanceGovernmentsLocal GovernmentsLicenses

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3-18 California Forms of Pleading and Practice--Annotated § 18.14

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.14 Denial of License

[1] Authority of Department

The Department of Alcoholic Beverage Control has the power, in its discretion, to deny a license application or suspend or revoke an issued license if it determines on good cause that [*Cal. Const., art. XX, § 22*]:

- Granting the application or allowing the license to remain in force would be contrary to public welfare or morals; or

- The applicant or licensee has violated any law prohibiting conduct involving moral turpitude.

The Department's constitutional discretion is not absolute but must be exercised in accordance with the law. The requirement to act on good cause necessarily implies that decisions must be based on sufficient evidence and that the Department may not act arbitrarily in determining what is contrary to public welfare or morals [*Kirby v. Alcoholic Bev. etc. Appeals Bd. (1972) 7 Cal. 3d 433, 436-437, 102 Cal. Rptr. 857, 498 P.2d 1105* ; *Department of Alcoholic Bev. Control v. Alcoholic Bev. etc. Appeals Bd. (1981) 122 Cal. App. 3d 549, 557, 175 Cal. Rptr. 342]* .

[2] Petition Following Denial of License

The Department of Alcoholic Beverage Control must immediately notify the applicant in writing after denying an application for a license. Within 10 days after the Department mails the notice, the applicant may present his or her written petition for a license to the Department [*Bus. & Prof. Code § 24011*]. The petition is set for hearing on receipt by the Department of a petition for a license in proper form [*Bus. & Prof. Code § 24012*]. The proceedings under *Bus. & Prof. Code §§ 24011-24016* (denial of licenses) are conducted in accordance with *Gov. Code § 11500 et seq.*, and the Department has all the powers granted therein [*Bus. & Prof. Code § 24016*].

For a form of petition following denial of application for license, *see* § 18.52.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicenses

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3-18 California Forms of Pleading and Practice--Annotated § 18.15

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.15 Suspension or Revocation of License

[1] Authority of Department

A license to sell liquor is a privilege that can be granted or withheld by the state. This is true even though a license to practice a trade is generally considered a vested property right. Revocation of a liquor license is expressly authorized in *Cal. Const., art. XX, § 22*. A license may be revoked to protect the public welfare and morals even in the absence of any showing of fault on the part of the licensee [*Yu v. Alcoholic Bev. etc. Appeals Bd. (1992) 3 Cal. App. 4th 286, 297, 4 Cal. Rptr. 2d 280]* . A finding that a licensee has violated provisions of the Alcoholic Beverage Control Act is tantamount to a finding of injury to public welfare and morals [*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2005) 128 Cal. App. 4th 1195, 1217, 27 Cal. Rptr. 3d 766]* . For a discussion of licensing generally, see Ch. 471B, *Licensing by Public Agencies* , et seq.

[2] Grounds

[a] Discretionary Suspension or Revocation

The Department of Alcoholic Beverage Control may suspend or revoke a license on any of the following grounds [*Bus. & Prof. Code § 24200*]:

- Allowing the license to remain in force is contrary to the public welfare or morals [*Cal. Const., art. XX, § 22*].

- The licensee has violated, or caused or permitted a violation of, the Alcohol Beverage Control Act [*Bus. & Prof. Code § 23000 et seq.*], any rules of the State Board of Equalization adopted under *Rev. & Tax. Code § 32001 et seq.* (excise tax provisions), any rules of the Department of Alcohol Beverage Control adopted under the Alcohol Beverage Control Act, or any penal provisions prohibiting or regulating the sale, use, possession, giving away, adulteration, dilution, misbranding, or mislabeling of alcoholic beverages or intoxicating liquors. This ground is subject to any limitations in *Bus. & Prof.*

Code § 25000 et seq. (beer price posting and marketing regulations).

- The licensee misrepresented a material fact in obtaining any license.

- The licensee has been convicted on a plea, verdict, or judgment of guilty, or a plea of nolo contendere, of any public offense involving moral turpitude or under any federal law prohibiting or regulating the sale, exposing for sale, use, possession, or giving away of alcoholic beverages or intoxicating liquors or prohibiting the refilling or reuse of distilled-spirits containers.

- The licensee has failed to take reasonable steps to correct objectionable conditions on the licensed premises or an adjacent area owned, leased, or rented by the licensee, that constitute a nuisance, within a reasonable time after receipt of notice to make those corrections from a district attorney, city attorney, county counsel, or the Department, under *Penal Code § 373a* (maintaining or permitting nuisance).

- The licensee has failed to take reasonable steps to correct objectionable conditions that occur during business hours on any public sidewalk abutting the licensed premises and that constitute a nuisance, within a reasonable time after receipt of written notice to correct these conditions from the Department.

The Department will issue this written notice on its own determination, or on a request from the local law enforcement agency in whose jurisdiction the premises are located, if there is substantial evidence that persistent objectionable conditions are occurring on the public sidewalk abutting the licensed premises [*Bus. & Prof. Code § 24200*; *see Bus. & Prof. Code § 24200(f)(1)-(3)* (definitions); *see also Bus. & Prof. Code § 24200(g)* (exceptions)].

[b] Mandatory Revocation

The Department of Alcoholic Beverage Control must revoke a license on either of the following grounds [*Bus. & Prof. Code § 24200.5*]:

- A retail licensee has knowingly permitted the illegal sale, or negotiations for illegal sales, of controlled substances or dangerous drugs on the licensed premises.

- The licensee has employed or permitted any persons to solicit or encourage others, directly or indirectly, to buy them drinks on the licensed premises under any commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy.

[c] Automatic Suspension on Cancellation of Bond, or Failure to Pay Taxes

[i] Security Requirements

The State Board of Equalization, whenever it deems it necessary, may require any licensee to place with it, in the form and amount that the Board prescribes, any security in the form of cash, insured deposits in banks and savings and loan institutions, or a bond or bonds executed by an admitted surety insurer, payable to the state, conditioned upon faithful performance of all of the requirements of *Rev. & Tax Code § 32001 et seq.*, and expressly providing for the payment of all license taxes, penalties, and other obligations of the person arising out of *Rev. & Tax Code § 32001 et seq.*, to be held in trust and used solely in the manner provided [*Rev. & Tax Code § 32102*].

The State Board of Equalization fixes the total amount of the security required of any licensee, and may increase or reduce the amount at any time [*Rev. & Tax Code § 32103*]. In fixing the total amount, the Board may set an amount which is not less than $500, and not more than [*Rev. & Tax Code § 32103*]:

- Twice the licensee's estimated monthly tax for the tax reporting period, for taxpayers reporting monthly, or

- Twice the licensee's estimated tax for the tax reporting period, for taxpayers reporting for periods longer than one month.

Every bond must contain a provision substantially that when the surety exercises his or her right to withdraw as surety, the withdrawal is to be effective [*Rev. & Tax Code § 32104*]:

- If the notice is received on or before the 15th day of the month, on the first day of the calendar month after receipt of the notice by the State Board of Equalization.

- Otherwise, on the first day of the second calendar month after receipt of the notice by the Board.

[ii] Automatic Suspension of License

A license is automatically suspended [*Bus. & Prof. Code § 24205*]:

- Upon cancellation of the licensee's bond (if, as required security, the licensee has elected to post a bond) [*see Rev. & Tax Code § 32102*];

- If the licensee's bond becomes void or unenforceable for any reason; or

- If the licensee fails to pay any taxes or penalties under the Sales and Use Tax Law [*see Rev. & Tax Code § 6001 et seq.*], the Bradley-Burns Uniform Local Sales and Use Tax Law [*see Rev. & Tax Code § 7200 et seq.*], the Transactions and Use Tax Law Law [*see Rev. & Tax Code § 7251 et seq.*], when that liability arises in whole or in part from exercising the privilege of an alcoholic beverage license, or the Alcoholic Beverage Tax Law [Rev. & Tax Code § 24205; *see Rev. & Tax Code § 32001 et seq.*].

A suspension for tax delinquency may only be imposed if the taxpayer is at least three months delinquent [*Bus. & Prof. Code § 24205*].

The license is automatically reinstated if the licensee files a valid bond, or pays the delinquent taxes, as the case may be [*Bus. & Prof. Code § 24205*].

On the suspended licensee's petition, a hearing may be held to determine whether the suspension in valid, after five days' notice of the time and place of hearing [*Bus. & Prof. Code § 24205*]. For a petition for hearing on automatic suspension of license for cancellation of bond or failure to pay taxes, *see § 18.55*.

[3] Accusations to Suspend or Revoke License

[a] Right to File Accusation

Any person may make an accusation against any licensee to the Department of Alcoholic Beverage Control. Accusations must be in writing and state one or more grounds that would authorize the Department to suspend or revoke the license or licenses of the licensee against whom the accusation is made [*Bus. & Prof. Code § 24201*]. For a form of accusation, *see § 18.56*.

The accusation must set forth, in ordinary and concise language, the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense [*Gov. Code § 11503*]. It must specify the

statutes and rules which the respondent is alleged to have violated, but must not consist merely of charges phrased in the language of those statutes and rules [*Gov. Code § 11503*].

The accusation must be verified unless made by a public officer acting in his official capacity, or by and employee of the Department [*Gov. Code § 11503*]. The verification may be on information and belief [*Gov. Code § 11503*].

An accusation may also be filed by the legislative body, or chief of police, of any city in which the premises in question are located, or if the premises are in unincorporated territory, then by the board of supervisors, or the sheriff, of the county, requesting the suspension or revocation of any retail license [*Bus. & Prof. Code § 24203*].

On the filing of the accusation, the Department provides for a public hearing in the county in which the premises are located and determines whether or not the license should be revoked or suspended [*Bus. & Prof. Code § 24203*]. Whenever the local legislative body, chief of police, or sheriff certifies that the public safety, health, or welfare requires an immediate hearing of the accusation, the public hearing is held within 60 days after the filing of the accusation with the Department [*Bus. & Prof. Code § 24203*].

At any time before the matter is submitted for decision, the Department may file or permit the filing of an amended or supplemental accusation [*Gov. Code § 11507*]. If the amended or supplemental accusation presents new charges, the Department must afford the respondent a reasonable opportunity to prepare a defense, but the respondent is not entitled to file a further pleading unless the Department, in its discretion, permits otherwise [*Gov. Code § 11507*]. Any new charges are deemed controverted, and any objections to the amended or supplemental accusation made be made orally and must be noted in the record [*Gov. Code § 11507*].

[b] Notice of Defense

[i] In General

The licensee may file with the Department of Alcoholic Beverage Control a notice of defense within 15 days after service on the licensee of the accusation, in which he or she may [*Gov. Code § 11506(a)*]:

- Admit the accusation in whole or in part.
- Request a hearing.
- Object to the accusation on the ground that it does not state acts or omissions on which the Department may proceed.
- Object to the form of the accusation on the ground that it is so indefinite or uncertain that he or she cannot identify the transaction or prepare a defense.
- Object to the accusation on the ground that, under the circumstances, compliance with the requirements of the regulation on which the accusation is based would result in material violation of another regulation enacted by another department that affects substantive rights.
- Present new matter by way of defense.

Within the time specified, the licensee may file one or more notices of defense upon any or all of these grounds, but all such notices must be filed within that period, unless the Department, in its discretion, authorizes the filing of a later notice [*Gov. Code § 11506(a)*].

The notice of defense must be in writing signed by or on behalf of the respondent and must state his or her mailing address. It need not be verified or follow any particular form [*Gov. Code § 11506(c)*]. For a form of notice of defense, *see § 18.57*.

[ii] Right to Hearing

The licensee is entitled to a hearing on the merits if he or she files a notice of defense, and any such notice is deemed a specific denial of all parts of the accusation not expressly admitted [*Gov. Code § 11506(b)*]. Failure to file the notice constitutes a waiver of respondent's right to hearing, but the Department has discretion, nevertheless, to nevertheless grant a hearing [*Gov. Code § 11506(b)*].

[iii] Statement by Way of Mitigation

The licensee may file a statement by way of mitigation even if he does not file a notice of defense [*Gov. Code § 11506(d)*].

[4] Offer in Compromise in Lieu of Suspension

Whenever a decision suspending the petitioner's license for 15 days or less becomes final, whether by failure of the licensee to appeal the decision, or by exhaustion of all appeals and judicial review, the licensee may, before the operative date of the suspension, petition the Department of Alcoholic Beverage Control for permission to make an offer in compromise, to be paid into the Alcohol Beverage Control Fund, consisting of a sum of money in lieu of serving the suspension [*Bus. & Prof. Code § 23095*]. For a form of petition to make offer in compromise, *see § 18.58*.

Upon receipt of the petition, the Department may stay the proposed suspension and cause any investigation to be made which it deems desirable, and may grant the petition if it is satisfied that the following conditions are met [*Bus. & Prof. Code § 23095*]:

- The public welfare and morals would not be impaired by permitting the licensee to operate during the period set for suspension, and the payment of the sum of money will achieve the desired disciplinary purposes, and

- The books and records of the licensee are kept in such a manner that the loss of sales of alcoholic beverages which the licensee would have suffered had the suspension gone into effect can be determined with reasonable accuracy.

The amount of the offer in compromise is the equivalent of 50 percent of the estimated gross sales of alcoholic beverages for each day of the proposed suspension, and the offer is subject to certain minimum and maximum amounts [*Bus. & Prof. Code § 23095*].

For retail licensees, the offer in compromise must be either:

- Not less than $1,500 and not more than $6,000 [*Bus. & Prof. Code § 23095(a)*].

- Not less than $750 and not more than $3,000, if the petitioning retailer has had no other accusation filed against him or her by the Department during the preceding three years from the date of the petition that resulted in a final decision to suspend or revoke the retail license concerned [*Bus. & Prof. Code § 23095(b)*].

For nonretail licensees, the offer in compromise must be not less than $750 and not more than $10,000 [*Bus. & Prof.*

Code § 23095(c)(1); *see Bus. & Prof. Code § 23095(c)(2)* (exception)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsLicensesGovernmentsLocal GovernmentsAdministrative BoardsAdministrative LawAgency AdjudicationHearingsGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 3: Alcoholic Beverage Licenses thru Answers-Chs. 18-29
Chapter 18 ALCOHOLIC BEVERAGE LICENSES
PART II. LEGAL BACKGROUND

3-18 California Forms of Pleading and Practice--Annotated § 18.16

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.16 Hearings on Protest, Accusation, or Petition for License

[1] Place

Hearings on a protest, accusation, or petition for a license are held at the county seat of the county in which the premises or licensee are located [*Bus. & Prof. Code § 24300(a)*]. If a protest is filed against an application for a license and the proposed premises are located within a city, however, the Department of Alcoholic Beverage Control may, in its discretion, hold the hearing within that city, unless the protest is filed by the governing body of the city, in which case the Department *must* hold the hearing within that city [*Bus. & Prof. Code § 24300(b)*].

Hearings before the Department on reconsideration, or after the Department has rejected a proposed decision by an administrative law judge [*see Gov. Code § 11517(c)*], may be held at any place in California where the Department is meeting [*Bus. & Prof. Code § 24300(a)*].

The Department, in its exclusive discretion, must consider scheduling the hearing at a time, including evening hours, at a place convenient to all parties, including any witnesses required to be present, and the public affected [*Bus. & Prof. Code § 24300(a)*].

[2] Conduct of Hearing

Generally, the proceedings are conducted in accordance with *Gov. Code § 11500 et seq.*, and in all cases the Department of Alcoholic Beverage Control has all the powers granted therein [*Bus. & Prof. Code § 24300(a)*]. For discussion of the conduct of administrative proceedings, see Ch. 473, *Public Agency Adjudication* , et seq.

[3] Notice

The Department of Alcoholic Beverage Control must deliver or mail a notice of hearing to all parties at least 10 days prior to the hearing. The hearing may not be prior to the expiration of the time within which the respondent is entitled to file a notice of defense [*Gov. Code § 11509*].

The notice of hearing must include the substance of respondent's rights with respect to representation by counsel, the presentation of evidence, the cross examination of witnesses, and the issuance of subpoenas [*Gov. Code § 11509*; *see* [6], *below*, regarding corporation's right to representation by counsel]. For further discussion of hearing notices, see Ch. 473, *Public Agency Adjudication* , et seq.

[4] Discovery Rights

A party is entitled to have discovery from another party [*Gov. Code § 11507.6*]. The provisions of *Gov. Code § 11507.6* provide the exclusive right to and method of discovery [*Gov. Code § 11507.5*]. For discussion of discovery in administrative proceedings, and for appropriate forms, see Ch. 473, *Public Agency Adjudication* , et seq.

[5] Evidence

At administrative hearings oral evidence is taken only on oath or affirmation [*Gov. Code § 11513(a)*]. Each party has the right to call and examine witnesses, to introduce exhibits, to cross examine opposing witnesses on any matter relevant to the issues, to impeach any witness regardless of which party first called him or her to testify, and to rebut the evidence against him or her [*Gov. Code § 11513(b)*].

If the respondent does not testify in his or her own behalf the respondent may be called and examined as if under cross examination [*Gov. Code § 11513(b)*].

With limited exceptions, the hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence must be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of certain evidence over objection in civil actions [*Gov. Code § 11513(c)*; *see also Big Boy Liquors, Ltd. v. Alcoholic Bev. etc. Appeals Bd. (1969) 71 Cal. 2d 1226, 1230, 81 Cal. Rptr. 258, 459 P.2d 674* (applying *Gov. Code § 11513(c)* to a hearing before the Department of Alcoholic Beverage Control)].

A corporate licensee appearing as a party in an adjudicatory administrative hearing need not be represented by counsel and is entitled to be represented by a nonattorney officer of that corporation [*Caressa Camille, Inc. v. Alcoholic Bev. etc. Appeals Bd. (2002) 99 Cal. App. 4th 1094, 1103, 121 Cal. Rptr. 2d 758* (administrative tribunal is not "court of record" as defined by *Cal. Const., art. VI, § 1* in which corporation must be represented by counsel)].

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence by is not sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The rules of privilege are effective only to the extent that they are otherwise required by statute to be recognized at the hearing, and irrelevant and unduly repetitious evidence must be excluded [*Gov. Code § 11513(c)*].

For further discussion of the conduct of administrative proceedings, see Ch. 473, *Public Agency Adjudication* , et seq.

[6] Representation of Corporation

A court of appeal has held, as a matter of first impression in California, that the general common law rule requiring corporations to be represented by counsel in proceedings before courts of record other than small claims courts does not extend to proceedings before administrative agencies and tribunals [*Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd. (2002) 99 Cal. App. 4th 1094, 1103, 121 Cal. Rptr. 2d 758* (department's decision, upheld by board, to revoke corporation's liquor license was not void for lack of jurisdiction when corporation was represented by nonattorney president at evidentiary administrative hearing before ALJ)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceAdmissibilityGeneral OverviewAdministrative LawAgency AdjudicationHearingsGeneral OverviewGovernmentsLocal GovernmentsLicensesCivil ProcedureDiscoveryGeneral Overview

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Chapter 18 ALCOHOLIC BEVERAGE LICENSES
PART II. LEGAL BACKGROUND

3-18 California Forms of Pleading and Practice--Annotated § 18.17

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.17 Decision of Department

[1] Requirements

The decision must be in writing and contain findings of fact, a determination of the issues presented, and the penalty, if any. The findings may be stated in the language of the pleadings or by reference to the pleadings. Copies of the decision are delivered to the parties personally or sent to them by registered mail [*Gov. Code § 11518*]. The department prosecutor may not have ex parte communications with the department decision-maker about the substance of the case until after the decision is issued [*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal. 4th 1, 8-17, 50 Cal. Rptr. 3d 585, 145 P. 3d 462* ; *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board (2007) 149 Cal. App. 4th 116, 125-131, 57 Cal. Rptr. 3d 6]* .

Although administrative findings must conform to the statutes governing the particular agency, they need not be stated with the formality required in judicial proceedings. In connection with the action of an administrative board, the fact that certain action is taken or recommendation made may raise a presumption that the existence of the necessary facts was ascertained and found [*Martin v. Alcoholic Bev. etc. Appeals Bd. (1959) 52 Cal. 2d 259, 264, 341 P.2d 291]* . Administrative findings may be general as long as they satisfy the dual requirements of making intelligent review by the courts possible and apprising the parties of the basis for administrative action [*Stoumen v. Munro (1963) 219 Cal. App. 2d 302, 311, 33 Cal. Rptr. 305]* .

For further discussion of administrative decisions, see Ch. 473, *Public Agency Adjudication* , and subsequent chapters.

[2] Reconsideration

The Department of Alcoholic Beverage Control itself may order a reconsideration of all or part of the case on its own motion, or on petition of any party [*Gov. Code § 11521(a)*; *see* *Bonnell v. Medical Board of California (2003) 31 Cal. 4th 1255, 1259-1261, 8 Cal. Rptr. 3d 532, 82 P.3d 740* (interpreting statute)]. The power to order a reconsideration expires [*Gov. Code § 11521(a)*]:

- 30 days after the delivery or mailing of a decision to respondent, or
- On the effective date of the decision if it occurs before the 30-day period elapses, or
- At the termination of a stay of the decision (which cannot exceed 30 days) granted by the Department to enable the respondent to file a petition for reconsideration.

If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of any of the applicable periods, the Department may grant a stay of that expiration for no more than 10 days, solely for the purpose of considering the petition [*Gov. Code § 11521(a)*]. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is deemed denied [*Gov. Code § 11521(a)*].

The case may be reconsidered by the Department itself on all pertinent parts of the record, and on any additional evidence and argument as may be permitted, or may be assigned to an administrative law judge, whose reconsideration is subject to the procedure provided in *Gov. Code § 11517* [*Gov. Code § 11521(b)*].

If oral evidence is introduced before the Department itself, no member of the Department may vote unless he or she heard the evidence [*Gov. Code § 11521(b)*].

[3] Review of Penalty

The Department of Alcoholic Beverage Control may order a reconsideration of all or part of the case on its own motion or on petition of any party [*Gov. Code §§ 11501, 11521*]. Further, the Department may, on its own motion at any time before a penalty assessment is placed into effect, and without any further proceedings, review the penalty [*Bus. & Prof. Code § 24211*]. Review of the penalty, however, is limited to its reduction [*Bus. & Prof. Code § 24211*]. This applies only to a reduction of a penalty at a time after the penalty is actually set by administrative action, and before it is placed in effect by the Department. An offer of settlement by the Department does not "set" the penalty so as to cause application of *Bus. & Prof. Code § 24211* [*Kirby v. Alcoholic Bev. etc. Appeals Bd. (1971) 17 Cal. App. 3d 255, 261-262, 94 Cal. Rptr. 514]* .

For a form of petition for reconsideration of penalty assessment, *see § 18.59*.

[4] Stay of Decision

No decision of the Department of Alcoholic Beverage Control is effective during the period in which an appeal may be filed, and the filing of an appeal stays the effect of the decision until such time as a final order is made by the Alcoholic Beverage Control Appeals Board [*Bus. & Prof. Code § 23082*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicensesAdministrative LawAgency AdjudicationDecisionsGeneral Overview

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3-18 California Forms of Pleading and Practice--Annotated § 18.18

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§ 18.18 Administrative Appeal to Appeals Board

[1] Scope of Review

The Alcoholic Beverage Control Appeals Board determines the appeal on the record of the Department and on any briefs that may be filed by the parties [*Bus. & Prof. Code § 23083*]. The Appeals Board may not receive any evidence other than that contained in the record of the proceedings of the Department [*Bus. & Prof. Code § 23083*]. If any party to the appeal requests the right to appear before the Appeals Board, the Board fixes a time and place for argument [*Bus. & Prof. Code § 23083*].

The review by the Appeals Board of a decision of the Department is limited to the following questions [*Cal. Const., art. XX, § 22*; *Bus. & Prof. Code § 23084*]:

- Whether the Department proceeded without, or in excess of, its jurisdiction.
- Whether the Department proceeded in the manner required by law.
- Whether the decision is supported by the findings.
- Whether the findings are supported by substantial evidence in the light of the whole record.
- Whether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the Department.

The Appeals Board may not reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although equally reasonable, result [*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (2004) 118 Cal. App. 4th 1429, 1437, 13 Cal. Rptr. 3d 826* (court reversed Board when Board overruled Department's determination of factual issue)].

[2] Notice of Appeal

[a] Requirements for Appeal

On or before the tenth day after the last day on which reconsideration of a final decision of the Department of Alcoholic Beverage Control can be ordered, any party aggrieved by a final decision of the Department may file an appeal with the Alcoholic Beverage Control Appeals Board on such decision [*Bus. & Prof. Code § 23081*; *see Reimel v. House (1968) 264 Cal. App. 2d 173, 175, 70 Cal. Rptr. 224* (holding that notice of appeal must be filed on or before 10th day following 30th day after delivery or mailing of decision)]. For discussion of reconsideration of a decision, *see Gov. Code § 11521*; *see also § 18.16[2]*.

An appeal to the Appeals Board is deemed filed on the date it is received in the principal office of the Appeals Board, except that an appeal mailed to the Board by means of registered mail is deemed filed on the date of the registry with the United States Post Office [*Bus. & Prof. Code § 23081.5*].

A copy of the appeal must be mailed by the appellant to each party who appeared in the proceeding before the Department, including the Department which is thereafter treated in all respects as a party to the appeal [*Bus. & Prof. Code § 23081*]. The right to appeal is not affected by failure to seek reconsideration before the Department [*Bus. & Prof. Code § 23081*].

[b] Form of Notice of Appeal

The appeal must be typewritten or printed upon paper 81/2 x 11 inches in size and be double spaced [*4 Cal. Code Reg. § 183*]. It must be signed by the appellant or his authorized agent, and should state the general grounds for appeal, and the specific questions to be considered by the Appeals Board on review [*4 Cal. Code Reg. § 184*]. For discussion of the grounds for appeal, *see § 18.18[1]*.

The original and three copies of the notice of appeal must be filed with the Appeals Board, and a copy must also be served upon all parties to the proceeding before the Department, including the Department at its principal office in Sacramento [*4 Cal. Code Reg. § 184*]. Service must be made by delivering or mailing a copy of the notice of appeal to each party [*4 Cal. Code Reg. § 184*]. Proof of service must be filed with the original notice of appeal [*4 Cal. Code Reg. § 184*].

For a form of notice of appeal, *see § 18.65*.

[3] Record on Appeal

[a] Request for Preparation of Transcript and Record

When a notice of appeal has been filed with the Appeals Board, the Board is to request the Department of Alcoholic Beverage Control to furnish the appellant an itemized statement of the estimated cost of the record on appeal in accordance with the fee schedule provided in *Gov. Code § 69950* [*4 Cal. Code Reg. § 187*]. The cost is to include filing of the original and three copies of the transcript and record, including the original exhibits, with the Appeals Board [*4 Cal. Code Reg. § 187*]. The statement of costs is to include the cost of preparing and delivering to the appellant a copy of the reporter's transcript, exhibits, and file transcript, if any or all are requested by the appellant [*4 Cal. Code Reg. § 187*]. If the Department previously ordered a transcript because of action it took under *Gov. Code § 11517(c)*, the appellant need only pay for the copies [*4 Cal. Code Reg. § 187*]. The Department is to calculate the cost, notify the appellant of the cost, and demand payment [*4 Cal. Code Reg. § 190*]. The appellant must make payment to the Department within 15 days after the Department issues the demand [*4 Cal. Code Reg. § 190*].

On payment by the appellant of the amount specified, the Department is to forthwith arrange for the preparation and

delivery of the record on appeal [*4 Cal. Code Reg. § 187*].

For a form of request for transcript and record, *see § 18.66*.

PRACTICE TIP:

On payment by the appellant of the amount specified, the Department of Alcoholic Beverage Control forthwith arranges for the preparation of the record on appeal, and delivers a copy of the record to the appellant, including copies of exhibits. A lengthy administrative hearing can result in transcripts not being prepared for several months. *By Solomon, Saltsman & Jamieson*

[b] Content of Record

The record on appeal consists of [*4 Cal. Code Reg. § 188*]:

- The file transcript, including all pleadings and correspondence by a party; notices and orders issued by either the administrative law judge or the Department, including any proposed decision by an administrative law judge and the final decision issued by the Department; and notices, orders, pleadings, and correspondence relating to reconsideration.
- The hearing reporter's transcript of all proceedings.
- Exhibits admitted or rejected.

The notice of appeal, any papers, petitions, affidavits, declarations, or documents received by the Appeals Board in connection with the appeal become part of the record [*4 Cal. Code Reg. § 189*].

[4] Briefs

If the parties desire to submit written argument, the appellant may file an opening brief, the respondent may file a reply brief, and the appellant may file a closing brief [*4 Cal. Code Reg. § 193*]. The format and filing requirements of briefs are specified in *4 Cal. Code Reg. § 193(a)*.

The opening brief is required to be served and filed within 15 days after notice by the Appeals Board that the record on appeal has been filed with the Board [*4 Cal. Code Reg. § 193(b)*]. The reply brief is required to be served and filed within 15 days after the filing of the opening brief with the Board [*4 Cal. Code Reg. § 193(b)*]. The closing brief is required to be served and filed within five days after the filing of the reply brief with the Board. No extension of time to file briefs will be granted except for good cause [*4 Cal. Code Reg. § 193(b)*].

[5] Motions

Any motion filed with the Appeals Board must comply with the format and filing requirements of *4 Cal. Code Reg. § 193(a)* [*4 Cal. Code Reg. § 198.1*]. Any showing in opposition to the motion of a party must be served and filed within 10 days after the date on the notice by the Appeals Board providing therefor [*4 Cal. Code Reg. § 198.1*]. The Board may place any motion on the calendar for hearing or may otherwise dispose of the motion [*4 Cal. Code Reg. § 198.1*].

[6] Oral Argument

Unless otherwise ordered by the Appeals Board [*4 Cal. Code Reg. § 197(a)*]:

- Each party is allowed a maximum of 30 minutes for oral argument.

- Not more than one person on a side need be heard.

- The appellant or the moving party has the right to open and close.

PRACTICE TIP:
It is rare that an appellant requires more than 30 minutes for oral argument, but the forum is generally fairly relaxed about this limitation. *By Solomon, Saltsman & Jamieson*

[7] Continuances

Continuances of oral argument will be granted only on a showing of good cause [*4 Cal. Code Reg. § 197(b)*].

[8] Dismissal of Appeal

The Appeals Board may issue an order dismissing an appeal [*4 Cal. Code Reg. § 199*]:

- On the filing by appellant with the Board a request to dismiss the appeal.

- On motion of a party, or the Board itself, that appellant has failed to perfect the appeal by failure to timely file appeal or to pay the amount specified pursuant to *4 Cal. Code Reg. §§ 187* and *190*.

- On certification by the Department that reconsideration has been granted in the case, in which case dismissal is to be without prejudice to the filing of a subsequent appeal.

- On motion by the Department or other party, or on the Board's own motion, if sufficient cause exists for dismissal [*4 Cal. Code Reg. § 199*].

[9] Settlement Pending Appeal

Whenever any matter is pending before the Appeals Board or a court of record involving a dispute between the Department of Alcoholic Beverage Control and a licensee, petitioner or protestant, and the parties to the dispute agree on a settlement or adjustment, the tribunal must, on stipulation by the parties that an agreement has been reached, remand the matter to the Department [*Bus. & Prof. Code § 23087*].

[10] Decision of Appeals Board

[a] General Requirements

[i] Time and Form

In all cases, the Appeals Board must enter its order within 60 days after the filing of the appeal [*Bus. & Prof. Code § 23086*]. Each order of the Appeals Board on appeal from a decision of the Department of Alcoholic Beverage Control must be in writing [*Bus. & Prof. Code § 23088*].

[ii] Filing and Service

The order of the Appeals Board is filed by delivering copies to the parties personally, or by mailing copies to them by certified mail [*Bus. & Prof. Code § 23088*].

[iii] Finality

The order becomes final on being filed, and there may be no reconsideration or rehearing by the Appeals Board [*Bus. &*

Prof. Code § 23088].

[b] Remand on Grounds of New Evidence

If the Appeals Board finds there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or was improperly excluded at the hearing before the Department of Alcoholic Beverage Control, the Board may enter an order remanding the matter to the Department for reconsideration in the light of the evidence [*Cal. Const., art. XX, § 22*; *Bus. & Prof. Code § 23085*; *4 Cal. Code Reg. § 198*]. Cumulative evidence does not constitute a valid ground for remand [*4 Cal. Code Reg. § 198*].

The party making the request must set forth the following in the form of a declaration or affidavit [*4 Cal. Code Reg. § 198*]:

- The substance of the newly discovered evidence.
- Its relevancy and that part of the record to which it pertains.
- The names of witnesses to be produced and their expected testimony.
- The nature of any exhibits to be introduced.
- A detailed statement of the reasons why the evidence could not, with due diligence, have been discovered or produced at the hearing before the Department.

For a form of declaration of merits in support of a request to remand proceedings to the Department on the grounds of newly discovered evidence, *see § 18.67*.

[c] Affirming or Reversing Department Decision

In all appeals (other than those which the Appeals Board remands to the Department of Alcoholic Beverage Control on the grounds of new evidence [*see* [b], *above*]) the Appeals Board must enter an order either affirming or reversing the decision of the Department [*Bus. & Prof. Code § 23085*]. When the order reverses the decision of the Department, the Appeals Board may direct the reconsideration of the matter in the light of its order, and may direct the Department to take such further action as is specially enjoined on it by law [*Bus. & Prof. Code § 23085*]. The order may not limit or control in any way the discretion vested by law in the Department [*Cal. Const., art. XX, § 22*; *Bus. & Prof. Code § 23085*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationReview of Initial DecisionsGovernmentsState & Territorial GovernmentsLicensesAdministrative LawAgency AdjudicationDecisionsContents

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Chapter 18 ALCOHOLIC BEVERAGE LICENSES
PART II. LEGAL BACKGROUND

3-18 California Forms of Pleading and Practice--Annotated § 18.19

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.19 Stay of Administrative Proceedings

The mere filing of a petition for, or the pendency of, a writ of review does not of itself stay or suspend the operation of any order, rule, or decision of the Department [*Bus. & Prof. Code § 23090.6*]. The court before which the petition is filed may, however, stay or suspend, in whole or in part, the operation of the order, rule, or decision of the Department subject to review, on the terms and conditions that the court by order directs [*Bus. & Prof. Code § 23090.6*].

No decision of the Department of Alcoholic Beverage Control that has been appealed to the Appeals Board, and no final order of the Board, is effective during the period in which application may be made for a writ of review [*Bus. & Prof. Code § 23090.7*].

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Chapter 18 ALCOHOLIC BEVERAGE LICENSES
PART II. LEGAL BACKGROUND

3-18 California Forms of Pleading and Practice--Annotated § 18.20

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§ 18.20 Judicial Review of Appeals Board Orders

[1] Right to Judicial Review

Orders of the Appeals Board are subject to judicial review on petition of the Director of the Department of Alcoholic Beverage Control, or any party aggrieved by the order [*Cal. Const., art. XX, § 22*].

[2] Writ of Review

[a] Requirements

Any person affected by a final order of the Appeals Board, including the Department of Alcoholic Beverage Control, may apply to the Supreme Court or to the court of appeal for the appellate district in which the proceeding arose for a writ of review of the final order [*Bus. & Prof. Code § 23090*]. The application must be made within 30 days after filing of the final order of the Appeals Board [*Bus. & Prof. Code § 23090*].

A person whose complaint seeking revocation of another's liquor license has been denied probably has a sufficient beneficial interest to petition for a writ of review [*see Covert v. State Board of Equalization (1946) 29 Cal. 2d 125, 130, 173 P.2d 545* (holding that such a person had standing to petition for writ of mandate prior to enactment of *Bus. & Prof. Code § 23090*, changing procedure from mandate to review)].

Judicial review of cases in which the Appeals Board has reversed the Department is necessarily directed at the decision of the Appeals Board, but any judicial determination of whether the Board exceeded its limited powers incidentally requires a review of the decision of the Department and of the record on which the Department's decision was based [*Martin v. Alcoholic Bev. etc. Appeals Bd. (1961) 55 Cal. 2d 867, 871-872, 13 Cal. Rptr. 513, 362 P.2d 337]* .

Writs of certiorari, or review [*see Code Civ. Proc. § 1067*], generally, are governed by *Code Civ. Proc. §§ 1067-1077*. These provisions, insofar as applicable, apply to writs of review of decisions and orders of the Appeals Board [*Bus. & Prof. Code § 23090.4*]. If a writ petition is filed in superior court, the court must transfer the writ to the Court of Appeal

under the statute mandating that a court lacking subject matter jurisdiction over an action transfer it to a court with jurisdiction [*Padilla v. Department of Alcoholic Beverage Control (1996) 43 Cal. App. 4th 1151, 1157-1158, 51 Cal. Rptr. 2d 133* (when bar owner filed petition for writ of mandate pursuant to *Code Civ. Proc. § 1094.5* in superior court, challenging ABC's decision to revoke alcoholic beverage license, appellate court treated writ as writ of review and denied it); *see Code Civ. Proc. § 396*].

For forms relating to proceedings on petition for writ of review of order by the Appeals Board, *see §§ 18.70 -18.72*. For procedure and forms relating to writs of certiorari generally, see Ch. 492, *Review (Certiorari), Writ of.*

[b] Return of Writ

The writ of review is made returnable at a time and place specified by court order, and must direct the Appeals Board to certify the whole record of the Department of Alcoholic Beverage Control in the case to the court, within the time specified [*Bus. & Prof. Code § 23090.1*]. No new or additional evidence may be introduced in such court, but the cause is heard on the whole record of the Department as certified by the Appeals Board [*Bus. & Prof. Code § 23090.1*].

[3] Writ of Mandate

A writ of mandate lies only from the Supreme Court or the courts of appeal in any proper case [*Bus. & Prof. Code § 23090.5*]. Thus, while under *Bus. & Prof. Code § 23090* "final orders" of the Appeals Board are subject to review by writ of review, under *Bus. & Prof. Code § 23090.5* the appellate courts may issue a writ of mandate when otherwise appropriate to compel the Department of Alcoholic Beverage Control to perform its duties [*see Code Civ. Proc. §§ 1084-1097* (governing writ of mandate generally); *see also Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 7, 95 Cal. Rptr. 329, 485 P.2d 529* (preemptory writ of mandate issued to compel Department to cease enforcing *Bus. & Prof. Code § 25656*, which prohibits employment of women as bartenders, on the ground that such statute is unconstitutional)].

For a form of petition for writ of mandate to compel the Department to perform administrative duties, *see § 18.80*. For procedure and forms relating to writs of mandate generally, see Ch. 358, *Mandate and Prohibition* .

[4] Scope of Judicial Review

The review by the court may not extend further than to determine, based on the whole record of the Department of Alcoholic Beverage Control, as certified by the Appeals Board, whether [*Bus. & Prof. Code § 23090.2*]:

- The Department has proceeded without or in excess of its jurisdiction [*see, e.g., Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd. (2002) 99 Cal. App. 4th 1094, 1103, 121 Cal. Rptr. 2d 758* (department did not proceed without or in excess of jurisdiction by permitting corporation's nonattorney president to represent it at administrative hearing on accusation)].

- The Department has proceeded in the manner required by law [*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal. 4th 1, 8-17, 50 Cal. Rptr. 3d 585, 145 P. 3d 462]* .

- The decision of the Department is supported by the findings.

- The findings in the Department's decision are supported by substantial evidence in the light of the whole record.

- There is relevant evidence which, in the exercise of reasonable diligence, could not have been

produced, or which was improperly excluded at the hearing before the Department.

The court is not permitted to hold a trial de novo, to take additional evidence, or to exercise its independent judgment on the evidence [*Bus. & Prof. Code § 23090.2*; *see SP Star Enterprises, Inc. v. City of Los Angeles (2009) 173 Cal. App. 4th 459, 468-470, 93 Cal. Rptr. 3d 152* (application for permit to sell alcohol at topless bar did not involve fundamental vested right or right of free speech and thereby require court's independent judgment); *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board (2007) 149 Cal. App. 4th 116, 124, 57 Cal. Rptr. 3d 6* ; *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2005) 128 Cal. App. 4th 1195, 1204-1205, 27 Cal. Rptr. 3d 766* (scope of review is "narrow one"); *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (2004) 118 Cal. App. 4th 1429, 1437, 13 Cal. Rptr. 3d 826* (court may not interpose its independent judgment on evidence, and must accept as conclusive the Department's findings of fact)].

The findings and conclusions of the Department on questions of fact are conclusive and final, and are not subject to review [*Bus. & Prof. Code § 23090.3*; *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board (2007) 149 Cal. App. 4th 116, 124, 57 Cal. Rptr. 3d 6* ; *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2005) 128 Cal. App. 4th 1195, 27 Cal. Rptr. 3d 766]* . Questions of fact include ultimate facts and the findings and conclusions of the Department [*Bus. & Prof. Code § 23090.3*]. The Appeals Board, the Department, and each party to the action or proceeding before the Appeals Board, has the right to appear in the review proceeding [*Bus. & Prof. Code § 23090.3*]. Following the hearing, the court must enter judgment either affirming or reversing the decision of the Department, or the court may remand the case for further proceedings before, or reconsideration by, the Department [*Bus. & Prof. Code § 23090.3*].

Insofar as the Department's factual findings are concerned, the scope of review is strictly limited [*Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal. 3d 85, 94, 84 Cal. Rptr. 113, 119, 465 P.2d 1]* . Since the Department is an agency on which the California Constitution has conferred limited judicial powers [*see* Cal. Const., art. XX, § 22], the reviewing court is not entitled to exercise its independent judgment on the effect or weight of the evidence, but is simply called on to determine whether the findings are supported by substantial evidence in the light of the whole record [*Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal. 3d 85, 94, 84 Cal. Rptr. 113, 119, 465 P.2d 1* ; *Caressa Camille, Inc. v. Alcoholic Bev. etc. Appeals Bd. (2002) 99 Cal. App. 4th 1094, 1104, 121 Cal. Rptr. 2d 758* ; *see also Code Civ. Proc. § 1094.5(c)*].

A different set of principles governs judicial review of administrative action to the extent that it consists of declarations or applications of legal rules or is the statement of the conclusions of law that are drawn from facts found in an adjudicatory proceeding [*Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal. 3d 85, 95, 84 Cal. Rptr. 113, 119, 465 P.2d 1]* . In that respect, the decisions of the Appeals Board are subject to review for excess of jurisdiction, errors of law, abuse of discretion, and insufficiency of the evidence [*Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal. 3d 85, 95, 84 Cal. Rptr. 113, 119, 465 P.2d 1* ; *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (2004) 118 Cal. App. 4th 1429, 1437, 13 Cal. Rptr. 3d 826* (court may not interpose its independent judgment on evidence, and must accept as conclusive Department's findings of fact); *Department of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (1981) 122 Cal. App. 3d 549, 554, 175 Cal. Rptr. 342* ; *Kirby v. Alcoholic Bev. etc. Appeals Bd. (1972) 25 Cal. App. 3d 331, 334-335, 101 Cal. Rptr. 815]* .

In determining whether the decision of the Department is arbitrary, its action is measured by the standard set by reason and reasonable people [*Kirby v. Alcoholic Bev. etc. Appeals Bd. (1968) 261 Cal. App. 2d 119, 122, 67 Cal. Rptr. 628, 630]* . The court may not substitute a decision contrary to that made by the Department, even though such decision is equally reasonable, or more reasonable, if the determination by the Department is one that could have been made by reasonable people [*Kirby v. Alcoholic Bev. etc. Appeals Bd. (1968) 261 Cal. App. 2d 119, 122, 67 Cal. Rptr. 628, 630]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewStandards of ReviewGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesCivil ProcedureRemediesWritsCommon Law WritsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusAdministrative LawJudicial ReviewRemediesGeneral Overview

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3-18 California Forms of Pleading and Practice--Annotated § 18.21

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.21 Transfer and Exchange of Licenses

[1] In General

Each license is separate and distinct, and is transferable from the licensee to another person, and from one premises to another premises, on approval by the Department of Alcoholic Beverage Control [*Bus. & Prof. Code § 24070*; *4 Cal. Code Reg. § 60*]. The requirement for approval by the Department is an implied condition of all agreements for the transfer of alcoholic beverage licenses, whatever the context, and whatever the nature of the consideration [*Greve v. Leger, Ltd. (1966) 64 Cal. 2d 853, 859, 52 Cal. Rptr. 9, 415 P.2d 824]* .

A notice of intended transfer is required to be recorded at the county recorder's office prior to filing an application for transfer of certain specifiedtypes of licenses [*Bus. & Prof. Code § 24073*]. Transfer fees charged by the Department are specified in *Bus. & Prof. Code § 24072*.

Exchanges of certain licenses for other types of licenses are permitted as provided in *Bus. & Prof. Code §§ 24072.2* and *24072.5*.

[2] Procedure

The transferee must apply to the Department of Alcoholic Beverage Control for a license of the type to be transferred, and is required to meet all the qualifications required of an original applicant for the license [*4 Cal. Code Reg. § 60(b)*]. The transferor is also required to join in the application [*4 Cal. Code Reg. § 60(b)*]. The transfer fee is to be paid by the transferee, and must accompany the application [*4 Cal. Code Reg. § 60(c)*]. No license may be issued or transferred to any person unless the transferee owns or otherwise has possession and control, or a right to possession and control, of the premises for which he or she makes application for a license, evidenced by an instrument in writing or by other clear and convincing proof [*4 Cal. Code Reg. § 60(m)*].

Every application filed by the intended transferee for the transfer of an on sale or off sale general license (for definitions of these terms *see Bus. & Prof. Code §§ 23394, 23396, 23399*) must indicate whether the consideration, if any, to be

paid to the transferor includes payment for any or all of the following, and if so, the actual amount of the consideration [*Bus. & Prof. Code § 24080*]:

- Inventory.
- Fixtures.
- Transfer of the license.

If an intended transfer of a license involves a purchase price or a consideration, the licensee and intended transferee must establish an escrow before filing a transfer application with the Department, and the intended transferee must deposit with the escrow holder the full amount of the purchase price or consideration [*Bus. & Prof. Code § 24074*]. An exception to this rule applies in the case of certain fiduciaries [*Bus. & Prof. Code § 24075*]. The licensee and intended transferee must also enter into an agreement directing the escrow holder, after the state taxes referred to in *Bus. & Prof. Code § 24049* have been satisfied, to pay the claims of the licensee's bona fide creditors who have filed claims with the escrow holder before the Department notifies the escrow holder that the transfer has been approved [*Bus. & Prof. Code § 24075*]. The agreement must also provide for distribution of the consideration in accordance with the priorities set out in *Bus. & Prof. Code § 24074*, if the purchase price or consideration is insufficient to pay the claims in full [*Bus. & Prof. Code § 24074*].

This procedure constitutes a mandatory and exclusive scheme for payment of creditors of liquor license transferors, giving creditors that comply with *Bus. & Prof. Code § 24074* priority over creditors that effect any form of levy on the proceeds [*Grover Escrow Corp. v. Gole (1969) 71 Cal. 2d 61, 62, 77 Cal. Rptr. 21, 453 P.2d 461]* .

For a form for a complaint for restitution of purchase price against transferee and escrow holder, after disapproval of transfer by the Department, *see § 18.86*.

[3] Temporary Permit

The Department of Alcoholic Beverage Control, in its discretion, may issue a temporary permit to the transferee of any license to continue the operation of the premises during the period a transfer application for the license from person to person at the same premises is pending, and when all of the following conditions exist [*Bus. & Prof. Code § 24045.5*]:

- The premises have been operated under a license within 30 days of the date of filing the application for a temporary permit.
- The license for the premises has been surrendered pursuant to the rules of the Department.
- The applicant for the temporary permit has filed with the Department an application for transfer of the license to himself or herself.
- The application for the temporary permit is accompanied by a temporary permit fee of $100.

A temporary permit is for a period not to exceed 120 days, and may be extended at the discretion of the Department for an additional 120 day period upon payment of an additional fee of $100 and compliance with all conditions set forth in *Bus. & Prof. Code § 24045.5* [*Bus. & Prof. Code § 24045.5*]. A temporary permit may be canceled or suspended summarily at any time if the Department determines that good cause for the cancellation or suspension exists [*Bus. & Prof. Code § 24045.5(d)*].

[4] License as Security

A licensee may not pledge the license as security for a loan, or as security for the performance of any agreement [*Bus. & Prof. Code § 24076*]. No license may be transferred for any of the following purposes [*Bus. & Prof. Code § 24076*]:

- To satisfy or to fulfill an agreement entered into more than 90 days before the date the transfer application is filed.

- To gain or establish a preference to or for any creditor of the transferor (except as provided in *Bus. & Prof. Code § 24074*).

- To defraud or injure any creditor of the transferor.

Notwithstanding the prohibition of pledging a license as security, a party agreeing to purchase licensed premises may grant, and the vendor may take, an option to buy back the liquor license for a substantial consideration in the event the purchaser defaults under the agreement [*Greve v. Leger, Ltd. (1966) 64 Cal. 2d 853, 860, 52 Cal. Rptr. 9, 415 P.2d 824]* .

Once the 90-day window for filing a transfer application is closed, the transfer of a license pursuant to an agreement is unlawful. Therefore, an agreement entered into more than 90 days before the filing of a transfer application may not be specifically enforced. However, the agreement is not for that reason illegal, and the impossibility of performance because of failure to meet the 90-day requirement is not a defense to an action for damages [*Greve v. Leger, Ltd. (1966) 64 Cal. 2d 853, 862, 52 Cal. Rptr. 9, 415 P.2d 824]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAssignmentGeneral OverviewGovernmentsState & Territorial GovernmentsLicenses

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3-18 California Forms of Pleading and Practice--Annotated §§ 18.22-18.29

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[Reserved]

§§ 18.22[Reserved]

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3-18 California Forms of Pleading and Practice--Annotated § 18.30

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.30 Related Matthew Bender Publications

For memoranda of points and authorities related to forms in this chapter, see California Points and Authorities, Ch. 15, *Alcoholic Beverages* (Matthew Bender)

For discussion and forms relating to the sale of a retail alcoholic beverages license, see California Legal Forms, Ch. 18, Buying and Selling a Retail Alcoholic Beverage License and Business (Matthew Bender)

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3-18 California Forms of Pleading and Practice--Annotated § 18.31

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.31 Federal Constitution

U.S. Const., amend. XVIII, prohibiting transportation, manufacture, or sale of intoxicating liquors, is repealed. *U.S. Const., amend. XXI, § 1*

Transportation or importation of alcoholic beverages into state, territory, or possession of United States in violation of local laws thereof is prohibited. *U.S. Const., Amend. XXI, § 2*

Legal Topics:

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

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3-18 California Forms of Pleading and Practice--Annotated § 18.32

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.32 Federal Statutes

Unlawful liquor traffic. *18 U.S.C. §§ 1261-1265*

Seizure and forfeiture of liquor involved in violation of *18 U.S.C. §§ 1261-1265* (unlawful liquor traffic). *18 U.S.C. § 3667*

Customs inspection and branding of imported liquors. *19 U.S.C. §§ 467, 468*

Federal excise taxes on alcoholic beverages. *I.R.C. § 5000* et seq.

Intoxicating liquors transported into state or territory as subject to laws of such state or territory. *27 U.S.C. § 121*

Interstate transportation of intoxicating liquor for possession, use, or sale in violation of laws of state or territory as prohibited. *27 U.S.C. § 122*

Federal Alcohol Administration Act. *27 U.S.C. §§ 201-211*

Permits are required for interstate and foreign commerce in distilled spirits, wines, and malt beverages. *27 U.S.C. § 203*

Procedure for obtaining permits. *27 U.S.C. § 204*

Unfair competition. *27 U.S.C. § 205*

Bulk sales and bottling. *27 U.S.C. § 206*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesIntoxicating LiquorsDistribution & SaleGeneral OverviewTax LawExcise TaxesAlcohol, Tobacco & Related ItemsAlcoholCriminal Law & ProcedureCriminal OffensesIntoxicating LiquorsTransportationGeneral Overview

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3-18 California Forms of Pleading and Practice--Annotated § 18.33

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.33 State Constitution

Power of State of California to control alcoholic beverages; establishment of Department of Alcoholic Beverage Control and Appeals Board. *Cal. Const., art. XX, § 22*

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3-18 California Forms of Pleading and Practice--Annotated § 18.34

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.34 State Statutes

[1] Administration of Alcoholic Beverage Control Act

Administration of Alcoholic Beverage Control Act by Department of Alcoholic Beverage Control. *Bus. & Prof. Code § 23050*

Action to enjoin violation of Alcoholic Beverage Control Act (*Bus. & Prof. Code § 23000 et seq.*) by Director of Alcoholic Beverage Control. *Bus. & Prof. Code § 23053.1*

[2] Licenses

[a] In General

Authorized unlicensed transactions. *Bus. & Prof. Code §§ 23100-23113*

Licenses and fees. *Bus. & Prof. Code §§ 23300-23455*

Necessity of license. *Bus. & Prof. Code § 23300*

Rights and obligations of licensees. *Bus. & Prof. Code § 23355 et seq.*

Wine sales event permit. *Bus. & Prof. Code § 23399.6*

Club licenses. *Bus. & Prof. Code § 23425 et seq.*

Veterans' club licenses. *Bus. & Prof. Code §§ 23450-23455*

[b] Application for License

Notice by Department of Alcoholic Beverage Control of intention to receive applications for licenses. *Bus. & Prof. Code § 23821*

Application for license. *Bus. & Prof. Code § 23950 et seq.*

Notice of application for license. *Bus. & Prof. Code §§ 23985, 23985.5*

Notice of intent to engage in sale of alcoholic beverages. *Bus. & Prof. Code § 23985*

Affidavit of publication of notice of application. *Bus. & Prof. Code § 23986*

Notice to law enforcement agencies of receipt of application for license by Department of Alcoholic Beverage Control. *Bus. & Prof. Code §§ 23987, 24042*

Protest against issuance of license. *Bus. & Prof. Code §§ 24013-24016*

Hearing. *Bus. & Prof. Code §§ 23805, 24016, 24300*; *Gov. Code § 11500 et seq.*

Notice of denial of license. *Bus. & Prof. Code § 24011*

Petition for hearing after denial of license. *Bus. & Prof. Code §§ 24011, 24012*

Posting of license. *Bus. & Prof. Code § 24046*

[c] Denial

Denial of licenses. *Bus. & Prof. Code §§ 24011-24016*

Petition for hearing on denial of license. *Bus. & Prof. Code §§ 24011, 24012*

Protests. *Bus. & Prof. Code § 24013*

[d] Issuance

Compliance with support order or judgment is prerequisite to issuance or renewal of license. *Bus. & Prof. Code § 31*; *Welf. & Inst. Code § 11350.6*

Restrictions on issuance of licenses. *Bus. & Prof. Code §§ 23770-23827*

Investigation of qualifications for issuance of license; grounds for denial. *Bus. & Prof. Code § 23958*

Exceptions to grounds for denial. *Bus. & Prof. Code § 23958.4(b)*

Notices re license application. *Bus. & Prof. Code §§ 23985-23987*

Issuance and renewal. *Bus. & Prof. Code §§ 24040-24051*

Issuance of interim retail permit. *Bus. & Prof. Code § 24044.5*

[e] Transfer and Exchange

Transfer and exchange generally. *Bus. & Prof. Code §§ 24070-24082*

Transferability of liquor licenses. *Bus. & Prof. Code §§ 24070-24071.1, 24072.1*

Transfer fees. *Bus. & Prof. Code § 24072*

Exchange of licenses. *Bus. & Prof. Code §§ 24072.2, 24072.5*

Notice of intended transfer. *Bus. & Prof. Code § 24073*

Escrow. *Bus. & Prof. Code § 24074 et seq.*

Exemption of fiduciaries from notice of intended transfer and escrow provisions. *Bus. & Prof. Code § 24075*

Pledge agreement to transfer liquor license as security is prohibited. *Bus. & Prof. Code § 24076*

Maximum purchase price for transfer of certain licenses. *Bus. & Prof. Code §§ 24070(d), 24079*

Application for transfer of certain licenses is required to contain certain disclosures regarding consideration. *Bus. & Prof. Code § 24080*

Right of Department of Alcoholic Beverage Control to refuse transfer of license for tax delinquencies. *Bus. & Prof. Code § 24049*

[f] Suspension and Revocation

Sale by brand owner of distilled spirits to wholesaler or rectifier at higher than price permitted by statute is ground for suspension or revocation of license. *Bus. & Prof. Code § 23673*

Grounds. *Bus. & Prof. Code §§ 24200, 24200.5*

Revocation or suspension if licensee violates *Health & Safety Code § 11364.7* regarding furnishing drug paraphernalia. *Bus. & Prof. Code § 24200.6.*

Accusations. *Bus. & Prof. Code §§ 24201, 24203*

Investigations. *Bus. & Prof. Code §§ 24202, 24204*

Automatic suspension of license on cancellation of bond or failure to pay taxes; petition for hearing. *Bus. & Prof. Code § 24205*

Periods of limitation on filing accusations. *Bus. & Prof. Code §§ 24206, 24207*

Commencement of limitations period. *Bus. & Prof. Code § 24208*

Drug paraphernalia offenses under *Health & Safety Code § 11364.7* are grounds for revocation of license if committed in course of business. *Health & Safety Code § 11364.7(d)*

[3] Imports

Regulation of imported alcoholic beverages. *Bus. & Prof. Code §§ 23660 et seq.*

Out-of-state distilled spirits shipper's certificate required. *Bus. & Prof. Code §§ 23366.2, 23366.3*

Out-of-state tied-house allowance. *Bus. & Prof. Code § 25503.41*

[4] Administrative Hearings

[a] Conduct of Hearing

Place of hearings on protests, accusations, or petitions for licenses. *Bus. & Prof. Code § 24300*

Time for hearing on protest. *Bus. & Prof. Code § 24015*

Application of statutes governing administrative adjudications (*Gov. Code § 11500 et seq.*) to hearings by Department of Alcoholic Beverage Control on protests, accusations, or petitions for licenses. *Bus. & Prof. Code §§ 24016, 24300*; *Gov. Code § 11501*

Hearing to determine whether right, authority, license, or privilege should be revoked, suspended, limited, or conditioned is initiated by filing accusation. *Gov. Code § 11503*

Hearing to determine whether right, authority, license, or privilege should be granted, issued, or renewed is initiated by filing statement of issues. *Gov. Code § 11504*

Service of accusation; notice of defense; request for hearing. *Gov. Code § 11505*

Examination of witnesses and presentation of evidence at hearing; technical rules of evidence is inapplicable. *Gov. Code § 11513*

[b] Decision

Review of penalty by Department of Alcoholic Beverages on its own motion. *Bus. & Prof. Code § 24211*

Form and contents of decision in administrative proceeding. *Gov. Code § 11518*

Reconsideration by agency of decision; time limits. *Gov. Code § 11521*

[c] Administrative Review

Appeals from decisions of Department of Alcoholic Beverage Control. *Bus. & Prof. Code § 23080 et seq.*

Time to file appeal from decision of Department of Alcoholic Beverage Control. *Bus. & Prof. Code § 23081*

Date appeal deemed filed. *Bus. & Prof. Code § 23081.5*

Decision of Department of Alcoholic Beverage Control is stayed by filing of appeal. *Bus. & Prof. Code § 23082*

Appeal is based solely on record of Department of Alcoholic Beverage Control proceedings. *Bus. & Prof. Code § 23083*

Appeals fund and license surcharge. *Bus. & Prof. Code § 23083.5*

Questions considered by Appeals Board. *Bus. & Prof. Code § 23084*

Remand to Department of Alcoholic Beverage Control for consideration of newly discovered evidence. *Bus. & Prof. Code § 23084(e)*

Time for entering Appeals Board order. *Bus. & Prof. Code § 23086*

Remand of proceedings. *Bus. & Prof. Code §§ 23085, 23087*

[5] Judicial Review

Application to court of appeal or Supreme Court for writ of review; time to apply. *Bus. & Prof. Code § 23090*

Review to be based on record of Department of Alcoholic Beverage Control certified by Appeals Board. *Bus. & Prof. Code § 23090.1*

Matters to be determined by court on review; trial de novo is not permitted. *Bus. & Prof. Code § 23090.2*

Findings and conclusions of Department of Alcoholic Beverage Control on questions of fact as conclusive and not subject to review. *Bus. & Prof. Code § 23090.3*

Procedure in applying for writ of review. *Bus. & Prof. Code § 23090.4*; *Code Civ. Proc. §§ 1067-1077*

Jurisdiction of appellate courts to review acts of Department of Alcoholic Beverage Control. *Bus. & Prof. Code § 23090.5*

Decision of Department of Alcoholic Beverage Control is not automatically stayed by filing application for writ of review. *Bus. & Prof. Code § 23090.6*

Decision of Department of Alcoholic Beverage Control is not effective during period in which application for writ of review may be made. *Bus. & Prof. Code § 23090.7*

Offer in compromise to pay money in lieu of license suspension. *Bus. & Prof. Code §§ 23095-23098*

[6] Penal Provisions

Violation of any provision of Alcoholic Beverage Control Act [*Bus. & Prof. Code §§ 23000-25763*] for which penalty is not otherwise specifically provided is misdemeanor. *Bus. & Prof. Code § 25617*

Possessing beer keg with knowledge that keg not properly identified is misdemeanor. *Bus. & Prof. Code § 25659.5(c)*

Purchaser knowingly providing false information on receipt required for purchase of beer keg is guilty of misdemeanor. *Bus. & Prof. Code § 25659.5(d)*

Sales of intoxicating liquors within proximity of certain colleges and other institutions is misdemeanor. *Penal Code § 172*

Person administering intoxicating agent to another to assist in committing felony is guilty of felony. *Penal Code § 222*

Employing person to solicit purchases of alcoholic beverages is misdemeanor. *Penal Code § 303*

Loitering on premises where alcoholic beverages are sold for consumption, for purpose of soliciting others to purchase alcoholic beverage for solicitor, is misdemeanor. *Penal Code § 303a*

Offering to public or public establishment video game containing commercial advertisement of alcoholic beverage is misdemeanor. *Penal Code § 308.5*

Maintaining public nuisance after notice of abatement is misdemeanor. *Penal Code § 373a*

Adulteration or dilution of spirituous or malt liquor or wine with fraudulent intent to sell as unadulterated or undiluted and fraudulent sales thereof are misdemeanors. *Penal Code § 382*

Person who knowingly sells adulterated food or drink articles for human consumption is guilty of misdemeanor. *Penal Code § 383*

Bringing alcoholic beverages into state prison facilities without authority is felony. *Penal Code § 4573.5*

Possession of alcoholic beverages without authority in state prison facilities is felony. *Penal Code § 4573.6*

Possession of device for consumption of alcohol in state prison facilities without authority is felony. *Penal Code § 4573.8*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAssignmentGeneral OverviewAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesAdministrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationHearingsGeneral Overview

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PART III. RESEARCH GUIDE

3-18 California Forms of Pleading and Practice--Annotated § 18.35

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.35 Administrative Regulations

[1] Licenses and Licensees

Violation of rules established by Department of Alcoholic Beverage Control is ground for suspension or revocation of liquor license. *4 Cal. Code Reg. § 1*

Applications and licenses. *4 Cal. Code Reg. § 55 et seq.*

Transfer of license. *4 Cal. Code Reg. §§ 60, 68*

Exchange of licenses. *4 Cal. Code Reg. § 60.2*

Authorized sales without license. *4 Cal. Code Reg. §§ 79-81*

Suspension and forfeiture of license. *4 Cal. Code Reg. §§ 143-143.5*

Service of notices. *4 Cal. Code Reg. § 145*

Certain sex entertainment, displays, and conduct on licensed premises is prohibited. *4 Cal. Code Reg. §§ 143.2-143.4*

Entertainment or attire on licensed premises in violation of local ordinances is prohibited. *4 Cal. Code Reg. § 143.5*

[2] Tax Regulations

Alcoholic beverage tax regulations. *18 Cal. Code Reg. § 2500 et seq.*

[3] Appeals

Filing of appeal. *4 Cal. Code Reg. §§ 183, 184*

Record on appeal. *4 Cal. Code Reg. §§ 187-190*

Procedure in submitting written argument; filing of briefs. *4 Cal. Code Reg. § 193*

Oral argument. *4 Cal. Code Reg. § 197*

Request for remand to Department of Alcoholic Beverage Control due to newly discovered evidence. *4 Cal. Code Reg. § 198*

Motions filed with Appeals Board. *4 Cal. Code Reg. § 198.1*

Dismissal of appeal; grounds. *4 Cal. Code Reg. § 199*

Disqualification of members of Appeals Board. *4 Cal. Code Reg. § 200*

Legal Topics:

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§ 18.36 California Rules of Court

Petition for writ of review in appellate court; form and contents. *Cal. Rules of Ct., Rule 8.486(a)*

Respondent's return to writ of review. *Cal. Rules of Ct., Rule 8.487*

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§ 18.37 Decisions

[1] Constitutionality

[a] In General

U.S. Const., amend. XXI, § 2 does not allow states to regulate wine shipments on terms that discriminate in favor of in-state producers. *Granholm v. Heald (2005) 544 U.S. 460, 492, 125 S. Ct. 1885, 1907, 161 L. Ed. 2d 796*

Rule of Bacchus Imports, Ltd. v. Dias (1984) 468 U.S. 263, 104 S. Ct. 3049, 82 L. Ed. 2d 200 , is applicable retroactively to permit out-of-state liquor manufacturer to recover refund of excise taxes paid. *James B. Beam Distilling Co. v. Georgia (1991) 501 U.S. 529, 532, 544, 111 S. Ct. 2439, 115 L. Ed. 2d 481* (plurality opinion)

City ordinance banning nude dancing as part of liquor license control program is constitutional under *U.S. Const., amend. XXI*, which gives broad powers to states to regulate sale of liquor, even though state Constitution delegates part of regulatory power to electorate. *City of Newport v. Iacobucci (1986) 479 U.S. 92, 95-97, 107 S. Ct. 383, 93 L. Ed. 2d 334*

State law imposing excise tax on imported liquor at rate more than that imposed on liquor manufactured in state is violation of Commerce Clause (U.S. *Const., art. I, § 8, cl. 3*). *Bacchus Imports, Ltd. v. Dias (1984) 468 U.S. 263, 274-277, 104 S. Ct. 3049, 82 L. Ed. 2d 200*

State statute prohibiting topless dancing in establishment licensed by state to serve liquor is within state's constitutional authority under *U.S. Const., amend. XXI*. *New York State Liquor Auth. v. Bellanca (1981) 452 U.S. 714, 715-718, 101 S. Ct. 2599, 69 L. Ed. 2d 357*

Application of *Bus. & Prof. Code § 25503(h)* to restrict advertising of alcoholic beverages on supermarket shopping carts is not violative of *U.S. Const., amend. I*, under standards of *Central Hudson v. Public Serv. Comm'n (1980) 447*

U.S. 557, 563-566, 100 S. Ct. 2343, 65 L. Ed. 2d 341 . *Actmedia, Inc. v. Stroh (9th Cir. 1986) 830 F.2d 957, 965-968*

Use by police of underage decoys to enforce laws prohibiting sales of alcoholic beverages to minors is not unconstitutional under *Cal. Const., art. XX, § 22*, and therefore is not an excuse or defense to charge of unlawful sales to minors; use of underage decoys promotes purpose of liquor laws, which is to protect minors. *Provigo Corp. v. Alcoholic Beverage Control Appeals Bd. (1994) 7 Cal. 4th 561, 566, 567* , *28 Cal. Rptr. 2d 638, 869 P.2d 1163* ; *see also Bus. & Prof. Code § 25658(e)*; *4 Cal. Code Reg. § 141(b)(5)*; *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2002) 103 Cal. App. 4th 1084, 1094, 127 Cal. Rptr. 2d 652* (finding that substantial evidence supported ALJ's finding that underage decoy displayed appearance required by *4 Cal. Code Reg. § 141(b)(2)*); *People v. Figueroa (1999) 68 Cal. App. 4th 1409* . 1411, *81 Cal. Rptr. 2d 216* (defense established by regulation is limited to administrative actions and does not apply to criminal prosecutions); *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd. (1998) 67 Cal. App. 4th 575, 581, 79 Cal. Rptr. 2d 126*

Local ordinances prohibiting nonobscene nude dancing, which extend beyond establishments serving alcohol, are presumptively overbroad infringements on constitutionally protected expression. *Morris v. Municipal Court (1982) 32 Cal. 3d 553, 564-565, 186 Cal. Rptr. 494, 652 P.2d 51* (overruling to the extent inconsistent *Crownover v. Musick (1973) 9 Cal. 3d 405, 423-425, 107 Cal. Rptr. 681, 509 P.2d 497*)

Rules 143.3 and 143.4 of the Alcoholic Beverage Commission prohibiting certain sexually explicit live entertainment or films in licensed establishments are constitutional. *California v. LaRue (1972) 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 342* , reh. den. *410 U.S. 948, 93 S. Ct. 1351, 35 L. Ed. 2d 615* ; *Dep't Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (2002) 99 Cal. App. 4th 880, 887-888, 121 Cal. Rptr. 2d 729* (annulling order of Board, which reversed Department's decision to suspend bar's liquor license for violation of Cal. Code Reg. § 143.3)

Statute [former Bus. & Prof. Code § 25656 (repealed 1971)] prohibiting hiring of women as bartenders is unconstitutional. *Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 22, 95 Cal. Rptr. 329, 485 P.2d 529*

Municipal purchase and use tax imposed on sales of alcoholic beverages does not enter field of taxation preempted by state under *Cal. Const., art. XX, § 22* (giving state exclusive power to collect license fees or occupation taxes on liquor business). *Ainsworth v. Bryant (1949) 34 Cal. 2d 465, 475, 211 P.2d 564*

Local ordinance entirely prohibiting alcohol sales within jurisdiction is unconstitutional under *Cal. Const., art. XX, § 22*; however, zoning ordinance directed at abating nuisance on premises licensed to sell alcoholic beverages for off-site consumption is valid. *Korean American Legal Advocacy Foundation v. City of Los Angeles (1994) 23 Cal. App. 4th 376, 390-393, 28 Cal. Rptr. 2d 530*

City ordinance regulating both possession and consumption of alcohol is preempted by *Cal. Const., art. XX, § 22* regarding regulation of possession, but not regarding regulation of consumption; provisions regulating consumption are severable and constitutionally valid. *People v. Brewer (1991) 235 Cal. App. 3d 909, 913-914, 1 Cal. Rptr. 2d 146*

City's authority to regulate conduct in establishments licensed by state of California to sell alcoholic beverages derives solely from city's general police power, not from delegation of state regulatory powers under the *Twenty-first Amendment* (*U.S. Const., amend. XXI*); city is required to justify ban on topless dancing in such establishments under traditional *First Amendment* (*U.S. Const., amend. I*) analysis. *City of Rancho Cucamonga v. Warner Consulting Services, Ltd. (1989) 213 Cal. App. 3d 1338, 1345-1346, 262 Cal. Rptr. 349*

City ordinance requiring places where alcoholic beverages are sold to post warnings that drinking alcohol during pregnancy can cause birth defects is not expressly preempted by *Cal. Const., art. XX, § 22* or impliedly preempted by provisions of Alcoholic Beverage Control Act (*Bus. & Prof. Code § 23000 et seq.*). *California Restaurant Assn. v. City of Los Angeles (1987) 192 Cal. App. 3d 405, 409-414, 237 Cal. Rptr. 415*

Segregation in petitioner's premises of patrons between ages of 18 and 21 is permissible to promote constitutional objective of preventing alcoholic beverage consumption by persons under age 21, if petitioner cannot otherwise control underage drinking on premises. *Reilly v. Stroh (1984) 161 Cal. App. 3d 47, 53, 207 Cal. Rptr. 250*

County ordinance prohibiting persons possessing, consuming, using, or being under influence of alcoholic beverage from attending model studio, but permitting nondrinking, sober persons to attend does not deny equal protection or due process of law guaranteed by *U.S. Const, Amend XIV*. *Cristmat, Inc. v. County of Los Angeles (1971) 15 Cal. App. 3d 590, 598-599, 93 Cal. Rptr. 325*

Jurisdiction of superior courts to issue writs of mandate is not unconstitutionally curtailed by *Bus. & Prof. Code § 23090.5* (giving appellate courts exclusive jurisdiction over review of rules and decisions by the Department of Alcoholic Beverage Control). *Kirby v. Superior Court of Santa Clara County (1969) 275 Cal. App. 2d 975-976, 275 Cal. App. 2d 975, 976, 80 Cal. Rptr. 381* ; *Dept. of Alcoholic Bev. Control v. Superior Court (1968) 268 Cal. App. 2d 67, 75, 73 Cal. Rptr. 780*

Bus. & Prof. Code § 25601 (misdemeanor to keep disorderly house in conjunction with licensed premises) is not unconstitutional. *Los Robles Motor Lodge, Inc. v. Dept. of Alcoholic Bev. Control (1966) 246 Cal. App. 2d 198, 203, 54 Cal. Rptr. 547*

Right to engage in liquor business is subject to regulation by state in exercise of police power. *Sibert v. Dept. Alcoholic Bev. Control (1959) 169 Cal. App. 2d 563, 566, 337 P.2d 882* ; *see also Premier-Pabst Sales Co. v. State Board of Equalization (SD Cal. 1935) 13 F. Supp. 90, 93-94*

State has power to regulate and even prohibit business of manufacturing and selling alcoholic beverages. *Shaub's Inc. v. Dept. Alcoholic Bev. Control (1957) 153 Cal. App. 2d 858, 866-867, 315 P.2d 459* ; *see also Premier-Pabst Sales Co. v. State Board of Equalization (SD Cal. 1935) 13 F. Supp. 90, 93-94*

[b] Power of Department

[i] In General

Department prosecutor may not have ex parte communications with department decision-maker about substance of the case until after the decision is issued. *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal. 4th 1, 8-17, 50 Cal. Rptr. 3d 585, 145 P. 3d 462*

Agency prosecutor cannot secretly communicate with the agency decision maker or the decision maker's adviser about the substance of the case prior to issuance of a final decision. *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board (2007) 149 Cal. App. 4th 116, 125-131, 57 Cal. Rptr. 3d 6*

Limitation on review of penalty by Department of Alcoholic Beverage Control under *Bus. & Prof. Code § 24211* only applies after penalty is set by administrative action; penalty is not "set" when Department makes offer of settlement prior to assessing penalty. *Kirby v. Alcoholic Bev. etc. Appeals Bd. (1971) 17 Cal. App. 3d 255, 261-262, 94 Cal. Rptr. 514*

Department of Alcoholic Beverage Control's power over denial, suspension, or revocation of licenses is subject to reasonable legislative enactments, and is not absolute. *Kirby v. Alcoholic Bev. etc. Appeals Bd. (1969) 71 Cal. 2d 1200, 1203, 81 Cal. Rptr. 241, 459 P.2d 657*

Right of administrative agency to order stay of decision after filing of position for reconsideration. *Koehn v. State Board of Equalization (1958) 166 Cal. App. 2d 109, 114, 333 P.2d 125*

Though final determination of State Board of Equalization (predecessor of Department of Alcoholic Beverage Control) denying liquor license may be binding on Appeals Board and not subject to rehearing, determination is binding only as to time at which, and proceeding during which, such determination was made. *Altadena Church v. St. Bd. Equalization (1952) 109 Cal. App. 2d 99, 105, 240 P.2d 322*

Plenary jurisdiction of State Board of Equalization (predecessor of Department of Alcoholic Beverage Control) under *Cal. Const., art. XX, § 22* to license and regulate sale of liquor is not to be exercised without notice and hearing required by statute when revoking license. *Irvine v. State Board of Equalization (1940) 40 Cal. App. 2d 280, 285, 104 P.2d 847*

[ii] Discretion

Propriety of penalty imposed on licensee in disciplinary proceedings is matter vested in discretion of Department of Alcoholic Beverage Control; its determination is not to be disturbed unless there is clear abuse of discretion. *Harris v. Alcoholic Bev. etc. Appeals Bd. (1965) 62 Cal. 2d 589, 594, 43 Cal. Rptr. 633, 400 P.2d 745*

Department of Alcoholic Beverage Control is bound to exercise "legal discretion" in passing on license applications; meaning of legal discretion. *Martin v. Alcoholic Bev. etc. Appeals Bd. (1961) 55 Cal. 2d 867, 875-876, 13 Cal. Rptr. 513, 362 P.2d 337*

Decision of Department of Alcoholic Beverage Control to deny license because of undue concentration of licenses is abuse of discretion because there was no evidence of undue concentration within immediate vicinity of proposed premises. *Department of Alcoholic Bev. Control v. Alcoholic Bev. etc. Appeals Bd. (1982) 136 Cal. App. 3d 315, 321, 186 Cal. Rptr. 189*

Penalty of suspension of license for accidental violation is abuse of discretion by Department of Alcoholic Beverage Control. *Joseph's of California v. Alcoholic Bev. etc. Appeals Bd. (1971) 19 Cal. App. 3d 785, 789, 97 Cal. Rptr. 183*

Decision of Department of Alcoholic Beverage Control is measured by standard set by "reason and reasonable people" in determining whether decision is arbitrary. *Kirby v. Alcoholic Bev. etc. Appeals Bd. (1968) 261 Cal. App. 2d 119, 122, 67 Cal. Rptr. 628*

Department of Alcoholic Beverage Control is bound to exercise judicial discretion in imposing penalties in disciplinary proceedings. *Harris v. Alcoholic Bev. etc. Appeals Bd. (1965) 62 Cal. 2d 589, 594, 43 Cal. Rptr. 633, 400 P.2d 745*

Covenant against sale of intoxicating liquors is not binding on Department of Alcoholic Beverage Control in exercising its discretion whether to issue license in area subject to covenant. *Board of Trustees v. Munro (1958) 163 Cal. App. 2d 440, 447-448, 329 P.2d 765* (license granted); *see Hansen v. State Board of Equalization (1941) 43 Cal. App. 2d 176, 178-180, 110 P.2d 453* (license denied)

[c] Search and Seizure

Warrantless inspection of licensee's premises to investigate suspected sale of controlled substances or dangerous drugs on premises is authorized under *Bus. & Prof. Code §§ 24200.5, 25753, 25755* and permissible under *U.S. Const., amend. IV*. *People v. Paulson (1990) 216 Cal. App. 3d 1480, 1487-1490, 265 Cal. Rptr. 579*

Warrantless inspection of liquor-selling business is unreasonable unless substantial governmental interest informs

regulatory scheme pursuant to which inspection is made; warrantless inspection is necessary to further regulatory scheme; and statutory inspection program, in terms of certainty and regularity of its application, provides constitutionally adequate substitute for warrant [*People v. Paulson (1990) 216 Cal. App. 3d 1480, 1485, 265 Cal. Rptr. 579]*

[2] Antitrust

Bus. & Prof. Code § 23672, restricting a licensed importer from purchasing or accepting delivery of any brand of distilled spirits unless he or she is designated as an authorized importer, does not conflict with the Sherman Act (*15 U.S.C. § 1*) so as to be unenforceable because it merely enforces distiller's decision to restrain intra-brand competition. *Rice v. Norman Williams Co. (1982) 458 U.S. 654, 661-662, 102 S. Ct. 3294, 73 L. Ed. 2d 1042*

[3] Selling Without License

Reliance on mistaken advice of counsel that caterer's permit under Bus. & Prof. Code § 23999 was not revoked along with on-sale license is no defense to criminal charge of selling liquor without valid license in violation of *Bus. & Prof. Code § 23300*. *People v. Guinn (1983) 149 Cal. App. 3d Supp. 1, 10-11 , 196 Cal. Rptr. 696*

Individuals relying on Bus. & Prof. Code § 23999 (caterer's permit to sell alcoholic beverages after on-sale liquor license revoked) violates *Bus. & Prof. Code § 23300*, prohibiting sale of liquor without license, because caterer's permit is dependent on existence of on-sale license. *Department v. Locker (1982) 129 Cal. App. 3d 381, 385-387, 181 Cal. Rptr. 55*

[4] Tied House Restrictions

Historical development of "tied house" restrictions [*Bus. & Prof. Code §§ 25500-25511*]. *California Beer Wholesalers Assn., Inc. v. Alcoholic Bev. etc. Appeals Bd. (1971) 5 Cal. 3d 402, 407-408, 96 Cal. Rptr. 297, 487 P.2d 745*

Alcoholic beverage wholesaler's sponsorship of restaurant's athletic events was not permitted by *4 Cal. Code Reg. § 106(e)(1)* when wholesaler paid intermediary established to provide marketing services, not to promote athletic events. *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2005) 128 Cal. App. 4th 1195, 1209, 27 Cal. Rptr. 3d 766*

Bus. & Prof. Code § 25503(h) prohibits payments for privilege of placing advertising in retail establishments; it does not specify recipient of payment. *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2005) 128 Cal. App. 4th 1195, 1213-1214, 27 Cal. Rptr. 3d 766*

Promotion whereby licensee gave cash rebates to consumers of nonalcoholic products for purchase of alcoholic beverages did not violate *4 Cal. Code Reg. § 106* or *Bus. & Prof. Code § 25600*. *People ex rel. Department of Alcoholic Beverage Control v. Miller Brewing Company (2002) 104 Cal. App. 4th 1189, 1194-1200, 128 Cal. Rptr. 2d 861* (noting legislature's distinction between premium, which is not permitted, and rebate)

Placing advertisements in a licensed retailer's exclusive sales catalog violates prohibition in *Bus. & Prof. Code § 25502(a)(2)* against a winegrower furnishing anything of value to a retailer. *Department of Alcoholic Beverage Control v. Alcoholic Bev. etc. Appeals Bd. (2002) 100 Cal. App. 4th 1066, 1074-1079, 123 Cal. Rptr. 2d 278*

Amended regulation [*4 Cal. Code Reg. § 106*] that prohibits alcoholic beverage licensees from continuing to conduct

promotional contests in which cash prizes are given to consumers, notwithstanding that Department of Alcoholic Beverage Control authorized sweepstakes in past, held valid; regulation does not exceed scope of its enabling statute [*Bus. & Prof. Code § 25600*]. *Coors Brewing Co. v. Stroh (2001) 86 Cal. App. 4th 768, 771, 778, 103 Cal. Rptr. 2d 570*

Regulation that authorizes supplier to give retailers free "advertising specialties" (supplies bearing advertising, such as coasters, beer mats, and menu cards) up to $50 in value [*4 Cal. Code Reg. § 106(e)(1)*] is invalid because it conflicts with *Bus. & Prof. Code § 25501(a)* prohibiting beer supplier from making gift of "supplies" for use by owner or operator of establishment where alcoholic beverages are sold for consumption on the premises. *California Beer & Wine Wholesalers Assn. v. Department of Alcoholic Beverage Control (1988) 201 Cal. App. 3d 100, 101-102, 106, 109, 247 Cal. Rptr. 60*

Ownership, by officers and directors of corporate subsidiary which held wholesaler's license, of interest in parent corporation which held off sale general licenses violates *Bus. & Prof. Code §§ 23779* and *25502* (tied house restrictions) and are grounds for revoking subsidiary's license under *Cal. Const., art. XX, § 22* and *Bus. & Prof. Code § 24200(a), (b)*. *Borun Bros. v. Department Alcoholic Beverage Control (1963) 215 Cal. App. 2d 503, 507, 510, 511, 30 Cal. Rptr. 175*

Subsidiary of corporation holding off sale retail license is precluded under *Bus. & Prof. Code § 25502* from acquiring wholesaler's license. *California Beer Wholesalers Assn., Inc. v. Alcoholic Bev. etc. Appeals Bd. (1971) 5 Cal. 3d 402, 412, 96 Cal. Rptr. 297, 487 P.2d 745*

[5] Policing Premises

Applicability of *Penal Code § 303*, forbidding liquor licensee from employing person for purposes of encouraging sale of alcoholic beverages, to bartender who asks patron if he or she wants to buy drink for employee of licensee. *Kirby v. Alcoholic Bev. etc. Appeals Bd. (1973) 33 Cal. App. 3d 732, 737-738, 109 Cal. Rptr. 291*

Acts of employee in operation of liquor license are imputed to licensee. *Kirby v. Alcoholic Bev. etc. Appeals Bd. (1973) 33 Cal. App. 3d 732, 737, 109 Cal. Rptr. 291*

Licensee is required to police his premises against successive offenses by employees and patrons. *Kirchhubel v. Munro (1957) 149 Cal. App. 2d 243, 249, 308 P.2d 432*

[6] Grounds for Denial, Suspension, Revocation of License

[a] In General

Federal law does not preempt *Bus. & Prof. Code § 25241*, prohibiting use of word "Napa" in wine brand names when grapes are not from *Napa Valley. Bronco Wine Company v. Jolly (2004) 33 Cal. 4th 943, 988-989, 17 Cal. Rptr. 3d 180, 95 P. 3d 422*

That premises might present, or have presented, law enforcement problem is ground for denial of liquor license. *Kirby v. Alcoholic Bev. etc. Appeals Bd. (1972) 7 Cal. 3d 433, 440-441, 102 Cal. Rptr. 857, 498 P.2d 1105*

Bus. & Prof. Code § 25241, prohibiting use of word "Napa" in wine brand names where grapes are not from Napa Valley, does not violate wine bottler's free speech rights, commerce clause, or *takings clause*. *Bronco Wine Co. v. Jolly (2005) 129 Cal. App. 4th 988, 1013-1014, 29 Cal. Rptr. 3d 462*

Duplicate license is not one of statutory rights or privileges of on-sale general license, and club license holder is therefore not entitled to duplicate license. *Outdoor Resorts etc. Owners' Assn. v. Alcoholic Beverage Control Appeals Bd. (1990) 224 Cal. App. 3d 696, 701-702, 273 Cal. Rptr. 748*

Licensee conducting sale of beverages under on-sale license was charged, under penalty of suspension, with active duty to prevent minors from consuming intoxicating liquor on licensed premises, and active duty to prevent its continuance immediately arises if licensee, through its employee, has knowledge that consumption is taking place. *Reilly v. Stroh (1984) 161 Cal. App. 3d 47, 51, 207 Cal. Rptr. 250*

Licensee's failure to prevent minors from consuming intoxicating liquor on licensed premises, when licensee was conducting sale of beverages under on-sale license, is within statutory meaning of "permitting" unlawful consumption, for violation of which suspension of alcoholic beverage license is authorized. *Reilly v. Stroh (1984) 161 Cal. App. 3d 47, 51, 207 Cal. Rptr. 250*

Criminal conviction involving fraud necessarily involves moral turpitude for purposes of suspension and revocation of liquor licenses under *Bus. & Prof. Code § 24200(d)*. *Kirby v. Alcoholic Bev. etc. Appeals Bd. (1969) 270 Cal. App. 2d 535, 540, 542, 75 Cal. Rptr. 823* (filing fraudulent federal income tax returns)

Licensee is subject to disciplinary action by Department of Alcoholic Beverage Control for unlawful acts of employees while engaged in conduct and operation of business even though licensee did not authorize or have actual knowledge of activities. *Mack v. Dept. Alcoholic Bev. Control (1960) 178 Cal. App. 2d 149, 152-153, 2 Cal. Rptr. 629*

[b] Sales to Intoxicated Persons

In hearing to determine whether bar served alcohol to obviously intoxicated person, admission of witness's expert opinion testimony that customer was "obviously" intoxicated when served is not error because, under *Evid. Code § 805*, opinion testimony that is otherwise admissible is not objectionable because it embraces ultimate issue to be decided by trier of fact. *Paez v. Alcoholic Beverage Control Appeals Bd. (1990) 222 Cal. App. 3d 1025, 1026, 272 Cal. Rptr. 272* (*overruling People v. Johnson (1947) 81 Cal. App. 2d Supp. 973, 81 Cal. App. 2d Supp. 973, 185 P.2d 105* , and *People v. Smith (1949) 94 Cal. App. 2d Supp. 975, 219 P.2d 98* , to extent they hold otherwise)

Franchisor, when found to be neither colicensee nor in principal-agent relationship with franchisee, is not under duty to prevent franchisee's sale of alcohol to intoxicated persons; franchisor is not under nondelegable duty to prevent such sales simply because of status as franchisor. *Wickham v. Southland Corp. (1985) 168 Cal. App. 3d 49, 55-61, 213 Cal. Rptr. 825*

Statutes prohibiting sales to obviously intoxicated persons and providing for suspension or revocation of license for violations [*Bus. & Prof. Code §§ 24200, 25602*] apply to persons who are obviously intoxicated regardless of whether caused by alcohol alone or other drugs or combinations of substances. *Rice v. Alcoholic Bev. etc. Appeals Bd. (1981) 118 Cal. App. 3d 30, 38, 173 Cal. Rptr. 232*

[c] Public Welfare and Morals

Role of Department of Alcoholic Beverage Control in evaluating application for license to sell alcoholic beverages is to assure that public welfare and morals are preserved from probable impairment in future. *Kirby v. Alcoholic Bev. etc. Appeals Bd. (1972) 7 Cal. 3d 433, 441, 102 Cal. Rptr. 857, 498 P.2d 1105*

Undercover police officer's request to licensee's exotic dancer to show "more skin" did not constitute entrapment. *Department of Alcoholic Beverage Control v. Alcoholic Bev. etc. Appeals Bd. (2002) 100 Cal. App. 4th 1094,*

1099-1101, 122 Cal. Rptr. 2d 854

Department did not abuse its discretion in revoking liquor license when evidence established third violation of *Bus. & Prof. Code § 25658.1(b)* (sales to minors); Constitution vests department with broad discretion to revoke when continuing license would be contrary to public welfare or morals. *Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd. (2002) 99 Cal. App. 4th 1094, 1103-1105, 121 Cal. Rptr. 2d 758*

4 C.F.R. § 143.3(1)(b), which prohibits "touching, caressing or fondling of the breast, buttocks, anus or genitals," and 4 C.F.R. § 143.3(2), which prohibits exposing a breast or buttock unless the dancer is on a raised stage at least six feet from patrons in an establishment licensed to serve alcoholic beverages are constitutional limitations on free speech. *Department of Alcoholic Beverage Control v. Alcoholic Bev. etc. Appeals Bd. (2002) 99 Cal. App. 4th 880, 887-895, 121 Cal. Rptr. 2d 729*

Sexually discriminatory admission policy is sufficient ground for revocation of license. *Easebe Enterprises, Inc. v. Alcoholic Bev. etc. Appeals Bd. (1983) 141 Cal. App. 3d 981, 985-986, 190 Cal. Rptr. 678*

Determination that license issuance was contrary to public welfare and morals is overbroad analysis of good cause requirement and unsupported by facts. *Department of Alcoholic Bev. Control v. Alcoholic Bev. etc. Appeals Bd. (1981) 122 Cal. App. 3d 549, 557-558, 175 Cal. Rptr. 342*

Types of misbehavior of licensees justifying disciplinary action by Department of Alcoholic Beverage Control under "public welfare or morals" clause of *Cal. Const., art. XX, § 22*. *H.D. Wallace & Assoc., Inc. v. Dept. of Alcoholic Bev. Control (1969) 271 Cal. App. 2d 589, 592-593, 76 Cal. Rptr. 749*

"Public welfare or morals" clause of *Cal. Const., art. XX, § 22* permits license termination for law violations not involving moral turpitude but having rational relation to operation of licensed business. *H.D. Wallace & Assoc., Inc. v. Dept. of Alcoholic Bev. Control (1969) 271 Cal. App. 2d 589, 593, 76 Cal. Rptr. 749* ; *see also* *Kirby v. Alcoholic Bev. etc. Appeals Bd. (1970) 7 Cal. App. 3d 126, 128-129, 86 Cal. Rptr. 433*

Factors considered in determining whether issuance of license would be inimical to general welfare or public morals. *Koss v. Dept. Alcoholic Beverage Control (1963) 215 Cal. App. 2d 489, 495-496, 30 Cal. Rptr. 219*

[d] Disorderly House

Liquor license is revocable for keeping disorderly house absent findings by Department of Alcoholic Beverage Control and Appeals Board that licensee knew of illegal drug activity occurring on premises given ample evidence that premises were law enforcement problems, owners were actually or constructively aware of problems, and owners were not effective in controlling rampant drug trade on premises. *Yu v. Alcoholic Bev. etc. Appeals Bd. (1992) 3 Cal. App. 4th 286, 289, 294-298, 4 Cal. Rptr. 2d 280*

Proof of illegal acts such as pandering, attempted pandering, and conspiring to operate house of prostitution on licensed premises is evidence of conducting disorderly house in violation of *Bus. & Prof. Code § 25601*. *Kirby v. Alcoholic Bev. etc. Appeals Bd. (1972) 25 Cal. App. 3d 331, 337, 101 Cal. Rptr. 815*

Meaning of term "disorderly house" as used in *Bus. & Prof. Code § 25601* (misdemeanor to keep disorderly house in conjunction with licensed premises). *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal. 3d 85, 97-99, 84 Cal. Rptr. 113, 465 P.2d 1* ; *Kirby v. Alcoholic Bev. etc. Appeals Bd. (1972) 25 Cal. App. 3d 331, 336-337, 101 Cal. Rptr. 815* ; *Los Robles Motor Lodge, Inc. v. Dept. of Alcoholic Bev. Control (1966) 246 Cal. App. 2d 198, 203-204, 54 Cal. Rptr. 547* ; *Stoumen v. Munro (1963) 219 Cal. App. 2d 302, 307-311, 33 Cal. Rptr. 305*

Term "disorderly house" as used in *Bus. & Prof. Code § 25601* (prohibiting licensee from keeping disorderly house) is not unconstitutionally vague. *Los Robles Motor Lodge, Inc. v. Dept. of Alcoholic Bev. Control (1966) 246 Cal. App. 2d 198, 203-204, 54 Cal. Rptr. 547*

Affirmative duty to maintain lawfully conducted premises is required by *Bus. & Prof. Code § 25601* (prohibiting keeping disorderly house in connection with licensed premises); active participation is unnecessary on part of license holder in acts rendering premises injurious to public morals. *Coleman v. Harris (1963) 218 Cal. App. 2d 401, 404, 32 Cal. Rptr. 486* ; *see also* *Morell v. Dept. of Alcoholic Bev. Control (1962) 204 Cal. App. 2d 504, 514, 22 Cal. Rptr. 405* ; *Munro v. Alcoholic Bev. etc. Appeals Bd. (1960) 181 Cal. App. 2d 162, 164, 5 Cal. Rptr. 527*

Repeated instances of intoxicated persons found on premises is evidence that premises were permitted to be kept and used as disorderly house. *Harris v. Alcoholic Bev. etc. Appeals Bd. (1963) 212 Cal. App. 2d 106, 123, 28 Cal. Rptr. 74*

Condition of licensed premises rendering it disorderly house denounced by *Bus. & Prof. Code § 25601* is not required to be knowingly created by licensee to constitute violation. *Harris v. Alcoholic Bev. etc. Appeals Bd. (1963) 212 Cal. App. 2d 106, 123, 28 Cal. Rptr. 74* ; *Morell v. Dept. of Alcoholic Bev. Control (1962) 204 Cal. App. 2d 504, 511-512, 22 Cal. Rptr. 405*

[e] Drug Sales

Licensee's general affirmative duty to maintain lawful establishment becomes specific and focused on eliminating violation of law on premises once licensee knows of particular violation; licensee's failure to prevent recurring violation "permits" violation to occur by failure to take preventive action. *Laube v. Stroh (1992) 2 Cal. App. 4th 364, 377, 379, 3 Cal. Rptr. 2d 779* (drug sale case) (interpreting *McFaddin, below*, and good cause requirement of *Cal. Const., art. XX, § 22* to require licensee to have actual or constructive knowledge of illegal activity on premises before licensee can be found to have "permitted" that activity)

Licensee's failure to prevent sale of illegal drugs on nightclub premises does not support determination in license revocation proceeding that licensee "permitted" such sales when licensee did not reasonably know of specific drug transactions and took all reasonable measures to prevent such transactions. *McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal. App. 3d 1384, 1392, 257 Cal. Rptr. 8*

[f] Bookmaking

Bookmaking and gambling on licensed premises constitutes conditions contrary to public welfare and morals and is grounds for discipline under *Cal. Const., art. XX, § 22*; *Mack v. Dept. Alcoholic Bev. Control (1960) 178 Cal. App. 2d 149, 154-155, 2 Cal. Rptr. 629*

[g] Proximity to Church

Proximity to church or school coupled with additional evidence disclosing potential threat to public welfare or morals is sufficient to justify denial of liquor license. *Kirby v. Alcoholic Bev. etc. Appeals Bd. (1972) 7 Cal. 3d 433, 440, 102 Cal. Rptr. 857, 498 P.2d 1105*

Denial of license for premises located within immediate vicinity of churches [*Bus. & Prof. Code § 23789*] is required to be based on good cause under *Cal. Const., art. XX, § 22*. *Martin v. Alcoholic Bev. etc. Appeals Bd. (1961) 55 Cal. 2d 867, 875, 13 Cal. Rptr. 513, 362 P.2d 337*

Mere fact that church is located near proposed licensed premises does not require finding as matter of law that issuance of license would be contrary to public welfare or morals. *Koss v. Dept. Alcoholic Beverage Control (1963) 215 Cal. App. 2d 489, 495, 30 Cal. Rptr. 219*

Breach of discretion by Department of Alcoholic Beverage Control is required to be shown in contesting issuance of liquor license for premises in proximity to church. *Altadena Church v. St. Bd. Equalization (1952) 109 Cal. App. 2d 99, 104, 240 P.2d 322*

[h] Topless Waitresses

Employment of topless waitresses alone is not sufficient basis for suspension or revocation of license. *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal. 3d 85, 99, 106, 84 Cal. Rptr. 113, 465 P.2d 1*

Conclusion that topless waitresses in bar are per se contrary to public welfare or morals and cause for suspending liquor license under *Cal. Const., art. XX, § 22* is arbitrary and abuse of discretion by *Department of Alcoholic Beverage Control. Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal. 3d 85, 103, 84 Cal. Rptr. 113, 465 P.2d 1*

Application for permit to sell alcohol at topless bar did not involve fundamental vested right or right of free speech and thereby require court's independent judgment. *SP Star Enterprises, Inc. v. City of Los Angeles (2009) 173 Cal. App. 4th 459, 468-470, 93 Cal. Rptr. 3d 152*

Board's order reversing Department's decision to suspend liquor license, based on ALJ's finding that adult entertainment business violated Rule 143.3 [*4 Cal. Code Reg. § 143.3* (indecent exposure)], was annulled by court of appeal; undercover officer's conduct with respect to exotic dancer did not amount to entrapment as a matter of law. *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (2002) 100 Cal. App. 4th 1094, 1099-1101, 122 Cal. Rptr. 2d 854*

Portions of *4 Cal. Code Reg. § 143.2*, prohibiting, among other things, employment of person in sale or service of alcoholic beverages on licensed premises while unclothed or in such attire as to expose to view any portion of female breast below top of areola or any portion of pubic hair, anus, cleft of buttocks, vulva, or genitals, are constitutional on its face. *Locker v. Kirby (1973) 31 Cal. App. 3d 520, 522, 107 Cal. Rptr. 446*

[7] Department Review

[a] Pleading

In administrative proceedings accusation is required to give fair notice to accused to enable him or her to prepare defense; technical rules of pleading are inapplicable. *Stoumen v. Munro (1963) 219 Cal. App. 2d 302, 306-307, 33 Cal. Rptr. 305*

Pleading and burden of proof requirements in proceedings involving applications for licenses are distinguished from such requirements in revocation proceedings. *Martin v. Alcoholic Bev. etc. Appeals Bd. (1959) 52 Cal. 2d 259, 264-265, 341 P.2d 291*

Accusation is required to disclose to licensee particular offense charged at least to extent of stating essential elements of offense. *Greenblatt v. Munro (1958) 161 Cal. App. 2d 596, 604, 326 P.2d 929*

[b] Hearing

Because procedure by which Department of Alcoholic Beverage Control adjudicated whether licensee violated terms of license had two phases in which functions of prosecution and adjudication were not kept strictly separate, that procedure contravened Administrative Procedure Act's proscription against ex parte communications. *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Quintanar) (2006) 40 Cal. 4th 1, 5* (APA was violated by Department's practice of having Department's prosecuting attorney send report of hearing to Department's decision maker before final decision was made; Department's decision maker rejected ALJ's proposed decision); *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Bd. (2007) 149 Cal. App. 4th 116, 121, 57 Cal. Rptr. 3d 6* (same; Department's decision maker adopted ALJ's proposed decision)

Technical rules of evidence are not applicable to administrative hearings before *Department of Alcoholic Beverage Control. Big Boy Liquors, Ltd. v. Alcoholic Bev. etc. Appeals Bd. (1969) 71 Cal. 2d 1226, 1230, 81 Cal. Rptr. 258, 459 P.2d 674* (applying *Gov. Code § 11513*)

When court reviews Department of Alcoholic Beverage Control decision to revoke license, department has "burden of demonstrating that it employed an effective ethical wall" to keep functions of prosecution and adjudication strictly separate in administrative license proceeding, in accord with California Supreme Court's *Quintanar* opinion, *above*. *Rondon v. Alcoholic Beverage Control Appeals Bd. (2007) 151 Cal. App. 4th 1274, 1288, 60 Cal. Rptr. 3d 295*

Applicant bears burden of proof regarding eligibility for liquor license from start of application process until Department makes final determination. *Coffin v. Alcoholic Bev. Control Appeals Bd. (2006) 139 Cal. App. 4th 471, 473, 43 Cal. Rptr. 3d 420*

General common law rule requiring corporations to be represented by counsel in proceedings before courts of record other than small claims courts does not extend to proceedings before administrative agencies and tribunals; department's decision, upheld by board, to revoke corporation's liquor license was not void for lack of jurisdiction when corporation was represented by nonattorney president at evidentiary administrative hearing before *ALJ. Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd. (2002) 99 Cal. App. 4th 1094, 1103, 121 Cal. Rptr. 2d 758*

Error by Department of Alcoholic Beverage Control in failing to rule on statement of objections filed by licensees is non-prejudicial and is waived by licensees when, among other things, no objections were made to accusation at hearing, and licensees were able to adequately prepare defense to charges. *Rolfe v. Munro (1958) 165 Cal. App. 2d 726, 728-729, 332 P.2d 404*

Consideration of prior disciplinary proceedings is proper in administrative hearing before Department of Alcoholic Beverage Control; prior record of licensee is relevant and material evidence of his knowledge and compliance with pertinent laws. *Reimel v. Alcoholic Bev. etc. Appeals Bd. (1967) 256 Cal. App. 2d 158, 175, 64 Cal. Rptr. 26*

[c] Findings

Administrative findings are not required to be stated with formality required in judicial proceedings, though they must conform to statutes governing particular agency. *Martin v. Alcoholic Bev. etc. Appeals Bd. (1959) 52 Cal. 2d 259, 264, 341 P.2d 291*

Action or recommendation by Department of Alcoholic Beverage Control raises presumption that existence of necessary facts was ascertained and found by *Department. Martin v. Alcoholic Bev. etc. Appeals Bd. (1959) 52 Cal. 2d 259, 264, 341 P.2d 291*

Finding by Department of Alcoholic Beverage Control on ultimate fact includes finding on all special facts necessary to sustain it that are supported by substantial evidence. *Koss v. Dept. Alcoholic Beverage Control (1963) 215 Cal. App. 2d 489, 493, 30 Cal. Rptr. 219*

Administrative findings are required to satisfy dual requirements of making intelligent review by courts possible and apprising parties of basis for administrative action. *Stoumen v. Munro (1963) 219 Cal. App. 2d 302, 311, 33 Cal. Rptr. 305*

[d] Estoppel

Former order of Appeals Board denying liquor license does not prevent, by estoppel, reexamination of same questions between same parties when in interval facts have changed that may alter legal rights. *Hasselbach v. Dept. Alcoholic Bev. Control (1959) 167 Cal. App. 2d 662, 665, 334 P.2d 1058*

[8] Administrative Appeal

[a] Scope of Review

Scope of administrative and judicial review of decisions of the *Department of Alcoholic Beverage Control. Kirby v. Alcoholic Bev. etc. Appeals Bd. (1972) 7 Cal. 3d 433, 436-437, 102 Cal. Rptr. 857, 498 P.2d 1105* ; *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal. 3d 85, 94-96, 84 Cal. Rptr. 113, 465 P.2d 1* ; *Department of Alcoholic Beverage Control v. Alcoholic Bev. etc. Appeals Bd. (2002) 100 Cal. App. 4th 1066, 1071-1072, 123 Cal. Rptr. 2d 278* ; *Donia v. Alcoholic Bev. etc. Appeals Bd. (1985) 167 Cal. App. 3d 588, 595, 213 Cal. Rptr. 447* ; *Department of Alcoholic Bev. Control v. Alcoholic Bev. etc. Appeals Bd. (1981) 122 Cal. App. 3d 549, 554, 175 Cal. Rptr. 342*

Limited powers of Appeals Board in reviewing decisions of Department of Alcoholic Beverage Control. *Martin v. Alcoholic Bev. etc. Appeals Bd. (1959) 52 Cal. 2d 238, 242-243, 340 P.2d 1* ; *Department of Alcoholic Bev. Control v. Alcoholic Bev. etc. Appeals Bd. (1982) 136 Cal. App. 3d 315, 318, 186 Cal. Rptr. 189*

Appeals Board has jurisdiction to review determination by Department of Alcoholic Beverage Control of fee applicable to transfer of liquor license, whether or not Department conducts formal hearing, when correspondence between Department and transferor provides sufficient record, with stated findings and decision, for review under *Bus. & Prof. Code § 23084*. *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (1987) 195 Cal. App. 3d 812, 818-820, 240 Cal. Rptr. 915*

Department of Alcoholic Beverage Control, not Appeals Board or courts, determines whether good cause exists for denying license on ground that issuance would be contrary to public welfare or morals; Appeals Board or courts determines whether Department acted arbitrarily in making decision. *Department of Alcoholic Bev. Control v. Alcoholic Bev. etc. Appeals Bd. (1982) 133 Cal. App. 3d 814, 817, 184 Cal. Rptr. 367*

Scope of judicial review of administrative rule making by Department of Alcoholic Beverage Control. *Schenley Affiliated Brands Corp. v. Kirby (1971) 21 Cal. App. 3d 177, 196-198, 98 Cal. Rptr. 609*

[b] Time to Appeal

Time to file appeal from decision of Department of Alcoholic Beverage Control under *Bus. & Prof. Code § 23081*.

Reimel v. House (1968) 264 Cal. App. 2d 173, 174, 70 Cal. Rptr. 224 ; *Reimel v. Alcoholic Bev. etc. Appeals Bd. (1967) 254 Cal. App. 2d 340, 346, 62 Cal. Rptr. 54* ; *Harris v. Alcoholic Bev. etc. Appeals Bd. (1963) 223 Cal. App. 2d 563, 570-572, 35 Cal. Rptr. 865*

[c] Injunction Pending Appeal

Bus. & Prof. Code § 23053.1, which empowers superior court to enjoin violations of rules of Department of Alcoholic Beverage Control occurring after revocation of liquor license and pending administrative appeal, is constitutional when narrowly construed to allow injunction only when licensee continues to violate same rules after license revocation. *Stroh v. Midway Restaurant Systems, Inc. (1986) 180 Cal. App. 3d 1040, 1049-1050, 226 Cal. Rptr. 153*

[d] Evidence on Appeal

Due process does not require Department of Alcoholic Beverage Control to produce internal documents regarding decision on review by Appeals Board because Department does not have to present argument to support decision, Appeals Board is limited to review of record. *Department of Alcoholic Bev. Control v. Alcoholic Bev. etc. Appeals Bd. (1981) 118 Cal. App. 3d 720, 725-726, 727 n.3, 173 Cal. Rptr. 582*

[e] Substantial Evidence

"Substantial evidence rule" is applicable to review of decisions of Department of Alcoholic Beverage Control under *Cal. Const., art. XX, § 22.* *Martin v. Alcoholic Bev. etc. Appeals Bd. (1959) 52 Cal. 2d 238, 246, 340 P.2d 1*

Appellate court is required to sustain discretionary decisions of Department of Alcoholic Beverage Control unless Department proceeds without jurisdiction, acts in manner contrary to law, or makes finding unsupported by substantial evidence. *Outdoor Resorts etc. Owners' Assn. v. Alcoholic Beverage Control Appeals Bd. (1990) 224 Cal. App. 3d 696, 700, 273 Cal. Rptr. 748*

[f] Legal Malpractice on Appeal

Legal malpractice action falls within two year limitation of *Code Civ. Proc. § 339(1).* *Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 182, 98 Cal. Rptr. 837, 491 P.2d 421*

Liability of attorney for negligence in prosecuting appeal. *Croce v. Sanchez (1967) 256 Cal. App. 2d 680, 683, 64 Cal. Rptr. 448* ; *Pete v. Henderson (1954) 124 Cal. App. 2d 487, 489-490, 269 P.2d 78*

Elements of actionable negligent malpractice against attorney. *Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 523, 50 Cal. Rptr. 592*

[9] Judicial Review

Bus. & Prof. Code §§ 23090-23090.7 (conditions for writ of review) is exclusive avenue to judicial review following final order of *Appeals Board. Top Hat Liquors v. Department of Alcoholic Beverage Control (1974) 13 Cal. 3d 107, 111, 118 Cal. Rptr. 10, 529 P.2d 42*

Either writ of mandate or review is proper procedure to review exercise of quasi judicial power by *Department of Alcoholic Beverage Control Department of Alcoholic Beverage Control. Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 7,*

95 Cal. Rptr. 329, 485 P.2d 529

Court is entitled to take judicial notice of matters not judicially noticed by Department of Alcoholic Beverage Control on review of Department's decision. *Harris v. Alcoholic Bev. etc. Appeals Bd. (1965) 62 Cal. 2d 589, 596-597, 43 Cal. Rptr. 633, 400 P.2d 745*

Judicial review is directed at decision of Appeals Board but incidentally requires review of Department of Alcoholic Beverage Control's decision in determining whether Appeals Board exceeded its limited powers. *Martin v. Alcoholic Bev. etc. Appeals Bd. (1961) 55 Cal. 2d 867, 871-872, 13 Cal. Rptr. 513, 362 P.2d 337*

Person whose complaint seeking revocation of liquor license was rejected after hearing by State Board of Equalization (predecessor of Department of Alcoholic Beverage Control) is proper party "beneficially interested" under *Code Civ. Proc. § 1086* to seek writ off mandate to compel such board to revoke license. *Covert v. State Board of Equalization (1946) 29 Cal. 2d 125, 130, 173 P.2d 545* (*now see Bus. & Prof. Code § 23090* designating writ of review is proper procedure to review final orders of Department)

Application for permit to sell alcohol at topless bar did not involve fundamental vested right or right of free speech and thereby require court's independent judgment. *SP Star Enterprises, Inc. v. City of Los Angeles (2009) 173 Cal. App. 4th 459, 468-470, 93 Cal. Rptr. 3d 152*

Exclusive jurisdiction of Supreme and appellate courts to review actions of Department of Alcoholic Beverage Control is not subject to circumvention by filing superior court challenge to prospective action styled as claim for declaratory or injunctive relief. *American Drug Stores, Inc. v. Stroh (1992) 10 Cal. App. 4th 1446, 1449-1452, 13 Cal. Rptr. 2d 432*

Court of appeal's refusal to treat appeal from superior court judgment sustaining demurrer of Department of Alcoholic Beverage Control is petition for writ of mandate under *Bus. & Prof. Code § 23090.5* when request to treat appeal as petition for extraordinary relief was raised for first time in reply brief. *American Drug Stores, Inc. v. Stroh (1992) 10 Cal. App. 4th 1446, 1453, 13 Cal. Rptr. 2d 432*

Supreme and appellate courts has exclusive jurisdiction under *Bus. & Prof. Code § 23090.5* to review disciplinary orders of Department of Alcoholic Beverage Control; jurisdiction may not be circumvented by filing superior court action to prospective disciplinary action styled is claim for declaratory or injunctive relief. *American Drug Stores, Inc. v. Stroh (1992) 10 Cal. App. 4th 1446, 1449-1452, 13 Cal. Rptr. 2d 432*

Jurisdiction of Supreme Court and courts of appeal under *Bus. & Prof. Code § 23090.5* is not limited to review of quasi judicial acts of Department of Alcoholic Beverage Control but is designed to channel into appellate courts proceedings challenging rules and regulations of Department. *Schenley Affiliated Brands Corp. v. Kirby (1971) 21 Cal. App. 3d 177, 196, 98 Cal. Rptr. 609*

Court has no jurisdiction for judicial review of decisions of Department of Alcoholic Beverage Control unless administrative remedy is exhausted by appeal to *Appeals Board. Greenblatt v. Munro (1958) 161 Cal. App. 2d 596, 605, 326 P.2d 929* ; *Miller v. Dept. Alcoholic Bev. Control (1958) 160 Cal. App. 2d 658, 661-663, 325 P.2d 601* ; *Fiscus v. Dept. Alcoholic Bev. Control (1957) 155 Cal. App. 2d 234, 236, 317 P.2d 993*

[10] Transfer of License

[a] In General

Transfer of priority liquor licenses from subsidiary to parent corporation into which licensee had been merged is not

prohibited by *Bus. & Prof. Code §§ 24070(c), 24071*, which generally prohibit transfer within two years after issuance. *Foodmaker, Inc. v. Alcoholic Bev. etc. Appeals Bd. (1974) 10 Cal. 3d 605, 609-610, 111 Cal. Rptr. 553, 517 P.2d 817*

Holders of liquor licenses are able to contract freely to transfer licenses to other persons subject to official approval by *Department of Alcoholic Beverage Control. Greve v. Leger, Ltd. (1966) 64 Cal. 2d 853, 857, 52 Cal. Rptr. 9, 415 P.2d 824*

Matters of aesthetics and predicted mode of operation are factors rightly considered by Department of Alcoholic Beverage Control when applicant for transfer of liquor license alleges public convenience or necessity in effort to obtain license in area of undue concentration of licenses [*Bus. & Prof. Code § 23958*]. *Sepatis v. Alcoholic Bev. etc. Appeals Bd. (1980) 110 Cal. App. 3d 93, 101, 167 Cal. Rptr. 729*

Liquor license is transferable property when licensee and third party are concerned. *Belle'Isle v. Hempy (1962) 206 Cal. App. 2d 14, 16, 23 Cal. Rptr. 599*

Federal tax lien on liquor license attaches to proceeds of sale of such license. *Golden v. State of California (1955) 133 Cal. App. 2d 640, 645-646, 285 P.2d 49*

[b] Contracts

Contracts to transfer liquor license subject to approval by Department of Alcoholic Beverage Control are specifically enforceable. *Greve v. Leger, Ltd. (1966) 64 Cal. 2d 853, 857, 52 Cal Rptr 9, 415 P.2d 824* ; *Campbell v. Bauer (1951) 104 Cal. App. 2d 740, 743-744, 232 P.2d 590*

Requirement of approval by Department of Alcoholic Beverage Control of transfer of liquor license is implied condition of all agreements for transfer regardless of context or nature of consideration. *Greve v. Leger, Ltd. (1966) 64 Cal. 2d 853, 859, 52 Cal. Rptr. 9, 415 P.2d 824*

Option agreement repudiated by optionor more than 90 days after execution is not specifically enforceable due to *Bus. & Prof. Code § 24076* but is subject to cause of action for damages for breach of contract. *Greve v. Leger, Ltd. (1966) 64 Cal. 2d 853, 862, 52 Cal. Rptr. 9, 415 P.2d 824*

Contract rights involving transfer of liquor license is not subject to deprivation by retroactive operation of statute; such rights are unenforceable if accruing after effective date of statute and violative thereof. *Belle'Isle v. Hempy (1962) 206 Cal. App. 2d 14, 16-17, 23 Cal. Rptr. 599*

Illegality is no defense to action for damages for breach of contract to transfer license when contemplated performance was not illegal, but manner of performance attempted by defendant was illegal. *Du Pre v. Bogumill (1959) 173 Cal. App. 2d 406, 412-414, 343 P.2d 415*

Inability to transfer liquor license, due to denial by Department of Alcoholic Beverage Control of application for transfer, is total failure of consideration as to agreement to transfer liquor business that included license. *Lenchner v. Chase (1950) 98 Cal. App. 2d 794, 802, 220 P.2d 921*

[c] Criminal Violations

Violation of *Bus. & Prof. Code § 24079* (limiting purchase price paid by license transferee or received by transferor) is misdemeanor. *People v. Anderson (1991) 1 Cal. App. 4th 1084, 1089-1090, 3 Cal. Rptr. 2d 247*

[d] Escrow

Bus. & Prof. Code § 24074 (governing transfers in escrow of liquor licenses) represents mandatory and exclusive scheme for payment of creditors of liquor license transferors, giving creditors who comply with that section priority over those who employ any form of levy on proceeds. *Grover Escrow Corp. v. Gole (1969) 71 Cal. 2d 61, 62, 77 Cal. Rptr. 21, 453 P.2d 461*

Attempted garnishment of escrow funds held in connection with sale of liquor license creates priority over bona fide creditors of seller who filed timely claims with escrow holder pursuant to *Bus. & Prof. Code § 24074*. *Grover Escrow Corp. v. Gole (1969) 71 Cal. 2d 61, 66, 77 Cal. Rptr. 21, 453 P.2d 461*

Bus. & Prof. Code § 24070 et seq., instead of general escrow law, governs escrow for transfer of liquor license; on transfer of license by state, escrow money belongs to seller and seller's timely-filing creditors; U.S. government is not entitled to taxes accrued against buyer after transfer. *Doyle v. Coughlin (1974) 37 Cal. App. 3d 911, 916-917, 919, 112 Cal. Rptr. 701*

Federal government collecting on tax lien against proceeds of sale of liquor license is not bound by state law requiring filing claim with escrow holder. *Golden v. State of California (1955) 133 Cal. App. 2d 640, 648, 285 P.2d 49*

[e] Security Agreements

Agreement incident to lease of business premises that lessee would retransfer liquor license to lessor on termination of lease is unenforceable "pledge" in violation of *Bus. & Prof. Code § 24076* when entered into more than 90 days prior to filing of any application for such retransfer. Citrigno v. Williams (9th Cir. [Cal] 1958) *255 F.2d 675, 678-679*

Option to repurchase liquor licenses for substantial consideration on default by buyer to complete purchase of the licensed premises does not constitute security device within meaning of *Bus. & Prof. Code § 24076* (prohibiting pledges of licenses as security). *Greve v. Leger, Ltd. (1966) 64 Cal. 2d 853, 860, 52 Cal. Rptr. 9, 415 P.2d 824*

Term "pledge" as used in *Bus. & Prof. Code § 24076* (prohibiting licensee to pledge transfer of license as security) is construed to embrace all promises or undertakings to transfer license is security. *Greve v. Leger, Ltd. (1966) 64 Cal. 2d 853, 857, 52 Cal. Rptr. 9, 415 P.2d 824*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawProhibitionContracts LawPerformanceAssignmentGeneral OverviewAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesAdministrative LawAgency AdjudicationDecisionsGeneral Overview

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PART III. RESEARCH GUIDE

3-18 California Forms of Pleading and Practice--Annotated § 18.38

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.38 Attorney General Opinions

Retail licensees are unauthorized to transport tax-paid alcoholic beverages to out-of-state free port warehouse for storage before delivery to retailer's California premises; alcoholic beverages stored in out-of-state free port warehouse are not authorized to be transported into California by retail licensee. *69 Ops. Cal. Att'y Gen. 191 (1986)*

Offer of "complimentary" alcoholic beverages by operator of commercial enterprise constitutes "sale" of those beverages when charge is imposed for business or service provided, thus necessitating alcoholic beverage license. *68 Ops. Cal. Att'y Gen. 263 (1985)*

Out-of-state manufacturers or wholesalers are prohibited from having interest in California licensed alcoholic beverage retailers by "tied-house" restrictions of Alcoholic Beverage Control Act [*Bus. & Prof. Code §§ 25500-25511*]. *55 Ops. Cal. Att'y Gen. 208 (1972)*

Burden of proof in hearing on protest or petition. *23 Ops. Cal. Att'y Gen. 290 (1954)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesAlcohol & Tobacco Products TaxAlcohol TaxGeneral OverviewTax LawState & Local TaxesAlcohol & Tobacco Products TaxGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesCriminal Law & ProcedureCriminal OffensesIntoxicating LiquorsTransportationGeneral Overview

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3-18 California Forms of Pleading and Practice--Annotated § 18.39

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.39 Law Reviews

Saxer, *License to Sell: Constitutional Protection Against State or Local Government Regulation of Liquor Licensing, 22 Hastings Const. L.Q. 441 (Winter 1995)*

Saxer, *Down with Demon Drink!: Strategies for Resolving Liquor Outlet Overconcentration in Urban Areas, 35 Santa Clara L. Rev. 123 (Winter 1994)*

Comment, *The Twenty-First Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest, 79 Calif. L. Rev. 161 (1991)*

McNair, *Business Associations: Alcoholic Beverages - Licensing, 19 Pac. L.J. 472 (January 1988)* (review of selected 1987 legislation)

Note, *Zoning Away the Evils of Alcohol, 61 S. Cal. L. Rev. 1373 (1988)*

Comment, *Civil Liability for Furnishing Liquor in California, 5 Pac. L.J. 186 (1974)*

Keenan, *Liquor Law Liability in California, 14 Santa Clara Law. 46 (1973)*

Aitken and Murray, *The Constitutionality of California's Under-the-Influence-of-Alcohol Presumption, 45 So Cal. L Rev 955 (1972)*

Saeta and Smiland, *Public Inebriate Health: The Legislature and the Revolving Door, 1 Pacific LJ 65 (1970)*

Comment, *The Public Inebriate Health Act and the Failure of the Legislature, 1 Pacific LJ 269 (1970)*

Note, *Alcoholism and the Eighth Amendment: Powell v. Texas, 2 Loyola L Rev 159 (1969)*

Legal Topics:

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

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3-18 California Forms of Pleading and Practice--Annotated § 18.40

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.40 Text References

California Administrative Hearing Practice (Cal. C.E.B. 1984)

California Civil Writ Practice (Cal. C.E.B. 2d ed. 1987)

Witkin, Summary of California Law, vol. 7, *Constitutional Law*, §§ 559-577, 885 (9th ed. 1988)

48 C.J.S., *Intoxicating Liquors*, §§ 142-166, 174-180

45 Am. Jur. 2d, *Intoxicating Liquors*, §§ 177-194

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3-18 California Forms of Pleading and Practice--Annotated §§ 18.41-18.49

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

[Reserved]

§§ 18.41[Reserved]

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3-18 California Forms of Pleading and Practice--Annotated § 18.50

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.50 Protest Against Alcoholic Beverage License Application [Bus. & Prof. Code §§ 24013, 24014]

[1] FORM Protest Against Alcoholic Beverage License Application [Bus. & Prof. Code §§ 24013, 24014]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a verified protest for stating specific objections to the granting of a license under the Alcoholic Beverage Control Act [*see Bus. & Prof. Code § 24013*]. For discussion of protests against a license, including procedure and content requirements, *see § 18.13*.

The form is a reproduction of Form ABC-510-A (11/03) prepared by the Department of Alcoholic Beverage Control, and may be obtained at any office of the Department.

For a procedural guide and forms for use in proceedings before administrative agencies generally, see Ch. 473, *Public Agency Adjudication* , et seq.

[3] Verification Required

A protest made by any person other than an employee of the Department of Alcoholic Beverage Control or a public officer must be verified [*Bus. & Prof. Code § 24014*]. The form in [1], *above*, contains a verification.

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3-18 California Forms of Pleading and Practice--Annotated § 18.51

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.51 Petition for Hearing Following Denial of Application for License [Bus. & Prof. Code § 24011]

[1] FORM Petition for Hearing Following Denial of Application for License [Bus. & Prof. Code § 24011]

BEFORE THE DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL
STATE OF CALIFORNIA

	)	
In the Matter of the	)	
Application of:	)	File No. _____
_____ [*name*]	)	PETITION
D.B.A. _____ [*name*]	)	
Premises:_____ [*street address*]	)	
_____ [*city, state*]	)	
	)	

_____

To the Department of Alcoholic Beverage Control:

Under *Section 24011 of the Business and Professions Code*, the undersigned hereby petitions for a hearing on the denial of his/her application for an _____ [*describe, e.g.*, on sale general] license by the Department on _____[*date*].
Dated: _____.

_____ [*signature*]

_____ [*typed name*]
Petitioner

[2] Use of Form

The form in [1], *above*, is a petition for hearing after an application for a license has been denied by the Department of Alcoholic Beverage Control [*see Bus. & Prof. Code §§ 24011, 24012*]. For discussion of denial of licenses generally, and petitions for hearing following denial of application, *see § 18.14*.

[3] Requirements

The petition must be presented in writing by the applicant to the Department of Alcoholic Beverage Control within 10 days after the Department mails a written notice of denial of the application [*Bus. & Prof. Code § 24011*]. On receipt of the petition, the Department must set the matter for hearing [*Bus. & Prof. Code § 24012*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporate NamesFictitious NamesRegistration RequirementsGovernmentsLocal GovernmentsLicenses

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3-18 California Forms of Pleading and Practice--Annotated §§ 18.52-18.54

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

[Reserved]

§§ 18.52[Reserved]

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3-18 California Forms of Pleading and Practice--Annotated § 18.55

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.55 Petition for Hearing on Automatic Suspension of License for Cancellation of Bond or Failure to Pay Taxes [Bus. & Prof. Code § 24205]

[1] FORM Petition for Hearing on Automatic Suspension of License for Cancellation of Bond or Failure to Pay Taxes [Bus. & Prof. Code § 24205]

Department of Alcoholic Beverage Control
3810 Rosin Court, Suite 150
Sacramento, California 95834

Re: Petition for hearing under *Section 24205 of the Business and Professions Code*

Department of Alcoholic Beverage Control:

Under *Section 24205 of the Business and Professions Code*, the undersigned hereby petitions for a hearing on the suspension of his/her license under that statute on _____[*date*], on the grounds that _____ [petitioner's bond has _____ (been canceled *or* become void *or* become unenforceable) *or* petitioner has failed to pay _____ (taxes *or* penalties) due under Rev. & Tax Code *§ 6001 et seq., Rev. & Tax Code § 7200 et seq., Rev. & Tax Code* § 7251 et seq., or *Rev. & Tax Code § 32001 et seq.*].

_____[*Allege filing of valid security or payment of taxes or penalties, as the case may be*].
Dated: _____.

_____ [*signature*]
_____ [*typed name*]
Petitioner

[2] Use of Form

The form in [1], *above*, is a petition used to seek a hearing under *Bus. & Prof. Code § 24205* after an automatic suspension of a license for cancellation of the petitioner's bond, or when the bond becomes void or unenforceable, or for failure to pay taxes or penalties under the Sales and Use Tax Law, the Transactions and Use Tax Law, the Bradley-Burns Uniform Local Sales and Use Tax Law, or the Alcoholic Beverage Tax Law [*Bus. & Prof. Code § 24205*]. For further discussion of automatic suspension, including suspended licensee's petition for hearing, *see § 18.15[2][c]*.

Since the license is automatically reinstated if the taxpayer files a valid bond or pays the delinquent taxes [*Bus. & Prof. Code § 24205*], a hearing is useful to obtain a ruling from the Department of Alcoholic Beverage Control declaring or acknowledging the automatic reinstatement, and any rights and duties incident to the reinstatement.

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3-18 California Forms of Pleading and Practice--Annotated § 18.56

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.56 Accusation to Suspend or Revoke License [Bus. & Prof. Code §§ 24201, 24203]

[1] FORM Accusation to Suspend or Revoke License [Bus. & Prof. Code §§ 24201, 24203]

In the Matter of the Accusation	)	
Against	)	File No. _____
_____ [*name*],	)	Reg. No. _____
Licensee and Respondent.	)	ACCUSATION
Premises: _____ [*address*]	)	
	)	
	)	

_____

To the Department of Alcoholic Beverage Control:

I hereby complain and accuse the above respondent(s), holding the above license(s), based on the following statement of facts: _____[*specify grounds on which accusation is based*].

By reason of the foregoing facts, grounds for suspension or revocation of such license(s) exist and the continuance of the license(s) would be contrary to public welfare and morals, as set forth in Article XX, Section 22 of the California State Constitution, and Section(s) _____[*specify section numbers*] of the Business and Professions Code.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is an accusation to suspend or revoke a license [*see Bus. & Prof. Code § 24201*]. For further discussion relating to accusations to suspend or revoke license, *see § 18.15[3]*.

[3] Service

On the filing of an accusation, the Department of Alcoholic Beverage Control serves a copy on the respondent [*Gov. Code § 11505(a)*]. The Department may include with the accusation any information that it deems appropriate, but it must include a post card or other form entitled, "Notice of Defense" [*see § 18.57*] which, when signed by or on behalf of the respondent and returned to the agency, will acknowledge service of the accusation and constitute a notice of defense under *Gov. Code § 11506* [*Gov. Code § 11505(a)*].

[4] Statement to Respondent

The copy of the accusation must include or be accompanied by a statement that respondent may request a hearing by filing a notice of defense within 15 days after service of the accusation, and that failure to do so will constitute a waiver of the respondent's right to a hearing [*Gov. Code § 11505(a)*]. The statement must also include or be accompanied by copies of *Gov. Code §§ 11507.5*, *11507.6*, and *11507.7* [*Gov. Code § 11505(a)*].

The statement to respondent must be substantially in the following form [*Gov. Code § 11505(b)*]:

> "Unless a written request for a hearing signed by or on behalf of the person named as respondent in the accompanying accusation is delivered or mailed to the agency within 15 days after the accusation was personally served on you or mailed to you, _____ [*name of agency*] may proceed on the accusation without a hearing. The request for a hearing may be made by delivering or mailing the enclosed form entitled 'Notice of Defense,' or by delivering or mailing a notice of defense as provided by *Section 11506 of the Government Code* to: _____ [*name and address of agency*]. You may, but need not, be represented by counsel at any time at any or all stages of these proceedings.
>
> "If you desire the names and addresses of witnesses or an opportunity to inspect and copy the items mentioned in Section 11507.6 in the possession, custody, or control of the agency, you may contact _____[*name and address of appropriate person*]. The hearing may be postponed for good cause. If you have good cause, you are obliged to notify the agency within 10 working days after you discover the good cause. Failure to notify the agency within 10 days will deprive you of a postponement."

[5] Verification

The accusation must be verified, unless made by a public officer acting in his official capacity, or by an employee of the Department of Alcoholic Beverage Control [*Gov. Code § 11503*]. The verification may be on information and belief [*Gov. Code § 11503*].

For a form of verification, *see § 18.70[1]*.

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3-18 California Forms of Pleading and Practice--Annotated § 18.57

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.57 Notice of Defense Requesting Dismissal of Accusation, or Alternatively, Requesting Hearing [Gov. Code §§ 11505, 11506]

[1] FORM Notice of Defense Requesting Dismissal of Accusation, or Alternatively, Requesting Hearing [Gov. Code §§ 11505, 11506]

In the Matter of the Accusation	)	
Against	)	File No. _____
_____ [*name*],	)	Reg. No. _____
Licensee and Respondent.	)	NOTICE OF DEFENSE REQUESTING DIS-
	)	MISSAL OF ACCUSATION, OR ALTERNAT-
	)	IVELY, REQUESTING HEARING

To the Department of Alcoholic Beverage Control:

_____[*name of licensee*], the licensee and respondent in the above-entitled proceeding ("Respondent"), hereby acknowledges receipt of a copy of the Accusation and accompanying statement, and responds as follows, pursuant to *Section 11506 of the Government Code*:

[1. Respondent objects to the Accusation on the grounds that Respondent has not operated the establishment in such a way that continuance of its license would be contrary to public welfare and morals.]

[2. Respondent objects to the Accusation on the grounds that the form of Accusation is so indefinite and uncertain that he/she cannot identify the transactions or prepare a defense.

[3. Respondent objects to the Accusation on the grounds that it does not state acts or omissions upon which the Department of Alcoholic Beverage Control can proceed.]

[4. Respondent objects to the Accusation on the grounds that there is no factual basis in support of the allegations contained therein.]

[5. Respondent objects to the Accusation on the grounds that, under the circumstances, compliance with _____ (*identify offending regulation section*) would result in a material violation of _____ (*identify regulation section*) in that: _____ (*specify grounds*).]

[6. Respondent objects to the Accusation on the grounds that: _____ (*state other grounds*).]

For all of the foregoing reasons, Respondent requests that the Accusation be dismissed in its entirety. In the event that the above-enumerated defenses are overruled, in whole or in part, Respondent respectfully requests a hearing pursuant to *Sections 11505* and *11506 of the Government Code*.
Dated: _____.

_____ [*signature*]
Petitioner

[2] Use of Form

The form in [1], *above*, is a notice of defense acknowledging service of the accusation, and requesting dismissal of the accusation, or alternatively, requesting a hearing [*see Gov. Code §§ 11505, 11506*]. For further discussion of notice of defense, *see § 18.15[3][b]*.

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3-18 California Forms of Pleading and Practice--Annotated § 18.58

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.58 Petition to Make Offer in Compromise [Bus. & Prof. Code § 23095]

[1] FORM Petition to Make Offer in Compromise [Bus. & Prof. Code § 23095]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is for use in petitioning the Department of Alcoholic Beverage Control for permission to make an offer in compromise by payment of a sum of money in lieu of suspension of the petitioner's license [*Bus. & Prof. Code § 23095*]. The petition may be used when a decision suspending the petitioner's license for 15 days or less becomes final, but before the operative date of suspension [*Bus. & Prof. Code § 23095*].

For further discussion of offers in compromise, including required monetary amounts, *see § 18.15[4]*.

The form is a reproduction of Form ABC-162(1/95) prepared by and available from the Department of Alcoholic Beverage Control.

[3] Amount of Offer

For retail licensees, the offer in compromise must be either:

- Not less than $1,500 and not more than $6,000 [*Bus. & Prof. Code § 23095(a)*].

- Not less than $750 and not more than $3,000, if the petitioning retailer has had no other accusation filed against him or her by the Department during the preceding three years from the date of the petition that resulted in a final decision to suspend or revoke the retail license concerned [*Bus. & Prof. Code § 23095(b)*].

For nonretail licensees, the offer in compromise must be not less than $750 and not more than $10,000 [*Bus. & Prof. Code § 23095(c)(1)*; *see Bus. & Prof. Code § 23095(c)(2)* (exception)].

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3-18 California Forms of Pleading and Practice--Annotated § 18.59

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.59 Petition for Reconsideration [Gov. Code § 11521]--Review of Penalty Assessment [Bus. & Prof. Code § 24211]

[1] FORM Petition for Reconsideration [Gov. Code § 11521]--Review of Penalty Assessment [Bus. & Prof. Code § 24211]

In the Matter of the Accusation	)	
Against	)	File No. _____
_____ [*name*],	)	Reg. No. _____
Licensee and Respondent.	)	PETITION FOR RECONSIDERATION AND RE-
	)	VIEW OF PENALTY
	)	

To the Department of Alcoholic Beverage Control:

The undersigned hereby petitions that the Department reconsider its decision in this matter under *Section 11521 of the Government Code* for the purpose of reducing the penalty assessed under such decision, as authorized by *Section 24211 of the Business and Professions Code*. The following reasons are offered in support of this petition:
_____[*specify*].
Dated: _____.

_____ [*signature*]
Petitioner

[2] Use of Form

The form in [1], *above*, is for use in seeking reconsideration by the Department of Alcoholic Beverage Control of the penalty assessed [*see Bus. & Prof. Code § 24211*; *see also Gov. Code § 11521*].

For discussion relating to reconsideration of the Department's decision, *see § 18.16 [2]*. For forms of petition for reconsideration in administrative proceedings generally, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

[3] Department Authority

The Department of Alcoholic Beverage Control may order a reconsideration of all or part of the case on its own motion or on petition of any party [*Gov. Code §§ 11501, 11521*]. Further, the Department may on its own motion, at any time before a penalty assessment is placed into effect and without any further proceedings review the penalty, but such review is limited to its reduction [*Bus. & Prof. Code § 24211*].

[4] Time to File Petition

The power to order a reconsideration expires [*Gov. Code § 11521(a)*]:

- Thirty days after the delivery or mailing of a decision to respondent,
- After the effective date of the decision if it occurs before that 30-day period elapses,
- At the termination of a stay of the decision (which cannot be longer than 30 days) granted by the agency to enable the respondent to file a petition for reconsideration, or
- At the termination of a stay (which cannot be longer than 10 days) granted by the agency for the purpose of evaluating a petition that was filed prior to the expiration of any of the applicable time periods.

If no action is taken on the petition within the time allowed, the petition is deemed denied [*Gov. Code § 11521(a)*; *see Bonnell v. Medical Board of California (2003) 31 Cal. 4th 1255, 1261-1263, 8 Cal. Rptr. 3d 532, 82 P.3d 740* (interpreting statute)].

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3-18 California Forms of Pleading and Practice--Annotated §§ 18.60-18.64

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

[Reserved]

§§ 18.60[Reserved]

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Volume 3: Alcoholic Beverage Licenses thru Answers-Chs. 18-29
Chapter 18 ALCOHOLIC BEVERAGE LICENSES
PART IV. FORMS
C. Proceedings Relating to the Administrative Review of the Department of Alcoholic Beverage Control

3-18 California Forms of Pleading and Practice--Annotated § 18.65

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.65 Notice of Appeal [Bus. & Prof. Code § 23081; 4 Cal. Code Reg §§ 183, 184]

[1] FORM Notice of Appeal [Bus. & Prof. Code § 23081; 4 Cal. Code Reg §§ 183, 184]

In the Matter of the Accusation	)	
Against	)	File No. _____
_____ [*name*],	)	
Licensee and Respondent.	)	Reg. No. _____
	)	NOTICE OF APPEAL FROM DECISION OF DE-
	)	PARTMENT OF ALCOHOLIC BEVERAGE CON-
		TROL

_____

NOTICE IS HEREBY GIVEN that _____[*name*] appeals from the decision of the Department of Alcoholic Beverage Control, _____ [mailed *or* delivered] on _____[*date*], and for grounds of appeal specifies:

[*SPECIFY any or all of the following:*]

1. The Department of Alcoholic Beverage Control proceeded in excess of its jurisdiction.

2. The Department of Alcoholic Beverage Control did not proceed in the manner required by law.

3. The decision appealed from is not supported by the findings.

4. The findings in the decision appealed from are not supported by substantial evidence in the light of the whole record viewed in its entirety, including the body of evidence opposed to the Department's findings.

5. There is relevant evidence that in the exercise of reasonable diligence, could not have been produced at the hearing.

6. There is relevant evidence that was improperly excluded at the hearing before the Department.

[*CONTINUE*]

The question(s) to be considered by the board _____ is/are the following:
_____[*specify*]

[Appellant requests oral argument before the Board at a time and place to be fixed by the Board.]

_____ [*signature*]
[Attorney for] Appellant

[2] Use of Form

The form in [1], *above*, is a notice of appeal for filing with the Alcoholic Beverage Control Appeals Board of the State of California by any person "aggrieved" by a final decision of the Department of Alcoholic Beverage Control [*Bus. & Prof. Code § 23081*]. For further discussion of appeal from a decision of the Department, *see § 18.18*.

[3] Contents of Form

The appeal must be in writing and state the grounds on which review is sought [*Bus. & Prof. Code § 23081*] and the questions to be considered [*4 Cal. Code Reg. § 184*]. The notice of appeal should be typed or printed on paper 8 1/2 x 11 inches in size, and be double spaced [*4 Cal. Code Reg. § 183*]. It must be signed by the appellant or appellant's authorized agent [*4 Cal. Code Reg. § 184*].

[4] Filing and Service

The original and three copies are filed with the Appeals Board, and a copy is served on all parties to the proceedings before the Department of Alcoholic Beverage Control, including the Department [*4 Cal. Code Reg. § 184*]. Service is made by delivering or mailing a copy to the party to be served, and proof of service must be filed with the original notice of appeal [*4 Cal. Code Reg. § 184*].

[5] Time to File Appeal

The appeal must be filed with the Appeals Board on or before the tenth day after the last day on which reconsideration of a final decision of the Department of Alcoholic Beverage Control can be ordered [*Bus. & Prof. Code § 23081*]. The power to order a reconsideration expires [*Gov. Code § 11521(a)*; *see Bonnell v. Medical Board of California (2003) 31 Cal. 4th 1255, 1261-1263, 8 Cal. Rptr. 3d 532, 82 P.3d 740* (interpreting statute)]:

- 30 days after the delivery or mailing of a decision to respondent, or
- On the effective date of the decision if it occurs before the 30-day period elapses, or
- At the termination of a stay of the decision (which cannot exceed 30 days) granted by the Department to enable the respondent to file a petition for reconsideration.

For further discussion of reconsideration of a final decision of the Department, *see § 18.16[2]*.

The appeal is deemed filed on the date it is received in the principal office of the Appeals Board, except that an appeal mailed to the Appeals Board by registered mail is deemed filed on the date of registry with the United States Post Office [*Bus. & Prof. Code § 23081.5*].

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3-18 California Forms of Pleading and Practice--Annotated § 18.66

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.66 Request for Transcript and Record [4 Cal. Code Reg § 187]

[1] FORM Request for Transcript and Record [4 Cal. Code Reg § 187]

In the Matter of the Accusation	)	
Against	)	File No. _____
_____ [*name*],	)	Reg. No. _____
Licensee and Respondent.	)	REQUEST FOR TRANSCRIPT AND RECORD
	)	FOR APPEAL
	)	

_____

To the Department of Alcoholic Beverage Control:

_____[*Name of appellant*], having filed an appeal in this matter with the Alcoholic Beverage Control Appeals Board, hereby requests that the Department prepare a transcript and record of all proceedings before the Department, including all documents and records described in *Section 188 of Title 4 of the California Code of Regulations.*
Dated: _____.

_____ [*signature*]
_____ [*typed name*]
Appellant

[2] Use of Form

The form in [1], *above*, is for use in requesting the Department of Alcoholic Beverage Control to prepare a transcript

and record of proceedings before the Department after an appeal has been filed [*see 4 Cal. Code Reg. § 187*].

For further discussion of request, content, and cost of record on appeal, *see § 18.18[3]*.

[3] Cost and Delivery of Transcript and Record

The Department of Alcoholic Beverage Control informs appellant of the estimated cost of the record on appeal and arranges for the preparation of the record on payment of such costs [*4 Cal. Code Reg. § 187*]. A copy of the record is delivered to appellant within 30 days or as soon thereafter as the records become available [*4 Cal. Code Reg. § 187*]. At the same time the copy is delivered to appellant, the original and three copies of the transcript and record, including original exhibits, are filed by the Department with the Appeals Board [*4 Cal. Code Reg. § 187*]. For further discussion of this procedure, *see § 18.18[3]*.

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C. Proceedings Relating to the Administrative Review of the Department of Alcoholic Beverage Control

3-18 California Forms of Pleading and Practice--Annotated § 18.67

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.67 Declaration of Merits [4 Cal. Code Reg §§ 198, 198.1] in Support of Request for Remand of Proceedings to Department--Newly Discovered Evidence [Bus. & Prof. Code § 23084(e)]

[1] FORM Declaration of Merits [4 Cal. Code Reg §§ 198, 198.1] in Support of Request for Remand of Proceedings to Department--Newly Discovered Evidence [Bus. & Prof. Code § 23084(e)]

In the Matter of the Accusation	)	
Against	)	File No. _____
_____ [*name*],	)	
Licensee and Respondent.	)	Reg. No. _____
	)	DECLARATION OF MERITS IN SUPPORT OF
	)	REQUEST FOR REMAND

_____

Appellant requests that the Alcoholic Beverage Control Appeals Board remand this case to the Department of Alcoholic Beverage Control for consideration on the ground that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced at the hearing before the Department. In support of this request, appellant declares: _____[*set forth the substance of the newly discovered evidence, its relevancy and that part of the record to which it pertains, names of witnesses to be produced and their expected testimony, nature of any exhibits to be introduced, and a detailed statement of the reasons why that evidence could not, with due diligence, have been discovered and produced at the hearing before the Department; do not set out any cumulative evidence*].

_____ [*signature*]
_____ [*typed name*]
Appellant

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*].

_____ [*signature*]
_____ [*typed name*]
Appellant

[2] Use of Form

The form in [1], *above*, is a declaration of merits in support of a request to the Appeals Board that a case be remanded to the Department of Alcoholic Beverage Control for consideration of newly discovered evidence [*see Bus. & Prof. Code § 23084(e)*; *4 Cal. Code Reg. § 198*]. For discussion of grounds and procedure for requesting that a decision be remanded, *see § 18.18[10][b]*.

[3] Contents

The party making the request must set forth the following in the form of a declaration or affidavit [*4 Cal. Code Reg. § 198*]:

- The substance of the newly discovered evidence.
- Its relevancy and that part of the record to which it pertains.
- The names of witnesses to be produced and their expected testimony.
- The nature of any exhibits to be introduced.
- A detailed statement of the reasons why the evidence could not, with due diligence, have been discovered or produced at the hearing before the Department.

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C. Proceedings Relating to the Administrative Review of the Department of Alcoholic Beverage Control

3-18 California Forms of Pleading and Practice--Annotated §§ 18.68-18.69

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

[Reserved]

§§ 18.68[Reserved]

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Chapter 18 ALCOHOLIC BEVERAGE LICENSES
PART IV. FORMS
D. Proceedings Relating to Judicial Review of Denial, Suspension, or Revocation of Licenses

3-18 California Forms of Pleading and Practice--Annotated § 18.70

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.70 Petition for Writ of Review [Bus. & Prof. Code § 23090.4; Code Civ. Proc. § 1069] to Review Order of Appeals Board [Bus. & Prof. Code § 23090]--By License Applicant--Review of Denial of Application for License as to Premises in Proximity to Church [Bus. & Prof. Code § 23789]

[1] FORM Petition for Writ of Review [Bus. & Prof. Code § 23090.4; Code Civ. Proc. § 1069] to Review Order of Appeals Board [Bus. & Prof. Code § 23090]--By License Applicant--Review of Denial of Application for License as to Premises in Proximity to Church [Bus. & Prof. Code § 23789]

[*Cover*]

[SC NO. _____]

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

[*OR*]

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

_____ APPELLATE DISTRICT

_____ [*name*],)
Petitioner,)

vs.	)	[CA NO. _____]
_____ [*name*], as DIRECTOR	)	PETITION FOR WRIT OF REVIEW
OF THE DEPARTMENT OF ALCOHOLIC	)	
BEVERAGE CONTROL, and ALCOHOLIC	)	
BEVERAGE CONTROL APPEALS BOARD,	)	
Respondent.		

_____

_____ [*name*]
_____ [*address*]
_____ [*telephone number*]
Attorney for Petitioner

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IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

[*OR*]

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

_____ APPELLATE DISTRICT

_____ [*name*],	)	
Petitioner,	)	
vs.	)	PETITION FOR WRIT OF REVIEW
_____ [*name*], as DIRECTOR	)	
OF THE DEPARTMENT OF ALCOHOLIC	)	
BEVERAGE CONTROL, and ALCOHOLIC	)	
BEVERAGE CONTROL APPEALS BOARD,	)	
Respondents.		

_____

[*EITHER*]

TO THE HONORABLE _____, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

[*OR*]

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL, _____ APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA:

Petitioner alleges:

1. Petitioner is the person aggrieved and affected by a final order of Respondent Alcoholic Beverage Control Appeals Board ("the Board"), and is a party beneficially interested in these proceedings in that such order by the Board affirmed a decision of Respondent Department of Alcoholic Beverage Control ("the Department") denying petitioner's application for issuance of a _____[*specify type of license*] liquor license for certain premises located at _____[*address*], California.

2. On _____[*date*], petitioner filed with the Department an application for issuance of a _____[*type of license*] liquor license to petitioner for premises located at _____[*address*], California.

3. On _____[*date*], the Department denied petitioner's application and mailed notice of the same to petitioner. Within 10 days after such mailing of notice, petitioner presented a written petition for a license with the Department on _____[*date*]. Thereafter petitioner was served with a notice of hearing and statement of issues by the Department. The issues stated as affecting issuance of a license to petitioner were whether the described premises are in proximity to a church and whether, if such was the fact, issuance of a license would be contrary to the public welfare or morals.

4. At the conclusion of a hearing on these matters, the Department decided against the issuance of a license to petitioner for the described premises, and _____ [delivered *or* mailed] its decision to petitioner on _____[*date*].

5. On _____[*date*] petitioner filed an appeal of such decision by the Department by filing a notice of appeal with the Board, setting forth as grounds for the appeal that:

[*INCLUDE any or all of the following:*]

(a) The findings of the Department are not supported by substantial evidence in the light of the whole record viewed in its entirety, including the body of evidence opposed to the Department's findings.

(b) The decision is not supported by the findings.

(c) The Department proceeded in excess of its jurisdiction.

(d) The Department did not proceed in the manner required by law.

(e) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced at the hearing.

(f) There is relevant evidence that was improperly excluded by the Department at the hearing.

[*CONTINUE*]

6. On _____[*date*], a final order of the Board affirming the decision of the Department denying petitioner's application for issuance of a _____[*specify type of license*] liquor license for described premises. Petitioner has exhausted all administrative remedies available.

7. The order by the Board is in error and the decision by the Department should be _____ [reversed *or* reversed and remanded for consideration of evidence] on the following grounds: _____[*specify applicable grounds as set out in Paragraph 5, above*].

8. There is no appeal from such decision and order and petitioner has no other plain, speedy, or adequate remedy, or any remedy, unless the court grants a writ of review.

[9. *If the petition is filed in the Supreme Court rather than a court of appeal, the following should be included*: The following circumstances render it proper that the writ be issued by the Supreme Court rather than the court of appeal: _____ (*specify*).]

WHEREFORE, petitioner prays:

1. That a writ of review issue out of this court to the Alcoholic Beverage Control Appeals Board, commanding it to certify fully to this court at a specified time and place the records and proceedings in this cause so that the same may be inquired into, reviewed, and determined by this court.

2. That pending the judgment of this court, the operation of the order and decision sought to be reviewed be stayed by order of this court.

3. That following the inquiry, review, and determination by this court, the _____ [order of the Alcoholic Beverage Control Appeals Board and the decision of the Department of Alcoholic Beverage Control be reversed *or* matter be reversed and remanded to the Alcoholic Beverage Control Appeals Board for the purpose of _____ (*specify*)].

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner_____ [*name*]

VERIFICATION

I, _____[*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*].

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities*]

PROOF OF SERVICE

I, _____[*name*], declare that I am, and was at the time of the service hereinafter mentioned, at least 18 years of age and not a party to the above entitled proceeding. My _____ [residence *or* business] address is _____, California. I am _____ [a resident of *or* employed in] _____[*county where mailing occurred*] County, California.

On _____[*date*], I served the foregoing petition for writ of review on _____[*name of attorney served*], attorney for _____[*name of party represented by attorney served*], by depositing copies thereof together with copies of the memorandum of points and authorities in the United States mail in _____, California, enclosed in sealed envelopes, with postage fully prepaid, addressed to: _____[*address of Alcoholic Beverage Control Appeals Board*] and to _____[*address of Department of Alcoholic Beverage Control*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*].

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is a petition for use in seeking review of an order by the Alcoholic Beverage Control Appeals Board affirming denial by the Department of Alcoholic Beverage Control of issuance of a license for premises in proximity to a church [*see Bus. & Prof. Code § 23090*].

For legal background related to a petition for writ of review of an order by the Appeals Board, *see § 18.20*. For a procedural guide and forms for use in proceedings involving writs of review, see Ch. 492, *Review (Certiorari), Writ of.* For a memorandum of points and authorities in support of the petition, see California Points and Authorities, Ch. 15, *Alcoholic Beverages* .

[3] Allegations

The form alleges:

- Petitioner's standing to seek review (Paragraph 1) [*see Bus. & Prof. Code § 23090*; *Code Civ. Proc. § 1069*],

- Facts concerning the Department's action denying the license (Paragraphs 3, 4),

- That the order by the Appeals Board is a final order (Paragraph 6) [*see Bus. & Prof. Code § 23090*],

- That petitioner has exhausted his or her administrative remedies (Paragraphs 5 and 6) [*see Greenblatt v. Munro (1958) 161 Cal. App. 2d 596, 605, 326 P.2d 929]* ,

- The grounds for review (Paragraph 7) [*see Bus. & Prof. Code § 23090.2*],

- The lack of appeal or other remedy except writ of review (Paragraph 8) [*see Bus. & Prof. Code §§ 23090, 23090.2*; *Code Civ. Proc. § 1069*].

[4] Parties

If the Alcoholic Beverage Control Appeals Board reverses the decision of the Director, and the Director petitions for writ of review, the Director is the petitioner, the Appeals Board is the respondent, and the licensee (or applicant) is the real party in interest.

If, however, the Appeals Board affirms the order of the Director, and the licensee petitions for review, the licensee is the petitioner, and the Director and the Appeals Board are the respondents. There is no real party in interest.

[5] Additional Allegations for Petition to Supreme Court

If a petition for writ of review might lawfully be made to a lower court in the first instance, the petition must set forth the circumstances which render it proper for the writ to issue originally from the higher court [*Cal. Rules of Ct., Rule 8.486(b)(1)*]. These additional allegations would be necessary if the petition is filed in the Supreme Court, rather than in a court of appeal, since a court of appeal also has original jurisdiction to review orders of the Department of Alcoholic Beverage Control and the Alcoholic Beverage Control Appeals Board [*Bus. & Prof. Code §§ 23090, 23090.5*]. It is, however, rare for the Supreme Court to assume original jurisdiction over the review of this type of decision, and those petitions that are filed with that court are almost always transferred to a court of appeal [*see Cal. Const., art. VI, § 12* on power of Supreme Court to transfer cases from itself to a court of appeal].

[6] Verification

The application must be made on the verified petition [*see Code Civ. Proc. § 1069*] of a person aggrieved [*Cal. Const., art. XX, § 22*] or affected by the order [*Bus. & Prof. Code § 23090*].

[7] Points and Authorities, and Proof of Service

The petition must be accompanied by a supporting memorandum and by proof of service of copies of the petition and accompanying memorandum on the respondent and any real party in interest named in the petition [*Code Civ. Proc. §§ 1069, 1107*; *Cal. Rules of Ct., Rule 8.486(b), (e)*].

[7a] Certificate of Interested Entities or Persons

If a party files a motion, application, or opposition to a motion or application in the Court of Appeal before filing its principal brief, the party must serve and file its Certificate of Interested Entities or Persons at the time it files the first such motion, application, or opposition, and must include a copy of this certificate in the party's principal brief. If no motion, application, or opposition to a motion or application is filed before the parties file their principal briefs, each party must include its certificate in its principal brief [*Cal. Rules of Ct., Rule 8.208(d)(1)*]. If the identity of any party or any entity or person subject to disclosure has not been publicly disclosed in the proceedings and a party wants to keep that identity confidential, the party may serve and file an application for permission to file its certificate under seal

separately from its principal brief, motion, application, or opposition. If the application is granted, the party must file the certificate under seal and without service within 10 days of the court's order granting the application [*Cal. Rules of Ct., Rule 8.208(d)(2)*].

If a party is an entity, the certificate must list any other entity or person that the party knows has an ownership interest of 10 percent or more in the party [*Cal. Rules of Ct., Rule 8.208(e)(1)*]. All parties must also list any person or entity, other than the parties themselves, that has a financial or other interest in the outcome of the proceeding that the party reasonably believes the justices should consider in determining whether to disqualify themselves under Canon 3E of the Code of Judicial Ethics [*Cal. Rules of Ct., Rule 8.208(e)(2)*]. If the party knows of no entity or person that is required to be disclosed under the rule, he or she must so state in the certificate [*Cal. Rules of Ct., Rule 8.208(e)(3)*]. Furthermore, if a party learns of changed or additional information that must be disclosed under *Cal. Rules of Ct., Rule 8.208*, he or she must promptly serve and file a supplemental certificate [*Cal. Rules of Ct., Rule 8.208(f)*].

The petitioner's certificate must be included in the petition [*Cal. Rules of Ct., Rule 8.488(c)(1)*]. The certificates of the respondent and real party in interest must be included in their preliminary opposition or, if no such opposition is filed, in their return, if any [*Cal. Rules of Ct., Rule 8.488(c)(2)*]. The certificate must appear after the cover and before the tables [*Cal. Rules of Ct., Rule 8.488(c)(3)*]. If the identity of any party has not been publicly disclosed in the proceedings, the party may file an application for permission to file its certificate under seal separately from the petition, preliminary opposition, or return [*Cal. Rules of Ct., Rule 8.488(c)(4)*]. If a party fails to file a certificate, the clerk must notify the party by mail that the party must file the certificate within 10 days after the clerk's notice is mailed and that failure to comply will result in one of the following sanctions: (A) If the party is the petitioner, the court may strike the petition; (B) If the party is the respondent or the real party in interest, the court may strike the document [*Cal. Rules of Ct., Rule 8.488(d)*].

[8] Cover, Index, and Table

The cover of the petition must contain the title of the case, the name of the trial judge and county, the designation of the paper, and the name, address, and telephone number of the attorney filing it, and the California State Bar membership number of that attorney and of every attorney who joins in the petition [*see Cal. Rules of Ct., Rules 8.212(b)(6), 8.40(a)*].

Insofar as practicable, the cover of the petition should be red [*Cal. Rules of Ct., Rule 8.40(b)*]. While there is no express requirement that the petition contain a topical index or table of authorities, the better practice is to include them [*see Cal. Rules of Ct., Rule 8.204(a)* (requiring such index and tables in briefs)].

[9] Time and Place to File

The petition is filed with the Supreme Court or the court of appeal for the appellate district in which the proceeding arose [*Bus. & Prof. Code § 23090*]. No other court has jurisdiction to review orders by the Department of Alcoholic Beverage Control [*Bus. & Prof. Code § 23090.5*]. A writ filed in superior court must be transferred to the court of appeal under the statute mandating that a court without jurisdiction transfer the action to a court with jurisdiction [*Padilla v. Department of Alcoholic Beverage Control (1996) 43 Cal. App. 4th 1151, 1157-1158, 51 Cal. Rptr. 2d 133* (owner's petition for writ of mandate under *Code Civ. Proc. § 1094.5* treated as writ of review and denied); *see Code Civ. Proc. § 396*]. The petition must be filed within 30 days after the Appeals Board has filed its final order [*Bus. & Prof. Code § 23090*].

[10] Service

A copy of the pleading must be served on the Appeals Board, the Department of Alcoholic Beverage Control, and on each party who entered an appearance before the Appeals Board [*Bus. & Prof. Code § 23090.4*]. In addition, the petition

must be accompanied by points and authorities, the Certificate of Interested Entities or Persons [*see § 18.70[7a]*], and by proof of service of copies of the petition and accompanying points and authorities on the respondent and any real party in interest named in the petition [*Code Civ. Proc. §§ 1069, 1107*; *Cal. Rules of Ct., Rule 8.486(e), (j)*]. However, a court may, in its discretion and for good cause, grant the petition ex parte without notice or service of the petition on the respondent and any real party in interest [*Code Civ. Proc. §§ 1069, 1107*].

Service on the Appeals Board is made by service on its presiding officer (that is, the chairperson), or its secretary, or on a majority of its members [*Code Civ. Proc. § 1107*]. Service may be made by personal delivery of a copy of the petition to each respondent, or by substituted service, or by mailing a copy of the petition to each respondent [*see Bus. & Prof. Code § 23090.4*; *Code Civ. Proc. §§ 1011, 1012, 1109*].

[11] Proof of Service of Petition

In addition to complying with the requirements of *Cal. Rules of Ct., Rule 8.25*, the proof of service must give the telephone number of each attorney served [*Cal. Rules of Ct., Rule 8.486(e)*]. A petition accompanied by a defective proof of service must be filed, but if a proper proof of service is not filed within five days after the clerk gives notice of the defect, the court may strike the petition or impose a lesser sanction [*Cal. Rules of Ct., Rule 8.486(e)*]. However, a court may, in its discretion and for good cause, grant the petition ex parte without notice or service of the petition on the respondent and any real party in interest [*Code Civ. Proc. §§ 1069, 1107*].

The proof of service contained in the form is for use when service is made by mail by a nonattorney [*see Code Civ. Proc. §§ 1013a(1), 1015, 1109*]. For forms of proof of service by mail by an attorney [*see Code Civ. Proc. §§ 1013a(2), 1015, 1109*], proof of personal or substituted service [*see Code Civ. Proc. §§ 1011, 1015, 1109*], acknowledgment of service [*see Code Civ. Proc. §§ 417.10(d)* (relating to proof of service of summons), 1015, 1109], or proof of service by affidavit or declaration, see Ch. 518, *Service of Summons and Papers* .

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D. Proceedings Relating to Judicial Review of Denial, Suspension, or Revocation of Licenses

3-18 California Forms of Pleading and Practice--Annotated § 18.71

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.71 Petition for Writ of Review [Bus. & Prof. Code § 23090.4; Code Civ. Proc. § 1069] to Review Order of Appeals Board [Bus. & Prof. Code § 23090]--By Complainant--Review of Issuance of License for Premises in Proximity to Church [Bus. & Prof. Code § 23789]

[1] FORM Petition for Writ of Review [Bus. & Prof. Code § 23090.4; Code Civ. Proc. § 1069] to Review Order of Appeals Board [Bus. & Prof. Code § 23090]--By Complainant--Review of Issuance of License for Premises in Proximity to Church [Bus. & Prof. Code § 23789]

[*Cover and Topical Index. See § 18.70[1]*.]

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

[*OR*]

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]

_____ [*name*],	)	
Petitioner,	)	
vs.	)	
_____ [*name*],	)	
as DIRECTOR OF THE DEPARTMENT OF AL-	)	PETITION FOR WRIT OF REVIEW

COHOLIC BEVERAGE CONTROL, and ALCO-	)
HOLIC BEVERAGE CONTROL APPEALS	)
BOARD,	)
Respondents.	)
_____ [*name of licensee*],	)
Real Party in Interest.	

_____

[*EITHER*]

TO THE HONORABLE _____, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

[*OR*]

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL, _____ APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA:

Petitioner alleges:

1. Petitioner is, and at all times herein mentioned was, the _____ [*title, e.g.*, pastor] of _____[*name of church*], authorized to represent that church in this proceeding. Petitioner did so represent the church in proceedings before Respondent Department of Alcoholic Beverage Control ("the Department") and before Respondent Alcoholic Beverage Control Appeals Board ("the Board"). In those proceedings, petitioner protested the issuance of a liquor license to _____[*name of licensee*] for the premises located at _____[*address*], California. Petitioner is a person aggrieved and affected by the final order of the Board affirming the issuance of that license by the Department over petitioner's protest.

2. _____[*Name of licensee*] ("Real Party") is the real party in interest in this proceeding because by this proceeding petitioner seeks review of an order by the Board affirming the Department's decision overruling the protest of petitioner and granting the license to Real Party.

3. _____[*Name of licensee*] applied to the Department for issuance of a _____ [*type of license, e.g.*, on sale general] license to operate a _____ [*e.g.*, night club] at _____[*address*], California. Real Party first posted his/her notice of intention to engage in the sale of alcoholic beverages at those premises on _____[*date*].

4. Within 30 days of such posting, petitioner filed a protest at the office of the Department at _____[*address*], California on the grounds that issuance of the license for the described premises would be contrary to the public welfare and morals because the proposed licensed premises are _____[*specify distance*] from petitioner's church, and that there was good cause to deny the license under *Section 23789 of the Business and Professions Code*. Petitioner's protest was rejected by the Department and a license was issued to Real Party. Within ten days after the rejection, petitioner filed an accusation.

5. Following a hearing on petitioner's accusation, the Department decided that the license should not be revoked.

6. Within ten days after the last day on which reconsideration of the Department's decision could be ordered, petitioner appealed the decision by filing a notice of appeal with the Board on _____[*date*]. As grounds for the appeal, petitioner contended, as he/she does in this petition, that the decision of the Department in failing to revoke Real Party's license was arbitrary and capricious because_____ [*state grounds, e.g.*, the Department's findings were without the support of any substantial evidence and do not support the Department's decision].

7. On _____[*date*], the Board filed its final order affirming the Department's decision.

8. The Board's order is in error and the decision by the Department should be reversed on the grounds that the Department acted arbitrarily and capriciously in refusing to revoke Real Party's license for the described premises because _____ [*specify grounds, e.g.*, the Department's findings were without the support of any substantial evidence and do not support the decision].

9. There is no appeal from the final order of the Board and petitioner has no plain, speedy, or adequate remedy, nor any remedy, unless the court grants a writ of review.

10. [*If petition is filed in Supreme Court, allege circumstances rendering it proper that writ issue from that court rather than from Court of Appeal. See § 18.70[1]*, Paragraph 9.]

WHEREFORE, petitioner prays:

1. That a writ of review issue out of this court to the Alcoholic Beverage Control Appeals Board, commanding it to certify fully to this court at a specified time and place the records and proceedings in this cause so that the same may be inquired into, reviewed, and determined by this court.

2. That following the inquiry, review, and determination by this court, the decision of the Alcoholic Beverage Control Appeals Board, and the decision of the Department of Alcoholic Beverage Control, be reversed and that the license issued to _____[*name*] be revoked.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification; see § 18.70[6]*]

SUPPORTING MEMORANDUM

[*Add supporting memorandum*]

[*Proof of service*; *see § 18.70[11]*]

[2] Use of Form

The form in [1], *above*, is a petition for use in seeking review of an order by the Alcoholic Beverage Control Appeals Board affirming a decision by the Department of Alcoholic Beverage Control, whereby a license was permitted to issue over protest that the premises are in proximity to a church [*see Bus. & Prof. Code § 23789*].

For legal background related to a petition for writ of review of an order by the Appeals Board, *see § 18.20*. For a procedural guide and forms for use in proceedings involving writs of review, see Ch. 492, *Review (Certiorari), Writ of.* For a memorandum of points and authorities in support of the petition, see California Points and Authorities, Ch. 15, *Alcoholic Beverages* .

[3] Allegations

The form alleges:

- Petitioner's standing to seek a writ of review (Paragraph 1) [*see Bus. & Prof. Code §§ 23090, 23090.4*; *Code Civ. Proc. § 1069*; *see also Covert v. State Board of Equalization (1946) 29 Cal. 2d 125, 130, 173 P.2d 545* (complainant in administrative proceedings whose accusation seeking revocation of license was denied has standing to seek review),

- Identification of the licensee as a real party in interest (Paragraph 2) [*Cal. Rules of Ct., Rule 8.486(a)*],

- That the order to be reviewed is a final order (Paragraph 7) [*see Bus. & Prof. Code § 23090*],

- The grounds for review (Paragraph 8) [*Bus. & Prof. Code § 23090.2*; *Altadena Church v. St. Bd. Equalization (1952) 109 Cal. App. 2d 99, 104, 240 P.2d 322* (abuse of discretion as basis for review)],

- That petitioner has exhausted his or her administrative remedies (Paragraphs 4-6) [*see Greenblatt v. Munro (1958) 161 Cal. App. 2d 596, 605, 326 P.2d 929]* , and

- That petitioner has no appeal from the order or any other plain, speedy, or adequate remedy except judicial review (Paragraph 9) [*see Code Civ. Proc. § 1069*].

[4] Verification

The application for review must be on the verified petition [*Code Civ. Proc. § 1069*] of a person aggrieved [*Cal. Const., art. XX, § 22*] or affected by the order [*Bus. & Prof. Code § 23090*].

[5] Memorandum and Proof of Service

The petition must be accompanied by a supporting memorandum, the Certificate of Interested Entities or Persons [*see § 18.70[7a]*], and by proof of service of copies of the petition and accompanying memorandum on the respondent and any real party in interest named in the petition [*Code Civ. Proc. §§ 1069, 1107*; *Cal. Rules of Ct., Rule 8.486*].

For further discussion of memoranda, and proof of service requirements, *see § 18.70[7], [11]*.

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Volume 3: Alcoholic Beverage Licenses thru Answers-Chs. 18-29
Chapter 18 ALCOHOLIC BEVERAGE LICENSES
PART IV. FORMS
D. Proceedings Relating to Judicial Review of Denial, Suspension, or Revocation of Licenses

3-18 California Forms of Pleading and Practice--Annotated § 18.72

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.72 Petition for Writ of Review [Bus. & Prof. Code § 23090.4; Code Civ. Proc. § 1069] to Review Order of Appeals Board [Bus. & Prof. Code § 23090]--By Licensee--Review of Suspension or Revocation of License

[1] FORM Petition for Writ of Review [Bus. & Prof. Code § 23090.4; Code Civ. Proc. § 1069] to Review Order of Appeals Board [Bus. & Prof. Code § 23090]--By Licensee--Review of Suspension or Revocation of License

[*Cover, topical index, and caption. see § 18.70[1]*.]

Petitioner alleges:

[*EITHER*]

1. Petitioner was at all times herein mentioned the owner and holder of a _____ [*identify type of license, e.g.*, on sale general] liquor license under which petitioner operated a _____ [*e.g.*, cocktail lounge] located at _____[*address*], California. As disclosed more fully herein, petitioner is the party aggrieved and affected by the final order of the Alcoholic Beverage Control Appeals Board herein referred to.

[*OR*]

1. Petitioner at all times herein mentioned was a licensee of the Department of Alcoholic Beverage Control and conducted a business known as _____[*specify*], located at _____[*address*], California. Petitioner is the party aggrieved and affected by a final decision of the Alcoholic Beverage Control Appeals Board.

[*CONTINUE*]

2. The Department of Alcoholic Beverage Control ("the Department") is, and at all times herein mentioned was, a duly and regularly constituted agency of the State of California. Respondent _____[*name*] is the duly appointed, qualified, and acting Director of the Department of Alcoholic Beverage Control.

3. The Alcoholic Beverage Control Appeals Board ("the Board") is, and at all times herein mentioned was, a duly and regularly constituted agency of the State of California.

4. On _____[*date*], an accusation was filed with the Department by _____[*name*], charging petitioner with violations of Sections _____[*specify*] of the Business and Professions Code [and *Article XX, Section 22 of the California Constitution*]. A copy of the accusation is attached hereto as Exhibit "A" and made a part hereof.

5. On _____[*date*] petitioner filed with the Department his/her notice of defense specifically denying all parts of the accusation and requesting a hearing.

6. At a hearing held on _____[*date*], the Department found that petitioner had violated Sections _____[*specify*] of the Business and Professions Code [and *Article XX, Section 22 of the California Constitution*], and by decision of the Department, petitioner's license was _____ [revoked *or* suspended for a period of _____ (*specify*)]. A copy of the Department's opinion is attached hereto as Exhibit "B" and made a part hereof.

[7. *If a petition for reconsideration was filed include either the following*: On _____ (*date*), petitioner filed a petition for reconsideration with the Department, and the petition was denied on _____, (*date*).]

[*OR*]

[7. On _____ (*date*) petitioner filed a petition for reconsideration with the Department, and the petition was granted and heard on _____ (*date*). At the conclusion thereof the Department reaffirmed its decision of _____ (*date*) by which it _____ (revoked *or* suspended) petitioner's license as herein alleged.]

[*CONTINUE*]

8. [*Allege appeal of Department's decision and grounds for the appeal. see § 18.70[1]*, Paragraph 5.]

9. On _____[*date*], a final order of the Board affirming the decision of the Department _____ [revoking *or* suspending] petitioner's license was filed. Petitioner has exhausted all administrative remedies available.

10. The order by the Board is in error and the decision by the Department should be _____ [reversed *or* reversed and remanded for consideration of evidence] on the following grounds: _____ [*specify applicable grounds as set out in § 18.70[1], Paragraph 5*.]

11. Petitioner has invested large sums of money in the establishment of the licensed premises, has a valuable patronage

and goodwill in the pursuit thereof, and receives his/her livelihood therefrom. Unless stayed by order of this court, the _____ [suspension *or* revocation] of petitioner's license will be effective on _____[*date*], and will cause the loss of petitioner's investment and the destruction of petitioner's patronage and goodwill, and petitioner will suffer great and irreparable injury and loss for which petitioner will have no plain, speedy, and adequate remedy at law.

12. There is no appeal from these decisions and order and petitioner has no other plain, speedy, and adequate remedy, nor any remedy, unless this court grants a writ of review.

[13. *If petition is filed in Supreme Court, allege circumstances rendering it proper that writ issue from that court rather than from Court of Appeal. see § 18.70[1],* Paragraph 9.]

WHEREFORE, petitioner prays:

1. That a writ of review issue out of this court to the Alcoholic Beverage Control Appeals Board, commanding it to certify fully to this court at a specified time and place the records and proceedings in this cause so that the same may be inquired into, reviewed, and determined by this court.

2. That pending the judgment of this court, the operation of the order and decision sought to be reviewed be stayed by order of this court.

3. That following the inquiry, review, and determination by this court, the _____ [order of the Alcoholic Beverage Control Appeals Board and the decision of the Department of Alcoholic Beverage Control be reversed *or* matter be reversed and remanded to the Alcoholic Beverage Control Appeals Board for the purpose of _____ (*specify*)].

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification; see § 18.70[1]*]

SUPPORTING MEMORANDUM

[*Add supporting memorandum*]

[*Proof of service*; *see § 18.70[11]*]

[2] Use of Form

The form in [1], *above*, is a petition for use to seek judicial review of a final order by the Alcoholic Beverage Control Appeals Board.

For further comments relating to a petition for writ of review of decision by the Appeals Board, *see § 18.70[2] -[10]*.

[3] Allegations

The form alleges:

- Petitioner is the person aggrieved and affected by a final order of the Alcoholic Beverage Control Appeals Board (Paragraph 1) [*see Bus. & Prof. Code § 23090*; *see also Code Civ. Proc. § 1069* (petitioner must be "party beneficially interested")],

- The order by the Alcoholic Beverage Control Appeals Board is a final order (Paragraph 9) [*see Bus. & Prof. Code § 23090*];

- The grounds for review (Paragraph 10) [*see Bus. & Prof. Code § 23090.2*],

- The petitioner has exhausted his or her administrative remedies (Paragraphs 8, 9) [*see Greenblatt v. Munro (1958) 161 Cal. App. 2d 596, 605, 326 P.2d 929]* ,

- Grounds for requesting stay of execution of the Appeals Board's order (Paragraph 11) [*see Bus. & Prof. Code § 23090.6*; *Code Civ. Proc. § 1072*], and

- There is no appeal from the order or any other plain, speedy, or adequate remedy (Paragraph 12) [*see Code Civ. Proc. § 1069*].

[4] Verification

This form of application must be on the verified petition of the party beneficially interested [*Code Civ. Proc. § 1069*]. For a form of verification, *see § 18.70[1]*.

[5] Memorandum and Proof of Service

The petition must be accompanied by a memorandum supporting, the Certificate of Interested Entities or Persons [*see § 18.70[7a]*], and by proof of service of copies of the petition and accompanying memorandum on the respondent and any real party in interest named in the petition [*Code Civ. Proc. §§ 1069, 1107*; *Cal. Rules of Ct., Rule 8.486*].

For further discussion of memoranda, and proof of service requirements, *see § 18.70[7], [11]*.

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Chapter 18 ALCOHOLIC BEVERAGE LICENSES
PART IV. FORMS
D. Proceedings Relating to Judicial Review of Denial, Suspension, or Revocation of Licenses

3-18 California Forms of Pleading and Practice--Annotated §§ 18.73-18.79

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

[Reserved]

§§ 18.73[Reserved]

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Chapter 18 ALCOHOLIC BEVERAGE LICENSES
PART IV. FORMS
E. Proceedings to Compel Department of Alcoholic Beverage Control to Perform Administrative Duties

3-18 California Forms of Pleading and Practice--Annotated § 18.80

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.80 Petition for Writ of Mandate [Code Civ. Proc. § 1086] to Compel Department of Alcoholic Beverage Control to Perform Administrative Duties [Bus. & Prof. Code § 23090.5]

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. § 1086] to Compel Department of Alcoholic Beverage Control to Perform Administrative Duties [Bus. & Prof. Code § 23090.5]

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

[*OR*]

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

_____ APPELLATE DIVISION
[DIVISION _____]

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR WRIT OF MANDATE
as DIRECTOR OF THE DEPARTMENT OF AL-	)	
COHOLIC BEVERAGE CONTROL,	)	
Respondent.	)	
	)	

_____

TO THE HONORABLE _____ [CHIEF *or* PRESIDING] JUSTICE AND TO THE ASSOCIATE JUSTICES OF THE _____ [CALIFORNIA SUPREME COURT *or* COURT OF APPEAL OF THE STATE OF CALIFORNIA, _____ APPELLATE DISTRICT]:

Petitioner alleges:

1. Petitioner is the party beneficially interested in the relief sought in this petition in that _____[*set forth facts showing beneficial interest*].

2. The Department of Alcoholic Beverage Control (hereinafter called "Department") is, and at all times herein mentioned was, a duly and regularly constituted agency and Department of the State of California. Respondent _____[*name*] (hereinafter called "Director") is the duly appointed, qualified, and acting director of Department, serving as its civil executive officer.

3. [*Set forth facts showing that petitioner is a party entitled to a right or office from which he or she is unlawfully precluded by respondents*].

4. [*Set forth administrative duties sought to be enforced by writ of mandate, e.g.,* Section _____ of the Business and Professions Code specifically enjoins respondent to _____ (*specify*)].

5. At all times herein mentioned respondent has been and is, fully able to perform such duties.

6. On or about _____[*date*], petitioner issued a demand to respondent that he/she perform such duties.

7. Petitioner has fully performed all acts required of him/her, and all conditions and events precedent to respondent's responsibilities and duties under the law, and, specifically, to _____[*specify*].

8. Respondent has failed and refused, and still fails and refuses, to perform his duties under the aforementioned law, and, specifically, to _____[*specify*].

9. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law in that _____[*set forth supporting facts*].

10. [*If petition is filed in the Supreme Court set forth circumstances that render it proper that the writ should issue originally from that court rather than from a court of appeal.*]

WHEREFORE petitioner prays judgment against respondent as follows:

1. That the court issue an alternative writ of mandate commanding respondent to _____[*state duties to be performed*], or to show cause before this court at a specified time and place why he/she has not done so.

2. That, on the hearing of this petition and the return thereto, if any, this court issue its peremptory writ of mandate commanding respondent to _____[*state duties to be performed*].

3. For costs of this proceeding and such other and further relief as the court may deem proper.

_____ [*signature*]

[*Verification; see § 18.70[1]*]

SUPPORTING MEMORANDUM
[*Add supporting memorandum*]

[*Proof of service*; *see § 18.70[11]*]

[2] Use of Form

The form in [1], *above*, is a petition for writ of mandate for use to compel the Director of the Department of Alcoholic Beverage Control to perform duties imposed on the Department by law [*see Bus. & Prof. Code § 23090.5*].

For discussion of a writ of mandate to compel the Department to act, *see § 18.20[3]*.

[3] Compared With Petition for Writ of Review

A petition for writ of mandate is used when judicial review is sought of the orders, rules, decisions, or other actions of the director in the performance of his or her duties when acting in an administrative rather than a limited judicial capacity [*see Samson Market Co. v. Kirby (1968) 261 Cal. App. 2d 577, 581, 68 Cal. Rptr. 130* ; *see also Bus. & Prof. Code § 23090.5*]. A petition for writ of mandate may also be used to prohibit official conduct, ministerial in nature, that is based on an unconstitutional statute [*see Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 7, 95 Cal. Rptr. 329, 485 P.2d 529]* .

When judicial review is sought for a final order by the Alcoholic Beverage Control Appeals Board, either affirming or reversing a quasi judicial decision of the Department of Alcoholic Beverage Control, a petition for writ of review should be used [*Bus. & Prof. Code § 23090*; for appropriate forms, *see §§ 18.70 -18.72*]. For forms and procedure for use in extraordinary writ proceedings generally, see Ch. 292, *Habeas Corpus* , Ch. 358, *Mandate and Prohibition* , and Ch. 492, *Review (Certiorari) Writ of.*

[4] Proceedings in Supreme Court

A petition for writ of mandate to compel administrative action by the Department of Alcoholic Beverage Control must be filed in the court of appeal or the Supreme Court [*Bus. & Prof. Code § 23090.5*]. If the petition is to be heard by the Supreme Court, it must set forth the circumstances which render it appropriate that the writ issue originally from that court, rather than from a court of appeal (Paragraph 10) [*Cal. Rules of Ct., Rule 8.486(a)*]. If legal issues of statewide significance are raised in the petition, the Supreme Court might entertain original jurisdiction to issue the writ [*see Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 6-7, 95 Cal. Rptr. 329, 485 P.2d 529]* . Otherwise it will generally transfer the case to a court of appeal [*see Cal. Const., art. VI, § 12*; *Cal. Rules of Ct., Rule 10.1000* (transfer of causes from the Supreme Court to a court of appeal)].

[5] Allegations

The form alleges:

- The identity of the petitioner as the real party in interest (Paragraph 1) [*see Code Civ. Proc. § 1086*].

- The identity and capacity of the respondents Department of Alcoholic Beverage Control and Director (Paragraph 2) [*see Code Civ. Proc. § 1085* (parties to whom writ may be issued)].

- The right or office to which petitioner is entitled and from which he or she is unlawfully precluded by respondent (Paragraph 3) [*see Code Civ. Proc. § 1085*].

- Respondent's duties enjoined by law (Paragraph 4) [*see Code Civ. Proc. § 1085*].

- Respondent's ability to perform such duties (Paragraph 5) [*see Tevis v. City & County of San Francisco (1954) 43 Cal. 2d 190, 200, 272 P.2d 757]* .

- Performance and/or occurrence of conditions and events precedent (Paragraph 7).

- Demand for performance (Paragraph 6) [*see Metropolitan Life Ins. Co. v. Rolph (1920) 184 Cal. 557, 559-560, 194 P. 1005* (demand must be alleged when it is condition precedent to existence of respondent's duties).

- Failure and refusal by respondents to perform duties (Paragraph 8).

- Absence of plain, speedy, and adequate remedy in the ordinary course of law (Paragraph 9) [*see Code Civ. Proc. § 1086*].

[6] Prayer

The prayer of the petition requests that a writ be issued directing respondent to perform the duties required (or to show cause at a hearing why he or she has not done so), and that a peremptory writ be issued after a hearing commanding that the duties be performed [*see Code Civ. Proc. § 1087*]. The prayer also contains a request for costs of suit [*see Code Civ. Proc. §§ 1029* (allowance of costs against public agency), 1095 (allowance of costs against public agency in mandate proceeding)].

[7] Verification

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*].

For a form of verification, *see § 18.70[1]*.

[8] Memorandum and Proof of Service

The petition must be accompanied by a memorandum supporting, the Certificate of Interested Entities or Persons [*see § 18.70[7a]*], and by proof of service of copies of the petition and accompanying memorandum on the respondent and any real party in interest named in the petition [*Code Civ. Proc. §§ 1069, 1107*; *Cal. Rules of Ct., Rule 8.486*].

For further discussion of memoranda, and proof of service requirements, *see § 18.70[7], [11]*.

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PART IV. FORMS
E. Proceedings to Compel Department of Alcoholic Beverage Control to Perform Administrative Duties

3-18 California Forms of Pleading and Practice--Annotated §§ 18.81-18.84

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

[Reserved]

§§ 18.81[Reserved]

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Chapter 18 ALCOHOLIC BEVERAGE LICENSES
PART IV. FORMS
F. Proceedings to Recover Sums Due

3-18 California Forms of Pleading and Practice--Annotated § 18.85

AUTHOR: Ralph Barat Saltsman Stephen Warren Solomon of Solomon, Saltsman & Jamieson Editorial Consultants

§ 18.85 Complaint for Recovery of Excise Taxes Illegally Collected and Paid Under Protest--By Licensee Against State Board of Equalization [Rev. & Tax Code § 32413]

[1] FORM Complaint for Recovery of Excise Taxes Illegally Collected and Paid Under Protest--By Licensee Against State Board of Equalization [Rev. & Tax Code § 32413]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
BOARD OF EQUALIZATION OF THE STATE OF	)	COMPLAINT FOR RECOVERY OF EXCISE
CALIFORNIA,	)	TAXES PAID UNDER PROTEST
Defendant.	)	
	)	

Plaintiff(s) allege(s):

1. Plaintiff is, and at all times herein mentioned was, the owner and holder of a _____ [*state type of liquor license, e.g.,* on sale general] liquor license under which petitioner operated a _____ [*describe nature of business, e.g.,* cocktail lounge] located at _____[*address*], California.

2. On _____[*date*], plaintiff filed a return for alcoholic beverage taxes due for the month of _____[*date*] on sales of _____ [*specify, e.g.,* distilled spirits] and at the same time paid the sum of $_____ as the tax due and payable thereon.

3. On _____[*date*] defendant served on plaintiff a notice of deficiency in the amount of $_____, claiming that plaintiff underpaid his taxes for the month of _____[*date*] in that amount and demanding payment therefor.

4. On _____[*date*] plaintiff paid the amount of $_____ under protest.

5. On _____[*date*] plaintiff filed a written claim for refund, a copy of which is attached hereto as Exhibit "A" and made a part hereof, stating as grounds for refund that the amount of such deficiency collected by defendant exceeded the amount of taxes owed by plaintiff for the month of _____[*date*] and that the deficiency collected by defendant was excessive and illegal.

[*EITHER*]

6. On _____[*date*] defendant notified plaintiff that such claim was disallowed.

[*OR*]

6. Defendant failed to mail any notice of action on plaintiff's claim within six months after the claim was filed, and plaintiff therefore considers his claim disallowed.

[*CONTINUE*]

7. For the month of _____[*date*] plaintiff owed no more than the sum of $_____ for alcoholic beverage taxes. That amount was paid in full as herein alleged. The sum of $_____ paid by plaintiff under protest constituted an overpayment and was illegally collected by defendant in the same manner and to the same extent alleged in plaintiff's claim for refund.

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____ with interest thereon at the rate of 12 percent per annum.

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff_____ [*name*]

[*Verification, if desired; for discussion of the implications of verifying the complaint, see [5], below; for a form of verification, see § 18.70[1]* .]

[2] Use of Form

The form in [1], *above*, is a complaint for use in recovering an overpayment of taxes under the Alcoholic Beverage Tax Law (*Rev. & Tax Code § 32001 et seq.*).

For discussion and forms for use in actions involving excise taxes generally, see Ch. 540, *Taxes and Assessments* .

[3] Contents of Form

The complaint alleges:

- Overpayment of taxes (Paragraph 4),
- Filing of a claim for refund (Paragraph 5) [*see Rev. & Tax Code § 32412*],
- Actual or implied disallowance of such claim (Paragraph 6), [*see Rev. & Tax Code §§ 32413, 32414*], and
- Illegality of the excessive tax on the same grounds set forth in the claim submitted to the Board of Equalization (Paragraph 7) [*see Rev. & Tax Code § 32413*].

[4] Time and Place to File

No suit or proceeding may be maintained in any court for the recovery of any amount of taxes alleged to have been erroneously or illegally assessed or collected unless a claim for refund or credit has been duly filed [*Rev. & Tax Code § 32412*]. Within 90 days after the mailing of the notice of the Board of Equalization's action on a claim for refund or credit, or if there is no notice mailed within six months (in which event, plaintiff may consider the claim disallowed [*Rev. & Tax Code § 32414*]), the claimant may bring an action against the Board of Equalization on the grounds set forth in the claim in a court of competent jurisdiction in Sacramento County for the recovery of the whole or any part of the amount disallowed [*Rev. & Tax Code § 32413*]. The claimant may, alternatively, commence the action in any city or city and county in which the Attorney General has an office, rather than in Sacramento County [*see Code Civ. Proc. § 401(1)*]. In this event the caption should be modified accordingly.

[5] Verification

A public entity need not verify its answer even though the complaint is verified [*see Code Civ. Proc. § 446*]. The verification of a complaint against a public entity does, however, preclude a general denial [*see Code Civ. Proc. § 431.30(d)*].

[6] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, § 177.40* et seq.

For discussion and forms relating to Fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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Volume 3: Alcoholic Beverage Licenses thru Answers-Chs. 18-29
Chapter 18 ALCOHOLIC BEVERAGE LICENSES
PART IV. FORMS
F. Proceedings to Recover Sums Due

3-18 California Forms of Pleading and Practice--Annotated § 18.86

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§ 18.86 Complaint for Restitution [Civ. Code §§ 1689, 1692] Based on Rescission and for Money Had and Received--By Transferee Against Transferor of Liquor License and Business and Escrow Holder After Disapproval of Transfer by Department

[1] FORM Complaint for Restitution [Civ. Code §§ 1689, 1692] Based on Rescission and for Money Had and Received--By Transferee Against Transferor of Liquor License and Business and Escrow Holder After Disapproval of Transfer by Department

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RESTITUTION
_____ [*name*], [and DOES I through	)	[LIMITED CIVIL CASE]
_____,]	)	
Defendant(s).	)	
	)	

Plaintiff alleges:

FIRST COUNT
(Restitution)

1. [*Allege corporate or other capacity of defendant transferor, e.g.*, Defendant _____[*name*] is, and at

all times herein mentioned was, a California corporation with its principal place of business in _____ County, California.]

2. Defendant _____[*name of escrow holder*] is, and at all times herein mentioned was, a California corporation organized, and licensed by the Commissioner of Corporations, to engage in the business of handling escrows, and acting as such in _____ County, California.

[3. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.)]

[4. Plaintiff is informed and believes and thereon alleges that [A]t all times herein mentioned each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of that agency and employment.]

5. At all times herein mentioned, defendant _____[*name of transferor*] was the owner of the business of a certain _____ [*describe, e.g.,* cocktail lounge] located at _____[*address*], California, operated under the fictitious business name of _____[*specify*]. Defendant's ownership of such business included a _____ [*type of license, e.g.,* on sale general] license for the sale of alcoholic beverages at such premises.

6. On _____[*date*], plaintiff and defendant _____[*name of transferor*] entered into a written agreement in which plaintiff agreed to purchase, and defendant agreed to sell, the described defendant's business and liquor license. Plaintiff and defendant agreed to sell the business and license for a purchase price of $_____, subject to approval by the Department of Alcoholic Beverage Control. The agreement provides that the consideration for the transfer of the business and license is to be paid to defendant _____[*name of transferor*] only after the transfer is approved by the Department of Alcoholic Beverage Control. The agreement also provide for the establishment of an escrow with defendant _____[*name of escrow holder*] for the purpose of holding and disbursing the funds deposited as the purchase price and directs that escrow holder to pay claims of _____[*name of transferor*], duly filed, out of such funds.

7. On _____[*date*], plaintiff deposited the full amount of the purchase price of $_____ with defendant _____[*name of escrow holder*], together with a copy of the aforementioned agreement.

8. Plaintiff duly recorded notice of intended transfer on _____[*date*], in _____ County as required by *Section 24073 of the Business and Professions Code*, and thereafter filed an application for transfer of defendant's liquor license with the Department of Alcoholic Beverage Control in due form and accompanied such with the required transfer fees. Within 30 days after filing the application, plaintiff filed with the Department of Alcoholic Beverage Control a statement under penalty of perjury that the agreed purchase price and consideration had been deposited with the escrow holder, and submitted copies of the statement to defendant _____[*name of transferor*]. Plaintiff has performed everything required by the agreement, and by the laws of the State of California.

9. On _____[*date*], the Department of Alcoholic Beverage Control disapproved the transfer and gave notice thereof to plaintiff and defendant _____[*name of transferor*]. Plaintiff thereafter instructed defendants _____[*name of transferor*] and _____[*name of escrow holder*] by written

notice to return forthwith all funds deposited by plaintiff with defendant _____[*name of escrow holder*] for the reason that the agreement could not be completed due to the Department's disapproval. By such notice plaintiff rescinded the contract for failure of consideration.

10. Defendants, and each of them, failed and refused, and continue to fail and refuse, to restore the described funds to plaintiff. Neither the full amount of $_____, nor any part of that amount, has been returned to plaintiff by defendants or either of them, and plaintiff has been damaged in that sum and by loss of interest on such amount at the legal rate percent per annum from the date of plaintiff's notice of rescission.

SECOND COUNT
(Common Count)

11. Plaintiff refers to and herein incorporates Paragraphs 1-4 of the First Count.

12. On _____[*date*], defendants _____[*name of transferor*] and _____[*name of escrow holder*], and each of them, became indebted to plaintiff in the sum of $_____ for money had and received by such defendants, and each of them, for plaintiff's use and benefit.

13. Neither that sum, nor any part thereof has been paid although demand therefor has been made, and there is now due, owing, and unpaid the sum of $_____, with interest thereon at the legal rate percent per annum from _____[*date*].

WHEREFORE, plaintiff prays judgment against defendants and each of them as follows:

1. For the sum of $_____, with interest thereon at the legal rate percent per annum from _____[*date*].

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff_____ [*name*]

[*Verification, if desired; for discussion of the implications of verifying the complaint, see [4], below; for a form of verification, see § 18.70[1]* .]

[2] Use of Form

The form in [1], *above*, is a complaint seeking restitution of an amount paid in escrow on the purchase price of a liquor business and license, on the ground that the transfer was disapproved by the Department of Alcoholic Beverage Control, resulting in a failure of consideration (First Count). The form also alleges a common count (Second Count).

For discussion relating to a complaint for restitution in this context, see *§ 18.21*. For a complaint for interpleader by an escrow agent holding funds in connection with the transfer of a liquor license, see Ch. 253, *Escrows* . For discussion

and other forms relating to the causes of action alleged in this complaint, see generally Ch. 121, *Common Counts* , Ch. 140, *Contracts* , and Ch. 490, *Rescission and Restitution* .

For a memorandum of points and authorities in support of a motion for summary judgment on the cause of action alleged in this complaint, *see* California Points and Authorities, Ch. 15, *Alcoholic Beverages* .

[3] Allegations

The First Count of the complaint, for restitution, alleges:

- The agreement to transfer the license (Paragraph 6),
- Plaintiff's performance under the agreement (Paragraph 8),
- Disapproval of the transfer by the Department of Alcoholic Beverage Control (Paragraph 9),
- Plaintiff's rescission of the agreement for failure of consideration and demand for restitution (Paragraph 9) [*see Civ. Code §§ 1689, 1691*], and
- Defendants' refusal to repay (Paragraph 10) [*see Civ. Code § 1692*].

The Second Count of the complaint, for money had and received, a common count, alleges:

- The indebtedness and when it accrued (Paragraph 12), and
- Nonpayment (Paragraph 13).

[4] Verification

Verification of this complaint is not required, but verification of the complaint requires the defendant to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446*] and precludes a general denial in superior court and some limited civil cases [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

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Chapter 19 ALCOHOLIC BEVERAGES: CIVIL LIABILITY

3-19 California Forms of Pleading and Practice--Annotated 19.syn

§ 19.syn Synopsis to Chapter 19: ALCOHOLIC BEVERAGES: CIVIL LIABILITY

§ 19.01 Scope of Chapter

§ 19.02 Cross References

§ 19.03 Governing Law

§§ 19.04through 19.09 [Reserved]

§ 19.10 Drinker's Liability

[1] Damages Due to Negligence

[2] Costs of Emergency Response

§ 19.11 General Rule of Nonliability for Furnishing Alcoholic Beverages

[1] Furnishing to Drunkard or Intoxicated Person

[2] Furnishing to Person Under 21 Years of Age

§ 19.12 Liability for Sale or Furnishing to Obviously Intoxicated Minor

[1] Right to Bring Action

[2] Proper Defendant

[a] Any Person Who Sells or Causes Sale

[b] Licensee Who Sells, Furnishes, or Gives Away to

[3] Meaning of "Obviously Intoxicated"

[4] Proximate Cause Narrows Scope of Liability

[5] Lone Statutory Exception to Immunity

§ 19.13 Liability of Social Host for Furnishing to Person With Exceptional Condition

[1] General Rule of Social Host Immunity

[2] Furnishing to Person With Exceptional Physical or Mental Condition

§ 19.14 Liability of Employer for Act of Intoxicated Employee

§ 19.15 Liability for Breach of Independent Duty

[1] Limited Scope of Immunity

[2] Breach of Duty to Maintain Safe Premises

[3] Negligent Entrustment

[4] Voluntary Assumption of Duty or Special Relationship

§ 19.16 Intoxicated Person's Capacity to Contract

§§ 19.17through 19.29 [Reserved]

§ 19.30 Definition

§ 19.31 Abatement

§ 19.32 Temporary Injunction

§ 19.33 Trial Precedence

§ 19.34 Dismissal

§ 19.35 Costs

§ 19.36 Order of Abatement

§ 19.37 Contempt

§§ 19.38through 19.49 [Reserved]

§ 19.50 Related Matthew Bender Publications

§ 19.51 State Statutes

[1] Civil Liability for Acts of Intoxicated Persons

[2] Abatement of Unlawful Liquor Sales

§ 19.52 Decisions

[1] Contracts

[2] Liability

[a] Tavern Owners

[b] Alcoholic of Unsound Mind

[c] Motor Vehicle Owner for Negligent Entrustment

[d] Social Host

[3] Obviously Intoxicated Person

[4] Proximate Cause

[5] Punitive Damages

[6] Statutory Immunity and Liability

[7] Jury Instructions

[8] Abatement of Unlawful Liquor Sales

§ 19.53 Law Reviews

§ 19.54 Text References

§§ 19.55through 19.69 [Reserved]

§ 19.70 Complaint for Damages [Civ. Code § 3333] by Automobile Driver for Personal Injuries and Property Damages Based on Negligence [Civ. Code § 1714(a)] Against Intoxicated Person and Against Owner of Automobile Driven by Intoxicated Defendant

[1] FORM

[2] Use of Form

[3] Specification of Damages

[4] Verification

[5] Cross References

§§ 19.71through 19.74 [Reserved]

§ 19.75 Complaint for Damages [Civ. Code § 3333] for Personal Injuries or Wrongful Death [Code Civ. Proc. § 377.60] Against Seller of Alcoholic Beverages--Furnishing, Sale, or Giving of Alcoholic Beverage to Obviously Intoxicated Minor Was Proximate Cause of Personal Injury or Death [Bus. & Prof. Code § 25602.1]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Alleging Amounts Claimed

[5] Verification

[6] Other Causes of Action

[a] Joinder of Minor as Party Defendant

[b] Survival Action

§ 19.76 Complaint for Damages [Civ. Code § 3333] for Personal Injuries or Wrongful Death [Code Civ. Proc. § 377.60] Against Seller of Alcoholic Beverages--Negligent Performance of Undertaking Resulting in Harm to Third Person

[1] FORM

[2] Use of Form

[3] Allegations

§ 19.77 Complaint for Damages [Civ. Code § 3333] for Personal Injuries--By Patron Against Tavern Proprietor for Negligence [Civ. Code § 1714] in Failing to Protect Plaintiff From Intoxicated and Dangerous Patron on Premises (First Cause of Action)--And Against Intoxicated Patron for Assault and Battery (Second Cause of Action)

[1] FORM

[2] Use of Form

[3] Allegations

[4] Specification of Damages

§§ 19.78through 19.89 [Reserved]

§ 19.90 Affirmative Defense to Action on Contract

[1] Incapacity to Contract Due to Intoxication

[a] FORM

[b] Use of Form

[2] Alternative Form

[a] FORM

[b] Use of Form

§§ 19.91through 19.99 [Reserved]

§ 19.100 Complaint to Abate Unlawful Sale of Liquor Under Unlawful Liquor Sale Abatement Law [Penal Code §§ 11200-11207]--By Private Citizen [Penal Code § 11201]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification and Separate Declaration

[5] Written Undertaking

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PART I. SCOPE

3-19 California Forms of Pleading and Practice--Annotated § 19.01

§ 19.01 Scope of Chapter

This chapter covers liability for injuries caused by intoxicated persons, an intoxicated persons capacity to contract, and abatement of unlawful liquor sales.

The chapter discusses actions for injuries caused by intoxicated persons in § 19.10 et seq. and provides the following forms:

- A complaint for damages for personal injury against intoxicated driver and automobile owner [*see § 19.70*].

- Complaints for damages for personal injury against seller of alcoholic beverages [*see §§ 19.75 -19.77*].

The chapter discusses an intoxicated person's capacity to contract in § 19.16 and provides forms of affirmative defense to a contract action based on incapacity due to intoxication in § 19.90.

The chapter discusses actions to abate a building or place used for unlawful selling or serving alcoholic liquor as a nuisance in § 19.30 et seq. and provides a form of complaint to abate unlawful sale of liquor in § 19.100.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDutyAlcohol ProvidersGeneral OverviewReal Property LawTortsNuisanceRemediesSummary AbatementReal Property LawTortsNuisanceTypesGeneral OverviewContracts LawFormationCapacity of PartiesMental CapacityCriminal Law & ProcedureCriminal OffensesIntoxicating LiquorsDistribution & SaleElements

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PART I. SCOPE

3-19 California Forms of Pleading and Practice--Annotated § 19.02

§ 19.02 Cross References

- For discussion and forms for use in liquor license proceedings, see Ch. 18, *Alcoholic Beverage Licenses* .

- For discussion and forms regarding assault and battery, see Ch. 58, *Assault and Battery* .

- For discussion and an illustration of a complaint involving multiple parties and multiple causes of action in the context of an automobile accident, see *Ch. 83, Automobiles: Bringing the Action, § 83.66*.

- For a discussion of wrongful death actions, including form allegations for the entitlement of specific persons to a wrongful death cause of action, see Ch. 181, *Death and Survival Actions* .

- For discussion of doctrines of respondeat superior and negligent breach of duty based on a voluntary assumption of duty or special relationship, see Ch. 380, *Negligence* .

- For discussion and forms for use in nuisance actions generally, see Ch. 391, *Nuisance* .

- For discussion of the duty of the owner or possessor or real property to persons on the premises, see Ch. 421, *Premises Liability* .

- For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions* .

- For discussion of workers' compensation exclusive remedy for injuries sustained in automobile accidents after leaving premises following customary after-hours drinking on premises, see Ch. 577, *Workers' Compensation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDutyAlcohol ProvidersGeneral OverviewTortsWrongful Death & Survival ActionsGeneral OverviewReal Property LawTortsNuisanceTypesGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal VehiclesWorkers' Compensation & SSDIDefensesExclusivity Provisions

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PART I. SCOPE

3-19 California Forms of Pleading and Practice--Annotated § 19.03

§ 19.03 Governing Law

Liability for willful and negligent acts is governed generally by *Civ. Code § 1714*. Liability of minors and persons of unsound mind for civil wrongs is governed by *Fam. Code § 6600* and *Civ. Code § 41*, respectively.

Liability of persons of unsound mind for their contracts is governed by *Civ. Code §§ 38-40, 1556, 1557(b)*. The right to rescind a contract made by a person of unsound mind but not entirely without understanding, when the contract is made before incapacity has been judicially determined, is set forth in *Civ. Code §§ 39, 1689(b)(7)*.

Civil liability of a person who sells or furnishes any alcoholic beverage is governed by *Bus. & Prof. Code §§ 25602(b),(c)* and *25602.1*.

Abatement of a building or place used for the unlawful selling or serving of alcoholic liquor is governed by the Unlawful Liquor Sales Abatement Law (*Penal Code § 11200 et seq.*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesMental Capacity

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3-19 California Forms of Pleading and Practice--Annotated §§ 19.04through 19.09

[Reserved]

§§ 19.04[Reserved]

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PART II. LEGAL BACKGROUND
A. Civil Liability for Acts of Intoxicated Persons

3-19 California Forms of Pleading and Practice--Annotated § 19.10

§ 19.10 Drinker's Liability

[1] Damages Due to Negligence

A person is responsible for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her person [*Civ. Code § 1714*]. The absence of volition in becoming intoxicated, as in the case of the habitual drunkard who is unable to resist temptation when liquor is offered, generally does not exonerate the drinker from liability for his or her negligence or contributory negligence [*Carlisle v. Kanaywer (1972) 24 Cal. App. 3d 587, 591-592, 101 Cal. Rptr. 246* ; *see also Mullen v. Bruce (1959) 168 Cal. App. 2d 494, 496, 335 P.2d 945* (person suffering delirium tremens as civilly liable for wrongful acts under *Civ. Code § 41*)].

For a form of complaint for damages by an automobile driver for personal injuries and property damage against an intoxicated person and automobile owner, see *§ 19.70* 1 . For further discussion and forms relating to actions for negligence, see Ch. 380, *Negligence* .

[2] Costs of Emergency Response

Any person under the influence of an alcoholic beverage or any drug, or the combined influence of an alcoholic beverage and any drug, who, because of that influence, negligently operates a motor vehicle, boat or vessel, or civil aircraft that proximately causes any incident resulting in an appropriate emergency response is liable for the expense of a public agency's emergency response to the incident [*Gov. Code §§ 53150-53152*]. The liability is limited to $12,000 for a particular incident [*Gov. Code § 53155*].

For purposes of this liability, a person is under the influence of an alcoholic beverage or drug, or the combined influence of an alcoholic beverage and a drug, if, as a result of drinking an alcoholic beverage alone or in combination with a drug, his or her physical or mental abilities are impaired to a degree that he or she no longer has the ability to operate a motor vehicle, boat or vessel, or aircraft with the caution characteristic of a sober person of ordinary prudence under the same or similar circumstances. The inferences regarding alcohol levels in a driver's blood at the time of an accident described in *Veh. Code §§ 23152* and *23155* apply [*Gov. Code § 53153*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsTransportation TortsWatercraftGeneral OverviewTortsDamagesCompensatory DamagesGeneral OverviewTortsNegligenceDutyGeneral OverviewTortsNegligenceDefensesComparative NegligenceCommon Law ConceptsIncapacityTortsTransportation TortsMotor VehiclesGeneral Overview

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PART II. LEGAL BACKGROUND
A. Civil Liability for Acts of Intoxicated Persons

3-19 California Forms of Pleading and Practice--Annotated § 19.11

§ 19.11 General Rule of Nonliability for Furnishing Alcoholic Beverages

[1] Furnishing to Drunkard or Intoxicated Person

No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to *Bus. & Prof. Code § 25602(a)* (person furnishing alcoholic beverage to habitual or common drunkard or obviously intoxicated person as guilty of misdemeanor) is civilly liable to any injured person or the estate of that person for injuries inflicted on him or her as a result of intoxication by the consumer of the alcoholic beverage [*Bus. & Prof. Code § 25602(b)*].

The legislative intent of *Bus. & Prof. Code § 25602(b)* was to abrogate the holdings in cases such as *Vesely v. Sager (1971) 5 Cal. 3d 153, 95 Cal. Rptr. 623, 486 P.2d 151* (commercial vendor of alcoholic beverages subject to liability for injuries to third persons resulting from vendor's sale of alcohol to an obviously intoxicated person), *Bernhard v. Harrah's Club (1976) 16 Cal. 3d 313, 128 Cal. Rptr. 215, 546 P.2d 719 , cert. denied, 429 U.S. 859, 97 S. Ct. 159, 50 L. Ed. 2d 136* (no bar to civil liability under modern negligence law against a defendant commercially providing alcohol in Nevada to an obviously intoxicated person), and *Coulter v. Superior Court (1978) 21 Cal. 3d 144, 145 Cal. Rptr. 534, 577 P.2d 669* (extending liability to noncommercial providers of alcohol, such as social hosts, discussed *below*), and to reinstate the prior judicial rule that the consumption of alcoholic beverages rather than the serving of them is the proximate cause of injuries inflicted by an intoxicated person [*Bus. & Prof. Code § 25602(c)*; *see Civ. Code § 1714(b)* (containing similar declaration of legislative intent); *Strang v. Cabrol (1984) 37 Cal. 3d 720, 724-727, 209 Cal. Rptr. 347, 691 P.2d 1013* ; *Zieff v. Weinstein (1987) 191 Cal. App. 3d 243, 246-247, 236 Cal. Rptr. 536* ; *Bass v. Pratt (1986) 177 Cal. App. 3d 129, 132-133, 222 Cal. Rptr. 723]* .

Bus. & Prof. Code § 25602(b) also exempts from liability a person who simply permits the consumption of alcoholic beverages, even though the person neither sold, furnished, or gave the alcoholic beverage [*see Leong v. San Francisco Parking, Inc. (1991) 235 Cal. App. 3d 827, 832, 1 Cal. Rptr. 2d 41]* .

Not only are suits by third persons injured by the intoxicated consumer against the supplier of the alcohol barred, but suits by the intoxicated consumer for injury to himself or herselfagainst the supplier are barred as well [*Cory v.*

Shierloh (1981) 29 Cal. 3d 430, 437, 174 Cal. Rptr. 500, 629 P.2d 8 ; *see Strang v. Cabrol (1984) 37 Cal. 3d 720, 727-728, 209 Cal. Rptr. 347, 691 P.2d 1013]* .

[2] Furnishing to Person Under 21 Years of Age

Bus. & Prof. Code § 25658(a) provides that every person who sells, furnishes, or gives away any alcoholic beverage to a person under the age of 21 years is guilty of a misdemeanor. One who furnishes an alcoholic beverage to a person under the age of 21 in violation of *Bus. & Prof. Code § 25658(a)*, however, is not civilly liable to any person for injuries resulting from the minor's intoxication.

Although *Bus. & Prof. Code § 25658(a)* does not contain an express provision for civil immunity such as that expressed in *Bus. & Prof. Code § 25602(b)* (discussed under 1 , *above*), immunity is implied in the legislative declarations of *Bus. & Prof. Code § 25602(a)* and *Civ. Code § 1714(b)* [*Strang v. Cabrol (1984) 37 Cal. 3d 720, 722-728, 209 Cal. Rptr. 347, 691 P.2d 1013* ; *see Rogers v. Alvas (1984) 160 Cal. App. 3d 997, 1000-1004, 207 Cal. Rptr. 60]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDutyAlcohol ProvidersGeneral OverviewTortsNegligenceDutyGeneral OverviewTortsNegligenceDefensesComparative NegligenceCommon Law ConceptsIncapacityCriminal Law & ProcedureCriminal OffensesIntoxicating LiquorsDistribution & SaleElements

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A. Civil Liability for Acts of Intoxicated Persons

3-19 California Forms of Pleading and Practice--Annotated § 19.12

§ 19.12 Liability for Sale or Furnishing to Obviously Intoxicated Minor

[1] Right to Bring Action

A person who has sold an alcoholic beverage to an obviously intoxicated minor may be liable for negligence if his or her conduct is the proximate cause of personal injury or death [*Bus. & Prof. Code § 25602.1*; *Strang v. Cabrol (1984) 37 Cal. 3d 720, 724, 725, 209 Cal. Rptr. 347, 691 P.2d 1013* (involving statute prior to its 1986 amendment); *see also Cory v. Shierloh (1981) 29 Cal. 3d 430, 439-441, 174 Cal. Rptr. 500, 629 P.2d 8* (same; upholding constitutionality of *Bus. & Prof. Code § 25602.1* against challenge that it denied equal protection of the laws)].

The cause of action may be brought by or on behalf of any person who has suffered injury or death [*Bus. & Prof. Code § 25602.1*]. For a form of complaint for damages for personal injuries or wrongful death against a seller of alcoholic beverages for furnishing, sale, or giving of a alcoholic beverages to a minor, see *§ 19.75* 1 .

[2] Proper Defendant

[a] Any Person Who Sells or Causes Sale

A defendant may be any person who sells, or causes to be sold, any alcoholic beverage to any obviously intoxicated minor [*Bus. & Prof. Code § 25602.1*].

[b] Licensee Who Sells, Furnishes, or Gives Away to

The defendant may also be any person who sells, furnishes, or gives away any alcoholic beverage, and who is [*Bus. & Prof. Code § 25602.1*]:

- Licensed, or required to be licensed, pursuant to *Bus. & Prof. Code § 23300* (alcoholic beverage licenses), or

- Authorized by the federal government to sell alcoholic beverages on a military base or other federal

enclave.

[3] Meaning of "Obviously Intoxicated"

"Obviously intoxicated," for purposes of a liquor licensee's civil tort liability, and "driving under the influence" of alcohol as used in connection with a driver's responsibility when driving a vehicle [*see Veh. Code § 23152*] do not mean the same thing. "Under the influence" is defined by a person's capability to drive safely, whereas "obvious intoxication" is defined by a person's appearance. Ability to drive safely is usually related to blood alcohol level, whereas outward appearance depends in part on a person's tolerance to alcohol. Evidence of blood alcohol level may be circumstantial evidence of a minor's outward appearance, but it is not dispositive, as reaction to alcohol and tolerance differ among persons and change even within a person, depending on that person's physical condition and other factors at any particular time [*Jones v. Toyota Motor Co. (1988) 198 Cal. App. 3d 364, 368, 370, 243 Cal. Rptr. 611]* .

The obviously intoxicated minor is included within the meaning of the term "any person" as used in *Bus. & Prof. Code § 25602.1*, and, hence, under the statute, a minor who suffers injuries as a proximate result of having been sold alcoholic beverages while obviously intoxicated may state a cause of action against the purveyor of the alcoholic beverage [*Chalup v. Aspen Mine Co. (1985) 175 Cal. App. 3d 973, 975-979, 221 Cal. Rptr. 97* ; *see Jones v. Toyota Motor Co. (1988) 198 Cal. App. 3d 364, 369, 243 Cal. Rptr. 611]* . The word "minor," as used in *Bus. & Prof. Code § 25602.1*, is not limited to persons under the age of 18, but means any person under the age of 21 [*Chalup v. AspenMine Co. (1985) 175 Cal. App. 3d 973, 975 n.2, 221 Cal. Rptr. 97* (*see Civ. Code § 25*, defining minor as person under age of 18, through December 31, 1993; operative January 1, 1994, *see Fam. Code § 6500*)].

[4] Proximate Cause Narrows Scope of Liability

The persons described in 1 , *above*, may be liable if the furnishing, sale, or giving of that beverage to the minor is the proximate cause of the personal injury or death sustained by that person [*Bus. & Prof. Code § 25602.1*; *Strang v. Cabrol (1984) 37 Cal. 3d 720, 724, 725, 209 Cal. Rptr. 347, 691 P.2d 1013* (involving statute prior to its 1986 amendment); *see also Cory v. Shierloh (1981) 29 Cal. 3d 430, 439-441, 174 Cal. Rptr. 500, 629 P.2d 8* (same; upholding constitutionality of *Bus. & Prof. Code § 25602.1* against challenge that it denied equal protection of the laws)].

The term "proximate" in *Bus. & Prof. Code § 25602.1* was intended to restrict, rather than to expand, potential application of this exception to liability [*Salem v. Superior Court (1989) 211 Cal. App. 3d 595, 603, 259 Cal. Rptr. 447]* . Hence, injury resulting from intoxication of a person to whom an intoxicated minor (as described in *Bus. & Prof. Code § 25602.1*) gives liquor is not injury proximately resulting from the sale to the intoxicated minor [*Salem v. Superior Court (1989) 211 Cal. App. 3d 595, 603, 259 Cal. Rptr. 447]* .

[5] Lone Statutory Exception to Immunity

Bus. & Prof. Code § 25602.1 contains the only statutory exception to the rule of immunity expressed in *Bus. & Prof. Code § 25602(b),(c)* and *Civ. Code § 1714(b),(c)* (discussed under 1 , *above*), and no other statutory exceptions exist [*Strang v. Cabrol (1984) 37 Cal. 3d 720, 728, 209 Cal. Rptr. 347, 691 P.2d 1013* (disapproving *Burke v. Superior Court (1982) 129 Cal. App. 3d 570, 579, 181 Cal. Rptr. 149*); *Bass v. Pratt (1986) 177 Cal. App. 3d 129, 134, 222 Cal. Rptr. 723]* .

The 1986 amendment to *Bus. & Prof. Code § 25602.1* does not have retroactive effect, and the prior version governs a cause of action accruing during the time it was in effect [*Baker v. Sudo (1987) 194 Cal. App. 3d 936, 943-945, 240 Cal. Rptr. 38* (effect of 1986 amendment was to broaden exception to immunity)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceCausationProximate CauseGeneral OverviewTortsNegligenceDutyAlcohol ProvidersDram Shop Statutes

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§ 19.13 Liability of Social Host for Furnishing to Person With Exceptional Condition

[1] General Rule of Social Host Immunity

No social host who furnishes alcoholic beverages to any person is legally accountable for damages suffered by that person or for injury to the person or property or death of any third person, resulting from the consumption of the beverages [*Civ. Code § 1714(c)*]. In amending *Civ. Code § 1714* in 1978, the Legislature, in language substantially identical to that set forth in *Bus. & Prof. Code § 25602(c)* (discussed under 1 , *above*), declared its intent to reinstate the prior judicial interpretation of *Civ. Code § 1714* that the consumption, not the furnishing, of alcoholic beverages is the proximate cause of injuries resulting from intoxication [*Civ. Code § 1714(b)*].

Civ. Code § 1714(b),(c), together with *Bus. & Prof. Code § 25602(b),(c)*, immunizes a social host against civil liability for furnishing alcoholic beverages to any person, including an intoxicated minor [*Bass v. Pratt (1986) 177 Cal. App. 3d 129, 132, 137, 222 Cal. Rptr. 723]* . This rule applies even if the host orders an intoxicated minor to leave the premises knowing that the minor will be driving a vehicle [*see DeBolt v. Kragen Auto Supply, Inc. (1986) 182 Cal. App. 3d 269, 272-276, 227 Cal. Rptr. 258* (after driving away from party, intoxicated minor guest was involved in traffic accident in which two people were killed)]. Further, this immunity may not be circumvented by alleging that the social host is liable for failing to supervise guests to whom he or she furnished alcohol [*Biles v. Richter (1988) 206 Cal. App. 3d 325, 327, 253 Cal. Rptr. 414]* .

[2] Furnishing to Person With Exceptional Physical or Mental Condition

In *Cantor v. Anderson*, a Third Appellate District court of appeal held that a social host who furnishes a guest with alcoholic beverages knowing that the guest, because of some exceptional physical or mental condition, is one who should not be served alcoholic beverages and is or should be aware of the risks involved in providing the person with alcohol may be held liable for any resulting damages despite *Civ. Code § 1714(b),(c)* [*Cantor v. Anderson (1981) 126 Cal. App. 3d 124, 132, 178 Cal. Rptr. 540* ; *see Strang v. Cabrol (1984) 37 Cal. 3d 720, 726, 209 Cal. Rptr. 347, 691 P.2d 1013* (citing *Cantor* regarding potential limitation on immunity if person had some exceptional condition); *Bass v. Pratt (1986) 177 Cal. App. 3d 129, 222 Cal. Rptr. 723]* .

Other courts of appeal, however, have rejected the conclusion of *Cantor v. Anderson, above,* on the ground that a common law action based on injuries caused by the foreseeable effect of alcohol on an individual with a mental disability is precluded by *Civ. Code § 1714* and *Bus. & Prof. Code § 25602* [*see Cardinal v. Santee Pita, Inc. (1991) 234 Cal. App. 3d 1676, 1682, 286 Cal. Rptr. 275* (Fourth Appellate District; stating that *Cantor* was wrongly decided); *Hepe v. Paknad (1988) 199 Cal. App. 3d 412, 417-419, 244 Cal. Rptr. 823* (Sixth Appellate District; criticizing *Cantor* reasoning for creating exception without statutory basis and rejecting as dictum favorable citation to *Cantor* in *Strang v. Cabrol*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceCausationProximate CauseGeneral OverviewTortsNegligenceDutyAlcohol ProvidersSocial Hosts

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§ 19.14 Liability of Employer for Act of Intoxicated Employee

An employer may be held liable under the doctrine of respondeat superior for the damages caused by an intoxicated employee if it is shown that the employee's state of intoxication occurred within the scope of his or her employment [*Harris v. Trojan Fireworks Co. (1981) 120 Cal. App. 3d 157, 163-165, 174 Cal. Rptr. 452* (alleged intoxication occurring at Christmas party on company time); for discussion of doctrine of respondeat superior, *see* Ch. 380, *Negligence*].

Neither *Bus. & Prof. Code § 25602(b)* nor *Civ. Code § 1714(c)* immunize the employer from respondeat superior liability. However, if the injured party is a coemployee, workers' compensation may be the exclusive remedy [*see Childers v. Shasta Livestock Auction Yard, Inc. (1987) 190 Cal. App. 3d 792, 798, 235 Cal. Rptr. 641* (workers' compensation exclusive remedy for injuries sustained in automobile accident after leaving premises following customary after-hours drinking on premises, which was encouraged by management); *see* Ch. 577, *Workers' Compensation*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceCausationProximate CauseGeneral OverviewTortsPublic Entity LiabilityLiabilityVicarious LiabilityWorkers' Compensation & SSDIDefensesExclusivity ProvisionsWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityEmployees & EmployersTortsVicarious LiabilityEmployersGeneral Overview

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§ 19.15 Liability for Breach of Independent Duty

[1] Limited Scope of Immunity

Civ. Code § 1714(b),(c) and *Bus. & Prof. Code § 25602(b),(c)* (*discussed under § 19.11* and *§ 19.13* 1) afford immunity only against risks directly flowing from the supplying of liquor. These provisions do not apply to insulate a furnisher of the alcohol from liability arising from the furnisher's breach of an independent duty [*see Blake v. Moore (1984) 162 Cal. App. 3d 700, 702, 208 Cal. Rptr. 703]* .

[2] Breach of Duty to Maintain Safe Premises

The proprietor of a place where intoxicating liquors are dispensed owes his or her patrons a duty to exercise reasonable care to protect them from injury at the hands of fellow patrons, whether drunk or sober [*Cantwell v. Peppermill, Inc. (1994) 25 Cal. App. 4th 1797, 1801-1803, 31 Cal. Rptr. 2d 246* ; *see also Saatzer v. Smith (1981) 122 Cal. App. 3d 512, 518, 176 Cal. Rptr. 68* (noting limits on duty)].

A proprietor who breaches this duty is not immune from liability under *Bus. & Prof. Code § 25602* for injuries sustained as a proximate result of the breach. A license to sell alcoholic beverages does not confer a grant of immunity to the innkeeper who permits the premises to be used as an arena for aggressive tortfeasors [*Cantwell v. Peppermill, Inc. (1994) 25 Cal. App. 4th 1797, 1801-1803, 31 Cal. Rptr. 2d 246* ; *see also Saatzer v. Smith (1981) 122 Cal. App. 3d 512, 518, 176 Cal. Rptr. 68* ; *Slawinski v. Mocettini (1963) 217 Cal. App. 2d 192, 196, 31 Cal. Rptr. 613* (setting forth circumstances that must exist for duty to arise)].

For forms of complaint against a tavern proprietor by a patron injured by a third party on the premises, see *§ 19.77*. For further discussion of the duty of the owner or possessor of real property to persons on the premises, see Ch. 421, *Premises Liability* .

[3] Negligent Entrustment

A social host who supplies a guest with liquor and then furnishes the guest with a car to drive may be liable to the guest

for injuries the guest sustains in an accident involving the car, on a theory of negligent entrustment [*see Blake v. Moore (1984) 162 Cal. App. 3d 700, 702-707, 208 Cal. Rptr. 703]* . Similarly, an innkeeper who loans a vehicle to a drunken patron to drive home is not shielded by *Bus. & Prof. Code § 25602* from liability based on negligent entrustment if the patron injures a third person with the vehicle [*see Cantwell v. Peppermill, Inc. (1994) 25 Cal. App. 4th 1797, 1803, 31 Cal. Rptr. 2d 246]* .

For further discussion of negligent entrustment, see *Ch. 83, Automobiles: Causes of Action, § 82.11*.

[4] Voluntary Assumption of Duty or Special Relationship

A tavern owner may, by acting as a so-called "Good Samaritan," make the liability limitations of *Bus. & Prof. Code § 25602* and *Civ. Code § 1714* inapplicable. If the tavern owner (or the owner's employee) has undertaken to provide a service to another that the owner or employee should recognize as necessary for the protection of a third person, and the failure of the owner or employee to exercise due care in providing the service has increased the risk of harm to that third person, liability for injury caused by that increased risk can be imposed based on that breach of duty, independent of the furnishing of alcohol [*see Williams v. Saga Enterprises, Inc. (1990) 225 Cal. App. 3d 142, 151, 274 Cal. Rptr. 901* ; Restatement (Second) of Torts § 324A].

ILLUSTRATION:

Tavern Returns Keys to Intoxicated Driver who Allegedly Injures Plaintiff. A plaintiff was injured in an automobile accident allegedly caused by an intoxicated driver and sued both the driver and a tavern. Plaintiff opposed the tavern's summary judgment motion by producing evidence that employees of the tavern customarily took the car keys of the patron who injured plaintiff and returned them only on the determination that the patron could drive safely. Was there a triable issue of material fact? Yes. The court held that pursuant to Restatement (Second) of Torts § 324A, this evidence was sufficient to raise an issue of material fact whether defendant has assumed a duty to plaintiff [*Williams v. Saga Enterprises, Inc. (1990) 225 Cal. App. 3d 142, 153-154, 274 Cal. Rptr. 901]* .

In contrast, a commercial server of alcohol has no duty to arrange transportation home for an intoxicated patron on request, even though the establishment accommodated the patron's wishes in the past by asking other patrons to drive him or her home, unless some special relationship exists that gives rise to an affirmative duty of assistance [*Andrews v. Wells (1988) 204 Cal. App. 3d 533, 541-542, 251 Cal. Rptr. 344]* .

For a form of complaint alleging a cause of action against a seller of alcoholic beverages based on Restatement (Second) of Torts § 324A, see *§ 19.76* 1 . For further discussion of negligent breach of duty based on a voluntary assumption of duty or a special relationship, see Ch. 380, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDutyAlcohol ProvidersGeneral OverviewTortsNegligenceDutyAffirmative Duty to ActSpecial RelationshipsPremise OwnersTortsNegligenceDutyAffirmative Duty to ActVoluntary Assumption of DutyTortsNegligenceActionsNegligent EntrustmentTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesReasonable Care

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§ 19.16 Intoxicated Person's Capacity to Contract

Generally, a person of unsound mind is incapable of entering into a contract [*Civ. Code § 1556*]. Persons who are entirely without understanding have no power to make contracts of any kind; however, they are liable for the reasonable value of things furnished to them that are necessary for the support of themselves or their families [*Civ. Code § 38*]. A person who has been adjudicated to be of unsound mind cannot make a conveyance or contract, delegate any power, or waive any right, until he or she has been restored to capacity [*Civ. Code § 40*; *see* Ch. 140,*Contracts*]. However, persons of unsound mind who are not entirely without understanding and who have not been adjudicated to be of unsound mind may rescind their conveyances or contracts [*Civ. Code §§ 39, 1689(b)(7)*; *see* Ch. 490, *Rescission and Restitution*].

Intoxication is proof of want of mental capacity. A completely intoxicated person is generally placed on the same footing as a person of unsound mind. One deprived of reason and understanding by drunkenness is, temporarily, as unable to consent to the terms of a contract as a person who lacks mental capacity because of insanity or idiocy. Therefore, a person who was completely intoxicated when he or she entered into a contract may avoid that contract even though his or her voluntary act, and not the contrivance of the other party to the contract, caused his or her intoxication [*Guidici v. Guidici (1935) 2 Cal. 2d 497, 502, 41 P.2d 932]* . If a person is unable to understand the nature or quality of his or her act and does not seek affirmative relief, that person's intoxication at the time of making a contract is a defense to an action on the contract, and rescission need not be pleaded as an element of the defense [*Mundorff v. Ramm (1924) 66 Cal. App. 553, 566-567, 226 P. 820]* .

For alternative forms of affirmative defense to a contract on the ground of incapacity to contract due to intoxication, see *§ 19.90*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawFormationCapacity of PartiesMental Capacity

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[Reserved]

§§ 19.17[Reserved]

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3-19 California Forms of Pleading and Practice--Annotated § 19.30

§ 19.30 Definition

Every building or place used for the purpose of unlawfully selling, serving, or giving away alcoholic liquor, and every building or place in or on which those liquors are unlawfully sold, served, or given away, is a nuisance that is required to be enjoined, abated, and prevented, whether it is a public or private nuisance [*Penal Code § 11200*].

"Person," as that term is used in *Penal Code § 11200 et seq.*, means individuals, corporations, associations, partnerships, trustees, lessees, agents, assignees, and limited liability companies [*Penal Code § 11207*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceTypesPublic NuisanceReal Property LawTortsNuisanceRemediesInjunctionsGeneral OverviewReal Property LawTortsNuisanceTypesPrivate NuisanceCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesNuisancesAlcohol & Drug NuisancesElements

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3-19 California Forms of Pleading and Practice--Annotated § 19.31

§ 19.31 Abatement

Whenever there is reason to believe that a nuisance, as defined in *Penal Code § 11200*, is kept, maintained, or exists in anycounty, the district attorney, in the name of the People of the State of California, shall, or the city attorney of an incorporated city, or any citizen of the state resident within the county, in his or her own name may, maintain an action in equity to abate and prevent the nuisance and to perpetually enjoin the person or persons conducting or maintaining it, and the owner, lessee, or agent of the building, or place, in or on which the nuisance exists, from directly or indirectly maintaining or permitting it [*Penal Code § 11201*].

For a form of complaint by a private citizen to abate the unlawful sale of liquor, see *§ 19.100* 1 .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceRemediesSummary AbatementReal Property LawTortsNuisanceTypesPrivate NuisanceReal Property LawTortsNuisanceTypesPublic NuisanceReal Property LawTortsNuisanceRemediesInjunctionsGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesNuisancesAlcohol & Drug NuisancesElements

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3-19 California Forms of Pleading and Practice--Annotated § 19.32

§ 19.32 Temporary Injunction

Whenever the existence of a nuisance is shown in an action brought under *Penal Code § 11200 et seq.* to the satisfaction of the court or judge thereof, either by verified complaint or affidavit (or declaration under *Code Civ. Proc. § 2015.5*), and the court or judge is satisfied that the owner of the property has received written notice of the existence of the nuisance, signed by the complainant or the district attorney at least two weeks prior to the filing of the complaint, the court or judge shall allow a temporary writ of injunction to abate and prevent the continuance or recurrence of the nuisance. On granting the writ, the court or judge must require an undertaking to the effect that the applicant will pay to the party enjoined such damages, not exceeding an amount to be specified, as the opposing party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction [*Penal Code § 11202*]. The undertaking must be in writing and signed by the sureties under oath [*Code Civ. Proc. § 995.320(a)*]. It must be executed by two or more sufficient personal sureties, by one sufficient admitted surety insurer, or by any combination of sufficient personal sureties and admitted surety insurers [*see Code Civ. Proc. § 995.310*]. An undertaking is not required of a public entity [*see Code Civ. Proc. § 995.220*].

For further discussion of bonds and undertakings and related forms, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceRemediesSummary AbatementCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsReal Property LawTortsNuisanceRemediesInjunctionsTemporary Injunctions

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3-19 California Forms of Pleading and Practice--Annotated § 19.33

§ 19.33 Trial Precedence

Actions brought under *Penal Code §§ 11200-11207* have precedence over all other actions, except criminal proceedings, election contests, and hearings on injunctions [*Penal Code § 11203*].

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3-19 California Forms of Pleading and Practice--Annotated § 19.34

§ 19.34 Dismissal

If a complaint is filed under *Penal Code §§ 11200-11207* by a citizen, it may not be dismissed by the plaintiff or for want of prosecution except on a sworn statement made by the complainant and his attorney, setting forth the reasons why the action should be dismissed, and the dismissal ordered by the court. In case of failure to prosecute any such action with reasonable diligence, or at the request of the plaintiff, the court, in its discretion, may substitute any other citizen consenting thereto for the plaintiff [*Penal Code § 11203*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewReal Property LawNonmortgage LiensJudgment LiensReal Property LawTortsNuisanceRemediesSummary AbatementCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory Awards

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3-19 California Forms of Pleading and Practice--Annotated § 19.35

§ 19.35 Costs

If the action is brought by a citizen and the court finds there was no reasonable ground or cause therefor, the costs are taxed against that citizen [*Penal Code § 11203*]. If the existence of a nuisance is established in such an action, plaintiff's costs in that action are a lien on the building and place, enforceable and collectable by execution issued by order of the court [*Penal Code § 11204*].

The court may award costs, including costs of investigation and discovery, and reasonable attorneys' fees, that are not compensated for pursuant to some other provision of law, in any case in which a governmental agency seeks to enjoin the unlawful sale, service, storage, keeping, or giving away of alcoholic liquor, as authorized by *Penal Code §§ 11200-11207* [*Civ. Code § 3496*].

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§ 19.36 Order of Abatement

If the existence of a nuisance is established in such an action, an order of abatement is required to be entered as part of the judgment in the case [*Penal Code § 11204*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceRemediesSummary AbatementCriminal Law & ProcedureTrialsEntry of Judgments

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§ 19.37 Contempt

Any violation or disobedience of an injunction or order expressly provided for in *Penal Code §§ 11200-11207* is punishable as a contempt of court by a fine of not less than $200 nor more than $1000, or by imprisonment in the county jail for not less than one nor more than six months, or by both [*Penal Code § 11205*; *see also Code Civ. Proc. § 1209(a)(5)*].

When the owner of a building or place in which an act or acts constituting a contempt as defined in *Penal Code §§ 11200-11207* has been committed is guilty of a contempt of court, and is fined therefor, the fine is a lien on that building and place to the extentof the interest of that person therein, enforceable and collectable by execution issued by order of the court [*Penal Code § 11206*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawNonmortgage LiensJudgment LiensReal Property LawTortsNuisanceRemediesSummary AbatementCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptPenalties

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[Reserved]

§§ 19.38[Reserved]

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3-19 California Forms of Pleading and Practice--Annotated § 19.50

§ 19.50 Related Matthew Bender Publications

For forms of interrogatories for use in actions involving injuries following the sale of liquor to an intoxicated person, see Bender's Forms of Discovery, *Alcoholic Beverages* (Matthew Bender)

For memoranda of points and authorities related to forms in this chapter, see California Points and Authorities, *Alcoholic Beverages* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewTortsNegligenceDutyAlcohol ProvidersGeneral Overview

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3-19 California Forms of Pleading and Practice--Annotated § 19.51

§ 19.51 State Statutes

[1] Civil Liability for Acts of Intoxicated Persons

Furnishing liquor to drunkard or obviously intoxicated person is misdemeanor. *Bus. & Prof. Code § 25602(a)*

General immunity of persons selling, furnishing, or giving alcoholic beverages from liability for injuries or death sustained as result thereof. *Bus. & Prof. Code § 25602(b),(c)*; *Civ. Code § 1714(b),(c)*

Consumption, not serving, of alcoholic beverages is proximate cause of injuries inflicted on another by intoxicated person. *Bus. & Prof. Code § 25602(c)*

Liability of specified persons for injuries or death proximately caused by selling, furnishing, or giving alcoholic beverages to obviously intoxicated minor. *Bus. & Prof. Code § 25602.1*

Furnishing liquor to minor is misdemeanor. *Bus. & Prof. Code § 25658(a)*

Parents or legal guardians who knowingly permit minor child or other minor in company of child to consume alcohol or use controlled substance at home and then drive, resulting in traffic collision, are guilty of misdemeanor. *Bus. & Prof. Code § 25658.2*

Possessing beer keg with knowledge that keg not properly identified is misdemeanor. *Bus. & Prof. Code § 25659.5(c)*

Purchaser knowingly providing false information on receipt required for purchase of beer keg is guilty of misdemeanor. *Bus. & Prof. Code § 25659.5(d)*

Capacity to contract. *Civ. Code §§ 38-40, 1556, 1557*

Rescission of contract based on incompetency. *Civ. Code §§ 39, 1689(b)(7)*

Marriage license is not to be granted when either applicant is under influence of intoxicating liquor or narcotic drug. *Fam. Code § 352*

Presumption of negligence from violation of statute. *Evid. Code § 669(a)*

Selling or furnishing intoxicating liquor to habitual drunkard or incompetent or insane person is misdemeanor. *Penal Code § 397*

[2] Abatement of Unlawful Liquor Sales

Maintaining club room or other premises for drinking alcoholic beverages by members of club or public without license is public nuisance abatable by Attorney General or district attorney. *Bus. & Prof. Code § 25604*

Public entity is not required to file undertaking. *Code Civ. Proc. § 995.220*

Execution and filing of undertaking. *Code Civ. Proc. § 995.310 et seq.*

Unlawful Liquor Sale Abatement Law. *Penal Code §§ 11200-11207*

Place where liquor sold unlawfully is nuisance. *Penal Code § 11200*

Persons entitled to bring abatement suits. *Penal Code § 11201*

Temporary injunction. *Penal Code § 11202*

Trial precedence; dismissal; costs. *Penal Code § 11203*

Plaintiff's costs is lien on place used for unlawful sales. *Penal Code § 11204*

Violation of injunction is contempt of court. *Penal Code § 11205*; *see also Penal Code § 11206* (enforcement of fine by lien on building); and *Code Civ. Proc. § 1209(a)(5)* (disobedience of lawful court process is contempt)

"Person" defined for purposes of *Penal Code §§ 11200-11207*. *Penal Code § 11207*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDutyAlcohol ProvidersGeneral OverviewReal Property LawTortsNuisanceRemediesSummary AbatementReal Property LawTortsNuisanceTypesGeneral OverviewContracts LawFormationCapacity of PartiesMental CapacityCriminal Law & ProcedureCriminal OffensesIntoxicating LiquorsDistribution & SaleElements

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3-19 California Forms of Pleading and Practice--Annotated § 19.52

§ 19.52 Decisions

[1] Contracts

Lack of capacity due to complete intoxication is ground for avoidance of contract. *Guidici v. Guidici (1935) 2 Cal. 2d 497, 502, 41 P.2d 932* ; *Mundorff v. Ramm (1924) 66 Cal. App. 553, 566-567, 226 P. 820*

Rescission of contract is not necessary to defense of incapacity when there was no rational understanding of contractual act and when no affirmative relief is sought. *Mundorff v. Ramm (1924) 66 Cal. App. 553, 566-567, 226 P. 820*

[2] Liability

[a] Tavern Owners

Duty of bar proprietor to protect patrons from third parties. *Cantwell v. Peppermill, Inc. (1994) 25 Cal. App. 4th 1797, 1801-1803, 31 Cal. Rptr. 2d 246* ; *Saatzer v. Smith (1981) 122 Cal. App. 3d 512, 518, 176 Cal. Rptr. 68* ; *Slawinski v. Mocettini (1963) 217 Cal. App. 2d 192, 196-197, 31 Cal. Rptr. 613* ; *Thomas v. Bruza (1957) 151 Cal. App. 2d 150, 153-154, 311 P.2d 128* ; *see also* *Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561* (modern doctrine of premises liability)

Bus. & Prof. Code § 25602 does not immunize proprietor of bar from liability for injuries of patron assaulted by another patron; proprietor has duty as premises owner or possessor to take reasonable steps to protect patrons from reasonably foreseeable aggressive conduct of other persons on premises. *Cantwell v. Peppermill, Inc. (1994) 25 Cal. App. 4th 1797, 1801-1803, 31 Cal. Rptr. 2d 246*

Seller of alcoholic beverages to minor is not liable unless outward manifestations of intoxication were sufficient to cause a reasonable person with normal powers of observation to believe the minor was intoxicated. *Schaffield v. Abboud (1993) 15 Cal. App. 4th 1133, 1140-1141, 19 Cal. Rptr. 2d 205*

Complaint states cause of action against tavern owners for wrongful death of habitual drunkard by alleging that defendants negligently served liquor to deceased and then failed to render aid when he or she became sick and helpless on premises and strangled on his own vomit. *Carlisle v. Kanaywer (1972) 24 Cal. App. 3d 587, 592, 101 Cal. Rptr. 246*

Allowing person with known propensity for fighting on tavern premises is grounds for liability of tavern owner to injured patron. *Slawinski v. Mocettini (1963) 217 Cal. App. 2d 192, 196, 31 Cal. Rptr. 613*

[b] Alcoholic of Unsound Mind

Alcoholic suffering delirium tremens is person of unsound mind within meaning of *Civ. Code § 41* (providing that such persons are civilly liable for wrongful acts). *Mullen v. Bruce (1959) 168 Cal. App. 2d 494, 496, 335 P.2d 945*

[c] Motor Vehicle Owner for Negligent Entrustment

Bus. & Prof. Code § 25602 and *Civ. Code § 1714* does not preclude action based on negligent entrustment of motor vehicle to intoxicated person is concurrent cause of injuries to driver who was furnished alcohol and automobile by defendant. *Blake v. Moore (1984) 162 Cal. App. 3d 700, 703-705, 208 Cal. Rptr. 703*

[d] Social Host

Effect of *Civ. Code § 1714(b),(c)* is not avoided by alleging that defendant's wrong was in forcing intoxicated person to leave party or in failing to provide intoxicated person safe transportation, rather than in furnishing alcohol. *DeBolt v. Kragen Auto Supply, Inc. (1986) 182 Cal. App. 3d 269, 274, 227 Cal. Rptr. 258*

Social host who furnishes alcoholic beverages to intoxicated minor is immune from liability under *Bus. & Prof. Code § 25602(b),(c)* and *Civ. Code § 1714(b),(c)* for injuries to third parties subsequently caused by minor while driving. *Bass v. Pratt (1986) 177 Cal. App. 3d 129, 135-137, 222 Cal. Rptr. 723*

Under *Bus. & Prof. Code §§ 25602, 25602.1* and *Civ. Code § 1714*, social host who furnishes alcoholic beverages to any person is not legally accountable for damages or injury resulting from consumption of those beverages. *Andre v. Ingram (1985) 164 Cal. App. 3d 206, 209-210, 210 Cal. Rptr. 150*

[3] Obviously Intoxicated Person

Depending on individual and his or her condition, individual may have blood alcohol level at which "under the influence" is statutorily presumed [*see Veh. Code §§ 23152, 23155*] but not manifest behavior so as to be considered obviously intoxicated; although obviously intoxicated person is under influence of intoxicating liquor, reverse is not necessarily true. *Jones v. Toyota Motor Co. (1988) 198 Cal. App. 3d 364, 369-370, 243 Cal. Rptr. 611*

"Obvious intoxication" is defined by person's appearance. *Jones v. Toyota Motor Co. (1988) 198 Cal. App. 3d 364, 368, 243 Cal. Rptr. 611*

[4] Proximate Cause

"Proximate" in *Bus. & Prof. Code § 25602.1* construed is intended to restrict, rather than to expand, potential application of exception to liability. *Salem v. Superior Court (1989) 211 Cal. App. 3d 595, 603, 259 Cal. Rptr. 447*

Consumption, not furnishing, of alcoholic beverages is proximate cause of injuries resulting from intoxication. *Andre v. Ingram (1985) 164 Cal. App. 3d 206, 209, 210 Cal. Rptr. 150*

[5] Punitive Damages

Rule of Taylor v. Superior Court (1979) 24 Cal. 3d 890, 894-897, 157 Cal. Rptr. 693, 598 P.2d 854 , that punitive damages are recoverable from intoxicated driver who causes personal injuries, applies retroactively. *Peterson v. Superior Court (1982) 31 Cal. 3d 147, 150, 152-158, 181 Cal. Rptr. 784, 642 P.2d 1305* (disapproving *Mau v. Superior Court (1980) 101 Cal. App. 3d 875, 882, 161 Cal. Rptr. 895*)

Punitive damages are recoverable from intoxicated automobile driver because person who voluntarily drinks to point of intoxication, knowing he or she must drive motor vehicle, demonstrates such conscious and deliberate disregard of others that his or her conduct is willful or wanton. *Taylor v. Superior Court (1979) 24 Cal. 3d 890, 894-897, 157 Cal. Rptr. 693, 598 P.2d 854*

[6] Statutory Immunity and Liability

Under *Bus. & Prof. Code § 25602.1*, making California-licensed seller of alcoholic beverages who furnishes liquor to obviously intoxicated minor subject to liability for injuries proximately caused thereby, club for U.S. Marines located in federal enclave is not subject to liability because it was not licensed under California law. *Gallea v. United States (9th Cir. 1986) 779 F.2d 1403, 1405, 1406* (decided prior to 1986 amendment of *Bus. & Prof. Code § 25602.1* to such cases)

Licensed alcoholic beverage dealers who provide alcoholic beverages to sober minors are statutorily immune (under *Bus. & Prof. Code §§ 25602(b)* and *25602.1*) from claims by third parties injured as result of intoxication of those minors. *Strang v. Cabrol (1984) 37 Cal. 3d 720, 722-728, 209 Cal. Rptr. 347, 691 P.2d 1013* ; *Rogers v. Alvas (1984) 160 Cal. App. 3d 997, 1000-1004, 207 Cal. Rptr. 60*

Statutory amendments abrogating civil liability of furnishers of alcoholic beverages (*Bus. & Prof. Code § 25602(b),(c)*) is valid and not violating equal protection, even though statute preserves liability against licensed providers serving obviously intoxicated minors. *Cory v. Shierloh (1981) 29 Cal. 3d 430, 438-441, 174 Cal. Rptr. 500, 629 P.2d 8*

Statutory amendments abrogating civil liability of furnishers of alcoholic beverages (*Bus. & Prof. Code § 25602(b),(c)*) bars suit by intoxicated consumer as well as by injured third persons. *Cory v. Shierloh (1981) 29 Cal. 3d 430, 437, 174 Cal. Rptr. 500, 629 P.2d 8*

Security company hired to provide additional security at club party could not be liable under *Bus. & Prof. Code § 25602.1* for death of two minors who drove away from club while intoxicated, because security company did not sell, furnish, or cause alcohol to be sold or furnished to minors. *Elizarraras v. L.A. Private Security Servs., Inc. (2003) 108 Cal. App. 4th 237, 243, 133 Cal. Rptr. 2d 302*

Injury resulting from intoxication of person to whom intoxicated minor gives liquor does not constitute injury proximately resulting from sale to intoxicated minor. *Salem v. Superior Court (1989) 211 Cal. App. 3d 595, 603, 259 Cal. Rptr. 447*

Bus. & Prof. Code § 25602 confers sweeping immunity on servers of alcoholic beverages through legislative determination that consumption of alcoholic beverages, rather than service thereof, is proximate cause of injuries inflicted on another by intoxicated person, regardless of whether injuries inflicted negligently or recklessly. *Hepe v. Paknad (1988) 199 Cal. App. 3d 412, 416, 421-422, 244 Cal. Rptr. 823*

Unlicensed party who sells liquor to obviously intoxicated minor is not civilly liable to person later injured by minor. *Zieff v. Weinstein (1987) 191 Cal. App. 3d 243, 245-249, 236 Cal. Rptr. 536* (decided prior to 1986 amendment of *Bus. & Prof. Code § 25602.1* imposing such liability)

Bus. & Prof. Code § 25602(b) has no effect on respondeat superior liability because that liability is not premised on employer's selling, furnishing, or giving alcohol to another; rather, respondeat superior liability is premised on employee's consumption of alcohol is customary incident of employment. *Childers v. Shasta Livestock Auction Yard, Inc. (1987) 190 Cal. App. 3d 792, 808, 235 Cal. Rptr. 641*

Passengers in car who furnished minor driver with liquor are not liable to victims injured in subsequent car accident because passengers were not liquor licensees selling to obviously intoxicated minor pursuant to exception to immunity under Bus. &Prof. Code § 25602.1. *Cully v. Bianca (1986) 186 Cal. App. 3d 1172, 1175, 231 Cal. Rptr. 279* (decided before 1986 legislation expanding statutory exception to immunity)

Obviously intoxicated minor who was served alcohol by California-licensed purveyor of liquor is able under *Bus. & Prof. Code § 25602.1* to sue purveyor in negligence for subsequent injuries. *Chalup v. Aspen Mine Co. (1985) 175 Cal. App. 3d 973, 975-979, 221 Cal. Rptr. 97*

Bus. & Prof. Code § 25602 and *Civ. Code § 1714*, limiting civil liability for furnishing alcoholic beverages, are not applicable when injury occurred before effective date of amendments. *Clendening v. Shipton (1983) 149 Cal. App. 3d 191, 197, 196 Cal. Rptr. 654*

[7] Jury Instructions

In action against liquor licensee for damages sustained by plaintiff for serving alcohol to allegedly obviously intoxicated minor driver, jury instruction upheld that instructed jury to consider outward manifestations of obvious intoxication, including incontinence, unkempt appearance, alcoholic breath, loud or boisterous conduct, bloodshot or glassy eyes, incoherent or slurred speech, flushed face, poor muscular coordination or unsteady walking, loss of balance, impaired judgment, or argumentative behavior. *Jones v. Toyota Motor Co. (1988) 198 Cal. App. 3d 364, 370, 243 Cal. Rptr. 611*

In action against liquor licensee for damages sustained by plaintiff as passenger in single vehicle accident for serving alcohol to allegedly obviously intoxicated minor driver, jury instruction that use of alcohol and its effect required to place person in violation of *Veh. Code § 23152* ("under the influence" of intoxicating liquor) is substantially less than that required to be "obviously intoxicated" pursuant to *Bus. & Prof. Code § 25602.1*, is error because there is no ranking of the two standards in language of statutes or otherwise and they are applied in different situations; moreover, instruction did not permit jury to give proper weight to blood alcohol evidence. *Jones v. Toyota Motor Co. (1988) 198 Cal. App. 3d 364, 368-370, 243 Cal. Rptr. 611* (noting instruction was taken from dicta in *Paula v. Gagnon (1978) 81 Cal. App. 3d 680, 686, 146 Cal. Rptr. 702* and holding error was harmless under facts of case)

[8] Abatement of Unlawful Liquor Sales

Abatement proceeding under former Unlawful Liquor Sales Abatement Act [*now see Penal Code §§ 11200-11207*] does not constitute "adequate remedy" in ordinary course of law within meaning of *Code Civ. Proc. § 1086* for purpose of denying petition for writ of mandate to compel State Board of Equalization (predecessor of Department of Alcoholic Beverage Control) to revoke liquor license. *Covert v. State Board of Equalization (1946) 29 Cal. 2d 125, 130, 173 P.2d 545*

Reliance on mistaken advice of counsel that caterer's permit under Bus. & Prof. Code § 23999 was not revoked along with on-sale license is no defense to criminal charge of selling liquor without valid license in violation of *Bus. & Prof. Code § 23300*. People v. Guinn (1983) 149 Cal. App. 3d Supp. 1, 10-11, *149 Cal. App. 3d Supp. 1, 196 Cal. Rptr. 696*

Individuals relying on Bus. & Prof. Code § 23999 (caterer's permit to sell alcoholic beverages after on-sale liquor license revoked) violates *Bus. & Prof. Code § 23300*, prohibiting sale of liquor without license, because caterer's permit is dependent on existence of on-sale license. *Department of Alcoholic Beverage Control v. Locker (1982) 129 Cal. App. 3d 381, 385, 181 Cal. Rptr. 55*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDutyAlcohol ProvidersGeneral OverviewReal Property LawTortsNuisanceRemediesSummary AbatementReal Property LawTortsNuisanceTypesGeneral OverviewContracts LawFormationCapacity of PartiesMental CapacityCriminal Law & ProcedureCriminal OffensesIntoxicating LiquorsDistribution & SaleElements

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3-19 California Forms of Pleading and Practice--Annotated § 19.53

§ 19.53 Law Reviews

Comment, *The Liability of Providers of Alcohol: Dram Shop Act? 12 Pepperdine L. Rev. 177 (1984)*

Krause, *Reducing Drunk Driving--The California Dream*, 16 Bev. Hills B.J. (1982)

Comment, *Social Host Liability for Furnishing Alcohol: A Legal Hangover? 10 Pac. L.J. 95 (1979)*

Comment, *Liquor, the Law, and California: One Step Forward--Two Steps Backward, 16 San Diego L. Rev. 355 (1979)*

Note, *Punitive Damages and the Intoxicated Driver: An Approach to Taylor v. Superior Court, 31 Hastings L.J. 308 (1979)*

Note, *Negligence--A Bartender Owes a Duty of Care to Patrons to Refrain from Serving Them Injurious Amounts of Alcohol--Ewing v. Cloverleaf Bowl, 19 Santa Clara L. Rev. 263 (1979)*

Note, *Liability of Liquor Suppliers in California: A Return to the Common Law, 12 U.C. Davis L. Rev. 191 (1979)*

Recent Case, *Liquor Law Liability--Comparative Negligence--Drunk Bar Patron Denied Recovery for His Injuries in a Suit Against the Bar--Kindt v. Kauffman, 17 Santa Clara L. Rev. 469 (1977)*

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§ 19.54 Text References

Witkin, Summary of California Law, vol. 1, *Contracts,* §§ 50-56; vol. 6, *Torts,* §§ 1066-1076 (10th ed. 2005)

3 Cal. Jur. 3d, *Alcoholic Beverages,* §§ 59-63

45 Am. Jur. 2d, *Intoxicating Liquors,* §§ 427-463

48 C.J.S., *Intoxicating Liquors,* §§ 405-429

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[Reserved]

§§ 19.55[Reserved]

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§ 19.70 Complaint for Damages [Civ. Code § 3333] by Automobile Driver for Personal Injuries and Property Damages Based on Negligence [Civ. Code § 1714(a)] Against Intoxicated Person and Against Owner of Automobile Driven by Intoxicated Defendant

[1] FORM Complaint for Damages [Civ. Code § 3333] by Automobile Driver for Personal Injuries and Property Damages Based on Negligence [Civ. Code § 1714(a)] Against Intoxicated Person and Against Owner of Automobile Driven by Intoxicated Defendant

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Negligence)
through_____,]	)	[LIMITED CIVIL CASE]
Defendant(s).	)	
	)	

Plaintiff(s) allege(s):

1. Plaintiff is ignorant of the true names and capacities of defendants sued herein as Does I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by that negligence.)

2. At all times herein mentioned, the defendant _____ [*name of vehicle owner*] was the owner of the motor vehicle referred to herein and generally described as a _____ [*year, make, and model*], California license number _____.

3. At all times herein mentioned, defendant _____ [*name of drunk driver*] was driving that vehicle with the consent and permission and knowledge of the remaining defendants, and at all times herein mentioned, was the agent and employee of each of the remaining defendants, and was at all times acting within the purpose and scope of that agency and employment.

4. At all times herein mentioned, _____ [*specify e.g.*, _____ Road] was and is a public street and highway in the County of _____, California.

5. On or about _____ [*date*], at approximately _____ [*time*], plaintiff _____ [*name*] was operating his/her motor vehicle, a _____ [*year, make, and model*], California license number _____, in a general _____ [*specify, e.g.*, northerly ascending] direction on the that _____ [*specify, e.g.*, _____ Road] approximately _____ [*state, e.g.*, two miles north of _____ Road]. At that time and place defendant _____ [*name of drunk driver*] was operating his/her motor vehicle in the opposite direction on that _____ [*specify, e.g.*, _____ Road]. At that time and place, defendants, and each of them, negligently entrusted, managed, maintained, operated, and drove that motor vehicle so as to proximately cause the motor vehicle to collide with the motor vehicle being driven by plaintiff, thereby causing the injuries and damages herein described.

6. As a proximate result of this negligence of the defendants, and each of them, plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her body and shock and injury to his/her nervous system and person, all of which these injuries have caused and continue to cause plaintiff great mental, physical, and nervous pain and suffering. Plaintiff is informed and believes and thereon alleges that these injuries will result in some permanent disability to plaintiff, all to plaintiff's general damage.

7. As a further proximate result of this negligence of the defendants, and each of them, plaintiff was required to and did and continues to incur medical and incidental expenses.

8. As a further proximate result of the negligence of the defendants, and each of them, plaintiff was prevented from attending to his/her usual occupation [as a _____ (*specify*)] for a period of time, sustaining a loss of earnings.

9. As a further proximate result of this negligence of the defendants, and each of them, the vehicle owned and operated by plaintiff was damaged, and plaintiff thereafter was denied the use of that vehicle, to plaintiff's further damage.

10. The aforementioned acts of defendant [s, and each of them,] were willful and wanton in that defendant demonstrated a conscious and deliberate disregard of the rights, safety, and interests of others by voluntarily commencing, and thereafter continuing, to consume alcoholic beverages to the point of intoxication, knowing from the outset that he/she must thereafter operate a motor vehicle.

WHEREFORE, plaintiff prays for judgment as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

4. For damages to plaintiff's automobile in the sum of $ _____;

5. For damages for loss of use of plaintiff's automobile in the sum of $_____;

6. For punitive damages in an amount appropriate to punish defendants and deter others from engaging in similar wrongful conduct;

7. For costs of suit herein incurred; and

8. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form is a complaint for use in an action by a party involved in an automobile accident with an intoxicated person against the intoxicated driver and owner of the vehicle. The basis of the complaint is the negligence of the driver in operating the vehicle in an intoxicated condition. For discussion of a drinker's liability for negligence generally, see *§ 19.10*.

[3] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Cross References

For discussion and an illustration of a complaint involving multiple parties and multiple causes of action in the context of an automobile accident, see *Ch. 83, Automobiles: Bringing the Action, § 83.66*.

For discussion and forms relating to negligence actions generally, see Ch. 380, *Negligence* .

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to Fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceCausationProximate CauseGeneral OverviewTortsNegligenceStandards of CareGeneral OverviewTortsNegligenceActionsNegligent EntrustmentCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsTransportation TortsMotor VehiclesPersonal Vehicles

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[Reserved]

§§ 19.71[Reserved]

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3-19 California Forms of Pleading and Practice--Annotated § 19.75

§ 19.75 Complaint for Damages [Civ. Code § 3333] for Personal Injuries or Wrongful Death [Code Civ. Proc. § 377.60] Against Seller of Alcoholic Beverages--Furnishing, Sale, or Giving of Alcoholic Beverage to Obviously Intoxicated Minor Was Proximate Cause of Personal Injury or Death [Bus. & Prof. Code § 25602.1]

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries or Wrongful Death [Code Civ. Proc. § 377.60] Against Seller of Alcoholic Beverages--Furnishing, Sale, or Giving of Alcoholic Beverage to Obviously Intoxicated Minor Was Proximate Cause of Personal Injury or Death [Bus. & Prof. Code § 25602.1]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], [as _____ (*specify capacity, e.g.*, Personal Representative of the Estate of _____ (*name*), Deceased,] Plaintiff, vs. _____ [*name*], [and DOES I through_____,] Defendant(s).	)))))))	NO. _____ COMPLAINT FOR DAMAGES (_____ [Personal Injury *or* Wrongful Death]) [LIMITED CIVIL CASE]

Plaintiff(s) allege(s):

[*EITHER, if action is for personal injuries*]

1. Plaintiff is _____ [*specify, e.g.,* a _____-year old _____ (man *or* woman) residing in _____ [*city and state*] and prior to the accident hereinafter alleged was engaged in the _____ (business *or* profession *or* occupation) of _____ (*specify*)].

[*OR, if action is for wrongful death*]

1. _____ [Plaintiff(s) *or* The person(s) listed below] is/are entitled to bring an action for the wrongful death of _____ [*name of decedent*] (hereinafter "decedent") pursuant to *Code of Civil Procedure Section 377.60*, based on his/her/their relationship to decedent, as follows:

Name(s)	Relationship to Decedent
_____	_____
_____	_____
_____	_____

[_____ (*If one or more persons are required to establish additional facts, such as that there is no surviving spouse, domestic partner, child, or issue of deceased child or that the person was dependent on decedent, in order to be entitled to bring a wrongful death action under Code Civ. Proc. § 377.60, specify facts that satisfy applicable requirement*).]

[*ADD, if decedent's personal representative is maintaining action on behalf of one or more entitled persons*]

Plaintiff _____ [*name*] is the duly appointed, qualified, and acting personal representative of the estate of decedent and brings this action on behalf of _____ [all of the above-listed persons entitled to bring a cause of action for the wrongful death of decedent *or* the following person(s) entitled to bring an action for the wrongful death of decedent: _____ (*specify person(s) on whose behalf personal representative is maintaining action*)].

[*CONTINUE*]

2. At all times herein mentioned, defendant _____ [*name*] (hereinafter "defendant licensee") was [and is] _____ [*specify capacity, e.g.,* the holder of an on sale liquor license, duly issued by the California State Department of Alcoholic Beverage Control, and the sole proprietor of a tavern known as "_____" [*name*] (hereinafter "the tavern"), located in _____ (*city*), _____ County, California, at which he/she was engaged in the business of selling alcoholic beverages for consumption on the premises].

[3. At all times herein mentioned, defendant _____ (*name*) (hereinafter "defendant _____ (*identify position, e.g.,* bartender")) was (and is) employed by defendant licensee as _____ (*specify, e.g.,* a bartender at the tavern) and in doing the things herein alleged was acting in the course and scope of his/her employment and as the employee and agent of defendant licensee.]

4. At all times herein mentioned, defendant _____ [*name*] was a minor [within the meaning of *Business and Professions Code Section 25602.1*] (hereinafter "the minor").

[5. Plaintiff is ignorant of the true names and capacities of defendants sued herein as Does I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by that negligence.)]

6. Plaintiff(s) is/are informed and believes/believe and thereon alleges/allege, that _____ [*describe sale of alcoholic beverages to obviously intoxicated minor, e.g.,* on the evening of _____ [*date*], the minor was a patron in the tavern and, commencing at approximately _____ [*time*], was sold and served alcoholic beverages by defendant _____ (licensee *or* bartender). _____ [By _____ [*time*] *or* After the first _____ (*number*) drinks], the minor had become obviously intoxicated. Nevertheless, defendant _____ (licensee *or* bartender) continued until _____ [*time*] to sell and serve the minor alcoholic beverages, all of which the minor drank].

[7. Plaintiff(s) is/are further informed and believes/believe and thereon alleges/allege, that at the time the minor was being sold and served alcoholic beverages as herein alleged, defendants were fully aware _____ (*specify facts showing conscious disregard of the rights or safety of others, e.g.,* (a) that the minor was celebrating his/her 17th birthday, (b) that he/she had arrived at the tavern driving a new Ford Mustang convertible that he/she had received as a birthday gift from his/her parents, (c) that the minor intended to drive the vehicle when he/she left the tavern, and (d) that to reach his/her home, the minor would be required to drive _____ [*specify, e.g.,* along city streets through heavy and erratic traffic *or* along a narrow, winding, and dangerous mountain road] in order to reach his/her home). The conduct of defendants in continuing to sell and serve alcoholic beverages to the minor who had become obviously intoxicated as herein alleged was despicable, and was carried on by defendants with a willful and conscious disregard of the rights and safety of all others using the _____ (streets *or* highways *or* roads) along which the minor would be driving after leaving the tavern.]

8. Plaintiff(s) is/are further informed and believes/believe and thereon alleges/allege that the minor left the _____ [*e.g.,* tavern] at approximately _____ [*time*]. _____ [*Specify manner of his/her leaving, if known, e.g.,* and, with the help of defendant _____ (licensee *or* bartender), got into his/her car, got the car started, got it headed in the direction of his/her home, and drove off].

9. Approximately _____ [*specify time, e.g.,* 15 minutes] later, to wit, at about _____ [*time*], the car, with the minor at the wheel, was careening in a _____ [*specify, e.g.,* northerly] direction over and along _____ [*name and description of street, road, or highway, e.g.,* Main Street, that was and is a four-lane undivided public highway running in a generally northerly-southerly direction in _____ (*city*), _____ County, California, with two lanes running in each direction]. At that time and place, as a proximate result of the defendants' having sold and served alcoholic beverages to the obviously intoxicated minor as herein alleged, the minor was driving _____ [*describe erratic driving, e.g.,* at a high rate of speed, was weaving erratically in and out of traffic, was swerving from lane to lane, and had little if any control over the car]. Immediately before the impact hereinafter alleged, the minor's vehicle was _____ [*describe location on street, road, or highway, e.g.,* moving north in the northbound inside lane].

10. At the above-stated time, _____ [plaintiff *or* the decedent] was _____ [*describe plaintiff's or decedent's proximity to the scene of the accident, e.g.,* riding as a passenger in a 1994 Chevrolet sedan that was traveling in a southerly direction over and along _____ (*name of street, road, or highway*) in the southbound inside lane].

11. As a proximate result of the defendants' having sold and served alcoholic beverages to the minor and the minor's intoxication as herein alleged, _____ [*describe accident, e.g.,* at a point approximately _____ feet from the point at which the two vehicles would have passed each other, the minor's car suddenly swerved into the southbound inside lane and crashed head-on into the vehicle in which _____ (plaintiff *or* the decedent) was riding].

12. As a further proximate result of the defendants' having sold and served alcoholic beverages to the minor, the minor's intoxication, and the collision as herein alleged, _____ [plaintiff *or* the decedent] was _____ [*specify result of collision and injuries, e.g.,* thrown from the vehicle in which he/she was riding, thereby sustaining serious and permanent injuries to his/her body, including broken bones, lacerations, contusions, and abrasions], _____ [all of which have caused, cause, and will continue to cause plaintiff great physical, mental, and nervous pain and suffering *or* from which he/she died].

[*EITHER, if action is for personal injuries*]

13. As a further proximate result of defendants' acts, the minor's intoxication, the collision, and the injuries sustained as herein alleged, plaintiff was required to, did, and continues to incur medical and related expenses all to his/her damage.

14. As a further proximate result of defendants' acts, the minor's intoxication, the collision, and the injuries sustained by plaintiff as herein alleged, plaintiff was prevented from attending to his/her usual _____ [business *or* profession *or* occupation] as _____ [*specify*] _____ [*specify period, e.g.,* from the date of the accident on _____ (*date*) to and including _____ (*date*)], all to his/her further damage.

[*OR, if action is for wrongful death*]

13. As a further proximate result of defendants' acts, the minor's intoxication, the collision, and the death of the decedent as herein alleged, _____ [plaintiff(s) *or* the entitled person(s) on whose behalf this action is brought] [, and each of them,] has/have been deprived of the decedent's support, services, society, comfort, love, and attention, all to his/her/their general damage.

14. As a further proximate result of defendants' acts, the minor's intoxication, the collision, and the death of the decedent as herein alleged, _____ [plaintiff(s) *or* the entitled person(s) on whose behalf this action is brought] has/have incurred funeral and burial expenses to his/her/their further damage.

[*CONTINUE*]

WHEREFORE, plaintiff(s) pray(s) for judgment as follows:

1. For general damages according to proof.

2. For medical and related expenses according to proof.

[3. For loss of earnings according to proof.]

[4. For funeral and burial expenses according to proof.]

[5. For punitive damages.]

6. For costs of suit herein incurred.

7. For such other and further relief as the court may deem just.
Dated: _____.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff(s)

[*Verification if desired, see § 19.70 1* .]

[2] Use of Form

This form is a complaint for use in an action for damages against a defendant or defendants who sold, or caused to be sold, alcoholic beverages to an obviously intoxicated minor when the sale proximately caused injury to the plaintiff or, in a wrongful death action, the death of the decedent. For further discussion relating to the furnishing of alcoholic beverages to an obviously intoxicated minor, see *§ 19.12*.

The form may be modified for use when the alcohol was furnished or given or caused to be furnished or given, rather than sold, to an obviously intoxicated minor [*see Bus. & Prof. Code § 25602.1*; *see also § 19.11* 3]:

- By a person licensed or required to be licensed by the Department of Alcoholic Beverage Control, or

- By a person authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave.

The fact situation illustrated in this form is an automobile accident. Liability is not limited to automobile accidents, however, but is imposed whenever personal injury or death is the proximate result of a person's having supplied alcoholic beverages to an obviously intoxicated minor as provided in *Bus. & Prof. Code § 25602.1*.

When the plaintiff is a minor, a guardian ad litem will have to be appointed for the purposes of the action, unless the minor already has a guardian [*see Code Civ. Proc. § 372*]. For discussion and forms relating to appointment of a guardian ad litem generally, see Ch. 291, *Guardians ad Litem* .

[3] Allegations

The complaint alleges:

- For use in a personal injury action, the capacity and residence of the individual plaintiff, which, although not required, is frequently included to identify the plaintiff at the beginning of the complaint (first Paragraph 1); or, alternatively, for use in a wrongful death action, the basis for plaintiff's entitlement to bring the action (second Paragraph 1) [*Code Civ. Proc. § 377.60* (permitting decedent's

surviving spouse, domestic partner, children, and issue of deceased children to bring action without qualification and permitting others to bring action under specified circumstances); *see* Ch. 181, *Death and Survival Actions* for alternative forms of allegations establishing standing to bring wrongful death action];

- The status of the defendant as a person licensed by the California State Department of Alcoholic Beverage Control, giving rise to the statutory duty not to sell alcoholic beverages to a person under the age of 21 [*see Bus. & Prof. Code §§ 25602.1, 25658(a)*] (Paragraph 2);

- The identity of the person who actually sold the alcohol to the minor if not the licensee, and his or her relationship to the licensee (Paragraph 3) [*see Bus. & Prof. Code § 25602.1*];

- The status of the purchaser of the alcoholic beverages as a minor (Paragraph 4) [*see Bus. & Prof. Code §§ 25602.1, 25658(a)*];

- Fictitiously named defendants (Paragraph 5) [*see Code Civ. Proc. § 474*];

- The sale of alcoholic beverages to the minor when the minor was obviously intoxicated, giving rise to civil liability for personal injuries or death proximately resulting from that breach (Paragraph 6) [*Bus. & Prof. Code § 25602.1*; *Civ. Code § 3333*];

- Defendants' knowledge of facts that made their breach of duty conduct carried on in conscious disregard of the rights or safety of others, constituting the basis of a claim for punitive damages (Paragraph 7) [*see Civ. Code § 3294(c)(1)*];

- Proximate cause (Paragraphs 8, 9, and 11-14) [*see Bus. & Prof. Code § 25602.1*; *Civ. Code § 3333*]; and

- Plaintiff's or the decedent's location within the zone of danger created by defendants' breach of duty (Paragraph 10).

The complaint also alleges plaintiff's injuries or the death of the decedent (Paragraph 12) [*see Bus. & Prof. Code § 25602.1*; *Civ. Code §§ 3282, 3333*] and damages (Paragraph 12-14) [*Civ. Code §§ 3281, 3333*].

[4] Alleging Amounts Claimed

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual damages demanded [*Code Civ. Proc. § 425.10(b)*]. No claim for punitive damages may state an amount sought [*Civ. Code § 3295(e)*; *Code Civ. Proc. § 425.10(b)*]. Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For forms and procedure for use in requesting notice of the specific amount sought, see Ch. 177, *Damages* .

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any

answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Other Causes of Action

[a] Joinder of Minor as Party Defendant

The intoxicated minor may be joined as a party defendant in the same complaint as the action against the seller of the alcoholic beverages [*see Fam. Code § 6600*; *Code Civ. Proc. § 379*; *Strang v. Cabrol (1984) 37 Cal. 3d 720, 725-726, 209 Cal. Rptr. 347, 691 P.2d 1013* (consumption of alcoholic beverages is proximate cause of injuries resulting from intoxication)]. If this is done, the cause of action alleged in the form should be titled First Cause of Action, and a Second Cause of Action added to state a cause for relief against the minor. Punitive damages might also be recovered in that action.

Other persons who might be joined in an action against the minor include:

- The minor's parents or guardian [*see Veh. Code § 17708*].
- The owner if other than the minor of the car the minor was driving [*see Veh. Code § 17154*].
- Any person who signed for the minor's driver's license, except specified public entities, officers, and workers [*Veh. Code § 17707*].

For discussion of above persons or others who might be joined, see *Ch. 83, Automobiles: Bringing the Action, § 83.12*.

[b] Survival Action

A survival action under *Code Civ. Proc. § 377.30* may be joined with a wrongful death action under *Code Civ. Proc. § 377.60* arising out of the same wrongful act or neglect [*Code Civ. Proc. § 377.62(a)*]. For discussion, procedure, and forms, see Ch. 181, *Death and Survival Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceCausationProximate CauseGeneral OverviewTortsWrongful Death & Survival ActionsGeneral OverviewTortsNegligenceStandards of CareGeneral OverviewTortsNegligenceDutyAlcohol ProvidersDram Shop StatutesCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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California Forms of Pleading and Practice--Annotated

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Volume 3: Alcoholic Beverage Licenses thru Answers-Chs. 18-29
Chapter 19 ALCOHOLIC BEVERAGES: CIVIL LIABILITY
PART IV. FORMS
A. Civil Liability for Acts of Intoxicated Persons

3-19 California Forms of Pleading and Practice--Annotated § 19.76

§ 19.76 Complaint for Damages [Civ. Code § 3333] for Personal Injuries or Wrongful Death [Code Civ. Proc. § 377.60] Against Seller of Alcoholic Beverages--Negligent Performance of Undertaking Resulting in Harm to Third Person

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries or Wrongful Death [Code Civ. Proc. § 377.60] Against Seller of Alcoholic Beverages--Negligent Performance of Undertaking Resulting in Harm to Third Person

[*Caption. See § 19.75 1*]

Plaintiff(s) allege(s):

1. [*Capacity and residence of parties. See § 19.70 1 , Paragraph 3, and § 19.75 1 , Paragraphs 1-3.*]

2. [*Fictitious name allegation. See § 19.75 1 , Paragraph 5.*]

[3. Plaintiff is informed and believes and thereon alleges that] A t all times herein mentioned each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of that agency and employment.]

4. _____ [*Describe undertaking by seller of alcoholic beverages to another, e.g.,* On or about _____ (*date*), _____ (*name of defendant whose conduct directly caused plaintiff's (or decedent's) injury*) was a patron at the business establishment of _____ (*name of defendant licensee*). Commencing at approximately _____ (*time*), _____ (*name of defendant licensee*) undertook, gratuitously or for consideration, to render services to _____ (*name of defendant whose conduct directly caused plaintiff's (or decedent's) injury*) that the _____ (*name of defendant licensee*) should have recognized as necessary for the protection of a third person or his/her things, in that _____ (*name*), an employee of _____ (*name of defendant licensee*), received _____'s (*name*

of defendant whoseconduct directly caused plaintiff's (or decedent's) injury) car keys before selling him/her alcoholic beverages].

5. _____ [*Describe seller's negligence in protecting the undertaking, e.g.,* Commencing at approximately _____ (*time*), _____ (*name of defendant licensee's employee*) sold and served alcoholic beverages to _____ (*name of defendant whose conduct directly caused plaintiff's injury*). At approximately _____ (*time*), after _____ (*name of defendant whose conduct directly caused plaintiff's injury*) had become obviously intoxicated, _____ (*name of defendant licensee*) failed to exercise reasonable care in the ownership, operation, control, management, and maintenance of the premises and failed to exercise reasonable care to protect the undertaking with _____ (*name of defendant whose conduct directly caused plaintiff's (or decedent's) injury*) as herein alleged, as to permit Defendant Bartender to return _____ (*name of defendant whose conduct directly caused plaintiff's (or decedent's) injury*)'s keys to him/her and _____ (*name of defendant whose conduct directly caused plaintiff's (or decedent's) injury*) got into his/her automobile and drove off.]

[*EITHER, if licensee's failure to exercise reasonable care in the undertaking increased risk of harm to third persons*]

6. The failure of _____ [*name of defendant licensee*] to exercise reasonable care to protect his/her/its undertaking by _____ [*describe, e.g.,* taking possession of the automobile keys and then returning them to the obviously intoxicated _____ (*name of defendant whose conduct directly caused plaintiff's (or decedent's) injury*)] increased the risk of physical harm to third persons such as _____ [plaintiff *or* decedent].

[*OR, if licensee undertook to perform a duty owed to the third person*]

6. The undertaking herein alleged is an undertaking by _____ [*name of defendant licensee*] to perform a duty owed by _____ [*name of other person*] to _____ [plaintiff *or* decedent], in that _____ [*describe duty owed by other person*].

[*OR, if injuries resulted because of a person relying on the licensee's undertaking*]

6. The injuries suffered by _____ [plaintiff *or* decedent], as herein alleged below, were suffered because of reliance of _____ [plaintiff *or* decedent *or identify other person*] on the undertaking herein alleged.

[*CONTINUE*]

7. _____ [*Describe circumstances preceding the accident, e.g.,* At all times herein mentioned, the Scenic Parkway was, and is, a public street and highway running in a generally north-south direction in Columbus County, California. On or about _____ (*date*), at approximately _____ (*time*), _____ (plaintiff *or* the decedent) was operating his/her automobile in a northerly direction along and over the Scenic Parkway, and _____ (*name of defendant whose conduct directly caused plaintiff's (or decedent's) injury*) was operating his/her automobile in a southerly direction along and over that parkway].

8. As a proximate result of _____'s [*name of defendant licensee*] failure to exercise reasonable care to

protect the undertaking herein alleged, _____ [*describe circumstances preceding the accident, e.g.,* at that time and place, _____ (*name of defendant whose conduct directly caused plaintiff's (or decedent's) injury*) so negligently operated his/her automobile as to cause it to cross over the center divider strip into oncoming traffic and to collide head-on with the automobile driven by _____ (plaintiff *or* the decedent)].

9. As a further proximate result of _____'s [*name of defendant licensee*] failure to exercise reasonable care to protect the undertaking herein alleged, the intoxication of _____ [*name of defendant whose conduct directly caused plaintiff's (or decedent's) injury*], and the collision as herein alleged, _____ [plaintiff *or* the decedent] _____ [*specify result of accident and injuries, e.g.,* was hurt and injured in his/her health, strength, and activity, and sustained bodily injuries and shock and injury to his/her nervous system, all of which have caused, cause, and will continue to cause plaintiff great physical, mental, and nervous pain and suffering *or* suffered severe physical injuries from which he/she died)].

10. At the above-stated time, _____ [plaintiff *or* the decedent] was _____ [*describe plaintiff's or decedent's proximity to the scene of the accident, e.g.,* riding as a passenger in a 1994 Chevrolet sedan that was traveling in a southerly direction over and along _____ (*name of street, road, or highway*) in the southbound inside lane].

11. As a proximate result of the defendants' having sold and served alcoholic beverages to the minor and the minor's intoxication as herein alleged, _____ [*describe accident, e.g.,* at a point approximately _____ feet from the point at which the two vehicles would have passed each other, the minor's car suddenly swerved into the southbound inside lane and crashed head-oninto the vehicle in which _____ (plaintiff *or* the decedent) was riding].

12. As a further proximate result of the defendants' having sold and served alcoholic beverages to the minor, the minor's intoxication, and the collision as herein alleged, _____ [plaintiff *or* the decedent] was _____ [*specify result of collision and injuries, e.g.,* thrown from the vehicle in which he/she was riding, thereby sustaining serious and permanent injuries to his/her body, including broken bones, lacerations, contusions, and abrasions], _____ [all of which have caused, cause, and will continue to cause plaintiff great physical, mental, and nervous pain and suffering *or* from which he/she died].

[*EITHER, if action is for personal injuries*]

13. As a further proximate result of defendants' acts, the minor's intoxication, the collision, and the injuries sustained as herein alleged, plaintiff was required to, did, and continues to incur medical and related expenses all to his/her damage.

14. As a further proximate result of defendants' acts, the minor's intoxication, the collision, and the injuries sustained by plaintiff as herein alleged, plaintiff was prevented from attending to his/her usual _____ [business *or* profession *or* occupation] as _____ [*specify*] _____ [*specify period, e.g.,* from the date of the accident on _____ (*date*) to and including _____ (*date*)], all to his/her further damage.

[*OR, if action is for wrongful death*]

13. As a further proximate result of defendants' acts, the minor's intoxication, the collision, and the death of the decedent as herein alleged, _____ [plaintiff(s) *or* the entitled person(s) on whose behalf this action is brought] [, and each of them,] has/have been deprived of the decedent's support, services, society, comfort, love, and

attention, all to his/her/their general damage.

14. As a further proximate result of defendants' acts, the minor's intoxication, the collision, and the death of the decedent as herein alleged, _____ [plaintiff(s) *or* the entitled person(s) on whose behalf this action is brought] has/have incurred funeral and burial expenses to his/her/their further damage.

[*CONTINUE*]

WHEREFORE, plaintiff(s) pray(s) for judgment as follows:

1. For general damages.

2. For medical and related expenses.

[3. For loss of earnings.]

[4. For funeral and burial expenses.]

5. For costs of suit herein incurred.

6. For such other and further relief as the court may deem just.
Dated: _____.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff(s)

[*Verification if desired, see § 19.70 1* .]

[2] Use of Form

This form is a complaint for use by a plaintiff to bring an action for damages against a defendant or defendants who have undertaken to render a service to another, such as to a patron, to whom the defendant has sold, furnished, or given alcoholic beverages, under circumstances in which the defendant should have recognized that the services were necessary for the protection of a third person, the defendant was negligent in the performance of that undertaking, and the negligence resulted in injury to the plaintiff or the death of the plaintiff's decedent. For further discussion relating to liability based on a voluntary assumption of duty or special relationship, see *§ 19.15* 4 .

The fact situation illustrated in the form involves an automobile accident, and was adapted from the facts in *Williams v. Saga Enterprises, Inc. (1990) 225 Cal. App. 3d 142, 274 Cal. Rptr. 901* . The allegations are based on the principles stated in Restatement (Second) of Torts § 324A. Counsel should note, however, that liability would not be limited to automobile accidents, and may be imposed under other circumstances.

[3] Allegations

The complaint in 1 , *above*, alleges that:

- The defendant seller of alcoholic beverages has undertaken, gratuitously or for consideration, to render services to another that he or she should recognize as necessary for the protection of a third person or his or her things (Paragraph 4);

- The seller failed to exercise reasonable care to protect the undertaking (Paragraph 5);

- Either the seller's failure to exercise reasonable care increased the risk of harm of physical injuries to the third person, the seller has undertaken to perform a duty owed by the other to the third person, or the harm is suffered because of reliance of the other or the third person on the undertaking (Alternative Paragraphs 6); and

- The seller's failure to exercise reasonable care was the proximate cause of the third-person plaintiff's or decedent's physical injuries (Paragraphs 7-9).

For discussion of allegations relating to damages and verification in a personal injury or wrongful death action, see the discussion in *§ 19.75* 4 and 5 , respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceCausationProximate CauseGeneral OverviewTortsWrongful Death & Survival ActionsGeneral OverviewTortsNegligenceStandards of CareGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsNegligenceDutyAffirmative Duty to ActVoluntary Assumption of Duty

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Volume 3: Alcoholic Beverage Licenses thru Answers-Chs. 18-29
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A. Civil Liability for Acts of Intoxicated Persons

3-19 California Forms of Pleading and Practice--Annotated § 19.77

§ 19.77 Complaint for Damages [Civ. Code § 3333] for Personal Injuries--By Patron Against Tavern Proprietor for Negligence [Civ. Code § 1714] in Failing to Protect Plaintiff From Intoxicated and Dangerous Patron on Premises (First Cause of Action)--And Against Intoxicated Patron for Assault and Battery (Second Cause of Action)

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries--By Patron Against Tavern Proprietor for Negligence [Civ. Code § 1714] in Failing to Protect Plaintiff From Intoxicated and Dangerous Patron on Premises (First Cause of Action)--And Against Intoxicated Patron for Assault and Battery (Second Cause of Action)

[*Caption. See § 19.75 1* .]

FIRST CAUSE OF ACTION
(Negligence)

Plaintiff alleges:

1. Defendant _____ [*name of proprietor*] is, and at all times mentioned was, the owner and proprietor of a tavern known as _____ [*name of tavern*], located in _____ County, California, and engaged in the business of selling alcoholic beverages to the general public therein.

2. [*Fictitious name and agency allegations, if appropriate. See §§ 19.75 1 , Paragraph 5, 19.76 1 , Paragraph 3].*

3. Defendant knew, or in the exercise of ordinary care should have known, that _____ [*name of person who injured plaintiff*] was a person of violent, vicious, and dangerous character and disposition while intoxicated, and a person whose presence in defendant's tavern while intoxicated would be a danger and hazard to the tavern's patrons, including plaintiff. Given this knowledge, defendant _____ [*name of tavern proprietor*] had a duty to protect other patrons from that danger.

4. On or about _____ [*date*], while plaintiff was present in defendant's tavern as a patron, defendant _____ [*name of tavern proprietor*] negligently owned, operated, controlled, managed, and maintained those premises by permitting _____ [*name of person who injured plaintiff*] to enter the premises while in an obviously intoxicated condition, to remain on the premises, and _____ [*specify conduct that injured plaintiff, e.g.,* to attack, assault, batter, and stab plaintiff in a brutal and unprovoked manner]. Defendant _____ [*name of tavern proprietor*] failed to warn or take appropriate action to protect the tavern's patrons, including plaintiff, from the assaultive conduct of _____ [*name of person who injured plaintiff*], and failed to provide those patrons with a safe environment.

5. As a proximate result of defendant's negligence, plaintiff _____ [*specify injuries and/or damages, e.g.,* was beaten and stabbed, sustaining bodily injuries and shock and injury to his/her nervous system that have caused, and continue to cause, him/her great mental and physical pain and suffering]. [Plaintiff is informed and believes and on this information and belief alleges that these injuries will result in permanent disability to him/her.] As a result of these injuries, plaintiff has suffered general damages in an amount according to proof.

6. As a further proximate result of defendant's negligence, plaintiff has incurred [, and will continue to incur,] medical and related expenses in an amount according to proof.

7. As a further proximate result of defendant's negligence, plaintiff's earning capacity has been greatly impaired, both in the past and present, in an amount according to proof.

SECOND CAUSE OF ACTION
(Assault and Battery)

8. Plaintiff refers to and herein incorporates Paragraphs 1, 3, 4, 5, 6, and 7 of his/her First Cause of Action.

9. On _____ [*date*], at _____ [*name of tavern*] in _____ County, California, defendant _____ [*name of patron who injured plaintiff*] _____ [*state all acts of defendant that placed plaintiff in fear of a harmful or offensive contact, e.g.,* threatened to strike plaintiff, drew a knife from his coat pocket, and threatened to kill plaintiff].

10. In acting as alleged above, defendant _____ [*name of patron who injured plaintiff*] intended to place plaintiff in apprehension of _____ [a harmful *or* an offensive] contact with plaintiff's person.

11. As a result of the acts of defendant _____ [*name of patron who injured plaintiff*] as alleged above, plaintiff was, in fact, placed in great apprehension of _____ [a harmful *or* an offensive] contact with his/her person.

12. Immediately thereafter, defendant _____ [*name of patron who injured plaintiff*] _____ [*state all acts of defendant that constituted a harmful or offensive contact with plaintiff, e.g.,* struck plaintiff with his fists, and then stabbed plaintiff in the chest].

13. In acting as alleged above, defendant _____ [*name of patron who injured plaintiff*] acted with the intent to make a contact with plaintiff's person.

14. At no time did plaintiff consent to any of the acts of defendant _____ [*name of patron who injured plaintiff*] alleged above.

15. The aforementioned conduct of defendant _____ [*name of patron who injured plaintiff*] was willful and malicious and was intended to oppress and cause injury to plaintiff, in conscious disregard of plaintiff's rights, thereby warranting an assessment of punitive damages in an amount appropriate to punish defendants and deter others from engaging in similar misconduct.

WHEREFORE, plaintiff prays judgment as follows:

1. Against defendants, and each of them, for general damages;

2. Against defendants, and each of them, for medical and related expense;

3. Against defendants, and each of them, for loss of earnings;

4. Against defendant _____ [*name of defendant who injured plaintiff*], for punitive damages.

5. Against defendants, and each of them, for costs of suit incurred herein;

6. Against defendants, and each of them, for such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for_____ [*party's status and name*]

[*Verification, if desired. See § 19.70 1* .]

[2] Use of Form

This form is a complaint for negligence and assault and battery. The complaint is for use in an action by a tavern patron against both the tavern's proprietor and an intoxicated patron for personal injuries resulting from the intoxicated patron's assault on plaintiff.

For discussion relating to a duty of a seller of alcoholic beverages to maintain safe premises, see *§ 19.15* 2 .

[3] Allegations

The first cause of action, negligence, is against the tavern's proprietor and alleges:

- That plaintiff was a patron of defendant proprietor's tavern (Paragraph 1);

- That defendant proprietor knew or should have known of the intoxicated patron's dangerous character (Paragraph 3);

- That defendant negligently operated the tavern by permitting the intoxicated patron to enter the premises in an intoxicated condition, to remain on the premises, and to attack plaintiff, without warning or taking appropriate steps to protect plaintiff, and by failing to provide a safe environment for the

tavern's patrons (Paragraph 4); and

- That plaintiff suffered injuries and damages as a proximate result of that negligence (Paragraphs 5, 6, and 7).

The second cause of action, assault and battery, is against the intoxicated patron and alleges:

- Defendant's acts that constituted an assault, that is, the acts that placed plaintiff in apprehension of a harmful or offensive contact (Paragraph 9);

- Defendant's intent to cause the apprehension (Paragraph 10);

- Plaintiff's actually feeling apprehension (Paragraph 11);

- Defendant's acts that constituted a battery, that is, the acts of harmful or offensive contact (Paragraph 12);

- Defendant's intent to actually make the contact (Paragraph 13);

- Plaintiff's lack of consent to defendant's acts (Paragraph 14); and

- The willfulness and maliciousness of defendant's conduct entitling plaintiff to punitive damages (Paragraph 15).

PRACTICE POINT: Insurance Considerations in Alleging Intentional Torts. Counsel should remember that, in cases in which a defendant's assets are primarily insurance coverage, allegations that defendant intentionally injured plaintiff are likely to preclude insurance coverage, under *Ins. Code § 533*. In such a case, counsel may wish to allege negligence in addition to, or instead of, intent to injure plaintiff, in order to preclude the possibility of obtaining a larger judgment that is unlikely to be collectable. *Practice Point by Professor Neil Levy*

[4] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDutyAlcohol ProvidersGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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Chapter 19 ALCOHOLIC BEVERAGES: CIVIL LIABILITY
PART IV. FORMS
A. Civil Liability for Acts of Intoxicated Persons

3-19 California Forms of Pleading and Practice--Annotated §§ 19.78through 19.89

[Reserved]

§§ 19.78[Reserved]

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Chapter 19 ALCOHOLIC BEVERAGES: CIVIL LIABILITY
PART IV. FORMS
A. Civil Liability for Acts of Intoxicated Persons

3-19 California Forms of Pleading and Practice--Annotated § 19.90

§ 19.90 Affirmative Defense to Action on Contract

[1] Incapacity to Contract Due to Intoxication

[a] FORM Affirmative Defense to Action on Contract--Incapacity to Contract Due to Intoxication

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* to THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the time defendant signed and executed the contract sued on in this action, defendant was intoxicated from the use of alcoholic beverages to such an extent that [his reason was impaired and] he/she was of unsound mind and unable to understand the nature or consequences of his act.

[b] Use of Form

The allegation in a , *above,* states, as an affirmative defense [*see Code Civ. Proc. § 431.30(b)(2)*] to an action on a written contract, that defendant was incapacitated at the time he or she executed the contract due to intoxication [*see Guidici v. Guidici (1935) 2 Cal. 2d 497, 502, 41 P.2d 932]* . If defendant was "not entirely without understanding" at the time he or she executed the contract, he or she may rescind it [*see Civ. Code § 39*] and plead that rescission as an affirmative defense [for such a form *see* Ch. 140, *Contracts* . When, as alleged in the form in a , *above,* he or she was unable to understand the nature or quality of his or her act and does not seek affirmative relief, rescission need not be pleaded as a necessary element of the defense [*see Mundorff v. Ramm (1924) 66 Cal. App. 553, 566-567, 226 P. 820]* .

For further discussion relating to an intoxicated person's capacity to contract, see *§ 19.15*.

[2] Alternative Form

[a] FORM Affirmative Defense to Action on Contract--Alternative Form

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND)

CAUSE OF ACTION], defendant alleges that prior to and at the time of the making and delivery of the contract alleged in the complaint, defendant was under the influence of intoxicating liquors to such an extent as to make him/her mentally incompetent and of unsound mind, and by reason thereof he/she was unable to understand the nature or quality of his act and was incapable of making or executing that contract.

[b] Use of Form

When appropriate, the form of affirmative defense in a , *above* may be used in lieu of the form in 1 a , *above.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewTortsNegligenceDutyAlcohol ProvidersGeneral OverviewContracts LawFormationCapacity of PartiesMental Capacity

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3-19 California Forms of Pleading and Practice--Annotated §§ 19.91through 19.99

[Reserved]

§§ 19.91[Reserved]

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Chapter 19 ALCOHOLIC BEVERAGES: CIVIL LIABILITY
PART IV. FORMS
B. Abatement of Unlawful Liquor Sales

3-19 California Forms of Pleading and Practice--Annotated § 19.100

§ 19.100 Complaint to Abate Unlawful Sale of Liquor Under Unlawful Liquor Sale Abatement Law [Penal Code §§ 11200-11207]--By Private Citizen [Penal Code § 11201]

[1] FORM Complaint to Abate Unlawful Sale of Liquor Under Unlawful Liquor Sale Abatement Law [Penal Code §§ 11200-11207]--By Private Citizen [Penal Code § 11201]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO ABATE NUISANCE UNDER
_____ [*name*], [and DOES I	)	UNLAWFUL LIQUOR SALE ABATEMENT LAW
through_____,]	)	[LIMITED CIVIL CASE]
Defendant(s).	)	
	)	

Plaintiff(s) allege(s):

1. Plaintiff is a citizen of the State of California residing in _____ County, California.

2. Defendant is _____ [*allege capacity, e.g.,* a domestic corporation] engaged in the business of selling and furnishing alcoholic beverages and liquors to the general public and maintains, owns, and operates a building and place [known as the _____ (*name*)] that is located in _____ County at _____ [*address*].

3. [*Fictitious name and agency allegations, if appropriate. See §§ 19.75 1 , Paragraph 5, 19.76 1 , Paragraph 3].*

4. Defendant, through its agents and employees, is maintaining that building and place as a nuisance, as defined by *Section 11200 of the Penal Code*, by unlawfully _____ [selling *or* serving *or* giving away *or any combination of these*] spirituous, vinous, malt, or other alcoholic liquor in that _____ [*set forth unlawful acts*].

5. [On or about _____ (*date*), which was (more than) two weeks prior to filing this complaint, plaintiff served, and defendant received, written notice signed by plaintiff of the existence of that nuisance demanding that it be discontinued. Despite that notice defendant maintained and continues to maintain the nuisance in the same manner and fashion described herein. A copy of the notice is attached hereto as Exhibit "A" and made a part hereof.]

WHEREFORE, plaintiff prays judgment as follows:

1. For an order requiring defendant to show cause, if any he/she has, why he/she should not be enjoined as hereinafter set forth, during the pendency of this action.

2. For [a temporary writ of injunction and] a permanent injunction, all enjoining defendant, his or her agents, servants, and employees, and all persons acting under, in concert with, or for him or her from _____ [*set forth unlawful acts to be enjoined with clarity and detail*].

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*signature*]

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification. See § 19.70 1* .]

[2] Use of Form

This form is a complaint for use in an action to enjoin unlawful selling or serving of liquor as a nuisance under the Unlawful Liquor Sale Abatement Law [*Penal Code § 11200 et seq.*].

For further discussion relating to the abatement of unlawful liquor sales, see *§ 19.30* et seq.

[3] Allegations

The complaint alleges that:

- Plaintiff is a citizen of the state and resident of the county in which the nuisance is maintained (Paragraph 1) [*see Penal Code § 11201* (who may bring action)];

- The unlawful selling of liquor by defendant constituting a nuisance within the meaning set forth in *Penal Code § 11200* (Paragraph 4) [*see Penal Code § 11200*]; and

- Defendant received written notice of the existence of the nuisance, signed by plaintiff, at least two weeks prior to filing of the complaint, to support a request for a temporary writ of injunction (Paragraph 5) [*see Penal Code § 11202*; *see also Department of Alcoholic Beverage Control v. Locker (1982) 129 Cal. App. 3d 381, 385, 181 Cal. Rptr. 55* (required two-week notice is of the existence of the nuisance, not of the proceeding; formal notice was not required where defendanta had actual notice)].

[4] Verification and Separate Declaration

The complaint must be verified [*Penal Code § 11201*]. Unless the complaint sets forth evidentiary facts to justify issuing a temporary writ ofinjunction, plaintiff should set forth those facts in a separate affidavit (or declaration under penalty of perjury executed in California) that may be served and filed with the complaint [*Code Civ. Proc. § 2015.5*; *Penal Code § 11202*].

[5] Written Undertaking

If the temporary writ of injunction is granted, the court or judge must require an undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined those damages, not exceeding an amount to be specified, as the opposing party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled thereto [*Penal Code § 11202*].

If *Penal Code § 11202* is construed as authorizing issuance of the temporary writ of injunction without notice to, and opportunity to be heard by, the defendant [*see In re Brambini (1923) 192 Cal. 19, 25-26, 218 P. 569]* , it may be held to violate the requirements of procedural due process [*see, e.g., Blair v. Pitchess (1971) 5 Cal. 3d 258, 276-277, 96 Cal. Rptr. 42, 486 P.2d 1242* (provisional remedy of claim and delivery held unconstitutional absent probable cause, notice, and hearing); *Randone v. Appellate Dep't of Superior Court (1971) 5 Cal. 3d 536, 541, 96 Cal. Rptr. 709, 488 P.2d 13* (prejudgment attachment held unconstitutional as violating procedural due process)].

The procedure for execution and filing of undertakings is governed by *Code Civ. Proc. § 995.310 et seq.*, and is discussed in Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceRemediesSummary AbatementReal Property LawTortsNuisanceTypesPrivate NuisanceReal Property LawTortsNuisanceTypesPublic NuisanceCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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Chapter 20 ALLEGATIONS COMMONLY USED

3-20 California Forms of Pleading and Practice--Annotated 20.syn

§ 20.syn Synopsis to Chapter 20: ALLEGATIONS COMMONLY USED

§ 20.01 Scope of Chapter

§ 20.02 Cross References

§§ 20.03-20.09 [Reserved]

§ 20.10 Pleading in a Complaint

§ 20.11 Pleading in an Answer

§ 20.12 Fictitiously Named Defendants

[1] Suing Defendants by Fictitious Names Authorized

[2] Purpose of Fictitious Defendant Allegations

[a] Commencing Action to Stop Statute of Limitations

[b] Statement of Cause of Action Against Fictitious Defendants Is Necessary

[3] Plaintiff's Ignorance of Defendant

[a] Identity of Defendant or Existence of Cause of Action

[b] Time for Determining Ignorance

[c] Genuine Ignorance Required; No Duty of Diligence

[4] Default

[5] Impact on Federal Diversity Jurisdiction

§§ 20.13-20.19 [Reserved]

§ 20.20 State Statutes

§ 20.21 Decisions

[1] Ignorance of Identity or of Liability of Fictitious Defendant

[2] Genuineness of Plaintiff's Ignorance re Doe Defendant

[3] Default

§§ 20.22-20.29 [Reserved]

§ 20.30 Fictitiously Named Defendants (Doe Allegations) [Code Civ. Proc. § 474]--General Form

[1] FORM

[2] Use of Form

[3] Contents of Allegation

[4] Cross References

§ 20.31 Fictitiously Named Defendants (Doe Allegations) [Code Civ. Proc. § 474]--Tort Action Based on Negligence

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.32 Fictitiously Named Defendants (Doe Allegations) [Code Civ. Proc. § 474]--Tort Action Based on Negligence--Alternative Form

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.33 Fictitiously Named Defendants (Doe Allegations) [Code Civ. Proc. § 474]--Allegation of Fictitious First Name Where Only Last Name Is Known

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.34 Fictitious Business Name [Bus. & Prof. Code § 17910 et seq.]--Individual as Plaintiff

[1] FORM

[2] Use of Form

[3] Fictitious Business Name

[4] Action Barred Until Statement Filed

[5] Allegation of Compliance

[6] Cross References

§ 20.35 Fictitious Business Name [Bus. & Prof. Code § 17910 et seq.]--Partnership or Unincorporated Association as Plaintiff

[1] FORM

[2] Use of Form

[3] Fictitious Business Name

[4] Suit in Name of Partnership or Association

[5] Cross References

§ 20.36 Fictitious Business Name [Bus. & Prof. Code § 17910 et seq.]--Limited Liability Company as Plaintiff

[1] FORM

[2] Use of Form

[3] Fictitious Business Name

[4] Cross References

§ 20.37 Partnership or Unincorporated Association as Defendant [Code Civ. Proc. § 369.5(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.38 Corporate Capacity--Domestic Corporation [Corp. Code § 167]

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.39 Corporate Capacity--Foreign Corporation [Corp. Code § 171]

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.40 Corporate Capacity--Foreign Corporation [Corp. Code § 171] Transacting Intrastate Business [Corp. Code § 191(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.41 Limited Liability Company--Foreign or Domestic

[1] FORM

[2] Use of Form

§ 20.42 Municipal Corporation--General Form

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.43 Municipal Corporation--Chartered City

[1] FORM

[2] Use of Form

§ 20.44 County

[1] FORM

[2] Use of Form

§ 20.45 Husband and Wife

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.46 Minor or Incompetent Person Appearing by Guardian ad Litem [Code Civ. Proc. § 372]

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.47 Minor Appearing by Guardian of Estate [Code Civ. Proc. § 372; Prob. Code § 1510]

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.48 Conservatee Appearing by Conservator [Code Civ. Proc. § 372; Prob. Code § 1801]

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.49 Personal Representative of Decedent's Estate [Code Civ. Proc. §§ 377.30, 377.31]--Plaintiff

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.50 Personal Representative of Decedent's Estate [Code Civ. Proc. §§ 377.20, 377.21, 377.30, 377.40]--Defendant

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.51 License--General Form

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.52 Business License

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.53 Business License--Contractor [Bus. & Prof. Code § 7031]

[1] FORM

[2] Use of Form

[3] Allegation and Proof of Contractor's License

§ 20.54 Professional License

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.55 Agency--Generally

[1] FORM

[2] Use of Form

[3] Sufficiency of Allegation

[4] Cross References

§ 20.56 Agency--Fictitiously Named Defendants

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.57 Agency--Nonparty Principal

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.58 Residence--Plaintiff and Defendant Residents of Same County

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.59 Residence--Plaintiff and Defendant Residents of Different Counties

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.60 Unruh Act [Civ. Code § 1801 et seq.] or Rees-Levering Motor Vehicle Sales and Finance Act [Civ. Code § 2981 et seq.]--Allegation of Proper Court

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.61 Action or Proceeding Arising From Offer or Provision of Goods, Services, Loans, or Extensions of Credit for Personal, Family, or Household Use [Code Civ. Proc. §§ 395(b), 396a]--Allegation of Proper Court in Limited Civil Case

[1] FORM

[2] Use of Form

§ 20.62 Action or Proceeding Arising From Transaction Consummated as Proximate Result of Seller's Unsolicited Telephone Call or Response to Telephone Call or Electronic Transmission [Code Civ. Proc. §§ 395(b), 396a]--Allegation of Proper Court in Limited Civil Case

[1] FORM

[2] Use of Form

§ 20.63 Ownership--General Form

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.64 Ownership, Operation, and Control of Automobile

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.65 Existence of Intersecting Public Streets and Highways

[1] FORM

[2] Use of Form

§ 20.66 Written Contract [Code Civ. Proc. § 430.10(g)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.67 Oral Contract [Code Civ. Proc. § 430.10(g)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.68 Place of Making and Performance of Obligation, Contract, or Agreement

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.69 Prior Money Judgment

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.70 Fact Alleged on Information and Belief

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.71 Fact Denied According to Information and Belief [Code Civ. Proc. § 431.30(f)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.72 Fact Denied on Lack of Information and Belief [Code Civ. Proc. § 431.30(e),(f)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.73 Incorporation by Reference--Document

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.74 Incorporation by Reference--Paragraphs in Previous Cause of Action in Complaint

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.75 Incorporation by Reference--Denials or Defenses in Answer

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.76 Incorporation by Reference--Exhibits From Previous Pleadings

[1] FORM

[2] Use of Form

[3] Cross References

§ 20.77 Incorporation by Reference--Paragraphs of Previous Pleading

[1] FORM

[2] Use of Form

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Chapter 20 ALLEGATIONS COMMONLY USED
PART I. SCOPE

3-20 California Forms of Pleading and Practice--Annotated § 20.01

§ 20.01 Scope of Chapter

This chapter discusses [*see § 20.12*] and includes forms [*see §§ 20.30 -20.33*] of fictitiously named defendant allegations.

The chapter also collects the following types of allegations commonly used in pleadings:

- Capacity, residence, and identity of parties [*see §§ 20.34 -20.54*].
- Agency [*see §§ 20.55 -20.57*].
- Venue [*see §§ 20.58 -20.62*].
- Ownership [*see §§ 20.63 -20.64*].
- Existence of an intersection [*see § 20.65*].
- Existence of a written [*see § 20.66*] or oral [*see § 20.67*] contract, and the place of making and performing a contract [*see § 20.68*].
- Existence of a prior money judgment [*see § 20.69*].
- Information and belief [*see §§ 20.70 -20.72*].
- Incorporation by reference [*see §§ 20.73 -20.77*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedurePartiesFictitious NamesCivil

ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsAnswers

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3-20 California Forms of Pleading and Practice--Annotated § 20.02

§ 20.02 Cross References

For discussion of pleading and general forms of pleadings, see Ch. 26, *Answers* , and Ch. 123, *Complaints and Cross Complaints* .

For discussion and forms of allegations relating to damages, see Ch. 177, *Damages* .

For discussion and forms relating to the appointment of a guardian ad litem, see Ch. 291, *Guardian Ad Litem* .

For discussion and forms of prayers, see Ch. 420, *Prayers* .

For discussion of venue and additional forms of allegation relating to venue, see Ch. 571, *Venue* .

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[Reserved]

§§ 20.03[Reserved]

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3-20 California Forms of Pleading and Practice--Annotated § 20.10

§ 20.10 Pleading in a Complaint

A complaint or cross complaint is required to contain a statement of the facts constituting the cause of action, in ordinary and concise language [*Code Civ. Proc. § 425.10(a)*]. For discussion of general rules for pleading in complaints, see Ch. 123, *Complaints and Cross Complaints* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.11

§ 20.11 Pleading in an Answer

An answer contains general or specific denials of material allegations of the complaint and a statement of any new matter constituting a defense [*Code Civ. Proc. § 431.30(b)*]. For discussion of answers, including pleading affirmative defenses, see Ch. 26, *Answers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDenials

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3-20 California Forms of Pleading and Practice--Annotated § 20.12

§ 20.12 Fictitiously Named Defendants

[1] Suing Defendants by Fictitious Names Authorized

When the plaintiff is ignorant of the name of a defendant, the plaintiff must state that fact in the complaint, or the affidavit if the action is commenced by affidavit [*see, e.g., Code Civ. Proc. § 116.320* (claim under oath in small claims court); *see also Code Civ. Proc. § 2015.5* (use of declarations in lieu of affidavits)], and that defendant may be designated in any pleading or proceeding by any name. When the defendant's true name is discovered, the pleading or proceeding must be amended accordingly [*Code Civ. Proc. § 474*]. The most commonly used name is Doe.

For forms of Doe allegations, see *§§ 20.30 -20.33*.

[2] Purpose of Fictitious Defendant Allegations

[a] Commencing Action to Stop Statute of Limitations

The purpose of *Code Civ. Proc. § 474* [*see* [1], *above*] is to enable a plaintiff who is ignorant of the true name of a defendant to bring an action against that defendant before it is barred by the statute of limitations [*Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 602, 15 Cal. Rptr. 817, 364 P.2d 681* ; *see Smeltzley v. Nicholson Mfg. Co. (1977) 18 Cal. 3d 932, 939 n.1, 136 Cal. Rptr. 269, 559 P.2d 624* ; *see also Code Civ. Proc. § 350* (action is commenced when complaint is filed); *Stephens v. Berry (1967) 249 Cal. App. 2d 474, 477, 57 Cal. Rptr. 505]* . If the defendant's name is not discovered until after thestatute of limitations has expired, the plaintiff's amended complaint naming the defendant may "relate back" to the time the original complaint was filed so as to avoid the bar of the statute of limitations if the requirements of the doctrine of relation back are satisfied [*see Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 599, 15 Cal. Rptr. 817, 364 P.2d 681* ; for discussion of relation back, *see* Ch. 21, *Amended and Supplemental Pleadings*].

In an action under the Medical Injury Compensation Reform Act of 1975 (MICRA), giving the required *Code Civ. Proc. § 364(d)* and *(e)* 90 days notice of intent to commence a medical malpractice action to only known potential defendants serves to extend the statute of limitations for commencing an action against both the known defendants and unknown defendants designated in the action as "Does." In this regard, *Code Civ. Proc. § 364* is read together with

Code Civ. Proc. § 474, to provide this workable and common-sense rule [*Camarillo v. Vaage (2003) 105 Cal. App. 4th 552, 562-570, 130 Cal. Rptr. 2d 26]* .

When a named defendant is substituted for a Doe defendant before the statute of limitations has expired, *Code Civ. Proc. § 474* analysis is irrelevant [*see* *Davis v. Marin (2000) 80 Cal. App. 4th 380, 386-387, 94 Cal. Rptr. 2d 896]* .

[b] Statement of Cause of Action Against Fictitious Defendants Is Necessary

If a defendant is designated by a fictitious name in a complaint and no attempt is made to state any cause of action against him or her, the statute of limitations is not tolled as to that defendant [*Williams v. Goodman (1963) 214 Cal. App. 2d 856, 861, 29 Cal. Rptr. 877]* . If the complaint merely alleges plaintiff's ignorance of the true names of fictitiously named defendants without including them in any way in the charging allegations, any attempt to assert a cause of action by amendment against such a defendant will fail if the amended complaint is filed after the statute of limitations has expired [*Williams v. Goodman (1963) 214 Cal. App. 2d 856, 861-862, 29 Cal. Rptr. 877* ; *Kolodziejski v. Hover (1954) 124 Cal. App. 2d 731, 732-733, 269 P.2d 163]* .

However, a charging allegation in a complaint that refers to "defendants" in the plural necessarily includes fictitiously named defendants, and amendment is permitted to state a new theory of liability based on those facts alleged in the original complaint [*see* *Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 598-603, 15 Cal. Rptr. 817, 364 P.2d 681* ; *Breceda v. Gamsby (1968) 267 Cal. App. 2d 167, 173-179, 72 Cal. Rptr. 832* ; *Garrett v. Crown Coach Corp. (1968) 259 Cal. App. 2d 647, 650-651, 66 Cal. Rptr. 590* ; *Mishalow v. Horwald (1964) 231 Cal. App. 2d 517, 520, 41 Cal. Rptr. 895* ; *Johnson v. Goodyear Tire & Rubber Co. (1963) 216 Cal. App. 2d 133, 136-139, 30 Cal. Rptr. 650]* .

[3] Plaintiff's Ignorance of Defendant

[a] Identity of Defendant or Existence of Cause of Action

Code Civ. Proc. § 474 [*see* [1], *above*] states that when a plaintiff is "ignorant of the name" of a defendant, that defendant may be sued by a fictitious name. This phrase has been liberally construed so that even though a plaintiff knows the true name of another, the plaintiff is still ignorant of the name within the meaning of Section 474 if he or she lacks knowledge of facts necessary to state a cause of action against that person [*General Motors Corp. v. Superior Court (1996) 48 Cal. App. 4th 580, 593-594, 55 Cal. Rptr. 2d 871* ; *Mishalow v. Horwald (1964) 231 Cal. App. 2d 517, 521-522, 41 Cal. Rptr. 895]* .

ILLUSTRATION:

Lack of Knowledge of Cause of Action. Plaintiffs bring an action for wrongful death against three doctors who treated their son. The medical malpractice complaint names Drs. A, B, and C, plus Does, and charges that negligent delay in operating caused death during surgery. The complaint does not name the attending anesthesiologist, Dr. D, whose name is known to the plaintiffs. Nothing in the facts known when the complaint was filed revealed any cause other than delay in performing the surgery. After the statute of limitations has run, plaintiff's counsel discovers that the cause of death may have been respiratory arrest during surgery. May the anesthesiologist be served as Doe I? Yes. Even though Dr. D's name was known, there was nothing in the information available when the complaint was served to indicate that the anesthesiologist may have been negligent in treating a respiratory arrest during the surgery [*see* *Mishalow v. Horwald (1964) 231 Cal. App. 2d 517, 41 Cal. Rptr. 895]* .

Code Civ. Proc. § 474 also allows the designation of a defendant by a fictitious name in a situation where plaintiff knew the defendant's true name and knew all of the facts giving rise to a cause of action against the defendant, but was unaware at the time of filing that the cause of action existed [*Johnson v. Goodyear Tire & Rubber Co. (1963) 216 Cal. App. 2d 133, 136-139, 30 Cal. Rptr. 650]* .

ILLUSTRATION:

Later Discovery of Cause of Action. Plaintiff is injured in an automobile accident. He sues the manufacturers of the car and tires in federal court based on negligent testing and manufacture of a wheel and tire. He subsequently files an action in California superior court for breach of warranty against the dealer from which he bought the car and Does one to ten. Plaintiff's attorney later becomes aware, through decisions and text writings that were not available when the complaint was filed that the plaintiff has a cause of action for breach of warranty against the manufacturers. Canthe manufacturers be served as Does one and two? Yes. Even though the plaintiff was aware of the identity of the manufacturers, he was unaware of the existence of the cause of action, and they could properly be sued and served as fictitious defendants [*Johnson v. Goodyear Tire & Rubber Co. (1963) 216 Cal. App. 2d 133, 136-139, 30 Cal. Rptr. 650]* . In this particular case, the trial court had granted the manufacturer's motion to quash on the ground that the manufacturer's names were known to the plaintiff, and court of appeal. The court of appeal specifically noted that it was not concerned with the statute of limitations [*Johnson v. Goodyear Tire & Rubber Co. (1963) 216 Cal. App. 2d 133, 134 n.1, 30 Cal. Rptr. 650]* .

This broad interpretation of the requirements of *Code Civ. Proc. § 474* is based on the modern rule of relation back with respect to an amended complaint [*see* *Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 600-603, 15 Cal. Rptr. 817, 364 P.2d 681]* . The rule is that an amendment relates back when recovery is sought on the same general set of facts as those alleged in the original complaint, which is in accordance with the basic principle of code pleading that a litigant need only allege the facts warranting recovery [*Smeltzley v. Nicholson Mfg. Co. (1977) 18 Cal. 3d 932, 940, 136 Cal. Rptr. 269, 559 P.2d 624* ; *Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 601, 15 Cal. Rptr. 817, 364 P.2d 681* ; *see also* *Breceda v. Gamsby (1968) 267 Cal. App. 2d 167, 173, 179, 72 Cal. Rptr. 832]* .

[b] Time for Determining Ignorance

Plaintiff's ignorance of defendant's identity is measured as of the time the complaint is filed [*Streicher v. Tommy's Electric Co. (1985) 164 Cal. App. 3d 876, 882, 211 Cal. Rptr. 22* ; *Mishalow v. Horwald (1964) 231 Cal. App. 2d 517, 522, 41 Cal. Rptr. 895]* .

[c] Genuine Ignorance Required; No Duty of Diligence

Plaintiff's ignorance of the identity of a fictitiously named defendant must be genuine, and that fact must be clearly stated in the complaint [*Streicher v. Tommy's Electric Co. (1985) 164 Cal. App. 3d 876, 882, 211 Cal. Rptr. 22* ; *Nissan v. Barton (1970) 4 Cal. App. 3d 76, 79-81, 84 Cal. Rptr. 36]* .

Ignorance of the facts is the critical issue; whether the ignorance results from misinformation or negligence is not relevant [*General Motors Corp. v. Superior Court (1996) 48 Cal. App. 4th 580, 592-594, 55 Cal. Rptr. 2d 871* ; *Balon v. Drost (1993) 20 Cal. App. 4th 483, 488, 25 Cal. Rptr. 2d 12]* . *Code Civ. Proc. § 474* imposes no duty of inquiry. The pivotal question is "did plaintiff know of facts?" not "did plaintiff know or believe that plaintiff had a cause of action based on those facts?" To defeat a claim of ignorance, it must be shown that the plaintiff had actual knowledge of the basic facts [*General Motors Corp. v. Superior Court (1996) 48 Cal. App. 4th 580, 594,55 Cal. Rptr. 2d 871* ; *see also* *Woo v. Superior Court (1999) 75 Cal. App. 4th 169, 179-180, 89 Cal. Rptr. 2d 20* (Fourth Dist., Div. One; criticizing *Balon;* plaintiff who forgot defendant's identity required to resort to readily available information)].

Because a plaintiff has no duty to exercise even reasonable diligence to discover a defendant's name, a plaintiff may act unreasonably in failing to ascertain a defendant's name and still claim the benefit of Section 474 [*General Motors Corp. v. Superior Court (1996) 48 Cal. App. 4th 580, 592, 596, 55 Cal. Rptr. 2d 871* (no duty imposed on plaintiff to search for facts the plaintiff does not actually have at time plaintiff files original pleadings); *Balon v. Drost (1993) 20 Cal. App. 4th 483, 488-489, 25 Cal. Rptr. 2d 12* (plaintiff could substitute named defendant for Doe defendant when she

had lost paper with driver's name on it and forgot name)]. Thus, the fact that the plaintiff has means of discovering the defendant's identity and does not do so, does not in and of itself bar application of *Code Civ. Proc. § 474* [*Garrett v. Crown Coach Corp. (1968) 259 Cal. App. 2d 647, 650, 66 Cal. Rptr. 590* ; *see* *General Motors Corp. v. Superior Court (1996) 48 Cal. App. 4th 580, 592, 596, 55 Cal. Rptr. 2d 871]* .

The courts of appeal are split on the extent of the duty of a plaintiff who knew, but forgot, the defendant's identity.

Under one view, unless the evidence demonstrates that the plaintiff willfully or intentionally misused Section 474, a plaintiff's failure to inquire as to the defendant's name or identity will not bar the statute's application [*see* *Balon v. Drost (1993) 20 Cal. App. 4th 483, 488-490, 25 Cal. Rptr. 2d 12* (First Dist., Div. Two; forgetting name reflected negligence, not willful or intentional misuse; attorney moved promptly to obtain name and amend complaint)]. *Balon* criticized dicta in *Schroeter v. Lowers (1968) 260 Cal. App. 2d 695, 67 Cal. Rptr. 270* , which would require a plaintiff to resort to easily accessible information, as being contrary to controlling Supreme Court authority in *Irving v. Carpentier (1886) 70 Cal. 23, 26, 11 P. 391* [*Balon v. Drost (1993) 20 Cal. App. 4th 483, 488, 25 Cal. Rptr. 2d 12* ; *but see* dissenting opinion in *Balon*, arguing that *Irving* is consistent with requiring plaintiff to resort to readily accessible information].

Under the other view, the plaintiff must at least review readily available information likely to refresh his or her memory to use the *Code Civ. Proc. § 474* relation back doctrine to avoid the bar of the statute of limitations. If the defendant cannot be identified from readily available information, section 474 is available [*Woo v. Superior Court (1999) 75 Cal. App. 4th 169, 180, 89 Cal. Rptr. 2d 20* (Fourth Dist., Div. One; plaintiff was not entitled to amend complaint after statute of limitations had run; under circumstances, there was no good faith, bona fide ignorance as required by Section 474)]. *Woo* criticized and declined to follow *Balon* as establishing an undesirable rule, and suggested that a rule requiring a plaintiff who knew but forgot a defendant's identity to review readily available information that discloses the defendant's identity is not inconsistetnt with casesimposing no duty of inquiry on plaintiffs who never knew the defendant's identity and assures plaintiff's good faith [*Woo v. Superior Court (1999) 75 Cal. App. 4th 169, 180, 89 Cal. Rptr. 2d 20]* .

Code Civ. Proc. § 474 does not require the plaintiff to exercise reasonable diligence after filing the complaint to discover the true identity of fictitiously designated defendants or of facts giving rise to a cause of action against those defendants [*Streicher v. Tommy's Electric Co. (1985) 164 Cal. App. 3d 876, 883, 211 Cal. Rptr. 22]* .

[4] Default

No default or default judgment may be entered against a defendant sued under a fictitious name, unless it appears that the copy of the summons or other process, or, if there be no summons or process, the copy of the first pleading or notice served on that defendant, bore on the face thereof a notice stating in substance: "To the person served: You are hereby served in the within action (or proceedings) as (or on behalf of) the person sued under the fictitious name of (designating it)" [*Code Civ. Proc. § 474*]. The form of summons used in California is intended to facilitate compliance with the § 474 notice requirement by providing a checkbox with which the serving party can indicate that the recipient is being served as a person sued under a fictitious name, with the name to be written on the form at that point [*Carol Gilbert, Inc. v. Haller (2009) 179 Cal. App. 4th 852, 858, 101 Cal. Rptr. 3d 843]* .

"Process" under *Code Civ. Proc. § 474* means an instrument resembling a summons in that it is issued by or on behalf of the court [*Carol Gilbert, Inc. v. Haller (2009) 179 Cal. App. 4th 852, 858-859, 101 Cal. Rptr. 3d 843* ; *see* *Lister v. Superior Court (1979) 98 Cal. App. 3d 64, 71, 159 Cal. Rptr. 280* (acknowledging broader sense of meaning of "process," but refusing to apply it to statute defining contempts so as to include disrespect for letter issued by clerk); *Meadows v. Bakersfield Sav. & Loan Ass'n (1969) 250 Cal. App. 2d 749, 753, 59 Cal. Rptr. 34* , quoting Bouvier's Law Dict. (3d ed.) p. 2731 (process is means of compelling defendant to appear in court; writ, warrant, subpoena, or other formal writing issued by authority of law); *Lobrovich v. Georgison (1956) 144 Cal. App. 2d 567, 574, 301 P.2d 460*

(process is means whereby court compels compliance with its demands)]. The function of the phrase "or other process" in § 474 is to address situations in which the defendant is served with an instrument, other than a summons, by which the court commands some action. The statute embraces a third situation, i.e., when the paper served is neither a writ nor a summons, but the operation of that phrase is limited to situations in which "no summons or process" is served. When a writ or summons is served, the notice must appear in that document, and its appearance in some other document will not comply with the statute [*Carol Gilbert, Inc. v. Haller (2009) 179 Cal. App. 4th 852, 859, 101 Cal. Rptr. 3d 843]* .

A summons completely lacking the required notice cannot be found to substantially comply with the statutory notice requirement [*Carol Gilbert, Inc. v. Haller (2009) 179 Cal. App. 4th 852, 862-866, 101 Cal. Rptr. 3d 843]* . A finding of substantial compliance requires three preconditions [*Carol Gilbert, Inc. v. Haller (2009) 179 Cal. App. 4th 852, 865-866, 101 Cal. Rptr. 3d 843]* :

- There must have been some degree of compliance with the offended statutory requirements.

- The objective nature and circumstances of the attempted service must have made it highly probable that it would impart the same notice as full compliance.

- It must in fact have imparted notice, or at least sufficient notice to put the defendant on the defense. It is not enough that the process inform the defendant of the fact of a lawsuit, or even of a lawsuit in which defendant's name appears. Due process requires notice of "the duty to defend."

The certificate or affidavit (or declaration under penalty or perjury executed in California [*Code Civ. Proc. § 2015.5*]) of service must state the fictitious name under which the person was served and the fact that notice of identity was given by endorsement on the document served as required by *Code Civ. Proc. § 474*.

These requirements for entry of a default or default judgment apply only to defendants sued by fictitious names designated pursuant to *Code Civ. Proc. § 474* and not to a defendant sued by an erroneous name; nor do they apply to entry of a default or default judgment based on service, in the manner otherwise provided by law, of an amended pleading, process, or notice designating defendant by his or her true name [*Code Civ. Proc. § 474*].

[5] Impact on Federal Diversity Jurisdiction

For the effect of fictitious defendant allegations on federal diversity jurisdiction and removal to federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsGovernmentsLegislationStatutes of LimitationsTime LimitationsCivil ProcedurePartiesFictitious NamesCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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[Reserved]

§§ 20.13[Reserved]

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§ 20.20 State Statutes

Contents of complaint. *Code Civ. Proc. § 425.10*

Contents of answer. *Code Civ. Proc. § 431.30(b)*

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3-20 California Forms of Pleading and Practice--Annotated § 20.21

§ 20.21 Decisions

[1] Ignorance of Identity or of Liability of Fictitious Defendant

Code Civ. Proc. § 474 is to be liberally construed; even though plaintiff knows existence of defendant sued by fictitious name and defendant's actual identity (his or her name), plaintiff is "ignorant" within meaning of statute if he or she lacks knowledge of that person's connection with case or with his or her injuries; ignorance of facts giving rise to cause of action is the ignorance required by section 474 and pivotal question is "did plaintiff know of facts?" not "did plaintiff know or believe that plaintiff had a cause of action based on those facts?" *General Motors Corp. v. Superior Court (1996) 48 Cal. App. 4th 580, 593-594, 55 Cal. Rptr. 2d 871*

Code Civ. Proc. § 474 only allows substitution of named defendants for fictitious defendants when plaintiff was unaware of named defendant's identity or of facts giving rise to cause of action prior to filing complaint. *Optical Surplus, Inc. v. Superior Court (1991) 228 Cal. App. 3d 776, 782-784, 279 Cal. Rptr. 194*

Even though identity of person is known to plaintiff at time of filing complaint, if plaintiff is ignorant of basis of liability against that person, joinder as fictitiously named defendant is proper. *Oakes v. McCarthy Co. (1968) 267 Cal. App. 2d 231, 253, 73 Cal. Rptr. 127*

Plaintiff who knows true name of person is still "ignorant of his name" if plaintiff lacks knowledge of facts giving him or her cause of action against that person. *Breceda v. Gamsby (1968) 267 Cal. App. 2d 167, 174, 72 Cal. Rptr. 832*

[2] Genuineness of Plaintiff's Ignorance re Doe Defendant

Plaintiff who knew but forgot defendant's identity and did not avail herself of readily available information that would have refreshed plaintiff's recollection of defendant's identity, was not entitled to use *Code Civ. Proc. § 474* to amend her complaint after statute of limitations had run; under these circumstances, there was no good faith, bona fide ignorance as required by Section 474. *Woo v. Superior Court (1999) 75 Cal. App. 4th 169, 180, 89 Cal. Rptr. 2d 20* (Fourth Dist., Div. One; criticizing *Balon v. Drost (1993) 20 Cal. App. 4th 483, 25 Cal. Rptr. 2d 12 (First Dist., Div. Two))*

No duty imposed on plaintiff under *Code Civ. Proc. § 474* to go in search of facts plaintiff does not actually have at time plaintiff files original pleadings; whether ignorance from misfortune or negligence, plaintiff is ignorant alikewithin meaning of statute. *General Motors Corp. v. Superior Court (1996) 48 Cal. App. 4th 580, 592, 596, 55 Cal. Rptr. 2d 871*

Failing to inquire as to defendant's name or identity is "ignorance" for purposes of *Code Civ. Proc. § 474*. *Balon v. Drost (1993) 20 Cal. App. 4th 483, 488-490, 25 Cal. Rptr. 2d 12*

Question of plaintiff's good faith in alleging ignorance of defendant's true name is for trial court to determine. *Hazel v. Hewlett (1988) 201 Cal. App. 3d 1458, 1465, 247 Cal. Rptr. 723*

*Code Civ. Proc. § 474*does not require plaintiff to exercise reasonable diligence prior to filing complaint to discover defendant's identity or facts giving cause of action against defendant; plaintiff's ignorance is required to be real, not merely feigned. *Dover v. Sadowinski (1983) 147 Cal. App. 3d 113, 116-118, 194 Cal. Rptr. 866*

Plaintiff's genuine ignorance of defendant's identity and clear statement of that fact in complaint are mandatory requirements of *Code Civ. Proc. § 474*. *Nissan v. Barton (1970) 4 Cal. App. 3d 76, 79, 84 Cal. Rptr. 36*

Fact that plaintiff has means of discovering defendant's identity at time complaint is filed does not necessarily bar application of *Code Civ. Proc. § 474*. *Garrett v. Crown Coach Corp. (1968) 259 Cal. App. 2d 647, 650, 66 Cal. Rptr. 590*

Plaintiff's willful or feigned ignorance of defendant's identity is insufficient to meet requirements of *Code Civ. Proc. § 474* for suing such defendant under fictitious name. *Stephens v. Berry (1967) 249 Cal. App. 2d 474, 477, 57 Cal. Rptr. 505*

Joinder of defendants by fictitious names on plaintiff's mere pretense that defendants' names are unknown does not toll running of statute of limitations as to them. *Noble v. Merchants Nat. Realty Corp. (1967) 248 Cal. App. 2d 48, 51, 56 Cal. Rptr. 253*

[3] Default

Complete absence of notice required by *Code Civ. Proc. § 474* to notify defendant that he was served as person sued under specified fictitious name, because it was only marked to show service on defendant "as an individual defendant" and plaintiff failed to check box and fill in blank so as to state in substance that defendant was sued as person named in accompanying pleadings as Doe 1, was violation of *Code Civ. Proc. § 474*, and service of amended pleading did not serve as "process" under § 474 to satisfy requirement. Summons did not substantially comply with notice requirement, where nothing in summons hinted to defendant, let alone "made clear" to him, that summons was served on him as Doe 1, where summons made no reference to statute governing service, and where nothing in his conduct showed defendant knew summons did, or was intended to, hale him personally into court, as his very inaction, leading to entry of default judgment, suggested that he did not understand summons required him to answer on pain of adverse judgment, and, at best, question of his understanding and belief was open to doubt and dispute. *Carol Gilbert, Inc. v. Haller (2009) 179 Cal. App. 4th 852, 858-866, 101 Cal. Rptr. 3d 843*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsCivil ProcedurePartiesFictitious NamesCivil

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[Reserved]

§§ 20.22[Reserved]

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3-20 California Forms of Pleading and Practice--Annotated § 20.30

§ 20.30 Fictitiously Named Defendants (Doe Allegations) [Code Civ. Proc. § 474]--General Form

[1] FORM Fictitiously Named Defendants (Doe Allegations) [Code Civ. Proc. § 474]--General Form

[*EITHER*]

Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____ [*numeral, e.g.*, 50], inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by such defendants.]

[*OR*]

Defendants DOE 1 through DOE _____ [*numeral, e.g.*, 50], inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When said true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by such defendants.]

[*OR*]

DOE 1 through DOE _____ [*numeral, e.g.*, 50], inclusive, are fictitious names of defendants sued herein under the provisions of *Section 474 of the Code of Civil Procedure.* [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by such defendants.]

[2] Use of Form

The allegations in the form in [1], *above*, are for use in a complaint when plaintiff is ignorant of the true names and capacities of one or more defendants and to name such defendants by fictitious names [*see Code Civ. Proc. § 474*].

For discussion of Doe allegations, see *§ 20.12*.

[3] Contents of Allegation

The allegation must state plaintiff's ignorance of the defendant's true name [*Code Civ. Proc. § 474*; *see Dieckmann v. Superior Court (1985) 175 Cal. App. 3d 345, 351-364* , 220 Cal. Rtpr 602 (allowing amendment of complaint to add allegation of ignorance required by Section 474); for discussion, *see § 20.12 [1]*]. This requirement may be satisfied by stating that the fictitiously named defendant is sued pursuant to provisions of *Code Civ. Proc. § 474* [*Motor City Sales v. Superior Court (1973) 31 Cal. App. 3d 342, 347-348, 107 Cal. Rptr. 280]* .

The form includes bracketed optional language which charges the fictitiously named defendants, in a general way, with responsibility for plaintiff's damages. This or similar language must be included unless the remainder of the complaint states a cause of action against all defendants, which would include the fictitiously named ones [*see Breceda v. Gamsby (1968) 267 Cal. App. 2d 167, 171-172, 72 Cal. Rptr. 832* ; *Garrett v. Crown Coach Corp. (1968) 259 Cal. App. 2d 647, 649, 66 Cal. Rptr. 590]* . Failure to state a cause of action against the fictitiously named defendants renders the allegation ineffective to toll the statute of limitations [*Williams v. Goodman (1963) 214 Cal. App. 2d 856, 861, 29 Cal. Rptr. 877]* . For discussion, see *§ 20.12[2][b]*.

[4] Cross References

For forms and procedure for use in amending a complaint, including a discussion of the relation back doctrine, see Ch. 21, *Amended and Supplemental Pleadings*

For memoranda of points and authorities in support of and in opposition to suing a defendant by a fictitious name, see California Points and Authorities, Ch. 104, *Fictitiously Named Defendants (Does)* (Matthew Bender)

Witkin, California Procedure, vol. 4, *Pleading,* § 439et seq. (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureParties Fictitious NamesCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.31

§ 20.31 Fictitiously Named Defendants (Doe Allegations) [Code Civ. Proc. § 474]--Tort Action Based on Negligence

[1] FORM Fictitiously Named Defendants (Doe Allegations) [Code Civ. Proc. § 474]--Tort Action Based on Negligence

The true names or capacities, whether individual, corporate, associate, or otherwise, of defendants DOE 1 to DOE _____ [*numeral, e.g.*, 50] are unknown to plaintiff, who therefore sues such defendants by such fictitious names, and will amend this complaint to show their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the defendants designated as a DOE is negligently responsible in some manner for the events and happenings herein referred to, and thereby proximately caused injuries and damages to the plaintiff as herein alleged.

[2] Use of Form

The form in [1], *above*, is for use in a complaint for damages for injuries based on negligence where unknown defendants are to be sued by fictitious names [*see Code Civ. Proc. § 474*]. The purpose of the allegation is to prevent the running of the statute of limitations as to a fictitiously named defendant [*see Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 602, 15 Cal. Rptr. 817, 364 P.2d 681]* .

This form is based on the fictitious name allegation in the complaint filed in *Garrett v. Crown Coach Corp. (1968) 259 Cal. App. 2d 647, 66 Cal. Rptr. 590* .

[3] Cross References

For discussion of Doe allegations, see *§ 20.30[2]* et seq.

See generally Ch. 380, *Negligence*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceGeneral OverviewCivil ProcedurePartiesFictitious NamesCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.32

§ 20.32 Fictitiously Named Defendants (Doe Allegations) [Code Civ. Proc. § 474]--Tort Action Based on Negligence--Alternative Form

[1] FORM Fictitiously Named Defendants (Doe Allegations) [Code Civ. Proc. § 474]--Tort Action Based on Negligence--Alternative Form

The true names or capacities of defendants DOE 1 to DOE _____ [*numeral, e.g.*, 50] are unknown to plaintiff, who therefore sues such defendants by such fictitious names under *Section 474 of the Code of Civil Procedure.* Each of the defendants DOE is negligently responsible in some manner for the events herein referred to, and negligently caused injury and damages proximately thereby to plaintiff as herein alleged. Plaintiff will amend this complaint to insert the true names and capacities of the fictitiously named defendants when ascertained.

[2] Use of Form

The form in [1], *above*, is for use in a complaint for damages for injuries based on negligence where unknown defendants are to be sued by fictitious names [*see Code Civ. Proc. § 474*].

[3] Cross References

For discussion of Doe allegations, see *§ 20.30[2] et seq. and § 20.31[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-20 California Forms of Pleading and Practice--Annotated § 20.33

§ 20.33 Fictitiously Named Defendants (Doe Allegations) [Code Civ. Proc. § 474]--Allegation of Fictitious First Name Where Only Last Name Is Known

[1] FORM Fictitiously Named Defendants (Doe Allegations) [Code Civ. Proc. § 474]--Allegation of Fictitious First Name Where Only Last Name Is Known

Defendant DOE _____[*known last name*] is and at all times herein mentioned was _____ [*capacity*, *e.g.*, president of defendant _____ (*name*) corporation].

The true first name of the defendant sued herein as DOE _____[*known last name*] is unknown to plaintiff, who therefore sues such defendant under a fictitious first name. When the true first name is ascertained, plaintiff will amend this complaint to so state.

[2] Use of Form

The form in [1], *above*, is for use in a complaint to sue a defendant when plaintiff is ignorant of defendant's first name but does know defendant's last name [*see Code Civ. Proc. § 474*].

[3] Cross References

For discussion of Doe allegations, see *§ 20.30[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-20 California Forms of Pleading and Practice--Annotated § 20.34

§ 20.34 Fictitious Business Name [Bus. & Prof. Code § 17910 et seq.]--Individual as Plaintiff

[1] FORM Fictitious Business Name [Bus. & Prof. Code § 17910 et seq.]--Individual as Plaintiff
[*EITHER*]

At all times herein mentioned plaintiff _____[*name*] is and was an individual doing business under the fictitious business name of _____[*name*], and plaintiff has filed the statement and published the notice as required by *Sections 17910 through 17917 of the Business and Professions Code*.

[*OR*]

Plaintiff is an individual residing in [_____ (*city*),] _____ County, California, and therein doing business under the fictitious business name of _____[*name*]. Plaintiff has duly complied in all respects with the requirements of *Sections 17910 through 17917 of the Business and Professions Code* with respect to this fictitious business name.

[2] Use of Form

The form in [1], *above*, is for use when the plaintiff is an individual person transacting business under a fictitious business name and seeks to maintain an action on, or on account of, a contract made, or a transaction had, in the fictitious business name [*see Bus. & Prof. Code §§ 17910-17918*].

[3] Fictitious Business Name

A "fictitious business name," in the case of an individual, is a name that does not include the surname of the individual or a name that suggests the existence of additional owners [*Bus. & Prof. Code § 17900(b)(1)*].

A name that suggests the existence of additional owners within the meaning of *Bus. & Prof. Code § 17900(b)(1)*, *above*, is one which includes such words as "Company," "& Company," "& Son," "& Sons," "& Associates," "Brothers," and the like, but not words that merely describe the business being conducted [*Bus. & Prof. Code § 17900(c)*].

[4] Action Barred Until Statement Filed

No person transacting business under a fictitious business name, or as assignee, may maintain any action on, or on account of, any contract made, or transaction had, in the fictitious business name in any court of California until the fictitious business name statement, in the form required by *Bus. & Prof. Code §§ 17910-17913*, has been executed [*see Bus. & Prof. Code § 17914*], filed with the clerk of the county in which the individual has his or her principal place of business in California, or if the individualhas no place of business in California, with the clerk of Sacramento County [*see Bus. & Prof. Code §§ 17915, 17916*], and published as provided in *Bus. & Prof. Code § 17917* [*Bus. & Prof. Code § 17918*].

[5] Allegation of Compliance

If the complaint shows that plaintiff does business under a fictitious business name [*see Bus. & Prof. Code §§ 17910-17918*], but does not affirmatively allege compliance with the requirements of those sections, it is subject to demurrer on the ground of lack of capacity to sue pursuant to *Code Civ. Proc. § 430.10(b)* [*Pleaters & Stitchers Assn. v. Davis (1934) 140 Cal. App. 403, 406, 35 P.2d 401* (construing former *Civ. Code § 2468*, which is the predecessor statute to *Bus. & Prof. Code § 17918*); *see also Rivers v. Beadle (1960) 183 Cal. App. 2d 691, 700-701, 7 Cal. Rptr. 170* (objection waived; also plaintiff found not to have been using fictitious name)].

[6] Cross References

For a form of a fictitious business name for use by a partnership or unincorporated association, see *§ 20.35*

For a form of a fictitious business name for use by a limited liability company, see *§ 20.36*

For forms of affirmative defense and demurrer based on lack of capacity to sue, see the following chapters:

- Ch. 3, *Abatement of Actions*
- Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*
- Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties*

For memoranda of points and authorities relating to actions by plaintiffs under fictitious business names, *see* California Points and Authorities, Ch. 10, *Abatement and Survival of Actions* (Matthew Bender)

Witkin, Summary of California Law, vol. 9, *Partnership*, §§ 2-10 (9th ed. 1989)

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporate NamesFictitious NamesGeneral OverviewCivil ProcedurePartiesFictitious NamesCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.35

§ 20.35 Fictitious Business Name [Bus. & Prof. Code § 17910 et seq.]--Partnership or Unincorporated Association as Plaintiff

[1] FORM Fictitious Business Name [Bus. & Prof. Code § 17910 et seq.]--Partnership or Unincorporated Association as Plaintiff

Plaintiff is, and at all times herein mentioned was, _____ [a partnership *or* an unincorporated association] with its principal place of business in [_____ (*city*),] _____ County, California, and it has filed and published the fictitious business name statement as required by *Sections 17910 through 17917 of the Business and Professions Code*.

[2] Use of Form

The form in [1], *above*, is for use when the plaintiff is a partnership or an unincorporated association [*see Code Civ. Proc. § 369.5(a)*] doing business under a fictitious business name [*see Bus. & Prof. Code § 17900 et seq.*]. It alleges plaintiff's capacity as a partnership or an unincorporated association, and its compliance with the statutory requirements for filing and publishing a fictitious business name statement [*see Bus. & Prof. Code §§ 17910-17917*].

[3] Fictitious Business Name

In the case of a partnership or other association of persons, with the exceptions noted below, a fictitious business name is a name that does not include the surname of each general partner or a name that suggests the existence of additional owners [*Bus. & Prof. Code § 17900(b)(2)*].

A name that suggests the existence of additional owners within the meaning of *Bus. & Prof. Code § 17900(b), above*, is one which includes words such as "Company," "& Company," "& Son," "& Sons," "& Associates," "Brothers," and the like, but not words that merely describe the business being conducted [*Bus. & Prof. Code § 17900(c)*].

The following types of partnerships are excepted from the rule of *Bus. & Prof. Code § 17900(b)(2)* [*Bus. & Prof. Code § 17900(b)(2)*]:

- A limited partnership that has filed a certificate of limited partnership with the Secretary of State pursuant to *Corp. Code §§ 15621* or *15902.01*.

- A foreign limited partnership that has filed an application for registration with the Secretary of State pursuant to *Corp. Code §§ 15692* or *15909.02*.

- A registered limited liability partnership that has filed a registration pursuant to *Corp. Code § 15049* or *Corp. Code § 16953*.

- A foreign limited liability partnership that has filed an application for registration pursuant to *Corp. Code § 15055* or *Corp. Code § 16953*.

In the case of a limited partnership or a foreign limited partnership, a "fictitious business name" is any name other than the name of the limited partnership as on file with the Secretary of State [*Bus. & Prof. Code § 17200(a)(4)*]. Section 17200 does not provide a definition for what constitutes a "fictitious business name" of a limited liability partnership.

[4] Suit in Name of Partnership or Association

Any partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name which it has assumed or by which it is known [*Code Civ. Proc. § 369.5(a)*].

[5] Cross References

For a form of a fictitious business name for use by an individual, see *§ 20.34*

For a form of a fictitious business name for use by a limited liability company, see *§ 20.36*

For additional information about fictitious business name allegations, see *§ 20.34[5], [6]*

For discussion and forms relating to actions by and against partnerships and unincorporated associations, see generally Ch. 61, *Associations and Clubs* , and Ch. 402, *Actions by and Against Partners or Partnership and Third Parties*

For memoranda of points and authorities relating to partnerships using fictitious business names, *see* California Points and Authorities, Ch. 10, *Abatement and Survival of Actions* ; Ch. 170, *Partnerships and Joint Ventures* (Matthew Bender)

For legal forms relating to partnerships using fictitious business names, *see* California Legal Forms, Ch. 15, *Partnerships* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-20 California Forms of Pleading and Practice--Annotated § 20.36

§ 20.36 Fictitious Business Name [Bus. & Prof. Code § 17910 et seq.]--Limited Liability Company as Plaintiff

[1] FORM Fictitious Business Name [Bus. & Prof. Code § 17910 et seq.]--Limited Liability Company as Plaintiff

Plaintiff is, and at all times herein mentioned was a limited liability company organized and existing under the laws of _____ [California *or other state or country*] [*add for foreign limited liability company maintaining action or intrastate business;* and registered to transact intrastate business in California]. Plaintiff has filed and published the fictitious name statement as required by *Business and Professions Code Sections 17910 through 17917*.

[2] Use of Form

The form in [1], *above*, is for use when the plaintiff is a limited liability company doing business under a fictitious business name [*see Bus. & Prof. Code §§ 17900(b)(5), 17902*; *Corp. Code § 17003(b)*]. It alleges the plaintiff's capacity as a limited liability company and its compliance with *Bus. & Prof. Code § 17910 et seq.*

[3] Fictitious Business Name

In the case of a limited liability company, a fictitious business name is any name other than the name stated in the company's articles of organization, or in the case of a foreign limited liability company that has registered with the Secretary of State [*see Corp. Code § 17451*], the name on file with the Secretary of State [*see Bus. & Prof. Code § 17900(b)(5)*].

[4] Cross References

For a form of a fictitious business name for use by an individual, see *§ 20.34*

For a form of a fictitious business name for use by a partnership or unincorporated association, see *§ 20.35*

For additional information about fictitious business name allegations, see *§ 20.34[5], [6]*

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-20 California Forms of Pleading and Practice--Annotated § 20.37

§ 20.37 Partnership or Unincorporated Association as Defendant [Code Civ. Proc. § 369.5(a)]

[1] FORM Partnership or Unincorporated Association as Defendant [Code Civ. Proc. § 369.5(a)]

At all times herein mentioned, defendant _____[*name*] was [and is] a _____ [partnership *or* unincorporated association] sued herein under the name _____ [it has assumed *or* by which it is known], doing business as _____[*describe*] with its principal office in [_____ (*city*),] _____ County, California. [Defendants _____ (*names*) are, and at all times herein mentioned were, members of that _____ (partnership *or* unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[2] Use of Form

The form in [1], *above*, is for use to allege the capacity of a defendant partnership or unincorporated association [*see Code Civ. Proc. § 369.5(a)*] and that it is being sued under its common name.

The form includes an optional sentence for use to join of individual members of the partnership or unincorporated association as defendants [*see Code Civ. Proc. § 369.5(b)*]. Any member of the partnership or other unincorporated association may be joined as a party in an action against the unincorporated association. If service of process is made on a member as an individual, whether or not he or she is also served as a person upon whom service is made on behalf of the unincorporated association, a judgment against the member based on his or her personal liability may be obtained in the action, whether such liability be joint, joint and several, or several [*Code Civ. Proc. § 369.5(b)*].

The form also includes an optional clause that may be used to show venue.

[3] Cross References

For discussion of fictitious business names, see *§ 20.35[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsGeneral OverviewBusiness & Corporate LawUnincorporated AssociationsCivil ProceduresPartiesFictitious NamesCivil ProceduresPleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.38

§ 20.38 Corporate Capacity--Domestic Corporation [Corp. Code § 167]

[1] FORM Corporate Capacity--Domestic Corporation [Corp. Code § 167]

_____ [Plaintiff *or* Defendant] _____[*name*] is, and at all times herein mentioned was, a corporation, organized and existing under the laws of California [with its principal place of business in (_____[*city*],) _____ County.

[2] Use of Form

The form in [1], *above*, is for use to allege that a party is a domestic corporation, that is, one formed under the laws of California [*see Corp. Code § 167*].

The bracketed optional allegation at the end of the paragraph is for use when venue is based on the location of a corporate defendant's principal place of business [*see Code Civ. Proc. § 395.5*]. That option includes a further optional clause that may be used to show venue.

[3] Cross References

For other forms of allegation relating to venue, Ch. 571, *Venue*

For discussion and forms relating to corporations generally, see generally Ch. 160, *Corporations: Capacity*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewBusiness & Corporate LawCorporationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.39

§ 20.39 Corporate Capacity--Foreign Corporation [Corp. Code § 171]

[1] FORM Corporate Capacity--Foreign Corporation [Corp. Code § 171]
[*EITHER*]

_____ [Plaintiff *or* Defendant] _____[*name*] is, and at all times herein mentioned was, a corporation organized and existing under the laws of the _____ [state *or other*] of _____[*name of state or foreign country*], and authorized to do business, and doing business in California [, with its principal place of business in this state in (_____[*city*],) _____ County. Judicial District].

[*OR*]

At all times herein mentioned _____ [plaintiff *or* defendant] _____[*name*], a corporation, was and now is organized and existing under the laws of the _____ [state *or other*] of _____[*name of state or foreign country*] as a corporation, and is authorized to do business, and doing business within California [, with its principal place of business in this state in (_____[*city*],) _____ County.

[2] Use of Form

The form in [1], *above*, is for use to allege the capacity of either a plaintiff or defendant as a foreign corporation, that is, a corporation formed under the laws of another state or foreign country [*see Corp. Code § 171*].

The bracketed optional allegation is for use when venue is based on the location of a corporate defendant's principal place of business in this state [*see Code Civ. Proc. § 395.5*]. That option includes a further optional clause that may be used to show venue.

[3] Cross References

See *§ 20.38 [2]* et seq. for discussion of corporate capacity

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureParties Capacity of PartiesGeneral OverviewBusiness & Corporate LawCorporationsGeneral OverviewBusiness & Corporate LawForeign BusinessesQualificationsCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.40

§ 20.40 Corporate Capacity--Foreign Corporation [Corp. Code § 171] Transacting Intrastate Business [Corp. Code § 191(a)]

[1] FORM Corporate Capacity--Foreign Corporation [Corp. Code § 171] Transacting Intrastate Business [Corp. Code § 191(a)]

Plaintiff _____[*name*] is, and at all times herein mentioned was, a corporation organized and existing under the laws of the _____ [State *or other*] of _____[*name of state or foreign country*], and has qualified to transact intrastate business in California and has obtained a certificate of qualification from the California Secretary of State.

[2] Use of Form

The form in [1], *above*, is for use when the plaintiff is a foreign corporation [*see Corp. Code § 171*] and the action is on intrastate business transacted in California [*see Corp. Code § 191(a)*].

The form alleges the place where plaintiff was incorporated, that it has qualified to transact intrastate business in California [*see Corp. Code §§ 2105-2107, 2203, 2115(a), (b)*], and that it has obtained a certificate of qualification from the California Secretary of State [*see Corp. Code § 2105*].

A foreign corporation subject to the provisions of *Corp. Code §§ 2105-2107, 2203, 2115(a), (b)* (governing the qualification for transaction of intrastate business in California) which transacts intrastate business in California without complying with those sections may not maintain any action or proceeding on any intrastate business so transacted in any court of California, commenced prior to such compliance until it has so complied, and has paid to the Secretary of State a penalty of $250 in addition to the fees due for filing the statement and designation required by *Corp. Code § 2105*, and has filed with the clerk of the court in which the action is pending receipts showing the payment of those fees and penalties and all franchise taxes and other taxes on business or property in California that should have been paid for the period during which it transacted intrastate business [*Corp. Code § 2203(c)*].

[3] Cross References

For legal forms for use by foreign corporations, see California Legal Forms, Ch. 12B, *Foreign Corporations* (Matthew Bender), and Ballantine & Sterling,Califonria Corporation Laws, Ch. 18, *Foreign Corporations* (Matthew Bender)

Witkin, California Procedure, vol. 4, *Pleading*, § 76 (4th ed. 1997)

Witkin, Summary of California Law, vol. 9, *Corporations*, §§ 228-235 (9th ed. 1989)

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-20 California Forms of Pleading and Practice--Annotated § 20.41

§ 20.41 Limited Liability Company--Foreign or Domestic

[1] FORM Limited Liability Company--Foreign or Domestic

_____ [Plaintiff *or* Defendant] is, and at all times herein mentioned was, a limited liability company organized and existing under the laws of _____ [California *or other state or country*] [*add for plaintiff foreign limited liability company maintaining action on intrastate business:* and registered to transact intrastate business in California].

[2] Use of Form

The form in [1], *above*, is for use to allege the capacity of either a plaintiff or defendant limited liability corporation [*see Corp. Code § 17003(b)*].

When the plaintiff is a foreign limited liability company and the action arises out of intrastate business transacted by the plaintiff, counsel should allege that the company has registered in California [*see Corp. Code §§ 17451, 17456(a)*].

Limited liability companies are subject to the same provisions as are corporations with respect to suspension or forfeiture of powers for nonpayment of taxes [*see Rev. & Tax Code § 23305.5* (defining taxpayer as used in *Rev. & Tax Code § 23301 et seq.* to include limited liability company)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesGeneral OverviewBusiness & Corporate LawForeign BusinessesQualificationsCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.42

§ 20.42 Municipal Corporation--General Form

[1] FORM Municipal Corporation--General Form

At all times herein mentioned _____ [plaintiff *or* defendant] City of _____[*name*] was, and now is, a municipal corporation organized and existing under and by virtue of the laws [and Constitution] of [the State of] California.

[*OR*]

_____ [Plaintiff *or* Defendant] City of _____[*name*], is, and all times herein mentioned has been, a municipal corporation existing under and by virtue of the laws of [the State of] California, and located in _____ County.

[*OR*]

The City of _____[*name*], and at all times herein mentioned was, a body politic and corporate of [the State of] California.

[*OR*]

At all times herein mentioned _____ [plaintiff *or* defendant] has been and now is a city incorporated under the laws of [the State of] California, and situated in _____ County, California.

[2] Use of Form

The form in [1], *above*, is for use to allege the legal capacity of a city [*see Gov. Code § 945*]. For a form for use in case of a chartered city, see *§ 20.43*. An allegation of municipal incorporation should not be necessary, as it may be the

subject of judicial notice [*see* *Owens v. Dudley (1912) 162 Cal. 422, 425, 122 P. 1087* (chartered city); *City of Pasadena v. Stimson (1891) 91 Cal. 238, 246-247, 27 P. 604* (incorporated city)].

[3] Cross References

For discussion and forms relating to actions against cities, see generally Ch. 464, *Public Entities and Officers: California Tort Claims Act*

For memoranda of points and authorities relating to municipal corporations, see California Points and Authorities, Ch. 196, *Public Entities* (Matthew Bender)

Witkin, California Procedure, vol. 4, *Pleading*, §§ 91-93 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-20 California Forms of Pleading and Practice--Annotated § 20.43

§ 20.43 Municipal Corporation--Chartered City

[1] FORM Municipal Corporation--Chartered City
[*EITHER*]

_____ [Plaintiff *or* Defendant] City of _____[*name*], is now and has been at all times herein mentioned a municipal corporation duly chartered under statutes adopted _____[*date*], and set forth in California Statutes, _____[*year*] Edition, Chapter _____.

[*OR*]

_____ [Plaintiff *or* Defendant] _____[*name*] is and at all times herein mentioned was a municipal corporation organized and existing under a freeholders' charter adopted and from time to time amended pursuant to the _____ [California Constitution *or* Constitution of the State of California].

[2] Use of Form

The form in [1], *above*, is for use to allege that a municipal corporation is a chartered city [*see Cal. Const., art. XI, § 5* (competent provisions of city charter)]. For a form that can be used in the case of general law cities, see *§ 20.42*.

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3-20 California Forms of Pleading and Practice--Annotated § 20.44

§ 20.44 County

[1] FORM County
[*EITHER*]

_____ [Plaintiff *or* Defendant] County of _____[*name*] is now and was at all times herein mentioned a political subdivision of the State of California.

[*OR*]

The County of _____[*name*] is, and at all times herein mentioned was, a political subdivision of the State of California, created and existing under and by virtue of the laws of the State of California.

[*OR*]

The County of _____[*name*] was and is at all times herein mentioned a body corporate and politic, duly created and existing as a county under and by virtue of the Constitution and laws of the State of California.

[2] Use of Form

The form in [1], *above*, is for use to allege the legal capacity of a county [*see Gov. Code § 945* and *Cal. Const., art XI, § 4* (competent provisions of county charter)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-20 California Forms of Pleading and Practice--Annotated § 20.45

§ 20.45 Husband and Wife

[1] FORM Husband and Wife

_____ [Plaintiffs *or* Defendants] _____[*name*] and _____[*name*] were at all times herein mentioned, and now are, husband and wife.

[2] Use of Form

The form in [1], *above*, is for use to allege that either plaintiffs or defendants are husband and wife.

[3] Cross References

For discussion and forms relating to actions involving spouses, see the following chapters:

- Ch. 122, *Community Property*
- Ch. 354, *Loss of Consortium*
- Ch. 359, *Marriage*

Witkin, California Procedure, vol. 4, *Pleading*, § 74 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewFamily LawFamily Relationships & TortsTort LiabilitySpousal TortsCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.46

§ 20.46 Minor or Incompetent Person Appearing by Guardian ad Litem [Code Civ. Proc. § 372]

[1] FORM Minor or Incompetent Person Appearing by Guardian ad Litem [Code Civ. Proc. § 372]
[*EITHER*]

1.On _____[*date*], _____[*name of guardian ad litem*] was, by order duly made and entered by this court, appointed guardian ad litem of plaintiff _____[*name*], _____ [a minor *or* an incompetent person].

[*OR*]

1.For the purpose of this action, _____[*name of guardian ad litem*] was appointed by this court, and now is, the guardian ad litem of plaintiff _____[*name*] _____ [a minor *or* an incompetent person].

[2] Use of Form

The form in [1], *above*, is for use in a complaint to allege that the plaintiff is a minor or incompetent person, and that he or she is appearing by a court appointed guardian ad litem [*see Code Civ. Proc. § 372*]. Appointment of guardian ad litem is a traversable fact which must be alleged in complaint [*Security Loan etc. Co. v. Kauffman (1895) 108 Cal. 214, 223, 41 P. 467]* .

For a form alleging appearance by a guardian of the estate, see *§ 20.47*, and for a form alleging appearance by a conservator of the estate, see *§ 20.48*.

[3] Cross References

For discussion and form for the appointment of a guardian ad litem, see Ch. 291, *Guardians Ad Litem*

For forms relating to actions involving minors, see Ch. 365, *Minors: Contract Actions*

For a memorandum of points and authorities relating to minors and insane or incompetent persons appearing by guardian ad litem, see California Points and Authorities, Ch. 10, *Abatement and Survival of Actions* (Matthew Bender)

Witkin, California Procedure, vol. 4, *Pleading*, §§ 60-73 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.47

§ 20.47 Minor Appearing by Guardian of Estate [Code Civ. Proc. § 372; Prob. Code § 1510]

[1] FORM Minor Appearing by Guardian of Estate [Code Civ. Proc. § 372; Prob. Code § 1510]

1.Plaintiff _____[*name*] is a minor of the age of _____[*number*] years.

2.On _____[*date*], _____[*name*] was by order duly made and entered by the _____ Court of _____, appointed guardian of the [person and] estate of plaintiff, and on _____[*date*], was issued letters of guardianship, a _____[certified] copy of which is attached hereto as Exhibit A and made a part hereof.

[2] Use of Form

The form in [1], *above*, is for use in a complaint to allege that the plaintiff is a minor and that he or she is appearing by a court appointed guardian of the estate [*see Prob. Code § 1500 et seq.*].

[3] Cross References

For forms relating to the appointment of a guardian of a minor, see *Ch. 280, Guardianship and Conservatorship: Appointment of Guardians, § 280.110* et seq.

Witkin, California Procedure, vol. 4, *Pleading*, §§ 60-61, 71-73 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsCivil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.48

§ 20.48 Conservatee Appearing by Conservator [Code Civ. Proc. § 372; Prob. Code § 1801]

[1] FORM Conservatee Appearing by Conservator [Code Civ. Proc. § 372; Prob. Code § 1801]

On _____[*date*], _____[*name*] was appointed conservator of the [person and] estate of plaintiff _____[*name*] by the _____ Court of _____, and on _____[*date*], was issued letters of conservatorship, a _____[certified] copy of which is attached hereto as Exhibit A and made a part hereof.

[2] Use of Form

The form in [1], *above*, is for use in a complaint to allege that plaintiff is appearing in the action by his or her court appointed conservator [*see Prob. Code § 1801*].

[3] Cross References

See also *§ 20.46 [2]* et seq. for discussion and other references relating to litigation involving minors and incompetent persons

For forms relating to the appointment of a conservator, see *Ch. 281, Guardianship and Conservatorship: Appointment of Conservators, § 281.100* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsCivil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.49

§ 20.49 Personal Representative of Decedent's Estate [Code Civ. Proc. §§ 377.30, 377.31]--Plaintiff

[1] FORM Personal Representative of Decedent's Estate [Code Civ. Proc. §§ 377.30, 377.31]--Plaintiff

On _____[*date*], plaintiff _____[*name*] was issued letters _____ [testamentary *or* of administration *or* of administration with the will annexed *or* of special administration] by the _____ Court of _____, a _____[certified] copy of which isattached hereto as Exhibit A and made a part hereof, and is the personal representative of the estate of _____[*name*], deceased.

[2] Use of Form

The form in [1], *above*, is for use by plaintiff to allege his or her capacity as the personal representative of a decedent's estate [*see Code Civ. Proc. §§ 377.30, 377.31*].

[3] Cross References

For discussion of and forms for use in wrongful death and survival actions, see Ch. 181, *Death and Survival Actions* .

For discussion of and forms relating to the appointment of personal representatives and administration of a decedent's estate, see Ch. 442, *Probate: Initiating Probate Administration* .

Witkin, California Procedure, vol. 4, *Pleading*, §§ 115, 238-240, 437 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsEstate, Gift & Trust LawProbateProcedures in ProbatePleadings

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3-20 California Forms of Pleading and Practice--Annotated § 20.50

§ 20.50 Personal Representative of Decedent's Estate [Code Civ. Proc. §§ 377.20, 377.21, 377.30, 377.40]--Defendant

[1] FORM Personal Representative of Decedent's Estate [Code Civ. Proc. §§ 377.20, 377.21, 377.30, 377.40]--Defendant

Defendant _____[*name*] is the personal representative of the estate of _____[*name*], deceased.

[2] Use of Form

The form in [1], *above*, is for use to allege defendant's capacity as personal representative of a decedent's estate [*see Code Civ. Proc. §§ 377.20, 377.21, 377.30, 377.40*].

[3] Cross References

For references, see *§ 20.49[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.51

§ 20.51 License--General Form

[1] FORM License--General Form

At all times herein mentioned plaintiff _____[*name*] possessed a valid license as _____[*describe*] issued by _____[*name of appropriate city, county, or state agency*].

[2] Use of Form

The form of allegation in [1], *above*, is for use in a complaint when the cause of action sued on arises out of a service or contract that would be unlawful unless plaintiff possessed a valid license.

A person who is required to be licensed under the Business and Professions Code must plead and prove that he or she was licensed in order to recover compensation for performing acts or contracts for which the license is required [*see Bus. & Prof. Code § 143*].

A licensing requirement may be imposed by any of the following:

- A city [*see Bus. & Prof. Code §§ 16000-16003*].
- A county [*see Bus. & Prof. Code §§ 16100-16104*].
- The state [*see Bus. & Prof. Code §§ 16200-16240*].

[3] Cross References

For a form alleging that plaintiff holds a business license, see *§ 20.52*

For a form alleging that plaintiff holds a contractor's license, see *§ 20.53*

For a form alleging that plaintiff holds a professional license, see *§ 20.54*

For discussion of licensing, see Ch. 471B, *Licensing by Public Agencies* .

Witkin, California Procedure, vol. 5, *Pleading*, § 859 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsGovernmentsState & Territorial GovernmentsLicensesGovernmentsLocal GovernmentsLicenses

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3-20 California Forms of Pleading and Practice--Annotated § 20.52

§ 20.52 Business License

[1] FORM Business License

At all times herein mentioned plaintiff _____[*name*] was doing business as a _____[*type of business*], and was duly licensed to engage in such business by _____[*city, county, or state agency*].

[2] Use of Form

The form in [1], *above*, is for use to allege that plaintiff was duly licensed to do the business on which the action is brought [*see Bus. & Prof. Code § 143*].

[3] Cross References

For discussion and references, see *§ 20.51[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewGovernmentsLocal GovernmentsLicensesCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsBusiness & Corporate LawCorporate NamesFictitious NamesConducting Business Under Fictitious NamesGovernmentsState & Territorial GovernmentsLicenses

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3-20 California Forms of Pleading and Practice--Annotated § 20.53

§ 20.53 Business License--Contractor [Bus. & Prof. Code § 7031]

[1] FORM Business License--Contractor [Bus. & Prof. Code § 7031]

At all times mentioned herein, plaintiff _____[*name*] was a contractor duly licensed as such by the State of California.

[2] Use of Form

The form in [1], *above*, is for use in an action by a licensed contractor based on an act or contract for which he or she was licensed [*see Bus. & Prof. Code § 7031*].

[3] Allegation and Proof of Contractor's License

No person engaged in a business or acting in the capacity of a contractor [*see Bus. & Prof. Code § 7026 et seq.*] may bring or maintain any action, or recover in law or equity in any action, in any court of California for the collection of compensation for the performance of any act or contract for which a license is required by *Bus. & Prof. Code § 7000 et seq.* without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract. This requirement does not apply to contractors who are each individually licensed but who fail to comply with the joint venture licensing requirements of *Bus. & Prof. Code § 7029* [*Bus. & Prof. Code § 7031(a)*; *see also Bus. & Prof. Code § 7031(d)* (proof of licensure if controverted); *see also Bus. & Prof. Code § 143* (pleading and proof requirement of any license required by Business and Professions Code)].

Bus. & Prof. Code § 7031(e), (f) limits application of the judicial doctrine of substantial performance to the requirements of Section 7031. For discussion, see Ch. 104, *Building Contracts*, § 104.90 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicensesCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.54

§ 20.54 Professional License

[1] FORM Professional License

At all times herein mentioned _____ [plaintiff *or* defendant] _____[*name*] was, and now is, a _____ [*profession, e.g.*, physician] duly licensed to practice his/her profession in the State of California.

[2] Use of Form

The form in [1], *above*, is for use in a complaint by a licensed attorney, doctor, or other professional person in a cause of action arising out of his or her professional status [*see also Bus. & Prof. Code § 143*].

[3] Cross References

For discussion and references, see *§ 20.51[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-20 California Forms of Pleading and Practice--Annotated § 20.55

§ 20.55 Agency--Generally

[1] FORM Agency--Generally
[*EITHER to allege all defendants are agents of their codefendants*]

[Plaintiff is informed and believes and thereon alleges that] at all times herein mentioned each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things alleged below, was acting within the scope of such agency.

[*OR to allege that multiple defendants were agents of their codefendants*]

[Plaintiff is informed and believes and thereon alleges that] at all times herein mentioned defendants _____[*names of agents*] were the agents, servants, and employees of their codefendants, and [in doing the things alleged below] were acting in the scope of their authority as such agents, servants, and employees with the permission and consent of their codefendants].

[*OR to allege specific defendant was agent of another defendant*]

[Plaintiff is informed and believes and thereon alleges that] at all times herein mentioned defendant _____[*name of agent*] was the agent of defendant _____[*name of principal*], and [in doing the things alleged below] was acting in the scope of such agency and with the permission and consent of his/her codefendant].

[*OR alternative to allege specific defendant was agent of another defendant*]

[Plaintiff is informed and believes and thereon alleges that] at all times herein mentioned defendant _____[*name of agent*] was authorized and empowered by defendant _____[*name of*

principal] to act and did act as the agent of defendant_____[*name of principal*], and each and all of the things herein alleged to have been done by him/her were done in the capacity of and as agent for defendant _____[*name of principal*].

[2] Use of Form

The alternative allegations in the form in [1], *above*, are for use to allege agency between or among defendants to an action. The first alternative, by broadly alleging the agency of all defendants for their codefendants, would extend to fictitiously named defendants [for allegations naming Doe defendants, *see §§ 20.30 -20.33*, for an allegations specifically alleging the agency of Doe defendants, *see § 20.56*].

[3] Sufficiency of Allegation

A general allegation that defendants were agents and employees of their codefendants is a sufficient allegation of actual agency to withstand general demurrer [*Meyer v. Graphic Arts International Union (1979) 88 Cal. App. 3d 176, 178, 151 Cal. Rptr. 597]* . An allegation of agency in terms of "scope of employment" and "line of employment" constitutes conclusions of fact, but is sufficient to allow admission of evidence supporting the issue [*May v. Farrell (1928) 94 Cal. App. 703, 707-708, 271 P. 789]* .

[4] Cross References

For discussion and forms relating to agency, see Ch. 427, *Principal and Agent*

Witkin, California Procedure, vols. 4, 5, *Pleading*, §§ 121, 122, 183, 873, 874 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityExpress AuthorityCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.56

§ 20.56 Agency--Fictitiously Named Defendants

[1] FORM Agency--Fictitiously Named Defendants
[*EITHER to allege that all Does acted as agents of all other defendants*]

[Plaintiff is informed and believes and thereon alleges that] at all times herein mentioned each of the defendants sued herein as DOE was the agent and employee of each of the remaining defendants and was at all times acting within the purpose and scope of such agency and employment.

[*OR to allege that some of the Doe defendants acted as agents of all other defendants*]

At all times herein mentioned defendants DOE 1 through DOE _____[*numeral, less than all Does*] were the agents, servants, and employees of their codefendants, and in doing the things alleged below were acting in the scope of their authority as such agents, servants, and employees, and with the permission and consent of their codefendants.

[2] Use of Form

The form in [1], *above*, is for use when unknown defendants have been sued under fictitious names and may be used as an alternative to the first paragraph in the *form in § 20.55[1]* [*see Code Civ. Proc. § 474*]. It is used to allege that one or more of the fictitiously named defendants is the agent of the remaining defendants.

[3] Cross References

For references relating to agency, see *§ 20.55[4]*

For forms of allegations naming Doe defendants, see *§§ 20.30 -20.33*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityExpress AuthorityCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePartiesFictitious Names

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3-20 California Forms of Pleading and Practice--Annotated § 20.57

§ 20.57 Agency--Nonparty Principal

[1] FORM Agency--Nonparty Principal

At all times herein mentioned _____ [plaintiff *or* defendant] _____[*name*] was authorized and empowered by _____[*name of principal*] to act, and acted as the agent of _____[*name of principal*], and each and all of the things herein alleged to have been done by him/her were done in the capacity of and as agent for _____[*name of principal*].

[2] Use of Form

The form in [1], *above*, is for use to allege the agency of either a plaintiff or a defendant if the agent's principal is not a party to the action.

[3] Cross References

For references relating to agency, see *§ 20.55[4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityExpress AuthorityCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.58

§ 20.58 Residence--Plaintiff and Defendant Residents of Same County

[1] FORM Residence--Plaintiff and Defendant Residents of Same County

At all times herein mentioned plaintiff and defendant were and are residents of [_____ (*city*),] _____ County, California.

[2] Use of Form

The form in [1], *above*, is for use to show venue if the plaintiff and defendant are residents of the same county. This form includes an optional clause to specify the judicial district if the Superior Court, by local rule, specifies where certain types of actions or proceedings are to be filed, heard, or tried [*see Code Civ. Proc. § 402*].

[3] Cross References

For discussion and other forms relating to venue, see Ch. 571, *Venue*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureVenueIndividual Defendants

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3-20 California Forms of Pleading and Practice--Annotated § 20.59

§ 20.59 Residence--Plaintiff and Defendant Residents of Different Counties

[1] FORM Residence--Plaintiff and Defendant Residents of Different Counties

At all times herein mentioned plaintiff was and is a resident of [_____ (*city*),] _____ County, California, and defendant was and is a resident of [_____ (*city*),] _____ County, California. [The _____ (*describe the occurrence or transaction on which action is based, e.g.,* accident described below occurred *or* contract that is the subject of this action was entered into) in (_____[*city*],) _____ County, California.]

[2] Use of Form

The form in [1], *above*, is for use to allege the residences of plaintiff and defendant if they reside in different counties. The form includes an optional sentence if counsel desires to allege the county where the occurrence or transaction on which the action is based occurred [*see Code Civ. Proc. §§ 392-395.5* (venue)].

[3] Cross References

For discussion and other forms relating to venue, see Ch. 571, *Venue*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueIndividual DefendantsCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.60

§ 20.60 Unruh Act [Civ. Code § 1801 et seq.] or Rees-Levering Motor Vehicle Sales and Finance Act [Civ. Code § 2981 et seq.]--Allegation of Proper Court

[1] FORM Unruh Act [Civ. Code § 1801 et seq.] or Rees-Levering Motor Vehicle Sales and Finance Act [Civ. Code § 2981 et seq.]--Allegation of Proper Court
[*EITHER, if action brought where contract was signed*]

The sales contract on which this action is based was signed in [_____ (*city*),] _____ County, California.

[*OR, if action brought where consumer resided or resides*]

_____ [Plaintiff *or* Defendant] _____[*name*] is the buyer under the sales contract on which this action is based and at the time _____ [the contract was entered into *or* this action was commenced] resided in [_____ (*city*),] _____ County, California.

[*OR, if action brought where goods have become part of realty*]

The goods purchased pursuant to the contract on which this action is based are affixed to and have become a part of the real property] at _____[*street address and city*], _____ County, California.

[*OR, if action brought where vehicle is garaged*]

The motor vehicle purchased pursuant to the contract on which the action is based is permanently garaged at _____[*street address and city*], _____ County, California.

[2] Use of Form

The form in [1], *above*, is for use to show that an action under the Unruh Act (*Civ. Code § 1801 et seq.*) or under the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*) is being commenced in the proper court by alleging the facts on which venue is based [*see Civ. Code §§ 1812.10, 2984.4*].

The allegation may be used in either a verified complaint or an accompanying affidavit (or declaration under *Code Civ. Proc. § 2015.5*). The allegation may not be made on information or belief. If an affidavit or declaration is used, a copy must be served with the summons [*Civ. Code §§ 1812.10, 2984.4*; *Code Civ. Proc. § 396a*].

[3] Cross References

For a form of declaration of proper venue in an action under the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*), see *Ch. 89, Automobiles: Sales and Financing Under the Rees-Levering Act, § 89.61*.

For allegations, or declaration of proper venue in contract actions on retail installment sales under the Unruh Act, see Ch. 500, *Sales and Secured Transactions* .

For discussion of venue generally, see Ch. 571, *Venue* .

Witkin, California Procedure, vol. 3, *Actions,* §§ 701-873 (4th ed. 1996)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsTransportation TortsMotor VehiclesPersonal Vehicles

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3-20 California Forms of Pleading and Practice--Annotated § 20.61

§ 20.61 Action or Proceeding Arising From Offer or Provision of Goods, Services, Loans, or Extensions of Credit for Personal, Family, or Household Use [Code Civ. Proc. §§ 395(b), 396a]--Allegation of Proper Court in Limited Civil Case

[1] FORM Action or Proceeding Arising From Offer or Provision of Goods, Services, Loans, or Extensions of Credit for Personal, Family, or Household Use [Code Civ. Proc. §§ 395(b), 396a]--Allegation of Proper Court in Limited Civil Case

1.The contract on which this _____ [action *or* proceeding] is based arose from an _____ [offer *or* provision] of _____ [goods *and/or* services *and/or* loans *and/or* extensions of credit] intended primarily for _____ [personal *and/or* family *and/or* household] use.

[*EITHER, if action brought where buyer or lessee signed contract*]

2._____[*Name of buyer or lessee under contract*], the _____ [buyer *or* lessee], in fact signed the contract in _____ County, California.

[*OR, if action brought where buyer or lessee resided at time of entering contract*]

2.At the time the contract was entered into, _____[*name of buyer or lessee under contract*], the _____ [buyer *or* lessee] under the contract, resided in _____ County, California.

[*OR, if action brought where buyer or lessee resided at time of commencing action*]

2.At the time this _____ [action *or* proceeding] was commenced, _____[*name of buyer or lessee under contract*], the _____ [buyer *or* lessee] under the contract, resided in

_____ County, California in the _____[*name*] Judicial] District.

[2] Use of Form

The form in [1], *above*, is for use in an limited civil case arising from an offer or provision of goods, services, loans, or extensions of credit intended primarily for personal, family, or household use to show that the action or proceeding is being commenced in the proper court, by alleging the facts on which venue is based [*see Code Civ. Proc. §§ 395(b), 396a*].

The allegation may be set forth in a complaint verified by the oath of the plaintiff or of his or her attorney, or in an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) made by the plaintiff or of his or her attorney and filed with the complaint. If an affidavit or declaration is used, a copy of it must be served with the summons [*Code Civ. Proc. § 396a*].

This form is not to be used if the action involves a retail installment contract governed by the Unruh Act (*Civ. Code § 1801 et seq.*) or a contract governed by the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*) [*see Civ. Code §§ 1812.10, 2984.4*; *Code Civ. Proc. § 395(b)*]. For a form for use under those acts, see *§ 20.60*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.62

§ 20.62 Action or Proceeding Arising From Transaction Consummated as Proximate Result of Seller's Unsolicited Telephone Call or Response to Telephone Call or Electronic Transmission [Code Civ. Proc. §§ 395(b), 396a]--Allegation of Proper Court in Limited Civil Case

[1] FORM Action or Proceeding Arising From Transaction Consummated as Proximate Result of Seller's Unsolicited Telephone Call or Response to Telephone Call or Electronic Transmission [Code Civ. Proc. §§ 395(b), 396a]--Allegation of Proper Court in Limited Civil Case

1.The contract on which this _____ [action *or* proceeding] is based arose from a transaction consummated as a proximate result of an unsolicited telephone call made by a seller engaged in the business of consummating transactions of that kind [or a _____ (telephone call *or* electronic transimssion) made by _____ (*name of buyer or lessee under contract*), the _____ (buyer *or* lessee), in response to a solication by the seller].

[*EITHER, if action brought where buyer or lessee signed contract*]

2._____[*Name of buyer or lessee under contract*], the _____ [buyer *or* lessee], in fact signed the contract in _____ County, California.

[*OR, if action brought where buyer or lessee resided at time of entering contract*]

2.At the time the contract was entered into, _____[*name of buyer or lessee under contract*], the _____ [buyer *or* lessee] under the contract, resided in _____ County, California.

[*OR, if action brought where buyer or lessee resided at time of commencing action*]

2.At the time this _____ [action *or* proceeding] was commenced, _____[*name of buyer or lessee under contract*], the _____ [buyer *or* lessee] under the contract, resided in _____ County, California.

[2] Use of Form

The form in [1], *above*, is for use in a limited civil case arising from a transaction consummated as a proximate result of either an unsolicited telephone call made by a seller engaged in the business of consummating transactions of that kind or a telephone call or electronic transmission made by the buryer or lessee in response to a solicitation by the seller, to show that the action or proceeding is being commenced in the proper court, by alleging the facts on which venue is based [*Code Civ. Proc. §§ 395(b), 396a*].

If the transaction was based on the buyer or lessee's telephone call or electronic transmission, the optional bracketted phrase in Paragraph 1 should be included.

The allegation may be set forth in a complaint verified by the oath of the plaintiff or of his or her attorney, or in an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) made by the plaintiff or of his or her attorney and filed with the complaint. If an affidavit or declaration is used, a copy of it must be served with the summons [*Code Civ. Proc. § 396a*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionTelemarketingCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.63

§ 20.63 Ownership--General Form

[1] FORM Ownership--General Form

At all times herein mentioned _____[*name*] was, and now is, the owner [and entitled to the possession of] _____[*description of real or personal property*].

[2] Use of Form

The form in [1], *above*, is for use to allege the identity of an owner of property. The form includes an optional phrase to include, if appropriate, to allege the owner's right to possession of the property.

[3] Cross References

Witkin, California Procedure, vol. 5, *Pleading*, §§ 749-752 (real property), 786-788, 793 (personal property) (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.64

§ 20.64 Ownership, Operation, and Control of Automobile

[1] FORM Ownership, Operation, and Control of Automobile
[*EITHER, if the owner and operator are the same person*]

1.At all times herein mentioned _____ [plaintiff *or* defendant *or other*] _____[*name*] was the owner and operator of a certain _____ [*description of vehicle, e.g.,* 1995 Chevrolet sedan automobile, California License No. _____].

[*OR, if the owner was not in vehicle at time of accident*]

1.At all times herein mentioned, _____ [plaintiff *or* defendant *or other*] _____[*name*] was the owner of a certain _____ [*description of vehicle, e.g.,* 1995 Chevrolet sedan automobile, California License No. _____].

[*OR, if the owner was a passenger in the vehicle at time of accident*]

1.At all times herein mentioned _____ [plaintiff *or* defendant *or other*] _____[*name*] was the owner of a certain _____ [*description of vehicle, e.g.,* 1995 Chevrolet sedan automobile, California License No. _____], and at the time of the collision alleged below was an occupant of and in control of that automobile.

[*INCLUDE, if owner was not driver*]

2.At the time of the collision alleged below _____ [plaintiff *or* defendant *or other*] _____[*name*] was driving and operating _____[*name of owner*]'s automobile with _____[*name of owner*]'s knowledge, permission, and consent.

[2] Use of Form

The form of allegations in [1], *above*, is for use to allege the ownership, operation, and control of an automobile.

[3] Cross References

For discussion and forms relating to automobile accidents, see Ch. 83, *Automobiles: Bringing the Action*

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 1025-1040 (9th ed. 1988)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTransportation LawPrivate VehiclesVehicle RegistrationGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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3-20 California Forms of Pleading and Practice--Annotated § 20.65

§ 20.65 Existence of Intersecting Public Streets and Highways

[1] FORM Existence of Intersecting Public Streets and Highways

At all times herein mentioned _____[*name of street*] and _____[*name of street*] were and are public streets and highways in _____[*city*], _____ County, California running in a general _____ [*specify, e.g.,* north-south and east-west] direction, respectively, and intersecting within that city, county, and state.

[2] Use of Form

The form in [1], *above*, is for use to allege the existence of intersecting public streets or highways.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsBridges & RoadsCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.66

§ 20.66 Written Contract [Code Civ. Proc. § 430.10(g)]

[1] FORM Written Contract [Code Civ. Proc. § 430.10(g)]

1.On or about _____[*date*], in [_____ (*city*),] _____ County, California plaintiff entered into a written _____ [contract *or* agreement] with defendant for _____[*nature of contract*].

[*EITHER*]

A copy of the contract is attached hereto as Exhibit A and made a part hereof.

[*OR*]

The terms of the contract are in substance as follows: _____[*summarize*].

[*OR*]

The contract was in words as follows: _____[*set forth in haec verba*].

2. Among other things, _____ [the contract provides that *or* defendant promised and agreed in the contract to] _____[*set out specific provisions of contract that were breached, or with which action is concerned*].

[2] Use of Form

The form of allegations in [1], *above*, is for use in an action on a written contract.

[3] Cross References

For general discussion and forms relating to actions on contracts, see Ch. 140, *Contracts*

Witkin, California Procedure, vol. 3, *Actions*, §§ 772-778 vol. 4, *Pleading*, §§ 476-482 (4th ed. 1996)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.67

§ 20.67 Oral Contract [Code Civ. Proc. § 430.10(g)]

[1] FORM Oral Contract [Code Civ. Proc. § 430.10(g)]

On or about _____[*date*], in [_____ (*city*),] _____ County, California,plaintiff and defendant entered into an oral _____ [agreement *or* contract] concerning _____[*subject matter of contract*] by the terms of which they agreed _____[*set out material terms of contract*].

[2] Use of Form

The form of allegation in [1], *above*, is for use in an action on an oral contract to allege that the contract was oral [*see Code Civ. Proc. § 430.10(g)*] and to set out its material terms. This form includes an optional clause to specify the judicial district if the Superior Court, by local rule, specifies where certain types of actions or proceedings are to be filed, heard, or tried [*see Code Civ. Proc. § 402*].

[3] Cross References

For general discussion and forms relating to actions on contracts, see Ch. 140, *Contracts*

Witkin, California Procedure, vol. 4, *Pleading*, §§ 483-486 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsContracts LawTypes of ContractsOral Agreements

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3-20 California Forms of Pleading and Practice--Annotated § 20.68

§ 20.68 Place of Making and Performance of Obligation, Contract, or Agreement

[1] FORM Place of Making and Performance of Obligation, Contract, or Agreement
[*EITHER*]

The _____ [obligation *or* contract *or* agreement] sued on in this action was entered into in [_____ (*city*),] _____ County, California. The _____ [obligation *or* contract *or* agreement] was, as _____ [expressly provided in Paragraph _____ thereof, as shown in Exhibit "A" attached hereto, *or* provided by a special written contract between the parties, a copy of which is attached hereto as Exhibit "A"] and made a part hereof, to be performed in [_____ (*city*),] _____ County, California.

[*OR*]

The _____ [obligation *or* contract *or* agreement] herein sued on was entered into and to be performed in [_____ (*city*),] _____ County, California.

[2] Use of Form

The form in [1], *above*, is for use to allege the place of making and place of performance of a contract [*see Code Civ. Proc. § 395(a)*].

[3] Cross References

See *§ 20.66 [2]* et seq. for discussion of contract allegations

Legal Topics:

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

Contracts LawPerformanceGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.69

§ 20.69 Prior Money Judgment

[1] FORM Prior Money Judgment

On _____[*date*], in an action entitled _____[*name*], Plaintiff, vs. _____[*name*], Defendant, in the _____ Court of _____, No. _____, a judgment was duly made, entered, and has become final in favor of _____[*name*], _____ [plaintiff *or* defendant], who is the _____ [plaintiff *or* defendant] herein. That judgment _____ [*specify, e.g.*, awarded plaintiff therein the sum of $_____ with interest from the date thereof at the rate of _____ percent per annum until paid. Neither the whole nor any part of the judgment has been paid (, except the sum of $_____)].

[2] Use of Form

The form in [1], *above*, is for use to allege the existence of a prior judgment, as for example in an action to establish a foreign judgment as a California judgment, or in a cross complaint to set up an existing cross demand. *Code Civ. Proc. § 1908.5* provides that when a judgment or order of a court is conclusive, the judgment or order must be alleged in the pleadings if there be an opportunity to do so; if there is no opportunity, the judgment or order may be used as evidence.

[3] Cross References

For discussion and forms relating to judgments generally, see Ch. 318, *Judgments*

For discussion and forms relating to the enforcement of judgments, see Ch. 254, *Executions and Enforcement of Judmgents* , and Ch. 258, *Family Law Enforcement*

Witkin, California Procedure, vol. 5, *Pleading*, § 1053; vol. 7, *Judgment*, §§ 280-291, 324, 325, 332, 336, 339-341, 347, 351, 376, 397 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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3-20 California Forms of Pleading and Practice--Annotated § 20.70

§ 20.70 Fact Alleged on Information and Belief

[1] FORM Fact Alleged on Information and Belief
[*EITHER*]

_____ [Plaintiff *or* Defendant] is informed and believes and on such information and belief alleges _____[*specify*].

[*OR*]

Plaintiff is informed and believes and thereon alleges _____[*specify*].

[2] Use of Form

The alternative paragraphs in the form in [1], *above*, are for use to introduce an allegation of fact which is not within the personal knowledge of the pleader but which he or she believes to be true based on information he has received.

Allegations on information and belief are not proper if the facts are peculiarly within knowledge of pleader [*Hall v. James (1926) 79 Cal. App. 433, 435-436, 249 P. 876]* or if the facts are a matter of public record [*People v. Birch Securities Co. (1948) 86 Cal. App. 2d 703, 708, 196 P.2d 143]* .

[3] Cross References

For discussion of pleading, see Ch. 123, *Complaints and Cross Complaints*

For forms of verification that may be used when a paper contains allegations on information and belief, see Ch. 572, *Verification*

Witkin, California Procedure, vol. 4, *Pleading*, §§ 359, 360 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirements

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3-20 California Forms of Pleading and Practice--Annotated § 20.71

§ 20.71 Fact Denied According to Information and Belief [Code Civ. Proc. § 431.30(f)]

[1] FORM Fact Denied According to Information and Belief [Code Civ. Proc. § 431.30(f)]

Defendant is informed and believes that the matters alleged in Paragraph _____[*number*] of the complaint are not true, and, on the basis of such information and belief, denies each and every allegation thereof.

[2] Use of Form

The form of denial in [1], *above*, is for use when defendant has no personal knowledge sufficient to allow him or her to deny a particular allegation of the complaint but defendant believes it to be untrue based on information he or she has received [*see Code Civ. Proc. § 431.30(f)*].

[3] Cross References

For discussion and forms of answers, see Ch. 26, *Answers*

Witkin, California Procedure, vol. 5, *Pleading*, §§ 991-994 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDenialsCivil ProceduresPleading & PracticePleadingsAnswers

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3-20 California Forms of Pleading and Practice--Annotated § 20.72

§ 20.72 Fact Denied on Lack of Information and Belief [Code Civ. Proc. § 431.30(e),(f)]

[1] FORM Fact Denied on Lack of Information and Belief [Code Civ. Proc. § 431.30(e),(f)]

Defendant has no information or belief sufficient to enable him/her to answer the allegations of Paragraph _____[*number*] of the complaint, and basing his/her denial on that ground, denies generally and specifically each and every allegation contained therein.

[2] Use of Form

The form of denial in [1], *above*, is for use when defendant has no information or belief sufficient to enable him or her to answer an allegation of the complaint [*see Code Civ. Proc. § 431.30(e),(f)*].

[3] Cross References

For discussion and forms of answers, see Ch. 26, *Answers*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDenialsCivil ProceduresPleading & PracticePleadingsAnswers

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3-20 California Forms of Pleading and Practice--Annotated § 20.73

§ 20.73 Incorporation by Reference--Document

[1] FORM Incorporation by Reference--Document
[*EITHER*]

_____ [*Identify document, e.g.*, On _____ (*date*), plaintiff and defendant entered into a written contract], a copy of which is attached hereto as Exhibit A and made a part hereof.

[*OR*]

_____ [*Identify document, e.g.*, On _____ (*date*), plaintiff and defendant entered into a written contract]. A copy of the _____ [*specify docuement, e.g.*, contract] is attached hereto as Exhibit A and made a part hereof.

[2] Use of Form

The form in [1], *above*, is for use to incorporate a document into a pleading by referring to a copy of that document which is attached to the pleading and identified as an exhibit. Incorporation by reference of a document that is the foundation of a cause of action may substitute for directly alleging essentials of a cause of action [*Lambert v. Haskell (1889) 80 Cal. 611, 612-613, 22 P. 327* ; *Byrne v. Harvey (1962) 211 Cal. App. 2d 92, 103, 27 Cal. Rptr. 110]* .

Incorporation by reference of an instrument that is not the basis of the cause of action or defense acts as an assertion only of its existence and character absent allegations indicating the pleader's intent to adopt the recitals of the exhibit as his or her own [*Washer v. Bank of America (1943) 21 Cal. 2d 822, 830, 136 P.2d 297* , *disapproved on other grounds, MacLeod v. Tribune Publishing Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36* ; *Holly Sugar Corp. v. Johnson (1941) 18 Cal. 2d 218, 226*].

[3] Cross References

Witkin, California Procedure, vol. 4, *Pleading*, §§ 391-395 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsAnswers

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3-20 California Forms of Pleading and Practice--Annotated § 20.74

§ 20.74 Incorporation by Reference--Paragraphs in Previous Cause of Action in Complaint

[1] FORM Incorporation by Reference--Paragraphs in Previous Cause of Action in Complaint
[*EITHER*]

Plaintiff refers to Paragraphs _____ [*numbers, e.g.*, 1, 2, and 4] of his/her _____ [*e.g.*, First] _____ [Cause of Action *or* Count] above, and by reference makes them a part hereof.

[*OR*]

Plaintiff hereby refers to and incorporates in this _____ [Cause of Action *or* Count] Paragraphs _____ [*numbers, e.g.*, 1, 2, and 4] of his/her _____ [*e.g.*, First] _____ [Cause of Action *or* Count] as though the same were fully set out at this point.

[*OR*]

Plaintiff realleges and incorporates hereby by reference each and every allegation contained in Paragraphs _____ [*numbers, e.g.*, 1, 2, and 4] of his/her _____ [*e.g.*, First] _____ [Cause of Action *or* Count] herein set forth.

[2] Use of Form

The alternative paragraphs in the form in [1], *above*, are for use in those complaints and cross complaints in which information pleaded in one cause of action or count is being incorporated by reference in another cause of action or count in the same pleading [*see Treweek v. Howard (1895) 105 Cal. 434, 441-442, 39 P. 20]* .

[3] Cross References

For discussion and general forms of pleadings, see Ch. 123, *Complaints and Cross Complaints*

Witkin, California Procedure, vol. 4, *Pleading*, §§ 396-398 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsComplaintsCross-Complaints

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3-20 California Forms of Pleading and Practice--Annotated § 20.75

§ 20.75 Incorporation by Reference--Denials or Defenses in Answer

[1] FORM Incorporation by Reference--Denials or Defenses in Answer
[*EITHER*]

Answering the allegations of Paragraph _____ [*number, e.g.*, 1] of plaintiff's _____ [*e.g.*, Third] _____ [Cause of Action *or* Count] in his/her complaint herein, defendant incorporates herein by reference each and every admission, denial, and allegation of Paragraph(s) _____ [*number(s)*] of this answer to plaintiff's _____ [*e.g.*, First] _____ [Cause of Action *or* Count].

[*OR*]

Defendant realleges and incorporates herein by reference as a part of this defense each and every allegation contained in Paragraph(s) _____ [*number(s)*] of the _____ [*e.g.*, First Affirmative] Defense herein set forth.

[2] Use of Form

The alternative paragraphs in the form in [1], *above*, are for use in an answer where the material that is being incorporated by reference has already been pleaded in a previous part of the same answer.

[3] Cross References

For general discussion and forms of answers, see Ch. 26, *Answers*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDenialsCivil ProceduresPleading & PracticePleadingsComplaintsRequirementsCivil ProceduresPleading & PracticePleadingsAnswers

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3-20 California Forms of Pleading and Practice--Annotated § 20.76

§ 20.76 Incorporation by Reference--Exhibits From Previous Pleadings

[1] FORM Incorporation by Reference--Exhibits From Previous Pleadings

_____ [Plaintiff *or* Defendant] refers to Exhibit _____[*specify*] attached to _____ [*specify previous pleading, e.g.,* plaintiff's original complaint *or* defendant's original answer] on file herein and incorporates that exhibit in this _____ [*describe pleading, e.g.,* First Amended Complaint *or* First Amended Answer] as if physically attached hereto.

[2] Use of Form

The form in [1], *above*, is for use to incorporate an exhibit to a previous pleading in a subsequent pleading.

[3] Cross References

Witkin, California Procedure, vol. 4, *Pleading*, §§ 396-398 (4th ed. 1997)

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3-20 California Forms of Pleading and Practice--Annotated § 20.77

§ 20.77 Incorporation by Reference--Paragraphs of Previous Pleading

[1] FORM Incorporation by Reference--Paragraphs of Previous Pleading

_____ [Plaintiff *or* Defendant] refers to Paragraphs _____[*numbers*] of the _____ [*specify, e.g.*, First Cause of Action] of the _____ [*identify previous pleading, e.g.*, First Amended Complaint] and makes them a part hereof by reference.

[2] Use of Form

The form in [1], *above*, is for use to incorporate paragraphs from previous pleadings by reference in subsequent pleadings in the same case [*see Turney v. Collins (1941) 48 Cal. App. 2d 381, 388, 119 P.2d 954* (dictum re impropriety of incorporation by reference from different case)]. Although this method of pleading has been mildly criticized, it has been held not to constitute reversible error where the opposing party has both pleadings before him or her [*Casaretto v. DeLucchi (1946) 76 Cal. App. 2d 800, 806, 174 P.2d 328]* .

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Chapter 21 AMENDED AND SUPPLEMENTAL PLEADINGS

3-21 California Forms of Pleading and Practice--Annotated 21.syn

§ 21.syn Synopsis to Chapter 21: AMENDED AND SUPPLEMENTAL PLEADINGS

§ 21.01 Scope of Chapter

§ 21.02 Cross References

§§ 21.03-21.09 [Reserved]

§ 21.10 Governing Statutes

§ 21.11 Amended and Supplemental Pleadings Distinguished

§ 21.12 Amendment of Course

§ 21.13 Amendment Allowed in Court's Discretion

[1] Under Code Civ. Proc. § 473

[a] Amendments Authorized in Furtherance of Justice

[b] Correction of Mistake in Party's Name

[c] Postponement of Trial

[2] Under Code Civ. Proc. § 576

[3] Denial for Failure of Amended Pleading to State Cause of Action or Defense

[4] Denial for Delay

§ 21.14 Amendment Substituting True Name for Fictitious Defendant

[1] Requirement of Alleging Unknown Defendants in Complaint

[2] Effect of Delay in Making Amendment

§ 21.15 Statute of Limitations; Relation-Back Doctrine

§ 21.16 Amendment of Cross Complaint to Plead Compulsory Cross Claim

§ 21.17 Amendment After Demurrer or Motion to Strike

[1] Demurrer Sustained With Leave to Amend

[a] Specific Amendment Is Not Approved

[b] Time to Amend

[c] Dismissal for Failure to Timely Amend Complaint After Demurrer to it Is Sustained

[d] Entry of Default on Failure to Timely Amend Answer After Demurrer to it Is Sustained

[2] Demurrer Sustained Without Leave to Amend

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[1] FORM

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[3] Memorandum

[4] Cross References

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[2] Use of Form

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[2] Use of Form

[3] Cross References

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PART I. SCOPE

3-21 California Forms of Pleading and Practice--Annotated § 21.01

§ 21.01 Scope of Chapter

This chapter discusses amended and supplemental pleadings. It covers the procedure for drafting, serving, and filing amended and supplemental pleadings.

Forms relating to amended pleadings include the following:

- An amended pleading [*see § 21.60*].
- Amendments to pleadings [*see §§ 21.61 -21.69*].
- Stipulations [*see §§ 21.70 -21.75*].
- An ex parte motion [*see § 21.76*] and notices of motion to amend [*see §§ 21.77, 21.78, 21.84*], with supporting declarations [*see §§ 21.79 -21.82*] and orders [*see §§ 21.83, 21.85*].

Forms relating to supplemental pleadings include the following:

- A skeletal example of the format of a supplemental complaint [*see § 21.90*].
- A stipulation to allow filing of a supplemental pleading [*see § 21.91*].
- A notice of motion with supporting declaration [*see § 21.92*], and order [*see § 21.93*] for leave to file supplemental pleadings generally.

Forms relating to supplemental pleadings in connection with substituting parties are also included. They are:

- Notices of motion [*see §§ 21.100*, 21.103 -*21.105*], supporting declarations [*see §§ 21.101, 21.102, 21.106*], and an order [*see § 21.107*] to substitute a personal representative or successor in interest for a deceased party, and a related form of supplemental complaint [*see § 21.108*].

- A notice of motion and supporting declaration [*see § 21.109*] and order [*see § 21.110*] to substitute a personal representative for an incompetent party.

- A notice of motion and supporting declaration [*see § 21.112*] and an order [*see § 21.113*] to substitute an assignee or other successor in interest in an action or proceeding.

Forms of notice of motion [*see § 21.94*] and order [*see § 21.95*] to strike a portion of a supplemental pleading are also provided.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedurePartiesSubstitutionsMotions for SubstitutionCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of Court

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§ 21.02 Cross References

On the format of complaints and answers generally see Ch. 123, *Complaints and Cross Complaints* , and Ch. 26. *Answers* , respectively. For procedure and forms on adding parties to actions, see Ch. 395, *Parties* .

For forms of captions and introductions for use in amended pleadings, see Ch. 108, *Captions and Introductions* .

For forms of petitions to join omitted employers as parties in worker's compensation proceedings, see Ch. 577, *Workers' Compensation* .

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[Reserved]

§§ 21.03[Reserved]

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3-21 California Forms of Pleading and Practice--Annotated § 21.10

§ 21.10 Governing Statutes

Amendment of pleadings as a matter of course is governed by *Code Civ. Proc. § 472*. Amendment of pleadings after a demurrer or motion to strike has been sustained is governed by *Code Civ. Proc. § 472a*. Amendments of pleadings in the furtherance of justice and on any terms as the court may deem proper are governed by *Code Civ. Proc. §§ 473(a)* and *576*, and amendments to substitute a true name for a fictitious name by *Code Civ. Proc. § 474*.

Filing, service, and response to amended complaints and amended answers are governed by *Code Civ. Proc. § 471.5*.

Supplemental pleadings are governed by *Code Civ. Proc. § 464*.

Substitution of parties on death, disability, or devolution of interest is governed by *Code Civ. Proc. §§ 368.5*, *375*, *377.20 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedurePartiesSubstitutionsDeath of Party

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3-21 California Forms of Pleading and Practice--Annotated § 21.11

§ 21.11 Amended and Supplemental Pleadings Distinguished

Amended pleadings and amendments to pleadings serve to correct errors in pleadings and are to be distinguished from supplemental pleadings, which do not supersede the original pleadings, but are used to allege facts material to the case that occurred after the former complaint or answer was filed [*see Code Civ. Proc. § 464*]. A supplemental pleading, thus, brings to the notice of the court and the opposite party things that occurred after the commencement of the action and that do or may affect the rights asserted and the relief sought in the action as originally instituted [*California etc. Co. v. Schiappa-Pietra (1907) 151 Cal. 732, 743, 91 P. 593]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProceduresPleading & PracticePleadingsSupplemental Pleadings

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3-21 California Forms of Pleading and Practice--Annotated § 21.12

§ 21.12 Amendment of Course

Any pleading may be amended once by the party of course, without costs, at any time before the answer or demurrer is filed or entered in the docket, or after demurrer and before the trial of the issue of law thereon, by filing the pleading as amended and serving a copy on the adverse party. The time in which the adverse party must respond to the amended pleading is computed from the date of notice of the amendment [*Code Civ. Proc. § 472*; for discussion of the time within which responses to amended pleadings must be served and filed, *see §§ 21.19*, 21.20]. A party is authorized to make one such amendment of course, without leave of court, including the addition of new parties, before any defendant has filed an answer or demurrer [*Gross v. Department of Transportation (1986) 180 Cal. App. 3d 1102, 1105, 226 Cal. Rptr. 49* ; *see also National Secretarial Service, Inc. v. Froehlich (1989) 210 Cal. App. 3d 510, 519, 258 Cal. Rptr. 506]* .

One defendant's filing of an answer does not divest a plaintiff of the right to amend the complaint with respect to causes of action brought against other demurring defendants [*Barton v. Khan (2007) 157 Cal. App. 4th 1216, 1222, 69 Cal. Rptr. 3d 238*].

When a pleading is sought to be amended of course, that is, without permission of the court, for a purpose other than merely to substitute the true name of a defendant for a fictitious name [*see Code Civ. Proc. § 474*], an amended pleading, rather than amendments to the pleading or alteration on the face, is required [*see Code Civ. Proc. § 472*; for discussion of the distinction between amended pleadings and amendments to pleadings, *see § 21.18*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePartiesFictitious Names

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3-21 California Forms of Pleading and Practice--Annotated § 21.13

§ 21.13 Amendment Allowed in Court's Discretion

[1] Under Code Civ. Proc. § 473

[a] Amendments Authorized in Furtherance of Justice

The court may, in furtherance of justice and on any terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party or by correcting a mistake in the name of a party or a mistake in any other respect; and may, on like terms, enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, on any terms as may be just, an amendment to any pleading or proceeding in other particulars; and may, on like terms, allow an answer to be made after the time limited by the Code of Civil Procedure [*Code Civ. Proc. § 473(a)(1)*]. For a form of ex parte motion for leave to amend, see *§ 21.76*, and for forms of notice of motion, see *§§ 21.77* and *21.78*.

Leave to amend a complaint is entrusted to the sound discretion of the trial court. The exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse. More importantly, the discretion to be exercised is that of the trial court, not that of the reviewing court. Thus, even if the reviewing court might have ruled otherwise in the first instance, the trial court's order will yet not be reversed unless, as a matter of law, it is not supported by the record [*Branick v. Downey Savings & Loan (2006) 39 Cal. 4th 235, 242, 46 Cal. Rptr. 3d 66]* .

[b] Correction of Mistake in Party's Name

Under *Code Civ. Proc. § 473(a)* [*see* [i], *above*], a plaintiff with standing may be substituted for one who is not the real party in interest [*California Air Resources Bd. v. Hart (1993) 21 Cal. App. 4th 289, 300, 26 Cal. Rptr. 2d 153]* . Whether amendment will be allowed turns on whether the mistake is merely a misnomer in the description of the party or a substitution or entire change of parties. Thus, amendment is generally proper if leave is sought to substitute a new party based on a technical defect in the party's status, such as an honest mistake in naming a party, but may not be used to interject a new party into the litigation for the first time under the guise of a misnomer [*California Air Resources Bd. v. Hart (1993) 21 Cal. App. 4th 289, 300-301, 26 Cal. Rptr. 2d 153* ; *Kerr-McGee Chemical Corp. v. Superior Court (1984) 160 Cal. App. 3d 594, 598-599, 206 Cal. Rptr. 654* ; *see Meller & Snyder v. R & T Properties, Inc. (1998) 62 Cal. App. 4th 1303, 1313 n.5, 73 Cal. Rptr. 2d 740* (questioning whether it could be seriously argued that R &

T Properties, Inc. was the same entity as an individual doing business as R & T Properties)].

For example, an amendment substituting the People of the State of California for a state agency as plaintiff is a technical one that is properly allowed [*California Air Resources Bd. v. Hart (1993) 21 Cal. App. 4th 289, 301, 26 Cal. Rptr. 2d 153]* . However, substituting "Kerr-McGee Chemical Corporation, doing business as Trona Medical Clinic" for "Trona Medical Clinic" would improperly allow the addition of a new party for a named party defendant [*Kerr-McGee Chemical Corp. v. Superior Court (1984) 160 Cal. App. 3d 594, 599, 206 Cal. Rptr. 654* (distinguishing cases that allowed substitution of ("Southern Pacific Company" for "Southern Pacific Railroad Company" and "Clio Mining Company" for "Clio Mill and Mining Company," among other evident misnomers that could be corrected as clerical errors)].

[c] Postponement of Trial

When the amendment appears, to the court's satisfaction, to render postponement of the trial necessary, the court may postpone the trial [*Code Civ. Proc. § 473(a)(2)*], even if the case is on a "fast track" pursuant to the Trial Court Delay Reduction Act [*Honig v. Financial Corp. of America (1992) 6 Cal. App. 4th 960, 967, 7 Cal. Rptr. 2d 922]* . If postponement is necessary, the court may require, as a condition to allowing amendment, that the party seeking to amend pay the adverse party any costs as may be just [*Code Civ. Proc. § 473(a)(2)*; *see also* Ch. 136, *Continuances*].

[2] Under Code Civ. Proc. § 576

Any judge, at any time before or after trial commences, in the furtherance of justice and on such terms as may be proper, may allow the amendment of any pleading [*Code Civ. Proc. § 576*; *see also City of Stanton v. Cox (1989) 207 Cal. App. 3d 1557, 1563, 255 Cal. Rptr. 682]* . The amended pleading must, however, be based on the same general set of facts as those on which the cause of action or defense as originally pleaded was grounded [*City of Stanton v. Cox (1989) 207 Cal. App. 3d 1557, 1563, 255 Cal. Rptr. 682]* . In ruling on a Section 576 motion to amend during trial, trial courts should be guided by two general principles:

- Whether facts or legal theories are being changed; and
- Whether the opposing party will be prejudiced by the proposed amendment.

Frequently, each principle represents a different side of the same coin. If new facts are being alleged, prejudice may easily result because of the other party's inability to investigate the validity of the factual allegations while engaged in trial or to call rebuttal witnesses. If the same set of facts supports merely a different theory, for example, an easement as opposed to a fee, no prejudice can result [*City of Stanton v. Cox (1989) 207 Cal. App. 3d 1557, 1563, 255 Cal. Rptr. 682* (plaintiff city's request to amend its complaint during trial to raise new issue was properly denied, although evidence on issue had been introduced at trial over defendant's objection, because city failed to seek to amend its pleading until conclusion of trial and it offered no excuse for delay)].

For forms of notice of motion, see *§§ 21.77* and *21.78*.

[3] Denial for Failure of Amended Pleading to State Cause of Action or Defense

Failure of a proposed amendment to state facts sufficient to constitute a cause of action or defense may support an order denying a motion to amend [*see California Casualty Gen. Ins. Co. v. Superior Court (1985) 173 Cal. App. 3d 274, 280, 218 Cal. Rptr. 817]* . However, when the legal sufficiency of the proposed defense is a novel question almost certain to be tested in an appellate court, the preferred practice is to permit the amendment and allow the parties to test its legal sufficiency by demurrer, motion for judgment on the pleadings, or other appropriate proceedings [*California Casualty Gen. Ins. Co. v. Superior Court (1985) 173 Cal. App. 3d 274, 281, 218 Cal. Rptr. 817* ; *see also Kittredge*

Sports Co. v. Superior Court (1989) 213 Cal. App. 3d 1045, 1048, 261 Cal. Rptr. 857] .

[4] Denial for Delay

A court may deny an amendment to a pleading that would add a new cause of action or defense involving facts and theories not included in the original pleading, especially when inexcusable delay and prejudice to the opposing party are indicated [*see Green v. Rancho Santa Margarita Mortgage Co. (1994) 28 Cal. App. 4th 686, 692-693, 33 Cal. Rptr. 2d 706* ; *Avedissian v. Manukian (1983) 141 Cal. App. 3d 379, 383, 190 Cal. Rptr. 291]* .

Thus, despite the policy of great liberality in allowing amendment, the trial court may properly deny a motion for leave to amend a complaint on the eve of trial when the delay is unexplained and the amendment opens an entirely new area of inquiry [*Magpali v. Farmers Group, Inc. (1996) 48 Cal. App. 4th 471, 486-487, 55 Cal. Rptr. 2d 225]* .

For example, when an amendment sought to add a cause of action based on a company's alleged system-wide discrimination to an original complaint based on breach of contract, misrepresentation, and intentional infliction of emotional distress, prejudice to the defendant was clearly shown because the defendant had not discovered or deposed witnesses who would support the new allegations and had not marshaled evidence to oppose the new claim. The amendment would have changed the tenor and complexity of the action, and would have required a continuance to allow further discovery. When the trial date has been set, the jury is about to be impaneled, counsel, the parties, the court, and the witnesses have blocked the time, and the only way to avoid prejudice to the opposing party is to continue the trial date to allow further discovery, the trial court does not abuse its discretion by denying leave to amend [*Magpali v. Farmers Group, Inc. (1996) 48 Cal. App. 4th 471, 486-488, 55 Cal. Rptr. 2d 225]* .

A motion to amend a complaint to be heard at the same time as a summary judgment motion may be subject to the principle that even if a good amendment is proposed in proper form, unwarranted delay in presenting it may itself be valid reason for denial [*see Record v. Reason (1999) 73 Cal. App. 4th 472, 486, 86 Cal. Rptr. 2d 547]* . Thus, a trial court that granted summary judgment in defendant's favor based on primary assumption of risk did not abuse its discretion in denying leave to amend a complaint to allege intentional or reckless conduct when the plaintiff had knowlege of the circumstances that were the basis of the amended complaint on the day he was injured, nearly three years before seeking leave to amend the complaint [*Record v. Reason (1999) 73 Cal. App. 4th 472, 486-487, 86 Cal. Rptr. 2d 547]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProceduresPleading & PracticePleadingsAmended PleadingsLeave of Court

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3-21 California Forms of Pleading and Practice--Annotated § 21.14

§ 21.14 Amendment Substituting True Name for Fictitious Defendant

[1] Requirement of Alleging Unknown Defendants in Complaint

When the plaintiff is ignorant of the defendant's name, plaintiff must state that fact in the complaint, or in the affidavit if the action is commenced by affidavit, and that defendant may be designated in any pleading or proceeding by any name (Doe allegations). When the defendant's true name is discovered, the pleading or proceeding must be amended accordingly [*Code Civ. Proc. § 474*; for forms of amendment to a complaint substituting a defendant's true name for a fictitious name, *see § 21.65* et seq.]. However, a plaintiff who substitutes a defendant's true name after failing to allege in the original complaint that the true names of the fictitiously named defendants were unknown, as required by *Code Civ. Proc. § 474*, may amend the complaint to include the required allegation of ignorance [*Dieckmann v. Superior Court (1985) 175 Cal. App. 3d 345, 351-364, 220 Cal. Rptr. 602]* .

Amending a complaint to allege the true name of a fictitiously named defendant is improper if the plaintiff was aware of the named defendant's identity and of facts giving rise to the claim against that defendant when the plaintiff filed the original complaint [*Optical Surplus, Inc. v. Superior Court (1991) 228 Cal. App. 3d 776, 782-784, 279 Cal. Rptr. 194]* .

On the other hand, if the plaintiff was ignorant of the facts giving rise to a cause of action against a defendant whose name was known at the time of filing the complaint, amendment may be proper even though *Code Civ. Proc. § 474* refers literally only to ignorance of the defendant's name [*Parker v. Robert E. McKee, Inc. (1992) 3 Cal. App. 4th 512, 516-517, 4 Cal. Rptr. 2d 347* (plaintiff could amend after belatedly learning that previously named and mistakenly dismissed defendant acted in different capacity)].

Code Civ. Proc. § 474 is to be liberally construed. Even though the plaintiff knows of the existence of the defendant sued by a fictitious name and the defendant's actual identity (*i.e.*, the defendant's name), the plaintiff is "ignorant" within the meaning of the statute if the plaintiff lacks knowledge of that party's connection with the case or with the plaintiff's injuries. Ignorance of the facts giving rise to a cause of action is the ignorance required by *Code Civ. Proc. § 474*, and the pivotal question is "did plaintiff know of facts?" not "did plaintiff know or believe that plaintiff had a cause of action based on those facts?" [*General Motors Corp. v. Superior Court (1996) 48 Cal. App. 4th 580, 593-594, 55 Cal.*

Rptr. 2d 871] .

Because the purpose of *Code Civ. Proc. § 474* is to enable the plaintiff to avoid the bar of the statute of limitations when the plaintiff is ignorant of the defendant's identity, the analytical approach of Section 474 is irrelevant if amendment is sought before the period of limitation has expired [*Davis v. Marin (2000) 80 Cal. App. 4th 380, 386-387, 94 Cal. Rptr. 2d 896]* . Thus, if a plaintiff amends a complaint to substitute a named defendant for a Doe before the statute of limitations has expired, the amendment to the complaint should be treated the same as if the plaintiff had simply filed an amended complaint naming the defendant, in which case Section 474 analysis would have been irrelevant [*Davis v. Marin (2000) 80 Cal. App. 4th 380, 387, 94 Cal. Rptr. 2d 896]* .

For forms of pleading fictitiously named defendants and further discussion of what constitutes "ignorance of the defendant's name," see Ch. 20, *Allegations Commonly Used* .

[2] Effect of Delay in Making Amendment

Unreasonable delay in amending the complaint after plaintiff has actually acquired knowledge of the identity of the fictitiously named defendant may bar plaintiff's resort to the fictitious-name procedure [*A.N. v. County of Los Angeles (2009) 171 Cal. App. 4th 1058, 1068-69, 90 Cal. Rptr. 3d 293* ; *Barrows v. American Motors Corp. (1983) 144 Cal. App. 3d 1, 8, 192 Cal. Rptr. 380]* . However, for a defendant to challenge successfully a plaintiff's use of the procedure, the defendant must show not only that the plaintiff was dilatory, but also that the defendant suffered specific prejudice, beyond the general policy of the applicable statute of limitations, from the delay. An example would be substantial and demonstrable prejudice by loss of evidence during the period after the statute of limitations has run [*Barrows v. American Motors Corp (1983) 144 Cal. App. 3d 1, 9-10, 192 Cal. Rptr. 380* (amendment allowed)]. Where counsel did not state the dates upon which he learned the names of the Doe defendants and did not explain why their identities could not have been discovered sooner, as the record indicated that counsel had access to the information sooner, and Doe defendants were brought into the case less than one month before the case was set to begin trial, a two-year delay was unreasonable and prejudicial [*A.N. v. County of Los Angeles (2009) 171 Cal. App. 4th 1058, 1068-69, 90 Cal. Rptr. 3d 293*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 21.15 Statute of Limitations; Relation-Back Doctrine

Once an action has been timely commenced by the filing of a complaint, the filing of an amended pleading that does not introduce a new cause of action is not subject to the statute of limitations [*Hutnick v. United States Fidelity & Guaranty Co. (1988) 47 Cal. 3d 456, 464, 253 Cal. Rptr. 236, 763 P.2d 1326]* . An amendment relates back to the time the original complaint was filed when the amendment is based upon the same general set of facts contained in the initial complaint; and it is essential to distinguish between a new cause of action arising out of "the same general set of facts" and a new cause arising out of different facts [*Wiener v. Superior Court (1976) 58 Cal. App. 3d 525, 528, 130 Cal. Rptr. 61]* . Moreover, as a general rule, the statute of limitations provides no defense to the successor of a party timely sued [*Hutnick v. United States Fidelity & Guaranty Co. (1988) 47 Cal. 3d 456, 467, 253 Cal. Rptr. 236, 763 P.2d 1326* (citing former *Code Civ. Proc. § 385* (*now see Code Civ. Proc. §§ 368.5, 375*); *Code Civ. Proc. § 1908*)]. Thus when an individual defendant dies or becomes incompetent, title to property at issue is transferred, or a corporate defendant is merged or dissolved, the substitution of a representative or successor in place of the named defendant may not be challenged on the ground that the statute of limitations has expired as to the representative or successor [*Hutnick v. United States Fidelity & Guaranty Co. (1988) 47 Cal. 3d 456, 467, 253 Cal. Rptr. 236, 763 P.2d 1326* ; for further discussion, *see § 21.27*].

However, if an amended complaint adds a new cause of action or new party, other than to identify fictitiously named defendants pursuant to *Code Civ. Proc. § 474* [*see § 21.14*], it will be barred by the statute of limitations unless the amended pleading can be said to relate back to the time the original pleading was filed [*see Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 599-600, 15 Cal. Rptr. 817, 364 P.2d 681* ; *Woo v. Superior Court (1999) 75 Cal. App. 4th 169, 176, 89 Cal. Rptr. 2d 20]* . For discussion of the relation-back doctrine, see *Ch. 345, Limitation of Actions, § 345.25*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 21.16 Amendment of Cross Complaint to Plead Compulsory Cross Claim

A party who fails to plead a cause of action subject to *Code Civ. Proc. § 426.10 et seq.* (compulsory cross complaints), whether through oversight, inadvertence, mistake, neglect, or other cause, may apply to the court for leave to amend the pleading, or to file a cross complaint, to assert that cause at any time during the course of the action. The court, after notice to the adverse party, grants, on terms as may be just to the parties, leave to amend the pleading, or to file the cross complaint, to assert the cause if the party who failed to plead the cause acted in good faith. These provisions are liberally construed to avoid forfeiture of causes of action [*Code Civ. Proc. § 426.50*].

The determination of what constitutes good faith, or lack of it, under *Code Civ. Proc. § 426.50* must be made in light of and in conformity with the liberality conferred on the trial courts by that section and by prior law. Generally, the principle of liberality requires that a strong showing of bad faith be made in order to support a denial of the right to amend a pleading or file a cross complaint under *Code Civ. Proc. § 426.50* [*Foot's Transfer & Storage Co. v. Superior Court (1980) 114 Cal. App. 3d 897, 902, 171 Cal. Rptr. 1]* . Mere delay in amending a pleading or filing a cross complaint is generally insufficient to constitute the requisite bad faith, absent a showing that the amendment of the pleading or filing of the cross complaint would work a substantial injustice to the opposing party and would prejudice that party's position in some way [*see Foot's Transfer & Storage Co. v. Superior Court (1980) 114 Cal. App. 3d 897, 903, 171 Cal. Rptr. 1]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 21.17 Amendment After Demurrer or Motion to Strike

[1] Demurrer Sustained With Leave to Amend

[a] Specific Amendment Is Not Approved

This leave to amend does not constitute an approval of a particular amendment that the pleader has submitted to the court. Rather, it is permission to the pleader to amend the cause of action or defense in the pleading to which the demurrer has been sustained [*People ex rel. Dept. Pub. Wks. v. Clausen (1967) 248 Cal. App. 2d 770, 785, 57 Cal. Rptr. 227]* .

[b] Time to Amend

When a demurrer is sustained, unless the court otherwise orders, leave to amend within 10 days is deemed granted, except in actions in forcible entry, forcible detainer, or unlawful detainer, for which five days are granted [*Cal. Rules of Ct., Rule 3.1320(g)*; *see Code Civ. Proc. § 472a(c)*]. If a demurrer to any pleading is sustained or overruled, and time to amend or answer is given, the time given runs from the service of notice of the decision or order, unless notice is waived in open court and the waiver is entered in the minutes or docket [*Code Civ. Proc. § 472b*].

While leave to amend within 10 days is standard under *California Rules of Court, Rule 3.1320(g)*, the court may grant leave to amend "upon any terms as may be just and shall fix the time within which the amendment or amended pleading shall be filed" [*Code Civ. Proc. § 472a(c)*]. In fact, even if the court has not ordered additional time beyond the standard 10 days, the court has the discretion to accept a late filing even after the 10 days has expired, effectively fixing a new time for amendment [*Harlan v. Department of Transportation (2005) 132 Cal. App. 4th 868, 873, 33 Cal. Rptr. 3d 912* (court properly accepted pleading filed eight days late without a request for extension of time)]. The late filing may be accepted even without noticed motion requesting an extension of time [Harlan v. Department of Transportation *(2005) 132 Cal. App. 4th 868, 873-876, 33 Cal. Rptr. 3d 912]* .

[c] Dismissal for Failure to Timely Amend Complaint After Demurrer to it Is Sustained

If the plaintiff fails to timely amend the complaint after a demurrer has been sustained with leave to amend, the trial

court has discretion to grant or deny defendant's motion to dismiss under *Code Civ. Proc. § 581(f)(2)* if plaintiff opposes the motion and promptly submits an amended complaint. The court is not required to dismiss action, subject to a subsequent *Code Civ. Proc. § 473* motion by plaintiff to set aside and vacate order of dismissal for excusable neglect [*Contreras v. Blue Cross of California (1988) 199 Cal. App. 3d 945, 948, 245 Cal. Rptr. 258* (applying former *Code Civ. Proc. § 581(c)*)].

[d] Entry of Default on Failure to Timely Amend Answer After Demurrer to it Is Sustained

Similarly to the rule in § 21.19[3], the plaintiff may take the defendant's default if the court sustains a demurrer to the answer and the defendant fails to amend the answer within the time allowed by the court [*Code Civ. Proc. § 586(a)(5)*].

[2] Demurrer Sustained Without Leave to Amend

If any court makes an order sustaining a demurrer without leave to amend, the question as to whether the court abused its discretion in making the order is open on appeal even though no request to amend the pleading was made [*Code Civ. Proc. § 472c(a)*; *see Kolani v. Gluska (1998) 64 Cal. App. 4th 402, 411-412, 75 Cal. Rptr. 2d 257* (trial court should have granted leave to amend when it knew of potentially viable claim when it sustained demurrer, even though plaintiff did not request leave to amend); *Galligan v. City of San Bruno (1982) 132 Cal. App. 3d 869, 876, 183 Cal. Rptr. 466* (applying rule to motion for judgment on pleadings)].

If an order sustaining a demurrer without leave to amend is reversed or otherwise remanded by any order issued by a reviewing court, any amended pleading must be filed within 30 days after the clerk of the reviewing court mails notice of the issuance of the remittitur [*Code Civ. Proc. § 472b*].

[3] Motion to Strike

If a motion to strike is granted under *Code Civ. Proc. § 436*, the court may order that an amendment or amended pleading be filed on terms that it deems proper [*Code Civ. Proc. § 472a(d)*].

Default proceedings may be had if a motion to strike the answer in whole or part, of the character specified in *Code Civ. Proc. § 585*, is granted and the defendant fails to amend the answer within the time allowed by the court [*Code Civ. Proc. § 586(a)(7)*].

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§ 21.18 Method of Amending Pleading; Amended Pleading Versus Amendment to Pleading

A pleading may be amended by filing an amended pleading or by filing an amendment to the pleading, or making alterations on the face of the pleading [*Code Civ. Proc. § 472*; *Cal. Rules of Ct., Rule 3.1324*]. An amended pleading is one that is entirely rewritten and completely supersedes the original or prior pleading but relates to facts occurring before the action was begun. An amendment to a pleading is the addition, substitution, or change of only a part of a pleading [*Cohen v. Superior Court (1966) 244 Cal. App. 2d 650, 657, 53 Cal. Rptr. 378]* .

An amendment, as distinguished from an amended pleading, designates the pages and lines of the prior pleading that is thereby amended. No amendment may be made by alterations on the face of a pleading except by permission of the court, and all alterations must be initialed by the court or clerk [*Cal. Rules of Ct., 3.1324(d)*].

The court may deem a motion to file an amendment to a pleading to be a motion to file an amended pleading and require the filing of the entire previous pleading with the approved amendments incorporated into it [*Cal. Rules of Ct., Rule 3.1324(c)*].

For a form of amended pleading, see *§ 21.60*, and for forms of amendments to pleadings, see *§ 21.61* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 21.19 Procedure for Amended Complaint

[1] Service

If the complaint is amended, a copy of the amendment must be filed, or the court may, in its discretion, require the complaint as amended to be filed, and a copy of the amendments or amended complaint must be served on the defendants affected by it [*Code Civ. Proc. § 471.5(a)*; *see also Code Civ. Proc. § 670(b)*, providing that judgment roll includes all pleadings and does not distinguish original from amended or supplemental pleadings].

If a defendant has not previously been served with a summons, a copy of the amended complaint or amendment to the complaint and a summons are served on the defendant in the manner provided for service of summons in civil actions [*see Code Civ. Proc. § 415.10 et seq.*, and Ch. 518, *Service of Summons and Papers*]. The summons may refer to the complaint on file or to the amended complaint [*see Dowling v. Comerford (1893) 99 Cal. 204, 206, 33 P. 853* ; *Koeper v. Koeper (1954) 125 Cal. App. 2d 118, 119, 269 P.2d 905]* .

For discussion of the relation between an amended complaint and the mandatory period for completing service [*Code Civ. Proc. § 583.210*], see Ch. 212, *Dismissal* .

If a defendant has previously been served with a summons but failed to make an appearance in the action, service of an amended complaint in the manner provided for service of summons, although not required for personal jurisdiction, is an essential prerequisite to a valid default judgment [*Engebretson & Co. v. Harrison (1981) 125 Cal. App. 3d 436, 441-442, 444, 178 Cal. Rptr. 77* ; *see Code Civ. Proc. §§ 413.10-417.40*]. However, if a defendant has made an appearance, service of an amended complaint by mail under *Code Civ. Proc. § 1012* is probably sufficient to support a default judgment [*see Engebretson & Co. v. Harrison (1981) 125 Cal. App. 3d 436, 441, 178 Cal. Rptr. 77]* .

[2] Answer to Amended Complaint

The defendant or cross defendant is required to answer the amendments, or the complaint or cross complaint as amended, within 30 days after service, or by such other time as the court may direct, and judgment by default may be entered on failure to answer as in other cases [*Code Civ. Proc. § 471.5(a)*]. *Code Civ. Proc. § 471.5(a)* refers only to the filing of an answer to the amended complaint and does not authorize the filing of a demurrer. This was also true of its

predecessor statute, former *Code Civ. Proc. § 432*. Nevertheless, a demurrer, with or without an answer, may be filed [*see Johns v. Mongan (1961) 190 Cal. App. 2d 94, 97, 11 Cal. Rptr. 673]* , since the filing of a demurrer as well as an answer prevents entry of default [*see Code Civ. Proc. § 586(a)(1)*].

[3] Entry of Default on Failure to Answer Amended Pleading

Default proceedings and judgment [*see Code Civ. Proc. §§ 585, 585.5*] may be had if the complaint has been amended, and the defendant fails to answer it as amended, or to demur to it, or to file a notice of motion to strike of the character specified in *Code Civ. Proc. § 585*, within 30 days after service thereof or within the time allowed by the court [*Code Civ. Proc. § 586(a)(1)*; *see also* Ch. 205, *Defaults and Default Judgments* , and California Points and Authorities, Ch. 70, *Defaults and Default Judgments* (Matthew Bender)]. When the amendment is merely as to formal or immaterial matters, however, and does not change the cause of action, the defendant does not have to answer. Default entered under those circumstances should be set aside [*Gray v. Hall (1928) 203 Cal. 306, 310-311, 265 P. 246* ; *Carrasco v. Craft (1985) 164 Cal. App. 3d 796, 808-811, 210 Cal. Rptr. 599]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 21.20 Time to Demur to Amended Answer

If the answer is amended, the adverse party has 10 days after service, or such other time as the court may direct, in which to demur to the amended answer [*Code Civ. Proc. § 471.5(b)*]. Service is made in the manner provided for service of papers [*see Code Civ. Proc. §§ 465, 1010-1020*, and Ch. 518, *Service of Summons and Papers*].

Legal Topics:

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§ 21.21 Striking Amended Pleadings

A court may, by virtue of its inherent power to prevent abuse of its processes, strike an amended pleading that is filed in disregard of established procedural processes. For example, if a motion to strike an amended complaint is made by only one defendant, the court may strike the amended pleading as to all defendants because no request for permission to amend was sought. An order striking an amended pleading may be made without prejudice to the rights of the pleader to file another amended pleading with permission of the court [*Loser v. E.R. Bacon Co. (1962) 201 Cal. App. 2d 387, 390, 20 Cal. Rptr. 221* (recognizing noticed motion as proper procedure to add cause of action based on breach of warranty)].

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§ 21.22 Inconsistency With Previous Pleadings

A plaintiff may not discard factual allegations of a prior complaint, or avoid them by contradictory averments, in a superseding, amended pleading [*Richelle L. v. Roman Catholic Archbishop of San Francisco (2003) 106 Cal. App. 4th 257, 282, 130 Cal. Rptr. 2d 601]* . Where it is inconceivable that a trial court would accept any effort to omit or avoid facts central to complaint where a demurrer has been sustained with leave to amend, a superseding, amended pleading will not be permitted [*Richelle L. v. Roman Catholic Archbishop of San Francisco (2003) 106 Cal. App. 4th 257, 282, 130 Cal. Rptr. 2d 601]* .

When an amended pleading attempts to avoid defects revealed in a previous pleading by ignoring those defects, a court may examine the prior pleading or pleadings to ascertain whether the amended pleading is merely a sham [*Amid v. Hawthorne Community Medical Group, Inc. (1989) 212 Cal. App. 3d 1383, 1387, 261 Cal. Rptr. 240* ; *Kiseskey v. Carpenters' Trust for So. California (1983) 144 Cal. App. 3d 222, 228-229, 192 Cal. Rptr. 492]* . That is, when a party files an amended complaint and attempts to avoid the defects of the original complaint by either omitting the facts that made the prior pleading defective or by adding facts inconsistent with those of the prior pleading, the court may take judicial notice of the prior pleading and disregard any inconsistent allegations in the amended pleading [*Colapinto v. County of Riverside (1991) 230 Cal. App. 3d 147, 151, 281 Cal. Rptr. 191]* .

When an amendment contradicts earlier allegations, the moving party must clearly show, by very satisfactory evidence, that the earlier allegation was the result of mistake or inadvertence, whereas the amendment has been presented in good faith [*Savage v. Pacific Gas & Electric Co. (1993) 21 Cal. App. 4th 434, 441, 26 Cal. Rptr. 2d 305* ; *American Advertising & Sales Co. v. Mid-Western Transport (1984) 152 Cal. App. 3d 875, 878-880, 199 Cal. Rptr. 735]* . For example, when plaintiffs could offer no explanation for a proposed omission of allegations destructive of their cause of action, other than a desire to avoid the pertinent statute, the court properly sustained a demurrer without leave to amend [*Leong v. San Francisco Parking, Inc. (1991) 235 Cal. App. 3d 827, 832 n.5, 1 Cal. Rptr. 2d 41]* .

On the other hand, the fact that a prior pleading may have contained true, but irrelevant, matters does not render the proposed amended complaint a sham. The sham pleading rule should not be applied in a case in which the plaintiff seeks to change the legal theory of recovery and the legal conclusions the plaintiff seeks to draw from the underlying factual events, and also seeks to omit factual allegations that are irrelevant and immaterial to the new legal theories

asserted [*Berman v. Bromberg (1997) 56 Cal. App. 4th 936, 948-949, 65 Cal. Rptr. 2d 777]* . Under these circumstances, the sham pleading rule does not apply and there is no need for the plaintiff to explain the reasons for the amended pleading because there are no inconsistencies in the underlying material or relevant factual allegations [*Berman v. Bromberg (1997) 56 Cal. App. 4th 936, 949, 65 Cal. Rptr. 2d 777]* .

Although a trial court has good reason to be hesitant to accept new factual allegations from the plaintiff, at least to the extent they are inconsistent with prior allegations, the court may not demand the production of admissible evidence, specifically excluding plaintiff's own testimony, to support the proposed amendment to the complaint while at the same time preventing plaintiff from conducting any discovery. Although a trial court has powerful tools to shield parties and nonparties from abusive litigation tactics, it does not have the power to demand, as the condition for leave to amend, that a party present admissible evidence sufficient to withstand summary judgment [*Sanai v. Saltz (2009) 170 Cal. App. 4th 746, 770, 88 Cal. Rptr. 3d 673*].

For further discussion of the effect of the inconsistency in pleadings on the court's ruling on a demurrer, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-21 California Forms of Pleading and Practice--Annotated § 21.23

§ 21.23 Effect of Case Management Conference and Order

The necessity of a case management conference and the matters to be determined at this conference, including amendments to pleadings, are now governed by rules of court [*Cal. Rules of Ct., Rule 3.720 et seq.*]. After a pretrial conference order has been issued, any judge may, in the furtherance of justice and on such terms as may be proper, allow the amendment of any pleading or pretrial conference order, such as a case management order, either before or after commencement of trial [*Code Civ. Proc. § 576*]. Thus, a pretrial conference order, if any, does not foreclose the trial court from permitting an amendment to the pleadings [*Feykert v. Hardy (1963) 213 Cal. App. 2d 67, 74, 28 Cal. Rptr. 510]* .

An amendment to a pleading made after the pretrial order is filed may constitute a modification of the pretrial order [*see Arthur v. New House Building Corp. (1963) 217 Cal. App. 2d 526, 534, 31 Cal. Rptr. 868]* . Counsel is advised to move for an amendment of the pretrial conference order in addition to a motion to amend the pleadings so that the advantages of the pretrial conference in clearly defining the issues and in eliminating unnecessary and time consuming allegations of fact might be preserved [*Posz v. Burchell (1962) 209 Cal. App. 2d 324, 335, 25 Cal. Rptr. 896]* . For further discussion relating to amendment of pleadings and the pretrial conference order under *Code Civ. Proc. § 576*, see Ch. 425, *Pretrial Proceedings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial Orders

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3-21 California Forms of Pleading and Practice--Annotated § 21.24

§ 21.24 Oral Motion to Amend During Trial

The allowance or disallowance of amendments to pleadings during the course of the trial rests largely in the discretion of the trial court whose ruling will not be disturbed on appeal unless it clearly appears that such discretion has been abused. The trial court has a wide discretion in such matters in which the purpose of the amendment is to raise new issues after the pleadings have been settled and the trial has commenced [*Garcia v. Roberts (2009) 173 Cal. App. 4th 900, 909, 93 Cal. Rptr. 3d 286* ; *Walter v. Rollins International, Inc. (1985) 169 Cal. App. 3d 1, 23, 215 Cal. Rptr. 59* ; *Del Pino v. Gualtieri (1968) 265 Cal. App. 2d 912, 916, 71 Cal. Rptr. 716* ; *Hansen v. Matich Corporation (1965) 234 Cal. App. 2d 129, 131-132,44 Cal. Rptr. 149* ; *Feykert v. Hardy (1963) 213 Cal. App. 2d 67, 75, 28 Cal. Rptr. 510]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDiscretion

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3-21 California Forms of Pleading and Practice--Annotated § 21.25

§ 21.25 Amendments to Conform to Proof

Motions and orders to conform a pleading to proof are generally made orally at trial. When the variance is not material, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs [*Code Civ. Proc. § 470*; *see Walker v. Belvedere (1993) 16 Cal. App. 4th 1663, 1670, 20 Cal. Rptr. 2d 773* (court erred in not directing fact to be found according to evidence when variance was not material, defendant was not prejudiced, even though plaintiff did not ask to conform to proof)]. No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party, to his or her prejudice, in maintaining the action or defense on the merits. Whenever it appears that a party has been so misled, the court may order the pleading to be amended, on such terms as may be just [*Code Civ. Proc. § 469*]. If the allegation of the claim or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance [*see Code Civ. Proc. §§ 469, 470*], but a failure of proof [*Code Civ. Proc. § 471*].

Amendments to conform to proof should not be granted at trial if by permitting the amendment new and substantially different issues are introduced in the case or the rights of the adverse party prejudiced; amendments of pleadings to conform to the proofs should not be allowed when they raise new issues not included in the original pleadings and upon which the adverse party had no opportunity to defend [*Garcia v. Roberts (2009) 173 Cal. App. 4th 900, 909, 93 Cal. Rptr. 3d 286* , *citing Trafton v. Youngblood (1968) 69 Cal. 2d 17, 31, 69 Cal. Rptr. 568, 442 P.2d 648* ; *see South Bay Building Enterprises, Inc. v. Riviera Lend-Lease, Inc. (1999) 72 Cal. App. 4th 1111, 1124, 85 Cal. Rptr. 2d 647*].

The basic rule applicable to amendments to conform to proof during trial is that the amended pleading must be based upon the same general set of facts as those upon which the cause of action or defense as originally pleaded was grounded, and trial court should be guided by two general principles [*Garcia v. Roberts (2009) 173 Cal. App. 4th 900, 910, 93 Cal. Rptr. 3d 286*]:

- Whether facts or legal theories are being changed, and
- Whether the opposing party will be prejudiced by the proposed amendment.

Frequently, each principle represents a different side of the same coin: If new facts are being alleged, prejudice may easily result because of the inability of the other party to investigate the validity of the factual allegations while engaged in trial or to call rebuttal witnesses. If the same set of facts supports merely a different theory--for example, an easement as opposed to a fee--no prejudice can result [*Garcia v. Roberts (2009) 173 Cal. App. 4th 900, 910, 93 Cal. Rptr. 3d 286*].

For a form of notice of motion that may be used if the motion is not made orally, see *§ 21.84*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to EvidenceEvidenceProcedural ConsiderationsVariances Between Pleadings & Proof

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3-21 California Forms of Pleading and Practice--Annotated § 21.26

§ 21.26 Supplemental Pleadings

[1] Authorized on Motion

The plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint or answer alleging facts material to the case occurring after the former complaint or answer [*Code Civ. Proc. § 464(a)*; for special considerations in family law matters, *see §§ 21.28* and *21.29*]. A supplemental complaint must be in furtherance of and consistent with the action asserted in original complaint [*Gonzales v. Arbelbide (1957) 155 Cal. App. 2d 721, 726-727, 318 P.2d 746* ; *Erickson v. Boothe (1954) 127 Cal. App. 2d 644, 647, 274 P.2d 460]* .

A motion to file a supplemental complaint is addressed to the trial court's discretion [*American Aeronautics Corp. v. Grand Cent. Aircraft Co. (1957) 155 Cal. App. 2d 69, 83, 317 P.2d 694]* . A trial court does not abuse that discretion when the motion is not timely and the delay is not explained [*American Aeronautics Corp. v. Grand Cent. Aircraft Co. (1957) 155 Cal. App. 2d 69, 83, 317 P.2d 694* (denying motion to file supplemental complaint made on third day of trial when eight months and numerous depositions had been taken between filing of complaint and the trial)].

[2] Effect of Statutes of Limitation

Once an action has been timely commenced by the filing of a complaint, the filing of a supplemental complaint that does not introduce a new cause of action is not subject to the statute of limitations [*Hutnick v. United States Fidelity & Guaranty Co. (1988) 47 Cal. 3d 456, 464, 253 Cal. Rptr. 236, 763 P.2d 1326]* .

The relation back doctrine can apply to supplemental, as well as amended complaints. Whether a supplemental complaint may encompass the entire period following commencement of suit depends on the nature of the claims raised in the supplemental pleading. If the claims are unrelated to those alleged in the initial complaint or rely on conduct or events different from those involved in the original action, the statute of limitations should be applied. If however, the original pleading gave notice that the alleged wrongful conduct was of a continuing nature, supplemental pleadings addressed to the same conduct should not encounter statute of limitation questions [*Bendix Corp. v. City of Los Angeles (1984) 150 Cal. App. 3d 921, 925-926, 198 Cal. Rptr. 370* (disagreeing with *ITT Gilfillan, Inc. v. City of Los Angeles (1982) 136 Cal. App. 3d 581, 586, 185 Cal. Rptr. 848* to the extent that case appears to have concluded that supplemental and amended pleadings must always be accorded different treatment regardless of the circumstances of

the individual case)].

[3] Issuance of Summons

When a supplemental complaint is filed, the clerk is required to issue an amended or supplemental summons pursuant to *Code Civ. Proc. § 412.10*. Service of the supplemental summons and complaint must be made in the manner provided for the initial service of a summons by the Code of Civil Procedure [*Code Civ. Proc. § 464(c)*].

For discussion of service, see Ch. 518, *Service of Summons and Papers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedureJudicial OfficersJudgesDiscretionGovernmentsLegislationStatutes of LimitationsTime Limitations

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3-21 California Forms of Pleading and Practice--Annotated § 21.27

§ 21.27 Substitution of Personal Representative or Transferee as Party

[1] Transfer of Interest

[a] At Transferee's Option After Transfer

An action or proceeding does not abate by the transfer of an interest in the action or proceeding or by any other transfer of an interest [*Code Civ. Proc. § 368.5*]. The action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding [*Code Civ. Proc. § 368.5*].

A transferee of an interest in a pending action has the option of being substituted in the action or continuing it in the name of his or her transferor [*Code Civ. Proc. § 368.5*; *see Casey v. Overhead Door Corp. (1999) 74 Cal. App. 4th 112, 121-122, 87 Cal. Rptr. 2d 603* (plaintiffs' attorney had actual authority to act on settling defendant's behalf regarding cross complaint for indemnity against third party that defendant assigned to plaintiffs even though plaintiffs failed to substitute attorney as attorney of record for cross complainant; cross defendant was not misled or prejudiced by lack of substitution)]. The transferee has the right to control the further proceedings in the action [*Davis v. Rudolph (1947) 80 Cal. App. 2d 397, 401, 181 P.2d 765* ; *see Casey v. Overhead Door Corp. (1999) 74 Cal. App. 4th 112, 122, 87 Cal. Rptr. 2d 603]* .

If a transferee elects to continue the action in the name of the original party, the court may give judgment according to the conditions existing at the time the case was begun [*Knobloch v. Associated Oil Co. (1915) 170 Cal. 144, 147, 148 P. 938]* .

A transferee's right of substitution is permissive, resting in the discretion of the court [*Hogan v. Superior Court (1925) 74 Cal. App. 704, 713, 241 P. 584]* .

[b] Transfer of Interest to Coplaintiff

Substitution is not required when one who is already a party, pending trial, acquires by purchase and assignment the balance of the joint interest of his or her coplaintiff, either from the coplaintiff in his or her lifetime, or from his or her

executor or administrator in the event of death [*Miller v. Bank of America (1942) 52 Cal. App. 2d 512, 516, 126 P.2d 444]* .

[c] Transfer Before Death

If a decedent transferred his or her interest during the course of the trial, his or her executor or administrator is not a proper party to be substituted. The action may continue in the decedent's name or the grantee may be substituted [*Tuffree v. Stearns Ranchos Co. (1899) 124 Cal. 306, 308, 57 P. 69]* .

[2] Substitution of Bankruptcy Trustee

When a bankruptcy petition is filed under Title 11 of the United States Code, all legal and equitable interests of the debtor and certain community interests, including a cause of action, become property of the estate [*11 U.S.C. § 541(a)*]. The bankruptcy trustee is the representative of the bankruptcy estate, and has the capacity to sue and be sued [*11 U.S.C. § 323*]. However, the bankrupt is not divested of his or her right to continue to prosecute a state cause of action, pending assertive action by the bankruptcy trustee [*Kaley v. Catalina Yachts (1986) 187 Cal. App. 3d 1187, 1194-1195, 232 Cal. Rptr. 384* ; *cf. 11 U.S.C. § 362(a)(1)* (automatic stay of any judicial action or proceeding against debtor to recover claim against debtor)]. Until the bankruptcy trustee intervenes and substitutes himself or herself in the action, the trustee is not the real party in interest. Under *Code Civ. Proc. § 368.5*, the bankrupt remains the real party in interest even after the cause of action is transferred to the bankruptcy estate by operation of law, until the time that the trustee seeks, and is allowed, to substitute in by the state court [*Kaley v. Catalina Yachts (1986) 187 Cal. App. 3d 1187, 1194-1195, 232 Cal. Rptr. 384* ; *see Code Civ. Proc. § 387* (intervention)].

Once the bankruptcy trustee has assumed all authority in the litigation, however, the bankrupt ceases to have standing in the action. Thus, for example, if a bankruptcy trustee has represented a bankrupt's interest in litigation by or against the bankrupt and the trustee chooses not to appeal the judgment, the bankrupt has no standing to bring an appeal. Instead, the bankrupt's remedy is to petition the bankruptcy court to compel the trustee to file an appeal or to authorize the bankrupt to file an appeal on its own behalf [*People v. Kings Point Corp. (1986) 188 Cal. App. 3d 544, 549, 233 Cal. Rptr. 227]* .

If a plaintiff, after filing a bankruptcy petition, files a complaint alleging causes of action that accrued before the filing of the bankruptcy petition, there may be instances when a court will permit the complaint to be amended to substitute the trustee in bankruptcy as plaintiff even thought at that time the statute of limitations has run [*see, e.g.,* *Haley v. Dow Lewis Motors, Inc. (1999) 72 Cal. App. 4th 497, 506-509, 85 Cal. Rptr. 2d 352* (plaintiffs did not act in bad faith); for discussion of relation-back doctrine, *see Ch. 345, Limitation of Actions, § 345.25*)].

[3] Disability of a Party

An action or proceeding does not abate by the disability of a party [*Code Civ. Proc. § 375*]. The court, on motion, must allow the action or proceeding to be continued by or against the party's representative [*Code Civ. Proc. § 375*].

[4] Death of a Party

[a] Effect of Death

A pending action or proceeding does not abate by the death of a party if the cause of action survives [*Code Civ. Proc. § 377.21*; for discussion of survival of actions, *see* Ch. 181, *Death and Survival Actions*].

On motion after the death of a person who commenced an action or proceeding, the court must allow a pending action or proceeding that does not abate to be continued by the decedent's personal representative or, if none, by the decedent's successor in interest [*Code Civ. Proc. § 377.31*; for further discussion, *see* [b], *below*].

Conversely, on motion, the court must allow a pending action or proceeding against the decedent that does not abate to be continued against the decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest, except that proof of compliance with the creditor claims statute is required before the action or proceeding can be continued against the personal representative [*Code Civ. Proc. § 377.41*; *see Prob. Code § 9000 et seq.*; for further discussion, *see* [c], *below*].

Under *Code Civ. Proc. § 583.340(a)*, a party's death tolls the *Code Civ. Proc. § 583.310* five-year period for bringing the case to trial. The tolling lasts until a personal representative is substituted for deceased defendant pursuant to *Code Civ. Proc. § 377.31* or an insurer is served with copy of complaint if case comes within *Prob. Code § 550 et seq.* [*Pham v. Wagner Litho Machinery Co. (1985) 172 Cal. App. 3d 966, 970-974, 218 Cal. Rptr. 476* (death of plaintiff; construing former *Code Civ. Proc. § 583(f)*); *Herring v. Peterson (1981) 116 Cal. App. 3d 608, 613-616, 172 Cal. Rptr. 240* (death of defendant; construing former *Code Civ. Proc. § 583(f)* and predecessor statutes to Sections 377.31 and 550 et seq.)]. These cases are based on the premise that the party's death deprives the court of jurisdiction to try a case [*see Pham v. Wagner Litho Machinery Co. (1985) 172 Cal. App. 3d 966, 970-974, 218 Cal. Rptr. 476* ; *Herring v. Peterson (1981) 116 Cal. App. 3d 608, 611-612, 172 Cal. Rptr. 240* , both cited by the Supreme Court as consistent with its decision in *Watts v. Crawford (1995) 10 Cal. 4th 743, 759 n.14, 42 Cal. Rptr. 2d 81, 896 P.2d 807]* . For additional discussion of tolling the involuntary dismissal statutes, see Ch. 212, *Dismissal* .

As a general proposition, judgment cannot be rendered for or against a decedent, or for or against a personal representative of a decedent's estate, until the representative has been made a party by substitution [*Sacks v. FSR Brokerage, Inc. (1992) 7 Cal. App. 4th 950, 957, 9 Cal. Rptr. 2d 306]* . *Sacks* traced this rule back to *Judson v. Love (1868) 35 Cal. 463* , and concluded that the rule has not been applied blindly, but has acted to prevent prejudice to the parties because of lack or notice, lack of proper representation, or some other disadvantage [*Sacks v. FSR Brokerage, Inc. (1992) 7 Cal. App. 4th 950, 957, 959, 9 Cal. Rptr. 2d 306* (distinguishing cases that state a broader rule as actually involving prejudice, or in the case of *Bliss v. Speier (1961) 193 Cal. App. 2d 125, 13 Cal. Rptr. 847* , as failing to consider the issue of prejudice)].

The personal representative of a deceased party who has been substituted in a case must take the situation as he or she finds it as of decedent's death, and is not, for example, entitled to a new trial [*Bliss v. Speier (1961) 193 Cal. App. 2d 125, 127, 13 Cal. Rptr. 847]* .

[b] Substitution on Plaintiff's Death

[i] Personal Representative

The personal representative of the estate of a person who has filed suit before death has by custom and practice a firm right to expect and demand a substitution if the cause of action survives or continues [*Majors v. County of Merced (1962) 207 Cal. App. 2d 427, 434, 24 Cal. Rptr. 610* ; *see Code Civ. Proc. §§ 377.20, 377.21* (survival of actions), 377.31 (substitution of personal representative or, if none, successor in interest)]. For a form of notice of motion to substitute the plaintiff's personal representative for the plaintiff, see *§ 21.105*.

If the decedent's gross estate, as defined, does not exceed $100,000, and there is no administration of the decedent's estate, or if there is administration and the personal representative consents, the decedent's successor to the property involved in the litigation may obtain substitution as plaintiff [*see Prob. Code § 13107.5*; *see also Code Civ. Proc. § 377.31* (continuation of action by of successor of decedent)]. For discussion of this procedure, see [ii], *below*.

The refusal to permit a substitution of a personal representative finally eliminates him or her as a party. The refusal is treated as a final judgment from which an appeal can be taken [*Majors v. County of Merced (1962) 207 Cal. App. 2d 427, 432, 24 Cal. Rptr. 610* ; *Walsh v. Superior Court (1928) 92 Cal. App. 454, 456, 268 P. 442]* .

[ii] Successor of Decedent Under Summary Procedure

If the money or personal property claimed in an affidavit or declaration executed under the summary provisions for the collection or transfer of personal property of a decedent (*Prob. Code § 13100 et seq.*) is the subject of a pending proceeding or cause of action in which the decedent was a party, the successor of the decedent (defined in *Prob. Code § 13006*) is entitled to be substituted as a party in place of the decedent by making a motion under *Code Civ. Proc. § 377.31*, without procuring letters of administration or awaiting probate of the will [*Prob. Code § 13107.5*]. This procedure is only available if the gross value of the decedent's estate, excluding property listed in *Prob. Code § 13050*, does not exceed $100,000 [*Prob. Code §§ 13100, 13101(a)(5)*] and either no administration of the decedent's estate has been or is being conducted in California or the personal representative consents to use of the procedure [*Prob. Code § 13108*]. For discussion of this affidavit or declaration procedure, see Ch. 441, *Probate: Disposition Without Administration* . If this summary procedure is not available, the decedent's personal representative will be the appropriate party to substitute [*see Code Civ. Proc. § 377.31*; for discussion, *see* [i], *above*].

Under the summary procedure, the successor of the decedent must file the affidavit or declaration with the court when the motion is made. For purposes of *Code Civ. Proc. § 377.31*, a successor of the decedent who complies with the affidavit or declaration procedure of *Prob. Code § 13100 et seq.* is considered a successor in interest of the decedent [*Prob. Code § 13107.5*]. For a form of notice of motion that may be used to substitute decedent's successor for the plaintiff, see *§ 21.100*.

[c] Substitution on Defendant's Death

[i] To Proceed Against Personal Representative

An action or proceeding pending against the decedent at the time of death may not be continued against the decedent's personal representative unless all of the following conditions are satisfied [*Prob. Code § 9370(a)*]:

- A claim is first filed as provided in *Prob. Code § 9000 et seq.*
- The claim is rejected in whole or in part.
- Within three months after the notice of rejection is given, the plaintiff applies to the court in which the action or proceeding is pending for an order to substitute the personal representative in the action or proceeding. This requirement, however, applies only if the notice of rejection contains a statement that the plaintiff has three months within which to apply for an order for substitution.

The plaintiff must prove compliance with *Prob. Code § 9370* to recover in the action against property in the decedent's estate [*Prob. Code § 9370(b)*].

For discussion and forms for filing creditor claims under *Prob. Code § 9000 et seq.*, see Ch. 454, *Probate: Claims Against the Estate* . For a form of notice of motion to substitute the personal representative for a deceased party, see § 21.103. For a form of supplemental complaint alleging the defendant's death and compliance with the claims procedure, see *§ 21.108*.

[ii] Decedent's Liability Covered by Insurance

An action to establish a decedent's liability may be continued against the decedent's estate without the need to join as a party the decedent's personal representative or successor in interest if the decedent's liability was protected by insurance [*Prob. Code § 550(a)*]. If, however, the personal representative is not substituted in the action, the plaintiff cannot recover damages in excess of the insurance policy limits [*see Prob. Code § 554*]. The plaintiff need not file a claim in

the decedent's estate if the plaintiff pursues only the potential insurance proceeds, but must file a claim to proceed against the personal representative and property in the estate [*Prob. Code §§ 554, 9370, 9390(b)*]. If the plaintiff does file a claim, the personal representative may either be joined as a party to the *Prob. Code §§ 550-555* action against the insurer, or the *Prob. Code §§ 550-555* action against the insurer may be consolidated with an action against the personal representative [*Prob. Code §§ 552(c), 554(b)(1), 9390(b)*; *see Prob. Code § 550(b)* (remedy as cumulative)].

The plaintiff must name as the defendant, "Estate of (name of decedent), Deceased" and must serve a summons on a person designated in writing by the insurer or, if none, on the insurer. Further proceedings are in the name of the estate, but otherwise are conducted in the same manner as if the action was against the personal representative [*Prob. Code § 552(a)*]. The insurer may deny or otherwise contest its liability either under *Prob. Code § 550 et seq.* or by an independent action. Unless the personal representative is joined as a party, a judgment in either action does not adjudicate rights by or against the estate [*Prob. Code § 553*].

In an action being continued or commenced against an insurer under *Prob. Code § 550 et seq.*, the court may order the appointment and substitution of a personal representative as the defendant for good cause, either on motion of an interested person or on its own motion [*Prob. Code § 552(b)*; *see Prob. Code §§ 550(a), 551* (commencing as well as continuing an action authorized)]. For forms of notice of motion, declaration, and order for the appointment and substitution of a personal representative, see *§§ 21.105 -21.107*; for a form of supplement complaint, see *§ 21.108*. For discussion of commencing an action against an insurer under *Prob. Code § 550 et seq.* as opposed to continuing a pending action, see Ch. 345, *Limitation of Actions* .

These procedures apply to cases commenced on or after July 1, 1989 [*Prob. Code § 555(a)*]. If the action was commenced before July 1, 1989, the law in effect prior to that date continues to apply to the action [*Prob. Code § 555(b)*; *see* former *Code Civ. Proc. § 385(b)*; former Prob. Code §§ 709, 709.1, 721; *see also Recommendations Relating to Probate Law*, 19 Cal. L. Revision Comm'n Reports 701, 904-905 (1988)].

[5] Death After Submission of Case

If a party dies after trial and submission of the case to a judge sitting without a jury for decision or after a verdict on any issue of fact, and before judgment, the court may nevertheless render judgment in the case [*Code Civ. Proc. § 669*; *see Code Civ. Proc. §§ 686.010, 686.020*; *Prob. Code §§ 9002, 9150, 9300-9304, 9391, 9399* (enforcement of judgment after death of judgment debtor or judgment creditor); *see also* 15 Cal. L. Revision Comm'n Reports (1979) 1331-1345].

[6] Notice of Motion

In substituting parties, use of a noticed motion is the preferred practice. However, there is generally no requirement that notice be given, and an order of substitution may be obtained by stipulation or by ex parte application [*Campbell v. West (1892) 93 Cal. 653, 656, 29 P. 219* ; *Chatten v. Martell (1958) 166 Cal. App. 2d 545, 553, 333 P.2d 364* ; *Macmillan Petroleum Corp. v. Griffin (1950) 99 Cal. App. 2d 523, 526, 222 P.2d 69]* . However, if the motion is made by an adverse party, a noticed motion is required [*Higgins v. Kay (1914) 168 Cal. 468, 471-472, 143 P. 710]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSubstitutionsDeath of PartyCivil ProcedurePartiesSubstitutionsTransfers of InterestsCivil ProcedurePartiesCapacity of PartiesTrusteesCivil ProcedurePartiesCapacity of PartiesRepresentativesBankruptcy LawCase AdministrationExaminers, Officers & TrusteesDuties & FunctionsCapacities & Roles

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§ 21.28 Supplemental Pleading When Child Support Is at Issue

In any action in which the support of children is an issue, the plaintiff and defendant, or petitioner and respondent, may file a supplemental complaint seeking a judgment or order of paternity or support for another child of the parents of the child whose paternity and support are already in issue before the court [*Code Civ. Proc. § 464(b)*].

A supplemental complaint for paternity or child support may be filed without leave of court either before or after final judgment in the underlying action [*Code Civ. Proc. § 464(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental PleadingsFamily LawChild SupportGeneral Overview

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§ 21.29 Amended and Supplemental Pleadings in Family Law Proceedings

Amendments to pleadings, amended pleadings, and supplemental pleadings under the Family Law Rules [*Cal. Rules of Ct., Rule 5.10 et seq.*] may be served and filed in conformity with the provisions of law applicable to those matters in civil actions generally, but the petitioner is not required to file a reply if the respondent has filed a response. If both parties have filed pleadings, no default may be entered on an amended pleading of either party [*Cal. Rules of Ct., Rule 5.108(b)*].

In any proceeding for legal separation in which neither party, at the time the proceeding was commenced, has complied with the residence requirements of *Fam. Code § 2320*, either party may, on complying with the residence requirements, amend his or her petition or responsive pleading in the proceeding to request that a judgment decreeing the dissolution of the marriage be entered. The date of the filing of the amended petition or pleading is deemed to be the date of commencement of the proceeding for the dissolution of the marriage for the purposes only of the residence requirement [*Fam. Code § 2321*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresCivil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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§ 21.30 Amendments in Joint Debtor Proceedings

Joint debtor proceedings under *Code Civ. Proc. §§ 989-994* are authorized when an alleged joint debtor was named or joined as a party and a joint liability cause of action was stated against it, but it was not served with summons [*Meller & Snyder v. R & T Properties, Inc. (1998) 62 Cal. App. 4th 1303, 1307-1310, 73 Cal. Rptr. 2d 740]* . For discussion and forms relating to these proceedings, see *Ch. 254, Executions and Enforcement of Judgments, § 254.340* et seq.

Under *Code Civ. Proc. § 993*, parties in joint debtor proceedings can amend their pleadings to cure technical defects or matters of form such as to substitute the true names of parties sued as fictitious defendants, but Section 993 does not authorize a plaintiff to amend the complaint to raise new issues of fact giving rise to a different legal obligation [*Meller & Snyder v. R & T Properties, Inc. (1998) 62 Cal. App. 4th 1303, 1311-1312, 73 Cal. Rptr. 2d 740]* .

When an alleged join debtor is sued under a fictitious name, the complaint must be amended to substitute its true identity, otherwise a court is without power to enter a judgment against it under *Code Civ. Proc. § 989 et seq.* [*Meller & Snyder v. R & T Properties, Inc. (1998) 62 Cal. App. 4th 1303, 1311, 73 Cal. Rptr. 2d 740]* . The trial court must rule on the question whether the plaintiff has complied with *Code Civ. Proc. § 474* before the court may enter judgment against the defendant in joint debtor proceedings [*Meller & Snyder v. R & T Properties, Inc. (1998) 62 Cal. App. 4th 1303, 1311-1312, 73 Cal. Rptr. 2d 740]* .

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§ 21.31 Reclassification of Case by Amended Pleading

If a case is reclassified by an amended complaint, cross-complaint, amended cross-complaint, or other pleading under *Code Civ. Proc. §§ 403.020* or *403.030* and the reclassification fee, if required, is paid, the clerk will promptly reclassify the cases [*Code Civ. Proc. § 403.020(a)*], and the caption must indicate that the action or proceeding is reclassified by this pleading [*Cal. Rules of Ct., Rule 2.111(11)*]. If a case is reclassified by stipulation under *Code Civ. Proc. § 403.050*, the title of the stipulation must state that the action or proceeding is reclassified by the stipulation. The caption or title must state that the case is a limited civil case reclassified as an unlimited civil case, or an unlimited civil case reclassified as a limited civil case, or other words to that effect [*Cal. Rules of Ct., Rule 2.111(10)*].

An amendment to an initial pleading is treated the same manner as an amended initial pleading [*Code Civ. Proc. § 403.020(b)*].

For discussion of the jurisdictional classification of cases and for discussion and forms relating to reclassification of cases, see Ch. 324, *Jurisdiction: Subject Matter* .

Legal Topics:

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

§§ 21.32[Reserved]

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§ 21.40 Related Matthew Bender Publications

For memoranda in support of and in opposition to motions to amend pleadings, see California Points and Authorities, Ch. 16, *Amended and Supplemental Pleadings*

For memoranda in support of and in opposition to a motion to amend a pleading and a pretrial order, see California Points and Authorities, Ch. 180, *Pretrial Proceedings*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 21.41 State Statutes

[1] Amendment With Leave of Court

Amendment to plead cause of action subject to compulsory cross complaint provisions of *Code Civ. Proc. §§ 426.10-426.60*. *Code Civ. Proc. § 426.50*

Amendment because of variance between pleading and proof. *Code Civ. Proc. §§ 469-471*

Amendment after demurrer to pleading is sustained. *Code Civ. Proc. §§ 472a-472c*

Amendment after motion to strike is granted. *Code Civ. Proc. § 472a(d)*

Amendments to pleadings on such terms as may be just. *Code Civ. Proc. § 473*

Amendment of pleading or pretrial order before or after commencement of trial in furtherance of justice. *Code Civ. Proc. § 576*

[2] Amendment Without Leave of Court

Amendments "of course." *Code Civ. Proc. § 472*

Amendment to show true name of fictitiously named defendant. *Code Civ. Proc. § 474*

[3] Particular Amendments

Amendment of pleadings in proceeding for legal separation. *Fam. Code § 2321*

Amendment of pleadings on change of venue. *Code Civ. Proc. § 399*

Amendment of conclusions of law inconsistent with findings of fact. *Code Civ. Proc. § 663(1)*

Amendment of pleadings in proceedings after judgment against joint debtors. *Code Civ. Proc. § 993*

Amendment of complaint in unlawful detainer action. *Code Civ. Proc. §§ 1161.1, 1173*

Amendment of will contest. *Prob. Code § 8251(b)*

[4] Pleadings

Defined. *Code Civ. Proc. § 420*

Permissible pleadings enumerated. *Code Civ. Proc. § 422.10*

Contents of complaint or cross complaint. *Code Civ. Proc. § 425.10*

Compulsory cross complaints. *Code Civ. Proc. § 426.30*

Form and content of answer. *Code Civ. Proc. § 431.30*

[5] Procedure After Amendment

All pleadings subsequent to complaint required to be filed and served. *Code Civ. Proc. § 465*

Amended complaint required to be filed and served. *Code Civ. Proc. § 471.5*

Amended complaint; time to answer. *Code Civ. Proc. § 471.5(a)*

Amended answer; time to demur. *Code Civ. Proc. § 471.5(b)*

Default for failure to answer, demur, or move to strike amended complaint. *Code Civ. Proc. § 586(a)(1)*

Default for failure to amend answer after demurrer is sustained. *Code Civ. Proc. § 586(a)(5)*

Default for failure to amend answer after motion to strike answer is granted in whole or in part. *Code Civ. Proc. § 586(a)(7)*

Order allowing or refusing to allow amendment of pleading deemed excepted to. *Code Civ. Proc. § 647*

Amended pleading required to be served on party whose default has been entered. *Code Civ. Proc. § 1010*

Extension of time for amendment. *Code Civ. Proc. §§ 1054, 1054.1*

[6] Substitution of Parties

Continuation of action when party transfers interest in subject of action. *Code Civ. Proc. § 368.5(a)*

Continuation of action by or against representative of disabled party. *Code Civ. Proc. § 375*

Survival of actions. *Code Civ. Proc. § 377.20*

Continuation of action by or against representative or successor in interest of deceased party. *Code Civ. Proc. § 377.30 et seq.*

Continuation of action if deceased defendant covered by liability insurance. *Prob. Code §§ 550 et seq., 9390*

Continuation of action pending against deceased defendant at time of death commenced after July 1, 1989. *Prob. Code § 9370*

Transitional provisions governing continuation of action pending against decedent at time of death. *Prob. Code §§ 555, 9399*

Continuation of action for damages commenced before July 1, 1989, if deceased defendant covered by liability insurance. Former Prob. Code §§ 709.1, 721

[7] Supplemental Pleadings

Supplemental complaint or answer alleging facts material to case occurring after former complaint or answer. *Code Civ. Proc. § 464*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 21.42 California Rules of Court

While the title of the case on each initial complaint or cross-complaint requires that the name of each party be listed on a separate line at the left margin of the page, on any subsequent pleading or paper it is sufficient in the title of the case to (1) state the name of the first party on each side, with appropriate indication of other parties, and (2) state that a cross-action or cross-actions are involved, if applicable. *Cal. Rules of Ct., Rule 2.111(4)*

Caption of amended pleading required to indicate if case has been reclassified as a limited or unlimited civil case. *Cal. Rules of Ct., Rule 2.111(11)*

On ruling on demurrer, leave to amend within 10 days deemed granted unless otherwise ordered, except in actions in forcible entry, forcible detainer, or unlawful detainer, in which five days are granted. *Cal. Rules of Ct., Rules 3.1100, 3.1320(g)*

Amendment by page and line except when permission granted for alteration. *Cal. Rules of Ct., Rules 3.1100, 3.1324(b)*

Amended and supplemental pleadings in proceedings under Family Law Rules (*Cal. Rules of Ct., Rule 5.10 et seq.*). *Cal. Rules of Ct., Rule 5.108(b)*

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§ 21.43 Decisions

[1] Amendment Substituting True Name

Where counsel did not state the dates upon which he learned the names of the Doe defendants and did not explain why their identities could not have been discovered sooner, as the record indicated that counsel had access to the information sooner, and Doe defendants were brought into the case less than one month before the case was set to begin trial, a two-year delay was unreasonable and prejudicial. *A.N. v. County of Los Angeles (2009) 171 Cal. App. 4th 1058, 1068-69, 90 Cal. Rptr. 3d 293*

Plaintiff who knew but forgot defendant's identity and did not avail herself of readily available information that would have refreshed plaintiff's recollection of defendant's identity, was not entitled to use *Code Civ. Proc. § 474* to amend her complaint after statute of limitations had run; under these circumstances, there was no good faith, bona fide ignorance as required by Section 474. *Woo v. Superior Court (1999) 75 Cal. App. 4th 169, 180, 89 Cal. Rptr. 2d 20* (Fourth Dist., Div. One; criticizing *Balon v. Drost (1993) 20 Cal. App. 4th 483, 25 Cal. Rptr. 2d 12 (First Dist., Div. Two))*

Failing to inquire as to defendant's name or identity constitutes "ignorance" for purposes of *Code Civ. Proc. § 474. Balon v. Drost (1993) 20 Cal. App. 4th 483, 488-490, 25 Cal. Rptr. 2d 12*

Trial court abused its discretion in denying plaintiff's motion to amend to name correct defendant after statute of limitations expired when defendants conducted themselves for three years as though properly named, and defense counsel took willful action to mask plaintiff's error from plaintiff until eve of arbitration. *Cuadros v. Superior Court (1992) 6 Cal. App. 4th 671, 677, 8 Cal. Rptr. 2d 18*

Plaintiff's ignorance of insurance assets in decedent driver's estate, revealed only during discovery in motor vehicle action against owner, did not constitute ignorance of facts giving rise to cause of action; therefore, plaintiff was not allowed to substitute estate for Doe defendant after applicable statute of limitations had expired. *Von Gibson v. Estate of Lynch (1988) 197 Cal. App. 3d 725, 729-730, 243 Cal. Rptr. 50*

Sustaining demurrer without leave to amend complaint was abuse of discretion when plaintiff moved to amend to cure

failure to allege that defendants' true names were being substituted for fictitious names, since plaintiff's prior act of naming defendants as if they were new parties after statute of limitations had expired was procedural error and easily curable by amendment. *Streicher v. Tommy's Electric Co. (1985) 164 Cal. App. 3d 876, 884-885, 211 Cal. Rptr. 22*

Plaintiff cannot avoid statute of limitations by naming fictitious defendant and then, after statute has run, add by amendment defendant whose identity and capacity were known from outset. *Pabitzky v. Frager (1985) 164 Cal. App. 3d 401, 403-404, 210 Cal. Rptr. 426*

Plaintiff is not precluded from substituting true name of Doe defendant after statute of limitations has run, even though plaintiff originally knew of defendant's existence, when plaintiff was originally ignorant of facts giving rise to cause of action against that defendant. *Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 616-617, 199 Cal. Rptr. 644*

Plaintiff is not precluded from using fictitious name procedure [*Code Civ. Proc. § 474*] because of unreasonable delay in amending complaint unless defendant suffered specific prejudice from the delay. *Barrows v. American Motors Corp. (1983) 144 Cal. App. 3d 1, 9-10, 192 Cal. Rptr. 380*

Time for return of summons under former *Code Civ. Proc. § 581a* (*now see Code Civ. Proc. §§ 583.210, 583.240*) starts from time of filing original complaint and not from time of filing amended complaint substituting defendant's true name for fictitious name. *Nelson v. State of California (1982) 139 Cal. App. 3d 72, 76, 188 Cal. Rptr. 479*

[2] Amendment Conforming Pleadings to Proof

Amendment of complaint to conform to proof is not allowed to inject new issue that would substantially prejudice defendant. *Trafton v. Youngblood (1968) 69 Cal. 2d 17, 32, 69 Cal. Rptr. 568, 442 P.2d 648*

Amendments at and after trial. *Mountain States Creamery Co. v. Tagerman (1952) 39 Cal. 2d 355, 356-357, 246 P.2d 21*

Pleading may be amended at trial unless adverse party can establish prejudice; when party allowed to prove facts to establish one cause of action, amendment that would allow same facts to establish another cause of action is favored, and trial court abuses discretion by prohibiting amendment when it would not prejudice another party; variance between pleading and proof does not justify denial of amendment unless unamended pleading misled adverse party to his or her prejudice in maintaining his or her action or defense on merits. *South Bay Building Enterprises, Inc. v. Riviera Lend-Lease, Inc. (1999) 72 Cal. App. 4th 1111, 1124, 85 Cal. Rptr. 2d 647*

Trial court did not abuse its discretion in denying defendant's motion made at trial to amend answer to conform to proof to allege defense that action sued on was barred by mandatory cross complaint statute (*Code Civ. Proc. § 426.30*), when motion was made more than three years after defendant answered amended complaint and plaintiff was prejudiced by delay. *Hulsey v. Koehler (1990) 218 Cal. App. 3d 1150, 1159, 267 Cal. Rptr. 523*

Amendment to allege new cause of action to conform to facts that were proved to establish pleaded cause of action is favored unless amendment would mislead other party in maintaining action or defense on merits. *Brady v. Elixir Industries (1987) 196 Cal. App. 3d 1299, 1303, 242 Cal. Rptr. 324 , disapproved on other grounds Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022*

Amendment of cross complaint to conform to proof was improperly allowed when facts alleged in amendment were entirely outside cause of action stated in original cross complaint in that facts had not even occurred at time original cross complaint was filed; such facts must be brought in, if at all, by supplemental cross complaint. *Earp v. Nobmann*

(1981) 122 Cal. App. 3d 270, 286-287, 175 Cal. Rptr. 767 , disapproved on other grounds Silberg v. Anderson (1990) 50 Cal. 3d 205, 219, 266 Cal. Rptr. 638, 786 P.2d 365

Amendment to conform to proof properly denied when there is complete failure of proof at trial. *Johnston v. County of Yolo (1969) 274 Cal. App. 2d 46, 51, 79 Cal. Rptr. 33*

Amendment to conform to proof properly denied when evidence is received on issue involved in amendment and court determines that no relief should be given. *Amerson v. Christman (1968) 261 Cal. App. 2d 811, 822-824, 68 Cal. Rptr. 378*

Motion to amend complaint to conform to proof to increase damages was deemed granted for purpose of appeal when judgment was rendered for higher amount. *Harm v. Frasher (1960) 181 Cal. App. 2d 405, 420, 5 Cal. Rptr. 367*

Amendment to conform to proof is proper when evidence is sufficient to support amendment. *Clark v. Pullins (1959) 171 Cal. App. 2d 703, 711, 341 P.2d 73*

[3] Failure to Amend to Conform to Proof

In contested cause, absent amendment to complaint to conform to proof, court is not permitted to award plaintiff sum in excess of amount of damages claimed to have been sustained; allegations in pleading, and not prayer, determine maximum amount of compensatory damages that may be awarded; however, since parties actually tried issues of damages above limits stated in complaint, there was no surprise or prejudice to defendant, and although it is lamentable that plaintiff failed to move to amend to conform to proof, judicial economy would be ill served by requiring retrial because of that technicality. *Castaic Clay Manufacturing Co. v. Dedes (1987) 195 Cal. App. 3d 444, 449, 240 Cal. Rptr. 652*

Amendment of pleadings to conform to proof is not necessary when trial court properly received evidence on pleadings as filed from which relief sought by proposed amended pleadings could be granted; when case is tried as though issues were before the court, parties waive any defect in pleadings. *Amerson v. Christman (1968) 261 Cal. App. 2d 811, 822-824, 68 Cal. Rptr. 378*

[4] Leave of Court to Amend Pleading

[a] Discretion to Be Liberally Exercised

Leave to amend a complaint is entrusted to the sound discretion of the trial court. The exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse. More importantly, the discretion to be exercised is that of the trial court, not that of the reviewing court. Thus, even if the reviewing court might have ruled otherwise in the first instance, the trial court's order will yet not be reversed unless, as a matter of law, it is not supported by the record. *Branick v. Downey Savings & Loan (2006) 39 Cal. 4th 235, 242, 46 Cal. Rptr. 3d 66*

Leave to amend complaint entrusted to trial court's sound discretion; there is liberal policy permitting amendment. *Haley v. Dow Lewis Motors, Inc. (1999) 72 Cal. App. 4th 497, 506-507, 510, 85 Cal. Rptr. 2d 352*

Generally, leave to amend must be granted liberally, provided there is no statute of limitations concern, nor any prejudice to opposing party, such as delay in trial, loss of critical evidence, or added preparation costs. *Solit v. Tokai Bank (1999) 68 Cal. App. 4th 1435, 1448, 81 Cal. Rptr. 2d 243*

Leave to amend is in general required to be liberally granted provided there is no statute of limitations concern; leave to

amend may be denied however, if there is prejudice to opposing party, such as delay in trial, loss of critical evidence, or added costs of preparation. *Kolani v. Gluska (1998) 64 Cal. App. 4th 402, 412, 75 Cal. Rptr. 2d 257*

At each stage in proceedings policy is one of great liberality in allowing amendments to pleadings; application to amend pleading addressed to trial court's sound discretion. *Berman v. Bromberg (1997) 56 Cal. App. 4th 936, 945, 65 Cal. Rptr. 2d 777*

Trial court has discretion to allow amendments to pleading in furtherance of justice (*Code Civ. Proc. § 473*); discretion is to be exercised liberally in favor of amendments, because judicial policy favors resolution of all disputed matters in same lawsuit. *Kittredge Sports Co. v. Superior Court (1989) 213 Cal. App. 3d 1045, 1047, 261 Cal. Rptr. 857*

General rule as one of great liberality in allowing amending pleadings prior to and even during trial. *Hooper v. Romero (1968) 262 Cal. App. 2d 574, 580, 68 Cal. Rptr. 749*

[b] Amendment During Trial

Allowance of amendments to conform to the proof rests largely in the discretion of the trial court, and its determination will not be disturbed on appeal unless it clearly appears that such discretion has been abused. Such amendments have been allowed with great liberality, and no abuse of discretion is shown unless by permitting the amendment new and substantially different issues are introduced in the case or the rights of the adverse party prejudiced. Conversely, amendments of pleadings to conform to the proofs should not be allowed when they raise new issues not included in the original pleadings and upon which the adverse party had no opportunity to defend. *Trafton v. Youngblood (1968) 69 Cal. 2d 17, 31, 69 Cal. Rptr. 568, 442 P.2d 648*

The basic rule applicable to amendments to conform to proof during trial is that the amended pleading must be based upon the same general set of facts as those upon which the cause of action or defense as originally pleaded was grounded, and trial court should be guided by two general principles: 1) whether facts or legal theories are being changed, and 2) whether the opposing party will be prejudiced by the proposed amendment. *Garcia v. Roberts (2009) 173 Cal. App. 4th 900, 910, 93 Cal. Rptr. 3d 286*

Under *Code Civ. Proc. § 576*, providing in part that any judge after commencement of trial in furtherance of justice may allow amendment of any pleading, trial judge has discretion to permit amendment to pleadings during course of trial; in exercising discretion, trial court as required to consider (1) whether facts or legal theories are being changed and (2) whether opposing party will be prejudiced by proposed amendment; amended pleading must be based on same general set of facts as those on which cause of action or defense as originally pleaded was grounded. *City of Stanton v. Cox (1989) 207 Cal. App. 3d 1557, 1563, 255 Cal. Rptr. 682*

Amendment of complaint after plaintiff rests case in chief is within discretion of trial court. *Oakes v. McCarthy Co. (1968) 267 Cal. App. 2d 231, 262, 73 Cal. Rptr. 127*

[c] Effect of Delay

Even if good amendment proposed in proper form, unwarranted delay in presenting it may itself be valid reason for denial. *Record v. Reason (1999) 73 Cal. App. 4th 472, 486, 86 Cal. Rptr. 2d 547*

Courts ordinarily exercise liberality in permitting amendments at any stage of proceeding; in particular, liberality is displayed in allowing amendments to answers, because defendant denied leave to amend is permanently deprived of defense; but whether amendment will be allowed rests in sound discretion of court, and courts are much more critical of proposed amendments to answers when offered after long unexplained delay or on eve of trial, or when there is a lack of

diligence, or there is prejudice to other party. *Hulsey v. Koehler (1990) 218 Cal. App. 3d 1150, 1159, 267 Cal. Rptr. 523*

Trial court's denial of motion to file amended cross complaint for delay in making motion as abuse of discretion when delay was caused by cross defendant's failure to deliver discovery materials. *Arthur L. Sachs, Inc. v. City of Oceanside (1984) 151 Cal. App. 3d 315, 319-320, 198 Cal. Rptr. 483*

Long unexcused delay as basis to deny permission to amend to interject new issue requiring discovery. *Nelson v. Specialty Records, Inc. (1970) 11 Cal. App. 3d 126, 139, 89 Cal. Rptr. 540*

[d] Denial for Failure to State Cause of Action

Leave to amend was properly denied to a group of governmental entities in a class action suit against lead manufacturers. The plaintiffs sought leave to file an amended complaint adding a cause of action for continuing trespass. The trial court denied leave on the ground that the proposed allegations did not state a cause of action. The court of appeal affirmed, holding that there was no cause of action for trespass in this instance because the pleadings clearly established that the lead was placed on plaintiffs' property either by the plaintiffs or with their consent. Where the owner has consented to the entry of the product onto the land there can be no cause of action for trespass. The court of appeal held that the trial court did not abuse its discretion in denying leave to file an amended pleading adding the proposed trespass cause of action because the proposed allegations did not, in fact, state a trespass cause of action. *County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal. App. 4th 292, 315, 40 Cal. Rptr. 3d 313*

While amendments are generally liberally construed, failure of proposed amendment to state facts sufficient to constitute cause of action supports order denying motion to amend. *La Jolla Village Homeowners' Assn. v. Superior Court (1989) 212 Cal. App. 3d 1131, 1141, 261 Cal. Rptr. 146*

Leave to amend pleading is properly denied when facts are not in dispute and nature of plaintiff's claim is clear, but, under substantive law, no liability exists. *Central National Ins. Co. v. California Ins. Guarantee Assn. (1985) 165 Cal. App. 3d 453, 460, 211 Cal. Rptr. 435*

[e] Examples of When Granting Leave to Amend Is Proper or Denying Leave Is Abuse of Discretion

Civ. Code § 714.10(b) does not divest the trial court of its authority, under *Code Civ. Proc. § 473*, to grant leave to amend; in appropriate circumstances, amendment after a sustained demurrer is permissible. *Central Concrete Supply Co., Inc. v. Michael Bursak (2010) 182 Cal. App. 4th 1092, 1103, 105 Cal. Rptr. 3d 909*

Where plaintiffs presented factual assertions in their original Government Code claim to defendant city that fences erected upon city property prevent access to the sidewalk area, and block the sight lines upon entering and exiting their garage, these assertions support both a public nuisance per se and specific injury and plaintiffs are entitled to amend their complaint to allege a valid cause of action for public nuisance. *Kempton v. City of Los Angeles (2008) 165 Cal. App. 4th 1344, 1348, 81 Cal. Rptr. 3d 852*

The mantra "incorporated by reference" is not sacrosanct and under the rule of liberal construction cannot defeat otherwise adequate pleading; if all that was needed was to state words "incorporated by reference," trial court should have allowed cross complainant to amend further its fifth amended cross-complaint to add those words; denying cross complainant opportunity to amendment was abuse of discretion. *Ludgate Ins. Co. v. Lockheed Martin Corp. (2000) 82 Cal. App. 4th 592, 609, 98 Cal. Rptr. 2d 277*

When plaintiffs filed chapter 7 bankruptcy petition and thereafter filed complaint alleging several causes of action some

of which accrued before filing of bankruptcy petition, trial court erred in granting defendants' motion for judgment on the pleadings and denying plaintiffs' motion to amend complaint to substitute bankruptcy trustee as plaintiff; causes of action that accrue after filing bankruptcy petition are not property of bankruptcy estate, and thus, granting defendants' motion as to them was improper; plaintiffs were ignorant of viability of causes of action accruing before filing of bankruptcy petition because of what they were told by their bankruptcy attorney and leave to amend as to those causes of action should have been granted. *Haley v. Dow Lewis Motors, Inc. (1999) 72 Cal. App. 4th 497, 503-509, 85 Cal. Rptr. 2d 352*

Trial court erred in denying cross-complainant's motion for leave to file second amended cross-complaint when trial court erroneously concluded that cross-complainant's earlier release of mechanic's lien prevented cross-complainant from filing any valid mechanic's lien thereafter; trial court should have considered cross-complainant's motion for leave to file amended pleadings on merits, to wit, on whether cross-complainant, the party seeking to amend, was not diligent in offering amendment after knowledge of facts, or whether delay prejudiced adverse party. *Solit v. Tokai Bank (1999) 68 Cal. App. 4th 1435, 1448, 81 Cal. Rptr. 2d 243*

Absent statute of limitations concern or prejudice to opposing party such as delay in trial, loss of critical evidence, or added cost of preparation, trial court should have granted leave to amend, rather than sustaining demurrer without leave to amend, when it knew of potentially viable claim at time of sustaining of demurrer, even though plaintiff did not request leave to amend. *Kolani v. Gluska (1998) 64 Cal. App. 4th 402, 405, 412, 75 Cal. Rptr. 2d 257*

Leave to amend complaint was proper when circumstances surrounding motion for judgment on pleadings showed that plaintiff's complaint excusably confused similar names of seller and manufacturer of automobile, and no prejudice to defendant was shown. *Prince v. Jensen Motors, Inc. (1983) 139 Cal. App. 3d 653, 655-656, 188 Cal. Rptr. 911*

Refusal to allow amendment of pleading to correct minor technical error (wrong document attached) was error when no significant delay or prejudice to adverse parties was suffered. *Higgins v. Del Faro (1981) 123 Cal. App. 3d 558, 565-566, 176 Cal. Rptr. 704*

Denial of motion before trial to amend complaint in action by purchaser against seller of real property for damages for fraud and breach of warranty contained in sales agreement to correct misdesignation of zoning and change values of property at time of sale was error; amendment for such purpose as commonly granted even after commencement of trial. *Szabo v. Superior Court (1978) 84 Cal. App. 3d 839, 845, 148 Cal. Rptr. 837*

Trial court's order substituting correct name of plaintiff was proper. *Bank of America v. Superior Court (1973) 35 Cal. App. 3d 555, 557, 110 Cal. Rptr. 709*

Trial court is not allowed to summarily enter judgment of dismissal in sustaining objection to introduction of evidence on ground that complaint fails to state cause of action without allowing plaintiff leave to amend, if leave is requested and if it appears defect in pleading can be remedied. *McFaddin v. H. S. Crocker Co. (1963) 219 Cal. App. 2d 585, 594, 33 Cal. Rptr. 389* (criticized on other grounds in *DeCesare v. Lembert (1983) 144 Cal. App. 3d 20, 23-24, 192 Cal. Rptr. 354*)

[f] Procedure

Party requesting leave to amend required to disclose nature of amendment either in notice of motion or by presenting proposed amendment. *Stockton v. Newman (1957) 148 Cal. App. 2d 558, 562, 307 P.2d 56*

Notice of motion and supporting affidavit are prerequisites of leave to amend complaint after complaint has been amended once as of course. *Citizens' etc. Pensions v. Bd. of Supervisors (1949) 91 Cal. App. 2d 658, 661, 205 P.2d*

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[5] Motion to Strike if Leave Not Obtained

Motion to strike amended pleading filed without leave of court. *Loser v. E.R. Bacon Co. (1962) 201 Cal. App. 2d 387, 390, 20 Cal. Rptr. 221*

[6] Inconsistency With Previous Pleadings

Sham pleading doctrine does not allow a trial court to demand the production of admissible evidence, specifically excluding plaintiff's own testimony, to support the proposed amendment to the complaint while at the same time preventing plaintiff from conducting any discovery. Although a trial court has powerful tools to shield parties and nonparties from abusive litigation tactics, it does not have the power to demand, as the condition for leave to amend, that a party present admissible evidence sufficient to withstand summary judgment. *Sanai v. Saltz (2009) 170 Cal. App. 4th 746, 770, 88 Cal. Rptr. 3d 673*

Sham pleading doctrine did not apply where plaintiff offered a plausible explanation for the amendment and demonstrated that a mistake had been made in drafting the original pleading. The sham pleading doctrine, under which plaintiffs are precluded from amending complaints without explanation to omit harmful allegations, is not intended to prevent honest complainants from correcting erroneous allegations or to prevent correction of ambiguous facts; instead, it is intended to enable courts to prevent an abuse of process. *Deveny v. Entropin, Inc. (2006) 139 Cal. App. 4th 408, 426-427, 42 Cal. Rptr. 3d 807*

Sham pleading rule should not be applied when plaintiff seeks to change legal theory of recovery and legal conclusions plaintiff seeks to draw from underlying factual events, and also seeks to omit factual allegations irrelevant and immaterial to new legal theories asserted; third amended complaint alleged different legal theories based on same set of general facts as set out in superseded pleadings and prior omitted allegations pertaining to plaintiff's lack of intent and lack of agreement to sell plaintiff's partnership interest, even if true and read into the third amended complaint, were immaterial to the legal theories set out in that complaint and thus did not undermine or destroy causes of action in third amended complaint; under these circumstances, sham pleading rule inapplicable and no need for the plaintiff to explain reasons for amended pleading because there were no inconsistencies in underlying material or relevant factual allegations. *Berman v. Bromberg (1997) 56 Cal. App. 4th 936, 946-949, 65 Cal. Rptr. 2d 777*

Plaintiff may not discard factual allegations of prior complaint, or avoid them by contradictory averments, in superseding, amended pleading; even if appellant were given leave to amend, it would not be allowed to amend complaint to state fact directly contradictory to one previously stated. *Continental Ins. Co. v. Lexington Ins. Co. (1997) 55 Cal. App. 4th 637, 646, 64 Cal. Rptr. 2d 116*

After amended pleading has been filed, courts generally disregard original pleading, but not when amended complaint attempts to avoid defects set forth in prior complaint by ignoring them; court may examine prior complaint to ascertain whether amended complaint is merely sham. *Amid v. Hawthorne Community Medical Group, Inc. (1989) 212 Cal. App. 3d 1383, 1387, 261 Cal. Rptr. 240*

Allegations of fact in verified complaint that are subsequently omitted or contradicted in amended complaint continue to bind plaintiff; rule is useful to defeat abuses of privilege to amend and to discourage sham and untruthful pleadings, but is not intended to prevent honest plaintiffs from correcting erroneous allegations of generic terms or to prevent correction of ambiguous statements of fact. *Contreras v. Blue Cross of California (1988) 199 Cal. App. 3d 945, 950, 245 Cal. Rptr. 258*

Leave to amend is not allowed when amendment contradicts earlier allegations absent very satisfactory evidence that clearly shows mistake or inadvertence as to earlier allegation. *American Advertising & Sales Co. v. Mid-Western Transport (1984) 152 Cal. App. 3d 875, 879, 199 Cal. Rptr. 735*

Trial court did not abuse discretion in denying leave to amend when amendments contradict earlier allegations and ample evidence supports conclusion that moving party had not acted in good faith. *American Advertising & Sales Co. v. Mid-Western Transport (1984) 152 Cal. App. 3d 875, 878-880, 199 Cal. Rptr. 735*

Court ordinarily inclined to grant leave to cure mistaken or inadvertent allegation by amendment, but not required to accept bad faith, frivolous, or sham amendment. *American Advertising & Sales Co. v. Mid-Western Transport (1984) 152 Cal. App. 3d 875, 878, 199 Cal. Rptr. 735*

Trial court is allowed to examine superseded pleadings to determine whether or not amended pleading merely ignored defects in prior pleadings. *Kiseskey v. Carpenters' Trust for So. California (1983) 144 Cal. App. 3d 222, 228-229, 192 Cal. Rptr. 492*

Trial court allowed to refer to inconsistent allegations in original verified complaint in ruling on demurrer to amended verified complaint. *Arthur v. Oceanside-Carlsbad Junior College Dist. (1963) 216 Cal. App. 2d 656, 665, 31 Cal. Rptr. 177*

Reference to purchase order set forth verbatim in original unverified complaint for damages for breach of contract was properly considered by court in ruling on demurrer to unverified amended complaint. *Continental Nut Co. v. Slate (1950) 97 Cal. App. 2d 264, 270-271, 217 P.2d 673*

[7] Jurisdiction to Amend Pending or After Appeal

Trial court has same authority to allow amendments after general reversal as in case not yet tried. *Slaughter v. Legal Process & Courier Service (1984) 162 Cal. App. 3d 1236, 1252-1253, 209 Cal. Rptr. 189*

Trial court lacks jurisdiction to allow amendment to pleading after appeal from judgment has been taken from judgment on the pleadings. *Olson v. Superior Court (1969) 274 Cal. App. 2d 311, 312-314, 79 Cal. Rptr. 136*

[8] Effect of Amendment

Second amended complaint that omitted name of one defendant of initial complaint effected dismissal of action with respect to that defendant; court's grant of motion to strike third amended complaint that reinstated that defendant was erroneous because dismissal was without prejudice. *Kuperman v. Great Republic Life Ins. Co. (1987) 195 Cal. App. 3d 943, 947, 241 Cal. Rptr. 187*

Amended pleading constitutes abandonment of issues raised by original pleading and is subject to demurrer by defendant who filed answer to original complaint. *Tushinsky v. Arnold (1987) 195 Cal. App. 3d 666, 669 n.1, 241 Cal. Rptr. 103*

Amended complaint supersedes original complaint and grant of summary judgment on first complaint is therefore erroneous. *Perry v. Atkinson (1987) 195 Cal. App. 3d 14, 18, 240 Cal. Rptr. 402*

When complaint was amended by interlineation to delete cause of action, remaining paragraph not deleted but relating only to that cause of action became nullity. *Burge v. Krug (1958) 160 Cal. App. 2d 201, 206*

Amended complaint frames issues of case; after trial, leave may be granted to file second amended complaint. *Foster v. Keating (1953) 120 Cal. App. 2d 435, 444-445, 452, 261 P.2d 529*

[9] Amendment by New Counsel When No Substitution Filed

When original complaint was filed but not served, amended complaint served and filed by plaintiff's new attorney who had not filed and served formal substitution of attorneys in accordance with *Code Civ. Proc. §§ 284(1), 285* was not rendered inoperative; rather, where actual authority of new or different attorney appears, courts regularly excuse absence of record of formal substitution and validate attorney's acts, particularly where adverse party has not been misled or otherwise prejudiced. *Baker v. Boxx (1991) 226 Cal. App. 3d 1303, 1308-1309, 277 Cal. Rptr. 409*

[10] Review

[a] Leave to Amend Denied

An order denying leave to amend a complaint is not appealable, unless it has the effect of eliminating all issues between the plaintiff and a defendant so that there is nothing left to be tried or determined [*Figueroa v. Northridge Hospital Medical Center (2005) 134 Cal. App. 4th 10, 13, 35 Cal. Rptr. 3d 677]* .

Trial court has wide discretion in allowing amendment of any pleading, and as matter of policy, trial court's ruling in such matters will be upheld unless manifest or gross abuse of discretion shown. *Record v. Reason (1999) 73 Cal. App. 4th 472, 486, 86 Cal. Rptr. 2d 547*

Motion for relief under *Code Civ. Proc. 473(a)(1)* is addressed to trial court's sound discretion; exercise of that discretion will not be reversed on appeal absent clear showing of abuse; more importantly, discretion to be exercised is that of trial court, not reviewing court; thus, even if reviewing court might have ruled otherwise in first instance, trial court's order will not be reversed, unless as matter of law, it is not supported by record. *Haley v. Dow Lewis Motors, Inc. (1999) 72 Cal. App. 4th 497, 506, 85 Cal. Rptr. 2d 352*

On appeal, trial court's ruling will be upheld unless a manifest or gross abuse of discretion is shown; plaintiff has burden to show that trial court abused its discretion. *Berman v. Bromberg (1997) 56 Cal. App. 4th 936, 945, 65 Cal. Rptr. 2d 777*

Denial of motion to amend pleading is reviewable on appeal from final judgment. *Northridge Hospital Foundation v. Pic'N' Save No. 9, Inc. (1986) 187 Cal. App. 3d 1088, 1102*

Appellate court may not interfere with denial of motion to amend unless abuse of discretion is manifest. *American Advertising & Sales Co. v. Mid-Western Transport (1984) 152 Cal. App. 3d 875, 880, 199 Cal. Rptr. 735*

Order denying leave to amend is generally not appealable unless order in effect is final determination of plaintiff's rights. *American Advertising & Sales Co. v. Mid-Western Transport (1984) 152 Cal. App. 3d 875, 877 n. 1, 199 Cal. Rptr. 735*

On appeal from denial of leave to amend complaint after sustaining demurrer, court is not concerned with plaintiff's possible difficulty or inability in proving allegations of complaint. *Johnson v. County of Los Angeles (1983) 143 Cal. App. 3d 298, 306, 191 Cal. Rptr. 704*

Writ of mandate is appropriate remedy to compel trial court to allow amendment when denial was abuse of trial court's discretion. *Dunzweiler v. Superior Court (1968) 267 Cal. App. 2d 569, 573, 581, 73 Cal. Rptr. 331* ; *Vedder v.*

Superior Court (1967) 254 Cal. App. 2d 627, 628, 62 Cal. Rptr. 222 (stating rule but denying writ); *Morgan v. Superior Court (1959) 172 Cal. App. 2d 527, 530-531, 343 P.2d 62*

Issue of court's abuse of discretion in not granting permission to amend after sustaining demurrer or granting judgment on pleadings is preserved for appeal without request for leave to amend in trial court. *Dobbins v. Hardister (1966) 242 Cal. App. 2d 787, 797, 51 Cal. Rptr. 866* ; *Greninger v. Fischer (1947) 81 Cal. App. 2d 549, 551, 184 P.2d 694*

[b] Leave to Amend Granted

Trial court's action in permitting amendment is upheld on appeal absent clear showing of abuse of discretion. *People ex rel. Dept. Pub. Wks. v. Jarvis (1969) 274 Cal. App. 2d 217, 222, 79 Cal. Rptr. 175*

Permission to file amendment as assumed on appeal where amendment is filed and trial court made decisions thereon. *Harm v. Frasher (1960) 181 Cal. App. 2d 405, 420, 5 Cal. Rptr. 367*

[11] Supplemental Pleadings

[a] Subject Matter

Plaintiffs may bring, but are not required to bring, events occurring after filing of complaint into scope of litigation by filing supplemental complaint with leave of court (*Code Civ. Proc. § 464*). *Los Angeles Branch NAACP v. L.A. Unified Sch. Dist. (9th Cir. 1984) 750 F.2d 731, 739*

Supplemental pleading is not required to obtain damages to date of trial in equitable action. *Hutcherson v. Alexander (1968) 264 Cal. App. 2d 126, 136, 70 Cal. Rptr. 366*

Supplemental complaint must state matter in furtherance of and consistent with original action. *Gonzales v. Arbelbide (1957) 155 Cal. App. 2d 721, 726-727, 318 P.2d 746* ; *Erickson v. Boothe (1954) 127 Cal. App. 2d 644, 647, 274 P.2d 460*

Supplemental answer alleges occurrences material to defense happening after commencement of action and prior to judgment. *Security-First Nat. Bank v. Hauer (1941) 47 Cal. App. 2d 302, 307, 117 P.2d 952*

[b] Effect of Delay

Unexplained delay is basis for refusal of permission to file supplemental complaint. *American Aeronautics Corp. v. Grand Cent. Aircraft Co. (1957) 155 Cal. App. 2d 69, 83, 317 P.2d 694*

[c] Inconsistency With Prior Pleadings

Trial court is not bound to accept as true allegations in supplemental pleadings that are contrary to factual allegations in former pleadings. *Potter v. Arizona So. Coach Lines, Inc. (1988) 202 Cal. App. 3d 126, 133 n. 2, 248 Cal. Rptr. 284*

[d] Relation to Statute of Limitations

Supplemental complaint relates back to date of original complaint when original complaint gave defendant notice that wrong was of continuing nature and supplemental complaint only addresses later instances of same continuing conduct

as that alleged in original complaint. *Bendix Corp. v. City of Los Angeles (1984) 150 Cal. App. 3d 921, 926, 198 Cal. Rptr. 370* (*disagreeing with ITT Gilfillan, Inc. v. City of Los Angeles (1982) 136 Cal. App. 3d 581, 589, 185 Cal. Rptr. 848*)

Supplemental complaint does not relating back to date of filing of original complaint and thus not allowed after statute of limitations expires. *ITT Gilfillan, Inc. v. City of Los Angeles (1982) 136 Cal. App. 3d 581, 586-589, 185 Cal. Rptr. 848*

[e] Procedure

Filing of supplemental complaint or cross complaint requires noticed motion. *Earp v. Nobmann (1981) 122 Cal. App. 3d 270, 287, 175 Cal. Rptr. 767* , *disapproved on other grounds Silberg v. Anderson (1990) 50 Cal. 3d 205, 219, 266 Cal. Rptr. 638, 786 P.2d 365*

[12] Substitution of Parties

[a] Unnecessary When Party Acquires Coplaintiff's Interest

Substitution is unnecessary when one already a party acquires coplaintiff's interest. *Miller v. Bank of America (1942) 52 Cal. App. 2d 512, 516, 126 P.2d 444*

[b] Granting Motion

Amendment naming State of California as plaintiff in place of state agency was proper as technical amendment not affecting nature of the action. *California Air Resources Bd. v. Hart (1993) 21 Cal. App. 4th 289, 301, 26 Cal. Rptr. 2d 153*

Substitution of successor of public officer is allowed on death of officer sued in official capacity. *Ott Hardware Co. v. Holmberg (1918) 36 Cal. App 402, 405, 179 P. 422*

[c] Denial of Motion

Motion to substitute assignee is properly denied when purpose of assignment is to permit layperson to practice law. *Ruby v. Superior Court (1951) 104 Cal. App. 2d 175, 176, 230 P.2d 860, 231 P.2d 868*

[d] Time for Motion

Motion for substitution may be granted after trial concluded, judgment entered, and motion for new trial denied. *Erickson v. Boothe (1949) 90 Cal. App. 2d 457, 459, 203 P.2d 122*

Transferee's right of substitution is permissive, resting in court's discretion, and under some circumstances may be granted following rendition of judgment; when judgment was entered in favor of plaintiff as administratrix of estate and as sole heir, judgment debtor could not collaterally attack judgment based on plaintiff's obtaining ex parte order substituting herself, individually, as plaintiff after entry of judgment and seeking to execute the judgment in the name of the substituted plaintiff. *Hogan v. Superior Court (1925) 74 Cal. App. 704, 713, 241 P. 584*

[e] Notice

Notice of application for substitution must be given to party being substituted when that party is not making the application. *Higgins v. Kay (1914) 168 Cal. 468, 471-473, 143 P. 710*

Courts allow substitution of executor or administrator of estate of deceased on ex parte motion. *Campbell v. West (1892) 93 Cal. 653, 656, 29 P. 219*

Notice of application for substitution is better practice, although not required. *Chatten v. Martell (1958) 166 Cal. App. 2d 545, 553, 333 P.2d 364* ; *Macmillan Petroleum Corp. v. Griffin (1950) 99 Cal. App. 2d 523, 526, 222 P.2d 69*

[f] Continuation of Action in Original Party's Name

[i] Transferee's Option

Trial court has discretion to allow action to continue in name of original party when interest is voluntarily transferred. *Alameda County Home Inv. Co v. Whitaker (1933) 217 Cal. 231, 234, 18 P.2d 662*

Grantee's option to continue action in name of original party or substitute. *Tuffree v. Stearns Ranchos Co. (1899) 124 Cal. 306, 308, 57 P. 69*

Action by court is unnecessary to continue case in name of original party after assignment of interest in the action. *Malone v. Big Flat Gravel M. Co. (1892) 93 Cal. 384, 390, 28 P. 1063* ; *Cleverdon v. Gray (1944) 62 Cal. App. 2d 612, 616, 145 P.2d 95*

On transfer of party's interest in subject matter of pending action, proceeding may, under former *Code Civ. Proc. § 385(a)* (*now see Code Civ. Proc. § 368.5*), be continued in name of original party. *Knapp Development & Design v. Pal-Mal Properties, Ltd. (1987) 195 Cal. App. 3d 786, 793, 240 Cal. Rptr. 920*

[ii] Effect

When transferee elects to continue action in name of original party, court may give judgment according to conditions existing at time case was begun. *Knobloch v. Associated Oil Co. (1915) 170 Cal. 144, 147, 148 P. 938*

When action is continued in name of original party after transfer in interest, nominal party's stipulation for entry of judgment is fraudulent and may be set aside. *Crescent Canal Co. v. Montgomery (1899) 124 Cal. 134, 142, 56 P. 797*

Assignee's right to control further proceedings in action continued in name of assignor. *Davis v. Rudolph (1947) 80 Cal. App. 2d 397, 401, 181 P.2d 765*

[g] Waiver of Objection

Filing answer to supplemental complaint bringing in substituted party constituted waiver of right to object to substitution. Dougherty v. California Kettleman etc. *(1937) 9 Cal. 2d 58, 85, 69 P.2d 155* ; *see Ford v. Bushard (1897) 116 Cal. 273, 276, 48 P. 119*

[h] Appeal

Order of substitution after judgment is appealable. *Erickson v. Boothe (1949) 90 Cal. App. 2d 457, 460, 203 P.2d 122*

Refusal to permit substitution of administrator, which eliminated her as party, is final judgment from which appeal can be taken. *Majors v. County of Merced (1962) 207 Cal. App. 2d 427, 432, 24 Cal. Rptr. 610* ; *Walsh v. Superior Court (1928) 92 Cal. App 454, 456, 268 P. 442* (executor)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedureParties SubstitutionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of Court

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§ 21.44 Law Reviews

Wagstaffe, *Much Ado About Doe Defendants*, 5(9) Cal. Law. 51 (1985)

Vold, *When Is a Variance Immaterial Under the Code of Civil Procedure? 29 S. Cal. L. Rev. 182 (1956)*

Note, *Procedure: Aider: Leave at Trial to Amend Previously Unchallenged Complaint, 2 UCLA L. Rev. 280 (1955)*

Note, *Pleading: Amendments: Effect of Prior Pleadings in Same Action, 42 Cal. L. Rev. 356 (1954)*

Note, *Code Pleading: Right of Plaintiff to Amend Complaint After a Demurrer Thereto Has Been Sustained, 24 Cal. L. Rev. 604 (1936)*

Comment, *Suing Parties Defendant by Fictitious Names, 22 Cal. L. Rev. 685 (1934)*

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§ 21.45 Text References

Witkin, California Procedure, vol. 5, *Pleading*, § 1113 et seq. (4th ed. 1997)

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§§ 21.46[Reserved]

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Chapter 21 AMENDED AND SUPPLEMENTAL PLEADINGS
PART IV. PROCEDURAL CHECKLIST

3-21 California Forms of Pleading and Practice--Annotated § 21.50

§ 21.50 Checklist for Amending Pleading

NOTE:
Illustrative List. The following checklist is illustrative only and is not exhaustive.

[1] Preliminary Determinations and Matters to Be Ascertained

☐ On becoming aware of facts, law, or a development in the case requiring a change in a pleading, determine whether an amended or supplemental pleading is required:

☐ If new facts to be alleged occurred after original pleading was filed, a supplemental pleading is required rather than an amended pleading [*see Code Civ. Proc. § 464(a)*; *Cohen v. Superior Court (1966) 244 Cal. App. 2d 650, 657, 53 Cal. Rptr. 378* ; for a checklist, *see § 21.51, below*].

☐ Determine applicable time limits:

☐ For amendment as of course:

☐ Any time before the answer or demurrer is filed, or after demurrer and before the trial of the issue of law thereon [*Code Civ. Proc. § 472*; *see § 21.12*].

☐ For amendment to substitute true name for fictitious name of defendant:

☐ Promptly after learning true name [*see § 21.14*].

☐ For amendment based on development in case:

☐ After demurrer is granted with leave to amend either [for discussion, *see 21.17[1][b]*]:

☐ If forcible entry, forcible detainer, or unlawful detainer action, within 5 calendar days [*Code Civ. Proc. § 472a(c)*; *Cal. Rules of Ct., Rule 3.1320(g)*],

☐ If action is will contest, within 15 days [*Prob. Code § 8251(b)*], or

☐ Otherwise, within 10 days, or other period as ordered by the court [*see Code Civ. Proc. § 472a(c)*; *Cal. Rules of Ct., Rule 3.1320(g)*].

☐ After motion to strike is granted with leave to amend:

☐ Within period ordered by the court, [*see Code Civ. Proc. § 472a(d)*].

☐ After change of venue:

☐ As ordered by the court [*see Code Civ. Proc. § 399*].

☐ To plead omitted cause of action subject to compulsory cross complaint requirements:

☐ Any time during the course of the action [*see Code Civ. Proc. § 426.50*].

☐ To conform to proof:

☐ When variance between pleading and proof appears [*see Code Civ. Proc. §§ 469, 470*].

☐ In furtherance of justice:

☐ At any time as allowed by court [*see Code Civ. Proc. §§ 473, 576*].

PRACTICE TIP:

Do Not Delay Amending Pleading. Once the need to amend becomes apparent, counsel should amend the pleading promptly. Counsel will need to explain any long, unexcused delay, and if the amendment is subject to the court's discretion, the court may refuse to allow the amendment, particularly if allowing it will require further discovery [*Nelson v. Specialty Records, Inc. (1970) 11 Cal. App. 3d 126, 139, 89 Cal. Rptr. 540* (no abuse of discretion to deny leave to amend); *see also Dunzweiler v. Superior Court (1968) 267 Cal. App. 2d 569, 577, 73 Cal. Rptr. 331* (issuing writ of mandate directing trial court to allow amendment)].

☐ Consider potential problems raised by amendment.

☐ If a party is to be joined, determine where the party resides or has a principal place of business and whether the party is subject to the court's jurisdiction.

☐ If a defendant or cause of action is to be added to a complaint, determine whether the statute of limitations has run, and if so, whether the amended complaint will relate back to avoid the statute [*see § 21.15*].

☐ Will the proposed amendment affect the jurisdictional classification of the case [*see Code Civ. Proc. §§ 32.5* (jurisdictional classification), 85.1 (jurisdiction in limited civil cases), 403.010 et seq. (motion to reclassify case), 396 (transfer of an action from a court lacking to a court having jurisdiction); for discussion, *see* Ch. 324, *Jurisdiction: Subject Matter*].

☐ Determine whether there has been such delay in seeking to amend a pleading that an explanation will be required.

☐ Determine whether the filing of the proposed pleading requires court permission.

☐ Leave is not required for:

☐ One amendment before answer or demurrer [*see Code Civ. Proc. § 472*].

☐ Amendment to substitute true for fictitious name [*see Code Civ. Proc. § 474*].

☐ Amendment to change proceeding from legal separation to dissolution of marriage if residence requirements for the latter were not met when the proceeding commenced [*see Fam. Code § 2321(a)*].

☐ Leave is required in all other cases.

☐ If leave of court is required, ascertain whether counsel for opposing parties will stipulate to the proposed amendment.

☐ Determine whether an amended pleading [for a form, *see § 21.60*] is required or whether an amendment to the pleading [for forms, *see § 21.61* et seq.] may be used [*see § 21.18*]:

☐ Does the court require an amended complaint rather than an amendment to a complaint [*see Code Civ. Proc. § 471.5*]?

☐ Does local court rule or practice express a preference for an amended pleading over an amendment

to a pleading?

☐ If amendment to the pleading can be used, weigh, as a practical matter, the effort involved in preparing a complete new pleading and the difficulty in reading the original and the amendment together.

☐ If leave of court is required and counsel will not stipulate to the pleading, determine manner of making request:

☐ By ex parte motion.

☐ By noticed motion.

☐ Orally in open court [*see, e.g., State Medical Education Bd. v. Roberson (1970) 6 Cal. App. 3d 493, 502, 86 Cal. Rptr. 258* (amendment to conform to proof)].

NOTE:
Local Practice. Consult local court rules regarding ex parte motions.

[2] Amendment Without Leave of Court

☐ Prepare an amended pleading [for a form, *see § 21.60*] or an amendment to the pleading [for forms, *see § 21.61* et seq.] in the following number of copies:

☐ Original for filing.

☐ Copy for each named party.

☐ Office copy.

☐ Copy for client, if desired.

☐ Additional copies as desired.

☐ Prepare summons if [*see § 21.19[1]*]:

☐ New party is named.

☐ Party has not appeared (to ensure ability to take default).

☐ Prepare proof of service.

☐ File the amendment or amended pleading and serve copies of it, along with any summons required,

on the other parties.

☐ In case of complaint, serve on the defendants affected by it [*Code Civ. Proc. § 471.5*].

☐ In case of all pleadings subsequent to complaint, except with leave of court, serve the adverse party or his or her attorney in the manner provided for the service of papers generally, unless service of summons is required [*see Code Civ. Proc. § 465*].

NOTE:
For a procedural guide and for forms of summons and proof of service, see Ch. 518, *Service of Summons and Papers* .

[3] Stipulation to Amendment

☐ Prepare the proposed amendment [for forms, *see § 21.61* et seq.] or amended pleading [for a form, *see § 21.60*] in the following number of copies:

☐ Original for filing.

☐ Copy for each party.

☐ Office copy.

☐ Copy for client, if desired.

☐ Additional copies as desired.

☐ Prepare the stipulation in the same number of copies.

☐ Attach one copy of the proposed amendment to the original and to each copy of the stipulation.

☐ Date and sign the original stipulation and transmit it and one copy of it, to the other party to the stipulation with request that he or she sign and return the original.

☐ Present the original executed stipulation to the clerk of the judge who will sign the order allowing the amendment.

☐ After the order is signed, prepare the amendment or amended pleading in the following number of copies:

☐ Original for filing.

- ☐ Copy for each party (unless stipulation has waived service).
- ☐ Office copy.
- ☐ Copy for client, if desired.
- ☐ Additional copies as desired.

☐ Prepare proof of service (unless stipulation has waived service).

☐ File the original and serve the copies on the parties.

☐ Prepare summons if [*see § 21.19[1]*]:

- ☐ New party is named.
- ☐ Party has not appeared (to ensure ability to take default).

For procedure and forms relating to issuance and service of summons, see Ch. 518, *Service of Summons and Papers* .

[4] Ex Parte Motion for Leave to Amend

☐ Check local ex parte practice if not familiar with it, including any preference for the motion and order to be separate papers.

☐ Prepare papers:

- ☐ Proposed amendment [for forms, *see § 21.61* et seq.] or amended pleading [for a form, *see § 21.60*] in the following number of copies:
  - ☐ Original for submitting to judge.
  - ☐ Office copy.
  - ☐ Copy for client, if desired.
  - ☐ Additional copies as desired.

☐ Motion [for a form, *see § 21.76*] and order [forms, *see §§ 21.76, 21.83*] in a same number of copies.

☐ Reasonable time before making application either:

☐ Inform opposing party or opposing party's attorney when and where application will be made, or

☐ Determine not to do so.

☐ Prepare declaration [for a form, *see* Ch. 372, *Motions and Orders*] to accompany motion stating that either:

☐ The moving party informed the opposing party or opposing party's attorney of the time and place of the application a reasonable time before it was made, or

☐ The moving party attempted to inform the opposing party and the opposing party's attorney of the time and place of the application, but was unable to do so, specifying the efforts made, or

☐ For specified reasons, the moving party should not be required to notify the opposing party or the opposing party's attorney.

☐ Deliver the original of the motion and accompanying papers to the court clerk for presentation to the judge.

☐ If the motion is granted, prepare the amendment to the pleading or amended pleading, if not already done, and the proof of service in the same number of copies indicated above.

☐ Attach a copy of the court's order (or motion and order where they are combined) to the original of the amendment to, or amended, pleading, and attach the original of the proof of service.

☐ Serve a copy of each of these papers on the adverse party and present the originals (with the copy of the court's order attached) to the court clerk for filing.

[5] Noticed Motion

NOTE:
This checklist briefly outlines the steps in proceeding by a noticed motion. For a more detailed checklist and additional forms for use in making a noticed motion, see Ch. 372, *Motions and Orders* .

☐ Prepare papers:

☐ Proposed amendment [for forms, *see § 21.61* et seq.] or amended pleading [for a form, *see § 21.60*] in the following number of copies:

☐ Original for filing.

☐ Copy for each party to be given notice.

- ☐ Office copy.
- ☐ Copy for client, if desired.
- ☐ Additional copies as desired.

☐ Notice of motion [for forms, *see §§ 21.77, 21.78, 21.84*] in the same number of copies.

☐ Supporting affidavit or declaration under penalty of perjury [for forms, *see §§ 21.79 -21.82*] in same number of copies and have the original executed.

☐ Memorandum in support of the motion in the same number of copies.

☐ Proposed order [for a form, *see § 21.83*], if required by local practice.

☐ Proof of service.

☐ Attach the original and copies of the proposed amendment or pleading to the original notice of motion and the copies to the copies of the notice of motion.

☐ Present the original notice and supporting papers to the clerk of the court for filing and request that the hearing be calendared if that has not already been done.

☐ Lodge proposed order with court, if required by local practice.

☐ Serve a copy of notice of motion and supporting papers on each party who has appeared in the action.

For a checklist and for forms of proof of service, see Ch. 518, *Service of Summons and Papers* .

☐ Follow local practice regarding tentative rulings.

☐ Attend the hearing, if any, and present argument in support of the motion.

☐ If the motion is granted:

- ☐ If proposed order was not adequate, prepare revised order.
- ☐ Prepare amendment to the pleading, or the amended pleading in the same number of copies as proposed amendment or amended pleading.

☐ Present the order to the judge for signing.

☐ Present the original order and the original pleading to the court for filing.

☐ Prepare proof of service, attach the original to true copies of the order and pleading for filing, and attach a copy to each copy of the order and pleading to be served.

☐ Serve the copies of the order, pleading, and proof of service on the other parties.

☐ If the amendment adds a party, a summons will also have to be served on that party.

For a checklist and forms, see Ch. 518, *Service of Summons and Papers* .

[6] Oral Motion

☐ Make the motion orally in open court.

☐ If the motion is granted, prepare the amendment or amended or supplemental pleading in the same number of copies as in [4], *above*.

☐ Present the original to the court clerk for filing and serve the copies on the parties.

For a checklist and forms of proof of service, see Ch. 518, *Service of Summons and Papers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to Evidence

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Chapter 21 AMENDED AND SUPPLEMENTAL PLEADINGS
PART IV. PROCEDURAL CHECKLIST

3-21 California Forms of Pleading and Practice--Annotated § 21.51

§ 21.51 Checklist for Supplemental Pleading

NOTE:
Illustrative List. The following checklist is illustrative only and is not exhaustive.

[1] Preliminary Determinations and Matters to Be Ascertained

☐ On becoming aware of facts, law, or development in the case requiring a change in a pleading, determine whether an amended or supplemental pleading is required:

☐ If the new facts to be alleged occurred before the original pleading was filed, an amended pleading is required rather than a supplemental pleading [*see Code Civ. Proc. § 464(a)*; *Cohen v. Superior Court (1966) 244 Cal. App. 2d 650, 657, 53 Cal. Rptr. 378* ; for a checklist, see *§ 21.50, above*].

☐ Move promptly on determining need for supplemental complaint [*see § 21.26[1]*].

☐ Consider potential problems raised by supplemental pleading.

☐ If a party is to be joined, determine where the party resides or has a principal place of business and whether the party is subject to the court's jurisdiction.

☐ If a defendant or cause of action is to be added to a complaint, determine whether the statute of limitations has run, and if so, whether the amended complaint will relate back to avoid the statute [*see § 21.26[2]*].

☐ Will the proposed supplemental pleading affect the jurisdictional classification of

the case [*see Code Civ. Proc. §§ 32.5* (jurisdictional classification), 85.1 (jurisdiction in limited civil cases), 403.010 et seq. (motion to reclassify case), 396 (transfer of an action from a court lacking to a court having jurisdiction); for discussion, *see* Ch. 324, *Jurisdiction: Subject Matter*].

☐ Determine whether there has been such delay in seeking to amend a pleading that an explanation will be required.

☐ If supplemental pleading is to allege death of defendant and substitute in personal representative, follow procedure for filing a claim against estate [*see* Ch. 454, *Probate: Claims Against the Estate*].

☐ Determine whether the filing of the proposed pleading requires court permission.

☐ Leave is not required for:

☐ Supplemental complaint when child support is at issue [*Code Civ. Proc. § 464(b)*; for discussion, *see § 21.28*].

☐ Leave is required in all other cases.

☐ If leave of court is required, ascertain whether counsel for opposing parties will stipulate to the proposed supplemental complaint.

[2] Stipulation to Supplemental Pleading

☐ Prepare the supplemental pleading [for a form, *see § 21.90*] in the following number of copies:

☐ Original for filing.

☐ Copy for each party.

☐ Office copy.

☐ Copy for client, if desired.

☐ Additional copies as desired.

☐ Prepare the stipulation [for a form, *see § 21.91*] in the same number of copies.

☐ Attach one copy of the proposed pleading to the original and to each copy of the stipulation.

☐ Date and sign the original stipulation and transmit it and one copy of it, to the other party to the

stipulation with request that he or she sign and return the original.

☐ Present the original executed stipulation to the clerk of the judge who will sign the order allowing the supplemental pleading.

☐ After the order is signed, prepare the supplemental pleading in the following number of copies:

☐ Original for filing.

☐ Copy for each party (unless stipulation has waived service).

☐ Office copy.

☐ Copy for client, if desired.

☐ Additional copies as desired.

☐ Prepare proof of service (unless stipulation has waived service).

☐ File the original and serve the copies on the parties.

☐ Prepare summons if [*see § 21.19[1]*]:

☐ New party is named.

☐ Party has not appeared (to ensure ability to take default).

For procedure and forms relating to issuance and service of summons, see Ch. 518, *Service of Summons and Papers* .

[3] Noticed Motion

NOTE:
Although *Code Civ. Proc. § 464* does not expressly require use of a noticed motion, that appears to be the usual practice. This checklist briefly outlines the steps in proceeding by a noticed motion. For a more detailed checklist and additional forms for use in making a noticed motion, see Ch. 372, *Motions and Orders* .

☐ Prepare papers:

☐ Proposed supplemental pleading [for a form, *see § 21.90* (general) or § 21.108 (substitution for deceased defendant)] in the following number of copies:

- ☐ Original for filing.
- ☐ Copy for each party to be given notice.
- ☐ Office copy.
- ☐ Copy for client, if desired.
- ☐ Additional copies as desired.

☐ Notice of motion and supporting declarations in the same number of copies:

- ☐ General form [*see § 21.92*].
- ☐ Substitution for Deceased Plaintiff [*see §§ 21.100 -21.102*].
- ☐ Substitution for Deceased Defendant [*see* §§ 21.103 -*21.105*].
- ☐ Memorandum in support of the motion in the same number of copies.

☐ Proposed order, if required by local practice.

☐ Proof of service.

☐ Attach the original and copies of the proposed pleading to the original notice of motion and the copies to the copies of the notice of motion.

☐ Present the original notice and supporting papers to the clerk of the court for filing and request that the hearing be calendared if that has not already been done.

☐ Lodge proposed order with court, if required by local practice.

☐ Serve a copy of notice of motion and supporitng papers papers on each party who has appeared in the action.

For a checklist and for forms of proof of service, see Ch. 518, *Service of Summons and Papers* .

☐ Follow local practice regarding tentative rulings.

☐ Attend the hearing, if any, and present argument in support of the motion.

☐ If the motion is granted:

☐ If proposed order was not adequate, prepare revised order.

☐ Prepare supplemental pleading in the same number of copies as proposed pleading.

☐ Present the order to the judge for signing.

☐ Present the original order and the original pleading to the court for filing.

☐ Prepare proof of service, attach the original to true copies of the order and pleading for filing, and attach a copy to each copy of the order and pleading to be served.

☐ Serve the copies of the order, pleading, and proof of service on the other parties.

☐ If the pleading adds a party, a summons will also have to be served on that party.

For a checklist and forms, see Ch. 518, *Service of Summons and Papers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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[Reserved]

§§ 21.52[Reserved]

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Chapter 21 AMENDED AND SUPPLEMENTAL PLEADINGS
PART V. FORMS
A. Amended Pleadings

3-21 California Forms of Pleading and Practice--Annotated § 21.60

§ 21.60 Amended Pleading--Format

[1] FORM Amended Pleading--Format

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	[_____ (*number, e.g.,* SECOND)]
_____ [*name*],	)	AMENDED _____ [*e.g.,* COM-
Defendant.	)	PLAINT] [Amount demanded
	)	_____ (exceeds *or* does not exceed)
	)	$10,000] [LIMITED CIVIL CASE] [(*if reclassified*) LIMITED CIVIL CASE RECLASSIFIED AS AN UNLIMITED CIVIL CASE *or* UNLIMITED CIVIL CASE RECLASSIFIED AS A LIMITED CIVIL CASE]

_____

_____ [*Party, e.g.,* Plaintiff] alleges:

1. _____ [*Here and in succeeding numbered paragraphs, set forth entire pleading.*]

WHEREFORE, _____ [*party, e.g.,* plaintiff] prays _____ [*e.g.,* judgment as follows]:

1. _____ [*Here and in succeeding numbered paragraphs, set forth complete prayer.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party, e.g.*, Plaintiff]

VERIFICATION

I, _____ [*name*], am the _____ [*party, e.g.*, plaintiff] in the above entitled _____ [action *or* proceeding]. I have read the foregoing amended _____ [*pleading, e.g.*, complaint] and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, shows the format for an amended pleading and is for use when a pleading is to be entirely rewritten and will completely supersede the preceding pleading. By contrast, an amendment to a pleading merely adds to or otherwise changes part of an existing pleading [*Cohen v. Superior Court (1966) 244 Cal. App. 2d 650, 657, 53 Cal. Rptr. 378* ; for forms of amendments to pleadings, *see §§ 21.61, 21.63 -21.69*].

[3] Determining Whether to Use Amended Pleading or Amendment to Pleading

An amended pleading is required when a party seeks to amend of course under *Code Civ. Proc. § 472*.

A court may, in its discretion, require that an amended pleading, rather than an amendment to a pleading, be filed [*see Code Civ. Proc. § 471.5* (complaints); *Spreckels v. Ord (1887) 72 Cal. 86, 88, 13 P. 158* (applying predecessor of *Code Civ. Proc. § 471.5* to answers)]. When an amended pleading is not required, counsel, in determining whether to file an amended pleading or an amendment to the pleading, should consider the complexity of the amendment and the ease with which the pleading may be read after amendment. An amended pleading may be preferred over an amendment to a pleading [*see, e.g.* Siskiyou Super. Ct. Rules, Rule 3.04(B)(2)].

[4] Format of Amended Pleading

The format of an amended pleading follows the format of the original pleading, with the exception of the caption. The caption in the amended pleading should indicate that the pleading is an amended one, for example, in the case of a complaint, by writing "AMENDED COMPLAINT" below the number of the action. If there is more than one amended pleading filed, the second will be denoted, for example, "SECOND AMENDED COMPLAINT." Subsequent amended pleadings will be denoted "THIRD," "FOURTH," etc.

While the title of the case on each initial complaint or cross-complaint requires that the name of each party be listed on a separate line at the left margin of the page, on any subsequent pleading or paper it is sufficient in the title of the case to (1) state the name of the first party on each side, with appropriate indication of other parties, and (2) state that a cross-action or cross-actions are involved, if applicable [*Cal. Rules of Ct., Rule 2.111(4)*].

If a case is reclassified by an amended complaint, cross-complaint, amended cross-complaint, or other pleading under *Code Civ. Proc. §§ 403.020* or *403.030* and the reclassification fee, if required, is paid, the clerk will promptly reclassify the cases [*Code Civ. Proc. § 403.020(a)*], and the caption must indicate that the action or proceeding is reclassified by this pleading [*Cal. Rules of Ct., Rule 2.111(11)*]. If a case is reclassified by stipulation under *Code Civ. Proc. § 403.050*, the title of the stipulation must state that the action or proceeding is reclassified by the stipulation. The caption or title must state that the case is a limited civil case reclassified as an unlimited civil case, or an unlimited civil case reclassified as a limited civil case, or other words to that effect [*Cal. Rules of Ct., Rule 2.111(11)*].

An amendment to an initial pleading is treated the same manner as an amended initial pleading [*Code Civ. Proc. § 403.020(b)*].

[5] Verification

There is no requirement that an amended pleading not otherwise required to be verified be verified because the original pleading was verified.

For a discussion of when verification is required and for alternative forms of verification, see Ch. 572, *Verification* .

[6] Application of Rules to Special Proceedings

Although the rules relating to amendment of pleadings are found in Part Two of the Code of Civil Procedure, and therefore are expressly applicable only to the pleadings permitted in civil actions, namely, complaints, demurrers, answers, and cross complaints [*see Code Civ. Proc. § 422.10*], amendments to pleadings in special proceedings are generally made in compliance with these rules, particularly when the statutes governing the special proceeding include incorporate the provisions of Part Two of the Code of Civil Procedure to the extent they are not inconsistent with provisions expressly governing the particular special proceeding [*see, e.g., Code Civ. Proc. § 1109* (rules of practice in proceedings involving writs of review, mandate, and prohibition)].

[7] Cross References

For forms of answers, see Ch. 26, *Answers*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For forms of complaints, see Ch. 123, *Complaints and Cross Complaints*

For forms of prayers, see Ch. 420, *Prayers*

Witkin, California Procedure, Vol. 5, *Pleading*, § 1113 et seq. (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-21 California Forms of Pleading and Practice--Annotated § 21.61

§ 21.61 Amendment to Pleading--Replacing Paragraph

[1] FORM Amendment to Pleading--Replacing Paragraph

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	AMENDMENT TO _____
_____ [*name*],	)	[*pleading, e.g.*, COMPLAINT]
Plaintiff,	)	[(*if reclassified*) LIMITED CIVIL
vs.	)	CASE RECLASSIFIED AS AN
_____ [*name*],	)	UNLIMITED CIVIL CASE
Defendant.	)	*or*
	)	UNLIMITED CIVIL CASE
	)	RECLASSIFIED AS A LIMITED
	)	CIVIL CASE]
	)	

_____

_____ [*Party, e.g.*, Plaintiff] amends the _____ [*pleading, e.g.*, complaint] herein by deleting Paragraph _____ [*number*] thereof, commencing on page _____, line _____, and concluding on page _____, line _____, and in place thereof adding a new paragraph as follows:

_____ [*Number of paragraph*]. _____ [*Set forth new paragraph*].

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for_____ [*party, e.g.*, Plaintiff]

VERIFICATION

I, _____ [*name*], am the _____ [*party, e.g.*, plaintiff] in this _____ [*either* action *or* proceeding]. I have read the foregoing amendment to the _____ [*pleading, e.g.*, complaint] on file herein and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form of amendment to a pleading in [1], *above*, is for use in deleting a paragraph of the original pleading and adding a new paragraph.

The amendment must designate the pages and lines of the pleading which are being amended. No amendment is to be made by alterations on the face of a pleading without the court's permission. All alterations must be initialed by the court or clerk [*Cal. Rules Ct., Rule 3.1324(d)*].

An amendment to a pleading is not used where the pleader seeks to amend of course under *Code Civ. Proc. § 472* or where the court directs that an amended pleading be filed [*see Code Civ. Proc. § 471.5*; *Spreckels v. Ord (1887) 72 Cal. 86, 88, 13 P. 158* (decided under predecessor of *Code Civ. Proc. § 471.5*)]. For a form of amended pleading and further discussion, see *§ 21.60*.

An amendment should be executed in the same manner as the original pleading, and, thus, if the original pleading was verified, the amendment should be verified [*see* Placer Super. Ct. Rules, Rule 20.2.4(E)(3)].

If the effect of the amendment is to reclassify the case, the caption or title must state that the case is a limited civil case reclassified as an unlimited civil case, or an unlimited civil case reclassified as a limited civil case, or other words to that effect [*Cal. Rules of Ct., Rule 2.111(11)*].

[3] Verification

There is no requirement that an amended pleading not otherwise required to be verified be verified because the original pleading was verified.

For a discussion of when verification is required and for alternative forms of verification, see Ch. 572, *Verification* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral Overview

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3-21 California Forms of Pleading and Practice--Annotated § 21.62

§ 21.62 Amendment to Pleading--Alternative Introductory Paragraphs

[1] FORM Amendment to Pleading--Alternative Introductory Paragraphs

[*EITHER*]

Comes now _____ [*e.g.*, plaintiff] _____ [*name*] and amends the _____ [*e.g.*, complaint] on file herein as follows: _____.

[*OR*]

The _____ [*e.g.*, petitioner] by leave of court files this amendment to his _____ [*e.g.*, petition] for _____ [*specify relief sought*]. The amendment consists of the following: _____.

[*OR*]

COMES NOW THE _____ [*e.g.*, DEFENDANT] HEREIN, _____ [*name*], and amends his _____ [*e.g.*, answer to plaintiffs' complaint] by adding thereto, as Paragraph _____ [*number*], the following: _____.

[2] Use of Form

The form in [1], *above*, illustrates introductory paragraphs that have been used in an amendment to a pleading. For a form of amendment to a pleading, see *§ 21.61*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of Court

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A. Amended Pleadings

3-21 California Forms of Pleading and Practice--Annotated § 21.63

§ 21.63 Amendment to Complaint--Amendment of Amended Complaint by Stipulation

[1] FORM Amendment to Complaint--Amendment of Amended Complaint by Stipulation

[*Caption. See § 21.61.*]

Paragraph _____ [*number*] of the [_____ (*e.g.*, Second)] Amended Complaint is hereby amended to read as follows: _____ [*specify*].

This amendment is filed pursuant to the stipulation and order of the court made in the pretrial order signed on _____ [*date*] by the Honorable _____ [*name*], Judge.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

[*Verification. See § 21.61.*]

[2] Use of Form

The form in [1], *above*, is a form of amendment for use when an amended complaint is to be amended after stipulation by the parties and pursuant to an order of the court. For additional discussion, see *§§ 21.60[2] et seq. and 21.61[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePartiesSubstitutionsGeneral Overview

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A. Amended Pleadings

3-21 California Forms of Pleading and Practice--Annotated § 21.64

§ 21.64 Amendment to Complaint and Order Thereon--Substituting Defendant's Correct for Incorrect Name [Code Civ. Proc. § 473]

[1] FORM Amendment to Complaint and Order Thereon--Substituting Defendant's Correct for Incorrect Name

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	AMENDMENT TO COMPLAINT
_____ [*name*],	)	(Substituting Defendant's Correct for Incorrect
Defendant.	)	Name)
	)	
	)	

_____

Plaintiff has now discovered that he/she designated a defendant in the complaint by an incorrect name. Plaintiff hereby amends the complaint to substitute the correct name for the incorrect name wherever it appears in the complaint.

Correct Name Incorrect Name

_____ [*correct name*] to substitute for _____ [*incorrect name*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

ORDER

Good cause appearing, plaintiff is hereby allowed to file the above amendment.
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The form in [1], *above*, is for use as an amendment to a complaint to substitute the defendant's correct name for an incorrect name [*see Code Civ. Proc. § 473*; for discussion of this type of amendment, see *§ 21.13[1] [b]*]. The form may be adapted for use as an amendment to a cross complaint or a petition by appropriate designation of the parties and by use of the proper caption.

The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by correcting a mistake in the name of a party [*Code Civ. Proc. § 473*]. Most courts do not require a separate application for leave to file the amendment. However, where a court does require a separate application, it may be made ex parte [*see Code Civ. Proc. § 473*].

[3] Cross References

For additional discussion of amendments to pleadings, see *§ 21.61[2]* et seq.

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 1113 (4th ed. 1997)

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Chapter 21 AMENDED AND SUPPLEMENTAL PLEADINGS
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A. Amended Pleadings

3-21 California Forms of Pleading and Practice--Annotated § 21.65

§ 21.65 Amendment to Complaint--Substituting Defendant's True Name for Fictitious Name [Code Civ. Proc. § 474]

[1] FORM Amendment to Complaint--Substituting Defendant's True Name for Fictitious Name

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	AMENDMENT TO COMPLAINT
_____ [*name*],	)	(Substituting Defendant's True Name for Fictitious
Defendant.	)	Name)
	)	
	)	

_____

Plaintiff was ignorant of a defendant's name, stated that fact in the complaint, and designated the defendant by a fictitious name. That defendant's true name has now been discovered and plaintiff hereby amends the complaint, as follows:

True Name Fictitious Name

_____ [*name*] to substitute for _____ [*fictitious name*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

The form in [1], *above*, is for use as an amendment to a complaint to substitute the true name of a defendant for the fictitious name by which that defendant was sued [*see Code Civ. Proc. § 474*]. The form may be adapted for use as an amendment to a cross complaint or a petition by appropriate designation of the parties and by use of the proper caption.

When a defendant is sued by a fictitious name and the true name is subsequently discovered, the pleading or proceeding must be amended accordingly [*Code Civ. Proc. § 474*]. *Code Civ. Proc. § 474* contains no express requirement that leave of court be obtained before filing the amendment; however, some court forms [*see § 21.66*] have a space provided for granting such leave, and counsel should determine whether the clerk will require leave before filing the amendment.

Some courts have printed forms that should be used for this purpose [for illustrations of some of those forms, *see §§ 21.66, 21.67*].

[3] Fictitious Name Allegation Requirement

The requirements of *Code Civ. Proc. § 474* are mandatory, including the requirement that the complaint allege the plaintiff's ignorance of the true name of a defendant [*Kerr-McGee Chemical Corp. v. Superior Court (1984) 160 Cal. App. 3d 594, 598, 206 Cal. Rptr. 654]* .

A plaintiff is not allowed to substitute the true name of party for a fictitious name if the plaintiff was not ignorant of the true name when complaint was filed [*Code Civ. Proc. § 474*; *see, e.g.,* *Woo v. Superior Court (1999) 75 Cal. App. 4th 169, 177-180, 89 Cal. Rptr. 2d 20* (declining to follow Balon v. *Drost); Balon v. Drost (1993) 20 Cal. App. 4th 483, 488-490, 25 Cal. Rptr. 2d 12* (allowing amendment); *Optical Surplus, Inc. v. Superior Court (1991) 228 Cal. App. 3d 776, 782-784, 279 Cal. Rptr. 194]* . However, even though the plaintiff knows of the existence of the defendant sued by a fictitious name and the defendant's actual identity (*i.e.*, his or her name), the plaintiff is "ignorant" within the meaning of the statute if he or she lacks knowledge of that person's connection with the case or with his or her injuries. Ignorance of the facts giving rise to a cause of action is the ignorance required by *Code Civ. Proc. § 474* and the pivotal question is "did plaintiff know of facts?" not "did plaintiff know or believe that plaintiff had a cause of action based on those facts?" [*General Motors Corp. v. Superior Court (1996) 48 Cal. App. 4th 580, 593-594, 55 Cal. Rptr. 2d 871]* . For further discussion of what constitutes "ignorance" of a defendant's name, see *Ch. 20, Allegations Commonly Used, § 20.12*.

A plaintiff cannot amend under Section 474 to substitute one party for another named party. For example, even though the complaint included a Doe allegation, the plaintiff could not use Section 474 to amend the complaint to name Kerr-McGee Chemical Corp. as "the person sued under the fictitious name of: Trona Medical Center" because Trona Medical Center was not identified as a fictitious name in the original complaint [*Kerr-McGee Chemical Corp. v. Superior Court (1984) 160 Cal. App. 3d 594, 597-601, 206 Cal. Rptr. 654* (also rejecting use of *Code Civ. Proc. § 473* to bring a new party into the action; service was properly quashed)].

[4] Timing

A plaintiff is not precluded from using the fictitious name procedure [*Code Civ. Proc. § 474*] because of unreasonable delay in amending the complaint unless defendant suffered specific prejudice from the delay [*Barrows v. American Motors Corp. (1983) 144 Cal. App. 3d 1, 9-10, 192 Cal. Rptr. 380]* . For discussion of the effect of delay, see *§ 21.14[2]*.

[5] Cross References

For discussion of the form of amended pleadings generally, see *§ 21.60*.

For forms for use in suing a defendant by a fictitious name, see Ch. 20, *Allegations Commonly Used*

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 1151, 1152, 1160 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProceduresPartiesSubstitutionsGeneral OverviewCivil ProceduresPartiesFictitious Names

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3-21 California Forms of Pleading and Practice--Annotated § 21.66

§ 21.66 Amendment to Complaint--Substituting Defendant's True Name for Fictitious Name [Code Civ. Proc. § 474]--Orange County Superior Court Form

[1] FORM Amendment to Complaint--Substituting Defendant's True Name for Fictitious Name

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of Orange County Superior Court Form L-0132 (Rev. July 1, 2008). Copies are available from the clerk's office or on the Orange County Superior Court website.

The form is for use when plaintiff seeks to amend the complaint to add the true name of a defendant sued by a fictitious name.

For related discussion, see *§ 21.65[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-21 California Forms of Pleading and Practice--Annotated § 21.67

§ 21.67 Amendment to Complaint--Substituting Defendant's True Name for Fictitious Name [Code Civ. Proc. § 474]--Los Angeles County Superior Court Form

[1] FORM Amendment to Complaint--Substituting Defendant's True Name for Fictitious Name

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of Los Angeles County Superior Court Form LACIV 105. Copies are available from the clerk's office or on the Los Angeles County Superior Court website.

This form of amendment is for use when a plaintiff seeks to amend the complaint to add the true name of a defendant sued by a fictitious name.

For related discussion, see *§ 21.65[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProceduresPartiesSubstitutionsGeneral OverviewCivil ProceduresPartiesFictitious Names

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3-21 California Forms of Pleading and Practice--Annotated § 21.68

[Reserved]

§ 21.68[Reserved]

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3-21 California Forms of Pleading and Practice--Annotated § 21.69

§ 21.69 Amendment to Answer--Amendment to Conform to Proof

[1] FORM Amendment to Answer--Amendment to Conform to Proof

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	AMENDMENT TO ANSWER
Defendant.	)	
	)	
	)	

Defendant, having obtained leave of court, and in order to conform to the proof taken at the trial, files this amendment to his/her/its answer on file in this matter:

AS A [_____ (*if more than one, specify number, e.g.,* THIRD)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that _____ [*specify*].

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Defendant

[*Verification. § 21.61.*]

[2] Use of Form

The form of amendment to an answer in [1], *above*, is for use when defendant seeks to amend his answer to conform it to evidence taken at trial. A complaint or cross complaint may also be amended to conform to proof [*see Code Civ. Proc. §§ 469, 470*]. For discussion, see *§ 21.26*.

[3] Cross References

For discussion of amended pleadings generally, see *§ 21.60[2]* et seq.

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 1141-1148 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProceduresPleading & PracticePleadingsAnswersCivil ProceduresPleading & PracticePleadingsAmended PleadingsConforming Pleadings to Evidence

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3-21 California Forms of Pleading and Practice--Annotated § 21.70

§ 21.70 Stipulation--That Party May Amend Pleading [Code Civ. Proc. § 473] and Order Thereon

[1] FORM Stipulation--That Defendant May Amend Answer [Code Civ. Proc. § 473] and Order Thereon

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	STIPULATION (To Amend
_____ [*name*],	)	_____ [*Pleading*]) [(*if reclassified*)
Defendant.	)	RECLASSIFIED BY STIPULATION] [(*if reclassi-*
	)	*fied*) LIMITED CIVIL CASE RECLASSIFIED AS
	)	AN UNLIMITED CIVIL CASE
		or
		UNLIMITED CIVIL CASE RECLASSIFIED AS A
		LIMITED CIVIL CASE]

_____

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel, that this court may allow _____ [*e.g.*, plaintiff] to file the _____ [amended *or* amendment to the] _____ [*pleading*, *e.g.*, complaint], a copy of which is attached hereto.

[It is further stipulated that _____ (*e.g.*, defendant) waives notice and service of the _____ (amended *or* amendment to the) _____ (*pleading*, *e.g.*, complaint) (, that _____ (*e.g.*, defendant) shall not be required to answer the amendment, and that the allegations thereof shall be deemed denied).]
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant_____ [*name*]

ORDER

Good cause appearing, _____ [*e.g.*, plaintiff] is hereby allowed to file the within proposed _____ [amended *or* amendment to the] _____ [*pleading, e.g.*, complaint].
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The form of stipulation and order in [1], *above*, is for use to amend a pleading [*see Code Civ. Proc. § 283(1)* (attorney's authority to bind client)]. The stipulation is not necessary if leave of court is not required to amend [*see Code Civ. Proc. §§ 472* (amendment of course), 474 (fictitiously named defendant)]; or if notice to the adverse party is not required [*see Code Civ. Proc. § 473*].

If a case is reclassified by stipulation under *Code Civ. Proc. § 403.050*, the title of the stipulation must state that the action or proceeding is reclassified by this stipulation; and the caption or title must state that the case is a limited civil case reclassified as an unlimited civil case, or an unlimited civil case reclassified as a limited civil case, or other words to that effect [*Cal. Rules of Ct., Rule 2.111(11)*].

The stipulation is to the filing of a particular amendment. A copy of that amendment is attached to the stipulation and is identified as a proposed amendment or amended pleading, for example, "PROPOSED AMENDED COMPLAINT" or "PROPOSED AMENDMENT TO ANSWER." For a form of an amended pleading, see *§ 21.60*; for forms of amendments to pleadings, see *§§ 21.61, 21.63 -21.69*.

The optional second paragraph of the stipulation waives notice [*see Code Civ. Proc. § 473*] and service of the amendment [*see Code Civ. Proc. § 471.5*] and concludes with a further optional clause, for use if the amendment is to a complaint or cross complaint, that an answer to the amendment need not be filed. These stipulations are to be used only in appropriate situations.

Additional stipulations may also be added as desired by the parties, such as a stipulation that the period between the filing of the complaint and the time of adding a new party will not be included in computing the time during which summons must be served [*see Code Civ. Proc. § 583.230(a)*] or the time during which an action must be brought to trial [*see Code Civ. Proc. § 583.330(a)*]. For further discussion of these periods, see Ch. 212, *Dismissal* .

[3] Cross References

For general forms of stipulations, see Ch. 533, *Stipulations*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProceduresDiscoveryMethodsStipulationsCivil ProceduresPleading & PracticePleadingsAnswers

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3-21 California Forms of Pleading and Practice--Annotated § 21.71

§ 21.71 Stipulation--That Defendant May Amend Answer [Code Civ. Proc. § 473] and Order Thereon

[1] FORM Stipulation--That Defendant May Amend Answer [Code Civ. Proc. § 473] and Order Thereon

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	STIPULATION
_____ [*name*],	)	(To Amend Answer)
Defendant.	)	
	)	
	)	

IT IS HEREBY STIPULATED by and between the plaintiff and defendant, through their respective counsel, that defendant may, concurrently with the filing of this stipulation, file an Amended Answer to Complaint herein on or before _____ [*date*].
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant_____ [*name*]

ORDER

IT IS HEREBY ORDERED that defendant may file the Amended Answer to Complaint referred to in the stipulation above.
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The form of stipulation in [1], *above*, is for use by the parties to permit the defendant to file an amended answer [*see Code Civ. Proc. § 473*]. For an alternative form of stipulation with the proposed amended pleading attached, discussion, and cross references relating to stipulations, see *§ 21.70*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-21 California Forms of Pleading and Practice--Annotated § 21.72

§ 21.72 Stipulation--That Plaintiff May File Amended Complaint [Code Civ. Proc. § 473] and Order Thereon

[1] FORM Stipulation--That Plaintiff May File Amended Complaint [Code Civ. Proc. § 473] and Order Thereon

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	STIPULATION
vs.	)	(To File Amended Complaint)
_____ [*name*],	)	[(*if reclassified*) RECLASSIFIED BY STIPULA-
Defendant.	)	TION] [(*if reclassified*) LIMITED CIVIL CASE RE-
	)	CLASSIFIED AS AN UNLIMITED CIVIL CASE
	)	*or*
		UNLIMITED CIVIL CASE RECLASSIFIED AS A
		LIMITED CIVIL CASE]

_____

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel, that the plaintiff be permitted to file an amended complaint in the above entitled action.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant_____ [*name*]

IT IS HEREBY ORDERED that plaintiff may file his amended complaint in this action.
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The form of stipulation in [1], *above*, is for use to file an amended complaint. For an alternative form of stipulation with the proposed amended pleading attached, discussion, and cross references relating to stipulations, see *§ 21.70*. For a form of an amended pleading, see *§ 21.60*.

If a case is reclassified by stipulation under *Code Civ. Proc. § 403.050*, the title of the stipulation must state that the action or proceeding is reclassified by this stipulation; and the caption or title must state that the case is a limited civil case reclassified as an unlimited civil case, or an unlimited civil case reclassified as a limited civil case, or other words to that effect [*Cal. Rules of Ct., Rule 2.111(11)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-21 California Forms of Pleading and Practice--Annotated § 21.73

§ 21.73 Stipulation--That Plaintiff May Amend Complaint [Code Civ. Proc. § 473] and to Extend Time Within Which to Prosecute Action [Code Civ. Proc. §§ 583.230(a), 583.330(a)] and Order Thereon

[1] FORM Stipulation--That Plaintiff May Amend Complaint [Code Civ. Proc. § 473] and to Extend Time Within Which to Prosecute Action [Code Civ. Proc. §§ 583.230(a), 583.330(a)] and Order Thereon

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	STIPULATION (To Amend Complaint and to Ex-
_____ [*name*],	)	tend Time to Prosecute Action) [(*if reclassified*) RE-
Defendant.	)	CLASSIFIED BY STIPULATION] [(*if reclassified*)
	)	LIMITED CIVIL CASE RECLASSIFIED AS AN
	)	UNLIMITED CIVIL CASE
		or
		UNLIMITED CIVIL CASE RECLASSIFIED AS A LIMITED CIVIL CASE]

_____

IT IS HEREBY STIPULATED by and between the plaintiff and defendant, through their respective counsel, that plaintiff may amend his/her complaint on file in this action so as to _____ [*specify*], and that the amended complaint may be filed with the clerk of the above-entitled court.

IT IS FURTHER STIPULATED that defendant may have _____ days from the date the _____ [amended *or* amendment to the] complaint is served on him, or on his counsel, in which to answer or otherwise plead thereto.

[IT IS FURTHER STIPULATED that the period commencing on _____ [*date*], and ending on _____ [*date*], shall not be computed in determining the times specified in *Sections 583.230(a)* and *583.330(a) of the Code of Civil Procedure*.]
Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant_____ [*name*]

SO ORDERED.
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The form of stipulation in [1], *above*, is for use to amend a complaint, to limit the time within which an answer to the amendment must be served and filed [*see Code Civ. Proc. § 471.5* (defendant required to answer amendment to complaint within 30 days after service thereof)], and to extend the time within which the action must be prosecuted [*see Code Civ. Proc. §§ 583.230(a), 583.330(a)*].

A stipulation to extend the time for prosecution of an action beyond the 5-year period provided by former *Code Civ. Proc. § 583(b)* [*now see Code Civ. Proc. § 583.310*] does not permit the plaintiff to amend the complaint to add a new cause of action warranting a series of new facts and theories not included in the original complaint filed more than five years previously [*Avedissian v. Manukian (1983) 141 Cal. App. 3d 379, 383, 190 Cal. Rptr. 291]* .

If a case is reclassified by stipulation under *Code Civ. Proc. § 403.050*, the title of the stipulation must state that the action or proceeding is reclassified by this stipulation; and the caption or title must state that the case is a limited civil case reclassified as an unlimited civil case, or an unlimited civil case reclassified as a limited civil case, or other words to that effect [*Cal. Rules of Ct., Rule 2.111(11)*].

[3] Cross References

For discussion, and cross references relating to stipulations, see *§ 21.70[2]* et seq.

For a discussion and forms relating to dismissal of actions for want of prosecution, see Ch. 212, *Dismissal*

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 1126-1127 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-21 California Forms of Pleading and Practice--Annotated § 21.74

§ 21.74 Stipulation--That Plaintiff May Amend Amended Complaint to Correct Mistake [Code Civ. Proc. § 473] and Order Thereon

[1] FORM Stipulation--That Plaintiff May Amend Amended Complaint to Correct Mistake [Code Civ. Proc. § 473] and Order Thereon

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	STIPULATION
_____ [*name*],	)	(To Amend Amended Complaint)
Defendant.	)	
	)	
	)	

_____

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel, that the words _____ [*set forth incorrect words*] as they appear on page _____, lines _____, in the [_____ (*number, e.g.,* Second)] Amended Complaint filed herein on _____ [*date*], be and hereby are corrected to read _____ [*set forth correct words*].
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant_____ [*name*]

SO ORDERED.
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The form of stipulation in [1], *above*, is for use to amend an amended complaint to correct specified words appearing in the amended complaint. When an amendment is used, as distinguished from an amended pleading, the pleader is required to designate the pages and lines of the prior pleading which are being amended [*Cal. Rules of Ct., Rules 3.1100, 3.1324(b)*].

[3] Cross References

For discussion, and cross references relating to stipulations, see *§ 21.70[2]* et seq.

For a form of amendment to a pleading, see *§ 21.61*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedureDiscoveryMethodsStipulations

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3-21 California Forms of Pleading and Practice--Annotated § 21.75

§ 21.75 Stipulation--That Plaintiff May Amend Complaint and Other Pleadings to Correct Name of Defendant [Code Civ. Proc. § 473] and Order Thereon

[1] FORM Stipulation--That Plaintiff May Amend Complaint and Other Pleadings to Correct Name of Defendant [Code Civ. Proc. § 473] and Order Thereon

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	STIPULATION
_____ [*name*],	)	(To Amend Pleadings to Correct Name of Defendant)
Defendant.	)	
	)	
	)	

It appearing to the parties to this action that the true and correct name of the defendant and cross complainant sued herein as _____ [*incorrect name*] is _____ [*correct name*];

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel, that plaintiff's complaint herein and all other pleadings and papers in this action may be amended and corrected nunc pro tunc as of the filing of this action, to name and designate the defendant as _____ [*correct name*] instead of _____ [*incorrect name*].

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant_____ [*name*]

IT IS SO ORDERED.
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The form of stipulation in [1], *above*, is for use to amend pleadings to correct the name of the defendant. The court may, in furtherance of justice, and on any terms as may be proper, allow a party to amend any pleading by correcting a mistake in the name of a party [*Code Civ. Proc. § 473*; for discussion, see *§ 21.13[1]*].

[3] Cross References

For a form of amendment to a complaint correcting the defendant's name, see *§ 21.64*

For discussion, and cross references relating to stipulations, see *§ 21.70[2]* et seq.

Witkin, California Procedure, Vol. 5, *Pleading*, § 1126 (4th ed. 1985)

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-21 California Forms of Pleading and Practice--Annotated § 21.76

§ 21.76 Ex Parte Motion for Order Granting Leave to Amend Pleading [Code Civ. Proc. § 473] and Order Thereon

[1] FORM Ex Parte Motion for Order Granting Leave to Amend Pleading [Code Civ. Proc. § 473] and Order Thereon

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
_____ [*e.g.*, Plaintiff],	)	NO. _____
vs.	)	EX PARTE MOTION
_____ [*name*],	)	(To Amend _____ [*e.g.*, Com-
_____ [*e.g.*, Defendant].	)	plaint])
	)	
	)	

_____

_____ [*Party, e.g.*, Plaintiff] hereby applies to this court for an order granting leave to file his/her/its _____ [*number, e.g.*, first] _____ [amended *or* amendment to the] _____ [*pleading, e.g.*, complaint]. [A copy of the proposed _____ (amendment *or* amended pleading) is attached hereto as Exhibit "A."] This application is made on the grounds that the proposed amendment is in furtherance of justice in that _____ [*specify reasons*].
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

ORDER

Good cause appearing, _____ [*party, e.g.*, plaintiff] is hereby allowed to file the original of the within proposed _____ [amended *or* amendment to the] _____ [*pleading, e.g.*, complaint]. Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The form of ex parte motion in [1], *above*, is for use when leave of court is required to amend a pleading, but notice to the adverse party is not required. A party may amend a pleading by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect without notice to the adverse party [*see Code Civ. Proc. § 473(a)*]. However, leave of court is required if the period specified in *Code Civ. Proc. § 472* (amendment of course) has elapsed [*see Code Civ. Proc. § 473(a)*]. For discussion, see *§§ 21.12, 21.13[1]*.

This motion need not be made in writing and preparation of this form may not be necessary if counsel is otherwise before the court and can make the motion orally.

[3] Contents of Motion

A motion to amend a pleading before trial must include a copy of the proposed amendment or amended pleading, which must be serially numbered to differentiate it from previous pleadings or amendments [*Cal. Rules of Ct., Rule 3.1324(a)(1)*]. It must state what allegations in the previous pleading are proposed to be deleted, if any, and where, by page, paragraph, and line number, the deleted allegations are located; and it must state what allegations are proposed to be added to the previous pleading, if any, and where, by page, paragraph, and line number, the additional allegations are located [*Cal. Rules of Ct., Rule 3.1324(a)(2), (3)*]. The form includes an optional sentence for attaching a copy of the proposed amendment, but local practice should be checked as to whether the amendment should be bound with the motion or submitted under separate cover.

The motion must be accompanied by a declaration which specifies, 1) the effect of the amendment; 2) why the amendment is necessary and proper; 3) when the facts giving rise to the amended allegations were discovered; and 4) the reasons why the request for amendment was not made earlier [*Cal. Rules of Ct., Rule 3.1324(b)*].

For a declaration that may be incorporated in or submitted with this form that both states the effect and details changes made by the amendment, see *§ 21.79*.

[4] Cross References

For a form of an amended pleading, see *§ 21.60*

For a form of an amendment to a pleading, see *§§ 21.61, 21.63 -21.69*

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 1114, 1126-1127 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of Court

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PART V. FORMS
A. Amended Pleadings

3-21 California Forms of Pleading and Practice--Annotated § 21.77

§ 21.77 Notice of Motion for Order Granting Leave to Amend Pleading [Code Civ. Proc. § 473(a)]

[1] FORM Notice of Motion for Order Granting Leave to Amend Pleading [Code Civ. Proc. § 473(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION TO
Plaintiff,	)	AMEND _____ [*e.g.*,
vs.	)	COMPLAINT]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
_____		

To _____ [*identify party, e.g.*, defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____

of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.*, plaintiff] will, and hereby does, move for an order allowing _____ [*party, e.g.*, plaintiff] to file a/an _____ [(*number if not the first, e.g.*, second) amended *or* amendment to the] _____ [*pleading, e.g.*, complaint], a copy of which is attached hereto, in order to _____ [*state effect of amendment*]. _____ [*State the page, line number, and wording of any proposed interlineations of material, e.g., The proposed amendment deletes "_____" (quote words to be deleted*), which appear commencing on page _____, paragraph _____, line _____, and concluding on page _____, paragraph _____, line _____. The proposed amendment adds "_____" (*quote words to be added*), to commence on page _____, paragraph _____, line _____, and to conclude on page _____, paragraph _____, line _____.] The motion will be made on the ground that the amendment is in furtherance of justice in that _____ [*specify*].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, the proposed [*number, if not first, e.g.*, second] amended complaint, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Use of Form

The form of notice of motion in [1], *above*, is for use when notice to the adverse party is required to obtain leave of court to amend a pleading. Notice is required after the period specified in *Code Civ. Proc. § 472* (amendment of course) has passed, unless the amendment seeks merely to add or to strike a pary's name or to correct a mistake in the pleading [*see Code Civ. Proc. § 473(a)*].

[3] Contents of Motion

A motion to amend a pleading before trial must include a copy of the proposed amendment or amended pleading, which must be serially numbered to differentiate it from previous pleadings or amendments [*Cal. Rules of Ct., Rule 3.1324(a)(1)*]. It must state what allegations in the previous pleading are proposed to be deleted, if any, and where, by page, paragraph, and line number, the deleted allegations are located; and it must state what allegations are proposed to be added to the previous pleading, if any, and where, by page, paragraph, and line number, the additional allegations are located [*Cal. Rules of Ct., Rule 3.1324(a)(2), (3)*]. The form includes an optional sentence for attaching a copy of the proposed amendment, but local practice should be checked as to whether the amendment should be bound with the motion or submitted under separate cover.

The motion must be accompanied by a declaration which specifies, 1) the effect of the amendment; 2) why the amendment is necessary and proper; 3) when the facts giving rise to the amended allegations were discovered; and 4) the reasons why the request for amendment was not made earlier [*Cal. Rules of Ct., Rule 3.1324(b)*]. For forms of declarations under penalty of perjury that support a motion, see *§§ 21.79* et seq.

Filing the proposed amendment as an attachment to the notice of motion must be distinguished from the actual filing of the amendment after obtaining leave of court; if leave of court is obtained, the amendment or amended pleading must

then be filed and served [*see Code Civ. Proc. § 471.5*].

[4] Memorandum

A supporting memorandum must be filed and a copy served with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*].

[5] Compulsory Cross Complaint

A party who fails to plead a cause of action subject to the requirements of *Code Civ. Proc. §§ 426.10-426.60* (compulsory cross complaint), whether through oversight, inadvertence, mistake, neglect, or other cause, may apply to the court for leave to amend his or her pleading, or to file a cross complaint, to assert that cause of action at any time during the course of the case [*Code Civ. Proc. § 426.50*]. *Code Civ. Proc. § 426.50* provides that the court, after notice to the adverse party, shall grant, on such terms as may be just to the parties, leave to amend the pleading, or to file the cross complaint, to assert the cause of action if the party who failed to plead the cause acted in good faith. Section 426.50 is to be liberally construed to avoid forfeiture of causes of action [*Code Civ. Proc. § 426.50*]. For a further discussion of compulsory cross complaints, see Ch. 123, *Complaints and Cross Complaints* .

[6] Cross References

For forms of amended pleading and amendment to a pleading, see *§§ 21.60, 21.61*

For a form of order granting this motion, see *§ 21.83*

For a procedural guide and for additional forms for use in noticed motion proceedings, see Ch. 372, *Motions and Orders*

For memoranda of points and authorities in support of and in opposition to motions to amend, see California Points and Authorities, Ch. 16, *Amended and Supplemental Pleadings* (Matthew Bender)

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 1114, 1126-1127 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProceduresPleading & PracticePleadingsAmended PleadingsLeave of Court

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3-21 California Forms of Pleading and Practice--Annotated § 21.78

§ 21.78 Notice of Motion for Order Granting Leave to Amend Complaint [Code Civ. Proc. §§ 473(a), 576] to Increase Demand for Damages

[1] FORM Notice of Motion for Order Granting Leave to Amend Complaint [Code Civ. Proc. §§ 473(a), 576] to Increase Demand for Damages

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION TO
Plaintiff,	)	AMEND _____ [*e.g.*,
vs.	)	COMPLAINT]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To defendant and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], plaintiff will, and hereby does, move for an order granting him/her leave to file a/an [*number if not the first, e.g.*, second] amended complaint, a copy of which is attached hereto, in order to increase the amount of damages alleged to have been sustained by reson of the facts set forth in the complaint. _____ [*State the page, line number, and wording of any proposed interlineations of material, e.g.*, The proposed amendment deletes "_____" (*quote words to be deleted*), which appear commencing on page _____, paragraph _____, line _____, and concluding on page _____, paragraph _____, line _____. The proposed amendment adds "_____" (*quote words to be added*), to commence on page _____, paragraph _____, line _____, and to conclude on page _____, paragraph _____, line _____.] The motion will be made on the ground that the amendment is in furtherance of justice in that plaintiff will not be able to recover these damages if he/she cannot do so in this action.

The motion will be based on this notice of motion, on the declaration(s) of _____[*name(s)*] and the supporting memorandum served and filed herewith, the proposed [*number, if not first, e.g.*, second] amended complaint, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

The form of notice of motion in [1], *above*, is for use in obtaining an order to file an amended complaint increasing the demand for damages [*see Code Civ. Proc. §§ 473(a), 576*; for discussion of these sections, see *§ 21.13[1][a], [2]*]. For discussion of the requirements for this motion, including papers that must accompany it, and additional cross references, see *§ 21.77[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of Court

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PART V. FORMS
A. Amended Pleadings

3-21 California Forms of Pleading and Practice--Annotated § 21.79

§ 21.79 Declaration Under Penalty of Perjury in Support of Motion to Amend Pleading [Code Civ. Proc. § 473(a)]--By Attorney--Identifying Changes Made

[1] FORM Declaration Under Penalty of Perjury in Support of Motion to Amend Pleading [Code Civ. Proc. § 473(a)]--By Attorney--Identifying Changes Made

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	DECLARATION OF _____
_____ [*name*],	)	[*name*]
Plaintiff,	)	IN SUPPORT OF MOTION TO AMEND
vs.	)	_____ [*e.g.*,
_____ [*name*],	)	COMPLAINT]
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am the attorney for the _____ [*party*] herein.

2. The declaration is made in support of _____ [*specify moving party, e.g.*, plaintiff's] motion for leave to file a _____ [*specify pleading, e.g.*, second amended complaint] in order to _____ [*specify effect of the amendment*].

[*EITHER, if changes are by interlineation*]

3. The allegations of the _____ [*pleading to be amended, e.g.*, complaint] to be deleted by the proposed amendment are "_____" [*quote words to be deleted*], which appear commencing on page _____, paragraph _____, line _____, and concluding on page _____, paragraph _____, line_____.

4. The allegations of the _____ [*pleading to be amended, e.g.*, complaint] to be added by the proposed amendment are "_____" [*quote words to be added*], which will appear commencing on page _____, paragraph _____, line _____, and concluding on page _____, paragraph _____, line _____.

[*OR, if pleading is completely rewritten*]

3. The proposed amendment is a complete rewrite of the _____ [*specify pleading, e.g.*, complaint] in order to _____ [*describe changes in general terms*].

4. The _____ [*specify pleading, e.g.*, complaint] has been completely rewritten because _____ [*state reason for the complete rewrite*].

[*CONTINUE*]

5. The proposed amendment is necessary and proper in that _____ [*specify*].

6. _____ [*Explain when facts giving rise to amended allegations were discovered*].

7. _____ [*Explain why the motion was not filed earlier*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form of declaration in [1], *above*, is for use to support a motion to amend a pleading. The form is designed to comply with *Cal. Rules Ct., Rule 3.1324(b)*, which requires that a motion to amend a pleading must be accompanied by a declaration which specifies:

- the effect of the amendment;
- why the amendment is necessary and proper;
- when the facts giving rise to the amended allegations were discovered; and
- the reasons why the request for amendment was not made earlier.

[3] Cross References

For additional forms of declaration supporting a motion for leave to amend a pleading, see, *§§ 21.80 -21.82*

For discussion and general forms of affidavits and declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesPerjuryGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of Court

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3-21 California Forms of Pleading and Practice--Annotated § 21.80

§ 21.80 Declaration Under Penalty of Perjury in Support of Motion to Amend Complaint [Code Civ. Proc. §§ 473(a), 576]--By Witness

[1] FORM Declaration Under Penalty of Perjury in Support of Motion to Amend Complaint [Code Civ. Proc. §§ 473(a), 576]--By Witness

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

	)	
	)	NO. _____
	)	DECLARATION OF _____
_____ [*name*],	)	[*name*]
Plaintiff,	)	IN SUPPORT OF MOTION TO AMEND COM-
vs.	)	PLAINT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identity declarant, e.g.*, a general partner of plaintiff partnership and the person under whose direction the repairs referred to in the complaint were made and the person in charge of expenditures made in connection with those repairs].

2. _____ [*Here and in subsequent paragraphs set forth additional facts in support of motion, e.g.*, I did not know or realize that the repair costs now proposed to be added to the complaint were chargeable to the acts of the defendant as alleged in the complaint until plaintiff's attorney informed me of that fact on or about _____ (*date*). I therefore did not inform plaintiff's attorney of the additional repair costs until after _____ (*date*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form of declaration in [1], *above*, is for use to support a motion to amend a complaint [for forms of notice of motion, see *§§ 21.77, 21.78*]. For an additional form of declaration that must accompany the motion, see *§ 21.79*.

[3] Contents of Declaration

Leave to amend a pleading is granted where the amendment is in furtherance of justice [*see Code Civ. Proc. §§ 473(a), 576*] and this form should be filled in to show facts in support of this ground. Motions to amend should be made promptly when the need to amend is discovered, and reasons for delay, if any, should be contained in the declaration. If the motion is made after the trial date has been set, the papers accompanying the motion should set forth in special detail the reasons therefor and a clear explanation as to why the matter has been delayed.

[4] Cross References

For additional discussion and cross references relating to declarations, see *§ 21.79[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesPerjuryGeneral OverviewCivil ProceduresPleading & PracticePleadingsComplaintsRequirementsCivil ProceduresPleading & PracticePleadingsAmended PleadingsLeave of Court

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3-21 California Forms of Pleading and Practice--Annotated § 21.81

§ 21.81 Declaration Under Penalty of Perjury in Support of Motion for Order Allowing Plaintiff to Amend Complaint [Code Civ. Proc. § 473(a)]--To Increase Damages--By Attorney

[1] FORM Declaration Under Penalty of Perjury in Support of Motion for Order Allowing Plaintiff to Amend Complaint [Code Civ. Proc. § 473(a)]--To Increase Damages--By Attorney

[*Caption. See § 21.79[1]*]

I, _____ [*name*], declare:

1. I am the attorney for the plaintiff in the above entitled action.

2. I did not learn until _____ [*date*], that the _____ [*specify nature of increased damages to be claimed in amended complaint, e.g.,* cost of repairs referred to in the complaint on file in this action exceeded the amount set forth in the complaint].

3. _____ [*Set forth particular facts showing how attorney learned of increased damages*].

4. On discovering that these _____ [costs *or* expenses *or* damages] exceeded those previously known, I informed plaintiff that those amounts should be included as damages resulting from the _____ [*specify basis of action, e.g.*, negligence *or* breach of contract] of defendant _____ [*name*].

5. Plaintiff promptly agreed that a notice of motion to amend the complaint should be filed so that the motion for leave to amend could be heard at the pretrial hearing heretofore set. The notice of motion was so filed and served.

6. The interests of justice will be served by permitting the amendment to be made as _____ [*specify, e.g.*, plaintiff will not be able to recover the increased damages, and thus, will not be made whole, unless these increased

damages are awarded in this action].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form of declaration under penalty of perjury in [1], *above*, is for use by an attorney to support a motion to amend a complaint to increase damages [*see Code Civ. Proc. §§ 2009, 2015.5*; for the form of notice of motion, *see § 21.78*]. For an additional form of declaration by the attorney that must accompany the motion, see *§ 21.79*.

[3] Cross References

For additional discussion and cross references relating to declarations, see *§ 21.79[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesPerjuryGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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PART V. FORMS
A. Amended Pleadings

3-21 California Forms of Pleading and Practice--Annotated § 21.82

§ 21.82 Declaration Under Penalty of Perjury in Support of Motion for Order Allowing Plaintiff to Amend Complaint [Code Civ. Proc. § 473(a)]--To Allege Additional Capacity of Plaintiff and to Change Caption Accordingly--By Attorney

[1] FORM Declaration Under Penalty of Perjury in Support of Motion for Order Allowing Plaintiff to Amend Complaint [Code Civ. Proc. § 473(a)]--To Allege Additional Capacity of Plaintiff and to Change Caption Accordingly--By Attorney

[*Caption. See § 21.79[1].*]

I, _____ [*name*], declare:

1. I am the attorney for plaintiff _____ [*name*] in the above entitled matter.

2. The relief sought in the above-entitled action affects the plaintiff both as an individual and in his/her representative capacity as _____ [*e.g.*, executor of the will of _____ (*name*), deceased] in that _____ [*specify*].

3. It is necessary that plaintiff's rights be adjudicated both in his individual and representative capacities in order to give finality to the orders and judgment herein in that _____ [*specify*].

4. It is also necessary that the caption of the above-entitled action be changed to show plaintiff's individual and representative capacity in that _____ [*specify*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form of declaration in [1], *above*, is for use by an attorney to support a motion to amend a complaint to allege an additional capacity of plaintiff, such as his or her capacity as executor [*see Code Civ. Proc. §§ 2009, 2015.5*; for a form of notice of motion for leave to amend a pleading, see *§ 21.77*]. The form provides for stating facts showing the necessity for the additional allegations and for changing the title of the action. For an additional form of declaration by the attorney that must accompany the motion, see *§ 21.79*.

[3] Cross References

For additional discussion and cross references relating to declarations, see *§ 21.79[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePartiesCapacity of PartiesGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesPerjuryGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of Court

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3-21 California Forms of Pleading and Practice--Annotated § 21.83

§ 21.83 Order Granting Party Leave to Amend Pleading [Code Civ. Proc. § 473(a)]

[1] FORM Order Granting Party Leave to Amend Pleading [Code Civ. Proc. § 473(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [*party, e.g.*, plaintiff] for an order allowing amendment of the _____ [*pleading, e.g.*, complaint] came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*]. On proof made to the satisfaction of the court that the motion ought, in furtherance of justice, to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that _____ [*party, e.g.*, plaintiff] be allowed to file the _____ [amended *or* amendment to the] _____ [*pleading, e.g.*, complaint], a copy of which is attached to the notice of motion herein.

IT IS FURTHER ORDERED that _____ [*specify terms of order, e.g.*, defendant shall have _____ days from the date of service of the amendment in which to answer *or* the answer heretofore filed by the defendant shall stand as the answer to this amendment].
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, is for use when the court grants a motion to amend a pleading and allows the filing of the amendment. After the order is made, the amendment is filed and served [*see Code Civ. Proc. § 471.5*]. For related forms of notice of motion, see *§§ 21.77, 21.78*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProceduresPleading & PracticePleadingsAmended PleadingsLeave of Court

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3-21 California Forms of Pleading and Practice--Annotated § 21.84

§ 21.84 Notice of Motion for Order Granting Leave to Amend Complaint [Code Civ. Proc. §§ 473(a), 576] to Conform to Proof Adduced at Trial [Code Civ. Proc. § 469]

[1] FORM Notice of Motion for Order Granting Leave to Amend Complaint [Code Civ. Proc. §§ 473(a), 576] to Conform to Proof Adduced at Trial [Code Civ. Proc. § 469]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR
vs.	)	LEAVE TO AMEND COMPLAINT, SUPPORTING
_____ [*name*],	)	DECLARATION OF _____
Defendant.	)	[*name*], AND SUPPORTING MEMORANDUM
	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of

record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* plaintiff] will, and hereby does, move for permission to amend his complaint on file to conform to proof adduced at trial. A copy of the proposed amendments is attached hereto. The motion will be made on the ground that the amendment is necessary in the interests of justice to allow the complaint to conform to the proof adduced at trial in that _____ [*specify*].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the proposed amendment to the _____ [*specify pleading, e.g.,* complaint], on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Use of Form

The form of notice of motion in [1], *above*, is for use to amend a complaint to conform to proof [*see Code Civ. Proc. §§ 469, 470*; for discussion of amendments to conform to proof, *see § 21.25*]. A noticed motion may be used where, for example, it is not made until after completion of the trial. Generally a motion to amend to conform to proof is made orally to the court during the course of, or at the termination of, the trial, and is not a noticed motion. For discussion of the requirements for this motion, including papers that must accompany it, and cross references, see *§ 21.77[2]* et seq.

[3] Cross References

For memoranda of points and authorities relating to a motion for leave to amend to conform to proof, see California Points and Authorities, Ch. 16, *Amended and Supplemental Pleadings* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to Evidence

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PART V. FORMS
A. Amended Pleadings

3-21 California Forms of Pleading and Practice--Annotated § 21.85

§ 21.85 Order Granting Leave to Amend Complaint to Conform to Proof [Code Civ. Proc. §§ 469, 473(a), 576]

[1] FORM Order Granting Leave to Amend Complaint to Conform to Proof [Code Civ. Proc. §§ 469, 473(a), 576]

[*Caption. See § 21.83[1].*]

Plaintiff's motion to amend the complaint to conform to proof having come on regularly for hearing on _____ [*date*], all parties appearing through their respective counsel, and good cause appearing therefor:

IT IS ORDERED that plaintiff be allowed to file the amendment attached to the notice of motion herein.
Dated: _____.

_____ [*signature*]
Judgeof the _____ Court

[2] Use of Form

The form of order in [1], *above*, is for use when the court grants a motion to amend a complaint to conform to proof. For the related notice of motion, see *§ 21.84*, and for general references relating to orders, see *§ 21.83*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to EvidenceCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral Overview

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3-21 California Forms of Pleading and Practice--Annotated §§ 21.86-21.89

[Reserved]

§§ 21.86[Reserved]

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B. Supplemental Pleadings

3-21 California Forms of Pleading and Practice--Annotated § 21.90

§ 21.90 Supplemental Pleading [Code Civ. Proc. § 464]--Format

[1] FORM Supplemental Pleading [Code Civ. Proc. § 464]--Format

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	SUPPLEMENTAL _____ [*plead-*
_____ [*name*],	)	*ing, e.g.*, COMPLAINT]
Defendant.	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Pursuant to leave of court, _____ [*party, e.g.*, plaintiff] files his/her supplemental _____ [*specify, e.g.*, complaint] and alleges as follows:

1. [*Here and in succeeding numbered paragraphs, set forth supplemental pleading.*]

WHEREFORE, _____ [*party, e.g.*, plaintiff] prays _____ [*e.g.*, judgment as follows]:

1. [*Here and in succeeding numbered lines, set forth prayer of supplemental pleading.*]

_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for_____ [*party's status and name*]

VERIFICATION

I, _____ [*name*], am the _____ [*party, e.g.*, plaintiff] in this _____ [*either* action *or* proceeding]. I have read the foregoing supplemental _____ [*pleading, e.g.*, complaint] and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, indicates the format of a supplemental pleading. *Code Civ. Proc. § 464(a)* provides that the plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer. Although this rule is only expressly applicable to complaints and answers in civil actions, supplemental pleadings are generally allowed in special proceedings, particularly where there is a provision incorporating the provisions of Part Two of the Code of Civil Procedure (in which *Code Civ. Proc. § 464*, is found) to the extent that they are not inconsistent with provisions expressly governing the particular special proceeding [*see, e.g., Code Civ. Proc. § 1109* (rules of practice in proceedings involving writs of review, mandate, and prohibition)].

For a special rule allowing supplemental pleadings without leave of court in actions involving child support, see *§ 21.28*.

[3] Verification

There is no express statutory requirement that a supplemental pleading not otherwise required to be verified be verified because the original pleading was verified.

For a discussion of when verification is required and for alternative forms of verification, see Ch. 572, *Verification* .

[4] Cross References

For general forms of answers, see Ch. 26, *Answers*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For general forms of complaints and cross complaints, see Ch. 123, *Complaints and Cross Complaints*

For forms of prayers, see Ch. 420, *Prayers*

Witkin, California Procedure, vol. 5, *Pleading*, § 1172 et seq. (4th ed.1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedurePleading & PracticePleadingsAnswers

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B. Supplemental Pleadings

3-21 California Forms of Pleading and Practice--Annotated § 21.91

§ 21.91 Stipulation Permitting Filing of Supplemental Pleading [Code Civ. Proc. § 464]

[1] FORM Stipulation Permitting Filing of Supplemental Pleading [Code Civ. Proc. § 464]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	STIPULATION
_____ [*name*],	)	(Permitting Filing of Supplemental
Defendant.	)	_____ [*pleading, e.g.*, Complaint])
	)	
	)	

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel, that this court may allow the _____ [*party, e.g.*, plaintiff], to file the supplemental _____ [*pleading, e.g.*, complaint], a copy of which is attached hereto.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant_____ [*name*]

SO ORDERED.
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The form of stipulation in [1], *above*, is for use to permit the filing of a supplemental pleading [*see Code Civ. Proc. § 464*].

[3] Cross References

For discussion and general forms of stipulations, see Ch. 533, *Stipulations*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedureDiscoveryMethodsStipulations

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3-21 California Forms of Pleading and Practice--Annotated § 21.92

§ 21.92 Notice of Motion for Order Granting Leave to File Supplemental Pleading [Code Civ. Proc. § 464] and Supporting Declaration

[1] FORM Notice of Motion for Order Granting Leave to File Supplemental Pleading [Code Civ. Proc. § 464] and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR
vs.	)	LEAVE TO FILE SUPPLEMENTAL
_____ [*name*],	)	_____ [*pleading, e.g.*, COM-
Defendant.	)	PLAINT], SUPPORTING DECLARATION OF
	)	_____ [*name*], AND SUPPORT-
	)	ING MEMORANDUM
	)	Date: _____
	)	Time: _____
		Dept: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.*, defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.*, plaintiff] will, and hereby does, move for an order allowing _____ [*party, e.g.*, plaintiff] to file the supplemental _____ [*pleading, e.g.*, complaint], a copy of which is attached hereto. The motion will be made on the ground that the facts alleged in the supplemental _____ [*pleading, e.g.*, complaint] are material to the case and occurred after the filing of the former _____ [*pleading, e.g.*, complaint].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the proposed supplemental _____ [*e.g.*, complaint], on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, the plaintiff in the above-entitled action *or other statement as appropriate*].

2. The facts alleged in the proposed supplemental _____ [*pleading, e.g.*, complaint] are material to the case in that _____ [*specify*].

3. The facts alleged in the proposed supplemental _____ [*pleading, e.g.*, complaint] occurred after the filing of the former _____ [*pleading, e.g.*, complaint] and on or about _____ [*date*].

[4. *Here and in subsequent paragraphs set forth additional facts as necessary in support of the motion.*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion*]

[2] Use of Form

The form of notice of motion in [1], *above*, is for use by any party to obtain leave to file a supplemental pleading [*see Code Civ. Proc. § 464*].

[3] Memorandum

A memorandum must be filed and a copy served with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*].

[4] Cross References

For a form of order granting this motion, see *§ 21.93*

For a procedural guide and for additional forms for use in noticed motion proceedings, see Ch. 372, *Motions and Orders*

For memoranda of points and authorities in support of and in opposition to this motion, see California Points and Authorities, Ch. 16, *Amended and Supplemental Pleadings* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedurePleading & PracticeMotion PracticeContent & Form

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3-21 California Forms of Pleading and Practice--Annotated § 21.93

§ 21.93 Order Granting Motion to File Supplemental Pleading [Code Civ. Proc. § 464]

[1] FORM Order Granting Motion to File Supplemental Pleading [Code Civ. Proc. § 464]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [*party, e.g.*, plaintiff] for an order allowing filing of a supplemental _____ [*pleading, e.g.*, complaint] came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*]. On proof made to the satisfaction of the court that the facts alleged in the proposed supplemental _____ [*pleading, e.g.*, complaint] are material to the case and that they occurred after the filing of the former _____ [*pleading, e.g.*, complaint] and that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that _____ [*party, e.g.*, plaintiff] be allowed to file the original of the supplemental _____ [*pleading, e.g.*, complaint], a copy of which is

attached to the notice of motion herein.
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The form of order in [1], *above*, is for use when the court grants a motion to allow a party to file a supplemental pleading. The original of the supplemental pleading is filed after the motion is granted.

[3] Cross References

For the related form of notice of motion, see *§ 21.92*

For general information relating to orders, see Ch. 372, *Motions and Orders*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental Pleadings

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3-21 California Forms of Pleading and Practice--Annotated § 21.94

§ 21.94 Notice of Motion to Strike Portion of Supplemental Complaint [Code Civ. Proc. §§ 435, 436]

[1] FORM Notice of Motion to Strike Portion of Supplemental Complaint [Code Civ. Proc. §§ 435, 436]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO STRIKE, SUPPORTING DECLARATION OF _____ [*name*], AND SUPPORTING MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To plaintiff _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], defendant will, and hereby does, move for an order to strike _____ [*designate portions to be stricken*]. The motion will be made on the grounds that those portions of the supplemental complaint are _____ [*irrelevant or* false *or* improper *or any combination of those grounds*].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant_____ [*name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*Set out facts showing irrelevant, false, or improper nature of the challenged portions of pleading in as many paragraphs as appropriate*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion*]

[2] Use of Form

The form in [1], *above*, is a notice of motion to strike portions of a supplemental complaint on the ground that the motion is irrelevant, false, or improper [*see Code Civ. Proc. §§ 435, 436*]. This form may be used only in superior court and is not a limited civil case [*see Code Civ. Proc. § 92(d)* (motions to strike in limited civil cases are allowed only on the ground that the damages or relief sought are not supported by the allegations of the complaint)].

[3] Memorandum

A supporting memorandum is required to be filed and a copy served with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[4] Cross References

For discussion, a procedural checklist, and other forms relating to motions to strike, see Ch. 375, *Motions to Strike: Pleadings*

For additional forms and a procedural checklist for use in making motions generally, see Ch. 372, *Motions and Orders*

For memoranda of points and authorities relating to motions to strike, see California Points and Authorities, Ch. 160, *Motions To Strike* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticePleadingsSupplemental PleadingsCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral Overview

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3-21 California Forms of Pleading and Practice--Annotated § 21.95

§ 21.95 Order Granting Motion to Strike Portion of Supplemental Complaint

[1] FORM Order Granting Motion to Strike Portion of Supplemental Complaint

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of defendant for an order striking portions of the supplemental complaint on file herein on the ground that _____ [*specify*] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted as to _____ [*designate portions to be stricken*] and the same is ordered stricken forthwith.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of order in [1], *above*, is for use when the motion to strike a supplemental complaint, or a portion thereof, is granted [*see Code Civ. Proc. §§ 435, 436*]. For the related form of notice of motion, see *§ 21.94*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral Overview

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3-21 California Forms of Pleading and Practice--Annotated §§ 21.96-21.99

[Reserved]

§§ 21.96[Reserved]

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C. Substitution of Parties

3-21 California Forms of Pleading and Practice--Annotated § 21.100

§ 21.100 Notice of Motion for Order Substituting Personal Representative or Successor in Interest for Deceased Plaintiff, Allowing Action to Be Continued by Personal Representative or Successor in Interest, and Allowing Filing of Supplemental Pleading [Code Civ. Proc. §§ 377.31, 464]

[1] FORM Notice of Motion for Order Substituting Personal Representative or Successor in Interest for Deceased Plaintiff, Allowing Action to Be Continued by Personal Representative or Successor in Interest, and Allowing Filing of Supplemental Pleading [Code Civ. Proc. §§ 377.31, 464]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*]	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER SUBSTITUTING _____
vs.	)	[PERSONAL REPRESENTATIVE *or* SUCCESSOR
_____ [*name*],	)	IN INTEREST] FOR DECEASED PLAINTIFF
Defendant.	)	[AND GRANTING LEAVE TO FILE SUPPLE-
	)	MENTAL COMPLAINT,] AND SUPPORTING
	)	MEMORANDUM
	)	Date: _____
		Time: _____
		Dept.: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*name*], defendant, and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*name*], as _____ [*describe type of personal representative, e.g.,* executor of the will of _____ (*name*), deceased *or, if no personal representative,* successor in interest] will, and hereby does, move the court for an order allowing this action to be continued by him/her, as _____ [*describe type of personal representative, e.g.,* executor of the will of _____ (*name*), deceased], in the place of plaintiff[, and granting leave to file a supplemental complaint _____ (to allege _____ (*set forth facts to be alleged in supplemental complaint*) *or*, a copy of which is attached hereto)]. The motion will be made on the ground that plaintiff died on _____ [*date*], that this action survives, and that _____ [*name*] is _____ [the duly appointed, qualified, and acting _____ (*describe type of personal representative, e.g.,* executor of plaintiff's will) *or, if no personal representative,* successor in interest].

The motion will be based on this notice of motion, [the attached proposed supplemental complaint,] the declaration(s) of _____ [*name(s)*], the supporting memorandum served and filed herewith, the records and file herein, and on such evidence that may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion.*]

[2] Use of Form

[a] Substitution of Personal Representative or Successor in Interest

The form of notice of motion in [1], *above,* is for use when a plaintiff in an action or proceeding has died to substitute for the deceased plaintiff his or her duly appointed, qualified, and acting personal representative or successor in interest and to allow the action or proceeding to be continued by the personal representative or successor in interest [*see Code Civ. Proc. § 377.31*; *see also Code Civ. Proc. § 377.11* ("successor in interest" defined); *Prob. Code § 58* ("personal representative" defined)]. For discussion of the right to substitution, see *§ 21.27[4]*.

[b] Leave to File Supplemental Pleading

The form may also be used to obtain an order permitting the filing of a supplemental complaint if one is required. For a

form of supplemental complaint, see *§ 21.90*.

[c] In Proceedings as Well as Actions

In addition to substituting a plaintiff in a pending action, the form may also be used to substitute a petitioner in a pending proceeding [*see Code Civ. Proc. § 377.31*]. In that situation, modify the form by replacing the words "plaintiff," "action," and "complaint" with "petitioner," "proceeding," and "petition," respectively, and as appropriate, based on the papers previously filed in the proceeding.

[3] Nonabatement of Actions on Party's Death

An action or proceeding does not abate by the death of a party if the cause of action survives or continues [*Code Civ. Proc. § 377.21*]. As to survival of actions, no cause of action is lost by reason of the death of any person, but may be maintained by or against the party's personal representative [*Code Civ. Proc. § 377.20*]. For further discussion of survival of actions, see Ch. 181, *Death and Survival Actions* .

[4] Accompanying Papers

[a] Supporting Declarations

[i] Attorney's Declaration When Substituting Personal Representative

For a form of supporting declaration to use if the decedent's personal representative is being substituted for the decedent, see *§ 21.101*.

[ii] Declaration of Successor in Interest

A person who seeks to continue a pending action or proceeding as the decedent's successor in interest must execute and file an affidavit or declaration under penalty of perjury under the law of California, stating the basis for the declarant's status as successor in interest [*see Code Civ. Proc. § 377.32*]. For a form of declaration of the successor in interest to accompany this notice of motion, see *§ 21.102*.

In addition, if the property that is the subject of the action or proceeding is claimed by the decedent's successor in interest under the *Prob. Code § 13100 et seq.* affidavit procedure for collecting or transferring personal property, that affidavit (or declaration under penalty of perjury) must also be filed when the motion to substitute the successor for the decedent is made [*Prob. Code § 13107.5*]. For a form of declaration under *Prob. Code § 13100 et seq.*and discussion of that procedure, see Ch. 441, *Probate: Disposition Without Administration* .

[b] Memorandum

A supporting memorandum is required to be filed and a copy served with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*].

[5] Continuance

If the death occurs before trial but after a trial date has been set or during trial, a continuance of the trial date or trial will be required to allow time for the appointment of a personal representative. For discussion and forms relating to motions for continuances, see Ch. 136, *Continuances* .

[6] Cross References

For for a procedural checklist and additional forms for making motions, see Ch. 372, *Motions and Orders*

For memoranda of points and authorities in support of this motion, see s California Points and Authorities, Ch. 10, *Abatement and Survival of Actions* (Matthew Bender)

Witkin, California Procedure, vol. 4, *Pleading*, §§ 238-240 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedureParties SubstitutionsMotions for SubstitutionCivil ProcedureParties SubstitutionsDeath of Party

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3-21 California Forms of Pleading and Practice--Annotated § 21.101

§ 21.101 Declaration in Support of Motion for Order Substituting Personal Representative for Deceased Plaintiff and Allowing Action to Be Continued by Personal Representative [Code Civ. Proc. § 377.31]--By Attorney

[1] FORM Declaration in Support of Motion for Order Substituting Personal Representative for Deceased Plaintiff and Allowing Action to Be Continued by Personal Representative [Code Civ. Proc. § 377.31]--By Attorney

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF MOTION FOR ORDER SUBSTI-
_____ [*name*],	)	TUTING PERSONAL REPRESENTATIVE FOR
Defendant.	)	DECEASED PLAINTIFF
	)	Date: _____
	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I/We, _____ [*name(s)*], declare:

1. I am an attorney at law, duly admitted to practice before all the courts of the State of California, and the attorney [of record] for _____ [the plaintiff *or* _____ (*name and status of interested party*)].

2. This _____ [action *or* proceeding] was commenced on _____ [*date*].

3. Thereafter, on _____ [*date*], _____ [*name of deceased plaintiff*], the plaintiff in this _____ [action *or* proceeding], died. A certified copy of the death certificate relating to this death is attached hereto as Exhibit "A."

4. On _____ [*date*], _____ [*name of personal representative*] was duly appointed _____ [*specify type of personal representative, e.g.,* executor of the will of _____ (*name deceased plaintiff*), deceased], by order of the Superior Court of California, County of _____, in proceeding No. _____. Thereafter, _____ [*name*] qualified to act as such, and, on _____ [*date*], letters _____ [*specify type of letters, e.g.,* testamentary] were duly issued to him/her. A certified copy of those letters is attached hereto as Exhibit "B."

I declare under penalty of perjury under the laws of the State of California that the foregoing i s true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

The form of declaration in [1], *above*, is for use to support a motion to substitute the personal representative of a deceased plaintiff under *Code Civ. Proc. § 377.31*, and to continue the action in the representative's name [*see Code Civ. Proc. § 377.31*]. It supports the notice of motion in § 21.100.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsSupplemental PleadingsEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewCivil ProcedurePartiesSubstitutionsDeath of PartyCivil ProcedurePartiesSubstitutionsMotions for Substitution

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Volume 3: Alcoholic Beverage Licenses thru Answers-Chs. 18-29
Chapter 21 AMENDED AND SUPPLEMENTAL PLEADINGS
PART V. FORMS
C. Substitution of Parties

3-21 California Forms of Pleading and Practice--Annotated § 21.102

§ 21.102 Declaration in Support of Motion for Order Substituting Successor in Interest for Deceased Plaintiff and Allowing Action to Be Continued by Successor in Interest [Code Civ. Proc. §§ 377.31, 377.32]--By Successor in Interest

[1] FORM Declaration in Support of Motion for Order Substituting Successor in Interest for Deceased Plaintiff and Allowing Action to Be Continued by Successor in Interest [Code Civ. Proc. §§ 377.31, 377.32]--By Successor in Interest

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF MOTION FOR ORDER SUBSTI-
_____ [*name*],	)	TUTING SUCCESSOR IN INTEREST FOR DE-
Defendant.	)	CEASED PLAINTIFF
	)	Date: _____
	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I/We, _____ [*name(s)*], declare:

1. This _____ [action *or* proceeding] was commenced on _____ [*date*].

2. On _____ [*date*], _____ [*name of deceased plaintiff or petitioner*], the _____ [plaintiff *or* petitioner] in this _____ [action *or* proceeding], died in _____ [*place of death*]. A certified copy of the death certificate relating to this death is attached herto as Exhibit "A."

[*EITHER, if the decedent's estate was administered*]

3. No proceeding is now pending in California for administration of the decedent's estate. Administration of the decedent's estate is complete, and decedent's cause of action was distributed to _____ [*name(s) of successor(s) in interest*]. A copy of the final order showing this distribution is attached hereto as Exhibit "B."

[*OR, if decedent's estate was not administered*]

3. No proceeding is now pending in California for administration of the decedent's estate. The decedent's estate has not been administered in California.

[*EITHER, if declarant(s) is/are acting on own behalf*]

4. The declarant(s) is/are the successor(s) in interest of the decedent (as defined in *Code of Civil Procedure Section 377.11*) and succeed to the decedent's interest in the _____ [action *or* proceeding].

[*OR, if declarant is acting on behalf of successor(s) in interest*]

4. _____ [*Describe basis of authority to act on behalf of successor(s) in interest, e.g.,* I am an attorney at law, duly admitted to practice before all the courts of the State of California, and am counsel of record for _____ (*name(s) of successor(s) in interest*)]. I am authorized to act on behalf of the decedent's successor(s) in interest (as defined in *Code of Civil Procedure Section 377.11*) with respect to the decedent's interest in the _____ [action *or* proceeding].

[*CONTINUE*]

5. No other person has a superior right to commence the _____ [action *or* proceeding] or to be substituted for the decedent in the pending _____ [action *or* proceeding].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature(s)*]

[2] Use of Form

The form of declaration in [1], *above*, is for use to support a motion to substitute the successor in interest of a deceased plaintiff under *Code Civ. Proc. § 377.31*, and to continue the action in the name of the successor in interest [*see Code Civ. Proc. § 377.32(a)*]. It supports the notice of motion in § 21.100.

[3] Contents of Form; Attachments

The form includes the statements required by *Code Civ. Proc. § 377.32(a)*:

- Decedent's name and date and place of death (Paragraph 2) [*see Code Civ. Proc. § 377.32(a)(1), (2)*].

- That no proceeding is pending in California for administration of the dececent's estate (Alternative Paragraph 3) [*see Code Civ. Proc. § 377.32(a)(3)*].

- That the declarant is the decedent's successor in interest or authorized to act for the successor in interest (Alternative Paragraph 4) [*see Code Civ. Proc. § 377.32(a)(5)*].

- That no other person has a superior right to commence or be substituted into the action or proceeding (Paragraph 5) [*see Code Civ. Proc. § 377.32(a)(6)*].

First alternative Paragraph 3 is for use if the decedent's estate was administered. When the estate has been administered, a copy of the final order showing the distribution of the cause of action to the successor in interest must be attached [*see Code Civ. Proc. § 377.32(a)(4)*].

Second alternative Paragraph 3 is for use if the decedent's estate was not, and will not be, administered.

A certified copy of the decedent's death certificate must be attached to the declaration [*Code Civ. Proc. § 377.32(c)*].

If the successor in interest claims the property under the affidavit procedure for collecting or transferring personal property established by *Prob. Code § 13100 et seq.*, that affidavit (or declaration under penalty of perjury) must be be filed when the motion to substitute the sucessor for the decedent is made [*Prob. Code § 13107.5*]. That affidavit or declaration must comply with *Prob. Code § 13101* and is in addition to the form set out in [1], *above*. For a form of *Prob. Code § 13101* declaration, see Ch. 441, *Probate: Disposition Without Administration* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedurePartiesSubstitutionsTransfers of InterestsCivil ProcedurePartiesSubstitutionsMotions for Substitution

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Chapter 21 AMENDED AND SUPPLEMENTAL PLEADINGS
PART V. FORMS
C. Substitution of Parties

3-21 California Forms of Pleading and Practice--Annotated § 21.104

§ 21.104 Notice of Motion for Order Substituting Successor in Interest for Deceased Defendant, Allowing Action to Be Continued Against Successor in Interest, and Allowing Filing of Supplemental Pleading [Code Civ. Proc. §§ 377.41, 464]

[1] FORM Notice of Motion for Order Substituting Successor in Interest for Deceased Defendant, Allowing Action to Be Continued Against Successor in Interest, and Allowing Filing of Supplemental Pleading [Code Civ. Proc. §§ 377.41, 464]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER SUBSTITUTING SUCCESSOR IN INTEREST
vs.	)	FOR DECEASED DEFENDANT AND GRANTING
_____ [*name*],	)	LEAVE TO FILE SUPPLEMENTAL COMPLAINT,
Defendant.	)	AND SUPPORTING MEMORANDUM
	)	Date: _____
	)	Time: _____
	)	Dept.: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*name of decedent's successor in interest*], as successor in interest to the estate of _____ [*name of deceased defendant*], and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], plaintiff will, and hereby does, move the court for an order substituting the successor in interest of _____ [*name of deceased defendant*], deceased, for _____ [*name of deceased defendant*] as the defendant in this action, and granting leave to file a supplemental complaint _____ [to allege _____ (*set forth facts to be alleged in supplemental complaint*) *or*, a copy of which is attached hereto]. The motion will be made on the ground that this _____ [action *or* proceeding] was commenced on _____ [*date*], that defendant died on _____ [*date*], that the action survives, that the action may be maintained against decedent's successor in interest under _____ [*specify statute, e.g., Code Civ. Proc. § 377.41*], and that _____ [*name*] is the successor in interest to the estate of the deceased defendant.

The motion will be based on this notice of motion, on the attached proposed supplemental complaint, on the declaration(s) of _____ [*name(s)*], on the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion.*]

[2] Use of Form

The notice of motion in [1], *above*, is for use by a plaintiff when a defendant in an action or proceeding has died and the decedent's property is transferred without probate, to substitute for the deceased defendant his or her successor in interest. A cause of action that survives may be asserted against the decedent's successor in interest to the extent provided by statute [*Code Civ. Proc. § 377.41*; *see Code Civ. Proc. § 377.11* ("successor in interest defined")]. A person to whom the decedent's property is transferred without probate is personally liable, within limits, for the decedent's unsecured debts [*see, e.g., Prob. Code §§ 13109* (persons taking personal property under affidavit procedure), 13156 (persons taking property under court order determining succession), 13204 (persons taking real property under affidavit procedure), 13500 et seq. (surviving spouse)]. For additional discussion, see § 21.103 [2] et seq.

[3] Memorandum

A supporting memorandum is required to be filed and a copy served with this notice of motion [*see Code Civ. Proc. §§*

1005, 1010; *Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[4] Cross References

For a form of declaration that may be used to support this motion, see *§ 21.106*

For forms of notice of motions to substitute a personal representative or a liability insurer for a deceased defendant, see §§ 21.103 and *21.105*, respectively

For for a procedural checklist and additional forms for making motions, see Ch. 372, *Motions and Orders*

For memoranda of points and authorities in support of this motion, see s California Points and Authorities, Ch. 10, *Abatement and Survival of Actions* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental PleadingsEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewCivil ProcedurePartiesSubstitutionsDeath of PartyCivil ProcedurePartiesSubstitutionsMotions for SubstitutionCivil ProcedurePleading & PracticePleadingsAnswers

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PART V. FORMS
C. Substitution of Parties

3-21 California Forms of Pleading and Practice--Annotated § 21.105

§ 21.105 Notice of Motion for Order Appointing and Substituting Personal Representative for Deceased Defendant, Allowing Action to Be Continued Against Personal Representative, and Allowing Filing of Supplemental Pleading [Code Civ. Proc. § 464; Prob. Code § 552(b)]--In Action Commenced or Continued Against Deceased Defendant's Insurer

[1] FORM Notice of Motion for Order Appointing and Substituting Personal Representative for Deceased Defendant, Allowing Action to Be Continued Against Personal Representative, and Allowing Filing of Supplemental Pleading [Code Civ. Proc. § 464; Prob. Code § 552(b)]--In Action Commenced or Continued Against Deceased Defendant's Insurer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*]	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER [APPOINTING AND] SUBSTITUTING PER-
vs.	)	SONAL REPRESENTATIVE FOR DECEASED DE-
_____ [*name*],	)	FENDANT [AND GRANTING LEAVE TO FILE
Defendant.	)	SUPPLEMENTAL COMPLAINT,] AND SUP-
	)	PORTING MEMORANDUM
	)	Date: _____
	)	Time: _____
		Dept.: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*specify all nonmoving parties to action or proceeding*], [*if appointed*, the decedent's personal representative,] and to his/her/their attorney(s) of record:

[*EITHER, if action was pending at time of defendant's death*]

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify moving party, e.g.,* plaintiff *or* _____ (*name*), as _____ (*describe status as interested person*),] will, and hereby does, move the court for an order [appointing and] substituting a personal representative as the defendant in this action[, and granting leave to file a supplemental complaint _____ (to allege _____ (*set forth facts to be alleged in supplemental complaint*)) *or*, a copy of which is attached hereto]. The motion will be made on the ground that this action was commenced on _____ [*date*], that defendant _____ [*name*] died on _____ [*date*], that the action survives, and that good cause within the meaning of *Probate Code Section 552(b)* exists for the order.

[*OR, if action was commenced after defendant's death*]

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify moving party, e.g.,* plaintiff *or* _____ (*name*), as _____ (*describe status as interested person*),] will, and hereby does, move the court for an order [appointing and] substituting a personal representative as the defendant in this action[, and granting leave to file a supplemental complaint _____ (to allege _____ (*set forth facts to be alleged in supplemental complaint*)) *or*, a copy of which is attached hereto]. The motion will be made on the ground that _____ [*name*], deceased, died on _____ [*date*], and that good cause within the meaning of *Probate Code Section 552(b)* exists for the order.

[*CONTINUE*]

The motion will be based on this notice of motion, [the attached proposed supplemental complaint,] the declaration(s) of _____ [*name(s)*], the memorandum served and filed herewith, the records and file herein, and on such evidence that may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

By: _____ [*signature*]

Attorney for _____ [*moving parrty*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion.*]

[2] Use of Form

[a] Substitution of Personal Representative

The form of notice of motion in [1], *above*, is for use in a pending action or proceeding to substitute, or to appoint and substitute, a duly appointed, qualified, and acting personal representative of the deceased defendant's estate when the plaintiff is seeking recovery against the insurance carrier of the deceased defendant in an action that was pending at the defendant's death and was continued against the insurer or in an action commenced against the insurer after the decedent's death [*see Prob. Code § 552(b)*]. If the action was pending prior to July 1, 1989, the law then in effect continues to control, and the form would have to be modified to conform to the requirements of those provisions [*see Prob. Code § 555(b)*; former *Code Civ. Proc. § 385(b)*; former Prob. Code §§ 709.1, 721(c)].

[b] Leave to File Supplemental Complaint

The form is also for use to obtain an order permitting the filing of a supplemental complaint. When the filing of a claim against the defendant's estate is a condition of recovery in the action or proceeding against the personal representative [*see Prob. Code § 9370*], a supplemental complaint will be required to allege the defendant's death, the substitution of the personal representative, and the filing of the claim [*see Wood v. Brown (1974) 39 Cal. App. 3d 232, 240, 114 Cal. Rptr. 63]* . For a form of supplemental complaint, see *§ 21.108*.

[3] Action Pending at Decedent's Death

Prob. Code § 550 et seq. apply to an action that is commenced on or after July 1, 1989, and is pending against a decedent at the time of his or her death to establish the decedent's liability for which he or she was protected by insurance [*see Prob. Code § 555(a)*]. This type of action may be continued against the decedent's insurer without the need to join as a party the decedent's personal representative or successor in interest [*see Prob. Code § 550(a)*]. However, on the motion of an interested person, or on its own motion, the court in which the action is pending may, for good cause, order the appointment and substitution of a personal representative as the defendant [*Prob. Code § 552(b)*].

For further discussion of practice and procedure under *Prob. Code § 550 et seq., see § 21.27[4][c]*.

[4] Action Commenced After Decedent's Death

Prob. Code § 550 et seq. apply to an action commenced after a decedent's death and on or after July 1, 1989, to establish the decedent's liability for which the decedent was protected by insurance [*see Prob. Code §§ 550(a), 555(a)*]. The action must be commenced against "Estate of (name), Deceased," but, as in an action pending at the time of decedent's death and continued thereafter, the court in which the action is pending may, for good cause, order the appointment and substitution of a personal representative as the defendant [*see Prob. Code § 552*]. The procedure for

commencing an action under *Prob. Code § 550 et seq.* is parallel to that for continuing an action under those sections. For further discussion of that procedure, see *§ 21.27[4][c]*.

[5] Filing Claim Against Estate

Whether an action is continued or commenced against the insurer after the decedent's death under *Prob. Code § 550 et seq.*, the plaintiff is excused from filing a claim in probate against the decedent's estate if the damages sought in the action are within the limits and coverage of the insurance or if the plaintiff waives recovery outside the limits or coverage of the insurance [*Prob. Code §§ 554, 9370, 9390*]. If the amount of damages sought exceeds the insurance coverage, the personal representative must be joined as a party to the action and the plaintiff must file a claim against the estate under *Prob. Code § 9390* [*see* former Prob. Code § 707; *Prob. Code § 554*]. Thus, if the plaintiff seeks damages in excess of the insurance coverage, the plaintiff should file a claim against the estate. Even if the the damages are for less than the insurance coverage, counsel should carefully consider whether or not to file a claim, particularly if the insurer contests coverage of the decedent's liability [*see Prob. Code § 553*]. For further discussion of claim filing requirements, *see* Ch. 454, *Probate: Claims Against the Estate* .

[6] Memorandum

A supporting memorandum is required to be filed and a copy served with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[7] Cross References

For a form of declaration that may be used to support this motion, see *§ 21.106*

For forms of notice of motions to substitute a personal representative or a successor in interest for a deceased defendant, see §§ 21.103 and *21.104*, respectively

For for a procedural checklist and additional forms for making motions, see Ch. 372, *Motions and Orders*

For memoranda in support of this motion, see California Points and Authorities, Ch. 10, *Abatement and Survival of Actions* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental PleadingsEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewCivil ProcedurePartiesSubstitutionsDeath of PartyCivil ProcedurePartiesSubstitutionsMotions for SubstitutionCivil ProcedurePleading & PracticePleadingsAnswers

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3-21 California Forms of Pleading and Practice--Annotated § 21.106

§ 21.106 Declaration in Support of Motion for Order Substituting or Appointing and Substituting Personal Representative for Deceased Party, Allowing Action to Be Continued Against Personal Representative, and Allowing Filing of Supplemental Complaint [Code Civ. Proc. § 377.41, 464; Prob. Code §§ 552(b), 9370]--By Attorney

[1] FORM Declaration in Support of Motion for Order Substituting or Appointing and Substituting Personal Representative for Deceased Party, Allowing Action to Be Continued Against Personal Representative, and Allowing Filing of Supplemental Complaint [Code Civ. Proc. § 377.41, 464; Prob. Code §§ 552(b), 9370]--By Attorney

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	DECLARATION OF
Plaintiff,	)	_____ [*name*] IN SUPPORT OF
vs.	)	MOTION FOR ORDER [APPOINTING AND] SUB-
_____ [*name*],	)	STITUTING PERSONAL REPRESENTATIVE FOR
Defendant.	)	DECEASED DEFENDANT
	)	Date: _____
	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am an attorney at law, duly admitted to practice before all the courts of the State of California, and the attorney [of record] for _____ [the plaintiff *or* the defendant *or* _____ (*name and status of interested party*)].

2. This _____ [action *or* proceeding] was commenced on _____ [*date*].

3. On _____ [*date*], _____ [*name of deceased party*], the defendant in this _____ [action *or* proceeding], died. A certified copy of the death certificate relating to this death is attached hereto as Exhibit "A."

[*EITHER, if motion is to appoint and substitute personal representative for decedent*]

4. To date, no personal representative of the estate of the deceased defendant has been appointed.

[*OR, if motion is to substitute previously appointed personal representative for decedent*]

4. On _____ [*date*], _____ [*name of personal representative*] was duly appointed _____ [*e.g.*, executor of the will of _____ (*name*), deceased,] by order of the Superior Court of California, County of _____, in proceeding No. _____. Thereafter, _____ [*name*] qualified to act as such, and on _____ [*date*], letters _____ [*e.g.*, testamentary] were duly issued to him/her. A certified copy of those letters is attached hereto as Exhibit "B."

5. _____ [*Name*] has ever since been, and now is, the duly appointed, qualified, and acting _____ [*e.g.*, executor of the will] of _____ [*name*], the deceased defendant, in this action.

[*ADD, if motion is to appoint and/or substitute personal representative as defendant in an action or proceeding continued or commenced against an insurer under Prob. Code § 552(b)*]

6. Good cause exists for ordering the [appointment and] substitution of _____ [*name*] as the personal representative for the defendant in the _____ [action *or* proceeding], in that _____ [*set forth facts within the declarant's personal knowledge establishing good cause for the order*].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

The form of declaration in [1], *above*, is for use to support a motion to substitute a personal representative for a deceased defendant under *Code Civ. Proc. § 377.41*, and to continue the action by or against the personal representative [*see Code Civ. Proc. § 377.41*].

It is also for use to support a motion to appoint and/or substitute the personal representative as the defendant in the action that is being continued or was commenced against an insurance carrier that covers the decedent's liability after the insured's death, and to continue that action against the personal representative under *Prob. Code § 552(b)* and *Prob. Code § 9390* [*see Code Civ. Proc. § 2009* (use of affidavits), *Code Civ. Proc. § 2015.5* (declarations in lieu of affidavits)]. Because *Prob. Code § 552(b)* and *Prob. Code § 9390* apply only in actions commenced on or after July 1, 1989, and former *Code Civ. Proc. § 385(b)* and former Prob. Code § 709.1 and former Prob. Code § 721 apply in actions commenced before that date, it may be necessary to modify the form if the older statutes apply [*see Prob. Code §§ 555, 9399*].

[3] Contents of Declaration

First alternative Paragraph 4 is for use under any of these statutes except *Code Civ. Proc. § 377.41*. It is used when the action has been commenced or continued against an insurance carrier and there is a subsequent motion to appoint and substitute a personal representative for the defendant in the action or proceeding.

Second Alternative Paragraph 4 and Paragraph 5 are for use when a personal representative has already been appointed and the motion is simply to substitute him or her for the defendant, regardless of which of the statutes is the basis for the motion.

Paragraph 6 is for use when the moving party is proceeding under *Prob. Code § 552(b)*. Under that statute, the moving party is required to show good cause for the appointment and/or substitution for the defendant.

[4] Cross References

For a form of notice of motion for use under *Prob. Code § 9370* in substituting a personal representative for a deceased defendant in an action pending against the defendant at the time of his or her death, see § 21.103

For a form of notice of motion for use in substituting a successor in interest for a deceased defendant in an action pending against the defendant at the time of his or her death, see *§ 21.104*

For a form of notice of motion for use under *Prob. Code § 552(b)* for appointing and/or substituting a personal representative for a deceased defendant or the defendant's estate in an action either pending at the time of the defendant's death or commenced thereafter, see *§ 21.105*

For alternative general forms of declaration, see Ch. 15, *Affidavits, Certificates, and Declarations*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticePleadingsSupplemental PleadingsEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewCivil ProceduresPartiesSubstitutionsDeath of PartyCivil ProceduresPartiesSubstitutionsMotions for Substitution

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3-21 California Forms of Pleading and Practice--Annotated § 21.107

§ 21.107 Order Substituting or Appointing and Substituting Personal Representative or Successor in Interest for Deceased Party, Allowing Action to Be Continued by or Against Personal Representative, and Allowing Filing of Supplemental Complaint [Code Civ. Proc. §§ 377.31, 377.41, 464; Prob. Code §§ 552(b), 9370]

[1] FORM Order Substituting or Appointing and Substituting Personal Representative or Successor in Interest for Deceased Party, Allowing Action to Be Continued by or Against Personal Representative, and Allowing Filing of Supplemental Complaint [Code Civ. Proc. §§ 377.31, 377.41, 464; Prob. Code §§ 552(b), 9370]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

[*EITHER, if motion is to substitute personal representative or successor in interest for deceased plaintiff*]

The motion of _____ [*identify party, e.g.,* _____ (*name*), as _____ (successor in interest *or describe type of personal representative, e.g.,* the executor of the will) of _____ (*name*), deceased,] for an order allowing this _____ [action *or* proceeding] to be continued by _____ [him/her *or name*], as _____ [successor in interest *or describe type of personal representative, e.g.,* the executor of the will] of _____ [*name*], deceased, in the place of the plaintiff, [and permitting the filing of a supplemental complaint,] came on regularly for hearing by the court on _____ [*date*], the undersigned presiding. The _____ [*identify moving party*] appeared by counsel _____ [*name*], and _____ [*identify adverse party*] appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it is, granted and that this _____ [action *or* proceeding] continue by _____ [*name*], as the _____ [successor in interest *or describe type of personal representative, e.g.,* executor of the will of _____ (*name*), deceased,] in the place of the plaintiff.

[*OR, if motion is to appoint and/or substitute personal representative for deceased defendant or defendant's estate*]

The motion of _____ [plaintiff *or name of interested party*] for an order [appointing and] substituting _____ [*name*] as the personal representative for the defendant in the action [and permitting the filing of a supplemental complaint] came on regularly for hearing by the court on _____ [*date*], the undersigned presiding. The _____ [plaintiff *or name of moving party*] appeared by counsel _____ [*name*], and _____ [*identify adverse party*] appeared by counsel _____ [*name*].

[Good cause existing for the granting of the motion,]

IT IS ORDERED that the motion be, and it is, granted and that a personal representative be [appointed for and] substituted as the defendant in this action.

[*CONTINUE*]

[IT IS FURTHER ORDERED that leave be and is granted to file the original of the supplemental complaint _____ [to allege _____ (*set forth facts to be alleged in supplemental complaint*) *or*, a copy of which is attached to the notice of motion herein.]
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The form of order in [1], *above*, is for use when a motion is granted under *Code Civ. Proc. § 377.31* to substitute a personal representative or successor in interest for a deceased plaintiff and to permit the personal representative or successor in interest to continue the action.

The form is also for use when a motion is granted under *Prob. Code § 552(b)* or *Prob. Code § 9370* to appoint and/or substitute a personal representative for a deceased defendant or the defendant's estate and continue the action against the personal representative. When the moving party is proceeding under *Prob. Code § 552(b),* good cause must be shown for the appointment and/or substitution of the personal representative. The form may also be used to grant leave to file a supplemental complaint if sought in the notice of motion.

[3] Cross References

For general forms of orders granting or denying motions, see Ch. 372, *Motions and Orders*

For the related forms of notice of motion, see §§ 21.103 -*21.105*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticePleadingsSupplemental PleadingsEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewCivil ProceduresPartiesSubstitutionsDeath of PartyCivil ProceduresPartiesSubstitutionsMotions for Substitution

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PART V. FORMS
C. Substitution of Parties

3-21 California Forms of Pleading and Practice--Annotated § 21.108

§ 21.108 Supplemental Complaint [Code Civ. Proc. § 464]--For Filing in Pending Action on Death of Defendant and Substitution of Personal Representative in Defendant's Place [Code Civ. Proc. § 464; Prob. Code §§ 552(b), 9370, 9390(b)]

[1] FORM Supplemental Complaint [Code Civ. Proc. § 464]--For Filing in Pending Action on Death of Defendant and Substitution of Personal Representative in Defendant's Place [Code Civ. Proc. § 464; Prob. Code §§ 552(b), 9370, 9390(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	SUPPLEMENTAL COMPLAINT
_____ [*name*],	)	[Amount demanded _____ (exceeds
Defendant.	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff by way of supplemental complaint alleges:

[1. On or about _____ (*date*), defendant _____ (*name*), hereinafter, the "deceased," died, and his/her estate is now pending administration in the Superior Court of California, County of _____, in a proceeding entitled _____, No. _____, hereinafter, "the estate proceeding."]

2. _____ [*Name*] is the duly appointed, qualified, and acting _____ [*describe status as personal representative, e.g.,* executor of deceased's will] and, by order of this court made and entered on _____ [*date*], was substituted as defendant herein.

3. On _____ [*date*], _____ [plaintiff *or* _____ (*name*), on plaintiff's behalf,] filed a claim in the amount of $_____ against the decedent's estate with the clerk of the court in the estate proceeding. On _____ [*date*], _____ [plaintiff *or* _____ (*name*), on plaintiff's behalf,] also _____ [mailed *or* delivered] a copy of the claim to defendant. A copy of the claim is attached hereto as "Exhibit A" and made a part hereof.

[*EITHER, if claim was rejected by personal representative*]

4. On _____ [*date*], defendant rejected the claim _____ [in its entirety *or* in the amount of $_____ and allowed it in the amount of $_____], filed the [allowance and] rejection with the clerk of the court in the estate proceeding, and served plaintiff with written notice of the [partial] rejection on _____ [*date*].

[*OR, if claim was rejected by court*]

4. On _____ [*date*], defendant allowed the claim in its entirety and filed the allowance with the clerk of the court in the estate proceeding. The clerk, in turn, presented the allowance to the judge of that court who endorsed a rejection on the claim [after _____ (*describe court action, e.g.,* examining plaintiff and others on oath and receiving evidence relevant to the validity of the claim)]. On _____ [*date*], defendant served plaintiff with written notice of the rejection.

[*OR, if plaintiff treats inaction on claim as rejection of claim*]

4. Thirty days have passed since _____ [plaintiff *or* _____ (*name*), on plaintiff's behalf,] filed the claim with the clerk of the court in the estate proceeding and provided defendant with a copy of the claim. _____ [Defendant *and/or* the judge in the estate proceeding] has/have refused or neglected to act on the claim. Pursuant to *Section 9256 of the Probate Code*, plaintiff elects to treat this inaction on the claim as equivalent to notice of rejection of the claim.

[*CONTINUE*]

5. _____ [No part *or* Only $_____] of plaintiff's claim as filed, the total amount of which is $_____, has been paid by the decedent, by the defendant as the personal representative of the decedent's estate, or otherwise.

6. On _____ [*date*], this court granted plaintiff's motion for an order to substitute the personal representative for the deceased in this _____ [action *or* proceeding].

WHEREFORE, plaintiff prays judgment, as asked for in the complaint on file herein, against defendant, as the _____ [*describe capacity as personal representative, e.g.,* executor of the deceased's will], to be paid out of the estate in due course of administration.

[*Verification, if desired. See § 21.90[1].*]

[2] Use of Form

The form of supplemental complaint in [1], *above*, is for use to file in an action or proceeding, with the court's permission, after the substitution of a personal representative for a deceased defendant. The purpose of the supplemental complaint is to allege any conditions precedent to recovery or any other matters affecting the case arising after the original complaint was filed [*see Code Civ. Proc. § 464*]. The fact situation illustrated in the form is the filing of a claim against the estate as a condition precedent to recovery. However, any condition precedent to recovery that must be pleaded and that arises after the filing of the original complaint may be set forth in a supplemental complaint [*see, e.g., Hibernia etc. Soc. v. Wackenreuder (1893) 99 Cal. 503, 509-510, 34 P. 219]* . Filing a supplemental complaint to substitute a personal representative for deceased defendant is proper [*Clary v. Miller (1951) 101 Cal. App. 2d 790, 793, 226 P.2d 32]* .

[3] Claim-Filing Requirement

If recovery is sought from the decedent's estate, a claim generally must be filed [*see Code Civ. Proc. § 377.41*; *Prob. Code §§ 554, 9370, 9390(b)*]. However, a claim need not be filed against the estate if recovery is sought only from defendant's insurance carrier and is limited to the amount of insurance coverage. A claim must be filed if recovery in excess of the insurance coverage is sought [*see Prob. Code §§ 554, 9390*]. For discussion of claim requirements, see *§ 21.27[4][c]*.

[4] Necessary Allegations

Unless the action or proceeding was commenced against the decedent's insurer after the death occurred [*see Prob. Code § 550*], the defendant's death should be alleged as having occurred after the original complaint (Paragraph 1).

The appointment of a personal representative for the deceased defendant is alleged to identify the personal representative (Paragraph 2).

If the plaintiff is (1) substituting a personal representative for a deceased defendant to continue a claim against the personal representative [*see Code Civ. Proc. § 377.41*; *Prob. Code § 9370*], or (2) seeking the appointment and/or substitution of a personal representative to allow recovery of an amount in excess of the insurance that covers a decedent's liability in an action or proceeding that was continued or commenced against the decedent's insurance carrier after the decedent's death [*see Prob. Code §§ 554, 9390(b)*], plaintiff must allege the filing of a claim against the estate for the amount claimed or, if insurance partly covers the claim, for the amount in excess of the insurance coverage (Paragraph 3) [*see Prob. Code §§ 554, 9370, 9390(b)*; *see also Prob. Code § 9150 et seq.* (claim filing procedure); *see also Wood v. Brown (1974) 39 Cal. App. 3d 232, 240, 114 Cal. Rptr. 63]* .

The plaintiff must also allege the rejection of the claim in whole or in part (alternative Paragraphs 4) [*see Prob. Code § 9370*; *see also Prob. Code §§ 9250, 9251, 9256* (rejection of claims)].

The form alleges that the amount claimed remains unpaid in whole or in part (Paragraph 5).

The form finally alleges that the court granted plaintiff's motion for substitution of the personal representative for the

defendant (Paragraph 6).

[5] Prior Law

The statutes cited in [2]-[5], *above*, apply to actions commenced on or after July 1, 1989. If the action was commenced prior to that date, claims for damages in pending litigation and/or in excess of insurance coverage are governed by former *Code Civ. Proc. § 385(b)* and former Prob. Code §§ 709, 709.1, 721 [*see Prob. Code §§ 555, 9399*].

[6] Cross References

For forms of notice of motion, declaration, and order substituting a personal representative for a deceased defendant and granting leave to file a supplemental complaint, see §§ 21.103, *21.105 -21.107*

For discussion and forms for filing creditor claims, see Ch. 454, *Probate: Claims Against the Estate* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental PleadingsEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewCivil ProcedurePartiesSubstitutionsDeath of PartyCivil ProcedurePartiesSubstitutionsMotions for SubstitutionCivil ProcedurePleading & PracticePleadingsAnswers

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3-21 California Forms of Pleading and Practice--Annotated § 21.109

§ 21.109 Notice of Motion and Supporting Declaration for Order Allowing Action or Proceeding to Be Continued and Supplemental Pleading to Be Filed Substituting Personal Representative for Incompetent Party [Code Civ. Proc. §§ 375, 464]

[1] FORM Notice of Motion and Supporting Declaration for Order Allowing Action or Proceeding to Be Continued and Supplemental Pleading to Be Filed Substituting Personal Representative for Incompetent Party [Code Civ. Proc. §§ 375, 464]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER SUBSTITUTING PERSONAL REPRESENT-
vs.	)	ATIVE OF INCOMPETENT _____
_____ [*name*],	)	[*specify party, e.g.,* PLAINTIFF], SUPPORTING
Defendant.	)	DECLARATION OF _____
	)	[*name*], AND SUPPORTING MEMORANDUM
	)	Date: _____
	)	Time: _____
	)	Dept.: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*specify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*name*], as _____ [*specify type of personal representative, e.g.,* conservator of the person and estate] of _____ [*name of incompetent party*], will, and hereby does, move for an order allowing this action to be continued _____ [by *or* against] him/her as _____ [*specify status, e.g.,* conservator] in the place of _____ [*name*], _____ [*specify party, e.g.,* plaintiff] herein, and allowing a supplemental _____ [*specify pleading, e.g.,* complaint], a copy of which is attached hereto as Exhibit "A," to be filed showing this substitution. The motion will be made on the grounds that _____ [*name*], plaintiff herein, _____ [*set forth fact of incompetency, e.g.,* has been judicially determined to be incompetent by order of the _____ (*specify court, e.g.,* Superior Court of California, County of _____), proceeding No. _____,] and that _____ [*name*] is the duly appointed, qualified, and acting _____ [*specify, e.g.,* conservator of the person and estate] of _____ [*name of plaintiff*]. [A certified copy of the order of appointment is attached hereto as Exhibit "B" and a certified copy of the letters of conservatorship are attached hereto as Exhibit "C."]

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

I am an attorney at law, duly admitted to practice before all the courts of the State of California, and the attorney for the moving party herein.

On _____ [*date*], _____ [*name of incompetent*], _____ [*identify party, e.g.,* plaintiff] in this action, _____ [*set forth fact of incompetency, e.g.,* was judicially determined to be incompetent by order of the Superior Court of California, County of _____, proceeding No. _____,] and _____ [*name*] was duly appointed _____ [*describe type of personal representative, e.g.,* conservator of the person and estate] of _____ [*name*]. [A certified copy of that order is attached hereto as Exhibit "A."] Thereafter, _____ [*name*] qualified to act as _____ [*describe type of personal representative,*

e.g., conservator] and on _____ [*date*], letters of _____ [*e.g.*, conservatorship] were duly issued to him. [A certified copy of those letters is attached hereto as Exhibit "B."]

_____ [*Name*] has ever since been, and now is, the duly appointed, qualified, and acting _____ [*describe type of personal representative, e.g.*, conservator of the person and estate] of _____ [*name*], the _____ [*identify party, e.g.*, plaintiff] in this action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct
Dated: _____.

_____ [*signature*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion*]

[2] Use of Form

The form of notice of motion and supporting declaration in [1], *above*, is for use to obtain an order substituting a personal representative for an incompetent party. An action or proceeding does not abate by any disability of a party if the cause of action survives or continues [*Code Civ. Proc. § 375*].

The motion requests an order substituting the personal representative in place of the incompetent party and allowing a supplemental pleading to be filed showing the substitution [*see Code Civ. Proc. §§ 375, 464*]. For a form of supplemental pleading, see *§ 21.90*. Copies of the order declaring incompetency and the letters issued thereon are also attached to this notice.

The declaration [*see Code Civ. Proc. §§ 2009, 2015.5*] shows the fact of incompetency and the appointment, qualification, and present status of the moving party as the personal representative of the incompetent party. The form calls for the attachment of certified copies of the order of appointment and letters. Although there is no requirement that these copies be attached, they support the statements of the declaration.

[3] Memorandum

A supporting memorandum is required to be filed and a copy served with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[4] Cross References

For forms for use in guardianship and conservatorship proceedings, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , through Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships*

For forms relating to insane and incompetent persons, see Ch. 304, *Insane and Other Incompetent Persons*

For a procedural guide and additional forms for use in making motions, see Ch. 372, *Motions and Orders*

For alternative forms of declaration, see Ch. 15, *Affidavits, Certificates, and Declarations*

For forms relating to stipulations, see Ch. 533, *Stipulations*

For memoranda of points and authorities relating to the requirement that an incompetent person appear by a guardian, see California Points and Authorities, Ch. 10, *Abatement and Survival of Actions* (Matthew Bender)

Witkin, California Procedure, vol. 3, *Actions*, §§ 547-552 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedurePartiesSubstitutionsIncompetencyCivil ProcedurePartiesSubstitutionsMotions for Substitution

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3-21 California Forms of Pleading and Practice--Annotated § 21.110

§ 21.110 Order Allowing Action to Be Continued and Supplemental Pleading to Be Filed Substituting Personal Representative for Incompetent Party [Code Civ. Proc. §§ 375, 464]

[1] FORM Order Allowing Action to Be Continued and Supplemental Pleading to Be Filed Substituting Personal Representative for Incompetent Party [Code Civ. Proc. §§ 375, 464]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [*name*], as _____ [*describe type of personal representative, e.g.,* conservator of the person and estate] of _____ [*name*], For an order allowing this action to be continued _____ [by *or* against] him or her in the place of _____ [*name*], _____ [*identify party, e.g.,* plaintiff] herein, and For a supplemental _____ [*identify pleading, e.g.,* complaint] to be filed came on regularly For hearing by the court on _____ [*date*]. The moving party appeared by counsel _____ [*name*]; _____ [*identify party, e.g.,* defendant] appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that this action continue _____ [by *or* against] _____ [*name*], as _____ [*describe type of personal representative, e.g.,* conservator of the person and estate] of _____ [*name*], as _____ [*identify party, e.g.,* plaintiff], in the place of _____ [*name*] and leave is granted to file the original of the supplemental _____ [*identify pleading, e.g.,* complaint], a copy of which is attached to the notice of motion herein, showing substitution.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of order in [1], *above*, is For use when a motion to substitute a personal representative For an incompetent party is granted [*see* Code *Civ. Proc. §§ 375, 464*; For a form of notice of motion, *see § 21.109*]. The wording of the order may be dictated by the judge granting the motion.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedurePartiesSubstitutionsIncompetency

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3-21 California Forms of Pleading and Practice--Annotated § 21.111

§ 21.111 Notice of Motion and Supporting Declaration for Order Substituting Successor in Interest as Party to Action or Proceeding and Allowing Supplemental Pleading to Be Filed [Code Civ. Proc. §§ 368.5, 464]--Assignee or Purchaser of Interest

[1] FORM Notice of Motion and Supporting Declaration for Order Substituting Successor in Interest as Party to Action or Proceeding and Allowing Supplemental Pleading to Be Filed [Code Civ. Proc. §§ 368.5, 464]--Assignee or Purchaser of Interest

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER SUBSTITUTING _____ [*describe type of successor, e.g.,* ASSIGNEE] FOR _____ [*identify party, e.g.,* PLAINTIFF], SUPPORTING DECLARATION OF _____ [*name*], AND SUPPORTING MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to _____ [*name*], his attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*] or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*name*] will, and hereby does, move for an order allowing this _____ [action *or* proceeding] to be continued _____ [by *or* against] him/her as the successor in interest of _____ [*name*], _____ [*identify party, e.g.,* plaintiff] herein, and allowing a supplemental _____ [*specify pleading, e.g.,* complaint] to be filed showing substitution, a copy of which is attached hereto. The motion will be made on the ground that, since the commencement of this _____ [action *or* proceeding], _____ [*name*] has _____ [purchased *or* acquired by assignment] all of the interest of _____ [*name*], _____ [*identify party, e.g.,* plaintiff] herein, in the subject of this _____ [action *or* proceeding]. [A copy of the agreement transferring this interest is attached hereto as Exhibit "A."]

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum served and filed herewith, on the supplemental _____ [*specify pleading, e.g.,* complaint], on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am the _____ [*specify, e.g., plaintiff*] in the above-entitled action.

2. On _____ [*date*], I _____ [*set forth fact of transfer of interest, e.g.,* transferred all my rights and interest in the cause of action which is the subject of the above-entitled case,] to _____ [*name*]. [A copy of the agreement under which this transfer was made is attached hereto as Exhibit "A."]

3. _____ [*Name*] has ever since been, and now is, the real party in interest as the _____ [*identify party, e.g.,* plaintiff] in this action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct
Dated: _____.

_____ [*signature*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion*]

[2] Use of Form

The form of notice of motion and supporting declaration in [1], *above*, is For use to obtain an order substituting a successor in interest by purchase or assignment For a party to an action or proceeding and For leave to file a supplemental pleading [*see Code Civ. Proc. § 464*]. An action or proceeding does not abate by the transfer of any interest therein if the cause of action survives or continues [*Code Civ. Proc. § 368.5*].

The form includes optional language providing For attachment of the agreement under which the transfer was made, but this is not an express requirement, and counsel and the parties may prefer that this be kept confidential.

[3] Memorandum

A memorandum is required to be filed and a copy served with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[4] Cross References

For a form of order that may be used with this notice of motion, see *§ 21.113*

For forms relating to assignments generally, see Ch. 60, *Assignments*

For a procedural guide and additional forms for use in making motions, see Ch. 372, *Motions and Orders*

For a memorandum in support of this motion, see California Points and Authorities, Ch. 10, *Abatement and Survival of Actions* (Matthew Bender)

Witkin, California Procedure, vol. 3, *Actions*, §§ 64-70 (4th ed. 1996)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedurePartiesSubstitutionsTransfers of InterestsCivil ProcedurePartiesSubstitutionsMotions for Substitution

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3-21 California Forms of Pleading and Practice--Annotated § 21.112

§ 21.112 Notice of Motion and Supporting Declaration for Order Allowing Action or Proceeding to Be Continued and Supplemental Pleading to Be Filed Substituting Successor in Interest as Party [Code Civ. Proc. §§ 368.5, 464]--Party Sued in Special Capacity

[1] FORM Notice of Motion and Supporting Declaration for Order Allowing Action or Proceeding to Be Continued and Supplemental Pleading to Be Filed Substituting Successor in Interest as Party [Code Civ. Proc. §§ 368.5, 464]--Party Sued in Special Capacity

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR OR-
vs.	)	DER ALLOWING _____ [ACTION
_____ [*name*],	)	*or* PROCEEDING] TO BE CONTINUED AND
Defendant.	)	SUPPLEMENTAL _____ [*specify*
	)	*pleading, e.g.,* COMPLAINT] TO BE FILED SUB-
	)	STITUTING SUCCESSOR IN INTEREST FOR
	)	_____ [*identify party, e.g.,*
	)	PLAINTIFF], SUPPORTING DECLARATION OF
		_____ [*name*], AND SUPPORTING
		MEMORANDUM
		Date: _____
		Time: _____
		Dept.: _____
		Judge: _____
		Date Action Filed: _____

Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to _____ [*name*], his attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*] at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*name*] will, and hereby does, move for an order allowing this _____ [action *or* proceeding] to be continued _____ [by *or* against] him/her as the successor of _____[*name*], _____ [*identify party, e.g.,* plaintiff] herein, and allowing a supplemental _____ [*specify pleading, e.g.,* complaint], a copy of which is attached hereto, to be filed showing substitution. The motion will be made on the ground that this _____ [action *or* proceeding] is brought _____ [by *or* against] _____ [*identify party, e.g.,* plaintiff] as _____ [*describe capacity, e.g.,* treasurer of _____ County *or* trustee of _____ (*name*) trust] and that _____ [*name*] has been succeeded in that capacity by], by reason of _____ [*specify, e.g.,* the death of _____ [*name*].

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the supporting memorandum served and filed herewith, on the supplemental _____ [*specify pleading, e.g.,* complaint] attached hereto, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am an attorney at law, duly admitted to practice before all the courts of the State of California, and the attorney For the moving party herein.

2. On _____ [*date*], _____ [*name*], _____ [*status in action, e.g., plaintiff*] in this action in his/her capacity as _____ [*capacity, e.g.,* trustee of the Widget Trust], _____ [*set forth facts showing loss of capacity, e.g.,* died] and _____ [*name*] _____ [*set forth facts showing assumption of that capacity by another, e.g.,* was appointed as trustee in his/her place]. [A copy of the _____ (*specify relevant paper*) is attached hereto as Exhibit "A."]

3. _____ [*Name of successor*] has ever since been, and now is, the duly appointed, qualified, and acting _____ [*describe capacity, e.g.*, trustee of the Widget Trust], and in that capacity should be substituted as _____ [*specify, e.g.*, plaintiff] in this in this action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion*]

[2] Use of Form

The form of notice of motion and supporting declaration in [1], *above*, is For use to obtain an order allowing an action or proceeding to continue and a supplemental pleading to be filed substituting a successor in interest For a party sued in a special capacity [*see Ott Hardware Co. v. Holmberg (1918) 36 Cal. App. 402, 405, 179 P. 422* (substitution of successor of public officer as allowed on death of officer sued in his official capacity)].

[3] Memorandum

A supporting memorandum is required to be filed and a copy served with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[4] Cross References

For a form of order that may be used with this notice of motion, see *§ 21.113*

For general cross references relating to motions, see *§ 21.111[4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedurePartiesSubstitutionsTransfers of InterestsCivil ProcedurePartiesSubstitutionsMotions for Substitution

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Chapter 21 AMENDED AND SUPPLEMENTAL PLEADINGS
PART V. FORMS
C. Substitution of Parties

3-21 California Forms of Pleading and Practice--Annotated § 21.113

§ 21.113 Order Allowing Action or Proceeding to Be Continued and Supplemental Pleading to Be Filed Substituting Successor in Interest as Party [Code Civ. Proc. §§ 368.5, 464]

[1] FORM Order Allowing Action or Proceeding to Be Continued and Supplemental Pleading to Be Filed Substituting Successor in Interest as Party [Code Civ. Proc. §§ 368.5, 464]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [*name*] For an order allowing this _____ [action *or* proceeding] to be continued [by *or* against] him as the successor of _____ [*name*], _____ [*identify party, e.g.,* plaintiff] herein, and allowing a supplemental _____ [*specify pleading, e.g.,* complaint] to be filed showing such substitution came on regularly For hearing by the court on _____ [*date*]. The moving party appeared by counsel _____ [*name*]; _____ [*identify party, e.g.,* defendant] appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that this _____ [action *or* proceeding] continue _____ [by *or* against] _____ [*name*] in place of _____ [*name*], as _____ [*identify party, e.g.,* plaintiff] herein, and leave is granted to file the original of the supplemental _____ [*specify pleading, e.g.,* complaint], a copy of which is attached to the notice of motion herein, showing substitution.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of order in [1], *above*, is For use to allow an action or proceeding to be continued by or against the moving party as the successor to the presently named party and to allow filing of a supplemental pleading showing the substitution [*Code Civ. Proc. §§ 368.5, 464*].

[3] Cross References

For related forms of notice of motion, see *§§ 21.111, 21.112*

For a procedural checklist and forms relating to orders, see Ch. 372, *Motions and Orders*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedurePartiesSubstitutionsTransfers of InterestsCivil ProcedurePartiesSubstitutionsMotions for Substitution

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Chapter 22 AMICUS CURIAE

3-22 California Forms of Pleading and Practice--Annotated 22.syn

§ 22.syn Synopsis to Chapter 22: AMICUS CURIAE

§ 22.01 Scope of Chapter

§ 22.02 Cross References

§§ 22.03-22.09 [Reserved]

§ 22.10 Governing Law

§ 22.11 Definitions

[1] Amicus Curiae

[2] Amicus Curiae Distinguished From Party or Intervenor

§ 22.12 Participation Allowed or Requested by Court

§ 22.13 Impartiality Not Required

§ 22.14 Rights and Powers Conferred on Amici Curiae

§ 22.15 New Issues, Arguments, or Material on Appeal

[1] Raising New Matters Generally Not Permitted

[2] New Arguments or Issues Sometimes Allowed

[3] Improper Matter Ignored or Stricken

§ 22.16 Procedure for Participation in Proceeding or Appeal

[1] Trial Court

[2] Appellate Division of Superior Court

[3] California Court of Appeal

[4] California Supreme Court

[a] Letter Supporting or Opposing Grant of Writ or Petition for Review

[b] Brief on Merits

§ 22.17 Recovery of Attorney's Fees

§ 22.18 No Appeal From Denial of Leave to Participate as Amicus Curiae

§§ 22.19-22.29 [Reserved]

§ 22.30 California Rules of Court

§ 22.31 Decisions

[1] Amicus Curiae in Trial Courts

[2] Amicus Curiae Distinguished From Party or Intervenor

[3] Powers and Rights of Amicus Curiae

[4] Impartiality of Amicus Curiae Not Required

[5] Raising New Matter on Appeal

[a] General Prohibition

[b] Exceptions

[6] Appeal by Amicus Curiae

§ 22.32 Text References

§§ 22.33-22.39 [Reserved]

§ 22.40 Request to Participate as Amicus Curiae in State Trial Court

[1] FORM

[2] Use of Form

[3] Procedure and Contents of Request

§ 22.41 Request to Submit Amicus Curiae Brief in State Reviewing Court

[1] California Court of Appeal or Appellate Division of Superior Court

[a] FORM

[b] Use of Form

[c] Procedure and Contents of Request

[2] California Supreme Court

[a] FORM

[b] Use of Form

§ 22.42 Notation for Cover of Amicus Curiae Brief in State Reviewing Court

[1] FORM

[2] Use of Form

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Chapter 22 AMICUS CURIAE
PART I. SCOPE

3-22 California Forms of Pleading and Practice--Annotated § 22.01

§ 22.01 Scope of Chapter

This chapter discusses the procedure under which a person or entity may obtain permission, from a state or federal court, to participate in a state trial court proceeding, or in a state or federal appeal, as amicus curiae.

The chapter includes the following forms:

- A request to participate as amicus curiae in an action or proceeding in a California municipal or superior court [*see § 22.40*].

- A request for leave to file a brief as amicus curiae in an appeal before the California court of appeal, or before the appellate division of the superior court [*see § 22.41[1]*].

- A request for leave to file a brief as amicus curiae in an appeal before the California Supreme Court [*see § 22.41[2]*].

- A notation for using in preparing the cover of an amicus curiae brief that is to be filed in a state reviewing court [*see § 22.42*].

Legal Topics:

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

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3-22 California Forms of Pleading and Practice--Annotated § 22.02

§ 22.02 Cross References

For discussion and forms relating to appeals before the appellate divisions of the California Superior Court, see 345A, *Limited Civil Cases*, § 345A.30 et seq. and § 345A.110 et seq.

For discussion and forms relating to civil appellate practice generally, see Ch. 40, *Appeal: An Overview* , et seq. For discussion and forms relating to appellate briefs generally, including briefs filed by an amicus curiae, see Ch. 50, *Appeal: Briefs* .

Briefs and argument by amicus curiae in federal appellate courts are governed by federal rule and are beyond the scope of this chapter [*see U.S. Sup. Ct. Rules, Rules 28.7, 37* (U.S. Supreme Court); *Fed. R. App. P., Rule 29* (Court of Appeals)]. For detailed discussion relating to amicus curiae in federal appellate proceedings, see Moore's Federal Practice, Ch. 329, Ch. 537 (3rd ed. Matthew Bender). For forms relating to this discussion, see Bender's Federal Practice, vol. 4B, Forms AR 20:7, AR 20:8 (Court of Appeals); vol. 5, Forms SCt 37:1-SCt 37:4 (Supreme Court) (Matthew Bender).

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3-22 California Forms of Pleading and Practice--Annotated §§ 22.03-22.09

[Reserved]

§§ 22.03[Reserved]

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Chapter 22 AMICUS CURIAE
PART II. LEGAL BACKGROUND

3-22 California Forms of Pleading and Practice--Annotated § 22.10

§ 22.10 Governing Law

Amicus curiae letters and briefs in the California Supreme Court are governed by *Cal. Rules of Ct., Rules 8.500(g)* and *8.520(f)*. Amicus curiae briefs in the California courts of appeal are governed by *Cal. Rules of Ct., Rule 8.200(c)*. Amicus curiae briefs filed in the appellate division of the superior court are governed by *Cal. Rules of Ct., Rule 8.706(b)* and *(e)*.

No statutes or court rules expressly govern appearances or briefs by an amicus curiae in a trial court. Both the Supreme Court and the court of appeal have ruled, however, that an amicus curiae may be permitted to appear and submit a brief to a trial court at the discretion of the trial judge [*see Jersey Maid Milk Products Co. v. Brock (1939) 13 Cal. 2d 661, 665, 91 P.2d 599* ; *In re Veterans' Industries, Inc. (1970) 8 Cal. App. 3d 902, 924-925, 88 Cal. Rptr. 303* ; *Estate of Thomas (1946) 74 Cal. App. 2d 389, 390, 168 P.2d 773*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAmici CuriaeCivil ProcedureJudicial OfficersJudgesDiscretion

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Chapter 22 AMICUS CURIAE
PART II. LEGAL BACKGROUND

3-22 California Forms of Pleading and Practice--Annotated § 22.11

§ 22.11 Definitions

[1] Amicus Curiae

"Amicus curiae" is a Latin expression meaning "friend of the court" [Black's Law Dictionary 75 (5th ed. 1979)]. The plural of amicus curiae is "amici curiae." Amicus curiae presentations assist the court by broadening its perspective on the issues raised by the parties. Among other services, they facilitate informed judicial consideration of a wide variety of information and points of view that may bear on important legal questions [*Connerly v. State Personnel Bd. (2006) 37 Cal. 4th 1169, 1179-1183, 39 Cal. Rptr. 3d 788, 129 P. 3d 1* ; *Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 405 n.14, 11 Cal. Rptr. 2d 51, 834 P.2d 745*].

[2] Amicus Curiae Distinguished From Party or Intervenor

An amicus curiae is not a party to the action [*see In re Veterans' Industries, Inc. (1970) 8 Cal. App. 3d 902, 916, 88 Cal. Rptr. 303* ; *Estate of Thomas (1946) 74 Cal. App. 2d 389, 390, 168 P.2d 773*]. Therefore, he or she does not have the rights of an adversary in the litigation [*see In re Pina (1896) 112 Cal. 14, 16, 44 P. 332*]. In particular, an amicus curiase has no right to take exception or to appeal the court's orders or decision [*see In re Veterans' Industries, Inc. (1970) 8 Cal. App. 3d 902, 916, 88 Cal. Rptr. 303*]. In addition, an amicus curiae may not be held liable to a prevailing party for attorney's fees [*Connerly v. State Personnel Bd. (2006) 37 Cal. 4th 1169, 1179-1183, 39 Cal. Rptr. 3d 788, 129 P.3d 1]* .

An intervenor is a third person permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought in the complaint, uniting with the defendant in resisting the claims of the plaintiff, or demanding anything adverse to both the plaintiff and the defendant [*Code Civ. Proc. § 387(a)*]. Intervention is proper only when authorized by law, or when the person seeking to intervene has an interest in the matter in litigation or the success of either of the parties, or an interest against both such that he or she will gain or lose by the direct legal operation and effect of the judgment [*see Code Civ. Proc. § 387*; *People v. City of Long Beach (1960) 183 Cal. App. 2d 271, 275, 6 Cal. Rptr. 658*]. When a person's interest in the case does not meet these criteria, the court may allow him or her to file an amicus curiae brief [*Jersey Maid Milk Products Co. v. Brock (1939) 13 Cal. 2d 661, 665, 91 P.2d 599*].

Unlike an amicus curiae, an intervenor is a party to the action and has the same procedural rights and remedies as does an original party [*People v. Perris Irrigation District (1901) 132 Cal. 289, 290-291, 64 P. 399* ; *Corridan v. Rose (1955) 137 Cal. App. 2d 524, 528, 290 P.2d 939*]. Nevertheless, a person who qualifies as an intervenor may instead act as an amicus curiae [*see* *Golden Gate Bridge etc. Dist. v. Felt (1931) 214 Cal. 308, 319, 5 P. 2d 585*].

For discussion and forms relating to parties and intervenors generally, see Ch. 395, *Parties* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionPermissive InterventionsCivil ProcedureAppealsAmici Curiae

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Chapter 22 AMICUS CURIAE
PART II. LEGAL BACKGROUND

3-22 California Forms of Pleading and Practice--Annotated § 22.12

§ 22.12 Participation Allowed or Requested by Court

Although an amicus curiae generally participates in an appellate court proceeding at his or her own request [*see § 22.16*], the trial court may request him or her to seek permission to participate from the appellate court [*see Marshall v. Marshall (1931) 212 Cal. 736, 737-738, 300 P. 816* (trial court requested that certain attorneys seek permission from appellate court to file amicus curiae briefs when defendant failed to appear on appeal or file a brief; trial court's action justified by sufficiently public nature of matter involved)]. A trial court may not appoint an amicus curiae to represent it on appeal, however, since the court itself is not a party to the appeal [*In re Pina (1896) 112 Cal. 14, 16, 44 P. 332*].

The appellate court may also invite amicus curiae briefs [*see Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, 153 Cal. Rptr. 842, 592 P.2d 329* (Supreme Court requested amicus briefs relating to construction of disputed insurance statute), *overruled on other grounds in Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal. 3d 287, 250 Cal. Rptr. 116, 758 P.2d 58*].

Legal Topics:

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

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3-22 California Forms of Pleading and Practice--Annotated § 22.13

§ 22.13 Impartiality Not Required

An amicus curiae need not be impartial and may support one side [*see Cal. Rules of Ct., Rules 8.200(c), 8.500(g), 8.520(f), 8.706(b)* (requiring that a brief in support of one of the parties so indicate); *McAllister v. Drapeau (1939) 14 Cal. 2d 102, 113, 92 P.2d 911*], or oppose both sides in a particular controversy [*see La Mesa etc. Irr. Dist. v. Halley (1925) 195 Cal. 739, 743, 235 P. 999*].

Legal Topics:

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

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3-22 California Forms of Pleading and Practice--Annotated § 22.14

§ 22.14 Rights and Powers Conferred on Amici Curiae

An amicus curiae appears at the discretion of the court [*see In re Veterans' Industries, Inc. (1970) 8 Cal. App. 3d 902, 924, 88 Cal. Rptr. 303*], and his or her powers are prescribed by the court in which he or she appears [*see Cal. Rules of Ct., Rules 8.520(f), 8.706(b)*]. In an appellate court action or proceeding, an amicus curiae's rights and powers generally extend only to filing a brief and arguing orally to the court [*see, e.g., U.S. Sup. Ct. Rules, Rule 28.7*].

A California trial or appellate court may, however, grant to an amicus curiae the power to participate in a court proceeding to the extent that the court itself has power to participate [*see Code Civ. Proc. § 187* (court is allowed to use any suitable process to carry into effect its jurisdiction)]. Thus, a court may appoint an amicus curiae to examine witnesses when the court itself has the power to examine witnesses [*see Evid. Code §§ 732, 775*; *Estate of Clark (1949) 93 Cal. App. 2d 110, 117-118, 208 P.2d 737*]. A court may also entertain a motion by an amicus curiae to take action that the court may take on its own motion [*see Golden Gate Bridge etc. Dist. v. Felt (1931) 214 Cal. 308, 315-320, 5 P.2d 585* (court heard and denied motion by amicus curiae to dismiss action on ground of collusion between parties); *Tomkin v. Harris (1891) 90 Cal. 201, 206, 27 P. 202* (action dismissed for want of prosecution on motion of amicus curiae; decided prior to enactment of *Code Civ. Proc. §§ 581a, 583.310 et seq.*); *In re Frowenfeld (1935) 3 Cal. App. 2d 576, 579, 40 P.2d 552* (amicus curiae, with consent of trial court, filed motion to set aside void order of appointment of trustee)].

Legal Topics:

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

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3-22 California Forms of Pleading and Practice--Annotated § 22.15

§ 22.15 New Issues, Arguments, or Material on Appeal

[1] Raising New Matters Generally Not Permitted

As a general rule, an appellate court will consider only those questions properly raised by the parties; an amicus curiae in an appellate court must accept the issues as framed and propositions as set forth by the appealing parties. Any additional questions presented in a brief filed by an amicus curiae will generally not be considered by the court [*White v. Davis (2003) 30 Cal. 4th 528, 553, n. 10, 133 Cal. Rptr. 2d 648, 68 P.3d 74* (court refused to consider amicus curiae argument regarding payment to lawyers appointed to represent indigent defendants when argument was not previously raised); *Strong v. State Board of Equalization (2007) 155 Cal. App. 4th 1182, 1191, n.6, 66 Cal. Rptr. 3d 657* ; *Berg v. Traylor (2007) 148 Cal. App. 4th 809, 823, 56 Cal. Rptr. 3d 140* ; *Big Creek Lumber Co. v. County of Santa Cruz (2004) 115 Cal. App. 4th 952, 966, 10 Cal. Rptr. 3d 356* (court refuses to hear constitutional issue raised solely by amicus curiae); *Rieger v. Arnold (2002) 104 Cal. App. 4th 451, 461, 128 Cal. Rptr. 2d 295* (court rejected amicus curiae argument urging court not to consider plaintiff's actions in sexual harassment cause of action because parties did not raise argument); *see also Knetsch v. United States (1960) 364 U.S. 361, 370, 81 S. Ct. 132, 5 L. Ed. 2d 128* (additional questions presented in amicus curiae brief filed in U.S. Supreme Court not considered); *City of Los Angeles v. Standard Oil Co. (1968) 262 Cal. App. 2d 118* , 127, *68 Cal. Rptr. 512* (amicus curiae who filed brief in appellate court declaratory relief action to determine constitutionality of a statute was not allowed to seek relief based on hypothetical construction of statute not asserted by parties)].

[2] New Arguments or Issues Sometimes Allowed

Generally, courts will consider an issue raised only by amicus curiae only in the following situations [*Costa v. Workers' Comp. Appeals Bd. (1998) 65 Cal. App. 4th 1177, 1187-1188, 77 Cal. Rptr. 2d 289*]:

- The issue supports affirmance.
- The issue concerns the jurisdiction of the court.

For example, the Supreme Court considered an issue first raised by an amicus curiae on appeal because a jurisdictional question was involved, and the appeal was also from judgment of dismissal after the trial court sustained a general

demurrer without leave to amend, in which situation an appellate court is required to affirm the judgment if it is correct on any theory, including one first raised by amicus [*see E. L. White, Inc. v. City of Huntington Beach (1978) 21 Cal. 3d 497, 510-511, 146 Cal. Rptr. 614, 579 P.2d 505*].

An amicus curiae may also be permitted to raise a new issue on appeal when the issue arises from a United States Supreme Court opinion decided during pendency of appellate court action, the parties do not inform the appellate court of that decision, and the appellate decision does not address the particular issue [*see Fisher v. City of Berkeley (1984) 37 Cal. 3d 644, 209 Cal. Rptr. 682, 693 P.2d 261 , aff'd, 475 U.S. 260, 106 S. Ct. 1045, 89 L. Ed. 2d 206*]; the issue is a purely legal issue of statutory interpretation and is not dependent upon the development of a factual record in the trial court [*see California Highway Patrol v. Superior Court (2006) 135 Cal. App. 4th 488, 498, 38 Cal. Rptr. 3d 16]* ; the issue presented is of statewide importance and capable of being presented repeatedly [*see Lavie v. Procter & Gamble Co. (2003) 105 Cal. App. 4th 496, 503, 129 Cal. Rptr. 2d 486* (court considered amicus argument because standard for evaluating whether advertisement is deceptive under Unfair Competition Law is question of law with important public policy implications); *People v. Niebauer (1989) 214 Cal. App. 3d 1278, 1291, 263 Cal. Rptr. 287* (court considered argument of amicus curiae not raised by either party, relating to constitutionality of statute prohibiting dark-tinted windows in motor vehicles)]; the lower court had a duty to take judicial notice of the material forming the basis of the amicus curiae's argument, and the material can therefore be considered part of the record on appeal [*see Pratt v. Coast Trucking, Inc. (1964) 228 Cal. App. 2d 139, 143-149, 39 Cal. Rptr. 332 (Public Utilities Commission as amicus curiae permitted to raise argument not raised by either party)*]; or the interests of justice dictate that the amicus be allowed to present the issue [*see People v. Coleman (1942) 53 Cal. App. 2d 18, 32, 127 P.2d 309* (allowing amicus curiae in criminal action to raise objections to instructions not objected to by defendant)].

[3] Improper Matter Ignored or Stricken

The rules and practices of reviewing courts accord wide latitude to interested and responsible parties who seek to file amicus curiae briefs, in order to further the purpose of these briefs in assisting the court [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 405 n.14, 11 Cal. Rptr. 2d 51, 834 P.2d 745* ; *see Cal. Rules of Ct., Rule 8.520(f)*; *see also* discussion in *§ 22.11[1]* (purpose of participation by amicus curiae)]. The reviewing court may choose to ignore, however, improper material such as unreliable and irrelevant information [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 405 n.14, 11 Cal. Rptr. 2d 51, 834 P.2d 745*].

Improper material may be stricken from an amicus brief in extreme cases of obvious abuse of the amicus curiae privilege. Otherwise courts are not inclined to control the contents of amicus curiae briefs by use of orders to strike [*see Cornette v. Department of Transp. (2001) 26 Cal. 4th 63, 77, 109 Cal. Rptr. 2d 1, 26 P.3d 332* ; *Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 405 n.14, 11 Cal. Rptr. 2d 51, 834 P.2d 745* ; *Matuz v. Gerardin Corp. (1989) 207 Cal. App. 3d 203, 206-207*].

For further discussion of improper content of appellate briefs generally, and a form of motion to strike a defective brief, see Ch. 50, *Appeal: Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityPreservation for ReviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsAmici Curiae

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3-22 California Forms of Pleading and Practice--Annotated § 22.16

§ 22.16 Procedure for Participation in Proceeding or Appeal

[1] Trial Court

Although not specifically authorized by statute or the California Rules of Court, an amicus curiae may be permitted to appear, to cross examine witnesses, and to submit a brief to a trial court at the discretion of the trial judge [*see Jersey Maid Milk Products Co. v. Brock (1939) 13 Cal. 2d 661, 665, 91 P.2d 599* ; *In re Veterans' Industries, Inc. (1970) 8 Cal. App. 3d 902, 924-925, 88 Cal. Rptr. 303* ; *Estate of Thomas (1946) 74 Cal. App. 2d 389, 390, 168 P.2d 773*]. This practice is most often appropriate when the case is of particular importance to the amicus curiae, for example when the case is a test case [*see La Mesa etc. Irr. Dist. v. Halley (1925) 195 Cal. 739, 235 P. 999* (mandamus action by irrigation district to compel its president and secretary to sign and attest bonds authorized by the district)]. Procedure varies among trial courts, and counsel is advised to consult local court rules. For a form of motion for leave to appear as an amicus curiae in a state trial court, together with an order granting the motion, see *§ 22.40*.

An amicus curiae is not a party and has no independent right to appeal a court's decision [*see § 22.11[1]*]. Thus, one who appears at the trial level and desires to participate in the action or proceeding on appeal must apply to the appropriate appellate court for permission to appear in that court [*Estate of Bodger (1954) 128 Cal. App. 2d 710, 716, 276 P.2d 83* ; *see also In re Pina (1896) 112 Cal. 14, 16, 44 P. 332*].

[2] Appellate Division of Superior Court

In an appeal to the appellate division of the Superior Court, an amicus curiae may file a brief after permission is obtained from the presiding judge, subject to any conditions that he or she may prescribe. If the brief supports one of the parties' position, that fact must be noted in its heading [*Cal. Rules of Ct., Rule 8.706(b)*; *see also Cal. Rules of Ct., Rule 8.706(c), (d)* (contents and format of briefs filed in appellate division of superior court); for a form of such notation, *see § 22.42*].

The Attorney General may file an amicus curiae brief without obtaining the presiding judge's permission, unless the Attorney General is presenting the brief on behalf of another state officer or agency. The presiding judge may prescribe reasonable conditions for filing and answering such a brief [*Cal. Rules of Ct., Rule 8.706(b)*].

For a form of request for leave to file a brief as amicus curiae in the appellate division of the superior court, see *§ 22.41[1]*. For further discussion relating to the requirements governing the content and format, and filing of a brief, including an amicus curiae brief, in an appeal before the appellate division of the superior court, see *Ch. 345A, Limited Civil Cases, § 345A.56*.

An amicus curiae brief must be served on all parties before it is filed [*Cal. Rules of Ct., Rule 8.706(e)*]. To demonstrate compliance with this requirement, it is recommended that proof of service accompany the filing copies of the brief. For forms of proof of service, see *Ch. 518, Service of Summons and Papers, § 518.90* et seq.

[3] California Court of Appeal

A brief of amicus curiae in a court of appeal on the merits of an action or proceeding may be filed after permission is first obtained from the presiding justice, subject to any conditions that may be prescribed. To obtain permission, within 14 days after the last appellant's reply brief is filed or could have been filed under *Cal. Rules of Ct., Rule 8.212*, whichever is earlier, the applicant must file with the clerk of the reviewing court a signed request that states the nature of the applicant's interest and explains how the proposed amicus curiae brief will assist the court in deciding the matter [*Cal. Rules of Ct., Rule 8.200(c)(2)*]. For good cause, the presiding justice may allow later filing [*Cal. Rules of Ct., Rule 8.200(c)(1)*]. The proposed brief must be served and must accompany the application, and may be combined with the application [*Cal. Rules of Ct., Rule 8.200(c)(4)*]. The covers of the application and proposed brief must identify the party the applicant supports, if any [*Cal. Rules of Ct., Rule 8.200(c)(5)*]. The application must also identify any party or any counsel for a party in the pending appeal who authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief. It must also identify every person or entity who made a monetary contribution intended to fund the preparation or submission of the brief, other than the amicus curiae, its members, or its counsel in the pending appeal [*Cal. Rules of Ct., Rule 8.200(c)(3)*]. For a form of request for leave to file a brief as amicus curiae in the court of appeal, see *§ 22.41[1]*.

The Attorney General may file an amicus curiae brief without obtaining the presiding justice's permission, unless the Attorney General is presenting the brief on behalf of another state officer or agency. The Attorney General must file the brief within 14 days after the last appellant's reply brief is filed or could have been filed under *Cal. Rules of Ct., Rule 8.212*, whichever is earlier. The brief must contain the information otherwise required in a request for permission to file an amicus brief in the court of appeal. Any party may file an answer to an amicus curiae brief of the Attorney General within 14 days after it is filed [*Cal. Rules of Ct., Rule 8.200(c)(7)*].

If the court grants the application of an amicus curiae to file a brief, any party may file an answer within the time the court specifies [*Cal. Rules of Ct., Rule 8.200(c)(6)*]. Before any answer to an amicus curiae brief is filed, it must be served on all parties and on the amicus curiae [*Cal. Rules of Ct., Rule 8.200(c)(6)*]. To demonstrate compliance with this requirement, it is recommended that proof of service accompany the filing copies of such briefs. For forms of proof of service, see *Ch. 518, Service of Summons and Papers, § 518.90* et seq. The filing copies of the brief must also be accompanied by proof of deposit of one copy with the clerk of the superior court for delivery to the judge who presided at trial [*see Cal. Rules of Ct., Rule 8.212(c)*].

The covers of the amicus curiae application and brief must identify the party, if any, that the brief supports [*Cal. Rules of Ct., Rule 8.520(f)(6)*; for a form of such notation, *see § 22.42*]. Whenever practicable, the cover of an amicus curiae brief should be gray [*Cal. Rules of Ct., Rule 8.40(b)*].

For further discussion and forms relating to the format, content, and other procedural requirements governing briefs generally, including amicus curiae briefs, filed in a civil appeal before the court of appeal, see Ch. 50, *Appeal: Briefs* .

[4] California Supreme Court

[a] Letter Supporting or Opposing Grant of Writ or Petition for Review

An individual or entity desiring to support or oppose either (1) the granting of a petition for review or original writ in the Supreme Court, or (2) the accepting of a request for an answer to a certified question under *Cal. Rules of Ct., Rule 8.548*, must send a letter to that court in lieu of a brief of amicus curiae [*Cal. Rules of Ct., Rule 8.500(g)(1)*]. The letter must state the nature of the applicant's interest and conform to the requirements of *Cal. Rules of Ct., Rule 8.504(e)*, regarding incorporation of documents by reference and annexed material [*Cal. Rules of Ct., Rule 8.500(g)(3)*; for discussion relating to the requirements of *Cal. Rules of Ct., Rule 8.504(e)*, *see* Ch. 54, *Appeal: California Supreme Court Review*]. Prior to January 1, 2003, the rules required that the letter be accompanied by proof of service on each party to the action or proceeding [*see former* Rule 28(f); revised Rule 8.500(g) does not require proof of service. For discussion and forms relating to proof of service, *see Ch. 518, Service of Summons and Papers, § 518.90* et seq.].

The fact that a person has lodged such a letter, however, does not constitute leave for that person to file an amicus curiae brief on the merits of the case if the petition is granted or if the request is accepted. All persons seeking to file an amicus curiae brief on the merits must comply with the requirements applicable to those briefs (discussed in [b], *below*) [*Cal. Rules of Ct., Rule 8.520(f)*].

For discussion and forms relating generally to petitions for review and requests for an answer to a certified question, see Ch. 54, *Appeal: California Supreme Court Review* .

[b] Brief on Merits

A brief of amicus curiae on the merits of an action or proceeding may be filed after permission is obtained from the Chief Justice, subject to any conditions that may be prescribed. To obtain permission the applicant must file with the clerk of the Supreme Court a signed request, accompanied by the proposed brief, stating the nature of the applicant's interest and explaining how the proposed brief will assist the court in deciding the matter [*Cal. Rules of Ct., Rule 8.520(f)(3)*].

The request and proposed brief must be received by the court no later than 30 days after all briefs, other than supplemental briefs, which the parties are entitled to file pursuant to *Cal. Rules of Ct., Rule 8.520(f)*, either have been filed or can no longer be filed within the time limits prescribed by that rule. For good cause, the Chief Justice may allow later filing [*Cal. Rules of Ct., Rule 8.520(f)(2)*]. For a form of request for leave to file a brief as amicus curiae in an appeal before the Supreme Court, see *§ 22.41[2]*.

The Attorney General may file an amicus curiae brief without obtaining the Chief Justice's permission, unless the Attorney General is presenting the brief on behalf of another state officer or agency. The Attorney General must file the brief within the time required for receipt of a request for permission to file an amicus brief. The brief must contain the information otherwise required in a request for permission to file an amicus brief in the Supreme Court [*Cal. Rules of Ct., Rule 8.520(f)(8)*].

Before any amicus curiae brief is filed, it must be served on all parties [*Cal. Rules of Ct., Rule 8.520(f)(1)*]. To demonstrate compliance with this requirement, it is recommended that proof of service accompany the filing copies of such briefs [*cf.* discussion in [a], *above* (proof of service expressly required for amicus curiae letter supporting or opposing petition for review); for forms of proof of service, see *Ch. 518, Service of Summons and Papers § 518.90* et seq.]. The filing copies of the brief must also be accompanied by proof of deposit of one copy with the clerk of the superior court for delivery to the judge who presided at trial [*see Cal. Rules of Ct., Rule 8.212(c)*].

Any party may file an answer to an amicus brief within 20 days after it is filed. Before any answer is filed, it must be served on all parties and on the amicus curiae [*Cal. Rules of Ct., Rule 8.520(f)(7)*].

Amicus curiae briefs on the merits in the Supreme Court must conform as nearly as possible to the requirements of *Cal. Rules of Ct., Rule 8.520(b)*, relating to form and content. The cover of an amicus curiae brief must identify the party, if any, that the brief supports [*Cal. Rules of Ct., Rule 8.520(f)(6)*; for a form of such notation, *see § 22.42*]. In addition, whenever practicable, the cover of an amicus curiae brief should be gray [*Cal. Rules of Ct., Rule 8.40(b)*].

For further discussion and forms relating to the format, content, and other procedural requirements governing briefs generally, including amicus curiae briefs, filed in a civil review proceeding before the Supreme Court, see Ch. 54, *Appeal: California Supreme Court Review* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsBriefsCivil ProcedurePartiesInterventionPermissive InterventionsCivil ProcedureAppealsAmici Curiae

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Chapter 22 AMICUS CURIAE
PART II. LEGAL BACKGROUND

3-22 California Forms of Pleading and Practice--Annotated § 22.17

§ 22.17 Recovery of Attorney's Fees

Generally, an amicus curiae is not permitted to recover his or her attorney's fees [*Universal Oil Products Co. v. Root Ref. Co. (1945) 328 U.S. 575, 581, 66 S. Ct. 1176, 90 L. Ed. 1447*]. Nevertheless, an amicus curiae may be awarded a fee for services to the court if he or she is appointed by the court, renders services that help to resolve the question presented, and the party required to pay the fee caused the situation prompting the appointment [*see Miller-Wohl Co. v. Comm'r of Labor (9th Cir. 1982) 694 F.2d 203, 205*]. In addition, an amicus curiae may not be held liable to a prevailing party for attorney's fees [*Connerly v. State Personnel Bd. (2006) 37 Cal. 4th 1169, 1179-1183, 39 Cal. Rptr. 3d 788, 129 P.3d 1]* . However, when a party is an amicus curiae in one case and a party defending the same issue in another case, it may be liable for attorney's fees under *Code Civ. Proc. § 1021.5* to a plaintiff under the private attorney general theory [*Ramon v. County of Santa Clara (2009) 173 Cal. App. 4th 915, 921-925, 93 Cal. Rptr. 3d 278*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsBriefsCivil ProcedureAppealsCosts & Attorney FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureAppealsAmici Curiae

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3-22 California Forms of Pleading and Practice--Annotated § 22.18

§ 22.18 No Appeal From Denial of Leave to Participate as Amicus Curiae

An order denying permission to appear as an amicus curiae is not appealable [*In re Veterans' Industries, Inc. (1970) 8 Cal. App. 3d 902, 924, 88 Cal. Rptr. 303* ; *People v. City of Long Beach (1960) 183 Cal. App. 2d 271, 276, 6 Cal. Rptr. 658* ; *see also* discussion in *§ 22.11[1]* (amicus curiae has no standing to appeal other orders or decision)].

Legal Topics:

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

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3-22 California Forms of Pleading and Practice--Annotated §§ 22.19-22.29

[Reserved]

§§ 22.19[Reserved]

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3-22 California Forms of Pleading and Practice--Annotated § 22.30

§ 22.30 California Rules of Court

Amicus curiae briefs in California Supreme Court. *Cal. Rules of Ct., Rule 8.520(f)*

Amicus curiae briefs in California courts of appeal. *Cal. Rules of Ct., Rule 8.200(c)*

Form and content of briefs filed in California Supreme Court and courts of appeal. *Cal. Rules of Ct., Rules 8.204, 8.520*

Proof of deposit of one copy with clerk of the superior court, for delivery to judge who presided at trial, is required for filing any appellate brief. *Cal. Rules of Ct., Rule 8.212(c)*

Request for decision by California Supreme Court relating to state law certified by federal or foreign appellate court. *Cal. Rules of Ct., Rule 8.548*

Amicus curiae briefs in appellate division of superior court. *Cal. Rules of Ct., Rule 8.706(b)*

Form and content of briefs in appellate division of superior court. *Cal. Rules of Ct., Rule 8.706(c), (d)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsBriefsCivil ProcedureAppealsAmici Curiae

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3-22 California Forms of Pleading and Practice--Annotated § 22.31

§ 22.31 Decisions

[1] Amicus Curiae in Trial Courts

Amicus curiae permitted to appear and file briefs in trial court at discretion of trial judge. *Jersey Maid Milk Products Co. v. Brock (1939) 13 Cal. 2d 661, 665, 91 P.2d 599* ; *In re Veterans' Industries, Inc. (1970) 8 Cal. App. 3d 902, 924-925, 88 Cal. Rptr. 303* ; *Estate of Thomas (1946) 74 Cal. App. 2d 389, 390, 168 P.2d 773*

[2] Amicus Curiae Distinguished From Party or Intervenor

Amicus curiae distinguished from party to action. *Connerly v. State Personnel Bd. (2006) 37 Cal. 4th 1169, 1179-1183, 39 Cal. Rptr. 3d 788, 129 P.3d 1*

Intervenor compared with amicus curiae. *Jersey Maid Milk Products Co. v. Brock (1939) 13 Cal. 2d 661, 663-664, 91 P.2d 599* ; *Golden Gate Bridge etc. Dist. v. Felt (1931) 214 Cal. 308, 319, 5 P.2d 585*

Amicus curiae do not have rights of an adversary in litigation. *In re Pina (1896) 112 Cal. 14, 16, 44 P. 332*

Amicus curiae distinguished from party to action. *In re Veterans' Industries, Inc. (1970) 8 Cal. App. 3d 902, 916, 88 Cal. Rptr. 303* ; *Estate of Thomas (1946) 74 Cal. App. 2d 389, 390, 168 P.2d 773*

[3] Powers and Rights of Amicus Curiae

Amicus curiae is permitted to make motion that requests court to take action that court itself may take on its own motion. *Tomkin v. Harris (1891) 90 Cal. 201, 206, 27 P. 202* (motion to dismiss for want of prosecution); *In re Frowenfeld (1935) 3 Cal. App. 2d 576, 579, 40 P.2d 552* (motion to set aside void order); *cf. Golden Gate Bridge etc. Dist. v. Felt (1931) 214 Cal. 308* , 315-320, *5 P.2d 585* (motion to dismiss action on ground of collusion between parties)

Amicus curiae is permitted to examine witnesses if court itself has power to examine witnesses. *Estate of Clark (1949) 93 Cal. App. 2d 110, 118, 208 P.2d 737*

[4] Impartiality of Amicus Curiae Not Required

Amicus curiae need not be totally disinterested. *Funbus Systems, Inc. v. California Public Utilities Commission (9th Cir. 1986) 801 F.2d 1120, 1125*

Amicus curiae is allowed to be interested in outcome of litigation and is not required to be impartial. *McAllister v. Drapeau (1939) 14 Cal. 2d 102, 113, 92 P.2d 911* (supporting one side); *La Mesa etc. Irr. Dist. v. Halley (1925) 195 Cal. 739, 743, 235 P. 999* (opposing both sides)

[5] Raising New Matter on Appeal

[a] General Prohibition

Amicus curiae generally not permitted to raise new issues in appellate court. *White v. Davis (2003) 30 Cal. 4th 528, 553, n. 10, 133 Cal. Rptr. 2d 648, 68 P.3d 74* ; *Eggert v. Pacific States S. & L. Co. (1943) 57 Cal. App. 2d 239, 251, 136 P.2d 822* ; *see also* *Knetsch v. United States (1960) 364 U.S. 361, 370, 81 S. Ct. 132, 5 L. Ed. 2d 128*

Amicus curiae must accept the issues made and propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered. *Strong v. State Board of Equalization (2007) 155 Cal. App. 4th 1182, 1191, n.6, 66 Cal. Rptr. 3d 657*

Courts refuse to consider arguments raised by amicus curiae when those arguments are not presented in the trial court, and are not urged by the parties on appeal. Amicus curiae must accept the issues made and propositions urged by the appealing parties, and an appellate court will not consider any additional questions presented in a brief filed by an amicus curiae. *Berg v. Traylor (2007) 148 Cal. App. 4th 809, 823, 56 Cal. Rptr. 3d 140*

Amicus curiae's argument (urging court not to consider plaintiff's actions in sexual harassment cause of action) rejected by appellate court because parties did not raise argument. *Rieger v. Arnold (2002) 104 Cal. App. 4th 451, 461, 128 Cal. Rptr. 2d 295*

Rule that amicus curiae may not raise issues not raised by parties is especially applicable when appellants initiate appeal with express decision not to address issue raised by amicus. *San Franciscans for Reasonable Growth v. City and County of San Francisco (1989) 209 Cal. App. 3d 1502, 1515 n.10, 258 Cal. Rptr. 267*

[b] Exceptions

Amicus curiae permitted to raise new issue on appeal if issue arises from United States Supreme Court opinion decided during pendency of appellate court action, parties do not inform appellate court of decision, and appellate decision does not address issue. *Fisher v. City of Berkeley (1984) 37 Cal. 3d 644, 209 Cal. Rptr. 682, 693 P.2d 261 , aff'd, 475 U.S. 260, 106 S. Ct. 1045, 89 L. Ed. 2d 206*

Amicus curiae is permitted to raise issue not raised by either party if jurisdictional question involved, appeal is from judgment of dismissal following sustaining of general demurrer without leave to amend, and Court therefore is required to affirm judgment if correct on any theory, including that of amicus curiae. *E. L. White, Inc. v. City of Huntington*

Beach (1978) 21 Cal. 3d 497, 510-511, 146 Cal. Rptr. 614, 579 P.2d 505

Amicus curiae is permitted to raise new issue on appeal when issue is of statewide importance and capable of being presented repeatedly. *People v. Niebauer (1989) 214 Cal. App. 3d 1278, 1291, 263 Cal. Rptr. 287*

Amicus curiae is permitted to raise new issue on appeal if lower court had duty to take judicial notice of material forming basis of amicus curiae's argument and material can therefore be considered part of record on appeal. *Pratt v. Coast Trucking, Inc. (1964) 228 Cal. App. 2d 139, 143-149, 39 Cal. Rptr. 332*

[6] Appeal by Amicus Curiae

Order denying permission to appear as amicus curiae not appealable. *In re Veterans' Industries, Inc. (1970) 8 Cal. App. 3d 902, 924, 88 Cal. Rptr. 303* ; *People v. City of Long Beach (1960) 183 Cal. App. 2d 271, 276, 6 Cal. Rptr. 658*

Amicus curiae may not appeal from decision of court contrary to position advocated by him or her. *In re Veterans' Industries, Inc. (1970) 8 Cal. App. 3d 902, 916-917, 88 Cal. Rptr. 303*

Amicus curiae appearing in trial court is not allowed to appear on appeal without permission of appellate court. *Estate of Bodger (1954) 128 Cal. App. 2d 710, 716, 276 P.2d 83* ; *see also In re Pina (1896) 112 Cal. 14, 16, 44 P. 332*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityPreservation for ReviewCivil ProcedureAppealsAmici CuriaeCivil ProcedureAppealsBriefsCivil ProcedurePartiesInterventionPermissive Interventions

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§ 22.32 Text References

California Civil Appellate Practice, ch. 14, *Amicus Curiae* (Cal. CEB 3d ed. 2000)

Witkin, California Procedure, vol. 4, *Pleading*, § 215; vol. 9, *Appeal*, §§ 617-619 (4th ed. 1997)

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[Reserved]

§§ 22.33[Reserved]

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Chapter 22 AMICUS CURIAE
PART IV. FORMS

3-22 California Forms of Pleading and Practice--Annotated § 22.40

§ 22.40 Request to Participate as Amicus Curiae in State Trial Court

[1] FORM Request to Participate as Amicus Curiae in State Trial Court

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	APPLICATION OF
vs.	)	_____ [*name*]
_____ [*name*],	)	FOR LEAVE TO [APPEAR AND]
Defendant.	)	FILE BRIEF AS
	)	AMICUS CURIAE
	)	

_____

To the Honorable _____ [*name*], _____ Judge of the _____ [Superior *or* Muncipal] Court:

This application of _____ [*name*] respectfully shows:

1. Applicant is _____ [*identify applicant and specify applicant's interest in determination of the issues*

involved in the action or proceeding].

2. Applicant is familiar with the facts of this case, the questions involved, and the scope of their presentation to date.

3. Applicant will _____ [assist the court *and/or* argue the following points in his/her/its trial brief]: _____ [*specify how applicant's participation in the action or proceeding will assist the trial court, e.g., applicant possesses a specifed expertise that will assist in examining key witnesses, or applicant's specified points to be argued in the amicus curiae brief will assist the court in addressing larger issues raised by the pleadings but not thus far addressed by the parties*].

4. Applicant believes that there is necessity for the foregoing additional assistance and/or argument.

5. The following party or counsel for a party in the pending appeal authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief: _____[*name(s)*].

6. The following persons or entities made a monetary contribution intended to fund the preparation or submission of the proposed amicus brief: _____[*name(s)*].

WHEREFORE, _____ [*name*] respectfully requests leave to [appear and] file a brief as amicus curiae in the above-entitled cause.

Respectfully submitted,
_____ [*signature*]
_____ [*typed name, address, and telephone*]

_____ [*date*]

ORDER

The application of _____ [*name*] for permission to [appear and] file a brief as amicus curiae having been read and filed, and good cause appearing therefor,

IT IS HEREBY ORDERED that _____ [*name*] be, and hereby is, permitted to file a brief as amicus curiae herein;

IT IS HEREBY ORDERED that the amicus curiae brief be served on all the parties to this appeal and filed by _____ [*date*]; and

PERMISSION IS HEREBY GRANTED to any party to serve and file an answering brief within _____ [number] days thereafter.
Dated: _____.

_____ [*signature*]
Judge of the [Superior *or* Municipal] Court

[2] Use of Form

This form of application is for use in a California trial court by an individual or entity requesting leave to participate in

an action or proceeeding as amicus curie, by either filing an amicus curiae trial brief, or by appearing in the action or proceeding as well as filing a trial brief. For discussion of amicus curiae in trial courts, see *§ 22.16[1]*.

[3] Procedure and Contents of Request

There are no express statutes or court rules governing such requests, and counsel should consult local rules and practice, if any. The rules governing such requests in the reviewing courts, however, uniformly permit the presiding judge or justice to permit the filing of an amicus curiae brief on any conditions that he or she may set, usually after the applicant files a signed request with the clerk of the court [*see Cal. Rules of Ct., Rules 8.200(c), 8.706(b)*]. By analogy with these rules, it appears that a noticed motion, with notice to the parties and a hearing, is not necessary. Therefore it is recommended that an applicant file a signed request, such as this application, with the clerk of the court.

The application follows the content requirements for a request made in a state court of appeal [*see Cal. Rules of Ct., Rule 8.200(c)*]. These requirements provide the most relevant guidelines, because the procedure applicable in the appellate divisions of the superior court provide no express guidelines [*see Cal. Rules of Ct., Rules 8.200(c), 8.706(b)*], and a trial court is unlikely to require an applicant to satisfy the more stringent content requirements that apply only to signed requests filed with the California Supreme Court [*see Cal. Rules of Ct., Rules 8.200(c), 8.706(b)*].

The application includes an order to be signed by the judge of a type typically appended to ex parte applications. In this instance, the order includes language allowing the judge to specify the time for serving and filing the amicus curiae brief, as well as the language permitting answers by the parties. This language, too, is recommended by analogy to the rules governing the procedure in reviewing courts [*see Cal. Rules of Ct., Rules 8.200(c), 8.706(b)*]. Some courts may prefer to prepare their own order, however, and local practice should be consulted.

While not required, the applicant may wish to include a memorandum of points and authorities citing the analogous procedures and any other authorities that would support an order granting leave in a particular case [*see* Ch. 417, *Points and Authorities* (general discussion and forms relating to memoranda of points and authorities)]. A declaration under penalty of perjury may also be desirable if the applicant is seeking to introduce new issues [*see* discussion in *§ 22.15[2]* (introducing new matter); *see also* Ch. 15, *Affidavits, Certificates, and Declarations* (general discussion and forms relating to declarations)].

Legal Topics:

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

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3-22 California Forms of Pleading and Practice--Annotated § 22.41

§ 22.41 Request to Submit Amicus Curiae Brief in State Reviewing Court

[1] California Court of Appeal or Appellate Division of Superior Court

[a] FORM Request to Submit Amicus Curiae Brief in State Reviewing Court--California Court of Appeal or Appellate Division of Superior Court

[*EITHER*]

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]

[*OR*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
APPELLATE DEPARTMENT

[*CONTINUE*]

_____ [*name*],	)
_____ [*identify party, e.g.,*	)
Plaintiff and Appellant],	)

vs.	)	NO. _____
_____ [*name*],	)	
_____ [*identify party, e.g.,*	)	
Defendant and Respondent].	)	
	)	
	)	

_____

APPLICATION OF _____ [*name*] FOR LEAVE
TO FILE BRIEF AS AMICUS CURIAE

On Appeal From the Judgment of the _____
[*specify trial court*] of the State of California,
_____ County, Honorable _____ [*name*], Judge

To the Honorable _____ [*name*], _____ [Presiding Justice *or* Presiding Judge]:

This application of _____ [*name*] respectfully shows:

1. Applicant is _____ [*identify applicant and state the nature of applicant's interest in the appeal*].

2. The proposed brief is attached.

3. Applicant believes that there is necessity for additional argument on the points raised on the brief because:
_____ [*specify, e.g.:*

A. An argument, although raised by the trial court proceedings (Reporter's Transcript, Page _____,
Line _____), and determinative of the outcome hereof, is not argued in the briefs of appellant or respondent.

B. Applicant can present authorities and argument not presented in the briefs of appellant or respondent that may assist this court in the determination of this appeal.

C. Applicant believes the legal issues involved in the appeal are a matter of public interest, and can present information and authorities directly bearing on these issues.

D. Applicant is experienced in litigation involving questions similar to those to be decided by the court on this appeal, and can assist this court in locating and analyzing important authorities bearing on the issues involved in this appeal and in furnishing citations to relevant authorities.]

E. The following party or counsel for a party in the pending appeal authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief:
_____[*name(s)*].

F. The following persons or entities made a monetary contribution intended to fund the preparation or submission of the proposed amicus brief: _____[*name(s)*].

WHEREFORE, _____ [*name*] respectfully requests leave to file a brief as amicus curiae in the above-entitled cause.

Respectfully submitted,
_____ [*signature*]
_____ [*address and telephone*]

_____ [*date*]

ORDER

The application of _____ [*name*] for permission to file a brief as amicus curiae having been read and filed, and good cause appearing therefor,

IT IS HEREBY ORDERED that _____ [*name*] be, and hereby is, permitted to file the proposed brief attached to this application as amicus curiae herein; and

PERMISSION IS HEREBY GRANTED to any party to this appeal to serve and file an answering brief within _____ [*number*] days thereafter.
Dated: _____.

_____ [*signature*]
_____ [Chief Justice *or* Presiding Justice *or* Presiding Judge]

[b] Use of Form

This form is for use by a person or entity to request leave to file a brief as amicus curiae in an appeal before either the appellate division of the California superior court or the California court of appeal.

[c] Procedure and Contents of Request

This application conforms to the procedures governing requests to file amicus curiae briefs with the California Court of Appeal [*Cal. Rules of Ct., Rule 8.200(c)*], which are discussed in *see § 22.16[3]*. The proposed brief must accompany the application and may be combined with it [*Cal. Rules of Ct., Rule 8.200(c)(4)*]. The application and proposed brief must be served [*Cal. Rules of Ct., Rule 8.200(c)(4)*].

In the appellate division of the superior court, there is no express mention of a written request or its contents, filing, and other procedures. The applicable rule merely provides that a brief of amicus curiae may be filed after first obtaining permission from the presiding judge, on such terms as that judge may set [*Cal. Rules of Ct., Rule 8.706(b)*; *see* discussion in *§ 22.16[2]*]. Counsel should consult local practice if any when filing a request in the appellate division of a superior court. Otherwise, however, it is recommended that the applicant use the requirements applicable in the court of appeal as a guideline, and file a signed request, such as this application, with the clerk of the court.

If the court grants the application, any party may file an answer within the time the court specifies [*Cal. Rules of Ct., Rule 8.200(c)(6)*]. It must be served on all parties and the amicus curiae.

[2] California Supreme Court

[a] FORM Request to Submit Amicus Curiae Brief in State Reviewing Court--California Supreme Court

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

_____ [*name*],	)	
_____ [*identify party, e.g.,*	)	
Plaintiff and Appellant],	)	
vs.	)	NO. _____
_____ [*name*],	)	
_____ [*identify party, e.g.,*	)	
Defendant and Respondent].	)	
	)	
	)	

APPLICATION OF _____ [*name*] FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

On Appeal From the Judgment of the _____ [*specify trial court*] of the State of California, _____ County, Honorable _____ [*name*], Judge

To the Honorable _____ [*name*], _____ Chief Justice:

This application of _____ [*name*] respectfully shows:

1. Applicant is _____ [*identify applicant and specify the nature of applicant's interest in the appeal*].

2. Applicant's proposed brief, in summary, sets forth the following _____ [facts *and/or* questions of law] that have not been adequately been presented by the parties:

A. _____ [*summarize here and in subsequent paragraphs as necessary facts and questions of law presented in accompanying proposed brief*];

B. _____;

Etc.

3. The _____ [facts *and/or* questions of law] in Applicant's proposed brief are relevant to the disposition of this case because _____ [*explain*].

WHEREFORE, _____ [*name*] respectfully requests leave to file a brief as amicus curiae in the above-entitled cause.

Respectfully submitted,
_____ [*signature*]
_____ [*typed name, address, and telephone*]
_____ [*date*]

ORDER

The application of _____ [*name*] for permission to file a brief as amicus curiae having been read and filed, and good cause appearing therefor,

IT IS HEREBY ORDERED that _____ [*name*] be, and hereby is, permitted to file a brief as amicus curiae herein.
Dated: _____.

_____ [*signature*]
_____ Chief Justice

[b] Use of Form

This form of application is for use by an individual or entity to obtain leave to file an amicus curiae brief on the merits of an appeal before the California Supreme Court. It must be accompanied by the proposed brief and served and filed with the clerk of the Supreme Court [*Cal. Rules of Ct., Rule 8.520(f)*; for discussion and forms relating to preparation of appellate briefs, *see* Ch. 50, *Appeal: Briefs* , and Ch. 54, *Appeal: California Supreme Court Review*].

Legal Topics:

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

California Forms of Pleading and Practice--Annotated

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Volume 3: Alcoholic Beverage Licenses thru Answers-Chs. 18-29
Chapter 22 AMICUS CURIAE
PART IV. FORMS

3-22 California Forms of Pleading and Practice--Annotated § 22.42

§ 22.42 Notation for Cover of Amicus Curiae Brief in State Reviewing Court

[1] FORM Notation for Cover of Amicus Curiae Brief in State Reviewing Court

BRIEF OF _____ [*name or title, e.g.,*
HAZARDOUS WASTE CONTROL RESEARCH
INSTITUTE]
AS AMICUS CURIAE IN SUPPORT OF
_____ [*designation of party, e.g.,* APPELLANT]

[2] Use of Form

This form of notation is for inclusion on the cover of an amicus curiae brief filed in a state reviewing court. If an amicus curiae brief filed in the Supreme Court, the court of appeal, or the appellate division of the superior court, is in support of the position of one of the parties, that fact must be noted on the cover of the brief [*Cal. Rules of Ct., Rules 8.200(c)*, 8.520(f)(6), *8.706(b)*]. Whenever practicable, the cover of an amicus curiae brief should be gray [*Cal. Rules of Ct., Rule 8.40(b)*; for discussion and forms relating to preparations of briefs and covers generally, *see* Ch. 50, *Appeal: Briefs* (appellate courts), and Ch. 345A, *Limited Civil Cases* (appellate division of superior court)].

Legal Topics:

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

California Forms of Pleading and Practice--Annotated

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Volume 3: Alcoholic Beverage Licenses thru Answers-Chs. 18-29
Chapter 23 ANIMALS: CIVIL LIABILITY

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[1] FORM

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[2] Use of Form

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[2] Use of Form

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[2] Use of Form

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[2] Use of Form

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[2] Use of Form

[3] Allegations

[4] Specification of Damages

[5] Cross References

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[2] Use of Form

[3] Allegations

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[2] Use of Form

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[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Specification of Damages

[5] Cross References

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[1] FORM

[2] Use of Form

§ 23.147 Complaint for Damages Based on Breach of Implied Warranty of Safety and Suitability--By Bailee Against Bailors of Horse--Bailee Thrown From Horse

[1] FORM

[2] Use of Form

[3] Specification of Damages

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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[2] Use of Form

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[2] Use of Form

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[4] Cross References

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[2] Use of Form

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[1] FORM

[2] Use of Form

§ 23.156 Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Store Customer Against Store and Dog Owner--Customer Injured by Dog in Store

[1] FORM

[2] Use of Form

[3] Cross Reference

§ 23.157 Complaint for Damages Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code § 2100] and Dog Owner and Keeper--Passenger Bitten by Dog

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[2] Use of Form

§ 23.158 Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Milker of Cow Against Person Photographing Cow--Milker Injured by Frightened Cow

[1] FORM

[2] Use of Form

§ 23.159 Complaint for Damages Based on Strict Liability [Civ. Code § 3342]--By Person Lawfully in a Private Place--Against Dog Owner--Person Bitten by Dog

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[2] Use of Form

[3] Specification of Damages

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[2] Use of Form

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[1] FORM

[2] Use of Form

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§ 23.162 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Assumption of Risk and Negligence of Plaintiff--Riding Horse One Knows to Be Dangerous and Riding It Unskillfully

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[2] Use of Form

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[2] Use of Form

§ 23.164 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Willfully Inviting Attack by Dog

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[2] Use of Form

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[1] FORM

[2] Use of Form

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[1] Petition to Determine if Dog Is Potentially Dangerous or Vicious [Food & Agric. Code § 31601 et seq.]--Judicial Council Form MC-600

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[b] Use of Form

[c] Completing Form

[d] Supporting Documents

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[a] FORM

[b] Use of Form

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[a] FORM

[b] Use of Form

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[b] Use of Form

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[1] FORM

[2] Use of Form

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§ 23.181 Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Civ. Code § 3422] and for Damages Based on Trespass--By Landowners Against Livestock Owners--Livestock Trespassed on Plaintiffs' Land

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[2] Use of Form

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[5] Cross References

§ 23.182 Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Civ. Code § 3422]--By Landowner Against Holder of Easement on His/Her Land--Easement Holder's Failure to Close Gate, Resulting in Escape of Livestock

[1] FORM

[2] Use of Form

California Forms of Pleading and Practice--Annotated

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Volume 3: Alcoholic Beverage Licenses thru Answers-Chs. 18-29
Chapter 23 ANIMALS: CIVIL LIABILITY
I SCOPE

3-23 California Forms of Pleading and Practice--Annotated § 23.01

§ 23.01 Scope of Chapter

This chapter covers injuries to, and conversion of, animals, injuries by animals to people, and trespassing and estray animals.

The chapter discusses injuries to, and conversion of, animals in § 23.10 et seq. and provides a research guide in § 23.70 et seq. Related forms include the following:

- Forms of complaint for damages for injuries to animals based on negligence [*see §§ 23.120 -23.123, 23.125 -23.127*].

- A form of complaint for damages for injuries to animals based on breach of a bailment contract [*see § 23.126*].

- Forms of complaint for damages for conversion of animals [*see §§ 23.126, 23.127*].

- A form of complaint for recovery of possession of, and for damages to, animals [*see § 23.128*].

- Forms of complaint for damages for injuries to animals based on strict liability [*see §§ 23.129, 23.130*].

- A form of complaint for damages for injuries to animals based on willfulness [*see § 23.131*].

- A form of complaint against a breeder or dealer for illness or death of a dog [*see § 23.134*].

- A form of affirmative defense based on contributory negligence [*see § 23.124*].

- Forms of affirmative defenses based on the dangerous acts of a dead animal when it was killed [*see §§ 23.132, 23.133*].

The chapter discusses injuries by animals to people in § 23.30 et seq., with a research guide in § 23.90, and the following related forms:

- Forms of complaints for damages for injuries based on strict liability [*see §§ 23.140 -23.144*, *23.159*, *23.160*].

- Forms of complaints for damages based on negligence [*see §§ 23.141 -23.143*, *23.145*, *23.146*, *23.152 -23.158*],

- A form of complaint for damages based on an implied warranty [*see § 23.147*].

- Forms of allegations for use in these complaints [*see §§ 23.148 -23.151*]

- Forms of affirmative defenses [*see §§ 23.161 -23.164*].

- A form of complaint for use in an action against the owner of a dog which has previously bitten humans to determine if danger still exists from the dog [*see § 23.165*].

- Forms for use to determine if a dog is potentially dangerous or vicious [*see § 23.166*].

The chapter discusses trespassing and estray animals to people in § 23.50 et seq., with a research guide in § 23.110, and the following related forms:

- A form of complaint for animal trespasses resulting in a nuisance [*see § 23.180*]

- A form of complaint for animal trespasses resulting in injury to crops and soil on real property [*see § 23.181*]

- A form of complaint for damages for the value of livestock lost when a gate was left open [*see § 23.182*].

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§ 23.02 Cross References

- For a form of letter informing an owner that his or her animal has been saved from drowning or starvation, see Ch. 355, *Lost and Unclaimed Property* .

- For discussion of general principles relating to liability of property owners for injuries to persons outside the owned premises, see Ch. 421, *Premises Liability* .

- For a form of complaint in an action by the owner of cattle against a railroad for failure to maintain a fence, resulting in loss of a cow, see Ch. 485, *Railroads* .

- For forms and discussion for use in an action based on trespass to real property, see Ch. 550, *Trespass* .

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[Reserved]

§§ 23.03[Reserved]

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§ 23.10 Governing Statutes

[1] Ownership of Animals

The ownership of animals is authorized by *Civ. Code §§ 655* (domestic animals), 656 (wild animals). The duty to avoid injuring, and liability for injury to, another's property is governed generally by *Civ. Code §§ 1708, 1714(a)* and, in the case of livestock, by *Civ. Code § 3341* and *Food & Agric. Code §§ 31501-31508*.

[2] Injury to Property or Animals

Damages for injury to property generally are governed by *Civ. Code §§ 3333, 3354, 3355*, and exemplary damages for injuries to animals are governed by *Civ. Code § 3340*. The remedies for unlawful taking and detaining of animals are set forth in *Code Civ. Proc. § 667* (claim and delivery) and *Civ. Code § 3336* (conversion).

Authorization to kill or seize animals threatening other animals is governed by *Civ. Code § 3341(2)* and *Food & Agric. Code §§ 31102-31104, 31151-31153*. Seizure and disposition of neglected animals is governed by *Penal Code §§ 597f* and *597.1*.

[3] Bailees of Animals

The duties, liabilities, and rights of bailees of animals are governed generally by *Civ. Code §§ 1834-1836, 1838-1840*. *Civ. Code § 1844* defines a gratuitous deposit, *Civ. Code § 1851* defines a deposit for hire, *Civ. Code § 1884* defines a loan for use, and *Civ. Code § 1925* defines a hiring. The degree of care required is governed by *Civ. Code §§ 1846* (gratuitous bailee), 1852 (bailee for hire), 1886-1888 (loan for use), and 1928 (hirer).

[4] Common Carriers

The definition, duties, and liabilities of common carriers are set forth in *Civ. Code §§ 2168-2178, 2194-2203*.

The duties of railroads to animals along their rights of way are governed by *Pub. Util. Code §§ 7626-7631*.

[5] Dog Breeders and Pet Dealers

The duties of dog breeders and dog and cat dealers are described, respectively, in the Pet Breeder Warranty Act (*Health & Safety Code § 122045 et seq.*) and the Pet Protection Act (*Health & Safety Code § 122125 et seq.*) [*see Health & Safety Code §§ 122045(b), 122125(b)*]. These provisions, as added or amended in 1991, apply to sales occurring on or after January 1, 1992 [*see* Stats. 1991, ch. 1128, § 20]. The provisions do not apply to publicly operated pounds or humane societies [*Health & Safety Code §§ 122045(d), 122125(d)*] or, in the case of the Pet Breeder Warranty Act, to privately operated rescue organizations [*Health & Safety Code § 122045(d)*]. Nothing in either Act limits the rights or remedies that are otherwise applicable to a consumer under any other law. In addition, any agreement or contract by the purchaser to waive any rights under the Acts are null and void and are unenforceable [*Health & Safety Code §§ 122105, 122195*]. The provisions of these two Acts are substantially similar to each other, and are discussed in *§ 23.14*.

Dog breeders and dealers are also governed by a third set of provisions regulating dog pedigree registration, set forth in *Health and Safety Code § 122300 et seq.* These provisions are discussed in *§ 23.14*[6].

[6] Pedigreed Animals

Disclosure of pedigree registration is governed by *Health & Safety Code § 122300 et seq.* The Pet Breeder Warranty Act regulating dog breeders is contained in *Health & Safety Code § 122045 et seq.* The Pet Protection Act regulating dealers of cats and dogs is contained in *Health & Safety Code § 122125 et seq.*

[7] Cruelty to Animals

Prohibitions against cruelty to animals are found in *Penal Code §§ 537b, 596-600*; *Food & Agric. Code § 19348.5*; *Health & Safety Code §§ 1650-1677*; and 45 U.S.C.S. §§ 71-74. However, a violation of these statutes is not necessarily enforceable through a private right of action [*see, e.g., Animal Legal Defense Fund v. Mendes (2008) 160 Cal. App. 4th 136, 145, 72 Cal. Rptr. 3d 553* (no private right to enforce violation of *Pen. Code § 597t*)].

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§ 23.11 Statutes of Limitations

An action against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in *Bus. & Prof. Code § 4826* (including a person who represents himself or herself as so engaged) for such person's neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding such animal or fowl or in the course of the practice of veterinary medicine on such animal or fowl must be commenced within one year [*Code Civ. Proc. §§ 312, 340(c)*].

An action for injury or death against a veterinarian based on alleged professional negligence, or for rendering professional services without consent or for error or omission in such person's practice, must be commenced within three years after the date of injury or one year after the plaintiff discovers or, through the use of reasonable diligence, should have discovered the injury, whichever first occurs [*Code Civ. Proc. §§ 312*, 340.5]. *Code Civ. Proc. § 340.5* enumerates several health care providers such as physicians, dentists, nurses and opticians and includes veterinarians. It refers to actions for injury or death but apparently would apply only to the injury or death of a person and not to an animal so that *Code Civ. Proc. § 340(c)* would govern such cases.

An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property, must be commenced within three years [*Code Civ. Proc. §§ 312, 338(c)*].

An action for injury to or for the death of one caused by the wrongful act or neglect of another must be commenced within two years (within one year prior to January 1, 2003) [*Code Civ. Proc. §§ 312, 335.1*; *see* former *Code Civ. Proc. § 340(3)*; *see also Ch. 345, Limitation of Actions, § 345.14*], and an action for trespass on or injury to real property must be commenced within three years [*Code Civ. Proc. §§ 312, 338(b)*], after the cause of action has accrued.

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§ 23.12 Ownership of Animals

All domestic animals are subject to ownership [*Civ. Code § 655*]. Animals wild by nature are subject to ownership, while living, only when on the land of the person claiming them, or when tamed, or taken and held in possession, or disabled and immediately pursued [*Civ. Code § 656*; *see also People v. Kasold (1957) 153 Cal. App. 2d Supp. 891, 892-893 , 314 P.2d 241* (involving bees)].

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3-23 California Forms of Pleading and Practice--Annotated § 23.13

§ 23.13 Duty to Avoid Injury to Animals

[1] General Responsibilities

Every person is bound, without contract, to abstain from injuring the property of another or infringing on any of his or her rights [*Civ. Code § 1708*]. Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury on himself or herself. The extent of liability in such cases is defined by *Civ. Code §§ 3281-3360* (compensatory relief) [*Civ. Code § 1714*; *see also Smith v. Finley (1952) 112 Cal. App. 2d 599, 601, 246 P.2d 989* (negligent injury of horse by motorist)]. For a form of complaint based on this general duty, see *§ 23.120*.

[2] Railroads

[a] Duty of Railroad

Every railroad corporation must make and maintain a good and sufficient fence on both sides of its track and property. If it does not and if its engine or cars kill or maim any cattle or other domestic animals on its line or road, except, if the road runs through or on public land, it must pay to the owner of the cattle or other domestic animals a fair market price for them, unless the killing or maiming occurred through the neglect or fault of the owner of the animal [*Pub. Util. Code §§ 14, 7626*].

The railroad is bound to use reasonable diligence in keeping its right of way fences in repair, and it need not resort to extraordinary means, such as the maintenance of a special patrol, to ensure that its fences will not be broken or that they are promptly repaired, if broken. If animals escape onto the track as a result of the giving way of a part of the fence that was neither defective nor unfitted for any other reason for the task imposed on it under ordinary conditions, the railroad is not liable for any resulting harm [*Jesus Maria Rancho v. South. Pac. Co. (1918) 36 Cal. App. 375, 379, 384, 172 P. 183* (decided under former Civ. Code § 485)]. For a form of complaint against a railroad based on the failure to properly fence a right-of-way, see *§ 23.121*.

[b] Duty of Landowner

A railroad corporation that pays to the owner of the land through or along which its road is located an agreed price for making and maintaining a good and sufficient fence, or that pays the cost of such a fence with the award of damages allowed for the right of way for the railroad, is relieved and exonerated from all claims for damages arising out of the killing or maiming of any animals of persons who fail to construct and maintain the fence. The owners of these animals are responsible for any damages or loss that may accrue to the corporation from the animals being on its railroad track as a result of the failure to construct such a fence, unless it is shown that the loss or damage occurred through the negligence or fault of the corporation or its officers, agents, or employees [*Pub. Util. Code § 7627*; *see also Pub. Util. Code §§ 7628-7631* (procedure before Public Utilities Commission to obtain order directing railroad to erect and maintain fences along track to protect domestic animals)].

[3] Bailees

[a] Duty of Care

A depositary of living animals must provide them with suitable food and shelter, and treat them kindly [*Civ. Code § 1834*; *see also Civ. Code §§ 1834.5, 1834.6* (treatment by animal care facilities of abandoned animals); *Cox v. Pithoud (1963) 221 Cal. App. 2d 571, 573-575, 34 Cal. Rptr. 582* (liability of for negligent failure to provide cattle with food)].

A contract of deposit for mutual consideration is a deposit for hire, under which the depositary has a duty of ordinary care with respect to the thing deposited. The depositor is entitled to recover damages in an action for breach of the deposit contract if the depositary fails to redeliver the thing deposited because of the depositary's want of ordinary care. In such an action, once the depositor establishes the fact of the deposit, the burden then shifts to the depositary to establish his or her lack of negligence [*Gebert v. Yank (1985) 172 Cal. App. 3d 544, 551-555, 218 Cal. Rptr. 585* (upholding award against depositary for loss of horse deposited for sale on commission)].

For a form of complaint seeking damages based on the death of an animal during the course of a bailment, see *§ 23.126*.

[b] Gratuitous Deposit

Gratuitous deposit is a deposit for which the depositary receives no consideration beyond the mere possession of the thing deposited [*Civ. Code § 1844*]. A gratuitous depositary must use, at least, slight care for the preservation of the thing deposited [*Civ. Code § 1846*; *see also Davis v. National Lumber Co. (1913) 22 Cal. App. 111, 113, 133 P. 509* (nonliability of bailee, absent gross negligence, for death of bailed mule killed by another animal)].

[c] Loan for Use

A loan for use is a contract by which one gives to another the temporary possession and use of personal property and the latter agrees to return the same thing to the lender at a future time, without reward for its use [*Civ. Code § 1884*]. A borrower for use must use great care for the preservation in safety and in good condition of the thing lent [*Civ. Code § 1886*]. One who borrows a living animal for use must treat it with great kindness and provide everything necessary and suitable for it [*Civ. Code § 1887*]. A borrower for use is bound to have and to exercise such skill in the care of the thing lent as the borrower causes the lender to believe the borrower to possess [*Civ. Code § 1888*].

[d] Contract for Hire

Hiring is a contract by which one gives to another the temporary possession and use of property, other than money for reward, and the latter agrees to return the same to the former at a future time [*Civ. Code § 1925*]. The hirer of a thing must use ordinary care for its preservation in safety and in good condition [*Civ. Code § 1928*; *see also Lintott v. San Francisco etc. Co. (1909) 10 Cal. App. 372, 373, 375, 101 P. 1064* (liability for injury to horses due to hirer's

negligence)].

[4] Common Carriers

A passenger, consignor, or consignee, by accepting a ticket, bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the limitation stated therein to the common carrier's liability for loss or injury to live animals carried [*Civ. Code § 2176*]. But a common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or willful wrong of the carrier or its servants [*Civ. Code § 2175*]. For a form of complaint against a carrier based on the death of an animal during transit, see *§ 23.122*.

[5] Animal Owners, Possessors, and Harborers

The owner, possessor, or harborer of any dog or other animal that, on the premises of any person other than the owner, possessor, or harborer of such dog or other animal, kills, worries, or wounds any bovine animal, swine, horse, mule, burro, sheep, angora goat, cashmere goat, or poultry is liable to the owner of the same for the damages and costs of suit, to be recovered in any court of competent jurisdiction. In the prosecution of actions for damages, it is not necessary for the plaintiff to show that the owner, possessor, or harborer of such dog or other animal had knowledge of the fact that such dog or other animal would kill, wound, or worry bovine animals, swine, horses, mules, burros, sheep, goats, or poultry. This does not render an owner, possessor, or harborer of a dog liable for the accidental or unavoidable killing or injury of any bovine animal, swine, horse, mule, burro, sheep, angora goat, cashmere goat, or poultry that occurs in connection with or as an incident to the driving or herding the same from the premises of the owner, possessor, or harborer of the dog, whether such killing or injury occurs on such premises or off of such premises [*Civ. Code § 3341*].

The owner of any livestock or poultry that is injured or killed by any dog may recover as liquidated damages from the owner of the dog twice the actual value of the animals killed or twice the value of the damages sustained by reason of the injuries, as the case may be [*Food & Agric. Code § 31501*; *Haworth v. Lira (1991) 232 Cal. App. 3d 1362, 1372, 284 Cal. Rptr. 62* ; *see also § 23.129* [1]]. If two or more dogs kept by two or more owners or keepers injure or kill any livestock or poultry at the same time, the owners or keepers of the dogs are jointly and severally liable for the damage [*Food & Agric. Code § 31502*].

The liability of an owner, possessor, or harborer of an animal for injury to an animal other than poultry or livestock [*see Civ. Code § 3341*; *Food & Agric. Code §§ 31501, 31502*] is apparently governed by the general rules of negligence [*see Roos v. Loeser (1919) 41 Cal. App. 782, 785-786, 183 P. 204* (plaintiff's dog killed by defendant's dog)].

For a form of complaint seeking damages for an animal killed by a dog, see *§ 23.125*

[6] Defenses

When the negligence of an owner of animals contributes proximately to their injury or death, the owner's recovery of damages therefor will be reduced by his or her proportion of fault [*see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 809-825, 119 Cal. Rptr. 858, 532 P.2d 1226*]. The owner is guilty of contributory negligence when, despite his or her full knowledge of anticipated or actual performance of acts that will result in injury, the owner fails to exercise reasonable precaution to protect his or her animals [*Lenk v. Spezia (1949) 95 Cal. App. 2d 296, 305-306, 213 P.2d 47* (failure to protect bees during crop dusting)]. For a form of affirmative defense alleging that plaintiff's negligence should reduce his or her recovery under comparative fault principles, see *§ 23.124*.

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§ 23.14 Duties of Dog Breeders and Pet Dealers

[1] Disclosures and Health Conditions

At the time of sale of a cat or dog, retail dealers are obligated to provide written disclosure to the purchaser of information, including the breeder's name and address, and certain health information [*see Health & Safety Code § 122140*; *see also Health & Safety Code §§ 122210(a)* (sale of dog prohibited unless it has been examined by licensed veterinarian), 122215, 122220 (notices or information that must be posted or provided on request by pet dealers)]. Dog breeders must provide a similar disclosure to each purchaser of a dog [*see Health & Safety Code § 122050*]. The dealer or breeder must maintain a written record on the health, status, and disposition of each animal for a period not less than one year after disposition of the animal [*Health & Safety Code §§ 122055, 122145*].

In addition, for the sale of dogs, breeders and dealers are obligated to maintain specified healthy conditions for the dogs [*Health & Safety Code §§ 122065, 122165*] and to provide an oral and written summary of the purchaser's rights under California law on the illness or death of a dog from any known disease, illness, or congenital or hereditary condition that adversely affects the dog's health at the time of sale or that is likely to affect the dog's health in the future [*Health & Safety Code §§ 122100, 122190*].

[2] Purchaser's Rights on Illness or Death of Dog

[a] Illness of Dog

If a licensed veterinarian states in writing that, within 15 days (or one year for certain congenital or hereditary conditions) after the purchaser has taken physical possession of a dog sold by a breeder or dealer, the dog has become ill due to the illness or condition of the dog, the purchaser may elect one of the following remedies [*Health & Safety Code §§ 122070(a), 122160(a)*; *see Health & Safety Code §§ 122075(a), 122165(a)* (rebuttable presumption of illness)]:

- Return the dog to the breeder or dealer for a refund of the purchase price, plus sales tax, and reimbursement of reasonable veterinary fees not to exceed the original purchase price, including sales.

- Exchange the dog for one of equivalent value, providing a replacement dog is available, and receive reimbursement of reasonable veterinary fees not to exceed the original purchase price, plus sales tax on the original purchase price.

- Retain the dog and receive reimbursement for reasonable veterinary fees not to exceed 150 percent of the original purchase price, plus sales tax.

[b] Death of Dog

If a dog has died and a licensed veterinarian states in writing that the dog has died because of an illness or disease that existed within 15 days after the purchaser obtained possession, or because of a congenital or hereditary condition that was diagnosed within one year after obtaining possession, then regardless of the date of death, the purchaser may elect to obtain a refund or a replacement dog of equivalent value of the purchaser's choice and reimbursement of reasonable veterinary fees not to exceed the original purchase price, plus sales tax [*Health & Safety Code §§ 122070(b), 122160(b)*].

A refund, replacement, or reimbursement of veterinary fees is prohibited if any of the conditions listed in *Health & Safety Code § 122085* or *122175* exist. A veterinarian's statement and itemized bill of fees is governed by *Health & Safety Code § 122090(a)* and *(b)* or *122180(a)* and *(b)*. The reasonableness of the value of veterinarian services is governed by *Health & Safety Code § 122075(c)* or *122165(c)*.

[3] Purchaser's Duties Prior to Initiating Action

To obtain the remedies discussed in [2], *above* [*Health & Safety Code §§ 122070, 122160*] or to file a civil action [*Health & Safety Code §§ 122095(b), 122185(b)*], a purchaser must substantially comply with certain requirements, including the following:

- Notify the breeder within five days of a licensed veterinarian's diagnosis of a medical or health problem [*Health & Safety Code §§ 122080(a), 122170(a)*].

- Return the dog to the breeder or dealer with a copy of the veterinarian's statement, within five days of receipt of the statement [*Health & Safety Code §§ 122080(b), 122170(b)*].

- In the event of the dog's death, provide a statement by a licensed veterinarian that the dog died from an illness that existed on or before the delivery of the dog to the purchaser [*Health & Safety Code §§ 122080(c), 122170(c)*].

The purchaser must also provide a dealer or breeder contesting the purchaser's demand for refund or reimbursement with the opportunity to have the dog examined by a licensed veterinarian of the dealer's or breeder's choice and at the dealer's or breeder's own expense [*Health & Safety Code §§ 122095(a), 122185(a)* (not applicable if dog has died)].

[4] Civil Action or Arbitration

If the purchaser and the dealer or breeder are unable to reach an agreement within 10 business days following receipt by the dealer or breeder of the veterinarian's statement, or following receipt of the dog for examination by a veterinarian designated by the dealer or breeder, whichever is later, the purchaser may initiate an action in a court of competent jurisdiction to resolve the dispute. Alternatively, the parties may submit to binding arbitration if mutually agreed on by the parties in writing [*Health & Safety Code §§ 122095(b), 122185(b)*; *see § 23.134* [1]; *see generally* Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*].

For a form of complaint for use in an action against a dog breeder or dealer, see *§ 23.134*.

[5] Civil Penalties and Injunction

Breeders or dealers who knowingly sell a dog that is diseased, ill, or has a condition, any one of which that requires hospitalization or surgical procedures (sale by pet dealer) or nonelective surgical procedures (sale by breeder), are also subject to civil penalties up to $10,000 (depending on number of violations) or a prohibition from selling dogs at retail for up to one year, or both [*see Health & Safety Code §§ 122060, 122205* (action by county district attorney or city attorney)]. Any person violating any provision of the Pet Breeder Warranty Act or Pet Protection Act other than *Health & Safety Code § 122060* or *122205* are subject to civil penalties of up to $1,000 per violation [*see Health & Safety Code §§ 122110, 122150* (action by county district attorney or city attorney)].

[6] Dog Pedigree Registration

Dog breeders and dealers who sell a dog represented to be registered or registrable with a dog pedigree registry are obligated to provide the purchaser with a notice to the effect that dog pedigree registration does not guarantee a healthy dog, the quality of the lineage, the accuracy of lineage recorded, or that the dog is purebred [*Health & Safety Code § 122310*; *see Health & Safety Code §§ 122300* (defining "dog dealer," "dog breeder," and "dog pedigree registry"), 122305 (dealer's duty to post notice regarding pedigree registration)]. A breeder or dealer failing to comply with this disclosure requirement is liable to the retail purchaser for civil damages in an amount equal to three times the cost of the dog. Claim for payment must be made within one year from the date of the purchase of the dog [*Health & Safety Code § 25996.953(a)*]. These remedies are in addition to any other remedies or penalties authorized by other provisions of law [*Health & Safety Code § 25996.953(b)*].

Under the Pet Protection Act, a pet dealer may not state or represent that a dog is registered or capable of being registered unless the dealer provides the purchaser with the appropriate documents necessary for registration [*see Health & Safety Code § 122200(a)*]. The purchaser has the right to a partial refund or to return the dog for violation of this provision [*see Health & Safety Code § 122200(b)*].

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§ 23.15 Damages

[1] General Noncontract Measure

For the breach of an obligation not arising from contract, the measure of damages, except if otherwise expressly provided by the Civil Code, is the amount that will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not [*Civ. Code § 3333*].

[2] For Loss by Buyer or Owner

In estimating damages, except as provided by *Civ. Code §§ 3355* (peculiar value) and 3356 (value of written instrument), the value of property to a buyer or owner thereof deprived of its possession is deemed to be the price at which he or she might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his or her possession, and at such time after the breach of duty on which his or her right to damages is founded as would suffice, with reasonable diligence, for him or her to make such a purchase [*Civ. Code § 3354*; *see also Wilkinson v. Singh (1928) 93 Cal. App. 337, 342, 269 P. 705* (damages for loss of dogs)]. A pet owner may not recover for loss of the companionship of a pet, nor for negligent or intentional infliction of emotional distress based on veterinary malpractice that is not outrageous [*McMahon v. Craig (2009) 176 Cal. App. 4th 222, 229-238, 97 Cal. Rptr. 3d 555]* .

[3] Peculiar Value

If certain property has a peculiar value to a person recovering damages for deprivation thereof or injury thereto, such may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer [*Civ. Code § 3355*; *see also King v. Karpe (1959) 170 Cal. App. 2d 344, 348-349, 338 P.2d 979* (peculiar value of Hereford cow and knowledge thereof by defendant)]. Peculiar value under *Civ. Code § 3355* refers to a property's unique economic value, not its sentimental or emotional value [*McMahon v. Craig (2009) 176 Cal. App. 4th 222, 97 Cal. Rptr. 3d 555*]. In an early case considering an animal's peculiar value, the plaintiff sought damages for the death of his dog caused by the defendant's negligence. On the amount of damages sought, the court observed the elements of the dog's peculiar value to include its pedigree, reputation, age, health, and

ability to win dog shows [*Roos v. Loeser (1919) 41 Cal. App. 782, 183 P. 204*].

[4] Exemplary

For wrongful injuries to animals being subjects of property, committed willfully or by gross negligence, in disregard of humanity, exemplary damages may be given [*Civ. Code § 3340*; *see also Dreyer v. Cyriacks (1931) 112 Cal. App. 279, 284, 297 P. 35* (gross excessiveness of punitive damages for killing of dog)].

[5] Damages for Taking or Killing Cattle

In any action for the wrongful taking, possessing, harboring, or transporting of cattle, for the driving of cattle off their usual range, or for the killing or slaughter of cattle without the consent of the owner or the person lawfully in possession of such cattle, the detriment caused thereby to the plaintiff is measured as four times the value of the cattle at the time of the taking, possessing, harboring, transporting or driving, or killing or slaughtering thereof, with interest from that time, plus an amount in fair compensation for the time and money properly expended by the plaintiff in pursuit of the cattle [*Food & Agric. Code § 21855*]. In certain cases in which a secured party [*see Com. Code § 9102(a)(72)*] takes possession of cattle pursuant to a security agreement, *Food & Agric. Code § 21855* does not apply. Also, in a proper case, exemplary damages may be awarded pursuant to *Civ. Code § 3340*, and the commencement of a criminal action for grand theft of cattle is no impediment to commencing a civil action for damages [*see Food & Agric. Code § 21855*].

[6] Limit Against Dog Breeders and Dealers

In an action against a dog breeder or dealer for illness or death of a recently purchased dog [*see Health & Safety Code §§ 122095(b), 122185(b)*], damages are limited by *Health & Safety Code §§ 122070* and *122160(a)*. For further discussion, see *§ 23.14*[2].

[7] Attorney's Fees

If a plaintiff brings an action to recover damages to personal or real property resulting from trespassing on lands either under cultivation or intended or used for the raising of livestock and the plaintiff prevails, he or she is entitled to reasonable attorney's fees in addition to other costs and in addition to any liability for damages imposed by law [*Code Civ. Proc. § 1021.9*].

In an action against a dog breeder or dealer for illness or death of a recently purchased dog, the prevailing party has the right to collect reasonable attorney's fees if the other party acted in bad faith in seeking or denying the requested remedy [*Health & Safety Code §§ 122095(c), 122185(c)*].

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§ 23.16 Conversion of Animals

The detriment caused by the wrongful conversion of personal property is presumed to be both of the following [*Civ. Code § 3336*; *see also Kane v. County of San Diego (1969) 2 Cal. App. 3d 550, 552-553, 83 Cal. Rptr. 19* (interest awarded to owner of dogs from date of their wrongful destruction by animal shelter)]:

- The value of the property at the time of the conversion, with the interest from that time, or an amount sufficient to indemnify the party injured for the loss that is the natural, reasonable, and proximate result of the wrongful act complained of and that a proper degree of prudence on his or her part would not have averted.

- A fair compensation for the time and money properly expended in pursuit of the property.

For a form of complaint alleging conversion, see *§ 23.128*.

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§ 23.17 Recovery of Possession

In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention [*Code Civ. Proc. § 667*; *see also Garcia v. Gunn (1897) 119 Cal. 315, 321-322, 51 P. 684* (right of one with dominion over animals to bring an action to replevy their skins from one who kills them without permission)].

For a form of complaint alleging conversion, see *§ 23.128*.

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3-23 California Forms of Pleading and Practice--Annotated § 23.18

§ 23.18 Killing Depredator

[1] Depredator on Other's Premises

Any person on finding any dog or dogs or other animal, not on the premises of the owner or possessor of such dog or dogs or other animal, worrying, wounding, or killing any bovine animals, swine, horses, mules, burros, sheep, or angora or cashmere goats may, at the time of finding such dog or dogs or other animal, kill the same, and the owner or owners thereof sustains no action for damages against any person so killing such dog or dogs, or other animal [*Civ. Code § 3341(2)*; *see also Food & Agric. Code §§ 31102-31104, 31151-31153* (similar provisions, but limited to when dogs are the aggressors)].

The victimized animal need not belong to the person killing the depredator for Section 3341(2) to apply [*Sabin v. Smith (1915) 26 Cal. App. 676, 678, 147 P. 1180*].

The depredator must be actually be worrying, wounding, or killing the animal protected by *Civ. Code § 3341* for the defendant to be protected from liability; a defendant who acts on appearances, believing the depredator to be worrying, wounding, or killing an animal, acts at his or her peril, and must prove that the depredator was doing so in fact [*Johnson v. McConnell (1889) 80 Cal. 545, 550-552, 22 P. 219*]. The depredator must be caught in the act; killing it to prevent it from returning later to continue its harm is not authorized [*Johnson v. McConnell (1889) 80 Cal. 545, 550-551, 22 P. 219* (reversing judgment for defendant; dicta that killing is justifiable if one finds a dogs in the act and immediately pursues and kills them without allowing them to escape or get out of sight)].

For a form of affirmative defense alleging that the killing of a dog was done while the dog was worrying, wounding, or killing other domestic animals, see *§ 23.132*.

[2] Defense of Domestic Animals

The remedy set forth in [1], *above,* does not abridge the common law right of a person to defend his or her domestic animals, including poultry (not mentioned in *Civ. Code § 3341(2)*), against the attacks of dogs, or to kill such dogs when the circumstances warrant the belief that his or her domestic animals are in peril. At common law, the justification

for the killing was complete when it appeared that the dog was engaged in worrying and terrifying domestic animals in their own lawful enclosure and when the necessity of the killing in order to protect the property was apparent [*Sabin v. Smith (1915) 26 Cal. App. 676, 678-679, 147 P. 1180* ; *see also Devincenzi v. Faulkner (1959) 174 Cal. App. 2d 250, 253-254, 344 P.2d 322*].

For a form of affirmative defense alleging that the killing of a dog was done while the dog was worrying, wounding, or killing other domestic animals, see *§ 23.132*.

[3] Loss or Damage to Livestock or Poultry

If any person sustains any loss or damage to any livestock or poultry that is caused by a dog, or if any livestock of any person is necessarily destroyed because of having been bitten by a dog, the person may file a complaint in the superior court of the county within which the damage occurred [*Food & Agric. Code § 31503*; *see also Food & Agric. Code §§ 31504-31507* (requirements of complaint, issuance and service of summons)]. The proceeding is a limited civil case [*Food & Agric. Code § 31503*]. On the return day fixed in the summons, the court proceeds to determine whether the loss or damage to the livestock was caused by the dog. If the court finds that it was caused by the dog, the court notifies the person who owns the dog or was in charge of it when the loss or damage was sustained to kill the dog. Failure of that person to kill the dog as directed renders the owner subject to the penalties that are prescribed in *Food & Agric. Code § 30501 et seq.* [*Food & Agric. Code § 31508*].

For forms of complaint for damages based on allegations that livestock or poultry were killed by an aggressor animal, see *§§ 23.129* (livestock), 23.130 (poultry).

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§ 23.19 Cruelty to Animals Prohibited

[1] Penalty

Except as provided in *Penal Code § 597(c)* or *599c*, every person who maliciously and intentionally maims, mutilates, tortures, or wounds a living animal or maliciously and intentionally kills an animal is guilty of an offense punishable by imprisonment in the state prison, by a fine of not more than $20,000, or by both, or, alternatively, by imprisonment in the county jail for not more than one year, by a fine of not more than $20,000, or by both [*Penal Code § 597(a)*; *but see Church of Lukumi v. Hialeah (1993) 508 U.S. 520, 537-546, 113 S. Ct. 2217, 124 L. Ed. 2d 472* (ordinance forbidding ritual sacrifice of animals violates *First Amendment* guarantees of free exercise of religion)].

Whoever, having the charge or custody of any animal either as owner or otherwise, subjects any animal to needless suffering, or inflicts unnecessary cruelty on the animal, or in any manner abuses any animal, or fails to provide the animal with proper food, drink, shelter, or protection from the weather, or who drives, rides, or otherwise uses the animal when unfit for labor, is for every such offense guilty of a crime punishable as a misdemeanor or as a felony or alternatively punishable as a misdemeanor or a felony and by a fine of not more than $20,000 [*Penal Code § 597(b)*; *see also Food & Agric. Code § 19348.5* (other cruelty to animals provisions); *Health & Safety Code §§ 1650-1677* (humane treatment of animals in medical research); *Health & Safety Code § 25990 et seq.* (prohibition on cruel confinement of farm animals, effective Jan. 1, 2015); *Penal Code §§ 537b, 596 et seq.*; *Humane Society etc., California Branch, Inc. v. Merrill (1962) 199 Cal. App. 2d 115, 118-120, 18 Cal. Rptr. 701* (procedure for revoking or suspending facility's animal research certificate)].

Animal cruelty under *Penal Code § 597(a)* is a general intent crime. Therefore, in the trial of a defendant who was accused of killing two dogs, the trial court properly refused to the instruct the jury that defendant had to have acted with the specific intent to maim, mutilate, torture, wound or kill a living animal [*People v. Alvarado (2005) 125 Cal. App. 4th 1179, 23 Cal. Rptr. 3d 391*].

[2] Mandatory Seizure and Impoundment of Animal

On the conviction of a person charged with violating *Penal Code § 597* by causing or permitting an act of cruelty as

defined in *Penal Code § 599b*, all animals lawfully seized and impounded with respect to the violation by a peace officer, officer of a humane society, or officer of a pound or animal regulation department must be adjudged forfeited and awarded to the impounding officer for proper disposition, except that mandatory seizure and impoundment does not apply to animals in properly conducted scientific experiments performed under the authority of the faculty of a regularly incorporated medical college or university [*Penal Code § 597(f)*].

In addition, every owner, driver, or keeper of any animal who permits that animal to be in any building, enclosure, lane, street, square, or lot of any city, county, city and county, or judicial district without proper care and attention is guilty of a misdemeanor, and law enforcement and animal control officers have specified duties relating to seizure or impoundment of the animals [*see Penal Code §§ 597f, 597.1*; *see also § 23.20*].

[3] Treatment of Livestock by Interstate Carriers

The Federal Cruelty to Animals Act (*45 U.S.C.S. § 71 et seq.*), relating to transportation of animals and imposing a penalty of not less than $100 nor more than $500 for each violation of the act, occupies the entire field of regulating the treatment of livestock carried by interstate carriers and therefore precludes the application of *Penal Code § 597* to such a carrier. This includes the situation in which the animals are at the point of destination, but there has not yet been a delivery to the consignee and a complete surrender of dominion and control over the goods by the carrier [*People v. Southern Pacific Co. (1962) 208 Cal. App. 2d 745,747-752, 25 Cal. Rptr. 644*].

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§ 23.20 Seizure of Neglected Animals

[1] General Duties of Public Authorities

[a] Animal Kept Without Proper Care and Attention

It is a misdemeanor to permit an animal to be kept without proper care and attention [*see Penal Code §§ 597f, 597.1*; *see also* discussion in *§ 23.19*]. Specified law enforcement and animal control officers have a duty to take possession and care of an abandoned or neglected animal and care for it until it is redeemed by the owner or claimant. Any necessary expenses incurred for care of the animal is a lien on the animal, to be paid before the animal may be lawfully recovered [*Penal Code § 597f(a)*].

[b] Injured and Abandoned Animal

On information of abandonment, the officer is required to cause a sick, disabled, infirm, or crippled animal, except a dog or cat, to be killed [*Penal Code § 597f(a)*]. The officer must convey, or cause to be conveyed, all injured dogs and cats found in a public place without their owners, directly to a veterinarian for a determination of whether the animal must be immediately and humanely destroyed or hospitalized under proper care and given emergency treatment. If the owner does not redeem the animal within the locally prescribed waiting period, the veterinarian may personally perform euthanasia on the animal, or, if the animal is treated and recovers from its injuries, the veterinarian may keep the animal for purposes of adoption, provided the responsible animal control agency has first been contacted and has refused to take possession of the animal [*Penal Code § 597f(b)* (also providing for transfer to other facility, payment of costs, and veterinarian immunity); *see also Penal Code § 597f(c)* (records on whereabouts of animal transferred by veterinarian to other facility)]. A veterinarian is immune from civil or criminal liability for any decision made or services provided pursuant to *Penal Code § 597f* [*Penal Code § 597f(b)*].

[c] Animal Unfit for Labor

Specified law enforcement and animal control officers may take charge of any animal, including a dog or cat, that is unfit for the labor it is performing by reason of lameness, sickness, feebleness, or neglect, or that is in any other manner

is being cruelly treated. If the animal is not in the custody of its owner, the officer is required to give notice of this action to the owner, if known, and may provide suitable care for the animal until it is deemed to be in suitable condition to be delivered to the owner [*Penal Code § 597f(a)*].

[d] Destruction of Severely Injured Animal

Notwithstanding the provisions set forth in [1]-[3], *above*, a specified law enforcement or animal control officer may, with the approval of his or her immediate superior, humanely destroy any abandoned animal in the field if the animal is too severely injured to move or if a veterinarian is not available and it would be more humane to dispose of the animal [*Penal Code § 597f(d)*].

[2] Procedures

[a] Seizure of Animal and Right to Hearing

[i] Postseizure Hearing

If a peace officer, humane society officer, or animal control officer has reasonable grounds to believe that very prompt action is required to protect the health or safety of an abandoned, stray, sick or infirm, or cruelly treated animal or the health and safety of others, the officer is required to immediately seize the animal [*Penal Code § 597.1(a), (b)*]. Prior to the commencement of any criminal proceedings authorized by *Penal Code § 597.1*, the officer is required to provide the owner or keeper of the animal, if known or ascertainable after reasonable investigation, with the opportunity for a postseizure hearing to determine the validity of the seizure or impoundment or both [*Penal Code § 597.1(a), (b), (f)*].

[ii] Preseizure Hearing

If the need for immediate seizure is not present, prior to the commencement of any criminal proceedings authorized by *Penal Code § 597.1*, the agency is required to provide the owner or keeper of the animal, if known or ascertainable after reasonable investigation, with the opportunity for a hearing prior to any seizure or impoundment of the animal. The owner must produce the animal at the time of the hearing unless, prior to the hearing, the owner has made arrangements with the agency to view the animal on request of the agency, or unless the owner can provide verification that the animal was humanely destroyed. Any person who willfully fails to produce the animal or provide the verification is guilty of an infraction, punishable by a fine [*Penal Code § 597.1(g)*].

[iii] Animal Seized as Evidence

Penal Code § 597.1 does not prohibit the seizure or impoundment of animals as evidence as provided for under any other provision of law [*Penal Code § 597.1(k)*].

[b] Notice of Hearing

The agency is required to cause a notice to be affixed to a conspicuous place where the animal was situated or personally deliver a notice of hearing as required [*Penal Code § 597.1(f)(1), (g)(1)*]. In the case of an immediate seizure or impoundment, the notice must be given within 48 hours, excluding weekends and holidays [*Penal Code § 597.1(f)(1)*]. In the case of a possible seizure or impoundment, the notice must state the grounds for believing the animal should be seized under *Penal Code § 597.1(a)* or *(b)* [*Penal Code § 597.1(g)(1)*].

The notice must include all of the following [*Penal Code § 597.1(f)(1), (g)(1)*]:

- The name, business address, and telephone number of the officer providing the notice.

- A description of the animal seized, including any identification on the animal.

- The authority and purpose for the seizure or impoundment, or possible seizure or impoundment; and, in the case an immediate seizure, the time, place, and circumstances under which the animal was seized.

- In the case of an immediate seizure, a statement that, in order to receive a postseizure hearing, the owner or person authorized to keep the animal, or his or her agent, must request the hearing by signing and returning an enclosed declaration of ownership or right to keep the animal to the agency providing the notice within 10 days, including weekends and holidays, of the date of the notice [*Penal Code § 597.1(f)(1)(D)*]. The declaration may be returned by personal delivery or mail.

- In the case of a possible seizure or impoundment, a statement that, in order to receive a hearing prior to any seizure, the owner or person authorized to keep the animal, or his or her agent, is required to request the hearing by signing and returning the enclosed declaration of ownership or right to keep the animal to the officer providing the notice within two days, excluding weekends and holidays, of the date of the notice [*Penal Code § 597.1(g)(1)(D)*].

- A statement that the cost of caring for and treating any animal properly seized under *Penal Code § 597.1* is a lien on the animal and that the animal may not be returned to the owner until the charges are paid. Further, in the case of an immediate seizure, the failure to request or to attend a scheduled hearing will result in liability for that cost [*Penal Code § 597.1(f)(1)(E)*]. In the case of a possible seizure, the failure will result in a conclusive determination that the animal may properly be seized and that the owner will be liable for the charges [*Penal Code § 597.1(g)(1)(E)*].

[c] Hearing and Decision

[i] Timing of Hearing

The hearing is to be conducted within 48 hours of receipt of the request, excluding weekends and holidays [*Penal Code § 597.1(f)(2), (g)(2)* (preseizure hearing to be conducted within 48 hours "after receipt of the request")].

[ii] Hearing Officer

The seizing agency may authorize its own officer or employee to conduct the hearing if the hearing officer is not the same person who directed the seizure or impoundment of the animal (or, in the case of a possible seizure, is not the same person who requests the seizure or impoundment), and is not junior in rank to that person. The agency may utilize the services of a hearing officer from outside the agency for the purposes of complying with *Penal Code § 597.1* [*Penal Code § 597.1(f)(2), (g)(2)*].

[iii] Forfeiture of Right to Hearing

Failure of the owner or keeper, or of his or her agent, to request or to attend a scheduled hearing will result in a forfeiture of any right to a postseizure or preseizure hearing, as the case may be, or the right to challenge his or her liability for costs incurred [*Penal Code § 597.1(f)(3), (g)(3)*].

[iv] Determination in Postseizure Hearing of Liability for Care of Animal

In the case of postseizure hearing, the agency, department, or society employing the person who directed the seizure is responsible for the costs incurred for caring and treating the animal, if it is determined in the postseizure hearing that the seizing officer did not have reasonable grounds to believe very prompt action, including seizure of the animal, was required to protect the health or safety of the animal or the health or safety of others. If it is determined the seizure was

justified, the owner or keeper is personally liable to the seizing agency for the cost of the seizure and care of the animal. The charges for the seizure and care of the animal is a lien on the animal, and the animal may not be returned to its owner until the charges are paid and the seizing agency or hearing officer has determined that the animal is physically fit or the owner demonstrates to the seizing agency's or the hearing officer's satisfaction that the owner can and will provide the necessary care [*Penal Code § 597.1(f)(4)*].

[v] Authority of Hearing Officer After Preseizure Hearing

In the case of a preseizure hearing, the hearing officer, after the hearing, may affirm or deny the owner's or keeper's right to custody of the animal and, if reasonable grounds are established, may order the seizure or impoundment of the animal for care and treatment [*Penal Code § 597.1(g)(4)*].

[d] Conditions for Return of Animal

[i] Liability for Cost of Seizure and Care of Animal

The owner or keeper is personally liable to the seizing agency for the cost of the seizure and care of the animal. If all charges are not paid within 14 days of the seizure, or within 14 days of notice of availability of the animal to be returned, the animal is deemed abandoned and may be disposed of by the impounding officer [*Penal Code § 597.1(h)*].

[ii] Animal Requiring Veterinary Care

If the animal requires veterinary care and the agency or society is not assured, within 14 days of seizure, that the owner will provide the necessary care, the animal will not be returned to the owner, and will be deemed to have been abandoned and may be disposed of by the impounding officer. An animal may be destroyed without regard to the holding period if the animal has incurred severe injuries or is incurably crippled. An animal afflicted with a serious contagious disease may also be immediately destroyed unless the owner or his or her agent immediately authorizes treatment by the veterinarian at the expense of the owner or agent [*Penal Code § 597.1(i)*].

A seized animal may not be returned to its owner until the seizing agency or hearing officer determines that the animal is physically fit, or the owner can demonstrate that he or she can and will provide the necessary care [*Penal Code § 597.1(j)*].

[e] Disposition of Seized Animal After Conviction

On the conviction of a person charged with a violation of *Penal Code § 597.1*, all animals lawfully seized and impounded with respect to the violation are to be adjudged by the court to be forfeited and are to thereon be transferred to the impounding officer for proper disposition. A person convicted of a violation of that section is personally liable to the seizing agency for all costs of impoundment from the time of seizure to the time of proper disposition [*Penal Code § 597.1(k)*].

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[Reserved]

§§ 23.21[Reserved]

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§ 23.30 Governing Statutes

The liability for injuries to others is governed generally by *Civ. Code § 1714(a)*. As to dog bites, liability is governed by *Civ. Code §§ 3342, 3342.5*. The duty to control livestock along a highway is governed by *Food & Agric. Code §§ 16902-16904*. The regulation and control of potentially dangerous or vicious dogs is governed by *Food & Agric. Code § 31601 et seq.* The presumption of failure to exercise due care that arises from violation of law is governed by *Evid. Code § 669*.

Criminal liability of animal owners, or those in custody or control of a mischievous animal, for human deaths caused by their animals is governed by *Penal Code § 399*. Criminal liability of an owner, custodian, or person in control of a dog trained to fight, attack, or kill whose bite causes a human injury is governed by *Penal Code § 399.5*. The requirement that an animal owner or custodian provide identifying and other contact information when the person knows or has reason to know that the animal bit another person is contained in *Pen. Code § 398* (effective January 1, 2008).

In addition, *Penal Code § 245*, governing assault with a deadly weapon, has been construed to include dogs trained to attack humans on command within the meaning of "deadly weapon or instrument" [*see People v. Nealis (1991) 232 Cal. App. 3d Supp. 1, 6 , 283 Cal. Rptr. 376* , discussed in *§ 23.36*[2]]. Criminal liability for violations involving vicious or potentially dangerous dogs are governed by *Food & Agric. Code § 31662*.

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§ 23.31 Negligent Maintenance or Handling of Animals

[1] Extent of Liability

Everyone is responsible not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury on himself or herself. The extent of liability in such cases is defined by *Civ. Code §§ 3281-3360* (compensatory relief) [*Civ. Code § 1714(a)*]. There are other factual contexts that can lead to liability for negligent maintaining or handling of an animal [*see § 23.32*]. These include public exhibitions of animals [*Porter v. Thompson (1946) 74 Cal. App. 2d 474, 477-478, 169 P.2d 40* (injury to spectators at cattle auction)], animals in stores [*Baley v. J. F. Hink & Son (1955) 133 Cal. App. 2d 102, 108-109, 111, 283 P.2d 349* (potential liability to injured customer of both the store and the customer bringing in the animal)], animals on public conveyances [*Westwater v. Southern Pacific Co. (1940) 38 Cal. App. 2d 369, 371-372, 101 P.2d 154* (passenger bitten on train)], animals startled into uncharacteristic violence by an unusual spectacle [*Darnold v. Voges (1956) 143 Cal. App. 2d 230, 243-247, 300 P.2d 255* (cow, photographed in barn, was startled by flash bulb, causing injury to milker)].

For forms of complaint seeking recovery of damages based on negligence in the maintenance or handling of animals, see *§§ 23.143, 23.145 -23.158*.

[2] Violation of Statute, Ordinance, Regulation

The failure of a person to exercise due care is presumed if all of the following are met [*Evid. Code § 669(a)*; *Delfino v. Sloan (1993) 20 Cal. App. 4th 1429, 1433-1434, 1438, 25 Cal. Rptr. 2d 265* (violation of leash law ordinance did not require proof that dog's owner willfully caused dog to run loose; ordinance applied to bicyclist injured by dog knocking her off bicycle); *see also* *Hagen v. Laursen (1953) 121 Cal. App. 2d 379, 385-386, 263 P.2d 489* (no liability if the ordinance violated is intended to protect livestock, not social guests such as plaintiff, from attack by dogs); *Rollins v. Hedin (1952) 114 Cal. App. 2d 488, 490, 250 P.2d 728* (dog owner liable to pedestrian injured as proximate result of violation of leash ordinance); *Brotemarkle v. Snyder (1950) 99 Cal. App. 2d 388, 389-390, 221 P.2d 992* (purpose of leash ordinance as not restricted to preventing dog bites; motorcyclist as allowed to recover for injury resulting from collision between his motorcycle and unleashed dog)]:

- The person violated a statute, ordinance, or regulation of a public entity.

- The violation proximately caused death or injury to person or property.

- The death or injury resulted from an occurrence of the nature that the statute, ordinance, or regulation was designed to prevent.

- The person suffering the death or the injury to his or her person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

This presumption may be rebutted by proof of either of the following [*Evid. Code § 669(b)*]:

- The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.

- The person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his or her maturity, intelligence, and capacity under similar circumstances, and the violation did not occur in the course of an activity normally engaged in only by adults and requiring adult qualifications.

- Even if the presumption is not rebutted, there is no liability if the evidence fails to show any causal connection between the alleged violation of law and the injuries sustained. The violation must have proximately caused the injury [*Eigner v. Race (1942) 54 Cal. App. 2d 506, 512-513, 129 P.2d 444* (actions of friendly dog on leash held by small girl who bumped into woman as unavoidable accident)].

[3] Failure to Prevent Foreseeable Harm by Dog

Keepers of dogs not known to be abnormally dangerous are not required to keep them under constant control. However, they are required to realize that even ordinarily gentle dogs may cause harm under certain circumstances, and they must exercise reasonable care to prevent foreseeable harm. Harm may be foreseeable because of the characteristics of the particular dog, even if they are not abnormal characteristics. The owner of a dog known to be prone to potentially harmful behavior, such as jumping on people and knocking them down, is liable for injuries caused by this behavior, if the owner failed to exercise reasonable care to control the dog. A plaintiff seeking recovery for injuries under a theory of negligence, as opposed to a theory of strict liability [*see § 23.33* [1]], is not required to plead or prove that the dog had vicious or dangerous propensities [*Drake v. Dean (1993) 15 Cal. App. 4th 915, 931-932, 19 Cal. Rptr. 2d 325* , rejecting dicta to contrary in *Hagen v. Laursen (1953) 121 Cal App. 2d 379, 381-382, 263 P.2d 489*].

However, a dog owner's duty to exercise reasonable care to prevent foreseeable harm requires knowledge, either actual or constructive, of the particular harm. Thus, the duty does not require the owner to warn a house guest not to allow the dog on the guest's lap to prevent the possible transmission from the dog to the guest of a tick carrying Lyme disease, if the owner did not know, and could not reasonably be expected to have known, that ticks carrying the disease were present in the area [*see* *Butcher v. Gay (1994) 29 Cal. App. 4th 388, 405-406, 34 Cal. Rptr. 2d 771*].

Absent evidence sufficient to create a triable issue of fact that the neighboring unit owner had actual knowledge his tenant's dog was dangerous, he owed no duty to plaintiff to protect her from his tenant's dog. Although the neighboring unit owner knew the tenant owned a Jack Russell terrier, prior to the incident in which plaintiff was injured, the unit owner had never seen the dog or received any complaints about the dog. The neighboring unit owner had no knowledge that the dog had any dangerous propensities or posed any threat of bodily harm [*Chee v. Amanda Goldt Property Management (2006) 143 Cal. App. 4th 1360, 1375, 50 Cal. Rptr. 3d 40*].

Conversely, the court concluded that a homeowner was aware of the risk posed by the dog that belonged to the homeowner's gardeners after an employee working on a remodeling project at the homeowner's residence told the homeowner that the dog looked dangerous and should not be loose on the job site. The employee was subsequently attacked by the dog. The court stated that the homeowner's continued control over the premises distinguished the situation from case law involving a landlord's failure to inspect or take security measures to protect third parties from a dangerous condition on a tenant's property. The gardeners were temporary invitees who kept the dog on the premises with the homeowner's express permission. The homeowner could have prevented the attack simply by directing his gardeners to keep their dogs away from the construction site [*Salinas v. Martin (2008) 166 Cal. App. 4th 404, 412, 82 Cal. Rptr. 3d 735*].

For a form of complaint for damages based on the negligence of an owner of a dog prone to harmful conduct, see *§ 23.143*.

[4] Assumption of Risk

Assumption of risk may be a complete defense to an action for negligence brought against a dog owner by a veterinarian or veterinarian's assistant who is bitten by a dog that is receiving care and treatment while under the veterinarian's or assistant's control. The risk of being attacked or bitten by a dog is an occupational hazard that veterinarians and their assistants accept when they undertake this occupation; they are in the best position to guard against this hazard by taking the necessary precautions. This so-called veterinarian's rule (a variant of the fireman's or firefighter's rule) applies even if the dog owner knew that the dog had previously bitten other people and failed to warn the veterinarian or assistant about the dog's history [*Cohen v. McIntyre (1993) 16 Cal. App. 4th 650, 654-655, 20 Cal. Rptr. 2d 143* ; *Nelson v. Hall (1985) 165 Cal. App. 3d 709, 714, 211 Cal. Rptr. 668*].

The California Supreme Court extended this rationale to an injury suffered by a kennel worker who was bitten while tending to a dog under the kennel's care [*Priebe v. Nelson (2006) 39 Cal. 4th 1112, 1132, 47 Cal. Rptr. 3d 553, 140 P.3d 848]* . The Court held that the assumption of risk doctrine was a defense to the imposition of strict liability under the dog bite statute [*Civ. Code § 3342*; *see § 23.33[5]*], but remanded the case for retrial on common law claims that were beyond the scope of the Court's review [*Priebe v. Nelson (2006) 39 Cal. 4th 1112, 1132, 47 Cal. Rptr. 3d 553, 140 P.3d 848]* .

At least one court of appeal opinion has applied this general rule in a case involving, not a veterinarian, but the assistant of a professional shark handler who was bitten by defendant's shark while being employed to move the shark. The court of appeal analogized the situation to that of the veterinarian and concluded that defendant owed no duty to protect a professional shark handler or his or her crew from the very danger defendant employed the handler to confront [*Rosenbloom v. Hanour Corp. (1998) 66 Cal. App. 4th 1477, 1480-1481* & n.4, *78 Cal. Rptr. 2d 686*]. For further discussion of primary and secondary assumption of risk, see Ch. 380, *Negligence* .

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§ 23.32 Livestock on Highway

Food & Agric. Code § 16902 provides that a person who owns or controls any livestock must not willfully or negligently permit any of the livestock to stray on, or remain unaccompanied by a person in charge or control of the livestock on, a public highway, if both sides of the highway are adjoined by property that is separated from the highway by a fence, wall, hedge, sidewalk, curb, lawn, or building. However, a livestock owner who negligently fails to keep his or her cattle from straying on a highway may be held liable for damages in a civil action arising from a collision with his or her livestock, even if the collision occurs at a point where the highway is unfenced, in open range country [*Summers v. Parker (1953) 119 Cal. App. 2d 214, 216, 259 P.2d 59* ; *Jackson v. Hardy (1945) 70 Cal. App. 2d 6, 14, 160 P.2d 161*]. The "open range" law [*Food & Agric. Code § 17123*], which provides that persons grazing cattle in counties devoted chiefly to grazing are not required to fence in their cattle, does not absolve cattle owners of their duty under *Civ. Code § 1714* to exercise reasonable care in the management of their animals; that duty may include keeping them off well-traveled highways, especially at night, to avoid collisions with automobiles [*Shively v. Dye Creek Cattle Co. (1994) 29 Cal. App. 4th 1620, 1629-1631, 35 Cal. Rptr. 2d 238*].

It is unlawful for any person to drive any livestock on, over, or across any public highway between the hours of sunset and sunrise unless he or she keeps a sufficient number of herders on continual duty to open the road so as to permit the passage of vehicles [*Food & Agric. Code § 16903*].

In any civil action that is brought by the owner, driver, or occupant of a motor vehicle, or by his or her personal representatives or assignees, or by the owner of livestock, for damages that are caused by collision between any motor vehicle and any domestic animal on a highway, there is no presumption or inference that the collision was due to negligence on behalfof the owner or the person in possession of the animal [*Food & Agric. Code § 16904*; *see also Pepper v. Bishop (1961) 194 Cal. App. 2d 731, 734, 15 Cal. Rptr. 346* (decided under former Food & Agric. Code § 423)].

For a form of complaint by a motorist to recover for damages sustained in a collision with livestock in the highway, see *§ 23.153*.

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§ 23.33 Strict Liability

[1] Injury by Dangerous Animal

The keeper of an animal of a species dangerous by nature, or of any animal that he or she knows, or has reason to know, to have dangerous propensities, is liable, without wrongful intent or negligence, for damage to others resulting from such a propensity. The liability of the keeper is absolute, for the gist of the action is not the manner of keeping the vicious animal, but keeping it at all with knowledge of the vicious propensities. In these instances the owner is an insurer against the acts of the animal to one who is injured without fault, and the question of the owner's negligence is not in the case [*Hillman v. Garcia-Ruby (1955) 44 Cal. 2d 625, 626, 283 P.2d 1033* (dog); *see also Palmquist v. Mercer (1954) 43 Cal. 2d 92, 99, 272 P.2d 26* (implied warranty of stablekeeper against defects or vicious habits of his horses of which he knows or by reasonable care should know; liability for injury caused to rider by defect or habit); *Talizin v. Oak Creek Riding Club (1959) 176 Cal. App. 2d 429, 437, 1 Cal. Rptr. 514* (controllers had reason to know their horse's propensity to jump out of ring at horse shows); *Baugh v. Beatty (1949) 91 Cal. App. 2d 786, 791-792, 205 P.2d 671* (chimpanzee; wild animals presumed to be vicious)].

For forms alleging strict liability, see *§§ 23.140 -23.142*.

[2] Dangerous Propensity Defined

A dangerous, or vicious, propensity within the meaning of the law means any propensity on the part of a domestic animal that is likely to cause injury to human beings under the circumstances in which the party controlling the animal places it [*Talizin v. Oak Creek Riding Club (1959) 176 Cal. App. 2d 429, 435, 1 Cal. Rptr. 514*].

However, one prior incident involving the animal does not constitute a dangerous propensity [*Harrold v. Rolling J Ranch (1993) 19 Cal. App. 4th 578, 588, 23 Cal. Rptr. 2d 671* (no liability for horse "spooking" when rider removed coat even though stables knew horse had "spooked" once before when rider waved hat)].

[3] Employee's Knowledge of Dangerous Propensity Imputed to Employer

The knowledge of the propensities of an animal by an employee to whom the care of the animal is intrusted is knowledge by the employer sufficient to render the latter liable for injuries to others caused by the propensities [*Barrett v. Metropolitan Contracting Co. (1916) 172 Cal. 116, 119, 155 P. 645*].

[4] Normal, Justified, or Harmless Behavior Not Evidence of Viciousness

The viciousness of an animal is not evidenced by behavior that is justified or normal under the circumstances or is basically harmless. Thus, a dog bite occurring while the dog is chasing the victim away from its nursing pups is not evidence the dog is vicious and likely to bite again after its nursing period is over. That a dog chases a cyclist and merely snaps at the rear tire is not viciousness, but rather a sign of playfulness [*Chandler v. Vaccaro (1959) 167 Cal. App. 2d 786, 789-790, 334 P.2d 998*].

[5] Dog Bite

[a] Liability for Damages

The owner of any dog is liable for the damages suffered by any person who is bitten by the dog while in a public place or lawfully in a private place, including the property of the owner of the dog, regardless of the former viciousness of the dog or the owner's knowledge of the viciousness. A person is lawfully on the private property of the owner if he or she is on the property in the performance of any duty imposed by the laws of California or by the laws or postal regulations of the United States, or if he or she is on the property on the invitation, express or implied, of the owner [*Civ. Code § 3342(a)*; for forms of complaint, *see § 23.159* (private place) and § 23.160 (public place)].

One court of appeal opinion, relying on the dictionary definition of the term, held that a "bite" does not actually require that the skin of the victim be broken or a teeth wound inflicted. In that case, the court concluded that the statute applied, even absent an actual piercing by the dog's teeth, when the defendants' dog clamped the plaintiff's clothed leg between its jaws, causing the plaintiff to fall off a ladder [*Johnson v. McMahan (1998) 68 Cal. App. 4th 173, 176, 80 Cal. Rptr. 2d 173*].

Although *Civ. Code § 3342* withholds the benefits of strict liability from those who are guilty of trespassing, the statute does not abrogate any common-law remedies that might also be available to a dog bite victim [Stats. 1988, ch. 298, § 2; *People v. Berry (1991) 1 Cal. App. 4th 778, 787, 2 Cal. Rptr. 2d 416*]. Thus, any other cause of action predicated on common-law theories such as negligence or intentional tort is unaffected by the legislation [Stats. 1988, ch. 298, § 2; *see People v. Berry (1991) 1 Cal. App. 4th 778, 788, 2 Cal. Rptr. 2d 416*].

[b] Nonliability of Government Entities

The strict liability of the owner of a biting dog is subject to limitations in the case of a governmental-entity dog owner. No action based on strict liability may be brought against a governmental agency that uses a dog in military or police work if the bite occurred while the dog was defending itself from an annoying, harassing, or provoking act, or assisting an employee of the agency in any of the following [*Civ. Code § 3342(b)*]:

- The apprehension or holding of a suspect if the employee has a reasonable suspicion of the person's involvement in criminal activity.
- The investigation of a crime or possible crime
- The execution of a warrant.
- The defense of a peace officer.

This limitation does not apply if the victim of the bite was not a party to, or a participant in, or was not suspected to be a party to or a participant in, the act that prompted the use of the dog [*Civ. Code § 3343(c)*]. Also, the limitation is applicable only if the governmental agency using the dog has adopted a written policy on the necessary and appropriate use of a dog for police or military work [*Civ. Code § 3342(d)*].

[c] Defense of Assumption of Risk

Although *Civ. Code § 3342* imposes absolute liability on the owner of a biting dog, the defense of assumption of risk applies to actions brought under that statute [*Priebe v. Nelson (2006) 39 Cal. 4th 1112, 1132, 47 Cal. Rptr. 3d 553, 140 P.3d 848* (assumption of risk by kennel worker); *Gomes v. Byrne (1959) 51 Cal. 2d 418, 420, 333 P.2d 754* ; *Davis v. Gaschler (1992) 11 Cal App. 4th 1392, 1399, 14 Cal. Rptr. 2d 679* ; *Nelson v. Hall (1985) 165 Cal. App. 3d 709, 713, 211 Cal. Rptr. 668*]. The risk of a dog bite has been viewed as an occupational hazard to those in the veterinary profession, and assumption of the risk may be a complete defense to an action brought under *Civ. Code § 3342* by one in that profession [*Gomes v. Byrne (1959) 51 Cal. 2d 418, 420, 333 P.2d 754* ; *Davis v. Gaschler (1992) 11 Cal App. 4th 1392, 1399, 14 Cal. Rptr. 2d 679* ; *Nelson v. Hall (1985) 165 Cal. App. 3d 709, 714, 211 Cal. Rptr. 668* (likening concept of occupational risk inherent in the veterinary profession to occupational risk inherent in firefighting); *see also Willenberg v. Superior Court (1986) 185 Cal. App. 3d 185, 187, 229 Cal. Rptr. 625* (veterinarian assumed risk that dog brought for treatment would jump on him); *Cohen v. McIntyre (1993) 16 Cal App. 4th 650, 654-655, 20 Cal. Rptr. 2d 143* ; for further discussion, *see § 23.31[4]*].

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§ 23.34 Control of Biting Dog

[1] Owner's Duty to Prevent Further Biting

The owner of any dog that has bitten a human being has the duty to take all reasonable steps necessary to remove any danger presented to other persons from bites by the animal [*Civ. Code § 3342.5(a)*].

[2] Action to Remove Danger of Biting Dog

If a dog has bitten a human being on at least two separate occasions, the district attorney, the city attorney, or any person, may bring an action as a limited civil case against the owner of the animal to determine whether conditions of the treatment or confinement of the dog or other circumstances existing at the time of the bites have been changed so as to remove the danger presented by the animal to other persons [*Civ. Code § 3342.5(b), (g)*]. This action shall be brought in the county where a bite occurred. The court, after hearing, may make any order it deems appropriate to prevent the recurrence of such an incident, including, but not limited to, the removal of the animal from the area or its destruction if necessary [*Civ. Code § 3342.5(b)*]. If the dog involved was trained to fight, attack, or kill, the action may be brought whenever the dog has bitten a human being, causing substantial physical injury [*Civ. Code § 3342.5(c)*].

Nothing in *Civ. Code § 3342.5(c)* authorizes the bringing of an action pursuant to *Civ. Code § 3342.5(b)* based on a bite or bites inflicted on a trespasser, or by a dog used in military or police work if the bite or bites occurred while the dog was actually performing in that capacity [*Civ. Code § 3342.5(d)*]. Furthermore, nothing in *Civ. Code § 3342.5* is to be construed to prevent legislation in the field of dog control by any city, county, or city and county, or to affect the liability of the owner of a dog under *Civ. Code § 3342* (dog bite statute) or any other provision of law [*Civ. Code § 3342.5(e), (f)*].

A proceeding under this section is a limited civil case [*Civ. Code § 3342.5(g)*; *see Cal. Const. art. VI, § 10*; *Code Civ. Proc. § 85 et seq.*]. For further discussion of limited civil cases, see Ch. 324, *Jurisdiction: Subject Matter* .

For a form of complaint under *Civ. Code § 3342.5*, see *§ 23.165*.

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§ 23.35 Control of Potentially Dangerous or Vicious Dog

[1] In General

The Legislature has determined that potentially dangerous and vicious dogs have become a serious and widespread threat to the safety and welfare of California citizens [*see Food & Agric. Code § 31601*], and enacted *Food & Agric. Code § 31601 et seq.* to regulate and control these animals. The legislation does not prevent a city or county from adopting or enforcing its own program to control potentially dangerous or vicious dogs or to punish as a misdemeanor a violation under *Food & Agric. Code § 31601 et seq.* [*Food & Agric. Code § 31683*]. However, except as authorized by Food & Agric. § 122331, which allows cities and counties to enact breed-specific spay or neutering and breeding requirements, no program may regulate potentially dangerous or vicious dogs in a manner that is specific to breed [*Food & Agric. Code § 31683*].

For forms for use in proceedings to determine if a dog is potentially dangerous or vicious, see *§ 23.166*.

[2] Potentially Dangerous Dog

[a] Definition

"Potentially dangerous dog" means any of the following [*Food & Agric. Code § 31602*]:

- Any dog that, when unprovoked, on two separate occasions within the prior 36-month period, engages in any behavior that requires a defensive action by any person to prevent bodily injury when the person and the dog are off the property of the owner or keeper of the dog.

- Any dog that, when unprovoked, bites a person causing a less severe injury than muscle tears or disfiguring lacerations or one requiring multiple sutures or corrective or cosmetic surgery [*see Food & Agric. Code § 31604*].

- Any dog that, when unprovoked, on two separate occasions within the prior 36-month period, has

killed, seriously bitten, inflicted injury, or otherwise caused injury when attacking a domestic animal off the property of the owner or keeper of the dog.

[b] Consequence of Potentially Dangerous Dog Designation

Any dog that is determined (pursuant to the procedures set forth in *Food & Agric. Code §§ 31621-31626*, discussed in [5], *below*) to be potentially dangerous must be properly licensed and vaccinated [*see Food & Agric. Code § 31641*]. In addition, a potentially dangerous dog, while on the owner's property, must at all times be kept indoors, or in a securely fenced yard from which the dog cannot escape and into which children cannot trespass. A potentially dangerous animal may be off the owner's premises only if it is restrained by a substantial leash of appropriate length, and if it is under the control of a responsible adult [*Food & Agric. Code § 31642*].

If the dog in question dies or is sold, transferred, or permanently removed from the city or county where the owner or keeper resides, the owner of a potentially dangerous dog must notify the animal control department of the changed condition and new location of the dog in writing within two working days [*Food & Agric. Code § 31643*; *see also Food & Agric. Code § 31606* (definition of "animal control department")].

[3] Vicious Dog

[a] Definition

"Vicious dog" means any of the following [*Food & Agric. Code § 31603*]:

- Any dog seized under *Penal Code § 599aa* (animals used for fighting) and on the sustaining of a conviction of the owner or keeper under *Penal Code § 597.5* (training, conducting, attending dog fight).

- Any dog that, when unprovoked, in an aggressive manner, inflicts severe injury on or kills a human being [*see Food & Agric. Code § 31604* (defining "serious injury" as any physical injury to a human being that results in muscle tears or disfiguring lacerations or requires multiple sutures or corrective or cosmetic surgery)].

- Any dog previously determined to be and currently listed as a potentially dangerous dog that, after its owner or keeper has been notified of this determination, continues behavior described in *Food & Agric. Code § 31602* [*see* discussion in [2] [a], *above*] or is maintained in violation of *Food & Agric. Code § 31641* (licensing and vaccination of potentially dangerous dog), 31642 (keeping potentially dangerous dog), or 31643 (change of condition or location of potentially dangerous dog).

[b] Consequence of Vicious Dog Designation

[i] Destruction of Vicious Dog

A dog that is determined to be a vicious dog may be destroyed by the animal control department when it is found, after proceedings conducted under *Food & Agric. Code §§ 31621-31626* [*see* discussion in [5], *below*], that the release of the dog would create a significant threat to the public health, safety, and welfare [*Food & Agric. Code § 31645(a)*; *see also Food & Agric. Code § 31606* (definition of "animal control department")].

[ii] Conditions of Ownership of Vicious Dog

If it is determined that the dog found to be vicious is not to be destroyed, the judicial authority is required to impose conditions on the ownership of the dog that protect the public health, safety, and welfare [*Food & Agric. Code § 31645(b)*]. These requirements are met by an enclosure that consists of a fence or structure suitable to prevent the entry

of young children, and that is suitable to confine a vicious dog in conjunction with other measures that may be taken by the owner or keeper of the dog. The enclosure must be designed in order to prevent the animal from escaping and the animal must be housed as required by *Penal Code § 597t* (providing for care of confined animals) [*Food & Agric. Code § 31605*].

[iii] Owner Temporarily Prohibited From Future Ownership

The owner of a dog determined to be a vicious dog may be prohibited by the city or county from owning, possessing, controlling, or having custody of any dog for a period of up to three years, when it is found, after proceedings conducted under *Food & Agric. Code §§ 31621-31626* [*see* discussion in [5], *below*], that ownership or possession of a dog by that person would create a significant threat to the public health, safety, and welfare [*Food & Agric. Code § 31646*].

[4] When Dog Cannot Be Declared Potentially Dangerous or Vicious

No dog may be declared potentially dangerous or vicious if any injury or damage is sustained by a person who, at the time the injury or damage was sustained, was committing a willful trespass or other tort on the premises occupied by the owner or keeper of the dog, or was teasing, tormenting, abusing, or assaulting the dog, or was committing or attempting to commit a crime. No dog may be declared potentially dangerous or vicious if an injury or damage was sustained by a domestic animal that, at the time the injury or damage was sustained, was teasing, tormenting, abusing, or assaulting the dog [*Food & Agric. Code § 31626(a)*].

No dog may be declared potentially dangerous or vicious if the injury or damage to a domestic animal was sustained while the dog was working as a hunting, herding, or predator-control dog on the property of, or under the control of, its owner or keeper, and the damage or injury was to a species or type of domestic animal appropriate to the work of the dog [*Food & Agric. Code § 31626(b)*].

[5] Proceedings to Determine if Dog Is Potentially Dangerous or Vicious

[a] Petition by Public Pound, Animal Control, or Law Enforcement Officer

If an animal control officer or a law enforcement officer has investigated and determined that there exists probable cause to believe that a dog is potentially dangerous or vicious, the chief officer of the public pound or animal control department or his or her immediate supervisor or the head of the local law enforcement agency, or his or her designee, must petition the superior court for a hearing for the purpose of determining whether or not the dog in question should be declared potentially dangerous or vicious. A city or county is permitted to establish an administrative hearing procedure to hear and dispose of petitions filed pursuant to *Food & Agric. Code §§ 31601-31683* [*Food & Agric. Code § 31621*].

Whenever possible, any complaint received from a member of the public that serves as the evidentiary basis for the animal control officer or law enforcement officer to find probable cause must be sworn to and verified by the complainant and must be attached to the petition [*Food & Agric. Code § 31621*].

The Judicial Council has promulgated a Petition to Determine If Dog Is Potentially Dangerous or Vicious [*see § 23.166*[1]] for use by an animal control or law enforcement officer.

[b] Notice to Owner

The chief officer of the public pound or animal control department or head of the local law enforcement agency is required to notify the owner or keeper of the dog that a hearing will be held by the superior court or the hearing entity, as the case may be, at which time he or she may present evidence as to why the dog should not be declared potentially dangerous or vicious. The owner or keeper of the dog must be served with notice of the hearing and a copy of the

petition, either personally or by first-class mail with return receipt requested [*Food & Agric. Code § 31621*].

The Judicial Council has promulgated a Notice of Hearing [*see § 23.166* [2]], which is served with the petition on the owner or keeper of the dog. The Notice instructs the owner or keeper not to bring the dog to the hearing.

[c] Seizure of Dog Pending Hearing

If, on investigation, it is determined by the animal control officer or law enforcement officer that probable cause exists to believe the dog in question poses an immediate threat to public safety, the animal control officer or law enforcement officer may seize and impound the dog pending the hearings to be held pursuant to *Food & Agric. Code §§ 31621-31626* [*see* discussion in [d], *below*]. The owner or keeper of the dog is liable to the city or county where the dog is impounded for the costs and expenses of keeping the dog if the dog is later adjudicated potentially dangerous or vicious [*Food & Agric. Code § 31625(a)*].

When a dog has been impounded pursuant to *Food & Agric. Code § 31625(a)* and it is not contrary to public safety, the chief animal control officer is required to permit the animal to be confined at the owner's expenses in a department-approved kennel or veterinary facility [*Food & Agric. Code § 31625(b)*].

[d] Hearing

The hearing must be held promptly within no less than five working days or more than 10 workings days after service of notice on the owner or keeper of the dog. The hearing is to be open to the public. The court may admit into evidence all relevant evidence, including incident reports and affidavits of witnesses, limit the scope of discovery, and may shorten the time to produce records or witnesses. A jury shall not be available. The court may find, on a preponderance of the evidence, that the dog is potentially dangerous or vicious and make other orders authorized by *Food & Agric. Code §§ 31601-31683* [*Food & Agric. Code § 31621*].

The court or hearing entity of original jurisdiction may decide all issues for or against the owner or keeper of the dog even if the owner or keeper fails to appear at the hearing [*Food & Agric. Code § 31623*].

[e] Disposition After Hearing

After the hearing conducted under *Food & Agric. Code § 31621* [*see* discussion in [d], *above*], the owner or keeper of the dog must be notified in writing of the determination and orders issued, either personally or by first-class mail postage prepaid by the court or hearing entity. If a determination is made that the dog is potentially dangerous or vicious, the owner or keeper must comply with *Food & Agric. Code §§ 31641-31646* in accordance with a time schedule established by the chief officer of the public pound or animal control department or the head of the local law enforcement agency, but in no case more than 30 days after the date of the determination or 35 days if notice of the determination is mailed to the owner or keeper of the dog [*Food & Agric. Code § 31622(a)*].

The Judicial Council has promulgated an Order After Hearing [*see § 23.166* [3]] for use by the court or hearing officer. The form sets out the requirements of the Food and Agricultural Code depending on whether or not the dog is determined to be potentially dangerous or vicious [*see* discussions in [2][a] and [3][a], *above*].

[f] Appeal

[i] Court Authorized to Hear Appeal

If the petitioner or the owner or keeper of the dog contests the determination, he or she may, within five days of the receipt of the notice of determination, appeal the decision of the court or hearing entity of original jurisdiction to a court authorized to hear the appeal. If the original hearing held under *Food & Agric. Code § 31621* [*see* discussion in [d],

above] was before a hearing entity other than the court of the jurisdiction, appeal is to the superior court. If the original hearing was held in the superior court, appeal is to the superior court before a judge other than the judge who originally heard the petition [*Food & Agric. Code § 31622(a)*].

[ii] Filing Fee

The fee for filing an appeal is $30, payable to the clerk of the court [*Food & Agric. Code § 31622(a)*; *see Gov. Code § 70626(b)*].

[iii] Notice of Appeal

The petitioner or the owner or keeper of the dog must serve, personally or by first-class mail, postage prepaid, notice of the appeal on the other party [*Food & Agric. Code § 31622(a)*]. The Judicial Council has promulgated a form of notice of appeal for use by the petitioner or owner [*see § 23.166*[4]].

[iv] Hearing de Novo

The court hearing the appeal is required to conduct a hearing de novo, without a jury, and make its own determination as to potential danger and viciousness and make other orders authorized by *Food & Agric. Code §§ 31601-31683*, based on the evidence presented. The rules governing admission of evidence, scope of discovery, shortening of time for production of records and witnesses, and standard of proof are the same as those provided for the initial hearing under *Food & Agric. Code § 31621* [*see* discussion in [d], *above*] [*see Food & Agric. Code § 31622(b)*].

The determination of the court hearing the appeal is final and conclusive on all parties [*Food & Agric. Code § 31624*].

[v] Owner's Appearance Not Required

The court hearing the appeal may decide all issues for or against the owner or keeper of the dog even if the owner or keeper fails to appear at the hearing [*Food & Agric. Code § 31623*].

[vi] Time Schedule for Compliance When Dog Is Potentially Dangerous or Vicious

If the court rules that the dog is potentially dangerous or vicious, the court may establish a time schedule to ensure compliance with *Food & Agric. Code §§ 31601-31683*, but in no case more than 30 days subsequent to the date of the court's determination or 35 days if the service of the judgment is by first-class mail [*Food & Agric. Code § 31622(b)*].

[g] Removal From List of Potentially Dangerous Dogs

If there are no additional instances of the behavior described in *Food & Agric. Code § 31602* [defining "potentially dangerous dog"; *see* discussion in [2][a], *above*] within a 36-month period from the date of designation as a potentially dangerous dog, the dog must be removed from the list of potentially dangerous dogs. The dog may, but is not required to be, removed from the list of potentially dangerous dogs prior to the expiration of the 36-month period if the owner or keeper of the dog demonstrates to the animal control department that changes in circumstances or measures taken by the owner or keeper, such as training of the dog, have mitigated the risk to the public safety [*Food & Agric. Code § 31644*; *see also Food & Agric. Code § 31606* (definition of "animal control department")].

[6] Proceedings Distinguished From Action to Control Biting Dog

[a] In General

There are a number of differences between the provisions of *Civ. Code § 3342.5*, which allow actions against an owner

of a dog that has bitten a human being on at least two separate occasions, or against an owner of a dog trained to fight, attack, or kill, and the provisions of *Food & Agric. Code §§ 31601-31683*, which provide for a hearing to determine whether a dog is vicious or potentially dangerous.

The former are actions to determine if circumstances have changed after the animal has bitten a human being, so as to remove danger to other persons [*Civ. Code § 3342.5(b), (c)*], whereas the latter provide for control of animals that are potentially dangerous or vicious as defined [*see Food & Agric. Code § 31601*]. The latter also provide for a system of licensing, vaccination, and confinement of potentially dangerous animals as well as for the prohibition of dog ownership in certain instances [*see Food & Agric. Code §§ 31641-31646*]. The former apply after a dog has bitten a human being on at least two separate occasions, or if it has been trained to fight, attack, or kill, and has bitten a human being [*Civ. Code § 3342.5(b), (c)*], whereas the latter apply even if the dog has never actually bitten a person [*see Food & Agric. Code § 31602(a)*].

It is conceivable that a case may fall under both statutory schemes, such as a case in which a dog has bitten another human being on two separate occasions and, after investigation, an animal control or law enforcement officer has determined that the dog is potentially dangerous or vicious. None of the statutes address the relationship between the two schemes. If an action has been commenced under the former scheme against an owner of a dog and a petition has been filed under the latter scheme, however, the cases may qualify for consolidation under *Code Civ. Proc. § 1048(a)* for the purpose of trying issues common to both proceedings. For discussion of consolidation, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

[b] Who May Bring Action

The provisions governing actions against an owner of a dog that has bitten a human being on at least two separate occasions, or against an owner of a dog trained to fight, attack, or kill permit any person, district attorney, or city attorney to bring the action [*Civ. Code § 3342.5(b), (c)*], whereas the provisions providing for a hearing to determine whether a dog is vicious or potentially dangerous permit only specified public pound, animal control department, or law enforcement officials to petition the court [*Food & Agric. Code § 31621*]. The former require the action to be brought as a limited civil case [*Civ. Code § 3342.5(g)*], whereas the latter permit a city or county to establish an administrative procedure to hear and dispose of petitions filed [*see Food & Agric. Code § 31621*].

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§ 23.36 Criminal Liability

[1] Mischievous Animal

The owner of a mischievous animal, knowing its propensities, is guilty of a felony if the owner willfully suffers it to go at large, or keeps it without ordinary care, and the animal, while at large or while not kept with ordinary care, kills any human being who has taken all the precautions that the circumstances permitted or that a reasonable person would ordinarily take in the same situation [*Penal Code § 399*].

"Mischievous" animals for purposes of *Penal Code § 399* are animals that possess mischievous propensities by their very nature and therefore put their owners on notice that they must be confined lest they injure a human being. The term does not refer to animals that are not mischievous per se but might be dangerous to people if allowed to run free; animals are not made mischievous by the mere fact of their roaming free. Therefore, the owner of a horse that escaped through a fence, ran onto a nearby highway, and collided with a car, killing the car's passenger, was not guilty of violating *Penal Code § 399* because the horse was not a mischievous animal; a tendency to bite, gore, or kick is a mischievous propensity, not a tendency to roam, stray, or walk on a highway [*Sea Horse Ranch v. Superior Court (1994) 24 Cal. App. 4th 446, 460-461*].

[2] Dog Trained to Fight, Attack, or Kill

[a] Misdemeanor/Felony Violation

Any person owning or having custody or control of a dog trained to fight, attack, or kill is guilty of a misdemeanor or, effective January 1, 2000, a felony if, as a result of that person's failure to exercise ordinary care, the dog bites a human being on two separate occasions, or on one occasion causing substantial physical injury. No person is criminally liable under this provision, however, unless he or she knew or reasonably should have known of the vicious or dangerous nature of the dog, or unless the victim failed to take all precautions that a reasonable person would ordinarily take in the same situation [*Penal Code § 399.5(a)*].

[b] Hearing Following Conviction

Following an individual's conviction for violation of *Penal Code § 399.5(a)*, the court must hold a hearing to determine if conditions of treatment or confinement of the dog or other circumstances existing at the time of the bite or bites have changed so as to remove the danger to other persons presented by the animal. The court, after the hearing, may make any order it deems appropriate to prevent the recurrence of such an incident, including, but not limited to, the removal of the animal from the area or its destruction if necessary [*Penal Code § 399.5(b)*].

[c] Limitations on Liability

Penal Code § 399.5 does not affect the liability of a dog owner under *Penal Code § 399* or under any other provision of law, or authorize the bringing of an action pursuant to *Penal Code § 399.5(a)* based on a bite or bites inflicted on a trespasser, on a person who has provoked the dog or contributed to his or her own injuries, or by a dog used in military or police work if the bite or bites occurred while the dog was actually performing in that capacity. "Provocation" as used in this statute, includes, but is not limited to, situations in which a dog held on a leash by its owner or custodian reacts in a protective manner to a person or persons who approach the owner or custodian in a threatening manner [*Penal Code § 399.5(c), (d)*]. In addition, effective January 1, 2000, *Penal Code § 399.5* does not apply to a veterinarian or an on-duty animal control officer while in performance of his or her duties [*Penal Code § 399.5(e)*].

[d] Dog as Deadly Weapon or Instrument

In addition to the criminal provisions contained in *Penal Code § 399.5* relating to ownership, custody, or control of a dog trained to fight, attack, or kill, *Penal Code § 245* provides that every person who commits an assault on the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury is punishable by imprisonment in the state prison or county jail for specified periods, or by a specified fine, or both [*Penal Code § 245*]. In a given situation, a dog may come within the definition of a "deadly weapon or instrument." Depending on the circumstances of each case, a dog trained to attack humans on command, or one without training that follows such a command, and that is of sufficient size and strength relative to its victim to inflict death or great bodily injury, may be considered a "deadly weapon or instrument" within the meaning of *Penal Code § 245* [*People v. Nealis (1991) 232 Cal. App. 3d Supp. 1, 5-6 , 283 Cal. Rptr. 376*].

Penal Code § 399.5 is to be distinguished from *Penal Code § 245*, in that the former expressly penalizes dog owners or custodians *who are negligent* in caring for their dog that then bites a human as a result of that negligence. The bite must be a "result of the owner's or custodian's failure to exercise ordinary care" [*Penal Code § 399.5(a)*]. The latter, however, governs the *intentional act* of assault with a deadly weapon, such as when the defendant orders the dog to attack the victim [*People v. Nealis (1991) 232 Cal. App. 3d Supp. 1, 6 , 283 Cal. Rptr. 376*].

[3] Violation of Statute Controlling Vicious or Potentially Dangerous Dog

Any violation of *Food & Agric. Code §§ 31601-31683* (governing vicious and potentially dangerous dogs) involving a potentially dangerous dog is punished by a fine not to exceed $500. Any violation involving a vicious dog is punished by a fine not to exceed $1,000 [*Food & Agric. Code § 31662*].

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§ 23.37 Rabies Control

Whenever any case of rabies is reported as existing in any county or city, the State Department of Public Health makes, or causes to be made, a preliminary investigation as to whether the disease exists and the probable area of the state in which the population or animals are endangered [*Health & Safety Code § 121595*]. If in the investigation the Department finds that rabies exists, a quarantine is declared against all animals designated in the quarantine order and living within the area specified in the order [*Health & Safety Code § 121600*]. The Department may substitute for the quarantine order those regulations deemed adequate for the control of the disease in that area [*Health & Safety Code § 121610*; *see also Health & Safety Code §§ 121575 et seq., 1904, 1906-2000* (other rabies control provisions); *Dept. Pub.Health v. Board of Supervisors (1959) 171 Cal. App. 2d 99, 105-106, 339 P.2d 884* (no notice and hearing for local agencies required before state establishes rabies control areas)].

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§ 23.38 Local Ordinances on Use of Property

The propriety of local regulation, adopted in the interest of public health and welfare and regulating the use made of property, may not be questioned if the regulation is not unreasonable or arbitrary [*In re Ellis (1938) 11 Cal. 2d 571, 574, 81 P.2d 911* (upholding constitutionality of city ordinance prohibiting bee keeping within most of Los Angeles)]. The exercise of this police power is not limited to the regulation of things that have already become nuisances or have been declared nuisances by the courts [*In re Jones (1943) 56 Cal. App. 2d 658, 663, 133 P.2d 418* (upholding constitutionality of county ordinance requiring permit to maintain commercial hog ranch); *see also People v. Johnson (1954) 129 Cal. App. 2d 1, 6-7, 277 P.2d 45* (injunction against violation of county zoning ordinance restricting the keeping of hogs)].

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[Reserved]

§§ 23.39[Reserved]

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§ 23.50 Governing Statutes

The rights and duties of owners and distrainers of estray animals, including the distrainer's lien, are governed by *Food & Agric. Code §§ 17001-17128*.

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§ 23.51 Definition

For purposes of *Food & Agric. Code §§ 17001-17128*, the term "estray" means any impounded or seized bovine animal, horse, mule, sheep, swine, or burro whose owner is unknown or cannot be located [*Food & Agric. Code § 17001.5*]. An estray has also been defined as an animal found wandering at large outside of the premises and beyond the restraint of its owner [*Yraceburn v. Cape (1923) 60 Cal. App. 374, 381, 212 P. 938* (term as not including animal in the charge of a herder)].

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§ 23.52 Taking Up and Caring for Estray Animal

Except as noted in § 23.53 any person who finds any estray domestic animal on his or her premises, or on premises to which he or she has the right of possession, or on any highway which is adjacent to such premises, may take up the animal and have a lien for all expenses which are incurred in taking up, keeping, and caring for it [*Food & Agric. Code § 17041*]. He or she must confine the animal in a secure place, and within five days file with the Director of Food and Agriculture a notice [*see Food & Agric. Code §§ 35, 47, 50, 17042*]. The taker-up of an estray animal must use reasonable care to preserve it from injury. If it dies or escapes from him or her at any time while he or she is holding it pursuant to *Food & Agric. Code §§ 17001-17128*, he or she must not be held liable in any manner therefor [*Food & Agric. Code §§ 47, 17043*].

Except as otherwise provided in *Food & Agric. Code §§ 17001-17128*, it is unlawful for any person to remove any animal from the possession of the taker-up [*Food & Agric. Code § 17045*].

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§ 23.53 Locations Where Estray Animal May Not Be Taken Up

A person does not have the right to take up any estray animal found on his or her premises, or on premises to which he or she has the right of possession, nor does he or she have a lien thereon, unless the premises are entirely enclosed with a good and substantial fence, in the following places [*Food & Agric. Code §§ 17122-17127*]:

- Parts of Trinity and Shasta Counties.

- All of Siskiyou, Lassen, and Modoc Counties.

- All or part of a county which is declared by its board of supervisors by ordinance to be devoted chiefly to grazing. These are "fence law" counties [*see 39 Ops. Cal. Att'y Gen. 75 (1962)*].

Two acts relating to lawful fences, passed in 1850 and 1859, insofar as the provisions of each of the acts apply to or affect the Counties of Trinity and Siskiyou and part of Shasta County are continued in force, except as to goats, swine, or hogs, which may be taken up in the counties when the goats, swine, or hogs estray or trespass on lands of others. The provisions of *Food & Agric. Code §§ 17001-17128* apply to goats, swine, or hogs in such counties, but in all other respects the acts of 1850 and 1859 specified above are continued in full force therein, it being determined that the conditions prevailing in the Counties of Trinity and Siskiyou and part of Shasta County demand the continued application of the acts in the counties until such time as action is taken pursuant to *Food & Agric. Code § 17124* (ordinance enacted by county supervisors) [*Food & Agric. Code § 17128*].

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§ 23.54 Procedure for Handling Estray Animal

[1] Delivery of Animal to Inspector

On demand of any authorized inspector, the taker-up must deliver possession of the animal to the inspector [*Food & Agric. Code §§ 47, 17061*]. Except as otherwise provided in *Food & Agric. Code §§ 17001-17128*, it is unlawful for any person to remove from the possession of an inspector any animal so delivered to him or her [*Food & Agric. Code § 17062*].

[2] Search for Owner of Branded Animal

If the animal is branded, the Director of Food and Agriculture causes a search to be made of the brand records to ascertain the owner [*Food & Agric. Code §§ 35, 50, 17063*]. If the brands or marks are recorded, the Director immediately, by letter, notifies the person in whose name the brands or marks are recorded [*Food & Agric. Code § 17064*]. If the owner is not found, notice is posted and sometimes also published [*see Food & Agric. Code §§ 17065-17067*].

[3] Proving Ownership of Estray Animal

Any person that claims ownership in the animal may, at any time, but no later than 30 days after the first posting of notice, file his or her proofs of ownership with the Director, and the Director proceeds to hear and determine the claim of ownership [*Food & Agric. Code § 17068*]. If ownership is proved to the satisfaction of the Director, the animal is turned over to the owner on payment by the owner of all expenses which were incurred in the handling of the animal [*Food & Agric. Code § 17069*].

[4] Sale of Estray Animal

If after 30 days from the date of the first posting of notice no satisfactory proof of ownership of the animal has been made, or if the owner fails or refuses to pay all expenses which were incurred, the Director sells the animal at public sale [*Food & Agric. Code § 17092*] or at private sale [*Food & Agric. Code § 17093*; *see also Food & Agric. Code §*

17091 (disposal of animal if its condition so requires)]. All sales which are made pursuant to *Food & Agric. Code §§ 17001-17128* convey a good and valid title to the purchaser. The former owner of the animal so sold is thereafter barred from all right to recover it [*Food & Agric. Code § 17092*]. But if any person, within one year after the date of the sale, proves to the satisfaction of the Director his or her ownership of an animal which was sold pursuant to *Food & Agric. Code §§ 17091-17096*, the Director orders the net proceeds of the sale of the animal to be paid to such person [*Food & Agric. Code § 17096*].

[5] Proceeds of Sale

The proceeds from the sale of any animal are paid into, and the expenses of holding, advertising, sale, and other incidental expenses are paid from, the Department of Food and Agriculture Fund. For the keeping and care of the estray animal, the taker-up is entitled to a per-day payment based on the prevailing rates charged by commercial enterprises which feed livestock on a custom basis. In no event is the taker-up to be paid for feed and care for more than five days prior to the date the notice which is required by *Food & Agric. Code § 17042* is made to the Director [*Food & Agric. Code §§ 50, 17095*; *see also Food & Agric. Code § 17044* (taker-up entitled to sum prescribed by *Food & Agric. Code § 17095* for keeping and care of estray animal)].

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§ 23.55 Animal Trespasses

At the common law no one is bound to fence his or her lands against the livestock of another, but each owner is bound to restrain his or her own livestock and is answerable for any trespass they may commit on the lands of another [*Meade v. Watson (1885) 67 Cal. 591, 593-594, 8 P. 311* ; *see also Blevins v. Mullally (1913) 22 Cal. App. 519, 524, 135 P. 307*]. This rule applies in most of California.

Remedies under the common law rule include injunctive relief [*Montezuma Improvement Co. v. Simmerly (1919) 181 Cal. 722, 726, 189 P. 100* (decided under former statute)] and damages [*Moran v. Freeman (1920) 48 Cal. App. 514, 515-516, 192 P. 155* ; *see also Waters v. Lanigan (1955) 137 Cal. App. 2d 268, 269, 275, 290 P.2d 370* (granting damages to landowner against livestock owner who allowed his stock to trespass on plaintiff's unfenced real property) (the preceding two cases were decided under former statutes)]. For forms of complaint for injunctive relief and damages, see *§ 23.180* et seq.

If a plaintiff brings an action to recover damages to personal or real property resulting from trespassing on lands either under cultivation or intended or used for the raising of livestock, and the plaintiff prevails, he or she is entitled to reasonable attorney's fees in addition to other costs, and in addition to any liability for damages imposed by law [*Code Civ. Proc. § 1021.9*].

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§ 23.56 Destruction of Pasturage and Crops

The measure of damages for the appropriation or destruction of pasturage which is used for grazing purposes, where the grass cannot be reasonably severed and marketed separate from the land, is the reasonable rental value thereof in that vicinity for pasture purposes [*Murphy v. Nielsen (1955) 132 Cal. App. 2d 396, 399, 282 P.2d 126* (trespass by cattle); *Maddalena v. LeDuc (1938) 29 Cal. App. 2d 211, 212, 84 P.2d 254* (trespass by sheep); *Miller & Lux Inc. v. Pinelli (1927) 84 Cal. App. 42, 51, 257 P. 573* (trespass by cattle)].

In contrast, the measure of damages for destruction of annually planted crops raised to be harvested is the market value of the estimated product at the time of destruction, less the cost of producing and marketing the crops [*Crofoot Lumber, Inc. v. Ford (1961) 191 Cal. App. 2d 238, 249, 12 Cal. Rptr. 639* (wrongful removal of timber by loggers)].

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[Reserved]

§§ 23.57[Reserved]

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§ 23.70 Related Matthew Bender Publications

For legal forms relating to civil liability regarding animals, see California Legal Forms, *Service Contracts*; *Personal Property Transactions* (Matthew Bender)

For forms of interrogatories for use in actions involving injuries to animals, see Forms of Discovery, *Animals*; *Railroads* (Matthew Bender)

For discussion relating to personal injury actions, see Personal Injury: Actions, Defenses, Damages, *Fright, Shock, and Emotional Distress*, §§ 1.01, 1.04, 1.05 (Matthew Bender)

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§ 23.71 State Constitution

Superior courts have original jurisdiction in all causes except those given by statute to other trial courts. *Cal. Const., art. VI, § 10*

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§ 23.72 Federal Statutes

[1] Agricultural Animals

Animal products are agricultural products. *7 U.S.C.S. §§ 2, 451*

Importing and breeding honeybees. *7 U.S.C.S. §§ 281-283*

Improving poultry, poultry products, and hatcheries. *7 U.S.C.S. § 429*

Raising of fur bearing animals is agricultural pursuit. *7 U.S.C.S. §§ 433, 434*

Improving breeding of horses. *7 U.S.C.S. § 437*

[2] Commercial Transactions Involving Animals

Discounting notes, drafts, and bills of exchange based on livestock. *12 U.S.C.S. § 348*

Disposal of surplus animals by federal government. *7 U.S.C.S. § 2241*; *16 U.S.C.S. §§ 36, 36a, 715s*

[3] Conservation of Animals

Conservation of animals generally. *16 U.S.C.S. §§ 60-63, 65, 117c, 117d, 198c, 198d, 661*-785, 916 et seq., 1087 et seq., 1100a, 1133, 1151 et seq., 1331-1340

Marine Mammal Protection Act. *16 U.S.C.S. § 1361 et seq.*

Marine Protection, Research, and Sanctuaries Act. *16 U.S.C.S. §§ 1431-1439*; *33 U.S.C.S. § 1401 et seq.*

Coastal Zone Management Act. *16 U.S.C.S. § 1451 et seq.*

[4] Cruelty to Animals

Federal Cruelty to Animals Act, or Livestock Transportation Act of 1906 (28 Hour Law), providing for humane treatment of animals in transit. *45 U.S.C.S. § 71 et seq.*

[5] Diseases of Animals

[a] Prevention

Preventing and controlling animal diseases. *7 U.S.C.S. §§ 391-396, 450*; *19 U.S.C.S. § 1306*; *21 U.S.C.S. § 101 et seq.*; *42 U.S.C.S. § 264*

Protecting livestock from poisonous weed Halogeton glomeratus. *7 U.S.C.S. § 1651 et seq.*

[b] Medicines

Testing products designed to detect, prevent, treat, and cure domestic animal diseases. *7 U.S.C.S. § 430*

Marketing of anti-hog-cholera serum and hog-cholera virus. *7 U.S.C.S. §§ 851-855*

Preventing preparation and sale of harmful or worthless products for treatment of domestic animals. *21 U.S.C.S. §§ 151-158*

Regulating new animal drugs and animal feeds containing such drugs. *21 U.S.C.S. §§ 321(u), (w), (x), 342, 351, 360b, 381*

[6] Dogs

Seeing-eye dogs. *40 U.S.C.S. § 291*; *49 U.S.C.S. § 10723(b)(2)(A)*

[7] Feed and Water

Preventing starvation of resident wildlife and migratory birds. *7 U.S.C.S. §§ 447-449*

Exception to quota provisions for sugar imported into, or manufactured In, United States for livestock feed. *7 U.S.C.S. § 1122*

Livestock and poultry feed and wheat quota. *7 U.S.C.S. § 1332*

Sale of feed for livestock by Commodity Credit Corporation. *7 U.S.C.S. §§ 1427, 1433*

Reservoirs on unoccupied public lands to furnish water to livestock. *43 U.S.C.S. §§ 952-955*

[8] Grazing

Grazing lands. *43 U.S.C.S. § 315 et seq.*

[9] Harmful Animals

Insecticides and pest control. *7 U.S.C.S. § 135 et seq.*

Research on suppressing undesirable animals. *7 U.S.C.S. §§ 426, 426c*

Preventing crop damage by migratory waterfowl. *7 U.S.C.S. §§ 442-445*

Destroying animals detrimental to use of national parks, reservations, monuments. *16 U.S.C.S. §§ 3, 64*

Poisonous animals are nonmailable matter. *18 U.S.C.S. § 1716*

Forfeiture of animals used in unlawful importation. *19 U.S.C.S. § 1595a*

[10] Marketing Animals

Packers and Stockyards Act of 1921. *7 U.S.C.S. § 181 et seq.*

[11] Research on Animals

Dairying and livestock experiment stations. *7 U.S.C.S. §§ 385, 385a, 421, 422*

Research on animal commodities. *7 U.S.C.S. §§ 427, 427i*

Limitations on nonmedical research on animals. *Civ. Code § 1834.9*

[12] Slaughtered Animals

Humane methods of livestock slaughter. *7 U.S.C.S. § 1901 et seq.*

[13] Taxes and Tariffs

Tariff schedules on animals. *19 U.S.C.S. § 1202*

Related income tax provisions. *I.R.C. §§ 1031, 1033, 1231, 6334*

[14] Transporting Animals

Driving livestock on publicly owned realty. *10 U.S.C.S. §§ 4777, 9777*; *18 U.S.C.S. § 1857*

Transporting stolen cattle knowingly is crime. *18 U.S.C.S. §§ 2311, 2316*

Nonimportation of wild animals taken or exported in violation of foreign law. *19 U.S.C.S. § 1527*

Federal Cruelty to Animals Act, or Livestock Transportation Act of 1906 (28 Hour Law), providing for humane treatment of animals in transit. *45 U.S.C.S. § 71 et seq.*

Transportation of animals by vessel. 46 U.S.C.S. §§ *3901*, *3902*, 30702

[15] Zoos

National Zoological Park. *20 U.S.C.S. § 81*

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§ 23.73 State Statutes

[1] Animals at Large

Management of coyotes on public lands other than state parks and ecological reserves. *Food & Agric. Code §§ 11281-11284*

Management of coyotes on state park lands and ecological reserves. *Food & Agric. Code §§ 11301-11305*

General provisions. *Food & Agric. Code § 16301 et seq.*

Violations. *Food & Agric. Code § 16411 et seq.*

[2] Animal Control Officers

When animal control officers may exercise powers of arrest and power to serve warrants. *Penal Code § 830.9*

[3] Carriers of Animals

Care required of carrier of property for reward. *Civ. Code § 2114*

Common carrier's limitation of its liability for injury to animals carried by it. *Civ. Code § 2176*; *but see Civ. Code § 2175* (common carrier as not subject to exoneration, by agreement made in anticipation thereof, from liability for gross negligence, fraud, or willful wrong)

Liability of inland common carrier of property, absent agreement to contrary. *Civ. Code §§ 2194, 2195*

Highway Patrol inspection of vehicle transporting livestock, poultry, or farm produce to determine whether driver is in legal possession of load. *Veh. Code § 2810*

[4] Damages

Prevailing plaintiff as entitled to attorney's fees in action to recover damages to personal or real property resulting from trespassing on lands either under cultivation or intended or used for raising livestock. *Code Civ. Proc. § 1021.9*

Damages for breach of contract. *Civ. Code § 3300*

Compensatory damages generally. *Civ. Code § 3333*

Exemplary damages are available for wrongful injuries to animals, being subjects of property, committed willfully or by gross negligence, in disregard of humanity. *Civ. Code § 3340*

Value of property, to buyer or owner thereof, deprived of its possession, is market price. *Civ. Code § 3354*

Recovery of peculiar value of property by one deprived of property. *Civ. Code § 3355*

Damages for taking or killing cattle. *Food & Agric. Code § 21855*

Owner of livestock or poultry injured or killed by dog is entitled to liquidated damages from dog owner of twice actual value of animals killed or twice value of damages sustained. *Food & Agric. Code § 31501*; *see also Food & Agric. Code § 31502* (liability of owners of two or more dogs injuring or killing livestock or poultry at same time)

Duty of public pounds and other shelters to provide specified assistance to owners and finders of lost animals is not mandatory for purposes of damages action under *Gov. Code § 815.6. Food & Agric. Code § 32001*

If bad faith, prevailing party in action against dealer or breeder for ill or dead dog entitled to attorney's fees. *Health & Safety Code §§ 122095(c), 122185(c)*

[5] Definitions

Definitions of wild animal. *Fish & Game Code § 2116*; *Health & Safety Code § 25990*

Animals are every dumb creatures. *Penal Code § 599b*

[6] Depositaries of Animals

Depositary of living animals are required to provide them with suitable food and shelter and to treat them kindly. *Civ. Code § 1834*; *see also Civ. Code §§ 1834.5, 1834.6* (duties of animal care facilities toward abandoned animals)

Liability of depositary for misuse of deposit. *Civ. Code §§ 1835, 1836*

Gratuitous depositary is required to use, at least, slight care for preservation of thing deposited. *Civ. Code § 1846*; *see also Civ. Code § 1844* (gratuitous deposit defined)

Depositary for hire is required to use at least ordinary care for preservation of thing deposited. *Civ. Code § 1852*; *see*

also Civ. Code § 1851 (depositary for hire defined)

Compensation of depository of animals for hire. *Civ. Code § 1853*

One who borrows living animal for use is required to treat it with great kindness and to provide everything necessary and suitable for it. *Civ. Code § 1887*; *see also Civ. Code §§ 1884, 1886, 1888* (borrower for use generally)

Hirer of thing is required to use ordinary care for its preservation in safety and in good condition. *Civ. Code § 1928*; *see also Civ. Code § 1925* (hiring defined)

[7] Diseases of Animals

Animal quarantine and pest control. *Fish & Game Code §§ 5670-5674, 6304, 6305*; *Food & Agric. Code §§ 403, 482, 2272, 2274-2276, 2342, 2343, 5002, 6021-6024, 6304, 6305, 9101 et seq.*

Animal disease diagnostic laboratories. *Food & Agric. Code § 520 et seq.*

[8] Dogs

Guide dogs for blind. *Bus. & Prof. Code § 7200 et seq.*; *Civ. Code §§ 54.1, 54.2, 54.4*

Signal dogs and service dogs for deaf and physically disabled persons. *Civ. Code §§ 54.1, 54.2*

Regulating, licensing, and impounding dogs. *Food & Agric. Code §§ 30501 et seq., 31251 et seq.*

Requirement that owner of impounded dog, if known, be given notice before animal is killed or disposed of. *Food & Agric. Code § 31107*

Requirement that impounded dog not be killed for six or four business days. *Food & Agric. Code § 31108*

Requirement that dogs be released to nonprofit animal rescue or adoption organization if requested by organization prior to killing of animal. *Food & Agric. Code § 31108*

City dog licensing. *Gov. Code § 38792*

Dogs used in sentry and law enforcement work. *Health & Safety Code § 25970 et seq.*

Income tax deductions for guide, signal, and service dogs. *Rev. & Tax. Code § 17253.5*

[9] Drugs for Animals

Livestock, poultry, and bee remedies. *Food & Agric. Code § 14201 et seq.*

Sale of livestock that has drug residue in excess of allowable federal or state tolerances 48 hours after buyer takes possession is prohibited; buyer is entitled to recover three times purchase price and penalty from owner or agent. *Food & Agric. Code § 14363*

Administering, for nonmedical purposes, noxious substances to livestock entered in competition is misdemeanor. *Penal*

Code § 337h; *see also Food & Agric. Code §§ 24000-24013* (drugging of horses)

[10] Fighting Animals

Prohibitions regarding conducting, attending, or training dog for dog fights. *Penal Code § 597.5*

Seizure of animals used for fighting. *Penal Code § 599aa*

[11] Fish and Game Regulation

Notice required by Fish and Game Code is sufficient if sent by first class mail to individual's last address. *Fish & Game Code § 13*

Aquaculture. *Fish & Game Code §§ 17, 61, 15000 et seq.*

Fish and Game Commission and Department of Fish and Game. *Fish & Game Code § 101 et seq.*

Trout management. *Fish & Game Code § 1725 et seq.*

Fish and game generally. *Fish & Game Code § 2000 et seq.*

Birds and mammals. *Fish & Game Code § 3000 et seq.*

Fish and wildlife resources on private land. *Fish & Game Code §§ 3400-3409*

Waterfowl habitat program. *Fish & Game Code § 3460 et seq.*

Reptiles and amphibia. *Fish & Game Code § 5000 et seq.*; *see also Gov. Code § 422.5* (desert tortoise is official state reptile)

Fish and amphibia. *Fish & Game Code § 5500 et seq.*

Fish and game districts. *Fish & Game Code § 11000 et seq.*

Penalties for fish and game violations. *Fish & Game Code § 12000 et seq.*

[12] Food for Animals

Horsemeat and pet food. *Food & Agric. Code § 19200 et seq.*

[13] Grazing

Open range grazing. *Food & Agric. Code § 16801 et seq.*

Federal grazing lands. *Pub. Res. Code § 8501 et seq.*

[14] Importing and Transporting Animals

Importing and transporting animals. *Fish & Game Code §§ 2116 et seq., 2575, 2576*

Transporting animals. *Food & Agric. Code § 16901 et seq.*

Importing exotic vectors. *Health & Safety Code § 116120*

Livestock carriers. Pub. Util. Code §§ 3517, 3521, 3575, 3581-3586, *5004*

[15] Jurisdiction and Venue

Limited civil cases. *Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85-86*

Venue for actions for injury to real propery. *Code Civ. Proc. § 392*

Venue for actions to recover statutory penalty or against public officer. *Code Civ. Proc. § 393*

Venue for actions against local government. *Code Civ. Proc. § 394*

Venue for tort and contract actions. *Code Civ. Proc. § 395*

Venue for actions against executors, administrators, guardians, conservators, or trustees. *Code Civ. Proc. § 395.1*

Venue for actions against unincorporated associations. *Code Civ. Proc. § 395.2*

Venue for actions against corporations or associations. *Code Civ. Proc. § 395.5*

[16] Local Powers

Powers of county boards of supervisors regarding animals. *Gov. Code §§ 25800-25803*

[17] Pedigrees, Branding, Breeding

Domesticated game breeding. *Fish & Game Code §§ 3200-3219*

Spaying cats and killing stray cats. Fish & Game Code §§ 31751, 31752

Animal pedigrees, proof of ownership, and breeding. *Food & Agric. Code § 16501 et seq.*

Unlawful marking and branding. *Food & Agric. Code §§ 17401 et seq.* (livestock), 26651 et seq. (poultry)

Brands and brand records. *Food & Agric. Code §§ 20601 et seq.* (generally), 20901 et seq. (cattle), 23251 et seq. (horses, mules, burros, sheep, swine)

Pet Breeder Warranty Act (dog breeders). *Health & Safety Code § 122045 et seq.*

Pet Protection Act (dealers of cats and dogs). *Health & Safety Code § 122125 et seq.*

Pedigree registration disclosure. *Health & Safety Code § 122300 et seq.*

[18] Principal and Income Allocation

Principal-income allocation for animal property. *Civ. Code §§ 731.09, 731.10*

[19] Property Rights in Animals

[a] Generally

Domestic animals as subject to ownership. *Civ. Code § 655*

Conditions under which animals wild by nature are subjects of ownership. *Civ. Code § 656*; *see also Civ. Code § 996* (owning fur bearing animals)

Rights to pasture, fish, and take game as servitudes on land. *Civ. Code § 802*

Animal-relating security interests. *Civ. Code §§ 3051, 3052, 3062-3065a*; *Code Civ. Proc. § 1208.5*; *Com. Code § 9204*

Dogs is personal property. *Penal Code § 491*

[b] Criminal Interference

Killing or wounding another person's animal while hunting is misdemeanor. *Penal Code § 384h*

Grand theft of animals or animal carcasses. *Penal Code §§ 487, 487a, 487e-487g*; *see also Food & Agric. Code §§ 17401 et seq., 26651 et seq.* (marking and branding of livestock and poultry to facilitate stealing)

Liveryman or stablekeeper who uses or loans to another an animal in his or her charge without consent of its owner is guilty of misdemeanor. *Penal Code § 537c*

Trespass on land where shellfish are growing is misdemeanor. *Penal Code § 602(g)*

Trespass on land on which animals are being raised, bred, fed, or held for purpose of food for human consumption is misdemeanor. *Pen. Code § 602(h)*

[c] Tortious Interference

Every person is bound, without contract, to abstain from injuring property of another, or infringing on any of his rights. *Civ. Code § 1708*; *see also Civ. Code § 1714(a)* (liability for injury to another caused by willful acts or negligence)

Damages for conversion as including value of property at time of conversion and interest from that time. *Civ. Code § 3336*

Return of personal property. *Code Civ. Proc. § 667*

[20] Railroads

Railroad's duty to report when livestock injured or killed on its right of way. *Food & Agric. Code §§ 21881-21886*

Putting animals along railroad tracks or within railroad fences as illegal. *Food & Agric. Code § 16901*

[21] Rare and Endangered Animals

California Endangered Species Act. *Fish & Game Code § 2050 et seq.*

Cruelty to endangered animals. *Penal Code § 597(c), (d)*

[22] Rescued Animals

Any person who saves any domestic animal from drowning or starvation is required, within reasonable time, to inform owner, if known, and make restitution without compensation, except for reasonable charges. *Civ. Code § 2080*; *see also Civ. Code § 2080.1* (procedure when owner unknown)

[23] Refuges for Animals

Animal refuges. *Fish & Game Code § 10500 et seq.*

[24] Seizure of Abandoned or Neglected Animals

Seizure and disposition of abandoned or neglected animal if local agency has not adopted regulatory scheme. *Penal Code § 597f*

Alternative regulatory scheme for adoption by local agency governing seizure of neglected or abandoned animals; owner or caretaker is entitled to hearing when animal has been seized, or designated for seizure. *Penal Code § 597.1*

[25] Slaughtered Animals

Compensation for animals required to be slaughtered. *Food & Agric. Code §§ 10405, 10406, 10407, 10422, 10423*

Appeal and review procedure. *Food & Agric. Code § 10406.5*

Slaughtered animals. Food & Agric. Code § 18301 et seq.

Methods of animal slaughter. *Food & Agric. Code §§ 19501-19503*

[26] Statutes of Limitations

Statutes of limitations. *Code Civ. Proc. §§ 312* (generally), 335.1 (personal injury), 338(b) (trespass to real property), 338(c) (injury to chattels), 340(c), injury to animal in course of boarding or feeding it or practicing veterinary medicine on it), 340.5 (action against veterinarian); *Health & Safety Code § 25996.952* (dog breeder's or dealer's failure to disclose)

[27] Threats to Plants

Barring herbivorous animals from wildflower reserves. *Gov. Code § 25601*

[28] Treatment of Animals

Veterinarian is immune from civil liability for reporting incidents involving cruelty to animals, poisoning of animals, fighting of animals, or failure to care for animals. *Bus. & Prof. Code § 4830.5*

Veterinarian is required to report, and incurs no civil liability therefrom, death of or injury to dog probably resulting from staged dogfight. *Bus. & Prof. Code § 4830.5*

Societies for prevention of cruelty to animals; humane officers. *Civ. Code §§ 607e, 607f*; *Corp. Code §§ 10400-10406*

Schools and kindness to animals. *Educ. Code §§ 10401*, 13556.5

Humane treatment of transported animals. *Food & Agric. Code §§ 16905-16909*

Cruelty to animals. *Food & Agric. Code § 19348.5*; *Penal Code §§ 537b, 596 et seq.*; *see also Code Civ. Proc. § 1208.5*

Use of animals in medical research. *Food & Agric. Code § 32000*; *Health & Safety Code § 1650 et seq.*

Prohibition on force-feeding birds for purposes of enlarging liver. *Health & Safety Code § 25980 et seq.* (effective July 1, 2012)

Prohibition on cruel confinement of farm animals. *Health & Safety Code § 25990 et seq.* (effective Jan. 1, 2015)

Humane treatment of sentry, narcotic detection, and tracker or attack dogs. *Health & Safety Code §§ 121925, 121930*

Operating snowmobile to harass game is unlawful. *Veh. Code § 23128(c)*

[29] Vehicles and Animals

Railroad's duty to fence to avert injury to domestic animals. *Pub. Util. Code §§ 7626-7631*; *see also Food & Agric. Code §§ 21881-21886* (reporting injury to, or killing of, animal on railroad right of way)

Duty of driver approaching animal. *Veh. Code § 21759*

Enclosure requirements for transporting animal in motor vehicle; violation is infraction. *Veh. Code §§ 23117, 42001.4*

[30] Veterinarians

Veterinary medicine. *Bus. & Prof. Code § 4800 et seq.*

[31] Vicious Animals

Liability of owner or possessor of animal to owner of livestock which were killed, wounded, or worried by animal on premises other than those of animal's owner. *Civ. Code § 3341*

Right of person, on finding animal which is not on owner's premises and is victimizing livestock or poultry, to kill it without liability to owner. *Civ. Code § 3341(2)*

Remedies of owner of livestock or poultry injured or killed by other animal. *Food & Agric. Code §§ 30651-30656, 31501-31508*

Authorization to kill or seize dogs which injure or may injure livestock or poultry. *Food & Agric. Code §§ 31102-31104, 31151-31153*

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§ 23.74 Administrative Regulations

Fish and Game Commission and Department of Fish and Game regulations. *14 Cal. Code Reg. § 1.05 et seq.*

Care of laboratory animals. *17 Cal. Code Reg. § 1150 et seq.*

Importation of wild animals. *17 Cal. Code Reg. § 30070 et seq.*

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§ 23.75 Decisions

[1] Conversion

Destruction of impounded dogs by county animal shelter in violation of notice and time requirement of former Agric. Code § 439.26 (*now see Food & Agric. Code §§ 31107, 31108*) is conversion under *Civ. Code § 3336*. *Kane v. County of San Diego (1969) 2 Cal. App. 3d 550, 552, 83 Cal. Rptr. 19* ; *see also* *Romero v. County of Santa Clara (1970) 3 Cal. App. 3d 700, 702, 83 Cal. Rptr. 758*

Individuals have no personal property ownership rights in wild animals or fish unless animals or fish are captured, tamed, or otherwise reduced to possession; abalone caught in state's coastal waters belong to people of California in their collective, sovereign capacity, and may not be construed to be "property of another" for purpose of obtaining conviction for larceny. *People v. Brady (1991) 234 Cal. App. 3d 954, 957, 286 Cal. Rptr. 19*

[2] Cruelty to Animals

If owner leaves on trip and animals fails to receive adequate food, drink, and shelter, *Penal Code § 597(b)*, prohibiting neglect of animals, requires proof of owner's criminal intent or criminal negligence. *People v. Brian (1980) 110 Cal. App. 3d Supp. 1, 3 , 168 Cal. Rptr. 105*

Federal Cruelty to Animals Act (*45 U.S.C.S. § 71 et seq.*) precludes application of *Penal Code § 597* (cruelty to animals) to common carrier engaging in interstate commerce. *People v. Southern Pacific Co. (1962) 208 Cal. App. 2d 745, 747-752, 25 Cal. Rptr. 644*

Procedure for revoking or suspending research facility's animal research certificate after investigation by State Board of Public Health [*Health & Safety Code § 1668*]. *Humane Society etc., California Branch, Inc. v. Merrill (1962) 199 Cal. App. 2d 115, 118-120, 18 Cal. Rptr. 701*

[3] Damages

Measure of damages in action to recover possession of animal. *Drinkhouse v. Van Ness (1927) 202 Cal. 359, 374-376, 378-380, 260 P. 869* (necessity of pleading special damages)

One with dominion over animals is entitled to recover possession of their skins under *Code Civ. Proc. § 667* from one who killed them without permission. *Garcia v. Gunn (1897) 119 Cal. 315, 321-322, 51 P. 684* (goats)

Admissibility of "peculiar value" of animal [*Civ. Code § 3355*] in action for damages for its negligent destruction. *King v. Karpe (1959) 170 Cal. App. 2d 344, 348-349, 338 P.2d 979* (cow); *see also Drinkhouse v. Van Ness (1927) 202 Cal. 359, 378-379, 260 P. 869* (action for recovery of horse)

Damages for negligent injury to animal is difference between its reasonable value before and after injury. *Smith v. Finley (1952) 112 Cal. App. 2d 599, 601, 246 P.2d 989* (horse hit by car)

Civ. Code § 3355 deals with property which has market value and also peculiar value to owner and not with property having no market value. *Zvolanek v. Bodger Seeds Ltd. (1935) 5 Cal. App. 2d 106, 110, 42 P.2d 92* (sweet peas)

Gross excessiveness of compensatory and exemplary damages awarded for killing of animal. *Dreyer v. Cyriacks (1931) 112 Cal. App. 279, 284, 297 P. 35* (dog)

Valid tender of full amount due to agister by livestock owner discharges agister's lien on livestock, and agister's failure to deliver animals makes him liable for all damages accruing therefrom. *Bogue v. Roeth (1929) 98 Cal. App. 257, 261, 276 P. 1071* (action to recover possession of cattle); *see also Esponda v. Kelly (1922) 57 Cal. App. 766, 768, 207 P. 939* (failure of agister to redeliver cattle to owner on demand makes agister liable for damages for conversion)

Measure of damages for lost animals is their replacement value [*Civ. Code § 3354*]. *Wilkinson v. Singh (1928) 93 Cal. App. 337, 342, 269 P. 705* (dogs); *see also Wells v. Brown (1950) 97 Cal. App. 2d 361, 365, 217 P.2d 995* (dog)

[4] Endangered Species

Governmental entity is subject to *Fish & Game Code § 2080* prohibition against possessing or taking endangered species; specific intent to hunt or fish is not required under section and statute prohibits killing endangered species in course of lawful activity. *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist. (1992) 8 Cal. App. 4th 1554, 1562, 11 Cal. Rptr. 2d 222*

State is not precluded from obtaining injunctive relief against governmental entity whose operations kill fish that are endangered species under *Fish & Game Code § 2014*, which permits state to recover damages for wrongful taking or destruction of protected living creatures except for destruction of fish in irrigation canals or works or irrigation drainages. *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist. (1992) 8 Cal. App. 4th 1554, 1564, 11 Cal. Rptr. 2d 222*

[5] Injury to Animals

[a] By Bailees and Carriers

In action for breach of bailment contract, brought against bailee for loss of bailor's horse, bailee has burden of proving that loss did not result from his or her negligence once bailor established fact of bailment. *Gebert v. Yank (1985) 172*

Cal. App. 3d 544, 551-555, 218 Cal. Rptr. 585

Liability of agister to animal owner for loss occasioned by agister's negligent treatment of animals entrusted to him by owner. *Cox v. Pithoud (1963) 221 Cal. App. 2d 571, 573-575, 34 Cal. Rptr. 582* (insufficient feed for cattle); *see also Monroe v. Owens (1946) 76 Cal. App. 2d 23, 28, 172 P.2d 110* (inaccessibility of feed for cattle); *Vaughn v. Bixby (1914) 24 Cal. App. 641, 643-645, 142 P. 100* (inaccessibility of water for horses)

Liability of private carrier under *Civ. Code § 2114* to shipper for failure to use ordinary care to prevent damage to freight. *W.C. Cook & Co. v. White Truck etc. Co. (1932) 124 Cal. App. 721, 725, 13 P.2d 549* (fruit); *Klein v. Baker (1931) 112 Cal. App. 157, 161, 296 P. 631* (household goods)

Only slight care for preservation of thing deposited is required of bailee without reward under *Civ. Code § 1846*. *Davis v. National Lumber Co. (1913) 22 Cal. App. 111, 113, 133 P. 509* (deposited mule killed by other animal; bailee not liable absent gross negligence by him)

Failure of common carrier to feed and water animal during its transit is gross negligence. *Mering v. Southern Pacific Co. (1911) 161 Cal. 297, 302-303, 119 P. 80* (contract relieved carrier from liability for any damage to horse not proved to have been caused by gross negligence)

Liability of hirer of animal to its owner for injury to animal due to hirer's negligence. *Lintott v. San Francisco etc. Co. (1909) 10 Cal. App. 372, 373, 375, 101 P. 1064* (horses)

[b] By Collision

Railroad's liability to animal owner for destruction of animals on its right of way due to its negligent failure to properly maintain fence under former Civ. Code § 485 (*now see Pub. Util. Code §§ 7626-7631*). *Jesus Maria Rancho v. South. Pac. Co. (1918) 36 Cal. App. 375, 379-384, 172 P. 183* ; *see also Staggs v. Atchison, T. & S. F. R. Co. (1955) 135 Cal. App. 2d 492, 505, 287 P.2d 817* (prima facie case of liability made out by injury to animal by train and absence of fence); *Johnson v. Southern Pacific Co. (1909) 11 Cal. App. 278, 284-285, 104 P. 713* (liability of lessee of railroad under former Civ. Code § 485); *but see Bell v. Southern Pacific Co. (1922) 189 Cal. 421, 424-425, 208 P. 970* (nonliability of railroad under former Civ. Code § 485 where its property was under federal government control at time of injury to livestock)

Liability of railroad to owner of animal for negligently killing animal at crossing. *Barbee v. Southern Pacific Co. (1908) 9 Cal. App. 457, 461, 99 P. 541* (failure to sound whistle or ring bell)

[c] By Poisoning

Crop owner or crop duster is not liable to animal owner for poisoning of his animal during dusting when animals are not on their owner's property when poisoned and duster does not intend to injure them. *Lenk v. Spezia (1949) 95 Cal. App. 2d 296, 302-303, 213 P.2d 47* (bees); *see also Jeanes v. Holtz (1949) 94 Cal. App. 2d 826, 829-830, 211 P.2d 925* (bees)

Liability of crop owner and crop duster to animal owner for death of his animals resulting from crop dust that floated into animals' enclosures. *Miles v. A. Arena & Co. (1937) 23 Cal. App. 2d 680, 683-685, 73 P.2d 1260* (bees); *see also Lenk v. Spezia (1949) 95 Cal. App. 2d 296, 302-303, 213 P.2d 47* ; *Jeanes v. Holtz (1949) 94 Cal. App. 2d 826, 829-830, 211 P.2d 925*

Liability to animal owner of one whose negligence causes poisoning of owner's animals. *Wolfsen v. Wheeler (1933)*

130 Cal. App. 475, 481-484, 19 P.2d 1004 (sheep killed by rodent poison); *see also Selby v. County of Sacramento (1956) 139 Cal. App. 2d 94, 98-100, 294 P.2d 508* (horses killed by contamination of water and forage by escaping sewage); *Brady v. Sutter Butte Canal Co. (1929) 99 Cal. App. 368, 371-372, 278 P. 505* (sheep killed or injured by weed killer sprayed on pastureland)

[d] By Vaccinator

Vaccinator impliedly warrants, not that animal will be rendered immune, but only that reasonable skill and care will be exercised in selecting and applying vaccine. *Simons Brick Co. v. Wiglesworth (1920) 184 Cal. 390, 394, 193 P. 947* (hogs)

[e] Defenses

Owner of animals whose negligence contributes proximately to their injury or death is barred from recovering damages therefor. *Lenk v. Spezia (1949) 95 Cal. App. 2d 296, 305-306, 213 P.2d 47* (bee owner failing to protect bees during periods of crop dusting)

[6] Insurer's Liability for Failure to Defend

Liability of insurer under farmer's comprehensive personal liability policy where it refused to defend action arising from escape of horse. *Wint v. Fidelity & Casualty Co. (1973) 9 Cal. 3d 257, 261-265, 107 Cal. Rptr. 175, 507 P.2d 1383*

[7] Killing Depredators

Food & Agric. Code § 31103 privilege to kill is extended to shooting that is intended to kill but that does not result in death, and immunizes poultry owner whose employee shoots and wounds trespassing dog that subsequently bites veterinary assistant during treatment of dog's injuries. *Scozzafava v. Lieb (1987) 190 Cal. App. 3d 1575, 1577, 1581, 236 Cal. Rptr. 129*

Food & Agric. Code § 31103 provides privilege with regard to damages and negligent infliction of emotional distress actions for defendant who killed neighbor's dogs for entering land on which livestock were confined, but does not provide privilege with regard to action for intentional infliction of emotional distress for lying in response to owner's direct questions over course of 10-day period regarding whereabouts of dogs. *Katsaris v. Cook (1986) 180 Cal. App. 3d 256, 266-267, 225 Cal. Rptr. 531*

[8] Vicious Animals

Scope of authorization to kill animal threatening livestock under *Civ. Code § 3341(2). Johnson v. McConnell (1889) 80 Cal. 545, 550-552, 22 P. 219* ; *see also Sabin v. Smith (1915) 26 Cal. App. 676, 678, 147 P. 1180* (under *Civ. Code § 3341(2)*, victimized animal is not required to belong to person killing depredator)

Landlord has neither statutory duty under *Civ. Code § 1714(a)* nor common law duty to warn prospective tenant of presence of vicious dog in neighborhood when dog is kept by persons who are strangers to landlord on premises over which landlord has no control. *Wylie v. Gresch (1987) 191 Cal. App. 3d 412, 414, 420, 424, 236 Cal. Rptr. 552*

Right to destroy animal for purpose of defending oneself or third persons against harm threatened by animal.

Devincenzi v. Faulkner (1959) 174 Cal. App. 2d 250, 254-255, 344 P.2d 322 (dog)

Liability of owner of animal to owner of animal killed by first animal if first animal is vicious and owner has notice of that fact. *Roos v. Loeser (1919) 41 Cal. App. 782, 785, 183 P. 204* (one dog killed another dog)

Common law right of person to defend his or her domestic animals against attacks of dogs is not abridged by *Civ. Code § 3341(2)* (authorization to kill depredators). *Sabin v. Smith (1915) 26 Cal. App. 676, 678-679, 147 P. 1180*

[9] Wild Animals

Honey bees are close to dividing line between wild and domestic animals but are classified as wild animals. *People v. Kasold (1957) 153 Cal. App. 2d Supp. 891, 892-893 , 314 P.2d 241*

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§ 23.76 Attorney General Opinions

Whether or not transportation of dog or cat on unenclosed back of truck without proper caging or securing animal is transportation of animal in cruel or inhuman manner or subjecting it to torture, suffering, or cruelty under *Penal Code § 597a* is dependent on facts of particular situation. *62 Ops. Cal. Att'y Gen. 708 (1979)*

Costs of emergency veterinarian services under *Penal Code § 597f* (permitting animal to go without care). *54 Ops. Cal. Att'y Gen. 93, 94-96 (1971)*

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§ 23.77 Law Reviews

Note, *Religious Ritual Exemptions: Sacrificing Animal Rights for Ideology, 24 Loy. L.A.L. Rev. 1367 (1991)*

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Comment, *The California Law of Liability for Domestic Animals: A Review of Current Status, 11 U.C. Davis L. Rev. 381 (1978)*

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§ 23.78 Text References

California Farm & Ranch Law (Cal C.E.B. 1967)

Witkin, Summary of California Law, vol. 13, *Personal Property*, §§ 5-26, 164, 177-182; vol. 5, *Torts*, §§ 705-707, 710-713, 718, 720-724, 746, 755-756; vol 6, *Torts*, 1082-1085, 1407, 1414, 1418-1421, 1427, 1718-1723 (10th ed. 2005)

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[Reserved]

§§ 23.79[Reserved]

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§ 23.90 Related Matthew Bender Publications

For forms of interrogatories for use in actions involving injuries by animals, see Forms of Discovery, *Animals, Control and Custody, Owners and Ownership* (Matthew Bender)

For legal forms relating to contracts, see California Legal Forms, Ch. 92, *Service Contracts* (Matthew Bender)

Personal Injury: Actions, Defenses, Damages, Vol. 2, *Amusement Places and Devices,* and *Animals,* Vol. 4, *Automobiles,* Vol. 7, *Children,* Vol. 19, *Lease or Loan of Personal Property,* Vol. 21, *Negligence, Nuisance,* and *Obstructions,* (Matthew Bender)

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§ 23.91 Federal Statutes

Poultry Products Inspection Act and Wholesome Poultry Products Act. *21 U.S.C.S. § 451 et seq.*

Meat Inspection Act. *21 U.S.C.S. § 601 et seq.*

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§ 23.92 State Statutes

[1] Dogs

Strict liability of owner of dog that has bitten another person. *Civ. Code §§ 3342, 3342.5*

Court action to prevent recurrence of bites by dog. *Civ. Code § 3342.5*

Regulation and control of potentially dangerous or vicious dogs. *Food & Agric. Code §§ 31601-31683*

Sentry dogs or tracker or attack dogs in business establishments open to general public. *Health & Safety Code § 121935*

[2] Liability Generally

Duty of care of persons owning interest in real property and of public entities to those using their land for fishing, hunting, riding of animals. *Civ. Code § 846*; *Gov. Code §§ 831.4, 831.5*

Limitation on liability of landowner toward person injured or killed during commission of crime. *Civ. Code § 847*

Liability for injury to another caused by willful acts or negligence. *Civ. Code § 1714(a)*

Presumption arising from violations of statute, ordinance, or regulation of public entity. *Evid. Code § 669*

Limitation on liability of landowner toward employees of Fish and Game Department injured during work on behalf of endangered species. *Fish & Game Code § 2056*

[3] Livestock on Highways

Duties of persons owning, controlling, or driving livestock in areas which are adjacent to public highways. *Food & Agric. Code §§ 16902, 16903*

No presumption or inference that collision between motor vehicle and domestic animal on highway was due to negligence of owner or person in possession of animal. *Food & Agric. Code § 16904*

[4] Penal Provisions

Criminal liability of animal owner or custodian who fails to provide identifying and other contact information when person knows or has reason to know that animal bit another person. *Pen. Code § 398* (effective January 1, 2008)

Criminal liability of owner, or those in custody or control, of mischievous animal that kills person. *Penal Code § 399*

Criminal liability of owner, custodian, or person in control of a dog trained to fight, attack or kill, whose bite causes a human injury. *Penal Code § 399.5*

[5] Threats From Animals

[a] To Human Health

Criminal liability for wrongful dumping or destruction of animal carcass. *Fish & Game Code § 5652*; *Health & Safety Code §§ 117475-117500, 116975-116985, 117530*; *Penal Code §§ 374(b), 374a, 374d, 374.3, 374.4, 374.7*; *Pub. Res. Code § 49620*

Pollution of water supply by animals. *Health & Safety Code §§ 116990, 116995, 117005*; *see also Health & Safety Code §§ 41704(h), 41705, 41861* (inapplicability of restrictions on air pollution in *Health & Safety Code §§ 41700, 41701*, to raising of fowl or animals)

Destroying, quarantining, disinfecting animals by State Department of Public Health. *Health & Safety Code §§ 120135-120150, 120210*; *see also Health & Safety Code §§ 121775-121870*

Rabies control. *Health & Safety Code § 121575 et seq.*

Bovine tuberculosis. *Food & Agric. Code §§ 9901-10152*

Rodent infestation. *Health & Safety Code §§ 116102-116250*

[b] Impure Food Supply

Commercial feed. *Food & Agric. Code §§ 14901-15092*

Meat and Poultry Inspection Act. *Food & Agric. Code §§ 18650-18935*

No live animal, bird, or fowl allowed in food facility, or certified farmer's market (except guide, service, or signal dogs). Health & Safety Code §§ *114190, 114320, 114350*

Holding, segregation, and disposal of animals unfit for human food purposes. *Food & Agric. Code §§ 19051-19056*

[6] Traffic Rules and Animals

Stock trails. *Sts. & Hy. Code §§ 104(i), 105*

Person in charge of animal is required to obey traffic signals and rules. *Veh. Code §§ 21050, 21462*

Restrictions on driving or parking animals on public premises, *Veh. Code § 21113*

Animals being led or driven are not permitted on vehicular crossing. *Veh. Code § 23330(a)*

Signs warning of livestock on highways. *Veh. Code §§ 21364, 21365, 21805*

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Control of pet birds. *17 Cal. Code Reg § 2603*

Animal rabies. *17 Cal. Code Reg §§ 2606-2606.8*

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§ 23.94 Decisions

[1] Criminal Liability

Owner of horse that strayed onto highway and collided with car, killing the passenger, not guilty under *Penal Code § 399*; horse is not mischievous animal merely because it was roaming free. *Sea Horse Ranch v. Superior Court (1994) 24 Cal. App. 4th 446, 460-461*

[2] Defenses

[a] Assumption of Risk

"Primary" assumption of risk by plaintiff, which bars negligence cause of action, exists when nature of activity and plaintiff's relationship to that activity are such that defendant owed no legal duty to protect plaintiff from particular risk of harm. *Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

"Secondary" assumption of risk, when plaintiff proceeds to encounter known risk caused by defendant's breach of duty of care, is merged into comparative negligence system. *Knight v. Jewett (1992) 3 Cal. 4th 296, 315, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

Assumption of risk and plaintiff's negligence as defenses to action for injuries by horseback rider. *Palmquist v. Mercer (1954) 43 Cal. 2d 92, 99-100, 272 P.2d 26* ; *Kersten v. Young (1942) 52 Cal. App. 2d 1, 6-9, 125 P.2d 501*

Assumption of risk and willfully invited injury are available defenses under *Civ. Code § 3342* (dog bites). *Gomes v. Byrne (1959) 51 Cal. 2d 418, 420-421, 333 P.2d 754* ; *see also* *Smythe v. Schacht (1949) 93 Cal. App. 2d 315, 321-322, 209 P.2d 114* (decided under former statute)

Primary assumption of risk bars recovery of rider for injuries suffered when horse "spooked" and threw her;

commercial operator of horse-riding facility has no duty to provide customers with ideal horses that never engage in sudden movements. *Harrold v. Rolling J Ranch (1993) 19 Cal. App. 4th 578, 588-589, 23 Cal. Rptr. 2d 671*

Assumption of risk available as defense to actions brought under *Civ. Code § 3342*; person in veterinary profession assumes risk of dog bite that is inherent in that profession. *Cohen v. McIntyre (1993) 16 Cal. App. 4th 650, 654-655, 20 Cal. Rptr. 2d 143* ; *Nelson v. Hall (1985) 165 Cal. App. 3d 709, 713-715, 211 Cal. Rptr. 668*

Assumption of risk is no defense under *Civ. Code § 3342* (dog bites) against child who is too young to be capable of contributory negligence. *Greene v. Watts (1962) 210 Cal. App. 2d 103, 105-107, 26 Cal. Rptr. 334* ; *see also Vierra v. Fifth Ave. Rental Service (1963) 60 Cal. 2d 266, 271, 32 Cal. Rptr. 193, 383 P.2d 777*

Victim of animal attack who voluntarily or consciously had done something that brought injury on himself or herself is precluded from recovering damages from animal owner or keeper. *Baugh v. Beatty (1949) 91 Cal. App. 2d 786, 791, 793, 205 P.2d 671* (chimpanzee); *Heath v. Fruzia (1942) 50 Cal. App. 2d 598, 600, 123 P.2d 560* (horse)

[b] Negligence of Plaintiff

System of comparative negligence established. *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226*

Defense of plaintiff's negligence in action for injuries caused by animal's viciousness, of which its owner or keeper knew or should have known, is permitted. *Palmquist v. Mercer (1954) 43 Cal. 2d 92, 99-100, 272 P.2d 26* ; *Whalen v. Streshley (1928) 205 Cal. 78, 79-82, 269 P. 928, 60 A.L.R. 445* ; *Kersten v. Young (1942) 52 Cal. App. 2d 1, 7-8, 125 P.2d 501* ; *Opelt v. Al. G. Barnes Co. (1919) 41 Cal. App. 776, 780, 183 P. 241*

Contributory negligence is no defense in action under former Dog Bite Statute [*now see Civ. Code § 3342*]. *Smythe v. Schacht (1949) 93 Cal. App. 2d 315, 322, 209 P.2d 114* ; *see also Gomes v. Byrne (1959) 51 Cal. 2d 418, 422, 333 P.2d 754* ; *but see Burden v. Globerson (1967) 252 Cal. App. 2d 468, 470-471, 60 Cal. Rptr. 632* (contributory negligence is defense in *Civ. Code § 3342* dog bite action); *Ellsworth v. Elite Dry Cleaners, etc., Inc. (1954) 127 Cal. App. 2d 479, 484, 274 P.2d 17* (treating contributory negligence is defense under Dog Bite Statute, but equating it with provoking attack and inviting injury) (case decided under former statute)

[c] Relationship Between Defenses

Defenses of contributory negligence and assumption of risk overlap. *Dorobek v. Ride-A-While Stables (1968) 262 Cal. App. 2d 554, 559-560, 68 Cal. Rptr. 774* (injuries resulting from being thrown by rented horse)

[d] Release From Liability

Person signing instrument releasing another from liability is bound by its contents (where he can read and understand instrument), but not where other is guilty of fraud. *Palmquist v. Mercer (1954) 43 Cal. 2d 92, 98-100, 272 P.2d 26* (stablekeeper allegedly assigned horse he knew to be vicious to rider without informing him of viciousness)

[3] Dog Bite Statute

Only limited immunity is provided from strict liability under *Civ. Code § 3342* (owner liable for dog bite to person lawfully in private place); any other cause of action predicated on common-law theories of negligence, intentional tort,

or other theories are unaffected. *People v. Berry (1991) 1 Cal. App. 4th 778, 788, 2 Cal. Rptr. 2d 416*

Risk that any dog will bite and injure is so great that California statutes impose strict liability on dog owners for injuries their dogs cause; even tamest household pet is deemed dangerous enough to justify strict liability. *Walker v. County of Los Angeles (1987) 192 Cal. App. 3d 1393, 1403-1404, 238 Cal. Rptr. 146* (citing *Civ. Code § 3342*)

Occupational risk of dog bite is known by those in veterinary profession; veterinarian's assumption of that risk is complete defense to absolute liability imposed by *Civ. Code § 3342*. *Nelson v. Hall (1985) 165 Cal. App. 3d 709, 713-715, 211 Cal. Rptr. 668*

Former Dog Bite Statute [*now see Civ. Code § 3342*] makes owner of dog that bites person lawfully in public or private place liable for damages whether or not owner wrongfully or negligently permits dog to be at large. *Goldberg v. Rabuchin (1944) 65 Cal. App. 2d 111, 113-114, 149 P.2d 861*

Dog bite occurring at any point after transfer of ownership of dog does not make former owner liable to injured party under former Dog Bite Statute [*now see Civ. Code § 3342*]. *Menches v. Inglewood Humane Soc. (1942) 51 Cal. App. 2d 415, 417-418, 124 P.2d 870*

Implied invitation under *Civ. Code § 3342* (liability of dog owner for dog's biting of person who is on owner's property on owner's implied invitation). *Bauman v. Beaujean (1966) 244 Cal. App. 2d 384, 387-388, 53 Cal. Rptr. 55* (no implied invitation); *see also Smythe v. Schacht (1949) 93 Cal. App. 2d 315, 319-321, 209 P.2d 114* (use of uncustomary entrance does not preclude implied invitation)

[4] Fighting Animals

Owner of dog confiscated under fighting dog statutes (*Penal Code §§ 597.5, 599aa*) has standing to bring action for return of puppies born to impounded dog when unborn puppies were not listed in search warrant, nor considered as fighting dogs in criminal prosecution. *Zuniga v. County of San Mateo Dep't of Health Services (1990) 218 Cal. App. 3d 1521, 1527, 267 Cal. Rptr. 755*

[5] Fraud

Elements of fraud. *Ach v. Finkelstein (1968) 264 Cal. App. 2d 667, 674, 70 Cal. Rptr. 472* (sale of apartment building)

Person signing instrument releasing another from liability as bound by its contents (where he can read and understand instrument), but not where other is guilty of fraud. *Palmquist v. Mercer (1954) 43 Cal. 2d 92, 98-100, 272 P.2d 26* (stablekeeper allegedly assigned horse he knew to be vicious to rider without informing rider of viciousness)

[6] Liability for Dangerous Propensity

[a] Generally

Homeowner was aware of the risk posed by the dog that belonged to the owner's gardeners after an employee working on a remodeling project at the owner's residence told the homeowner that the dog looked dangerous and should not be loose on the job site. The court stated that the homeowner's continued control over the premises distinguished the situation from case law involving a landlord's failure to inspect or take security measures to protect third parties from a dangerous condition on a tenant's property. *Salinas v. Martin (2008) 166 Cal. App. 4th 404, 412, 82 Cal. Rptr. 3d 735*

Absent evidence sufficient to create a triable issue of fact that the neighboring unit owner had actual knowledge his tenant's dog was dangerous, he owed no duty to plaintiff to protect her from his tenant's dog. *Chee v. Amanda Goldt Property Management (2006) 143 Cal. App. 4th 1360, 1375, 50 Cal. Rptr. 3d 40*

Negligence action for injuries caused by dog prone to harmful behavior does not require pleading or proof of dog's abnormal or vicious propensity. *Drake v. Dean (1993) 15 Cal. App. 4th 915, 931-932, 19 Cal. Rptr. 2d 325* (rejecting dicta to contrary in *Hagen v. Laursen (1953) 121 Cal App. 2d 379, 381-382, 263 P.2d 489*)

Keeper of animal of species dangerous by nature, or of animal keeper knows, or has reason to know, to have dangerous propensities, is absolutely liable for damage to others resulting from those propensities. *Hillman v. Garcia-Ruby (1955) 44 Cal. 2d 625, 626, 283 P.2d 1033* (dog); *see also Gooding v. Chutes Co. (1909) 155 Cal. 620, 624-625, 102 P. 819* (camel); *Talizin v. Oak Creek Riding Club (1959) 176 Cal. App. 2d 429, 437, 1 Cal. Rptr. 514* (horse's jumping out of ring during horse shows); *Northon v. Schultz (1955) 130 Cal. App. 2d 488, 489, 279 P.2d 103* (dog's jumping on people); *Baugh v. Beatty, (1949) 91 Cal. App. 2d 786, 791, 793, 205 P.2d 671* (chimpanzee; wild animals are presumed vicious or dangerous); *Buffington v. Nicholson (1947) 78 Cal. App. 2d 37, 42-43, 177 P.2d 51* (liability of bailor to bailee injured by dog bailor knew to be vicious); *Heath v. Fruzia (1942) 50 Cal. App. 2d 598, 600, 123 P.2d 560* (horse); *Hicks v. Sullivan (1932) 122 Cal. App. 635, 638-639, 10 P.2d 516* (dog); *Hackleberry v. Sherlock Land etc. Co. (1919) 39 Cal. App. 764, 770, 180 P. 37* (horse)

Stablekeeper warrants against horses defects or vicious habits, of which stablekeeper knows, or by exercise of reasonable care could know, and is liable to customer injured due to those habits or defects. *Palmquist v. Mercer (1954) 43 Cal. 2d 92, 99, 272 P.2d 26* ; *Dam v. Lake Aliso Riding School (1936) 6 Cal. 2d 395, 399-400, 57 P.2d 1315* ; *see also Dorobek v. Ride-A-While Stables (1968) 262 Cal. App. 2d 554, 561-562, 68 Cal. Rptr. 774* ; *Estes v. Smith (1955) 132 Cal. App. 2d 529, 533, 282 P.2d 534* ; *Kersten v. Young (1942) 52 Cal. App. 2d 1, 6, 125 P.2d 501* ; *but see O'Brien v. Gateway Stables (1951) 104 Cal. App. 2d 317, 319-320, 231 P.2d 524* (no liability if no knowledge, or reason to know, of horse's dangerousness)

Knowledge of employee, to whom care of animal is entrusted, of animal's vicious propensities is knowledge of employer sufficient to render employer liable to persons injured by those propensities. *Barrett v. Metropolitan Contracting Co. (1916) 172 Cal. 116, 119, 155 P. 645* ; *see also Gooding v. Chutes Co. (1909) 155 Cal. 620, 623, 102 P. 819*

Commercial operator of horse-riding facility as having no duty to provide customers with ideal horses that never engage in sudden movements; recovery of rider for injuries suffered when horse "spooked" and threw her as barred by primary assumption of risk. *Harrold v. Rolling J Ranch (1993) 19 Cal. App. 4th 578, 588-589, 23 Cal. Rptr. 2d 671*

"Dangerous or vicious propensity" means any propensity of domestic animals likely to cause injury to human beings under circumstances in which party controlling animal places it. *Talizin v. Oak Creek Riding Club (1959) 176 Cal. App. 2d 429, 435, 1 Cal. Rptr. 514*

Victim of injury by vicious animal is not required to prove ignorance of its viciousness prior to injury to recover damages for injury. *Bowden v. Herberger (1920) 47 Cal. App. 555, 556-557, 191 P. 32* (dog bite); *but see Haneman v. Western Meat Co. (1908) 8 Cal. App. 698, 699, 97 P. 695*

[b] Evidence

Viciousness of animal is not evidenced by behavior which is justified or normal under circumstances or basically harmless. *Chandler v. Vaccaro (1959) 167 Cal. App. 2d 786, 789-790, 334 P.2d 998* (dog bite occurring while dog

was chasing person away from her nursing pups); *Haneman v. Western Meat Co. (1908) 8 Cal. App. 698, 701, 97 P. 695* (horse kicking when struck with whip or pitchfork)

Vicious propensities and dangerous character of dog and knowledge thereof by its owner is inferable from evidence it was kept tied as watchdog and from its size and breed. *Radoff v. Hunter (1958) 158 Cal. App. 2d 770, 773-774, 323 P.2d 202* (German shepherd of between 80 and 100 pounds); *Frederickson v. Kepner (1947) 82 Cal. App. 2d 905, 908-909, 187 P.2d 800* (75 pound German police dog)

[7] Local Regulation

Local police power to regulate uses of animals on private property in interest of public health and welfare is unquestioned. *In re Ellis (1938) 11 Cal. 2d 571, 574, 81 P.2d 911* (ordinance prohibiting beekeeping within most of city upheld); *People v. Johnson (1954) 129 Cal. App. 2d 1, 6-7, 277 P.2d 45* (injunction issued to prohibit violation of county ordinance restricting keeping of hogs); *In re Jones (1943) 56 Cal. App. 2d 658, 663, 133 P.2d 418* (county ordinance requiring permit to maintain commercial hog ranch upheld)

Violation of leash law ordinance does not require proof that dog's owner willfully caused dog to run loose; ordinance is applicable to bicyclist injured by dog knocking her off bicycle. *Delfino v. Sloan (1993) 20 Cal. App. 4th 1429, 1433-1434, 1438*

Ordinance permitting county to destroy dog that has bitten people without noticed hearing to dog owner is constitutionally infirm; due process require that owner have opportunity to be heard prior to destruction of dog unless prompt governmental action needed; courtesy hearing granted as matter of discretion is no substitute for due process. *Phillips v. San Luis Obispo County Dept. etc. Regulation (1986) 183 Cal. App. 3d 372, 376-377, 380, 228 Cal. Rptr. 101*

[8] Negligence

[a] Generally

Landlord not liable for attack by residential tenant's dog in absence of actual knowledge of dog's alleged vicious tendencies; mere fact that landlord may have observed dog barking and jumping at inside door of tenant's residence did not establish that landlord had actual knowledge of dog's vicious propensities. *Yuzon v. Collins (2004) 116 Cal. App. 4th 149, 164, 10 Cal. Rptr. 3d 18*

Bank that purchased property at foreclosure owed no duty to third party injured by dogs on property because possessors of property were contesting bank's unlawful detainer proceeding and bank lacked both actual knowledge of danger from dogs and ability to control dogs. *Martinez v. Bank of America (2000) 82 Cal. App. 4th 883, 890-894, 98 Cal. Rptr. 2d 576*

"Open range" law [*Food & Agric. Code § 17123*], which provides that persons grazing cattle in counties devoted chiefly to grazing are not required to fence in their cattle, does not absolve cattle owners of duty under *Civ. Code § 1714* to exercise reasonable care in management of animals; that duty includes keeping them off well-traveled highways, especially at night, to avoid collisions with automobiles. *Shively v. Dye Creek Cattle Co. (1994) 29 Cal. App. 4th 1620, 1629-1631, 35 Cal. Rptr. 2d 238* .

Dog owner not liable to visitor claiming to have contracted Lyme disease from tick carried by dog; because evidence showed that owner did not know, and could not reasonably be expected to have known, that ticks carrying disease were present in area, owner had no duty to warn visitor not to allow dog to sit on her lap. *Butcher v. Gay (1994) 29 Cal.*

App. 4th 388, 405-406, 34 Cal. Rptr. 2d 771

Landlord liable for injuries caused by commercial tenant's guard dog, despite no actual knowledge of dog's disposition, if landlord could have discovered dog's nature by reasonable inspection; court distinguished between guard dogs on commercial premises and family pets at single family residences. *Portillo v. Aiassa (1994) 27 Cal. App. 4th 1128, 1134-1135, 32 Cal. Rptr. 2d 755*

Livestock owner who negligently fails to keep stock from straying on highway as liable to one injured in collision with stock even at point where highway unfenced. *Shively v. Dye Creek Cattle Co. (1994) 29 Cal. App. 4th 1620, 1629-1631, 35 Cal. Rptr. 2d 238* ; *Summers v. Parker (1953) 119 Cal. App. 2d 214, 216, 259 P.2d 59* ; *Jackson v. Hardy (1945) 70 Cal. App. 2d 6, 14, 160 P.2d 161*

Liability of hirer of chattel under *Civ. Code § 1955* to renter injured by chattel as finding its basis in duty to exercise ordinary care under *Civ. Code §§ 1708* (avoiding injury to another), 1714(a) (negligence), 3281 (damages). *Holmes Packaging Mach. Corp. v. Bingham (1967) 252 Cal. App. 2d 862* (involving unfitness of vulcanizing equipment to perform work for which hired.)

Exhibitors are liable for injuries to others resulting from negligence in supervising and managing exhibited animals. Barnett v. La Mesa Post No. 282 *(1940) 15 Cal. 2d 191, 194, 99 P.2d 650* (horse in parade); *see also* *Porter v. Thompson (1946) 74 Cal. App. 2d 474, 477-478, 169 P.2d 40* (duty of cattle auctioneers to protect customers from cattle)

Property owners with no previous knowledge of vicious nature or dangerous propensities of dog owned by their tenant is not liable for injuries suffered by plaintiff, on premises rented to tenant, from attack by tenant's dog. *Lundy v. California Realty (1985) 170 Cal. App. 3d 813, 821, 216 Cal. Rptr. 575*

Fact that passerby frightened by mere presence of dogs behind chain link fence does not give rise to liability of owner either in strict liability or negligence. *Nava v. McMillan (1981) 123 Cal. App. 3d 262, 264-268, 176 Cal. Rptr. 473*

Presumption of negligence arising from violation of leash ordinance is not rebutted by showing that unleashed and hitherto well-behaved dog had received obedience training and had never before been vicious or disobedient, since ordinance only mentioned physical, and not psychological, restraints; sudden, unforeseeable attack as embodying situation intended to be prevented by leash ordinance. *Garson v. Juarique (1979) 99 Cal. App. 3d 769, 774, 160 Cal. Rptr. 461*

Landlord has duty of ordinary care to child injured by tenant's dog if landlord has control over premises and has actual knowledge of dog and its dangerous propensities. *Uccello v. Laudenslayer (1975) 44 Cal. App. 3d 504, 514, 118 Cal. Rptr. 741*

Owner of animal is negligent in telling another person to handle animal without warning him of known habit of animal that creates possibility of serious injury to person. *Dolieslager v. Excelsior Farms (1964) 225 Cal. App. 2d 565, 567, 37 Cal. Rptr. 567* (bull); *see also* *Bocker v. Miller (1963) 213 Cal. App. 2d 345, 348, 28 Cal. Rptr. 818* (horse)

If animal previously of peaceable disposition suddenly and unexpectedly inflicts injury, person in control of animal is not responsible if at time he or she was exercising due care. *Mann v. Stanley (1956) 141 Cal. App. 2d 438, 441-442, 444, 296 P.2d 921* (bull); *see also* *Hagen v. Laursen (1953) 121 Cal. App. 2d 379, 383, 263 P.2d 489* (that dogs at play would run into person is unforeseen)

Unless animal has established reputation for phlegmatic behavior in sudden appearance of unusual spectacle, its unpredictability is assumed by reasonably prudent people. *Darnold v. Voges (1956) 143 Cal. App. 2d 230, 243-247,*

300 P.2d 255 (cow, photographed in barn, startled by flash bulb, causing actionable injury to milker)

Liability of storeowner and customer bringing animal into store for negligent injury to another customer from animal. *Baley v. J. F. Hink & Son (1955) 133 Cal. App. 2d 102, 108-109, 111, 283 P.2d 349* (dog)

[b] Carriers

Common carrier is required under *Civ. Code § 2100* to exercise utmost care in selecting and training animals used as agency for carriage. *McIntyre v. Smoke Tree Ranch Stables (1962) 205 Cal. App. 2d 489, 493-494, 23 Cal. Rptr. 339* (operator of mule train is common carrier)

Railroad is required to use utmost care to safeguard passengers if it allows animal to ride in coach set apart for passengers. *Westwater v. Southern Pacific Co. (1940) 38 Cal. App. 2d 369, 371-372, 101 P.2d 154* (dog)

[c] Employer's Liability

Employer is liable for injuries caused by employee's negligent supervision of animal within scope of employment. *Bulow v. Dawn Patrol (1963) 216 Cal. App. 2d 721, 728-730, 31 Cal. Rptr. 132* (plant guard's dog)

[d] Livestock

Livestock owner who negligently fails to keep stock from straying on highway is liable to one injured in collision with stock even where highway is unfenced and in open range country. *Davert v. Larson (1985) 163 Cal. App. 3d 407, 410, 209 Cal. Rptr. 445* ; *Summers v. Parker (1953) 119 Cal. App. 2d 214, 216, 259 P.2d 59* ; *Jackson v. Hardy (1945) 70 Cal. App. 2d 6, 14, 160 P.2d 161*

[e] Res Ipsa Loquitur

Former Agric. Code § 423 [*now see Food & Agric. Code § 16904*] (no presumption or inference of negligence of livestock owner from fact of collision of vehicle and animal) bars application of res ipsa loquitur. *Pepper v. Bishop (1961) 194 Cal. App. 2d 731, 734, 15 Cal. Rptr. 346* ; *see also Burnett v. Reyes (1953) 118 Cal. App. 2d Supp. 878, 880 , 256 P.2d 91*

Applicability of res ipsa loquitur in negligence action arising out of fall from horse. *Rafter v. Dubrock's Riding Academy (1946) 75 Cal. App. 2d 621, 625-627, 171 P.2d 459* (rider thrown when saddle came off horse rented from stable)

Owner of animal that runs away unattended in city streets and in its course injures person, is held negligent under res ipsa loquitur principles. *Breidenbach v. McCormick Co. (1912) 20 Cal. App. 184, 188-190, 193, 128 P. 423* (horse)

[f] Violation of Ordinance

One injured by dog as proximate result of violation of leash ordinance is entitled to recover damages against dog owner. *Rollins v. Hedin (1952) 114 Cal. App. 2d 488, 490, 250 P.2d 728* (pedestrian); *see also Brotemarkle v. Snyder (1950) 99 Cal. App. 2d 388, 389-390, 221 P.2d 992* (driver of vehicle)

Violation by dog owner of leash ordinance does not make owner liable to person injured by dog if injury was not

proximately contributed to by such violation. *Eigner v. Race (1942) 54 Cal. App. 2d 506, 512-513, 129 P.2d 444*

Violation of statute or ordinance is actionable negligence only as to those persons for whose benefit or protection law was enacted. *Hagen v. Laursen (1953) 121 Cal. App. 2d 379, 385-386, 263 P.2d 489* (ordinance to protect livestock, not social guests such as plaintiff, from attacks by dogs)

[9] Nuisance

Action by private persons to abate public nuisance involving raising of animals. *Wade v. Campbell (1962) 200 Cal. App. 2d 54, 58-63, 19 Cal. Rptr. 173, 92 A.L.R.2d 966* (operation of dairy)

[10] Public Employees and Entities

By asking citizen to perform public function that is for benefit of general public and that involves foreseeable risk of injury, public employee creates "special relationship" with citizen to whom he or she owes duty of due care; both public employee and public entity are liable to private citizen for injuries caused by employee's negligence. *Walker v. County of Los Angeles (1987) 192 Cal. App. 3d 1393, 1395, 1397, 1402-1405, 238 Cal. Rptr. 146* (plaintiff's thumb was bitten off by stray dog he was attempting to capture at request of county's animal control officer who failed to give him proper equipment and support and otherwise to exercise due care in connection with his attempt to capture dog)

[11] Rabies Control

Local agencies are not entitled to notice and hearing before state officer's determination that rabies control is required. *Dept. Pub. Health v. Board of Supervisors (1959) 171 Cal. App. 2d 99, 105-106, 339 P.2d 884*

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§ 23.95 Attorney General Opinions

Constitutionality of regulations requiring permit for keeping or maintaining wild, exotic, dangerous or nondomestic animal or reptile. *59 Ops. Cal. Att'y Gen. 557 (1976)*

Local health officers are authorized to establish rabies quarantine of skunks under *Health & Safety Code §§ 121610, 120175* (formerly *Health & Safety Code §§ 1905, 3110*), and 17 Cal. Code Reg § 2606.2.3838 Ops. Cal. Att'y Gen. 176 (1961)

Sanitary district has authority under Sanitary District Act of 1923 [*now see Health & Safety Code §§ 6400-6830* and *Pub. Contract Code §§ 20800-20806*] to forbid keeping certain animals within specified distances from residences. *16 Ops. Cal. Att'y Gen. 6 (1950)*

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§ 23.96 Text References

California Tort Guide (Cal C.E.B. 1971), Ch. 2, *Animals*

Witkin, California Procedure (2d ed.), *Pleading,* §§ 494, 572-593, 790

Witkin, Summary of California Law, vols. 5-6 *Torts,* §§ 767-769, 771-779, 821-822, 826, 1086-l1087, 1199, 1281, 1282, 1284-1294, 1331, 1332, 1337-1371, 1374-1376, 1403-1414, 1718-1721; vol. 13, *Personal Property,* §§ 187-189 (10th ed. 2005)

4 Am. Jur. 2d, *Animals,* §§ 80-128

Schwartz, Comparative Negligence (special California supplement)

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[Reserved]

§§ 23.97[Reserved]

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3-23 California Forms of Pleading and Practice--Annotated § 23.110

§ 23.110 Related Matthew Bender Publications

For forms of interrogatories for use in actions involving damage to crops, see Forms of Discovery, *Crops* (Matthew Bender)

Personal Injury: Actions, Defenses, Damages, *Animals*, §§ 1.03, 1.04, 2.02, 3.02; *Nuisance*, § 1 (Matthew Bender)

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§ 23.111 State Statutes

Injunctive relief. *Civ. Code § 3422*; *Code Civ. Proc. §§ 526, 527(a)*

Nuisance defined. *Civ. Code §§ 3479-3482*

Private action against nuisance. *Civ. Code §§ 3484, 3501*

Action for damages and injunction or abatement in case of nuisance. *Code Civ. Proc. § 731*

Prevailing plaintiff is entitled to attorney's fees in action to recover damages to property resulting from trespassing on lands under cultivation or intended or used for raising livestock. *Code Civ. Proc. § 1021.9*

Rights and duties of owners and distrainers of estray domestic animals. *Food & Agric. Code §§ 17001-17128*

Limitations on public control of stray dogs. *Gov. Code § 53074*

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§ 23.112 Decisions

[1] Animal Trespasses

Factors justifying injunctive relief against animal trespasses. *Montezuma Improvement Co. v. Simmerly (1919) 181 Cal. 722, 726-727, 189 P. 100* (repeated damage suits and distraints); *Huffman v. Coulter (1921) 55 Cal. App. 173, 174-175, 203 P. 125* (trespasses would prevent putting in crop for that year); *Blevins v. Mullally (1913) 22 Cal. App. 519, 534, 135 P. 307* (property destroyed not subject to replacement to accomplish its purpose)

Elements of trespass. *Gomez v. Reed (1918) 178 Cal. 759, 763, 174 P. 658* (human trespass); *Morgan v. French (1945) 70 Cal. App. 2d 785, 787, 161 P.2d 800* (human trespass)

Common law rule that one is liable for injuries resulting from his animals being permitted to range or run at large. *Blevins v. Mullally (1913) 22 Cal. App. 519, 524, 135 P. 307* ; *see also* *Montezuma Improvement Co. v. Simmerly (1919) 181 Cal. 722, 726, 189 P. 100* ; *Hahn v. Garratt (1886) 69 Cal. 146, 148-149, 10 P. 329* ; *Meade v. Watson (1885) 67 Cal. 591, 593-594, 8 P. 311*

Measure of damages for destruction of pasturage, where grass cannot be reasonably severed and marketed separate from land, is reasonable rental value thereof in that vicinity for pasture purposes. *Murphy v. Nielsen (1955) 132 Cal. App. 2d 396, 399, 282 P.2d 126* (trespass by cattle); *Maddalena v. LeDuc (1938) 29 Cal. App. 2d 211, 212, 84 P.2d 254* (trespass by sheep); *Miller & Lux Inc. v. Pinelli (1927) 84 Cal. App. 42, 51, 257 P. 573* (trespass by cattle)

Measure of damages for destruction of annually planted crops raised to be harvested is market value of estimated product at time of destruction, less cost of producing and marketing crops. *Crofoot Lumber, Inc. v. Ford (1961) 191 Cal. App. 2d 238, 249, 12 Cal. Rptr. 639* (wrongful removal of timber by loggers)

[2] Definition

"Estray" means animal found wandering at large outside of premises and beyond restraint of its owner. *Yraceburn v. Cape (1923) 60 Cal. App. 374, 381, 212 P. 938* (term does not include animal in the charge of herder)

[3] Distrained Animals

Distraining statutes [*now see Food & Agric. Code §§ 17001-17128*] replace common law remedy, wherein impounded animals were held by distrainer until owner made satisfaction or contested his right to animals by replevin. *Chase v. Putnam (1897) 117 Cal. 364, 366, 49 P. 204*

[4] Injunctions

Factors justifying injunctive relief against animal trespasses. *Montezuma Improvement Co. v. Simmerly (1919) 181 Cal. 722, 726-727, 189 P. 100* (repeated damage suits and distraints); *Huffman v. Coulter (1921) 55 Cal. App. 173, 174-175, 203 P. 125* (further trespasses would prevent putting in crop for that year); *Blevins v. Mullally (1913) 22 Cal. App. 519, 534, 135 P. 307* (property destroyed not subject to replacement)

[5] Personal Injuries

Owner is liable for infliction of personal injury by bull on occupier of land as direct result of trespass by bull on that land. *Williams v. Goodwin (1974) 41 Cal. App. 3d 496, 507, 116 Cal. Rptr. 200*

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§ 23.113 Attorney General Opinions

Effect of county's adoption of "fence law" of former *Agric. Code §§ 401, 402* [*now see Food & Agric. Code §§ 17121, 17122*] on remedies of landowner against estray and trespassing cattle. *39 Ops. Cal. Att'y Gen. 75 (1962)* ; *see also 16 Ops. Cal. Att'y Gen. 156 (1950)* (estrays on fenced highway in "fence law" county are public nuisance)

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§ 23.114 Text References

Witkin, California Procedure, *Actions*, 121, 548-554, *Pleading*, 47-49, 590-592, 784, 892, *Provisional Remedies*, 305, 338-342 (4th ed. 1996-1997)

Witkin, Summary of California Law, vols. 5-6, *Torts*, 693-695, 1082-1085, 1403-1413, 1726-1737; vol. 13, *Equity* §§ 133-135, 137, 141 (10th ed. 2005)

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[Reserved]

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§ 23.120 Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Owner of Animal Against Vehicle Owner/Operator--Animal Struck and Killed by Vehicle

[1] FORM Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Owner of Animal Against Vehicle Owner/Operator--Animal Struck and Killed by Vehicle
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____,

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Negligence)
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, a resident of _____ County, California [*or other capacity and residence of defendant*].

2. [Plaintiff is ignorant of the true names and capacities of defendants sued herein as Does I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that

plaintiff's injuries as herein alleged were proximately caused by that negligence.)]

3. At all times herein mentioned, plaintiff was the owner of a certain _____ [*specify animal, e.g.,* German shepherd dog], which, at the time of its death as herein alleged, was of the value of $_____ [*allege any additional facts relating to the animal's value*].

4. At all times herein mentioned, _____ [*name of street*] and _____ [*name of street*] were and are public streets and thoroughfares in _____ [*city*], California.

5. On or about _____ [*date*], defendant was the owner of a certain _____ [*specify vehicle, e.g.,* truck], California license No. _____. On or about _____ [*date*], defendant was operating the vehicle along _____ [*name of street*] in a _____ [*describe direction, e.g.,* northerly] direction. At that time plaintiff's animal was at the intersection of _____ [*name of street*] and _____ [*name of street*].

6. At the aforementioned time and place, defendant so negligently, carelessly, and recklessly owned, operated, and maintained the vehicle so as to cause it to strike and kill plaintiff's _____ [*animal*].

7. As a proximate result of defendant's negligence, carelessness, and recklessness, plaintiff has been damaged in the amount of $_____ [*value of animal*].

[8. _____ *Allege special damages, if any.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the value of the animal at the time of its death [in the sum of $_____];

[2. _____ (*Special damages, if any*)];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form is a complaint for use in an action by an animal owner against the owner/operator of a vehicle. Plaintiff seeks damages for the loss of the animal caused by defendant's negligent operation of the vehicle. For discussion of the generally applicable duty to avoid injuries to animals, see *§ 23.13*[1].

When the owner and the operator of a vehicle are two different persons, counsel may want to sue both of them in the action [*see Code Civ. Proc. § 379* (joinder of defendants)], in which case the form should be modified accordingly.

[3] Allegations

This complaint alleges:

- A legal duty to use due care (Paragraphs 3-5).
- A breach of that duty (Paragraph 6).
- Injury proximately caused by the breach (Paragraph 7).
- Damages (Paragraph 7) [*see Dillon v. Legg (1968) 68 Cal. 2d 728, 733-734, 69 Cal. Rptr. 72, 441 P.2d 912* ; *Smith v. Johnson (1957) 152 Cal. App. 2d 20, 23, 313 P.2d 7* (both cases involving negligent injury to persons)].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)(1)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[6] Venue

Complaints are filed in the court having jurisdiction of the subject matter in the county declared by statute to be the proper county for trial of the action.

The proper county for trial of actions for injury to real property is governed by *Code Civ. Proc. § 392(a)(1)*, for trial of actions to recover a statutory penalty or against a public officer by *Code Civ. Proc. § 393*, for trial of actions against a county, city, or local agency by *Code Civ. Proc. § 394(a)*, and for trial of actions on contract for injury to person or personal property by *Code Civ. Proc. § 395(a), (b)*.

The venue of an action against an executor, administrator, guardian, conservator, or trustee on a claim for the payment of money or for the recovery of personal property is governed by *Code Civ. Proc. § 395.1*. The venue of actions against certain unincorporated associations and against corporations is governed by *Code Civ. Proc. §§ 395.2* and *395.5*, respectively.

For discussion of selecting venue, see Ch. 571, *Venue* .

[7] Cross References

For points and authorities in support of and in opposition to a general demurrer to a complaint to recover damages based on negligence generally, see California Points and Authorities, Ch. 165, *Negligence* , Forms 1, 2 (Matthew Bender)

See generally Ch. 380, *Negligence*

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms of prayers and verifications, see Ch. 420, *Prayer* and Ch. 572, *Verification* , respectively

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§ 23.121 Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Owner of Domestic Animal Against Railroad--Animal Struck and Killed by Railroad Due to Its Failure to Properly Fence Right of Way [Pub. Util. Code § 7626] and Stop Train in Time

[1] FORM Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Owner of Domestic Animal Against Railroad--Animal Struck and Killed by Railroad Due to Its Failure to Properly Fence Right of Way [Pub. Util. Code § 7626] and Stop Train in Time

[*Caption. See § 23.120[1].*]

Plaintiff alleges:

1. Defendant _____ [*name of railroad*] is, and at all times herein mentioned was, a corporation organized and existing under the laws of _____ [*name of state*], authorized to transact, and transacting, business in California, and having its principal place of business in this state in _____ County [*or other allegations of capacity and residence as appropriate*].

2. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

3. At all times herein mentioned, plaintiff was the owner of certain lands and premises in _____ [*town*], _____ County, California, consisting of a farm commonly known as the _____ [*name of farm, e.g., Golden Farm*] _____ [lying _____ (*number*) miles from *or* on the _____ (right *or* left) side of _____ (*name*) Road, adjoining] the property and right of way of defendant.

4. At all times herein mentioned, defendant was engaged in the operation of a railroad in California, together with the right of way, tracks, cars, locomotives, and other appurtenances belonging thereto.

5. On or about _____ [*date*], plaintiff was the owner of certain _____ [*domestic animals, e.g.*, cattle] worth, at the time of their death, $_____, to wit: _____ [*describe, giving breed, approximate age, approximate weight of each*]. At all times herein mentioned, plaintiff was engaged in the business of raising and selling these animals and, as an incident thereto, in running and grazing them on plaintiff's _____ [*name of farm, e.g., Golden Farm*].

6. At all times herein mentioned, defendant negligently failed to _____ [erect a fence *or* erect a sufficient fence *or* maintain the fence *or* sufficiently maintain the fence *or a combination of these*] along the sides of its right of way as required by law at a point where defendant's railroad passes through and immediately adjacent to plaintiff's real property, _____ [*name of farm, e.g., Golden Farm*].

7. As a proximate result of defendant's negligence, as alleged above, plaintiff's _____ [*specify animals, e.g.*, cattle], on or about _____ [*date*], strayed from plaintiff's property onto defendant's right of way and tracks and were struck and killed by one of defendant's locomotives [which was being negligently and carelessly managed and operated at the time by defendant's agents and employees].

8. By reason of the acts of negligence set forth above, and as a proximate result thereof, plaintiff has been damaged in the sum of $_____ which amount is the value of the _____ [*animals*] at the time of their death.

[9. _____ [*Allege special damages, if any.*]

[*Prayer. See § 23.120[1].*]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by the owner of domestic animals against a railroad for damages for the negligent killing of plaintiff's animals resulting from its breach of its statutory duty to erect and maintain fences [*see Pub. Util. Code § 7626*; for discussion, *see § 23.13*[2]].

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

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Volume 3: Alcoholic Beverage Licenses thru Answers-Chs. 18-29
Chapter 23 ANIMALS: CIVIL LIABILITY
IV FORMS
A Injuries to, and Conversion of, Animals

3-23 California Forms of Pleading and Practice--Annotated § 23.122

§ 23.122 Complaint for Damages Based on Negligence [Civ. Code §§ 1714(a), 2114]--By Owner of Animal Against Carrier of Property for Reward [Civ. Code §§ 2114, 2338] and Its Agents [Civ. Code § 2343]--Death of Animal During Transit

[1] FORM Complaint for Damages Based on Negligence [Civ. Code §§ 1714(a), 2114]--By Owner of Animal Against Carrier of Property for Reward [Civ. Code §§ 2114, 2338] and Its Agents [Civ. Code § 2343]--Death of Animal During Transit

[*Caption. See § 23.120[1].*]

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of California, with its principal place of business in _____ County, California [*or allege other capacity and residence*].

2. Defendants _____ [*name of agents*] are, and at all times herein mentioned were, residents of _____ County, California [*or allege other capacity and residence*].

3. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

4. Defendant _____ [*carrier*], at all times herein mentioned, was, and now is, a carrier of property for reward between various places in California, including those hereinafter mentioned. Defendants _____ [*name*] and _____ [*name*] were, at all times herein mentioned, the agents, servants, and employees of defendant _____ [*carrier*], and in doing the things hereinafter mentioned, were acting in the scope of their authority as such agents, servants, and employees, and with the permission and consent of defendant _____ [*carrier*].

5. At all times herein mentioned, plaintiff was the owner of a certain _____ [*specify animal, e.g.*, thoroughbred horse], _____ [*name of animal*], a _____ [*breed*], worth $_____, at the time of its death [*allege any additional facts relating to the animal's value*].

6. Defendant _____ [*carrier*] was, at all times herein mentioned, the owner of a certain _____ [*conveyance, e.g.*, moving van]. On or about _____ [*date*], plaintiff arranged with defendant _____ [*carrier*] for the shipping of plaintiff's animal in defendant's conveyance from _____ [*city*], California, to _____ [*city*], California. Defendant _____ [*carrier*] for and in consideration of a charge for transportation agreed on and paid by plaintiff in _____ County, agreed to safely ship plaintiff's animal to the aforementioned destination. [A copy of the agreement is attached hereto as Exhibit "A" and made a part hereof.]

7. Defendant _____ [*carrier*], acting through defendants _____ [*name*] and _____ [*name*], its agents, servants, and employees, so carelessly and negligently conducted the shipping that plaintiff's animal became ill and died on or about _____, [*date*]. By reason of its death, proximately caused by the negligence of defendants, and each of them, plaintiff has been damaged in the sum of $_____.

[*Prayer. See § 23.120[1].*]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by an animal owner against a carrier of property for reward and its agents. The plaintiff seeks damages for the death of the animal caused by negligence of the carrier and the agents. The carrier is not a common carrier, which is subject to strict liability, with some exceptions, for loss to freight [*see Civ. Code §§ 2175, 2176, 2194, 2195*].

For further discussion and cross references relating to complaints generally, see *§ 23.120* [2] et seq. For discussion of the duties of railroads and landowners, see *§ 23.13*[2].

[3] Cross References

For a form of complaint against a common carrier for damages for loss of freight, see Ch. 109, *Carriers*

For forms of interrogatories for use in actions involving injuries to animals in storage, see 8 Bender's Forms of Discovery, *Railroads*, Form 4

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3-23 California Forms of Pleading and Practice--Annotated § 23.123

§ 23.123 Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Owner of Livestock Against Pest Controller--Livestock Injured by Controller's Poison

[1] FORM Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Owner of Livestock Against Pest Controller--Livestock Injured by Controller's Poison

[*Caption. See § 23.120[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 23.120 [1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

3. At all times herein mentioned, defendant possessed [a valid commercial airplane pilot's license, issued by the Civil Aeronautics Administration, a valid certificate of qualification to operate a pest control aircraft, issued by the Director of Food and Agriculture of California, and] a valid license as an agricultural pest control operator, issued by the Director of Food and Agriculture of California.

4. At all times herein mentioned, plaintiff was the owner of that certain real property situated in _____ County, California, consisting of about _____ [*number*] acres, and described as follows: _____ [*describe*].

5. At all times herein mentioned, plaintiff was engaged in raising _____ [*animals, e.g.,* beef cattle] on plaintiff's real property and was at all times herein mentioned the owner of these animals.

6. On or about _____ [*date*], defendant was _____ [*describe the pest control activity by defendant, e.g.,* operating, controlling, and flying a certain airplane, serial number _____ (*number*

)]. He was engaged in dusting certain land on which trees were growing, which land is situated in _____ County, California, and _____ [is located _____ (*miles*) from *or* adjoins] plaintiff's property, on which plaintiff's _____ [*e.g.*, beef cattle] were being raised.

Defendant was dusting the land with a noxious and poisonous substance, _____ [*name*]. Defendant at this time and place so negligently conducted the dusting operation that the noxious and poisonous substance was caused to be deposited on the pasture and fodder on plaintiff's premises. Plaintiff's _____ [*e.g.*, beef cattle] thereafter consumed the pasture and fodder.

7. As a proximate result of defendant's negligence, plaintiff's _____ [*e.g.*, beef cattle] became sick. As a further proximate result of defendant's negligence, _____ [*number*] of plaintiff's animals died. At the time of their death, their total value was $_____ [*allege any additional facts relating to their value*]. As a further proximate result of defendant's negligence, _____ [*number*] of plaintiff's animals lost weight, thereby reducing their value in the sum of $_____. As a further proximate result of defendant's negligence, medical care became necessary for plaintiff's animals, all to plaintiff's damage in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the value of the deceased _____ [*e.g.*, beef cattle] at the time of their death in the sum of $_____.

2. For the reduction in value of plaintiff's _____ [*e.g.*, beef cattle] in the sum of $_____ and interest thereon from and after _____ [*date*].

3. For medical and incidental expenses for plaintiff's _____ [*e.g.*, beef cattle] in the sum of $_____.

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by a livestock owner against a pest control operator for damages for injury to plaintiff's animals caused by defendant's negligent pest control operation.

A crop crop owner and crop duster may be liable to an animal owner for the death of animals resulting from a pesticide

which floated into the animals' enclosure [*Miles v. A. Arena & Co. (1937) 23 Cal. App. 2d 680, 683-685, 73 P.2d 1260* (bees); *see also* *Lenk v. Spezia (1949) 95 Cal. App. 2d 296, 302-303, 213 P.2d 47* (bees; no liability when dust did not invade enclosure and bee owner failed to act to protect bees from pesticide); *Jeanes v. Holtz (1949) 94 Cal. App. 2d 826, 829-830, 211 P.2d 925* (bees; no liability when bees encountered poison beyond the confines of their owner's property)].

A person whose negligence causes the poisoning of animals may be held liable to the animal owner in situations other than crop dusting [*Wolfsen v. Wheeler (1933) 130 Cal. App. 475, 481-484, 19 P.2d 1004* (sheep killed by rodent poison); *Brady v. Sutter Butte Canal Co. (1929) 99 Cal. App. 368, 371-372, 278 P. 505* (sheep killed or injured by weed killer sprayed on pastureland); *see also* *Selby v. County of Sacramento (1956) 139 Cal. App. 2d 94, 98-100, 294 P.2d 508* (horses killed by contamination of water and forage by escaping sewage)].

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

[3] Cross Reference

For forms of interrogatories for use in an action involving bees poisoned by drifting spray, see 1 Bender' s Forms of Discovery, *Animals*

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3-23 California Forms of Pleading and Practice--Annotated § 23.124

§ 23.124 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Negligence of Plaintiff--Feeding Animals Food Known to Have Been Dusted

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Negligence of Plaintiff--Feeding Animals Food Known to Have Been Dusted

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that at the time and place mentioned in his/her complaint, plaintiff conducted himself/herself in a careless and negligent manner, and plaintiff's carelessness and negligence contributed proximately to the damage and or detriment suffered by him/her, if any, in that plaintiff fed certain _____ [*specify food, e.g.,* crops *or* hay *or* fodder] to his/her animals, well knowing that this food had been dusted with the product _____ [*name*] during the pest control operations alleged in plaintiff's complaint.

[2] Use of Form

This form is an affirmative defense based on plaintiff's negligence for use by defendant in an action against him or her for damages for killing plaintiff's animals as a result of allegedly negligent pest control operations [*see Lenk v. Spezia (1949) 95 Cal. App. 2d 296, 302-303, 213 P.2d 47*]. For further discussion of negligence in the context of pest control operations, see *§ 23.122* [2] et seq. For discussion of comparative negligence and other defenses to negligence actions involving animals, see *§ 23.13*[6].

[3] Cross References

For general discussion of answers, including affirmative defenses and forms of answer in which this affirmative defense may be used, see Ch. 26, *Answers*

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3-23 California Forms of Pleading and Practice--Annotated § 23.125

§ 23.125 Complaint for Damages Based on Negligence [Civ. Code § 1714]--By Animal Owner Against Dog Owner--Animal Killed by Dog

[1] FORM Complaint for Damages Based on Negligence [Civ. Code § 1714]--By Animal Owner Against Dog Owner--Animal Killed by Dog

[*Caption. See § 23.120[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 23.120 [1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

3. At all times herein mentioned, defendant was the owner of a certain _____ [*breed*] dog.

4. Prior to _____ [*date*], the _____ [*name of city*] City Council duly adopted an ordinance, a copy of which is hereto annexed, and made a part of this complaint, which requires that no dog be taken onto a public highway of the city or otherwise allowed off of its owner's premises, unless it is led on a leash of sufficient strength to prevent the animal from escaping from the person leading it or from otherwise being free of restraint in its movements. This ordinance was in force at all times mentioned in this complaint.

5. At all times herein mentioned plaintiff was the owner of a certain _____ [*animal, e.g.,* cat] worth, at the time of its death, $_____ [*allege any additional facts relating to the animal's value*], which plaintiff kept on his/her premises at _____ [*address*] _____ [*city*].

6. On or about _____ [*date*], defendant negligently and carelessly, and in violation of the leash ordinance referred to above, allowed his dog to go onto the public highway of _____ [*city*] and pass

along _____ [*name of street*], without a leash. The dog came on plaintiff's premises and, as a proximate result of defendant's negligence, attacked and killed plaintiff's _____ [*animal, e.g.,* cat].

7. By reason of the foregoing and as a proximate result thereof, plaintiff has sustained damages in the sum of $_____ [*value of animal*].

[*Prayer. See § 23.120[1].*]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by an animal owner against a dog owner. Plaintiff seeks damages for the killing of his or her animal by defendant's dog as a result of the defendant's negligence. The complaint relies on violation of a leash ordinance as the basis for establishing liability [*see Rollins v. Hedin (1952) 114 Cal. App. 2d 488, 490, 250 P.2d 728* (injury to pedestrian); *see also Brotemarkle v. Snyder (1950) 99 Cal. App. 2d 388, 389-390, 221 P.2d 992* (driver of vehicle); *see also Evid. Code § 669* (violation of ordinance as basis of presumption of failure to exercise due care)].

For further discussion and cross references relating to complaints generally, see *§ 23.120* [2] et seq. For discussion of duties of animal owners, see *§ 23.13*[5].

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3-23 California Forms of Pleading and Practice--Annotated § 23.126

§ 23.126 Complaint for Damages Based on Negligence [Civ. Code §§ 1714, 1852], Conversion [Civ. Code § 3336], and Breach of Bailment Contract [Civ. Code §§ 1835, 1836, 3300]--By Owner of Animal Against Bailee of Animal--Animal Killed by Bailee

[1] FORM Complaint for Damages Based on Negligence [Civ. Code §§ 1714, 1852], Conversion [Civ. Code § 3336], and Breach of Bailment Contract [Civ. Code §§ 1835, 1836, 3300]--By Owner of Animal Against Bailee of Animal--Animal Killed by Bailee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____,

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Negligence)
_____ [*name*], [and DOES I	)	(Conversion)
through _____,]	)	(Breach of Bailment Contract)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

FIRST COUNT
(Negligence)

1. [*Capacity and residence of defendant. See § 23.120 [1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

3. At all times herein mentioned, plaintiff was the owner of a herd of _____ [*animals, e.g.,* cattle], including a certain prize winning _____ [*e.g.,* bull] named _____, number _____, tattooed _____ [*e.g.,* on the inside of its left flank].

4. On or about _____ [*date*], plaintiff delivered his/her _____ [*e.g.,* bull] to defendant for safe keeping and for a consideration.

5. On or about _____ [*date*], defendant negligently mistook plaintiff's _____ [*e.g.,* bull] for defendant's own _____ [*e.g.,* bull] and dispatched plaintiff's _____ [*e.g.,* bull], without plaintiff's knowledge or consent, to the _____ [*name*] slaughterhouse, as a proximate result of which negligence, the animal was caused to be destroyed, all to plaintiff's damage in the sum of $_____.

6. The animal destroyed had a peculiar value to plaintiff in that _____ [*specify, e.g.,* its blood line produced good calves particularly valuable for breeding, and plaintiff needed such stock to build up a good herd of cattle]. Before the _____ [*e.g.,* bull] was destroyed defendant had notice of this particular value in that _____ [*specify, e.g.,* he/she was a leading breeder of cattle and well aware of the results of breeding cattle with the qualities of plaintiff's bull. He/She was familiar with these qualities since he/she had himself/herself bred this animal to one of his/her cows. He/She was familiar with plaintiff's herd as a whole, and therefore, he/she knew or should have known the herd's needs.]

7. The value of the animal at the time of its death was $_____ and as a proximate result of defendant's negligence as herein alleged plaintiff has sustained damages in that sum.

SECOND COUNT
(Conversion)

1. Plaintiff hereby incorporates herein Paragraph 1-4 of his/her First Count.

2. On or about _____ [*date*], defendant converted the _____ [*e.g.,* bull] to his/her own use by dispatching the animal, without consent or knowledge of plaintiff, to the _____ [*name*] slaughterhouse, where the animal was caused to be destroyed.

3-4. [*Peculiar value and damages. See First Count, Paragraphs 6-7.*]

5. [In addition to the foregoing damages, plaintiff sustained damages in the sum of $_____ consisting of the following: _____ (*specify attempts made by plaintiff in his/her pursuit to find out where this animal was and what happened to it*).]

THIRD COUNT
(Breach of Bailment Contract)

1. Plaintiff hereby incorporates herein Paragraphs 1-3 of his/her First Count.

2. On or about _____ [*date*], [at the special instance and request of defendant] plaintiff delivered to defendant as bailee for safekeeping and for a consideration plaintiff's _____ [*animal*], as herein described. Defendant promised and agreed to safely and securely keep the animal and redeliver it in its original condition to plaintiff when so requested. Plaintiff has _____ [offered to perform *or* duly performed] all the conditions of the agreement on his/her part to be performed. [A copy of the agreement is attached hereto as Exhibit "A" and made a part hereof.]

3. On or about _____ [*date*], plaintiff demanded of defendant the return of his/her _____ [*animal*] and defendant failed and refused, and continues to fail and refuse, to return the _____ [*e.g.*, bull].

4-5. [*Peculiar value and damages. See First Count, Paragraphs 6-7*].

WHEREFORE, plaintiff prays judgment as follows:

1. For the value of the _____ [*e.g.*, bull] in the sum of $_____.

2. For the sum of $_____, which is a fair compensation for the time and money properly expended by plaintiff in pursuit of the converted animal.

3. For interest at the legal rate on the sum of $_____, the value of the animal from _____ [*date*], the date of its conversion.

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by the owner of an animal against the animal's bailee. The form is based on the fact situation in *King v. Karpe (1959) 170 Cal. App. 2d 344, 338 P.2d 979* . It illustrates the common practice of pleading a cause of action on alternative theories in separate counts. Of course, counsel need not do so. In this complaint, for example, on the basis of the fact situation stated, counsel might prefer to set forth a cause of action for conversion only, since of the three counts, the count for conversion alone allows him or her to recover interest on the value of the animal from the time of its destruction [*see Civ. Code § 3336*].

If the destruction were intentional and defendant was guilty of oppression, fraud, or malice, he or she could also be

liable for punitive damages [*see Civ. Code § 3294*]. In that case, this form of complaint may be modified to so allege. For discussion of punitive damages and allegations that may be used with this form, see Ch. 177, *Damages* .

For discussion of the liability of bailees of animals generally, see *§ 23.13*[3].

[3] Allegations

In the complaint in [1], *above*, plaintiff seeks damages for the animal's killing, based on three counts: negligence, conversion, and breach of a bailment contract. For a discussion of the allegations for negligence, see *§ 23.120*[3].

The second count, for conversion, alleges:

- The ownership by plaintiff of the animal (Paragraph 1).
- Conversion by the defendant of the animal (Paragraph 2).
- Damages (Paragraphs 2, 3) [*see Wendling etc. Co. v. Glenwood etc. Co. (1908) 153 Cal. 411, 415, 95 P. 1029*].
- Special damages sustained in pursuit of the animal (Paragraph 4).

The third count, for breach of a bailment contract, alleges:

- The making of the contract and its terms (Paragraph 2).
- Plaintiff's performance or tender of performance (Paragraph 2).
- Defendant's breach (Paragraph 3).
- Damages to plaintiff therefrom (Paragraphs 4, 5) [*see M. G. Chamberlain & Co. v. Simpson (1959) 173 Cal. App. 2d 263, 274, 343 P.2d 438* (contract to pay finder's fee in connection with purchase of business); for discussion of a bailee's duty of care, see *§ 23.13*[3]].

Recovery of a fair compensation for any time and money properly expended in pursuit of the property is expressly authorized by *Civ. Code § 3336* in an action for conversion.

[4] Cross References

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

See generally Ch. 93, *Bailments* , and Ch. 150, *Conversion*

For forms of interrogatories for use in actions involving injuries to animals in storage, see Bender's Forms of Discovery, *Railroads*, Form 4 (Matthew Bender)

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3-23 California Forms of Pleading and Practice--Annotated § 23.127

§ 23.127 Complaint for Damages for Conversion [Civ. Code § 3336] and Negligence [Civ. Code §§ 1714, 3333]--By Dog Owner Against County and County Agencies--Dogs Killed by County Animal Shelter Without Notice to Owner [Food & Agric. Code § 31107] and Without Waiting Statutory Period [Food & Agric. Code § 31108]

[1] FORM Complaint for Damages for Conversion [Civ. Code § 3336] and Negligence [Civ. Code §§ 1714, 3333]--By Dog Owner Against County and County Agencies--Dogs Killed by County Animal Shelter Without Notice to Owner [Food & Agric. Code § 31107] and Without Waiting Statutory Period [Food & Agric. Code § 31108]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Conversion)
_____ [*name*], [and DOES I	)	(Negligence)
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

FIRST COUNT
(Conversion)

1. At all times herein mentioned, plaintiff was and is engaged in the business of raising _____ [*dogs, e.g.,* racing greyhounds] and was the owner of _____ [*number*] of these dogs, all listed on Exhibit "A," attached hereto, and made a part hereof. At the time of their destruction as hereinafter alleged, the fair market value of the dogs was $_____ [*allege any additional facts relating to their value*].

2. At all times herein mentioned, defendant _____ [*name, e.g.,* County Livestock Department] was and is a public entity.

3. At all times herein mentioned, defendant County of _____ was and is a political subdivision of the State of California.

4. At all times herein mentioned, these defendants owned and operated defendant _____ [*name, e.g.,* North County Animal Shelter], located at _____ [*address, city*], California, whose duties include the destruction of unwanted animals.

5. [*Fictitious name allegation if appropriate. See § 23.120 [1], Paragraph 2.*]

6. On or about _____ [*date*], plaintiff delivered his/her dogs described in Exhibit "A" to _____ [*name*], pursuant to a leasing agreement between plaintiff and _____ [*name of lessee*]. At all times herein mentioned, plaintiff retained legal title to, and ownership of, the dogs.

7. On or about _____ [*date*], _____ [*name of lessee*] took plaintiff's dogs to defendant _____ [*shelter*] and sent plaintiff a letter so stating. Plaintiff received the letter on _____ [*date*], the day after the dogs were destroyed as hereinafter alleged.

8. Plaintiff is informed and believes and thereon alleges that defendant _____ [*shelter*] was told at the time the dogs were delivered to them that _____ [*name of lessee*] was not the owner of the dogs.

9. On receipt of the dogs, as alleged above, defendant _____ [*shelter*], without giving notice to plaintiff or waiting the statutory period of _____ [six days *or* four days], forthwith destroyed the dogs, thereby converting them and depriving plaintiff of his/her ownership in, and rights to, the dogs, all to plaintiff's damage in the amount of $_____ [*value of dogs at time of their destruction*].

10. Plaintiff presented a claim for damages sought in this action to _____ [*name*], on _____ [*date*]. This claim was rejected by the Board of Supervisors of _____ County on _____ [*date*], and the notice of rejection was mailed to plaintiff's attorney under date of _____ [*date*]. A copy of this notice of rejection is attached hereto as Exhibit "B" and made a part hereof.

SECOND COUNT
(Negligence)

1. Plaintiff incorporates Paragraph 1-7 and 10 of his/her First Count.

2. On receipt of the dogs, as alleged above, defendant _____ [*shelter*], negligently and carelessly and without further inquiry as to the ownership of the dogs, without notice to plaintiff, and without waiting the statutory period of _____ [six days *or* four days], forthwith destroyed them; as a proximate result of the negligence of defendants, and each of them, plaintiff's dogs are dead.

3. The fair market value of the dogs at the time of their destruction on _____ [*date*] was $_____ [*allege any additional facts relating to the dogs' value*].

4. As a proximate result of the negligence of defendant _____ [*shelter*], as hereinbefore alleged, plaintiff was damaged in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For damages in the sum of $_____, and interest thereon from _____ [*date dogs were destroyed*] at the legal rate.

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action for conversion and negligence by a dog owner against a county and county agencies. The plaintiff seeks damages for the killing of his or her dogs by the county animal shelter without following statutorily prescribed procedure [*see Food & Agric. Code § 31108* (statutory waiting period)].

This form is adapted from the complaint filed in *Kane v. County of San Diego (1969) 2 Cal. App. 3d 550, 83 Cal. Rptr. 19* .

For discussion of the procedures applicable to the seizure of neglected animals, see *§ 23.20*.

[3] Statutory Waiting Period

A pound or shelter must hold a stray dog impounded under Division 14 of the Food and Agriculture Code (commencing with *Food & Agric. Code § 30501*) for six business days, not including the day of impoundment [*Food & Agric. Code § 31108(a)*]. The period is reduced to four business days if the pound or shelter has made the dog available for owner redemption on one weekday evening or one weekend day, or in some cases if the pound or shelter has has an appointment procedure for owners to reclaim their dogs [*Food & Agric. Code § 31108(a)*].

The dog must be held for owner redemption during the first three days of the holding period, and for the remainder of the period must be available for either owner redemption or for adoption [*Food & Agric. Code § 31108(a)*].

Rather than killing a dog for any reason other then irremediable suffering, a pound or shelter must release the dog to a nonprofit animal rescue or adoption organization on the organization's request prior to the scheduled killing [*Food & Agric. Code § 31108(b)*].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[5] Cross References

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq. and § 23.126 [2] et seq.

For discussion of claim requirements and forms of claims against public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

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3-23 California Forms of Pleading and Practice--Annotated § 23.128

§ 23.128 Complaint to Recover Possession of Livestock and for Damages for Detention [Code Civ. Proc. § 667]

[1] FORM Complaint to Recover Possession of Livestock and for Damages for Detention [Code Civ. Proc. § 667]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO RECOVER POSSESSION
_____ [*name*], [and DOES I	)	[Amount demanded _____
through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, a resident of _____ County, California [*or other capacity and residence of defendant*].

2. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

3. Plaintiff was at all times herein mentioned, and is now, the owner of _____ [*number*] _____ [*describe, e.g.*, Hereford cows], valued in the sum of $_____, and is now entitled to their possession.

[*EITHER*]

4. On or about _____ [*date*], plaintiff delivered these _____ [*e.g.*, cows] to defendant. Defendant agreed to pasture them for plaintiff. Plaintiff agreed to pay defendant $_____ for this service. On or about _____ [*date*], plaintiff tendered defendant $_____ and demanded delivery of his/her _____ [*e.g.*, cows], but defendant refused this demand and still retains possession of the _____ [*e.g.*, cows] and unjustly claims to be their owner.

[*OR*]

4. Defendant, on or about _____ [*date*], without plaintiff's consent, had these _____ [*e.g.*, cows] in his/her possession. At this time, plaintiff demanded his/her possession from defendant but defendant refused this demand and still retains possession of the _____ [*e.g.*, cows] and unjustly claims to be their owner.

[*CONTINUE*]

5. As a proximate result of defendant's wrongful detention, plaintiff has suffered special damages in the sum of $_____, consisting of _____ [*state*].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For possession of the _____ [*e.g.*, cows] or their value in the sum of $_____ in case delivery thereof cannot be had.

2. For special damages in the sum of $_____.

3 For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by the owner of livestock against one who is wrongfully detaining them. Plaintiff seeks to recover possession of the animals, or their value if delivery cannot be had, and damages for their

detention [*see Code Civ. Proc. § 667*].

For discussion of conversion and recovery of possession issues, see *§§ 23.16* and *23.17*.

[3] Allegations

The complaint in [1], *above,* alleges:

- Title in plaintiff to the property demanded and his or her right to possession when the action began (Paragraph 3).

- Actual possession of the property by the defendant (Paragraph 4).

- Demand for possession and refusal by defendant to deliver (Paragraph 4) [*Stockton M.P. Co. v. Mariposa County (1950) 99 Cal. App. 2d 210, 213, 221 P.2d 232* (road equipment)].

If the original taking was not unlawful, as in a bailment situation, but the detention is, possession by defendant must be proved; however, it is not necessary that possession be continued up to the time of the commencement of the action for return of the property [*Faulkner v. First National Bank (1900) 130 Cal. 258, 264-266, 62 P. 463* (promissory notes)].

[4] Cross References

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

For a general form of complaint for use in an action to recover possession of personal property, see Ch. 119, *Claim and Delivery*

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3-23 California Forms of Pleading and Practice--Annotated § 23.129

§ 23.129 Complaint for Damages [Civ. Code §§ 3333, 3354; Food & Agric. Code § 31501] Based on Strict Liability [Civ. Code § 3341]--By Owner of Livestock Against Owner of Aggressor Animal--Livestock Killed by Aggressor Animal

[1] FORM Complaint for Damages [Civ. Code §§ 3333, 3354; Food & Agric. Code § 31501] Based on Strict Liability [Civ. Code § 3341]--By Owner of Livestock Against Owner of Aggressor Animal--Livestock Killed by Aggressor Animal

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Strict Liability)
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 23.120 [1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

3. At all times herein mentioned, defendant was the owner of a certain _____ [*animal, e.g.,* dog].

4. At all times herein mentioned, plaintiff was the owner of certain _____ [*livestock specified in Civ. Code § 3341(1)* , *e.g.*, sheep], which he/she kept on his/her property located at _____ [*location*] [enclosed _____ (*e.g.*, by a fence)].

5. On or about _____ [*date*], defendant's _____ [*e.g.*, dog] came [and trespassed] on plaintiff's property and attacked the _____ [*e.g.*, sheep] there, killing _____ [*number*] of them.

6. The _____ [*e.g.*, sheep] killed by defendant's _____ [*e.g.*, dog] were, at the time of their death, worth $_____ [*allege any additional facts relating to their value*].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages for [twice] the value, at the time of their death, of the _____ [*e.g.*, sheep] killed, in the sum of $_____;

2. For costs of suit herein incurred;

[3. For reasonable attorney's fees _____ (of $_____ *or* according to proof);] and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by the owner of livestock against the owner of another animal. Plaintiff seeks damages, based on strict liability, for the killing of his or her livestock by defendant's animal [*see Civ. Code § 3341*]. *Civ. Code § 3341* covers worrying or wounding as well as killing, and the form may be modified for use in that situation. Under *Civ. Code § 3341(1)* the plaintiff need not prove that the owner of the predator had knowledge of the vicious habits of his or her animal [*Sabin v. Smith (1915) 26 Cal. App. 676, 678, 147 P. 1180*].

The statute protects bovine animals, swine, horses, mules, burros, sheep, and angora or cashmere goats [*Civ. Code § 3341*].

If the aggressor is a dog, recovery is for twice the value of the animals killed [*see Food & Agric. Code § 31501*].

If the action is to recover damages to personal or real property resulting from trespassing on lands either under cultivation or intended or used for raising livestock, the plaintiff, on prevailing in the action, is entitled to reasonable

attorney's fees in addition to other costs, and in addition to any liability for damages imposed by law [*Code Civ. Proc. § 1021.9*]. An optional prayer for attorney's fees is provided in the form for requesting these fees.

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

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§ 23.130 Complaint for Damages [Civ. Code §§ 3333, 3354; Food & Agric. Code § 31501] Based on Strict Liability [Civ. Code § 3341]--By Owner of Poultry Against Owner of Aggressor Animal--Poultry Killed by Aggressor Animal [Civ. Code § 3341]

[1] FORM Complaint for Damages [Civ. Code §§ 3333, 3354; Food & Agric. Code § 31501] Based on Strict Liability [Civ. Code § 3341]--By Owner of Poultry Against Owner of Aggressor Animal--Poultry Killed by Aggressor Animal [Civ. Code § 3341]

[*Caption. See § 23.129[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 23.120 [1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

3. At all times herein mentioned, defendant was the owner of a certain _____ [*animal, e.g.,* dog].

4. At all times herein mentioned, plaintiff was the owner of certain _____ [*poultry, e.g.,* game hens], which he/she kept on his/her property located at _____ [*address*], _____ [*city*], _____ County, California [enclosed and contained in a coop].

5. On or about _____ [*date*], defendant's _____ [*e.g.,* dog] came on plaintiff's property [and gained entry to the coop], whereon defendant's _____ [*e.g.,* dog] attacked and destroyed _____ [*number*] of plaintiff's _____ [*e.g.,* game hens].

6. The _____ [*e.g.,* game hens] destroyed by defendant's _____ [*e.g.,* dog] were, at the time of their death, worth $_____ [*allege any additional facts relating to their value*].

[*Prayer. See § 23.129 [1].*]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by the owner of poultry against the owner of another animal. Plaintiff seeks damages, based on strict liability, for the killing of his or her poultry by the defendant's animal [*Civ. Code § 3341*; for further discussion *see § 23.129*[2]].

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

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3-23 California Forms of Pleading and Practice--Annotated § 23.131

§ 23.131 Complaint for Compensatory and Exemplary Damages Based on Willful Killing--By Owner of Animal Killed

[1] FORM Complaint for Compensatory and Exemplary Damages Based on Willful Killing--By Owner of Animal Killed
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Willful Killing)
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 23.120 [1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

3. At all times herein mentioned, plaintiff was the owner of a certain _____ [*animal, e.g.,* collie dog] [which was well trained and good natured and which _____ (*e.g.,* was accustomed to and did drive cows from the pasture on the farm owned by plaintiff as hereinafter alleged to the stable) and did many other things of a

similar character of service to the plaintiff]. The _____ [*e.g.*, dog] was of the value at the time of its death, of $_____ [*allege any additional facts relating to animal's value*].

4. At all times herein mentioned, plaintiff owned a farm [under cultivation] in _____ County, California. On or about _____, [*date*], plaintiff's _____ [*e.g.*, dog] was on this farm. At this time, defendant came [and trespassed] onto plaintiff's _____ [farm *or* cultivated farmland] and willfully and maliciously and without just cause, shot and killed plaintiff's _____ [*e.g.*, dog].

5. By reason of the foregoing, and as a proximate result thereof, plaintiff has sustained damages in the sum of $_____.

6. In doing the acts herein complained of defendant acted willfully, maliciously, and in complete disregard of humanity. By reason thereof, plaintiff is entitled to an award of exemplary damages in the amount of $_____;

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the value of the _____ [*e.g.*, dog] at the time of its death in the sum of $_____;

2. For exemplary damages;

3. For costs of suit herein incurred;

[4. For reasonable attorney's fees _____ (of $_____ *or* according to proof);] and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by an animal owner against one who willfully killed his or her animal. Plaintiff seeks compensatory [*see Civ. Code § 3333*; *see also Johnson v. McConnell (1889) 80 Cal. 545, 548-549, 22 P. 219* (dog is property and action may be brought for the malicious destruction or injury of it)] and exemplary [*Civ. Code § 3340*] damages for the killing. Counsel should note that, if the facts support an award of exemplary damages, an action in tort may also be maintainable, as for intentional infliction of emotional distress. For discussion and forms regarding such an action, see Ch. 362, *Mental Suffering and Emotional Distress* .

If the action is to recover damages to personal or real property resulting from trespassing on lands either under cultivation or intended or used for the raising of livestock, the plaintiff on prevailing in the action is entitled to

reasonable attorney's fees in addition to other costs, and in addition to any liability for damages imposed by law [*Code Civ. Proc. § 1021.9*]. An optional prayer for attorney's fees is provided in the form for requesting these fees.

[3] Cross Reference

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

For interrogatories for use in actions involving the killing of dogs, see Bender' s Forms of Discovery, *Animals* (Matthew Bender)

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3-23 California Forms of Pleading and Practice--Annotated § 23.132

§ 23.132 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Dog Killed While Worrying, Wounding, or Killing Other Domestic Animals [Civ. Code § 3341(2)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Dog Killed While Worrying, Wounding, or Killing Other Domestic Animals [Civ. Code § 3341(2)]

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that at the time and place alleged in plaintiff's complaint, defendant found plaintiff's dog _____ [worrying *or* wounding *or* killing] certain _____ [*describe animals enumerated in Civ. Code § 3341(2), e.g.,* sheep] that were not then on the premises of the dog's owner or possessor. _____ [At the time defendant found the dog engaged in this conduct, he/she killed it *or* Defendant immediately followed the dog and, without allowing it to escape or get out of his/her sight, killed it.]

[2] Use of Form

This form is an affirmative defense for use by the defendant in an action by the owner of a dog that defendant killed. Plaintiff seeks damages for the killing, but defendant asserts that the killing occurred while the dog was worrying, wounding, or killing other domestic animals not on plaintiff's property [*see Civ. Code § 3341(2)* (not limited to dogs); *see also Food & Agric. Code §§ 31102-31104, 31151-31153*]. For discussion of the scope of this defense, see *§ 23.18*.

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

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3-23 California Forms of Pleading and Practice--Annotated § 23.133

§ 23.133 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Animal Killed While Threatening Harm to Defendant or Third Person

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Animal Killed While Threatening Harm to Defendant or Third Person

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that at the time and place alleged in plaintiff's complaint, defendant knew that plaintiff's _____ [*describe animal*] would inflict serious harm on _____ [*identify person threatened*], because plaintiff's _____ [*describe animal*] _____ [was attacking *or* was, in the reasonable belief of defendant, about to attack] _____ [*identify person threatened*]. Defendant reasonably believed this harm could be prevented only by defendant's immediate destruction of plaintiff's _____ [*describe animal*]. Such destruction was reasonable in view of the gravity of the harm threatened.

[2] Use of Form

This form is an affirmative defense for use by the defendant in an action by the owner of an animal that defendant killed. Plaintiff seeks damages for the killing, but defendant asserts that the killing occurred for the purpose of defending himself or herself or a third person against harm threatened by the animal. A person is privileged to destroy an animal to defend oneself or a third person against harm threatened by animal [*Devincenzi v. Faulkner (1959) 174 Cal. App. 2d 250, 254-255, 344 P.2d 322* (dog; approving jury instruction based on Restatement of Torts, § 275, comment c)]:

- If the animal's actions led the person to know or reasonably believe that the animal would inflict such harm,

- The destruction was reasonable in view of the gravity of the harm threatened, and

- The person reasonably believed that the harm could be prevented only by the immediate destruction of the animal.

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

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§ 23.134 Complaint for Damages Based on Dog Unfit for Sale--By Purchaser Against Dog Breeder or Dealer [Health & Safety Code §§ 25989.555(b), 25995.75(b)]

[1] FORM Complaint for Damages Based on Dog Unfit for Sale--By Purchaser Against Dog Breeder or Dealer [Health & Safety Code §§ 25989.555(b), 25995.75(b)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	[Amount demanded _____
through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. [*Capacity and residence of defendant breeder or dealer. See § 23.120 [1], Paragraph 1.*]

[2. *Fictitious name allegation. See § 23.120 [1], Paragraph 2.*]

3. On or about _____ [*date*], plaintiff purchased from defendant _____ [breeder *or* dealer] a dog, purportedly free from any known disease, illness, or congenital or hereditary condition that adversely affected the dog's health. At the time of purchase, defendant provided a written disclosure that included a statement that

the dog was free from any known disease, illness, or congenital or hereditary condition that adversely affected the dog's health. Plaintiff took possession of the dog on or about _____ [*date*].

[*EITHER*]

4. The dog was unfit for sale according to _____ [*name*], a licensed veterinarian, in that, within 15 days of when plaintiff took possession of the dog, the dog suffered from a disease or illness that existed in the dog on or before delivery of the dog to plaintiff. The written statement of _____ [*name of licensed veterinarian*] is attached hereto as Exhibit A and made a part hereof.

[*OR*]

4. The dog was unfit for sale according to _____ [*name*], a licensed veterinarian, in that, within one year after plaintiff took possession of the dog, the dog suffered from a congenital or hereditary condition that _____ [adversely affects its health *or* requires, or is likely in the future to require, hospitalization or nonelective surgical procedures], and which condition was diagnosed to have existed in the dog on or before delivery of the dog to plaintiff. The written statement of _____ [*name of licensed veterinarian*] is attached hereto as Exhibit A and made a part hereof.

[*INCLUDE, if dog died*]

[5. The dog died due to the _____ (disease *or* illness *or* congenital and/or hereditary condition] mentioned above, according to the conclusions of _____ (*name of licensed veterinarian*) whose written statement is attached hereto as Exhibit A and made a part hereof.]

[*CONTINUE*]

6. Plaintiff requested, and defendant refused, _____ [(to accept return of the dog and) to provide a refund of the original purchase price, plus sales tax, and reimbursement for plaintiff's reasonable veterinary fees for diagnosis and treatment *or* to replace the dog with a dog of plaintiff's choice of equivalent value, and to provide reimbursement for plaintiff's reasonable veterinary fees for diagnosis and treatment *or* reimbursement of plaintiff's reasonable veterinary fees incurred for diagnosis and treatment].

7. Plaintiff has substantially complied with his/her duties prescribed by Health & Safety Code Section _____ [25989.540 *or* 25995.72].

8. Plaintiff and defendant were unable to reach an agreement within 10 days of defendant's receipt of the written statement of _____ [*name*], a veterinarian licensed in this state, as to the dog's condition as described above.

9. Plaintiff has been damaged in the amount of $_____ [*original purchase price of dog plus sales tax plus reasonable veterinary fees for treatment and diagnosis, not to exceed the original purchase price plus sales tax, or if plaintiff has accepted a replacement dog of equivalent value, only reasonable veterinary fees for treatment and diagnosis, not to exceed the original purchase price plus sales tax or, if the dog has died, reasonable veterinary fees for treatment and diagnosis, not to exceed 150 percent of the original purchase price plus sales tax*].

[10. Defendant has acted in bad faith in denying the remedy requested by plaintiff in that _____ [*specify acts of bad faith*]. Therefore, plaintiff is entitled to recover reasonable attorney's fees.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For compensatory damages in the amount of $_____;

[2. For reasonable attorney's fees;]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by a dog owner against the breeder or dealer who sold plaintiff a dog that was unfit for sale as defined in *Health & Safety Code § 25989.530* or *25995.70* [*see Health & Safety Code §§ 25989.555(b), 25995.75(b)*]. Plaintiff seeks compensatory damages [*see Health & Safety Code §§ 25989.530, 25995.70*] for the ill or dead dog. For further discussion of dog breeders and dealers, see *§ 23.14*.

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

[3] Allegations

The complaint in [1], *above*, alleges the following:

- Plaintiff's purchase of the dog from defendant, and defendant's disclosures at time of sale (Paragraph 3) [*Health & Safety Code §§ 25989.505, 25995.3*].

- The dog's unfitness for sale within 15 days of purchase pursuant to the diagnosis of a licensed veterinarian (alternative Paragraphs 4) [*Health & Safety Code §§ 25989.530(a), 25995.70(a)*].

- If applicable, the dog's death because of its health or condition within 15 days of purchase (optional Paragraph 5) [*Health & Safety Code §§ 25989.530(b), 25995.70(b)*].

- Plaintiff's election of a remedy (Paragraph 6) [*Health & Safety Code §§ 25989.530, 25995.70*].

- Plaintiff's compliance with statutory requirements to obtain relief (Paragraph 7) [*Health & Safety*

Code §§ 25989.540, 25995.72].

- The inability of plaintiff and defendant to resolve the dispute (Paragraph 8) [*Health & Safety Code §§ 25989.555(b), 25995.75(b)*].

- Plaintiff's damages (Paragraph 9) [*Health & Safety Code §§ 25989.530, 25989.535(c), 25995.70, 25995.71(c)*].

- Plaintiff's claim for attorney's fees based on defendant's bad faith conduct (Paragraph 10) [*Health & Safety Code §§ 25989.555(c), 25995.75(c)*].

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[Reserved]

§§ 23.135[Reserved]

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§ 23.140 Complaint for Damages Based on Strict Liability--By Injured Person Against Animal Owner or Keeper--Person Injured by Wild Animal

[1] FORM Complaint for Damages Based on Strict Liability--By Injured Person Against Animal Owner or Keeper--Person Injured by Wild Animal
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Strict Liability)
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 23.120 [1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

3. At all times herein mentioned, defendant was _____ [the owner *or* the keeper] of a certain wild animal, a _____ [*animal, e.g.,* chimpanzee] [kept on his/her premises at _____ (*address*), _____ (*city*), California].

4. At all times herein mentioned, the _____ [*e.g.*, chimpanzee] was of a vicious disposition and possessed dangerous propensities, and was likely to attack and injure human beings. The defendant was at all times aware of these traits.

5. On or about _____ [*date*], plaintiff was _____ [*e.g.*, on defendant's premises]. At this time and place plaintiff was suddenly attacked by the _____ [*e.g.*, chimpanzee], which _____ [*state*, *e.g.*, clawed, bit, and cuffed] plaintiff and knocked him/her down.

6. As a proximate result of the actions of defendant's _____ [*e.g.*, chimpanzee], plaintiff sustained _____ [*describe injuries*], all to his damage.

7. As a further proximate result of the actions of defendant's _____ [*e.g.*, chimpanzee] plaintiff was required to and did employ physicians and surgeons to examine, treat, and care for him, and incurred additional medical expenses for hospital bills [and other incidental medical expenses].

Plaintiff is informed and believes, and on such information and belief alleges, that he/she will incur some additional medical expenses.

8. As a further proximate result of the actions of defendant's _____ [*e.g.*, chimpanzee], plaintiff has suffered a loss of income and earnings, and his/her earning ability is, and will remain, impaired and diminished by reason thereof, and he/she will continue to suffer a further loss of earnings and income.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages according to proof.

2. For medical [and incidental] expenses according to proof.

3. For damages for loss of income and earnings and impairment of earning ability according to proof.

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action against an owner or keeper of a wild animal by one who has been injured

by the animal. A wild animal is presumed vicious and its owner is an insurer against its acts to anyone who is injured by it [*Baugh v. Beatty (1949) 91 Cal. App. 2d 786, 791, 205 P.2d 671* (chimpanzee); *see also Opelt v. Al. G. Barnes Co. (1919) 41 Cal. App. 776, 778-779, 183 P. 241* (leopard)].

For further discussion and cross references relating to complaints generally, see *§ 23.120* [2] et seq. For discussion of strict liability for injuries from animals, see *§ 23.33*.

[3] Allegations

The complaint in [1], *above,* alleges the following [*see Baugh v. Beatty (1949) 91 Cal. App. 2d 786, 791, 205 P.2d 671*]:

- That defendant owned or was the keeper of the animal (Paragraph 3).
- That the animal was wild (Paragraph 4).
- That the animal caused personal injury to plaintiff (Paragraph 5).
- That plaintiff sustained damages (Paragraphs 6-8).

The superior court has jurisdiction of the action unless it is a limited civil case (amount in controversy, exclusive of interest, is $25,000 or less) [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

[4] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see *Ch. 177, Damages, § 177.40* et seq., and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[5] Cross References

For alternative forms of allegations of damages and personal injuries, see Ch. 177, *Damages* , and Ch. 380, *Negligence* , respectively

For forms of interrogatories for use in actions involving attacks by wild animals, see Bender' s Forms of Discovery, *Animals*, Form 5 (Matthew Bender)

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3-23 California Forms of Pleading and Practice--Annotated § 23.141

§ 23.141 Complaint for Damages Based on Strict Liability and Negligence [Civ. Code § 1714(a)]--By Injured Person Against Animal Owner or Keeper--Person Injured by Animal With Vicious or Dangerous Propensities

[1] FORM Complaint for Damages Based on Strict Liability and Negligence [Civ. Code § 1714(a)]--By Injured Person Against Animal Owner or Keeper--Person Injured by Animal With Vicious or Dangerous Propensities
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Strict Liability)
_____ [*name*], [and DOES I	)	(Negligence)
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

FIRST COUNT
(Strict Liability)

1. [*Capacity and residence of defendant. See § 23.120 [1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

3. At all times herein mentioned, defendant was the _____ [owner *or* keeper] of a certain domestic animal, namely, a _____ [*animal, e.g.,* horse].

4. The _____ [*e.g.,* horse] was possessed of _____ [vicious *or* dangerous] propensities and was inclined _____ [*describe e.g.,* to kick persons in its vicinity].

5. Defendant knew of the _____ [viciousness *or* dangerousness] of the _____ [*e.g.,* horse] and of its inclination, or reasonably should have known these facts.

6. On or about _____ [*date*], plaintiff was _____ [*location, e.g.,* walking on and along _____ (*name of road*) in _____ County]. Defendant's _____ [*e.g.,* horse], at that time and place, and as a proximate result of the propensity mentioned above _____ [*describe animal's actions e.g.,* kicked plaintiff].

7-9. [*Injuries and damages. See § 23.140 [1], Paragraphs 6-8.*]

SECOND COUNT
(Negligence)

1. Plaintiff incorporates Paragraphs 1-5 of his/her First Count.

2. Defendant negligently and carelessly permitted the _____ [*e.g.,* horse] to go _____ [*location, e.g.,* on the public roads in _____ County]. Defendant knew that persons were likely to be in the vicinity of the _____ [*e.g.,* horse] while it was on these roads.

3. On or about _____ [*date*], plaintiff was _____ [*e.g.,* walking on and along _____ (*name of road*) in _____ County]. Defendant's _____ [*e.g.,* horse], at this time and place and as a proximate result of the aforementioned propensity, _____ [*e.g.,* kicked plaintiff].

4. As a proximate result of the negligence and carelessness of defendant as alleged above, plaintiff sustained _____ [*describe injuries*], all to his/her damage.

5. As a further proximate result of the negligence of defendant, as alleged above, and of the injuries, plaintiff was required to and did employ physicians and surgeons to examine, treat, and care for him/her, and incurred additional medical expenses for hospital bills [and other incidental medical expenses].

Plaintiff is informed and believes, and on such information and belief alleges, that he/she will incur some additional medical expenses.

6. As a further proximate result of the defendant's negligence and of the injuries alleged above, plaintiff has suffered a loss of income and earnings, and his/her earning ability is, and will remain, impaired and diminished by reason thereof, and he/she will continue to suffer a further loss of earnings and income.

[*Prayer. See § 23.140[1].*]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by a person injured by a domestic animal with vicious or dangerous propensities against the owner or keeper.

Because the defendant is liable under a strict liability theory, his or her negligence is immaterial, but plaintiff may wish to allege it nevertheless. The second count is included for this purpose.

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

[3] Allegations

The complaint in [1], *above,* alleges in the first count (strict liability):

- That defendant is the owner or keeper of a domestic animal (Paragraph 3).
- That the animal had vicious or dangerous propensities (Paragraph 4).
- That defendant knew or should have known of the propensities (Paragraph 5).
- Injury to plaintiff and damages (Paragraphs 7-9) [*see Hillman v. Garcia-Ruby (1955) 44 Cal. 2d 625, 626, 283 P.2d 1033* (dog); *Talizin v. Oak Creek Riding Club (1959) 176 Cal. App. 2d 429, 437, 1 Cal. Rptr. 514* (horse jumping out of ring during horse show); *Northon v. Schultz (1955) 130 Cal. App. 2d 488, 489, 279 P.2d 103* (dog jumping on people); *Heath v. Fruzia (1942) 50 Cal. App. 2d 598, 600, 123 P.2d 560* (horse kicking people)].

[4] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see *Ch. 177, Damages, § 177.40* et seq., and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

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3-23 California Forms of Pleading and Practice--Annotated § 23.142

§ 23.142 Complaint for Damages Based on Strict Liability and Negligence [Civ. Code § 1714(a)]--By Injured Person Against Owner of Vicious Dog--Person Injured by Dog on Owner's Premises Where There Was No Warning of Danger

[1] FORM Complaint for Damages Based on Strict Liability and Negligence [Civ. Code § 1714(a)]--By Injured Person Against Owner of Vicious Dog--Person Injured by Dog on Owner's Premises Where There Was No Warning of Danger

[*Caption. See § 23.141[1]*.]

Plaintiff alleges:

FIRST COUNT
(Strict Liability)

1. [*Capacity and residence of defendant. See § 23.120 [1], Paragraph 1*.]

2. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2*.]

3. At all times herein mentioned defendant was, and still is, the owner of a certain _____ [*breed*] dog, which caused the injuries and damage complained of below. This dog had a vicious nature, disposition, and propensity, which was known or should have been known by defendant.

4. On or about _____ [*date*], at about _____ [*time*], the dog was in the rear of the premises owned by defendant. The dog was on a leash at this time and place, but was not under any form of restraint or control of a competent person. At this time and place, there were certain trash cans in the rear of the premises that concealed the dog. The area is open and exposed and is connected by two alleys and is heavily traveled by pedestrians

and business people. At this time and place, plaintiff proceeded to put a piece of waste paper in the trash can and, on moving away therefrom, was suddenly and with no warning viciously attacked by the dog. The dog knocked him/her to the ground and severely bit him/her about the legs.

5-7. [*Injuries and damages. See § 23.140 [1], Paragraphs 6-8.*]

SECOND COUNT
(Negligence)

1. Plaintiff incorporates herein Paragraphs 1-4 of his/her First Count.

2. Defendant negligently failed to have the dog under restraint or to take any other precautions to prevent the dog from attacking plaintiff or other persons. Defendant was also negligent in that he/she failed to post a sign or take other measures to warn of the presence of a vicious dog.

3-5. [*Injuries and damages. See § 23.141[1], Second Count, Paragraphs 3-5.*]

[*Prayer. See § 23.140[1].*]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by a person injured by a dog against the dog's owner [*see Radoff v. Hunter (1958) 158 Cal. App. 2d 770, 773-774, 323 P.2d 202* (evidence of dog's vicious propoensity and owner's knowlegde of it)]. Plaintiff seeks damages based on strict liability and negligence, for his/her or her injuries. For discussion of strict liability for dog bites, see *§ 23.33* [5]; for discussion of negligence liability, see *§ 23.31*. For further discussion of personal injury complaints and complaints relating to vicious animals, see *§§ 23.140*[2] et seq. and 23.141[2] et seq.

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

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3-23 California Forms of Pleading and Practice--Annotated § 23.143

§ 23.143 Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Injured Person Against Animal Owner or Keeper--Person Injured by Animal Known to Be Prone to Harmful Conduct

[1] FORM Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Injured Person Against Animal Owner or Keeper--Person Injured by Animal Known to Be Prone to Harmful Conduct
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	[Amount demanded _____
through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times mentioned herein was, a resident of _____ County, California.

2. At all times mentioned herein, defendant was the [*owner* or *keeper*] of a certain _____ [*specify breed, e.g.,* American Staffordshire terrier] dog, which caused the injuries and damages hereinafter complained of.

3. The dog posed a risk of harm to others because _____ [*specify facts that support allegation, e.g.,*

he/she had a habit of jumping on people and knocking them down].

4. Defendant knew or reasonably should have known that the dog posed a risk of harm.

5. Defendant did not exercise reasonable care to avert that risk of harm, because _____ [*specify facts that support allegation, e.g.,* the defendant kept the dog specified in Paragraph 2 on a leash that was long enough to give him/her access to the entire front yard and the driveway of defendant's house and failed to post any signs warning of the dog's presence].

6. On _____ [*date*], plaintiff was _____ [*set forth circumstances, e.g.,* walking up plaintiff's driveway towards defendant's house when the dog specified in Paragraph 2 ran toward plaintiff, jumped on plaintiff, and knocked plaintiff to the ground].

7. [*Injuries and damages. See § 23.141[1], Paragraphs 3-5.*]

[*Prayer. See § 23.140[1].*]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use to obtain damages from a person who owns or keeps a dog prone to harmful behavior, who has not adequately controlled the dog, and who thereby has failed to take reasonable care to prevent that harm. It differs from complaints arising from a dog bite, which are based on the strict liability of the dog's owner or keeper and therefore need not allege any lack of reasonable care in maintaining the dog (merely owning or keeping the dog creates the liability), but which must allege the dog's vicious nature or propensity and the defendant's knowledge of that nature or propensity [*see, e.g., § 23.142* [1]. Rather, this complaint need not allege any vicious propensity, but must allege the defendant's knowledge that the dog was prone to behavior that (despite being normal for dogs with no vicious propensities) could foreseeably harm people, and the defendant's failure to exercise reasonable care to avoid that harm [*Drake v. Dean (1993) 15 Cal. App. 4th 915, 931-932, 19 Cal. Rptr. 2d 325* (rejecting dicta to contrary in *Hagen v. Laursen (1953) 121 Cal App. 2d 379, 381-382, 263 P.2d 489*)].

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3-23 California Forms of Pleading and Practice--Annotated § 23.144

§ 23.144 Complaint for Damages Based on Strict Liability--By Spectator at Riding Exhibition Against Owner of Horse--Spectator Injured by Horse

[1] FORM Complaint for Damages Based on Strict Liability--By Spectator at Riding Exhibition Against Owner of Horse--Spectator Injured by Horse

[*Caption. See § 23.140[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 23.120 [1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

3. At all times herein mentioned, defendant was the owner of a horse, _____ [*name of horse*].

4. The horse was possessed of _____ [dangerous *or* vicious] propensities, in that the horse became at many times uncontrollable and unmanageable. The defendant knew [, or should have known,] of these traits at all times herein mentioned.

5. The defendant, though he/she knew [, or should have known,] of the _____ [dangerous *or* vicious] propensities, entered the horse in an exhibition for the purpose of _____ [*state, e.g.,* displaying the horse's talent and proficiency in jumping hurdles]. The exhibition took place on or about _____ [*date*], at the exhibition pavilion of _____ [*name*], located in _____ [*city*], _____ County, California.

6. Plaintiff, on or about _____ [*date*], was a spectator at this exhibition and, as such, _____ [*state, e.g.,* stood adjacent to the gate which served as the entrance to the pavilion ring].

7. At this time and place, the horse, during the course of the exhibition, demonstrated its _____ [dangerous *or* vicious] propensities as alleged above, in that it _____ [*state, e.g.,* shied and desisted from jumping a hurdle in the pavilion and thereon bolted and ran away with the rider. The horse jumped over the gate serving as the entrance to the pavilion ring and ran into, struck, and severely injured plaintiff, who was standing adjacent to the gate].

8-10. [*Injuries and damages. See § 23.140[1], Paragraphs 6-8.*]

[*Prayer. See § 23.140[1].*]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by a spectator at a riding exhibition against the owner of a horse. Plaintiff seeks damages, based on strict liability, for injuries he or she suffered when struck by the horse at the exhibition [*see Talizin v. Oak Creek Riding Club (1959) 176 Cal. App. 2d 429, 437, 1 Cal. Rptr. 514*]. For discussion of strict liability for injuries by animals, see *§ 23.33*. For further discussion of personal injury complaints and complaints relating to vicious animals, see *§§ 23.140*[2] et seq. and 23.141[2] et seq.

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

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3-23 California Forms of Pleading and Practice--Annotated § 23.145

§ 23.145 Complaint for Compensatory Damages Based on Negligence [Civ. Code § 1714(a)], and for Compensatory [Civ. Code § 1709] and Exemplary and Punitive Damages Based on Fraud [Civ. Code § 1710]--By Bailee of Horse Against Bailor of Horse--Bailee Thrown by Horse

[1] FORM Complaint for Compensatory Damages Based on Negligence [Civ. Code § 1714(a)], and for Compensatory [Civ. Code § 1709] and Exemplary and Punitive Damages Based on Fraud [Civ. Code § 1710]--By Bailee of Horse Against Bailor of Horse--Bailee Thrown by Horse

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Negligence)
_____ [*name*], [and DOES I	)	(Fraud)
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

FIRST COUNT
(Negligence)

1. [*Capacity and residence of defendant. See § 23.120 [1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

3. At all times mentioned herein, defendant was the owner and proprietor of a riding stable, _____ [*name*], and engaged in the business of furnishing horses for hire to members of the general public.

4. At all times mentioned herein, plaintiff was an unskilled rider incapable of riding any horse other than a gentle and dependable horse, which fact was well known to defendant.

5. On or about _____ [*date*], plaintiff requested defendant to furnish him/her with a horse suitable for him/her to ride.

6. Defendant thereon negligently furnished to plaintiff a horse for hire which had a _____ [dangerous *or* vicious] propensity for _____ [*state, e.g.,* plunging, lunging, rearing, jumping, shying, and bolting] and which was entirely unsuitable for plaintiff to ride. Defendant knew or should have known of such _____ [dangerous *or* vicious] propensity and that the horse was unsuitable for plaintiff, as an inexperienced equestrian, to ride and yet he/she negligently furnished such horse to plaintiff without warning plaintiff of such propensity.

7. On the aforementioned date, plaintiff took the horse out and rode it on a nearby trail in _____ [*city*], _____ County, California, where defendant knew [, or should have known,] plaintiff would ride. While plaintiff was riding, the horse _____ [*state, e.g.,* ignored plaintiff's rein directions, veered, and turned toward an embankment on the side of the trail. The horse then proceeded to shy, rear, plunge, lunge, jump, and bolt in such a manner that plaintiff was violently thrown to the ground].

8. [*Injuries and damages. See § 23.141 [1], Second Count, Paragraphs 3-5.*]

SECOND COUNT
(Fraud)

1. Plaintiff hereby incorporates herein Paragraphs 1-3, 7 of his/her First Count.

2. Defendant thereon produced a horse and, to induce plaintiff to hire it, stated to plaintiff that the animal was suitable for him/her to ride. Defendant then well knew that the horse had previously demonstrated a _____ [dangerous *or* vicious] propensity for _____ [*state, e.g.,* plunging, lunging, rearing, jumping, shying, and bolting] and that the horse, because of these traits and disposition, was unsafe for an unskilled rider such as plaintiff. Defendant, in falsely representing to plaintiff that the horse was suitable for him/her to ride, intended that plaintiff rely on the representation by hiring and riding the horse and thereby patronizing defendant's riding academy and not a competitive riding academy.

3. Plaintiff was unaware of the horse's _____ [dangerous *or* vicious] propensities and accepted the animal in justifiable reliance on defendant's representation that the horse was one suitable for him/her to ride. Had plaintiff known the true facts about the horse, he/she would not have hired the animal to ride.

On the aforementioned date, plaintiff took the horse out and rode it on a nearby trail in _____ [*city*], California, where defendant knew [, or should have known], plaintiff would ride. While plaintiff was riding, the horse ignored plaintiff's rein directions, veered, and turned toward an embankment on the side of the trail. The horse then proceeded to shy, rear, plunge, lunge, jump, and bolt in such a manner that plaintiff was violently thrown to the ground.

4. Defendant did the things herein alleged with intent to defraud plaintiff. Plaintiff therefore is entitled to exemplary and punitive damages.

5. By reason of the facts alleged, plaintiff has sustained _____ [*describe injuries*].

6. By reason of the facts alleged, plaintiff was required to and did employ physicians and surgeons to examine, treat, and care for him/her, and incurred additional medical expenses for hospital bills [and other incidental medical expenses].

Plaintiff is informed and believes, and thereon alleges, that he/she will incur some additional medical expenses.

7. By reason of the facts alleged, plaintiff has suffered a loss of income and earnings, and his/her earning ability is, and will remain, impaired and diminished by reason thereof, and he/she will continue to suffer a further loss of earnings and income.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages according to proof.

2. For medical [and incidental] expenses according to proof.

3. For damages for loss of income and earnings and impairment of earning ability according to proof.

4. For exemplary and punitive damages.

5. For costs of suit herein incurred.

6. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by a bailee of a horse against the animal's bailor. Plaintiff seeks damages for injuries he or she suffered when he or she was thrown by the horse. The complaint sets forth two theories of recovery: negligence and fraud [*see Palmquist v. Mercer (1954) 43 Cal. 2d 92, 99, 272 P.2d 26* ; *Estes v. Smith (1955) 132 Cal. App. 2d 529, 533, 282 P.2d 534* ; *see also Bocker v. Miller (1963) 213 Cal. App. 2d 345, 348, 28 Cal. Rptr. 818* (negligent failure to inform rider of dangerous propensity)].

A contract for the hire of a horse for riding contains an implied warranty to the rider that the stable keeper knows or has exercised reasonable care to determine the horse's habits and that the horse is safe and suitable for the purpose for which it is hired. Thus, if the stable keeper knows a horse is not tame and gentle and that the rider is inexperienced, a release will not necessarily protect the stable keeper [*see Palmquist v. Mercer (1954) 43 Cal. 2d 92, 98-99, 272 P.2d 26*].

[3] Allegations

The first count alleges negligence; for discussion of allegations for negligence, see *§ 23.141*[3].

The second count, for fraud, alleges [*see Civ. Code §§ 1710, 3294*; *Ach v. Finkelstein (1968) 264 Cal. App. 2d 667, 674, 70 Cal. Rptr. 472* (elements of fraud; sale of apartment building)]:

- A false representation or the concealment of a matter of fact, material to the transaction (Paragraph 2).
- Knowledge of the falsity (Paragraph 2).
- Intent to induce another into relying on the representation (Paragraph 2).
- Reliance by one who has a right to rely (Paragraph 3).
- Resulting damage (Paragraphs 5-7).
- That plaintiff is entitled to punitive damages (Paragraph 4).

PRACTICE TIP:

Insurance Considerations. Counsel should be aware that, if the defendant's main assets are insurance coverage, pleading that defendant's conduct was intended to injure plaintiff may preclude coverage under *Ins. Code § 533*. In such a case, it may well be prudent to be sure that the complaint alleges negligent conduct as an alternate basis of liability. *Practice Tip by Professor Neil Levy*

[4] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see *Ch. 177, Damages, § 177.40* et seq., and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[5] Cross References

For other forms of complaint involving being thrown from a horse, see *§§ 23.146, 23.147*

For an allegation of exemplary and punitive damages based on fraud, see Ch. 177, *Damages* .

For a general form of complaint for use in an action based on fraud, see Ch. 269, *Fraud and Deceit* .

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3-23 California Forms of Pleading and Practice--Annotated § 23.146

§ 23.146 Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Rider of Horse Against Owner and Custodian of Horse--Rider Thrown From Horse

[1] FORM Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Rider of Horse Against Owner and Custodian of Horse--Rider Thrown From Horse
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Negligence)
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. Defendants are, and at all times herein mentioned were, residents of _____ County, California [*or other capacity and residence of defendants*].

2. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

3. On or about _____ [*date*], defendant _____ [*name*] was the owner of a horse which was in the custody of defendant _____ [*name*]. The horse was _____ [*state,*

e.g., a blooded and spirited mare and had been in pasture several months prior to _____ [*date*], with the exception of three or four days immediately prior thereto]. Both defendants knew that the horse was _____ [*e.g.*, a blooded and spirited mare].

4. On or about _____ [*date*], defendant _____ [*name*], with the full authority and consent of defendant _____ [*name*], negligently and carelessly placed plaintiff on the horse and carelessly and negligently allowed plaintiff to ride the horse, on a trail in _____ County, California.

5. Plaintiff was an inexperienced horse rider and was not capable of managing, guiding, controlling, or directing a spirited horse, and defendants had knowledge of that fact.

6. As a proximate result of defendants' negligence and carelessness, plaintiff, while on the trail in _____ County, California, on or about _____ [*date*], was thrown from the horse to the ground with great force and violence.

7-9. [*Injuries and damages. See § 23.141 [1], Second Count, Paragraphs 3-5.*]

[*Prayer. See § 23.140 [1].*]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action based on negligence by a rider of horse against the owner and the custodian of the horse. Plaintiff seeks damages for injuries suffered when he or she was thrown from the horse. For discussion of negligence in the context of maintenmance of animals, see *§ 23.31*. For other forms of complaint based on being thrown from a horse, see *§§ 23.145*, *23.147*.

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

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3-23 California Forms of Pleading and Practice--Annotated § 23.147

§ 23.147 Complaint for Damages Based on Breach of Implied Warranty of Safety and Suitability--By Bailee Against Bailors of Horse--Bailee Thrown From Horse

[1] FORM Complaint for Damages Based on Breach of Implied Warranty of Safety and Suitability--By Bailee Against Bailors of Horse--Bailee Thrown From Horse
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Breach of Implied Warranty)
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

2. At all time herein mentioned, defendants were the owners and proprietors of a riding academy known as _____ [*name*], located in _____ [*city*], _____ County, California and were engaged in the business of furnishing horses for hire to members of the general public.

3. On or about _____ [*date*], plaintiff and defendants entered into _____ [an oral *or* a

written] contract of hire of a horse at the riding academy. Under this contract, defendants [impliedly] warranted that the horse had no defects or vicious habits which defendants knew about or by the exercise of proper care could know about and that, as far as they knew, or, by the exercise of proper care, could know, the horse was a gentle, dependable animal, safe and suitable for plaintiff to ride.

4. In truth and in fact, the horse was not dependable or gentle and was not safe and suitable for plaintiff to ride, and defendants knew, or by the exercise of proper care, could have known this at the time the contract was entered into. The horse had the defect and vicious habit of _____ [*e.g.*, bolting and rearing while it was being ridden]. Defendants thereby breached their [implied] warranty.

5. Plaintiff took the horse out on a nearby trail in _____ County, California. The horse thereon exhibited his/her defect and vicious habit of _____ [*e.g.*, bolting and rearing]. This caused plaintiff to be thrown to the ground and seriously injured.

6. As a proximate result of defendants' breach of their [implied] warranty of safety and suitability, plaintiff sustained _____ [*describe injuries*], all to his/her general damage.

7. As a further proximate result of defendants' breach of their [implied] warranty, plaintiff was required to and did employ physicians and surgeons to examine, treat, and care for him/her, and incurred additional medical expenses for hospital bills [and other incidental medical expenses].

Plaintiff is informed and believes, and thereon alleges, that he/she will incur some additional medical expenses.

8. As a further proximate result of defendants' breach of their [implied] warranty, plaintiff has suffered a loss of income and earnings, and his/her earning ability is, and will remain, impaired and diminished by reason thereof, and he/she will continue to suffer a further loss of earnings and income.

[*Prayer. See § 23.140[1].*]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by the bailee of a horse against the bailors of the horse. Plaintiff seeks damages for injuries he or she sustained when thrown from the horse, allegedly as a result of defendants' breach of their warranty, implied or express, that the horse had no defects or vicious habits which defendants knew about or, by the exercise of proper care, could know about [*see Palmquist v. Mercer (1954) 43 Cal. 2d 92, 98-99, 272 P.2d 26* (implied warranty); *Dam v. Lake Aliso Riding School (1936) 6 Cal. 2d 395, 399-400, 57 P.2d 1315*]. For other forms of complaint based on being thrown from a horse, see *§§ 23.145, 23.147*.

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

[3] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see *Ch. 177, Damages, § 177.40* et seq., and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

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3-23 California Forms of Pleading and Practice--Annotated § 23.148

§ 23.148 Allegation--Horse Inclined to Kick

[1] FORM Allegation--Horse Inclined to Kick

The horse had a _____ [dangerous *or* vicious] propensity to kick at both human beings and other horses, thereby creating a hazard to the riders of any horses which came near this horse. Defendant knew [or should have known] of this propensity, but failed to warn plaintiff.

[2] Use of Form

The allegation in [1], *above,* is for use in a complaint in an action by one injured by a horse against the horse's owner or keeper. The allegation is used to allege the horse's dangerous or vicious propensity. Kicking at human beings and other horses is a dangerous or vicious propensity in horse [*Heath v. Fruzia (1942) 50 Cal. App. 2d 598, 600-601, 123 P.2d 560*]. It may be used in conjunction with the complaints in §§ 23.141, 23.143-23.147.

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3-23 California Forms of Pleading and Practice--Annotated § 23.149

§ 23.149 Allegation--Horse's Inclination to Stumble and Fall

[1] FORM Allegation--Horse's Inclination to Stumble and Fall

The horse had a dangerous propensity to stumble and fall when being ridden, and was unsafe and unfit to be ridden, all of which was known [, or should have been known,] to defendant. Defendant failed to warn plaintiff of this propensity.

[2] Use of Form

The allegation in [1], *above,* is for use in a complaint in an action by a bailee of a horse against the bailor of the horse for injuries caused to plaintiff by the horse. The allegation is used to allege the horse's dangerous or vicious propensity. It may be used in conjunction with the complaints in §§ 23.141, 23.143-23.147.

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3-23 California Forms of Pleading and Practice--Annotated § 23.150

§ 23.150 Allegation--Horse Inclined to Bolt

[1] FORM Allegation--Horse Inclined to Bolt

The horse had a dangerous propensity to bolt and attempt to unseat its rider. This propensity constituted a peril to anyone riding the horse who was unaware of it. Defendant knew of the propensity [, or should have known of it], but he/she failed to warn plaintiff of the danger.

[2] Use of Form

The allegation in [1], *above,* is for use in a complaint in an action by a bailee of a horse against the bailor of the horse for damages for injuries caused to plaintiff by the horse. The allegation is used to allege the horses dangerous or vicious propensity. It may be used in conjunction with the complaints in § 23.141, 23.143-23.147.

Bolting is a dangerous propensity [*Palmquist v. Mercer (1954) 43 Cal. 2d 92, 99, 272 P.2d 26*]. However, the fact that a horse has only "spooked" and thrown its rider once before does not establish a dangerous propensity to do so [*Harrold v. Rolling J Ranch (1993) 19 Cal. App. 4th 578, 588, 23 Cal. Rptr. 2d 671*].

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

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3-23 California Forms of Pleading and Practice--Annotated § 23.151

§ 23.151 Allegation--Horse High-Spirited and Inclined to Run Away

[1] FORM Allegation--Horse High-Spirited and Inclined to Run Away

The horse had a dangerous propensity to be high spirited and inclined to run away. This propensity created a danger to unskilled riders, and defendant knew that plaintiff was not a skilled rider and that plaintiff was unaware of the horse's propensity. Defendant knew [, or should have known,] of the propensity but failed to warn plaintiff thereof.

[2] Use of Form

The allegation in [1], *above,* is for use in a complaint in an action by a bailee of a horse against the bailor of the horse for damages for injuries caused to plaintiff by the horse. The allegation is used to allege the horses dangerous or vicious propensity. Restiveness and high spiritedness is a vicious propensity in horse. [*Barrett v. Metropolitan Contracting Co. (1916) 172 Cal. 116, 118-119, 155 P. 645*]. It may be used in conjunction with the complaints in §§ 23.141, 23.143-23.147.

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3-23 California Forms of Pleading and Practice--Annotated § 23.152

§ 23.152 Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Minor Against Amusement Park Owner and Operator and His/Her Agents [Civ. Code §§ 2338, 2343]--Minor Thrown From Park's Pony

[1] FORM Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Minor Against Amusement Park Owner and Operator and His/Her Agents [Civ. Code §§ 2338, 2343]--Minor Thrown From Park's Pony
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], a minor, by	)	
_____ [*name*], his/her Guardian	)	NO. _____
ad Litem,	)	COMPLAINT FOR DAMAGES
Plaintiff,	)	(Negligence)
vs.	)	[Amount demanded _____
_____ [*name*], [and DOES I	)	(exceeds *or* does not exceed) $10,000]
through _____,]	)	[LIMITED CIVIL CASE]
Defendant(s).		

Plaintiff _____ [*name*], a minor, through his/her guardian ad litem, alleges:

1. Plaintiff _____ [*name*] is, and at all times herein mentioned was, a minor of the age of _____ years. On _____ [*date*], _____ [*name*] was, by order duly made and entered by this court, appointed guardian ad litem of plaintiff _____ [*minor*] for the purpose of bringing this action.

2. Defendants are, and at all time herein mentioned were, residents of _____ County, California [*or*

allege other capacity and residence of defendants].

3. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

4. At all times herein mentioned, defendant _____ [*name*] was the owner and operator of a certain amusement park in _____ [*city*], California.

5. At all times herein mentioned, defendants _____ [*names*] were the agents, servants, and employees of defendant _____ [*name*], and, in doing the things hereinafter alleged, were acting within the course and scope of such agency and employment.

6. On or about _____ [*date*], defendants, and each of them, maintained in the amusement park a concession which, for a consideration, was offered to children of the general public for the purpose of riding a pony around a circular track. On or about _____ [*date*], plaintiff accepted defendants' invitation, paid the consideration required, mounted the pony provided by defendants, and began to ride around the track.

7. Defendants, and each of them, so negligently and carelessly selected the pony which was provided for plaintiff's use, and so negligently operated and maintained the circular track, and so negligently and carelessly supervised the riding of the pony, that this pony pulled out of plaintiff's control, throwing plaintiff heavily to the ground, and causing plaintiff the injuries complained of below.

8. As a proximate result of the negligence and carelessness of defendants, and each of them, plaintiff was injured in his/her health, strength, and activity, sustained bodily injury, and shock and injury to his/her nervous system, these injuries have caused, and continue to cause, plaintiff great mental and physical pain and suffering. Plaintiff [is informed and believes and thereon] alleges that these injuries will result in his/her permanent disability, all to his/her damage.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages according to proof.

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by a minor against an amusement park owner and operator and his or her agents. Plaintiff seeks damages for injuries he or she suffered when plaintiff was thrown from the amusement park's

pony as a result of defendants' negligence. If plaintiff's parents seek recovery of medical expenses or other losses sustained by them, as opposed to losses sustained by the minor, they may join as plaintiffs, in which case the complaint should be modified accordingly and set forth a second cause of action on behalf of the parents.

For further discussion of complaints based on providing an inappropriate horse for riding, see *§ 23.145*[2] et seq.

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

[3] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see *Ch. 177, Damages, § 177.40* et seq., and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[4] Cross References

For forms relating to petitions for appointment of guardians ad litem for minors in civil actions, see Ch. 291, *Guardians ad Litem* .

See generally Ch. 547, *Theaters, Shows, and Amusement Places* .

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3-23 California Forms of Pleading and Practice--Annotated § 23.153

§ 23.153 Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Injured Person Against Owner of Animal--Collision on Highway With Inadequately Controlled Animal

[1] FORM Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Injured Person Against Owner of Animal--Collision on Highway With Inadequately Controlled Animal

[*Caption. See § 23.120[1].*]

Plaintiff alleges:

1. At all times herein mentioned _____ [*name of road, highway, etc.*] was, and is, a public thoroughfare in _____ County, California.

2. At all times herein mentioned, defendant was the _____ [owner *or* occupant] of certain real property that fronted for _____ [*e.g.*, one-half mile] on the _____ [*e.g.*, south] side of _____ [*name of road, highway, etc.*] in _____ County. Defendant kept _____ [*e.g.*, cattle] on his/her/its property, including the animal hereinafter referred to.

3. At all times herein mentioned, plaintiff was the owner of a _____ [*describe vehicle*] _____ [*e.g.*, California] license number _____.

4. On or about _____ [*date*], at or about _____ [*time*], plaintiff was driving his/her _____ [*e.g.*, automobile] in a _____ [*e.g.*, westerly] direction on _____ [*name of road, highway, etc.*] where it passes alongside defendant's property.

5. At the above-mentioned time and place, defendant so negligently owned, and controlled his/her/its _____ [*e.g.*, cattle] as to allow one of them to enter on _____ [*name of road, highway, etc.*] and _____ [*e.g.*, lie down].

6. As a direct and legal result of defendant's negligence, plaintiff's vehicle was caused to collide with the animal [lying] in the _____ [road *or* highway *or other*].

7. As a direct and legal result of the defendant's negligence, plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, emotional, and nervous pain and suffering. [Plaintiff is informed and believes and on this information and belief alleges that these injuries will result in permanent disability to him/her.] As a result of these injuries, plaintiff has suffered general damages.

8. As a direct and legal result of defendant's negligence, plaintiff has incurred [, and will continue to incur,] medical and related expenses. Plaintiff does not know at this time the exact amount of expenses that have been incurred and that will be incurred in the future. When plaintiff has ascertained this amount, plaintiff will seek leave of court, orally or in writing, to amend this complaint to insert this amount.

9. As a direct and legal result of defendant's negligence, plaintiff's earning capacity has been and will be impaired, in an amount according to proof.

10. As a direct and legal result of defendant's negligence, plaintiff's _____ [*describe personal property, e.g.,* automobile] was [damaged *or describe damage, e.g.,* destroyed beyond repair, all to plaintiff's damage in the sum of $_____]. [*If property was not destroyed, add:* Plaintiff _____ (has expended *or* must expend) $_____ for repair of the damage to _____ (*describe personal property, e.g.,* automobile), which is a reasonable sum for this repair.] [*For either destroyed or damaged property, add:* Plaintiff lost the use of _____ (*describe personal property*) for a period of _____ (*specify length of time*) while it was being _____ (repaired *or* replaced), to plaintiff's damage in the sum of $_____.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

4. For damage to personal property _____ [according to proof *or* in the sum of $_____];

5. For costs of suit incurred; and

6. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

This form is a complaint for use in an action by one injured in a collision with an animal against the owner of the animal. The plaintiff seeks damages for injuries based on the owner's negligent failure to adequately control the animal.

A livestock owner who negligently fails to keep stock from straying on highway is liable to one injured in collision with stock even at point where highway unfenced [*Shively v. Dye Creek Cattle Co. (1994) 29 Cal. App. 4th 1620, 1629-1631, 35 Cal. Rptr. 2d 238* ; *Summers v. Parker (1953) 119 Cal. App. 2d 214, 216, 259 P.2d 59* ; *Jackson v. Hardy (1945) 70 Cal. App. 2d 6, 14, 160 P.2d 161*]. However, the fact of a highway collision between a vehicle and an animal cannot give rise to a presumption or inference of negligence on the part of the livestock owner [*Food & Agric. Code § 16904*]. This precludes the use of res ipsa loquitur to establish negligence [*Pepper v. Bishop (1961) 194 Cal. App. 2d 731, 734, 15 Cal. Rptr. 346* (applying former Ag C § 423); *see also Burnett v. Reyes (1953) 118 Cal. App. 2d Supp. 878, 880 , 256 P.2d 91*]. For further discussion, see *§ 23.32*.

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

[3] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see *Ch. 177, Damages, § 177.40*, and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[4] Cross References

See generally *Ch. 82, Automobiles: Causes of Action, § 82.10*, and Ch. 380, *Negligence*

For forms of interrogatories for use in an action involving a collision between an automobile and a horse, see Bender's Forms of Discovery, *Animals*, Form 3 (Matthew Bender)

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3-23 California Forms of Pleading and Practice--Annotated § 23.154

§ 23.154 Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Pedestrian Against Dog Owner--Pedestrian Injured by Dog

[1] FORM Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Pedestrian Against Dog Owner--Pedestrian Injured by Dog

[*Caption. See § 23.120[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 23.120 [1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

3. At all times herein mentioned defendant was the owner of a certain large _____ [*breed*] dog.

4. On or about _____ [*date*], plaintiff was walking on a public sidewalk in _____ [*city*], California, near the intersection of _____ [*name*] and _____ [*name*] Streets.

5. [*Leashing ordinance. See § 23.125 [1], Paragraph 4.*]

6. On or about _____ [*date*], defendant negligently, carelessly, and in violation of the ordinance hereinbefore referred to, allowed the dog to be absent from his/her premises while alone and unleashed. As plaintiff approached the intersection hereinbefore referred to, the dog, alone and unleased, dashed out from defendant's residence in pursuit of another dog. Defendant's dog, intent on fighting with the other dog, rushed heedlessly toward the impending affray, and, in seeking out the impending combat, struck plaintiff a severe and jarring blow with his/her head, causing the injuries hereinafter complained of.

7-9. [*Injuries and damages. See § 23.141 [1], Second Count, Paragraphs 4-6.*]

[*Prayer. See § 23.140 [1].*]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by a pedestrian against the owner of a dog. Plaintiff seeks damages for injuries caused by the dog as a result of defendant's violation of a leash ordinance [*see Rollins v. Hedin (1952) 114 Cal. App. 2d 488, 490, 250 P.2d 728* (pedestrian); *see also Brotemarkle v. Snyder (1950) 99 Cal. App. 2d 388, 389-390, 221 P.2d 992* (driver of vehicle); *Eigner v. Race (1942) 54 Cal. App. 2d 506, 512-513, 129 P.2d 444* (no liability when violation of leash law did not proximately contribute to injury)].

For discussion of general negligence principles as applied to the maintenance of animals, see *§ 23.31*. For further discussion of complaints based on injury by vicious or dangerous animals, see *§ 23.140* [2] et seq.

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

[3] Cross Reference

For forms of interrogatories for use in actions involving persons injured by unleashed dogs, see Bender's Forms of Discovery, *Animals* (Matthew Bender)

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Volume 3: Alcoholic Beverage Licenses thru Answers-Chs. 18-29
Chapter 23 ANIMALS: CIVIL LIABILITY
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B Injuries by Animals to People

3-23 California Forms of Pleading and Practice--Annotated § 23.155

§ 23.155 Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Apartment House Guest Against Dog Owner--Guest Injured by Dog in Apartment Building Hallway

[1] FORM Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Apartment House Guest Against Dog Owner--Guest Injured by Dog in Apartment Building Hallway

[*Caption. See § 23.120[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 23.120 [1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

3. At all times herein mentioned, defendant was a tenant in that certain apartment building located at _____ [*address*], _____ [*city*], _____ County, California.

4. This apartment building is divided into separate apartments, and there are hallways, entries, and doors maintained for the use of all of the tenants of the apartment building and their guests.

5. At all times herein mentioned, defendant was the owner of a certain _____ [*breed*] dog.

6. On or about _____ [*date*], and prior thereto, defendant carelessly and negligently allowed this dog to run and play and move about in the rooms and hallways of the apartment building, and the dog had on occasion jumped on various guests, and had run between their legs and against them. The dog's activities were hazardous to persons about the building. The nature, extent, and hazardousness of the dog's activities were all well known to defendant.

7. On or about _____ [*date*], plaintiff was a guest in the apartment building. At that time, while plaintiff was walking in a hallway of the building, the defendant negligently and carelessly permitted the dog to run against plaintiff's legs, causing plaintiff to fall violently to the floor of the hallway.

8. [*Injuries and damages. See § 23.141 [1], Second Court, Paragraphs 4-6.*]

[*Prayer. See § 23.140 [1].*]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by a guest in an apartment building against the owner of a dog. Plaintiff seeks damages for injuries caused by the dog as a result of the owner's negligence. Plaintiff may also proceed on the basis of the owner's strict liability to a person injured by the owner's dog as a result of a dangerous propensity of which the owner has knowledge, or should have knowledge [*see § 23.141*; *see also Northon v. Schultz (1955) 130 Cal. App. 2d 488, 489, 279 P.2d 103* (dog that jumped on people)].

For discussion of general negligence principles as applied to the maintenance of animals, see *§ 23.31*. For further discussion of personal injury complaints and complaints relating to vicious animals, see *§§ 23.140*[2] et seq. and 23.141[2] et seq.

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

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§ 23.156 Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Store Customer Against Store and Dog Owner--Customer Injured by Dog in Store

[1] FORM Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Store Customer Against Store and Dog Owner--Customer Injured by Dog in Store

[*Caption. See § 23.120[1].*]

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a corporation organized and existing under the laws of _____ [*state*], authorized to transact, and transacting, business in California, and having its principal place of business in this state in _____ County [*or other allegation of capacity and residence as appropriate*].

2. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California [*or other capacity and residence of defendant*].

3. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

4. At all times herein mentioned, defendant _____ [*name*] operated a _____ [*type, e.g.,* department] store in _____ [*city*], _____ County, California. In the course of the operation of the store, defendant advertised and offered certain merchandise for sale and invited the public to come on the premises for the purpose of inspecting and purchasing the merchandise so offered and advertised.

5. On or about _____ [*date*], plaintiff entered the store operated by defendant _____ [*name*], for the purpose of inspecting and purchasing certain of the merchandise advertised and offered for sale therein.

6. At all times herein mentioned, defendant _____ [*name*] maintained in the store various counters and display windows separated by aisles for the purpose of permitting customers to inspect and purchase the merchandise.

7. At all times herein mentioned, defendant _____ [*name*] was the owner of a lively, mischievous, unruly, and frolicsome dog, and the disposition and each of these attributes and inclinations of the dog were well known to the dog's owner.

8. On or about _____ [*date*], plaintiff was present in one of the aisles for the purpose of inspecting and purchasing certain merchandise then and there offered for sale. Defendant _____ [*name of corporation*] carelessly and negligently permitted defendant _____ [*name of dog owner*] to bring the dog on the premises and into the aisle were plaintiff was present.

9. At that time and place, defendant _____ [*name of dog owner*] so negligently and carelessly guided and controlled the dog that it was caused, permitted, and allowed by defendant _____ [*name of dog owner*] to collide with and trip plaintiff and throw plaintiff to the floor with great force and violence and inflict the injuries hereinafter related.

10. The careless and negligent acts of the defendants, and each of them, hereinabove set forth, operated inseparably and as the sole proximate cause of the injuries to plaintiff which are hereinafter specified.

11-13. [*Injuries and damages. See § 23.141 [1], Second Count, Paragraphs 3-5.*]

[*Prayer. See § 23.140 [1].*]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by a customer in a store against the corporation owning the store and the owner of a dog. The plaintiff seeks damages for injuries caused by the dog as a result of the negligence of the corporation and the dog's owner [*see Baley v. J. F. Hink & Son (1955) 133 Cal. App. 2d 102, 108-109, 111, 283 P.2d 349*].

For discussion of general negligence principles as applied to the maintenance of animals, see *§ 23.31*. For further discussion of personal injury complaints and complaints relating to vicious animals, see *§§ 23.140*[2] et seq. and 23.141[2] et seq.

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

[3] Cross Reference

See generally Ch. 421, *Premises Liability*

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§ 23.157 Complaint for Damages Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code § 2100] and Dog Owner and Keeper--Passenger Bitten by Dog

[1] FORM Complaint for Damages Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code § 2100] and Dog Owner and Keeper--Passenger Bitten by Dog
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Negligence)
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. [*Capacity and residence of defendant carrier. See § 23.122 [1], Paragraph 1.*]

2. Defendants _____ [*dog owner*] and _____ [*dog keeper*] are, and at all times herein mentioned were, residents of _____ County, California [*or other capacity and residence of defendants*].

3. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

4. At all times herein mentioned, defendant _____ [*name*] owned a certain _____ [*breed*] dog, and at all times herein mentioned, the dog was in the custody and control of defendant _____ [*name*].

5. On or about _____ [*date*], plaintiff was a passenger on a _____ [*type of vehicle, e.g.,* train] owned and operated by defendant _____ [*name*] in _____ County, California.

6. On this date defendant _____ [*carrier*] acting through its agents, servants, and employees, carelessly and negligently allowed the dog to be taken aboard and transported on the _____ [*e.g.,* train] by defendant _____ [*name*] without first attempting to ascertain whether the dog would endanger the safety of its passengers. The dog was being transported _____ [*e.g.,* in the car] in which plaintiff was a passenger, and the dog was negligently placed by agents of defendant _____ [*carrier*] in the seat immediately behind the seat in which plaintiff was seated, where the dog was in good position to harm plaintiff and negligently failed thereafter to protect plaintiff from the dog.

At this time and place, the dog, without provocation on plaintiff's part and without warning to plaintiff, leaped at plaintiff and bit plaintiff and did thereby cause plaintiff to be injured as hereinafter alleged.

7. Defendant _____ [*name of keeper*] was careless and negligent in allowing the dog to leap on plaintiff and bite him/her and thereby cause plaintiff to be injured as hereinafter alleged.

8-10. [*Injuries and damages. See § 23.141 [1], Second Count, Paragraphs 4-6.*]

[*Prayer. See § 23.140 [1].*]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by a passenger against a carrier of passengers for reward and a dog's owner and keeper for damages caused by a dog bite [*see Civ. Code §§ 1714(a), 2100*; *Westwater v. Southern Pacific Co. (1940) 38 Cal. App. 2d 369, 371-372, 101 P.2d 154*].

For discussion of general negligence principles as applied to the maintenance of animals, see *§ 23.31*. For further discussion of personal injury complaints and complaints relating to vicious animals, see *§§ 23.140*[2] et seq. and 23.141[2] et seq.

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

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3-23 California Forms of Pleading and Practice--Annotated § 23.158

§ 23.158 Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Milker of Cow Against Person Photographing Cow--Milker Injured by Frightened Cow

[1] FORM Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Milker of Cow Against Person Photographing Cow--Milker Injured by Frightened Cow

[*Caption. See § 23.120[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 23.120 [1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

3. On or about, and prior to, _____ [*date*], plaintiff was employed by _____ [*name*], who operated a dairy business.

4. On or about _____ [*date*], plaintiff was engaged in his/her employment of milking a cow inside a barn belonging to his/her employer. There were other cows in the barn at this time. Defendant entered the barn and saw plaintiff milking the cow. He/She said nothing to plaintiff but proceeded, without plaintiff's knowledge, to carelessly and negligently take or attempt to take pictures of the inside of the barn with flash equipment. This taking of, or attempt at taking of, pictures frightened the cow which plaintiff was milking and caused this cow to kick plaintiff.

5-7. [*Injuries and damages. See § 23.141 [1], Second Count, Paragraphs 4-6.*]

[*Prayer. See § 23.140 [1].*]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by a milker of cows against the person who photographed or tried to photograph the area where plaintiff was working. Plaintiff seeks damages for injuries to him or her by that cow after it was frightened at being the object of photography and kicked plaintiff [*see Darnold v. Voges (1956) 143 Cal. App. 2d 230, 243-247, 300 P.2d 255* (unless animal has established reputation for phlegmatic behavior in sudden appearance of unusual spectacle, its unpredictability is to be assumed by reasonably prudent people; startling cow by use of flash bulb in barn caused actionable injury to milker)].

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

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§ 23.159 Complaint for Damages Based on Strict Liability [Civ. Code § 3342]--By Person Lawfully in a Private Place--Against Dog Owner--Person Bitten by Dog

[1] FORM Complaint for Damages Based on Strict Liability [Civ. Code § 3342]--By Person Lawfully in a Private Place--Against Dog Owner--Person Bitten by Dog

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____,

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Strict Liability)
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 23.120 [1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

3. On or about _____ [*date*], defendant was the owner of a certain _____ [*breed*] dog which was kept on defendant's premises at _____ [*address*], _____ [*city*], California.

4. On or about _____ [*date*], at about _____ [*time*], plaintiff was lawfully on the property of defendant, _____ [*describe, e.g.,* on the invitation of defendant *or* delivering mail to defendant pursuant to plaintiff's duties imposed on him/her by United States postal regulations].

5. While plaintiff was in and on the premises of defendant, the dog attacked and bit plaintiff.

6-8. [*Personal injuries and damages. See § 23.140 [1], Paragraphs 6-8.*]

9. As a further proximate result of the bite of defendant's dog, certain articles of plaintiff's clothing were torn, ripped, and made useless to his/her further damage in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages according to proof.

2. For medical [and incidental] expenses according to proof.

3. For damages for loss of income and earnings and impairment of earning ability according to proof.

4. For damages to personal property in the sum of $_____.

5. For costs of suit herein incurred.

6. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by a person bitten by a dog while lawfully in a private place against the owner of the offending dog. Plaintiff seeks damages for the resulting injuries, based on strict liability under *Civ. Code § 3342*. For a form based on a dog bite in a public place, see *§ 23.160*.

Strict liability under *Civ. Code § 3342* is available only against the dog's owner, and applies only to injuries from being bitten by a dog. It is not available to a plaintiff who, at the time of the dog bite, was not in a public place or lawfully in a private place, including the property of the dog's owner. A person is lawfully on the private property of the dog's owner when he or she is on the property in the performance of any duty imposed on him or her by the laws of California or by the laws or postal regulations of the United States, or when he or she is on the property on the owner's invitation, express or implied [*Civ. Code § 3342*]. For discussion of Section 3342, see *§ 23.33*[5].

For further discussion of personal injury complaints and complaints relating to vicious animals, see *§§ 23.140*[2] et seq. and 23.141[2] et seq.

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

[3] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see *Ch. 177, Damages § 177.40* et seq., and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

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§ 23.160 Complaint for Damages Based on Strict Liability [Civ. Code § 3342]--By Person in a Public Place--Against Dog Owner--Person Bitten by Dog

[1] FORM Complaint for Damages Based on Strict Liability [Civ. Code § 3342]--By Person in a Public Place--Against Dog Owner--Person Bitten by Dog

[*Caption. See § 23.159[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 23.120 [1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

3. At all times herein mentioned, defendant was the owner of a certain _____ [*breed*] dog.

4. At all times herein mentioned, _____ [*name*] Street in _____ [*city*], California, was a public street or highway.

5. On or about _____ [*date*], plaintiff was walking on and along the sidewalk of the aforementioned street. At this time and place, defendant's dog approached and bit plaintiff.

6-8. [*Personal injuries and damages. See § 23.140 [1], Paragraphs 6-8.*]

9. [*Property damage. See § 23.159 [1], Paragraph 9.*]

[*Prayer. See § 23.159 [1].*]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action by a person bitten by a dog while in a public place against the owner of the dog. Plaintiff seeks damages for the resulting injuries based on strict liability under *Civ. Code § 3342*. For a form based on a dog bite in a private place, see *§ 23.159*.

For further discussion of personal injury complaints and complaints relating to vicious animals, see *§§ 23.140*[2] et seq., 23.141 [2] et seq.

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

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3-23 California Forms of Pleading and Practice--Annotated § 23.161

§ 23.161 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Assumption of Risk--Inviting Injury by Caged Animal

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Assumption of Risk--Inviting Injury by Caged Animal

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff's injuries were proximately caused by his/her own misconduct, in that plaintiff read but failed to obey signs plainly posted on the animal's cage which warned plaintiff to stay away from the cage to avoid being injured. Plaintiff placed himself/herself in a position where he/she could be seriously injured in that plaintiff came within _____ [*number*] inches of the animal's cage. Plaintiff did this act voluntarily and with full understanding not only of the danger and risk he/she faced, but also the magnitude of this danger and risk, in that he/she knew his/her conduct might result in the animal's extending parts of its body outside its cage and seriously injuring plaintiff, both of which events plaintiff alleges occurred. Plaintiff invited the injuries of which he/she complains by the foregoing misconduct, and plaintiff thereby assumed the risk of the injuries he/she suffered.

[2] Use of Form

This form is an affirmative defense of assumption of risk for use in an answer by defendant to a complaint alleging serious injuries to plaintiff by defendant's wild animal.

[3] Assumption of Risk

The term "assumption of risk" has been applied to at least two distinct defenses. The first, known as "secondary assumption of risk," is where plaintiff undertakes to encounter a specific known risk imposed by defendant's negligence. This defense is in reality a form of contributory negligence, even though plaintiff encounters the risk in a prudent manner. The adoption of comparative negligence merged this variety of assumption of risk into the general scheme of assessment of liability in proportion to negligence [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 315, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 119 Cal. Rptr. 858, 532 P.2d 1226*].

The second assumption of risk situation, known as "primary assumption of risk," is where plaintiff agrees to relieve defendant of an obligation of reasonable conduct. Such a situation does not involve contributory negligence, but rather a reduction of defendant's duty of care. In this latter situation, the defense of assumption risk is not subsumed by comparative negligence; if the defendant did not have a duty to protect plaintiff from the specific harm, the doctrine completely bars recovery [*Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 829, 119 Cal. Rptr. 858, 532 P.2d 1226*].

Whether the form of assumption of risk in [1], *above*, illustrates a first-mentioned variety of contributory negligence in which plaintiff's recovery would be reduced but not barred, or whether it illustrates the second type of situation in which plaintiff has agreed to relieve defendant of his or her responsibility and hence is barred from recovery would depend on the facts involved.

For discussion of assumption of risk in the context of injuries caused by animals, see *§ 23.31*[4].

[4] Cross Reference

See generally Ch. 26, *Answers*

For discussion of assumption of risk and contributory negligence, see Ch. 380, *Negligence*

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3-23 California Forms of Pleading and Practice--Annotated § 23.162

§ 23.162 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Assumption of Risk and Negligence of Plaintiff--Riding Horse One Knows to Be Dangerous and Riding It Unskillfully

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Assumption of Risk and Negligence of Plaintiff--Riding Horse One Knows to Be Dangerous and Riding It Unskillfully

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff represented to defendant that he/she was an experienced rider and desired a spirited horse. Plaintiff was advised and warned of the fact that the horse could not be safely ridden by one not experienced in the handling of horses and specifically that the horse had a tendency to _____ [*specify, e.g.,* run away if not kept under proper restraint]. Despite these warnings plaintiff insisted that he/she be allowed to ride the horse and thereby voluntarily assumed the risk of riding the horse with full knowledge of this propensity of the horse to _____ [*e.g.,* run away]. He/She understood the full magnitude of the risk he/she was assuming when he/she mounted the horse, in that he/she knew that the horse might exhibit this propensity to _____ [*e.g.,* run away] and that he/she might be seriously injured as a result, both of which events he/she alleges occurred. He/She thereby agreed to relieve defendant of an obligation of reasonable conduct toward him/her and thus reduced defendant's duty of care to him/her. Consequently, plaintiff's claim for damages is barred.

AS A [(*if more than one, specify number, e.g.,* SECOND)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that in addition to plaintiff's assumption of risk, his/her contributory negligence proximately caused his/her injuries in that he/she so negligently handled and managed the horse that _____ [*specify, e.g.,* the horse lost its balance and fell, throwing plaintiff to the ground].

[2] Use of Form

This form contains affirmative defenses of assumption of the risk and the plaintiff's negligence for use in an answer by a defendant to a complaint by a horseback rider for injuries caused by the dangerous propensities of the defendant's horse.

For further discussion of assumption of risk and cross references, see *§ 23.161*[3] et seq.

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3-23 California Forms of Pleading and Practice--Annotated § 23.163

§ 23.163 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Primary Assumption of Risk by Rider--Commercial Stable Operator as Having No Duty to Provide Ideal Horse for Riding

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Primary Assumption of Risk by Rider--Commercial Stable Operator as Having No Duty to Provide Ideal Horse for Riding

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff's recovery is barred by primary assumption of risk because sudden movements of a horse are inherent in the sport of horseback riding and defendant had no duty to provide plaintiff with a horse for riding that would never buck, bite, rear, break into a trot or a gallop, stumble, "spook," or otherwise react to unusual movements of its rider.

[2] Use of Form

This form is an affirmative defense of assumption of risk for use in an answer by a defendant to a complaint alleging that plaintiff was injured when the horse owned or provided by defendant threw plaintiff. The defense is that primary assumption of risk bars plaintiff's recovery, because sudden movements are inherent in the sport of horseback riding and defendant had no duty to provide plaintiff with an ideal horse that would never make any sudden movements [*see Harrold v. Rolling J Ranch (1993) 19 Cal. App. 4th 578, 588-589, 23 Cal. Rptr. 2d 671* (commercial operator of horse-riding facility has no duty to provide customers with ideal horses that never engage in sudden movements; recovery of rider for injuries suffered when horse "spooked" and threw her was barred by primary assumption of risk)].

For further discussion of assumption of risk and cross references, see *§ 23.161*[3] et seq.

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3-23 California Forms of Pleading and Practice--Annotated § 23.164

§ 23.164 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Willfully Inviting Attack by Dog

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Willfully Inviting Attack by Dog

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the injuries complained of by plaintiff were proximately caused by plaintiff's misconduct in that he/she willfully and voluntarily teased, abused, and mistreated the dog and thereby provoked the attack. Plaintiff invited the injuries he/she complains of and assumed the risk of them with full knowledge of the magnitude of that risk, in that he/she knew his/her foregoing conduct might cause the dog to attack him/her, and seriously injure him/her, both of which events he/she alleges occurred.

[2] Use of Form

This form is an affirmative defense for use in an answer by a defendant to a complaint alleging that defendant's dog attacked plaintiff. The defense is that plaintiff's injuries were caused by the plaintiff willfully inviting the attack. Assumption of the risk is available as a defense in action under *Civ. Code § 3342* [*see Smythe v. Schacht (1949) 93 Cal. App. 2d 315, 321-322, 209 P.2d 114* (decided under former statute; recognizing teasing and provoking attach as defense, but finding no proof to support it); for discussion, *see § 23.33*[5][c]].

For a discussion of the effect of the doctrine of comparative negligence on assumption of risk and cross references, see *§ 23.161*[3] et seq.

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3-23 California Forms of Pleading and Practice--Annotated § 23.165

§ 23.165 Complaint to Determine If Danger to Other Persons From Dog Has Been Removed--Against Owner of Dog That Has Bitten Humans [Civ. Code § 3342.5]

[1] FORM Complaint to Determine If Danger to Other Persons From Dog Has Been Removed--Against Owner of Dog That Has Bitten Humans [Civ. Code § 3342.5]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO DETERMINE IF DOG
_____ [*name*], [and DOES I	)	PRESENTS DANGER TO HUMANS
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. Plaintiff is _____ [*e.g.*, a neighbor of defendant].

2. Defendant is the owner of a _____ [*specify breed*] dog.

[*EITHER, if proceeding under Civ. Code § 3342.5(b)*]

3. Defendant's previously mentioned dog has bitten humans on the following occasions: _____ [*specify at least two times that dog has bitten humans, including place and circumstances showing that the persons bitten were not trespassers and that the dog was not performing military or police work at the time of biting*]. [All *or* Both *or* One] of these bites occurred in _____ County, California.

[*OR, if proceeding under Civ. Code § 3342.5(c)*]

3. Defendant's previously mentioned dog has bitten a human being on the following occasion: _____ [*specify at least one occasion on which the dog caused substantial physical injury to a human by biting, including the place and circumstances, the fact that substantial physical injury to a human occurred, and that the dog was trained to fight, attack, or kill when the bite occurred*]. The bite occurred in _____ County, California.

[*CONTINUE*]

4. _____ [*Specify conditions of treatment or confinement of dog (or other circumstances existing when bite occurred since such bites, if any, e.g.,* At the time of the bites by defendant's dog as previously mentioned, defendant's dog was allowed to run loose and was not confined in any manner. Since the bites, defendant confines dog during the night, but during the day the dog is still allowed to run around the neighborhood without a leash or any other control or supervision from defendant].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a determination that conditions of the _____ [treatment *or* confinement *or other circumstances existing when bite or bites occurred*] of the dog have not been changed so as to remove the danger to other persons presented by such animal.

2. For an order _____ [*e.g.*, requiring the dog to be removed from the area].

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[2] Use of Form

This form is a complaint for use in an action to determine whether conditions of the treatment or confinement (or other circumstances) of a dog which has bitten a human have been changed since the bite or bites occurred so as to remove

the danger to other persons presented by the animal. Plaintiff may proceed on either of two grounds:

- That the dog has bitten a human on at least two separate occasions [*Civ. Code § 3342.5(b)*]; or

- That the dog has bitten a human on at least one occasion causing substantial physical injury, and was trained to fight, attack, or kill when the bite occurred [*Civ. Code § 3342.5(c)*]. For discussion, see *§ 23.34*.

A proceeding under *Civ. Code § 3342.5* is a limited civil case (amount in controversy, exclusive of interest, is $25,000 or less) [*Civ. Code § 3342.5(g)*; *see Code Civ. Proc. § 85 et seq.*]. The superior court has jurisdiction of the action [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*]. For further discussion of limited civil cases, see Ch. 324, *Jurisdiction: Subject Matter Jurisdiction* .

The action may be brought by any person, including the district attorney or a city attorney [*Civ. Code § 3342.5(b), (c)*].

Actions brought under *Civ. Code § 3342.5(b)* are not sanctioned with respect to bites suffered by trespassers or bites by dogs performing military or police work *Civ. Code § 3342.5(d)*. *Civ. Code § 3342.5(c)* (dogs trained to fight, attack, or kill) is not mentioned in this regard, which seems inconsistent with the overall statute and its penal companion [*see Civ. Code § 3342.5(d)*; *Penal Code § 399.5*]. Caution should therefore be exercised in attempting to bring an action under *Civ. Code § 3342.5(c)* involving trespassers or dogs performing military or police work.

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

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3-23 California Forms of Pleading and Practice--Annotated § 23.166

§ 23.166 Proceedings to Determine if Dog Is Potentially Dangerous or Vicious

[1] Petition to Determine if Dog Is Potentially Dangerous or Vicious [Food & Agric. Code § 31601 et seq.]--Judicial Council Form MC-600

[a] FORM

Click here to view image.

[b] Use of Form

This form is an illustrative filled-in reproduction of the Judicial Council form for use by an animal control or law enforcement officer to determine if a dog is potentially dangerous or vicious [*see Food & Agric. Code § 31601 et seq.*].

For further discussion of the proceedings to determine if a dog is potentially dangerous or vicious, see *§ 23.35*[5].

[c] Completing Form

Counsel should complete the caption of the form of petition by setting forth his or her name, address, telephone number, and bar number [*see Cal. Rules of Ct., Rule 2.111(1)*]. After the "Attorney for" designation, counsel should specify the name of the party represented and whether the party is the petitioner or the respondent. If the party has no attorney and is appearing in propria persona, the party should insert his or her name, address, and phone number in the designated space. In that case, the "Attorney for" designation should be crossed out and replaced by the words "In pro. per." The county and address of the court, the names of the petitioner and the respondent, and the case number should also be set forth in the appropriate spaces.

The form contains boxes to check for specifying whether the petition is to determine if the dog in question is a potentially dangerous dog or a vicious dog. Counsel should check at least one of these boxes. Counsel should also check at least one of the boxes in the potentially dangerous or vicious paragraph heading.

[d] Supporting Documents

The second page of the form contains boxes for use to check which supporting documents are being filed with the petition. Counsel should check at least one of these boxes and attach the accompanying supporting document(s) to the petition.

[2] Notice of Hearing [Food & Agric. Code § 31621]--Judicial Council Form MC-601

[a] FORM

Click here to view image.

[b] Use of Form

This form is an illustrative filled-in reproduction of the Judicial Council form of notice of hearing on a petition to determine if a dog is potentially dangerous or vicious [*see Food & Agric. Code § 31601 et seq.*].

For further discussion of the proceedings to determine if a dog is potentially dangerous or vicious, see *§ 23.35*[5]. See also [1] [b] et seq., *above.*

[3] Order After Hearing [Food & Agric. Code § 31601 et seq.]--Judicial Council Form MC-602

[a] FORM

Click here to view image.

[b] Use of Form

This form is an illustrative filled-in reproduction of the Judicial Council form of order for use after a hearing to determine if a dog is potentially dangerous or vicious [*see Food & Agric. Code § 31601 et seq.*].

For further discussion of the proceedings to determine if a dog is potentially dangerous or vicious, see *§ 23.35*[5]. See also [1][b] et seq., *above.*

[4] Notice of Appeal [Food & Agric. Code § 31622]--Judicial Council Form MC-603

[a] FORM

Click here to view image.

[b] Use of Form

This form is an illustrative filled-in reproduction of the Judicial Council form of notice of appeal for use by a petitioner or respondent after an order has been made ruling that a dog is or is not either potentially dangerous or vicious [*see Food & Agric. Code § 31601 et seq.*].

For further discussion of the proceedings to determine if a dog is potentially dangerous or vicious, see *§ 23.35*[5]. See also [1][b] et seq., *above.*

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[Reserved]

§§ 23.167[Reserved]

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3-23 California Forms of Pleading and Practice--Annotated § 23.180

§ 23.180 Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. § 731] to Abate Nuisance [Civ. Code § 3479] and for Damages--By Landowner Against Dog Owner--Trespassing Dogs Polluting Landowner's Wellspring

[1] FORM Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. § 731] to Abate Nuisance [Civ. Code § 3479] and for Damages--By Landowner Against Dog Owner--Trespassing Dogs Polluting Landowner's Wellspring

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AND INJUNC-
_____ [*name*], [and DOES I	)	TION
through _____,]	)	(Nuisance)
Defendant(s).	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 23.120 [1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

3. At all times herein mentioned, plaintiff was, and now is, the owner and in possession of the following real property,

at _____ [*address*], _____ County, California [and more particularly described as follows: _____ (*legal description*)].

[4. At all times herein mentioned, plaintiff's real property described above was _____ (under cultivation *or* intended for the raising of livestock *or* used for the raising of livestock).]

5. At all times herein mentioned, defendant was, and now is, the _____ [owner *or* occupant] of the premises at _____ [*address*], _____ County, California, consisting of _____ [*description of improvements*] [and more particularly described as follows: _____ (*legal description*)]. These premises are _____ [*show location relative to plaintiff's property*].

6. At all times herein mentioned, plaintiff maintained on his/her property a wellspring, located wholly on this property, which wellspring was used by plaintiff for the purpose of supplying fresh and usable water for his/her household, the needs of his/her stock, and the irrigation of his/her land.

7. At all times herein mentioned, defendant was and is the owner and possessor of a certain group of _____ [*breed*] dogs, unknown in number, which dogs were and are used by the defendant for the purpose of running and shepherding his/her sheep and which dogs are given to the habit of roaming at large and at will, all of which was and is known to the defendant.

8. On or about _____ [*date*], and from that time until the present, these dogs have continually and regularly come onto and trespassed on the property of plaintiff during the nighttime. They have congregated about plaintiff's wellspring, and have conducted themselves so as to create a private nuisance, in that they have polluted, befouled, and rendered the water in the wellspring filthy and unusable for the described purposes. These acts have been injurious to health, offensive to the senses, and an obstruction to the free use of plaintiff's property, so as to interfere with the comfortable enjoyment of life and property by plaintiff.

9. Plaintiff has, on several occasions preceding commencement of this action, notified defendant of this nuisance and requested that defendant take measures to remedy it and prevent its future occurrence, but these requests have been ignored.

10. As a result of the foregoing, plaintiff is denied the use and comfortable enjoyment of his/her property, and is put to labor and expense in the continuing process of cleaning and purifying the wellspring, to plaintiff's damage in the sum of $_____.

11. Unless defendant is restrained by order of this court from continuing to allow this trespass and nuisance, it will be necessary for plaintiff to commence many successive actions against defendant to secure compensation for damages sustained, thus requiring a multiplicity of judicial proceedings, and plaintiff will be daily threatened with the continuation of the private nuisance described above.

12. Unless defendant is enjoined from continuing his/her course of conduct in permitting his/her dogs to trespass on plaintiff's property and create the nuisance thereon, plaintiff will be irreparably injured in an amount which cannot be calculated in terms of money, in that plaintiff will be deprived to a substantial extent of the use and comfortable enjoyment of his/her property. _____ [*Allege other irreparable injury, e.g.,* Any efforts by plaintiff to sell or lease his/her property will be without avail because its usefulness will be substantially diminished].

13. For all of the reasons alleged above plaintiff has no plain, speedy, or adequate remedy at law, pecuniary compensation would not afford him/her adequate relief, and injunctive relief is expressly authorized by *Section 731 of the Code of Civil Procedure.*

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an order requiring defendant to show cause, if he/she has any, why he/she should not be enjoined as hereinafter set forth, during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining and restraining defendant, his/her agents, servants, and employees, and all persons acting under, in concert with, or for them, from allowing defendant's dogs to come onto plaintiff's property and create the aforementioned nuisance;

3. For damages in the sum of $_____;

4. For costs of suit herein incurred;

[5. For reasonable attorney's fees _____ (of $_____ *or* according to proof);] and

6. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

CERTIFICATION RE NOTICE

I hereby certify that _____ [on _____ (*date*), I informed defendant of what time and where the foregoing application for a temporary restraining order would be made *or* in good faith I attempted to inform defendant of what time and where the foregoing application for a temporary restraining order would be made, by _____ (*specify efforts*), but I was unable to do so *or* notice to defendant of the foregoing application for a temporary restraining order should not be required for the reason that _____ (*specify*)].

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date and place*]

_____ [*signature*]

[Attorney for] Plaintiff

[2] Use of Form

This form is a complaint for use in an action by a landowner against a dog owner. Plaintiff seeks damages for a private nuisance created by defendant's dogs trespassing on his or her real property and injunctive relief against defendant's allowing the nuisance to continue [*see Civ. Code § 3479*; *Code Civ. Proc. § 731*]. For discussion of animal trespasses, see *§ 23.55*.

[3] Allegations

A complaint for trespass resulting in property damage by animals should allege:

- Venue and jurisdiction.
- That defendant was the owner of the animal.
- That plaintiff was the owner or occupier of the property.
- That the animal trespassed on plaintiff's property.
- That damage resulted from the trespass.
- Facts showing grounds for injunctive relief.

Factors justifying injunctive relief against animal trespasses include the following:

- Repeated damage suits and distraints [*Montezuma Improvement Co. v. Simmerly (1919) 181 Cal. 722, 726-727, 189 P. 100*].
- Trespasses would prevent putting in crop for that year [*Huffman v. Coulter (1921) 55 Cal. App. 173, 174-175, 203 P. 125*].
- Property destroyed is not subject to replacement to accomplish its purpose [*Blevins v. Mullally (1913) 22 Cal. App. 519, 534, 135 P. 307*].

[4] Attorney's Fees

If a plaintiff brings an action to recover damages to personal or real property resulting from trespassing on lands either under cultivation or intended or used for raising livestock, and the plaintiff prevails, he or she is entitled to reasonable attorney's fees in addition to other costs, and in addition to any liability for damages imposed by law [*Code Civ. Proc. § 1021.9*]. An optional prayer for attorney's fees is provided in the form for requesting these fees.

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

[5] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581*]. Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the

effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[6] Certification re Notice

When a temporary restraining order is sought without formal notice, the applicant or the applicant's attorney is required to certify to the court underoath that either (1) within a reasonable time prior to the application he or she informed the opposing party (or his or her attorney, if any) at what time and where the application would be made, or (2) he or she in good faith attempted to inform the opposing party (or attorney) but was unable to do so, specifying the efforts made to do so, or (3) for reasons specified he or she should not be required to inform the opposing party (or attorney) [*Code Civ. Proc. § 527(a)*; *Cal. Rules of Ct., Rules 3.1200, 3.1204(b)*].

[7] Cross References

For forms of temporary restraining orders, orders to show cause, and preliminary and permanent injunctions, see Ch. 303, *Injunctions*

For forms of complaints in actions involving nuisances, see Ch. 391, *Nuisance*

For forms of interrogatories for use in an action involving operation of a public dump and insects and pests therein, see Bender's Forms of Discovery, *Nuisances,* Form 2 (Matthew Bender)

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3-23 California Forms of Pleading and Practice--Annotated § 23.181

§ 23.181 Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Civ. Code § 3422] and for Damages Based on Trespass--By Landowners Against Livestock Owners--Livestock Trespassed on Plaintiffs' Land

[1] FORM Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Civ. Code § 3422] and for Damages Based on Trespass--By Landowners Against Livestock Owners--Livestock Trespassed on Plaintiffs' Land

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AND INJUNC-
_____ [*name*], [and DOES I	)	TION
through _____,]	)	(Trespass)
Defendant(s).	)	
	)	

Plaintiffs allege:

1. [*Capacity and residence of defendants. See § 23.120 [1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

3. At all times herein mentioned, plaintiffs were and now are [the owners and] in rightful possession of real property,

situated at _____ [*address*], _____ County, California [, and more particularly described as follows: _____ (*legal description*),] on which premises, they have grown crops of _____ [*specify*] and grazed livestock, namely _____ [*e.g.*, cattle].

4. At all times herein mentioned, defendants were and still are the owners of about _____ [*number*] livestock, namely, _____ [*e.g.*, cattle], which are at pasture on lands adjoining plaintiffs' property.

5. On or about _____ [*date*], and continuing until the present, defendants have permitted these livestock repeatedly and on numerous occasions to trespass on plaintiffs' land, where they have eaten up, trampled on, and destroyed the _____ [*state*, *e.g.*, alfalfa] growing thereon, and injured the soil.

6. Plaintiffs have repeatedly gathered up and returned these _____ [*e.g.*, cattle] to defendants and have repeatedly asked defendants to prevent them from entering on plaintiffs' land and doing damage thereon, but defendants have ignored such requests and have permitted and threaten to continue to permit this condition to continue.

7. As a result of the foregoing, plaintiffs have been damaged in the sum of $_____.

8. Unless defendants are restrained by order of this court from continuing to allow the trespass and injury to plaintiffs' property, it will be necessary for plaintiffs to commence many successive actions against defendants to secure compensation for damages sustained, thus requiring a multiplicity of judicial proceedings, and it will be necessary for plaintiffs to repeatedly take up the _____ [*e.g.*, cattle] as estrays under *Section 17041 of the Food and Agricultural Code*.

9. Unless defendants are enjoined from continuing to permit these _____ [*e.g.*, cattle] to trespass on plaintiffs' property and do the injuries to _____ [*e.g.*, alfalfa] and soil as alleged above, plaintiffs will be irreparably injured in an amount which cannot be calculated in money, in that _____ [*e.g.*, the soil will thereby be made unfit for farming purposes and plaintiffs will be prevented from putting in new crops for this year, so that plaintiffs' own livestock will not have enough feed to sustain them; as a result, plaintiffs will have to move to another locality to carry on their living].

10. As a result of the facts stated in Paragraphs 8 and 9 of this complaint, plaintiffs have no plain, speedy, or adequate remedy at law.

WHEREFORE, plaintiffs pray judgment against defendants, and each of them, as follows:

1. For an order requiring defendants to show cause, if any they have, why they should not be enjoined as hereinafter set forth, during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendants, their agents, servants, and employees, and all persons acting under, in concert with, or for them, from allowing defendants' livestock to trespass on plaintiffs' property and do the injury thereon alleged in this complaint;

3. For damages in the sum of $_____;

4. For costs of suit herein incurred;

[5. For reasonable attorney's fees _____ (of $_____ *or* according to proof); and]

6. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[*Certification re notice. See § 23.180[1].*]

[2] Use of Form

This form is a complaint for use in an action by landowners against livestock owners. Plaintiffs seek damages and injunctive relief against defendants based on trespasses by defendants' livestock on plaintiffs' land. [*see Huffman v. Coulter (1921) 55 Cal. App. 173, 174-175, 203 P. 125* (injunctive relief against animal trespasses)]. For discussion of animal trespasses, see *§ 23.55*.

[3] Measures of Damages

The measure of damages for destruction of pasturage, where grass cannot be reasonably severed and marketed separate from the land, is the reasonable rental value thereof in that vicinity for pasture purposes [*see Murphy v. Nielsen (1955) 132 Cal. App. 2d 396, 399, 282 P.2d 126* (trespass by cattle); *Maddalena v. LeDuc (1938) 29 Cal. App. 2d 211, 212, 84 P.2d 254* (trespass by sheep); *Miller & Lux Inc. v. Pinelli (1927) 84 Cal. App. 42, 51, 257 P. 573* (trespass by cattle)].

The measure of damages for destruction of annually planted crops raised to be harvested is the market value of the estimated product at the time of destruction, less the cost of producing and marketing the crops [*Crofoot Lumber, Inc. v. Ford (1961) 191 Cal. App. 2d 238, 249, 12 Cal. Rptr. 639* (wrongful removal of timber by loggers)].

[4] Attorney's Fees

If a plaintiff brings an action to recover damages to personal or real property resulting from trespassing on lands either under cultivation or intended or used for raising livestock, and the plaintiff prevails, he or she is entitled to reasonable attorney's fees in addition to other costs, and in addition to any liability for damages imposed by law [*Code Civ. Proc. § 1021.9*]. An optional prayer for attorney's fees is provided in the form for requesting these fees.

[5] Cross References

For further discussion of complaints for injunctive relief and damages based on animal trespasses, see *§ 23.180*[2] et seq.

For further discussion and cross references relating to complaints generally, see *§ 23.120*[2] et seq.

For forms of complaints for use in actions involving trespasses, see Ch. 550, *Trespass*

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3-23 California Forms of Pleading and Practice--Annotated § 23.182

§ 23.182 Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Civ. Code § 3422]--By Landowner Against Holder of Easement on His/Her Land--Easement Holder's Failure to Close Gate, Resulting in Escape of Livestock

[1] FORM Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Civ. Code § 3422]--By Landowner Against Holder of Easement on His/Her Land--Easement Holder's Failure to Close Gate, Resulting in Escape of Livestock

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AND INJUNC-
_____ [*name*], [and DOES I	)	TION
through _____,]	)	(Negligence)
Defendant(s).	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 23.120 [1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 23.120 [1], Paragraph 2.*]

3. [*Description of plaintiff's real property. See § 23.180 [1], Paragraph 3.*]

4. Defendant has a right of way over a portion of this real property, which right of way is in the nature of an easement for access to a road. But this easement is limited in scope and purpose, and plaintiff is owner of a fee in the real property.

5. Plaintiff installed a gate at the entrance of the right of way, for the purpose of preventing undue use of the right of way by unauthorized persons. It has been the understanding between plaintiff and defendant that this gate would be kept shut when the right of way was not being used.

6. Plaintiff is the owner of certain livestock, namely _____ [*e.g.*, burros], which are kept on his/her property. The livestock are prone to wander off this property through the gate when this gate is left open for long periods of time.

7. Defendant, during the past _____ [*number*] months and continuously until the present has failed to close the gate when his/her right of way is not in use, although plaintiff has repeatedly and on many occasions asked him/her to do so.

8. As a result of the defendant's failure to close the gate, plaintiff's livestock have on several occasions wandered off plaintiff's property, making it necessary that plaintiff spend much time and effort in reclaiming them. Plaintiff has informed defendant of this on several occasions.

9. On or about _____ [*date*], after several requests to defendant, plaintiff was informed that his/her livestock had again wandered through the open gate and caused damage to the property of _____ [*name*], a neighbor of plaintiff.

10. Unless defendant is restrained by order of this court from continuing to fail to close the gate, plaintiff will be exposed to a possible multiplicity of judicial proceedings by neighbors whose property is damaged by livestock which escape through the open gate, and to continuing effort and expense. It will be necessary for plaintiff to commence many successive actions against defendant resulting in a multiplicity of judicial proceedings, to secure compensation for his/her efforts and expense in reclaiming plaintiff's livestock, in defending himself/herself in actions against him/her by neighbors whose property is damaged as alleged above, and in paying adverse judgments against him/her obtained by these neighbors.

11. Unless defendant is enjoined from continuing to leave the gate open, plaintiff will be irreparably injured in an amount which cannot be calculated in terms of money, in that plaintiff will be forced to expend effort in reclaiming plaintiff's livestock and defending himself/herself in actions against him/her as alleged above, which will deprive plaintiff to a substantial extent of time he/she would otherwise spend in the use and comfortable enjoyment of his/her property.

12. In view of the foregoing facts, plaintiff has no plain, speedy, or adequate remedy at law.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an order requiring defendant to show cause, if any he/she has, why he/she should not be enjoined as hereinafter set forth, during the pendency of this action.

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant, his/her agents, servants, and employees, and all persons acting under, in concert with, or for them, from leaving the gate open when the right of way is not in actual use.

3. For general damages against defendant in the sum of $_____, by way of reimbursement for plaintiff's efforts and expenses in reclaiming his/her livestock.

4. For an order of the court compelling defendant to settle such claims as may exist against plaintiff for damages caused by plaintiff's livestock being off the property of plaintiff.

5. For costs of suit herein incurred.

6. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 23.120[1].*]

[*Certification re notice. See § 23.180[1].*]

[2] Use of Form

This form is a complaint for use in an action by a landowner against the holder of an easement on his or her land. Plaintiff seeks injunctive relief against defendant based on defendant's failure to close the gate at the entrance to the easement, resulting in the escape of plaintiff's livestock.

For further discussion and cross references relating to complaints for injunctive relief, see *§ 23.180*[2]-[4].

For further discussion and cross references relating to complaints generally, see *§ 23.120* [2] et seq.

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[1] FORM

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[1] FORM

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§ 24.73 Proceedings for Order to Authorize Sale of Livestock Prior to Judgment in Livestock Servicer's Action on Underlying Claim [Civ. Code § 3080.03 et seq.]

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[a] FORM

[b] Use of Form

[c] Basis for Motion

[d] Contents of Notice

[i] Supporting Statement

[ii] Special Notice to Defendant

[e] Supporting Affidavit or Declaration

[f] Service; Hearing Date

[g] Supporting Memorandum

[2] Ex Parte Motion, Supporting Statement, and Supporting Declaration--For Order Authorizing Sale of Livestock Prior to Judgment [Civ. Code § 3080.15]

[a] FORM

[b] Use of Form

[c] Attempt to Give Notice

[d] Basis for Motion

[e] Order

[f] Modification or Vacation of Order

[3] Notice of Opposition to Motion for Order Authorizing Sale of Livestock Prior to Judgment [Civ. Code § 3080.05]

[a] FORM

[b] Use of Form

[c] Requirements of Notice of Opposition

[4] Order Authorizing Sale of Livestock Prior to Judgment [Civ. Code § 3080.06]

[a] FORM

[b] Use of Form

[c] Hearing and Findings Supporting Order

[d] Basis for Findings

[e] Effect of Findings

[f] Requirements of Order

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§ 24.74 Proceedings for Order for Substitution of Undertaking for Livestock [Civ. Code § 3080.09 et seq.]

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[a] FORM

[b] Use of Form

[c] Contents

[i] Supporting Statement

[ii] Verification

[d] Basis of Motion

[e] Hearing Date

[f] Supporting Memorandum

[2] Order for Substitution of Undertaking

[a] FORM

[b] Use of Form

[c] Requirements of Order

[3] Undertaking [Code Civ. Proc. § 995.330]--For Substitution for Livestock Held Under Claim of Lien [Civ. Code § 3080.11]

[a] FORM

[b] Use of Form

[c] Content of Undertaking

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§ 24.80 Complaint to Foreclose Dairy Cattle Supply Lien [Food & Agric. Code § 57413]

[1] FORM

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[4] Notice

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[6] Venue

[7] Enforcement

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§ 24.01 Scope of Chapter

This chapter discusses proceedings arising under the Livestock Service Lien Law (*Civ. Code § 3080 et seq.*) [Subpart A] and the Dairy Cattle Supply Lien Law (*Food & Agric. Code § 57401 et seq.*) [Subpart B]. The Poultry and Fish Supply Lien Law (*Food & Agric. Code § 57501 et seq.*) is similar to the Dairy Cattle Supply Lien Law, but it is not discussed in this chapter.

Subpart A of the chapter contains the following forms:

- Forms of letters proposing, and giving notice of a proposal, that a livestock servicer retain livestock (held under claim of lien) in satisfaction of a claim for payment for rendering livestock services [§§ 24.70, 24.71].

- A form of release of interest in livestock held under claim of lien [§ 24.72].

- Forms relating to an order authorizing sale of livestock (held under claim of lien) prior to judgment in an action on the underlying claim [§ 24.73].

- Forms relating to a substitution of an undertaking [§ 24.74].

Subpart B of the chapter contains the following form:

- A form of complaint for foreclosure on a dairy cattle supply lien [§ 24.80].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiensCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsPossessionCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionPublic SaleGovernmentsAgriculture & FoodProcessing, Storage & DistributionCommercial Law

(UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionEnforcement

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§ 24.02 Cross References

- For discussion and forms relating to enforcement of judgments, *see* Ch. 254, *Execution and Enforcement of Judgments* .

- For forms and discussion of proceedings relating to liens generally, *see* Ch. 342, *Liens and Wage Preferences* .

- For discussion and forms relating to Division 9 of the Commercial Code (*Com. Code § 9101 et seq.*), *see* Ch. 503, *Sales: Secured Transactions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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[Reserved]

§§ 24.03[Reserved]

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§ 24.10 Governing Statutes

The Livestock Service Lien Law (*Civ. Code §§ 3080-3080.22*) governs liens on "livestock" which secure claims for "livestock services" rendered with respect to the livestock [*see* definitions in § 24.11]. Liens in general are governed by *Civ. Code §§ 2872-2914* [*see* Ch. 342, *Liens and Wage Preferences*]. Formerly, Civ. Code § 3051 provided for a possessory lien in favor of livery, boarding, feed stable, or feed yard proprietors, and persons pasturing horses or stock, but that provision was repealed [*see* Stats. 1979, Ch 600, § 1] and replaced by a new provision in the Livestock Service Lien Law [*see* discussion in *§ 24.12* [1]].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiens

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§ 24.11 Definitions

"Livestock" means any cattle, sheep, swine, goat, or horse, mule, or other equine [*Civ. Code § 3080(a)*].

"Livestock services" are any and all grazing, feeding, boarding, general care (which includes animal health services), transportation or other services rendered to livestock for the owner of livestock, or for any person acting by or under the owner's authority [*Civ. Code § 3080(c)*].

A "livestock servicer" is any individual, corporation, partnership, joint venture, cooperative association, or other organization or entity which provides livestock services [*Civ. Code § 3080(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGoodsFarm Products

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3-24 California Forms of Pleading and Practice--Annotated § 24.12

§ 24.12 Livestock Service Lien

[1] In General

A livestock servicer has a general lien on livestock in his or her possession to secure the livestock owner's obligations with respect to [*Civ. Code § 3080.01*]:

- The provision of livestock services to the livestock in the possession of the livestock servicer, and

- The provision of livestock services to other livestock for which the services were provided in connection with or as part of the same livestock service transaction, if those livestock services were provided within the immediately preceding 12 months prior to the date on which the lien arose

[2] Date Lien Arises

The lien arises as the charges for livestock services become due [*Civ. Code § 3080.01*].

[3] Lien as Possessory

The lien is dependent on possession [*Civ. Code § 3080.01*].

[4] Priority of Lien

The lien has priority over all other liens on and security interests in the livestock [*Civ. Code § 3080.01*].

[5] Obligations Secured

The lien secures the owner's contractual obligations to the lienholder for the provision of livestock services, the lienholder's reasonable charges for the provision of livestock services after the lien has arisen as set forth in *Civ. Code § 3080.02*[*see § 24.13*], and the lienholder's costs of lien enforcement, including attorney's fees [*Civ. Code § 3080.01*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiensCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsPossession

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§ 24.13 Rights and Remedies of Lienholder

[1] Retention of Livestock

A lienholder may retain possession of the livestock and charge the owner for the reasonable value of providing livestock services to the livestock until the owner's obligations secured by the lien have been satisfied [*Civ. Code § 3080.02(a)*].

[2] Acceptance of Livestock in Lieu of Payment

At any time after a lien has arisen under the Livestock Service Lien Law, the lienholder (livestock servicer) may propose to retain all or any portion of the livestock in its possession, in satisfaction of all or any portion of the claim against the owner or other person indebted to the lienholder for livestock services [*Civ. Code § 3080.21*].

The proposal must be made in writing to the owner [for a form of written proposal, *see § 24.70*], and written notice of the proposal must be given to any person claiming a lien or security interest in the livestock who had on file with the Secretary of State on the date the lien arose, a financing statement covering the livestock for which livestock services secured by the lien were provided [*Civ. Code § 3080.21*; for a form of written notice to other lienholders, *see § 24.71*].

If, within 21 days after the notice is sent, the lienholder receives objection in writing from a person entitled to receive notification, the lienholder must proceed to sell the livestock and account for the proceeds pursuant to *Civ. Code §§ 3080-3080.22* [*Civ. Code § 3080.21*].

In the absence of written objection, the lienholder may retain the livestock, or so much of the livestock as proposed, in satisfaction of all or a portion of the claim for livestock services, on the owner's and such other person's execution of a release conforming to *Civ. Code § 3080.20* [*Civ. Code § 3080.21*]. For a form of release of interest in livestock, *see § 24.72*.

[3] Sale as Provisional Remedy

[a] Application to Court

Upon the filing of a complaint, or at any time thereafter prior to judgment, the lienholder may apply to the court in which the action was commenced for an order authorizing sale of the livestock prior to judgment [*Civ. Code § 3080.03*]. A hearing is held in the court in which the lienholder has brought the action [*Civ. Code § 3080.03(c)*].

In some cases, an order authorizing sale prior to judgment may be issued ex parte [*see* [b], *below*].

For appropriate forms for an order authorizing sale of the livestock prior to judgment, *see § 24.73*.

[b] Ex Parte Application

An order authorizing the sale of livestock prior to judgment may be issued on an ex parte application, if it appears from facts shown by affidavit that great or irreparable injury would result to the lienholder if issuance of the order were delayed until the matter could be heard on noticed hearing [*Civ. Code § 3080.15(a)*]. Otherwise, the defendant must be served with notice of the application (and other related papers) at least 10 days before the hearing date, or otherwise as the court may order for good cause shown [*Civ. Code § 3080.03(c)*]. For a form of ex parte motion, *see § 24.73* [2]; for a form of notice of motion and supporting papers, *see § 24.73*[1]].

If an order for sale is issued ex parte, then on ex parte application of any party affected by the order or, if the court so orders, after a noticed hearing, the court may modify or vacate the order if it determines that it would be proper under the circumstances [*Civ. Code § 3080.15(e)*].

[c] Noticed Hearing

The defendant is entitled to oppose the issuance of a pre-judgment order of sale by filing and serving a notice of opposition no later than three days prior to the date set for hearing [*Civ. Code § 3080.05(a)*]. For a form of notice of opposition to motion, *see § 24.73*[3].

Except when the lienholder has made an ex parte application pursuant to *Civ. Code § 3080.15*, or for good cause shown, a defendant shall not be permitted to oppose the issuance of an order if it has failed to file a notice of opposition within the time prescribed [*Civ. Code § 3080.05(b)*].

[d] Findings Required for Court Order

The court must issue an order authorizing the sale of the livestock prior to judgment if it finds all of the following [*Civ. Code § 3080.06(a)*]:

- The claim on which the lienholder's action is based is a claim giving rise to a lien on which an order authorizing sale may be issued under *Civ. Code §§ 3080-3080.22*.
- The lienholder has established the probable validity of the claim on which the action is based.
- The lienholder has established the probable validity of the lien sought to be enforced by sale.
- The sale is necessary to prevent a possible decline in the value or condition of the livestock, or the sale should be held (prior to judgment) in the interest of equity.
- The sale is not sought for a purpose other than the recovery on the claim on which the lien is based.
- The sale, if conducted in the manner set forth in the application, would be conducted in a

commercially reasonable manner.

For a form of order authorizing sale of livestock prior to judgment, [*see § 24.73*[4]].

[4] Sale Pursuant to Judgment

A lienholder may proceed to sell all or any portion of the livestock if a judgment authorizing sale has been entered in favor of the lienholder on the claim which gives rise to the lien [*Civ. Code § 3080.02(b)(2)*]. The sale must be made in compliance with the requirements of *Civ. Code § 3080.16*. For discussion of the requirements of *Civ. Code § 3080.16, see § 24.14*.

[5] Sale After Owner's Release

A lienholder may proceed to sell all or any portion of the livestock pursuant to *Civ. Code § 3080.16* if the owner of the livestock has released, after the lien has arisen, his or her interest in the livestock in the form prescribed by *Civ. Code § 3080.20* [*Civ. Code § 3080.02(b)(3)*]. For a form of release, *see § 24.72*.

The sale must be made in compliance with the requirements of *Civ. Code § 3080.16*. For discussion of the requirements of *Civ. Code § 3080.16, see § 24.14*.

[6] Action on Underlying Claim

A lienholder may commence a legal action on his or her claim against the owner of the livestock or any other person indebted to the lienholder for services to the livestock and reduce the claim to judgment [*Civ. Code § 3080.02(c)*]. When the lienholder has reduced the claim to judgment, any lien, levy, or other form of enforcement which may be made upon the livestock by virtue of any execution based on the judgment relates back to the attachment of, and has the same priority as, the livestock service lien [*Civ. Code § 3080.02(c)*]. The lienholder may purchase at a judicial sale held pursuant to the execution on the judgment and thereafter hold the livestock free of any liens on or security interests in the livestock [*Civ. Code § 3080.02(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiensCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsPossessionCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionPublic SaleCivil ProcedureRemediesJudgment LiensEnforcementCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionDisposition of Collateral

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§ 24.14 Sale Procedure

[1] Commercially Reasonable

Except as otherwise specified by an order authorizing sale, or as agreed to by the parties after the lien has arisen, a sale of livestock under the Livestock Lien Law may be held in bulk or in parcels, at wholesale or retail, and at any time and place and on any terms, provided the lienholder acts in good faith and in a commercially reasonable manner [*Civ. Code § 3080.16(a)*]. The livestock may be sold in its existing condition or following any commercially reasonable preparation or processing [*Civ. Code § 3080.16(a)*]. The fact that a better price could have been obtained by a sale at a different time or in a different manner from that selected by the lienholder is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner [*Civ. Code § 3080.16(a)*]. If the lienholder either sells the livestock in the usual manner in any recognized market for the livestock, or sells at the price current in that market at the time of the sale, or if the lienholder has otherwise sold in conformity with reasonable commercial sales practices for the type of livestock sold, it has sold in a commercially reasonable manner [*Civ. Code § 3080.16(a)*].

[2] Deposit of Provisional Remedy Sale Proceeds

Except as otherwise specified by order of the court, or as otherwise agreed by all interested parties after the lien has arisen, if the livestock is sold as a provisional remedy [*see § 24.13* [3]], the proceeds of sale are to be deposited with the clerk of the court in an interest-bearing account to abide the judgment in the action [*Civ. Code § 3080.16(b)*].

[3] Disbursement of Sale Proceeds

Except as may be otherwise specified in the judgment in an action by the lienholder, the proceeds of sale must be applied in the following order [*Civ. Code § 3080.16(c)*]:

- For reasonable expenses incurred by the lienholder in enforcing the lien, including, but not limited to:
    - The charges for livestock services from the date the lien arose to the date of sale.

- The costs of transporting and preparing the livestock for sale and of conducting the sale.

- The reasonable attorney's fees and legal costs and expenses incurred by the lienholder.

- For satisfaction of the contractual indebtedness secured by the lien.

- For satisfaction of indebtedness secured by any subordinate lien or security interest in the livestock, if written notification or demand therefor is received by the court or the lienholder before the proceeds have been distributed; provided, if requested by the lienholder, the holder of a subordinate lien or security interest must seasonably furnish reasonable proof to the court of its subordinate interest before the lienholder need comply with the demand.

The lienholder must account to the owner of the livestock for any surplus and, unless otherwise provided in the judgment in an action by the lienholder, the owner is liable for any deficiency [*Civ. Code § 3080.16(d)*].

[4] Notice of Sale

[a] Who Must Be Notified

Except as otherwise agreed or specified by order of court, a notice in writing of the date, time, and place of sale must be delivered personally or be deposited in the United States mail, postage prepaid, addressed to the owner of the livestock, at his or her last known address [*Civ. Code § 3080.17(a)*]. The notice must also be mailed, in the same manner, to any other person claiming a lien or security interest in the livestock, who had on file with the Secretary of State on the date the lien arose, a financing statement covering the livestock for which livestock services secured by the lien were provided at least five days before the date fixed for any public sale, or before the day on or after which any private sale or other disposition is to be made [*Civ. Code § 3080.17(a)*].

[b] Publication of Notice

Notice of the time and place of a public sale must also be given at least five days before the date of sale by publication once in a newspaper of general circulation published in the county where the sale is to be held. If there is no such newspaper, notice is given by posting, for five days prior to sale, a notice of sale at the place where the sale is to be conducted [*Civ. Code § 3080.17(b)*].

[c] Postponement of Sale

Any public sale may be postponed from time to time by public announcement at the time and place last scheduled for sale [*Civ. Code § 3080.18(b)*].

Any sale of which notice is delivered or mailed and published as provided in the Livestock Service Lien Law, and which is held as provided therein, is a public sale [*Civ. Code § 3080.18(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionPublic SaleCommercial Law (UCC)Secured Transactions (Article 9)DefaultCreditor MisbehaviorCommercially Reasonable ConductCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionDisposition of

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§ 24.15 Rights of Purchaser

The lienholder may purchase the livestock at a public sale [*Civ. Code § 3080.18(c)*].

A sale of livestock held pursuant to the Livestock Service Lien Law transfers to a purchaser for value all of the owner's rights in the livestock, and discharges the lien under which the sale is made and any lien or security interest subordinate to the discharged lien [*Civ. Code § 3080.19(a)*].

The purchaser takes free of all subordinate rights and interests even though the lienholder fails to comply with the requirements of the Livestock Service Lien Law or of any judicial proceeding if [*Civ. Code § 3080.19(b)*]:

- In the case of a public sale, the purchaser has no knowledge of any defects in the sale and does not buy in collusion with the lienholder, other bidders, or the person conducting the sale, or

- In any other case, the purchaser acts in good faith

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBona Fide PurchasersCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionPublic SaleCommercial Law (UCC)Secured Transactions (Article 9)DefaultCreditor MisbehaviorCommercially Reasonable ConductCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionDisposition of Collateral

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A. Livestock Service Liens

3-24 California Forms of Pleading and Practice--Annotated § 24.16

§ 24.16 Debtor's Options

[1] Release of Interest in Livestock

The owner of livestock, or any other person claiming an interest in livestock, may release his or her interest in the livestock at any time after the lien has arisen [*Civ. Code § 3080.20(a)*]. The release must be in writing and dated when signed [*Civ. Code § 3080.20(a)*]. A copy of the release must be given to the person releasing the interest at the time the release is signed [*Civ. Code § 3080.20(a)*]. For a form of release, *see § 24.72*.

A lienholder may proceed to sell all or any portion of the livestock pursuant to *Civ. Code § 3080.16* if the owner of the livestock has released, after the lien has arisen, his or her interest in the livestock in the form prescribed by *Civ. Code § 3080.20* [*Civ. Code § 3080.02(b)(3)*]. The sale must be made in compliance with the requirements of *Civ. Code § 3080.16*. For discussion of the requirements of *Civ. Code § 3080.16*, *see § 24.14*.

[2] Opposition to Sale as Provisional Remedy

If a lienholder, after commencing an action on the underlying claim, seeks or obtains an order authorizing sale of the livestock prior to judgment, the debtor (defendant) may oppose issuance of the order or apply to have it modified or vacated [*see Civ. Code §§ 3080.05*, *3080.15(e)*]. For general discussion of sale of livestock prior to judgment, *see § 24.13*[3].

The debtor may also counter with a motion for an order to substitute an undertaking for the lien so as to release the livestock [*see Civ. Code § 3080.09*; *see also* [4], *below*]. For appropriate forms to substitute an undertaking for the lien, *see § 24.74*.

[3] Action to Recover Possession of Livestock

The owner or other person entitled to possession of livestock on which another claims a livestock service lien may sue to recover possession. For discussion of actions to recover possession and appropriate forms, *see* Ch. 119, *Claim and Delivery* .

[4] Undertaking to Release Lien

[a] In General

At any time after the owner of the livestock has commenced an action to recover possession of the livestock, the owner may apply to the court in which the action was brought for an order for substitution of an undertaking which meets the requirements of *Civ. Code § 3080.11* [*Civ. Code § 3080.09(a)*]. For a form of notice of motion for an order for substitution of undertaking, *see § 24.74*[1].

The owner may also take this step at any time after a livestock servicer has filed a complaint and claimed a lien under *Civ. Code §§ 3080-3080.22* [*Civ. Code § 3080.09(a)*]. An application for an order substituting an undertaking may be included in the owner's opposition to the lien claimant's motion for an order authorizing sale of the livestock prior to judgment [*Civ. Code § 3080.09(b)*]. For discussion of sale of livestock as a provisional remedy, *see § 24.13*[3].

Unless it is included in the owner's notice of opposition, or except for good cause shown, an application for an order substituting an undertaking must on notice [*Civ. Code § 3080.09(b)*]. After a hearing, the court may enter an order directing the lienholder to release all or a portion of the livestock to the owner or the owner's agent [*Civ. Code § 3080.10*]. The order must be conditioned on the filing by the owner of an undertaking as set forth in *Civ. Code § 3080.11* [*Civ. Code § 3080.10*]. For a form of order for substitution of an undertaking, *see § 24.74*[2].

It appears that the undertaking will become effective without court approval [*see Code Civ. Proc. §§ 995.210(b), 995.410(a)*].

[b] Lienholder's Objection to Undertaking

The lienholder may object to the undertaking on the grounds that the sureties are insufficient, the amount of the bond is insufficient, or the undertaking, for any other cause, is insufficient [*see Code Civ. Proc. § 995.920*]. For discussion of the procedures for objecting to an undertaking, and a form notice of motion to object to an undertaking, *see* Ch. 538, *Suretyship, Bonds, and Undertakings* .

[c] Surety May Require Creditor to Pursue Other Remedy

Generally, a surety may require the creditor (in this case, the livestock servicer) to proceed against the debtor, or to pursue any other remedy that would lighten the surety's burden, which the surety cannot itself pursue, before turning to the surety [*Civ. Code § 2845*]. If the creditor neglects to do so, the surety is exonerated to the extent to which the surety is prejudiced [*Civ. Code § 2845*]. Notwithstanding this provision, a judgment of liability on any undertaking is in favor of the beneficiary (in this case, the livestock servicer) and against the debtor and surety, and may be enforced directly against the surety [*Code Civ. Proc. § 996.460(a), (d)*]. The liability of the surety is limited to the amount of the undertaking, but the surety's right of subrogation against the debtor is not limited to that amount [*Code Civ. Proc. § 996.470(a)*]. A motion to enforce liability on the undertaking may not be made prior to entry of final judgment in the action in which the undertaking is given and the time for appeal has expired or, if an appeal is taken, until the appeal is finally determined [*Code Civ. Proc. § 996.440(b)*]. The motion must not be made or notice of motion served more than one year after the later of the preceding dates [*Code Civ. Proc. § 996.440(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGuaranty ContractsCommercial Law (UCC)Secured Transactions (Article 9)DefaultCreditor MisbehaviorRemedies for NoncomplianceCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionRedemptionCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionPublic SaleCommercial Law (UCC)Secured Transactions (Article

9)DefaultForeclosure & RepossessionDisposition of Collateral

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§ 24.17 Assignment of Lien

Any lien provided for in the Livestock Service Lien Law may be assigned by written instrument accompanied by delivery of possession of the livestock, subject to the lien, and the assignee may exercise the rights of a lienholder [*Civ. Code § 3080.22*]. Any lienholder assigning a lien must at the time of assigning the lien give written notice of the assignment either by personal delivery or by registered or certified mail, to the legal owner and any other person claiming a lien on or security interest in the livestock who had on file with the Secretary of State on the date the lien arose a financing statement covering the livestock for which livestock services secured by the lien were provided, including the name and address of the person to whom the lien has been assigned [*Civ. Code § 3080.22*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiensCommercial Law (UCC)Secured Transactions (Article 9)Third Party RightsAssignmentsCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionDisposition of Collateral

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[Reserved]

§§ 24.18[Reserved]

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3-24 California Forms of Pleading and Practice--Annotated § 24.30

§ 24.30 Governing Law

The Dairy Cattle Supply Lien Law [*Food & Agric. Code §§ 57401-57414*] governs liens upon the "proceeds" of milk or milk products produced from dairy cattle, which secure claims for "feed or materials" to aid the raising or maintaining of the dairy cattle.

There is also a Poultry and Fish Supply Lien Law (*Food & Agric. Code § 57501 et seq.*) that is similar to the Dairy Cattle Supply Lien Law, but it is not discussed in this chapter.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiens

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3-24 California Forms of Pleading and Practice--Annotated § 24.31

§ 24.31 Definitions

[1] Feed and Materials

"Feed and materials" means commercial feed, grain, forage, feed ingredients, mineral feed, drugs, animal health products, customer-formula feed, any mixture or preparation for feeding animals, any of the constituent nutrients of an animal ration, or any other food which is used for feeding dairy cattle [*Food & Agric. Code § 57401(b)*].

[2] Proceeds

"Proceeds" means funds derived from the sale of milk or milk products which are payable to the lien debtor by the possessor of the funds, except for any of the following [*Food & Agric. Code § 57401(c)*]:

- Deductions for taxes, fees, and assessments.
- Funds due or owing milk processing cooperative associations organized and operating pursuant to *Food & Agric. Code §§ 54001-54294*.
- Funds retained by the cooperative association.
- Deductions made pursuant to court order.
- Deductions due or owing the buyer of the milk for hauling services provided by the buyer pursuant to *Food & Agric. Code § 62096(e)*, or for the testing of milk for purposes of payment pursuant to *Food & Agric. Code § 34231*.

[3] Raising or Maintaining Dairy Cattle

"Raising or maintaining of dairy cattle" means feeding, pasturing, caring for, and managing dairy cattle kept or raised for use or profit [*Food & Agric. Code § 57401(d)*].

[4] Reasonable or Agreed Charges

"Reasonable or agreed charges" means the agreed price, if any, for the feed and materials sold to the lien debtor, at the lien debtor's request. If there is no agreed price or a method for determining price which is agreed on, reasonable or agreed charges means the reasonable value of the feed or materials as of the date of delivery [*Food & Agric. Code § 57401(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiensCommercial Law (UCC)Secured Transactions (Article 9)PriorityCreditor PrioritiesProceeds

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§ 24.32 Entitlement to Lien

A person who provides feed or materials to aid the raising or maintaining of dairy cattle has a lien on the proceeds of the milk or milk products produced from the dairy cattle, for the reasonable or agreed charges for the feed or materials provided, and for the costs of enforcing the lien [*Food & Agric. Code § 57402*]. The amount of charges secured by the lien cannot exceed an amount equal to the reasonable or agreed charges for feed or material provided within a 45-day period, and only two providers of feed or materials can have an enforceable lien at any time according to the priority set forth in *Food & Agric. Code § 57406* [*Food & Agric. Code § 57402*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiens

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§ 24.33 Applicability of Division 9 of the Commercial Code

Except to the extent specifically set forth in the Dairy Cattle Supply Lien Law, dairy cattle supply liens are subject to Division 9 of the Commercial Code [*Food & Agric. Code § 57407*]. A dairy cattle supply lien has the same priority as a security interest perfected by the filing of a financing statement as of the date the notice of claim of lien was filed [*Food & Agric. Code § 57406(b)*]. As discussed in *§ 24.40*, notice of claims of lien and lien termination statements are maintained by the Secretary of State's office in much the same manner as financing statements under Division 9 of the Commercial Code.

For discussion of Division 9 of the Commercial Code, *see* Ch. 503, *Sales: Secured Transactions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiensCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionScope

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§ 24.34 Perfection of Lien

A dairy cattle supply lien is perfected and effective on the filing of a notice of claim of lien with the Secretary of State [*Food & Agric. Code § 57405*]. The notice of claim of lien can be filed at any time [*Food & Agric. Code § 57405(a)*] and must, at a minimum, set forth the following information [*Food & Agric. Code § 57405 (b)*]:

- The name and address of the lien claimant.
- The name and address of the lien debtor
- The location of the dairy to which the feed and materials were provided.
- That the lien claimant has a dairy cattle supply lien pursuant to *Food & Agric. Code § 57402*.

The notice of claim of lien must be filed by the lien claimant or a person authorized by the lien claimant to sign similar documents on its behalf [*Food & Agric. Code § 57405(c)*]. Although the Secretary of State is authorized to adopt necessary regulations and forms [*Food & Agric. Code § 57410*], the notice of lien claim must be filed on a standard form of original financing statement prescribed by the Secretary of State pursuant to *Com. Code § 9521*, with the following changes [*Food & Agric. Code § 57405(d)*]:

- The lien claimant may be identified either as lien claimant or as secured party.
- The form must be signed by the lien claimant and need not be signed by the debtor.
- In the space provided for the description of the collateral, there must instead be the statement substantially as set forth at *Food & Agric. Code § 57405(b)(3),(4)* (the location of the dairy to which the feed and materials were provided, and that the lien claimant has a dairy cattle supply lien).

The lien claimant must provide written notice of the claim of lien to the lien debtor within 10 days of the date of the

filing with the office of the Secretary of State [*Food & Agric. Code § 57405(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsDuration & EffectivenessCommercial Law (UCC)Secured Transactions (Article 9)PriorityLiensCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsRequirements

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§ 24.35 Duration of Lien

Except as otherwise provided by the Dairy Cattle Supply Lien Law, the claim of notice of lien remains in effect, and no new notice of claim of lien is required in order to maintain the lien, as long as the person who provides feed or materials either remains unpaid for amounts secured by the lien, or continues to provide feed or materials on a regular basis to the lien debtor. For purposes of this provision, providing feed or materials is not deemed to be made on a regular basis if a period of more than 30 days elapses between deliveries [*Food & Agric. Code § 57403(b)*].

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3-24 California Forms of Pleading and Practice--Annotated § 24.36

§ 24.36 Priority of Lien

A dairy cattle supply lien has priority in accordance with the time the notice of claim of lien is filed [*Food & Agric. Code § 57406(a)*]. It has the same priority as a security interest perfected by the filing of a financing statement as of the date the notice of claim of lien was filed [*Food & Agric. Code § 57406(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiensCommercial Law (UCC)Secured Transactions (Article 9)Third Party RightsAssignments

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3-24 California Forms of Pleading and Practice--Annotated § 24.37

§ 24.37 Assignment of Lien

A dairy cattle supply lien is assignable or transferable by the lienholder, with full rights of enforcement [*Food & Agric. Code § 57411*]. A lienholder's statement of assignment or transfer must be filed with the Secretary of State in the same manner as prescribed in *Com. Code § 9514* [*Food & Agric. Code § 57411*].

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3-24 California Forms of Pleading and Practice--Annotated § 24.38

§ 24.38 Enforcement of Lien

The lien claimant must provide written notice to secured creditors at least 30 days prior to enforcing a claim of lien [*Food & Agric. Code § 57412*]. For purposes of this provision, "secured creditors" are those creditors having a perfected security interest in dairy cattle, milk, milk products, or the proceeds thereof, as of the date the notice of claim of lien is filed with the Secretary of State [*Food & Agric. Code § 57412*].

A dairy cattle supply lien can be foreclosed only in an action to recover the reasonable or agreed charges for feed or material delivered [*Food & Agric. Code § 57413*]. The final judgment is enforced pursuant to *Code Civ. Proc. § 680.010 et seq.* [*Food & Agric. Code § 57413*]. For discussion of judgment enforcement, *see* Ch. 254, *Executions and Enforcement of Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiensCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionEnforcement

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3-24 California Forms of Pleading and Practice--Annotated § 24.39

§ 24.39 Lien Termination Statement

When a lien claimant receives payment for amounts secured by the lien and has not been providing feed or materials for a period of 30 consecutive days, the lien claimant must, on written demand of the debtor, send the debtor a statement that he or she no longer claims a security interest under the notice of claim of lien [*Food & Agric. Code § 57414(a)*]. The notice of claim of lien must be identified by date, names of the parties, and file number [*Food & Agric. Code § 57414(a)*].

If the affected lienholder of record fails to send termination statement within 10 days after proper demand for one, he or she is liable to the debtor for all actual damages suffered by the debtor by reason of the failure, and, if the failure is in bad faith, for a penalty of $100 [*Food & Agric. Code § 57414(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsTermination StatementsCommercial Law (UCC)Secured Transactions (Article 9)PriorityLiens

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3-24 California Forms of Pleading and Practice--Annotated § 24.40

§ 24.40 Records and Public Information

[1] Notices and Statements

The notice of claim of lien is filed, indexed, and marked in the office of the Secretary of State in the same manner as a financing statement pursuant to *Com. Code § 9519* [*Food & Agric. Code § 57405(e)*]. For the purpose of the Secretary of State's index pursuant to *Com. Code §§ 9515, 9516*, and *9522*, and for the purpose of the issuance of a certificate pursuant to *Com. Code § 9519* or *Com. Code § 9528*, the Secretary of State must to identify a notice of claim of lien as a financing statement [*Food & Agric. Code § 57405(g)*]. Termination statements are marked with the date and time of filing and indexed under the name of the debtor and under the file number of the original lien, and kept on file at the Secretary of State's office for one year after receipt [*Food & Agric. Code § 57414(b)*].

[2] Lien Search

Any member of the public can obtain a copy of any notice of claim of dairy cattle supply lien, including notices affecting the notices [*Food & Agric. Code § 57409*]. The fee for these copies is the same as the fee prescribed by *Com. Code § 9525* [*Food & Agric. Code § 57409*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsDuration & EffectivenessCommercial Law (UCC)Secured Transactions (Article 9)PriorityLiensCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsRequirements

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[Reserved]

§§ 24.41[Reserved]

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3-24 California Forms of Pleading and Practice--Annotated § 24.50

§ 24.50 Related Matthew Bender Publications

For transactional forms related to forms in this chapter, see California Legal Forms (Matthew Bender), Ch. 92, and *Service Contracts*; Ch. 102, *Personal Property Transactions*

For interrogatories for use in actions involving liens on offspring of breeding stallions, see Forms of Discovery (Matthew Bender), *Liens*

For interrogatories for use in actions involving delay in delivery of livestock, see Forms of Discovery (Matthew Bender), *Trucks and Trucking*

Legal Topics:

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

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3-24 California Forms of Pleading and Practice--Annotated § 24.51

§ 24.51 Federal Statutes

[1] Agricultural Animals

Animal products as agricultural products. *7 U.S.C. §§ 2, 451*

Importing and breeding honeybees. *7 U.S.C. §§ 281-283*

Raising of fur bearing animals as agricultural pursuit. *7 U.S.C. §§ 433, 434*

Improving breeding of horses. *7 U.S.C. § 437*

[2] Commercial Transactions Involving Animals

Discounting notes, drafts, and bills of exchange based on livestock. *12 U.S.C. § 348*

Disposal of surplus animals by federal government. *7 U.S.C. § 2241*; *16 U.S.C. §§ 36, 36a, 715s*

[3] Feed and Water

Preventing starvation of resident wildlife and migratory birds. *7 U.S.C. §§ 447-449*

Exception to quota provisions for sugar imported into, or manufactured In, United States for livestock feed. *7 U.S.C. § 1122*

Livestock and poultry feed and wheat quota. *7 U.S.C. § 1332*

Sale of feed for livestock by Commodity Credit Corporation. *7 U.S.C. §§ 1427, 1433*

Reservoirs on unoccupied public lands to furnish water to livestock. *43 U.S.C. §§ 952-955*

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiensCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsPossessionCommercial Law (UCC)Secured Transactions (Article 9)PriorityCreditor PrioritiesNon-Filing CollateralGovernmentsAgriculture & FoodProcessing, Storage & Distribution

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3-24 California Forms of Pleading and Practice--Annotated § 24.52

§ 24.52 State Statutes

Principal-income allocation for animal property. *Civ. Code §§ 731.09, 731.10*

Liens generally. *Civ. Code §§ 2872-2914*

Veterinarian's lien rights. *Civ. Code §§ 3051, 3052*

Livestock Service Lien Law. *Civ. Code § 3080 et seq.*

Undertaking to obtain release of livestock. *Civ. Code § 3080.10*

Amount of undertaking. *Civ. Code § 3080.11*

Execution and filing of undertaking. *Code Civ. Proc. § 995.310 et seq.*

Sufficiency of personal surety. *Code Civ. Proc. § 995.510*

Affidavit of qualifications of surety. *Code Civ. Proc. § 995.520*

Commercial secured transactions. *Com. Code §§ 9101 et seq.*

Slaughtered animals. Food & Agric. Code § 18301 et seq.

Dairy cattle supply liens. *Food & Agric. Code § 57401 et seq.*

Poultry and fish supply liens. *Food & Agric. Code § 57501 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCommercial Law (UCC)Secured Transactions (Article 9)PriorityLiens

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3-24 California Forms of Pleading and Practice--Annotated § 24.53

§ 24.53 Decisions

Civ. Code § 3051 governs veterinary proprietors' and veterinary surgeons' lien rights, and *Civ. Code § 3080 et seq.* governs all other livestock service providers; determining factor is who is in possession and who provides the services, not which service is provided. *Jakubaitis v. Fischer (1995) 33 Cal. App. 4th 1601, 1606, 40 Cal. Rptr. 2d 39*

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiens

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3-24 California Forms of Pleading and Practice--Annotated § 24.54

§ 24.54 Law Reviews

Note, *The California Agricultural Producer's Lien, Processing Company Insolvencies, and Federal Bankruptcy Law: An Evaluation and Alternative Methods of Protecting Farmers, 36 Hastings LJ 609 (1985)*

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§ 24.55 Text References

California Farm & Ranch Law (Cal. C.E.B. 1967)

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3-24 California Forms of Pleading and Practice--Annotated §§ 24.56-24.69

[Reserved]

§§ 24.56[Reserved]

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California Forms of Pleading and Practice--Annotated

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Volume 3: Alcoholic Beverage Licenses thru Answers-Chs. 18-29
Chapter 24 ANIMALS: LIENS
PART IV. FORMS
A. Livestock Service Liens

3-24 California Forms of Pleading and Practice--Annotated § 24.70

§ 24.70 Letter to Livestock Owner--Livestock Servicer's Proposal to Retain Livestock in Satisfaction of Claim [Civ. Code § 3080.21]

[1] FORM Letter to Livestock Owner--Livestock Servicer's Proposal to Retain Livestock in Satisfaction of Claim [Civ. Code § 3080.21]

_____ [*inside address*]

Dear _____:

_____ [*Introductory reference to underlying transaction, e.g.,* This firm has been retained to represent _____ (*specify livestock servicer, e.g.,* Bender Boarding Ranch, Inc.) in the matter of your debt, now past due, in the amount of $_____, for _____(*specify livestock service, e.g.,* stabling your horses during the months of June and July of this year)].

If you are unable or unwilling to pay this debt promptly, _____[*specify livestock servicer, e.g.,* Bender Boarding Ranch, Inc.] proposes to retain _____ [*specify livestock, e.g.,* your mare named Lightning] in satisfaction of the claim, pursuant to the Livestock Service Lien Law (*Civil Code §§ 3080-3080.22*).

You may accept this proposal by executing and returning, in the envelope enclosed, the attached Release of Interest. Provided you do so [on or before _____[*date*], _____ [*add if notice of proposal, § 24.71 [1], is sent to any person* and provided (each of) the person(s) listed below executes a similar release,] _____ [*specify livestock servicer, e.g.,* Bender Boarding Ranch, Inc.] will retain _____ [*specify livestock, e.g.,* your mare], cancel the debt, _____ [*insert if appropriate:* release _____ (*specify livestock, e.g.,* the other two horses) to you or your agent,] and consider the matter closed.

_____ [*Add if notice of proposal, § 24.71 [1], is sent to any person:* If (any of) the person(s) listed below should object to this proposal as provided in the Livestock Service Lien Law or refuse to execute a release of

interest, then notwithstanding that you may have accepted the proposal, _____ (*specify livestock servicer, e.g.,* Bender Boarding Ranch, Inc.) will, pursuant to that law, proceed to sell your _____ (*specify livestock, e.g.,* horses) and apply the proceeds of sale as provided in that law].

Very truly yours,
_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a model for an attorney's letter to the debtor of a livestock servicer, proposing to enforce the livestock servicer's lien by retaining some or all of the livestock in the client's possession, in lieu of payment [*see Civ. Code § 3080.21*]. To avoid delay, a copy of a release of interest should accompany the letter [*see Civ. Code § 3080.21*]. For a form of release, *see § 24.72*.

For further discussion of acceptance of livestock in lieu of payment, *see § 24.13*[2].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiensCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsPossessionCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionEnforcement

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3-24 California Forms of Pleading and Practice--Annotated § 24.71

§ 24.71 Letter to Other Lienholders--Notice of Proposal by Lienholder to Retain Livestock in Satisfaction of Claim [Civ. Code § 3080.21]

[1] FORM Letter to Other Lienholders--Notice of Proposal by Lienholder to Retain Livestock in Satisfaction of Claim [Civ. Code § 3080.21]

_____ [*inside address*]

Dear _____:

Pursuant to the Livestock Service Lien Law (*Civil Code Sections 3080-3080.22*), you are hereby notified of the proposal of _____ [*specify livestock servicer, e.g.,* Bender Boarding Ranch, Inc.] to satisfy a claim against _____ [*name of debtor*] by retaining _____ [*specify livestock, e.g.,* a certain mare named Lightning], the property of _____ [*name of debtor*], which is now in the possession of _____ [*specify livestock servicer, e.g.,* Bender Boarding Ranch, Inc.] and so held subject to a lien for $ _____. A copy of the proposal is attached for your information.

You are being sent this notice because it appears you claim a lien on or security interest in this _____ [*specify livestock, e.g.,* mare] and had on file with the Secretary of State on the date the lien arose a financing statement covering this _____ [*specify livestock, e.g.,* mare].

If you object to the lienholder's proposal, your written statement in objection must be received by us on or before _____ [*date 21 days after notice is sent*]. If you do not object, please execute and return, in the envelope enclosed, the attached Release of Interest.

Very truly yours,
_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a model for the notice of proposal to retain livestock in satisfaction of a livestock servicer's claim, which notice is required to be sent to other lienholders [*Civ. Code § 3080.21*. For a form of proposal to the debtor, and a release of interest, *see §§ 24.70* and *24.72*, respectively].

For further discussion of acceptance of livestock in lieu of payment, *see § 24.13*[2].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiensCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsPossessionCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionEnforcement

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3-24 California Forms of Pleading and Practice--Annotated § 24.72

§ 24.72 Release of Interest in Livestock Subject to Lien [Civ. Code § 3080.20]

[1] FORM RELEASE OF INTEREST
IN
LIVESTOCK SUBJECT TO LIEN

Pursuant to the Livestock Service Lien Law (*Civil Code §§ 3080-3080.22*), _____ [*name of debtor or other interested party (releasing party)*] hereby gives up all of his/her/its interest in the livestock hereinafter described, _____ [*either, if executed by debtor:* and in the proceeds of sale, to the extent of the lien hereinafter referred to *or, if executed by other interested party:* but retains an interest of the same priority in the proceeds of sale] in the event such livestock is subsequently sold, and hereby gives _____ [*name of lienholder*] permission to sell such livestock pursuant to *Civil Code Section 3080.16*.

_____ [*Name of releasing party*] hereby acknowledges that he/she/it has a legal right to a hearing in court prior to any sale of such livestock to satisfy the lien hereinafter referred to, and hereby expressly waives that right to a hearing.

This release covers _____ [*description of livestock*], which livestock is owned by _____ [*name (debtor)*], _____ [*add if release is executed by other interested party:* in which _____ (*name of releasing party*) has _____ (*specify interest, e.g.,* a security interest as described in a financing statement on file with the Secretary of State),] and which is subject to a lien under the Livestock Service Lien Law for $_____ in favor of _____[*name of lienholder*].

[*INCLUDE if release is executed by debtor*]

This release is given in _____ [full *or* partial] satisfaction of the claim of _____ [*name of lienholder*] against _____ [*name of debtor*] for the sum of $ _____ on account of _____ [*briefly describe transaction giving rise to debt*]. _____ [*If release*

given in partial satisfaction, add _____ (*Name of debtor*) hereby acknowledges he/she/it is aware that _____(*name of lienholder*) may still have a claim against him/her/it after this release has been executed].
Dated: _____

_____ [*signature*]
_____ [*name*]

[2] Use of Form

The form in [1], *above*, is a release for use by the owner of livestock subject to a lien under the Livestock Service Lien Law, or by any person claiming an interest in the livestock, to release that person's interest pursuant to *Civ. Code § 3080.20*.

For discussion of release of the debtor's interest in livestock, *see § 24.16* [1]; for discussion of the sale of livestock after the owner's release, *see § 24.13*[5].

[3] Contents of Release

The release must contain all of the following information in simple, nontechnical language [*Civ. Code § 3080.20(b)*]:

- A description of the livestock covered by the release and the releasing party's interest in the livestock.

- A statement of the amount of the lien to which the livestock is subject

- A statement that the releasing party has a legal right to a hearing in court prior to any sale of the livestock to satisfy the lien.

- A statement by the releasing party that it is giving the lienholder permission to sell the livestock.

- A statement of the extent to which the releasing party gives up any interest it may have in the livestock or in the sale proceeds of the livestock.

- To the extent that the release is not given in full satisfaction of the lienholder's claim or claims against the releasing party, a statement by the releasing party that it is aware that the lienholder may still have a claim against it after the release has been executed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiensCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsPossessionCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionEnforcement

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3-24 California Forms of Pleading and Practice--Annotated § 24.73

§ 24.73 Proceedings for Order to Authorize Sale of Livestock Prior to Judgment in Livestock Servicer's Action on Underlying Claim [Civ. Code § 3080.03 et seq.]

[1] Notice of Motion, Supporting Statement, Supporting Declaration, and Supporting Memorandum--For Order Authorizing Sale of Livestock Prior to Judgment [Civ. Code § 3080.15]

[a] FORM Notice of Motion, Supporting Statement, Supporting Declaration, and Memorandum of Points and Authorities--For Order Authorizing Sale of Livestock Prior to Judgment [Civ. Code § 3080.15]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION FOR ORDER AUTHORIZ-
vs.	)	ING SALE OF LIVESTOCK PRIOR TO JUDG-
_____ [*name*],	)	MENT, SUPPORTING STATEMENT, FURTHER
Defendant.	)	NOTICE, SUPPORTING DECLARATION OF
	)	_____
	)	[*name*], AND MEMORANDUM
	)	Date: _____
		Time: _____
		Dept: _____
		Trial Date: _____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* plaintiff] will move for an order authorizing sale of the livestock referred to in the complaint, prior to judgment, pursuant to the Livestock Service Lien Law. The motion will be made on the grounds that: (1) the claim on which the present action is based is a claim giving rise to a lien on which an order authorizing sale may be issued under the Livestock Service Lien Law, (2) the claim on which the present action is based is probably valid, (3) the lien sought to be enforced by sale is probably valid, and (4) _____ [the sale is necessary to prevent possible decline in the value or condition of the livestock *or* the sale should be held in the interest of equity].

The motion will be based on this notice of motion, the following supporting statement (filed pursuant to *Civ. Code § 3080.03(a)*), the declaration(s) of _____ [*name*], and the attached memorandum served and filed herewith, on the records and file herein, and such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff,_____ [*party's name*]

SUPPORTING STATEMENT

The motion referred to in the foregoing notice seeks an order authorizing sale pursuant to the Livestock Service Lien Law, *Civil Code Sections 3080-3080.22*, to enforce a livestock service lien. The lienholder seeks to recover $ _____ from the defendant. That amount became due _____ [*date*].

A sale of the livestock subject to the lien should be held prior to judgment in the above-entitled action because _____ [*specify reason, showing either that sale is necessary to prevent possible decline in value or condition of livestock or that sale should be held in interest of equity*].

The livestock to be sold consist of _____ [*description*], having a total estimated fair market value of $ _____.

Plaintiff proposes to sell the livestock _____ [*describe manner of sale, including whether public or private, the amount of expected proceeds, and why such manner of sale is commercially reasonable, e.g.,* at public auction, on consignment to the Matthews Livestock Market in Midland, California, in the usual manner of such sales and on customary terms, with expected proceeds (net after commission and other sale-related deductions) to exceed $_____].

FURTHER NOTICE

To: _____ [*name*], Defendant:

(1) The order sought by the motion referred to in the foregoing notice will issue if the court finds, after hearing, that the plaintiff has established the probable validity of the claim on which the present action is based, and has satisfied the other requirements set forth in the Livestock Service Lien Law, *Civil Code Sections 3080-3080.22*.

(2) The hearing on the motion is not held for the purpose of determining the actual validity of the claim, which determination will be made in other proceedings in the present action and will not be affected by the findings made at the hearing on the motion.

(3) If the order authorizing sale is issued, the plaintiff may proceed to sell the livestock in the manner set forth in the order, and the sale proceeds will be deposited with the court pending judgment on the plaintiff's claim.

(4) If you desire to oppose the issuance of the order, you must file with the court and serve on the plaintiff's undersigned attorney a notice of opposition and supporting affidavit as required by *Civil Code Section 3080.05* no later than three days prior to the date set for hearing.

(5) At the hearing, the court may deny the plaintiff's motion if you file an undertaking as set forth in *Civil Code Section 3080.11*.

(6) You may seek the advice of an attorney as to any matters concerning the lienholder's complaint and application. If an attorney is to assist you, he or she should be consulted promptly. You or your attorney or both of you may be present at the hearing.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff,_____ [*name*]

SUPPORTING DECLARATION OF _____ [*name*] FOR AN ORDER TO AUTHORIZE SALE OF LIVESTOCK PRIOR TO JUDGMENT

I, _____ [*name*], declare:

I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

_____ [*Testimony as to facts that would entitle lienholder to judgment on claim on which action is brought, e.g.,* During the months of June and July of this year, I provided usual stable services for the care of three horses owned by defendant, pursuant to defendant's oral promise to pay for such services at the rate of $300 per month per horse, payment to be made within 10 days after receipt of a bill. A bill for $900 was duly sent by mail to defendant on June 30, for the month of June; and a like bill was sent on July 31, for the month of July. No part of the sum now owing, namely $1,800, has been paid; therefore, the present action was commenced to recover the same].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM

[*Add memorandum supporting motion*]

[b] Use of Form

The form in [a], *above*, is a notice of motion, supporting statement, supporting declaration, and memorandum for use by a livestock servicer, after filing a complaint to collect a debt secured by a lien under the Livestock Service Lien Law, to obtain an order authorizing sale of the subject livestock prior to judgment [*see Civ. Code § 3080.03*]. For discussion of sale of livestock prior to judgment, *see § 24.13*[3].

[c] Basis for Motion

A lienholder under the Livestock Service Lien Law may commence a legal action on its claim against the owner of the livestock, or any other person indebted to the lienholder for services to the livestock [*Civ. Code § 3080.02(c)*]. On the filing of the complaint, or at any time thereafter prior to judgment, the lienholder may apply to the court in which the action was commenced for an order authorizing sale of livestock [*Civ. Code § 3080.03*].

[d] Contents of Notice

[i] Supporting Statement

The application must include all of the following [*Civ. Code § 3080.03(a)*]:

- A statement showing that the sale is sought pursuant to the Livestock Service Lien Law to enforce a livestock service lien.

- A statement of the amount the lienholder seeks to recover from the defendant and the date that amount became due.

- A statement setting forth the reasons why a sale should be held prior to judgment (namely, why the sale is necessary to prevent possible decline in the value or condition of the livestock or why the sale should be held in the interest of equity [*see Civ. Code § 3080.06(a)(4)*]).

- A description of the livestock to be sold and an estimate of the fair market value thereof.

- A statement of the manner in which the lienholder intends to sell the livestock, including (but not limited to) whether the sale will be public or private, the amount of proceeds expected from the sale, and why the sale, if authorized, would conform to the standard of commercial reasonableness (as required by *Civ. Code § 3080.16*). For discussion of sale requirements and procedure, *see § 24.14*.

[ii] Special Notice to Defendant

In addition to other information, the notice of application and hearing must inform the defendant of all of the following

[*Civ. Code § 3080.04*]:

- The date, time, and place of the hearing on the application.

- That the order will issue if the court finds, after hearing, that the lienholder has established the probable validity of the claim (on which the present action is based) and has satisfied the other requirements set forth in the Livestock Service Lien Law.

- That the hearing is not held for the purpose of determining the actual validity of the claim, which determination will be made in other proceedings in the action and will not be affected by the findings made at the hearing on the application for the order.

- If the order authorizing sale is issued, that the lienholder may proceed to sell the livestock in the manner set forth in the order, and the sale proceeds will be deposited with the court pending judgment on the lienholder's claim.

- If the defendant desires to oppose the issuance of the order, that the defendant must file with the court and serve on the lienholder (actually, on the lienholder's attorney; *see* Code Civ. Proc. § 101) a notice of opposition and supporting affidavit as required by *Civ. Code § 3080.05* no later than three days prior to the date set for hearing.

- That at the hearing, the court may deny the lienholder's application if the defendant files an undertaking as set forth in *Civ. Code § 3080.11*.

- That, in these words: "You may seek the advice of an attorney as to any matters concerning the lienholder's complaint and application. If an attorney is to assist you, he or she should be consulted promptly. You or your attorney or both of you may be present at the hearing."

[e] Supporting Affidavit or Declaration

The application must be supported by an affidavit or affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) showing that on the facts presented therein the lienholder would be entitled to a judgment on the claim on which the action is brought [*Civ. Code § 3080.03(b)*].

[f] Service; Hearing Date

Except as ordered by the court on good cause shown, the defendant must be served with a copy of all of the following at least 10 days prior to the date set for hearing [*Civ. Code § 3080.03(c)*]:

- A summons and complaint.

- A notice of application and hearing.

- An application and all affidavits filed in support thereof.

A hearing is required [*Civ. Code § 3080.03(c)*; *see* [4][d], *below*].

[g] Supporting Memorandum

A memorandum in support of the motion must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule*

3.1113(a)].

[2] Ex Parte Motion, Supporting Statement, and Supporting Declaration--For Order Authorizing Sale of Livestock Prior to Judgment [Civ. Code § 3080.15]

[a] FORM Ex Parte Motion, Supporting Statement, and Supporting Declaration--For Order Authorizing Sale of Livestock Prior to Judgment [Civ. Code § 3080.15]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	EX PARTE MOTION FOR ORDER AUTHORIZ-
vs.	)	ING SALE OF LIVESTOCK, SUPPORTING
_____ [*name*],	)	STATEMENT, AND SUPPORTING DECLARA-
Defendant.	)	TION OF _____ [*name*]
	)	
	)	Date: _____
	)	Time: _____
		Dept: _____
		Trial Date: _____

Without notice to defendant, plaintiff moves for an order authorizing sale of the livestock referred to in the complaint, prior to judgment, pursuant to the Livestock Service Lien Law, on the following grounds:

(1) The claim on which the present action is based is a claim giving rise to a lien on which an order authorizing sale may be issued under the Livestock Service Lien Law;

(2) The claim on which the present action is based is probably valid;

(3) The lien sought to be enforced by sale is probably valid;

(4) As more particularly stated in the following supporting statement, _____ [the sale is necessary to prevent possible decline in the value or condition of the livestock *or* the sale should be held in the interest of equity];

(5) As more particularly stated in the appended declaration, plaintiff will suffer great and irreparable injury if the order is not issued; and

(6) The condition of the livestock will greatly deteriorate, or the value of the livestock will greatly depreciate, or both, before an order authorizing sale can be obtained pursuant to noticed hearing.

SUPPORTING STATEMENT

The foregoing motion seeks an order authorizing sale pursuant to the Livestock Service Lien Law, *Civil Code Sections 3080-3080.22*, to enforce a livestock service lien. The lienholder seeks to recover $ _____ from the defendant. That amount became due _____ [*date*].

A sale of the livestock subject to the lien should be held prior to judgment in the above-entitled action because _____ [*specify reason, showing either that sale is necessary to prevent possible decline in value or condition of livestock or that sale should be held in interest of equity*].

The livestock to be sold consist of _____ [*description*], having a total estimated fair market value of $ _____, provided they are promptly sold.

Plaintiff proposes to sell the livestock _____ *describe manner of sale, including whether public or private, the amount of expected proceeds, and why such manner of sale is commercially reasonable, e.g.,* at private sale, to the Matthews Farm, Inc., which is ready to buy such livestock at the aforesaid price, provided the sale can be consummated and delivery can be made before _____ [*date*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff_____ [*name*]

SUPPORTING DECLARATION OF _____ [*name*] FOR AN ORDER TO AUTHORIZE SALE OF LIVESTOCK PRIOR TO JUDGMENT

I, _____ [*name*], declare:

I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

_____ [*Testimony as to facts that would entitle lienholder to judgment on claim on which action is brought*].

_____ [*Testimony that plaintiff would suffer great or irreparable injury if order not issued*].

_____ [*Testimony that condition of livestock will greatly deteriorate or value will greatly depreciate before noticed hearing can be held*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature*]
_____ [*typed name*]

[b] Use of Form

The form in [a], *above*, is an ex parte motion, incorporating a supporting statement required by the Livestock Service Lien Law [*see Civ. Code § 3080.03(a)*], and a supporting declaration. The form should be used instead of a notice of motion [*see* [1], *above*] in those rare cases when livestock subject to a livestock servicer's lien should be sold promptly, to get maximum value, and the customary or expected delay before a noticed hearing would probably result in great loss of value, or other irreparable injury to the plaintiff.

The motion must be accompanied by a supporting memorandum [*Cal. Rules of Ct., Rule 3.1201(4)*].

[c] Attempt to Give Notice

For discussion of the requirement that an ex parte motion be accompanied by a declaration relating to whether notice was given, or could or should not be given, to an adverse party [*see Cal. Rules of Ct., Rules 3.1201(3), 3.1204(b)*], see Ch. 372, *Motions and Orders* .

[d] Basis for Motion

An order authorizing sale of livestock subject to a lien prior to judgment without a noticed hearing may be made if it appears from facts shown by affidavit (or declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) that great or irreparable injury would result to the plaintiff if issuance of the order were delayed until the matter could be heard on notice [*see Civ. Code § 3080.15(a)*].

In addition to a specific statement of the facts showing great or irreparable injury, an ex parte application for an order authorizing sale prior to judgment must include the substantive requirements of a notice motion under *Civ. Code § 3080.03*[*Civ. Code § 3080.15(b)*]. For a form for a notice of motion, *see § 24.73[1]*.

[e] Order

The court must examine the ex parte application, supporting affidavits, and other papers on record, and may issue the order sought if it finds all of the following [*Civ. Code § 3080.15(c)*]:

- The plaintiff is entitled to the order under the substantive provisions of the Livestock Service Lien Law.

- The plaintiff will suffer great and irreparable injury if the order is not issued.

- The condition of the livestock will greatly deteriorate or the value of the livestock will greatly depreciate before an order authorizing sale could be obtained pursuant to noticed hearing.

An order issued on ex parte application must contain such provisions as the court determines to be in the interests of justice and equity to the parties, taking into account the effects on all parties under the circumstances of the case. The court may authorize the lienholder to take any action necessary to preserve the value of the livestock so long as the court has determined that the action would be commercially reasonable under the circumstances [*Civ. Code § 3080.15(d)*].

[f] Modification or Vacation of Order

On ex parte application of any party affected by an order authorizing sale prior to judgment that was issued on ex parte application, or after a noticed hearing if the court so orders, the court may modify or vacate the order if it determines that the action would be proper under the circumstances [*Civ. Code § 3080.15(e)*].

[3] Notice of Opposition to Motion for Order Authorizing Sale of Livestock Prior to Judgment [Civ. Code §

3080.05]

[a] FORM Notice of Opposition to Motion for Order Authorizing Sale of Livestock Prior to Judgment [Civ. Code § 3080.05]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF OPPOSITION TO MOTION FOR OR-
vs.	)	DER AUTHORIZING SALE OF LIVESTOCK
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Trial Date: _____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that defendant will oppose the motion of plaintiff, for an order authorizing sale of the livestock referred to in the complaint prior to judgment, at the hearing scheduled pursuant to plaintiff's notice of motion heretofore served and filed.

Opposition will be made on the ground[s] that _____ [*state ground(s) on which defendant opposes order*].

_____ [*Add if appropriate* Defendant is prepared to file an undertaking as provided in *Civil Code Section 3080.11* and estimates the amount thereof should be $ _____, on the basis that _____ (*specify basis for estimate of amount*)].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant_____ [*name*]

[b] Use of Form

The form in [a], *above*, is a notice of opposition for use by a defendant who desires to oppose a lienholder's motion for an order authorizing sale of livestock prior to judgment [*see Civ. Code § 3080.05*]. For a form for a motion, *see § 24.73[1]*.

[c] Requirements of Notice of Opposition

If the defendant desires to oppose the issuance of an order authorizing sale of livestock prior to judgment, the defendant must file and serve on the lienholder a notice of opposition no later than three days prior to the date set for hearing. The notice must [*Civ. Code § 3080.05(a)*]:

- State the grounds on which the defendant opposes the order.

- Be accompanied by an affidavit or affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) supporting any factual issues raised.

- State whether the defendant is prepared to file an undertaking as provided in *Civ. Code § 3080.11* [for a form for an undertaking, *see § 24.74[3]*].

- If the defendant is prepared to file an undertaking, include an estimate of the amount of the undertaking as set forth in *Civ. Code § 3080.09*, and the defendant's basis for the estimate [for a form for an estimate, *see § 24.74*[1]].

Except for good cause shown, a defendant is not permitted to oppose the issuance of an order authorizing sale of livestock prior to judgment if the defendant has failed to file a notice of opposition within the time prescribed [*Civ. Code § 3080.05(b)*].

Neither the failure of the defendant to oppose the issuance of an order authorizing sale, nor the defendant's failure to rebut any evidence produced by the lienholder at the hearing on the motion, constitutes a waiver of any defense to the lienholder's claim in the action or in any other action or have any effect on the right of the defendant to produce or exclude evidence at the trial of the action [*Civ. Code § 3080.08(c)*].

[4] Order Authorizing Sale of Livestock Prior to Judgment [Civ. Code § 3080.06]

[a] FORM Order Authorizing Sale of Livestock Prior to Judgment [Civ. Code § 3080.06]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____
	)	Trial Date: _____
	)	

The motion of plaintiff for an order authorizing sale of certain livestock referred to in the complaint, prior to judgment,

came on regularly for hearing by the court on [*date*]_____. Plaintiff appeared by counsel, _____ [*name*]; defendant, having duly filed a notice of opposition, appeared by counsel, _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted, the court finds as follows:

(1) The claim on which the present action is based is a claim giving rise to a lien on which an order authorizing sale of livestock may be issued under the Livestock Service Lien Law, *Civil Code Sections 3080-3080.22*.

(2) The plaintiff has established the probable validity of the claim on which the present action is based.

(3) The plaintiff claims a lien on the livestock in question and has established the probable validity of that lien, which the plaintiff now seeks to enforce by the proposed sale.

(4) The sale _____ [is necessary to prevent a possible decline in the value or condition of the livestock *or* should be held in the interest of equity].

(5) The sale is not sought for a purpose other than the recovery on the claim on which the lien is based.

(6) The sale, if conducted in the manner set forth in the plaintiffs application, would be conducted in a commercially reasonable manner.

IT IS ORDERED that the motion be, and it hereby is, granted and plaintiff shall proceed to sell the following described livestock in the following manner:

(1) The livestock to be sold consist of _____ [*describe*].

(2) The livestock shall be sold _____ [*specify manner of sale*].

[*EITHER*]

IT IS FURTHER ORDERED that the plaintiff shall deposit the proceeds of sale with the clerk of this court pending final judgment in this action.

[*OR*]

IT IS FURTHER ORDERED that the plaintiff shall deduct and retain from the sale proceeds an amount sufficient to compensate the plaintiff for services provided to the livestock from the date when the lien arose (namely, _____ [*date*]) until the date of sale. [The amount that may be retained by the plaintiff shall not exceed _____(*specify dollar amount or formula*).] The balance of sale proceeds, if any, remaining after said deduction shall be deposited with the clerk of this court pending final judgment in this action.

[*OR*]

IT IS FURTHER ORDERED that the plaintiff shall deposit $ _____ [*amount reasonably necessary to satisfy indebtedness secured by lien*] of the sale proceeds with the clerk of this court pending final judgment in this action; and plaintiff shall apply and distribute the remainder, if any, as follows:

First, for satisfaction of indebtedness secured by any subordinate lien or security interest in the livestock, if written notification or demand thereof is received by the court or the plaintiff before the proceeds have been distributed;

Next, to the clerk of this court, to remain on deposit pending final judgment in this action;

Provided, before actually distributing such remainder of the sale proceeds (otherwise than by depositing such remainder with the clerk of this court), the plaintiff shall file, and obtain the court's approval of, a schedule of distribution identifying each person to whom any portion of such remainder of the sale proceeds will be distributed, the basis for such person's claim, and the amount to be distributed to such person; and

Provided further, the plaintiff may require the holder of a subordinate lien or security interest to seasonably furnish reasonable proof to the court of such subordinate interest before the plaintiff need comply with a demand for satisfaction thereof.

[*CONTINUE*]

Dated: _____

_____ [*signature*]
Judge of the _____ Court

[b] Use of Form

The form in [a], *above*, is an order that may be submitted for the court's issuance if the plaintiff's motion for an order authorizing sale of livestock prior to judgment is granted [*see Civ. Code § 3080.06*]. For a form for a motion to authorize sale of livestock prior to judgment, *see § 24.73[1]*.

[c] Hearing and Findings Supporting Order

At the hearing, the court must consider the showing made by the parties and issue an order authorizing sale of the livestock if it finds all of the following [*Civ. Code § 3080.06(a)*]:

- The claim on which the lienholder's action is based is a claim giving rise to a lien on which an order authorizing sale may be issued under the Livestock Service Lien Law
- The lienholder has established the probable validity of the claim on which the action is based.
- The lienholder has established the probable validity of the lien sought to be enforced by sale.
- The sale is necessary to prevent a possible decline in the value or condition of the livestock, or the sale should be held in the interest of equity.
- The sale is not sought for a purpose other than the recovery on the claim on which the lien is based.
- The sale, if conducted in the manner set forth in the application, would be conducted in a commercially reasonable manner.

[d] Basis for Findings

The court's findings at the hearing must be made on the basis of the pleadings and other papers in the record [*Civ. Code*

§ 3080.08(a)]. On good cause shown, the court may receive and consider additional oral and documentary evidence or points and authorities at the hearing, or it may continue the hearing to allow the production of additional evidence or points and authorities [*Civ. Code § 3080.08(a)*].

[e] Effect of Findings

The court's findings at the hearing have no effect on the determination of any issue in the action, other than issues relevant to the proceedings authorized by the Livestock Service Lien Law; nor do the findings affect the rights of the defendant in any other action arising out of the same claim [*Civ. Code § 3080.08(b)*]. The court's determination at the hearing is neither admissible as evidence nor permitted to be referred to at the trial of the action [*Civ. Code § 3080.08(b)*].

[f] Requirements of Order

The order authorizing sale must [*Civ. Code § 3080.06(b)*]:

- Identify the livestock for which sale is authorized.
- Specify the manner of sale, including the date, time, place and necessary publication or other notice.
- Except as may be otherwise ordered (*see* below), direct the lienholder to deposit the proceeds of sale with the clerk of the court pending final judgment in the action.

The court may in its discretion do either of the following [*Civ. Code § 3080.06(c)*]:

- Authorize the lienholder to deduct and retain funds from the sale proceeds in an amount sufficient to compensate the lienholder for services provided to the livestock from the date that the lien arose until the date of sale, or
- Determine the amount of sale proceeds reasonably necessary to satisfy the indebtedness secured by the lien and order any portion or all of the remaining sale proceeds distributed and applied as set forth in *Civ. Code § 3080.16(c)(3)*.

In either case, the balance of sale proceeds, if any, remaining after the deductions must be deposited with the clerk of the court pending final judgment in the action [*Civ. Code § 3080.06(c)*].

Application of sale proceeds as set forth in *Civ. Code § 3080.16(c)(3)* would be for satisfaction of indebtedness secured by any subordinate lien or security interest in the livestock.

[g] Denial of Motion

After hearing, the court may deny the lienholder's application if the court finds that [*Civ. Code § 3080.07(a)*]:

- A sale is not necessary prior to judgment, and
- The defendant has filed an undertaking pursuant to *Civ. Code § 3080.11*.

If the defendant has filed an undertaking pursuant to *Civ. Code § 3080.11*, the order must direct the lienholder to assemble and make the livestock available to defendant or defendant's agent, at a specified date, time, and place [*Civ. Code § 3080.07(b)*].

For a form for an undertaking, *see § 24.74*[3].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiensCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsPossessionCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionPublic SaleCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionEnforcement

California Forms of Pleading and Practice--Annotated

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Volume 3: Alcoholic Beverage Licenses thru Answers-Chs. 18-29
Chapter 24 ANIMALS: LIENS
PART IV. FORMS
A. Livestock Service Liens

3-24 California Forms of Pleading and Practice--Annotated § 24.74

§ 24.74 Proceedings for Order for Substitution of Undertaking for Livestock [Civ. Code § 3080.09 et seq.]

[1] Notice of Motion, Supporting Statement, Verification, and Memorandum--For Order for Substitution of Undertaking for Livestock [Civ. Code § 3080.09 et seq.]

[a] FORM Notice of Motion, Supporting Statement, Verification, and Memorandum of Points and Authorities--For Order for Substitution of Undertaking for Livestock [Civ. Code § 3080.09 et seq.]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION FOR ORDER FOR SUBSTI-
vs.	)	TUTION OF UNDERTAKING, SUPPORTING
_____ [*name*],	)	STATEMENT, AND MEMORANDUM
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept: _____
		Trial Date: _____

To _____ [*identify party, e.g.*, plaintiff] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.*, defendant] will move for an order for substitution of an undertaking which meets the requirements of *Civil Code Section 3080.11* for the livestock held by plaintiff subject to a claim of lien under the Livestock Service Lien Law. The motion will be made on the ground that defendant is entitled by statute to substitute a sufficient undertaking to secure plaintiff's claim in lieu of the lien now claimed, and thereby to recover possession of the livestock in question.

The motion will be based on this notice of motion, the following supporting statement, the attached verification of _____ (*name*),] the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

SUPPORTING STATEMENT

The livestock sought to be recovered by this motion consist of _____ [*description*].

Defendant estimates the fair market value of the said livestock to be $ _____. This estimate is based on _____ [*specify basis for estimate*].

The undertaking which defendant will file will be executed by _____ [a corporate surety possessing a certificate of authority from the Insurance Commissioner, as provided by *Code of Civil Procedure Section 1056 or* the following two persons as sureties: _____ (*identify and describe each such person*)].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant_____ [*name*]

VERIFICATION

I, _____ [*name*], am the defendant in the above-entitled action. I have read the foregoing notice of motion, including the supporting statement, and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM

[*Add memorandum supporting motion*]

[b] Use of Form

The form in [a], *above*, is a notice of motion for use by the defendant, in an action by a lien claimant under the Livestock Service Lien Law to obtain an order allowing substitution of an undertaking as security for claim and directing the lien claimant (plaintiff) to restore possession of the livestock to the defendant [*see Civ. Code § 3080.09(b)*]. By transposing the party designations, the form may also be used by the owner of the livestock who has commenced an action to recover possession from a livestock servicer claiming a lien.

[c] Contents

[i] Supporting Statement

The application must contain the following [*Civ. Code § 3080.09(b)*]:

- A description of the livestock to be recovered.
- An estimate, and the basis for the estimate, of the fair market value of the livestock.
- A statement identifying and describing the sureties for the undertaking.

[ii] Verification

The application for the order must be executed under oath [*Civ. Code § 3080.09(b)*].

[d] Basis of Motion

At any time after a livestock servicer has filed a complaint and claimed a lien under the Livestock Service Lien Law, or at any time after the owner of the livestock has commenced an action to recover possession of the livestock, the owner of the livestock may apply to the court in which the action was brought for an order for substitution of an undertaking which meets the requirements of *Civ. Code § 3080.11* [*Civ. Code § 3080.09(a)*]. For a form for an undertaking, *see § 24.74[3]*.

Unless it is included in a notice of opposition to sale, or except for good cause shown, the application must be made on noticed motion [*Civ. Code § 3080.09(b)*].

[e] Hearing Date

Unless the parties agree otherwise, a hearing must be held on the motion not less than five or more than 10 days after service of the notice of motion [*Civ. Code § 3080.09(b)*].

[f] Supporting Memorandum

A memorandum in support of the motion must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*].

[2] Order for Substitution of Undertaking

[a] FORM Order for Substitution of Undertaking

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____
	)	Trial Date: _____
	)	

The motion of defendant for an order for substitution of an undertaking for livestock held by plaintiff under claim of lien came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____[*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted, the court finds as follows:

(1) Plaintiff now holds, under claim of lien pursuant to the Livestock Service Lien Law, certain livestock owned by defendant, to wit: _____ [*describe livestock in question*].

(2) The fair market value of this livestock is $ _____, based on _____ [*state basis for finding of fair market value*].

(3) Plaintiff can reasonably expect to incur $ _____ in costs to assemble and turn over the livestock to defendant.

(4) An undertaking, with sufficient sureties, in the amount of $ _____ [*sum of amounts stated in Paragraphs (2) and (3)*] would meet the requirements of *Civil Code Section 3080.11*.

(5) Defendant is ready, willing, and able to furnish an undertaking in that amount.

IT IS ORDERED that the motion be, and it hereby is, granted and that plaintiff shall release all of the above-described livestock to defendant, or any person whom defendant may designate as agent for the purpose of receiving the livestock, at or before _____ [*time*] on _____ [*date*], or on an earlier date if the parties so agree, at _____ [*place*], or elsewhere if the parties so agree, _____ [*describe manner of delivery*], or otherwise as the parties may agree;

Provided, plaintiff need not comply with this order unless and until defendant files with the clerk of this court an undertaking by plaintiff, executed by two or more sufficient personal sureties, or by an admitted surety insurer possessing a certificate of authority from the Insurance Commissioner, as provided by *Code of Civil Procedure section*

995.120(a), to pay the sum of $_____ [*amount equal to sum of (1) fair market value of livestock to be recovered and (2) costs to be incurred by plaintiff to assemble and turn over livestock*] in the event it is subsequently determined by appropriate judicial proceedings that plaintiff has a valid claim against defendant and a valid lien on the livestock securing such claim;

Provided further, plaintiff has the right to object to the undertaking pursuant to *Code of Civil Procedure Section 995.910*.
Dated: _____

_____ [*signature*]
Judge of the _____ Court

[b] Use of Form

The form of order in [a], *above*, may be submitted for the court's issuance if the defendant's motion for an order for substitution of an undertaking for livestock held by the plaintiff under claim of lien is granted [*see Civ. Code § 3080.10*].

[c] Requirements of Order

After hearing the defendant's motion, the court may enter an order directing the lienholder to release all or a portion of the livestock to the owner (defendant), or to the owner's agent. The order shall be conditioned on the filing by the owner of an undertaking as set forth in *Civ. Code § 3080.11*, and must include the following [*Civ. Code § 3080.10*]:

- The amount of the undertaking required.
- The basis for the court's finding as to the fair market value of the livestock.
- A statement that the lienholder has the right to object to the undertaking pursuant to *Code Civ. Proc. § 995.910*.
- A description of the livestock to be substituted.
- A statement of the date, time, place, and manner in which the lienholder is to turn over the livestock to the owner.

For a form of undertaking, *see § 24.74* [3]; for a form of notice of motion to object to an undertaking, *see* Ch. 538, *Suretyship, Bonds, and Undertakings* .

[3] Undertaking [Code Civ. Proc. § 995.330]--For Substitution for Livestock Held Under Claim of Lien [Civ. Code § 3080.11]

[a] FORM Undertaking [Code Civ. Proc. § 995.330]--For Substitution for Livestock Held Under Claim of Lien [Civ. Code § 3080.11]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	UNDERTAKING AND DECLARATIONS OF
Defendant.	)	SURETIES
	)	
	)	

WHEREAS defendant desires to give an undertaking to be substituted for livestock held under claim of lien by plaintiff, as provided by *Civil Code Section 3080.11* and related sections of the same code.

[*EITHER, if sureties and principal are jointly and severally liable*]

NOW, THEREFORE, we, the undersigned sureties [and the principal], do hereby obligate ourselves, jointly and severally, to _____ [*name of lienholder*] under these statutory obligations, in the sum of $ _____, payable in the event it is determined by appropriate judicial proceedings that plaintiff has a valid claim against defendant and a valid lien on the livestock securing such claim.

[*OR, if surety limits liability*]

NOW, THEREFORE, the undersigned surety, _____ [*name of surety with limited liability*] hereby obligates itself to _____[*name of lienholder*] under these statutory obligations, in the amount of $_____ [*amount less than amount of bond or undertaking*].

[*AND, if amount of bond is based on value of property or interest in property*]

The [interest in] property on which the amount of this _____[bond *or* undertaking] is based, and which is relied on by the sureties as qualifying them on the _____ [bond *or* undertaking] is as follows: _____ [*describe the property or interest*].

The estimate of the _____ [principal *or* beneficiary *or* court] as to the fair market value of each above-mentioned item or [interest in] property is as follows: _____ [*specify fair market value of each property or interest*].

The addresses at which the personal sureties and the defendant, as principal, may be served with notices, papers, and other documents are:

_____ [*name of surety*]	_____ [*address*]

_____ [*name of surety*] _____ [*address*]
_____ [*name of principal*] _____ [*address*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date and place*] _____ [*signature of surety*]
_____ [*date and place*] _____ [*signature of surety*]

[*ADD, if appropriate*]

Stipulation Limiting Liability of Additional Sureties

The aggregate worth of all sureties executing the _____ [bond *or* undertaking] herein is $ _____, which is twice the amount of the [bond *or* undertaking]. Therefore, pursuant to *Code of Civil Procedure Section 995.520(d)*;

IT IS HEREBY STIPULATED AND AGREED by and between the [principal and] sureties hereto, that the liability of _____ [*name of surety*] on the _____ [bond *or* undertaking] herein is limited to the worth of _____ [*name of surety*], as stated in the accompanying declaration of _____ [*name of surety*].

[*CONTINUE*]

Dated: _____.

_____ [*signature of surety*]
_____ [*signature of surety*]
_____ [*signature of surety*]
_____ [*signature of principal*]

[b] Use of Form

The form of undertaking in [a], *above*, may be used to comply with an order allowing substitution of an undertaking for livestock held under claim of lien pursuant to the Livestock Service Lien Law [*see Civ. Code § 3080.11*]. For a form of order, *see § 24.74* [2]. It illustrates a form acceptable for execution by two or more personal sureties. If an admitted surety insurer will execute the undertaking, the admitted surety insurer will customarily provide its own form.

The undertaking must be executed by two or more sufficient personal sureties or by one sufficient admitted surety insurer or by any combination of sufficient personal sureties and admitted surety insurers [*Code Civ. Proc. § 995.310*]. An undertaking executed by personal sureties must be accompanied by an affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) of qualifications of each surety [*see Code Civ. Proc. § 995.520*]. For a declaration setting forth the

qualifications of a personal surety, *see* Ch. 538, *Suretyship, Bonds, and Undertakings* .

[c] Content of Undertaking

An undertaking must be in writing and signed by the sureties under oath. It must include a statement that the sureties are jointly and severally liable on the obligations of the statute providing for the undertaking and should include the addresses at which the principal and sureties may be served with notices, papers, and other documents [*see Code Civ. Proc. § 995.320(a)*].

If the undertaking is executed by two or more personal sureties and the amount of the bond exceeds $10,000, the undertaking may stipulate that the liability of the surety is limited to the worth of the surety stated in the affidavit (or declaration [*Code Civ. Proc. § 2015.5*]), so long as the aggregate worth of all the sureties executing the undertaking is twice the amount of the undertaking. The affidavit must state that the surety is worth less than the amount of the bond [*see Code Civ. Proc. § 995.520(d)*].

If the amount of the undertaking is based on the value of property or an interest in property, the undertaking should contain a description of the property or interest and the principal's estimate of the value of the property or interest. If the undertaking is given pursuant to an estimate of the beneficiary or court, the value so estimated should be included in the undertaking [*see Code Civ. Proc. § 995.320(a)(3)*].

[d] Amount of Undertaking

The undertaking must be an amount equal to the sum of (1) the fair market value of the livestock sought to be recovered, and (2) the costs to be incurred by the lienholder in order to assemble and turn over the livestock [*Civ. Code § 3080.11*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiensCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionRedemptionCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionPublic SaleCivil ProcedureRemediesBondsSuretiesProceduresCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionEnforcement

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Volume 3: Alcoholic Beverage Licenses thru Answers-Chs. 18-29
Chapter 24 ANIMALS: LIENS
PART IV. FORMS
A. Livestock Service Liens

3-24 California Forms of Pleading and Practice--Annotated §§ 24.75-24.79

[Reserved]

§§ 24.75[Reserved]

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Volume 3: Alcoholic Beverage Licenses thru Answers-Chs. 18-29
Chapter 24 ANIMALS: LIENS
PART IV. FORMS
B. Dairy Cattle Supply Liens

3-24 California Forms of Pleading and Practice--Annotated § 24.80

§ 24.80 Complaint to Foreclose Dairy Cattle Supply Lien [Food & Agric. Code § 57413]

[1] FORM Complaint to Foreclose Dairy Cattle Supply Lien [Food & Agric. Code § 57413]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO FORECLOSE DAIRY CATTLE
_____ [*name*], [and DOES I	)	SUPPLY LIEN
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence*], and raises or maintains dairy cattle

within the meaning of *Section 57401(d) of the Food and Agriculture Code* at _____ [*address as set forth in notice of claim of lien*].

2. [Plaintiff is ignorant of the true names and capacities of defendants sued herein as Does I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants claims an interest in the proceeds sought to be reached by this action or is indebted to plaintiff on the obligation described herein.)]

3. From _____ [*date*], to _____ [*date*], on a regular basis, [as defined in *Section 57403(b) of the Food and Agriculture Code*,] plaintiff, at defendant's request, delivered the following feed and/or materials for the feeding of defendant's dairy cattle to defendant at the address set forth in Paragraph 1: _____ [*specify dates, amounts, and items delivered*].

[*EITHER*]

4. [By written agreement, a copy of which is attached as Exhibit "A" and incorporated by reference,] [D]efendant agreed to pay plaintiff for the feed and/or materials delivered by plaintiff to defendant the sum of $_____ per _____.

[*OR*]

4. The reasonable value of the feed and/or materials delivered by plaintiff to defendant, on the dates of delivery, is $ _____ per _____.

[*CONTINUE*]

5. On _____ [*date*], plaintiff filed in the office of the Secretary of State a notice of claim of lien on the proceeds of the milk or milk products produced by defendant's dairy cattle. [A copy of that notice of lien is attached as Exhibit "B" and incorporated by reference.]

6. As of _____ [*date*], _____ [no *or* only one] other provider of feed or materials claimed a lien on the proceeds of the milk or milk products produced by defendant's dairy cattle. [Attached as Exhibit "C" and incorporated by reference is a copy of the certificate of the Secretary of State issued pursuant to *Section 9523 of the Commercial Code* regarding claims of lien filed against the proceeds of defendant's milk or milk products as of _____ [*date*].]

7. Plaintiff has repeatedly demanded that defendant pay him/her/it for the feed and materials, but defendant has failed and refused, and continues to fail and refuse to make payment [, or any part thereof]. There remains owing from defendant to plaintiff the sum of $_____ [for feed and materials furnished by plaintiff to defendant during the 45-day period beginning _____ (*date*) and ending _____ (*date*)].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____.

2. For interest from and after _____ [*date*], to date of judgment at the rate of _____ percent per

annum;

3. For costs of suit herein incurred [and attorney's fees];

4. For a lien in the amount of the aggregate of items (1) through (3) on the proceeds of the milk and milk products produced by defendant's dairy cattle, and declarations that the lien was perfected as of _____ [*date*] [and has priority over any interest of defendant(s, and each of them) arising out of a competing dairy cattle supply lien or valid security agreement];

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff_____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is a complaint for use to foreclose a dairy cattle supply lien [*see Food & Agric. Code §§ 57402, 57413*].

[3] Allegations

The complaint in [1], *above*, alleges:

- The defendant's residence and status as a person against whom a dairy cattle supply lien may be imposed (Paragraph 1) [*see Food & Agric. Code §§ 57401(d), 57402*].

- Plaintiff's status as a supplier of feed and materials in whose favor the lien may be imposed (Paragraph 3) [*see Food & Agric. Code § 57402*].

- An agreement between the parties for the charges or the reasonable value of the feed or material (alternative Paragraphs 4) [*see Food & Agric. Code § 57401(e)*].

- That plaintiff filed a notice of claim of lien and the date on which it was filed (Paragraph 5).

- That plaintiff's lien is the only such lien of record or that plaintiff otherwise qualifies under *Food & Agric. Code § 57402* as one of the two providers who may have dairy cattle supply liens at any one time (Paragraph 6).

- The balance which remains owing from defendant to plaintiff. The lien cannot exceed an amount equal to the reasonable or agreed charges for feed or material provided within a 45-day period (Paragraph 7) [*Food & Agric. Code § 57402*].

The Dairy Cattle Supply Lien Law includes "the costs of enforcing the lien" in the lien amount *Food & Agric. Code § 57402*. There is no specific mention of attorney's fees as a cost of enforcing the lien. This should be compared with the Livestock Service Lien Law, which specifies that attorney's fees are included as a cost of enforcing the lien [*Civ. Code § 3080.01*].

Interest is recoverable as of the date damages were capable of being made certain [*see Civ. Code § 3287*], or as provided for in any contract of the parties [*see Civ. Code § 3289*].

[4] Notice

A lien claimant must provide written notice to secured creditors at least 30 days prior to enforcing a claim of lien [*Food & Agric. Code § 57412* (secured creditors are those creditors having perfected security interest in dairy cattle, milk, milk products, or the proceeds of any of those things, as of date the notice of claim of lien was filed)].

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[6] Venue

An action on a contract must be brought in the county in which the obligation is to be performed, in which the contract was entered into, or in which the defendant, or any defendant, resides at the time of the commencement of the action [*Code Civ. Proc. § 395(a)*]. An action to foreclose a lien on personal property based on a statute is to be brought in the county in which one or more of the defendants reside at the time of the commencement of the action [*Code Civ. Proc. § 395(a)*], or in which the cause of action arose [*Code Civ. Proc. § 393(a)*].

A corporation may be sued in the county in which the contract was made or was to be performed, in which the liability arises or the breach occurs, or in which the corporation's principal place of business is located [*Code Civ. Proc. § 395.5*].

[7] Enforcement

The final judgment is enforced pursuant to *Code Civ. Proc. § 680.010 et seq.* [*Food & Agric. Code § 57413*; for discussion of judgment enforcement, *see* Ch. 254, *Execution and Enforcement of Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCommercial Law (UCC)Secured Transactions (Article 9)PriorityLiensCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionEnforcement

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[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Uniform Child Custody Jurisdiction and Enforcement Act Declaration

[5] Service

[6] State Statutes

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[1] FORM

[2] Use of Form

[3] Contents of Response

[4] Uniform Child Custody Jurisdiction and Enforcement Act Declaration

[5] State Statutes

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[2] Use of Form

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[4] Notice of Entry of Judgment

[5] State Statutes

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PART I. SCOPE

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§ 25.01 Scope of Chapter

This chapter discusses the nature and effect of a proceeding for nullity of marriage and the grounds for obtaining a nullity judgment [*see § 25.10* et seq.]. It also discusses the considerations involved in determining whether a petition for nullity or for marital dissolution is more appropriate under particular circumstances.

Grounds for marital dissolution and legal separation are discussed in Ch. 221, *Dissolution of Marriage: Procedure* .

This chapter also discusses the procedures involved in obtaining a judgment of nullity of marriage [*see § 25.30* et seq.]. It includes illustrative, filled-in reproductions of mandatory Judicial Council forms that would be utilized in a nullity proceeding in which both parties file pleadings [*see §§ 25.140 -25.142*]. This chapter also includes a discussion of the limited circumstances under which a court may divide property acquired by a spouse during a marriage that is adjudged a nullity, and make other orders relating to support, attorney's fees and costs, and child custody.

For a general discussion of procedures and rules in family law proceedings, see Ch. 221, *Dissolution of Marriage: Procedure* .

This chapter also discusses the nature and legal effects of putative marriage--that is, a void or voidable marriage that at least one of the parties believes in good faith to be valid [*see § 25.50* et seq.]. They summarize the judicial and statutory tests for determining void and voidable marriages, and what is a good faith belief. This analysis summarizes the property and support rights of a putative spouse and the law governing conflicts between legal and putative spouses of the same person when both assert rights in the property accumulated during a putative marriage. This analysis also discusses the termination of a putative marriage and matters related to termination.

For discussion of the rights of parties who do not qualify as putative spouses, because they are cohabiting without a good-faith belief that they are married, see Ch. 387, *Nonmarital Cohabitation* . For a general discussion of the validity and legal effects of marriage, see Ch. 359, *Marriage* .

This chapter also discusses the property rights of a putative spouse when the other spouse dies intestate, and the property rights of an "omitted" putative spouse when the other spouse dies testate [*see § 25.80* et seq.]. This analysis

also discusses the property rights of a putative spouse when a common spouse dies leaving both a putative and a legal spouse.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageValidityPutative MarriagesFamily LawMarital Termination & Spousal SupportAnnulmentGroundsGeneral OverviewFamily LawMarital Termination & Spousal SupportAnnulmentProceduresFamily LawMarriageValidityVoid & Voidable MarriagesVoid MarriagesFamily LawMarriageValidityVoid & Voidable MarriagesVoidable Marriages

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§ 25.02 Cross References

For a general discussion of family law proceedings, and procedures regarding declarations of disclosure, pendente lite orders, and family law judgments, see Ch. 221, *Dissolution of Marriage: Procedure*

For a general discussion of a court's jurisdiction to characterize, value, and divide assets and liabilities, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation*

For discussion of rules governing child custody awards, see Ch. 223, *Dissolution of Marriage: Child Custody*

For discussion of child support awards, see Ch. 224, *Dissolution of Marriage: Child Support*

For a general discussion of spousal support and attorney's fees and costs, see Ch. 225, *Dissolution of Marriage: Spousal Support* , and Ch. 226, *Dissolution of Marriage: Attorney's Fees*

For additional discussion of the validity and legal effects of marriage, see Ch. 359, *Marriage*

For discussion of property rights arising from express or implied agreements between unmarried cohabitants, see Ch. 387, *Nonmarital Cohabitation*

For discussion of action for accounting, see Ch. 7, *Accounting, Action for*

For action for declaratory relief, see Ch. 182, *Declaratory Relief*

For discussion of solemnization requirements and other required formalities for a valid marriage, as well as actions to determine validity of marriage, see Ch. 359, *Marriage*

For general discussion of cohabitation, see Ch. 387, *Nonmarital Cohabitation*

For discussion of surviving putative spouse's inheritance rights when decedent spouse's legal spouse is also alive, see Ch. 458, *Probate: Determination of Heirship*

For discussion of action to impose constructive trust, see Ch. 561, *Trusts: Constructive Trusts*

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[Reserved]

§§ 25.03[Reserved]

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1. Nature of and Grounds for Judgment of Nullity

3-25 California Forms of Pleading and Practice--Annotated § 25.10

§ 25.10 Governing Law

Statutory provisions governing the grounds on which a marriage may be found void or voidable, and therefore subject to being adjudged a nullity, are contained in Fam. Code *§ 2200 et seq.Fam. Code* § 2212 sets forth the legal effect of a nullity judgment, and *Fam. Code § 2251* states the circumstances under which a party will be deemed a "putative spouse" for purposes of nullity proceedings. For a complete discussion of establishing "putative spouse" status, see *§ 25.50* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageValidityPutative MarriagesFamily LawMarital Termination & Spousal SupportAnnulmentGroundsGeneral OverviewFamily LawMarital Termination & Spousal SupportAnnulmentProceduresFamily LawMarriageValidityVoid & Voidable MarriagesVoid MarriagesFamily LawMarriageValidityVoid & Voidable MarriagesVoidable Marriages

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3-25 California Forms of Pleading and Practice--Annotated § 25.11

§ 25.11 General Nature and Effect of Nullity Proceeding

A party to a marriage that is void or voidable may petition the superior court for a judgment of nullity of marriage [*Fam. Code §§ 200, 2250*; *see also § 25.12* for discussion of void or voidable marriage]. The effect of a judgment of nullity, formerly called an "annulment," is to restore the parties to the status of unmarried persons [*Fam. Code § 2212(a)*]. Furthermore, under the "relation-back" doctrine, discussed in *§ 25.13*, a judgment of nullity is said to "relate back" and erase the marriage and most, if not all, of its incidents from the outset, subject to certain equitable limitations, whether the marriage is void or voidable. In other words, the parties are treated as if they never were married [*see Sefton v. Sefton (1955) 45 Cal. 2d 872, 874, 291 P.2d 439* ; *In re Marriage of Goldberg (1994) 22 Cal. App. 4th 265, 268-271, 27 Cal. Rptr. 2d 298* (nullity action is not about termination of marriage, but whether marriage ever existed in first instance)].

Unlike a cause of action for marital dissolution, moreover, which abates if a spouse dies before marital status is dissolved, an action for nullity survives the death of a party. Thus, a deceased party's estate administrator can substitute into the action and actually obtain a nullity judgment. Nevertheless, in view of the policy of the law that the death of a party to a marriage does not preclude later resolution of property issues raised in litigation pending before death, property rights of the parties remain subject to adjudication if either a dissolution or nullity proceeding was pending as of the time of a party's death [*see In re Marriage of Goldberg (1994) 22 Cal. App. 4th 265, 276-277, 27 Cal. Rptr. 2d 298* (action for nullity would determine whether decedent's nieces and nephews or surviving spouse would take decedent's estate)]. In dissolution cases, however, unless the dissolution court has reserved jurisdiction to determine the parties' property rights prior to the death of a party during a pending proceeding, the probate court would ordinarily determine their property rights.

For discussion of the distinction between the effects of a judgment of dissolution and those of a judgment of nullity, see *§ 25.14*. For illustrative filled-in reproductions of Judicial Council forms used in nullity proceedings, see *§ 25.140* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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3-25 California Forms of Pleading and Practice--Annotated § 25.12

§ 25.12 Bases for Judgment of Nullity

[1] "Void" and "Voidable" Marriage Distinction in General

Under the Family Code, a proceeding for judgment of nullity may be based on either a void or a voidable marriage [*see Fam. Code § 2250*]. In many respects, the distinction between void and voidable marriages is of more technical than practical importance, and the effect of a judgment of nullity in either case depends on fairness to the parties to the marriage and to third parties rather than on the legal distinction between voidness and voidability, as discussed in *§ 25.13*. Nevertheless, void and voidable marriages are treated differently for some purposes [*see, e.g., Fam. Code § 2255* (standards for awarding attorney's fees in nullity proceeding depend in part on whether marriage was void or voidable)]. Thus, counsel should be aware of the distinction between the two.

[2] Void Marriages

Two types of marriages are considered void from the beginning--incestuous and bigamous or polygamous marriages, although there are circumstances set forth by statute, involving a spouse who is believed dead, under which a bigamous marriage is treated as *voidable* rather than void [*see Fam. Code §§ 2200, 2201*]. For discussion of these grounds, see *§ 25.15[1]*.

When a marriage is "void from the beginning," it is a legal nullity. The marriage is regarded by the law as having never existed, and its invalidity may be asserted and shown in any proceeding in which the fact of marriage may be material [*Estate of Gregorson (1911) 160 Cal. 21, 26, 116 P. 60]* . The fact that the marriage is void and the parties have never been legally married to each other may be shown even though no judgment of nullity of the marriage has ever been rendered, entered, or even sought [*Estate of Gregorson (1911) 160 Cal. 21, 26, 116 P. 60* ; *see Vickers v. State Bar (1948) 32 Cal. 2d 247, 255, 196 P.2d 10]* .

The desirability of bringing a judicial proceeding to declare a marriage void is discussed in *§ 25.14*.

[3] Voidable Marriages

A marriage is merely "voidable," rather than void from the beginning, in the following circumstances [*Fam. Code § 2210*]:

(1) The party who commences the proceeding, or on whose behalf the proceeding is commenced, was without the capability of consenting to the marriage as provided in *Fam. Code § 301* or *302*, unless, after attaining the age of consent, the party for any time freely cohabited with the other as husband and wife (*see § 25.15[3]*).

(2) The spouse of either party was living and the marriage with that spouse was then in force and that spouse (1) was absent and not known to the party commencing the proceeding to be living for a period of five successive years immediately preceding the subsequent marriage for which the judgment of nullity is sought, or (2) was generally reputed or believed by the party commencing the proceeding to be dead at the time the subsequent marriage was contracted (*see § 25.15[2][b]*).

(3) Either party was of unsound mind, unless the party of unsound mind, after coming to reason, freely cohabited with the other as husband and wife (*see § 25.15[4]*).

(4) The consent of either party was obtained by fraud, unless the party whose consent was obtained by fraud afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife (*see § 25.15[5]*).

(5) The consent of either party was obtained by force, unless the party whose consent was obtained by force afterwards freely cohabited with the other as husband or wife (*see § 25.15[6]*).

(6) Either party was, at the time of marriage, "physically incapable of entering into the marriage state," and that incapacity continues and appears to be incurable (*see § 25.15[7]*).

In contrast to a void marriage, a marriage characterized as voidable is a valid, subsisting marriage both as between the parties to it and in relation to third parties until it is declared a nullity by a judgment of nullity rendered by an appropriate court [*Estate of Gregorson (1911) 160 Cal. 21, 26-27, 116 P. 60* ; *see Estate of LeMont (1970) 7 Cal. App. 3d 437, 439, 86 Cal. Rptr. 810]* .

The Family Code sets time limits, varying according to the defect that makes the marriage voidable, within which proceedings to obtain a judgment of nullity of a voidable marriage must be commenced [*see Fam. Code § 2211*]. These limitation periods are discussed in this subpart in connection with each respective ground of voidability. If a nullity proceeding is not commenced within the appropriate time period, the marriage remains valid and the right to have it declared a nullity is lost forever [*Estate of Gregorson (1911) 160 Cal. 21, 26, 116 P. 60* ; *see Greene v. Williams (1970) 9 Cal. App. 3d 559, 561, 88 Cal. Rptr. 261]* . Thus, the parties to a voidable marriage are married in fact and in law until a judgment of nullity of the marriage is entered. When the judgment is entered, its effect is to restore the parties to the status of unmarried persons [*Fam. Code § 2212(a)*; *Estate of LeMont (1970) 7 Cal. App. 3d 437, 439, 86 Cal. Rptr. 810]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageValidityPutative MarriagesFamily LawMarital Termination & Spousal SupportAnnulmentGroundsGeneral OverviewFamily LawMarriageValidityVoid & Voidable MarriagesVoid MarriagesFamily LawMarriageValidityVoid & Voidable MarriagesVoidable Marriages

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§ 25.13 Doctrine of Relation Back

[1] Applicability to Voidable Marriage

A judgment of nullity, whether of a void or of a voidable marriage, is said to "relate back" and erase the marriage and most, if not all, of its incidents from the outset [*see Sefton v. Sefton (1955) 45 Cal. 2d 872, 874, 291 P.2d 439]* . Thus, subject to the limitations discussed in *§ 25.13[2],* although a voidable marriage is valid until a judgment of nullity of the marriage is entered, from that time on it is as if the marriage had never taken place [*Millar v. Millar (1917) 175 Cal. 797, 807, 167 P. 394* ; *see Whealton v. Whealton (1967) 67 Cal. 2d 656, 661, 63 Cal. Rptr. 291, 432 P.2d 979]* . For this reason, property jointly acquired by the parties after their marriage but before entry of the judgment of nullity of marriage is not regarded as community property, although there may be circumstances under which the property is deemed to be "quasi-marital" property and divided as if it were community property [*Millar v. Millar (1917) 175 Cal. 797, 807, 167 P. 394* ; *see Fam. Code § 2251*; *see also § 25.32[3]*].

[2] Limitations on Application of Doctrine

The "relation back" doctrine is in reality a legal fiction fashioned by the courts to do substantial justice as between the parties to a voidable marriage [*Sefton v. Sefton (1955) 45 Cal. 2d 872, 875, 291 P.2d 439]* . Therefore, limitations exist on the doctrine to protect the rights of parties to the marriage or of innocent third parties [*Sefton v. Sefton (1955) 45 Cal. 2d 872, 877, 291 P.2d 439* ; *Interinsurance Exchange v. Velji (1975) 44 Cal. App. 3d 310, 316, 118 Cal. Rptr. 596]* .

In general, courts have declined to apply the doctrine when its application will result in substantial injustice to one of the parties to the marriage or if its application will unjustly affect an innocent third party's rights [*Sefton v. Sefton (1955) 45 Cal. 2d 872, 875, 291 P.2d 439* ; *Estate of Birch (1983) 140 Cal. App. 3d 776, 780, 189 Cal. Rptr. 796* ; *Interinsurance Exchange v. Velji (1975) 44 Cal. App. 3d 310, 316, 118 Cal. Rptr. 596]* . For example, a judgment of nullity of a woman's voidable second marriage was held not to relate back and erase the voidable second marriage so as to make the woman's first husband again liable for, and delinquent in, the payment of alimony awarded to her in the divorce decree dissolving her first marriage [*Sefton v. Sefton (1955) 45 Cal. 2d 872, 876, 291 P.2d 439]* . Similarly, it

has been held that a judgment of nullity of a voidable marriage does not relate back and remove a party to the marriage from an exclusionary clause of an insurance policy as to an accident occurring after the marriage was performed and before the judgment of nullity was rendered or entered [*Interinsurance Exchange v. Velji (1975) 44 Cal. App. 3d 310, 316-317, 118 Cal. Rptr. 596]* .

The doctrine has also been held inapplicable when a decedent's first wife claimed that a Mexican divorce was invalid after both parties had subsequently remarried other persons. In that instance, the court stated that remarriage estops the party entering into it from denying the validity of a previous divorce and that the annulment of the wife's second marriage did not preclude estoppel because she had remarried in reliance on the Mexican judgment. Therefore, the first wife was estopped from claiming that she was the decedent's surviving spouse, and the doctrine of relation back was inapplicable [*Estate of Birch (1983) 140 Cal. App. 3d 776, 780, 189 Cal. Rptr. 796]* .

The doctrine will also not be applied to void a stepparent adoption when the marriage of the parent and stepparent is later found to be voidable [*Adoption of Jason R. (1979) 88 Cal. App. 3d 11, 16, 151 Cal. Rptr. 501]* .

[3] Estoppel Doctrine Applied to Void Marriage

Because a void marriage is "void from the beginning," it may be thought that the doctrine of "relation back" would automatically apply in all instances to a judgment of nullity of a void marriage [*see Fam. Code §§ 2200, 2201*]. However, the courts have adopted an estoppel doctrine that prevents a party from asserting that his or her marriage is void even though it has been terminated by a judgment of nullity, when the rights of an *innocent third party* would be unjustly injured [*see Stoner v. Nethercutt (1970) 8 Cal. App. 3d 667, 670, 87 Cal. Rptr. 659* ; *Fry v. Fry (1970) 5 Cal. App. 3d 169, 171-172, 85 Cal. Rptr. 126* ; *Berkely v. Berkely (1969) 269 Cal. App. 2d 872, 873-874, 75 Cal. Rptr. 294]* .

In two cases applying the estoppel doctrine, a divorced wife was seeking payment of alimony ordered to be paid until she "remarried." In both cases, after entry of the divorce decree awarding her the alimony, the wife entered another marriage that was void because the second husband was already married to another woman [*Fry v. Fry (1970) 5 Cal. App. 3d 169, 171-172, 85 Cal. Rptr. 126* ; *Berkely v. Berkely (1969) 269 Cal. App. 2d 872, 873-874, 75 Cal. Rptr. 294]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 25.14 Choosing Between Dissolution and Nullity of Marriage

In some ways, a judgment of nullity of marriage resembles a judgment of dissolution of marriage. Both the judgment of dissolution and the judgment of nullity restore the parties to unmarried status [*see Fam. Code §§ 2212(a), 2300*]. A judgment of dissolution of marriage, just as a judgment of nullity, terminates the marriage and generally adjudicates the entire controversy between the parties arising from their marriage [*Figoni v. Figoni (1931) 211 Cal. 354, 357, 295 P. 339* ; *see Grubaugh v. Grubaugh (1962) 202 Cal. App. 2d 8, 10, 20 Cal. Rptr. 554]* .

Thus, a spouse who is seeking to terminate an invalid marriage will generally have a choice of remedies because irreconcilable differences necessary for dissolution will ordinarily also exist with respect to a marriage that could be terminated through nullity proceedings [*see Fam. Code § 2310(a)*; *see also* discussion in Ch. 221, *Dissolution of Marriage: Procedure*]. Nevertheless, in those situations in which the party seeking to terminate the marriage is not a party to the marriage [*see Fam. Code §§ 2211(a)(2), (b)(2), (c)*], dissolution will not be an available remedy, leaving aside instances in which the grounds for dissolution are incurable insanity [*see Fam. Code § 2332*].

In determining whether to petition for nullity or dissolution of marriage, there are a number of competing considerations, including the following:

(1) If counsel anticipates opposition to the nullity petition, it may be preferable to avoid a contested hearing on the issue of whether the marriage is valid by seeking a dissolution, the grounds for which are easier to establish unilaterally.

(2) Even if there is no opposition, the party seeking a judgment of nullity will still be required to adduce evidence establishing the grounds for such a judgment.

(3) In a nullity proceeding, only a putative spouse (a spouse who believed in good faith that the marriage was valid) is entitled to support and a division of the "quasi-marital" property [*see Fam. Code §§ 2251-2254*; *see also § 25.32[1], [3]*]. If it is uncertain whether the party who seeks the nullity qualifies as a putative spouse, it might be better not to petition for a nullity, but rather to initiate dissolution proceedings, in which the issues for resolution regarding the

marriage and property are framed differently. On the other hand, from the petitioner's viewpoint, if the respondent would not be found to be a putative spouse, he or she may be precluded from receiving spousal support or an equal share of the "quasi-marital" property.

(4) Attorney's fees and costs may be awarded in a proceeding for judgment of nullity only to a party who meets the statutory requirements for a putative spouse [*Fam. Code § 2255*; *see § 25.32[4]*].

(5) If a party might be guilty of either the crime of bigamy or of incest [*see Penal Code § 281 et seq.*], a petition for a judgment of nullity will bring the facts to the attention of the court, whereas a petition for dissolution generally will not.

(6) A judgment of nullity terminates the marriage as soon as the judgment is entered, while a judgment of dissolution does not become effective for purposes of terminating the marriage until the expiration of a waiting period [*see Fam. Code § 2339*; *see also* Ch. 221, *Dissolution of Marriage: Procedure*].

(7) The residence requirements for a judgment of dissolution of six months in the state and three months in the county prior to filing the petition are not applicable in a nullity proceeding [*see Fam. Code § 2320*; *see also* Ch. 221, *Dissolution of Marriage: Procedure*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawMarital Termination & Spousal SupportAnnulmentGroundsGeneral OverviewFamily LawMarriageValidityVoid & Voidable MarriagesVoid MarriagesFamily LawMarriageValidityVoid & Voidable MarriagesVoidable Marriages

California Forms of Pleading and Practice--Annotated

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Volume 3: Alcoholic Beverage Licenses thru Answers-Chs. 18-29
Chapter 25 ANNULMENT (NULLITY) OF MARRIAGE AND RELATED SPOUSAL RIGHTS
PART II. LEGAL BACKGROUND
A. Grounds and Procedure for Obtaining Judgment of Nullity
1. Nature of and Grounds for Judgment of Nullity

3-25 California Forms of Pleading and Practice--Annotated § 25.15

§ 25.15 Circumstances Giving Rise to Void or Voidable Marriage

[1] Incestuous Marriage

[a] Marriage Void

Marriages between parents and children, between ancestors and descendants of every degree, between brothers and sisters of the half as well as the whole blood, and between uncles and nieces or aunts and nephews, are incestuous and void from the beginning whether the relationship is legitimate or illegitimate [*Fam. Code § 2200*]. Marriages of uncles and nieces of the half-blood (uncle was half brother of niece's mother) and aunts and nephews of the half-blood are apparently not prohibited because the governing statute specifically prohibits marriages between half-blood brothers and sisters but is silent as to other half-blood relatives [*see People v. Baker (1968) 69 Cal. 2d 44, 46-50, 69 Cal. Rptr. 595, 442 P.2d 675* (criminal incest case construing former *Civ. Code § 59*)]. For additional discussion of the invalidity of incestuous marriages, see Ch. 359, *Marriage* .

[b] Adopted Persons

The Family Code provides that an adoptee and his or her adoptive parents have the legal relationship of parent and child and all the rights and duties of that relationship [*see Fam. Code §§ 8616, 9305*]. Given this statutory requirement, it seems that a marriage between an adoptee and the adoptive parent would be void from the beginning as incestuous, just as a marriage between blood relatives [*see Fam. Code § 2200*; *but see People v. Kaiser (1897) 119 Cal. 456, 457, 51 P. 702* ("daughter" in indictment for incestuous intercourse, as not including an adopted daughter, a stepdaughter, or a daughter in law)].

[c] No Limitation Period

Marriages that are void from the beginning as incestuous can be attacked during the lifetime of both parties or after the death of either of them [*Estate of Karau (1938) 26 Cal. App. 2d 606, 607, 80 P.2d 108]* .

[2] Bigamous or Polygamous Marriage

[a] Marriage Void

A subsequent marriage is illegal and void from the beginning when entered into by a person during the life of his or her former spouse, unless (1) the former marriage has been dissolved or adjudged a nullity before the date of the subsequent marriage [*Fam. Code § 2201(a)(1)*]; or (2) the former spouse is either (a) absent, and not known to the person to be living for five successive years immediately preceding the subsequent marriage; or (b) generally reputed or believed by the person to be dead at the time of the subsequent marriage [*Fam. Code § 2201(a)(2)*]. In the case of exception (2) (former spouse absent and believed to be dead), the marriage is voidable and is valid until its nullity is adjudged pursuant to *Family Code Section 2210(b)* (grounds for nullity) [*Fam. Code § 2201(b)*], as discussed in *§ 25.15[7][a]*.

For additional discussion of the invalidity of bigamous marriages, see discussion in Ch. 359, *Marriage* .

[b] Marriage Voidable

[i] Statutory Rule

A subsequent marriage is voidable and may be adjudged a nullity when the former spouse of either party was living, the marriage with that former spouse was then in force, and one of the following conditions existed at the time of the subsequent marriage [*Fam. Code § 2210(b)*]:

(1) The former spouse was absent and not known to the party commencing the proceeding to be living for a period of five successive years immediately preceding the subsequent marriage; or

(2) The former spouse was generally reputed or believed by the party to be dead at the time the subsequent marriage was contracted.

[ii] "Absent and Not Known to Be Living"

The meaning of the requirement that the spouse must be "absent and not known to be living" for the marriage to be voidable rather than void has been interpreted strictly. For example, if a party deserts his or her spouse and remarries after five years, the subsequent marriage is void, not voidable, in the absence of evidence showing that the deserting spouse actually believed the deserted spouse to be dead. There is no presumption that the deserted spouse is dead, even though there has been no communication between the spouses since the desertion. A person who deserts his or her spouse has a duty to keep the deserted spouse advised of his or her whereabouts, and it would be a legal inconsistency to predicate a presumption as to the death of a spouse on an absence resulting from the other spouse's desertion and failure to communicate [*People v. Glab (1936) 13 Cal. App. 2d 528, 533-534, 57 P.2d 588]* .

In another case, a husband who married and deserted his wife in Missouri and remarried five years later in California was presumed not to believe the former wife to be dead, and, because there was no evidence of any belief in any manner concerning the death of the former wife, the subsequent marriage was void, not voidable [*Estate of Richards (1901) 133 Cal. 524, 528, 65 P. 1034* (construing former *Civ. Code § 61*)].

The deserted spouse, on the other hand, does not have a duty to conduct inquiries for the absent spouse, and a subsequent marriage after five years is voidable, and not void, even though the spouse who remarried may conceivably have been able to ascertain that the absent spouse was alive by inquiries [*Estate of Perry (1922) 58 Cal. App. 420, 425, 208 P. 987* (decided under former *Civ. Code § 61*)]. However, the deserted spouse must have a good-faith belief that the missing spouse is dead [*Wilcox v. Wilcox (1916) 171 Cal. 770, 776-777, 155 P. 95* ; *see* *Goff v. Goff (1942) 52 Cal. App. 2d 23, 28, 125 P.2d 848* (both decided under former *Civ. Code § 61*)]. Thus, despite the statutory language that the marriage is voidable if the absent spouse is "not known to [the other spouse] to be living," testimony by a

deserted wife that she did not know whether the husband who had deserted her was dead or alive was held not sufficient, and her subsequent marriage was void, not voidable [*Neureither v. Workmen's Comp. App. Bd. (1971) 15 Cal. App. 3d 429, 432, 93 Cal. Rptr. 162* (decided under former *Civ. Code § 61*)].

[c] Estoppel

A party seeking a judgment of nullity on the grounds that a prior marriage existed at the time of the subsequent marriage may be estopped in certain situations. The invalidity of a dissolution or divorce cannot be raised by a party who has procured the decree (or a party who has remarried in reliance thereon) or by one who has aided another to procure the decree so that the latter will be free to remarry [*Rediker v. Rediker (1950) 35 Cal. 2d 796, 805, 221 P.2d 1* ; *Estate of Birch (1983) 140 Cal. App. 3d 776, 780, 189 Cal. Rptr. 796]* . The estopped party cannot obtain a judgment of nullity of a second marriage on the ground that a first marriage was never properly terminated. Thus, a husband could not obtain a judgment of nullity of a second marriage on the ground that his wife's prior marriage was still valid when he helped her obtain an invalid Mexican divorce and married her in reliance on that divorce [*Spellens v. Spellens (1957) 49 Cal. 2d 210, 213-222, 317 P.2d 613* ; *Schotte v. Schotte (1962) 203 Cal. App. 2d 28, 30-31, 21 Cal. Rptr. 220]* .

Furthermore, a party who marries a person knowing all the circumstances surrounding that person's divorce or dissolution, even though he or she did not help procure the divorce or dissolution, is estopped from attacking the validity of that divorce or dissolution by a proceeding for a judgment of nullity of a second marriage [*Dietrich v. Dietrich (1953) 41 Cal. 2d 497, 505, 261 P.2d 269 , cert. denied, 346 U.S. 938 (1954)* ; *Smith v. Smith (1958) 157 Cal. App. 2d 46, 48-49, 320 P.2d 100]* . Thus, one court of appeal has held that a husband is equitably estopped to deny that he was validly married to his wife on dissolution of the marriage when he went through a formal marriage ceremony with her, knowing that her divorce from her first husband was not final, continued to live with her for 15 years, had two children with her, and waited 15 years to attempt to assert the invalidity of the marriage [*In re Marriage of Recknor (1982) 138 Cal. App. 3d 539, 544-547, 187 Cal. Rptr. 887]* .

In a probate proceeding to determine heirship, a court of appeal held that a first wife was not estopped to attack the validity of a Mexican divorce procured by the decedent in order to marry the second wife when the first wife knew of the divorce but did not acquiesce in it or act in reliance on it [*Estate of Atherley (1975) 44 Cal. App. 3d 758, 764-765, 119 Cal. Rptr. 41]* . In contrast, in *Estate of Birch*, the court held that when the decedent and his first wife obtained a Mexican divorce and both subsequently remarried other persons, the first wife was estopped from asserting that the Mexican divorce was invalid and that she was the decedent's surviving spouse. It was reasoned that remarriage estopped the party entering into it from denying the validity of previous divorce and that the annulment of the wife's second marriage did not preclude estoppel, since she remarried in reliance on the Mexican judgment. Also, the children of the decedent and the first wife, being in privity with her, were similarly estopped from asserting the invalidity of the marriage [*Estate of Birch (1983) 140 Cal. App. 3d 776, 780, 189 Cal. Rptr. 796]* .

When there has been no prior divorce, valid or invalid, there is no basis for estoppel, and a person who married with knowledge that his or her first marriage was still in existence can have the second marriage adjudged a nullity [*Anderson v. Anderson (1936) 7 Cal. 2d 265, 266, 60 P. 2d 290]* .

[d] Parties and Statute of Limitations

By statute, a proceeding to obtain a judgment of nullity of a voidable, bigamous marriage must be commenced by either party during the life of the other or by the former husband or wife of the bigamous spouse [*Fam. Code § 2211(b)(1)*]. The statutory language is not clear as to whether the former husband or wife of the bigamous spouse may commence such an action after one of the parties to the bigamous marriage has died [*see Fam. Code § 2211(b)(1)*].

If the bigamous marriage is void, rather than voidable, there is no statute expressly limiting the time within which a

proceeding to obtain a judgment of nullity of such a marriage must be brought. Since the marriage is void from its beginning, the action to have it so declared may be brought at any time during the life of the parties [*Parmann v. Parmann (1942) 56 Cal. App. 2d 67, 68-69* ,]. The marriage may also be collaterally attacked both before and after the death of either party [*Estate of Karau (1938) 26 Cal. App. 2d 606, 607, 80 P.2d 108]* .

[e] Proof

A second (ceremonial) marriage is presumed valid [*see Evid. Code § 663*], and the party seeking to establish that such a marriage is void as bigamous has the burden of proof [*Vargas v. Superior Court (1970) 9 Cal. App. 3d 470, 473, 88 Cal. Rptr. 281* ; *see Estate of Smith (1973) 9 Cal. 3d 74, 81, 106 Cal. Rptr. 774]* . If the issue is whether the first marriage was ever dissolved or declared a nullity [*see Fam. Code § 2201(a)(1)*], the party seeking to have the second marriage declared void will have to prove that the first marriage was never dissolved. The best proof of this fact is a record search in every jurisdiction in which either party had ever resided since the first marriage to establish that no dissolution or judgment of nullity was ever granted in any such jurisdiction of either party of the first marriage. A record search is not the only permissible proof of the negative fact; any form of reasonable evidence is sufficient if it convinces the trier of fact [*Vargas v. Superior Court (1970) 9 Cal. App. 3d 470, 474-475, 88 Cal. Rptr. 281* ; *see Estate of Atherley (1975) 44 Cal. App. 3d 758, 766, 119 Cal. Rptr. 41]* . Testimony by all parties involved that the only attempt to dissolve the first marriage was an invalid Mexican divorce has been held sufficient to establish that the first marriage was still valid at the time of the second marriage [*Estate of Atherley (1975) 44 Cal. App. 3d 758, 766, 119 Cal. Rptr. 41]* .

If the issue is whether a deserted spouse had a good-faith belief that his or her spouse was dead, making the bigamous marriage voidable rather than void, the deserted spouse will have to establish a good faith belief. The cases have not delineated the elements of such a belief, but it would appear that facts such as the following might be sufficient:

(1) The absent spouse disappeared under circumstances that make it likely he or she is dead, such as being lost at sea or missing in action during wartime.

(2) The deserted spouse heard from relatives or friends that the absent spouse was dead.

(3) The deserted spouse made a reasonable search for the other spouse but could find no evidence that he or she was alive.

If the respondent is claiming that the petitioner is estopped to challenge the validity of the termination of the first marriage (*see § 25.15[2][c]*), the respondent will have to establish the petitioner's participation in, or knowledge of the facts of, the allegedly invalid termination of the first marriage.

[3] Minority

[a] Marriage Voidable

Except as discussed below, a marriage is voidable and may be adjudged a nullity when the party who commences the proceeding, or on whose behalf the proceeding is commenced, was under the age of legal consent (generally 18 years), as provided in *Family Code Sections 301* or *302*, at the time of the marriage [*see Fam. Code § 2210(a)*; *see also* discussion in Ch. 359, *Marriage*]. To establish the voidability of the marriage on this ground, that party must prove that he or she was under the age of 18 years on the date of the marriage and that one or both of the following conditions existed [*see Fam. Code §§ 301, 302, 2210(a)*]:

(1) The party's parent or guardian did not consent to the marriage in the manner provided by statute; or

(2) A court order granting permission for the marriage was not obtained.

The marriage cannot be adjudged a nullity if, after attaining the age of consent, the party commencing the proceeding, or on whose behalf the proceeding is commenced, for any time freely cohabitated with the other as husband and wife [*Fam Code § 2210(a)*]. Nor can the marriage be adjudged a nullity on the petition of the spouse who was over 18 at the time of the marriage [*Campbell v. Campbell (1926) 78 Cal. App. 745, 747-750, 248 P. 762* ; *see Fam Code § 2210(a)*].

The procedures to obtain a valid underage marriage are discussed in Ch. 359, *Marriage* .

[b] Misrepresentation of Minor's Age

A minor who misrepresents his or her age in order to obtain a marriage license can have the marriage annulled despite his or her knowing misrepresentation [*Ruiz v. Ruiz (1970) 6 Cal. App. 3d 58, 59-60, 85 Cal. Rptr. 674* (decided under former *Civ. Code § 82*)] as can the minor's parents [*Vaughan v. Gideon (1942) 56 Cal. App. 2d 158, 161-162, 132 P.2d 529* (decided under former *Civ. Code § 82*)]. A parent can also have the marriage of a minor child annulled if the parent's consent to the marriage was obtained by fraudulent misrepresentations that were material to obtaining the consent and were relied upon by the parent. Applying this rule, it has been held that misrepresentations by a minor and his intended wife that the minor was the father of the intended wife's unborn child and that the minor and the intended spouse had been married in Mexico were sufficient to void the parent's consent and allow the marriage to be annulled [*Turner v. Turner (1959) 167 Cal. App. 2d 636, 639-642, 334 P.2d 1011* (decided under former *Civ. Code § 82*)].

[c] Lack of Parental Consent

A minor who marries without parental consent can have the marriage annulled even though the parents consent and acquiesce to the marriage after the ceremony and before the minor reaches majority [*West v. West (1923) 62 Cal. App. 541, 542-543, 217 P. 567 , modified, (1924) 68 Cal. App. 258, 228 P. 1115* (decided under former *Civ. Code § 82*)].

The marriage of a minor without a parent's consent cannot be annulled by the parent after the death of the minor because the marriage has already been terminated by death [*see Fam. Code § 310*]. Neither the minor nor the parent has a property right to annul the marriage that survives the death of the minor [*Greene v. Williams (1970) 9 Cal. App. 3d 559, 561-564, 88 Cal. Rptr. 261* (decided under former *Civ. Code § 82*)], even though the marriage affects the disposition of the minor's estate.

In the case of an underage marriage that occurs outside of California without parental or judicial consent and that is valid under the laws of the state where it was performed, the marriage may not be adjudged a nullity on the ground of minority and will be valid in California [*McDonald v. McDonald (1936) 6 Cal. 2d 457, 459, 58 P.2d 163* (decided under former *Civ. Code § 82*)].

[d] Parties and Statute of Limitations

A proceeding to obtain a judgment of nullity brought by the underage party must be commenced within four years after reaching the age of 18 [*see Fam. Code § 2211(a)(1)*]. The proceeding can also be commenced by a parent, guardian, conservator, or other person having charge of the minor at any time before the minor reaches the age of 18 [*Fam. Code § 2211(a)(2)*].

[4] Unsound Mind

[a] Marriage Voidable

A marriage is voidable and may be adjudged a nullity if, at the time of the marriage, either party was of unsound mind,

unless the party, after coming to reason, freely cohabited with the other as husband or wife [*Fam. Code § 2210(c)*]. This ground deals with a mental condition existing at the time of marriage [*see Fam. Code § 2210(c)*]; a dissolution or legal separation may be obtained based on incurable insanity that occurs after the parties are married [*see Fam. Code § 2310(b)*; *see also* Ch. 221, *Dissolution of Marriage: Procedure*].

To furnish grounds for a judgment of nullity, the unsoundness of mind must be such that the party was incapable of understanding the nature of the marriage contract and the duties and responsibilities that it creates [*Dunphy v. Dunphy (1911) 161 Cal. 380, 383, 119 P. 512* (decided under former *Civ. Code § 82*)]. Thus, evidence that the husband did not know he was being married and thereafter did not know that he was married was sufficient to support a judgment of nullity [*McClure v. Donovan (1949) 33 Cal. 2d 717, 732-735, 205 P.2d 17* (decided under former *Civ. Code § 82*)]. Likewise, if a person is so intoxicated that he or she does not understand the nature of the marriage ceremony or its legal effect, the marriage can be annulled [*Dobson v. Dobson (1948) 86 Cal. App. 2d 13, 15, 193 P.2d 794* ; *see Dunphy v. Dunphy (1911) 161 Cal. 380, 386-389, 119 P. 512* (both decided under former *Civ. Code § 82*)].

[b] Parties and Statute of Limitations

An action to obtain a judgment of nullity based on unsound mind may be brought by either the "party injured" or a relative or conservator of the party of unsound mind at any time before the death of either party [*Fam. Code § 2211(c)*]. The party injured can be the party of unsound mind or the party who married the person of unsound mind [*see Goldman v. Goldman (1959) 169 Cal. App. 2d 103, 336 P.2d 952* (decided under former *Civ. Code § 82*); *Briggs v. Briggs (1958) 160 Cal. App. 2d 312, 325 P.2d 219* (actions brought by spouse of party with unsound mind, but grounds not established); *Vitale v. Vitale (1957) 147 Cal. App. 2d 665, 305 P.2d 690* (action brought by party claiming unsound mind)].

[c] Proof

The degree of mental capacity at the precise time the marriage is solemnized controls its validity [*see Fam. Code § 2210(c)*], and a marriage contracted during a lucid interval is valid [*Briggs v. Briggs (1958) 160 Cal. App. 2d 312, 320, 325 P.2d 219* (decided under former *Civ. Code § 82*)]. While the mental condition on the date of marriage is the issue, that mental condition can be established by evidence of the condition before and after that day [*Vitale v. Vitale (1957) 147 Cal. App. 2d 665, 669-670, 305 P.2d 690* (decided under former *Civ. Code § 82*)]. However, a finding of unsound mind is not supported when the only relevant evidence of incapacity was based on the spouse's condition six months and more after the date of the marriage [*Goldman v. Goldman (1959) 169 Cal. App. 2d 103, 109-110, 336 P.2d 952* (decided under former *Civ. Code § 82*)].

[5] Fraud

[a] Marriage Voidable

A marriage is voidable and may be adjudged a nullity if, at the time of the marriage, the consent of either party was obtained by fraud, unless the party whose consent was obtained by fraud afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other party as husband and wife [*Fam. Code § 2210(d)*; *see In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 155-156, 242 Cal. Rptr. 649]* . For discussion of the cohabitation exception, see *§ 25.15[5][f]*.

A marriage may be annulled for fraud only if the fraud relates to a matter that the state deems vital to the marriage relationship [*In re Marriage of Ramirez (2008) 165 Cal. App. 4th 751, 757, 81 Cal. Rptr. 3d 180* ; *In re Marriage of Meagher & Maleki (2005) 131 Cal. App. 4th 1, 6, 31 Cal. Rptr. 3d 663]* . Because of its peculiar position as a silent but active party in annulment proceedings, the state is particularly interested in seeing that marriages are not declared void as the result of fraud unless the evidence in support of the fraud is both clear and convincing. The fraud relied on must directly affect the marriage relationship [*In re Marriage of Ramirez (2008) 165 Cal. App. 4th 751, 757, 81 Cal. Rptr.*

3d 180 ; *In re Marriage of Meagher & Maleki (2005) 131 Cal. App. 4th 1, 6-7, 31 Cal. Rptr. 3d 663]* . Annulments on the basis of fraud are generally granted only in cases in which the fraud relates in some way to the sexual or procreative aspects of marriage [*In re Marriage of Ramirez (2008) 165 Cal. App. 4th 751, 757, 81 Cal. Rptr. 3d 180* ; *In re Marriage of Meagher & Maleki (2005) 131 Cal. App. 4th 1, 7, 31 Cal. Rptr. 3d 663* ; *see § 25.15[5][b]*]. In the absence of fraud involving a party's intentions or abilities with respect to these aspects of marriage, neither party may question the validity of the marriage on the ground of reliance on the express or implied representations of the other party concerning such matters as character, habits, chastity, business or social standing, financial worth or prospects, or matters of a similar nature [*In re Marriage of Ramirez (2008) 165 Cal. App. 4th 751, 757, 81 Cal. Rptr. 3d 180* ; *In re Marriage of Meagher & Maleki (2005) 131 Cal. App. 4th 1, 8, 31 Cal. Rptr. 3d 663* ; *see § 25.15[5][c]*].

[b] Effect of Concealment of Material Facts

A marriage can be adjudged a nullity if one party conceals from the other party a fact material to the other party's consent to the marriage that defeats the essential purpose of the spouse in consenting to the marriage [*In re Marriage of Ramirez (2008) 165 Cal. App. 4th 751, 757, 81 Cal. Rptr. 3d 180* ; *Douglass v. Douglass (1957) 148 Cal. App. 2d 867, 868-869, 307 P.2d 674]* . Marriages have been annulled where one spouse concealed the fact of her sterility [*see Vileta v. Vileta (1942) 53 Cal. App. 2d 794, 795-796, 128 P.2d 376* ; *Aufort v. Aufort (1935) 9 Cal. App. 2d 310, 311, 49 P.2d 620* (both decided under former *Civ. Code § 82*)], the fact that she was pregnant by another man [*see Hardesty v. Hardesty (1924) 193 Cal. 330, 332-333, 223 P. 951* (decided under former *Civ. Code § 82*)], the fact that she was not yet finally divorced [*see Crawford v. Summers (1936) 12 Cal. App. 2d 533, 535-536, 55 P.2d 936* (decided under former *Civ. Code § 82*)], and the fact that he had been convicted of grand theft and was a fugitive as a parole violator [*see Douglass v. Douglass (1957) 148 Cal. App. 2d 867, 868-870, 307 P.2d 674* (decided under former *Civ. Code § 82*)].

Fraud sufficient to justify a judgment of nullity can also be established by proof that one spouse concealed from the other his or her intention to act in a certain way after marriage, when the concealed intention defeats the purpose of the marriage relationship. For example, the concealment of one spouse's intention never to live with the other spouse is a sufficient fraud to justify an annulment [*Handley v. Handley (1960) 179 Cal. App. 2d 742, 746-747, 3 Cal. Rptr. 910* ; *but see Bruce v. Bruce (1945) 71 Cal. App. 2d 641, 644, 163 P.2d 95* (decided under former *Civ. Code § 82*)], as is the concealment of an intention never to engage in sexual intercourse with the other spouse [*Millar v. Millar (1917) 175 Cal. 797, 801-805, 167 P. 394* ; *Rathburn v. Rathburn (1956) 138 Cal. App. 2d 568, 573-574, 292 P.2d 274* (both decided under former *Civ. Code § 82*); *see In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 156, 242 Cal. Rptr. 649*], or the concealment of an intention not to have children despite a promise to do so [*Maslow v. Maslow (1953) 117 Cal. App. 2d 237, 242, 255 P.2d 65* (decided under former *Civ. Code § 82*)]. An annulment has been granted to a spouse who proved that the other spouse concealed an intention not to be faithful and to continue a sexual relationship with another [*In re Marriage of Ramirez (2008) 165 Cal. App. 4th 751, 758-759, 81 Cal. Rptr. 3d 180* ; *Schaub v. Schaub (1945) 71 Cal. App. 2d 467, 476-478, 162 P.2d 966* (decided under former *Civ. Code § 82*)].

In two cases involving immigrants, annulments were granted on the basis of evidence that the alien husband married to obtain a different immigration status and concealed his intention to desert his wife and not to remain faithful to her, as well as his intention not to enter into a religious marriage ceremony despite a promise to do so, when the parties never cohabited and never consummated the marriage because of the misrepresentation [*see In re Marriage of Rabie (1974) 40 Cal. App. 3d 917, 921-923, 115 Cal. Rptr. 594* ; *Lamberti v. Lamberti (1969) 272 Cal. App. 2d 482, 485, 77 Cal. Rptr. 430* ; *cf. In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 156, 242 Cal. Rptr. 649* (wife found to have married for immigration purposes and never intended to engage in sexual relations with husband)]. For additional discussion of marriages involving aliens, see Ch. 359, *Marriage* .

[c] Insufficient Misrepresentations

The following misrepresentations made by a spouse prior to marriage have been held insufficient to justify an

annulment: the wife, prior to the marriage, was of a chaste and moral character [*Barnes v. Barnes (1895) 110 Cal. 418, 421-422, 42 P. 904* ; *Sutton v. Sutton (1936) 12 Cal. App. 2d 355, 356, 55 P.2d 261* (both decided under former *Civ. Code § 82*)]; the wife's child was a product of a legitimate marriage [*Foy v. Foy (1943) 57 Cal. App. 2d 334, 335, 134 P.2d 29* (decided under former *Civ. Code § 82*)]; the spouse possessed a certain wealth and social position [*Marshall v. Marshall (1931) 212 Cal. 736, 738* ; *Mayer v. Mayer (1929) 207 Cal. 685, 695, 279 P. 783* (both decided under former *Civ. Code § 82*)]; and the wife was pregnant by the husband [*Gondouin v. Gondouin (1910) 14 Cal. App. 285, 287-288, 111 P. 756* (decided under former *Civ. Code § 82*)].

A husband's misrepresentations about his financial status, which were intended to fraudulently induce his wife to invest in a business venture with him, to enable him to gain control of her assets, was not the type of fraud that constitutes an adequate basis for granting the wife an annulment [*In re Marriage of Meagher & Maleki (2005) 131 Cal. App. 4th 1, 9, 31 Cal. Rptr. 3d 663*].

Similarly, one court of appeal held that evidence of a husband's alleged drinking problem, poor grooming, and refusal to seek employment was insufficient to support a finding of "fraud" that would support an annulment of marriage [*In re Marriage of Johnston (1993) 18 Cal. App. 4th 499, 22 Cal. Rptr. 2d 253*].

[d] Parties and Statute of Limitations

A proceeding to obtain a judgment of nullity based on fraud must be commenced by the party whose consent was obtained by fraud within four years after the discovery of the facts constituting the fraud [*Fam. Code § 2211(d)*].

Under general fraud rules, the statute of limitations commences to run when a person has notice or information of circumstances to put a reasonable person on inquiry or has the opportunity to obtain relevant knowledge from sources open to his or her investigation [*see Casualty Ins. Co. v. Rees Inv. Co. (1971) 92 Cal. Rptr. 857*]. However, there is an exception when the parties are in a fiduciary or confidential relationship, as are husband and wife. A party in such a relationship is entitled to rely on the representations of the other party, and the statute does not begin to run merely because the means of discovery are available [*Davis v. Kahn (1970) 7 Cal. App. 3d 868, 878, 86 Cal. Rptr. 872]* .

[e] Proof

The defrauded party may be relieved from the marriage on proof that he or she would not have entered into it if he or she had known the facts, and the performance of the contract would give him or her substantially less than he or she bargained for [*Handley v. Handley (1960) 179 Cal. App. 2d 742, 746, 3 Cal. Rptr. 910]* .

[f] Defense of Cohabitation After Learning of Fraud

A judgment of nullity cannot be obtained, even though the consent was obtained by fraud, if the defrauded party afterwards, with full knowledge of the facts constituting the fraud, freely cohabits with the other as husband or wife [*see Fam. Code § 2210(d)*]. Thus, in one case, a marriage could not be annulled when the husband lived with the wife for four and one-half months after discovering her fraudulently concealed unsound mental condition [*Curtis v. Curtis (1947) 82 Cal. App. 2d 965, 968-970, 187 P.2d 921* (decided under former *Civ. Code § 82*)]. However, when an annulment was based on the secret intention of the wife to refuse all sexual intercourse, the fact that the parties stayed together for a few months was not a defense to the action for annulment because they were not cohabiting as husband and wife [*Millar v. Millar (1917) 175 Cal. 797, 805-806, 167 P. 394* (decided under former *Civ. Code § 82*); *cf. In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 156, 242 Cal. Rptr. 649* (wife found to have married for immigration purposes and never intended to engage in sexual relations with husband; parties briefly lived in same home)].

Mere suspicion of facts constituting the fraud does not meet the statutory standard of full knowledge. Thus, for example, it has been held that the fact that a wife continued to live with her husband even though she suspected that he

had married her solely to improve his immigration status does not constitute ratification of the marriage [*In re Marriage of Rabie (1974) 40 Cal. App. 3d 917, 923, 115 Cal. Rptr. 594* ; *see* *Schaub v. Schaub (1945) 71 Cal. App. 2d 467, 480, 162 P.2d 966* (cohabitation after suspicion of wife's illicit relationship does not ratify fraud; decided under former *Civ. Code § 82*)].

[6] Force

[a] Marriage Voidable

A marriage is voidable and may be adjudged a nullity if, at the time of the marriage, the consent of either party was obtained by force, unless such party afterwards freely cohabited with the other as husband or wife [*Fam. Code § 2210(e)*]. The fact that threats were made is not sufficient unless it is found that the threats were the inducing cause of the consent to the marriage and that the threats overcame the free exercise of the will of the spouse so as to render the consent apparent rather than real [*Nicholson v. Nicholson (1917) 174 Cal. 391, 393, 163 P. 219* (decided under former *Civ. Code § 82*)].

[b] Parties and Statute of Limitations

A proceeding to obtain a judgment of nullity based on force must be commenced by the party whose consent was obtained by force within four years after the marriage [*Fam. Code § 2211(e)*; *see* *Pryor v. Pryor (2009) 177 Cal. App. 4th 1448, 1456, 99 Cal. Rptr. 3d 853* (only injured spouse has standing to bring action for annulment based on force)].

[7] Physical Incapacity

[a] Marriage Voidable

A marriage is voidable and may be adjudged a nullity, if either party was, at the time of marriage, "physically incapable of entering into the marriage state," and that incapacity continues, and appears to be incurable [*Fam. Code § 2210(f)*]. Physical incapacity means legal impotence or the physical inability to consummate the marriage by coition. The test is the ability to engage in normal copulation; the ability to engage in partial, unnatural, or painful copulation does not preclude a judgment of nullity. The inability must only exist with regard to the particular spouse and need not be general. However, the capacity or incapacity to conceive children is not relevant [*Stepanek v. Stepanek (1961) 193 Cal. App. 2d 760, 762-763, 14 Cal. Rptr. 793* (decided under former *Civ. Code § 82*)].

[b] Parties and Statute of Limitations

A proceeding to obtain a judgment of nullity based on physical incapacity must be commenced by the party who is not incapacitated within four years after the marriage [*Fam. Code § 2211(f)*; *see* *Pryor v. Pryor (2009) 177 Cal. App. 4th 1448, 1456, 99 Cal. Rptr. 3d 853* (only injured spouse has standing to bring action for annulment based on physical incapacity)].

[c] Proof

Clear proof of the permanent and incurable physical incapacity of one of the parties is required, and proof by testimony of the other spouse of inability over a relatively short period of time without any corroboration is insufficient [*Stepanek v. Stepanek (1961) 193 Cal. App. 2d 760, 763-768, 14 Cal. Rptr. 793* ; *Hobbs v. Hobbs (1909) 10 Cal. App. 97, 101-103, 101 P. 22]* . Evidence from a physician who has made an examination, evidence of an existing malformation or organic defect, or evidence of the existence of a physical or psychological condition persisting over a sufficient time may provide a basis from which a court could infer incapacity [*Stepanek v. Stepanek (1961) 193 Cal. App. 2d 760, 767, 14 Cal. Rptr. 793]* .

If the respondent refuses to submit to a physical examination by a physician, a court order for examination by a physician can be obtained [*see Code Civ. Proc. § 2032.310*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageValidityVoid & Voidable MarriagesVoid MarriagesFamily LawMarriageValidityVoid & Voidable MarriagesVoidable Marriages

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[Reserved]

§§ 25.16[Reserved]

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§ 25.30 Governing Law

Statutes governing procedural issues that relate specifically to nullity actions are contained in *Fam. Code § 2250 et seq.* Time limits on the commencement of nullity actions are set forth in *Fam. Code § 2211*. Provisions governing the jurisdiction of the superior court over nullity actions and related matters are contained in *Fam. Code §§ 200, 2010*. In addition, the general provisions that apply to actions for dissolution and legal separation also apply to actions for nullity [*see Fam. Code § 2000 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportAnnulmentProcedures

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3-25 California Forms of Pleading and Practice--Annotated § 25.31

§ 25.31 Commencement of Proceeding

[1] Jurisdiction and Venue

[a] Jurisdiction

The superior court has jurisdiction over proceedings to obtain a judgment of nullity of marriage [*Fam. Code § 200*]. In general, the superior court in such a proceeding has jurisdiction to inquire into and render judgment and make any appropriate orders concerning the status of the marriage, the custody of the minor children of the marriage, the support of any children for whom support may be ordered, the support of either party, the settlement of the property rights of the parties, and the award of attorney's fees and costs [*Fam. Code § 2010*; *see Fam. Code § 2251 et seq.*].

Special rules concerning putative spouses that govern the circumstances under which a court may divide property acquired during the marriage, award spousal support, and attorney's fees and costs are discussed in *§ 25.32* [*see Fam. Code § 2251 et seq.*].

[b] Venue

On and after January 1, 1995, the county in which *either* the petitioner or the respondent resides at the commencement of the proceeding is the proper county for trial of the proceeding [*Code Civ. Proc. § 395(a)*]. Before January 1, 1995, because neither the Family Code nor the Code of Civil Procedure then provided expressly for venue in nullity actions, venue was governed by the general rule that, except as otherwise provided by law (and subject to the power of the court to transfer proceedings) the county in which the defendant (i.e., the respondent) resides at the commencement of the proceeding is the proper county for the trial of the proceeding [*Code Civ. Proc. § 395(a)*; *see Forster v. Superior Court (1992) 11 Cal. App. 4th 782, 14 Cal. Rptr. 2d 258* (court has duty to transfer action for legal separation (or nullity) to county where respondent resides, on respondent's timely motion for change of venue); *see also Code Civ. Proc. §§ 396b-400*; *Fam. Code § 210*; *Cal. Rules of Ct., Rule 5.21*]. Certain exceptions to this general rule were otherwise provided in *Code Civ. Proc. § 395*.

[c] Domicile and Residence of Parties

A California court has jurisdiction to adjudge a marriage a nullity if either party is domiciled in California [*Bing Gee v. Chan Lai Yung Gee (1949) 89 Cal. App. 2d 877, 883, 202 P.2d 360]* . Furthermore, California courts have jurisdiction to adjudge a marriage a nullity when both parties have appeared in the proceedings, even though neither party is a domiciliary of California [*Whealton v. Whealton (1967) 67 Cal. 2d 656, 664, 63 Cal. Rptr. 291, 432 P.2d 979]* .

In contrast to proceedings for marital dissolution [*see Fam. Code § 2320*], no statutory residence requirements exist for a judgment of nullity.

[2] Petition and Related Papers

A party who seeks a judgment of nullity must complete and file in the proper superior court (*see § 25.31[1]*) a petition as set forth by Cal. Judicial Council Form FL-100 (*see § 25.140*). The proceeding is commenced on the filing of the petition [*see Fam. Code § 2250(a)*].

The petitioner in a nullity proceeding must also prepare and have the court clerk approve issuance of a family law summons [*see Cal. Rules of Ct., Rule 5.110*; Cal. Judicial Council Form FL-110]. Special declarations of disclosure and related income and expense declarations must also be served, as discussed in *§ 25.31[4]*.

The petitioner may also need to seek temporary orders pending a hearing, and if so, must utilize the required Judicial Council forms. For a complete discussion of seeking relief in family law proceedings, as well as discussion of the foregoing forms and procedures for filing and service, see Ch. 221, *Dissolution of Marriage: Procedure* .

The petition may be filed only by the injured spouse when the grounds for the annulment are fraud, force, or physical incapacity. A third party, acting for one of the spouses, may file the petition when the spouse is a minor or is of unsound mind [*Pryor v. Pryor (2009) 177 Cal. App. 4th 1448, 1456, 99 Cal. Rptr. 3d 853]* .

[3] Response and Related Papers

A party who wishes to respond to a nullity petition must serve and file a response in the form required by Cal. Judicial Council Form FL-120 on the petitioner within 30 days of the date of the service of the petition and summons [*see Fam. Code § 2020*; *Cal. Rules of Ct., Rule 5.108*].

Special declarations of disclosure and related income and expense declarations must also be served, as discussed in *§ 25.31[4]*. A respondent may also need to seek temporary orders pending a hearing, or respond to applications for such orders sought by the petitioner. If so, he or she must utilize the required Judicial Council forms. For a complete discussion of seeking relief in family law proceedings, as well as discussion of the foregoing forms and procedures for filing and service, see Ch. 221, *Dissolution of Marriage: Procedure* .

[4] Declarations of Disclosure

Parties to a nullity proceeding are required to comply with the disclosure declaration requirements of *Fam. Code § 2100 et seq.* These provisions require each party to serve a preliminary declaration of disclosure on a form prescribed by the Judicial Council after or concurrently with service of the petition, except by court order for good cause under *Fam. Code § 2107* [*see Fam. Code § 2104(a)*; *see* Cal. Judicial Council Form FL-140]. The declaration discloses all assets in which the party claims an interest and all liabilities for which he or she may be liable, as well as the party's percentage of ownership for each asset and percentage of liability for each debt. The preliminary declaration of disclosure is not be filed with the court, except on court order, but the parties must file proof of service of it [*see Fam. Code § 2104(c)*; *see*

Cal. Judicial Council Form FL-141 (required form for proof of service of disclosure declaration)]. Along with the preliminary declaration, each party must provide the other with a completed income and expense declaration unless one has already been provided and is current and valid [*Fam. Code § 2104(e)*; *see* Cal. Judicial Council Form FL-150].

In addition, each party generally must also serve a final disclosure declaration containing additional information before or at the time the parties enter into an agreement for the resolution of property or support issues (other than pendente lite support) or, if the case goes to trial, no later than 45 days before the first assigned trial date [*Fam. Code § 2105*]. However, for good cause, the court may dispense with the requirement of serving a final disclosure declaration, and the parties may also stipulate to a mutual waiver of the final disclosure declaration if their waiver meets prescribed statutory conditions [*Fam. Code § 2105(a), (d)*]. For a full discussion of preliminary and final declarations of disclosure, see Ch. 221, *Dissolution of Marriage: Procedure* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportAnnulmentProcedures

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§ 25.32 Determinations Made by Court

[1] Child Custody and Support

The superior court has jurisdiction to determine the custody of the minor children of the marriage in a nullity proceeding [*Fam. Code § 2010(b)*]. Child custody determinations in nullity proceedings are made in accordance with *Fam. Code § 3000 et seq.*, which govern child custody determinations generally [*Fam. Code § 2253*]. For discussion of rules governing child custody awards, see Ch. 223, *Dissolution of Marriage: Child Custody* .

The court also has jurisdiction to award support for any children for whom support may be awarded pursuant to statute, including children born after the filing of the initial petition or the final judgment of nullity [*see Fam. Code § 2010(c)*; *see also Fam. Code § 3901* (duration of support duty as to child)]. For discussion of child support awards, see Ch. 224, *Dissolution of Marriage: Child Support* .

[2] Spousal Support

During the pendency of a proceeding for nullity of marriage, or on judgment of nullity of marriage, the court may order a party to pay for the support of the other party in the same manner as if the marriage had not been void or voidable if the party for whose benefit the order is made is found to be a putative spouse [*Fam. Code § 2254*; *see Fam. Code § 2010(d)*].

For discussion of what constitutes a putative marriage, see *§ 25.50* et seq. For a complete discussion of spousal support, generally, see Ch. 225, *Dissolution of Marriage: Spousal Support* .

[3] Property Award in Judgment of Nullity

[a] Court's Jurisdiction to Determine Property Rights

The court in a nullity proceeding has jurisdiction to settle the property rights of the parties [*Fam. Code § 2010(e)*]. To

obtain an adjudication of property rights, the parties to the nullity proceeding must have placed those rights at issue in the pleadings [*see Shore v. Shore (1954) 43 Cal. 2d 677, 679, 277 P.2d 4* ; *Fam. Code § 2251(a)(2)*].

[b] Property Division in Putative Spouse Cases

[i] In General

Technically speaking, in the absence of a valid marriage, there can be no community property [*Baskett v. Crook (1948) 86 Cal. App. 2d 355, 359, 195 P.2d 39]* . However, the property acquired during a void or voidable marriage may be treated and divided as community or quasi-community property when at least one of the parties entered the marriage in good faith. Whenever a determination is made that a marriage is void or voidable and the court finds either or both parties believed in good faith that the marriage was valid, the court must declare the party or parties to have the status of "putative spouse" [*Fam. Code § 2251(a)(1)*].

In that case, if the division of property is at issue, the property acquired during the marriage that would have been community or quasi-community property if the marriage had not been void or voidable must be divided by the court in the same manner as it would be divided in a proceeding for dissolution of a valid marriage [*Fam. Code § 2251(a)(2)*; *see Fam. Code § 2500 et seq.* (division of property in dissolution proceeding)]. Property of a putative marriage subject to such division is called "quasi-marital property" [*Fam. Code § 2251(a)(2)*].

The property so divided is liable for debts of the parties to the same extent as if the property had been community property or quasi-community property [*Fam. Code § 2252*].

The court may divide the quasi-marital property at a time after the judgment of nullity of marriage if it expressly reserves jurisdiction to do so in the judgment of nullity [*Fam. Code § 2251(b)*]. Furthermore, in proceedings for nullity of marriage, the court has continuing jurisdiction to award community estate assets or community estate liabilities to the parties that have not been previously adjudicated by a judgment in the proceeding, through the use of a postjudgment motion or order to show cause [*see Fam. Code § 2556*]. For a general discussion of the court's jurisdiction to divide and value assets and liabilities, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

[ii] Rights of Bad-Faith Party

The division principles discussed in *§ 25.32[3][b][i]*, appear to apply with respect to the property interests of both parties, even if only one of the parties qualifies as a putative spouse. Whether a nonputative spouse in an otherwise putative marriage can seek an equal division of "quasi-marital" property has not been definitively settled. However, *Fam. Code § 2251* appears to require such a division once it is determined that "*either* party or both parties believed in good faith that the marriage was valid. ..." [*see Fam. Code § 2251(a)* (emphasis added)].

One court of appeal interpreted the identically worded precursor to *Fam. Code § 2251*, former *Civ. Code § 4452*, as giving the bad-faith party a right to demand an equal division of quasi-marital property on termination of a putative marriage [*see In re Marriage of Cary (1973) 34 Cal. App. 3d 345, 350-352, 109 Cal. Rptr. 862* (*disapproved on other grounds* in *Marvin v. Marvin (1976) 18 Cal. 3d 660, 680 n.18, 134 Cal. Rptr. 815, 557 P.2d 106*)]. In a later case, the Supreme Court expressly refused to hold on the issue of the correctness of this interpretation of the statute, the determination being unnecessary for its resolution of the issue in that case. However, the Supreme Court did note that parties to a putative marriage ordinarily arrange their economic affairs with the expectation that on dissolution the property will be divided equally. The Court reasoned that because of this fact, if a guilty or bad faith party to a putative marriage were to receive one-half of the property under former *Civ. Code § 4452*, no expectation of the innocent spouse would be frustrated [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 680-681 n.18, 134 Cal. Rptr. 815, 557 P.2d 106]* .

Some commentators have argued that (now former) *Civ. Code § 4452* was not intended to aid a bad-faith party to a

putative marriage, and that the most reasonable interpretation of the statute is that it was designed only to protect persons who qualify as putative, that is, good-faith, spouses [*see* Kay & Amyx, *Marvin v. Marvin: Preserving the Options, 65 Cal. L. Rev. 937,* 949-951 (1977); Note, *Dissolution and Voidable Marriage Under the California Family Law Act, 4 Loy. L. Rev. 331, 352 (1971)*].

[c] Effect of Lack of Putative Spouse Status by Both Parties

When a putative marriage does not exist (that is, neither party believed in good faith that the marriage was valid), the court in rendering a judgment of nullity of marriage may not treat and divide the property as community or quasi-community property [*see Fam. Code § 2251(a)(2)*; *Shore v. Shore (1954) 43 Cal. 2d 677, 679-680, 277 P.2d 4]* . The court may, however, declare the property rights of the parties, if those rights have properly been put in issue in the proceeding [*Shore v. Shore (1954) 43 Cal. 2d 677, 679-680, 277 P.2d 4* ; *see Fam. Code § 2010(e)*]. The fact that a man and woman do not in good faith believe they are married does not preclude the court from protecting their respective interests in jointly acquired property [*Shore v. Shore (1954) 43 Cal. 2d 677, 681, 277 P.2d 4]* .

The court's general jurisdiction to settle property rights in a proceeding for judgment of nullity of a void or voidable marriage [*see Fam. Code § 2010(e)*] would seem to allow the court to inquire into and enforce any property rights arising out of an implied contract between the parties [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 679, 134 Cal. Rptr. 815, 557 P.2d 106]* , even if the court finds that neither party is a putative spouse, if the matter is properly put in issue by the pleadings. For discussion of property rights arising from express or implied agreements between unmarried cohabitants, see Ch. 387, *Nonmarital Cohabitation* .

[4] Attorney's Fees and Costs

The court may grant attorney's fees and costs in accordance with *Fam. Code Section 2030 et seq.* (governing awards of attorney's fees in family law proceedings generally) in (1) proceedings to have a marriage adjudged void, and (2) proceedings based on a voidable marriage in which the party applying for attorney's fees and costs is found to be innocent of fraud or wrongdoing in inducing or entering into the marriage, and free from knowledge of the then-existence of any prior marriage or other impediment to the marriage for which a judgment of nullity is sought [*Fam. Code § 2255*; *see also Cal. Rules of Ct., Rule 5.128(b)*; Cal. Judicial Council Form FL-150 (form for use to request attorney's fees)].

For a complete discussion of attorney's fee awards in dissolution and other family law proceedings, see Ch. 224, *Dissolution of Marriage: Attorney's Fees* .

[5] Restoration of Spouse's Former Name

On the request of a party in a proceeding for nullity of marriage, the court must restore the birth or former name of that party [*Fam. Code § 2080*]. The court must, on the party's request, restore her birth or former name regardless of whether the request was included in the petition [*Fam. Code § 2080*]. An ex parte application may be made after the judgment of nullity if the party fails to make the request for restoration of his or her former name at the time of the judgment of nullity [*see* Cal. Judicial Council Form FL-395].

A request for the restoration of a former or birth name under *Fam. Code § 2080* cannot be denied on the basis that the party has custody of a minor child who bears a different name, or for any other reason exclusive of fraud [*Fam. Code § 2081*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportCosts & Attorney FeesFamily LawMarital Termination & Spousal

SupportAnnulmentEffectsChildrenFamily LawMarital Termination & Spousal SupportAnnulmentEffectsProperty DivisionFamily LawMarital Termination & Spousal SupportAnnulmentProceduresFamily LawMarital Termination & Spousal SupportAnnulmentJurisdiction

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[Reserved]

§§ 25.33[Reserved]

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§ 25.50 Governing Law

Statutory provisions governing putative spouses largely overlap those governing nullity of marriage in general, and counsel should refer to § 25.10 et seq. for a summary of related governing law. The judicial determination of void or voidable marriage (including putative marriages) is governed by *Fam. Code § 2200 et seq.*

Actions for damages based on a fraudulent promise to marry or to cohabit after marriage are precluded under *Civ. Code § 43.4*. Statutory provisions governing the right of a putative spouse to sue for the wrongful death of the other party to the relationship are contained in *Code Civ. Proc. § 377.60(b)*. Ceremonial marriages are presumed valid, under *Evid. Code § 663*. Recognition of marriages contracted outside California is contained in *Fam. Code § 308*. Statutory provisions for an action to determine the validity of a marriage are contained in *Fam. Code § 309*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 25.51 "Putative Marriage" Defined

A putative marriage is defined as a matrimonial union that was solemnized in due form and celebrated in good faith, but which, because of some legal infirmity, is void or voidable [*see In re Marriage of Tejeda (2009) 179 Cal. App. 4th 973, 979, 102 Cal. Rptr. 3d 361* ; *In re Marriage of Ramirez (2008) 165 Cal. App. 4th 751, 756, 81 Cal. Rptr. 3d 180* ; *see also Fam. Code § 2251(a)*].

Legal Topics:

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

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§ 25.52 General Rights and Duties of Putative Spouse

A putative spouse is a person who believes in reasonable, good faith that he or she is a party to a valid marriage, although the marriage is invalid [*In re Marriage of Tejeda (2009) 179 Cal. App. 4th 973, 980, 102 Cal. Rptr. 3d 361* ; *In re Marriage of Vryonis (1988) 202 Cal. App. 3d 712, 717, 248 Cal. Rptr. 807* ; *In re Domestic Partnership of Ellis & Arriaga (2008) 162 Cal. App. 4th 1000, 1003, 76 Cal. Rptr. 3d 401* ; *see Fam. Code § 2251(a)* (putative spouse defined for purposes of property division in nullity proceeding); *Code Civ. Proc. § 377.60(b)* (for purposes of determining eligibility to bring wrongful death action, putative spouse is defined as surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid)]. If the court finds that the marriage is invalid, it must declare any party with the required good faith belief to be a putative spouse [*In re Marriage of Tejeda (2009) 179 Cal. App. 4th 973, 980, 102 Cal. Rptr. 3d 361]* . A person who knew his or her marriage was invalid at the time of entering into it, or who lacked a good faith belief in the validity of the marriage cannot qualify as a putative spouse.

A person's good faith belief that the marriage was validly entered into must be objectively reasonable [*In re Domestic Partnership of Ellis & Arriaga (2008) 162 Cal. App. 4th 1000, 1005, 76 Cal. Rptr. 3d 401* ; *In re Marriage of Ramirez (2008) 165 Cal. App. 4th 751, 756, 81 Cal. Rptr. 3d 180]* . A subjective good faith belief is insufficient [*In re Marriage of Ramirez (2008) 165 Cal. App. 4th 751, 756, 81 Cal. Rptr. 3d 180]* .

One or both parties to a putative marriage may be putative spouses as defined above. For one spouse to occupy the status of a putative spouse, the other spouse need not be a putative spouse and need not have had a good faith belief in the validity of the marriage [*Sanguinetti v. Sanguinetti (1937) 9 Cal. 2d 95, 99, 69 P.2d 845]* .

Once either party is declared to be a putative spouse, the parties' union is a putative marriage. Even when only one party has the required good faith belief in the validity of the marriage thereby qualifying as the sole putative spouse, the court's declaration of this status operates as a declaration that the union itself is a putative marriage [*In re Marriage of Tejeda (2009) 179 Cal. App. 4th 973, 983, 102 Cal. Rptr. 3d 361]* .

Determination of a person's status as a putative spouse may have important consequences on various legal rights, including the following:

(1) The right to share in property accumulated in the name of the other party during the putative marriage on termination of the relationship [*see Fam. Code § 2251(a)*; *see also § 25.57*].

(2) The right to share in property accumulated during the putative marriage on the death of the other party (*see § 25.80* et seq.).

(3) The right to payment of support by the other party on termination of the relationship [*see Fam. Code § 2254*; *see also § 25.58*].

(4) Standing to sue for the wrongful death of the other party to the relationship [*see Code Civ. Proc. § 377.60(b)*; *see generally* Levy, Golden & Sacks, California Torts, Ch. 55 (Matthew Bender)]; and

(5) The right to recover state workers' compensation benefits when the other party dies [*see Lab. Code §§ 3503, 4702*; *see generally* Hanna, California Law of Employee Injuries and Workers' Compensation, Ch. 9 (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsProperty RightsGeneral OverviewFamily LawMarriageValidityPutative MarriagesFamily LawMarital Termination & Spousal SupportAnnulmentEffectsChildrenFamily LawMarital Termination & Spousal SupportAnnulmentEffectsProperty DivisionFamily LawMarital Duties & RightsDuty of Support

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§ 25.53 Cohabitation Distinguished

A putative marriage does not exist if unmarried persons live together knowing that they are not validly married. When both parties lack a good faith belief in the validity of their marriage, the relationship does not qualify as a putative marriage even though they may hold themselves out as husband and wife and conduct themselves as a family unit [*see In re Marriage of Cary (1973) 34 Cal. App. 3d 345, 348-349, 109 Cal. Rptr. 862* (*disapproved on other grounds* in Marvin v. *Marvin (1976) 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106*)]. The discussion in this part is limited to putative marriages. The rights and liabilities of persons living together without a good faith belief that they are married are discussed in Ch. 387, *Nonmarital Cohabitation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawCohabitationGeneral OverviewFamily LawMarriageValidityPutative Marriages

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§ 25.54 Solemnization and Good Faith Requirements for Putative Marriage

[1] Solemnization Requirements

Common-law marriage has been abolished in California, and solemnization is required for a valid marriage [*see Fam. Code §§ 300, 306, 420-425*; *see also* Stats. 1895, ch. 129, § 3]. For discussion of solemnization requirements and other required formalities for a valid marriage, see Ch. 359, *Marriage* .

In most circumstances involving putative marriages, the parties have attempted to comply with the statutory formalities for a valid marriage, namely that the marriage be licensed, solemnized, and authenticated, and that a certificate of registry be filed [*see Fam. Code §§ 300, 306*]. In these cases, the marriage was invalid because some essential fact was unknown to one or both of the parties, such as an earlier undissolved marriage of one of the parties, a blood relation between the parties, or the failure to satisfy completely the requirements of a valid solemnization [*see Vallera v. Vallera (1943) 21 Cal. 2d 681, 684, 134 P.2d 761*].

However, in a few cases, unions have been characterized as putative marriages even though no ceremony of solemnization took place. In one case, a couple who could not speak English and were not acquainted with the marriage laws applied for a marriage license and began living together in the good faith belief that they were married [*Santos v. Santos (1939) 32 Cal. App. 2d 62, 63, 89 P.2d 164*]. Putative marriage was also found without a solemnization in a case in which the spouses made an oral contract in Nevada, where common-law marriage was recognized, to live together as husband and wife in California [*Sancha v. Arnold (1952) 114 Cal. App. 2d 772, 779, 251 P.2d 67*]. In fact, it has been noted that "although the usual putative marriage situation may arise under circumstances where a marriage is duly solemnized and celebrated in good faith but suffers from a legal infirmity, lack of a solemnization ceremony does not necessarily mean bad faith precluding finding a putative marriage" [*Wagner v. County of Imperial (1983) 145 Cal. App. 3d 980, 983, 193 Cal. Rptr. 820*].

In other cases, putative marriages arose as a result of divorce, rather than as the direct result of a defective marriage ceremony. In one case, for example, a putative marriage was found when one party to a valid marriage obtained a secret

divorce in another jurisdiction, but the parties continued to live together as husband and wife [*Feig v. Bank of America (1936) 5 Cal. 2d 266, 269-270, 54 P.2d 3*]. Another couple's relationship was characterized as a putative marriage when they started divorce proceedings, reconciled after the interlocutory decree had been entered, and their attorney had the final decree entered without their knowledge [*Lazzarevich v. Lazzarevich (1948) 88 Cal. App. 2d 708, 716, 200 P.2d 49* ; *see In re Marriage of Monti (1982) 135 Cal. App. 3d 50, 56, 58, 185 Cal. Rptr. 72* (final decree of dissolution entered without one spouse's knowledge)].

[2] Good Faith Requirement

[a] Good Faith as Essential

A good-faith belief in the validity of the marriage on the part of one or both of the spouses is essential to the existence of a putative marriage. A putative marriage cannot exist if neither party believes in the existence of a valid marriage [*see Vallera v. Vallera (1943) 21 Cal. 2d 681, 684, 134 P.2d 761* ; *Brown v. Brown (1969) 274 Cal. App. 2d 178, 186, 82 Cal. Rptr. 238* ; *Fam. Code § 2251(a)*]. Likewise, a person must have a good faith belief in the validity of his or her marriage in order to be characterized as a putative spouse [*In re Marriage of Ramirez (2008) 165 Cal. App. 4th 751, 756, 81 Cal. Rptr. 3d 180* ; *In re Marriage of Vryonis (1988) 202 Cal. App. 3d 712, 720-722, 724, 248 Cal. Rptr. 807* ; *Fam. Code § 2251(a)*].

The required good-faith belief is that the marriage is lawful in California, and this belief must have an *objectively* reasonable basis [*In re Marriage of Ramirez (2008) 165 Cal. App. 4th 751, 756, 81 Cal. Rptr. 3d 180* ; *In re Marriage of Vryonis (1988) 202 Cal. App. 3d 712, 720-721, 724, 248 Cal. Rptr. 807* ; *see § 25.54[2][c]*]. A *subjective* good faith belief, even by a party who is found credible and sympathetic, is insufficient. Instead, under the objective standard, a claim to be a putative spouse must be based on facts that would cause a reasonable person to believe in good faith that he or she was married and that the marriage was valid under California law [*In re Marriage of Ramirez (2008) 165 Cal. App. 4th 751, 756, 81 Cal. Rptr. 3d 180*]. Whether a person has the required good faith belief in the validity of his or her marriage is a question of fact to be determined by the trial court [*Estate of Vargas (1974) 36 Cal. App. 3d 714, 717, 111 Cal. Rptr. 779* ; *see In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 156-157, 242 Cal. Rptr. 649* (trial court denied putative spouse status to woman who had not entered into marriage in good faith, i.e., she married to obtain residency in U.S.)].

[b] Presumption of Good Faith From Ceremonial Marriage

It is presumed that persons who participate in a marriage ceremony do so in good faith [*Brown v. Brown (1969) 274 Cal. App. 2d 178, 186, 82 Cal. Rptr. 238* ; *cf. Evid. Code § 663* (presumption that ceremonial marriage is valid)]. Accordingly, a person who claims to be a putative spouse as the result of a marriage ceremony has the benefit of the presumption of good faith when his or her status as a putative spouse has been challenged [*Holland America Ins. Co. v. Rogers (N.D. Cal. 1970) 313 F. Supp. 314, 318* ; *but see In re Marriage of Vryonis (1988) 202 Cal. App. 3d 712, 721-722, 724, 248 Cal. Rptr. 807* (belief that ceremony conformed to tenets of religious faith *alone*, coupled with assurances from other party in validity of marriage, did not support good-faith belief in existence of valid marriage)]. A person asserting bad faith to overcome another's claim to be a putative spouse must be able to produce some evidence proving or tending to prove bad faith.

[c] Objective Test of Good Faith

[i] Nature of Test

Under California law, an objective test is applied to determine whether or not a claimant putative spouse possessed a good-faith belief in the validity of his or her marriage at the time it occurred [*In re Marriage of Ramirez (2008) 165 Cal. App. 4th 751, 756, 81 Cal. Rptr. 3d 180* ; *In re Marriage of Vryonis (1988) 202 Cal. App. 3d 712, 720-721, 724, 248 Cal. Rptr. 807*]. Under the objective test, a person claiming to be a putative spouse must have had a reasonable

belief in the validity of the marriage in light of the facts known to the person at the time that the alleged marriage took place. The requirement of good faith cannot be satisfied merely by showing that the claimant putative spouse had no actual knowledge of the invalidity of the marriage or that he or she had an honest, but completely unreasonable, belief that the marriage was valid [*see Spearman v. Spearman (5th Cir. 1973) 482 F.2d 1203, 1207-1208* (applying California law as law of place where decedent died leaving two alleged wives); *see also In re Marriage of Ramirez (2008) 165 Cal. App. 4th 751, 756, 81 Cal. Rptr. 3d 180* ; *In re Marriage of Vryonis (1988) 202 Cal. App. 3d 712, 720-722, 724, 248 Cal. Rptr. 807*].

[ii] Application of Objective Test

Assertion of putative spouse status must be based on facts that would cause a reasonable person to have a good-faith belief in the existence of a valid marriage. Although solemnization is not an *absolute* prerequisite to establishing a putative marriage [*In re Marriage of Vryonis (1988) 202 Cal. App. 3d 712, 721, 248 Cal. Rptr. 807*], there must be some diligent attempt to meet the statutory requirements for a valid marriage. When there has been no attempted compliance with the procedural requirements of a valid marriage, and the usual indicia of, and conduct associated with, marriage are absent, a belief in the existence of a valid marriage would be unreasonable and lacking in good faith, even if the belief were sincere [*In re Marriage of Vryonis (1988) 202 Cal. App. 3d 712, 721, 724, 248 Cal. Rptr. 807* ; *see Welch v. State of California (2000) 83 Cal. App. 4th 1374, 1378, 100 Cal. Rptr. 2d 430*]. In one case, the court held that the parties made no colorable attempt to comply with statutory requirements in that they did not obtain a marriage license, their marriage ceremony was not solemnized by a third party, and there was no authentication or recordation. They did not cohabit, hold themselves out as husband and wife, and their conduct did not approximate that of a married couple. Although the "wife" sincerely believed that their ceremony conformed to her own religious beliefs and the "husband" assured her that they were validly married, the wife's belief under those circumstances was held to be objectively unreasonable and, thus, not in good faith [*In re Marriage of Vryonis (1988) 202 Cal. App. 3d 712, 721-722, 724, 248 Cal. Rptr. 807* ; *see Welch v. State of California (2000) 83 Cal. App. 4th 1374, 1379, 100 Cal. Rptr. 2d 430* (when couple made no attempt to obtain marriage license or solemnize their union but held themselves as married for 30 years, appellant was not putative spouse because she had been married and divorced twice, and must have been aware of procedural requirements for lawful California marriage)]. In another case, the court held that regardless of whether an alleged husband believed his marriage was valid, a reasonable person would not have because it was performed in California by an official from Mexico, who issued an "Acta de Matrimonio," a marriage license that stated that the wedding was performed in Mexico. This, in itself, was enough to put a reasonable person on notice that the marriage license and the marriage itself were not valid [*In re Marriage of Ramirez (2008) 165 Cal. App. 4th 751, 756-757, 81 Cal. Rptr. 3d 180]* .

Factors taken into consideration by the courts in determining whether or not a person possessed a good faith belief in the validity of his or her marriage include all of the following [*see Spellens v. Spellens (1957) 49 Cal. 2d 210, 216, 317 P.2d 613* ; *Flanagan v. Capital Nat'l Bank (1931) 213 Cal. 664, 667, 3 P.2d 307* ; *Neureither v. Workmen's Comp. App. Bd. (1971) 15 Cal. App. 3d 429, 434-435, 93 Cal. Rptr. 162* ; *Sutton v. Sutton (1956) 145 Cal. App. 2d 730, 734-735, 303 P.2d 21*]:

(1) The claimant's level of education.

(2) The claimant's degree of sophistication.

(3) The claimant's experience with the laws and procedures surrounding marriage and divorce.

(4) The nature of any official papers or other written or oral communications received by the parties.

(5) The degree of trust placed by the claimant in the assurances of a bad faith party, and the degree to which such trust was justified by differences in their ages, business experience, and other factors.

[3] Application of Requirements to Out-of-State Marriages

All marriages contracted outside of California that would be valid by the laws of the jurisdiction in which they were contracted are deemed to be valid in California [*Fam. Code § 308*; *see* discussion in Ch. 359, *Marriage*]. This statutory rule is a continuation of the common-law rule that the validity of a marriage was determined by the laws of the state in which it was contracted, and the validity of a decree of divorce was determined by the laws of the state in which it was obtained [*Jones v. Jones (1960) 182 Cal. App. 2d 80, 82, 5 Cal. Rptr. 803*].

Thus, whether a couple has complied with out-of-state statutory formalities may dictate whether they qualify as putative spouses in California [*see* *Estate of Levie (1975) 50 Cal. App. 3d 572, 576, 123 Cal. Rptr. 445* (putative marriage arose out of a marriage that was void where contracted although it would have been valid if contracted under California law)]. The law of another state may also be important when one of the parties was divorced out of state. In that case, the law of the place of divorce must be consulted to determine if the party was validly divorced at the time he or she married the present spouse. For full discussion of the recognition and validity of foreign judgments, see Ch. 260, *Family Law Enforcement Foreign Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawRelations Among GovernmentsFull Faith & CreditFamily LawMarriageValidityPutative MarriagesFamily LawMarriageProofCeremonial MarriagesSolemnization of MarriageFamily LawMarriageValidityGeneral Overview

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§ 25.55 No Action for Fraudulent Inducement to Marry

Before the enactment of *Civ. Code § 43.4* in 1959 [Stats. 1959, ch. 381], a putative spouse could state a cause of action for fraud based on the other spouse's fraudulent inducement to marry that rendered the marriage voidable [*Langley v. Schumacker (1956) 46 Cal. 2d 601, 602-603, 297 P.2d 977]* . *Civ. Code § 43.4* presently bars an action for damages based on a fraudulent promise to marry or to cohabit after marriage. Thus, although a marriage may be voidable and may be adjudged a nullity if one spouse's consent was induced by fraud [*see Fam. Code § 2210(d)*; *see also* discussion in *§ 25.10* et seq.], the fraud does not give rise to an action for damages [*see Boyd v. Boyd (1964) 228 Cal. App. 2d 374, 378, 39 Cal. Rptr. 400* ; *see also Askew v. Askew (1994) 22 Cal. App. 4th 942, 953-957, 28 Cal. Rptr. 2d 284]* .

Legal Topics:

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

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§ 25.56 Termination of Putative Marriage

[1] Voidable Marriage--Characteristics

The main characteristic of a voidable marriage is that it is *not* invalid from the outset (*ab initio*). In other words, a voidable marriage is such that although there may be grounds for declaring it invalid, those grounds can be cured and the marriage can be transformed into a valid legal marriage. For example, if a marriage is voidable because one or both spouses were under 18 years and no parental or court approval was obtained, the marriage is nevertheless valid if the underage spouse or spouses continue to cohabit as husband and wife after reaching the age of 18 [*see Fam. Code § 2210(a)*]. As another example, if the marriage is voidable because the consent of one spouse was obtained by fraud, the marriage will be valid if that defrauded spouse continues freely to cohabit with the other spouse after obtaining full knowledge of the facts constituting the fraud [*see Fam. Code § 2210(d)*].

For full discussion of the grounds for voidability of a marriage, see *§ 25.10* et seq.

[2] Necessity of Taking Legal Action to Terminate a Voidable Marriage

Because a voidable marriage is not invalid from its beginning, it can only be terminated by a judgment of nullity, a judgment of dissolution, or by the death of one of the parties [*see Fam. Code § 310*]. If both parties to the marriage are still alive, a voidable marriage is valid until it has been terminated through a judgment of dissolution or nullity of marriage [*Estate of LeMont (1970) 7 Cal. App. 3d 437, 439, 86 Cal. Rptr. 810]* .

A putative spouse has choice of either a nullity proceeding or a dissolution proceeding to terminate a voidable marriage [*see Fam. Code § 310(b), (c)*]. For a complete discussion of the relative advantages and disadvantages of bringing a particular proceeding, see *§ 25.10* et seq.

[3] Void Marriage

[a] Characteristics

Void marriages include bigamous (or otherwise polygamous) marriages and incestuous marriages [*see Fam. Code §§ 2200, 2201*]. Under limited circumstances involving a spouse who is believed dead, a bigamous marriage may be treated as a voidable marriage [*see Fam. Code §§ 2201(a)(2), 2210(b)*]. For a complete description of void marriages in the context of bringing a proceeding for nullity of marriage, see *§ 25.10* et seq.

An attempted marriage, which fell so far short of compliance with statutory requirements that no marriage was ever contracted, has also been considered a void marriage [*see Sutton v. Sutton (1956) 145 Cal. App. 2d 730, 734, 303 P.2d 21* ; *see also In re Marriage of Vryonis (1988) 202 Cal. App. 3d 712, 719, 248 Cal. Rptr. 807* (marriage was "plainly defective;" the "void/voidable" aspect of former *Civ. Code § 4452* (*now see Fam. Code § 2251*) is threshold determination that legal infirmity in formation renders marriage invalid)].

A marriage that is absolutely void is void from the beginning [*see Fam. Code §§ 2200, 2201*]. It is subject to collateral attack, meaning that its validity can be challenged in any proceeding, and not just in a proceeding brought to have the marriage declared invalid [*see Estate of Karau (1938) 26 Cal. App. 2d 606, 607-608, 80 P.2d 108]* .

[b] Desirability of Judicial Determination

If a marriage is absolutely void, not merely voidable, no action technically needs to be taken to terminate it. The parties may agree to terminate the relationship, or one party may simply leave. However, it might be wise for the parties to seek a judicial determination that the marriage is void or dissolved for a number of reasons, including all of the following:

(1) A judicial determination that the marriage is void will be a matter of public record and protect the parties in the event of a subsequent marriage or property dispute;

(2) The parties' status as unmarried persons will be judicially declared [*see Fam. Code §§ 2212(a), 2300*]; and

(3) Judicial intervention may be required for the putative spouse to benefit from statutory and other remedies for division of property, support, attorney's fees, and costs [*see Fam. Code §§ 2011, 2030 et seq., 2251, 2254, 2255, 2550, 3600 et seq., 4330 et seq.*].

On the other hand, at least with respect to nullity proceedings--in which the ground for the invalidity must be established--a party potentially exposes himself or herself to criminal liability if the marriage is void because of bigamy or incest. Thus, counsel must weigh the various benefits and disadvantages to seeking termination of the marriage through nullity or dissolution proceedings. For further discussion of these competing considerations, see *§ 25.10* et seq.

[4] Proceedings Other Than For Nullity or Dissolution

In cases in which a party believes that he or she may qualify as a putative spouse, but the marriage *does not* fall within the statutory definitions of void or voidable marriage for purposes of bringing a nullity proceeding [*see Fam. Code §§ 2200, 2201, 2210*], a determination of this issue and of the parties' property rights can be obtained in an action to have the validity of the marriage determined [*see Fam. Code § 308*; *Spellens v. Spellens (1957) 49 Cal. 2d 210, 215, 317 P.2d 613* (woman married in good faith before final decree of divorce entered); *see also* Ch. 359, *Marriage*] or in an action for declaratory relief [*Code Civ. Proc. § 1060*]. A declaratory relief action may also be brought when the invalidity of the marriage is conceded, and the only matter at issue is the parties' property rights.

One court has held that even if a marriage is neither void nor voidable as defined by the statutes governing nullity proceedings, relief may be afforded under the putative marriage doctrine on the basis of the reasonable expectations of the parties if the alleged marriage was entered into in *good faith*. The court in that case reasoned that the requirement of a void or voidable marriage for putative marriage status in the nullity statute [*see Fam. Code § 2251*] simply requires a

threshold determination that a legal infirmity in the formation of the marriage rendered the marriage invalid. However, relief will not extend to the parties to a *plainly defective* marriage that is neither void or voidable because they would lack the requisite good faith [*see In re Marriage of Vryonis (1988) 202 Cal. App. 3d 712, 718-719, 248 Cal. Rptr. 807* ; *see also § 25.54[2][a]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageValidityPutative MarriagesFamily LawMarriageValidityVoid & Voidable MarriagesVoid MarriagesFamily LawMarriageValidityVoid & Voidable MarriagesVoidable Marriages

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§ 25.57 Division of Quasi-Marital Property

[1] Division in Nullity Proceeding

"Quasi-marital property" is property that was acquired during a putative marriage that would have been community property or quasi-community property had the marriage not been void or voidable [*Fam. Code § 2251(a)(2)*; *In re Marriage of Tejeda (2009) 179 Cal. App. 4th 973, 981, 102 Cal. Rptr. 3d 361* (theory of quasi-marital property equates property rights acquired during putative marriage with community property rights acquired during legal marriage)]. In a proceeding to have a void or voidable marriage adjudged a nullity [*see Fam. Code § 2250 et seq.*], the court must divide the quasi-marital property in the same manner as community property or quasi-community property provided that [*Fam. Code § 2251*; *see Fam. Code § 2550*; *In re Marriage of Tejeda (2009) 179 Cal. App. 4th 973, 983, 102 Cal. Rptr. 3d 361* (division of quasi-marital property is required regardless of whether both parties have been declared putative spouses); *Estate of DePasse (2002) 97 Cal. App. 4th 92, 102, 118 Cal. Rptr. 2d 143* (court *must* divide quasi-marital property as if it were community property on making statutory findings)]:

(1) The court determines that the marriage is void or voidable;

(2) The court has found that either party or both of the parties believed in good faith that the marriage was valid, and thus qualifies as a putative spouse; and

(3) The division of property is in issue.

A putative spouse is entitled to the same share of the quasi-marital property as he or she would receive as an actual and legal spouse if there had been a valid marriage, i.e., it must be divided equally between the parties [*In re Marriage of Tejeda (2009) 179 Cal. App. 4th 973, 983, 102 Cal. Rptr. 3d 361]* .

For a complete discussion of dividing quasi-marital property in nullity proceedings, see *§ 25.30* et seq.

[2] Division Outside Nullity Proceeding

In a few cases "marriages" that were not solemnized and that did not fall within the statutory definitions of void and voidable marriages [*see Fam. Code §§ 2200, 2201, 2210*], have nevertheless been characterized by the courts as "putative marriages" because of the peculiar circumstances, and the good faith belief of one or both parties that they were married [*see, e.g., Santos v. Santos (1939) 32 Cal. App. 2d 62, 63, 89 P.2d 164* (parties obtained marriage license and commenced living together in the good faith belief that they were married)]. In the unusual case in which the relationship of the parties may be characterized as a putative marriage, and yet the union is *not* subject to termination in a nullity proceeding, an equitable division of the parties' property may nevertheless be sought. Suggested means to be employed by a putative spouse to secure an equitable division of the parties' quasi-marital property outside the context of a nullity proceeding include:

(1) An action for an accounting [*see* Ch. 7, *Accounting, Action for*];

(2) An action to impose a constructive trust [*Civ. Code §§ 2223, 2224*; *see* Ch. 561, *Trusts: Constructive Trusts*];

(3) An action to quiet title to property [*Code Civ. Proc. § 760.010 et seq.*; *see* Ch. 482, *Quieting Title*]; and

(4) An action for declaratory relief [*Code Civ. Proc. § 1060*; *see* Ch. 182, *Declaratory Relief*].

An action for declaratory relief may be the most appropriate action to pursue because a dispute may arise on whether the plaintiff spouse is actually a putative spouse in addition to the dispute over property rights. An action for declaratory relief would accommodate both of these disputes because the parties in such an action can seek a declaration of their rights and duties with respect to one another [*see Code Civ. Proc. § 1060*]. In addition, declaratory relief is a cumulative remedy and does not prevent a plaintiff from seeking any additional relief [*Code Civ. Proc. § 1062*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsConstructive TrustsCivil ProcedureRemediesEquitable AccountingsGeneral OverviewFamily LawMarriageValidityPutative MarriagesFamily LawMarital Termination & Spousal SupportAnnulmentEffectsProperty DivisionReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 25.58 Support for Putative Spouse

In nullity proceedings, *Fam. Code § 2254* provides a basis for an award of support to a person who qualifies as a putative spouse, in the same manner as if the marriage had not been void or voidable. For further discussion, see *§ 25.30* et seq.

In cases in which a putative marriage is *not* subject to a judgment of nullity or dissolution, there is no statutory authorization for the court to award support to a putative spouse. *Fam. Code § 2254* specifically refers to an award of support only during the pendency of a nullity proceeding or on judgment of nullity.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportAnnulmentGeneral OverviewFamily LawMarriageValidityPutative MarriagesFamily LawMarital Termination & Spousal SupportAnnulmentEffectsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral Overview

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§ 25.59 Recovery in Quantum Meruit

Before the Family Law Act [Stats. 1969, ch. 1608, former *Civ. Code § 4000 et seq.*, operative January 1, 1970; *now see* the Family Code, operative January 1, 1994], was enacted, a putative spouse could bring an action in quantum meruit to recover the reasonable value of services rendered to the other spouse, less the value of support received. By allowing such an action, courts were able to justify some recovery for a putative spouse in the case of a putative marriage when there was no quasi-marital property to divide [*see, e.g.,* *Lazzarevich v. Lazzarevich (1948) 88 Cal. App. 2d 708, 715-716, 200 P.2d 49]* . The basis for such recovery was quasi-contractual. Recovery was permitted on the theory that the spouse who received the services was unjustly enriched in the amount by which the reasonable value of the services rendered exceeded the amount of support and maintenance furnished to the spouse performing the services. In such a situation it was considered just and equitable for the law to imply a promise to compensate the spouse who performed the services solely because of his or her good-faith belief in the validity of the marriage [*Sanguinetti v. Sanguinetti (1937) 9 Cal. 2d 95, 100-101, 69 P.2d 845* ; *Lazzarevich v. Lazzarevich (1948) 88 Cal. App. 2d 708, 715-716, 200 P.2d 49]* .

Under current law, however, a putative spouse may seek temporary and permanent support in a nullity proceeding [*see Fam. Code § 2254*]. Commentators have argued that by allowing a putative spouse to seek permanent support in a nullity proceeding, the Legislature intended to abrogate the right of a putative spouse to seek quantum meruit recovery for the value of services rendered less the value of support received [Luther & Luther, *Support and Property Rights of the Putative Spouse, 24 Hastings L.J. 311, 323*-325 (1973); *see* Kay & Amyx, *Marvin v. Marvin: Preserving the Options, 65 Cal. L. Rev. 937*, 949 n.76 (1977)]. Also, no reported post-Family Law Act case has allowed such recovery. Therefore, it is unclear whether quantum meruit is currently viable in this context.

For discussion of quasi-contractual recovery in the context of a nonmarital cohabitation arrangement, see Ch. 387, *Nonmarital Cohabitation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportAnnulmentGeneral OverviewFamily LawMarriageValidityPutative MarriagesFamily LawMarital Termination & Spousal SupportAnnulmentEffectsGeneral OverviewFamily LawCohabitationAgreementsEnforceabilityQuantum MeruitFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral Overview

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§ 25.60 Express and Implied Contracts; Equitable Remedies

In addition to the statutory remedies of division of quasi-marital property [*Fam. Code § 2251*] and temporary or permanent support [*Fam. Code § 2254*], a putative spouse may resort to any of the following theories to protect his or her property interests:

(1) Action on an express contract between the putative spouses;

(2) Action on a contract implied in fact between the putative spouses;

(3) Equitable remedies such as resulting trust, constructive trust, and equitable liens, the purpose of which is to impress on property in the name of another the beneficial rights that have arisen in an innocent party who in some way contributed to the acquisition, protection, or improvement of that property [*see Holder v. Williams (1959) 167 Cal. App. 2d 313, 315-316, 334 P.2d 291]* .

The above remedies are discussed in detail in Ch. 387, *Nonmarital Cohabitation* , in the context of the property rights of unmarried cohabitants.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportAnnulmentGeneral OverviewEstate, Gift & Trust LawTrustsConstructive TrustsContracts LawTypes of ContractsImplied-in-Fact ContractsFamily LawMarital Termination & Spousal SupportAnnulmentEffectsGeneral OverviewContracts LawTypes of ContractsExpress Contracts

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§ 25.61 Estoppel to Assert Invalidity of Marriage

A party cannot contest the validity of a divorce or dissolution decree if he or she has done one of the following [*Rediker v. Rediker (1950) 35 Cal. 2d 796, 805, 221 P.2d 1]* :

(1) Procured the decree;

(2) Remarried in reliance on the decree; or

(3) Aided another to procure the decree so that the latter will be free to remarry.

Thus, if spouses in a nullity, dissolution, or validity of marriage proceeding were married after one of the parties procured an invalid divorce, a spouse who falls into any one of the three above categories may be estopped from denying the validity of the second marriage because of the alleged invalidity of the first divorce or dissolution. The practical effect of such estoppel is that it may entitle a putative spouse to be treated as if he or she were a legal spouse with regard to community property and support rights.

In *Estate of Birch*, a decedent and his first wife obtained a Mexican divorce and subsequently remarried other persons. The court held that the first wife was estopped from asserting that the Mexican divorce was invalid and that she was the decedent's surviving spouse. The court of appeal stated that remarriage estopped the party entering into it from denying the validity of previous divorce. The court also ruled that the annulment of the wife's second marriage did not preclude estoppel because she remarried in reliance on the Mexican judgment. Also, the children of the decedent and the first wife, being in privity with her, were similarly estopped [*Estate of Birch (1983) 140 Cal. App. 3d 776, 780, 189 Cal. Rptr. 796]* .

In addition, the doctrine of equitable estoppel may be applied to prevent a spouse from challenging the validity of his or her second marriage on dissolution of that marriage, even if the other spouse is not a putative spouse because he or she lacks a good-faith belief in the validity of the second marriage. Thus, one court of appeal has held that a husband is

equitably estopped to deny that he was validly married to his wife on dissolution of that marriage when he went through a formal marriage ceremony with her knowing that her divorce from her first husband was not final, continued to live with her for 15 years, had two children with her, and waited 15 years to attempt to assert the invalidity of the marriage [*In re Marriage of Recknor (1982) 138 Cal. App. 3d 539, 544-547, 187 Cal. Rptr. 887]* . The court also held that the wife may properly receive monthly spousal support pendente lite and attorney's fees as in an ordinary dissolution proceeding [*In re Marriage of Recknor (1982) 138 Cal. App. 3d 539, 542, 187 Cal. Rptr. 887]* .

A putative spouse is not estopped, however, from questioning the validity of his or her marriage when the invalidity of the marriage is not related to the invalidity of a prior divorce of one of the parties [*see Anderson v. Anderson (1936) 7 Cal. 2d 265, 266, 60 P. 2d 290]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 25.62 Attorney's Fees and Costs

In nullity proceedings, a court may order the payment of attorney's fees and costs in favor of a putative spouse, under the circumstances described in *Fam. Code § 2255*. For discussion, see *§ 25.30* et seq.

Legal Topics:

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

§§ 25.63[Reserved]

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§ 25.80 Inheritance Rights

[1] When Decedent Spouse Dies Intestate

The Probate Code contains no express provision for the intestate succession to property when the spouses are not validly married [*see Prob. Code § 6400 et seq.*; *see also Prob. Code § 78* (definition of "surviving spouse")], unless the spouses were registered domestic partners as defined in *Probate Code section 37(b)* [*see Prob. Code §§ 6401(c), 6402*]. As a result, courts have used equitable principles to provide for the distribution of a decedent's estate when the surviving spouse had an erroneous but good faith belief in the validity of his or her marriage to the decedent [*see, e.g., Estate of Vargas (1974) 36 Cal. App. 3d 714, 718, 111 Cal. Rptr. 779]* . In the absence of a surviving legal spouse (*see § 25.80[3]*), the surviving putative spouse is treated like a legal spouse for the purpose of succession to what would have been community property had the couple been validly married [*Kunakoff v. Woods (1958) 166 Cal. App. 2d 59, 66-67, 332 P.2d 773* ; *see Fam. Code § 2251* (quasi-marital property defined)]. Thus, if one party to a putative marriage dies intestate, leaving only a surviving putative spouse, that spouse takes all the parties' quasi-marital property by analogy to the laws governing intestate succession to community property and quasi-community property [*Estate of Krone (1948) 83 Cal. App. 2d 766, 769-770, 189 P.2d 741* ; *see Prob. Code §§ 100, 101, 6401(a), (b)*]. For a discussion of a surviving putative spouse's inheritance rights when the decedent spouse's legal spouse is also alive, see Ch. 458, *Probate: Determination of Heirship* .

The putative spouse's inheritance rights are not limited to the quasi-marital property. Prior to 1984, cases held that a putative spouse had no intestate succession rights in property of the decedent that would have been classified as separate property had the parties been validly married [*see Estate of Levie (1975) 50 Cal. App. 3d 572, 123 Cal. Rptr. 445]* . This rule was disapproved by the California Supreme Court in *Estate of Leslie* [*Estate of Leslie (1984) 37 Cal. 3d 186, 207 Cal. Rptr. 561, 689 P.2d 133]* . In *Leslie,* the Court held that a surviving putative spouse is to be treated as a surviving legal spouse for purposes of intestate succession to the decedent's separate property. Thus, a putative spouse may succeed to an intestate share of the decedent spouse's separate property to the same extent as a legal spouse [*Estate of Leslie (1984) 37 Cal. 3d 186, 197, 207 Cal. Rptr. 561, 689 P.2d 133* ; *see Prob. Code § 6401(c)* (surviving spouse's intestate share of decedent's separate property)].

For discussion of intestate succession to community and separate property by surviving legal spouses, see Ch. 458, *Probate: Determination of Heirship* .

[2] When Decedent Spouse Dies Testate ("Omitted" Spouse)

A putative spouse may also have inheritance rights in the estate of a spouse who dies testate and omits the surviving putative spouse from his or her will. One court has held that the surviving putative spouse is a "surviving spouse" for purposes of the "omitted spouse" provisions of the Probate Code [*Estate of Sax (1989) 214 Cal. App. 3d 1300, 1304, 263 Cal. Rptr. 190* (decided under former *Prob. Code § 6560*; *now see Prob. Code §§ 21610-21612*, which have substantially similar provisions, but now include both probate estate and revocable trusts)]. Under *Prob. Code § 21610*, a surviving spouse who is omitted from a premarital will executed by the decedent is entitled to one-half of the community property and the quasi-community property belonging to the decedent, plus a share of the decedent's separate property equal in value to that which the spouse would have received if the decedent had died intestate not to exceed one-half of the value of the separate property in the estate. That section applies only when the omission was unintentional and the surviving spouse was not otherwise provided for [*Prob. Code § 21611*]. Thus, the putative spouse may claim the decedent's interest in quasi-marital property as an omitted spouse [*Estate of Sax (1989) 214 Cal. App. 3d 1300, 1308, 263 Cal. Rptr. 190]* . For a discussion relating to the partial revocation of a testator's premarital will by an omitted spouse generally, see Ch. 458, *Probate: Determination of Heirship* .

If the putative spouse is provided for in a valid will of the decedent, the terms of the will govern the putative spouse's rights of succession. For discussion of the requirements for a valid will and rules governing judicial interpretation of wills, see California Wills and Trusts, chs. 10 and 11 (Matthew Bender).

[3] When Common Spouse Dies Leaving Both Putative and Legal Spouse

[a] Equitable Principles Govern Division

The determination of inheritance rights is more complicated if a decedent dies leaving both a putative and legal spouse. Such a situation could arise, for example, if a legally married person secures a divorce that is invalid for some reason (such as lack of jurisdiction), marries a second person who reasonably believes that the divorce from the first spouse was valid, accumulates property during the putative marriage to the second spouse, and subsequently dies.

The Probate Code contains no express provisions for allocation of property between the previous legal spouse and the subsequent putative spouse in such a situation. The courts have therefore resorted to equitable principles to determine the succession rights of the legal and putative spouses [*see* *Estate of Hafner (1986) 184 Cal. App. 3d 1371, 1394, 229 Cal. Rptr. 676* ; *Estate of Vargas (1974) 36 Cal. App. 3d 714, 718, 111 Cal. Rptr. 779* ; *Estate of Ricci (1962) 201 Cal. App. 2d 146, 148-149, 19 Cal. Rptr. 739]* . As indicated by the discussion in *§ 25.80[3][b]*, the result in a given case appears to depend on the nature of the estate assets being claimed, on the reason for the invalidity of the putative marriage, and on whether the decedent died testate or intestate.

[b] Succession Rights to Property Acquired During Putative Marriage

Case law has consistently held that, as against a surviving legal spouse, the putative spouse is entitled to succeed to one-half of the property accumulated during the putative marriage (i.e., the quasi-marital property) and that this portion is not subject to other testamentary disposition by the decedent [*see* *Estate of Hafner (1986) 184 Cal. App. 3d 1371, 1384, 229 Cal. Rptr. 676* ; *Sousa v. Freitas (1970) 10 Cal. App. 3d 660, 665-666, 89 Cal. Rptr. 485]* . The respective rights of the surviving putative and legal spouses in the *decedent's* half of the quasi-marital property (or in the decedent's other separate property) are less straightforward and appear to depend on the circumstances of the particular case and equitable considerations.

In *Estate of Ricci*, the decedent married in Italy in 1907. His marriage to his first wife was never terminated and remained in effect until his death in 1956. Subsequent to his first marriage, however, he moved to California and married a second wife in 1919, who was unaware of the decedent's previous marriage and lived with decedent continuously until his death. Decedent died intestate, and his estate consisted entirely of assets accumulated as a result of the joint efforts of the decedent and his second, putative wife during the second marriage. The trial court awarded half of the decedent's estate to the legal spouse and half to the putative spouse. The court of appeal noted that each spouse, in the absence of the other, would be entitled to the entire estate under the laws of intestate succession [*Estate of Ricci (1962) 201 Cal. App. 2d 146, 151, 19 Cal. Rptr. 739]* . The court held that the decision to award half of the estate to each spouse was equitable and supported by the law and the evidence and therefore affirmed the award [*Estate of Ricci (1962) 201 Cal. App. 2d 146, 149-151, 19 Cal. Rptr. 739]* .

In *Sousa v. Freitas*, the decedent had attempted to dissolve his marriage to his first wife, but the divorce decree was invalid because of lack of valid service of summons. The decedent then married a second wife, who believed the marriage to be valid and who lived with the decedent until his death. At the time of his death, all the property in the decedent's estate was the result of the joint efforts of the decedent and his second, putative wife. In his will, the decedent left all his property to his second wife. When the first wife learned of decedent's death, she brought proceedings to impose a constructive trust on the estate assets, claiming that the assets were community property of the decedent and herself. The trial court found that all of the property was community property of the decedent and the first wife, but that the second, putative wife was entitled to a one-half interest in the property. The court of appeal modified these findings and affirmed the judgment as modified. The court held that the putative spouse was entitled to share equally in the property accumulated during the putative marriage and that the putative spouse's share was not community property of the decedent and the first wife [*Sousa v. Freitas (1970) 10 Cal. App. 3d 660, 665, 89 Cal. Rptr. 485]* . The other half was community property, but one half of this share (i.e., one quarter of the entire estate) was subject to testamentary disposition by the decedent. Because the decedent had validly disposed of his one-half of the community property by will to the putative spouse, the first (legal) wife was only entitled to claim the other half of the community share. In other words, the putative spouse was entitled to three quarters of the estate and the legal spouse was entitled to only one quarter of the estate [*Sousa v. Freitas (1970) 10 Cal. App. 3d 660, 665-666, 89 Cal. Rptr. 485]* .

The results in both *Ricci* and *Sousa* appear to be based in part on the former rule that a husband's (but not a wife's) earnings after separation and before a judgment of dissolution remained community property [*see* former *Civ. Code § 5118*, prior to amendment by Stats. 1971, ch. 1699]. Thus, the community estate of the first marriage could claim a community interest in property derived from the earnings of the bigamous husband during the subsequent, putative marriage. In contrast, current law provides that the earnings and accumulations of *either* spouse while living separate and apart from the other spouse are the separate property of the earning spouse [*Fam. Code § 771*; *see* discussion in Ch. 222, *Dissolution of Marriage: Property Division and Valuation*]. Thus, if the legal spouses are separated during the period of the putative marriage, as would typically occur, the earnings of the bigamous spouse are his or her separate property, and the legal spouse arguably could not assert the right to succeed to any of the quasi-marital property on the basis of the rule governing succession to community property [*see Prob. Code §§ 100, 6401(a)* (applicable when decedent dies on or after January 1, 1985)]. However, the legal spouse might still be entitled to succeed to a portion of the quasi-marital property under the rules governing intestate succession to separate property [*see Prob. Code § 6401(c)*], subject to the equitable principles as noted in discussion in *§ 25.80[3][a]*.

In *Estate of Vargas*, the decedent lived a double life for 24 years as husband and father to two separate families, neither of which knew of the other's existence until the after the decedent's intestate death in 1969. In probate proceedings, the court found the second of the two wives to be the decedent's putative spouse and divided the estate equally between the two wives. The court of appeal affirmed the judgment, noting that neither the statutes governing intestate succession nor the statutes governing disposition of marital property were designed to cope with the extraordinary circumstance of purposeful bigamy at the expense of two innocent spouses and that the court must therefore resort to equitable principles [*Estate of Vargas (1974) 36 Cal. App. 3d 714, 718, 111 Cal. Rptr. 779]* . The court concluded that an equal division of the estate was equitable, given that both wives had contributed to the estate in indeterminable amounts and

proportions [*Estate of Vargas (1974) 36 Cal. App. 3d 714, 719, 111 Cal. Rptr. 779]* . In contrast to both *Sousa* and *Freitas*, the result in *Vargas* would appear to be unaffected by the 1971 change in the law governing the earnings of spouses while living separate and apart, because the decedent in *Vargas* was not living separate and apart from the legal spouse during the course of the putative marriage, but instead lived with both spouses during that period. Thus, the legal spouse could claim a community interest in the decedent's earnings during the putative marriage, and the putative spouse could claim an interest in those same earnings as quasi-marital property.

In *Estate of Hafner*, the decedent married his first wife in New York, but subsequently left her and moved to California. The first wife had four children by this marriage. Although the first wife brought child support proceedings against the decedent, she never sought a divorce from him. After moving to California, decedent married a second wife and had no further contact with his first wife, although he remained legally married to her. Decedent assured the second wife that he had divorced his first wife, but that his divorce records had been destroyed in a fire. The second wife relied on the decedent's representations in good faith and had no reason to believe otherwise. She and decedent lived together continuously as husband and wife until the decedent died intestate. His entire estate consisted of the proceeds of a personal injury settlement that arose out of an automobile accident that occurred during the second, putative marriage. The trial court in *Hafner* concluded that the second, putative wife should succeed to the decedent's entire estate as his surviving spouse [*Estate of Hafner (1986) 184 Cal. App. 3d 1371, 1383, 229 Cal. Rptr. 676]* .

However, the court of appeal in *Hafner* reversed. It reasoned that in relation to the legal wife and the children, the estate was the decedent's separate property [*Estate of Hafner (1986) 184 Cal. App. 3d 1371, 1383, 229 Cal. Rptr. 676* ; *see* former *Civ. Code § 5126(a)(2)* (now codified in *Fam. Code § 781(a)(2)*)]. In relation to the putative wife, the decedent's estate was quasi-marital property, because it would have been community property if her marriage to the decedent had been valid [*Estate of Hafner (1986) 184 Cal. App. 3d 1371, 1383-1384, 229 Cal. Rptr. 676* ; *see* former *Civ. Code § 4452* (now codified in *Fam. Code § 2251(a)*); *see also Fam. Code § 780*]. The court noted that based solely on the governing statutes, an argument could be made that the entire estate was the decedent's separate property and therefore should pass entirely to the decedent's surviving legal spouse and her children under the laws of intestate succession [*see Prob. Code §§ 6401(c), 6402(a)*]. Alternatively, it could be argued that the estate, being quasi-marital property, should pass entirely to the putative spouse as if it were community property of the decedent and the putative spouse [*see Fam. Code § 2251(a)*; *Prob. Code §§ 100, 6401(a)*]. The court also concluded that the result under either interpretation would be grossly unfair and unconscionable, given that the statutes were not designed to provide for the unique circumstances of this case. Applying equitable principles, it held that one-half of the estate should be distributed to the putative spouse and that the other half of the estate should be distributed to the legal spouse and to the children of the first marriage [*Estate of Hafner (1986) 184 Cal. App. 3d 1371, 1380, 1393-1394, 229 Cal. Rptr. 676]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 25.81 No Right to Family Allowance

A putative spouse has been held not to be a "surviving spouse" for purposes of the Probate Code provisions allowing family allowances from a decedent's estate. Therefore, the court may not award a family allowance to a decedent's surviving putative spouse [*Estate of Hafner (1986) 184 Cal. App. 3d 1371, 1396-1398, 229 Cal. Rptr. 676* ; *see Prob. Code § 6540(a)*].

Legal Topics:

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

§§ 25.82[Reserved]

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§ 25.100 State Statutes

[1] Custody, Support, and Attorney's Fees

Determination of child custody in nullity proceeding. *Fam. Code § 2253*

Authority of court to award spousal support to putative spouse in nullity proceeding. *Fam. Code § 2254*

Authority of court to award attorney's fees and costs to putative spouse in nullity proceeding. *Fam. Code § 2255*

Availability of child support in general. *Fam. Code § 3500 et seq.*

[2] Jurisdiction

Superior court as having jurisdiction over proceedings to obtain judgment of nullity. *Fam. Code § 200*

General authority of court to determine specified issues in nullity proceeding. *Fam. Code § 2010*

[3] Parties

Persons who may bring action for nullity. *Fam. Code § 2211(a), (b)*

[4] Petition, Response, and Disclosure Requirements

Procedural requirements for responding to petition for judgment of nullity. *Fam. Code § 2020*

Disclosure declaration requirements for parties to nullity proceeding. *Fam. Code § 2100 et seq.*

Proceeding for judgment of nullity as commencing on filing petition. *Fam. Code § 2250*

[5] Property Division

Court's authority in nullity proceeding to divide "quasi-marital" property on finding one or both parties to be putative spouse. *Fam. Code § 2251*

[6] Statute of Limitations

Time limits for filing action for nullity. *Fam. Code § 2211(c)-(f)*

[7] Validity of Marriage

Ceremonial marriage as presumed valid. *Evid. Code § 663*

Incestuous, bigamous, or polygamous marriage as void from beginning. *Fam. Code §§ 2200, 2201*

Circumstances in which marriage is voidable. *Fam. Code § 2210*

[8] Venue

Proper venue in nullity proceeding. *Code Civ. Proc. § 395*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 25.101 California Rules of Court

Except as otherwise provided in Family Law Rules, rules of practice and procedure governing civil actions generally apply to proceedings under Family Code. *Cal. Rules of Ct., Rule 5.22*

Form of petition. Pleadings. *Cal. Rules of Ct., Rule 5.108*

Financial declaration requirements when attorney's fees are requested. *Cal. Rules of Ct., Rule 5.128(b)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportCosts & Attorney FeesFamily LawMarital Termination & Spousal SupportAnnulmentEffectsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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1. Procedure for Obtaining Judgment of Nullity

3-25 California Forms of Pleading and Practice--Annotated § 25.102

§ 25.102 Law Reviews

Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry? 18 Fam. L.Q. 257 (1984)*.

Comment, *Dissolution and Voidable Marriage Under the California Family Law Act, 4 Loy. L.A. L. Rev. 331 (1971)*.

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3-25 California Forms of Pleading and Practice--Annotated § 25.103

§ 25.103 Text References

Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed. chs. 10- 12 (Matthew Bender).

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3-25 California Forms of Pleading and Practice--Annotated §§ 25.104-25.119

[Reserved]

§§ 25.104[Reserved]

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1. Property Rights of Putative Spouse on Other Spouse's Death

3-25 California Forms of Pleading and Practice--Annotated § 25.120

§ 25.120 State Statutes

[1] Rights of Putative Spouses

Right of putative spouse to sue for wrongful death of other spouse. *Code Civ. Proc. § 377.60(b)*

Definition of putative spouse for purposes of and right to property division, and related matters, in nullity proceeding. *Fam. Code § 2251(a)*

Right of putative spouse to seek spousal support in nullity proceeding. *Fam. Code § 2254*

Right of putative spouse to seek attorney's fees and costs in nullity proceeding. *Fam. Code § 2254*

Right of putative spouse to recover workers' compensation benefits when other spouse dies. *Lab. Code §§ 3503, 4702*

[2] Validity of Marriage

General requirements. *Fam. Code § 300*

Marriages contracted outside *California. Fam. Code § 308*

Action to have validity of marriage determined. *Fam. Code § 308*

Marriage as terminated only by judgment of nullity, judgment of dissolution, or death of one of the parties. *Fam. Code § 310*

Void marriages. *Fam. Code §§ 2200, 2201*

Voidable marriages. *Fam. Code § 2210*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportCosts & Attorney FeesFamily LawMarital Termination & Spousal SupportAnnulmentEffectsProperty DivisionFamily LawMarital Termination & Spousal SupportAnnulmentProceduresFamily LawMarriageValidityVoid & Voidable MarriagesVoid MarriagesFamily LawMarriageValidityVoid & Voidable MarriagesVoidable Marriages

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3-25 California Forms of Pleading and Practice--Annotated § 25.121

§ 25.121 Law Reviews

Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services, 10 Fam.* L.Q. 101 (1976).

Kay & Amyx, *Marvin v. Marvin: Preserving the Options, 65 Cal. L. Rev. 937 (1977).*

Laughran & Laughran, *Property and Inheritance Rights of Putative Spouses in California: Selected Problems and Suggested Solutions, 11 Loy. L.A. L. Rev. 45 (1977).*

Williams, *Property Rights of Putative Spouses*, 4 Com. Prop. J. 131 (1977).

Comment, *Putative Spousal Support Rights and the Federal Bankruptcy Act, 25 U.C.L.A. L. Rev. 96 (1977).*

Comment, *The Property Rights of Meretricious Spouses: The Effect of the New "No Punishment" Policy Indicated by the Consenting Adults Bill, 16 Santa Clara Law. 783 (1976).*

Comment, *In re Marriage of Carey [sic]: The End of the Putative-Meretricious Spouse Distinction in California, 12 San Diego L. Rev. 436 (1975).*

Comment, *In re Cary: A Judicial Recognition of Illicit Cohabitation, 25 Hastings L.J. 1226 (1974).*

Luther & Luther, *Support and Property Rights of the Putative Spouse, 24 Hastings L.J. 311 (1973).*

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3-25 California Forms of Pleading and Practice--Annotated § 25.122

§ 25.122 Text References

Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, ch. 11 (Matthew Bender 2d ed.).

California Probate Practice, ch. 23 (Matthew Bender).

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3-25 California Forms of Pleading and Practice--Annotated §§ 25.123-25.139

[Reserved]

§§ 25.123[Reserved]

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3-25 California Forms of Pleading and Practice--Annotated § 25.140

§ 25.140 Petition for Judgment of Nullity [Fam. Code § 2250(a); Cal. Judicial Council Form FL-100]

[1] FORM Petition for Judgment of Nullity [Fam. Code § 2250(a); Cal. Judicial Council Form FL-100]

Click here to view image.

[2] Use of Form

This form is a filled-in reproduction of the mandatory Judicial Council form of Petition (Family Law) for use in seeking a judgment of nullity of marriage [Cal. Judicial Council Form FL-100; *see Fam. Code § 2250*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

For a form of judgment of nullity, *see § 25.142*.

[3] Contents of Petition

The nullity petition uses the same form that is used to initiate marital dissolution or legal separation proceedings, and the comments here focus only on matters pertinent to nullity proceedings. For a general, detailed discussion and instructions for completing the family law petition, see Ch. 221, *Dissolution of Marriage: Procedure* .

As illustrated here, the form assumes that the petitioner is one of the parties to the void or voidable marriage. However, in certain circumstances the proceeding may be brought by other persons [*see Fam. Code § 2211(a)(2), (b)(2), (c)* (discussed in the § 25.15)].

In the caption, the box for "Nullity of Marriage" should be checked. Item 1 (residence) should be left blank as it is only relevant to dissolution proceedings [*see Fam. Code § 2320*].

Counsel should pay particular attention to the date of separation in Item 2, as this may have a significant impact on the division of any property at issue in the proceeding. For further discussion on the division of property and other assets, see generally Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

In Item 6, boxes c and/or d should be checked to indicate that nullity of marriage is sought. The box pertaining to the relevant ground or grounds for nullity should also be checked.

The petitioner may also request alternative relief [*Cal. Rules of Ct., Rule 5.114*]. For example, he or she may request a dissolution of marriage in the alternative. For further discussion on this option, see Ch. 221, *Dissolution of Marriage: Procedure* .

Counsel should be sure to include his or her California State Bar membership number in the space provided in the caption for counsel's identifying information, to comply with *Cal. Rules of Ct., Rule 2.111*.

[4] Uniform Child Custody Jurisdiction and Enforcement Act Declaration

A declaration under the Uniform Child Custody Jurisdiction and Enforcement Act [*Fam. Code § 3400 et seq.*] must be filed with the petition if there are minor children of the marriage [*see Fam. Code § 3429*]. The petitioner should complete the separate Judicial Council form of Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act (Cal Judicial Council Form FL-105) and attach it to the petition.

See Ch. 221, *Dissolution of Marriage: Procedure* , for further discussion and a filled-in reproduction of the Judicial Council UCCJEA form.

[5] Service

A copy of the petition together with a copy of the summons is required to be served on the respondent in the same manner as service of papers in civil actions generally [*Fam. Code § 2250(b)*; *see* Cal. Judicial Council Forms FL-110, FL-115].

The summons contains certain temporary restraining orders, which are effective against both parties until a final judgment is entered or the petition is dismissed, or until further order of the court [*see Fam. Code §§ 231 et seq., 2040*; *see Cal. Rules of Ct., Rule 5.110*]. For a filled-in reproduction of the Judicial Council form of summons and further discussion, see Ch. 221, *Dissolution of Marriage: Procedure* .

[6] State Statutes

Nullity proceeding commenced by filing petition. *Fam. Code § 2250*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportAnnulmentProceduresCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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1. Procedure For Obtaining Judgment Of Nullity

3-25 California Forms of Pleading and Practice--Annotated § 25.141

§ 25.141 Response to Petition for Judgment of Nullity [Cal. Judicial Council Form FL-120]

[1] FORM Response to Petition for Judgment of Nullity [Cal. Judicial Council Form FL-120]

Click here to view image.

[2] Use of Form

This form is a filled-in reproduction of the mandatory Judicial Council form of Response (Family Law) for use in responding to a petition for nullity of marriage [Cal. Judicial Council Form FL-120]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

A copy of the response must be served on the petitioner and the original filed within 30 days of the date of the service on the respondent of a copy of the petition and summons [*see Fam. Code § 2020*; *see also Code Civ. Proc. § 1054*; *Cal. Rules of Ct., Rules 5.10(e), 5.15*].

[3] Contents of Response

The form illustrated is the same general form that is used in dissolution proceedings, but it has been completed to illustrate a response to a nullity petition. For a detailed general discussion and instructions for completing the response form, see Ch. 221, *Dissolution of Marriage: Procedure* . The comments below focus on matters pertinent to nullity proceedings.

The box for "Nullity of Marriage" in the caption should be checked, unless counsel is requesting alternative relief, such as dissolution, in which case the box "and REQUEST FOR" should be checked, and the box for the appropriate alternative relief should be checked. Item 1 (residence) should be checked if respondent is seeking dissolution as alternative relief [*see Fam. Code § 2320*]; otherwise, it should be left blank.

The respondent may wish to deny the grounds set forth in Item 6 of the petition, in which case he or she should check Item 7 of the response. The respondent should then be prepared to present evidence to the court in support of his or her denial of the grounds set forth by petitioner.

The respondent may leave blank Item 8, check the same box as is in the petition, or check a box praying for relief on another grounds, or alternative relief (such as dissolution) [*see Cal. Rules of Ct., Rule 5.114*].

Counsel should be sure to include his or her California State Bar membership number in the space provided in the caption for counsel's identifying information, to comply with *California Rules of Court, Rule 2.111*.

[4] Uniform Child Custody Jurisdiction and Enforcement Act Declaration

The respondent must file a declaration under the UCCJEA if there are minor children of the marriage [*see Fam. Code § 3409*]. This may be accomplished by filing a separate Judicial Council form of declaration (Cal. Judicial Council Form FL-105). For further discussion and an illustrative filled-in copy of the applicable form, see Ch. 221, *Dissolution of Marriage: Procedure* .

[5] State Statutes

Service and filing of response within 30 days after service of petition. *Fam. Code § 2020*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportAnnulmentProceduresCivil ProcedurePleading & PracticePleadingsAnswers

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1. Procedure For Obtaining Judgment Of Nullity

3-25 California Forms of Pleading and Practice--Annotated § 25.142

§ 25.142 Judgment of Nullity [Cal. Judicial Council Form FL-180]

[1] FORM Judgment of Nullity [Cal. Judicial Council Form FL-180]

Click here to view image.

[2] Use of Form

This form is a filled-in reproduction of the mandatory Judicial Council form of Judgment (Family Law), for use in a proceeding for nullity of marriage [Cal. Judicial Council Form FL-180]. An attachment to the judgment is also illustrated. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents of Form

This form, which is also used for judgments in marital dissolution and legal separation proceedings, has been completed to illustrate its use in nullity proceedings [*see Fam. Code §§ 2212, 2250 et seq.*]. For a general discussion of and detailed instructions for completing the family law judgment form, see Ch. 221, *Dissolution of Marriage: Procedure* .

In completing the Judgment form, note that certain forms governing specific topics must be attached. If the judgment contains original or modified personal conduct restraining orders, counsel should check the appropriate box in Paragraph 1, as well as listing their expiration date [*see generally Fam. Code § 6200 et seq.*]. In Paragraph 1 of the judgment, counsel also must specify which page or pages of the attachment contain the personal conduct restraining orders. If support provisions are contained in the judgment, additional forms must be attached, to the extent they otherwise apply to the orders made. For child support, these include the Judicial Council forms of Child Support Information and Order Attachment, and Stipulations to Establish or Modify Child Support and Order [Cal. Judicial Council Forms FL-342, FL-350]. For spousal support, the Judicial Council form of Spousal or Family Support Order Attachment must be attached [Cal. Judicial Council Form FL-343]. In addition, when the judgment contains provisions

for child or family support, the Judicial Council forms of Notice of Rights and Responsibilities and of Information Sheet on Changing a Child Support Order must be attached to the judgment [Cal. Judicial Council Form FL-192], and, within 10 days of the issuance of the judgment, both parties must complete and file with the court a Child Support Case Registry Form [Cal. Judicial Council Form FL-191]. When provisions for child custody or visitation are contained in the judgment, they must be set forth in the Judicial Council form of Child Custody and Visitation Order Attachment [Cal. Judicial Council Form FL-341].

Property orders should be reflected in item 4n. The appropriate box should be checked if the optional Judicial Council form of Property Order Attachment to Judgment is utilized [*see* Cal. Judicial Council Form FL-345].

Item 4p provides a space for counsel to list "Other" types of orders. This box might be used to set out orders for attorney's fees, for example, when these are not otherwise embodied in a settlement agreement or stipulation attached to the judgment. When the space adjacent to item 4p is not sufficient to describe the order, counsel should include an attached page, marked to indicate that it is "Attachment 4p" to the judgment.

[4] Notice of Entry of Judgment

Every person who submits a judgment for signature by the court must also submit a Notice of Entry of Judgment, along with sufficient preaddressed, postage-paid mailing envelopes, [*see Cal. Rules of Ct., Rule 5.136(a)*; *see also* Cal. Judicial Council Form FL-190]. The Form FL-190 must be filled-in except for the designation of the date, book, and page where entered, the date of mailing, and signatures [*Cal. Rule of Ct., Rules 5.136(b)*; *see* Cal. Judicial Council Form FL-190]. Failure to comply with the requirements will be cause for refusal to sign the judgment [*Cal. Rule of Ct., Rules 5.136(d)*].

For further discussion and a filled-in reproduction of the notice of entry of judgment, see Ch. 221, *Dissolution of Marriage: Procedure* .

[5] State Statutes

Effect of judgment of nullity of marriage. *Fam. Code § 2212*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewFamily LawMarital Termination & Spousal SupportAnnulmentProcedures

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Chapter 26 ANSWERS

3-26 California Forms of Pleading and Practice--Annotated 26.syn

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§ 26.10 Governing Law

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§ 26.11 Kinds of Pleadings in Civil Actions and Terminology

§ 26.12 "Answer"

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§ 26.13 Time to Answer

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[a] Effect of Admission

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[6] Denial by Affirmative Allegations

[7] Affirmative Defenses

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[d] Waiver by Failure to Plead

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[b] Waiver of Objections and Exceptions

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[b] When Allowed

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[b] Not Presented Primarily for Improper Purpose

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§ 26.19A Case Cover Sheet; Joining or Contesting Complex Case Designation

§ 26.20 Cross Defendant's Special Answer

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§ 26.30 Other Matthew Bender Publications

§ 26.31 State Statutes

[1] Allegations

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[11] Issues

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§ 26.34 Decisions

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[a] Defined

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§§ 26.37-26.49 [Reserved]

§ 26.50 Prepare Responses and Draft Answer

§ 26.51 Review, Subscribe, File, and Serve Answer

§§ 26.52-26.59 [Reserved]

§ 26.60 Format and Content of Answer in California State Court [Code Civ. Proc. § 431.30; Cal. Rules of Ct., Rule 2.100 et seq.]

[1] FORM

[2] Use of Form

[3] Signature

§ 26.61 Format of Answer--Identification of Attorneys [Code Civ. Proc. § 431.30; Cal. Rules of Ct., Rule 2.111(1)]

[1] FORM

[2] Use of Form

§ 26.62 Format of Answer--Typical Designations of Nature of Paper [Cal. Rules of Ct., Rule 2.111(6)]

[1] FORM

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§ 26.63 Introduction to Answer of Sole Defendant

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§ 26.64 Introduction to Answer of Two or More Defendants

[1] FORM

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[1] FORM

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§ 26.66 Introduction to Answer of Defendant Sued Under Wrong Name

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§ 26.67 Introduction to Answer of Defendant Sued Under Fictitious Name

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§ 26.68 Introduction to Answer of Corporate Defendant

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§ 26.70 Introduction to Answer of Incompetent Defendant

[1] FORM

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§ 26.71 Introduction to Answer of Executor, Administrator, or Other Personal Representative Defendant

[1] FORM

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[3] Cross References

§ 26.72 Introduction to Answer of Assignee

[1] FORM

[2] Use of Form

[3] Cross References

§ 26.73 Introduction to Answer of Husband and Wife

[1] FORM

[2] Use of Form

[3] Cross References

§ 26.74 Introduction to Answer to Supplemental Complaint

[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

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§ 26.77 Body of Answer: Controverting Matter and Defenses [Code Civ. Proc. § 431.30(b)(1)]

[1] FORM

[2] Use of Form

§ 26.78 Body of Answer: Responses to More Than One Cause of Action--General Examples [Code Civ. Proc. § 431.30(b)]

[1] FORM

[2] Use of Form

§ 26.79 Body of Answer: Responses to More Than One Cause of Action--Alternative Forms [Code Civ. Proc. § 431.30(b)]

[1] FORM

[2] Use of Form

§ 26.80 Body of Answer: Controverting Matter--Incorporation by Reference of Paragraphs Previously Alleged

[1] FORM

[2] Use of Form

§§ 26.81-26.89 [Reserved]

§ 26.90 General Denial [Code Civ. Proc. §§ 431.30(b)(1), (d), 431.40(a), (c)] With Proof of Service--Judicial Council Form PLD-050

[1] FORM

[2] Source of Form

[3] Use of Form

[4] Alleging Affirmative Defenses

§ 26.91 Body of Answer: Specific Denial of Plaintiff's Corporate Status

[1] FORM

[2] Use of Form

§ 26.92 Body of Answer: Specific Denial of Plaintiff's Status as Executor, Administrator, or Other Personal Representative

[1] FORM

[2] Use of Form

§ 26.93 Body of Answer: Specific Denial by Reference to Specific Paragraph

[1] FORM

[2] Use of Form

§ 26.94 Body of Answer: Specific Denial by Reference to Specific Paragraphs--Alternative Form

[1] FORM

[2] Use of Form

§ 26.95 Body of Answer: Specific Denial by Reference to Specific Paragraphs--On Information and Belief

[1] FORM

[2] Use of Form

[3] When Denial on Information and Belief (or Lack Thereof) Is Proper

[4] Improper Form of Denial

[5] Cross References

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[2] Use of Form

[3] Improper Form of Denial

[4] Defendant Must Lack Presumptive Knowledge of Allegations Denied for Lack of Information or Belief

[5] Cross References

§ 26.97 Body of Answer: General Denial by Reference to Cause of Action

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[2] Use of Form

§ 26.98 Body of Answer: Combined Denial by Reference to Cause of Action and Specific Denial

[1] FORM

[2] Use of Form

[3] Negative Pregnant

§ 26.99 Body of Answer: Denial by Express Admission of Certain Allegations of Complaint and General Denial of All Other Allegations

[1] FORM

[2] Use of Form

§ 26.100 Body of Answer: Denial by Express Admission of Certain Allegations of Paragraph of Complaint With General Denial of All Other Allegations of Paragraph

[1] FORM

[2] Use of Form

§ 26.101 Body of Answer: Controverting Allegations Combined With Denial by Reference to Specific Paragraph

[1] FORM

[2] Use of Form

§§ 26.102-26.109 [Reserved]

§ 26.110 Body of Answer: Alternative Headings of Defenses and Introductions

[1] FORM

[2] Use of Form

§ 26.111 Body of Answer: Defenses to Several Causes of Action or Counts

[1] FORM

[2] Use of Form

§ 26.112 Body of Answer: Incorporation by Reference of Defenses Previously Stated

[1] FORM

[2] Use of Form

§ 26.113 Body of Answer: Defense That Plaintiff Failed in Prior Action to Allege Related Cause of Action [Code Civ. Proc. § 426.10(c)] in Compulsory Cross Complaint [Code Civ. Proc. § 426.30]

[1] FORM

[2] Use of Form

[3] "Related Cause of Action" Defined

§ 26.114 Body of Answer: Defense of Payment; Defendant's Right to Set Off Coexisting Cross Demand [Code Civ. Proc. § 431.70]

[1] FORM

[2] Use of Form

[3] Pleading Cross Demand

[4] Mutuality Required

[5] Relief Available

§§ 26.115-26.119 [Reserved]

§ 26.120 Prayers

[1] FORM

[2] Use of Form

§ 26.121 Verification [Code Civ. Proc. §§ 446, 2015.5] by Attorney When Defendant is Absent From County

[1] FORM

[2] Use of Form

[3] Cross Reference

§§ 26.122-26.129 [Reserved]

§ 26.130 Stipulation That Answer on File May Be Deemed to Be Answer of Another Defendant

[1] FORM

[2] Use of Form

[3] Cross Reference

§ 26.131 Stipulation Allowing Answer on File to Be Answer of Answer to Amended Complaint

[1] FORM

[2] Use of Form

[3] Cross References

§ 26.132 Stipulation Extending Time in Which Defendant May Plead or Make Motion and Order Thereon

[1] FORM

[2] Use of Form

[3] Cross References

§ 26.133 Order Extending Time for Answer or Demurrer

[1] FORM

[2] Use of Form

§§ 26.134-26.149 [Reserved]

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§ 26.01 Scope of Chapter

This chapter discusses answers to complaints and cross complaints, and includes the following forms:

- Illustrations of the form and content of answers [*see §§ 26.60 -26.80*].
- Denials and other controverting allegations [*see §§ 26.90 -26.101*].
- Illustrations of the form and content of defenses [*see §§ 26.110 -26.112*].
- Affirmative defenses [*see §§ 26.113, 26.114*].
- Prayers to an answer [*see § 26.120*].
- Verification of an answer [*see § 26.121*].
- Stipulations, and orders made on stipulation, relating to answers [*see §§ 26.130 -26.133*].

A Procedural Checklist covering the essential parts of an answer [*see § 26.50*] and a Research Guide [*see § 26.30*] are also included.

Concluding this chapter is Part VI. Table of Affirmative Defense Forms [*see § 26.150* et seq.], which is a quick reference for finding forms of affirmative defenses throughout California Forms of Pleading and Practice. Where appropriate, the table includes cross references to primary authority related to the affirmative defense.

For additional forms of answers and affirmative defenses in the various chapters in this publication, see the Index.

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§ 26.02 Cross References

- For a procedural guide for procedures an attorney should follow in a civil action, including an outline of responses to complaints, see Ch. 2, *Procedural Guide for Civil Actions* .

- For sample allegations of denials according to information and belief and on lack of information and belief, see Ch. 20, *Allegations Commonly Used* .

- For forms for use in filing amended and supplemental answers, see Ch. 21, *Amended and Supplemental Pleadings* .

- For forms of captions and introductions in answers, see Ch. 108, *Captions and Introductions* .

- For forms and procedure for filing a demurrer, a motion to strike, or a motion for judgment on the pleadings, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* and Ch. 375, *Motions to Strike: Pleadings* , and Ch. 376, *Motions to Strike: Anti-SLAPP* .

- For discussion of means of appearing in an action, including by answer to a complaint or cross complaint, see Ch. 323, *Jurisdiction: Personal* .

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[Reserved]

§§ 26.03[Reserved]

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§ 26.10 Governing Law

[1] In General

The pleadings allowed in civil actions, including answers, are set forth in *Code Civ. Proc. §§ 91(a)* and *422.10*. The form and content of answers are governed by *Code Civ. Proc. §§ 92(b)* and *431.10-431.70*. The filing by a cross defendant (third-party defendant), against whom a cross complaint for indemnity has been filed, of a special answer to the pleading asserting defenses to the cause of action against the cross complainant (third-party plaintiff) is authorized by *Code Civ. Proc. § 428.70(b)*. Objections to a complaint or cross complaint that may be made by answer or demurrer are covered in *Code Civ. Proc. §§ 430.30-430.80*.

Signatures on pleadings, and the certification of pleadings by presenting them to the court are governed by *Code Civ. Proc. § 128.7*, which is patterned on *Fed. R. Civ. P. 11* [*see Code Civ. Proc. § 128.7(i)* (application of § 128.7, sanctions for frivolous tactics in actions commenced on or after January 1, 1995); for discussion, *see* Ch. 510, *Sanctions* ; *see also Code Civ. Proc. § 128.5* (sanctions applicable to actions filed before 1995)].

The time in which an answer or other responsive pleading must be filed is governed by the following:

- Response to a summons: *Code Civ. Proc. § 412.20(a)(3)*.
- Demurrer to a complaint or cross complaint: *Code Civ. Proc. § 430.40(a)*.
- Response to a cross complaint: *Code Civ. Proc. § 432.10*.
- Response to a summons and answer to a complaint in proceeding for forcible entry, forcible detainer, or unlawful detainer: *Code Civ. Proc. §§ 1167, 1167.3*, and *1170*.
- The time to plead to a complaint or remaining causes of action when a demurrer to fewer than all the causes of action alleged is overruled or sustained: *Cal. Rules of Ct., Rule 3.1320(j)*.

- The time to answer an amended pleading: *Code Civ. Proc. §§ 471.5* and *472b*.

- The time to answer when a demurrer to the complaint or cross complaint is overruled: *Code Civ. Proc. § 472* and *Cal. Rules of Ct., Rule 3.1320(g)*.

- Extensions of time to plead: *Code Civ. Proc. §§ 473(a), 1054, 1054.1*, and *1167.5*.

Motions to strike pleadings in whole or in part are governed by *Code Civ. Proc. §§ 435-437*, and extensions of time within which to answer when a motion to strike a complaint or cross complaint in whole or in part has been filed without demurring are governed by *Code Civ. Proc. §§ 435(c)* and *472a(d)*.

[2] Trial Court Delay Reduction Act

Trial court delay reduction rules implementing the Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*) often affect answers. Under *Gov. Code § 68616(b)*, local rules may not require responsive pleadings to be filed less than 30 days after service of the complaint. Section 68616 expressly authorizes the parties to stipulate to an additional 15 days to respond. Beyond that, local rule may authorize exceptions for longer periods of time [*Gov. Code § 68616(b)*]. Local rules commonly track this provision, and may go on to set the times for responding to an amended complaint [*see* Los Angeles Super. Ct. Rules, Rule 7.7(a)(3)]. Local rule may also address exceptions allowing longer times to respond [*see* Los Angeles Super. Ct. Rules, Rule 7.7(b) (extension by court on showing of good cause)].

Within 30 days of service of the responsive pleadings, the parties may, by stipulation filed with the court, agree to a single continuance not to exceed 30 days [*Gov. Code § 68616(d)*].

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§ 26.11 Kinds of Pleadings in Civil Actions and Terminology

The pleadings allowed in a civil action are the complaint, demurrer, answer, and cross complaint [*Code Civ. Proc. § 422.10*; *see also Code Civ. Proc. §§ 91, 92(a)* (pleadings in most limited civil cases)]. A civil action is commenced by the filing of a complaint with the court [*Code Civ. Proc. § 411.10*]. Likewise, a cross action is commenced by the filing of a cross complaint [*see, e.g., Code Civ. Proc. § 432.10*]. The complaint and cross complaint state the facts constituting a cause of action [*see Code Civ. Proc. § 425.10*] and may, therefore, be referred to as "charging" pleadings. The demurrer and answer "respond to" the charging pleading and are generally referred to as "responsive" pleadings.

The two types of judicial remedies are "actions" and "special proceedings" [*see Code Civ. Proc. §§ 20, 21*]. The term "action" is defined in *Code Civ. Proc. § 22*, while the term "civil action" is defined in *Code Civ. Proc. §§ 25* and *30*. Part Two of the Code of Civil Procedure, which embraces *Code Civ. Proc. §§ 307-1062.10*, is entitled "Civil Actions" and sets forth the procedural rules applicable to them.

The term "special proceeding" is defined as every remedy other than an action [*Code Civ. Proc. § 23*]. Part Three of the Code of Civil Procedure, which embraces *Code Civ. Proc. §§ 1063-1822.59*, is entitled "Special Proceedings" and sets forth the procedural rules applicable to them.

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§ 26.12 "Answer"

[1] Defined

An answer is a pleading [*Code Civ. Proc. § 422.10*] filed by a defendant or cross defendant in a civil action in response to a complaint or cross complaint [*see Code Civ. Proc. § 431.30(a),(b)*]. It is also a pleading filed by a defendant, respondent, or real party in interest in a special proceeding when authorized by statute [*see, e.g., Code Civ. Proc. §§ 1069.1* (certiorari proceedings), 1089 (mandate proceedings), 1105 (prohibition proceedings), 1167.3 and 1170 (proceeding for forcible entry, forcible detainer, or unlawful detainer), 1250.230 (eminent domain proceeding)].

[2] Function

Pleadings consist of the formal allegations of the parties of their respective claims and defenses for the judgment of the court. The function of the pleadings is to outline the issues so that the parties may know what is involved in the litigation [*Fibreboard Paper Products Corp. v. East Bay Union of Machinists (1964) 227 Cal. App. 2d 675, 708, 39 Cal. Rptr. 64]* . The issues in the case are initially raised by the material allegations of the complaint or cross complaint. However, issues in a case do not arise or exist so as to require trial on the mere filing of a complaint. Rather, trial is required only on issues that are joined through appropriate denials and affirmative defenses, which are deemed denied, made or set forth in the answer [*see Code Civ. Proc. § 431.20(b)*; *Carlton v. Superior Court of Los Angeles County (1968) 261 Cal. App. 2d 282, 289, 67 Cal. Rptr. 568]* .

Hence, the function of the answer generally is to apprise the other party to the litigation and the court of the defendant's or cross defendant's position with respect to the allegations in the complaint or cross complaint; that is, it raises issues of fact. Issues of fact arise in the following ways [*Code Civ. Proc. § 590*; *see also § 26.15, below*)]:

- On a material allegation in the complaint controverted by the answer.
- On new matters in the answer, except an issue of law is joined thereon.

Thus, the function of the charging pleading and the answer taken together is to identify the fact issues to be tried. Or, put another way, one of the functions of the pleadings is to limit the issues and to narrow the proofs. If facts alleged in

the complaint are not controverted by the answer, they are not in issue [*Fuentes v. Tucker (1947) 31 Cal. 2d 1, 4, 187 P.2d 752* ; *see also* discussion at *§ 26.17*[5], *below*].

[3] Appearance in Action

A defendant appears in an action when he or she answers [*Code Civ. Proc. § 1014*]. For discussion of other acts constituting a general appearance under *Code Civ. Proc. § 1014*, see Ch. 323, *Jurisdiction: Personal* . After appearance, a defendant or his or her attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. When a defendant has not appeared, service of notice or papers need not be made on him or her [*Code Civ. Proc. § 1014*].

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§ 26.13 Time to Answer

[1] Charging Pleading

A responsive pleading, which term includes an answer, to a complaint in a civil action must be served and filed within 30 days after the summons was served on the party responding [*see Code Civ. Proc. § 412.20(a)(3)* (setting forth required contents of the summons)]. For discussion of service of the summons and forms of summonses, see Ch. 518, *Service of Summons and Papers* .

The time in which a responsive pleading must be filed in a special proceeding is normally governed by the statutes governing the special proceeding [*see, e.g., Code Civ. Proc. §§ 1167, 1167.3, 1170* (five days in forcible entry, forcible detainer, or unlawful detainer proceeding), discussed in Ch. 333, *Landlord and Tenant: Eviction Actions*].

A party served with a cross complaint in a civil action may, within 30 days after service, move, demur, or otherwise plead to the cross complaint in the same manner as to an original complaint [*Code Civ. Proc. § 432.10*].

[2] Amended Pleading

An answer to an amended pleading in a civil action must be served and filed within 30 days after the amendments or complaint as amended is served, or such other time as the court may direct [*Code Civ. Proc. §§ 471.5*]. The time to answer an amended complaint in forcible entry, forcible detainer, or unlawful detainer proceeding, is set forth in *Code Civ. Proc. § 1167.3* (discussed in Ch. 333, *Landlord and Tenant: Eviction Actions*).

When a complaint is amended "of course," the time within which the defendant must respond is computed from the date of notice of the amendment [*Code Civ. Proc. § 472*]., procedure, and forms of amended pleadings, see Ch. 21, *Amended Supplemental Pleadings* .

[3] After Ruling on Demurrer

When a demurrer to an answer is sustained or a demurrer to a complaint is overruled, and time to amend or answer is given, the time given runs from the service of notice of the decision or order, unless the notice is waived in open court

and the waiver entered in the minutes [*Code Civ. Proc. § 472b*]. Following a ruling on a demurrer, unless otherwise ordered, leave to answer or amend within 10 days is deemed granted, except for proceedings in forcible entry, forcible detainer, or unlawful detainer in which case five calendar days are deemed granted [*Cal. Rules of Ct., Rule 3.1320(g); see also Code Civ. Proc. § 1167.3* (forcible entry, etc.)].

For further discussion, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* ; and Ch. 333, *Landlord and Tenant: Eviction Actions* .

[4] After Demurrer to Fewer Than All Causes of Action

When a demurrer has been made to fewer than all the causes of action alleged in a complaint, unless otherwise ordered by the court, the defendant has 10 days to move to strike, demur, or otherwise plead to the complaint or to the remaining causes of action after any of the following [*Cal. Rules of Ct., Rule 3.1320(j)*]:

- The overruling of the demurrer.
- The amendment of the complaint or the expiration of the time to amend if the demurrer was sustained with leave to amend.
- The sustaining of the demurrer if the demurrer was sustained without leave to amend.

[5] Extensions of Time

Extensions of time within which to plead are authorized by the following provisions:

- *Code Civ. Proc. §§ 473(a)* empowers a court to enlarge the time to answer or demur in furtherance of justice and on such terms as may be proper, or to allow an answer to be made after the time limited on such terms as may be just.
- *Code Civ. Proc. § 1054* allows an extension for good cause shown.
- *Code Civ. Proc. § 1054.1* allows extensions in specified circumstances when an attorney of record of the party applying for the extension is a member of the California Legislature.

For stipulations and orders extending the time to plead, see *§§ 26.132, 26.133*.

and forms for use in securing an extension of time to plead, see Ch. 524, *Shortening and Extension of Time* .

Limitations on or special procedures for obtaining extensions of time to plead may apply in counties that have trial court delay reduction programs. of local rules of participating counties, see Ch. 552, *Trial Court Delay Reduction* .

[6] Failure to Answer Within Time Allowed

An entry of a default and default judgment may be made following a defendant's failure to answer or otherwise file a responsive pleading or specified notice of motion or petition within the period specified in the summons or otherwise allowed by law [*see Code Civ. Proc. §§ 85, 586*]. and forms relating to the entry and relief from the entry of defaults and default judgments, see Ch. 489, *Relief From Judgments and Orders* .

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§ 26.14 Concurrent Answer and Demurrer

A party objecting to a complaint or cross complaint may demur and answer at the same time [*Code Civ. Proc. § 430.30(c)*; *see also Code Civ. Proc. § 472a*].

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§ 26.15 "Material Allegation" Defined

A "material allegation" in a pleading is one essential to the claim or defense and which could not be stricken from the pleading without leaving it insufficient as to that claim or defense [*Code Civ. Proc. § 431.10(a)*].

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§ 26.16 "Immaterial Allegation" Defined

An "immaterial allegation" in a pleading is any of the following [*Code Civ. Proc. § 431.10(b)*]:

- An allegation that is not essential to the statement of a claim or defense.
- An allegation that is neither pertinent to nor supported by an otherwise sufficient claim or defense.
- A demand for judgment requesting relief not supported by the allegations of the complaint or cross complaint.

An "immaterial allegation" means "irrelevant matter," as that term is used in *Code Civ. Proc. § 436* (relating to motions to strike) [*Code Civ. Proc. § 431.10(c)*].

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§ 26.17 Contents of Answer

[1] Items That May Be Included in Answers

[a] In General

An answer to a complaint or cross complaint is required to contain [*Code Civ. Proc. § 431.30(b)*; *see Code Civ. Proc. § 431.30(a)(1)* (term "complaint" includes cross complaint)]:

- A general or specific denial of the material allegations of the complaint or cross complaint controverted (that is, disputed) by the defendant or cross defendant, and
- A statement of any new matter constituting a defense.

An answer may also admit the truth of material allegations, thereby establishing them as fact and removing them from the issues to be tried [*see Code Civ. Proc. § 431.20(a)* and discussion at [5], *below*].

Affirmative relief may not, however, be claimed in the answer [*Code Civ. Proc. § 431.30(c)*]. Such relief must be claimed in a cross complaint [*see Code Civ. Proc. §§ 425.10, 426, 30, 428.10, 428.80,* and Ch. 123, *Complaints and Cross Complaints*].

[b] Controverted Matter

The defendant or cross defendant may deny or otherwise controvert material allegations in the complaint or cross complaint, in which case the issues on those allegations are joined [*see Code Civ. Proc. §§ 588, 590(1)*; *see also Jetty v. Craco (1954) 123 Cal. App. 2d 876, 880, 267 P.2d 1055]* . Because denials may take various forms, perhaps the more comprehensive term "controverting matter" better describes the first set of items that the answer must contain than does "general or specific denial." Controverting matter may then be said to include not only express denials, but denials by implication resulting from, for example, a direct allegation of a fact contrary to the one alleged in the complaint or cross complaint.

Controverting matter, then, informs the plaintiff and other parties, and the court, of defendant's position with respect to the material allegations of the complaint or cross complaint that are disputed and identifies the material fact issues to be tried.

[c] New Matter

Under *Code Civ. Proc. § 431.30(b)(2)*, the answer may also allege new matter constituting a defense not otherwise disclosed by the pleadings [*see Code Civ. Proc. § 431.30(b)(2)*; *State Farm Mut. Auto. Ins. Co. v. Superior Court (1991) 228 Cal. App. 3d 721, 725, 279 Cal. Rptr. 116* ; *Jetty v. Craco(1954) 123 Cal. App. 2d 876, 880, 267 P.2d 1055]* . This new matter is referred to as an affirmative defense or, if more than one, affirmative defenses [*see, e.g., Erler v. Five Points Motors, Inc. (1967) 249 Cal. App. 2d 560, 562, 57 Cal. Rptr. 516]* . Affirmative defenses are discussed at [7], *below*.

"New matter" is something relied on by the defendant that is not put in issue by the plaintiff; thus, matters not responsive to essential allegations of complaint are new matter that must be raised in the answer. Facts set forth in an answer showing the untruth of some essential allegation of complaint do not constitute new matter [*State Farm Mut. Auto. Ins. Co. v. Superior Court (1991) 228 Cal. App. 3d 721, 725, 279 Cal. Rptr. 116]* .

[d] Privacy Protections: Redacting Social Security Numbers and Financial Account Numbers and Use of Confidential Reference List

Parties or their attorneys must not include, or must redact, certain identifiers from documents or records filed with the court do not apply to documents or records that by court order or operation of law are filed in their entirety either confidentially or under seal [*Cal. Rules of Ct., Rule 1.20(b)(1)*]. To protect personal privacy and other legitimate interests, parties and their attorneys must not include, or must redact where inclusion is necessary, the following identifiers from all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)(2)*]:

- Social security numbers. If an individual's social security number is required in a pleading or other paper filed in the public file, only the last four digits of that number may be used.

- Financial account numbers. If financial account numbers are required in a pleading or other paper filed in the public file, only the last four digits of these numbers may be used.

The responsibility for excluding or redacting identifiers identified above from all documents filed with the court rests solely with the parties and their attorneys. The court clerk will not review each pleading or other paper for compliance with this provision [*Cal. Rules of Ct., Rule 1.20(b)(3)*].

If the court orders on a showing of good cause, a party filing a document containing identifiers listed above may file a reference list, along with the redacted document that will be placed in the public file, a reference list. The reference list is confidential. For that purpose, a party filing a confidential reference list must use Judicial Council Form MC-120, Confidential Reference List of Identifiers. The confidential list must identify each item of redacted information and specify an appropriate reference that uniquely corresponds to each item of redacted information listed. All references in the case to the redacted identifiers included in the confidential reference list will be understood to refer to the corresponding complete identifier. A party may amend its reference list as of right [*Cal. Rules of Ct., Rule 1.20(b)(4)*].

For a form of Judicial Council Form MC-120, Confidential Reference List of Identifiers, see *Ch. 123, Complaints and Cross-Complaints, § 123.69*.

[2] Form and Effect of General Denials

General denials [*see Code Civ. Proc. § 431.30(b)(1)*], which are one class of controverting matter, usually in a single sentence, deny each and every allegation of the complaint. A general denial, however, only puts in issue the material allegations of the complaint [*see Code Civ. Proc. § 431.30(d)*; *see FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 383, 282 Cal. Rptr. 508]* . Moreover, a general denial only puts in issue the allegations of a complaint if:

- The general denial is in answer to an unverified complaint or to a complaint, whether verified or not, subject to *Code Civ. Proc. §§ 90-100* (discussed at *§ 26.19*[3]) [*see Code Civ. Proc. § 431.30(d)*]; or

- The action is one in which the demand, exclusive of interest, or the value of the property in controversy, does not exceed $1,000 and in which, in lieu of a demurrer or other answer, the defendant files a general written denial on the Judicial Council prescribed form [*Code Civ. Proc. § 431.40(a), (c)*; *see* § 26. 90].

[3] Form of Specific Denials

Specific denials [*see Code Civ. Proc. § 431.30(b)(1)*], in theory, single out the specific allegations of the complaint to be controverted, and positively [*see §§ 26.91 -26.94*], or according to information and belief [*see § 26.95*], deny each such allegation in its turn [*see Code Civ. Proc. § 431.30(d)*]. Moreover, if the defendant has no information or belief on the subject sufficient to enable him or her to answer an allegation of the complaint, the defendant may so state in the answer and place his or her denial on that ground [*Code Civ. Proc. § 431.30(e)*; *see § 26.96*].

Adherence to the strict form of specific denial has not been necessary in California since the 1927 amendment to former *Code Civ. Proc. § 437*, the predecessor to *Code Civ. Proc. § 431.30* [*see Conley v. Lieber (1979)97 Cal. App. 3d 646, 655-656, 158 Cal. Rptr. 770]* . For example, the denials of the allegations controverted may be stated by reference to specific paragraphs or parts of the complaint [*Code Civ. Proc. § 431.30(f)*; *see also Heusner v. Fleck (1958) 158 Cal. App. 2d 578, 582, 323 P.2d 155* (construing former *Code Civ. Proc. § 437*); *Edger v. Foster (1941) 48 Cal. App. 2d 580, 583, 120 P.2d 134* (same)].

ILLUSTRATION:

Denial by Paragraphs. An answered contained denials of paragraphs, instead of the allegations within the paragraphs. Was that sufficient to raise material issues of fact? Yes, but the court criticized the denials as being neither logical nor grammatical [*Edger v. Foster (1941) 48 Cal. App. 2d 580, 583, 120 P.2d 134]* .

Denials of the allegations controverted may also be stated by express admission of certain allegations of the complaint with a general denial of all of the allegations not so admitted; or by denial of certain allegations on information and belief, or for lack of sufficient information or belief, with a general denial of all allegations not so denied or expressly admitted [*Code Civ. Proc. § 431.30(f)*; *see §§ 26.97 -26.101*]. Denials in that format do not constitute negatives pregnant [*see Conley v. Lieber (1979) 97 Cal. App. 3d 646, 656, 656 n. 3, 158 Cal. Rptr. 770* ; *see also* [4], *below*]. Thus, defendants responding to verified complaints are spared the difficulties and the hazards of restating the allegations of the complaint and denying each of them in turn, risking the chance that any given denial may constitute a negative pregnant [*see Reinert v. Proud (1935) 8 Cal. App. 2d 169, 170-171, 47 P.2d 491* (decided under former *Code Civ. Proc. § 437*)].

[4] Negatives Pregnant

Specific denials, no matter how stated, should be of the substance of the allegation, not of its form. Thus a statement that "Defendant denies that said allegation is true in matter and form as stated" is not a good denial, but is a negative

pregnant and amounts to an admission that the substance of the matter alleged is true. While it has been said that the best form of specific denial is in the very language of the allegation denied, there is always the danger that such a denial will be a negative pregnant.

ILLUSTRATION:

Failure of Denial to State "or Any Other Sum" or "or Any Part Thereof." Plaintiff alleged that he or she was damaged in the sum of $1,000. Defendant denied "that plaintiff was damaged in the sum of $1,000" without adding "or any other sum." Has defendant impliedly admitted that plaintiff was damaged in some lesser sum? Yes [*Kennedy v. RosecransGardens, Inc. (1952) 114 Cal. App. 2d 87, 89 249 P.2d 593]* . Defendant denied that the sum mentioned in complaint was "wholly" due and payable. Is that an admission that some amount is due any payable? Yes. That was held to admit that all but one dollar of the sum mentioned in the complaint was due and payable [*Armer v. Dorton (1942) 50 Cal. App. 2d 413, 415, 123 P.2d 94* ; *Connecticut Mut. L. Ins. Co. v. Most (1940) 39 Cal. App. 2d 634, 640, 103 P.2d 1013]* . Plaintiff alleged "that the whole of said real property is necessary for the convenient use and occupation of said barn and grain elevator." Defendant denied "that the whole of said real property is necessary for the convenient use and/or occupation of the barn and/or grain elevator." Has defendant admitted that some portion of the property less than the whole is necessary for the convenient use and occupation of the barn and grain elevator? Yes [*California Corrugated C. Co. v. Stewart (1932) 215 Cal. 120, 123, 8 P.2d 1013]* .

California Corrugated, *Armer*, and *Connecticut Mut*, used in the illustration, *above*, have all been described as involving true negatives pregnant [*Conley v. Lieber (1979) 97 Cal. App. 3d 646, 656 n. 3, 158 Cal. Rptr. 770* ; *compare In re Kyle (1947) 77 Cal. App. 2d 634, 640, 176 P.2d 96* (set forth at § 26.34[7][b], example of "negative pregnant in an affirmative form")]. A specific form of negative pregnant consists of the conjunctive denial. Thus, when plaintiff alleges "A and B" or "A, B, and C," and defendant denies "A and B" or "A, B, and C," defendant may discover that he or she has impliedly admitted that one or more but less than all of the matters alleged is true [*see Janeway & Carpender v. Long Beach Co. (1922) 190 Cal. 150, 153, 211 P. 6]* .

ILLUSTRATION:

The Danger of Conjunctive Denials. Defendant denied that it "made, executed, *and* delivered" a contract. Did that form of denial admit the execution of the contract? Yes. Use of the conjunction "and" limited the denial to a simple statement that defendant did not do all three things, leaving an admission that it did any two of them [*Janeway & Carpender v. Long Beach Co. (1922) 190 Cal. 150, 153, 211 P. 6]* .

[5] Admissions

[a] Effect of Admission

Allegations in a complaint or cross complaint may be admitted expressly or by simple failure to controvert them [*see Code Civ. Proc. §§ 431.20(a), 431.30(f)*; *see also Fuentes v. Tucker (1947) 31 Cal. 2d 1, 5, 187 P.2d 752* ;Amusing Sandwich, Inc. v. City of Palm Springs (1985) 165 Cal. App. 3d1116, 1130, *211 Cal. Rptr. 911]* . When an allegation is admitted, the plaintiff is relieved of the need to prove that allegation at trial [*see Evid. Code §§ 210, 350*]. But, sometimes to defendant's advantage, plaintiff is also denied the privilege of offering any evidence on the issue raised by that allegation [*see Fuentes v. Tucker (1947) 31 Cal. 2d 1, 7, 187 P.2d 752* (disapproving *House v. Pacific Greyhound Lines (1939) 35 Cal. App. 2d 336, 95 P.2d 465* ; *Behrendt v. Times-Mirror Co. (1938) 30 Cal. App. 2d 77, 85 P.2d 949* ; and *Rowe v. Rennick (1931) 112 Cal. App. 576, 297 P. 603*)].

This result follows because admitted facts are not in issue [*Fuentes v. Tucker (1947) 31 Cal. 2d 1, 4, 187 P.2d 752* ; *Johnston v. Security Ins. Co. (1970) 6 Cal. App. 3d 839, 844, 86 Cal. Rptr. 133]* . Evidence which is not pertinent to the issues raised by the pleadings is not relevant [*see Evid. Code §§ 210, 350*], and it is error to allow the introduction of

such evidence at trial [*Fuentes v. Tucker (1947) 31 Cal. 2d 1, 4, 187 P.2d 752* ; *see also Lever v. Garoogian (1974) 41 Cal. App. 3d 37, 39, 115 Cal. Rptr. 856* (rule is well established that evidence cannot be used to establish issue that parties have not made in their pleadings)].

ILLUSTRATION:

Admission Prevents Plaintiff From Introducing Evidence That Might Be Inflammatory. In an action for the wrongful death of a minor child arising from negligence when the evidence establishing liability arose from reprehensible conduct that might have inflamed a jury and affected its award of damages, defendant admitted liability. Did that prevent the plaintiff's presenting evidence on that issue to the jury in the trial of the damages issue to the extent that such evidence is not relevant to the damages issue? Yes [*see Fuentes v. Tucker (1947) 31 Cal. 2d 1, 5-7, 187 P.2d 752* ; *see also Krouse v. Graham (1977) 19 Cal. 3d 59, 79, 137 Cal. Rptr. 863, 562 P.2d 1022* (liability admitted by stipulation)].

The introduction of evidence of admitted facts is permissible if the admission is ambiguous in form or limited in scope or when, during the trial of a case, a party seeks to deprive his or her opponent of the legitimate force and effect of material evidence by the bald admission of a probative fact [*Fuentes v. Tucker (1947) 31 Cal. 2d 1, 7, 187 P.2d 752]* .

[b] Admissions Are Not Necessary Except as Part of Qualified Denial

Because material allegations of the complaint, if not controverted by the answer, are for the purposes of the action taken as true [*Code Civ. Proc. § 431.20(a)*], there is no need for a defendant to expressly admit anything except if he or she wishes to make a qualified general denial, coupling the express admission of certain allegations with a general denial of all allegations not so admitted [*see Code Civ. Proc. § 431.30(f)*]. Indeed, it is probably poor form to plead express admissions except as part of a qualified general denial, although some defense attorneys do so as a matter of course or to be sure they gain the benefit of preventing plaintiff's presenting evidence on the admitted issue.

[6] Denial by Affirmative Allegations

In addition to general or specific denials, allegations of the complaint may be controverted by affirmative allegations in the answer. Any allegation in the answer that, if found to be true, necessarily shows that the allegation of the complaint as to the same matter is untrue, is sufficient as a denial [*Burris v. People's Ditch Co. (1894) 104 Cal. 248, 253, 37 P. 922* ; *Blume v. MacGregor (1944) 64 Cal. App. 2d 244, 253, 148 P.2d 656]* . Thus, when a defendant affirmatively alleges his or her ownership of particular property, this may be treated as equivalent to a denial of plaintiff's allegation that plaintiff owns the property [*Elliott v. Bertsch (1943) 59 Cal. App. 2d 543, 547, 139 P.2d 332]* .

[7] Affirmative Defenses

[a] Distinguished From Denials

The defenses set out in the answer as new matter are referred to as affirmative defenses [*see, e.g., Erler v. Five Points Motors, Inc. (1967) 249 Cal. App. 2d 560, 562, 57 Cal. Rptr. 516* ; *Jetty v. Craco (1954) 123 Cal. App. 2d 876, 880, 267 P.2d 1055]* . The answer may allege any new matter constituting a defense not otherwise disclosed by the pleadings [*see Code Civ. Proc. § 431.30(b)(2)*; *Jetty v. Craco (1954) 123 Cal. App. 2d 876, 880, 267 P.2d 1055]* .

"Affirmative defenses" consist of all defenses that were formerly referred to as "pleas in abatement," "dilatory pleas," "pleas in bar," "defenses on the merits," and "pleas of confession and avoidance."

[b] What Constitutes New Matter

Whether matter is new or not is determined by the matter itself, and not by the form in which it is pleaded. The test is whether it operates as a traverse or by way of confession and avoidance [*see Goddard v. Fulton (1863) 21 Cal. 430,*

436 ; *see also* *Erler v. Five Points Motors, Inc. (1967) 249 Cal. App. 2d 560, 565-567, 57 Cal. Rptr. 516]* , that is, whether it denies the plaintiff's allegations or alleges that a defense exists even if the complaint's allegations are true.

The difference between the "controverting matter," discussed at [6], *above*, and "new matter" is as follows: if the matter alleged in the answer shows only that some essential allegation of the complaint is not true, then it is not new matter, but only a traverse (that is, a denial). If, on the other hand, the matter alleged sets forth facts from which it results that no cause of action existed in the plaintiff at the time the action was brought, notwithstanding the truth of the allegations of the complaint, then the allegations are of new matter [*Goddard v. Fulton (1863) 21 Cal. 430, 436* ; *Lever v. Garoogian (1974) 41 Cal. App. 3d 37, 39, 115 Cal. Rptr. 856* ; *see also* *Erler v. Five Points Motors, Inc. (1967) 249 Cal. App. 2d 560, 566, 57 Cal. Rptr. 516]* .

New matter can also be something relied on by the defendant which is not put in issue by the plaintiff [*see* *Goddard v. Fulton (1863) 21 Cal. 430, 436* ; *Erler v. Five Points Motors, Inc. (1967) 249 Cal. App. 2d 560, 566, 57 Cal. Rptr. 516* ; *Jetty v. Craco (1954) 123 Cal. App. 2d 876, 880, 267 P.2d 1055]* which must be pleaded by the defendant [*Jetty v. Craco (1954) 123 Cal. App. 2d 876, 880, 267 P.2d 1055]* . Generally, defendant has the burden of proof on new matter [*Erler v. Five Points Motors, Inc. (1967) 249 Cal. App. 2d 560, 566, 57 Cal. Rptr. 516]* .

[c] Manner of Pleading

Each affirmative defense should plead the ultimate facts establishing the defense in the same manner as if it were set forth in a complaint. Thus, a defense should be so pleaded that if admitted as pleaded, judgment must go for the defendant [*see* *Greiss v. State Investment etc. Co. (1893) 98 Cal. 241, 244, 33 P. 195* ; *see also* *California Packing Corp. v. Larsen (1921) 187 Cal. 610, 612, 203 P. 102* ; *Bradbury v. Higginson (1914) 167 Cal. 553, 557, 140 P. 254]* .

Conclusory allegations of affirmative defenses without pleading the facts underlying the defenses, such as a laundry list of affirmative defenses stating essentially the name of a defense and that it bars recovery, will not raise an issue of material fact and will not withstand a motion for summary judgment [*FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 384, 282 Cal. Rptr. 508]* .

[d] Waiver by Failure to Plead

A party who fails to plead affirmative defenses waives them [*California Academy of Sciences v. County of Fresno (1987) 192 Cal. App. 3d 1436, 1442, 238 Cal. Rptr. 154]* . Certain affirmative defenses, such as illegality based on public policy, are not waived by a failure to include the affirmative defense in the answer to the complaint [*Yoo v. Robi (2005) 126 Cal. App. 4th 1089, 1103, 24 Cal. Rptr. 3d 740]* .

[e] Multiple Defenses

Defendant may set up as many defenses as he or she may have [*see Code Civ. Proc. § 431.30(b)(2)*]. However, the defenses must be separately stated and must refer to the causes of action that they are intended to answer in a manner by which they may be intelligibly distinguished [*Code Civ. Proc. § 431.30(g)*]. They must also be separately numbered [*Cal. Rules of Ct., Rule 2.112(1)*].

[8] Inconsistent Defenses

[a] Allowed

A defendant may plead inconsistent defenses in the answer, but each defense must be consistent in itself [*Allstate Ins. Co. v. Kim W. (1984) 160 Cal. App. 3d 326, 334, 206 Cal. Rptr. 609* ; *Poe v. Francis (1933) 132 Cal. App. 330, 335, 22 P.2d 801]* . This rule applies whether or not the answer is verified [*Banta v. Siller (1898) 121 Cal. 414, 418, 53 P. 935* ; *see also* *McDonald v. Southern Cal. Ry. Co. (1894) 101 Cal. 206, 212-213, 35 P. 643* ; *Miller & Lux, Inc., v.*

Light & Power Corp. (1932) 120 Cal. App. 589, 601, 8 P.2d 560] . If one separate answer denies all allegations of the complaint, plaintiff is not excused from proving material facts because of admissions of some or all of these facts found in other and separate answers [*South Shore Land Co. v. Petersen (1964) 226 Cal. App. 2d 725, 734, 38 Cal. Rptr. 392]* . Nor does affirmative matter pleaded in one defense in an answer does operate to waive a denial contained in another defense [*Calexico Lumber Co. v. Emerson (1921) 54 Cal. App. 239, 241, 242, 201 P. 612]* . Each defense alleged must be considered separately without regard to any other defense [*Miller & Lux, Inc., v. Light & Power Corp. (1932) 120 Cal. App. 589, 601, 8 P.2d 560]* .

Although the inconsistency may result merely from pleading different legal theories of defense, inconsistent defenses containing apparent contradictions of fact have also been allowed on the theory that the defendant does not always know what his or her proof will show when the answer is filed [*see, e.g.,* *South Santa Clara etc. Dist. v. Johnson (1964) 231 Cal. App. 2d 388, 403, 41 Cal. Rptr. 846* ("It is well established in California that several defenses may be pleaded in an answer though inconsistent in legal theory or in fact")]. A party's contradictory denials and affirmative allegations of fact do not necessarily indicate perjury or fraud, but simply that the party is attempting to raise all issues on which he or she may have some chance of success [*Lynch & Freytag v. Cooper (1990) 218 Cal. App. 3d 603, 613, 267 Cal. Rptr. 189]* .

[b] Does Not Waive Denial in Same Answer

A defendant also may deny certain material allegations of the complaint and, subsequently, in an affirmative defense allege that the same material allegations of the complaint are true; and the allegations in the affirmative defense will not constitute an admission of the truth of those allegations in the complaint. Defendant is merely pleading inconsistent defenses [*Edger v. Foster (1941) 48 Cal. App. 2d 580, 583, 120 P.2d 134* ; *see also* *South Shore Land Co. v. Petersen (1964) 226 Cal. App. 2d 725, 734, 38 Cal. Rptr. 392* ; *Calexico Lumber Co. v. Emerson (1921) 54 Cal. App. 239, 241, 242, 201 P. 612]* .

ILLUSTRATION:

Defenses May Allege Matter Denied in Answer. In an action for damages for assault and battery, defendant denied plaintiff's allegation and set out separate affirmative defenses of self-defense and removal of plaintiff in defense of defendant's property and to preserve the peace. Did those defenses waive the denial? No [*Oppenheimer v. Deutchman (1953) 119 Cal. App. 2d 450, 453, 259 P.2d 457]* . In an action for injunctive relief and damages for negligent maintenance of a ditch allowing seepage, defendant denied any negligence and alleged as a separate affirmative defense a prescriptive right to permit seepage. Did that defense amount to waiver of the denial of negligence? No [*Niegel v. Georgetown Divide Water Co. (1947) 78 Cal. App. 2d 445, 446, 177 P.2d 641]* .

[c] Constitutes Admission in Later Actions

The rule permitting inconsistent defenses applies, however, only to defenses set up in an answer in the same case. Such defenses may not be considered as admissions against interest in the action in which the answer was filed. However, when a defendant alleges facts in an inconsistent defense in one action and those facts are inconsistent with the position taken by the same party in a subsequent action between the defendant and other parties, statements made in the first verified pleading may be used against the pleader in the subsequent action as an admission against interest [*Jones v. Tierney-Sinclair (1945) 71 Cal. App. 2d 366, 374, 162 P.2d 669* (allegation of facts in verified answer in prior action contrary to defendant's claim of prescriptive easement in present action)]. *Subsequently, in Fibreboard Paper Products Corp. v. East Bay Union of Machinists (1964) 227 Cal. App. 2d 675, 39 Cal. Rptr. 64* , the court followed *Jones, above,* and held that plaintiff's inconsistent statements made in a prior unverified appeal document before the Unemployment Insurance Appeals Board should have been admitted in its present action as admissions against interest. The court in *Fibreboard* said that the rationale of *Jones* was compatible with the general rule that does not restrict the admissibility of prior inconsistent statements to those made under oath [Fibreboard Pape r *Products Corp. v. East Bay*

Union of Machinists (1964) 227 Cal. App. 2d 675, 711-712, 39 Cal. Rptr. 64] . That is, prior inconsistent statements of fact are admissible whether or not the statements were in a verified or an unverified pleading or paper.

[9] Objections by Demurrer or Answer

[a] Enumerated Grounds of Objection

The party against whom a complaint or cross complaint has been filed may object to it by demurrer or answer on any one or more of the following grounds [*Code Civ. Proc. § 430.10*]:

- The court has no jurisdiction of the subject of the cause of action alleged in the pleading.
- The person who filed the pleading does not have legal capacity to sue.
- There is another action pending between the same parties on the same cause of action.
- There is a defect or misjoinder of parties.
- The pleading does not state facts sufficient to constitute a cause of action.
- The pleading is uncertain; "uncertain" includes ambiguous and unintelligible.
- In an action founded on a contract, it cannot be ascertained from the pleading whether the contract is written or oral or whether it is implied by conduct.
- No certificate was filed as required by *Code Civ. Proc. § 411.35* (relating to actions against architects, engineers, or land surveyors).

If the ground for objection appears from the face of the complaint or cross complaint or from matter of which the court must or may take judicial notice, the objection may be taken by demurrer; if it does not so appear, the objection may be taken by answer [*Code Civ. Proc. § 430.30(a), (b)*; *see also Code Civ. Proc. § 430.10*]. Judicial notice is governed by *Code Civ. Proc. § 430.70* and *Evid. Code §§ 450-460*.

Other than the objection that the court lacks subject matter jurisdiction when there is no California court to which the action may be transferred [*see Code Civ. Proc. §§ 396(b)* (transfer of action), 430.10(a)], the objections listed in *Code Civ. Proc. § 430.10* constitute "pleas in abatement" [*see* Ch. 3, *Abatement of Actions*]. Certain other defenses appearing from the face of the complaint or from matter of which the court must or may take judicial notice and that would bar the action may also be raised by demurrer under *Code Civ. Proc. § 430.10(e)*), on the theory that the complaint or cross complaint fails to state facts sufficient to constitute a cause of action. Common illustrations of such defenses are:

- The statutes of limitation [*see* Ch. 345, *Limitation of Actions*].
- The statute of frauds [*see* Ch. 530, *Statute of Frauds*].
- Res judicata [*see* Ch. 491, *Res Judicata*].

Without this device, those "pleas in bar" could not be raised by demurrer because they are not expressly enumerated in *Code Civ. Proc. § 430.10*.

No such limitation exists on pleading affirmative defenses. Such pleas in bar may be raised directly in the answer

without alleging that the complaint or cross complaint fails to state facts sufficient to constitute a cause of action [*see Code Civ. Proc. § 430.30(b)(2)*].

[b] Waiver of Objections and Exceptions

If the party against whom a complaint or cross complaint has been filed fails to object to the pleading, either by demurrer or answer, the party is deemed to have waived the objection unless it is one of the following [*Code Civ. Proc. § 430.80(a)*]:

- An objection that the court has no jurisdiction of the subject of the cause of action alleged in the pleading.

- An objection that the pleading does not state facts sufficient to constitute a cause of action.

The objections that the complaint or cross complaint fails to state facts sufficient to constitute a cause of action [*see Code Civ. Proc. § 430.10(e)*] and that the court lacks jurisdiction of the subject of the action [*see Code Civ. Proc. § 430.10(a)*] may normally be made at any time during the pendency of the proceedings in the trial court [*see, e.g., Wilson v. Sharp (1954) 42 Cal. 2d 675, 677, 268 P.2d 1062* ; *Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6]* , or on appeal [*see, e.g., Greene v. Municipal Court (1975) 51 Cal. App. 3d 446, 450, 124 Cal. Rptr. 139]* .

A defendant or cross-defendant may move to quash service of summons, move to stay or dismiss the action on the grounds of inconvenient forum, or move to dismiss for delay in prosecution under *Code Civ. Proc. 418.10*, and simultaneously answer, demur, or move to strike the complaint or cross-complaint, without waiving a general appearance until entry of an order denying the motion [*Code Civ. Proc. 418.10(e)*].

Objections to a complaint or cross complaint or a portion thereof may also be raised by a motion to strike on any of the grounds set forth in *Code Civ. Proc. § 436* [*see Code Civ. Proc. §§ 435-437*, and § 26.22[3]].

[10] Setoff of Coexisting Cross Demand

[a] Nature and Purpose of Setoff

The right of setoff, while recognized by former *Code Civ. Proc. § 440*, and its successor, *Code Civ. Proc. § 431.70*, was not created by statute, but is grounded in principles of equity; in equity, setoff depends on the equitable jurisdiction of the court over its suitors [*Kruger v. Wells Fargo Bank (1974) 11 Cal. 3d 352, 363, 113 Cal. Rptr. 449, 521 P.2d 441* ; *see also Jess v. Herrmann (1979) 26 Cal. 3d 131, 142-143, 161 Cal. Rptr. 87, 604 P.2d 208* ; *Barnhill v. Robert Saunders & Co. (1981) 125 Cal. App. 3d 1, 4-5, 177 Cal. Rptr. 803]* . Thus, although the doctrine of setoff exists independent of statute, its governing principals are partially codified in *Code Civ. Proc. § 431.70*, which limits setoff to cross demands for money [*Carmel Valley Fire Protection Dist. v. State of California (1987) 190 Cal. App. 3d 521, 550, 234 Cal. Rptr. 795]* .

The underlying purpose of *Code Civ. Proc. § 431.70* is to prevent one party from sitting on a claim against a particular person and thereby inducing that person to permit his or her counterclaim to become time barred, and then swooping in on the defenseless victim [*Carnation Co. v. Olivet Egg Ranch (1986) 189 Cal. App. 3d 809, 821, 229 Cal. Rptr. 261]* .

[b] When Allowed

Although affirmative relief may not be claimed in an answer, if cross demands for money have existed between persons at any point in time when neither demand was barred by the statute of limitations, and an action is thereafter commenced by one of those persons, the other may assert in the answer the defense of payment in that the two demands are compensated so far as they equal each other, notwithstanding that an independent action asserting the person's claim

would at the time of filing the answer be barred by the statute of limitations [*Code Civ. Proc. § 431.70*; *see § 26.114*]. If the cross demand would otherwise be barred by the statute of limitations, the relief accorded must not exceed the value of the relief granted to the other party [*Code Civ. Proc. § 431.70*]. Neither person can be deprived of the benefits of *Code Civ. Proc. § 431.70* by the assignment or death of the other [*Code Civ. Proc. § 431.70*].

The cross demand need not be liquidated [*see Hauger v. Gates (1954) 42 Cal. 2d 752, 755, 269 P.2d 609* (decided under former *Code Civ. Proc. § 440*)].

Claims of setoff may be raised by way of affirmative defense as well as by cross complaint [*American National Bank v. Stanfill (1988) 205 Cal. App. 3d 1089, 1097, 252 Cal. Rptr. 861]* . Because *Code Civ. Proc. § 431.70* is not clear as to how the defendant is to claim the excess if he or she prevails on the cross demand, the cross demand is not barred by the statute of limitations, and the amount of that cross demand is in excess of the amount sought by plaintiff, if defendant's cross demand is not barred by the statute of limitations and its amount exceeds or might exceed the amount awarded to plaintiff, defendant should plead the cross demand in a cross complaint in addition to alleging it as an affirmative defense in the answer [*see Code Civ. Proc. § 428.80* (abolishing counterclaims and requiring that any claim formerly asserted by counterclaim be asserted by a cross complaint)]. For additional discussion of limitations and considerations in pleading setoff, see *§ 26.114*[2]-[5].

[c] When Not Allowed

The defense provided by *Code Civ. Proc. § 431.70* is not available if the cross demand is barred for failure to assert it in a prior action under *Code Civ. Proc. § 426.30* (compulsory cross complaint) [*Code Civ. Proc. § 431.70*].

Nor is setoff allowed against money that is exempt from execution [*Kruger v. Wells Fargo Bank (1974) 11 Cal. 3d 352, 367, 113 Cal. Rptr. 449, 521 P.2d 441* (decided under former *Code Civ. Proc. § 690.175* [now see Code *Civ. Proc. §§ 704.120, 704.130*])]. Similarly, an employer is not entitled to setoff of debts owed it by an employee against any wages due to that employee on his or her discharge [*Barnhill v. Robert Saunders & Co. (1981) 125 Cal. App. 3d 1, 4-6, 177 Cal. Rptr. 803]* . For when a setoff may or may not be proper in a comparative fault setting, see *Jess v. Herrmann (1979) 26 Cal. 3d 131, 136-143, 161 Cal. Rptr. 87, 604 P.2d 208* .

A cross demand under *Code Civ. Proc. § 431.70* by a bank to setoff deposited funds in satisfaction of obligation secured by a deed of trust arises only after the bank has procured a judgment of foreclosure and a deficiency judgment has been entered [*Woodruff v. California Republic Bank (1977) 75 Cal. App. 3d 108, 111, 141 Cal. Rptr. 915]* . Similarly, setoff is not available to a creditor that has deficiency remaining after nonjudicial foreclosure under a purchase money deed of trust to offset a debt owed by that creditor to plaintiff-trustors. To allow setoff in that situation, as practical matter, would abrogate *Code Civ. Proc. § 580b* [*Birman v. Loeb (1998) 64 Cal. App. 4th 502, 511-514, 516-518, 75 Cal. Rptr. 2d 294]* .

[d] Money Judgment

For the purposes of *Code Civ. Proc. § 431.70*, a money judgment is a "demand for money." As applied to a money judgment, the demand is barred by the statute of limitations when enforcement of the judgment is barred under *Code Civ. Proc. §§ 683.010-683.320* [*Code Civ. Proc. § 431.70*].

[e] Equitable Setoff Distinguished

Equitable setoff or offset is a means by which a debtor may satisfy in whole or in part a judgment or claim held against him or her out of a judgment or claim that he or she has subsequently acquired against the judgment creditor. The right exists independently of statute and rests on the inherent power of the court to do justice to the parties before it [*Aplanalp v. Forte (1990) 225 Cal. App. 3d 609, 615, 275 Cal. Rptr. 144]* . However, if the setoff is against a debtor on

an obligation secured by a mortgage or trust deed on real property, counsel for the creditor should be aware that the setoff constitutes an "action" within the meaning of *Code Civ. Proc. § 726* (providing that there can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage on real property or an estate for years therein), and hence, either the nonjudicial exercise of the right of setoff, or a lawsuit to enforce a setoff without suing for a judicial foreclosure in the same action, will result in a waiver of the right to foreclose on the security or to sell the security under a power of sale [*see Aplanalp v. Forte (1990) 225 Cal. App. 3d 609, 613-617, 275 Cal. Rptr. 144* ; *see also* Ch. 555, *Trust Deeds and Real Property Mortgages*]. Similarly, the public policy behind *Code Civ. Proc. § 580b* prohibits granting of equitable setoff to allow defendant-creditors to offset a debt owed by them to plaintiff-debtors against a deficiency remaining after nonjudicial foreclosure under a purchase money deed of trust would [*Birman v. Loeb (1998) 64 Cal. App. 4th 502, 511-514, 516-518, 75 Cal. Rptr. 2d 294]* .

California Forms of Pleading and Practice--Annotated

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Chapter 26 ANSWERS
PART II. LEGAL BACKGROUND

3-26 California Forms of Pleading and Practice--Annotated § 26.18

§ 26.18 Signature

[1] Requirement

Beginning January 1, 1995, every pleading must be signed by at least one attorney of record in the attorney's individual name. If a party is not represented by an attorney, the party must sign the papers. Each paper must state the signer's address and telephone number, if any [*Code Civ. Proc § 128.7(a)*]. An unsigned paper must be stricken unless the omission of the signature is corrected promptly after being called to the attorney's or party's attention [*Code Civ. Proc § 128.7(a)*].

Actions or proceedings filed on or after January 1, 1995 are subject to sanctions under *Code Civ. Proc. § 128.7* [*Code Civ. Proc. § 128.7(i)*]. of sanctions under Section 128.7 see Ch. 510, *Sanctions* .

Code Civ. Proc. § 128.7 is patterned on *Fed. R. Civ. P. 11*, and the signature ties into the grounds for imposing sanctions, as discussed at [2][a], *below*. For discussion of Rule 11, see Moore's Federal Practice, Ch. 11 (3rd ed. Matthew Bender).

[2] Presentation of Answer as Certification

[a] Four Conditions

By presenting an answer to the court an attorney or unrepresented party certifies under *Code Civ. Proc § 128.7(b)* that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the answer meets four conditions, discussed [b]-[e], *below*.

A paper is presented to the court by any of the following actions [*Code Civ. Proc § 128.7(b)*]:

- Signing.
- Filing.

- Submitting.
- Later advocating.

[b] Not Presented Primarily for Improper Purpose

The first condition is that the answer is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in litigation cost [*Code Civ. Proc § 128.7(b)(1)*].

[c] Legal Contentions Are Not Unwarranted

The second condition is that the claims, defenses, and other legal contentions set forth in the answer are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law [*Code Civ. Proc § 128.7(b)(2)*].

[d] Evidentiary Support Exists or Is Likely to Exist After Reasonable Opportunity for Discovery

The third condition is that there is evidentiary support for the allegations and other factual contentions or, if specifically so identified, the allegations and other factual contentions are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery [*Code Civ. Proc § 128.7(b)(3)*].

[e] Denials Warranted or Reasonably Based on Lack of Information and Belief

The fourth condition is that the denials of factual contentions are warranted on the evidence, or if specifically so identified, are reasonably based on a lack of information or belief [*Code Civ. Proc § 128.7(b)(4)*].

[3] Reasonable Inquiry

Code Civ. Proc. § 128.7 does not define the "inquiry reasonable under the circumstances" that must be the basis of the certification [*see* [2][a], *above*]. The standard under *Fed. R. Civ. P. 11*, on which *Code Civ. Proc. § 128.7* is patterned, is based on what was reasonable to believe at the time the pleading was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer, whether he or she had to rely on a client for information as to the facts underlying the pleading, motion, or other paper, whether the paper was based on a plausible view of the law, or whether he or she depended on forwarding counsel or another member of the bar [*see* Notes of Advisory Committee on Rules to 1983 Amendments to Rule 11].

This view comports with California cases which require the court to consider timing considerations, such as potential statute of limitations problems when considering imposing sanctions under *Code Civ. Proc. § 128.5* [*see Atchison, Topeka, & Santa Fe Ry. Co. v. Stockton Port Dist. (1983) 140 Cal. App. 3d 111, 115, 117, 189 Cal. Rptr. 208]* .

[4] Sanctions for Violation of Certification

If the certification of the four conditions discussed above is false, sanctions may be imposed after an opportunity to withdraw or correct the challenged complaint, claim, or allegation [*Code Civ. Proc. § 128.7(c)*]. For more detailed discussion of sanctions under Section 128.7, Ch. 510, *Sanctions*.

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§ 26.19 Verification

[1] In General

Verification is an affidavit verifying the truth of matters covered by it [*Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 204, 151 Cal. Rptr. 721]* ; its object is to assure good faith in averments or statements of a party to litigation [*Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 204, 151 Cal. Rptr. 721* ; *Hoffman v. City of Palm Springs (1959) 169 Cal. App. 2d 645, 648, 337 P.2d 521]* .

Unless specifically required by statute, a complaint or cross complaint need not be verified. If it is not verified, the answer normally need not be verified [*see Code Civ. Proc. § 446*]. However, if the plaintiff is the state, a county, city, school district, district, public agency, or public corporation, or an officer of such an entity acting in his or her official capacity, the answer must be verified, subject to two exceptions. First, the answer need not be verified if an admission of the truth of the complaint might subject the party to criminal prosecution, and second, the answer need not be verified if an officer of one of the public entities listed above, in his or her official capacity, is defendant [*see Code Civ. Proc. § 446*]. For a form of verification by an attorney for a party who is not in the county in which the attorney has his or her office, see *§ 26.121*.

An answer that need not be verified may be in the form of a general denial [*see § 26.90*], which, however, only puts in issue the material allegations of the complaint or cross complaint [*Code Civ. Proc. § 431.30(d)*].

[2] Superior Court Actions Other Than Limited Civil Cases

If the complaint is verified and is filed in a superior court and is not a limited civil case, the answer must be verified [*see Code Civ. Proc. §§ 91, 92(b), 446*]. In addition, the answer's denials must be made positively or according to the defendant's information and belief [*see Code Civ. Proc. § 431.30(d)*]. These rules apply to answers to cross complaints as well as to complaints [*Code Civ. Proc. § 431.30(a)(1)*].

[3] Limited Civil Cases

If the complaint is subject to *Code Civ. Proc. § 90 et seq.*, which includes most limited civil cases [*see Code Civ. Proc.*

§ 91], the answer need not be verified, even if the complaint or cross complaint is verified [*Code Civ. Proc. § 92(b)*]. Moreover, the denial of the allegations of the complaint need not be made positively or according to the information and belief of the defendant. Rather, a general denial is sufficient but puts in issue only the material allegations of the complaint [*Code Civ. Proc. § 431.30(d)*]. However, if the cause of action is a claim assigned to a third party for collection and the complaint is verified, the denial of the allegations must be made positively or according to the information and belief of the defendant, even if the complaint is brought as a limited civil case and is subject to *Code Civ. Proc. § 90 et seq.* [*Code Civ. Proc. § 431.30(d)*]. *Code Civ. Proc. § 90 et seq.* does not apply to small claims cases, to proceedings in unlawful detainer, forcible entry, or forcible detainer, or when the action is withdrawn from its provisions on motion [*Code Civ. Proc. § 91(b), (c)*]. These rules apply to answers to cross complaints as well as to complaints [*Code Civ. Proc. § 431.30(a)(1)*].

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§ 26.19A Case Cover Sheet; Joining or Contesting Complex Case Designation

If the plaintiff identifies a case as a complex case or a collections case on the case cover sheet [Cal. Judicial Council Form CM-010], the plaintiff must serve the case cover sheet on the defendant with the complaint [*Cal. Rules of Ct., Rule 3.220(a)*; *see Cal. Rules of Ct., Rule 3.400 et seq.* (complex cases); *Cal. Rules of Ct., Rule 3.740* (collection cases)].

The defendant may file a counter civil case cover sheet designating the case as complex or not complex [*Cal. Rules of Ct., Rule 3.400 et seq.* (complex cases)]. The counter case cover sheet must be filed and served no later than defendant's first appearance. The court will then determine whether the action is complex [*Cal. Rules of Ct., Rule 3.402*].

For discussion of what constitutes a complex case, and further discussion of these procedures, see *Ch. 425, Pretrial Proceedings, § 425.52*.

For discussion and an illustration of Cal. Judicial Council Form CM-010, see *Ch. 123, Complaints and Cross Complaints, § 123.60*.

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§ 26.20 Cross Defendant's Special Answer

A third-party defendant (that is, a cross defendant) who has been sued for indemnity by a third-party plaintiff (that is, a cross complainant) [*see Code Civ. Proc. § 428.70(a)*] may, at the time of filing an answer to the cross complaint, file as a separate document a special answer against the person who asserted the underlying cause of action against the cross complainant, alleging any defenses that the cross complainant has to that cause of action [*Code Civ. Proc. § 428.70(b)*; *see also Administrative Management Services, Inc. v. Fidelity & Deposit Co. (1982) 129 Cal. App. 3d 484, 487-489, 181 Cal. Rptr 141* ; *Berris & Seaton v. Meyers (1984) 163 Cal. App. 3d Supp. 54, 57 , 210 Cal. Rptr. 444]* .

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§ 26.21 Replication to Answer

The statement of any new matter in the answer, in avoidance or constituting a defense, is deemed controverted by the opposite party [*Code Civ. Proc. § 431.20(b)*; *see also Code Civ. Proc. § 590(2)*]. That is to say, no replication to the answer is required or permitted in California civil actions [*see Code Civ. Proc. § 422.10*, discussed at *§ 26.11*].

Nor is a replication proper in a special proceeding unless authorized by statute. Thus *Code Civ. Proc. § 1091*, relating to proceedings in mandate, provides that on the trial the applicant (petitioner) is not precluded by the return from any valid objection to its sufficiency, and may countervail it by proof either in direct denial or by way of avoidance. Under this statute, the petitioner for the writ may file a replication denying the affirmative averments of the answer or controvert them by proof presented at the hearing. Unless the affirmative averments are controverted by pleading or proof, they must be taken as true [*Franklin v. Municipal Court (1972) 26 Cal. App. 3d 884, 891, 103 Cal. Rptr. 354]* .

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§ 26.22 Objections to Answer

[1] By Demurrer

A party against whom an answer has been filed may object to it by demurrer on any one or more of the following grounds [*Code Civ. Proc. § 430.20*]:

- The answer does not state facts sufficient to constitute a defense.
- The answer is uncertain; "uncertain" includes ambiguous and unintelligible.
- When the answer pleads a contract, it cannot be ascertained from the answer whether the contract is written or oral.

A demurrer is proper, however, only when the ground for objection appears on the face of the answer or from any matter of which the court must or may take judicial notice [*Code Civ. Proc. § 430.30(a)*; *see also Code Civ. Proc. § 430.20*]. Judicial notice is governed by *Code Civ. Proc. § 430.70* and *Evid. Code §§ 450-460*.

The demurrer may be to the whole answer or to any one or more of the several defenses set up in the answer [*Code Civ. Proc. § 430.50(b)*], and must be filed within 10 days after the answer is served [*Code Civ. Proc. § 430.40(b)*; *see also Code Civ. Proc. §§ 1054, 1054.1* (extensions of time within which to plead)]. The time for filing a demurrer to an amended answer is governed by *Code Civ. Proc. §§ 471.5(b), 472*.

If a party against whom an answer has been filed fails to demur to it, that party is deemed to have waived the objection unless the objection is that the answer does not state facts sufficient to constitute a defense [*Code Civ. Proc. § 430.80(b)*].

Only general demurrers are allowed in limited civil cases; special demurrers are not authorized [*Code Civ. Proc. §§ 91, 92(c)*].

and forms of demurrers to answers, *see* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[2] By Motion for Judgment on the Pleadings

Because the objection that the answer fails to state facts sufficient to constitute a defense is not waived by failure to raise it by demurrer [*see Code Civ. Proc. § 430.80(b)*], plaintiff may move for a judgment on the pleadings if such a defect exists [*see MacIsaac v. Pozzo (1945) 26 Cal. 2d 809, 812-813, 161 P.2d 449]* . A motion for judgment on the pleadings is a nonstatutory motion and serves the same function as a general demurrer to the answer, but need not be made within the time limited for demurring.

For forms of motion for judgment on the pleadings and procedure, *see* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[3] By Motion to Strike

The court may, on a motion to strike made pursuant to *Code Civ. Proc. § 435* or at any time in its discretion, and on terms it deems proper, (a) strike out any irrelevant, false or improper matter inserted in any pleading; or (b) strike out all or any part of any pleading not drawn or filed in conformity with the laws of California, a court rule, or an order of the court [*Code Civ. Proc. § 436*]. "Pleading" is defined as meaning demurrer, answer, complaint, or cross complaint [*Code Civ. Proc. § 435(a)(2)*]. As in the case of a demurrer, the grounds for a motion to strike must appear on the face of the challenged pleading or from a matter of which the court is required to take judicial notice [*Code Civ. Proc. § 437(a)*].

Motions to strike an answer are not allowed in limited civil cases [*Code Civ. Proc. §§ 91, 92(d)*].

For further discussion of motions to strike, *see* Ch. 375, *Motions to Strike: Pleadings* . For discussion of special motions to strike under the anti-SLAPP statutes, see Ch. 376, *Motions to Strike: Anti-SLAPP* .

[4] By Motion for Summary Judgment

When it is claimed that there is no defense to the action, plaintiff may move for summary judgment under *Code Civ. Proc. § 437c* [*Code Civ. Proc. § 437c(a)*].

For forms and procedure, *see* Ch. 537, *Summary Judgment* .

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§ 26.23 Judicial Council Trial Court Forms

[1] In General

Code Civ. Proc. § 425.12 requires that the Judicial Council develop and approve official forms for use in California trial courts for any complaint, cross complaint, or answer in any action based on personal injury, property damage, wrongful death, unlawful detainer, breach of contract, or fraud, and the council has done so [*see Cal. Rules of Ct., Rule 1.45*]. The council has approved preprinted forms of answer for use in the following:

- Actions based on personal injury, property damage, or wrongful death [*see* Cal. Judicial Council Form PLD-PI-003].
- Actions on contracts [*see* Cal. Judicial Council Form PLD-C-010].
- Proceedings for unlawful detainer [*see* Cal. Judicial Council Form UD-105].

Use of these forms is optional [*see Code Civ. Proc. § 425.12*; *Cal. Rules of Ct., Rules 1.35, 1.45*].

These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[2] Use of Answer Forms

The Judicial Council forms of answers described in [1], *above*, contain boxes for checking to indicate a general denial, specific denial, admission, denial on information and belief, denial because of lack of sufficient information or belief to answer, admissions with a general denial of all allegations not admitted, and a denial of specified allegations and an admission of all others, and blank spaces to be filled in to identify what is being denied, admitted, etc., as well as various affirmative defenses that might be raised in the action.

If typed attachments to these forms are prepared, the format of papers prescribed by *Cal. Rules of Ct., Rule 2.100 et seq.*

(regulating format of papers presented for filing in superior court) should be followed; and each attachment, and paragraph in the attachment, should be sufficiently labeled and numbered as to its identity and relationship to the form (compare *Cal. Rules of Ct., Rule 1.45(c)*, relating to attachment of other causes of action to approved form). Any attachment prepared by counsel should also have the short title of the case at the top, along with a space designated for the case number, so that the attachment will be consistent in appearance with the answer form.

For discussion of the specific format requirements for any paper prepared by counsel for filing, *see* Ch. 123, *Complaints and Cross Complaints* .

For illustratively filled-in Judicial Council forms of answer, *see* Ch. 140, *Contracts* ; Ch. 380, *Negligence* ; and Ch. 333, *Landlord and Tenant: Eviction Actions* .

[3] Use of General Denial Form

In addition to the above-described answer forms, there is a Judicial Council form of general denial [Cal. Judicial Council Form PLD-050; *see § 26.90*]. This form was adopted prior to the development of the answer forms mentioned above. The form of general denial must be used in any civil action in which the demand or value of property in controversy does not exceed $1,000 [*see Code Civ. Proc. § 431.40(a), (c)*].

The general denial may be used if the complaint is not verified or, whether or not the complaint is verified, the action is subject to the economic litigation procedures of limited civil cases under *Code Civ. Proc. § 90 et seq.* [*see Code Civ. Proc. §§ 91, 431.30(d)*. Because the specific answer forms discussed above each contain a box to be checked to make a general denial, it would appear that, notwithstanding the existence of the general denial form, the specific answer forms may be used to make a general denial in actions involving personal injury, property damage, wrongful death, contracts, and unlawful detainer.

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[Reserved]

§§ 26.24[Reserved]

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§ 26.30 Other Matthew Bender Publications

For a memorandum supporting a demurrer to the answer on the ground that the answer does not state facts sufficient to constitute a defense because the cross demands alleged never coexisted, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*

For a memorandum supporting a motion for an order compelling acknowledgment of satisfaction of judgment on the ground the judgment was satisfied by setoff of a cross demand, see California Points and Authorities, Ch. 131, *Judgments* .

For a memorandum supporting the contention that a subrogee's action is subject to setoff against the subrogor, see California Points and Authorities, Ch. 220, *Subrogation*

Moore's Federal Practice, §§ 8.06 -8.08 (3rd ed. Matthew Bender)

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§ 26.31 State Statutes

[1] Allegations

"Material allegation" defined. *Code Civ. Proc. § 431.10(a)*

"Immaterial allegation" defined. *Code Civ. Proc. § 431.10(b), (c)*

Material allegation of complaint or cross complaint not controverted by answer is taken as true for purposes of action. *Code Civ. Proc. § 431.20(a)*

[2] Amended Pleadings

Answer to amended complaint or cross complaint. *Code Civ. Proc. § 471.5(a)*

Demurrer to amended answer. *Code Civ. Proc. § 471.5(b)*

Amendment of pleadings "of course." *Code Civ. Proc. § 472*

Amendment of pleadings "in furtherance of justice." *Code Civ. Proc. § 473*

[3] Answer

Answer is pleading allowed in civil action. *Code Civ. Proc. § 422.10*

Answer is allowed after demurrer to complaint or cross complaint is overruled and no answer was filed. *Code Civ. Proc. § 472a(b)*

Answer may be filed on terms that are just when demurrer is stricken under *Code Civ. Proc. § 436* and no answer has been filed. *Code Civ. Proc. § 472a(c)*

Answer is allowed after motion to strike complaint or cross complaint is denied. *Code Civ. Proc. § 472a(d)*

Answer is allowed after motion to dismiss under *Code Civ. Proc. § 583.210 et seq.* for failure to timely serve summons. *Code Civ. Proc. § 472a(e)*

[4] Appearance

Defendant's appearance in small claims court. *Code Civ. Proc. § 116.330*

Answer is appearance. *Code Civ. Proc. § 1014*

[5] Default

Default may not be entered against defendant who serves and files notice of motion to strike without demurring to complaint, as time to answer is extended. *Code Civ. Proc. § 435(c)*

Default for failure to answer. *Code Civ. Proc. §§ 585, 586*

Noticed motion to set aside default in specified situations. *Code Civ. Proc. § 585.5*

[6] Defenses

See also [14], *below*

Defenses must be separately stated and refer to cause of action which they are intended to answer. *Code Civ. Proc. § 431.30(g)*

Setoff of coexisting cross demand. *Code Civ. Proc. § 431.70*

Affirmative defense available to defendant in action by Attorney General against any person for protection of California's natural resources from pollution, impairment, or destruction. *Gov. Code § 12608*

[7] Denials

General denial of unverified complaint is sufficient but will only put in issue material allegations of complaint. *Code Civ. Proc. § 431.30(d)*

General denial of allegations in complaint is sufficient when complaint, whether or not verified, is subject to *Code Civ. Proc. §§ 90-100* (limited civil cases generally), except when cause of action is on claim assigned to third party for collection and complaint is verified, in which case denial of allegations must be made positively or according to defendant's information and belief. *Code Civ. Proc. § 431.30(d)*

Denial of allegations of verified complaint filed in superior court must be made positively or according to information and belief. *Code Civ. Proc. § 431.30(d)*

Manner of denying allegations controverted. *Code Civ. Proc. § 431.30(f)*

General written denial in actions in which demand, exclusive of interest, or value of property does not exceed $1,000. *Code Civ. Proc. § 431.40*

[8] Extensions of Time to Plead

Notice of motion to strike without demurring to complaint extends defendant's time to answer. *C.C.P § 435(c)*

Notice of motion to strike answer does not extend time to demur to answer. *C.C.P § 435(d)*

Court may enlarge time to answer or demur in furtherance of justice and on such terms as may be proper. *Code Civ. Proc. § 473(a)*

Court may allow answer to be made after time limited by Code of Civil Procedure on such terms as may be just. *Code Civ. Proc. § 473(a)*Extension of time to plead for good cause shown. *Code Civ. Proc. § 1054*

Extension of time to plead when attorney for applicant is member of State Legislature and specified conditions exist. *Code Civ. Proc. § 1054.1*

[9] Filing and Service of Pleadings

Civil action is commenced by filing of complaint. *Code Civ. Proc. § 411.10*

Pleadings subsequent to complaint must be filed and served. *Code Civ. Proc. § 465*

[10] Form and Content of Answer

Captions of pleadings. *Code Civ. Proc. § 422.30*

Use of abbreviated title of action in pleadings other than complaint. *Code Civ. Proc. § 422.40*

Required contents of answer. *Code Civ. Proc. § 431.30(b)*

Answer to contain general or specific denial of material allegations controverted by defendant. *Code Civ. Proc. § 431.30(b)(1)*

Answer to contain statement of any new matter constituting defense. *Code Civ. Proc. § 431.30(b)(2)*

Verification of answer. *Code Civ. Proc. § 446*

[11] Issues

Issues arise on pleadings when fact or conclusion of law is maintained by one party and controverted by other party. *Code Civ. Proc. § 588*

Issues are of two kinds: of fact and of law. *Code Civ. Proc. § 588*

Issues of law arise (a) on demurrer to complaint, cross complaint, or answer, or to some part thereof, or (b) on motion to strike made pursuant to *Code Civ. Proc. § 435*, *436*, or *473*. *Code Civ. Proc. § 589*

Issues of fact arise (1) on material allegation in complaint controverted by answer, and (2) on new matters in answer, except when an issue of law is joined thereon. *Code Civ. Proc. § 590*

[12] Motion to Strike

Irrelevant, false, or improper matter inserted in any pleading is subject to motion to strike. *Code Civ. Proc. § 436(a)*

All or any part of any pleading not drawn or filed in conformity with laws of California, court rule, or court order is subject to motion to strike. *Code Civ. Proc. § 436(b)*

[13] New Matter in Answer

Counterclaim is abolished. *Code Civ. Proc. § 428.80*

New matter in answer is deemed controverted by opposite party. *Code Civ. Proc. § 431.20(b)*

Affirmative relief may not be claimed in answer. *Code Civ. Proc. § 431.30(c)*

[14] Objections to Pleading

Grounds for objection to complaint or cross complaint that may be taken by demurrer or answer. *Code Civ. Proc. § 430.10*

Grounds for objection to answer. *Code Civ. Proc. § 430.20*

Objection to complaint, cross complaint, or answer is taken by demurrer if ground for objection appears on face of pleading or from matter of which court must or may take judicial notice. *Code Civ. Proc. § 430.30(a)*

Objection to complaint or cross complaint is taken by answer if ground for objection does not appear on face of pleading. *Code Civ. Proc. § 430.30(b)*

Party objecting to complaint or cross complaint may demur and answer at same time. *Code Civ. Proc. § 430.30(c)*

Objection to complaint or cross complaint, other than objection that court has no jurisdiction of subject of action or objection that pleading does not state facts sufficient to constitute cause of action, is waived by failure to raise objection by demurrer or answer. *Code Civ. Proc. § 430.80(a)*

Objection to answer, other than objection that answer does not state facts sufficient to constitute defense, is waived by failure to raise objection by demurrer. *Code Civ. Proc. § 430.80(b)*

[15] Specific Answers

Answer by third-party defendant. *Code Civ. Proc. § 428.70(b)*

Answer in defamation action. *Code Civ. Proc. §§ 460.5, 460.7, 461*

[16] Supplemental Answer

Motion for leave to file supplemental answer. *Code Civ. Proc. § 464*

[17] Time to Answer

Defendant in civil action has 30 days after service of summons to respond to complaint. *Code Civ. Proc. § 412.20(a)(3)*

Cross defendant has 30 days from service of cross complaint to respond to it. *Code Civ. Proc. § 432.10*

Answer to amended pleading in civil action must be served and filed within 30 days after service of amendments or complaint as amended, or such other time as court may direct. *Code Civ. Proc. § 471.5(a)*

Time within which defendant must respond to complaint amended "of course" is computed from date of notice of amendment. *Code Civ. Proc. § 472*

Time given to amend or answer when demurrer to answer is sustained or demurrer to complaint is overruled and time to amend or answer is given, runs from service of notice of decision or order, unless notice is waived in open court and waiver is entered in minutes. *Code Civ. Proc. § 472b*

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§ 26.32 California Rules of Court

Following ruling on demurrer, unless otherwise ordered, leave to answer or amend within 10 days is deemed granted, except for proceedings in forcible entry, forcible detainer, or unlawful detainer in which case five calendar days are deemed granted. *Cal. Rules of Ct., Rule 3.1320(g)*

When demurrer is made to fewer than all causes of action alleged in complaint, defendant has 10 days to move to strike, demur, or otherwise plead to complaint or to remaining causes of action following (1) overruling of demurrer, (2) amendment of complaint or expiration of time to amend if demurrer was sustained with leave to amend, or (3) sustaining of demurrer if demurrer was sustained without leave to amend. *Cal. Rules of Ct., Rule 3.1320(j)*

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§ 26.33 Local Court Rules

[1] Responses in Courts Under Trial Court Delay Reduction Act

Siskiyou Co. Super. Ct. Rules, Rule 4.01

Tehama Co. Super. Ct., Rules, Rule 3.50

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§ 26.34 Decisions

[1] Affirmative Defenses

See also [6], *below*.

Objection that action is barred by mandatory cross complaint statute (*Code Civ. Proc. § 426.30*), like defense of res judicata or rule against splitting cause of action, must be specially pleaded or it is waived; those objections are not raised by defense that complaint fails to state facts sufficient to constitute cause of action. *Hulsey v. Koehler (1990) 218 Cal. App. 3d 1150, 1157-1158, 267 Cal. Rptr. 523*

Fact of nonlicensure may be raised as affirmative defense to action by unlicensed collection agency by motion before, during, and after trial, whether asserted in answer or not. *Transworld Systems, Inc. v. Rogan (1989) 210 Cal. App. 3d 731, 734*

Defense of statute of limitations is personal privilege that must be affirmatively invoked in lower court by appropriate pleading; if defense appears on face of complaint, defense is raised by demurrer; otherwise, defense must be specially pleaded in answer or it is waived. *O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 156, 119 Cal. Rptr. 245* ; *see also Hall v. Chamberlain (1948) 31 Cal. 2d 673, 679, 192 P.2d 759* ; *Dicker v. Bisno (1957) 155 Cal. App. 2d 554, 560, 318 P.2d 159*

Defense of unclean hands must be pleaded or brought to attention of trial court. *Behm v. Fireside Thrift Co. (1969) 272 Cal. App. 2d 15, 21, 76 Cal. Rptr. 849*

Failure of complaint to state facts sufficient to constitute cause of action is proper affirmative defense and has same force as general demurrer to complaint. *Bracker v. American Nat. Food, Inc. (1955) 133 Cal. App. 2d 338, 339-340, 284 P.2d 163*

[2] Default

Defaulting defendant is deemed to have admitted each and every allegation in complaint through his or her default. *Weiss v. Blumencranc (1976) 61 Cal. App. 3d 536, 542 n.9, 131 Cal. Rptr. 298* ; *see also Taliaferro v. Davis (1963) 216 Cal. App. 2d 398, 408, 31 Cal. Rptr. 164* (generally speaking, party who makes default thereby confesses material allegations of complaint); *Csordas v. United Slate Tile etc. Roofers (1960) 177 Cal. App. 2d 184, 186, 2 Cal. Rptr. 133* (same)

Entry of default is not authorized by *Code Civ. Proc. § 585* when answer is on file, whether defendant does or does not appear at time action is called for hearing. *Wilson v. Goldman (1969) 274 Cal. App. 2d 573, 576, 79 Cal. Rptr. 309* ; *Barbaria v. Independent Elevator Co. (1955) 133 Cal. App. 2d 657, 659, 285 P.2d 91* ; *see also Wisdom v. Ramirez (1985) 177 Cal. App. 3d Supp. 1, 7 , 222 Cal. Rptr. 923*

Default entered after answer has been filed is void. *Wilson v. Goldman (1969) 274 Cal. App. 2d 573, 577, 79 Cal. Rptr. 309* ; *Wisdom v. Ramirez (1985) 177 Cal. App. 3d Supp. 1, 7 , 222 Cal. Rptr. 923*

[3] Denials

Notwithstanding fact that denials in answer are not as broad as allegations of complaint or are otherwise insufficient to put allegations of complaint in issue, if answer is treated in trial court as putting material facts in issue, plaintiff is not allowed for first time on appeal to object that such denials were insufficient for any purpose. *Cockerell v. Title Ins. & Trust Co. (1954) 42 Cal. 2d 284, 288, 267 P.2d 16*

Party may not permit issue to be litigated and on appeal escape consequences by claiming that such issue was not pleaded. *Cockerell v. Title Ins. & Trust Co. (1954) 42 Cal. 2d 284, 288, 267 P.2d 16*

As to matters not presumably within defendant's knowledge, answer stating that "defendant has no information or belief sufficient to enable him/her to answer allegations of complaint, and basing his/her denial on that ground, denies each and several the allegations thereof," is sufficient, and specific denial of each allegation as to those matters is not essential, notwithstanding that complaint is verified. *Jensen v. Dorr (1911) 159 Cal. 742, 747, 116 P. 553*

Defendant's denials that it held property in question in violation of plaintiff's rights or that plaintiff possessed any right or title to property was sufficient to put nature of plaintiff's interest at issue despite admission of complaint's allegations as true. *Walton v. City of Red Bluff (1992) 2 Cal. App. 4th 117, 126, 3 Cal. Rptr. 2d 275*

Allegations in complaints relating to contents of official records is not effectively placed in issue by denial on information and belief. *Transworld Systems, Inc. v. Rogan (1989) 210 Cal. App. 3d 731, 733, 258 Cal. Rptr. 555*

Affirmative allegation in answer contrary to plaintiff's allegation is equivalent of denial. *Elliott v. Bertsch (1943) 59 Cal. App. 2d 543, 546, 139 P.2d 332*

[4] Effect of Admission

Unlimited and unambiguous admission in answer precludes plaintiff from presenting evidence on issue at trial. *Fuentes v. Tucker (1947) 31 Cal. 2d 1, 5-8, 187 P.2d 752*

Admission of evidence to prove facts not in issue is error. *Fuentes v. Tucker (1947) 31 Cal. 2d 1, 4, 187 P.2d 752*

[5] Facts in Issue

Facts alleged in complaint and not controverted by answer are not in issue. *Fuentes v. Tucker (1947) 31 Cal. 2d 1, 4, 187 P.2d 752* ; *Carlton v. Superior Court of Los Angeles County (1968) 261 Cal. App. 2d 282, 289, 67 Cal. Rptr. 568*

[6] Inconsistent Defenses

[a] Same Action

Statements made in special defenses do not constitute evidence against party on issues tendered in other defenses contained in same answer, and this is so whether answer is verified or unverified. *McDonald v. Southern Cal. Ry. Co. (1894) 101 Cal. 206, 212-213, 35 P. 643*

In California, as in federal courts, inconsistent defenses have long been recognized and permitted because defendant cannot always know in advance precisely what his or her proof will show; party's contradictory denials and affirmative allegations of fact do not necessarily indicate perjury or fraud, but simply that party is attempting to raise all issues on which he or she may have some chance of success. *Lynch & Freytag v. Cooper (1990) 218 Cal. App. 3d 603, 613, 267 Cal. Rptr. 189*

While party may plead separate inconsistent defenses to complaint, each defense must be consistent in itself. *Allstate Ins. Co. v. Kim W. (1984) 160 Cal. App. 3d 326, 334, 206 Cal. Rptr. 609*

Defendant may plead inconsistent defenses, and when one separate answer denies all allegations of plaintiff's complaint, plaintiff is not excused from making proof of material facts because of admissions of some or all of them found in other and separate answers of defendant. *Southern Glass Co. v. Beverly Dairies (1935) 7 Cal. App. 2d 451, 454, 45 P.2d 1023*

[b] Different Actions

When defendant alleges facts in detail in inconsistent defense in one action and those facts are inconsistent with position taken by same party in subsequent action between same parties, first verified pleading may be used as evidence against pleader in subsequent action as admission against interest. *Jones v. Tierney-Sinclair (1945) 71 Cal. App. 2d 366, 374, 162 P.2d 669* ; *Fibreboard Paper Products Corp. v. East Bay Union of Machinists (1964) 227 Cal. App. 2d 675, 711-712, 39 Cal. Rptr. 64*

[7] Negative Pregnant

[a] Defined

Negative pregnant is form of negative expression that may imply or carry with it affirmative. *Huntoon v. Hurley (1955) 137 Cal. App. 2d 33, 37, 290 P.2d 14* ; *Jordan v. Jordan (1943) 58 Cal. App. 2d 371, 374, 135 P.2d 416*

[b] Examples of Negatives Pregnant

If complaint alleges that "... plaintiff is now and at all times herein mentioned as to it was the owner of the following described real property ...," answer reading "... defendant denies that plaintiff is now and at all times herein mentioned is the owner of that certain real property described in complaint" results in admission of ownership in plaintiff, because such denial is evasive and either averment might be true, even though together they may not be. *California Trust Co. v. Gustason (1940) 15 Cal. 2d 268, 271, 101 P.2d 74*

If complaint alleged that "the whole of said re al property is necessary for the convenient use and occupation of said barn and grain elevator" and defendant denied "that the whole of said real property is necessary for the convenient use and/or occupation of the barn and/or grain elevator," denial as negative pregnant which admitted that some portion of property less than the whole was so necessary. *California Corrugated C. Co. v. Stewart (1932) 215 Cal. 120, 123, 8 P.2d 1013*

Denial that defendant "made, executed, *and* delivered" contract is admission of its execution; use of conjunction "and" limited denial to simple statement that defendant did not do all three things, leaving admission that it did any two of them. *Janeway & Carpender v. Long Beach Co. (1922) 190 Cal. 150, 153, 211 P. 6*

In paternity action, defendant's answer stating that "Defendant further denies that a child, Brian Keith, a minor, was born to the plaintiff as issue of an alleged marriage ..." but failing to deny that he was father of child was negative pregnant impliedly admitting allegation of complaint that he was father. *Craig v. Superior Court (1975) 45 Cal. App. 3d 675, 681, 119 Cal. Rptr. 692*

Allegation in respondent's return in habeas corpus proceeding to recover custody of minor child, in which writ issued, "that at the time the complaint for said divorce was filed [in a Nevada court] and at the time the decree was entered, the minor children of the parties, including [name of child in question] were not living with petitioner in the County wherein said divorce complaint was filed and wherein said decree was entered" was "perfect example of negative pregnant in affirmative form," as it was incumbent on respondent to allege facts sufficient to show affirmatively want of jurisdiction of person of named child in Nevada Court; foregoing allegation was insufficient for this purpose. *In re Kyle (1947) 77 Cal. App. 2d 634, 640, 176 P.2d 96*

[c] Examples of What Is Not Negative Pregnant

Trial court's finding that "each and all of the allegations of paragraph III of the Defendant's answer are untrue" is not a negative pregnant. *Yellow Creek Logging Corp. v. Dare (1963) 216 Cal. App. 2d 50, 57, 30 Cal. Rptr. 629*

Trial court's finding that "none of the allegations" contained in specified paragraphs of the complaint "is true" is not a negative pregnant. *Huntoon v. Hurley (1955) 137 Cal. App. 2d 33, 37, 290 P.2d 14* (distinguishing finding that "all the allegations ... are not true," which is a negative pregnant)

Trial court's finding that "allegations contained in paragraphs ... VII ... of plaintiff's complaint are not true" is not a negative pregnant. *Jordan v. Jordan (1943) 58 Cal. App. 2d 371, 374, 135 P.2d 416* (distinguishing case holding that finding "that it is not true ... that *all* casing furnished by plaintiff was furnished at his own cost and expense" was a negative pregnant in that it implied that some of the casing was so furnished)

[8] New Matter

Difference between "controverting matter" and "new matter;" allegation in answer showing only that some essential allegation of complaint is not true, is not new matter, but traverse (denial). If allegation sets forth facts from which it results that no cause of action existed in plaintiff when action was brought, notwithstanding truth of allegations of complaint, that allegation is new matter. *Goddard v. Fulton (1863) 21 Cal. 430, 436* ; *State Farm Mut. Auto. Ins. Co. v. Superior Court (1991) 228 Cal. App. 3d 721, 725, 279 Cal. Rptr. 116* ; *Lever v. Garoogian (1974) 41 Cal. App. 3d 37, 39, 115 Cal. Rptr. 856*

New matter is something relied on by defendant that is not put in issue by plaintiff and which must be pleaded by defendant. *State Farm Mut. Auto. Ins. Co. v. Superior Court (1991) 228 Cal. App. 3d 721, 725, 279 Cal. Rptr. 116* ;

Jetty v. Craco (1954) 123 Cal. App. 2d 876, 880, 267 P.2d 1055

[9] Objections to Pleadings

Objection that complaint does not state facts sufficient to constitute cause of action is not waived by failure to demur, but may be raised for first time on appeal. *O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 156, 119 Cal. Rptr. 245*

[10] Setoff of Coexisting Cross Demand

Limitations on right of setoff in order to carry out state policies protecting interest of debtor. *Kruger v. Wells Fargo Bank (1974) 11 Cal. 3d 352, 367-371, 368 n. 24, 113 Cal. Rptr. 449, 521 P.2d 441*

To assert setoff, cross-demands for money must exist between parties; right to setoff arises when two parties are mutually debtor and creditor; former *Code Civ. Proc. § 440* [now *Code Civ. Proc. § 431.70*] partially codified common law equitable principle of setoff and established procedure for asserting setoff under California code pleading system; under facts, trial court's granting of equitable setoff contravened economic policy considerations underlying antideficiency legislation, specifically *Code Civ. Proc. § 580b*. *Birman v. Loeb (1998) 64 Cal. App. 4th 502, 506, 518, 518 n.5, 75 Cal. Rptr. 2d 294*

Trial court's allowing defendant setoff defense without its having been pleaded in answer criticized by appellate court, but issue not adjudicated because of parties' waiver of objection by failing to object to procedure at any time up to and including appeal. *R.M. Sherman Co. v. W.R. Thomason, Inc. (1987) 191 Cal. App. 3d 559, 562 n.3, 236 Cal. Rptr. 577*

Setoff, as general rule, must rest on claim enforceable in its own right; void contract under which no rights whatsoever are conferred and which is a legal nullity, furnishes no basis for setoff. *R.M. Sherman Co. v. W.R. Thomason, Inc. (1987) 191 Cal. App. 3d 559, 563, 236 Cal. Rptr. 577*

Right of counties to set off against funds owed state, moneys owed them by state for state-mandated expenditures. *Carmel Valley Fire Protection Dist. v. State of California (1987) 190 Cal. App. 3d 521, 550-551, 234 Cal. Rptr. 795*

[11] Waiver of Defense

Defense of illegality based on public policy is not waived by the defendant's failure to include it as an affirmative defense in the answer to the complaint. *Yoo v. Robi (2005) 126 Cal. App. 4th 1089, 1103, 24 Cal. Rptr. 3d 740*

Failure to raise particular defense at earliest possible time results in its waiver. *California Concrete Co. v. Beverly Hills Savings & Loan Assn. (1989) 215 Cal. App. 3d 260, 272, 261 Cal. Rptr. 484*

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§ 26.35 Law Reviews

Comment, *What a Difference a Day Makes: The Case For a Strict Approach to Untimely Pleadings, 16 U.C. Davis L. Rev. 187 (1982)*

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§ 26.36 Text References

Witkin, California Procedure, vol. 5, *Pleading*, §§ 972 et seq., 1111 (answers to cross complaints), 1172 et seq. (supplemental pleadings) (4th ed. 1997)

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[Reserved]

§§ 26.37[Reserved]

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§ 26.50 Prepare Responses and Draft Answer

☐ Prepare the following essential parts of the answer:

☐ Prepare the heading including the following information [for forms, *see §§ 26.60, 26.61*]:

☐ Identification of attorney or party [*Cal. Rules of Ct., Rule 2.111(1)*].

☐ Title of court [*Cal. Rules of Ct., Rule 2.111(3)*].

☐ Title of case [*Cal. Rules of Ct., Rule 2.111(4)*].

☐ Number of case [*Cal. Rules of Ct., Rule 2.111(5)*].

☐ Nature of paper [*Cal. Rules of Ct., Rule 2.111(6)*; for form, *see § 26.62*].

☐ If the case has multiple parties, the identity of the complaining party and the complaint being answered [*Cal. Rules of Ct., Rule 2.111(6)*; for form, *see § 26.62*].

☐ Below the nature of the paper or the character of the action or proceeding, the name of the judge and department, if any, to which the case is assigned [*Cal. Rules of Ct., Rule 2.111(7)*].

☐ Designation, if appropriate, as "Limited Civil Case" [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*].

☐ Prepare and draft introduction to answer, if desired [for forms for various types of actions, *see §§ 26.63 -26.76*].

☐ Prepare and draft the body of the answer.

☐ Using the facts to be established on behalf of the defendant, determine what denials or other controverting allegations to be made to allegations in the complaint are warranted by the evidence [*Code Civ. Proc. § 431.30(b)(1)*; for discussion, *see § 26.17[1] -[6]*; for forms, *see §§ 26.77 -26.101*].

☐ Use general denial used to answer unverified complaints [*Code Civ. Proc. § 431.30(d)*].

☐ Use Judicial Council Form PLD-050 (General Denial) if action in which demand for money or value of property at issue does not exceed $ 1,000 [*Code Civ. Proc. § 431.40(a)*].

☐ May use Judicial Council Form PLD-050 (General Denial) if the complaint is not verified or the action is subject to economic litigation procedures in limited civil cases [*Code Civ. Proc. § 431.30(d)*].

☐ Use specific denial to answer verified complaint [*Code Civ. Proc. § 431.30(b)*].

☐ Determine what, if any, admissions are to be included in answer.

☐ Admissions of specific allegations precludes admission of potentially inflammatory or prejudicial evidence at trial.

☐ Draft denials and admissions for inclusion in the body of the answer.

☐ Make denials positively, or according to information and belief, or by stating that defendant has insufficient information or belief to answer the allegation [*see Code Civ. Proc. § 431.30(d), (e)*].

☐ If admissions are to be included, decide whether [*see Code Civ. Proc. § 431.30(f)*]:

☐ All denials and admissions should be specified by reference to enumerated parts of the complaint,

☐ All admissions should be specified by reference to enumerated parts of the complaint, with a general denial of remaining allegations, or

☐ Specified denials and admissions are stated, with a general denial of remaining

allegations.

☐ Make sure all allegations in the complaint, and all parts of allegations, are either denied or admitted.

☐ Determine what, if any, affirmative defenses are to be made to the allegations in the complaint [*Code Civ. Proc. § 431.30(b)(2)*; for discussion, *see § 26.17[7], [10]*; for forms, *see §§ 26.110 -26.114*].

☐ Affirmative defenses are those that exist even if the complaint's allegations are true.

☐ Draft affirmative defenses to be included in the body of the answer.

☐ Decide which affirmative defenses to include in the answer rather than in subsequent demurrer [for discussion, *see § 26.17[9]*].

☐ Plead ultimate facts of affirmative defenses to be included in the answer [for discussion, *see § 26.17[7][c]*].

☐ For multiple affirmative defenses to be included in the answer:

☐ Number each separately [*see Code Civ. Proc. § 431.30(g)*],

☐ Refer to the causes of action that they are intended to answer [*see Code Civ. Proc. § 431.30(g)*], and

☐ Make sure they are internally consistent, even if they are inconsistent with each other [for discussion, *see § 26.17[8]*].

☐ Redact Social Security numbers and financial account numbers to their last four digits, or use Judicial Council Form MC-120, Confidential Reference List of Identifiers to designate this protected privacy information [*Cal. Rules of Ct., Rule 1.20(b)*; for discussion, see *§ 26.17[1][d]*; for form, see *Ch. 123, Complaints and Cross-Complaints, § 123.69*].

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3-26 California Forms of Pleading and Practice--Annotated § 26.51

§ 26.51 Review, Subscribe, File, and Serve Answer

☐ After drafting, determine whether answer is to be verified and, if so, whether the defendant must verify it.

☐ Verification in superior court action is generally optional, unless complaint is verified [*Code Civ. Proc. § 446*; for discussion; *see § 26.19*; for forms, *see §§ 26.60, 26.121*].

☐ An exception to this rule applies to answers in limited civil cases, which do not need to be verified even if the complaint or cross complaint is verified [*see Code Civ. Proc. § 92(b)*].

☐ Forward the answer to the defendant for review and, if applicable, subscription of verification.

☐ Counsel for defendant should subscribe the answer, or if defendant is pro per, defendant should do so [*Code Civ. Proc. § 128.7(a)*; for discussion, *see § 26.18*; for form, *see § 26.60*].

☐ Determine whether to file counter civil case cover sheet and, if so, prepare it for filing at time of first appearance [for discussion, *see § 26.19A*].

☐ Serve answer on all parties and file an original with proof of service with the court.

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[Reserved]

§§ 26.52[Reserved]

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PART V. FORMS
A. Form and Content

3-26 California Forms of Pleading and Practice--Annotated § 26.60

§ 26.60 Format and Content of Answer in California State Court [Code Civ. Proc. § 431.30; Cal. Rules of Ct., Rule 2.100 *et seq.*]

[1] FORM Format and Content of Answer in California State Court [Code Civ. Proc. § 431.30; Cal. Rules of Ct., Rule 2.100 *et seq.*]]

[Papers. *Answers are "papers," as that term is defined in Cal. Rules of Ct., Rule 2.3(2), that are to be typewritten or printed, or prepared by a photocopying or other duplication process that will produce clear and permanent copies equally legible to printing, in type not smaller than 12 points, on opaque, unglazed paper, white or unbleached, of standard quality not less than 20-pound weight, 81/2 by 11 inches in size. The type face must be essentially equivalent to Courier, Times, or Helvetica. The color of print must be blue-black or black. (Cal. Rules of Ct., Rule 2.106). Only one side of the paper may be used, and the lines on each page are to be one and one-half spaced or double spaced and numbered consecutively; but descriptions of real property may be single spaced. Footnotes, quotations, footers, and printed forms of corporate surety bonds and undertakings may be single spaced and have unnumbered lines if they comply generally with the space requirement of Cal. Rules of Ct., Rule 2.108(3). The left margin must be at least one inch from the left edge of the paper and the right margin at least one-half inch from the right edge of the paper. Line numbers must be placed at the left margin and separated from the text of the paper by a vertical column of space at least 1/5 inch wide or a single or double vertical line. The line number either must be placed on the same line as a line of type or must be evenly spaced vertically on the page. Line numbers must be consecutively numbered beginning with the number 1 on each page. There must be at least three line numbers for every vertical inch on the page (Cal. Rules of Ct., Rule 2.108(4)). The pages must be numbered consecutively at the bottom. Answers offered for filing are required to consist entirely of original pages without riders, and to be firmly bound together at the top. Exhibits may be fastened to pages of the specified size and, when prepared by a machine copying process, must be equal to typewritten material in legibility and permanency of image (Cal. Rules of Ct., Rule 2.114). All original papers filed with the court and all copies of papers, documents, and exhibits filed with the court or served on other parties must be on recycled paper. Filing or serving a paper constitutes a certification that the paper was purchased as recycled paper (Cal. Rules of Ct., Rule 2.101(b); see Cal. Rules of Ct., Rule 1.6(22) ("recycled" defined)).*]

[Identification of attorney. *In the space commencing on line 1 of the first page of the paper, to the left of the center of*

the page, set forth the name, office address or, if none, residence address, telephone number, fax number and e-mail address if available, inclusion does not constitute consent to service by fax or e-mail unless otherwise provided by law), and State Bar membership number of the attorney for the party or parties in whose behalf the paper is presented, or of the party if he or she is appearing in person (Cal. Rules of Ct., Rule 2.111(1)). It is customary to single space this identification, except that a final identifying line is generally added after a blank line. For an illustrative form, see § 26.61[1]. These requirements are satisfied if the attorney's name, office address, telephone number, and State Bar membership number are printed on the page.]

.....
.....
.....

1 _____ [*Name*]
2 _____ [*Address*]
3 _____, CA _____ [*zip code*]
4 _____ [*Area code and telephone number*]
5 _____ [*State Bar membership number*]
6 Attorney for Defendant
7

[*The first two inches of space between lines 1 and 7 to the right of the center of the first page is to be left blank for the use of the clerk (Cal. Rules of Ct., Rule 2.111(2)).*]

[Title of court. *Beginning on or below three and one-third inches from the top of the paper line 8, set forth the title of the court (Cal. Rules of Ct., Rule 2.111(3); see also Code Civ. Proc §§ 422.30 (caption), 422.40 (title of court)). For alternative forms of court titles, see Ch. 108, Captions and Introductions.*]

.....
.....
.....

8 SUPERIOR COURT OF CALIFORNIA,
9 COUNTY OF _____
10

[Line numbering. *Line numbering--comparable to that printed on standard pleading paper--is used at the left side of the illustrative parts of this form to show the spacing of the lines in and between these parts, and to provide continuity from one section to the next. Attorneys will, of course, recognize that a part in an actual answer need not be confined to the lines shown in this form, but may run on for additional lines, dropping subsequent sections a corresponding number of lines down the page. Thus, while the title of the court is usually set out commencing on line 8, if there has been an unusually lengthy identification of counsel or party or parties represented, running seven lines or more, the title of the court may be dropped to line 9 or further.*]

[Title of case. *Set out the title of the case below the title of the court, in the space to the left of the center of the page (Cal. Rules of Ct., Rule 2.111(4)). The names of the parties may be set forth as in the complaint, although it is sufficient to state the name of the first party on each side, followed by "et al." for the others, and to abbreviate unusually lengthy names of entities, inserting "etc." when necessary (see Code Civ. Proc. § 422.40).*]

.....

.....
.....
10
11 _____ [*name*], et al.,
12 Plaintiffs,
13 vs.
14 _____ [*name*], et al.,
15 Defendants.
16

[Number of case. *Add the case number, as in the complaint, to the right of, and opposite the title of the case (Cal. Rules of Ct., Rule 2.111(5)).*]

.....
.....
.....
10
11 No. _____
12

[Nature of paper. *State the nature of the paper immediately below the case number, and, in a case having multiple parties, specifically identify the complaining party and the complaint being answered (Cal. Rules of Ct., Rule 2.111(6)). It is customary to use all capital letters, and if more than one line is needed, the length of the description and the space available will determine whether single or double spacing is used. See § 26.6[1] for additional descriptive examples of the nature of the paper. If the complaint designated the action as a limited civil case, include the phrase "LIMITED CIVIL CASE" under the line or lines identifying the nature of the paper (Code Civ. Proc. § 422.30(b); Cal. Rules of Ct., Rule 2.111(10)).*]

.....
.....
.....
13 ANSWER TO COMPLAINT
14 [LIMITED CIVIL CASE]
15

[Assigned judge and department. *Below the nature of the paper or the character of the action or proceeding, the name of the judge and department, if any, to which the case is assigned* [*Cal. Rules of Ct., Rule 2.111(7).*]

15 Judge: _____
16 Dept: _____

[Introduction. *The introduction is set forth below the caption after a blank line, and is indented as in the subsequent paragraphs. For alternative introductions, see §§ 26.63 -26.76.*]

.....
.....
.....

16 _____

17

18 Defendant answers the complaint [of plaintiff _____

19 (*name*)] as follows:

[Body of answer; controverting matter. *The main portion of an answer usually consists of a series of numbered paragraphs, or one such paragraph, in which the controverted allegations of the complaint are put in issue by defendant's denials, admissions, and allegations (Code Civ. Proc. §§ 588, 590), and a second part in which defendant alleges new matter by way of defense (Code Civ. Proc. § 431.30(b)). If the complaint states only a single cause of action, the consecutively numbered paragraphs containing defendant's denials, admissions, and controverting allegations, follow the introduction without an intervening numbered line. For the format of the body of the answer to complaints that state more than one cause of action or counts, see §§ 26.77 -26.80.*]

.....
.....
.....

20 1. [*Set forth in this and subsequently numbered paragraphs*

21 *denials, admissions, and allegations.*

22 *See §§ 26.90-26.101.*]

[Body of answer; defenses. *After the paragraphs that admit and deny, or otherwise controvert, the allegations of the complaint, affirmative and special defenses are stated separately (Code Civ. Proc. § 431.30(g)). Each separately stated defense must be separately numbered (Cal. Rules of Ct., Rule 2.112). Thus, each defense is customarily preceded by a heading in capital letters, centered on the page, as shown below. If more than one paragraph is used to allege a defense or defenses, the normal practice is to number the paragraphs separately and consecutively with arabic numerals, even if multiple defenses are alleged. As a matter of common practice for clarity, paragraph numbers are not repeated within the same pleading, so that the defenses should not repeat the paragraph numbers used for admissions and denials or earlier affirmative defenses. For other affirmative defense formats, see §§ 26.110, 26.111.*]

.....
.....
.....

23 FIRST AFFIRMATIVE DEFENSE

24 2. [*In this, and subsequently numbered paragraphs*

25 *if necessary, allege ultimate facts constituting defense.*]

26

27 SECOND AFFIRMATIVE DEFENSE

28 5. [*In this, and subsequently numbered paragraphs*

1 *if necessary, allege ultimate facts constituting defense.*]

[Line numbering--further note. *Line 28, which is usually the last line of the page, has been reached in this form. Hence, the last line above will commence on line 1 of the next following page.*]

[Footer--*Except for exhibits, each paper filed with the court must have a footer in the bottom margin of each page, placed below the page number and divided from the rest of the document page by a printed line. The footer must include the title of the paper or some clear and concise abbreviation in at least 10-point type (Cal. Rules of Ct., Rule 2.110(c)).*]

_____

Answer of Defendant XYZ Corp.

[Prayers. *Defendant should set forth his or her prayer, following the body of the answer. For forms of prayers that may be used in answers, see § 26.120 and Ch. 420, Prayers.*]

.....
.....
.....

2 WHEREFORE, defendant prays that _____ [*specify, e.g.,*
3 plaintiff take nothing by his/her complaint and that defendant
4 be awarded his/her costs of suit].
5

[Subscription. *Answers are pleadings that are to be signed by the attorney in his or her individual name, or if a party is not represented by an attorney, by the party (Code Civ. Proc. §§ 128.7(a), 422.10). The signature block is placed on the right side of the page and consists of a signature, usually the typed name of the signer, and the designation "Defendant" or "Attorney for Defendant," or as the case may be when there are multiple attorneys and defendants. Some attorneys, especially when there is to be no verification, add the date below the prayer and indent it as a paragraph so as to have a record of when the pleading was signed, although this is not required.*]

.....
.....
.....

6 Dated: _____.
7
8 _____ [*firm name, if any*]
9 By: _____ [*signature*]]
10 _____ [*typed name*]
11 Attorney for Defendant
_____ [*name*]

[Verification. *In certain cases answers must be verified (see generally Code Civ. Proc. §§ 446, 2015.5) and in others they are verified as a matter of pleading strategy. However, in limited civil cases (see Code Civ. Proc. §§ 85, 91), verification is not required, and the answer need not be verified, even if the complaint or cross complaint is verified (Code Civ. Proc. § 92(b)). Defendant must verify the answer if the complaint was filed in superior court, is verified and does not relate to a limited civil case (see Code Civ. Proc. § 446). This is also true if the complaint is filed by one of the public entities or officers listed in the first paragraph of Code Civ. Proc. § 446, unless an admission of the truth of the complaint might subject the defendant to criminal prosecution, or unless the defendant is one of the public entities or officers specified in Code Civ. Proc. § 446 (Code Civ. Proc. § 446). The verification is set out following the subscription, often under the heading "VERIFICATION," either on the same page or, as where the attorney makes use of previously prepared printed or otherwise duplicated standard forms, on a separate page. For additional forms of verification, see § 26.121 and Ch. 572, Verification.*]

.....
.....
.....

VERIFICATION

I, _____ [*name*], declare that I am the defendant in the above entitled action; I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____
[*signature*]

[2] Use of Form

The form in [1], *above*, is a guide to the format requirements for an answer in a California state court. The notations in the body of the form refer to particular format requirements and include comments on practices used by attorneys that are not specifically set forth in the California Rules of Court.

[3] Signature

The attorney of record must sign the answer in his or her individual name, or if the party is not represented, the party must sign [*Code Civ. Proc. § 128.7(a)* (operative in actions filed on or after January 1, 1995; for discussion, *see § 26.18*[1]]. Presenting the answer to the court then acts as a certification of the paper violation of which may lead to sanctions [*Code Civ. Proc. § 128.7(b)*; for discussion, *see § 26.18*[2]].

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3-26 California Forms of Pleading and Practice--Annotated § 26.61

§ 26.61 Format of Answer--Identification of Attorneys [Code Civ. Proc. § 431.30; Cal. Rules of Ct., Rule 2.111(1)]

[1] FORM Format of Answer--Identification of Attorneys [Code Civ. Proc. § 431.30; Cal. Rules of Ct., Rule 20111(1)]

[*When a firm of attorneys presents an answer on behalf of several defendants, the identification of attorneys might appear as in the following form:*]

.....
.....
.....

1 Wayne Trier
2 Trier, Fact, and Law, LLP
3 234 Main Street, Suite 74
4 Anytown, California 94541
5 (209) 339-9393
6 SBN: 063875
7 Attorney for Defendants Brown, Black, and White

[2] Use of Form

The form in [1], *above*, is a guide for use in setting forth the identification of the attorney of record for the answering defendant. The identification appears on the first page of the answer in the space commencing with line 1, to the left of the center of the page, and consists of the name, office address, or, if none, the residence address, telephone number, and State Bar membership number of the attorney for the party on whose behalf the paper is presented, or of the party if he or she is appearing in person. [*Cal. Rules of Ct., Rule 2.111(1)*].

The attorney's fax number and e-mail address should appear after the telephone number, if available. Inclusion of the fax number or e-mail address is optional. Inclusion does not constitute consent to service by fax or e-mail unless otherwise provided by law [*Cal. Rules of Ct., Rule 2.111(1)*].

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3-26 California Forms of Pleading and Practice--Annotated § 26.62

§ 26.62 Format of Answer--Typical Designations of Nature of Paper [Cal. Rules of Ct., Rule 2.111(6)]

[1] FORM Format of Answer--Typical Designations of Nature of Paper [Cal. Rules of Ct., Rule 2.111(6)]

[*In addition to the common designation of the nature of the paper,* ***ANSWER TO COMPLAINT****, the following have been used by California attorneys and may be appropriate for use on any given answer:*]

ANSWER

[*OR*]

ANSWER OF DEFENDANT _____ [*name*] TO
COMPLAINT OF _____ [*name*]

[*OR*]

SEPARATE ANSWER OF DEFENDANT _____ [*name*]

[*OR*]

ANSWER OF DEFENDANTS _____ [*name*] and
_____ [*name*]

[*OR*]

ANSWER TO CROSS COMPLAINT

[*OR*]

ANSWER TO AMENDED COMPLAINT

[*OR*]

AMENDED ANSWER TO [SECOND *or* THIRD, *etc.*]
AMENDED COMPLAINT

[2] Use of Form

The form in [1], *above*, sets forth examples of designations of the nature of the paper. The nature of the paper is set forth on the right hand side of the page immediately below the number of the case. In a case having multiple parties, any answer shall specifically identify the complaining party and the complaint being answered [*Cal. Rules of Ct., Rule 2.111(6)*].

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3-26 California Forms of Pleading and Practice--Annotated § 26.63

§ 26.63 Introduction to Answer of Sole Defendant

[1] FORM Introduction to Answer of Sole Defendant

[*EITHER*]

Defendant answers the complaint herein as follows:

[*OR*]

Defendant answers the complaint herein by admitting, denying, and alleging as follows:

[*OR*]

The defendant, for his/her answer to the complaint herein, admits, denies, and alleges [as follows]:

[*OR*]

The defendant above-named, for answer to the complaint of the plaintiff herein, alleges:

[*OR*]

Comes now the defendant, and _____ [in answer to the complaint herein on file *or* answering the complaint of plaintiff on file herein], admits, denies, and alleges as follows [, to wit]:

[2] Use of Form

The form in [1], *above*, sets forths some of the forms of introduction that have found favor with California attorneys for answers by sole defendants.

[3] Cross References

For alternative forms of introductions, see Ch. 108, *Captions and Introductions*

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3-26 California Forms of Pleading and Practice--Annotated § 26.64

§ 26.64 Introduction to Answer of Two or More Defendants

[1] FORM Introduction to Answer of Two or More Defendants

[*When the answer is presented on behalf of more than one defendant, counsel may simply pluralize introductions of the type set forth in § 26.63[1], for example:*]

Defendants answer the complaint [herein] as follows:

[*OR*]

Come now the defendants in the above-entitled action and, answering the complaint on file therein, jointly and severally admit, deny, and allege as follows:

[2] Use of Form

The alternative forms of introductions in [1], *above*, are for use by multiple defendants.

[3] Cross References

For alternative forms of introductions, see Ch. 108, *Captions and Introductions*

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3-26 California Forms of Pleading and Practice--Annotated § 26.65

§ 26.65 Introduction to Answer of One of Several Defendants

[1] FORM Introduction to Answer of One of Several Defendants

[*EITHER*]

Defendant _____ [*name*] answers the complaint [herein] as follows:

[*OR*]

The defendant _____ [*name*], for his/her separate answer to the complaint herein, alleges, denies, and admits:

[*OR*]

Comes now defendant _____ [*name*] and, answering the complaint herein for himself/herself alone, admits, denies, and alleges as follows:

[*OR*]

Defendant _____ [*name*], severing from his/her codefendants herein and, answering plaintiff's complaint for himself/herself alone, admits, denies, and alleges as follows:

[*OR*]

Comes now defendant _____ [*name*], appearing for himself/herself and himself/herself alone, and, in answer to plaintiff's complaint on file herein, admits, denies, and alleges as follows:

[2] Use of Form

The alternative forms of introduction in [1], *above*, are among those that may be used by one of several defendants.

[3] Cross References

For alternative forms of introductions, see Ch. 108, *Captions and Introductions*

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3-26 California Forms of Pleading and Practice--Annotated § 26.66

§ 26.66 Introduction to Answer of Defendant Sued Under Wrong Name

[1] FORM Introduction to Answer of Defendant Sued Under Wrong Name

[*EITHER*]

Defendant _____ [*true name*], sued herein as _____ [*incorrect name*], answers the complaint as follows:

[*OR*]

The defendant, _____ [*true name*], in the summons and complaint named _____ [*incorrect name*], for answer to the complaint of the plaintiff herein, admits, denies, and alleges as follows:

[2] Use of Form

The alternative forms of introductions in [1], *above*, are among those that may be used by a defendant sued under a wrong name.

[3] Cross References

For alternative forms of introductions, see Ch. 108, *Captions and Introductions*

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3-26 California Forms of Pleading and Practice--Annotated § 26.67

§ 26.67 Introduction to Answer of Defendant Sued Under Fictitious Name

[1] FORM Introduction to Answer of Defendant Sued Under Fictitious Name

[*EITHER*]

Defendant _____ [*true name*], sued herein as _____ [*specify, e.g.,* DOE I], answers the complaint [herein] for himself/herself alone as follows:

[*OR*]

Defendant _____ [*true name*], sued herein under the fictitious name of _____ [*specify, e.g.,* DOE I], in answer to the complaint herein on file, admits, denies, and alleges as follows:

[2] Use of Form

The alternative forms of introductions in [1], *above*, are among these that may be used by a defendant sued under a fictitious name [*see Code Civ. Proc. § 474* (fictitiously named defendants)].

[3] Cross References

For a discussion of fictitiously named defendants and forms of related allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of introductions, see Ch. 108, *Captions and Introductions*

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3-26 California Forms of Pleading and Practice--Annotated § 26.68

§ 26.68 Introduction to Answer of Corporate Defendant

[1] FORM Introduction to Answer of Corporate Defendant

[*EITHER*]

Defendant _____ [*corporate name*], a _____ [*state of incorporation*] corporation, answers the complaint [herein] as follows:

[*OR*]

Comes now the defendant _____ [*corporate name*], a corporation, for itself and itself alone, and, in answer to plaintiff's complaint, admits, denies, and alleges as follows:

[2] Use of Form

The alternative forms of introductions in [1], *above*, are among those that may be used by a corporate defendant.

[3] Cross References

For alternative forms of introductions, see Ch. 108, *Captions and Introductions*

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3-26 California Forms of Pleading and Practice--Annotated § 26.69

§ 26.69 Introduction to Answer of Minor Defendant

[1] FORM Introduction to Answer of Minor Defendant

The defendant, a minor under the age of 18 years, by _____ [*name*], his/her guardian ad litem, for answer to plaintiff's complaint herein, admits, denies, and alleges:

[2] Use of Form

The form of introduction in [1], *above*, is illustrative of those used in an answer on behalf of a minor defendant [*see Family Code § 6500 et seq.* (minors)].

[3] Cross References

For forms for use in appointing a guardian ad litem, see Ch. 280, *Guardianship and Conservatorship*

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3-26 California Forms of Pleading and Practice--Annotated § 26.70

§ 26.70 Introduction to Answer of Incompetent Defendant

[1] FORM Introduction to Answer of Incompetent Defendant

The defendant _____ [*name*], an incompetent person, by _____ [*name*], his/her _____ [guardian *or* guardian ad litem], for answer to the plaintiff's complaint herein, admits, denies, and alleges:

[2] Use of Form

The form of introduction in [1], *above*, is for use in the answer of an incompetent defendant [*see Civ. Code §§ 38-40* (contracts by incompetent persons)].

[3] Cross References

For alternative forms of introductions, see Ch. 108, *Captions and Introductions*

For a discussion of incompetent persons, see Ch. 280, *Guardianship and Conservatorship* , and Ch. 304, *Insane and Other Incompetent Persons*

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3-26 California Forms of Pleading and Practice--Annotated § 26.71

§ 26.71 Introduction to Answer of Executor, Administrator, or Other Personal Representative Defendant

[1] FORM Introduction to Answer of Executor, Administrator, or Other Personal Representative Defendant

Defendant _____ [*name*], as _____ [*specify, e.g.,* executor of the will of _____ (*name*) *or* administrator of the estate of _____ (*name*) *or* administrator with the will annexed of the estate of _____ (*name*) *or* special administrator of the estate of _____ (*name*)], deceased, [and individually,] in answer to plaintiff's complaint herein admits, denies, and alleges as follows:

[2] Use of Form

The form of introduction in [1], *above*, is for use in the answer of a defendant executor, administrator, or other personal administrator [*see Prob. Code § 58(a)*"personal administrator" defined). For additional forms for use by personal representatives, see Ch. 457, *Probate: Instructions to Personal Representative*].

[3] Cross References

For alternative forms of introductions, see Ch. 108, *Captions and Introductions*

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3-26 California Forms of Pleading and Practice--Annotated § 26.72

§ 26.72 Introduction to Answer of Assignee

[1] FORM Introduction to Answer of Assignee

In answer to plaintiff's complaint, defendant _____ [*name*], as assignee [for the benefit of the creditors] of _____ [*name*], admits, denies, and alleges as follows:

[2] Use of Form

The form of introduction in [1], *above*, is typical of those used in the answer of an assignee.

[3] Cross References

For additional forms used by assignees, *see* Ch. 60, *Assignments*

For alternative forms of introductions, see Ch. 108, *Captions and Introductions*

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3-26 California Forms of Pleading and Practice--Annotated § 26.73

§ 26.73 Introduction to Answer of Husband and Wife

[1] FORM Introduction to Answer of Husband and Wife

_____ [*name*], one of the defendants above-named, and defendant _____ [*name*], his wife/her husband, for answer to the complaint of the plaintiff herein, jointly allege, admit, and deny:

[2] Use of Form

The form of introduction in [1], *above*, is for use by a husband and wife sued jointly.

[3] Cross References

For alternative forms of introductions, see Ch. 108, *Captions and Introductions*

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3-26 California Forms of Pleading and Practice--Annotated § 26.74

§ 26.74 Introduction to Answer to Supplemental Complaint

[1] FORM Introduction to Answer to Supplemental Complaint

Defendant _____ [*name*], [appearing for himself/herself alone], in answer to the supplemental complaint on file herein, [admits, denies, and] alleges:

[2] Use of Form

The form of introduction in [1], *above*, is among those that may be used in an answer to a supplemental complaint [*see Code Civ. Proc. § 464* (supplemental pleadings)].

[3] Cross References

For forms for use in filing supplemental answers, see Ch. 21, *Amended and Supplemental Pleadings*

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3-26 California Forms of Pleading and Practice--Annotated § 26.75

§ 26.75 Introduction to Supplemental Answer

[1] FORM Introduction to Supplemental Answer

[*EITHER*]

Defendant, by way of supplemental answer filed with leave of court, alleges:

[*OR*]

Pursuant to leave of court heretofore granted, defendant files his/her supplemental answer as follows:

[*OR*]

Pursuant to stipulation of the parties hereto, and with leave of court, defendant files his/her supplemental answer and alleges:

[*OR*]

Defendant, after permission first obtained from the above-entitled court, pursuant to the provisions of *Section 464 of the Code of Civil Procedure*, files this supplemental answer, and alleges:

[*OR*]

Comes now the defendant in the above-entitled action, and by leave of court first had and obtained, files this, his/her supplemental answer, and alleges that since the filing of the answer the following facts in reference to the defenses stated and affecting the defenses have arisen:

[2] Use of Form

The alternative forms of introductions in [1], above, are among the introductions that may be used in supplemental answers.

[3] Cross References

For forms for use in filing supplemental answers, see Ch. 21, *Amended and Supplemental Pleadings*

For alternative forms of introductions, see Ch. 108, *Captions and Introductions*

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3-26 California Forms of Pleading and Practice--Annotated § 26.76

§ 26.76 Introduction to Answer to Cross Complaint

[1] FORM Introduction to Answer to Cross Complaint

[*EITHER*]

Plaintiff and cross defendant [_____ (*name*)] answers the cross complaint [herein] as follows:

[*OR*]

Comes now the plaintiff and cross defendant [_____ (*name*)] and, by way of answer to the cross complaint of [_____ (*name*)] on file herein, admits, denies, and alleges as follows:

[*OR*]

Cross defendant [_____ (*name*)] answers the cross complaint [of _____ (*name*)] herein as follows:

[*OR*]

Comes now cross defendant [_____ (*name*)] and, for answer to the cross complaint of cross complainant [_____ (*name*)] on file herein, admits, denies, and alleges:

[2] Use of Form

The alternative forms of introductions in [1], *above*, are examples of introductions that may be used in an answer to a

cross complaint [*see Code Civ. Proc. § 432.10* (party served with cross complaint is permitted to plead to cross complaint within 30 days in same manner as to original complaint)].

[3] Cross References

For forms of cross complaints, *see* Ch. 123, *Complaints and Cross Complaints*

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3-26 California Forms of Pleading and Practice--Annotated § 26.77

§ 26.77 Body of Answer: Controverting Matter and Defenses [Code Civ. Proc. § 431.30(b)(1)]

[1] FORM Body of Answer: Controverting Matter and Defenses [Code Civ. Proc. § 431.30(b)(1)]

.....
.....
.....

Defendant answers the complaint as follows:

ANSWER TO FIRST CAUSE OF ACTION

1. _____ [*Set forth in this and subsequently numbered paragraphs, if any, in the order in which they are alleged, a denial of each material allegation controverted*].

FIRST DEFENSE TO FIRST CAUSE OF ACTION

2. _____ [*Set forth in this and, if necessary, subsequently numbered paragraphs facts establishing defense*].

SECOND DEFENSE TO FIRST CAUSE OF ACTION

3. _____ [*Set forth in this and, if necessary, subsequently numbered paragraphs facts establishing defense*].

ANSWER TO SECOND CAUSE OF ACTION

4. _____ [*Set forth in this and subsequently numbered paragraphs, if any, in the order in which they are alleged, a denial of each material allegation*

controverted].

FIRST DEFENSE TO SECOND CAUSE OF ACTION

5. _____ [*Set forth in this and, if necessary, subsequently numbered paragraphs, facts establishing defense*].

WHEREFORE, defendant prays _____ [*state*].

[2] Use of Form

The skeletal form in [1], *above*, illustrates the format used to set forth answers and defenses to separate causes of action in a complaint [*see also* Instructions in body of form at § 26.60[1]].

Defenses, or affirmative defenses as they are more often referred to, must be separately stated, and the several defenses refer to the causes of action that they are intended to answer, in a manner by which they may be intelligibly distinguished [*Code Civ. Proc. § 431.30(g)*].

Each separately stated defense must be separately numbered [*Cal. Rules of Ct., Rule 2.111(1)*].

Common practice is to number paragraphs throughout the answer consecutively, without reusing paragraph numbers in different parts of the answer. For additional forms of headings to affirmative defenses, see *§§ 26.110 -26.112*.

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3-26 California Forms of Pleading and Practice--Annotated § 26.78

§ 26.78 Body of Answer: Responses to More Than One Cause of Action--General Examples [Code Civ. Proc. § 431.30(b)]

[1] FORM Body of Answer: Responses to More Than One Cause of Action--General Examples [Code Civ. Proc. § 431.30(b)]

[*When plaintiff's complaint has set out his or her claim in more than one cause of action or count, the body of the answer, immediately following the introduction, is generally subdivided as follows:*]

ANSWER TO FIRST [ALLEGED] _____ [CAUSE OF ACTION *or* COUNT]

1. _____ [*Denials, admissions, etc.*].

2. _____ [*As above*].

[*Defenses to the first cause of action or count are set out immediately following matter controverting the allegations of the first cause of action or count. For examples of the format of such defenses, see §§ 26.112, 26.113.*]

ANSWER TO SECOND [ALLEGED] _____ [CAUSE OF ACTION *or* COUNT]

3. _____ [*Denials, admissions, etc.*].

4. _____ [*As above*].

[*Defenses to second cause of action, as above.*]

[2] Use of Form

The skeletal form in [1], *above*, illustrates the division of an answer to a complaint with multiple causes of action or counts [*see also § 26.77*[2]].

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3-26 California Forms of Pleading and Practice--Annotated § 26.79

§ 26.79 Body of Answer: Responses to More Than One Cause of Action--Alternative Forms [Code Civ. Proc. § 431.30(b)]

[1] FORM Body of Answer: Responses to More Than One Cause of Action--Alternative Forms [Code Civ. Proc. § 431.30(b)]

[*As an alternative to the preceding form, some attorneys use an introductory statement for each of their responses to the several causes of action alleged in the complaint. When following this alternative, some draftsmen eliminate the general introduction to the answers, while others retain it.*]

[Defendant answers the complaint as follows:]

ANSWER TO FIRST [ALLEGED] _____ [CAUSE OF ACTION *or* COUNT]

Defendant answers the allegations of the [alleged] First _____ [Cause of Action *or* Count] of the complaint herein as follows:

1.

2.

[*Etc.*]

ANSWER TO SECOND [ALLEGED] _____ [CAUSE OF ACTION *or* COUNT]

Defendant answers the allegations of the [alleged] Second _____ [Cause of Action *or* Count] of the complaint herein as follows:

3.

4.

[*Etc.*]

[*Another alternative combines the heading and the introduction as follows:*]

The defendants, _____ [*name*] and _____ [*name*], answer the complaint on file herein and for answer to the First _____ [Cause of Action *or* Count] admit, deny, and allege as follows:

1.

2.

[*Etc.*]

As and for their answer to the Second _____ [Cause of Action *or* Count] of the complaint, defendants admit, deny, and allege as follows:

3.

4.

[*Etc.*]

[2] Use of Form

The skeletal form in [1], *above*, is another illustration of the format of the body of an answer to a complaint setting forth multiple causes of action [*see also § 26.77*[2]].

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3-26 California Forms of Pleading and Practice--Annotated § 26.80

§ 26.80 Body of Answer: Controverting Matter--Incorporation by Reference of Paragraphs Previously Alleged

[1] FORM Body of Answer: Controverting Matter--Incorporation by Reference of Paragraphs Previously Alleged

ANSWER TO _____ [*specify, e.g.,* THIRD] CAUSE OF ACTION

1. Defendant hereby refers to Paragraphs _____ [*number*] through _____ [*number*] of his/her _____ [*specify, e.g.,* Answer to First Cause of Action] and _____ [incorporates them herein *or* makes them a part hereof].

2. Defendant refers to Paragraphs _____ [*number*] and _____ [*number*] of his/her _____ [*specify, e.g.,* Answer to Second Cause of Action] and, by this reference, _____ [incorporates them herein *or* makes them a part hereof].

[2] Use of Form

The form in [1], *above*, illustrates the format for the body of an answer when previous paragraphs are incorporated by reference [*see also § 26.77*[2]].

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Volume 3: Alcoholic Beverage Licenses thru Answers-Chs. 18-29
Chapter 26 ANSWERS
PART V. FORMS
A. Form and Content

3-26 California Forms of Pleading and Practice--Annotated §§ 26.81-26.89

[Reserved]

§§ 26.81[Reserved]

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3-26 California Forms of Pleading and Practice--Annotated § 26.90

§ 26.90 General Denial [Code Civ. Proc. §§ 431.30(b)(1), (d), 431.40(a), (c)] With Proof of Service--Judicial Council Form PLD-050

[1] FORM General Denial [Code Civ. Proc. §§ 431.30(b)(1), (d), 431.40(a), (c)] With Proof of Service--Judicial Council Form PLD-050

Click here to view image.

[2] Source of Form

The form illustrated in [1], *above*, is the general denial with proof of service adopted by the Judicial Council for mandatory use in all courts whenever applicable [*see Cal. Rules of Ct., Rule 1.31*; *Bank of Shasta v. Boyd (1893) 99 Cal. 604, 606, 34 P. 337* (general denial of unverified complaint puts only material allegations of complaint in issue)]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

For a discussion of use of the other Judicial Council official forms of answer approved for optional use [*see, e.g.,* Cal. Judicial Council Form PLD-PI-003], see *§ 26.23*[1].

[3] Use of Form

The form in [1], *above*, may be used to deny generally the allegations of a complaint if (1) the complaint is unverified, or (2) whether or not the complaint is verified, the action is subject to *Code Civ. Proc. § 90 et seq.*, which apply to most limited civil cases [*see Code Civ. Proc. §§ 85, 91*; *see also Code Civ. Proc. § 431.30(b)(1)* (answer must contain general or specific denial of material allegations of complaint controverted by defendant)]. The form must be used, whether or not the complaint is verified, if the action seeks recovery of a sum, exclusive of interest, not exceeding $1,000 or involves property not exceeding $1,000 in value [*see Code Civ. Proc. §§ 431.30(d), 431.40(a), (c)*; *see also Code Civ. Proc. §§ 91, 92(b)*].

The form may not be used if the complaint is verified and involves a claim for more than $1,000 that has been assigned to a third party for collection, even if the action was filed as a limited civil case [*see Code Civ. Proc. §§ 431.30(d), 431.40*].

[4] Alleging Affirmative Defenses

Affirmative defenses may also be alleged along with a general denial [*see Code Civ. Proc. § 431.30(b)(2)*], in which case the box in item 2. must be checked and the affirmative defenses inserted in the space provided. For illustrations of formats for alleging affirmative defenses and sample allegations, see *§§ 26.110*-114. For other examples of affirmative defenses, see the specific chapters throughout this set relating to the causes of action or defenses being alleged. For a listing of affirmative defenses covered in other chapters, see the Table of Affirmative Defenses at the end of this chapter.

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3-26 California Forms of Pleading and Practice--Annotated § 26.91

§ 26.91 Body of Answer: Specific Denial of Plaintiff's Corporate Status

[1] FORM Body of Answer: Specific Denial of Plaintiff's Corporate Status

Defendant denies that the plaintiff was, or is, a corporation as alleged in Paragraph _____ of the complaint or at all.

[2] Use of Form

The form in [1], *above*, is a specific denial for use in an answer to a verified complaint [*see Code Civ. Proc. § 431.30(b)(1)* (required contents of answer), (d) (manner of pleading specific denials of material allegations of complaint, (f) (specificity of denial)]. It denies plaintiff's corporate status [*see Reinert v. Proud (1935) 8 Cal. App. 2d 169, 170-171, 47 P.2d 491* (degree of specificity required in specific denial)].

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3-26 California Forms of Pleading and Practice--Annotated § 26.92

§ 26.92 Body of Answer: Specific Denial of Plaintiff's Status as Executor, Administrator, or Other Personal Representative

[1] FORM Body of Answer: Specific Denial of Plaintiff's Status as Executor, Administrator, or Other Personal Representative

Defendant denies that the plaintiff is, or ever has been, an _____ [*specify, e.g.*, executor of the will of _____ (*name*) *or* administrator of the estate of _____ (*name*) *or* administrator with the will annexed of the estate of _____ (*name*) *or* special administrator of the estate of _____ (*name*)], deceased, as alleged in Paragraph _____ of the complaint or at all.

[2] Use of Form

The form in [1], *above*, is a specific denial of plaintiff's status as an executor, administrator, or other personal representative. It is for use in an answer. See also *§ 26.71*[2], [3] and § 26.91[2].

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3-26 California Forms of Pleading and Practice--Annotated § 26.93

§ 26.93 Body of Answer: Specific Denial by Reference to Specific Paragraph

[1] FORM Body of Answer: Specific Denial by Reference to Specific Paragraph

[*EITHER*]

Answering Paragraph _____ [*number*] of the complaint, defendant denies each and every allegation thereof.

[*OR*]

Defendant answers the complaint as follows:

Denies each and every allegation in Paragraph _____ [*number*] of the alleged _____ [*specify, e.g.,* First Cause of Action] [in the conjunctive as well as in the disjunctive].

[2] Use of Form

The form in [1], *above*, is a specific denial made by reference to a specific paragraph and is for use in an answer [*Code Civ. Proc. § 431.30(f)* (statement of denial by reference to specific paragraph or part of complaint); *see also Heusner v. Fleck (1958) 158 Cal. App. 2d 578, 581-582, 323 P.2d 155* ; *Edger v. Foster (1941) 48 Cal. App. 2d 580, 582-583, 120 P.2d 134* ; *Reinert v. Proud (1935) 8 Cal. App. 2d 169, 170-171, 47 P.2d 491* (denial by reference to specific paragraph is sufficient denial)].

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3-26 California Forms of Pleading and Practice--Annotated § 26.94

§ 26.94 Body of Answer: Specific Denial by Reference to Specific Paragraphs--Alternative Form

[1] FORM Body of Answer: Specific Denial by Reference to Specific Paragraphs--Alternative Form

[*EITHER*]

The defendant denies each and every allegation set forth in Paragraphs _____, _____, and _____ [*numbers*] of the complaint [herein].

[*OR*]

Defendant answers the complaint as follows:

Denies each and every, all and singular, generally and specifically, the allegations contained in Paragraphs _____ [*number*] and _____ [*number*] thereof.

[*OR*]

The defendant, answering the complaint of the plaintiff herein, denies each and every allegation contained in Paragraphs _____ [*number*] and _____ [*number*].

[2] Use of Form

The form in [1], *above*, gives examples of specific denials by reference to specific paragraphs for use in an answer [*Code Civ. Proc. § 431.30(f)*; *see also § 26.93*[2]].

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3-26 California Forms of Pleading and Practice--Annotated § 26.95

§ 26.95 Body of Answer: Specific Denial by Reference to Specific Paragraphs--On Information and Belief

[1] FORM Body of Answer: Specific Denial by Reference to Specific Paragraphs--On Information and Belief

[*EITHER*]

The defendant, answering the complaint herein, denies, according to his/her information and belief, each and every allegation in Paragraph(s) _____ [*number(s)*] thereof.

[*OR*]

Defendant denies on information and belief each and every allegation of Paragraph(s) _____ [*number(s)*] of the complaint herein.

[*OR*]

Defendant in answer to the complaint herein:

1. Denies, _____ [on *or* according to] his/her information and belief, each and every allegation of Paragraph(s) _____ [*number(s)*] thereof.

[2] Use of Form

The form in [1], *above*, contains specific denials according to information and belief for use in an answer [*see Code Civ. Proc. § 431.30(d), (f)*; *see also § 26.93*[2]]. For a form of denial for lack of information and belief, see *§ 26.96*.

[3] When Denial on Information and Belief (or Lack Thereof) Is Proper

Denials according to information and belief [*see Code Civ. Proc. § 431.30(d),(f)*] or for lack of information or belief [*see Code Civ. Proc. § 431.30(e), (f)*] are limited to situations in which the defendant is unable to admit or deny an allegation positively [*Dobbins v. Hardister (1966) 242 Cal. App. 2d 787, 791, 51 Cal. Rptr. 866]* . Accordingly, if the matter is within the defendant's actual knowledge, or if the defendant has the means of ascertaining whether or not it is true, a denial on information and belief or for lack of information or belief will be deemed sham and evasive and may be stricken out or disregarded [*Dobbins v. Hardister (1966) 242 Cal. App. 2d 787, 791, 51 Cal. Rptr. 866]* .

The same is true if the facts are presumptively within the defendant's knowledge [*Transworld Systems, Inc. v. Rogan (1989) 210 Cal. App. 3d 731, 733, 258 Cal. Rptr. 555* ; *Oliver v. Swiss Club Tell (1963) 222 Cal. App. 2d 528, 538, 35 Cal. Rptr. 324]* . This rule is frequently applied to matters of public record. Accordingly, a denial on information and belief, or for want of information or belief, of an alleged fact that may be ascertained from the inspection of a public record available to a defendant is insufficient to raise an issue, and such a denial constitutes an admission of the allegation of the complaint [*Oliver v. Swiss Club Tell (1963) 222 Cal. App. 2d 528, 539, 35 Cal. Rptr. 324* ; *see also Smith v. Fidelity & Deposit Co. (1933) 130 Cal. App. 45, 58, 19 P.2d 1018* (fact alleged in complaint that may be ascertained from inspection of public record is not put in issue by denial based on lack of information); *Curtin v. Salomon (1926) 80 Cal. App. 470, 474, 251 P. 237* (facts alleged in complaint that may be ascertained from public record are not put in issue by denial based on lack of information or denial based on information and belief)].

The rule precluding the use of nonpositive denials when matters are presumptively within the defendant's knowledge applies to corporations and unincorporated associations, as well as to natural persons [*Oliver v. Swiss Club Tell (1963) 222 Cal. App. 2d 528, 540, 35 Cal. Rptr. 324]* .

[4] Improper Form of Denial

An allegation that "defendant is informed and believes and therefore denies" has been held to mean nothing and to raise no issue of any sort [*Poe v. Francis (1933) 132 Cal. App. 330, 333, 22 P.2d 801]* .

[5] Cross References

For an alternative form of denial based on information and belief, see Ch. 20, *Allegations Commonly Used*

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3-26 California Forms of Pleading and Practice--Annotated § 26.96

§ 26.96 Body of Answer: Specific Denial by Reference to Specific Paragraphs--Lack of Information or Belief

[1] FORM Body of Answer: Specific Denial by Reference to Specific Paragraphs--Lack of Information or Belief

[*EITHER*]

Defendant has no information or belief sufficient to enable him/her to answer the allegations of Paragraph(s) _____ [*number(s)*] of the complaint herein, and placing his/her denial on that ground, denies each and every allegation thereof.

[*OR*]

For answer to the _____ [*specify, e.g.,* First Cause of Action] of the complaint herein, defendant has no information or belief sufficient to enable him/her to answer the allegations thereof, and, basing his/her denial on that ground, he/she denies each and every allegation thereof.

[2] Use of Form

The form of denial in [1], *above*, is based on lack of information or belief sufficient to enable the defendant to answer an allegation or part of the complaint [*see Code Civ. Proc. § 431.30(e), (f)*] and is for use in an answer [*see § 26.95*[2]-[4]]. There must be a lack of both information and belief to make the denial effective [*see Code Civ. Proc. § 431.30(e)*; *Vickery v. Valdez (1931) 113 Cal. App. 135, 141, 298 P. 151]* . Denial based on lack of information or belief sufficient to enable defendant to answer allegations of complaint is permissible only as to matters not presumably within defendant's knowledge. Then specific denial of each allegation as to such matters is not essential, even if the complaint is verified [*Jensen v. Dorr (1911) 159 Cal. 742, 747, 116 P. 553]* .

[3] Improper Form of Denial

An allegation in an answer that defendant has "not sufficient knowledge or information to form a belief" and a denial on that basis is insufficient to present an issue of fact [*Aronson & Co. v. Pearson (1926) 199 Cal. 295, 298, 249 P. 191* ; *see also Cockerell v. Title Ins. & Trust Co. (1954) 42 Cal. 2d 284, 287-288, 267 P.2d 16* (defective denial waived by parties treating answer as putting allegation of complaint in issue at trial)].

[4] Defendant Must Lack Presumptive Knowledge of Allegations Denied for Lack of Information or Belief

A denial based on lack of information or belief cannot be made of matters within the knowledge, or presumptively within the knowledge, of the defendant. For example, a defendant's status as a corporation, unincorporated association, or other entity is a matter, at least presumptively, within its own knowledge. Thus, whether a defendant is an unincorporated association, for example, as alleged in a complaint, cannot be denied based on lack of information or belief. The defendant has possession of its own records, an examination of which will disclose its status and thus enable it to answer the allegation definitely. Such a denial raises no issue and in effect admits the allegation that the defendant is an unincorporated association [*Oliver v. Swiss Club Tell (1963) 222 Cal. App. 2d 528, 540, 35 Cal. Rptr. 324]* . Similarly, a denial based on an allegation in answer to petition for writ of mandate that respondent has "no knowledge or information sufficient to enable it to answer" the allegation of complaint that petitioner was the owner of bonds that were issued by respondent was insufficient to present an issue on the subject of ownershi [*May v. Board of Directors (1949) 34 Cal. 2d 125, 127, 208 P.2d 661]* .

[5] Cross References

For an alternative form of denial based on lack of information or belief, *see* Ch. 20, *Allegations Commonly Used*

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3-26 California Forms of Pleading and Practice--Annotated § 26.97

§ 26.97 Body of Answer: General Denial by Reference to Cause of Action

[1] FORM Body of Answer: General Denial by Reference to Cause of Action

Defendant answers the complaint as follows:

ANSWER TO _____ [*specify, e.g.,* FIRST] CAUSE OF ACTION

[*EITHER*]

Denies each and every allegation therein contained.

[*OR*]

The defendant, in answer to the _____ [*specify, e.g.,* First] Cause of Action of the complaint herein, denies each and every allegation of Paragraphs _____ [*number*] through _____ [*number*] contained therein, and the whole thereof.

[2] Use of Form

The form in [1], *above*, is a general denial of an entire cause of action alleged in a complaint for use in an answer to a complaint asserting multiple causes of action [*see Code Civ. Proc. § 431.30(f)* (denials of allegations controverted may be stated by reference to specific paragraphs or parts of complaint)].

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3-26 California Forms of Pleading and Practice--Annotated § 26.98

§ 26.98 Body of Answer: Combined Denial by Reference to Cause of Action and Specific Denial

[1] FORM Body of Answer: Combined Denial by Reference to Cause of Action and Specific Denial

Answering Paragraph _____ [*number*] of the _____ [*specify, e.g.,* First] Cause of Action of plaintiff's complaint on file herein, this answering defendant denies each and every, all and singular, generally and specifically, the allegations therein contained, specifically denying that _____ [*set forth the material allegation denied, being careful to avoid a negative pregnant*].

[2] Use of Form

The form of denial in [1], above, for use in an answer is a combined form of both a general and a specific denial [*see also § 26.93*[2]]. For a form of general denial, see *§ 26.90*

[3] Negative Pregnant

A negative pregnant is a denial in the exact words of a statement that may be construed as a mere denial of the immaterial or qualifying elements of the statement rather than of its material parts [*see Janeway & Carpender v. Long Beach Co. (1922) 190 Cal. 150, 153, 211 P. 6* ; *see also § 26.17*[4]].

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3-26 California Forms of Pleading and Practice--Annotated § 26.99

§ 26.99 Body of Answer: Denial by Express Admission of Certain Allegations of Complaint and General Denial of All Other Allegations

[1] FORM Body of Answer: Denial by Express Admission of Certain Allegations of Complaint and General Denial of All Other Allegations

Defendant answers the complaint as follows:

1. Admits the allegation of Paragraph _____ [*number*] that at the times mentioned in the complaint, the defendant was and now is _____ [*specify, e.g.,* a domestic railroad corporation operating various lines of railroad in _____ (*state*), and elsewhere.]

2. Admits the allegation of Paragraph _____ [*number*] that on _____ [*date*], _____ [*specify, e.g.,* _____ (*name*), then and for sometime prior thereto in the employment of defendant as a conductor, met with an accident at or near _____ (*location*), and sustained injuries from which he died].

3. Denies each and every allegation of the complaint not hereinbefore expressly admitted.

[2] Use of Form

The formin [1], *above*, for use in an answer admits certain allegations of a complaint and generally denies the other allegations, and is referred to as a qualified general denial [*see Code Civ. Proc. § 431.30(f)* (denial of allegations controverted may be stated by express admission of certain allegations of complaint with a general denial of all allegations not so admitted)].

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3-26 California Forms of Pleading and Practice--Annotated § 26.100

§ 26.100 Body of Answer: Denial by Express Admission of Certain Allegations of Paragraph of Complaint With General Denial of All Other Allegations of Paragraph

[1] FORM Body of Answer: Denial by Express Admission of Certain Allegations of Paragraph of Complaint With General Denial of All Other Allegations of Paragraph

[*EITHER*]

Answering Paragraph _____ [*number*] of the _____ [*specify, e.g.,* First] Cause of Action of the complaint, defendant admits that _____ [*specify, e.g.,* it is a corporation, having a place of business in _____, California], and with this exception denies each and every matter, fact, and allegation contained therein, and each and every part thereof, both generally and specifically.

[*OR*]

The defendant denies each and every allegation set forth in Paragraphs _____ [*number*] and _____ [*number*] of the complaint, except that he/she admits _____ [*specify, e.g.,* he/she was the owner of a certain _____ (*make*) automobile at the time specified in the complaint].

[*OR*]

Defendant answers the complaint as follows:

1. Denies generally and specifically, conjunctively and disjunctively, each and every, all and singular, the allegations made and contained in Paragraph _____ [*number*], except that defendant admits _____ [*specify*].

[2] Use of Form

The form in [1], *above*, is for use in an answer and gives examples of ways to admit certain allegations of a paragraph and expressly to deny all other allegations in the paragraph. Denial by admission of some allegations of a specified paragraph of a complaint and denial of all other allegations of that paragraph is sufficient [*Code Civ. Proc. § 431.30(f)*; *Whiteside v. United Theatres (1951) 106 Cal. App. 2d 471, 473, 235 P.2d 261* ; *Ukhtomski v. Tioga Mutual Water Co. (1936) 12 Cal. App. 2d 726, 729-730, 55 P.2d 1251* ; *see also § 26.99*[2]].

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3-26 California Forms of Pleading and Practice--Annotated § 26.101

§ 26.101 Body of Answer: Controverting Allegations Combined With Denial by Reference to Specific Paragraph

[1] FORM Body of Answer: Controverting Allegations Combined With Denial by Reference to Specific Paragraph

Defendants answer the complaint as follows:

1. Deny generally and specifically, conjunctively and disjunctively, each and every, all and singular, the allegations contained in Paragraph _____ [*number*], and in this connection defendants affirmatively allege _____ [*specify*].

[2] Use of Form

The form in [1], *above*, is for use in an answer to deny specific allegations of a complaint and to allege affirmatively the true facts [*Code Civ. Proc. § 431.30(f)*; *see also § 26.93*[2]]]. Denial by affirmative allegation is the equivalent of direct denial [*Burris v. People's Ditch Co. (1894) 104 Cal. 248, 253, 37 P. 922* ; *Blume v. MacGregor (1944) 64 Cal. App. 2d 244, 253, 148 P.2d 656* ; *Elliott v. Bertsch (1943) 59 Cal. App. 2d 543, 546-547, 139 P.2d 332]* .

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[Reserved]

§§ 26.102[Reserved]

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3-26 California Forms of Pleading and Practice--Annotated § 26.110

§ 26.110 Body of Answer: Alternative Headings of Defenses and Introductions

[1] FORM Body of Answer: Alternative Headings of Defenses and Introductions

[*EITHER*]

_____ [*number, e.g.,* FIRST] DEFENSE

[*OR*]

_____ [*number, e.g.,* FIRST] AFFIRMATIVE DEFENSE

[*OR*]

AS A FIRST AND SEPARATE DEFENSE TO THE COMPLAINT, defendant alleges:

[*OR*]

AS A FURTHER AND SEPARATE DEFENSE TO THE COMPLAINT, defendant alleges:

[*OR*]

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

[*OR*]

AS A FURTHER AND SECOND SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

[*OR*]

AS A FURTHER, SEPARATE, AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON FILE HEREIN, defendant alleges:

[*OR*]

AS A SECOND, FURTHER, SEPARATE, AND AFFIRMATIVE DEFENSE TO THE COMPLAINT ON FILE HEREIN, defendant alleges:

[*OR*]

FOR A DISTINCT, SEPARATE, AND AFFIRMATIVE DEFENSE, defendants allege:

[*OR*]

FOR ANOTHER DISTINCT, SEPARATE, AND AFFIRMATIVE DEFENSE, defendants allege:

[*OR*]

As and for a FURTHER, SEPARATE, and FIRST AFFIRMATIVE DEFENSE to the [_____ (*specify, e.g.,* First) cause of action in the] complaint herein, defendants aver as follows:

[*OR*]

As and for a FURTHER, SEPARATE, and FIRST AFFIRMATIVE DEFENSE to the [_____ (*e.g.,* Second) Cause of Action in the] complaint herein, defendants aver as follows:

[*OR*]

For a _____ [*specify, e.g.,* first] defense, defendants allege:

[2] Use of Form

The form in [1], *above*, sets forth forms of headings, and headings that include introductions, that have been used in answers in California [*see also § 26.77*[2]].

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3-26 California Forms of Pleading and Practice--Annotated § 26.111

§ 26.111 Body of Answer: Defenses to Several Causes of Action or Counts

[1] FORM Body of Answer: Defenses to Several Causes of Action or Counts

[*EITHER*]

FIRST DEFENSE TO FIRST CAUSE OF ACTION

1. [*Allegations.*]

2. [*Allegations.*]

SECOND DEFENSE TO FIRST CAUSE OF ACTION

[*Allegations.*]

[*The defenses to subsequent causes of action will be designated, for example,* "FIRST DEFENSE TO SECOND CAUSE OF ACTION," "FIRST DEFENSE TO THIRD CAUSE OF ACTION," *etc.*]

[*OR*]

[*If all of defendant's affirmative defenses are intended to be raised against all of plaintiff's alleged causes of action or counts, the defenses may appear together, under headings, such as:*]

FIRST DEFENSE TO EACH AND EVERY ALLEGED CAUSE OF ACTION

[*OR*]

As and for a FURTHER, SEPARATE, and FIRST AFFIRMATIVE DEFENSE to the causes of action in the above complaint, defendants allege as follows: _____.

[2] Use of Form

The form in [1], *above*, illustrates a common procedure, in stating defenses in an answer to a complaint in which plaintiff's claims have been set forth in more than one count or cause of action, to separately state each defense to each count or cause of action immediately after the controverting matter for that count or cause of action [*see Code Civ. Proc. § 431.30(g)* (defenses must be separately stated and refer to causes of action that they are intended to answer); *Cal. Rules of Ct., Rule 2.111(1)* (separately stated defenses must be separately numbered)].

See also instructions in § 26.60 relating to numbering defenses in the body of the answer.

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3-26 California Forms of Pleading and Practice--Annotated § 26.112

§ 26.112 Body of Answer: Incorporation by Reference of Defenses Previously Stated

[1] FORM Body of Answer: Incorporation by Reference of Defenses Previously Stated

FIRST DEFENSE TO _____ [*specify, e.g.,* THIRD] _____ [CAUSE OF ACTION *or* COUNT]

Defendant refers to his/her _____ [*specify, e.g.,* Second] Defense to _____ [*specify, e.g.,* First Cause of Action] and incorporates the same herein as a separate and distinct and affirmative defense to plaintiff's alleged _____ [Third] _____ [Cause of Action *or* Count].

SECOND DEFENSE TO _____ [*specify, e.g.,* THIRD] _____ [CAUSE OF ACTION *or* COUNT]

Defendant refers to his/her _____ [*specify, e.g.,* First] Defense to _____ [*specify, e.g.,* Second Cause of Action] and incorporates it herein as a separate and distinct affirmative defense to plaintiff's alleged _____ [*specify, e.g.,* Third Cause of Action].

[2] Use of Form

The form in [1], *above*, is for use in an answer to incorporate by reference a defense already alleged in the answer to a prior count or cause of action [*see also § 26.111*[2]].

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3-26 California Forms of Pleading and Practice--Annotated § 26.113

§ 26.113 Body of Answer: Defense That Plaintiff Failed in Prior Action to Allege Related Cause of Action [Code Civ. Proc. § 426.10(c)] in Compulsory Cross Complaint [Code Civ. Proc. § 426.30]

[1] FORM Body of Answer: Defense That Plaintiff Failed in Prior Action to Allege Related Cause of Action [Code Civ. Proc. § 426.10(c)] in Compulsory Cross Complaint [Code Civ. Proc. § 426.30]

_____ [*specify, e.g.,* FIRST] DEFENSE

Plaintiff's action is barred for failure to have asserted it against this defendant in a prior action by this defendant against plaintiff herein, as follows:

1. On _____ [*date*], defendant filed an action against plaintiff in the _____ [*specify court*], entitled _____ [*name*], Plaintiff, vs. _____ [*name*], Defendant, Number _____ (hereinafter "the prior action") to _____ [*specify relief sought*] for _____ [*specify transaction or occurrence giving rise to cause of action*]. Judgment in the prior action was rendered for this defendant, as plaintiff, on _____ [*date*], and has since become final. [A true copy of the complaint and answer filed in the prior action and a certified copy of the judgment therein entered are attached hereto as Exhibits 1, 2, and 3, respectively, and made a part hereof.] In the prior action, plaintiff herein sought no affirmative relief against this defendant and filed no cross complaint. This Court is hereby requested to take judicial notice of the [attached papers and of the] court's records and file in the prior action.

2. As shown by plaintiff's complaint herein and the pleadings filed in the prior action, plaintiff's alleged cause of action against this defendant arose out of the same _____ [transaction *or* occurrence *or* series of transactions *or* series of occurrences] as the cause of action asserted by defendant herein against plaintiff in the prior action in that _____ [*specify*] and is, therefore, related to the prior action and should have been asserted against this defendant in that action.

3. By reason of plaintiff's failure to allege his/her related action by way of cross complaint in the prior action, plaintiff is

barred under the provisions of *Section 426.30(a) of the Code of Civil Procedure* from asserting the related cause of action either by the complaint herein or in any other action against this defendant.

WHEREFORE, defendant prays that plaintiff take nothing by his/her complaint, that judgment be rendered for defendant, that defendant recover his/her costs herein incurred, and for such other and further relief as the court may deem proper.

[2] Use of Form

The form in [1], *above*, is for use as a defense to an action that should have been pleaded as a cross complaint in a former action [*see* Code Civ. Proc. §§ 426.30(b), 426.40-426.60 (exceptions to compulsory cross complaint requirements)]. Except as otherwise provided by statute, if a party against whom a complaint has been filed and served fails to allege in a cross complaint any related cause of action which (at the time of serving his or her answer to the complaint) he or she has against the plaintiff, that party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded [*Code Civ. Proc. § 426.30(a)*]. For alternative forms of prayers in answers, see *§ 26.120*.

A California court may take judicial notice of records of the following [*Evid. Code § 452(d)*]:

- Any court of California, or
- Any court of record of United States or of any state of United States.

A California court must take judicial notice of any matter specified in *Evid. Code § 452* if party does the following [*Evid. Code § 453*]:

- Requests it,
- Gives each adverse party sufficient notice of the request, through pleadings or otherwise, to enable the adverse party to prepare to meet request, and
- Furnishes court with sufficient information to enable it to take judicial notice of the matter.

[3] "Related Cause of Action" Defined

The term "related cause of action" means a cause of action that arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action that the plaintiff alleges in his or her complaint [*Code Civ. Proc. § 426.10(c)*].

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3-26 California Forms of Pleading and Practice--Annotated § 26.114

§ 26.114 Body of Answer: Defense of Payment; Defendant's Right to Set Off Coexisting Cross Demand [Code Civ. Proc. § 431.70]

[1] FORM Body of Answer: Defense of Payment; Defendant's Right to Set Off Coexisting Cross Demand [Code Civ. Proc. § 431.70]

_____ [*specify, e.g.,* FIRST] DEFENSE

1. On or about _____ [*date*], plaintiff became indebted to defendant in the sum of $_____. This indebtedness arose by virtue of _____ [*state facts constituting grounds for setoff, e.g.,* goods and services rendered by defendant at the special request of plaintiff].

2. Neither the whole nor any part of the above sum has been paid [except the sum of $_____] and there is now due and unpaid from defendant to plaintiff the sum of $_____ together with interest thereon at the rate of _____ percent per annum from _____ [*date*].

WHEREFORE, defendant prays that the sum of $_____ [*amount of defendant's claim against plaintiff*] be set off against any amount awarded to plaintiff in this action, that defendant be awarded his/her costs of suit herein, and for such other and further relief as the court may deem proper.

[2] Use of Form

The form of answer and prayer in [1], *above*, is for use by the defendant in his or her answer to a complaint for money to claim the amount of a coexisting cross demand for money which the defendant has against the plaintiff as a setoff against any amount awarded to plaintiff [*see Code Civ. Proc. § 431.70*; *see also § 26.17*[10]]. Claims of setoff may be raised by way of affirmative defense as well as by cross complaint [*American National Bank v. Stanfill (1988) 205 Cal. App. 3d 1089, 1097, 252 Cal. Rptr. 861]* , thus, especially if defendant's claim exceeds plaintiff's counsel may wish file a cross complaint [*see* [5], *below*].

The answer sets up the cross demand in the form of a cause of action in a common count and prays that the amount of defendant's claim be set off against any amount awarded plaintiff in the action. For alternative forms of prayers in answers, see *§ 26.120*.

[3] Pleading Cross Demand

Code Civ. Proc. § 431.70 actually provides that the cross demand is a defense of payment. A predecessor statute provided simply that when cross demands existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands were deemed compensated, so far as they equaled each other, and neither could be deprived of the benefit thereof by the assignment or death of the other [former *Code Civ. Proc. § 440*]. Under the former statute, it had been urged that it is sufficient to show the compensation of one demand by the other simply under a denial or plea of payment in the answer [*see Bidart Bros v. Elmo Farming Co. (1973) 35 Cal. App. 3d 248, 259, 110 Cal. Rptr. 819]* . Nevertheless, the court in *Bidart* assumed, without deciding, that a setoff needs to be affirmatively alleged and held that the trial court's allowance of an amendment to the answer after the close of trial to conform to proof to plead the defense did not constitute an abuse of discretion.

Another court has subsequently agreed with the statement that setoffs must generally be affirmatively pleaded [*Interstate Group Administrators, Inc. v. Cravens, Dargan & Co. (1985) 174 Cal. App. 3d 700, 706, 220 Cal. Rptr. 250]* . Nevertheless, the court held the rule did not apply to actions on common counts. The common count is a general pleading that seeks recovery of money without specifying the nature of the claim, and, because of its uninformative nature, the typical answer, a general denial, is sufficient to raise almost any kind of defense, including some that ordinarily require special pleading [*Interstate Group Administrators, Inc. v. Cravens, Dargan & Co. (1985) 174 Cal. App. 3d 700, 706, 220 Cal. Rptr. 250]* . Because of the scarcity of case law on the issue, it is recommended that, except when the plaintiff sues on a common count and the defendant files a general denial, the claim of setoff be alleged in the answer as an affirmative defense.

[4] Mutuality Required

To qualify as "cross demands" under *Code Civ. Proc. § 431.70*, the claims must be mutual, that is, they must be due from the same person to the same person; the two parties must be mutually debtor and creditor to each other [*Birman v. Loeb (1998) 64 Cal. App. 4th 502, 518-520, 75 Cal. Rptr. 2d 294* ; *Carnation Co. v. Olivet Egg Ranch (1986) 189 Cal. App. 3d 809, 819-820, 229 Cal. Rptr. 261]* . Consequently, in a proceeding by a former wife for execution on a judgment for arrearage in alimony and child support, the defendant could not offset against due child support any of the plaintiff's indebtedness to him that resulted from the unprofitable operation of an apartment house that was co-owned by the parties as the result of the disposition of community property in the divorce action. Child support is an obligation owing to the child rather than to the mother [*Williams v. Williams (1970) 8 Cal. App. 3d 636, 639-640, 87 Cal. Rptr. 754* (involving former statutes)].

Also, to be mutual, the cross demands must be owing from the one person to the other in the same capacity. Hence, the defendant in *Williams* could not offset the indebtedness owed him for the unprofitable operation of the apartment house against the alimony owed because alimony is not an ordinary debt but a marital duty of the husband to support his wife [*Williams v. Williams (1970) 8 Cal. App. 3d 636, 639, 87 Cal. Rptr. 754* (involving former statutes); *see also Carnation Co. v. Olivet Egg Ranch (1986) 189 Cal. App. 3d 809, 820, 229 Cal. Rptr. 261* (cross demands must be owing from one person to the other in the same capacity)]. By the same token, a partnership obligation or claim may not be set off against the personal obligation or claim of one of the partners [*Carnation Co. v. Olivet Egg Ranch (1986) 189 Cal. App. 3d 809, 819-820, 229 Cal. Rptr. 261]* .

[5] Relief Available

Code Civ. Proc. § 431.70 further provides that the relief accorded a defendant may not exceed the value of the relief granted to the other party if the demand is otherwise barred by the statute of limitations [*Code Civ. Proc. § 431.70*].

While the statute is clear as far as it goes, it is not clear as to how the defendant is to claim the excess if he or she prevails on the cross demand, the amount is in excess of that sought by plaintiff, and the cross demand is not barred by the statute of limitations. Because affirmative relief may not be claimed in the answer [*see Code Civ. Proc. § 431.30(c)*], it would appear that if defendant's cross demand is not barred by the statute of limitations and its amount exceeds or might exceed the amount awarded to plaintiff, defendant should plead the cross demand in a cross complaint in addition to alleging it as an affirmative defense in the answer [*see Code Civ. Proc. § 428.80* (abolishing counterclaims and requiring that any claim formerly asserted by counterclaim be asserted by a cross complaint)].

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[Reserved]

§§ 26.115[Reserved]

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3-26 California Forms of Pleading and Practice--Annotated § 26.120

§ 26.120 Prayers

[1] FORM Prayers

[*EITHER*]

WHEREFORE, defendant prays that plaintiff take nothing by his/her _____ [action *or* complaint herein]; that defendant _____ [be awarded *or* have judgment for] his/her costs of suit; and for such other and further relief as the court may deem proper.

[*OR*]

WHEREFORE, this answering defendant prays that plaintiff take nothing by reason of his/her complaint; that this defendant go hence with his/her costs of suit incurred; and for all other proper relief.

[*OR*]

WHEREFORE, this answering defendant prays that plaintiff take nothing by reason of his/her complaint; that this defendant go hence with his/her costs of suit incurred; and for such other and further relief as to the court seems just.

[*OR*]

WHEREFORE, defendants pray:

1. That plaintiff be granted no relief in this action;

2. For costs herein incurred; and

3. For such other and further relief as the court may deem proper.

[*OR*]

WHEREFORE, defendants pray that plaintiff take nothing by his/her complaint or any of his/her causes of action therein alleged, that defendants have judgment against plaintiff and recover their costs of suit herein incurred, and for such other relief as the court may deem proper.

[2] Use of Form

Although *Code Civ. Proc. § 431.30* does not require that the answer include a prayer, the normal practice is to include one. The form in [1], *above*, illustrates forms of prayer that have been used in answers to complaints. For additional forms of prayers, see *§§ 26.113, 26.114*

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3-26 California Forms of Pleading and Practice--Annotated § 26.121

§ 26.121 Verification [Code Civ. Proc. §§ 446, 2015.5] by Attorney When Defendant is Absent From County

[1] FORM Verification [Code Civ. Proc. §§ 446, 2015.5] by Attorney When Defendant is Absent From County

VERIFICATION

I, _____ [*name*], declare:

I am the attorney of record for the defendant herein. My office is in the [City and] County of _____; defendant is _____ [absent from the (city and) county *or* unable to verify the answer for the reason that _____ (*specify*)] and for that reason I make this verification.

[*EITHER*]

I have read the foregoing answer and know the contents thereof. I am informed and believe the matters therein to be true and on that ground I allege that the matters stated therein are true.

[*OR*]

I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters I believe it to be true.

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____.

_____ [*signature*]
Attorney for Defendant

[2] Use of Form

The form of verification in [1], *above*, is for use by an attorney to verify the answer on behalf of his or her client who is absent from the county where the attorney has his or her office or is otherwise unable to verify the answer, or when the attorney has personal knowledge of the facts [*see Code Civ. Proc. § 446* (who may verify pleadings); *Code Civ. Proc. § 2015.5* (declaration under penalty of perjury executed in California in lieu of affidavit); *see also § 26.19*]. A pleading may stand it is verified by an attorney as within his or her own knowledge and also on information and belief but does not state the reason it was not verified by the party [*Frio v. Superior Court (1988) 203 Cal. App. 3d 1480, 1497-1498, 250 Cal. Rptr. 819]* . For a form of verification by a defendant, see *§ 26.60*.

Verification of an answer in most limited civil cases is not required, even if the complaint or cross complaint is verified [*Code Civ. Proc. § 92(b)*].

Matters alleged on information and belief do not serve to establish facts, because an affidavit, to be used as evidence, must be positive, direct, and not based on hearsay [*Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 204, 151 Cal. Rptr. 721]* .

[3] Cross Reference

For alternative forms of verifications, *see* Ch. 572, *Verification*

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[Reserved]

§§ 26.122[Reserved]

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3-26 California Forms of Pleading and Practice--Annotated § 26.130

§ 26.130 Stipulation That Answer on File May Be Deemed to Be Answer of Another Defendant

[1] FORM Stipulation That Answer on File May Be Deemed to Be Answer of Another Defendant

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	STIPULATION
Defendant(s).	)	
	)	
	)	

_____

IT IS HEREBY STIPULATED by and between the parties to the above-entitled action, through their respective counsel, that the Answer filed therein on behalf of _____ [*name*] may be deemed to be also the answer of _____ [*name*], one of the defendants named therein.
Dated: _____.

_____ [*signature*]
Attorney for Plaintiff

_____ [*signature*]
Attorney for Defendant
_____ [*name*]
_____ [*signature*]
Attorney for Defendant
_____ [*name*]

[2] Use of Form

The stipulation by the parties through their attorneys in [1], *above*, may be used to have the answer filed by one defendant deemed to be also the answer of another defendant [*see Code Civ. Proc. § 283(1)* (authority of attorney to bind client)].

[3] Cross Reference

For discussion and additional forms of stipulations, see Ch. 533, *Stipulations*

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3-26 California Forms of Pleading and Practice--Annotated § 26.131

§ 26.131 Stipulation Allowing Answer on File to Be Answer of Answer to Amended Complaint

[1] FORM Stipulation Allowing Answer on File to Be Answer of Answer to Amended Complaint

[*Caption. See § 26.130[1].*]

IT IS HEREBY STIPULATED by and between plaintiff and defendant, by and through their respective counsel, that the Answer to Complaint previously filed in the above-entitled action on behalf of defendant may stand as his/her/its answer to the _____ [*number*] amended complaint filed by the plaintiff, and that any allegations of the _____ [*number*] amended complaint not contained in the original complaint shall be deemed denied by defendant.
Dated: _____.

_____ [*signature*]
Attorney for Plaintiff
_____ [*signature*]
Attorney for Defendant

[2] Use of Form

The stipulation by the parties through their counsel in [1], *above*, is for use to have the answer to the original complaint stand as the answer to the amended complaint [*see Code Civ. Proc. § 283(1)* (authority of attorney to bind client)].

[3] Cross References

For forms for use in amending pleadings, *see* Ch. 21, *Amended and Supplemental Pleadings*

For discussion and additional forms of stipulations, see Ch. 533, *Stipulations*

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3-26 California Forms of Pleading and Practice--Annotated § 26.132

§ 26.132 Stipulation Extending Time in Which Defendant May Plead or Make Motion and Order Thereon

[1] FORM Stipulation Extending Time in Which Defendant May Plead or Make Motion and Order Thereon

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	STIPULATION AND ORDER
Defendant(s).	)	
	)	
	)	

IT IS HEREBY STIPULATED by and between the parties hereto through their respective undersigned attorneys that the defendant shall have to and including _____ [*date*], to plead or make any motion in the above-entitled action.
Dated: _____.

_____ [*signature*]
Attorney for Plaintiff

_____ [*signature*]
Attorney for Defendant

ORDER

It is so ordered.
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The stipulation by the parties through their counsel in [1], *above*, is for use to extend the time in which the defendant may plead or make any motion [*see Code Civ. Proc. § 283(1)* (authority of attorney to bind client); *Code Civ. Proc. §§ 1054, 1054.1* (extension of time to plead; extension of time when attorney is member of Legislature)]. The order may be appended to the stipulation, as in the form in [1], *above* [*see Code Civ. Proc. § 1003* (orders generally)]. If a separate formal order is required, § 26.133[1] may be used.

The local rules of any court participating in the Trial Court Delay Reduction Act program (*see Gov. Code §§ 68600 et seq.*) may impose limitations on extensions of time and should be checked if counsel is unfamiliar with them. See the discussion at *§ 26.10*[2].

[3] Cross References

For discussion, a procedural checklist, and alternative forms for use in securing an extension of time, see Ch. 524, *Shortening and Extension of Time*

For discussion and additional forms of stipulations, see Ch. 533, *Stipulations*

For points and authorities relating to extensions of time, see California Points and Authorities, Ch. 212, *Shortening and Extension of Time* (Matthew Bender)

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3-26 California Forms of Pleading and Practice--Annotated § 26.133

§ 26.133 Order Extending Time for Answer or Demurrer

[1] FORM Order Extending Time for Answer or Demurrer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant(s).	)	
	)	
	)	

Good cause appearing therefor;

IT IS HEREBY ORDERED that the defendant may have to and including _____ [*date*], within which to answer, demur, or otherwise plead to the complaint on file herein.
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

The form in [1], *above*, is for use as an order extending the time in which a defendant is required to answer, demur, or otherwise plead to a complaint. Such an extension is not to exceed 30 days without the consent of the adverse party [*see Code Civ. Proc. §§ 1003, 1054*; *see also § 26.132*[2], [3]].

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[Reserved]

§§ 26.134[Reserved]

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3-VI California Forms of Pleading and Practice--Annotated Scope

Scope

PART VI. TABLE OF AFFIRMATIVE DEFENSE FORMS

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3-VI California Forms of Pleading and Practice--Annotated § 26.150

§ 26.150 Explanation of Table

This Table of Affirmative Defense Forms is a quick reference for finding forms of affirmative defenses throughout California Forms of Pleading and Practice. Where appropriate, the table includes cross references to primary authority related to the affirmative defense.

CAUTION:

This table is not intended to comprise an exhaustive list of all affirmative defenses available in California civil actions. If a particular topic being researched is not found in this table, review other chapters in California Forms of Pleading and Practice and California primary law sources.

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3-VI California Forms of Pleading and Practice--Annotated § 26.150A

§ 26.150A General Forms

[1] Format and Commonly Used Language

- Format for answers. *Ch. 26, Answers, § 26.60 et seq.*; *see also Code Civ. Proc. § 431.30*; *Cal. Rules of Ct., Rule 2.100 et seq.*

- Alternative headings of defenses and introductions. *Ch. 26, Answers, § 26.110*; *see also Code Civ. Proc. § 431.30*; *Cal. Rules of Ct., Rule 2.100 et seq.*

- Introduction to affirmative defense. *Ch. 108, Captions and Introductions, §§ 108.189, 108.190*; *see also Code Civ. Proc. § 431.30*; *Cal. Rules of Ct., Rule 2.100 et seq.*

- Defenses to several causes of action or counts. *Ch. 26, Answers, § 26.111*; *see also Code Civ. Proc. § 431.30(g)*; Cal. Rules of Ct., Rule 2.1111(1)

- Incorporation by reference of defenses previously stated. *Ch. 26, Answers, § 26.112*; *see also Code Civ. Proc. § 431.30(g)*; Cal. Rules of Ct., Rule 2.1111(1)

[2] Action Barred by Failure to Raise in Prior Action

- Defense that plaintiff failed in prior action to allege related cause of action in compulsory cross complaint. *Ch. 26, Answers, § 26.113*; *see also Code Civ. Proc. §§ 426.10(c), 426.30*

[3] Right to Set Off

- Defendant's right to set off coexisting cross demand under defense of payment. *Ch. 26, Answers, § 26.114*; *see also Code Civ. Proc. § 431.70*

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3-VI California Forms of Pleading and Practice--Annotated § 26.151

§ 26.151 Abatement

[1] Lack of Legal Capacity to Sue

- Corporate plaintiff's powers suspended or forfeited for failure to comply with tax statutes. *Ch. 3, Abatement of Actions, § 3.256*; *see also Rev. & Tax Code §§ 23301, 23301.5, 23775*

- Failure of plaintiff transacting business under fictitious name to have complied with fictitious name statute. *Ch. 3, Abatement of Actions, § 3.253*; *see also Bus. & Prof. Code § 17918*

- Foreign corporation suing on intrastate business without having obtained certificate of qualification. *Ch. 3, Abatement of Actions, § 3.257*; *see also Corp. Code § 2203(c)*

- Foreign limited liability company engaging in intrastate business in California without having registered with Secretary of State. *Ch. 3, Abatement of Actions, § 3.259*; *see also Corp. Code § 17456*

- Limited liability company plaintiff's powers suspended or forfeited for failure to comply with tax statutes. *Ch. 3, Abatement of Actions, § 3.258*; *see also Rev. & Tax Code §§ 23301, 23301.5, 23305.5*

- Minor plaintiff not appearing by guardian. *Ch. 3, Abatement of Actions, § 3.254*; *see also Fam. Code § 6601*; *Code Civ. Proc. § 372(a)*

[2] Misjoinder of Parties

- Misjoinder of party defendant. *Ch. 3, Abatement of Actions, § 3.307*; *see also Code Civ. Proc. § 379*

- Misjoinder of party plaintiff. *Ch. 3, Abatement of Actions, § 3.305*; *see also Code Civ. Proc. § 378*

[3] Nonjoinder of Parties

- Nonjoinder of party defendant. *Ch. 3, Abatement of Actions, § 3.303*; *see also Code Civ. Proc. §§*

379, 389

- Nonjoinder of party plaintiff. Ch. 3, *Abatement of Actions*, § 3.300; *see also Code Civ. Proc. §§ 378, 389*

[4] Pending Actions

- Another action pending. *Ch. 3, Abatement of Actions, § 3.282*; *see also Code Civ. Proc. § 430.10(c)*

[5] Premature Actions

- Failure to state cause of action. *Ch. 3, Abatement of Actions, § 3.321*; *see also Code Civ. Proc. § 430.10(e)*

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3-VI California Forms of Pleading and Practice--Annotated § 26.152

§ 26.152 Abuse of Process

- Absolute privilege for publication made in course of judicial proceedings. *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.225*; *see also Code Civ. Proc. § 47(b)*

- Malice absent when defendant acted on advice of counsel. *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.226*; *see also Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 472 n.7, 72 Cal. Rptr. 344, 446 P.2d 152*

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§ 26.153 Accord and Satisfaction

- Oral accord. *Ch. 6, Accord and Satisfaction, § 6.40*; *see also Civ. Code §§ 1521-1523*

- Written accord. *Ch. 6, Accord and Satisfaction, § 6.41*; *see also Civ. Code §§ 1521-1523*

- Written accord by check. *Ch. 6, Accord and Satisfaction, § 6.42*; *see also Civ. Code §§ 1521-1523, 1526(a)*; *Com. Code § 3311*

- Accord and satisfaction of dispute under a life insurance policy. *Ch. 6, Accord and Satisfaction, § 6.43*; *see also Civ. Code §§ 1521-1523*

- Accord by substitution of payment of shares of stock for money debt. *Ch. 6, Accord and Satisfaction, § 6.44*; *see also Civ. Code §§ 1521-1523*

- Accord by substitution of conveyance of property for money owed. *Ch. 6, Accord and Satisfaction, § 6.45*; *see also Civ. Code §§ 1521-1523*

- Part performance of obligation as satisfaction by acceptance in writing. *Ch. 6, Accord and Satisfaction, § 6.46*; *see also Civ. Code § 1524*

- Part performance of obligation as satisfaction pursuant to written agreement. *Ch. 6, Accord and Satisfaction, § 6.47*; *see also Civ. Code § 1524*

- Action for accounting. See *§ 26.155, below*

- Promissory note. See *§ 26.256[3], below*

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§ 26.154 Accountant Malpractice

- Accountant and plaintiff not in privity of contract. *Ch. 462, Public Accountants, § 462.53*; *see also Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 405-406, 11 Cal. Rptr. 2d 51, 834 P.2d 745* ; *Mariani v. Price Waterhouse (1999) 70 Cal. App. 4th 685, 701, 82 Cal. Rptr. 2d 671*

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§ 26.155 Accounting, Action for

- Accord and satisfaction. *Ch. 7, Accounting, Action for, § 7.78*; *see also Civ. Code §§ 1521-1526*

- Account rendered. *Ch. 7, Accounting, Action for, § 7.77*; *see also Guy Coburn, Inc. v. Tiffany P., Inc. (1940) 37 Cal. App. 2d 410, 414, 99 P.2d 569*

- Account stated. *Ch. 7, Accounting, Action for, § 7.76*; *see also Kinley v. Thelen (1910) 158 Cal. 175, 182-183, 110 P. 513* .

- Laches. *Ch. 7, Accounting, Action for, § 7.75*; *see also Bell v. Hudson (1887) 73 Cal. 285, 288-290, 14 P. 791* ; *Conti v. Board of Civil Service Commissioners (1969) 1 Cal. 3d 351, 362, 82 Cal. Rptr. 337, 461 P.2d 617*

- Partnership accounting, action for. See *§ 26.261[3], below*

- Statute of limitations. *Ch. 7, Accounting, Action for, § 7.74*; *see also Code Civ. Proc. §§ 312-365*

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§ 26.156 Act of God

- Airplane crash, weather causing. *Ch. 10, Act of God, § 10.41*; Ch. 16, *Airplanes and Airports*, § 16.76; *see also Civ. Code § 1511(2)*

- Building contract, performance of prevented. *Ch. 10, Act of God, § 10.42*; *see also Civ. Code § 1511(2)*

- Irresistible, superhuman cause. *Ch. 10, Act of God, § 10.40*; *see also Civ. Code § 1511(2)*

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§ 26.157 Account Stated

- Accounting, account stated is defense to action for. *Ch. 7, Accounting, Action for, § 7.76*; *see also Kinley v. Thelen (1910) 158 Cal. 175, 182-183, 110 P. 513*

- Breach of contract, account stated is defense to action based on. *Ch. 8, Accounts Stated and Open Accounts, § 8.46*; *see also Trafton v. Youngblood (1968) 69 Cal. 2d 17, 29-30, 69 Cal. Rptr. 568, 442 P.2d 648* .

- Fraud, as defense to action based on account stated. *Ch. 8, Accounts Stated and Open Accounts, § 8.44*; *see also Civ. Code § 1572*

- Mutual mistake of fact, as defense to action based on account stated. *Ch. 8, Accounts Stated and Open Accounts, § 8.45*; *see also Civ. Code § 1577*

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§ 26.158 Adjoining Landowners

- Encroachment, action for permanent injunction to compel removal of; defense based on doctrine of balancing conveniences. *Ch. 11, Adjoining Landowners, § 11.72*; *see also Ukhtomski v. Tioga Mutual Water Co. (1936) 12 Cal. App. 2d 726, 728-729, 55 P.2d 1251*

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§ 26.159 Adverse Possession

- Boundary, action to establish. See *§ 26.183[1], below*

- Statute of limitations barring action for recovery of real property. *Ch. 13, Adverse Possession, § 13.42*; *see also Code Civ. Proc. § 318*

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§ 26.160 Advertising

[1] Action Based on Misrepresentation

- Defense that advertisement was mere "puffing." *Ch. 14, Advertising, § 14.68*; *see also Civ. Code §§ 1709, 1710*

[2] Action to Compel Compliance With Advertising Sign Ordinance

- Enforcement of ordinance constitutes taking of private property without compensation or due process of law. *Ch. 14, Advertising, § 14.71*; *see also U.S. Const., amend. XIV*; *Cal. Const., art. I, §§ 7, 19*

- Ordinance, as applied to defendant, makes arbitrary classification in violation of equal protection guarantee. *Ch. 14, Advertising, § 14.70*; *see also U.S. Const., amend. XIV*; *Cal. Const., art. I, § 7*

- Ordinance impermissibly infringes on protected speech. *Ch. 14, Advertising, § 14.69*; *see also U.S. Const., amend. I*; *Cal. Const., art. I, § 2*

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§ 26.161 Airplanes

[1] In General

- Act of God causing damages. *Ch. 10, Act of God, § 10.41*; Ch. 16, *Airplanes and Airports,* § 16.76; *see also Civ. Code § 1511(2)*

- Assumption of risk by plaintiff. *Ch. 16, Airplanes and Airports, § 16.75*; *see also Vierra v. Fifth Avenue Rental Service (1963) 60 Cal. 2d 266, 271, 32 Cal. Rptr. 193, 383 P.2d 777* ; *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 829, 119 Cal. Rptr. 858, 532 P.2d 1226*

- Control tower operator, negligence of. *Ch. 16, Airplanes and Airports, § 16.74*; *see also United States v. Douglas Aircraft Co. (9th Cir. 1948) 169 F.2d 755, 758*

- Pilot, negligence of. *Ch. 16, Airplanes and Airports, § 16.74*; *see also United States v. Douglas Aircraft Co. (9th Cir. 1948) 169 F.2d 755, 758*

- Pilot was negligent and was plaintiff's decedent in action for wrongful death. *Ch. 16, Airplanes and Airports, § 16.72*; *see also Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226*

- Plaintiff passenger misadvised and interfered with pilot. *Ch. 16, Airplanes and Airports, § 16.73*; *see also Doyle v. Hamren (1966) 246 Cal. App. 2d 733, 737-738, 55 Cal. Rptr. 84*

- Plaintiff was pilot. *Ch. 16, Airplanes and Airports, § 16.71*

- Unavoidable accident. *Ch. 16, Airplanes and Airports, § 16.77*

[2] Bailed Plane, Negligence Action for Loss of

- Bailment for plaintiff's benefit and release from liability. *Ch. 16, Airplanes and Airports, § 16.81*;

see also Continental Mfg. Corp. v. Underwriters at Lloyds London (1960) 185 Cal. App. 2d 545, 550, 555, 8 Cal. Rptr. 276

- Gratuitous bailee, exercise of sufficient care by. *Ch. 16, Airplanes and Airports, § 16.80*; *see also Civ. Code § 1846*

- Plaintiff was negligent in furnishing defective, improperly equipped plane. *Ch. 16, Airplanes and Airports, § 16.79*; *see, e.g., North American Aviation v. Hughes (9th Cir. 1957) 247 F.2d 517, 521*

- Plaintiff was negligent in permitting decedent to take plane. *Ch. 16, Airplanes and Airports, § 16.78*; *see, e.g., Pignet v. City of Santa Monica (1938) 29 Cal. App. 2d 286, 287, 84 P.2d 166*

[3] International Air Travel

- General Warsaw Convention limitation on liability. *Ch. 16, Airplanes and Airports, § 16.82*; *see also* Warren v. Flying Tiger Line, Inc. (9th Cir. [Cal] 1965) *352 F.2d 494*

- Limitation of liability by baggage check under Warsaw Convention. *Ch. 16, Airplanes and Airports, § 16.83*; *see also 49 U.S.C.S. § 40105*

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§ 26.162 Alcoholic Beverages

- Intoxicated persons. See *§ 26.233, below*

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§ 26.163 Animals

[1] Assumption of Risk

- Plaintiff invited injury by caged animal. *Ch. 23, Animals: Civil Liability, § 23.161*; *see also Knight v. Jewett (1992) 3 Cal. 4th 296, 315, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 119 Cal. Rptr. 858, 532 P.2d 1226*

- Plaintiff unskillfully rode horse that he or she knew to be dangerous. *Ch. 23, Animals: Civil Liability, § 23.162*; *see also Knight v. Jewett (1992) 3 Cal. 4th 296, 315, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 119 Cal. Rptr. 858, 532 P.2d 1226*

- Plaintiff willfully invited attack by dog. *Ch. 23, Animals: Civil Liability, § 23.164*; *see also Civ. Code § 3342*; *Smythe v. Schacht (1949) 93 Cal. App. 2d 315, 321-322, 209 P.2d 114*

- Primary assumption of risk by rider; commercial stable operator under no duty to provide ideal horse. *Ch. 23, Animals: Civil Liability, § 23.163*; *see also Harrold v. Rolling J Ranch (1993) 19 Cal. App. 4th 578, 588-589, 23 Cal. Rptr. 2d 671*

[2] Injuries to Animals

- Animal killed while threatening harm to defendant or third person. *Ch. 23, Animals: Civil Liability, § 23.133*; *see also Devincenzi v. Faulkner (1959) 174 Cal. App. 2d 250, 254-255, 344 P.2d 322*

- Dog killed while worrying, wounding, or killing other domestic animals. *Ch. 23, Animals: Civil Liability, § 23.132*; *see also Civ. Code § 3341(2)*; *Food & Agric. Code §§ 31102-31104, 31151-31153*

- Plaintiff negligent in feeding animals food known to have been dusted with pesticide. *Ch. 23, Animals: Civil Liability, § 23.124*; *see also* Lenk v; spezia *(1949) 95 Cal. App. 2d 296, 302-303, 213 P.2d 47*

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§ 26.164 Arbitration

- Arbitration is condition precedent to lawsuit. *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.98*; *see also Charles J. Rounds Co. v. Joint Council of Teamsters No. 42 (1971) 4 Cal. 3d 888, 894-899, 95 Cal. Rptr. 53, 484 P.2d 1397*

- Arbitration was sole remedy and was not initiated within time specified in agreement. *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.99*; *see also Charles J. Rounds Co. v. Joint Council of Teamsters No. 42 (1971) 4 Cal. 3d 888, 894-899, 95 Cal. Rptr. 53, 484 P.2d 1397*

- Arbitration award satisfied. *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.100*; *see also Archuleta v. Grand Lodge etc. of Machinists (1968) 262 Cal. App. 2d 202, 208, 68 Cal. Rptr. 694*

- Waiver of arbitration. *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.94*; *see also Code Civ. Proc. § 1281.2(a)*

- Grounds exist for revoking agreement to arbitration. *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.94*; *see also Code Civ. Proc. § 1281.2(b)*

- Insufficient facts alleged for court to order arbitration. *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.94*; *see also Bertero v. Superior Court (1963) 216 Cal. App. 2d 213, 218, 30 Cal. Rptr. 719*

- Possibility of conflicting rulings. *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.94*; *see also Code Civ. Proc. § 1281.2(c)*

- Parties have no agreement to arbitrate. *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.94*; *see also Code Civ. Proc. § 1281*; *Banner Entertainment, Inc. v. Superior Court (1998) 62 Cal. App. 4th 348, 356, 72 Cal. Rptr. 2d 598*

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§ 26.165 Architects

- Architectural services contract unenforceable because plaintiff lacked architect's certificate. *Ch. 56, Architects, § 56.53*; *see also Bus. & Prof. Code § 5536(a)*

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§ 26.166 Art

- Disclaimer by seller. *Ch. 57, Art, § 57.131[1]*; *see also Civ. Code § 1742(d)*

- Lien on art work by bailee. *Ch. 57, Art, § 57.166[2]*; *see also Civ. Code §§ 1822, 1826*

- Notification to owner that art work is wrongfully detained by bailor. *Ch. 57, Art, § 57.166[1]*; *see also Civ. Code §§ 1822, 1826*

- Prohibition by owner or act of law against return of bailed art work. *Ch. 57, Art, § 57.166[3]*; *see also Civ. Code § 1825*

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§ 26.167 Assault and Battery

- Merchant's privilege to detain suspected shoplifter. *Ch. 58, Assault and Battery, § 58.75*; *see also Penal Code § 490.5(f)(7)*

- Plaintiff provoked altercation. *Ch. 58, Assault and Battery, § 58.76*; *see also Vaughn v. Jonas (1948) 31 Cal. 2d 586, 599-600, 191 P.2d 432*

- Recapture of personal property. *Ch. 58, Assault and Battery, § 58.73*; *see also Daluiso v. Boone (1969) 71 Cal. 2d 484, 499-500, 78 Cal. Rptr. 707, 455 P.2d 811*

- Self-defense. *Ch. 58, Assault and Battery, § 58.70*; *see also Boyer v. Waples (1962) 206 Cal. App. 2d 725, 727, 24 Cal. Rptr. 192* ; *Marriott v. Williams (1908) 152 Cal. 705, 711, 93 P. 875*

- Third person, defense of. *Ch. 58, Assault and Battery, § 58.71*; *see also Civ. Code § 50*; *Ward v. De Martini (1930) 108 Cal. App. 745, 748, 292 P. 192*

- Trespasser, defense of real property by ejecting. *Ch. 58, Assault and Battery, § 58.72*; *see also Livesey v. Stock (1929) 208 Cal. 315, 317-318, 281 P. 70*

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§ 26.168 Assignments

- Notice of prior assignment of obligation. *Ch. 60, Assignments, § 60.71*; *see also Code Civ. Proc. §§ 389, 1060 et seq.*

- Payment to assignor prior to notice of assignment. *Ch. 60, Assignments, § 60.72*; *see also Bank of Stockton v. Jones (1884) 65 Cal. 437, 438, 4 P. 418*

- Prior assignment of obligation. *Ch. 60, Assignments, § 60.70*; *see also Civ. Code §§ 955, 955.1(b)*; *Code Civ. Proc. § 368*

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§ 26.169 Associations and Clubs

- Failure to exhaust association's administrative remedies before seeking judicial relief. *Ch. 61, Associations and Clubs, § 61.100*; *see also Holderby v. Internat. Union etc. Engrs. (1955) 45 Cal. 2d 843, 846-847, 291 P.2d 463* ; *DeVaughn Peace, M.D., Inc. v. St. Francis Medical Center (1994) 28 Cal. App. 4th 454, 460, 33 Cal. Rptr. 2d 459*

- Sufficiency and legality of expulsion proceedings. *Ch. 61, Associations and Clubs, § 61.101*; *see, e.g., Corp. Code § 18320*

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§ 26.170 Assumption of Risk

- Airplane crash. See *§ 26.161, above*
- Animals, injury caused by. See *§ 26.163, above*
- Automobile, assumption of risk by passenger. See *§ 26.173, below*
- Athletic event, assumption of risk. See *§ 26.226, below*
- Bus, assumption of risk by passenger. See *§ 26.186, below*
- Negligence action, general form of defense to. See *§ 26.255, below*

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§ 26.171 Attorney Malpractice

- Comparative fault of successor attorney. *Ch. 76, Attorney Professional Liability, § 76.434*; *see also Lewis v. Purvin (1989) 208 Cal. App. 3d 1208, 1217, 256 Cal. Rptr. 827*

- Comparative negligence of plaintiff. *Ch. 76, Attorney Professional Liability, § 76.432*; *see also Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 530, 50 Cal. Rptr. 592* ; *Theobald v. Byers (1961) 193 Cal. App. 2d 147, 150, 13 Cal. Rptr. 864*

- Release executed by plaintiff. *Ch. 76, Attorney Professional Liability, § 76.433*; *see also Cal. Rules Prof. Conduct, Rule 3-400*; *Donnelly v. Ayer (1986) 183 Cal. App. 3d 978, 983, 228 Cal. Rptr. 764*

- Statute of limitations, action barred by. *Ch. 76, Attorney Professional Liability, § 76.430*; *see also Code Civ. Proc. § 340.6*

- Unclean hands doctrine, action barred by. *Ch. 76, Attorney Professional Liability, § 76.435*; *see also Blain v. Doctor's Co. (1990) 222 Cal. App. 3d 1048, 1063-1064, 272 Cal. Rptr. 250*

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§ 26.172 Auctions

- Plaintiff owner estopped to assert title in action against auctioneer for wrongful auction sale. *Ch. 77, Auctions and Auctioneers, § 77.41*; *see also Jessup v. Cattle Center, Inc. (1968) 259 Cal. App. 2d 434, 436-437, 66 Cal. Rptr. 361*

- Plaintiff seller prevented from enforcing auction sale because of bidding by or on behalf of seller without notice. *Ch. 77, Auctions and Auctioneers, § 77.52*; *see also Civ. Code § 1689(b)(1)*; *Com. Code § 2328(4)*

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§ 26.173 Automobiles

- Assumption of risk by passenger. *Ch. 84, Automobiles: Responding to the Action, § 84.66*; *see also Knight v. Jewett (1992) 3 Cal. 4th 296, 309, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

- Emergency vehicles. See *§ 26.209, below*

- Imminent peril or emergency. Ch. 84, *Automobiles: Responding to the Action,* § 84.67; *see also Leo v. Dunham (1953) 41 Cal. 2d 712, 714, 264 P.2d 1* ; *Balthrop v. Atchison, Topeka & Santa Fe R.R. (1959) 167 Cal. App. 2d 437, 446, 334 P.2d 1041*

- Imputed negligence. Ch. 84, *Automobiles: Responding to the Action,* § 84.63; *see also Brooks v. E. J. Willig Truck Transp. Co. (1953) 40 Cal. 2d 669, 680, 255 P.2d 802* ; *Singer v. Superior Court (1960) 54 Cal. 2d 318, 323, 5 Cal. Rptr. 697, 353 P.2d 305*

- Negligence of plaintiff driver. *Ch. 84, Automobiles: Responding to the Action, §§ 84.60- 84.62*; *see also Brooks v. E. J. Willig Truck Transp. Co. (1953) 40 Cal. 2d 669, 680, 255 P.2d 802* ; *Wiley v. Cole (1921) 52 Cal. App. 617, 618, 199 P. 550*

- Negligence of plaintiff passenger. Ch. 84, *Automobiles: Responding to the Action,* § 84.64; *see also Li v. Yellow Cab Co. (1975) 13 Cal. 3d. 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226*

- Negligence of plaintiff pedestrian. Ch. 84, *Automobiles: Responding to the Action,* § 84.62; *see also Singer v. Superior Court (1960) 54 Cal. 2d 318, 323, 5 Cal. Rptr. 697, 353 P.2d 305*

- Primary assumption of risk. Ch. 84, *Automobiles: Responding to the Action,* § 84.66; *see also Fonseca v. Orange (1972) 28 Cal. App. 3d 361, 368-369, 104 Cal. Rptr. 566*

- Repair of. See *§ 26.227, below*

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§ 26.174 Bailments

[1] Aircraft

- See *§ 26.161, above*

[2] Art

- See *§ 26.166, above*

[3] Deposits

- Property lost or destroyed without fault of depositary. *Ch. 93, Bailments, § 93.220*; *see also Downey v. Martin Aircraft Serv. (1950) 96 Cal. App. 2d 94, 98-99, 214 P.2d 581*

- Property withheld from plaintiff depositor to enforce repairman's lien. *Ch. 93, Bailments, § 93.219*; *see also Civ. Code § 3051*

[4] Hirings

- Leased property had no rental value and was unfit for purpose for which hired. *Ch. 413, Personal Property Leases, § 413.314*; *see also Civ. Code § 1955*

- Repairs incidental to use of bailed chattel. *Ch. 413, Personal Property Leases, § 413.321*; *see also Civ. Code § 1956*

- Repairs necessitated by misuse of bailed chattel. *Ch. 413, Personal Property Leases, § 413.320*; *see also Civ. Code § 1930*

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§ 26.175 Bankruptcy

- Discharge in bankruptcy. *Ch. 94, Bankruptcy, § 94.122*; *see also 11 U.S.C. § 524(a), (f)*

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§ 26.176 Banks

- See *§ 26.256, below*

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§ 26.177 Barbering and Cosmetology

[1] Negligence Actions Against Barber Shops and Salons

- Patron's denial failure to advise of allergic sensitivity to cosmetic product and refusal to permit patch test. *Ch. 97, Barbering and Cosmetology, § 97.113*; *see also* *Romero v. And'ra (1963) 216 Cal. App. 2d 295, 303, 30 Cal. Rptr. 645* ; *Arata v. Tonegato (1957) 152 Cal. App. 2d 837, 841-842, 314 P.2d 130*

[2] Strict Liability Actions Against Manufacturer, Wholesaler, and Retailer of Cosmetic or Personal Grooming Product

- Misuse or unintended use of product was proximate cause of plaintiff's injuries. *Ch. 97, Barbering and Cosmetology, § 97.134*; *see also* *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 426 n.9, 143 Cal. Rptr. 225, 573 P.2d 443* ; *Horn v. General Motors Corp. (1976) 17 Cal. 3d 359, 370, 131 Cal. Rptr. 78, 551 P.2d 398*

- Preliminary patch test recommended on container warning label was not conducted prior to application of product. *Ch. 97, Barbering and Cosmetology, § 97.133*; *see also* *Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 126, 104 Cal. Rptr. 433, 501 P.2d 1153* ; *Oakes v. E.I. Du Pont de Nemours & Co., Inc. (1969) 272 Cal. App. 2d 645, 649, 77 Cal. Rptr. 709*

- Plaintiff's injuries and damages caused solely by allergy. *Ch. 97, Barbering and Cosmetology, § 97.135*; *see also* *Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 993, 95 Cal. Rptr. 381* ; *Oakes v. E.I. Du Pont de Nemours & Co., Inc. (1969) 272 Cal. App. 2d 645, 651, 77 Cal. Rptr. 709*

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§ 26.178 Battery

- See *§ 26.167, above*

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§ 26.179 Bicycles

- Negligence of bicyclist. *Ch. 98, Bicycles, § 98.53*; *see also* *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226*

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§ 26.180 Bills and Notes

- See *§ 26.256, below*

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§ 26.181 Bills of Lading

- See *§ 26.207, below*

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§ 26.182 Book Account

- See *§ 26.157, above*

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§ 26.183 Boundaries

[1] Action to Establish Boundary

- Estoppel and laches. *Ch.101, Boundaries, § 101.55*; *see also Granco Steel, Inc. v. Workmen's Compensation Appeals Bd. (1968) 68 Cal. 2d 191, 203, 65 Cal. Rptr. 287, 436 P.2d 287* ; *Stafford v. Ballinger (1962) 199 Cal. App. 2d 289, 296, 18 Cal. Rptr. 568*

- Estoppel by agreement and acquiescence. *Ch.101, Boundaries, § 101.54*; *see also* Frericks v; sorensen *(1952) 113 Cal. App. 2d 759, 761, 248 P.2d 949*

- Adverse possession. *Ch.101, Boundaries, § 101.56*; *see also Code Civ. Proc. §§ 321-325*

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§ 26.184 Brokers

[1] Action by Broker for Recovery of Commission

- Broker breached his or her fiduciary duty. *Ch. 103, Brokers, § 103.84*; *see also Michelson v. Hamada (1994) 29 Cal. App. 4th 1566, 1579, 36 Cal. Rptr. 2d 343* ; *Rattray v. Scudder (1946) 28 Cal. 2d 214, 222-223, 169 P.2d 371*

- Broker failed to disclose dual agency. *Ch. 103, Brokers, § 103.82*; *see also Civ. Code § 2079.17*

- Broker failed to meet agreed upon conditions. *Ch. 103, Brokers, § 103.83*; *see also Blank v. Borden (1974) 11 Cal. 3d 963, 969, 972 n.8, 115 Cal. Rptr. 31, 524 P.2d 127*

- Broker not licensed. *Ch. 103, Brokers, § 103.81*; *see also Bus. & Prof. Code § 10136*

- Recovery barred by Statute of Frauds. *Ch. 103, Brokers, § 103.80*; *see also Civ. Code § 1624(a)(4)*

[2] Action Against Broker

- Buyer failed to use reasonable care. *Ch. 103, Brokers, § 103.97*; *see also Civ. Code § 2079.5*

- Defects were not visible within accessible area. *Ch. 103, Brokers, § 103.99*; *see also Civ. Code § 2079.3*

- Subject matter of alleged defect was contained in third party report. *Ch. 103, Brokers, § 103.98*; *see also Civ. Code § 1102.4*

- Plaintiff broker not licensed. Ch. 103, *Brokers*, § 103.81; *see also Bus. & Prof. Code § 10136*

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§ 26.185 Building Contracts

[1] Act of God

- Act of God prevented performance. *Ch. 10, Act of God, § 10.42*; *see also Civ. Code § 1511(2)*

[2] Actions by Contractors and Their Sureties

- Contractor failed to obtain architect's certificate; allegation by owner. *Ch. 104, Building Contracts, § 104.223*; *see also Connell v. Higgins (1915) 170 Cal. 541, 552, 150 P. 769*

- Subcontractor lacked contractor's license; allegation by prime contractor. *Ch. 104, Building Contracts, § 104.217*; *see also Bus. & Prof. Code § 7031*

[3] Actions by Owners

- Delay by plaintiff excused performance by contractor. *Ch. 104, Building Contracts, § 104.227*; *see also Civ. Code § 1511(1)*

- Plaintiff did not commence suit within time provided by performance bond; allegation by surety to action. *Ch. 104, Building Contracts, § 104.232*; *see also Civ. Code §§ 3239, 3240*; *Code Civ. Proc. § 360.5*

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§ 26.186 Buses and Streetcars

- Assumption of risk; passenger's injury resulted from ordinary bus movements. *Ch. 106, Buses and Streetcars, § 106.77*; *see also Knight v. Jewett (1992) 3 Cal. 4th 296, 308-311, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

- Imminent peril; bus stopped suddenly to avoid collision. *Ch. 106, Buses and Streetcars, § 106.78*; *see also Abney v. City & County of San Francisco (1953) 115 Cal. App. 2d 506, 514, 252 P.2d 654* ; *James v. American Buslines (1952) 111 Cal. App. 2d 273, 276, 244 P.2d 503* ; *Bovette v. Los Angeles Transit Lines (1947) 78 Cal. App. 2d 860, 863, 179 P.2d 80*

- Lack of knowledge by carrier that passenger was afflicted with special physical condition. *Ch. 106, Buses and Streetcars, § 106.79*; *see also McBride v. Atchison, T. & S. F. R. Co. (1955) 44 Cal. 2d 113, 119-120, 279 P.2d 966*

- Passenger plaintiff attempted to board or alight from bus while it was still in motion. *Ch. 106, Buses and Streetcars, § 106.74*; *see also Schultheiss v. Los Angeles Ry. Corp. (1936) 11 Cal. App. 2d 525, 527, 54 P.2d 49*

- Passenger plaintiff failed to use hand bars for support. *Ch. 106, Buses and Streetcars, § 106.73*; *see also* Tait v; san *Francisco (1956) 143 Cal. App. 2d 787, 790, 300 P.2d 74* ; Gerfers v; san *Diego Transit System (1954) 126 Cal. App. 2d 733, 736-737, 272 P.2d 930*

- Passenger plaintiff's conduct violated ordinance. *Ch. 106, Buses and Streetcars, § 106.75*; *see also Reeves v. Lapinta (1938) 25 Cal. App. 2d 680, 681, 78 P.2d 465* ; *Lorry v. Englander Drayage & Warehouse Co. (1930) 108 Cal. App. 116, 119, 291 P. 467*

- Pedestrian plaintiff failed to use caution in crossing street. *Ch. 106, Buses and Streetcars, § 106.76*; *see also Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858, 532 P.2d 1226*

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§ 26.187 Carriers

- Buses and streetcars. See *§ 26.186, above*
- Railroads. See *§ 26.275, below*
- Ships and shipping. See *§ 26.290, below*
- Documents of title. See *§ 26.207, below*

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§ 26.188 Checks

- See *§ 26.256[2], below*

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§ 26.189 Churches

- See *§ 26.279, below*

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§ 26.190 Civil Rights

- See *§ 26.206, below*

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§ 26.191 Composition Agreement

- See *§ 26.230, below*

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§ 26.192 Condominiums

- Action based on negligence of officer or director of association managing common interest in residential development; defendant is volunteer officer or director. *Ch. 124, Condominiums and Other Common Interest Developments, § 124.87*; *see also Civ. Code § 1365.7*

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§ 26.193 Conspiracy

- Actor in alleged conspiracy exonerated from liability. *Ch. 126, Conspiracy, § 126.58*; *see also Peterson v. Cruickshank (1956) 144 Cal. App. 2d 148, 163-164, 300 P.2d 915*

- Defendant legally incapable of committing tort underlying conspiracy. *Ch. 126, Conspiracy, § 126.59*; *see also Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 510, 514, 28 Cal. Rptr. 2d 475, 869 P.2d 454*

- Defendant was agent or employee of defendant corporation and is sued in such official capacity. *Ch. 126, Conspiracy, § 126.60*; *see also Black v. Bank of Am. (1994) 30 Cal. App. 4th 1, 4-6, 35 Cal. Rptr. 2d 725* ; Zumbrun v. University of So. Cal. (1972) 25 Cal. App. 3d l, 12-13, *25 Cal. App. 3d 1, 101 Cal. Rptr. 499*

- Defendant was agent or employee and complaint is based on alleged conspiracy to violate duty binding solely on principal. *Ch. 126, Conspiracy, § 126.61*; *see also Doctors' Co. v. Superior Court (1989) 49 Cal. 3d 39, 48, 260 Cal. Rptr. 183, 775 P.2d 508*

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§ 26.194 Consumer Protection

[1] Action Under Consumer Legal Remedies Act

- Violation result of bona fide error. *Ch. 504, Sales: Consumers Legal Remedies Act, § 504.40*; *see also Civ. Code § 1784*

[2] Credit Reporting

- See *§ 26.199, below*

[3] Discount Buying Services

- See *§ 26.204, below*

[4] Retail Installment Sales

- See *§ 26.283, below*

[5] Secured Transactions

- See *§ 26.287, below*

[6] Warranties

- See *§ 26.309, below*

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§ 26.195 Contractors

- See *§ 26.185, above*

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§ 26.196 Contracts

- Alteration of written contract without consent. *Ch. 140, Contracts, § 140.152*; *see also Civ. Code § 1700*
- Architectural services contracts. See *§ 26.165, above*
- Account stated; affirmative defense to breach of contract action. See *§ 26.157, above*
- Breach of brokerage contract. See *§ 26.184, above*
- Building contracts. See *§ 26.185, above*
- Disaffirmance of contract by minor. See *§ 26.251, below*
- Express provision of law, contract contrary to. *Ch. 140, Contracts, § 140.144*; *see also Civ. Code § 1667(1)*
- Failure of consideration. *Ch. 140, Contracts, § 140.148*; *see also Civ. Code § 1689(b)(2)*
- Failure to mitigate damages. See *§ 26.200, below*
- Gambling, illegal contract involving. See *§ 26.225, below*
- Home solicitation contracts. See *§ 26.228, below*
- Impossibility. *Ch. 140, Contracts, § 140.137*; *see also Civ. Code §§ 1441, 1511(2), 1596*
- Incompetence of party; contract made after person adjudged incompetent. *Ch. 140, Contracts, § 140.135*; *see also Civ. Code § 40*

- Incompetence of party; contract made before person adjudged incompetent. *Ch. 140, Contracts, § 140.134*; *see also Civ. Code § 39*; *Prob. Code § 812*

- Incompetence of party; party entirely lacked understanding to make contract. *Ch. 140, Contracts, § 140.133*; *see also Civ. Code § 38*

- Intoxication at time of contracting. See *§ 26.233, below*

- Invention development services contracts. See *§ 26.262, below*

- Lack of consideration. *Ch. 140, Contracts, § 140.142*; *see also Civ. Code § 1550*

- Leases. See *§ 26.237* (landlord and tenant) or *§ 26.265* (personal property leases)

- License, plaintiff's lack of. *Ch. 471B, Licensing by Public Agencies, § 471B.118*; *see, e.g., Bus. & Prof. Code § 7031*; *Wood v. Krepps (1914) 168 Cal. 382, 386-387, 143 P. 691*

- Modification of oral contract by writing. *Ch. 140, Contracts, § 140.149*; *see also Civ. Code § 1697*

- Modification of written contract by executed oral agreement. *Ch. 140, Contracts, § 140.151*; *see also Civ. Code § 1698(b)*

- Modification of written contract by written agreement or by oral agreement. *Ch. 140, Contracts, § 140.150*; *see also Civ. Code § 1698(a), (c)*

- Novation. *Ch. 140, Contracts, § 140.141*; *see also Civ. Code § 1530*

- Payment of obligation. *Ch. 140, Contracts, § 140.138*; *see also Civ. Code § 1478*

- Public policy or good morals, contract contrary to. *Ch. 140, Contracts, § 140.145*; *see also Civ. Code § 1667(2), (3)*

- Prevention of performance by plaintiff. *Ch. 140, Contracts, § 140.140*; *see also Civ. Code § 1511(1)*

- Reformation. See *§ 26.277, below*

- Rescission by mutual consent. *Ch. 140, Contracts, § 140.147*; *see also Civ. Code § 1689(a)*

- Rescission generally. See *§ 26.281, below*

- Reward, contract for. See *§ 26.285, below*

- Specific performance. See *§ 26.292, below*

- Statute of frauds. See *§ 26.294, below*

- Tender of payment by deposit and notice. *Ch. 140, Contracts, § 140.139*; *see also Civ. Code § 1500*

- Unconscionability. *Ch. 140, Contracts, § 140.146*; *see also Civ. Code § 1670.5*

- Usury. See *§ 26.308, below*

- Waiver of breach. *Ch. 140, Contracts, § 140.136*; *see also A.B.C. Distrib. Co. v. Distillers Distrib. Corp. (1957) 154 Cal. App. 2d 175, 187, 316 P.2d 71* ; *Bowman v. Santa Clara County (1957) 153 Cal. App. 2d 707, 713, 315 P.2d 67*

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§ 26.197 Conversion

- By auctioneer. See *§ 26.172, above*

- Defendant took possession as personal representative and in good faith belief that property was part of decedent's estate. *Ch. 150, Conversion, § 150.90*; *see also Prob. Code § 9651*

- Defendant took possession of property in defense of own interests. *Ch. 150, Conversion, § 150.91*; *see also Church of Scientology v. Armstrong (1991) 232 Cal. App. 3d 1060, 1072-1073, 283 Cal. Rptr. 917*

- By long-term health or residential care facility. See *§ 26.244, below*

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§ 26.198 Corporations

[1] Alter Ego Doctrine

- Plaintiff's knowledge of facts regarding relationship between shareholder and corporation. *Ch. 160, Corporations, § 161.60*; *see also Lynch v. McDonald (1909) 155 Cal. 704, 706, 102 P. 918* ; *Hiehle v. Torrance Millworks, Inc. (1954) 126 Cal. App. 2d 624, 629-630, 272 P.2d 780*

[2] Capacity

- Corporate plaintiff's powers suspended or forfeited for failure to comply with tax statutes. *Ch. 160, Corporations, § 160.60*; *see also Rev. & Tax. Code §§ 23301, 23301.5*

- Lack of legal capacity to sue, generally. See *§ 26.151, above*

- Plaintiff foreign corporation is not qualified to transact intrastate business in California. *Ch. 160, Corporations, § 160.54*; *see also Corp. Code §§ 191, 2105, 2203(c)*

[3] Director's Liability

- Director's liability for breach of fiduciary duty eliminated or limited by articles of incorporation. *Ch. 160, Corporations, § 167.184*; *see also Corp. Code §§ 204(a)(10)*

[4] Issuance of Shares

- No subscriber liability on preincorporation subscription agreement violating corporate securities law. Ch. 162, *Corporations: Issuance of Shares*, § 162.42; *see also Corp. Code §§ 25102(a), 25110*

[5] Shareholder's Derivative Actions

- Prosecution of suit is not in best interests of corporation. Ch. 168, *Corporations*, § 168.62; *see also*

Findley v. Garrett (1952) 109 Cal. App. 2d 166, 174, 178-179, 240 P.2d 421

[6] Transfers of Shares

- Purchase price recovery barred because contract is illegal for failure to comply with qualification requirement under corporate securities law. Ch. 163, *Corporations: Transfers of Shares*, § 163.41; *see also Civ. Code § 1667(1)*; *Corp. Code § 25130*

- Purchase price recovery barred because contract is illegal for failure to comply with legend condition requiring consent to transfer. Ch. 163, *Corporations: Transfers of Shares*, § 163.42; *see also Corp. Code § 25133*

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§ 26.199 Credit Reporting

[1] Action Against User of Consumer Information for Failure to Disclose to Consumer His or Her Right to Make Written Request for Reasons for Denial of Credit

- User of credit information obtained from credit reporting agency maintained reasonable procedures to assure compliance with disclosure statute. *Ch. 129, Consumer Credit Reporting, § 129.114*; *see also Civ. Code §§ 1785.20(c), 1785.20*.5(b)

- User of credit information obtained from person other than credit reporting agency maintained reasonable procedures to assure compliance with disclosure statute. *Ch. 129, Consumer Credit Reporting, § 129.115*; *see also Civ. Code § 1785.20(c)*

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§ 26.200 Damages

- Failure to mitigate damages in contract action. *Ch. 177, Damages, § 177.199*; *see also Mayes v. Sturdy Northern Sales, Inc. (1979) 91 Cal. App. 3d 69, 86, 154 Cal. Rptr. 43 , disapproved on other grounds, Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521, 869 P.2d 454* ; *Baruh v. Kuhl (1963) 213 Cal. App. 2d 266, 273, 28 Cal. Rptr. 573*

- Failure to mitigate damages in negligence action. See *§ 26.255, below*

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§ 26.201 Death Actions

- See *§ 26.311, below*

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§ 26.202 Decedent's Estates

- Conversion. See *§ 26.197, above*

- Failure to sue on rejected claim within statutory period. Ch. 454, *Probate: Claims Against the Estate*, § 454.298; *see also Prob. Code § 9353*

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§ 26.203 Deeds

- See *§ 26.284, below*

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§ 26.204 Discount Buying Services

- Action by buyer for statutory violation; limitation on recovery. *Ch. 128, Consumer Contracts: Statutes Regulating Specific Types of Contracts, § 128.81*; *see also Civ. Code §§ 1812.100-1812.128, 1812.123(b)*

- Action by organization to enforce contract for discount buying services; unenforceability based on statutory violation. *Ch. 128, Consumer Contracts: Statutes Regulating Specific Types of Contracts, § 128.82*; *see also Civ. Code §§ 1812.100-1812.128*

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§ 26.205 Disclaimer

- Art, sale of. See *§ 26.166, above*
- Securities transaction, rescission or damages based on. See *§ 26.288[3][b], below*

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§ 26.206 Discrimination

[1] Business Establishment

- Action required by law. *Ch. 116, Civil Rights: Discrimination in Business Establishments, § 116.100*; *see also Civ. Code § 51(c)*

- Modification of building required. *Ch. 116, Civil Rights: Discrimination in Business Establishments, § 116.101*; *see also Civ. Code § 51(d)*

[2] Employment

- See *§ 26.212, below*

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§ 26.207 Documents of Title

- Plaintiff failed to follow claims procedure required by warehouse receipt or bill of lading. *Ch. 213, Documents of Title, § 213.191*; *see also Com. Code §§ 7204(c), 7309(c)*

- Statutory excuse for nondelivery when goods damaged or destroyed by fire that was not caused by negligence of carrier or warehouseman. *Ch. 213, Documents of Title, § 213.151*; *see also Com. Code § 7403(a), (a)(2)*

- Warehouse receipt or bill of lading contains limitation on defendant's liability. *Ch. 213, Documents of Title, § 213.192*; *see also Com. Code §§ 7204(b), 7309(b)*

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§ 26.208 Duress

- Deprivation of exercise of free will without confinement of person or detention of property. *Ch. 215, Duress, Menace, Fraud, Undue Influence, and Mistake, § 215.121*; *see also Civ. Code § 1569*

- Economic or business duress. *Ch. 215, Duress, Menace, Fraud, Undue Influence, and Mistake, § 215.122*; *see also Civ. Code § 1569*

- Signing of note. See *§ 26.256, below*

- Threats of and actual confinement of person or property and threats of injury to person or property. *Ch. 215, Duress, Menace, Fraud, Undue Influence, and Mistake, § 215.120*; *see also Civ. Code §§ 1569, 1570*

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§ 26.209 Emergency Vehicles

- Exemption from vehicle code provisions by reason of response to emergency call. *Ch. 246, Emergency Vehicles, § 246.58*; *see also Veh. Code § 21055*

- Physician's immunity from speed limitations by reason of response to emergency call. *Ch. 246, Emergency Vehicles, § 246.62*; *see also Veh. Code § 21058*

- Public employee's immunity by reason of response to emergency call. *Ch. 246, Emergency Vehicles, § 246.59*; *see also Veh. Code § 17004*

- Public employee's immunity for injury to fleeing suspect. *Ch. 246, Emergency Vehicles, § 246.60*; *see also Gov. Code § 845.8*

- Public entity's immunity by reason of having policy for safe police pursuit. *Ch. 246, Emergency Vehicles, § 246.61*; *see also Veh. Code § 17004.7*

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§ 26.210 Eminent Domain

[1] Eminent Domain Action

- Grounds for objecting to the right to take. *Ch. 247, Eminent Domain, § 247.287*; *see also Code Civ. Proc. § 1250.325*

[2] Inverse Condemnation Action

- Estoppel by judgment or deed. *Ch. 247, Eminent Domain, § 247.347*; *see also Reinking v. Orange County (1970) 9 Cal. App. 3d 1024, 1030, 88 Cal. Rptr. 695*

- Failure to exhaust administrative remedies. *Ch. 247, Eminent Domain, § 247.346*; *see also Pan Pacific Properties, Inc. v. County of Santa Cruz (1978) 81 Cal. App. 3d 244, 249-253, 146 Cal. Rptr. 428*

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§ 26.211 Emotional Distress

- Plaintiff's conduct is privileged assertion of legal right. *Ch. 362, Mental Suffering and Emotional Distress, § 362.78*; *see also Cantu v. Resolution Trust Corp. (1992) 4 Cal. App. 4th 857, 888, 6 Cal. Rptr. 2d 151* ; *Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 395, 89 Cal. Rptr. 78*

- Plaintiff's conduct is privileged statement made in official proceeding. *Ch. 362, Mental Suffering and Emotional Distress, § 362.79*; *see also Civ. Code § 47(b)*

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§ 26.212 Employment Law

[1] Action for Failure to Pay Wages

- Cause of action preempted by federal law. *Ch. 250, Employment Law: Wage and Hour Disputes, § 250.74*; *see, e.g., Scott v. Gulf Oil Corp. (9th Cir. 1985) 754 F.2d 1499, 1503-1506*

- Defective assignment of wages. *Ch. 250, Employment Law: Wage and Hour Disputes, § 250.73*; *see also Lab. Code § 300*

- Defendant not liable for waiting time penalties due to plaintiff's avoidance or refusal of payment. *Ch. 250, Employment Law: Wage and Hour Disputes, § 250.72*; *see also Lab. Code § 203(a)*

- Good faith action or omission and reasonable belief of no minimum wage violation. *Ch. 250, Employment Law: Wage and Hour Disputes, § 250.75*; *see also Lab. Code § 1194.2(b)*

- Parties not subject to minimum wage/overtime provisions. *Ch. 250, Employment Law: Wage and Hour Disputes, § 250.71*; *see also Lab. Code § 517*; *8* Cal. Code Reg. §§ 11010-11130, 11150

- Plaintiff is independent contractor exempt from applicable provisions of Labor Code. *Ch. 250, Employment Law: Wage and Hour Disputes, § 250.70*; *see also Fitch v. Pacific Fid. Life Ins. Co. (1975) 54 Cal. App. 3d 140, 145-146, 126 Cal. Rptr. 445* ; *Zaremba v. Miller (1980) 113 Cal. App. 3d Supp. 1, 5-6, 169 Cal. Rptr. 688*

[2] Action for Wrongful Discharge

- Arbitration required under employment contract. *Ch. 249, Employment Law: Termination and Discipline, § 249.64*; *see* also *Heily v. Superior Court (1988) 202 Cal. App. 3d 255, 257-263, 248 Cal. Rptr. 673*

- Continued incapacity to perform duty. *Ch. 249, Employment Law: Termination and Discipline, §*

249.62; *see also Lab. Code § 2924*

- Good cause, employee terminated for. *Ch. 249, Employment Law: Termination and Discipline, § 249.63*; *see also Gianaculas v. Trans World Airlines, Inc. (9th Cir. 1985) 761 F.2d 1391, 1394-1395*

- Failure by plaintiff to mitigate damages. *Ch. 249, Employment Law: Termination and Discipline, § 249.65*; *see also Ash v. Soo Sing Lung (1918) 177 Cal. 356, 361-362, 170 P. 843*

- Habitual neglect of duty. *Ch. 249, Employment Law: Termination and Discipline, § 249.61*; *see also Lab. Code § 2924*

- Preemption of state law claim by Employee Retirement Income Security Act of 1974; action relates to employee benefit plan under ERISA and is not exempt from its provisions. *Ch. 249, Employment Law: Termination and Discipline, § 249.70*; *see also 29 U.S.C. § 1001 et seq*

- Preemption of state law claim by Federal Labor Management Relations Act; employment relationship covered by collective bargaining agreement. *Ch. 249, Employment Law: Termination and Discipline, § 249.66*; *see also 29 U.S.C. §§ 141 et seq., 185(a)*

- Preemption of state law claim by Federal Labor-Management Reporting and Disclosure Act; plaintiff is policymaking or confidential union employee. *Ch. 249, Employment Law: Termination and Discipline, § 249.67*; *see also 29 U.S.C. § 401 et seq.*

- Preemption of state law claim by National Bank Act; plaintiff is bank officer. *Ch. 249, Employment Law: Termination and Discipline, § 249.69*; *see also 12 U.S.C. § 24* P 5

- Preemption of tort claim against railroad or airline employer by Railway Labor Act; claim involves minor dispute. *Ch. 249, Employment Law: Termination and Discipline, § 249.68*; *see also 45 U.S.C. §§ 151 et seq., 153-155, 183-185*

- Willful breach of duty. *Ch. 249, Employment Law: Termination and Disci-pline, § 249.60*; *see also Lab. Code § 2924*

[3] Fair Employment and Housing Act Action

- Accommodation would cause undue hardship. *Ch. 115, Civil Rights: Employment Discrimination, § 115.100*; *see also Gov. Code §§ 12926(s), 12940(l), (m)*

- Avoidable consequences. Ch. 115, *Civil Rights: Employment Discrimination*, § 115.107; *see also Gov. Code § 12940(j)(1)*

- Bona fide occupational qualification. *Ch. 115, Civil Rights: Employment Discrimination, § 115.101*; *see also Gov. Code § 12940*

- Business necessity. *Ch. 115, Civil Rights: Employment Discrimination, § 115.102*; *see also Gov. Code § 12940*

- Job-relatedness. *Ch. 115, Civil Rights: Employment Discrimination, § 115.103*; *see also Gov. Code § 12940*

- Employee or applicant cannot perform duties. *Ch. 115, Civil Rights: Employment Discrimination, § 115.104*; *see also Gov. Code § 12940(a)*

- Employee or applicant is danger to health or safety. *Ch. 115, Civil Rights: Employment Discrimination, § 115.105*; *see also Gov. Code § 12940(a)*

- Waiver of employment claims. Ch. 115, *Civil Rights: Employment Discrimination*, § 115.106; *see also Skrbina v. Fleming Cos. (1996) 45 Cal. App. 4th 1353, 1366-1367, 53 Cal. Rptr. 2d 481*

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§ 26.213 Encroachments

- See *§ 26.158* (adjoining landowners), *above*, and *§ 26.221* (fences), *below*

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§ 26.214 Environmental Law

- See *§ 26.267, below*

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§ 26.215 Equitable Estoppel

- Action on promissory note. See *§ 26.256, below*

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§ 26.216 Estoppel

[1] Action to Establish Boundary

- See *§ 26.183, above*

[2] Equitable Estoppel

- See *§ 26.215, above*

[3] Inverse Condemnation Action

- See *§ 26.210, above*

[4] Wrongful Death Action

- See *§ 26.311, below*

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§ 26.217 Eviction

- Claims for damages. See *§ 26.237, below*
- Unlawful detainer. See *§ 26.307, above*

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§ 26.218 Explosives

- Plaintiff failed to use due care. *Ch. 256, Explosives, § 256.56*; *see also Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858, 532 P.2d 1226*

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§ 26.219 False Advertising

- See *§ 26.160[1], above*

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§ 26.220 False Imprisonment

- Defendant peace officer had reasonable cause to believe that plaintiff committed felony. *Ch. 257, False Imprisonment, § 257.94*; *see also Penal Code § 836(a)(3)*

- Defendant peace officer had reasonable cause to believe that plaintiff committed misdemeanor in his or her presence. *Ch. 257, False Imprisonment, § 257.95*; *see also Penal Code § 836(a)(1)*

- Defendant private citizen acted pursuant to request and instructions of peace officer in making arrest. *Ch. 257, False Imprisonment, § 257.91*; *see also Penal Code § 833 et seq.*

- Defendant private citizen made honest mistake in identifying plaintiff to police. *Ch. 257, False Imprisonment, § 257.92*; *see also Penal Code § 833 et seq.*

- Defendant private citizen gave information to police in good faith. *Ch. 257, False Imprisonment, § 257.93*; *see also Penal Code § 833 et seq.*

- Delay in taking plaintiff before magistrate caused by illness of plaintiff. *Ch. 257, False Imprisonment, § 257.97*; *see also Penal Code § 833 et seq.*

- Failure of plaintiff to explain suspicious circumstances giving reasonable cause for arrest. *Ch. 257, False Imprisonment, § 257.96*; *see also Penal Code § 833 et seq.*

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§ 26.221 Fences

- Doctrine of balancing of conveniences as defense to action for permanent injunction to compel removal of encroachment. *Ch. 266, Fences, § 266.53*; *see also Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 200, 323 P.2d 1001* ; *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 562-563, 250 P.2d 660*

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§ 26.222 Franchise Regulation

[1] Action for Damages or Rescission of Franchise Agreement

[a] Failure by Defendant to Register Franchise Offer

- Offer was exempt from registration because franchise was sold by franchisee or subfranchisor for own account. *Ch. 515, Securities and Franchise Regulation, § 515.454*; *see also Corp. Code § 31102*

- Offer was exempt from registration by virtue of proper exercise of seasoned franchisor exemption. *Ch. 515, Securities and Franchise Regulation, § 515.453*; *see also Corp. Code § 31101*

[b] Joint and Several Liability Alleged by Plaintiff

- Defendant did not know or believe in existence of violation. *Ch. 515, Securities and Franchise Regulation, § 515.461*; *see also Corp. Code § 31302*

[c] Material Misrepresentation Made in Franchise Registration

- Defendant's exercise of care concerning and lack of knowledge of misrepresentation. *Ch. 515, Securities and Franchise Regulation, § 515.457*; *see also Corp. Code §§ 31300, 31301*

- Plaintiff knew of facts concerning misrepresentation. *Ch. 515, Securities and Franchise Regulation, § 515.456*; *see also Corp. Code §§ 31300, 31301*

[d] Registration Violation or Misrepresentation

- Defendant sent approved written notice of violation of franchise invest ment law. *Ch. 515, Securities and Franchise Regulation, § 515.459*; *see also Corp. Code §§ 31303, 31304*

- Defendant's acts regarding franchise in conformity with written opinion of Commissioner of

Corporations or Attorney General. *Ch. 515, Securities and Franchise Regulation, § 515.460*; *see also Corp. Code § 31511*

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§ 26.223 Fraud or Mistake

[1] Account Stated

- Fraud as defense to action. See *§ 26.157, above*

[2] Constructive Fraud

- Confidential relationship raising presumption of constructive fraud. *Ch. 215, Duress, Menace, Fraud, Undue Influence, and Mistake, § 215.130*; *see also Civ. Code §§ 1573(1), 1575(1)*

[3] Misrepresentation of Fact

- Innocent misrepresentation. *Ch. 215, Duress, Menace, Fraud, Undue Influence, and Mistake, § 215.143*; *see also Guthrie v. Times-Mirror Co. (1975) 51 Cal. App. 3d 879, 890, 124 Cal. Rptr. 577* ; *Wood v. Kalbaugh (1974) 39 Cal. App. 3d 926, 930, 114 Cal. Rptr. 673*

- Intentional misrepresentation. *Ch. 215, Duress, Menace, Fraud, Undue Influence, and Mistake, § 215.144*; *see also Civ. Code § 1572*

- Misrepresentation of finances as defense to unlawful relocation. See *§ 26.244, below*

- Sale of franchise. See *§ 26.222, above*

- Sale of securities. See *§ 26.288, below*

[4] Mistake of Fact

- Account stated, as defense to action based on. See *§ 26.157, above*

- Mutual mistake of fact. *Ch. 215, Duress, Menace, Fraud, Undue Influence, and Mistake, § 215.140*;

see also Civ. Code § 1577

- Unilateral mistake of fact. *Ch. 215, Duress, Menace, Fraud, Undue Influence, and Mistake, § 215.141*; *see also Civ. Code § 1577*

[5] Mistake of Law

- Allegation of mistake of law. *Ch. 215, Duress, Menace, Fraud, Undue Influence, and Mistake, § 215.142*; *see also Civ. Code § 1578*

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§ 26.224 Fraudulent Conveyances

[1] Action to Set Aside Fraudulent Transfer

- Plaintiff creditor not harmed by fraudulent transfer. *Ch. 270, Fraudulent Conveyances, § 270.200*; *see also Civ. Code § 3439.01*

- Transfer as preference of defendant transferee over plaintiff. *Ch. 270, Fraudulent Conveyances, § 270.199*; *see also Civ. Code § 3432*

- Transfer resulted from noncollusive enforcement of lien in accordance with applicable law. *Ch. 270, Fraudulent Conveyances, § 270.202*; *see also Civ. Code § 3439.08(e)(2)*

- Transfer resulted from termination of lease on debtor's default. *Ch. 270, Fraudulent Conveyances, § 270.201*; *see also Civ. Code § 3439.08(e)(1)*

[2] Action to Set Aside or to Declare Void Transfer of Personal Property

- Transfer occurred or claim of plaintiff arose after filing of financing statement and publication of notice. *Ch. 270, Fraudulent Conveyances, § 270.223*; *see also Civ. Code §§ 3440.1(h), 3440.2*

- Transfer of statutorily excluded property. *Ch. 270, Fraudulent Conveyances, § 270.222*; *see also Civ. Code § 3440.1(a)-(g), (i)-(m)*

[3] Action to Set Aside or to Recover Value of Fraudulent Bulk Transfer

- Good faith attempt to comply with notice requirements. *Ch. 270, Fraudulent Conveyances, § 270.246*; *see also Com. Code § 6107*

- Statutory limit on cumulative liability exceeded. *Ch. 270, Fraudulent Conveyances, § 270.245*; *see also Com. Code § 6107*

- Transfer statutorily excluded. *Ch. 270, Fraudulent Conveyances, § 270.244*; *see also Com. Code §§ 6103, 6107*

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§ 26.225 Gambling

- Gambling establishment seeking recovery on check cashed for customer for gambling purposes. *Ch. 272, Gambling, § 272.41*; *see also Civ. Code § 1667(2), (3)*

- Illegal contract involving gambling. *Ch. 272, Gambling, § 272.40*; *see also Civ. Code § 1667(1)*

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§ 26.226 Games, Sports, and Athletics

- Assumption of risk by plaintiff spectator. *Ch. 273, Games, Sports, and Athletics, § 273.93*; *see also Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 829, 119 Cal. Rptr. 858, 532 P.2d 1226*

- Assumption of risk by plaintiff participant. *Ch. 273, Games, Sports, and Athletics, §§ 273.117, 273.118*; *see also Knight v. Jewett (1992) 3 Cal. 4th 296, 320, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

- Contributory negligence of plaintiff participant requires comparative fault apportionment. *Ch. 273, Games, Sports, and Athletics, § 273.120*; *see also Knight v. Jewett (1992) 3 Cal. 4th 296, 320, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

- Secondary assumption of risk or other negligence by plaintiff spectator requires comparative fault apportionment. *Ch. 273, Games, Sports, and Athletics, § 273.94*; *see also Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226*

- Secondary assumption of risk by plaintiff participant requires comparative fault apportionment. *Ch. 273, Games, Sports, and Athletics, § 273.119*; *see also Knight v. Jewett (1992) 3 Cal. 4th 296, 320, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

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§ 26.227 Garages

- Lack of registration as automotive repair dealer as defense to action by automobile repairer to recover for repairs. *Ch. 274, Garages and Gas Stations, § 274.50*; *see also Bus. & Prof. Code § 9884.16*

- Lack of written estimate or authorization as defense to action by automobile repairer to recover for repairs. *Ch. 274, Garages and Gas Stations, § 274.49*; *see also Bus. & Prof. Code § 9884.9*

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§ 26.228 Home Solicitation Contracts

- Cancellation of contract. *Ch. 128, Consumer Contracts: Statutes Regulating Specific Types of Contracts, § 128.61*; *see also Civ. Code §§ 1689.5, 1689.24, 1689.6, 1689.20*

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§ 26.229 Hotels and Motels

- Negligence of plaintiff guest proceeding in darkness after failing to turn on light provided in room. *Ch. 297, Hotels and Motels, § 297.76*; *see also Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858, 532 P.2d 1226*

- No liability in excess of statutory amount when guest given no "receipt in writing" for deposited valuables. *Ch. 297, Hotels and Motels, § 297.77*; *see also Civ. Code § 1860*

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§ 26.230 Insolvency

- Creditor's action against debtor barred by composition agreement. *Ch. 307, Insolvency, § 307.53*; *see also Reynolds v. Pennsylvania Oil Co. (1907) 150 Cal. 629, 634-635, 89 P. 610*

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§ 26.231 Insurance

- Action barred by failure to file within time specified in policy. *Ch. 308, Insurance, § 308.495*; *see also Ins. Code § 2070 et seq.*

- Action premature; appraisal proceeding pending. *Ch. 308, Insurance, § 308.493*; *see also Ins. Code § 2071*

- Action premature; failure of insured to comply with "No Action" clause. *Ch. 308, Insurance, § 308.494*; *see also Ins. Code § 11580(b)(2)*

- Assignment of policy without consent of insurer. *Ch. 308, Insurance, § 308.499*; *see also Ins. Code § 2071*

- Cancellation of policy before loss. *Ch. 308, Insurance, § 308.490*; *see also Ins. Code §§ 484, 661, 662, 664-667, 667.5, 668.5, 670, 673, 676, 676.6, 1861.03(c)(1)*

- Concealment or false representation in application for insurance. *Ch. 308, Insurance, § 308.496*; *see also Ins. Code §§ 330-339, 350-361*

- Failure by insured to cooperate. *Ch. 308, Insurance, § 308.502*; *see also Hall v. Travelers Ins. Co. (1971) 15 Cal. App. 3d 304, 306 n.1, 93 Cal. Rptr. 159*

- Failure by insured to give notice and proof of loss. *Ch. 308, Insurance, § 308.500*; *see also Ins. Code §§ 550-552, 555*

- Failure by insured to keep accurate books and records. *Ch. 308, Insurance, § 308.501*; *see also Holz Rubber Co., Inc. v. American Star Ins. Co. (1975) 14 Cal. 3d 45, 59, 120 Cal. Rptr. 415, 533 P.2d 1055*

- False or fraudulent statements in proof of loss. *Ch. 308, Insurance, § 308.497*; *see also Penal Code §§ 550, 590, 591, 2071*

- Noncoverage of policy or loss resulting from excluded or excepted risk. *Ch. 308, Insurance, § 308.498*; *see also Ins. Code § 532*

- Plaintiff's lack of insurable interest. *Ch. 308, Insurance, § 308.492*; *see also Ins. Code § 286*

- Rescission of policy. *Ch. 308, Insurance, § 308.491*; *see also Ins. Code § 650*

- Reservation of right to raise defense of noncoverage of policy. *Ch. 308, Insurance, § 308.503*; *see also Ins. Code § 11580(b)(2)*

- Subrogation. See *§ 26.297, below*

- Title insurance. See *§ 26.299, below*

- Willful act of insured as causing loss. *Ch. 308, Insurance, § 308.504*; *see also Ins. Code § 533*

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§ 26.232 Interference With Contract or With Economic Relations

- See *§ 26.306, below*

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§ 26.233 Intoxicated Persons

- Incapacity to contract due to intoxication. *Ch. 19, Alcoholic Beverages: Civil Liability, § 19.90*; *see also Guidici v. Guidici (1935) 2 Cal. 2d 497, 502, 41 P.2d 932*

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§ 26.234 Inventions

- See *§ 26.262, below*

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§ 26.235 Inverse Condemnation

- See *§ 26.210, above*

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§ 26.236 Laches

- Accounting action. See *§ 26.155, above*
- Boundary, action to establish. See *§ 26.183, above*
- Reformation action. See *§ 26.277, below*
- Tract restrictions, action to enjoin violation of. See *§ 26.284, below*

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§ 26.237 Landlord and Tenant

[1] Actions for Breach of Covenant Contained in Lease

- Premises destroyed through no fault of defendant; no duty under covenant to repair. *Ch. 332, Landlord and Tenant: The Tenancy, § 332.58*; *see also Civ. Code §§ 1932(2), 1933(4)*

- Illegality of lease or covenant. *Ch. 332, Landlord and Tenant: The Tenancy, § 332.59*; *see also Civ. Code § 1550(3)*; *Grace v. Croninger (1922) 56 Cal. App. 659, 663-664, 206 P. 130*

- Waiver of breach by plaintiff. *Ch. 332, Landlord and Tenant: The Tenancy, § 332.57*; *see also Kern Sunset Oil Co. v. Good Roads Oil Co. (1931) 214 Cal. 435, 440, 6 P.2d 71*

[2] Actions for Noncompliance With Rent Control Ordinance

- Eviction of tenant authorized because landlord is withdrawing units from rental market. *Ch. 335, Landlord and Tenant: Rent Control, § 335.43*; *see also Gov. Code § 7060*.

- Landlord in substantial compliance with ordinance. *Ch. 335, Landlord and Tenant: Rent Control, § 335.42*; *see also Civ. Code § 1947.7(b)*

[3] Actions for Recovery of Rent

- Alterations by landlord unreasonably interfered with quiet enjoyment of premises; constructive eviction. *Ch. 334, Landlord and Tenant: Claims for Damages, § 334.107*; *see also Civ. Code § 1927*.

- Breach of dependent covenant by landlord; discharge from payment of rent. *Ch. 334, Landlord and Tenant: Claims for Damages, § 334.111*; *see also Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 669-670, 155 P.2d 24* ; *Medico-Dental etc. Co. v. Horton & Converse (1942) 21 Cal. 2d 411, 418-420, 132 P.2d 457*

- Breach of warranty of habitability by landlord; discharge from payment of rent. *Ch. 334, Landlord and Tenant: Claims for Damages, § 334.112*; *see also Green v. Superior Court (1974) 10 Cal. 3d 616, 631, 637, 111 Cal. Rptr. 704, 517 P.2d 1168*

- Condemnation of premises; discharge from payment of rent. *Ch. 334, Landlord and Tenant: Claims for Damages, § 334.114*; *see also Texas Co. v. County of Los Angeles (1959) 52 Cal. 2d 55, 62, 338 P.2d 440*

- Destruction of premises; discharge from payment of rent. *Ch. 334, Landlord and Tenant: Claims for Damages, § 334.113*; *see also Civ. Code §§ 1932(2), 1933(4)*

- Discharge from payment of rent on surrender of premises by tenant and reletting by landlord at same rental under post-July 1, 1971 lease. *Ch. 334, Landlord and Tenant: Claims for Damages, § 334.104*; *see also Civ. Code § 1951.2*

- Discharge from payment of rent on surrender of premises by tenant and retaking by landlord for own account under pre-July 1, 1971 lease. *Ch. 334, Landlord and Tenant: Claims for Damages, § 334.103*; *see also Dorcich v. Time Oil Co. (1951) 103 Cal. App. 2d 677, 683, 230 P.2d 10*

- Failure by landlord to furnish heat; constructive eviction. *Ch. 334, Landlord and Tenant: Claims for Damages, § 334.108*; *see also Civ. Code § 1927*

- Failure by landlord to place tenant in possession of premises; constructive eviction. *Ch. 334, Landlord and Tenant: Claims for Damages, § 334.110*; *see also Dengler v. Michelssen (1888) 76 Cal. 125, 127, 18 P. 138*

- Failure by landlord to repair dwelling within reasonable time after notice; constructive eviction. *Ch. 334, Landlord and Tenant: Claims for Damages, § 334.105*; *see also Civ. Code §§ 1941, 1942*

- Failure by landlord to repair leased business premises, rendering premises unfit for purpose for which leased; constructive eviction. *Ch. 334, Landlord and Tenant: Claims for Damages, § 334.106*; *see also Butt v. Bertola (1952) 110 Cal. App. 2d 128, 130-131, 242 P.2d 32*

- Frustration of purpose of lease; discharge from payment of rent. *Ch. 334, Landlord and Tenant: Claims for Damages, § 334.116*; *see also Lloyd v. Murphy (1944) 25 Cal. 2d 48, 53, 153 P.2d 47* ; *Fey v. Rossi Improvement Co. (1914) 23 Cal. App. 766, 767-768, 139 P. 908*

- Harassment by landlord interfering with enjoyment of premises; constructive eviction. *Ch. 334, Landlord and Tenant: Claims for Damages, § 334.109*; *see also Civ. Code § 1927*

- Illegal purpose, premises leased for; discharge from payment of rent. *Ch. 334, Landlord and Tenant: Claims for Damages, § 334.115*; *see also Shephard v. Lerner (1960) 182 Cal. App. 2d 746, 748-751, 6 Cal. Rptr. 433*

- Invalid liquidated damages provision. *Ch. 334, Landlord and Tenant: Claims for Damages, § 334.102*; *see also Civ. Code § 1671*

- Retaliatory move by landlord; discharge from payment of rent. *Ch. 334, Landlord and Tenant: Claims for Damages, § 334.118*; *see also Civ. Code § 1942.5*

- Statute of limitations. *Ch. 334, Landlord and Tenant: Claims for Damages, § 334.100*; *see also Code Civ. Proc. §§ 337(1), 337.2, 339(1), 339.5*

- Tenant's right to repair and deduct; discharge from payment of rent. *Ch. 334, Landlord and Tenant: Claims for Damages, § 334.117*; *see also Civ. Code § 1942*

- Uncertainty of oral lease. *Ch. 334, Landlord and Tenant: Claims for Damages, § 334.101*; *see also Tillson v. Peters (1940) 41 Cal. App. 2d 671, 674, 107 P.2d 434*

[4] Actions for Recovery of Security Deposit

- Deposit was payment to secure execution of rental agreement, not security deposit. *Ch. 334, Landlord and Tenant: Claims for Damages, § 334.70*; *see also Civ. Code § 1950.7(a)*

[5] Unlawful Detainer Proceedings

- See *§ 26.307, below*

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§ 26.238 Leases

- Of personal property. See *§ 26.265, below*
- Of real property. See *§ 26.237, above*

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§ 26.239 Libel and Slander

- Consent. *Ch. 340, Libel and Slander, § 340.289*; *see also Moranville v. Aletto (1957) 153 Cal. App. 2d 667, 671, 315 P.2d 91*

- Defendant did not publish or broadcast statement about public figure with malice. *Ch. 340, Libel and Slander, § 340.267*; *see also Curtis Publ'g Co. v. Butts (1967) 388 U.S. 130, 164, 87 S. Ct. 1975, 18 L. Ed. 2d 1094*

- Defendant did not publish or broadcast statement about public official with malice. *Ch. 340, Libel and Slander, § 340.265*; *see also* New York Times Co. v; sullivan *(1964) 376 U.S. 254, 279-280, 84 S. Ct. 710, 11 L. Ed. 2d 686*

- Defendant not at fault in publishing allegedly defamatory statement about private plaintiff that related to matter of public concern. *Ch. 340, Libel and Slander, § 340.268*; *see also Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 347, 349-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789*

- Failure of plaintiff suing publisher or broadcaster to notify defendant of allegedly defamatory statements within statutory period. *Ch. 340, Libel and Slander, § 340.273*; *see also Civ. Code § 48a(1)*

- Failure of plaintiff suing publisher or broadcaster to notify defendant with sufficient specificity what statements were allegedly defamatory. *Ch. 340, Libel and Slander, § 340.272*; *see also Civ. Code § 48a(1)*

- Failure of plaintiff suing publisher or broadcaster to serve demand on owner rather than originator of allegedly defamatory statements. *Ch. 340, Libel and Slander, § 340.274*; *see also Civ. Code § 48a(1)*

- Justification on ground that defendant's statements were truthful. *Ch. 340, Libel and Slander, § 340.279*; *see also Draper v. Hellman Commercial Trust & Sav. Bank (1928) 203 Cal. 26, 34, 263 P. 240* ; *Swaffield v. Universal Ecsco Corp. (1969) 271 Cal. App. 2d 147, 164, 76 Cal. Rptr. 680*

- Mitigating circumstances. *Ch. 340, Libel and Slander, § 340.280*; *see also Clay v. Lagiss (1956) 143 Cal. App. 2d 441, 448, 299 P.2d 1025* ; *Code Civ. Proc. § 461*

- No defamatory meaning conveyed by publication. *Ch. 340, Libel and Slander, § 340.292*; *see also* Arno v; stewart *(1966) 245 Cal. App. 2d 955, 962-963, 54 Cal. Rptr. 392* ; *Ervin v. Record Publ'g Co. (1908) 154 Cal. 79, 82, 97 P. 21*

- Nonliability of radio or television broadcaster who has exercised due care to prevent defamatory statement. *Ch. 340, Libel and Slander, § 340.278*; *see also Civ. Code § 48.5*

- Privileged publication by executive officer. *Ch. 340, Libel and Slander, § 340.282*; *see also Civ. Code § 47(a)*

- Privileged publication made in connection with administrative proceeding. *Ch. 340, Libel and Slander, § 340.285*; *see also Civ. Code § 47(b)*

- Privileged publication made in connection with judicial proceeding. *Ch. 340, Libel and Slander, § 340.284*; *see also Civ. Code § 47(b)*

- Privileged publication made in connection with legislative proceeding. *Ch. 340, Libel and Slander, § 340.283*; *see also Civ. Code § 47(b)*

- Privileged publication when publication is fair and true report made in public journal. *Ch. 340, Libel and Slander, § 340.286*; *see also Civ. Code § 47(d)*

- Privileged publication when publication is fair and true report of public meeting or of matter for public benefit. *Ch. 340, Libel and Slander, § 340.287*; *see also Civ. Code § 47(e)*

- Privileged publication when publication made without malice. *Ch. 340, Libel and Slander, § 340.288*; *see also Civ. Code § 47(c)*

- Public employee immune for statement made within scope of authority. *Ch. 340, Libel and Slander, § 340.294*; *see also Gov. Code § 820.2*

- Public entity immune for discretionary statement of public employee. *Ch. 340, Libel and Slander, § 340.295*; *see also Gov. Code § 815.2(a), (b)*

- Slander of title. See *§ 26.291, below*

- Statute of limitations as bar. *Ch. 340, Libel and Slander, § 340.291*; *see also Code Civ. Proc. § 340(c)*

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§ 26.240 Liens

- Art. See *§ 26.166, above*

- Defense to complaint to marshal assets on ground that defendant would be substantially injured if required to marshal assets. *Ch. 342, Liens and Wage Preferences, § 342.160*; *see also Civ. Code §§ 2899, 3433*

- Mechanics' lien. See *§ 26.248, below*

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§ 26.241 Limitation of Actions

- General form. *Ch. 345, Limitation of Actions, § 345.100*; *see also Union Sugar Co. v. Hollister Estate Co. (1935) 3 Cal. 2d 740, 744, 47 P.2d 273* ; *County of San Mateo v. Booth (1982) 135 Cal. App. 3d 388, 399, 185 Cal. Rptr. 349* ; *In re Andrew V. (1991) 232 Cal. App. 3d 1286, 1291, 284 Cal. Rptr. 38*

- Accounting action. See *§ 26.155, above*

- Adverse possession. See *§ 26.159, above*

- Attorney malpractice. See *§ 26.171, above*

- Cause of action of nonresident arising outside California. *Ch. 345, Limitation of Actions, § 345.101*; *see also Code Civ. Proc. § 361*

- Defendant foreign corporation had designated agent within state for service of process. *Ch. 345, Limitation of Actions, § 345.102*; *see also* Corp. Code §§ 6403, 6500, 6501

- Foreclosure action. See *§ 26.303[2], below*

- Interference with economic relations, action for. See *§ 26.306, below*

- Libel action. See *§ 26.239, below*

- Negligence action. See *§ 26.255, below*

- Nuisance action. See *§ 26.259, below*

- Physician's negligence, action based on. See *§ 26.266, below*

- Products liability action. See *§ 26.272, below*

- Promissory note, action on. See *§ 26.256[3], below*

- Public entities, action against. See *§ 26.274, below*

- Reformation action. See *§ 26.277, below*

- Sexual abuse of children. Ch. 5, *Abuse of Minors and Elderly*, § 5.61 et seq.; Ch. 345, *Limitation of Actions*, § 345.20; *see also Code Civ. Proc. § 340.1*

- Shortening of period of limitation by private agreement. *Ch. 345, Limitation of Actions, § 345.103*; *see also Sanders v. American Casualty Co. (1969) 269 Cal. App. 2d 306, 309, 74 Cal. Rptr. 634*

- Slander of title action. See *§ 26.291, below*

- Subrogation action. See *§ 26.297, below*

- Trade secrets misappropriation, action for. See *§ 26.301, below*

- Trespass action. See *§ 26.302, below*

- Wrongful death action. See *§ 26.311, below*

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§ 26.242 Limited Liability Company

- Lack of capacity to sue, generally. See *§ 26.151[1], above*

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§ 26.243 Logs and Timber

- Treble damages are not available in action for wrongful cutting or removal of timber if defendant did not act willfully or maliciously. *Ch. 350, Logs and Timber, § 350.70*; *see also Civ. Code § 3346*; *Code Civ. Proc. § 733*

- Treble damages are not available in action for wrongful entry and willful removal of timber if agreed on boundary line was not crossed. *Ch. 350, Logs and Timber, § 350.71*; *see also Civ. Code § 3346*; *Code Civ. Proc. § 733*

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§ 26.244 Long-Term Health Care

- Lost or stolen property not included on patient's written inventory. *Ch. 351, Long-Term Health and Residential Care, § 351.241*; *see also Health & Safety Code §§ 1569.152, 1569.153(d)*

- Transfer or eviction justified by misrepresentation of finances. *Ch. 351, Long-Term Health and Residential Care, § 351.222*; *see also Welf. & Inst. Code § 14124.7*; *Health & Safety Code § 1439.7*

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§ 26.245 Lost Property

- Owner's failure to pay or tender reasonable charges for saving and taking care of property as defense to owner's action against finder or saver to recover property. *Ch. 355, Lost and Unclaimed Property, § 355.64*; *see also Civ. Code § 2080*

- Plaintiff's failure to make reasonable proof of ownership as defense to action against finder or saver to recover property. *Ch. 355, Lost and Unclaimed Property, § 355.65*; *see also Civ. Code § 2080*

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§ 26.246 Malicious Prosecution

[1] Prior Civil Action

- No favorable termination because prior case still pending. *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.200*; *see also* Rich v; siegel *(1970) 7 Cal. App. 3d 465, 469, 86 Cal. Rptr. 665*

- No favorable termination due to settlement of prior action. *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.199*; *see also Paskle v. Williams (1931) 214 Cal. 482, 484, 6 P.2d 505*

- Probable cause established by attorney's honest and reasonable belief in client's claim. *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.202*; *see also Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 886, 254 Cal. Rptr. 336, 765 P.2d 498*

- Public employee is not liable for malicious prosecution. See *§ 26.274, below*

- Waiver of action by request for defense costs. *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.203*; *see also Code Civ. Proc. § 1038(c)*

[2] Prior Criminal Action

- Defendant acted on advice of public prosecutor in initiating criminal prosecution against plaintiff. *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.196*; *see also Richter v. Neilson (1936) 11 Cal. App. 2d 503, 508, 54 P.2d 54*

- Defendant presented honest statement of facts to authorities. *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.198*; *see also Gogue v. MacDonald (1950) 35 Cal. 2d 482, 486-487, 218 P.2d 542*

- Dismissal of prior criminal proceeding did not indicate innocence of plaintiff. *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.195*; *see also Jaffe v. Stone (1941) 18 Cal. 2d 146, 150, 114*

P.2d 335 ; *De La Riva v. Owl Drug Co. (1967) 253 Cal. App. 2d 593, 599-600, 61 Cal. Rptr. 291*

- Probable cause established because plaintiff was guilty of offense charged. *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.197*; *see also* *Clary v. Hale (1959) 175 Cal. App. 2d 880, 890, 1 Cal. Rptr. 91*

- Public employee is not liable for malicious prosecution. See *§ 26.274, below*

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§ 26.247 Malpractice

- By accountant. See *§ 26.154, above*
- By attorney. See *§ 26.171, above*
- By physician. See *§ 26.266, below*

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§ 26.248 Mechanics' Liens

- Bond previously executed and recorded by original contractor, as defense in action to foreclose mechanic's lien. *Ch. 361, Mechanic's Liens, § 361.258*; *see also Civ. Code § 3143*

- Chattel installed is not fixture attached to realty, as defense in action to foreclose mechanic's lien. *Ch. 361, Mechanic's Liens, § 361.253*; *see also Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 129-131, 95 Cal. Rptr. 728* ; *R. Barcroft & Sons Co. v. Cullen (1933) 217 Cal. 708, 708-712, 20 P.2d 665*

- Labor performed did not result in permanent improvement to realty, as defense in action to foreclose mechanic's lien. *Ch. 361, Mechanic's Liens, § 361.254*; *see also Ogden v. Byington (1926) 198 Cal. 151, 157, 244 P. 332* ; *Howard A. Deason & Co. v. Costa Tierra, Ltd. (1969) 2 Cal. App. 3d 742, 753, 83 Cal. Rptr. 105*

- Owner recorded notice of nonresponsibility, as defense in action to foreclose owner's property. *Ch. 361, Mechanic's Liens, § 361.256*; *see also Civ. Code §§ 3097, 3129*

- Trust deed holder has senior lien, as defense in action to foreclose mechanic's lien. *Ch. 361, Mechanic's Liens, § 361.257*; *see also Civ. Code § 1214*

- Waiver of mechanics' lien by written contract, as defense in action to foreclose owner's property. *Ch. 361, Mechanic's Liens, § 361.255*; *see also Ferry v. Ohio Farmers Ins. Co. (1963) 211 Cal. App. 2d 651, 653, 27 Cal. Rptr. 471*

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§ 26.249 Menace

- Threats of and actual confinement of person or property and threats of injury to person or property. *Ch. 215, Duress, Menace, Fraud, Undue Influence, and Mistake, § 215.120*; *see also Civ. Code §§ 1569, 1570*

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§ 26.250 Mental Suffering

- See *§ 26.211, above*

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3-VI California Forms of Pleading and Practice--Annotated § 26.251

§ 26.251 Minors

- Contract disaffirmed by minor defendant. *Ch. 365, Minors: Contract Actions, § 365.161*; *see also Fam. Code § 6710*

- Defendant who purchased goods from minor plaintiff was innocent purchaser who received goods before plaintiff's disaffirmation. *Ch. 365, Minors: Contract Actions, § 365.162*; *see also Fam. Code § 6713*

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§ 26.252 Misjoinder of Parties

- See *§ 26.151[2], above*

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§ 26.253 Misrepresentation

- See *§ 26.223, above*

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§ 26.254 Mistake

- See *§ 26.223, above*

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3-VI California Forms of Pleading and Practice--Annotated § 26.255

§ 26.255 Negligence

- Airplanes. See *§ 26.161, above*

- Animals. See *§ 26.163, above*

- Assumption of risk; implied primary assumption of risk by participation in active sport. *Ch. 380, Negligence, § 380.374*; *see also Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

- Assumption of risk; implied secondary assumption of risk. *Ch. 380, Negligence, § 380.375*; *see also Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

- Assumption of risk; risk expressly assumed by plaintiff. *Ch. 380, Negligence, § 380.373*; *see also Ferrell v. Southern Nev. Off-Road Enthusiasts, Ltd. (1983) 147 Cal. App. 3d 309, 318, 195 Cal. Rptr. 90*

- Assumption of risk; risk expressly assumed. *Ch. 380, Negligence, § 380.373*; *see also Ferrell v. Southern Nev. Off-Road Enthusiasts, Ltd. (1983) 147 Cal. App. 3d 309, 318, 195 Cal. Rptr. 90*

- Automobiles. See *§ 26.173, above*

- Bailments. See *§ 26.174, above*

- Beauty salons. See *§ 26.177, above*

- Bicycles. See *§ 26.179, above*

- Buses. See *§ 26.186, above*

- Comparative negligence of plaintiff. *Ch. 380, Negligence, § 380.370*; *see also Simmons v. Wexler*

(1979) 94 Cal. App. 3d 1007, 1014, 156 Cal. Rptr. 810

- Emergency vehicles. See *§ 26.209, above*

- Explosives. See *§ 26.218, above*

- Failure by plaintiff to mitigate damages. *Ch. 380, Negligence, § 380.292*; *see also Pretzer v. California Transit Co. (1930) 211 Cal. 202, 294 P. 382*

- Games, sports, and athletics. See *§ 26.226, above*

- Hotels and motels. See *§ 26.229, above*

- Physicians. See *§ 26.266, below*

- Railroads. See *§ 26.275, below*

- Ships. See *§ 26.290, below*

- Statute of limitations bars action for personal injury and/or property damage. *Ch. 380, Negligence, § 380.351*; *see also Code Civ. Proc. §§ 335.1, 338(b), (c), 458*

- Vicarious liability of plaintiff is basis for imputing comparative negli gence. *Ch. 380, Negligence, § 380.372*; *see also Matthias v. United Pac. Ins. Co. (1968) 260 Cal. App. 2d 752, 755, 67 Cal. Rptr. 511*

- Violation by plaintiff of statute, ordinance, or regulation is comparative negligence. *Ch. 380, Negligence, § 380.371*; *see also Evid. Code § 669*

- Workers' compensation is exclusive remedy. *Ch. 380, Negligence, § 380.376*; *see also Lab. Code §§ 3601, 5300*

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§ 26.256 Negotiable Instruments

[1] General Defenses

- Defendant's signature obtained by threats of criminal prosecution. *Ch. 385, Negotiable Instruments, § 385.129*; *see also Com. Code § 3305(a)(1)(B)*

- Drawer or maker of instrument is incompetent. *Ch. 385, Negotiable Instruments, § 385.130*; *see also* Civ. Code § 1556 Com. Code § 3305(a)(1)(B)

- Failure of consideration. *Ch. 385, Negotiable Instruments, § 385.125*; *see also Com. Code §§ 3303(b), 3305(a)(2), (b)(2)*

- Forged or unauthorized signature. *Ch. 385, Negotiable Instruments, § 385.131*; *see also Com. Code § 3403*

- Holder had knowledge of infirmity, defense, or claim. *Ch. 385, Negotiable Instruments, § 385.128*; *see also Com. Code § 3302(a)(2)*

- No delivery and incomplete instrument. *Ch. 385, Negotiable Instruments, § 385.132*; *see also Com. Code §§ 3105(b), 3115*

[2] Checks

- Certification of check discharged drawer or endorser. *Ch. 385, Negotiable Instruments, § 385.126*; *see also Com. Code §§ 3409(a), (d), 3414(c), 3415(d)*

- Check not presented within 30 days after endorsement. *Ch. 385, Negotiable Instruments, § 385.127*; *see also Com. Code § 3415(e)*

- Employee's fraudulent endorsement binds plaintiff. *Ch. 95, Banks, Deposits, and Checks, § 95.454*;

see also Com. Code §§ 3405, 4401(a)

- Failure to inform bank of irregularities on statement or item. *Ch. 95, Banks, Deposits, and Checks, §§ 95.451, 95.452*; *see also Com. Code §§ 4401(a), 4406(a)-(f)*

- Fictitious payee's endorsement binds plaintiff. *Ch. 95, Banks, Deposits, and Checks, § 95.453*; *see also Com. Code §§ 3404(b), 4401(a)*

- Lack of care in issuing incomplete instrument contributed to alteration or loss. *Ch. 95, Banks, Deposits, and Checks, § 95.455*; *see also Com. Code §§ 3115, 3406, 3407, 4401(a)*

- Authority of person depositing check lacking payee's signature excuses depositary bank from liablility for statutory conversion of deposited check. *Ch. 95, Banks, Deposits, and Checks, § 95.462*; *see also Com. Code § 3420*

[3] Promissory Notes

- Equitable estoppel. *Ch. 385, Negotiable Instruments, § 385.118*; *see also Evid. Code § 623*

- Extension of maturity through renewal note. *Ch. 385, Negotiable Instruments, § 385.113*; *see also Civ. Code § 1530*; *Com. Code § 3601(b)*

- Alteration of note. *Ch. 385, Negotiable Instruments, § 385.114*; *see also Com. Code §§ 3302(a)(2)(D), 3305(a)(2), (b), 3407*

- Note given as consideration for gambling debt. *Ch. 385, Negotiable Instruments, § 385.116*; *see also Civ. Code § 1607*; *Com. Code § 3305(a)(1)(B), (b)*

- Note given pursuant to illegal agreement. *Ch. 385, Negotiable Instruments, § 385.115*; *see also Civ. Code § 1689(b)(6)*; *Com. Code § 3305(a)(1)(B), (b)*

- Note not properly presented for payment. *Ch. 385, Negotiable Instruments, § 385.111*; *see also Com. Code § 3502(a)(2)*

- Satisfaction and discharge of note through payment. *Ch. 385, Negotiable Instruments, § 385.112*; *see also Com. Code § 3603*

- Statute of limitations, action barred by. *Ch. 385, Negotiable Instruments, § 385.117*; *see also Com. Code § 3118(a), (b)*

- Tender of amount due on note. *Ch. 385, Negotiable Instruments, § 385.110*; *see also Civ. Code § 1500*; *Code Civ. Proc. § 2074*; *Com. Code § 3603*

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§ 26.257 Nonjoinder of Parties

- See *§ 26.151[3], above*

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§ 26.258 Nonprofit Corporations

- Defendant is volunteer director or executive officer of public benefit corporation. Ch. 388, *Nonprofit Corporations*, § 388.157; *see also Corp. Code § 5239*

- Defendant is volunteer director or executive officer of mutual benefit corporation. *Ch. 388, Nonprofit Corporations, § 388.158*; *see also Corp. Code § 7231.5*

- Defendant is volunteer director or officer of nonprofit corporation and corporation is insured. *Ch. 388, Nonprofit Corporations, § 388.159*; *see also Corp. Code § 5047.5*

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§ 26.259 Nuisance

- Balancing of conveniences, doctrine of. *Ch. 391, Nuisance, § 391.107*; *see also Dolske v. Gormley (1962) 58 Cal. 2d 513, 521, 25 Cal. Rptr. 270, 375 P.2d 174* ; *Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 200, 323 P.2d 1001* ; *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 559-564, 250 P.2d 660*

- Condition complained of created pursuant to express statutory authority. *Ch. 391, Nuisance, § 391.100*; *see also Civ. Code § 3482*

- Defendant business operating in permitted zone. *Ch. 391, Nuisance, § 391.101*; *see also Code Civ. Proc. § 731a*

- Lessee's lawful use was consented to by owner. *Ch. 391, Nuisance, § 391.108*; *see also Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1138-1139, 281 Cal. Rptr. 827*

- Obstruction of light and air does not constitute nuisance. *Ch. 391, Nuisance, § 391.106*; *see also Ingwersen v. Barry (1897) 118 Cal. 342, 343, 50 P. 536* ; *Sher v. Leiderman (1986) 181 Cal. App. 3d 867, 875-880, 226 Cal. Rptr. 698* ; *Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 127, 99 Cal. Rptr. 350*

- Preexisting agricultural use does not constitute nuisance. *Ch. 391, Nuisance, § 391.104*; *see also Civ. Code § 3482.5(a)*

- Preexisting agricultural processing use does not constitute nuisance. *Ch. 391, Nuisance, § 391.105*; *see also Civ. Code § 3482.6(a)*

- Statute of limitations. *Ch. 391, Nuisance, § 391.103*; *see also Code Civ. Proc. §§ 335.1, 338(b), (c), 458*

- Successive owner has no notice of nuisance created by former owner. *Ch. 391, Nuisance, § 391.102*; *see also Civ. Code § 3483*; *Pierce v. German Sav. & Loan Soc'y (1887) 72 Cal. 180, 183, 13 P. 478* ; *Reinhard v. Lawrence Warehouse Co. (1940) 41 Cal. App. 2d 741, 746, 107 P.2d 501*

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§ 26.260 Nursing Homes

- See *§ 26.244, above*

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§ 26.261 Partnerships

[1] Action Based on Obligation of Limited Partnership

- Defendant is limited partner. Ch. 405, *Partnerships: Actions Between Limited Partners or Partnerships and Third Parties*, § 405.46; *see also Corp. Code § 15507(a)* (Uniform Limited Partnership Act); *Corp. Code § 15632(a)* (California Revised Limited Partnership Act); *Corp. Code § 15903.03(a)* (Uniform Limited Partnership Act of 2008)

[2] Actions by Partners or Partnerships Against Third Parties

- Defendant is partner in registered limited liability partnership. *Ch. 402, Partnerships: Actions Between General Partners or Partnership and Third Parties, § 402.48*; *see also Corp. Code § 16306(c)*; former *Corp. Code § 15015*

- Nonjoinder of partners as plaintiffs. *Ch. 402, Partnerships: Actions Between General Partners or Partnership and Third Parties, § 402.41*; *see also Code Civ. Proc. § 369.5(a)*; *Corp. Code § 16307(a)*; *Williams v. Southern P. R. Co. (1895) 110 Cal. 457, 459, 42 P. 974*

- Partnership's noncompliance with fictitious business name statutes. *Ch. 402, Partnerships: Actions Between General Partners or Partnership and Third Parties, § 402.40*; *see also Bus. & Prof. Code §§ 17915, 17917, 17918*

[3] Action for Partnership Accounting

- Existence of partners' agreement settling accounts. *Ch. 406, Partnerships: Dissolution, § 406.67*; *see also Corp. Code § 16405*; former *Corp. Code § 15043*

[4] Action to Determine Buyout Price

- Existence of partners' agreement settling accounts. *Ch. 403, Partnerships: Actions by and Against*

Dissociated Partners, § 403.43; *see also Corp. Code §§ 16103, 16701(i)*; former *Corp. Code § 15043*

- Partner wrongfully withdrew before expiration of term of partnership. *Ch. 403, Partnerships: Actions by and Against Dissociated Partners, § 403.42*; *see also Corp. Code § 16701(h), (i)*

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§ 26.262 Patents

[1] Action by Invention Developer to Enforce Invention Development Services Contract

- Contract unenforceable for invention developer's noncompliance with Invention Development Services Law. *Ch. 411, Patents and Inventions, § 411.139*; *see also Bus. & Prof. Code § 22383*

- Contract unenforceable for misrepresentation by invention developer. *Ch. 411, Patents and Inventions, § 411.140*; *see also Bus. & Prof. Code § 22384*

- Failure of invention developer in advertisement to disclose requirement of fee or consideration. *Ch. 411, Patents and Inventions, § 411.141*; *see also Bus. & Prof. Code §§ 22380, 22388*

- Failure of invention developer to make precontractual disclosures. *Ch. 411, Patents and Inventions, § 411.142*; *see also Bus. & Prof. Code §§ 22381, 22388*

[2] Action by Inventor for Rescission of Invention Development Services Contract

- Invention developer's noncompliance with Chapter 17 is bona fide error. *Ch. 411, Patents and Inventions, § 411.138*; *see also Bus. & Prof. Code § 22383*

[3] Action for Damages Against Invention Developer or Developer's Surety

- Defendant invention promoter not within class regulated by Invention Development Services Law due to insufficient receipts from invention development services. *Ch. 411, Patents and Inventions, § 411.137*; *see also Bus. & Prof. Code §§ 22371(a),(d), 22386, 22390*; *Code Civ. Proc. §§ 996.410, 996.430*

- Plaintiff inventor not within class protected by invention development services law. *Ch. 411, Patents and Inventions, § 411.136*; *see also Bus. & Prof. Code §§ 22371(a),(b), 22386, 22390*; *Code Civ. Proc. §§ 996.410, 996.430*

[4] Employer's Action for Shop Rights to Employee's Invention

- Employer rejected invention is impractical. *Ch. 411, Patents and Inventions, § 411.113*; *see also Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 660-661, 3 Cal. Rptr. 421*

[5] Employer's Action to Enforce Employment Contract

- Employment contract provision requiring assignment of employee's invention rights to employer is unenforceable. *Ch. 411, Patents and Inventions, § 411.114*; *see also Lab. Code § 2870*

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§ 26.263 Paternity

- Mother cohabiting with husband at time of conception, as defense in action to declare existence of father/child relationship. *Ch. 412, Paternity, § 412.133*; *see also Fam. Code § 7540*

- Mother engaged in sexual intercourse with men other than defendant. *Ch. 412, Paternity, § 412.134*; *see also Fam. Code § 7600 et seq.*

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§ 26.264 Pending Actions

- See *§ 26.151[4], above*

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§ 26.265 Personal Property Leases

- Lease is finance lease. *Ch. 413, Personal Property Leases, § 413.347*; *see also Com. Code § 10103(a)(7)*

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§ 26.266 Physicians

- Comparative negligence of plaintiff. *Ch. 414, Physicians and Other Medical Personnel, § 415.102* (Judicial Council Pleading Form); *see also LeMons v. Regents of Univ. of Cal. (1978) 21 Cal. 3d 869, 874-875, 148 Cal. Rptr. 355, 582 P.2d 946* ; *Bolen v. Woo (1979) 96 Cal. App. 3d 944, 952, 158 Cal. Rptr. 454*

- Exemption from vehicular speed limitations in emergencies. See *§ 26.209, above*

- Statute of limitations bars action. *Ch. 414, Physicians and Other Medical Personnel, § 415.102* (Judicial Council Pleading Form); *see also LeMons v. Regents of Univ. of Cal. (1978) 21 Cal. 3d 869, 874-875, 148 Cal. Rptr. 355, 582 P.2d 946* ; *Bolen v. Woo (1979) 96 Cal. App. 3d 944, 952, 158 Cal. Rptr. 454*

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§ 26.267 Pollution

- Act of God or war. *Ch. 418, Pollution and Environmental Matters, § 418.191*; *see also 42 U.S.C § 9607(b)*

- Any act or omission by defendant is divisible and distinct from any compensable damage incurred by plaintiffs. *Ch. 418, Pollution and Environmental Matters, § 418.191*; *see also 42 U.S.C § 9607(b)*

- Any response costs incurred by plaintiffs were neither "necessary" nor consistent with the national contingency plan. *Ch. 418, Pollution and Environmental Matters, § 418.191*; *see also 42 U.S.C. § 9607(a)(4)(B).*

- Assumption of risk. *Ch. 418, Pollution and Environmental Matters, § 418.191*; *see also Town of Munster, Ind. v. Sherwin-Williams (7th Cir. 1994) 27 F.3d 1268, 1270* ; *U.S. v. Marisol, Inc. (M.D. Pa. 1989) 725 F. Supp. 833, 843*

- Comparative negligence. *Ch. 418, Pollution and Environmental Matters, § 418.191*; *see also Town of Munster, Ind. v. Sherwin-Williams (7th Cir. 1994) 27 F.3d 1268, 1270* ; *U.S. v. Marisol, Inc. (M.D. Pa. 1989) 725 F. Supp. 833, 843*

- Defendant is not jointly and severally liable because there is a reasonable basis on which to apportion any liability among the parties. *Ch. 418, Pollution and Environmental Matters, § 418.191*; *see also Town of Munster, Ind. v. Sherwin-Williams (7th Cir. 1994) 27 F.3d 1268, 1270* ; *U.S. v. Marisol, Inc. (M.D. Pa. 1989) 725 F. Supp. 833, 843*

- Doctrine of estoppel. *Ch. 418, Pollution and Environmental Matters, § 418.191*; *see also Town of Munster, Ind. v. Sherwin-Williams (7th Cir. 1994) 27 F.3d 1268, 1270* ; *U.S. v. Marisol, Inc. (M.D. Pa. 1989) 725 F. Supp. 833, 843*

- Doctrine of laches. *Ch. 418, Pollution and Environmental Matters, § 418.191*; *see also Town of*

Munster, Ind. v. Sherwin-Williams (7th Cir. 1994) 27 F.3d 1268, 1270 ; *U.S. v. Marisol, Inc. (M.D. Pa. 1989) 725 F. Supp. 833, 843*

- Doctrine of unclean hands. *Ch. 418, Pollution and Environmental Matters, § 418.191*; *see also Town of Munster, Ind. v. Sherwin-Williams (7th Cir. 1994) 27 F.3d 1268, 1270* ; *U.S. v. Marisol, Inc. (M.D. Pa. 1989) 725 F. Supp. 833, 843*

- Doctrine of waiver. *Ch. 418, Pollution and Environmental Matters, § 418.191*; *see also Town of Munster, Ind. v. Sherwin-Williams (7th Cir. 1994) 27 F.3d 1268, 1270* ; *U.S. v. Marisol, Inc. (M.D. Pa. 1989) 725 F. Supp. 833, 843*

- Failure to mitigate damages. *Ch. 418, Pollution and Environmental Matters, § 418.191*; *see also Town of Munster, Ind. v. Sherwin-Williams (7th Cir. 1994) 27 F.3d 1268, 1270* ; *U.S. v. Marisol, Inc. (M.D. Pa. 1989) 725 F. Supp. 833, 843*

- No release or threatened release of hazardous substances within the meaning of *42 U.S.C. Section 9607(a)* occurred. *Ch. 418, Pollution and Environmental Matters, § 418.191*; *see also 42 U.S.C. § 9607(a)*

- Plaintiffs or their agents consented to all of the activities of the defendant. *Ch. 418, Pollution and Environmental Matters, § 418.191*; *see also Town of Munster, Ind. v. Sherwin-Williams (7th Cir. 1994) 27 F.3d 1268, 1270* ; *U.S. v. Marisol, Inc. (M.D. Pa. 1989) 725 F. Supp. 833, 843*

- Plaintiffs' CERCLA § 107(a) claim is barred because plaintiffs are potentially responsible parties. *Ch. 418, Pollution and Environmental Matters, § 418.191*; *see also 42 U.S.C. § 9607(a)*

- Retroactive application of CERCLA would violate rights guaranteed to defendant. *Ch. 418, Pollution and Environmental Matters, § 418.191*; *see also 42 U.S.C. § 9601 et seq.*

- Statute of limitations bars action. *Ch. 418, Pollution and Environmental Matters, § 418.191*; *see also Code Civ. Proc. § 338*; *42* U.S.C. § 9613(g)

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§ 26.268 Powers of Attorney

- Attorney in fact previously breached agreement with third person plaintiff. *Ch. 427, Principal and Agent, § 427.147*; *see also Prob. Code § 4309*

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§ 26.269 Premature Actions

- See *§ 26.151[5], above*

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§ 26.270 Premises Liability

- Assumption of risk. *Ch. 421, Premises Liability, § 421.101*; *see also Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226* ; *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

- Comparative negligence of plaintiff; obvious danger. *Ch. 421, Premises Liability, § 421.100*; *see also Florez v. Groom Dev. Co. (1959) 53 Cal. 2d 347, 355, 1 Cal. Rptr. 840, 348 P.2d 200* ; *Rowland v. Christian (1969) 69 Cal. 2d 108, 112-113, 70 Cal. Rptr. 97, 443 P.2d 561*

- Plaintiff unreasonably failed to protect property from watercourse flow. *Ch. 421, Premises Liability, § 421.121*; *see also Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 337, 27 Cal. Rptr. 2d 613, 867 P.2d 724* ; *Sheffet v. County of Los Angeles (1970) 3 Cal. App. 3d 720, 730-731, 731 n.8, 84 Cal. Rptr. 11*

- Plaintiff was injured during or after commission of felony. *Ch. 421, Premises Liability, § 421.103*; *see also Civ. Code § 847(a)*

- Plaintiff was gleaner of agricultural or farm products from defendant's property. *Ch. 421, Premises Liability, § 421.104*; *see also Civ. Code § 846.2*

- Plaintiff was uninvited recreational user of defendant's property. *Ch. 421, Premises Liability, § 421.102*; *see also Civ. Code § 846*

- Waters intruding on plaintiff's property were flood waters. *Ch. 421, Premises Liability, § 421.120*; *see also Everett v. Davis (1941) 18 Cal. 2d 389, 393, 115 P.2d 821* ; *Weinberg Co. v. Bixby (1921) 185 Cal. 87, 96, 196 P. 25*

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§ 26.271 Privacy

[1] Action Against Federal or State Agency Based on Improper Disclosure of Personal Information

- Law enforcement exemption. *Ch. 429, Privacy, § 429.507*; *see also Civ. Code § 1798.24(o)*

[2] Action Against State or Local Official for Deprivation of Civil Rights

- Qualified immunity for acting in good faith. *Ch. 429, Privacy, § 429.561*; *see also Commonwealth of Pennsylvania ex rel. Feiling v. Sincavage (3rd Cir. 1971) 439 F.2d 1133, 1134*

[3] Action for Invasion of Privacy

- Defendant had statutory duty to disclose information. *Ch. 429, Privacy, § 429.479*; *see, e.g., Mason v. Western Union Tel. Co. (1975) 52 Cal. App. 3d 429, 440, 125 Cal. Rptr. 53* .

- Lack of standing. *Ch. 429, Privacy, § 429.476*; *see also Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 821* ; *Ion Equip. Corp. v. Nelson (1980) 110 Cal. App. 3d 868, 878-879, 168 Cal. Rptr. 361*

- Plaintiff is public figure. *Ch. 429, Privacy, § 429.477*; *see also Johnson v. Harcourt, Brace, Jovanovich, Inc. (1974) 43 Cal. App. 3d 880, 892, 118 Cal. Rptr. 370*

- Publication protected because it is newsworthy. *Ch. 429, Privacy, § 429.478*; *see also Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 541, 93 Cal. Rptr. 866, 483 P.2d 34 , overruled on other grounds, Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 696-697, 21 Cal. Rptr. 3d 663, 101 P.3d 552* & n.9, *21 Cal. Rptr. 3d 663, 101 P.3d 552* ; *Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 810, 812, 163 Cal. Rptr. 628, 608 P.2d 716*

[4] Action Under Information Practices Act

- No cause of action for subjective opinion in personnel evaluation contained in state agency's records.

Ch. 429, Privacy, § 429.503; *see also Civ. Code § 1798.50*

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§ 26.272 Products Liability

- Action preempted by federal law. Ch. 460, *Products Liability*, § 460.188; *see, e.g.,* *Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504, 524-525, 550, 112 S. Ct. 2608, 120 L. Ed. 2d 407*

- Adequate warning in English on nonprescription drug is defense to failure to warn in other language. *Ch. 460, Products Liability, § 460.186*; *see also 21 U.S.C.S. § 352*; *21 C.F.R. § 201.1 et seq.*; *Ramirez v. Plough, Inc. (1993) 6 Cal. 4th 539, 548, 25 Cal. Rptr. 2d 97, 863 P.2d 167*

- Alteration in product after sale. *Ch. 460, Products Liability, § 460.184*; *see also* *Martinez v. Nichols Conveyor & Eng'g Co., Inc. (1966) 243 Cal. App. 2d 795, 799, 52 Cal. Rptr. 842* ; *Warner Constr. Corp. v. Los Angeles (1970) 2 Cal. 3d 285, 298-299 n.15, 85 Cal. Rptr. 444, 466 P.2d 996*

- Comparative fault. *Ch. 460, Products Liability, § 460.182*; *see also* *Li v. Yellow Cab (1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226*

- Cosmetics and grooming products. See *§ 26.177, above*

- Government contractor immunity. *Ch. 460, Products Liability, § 460.187*; *see also* *Boyle v. United Techs. Corp. (1988) 487 U.S. 500, 512, 108 S. Ct. 2510, 2518, 101 L. Ed. 2d 442, 458*

- Manufacturer not liable to consumer because of failure to warn when adequate warnings given to distributor with control over packaging, labeling, and marketing. *Ch. 460, Products Liability, § 460.185*; *see also* *Artiglio v. General Elec. Co. (1998) 61 Cal. App. 4th 830, 837, 71 Cal. Rptr. 2d 817*

- Misuse of product causing injuries. *Ch. 460, Products Liability, § 460.183*; *see also* *Dosier v. Wilcox-Crittendon Co. (1975) 45 Cal. App. 3d 74, 78, 119 Cal. Rptr. 135* ; *Johnson v. Standard Brands Paint Co. (1968) 274 Cal. App. 2d 331, 340, 79 Cal. Rptr. 194*

- Statute of limitations bars action. *Ch. 460, Products Liability, § 460.181*; *see also Code Civ. Proc. §*

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§ 26.273 Promissory Notes

- See *§ 26.256[3], above*

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§ 26.274 Public Entities, Officers, and Employees

[1] Actions Against Public Entities and Employees Based on Determination With Regard to Mental Patient

- Public entity and public employee is not liable for determination to confine mental patient. *Ch. 464, Public Entities and Officers, § 464.245*; *see also Gov. Code § 856*

[2] Actions Against Public Entities and Employees for Dangerous Conditions of Public Property

- Injury caused by approved design, public entity is immune from liability for. *Ch. 464, Public Entities and Officers, § 464.220*; *see also Gov. Code § 830.6*

- Injury caused by natural condition of unimproved public property, public entity is not liable for. *Ch. 464, Public Entities and Officers, § 464.221*; *see also Gov. Code § 831.2*

- Public entity and public employee is not liable for injury resulting from work on nondedicated road performed with reasonable care. *Ch. 464, Public Entities and Officers, § 464.223*; *see also Gov. Code § 831.3*

- Public entity and public employee is not liable when action reasonable. *Ch. 464, Public Entities and Officers, § 464.222*; *see also Gov. Code §§ 835.4, 840.6*

[3] Actions Against Public Entities and Employees for Failure to Protect Public From Dangerous Persons

- Public entity and public employee is not liable for determination to release mental patient. *Ch. 464, Public Entities and Officers, § 464.245*; *see also Gov. Code § 856*

- Public entity and public employee is not liable for failure to provide police protection. *Ch. 464, Public Entities and Officers, § 464.243*; *see also Gov. Code § 845*

- Public entity and public employee is not liable for injury caused by release of prisoner or by escaping

prisoner. *Ch. 464, Public Entities and Officers, § 464.244*; *see also Gov. Code § 845.8*

[4] Actions Against Public Entities Based on General Liability

- Adoption of ordinance, public entity as not liable for. *Ch. 464, Public Entities and Officers, § 464.191*; *see also Gov. Code § 818.2*

- Discretionary acts, public entity is not liable for. *Ch. 464, Public Entities and Officers, § 464.196*; *see also Gov. Code § 820.2*

- Injuries caused by failure to inspect property, public entity is not liable for. *Ch. 464, Public Entities and Officers, § 464.193*; *see also Gov. Code § 818.6*

- Injury caused by revocation or issuance of license, public entity is not liable for. *Ch. 464, Public Entities and Officers, § 464.192*; *see also Gov. Code § 818.4*

- Libel. See *§ 26.239, above*

- Misrepresentation by employee, public entity is not liable for. *Ch. 464, Public Entities and Officers, § 464.194*; *see also Gov. Code § 818.8*

- Public entity is not liable when public employee is immune. *Ch. 464, Public Entities and Officers, § 464.195*; *see also Gov. Code § 815.2(b)*

- Punitive damages, public entity is not liable for. *Ch. 464, Public Entities and Officers, § 464.190*; *see also Gov. Code § 818*

- Statute of limitations as barring action against public entity. *Ch. 464, Public Entities and Officers, § 464.189*; *see also Gov. Code § 945.6*

[5] Actions Against Public Employees Based on General Liability

- Acts or omissions of others, public employee is not liable for. *Ch. 464, Public Entities and Officers, § 464.197*; *see also Gov. Code § 820.8*

- Malicious prosecution, public employee is not liable for. *Ch. 464, Public Entities and Officers, § 464.198*; *see also Gov. Code § 821.6*

- Mayor, member of governing body of local public entity, member of locally appointed board or commission, or member of locally appointed or elected advisory body not vicariously liable for injuries caused by acts or omissions of public entity. *Ch. 464, Public Entities and Officers, § 464.199*; *see also Gov. Code § 820.9*

- Libel. See *§ 26.239, above*

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§ 26.275 Railroads

[1] Action Based on Injuries to Employees

- Accident was caused by plaintiff's sole negligence, plaintiff's contributory negligence, sole negligence of third person, or combined negligence of plaintiff and third person. *Ch. 485, Railroads, § 485.129*; *see also 45 U.S.C.S. §§ 51, 53*

- Preemption by Longshore and Harbor Workers' Compensation Act (*33 U.S.C. § 901 et seq.*). *Ch. 485, Railroads, § 485.130*; *see also 45 U.S.C.S. §§ 51-60, 33 U.S.C.S. § 901 et seq.*

[2] Action Based on Injuries to Passengers and Other Persons

- Comparative negligence of automobile driver. *Ch. 485, Railroads, § 485.155*; *see also Civ. Code § 1714(a)*; *Veh. Code §§ 22450-22452*

- Trespasser injured while riding or getting on or off moving train. *Ch. 485, Railroads, § 485.156*; *see also Civ. Code § 1714.7*

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§ 26.276 Real Property

- Brokers. See *§ 26.184, above*
- Condominiums. See *§ 26.192, above*
- Construction. See *§§ 26.165* (architects), *26.185* (building contracts), and *§ 26.248* (mechanics' liens), *above*
- Eminent domain and inverse condemnation. See *§ 26.210, above*
- Landlord and tenant. See *§§ 26.237* (landlord and tenant), *above*, and *26.307* (unlawful detainer), *below*
- Possession and title. See *§§ 26.158* (adjoining landowners), 26.159 (adverse possession), *26.183* (boundaries), *26.221* (fences), *above*
- Restrictive covenants. See *§ 26.284, below*
- Trust deeds. See *§ 26.303, below*

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§ 26.277 Reformation of Instruments

- Intervening rights of bona fide purchaser, as defense in action to reform instrument. *Ch. 488, Reformation of Instruments, § 488.67*; *see also Civ. Code § 3399*

- Laches, as defense in action to reform instrument. *Ch. 488, Reformation of Instruments, § 488.65*; *see also Utica Mut. Ins. Co. v. Monarch Ins. Co. (1967) 250 Cal. App. 2d 538, 543-544, 58 Cal. Rptr. 639* ; *Laing v. Occidental Life Ins. Co. (1966) 244 Cal. App. 2d 811, 821, 53 Cal. Rptr. 681*

- Statute of limitations bars action to reform instrument. *Ch. 488, Reformation of Instruments, § 488.66*; *see also Code Civ. Proc. § 338(d)*

- Waiver and ratification of mistake by plaintiff, as defense in action to reform instrument. *Ch. 488, Reformation of Instruments, § 488.64*; *see also Civ. Code § 3399*

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§ 26.278 Release

- General release by plaintiff. *Ch. 520, Settlement and Release, § 520.131*; *see also Civ. Code § 1541*

- Release of joint tortfeasor or co-obligor for amount sufficient to satisfy entire claim. *Ch. 520, Settlement and Release, § 520.132*; *see also Code Civ. Proc. § 877*

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§ 26.279 Religious Corporations

- Approval by board prior to consummation of transaction; action against director based on director's alleged self dealing. *Ch. 110, Churches and Religious Organizations, § 110.59[1]*; *see also Corp. Code § 9243*

- Approval by committee authorized by board to approve transaction and subsequent approval by board; action against director based on director's alleged self-dealing. *Ch. 110, Churches and Religious Organizations, § 110.59[2]*; *see also Corp. Code § 9243*

- Reliance on information furnished by sources; action against director based on alleged breach of fiduciary duty. *Ch. 110, Churches and Religious Organizations, § 110.57*; *see also Corp. Code § 9241*

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§ 26.280 Rent Skimming

- Rental revenue used for emergency medical treatment or necessary repairs, as defense in action for damages for rent skimming. *Ch. 555, Trust Deeds and Real Property Mortgages, § 555.193*; *see also Code Civ. Proc. § 893*

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§ 26.281 Rescission

- Earlier actions of plaintiff amounted to election of another remedy instead of rescission. *Ch. 490, Rescission and Restitution, § 490.67*; *see also Steiner v. Rowley (1950) 35 Cal. 2d 713, 720, 221 P.2d 9* ; *Modoc Mineral & Oil Co. v. Cal-Vada Drilling etc. Co. (1965) 236 Cal. App. 2d 868, 874-875, 46 Cal. Rptr. 508*

- Waiver by plaintiff of right to rescind because delay has substantially prejudiced defendant. *Ch. 490, Rescission and Restitution, § 490.66*; *see also Civ. Code §§ 1691, 1693*

- Waiver by plaintiff of right to rescind; general form alleging. *Ch. 490, Rescission and Restitution, § 490.65*; *see also Civ. Code § 1691*

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§ 26.282 Res Judicata

- Basic issue between parties was determined in former action. *Ch. 491, Res Judicata, § 491.54*; *see also Code Civ. Proc. § 1908*

- Cause of action was merged in prior judgment. *Ch. 491, Res Judicata, § 491.51*; *see also Code Civ. Proc. § 1908(a)*

- Plaintiff's action barred by previous judgment--attempt to split single cause of action. *Ch. 491, Res Judicata, § 491.55*; *see also Wulfjen v. Dolton (1944) 24 Cal. 2d 891, 894, 151 P.2d 846* ; *Allstate Ins. Co. v. Mel Rapton, Inc. (2000) 77 Cal. App. 4th 901, 907, 914, 92 Cal. Rptr. 2d 151* ; *Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 41, 162 Cal. Rptr. 238*

- Judgment for employee defendant in prior action bars present action against employer. *Ch. 491, Res Judicata, § 491.53*; *see also Code Civ. Proc. § 1908(a)*

- Prior judgment for defendant or defendant's privy bars present action. *Ch. 491, Res Judicata, § 491.52*; *see also Code Civ. Proc. § 1908(a)*

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§ 26.283 Retail Installment Sales

[1] Action by Buyer for Violation of Retail Installment Sales Act

- Defendant's error corrected within statutory time allowed. *Ch. 501, Sales: Retail Installment Sales, § 501.140*; *see also Civ. Code § 1812.8*

[2] Action by Buyer for Violation of Truth in Lending Act

- Defendant's act or omissions in good faith compliance and conformity with written opinion or approval of board of governors of Federal Reserve System or authorized official or employee thereof. *Ch. 501, Sales: Retail Installment Sales, § 501.212*; *see also 15 U.S.C. § 1640(f)*

- Defendant seller's error corrected within statutory time allowed. *Ch. 501, Sales: Retail Installment Sales, § 501.210*; *see also 15 U.S.C. § 1640(b)*

- Defendant's violation of Truth in Lending Act unintentional and result of bona fide error. Ch. 501, *Sales: Retail Installment Sales*, § 501.211; *see also 15 U.S.C. § 1640(c)*

[3] Action by Creditor Against Cosigner on Consumer Credit Contract

- Failure to comply with cosigner liability notice requirements. *Ch. 501, Sales: Retail Installment Sales, § 501.120*; *see also Civ. Code § 1799.95*

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§ 26.284 Restrictive Covenants

[1] Action to Compel Reconveyance of Real Property for Breach of Condition Subsequent and to Quiet Title

- Power of termination is expired due to passage of time or obsolescence. *Ch. 184, Deeds, § 184.198*; *see also Civ. Code §§ 885.030, 885.040(a), 885.060(b)*

[2] Action to Enjoin Violation of Tract Restrictions

- Action unenforceable because plaintiff waived restrictions or is guilty of laches. *Ch. 184, Deeds, § 184.193*; *see also Wedum-Aldahl Co. v. Miller (1937) 18 Cal. App. 2d 745, 746, 752-753, 64 P.2d 762*

- Action unenforceable because plaintiff acquiesced in similar violations. *Ch. 184, Deeds, § 184.194*; *see also Seligman v. Tucker (1970) 6 Cal. App. 3d 691, 699 n.7, 700, 86 Cal. Rptr. 187*

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§ 26.285 Reward

- Withdrawal of offer of reward before performance of act, as defense in action for breach of contract for reward. *Ch. 493, Rewards, § 493.52*; *see also Wilson v. Stump (1894) 103 Cal. 255, 258, 37 P. 151* ; *Ryer v. Stockwell (1859) 14 Cal. 134, 137* ; *Berthiaume v. John Doe (1913) 22 Cal. App. 78, 79-80, 133 P. 515*

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§ 26.286 Sales

[1] Action on Sales Agreement

- Custom and usage. *Ch. 500, Sales: Sales Under the Commercial Code, § 500.120*; *see also Com. Code § 1303(b), (c)*

- Defendant not a merchant. *Ch. 500, Sales: Sales Under the Commercial Code, § 500.122*; *see also Com. Code § 2104(1)*

- Failure by buyer to effectively revoke acceptance. *Ch. 500, Sales: Sales Under the Commercial Code, § 500.123*; *see also Com. Code § 2608*

- No intention to be bound unless price term agreed on. *Ch. 500, Sales: Sales Under the Commercial Code, § 500.121*; *see also Com. Code § 2305(4)*

[2] Consumer Protection

- See *§ 26.194, above*

[3] Retail Installment Sales

- See *§ 26.283, above*

[4] Secured Transactions

- See *§ 26.287, below*

[5] Warranties

- See *§ 26.309, below*

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§ 26.287 Secured Transactions

[1] Action by Creditor for Default

- Secured party precluded from obtaining a deficiency judgment by failure to dispose of collateral in a commercially reasonable manner. *Ch. 503, Sales: Secured Transactions, § 503.111*; *see also Com. Code § 9626(a)*

- Disposition of collateral to the secured party or an affiliate or related entity did not realize as much as disposition to an unrelated party would have realized. *Ch. 503, Sales: Secured Transactions, § 503.112*; *see also Com. Code § 9626(a)(5)*

[2] Action for Injunctive Relief When Secured Party Not Proceeding in Accordance With Law

- Secured party is not proceeding or did not proceed in accordance with law based on debtor's authenticated modification or waiver of rights after default. *Ch. 503, Sales: Secured Transactions, § 503.150*; *see also Com. Code §§ 9624, 9629*

[3] Action Seeking Priority in Fixtures

- Trade fixtures did not become interest in real estate and were intended to remain free thereof. *Ch. 503, Sales: Secured Transactions, § 503.110*; *see also Civ. Code § 1019*

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§ 26.288 Securities Regulation

[1] Action for Contribution Based on Mutual Liability of Plaintiff and Defendant for Violation of Securities Law

- Plaintiff was willful violator of securities law and defendant was negligent violator. Ch. 515, *Securities and Franchise Regulation*, § 515.429; *see also Corp. Code § 25505*

- Plaintiff was willful violator of securities law and principal executive officer, director, or contracting person of defendant corporation. *Ch. 515, Securities and Franchise Regulation, § 515.430*; *see also Corp. Code § 25505*

[2] Action for Damages Based on Insider Trading

- Defendant had belief that plaintiff was informed concerning undisclosed matters regarding securities. *Ch. 515, Securities and Franchise Regulation, § 515.415*; *see also Corp. Code § 25402*

- Plaintiff was equally informed person. *Ch. 515, Securities and Franchise Regulation, § 515.416*; *see also Corp. Code § 25502*

- Price of securities transaction was unaffected by undisclosed information. *Ch. 515, Securities and Franchise Regulation, § 515.417*; *see also Corp. Code § 25502*

[3] Action for Rescission or Damages Alleging Securities Transaction Effected by Means of Material Misrepresentation

[a] In General

- Defendant's exercise of care concerning, and lack of knowledge of, misrepresentation.

- Plaintiff's knowledge of facts behind misrepresentation. *Ch. 515, Securities and Franchise*

Regulation, § 515.407; *see also Corp. Code § 25501*

[b] Action in Which Joint and Several Liability Is Alleged

- Defendant had reasonable belief in accuracy of representations. *Ch. 515, Securities and Franchise Regulation, § 515.410*; *see also Corp. Code § 25504.2(b)(1)*

- Defendant was without knowledge or belief. *Ch. 515, Securities and Franchise Regulation, § 515.409*; *see also Corp. Code § 25504*

- Document or report in prospectus or offering is not an accurate reflection of expert defendant's views. *Ch. 515, Securities and Franchise Regulation, § 515.411*; *see also Corp. Code § 25504.2(b)(2)*

- Expert defendant filed disclaimer. *Ch. 515, Securities and Franchise Regulation, § 515.412*; *see also Corp. Code § 25504.2(b)(3)*

[4] Action for Rescission or Damages Alleging Securities Transaction in Violation of Qualification Requirements

- Approved written order was sent to rectify violation. *Ch. 515, Securities and Franchise Regulation, § 515.426*; *see also Corp. Code § 25507(b), (c)*

- Plaintiff in position of being equally in the wrong with defendant. *Ch. 515, Securities and Franchise Regulation, § 515.425*; *see also Civ. Code § 3524*

- Security or transaction was exempt from qualification requirements. *Ch. 515, Securities and Franchise Regulation, § 515.423*; *see also Corp. Code §§ 25110, 25120, 25130*

- Security was qualified prior to receipt of consideration therefor. *Ch. 515, Securities and Franchise Regulation, § 515.424*; *see also Corp. Code § 25503*

[5] Action Seeking Liability When Defendant's Acts Conformed to Official Issuance of Commissioner of Corporations or Attorney General

- Defendant's acts regarding securities conformed to written opinion of commissioner of corporations or attorney general. *Ch. 515, Securities and Franchise Regulation, § 515.460*; *see also Corp. Code § 31511*

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§ 26.289 Settlement

[1] Action Based on Breach of Obligation That Has Been Extinguished by Compromise and Settlement Agreement

- Compromise of claim before suit by acceptance of defendant's promise. *Ch. 520, Settlement and Release, § 520.112*; *see also Stub v. Belmont (1942) 20 Cal. 2d 208, 217-218, 124 P.2d 826* ; *Armstrong v. Sacramento Valley R. Co. (1919) 179 Cal. 648, 651, 178 P. 516*

[2] Request for Costs by Plaintiff

- Tender before commencement of action of full amount due plaintiff and deposit of that amount in court. *Ch. 520, Settlement and Release, § 520.113*; *see also Civ. Code § 1717*; *Code Civ. Proc. § 1025*

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§ 26.290 Ships and Shipping

[1] Action for Damage to or Loss of Cargo

- Cargo lost or damaged due to perils of sea. Ch. 522, *Ships and Shipping*, § 522.221; *see also 46 U.S.C.S. § 30701* note, § 4(2)(c); *46 U.S.C.S. § 30706(b)(1)*

- Exoneration from liability when damage or loss caused by fire. Ch. 522, *Ships and Shipping*, § 522.222; *see also 46 U.S.C.S. §§ 30504, 30701* note, § 4(2)(b)

[2] Action for Personal Injuries

[a] By Longshoreman or Harbor Worker

- Injury caused by negligence of plaintiff's fellow servants. Ch. 522, *Ships and Shipping*, § 522.179; *see also 33 U.S.C.S. §§ 905(b), 933*.

[b] By Seaman

- No employment relationship between plaintiff and defendant. Ch. 522, *Ships and Shipping*, § 522.174; *see also Da Silva v. Pacific King, Inc. (1987) 195 Cal. App. 3d 1, 11, 240 Cal. Rptr. 395* ; *Petersen v. Marine Transport Lines (1948) 86 Cal. App. 2d Supp. 927, 935, 194 P.2d 161, 194 P.2d 161*

- Nonownership of vessel by defendant, who was merely time charterer. Ch. 522, *Ships and Shipping*, § 522.175; *see also Apodoca v. Schiffahrtsgesellschaft De Vries & Co. (1962) 199 Cal. App. 2d 605, 608-610, 18 Cal. Rptr. 869*

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§ 26.291 Slander of Title

- Conditional privilege of rival claimant to real property. *Ch. 340, Libel and Slander, § 340.314*; *see also Civ. Code § 47(c)*

- Defendant acted in good faith. *Ch. 340, Libel and Slander, § 340.316*; *see also Cavin Mem'l Corp. v. Requa (1970) 5 Cal. App. 3d 345, 361, 85 Cal. Rptr. 107*

- Defendant failed to publish allegedly disparaging material. *Ch. 340, Libel and Slander, § 340.317*; *see also Southcott v. Pioneer Title Co. (1962) 203 Cal. App. 2d 673, 676-677, 21 Cal. Rptr. 917*

- Judicial proceedings, absolute privilege for. *Ch. 340, Libel and Slander, 340.313*; *see also Civ. Code § 47(b)*

- Justification. *Ch. 340, Libel and Slander, § 340.312*; *see also Gudger v. Manton (1943) 21 Cal. 2d 537, 543, 134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405*

- Statute of limitations bars action. *Ch. 340, Libel and Slander, § 340.315*; *see also Code Civ. Proc. § 338(g)*

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§ 26.292 Specific Performance

- Contract for personal services. *Ch. 528, Specific Performance, § 528.136*; *see also Civ. Code § 3390(1), (2)*

- Contract requires series of acts. *Ch. 528, Specific Performance, § 528.135*; *see also Stevens Group Fund IV v. Sobrato Development Co. (1991) 1 Cal. App. 4th 886, 897, 2 Cal. Rptr. 2d 460*

- Contract to procure act of third person. *Ch. 528, Specific Performance, § 528.134*; *see also Civ. Code § 3390(4)*

- Seller's title in doubt. *Ch. 528, Specific Performance, § 528.137*; *see also Civ. Code § 3394*

- Usurious loan agreement. See *§ 26.308, below*

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§ 26.293 Sports Injuries

- See *§ 26.226, above*

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§ 26.294 Statute of Frauds

- General forms of defense. *Ch. 140, Contracts, § 140.143*; *Ch. 530, Statute of Frauds, § 530.50*; *see also Healy v. Obear (1916) 29 Cal. App. 696, 698, 157 P. 569 , reh'g denied, 157 P. 570* ; *Pao Ch'en Lee v. Gregoriou (1958) 50 Cal. 2d 502, 505-506, 326 P.2d 135*

- Oral contract for sale of goods valued over $500. *Ch. 530, Statute of Frauds, § 530.51*; *see also Com. Code § 2201*

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§ 26.295 Statute of Limitations

- See *§ 26.241, above*

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§ 26.296 Strict Liability

- Cosmetics and grooming products. See *§ 26.177, above*
- Products liability. See *§ 26.272, above*

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§ 26.297 Subrogation

- Accident was caused by subrogor's negligence. *Ch. 536, Subrogation, § 536.121*; *see also Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226*

- Plaintiff's claim was paid by setoff. *Ch. 536, Subrogation, § 536.123*; *see also Code Civ. Proc. § 431.70*

- Plaintiff was volunteer in satisfying claim. *Ch. 536, Subrogation, § 536.120*; *see also Stein v. Simpson (1951) 37 Cal. 2d 79, 84, 230 P.2d 816*

- Statute of limitations bars claim. *Ch. 536, Subrogation, § 536.122*; *see, e.g., Gov. Code §§ 21455, 31823*

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§ 26.298 Suretyship

[1] Action by Surety Against Principal for Reimbursement

- Express agreement to reimburse from specific funds. *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.164*; *see also Civ. Code § 2847*

[2] Action by Creditor Against Surety

- Creditor failed to proceed against principal debtor after demand. *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.175*; *see also Civ. Code § 2845*

- Surety exonerated by material alteration of principal obligation; extension of time for payment. *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.174*; *see also Civ. Code § 2819*

- Surety exonerated by material alteration of principal obligation; manner of payment altered. *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.173*; *see also Civ. Code § 2819*

[3] Action by Creditor Against Surety on Guaranty

- Nonreliance by plaintiff on guaranty. *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.176*; *see also Civ. Code § 2814*

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§ 26.299 Title Insurance

[1] Action Based on Title Insurer's Failure to Defend Action

- Litigation as based on insured's tortious acquisition of title rather than on title itself. *Ch. 548, Title Insurance, § 548.59*; *see also Safeco Title Ins. Co. v. Moskopoulos (1981) 116 Cal. App. 3d 658, 664-665, 172 Cal. Rptr. 248*

[2] Action Based on Title Insurer's Failure to Fulfill Its Obligations Under Policy

- Alleged reduction in value of land not due to title defect. *Ch. 548, Title Insurance, § 548.58*; *see also Hocking v. Title Ins. & Trust Co. (1951) 37 Cal. 2d 644, 652, 234 P.2d 625*

- Insured failed to give timely written notice of adverse claim or loss. *Ch. 548, Title Insurance, § 548.55*; *see also Moe v. Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 289, 302, 98 Cal. Rptr. 547*

- Off-record defect ascertainable by inspection or inquiry. *Ch. 548, Title Insurance, § 548.57*; *see also Bothin v. California Title Ins. Co. (1908) 153 Cal. 718, 722-723, 96 P. 500*

- Off-record defect known to insured not disclosed to insurer. *Ch. 548, Title Insurance, § 548.56*; *see also Vernon v. Title Guar. & Trust Co. (1935) 7 Cal. App. 2d 171, 174, 46 P.2d 191*

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§ 26.300 Trademarks

[1] Action for Infringement of Federal Registered Trade or Service Mark

- Abandonment of mark by registrant. *Ch. 549, Trademarks and Trade Names, § 549.93*; *see also 15 U.S.C. § 1115(b)(2)*

- Fair use. *Ch. 549, Trademarks and Trade Names, § 549.95*; *see also 15 U.S.C. § 1115(b)(4)*

- Functional mark. *Ch. 549, Trademarks and Trade Names, § 549.99*; *see also 15 U.S.C. § 1115(b)(8)*

- Laches, estoppel, or acquiescence. *Ch. 549, Trademarks and Trade Names, § 549.100*; *see also 15 U.S.C. § 1115(b)(9)*

- Misrepresentation of source of goods or services. *Ch. 549, Trademarks and Trade Names, § 549.94*; *see also 15 U.S.C. § 1115(b)(3)*

- Prior registration and use. *Ch. 549, Trademarks and Trade Names, § 549.97*; *see also 15 U.S.C. § 1115(b)(6)*

- Prior use. *Ch. 549, Trademarks and Trade Names, § 549.96*; *see also 15 U.S.C. § 1115(b)(5)*

- Registration or incontestable right to use mark obtained fraudulently. *Ch. 549, Trademarks and Trade Names, § 549.92*; *see also 15 U.S.C. § 1115(b)(1)*

- Use of plaintiff's trade or service mark violates federal antitrust laws. *Ch. 549, Trademarks and Trade Names, § 549.98*; *see also 15 U.S.C. § 1115(b)(7)*

[2] Action for Infringement or Dilution of Distinctive Quality of Trade or Service Mark Registered in California

- Prior use. *Ch. 549, Trademarks and Trade Names, § 549.104*; *see also Bus. & Prof. Code § 14342*

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§ 26.301 Trade Secrets

- Alleged secret information was completely disclosed by product marketed, as defense in action for trade secret misappropriation. *Ch. 565, Unfair Competition, § 565.273*; *see also Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279, 289, 23 Cal. Rptr. 198*

- Statute of limitations bars action for trade secret misappropriation. *Ch. 565, Unfair Competition, § 565.274*; *see also Civ. Code § 3426.6*; *Code Civ. Proc. § 339(1)*

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§ 26.302 Trespass

- Defendant entered out of necessity. *Ch. 550, Trespass, § 550.51*; *see also People v. Roberts (1956) 47 Cal. 2d 374, 377, 303 P.2d 721*

- Plaintiff expressly consented to defendant's entry. *Ch. 550, Trespass, § 550.49*; *see also Civic W. Corp. v. Zila Indus., Inc. (1977) 66 Cal. App. 3d 1, 17, 135 Cal. Rptr. 915*

- Plaintiff impliedly consented to defendant's entry. *Ch. 550, Trespass, § 550.50*; *see also Adams v. Albany (1954) 269 P.2d 142*

- Statute of limitations bars action. *Ch. 550, Trespass, § 550.48*; *see also Code Civ. Proc. § 338(b)*

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§ 26.303 Trust Deeds and Mortgages

[1] Action for Damages for Rent Skimming

- See *§ 26.280, above*

[2] Action for Foreclosure

- Senior lien of another trust deed. *Ch. 555, Trust Deeds and Real Property Mortgages, § 555.162*; *see also Civ. Code §§ 1214, 1215*

- Statute of limitations bars action. *Ch. 555, Trust Deeds and Real Property Mortgages, § 555.161*; *see also Civ. Code § 2911(1)*; *Code Civ. Proc. § 337(1)*

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§ 26.304 Trusts

[1] Action for Damages Based on Defendant Director's Alleged Self-Dealing Transaction

- Prior approval of transaction. *Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, § 560.672*; *see also Corp. Code § 5233(d)(2), (3)*

[2] Action Seeking to Establish and Enforce Resulting Trust in Real or Personal Property

- Consideration or transfer of property was gift. *Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, § 562.64*; *see also Martin v. Kehl (1983) 145 Cal. App. 3d 228, 238-239, 193 Cal. Rptr. 312* ; *Estate of Raphael (1953) 115 Cal. App. 2d 525, 531, 252 P.2d 979*

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§ 26.305 Undue Influence

- Confidential relationship raising presumption of undue influence. *Ch. 215, Duress, Menace, Fraud, Undue Influence, and Mistake, § 215.130*; *see also Civ. Code §§ 1573(1), 1575(1)*

- Confidential relationship not presumed from party's relationship, but unfair advantage taken of confidence and weakness. *Ch. 215, Duress, Menace, Fraud, Undue Influence, and Mistake, § 215.131*; *see also Civ. Code § 1575(2), (3)*

- Unfair advantage taken of weakness or distress. *Ch. 215, Duress, Menace, Fraud, Undue Influence, and Mistake, § 215.132*; *see also Civ. Code § 1575(2), (3)*

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§ 26.306 Unfair Competition

[1] Interference With Economic Relations

- Justification or privilege. Ch. 565, *Unfair Competition*, § 565.293; *see also Code Civ. Proc. § 431.30(b)(2)*

- Statute of limitations bars action. *Ch. 565, Unfair Competition, § 565.274*; *see also Civ. Code § 3426.6*; *Code Civ. Proc. § 339(1)*

[2] Trade Secrets

- See *§ 26.301, above*

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§ 26.307 Unlawful Detainer

[1] Unlawful Detainer Proceedings

[a] Generally

- Defendant made needed repairs and properly deducted cost from rent, and plaintiff did not give proper credit. *Ch. 333, Landlord and Tenant: Eviction Actions, § 333.110* (Judicial Council Pleading Form); *see also Code Civ. Proc. §§ 1170, 1177*; *Cal. Rules of Ct., Rule 1.45(a)*

- Plaintiff accepted rent from defendant to cover period of time after date stated in notice. *Ch. 333, Landlord and Tenant: Eviction Actions, § 333.110* (Judicial Council Pleading Form); *see also Kern Sunset Oil Co. v. Good Roads Oil Co. (1931) 214 Cal. 435, 440, 6 P.2d 71*

- Plaintiff arbitrarily and unlawfully discriminated against defendant by serving defendant with notice to quit or by filing complaint. *Ch. 333, Landlord and Tenant: Eviction Actions, § 333.110* (Judicial Council Pleading Form); *see also Gov. Code § 12955*

- Plaintiff failed to perform his or her obligations under rental agreement. *Ch. 333, Landlord and Tenant: Eviction Actions, § 333.110* (Judicial Council Pleading Form); *see, e.g., Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 52-53, 171 Cal. Rptr. 707, 623 P.2d 268* ; *see Green v. Superior Court (1974) 10 Cal. 3d 616, 629, 111 Cal. Rptr. 704, 517 P.2d 1168* .

- Plaintiff served defendant with notice to quit or filed complaint to retaliate against defendant. *Ch. 333, Landlord and Tenant: Eviction Actions, § 333.110* (Judicial Council Form); *see also Schweiger v. Superior Court (1970) 3 Cal. 3d 507, 517, 90 Cal. Rptr. 729, 476 P.2d 97* ; *Civ. Code § 1942.5*

- Plaintiff waived, changed, or canceled the notice to quit. *Ch. 333, Landlord and Tenant: Eviction Actions, § 333.110* (Judicial Council Pleading Form); *see also Lee v. Vignoli (1979) 98 Cal. App. 3d Supp. 24, 29-30, 160 Cal. Rptr. 79*

- Plaintiff's demand for possession violates local rent control or eviction control ordinance. *Ch. 333, Landlord and Tenant: Eviction Actions, § 333.110* (Judicial Council Pleading Form); *see also Cal. Const., art. XI, § 7*; *Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 149, 130 Cal. Rptr. 465, 550 P.2d 1001*

[b] Nonpayment of Rent

- Defendant exercised his or her right to repair and deduct. Ch. 333, *Landlord and Tenant: Eviction Actions*; *see also Civ. Code § 1942*

- Defendant offered rent due but plaintiff would not accept it. *Ch. 333, Landlord and Tenant: Eviction Actions, § 333.110* (Judicial Council Pleading Form); *see also Strom v. Union Oil Co. (1948) 88 Cal. App. 2d 78, 83-84, 198 P.2d 347*

- Plaintiff breached warranty to provide habitable premises. *Ch. 333, Landlord and Tenant: Eviction Actions, § 333.110* (Judicial Council Pleading Form); *see also Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 52-53, 171 Cal. Rptr. 707, 623 P.2d 268* ; *see Green v. Superior Court (1974) 10 Cal. 3d 616, 629, 111 Cal. Rptr. 704, 517 P.2d 1168*

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§ 26.308 Usury

[1] Action for Breach of Contract or Specific Performance by Lender of Usurious Loan

[a] In General

- Debt is not due until full contractual period elapses. *Ch. 568, Usury, § 568.122*; *see also Cal. Const., art. XV, § 1*; Deering's Annot. Uncod. Measures 1919-1 § 2; *Civ. Code § 1916-2*

- Interest provision is null and void under state constitutional usury provisions. *Ch. 568, Usury, § 568.121*; *see also Cal. Const., art. XV, § 1*; Deering's Annot. Uncod. Measures 1919-1 § 2; *Civ. Code § 1916-2*

[b] Lender Is Industrial Loan Company, Personal Property Broker, or Consumer Finance Lender

- Contract is void and lender unable to collect or receive principal, interest, or charges. *Ch. 568, Usury, § 568.128*; *see also Fin. Code §§ 18439, 22650(a), 24650(a)*

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§ 26.309 Warranties

[1] Action for Breach of Express Warranty

- Negation or limitation of express warranty by defendant. *Ch. 502, Sales: Warranties, § 502.150*; *see also Com. Code § 2316(1)*

[2] Action for Breach of Implied Warranty of Fitness

- Exclusion or modification of implied warranty of fitness. *Ch. 502, Sales: Warranties, § 502.230*; *see also Com. Code § 2316(2)*

[3] Action for Breach of Implied Warranty of Merchantability

- Exclusion or modification of warranty. *Ch. 502, Sales: Warranties, § 502.210*; *see also Com. Code § 2316(2)*

[4] Action for Breach of Implied Warranty Under Commercial Code

- Exclusion of all implied warranties by language such as "As Is" or "With All Faults." *Ch. 502, Sales: Warranties, § 502.212*; *see also Com. Code § 2316(3)(a)*

- Exclusion or modification of implied warranty by course of dealing or usage of trade. *Ch. 502, Sales: Warranties, § 502.213*; *see also Com. Code § 2316(3)(c)*

- No implied warranty because of buyer's opportunity to examine goods. *Ch. 502, Sales: Warranties, § 502.214*; *see also Com. Code § 2316(3)(b)*

[5] Action for Breach of Implied Warranty Under Song-Beverly Consumer Warranty Act

- Waiver of implied warranties by consumer. *Ch. 502, Sales: Warranties, § 502.211*; *see also Civ.*

Code § 1792.5

[6] Action for Breach of Warranty Against Infringement

- Agreement between parties excluded infringement protection. *Ch. 502, Sales: Warranties, § 502.290*; *see also Com. Code § 2312(3)*

- Buyer furnished specifications. *Ch. 502, Sales: Warranties, § 502.291*; *see also Com. Code § 2312(3)*

[7] Action for Breach of Warranty of Title

- Buyer had reason to know of lack or limitation of title. *Ch. 502, Sales: Warranties, § 502.271*; *see also Com. Code § 2312(2)*

- Warranty excluded or modified by specific language. *Ch. 502, Sales: Warranties, § 502.270*; *see also Com. Code § 2312(2)*

[8] Action for Breach of Warranty Under Commercial Code

- Agreement Concerning Limitation of Remedies for Breach of Warranty. *Ch. 502, Sales: Warranties, § 502.120*; *see also Com. Code § 2316(4)*

[9] Action for Violation of Song-Beverly Consumer Warranty Act

- Defect in consumer goods caused by unauthorized or unreasonable use after sale. *Ch. 502, Sales: Warranties, § 502.121*; *see also Civ. Code § 1794.3*

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§ 26.310 Water Law

[1] Action for Interference With Right to Use Water

[a] In General

- Right by prescription. *Ch. 575, Waters, § 575.391*; *see also Civ. Code § 1007*; *Code Civ. Proc. § 321*

- Riparian right to reasonable use of water. *Ch. 575, Waters, § 575.389*; *see also Gutierrez v. Wege (1905) 145 Cal. 730, 734-735, 79 P. 449*

- Sufficient water available to plaintiff. *Ch. 575, Waters, § 575.390*; *see also* Meridian, Ltd. v; san *Francisco (1939) 13 Cal. 2d 424, 450, 90 P.2d 537, 91 P.2d 105*

[b] Impounding of Waters

- Absence of watercourse; only surface drainage impounded. *Ch. 575, Waters, § 575.388*; *see also South Santa Clara Etc. Dist. v. Johnson (1964) 231 Cal. App. 2d 388, 394-395, 403, 41 Cal. Rptr. 846*

[2] General Affirmative Defense Allegations

- Acquisition of right to water by prescription. *Ch. 575, Waters, § 575.400*; *see also Civ. Code § 1007*; *Code Civ. Proc. § 321*

- Loss of prescriptive or appropriative water right by abandonment. *Ch. 575, Waters, § 575.402*; *see also Water Code §§ 1240, 1241*; *Lindblom v. Round Valley Water Co. (1918) 178 Cal. 450, 455, 173 P. 994*

- Loss of prescriptive or appropriative water right by non-use. *Ch. 575, Waters, § 575.401*; *see also Water Code §§ 1240, 1241*; *Orange County Water District v. City of Riverside (1959) 173 Cal. App. 2d 137, 184, 343 P.2d 450*

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3-VI California Forms of Pleading and Practice--Annotated § 26.311

§ 26.311 Wrongful Death

- Comparative fault of plaintiff or cross complainant. *Ch. 380, Negligence, § 380.370*; *see also Simmons v. Wexler (1979) 94 Cal. App. 3d 1007, 1014, 156 Cal. Rptr. 810*

- Statute of limitations bars action. *Ch. 380, Negligence, § 380.351* (Judicial Council Pleading Form); *see also Code Civ. Proc. §§ 335.1, 338(b), (c), 458*

- Wrongful death action estopped by judgment in prior action brought by decedent. *Ch. 181, Death and Survival Actions, § 181.149*; *see also Code Civ. Proc. §§ 377.60, 1908*

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Volume 3: Alcoholic Beverage Licenses thru Answers-Chs. 18-29
Chapter 26 ANSWERS
TABLE OF AFFIRMATIVE DEFENSE FORMS

3-VI California Forms of Pleading and Practice--Annotated § 26.312

§ 26.312 Wrongful Discharge of Employee

- See *§ 26.212, above*

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Volume 3: Alcoholic Beverage Licenses thru Answers-Chs. 18-29
Chapters 27-29 [RESERVED]

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 30 USING ALTERNATIVE DISPUTE RESOLUTION

4-30 California Forms of Pleading and Practice--Annotated 30.syn

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Chapter 30 USING ALTERNATIVE DISPUTE RESOLUTION
PART I. SCOPE

4-30 California Forms of Pleading and Practice--Annotated § 30.01

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§ 30.01 Scope of Chapter

This chapter provides an overview of alternative dispute resolution (ADR), including the nature [*see § 30.10*] of ADR, various types [*see § 30.11*] of ADR that are available, and the attorney's obligation to consider use of ADR [*see § 30.12*].

The chapter addresses considerations in selecting the best tool, including litigation, for the particular case [*see § 30.13*], concerns attorneys may have about making disclosures in the course of ADR [*see § 30.14*], and discovery issues [*see § 30.15*].

The chapter also covers techniques for getting the opposing party to agree to ADR [*see § 30.16*] and the timing of ADR [*see § 30.17*].

Finally, the chapter identifies situations in which litigation may be preferable to ADR [*see § 30.18*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral Overview

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§ 30.02 Cross References

For discussion of various types of voluntary ADR processes, see the following chapters:

- Ch. 31, *Mediation.*
- Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration.*
- Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding.*
- Ch. 34, *Contractual Arbitration: Judicial Review.*
- Ch. 35, *Arbitration and Conciliation of International Commercial Disputes.*

For discussion of the use of ADR within the judicial system, see the following chapters:

- Ch. 36, *Judicial Arbitration.*
- Ch. 37, *Judicially Mandated Civil Action Mediation.*
- Ch. 38, *Reference.*

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PART I. SCOPE

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[Reserved]

§§ 30.03[Reserved]

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PART II. LEGAL BACKGROUND

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§ 30.10 Nature and Purpose of ADR

[1] Nature

Everyone uses Alternative Dispute Resolution (ADR), and everyone uses it all the time. If we define ADR as the resolution of disputes other than through the court system, the point becomes obvious. People routinely resolve their disputes, or, more broadly stated, disagreements, of every shape and size, without any assistance from courts or even lawyers. These disagreements may range from the trivial ("Shall we eat dinner at restaurant-1 or restaurant-2 tonight?") to the momentous (multimillion dollar disputes between major industrial corporations). Of all the disagreements which our society and our economy spawn, only a minute fraction ever find their way into the courts or legal system.

[2] ADR as a Desirable Option

Among that minuscule number of disputes submitted to the court system at some point during their existence, however, lawyers often do not see ADR as an option at all. That is, lawyers often act as if legal processes, once initiated, must (or at least should) be carried through to their conclusion, with a judgment after trial or a dispositive motion, or perhaps a settlement on the courthouse steps after extensive resources have been devoted to discovery and trial preparation.

ADR, as described in this and the following chapters, questions, reexamines, and, to a degree, rejects that assumption. The initiation of a lawsuit does not necessarily require ultimate resolution of the dispute through, or after extensive application of the processes of, the courts. The impetus for this reexamination comes chiefly from two sources, the court system and our clients. The court system, for its part, increasingly lacks the resources to process civil disputes. The three-strikes legislation (and, on the federal level, the sentencing guidelines) have resulted in dramatic increases in the number and length of criminal trials, with a concomitant reallocation of the court's resources from civil to criminal matters. The public has spoken, and the message is that the resources of the court system should focus on public safety and crime prevention issues, rather that the resolution of private, civil disputes.

Our clients, for their part, increasingly send the message that civil litigation costs too much, takes too long, and causes too much disruption for them [*see* Deloitte and Touche Litigation Services 1993 Survey of General and Outside Counsels (reflecting popularity of ADR with major corporations, chiefly because ADR is less expensive and takes less time)]. The court's powers, to compel the production of evidence and to render coercive judgments, are expensive to invoke, and accordingly should be used sparingly in the resolution of society's disputes.

A comparison to the way in which patients look to doctors for the resolution of medical problems highlights the point. A patient who goes to a doctor and complains about a particular pain generally has the following goals in mind: elimination of the pain quickly, inexpensively, and with a minimum of pain and inconvenience along the way. The patient is little interested in elaborate procedures or fancy machinery, if there is a simpler path to recovery. It is hard to imagine, for example, a patient who would elect an operation if his or her condition could be cured with brief medication or other, less elaborate treatment.

For clients, a trial might be likened to a costly and disruptive surgical operation. ADR procedures which take less time, cost less money and involve less disruption, while still achieving a resolution through a process which the client finds acceptable, might be likened to medical procedures less drastic that surgery. Just as medical patients are generally better served by the latter option, so, generally, are lawyer's clients.

[3] Attorney Resistance

As lawyers, we perhaps overemphasize the tools and techniques of legal processes, in which we have been trained so intensely. That training emphasizes the benefits of those processes: the thoroughness of the factual record which discovery and trials are supposed to produce, and the fairness which the decisions of judges and juries are supposed to provide, measured by the objective standards of the law. In practice, those benefits may not always be provided. But even if the court system provided those benefits in every case, clients' needs may not be best served. Clients may seek other types of benefits, which legal tools and techniques may not be designed to provide: speed, affordability, finality, lack of disruption, and an ability to put the past behind them rapidly so that they can get on with their lives.

If these are the benefits that clients want in connection with the resolution of their disputes--and some undoubtedly do--then why should lawyers not be prepared to provide them? If lawyers are not prepared to provide clients with those benefits, then others will. Other providers of dispute resolution services, for example relatives and clergy in the case of some domestic relations disputes, have been and always will be there. In commercial law, trade associations and others provide a variety of dispute resolution options, often without the involvement of a legally trained decision maker.

There are a great variety of processes through which lawyers can provide the benefits which clients demand, in the context of the resolution of disputes in the legal system. To satisfy our own interests, as lawyers, in continuing to have the public bring their disputes to us (as opposed to non-legal professionals) for assistance in their resolution, it behooves us to become familiar and adept with as many of these processes as possible, as quickly as possible. Chapters 30 through 36 are designed to aid lawyers in that task.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral Overview

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4-30 California Forms of Pleading and Practice--Annotated § 30.11

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§ 30.11 Overview of Types of ADR

[1] No Specific Definition

Beyond the definition of "alternative dispute resolution process" as a process, other than formal litigation, in which a neutral person or persons resolve a dispute or assist parties in resolving their dispute [*Cal. Rules of Ct., Rule 3.800(1)*], there is no clear set of definitions of the "types" of ADR. There are as many different types of processes, mixes-and-matches of processes, and "hybrid" processes, as there are people who catalogue and use these processes in their writing and in their practice. Additionally, many people use different terms to refer to processes which are essentially the same. The following overview is intended to be a helpful, but necessarily incomplete, list of some of the more commonly used ADR processes, described by terms which many practitioners have come commonly to use. The list is incomplete because, when you try to apply these processes to the disputes in which you are involved, you will undoubtedly come up with new variations on these themes, and perhaps entirely new processes altogether.

[2] Negotiation

[a] Direct Unfacilitated Negotiation

The most commonly used ADR process, and one not to be overlooked as such, is direct negotiation. In virtually every case, virtually every lawyer uses direct negotiations, at some point, to try to get the dispute resolved. Even in the most hotly contested disputes, rarely do clients come to lawyers without first having tried some negotiations themselves, or at least without a willingness to try.

We may profitably think of negotiation, then, as one pole of the "dispute resolution spectrum"--clients can do it totally on their own, without any involvement by lawyers whatsoever, before any discovery takes place, in a totally nonbinding way. The other pole of the spectrum is full-scale litigation--clients play a much less prominent role, lawyers exert far more control, plenary discovery is conducted, and a stranger to the dispute (judge or jury) issues a binding result.

[b] Deficiencies in Direct Negotiation

As so many commentators have noted, a significant part of the ADR revolution of recent years is that we now understand that there is abundant territory between those the two poles of direct unfacilitated negotiation and litigation, and we spend much of our professional lives operating in that territory. In previous years, litigating lawyers believed that unfacilitated negotiations and full-scale litigation were their only options, and leapt to the latter whenever the former failed. We now understand that we can use more step-wise processes, starting first with negotiations and then utilizing the many available alternatives, resorting to expensive, time-consuming and disruptive litigation and trial processes only if other alternatives fail.

This enhanced development, understanding, and use of alternatives to the polar-extreme processes of unfacilitated negotiation and full-scale litigation benefits our clients, who seek to achieve their results at the lowest feasible cost. Unfacilitated negotiation, by itself, is often inadequate to get the job done as quickly and inexpensively as clients demand. Certain inherent, structural features of unfacilitated negotiations often prevent that process from leading to the resolution of a dispute. It is important to understand why this so, in order then to understand how and why ADR processes address the deficiencies of unfacilitated negotiations, and help clients better achieve their goals.

The structural problems of unfacilitated negotiations are best set forth in Professor Robert Mnookin's article, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 Ohio St. J. On Disp. Res. 235 (1993), and are briefly recounted below.

[c] Reluctance to Reveal Priorities to Opponent

In any negotiation, each party has certain paramount goals--what they really, really want. Each party may, however, be reluctant to reveal those goals to her adversary, for fear that the adversary will exploit the information. That is, if I tell you what I really, really want, you may demand more and more from me before you agree to let me have it. Just think of two children "negotiating" over the use of toys; if one knows what the other's favorite is, the one may demand all the rest of the toys before the other's favorite is relinquished. The same dynamic can be at work in negotiations between adults. As a result, each side may be reluctant to disclose its true priorities. With the threat of such an inefficient exchange of information, the parties' true priorities may never even be discussed, and even if discussed, are less likely to be negotiated in an efficient way [*see* Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 Ohio St. J. On Disp. Res. 235 (1993)].

[d] Principal/Agent Problems

In many negotiations, clients entrust the negotiating responsibilities to their lawyers. In some cases, this prevents the negotiations from succeeding. As Mnookin so bluntly states: "Litigation is fraught with principal/agent problems. In civil litigation, for example--particularly where the lawyers on both sides are being paid by the hour--there is very little incentive for the opposing lawyers to cooperate, particularly if the clients have the capacity to pay for trench warfare and are angry to boot. Commentators have suggested that this is one reason many cases settle on the courthouse steps, and not before: for the lawyers, a late settlement may avoid the possible embarrassment of an extreme outcome, while at the same time providing substantial fees" [Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 Ohio St. J. On Disp. Res. 235, 242 (1993)].

Even where lawyers are free from these baser motivations, principal/agent issues may still frustrate the negotiations. Agents (lawyers or not) may not fully understand a principal's interests, may not properly prioritize those interests, or may not articulate a principal's interests as well as the principal could if he or she were negotiating on his or her own behalf. While lawyers may, in some ways, be more articulate than their clients, in other ways--depth of commitment, for one--it is difficult for any agent to match his or her principal. Particularly if the negotiations involve planning, or even the possibility of planning, for future collaboration between the clients, it is difficult for a lawyer (or any agent) to know

and balance all of the parameters which will impact the client's creativity and decision-making.

[e] Nobody Wants to Go First

In many negotiations, neither side wants to be perceived as bearing the stigma of "weakness" that may follow from offering the first serious concession or compromise. Yet if both sides approach the negotiation this way, neither will budge from their initial position (at least not without significant passage of time and incursion of expense). Negotiations will at best stall and at worst fail. We have all felt frustrated in negotiations where this has taken place [*see* Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict,* 8 Ohio St. J. On Disp. Res. 235 (1993)].

[f] "Reactive Devaluation"

Mnookin describes the impact on legal negotiations of the psychological phenomenon called "reactive devaluation," which describes the situation which occurs "when one side offers a particular concession or proposes a particular exchange of compromises, [and] the other side may diminish the attractiveness of that offer or proposed exchange simply because it originated with a perceived opponent" [Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict,* 8 Ohio St. J. On Disp. Res. 235, 246 (1993)]. Mnookin again encapsulates the concept: "How often have you had a client indicate to you in the midst of litigation, 'If only we could settle this case for $7,000. I'd love to put this whole matter behind me.' Lo and behold, the next day, the other side's attorney calls and offers to settle for $7,000. You excitedly call your client and say, 'Guess what--the other side has just offered to settle this case for $7,000.' You expect to hear jubilation on the other end of the phone, but instead there is silence. Finally, your client says, 'Obviously they must know something we don't know. If $7,000 is a good settlement for them, it can't be a good settlement for us' " [Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict,* 8 Ohio St. J. On Disp. Res. 235, 246 (1993)]. Much to your frustration, the negotiations again at best stall, or at worst fail.

[3] Mediation

[a] Negotiation With a Facilitator

Mediation injects a neutral facilitator into the negotiation process. There is no set pattern for mediation, which the parties can formulate at will. There are, however, many mediation programs to which attorneys can turn to for assistance in obtaining a mediator.

It is difficult to give a single, simple definition of "mediation," as the art is currently practiced in California. Mediators' styles differ widely, and even the same mediator may employ different styles in different circumstances. Even so, most mediators seem to share certain basic techniques:

1. Parties as well as lawyers actively participate. This is in contrast to the traditional, judicially supervised settlement conference, in which the judge typically spends most (or all) of his or her time speaking to the lawyers, one at a time or together, with parties waiting in the hall. While the traditional, judicially-supervised settlement conference is effective in some circumstances, it is not likely to be as effective as mediation in others, and therefore should be distinguished therefrom.

2. One or more neutral mediators participates. To this extent, mediation is to be distinguished from an unfacilitated, direct negotiation between the parties or their lawyers. (One common example of the use of more than one mediator, or "co-mediation," is the use of both a male and a female mediator in the marital dissolution context.)

3. The mediator lacks coercive authority. That is, the mediator cannot make binding decisions, as can a judge, jury, or arbitrator. Therefore, the parties' focus in mediation is to persuade each other, rather than

the neutral mediator, regarding the best way to resolve the dispute.

Even though the mediator does not make coercive decisions, many mediators do employ one degree or another of an "evaluative" style, in which the mediator raises certain questions (or even expresses opinions) concerning the strengths and weaknesses of the parties' positions. (This is generally done in a private caucus with that party or attorney, rather than in the presence of the other side). Many parties and attorneys prefer, at least for some disputes, mediators who are willing to use one degree or another of this evaluative style (and some mediators will never do so). Those parties generally expect the mediator to use this approach to disabuse the other side of its belief in the strength of its position. In practice, though, these "doses of reality" tend to be meted out rather more equally.

Many parties and attorneys believe that, to use the evaluative style effectively, the mediator must be a specialized expert in the substantive area of the dispute. In practice, this is often not the case. The best mediators tend to be effective in disputes ranging over a variety of subject matters. It is not uncommon to hear the same mediators named as among the best in construction, employment, environmental, and other frequently mediated types of disputes. These mediators cannot be specialized experts in all of these areas any more than the litigating lawyers can be. Rather, these effective mediators tend to combine a basic familiarity with the substantive area and extensive expertise in communication and negotiation skills. In many cases, the mediator can be effective, knowing only what he or she learns about the substantive area during the mediation itself. In any event, it must be an infrequent case in which the mediator knows less about the substantive area than the alternative neutral; a judge or jury.

For discussion of mediation, its benefits and drawbacks, see Ch. 31, *Mediation* .

[b] May Reduce Deficiencies of Direct Negotiation

As in the case of negotiation [*see* [2][b], *above*], parties may be reluctant to reveal priorities to the opposition in a mediation. However, mediation, by structuring the negotiation through a facilitator, may help overcome some of the other problems that may prevent direct negotiation from coming to fruition. Thus, if the parties are present for the mediation, the mediator may help to reduce the parties' anger as an obstacle, as well as any reticence the attorney may have toward resolving the case early. The mediator should also be able to eliminate the perceived the weakness of one party "going first" with an offer and counter any party's "reactive devaluation" as response to an offer.

[c] Avoids Binding Arbitration's Loss of Recourse to Courts

Unlike binding arbitration, submitting to mediation does not cut off recourse to the courts. For parties and attorneys unwilling to put their fate in the hands of an arbitrator whose errors would be binding even if contrary to law and substantially unjust [*see Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 26-28, 33, 10 Cal. Rptr. 2d 183, 832 P.2d 899]* , mediation can offer a speedy and inexpensive alternative to litigation. Indeed, mediation is likely to be significantly faster and less expensive than arbitration, which, despite court decisions which frequently refer to the speed and economy of arbitration, can be very expensive.

[4] Mini-Trials, Summary Jury Trials, and Other Variations of Mediation

[a] Mediation Process May Emulate Courtroom Environment

The essential process of mediation is also found in innumerable other ADR devices. These permutations of mediation are more or less elaborate, with a greater or lesser emphasis on the presentation of factual claims regarding past events (rather than the negotiation of future arrangements and relationships between the parties). These permutations of mediation emulate "courtroom environments," with which litigating lawyers are comfortable, to greater or lesser degrees, and we give these permutations different names based on the elements of the courtroom environment which they emulate.

[b] Typical Mediation Process

The essential process in most mediations is as follows: The mediator first requests the parties' lawyers to describe the issues. Generally, the lawyers will respond with more or less argumentative "opening statements" which set forth certain aspects of the facts which give rise to the dispute, and the parties' positions on the legal issues set forth in the pleadings. This step serves the invaluable purpose of allowing each party to hear the other side's "spin." Each side will typically believe that the other side's spin is false, but will acknowledge that it sounds more or less persuasive at first blush, that it would take considerable effort to persuade a judge that the other side's spin is indeed not true, and that there is no absolute guarantee (in litigation, there are no absolute guarantees!) that the effort to set the judge or jury straight would succeed, no matter how great the resources devoted to that cause. These reciprocal realizations typically lead the parties to soften and moderate their expectations of what they can hope to achieve in settlement, and set the stage for the negotiations which are to follow.

Next, most mediators typically ask the parties themselves to describe their views of the situation. In these statements, the parties are free to discuss whatever they wish, including the myriad ways in which the dispute touches their careers and lives. The stuff of these statements shape the agenda for the negotiations, and begin the negotiations as well.

Upon hearing and, typically, reacting to these statements at least to the extent of attempting to set an agenda, the mediator may: keep all parties and lawyers together to negotiate; caucus with the parties and their respective attorneys separately, seriatim, to obtain additional information, test assumptions, and otherwise advance the negotiations; and may caucus privately with the lawyers, either alone or together, or both. Most mediators generally will not speak to the parties without their lawyers present, though, at least not without the lawyers' express consent. To do otherwise risks alienating and antagonizing the lawyers to the extent that they will, consciously or not, undermine the mediator's efforts to bring the clients to agreement. During this process, the mediator may or may not offer evaluations of the parties' positions, claims, and defenses. (In many cases, an evaluative neutral who caucuses with the parties and counsel separately will not share the same evaluations with both sides! Some neutrals will offer each side, in confidence, the most pessimistic view of their case, in order to provoke flexibility in the parties' positions.)

This essential structure--factual presentations by lawyers followed by negotiations involving lawyers and clients, with or without an evaluative component, can be expanded upon in ADR processes which go by many names, two of which are mini-trials (*see* [c], *below*) and summary jury trial (*see* [d], *below*).

[c] Mini-Trial

[i] "Trial" to Facilitate Negotiation or Mediation

In Mini-trials, lawyers commonly present opening statements of the type they would present in mediation, and, in addition, examine select witnesses (either live, on video tape, or by reading excerpts of deposition testimony), or may offer summaries of the most pertinent testimony. The proceedings may or may not be limited to the issues which the parties have identified as those most central to the dispute. All of this takes place before a "tribunal" comprised of the decision-makers for each side and, generally, a neutral--the same complement of participants as in a mediation. Where a neutral is involved, he or she typically moderates the presentations and may or may not render a non-binding, advisory "verdict," or other evaluative feedback on, for example, the credibility of witnesses, the appeal of particular case themes, or the strengths and weaknesses of specific factual or legal claims. This feedback can be given orally at the time or, if the parties so desire and time permits, in writing. The party representatives typically then try to negotiate a settlement, with facilitation by the neutral, as would take place in a mediation.

[ii] Neutral Evaluation or Early Neutral Evaluation

When the process described in [i], *above*, is conducted in a less formal manner (for example, by allowing witnesses

simply to speak rather than requiring them to be examined in question-and-answer format), and particularly when the process is used shortly after a lawsuit is filed, this process is typically referred to as "Neutral Evaluation" or "Early Neutral Evaluation," an effective process used extensively in the United States District Court for the Northern District of California.

[d] Summary Jury Trial

A Summary Jury Trial is essentially the same as a Mini-trial, but the "tribunal" is a panel of lay people, selected by whatever procedure appears appropriate (many market research firms are able to generate panels whose demographics mirror those of the relevant jury pool), impaneled as a mock jury. This mock jury, in addition to the decision-makers for the parties and the neutral, listen to the presentation of factual material and offer their non-binding "verdicts" or evaluations. The parties then proceed to negotiate, facilitated by the neutral.

[e] Common Objective of Mini-Trials, Summary Jury Trial, and Similar Processes

Processes such as a mini-trial, neutral case evaluation, or summary jury trial can be as simple or elaborate, as abbreviated or protracted, as the parties' imaginations and budgets permit. The key is that, in each, the decision-makers for the parties must hear the other side's factual presentations in meaningful detail, to appreciate the "spin" that the other side will put on the case. This generally goes a long way toward disabusing each party of the misconceptions many parties have, before they hear the other side's spin, concerning what the ultimate strengths of, and absence of weaknesses in, their positions. These presentations are followed by facilitated negotiations between the newly-chastened principals.

[f] Multiple ADR Processes May Be Used

Parties to a dispute are not limited to the use of just one ADR process. In a multi-step protocol, it would not be uncommon for the parties first to use a simple, lawyers-and-parties-only mediation, with its minimal preparation time and no antecedent discovery. Then, and only if the mediation does not result in a settlement, the parties might use the mediation to identify those issues on which there appears to be the most serious disagreements, and then have a mini-trial or summary jury trial on those narrowed issues, preceded by limited discovery focused on those issues. The types and amounts of discovery which the parties will require before using any of these ADR processes will depend on the anticipated elaborateness and formality of the factual presentations which they contemplate. The guiding principle is to use the fewest resources necessary to resolve the dispute, and to use those ADR processes which require fewer resources before using those ADR processes which require greater resources.

[5] Contractual Arbitration

[a] Binding Arbitration With Very Limited Judicial Review

In arbitration, the parties agree to submit their dispute to an arbitrator. The arbitration may be binding or nonbinding. If nonbinding, it is essentially either mediation by another name [*see* [3], *above*] or judicial arbitration [*see* [6][b], *below*]. Thus, contractual arbitration most accurately refers to binding arbitration. If binding, the decision of the arbitrator or arbitrators is very binding indeed and is substantially insulated from judicial review [*see Code Civ. Proc. § 1286 et seq.*; *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 26-28, 33, 10 Cal. Rptr. 2d 183, 832 P.2d 899* ; *see also Old Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co. (1996) 45 Cal. App. 4th 631, 635, 638, 53 Cal. Rptr. 2d 50* (parties' stipulation seeking to limit superior court review of arbitration award as provided in Section 1286 et seq., but to allow appellate court to review findings of fact and conclusions of law as though the case had been tried to the court without a jury held ineffective to empower appellate court to review award on its merits)]. Perhaps the most difficult issue confronting those considering binding arbitration is the matter of just how binding that process is. On petition to confirm an arbitrator's award, the available grounds for challenge are extremely limited. Thus, an arbitrator's decision is even more final than that of a judge or jury, because the grounds for further court review are so limited. Lawyers should

keep this absence of substantive review in mind when they consider binding versus nonbinding processes, particularly if their case contains important or novel questions of law, which frequently are made the subject of appellate review in traditional litigation, but which will likely evade meaningful judicial review if decided in binding arbitration.

Regardless of changes in the standards of judicial review of arbitrators' decisions, arbitration remains the submission of factual or legal issues, or both, to a neutral third party (or a panel of neutral third parties) who render a decision akin to the decision which a judge or jury would render in court. Arbitrators have traditionally been selected based on, among other criteria, their substantive expertise in the subject matter of the dispute. This substantive expertise is supposed to give the arbitrator an enhanced nose for the truth; hence, arbitrators are allowed to render binding decisions even though arbitration generally does not include the complete due process (e.g., evidence may be submitted by affidavit and affiants may avoid cross-examination; the hearsay ban is often relaxed; etc.) which must precede a binding decision in court, and which are designed to protect a non-expert judge or jury from being misled.

In arbitration, the respective roles of attorney and client are roughly the same as they are in court. The attorney presents the case, and the client is generally heard from only when testifying.

Binding arbitration is governed by *Code Civ. Proc. § 1280 et seq.* and is the most formal of ADR methods, and, except to the extent that the parties agree to relaxed procedures, is the method most similar to trial.

PRACTICE TIP:

Lis pendens. Arbitration is not an "action" under *Code Civ. Proc. § 405.5* [*see also Code Civ. Proc. § 405.20* (applying to federal courts)], governing the filing of a notice of lis pendens [*Manhattan Loft, LLC v. Mercury Liquors, Inc. (2009) 173 Cal. App. 4th 1040, 1051-1052, 1056, 93 Cal. Rptr. 3d 457* (lis pendens improperly filed)]. However, a party to arbitration may simultaneously file and stay a court action pending the arbitration of a dispute that is claimed to be arbitrable and relevant to the action [*Manhattan Loft, LLC v. Mercury Liquors, Inc. (2009) 173 Cal. App. 4th 1040, 1054, 93 Cal. Rptr. 3d 457* (citing *Code Civ. Proc. § 1298.5*)], giving grounds for filing lis pendens [*see Ch. 348, Lis Pendens, § 32.25[3]*] and not itself waiving arbitration [Code Civ. Proc. § 1298.2], so long as other steps are not taken in the litigation that have the effect of waiving arbitration [*see Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.25[3]*].

Also, despite the courts' frequent statement that parties opt for arbitration as a fast and economical method of dispute resolution, arbitration is often at least as expensive as trial, and may be similar to trial in terms of delay. In many cases, discovery costs and witness fees may be comparable to those that would be incurred if the case were litigated. Expenses beyond those incurred in litigation include paying for the arbitrator's time and renting the hearing room.

For discussion of contractual arbitration, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration ;* Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding ;* and Ch. 34, *Contractual Arbitration: Judicial Review* .

[b] Predispute Agreements

Arbitration agreements often submit all the disputes that may arise out of a contract to arbitration. These clauses are broadly construed in accordance with the policy generally favoring arbitration. For further discussion, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

[c] Postdispute Agreements Structuring the Dispute for Submission to Arbitration

[i] More Specific Than Predispute Agreements

An agreement to arbitrate a dispute made after the dispute has arisen may be more specific than an arbitration clause

anticipating undefined future disputes arising out of a contractual relationship. Thus, the parties in a postdispute arbitration agreements will be able to more precisely define the scope of the arbitration in a postdispute agreement than in a predispute arbitration clause.

Although parties may define the dispute in any fashion they wish, some of the more common ways in which parties structure the dispute for submission to arbitration are discussed in [ii] et seq., *below*. These many permutations--and there are countless others with which parties have experimented and found success--conjure images of a wild dormitory poker game, with drunken undergraduates declaring ever more exotic combinations of wild cards and minimum opening hands. Yet they also show that there is an almost infinite variety of possible techniques lawyers, courts, and parties can adapt to the needs of their particular cases. With imagination as the only boundary, all should feel empowered to design the techniques which can--and *will*--work best for them.

[ii] Defined Issues

The parties may structure the arbitration by simply submitting to the arbitrator (1) the pleading-style statements of their claims and defenses with which they initiated the arbitration and (2) briefs which resemble trial briefs, prepared after whatever discovery the particular arbitration protocol permits.

This structure provides the arbitrator with wide latitude to fashion remedies and provides the parties with a relatively unpredictable outcome.

[iii] High-Low

In a "high-low" arbitration, the parties negotiate a range of possible outcomes and then submit the dispute to the arbitrator for decision. For example, the claimant might agree to arbitration if, in her worst case, the arbitrator will award no less than a specified amount in her favor (e.g., $50,000); and the respondent might conversely agree to arbitration if, in her worst case, the arbitrator could no more than a specified amount against her (e.g., $250,000). The arbitrator's discretion would then be limited to awarding $50,000 or $250,000 or any amount in between, no matter whether the arbitrator would have awarded more or less, had his discretion been unfettered.

The "high-low" technique, and the others which follow (*see* [iv] et seq., *below*), are usually proposed to draw an otherwise-recalcitrant party into an arbitration process, with its attendant waiver of recourse to the court system. These techniques are designed, among other things, to increase the predictability of outcomes in the arbitration system.

[iv] Baseball

In a "baseball" arbitration, the arbitrator's discretion is limited in the way major league baseball limits the discretion of arbitrators in player salary disputes. That is, following on the example used in [iii], *above*, in a "baseball" arbitration, the arbitrator's award must be either $50,000 or $250,000. The arbitrator lacks authority to award any amount higher or lower, or any amount in between. Predictability of outcome is therefore enhanced even further. In addition, the process encourages the parties to set their numbers at levels which they believe the arbitrator will find reasonable; this process, in and of itself, encourages the type of negotiation which often will result in settlement without having to submit the dispute to an arbitrator at all.

[v] Night Baseball

In "night baseball," the arbitrator does not know the figures which the parties have selected (*see* [iv], *above*). The ultimate award will be that number selected by either the claimant or the respondent which is closest to the number which the arbitrator, working "in the dark," selects.

This technique is designed to allow the parties to select numbers which the arbitrator may perceive as less "reasonable"

(i.e., compromise-oriented), but which, in the parties' view, may better reflect results which are "just." This technique also serves less well as a catalyst for negotiation than does a "baseball" arbitration in which the arbitrator knows the numbers.

[vi] Med-Arb

In "Med-Arb" (a hybrid of mediation and arbitration), the parties want the flexibility of the facilitated negotiations which constitute mediation, but also want the assurance of finality which is the hallmark of arbitration. The parties want to achieve both benefits, though, in one procedure rather than two. They therefore agree to mediate, with the proviso that if they cannot settle during the mediation, the mediator can announce that he is converting the procedure to an arbitration, and will render a binding decision after such further factual or legal presentations as may be appropriate.

This process may be efficient in certain cases, but parties should be aware that they will be less likely to make candid, complete disclosures to the mediator, either in the presence of the other side or in private caucus, knowing that this person may then function as a decision-making, judgmental, arbitrator. It is akin to having a judge preside over a settlement conference, knowing that he will serve as judge in a bench trial if the settlement conference does not succeed. It is a potentially successful procedure, but not one without its risks.

[vii] Medaloa

Medaloa (Mediation And Last-Offer Arbitration) is a hybrid of Med-Arb and High-Low or Baseball arbitration. In Medaloa, the parties attempt settlement through mediation and, if the effort does not succeed, the mediator will then convert the proceedings to an arbitration, but her decision will be limited to a number banded by the range of the last offer and demand (borrowing from High-Low), or to either the last offer or the last demand (borrowing from Baseball).

This offers the benefits of certainty and finality but, again, the dual role of the mediator/arbitrator makes it somewhat less likely that complete disclosures will be made during the mediation component, hence lessening the likelihood that the mediation component will actually result in settlement. (Since the mediator/arbitrator participates in the earlier settlement discussions, no one has yet identified a way to give this technique a "night baseball" component, though it is likely that, sooner or later, such a development will occur.)

[viii] Arb-Med

In Arb-Med (Arbitration-Mediation), the case is arbitrated and the arbitrator reaches a decision. The decision is written down and sealed in an envelope. The arbitrator then tries to mediate between the parties, without disclosing the decision which will be entered as the arbitration award if the negotiations do not result in a settlement. Under this technique, the parties do not suffer the same disincentives to disclosure as they suffer in Med-Arb; but serious issues remain as to the "neutrality" of the neutral at this point, and whether the mediation will truly be the facilitation of the parties' own negotiations. This technique is also rather more expensive than many of the alternatives, since it contemplates a full arbitration before any attempt at mediation.

[6] ADR Within the Judicial System

[a] Court Policies Supporting Voluntary ADR

Courts are widely encouraging parties to consider ADR, often with the incentive that if the parties submit to voluntary ADR, the court will not require them to then go through judicial arbitration under *Code Civ. Proc. § 1141.10 et seq.*, which is discussed under [b], *below*. Beginning with general civil cases filed after June 30, 2001, every trial court must provide to the plaintiff, at the time of filing of the complaint, an ADR informationpackage that includes information about the various ADR options and a form of stipulation for ADR. The plaintiff must serve that ADR information on each defendant along with the complaint; and cross-complainants must serve copies of the ADR information package on

any new parties to the action along with the cross-complaint [*Cal. Rules of Ct., Rule 3.221* [*see Cal. Rules of Ct., Rule 3.800(1)* (definition of "ADR process")]. The issue of referring a case to judicial arbitration or some other form of ADR is required to be considered at the case management conference [*Cal. Rules of Ct., Rule 3.727(6)*]. In preparation for the case management conference, and no later than 30 calendar days before the date set for the case management conference, the parties must meet and confer, in person or by phone, to consider whether the case is appropriate for judicial arbitration, some other form of ADR, or possible settlement [*Cal. Rules of Ct., Rule 3.724(6), 3.727(6)*]; and the case management statement, which must be filed 15 days before the case management conference, will reflect any decision regarding ADR [*Cal. Rules of Ct., Rule 3.725*]. If the parties agree to use an ADR process, they must jointly complete the ADR stipulation form provided in accordance with *Cal. Rules of Ct, Rule 3.221* and served with the complaint, and file that stipulation with the court [*Cal. Rules of Ct., Rule 3.726*].

[b] Judicial Arbitration

Judicial arbitration is nonbinding arbitration which is a mandatory part of pretrial procedure in many litigated cases and when not mandatory, may be opted for by the parties [*see Code Civ. Proc. §§ 1141.11, 1141.12*]. It is governed by *Code Civ. Proc. § 1141.10 et seq.* Although nonbinding in the sense that a party may seek trial de novo if dissatisfied with the arbitrator's award, there is significant disincentive to seeking trial de novo: If the party seeking trial de novo fails to obtain a judgment more favorable than the arbitration award, he or she will become liable for costs and will be precluded from recovering costs from the other party [*see Code Civ. Proc. § 1141.21* (defining costs and providing for some exceptions)].

Because it is commonly mandatory, judicial arbitration is frequently a litigator's first exposure to structured ADR. However, because it is mandatory, the dynamics of judicial arbitration are less conducive to resolution of the action than are forms of ADR that the parties enter voluntarily. Because of this different dynamic, litigators forced into this form of ADR may form an unfavorable opinion of ADR generally and may resist volunteering for other forms of ADR. If you are trying to convince uncooperative opposing counsel to try a voluntary ADR option, you might probe for their prior experience. If it is limited to judicial arbitration, emphasize the very different atmosphere of entering a voluntary forum in persuading them to give it a try.

For discussion of judicial arbitration, see Ch. 36, *Judicial Arbitration* .

[c] Mediation Under Code Civ. Proc. § 1775 et seq.

In Los Angeles County, the court may order a case to mediation under *Code Civ. Proc. § 1775 et seq.* as an alternative to judicial arbitration, which is discussed in [b], *above* [*see Code Civ. Proc. § 1775.3*]. Other counties may opt into this program, if they so desire.

For discussion of mediation in accordance with *Code Civ. Proc. § 1775 et seq.*, see Ch. 37, *Judicially Mandated Mediation* .

[d] Reference

An additional point at which ADR may impact on litigation in the court system is through reference [*see Code Civ. Proc. § 639* (court's power to order involuntary reference)]. Although used in a variety of areas, the courts have turned more and more often to reference to move discovery disputes out of the court and into a referee's hands [*see Code Civ. Proc. § 639(a)(5)*]. This does not totally remove the referred matter from the court system because the referee returns a recommendation, not a binding order. Courts, however, rarely reject the referee's recommendation. And in some cases, a retired judge resolves discovery disputes in the more formal capacity of a "judge pro tem" rather than a "referee," in which case the retired judge's rulings are not confirmed by the trial court, but rather are reviewable only by writs to the Court of Appeal.

Even if the retired judge's role is limited to the resolution of discovery disputes, his or her involvement may nonetheless expedite the resolution of the dispute. First, documents and evidence which are ordered to be disclosed may reveal facts which materially impact the parties' perceptions of the strengths and weaknesses of their cases. (So, too, may the recognition that certain documents and evidence will not be produced.) Perhaps more importantly, in the course of the consideration and resolution of discovery disputes, the retired judge may, and frequently will, express opinions (with varying degrees of subtlety) as to the ultimate outcome of the case. This can be done quite consciously, with the goal of provoking progress toward a settlement. At times, this informal guidance from a respected jurist can be an enormous benefit in the process of resolving the ultimate dispute.

A very significant and potentially adverse aspect of reference is that, unless the referee is, at the time of the reference, an employee or officer of the court, the court may order the parties to pay the referee's fees [*see Code Civ. Proc. §§ 645.1, 1023*].

For discussion of reference, see Ch. 38, *Reference* , and for specific issues that arise in the use of reference in discovery matters, see *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.39*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionSummary Jury TrialsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 30 USING ALTERNATIVE DISPUTE RESOLUTION
PART II. LEGAL BACKGROUND

4-30 California Forms of Pleading and Practice--Annotated § 30.12

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§ 30.12 Obligation to Consider ADR

[1] When Use of ADR Is Required by Contract or Statute

In some cases, the obligation to use ADR will come from contract or statute. Contracts today often include arbitration clauses. They are frequently seen, for example, in contracts for the sale of real property, the provision of medical services, and agreements between banks and their customers. In fact, the current version of the standard-form residential purchase agreement used in California provides that a prevailing party in litigation or arbitration who refused a request to mediate made before the commencement of those proceedings is barred from recovering attorney's fees. The mediation need not be conducted first if a lawsuit is filed to enable recording of a lis pendens. But refusal to mediate after such a lawsuit is filed (and for several months thereafter, during which extensions of time to respond are granted) bars recovery of attorney's fees [*see Frei v. Davey (2004) 124 Cal. App. 4th 1506, 1515-1520, 22 Cal. Rptr. 3d 429* (parties collectively incurred more than $500,000 in attorney's fees pursuing a matter commenced when their settlement offers were $18,540 apart)].

These clauses more commonly require any and all disputes relating to the contract to be arbitrated. In some instances, inclusion of the arbitration clause may be mandated by statute, as in the case of uninsured and underinsured motorist insurance [*see Ins. Code § 11580.2(f)*]. In many other instances, the parties are forced into nonbinding judicial arbitration even if they choose to litigate [*see Code Civ. Proc. § 1141.11(a)*].

In more fully negotiated commercial contracts, many transactional lawyers will insert comprehensive, "multi-step" dispute resolution clauses. Typically, these clauses provide that, upon the occurrence of a dispute, representatives of the parties (of a particular seniority level) will attempt unfacilitated negotiation; if that does not succeed, more senior party-representatives will negotiate; if that does not succeed, a mediation will take place; and, if that does not succeed, a binding arbitration. These "multi-step" ADR clauses also typically provide specified, brief time periods within which these events must occur.

Those are, however, instances in which the obligation will have been imposed upon you, the litigating lawyer, by another--either the parties who negotiated the contract (in many cases, not the same people involved in the dispute) or the legislative branch. What are the circumstances in which the litigating lawyer himself will be obligated to initiate the idea?

[2] Voluntary to Serve Best Interests of Client

[a] Choosing the Best Tool to Serve the Client Is Also Good Marketing for the Attorney

Our concept is that the litigating lawyer should, for purely selfish, self-interested reasons, feel obligated to *consider* ADR in *every* case.

In every case, the litigating lawyer, no less than the transactional lawyer, should ask:

- What goals does the client want to accomplish?
- What tools are best suited to the accomplishment of those goals?

In a litigation (or, more broadly stated, *dispute*) situation, the goals may be varied. They may be financial or emotional; focused on the clients themselves or on their adversaries; abstract or concrete. As the litigating lawyer explores the client's goals, one conclusion ought to emerge: there is not one single, solitary tool that is best suited to the accomplishment of every goal or the resolution of every dispute.

Litigation may be best suited to the accomplishment of some goals and the resolution of some disputes. Its presence as guarantor of the rule of law should not be underestimated. But it is expensive. And it is time-consuming. And it is disruptive to the client's business and life. And so it should be used thoughtfully, not reflexively. ADR offers the litigating lawyer additional tools for the resolution of disputes which may well, in many cases, be better suited to the task at hand. In order best to serve the client's interests, the lawyer should be well versed in all the available tools, or processes, for dispute resolution. Only then will the lawyer be able to give the client the best available service through the intelligent matching of the best process and the current dispute. This focus on client service is designed to give the litigating lawyer a competitive advantage in the marketplace; the lawyer who can deliver financially successful results to clients through faster, more affordable, less disruptive processes will be the lawyer who will attract and keep clients.

In some cases, the delivery of a result which is final, and doing it faster and more affordably, may be the very criteria which clients use to determine whether the result is successful or not. This is the concept which originally gave rise to binding arbitration, and its importance to many clients has not lessened in the many years since binding arbitration was created. The criteria which clients use to determine "successful" results may not be obvious, may change from time to time even during the life of a single dispute, and may not be immediately apparent even to the client him or her self. For the litigating lawyer to do an effective job, these issues must be explored early, thoroughly and repeatedly.

[b] Determining Best Tool Through Client Counseling

More concretely, this begins with thorough client counseling. That beginning counseling, however, should neither focus upon, nor even discuss, the available processes. Rather, the discussion should focus on a thorough, detailed articulation of the client's goals and interests. What does the client hope to accomplish in this dispute situation? In what sort of situation would the client like to be when the dispute is over? It is not enough for the client to say that he or she wants to "win" the lawsuit, "get his money back," or "drive the other guy broke." These generalities need to be broken down and made far more concrete.

Areas you may should explore with the client include:

- What does it mean to "win"? Different clients will give different answers, based on their economic, psychological and other characteristics.

- How long he or she is willing to wait to "win," and what the consequences of that wait will be.

- How much he or she is willing to spend in order to "win," and whether those resources could or could not be put to other or better uses.

This type of discussion will lead to a more specific analysis of the opportunity cost of the full-scale litigation that the client may be contemplating. By engaging in full-scale litigation, the client loses the opportunity to make alternative uses of his time and money. How do those alternative uses compare?

As part of the counseling, the lawyer will need to work hard to explain to the client, particularly the client who does not have extensive litigation experience, just how disruptive litigation can be. As many people who have been parties to significant litigation will agree, a pending lawsuit becomes "Topic #1" in the client's life: a constant area of attention, focus and conversation with anyone within hearing distance. The litigation fills the client's mental landscape, and can detract from the client's ability to focus that attention on other, potentially more constructive and forward-looking, areas of life (e.g., what plans should I make for my career or business, how shall I rebuild my personal life after the dissolution of this marriage, etc.) This mental-energy "cost" of litigation is difficult to articulate or quantify, but it is real and it is significant. Thorough client counseling should take it into account.

Oftentimes, lawyers will see clients define "winning" in one of two general ways: (1) As the satisfaction of their own, forward-looking interests, needs, and values, or (2) as the "defeat" of the other side. Generally, it is easier to satisfy a client whose vision of victory is in the former, rather than the latter, camp. For example, in the family law context, one party's goal may be to secure sufficient resources to provide a particular standard of living. This goal is specific, measurable, and, to a greater or lesser degree, attainable. But that party's goal might, by contrast, be to "defeat," "humiliate," or "destroy" a spouse. This goal is vague, not measurable, and extraordinarily difficult to achieve. It is difficult for such a client ever to believe that the punishment inflicted on the other side measures up to what the other side "really deserves." Such a client typically believes that the other side is immoral, unethical, and generally incapable of learning the lesson which the client wants taught; yet this client also appears willing to commit resources to the achievement of what is, almost by definition, an unachievable goal. This dynamic is at work in a variety of business and civil disputes, not just in the family law Wars of the Roses. In any context, the folly of such a strategy should, in most cases, be obvious once clearly explained. So, when properly counseled, many clients will see the wisdom of expressing their goals in terms of satisfying their own needs rather than the frustration of the other side. This is generally in the lawyer's interest as well. It is difficult to envision circumstances in which it is appropriate to undertake the representation of a client, believing in advance that you will be unable to accomplish the goals set out for you. Better to work with the client to recast those goals in terms which are achievable, and will satisfy the client's own legitimate needs.

Only when the client's interests and goals have been thoroughly explored and articulated can the lawyer then work on the challenging task of selecting the dispute resolution process or processes, from among the many available, best suited to the task, as discussed in *§ 30.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureAlternative

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§ 30.13 Selecting the Best Dispute Resolution Tool

[1] Litigation as One Tool

[a] Rethinking the Scope of a Litigator's Business

In a sense, this may require a fundamental rethinking of the answer to the question, "what business are we in?" We tend to hold ourselves out to the client community as "litigators." The term we use to describe our business implies that we look first to litigation as the process for resolving clients' disputes. This can lead to a dangerous propensity *not* to view other processes as available in our toolkits. We tend to focus on one *feature* of the range of services we can provide, litigation.

[b] Applying Cost-Benefit Analysis to Litigation

Conventional wisdom in the world of marketing, however, discourages an emphasis on *features* and instead encourages an emphasis on *benefits* of the services provided. "Litigation" is not a benefit; the benefits of what we do are to provide "successful" resolutions of disputes (however the client may define it), and to do it while consuming the fewest resources necessary (time and money). Our services are more beneficial if, to borrow the language of mathematics, the resolutions we propose are more "elegant"--that is, the resolution of a dispute using the fewest steps and assumptions as necessary.

To make an analogy which might be more familiar to clients--particularly business clients--the litigating lawyer might compare the dispute "cycle" to other cycles with which the client is more familiar, such as an inventory or accounts receivable cycle. Businesses try to achieve their goals, such as the sale of inventory at an acceptable price or collection of an acceptable level of accounts receivable, as efficiently as possible. That is, businesses generally try to *shorten* the number of days, weeks or months in the cycle, and *reduce the number of junctures* in the cycle, thus minimizing the resources which must be devoted to the accomplishment of the underlying substantive goal.

So it is with disputes. If the client thinks of a dispute as a business event with a cycle, the remainder of the discussion often becomes obvious. The dispute will eventually be resolved (it is difficult to think of a civil dispute which actually goes on forever, though we often think the possibility is there!), with the client generally either paying or receiving some amount of money at the time of the resolution. The question then becomes, how can we make the cycle more efficient? How can we shorten it? How can we require less management attention to be devoted to it along the way? This style of thinking almost always leads to an ADR-friendly orientation to disputes; the lawyer and the client are both stimulated to think of creative ways to accomplish these process-related goals. A client who thinks this way will insist that the lawyer do so; hence, the business necessity of being open to ADR. If the client demands this style of service, and you don't provide it, the client will have no difficulty finding another lawyer who does.

[2] Advantages of Nonbinding ADR Processes

[a] Control of the Process

[i] Ability to Select Mediator or Other Facilitator

In ADR, most particularly in mediation, the parties do not turn their dispute over to another (judge or jury, most often) to make a binding decision. In many cases, the mediators or other ADR neutrals do not have extensive substantive expertise regarding the industry or subject matter of the dispute. Critics of the processes cite this "ceding of control" to non-expert others as a disadvantage of ADR.

Experienced ADR-sensitive practitioners, however, are likely to describe the implications of the issue of "control" differently.

Initially, the amount of "control" in ADR processes should be compared and contrasted with the amount of control parties retain in litigation. In many cases, the amount of control maintained in litigation is far less than the amount of control maintained in ADR processes, most particularly mediation. In litigation, the parties lose complete, or almost complete, control of important elements of the process. Most significantly, in litigation, the parties turn over decision-making authority to total strangers. The judge and jury who will decide the case are almost completely beyond the control of the parties or their lawyers. Decisions can be wholly motivated by these strangers' irrational, emotional, or subjective reactions to the evidence, the personalities involved, or other factors. As long as there is "substantial evidence" somewhere in the record to support whatever conclusions are reached, the verdict will withstand appeal. Yet (with the notable exception of patent and other technology-related cases) parties rarely complain that juries or even judges "lack substantive expertise." If parties do not voice such complaints about the jurors who can make binding decisions about their fortunes, careers, and lives, then mediators (who generally facilitate negotiations and *do* not make binding decisions) ought not to be subject to such complaints, either.

Moreover, in ADR, one need not cede control to a nonexpert. One of the potential advantages is that in a complex case, the parties may elect to have the matter mediated or arbitrated by an expert in the area involved in the dispute. Some attorneys, however, might prefer to have a non-expert so that they can educate the mediator or arbitrator in the course of the proceeding.

Thus, the distinguishing control factor here, unlike litigation, is that the parties get to opt whether to have the matter heard by an expert or nonexpert.

[ii] Freedom From Rules of Evidence and Civil Procedure

Other aspects of litigation are far beyond the clients control as well, and are subject to far more control in mediation or other forms of ADR. The rules of evidence and civil procedure, for example, severely limit the otherwise-relevant materials which can be presented to the judge or jury as the basis for decision-making. In mediation or other

facilitated-negotiation processes, however, where the parties themselves are the decision-makers, the rules of evidence and civil procedure need not be followed; the parties can, in their negotiations, refer to hearsay, opinions, conclusions, even argumentative materials--whatever they think will prove persuasive to the other side. The side hearing these matters may or may not be persuaded; but the articulating side will have maintained more complete control over the materials to be considered in the process, and is likely not to feel the frustration litigants feel, "if only I had been able to get on the stand and tell them what was really important."

[iii] Ability to Define Scope of the Issues

In litigation, the scope of the issues to be decided is also largely beyond the parties' control. The agenda of litigation is bounded by the parties' abilities to state facts sufficient to constitute legally cognizable causes of action and defenses. Other issues--emotional needs for respect or revenge, hurt feelings, pride, among others--may never be adequately addressed within what the parties may perceive to be the relatively narrow scope of the claims and defenses which are the stuff of lawsuits. In a mediation or other facilitated negotiation, the parties are free to discuss and negotiate over whatever they agree to make their agenda.

To some readers, it may seem that this will make the agenda of the mediation or other negotiation too long, too broad, or too unwieldy. In fact, the opposite often takes place. When the parties have the opportunity to focus on the factors most important to *them*, they generally do so. Those factors may not relate to the elements or proof of legally cognizable causes of action or defenses at all. But they are likely to relate to what the parties themselves see as the heart of the dispute--and hence the agenda becomes more narrowed and focused.

Litigating lawyers, on the other hand, often steer disputes in the other direction, away from the heart of the dispute and toward peripheral issues. In order to appear "aggressive" and "vigorous" in their advocacy, how many lawyers will add marginal causes of action to complaints? Hence the contract dispute expands to include the inflammatory language of fraud and deceit; the employment dispute expands to include allegations of emotional distress or loss of consortium; and the list goes on. South of the "*v.*" defense lawyers engage in similar tactics. The reflexive demurrer, the overbroad document request, and the deposition questioning which strays unduly into the plaintiff's personal life are all tactics which expand, rather than focus, disputes, often to the client's detriment.

[iv] Using Litigation for Leverage

There are times, of course, when aggressive or even hyper-aggressive litigation tactics are appropriate. In some cases, aggressive litigation tactics, on either the plaintiff's or defendant's side, can be seen as a necessary precursor to serious negotiations or engagement in an ADR process. For example, an employee who is one among many whose jobs have been eliminated in a company, but who nonetheless feels that she is the victim of racial discrimination or sexual harassment, may not be taken seriously by busy management until a complaint is filed and the summons is issued and served. On the other side, a defendant may need to disabuse a plaintiff of the mistaken impression that collecting a large sum of money via settlement is easy to accomplish; the defendant may need to show the plaintiff that litigation is a long, hard road, and that the plaintiff's time and money may more productively be employed elsewhere. In such cases, litigation is used strategically, not for its own sake. A "taste" of litigation can, in some cases, productively be used to encourage the parties to resort to more efficient ADR processes instead.

In other circumstances, the other side (or even your own client) may approach the dispute with attitudes and needs which cannot be addressed other than through full-scale litigation. In rare cases, those attitudes and needs will not change, even after litigation is "tasted." In these cases, full-scale litigation is the only alternative, and the litigating lawyer should not be reluctant to use it. But the number of cases which truly fall into this category is likely to be far smaller than one may at first think. Many lawyers, particularly those without significant ADR experience, believe that mediation and other ADR techniques are for "other" cases, "smaller" cases, or "somebody else's" cases. For these lawyers and their clients, willingness to try ADR will often lead to an extraordinarily pleasant surprise.

[v] Allows Focus on Actual Issues Important to Client

Many clients soon realize that their resources, which are by definition finite, are not best spent in litigation because the process does take them away from the core of their dispute, and they are not able to talk about what they really want to discuss. ADR offers clients an opportunity to refocus the agenda. For the client, this generally means greater control over the dispute. For the lawyer, however, it may not. For litigating lawyers are, by training, most comfortable when the agenda is within their legal domain: the allegation and proof of elements of legally-cognizable causes of action and defenses, the application of the sometimes complex rules of evidence and civil procedure to the real-world events and circumstances which are the guts of disputes (and therefore lawsuits). In ADR, where the clients participate more directly, the importance of the legal superstructures is minimized, if not stripped away entirely; the real-world events and circumstances take center-stage, unadorned by the procedural acoutrements in which lawyers specialize. To lawyers, this may not seem like much of an advantage; indeed, many lawyers question what their role in such processes is at all. But to clients, the advantages are manifest if they are able to participate more meaningfully and reach substantively satisfactory results faster and more affordably.

[vi] Actual Issues May Not Be Traditional Legal Issues

In giving full consideration to all the tools available, the lawyer becomes the architect of the processes. The lawyer's role is thus different, but no less important. The lawyer fulfills his or her responsibilities--and professionally and honorably so--when he or she has assisted the client, through whatever mix of processes is appropriate, to retain or regain control over their own disputes, and reach the best negotiated result possible under the circumstances. The result may not focus on strictly "legal" issues at all; the client may negotiate for an apology rather than a financial settlement, for example. But that ought not trouble the lawyer, if the result satisfies the client and the client is fully advised by the lawyer that other, legal issues may be present. If clients choose not to focus on their legal rights, but rather to focus on other parameters of their dispute, and the choice is based on full information, who are we as lawyers to say that our choice of issues for the client is better than the client's own choice?

Indeed, in many cases, these other, more emotionally-oriented issues, are present, are real, and may be far more important to the client than the "legal" issues which the case appears to present. In fact, the legal issues, and the possibilities for monetary recoveries which those legal issues may appear to offer, are often only proxies for the true, underlying emotional issues.

As litigating lawyers, we may tend to underestimate the pervasiveness and significance of these underlying emotional issues. That is because it is not our training to do so. We are trained to "spot the issues," not necessarily to figure out the motivations or causes of the significance which some (but not all!) people will place on a given dispute.

So why will some people look at a given conflict situation and "want to make a federal case out of it," while others might look at the same objective fact pattern and decide to "forget it and get on with life"? Why, in the employment context, for example, will some employees in a large reduction-in-force take the bad news as well as possible under the circumstances and move on, while others will be hell-bent for litigation? Why will some employers treat their employees differently than others when confronted with those conflict situations? What are the human factors involved?

In many cases, the human factors can be boiled down with surprising simplicity. The need to litigate arises most strongly in those who perceive themselves as having been treated with *disrespect*, and who desire *revenge* as a result. The desire for revenge masks the true desire, to be treated with respect, which the person has not been able to attain. Unable to achieve respect, the person becomes willing to settle for revenge, and revenge takes the form of the financial, time-and-disruption related, and other, burdens of litigation.

In facilitated negotiation processes such as mediation, a mediator can help the parties to understand this cycle, often for the first time. When this happens, a defendant (for example) can acquire the opportunity to remedy the situation by

clearly communicating the respect which the plaintiff feels he or she deserves, or by acknowledging that no disrespect was intended in the first place. Sometimes, the mere fact that the opposing party is willing to sit down and communicate face-to-face is a sufficient show of respect to go a long way toward settling the dispute. When coupled with the contents and tone of the communications which can follow, these face-to-face, mediated processes can be highly effective in defusing potentially lengthy litigation possibilities. Once respect is shown, the desire for revenge--through the processes of litigation--is reduced if not eliminated.

[vii] Allows Clients Greater Role in and Satisfaction With the Resolution

Clients who participate in the face-to-face, facilitated negotiations which mediation and other ADR processes offer often feel more invested in the process. As more direct participants, they have more of a stake in seeing the process succeed. The agreements they reach are their own, not ones imposed on them by others. They are less likely to feel taken when they participate and have this type of control over both process and outcome. Clients are more likely to reach agreement, and are more likely to comply with their agreements, when their investment in the process is maximized in this way.

For example, many clients tell their lawyers that they want nothing more than "to tell their story." As litigating lawyers, we often tell our clients to do no such thing. Many clients view their depositions as their opportunities to "set the other side straight" about the facts. As litigating lawyers, we almost always tell our clients not to do so, but to limit their answers, when and wherever possible, to "yes," "no," "I don't know" and "I don't remember." Clients may have more of an opportunity to tell their story at trial, but even then, the narration will be hamstrung by the formats of direct and cross-examination, the hearsay rule and other limitations of the rules of evidence, and what the clients may perceive as the cramped scope of relevance. How many clients, at the end of litigation, feel that they have really had the opportunity to be heard?

In mediation and other facilitated negotiation processes, clients often have better opportunities "to tell their story" than they have in litigation. First, the opportunity comes sooner. Trials take place at the end of the litigation process. Depositions, at which the story-telling opportunity is much more limited, often do not happen until some mid-point in the litigation, after the pleadings are settled (sometimes after significant motion practice) and document production and other preliminary discovery is complete. The scheduling of ADR processes, however, is much more flexible. ADR-sensitive advocates often try to schedule mediations at the very beginning of a lawsuit, or even before suit is filed; the best way to save clients the expense and delay of litigation, after all, is to try ADR processes *before* resources are spend in litigation and discovery.

Second, the question-and-answer formats of direct and cross-examination, which clients can find so frustrating, do not have to apply in mediation of any other ADR process, if the parties so agree. In most mediations, the neutral will begin by asking the lawyers briefly to describe the legal issues involved, and then ask the parties themselves to describe the situation as they see it. The parties then have the opportunity to give a more narrative response.

Third, the parties are not bound by the rules of evidence. In mediation and other facilitated-negotiation fora, no transcript is made, and nobody present has the power to make a binding decision and impose it on anyone else. Therefore, the process does not include the evils against which the hearsay bar and other rules of evidence are designed to protect (principally, the evil of erroneous decisions being imposed on the parties based on untrue evidence). The parties can draw on materials from whatever source they believe the other side will find persuasive.

Finally, the agenda of the negotiations is different than the agenda would be at trial. The parties choose to negotiate whatever is important to them. They tell *their* story, as they want to tell it, not the story required by the scope of relevance of legal claims and defenses. All in all, if the client wants to tell his or her story--and many clients do--then the control over the process which ADR offers can meet that need far better than the rule-bound processes of litigation.

[viii] Discovery

The last issue over which the parties have significant control in designing nonbinding ADR processes is the extent to which they will permit discovery. For discussion of discovery considerations, see *§ 30.15*.

[3] Confidentiality of ADR

Another often-stated advantage of ADR is the *confidentiality* which the processes offer. ADR need not, and rarely does, result in the creation of a public record of the dispute or its resolution. There is no binding legal precedent to govern future cases. This may be in all sides' interest. The stakes in a given case (or in anticipated future cases) may be too high, or the state of the law may be too uncertain, for the parties to desire a public result or one which will govern future cases. Additionally, both sides may be concerned about possible embarrassment, disclosure of confidential business information, or other materials which they would prefer not to expose to the light of public scrutiny through civil litigation and discovery. ADR processes allow the parties to resolve their disputes, presumably to their satisfaction, without making the public disclosures which they would rather not make.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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Chapter 30 USING ALTERNATIVE DISPUTE RESOLUTION
PART II. LEGAL BACKGROUND

4-30 California Forms of Pleading and Practice--Annotated § 30.14

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§ 30.14 Disclosures During ADR Process

[1] In Nonbinding ADR

In another sense, however, parties may be concerned about the disclosures which they may be tempted to make in the mediation or other ADR process itself. Parties may be concerned that a nonbinding ADR process will not result in a resolution and that the case will have to proceed in litigation; and that, in the ADR process, the parties will have made disclosures, in an effort to settle, which will turn out to have been disadvantageous in that subsequent litigation (if, for example, an opposing party changes his or her testimony in some material way as a result of the disclosure you have made). Indeed, there may be cases in which this concern is well-founded, and parties will be put to the strategic choice of disclosing sensitive evidence or not, hoping that the disclosure will help lead to a settlement, but concerned about having let the cat out of the bag in case the case does not settle.

Different advocates approach this judgment area differently. Some play their cards as close to the vest as possible. Others believe that they show confidence in their case by disclosing the evidence which they have accumulated; they keep an open mind with regard to new information with which they may be confronted; and in exchange, they ask the other side to keep an open mind and react rationally to the disclosures they make. For all advocates, though, the judgment calls regarding disclosure have to be made, and may be made differently at different times and under different circumstances.

Disclosures in ADR obviously give the opposing party knowledge that cannot be withdrawn. However, if the dispute does ultimately go to litigation, there are protections from the introduction in evidence of information discovered during ADR that would not otherwise be subject to discovery [*see Code Civ. Proc. § 1141.25* (no reference to judicial arbitration proceedings in later trial); for discussion, *see* Ch. 36, *Judicial Arbitration* ; *Evid. Code §§ 1119, 1122* (statements and documents made in connection with mediation), 703.5, 1121, 1127 (mediator's findings or testimony); for discussion, *see* Ch. 31, *Mediation*].

[2] In Binding ADR

The judgment calls regarding the extent of disclosure discussed in [1], *above*, present themselves most acutely in nonbinding ADR processes. In a binding process (such as binding arbitration), there is much less downside to the disclosure; at the end of the process, the arbitrator will issue a final, binding decision. If you don't make your potentially persuasive disclosures during a process such as that, you may never have a meaningful chance to make the disclosure again. Thus, binding processes eliminate the dilemma of whether or not to disclose key facts, although those binding processes present other difficult issues, primarily whether one wishes to submit to a process that places extreme limits on judicial review [*see Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 26-28, 33, 10 Cal. Rptr. 2d 183, 832 P.2d 899* ; for discussion, *see § 30.11[5]*].

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§ 30.15 Planning Discovery

[1] Timing of ADR Vis-'a-Vis Discovery

Parties can design ADR processes to take place before any discovery goes forward (most typically, a nonbinding mediation with client involvement maximized and lawyer involvement minimized), after discovery is complete (where other processes, including binding arbitration, may be more common), or after designated limited discovery takes place. Where the parties desire a fast, final resolution of their dispute, they may be inclined to forego discovery in the hope that a quick mediation will help them achieve the benefits they desire. Where the parties are eager to have more of a precedent to use in other cases involving other parties, they may be more inclined to develop a factual record more fully and then submit the dispute to a binding arbitration.

Discovery, although much abused, has its benefits. If important facts are uniquely under the control of the other side, discovery may be an appropriate or even necessary precursor to the resolution of the dispute. But virtually any discovery is expensive and time consuming. In ADR processes, the parties have the opportunity to mix formal and informal elements to arrive at the process most appropriate to their dispute.

Indeed, the parties can use a front-end mediation process to structure--and to limit--the discovery they will obtain before they again use mediation (or some other ADR process) to try to resolve their dispute. Parties may find it productive to use a mediator to help them in processes such as the Discovery Status Conferences contemplated in *Fed. R. Civ. P., Rule 26(f)*, U.S. Dist. Ct., Cen. Dist. of Cal., Rule 6, and analogous state court rules. There will likely be tremendous benefit from such an effort to structure discovery, even if applicable local rules do not require it. Parties and counsel can meet and confer to prioritize the issues in the dispute, isolate those on which different opinions and perceptions seem to be the most serious barriers to settlement, and then design appropriate discovery protocols (and perhaps adjudicative protocols as well, such as motions for partial summary judgments or trials on bifurcated issues) to address those issues. Once these smaller slices of the dispute are addressed, the parties may be able to achieve settlement without expending

the resources which otherwise would be required to adjudicate the issues which remain. For the reasons described in § 30.11[2], these discovery-structuring efforts may be more productive if a third-party neutral is involved.

[2] Discovery Not Prerequisite to Nonbinding ADR

Generally, parties are less insistent on discovery when their ADR process is nonbinding mediation (or another form of facilitated negotiation) rather than binding arbitration. Where the parties are free to walk away from the table if their questions about the facts are unanswered, parties may be more willing to go to the table without having those questions answered in advance.

In nonbinding processes, parties often feel able to negotiate meaningfully, even in the absence of full and complete answers to their factual questions. Experienced lawyers, and their clients, can often assess the *probabilities* that undiscovered documents or testimony will turn out one way rather than another. Parties (and those aligned with them) can generally be expected to testify and produce documents which more or less support their claims and defenses; there is always some possibility that a party will make a fatal error at his or her deposition, or produce a "smoking gun" document which will undo his or her case. If those probabilities, based on experience and intuition, are calculated and analyzed, using, for example, the sort of "Decision Analysis" taught in MBA programs and with which many clients (at least in the business arena) are familiar, then the "expected value" or "settlement value" of a case can be estimated before the discovery actually takes place.

In this sense, litigation can be likened to a game of poker; we do not know all of the cards the other players hold, but we feel that we can bet intelligently anyway, based on our knowledge of our own hand, the cards already played, and the skills and propensities of the other players. And, as in poker, any time you want to see more of the cards the other players hold, there is a monetary cost attached. Not everyone insists on playing the hand all the way through to the end in order to be satisfied with the game; similarly, not all litigants insist on seeing their case all the way through to trial. Clients can intelligently decide to forgo certain discovery once they understand its attendant costs and can estimate the likelihood that testimony and documents will come out a certain way.

Finally, to contrast ADR processes with lessened discovery to litigation, with its more complete discovery, lawyers should recall that even the Code of Civil Procedure is not a guarantee that discovery will be complete. In many cases, formal civil discovery does not produce all of the evidence to which a party is entitled, for a variety of reasons ranging from the malignant to the benign. In reality, whether in ADR processes or in full-scale litigation, we are always operating on less-than-full, less-than-perfect states of information. So the differences between traditional litigation and ADR processes may be more ones of degree. But in ADR processes the parties can exercise more complete control over the types and amount of evidence provided, and in nonbinding processes generally remain free to withdraw completely if their factual inquiries are not satisfied. That is not an option one has in traditional litigation.

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§ 30.16 Approaching the Other Side About ADR

[1] Opening the Topic

At some point, you as lawyer will have to take a difficult, possibly even courageous, step: You will have to approach the other side about using an ADR process in conjunction with, or instead of, full-scale litigation. To serve the client effectively, you will have to put your thoughts about the benefits of ADR into action, and that can be done only in conjunction with the other side.

This step may be difficult or even awkward if you are concerned that the other side is not familiar with ADR and its benefits. In those cases, the discussion may have to include a lengthy discussion of just what the various ADR processes *are*, before you are able to explain their benefits. The step becomes more difficult if you are concerned that the other side will perceive your overture as a "sign of weakness" and will respond to your overture with ever-more-aggressive litigation. In many cases, though, the client on the other side (even if not the lawyer) will welcome the advantages of time and cost savings which ADR has to offer, and the likelihood of a favorable response to an ADR overture may well be higher than we at first think.

The easiest ADR overtures come in cases where a contract or statute mandates the use of an ADR process. It is hardly a sign of weakness to express a willingness, or even eagerness, to comply with a contract or statute.

Most cases, however, do not involve contracts or statutes which mandate the use of ADR processes. There are still ways, though, to make the introduction of the subject less awkward. Many law firms, as well as many client businesses and companies, are signatories to "ADR Pledges" sponsored by bar associations or other organizations. Perhaps the most famous such pledge is sponsored by New York's Center for Public Resources, a business-supported organization which is dedicated to the identification and implementation of ways to reduce the high cost of litigation to its members. These pledges generally commit the signatories to becoming familiar with the spectrum of commonly-used ADR

processes, and to recommending and using those processes in lieu of litigation in appropriate cases.

If you or your client is a signatory to one or more of these pledges, then the introduction of the topic becomes much easier. Your pledge, you can explain to the other side, commits you to the exploration of the propriety of ADR in *every* case; your introduction of the topic in *this* case, therefore, is nothing extraordinary or unusual. It is not only your standard operating practice, it is part of your pledge--in a sense, your contract--with your bar association (or with your client, if the client company is itself a signatory to such a pledge, as more and more companies are).

There are other, more subtle, ways to introduce the topic of ADR with the other side as well. One approach is to initiate a conversation with opposing counsel to introduce yourself and discuss the case. You may not want to use the term "ADR" in this conversation at all. Rather, the purpose of the conversation is simply to discuss "how we're going to handle the case, to see whether there are any ways we can make things more efficient." A discussion of "efficiency" often leads naturally to a discussion of ADR, given the time and cost savings which ADR processes offer. In particular, this type of conversation can lead to an exploration of nonbinding, facilitative ADR processes such as mediation, which can, in general, be set up much more quickly than binding processes such as arbitration (which many parties want to await the conduct of extensive discovery) and thus have the potential to offer greater time and money savings.

There are as many ways to steer such conversations in these productive directions as there are cases and opposing counsel with whom to have such conversations. The key, as always, is active listening, and the identification of clues in what opposing counsel tells you that will help you understand how best to handle that conversation with that person at that time and place.

[2] Suggested Techniques

[a] Let the Other Side Express Confidence in Its Case

Tell opposing counsel that you are open to persuasion. While you might not currently believe that the other side's case is strong, you recognize that "a case never again looks as good as it does on the day the client first walks into your office," and you are interested in hearing the other side's take, the other side's spin. If the other side really has such an impenetrably great case, you will so advise your client, and you will advise your client to offer a settlement that takes the "greatness" of the other side's case into account. You are, after all, able to assess factual and legal presentations, and there is generally little sense advising your client to spend large amounts of time and money to defend a case that he or she is so likely to lose. The client would generally be better off simply paying the money that a judge or jury would likely order him or her to pay anyway, and save the attorneys' fees, time and aggravation that he or she would incur along the way.

This coin, however, has two sides, and you must make opposing counsel aware of that. The other side is that *you* expect *opposing counsel* to show the same open-mindedness that you have offered to show. That is, you will have the opportunity to explain the strength of your case, as you see it, to them. Just as you have offered to be open to persuasion, you expect the other side to be open to persuasion as well. As a practical matter, that means that you want opposing counsel to commit, in advance, to the same approach as the approach you are willing to take: If you can legitimately persuade the other side that your defense is as strong as you believe it is, then opposing counsel will so advise his or her client, and will further advise his or her client to "go away," or at least to be willing to settle the claim on nominal terms.

Many times, opposing counsel, no matter how blustery, will agree, believing that there is only the slimmest likelihood that his or her side will objectively appear weaker than yours. In practice, though, there are usually facts, law, and equities favoring each side, and compromise (if not true collaboration) becomes possible.

This approach takes one of the conventional excuses for *avoiding* ADR--the "certainty of winning"--and turns it on its

head. You have positioned to make the other side's certainty of winning as the very best reason to be *enthusiastic* about ADR. If the other side's case is truly a lead-pipe cinch (though lead-pipe cinches are far fewer and farther between than many lawyers believe--or are willing to admit--at the beginnings of cases), and you promise not to be so obtuse that the point will be lost on you if properly made, and you further promise to react, in terms of settlement negotiations, in a rational way, then the invitation to mediate is a challenge that many opposing counsel will find too tempting to pass up.

Again the analogy to a game of poker helps to shed light. In poker, once you show enough cards to cause your opponent to believe that you have an unbeatable (or even strong) hand, that opponent may well stop betting against you, and you will win the hand. So in dispute resolution, if you show enough of your case to cause your opponent to believe that you are unbeatable (or nearly so), that opponent, too, is likely to stop betting against the odds, and you will win.

[b] Show How Discovery Can Be Made Unnecessary or Hastened by ADR

[i] Discovery May Be Unnecessary in Nonbinding ADR

One of the most common objections to ADR is that the other side believes that it is too early in the process. Opposing counsel frequently will state that they need the deposition of this or that party or witness before he or she is able to have a "meaningful" settlement discussion.

Frequently, this objection is ill-founded in the first instance. The lawyer's insistence on discovery is, in many cases, designed to do nothing more than have the lawyer's state of knowledge catch up with knowledge the client already has. In many cases, the substance of the dispute involves direct dealings between the parties; conversations, meetings, and transactions in which they both participated. The clients know what actually happened and what did not; they were there. Clients in the business world and elsewhere resolve dispute after dispute themselves, without any involvement by lawyers at all. Many lawyers overstate their own importance to the processes by insisting that their state of knowledge be enhanced to this very expensive degree. To the extent that clients are seen as "in charge" of their own disputes (as often happens in mediation), rather than their lawyers being solely in charge, then the need for the education of the lawyers is much less.

[ii] Nonbinding ADR Can Serve the Function of Discovery

But even in those cases where some discovery actually may be necessary, ADR is generally not to be avoided. As part of the negotiation over the process and protocols, the sides can negotiate about who they want to attend the mediation (or other ADR process) session. If, for example, opposing counsel is reluctant to mediate because he or she has not yet deposed "Witness X," you can answer that you would be happy to bring Mr. or Ms. X to the mediation. At the mediation, you will let opposing counsel (and opposing parties, too) talk to Witness X about whatever is relevant to the dispute. The absence of a court reporter from a mediation ought not to deter opposing counsel; after all, Witness X's story, told in the presence of all involved in a dispute plus a neutral mediator (who is sometimes a retired judge), is likely to be the same as the story the witness would tell under oath at a deposition. (Put more bluntly, if Witness X is willing to lie in front of a retired judge, then Witness X will probably also lie under oath at a deposition; the oath adds nothing in such a circumstance).

The added efficiency from such a process can be extraordinary. When clients complain about the high cost of litigation, those complaints more often than not come in the context of the amount of money spent on discovery. Many clients perceive civil discovery as largely wasteful. Bringing clients or witnesses to a mediation can be a far more efficient way to exchange information. The questioning can be more relaxed, spontaneous and conversational. The numerous "objections to form" can be eliminated. Clients as well as lawyers can question each other and follow up. Absent the evidentiary formalities, and some of the cat-and-mouse strategy found in depositions, clients may find themselves able to get to the heart of the issue and negotiate with each other much more quickly in a single day of mediation than they would after weeks or months of formal discovery.

Importantly, this "free discovery" aspect of mediation can be valuable to opposing counsel and his or her client even if the mediation fails. Subsequent discovery can be truncated, and some depositions might be eliminated altogether, based on what the parties learn in the mediation. The information presented, along with what you learn about the demeanor of and chemistry among opposing counsel and his or her clients, also serves you well if you then have to prepare for trial.

[iii] Loss of Some Benefits of Formal Discovery

Some benefits of formal discovery may be lost through using ADR as a discovery mechanism. For example, because statements in mediation are not admissible in evidence, they cannot be used to impeach a witness whose testimony at trial is inconsistent with their deposition testimony. For the same reason, the statements made in mediation will not suffice to preserve the testimony of a witness who becomes unavailable [*see Evid. Code §§ 1119, 1126, 1128*]. The attorney will have to evaluate the importance of these potential benefits on a case by case basis. The option may also exist of the parties agreeing to the admission of all or part of specific communications made in connection with the mediation, which may restore some of these functions of formal discovery [*see Evid. Code § 1122(a)(1)*]. For discussion of the confidentiality of mediation proceedings, see Ch. 31, *Mediation* .

[c] Explain the Benefits

Most clients choose ADR processes, particularly mediation, because of the time and cost savings it offers. An explanation of these benefits to opposing counsel, along with a strong word concerning how this will keep the client happy even if it means fewer billable hours on *this* case, helps give many opposing counsel the tools they need to explain and advocate these processes to their own clients [*see § 30.12[2]*].

[d] Let the Other Side Pick the Process

An introductory meeting with opposing counsel might include asking the other side what they hope to get out of the litigation and where the client hopes to be, business-wise, career-wise, or otherwise, at the end of whatever process is adopted. The question to opposing counsel then becomes what is the best way to get there, given the realities of the case (e.g., unlikelihood of obtaining summary judgment, costs and delays of litigation, etc.). Particularly if you are able to prompt the other side with mention of your own experiences with ADR processes, opposing counsel may then suggest an ADR process with which he or she is familiar or has experience or which he or she otherwise feels might be appropriate. When the selection of the process appears to originate with the other side, then the likelihood of actually engaging in that process is far enhanced.

[3] Collaborative Approach to Process

[a] Parties' Objectives Usually Coincide on Issue of Using Speedy and Least Expensive Dispute Resolution Process

All of the approaches discussed under [2], *above,* both reflect and can cause a fundamental reorientation of the way lawyers think about they disputes they handle. We traditionally think of litigation as a classic "zero-sum game"; whatever the defendant pays, the plaintiff gets. But in some material respects, this zero-sum metaphor does not apply. Most specifically in the dimensions of cost and time, litigation generally is not a zero-sum game. When one side makes litigation take longer for the other side, it most certainly does not take any less time for the one; both sides are going to finish the litigation at the same time. Similarly with cost. When one side makes litigation more expensive for the other, it generally becomes more expensive for the one as well; both sides have to attend the extra deposition days, court hearings, or other junctures which can drive the cost so high.

The abandonment of the zero-sum metaphor means that there are opportunities for litigation, even hard-fought litigation, to take on collaborative aspects as well. In almost any lawsuit, the parties share *some* interests, most

commonly the interests in making the process (1) less expensive and (2) shorter. Most clients, after all, are not in the litigation "business," and would be happy to see the dispute put behind them, on overall terms they find acceptable. When lawyers come to think of the handling of disputes in these client-centered terms, then the development of ADR processes that benefit both sides becomes eminently more possible.

[b] Using Economic Power to Extend Litigation Is of Questionable Value

There are a few cases in which the parties may find it extremely difficult to find legitimate areas of collaboration, even in questions of process-design, and those deserve mention. Particularly in cases between business competitors, the collaborative design of ADR processes may prove extremely difficult. A competitor who seeks to increase its market power through the elimination of another competitor may be not the least bit interested in expediting the process of resolving a dispute. Indeed, such a competitor may try to instigate disputes to be litigated, in the hope of taxing a (generally smaller) competitor's resources to a point where the smaller competitor will simply no longer be able to remain in business. The larger competitor is willing to suffer the expense and delays of litigation, in the short run, in the hope of increased market power in the long run. The litigation is just one of many competitive (or perhaps anti-competitive) tactics in which the larger competitor could engage.

A warning, though, to such aggressive competitors who focus more on today's competition than on the future needs of the market: particularly in industries which rely on cutting-edge technologies, to focus on today's competition, rather than on tomorrow's demand, could leave the field unnecessarily open to *new* competition, focused in technological progress rather than on the "defeat" of a particular competitor company. In a competitive technological market, even strong competitors can be knocked off by newcomers. In most cases, a company keeping its eye on the ball will still look on disputes as matters to be prevented and resolved, rather than encouraged, so that the company can continue its focus, undistracted, on its true core business.

In any industry, a strong company with money to spend on litigation may, if focused on a cost-benefit analysis of potential litigation, see that there are more valuable endeavors in which to invest its assets. While this has always been true, it is all the more compelling in today's environment of fast track litigation, where cases, even in actions exempt from the fastest track, are closely monitored by the court and pressed to conclusion and the earliest possible removal from the docket. In this environment, even if the client's objective is to tie up the opponent in an endless torture of protracted litigation, that objective is not so easy to achieve as it formerly was; so the cost-benefit analysis may tip in favor of simply disposing of the dispute and moving on.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 30 USING ALTERNATIVE DISPUTE RESOLUTION
PART II. LEGAL BACKGROUND

4-30 California Forms of Pleading and Practice--Annotated § 30.17

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§ 30.17 Timing of the ADR Discussion

If the goals of ADR are to save time and money, then the subject ought to be approached as soon in the dispute process as possible--before that time and money are consumed in discovery and otherwise in litigation. Additionally, the emotional wear and tear of litigation, including particularly the embitterment which often results from adversarial cross-examination at depositions, can make it harder for the principals to consider the possibility of a collaborative negotiation with each other. So ADR may be more likely to succeed when attempted before litigation causes feelings and positions to harden.

Even if ADR is not discussed at the outset of a dispute, other appropriate junctures are likely to present themselves. Before or after a key deposition or the ruling on a key motion, or in conjunction with a key event on the court's calendar (e.g., a status conference, after which more intensive--and expensive--trial preparation will have to begin in earnest), parties may be attuned to issues of cost, delay, and risk with particular clarity, and ADR possibilities may appear especially appealing at those points. Moreover, in the course of the status conferences, the court will almost certainly suggest that the parties consider mediation or some other form of ADR, which may provide leverage to get a reluctant party or opposing counsel to commit to a voluntary ADR procedure at this juncture. Also, in the many cases subject to mandatory judicial arbitration [*see Code Civ. Proc. § 1141.11*], which uses cost-shifting as a disincentive to seeking trial de novo [*see Code Civ. Proc. § 1141.21*] and generally precludes discovery after the award [*see Code Civ. Proc. § 1141.24*], the inevitability of mandatory ADR might be persuasive in arguing for going first to a voluntary form of ADR over which the parties could maintain greater control.

As these junctures approach, the watchword should still be, "the sooner the better." Embitterment almost always grows as litigation progresses, and as embitterment grows, the parties' abilities to visualize constructive future dealings with each other shrinks. As the possibility of future dealings shrinks, the parties' interest in processes designed to foster future dealings will also shrink. With the accusatory tone of so much of what is said in litigation; with the expense and disruption of fetching what each side perceives as the at-best-marginally-relevant documents demanded by the other

side; with the repeated emphasis on "fraud" and the other hyperbole-laden claims which lawyers so often press in litigation in the name of aggressive advocacy, so lawyers diminish the likelihood that the parties will ever be able to restore whatever mutually beneficial relationship they once had. All of these factors contribute to a need for counsel to communicate with the other side about ADR.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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PART II. LEGAL BACKGROUND

4-30 California Forms of Pleading and Practice--Annotated § 30.18

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§ 30.18 When Not to Use ADR

All of this said, are there some cases in which ADR is *not* appropriate? Professors Sander and Goldberg, who have conducted the most thorough research on the subject [*see* Sander and Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 Negotiation Journal 49 (January 1994)], identify a few such cases, in which ADR is least appropriate and perhaps ought not to be used at all, with traditional litigation being preferred:

1. Where there is a significant public interest in a question of statutory or constitutional interpretation. The civil rights movement and other engines of social progress would have had a hard time exerting the constructive influences on society which they have had if court systems had not been available to the leaders of those movements.

2. Deterrence of recurring issues. For example, in cases of widespread consumer frauds in violation of statutes, or in cases where class actions seek equitable or injunctive relief, ADR might prove repetitive or inconsistent, and the public interest as well as the interests of the parties might well better be served through a court adjudication.

3. Cases where there is a public interest in sanctioning unacceptable conduct. For example, in cases involving slumlords, or other situations where punitive damages may be appropriate, court adjudications might be better suited to the task.

4. Cases where the parties are incompetent negotiators. Negotiation-oriented ADR processes may not be well suited to those who are not competent negotiators; but, query, how well are these incompetent negotiators (particularly among lawyers) likely to do at a trial, or in other court processes? If the results are not likely to be any more satisfactory (either to the parties or from the public's point of view), then

perhaps ADR processes which do not require the taxpayer-financed resources of the court system are still to be preferred.

5. Cases that present serious issues of compliance or discovery. In cases where injunctive relief is necessary to insure proper conduct in the future, or where discovery may be necessary to learn unknown facts, the existence of which cannot be intelligently estimated, then again, court processes may be preferable.

In the vast majority of cases, though, ADR processes at least ought to be seriously considered; in the vast majority of those, ADR processes are likely to offer significant advantages over traditional, full-scale litigation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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4-30 California Forms of Pleading and Practice--Annotated §§ 30.19-30.29

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[Reserved]

§§ 30.19[Reserved]

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Chapter 30 USING ALTERNATIVE DISPUTE RESOLUTION
PART III. RESEARCH GUIDE

4-30 California Forms of Pleading and Practice--Annotated § 30.30

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PART III. RESEARCH GUIDE

4-30 California Forms of Pleading and Practice--Annotated §§ 30.31-30.39

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§§ 30.31[Reserved]

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Chapter 30 USING ALTERNATIVE DISPUTE RESOLUTION
PART IV. CHECKLISTS

4-30 California Forms of Pleading and Practice--Annotated § 30.40

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§ 30.40 Considerations in Determining Whether to Use ADR, and If So, What Type?

- ☐ Is the dispute subject to a predispute arbitration clause?
  - ☐ If so, go to § 30.41.
  - ☐ If not, review the considerations set out below.
- ☐ Assess client's objectives:
  - ☐ What emotional issues color the client's objectives?
  - ☐ Is speedy resolution or "justice," in the sense of putting the case before a jury, more important to the client?
  - ☐ Is confidentiality an issue?
  - ☐ Is the establishment of precedent one of the client's objectives?
  - ☐ How important is cost?

☐ When, if necessary, you educate the client to the benefits of ADR versus litigation, is the client enthusiastic about ADR?

☐ Will nonbinding ADR help you make your client's expectations more realistic?

☐ Will nonbinding ADR reveal too much of the case to the opposing side too soon?

☐ If complex issues are involved, is ADR desirable so that the option will exist of having the dispute resolved by an expert in the field which is the subject of the dispute?

☐ Does the case involve less than $50,000, so that it will be forced into judicial arbitration even if parties do not wish to arbitrate?

PRACTICE TIP:

Use Existence of Mandatory Arbitration to Urge Much Earlier Voluntary ADR. If your case is going to be forced into judicial arbitration, consider a voluntary form of ADR. You may also be able to use the fact that the case will be forced to arbitration by the court to help reduce some of the resistance your client and opposing counsel may have to ADR. You may be able to avoid the cost of commencing litigation.

The statute of limitations runs on, however, so do not neglect to file a complaint simply because you are pursuing ADR. Filing a complaint with fictitious defendant allegations will also allow you to protect your client's rights against any unknown defendants whose identities are not discovered until after the statute of limitations has run.

☐ Is there an advantage in trying the case to a jury?

☐ If pursuing ADR is appropriate, consider the types available:

- ☐ Mediation [*see § 30.11[3]*].
  - ☐ Does client want to preserve right to resort to courts?
  - ☐ Might a mediator help overcome a party's emotional attitude?
  - ☐ Might a mediator help overcome a party's unrealistic evaluation of the case?
- ☐ Binding arbitration [*see § 30.11[5]*]. Considerations:
  - ☐ Is client willing to accept extreme limitations on scope of judicial review?
  - ☐ How broadly or narrowly defined should the matter submitted for arbitration be?

- ☐ How will you select the arbitrator? If your opponent arbitrates regularly will the opponent have any advantage due to familiarity with the record of available arbitrators.

☐ Consider timing:

- ☐ Seek ADR in early contacts with other side?
  - ☐ Benefit from maximum savings in time, cost, and effort.
  - ☐ Potential problem in appearing "weak" to the opposition.
  - ☐ Potential problem when few facts have been developed.
  - ☐ Benefit from mediation acting as informal discovery.
- ☐ Wait until court requires parties to consider ADR?
  - ☐ Reduces ADR benefit to be found in reducing time and cost.
  - ☐ Avoids any apparent weakness, as court requires consideration of ADR.
  - ☐ Depending on time, may allow development of facts through formal discovery before shifting to ADR.
  - ☐ Exposure to litigation may make reluctant party more agreeable to ADR.

Legal Topics:

For related research and practice materials, see the following legal topics:
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PART IV. CHECKLISTS

4-30 California Forms of Pleading and Practice--Annotated § 30.41

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§ 30.41 Implementing an ADR Plan

- ☐ Inform client of various types of ADR that might be suitable for the case.
  - ☐ If necessary, educate client on respective characteristics of ADR and trial.
  - ☐ Time frames involved.
  - ☐ Cost involved.
  - ☐ Difference in decision makers.
  - ☐ Extent of extremely limited appeal in case of binding arbitration.
  - ☐ Flexibility of ADR in relation to trial.
  - ☐ Extent of clients time and attention that will be required.

☐ Recommend appropriate option [*see § 30.40*] to client, explaining reasons for recommendation. Clearly inform the client:

- ☐ That using voluntary ADR is not a unilateral decision; that opposing party will have to agree to

use ADR, including specific type and some ground rules.

- ☐ If recommending binding arbitration, that recourse to the courts will be extremely limited.

- ☐ Sound out opposing counsel's attitude toward ADR.

- ☐ Propose specific type of ADR [*see § 30.40*] after, if necessary, educating opposing counsel with respect to ADR.

- ☐ Select a provider of mediation or arbitration services, if desired.

PRACTICE TIP:

Value of Using Established Provider. Although ADR is a flexible tool which the parties can bend to their specific needs, turning to an established provider of mediation or arbitration services may help to avoid disputes over the procedures to be followed. Because the provider will have some established procedures, not only can procedural dispute be minimized, but time and money can be saved because the parties will not have to develop and negotiate the procedure. This may be particularly helpful for a litigator who has not turned to voluntary ADR in the past.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 31 MEDIATION

4-31 California Forms of Pleading and Practice--Annotated 31.syn

AUTHOR: Lois D. Thompson

§ 31.syn Synopsis to Chapter 31: MEDIATION

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§ 31.02 Cross References

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[4] Exceptions to Confidentiality

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[5] Family Law Matters

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[8] Attorney Who Represents Party in Mediation Is Not Disqualified From Representing Others Against Same Adversary

§ 31.14 Enforcement of Mediation Settlement

[1] Enforcement Complicated by Confidentiality

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[a] Evidence Code Requirements

[b] Fair, Adequate and Reasonable Terms of Written Agreements

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§§ 31.15-31.29 [Reserved]

§ 31.30 State Statutes

[1] Provisions Requiring or Encouraging Use of Mediation

[2] Confidentiality of Mediation

§ 31.30A California Rules of Court

§ 31.31 Decisions

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[4] Enforcement of Settlement Arising From Mediation

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§ 31.32 Law Reviews and Legal Periodicals

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§ 31.40 Predispute Mediation Contract Clause

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§ 31.41 Negotiation-Mediation-Arbitration Clause

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§ 31.43 Confidentiality Agreement in Mediation

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[3] Contents of Form

§ 31.44 Express Waiver of Mediation Confidentiality for Single Purpose

[1] FORM

[2] Use of Form

Lois D. Thompson n*

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Chapter 31 MEDIATION
PART I. SCOPE

4-31 California Forms of Pleading and Practice--Annotated § 31.01

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§ 31.01 Scope of Chapter

This chapter discusses mediation, its nature [*see § 31.10*], the agreement to mediate [*see § 31.11*], the mediation process [*see § 31.12*], confidentiality issues [*see § 31.13*], and enforcement of the settlement that may arise from mediation [*see § 31.14*]. The chapter includes the following forms:

- Contract clauses agreeing to submit disputes arising from the contract to mediation [*see § 31.40*] or to attempt negotiation first, followed by mediation, and then arbitration if necessary [*see § 31.41*].
- An agreement to submit an existing dispute to mediation [*see § 31.42*].
- A confidentiality agreement [*see § 31.43*].
- An express limited waiver of mediation confidentiality [*see § 31.44*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-31 California Forms of Pleading and Practice--Annotated § 31.02

AUTHOR: Lois D. Thompson

§ 31.02 Cross References

For discussion of considerations that apply to electing any type of alternative dispute resolution, see Ch. 30, *Using Alternative Dispute Resolution* .

For discussion of judicially mandated mediation of civil actions under *Code Civ. Proc. § 1775 et seq.*, which may be an alternative to judicial arbitration, see Ch. 37, *Judicially Mandated Civil Action Mediation* . That chapter also discusses the California Rules of Court governing conduct of mediators in court-connected mediations and complaint procedures available against them.

For discussion and a form of certificate regarding alternative dispute resolution attempt (mediation, arbitration, or conciliation), which is a prerequisite to filing a complaint in specified actions relating to common interest developments [*Civ. Code § 1369.510 et seq.*], see Ch. 124, *Condominiums and Other Common Interest Developments* .

For general discussion of settlement, see Ch. 520, *Settlement and Release* .

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 31 MEDIATION
PART I. SCOPE

4-31 California Forms of Pleading and Practice--Annotated §§ 31.03-31.09

AUTHOR: Lois D. Thompson

[Reserved]

§§ 31.03[Reserved]

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 31 MEDIATION
PART II. LEGAL BACKGROUND

4-31 California Forms of Pleading and Practice--Annotated § 31.10

AUTHOR: Lois D. Thompson

§ 31.10 Nature of Mediation

[1] Neutral Mediator Assists Parties in Reaching Settlement

Mediation is the process through which a neutral person or persons facilitate communication between disputants to assist them in reaching a mutually acceptable agreement [*Evid. Code § 1115(a)*].

[2] Voluntary, Non-Adjudicatory, and Confidential

Mediation is:

(1) Voluntary. It begins, continues, and concludes by agreement of the parties. Any party is free to withdraw from the process at any time [*Kirschenman v. Superior Court (1994) 30 Cal. App. 4th 832, 835, 36 Cal. Rptr. 2d 166* ; for exceptions to the voluntary nature of mediation, *see* [3], *below*]. Thus, trial courts have no authority to order parties to complex civil action to attend and pay for private mediation [*Jeld-Wen, Inc. v. Superior Court (Marlborough Development Corp.) (2007) 146 Cal. App. 4th 536, 543, 53 Cal. Rptr. 3d 115* ; see *Cal. Rules of Ct., Rule 3.1380(d)* and Advisory Committee Comment thereto].

(2) Non-adjudicatory. The mediator does not decide who wins or loses. The goal is to reach a settlement, and the role of the mediator is to facilitate the settlement process. Mediation does not necessarily cast the parties in an adversarial relationship, and parties do not emerge from the process as clearly defined winners and losers [*see* *Cho v. Superior Court (1995) 39 Cal. App. 4th 113, 123, 45 Cal. Rptr. 2d 863* (*dicta*)].

PRACTICE TIP:

Be Careful in Using the Term "Non-Binding" When Explaining Mediation to a Client. The client should understand that a settlement reached through mediation (assuming appropriate steps are taken to conform the terms of the settlement agreement to the requirements of *Evid. Code § 1123* [*see* discussion at *§ 31.14, below*]) will be binding and enforceable. What is really meant by the term "non-binding" is that, unlike an arbitrator, a mediator cannot impose a result. If the parties do not resolve their dispute

through mediation, they can use other available procedures to resolve or adjudicate their dispute. *By Lois Thompson*

(3) Confidential. Because it is part of a settlement (*not* an adjudicatory) process, the mediation is confidential. Confidentiality is essential. The parties must be certain that nothing they say or reveal during the mediation process can be used against them if the process does not result in a settlement and litigation proceeds. The assurance of confidentiality also encourages full and frank communication. For discussion of confidentiality, see *§ 31.13*.

PRACTICE TIP:

Scope of Confidentiality. The confidential nature of mediation affects every aspect of the process. Clients must understand that the same confidentiality that permits them to be open during the mediation process bars them from using revelations of their adversaries against those adversaries if the mediation fails. The mediation agreement [*see § 31.11[2], below*] should expressly provide for confidentiality (notwithstanding that *Evid. Code § 1115 et seq.* explicitly so provides [*see § 31.13 below*]), since the Evidence Code may be construed more narrowly and is, in any event, not likely to be familiar to the disputants. The agreement also should assure that the terms of any settlement reached through mediation are not so shielded by the confidentiality provision and the Evidence Code as to preclude a party from suing to enforce the settlement should another party later breach the settlement agreement [*see § 31.14, below*]. *By Lois Thompson*

[3] Exceptions to Voluntary Nature of Mediation

There are some exceptions to the voluntary nature of mediation discussed in [2], *above*. For example, *Code Civ. Proc. § 1775* now permits judges in Los Angeles county (and in any other county that elects to participate in the program intended to encourage alternative dispute resolution) to order cases into mediation [*Code Civ. Proc. §§ 1775(a), (c), (d), (e), 1775.3(a), 1775.5*]. Even though parties may be required by a court to go to mediation, once there, each participant has the right to decide the extent of his or her participation in the mediation, including the right to withdraw from the mediation at any time [*Cal. Rules of Ct., Rule 3.853(2)*]. For discussion of this program, see Ch. 37, *Judicially Mandated Civil Action Mediation* .

Contractual dispute resolution clauses increasingly require parties to attempt to resolve their disputes through negotiation and/or mediation before proceeding to more formal forms of resolution or adjudication [for forms of such clauses, *see §§ 31.40, 31.41*]. Although the contracts containing such clauses may have been made voluntarily, a party to such a contract may not consider the contractual requirement to mediate to be voluntary at the time it is invoked. These clauses have been upheld and are becoming popular [*see Frei v. Davey (2004) 124 Cal. App. 4th 1506, 1515-1520, 22 Cal. Rptr. 3d 429* (mediation requirement in current version of standard form residential purchase agreement)]. Thus, a party to a contract prohibiting recovery of attorney's fees as a penalty for failing to first engage in mediation who prevails in litigation or arbitration after refusing a request to mediate cannot recover attorney fees in that arbitration or action [*Frei v. Davey (2004) 124 Cal. App. 4th 1506, 1515-1520, 22 Cal. Rptr. 3d 429* ; *Leamon v. Krajkiewcz (2003) 107 Cal. App. 4th 424, 433, 132 Cal. Rptr. 2d 362* (even though contract was found voidable for duress)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediationsEvidenceProcedural ConsiderationsMediation Evidence

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 31 MEDIATION
PART II. LEGAL BACKGROUND

4-31 California Forms of Pleading and Practice--Annotated § 31.11

AUTHOR: Lois D. Thompson

§ 31.11 Choosing to Mediate

[1] When to Mediate

Mediation may be employed at any time during the pendency of a dispute. At an early stage, if the parties have an on-going business relationship, mediation may help them to preserve that relationship and avoid costly litigation. After litigation has commenced and discovery has progressed, mediation may assist the parties to reach agreement based on a common understanding of the pertinent facts. Business agreements increasingly require parties to disputes arising under those agreements to attempt resolution through mediation before they may initiate litigation.

For additional discussion of determining if and when to use mediation or other alternative dispute resolution processes, see Ch. 30, *Using Alternative Dispute Resolution* .

[2] The Agreement to Mediate

[a] Can Be Simple Agreement

Agreements to mediate may be predispute, that is, before there is a dispute, for example when parties to a contract agree that if a dispute should later arise between them, they will submit the dispute to mediation, or may be postdispute, that is, when the parties to an existing dispute agree to submit the dispute to mediation.

The agreement to mediate generally can be very simple, providing for (a) mediation by a neutral, (b) selected by the parties, (c) usually at a neutral location. The agreement also should provide for payment of the mediator. Because it is equitable and because it gives all parties a "stake" in the process, mediation agreements generally provide for the costs of the mediation to be shared equally among the parties.

PRACTICE TIP:

Consider Med/Arb Clause. Contractual mediation clauses often are part of a multi-step dispute resolution process. The practitioner should consider designing a process that includes the following

steps: (1) direct negotiation between the parties, (2) mediation, (3) arbitration and/or minitrial. So-called med/arb clauses are increasingly popular. These clauses provide that the mediator shall arbitrate the dispute if, after reasonable efforts at mediation, the mediator concludes that the matter or any part thereof cannot be settled and finds that the parties are at impasse. *By Lois Thompson*

For a form of a simple clause that may be included in a contract to provide for mediation of disputes arising from the contract, see *§ 31.40*. For a form of med/arb clause, see *§ 31.41*. For a form of mediation agreement that may be used if parties to an existing dispute agree to submit the dispute to mediation, see *§ 31.42*.

[b] Confidentiality Provisions

Notwithstanding that the mediation process should be tailored to the needs and desires of the parties, all mediation agreements should provide both for confidentiality and for the recordation of any settlement that is reached through mediation in a way that will permit the settlement to be enforced should any party later fail to perform.

The Evidence Code renders a mediator incompetent to testify at a subsequent civil proceeding concerning any statement, conduct, or decision occurring at a mediation [*Evid. Code § 703.5*]. Nonetheless, to assure that the parties know this and to re-enforce their security in the confidentiality of the proceedings, the practitioner may want to include an express statement of incompetence in the mediation agreement.

For a form of confidentiality agreement, see *§ 31.43*.

[c] Additional Provisions

Mediation agreements may also address the following subjects:

- Whether and to what extent any discovery/exchange of documents will occur between the parties before the mediation session begins.

- Submission of mediation statements to the mediator in advance of the mediation.

- The number, length, and timing of mediation sessions.

- If the mediator has not been selected prior to the drafting of the mediation agreement, what will happen if the parties are unable to agree on a mediator within a set period of time.

[3] Selecting the Mediator

Careful consideration should be given to the choice of a mediator. In making that choice, there are a number of preliminary factors to consider. These include:

(1) Whether to pursue "pure" mediation. In a "pure" mediation, the mediator expresses no view on the merits, works primarily with the parties (as opposed to their counsel) and tries to facilitate negotiations so as to achieve a settlement. Alternatively, in a proceeding more akin to a "settlement conference," the mediator may express his or her view on the merits, interact more with counsel, and try to encourage settlement by suggesting how a trier of fact might determine the dispute. If the parties want a "pure" mediation they may want to select a trained mediator/facilitator as their neutral; if they want a proceeding more akin to a settlement conference, they may want to select a retired judge.

(2) Whether to engage a lawyer or non-lawyer to serve as mediator. Lawyers representing parties in a

dispute generally tend to turn to those with legal training to assist in resolving that dispute. However, given that the mediation process, particularly if one is pursuing "pure" mediation, is not intended to determine who is "right" and who is "wrong" but, rather, to assist the parties to resolve their differences, consideration should be given to engaging as mediator an individual trained in facilitating discourse rather than someone trained in legal analysis and advocacy.

(3) Whether to engage someone familiar with the substantive field involved in the dispute to serve as mediator. If the subject matter of the dispute is highly technical, particularly complex, or laden with unwritten but generally accepted custom, consideration should be given to engaging as mediator a person familiar with that field. The benefit is that the mediator already will be knowledgeable and time will not have to be devoted to bringing him or her "up to speed." The detriment, particularly if the substantive field is relatively small, is that the mediator may have had experiences with or been exposed to industry information about a party that will affect or have the appearance of affecting the mediator's neutrality.

PRACTICE TIP:

Service Providers Are Available. There are an increasing number of organizations that will provide parties with the services of a mediator or assistance in locating qualified mediators. These include the Center for Public Resources ("CPR") Institute for Dispute Resolution; the AAA Center for Mediation; JAMS/Endispute, as well as many local bar associations. *By Lois Thompson*

[4] Impartiality and the Role of the Mediator

The mediator must be, and must be perceived as, *impartial* throughout the proceedings.

PRACTICE TIP:

Disclosure of Potential Conflict of Interest. In order to assure impartiality and the equally important perception of impartiality, it is imperative that a potential mediator, the parties and their counsel all disclose all prior connections with that potential mediator. In addition, the potential mediator should disclose whether he or she has any financial interest in any party to the proceedings (for example, stock ownership) or any interest that may be affected by the outcome of the proceedings [*see Cal. Rules of Ct., Rule 3.855(b)* (disclosures required of mediator in mediation conducted in connection with court mediation program)].

When a large law firm or a corporate entity is involved, it is important that the disclosures go beyond the particular lawyer or business unit directly involved in the proceeding, particularly if the business unit is part of an organization that is known by a different name. No one wants to learn well into the mediation process that the mediator holds stock in a party's previously undisclosed parent company.

However, the fact that a potential mediator previously was engaged by the other party or opposing counsel should not automatically be viewed as disqualifying. To the contrary, this may make it possible to engage someone whose actual rather than reputed qualities as a facilitator are known to a party. Similarly, it may be in all sides' mutual interest to engage a mediator who already has credibility with one party or its counsel based on prior experience. *By Lois Thompson*

The American Arbitration Association describes the qualities of a successful mediator as follows: "an active listener who can, without endangering one side's perception of [his or her] impartiality by appearing to take a position, assist the parties to better understand each other's views and offer creative solutions to move them off what might otherwise be entrenched positions. Successful [m]ediators ... attempt to suggest, clarify, interpret, reason, persuade and to inform the parties of the pros and cons of each side's case and of alternative solutions to their disputes" [AAA, "Mediation and Arbitration: A Handbook for Attorneys and Their Clients," 1991, p. II-8].

The importance of a mediator's actual and perceived impartiality cannot be overstated. If the mediation is to succeed, the parties must be able to share their true desires, the strengths and the weaknesses of their case with the mediator in the sure knowledge that the mediator will preserve a party's confidences while moving all participants to a mutually acceptable resolution. A mediator's duty of disclosure requires disclosure of any facts that reasonably might cause any party to believe the mediator would not or could not be impartial. An attorney accepting the role of mediator has the same duty of full disclosure as an attorney accepting the representation of clients with actual or potentially conflicting interests. An attorney serving for compensation as a mediator is civilly liable for loss caused by lack of disclosure [*Furia v. Helm (2003) 111 Cal. App. 4th 945, 954-955, 4 Cal. Rptr. 3d 357*].

[5] Engagement of the Mediator

Once the mediator is selected, there should be a written agreement, signed by all parties, their counsel, and the mediator setting forth:

- The scope of the mediation.
- The financial arrangements between the parties and the mediator or service provider.
- The rules, if any, governing the mediation.
- An undertaking with respect to confidentiality (and an express exception relating to the terms of any settlement that may result from the mediation).
- An acknowledgment by the parties of the mediator's immunity from tort liability based on his or her conduct of the mediation.

In addition, if there is any conflict that the parties have agreed to waive, that waiver should be included in the agreement.

PRACTICE TIP:

Rules Supplied by Provider. Many mediation service providers have developed rules for the conduct of mediations under their auspices. The practitioner should obtain copies of such rules and become familiar with them before agreeing to employ the services of any particular mediation service provider. It is particularly important to learn if the service provider charges administrative or other fees, requires deposits, makes refunds in the event of cancellation, etc. As a practical matter, the rules relating to the actual conduct of the mediation tend to be both general and flexible in recognition of the fact that mediation is intended to be a process tailored to the needs and desires of the participants. *By Lois Thompson*

PRACTICE TIP: Immunity. The California Supreme Court has cloaked mediators and neutral fact finders with "quasi judicial" immunity from tort liability arising from their conduct during a dispute resolution process [*Howard v. Drapkin (1990) 222 Cal. App. 3d 843, 852-857, 271 Cal. Rptr. 893*]. To assure that the parties understand that mediators are so protected, it is recommended that mediator immunity be explicitly recognized in the agreement. Further, consideration should be given to entering into an agreement to provide all participants with such immunity in order to encourage full and open communication during the mediation. *By Lois Thompson*

Often the agreement to mediate discussed above in *§ 31.11[2]* and the written engagement of the mediator can be accomplished in the same document. If the parties are using a mediation services provider, the provider will commonly

have a form of agreement the parties may use. For a form of agreement that may be used if the provider does not have a form, see *§ 31.42*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediationsEvidenceProcedural ConsiderationsMediation Evidence

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4-31 California Forms of Pleading and Practice--Annotated § 31.12

AUTHOR: Lois D. Thompson

§ 31.12 The Mediation Process

[1] Participants

The decision-makers for all parties should be present, and present for the entire proceeding. If an insurance carrier is the true decision-maker, a representative of the carrier must be present or the mediation well may prove futile.

It is extremely difficult to communicate the dynamic of the mediation to an absent or occasionally present decision-maker. It also is hard for the mediator to fully elicit what that absent or intermittently present decision-maker must obtain from the other side or sides if the dispute is to be settled. Therefore, appearances by telephone or for part of a session should be avoided. If a necessary decision-maker truly cannot attend, consideration should be given to rescheduling the mediation session. Failing that, the parties should arrange a telephone hookup with the opportunity for the absent decision-maker to hear the other disputants and the mediator, and respond directly when appropriate. Resort should not be had to the more traditional brief telephone reports by counsel.

[2] The Mediation Session

[a] Combination of Joint and Separate Meetings Is Often Used

Mediation generally begins with a joint session attended by the mediator, all parties and their counsel. This often is followed by separate meetings (usually referred to as caucuses) between the mediator and each party and counsel, generally starting with the plaintiff (the party who first surfaced the existence of the dispute) [*see Cal. Rules of Ct., Rule 3.854(c)* (mediator in mediation conducted in connection with court mediation program must explain his or her practice with respect to confidentiality for separate communications)]. Some mediators, however, will not meet in separate caucuses with the parties out of concern that to do so may be perceived as compromising his/her neutrality.

If the mediator does meet separately with the parties, he or she will often go back and forth between the parties attempting to negotiate a resolution to the dispute. If agreement is reached, the mediator will again bring all the parties and their counsel back into a joint session so that the terms of the agreement can be recited in the presence of all parties

and then reduced to writing.

Depending on his or her practice, the mediator may again meet separately with each party to assure that the written document accurately reflects each party's understanding of the terms of the settlement. Once the writing has been accepted by all parties, the mediator will again convene the parties and counsel, review the terms of the final agreement, and conclude the mediation.

If after several separate meetings between the mediator and each party no agreement has been reached, a party or the mediator (finding impasse) may terminate the proceedings.

[b] First Joint Session

[i] Two Parts

The first joint session often consists of two parts, the *introduction*, during which the mediator is the primary speaker, making introductions andexplaining the process that will be followed during the proceeding, and the *prelude to negotiation* during which the mediator generally asks the *parties* (not counsel) to speak, usually by inviting them to explain what the dispute is about.

[ii] Introduction

In the introduction, the mediator will explain his or her role, stressing that a mediator does not receive evidence and decide a case but, rather, listens to the parties and helps them to reach a settlement.

The mediator generally will stress the confidential nature of the proceeding. In that regard, the mediator may well state that while he or she may take notes in order to be accurate in following what is being said by the parties during the proceeding, the notes will be destroyed at the conclusion of the mediation. The mediator likely will stress the fact that no record of the mediation is maintained and that the only document that will exist at the end of the mediation will be one memorializing any agreement that is reached as a result of the mediation.

The mediator also will state his/her intention to meet with the parties separately and will stress his/her undertaking to reveal nothing to any other party that one party has stated in private session is not to be divulged.

[iii] Prelude to Negotiation

In the prelude to negotiation the mediator is relatively passive, asking each party to describe the dispute and doing so through the use of neutral, open-ended questions. The mediator may also ask each party what he or she wishes to see result from the mediation session.

[c] The Separate Sessions

The mediator separates the parties in order to be able to fully explore each party's position. Generally, the first separate session will be with the plaintiff/complainant; however, the mediator may chose to begin with the party who seems most threatened by the process or who appears to have information that the mediator believes will assist him/her early in the process. As the mediator meets with each separate party, he/she will ask each for additional information concerning the dispute. Generally, the mediator will become increasingly active as he/she identifies areas of agreement around which to build a settlement and begins to test possible terms for agreement on the parties.

[d] The Final Joint Session

If the parties appear to be in agreement on the terms of a settlement, the mediator generally will convene a joint session

in which the terms ofthe settlement will be recited to all parties and their counsel. The mediator will usually urge the parties to immediately reduce that agreement to writing. Alternatively, the mediator may provide a tape recorder so that the terms of the settlement can be recited and a transcript memorializing the agreement can be prepared.

PRACTICE TIP:

Take Advantage of Momentum to Secure Written Resolution. A successful mediation creates a momentum toward settlement. If the parties have indeed resolved their dispute as a result of the mediation process, counsel should be certain to seize that momentum and insist that a written agreement be prepared and signed by all parties before the session ends. If the terms of the settlement are so complex as to require the preparation of a lengthy document, the parties should at least sign a memorandum summarizing all of the key terms before the session ends. *By Lois Thompson*

In particular, counsel should write the clause to include all communications during the mediation phase, to prevent the use of potentially damaging client-attorney communications disclosed during the period of mediation [*see § 31.13[4][d]*].

If the parties have been unable fully to resolve their dispute, the mediator may use the final session to identify those areas where agreement has been reached or to help the parties work out a procedure to adjudicate their remaining differences.

[3] Preparation for the Mediation

Counsel should explain the mediation process to the client, stressing that its purpose is to achieve a settlement of the dispute. The client should be encouraged to focus in advance of the mediation session both on what he/she needs and what he/she is prepared to give up to resolve the dispute. For further discussion of giving the client a realistic view of what to expect from alternative dispute resolution procedures, see *Ch. 30, Using Alternative Dispute Resolution, § 30.12[2]*.

Client and counsel both should understand that the client will be expected to express his/her views directly rather than through counsel.

PRACTICE TIP:

Other Party, Not Mediator Is the Target of Persuasion. Although the mediator will conduct and be the focal point in the joint sessions, it is the adverse party, not the mediator, who must be convinced to modify his/her positions if a settlement is to be achieved. Therefore, the client should be encouraged to consider what the adverse party is likely to need and be willing to give up to achieve a settlement. *By Lois Thompson*

Client and counsel also should recognize that the mediation process is time-consuming and that it requires patience and perseverance. Client and counsel generally must commit at least a full day to the actual mediation sessions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediations

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4-31 California Forms of Pleading and Practice--Annotated § 31.13

AUTHOR: Lois D. Thompson

§ 31.13 Confidentiality

[1] Protection of Communications, Negotiations, and Settlement Discussions

As noted above [*see § 31.10[2]*], mediation is confidential. *Evid. Code 1119(c)* expressly provides that, subject to exceptions in *Evid. Code § 1115 et seq.*, *"[a]*ll communications, negotiations, or settlement discussions by and between participants in the course of a mediation or mediation consultation shall remain confidential." The wording of this provision, specifically its reference to "participants" rather than "parties," gives rise to the observation that the confidentiality provisions apply to all mediations, regardless of whether litigation is pending. Further, as that term is used in other provisions [*see Evid. Code §§ 1118, 1122(a)(1)*], it indicates that not only the participants but also the mediator and other nonparties attending the mediation must expressly waive the privilege in writing before any mediation communication is disclosed or admitted as evidence [*Eisendrath v. Superior Court (Rogers) (2003) 109 Cal. App. 4th 351, 356-357, 134 Cal. Rptr. 2d 716*].

PRACTICE TIP:

Include a Confidentiality Clause to Assure Protection. To assure confidentiality the practitioner should not rely only on the Evidence Code but should also include an undertaking on confidentiality in the mediation agreement [*see § 31.10[2]*]. *By Lois Thompson*

In particular, counsel should write the clause to include all communications during the mediation phase, to prevent the use of potentially damaging client-attorney communications disclosed during the period of mediation [*see § 31.13[4][d]*.

The confidentiality protection of *Evid. Code § 1115 et seq.* covers consultations for the purpose of retaining a mediator or mediation service as well as the mediation itself [*Evid. Code §§ 1115(c), 1119-1120, 1122*].

For exceptions to the rule of confidentiality, see [4], *below*, and for situations in which *Evid. Code § 1115 et seq.* do not apply, see [5], *below*.

[2] Mediator's Declaration or Finding Is Inadmissible in Evidence

To further ensure the confidentiality of the mediation process, *Evid. Code § 1121* provides that a mediator may not file and a court may not consider any report, evaluation, recommendation, assessment, or finding by the mediator unless all parties to the mediation agree in writing, or orally in accordance with *Evid. Code § 1118*, which is discussed at *§ 31.14[3]*. Thus, Code Civ. Proc. § 1121 prohibits a court from considering a mediator's report, submitted in support of a motion for sanctions [*see Code Civ. Proc. § 128.5(c)* (order must recite in detail conduct or circumstances justifying sanctions)], that describes the conduct or communications of a party during the mediation [*Foxgate Homeowners Assoc., Inc. v. Bramalea California, Inc. (2001) 26 Cal. 4th 1, 15, 108 Cal. Rptr. 2d 642*]. An exception is provided for a report that is mandated by court rule or other law that states only whether an agreement was reached [*Evid. Code § 1121*]. This exception appears to relate to the procedure under *Code Civ. Proc. § 1775.9* when mediation is compelled by the court under *Code Civ. Proc. § 1775 et seq.* For discussion, see Ch. 37, *Judicially Mandated Civil Action Mediation* .

This confidentiality provision does not apply to any of the following [*Evid. Code § 1117(b)*]:

- Proceedings under the Family Concilliation Court Law [*Fam. Code § 1800 et seq.*].

- Mediation of child custody and visitation disputes under *Fam. Code § 3160 et seq.* [for discussion, *see* Ch. 223, *Dissolution of Marriage: Child Custody*].

- Settlement conferences pursuant to *Cal. Rules of Ct., Rule 3.1380* [for discussion, *see* Ch. 425, *Pretrial Proceedings*].

If a party improperly seeks in an action or proceeding to compel a mediator to testify as to anything said or to produce any writing made in the course of the mediation that is inadmissable under *Evid. Code § 1115 et seq., Evid. Code § 1127* directs the court to award attorney's fees and costs to the mediator against the person seeking the testimony or writing [*Evid. Code § 1127*]. Moreover, any reference to mediation during any subsequent trial is an irregularity in the proceedings for the purposes of *Code Civ. Proc. § 657*, and, if the reference materially affected the rights of the party requesting relief, is grounds for vacating or modifying the decision in that noncriminal proceeding or granting a new or further hearing [*Evid. Code § 1128*].

[3] Statements, Admissions, and Documents Prepared for or in Course of Mediation

In addition to the protection afforded by *Evid. Code § 1119(c)* [*see* [1], *above*] and *Evid. Code §§ 1118, 1127* [*see* [2], *above*], *Evid. Code § 1119(a)* and *(b)* provide that no evidence of anything said or admission made or writing prepared for the purpose of, in the course of, or pursuant to a mediation or mediation consultation is admissible in evidence, or subject to discovery, and that the disclosure of such evidence or writing shall not be compelled. "Writing" as used in *Evid. Code § 1119(b)* takes the definition in *Evid. Code § 250*: handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording on any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored [*Evid. Code §§ 250, 1119(b)*]. Thus, all of the following are protected from discovery if "prepared for the purpose of, in the course of, or pursuant to" a mediation [*Rojas v. Superior Court (Coffin) (2004) 33 Cal. 4th 407, 422-423* ; *Wimsatt v. Superior Court (Kausch) (2007) 152 Cal. App. 4th 137, 158-159, 61 Cal. Rptr. 3d 200]* :

- Raw test data, that is recorded analyses of samples of air and building materials from destructive testing, including reports describing the existence or amount of mold spores in a sample, but not the actual physical samples.

- Photographs.
- Video tapes.
- Witness statements, but not the facts contained therein [*see* [4][a], *below*].
- Mediation briefs.
- E-mails that quote from or refer to the mediation briefs.

There is no basis for reading the work-product privilege of *Code Civ. Proc. § 2018* into *Evid. Code § 1119(b)* and only protecting the confidentiality of derivative materials or allowing disclosure on a showing of good cause [*Rojas v. Superior Court (Coffin) (2004) 33 Cal. 4th 407, 422-423*]. Nor are there any exceptions to strict compliance with the statutes providing for enforcement of settlement agreements reached in mediation based on equitable principles such as estoppel or waiver. A party who voluntarily submits evidence of events that occurred during mediation and does not object to similar evidence submitted by the opposing party can later invoke the privilege to render that evidence inadmissible [*Simmons v. Ghaderi (2008) 44 Cal. 4th 570, 80 Cal. Rptr. 3d 83, 187 P.3d 934* (action to enforce oral settlement agreement that did not meet requirements of *Evid. Code §§ 1118, 1122, 1124* for making agreement admissible)]. In addition, the concept that *Evid. Code § 1119* does not protect "pure evidence" is not supported by the clear language of the statute or its legislative history [*Rojas v. Superior Court (2004) 33 Cal. 4th 407, 422-423*]. Code Civ. Proc. § 1119 prohibits a court from considering a declaration submitted in support of a motion for sanctions [*see Code Civ. Proc. § 128.5(c)* (order must recite in detail conduct or circumstances justifying sanctions)] that describes the conduct or communications of a party during the mediation [*Foxgate Homeowners Assoc., Inc. v. Bramalea California, Inc. (2001) 26 Cal. 4th 1, 15, 108 Cal. Rptr. 2d 642*].

For exceptions to the rule of confidentiality, see [4], *below*, and for situations in which *Evid. Code § 1115 et seq.* do not apply, see [5], *below*.

[4] Exceptions to Confidentiality

[a] Evidence That Is Otherwise Admissible or Discoverable

A party may not shield evidence from admission or discovery simply by producing it in a mediation. Evidence that is otherwise admissible or subject to discovery outside mediation does not become inadmissible or protected from disclosure solely because it was introduced or used in a mediation whether by itself or as part of a writing, such as a brief or declaration or consultant's report [*Evid. Code § 1120(a)*]. The protection from discovery only applies to documents that would not have existed but for the mediation. Hence, mediation is not being used as a device to thwart discovery [*Rojas v. Superior Court (Coffin) (2004) 33 Cal. 4th 407, 422-423*]. The fact that witness statements "prepared for the purpose of, in the course of, or pursuant to, a mediation" are protected from discovery under *Evid. Code § 1119* does not mean that the facts set forth in those statements are so protected. Under *Evid. Code § 1120(a)*, because the facts known to a percipient witness constitute "evidence otherwise admissible or subject to discovery outside a mediation," those *facts* do not become "inadmissible or protected from disclosure solely by reason of their introduction or use in a mediation" through witness statements prepared for the mediation [*Rojas v. Superior Court (Coffin) (2004) 33 Cal. 4th 407, 422-423* ; *accord Doe 1 v. Superior Court (Roman Catholic Archbishop of Los Angeles) (2005) 132 Cal. App. 4th 1160* (court prohibited disclosure of statements abstracted from personnel records for purposes of mediation, but stressed, without consideration of other privileges that might apply, that Archdiocese would not be prohibited from disclosing information from personnel records or other underlying sources)].

[b] Consent of All Participants in Mediation

Evid. Code § 1122 allows an otherwise confidential communication, document, or writing to be disclosed if all persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally agree in accordance with *Evid. Code § 1118* to the disclosure of the communication, document, or writing [*Evid. Code § 1122(a)(1)*; *Eisendrath v. Superior Court (Rogers) (2003) 109 Cal. App. 4th 351, 356-357, 134 Cal. Rptr. 2d 716*].

If the communication, document, or writing was prepared by, or on behalf of, fewer than all participants to the mediation, it may be disclosed if [*Evid. Code § 1122(a)(2)*]:

- Those participants expressly agree in writing or orally agree in accordance with Section 1118 to its disclosure; and

- The communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation.

Evid. Code § 1122(a)(2) does not contain an exception to allow disclosure of admissions by the party who made them. Thus, the court prohibited disclosure of statements abstracted from personnel records of priests for purposes of mediation, though real party, Archdiocese, was willing to allow disclosure of all statements including those which amounted to an admission by the Archdiocese that it was aware of priests' sexual interests towards minors [*see* Doe 1 v. *Superior Court (Roman Catholic Archbishop of Los Angeles) (2005) 132 Cal. App. 4th 1160, 1167-1168 n. 9, 34 Cal. Rptr. 3d 248*].

For a form of written waiver of mediation confidentiality for a limited purpose, see *§ 31.44*.

[c] Fraud, Duress, or Illegality

A written settlement agreement is admissible to show fraud, duress, or illegality that is relevant to an issue in dispute [*Evid. Code § 1123(d)*].

Similarly, an oral agreement made in the course of, or pursuant to, a mediation is admissible to show fraud, duress, or illegality that is relevant to an issue in dispute if the agreement is in accordance with *Evid. Code § 1118(a), (b)*, and *(d)* [*Evid. Code § 1124(c)*; for discussion of *Evid. Code § 1118, see § 31.14[3*]].

When it is the mediation settlement agreement itself that is attacked as having been obtained by fraud, duress, or undue influence there is no such exception. The party seeking to have the mediation settlement agreement set aside bears the burden of proof, which he or she likely cannot meet without waiving the mediation privilege. It would be especially difficult to set aside a mediated settlement agreement that recites it was made without duress, fraud, or undue influence. The court would need to know what transpired in mediation [*In re Marriage of Kieturakis (2006) 138 Cal. App. 4th 56, 91-93, 41 Cal. Rptr. 3d 119]* .

[d] Communications Neither Materially Related to, Nor Fostering, Mediation

The moving party has the burden to show that the conversation is protected by mediation confidentiality. To do so, the timing, context, and content of the communication all bear on the question. Mediation confidentiality protects communications and writings if they are materially related to, and foster, the mediation. Mediation confidentiality applies only to writings or statements that exist solely because of a mediation communication, negotiation, or settlement discussion. The timing of a conversation in relation to a scheduled mediation session is not determinative of whether the conversation was protected by mediation confidentiality [*Cassel v. Superior Ct. (2009) 179 Cal. App. 4th 152, 161, 101 Cal. Rptr. 3d 501* (attorney-client communication about litigation strategy not subject to confidentiality); *Wimsatt v. Superior Ct. (2007) 152 Cal. App. 4th 137, 160-161, 61 Cal. Rptr. 3d 200* (moving party failed to meet its "burden to link the conversation to a mediation session")].

[5] Family Law Matters

Proceedings in the Family Conciliation Court and in mediation of child custody and visitation disputes are not subject to *Evid. Code § 1115 et seq.* [*Evid. Code § 1117(b)(1)*; *see Fam. Code §§ 1818, 3177*; *but see Eisendrath v. Superior Court (Rogers) (2003) 109 Cal. App. 4th 351, 355-359, 134 Cal. Rptr. 2d 716* (*Evid. Code § 1115 et seq.* applicable to spousal support agreement resulting from mediation)].

For discussion, see Ch. 223, *Dissolution of Marriage: Child Custody* and Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., §§ 98.64, 110.12 (Matthew Bender).

[6] Pretrial Settlement Conference

A settlement conference pursuant to *Cal. Rules of Ct., Rule 3.1380* is not subject to *Evid. Code § 1115 et seq.* [*Evid. Code § 1117(b)(2)*]. For discussion of settlement conferences, see Ch. 425, *Pretrial Procedure* .

A court must not appoint a person to conduct a settlement conference under Rule 3.1380 at the same time as that person is serving as a mediator in the same action [*Cal. Rules of Ct., Rule 3.1380(d)(1)*]. Nor may the court appoint a person to conduct a mediation under Rule 3.1380 [*Cal. Rules of Ct., Rule 3.1380(d)(2)*]. Rule 3.1380(d) is not intended to discourage settlement conferences or mediations, but was added to address problems involving the blurring of distinctions between different ADR processes [*see e.g., Jeld-Wen. v. Superior Court (Marlborough) (2007) 146 Cal. App. 4th 536, 543, 53 Cal. Rptr.3d 115* ; Advisory Committee Comment to *Cal. Rules of Ct., Rule 3.1380(d)*]. To prevent confusion about the confidentiality of the proceedings, it is important to clearly distinguish between settlement conferences held under Rule 3.1380 and mediations. The special confidentiality requirements for mediations established by *Evid. Code §§ 1115-1128* expressly do not apply to settlement conferences under Rule 3.1380. Rule 3.1380 is not intended to prevent a court from appointing a person who has previously served as a mediator in a case to conduct a settlement conference in that case following the conclusion of that mediation [Advisory Committee Comment to *Cal. Rules of Ct., Rule 3.1380(d)*].

[7] Disqualification of Mediator From Later Representation of Party to Mediation

A law firm must be disqualified from representing a party when the firm employs a former judge who, while mediating a case as a settlement judge in his or her official capacity, received ex parte confidences bearing on the merits of the lawsuit from an adverse party in the identical litigation in which the motion to disqualify is brought [*Cho v. Superior Court (1995) 39 Cal. App. 4th 113, 119, 125, 45 Cal. Rptr. 2d 863*]. Although *Cho* involved a judge mediating settlement of a pending lawsuit, the same principle logically applies to the mediator of a dispute that has not developed into litigation. Thus, when an attorney has been privy to a litigant's confidences disclosed to the attorney acting as a neutral mediator, disqualification of both the individual attorney and his or her law firm will be required [*see Cho v. Superior Court (1995) 39 Cal. App. 4th 113, 125, 45 Cal. Rptr. 2d 863* (a "cone of silence" is not adequate, at least when the meditation was before a judicial officer)].

[8] Attorney Who Represents Party in Mediation Is Not Disqualified From Representing Others Against Same Adversary

Interpreting former *Evid. Code § 1152.5(a)(1)-(3)* [*now see Evid. Code § 1119*], a court of appeal has held that an attorney who represents a plaintiff in one mediation is not disqualified from representing another plaintiff in a second related case against the same defendant [*Barajas v. Oren Realty and Development Company (1997) 57 Cal. App. 4th 209, 219, 67 Cal. Rptr. 2d 62*]. The court reasoned that such a disqualification rule was not required by the language "shall remain confidential" in former *Evid. Code § 1152.5(a)* [*now see Evid. Code § 1119*] and would in fact discourage, rather than encourage mediation, especially in cases such as mass torts, product liability, employment practices, insurance coverage and bad faith cases, civil rights cases, lender liability and financial litigation, and

construction cases, which typically have many plaintiffs against the same defendant [*Barajas v. Oren Realty and Development Company (1997) 57 Cal. App. 4th 209, 213-217, 67 Cal. Rptr. 2d 62*]. The ruling remained true to the general intent of the language and legislative history: to encourage attorneys and litigants to agree to mediation. The court commented that it was especially unlikely that the Legislature intended to create so significant a change as a mediation-disqualification rule without expressly so stating [*Barajas v. Oren Realty and Development Company (1997) 57 Cal. App. 4th 209, 218-219, 67 Cal. Rptr. 2d 62*].

It remains to be seen whether this "no disqualification" rule will be changed by *Evid. Code § 1126*, effective January 1, 1998, which provides that anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential before mediation ends, remains so after the mediation ends. The Legislature did not considerattorney disqualification in enacting *Evid. Code § 1115 et seq.* [*see* Senate Judiciary Committee analysis of AB 939].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesDuress & Undue InfluenceGeneral OverviewFamily LawAlternative Dispute ResolutionMediationCivil ProcedureAlternative Dispute ResolutionMediationsEvidenceProcedural ConsiderationsMediation EvidenceEvidenceCompetencyAttorneys

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 31 MEDIATION
PART II. LEGAL BACKGROUND

4-31 California Forms of Pleading and Practice--Annotated § 31.14

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§ 31.14 Enforcement of Mediation Settlement

[1] Enforcement Complicated by Confidentiality

A settlement arising out of mediation is enforceable in the same manner as any other out of court settlement [for discussion, *see* Ch. 520, *Settlement and Release*]. However, the confidentiality surrounding mediation [*see § 31.13*] is a potential obstacle to enforcing a settlement reached in mediation if the consequences of the confidentiality requirement are not anticipated and addressed in the mediation agreement and especially in the settlement document itself. In addition, there are no exceptions to strict compliance with the statutes providing for enforcement of settlement agreements reached in mediation based on equitable principles such as estoppel or waiver. A party who voluntarily submits evidence of events that occurred during mediation and does not object to similar evidence submitted by the opposing party can later invoke the privilege to render that evidence inadmissible [*Simmons v. Ghaderi (2008) 44 Cal. 4th 570, 2008 Cal. LEXIS 9071* (action to enforce oral settlement agreement that did not meet requirements of *Evid. Code §§ 1118, 1122, 1124* for making agreement admissible)].

ILLUSTRATION:

Only Evidence to Support Claim Was Confidential. The parties negotiated a spousal support agreement in mediation. Later, based on statements made to each other during the mediation, one party moved to have that agreement corrected. Respondent former spouse sought to depose the mediator. The moving party sought a protective order barring discovery and admission of evidence regarding communications during the mediation *except* certain conversations between the parties that formed the basis of the motion. Those conversations were described in the moving party's declaration in support of the motion. The trial court found that the moving party had impliedly waived confidentiality and denied the motion for protective order. Moving party immediately petitioned for writ of mandate or prohibition to seek relief from the trial court's order. Were the confidential mediation communications admissible? No! The confidentiality requirements of *Evid. Code §§ 703.5, 1115 et seq.* are absolute! Any balancing that needed to be done was done by the legislature [*Foxgate Homeowners Assn. v. Bramalea California, Inc. (2001) 26 Cal. 4th 1, 17, 108 Cal. Rptr. 2d 642, 25 P.3d 1117* ; *Eisendrath v. Superior Court (Rogers) (2003) 109 Cal. App. 4th 351, 360, 134 Cal. Rptr. 2d 716*]. Especially when there are no

> unacceptable consequences to maintaining the confidentiality of the mediation, the statements of the parties, *even to each other* [*see* Evid. Code § 119(c)], and the mediator's testimony are inadmissable to correct an agreement reached during mediation. The court of appeal remanded to allow the parties, and the mediator, time to agree to expressly waive confidentiality before the trial court made its disposition of the matter. No waiver would be implied [*Eisendrath v. Superior Court (Rogers) (2003) 109 Cal. App. 4th 351, 361, 134 Cal. Rptr. 2d 716*].

Prior to the 1997 enactment of *Evid. Code §§ 1123* and *1124*, establishing procedures for enforcing settlements arrived at in mediation [*see* [2] and [3], *below*], *Ryan v. Garcia (1994) 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158* , held that the confidentiality provision of former *Evid. Code § 1152.5* precluded the introduction of statements made during mediation to prove an oral settlement agreement and its terms [*see* *Ryan v. Garcia (1994) 27 Cal. App. 4th 1006, 1010-1013, 33 Cal. Rptr. 2d 158* ; *but see* *Regents of the University of California v. Sumner (1996) 42 Cal. App. 4th 1209, 1212-1213, 50 Cal. Rptr. 2d 200* (rejecting *Ryan*, although in dicta, because the *Ryan* court actually held that the objection was waived for failure to raise it when the terms of the settlement were offered in evidence)].

It also has been held that a mediator is *not* a court officer within the meaning of *Code Civ. Proc. § 664.6* ['*Murphy v. Padilla (1996) 42 Cal. App. 4th 707, 714-715, 49 Cal. Rptr. 2d 722*]. Therefore, a party to an oral agreement of settlement recited to a mediator cannot thereafter sue for judgment on or to enforce that settlement under *Code Civ. Proc. § 664.6* [*but see* *In re Marriage of Assemi (1994) 7 Cal. 4th 896, 909, 30 Cal. Rptr. 2d 265, 872 P.2d 1190* , holding that an *arbitrator* is a court officer within the meaning of *Code Civ. Proc. § 664.6* if that arbitrator was empowered with an adjudicative function and in fact acted in that capacity)]. Note, however, that there are alternatives to the expedited procedure of *Code Civ. Proc § 664.6* such as a motion for summary judgment, a separate suit in equity, or an amendment of the pleadings [*Stewart v. Preston Pipeline, Inc. (2005) 134 Cal. App. 4th 1565, 1584-1589, 36 Cal. Rptr. 3d 901* (signature by counsel was enough to grant summary judgment based on mediation settlement agreement)].

[2] Enforcement of Written Settlement Agreement

[a] Evidence Code Requirements

To resolve the conflict between *Ryan v. Garcia (1994) 27 Cal. App. 4th 1006, 1010-1013, 33 Cal. Rptr. 2d 158* (oral settlement agreements made in mediation not admissible in evidence) and *Regents of the University of California v. Sumner (1996) 42 Cal. App. 4th 1209, 1212-1213, 50 Cal. Rptr. 2d 200* (dicta that oral settlement agreements made in mediation are admissible in evidence), *Evid. Code § 1152.5* was repealed, effective January 1, 1998, and replaced by *Evid. Code § 1115 et seq.*, which provide for enforcement of both oral and written settlement agreements. *Evid. Code §§ 1119* and *1124* codify the rule of *Ryan* and reject the contrary rule of *Sumner*, except specifically provided in the statutes [*Simmons v. Ghaderi (2008) 44 Cal. 4th 570, 580, 80 Cal. Rptr. 3d 83, 187 P.3d 934*].

A written settlement agreement prepared in the course of, or pursuant to, mediation, is not made inadmissable or protected from disclosure if the agreement is signed by the settling parties and any of the following conditions are satisfied [*Evid. Code § 1123*; *Stewart v. Preston Pipeline, Inc. (2005) 134 Cal. App. 4th 1565, 1579-1584, 36 Cal. Rptr. 3d 901* (signature by counsel issufficient to waive confidentiality in a procedural matter)]:

- The agreement provides that it is admissible or subject to disclosure or words to that effect [*Evid. Code § 1123(a)*]. A statement in a settlement agreement that "the parties agree that this confirmation of settlement is exempt from the confidentiality provisions of *Evid. Code Section 1152 et seq.*" qualifies as "words to that effect" within the meaning of *Evid Code § 1123(a)* so as to render that agreement admissible [*Stewart v. Preston Pipeline, Inc. (2005) 134 Cal. App. 4th 1565, 1577-1578, 36 Cal. Rptr. 3d 901]* .

- The agreement provides that it is enforceable or binding or words to that effect [*Evid. Code § 1123(b)*]. Statements in a mediated settlement agreement that it was "a full and final settlement of all claims" and that "the parties intend that this settlement is enforceable pursuant to the provisions of *Code Civ. Proc. Section 664.6*" meet the requirements of Code Civ. Proc. § 1123(b) so as to render that agreement admissible [*Stewart v. Preston Pipeline, Inc. (2005) 134 Cal. App. 4th 1565, 1577-1578, 36 Cal. Rptr. 3d 901* ; *compare* *Fair v. Bakhtiari (2006) 51 Cal. Rptr. 3d 871, 147 P.3d 653* (memorandum of settlement signed by all parties, that contained enforcement term "Any and all disputes subject to JAMS arbitration rules" was insufficient reflection of parties' awareness that they were executing enforceable or binding agreement to satisfy requirements of *Evid. Code § 1123(b)* for admissibility)].

- All parties to the agreement expressly agree in writing, or orally in accordance with *Evid. Code § 1118* (*see* [3], *below*), to its disclosure [*Evid. Code § 1123(c)*].

- The agreement is used to show fraud, duress, or illegality that is relevant to the issue in dispute [*Evid. Code § 1123(d)*].

[b] Fair, Adequate and Reasonable Terms of Written Agreements

A trial court must determine that the terms of a settlement agreement are indeed fair, adequate, and reasonable before entering a judgment including those terms [*Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal. App. 4th 116, 128, 85 Cal. Rptr. 3d 20* (trial court erred in finding the terms of the settlement to be fair, reasonable, and adequate without any evidence of the amount to which class members would be entitled if they prevailed in the litigation, and without any basis to evaluate the reasonableness of the agreed recovery)]. The court bears the ultimate responsibility to ensure the reasonableness of the settlement terms and must also receive and consider enough information about the nature and magnitude of the claims being settled, as well as the impediments to recovery, to make an independent assessment of the reasonableness of the terms to which the parties have agreed [*Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal. App. 4th 116, 128, 85 Cal. Rptr. 3d 20*].

[3] Enforceable Oral Agreements

Oral agreements made in the course of, or pursuant to, mediation are admissible and subject to disclosure under the following conditions [*Evid. Code §§ 1118, 1124(a)*]:

- The oral agreement is recorded by a court reporter, tape recorder, or other reliable means of sound recording [*Evid. Code § 1118(a)*].

- The terms of the oral agreement are recited on the record in the presence of the parties and the mediator, and the parties express on the record that they agree to the terms recited [*Evid. Code § 1118(b)*].

- The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding or words to that effect [*Evid. Code § 1118(c)*].

- The recording is reduced to writing and the writing is signed by the parties within 72 hours after it is recorded [*Evid. Code § 1118(d)*].

In addition, an oral agreement that does not meet all the conditions of *Evid. Code § 1118* is admissible and subject to disclosure if it meets the conditions of *Evid. Code § 1118(a), (b),* and *(d)* and either:

- The parties to the agreement expressly agree, in another writing or oral agreement in accordance

with *Evid. Code § 1118*, to disclosure of the agreement [*Evid. Code § 1124(c)*]; or

- The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute [*Evid. Code § 1124(d)*].

There are no exceptions to strict compliance with the statutes providing for enforcement of settlement agreements reached in mediation based on equitable principles such as estoppel or waiver. A party who voluntarily submits evidence of events which occurred during mediation and does not object to similar evidence submitted by the opposing party can later invoke the privilege to render that evidence inadmissible [*Simmons v. Ghaderi (2008) 44 Cal. 4th 570, 586, 80 Cal. Rptr. 3d 83, 187 P.3d 934* (action to enforce oral settlement agreement that did not meet requirements of *Evid. Code §§ 1118, 1122, 1124* for making agreement admissible)]. Although *Civ. Code § 3513* allows a party to waive to all rights and privileges that a person is entitled to, including those conferred by statute, unless otherwise prohibited by specific statutory provisions, the mediation privilege statutes as well as *Evid. Code § 912* make it clear that any waiver of mediation confidentiality must be express, not implied, and in accordance with the requirements of those statutes, i.e, *Evid. Code §§ 1118, 1122-1124* [*Simmons v. Ghaderi (2008) 44 Cal. 4th 570, 586, 80 Cal. Rptr. 3d 83, 187 P.3d 934*].

PRACTICE TIP:

Memorialize Agreement Before Leaving Site. Both *Ryan* and *Regents* grew out of situations in which a party to a mediation apparently sought to avoid going forward with an agreement reached as a result of mediation. Second thoughts are not uncommon. Memories of precisely what was agreed to when the parties said they had settled also can be flawed. It therefore is essential to memorialize any agreement (either in writing or on tape) *before* anyone leaves the mediation site [*see Simmons v. Ghaderi (2008) 44 Cal. 4th 570, 2008 Cal. LEXIS 9071* (defendant left before signing agreement and revoked authorization to insurer to settle thus rendering oral settlement agreement unenforceable)]. *By Lois Thompson*

PRACTICE TIP: Ensure Agreement Is Enforceable. *Ryan* and *Regents* also illustrate the need to memorialize agreements reached in mediation in a form that will make them admissible and enforceable in accordance with the provisions of *Evid. Code § 1118* or *1123*. The practitioner therefore should do the following:

(1) At the time the terms of agreement are recited, the parties, counsel, and the mediator *all* should be asked to expressly consent to disclosure of the terms of the settlement, to expressly state on the record that the agreement is enforceable and binding, and should sign a document so stating. (If the settlement terms are dictated into a tape recorder, each person present should be requested to audibly state his or her consent and intent that the agreement be binding.) In preparing for mediation, the practitioner should explain to the client that this procedure will be followed and why.

(2) All documents memorializing the settlement should state that the parties intend the agreement to be binding and enforceable in accordance with *Evid. Code §§ 1118* and *1124* or *1123*. (If the parties want their settlement to be confidential, they should include the usual statements of confidentiality, which generally have an exception if one party must commence litigation to enforce the settlement, but still state that the agreement is admissible, andthus subject to disclosure, in accordance with *Evid. Code §§ 1118* and *1124* or *1123*.) *By Lois Thompson*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAlternative Dispute ResolutionMediationCivil ProcedureAlternative Dispute ResolutionMediationsCivil

ProcedureSettlementsSettlement AgreementsEnforcementBreach of Contract ActionsEvidenceProcedural ConsiderationsMediation Evidence

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4-31 California Forms of Pleading and Practice--Annotated §§ 31.15-31.29

AUTHOR: Lois D. Thompson

[Reserved]

§§ 31.15[Reserved]

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PART III. RESEARCH GUIDE

4-31 California Forms of Pleading and Practice--Annotated § 31.30

AUTHOR: Lois D. Thompson

§ 31.30 State Statutes

[1] Provisions Requiring or Encouraging Use of Mediation

Legislative policy favoring alternative dispute resolution, including mediation. *Bus. & Prof. Code §§ 465, 465.5*

Dispute Resolution Advisory Council established within Division of Consumer Services of Department of Consumer Affairs. *Bus. & Prof. Code § 467 et seq.*

Alternative dispute resolution mediation program for attorney discipline complaints that do not warrant formal investigation or prosecution. *Bus. & Prof. Code § 6086.14*

Voluntary mediation of attorney's fees disputes that are subject to attorney's fee arbitration program. *Bus. & Prof. Code § 6200*

Environmental Responsibility Acceptance Act. *Civ. Code § 850 et seq.*

Mediation or other alternative dispute resolution (arbitration, conciliation) of specified disputes relating to common interest development is prerequisite to filing action in superior court. *Civ. Code § 1369.510 et seq.*; see also *Civ. Code § 1363.810 et seq.* (applicability and required components of common interest development's alternative resolution procedure)

Provision in contract between contractor and subcontractor with principal office in California for construction of public or private work of improvement in California that requires mediation outside California is void and unenforceable. *Code Civ. Proc. § 410.42*

Judicially mandated mediation of civil actions. *Code Civ. Proc. § 1775 et seq.*

Mediation program for disputes regarding special education. *Educ. Code § 56500.3*; see *Educ. Code § 56501 et seq.*

Statewide coordination of family mediation and conciliation services. *Fam. Code § 1850 et seq.*

Mediation of child custody or visitation issues. *Fam. Code 3160 et seq.*

Mediation of disputes regarding requirements for labels that accompany and pertain to seed in bulk or in a container under the California Seed Law. *Food & Agric. Code § 52456*

Mediation of dispute that is subject of administrative adjudication. *Gov. Code § 11420.10 et seq.*

Mediation of land use disputes. *Gov. Code § 66030 et seq.*

Mediation of insurance claims arising from automobile collision coverage, automobile physical damage cover, and earthquakes or fires for which Governor has declared state of emergency. *Ins. Code § 10089.70 et seq.*

Mediation of public works claims of $375,000 or less between contractor and local agency. *Pub. Contract Code §§ 20104, 20104.4*

[2] Confidentiality of Mediation

Limit on mediator's testimony relating to mediation. *Evid. Code § 1115 et seq.*

Protection of testimony and other evidence used in mediation proceeding from discovery or use in evidence in civil action or proceeding. *Evid. Code § 1115 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAlternative Dispute ResolutionMediationCivil ProcedureAlternative Dispute ResolutionMediationsEvidenceProcedural ConsiderationsMediation Evidence

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4-31 California Forms of Pleading and Practice--Annotated § 31.30A

AUTHOR: Lois D. Thompson

§ 31.30A California Rules of Court

Rules for conduct of mediators in court-connected mediation programs for civil cases. *Cal. Rules of Ct., Rule 3.850 et seq.*

Rules for addressing complaints about court-program mediators. *Cal. Rules of Ct., Rule 3.865 et seq.*

Rules for implementation of Civil Action Mediation Act (*Code Civ. Proc. § 1775 et seq.*). *Cal Rules of Ct., Rule 3.890 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediations

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PART III. RESEARCH GUIDE

4-31 California Forms of Pleading and Practice--Annotated § 31.31

AUTHOR: Lois D. Thompson

§ 31.31 Decisions

[1] Voluntary Nature of Mediation

Trial courts have no authority to order parties to complex civil action to attend and pay for private mediation. *Jeld-Wen, Inc. v. Superior Court (Marlborough Development Corp.) (2007) 146 Cal. App. 4th 536, 543, 53 Cal. Rptr. 3d 115*

Mediator had no authority to fashion settlement from one-page Deal Point Memorandum that parties agreed to after mediation despite "reservation of jurisdiction" in mediator; Deal Point Memorandum did not address all issues disputed by parties, and without agreement of one party there was no settlement to be enforced. *Weddington Productions, Inc. v. Flick (1998) 60 Cal. App. 4th 793, 797, 800-803, 810, 71 Cal. Rptr. 2d 265*

Confidentiality requirements of *Evid. Code §§ 703.5, 1115 et seq.* are absolute and include statements of parties made to each other; no waiver of confidentiality will be implied, although express written waiver is allowed. *Eisendrath v. Superior Court (Rogers) (2003) 109 Cal. App. 4th 351, 360-361, 134 Cal. Rptr. 2d 716*

Court that has not mandated mediation, but merely inquired of attorneys attending status conference if they were interested in mediation lacks authority to sanction party for failure to participate in mediation or to enforce oral agreement for mediation. *Kirschenman v. Superior Court (1994) 30 Cal. App. 4th 832, 835, 36 Cal. Rptr. 2d 166*

[2] Confidentiality

There are no exceptions to strict compliance with statutes providing for enforcement of settlement agreements reached in mediation based on equitable principles such as estoppel or waiver; party who voluntarily submits evidence of events that occurred during mediation and does not object to similar evidence submitted by opposing party can later invoke privilege to render that evidence inadmissible. *Simmons v. Ghaderi (2008) 44 Cal. 4th 570, 2008 Cal. LEXIS 9071*

(oral settlement agreement did not meet requirements of *Evid. Code §§ 1118, 1122, 1124* for making agreement admissible)

Although *Civ. Code § 3513* allows party to waive to all rights and privileges that person is entitled to, including those conferred by statute, unless otherwise prohibited by specific statutory provisions, mediation privilege statutes as well as *Evid. Code § 912* make clear that any waiver of mediation confidentiality must be express, not implied, and in accordance with requirements of those statutes, i.e, *Evid. Code §§ 1118, 1122-1124*. *Simmons v. Ghaderi (2008) 44 Cal. 4th 570, 2008 Cal. LEXIS 9071*

Work-product privilege of *Code Civ. Proc. § 2018* is not to be read into *Evid. Code § 1119(b)*, protection of which is not limited to derivative materials and cannot be overcome by showing of good cause. *Rojas v. Superior Court (Coffin) (2004) 33 Cal. 4th 407, 422-423*

Evid. Code § 1119(b) prohibits discovery of photographs, video tapes, witness statements (but not facts contained therein) and raw test data (but not physical samples on which tests were made) when "prepared for the purpose of, in the course of, or pursuant to" mediation. *Rojas v. Superior Court (Coffin) (2004) 33 Cal. 4th 407, 422-423*

Evid. Code § 1120(a) prevents mediation from being used to immunize evidence from discovery; protection of *Evid. Code § 1119(b)* only applies to documents that would not have existed but for mediation. Thus, although witness statement submitted in or prepared for mediation would not be discoverable, facts known to percipient witness are. *Rojas v. Superior Court (Coffin) (2004) 33 Cal. 4th 407, 422-423*

Code Civ. Proc. §§ 1119 and 1121 prohibit court from considering report of mediator or declaration of party, submitted in support of motion for sanctions [*see Code Civ. Proc. § 128.5(c)* (order must recite in detail conduct or circumstances justifying sanctions)], that describes conduct or communications of party during mediation. *Foxgate Homeowners Assn. v. Bramalea California, Inc. (2001) 26 Cal. 4th 1, 15, 108 Cal. Rptr. 2d 642*

The purpose of mediation confidentiality is not to facilitate communication between a party and his or her own attorney. In the governing statutes, "the party" refers to the litigant who is one of the disputants in a mediation. A party's attorney is a component of "the party" to the mediation, rather than a freestanding, independent entity. Attorney-client communications not linked to mediation are therefore not covered by the confidentiality. *Cassel v. Superior Ct. (2009) 179 Cal. App. 4th 152, 159, 163, 101 Cal. Rptr. 3d 501*

Because Termination Review Board not intended to help employer and employee resolve differences, its proceedings are not type of mediation (or arbitration); thus, *Evid. Code §§ 703.5, 1119* does not apply, and board member could be compelled at deposition to testify regarding statements made at TRB hearing. *Saeta v. Superior Court (2004) 117 Cal. App. 4th 261, 267, 270-272, 11 Cal. Rptr. 3d 610*

Confidentiality requirements of *Evid. Code §§ 703.5, 1115 et seq.* are absolute and include statements of parties made to each other; no waiver of confidentiality will be implied, although express written waiver is allowed. *Eisendrath v. Superior Court (Rogers) (2003) 109 Cal. App. 4th 351, 360-361, 134 Cal. Rptr. 2d 716*

There is no waiver of confidentiality if all parties did not sign a mediation agreement, and there was an understanding at the time of execution that said mediation agreement would not become operative until all parties signed it; thus, the agreement is inadmissible pursuant to *Evid. Code § 1119(b)*. *Rael v. Davis (2008) 166 Cal. App. 4th 1608, 1617-1619, 83 Cal. Rptr. 3d 745*

Mediator is neutral individual who confers with each party in private caucus, learning results acceptable to each and assessing strengths and weakness of their cases; also meets with parties together to facilitate settlement; as recipient of confidences, mediator and his or her law firm are disqualified from representing party to mediation in related litigation.

Cho v. Superior Court (1995) 39 Cal. App. 4th 113, 123-125, 45 Cal. Rptr. 2d 863

[3] Immunity of Mediator

Absolute quasi-judicial immunity is properly extended to neutral third parties for their conduct in performing dispute resolution services connected to the judicial process and that involve either (1) making binding decisions, (2) making findings or recommendations to the court, or (3) arbitration, mediation, conciliation, evaluation, or other similar resolution of pending disputes; *Civ. Code § 47(b)* litigation privilege protects communication made by psychologist in course of child custody evaluation. *Howard v. Drapkin (1990) 222 Cal. App. 3d 843, 852-857, 863-864, 271 Cal. Rptr. 893* (involving psychologist hired under parties' stipulation for evaluation, which included order signed by court, although court had not required evaluation, and written reports were authorized to go only to parties, not to court)

[3A] Impartiality of Mediator

Fact that attorney for one party to litigation who acted as mediator for both parties, failed to disclose lack of impartiality, and suggested that party adverse to mediator's legal client take certain action to settle matter, did not render mediator civilly liable to adverse party because adverse party did not rely on mediator's suggestion and alleged no other causal link for damages asserted. *Furia v. Helm (2003) 111 Cal. App. 4th 945, 959, 4 Cal. Rptr. 3d 357*

[4] Enforcement of Settlement Arising From Mediation

Memorandum of settlement signed by all parties, that contained enforcement term "Any and all disputes subject to JAMS arbitration rules" was insufficient reflection of parties' awareness that they were executing enforceable or binding agreement tosatisfy requirements of *Evid. Code § 1123(b)* for admissibility; dissent claimed ruling would be better based on finding that no settlement agreement was formed because key term was ambiguous and there was no meeting of minds. *Fair v. Bakhtiari (2006) 40 Cal. 4th 189, 203, 51 Cal. Rptr. 3d 871, 147 P.3d 653*

Court order submitted by plaintiff, which erroneously failed to set forth all of the material settlement terms concerning the scope of plaintiff's easement on defendant's property, failed to accurately reflect the parties' agreement and therefore failed to comply with *Code Civ. Proc., § 664.6*. The court found that a formal judgment must be entered setting forth all of the material terms of the settlement; the failure to do so would defeat the purposes of the settlement and spawn further litigation. Since defendant showed no basis to relieve her of her settlement obligations, the trial court properly considered the merits. *Hines v. Lukes (2008) 167 Cal. App. 4th 1174, 1176-1177, 1183-1186, 84 Cal. Rptr. 3d 689*

Party cannot use *Cal. Rules of Ct., Rule 3.1385* hearing to obtain court determination that settlement reached at mediation was unenforceable. Court can only dismiss case or restore it to civil active list. By alleging dispute over whether parties reached binding settlement, party demonstrated good cause to restore case to civil active list. *Irvine v. Regents of the University of California (2007) 149 Cal. App. 4th 994, 1001-1002, 57 Cal. Rptr. 3d 500*

Mediation settlement agreement executed in counterparts could not be enforced when there were two different versions and parties did not agree on meaning of term "binding mediation," which left contract uncertain in that there was no way to resolve material term regarding payment. *Lindsay v. Lewandowski (2006) 139 Cal. App. 4th 1618, 1623-1624, 43 Cal. Rptr. 3d 846*

Mediation agreement is inadmissible pursuant to *Evid. Code § 1119(b)* if all parties did not sign the agreement, and there was an understanding at the time of execution that said mediation agreement would not become operative until all parties signed it. *Rael v. Davis (2008) 166 Cal. App. 4th 1608, 1617-1619, 83 Cal. Rptr. 3d 745*

Waiver of confidentiality is procedural matter; thus signature by counsel is enough to comply with requirement of Code Civ. Proc § 1123 for admissibility. *Stewart v. Preston Pipeline, Inc. (2005) 134 Cal. App. 4th 1565, 1579-1584, 36 Cal. Rptr. 3d 901*

Statement in settlement agreement that parties agree it is exempt from confidentiality provisions of *Evid. Code Section 1152 et seq.* fulfills requirement of *Evid. Code § 1123(a)* so as to render that agreement admissible. *Stewart v. Preston Pipeline, Inc. (2005) 134 Cal. App. 4th 1565, 1577-1578, 36 Cal. Rptr. 3d 901*

Statements in mediated settlement agreement that it was "full and final settlement of all claims" and that parties intend it to be enforceable pursuant to provisions of *Code Civ. Proc. Section 664.6* meet requirements of Code Civ. Proc. § 1123(b) so as to render that agreement admissible. *Stewart v. Preston Pipeline, Inc. (2005) 134 Cal. App. 4th 1565, 1577-1578, 36 Cal. Rptr. 3d 901*

Terms of a settlement agreement must be determined by trial courts to be fair, adequate and reasonable before entering a judgment including those terms. The court bears the ultimate responsibility to ensure the reasonableness of the settlement terms and must also receive and consider enough information about the nature and magnitude of the claims being settled, as well as the impediments to recovery, to make an independent assessment of the reasonableness of the terms to which the parties have agreed [*Kullar v. Foot Locker Retail, Inc. (2008) 168 Cal. App. 4th 116, 128, 85 Cal. Rptr. 3d 20* (trial court erred in finding the terms of the settlement to be fair, reasonable, and adequate without any evidence of the amount to which class members would be entitled if they prevailed in the litigation, and without any basis to evaluate the reasonableness of the agreed recovery)].

Confidentiality provisions of former *Evidence Code § 1152.5* did not bar proof of settlement reached by mediation and memorialized after session ended. *Regents of the University of California v. Sumner, (1996) 42 Cal. App. 4th 1209, 1212-1213, 50 Cal. Rptr. 2d 200* (declining to follow *Ryan v. Garcia (1994) 27 Cal. App. 4th 1006, 1010-1013, 33 Cal. Rptr. 2d 158* , which held evidence of settlement reached during mediation to be inadmissible)

[5] Predispute Agreements Requiring Mediation

[a] In General

Contract provision requiring subcontractor to mediate with contractor in Nevada as condition precedent to litigation was void and unenforceable under *Code Civ. Proc. § 410.42*, so when contractor refused to mediate in California, subcontractor could proceed with litigation in *California. Templeton Development Corp. v. Superior Court (Dick Emard Electric, Inc.) (2006) 144 Cal. App. 4th 1073, 1077, 1079, 1083, 1085, 51 Cal. Rptr. 3d 19*

[b] Mediation Required to Recover Attorney's Fees

Prevailing party in action on contract that used standard California residential real estate purchase agreement who commenced litigation without first attempting to mediate dispute could not recover attorney's fees. *Lange v. Schilling (2008) 163 Cal. App. 4th 1412, 1416-1418, 78 Cal. Rptr. 3d 356*

Defendant who prevailed in specific performance action without first engaging in mediation, and whose offer to mediate was rebuffed by plaintiff, was entitled to recover attorney's fees under contract that stated, "Seeking mediation is a condition precedent to the recovery of attorney fees by the party who initiates the action." *Van Slyke v. Gibson (2007) 146 Cal. App. 4th 1296, 1301, 53 Cal. Rptr. 3d 491*

[6] Sanctions

While court would not award sanctions under Third Appellate District's local rule [Ct. App., Third Dist., Local Rules of Ct., rule 1(d)], relating to mandatory mediation, for failure of insurer with potential coverage to have representative attend court-ordered appellate mediation in person, with full settlement authority, in matter of first impression, because Local rule 1(d) does not explicitly assign to party and its counsel duty to notify insurance carrier that appellate mediation has been ordered; duty is implicit; and court served notice that henceforth, party on appeal, and party's counsel, will be sanctioned for failure to notify insurance carriers with potential insurance coverage that appellate mediation has been ordered and that carrier must have representative attend all mediation sessions in person, with full settlement authority. *Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc. (2008) 163 Cal. App. 4th 566, 573-574, 77 Cal. Rptr. 3d 551*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsJudicial ImmunityCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewEvidenceProcedural ConsiderationsMediation Evidence

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AUTHOR: Lois D. Thompson

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§ 31.33 Text References

"Drafting a California Dispute Resolution Agreement," JAMS/Endispute

Chernick, ADR for the Commerical Litigator, Ch. III-B, (The Rutter Group 1989)

Knight, Fannin, & Disco, Cal. Practice Guide: Alternative Dispute Resolution, Ch. 3, (The Rutter Group 1995)

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[Reserved]

§§ 31.34[Reserved]

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4-31 California Forms of Pleading and Practice--Annotated § 31.40

AUTHOR: Lois D. Thompson

§ 31.40 Predispute Mediation Contract Clause

[1] FORM Predispute Mediation Contract Clause

[*EITHER*]

If any dispute, controversy, or claim arising out of or relating to this contract or any claimed breach thereof has not been resolved through direct negotiation between the parties, the parties shall endeavor to settle the dispute through mediation [under the then applicable rules and procedures of _____ (select mediation service provider)].

[*OR, if agreement also designates a named mediator*]

If any dispute, controversy, or claim arising out of or relating to this contract or any claimed breach thereof has not been settled through direct negotiation between the parties, the parties shall endeavor to settle the dispute through mediation [under the then applicable rules and procedures of _____ (select mediation service provider)]. The neutral selected by the parties to conduct this mediation is _____ and he/she has agreed to serve in that capacity and to be available on reasonable notice.

[2] Use of Form

The form set out in [1], *above*, provides two examples of clauses that may be included in a contract to declare the parties' intent to pursue mediation should a dispute arise out of the contract.

[3] Contents of Form

Mediation clauses included in contracts before any dispute has arisen generally are quite brief, as illustrated by this

form.

The first alternative clause in this form merely states the parties' intent to use mediation in the event of a dispute. The optional clause in brackets at the end of the paragraph may be used if the parties also agree that the rules of a specific mediation provider are to govern any mediation relating to the contract.

The second alternative clause is the same, but adds the additional element of naming a person who will act as mediator in the event of a dispute. By naming the mediator in advance, when the parties have no existing dispute, the contract avoids the possibility of delay and unnecessary contentiousness over selecting a mediator after a dispute arises.

[4] Forms Available From Mediation Service Providers

Various of the service providers, for example, the Center for Public Resources, the American Arbitration Association, and JAMS/Endispute have model clauses relating to mediation that may be incorporated in a party's contracts as well as forms providing for the submission of a dispute for mediation. The practitioner should consider obtaining copies of such forms and dispute submission documents so that they will be on hand when needed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediations

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4-31 California Forms of Pleading and Practice--Annotated § 31.41

AUTHOR: Lois D. Thompson

§ 31.41 Negotiation-Mediation-Arbitration Clause

[1] FORM Negotiation-Mediation-Arbitration Clause

Article _____

1. The parties will attempt in good faith to resolve promptly any dispute, controversy, or claim arising out of or relating to this agreement or any claimed breach thereof by direct negotiation between senior executives of the parties who have authority to settle the controversy [and who are not directly responsible for administering this agreement].

2. The disputing party shall give the other party written notice of the dispute. Within _____ [*specify appropriate time limit, e.g.*, twenty-one days] after notice is given, the senior executives shall meet at a mutually acceptable time and place, and thereafter as often as those executives reasonably deem necessary, to exchange relevant information and attempt to resolve the dispute.

3. If the matter has not been resolved within _____ days after the disputing party gives notice, or if the party receiving notice will not meet within _____ days, either party may initiate mediation of the controversy, claim, or dispute in accordance with the rules and procedures of the _____ [*designated mediation service provider*].

[*EITHER, if providing for arbitration according to the rules of an arbitration service provider*]

4. If the matter has not been resolved within _____ days after a party has given notice of the intent to initiate mediation or either party will not participate in the mediation, or if the mediator has concluded that the parties are at impasse, whichever shall happen first, the controversy shall be settled by arbitration in accordance with the rules and procedures of _____ [*designated service provider*], and judgment upon the award rendered by the

arbitrator may be entered in any court having jurisdiction thereof.

[*OR, if providing for arbitration by a named person other than the mediator*]

4. If the matter has not been resolved within _____ days after a party has given notice of the intent to initiate mediation or either party will not participate in the mediation, or if the mediator has concluded that the parties are at impasse, whichever shall happen first, the controversy shall be settled by arbitration by _____ [*name of designated arbitrator*], and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

[*OR, if providing for the mediator to become arbitrator*]

4. If the matter has not been resolved within _____ days after a party has given notice of the intent to initiate mediation or either party will not participate in the mediation, or if the mediator has concluded that the parties are at impasse, whichever shall happen first, _____ [*name of mediator*] shall then serve as arbitrator to adjudicate the dispute pursuant to *California Code of Civil Procedure §§ 1280 et seq.*, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.

[*CONTINUE*]

5. All deadlines specified in this Article may be extended or modified by mutual agreement of the parties in writing.

[2] Use of Form

The form set out in [1], *above*, is an example of a negotiation-mediation-arbitration clause in a contract. It provides for the parties to attempt negotiation, before moving to mediation, and finally to binding arbitration. This type of clause is often referred to as a "med/arb clause."

[3] Contents of Form

The provision includes the following:

- A commitment to good faith negotiation of the dispute by the parties themselves (Paragraph 1).
- A procedure and time table for initiating negotiation (Paragraph 2).
- A procedure and time table for initiating mediation, should negotiation fail (Paragraph 3).
- A procedure and time table for initiating arbitration, should mediation fail, with alternative phrasing depending on whether the arbitration will be by a service provider, a designated arbitrator, or by the person who was the mediator (Alternative Paragraph 4).
- Express allowance for the parties to make written agreements changing the deadlines (Paragraph 5).

Paragraph 1 also includes an optional clause that may be used to ensure that the executives negotiating for the parties are not the persons responsible for administering the contract. Since the persons administering the contract are likely too close to the dispute to be objective and may have a significant personal investment in prevailing, use of this clause may

improve the chances for successful negotiation by providing for negotiators who are somewhat more neutral than the persons who have been on the front line of the dispute.

[4] Additional Considerations Regarding Arbitration

Because the last step of a med/arb clause is binding arbitration, counsel drafting the clause should consider all the issues that may be relevant to drafting an arbitration clause. In particular, any limitations on the scope of the issues that may be the subject of arbitration or on the remedy the arbitrator may fashion must be included in the clause [*see Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 373, 36 Cal. Rptr. 2d 581, 885 P.2d 994* ; *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 10, 10 Cal. Rptr. 2d 183, 832 P.2d 899*].

For discussion of contractual arbitration, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute ResolutionMediations

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4-31 California Forms of Pleading and Practice--Annotated § 31.42

AUTHOR: Lois D. Thompson

§ 31.42 Post-Dispute Mediation Agreement

[1] FORM Post-Dispute Mediation Agreement

A dispute having arisen between _____ [*name*] and _____ [*name*], the undersigned hereby agree to submit the dispute as follows:

1. _____ [*Describe the dispute that is to be mediated, itemizing specific issues as appropriate*].

2. _____ [*Name*] shall serve as mediator of this matter.

[*EITHER*]

3. For his/her services as mediator, _____ [*name*] shall be compensated _____ [in the amount of $_____ *or* at the rate of $_____ per hour *or other provision*]. This cost shall be split equally between the parties, _____ [*state additional terms of payment, e.g.,* with a deposit of $_____ due _____ (*date or time period prior to initial mediation session*)].

[*OR*]

3. _____ [*Name*] has volunteered to furnish his/her services without compensation from the parties.

[*CONTINUE*]

[4. _____ (*Set out or incorporate by reference any rules that are to govern the mediation, e.g.,* The mediation shall be conducted in the manner determined by _____ (*name of mediator*).]

[5. *Confidentiality and immunity provision. See § 31.43* .]

_____ [*signature of disputant*]

_____ [*typed name*]

_____ [*signature of disputant*]

_____ [*typed name*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*name of disputant*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*name of disputant*]

CONSENT OF MEDIATOR

I agree to mediate this dispute on the terms set out above.

_____ [*signature of mediator*]

_____ [*typed name*]

[2] Use of Form

The form set out in [1], *above*, is for use as an agreement to submit an existing dispute to mediation. If the parties are using the services of an established provider of mediation services, the provider will most likely have their own form of agreement that can be used.

For forms of mediation clauses agreeing to mediation of any dispute that may arise out of a contract, see *§§ 31.40, 31.41*.

[3] Contents of Form

This form of agreement includes the following terms:

- A description of the dispute, including any specific issues to define the scope of the mediation (Paragraph 1).

- Designation of a named mediator (Paragraph 2).

- The agreed compensation of the mediator, together with allocation of payment as between the parties and any additional terms of payment, or alternatively, a record of the fact that the mediator is volunteering his or her services (Alternative Paragraphs 3).

- Any rules that are to apply to the mediation (Optional Paragraph 4).

- A confidentiality and immunity clause, as found in the *form in § 31.43*, which should be included to ensure the parties understand their rights and obligations in this regard (Paragraph 5). Inclusion of this paragraph is particularly important to ensure that any settlement that may be reached can be enforced [for discussion, *see § 31.14*].

Although the Paragraph 3 language splitting any mediator fees between the parties is not mandatory, it is strongly recommended. Splitting the fees between the parties reinforces the appearance of impartiality of the mediator, who might be suspected, however incorrectly, of siding with the more solvent party if fees were to be paid by the prevailing party. In addition, settling this issue up front rather including it within the scope of mediation removes one more issue that could complicate resolution of the dispute.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediations

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4-31 California Forms of Pleading and Practice--Annotated § 31.43

AUTHOR: Lois D. Thompson

§ 31.43 Confidentiality Agreement in Mediation

[1] FORM Confidentiality Agreement in Mediation

MEDIATION CONFIDENTIALITY AGREEMENT

In order to maintain the confidentiality of this mediation, the parties and all other persons participating in or conducting the mediation are requested to sign the following agreement before it begins. Under this agreement, all statements made during the mediation, and all documents prepared for or during the mediation are protected from disclosure in any state or federal court proceeding, administrative proceeding or arbitration, unless all participants consent in writing to such disclosure.

1. The parties have agreed to voluntarily participate in this mediation conference.

2. Additionally, the parties and all other persons participating in or conducting the mediation agree to be bound by *California Evidence Code Sections 1115, 1128*, a copy of which is attached hereto and incorporated by reference.

3. The mediation process is to be considered settlement negotiations for the purpose of all state and federal rules, including Federal Rule of Evidence 408 and *California Evidence Code § 1152*, protecting disclosures made during or in connection with the mediation from later discovery or use in evidence. All conduct, tangible evidence (including documents) statements, promises, offers, views and opinions, oral or written, made or presented during or in connection with the mediation by any party, a party's agent, employee, or attorney, or a third party are confidential and, when appropriate, are to be considered work product and privileged. Such conduct, statements, promises, offers, views and opinions shall not be subject to discovery or admissible for any purpose, including impeachment, in any state or federal court proceeding, administrative proceeding, arbitration or other proceeding. Provided, however, that evidence that is otherwise subject to discovery or admissible in evidence is not excluded from discovery or admission in evidence simply as a result of it having been used in connection with this settlement process.

4. The parties and all other persons participating in or conducting the mediation agree that the entire mediation process is confidential. Accordingly, they agree not to disclose to any third party the fact of, the content of or the results of the mediation.

5. The parties and all other persons participating in or conducting the mediation agree that there shall be no liability for any participating individual or entity as a result of conduct engaged in during or in connection with the mediation.

6. The parties and all other persons participating in or conducting the mediation agree that in the event the parties reach a settlement of the dispute or any portion thereof as a result of this mediation process and recite the terms of that settlement before the mediator and/or prepare or cause to be prepared a document memorializing the terms of that settlement, the recitation of the terms of the settlement and/or the document memorializing the terms of the settlement shall not be subject to this Mediation Confidentiality Agreement or confidential for the purposes of all state and federal rules, including Federal Rule of Evidence 408 and *California Evidence Section 1115 et seq.*. The parties expressly agree that evidence of any recitation of the terms of a settlement and/or any document signed by the parties memorializing the terms of the settlement shall be subject to disclosure and admissible in evidence.

[2] Use of Form

The form set out in [1], *above*, is for use to ensure the confidentiality of the mediation proceedings, to provide immunity to the participants, and to allow enforcement of any settlement that may be reached despite the confidentiality of the proceedings.

The agreement may be entered into after a dispute has arisen or may be included with the predispute mediation provisions in a contract.

[3] Contents of Form

This form of confidentiality agreement provides the following:

- Confirmation that mediation is entered voluntarily (Paragraph 1).

- An agreement that the proceedings will be confidential, including an express statement that *Evid. Code § 1115 et seq.* applies to protect the confidentiality (Paragraph 2).

- An statement that the proceedings also constitute settlement negotiations, the confidentiality of which will also be protected by Fed. R. Evid. 408 and *Evid. Code § 1152* (Paragraph 3).

- An agreement not to disclose the existence, content, or result of the mediation to any third party (Paragraph 4).

- An agreement conferring immunity from liability for acts during or in connection with the mediation (Paragraph 5).

- An agreement that if the parties reach a settlement, the settlement will not be subject to the confidentiality provisions, so that it may be enforced (Paragraph 6).

Legal Topics:

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

Civil ProcedureAlternative Dispute ResolutionMediationsEvidenceProcedural ConsiderationsMediation Evidence

California Forms of Pleading and Practice--Annotated

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 31 MEDIATION
PART IV. FORMS

4-31 California Forms of Pleading and Practice--Annotated § 31.44

AUTHOR: Lois D. Thompson

§ 31.44 Express Waiver of Mediation Confidentiality for Single Purpose

[1] FORM Express Waiver of Mediation Confidentiality for Single Purpose

LIMITED WAIVER OF MEDIATION CONFIDENTIALITY

WHEREAS, _____ [*name and status*], and _____ [*name and status*] engaged in mediation of differences between them relating to _____ [*specify subject matter of mediation*]. That mediation conducted was in _____ [one *or* _____ (*number*) separate] session(s) on _____ [*date(s)*] by _____ [*name of mediator*], as mediator, and resulted in an agreement, dated _____ entitled _____ [*e.g.*, Spousal Support Agreement]. [Prior to the commencement of mediation, the parties entered into a separate _____ [mediation *and/or* confidentiality] agreement in which they agreed that all communications made by any of them in the course of the mediation would remain confidential and could never be introduced as evidence unless all parties so agreed in writing.]

WHEREAS, _____ [*name and status*], _____ [has made *or* intends to make] a motion the Superior Court of California, County of _____, in action number _____, entitled, _____ to correct the _____ [*describe, e.g.*, spousal support] agreement referred to above [, but has no evidence to support that motion except statements made during the mediation].

NOW THEREFORE, the parties and the mediator agree that for the limited purpose of _____ [(*describe, e.g.*, correcting the spousal support agreement], statements made by us during the course of the mediation, any notes made by the mediator, and testimony by the mediator regarding the mediation may be admitted as evidence in support of the motion to _____ [*describe, e.g.*, correct the agreement]. The aforementioned statements, notes, and recollections shall otherwise remain privileged.

_____ [*date*] _____ [*date*]

_____ _____

[*typed name and status of party*] [*typed name and status of party*]

_____ _____
[*signature of party*] [*signature of party*]

_____ [*date*]
_____, Mediator
[*typed mediator's name*]

_____
[*mediator's signature*]

[2] Use of Form

The form at [1], *above*, is an example of an express waiver of mediation confidentiality for a single limited purpose [*see Evid. Code § 1122(a)*]. It can be modified for use as needed and be put on pleading paper to be filed in the action in which the otherwise confidential testimony is to be given.

Besides the exception to mediation confidentiality to enforce any settlement agreement reached in that mediation [*see Evid. Code § 1122(a)* (discussed at *§ 31.14[2]*; *§ 31.43[1]*, paragraph 6], the parties may wish to waive confidentiality to correct or modify the settlement agreement, especially in domestic relations matters, where support, medical, or education needs and payments are likely to change as circumstances change. If it seems to be in the parties' best interests that each agree that their statements to each other (at least) during the course of the mediation that resulted in the agreement at issue are admissible to resolve any motions to correct or modify the agreement, counsel can use or adapt the form of waiver at [1], *above* [*see Evid. Code §§ 703.5, 1119(c), 1122(a)*; *Eisendrath v. Superior Court (Rogers) (2003) 109 Cal. App. 4th 351, 134 Cal. Rptr. 2d 716* (court was unwilling to create or recognize implied waiver of mediation confidentiality based on one party's filing motion, only evidence in support of which were confidential statements parties made to each other in the course of the mediation and mediator's testimony)].

The waiver must be signed by the mediator, if the mediator is to testify [*Eisendrath v. Superior Court (Rogers) (2003) 109 Cal. App. 4th 351, 361, 134 Cal. Rptr. 2d 716*] and either

- All persons who conducted or participated in the mediation [*see Evid. Code § 1122(a)(1)*]. This would include the mediator and other nonparties attending the mediation, or;

- All relevant participants to communications made, prepared by, or on behalf of fewer than all mediation participants [*see Evid. Code § 1122(a)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsEvidenceProcedural ConsiderationsMediation Evidence

California Forms of Pleading and Practice--Annotated

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 32 CONTRACTUAL ARBITRATION: AGREEMENTS AND COMPELLING ARBITRATION

4-32 California Forms of Pleading and Practice--Annotated 32.syn

AUTHOR: Michael S. Fields Editorial Consultant

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§ 32.02 Cross References

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[1] Not a Judicial Proceeding

[2] Strongly Favored by Public Policy

§ 32.12 Contractual Arbitration and Other Proceedings Compared

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[2] Contractual Arbitration and Reference Compared

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[1] General Information

[2] Incorporation of Provider's Rules

§ 32.14 Judicial Proceedings Related to Arbitration by Agreement

[1] Limited by Statute Unless Agreement Provides for Expanded Review

[2] Limitation on Demanding Arbitration Tolled While Civil Action Pending

§§ 32.15-32.19 [Reserved]

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[1] "Agreement"

[2] "Party to the Arbitration"

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[1] Dependent on Contract

[a] Contractual Principles Govern

[b] Existence of Contract

[i] As Question of Fact

[ii] Burden of Proof

[iii] Effect of Termination of Contract Containing Arbitration Agreement

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[v] Authority to Bind and Estoppel to Deny Authority

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[a] Adhesion Contract Analysis

[b] Procedural and Substantive Unconscionability Analysis

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[iii] "Substantive" Unconscionability Described

[c] Same Result Under Either Analysis

[d] Determined at Time Contract Made

[e] Policy Favors Upholding Agreement

[f] Severability of Unconscionable Provisions

[4] Enforceability When Induced by Fraud

[a] Possible Fraud Issues Distinguished

[b] Fraud in Inducement of Contract Is Subject to Arbitration Unless Parties Exclude It From Clause

[c] Fraud Going to the Arbitration Clause Itself

[i] Elements of Delay Constituting Fraud

[ii] Misrepresentation, Knowledge of Falsity, and Intent to Induce Reliance

[iii] Justifiable Reliance

[iv] Resulting Damage

[d] Fraud in Inception of Contract Is Not Subject to Arbitration

[5] Enforceability by or Against Third Party

[a] Court, Not Arbitrator, Decides Third Party's Status

[b] Medical Malpractice

[i] Heirs of Signatory Party

[ii] Loss of Consortium Claim by Spouse of Signatory Patient

[iii] Nonsignatory Parent Who Witnessed Accident

[c] Agent or Fiduciary of Signatory

[d] Introducing Securities Broker

[e] People Who Have Accepted Benefits of Underlying Agreement

[f] Shareholder's Derivative Action

[g] Equitable Estoppel Requires Signatory to Arbitrate with Nonsignatory

[6] Employee Benefits

[7] Agreement to Arbitrate as Waiver of Trial by Jury

[8] Compliance With Consumer Protection Statute

[9] Minor's Right to Disaffirm or Have Guardian Ad Litem

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[2] Statutory Claims Held Arbitrable

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[c] Examples of Agreements Held Not To Meet Minimum Standards

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[1] Goals of Act

[2] Scope of Preemption

[a] Extends to Limits of Commerce Clause

[b] Substantive Versus Procedural Provisions

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[b] Issue of Waiver Is Preliminary Question for Court

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[3] Implied Waiver

[a] Factors in Determining Implied Waiver

[b] Waiver by Acts Inconsistent With Agreement to Arbitrate

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[i] Nature of Delay That Results in Waiver

[ii] Failure to Conclude Uninsured Motorist Arbitration Within Five Years

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[i] Prejudice to Other Party or Litigation on Merits Required for Waiver

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[e] Heavy Burden of Proof to Establish Waiver

[4] Failure to Make Proper and Timely Demand

[5] Waiver Based on Insurer Misleading Insured

[6] Enforcement of Mechanics' Lien

[a] Suit to Enforce Mechanics' Lien

[i] Right to Arbitrate Not Waived When Stay Requested

[ii] Requirements for Request for Stay

[iii] Order Required for Stay

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[2] Motion to Stay Action

[a] When Motion Is Available

[b] Proper Court for Motion

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[c] Continuing Jurisdiction

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[5] Four-Year Limitation Period for Filing Action

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[7] Summary Hearing

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[b] Evidence

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[f] Severable Issues

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[iv] Joinder of Civil Case and Arbitration

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[10] Costs and Fees

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[d] Class Arbitration

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[5] Demand for Arbitration

[6] Compelling Arbitration

[a] Right to Arbitration If Agreement Exists

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[d] Attorney's Fees for Compelling Arbitration

[7] Civil Action on Arbitrable Dispute

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[9] Waiver of Arbitration In General

[10] Acts Constituting Waiver of Arbitration

[a] Action Instituted in Bad Faith

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[c] Delaying Tactics and Bad Faith

[d] Failure to Pursue Available Remedies

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[d] Dismissal From Employment

[e] Filing Application for Stay of Action to Enforce Mechanic's Lien

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[13] Federal Arbitration Act

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[5] Scope of Arbitration Defined by Agreement

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[7] Forms Available From Arbitration Service Providers

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[3] Form of Demand

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[b] Use of Form

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[d] Copies

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[f] Jurisdiction

[g] Venue

[h] Statute of Limitations

[i] Cross References

[2] Notice of Hearing on Petition to Compel Arbitration [Code Civ. Proc. § 1290.4]

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[3] Arbitration Under Uninsured Motorists Statute

[a] Terms Required by Statute

[b] Limit on Deceased Passenger's Heirs' Right to Compel

[c] Relationship to Arbitration Act

[d] Joinder With Civil Action Against Insured Motorist

[e] Time Limit for Concluding Arbitration

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[ii] Three Year Limit in Case of Related Workers' Compensation Claim

[iii] Excuses From Compliance

[iv] Calculation of Time; Denial of Untimely Petition to Compel

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[a] Only Two Issues If Clause Is No Broader Than Insurance Code § 11580.2(f)

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§ 32.93 Petition to Compel Arbitration [Code Civ. Proc. §§ 1281.2, 1290]--Uninsured Motorists Claim [Ins. Code § 11580.2(f)]--By Insured Against Insurer--Based on Physical Contact With Unidentified Motorist

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[3] Contents

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[b] Time

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[3] Contents

[4] Copies

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[b] Court's Function Is Limited to Determining Arbitrability Under Agreement

[c] Statement of Decision

[6] Cross References

§ 32.96 Order Denying Arbitration and Dismissing Proceedings

[1] FORM

[2] Use of Form

[3] Statement of Decision

[4] Cross References

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[1] FORM

[2] Use of Form

[3] Accompanying Papers

[a] Arbitration Agreement

[b] Supporting Declaration

[c] Memorandum of Points and Authorities

[4] Copies

[5] Service and Filing

[6] Cross References

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[2] Use of Form

[3] Contents

[4] Copies

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§ 32.97B Notice of Stay of Proceedings [Cal. Rules of Ct., Rule 3.650]--Judicial Council Form CM-180

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[3] Contents

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[5] Subsequent Requirements

[6] Cross References

§ 32.97C Notice of Termination or Modification of Stay [Cal. Rules of Ct., Rule 3.650]--Judicial Council Form CM-181

[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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§ 32.99 Affirmative Defense to Action--Arbitration as Sole Remedy and Not Conducted Within Time Specified

[1] FORM

[2] Use of Form

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§ 32.100 Affirmative Defense to Action--Satisfaction of Arbitration Award

[1] FORM

[2] Use of Form

[3] Allegations

§ 32.101 Motion to Set Aside Stay of Pending Action Involving Third Party and to Reverse Order Compelling Arbitration [Code Civ. Proc. §§ 1281.2(c), 1281.4]

[1] FORM

[2] Use of Form

[3] Time for Raising Issues on Which Motion Is Based

[4] Accompanying Papers

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FOOTNOTES:
(n18)Footnote *. **Michael S. Fields** is a private practitioner in Beverly Hills who has specialized in plaintiff tort litigation since 1969. He has had extensive jury trial experience in the areas of medical malpractice, product liability, employee third-party actions, vehicular collisions, and insurance bad faith actions throughout California. He has lectured and written on Kaiser-type contractual arbitrations.

California Forms of Pleading and Practice--Annotated

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 32 CONTRACTUAL ARBITRATION: AGREEMENTS AND COMPELLING ARBITRATION
PART I. SCOPE

4-32 California Forms of Pleading and Practice--Annotated § 32.01

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.01 Scope of Chapter

This chapter provides discussion and forms relating to arbitration agreements, their validity, the scope of arbitration under them [*see §§ 32.21 -32.23*], the effect of the Federal Arbitration Act [*see § 32.24*], and waiver of the right to arbitration [*see § 32.25*]. It also covers the procedure for compelling arbitration either when an action is brought on a dispute subject to arbitration [*see § 32.30* et seq.] or by means of a petition to compel arbitration [*see § 32.40* et seq.]. The relationship of arbitration and dismissal for delay in prosecution is also addressed [*see § 32.50* et seq.].

The chapter also includes a Research Guide [*see § 32.60* et seq.] and a Procedural Checklist for compelling arbitration [*see § 32.70*]. The following forms are included:

- Submission agreement [*see § 32.80*].
- Demand for arbitration [*see § 32.90*].
- Petition to compel arbitration [*see § 32.91[1]*] and notice of hearing on the petition [*see § 32.91[2]*].
- Petitions to compel arbitration of uninsured motorist claims [*see §§ 32.92, 32.93*].
- Response to petition to compel [*see § 32.94*].
- Orders compelling [*see § 32.95*] and denying [§ 32.96] arbitration.
- Motion to stay pending action until arbitration is complete [*see § 32.97*].
- Motion to set aside stay of pending action involving a third party [*see § 32.101*].
- Affirmative defenses based on existence of arbitration agreement [*see §§ 32.98, 32.99*] and on

satisfaction of arbitration award [*see § 32.100*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityContracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActCoverage & Exceptions

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Chapter 32 CONTRACTUAL ARBITRATION: AGREEMENTS AND COMPELLING ARBITRATION
PART I. SCOPE

4-32 California Forms of Pleading and Practice--Annotated § 32.02

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.02 Cross References

Additional information about contractual arbitration may be found in two other chapters:

- Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding*, provides discussion of selecting the arbitrator and the conduct of the arbitration proceeding itself.

- Ch. 34, *Contractual Arbitration: Judicial Review*, discusses the limited scope of review and the procedure for reviewing arbitration awards.

The following chapters have related information that may be of interest:

- Ch. 30, *Using Alternative Dispute Resolution*, has tactical consideration of the various types of ADR that are available, including a variety of methods in which arbitration proceedings may be structured.

- Ch. 35, *Arbitration and Conciliation of International Commercial Disputes*, discusses the procedure and provides forms for use in nonjudicial arbitration or conciliation of international commercial disputes.

- Ch. 31, *Mediation*, discusses mediation, which may, under some contracts with "med/arb" clauses, be a prerequisite to arbitration.

- Ch. 36, *Judicial Arbitration*, discusses the procedure and includes forms for use in judicial arbitration.

- Ch. 72, *Attorney Practice and Ethics*, § 72.430 et seq., discusses the procedure and provides forms for use in arbitration of attorney's fee disputes under *Bus. & Prof. Code § 6200*. An agreement for ordinary arbitration of fee disputes, signed by the client before there is such a dispute, contravenes the policy of mandatory fee arbitration, namely, that fee arbitration be voluntary for the client and mandatory

for the attorney [*see Alternative Systems, Inc. v. Carey (1998) 67 Cal. App. 4th 1034,1042-1044, 79 Cal. Rptr. 2d 567]* .

For forms for use in federal court proceedings involving arbitration, see Bender's Federal Practice Forms, ch. XI, *General Provisions*, under United States Arbitration Act (Matthew Bender).

For a general form of arbitration clause for inclusion in a contract, see California Legal Forms, Ch. 75 (Matthew Bender). In addition, many of the forms for structuring transactions that may be found in California Legal Forms include arbitration clauses.

For memoranda concerning compelling or resisting arbitration, see California Points and Authorities, Ch. 20, *Arbitration: Compelling* and Ch. 20A, *Arbitration: Resisting* (Matthew Bender). For further arbitration coverage and memoranda, see California Points and Authorities Ch. 20B, *Arbitration: Selecting Arbitrators; Aribtral Immunity* , Ch. 20C, *Arbitration: Confirming, Correcting, or Vacating the Award* , Ch. 20D *Arbitration: Dismissing* , and Ch. 20E, *Arbitration: Effect of Award* (Matthew Bender).

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PART I. SCOPE

4-32 California Forms of Pleading and Practice--Annotated §§ 32.03-32.09

AUTHOR: Michael S. Fields Editorial Consultant

[Reserved]

§§ 32.03[Reserved]

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A. Nature of Contractual Arbitration

4-32 California Forms of Pleading and Practice--Annotated § 32.10

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.10 Governing Law

Arbitration by agreement is governed generally by *Code Civ. Proc. §§ 1280-1294.2*. In addition, disclosures relating to an arbitrator's impartiality are governed by *Code Civ. Proc. §§ 170.1, 1281.85, 1281.9*. 1281.91, and 1281.95.

Various statutes govern agreements to arbitrate a variety of specific types of controversies, such as the following:

- Compensation in eminent domain proceedings [*Code Civ. Proc. §§ 1273.010-1273.050*; *see Ch. 247, Eminent Domain, § 247.10* et seq.].

- Professional negligence of health care providers [*Code Civ. Proc. § 1295*; *see* Ch. 415, *Physicians: Medical Malpractice*].

- Disputes involving public construction contracts [*Code Civ. Proc. § 1296*].

- International commercial arbitration and conciliation [*Code Civ. Proc. §§ 1297.11-1297.432*; *see* Ch. 35, *Arbitration and Conciliation of International Commercial Disputes*].

- Real estate contract disputes [*Code Civ. Proc. §§ 1298-1298.8*].

- Seed labeling [*Food & Agric. Code § 52456*; *see 3 Cal. Code Reg. §§ 3867, 3915-3918*].

- Uninsured motorist and underinsured motorist claims [*Ins. Code § 11580.2*; *see* Ch. 88A, *Automobiles: Uninsured Motorist Claims*].

- Wage claims [*Lab. Code § 229*].

- Labor contracts with talent agencies [*Lab. Code § 1700.45*; *see* Ch. 370, *Motion Pictures*].

- State employees' worker's compensation and insurance [*Lab. Code §§ 6144-6146*].

- Third party claimants' disputes with liability insurers or self-funded insureds [*see* Civ. Code § 2870 et seq. and Code Civ. Proc. § 1776 et seq.; for discussion, *see* Ch. 308, *Insurance*].

If a dispute involves interstate or foreign commerce or maritime law, *9 U.S.C. §§ 1-15* will also govern.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityInsurance LawMotor Vehicle InsuranceArbitrationPublic Contracts LawDispute ResolutionArbitration & MediationCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActCoverage & Exceptions

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4-32 California Forms of Pleading and Practice--Annotated § 32.11

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.11 Nature of Arbitration

[1] Not a Judicial Proceeding

Nonjudicial arbitration by agreement is neither a civil action [*see Code Civ. Proc. § 22* (defining action)] nor a special proceeding [*see Code Civ. Proc. § 23* (defining special proceeding)], both of which are undertaken in court. Contractual arbitration is a substitute for proceedings in court [*McRae v. Superior Court (1963) 221 Cal. App. 2d 166, 170, 34 Cal. Rptr. 346* ; *see Manhattan Loft, LLC v. Mercury Liquors, Inc. (2009) 173 Cal. App. 4th 1040, 1051-1052, 1056, 93 Cal. Rptr. 3d 457* (arbitration is not "action" under statutes for filing notice of lis pendens); *Brock v. Kaiser Foundation Hospitals (1992) 10 Cal. App. 4th 1790, 1802, 13 Cal. Rptr. 2d 678* (court-ordered discovery is not available because arbitration is not a "special proceeding"); *see also Baker v. Sadick (1984) 162 Cal. App. 3d 618, 628, 208 Cal. Rptr. 676* (arbitration is a substitute for court proceedings, but may be considered an action for purposes of *Civ. Code § 3294* to allow arbitrator to award punitive damages)]. Because an arbitration claim filed only in an agreed arbitral forum and not asserted by the claimant in any complaint, cross-complaint or petition filed in court is not a "complaint" within the meaning of *Code Civ. Proc. § 425.16*, it is not subject to a motion to strike under that section [*Sheppard v. Lightpost Museum Fund (2006) 146 Cal. App. 4th 315, 319, 323-324, 52 Cal. Rptr. 3d 821]* .

Although arbitration can take many procedural forms, a dispute resolution procedure is not an arbitration unless the following attributes are present [*Cheng-Canindin v. Renaisance Hotel Associates (1996) 50 Cal. App. 4th 676, 687-688, 57 Cal. Rptr. 2d 867* (denial of motion to compel arbitration affirmed because employer's voluntary internal problem solving procedure did not constitute arbitration); *Saeta v. Superior Court (2004) 117 Cal. App. 4th 261, 268-269, 11 Cal. Rptr. 3d 610* (termination review board hearing prescribed by employment contract was not arbitration because board was not neutral third party and lacked authority to render final and binding decision); *but see Wolsey, Ltd. v. Foodmaker, Inc. (9th Cir. 1998) 144 F. 3d 1205, 1209* (procedure that required non-binding arbitration in accordance with rules of American Arbitration Association before litigation in federal court was arbitration within scope of Federal Arbitration Act)]:

- A third party decision maker.
- A final and binding decision.
- A mechanism to assure a minimum level of impartiality with respect to the rendering of that decision.

Parties to private, nonjudicial arbitration typically expect that their dispute will be resolved without necessity for any contact with the courts [*Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 373, 36 Cal. Rptr. 2d 581, 885 P.2d 994]* . A stipulation for "binding judicial arbitration" by a sitting superior court judge may attempt to create a hybrid proceeding, but it cannot exist under California's arbitration statues, in part because a sitting judge cannot conduct a contractual arbitration [*see Heenan v. Sobati (2002) 96 Cal. App. 4th 995, 1000-1003, 117 Cal. Rptr. 2d 532* (finding that parties stipulated to bench trial waiving court reporter and right of appeal)].

[2] Strongly Favored by Public Policy

Public policy strongly favors arbitration as a speedy and relatively inexpensive means of dispute resolution [*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street (1983) 35 Cal. 3d 312, 322, 197 Cal. Rptr. 581, 673 P.2d 251]* . It is an accepted and favored method of resolving disputes, praised by the courts as an expeditious and economical method of relieving overburdened civil calendars [*Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 706-707, 131 Cal. Rptr. 882, 552 P.2d 1178* (the first California Supreme Court case to state this premise)].

One of the rare exceptions to this policy is an agreement to arbitrate future child support. An agreement to arbitrate child support is not binding on the children or the court, and is void to the extent it purports to deprive the court of jurisdiction to modify child support or to review future child support awards. Parties can validly agree to arbitrate future child support, but the agreement, or order approving it, should reserve jurisdiction to the court to review any results. Thus, an arbitration award modifying or establishing child support can not be confirmed or vacated in accordance with the contractual arbitration statutes (*Code Civ. Proc. §§ 1285-1287.6*) [*In re Marriage of Bereznak (2003) 110 Cal. App. 4th 1062, 1068-1070, 2 Cal. Rptr. 3d 351* ; *compare Fam. Code § 2554* (judicial arbitration of character, valuation, and division of property)].

The decision to arbitrate disputes is motivated in part by the desire to avoid delay and cost of judicial trial and appeals [*Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 373, 36 Cal. Rptr. 2d 581, 885 P.2d 994* ; *see McRae v. Superior Court of Los Angeles County (1963) 221 Cal. App. 2d 166, 170-171, 34 Cal. Rptr. 346]* . Thus, the courts disfavor litigation of preliminary issues before arbitration because it can cause serious delay and confusion, thus robbing the arbitration procedure of much of its value to the parties [*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street (1983) 35 Cal. 3d 312, 323, 197 Cal. Rptr. 581, 673 P.2d 251* ; for further discussion, *see § 32.43[8]*]. Similarly, because the parties expect the arbitrator's award to be the end of the dispute, judicial review of arbitration awards is very limited so as to ensure arbitral finality [*Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 373, 36 Cal. Rptr. 2d 581, 885 P.2d 994* ; *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 10, 10 Cal. Rptr. 2d 183, 832 P.2d 899* ; for further discussion, *see § 34.19*].

The Supreme Court has warned against "procedural gamesmanship" aimed at undermining the advantages of arbitration [*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street (1983) 35 Cal. 3d 312, 323, 197 Cal. Rptr. 581, 673 P.2d 251]* .

The general rules relative to arbitration and arbitration agreements provided in *Code Civ. Proc. §§ 1280-1294.2* reflect the strong legislative policy favoring arbitration [*Morris v. Zukerman (1967) 257 Cal. App. 2d 91, 95, 64 Cal. Rptr. 714]* .

The right to arbitration, however, depends on contract, and there is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate [*Engineers & Architects Assn. v. Community Development Dept. (1994) 30 Cal. App. 4th 644, 653, 35 Cal. Rptr. 2d 800* ; *Balandran v. Labor Ready, Inc. (2004) 124 Cal. App. 4th 1522, 1529-1530* Cal. Rptr. 3d 441; *In re Tobacco Cases I (2004) 124 Cal. App. 4th 1095, 1112, 21 Cal. Rptr. 3d 875* ; *see Mayhew v. Benninghoff (1997) 53 Cal. App. 4th 1365, 1371, 62 Cal. Rptr. 2d 27* ; *City of Vista v. Sutro & Co. (1997) 52 Cal. App. 4th 401, 407, 60 Cal. Rptr. 2d 488* (holding that agreement did exist)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActCoverage & Exceptions

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4-32 California Forms of Pleading and Practice--Annotated § 32.12

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.12 Contractual Arbitration and Other Proceedings Compared

[1] Contractual Arbitration and Judicial Arbitration Compared

The general arbitration statutes (*Code Civ. Proc. § 1280 et seq.*) govern private arbitration conducted pursuant to an agreement between the parties, whereas the Judicial Arbitration Act (*Code Civ. Proc. § 1141.10 et seq.*) provides for "court-annexed" arbitration. The provisions of the two statutory schemes are mutually exclusive and independent of each other [*Porreco v. Red Top RV Center (1989) 216 Cal. App. 3d 113, 118-119, 264 Cal. Rptr. 609* (citing *Code Civ. Proc. § 1141.30*)]. For discussion, procedure, and forms for use in judicial arbitrations, *see* Ch. 36, *Judicial Arbitration* .

Other differences include the following [*Mercury Insurance Group v. Superior Court (1998) 19 Cal. 4th 332, 334-345, 79 Cal. Rptr. 2d 308, 965 P.2d 1178]* :

- Contractual arbitration arises solely out of agreement between the parties, whereas judicial arbitration may be imposed on the parties litigant, whether or not they agree [*see Code Civ. Proc. § 1141.11*].

- Contractual arbitration allows the parties to the arbitration agreement to select the arbitrator, whereas in judicial arbitration, absent a stipulation, the parties must select an arbitrator from a list (equal to the number of adverse sides plus one) provided to them by the administrator [*Code Civ. Proc. § 1141.18*; *see Cal. Rules of Ct., Rule 3.815(b)*].

- Contractual arbitration allows the parties to an arbitration agreement to define the powers of the arbitrator, whereas judicial arbitration defines the arbitrator's powers for the parties litigant by operation of law [*Code Civ. Proc. § 1141.19*; *Cal. Rules of Ct., Rule 3.824(a)*].

- Parties to private arbitration bear the cost of arbitration while judicial arbitration is at public expense.

- Private arbitration allows discovery only in personal injury cases unless the parties' agreement provides otherwise, while parties to judicial arbitration have full discovery rights [*compare Cal. Rules of Ct., Rule 3.822 with Code Civ. Proc. § 1283.1*].

- Private arbitration generally dispenses with the rules of evidence while judicial arbitration follows those rules with certain modifications [*compare Code Civ. Proc. § 1282.2(d) with Cal. Rules of Ct., Rule 3.823(b)*] [*Porreco v. Red Top RV Center (1989) 216 Cal. App. 3d 113, 119-120, 264 Cal. Rptr. 609]* .

- Contractual arbitration generally frees the arbitrator from making a decision strictly in accordance with the law, whereas judicial arbitration does not [*cf. Cal. Rules of Ct., Rule 3.824(a)(7)* (providing that, in judicial arbitration, the arbitrator has the power "to decide the law and facts of the case and make an award accordingly")].

- Contractual arbitration generally results in a binding and final decision, whereas judicial arbitration generally does not [*Code Civ. Proc. § 1141.20(b)*; *Cal. Rules of Ct., Rule 3.826(a)*].

[2] Contractual Arbitration and Reference Compared

[a] Distinctions

A general reference occurs when the court, with the parties' consent, directs a referee to try any or all of the issues. Although the court appoints the referee, the person chosen may by the result of the parties' agreement. The hearing before the referee is conducted in the same manner as it would be before a court under the rules of evidence applicable to judicial proceedings. In the case of a general reference, the referee must prepare a statement of decision [*Sy First Family Ltd. Partnership v. Cheung (1999) 70 Cal. App. 4th 1334, 1341, 83 Cal. Rptr. 2d 340* (citing *Code Civ. Proc. §§ 638, 640*; *Evid. Code § 300*); *see also Nat. Union Fire Ins. Co. v. Nationwide Ins. (1999) 69 Cal. App. 4th 709, 715-716, 82 Cal. Rptr. 2d 16* (as to rules of evidence)]. The trial court independently reviews the decision of a referee [*Nat. Union Fire Ins. Co. v. Nationwide Ins. (1999) 69 Cal. App. 4th 709, 716, 82 Cal. Rptr. 2d 16]* .

Arbitration is voluntary. The parties chose the neutral decision maker. Unless the parties agree otherwise, the rules of evidence and judicial procedure do not apply. Arbitrators are not bound to decide cases in accordance with the law and may base a decision on principles of justice and equity; thus, it is inappropriate for a court to review an arbitration decision [*Sy First Family Ltd. Partnership v. Cheung (1999) 70 Cal. App. 4th 1334, 1341-1344, 83 Cal. Rptr. 2d 340]* .

[b] Label Given by Parties Is Not Controlling

The title or label given by the parties to a stipulation or agreement is not controlling [*see Sy First Family Ltd. Partnership v. Cheung (1999) 70 Cal. App. 4th 1334, 1342-1344, 83 Cal. Rptr. 2d 340]* . Thus, for example, in *Sy First Family Ltd.* the court determined that an ambiguous agreement, which used the term "Reference" in its title and cited *Code Civ. Proc. § 638*, was nonetheless a stipulation for arbitration, in part because it provided for trial under American Arbitration Association's Commercial Arbitration Rules. As an additional important factor, the court noted that at the arbitration hearing the parties expressly agreed with the determination of the panel hearing the case that they would they would proceed as if it were arbitration [*see Sy First Family Ltd. Partnership v. Cheung (1999) 70 Cal. App. 4th 1334, 1342, 83 Cal. Rptr. 2d 340]* . Similarly, in *Nat. Union Fire Ins. Co.*, because a stipulation for "binding arbitration with right to appeal" was a stipulation for reference in all but name, the trial court's nunc pro tunc order correcting the stipulation to be one for reference was proper and preserved the parties' right to appeal [*see Nat. Union Fire Ins. Co. v. Nationwide Ins. (1999) 69 Cal. App. 4th 709, 715-716, 82 Cal. Rptr. 2d 16* (declaring that there is no such creature as

binding arbitration with right to appeal)].

[3] Trial by Judge Pro Tem

Cal. Const., art. VI, § 21 provides for the appointment as a temporary judge, of a person who is a member of the State Bar and who takes the oath of office, to try a case to final determination and to render a judgment. The "judge pro tem" must be appointed by the parties litigant by stipulation. Although the California Rules of Court call for the stipulation to be written and submitted for approval to the presiding judge or to the supervising judge of a branch court [*Cal. Rules of Ct., Rule 2.831(a)*], stipulations for judges pro tem may also be implied by the parties' conduct [*Estate of Fain (1999) 75 Cal. App. 4th 973, 988, 89 Cal. Rptr. 2d 618* ; *In re Horton (1991) 54 Cal. 3d 82, 91-92, 284 Cal. Rptr. 305, 813 P.2d 1335]* . In *Estate of Fain*, appellants' did not contest the judge pro tem's authority until after he had issued a statement of decision that was adverse to them. Thereafter, the supervising probate judge reviewed the record, including appellant's "petition to vacate binding arbitration award," and issued what amounted to a post hearing order authorizing the judge pro tem to sit. A judge pro tem has more power that a special referee, but like a special referee, can render a statement of decision. For comparison of the powers of a judge pro tem and a referee, see Ch. 317, *Judges* , Pt. II.

[4] Relationship Between Contractual Arbitration and Mandatory Fee Arbitration

An arbitration provision in a written retainer agreement between attorney and client is generally enforceable under the California Arbitration Act [*Code Civ. Proc. § 1280 et seq.*] absent the client's exercise of the statutory right to mandatory fee arbitration [*see Bus. & Prof. Code § 6200 et seq.* (MFAA)]. A client who waives MFAA rights by filing a malpractice action may then be compelled to arbitrate that malpractice claim and any fee dispute in accordance with the arbitration provision in the retainer agreement and *Code Civ. Proc. § 1280 et seq.* [*Fagelbaum & Heller LLP v. Smylie (2009) 174 Cal. App. 4th 1351, 1361-1362, 95 Cal. Rptr. 3d 252* ; *Aguilar v. Lerner (2004) 32 Cal. 4th 974, 983-986, 12 Cal. Rptr. 3d 287, 88 P.3d 24]* . Similarly, a client waives his or her rights under the MFAA by failing to request arbitration within 30 days after receipt of the notice required by *Bus. & Prof. Code § 6201(a)*. Thus, a client who does not request arbitration under the MFAA within 30 days of receiving the statutory notice can be compelled to arbitrate a fee dispute under *Code Civ. Proc. § 1280 et seq.* in accordance with an arbitration provision in the retainer agreement [*Ervin, Cohen & Jessup, LLP v. Kassel (2007) 147 Cal. App. 4th 821, 826-830, 54 Cal. Rptr. 3d 685]* .

Both types of arbitration can be coordinated in the attorney-client agreement. For example, an agreement could provide that if nonbinding arbitration under the Mandatory Fee Arbitration provisions [*Bus. & Prof.Code § 6200 et seq.*] was chosen and either party rejected that award, the matter would then proceed to binding arbitration under *Code Civ. Proc. § 1280 et seq.* In that case, if the party rejecting the MFAA award instituted an action pursuant to which binding arbitration was compelled, and then dismissed that action, the MFAA award would be reinstated under a rule designed to prevent "mischievous lawyering:" abandonment of a de novo proceeding by the party who has invoked it to supersede an MFAA award may be treated as a retraction of that rejection of the award, rather than as an effective escape from it [*Corell v. Law Firm of Fox & Fox (2005) 129 Cal. App. 4th 531, 537-538, 28 Cal. Rptr. 3d 310]* . Mandatory fee arbitration is discussed in *Ch. 72, Attorney Practice and Ethics, § 72.430* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewLegal EthicsClient RelationsAttorney FeesGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureJudicial OfficersReferencesCivil ProcedureAlternative Dispute ResolutionMandatory ADR

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AUTHOR: Michael S. Fields Editorial Consultant

§ 32.13 Arbitration Services Providers

[1] General Information

There are numerous providers of arbitration services. Two of the commonly used providers in California are the American Arbitration Association, JAMS/Endispute, and Los Angeles County Bar Association Dispute Resolution Services, Inc.

The American Arbitration Association ("Association") is a private nonprofit organization founded in 1926 to foster the study of arbitration in all its aspects, and to perfect its techniques and procedures and advance generally the science of arbitration.

The Association has formulated a comprehensive set of specialized rules applicable to arbitration of various types of controversies. These rules include:

- Accident Claims Rules for arbitration of disputes involving a motor vehicle liability insurance policy.

- Construction Industry Arbitration Rules for arbitration of disputes under construction contracts.

- Voluntary Labor Arbitration Rules and Expedited Labor Arbitration Rules for arbitration of labor disputes.

- Commercial Arbitration Rules for arbitration of disputes under commercial contracts.

The American Arbitration Association does not act as arbitrator. Its function is to administer arbitrations in accordance with the agreement of the parties and to maintain panels from which arbitrators may be chosen by the parties. Once

chosen, the arbitrator decides the issues and his or her award is final and binding.

[2] Incorporation of Provider's Rules

The rules of an arbitration services provider may be incorporated by reference into any contract, and when they are, the provider becomes the administrator of any arbitration initiated pursuant to the agreement [*see Maggio v. Windward Capital Management Co. (2000) 80 Cal. App. 4th 1210, 1215, 96 Cal. Rptr. 2d 168* (agreement to conduct arbitration in accordance with American Arbitration Association Commercial Dispute Resolution Procedures means arbitration must take place before that body)]. Incorporation of the entire scheme for arbitration established by the rules of the American Arbitration Association is comprehensive enough to be self-executing, so that a court order to compel arbitration would not be required [*Kustom Kraft Homes v. Leivenstein (1971) 14 Cal. App. 3d 805, 811, 92 Cal. Rptr. 650]* .

Incorporating the possibility of a future rule by reference does not meet the basic requirements for a valid incorporation by reference under simple state contract law [*Gilbert Street Developers, LLC v. La Quinta Homes, LLC (2009) 174 Cal. App. 4th 1185, 1194, 94 Cal. Rptr. 3d 918*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADR

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4-32 California Forms of Pleading and Practice--Annotated § 32.14

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.14 Judicial Proceedings Related to Arbitration by Agreement

[1] Limited by Statute Unless Agreement Provides for Expanded Review

Parties to private, nonjudicial arbitration typically expect their dispute to be resolved without necessity for any contact with the courts [*Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 373, 36 Cal. Rptr. 2d 581, 885 P.2d 994* ; *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 9, 10 Cal. Rptr. 2d 183, 832 P.2d 899]* . Judicial proceedings surrounding the arbitration itself are restricted by the arbitration statutes to:

- The enforcement of the agreement to arbitrate [*see Code Civ. Proc. § 1281 et seq.*; for discussion, *see § 32.30* et seq.].

- The review of the merits of the award to the extent that the arbitration agreement properly provides for it [*see Cable Connection, Inc. v. DirecTV, Inc. (2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586* ; for discussion, *see Ch. 34, Contractual Arbitration: Judicial Review, § 34.10[2]*].

- The enforcement of the award made following arbitration [*see Code Civ. Proc. § 1285 et seq.*; for discussion, *see Ch. 34, Contractual Arbitration: Judicial Review, § 34.10* et seq.].

For discussion of the very limited grounds for vacating an award, see *Ch. 34, Contractual Arbitration: Judicial Review, § 34.19*.

[2] Limitation on Demanding Arbitration Tolled While Civil Action Pending

By statute effective January 1, 2007, if an arbitration agreement requires that arbitration of a controversy be demanded or initiated by a party to the arbitration agreement within a stated period of time, the commencement of a civil action by that party based upon that controversy, within that period of time, tolls the applicable time limitations contained in the agreement, from the date the civil action is commenced until 30 days after a final determination by the court hearing the

action that the party is required to arbitrate the controversy, or 30 days after the final termination of the civil action, whichever date occurs first [*see Code Civ. Proc. § 1281.12*; for discussion, *see § 32.40[1][b]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute ResolutionJudicial Review

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§§ 32.15[Reserved]

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B. Arbitration Agreement

4-32 California Forms of Pleading and Practice--Annotated § 32.20

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.20 Definitions

[1] "Agreement"

As used in *Code Civ. Proc. § 1280 et seq.* (governing contractual arbitration), the term "agreement" includes but is not limited to agreements that provide for valuations, appraisals, and similar proceedings and agreements between employers and employees or between their respective representatives [*Code Civ. Proc. § 1280(a)*; *but see Coopers & Lybrand v. Superior Court (1989) 212 Cal. App. 3d 524, 537-539, 260 Cal. Rptr. 713* (agreement for valuation is not necessarily arbitration; intent of parties and scope of third party's charge is determinative)]. The term "written agreement" is deemed to include a written agreement that has been extended or renewed by an oral or implied agreement [*Code Civ. Proc. § 1280(f)*], but not one modified or revised by an oral agreement [*Magness Petroleum Company v. Warren Resources of California, Inc. (2002) 103 Cal. App. 4th 901, 908-909, 127 Cal. Rptr. 2d 159]* .

[2] "Party to the Arbitration"

The term "party to the arbitration" means a party to the arbitration agreement [*Code Civ. Proc. § 1280(e)*]:

- Who seeks to arbitrate a controversy pursuant to the agreement;
- Against whom such arbitration is sought pursuant to the agreement; or
- Who is made a party to such arbitration by order of the neutral arbitrator on such party's application, on the application of any other party to the arbitration, or on the neutral arbitrator's own determination. A person who is not a party to the arbitration agreement may not be made a party to the arbitration [*see Unimart v. Superior Court (1969) 1 Cal. App. 3d 1039, 1045, 82 Cal. Rptr. 249]* .

[3] "Controversy"

The term "controversy" means any question arising between the parties to an agreement whether such question is one of law or of fact or both [*Code Civ. Proc. § 1280(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration Clauses

California Forms of Pleading and Practice--Annotated

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 32 CONTRACTUAL ARBITRATION: AGREEMENTS AND COMPELLING ARBITRATION
PART II. LEGAL BACKGROUND
B. Arbitration Agreement

4-32 California Forms of Pleading and Practice--Annotated § 32.21

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§ 32.21 Enforceability of Agreement to Arbitrate

[1] Dependent on Contract

[a] Contractual Principles Govern

Private arbitration is a matter of agreement between the parties and is governed by contract law [Platt Pacific, Inc. v. Andelson (1993) 6 Cal. 4th307, 313, *24 Cal. Rptr. 2d 597, 862 P.2d 158* ; *see Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 8, 10 Cal. Rptr. 2d 183, 832 P.2d 899]* . A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable, and irrevocable, except on such grounds as exist for revocation of any contract [*Code Civ. Proc. § 1281*]. Thus, parties may agree to submit an existing controversy to arbitration [for a form of agreement, *see § 32.80*], or submit future disputes to arbitration [for general forms of agreement, *see* California Legal Forms, Ch. 75 (Matthew Bender); many of the forms of agreements on various topics in California Legal Forms also include arbitration clauses]. A minor may avoid arbitration by disaffirming the agreement containing the arbitration clause [*see Berg v. Traylor (2007) 148 Cal. App. 4th 809, 812, 816-820, 56 Cal. Rptr. 3d 140* , discussed in [9], *below*].

The parties may agree as to the rules that govern their arbitration. Their agreement may alter the usual scope of review. The parties may obtain judicial review of the merits by express agreement in excess of that provided by statute by using appropriate explicit language [*Cable Connection, Inc. v. DirecTV, Inc. (2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586* (disapproving, to extent they conflict with opinion expressed therein); *Crowell v. Downey Community Hospital Foundation (2002) 95 Cal. App. 4th 730, 735, 115 Cal. Rptr. 2d 810* ; *Oakland-Alameda County Coliseum Authority v. CC Partners (2002) 101 Cal. App. 4th 635, 645, 124 Cal. Rptr. 2d 363* ; *Old Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co. (1996) 45 Cal. App. 4th 631, 638-639, 53 Cal. Rptr. 3d 50*)]. For further discussion of contract provisions for expanded review, see *Ch. 34, Contractual Arbitration: Judicial Review, § 34.10[2]*. The parties' agreement may also provide for review by a second arbitrator to determine compliance with applicable law, discussed in *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.28[7]*.

If the contract provides for arbitration under rules which specify that the arbitrator determines the existence, scope, or validity of the arbitration agreement, then the arbitrator--not a court--makes the evaluation under *Code Civ. Proc. § 1281.2* [*see Dream Theater, Inc. v. Dream Theater (2004) 124 Cal. App. 4th 547, 557, 21 Cal. Rptr. 3d 322* (agreement for arbitration in accordance with AAA Commercial Arbitration Rules)].

[b] Existence of Contract

[i] As Question of Fact

Whether a contract exists is a question of fact [*see Cochran v. Rubens (1996) 42 Cal. App. 4th 481, 485, 49 Cal. Rptr. 2d 672* (book account)]. For example, an arbitration clause in a contract for medical services governs all subsequent open-book transactions for which the contract was signed until or unless rescinded by written notice within 30 days of signature [*Code Civ. Proc. § 1295(c)*; *but see Rodriguez v. Superior Ct. (2009) 176 Cal. App. 4th 1461, 1469-1470, 98 Cal. Rptr. 3d 728* (expiration of 30-day revocation period necessary for valid arbitration agreement)]. However, whether the book account is open or closed is a question of fact [*see Cochran v. Rubens (1996) 42 Cal. App. 4th 481, 485, 49 Cal. Rptr. 2d 672* (book account)].

ILLUSTRATION:

Book Account for Medical Services. A patient's family doctor refers the patient to an orthopedic specialist for an ankle problem in 1990. The patient signs an arbitration agreement prior to treatment. After treatment, the patient does not return for a follow-up appointment. The bill is paid in 1990. The patient has no further contact with the specialist until he is again referred to the specialist by the family doctor in 1993, at which time the specialist performs surgery. The patient brings an action against the specialist, alleging that surgery was negligently performed. The specialist responds with a petition to compel arbitration based on the 1990 agreement. Does the agreement apply? No, not in this case. In *Cochran v. Rubens (1996) 42 Cal. App. 4th 481, 49 Cal. Rptr. 2d 672* , the appellate court held that the trial court's finding that the 1990 book account was closed was supported by substantial evidence, and that therefore *Code Civ. Proc. § 1295(c)* did not extend the arbitration agreement to the 1993 treatment. The court focused on the absence of an ongoing doctor-patient relationship, finding that neither party expected to have future transactions [*Cochran v. Rubens (1996) 42 Cal. App. 4th 481, 486-487, 49 Cal. Rptr. 2d 672* (distinguishing *Gross v. Recabaren (1988) 206 Cal. App. 3d 771, 778, 253 Cal. Rptr. 820* , in which the court had found evidence of an ongoing relationship despite an 18-month lapse in contact)].

[ii] Burden of Proof

The party seeking to compel arbitration does not have to introduce the agreement into evidence or provide the court with anything more than a copy or recitation of its terms. Under *Cal. Rules of Ct., Rule 3.1330*, petitioner need only allege the *existence* of an agreement and support the allegation as provided in Rule 3.1330. Once the petitioners have alleged that the agreement exists, the burden shifts to the party resisting arbitration to prove the falsity of the purported agreement [*Condee v. Longwood Management Corp (2001) 88 Cal. App. 4th 215, 105 Cal. Rptr. 2d 597]* .

[iii] Effect of Termination of Contract Containing Arbitration Agreement

An arbitration clause in a contract that has been terminated can still require arbitration of a dispute that arose under the contract while the agreement was still in force [*see, e.g., Ajida Technologies, Inc. v. Roos Instruments, Inc. (2001) 87 Cal. App. 4th 534, 545, 104 Cal. Rptr. 2d 686* ; *Coast Plaza Doctors Hospital v. Blue Cross of California (2000) 83 Cal. App. 4th 677, 685-687, 99 Cal. Rptr. 2d 809* (facts or transactions complained of occurred while agreement was in force and related to "problem or dispute" which arose under or concerned the terms of the agreement)].

ILLUSTRATION:

Arbitration Under Terminated Contract. A joint venture agreement contemplated that both parties

> would share ownership of the technology they developed for five years after termination of the agreement, with certain rights and responsibilities in marketing that technology, including audit rights. The agreement required arbitration of all disputes arising under it. An arbitration award determining a dispute arising out of that agreement found the agreement to have been terminated by mutual consent of the parties and required one party to diligently develop and market the product and make royalty payments to the other party. The award also required the parties to arbitrate any further disputes arising out of that award. Was the requirement for future arbitration permissible? Yes. The agreement required arbitration of disputes arising during the joint ownership period following its termination. Further, the fact that an arbitration award contemplates additional future proceedings does not necessarily destroy its character as "final and binding" [*Ajida Technologies, Inc. v. Roos Instruments, Inc. (2001) 87 Cal. App. 4th 534, 545-548, 104 Cal. Rptr. 2d 686]* .

Usually, a temporal test is not the applicable standard. For example, an employment agreement contained an arbitration provision that covered disputes concerning enforcement or interpretation of the agreement; this provision encompassed tort claims for interference with prospective advantage and defamation based on employer's conduct *after* the employee's termination. Because the tort claims were based on expectation of future income from the employee's patients who consulted him in his capacity as defendant's employee, the employment agreement informed the extent of any economic interest [*Buckhorn v. St. Jude Heritage Med. Group (2004) 121 Cal. App. 4th 1401, 1407-1408, 18 Cal. Rptr. 3d 215]* .

[iv] Meeting of the Minds

To form an enforceable contract, the parties' consent must be free [*Civ. Code § 1565*]. There must also be mutual assent, which usually rests on an offer and acceptance as evidenced by objective manifestations, not the subjective intent of any individual involved [*Civ. Code §§ 1550, 1565, 1580*; *Lopez v. Charles Schwab & Co., Inc. (2004) 118 Cal. App. 4th 1224, 1232-1234, 13 Cal. Rptr. 3d 544* ; *see Mitri v. Arnel Management Co. (2007) 157 Cal. App. 4th 1164, 1170-1173, 69 Cal. Rptr. 3d 223* (neither acknowledgement of receipt of employee handbook discussing company's arbitration program without any signature by employee agreeing to arbitrate nor employee's continuing to work after receipt of handbook was sufficient to demonstrate mutual assent)]. One party's attempt to unilaterally rescind an explicit rejection of an offer is likely to be ineffective because a reasonable person in the rejected party's position will not understand that a contract was formed [*Lopez v. Charles Schwab & Co., Inc. (2004) 118 Cal. App. 4th 1224, 1233-1234* Cal. Rptr, 3d 544 (brokerage that sent customer a rejection letter, only briefly opened account, and never funded it did not have enforceable contractual, or any, relationship with customer)]. Apparent consent is not free when obtained, among other ways, through duress, menace, which includes threat of criminal prosecution, or fraud [*Civ. Code § 1567*; *Bayscene Resident Negotiators v. Bayscene Mobilehome Park (1993) 15 Cal. App. 4th 119, 127, 129, 18 Cal. Rptr. 2d 626]* .

[v] Authority to Bind and Estoppel to Deny Authority

The parties to the arbitration agreement must be capable of contracting or no contract will be formed. Thus, a patient admitted to a nursing home while comatose who had not previously signed a durable power of attorney could not authorize her adult children to enter into an arbitration agreement on her behalf. Further, nothing in *Health & Safety Code §§ 1418.8, 1599.65* or *22* Cal. Code Reg. § 72527 empowered the children to bind their mother to a contract [*Pagarigan v. Libby Care Center, Inc. (2002) 99 Cal. App. 4th 298, 303, 307-308, 120 Cal. Rptr. 2d 892]* . Similarly, a spouse without a power of attorney has no power to bind the spouse being admitted to a residential care or skilled nursing facility to arbitration [*Warfield v. Summerville Senior Living, Inc. (2007) 158 Cal. App. 4th 443, 447-449, 69 Cal. Rptr. 3d 783* ; *see also Flores v. Evergreen at San Diego, LLC (2007) 148 Cal. App. 4th 581, 586-594, 55 Cal. Rptr. 3d 823* (considering several statutes, including *Health & Safety Code §§ 1599.63, 1599.81*, which do not confer authority to agree to arbitration)].

Of course, an attorney in fact under a durable power of attorney has authority to enter into arbitration agreements incidental to admission of the person who executed the power to a residential care facility [*Hogan v. Country Villa Health Services (2007) 148 Cal. App. 4th 259, 263-264, 55 Cal. Rptr. 3d 450* ; *Garrison v. Superior Court (2005) 132 Cal. App. 4th 253, 256, 265-267, 33 Cal. Rptr. 3d 350* (health care powers in form set forth in *Prob. Code § 4701* or reciting it was created under *Prob. Code § 4600 et seq*)]. For discussion of ways in which mutual consent is vitiated and of defenses to the enforcement of contracts generally, see Ch. 140, *Contracts* and Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* . Regarding arbitration clauses induced by fraud, see *§ 32.21[4]*.

In the absence of express authorization of counsel to sign a binding contract, a client is bound by an arbitration agreement signed by his or her counsel only if the client consented to or ratified the agreement. An attorney at law, merely by virtue of his or her employment as such, has no apparent authority to bind a client to an agreement for arbitration. When a client engages an attorney to litigate in a judicial forum, the client has a right to be consulted, and the client's consent obtained, before the dispute is shifted to another, and quite different, forum. A party may raise the issue of his or her lack of consent to the attorney's action at various stages of the proceedings [*Toal v. Tardif (2009) 178 Cal. App. 4th 1208, 1221 & n.9, 101 Cal. Rptr. 3d 97*].

An agreement to arbitrate and the resultant award can be confirmed on the basis of estoppel. Thus, a party is estopped to deny the promise of its apparent agent, made at a settlement conference, to pay the full amount of a binding arbitration award. When the issue involves insurance coverage, promissory estoppel will not support an award for punitive damages [*CalFarm Ins. Co. v. Krusiewicz (2005) 131 Cal. App. 4th 273, 276-277, 284-286, 31 Cal. Rptr. 3d 619]* .

[vi] Signatures and Effect of Provision Requiring Signatures of All Parties

Parties are free to draft their contract so as not to give effect to an arbitration clause in a contract unless the clause itself is accepted by all parties [*Marcus & Millichap Real Estate Investment Brokerage Co. (1998) 68 Cal. App. 4th 83, 89-91, 93, 80 Cal. Rptr. 2d 147*]. Likewise, where the evidence shows that a contract as a whole is conditioned upon execution by all parties, the contract is not binding on any signatory until it is signed by all [*Fagelbaum & Heller LLP v. Smylie (2009) 174 Cal. App. 4th 1351, 1365, 95 Cal. Rptr. 3d 252* ; *Angell v. Rowlands (1978) 85 Cal. App. 3d 536, 542, 149 Cal. Rptr. 574*]. As with the general rule [*see 32.21[1][b][ii]*], the signatory resisting enforcement of the contract or clause cannot escape liability without affirmatively establishing that the signatures of all parties were contemplated as being a condition precedent to the validity of the contract [*Fagelbaum & Heller LLP v. Smylie (2009) 174 Cal. App. 4th 1351, 1365, 95 Cal. Rptr. 3d 252* ; *Angell v. Rowlands (1978) 85 Cal. App. 3d 536, 541, 149 Cal. Rptr. 574*].

The Court of Appeals for the Second District, Division Four has allowed a party signing a contract who did not consent, in that the party did not initial the arbitration clause of the agreement, to arbitration of claims against that party to enforce arbitration against another party to the agreement who did initial the arbitration clause of the agreement, where neither the agreement's nor the clause's binding effect was conditioned upon mutual acceptance of the arbitration clause [*Grubb & EllisCo. v. Bello (1993) 19 Cal. App. 4th 231, 238, 241, 23 Cal. Rptr. 2d 281*]. However, the Court of Appeals for the First District, Division Two has found an agreement that required arbitration by only one party to be, in combination with other one-sided provisions, unconscionable and, therefore, unenforceable [*Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1538-1539, 60 Cal. Rptr. 2d 138* (criticizing *Bello*); for discussion of unconscionability of clauses and agreements, see *§ 32.21[3]*].

A multiparty contract that does not include a provision barring the binding effect of the entire agreement until all parties to it have signed does not bar parties that have signed the agreement from enforcing it against each other [*Fagelbaum & Heller LLP v. Smylie (2009) 174 Cal. App. 4th 1351, 1364-1365, 95 Cal. Rptr. 3d 252*].

[b.1] Unilateral Addition of Arbitration Clause to Existing Agreement

General contract principles also apply to determine whether an arbitration provision added unilaterally after the primary contract is made, actually becomes part of the primary contract [*Badie v. Bank of America (1998) 67 Cal. App. 4th 779, 790, 797-807, 79 Cal. Rptr. 2d 273]* . Under those principles, there must first be a provision in the primary contract that allows one party to unilaterally change the terms of the agreement. Then, the "change in terms" clause is examined to determine whether addition of a requirement to arbitrate disputes is within the scope of the things that party was allowed to unilaterally change [*compare Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 921-924, 702 P.2d 503* (bank's imposition of NSF charge was authorized by provision that allowed banks to unilaterally change its "rules, regulations, practices, and charges," *with Badie v. Bank of America (1998) 67 Cal. App. 4th 779, 797-807, 79 Cal. Rptr. 2d 273]* . Similarly, if the primary agreement provides it can only be modified or amended by an agreement in writing, no unilateral change can be made to add an arbitration provision [*see Mitchell v. American Fair Credit Assn., Inc. (2002) 99 Cal. App. 4th 1345, 1348, 1359-1360, 122 Cal. Rptr. 2d 193* (consumers who did not sign modification could not be compelled to arbitrate)]. Thus, a requirement for arbitration added in a "bill stuffer" was not binding on credit card holders because it was beyond the scope of what customers would reasonably believe the bank intended by reserving to itself the power to change terms. The power was reasonably interpreted to reserve to the bank the power to change financial terms, such as interest rate and service charges, but not to deprive cardholders of the right to a jury trial to resolve disputes with the bank [*Badie v. Bank of America (1998) 67 Cal. App. 4th 779, 802-803, 79 Cal. Rptr. 2d 273]* .

In another case considering unilateral modification of a credit card agreement to add an arbitration provision, the court of appeal held the arbitration provision could not be enforced against a card holder who informed the issuer that he would not be bound by the arbitration provision and thereafter did not use the credit card [*Shea v. Household Bank (SB) (2003) 105 Cal. App. 4th 85, 90, 129 Cal. Rptr. 2d 387]* . The agreement was governed by federal and Nevada law. Federal law, specifically Truth-in-Lending regulations, appear to defer to state law with respect to the definition of "use" sufficient to constitute the customer's acceptance of changed terms [*see 12 C.F.R. § 226.9(c)(1)*, Supp. I.; *Shea v. Household Bank (SB) (2003) 105 Cal. App. 4th 85, 88-89, 129 Cal. Rptr. 2d 387]* . Nevada law requires "actual use" before a customer is deemed to have accepted the initial terms of a credit card agreement. The court of appeal found it unlikely that the Nevada legislature would have required actual use by a consumer to accept the original terms of a credit card agreement but settled for something less definite or overt to signify acceptance of an amendment to that agreement. Thus, the customer was not required to pay off the balance owing to "opt out" of the arbitration provision [*Shea v. Household Bank (SB) (2003) 105 Cal. App. 4th 85, 90, 129 Cal. Rptr. 2d 387]* . Although no argument was made that it was unconscionable not to provide a way for the card holder to opt out, the court stated a good case could be made for unconscionability [*Shea v. Household Bank (SB) (2003) 105 Cal. App. 4th 85, 90, 129 Cal. Rptr. 2d 387]* . Unconscionability was considered in another case of unilateral insertion of an arbitration provision in credit card agreement. That case held that when a customer is presented with the unilateral addition of an arbitration clause and his or her only alternative to acceptance of the arbitration provision is to close his or her account and pay off any balance owing, oppression, and thus, procedural unconscionability are established [*Szetela v. Discover Bank (2002) 97 Cal. App. 4th 1094, 1100, 118 Cal. Rptr. 2d 862]* . For further discussion of unconscionability, see *§ 32.21[3]*.

[c] Arbitrator Must Act Within Scope of Agreement

[i] Arbitrable Disputes Defined by Contract

The parties may delineate the area to which the arbitration provision applies [*Morris v. Zukerman (1967) 257 Cal. App. 2d 91, 96, 64 Cal. Rptr. 714* ; *see Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street (1983) 35 Cal. 3d 312, 323, 197 Cal. Rptr. 581, 673 P.2d 251]* . A person may not be required to submit to arbitration any dispute that he or she has not agreed to submit [*Unimart v. Superior Court (1969) 1 Cal. App. 3d 1039, 1045, 82 Cal. Rptr. 249* ; *Balandran v. Labor Ready, Inc. (2004) 124 Cal. App. 4th 1522, 1529-1530, 22 Cal. Rptr. 3d 441* ; *In re Tobacco Cases I (2004) 124 Cal. App. 4th 1095, 1112, 21 Cal. Rptr. 3d 875* ; *see Engineers & Architects Assn. v. Community Development Dept. (1994) 30 Cal. App. 4th 644, 653, 35 Cal. Rptr. 2d 800* ; *Pacific Crown Distributors v. Brotherhood of Teamsters (1986) 183 Cal. App. 3d 1138, 1143, 228 Cal. Rptr. 645]* .

Given that an agreement to arbitrate is a contract, an arbitrator may consider only those disputes that are covered by the arbitration agreement. An arbitration award may be vacated if the arbitrator has exceeded his or her power [*Code Civ. Proc. § 1286.2(a)(4)*; *see Ch. 34, Contractual Arbitration: Judicial Review, § 34.19[1]*].

[ii] Who Determines Arbitrability

Parties to an arbitration contract must clearly and unmistakably agree that the arbitrator will have power to decide his or her own jurisdiction; otherwise, the question of whether the arbitrator has jurisdiction is for a court [*Gilbert Street Developers, LLC v. La Quinta Homes, LLC (2009) 174 Cal. App. 4th 1185, 1190, 94 Cal. Rptr. 3d 918*]. If the parties' agreement submits the issue of arbitrability to the arbitrator, a court must defer to the arbitrator's decision on that issue and stay the entire action [*Dream Theater, Inc. v. Dream Theater (2004) 124 Cal. App. 4th 547, 557, 21 Cal. Rptr. 3d 322*]. One of the most common instances of the parties' indication of this choice is a provision that the arbitration be conducted in accordance with American Arbitration Association Rules which specify the arbitrator is to determine his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement [*see* *Gilbert Street Developers, LLC v. La Quinta Homes, LLC (2009) 174 Cal. App. 4th 1185, 1194, 94 Cal. Rptr. 3d 918* (future rules may not be incorporated by reference); *Rodriguez v. American Technologies, Inc. (2006) 136 Cal. App. 4th 1110, 1123, 39 Cal. Rptr. 3d 437* (American Arbitration Associations Construction Industry Rule 8(a)); *Dream Theater Inc. v. Dream Theater (2004) 124 Cal. App. 4th 547, 557, 21 Cal. Rptr. 3d 322 (American Arbitration Association Commercial Rule)]* .

Generally, however, the court determines whether there is an agreement between the parties to arbitrate and whether the agreement covers the dispute at issue [*Howsam v. Dean Witter Reynolds, Inc. (2002) 537 U.S. 79, 83-86, 123 S. Ct. 588, 154 L. Ed. 2d 491* ; *First Options of Chicago, Inc. v. Kaplan (1995) 514 U.S. 938, 943-944, 115 S. Ct. 1920, 131 L. Ed. 2d 985* (under Federal Arbitration Act, court has primary power to decide arbitrability of dispute unless there is clear and unmistakable evidence that parties agreed for arbitrator to decide arbitrability); *Omar v. Ralphs Grocery Co. (2004) 118 Cal. App. 4th 955, 961, 965, 13 Cal. Rptr. 3d 562]* . Under the Federal Arbitration Act, issues regarding the *validity* or *enforcement* of a putative contract mandating arbitration should be referred to an arbitrator, but challenges to the *existence* of a contract as a whole must be determined by the court prior to ordering arbitration [*Preston v. Ferrer (2008) 552 U.S. 346, 128 S. Ct. 978, 169 L. Ed. 2d 917, 923, 925-926* (even when state law purports to vest exclusive jurisdiction in administrative agency that regulates the contract); *Sanford v. Member Works, Inc. (9th Cir. 2007) 483 F.3d 956, 962* ; *Three Valleys Mun. Water Dist. v. E.F. Hutton (9th Cir. 1991) 925 F.2d 1136, 1140-1141]* . Hence, the issue of whether the contract as a whole is illegal goes to the validity of the contract, and under the Federal Arbitration Act (FAA) is to be determined by the arbitrator [*see 9 U.S.C. § 2*; *Preston v. Ferrer (2008) 552 U.S. 346, 128 S. Ct. 978, 169 L. Ed. 2d 917, 923, 925-926* ; *Buckeye Check Cashing, Inc. v. Cardegna (2006) 546 U.S. 440, 126 S. Ct. 1204, 1209, 163 L. Ed. 2d 1038* ; *but compare* *Hotels Nevada LLC v. Bridge Banc, LLC (2005) 130 Cal. App. 4th 1431, 1437, 30 Cal. Rptr. 3d 903* (under contract governed by FAA and California law, it was proper for court to decide issue after it had first been presented to arbitrator, who acknowledged his authority to determine that issue, but ceded it to court)].

There are, however, certain contracts which the Legislature has mandated are void and unenforceable unless certain specifics are adhered to. Contracts contrary to express statutes or to the policy of express statutes are illegal, and that illegality voids the entire contract, including the arbitration clause. In situations involving these contracts, the court may determine the entire contract void and refuse to compel arbitration [*Duffens v. Valenti (2008) 161 Cal. App. 4th 434, 454-457, 74 Cal. Rptr. 3d 311* (court found it was not an FAA case; violations of *Civ. Code § 1694 et seq.* governing dating service contracts)].

Under California law, the question whether grounds exist for the revocation of an arbitration agreement based on grounds as exist for the revocation of any contract is for the courts to decide, not an arbitrator. This includes the determination of whether arbitration agreements or portions thereof are deemed to be unconscionable or contrary to

public policy [*Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 171, 167, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* (citing *Code Civ. Proc. §§ 1281* 1281.2 and *Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 973, 64 Cal. Rptr. 2d 843, 938 P.2d 903*); *Sanchez v. Western Pizza Enterprises, Inc. (2009) 172 Cal. App. 4th 154, 165-166, 90 Cal. Rptr. 3d 818* (agreement found not to authorize arbitration of issue of unconscionability)]. Despite this seemingly clear state, if the issue is whether the entire contract, not just the arbitration clause, is unconscionable, under the Federal Arbitration Act, that determination is for the arbitrator to make [*Higgins v. Superior Court (Disney/ABC International Television, Inc.) (2006) 140 Cal. App. 4th 1238, 1249-1250, 45 Cal. Rptr. 3d 293* ; *see also Nagrampa v. MailCoups, Inc. (9th Cir. 2006) 469 F. 3d 1257, 1276-1277* (in both cases trial court erred by characterizing challenge as to entire agreement)].

The issue of waiver of the right to arbitrate is determined by the court [*see Code Civ. Proc. 1281.2(a)*]; *Wagner Construction Co. v. Pacific Mechanical Corp. (2007) 41 Cal. 4th 19, 27-28, 31, 58 Cal. Rptr. 3d 434, 157 P.3d 1029* (remanding to have trial court determine waiver)], unless the matter is governed by the Federal Arbitration Act ("FAA") and there is no explicit choice of California law. In that case, the arbitrator determines whether a party has waived the right to compel arbitration [*Howsam v. Dean Witter Reynolds, Inc. (2002) 537 U.S. 79, 84, 123 S. Ct. 588, 154 L. Ed. 2d 491* ; *Omar v. Ralphs Grocery Co. (2004) 118 Cal. App. 4th 955, 962-965, 13 Cal. Rptr. 3d 562* ; *see 9 U.S.C. § 3*]. This is further complicated by the fact that even if the matter is governed by the FAA, a waiver claim that involves litigation conduct is to be determined by the court [*see Omar v. Ralph's Grocery Co., Inc. (2004) 118 Cal. App. 4th 955, 962-965, 13 Cal. Rptr. 3d 562* ; *Thorup v. Dean Witter Reynolds, Inc. (1986) 180 Cal. App. 3d 228, 234, 225 Cal. Rptr. 521* ; § 32.25[1][b]].

The issue of a party's standing to enforce an arbitration provision is an issue of law for the court to decide unless the agreement explicitly provides otherwise [*see* discussion at [5][a], *below*]. Because this is a general principle of law, a statement that the arbitrator is to determine the "scope" of the arbitration provision is not explicit enough to confer authority to the arbitrator to determine standing [*Smith v. Microskills San Diego, L.P. (2007) 153 Cal. App. 4th 892, 900, 63 Cal. Rptr. 3d 608]* .

Questions of arbitrability that are for the arbitrator to decide, sometimes referred to as "gateway procedural matters," include issues such as whether previous steps of a grievance procedure were completed, waiver, delay, compliance with special limitations periods in the underlying agreement or rules the parties agreed would govern their arbitration [*Green Tree Fin. Corp. v. Bazzle (2003) 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414* ; *Howsam v. Dean Witter Reynolds, Inc. (2002) 537 U.S. 79, 83-86, 123 S. Ct. 588, 154 L. Ed. 2d 491]* . A defense that the claim sought to be arbitrated is barred by the statute of limitations is also for the arbitrator, not the court, to decide. That the statute of limitations has run on the underlying claims is not one of the legislatively or judicially recognized justifications for denying a petition to compel. Rather, the statute of limitations is an affirmative defense that falls naturally within the plain language of an agreement to arbitrate [*Wagner Construction Co. v. Pacific Mechanical Corp. (2007) 41 Cal. 4th 19, 23, 25-26, 28, 58 Cal. Rptr. 3d 434, 157 P.3d 1029]* . The arbitrator also decides other more obviously procedural matters, such as whether classwide arbitration is permitted when the arbitration agreement is silent on the matter [*Green TreeFinancial Corp. v. Bazzle (2003) 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414* (defendant argued that manner of choosing arbitrator impliedly prevented classwide arbitration)]. When the agreement incorporates a set of arbitration rules, the parties would normally expect a forum-based decision maker to decide forum-specific procedural gateway matters, such as compliance with a limitation period set forth in the rules of arbitration procedure adopted by the agreement [*Howsam v. Dean Witter Reynolds, Inc. (2002) 537 U.S. 79, 84-86, 123 S. Ct. 588, 154 L. Ed. 2d 491]* .

Even if the parties argue the issue of arbitrability to the arbitrator, the issue is subject to independent review by the courts [*First Options of Chicago, Inc. v. Kaplan (1995) 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985, 995]* .

[iii] Agreement Construed in Favor of Coverage

The burden is on the party opposing arbitration to demonstrate that an arbitration clause cannot be interpreted to require arbitration of the dispute [Bono v. David *(2007) 147 Cal. App. 4th 1055, 1062, 54 Cal. Rptr. 3d 837* ; *Buckhorn v. St. Jude Heritage Med. Group (2004) 121 Cal. App. 4th 1401, 1406, 18 Cal. Rptr. 3d 215* ; Coast Plaza Doctors' Hosp. v. Blue Cross of California *(2000) 83 Cal. App. 4th 677, 686-687, 99 Cal. Rptr. 2d 809]* . Doubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration [*Buckhorn v. St. Jude Heritage Med. Group (2004) 121 Cal. App. 4th 1401, 1406, 18 Cal. Rptr. 3d 215* ; *Engineers & Architects Assn. v. Community Development Dept. (1994) 30 Cal. App. 4th 644, 652, 35 Cal. Rptr. 2d 800* ; *see § 32.43[8]*].

This rule, however, does not apply to a court's determination of whether the parties agreed to arbitrate the issue of arbitrability. Courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so [*First Options of Chicago, Inc. v. Kaplan (1995) 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985, 994]* .

Moreover, the rule of liberal construction of agreements to arbitrate may be offset by other presumptions [*Mayhew v. Benninghoff (1997) 53 Cal. App. 4th 1365, 1367, 62 Cal. Rptr. 2d 27]* . For example, presumptions relating to business transactions between an attorney and his or her clients may preclude the extension of an ambiguous arbitration clause in an engagement letter to cover a dispute between the attorney and client [*Mayhew v. Benninghoff (1997) 53 Cal. App. 4th 1365, 1369-1370, 62 Cal. Rptr. 2d 27* (attorney could not enforce arbitration clause in engagement letter relating to representation of client in divorce proceedings with respect to dispute involving unrelated financial investments); *cf. Powers v. Dickson, Carlson & Campillo (1997) 54 Cal. App. 4th 1102, 1113* , 63 Cal. Rtpr. 2d 261 (unambiguous arbitration clause in retainer agreement and amendment to retainer agreement was broad enough to cover malpractice as well as fee disputes)].

[2] Incorporation of Arbitration Clause by Reference

An arbitration clause need not be contained in the contract under which a dispute arises, but may be contained in a collateral agreement [*Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co. (1992) 6 Cal. App. 4th 1266, 1271, 8 Cal. Rptr. 2d 587* ; *Marsch v. Williams (1994) 23 Cal. App. 4th 250, 255, 28 Cal. Rptr. 2d 398]* . Thus, a dispute under a contract that does not include an arbitration clause may be subject to arbitration if that contract incorporates another contract that does include an arbitration clause [*Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co. (1992) 6 Cal. App. 4th 1266, 1271-1274, 8 Cal. Rptr. 2d 587]* . Similarly, an express agreement to abide by an organization's rules that provide for arbitration by members of the organization gives rise to an effective agreement to arbitrate. This is the case even though the party to the agreement may not have actually read the rules. The general rule is applied that a failure to read a contract before signing it is no reason of itself to refuse to enforce it [*Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1972) 24 Cal. App. 3d 35, 40-42, 100 Cal. Rptr. 791* ; *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1971) 20 Cal. App. 3d 668, 671, 97 Cal. Rptr. 811]* .

To be effective, however, the arbitration provision must be properly incorporated by reference by clearly referring to and identifying the incorporated document in which the arbitration clause appears [*Kleveland v. Chicago Title Ins. Co. (2006) 141 Cal. App. 4th 761, 763-765, 46 Cal. Rptr. 3d 314* (ALTA policy that was referred to in preliminary title report had arbitration clause, as did CTLA policy that was issued, but failure to reference form of policy actually issued was fatal to incorporation; distinguishing *Wolschlager*); *Wolschlager v. Fidelity Nat'l Title Ins. Co. (2003) 111 Cal. App. 4th 784, 790-791, 4 Cal. Rptr. 3d. 179* (incorporation of C.L.T.A. Coverage Policy form by preliminary title report's clear and unequivocal reference thereto); *Chan v. Drexel Burnham Lambert, Inc. (1986) 178 Cal. App. 3d 632, 643-645, 223 Cal. Rptr. 838* (reference and availability were insufficient for incorporation); *cf. Baker v. Aubry (1989) 216 Cal. App. 3d 1259, 1264-1265, 265 Cal. Rptr. 381* (agreement contained promise to arbitrate, but rules incorporated by reference defined scope of arbitration clause)].

ILLUSTRATION:

Incorporation by Reference Applies. A property owner and a construction company enter a contract to build a structure. The contract includes an arbitration clause. The construction company obtains a performance bond, which does not contain an arbitration clause but does incorporate the construction contract. After the project is completed, the owner withholds final payment, complaining of defective construction. The owner ultimately demands arbitration on its claims of breach of contract, negligence, and for recovery on the bond, and seeks to include the surety on the performance bond as an additional party to the arbitration. The surety resists on the basis it was not a party to the contract and did not sign any agreement to arbitrate. Can the surety be compelled to arbitrate? Yes, by incorporating the construction contract in the performance bond, the surety agreed to be bound by the arbitration clause even though it was not a party to the contract [*Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co. (1992) 6 Cal. App. 4th 1266, 1271-1274, 8 Cal. Rptr. 2d 587]* .

ILLUSTRATION: No Incorporation. Plaintiff and defendant enter a partnership to engage in real estate transactions. The partnership agreement does not provide for arbitration. Subsequently the parties enter into another partnership agreement to develop other property. This partnership does include an arbitration clause. The second partnership deteriorates and in the ensuing arbitration the arbitrator finds that the disputes involving the first partnership agreement are beyond the scope of the arbitration agreement. Plaintiff brings suit for breach of contract, fraud, and emotional distress arising out of the first partnership agreement. The complaint alleges that the defendant's attempt to obtain control of the second partnership involved undermining the plaintiff's ability to manage the first one. Because of the allegations referring to the second partnership, the defendant seeks to compel arbitration on the ground that the complaint has its "roots in the relationship between the parties created by the [second partnership] contract." Can arbitration be compelled? No. In this case the two agreements involved separate enterprises and separate commercial risks, were not closely related in purpose, did not incorporate one another's terms, were not executed at the same time, and breach of the second did not necessarily lead to breach of the first. The evidence used to establish the claim does not create an agreement to arbitrate [*Marsch v. Williams (1994) 23 Cal. App. 4th 250, 256-257, 28 Cal. Rptr. 2d 398]* .

[3] Unconscionability

[a] Adhesion Contract Analysis

Under California law, an arbitration provision contained in an adhesion contract will not be enforced if it does not fall within the reasonable expectations of the adhering party or if it is unduly oppressive or unconscionable [*Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 820, 171 Cal. Rptr. 604, 623 P.2d 165* ; *Bruni v. Didion (2008) 160 Cal. App. 4th 1272, 1288, 73 Cal. Rptr. 3d 395* ; *Murphy v. Check 'N Go of California, Inc. (2007) 156 Cal. App. 4th 138, 145, 67 Cal. Rptr. 3d 120* ; *Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 129 Cal. Rptr. 2d 659* ; *Patterson v. ITT Consumer Financial Corp. (1993) 14 Cal. App. 4th 1659, 1664, 18 Cal. Rptr. 2d 563 , cert. denied, 510 U.S. 1176 (1994)* ; *Parr v. Superior Court (1983) 139 Cal. App. 3d 440, 445, 188 Cal. Rptr. 801]* . Conversely, an arbitration clause in an adhesion contract is legally enforceable if it (1) falls within the reasonable expectations of the weaker party, and (2) is not unduly oppressive or unconscionable [*County of Solano v. Lionsgate Corporation (2005) 126 Cal. App. 4th 741, 750, 24 Cal. Rptr. 3d 362]* .

However, if the contract is within the scope of the Commerce Clause, the Federal Arbitration Act, *9 U.S.C. § 1 et seq.*, will govern the enforceability of the clause [*Allied-Bruce Terminix Cos. v. Dobson (1995) 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753, 761-762, 764-766]* . Judicial refusal to enforce an arbitration clause clearly unconscionable under a general contract law principle not at all hostile to arbitration presents no obstacle to the objective of the FAA, and is not preempted by the FAA [*Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 119, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *Gutierrez v. Autowest, Inc. (2004) 114 Cal. App. 4th 77, 86, 7 Cal. Rptr. 3d*

267 ; *Flores v. Transamerica HomeFirst, Inc. (2001) 93 Cal. App. 4th 846, 856, 113 Cal. Rptr. 2d 376* ; *Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1551-1552, 1548-1550, 60 Cal. Rptr. 2d 138* (distinguishing cases in which California unconscionability law preempted by federal statutes from those with specific anti-arbitration policy)]. While the federal Ninth Circuit recently affirmed that stance in the context of a preemption challenge to a petition to compel arbitration in a class action [*Laster v. AT&T Mobility LLC (2009) 584 F.3d 849, 856]* , the decision, which only otherwise considers whether a class action waiver in the parties' agreement is unenforceable as unconscionable under California law, is currently under review by the United States Supreme Court as the result of a grant of certiorari [*sub. nom.,* *AT&T Mobility LLC v. Concepcion (May 24, 2010) -- U.S. --, -- S. Ct. --, 176 L. Ed. 2d 1218, 2010 U.S. LEXIS 4309 at 1]* .

In fact, the inquiry under the FAA is the same as under California law [*Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 98-99, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *Flores v. Transamerica HomeFirst, Inc. (2001) 93 Cal. App. 4th 846, 856, 113 Cal. Rptr. 2d 376]* ; and a federal court deciding a case governed by the FAA should apply California law to determine whether a particular agreement involving a California resident is unconscionable [*Ingle v. Circuit City Stores, Inc. (9th Cir. 2003) 328 F.3d 1165, 1170* ; *Circuit City Stores, Inc. v. Adams (9th Cir. 2002) 279 F.3d. 889, 895* ; *but see* *Circuit City Stores, Inc. v. Najd (9th Cir. 2002) 294 F.3d 1104, 1108* ; *Circuit City Stores, Inc. v. Ahmed (9th Cir.2002) 283 F.3d 1198], 1200* (ordering arbitration of FEHA clams under materially identical agreement without considering *Armendariz* criteria for vindicating statutory claims after finding no procedural unconscionability [and therefore no unconscionability], because employees in both cases had right to opt out of arbitration program)]. *Armendariz* also held that mandatory employment arbitration agreements are enforceable if the arbitration permits employees to vindicate their statutory rights [*Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 91, 99 Cal. Rptr. 2d 745, 6 P.3d 669]* . Similarly, the fact that an employee in the securities industry is required by Securities and Exchange Commission (SEC) regulations to enter into an arbitration agreement on a take it or leave it basis with no opportunity for negotiation does prevent application of state law unconscionability principles. The lack of negotiation establishes procedural unconscionability or a contract of adhesion [*McManus v. CIBC World Markets Corp. (2003) 109 Cal. App. 4th 76, 90-92, 134 Cal. Rptr. 2d 446]* . The minimum criteria required under *Armendariz* are discussed in the analysis of statutory claims held arbitrable [*see § 32.22[2]*] and have been adopted by at least one case that never disclosed whether the causes of action involved were statutory or not [*see* *Craig v. Brown & Root, Inc. (2000) 84 Cal. App. 4th 416, 100 Cal. Rptr. 2d 818, 822* (example of arbitration clause held sufficient under *Armendariz* standard and therefore not unconscionable)]. *Armendariz* was decided August 24, 2000, and has been held retroactive [*Blake v. Ecker (2001) 93 Cal. App. 4th 728, 733, 741, 113 Cal. Rptr. 2d 422* (applied to case filed in September, 1998, in which motion to compel arbitration was granted in December, 1998)]. For discussion of the extent to which federal law preempts state law regarding arbitration, see *§ 32.24*.

The determination of whether a contract is one of adhesion may differ depending on who the parties are. In *Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 710-711, 131 Cal. Rptr. 882, 552 P.2d 1178* , an agreement between a group health care plan and a state employee was held not to be an adhesion contract, even though presented to the employee on a take it or leave it basis. The reason is that the parties who negotiated that contract were of equal power (Kaiser and the State of California), the employee had a number of different plans from which to choose, and the challenged clause did not limit the liability or obligations of a stronger party, but could prove helpful to all parties. Similarly, although an arbitration agreement may be part of a form contract that its drafter uses with many people, that will not make it a contract of adhesion if those other parties have the opportunity to bargain or negotiate [*see* *Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159, 1165-1167, 22 Cal. Rptr. 3d 189* (distinguishing bargaining power of used recreation vehicle purchasers from that of prospective employees)]. On the other hand, in *Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 985, 64 Cal. Rptr. 2d 843, 938 P.2d 903* , a group health care plan containing an arbitration clause was found to have more of the indicia of an adhesion contract when the employees are offered few plans, the employer has only a small number of employees enrolled in the plan containing the challenged arbitration clause, the employer lacked the strength to bargain with the health care provider, and the claim is not that the clause is unconscionable, but the arbitration program established under the clause was biased [*see*

Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 985, 64 Cal. Rptr. 2d 843, 938 P.2d 903 (distinguishing *Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 710-711, 131 Cal. Rptr. 882, 552 P.2d 1178* , but finding that the contract did not lack minimum level of integrity)]. Likewise, account agreements that were on printed, standardized forms drafted by the broker and presented to petitioners who were school teachers, a delivery driver, and a school janitor with the option of signing the agreements or rejecting them, in which case petitioner could not open a margin account, were contracts of adhesion, especially where the fact that the agreement contained a clause stating that "Any deletions from, additions to or cutting or mutilation of any portion of this Agreement will render the Agreement unacceptable" controverted the broker's claim that the petitioners were given reasonable notice of the opportunity to negotiate or reject the terms of a contract, and an actual, meaningful, and reasonable choice to exercise that discretion [*Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1570-1571, 98 Cal. Rptr. 3d 743*].

A determination that a contract is an adhesion contract is the beginning and not the end of the analysis. Enforceability depends on whether the terms of which the adherent was unaware are beyond the reasonable expectations of an ordinary person or unconscionable [*Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 715, 733-734, 129 Cal. Rptr. 2d 659* ; *Coon v. Nicola (1993) 17 Cal. App. 4th 1225, 1234, 21 Cal. Rptr. 2d 846]* .

An agreement to arbitrate will be denied enforcement on grounds of unconscionability if the arbitration procedures lack minimum levels of integrity [*Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 825, 171 Cal. Rptr. 604, 623 P.2d 165* ; *Patterson v. ITT Consumer Financial Corp. (1993) 14 Cal. App. 4th 1659, 1664-1667, 18 Cal. Rptr. 2d 563* , *cert. denied, 510 U.S. 1176 (1994)* ; *see Spinello v. Amblin Entertainment (1994) 29 Cal. App. 4th 1390, 1397-1398, 34 Cal. Rptr. 2d 695* (upholding clause)].

The determination of whether the contractual arrangements for arbitration possess minimum levels of integrity is based on the face of the contract. For example, an arbitration clause providing for neutral arbitrators to be selected by party arbitrators is not per se unconscionable [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 985-986, 64 Cal. Rptr. 2d 843, 938 P.2d 903* (party opposing arbitration claimed that other party established a system of arbitration inherently unfair to claimants because the method of selecting neutral arbitrators was biased, other party had unfair advantage as a repeat player in arbitration and maximized that advantage by reserving itself an unlimited right to veto the selection of arbitrators)]. If, however, a gap exists between the contractual provisions and the actual workings of the arbitration program, the theories of fraud [*see § 32.21[4]*] or waiver [*see § 32.25*] may be used to address the discrepancy between contractual representation and the reality [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 986, 64 Cal. Rptr. 2d 843, 938 P.2d 903]* .

ILLUSTRATION:

Arbitrator Is Associated With Party. A contract between a band and its booking agent with a concert promoter is entered into on a form contract provided by the American Federation of Musicians, to which the band belongs. The contract calls for arbitration of disputes before the union's International Executive Board or before a similar local board. Can the concert promoter avoid arbitration on the ground the clause is unconscionable? Maybe. Under California law, an agreement to arbitrate will not be enforced if it designates an arbitral body that is so associated with a party to the contract as to be presumptively biased in favor of that party [*Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 821, 825-827, 171 Cal. Rptr. 604, 623 P.2d 165]* . Similarly, in the context of a public works contract, a subcontractor was excused from exhausting the administrative remedy of arbitration before a dispute review board prior to litigation when the interests of the owner and the general contractor were aligned against the subcontractor and they, not the subcontractor, would select the members of the review board [*Sehulser Tunnels/Pre-Con v. Traylor Brothers, Inc./Obayashi Corp. (2003) 111 Cal. App. 4th 1328, 1342-1343, 4 Cal. Rptr. 3d 655]* . In 2003, both the New York Stock Exchange (NYSE) Arbitration Rules and the National Association of Securities Dealers (NASD) Code of Arbitration Procedure have been held not to be unconscionable (except with respect to the costs provision, which was severed), even as to an employee who was required by SEC regulations to enter the arbitration agreement, albeit in a discussion

that contemplated the proposed arbitrators' compliance with the California disclosure requirements, as well as with the requirements under the NYSE rules or NASD procedures, whichever was finally chosen [*McManus v. CIBC World Markets Corp. (2003) 109 Cal. App. 4th 76, 92-102, 134 Cal. Rptr. 2d 446]* .

[b] Procedural and Substantive Unconscionability Analysis

[i] Both Required

The traditional analysis of unconscionability, as set out in *A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473, 485-487, 489-490, 186 Cal. Rptr. 114* , analyzes the contract or provision in terms of *Civ. Code § 1670.5*. This analysis views both procedural and substantive components [*Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1072, 130 Cal. Rptr. 2d 892, 63 P.3d 979* ; *Gutierrez v. Autowest, Inc. (2004) 114 Cal. App. 4th 77, 87, 7 Cal. Rptr. 3d 267* ; *Harper v. Ultimo (2003) 113 Cal. App. 4th 1402, 1406, 7 Cal. Rptr. 3d 418* ; *Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 129 Cal. Rptr. 2d 659* ; *Flores v. Transamerica HomeFirst, Inc. (2001) 93 Cal. App. 4th 846, 852-853, 113 Cal. Rptr. 2d 376* ; *Patterson v. ITT Consumer Financial Corp. (1993) 14 Cal. App. 4th 1659, 1664, 18 Cal. Rptr. 2d 563 , cert. denied, 510 U.S. 1176 (1994)* ; *see Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1531-1532, 60 Cal. Rptr. 2d 138* ; *see generally* Ch. 140, *Contracts*].

To deny enforcement under the *A & M Produce* criteria, both procedural and substantive unconscionability must exist [*Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 114, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *Bruni v. Didion (2008) 160 Cal. App. 4th 1272, 1288, 73 Cal. Rptr. 3d 395* ; *Baker v. Osborne Development Corp. (2008) 159 Cal. App. 4th 884, 894, 71 Cal. Rptr. 3d 854* ; *Fitz v. NCR Corp. (2004) 118 Cal. App. 4th 702, 713-714, 13 Cal. Rptr. 3d 88* ; *Martinez v. Master Protection Corp. (2004) 118 Cal. App. 4th 107, 113, 12 Cal. Rptr. 3d 663* (employer not required to bear fair share of costs); *Abramson v. Juniper Networks, Inc. (2004) 115 Cal. App. 4th 638, 655* (unconscionable cost-sharing because employee required to bear half costs unique to arbitration); *Gutierrez v. Autowest, Inc. (2004) 114 Cal. App. 4th 77, 87, 7 Cal. Rptr. 3d 267* ; *Harper v. Ultimo (2003) 113 Cal. App. 4th 1402, 1406, 7 Cal. Rptr. 3d 418* ; *Jamarillo v. JH Real Estate Partners, Inc. (2003) 111 Cal. App. 4th 394, 400, 3 Cal. Rptr. 3d 525* ; *Mercuro v. Superior Court (Countrywide Securities Corp.) (2002) 96 Cal. App. 4th 167, 174-175, 116 Cal. Rptr. 2d 671* (highly oppressive conduct in securing older worker's consent to arbitration agreement required only minimal showing of substantive unconscionability); Kinney v. United Healthcare Services, Inc. (1999) 70 Cal, App. 4th 1322, 1329, *83 Cal. Rptr. 2d 348* ; *Patterson v. ITT Consumer Financial Corp. (1993) 14 Cal. App. 4th 1659, 1664, 18 Cal. Rptr. 2d 563 , cert. denied, 510 U.S. 1176 (1994)]* . A relatively larger degree of one, however, will compensate for a relatively smaller degree of the other [*Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 114, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1569, 98 Cal. Rptr. 3d 743* ("Because procedural unconscionability must be measured in a sliding scale with substantive unconscionability, our task is not only to determine whether procedural unconscionability exists, but more importantly, to what degree it may exist."); *Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal. App. 4th 1267, 1286-1287, 16 Cal. Rptr. 3d 296* (less procedural, more substantive); *Martinez v. Master Protection Corp. (2004) 118 Cal. App. 4th 107, 113, 12 Cal. Rptr. 3d 663* (employer not required to bear fair share of costs); *Abramson v. Juniper Networks, Inc. (2004) 115 Cal. App. 4th 638, 655-656* (unconscionable cost-sharing because employee required to bear half costs unique to arbitration); *Gutierrez v. Autowest, Inc. (2004) 114 Cal. App. 4th 77, 88, 7 Cal. Rptr. 3d 267* ; *Harper v. Ultimo (2003) 113 Cal. App. 4th 1402, 1406, 7 Cal. Rptr. 3d 418* ; *Jamarillov.JH Real Estate Partners, Inc. (2003) 111 Cal. App. 4th 394, 400-401, 3 Cal. Rptr. 3d 525* ; Kinney v. United Healthcare Services, Inc. (1999) 70 Cal, App. 4th 1322, 1329, *83 Cal. Rptr. 2d 348* ; *Dean Witter Reynolds, Inc. v. Superior Court (1989) 211 Cal. App. 3d 758, 768, 259 Cal. Rptr. 789* (decided in context of challenging IRA account fees as unconscionable); *but see Spinello v. Amblin Entertainment (1994) 29 Cal. App. 4th 1390, 1396, 34 Cal. Rptr. 2d 695* (rejecting *Dean Witter* analysis in cases involving arbitration clauses)].

[ii] "Procedural" Unconscionability Described

The procedural component of unconscionability involves essentially the same analysis entailed in determining whether a contract is one of adhesion. The procedural component focuses on factors of surprise and oppression [*Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1072, 130 Cal. Rptr. 2d 892, 63 P.3d 979* ; *Bruni v. Didion (2008) 160 Cal. App. 4th 1272, 1288-1289, 73 Cal. Rptr. 3d 395* ; *Baker v. Osborne Development Corp. (2008) 159 Cal. App. 4th 884, 894, 71 Cal. Rptr. 3d 854* ; *Brown v. Wells Fargo Bank (2008) 168 Cal. App. 4th 938, 955, 85 Cal. Rptr. 3d 817* ; *Fitz v. NCR Corp. (2004) 118 Cal. App. 4th 702, 713, 13 Cal. Rptr. 3d 88* ; *Gutierrez v. Autowest, Inc. (2004) 114 Cal. App. 4th 77, 87, 7 Cal. Rptr. 3d 267* ; *Harper v. Ultimo (2003) 113 Cal. App. 4th 1402, 1406, 7 Cal. Rptr. 3d 418* ; *Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 129 Cal. Rptr. 2d 659* ; *Flores v. Transamerica HomeFirst, Inc. (2001) 93 Cal. App. 4th 846, 853, 113 Cal.Rptr. 2d 376* ; Kinney v. United Healthcare Services, Inc. (1999) 70 Cal, App. 4th 1322, 1329, *83 Cal. Rptr. 2d 348]* . A finding of a contract of adhesion is essentially a finding of procedural unconscionability [*Flores v. Transamerica HomeFirst, Inc. (2001) 93 Cal. App. 4th 846, 853, 113 Cal. Rptr. 2d 376* ; Kinney v. United Healthcare Services, Inc. (1999) 70 Cal, App. 4th 1322, 1329, *83 Cal. Rptr. 2d 348* ; *Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1533-1534, 60 Cal. Rptr. 2d 138]* . However, adhesion is not a prerequisite for unconscionability. There are cases in which procedural unconscionability is obvious without the need either to establish that the contract is one of adhesion or to consider market alternatives [*Harper v. Ultimo (2003) 113 Cal. App. 4th 1402, 1409-1410, 7 Cal. Rptr. 3d 418]* . Other cases have gone further, arguing that courts often reflexively conclude the finding of an adhesion contract alone satisfies the procedural prong, and immediately move on to the subject of substantive unconscionability. Consequently, other procedural issues, including surprise, often are ignored when balancing or weighing procedural and substantive unconscionability. Undue reliance on any one procedural factor to the exclusion of others may produce analytical myopia and obscure the larger unconscionability picture [*Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1569, 98 Cal. Rptr. 3d 743*].

Surprise involves the extent to which the supposedly agreed-on term is hidden in a prolix preprinted form drafted by the party seeking to enforce the disputed term [*Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1571, 98 Cal. Rptr. 3d 743* ; *Bruni v. Didion (2008) 160 Cal. App. 4th 1272, 1288, 73 Cal. Rptr. 3d 395* ; *Baker v. Osborne Development Corp. (2008) 159 Cal. App. 4th 884, 894, 71 Cal. Rptr. 3d 854* ; *Abramson v. Juniper Networks, Inc. (2004) 115 Cal. App. 4th 638, 656* (unconscionable cost-sharing because employee required to bear half costs unique to arbitration); *Gutierrez v. Autowest, Inc. (2004) 114 Cal. App. 4th 77, 87, 7 Cal. Rptr. 3d 267* ; *Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 129 Cal. Rptr. 2d 659* ; Kinney v. United Healthcare Services, Inc. (1999) 70 Cal, App. 4th 1322, 1329, *83 Cal. Rptr. 2d 348* ; *Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1532, 60 Cal. Rptr. 2d 138* ; *Patterson v. ITT Consumer Financial Corp. (1993) 14 Cal. App. 4th 1659, 1664, 18 Cal. Rptr. 2d 563 , cert. denied, 510 U.S. 1176 (1994)]* . Surprise is a function of the disappointed reasonable expectations of the weaker party [*Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1571, 98 Cal. Rptr. 3d 743* ; *Harper v. Ultimo (2003) 113 Cal. App. 4th 1402, 1406, 7 Cal. Rptr. 3d 418]* . If a contractual provision would defeat the strong expectation of the weaker party, it may also be necessary to call his or her attention to the language of the provision. Thus, while arbitration may be within the reasonable expectations of consumers, a process that builds prohibitively expensive fees into the arbitration process is not. Further, the weaker party would not reasonably expect that his or her claims could not be joined with others in a single proceeding [*Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1571, 98 Cal. Rptr. 3d 743* (no evidence of calling applicable arbitration rules and three-arbitrator and anti-consolidation provisions to petitioners' attention)].

Oppression results when there is no real negotiation of contract terms because of unequal bargaining power [*Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1572, 98 Cal. Rptr. 3d 743* ; *Bruni v. Didion (2008) 160 Cal. App. 4th 1272, 1288, 73 Cal. Rptr. 3d 395* ; *Baker v. Osborne Development Corp. (2008) 159 Cal. App. 4th 884, 894, 71 Cal. Rptr. 3d 854* ; *Brown v. Wells Fargo Bank (2008) 168 Cal. App. 4th 938, 955, 85 Cal. Rptr. 3d 817* (court must determine if constructive fraud existed due to failure to explain material terms of arbitration agreement despite implied fiduciary duty between financial institution and elderly clients); *Fitz v. NCR Corp. (2004) 118 Cal. App. 4th 702, 721-722, 13 Cal. Rptr. 3d 88* ; *Martinez v. Master Protection Corp. (2004) 118 Cal. App. 4th 107, 114, 12 Cal. Rptr. 3d 663* (employer not required to bear fair share of costs); *Abramson v. Juniper Networks, Inc. (2004) 115 Cal. App.*

4th 638, 656, 9 Cal. Rptr. 2d 422 (unconscionable cost-sharing because employee required to bear half costs unique to arbitration); Kinney v. United Healthcare Services, Inc. (1999) 70 Cal, App. 4th 1322, 1329-1330, *83 Cal. Rptr. 2d 348* ; *Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1532, 60 Cal. Rptr. 2d 138* ; *Patterson v. ITT Consumer Financial Corp. (1993) 14 Cal. App. 4th 1659, 1664, 18 Cal. Rptr. 2d 563 , cert. denied, 510 U.S. 1176 (1994)]* and the absence of meaningful choice [*Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1572, 98 Cal. Rptr. 3d 743* ("absence of reasonable market alternatives"); *Flores v. Transamerica HomeFirst, Inc. (2001) 93 Cal. App. 4th 846, 853, 113 Cal. Rptr. 2d 376]* . For oppression to exist under this criteria, the party challenging the provision must not have been able to obtain the goods or services from an alternative source [*Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159, 1165-1167, 22 Cal. Rptr. 3d 189* (nothing prevents purchasers of used vehicles from bargaining with dealers, even though dealers use form contracts, and nothing in record showed that plaintiff could not bargain); *Flores v. Transamerica HomeFirst, Inc. (2001) 93 Cal. App. 4th 846, 853, 113 Cal. Rptr. 2d 376* (defendant told plaintiffs it was only company in California offering reverse mortgages); *Patterson v. ITT Consumer Financial Corp. (1993) 14 Cal. App. 4th 1659, 1667, 18 Cal. Rptr. 2d 563 , cert. denied, 510 U.S. 1176 (1994)* (small loan borrowers, many of whom did not feel they could qualify for bank loans, met the non-alternative source requirement); *see Dean Witter Reynolds, Inc. v. Superior Court (1989) 211 Cal. App. 3d 758, 771-772, 259 Cal. Rptr. 789* (establishing requirement in context of challenging IRA account fees as unconscionable); *but see Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1572-1573, 98 Cal. Rptr. 3d 743* (availability of reasonable alternatives is but one factor, along with absence of power to negotiate terms, used in considering oppression, and its absence does not disprove procedural unconscionability); *Bruni v. Didion (2008) 160 Cal. App. 4th 1272, 1293-1294, 73 Cal. Rptr. 3d 395* (most recent view is that absence of reasonable market alternatives has no bearing on whether contract is adhesive); *Harper v. Ultimo (2003) 113 Cal. App. 4th 1402, 1406, 1409-1410, 7 Cal. Rptr. 3d 418* (oppression inhered in $2,500 cap on consumer's relief, hidden in arbitration rules not provided at time of contracting; lack of alternative source not needed to find procedural unconscionability); *Spinello v. Amblin Entertainment (1994) 29 Cal. App. 4th 1390, 1395-1396, 34 Cal. Rptr. 2d 695* (rejecting *Dean Witter* analysis in cases involving arbitration clauses)]. Unequal bargaining power may exist even as between a corporate employer and a successful and sophisticated corporate executive when the executive is required to sign standard nonnegotiable employment contract presented to him or her after accepting employment, even after having negotiated extra benefits under a separate agreement [*Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1532, 60 Cal. Rptr. 2d 138]* . While the nonessential nature of recreational activities is a factor to be taken into account in assessing whether a contract is oppressive, it is not necessarily the dispositive factor [*Lhotka v. Geographic Expeditions, Inc. (2010) 181 Cal. App. 4th 816, 822, 104 Cal. Rptr. 3d 844]* .

ILLUSTRATION:

Agreement Can Be Procedurally Unconscionable Even If Negotiated with Advice of Attorney.

Employee was fired and sued employer. After more than three years of unemployment, employee negotiated a settlement that allowed for employee to be rehired and for employment for three years thereafter to be terminable only for cause. As part of the settlement and re-employment, employee had to sign an arbitration agreement. Employee was represented by an attorney, who approved the arbitration agreement as to form. Employer fired employee a second time and demanded arbitration. Employee contended the arbitration agreement was unconscionable. Employee claimed procedural unconscionability based on absence of opportunity to negotiate the terms of the arbitration agreement. Did that make the arbitration agreement procedurally unconscionable? Yes. Although there was no element of surprise, and although employee was able to negotiate other elements of the settlement and rehire agreement, the arbitration agreement was the standard one required of all new employees and was not negotiable. The inequality of bargaining power was sufficient for the court to conclude that the arbitration agreement was procedurally unconscionable [*Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal. App. 4th 1267, 1284-1286, 16 Cal. Rptr. 3d 296* (agreement phrased as promise only by employee)].

[iii] "Substantive" Unconscionability Described

The substantive component of the *A & M Produce* criteria looks to whether the contract allocates the risks of the bargain in an objectively unreasonable or unexpected manner [*Patterson v. ITT Consumer Financial Corp. (1993) 14 Cal. App. 4th 1659, 1664, 18 Cal. Rptr. 2d 563 , cert. denied, 510 U.S. 1176 (1994)* ; *Baker v. Osborne Development Corp. (2008) 159 Cal. App. 4th 884, 894, 71 Cal. Rptr. 3d 854]* .

An example of an unconscionable clause under this analysis is a clause in an employment contract that allows the employer to bring claims against the employee in court, limits the employee's rights in the litigation, and strips the employee of his or her job and salary pending the litigation, even if the employer's claim proves unmeritorious, while forcing the employee to arbitrate claims against the employer subject to concessions that favor the employer, such as a shortened period of limitations to which no tolling may apply and the loss of remedies for willful fraud or other intentional acts of the employer as well as statutory remedies [*Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1542, 60 Cal. Rptr. 2d 138]* . Other terms that have caused arbitration clauses to be held substantively unconscionable, usually if more than one appears in a single agreement [*see* [f], *below* (discussion of severing single unconscionable term but enforcing the rest of agreement)], include the following:

- Arbitration is mandatory for employee, but not for employer [*Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 121, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal. App. 4th 1267, 1282-1283, 1287-1288, 16 Cal. Rptr. 3d 296* (agreement phrased as promise only by employee); Kinney v. United Healthcare Services, Inc. (1999) 70 Cal, App. 4th 1322, 1331-1332, *83 Cal. Rptr. 2d 348]* .

- Class action prohibition [*Circuit City Stores, Inc. v. Mantor (9th Cir. 2003) 335 F. 3d 1101, 1107-1109* ; *Ingle v. Circuit City Stores, Inc. (9th Cir. 2003) 328 F.3d 1165, 1175-1176]* .

- Cost splitting [*Circuit City Stores, Inc. v. Mantor (9th Cir. 2003) 335 F. 3d 1101, 1107-1109* ; *Ingle v. Circuit City Stores, Inc. (9th Cir. 2003) 328 F.3d 1165, 1177-1178* ; *Martinez v. Master Protection Corp. (2004) 118 Cal. App. 4th 107, 115-116, 12 Cal. Rptr. 3d 663* ; *Abramson v. Juniper Networks, Inc. (2004) 115 Cal. App. 4th 638, 660-661]* or imposition of unaffordable fees on consumers [*Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1578-1580, 98 Cal. Rptr. 3d 743*].

- Covenants, Conditions and Restrictions (CCR's) cannot be construed as a contract that is sufficient to waive the constitutional right to trial by jury pursuant to *Code Civ. Proc. § 638*, although it may be reasonable to bind owners and the homeowners association concerning the governance of the community and the placement of restrictions on the use of property [Treo v. *Kettner Homeowners Assn. v. Superior Court (2008) 166 Cal. App. 4th 1055, 1066, 83 Cal. Rptr. 3d 318*]. Treating CCR's as a contract such that they were sufficient to waive the right to trial by jury did not comport with the importance of the right waived. [Treo v. *Kettner Homeowners Assn. v. Superior Court (2008) 166 Cal. App. 4th 1055, 1059-1060, 1066-1067, 83 Cal. Rptr. 3d 318*].

- Discovery too limited [*Fitz v. NCR Corp. (2004) 118 Cal. App. 4th 702, 716-719, 13 Cal. Rptr. 3d 88* (in context of statutory discrimination claim); Kinney v. United Healthcare Services, Inc. (1999) 70 Cal, App. 4th 1322, 1332, *83 Cal. Rptr. 2d 348* ; *see also Martinez v. Master Protection Corp. (2004) 118 Cal. App. 4th 107, 118-119, 12 Cal. Rptr. 3d 663* (discovery severely limited but not necessarily unconscionably so)].

- Employer's right to litigate intellectual property, trade secret, and/or unfair competition matters. This is generally not justified by business realities requiring an injunction because *Code Civ. Proc. § 1281.8(b)* allows a party in arbitration to obtain a provisional remedy, including an injunction [*Fitz v. NCR Corp. (2004) 118 Cal. App. 4th 702, 724-726, 13 Cal. Rptr. 3d 88* ; *Martinez v. Master Protection*

Corp. (2004) 118 Cal. App. 4th 107, 114-115, 12 Cal. Rptr. 3d 663 ; *Abramson v. Juniper Networks, Inc. (2004) 115 Cal. App. 4th 638, 660-661, 664-666* ; O'Hare v. Municipal Resource Consultants (2003) 107 CA4 267, 274-279, *132 Cal. Rptr. 2d 116* ; *Mercuro v. Superior Court (Countrywide Securities Corp.) (2002) 96 Cal. App. 4th 167, 176-178, 116 Cal. Rptr. 2d 671]* .

- Employer's unilateral power to modify or terminate agreement [*Circuit City Stores, Inc. v. Mantor (9th Cir. 2003) 335 F. 3d 1101, 1107-1109* ; *Ingle v. Circuit City Stores, Inc. (9th Cir. 2003) 328 F.3d 1165, 1179]* .

- Filing fee payable to employer [*Circuit City Stores, Inc. v. Mantor (9th Cir. 2003) 335 F. 3d 1101, 1107-1109* ; *Ingle v. Circuit City Stores, Inc. (9th Cir. 2003) 328 F.3d 1165, 1177]* .

- Limited recovery [*Ingle v. Circuit City Stores, Inc. (9th Cir. 2003) 328 F.3d 1165, 1178* ; *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 121, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *Harper v. Ultimo (2003) 113 Cal. App. 4th 1402, 1407, 7 Cal. Rptr. 3d 418* (Better Business Bureau arbitration rules limited consumer's recovery to $2,500); *Kinney v. United Healthcare Services, Inc. (1999) 70 Cal. App. 4th 1322, 1332* , *83 Cal. Rptr. 2d 348]* .

- One-sided scope of claims arbitrable [*Ingle v. Circuit City Stores, Inc. (9th Cir. 2003) 328 F.3d 1165, 1172-1179* ; *Baker v. Osborne Development Corp. (2008) 159 Cal. App. 4th 884, 894, 71 Cal. Rptr. 3d 854* ; *Higgins v. Superior Court (Disney/ABC International Television, Inc.) (2006) 140 Cal. App. 4th 1238, 1253-1255, 45 Cal. Rptr. 3d 293* (agreement phrased as promise to arbitrate only by subjects of television program); *Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal. App. 4th 1267, 1282-1283, 1287-1288, 16 Cal. Rptr. 3d 296* (agreement phrased as promise only by employee)].

- Shortened limitation period [*Circuit City Stores, Inc. v. Mantor (9th Cir. 2003) 335 F. 3d 1101, 1107-1109* (one year); *Ingle v. Circuit City Stores, Inc. (9th Cir. 2003) 328 F.3d 1165, 1175* (one year); *Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal. App. 4th 1267, 1283, 1288, 16 Cal. Rptr. 3d 296* (180 days); *Martinez v. Master Protection Corp. (2004) 118 Cal. App. 4th 107, 117-118, 12 Cal. Rptr. 3d 663* (six months)].

- Trial de novo provision that, while facially mutual, would in practice only be invoked by party that drafted agreement [*Saika v. Gold (1996) 49 Cal. App. 4th 1074, 1082, 56 Cal. Rptr. 2d 922]* .

- A condition precedent to arbitration that employee first discuss any dispute with supervisor, although facially benign goal because of employer-controlled mechanism (i.e., no neutral involved), was more likely to function as employer's opportunity for "free peek" at employee's case [*Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal. App. 4th 1267, 1282-1283, 1287-1288, 16 Cal. Rptr. 3d 296]* .

In the context of a residential lease, an arbitration clause that required the tenant to arbitrate any personal injury claims resulting from the condition of the premises, but allowed the landlord to seek judicial remedies for any default of tenants, including unlawful detainer actions, was unconscionable and unenforceable as lacking sufficient "bilaterality" [*Jamarillo v. JH Real Estate Partners, Inc. (2003) 111 Cal. App. 4th 394, 404-406, 3 Cal. Rptr. 3d 525]* .

A party, such as a company, that repeatedly appears before the same group of arbitrators, has a distinct advantage over the individual employee or consumer. This "repeat player effect" comes into play when an arbitration agreement requires the arbitrator to be from a specific dispute resolution organization before which the stronger (usually drafting) party appears frequently. Although this "repeat player effect" has never been held sufficient by itself to render an arbitration agreement unconscionable, it is a factor to be considered in determining substantive unconscionability because it deprives the weaker party of the chance to participate in the selection of the arbitrator [*Mercuro v. Superior*

Court (Countrywide Securities Corp.) (2002) 96 Cal. App. 4th 167, 176-178, 116 Cal. Rptr. 2d 671] .

[c] Same Result Under Either Analysis

Whether analyzed from the standpoint of an adhesion contract with a provision that is unfair or outside the reasonable expectations of the weaker party [*see* [a], *above*] or from the *A & M Produce* components of unconscionability [*see* [b], *above*], the determination regarding enforceability should reach the same result [*Patterson v. ITT Consumer Financial Corp. (1993) 14 Cal. App. 4th 1659, 1663-1664, 1666-1667, 18 Cal. Rptr. 2d 563 , cert. denied, 510 U.S. 1176 (1994)]* .

ILLUSTRATION:

Clause Unenforceable Under Either Approach. A clause provides for "binding arbitration by the National Arbitration Forum, Minneapolis, Minnesota." The Forum's procedures required a large fee of a consumer who wished a hearing, and provided that a response or denial mailed to Minnesota was considered acquiescence to jurisdiction in Minnesota and to arbitration on the documents alone. The Forum would not make copies of its rules available to a consumer until the defendant had initiated a claim against him or her. Nor would the Forum advise a claimant or a respondent of the location of the participatory hearing before the claim was brought or a response entered. Is the clause unconscionable? Yes. The court of appeal found that under either analysis, this procedure was designed to discourage borrowers from responding at all, and was certainly outside the reasonable expectation of a California consumer [*see* *Patterson v. ITT Consumer Financial Corp. (1993) 14 Cal. App. 4th 1659, 1665-1667, 18 Cal. Rptr. 2d 563 , cert. denied, 510 U.S. 1176 (1994)]* . However, this result may be subject to challenge under *Allied-Bruce Terminix Cos. v. Dobson (1995) 513 U.S. 265, 280-281, 115 S. Ct. 834, 130 L. Ed. 2d 753* ; for discussion, see *§ 32.24*.

[d] Determined at Time Contract Made

Unconscionability is determined as of the time the agreement was made [*Martinez v. Master Protection Corp. (2004) 118 Cal. App. 4th 107, 116, 12 Cal. Rptr. 3d 663* ; *Gutierrez v. Autowest, Inc. (2004) 114 Cal. App. 4th 77, 91, 7 Cal. Rptr. 3d 267]* . Once litigation has commenced, an offer by the drafting party to modify the unconscionable term is of no effect. The harm--that inclusion of the unconscionable term produces an unacceptable chilling effect on the non-drafting party--has already occurred [*Martinez v. Master Protection Corp. (2004) 118 Cal. App. 4th 107, 116-117, 12 Cal. Rptr. 3d 663* (statutory rights were at issue)]. Similarly, although arbitration rules may allow an arbitrator to reduce or defer administrative fees in the event of extreme hardship of any party, such rules are not sufficient to ensure either that only affordable fees may be imposed on the nondrafting party or that the fee term will not be unconscionable [*Gutierrez v. Autowest, Inc. (2004) 114 Cal. App. 4th 77, 92, 7 Cal. Rptr. 3d 267]* . Conversely, arbitration under a three-party agreement, which provides for each party to appoint one arbitrator and for those arbitrators to choose a neutral fourth arbitrator, will not be denied on the grounds of unfairness or unconscionability because two parties' interests have become aligned by the time the dispute arises [*Tate v. Saratoga Savings & Loan Assn. (1989) 216 Cal. App. 3d 843, 852-854, 265 Cal. Rptr. 440* (nor will resultant award be vacated)].

[e] Policy Favors Upholding Agreement

Absent some special element of unfair advantage, however, arbitration is considered to be mutually advantageous and inclusion of an arbitration provision in commercial contracts is common. If the facts show that the parties could reasonably anticipate an arbitration clause, and that the agreement is not unduly oppressive, the arbitration provision will be enforced even though it is contained in an adhesion contract [*see* *Keating v. Superior Court (1982) 31 Cal. 3d 584, 594-595, 183 Cal. Rptr. 360, 645 P.2d 1192* (reversed in part on other grounds in *Southland Corp. v. Keating (1984) 465 U.S. 1, 16-17, 104 S. Ct. 852, 79 L. Ed. 2d 1*); Painters Dist. Council No. 33 v. *Moen (1982) 128 Cal. App. 3d 1032, 1040-1041, 181 Cal. Rptr. 17]* .

For discussion of general principles of the law of unconscionability, see Ch. 140, *Contracts* .

[f] Severability of Unconscionable Provisions

Civ. Code § 1670.5(a) provides that a court may enforce the remainder of a contract without the unconscionable clause, or may limit the application of any unconscionable clause so as to avoid any unconscionable result. With respect to an arbitration clause that suffers from multiple problems of unconscionability, especially when one of those problems is that the entire arbitration provision is unilateral, and those multiple defects reflect a systematic effort to impose arbitration on the weaker party (not simply as an alternative to litigation, but as an inferior forum that works to the stronger party's advantage) severing the unconscionable portions of the clause and compelling arbitration is not appropriate [*Ingle v. Circuit City Stores, Inc. (9th Cir. 2003) 328 F.3d 1165, 1180* ; *Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 121-122, 124, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1586, 98 Cal. Rptr. 3d 743* ; *Fitz v. NCR Corp. (2004) 118 Cal. App. 4th 702, 726-727, 13 Cal. Rptr. 3d 88* ; *Martinez v. Master Protection Corp. (2004) 118 Cal. App. 4th 107, 119, 12 Cal. Rptr. 3d 663* ; *O'Hare v. Municipal Resource Consultants (2003) 132 Cal. Rptr. 2d 116* ; *Mercuro v. Superior Court (Countrywide Securities Corp.) (2002) 96 Cal. App. 4th 167, 184-186, 116 Cal. Rptr. 2d 671* ; *Flores v. Transamerica HomeFirst, Inc. (2001) 93 Cal. App. 4th 846, 857, 113 Cal. Rptr. 2d 376]* .

Furthermore, with an unconscionably unilateral arbitration clause, there is no single provision a court could strike or restrict in order to remove the unconscionable taint from the agreement. The only option would be to reform the agreement to make it bilateral; and a court has no power to do that [*Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 124-125, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1586, 98 Cal. Rptr. 3d 743* ; *Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal. App. 4th 1267, 1287-1288, 16 Cal. Rptr. 3d 296* ; *Martinez v. Master Protection Corp. (2004) 118 Cal. App. 4th 107, 119, 12 Cal. Rptr. 3d 663* ; *Mercuro v. Superior Court (Countrywide Securities Corp.) (2002) 96 Cal. App. 4th 167, 186-187, 116 Cal. Rptr. 2d 671* ; *Flores v. Transamerica HomeFirst, Inc. (2001) 93 Cal. App. 4th 846, 857, 113 Cal. Rptr. 2d 376]* . Accordingly, the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability [*Roman v. Superior Court (2009) 172 Cal. App. 4th 1462, 1477, 92 Cal. Rptr. 3d 153* (unconscionable fee sharing provision alone was insufficient to justify nonenforcement of entire arbitration agreement)]. Nor is severance appropriate after the underlying agreement has terminated, with the party urging arbitration having taken all that it bargained for in underlying agreement and thus no longer in need of enforcing the unconscionable portions of the arbitration agreement [*Flores v. Transamerica HomeFirst, Inc. (2001) 93 Cal. App. 4th 846, 857-858, 113 Cal. Rptr. 2d 376]* .

In determining whether to sever or restrict illegal terms rather than voiding the entire contract, the overarching inquiry is whether the interests of justice would be furthered by severance [*Roman v. Superior Court (2009) 172 Cal. App. 4th 1462, 1477, 92 Cal. Rptr. 3d 153* (unconscionable fee sharing provision severed)]. In making this determination, the strong legislative and judicial preference is to sever the offending term and enforce the balance of the agreement [*Roman v. Superior Court (2009) 172 Cal. App. 4th 1462, 1477-1478, 92 Cal. Rptr. 3d 153*]. First, courts are to look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If (1) the illegality is collateral to the main purpose of the contract, and (2) the illegal provision can be extirpated from the contract by means of severance or restriction, then severance and restriction are appropriate. An unconscionable arbitration term is not to be severed if it was drafted in bad faith, because severing such a term and enforcing the arbitration provision would encourage drafters to overreach [*Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1585-1586, 98 Cal. Rptr. 3d 743*].

One type of unconscionable provision that is severable is a provision that relates to the neutrality of the arbitrator. Then, the rest of the arbitration clause can be enforced and the arbitrator chosen in accordance with *Code Civ. Proc. § 1281.6* [*Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 831, 171 Cal. Rptr. 604, 623 P.2d 165* ; *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1986) 183 Cal. App. 3d 1097, 1107 228 Cal. Rptr. 345]* .

Other examples of unconscionable provisions that have been severed from arbitration clauses are the following:

- Although seemingly neutral on its face, a provision that allows either party to have an award in excess of $50,000 reviewed by a second arbitrator is so one-sided as to be unconscionable. The $50,000 threshold only benefits the party against whom an award of that magnitude is likely to be entered [*Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1074, 1077-1079, 130 Cal. Rptr. 2d 892, 63 P.3d 979* ; *Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 129 Cal. Rptr. 2d 659* ; *but see Finley v. Saturn of Roseville (2004) 117 Cal. App. 4th 1253, 1255, 1260, 12 Cal. Rptr. 3d 561* (trial court's confirmation of arbitration award on ground of untimeliness reversed and returned to trial court to vacate order and reverse arbitration award on ground of lack of jurisdiction arising from parties' agreement to submit issues for review to second arbitrator)].

- A provision in a credit card agreement, prohibiting arbitration of class or representative claims has been held severable. Not only is such a provision one-sided and unconscionable, in that it is likely to deprive consumers of any remedy for practices that involve relatively small amounts of money, it contradicts the public policy of discouraging unfair and unlawful business practices and it is contrary to the promotion of judicial economy [*Szetela v. Discover Bank (2002) 97 Cal. App. 4th 1094, 1101-1102, 118 Cal. Rptr. 2d 862* ; *accord Ting v. AT&T (9th Cir. 2003) 319 F. 3d 1126, 1150, 1152* (class action prohibition was unconscionable and unenforceable under California doctrine of unconscionability)].

- A provision in a franchise agreement requiring arbitration in Utah is severable because it is unduly oppressive as to the "Mom & Pop" franchisees [*Bolter v. Superior Court (Harris Research Inc.) 87 Cal. App. 4th 900, 909-911, 104 Cal. Rptr. 2d 888]* .

- A provision in a consumer contract (which gave the consumer unwaivable statutory rights) required the consumer to pay an unaffordable fee to initiate the arbitration process [*Gutierrez v. Autowest (2004) 114 Cal. App. 4th 77, 83, 92-93, 7 Cal. Rptr. 3d 267* ; *see also* discussion of remainder of cost provision at § 32.22[2][b]].

- Unenforceable fee sharing provision that was unconscionable as applied to claim under Fair Employment and Housing Act was by itself insufficient to justify nonenforcement of the entire arbitration agreement [*Roman v. Superior Court (2009) 172 Cal. App. 4th 1462, 1477, 92 Cal. Rptr. 3d 153*].

[4] Enforceability When Induced by Fraud

[a] Possible Fraud Issues Distinguished

Three types of fraud may be identified for purposes of analyzing when fraud is subject to arbitration:

- Fraud in the making of the arbitration clause itself [*see § 32.21[4][c]*].

- Fraud in the inception (or execution) of the contract (party never intended to enter any contract) [*see § 32.21[4][d]*].

- Fraud in the inducement of the contract as a whole (party intended to contract, but would not have done so but for other party's misrepresentations) [*see § 32.21[4][b]*].

The arbitration clause may be avoided when there is fraud in the inception or execution, that is, when the plaintiff had no intention to agree to arbitrate because the plaintiff had no intention of entering into any kind of contractual agreement at all. Arbitration may also be avoided when there is fraud in the making of the arbitration clause itself, for example, by actively concealing its existence or misrepresenting its meaning or value. However, an agreement to arbitrate may not be held invalid simply because the contract as a whole was induced by fraud. In that case, the issue of fraud is for the arbitrator [*Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 419, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* ; *Duffens v. Valenti (2008) 161 Cal. App. 4th 434, 448, 74 Cal. Rptr. 3d 311* ; *Larian v. Larian (2004) 123 Cal. App. 4th 751, 761-762, 19 Cal. Rptr. 3d 916* ; *see Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street (1983) 35 Cal. 3d 312, 323, 197 Cal. Rptr. 581, 673 P.2d 251* ; *Hayes Children Leasing Co. v. NCR Corp. (1995) 37 Cal. App. 4th 775, 783-785, 43 Cal. Rptr. 2d 650* ; *but see Brown v. Wells Fargo Bank (2008) 168 Cal. App. 4th 938, 960, 85 Cal. Rptr. 3d 817* (trial court must determine if constructive fraud existed due to failure to explain material terms of arbitration agreement despite implied fiduciary duty between financial institution and elderly clients)].

A fourth way of approaching fraud has been largely discredited. That is the argument that an arbitration clause may be held invalid because a party intended to use it to effect a fraudulent scheme. This theory was recognized by *Moseley v. Electronic Facilities (1963) 374 U.S. 167, 171, 83 S. Ct. 1815, 10 L. Ed. 2d 818* . This aspect of *Mosely*, however, was impliedly overruled by *Prima Paint Corp. v. Flood & Conklin (1967) 388 U.S. 395, 406, 87 S. Ct. 1801, 18 L. Ed. 2d 1270* , under which the question is whether the intent to arbitrate was given and given freely [*Hayes Children Leasing Co. v. NCR Corp. (1995) 37 Cal. App. 4th 775, 787, 43 Cal. Rptr. 2d 650]* .

Another view of fraud, the "permeation doctrine," has been rejected by the California Supreme Court as being in conflict with *Prima Paint Corp. v. Flood & Conklin (1967) 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270* [*see* [d], *below*] to the extent the doctrine indicates that an agreement to arbitrate may be found invalid simply because the contract as a whole was induced by fraud. Also, to the extent the "permeation doctrine" may merely be another name for fraud in the execution of a contract, the doctrine is simply unnecessary. Thus, the Court expressly declined to recognize the doctrine [*Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 418-419, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* ; *Duffens v. Valenti (2008) 161 Cal. App. 4th 434, 448, 74 Cal. Rptr. 3d 311]* .

The bottom line is that for fraud to invalidate an arbitration clause, the fraud must specifically and unquestionably infect the agreement to arbitrate such that it nullifies the apparent consent to that agreement [*Hayes Children Leasing Co. v. NCR Corp. (1995) 37 Cal. App. 4th 775, 785, 43 Cal. Rptr. 2d 650* ; *Brown v. Wells Fargo Bank (2008) 168 Cal. App. 4th 938, 958, -- Cal. Rptr. 3d --* (trial court must determine if constructive fraud existed due to failure to explain material terms of arbitration agreement despite implied fiduciary duty between financial institution and elderly clients)].

[b] Fraud in Inducement of Contract Is Subject to Arbitration Unless Parties Exclude It From Clause

The policy favoring arbitration supports validation of an arbitration clause contained in a contract obtained by fraud. The parties may limit the scope of arbitration so as to exclude questions of fraud in the inducement, but absent an indication of their contrary intent, if the arbitration clause is reasonably susceptible to such an interpretation, claims of fraud in the inducement of the contract (as distinguished from claims of fraud directed to the arbitration clause itself) are deemed subject to arbitration [*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street (1983) 35 Cal. 3d 312, 323, 197 Cal. Rptr. 581, 673 P.2d 251* (noting that the fraud did not permeate the entire contract, including the arbitration clause, because the plaintiff did not deny ever agreeing to anything and was concededly aware of the arbitration clause); *Duffens v. Valenti (2008) 161 Cal. App. 4th 434, 448-449, 74 Cal. Rptr. 3d 311* ; *Larian v. Larian (2004) 123 Cal. App. 4th 751, 761, 19 Cal. Rptr. 3d 916* ; *King v. Prudential-Bache Securities, Inc. (1990) 226 Cal. App. 3d 749, 753, 277 Cal. Rptr. 214]* .

This follows the federal rule that, under a broadly worded arbitration provision, fraud in the making or performance of the principal contract is to be decided by the arbitrator, and that the issue of fraud is to be decided by the court only

when it is alleged that the arbitration provision itself was obtained by fraud or as part of a fraudulent scheme [*Strotz v. Dean Witter Reynolds, Inc. (1990) 223 Cal. App. 3d 208, 214, 272 Cal. Rptr. 680* (harmonizing *Prima Paint Corp. v. Flood & Conklin (1967) 388 U.S. 395, 404, 87 S. Ct. 1801, 18 L. Ed. 2d 1270, 1277* , and *Moseley v. Electronic Facilities (1963) 374 U.S. 167, 171, 83 S. Ct. 1815, 10 L. Ed. 2d 818, 821)* ; *Brown v. Wells Fargo Bank (2008) 168 Cal. App. 4th 938, 958, 85 Cal. Rptr. 3d 817* (trial court must determine if constructive fraud existed due to failure to explain material terms of arbitration agreement despite implied fiduciary duty between financial institution and elderly clients); *see also C.H.I., Inc. v. Marcus Bros. Textile, Inc. (9th Cir. 1991) 930 F.2d 762, 763-764* (dismissing diversity case for failure to arbitrate; fact that arbitration clause was in confirmation order form, over signature line, and that party signed it to fill orders to its clients did not amount to evidence of duress or establish that contract was one of adhesion)].

[c] Fraud Going to the Arbitration Clause Itself

[i] Elements of Delay Constituting Fraud

The California Supreme Court has analyzed a party's claim of being fraudulently induced to enter an arbitration agreement as a claim of promissory fraud, that is, a promise made without the intention to perform [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 973, 64 Cal. Rptr. 2d 843, 938 P.2d 903]* . The elements are as follows [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 974, 64 Cal. Rptr. 2d 843, 938 P.2d 903]* :

- Misrepresentation (false representation, concealment, or nondisclosure).
- Knowledge of falsity ("scienter").
- Intent to defraud (that is, to induce reliance).
- Justifiable reliance.
- Resulting damage.

If delay in the selection of arbitrators that is the result of reasonable and good faith disagreement between the parties, or some other reasonable cause, the remedy may be a *Code Civ. Proc. § 1281.6* petition for appointment of an arbitrator rather than abandonment of the arbitration. However, a party that imposes and administers is own arbitration program, that fraudulently misrepresents the speed of the arbitrator selection process, and that in fact engages in conduct forcing substantial delay, may not then compel arbitration by contending that the other party failed to resort to a *Code Civ. Proc. § 1281.6* petition [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 981, 64 Cal. Rptr. 2d 843, 938 P.2d 903]* .

[ii] Misrepresentation, Knowledge of Falsity, and Intent to Induce Reliance

In *Engalla*, the Court found evidence sufficient to remand to the trial court for a determination of whether fraud barred a petitioner's attempt to compel arbitration. *Engalla* involved an arbitration clause, which was drafted by the petitioner (Kaiser) and provided for selection of party arbitrators within 30 days and of a neutral within 60 days, with arbitration to be held within a reasonable time thereafter. The Court found evidence of misrepresentation in a survey of Kaiser arbitrations that showed that only one percent of the cases followed the time table for appointing arbitrators and that the average time was nearly two years after the demand. Depositions of two of Kaiser's in-house attorneys showed that Kaiser was aware of the delay. Given the pervasiveness of the delays and the fact that it is the defense that often benefits from delay, as well as evidence that Kaiser kept detailed information on arbitrators and may have used delay to ensure that it would obtain the arbitrators that best served its interests, the Court concluded that it would be reasonable to infer

that Kaiser's representations of expedition were made with knowledge of their likely falsity and concealed an unofficial policy or practice of delay [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 974-975, 64 Cal. Rptr. 2d 843, 938 P.2d 903]* . One additional factor the Court pointed to was that under Kaiser's system Kaiser entrusted administration of the arbitration to outside counsel retained to act as Kaiser's advocates, rather than to a neutral third party organization [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 975-976, 64 Cal. Rptr. 2d 843, 938 P.2d 903]* .

The *Engalla* Court found that intent to induce reliance could be inferred from the repetition of the misrepresentation not only in the contract but in newsletters which were periodically sent to subscribers [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 976, 64 Cal. Rptr. 2d 843, 938 P.2d 903]* .

[iii] Justifiable Reliance

Actual reliance occurs when a misrepresentation is an immediate cause of a party's conduct, which alters his or her legal relations if, absent the representation, the party, in all reasonable probability, would not have entered into the contract or other transaction. The reliance need not be the sole or even predominant or decisive factor in influencing the party's conduct; it need only play a substantial part, and so have been a substantial factor, in influencing the party's decision [Engalla v. Permanente *Medical Group, Inc. (1997) 15 Cal. 4th 951, 976-977, 64 Cal. Rptr. 2d 843, 938 P.2d 903]* .

Reliance may be inferred from a showing that the misrepresentation was material, that is, that a reasonable person would attach importance to its existence or nonexistence in determining his or her choice of action in the transaction in question [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 977, 64 Cal. Rptr. 2d 843, 938 P.2d 903]* .

In the case of an arbitration clause in an agreement entered into by an employer on behalf of its employees, such as a group medical benefits plan, the employer acts as the employees' agent during the negotiation. Thus, the question of reliance in such a case is whether the material representation is one that would have substantially influenced the employer, acting as an agent of its employees as a class [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 977-978, 64 Cal. Rptr. 2d 843, 938 P.2d 903]* .

In *Engalla*, the Court concluded that Kaiser's representations of an expeditious arbitration system were not so obviously unimportant as to render them immaterial as a matter of law, given that expedition is commonly regarded as one of the primary advantages of arbitration [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 978, 64 Cal. Rptr. 2d 843, 938 P.2d 903]* . The availability of a statutory remedy to expedite appointment of arbitrators did not negate the materiality of the misrepresentation, because requiring recourse to the court is not the normal expectation of arbitration participants [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 978-979, 64 Cal. Rptr. 2d 843, 938 P.2d 903* ; *see Code Civ. Proc. § 1281.6* (petition to appoint arbitrator)].

[iv] Resulting Damage

A defrauded party need not show pecuniary damage to defeat a petition to compel arbitration. It is not, however, adequate merely to show that the other party has engaged generally in fraudulent misrepresentation about the speed of the arbitration process. The defrauded party must show that in their particular case, there was substantial delay in the selection of arbitrators contrary to their reasonable, fraudulently induced, contractual expectations [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 979, 64 Cal. Rptr. 2d 843, 938 P.2d 903]* . The *Engalla* Court appeared to consider the suffering of delay as adequate damage to support a finding of damage [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 981, 64 Cal. Rptr. 2d 843, 938 P.2d 903]* , although the facts of the case also indicated that the delay resulted in the reduction of recoverable damages due to the death of the plaintiff patient and the merger of the surviving spouse's loss of consortium claim with the wrongful death claim [*see Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 969, 64 Cal. Rptr. 2d 843, 938 P.2d 903]* .

[d] Fraud in Inception of Contract Is Not Subject to Arbitration

Fraud in the inception or execution of a contract is fraud in which the promisor is deceived as to the nature of his or her act, and actually does not know what he or she is signing, or does not intend to enter into a contract at all, mutual assent is lacking and the contract is void [*Brown v. Wells Fargo Bank (2008) 168 Cal. App. 4th 938, 958, 85 Cal. Rptr. 3d 817* (trial court must determine if constructive fraud existed due to failure to explain material terms of arbitration agreement despite implied fiduciary duty between financial institution and elderly clients); *Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 415, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* ; *Jones v. Adams Financial Services (1999) 71 Cal. App. 4th 831, 835, 84 Cal. Rptr. 2d 151]* . Where a party's assent to a contract is negated by fraud in the inception, there simply is no arbitration agreement to be enforced. Thus, *Prima Paint Corp. v. Flood & Conklin (1967) 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270* does not preclude the court from determining claims of fraud in the execution of the entire contract [*Brown v. Wells Fargo Bank (2008) 168 Cal. App. 4th 938, 958, 85 Cal. Rptr. 3d 817* (trial court must determine if constructive fraud existed due to failure to explain material terms of arbitration agreement despite implied fiduciary duty between financial institution and elderly clients); *Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 415-416, 58 Cal. Rptr. 2d 875, 926 P.2d 1061]* .

In *Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* , the court ultimately concluded that some of the plaintiffs failed to present legally sufficient evidence to render the agreements void for fraud in the execution, so that the defendant's petition to compel arbitration should be granted as to them. Other plaintiffs, however, had presented potentially sufficient evidence, requiring remand for further proceeding [*Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 402, 426-427, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* ; *see also* *Jones v. Adams Financial Services (1999) 71 Cal. App. 4th 831, 840, 84 Cal. Rptr. 2d 151* (fraud in inception established by 79-year-old legally blind woman with dementia who was tricked into signing note and deed of trust); *see also* *Brown v. Wells Fargo Bank (2008) 168 Cal. App. 4th 938, 958, 85 Cal. Rptr. 3d 817* (trial court must determine if constructive fraud existed at inception due to failure of bank representative to explain material terms of arbitration agreement despite implied fiduciary duty between financial institution and elderly clients)].

Other cases that have held that, if the complaint sufficiently alleges duress, undue influence, or fraud in the inception, factum, or execution, the entire agreement is rendered void for lack of mutual consent include:

- *Rice v. Dean Witter Reynolds, Inc. (1991) 235 Cal. App. 3d 1016, 1024-1026, 1 Cal. Rptr. 2d 265* (controlled by FAA; allegations of brokers' misrepresentation of nature of documents to person unsophisticated in business and with no experience in securities investments were sufficient to raise issue of fraud in the inception).

- *Strotz v. Dean Witter Reynolds, Inc. (1990) 223 Cal. App. 3d 208, 212, 217-219, 272 Cal. Rptr. 680* (plaintiff alleged not to have known document was contract; plaintiff's failure to read documents may be excusable in light of allegations of fiduciary relationship and defendant's misrepresentations; controversy admittedly controlled by FAA).

- *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1977) 67 Cal. App. 3d 19, 25, 27-33, 136 Cal. Rptr. 378* (controversy controlled by FAA; sufficient allegations of relationship of trust and confidence, undue influence, and fraud in inducing entire agreement and arbitration clause).

To the extent that cases issue analyzing this issue in terms of fraud "permeating" the contract have simply used that terminology as another name for fraud in the inception or execution of the contract, those cases may illustrate situations in which the arbitration agreement was void and unenforceable. However, to the extent that they fail to recognize that the arbitration clause is severable from the rest of the contract when the issue is fraud in the inducement, cases dealing with the "permeation doctrine" should not be relied on [*see* *Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 418, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* (criticizing *Ford v. Shearson Lehman American Express,*

Inc. (1986) 180 Cal. App. 3d 1011, 225 Cal. Rptr. 895)].

[5] Enforceability by or Against Third Party

[a] Court, Not Arbitrator, Decides Third Party's Status

An arbitrator generally does not have jurisdiction to determine any question regarding a third party's status, such as whether the third party can enforce the arbitration agreement, either for its own benefit or "on behalf" of a party to the arbitration agreement [*Valley Casework, Inc. v. Comfort Construction, Inc. (1999) 76 Cal. App. 4th 1013, 1024, 90 Cal. Rptr. 2d 779* (agreement between general contractor and subcontractor)], or whether the third party is an undisclosed principal of the signatory to the arbitration agreement. A court must determine these questions before it orders arbitration [*Valley Casework, Inc. v. Comfort Construction, Inc. (1999) 76 Cal. App. 4th 1013, 1024, 90 Cal. Rptr. 2d 779* ; *American Builder's Assn. v. Au-Yang (1990) 226 Cal. App. 3d 170, 177-180, 276 Cal. Rptr. 262* ; *accord*, *Three Valleys Mun. Water Dist. v. E.F. Hutton (9th Cir. 1991) 925 F.2d 1136, 1140-1142, 1144* (under federal rule and Federal Arbitration Act, court is required to decide threshold issue whether individual signatory had authority to bind government entity to contract)]. Thus, an arbitrator cannot order the joinder of a third party of undetermined status [*American Builder's Assn. v. Au-Yang (1990) 226 Cal. App. 3d 170, 177-180, 276 Cal. Rptr. 262* ; *Retail Clerks Union v. L. Bloom Sons Co. (1959) 173 Cal. App. 2d 701, 702-703, 344 P.2d 51* (third party claimed to be alter ego of signatory)]. An exception to the foregoing is an arbitration agreement that provides for any third party who is not a party to the agreement but is necessary for complete resolution of any matter required to be arbitrated under the agreement, to be joined in the arbitration and which also provides, or incorporates arbitration rules or procedures that provide, that the arbitrator determine whether anyone must be joined in the arbitration to provide a complete resolution. The California Hospital Association-California Medical Association Rules for the Arbitration of Hospital and Medical Fee Disputes (CHA-CMA Rules) contain such a provision. Thus, an agreement to be arbitrated under those or similar rules will be enforced to refer the issue of the third party's joinder to the arbitrator [*Zakarian v. Bekov (2002) 98 Cal. App. 4th 316, 325-327 Cal. Rptr. 2d 623* (third party wanted to be joined in arbitration)]. A well-drafted arbitration provision of this nature will include the signatories' consent to joinder of any person necessary to full resolution of an arbitrable dispute.

A third party's right to enforce an arbitration agreement is predicated on the contracting parties' intent to benefit that third party [*Matthau v. Superior Court (William Morris Agency) (2007) 151 Cal. App. 4th 593, 602, 60 Cal. Rptr. 3d 93* ; *City of Hope v. Bryan Cave (2002) 102 Cal. App. 4th 1356, 1369-1370, 126 Cal. Rptr. 2d 283]* . Some agreements, such as release agreements containing boilerplate language purporting to excuse everyone in the world from liability, can be enforced by persons who are not parties to the agreement. Still, a third party has the burden of proving that the contracting parties intended to benefit that third party. It is not enough that a literal interpretation of the contract would result in a benefit to the third party [*City of Hope v. Bryan Cave (2002) 102 Cal. App. 4th 1356, 1369-1370, 126 Cal. Rptr. 2d 283]* . A petition to compel arbitration is in essence a suit in equity to compel specific performance of a contract. In the case of a person claiming to be a third party beneficiary entitled to enforce an arbitration agreement, the minimal formalities required in the petition to compel arbitration are an allegation of a controversy between the parties, facts demonstrating the existence of an arbitrable controversy, the existence of the written agreement, and an allegation that the other party has refused to arbitrate. The petition should also set forth the written agreement and the arbitration provision verbatim so the court can determine both whether an arbitration agreement exists and who has standing to demand arbitration [*City of Hope v. Bryan Cave (2002) 102 Cal. App. 4th 1356, 1369, 126 Cal. Rptr. 2d 283]* .

If arbitration has already commenced between the signatories and a nonparty of undetermined status appears to be an indispensable party to the arbitration, the arbitration proceeding should be stayed until the nonsignatory's status is determined in the declaratory relief action [*see* *American Builder's Assn. v. Au-Yang (1990) 226 Cal. App. 3d 170, 180, 276 Cal. Rptr. 262]* .

[b] Medical Malpractice

[i] Heirs of Signatory Party

Ordinarily, a patient who signs an arbitration agreement covering medical malpractice claims cannot bind anyone else except his or her spouse and minor children to arbitrate any wrongful death claim under that agreement [*Fitzhugh v. Granada HealthCare and Rehabilitation Center, LLC (2007) 150 Cal. App. 4th 469, 474, 58 Cal. Rptr. 3d 585* ; *Buckner v. Tamarin (2002) 98 Cal. App. 4th 140, 142, 119 Cal. Rptr. 2d 489* (adult children not required to arbitrate wrongful death claim); *Herbert v. Superior Court (1985) 169 Cal. App. 3d 718, 722-725, 215 Cal. Rptr. 477* ; *see also Pietrelli v. Peacock (1993) 13 Cal. App. 4th 943, 947, 16 Cal. Rptr. 2d 688* (malpractice, not wrongful death; child bound); *Bolanos v. Khalatian (1991) 231 Cal. App. 3d 1586, 1591, 283 Cal. Rptr. 209* (malpractice, not wrongful death, child and spouse bound); *Gross v. Recabaren (1988) 206 Cal. App. 3d 771, 781, 253 Cal. Rptr. 820* (malpractice, not wrongful death, spouse bound)].

Herbert, mentioned above, is anomalous in that adult children of the decedent were required to arbitrate their wrongful death claims. Because decedent's spouse and five minor children were required by the arbitration agreement decedent signed to arbitrate their wrongful death claim, rather than try to split an indivisible cause of action, the court required the adult children to arbitrate too [*Herbert v. Superior Court (1985) 169 Cal. App. 3d 718, 722-725, 215 Cal. Rptr. 477]* . The converse is also true: the court has discretion under *Code Civ. Proc. § 1281.2(c)* to require all causes of action to be tried when only some are arbitrable. A trial court's discretionary ruling under *Code Civ. Proc. § 1281.2(c)* will not be disturbed unless it exceeds the bounds of reason [*see* *Fitzhugh v. Granada HealthCare and Rehabilitation Center, LLC (2007) 150 Cal. App. 4th 469, 475-476, 58 Cal. Rptr. 3d 585* (surviving spouse's and sons' wrongful death claims and decedent's claim for violations of Patient's *Bill of Rights* [*Health & Safety Code § 1430*; *22* Cal. Code Reg. § 72527])].

[ii] Loss of Consortium Claim by Spouse of Signatory Patient

The courts of appeal are in conflict regarding whether an arbitration agreement that complies with *Code Civ. Proc. § 1295* extends to require arbitration of the patient's spouse's loss of consortium claim if that claim arises out of the medical services that were the subject of the agreement to arbitrate. District Two, Division Four, holds that arbitration of a nonsignatory spouse's loss of consortium claim cannot be compelled [*Baker v. Birnbaum (1988) 202 Cal. App. 3d 288, 291-294, 248 Cal. Rptr. 336]* .

District Two, Division Two, holds that it must be compelled [*Gross v. Recabaren (1988) 206 Cal. App. 3d 771, 781, 253 Cal. Rptr. 820* ; *see also* *Mormile v. Sinclair (1994) 21 Cal. App. 4th 1508, 1515, 26 Cal. Rptr. 2d 725 (Fourth Appellate District)]* . The latter position is consistent with the language of *Code Civ. Proc. § 1295* and the practical realities of the situation, and furthers the judicially favored preference in favor of joining the loss of consortium and negligence claims. That holding is limited, however, to broadly worded agreements that provide for arbitration of "any dispute as to medical malpractice" [*Gross v. Recabaren (1988) 206 Cal. App. 3d 771, 780-781, 253 Cal. Rptr. 820]* .

[iii] Nonsignatory Parent Who Witnessed Accident

A nonsignatory parent has been required to arbitrate an emotional distress claim arising from witnessing injuries to the child when the arbitration agreement was signed by the other parent, contained broad language binding "all parties whose claims arise out of or relate to the treatment or services provided by physician," and complied with *Code Civ. Proc. § 1295* [*Bolanos v. Khalatian (1991) 231 Cal. App. 3d 1586, 1589-1591, 283 Cal. Rptr. 209]* .

[c] Agent or Fiduciary of Signatory

An agent of a signatory, though he or she did not sign the arbitration agreement, can enforce an arbitration agreement or can be compelled to arbitrate. This rule is based on equitable principles [*Bak v. MCL Financial Group, Inc. (2008)*

170 Cal. App. 4th 1118, 1125-1126, 88 Cal. Rptr. 3d 800 (attorney who submitted to the arbitration panel's jurisdiction by appearing for a party as its agent was subject to sanction by the arbitration panel); *Nguyen v. Tran (2007) 157 Cal. App. 4th 1032, 1037-1038, 68 Cal. Rptr. 3d 906* ; *Westra v. Marcus & Millichap Real Estate Investment Brokerage Co. (2005) 129 Cal. App. 4th 759, 764-765, 28 Cal. Rptr. 3d 752* (agent of both buyer and seller in real estate transaction); *see also Izzi v. Mesquite Country Club (1986) 186 Cal. App. 3d 1309, 1319, 231 Cal. Rptr. 315* (officers of condominium association in which property which was subject of transaction was located); *Berman V. Dean Witter & Co., Inc. (1975) 44 Cal. App. 3d 999, 1004, 119 Cal. Rptr. 130* (spouse of account holder and employee of broker both compelled to arbitrate as agents)]. The agent is as entitled to the benefit of arbitration as is his or her principal [*Berman v. Dean Witter & Co., Inc. (1975) 44 Cal. App. 3d 999, 1004, 119 Cal. Rptr. 130]* . It is helpful if the pleadings allege that the nonsignatory defendant sought to be compelled to arbitrate is alleged to be the agent of a signatory [*see Izzi v. Mesquite Country Club (1986) 186 Cal. App. 3d 1309, 1319, 231 Cal. Rptr. 315]* . For other examples of situations in which an agency or fiduciary relationship may have influenced the right or requirement to arbitrate, see [d], [e], and [g], *below*.

Like agents, nonsignatory officers alleged to be alter egos of a corporate defendant can compel signatories to arbitrate [*Rowe v. Exline (2007) 153 Cal. App. 4th 1276, 1279, 1284-1285, 63 Cal. Rptr. 3d 787*].

Similarly, the sole general partner of a limited partnership may be compelled to arbitrate a contract dispute pursuant to an arbitration provision in a contract between the partnership and a third party [*see Keller Constr. Co. v. Kashani (1990) 220 Cal. App. 3d 222, 227-229, 269 Cal. Rptr. 259* (partnership was in bankruptcy and stay prevented it from being compelled to arbitrate; decision was based in part on general partner's liability for obligations of limited partnership; decided under *Corp. Code § 15015(b)* [Uniform Partnership Act, repealed 1999]; *Corp. Code § 15507(a)* [Uniform Limited Partnership Act, repealed Jan. 1, 2010]; *now see Corp. Code §§ 15509(1), 15643(b), 15904.04(a)* [Uniform Limited Partnership Act of 2008]; *Corp. Code § 16306* [Uniform Partnership Act of 1994])].

[d] Introducing Securities Broker

A nonsignatory introducing broker, operating as a completely independent entity from a clearing broker, may not enforce an arbitration clause in a customer agreement between their client and a clearing broker absent a showing of a third party beneficiary status, an agency relationship, or some other appropriate nexus [*compare Arista Films, Inc. v. Gilford Securities, Inc. (1996) 43 Cal. App. 4th 495, 500-501, 51 Cal. Rptr. 2d 35* (not enforceable); *Van Luven v. Rooney Pace, Inc. (1987) 195 Cal. App. 3d 1201, 1207-1208, 241 Cal. Rptr. 248* (not enforceable); *with Macaulay v. Norlander (1992) 12 Cal. App. 4th 1, 8, 15 Cal. Rptr. 2d 204* (enforceable; introducing agent was third party beneficiary under clear language of agreement)].

[e] People Who Have Accepted Benefits of Underlying Agreement

One may accept the benefits of an agreement, or insurance policy, and thus be required to accept the policy's obligations, including the obligation to arbitrate, especially when there is an agency or similar relationship between the nonsignatory and one of the parties to the arbitration agreement [*Norcal Mutual Ins. Co. v. Newton (2000) 84 Cal. App. 4th 64, 71-72, 76, 84, 100 Cal. Rptr. 2d 683]* . See also related theory of equitable estoppel discussed at [g], *below*.

ILLUSTRATION:

Acceptance of Insurance Policy's Benefits Requires Insured's Spouse to Arbitrate in Accordance With Policy. Physician's spouse was not insured under physician's medical malpractice policy, but was sued, along with the physician, in an action alleging sexual misconduct by the insured and unauthorized treatment of patients by the spouse. The insurance company agreed to defend both the physician and the spouse, subject to a reservation of rights, including the right to decline to pay or indemnify any settlement and to seek reimbursement of all fees and costs. The case against the physician and spouse was settled, and a dispute arose as to how the settlement would be reported (as required) to the National

Practitioner Data Bank and to the Medical Board of California. On two occasions, attorneys for spouse demanded arbitration of a number of issues. Later, both physician and spouse "withdrew their request for arbitration." Physician died. Was spouse obligated to arbitrate? Yes, spouse sought and accepted the benefits of the insurance policy by tendering defense of the complaint to the insurance company and accepted those benefits by allowing the insurance company to assume the cost of the defense, by requesting and participating in the settlement of the complaint, by requesting arbitration of the ensuing dispute regarding the reporting of the settlement to the data bank, and even after physician's death by relying on the terms of the insurance policy to obtain a change of venue [*Norcal Mutual Ins. Co. v. Newton (2000) 84 Cal. App. 4th 64, 78, 82, 84, 100 Cal. Rptr. 2d 683]* .

[f] Shareholder's Derivative Action

A shareholder's derivative action that names as a defendant another entity that has an arbitration agreement with the corporation can be compelled to be arbitrated, as long as the subject matter of the derivative action is within the scope of the arbitration agreement. The shareholder plaintiff does not bring the derivative action in his or her own right, but on behalf of the corporation. Third parties can assert any rights and defenses they have against the corporation, including the right to compel arbitration [*Frederick v. First Union Securities, Inc. (2002) 100 Cal. App. 4th 694, 696-697, 701-702, 122 Cal. Rptr. 2d 774]* . *Frederick* involved claims of market manipulation of the corporation's stock by insider officers of both the corporation and its securities brokers. The broadly worded client agreement between the corporation and the brokerage firm that sought to compel arbitration encompassed claims for any transaction involving the corporation and the brokerage firm, whether or not the transaction occurred in the corporation's account or accounts. Thus, the arbitration agreement was broad enough to encompass transactions (in the corporation's stock) complained of that occurred in the accounts of the individuals participating in the scheme. The court found that the claims also fell within the portion of the arbitration agreement which applied to construction, performance, or breach of any duty arising from the brokerage firm's business [*Frederick v. First Union Securities, Inc. (2002) 100 Cal. App. 4th 694, 700, 122 Cal. Rptr. 2d 774]* .

[g] Equitable Estoppel Requires Signatory to Arbitrate with Nonsignatory

California recognizes that a signatory may be required by the doctrine of equitable estoppel to arbitrate claims against a nonsignatory when those claims are intimately founded in and intertwined with arbitrable claims against another signatory [*Turtle Ridge Media Group, Inc. v. Pacific Bell Directory (2006) 140 Cal. App. 4th 828, 833, 44 Cal. Rptr. 3d 817* (subcontractor compelled to arbitrate claims against nonsignatory that was party to primary contract, which had arbitration clause); *Boucher v. Alliance Title Co., Inc. (2005) 127 Cal. App. 4th 262, 269-273, 25 Cal. Rptr. 3d 440* ; *Metalclad Corp. v. Ventana Environmental Organizational Partnership (2003) 109 Cal. App. 4th 1705, 1713-1719, 1 Cal. Rptr. 3d 328]* . The theory, first recognized in federal courts, is usually applied to situations involving related companies and individual officers or agents of those companies and claims of fraud or conspiracy [*see, e.g.,* *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc. (11th Cir. 1993) 10 F.3d 753* (licensee acquired by and merged into licensor's competitor); *Rowe v. Exline (2007) 153 Cal. App. 4th 1276, 1284-1285, 63 Cal. Rptr. 3d 787* (nonsignatory officers alleged to be alter egos of corporate defendant); *Boucher v. Alliance Title Co., Inc. (2005) 127 Cal. App. 4th 262, 268, 272-273, 25 Cal. Rptr. 3d 440* (employee required to arbitrate with nonsignatory sister subsidiary to which employer had transferred all assets)].

ILLUSTRATION:

Equitable Estoppel Required Arbitration With Nonsignatory. One company agreed to sell a subsidiary to another company. The purchase agreement contained an arbitration clause that applied to any controversy or claim arising out of or relating to the contract. Buyer's parent company orally agreed to invest $5,000,000 to finance the purchase, but did not enter into a written agreement with the seller. Buyer assigned its rights to a third company, which seller claimed was merely a shell. Buyer's parent company never advanced the $5,000,000. Seller sued buyer, the buyer's parent company, the buyer's

assignee, and related companies and individuals on various fraud theories. Assignee compelled arbitration in Mexico. The buyer's parent company, and other affiliated companies, after unsuccessfully seeking to stay the action pending the outcome of the Mexican arbitration, sought to compel arbitration in California. Should the seller be required to arbitrate with parties to the litigation who were not also parties to the arbitration agreement? Yes. The claims were so inextricably interwoven that any other result would render arbitration between only the signatories meaningless [*Metalclad Corp. v. Ventana Environmental Organizational Partnership (2003) 109 Cal. App. 4th 1705, 1713-1719, 1 Cal. Rptr. 3d 328]* .

If the contracts involve interstate commerce, federal arbitration law will govern the determination of whether equitable estoppel applies [*Turtle Ridge Media Group, Inc. v. Pacific Bell Directory (2006) 140 Cal. App. 4th 828, 832-833, 835, 44 Cal. Rptr. 3d 817]* . Under federal arbitration law, detrimental reliance is not required to invoke the doctrine of equitable estoppel. It is enough that the claims against the nonsignatory are based on and intertwined with a contract containing an arbitration clause [*Turtle Ridge Media Group, Inc. v. Pacific Bell Directory (2006) 140 Cal. App. 4th 828, 835-836, 44 Cal. Rptr. 3d 817]* .

Likewise, a nonsignatory may not compel another nonsigantory to arbitrate a claim that was not intertwined with the contract providing for arbitration [*see Mundi v. Union Security Life Ins. Co. (2009) 555 F.3d 1042, 1046-1047* (defendant-insurer could not use equitable estoppel to compel plaintiff in survivor's action to arbitrate survivorship claim arising from insurer's policy on decedent's life on the basis of an arbitration clause in a loan agreement between the decedent and a creditor to whom the life insurance benefits were to be paid); *Goldman v. KPMG LLP (2009) 173 Cal. App. 4th 209, 221, 92 CR3d 534* (investors claims against law and accounting firms were not intimately founded in and intertwined with the underlying operating contract obligations)].

[6] Employee Benefits

Employees who enroll in medical plans negotiated by their agent or representative are bound by an arbitration clause in the agreement [*Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 705-706, 131 Cal. Rptr. 882, 552 P.2d 1178* (state employees bound by clause in medical plan negotiated by Board of Administration of State Employee's Retirement System)]. The party negotiating for the employees acts as their agent, and agreeing to an arbitration clause is within the scope of the agent's implied authority [*Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 705-706, 131 Cal. Rptr. 882, 552 P.2d 1178]* .

[7] Agreement to Arbitrate as Waiver of Trial by Jury

An agreement to arbitrate operates as a waiver of the right to a jury trial. The right to a jury trial in California courts is secured by *Cal. Const., art. I, § 16* [for discussion the right to a jury trial, *see* Ch. 322, *Juries and Jury Selection*]. Jury trial in a civil cause may be waived by the consent of the parties expressed as prescribed by statute [*Cal. Const., art. I, § 16*]. The statute that prescribes the procedure for waiving jury trial is *Code Civ. Proc. § 631*. Section 631, however, only applies to waiver by a party to a pending action. It does not prevent parties from avoiding jury trial by agreeing to a method of resolving a controversy, such as arbitration, that does not invoke a judicial forum [*Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 713, 131 Cal. Rptr. 882, 552 P.2d 1178]* .

An arbitration agreement need not expressly waive the parties' constitutional right to jury trial in order to be valid. When parties agree to submit their disputes to arbitration they select a forum that is alternative to, and independent of, the judicial; a forum in which, as they well know, disputes are not resolved by juries [*Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 713-714, 131 Cal. Rptr. 882, 552 P.2d 1178* ; *Powers v. Dickson, Carlson & Campillo (1997) 54 Cal. App. 4th 1102, 1109* , 63 Cal. Rtpr. 2d 261]. It is not unconstitutional for the California Department of Managed Health Care to approve health care service plans in which the only method for resolution of disputes is mandatory arbitration. An employee presented with the option of enrolling in a plan that requires arbitration

of disputes has a choice: to enroll in the plan and give up a right to jury trial, or to decline to enroll and forego coverage under the plan [*Viola v. Department of Managed Health Care (2005) 133 Cal. App. 4th 299, 310-312, 314, 34 Cal. Rptr. 3d 626]* . Similarly, neither California law nor public policy is offended by requiring an employee to waive his or her right to a jury trial as a condition of employment [*Lagatree v. Luce, Howard, Hamilton & Scripps (1999) 74 Cal. App. 4th 1105, 1127-1128, 88 Cal. Rptr. 2d 664]* . The compulsory nature of such a predispute arbitration agreement does not render the agreement unenforceable on the grounds of coercion or for lack of voluntariness [*Lagatree v. Luce, Howard, Hamilton & Scripps (1999) 74 Cal. App. 4th 1105, 1130, 88 Cal. Rptr. 2d 664]* . Thus, a predispute arbitration agreement does not raise any constitutional issue involving waiver of jury trial [*City of Vista v. Sutro & Co. (1997) 52 Cal. App. 4th 401, 407, 60 Cal. Rptr. 2d 488]* .

When the requirement to arbitrate is based on statute, such as *Civil Code § 2860(c)* (arbitration of disputes involving the amount of attorney's fees of independent counsel retained by an insured but to be paid by an insurer, i.e., *Cumis* counsel fees), the statute may be construed to avoid requiring arbitration of claims to which the right to a jury trial applies [*see Fireman's Fund Ins. Companies v. Younesi (1996) 48 Cal. App. 4th 451, 458-459, 55 Cal. Rptr. 2d 671* (fraud claim not subject to arbitration under section 2860(c))].

[8] Compliance With Consumer Protection Statute

Because the right to a judicial forum is a substantial right and not lightly to be deemed waived, the California Legislature has imposed mandatory disclosure requirements for arbitration provisions in various types of contracts [*see, e.g., Bus. & Prof. Code § 7191* (contract for work on residential property of one to four units); *Code Civ. Proc. § 1295* (contract for medical services requiring arbitration of professional negligence claims); *Code Civ. Proc. § 1298* (purchase and sale of real estate); *Health & Safety Code § 1363.1* (arbitration provision in health care service plan); *see* discussion at Ch. 39, *Tactics and New Developments in ADR*, § 39.81)]. Most of these statutes require a specific type size, and/or capitalization and/or bold print so that the arbitration provision is clearly visible and the consumer is made aware of waiving the right to a jury trial by agreeing to arbitration. If the consumer protection statute only applies to arbitration contracts (as opposed to contracts in general) and if the dispute arises from a contract involving interstate commerce, it will be preempted by the Federal Arbitration Act [*9 U.S.C. § 1*; *see* Woolls v. Superior Court (Turner) (2005) *127 Cal. App. 4th 197, 211, 25 Cal. Rptr. 3d 426* ; *see also* discussion at *§ 32.24*]. However, courts are reluctant to infer preemption; and the party claiming that the FAA preempts a particular state law has the burden of proving that the contract involves interstate commerce [Woolls v. Superior Court (Turner) (2005) *127 Cal. App. 4th 197, 211, 25 Cal. Rptr. 3d 426]* . If the contract is not shown to involve interstate commerce and compliance with the statute is absent, arbitration cannot be ordered [Woolls v. Superior Court (Turner) (2005) *127 Cal. App. 4th 197, 206-207, 214-215, 25 Cal. Rptr. 3d 426]* .

As a matter of statutory construction, although the word "may" is permissive, "may not" is prohibitory. Thus, a statute like *Bus. & Prof. Code § 7191*, which provides at subdivision (c) that a noncompliant arbitration clause "may not be enforceable against any person other than the licensee" leaves the court no discretion to enforce an arbitration provision that does not comply with the statute [Woolls v. Superior Court (Turner) (2005) *127 Cal. App. 4th 197, 208-210, 25 Cal. Rptr. 3d 426]* . This is so even if the consumer is an attorney and knew perfectly well that he or she was waiving the right to a jury trial. Any other approach would involve the court in rewriting the statute and would result in additional litigation, with the parties contesting whether the consumer was aware of giving up the basic right to a court or jury trial, notwithstanding a contract's failure to comply with a mandatory notice provision as a condition to the enforceability of an agreement [Woolls v. Superior Court (Turner) (2005) *127 Cal. App. 4th 197, 214, 25 Cal. Rptr. 3d 426]* .

[9] Minor's Right to Disaffirm or Have Guardian Ad Litem

A minor's statutory right to disaffirm a contract before majority or within a reasonable time thereafter includes contracts containing arbitration clauses. No special words are necessary to disaffirm the contract. Thus, a minor may avoid

arbitration by disaffirming the agreement containing the arbitration clause [*Fam. Code §§ 6700, 6710*; *Berg v. Traylor (2007) 148 Cal. App. 4th 809, 812, 816-820, 56 Cal. Rptr. 3d 140* (finding contract was not one for necessities within exception of *Fam. Code § 6712*)]. If a minor disaffirms the contract, even as late as beyond the deadline for moving to vacate the award, any award based on it will have to be vacated; and any judgment confirming the award, reversed [*Berg v. Traylor (2007) 148 Cal. App. 4th 809, 820, 56 Cal. Rptr. 3d 140]* .

If the minor does not disaffirm the contract containing the arbitration clause, a guardian at litem should be appointed to represent the minor in the arbitration, especially if the parent's interests are adverse to the minor's, for instance if the parent will be liable in the event of the minor's disaffirmance. Failure of the minor to be represented by a guardian at litem would be an independent ground for vacating any award and reversing any resultant judgment against the minor [*Berg v. Traylor (2007) 148 Cal. App. 4th 809, 821-822, 56 Cal. Rptr. 3d 140]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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PART II. LEGAL BACKGROUND
B. Arbitration Agreement

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§ 32.22 Arbitration of Statutory Claims

[1] Arbitrability Presumed

Statutory claims may be the subject of an arbitration agreement enforceable under the Federal Arbitration Act (FAA), *9 U.S.C. § 1 et seq.* Although all statutory claims may not be appropriate for arbitration, a party will be held to an arbitration clause unless Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. The burden is on the party seeking to avoid arbitration to show that Congress did intend to preclude waiver of a judicial forum for the statutory claims [*Gilmer v. Interstate/Johnson Lane Corp. (1991) 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26]* .

[2] Statutory Claims Held Arbitrable

[a] Statutes Listed

Statutory claims that may be subject to arbitration include claims under the following laws:

- Age Discrimination in Employment Act (*29 U.S.C. § 621 et seq.*) [*Gilmer v. Interstate/Johnson Lane Corp. (1991) 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26, 37]* .

- Title VII of the Civil Rights Act of 1964 and 1991 (*42 U.S.C. §§ 1982, 2000e* et seq.): the Ninth Circuit reversed itself, overruling *Duffield v. Robertson Stephens & Co. (9th Cir. 1998) 144 F.3d 1182 , cert. denied, 142 L. Ed.2d 399* , and holding that Title VII claims can be arbitrated, and further, that employers can require employees and applicants to agree to arbitrate Title VII claims as a condition of their employment [*EEOC v. Luce, Forward, Hamilton & Scripps (9th Cir. 2003) 345 F.3d 742, 752-754* (*rehearing en banc*); *see also* [4], *below*. *Luce Forward* did not address the "knowing waiver" issue].

- California Franchise Investment Law (*Corp. Code § 31000 et seq.*) [*Southland Corp. v. Keating (1984) 465 U.S. 1, 10-16, 104 S. Ct. 852, 79 L. Ed. 2d 1* (preempting *Corp. Code § 31512*)].

- Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*) [*Wolitarsky v. Blue Cross of California (1997) 53 Cal. App. 4th 338, 345, 61 Cal. Rptr. 2d 629* ; *Crown Homes, Inc. v. Landes (1994) 22 Cal. App. 4th 1273, 1276, 27 Cal. Rptr. 2d 827]* .

- Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*) claims for damages, at least to the extent those claims are governed by the Federal Arbitration Act, but not claims for injunctive relief in which the plaintiff is acting as private attorney general, for example, a claim seeking to enjoin deceptive business practices [*Cruz v. PacifiCare Health Sys. (2003) 30 Cal. 4th 303, 315-316, 133 Cal. Rptr. 2d 58, 66 P.3d 1157* ; *Broughton v. Cigna Healthplans of California (1999) 21 Cal. 4th 1066, 1072, 1079-1080, 1088, 90 Cal. Rptr. 2d 334, 988 P.2d 67* (remanding for determination regarding existence of arbitration agreement and applicability of FAA); *but see* dissenting opinion with respect to nonarbitrability of claim for injunctive relief; *Lee v. Southern California Univ. for Professional Studies (2007) 148 Cal. App. 4th 782, 787-788, 56 Cal. Rptr. 3d 134]* . Arbitrable damage claims include so-called equitable claims for restitution and/or disgorgement, as well as common law claims for unjust enrichment, whether sought in an individual action or a class action [*Cruz v. PacifiCare Health Sys. (2003) 30 Cal. 4th 303, 309-311, 133 Cal. Rptr. 2d 58, 66 P.3d 1157]* .

- Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*), as long as the arbitration procedures allow the plaintiff to vindicate his or her statutory rights, as discussed *below* [*Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 93-96, 102-113, 99 Cal. Rptr. 2d 745, 6 P.3d 669* (finding *Duffield v. Robertson Stephens & Co. (9th Cir. 1998) 144 F.3d 1182* , *cert. denied, 142 L. Ed. 2d 399* , unpersuasive and refusing to follow it); *but see Circuit City Stores, Inc. v. Najd (9th Cir. 2002) 294 F.3d 1104, 1108* ; *Circuit City Stores, Inc. v. Ahmed (9th Cir. 2002) 283 F.3d 1198, 1200* (ordering arbitration of FEHA clams under agreement found not unconscionable because employees in both cases had right to opt out of arbitration program, without considering *Armendariz* criteria for vindicating statutory claims)]. *Armendariz* was decided August 24, 2000, and has been held retroactive [*Blake v. Ecker (2001) 93 Cal. App. 4th 728, 733, 741, 113 Cal. Rptr. 2d 422]* .

- False Advertising Law [*Bus. & Prof. Code § 17500 et seq.*] claims for damages, including so-called equitable claims for restitution and/or disgorgement, as well as common law claims for unjust enrichment, are arbitrable, whether sought in an in individual action or in a class action. However, related claims for public injunctive relief, such as a claim by a plaintiff acting as private attorney general seeking to enjoin deceptive advertising practices, must be tried by a court [*see Bus. & Prof. Code § 17535*; *Cruz v. PacifiCare Health Sys. (2003) 30 Cal. 4th 303, 315-316, 133 Cal. Rptr. 2d 58, 66 P.3d 1157]* . When the same cause of action asserts both arbitrable claims for damages and inarbitrable claims for public injunction, the court has discretion to sever the claims and stay action on the injunctive relief until resolution of arbitration on damages claims [*Cruz v. PacifiCare Health Sys. (2003) 30 Cal. 4th 303, 320, 133 Cal. Rptr. 2d 58, 66 P.3d 1157]* .

- False Claims Act (*Gov. Code § 12650 et seq.*), despite the fact that *Gov. Code, §§ 12651, 12652* refer to "a civil action" to recover penalties and damages and to assessments and findings by "the court." Arbitrator may award statutory penalties as a form of compensation if those penalties bear a rational relationship to the contract and the breach [*County of Solano v. Lionsgate Corporation (2005) 126 Cal. App. 4th 741, 745, 747-749, 24 Cal. Rptr. 3d 362* (court did not consider whether purely punitive assessment of monetary penalties would be arbitrable)]. Although False Claims Act penalties do serve a public purpose by deterring false claims by public works contractors, that public purpose may be merely incidental to the primary benefit of compensating the public entity for the expenses associated with the

false claims. Thus, if the public entity's claims implicate no broad public remedy, there is no institutional advantage in a judicial forum that might preclude arbitration of False Claims Act charges [*County of Solano v. Lionsgate Corporation (2005) 126 Cal. App. 4th 741, 749, 24 Cal. Rptr. 3d 362]* .

- Federal Labor Standards Act (*29 U.S.C. § 201 et seq.*) [*Kuehner v. Dickinson & Co. (9th Cir. 1996) 84 F.3d 316, 319-320]* .

- Wage disputes under contracts involving interstate commerce [*Perry v. Thomas (1987) 482 U.S. 483, 491 492, 107 S. Ct. 2520, 96 L. Ed. 2d 426* ; *Giuliano v. Inland Empire Personnel, Inc. (2007) 149 Cal. App. 4th 1276, 1284-1288, 58 Cal. Rptr. 3d 5* (preempting *Lab. Code § 229*)].

- Racketeer Influenced and Corrupt Organizations Act [*18 U.S.C. § 1961 et seq.*] claims are arbitrable, even under an agreement that could be construed to limit the arbitrator's authority to award damages under that statute. The four agreements involved prohibited award of punitive, exemplary, or "extra-contractual" damages, but the Supreme Court concluded that neither precedents nor the ambiguous terms of the contracts made it clear how the arbitrator would construe the remedial limitations. Thus, the proper course was to compel arbitration [*PacifiCare Health Sys. v. Book (2003) 538 U.S. 401, 123 S. Ct. 1531, 155 L. Ed. 2d 578* ; *see 18 U.S.C. § 1964(c)* (authorizing treble damages)].

- Securities Act of 1933 (*15 U.S.C. § 77a et seq.*) and Securities Exchange Act of 1934 (*15 U.S.C. § 78a et seq.*) [*Elliot v. Albright (1989) 209 Cal. App. 3d 1028, 1036-1037, 257 Cal. Rptr. 762]* .

- Sherman Act (*15 U.S.C. § 1 et seq.*) [*Mitsubishi Motors v. Soler Chrysler-Plymouth (1985) 473 U.S. 614, 624-626, 105 S. Ct. 3346, 87 L. Ed. 2d 444]* .

- Unfair Trade Practices Act [*see Bus. & Prof. Code § 17000 et seq.*] and Unfair Competition Act [*see Bus. & Prof. Code §§ 17200, 17203*] damage claims are arbitrable [*Coast Plaza Doctors Hospital v. Blue Cross of California (2000) 83 Cal. App. 4th 677, 691-692, 99 Cal. Rptr. 2d 809]* . In the case of claims under the Unfair Competition Law, arbitrable damage claims include so-called equitable claims for restitution and/or disgorgement, as well as common law claims for unjust enrichment, whether sought in an individual action or a class action [*Cruz v. PacifiCare Health Sys. (2003) 30 Cal. 4th 303, 309-311, 133 Cal. Rptr. 2d 58, 66 P.3d 1157]* . However, related claims for public injunctive relief, such as a claim by a plaintiff acting as private attorney general seeking to enjoin unfair business practices, must be tried to a court [*Cruz v. PacifiCare Health Sys. (2003) 30 Cal. 4th 303, 315-316, 133 Cal. Rptr. 2d 58, 66 P.3d 1157* ; *Coast Plaza Doctors Hospital v. Blue Cross of California (2000) 83 Cal. App. 4th 677, 691-692, 99 Cal. Rptr. 2d 809* ; *but see Arriaga v. Cross Country Bank (S.D. Cal. 2001) 163 F. Supp. 2d 1189, 1199-1200* (public injunctive relief under *Bus. & Prof. Code § 17200* is arbitrable in case subject to Federal Arbitration Act)]. When the same cause of action asserts both arbitrable claims for damages and inarbitrable claims for public injunction, the court has discretion to sever the claims, and stay action on the injunctive relief until resolution of arbitration on damages claims [*Cruz v. PacifiCare Health Sys. (2003) 30 Cal. 4th 303, 320, 133 Cal. Rptr. 2d 58, 66 P.3d 1157* ; *Lee v. Southern California Univ. for Professional Studies (2007) 148 Cal. App. 4th 782, 787-788, 56 Cal. Rptr. 3d 134* ; *Coast Plaza Doctors Hospital v. Blue Cross of California (2000) 83 Cal. App. 4th 677, 691-692, 99 Cal. Rptr. 2d 809* (held injunctive relief claims and discovery thereon must be stayed)].

- Unruh Civil Rights Act (*Civ. Code § 51 et seq.*) [*Wolitarsky v. Blue Cross of California (1997) 53 Cal. App. 4th 338, 345-348, 61 Cal. Rptr. 2d 629]* .

[b] Minimum Requirements for Arbitration of Unwaivable Rights

In the context of statutory claims under the Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*), it has been held that the minimum requirements of an arbitration procedure necessary for the plaintiff to vindicate his or her statutory rights are the following [*Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 103-113, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *see also* *Blake v. Ecker (2001) 93 Cal. App. 4th 728, 733, 741, 113 Cal. Rptr. 2d 422* (holding *Armendariz* retroactive); *Mercuro v. Superior Court (Countrywide Securities Corp.) (2002) 96 Cal. App. 4th 167, 180, 116 Cal. Rptr. 2d 671* (holding *Armendariz's* five essentials applicable to claims under *Lab. Code §§ 230.8* and *970*)]:

- Neutrality of the arbitrator,
- The provision of adequate discovery,
- No limitation on the authority of the arbitrator to award all types of relief authorized by the statute, injunctive relief, punitive damages, attorney's fees,
- A written decision that will permit a limited form of judicial review,
- Limitations on the costs of arbitration.

Both the New York Stock Exchange (NYSE) Arbitration Rules and the National Association of Securities Dealers (NASD) Code of Arbitration Procedure have been held be meet the Armendariz criteria, except their costs provisions, which could be severed [*McManus v. CIBC World Markets Corp. (2003) 109 Cal. App. 4th 76, 92-102, 134 Cal. Rptr. 2d 446]* .

These minimum requirements have been held to apply not only to statutory claims, but also to unwaivable common law claims, such as so-called *Tameny* claims. Thus, an employee who is required by agreement to arbitrate a claim against his or her employer that he or she was demoted or terminated for a reason contrary to public policy is entitled to have that arbitration conducted in accordance with the minimum requirements set forth in *Armendariz*, including the requirement that the employer bear all costs unique to the arbitral forum [*Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1086, 130 Cal. Rptr. 2d 892, 63 P.3d 979* ; *see* *Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 178, 164 Cal. Rptr. 839, 610 P.2d 1330* (establishing cause of action for termination of employment for reason that is contrary to public policy); *Abramson v. Juniper Networks, Inc. (2004) 115 Cal. App. 4th 638, 660-661* (holding *Little* retroactive)]. The *Armendariz* minimum requirements have also been held applicable to claims under *Lab. Code § 970* (employee fraudulently induced to move to accept employment) [*Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 719-720, 129 Cal. Rptr. 2d 659]* . The franchise context has been held similar enough to mandatory employee/employer arbitration that these principles apply to franchisees' claims under the California Franchise Investment Law (*Corp. Code § 31000 et seq.*), the Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*), the Uniform Trade Secrets Act (*Civ. Code § 3426 et seq.*), and the Unfair Competition Law (*Bus. & Prof. Code § 17200 et seq.*) [*Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (Mail Boxes Etc., USA, Inc.) (2005) 133 Cal. App. 4th 396, 412-413, 34 Cal. Rptr. 3d 659* (only fee shifting was at issue)]. The rationale is that a right or cause of action created for a public purpose cannot, by private agreement, be waived, contravened, burdened, or subjected to procedural shortcomings that would preclude its vindication [*Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1085-1086, 130 Cal. Rptr. 2d 892, 63 P.3d 979* ; *Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 717-718* Cal. Rptr. 2d 659]. Moreover, the *Armendariz* requirements are applications of general state law contract principles regarding the unwaivability of public rights to the context of arbitration, and thus, are not preempted by the Federal Arbitration Act [*Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1090-1092, 130 Cal. Rptr. 2d 892, 63 P.3d 979]* . These criteria have *not* been extended to apply to insurance policies [*see* *Boghos v. Certain Underwriters at Lloyd's of London (2005) 36 Cal. 4th 495, 501-506, 30 Cal. Rptr. 3d 787, 115 P.3d 68* (only challenge was made to provision that insured share arbitration costs; on remand, court to consider whether cost sharing is unconscionable); *see also* [3], *below*]. Nor have the *Armendariz* criteria been held to apply to a "wage claim" under *Lab. Code § 229* when that claim

was a contract claim for a multimillion-dollar bonus and severance payment, rather than the ordinary statutory claim for overtime or minimum wage payments [*see Giuliano v. Inland Empire Personnel, Inc. (2007) 149 Cal. App. 4th 1276, 1289-1291, 58 Cal. Rptr. 3d 5* (thus not finding agreement unconscionable because it did not provide for discovery, require a written arbitration award, or require the employer to pay fees and costs unique to arbitration)].

As to discovery, a written decision, and limitations on costs, if the arbitration agreement at issue does not provide for them, but arbitration of the unwaivable statutory or other claim is within its scope, the agreement may be interpreted to impliedly provide for:

- Sufficient discovery to adequately arbitrate the statutory claim, including access to essential documents and witnesses, as determined by the arbitrator(s) and subject to limited judicial review pursuant to *Code Civ. Proc. § 1286.2* [*Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 106, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *but see Fitz v. NCR Corp. (2004) 118 Cal. App. 4th 702, 726-727, 13 Cal. Rptr. 3d 88* (discussed at [c], *below*, when agreement for adequate discovery will not be implied)];

- That the arbitrator must issue a written arbitration decision that will reveal, however briefly, the essential findings and conclusions on which the award is based [*Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 107, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *cf. Code Civ. Proc. § 1283.4* (written findings and conclusions are not required); *Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 722, 129 Cal. Rptr. 2d 659* (by virtue of incorporating *Code Civ. Proc. § 1283.4*, arbitration agreement required sufficient written award)];

- The employer to pay all types of costs that are unique to arbitration, specifically the "forum costs," such as the arbitrator's fees, the administrative fee, any filing fee, room rental, and court reporter's fees [*Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 113, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *see Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 130 Cal. Rptr. 2d 892, 63 P.3d 979* (as discussed *below*, this requirement does not contravene federal law)]. This type of implied agreement is acceptable if the arbitration provision is silent as to arbitral-forum costs, but an explicit cost-sharing provision does not permit such an inference and cannot be enforced [*Abramson v. Juniper Networks, Inc. (2004) 115 Cal. App. 4th 638, 661, 9 Cal. Rptr. 3d 422]* , even if the employer later offers to pay all forum costs [*Martinez v. Master Protection Corp. (2004) 118 Cal. App. 4th 107, 116-117, 12 Cal. Rptr. 3d 663* ; *see § 32.21[3][d], above*]; and

- Severance of a provision requiring the consumer to pay an unaffordable fee to initiate the arbitration process in a consumer arbitration (as opposed to employer/employee arbitration); also, there is an implied agreement, in the absence of express language to the contrary, that unaffordable fees are not to be imposed at the time of the award. The determination of what is affordable must be made on a case-by-case basis, with the consumer bearing the burden of proof as to what he or she cannot afford [*Gutierrez v. Autowest (2004) 114 Cal. App. 4th 77, 83, 92-93, 96-99, 7 Cal. Rptr. 3d 267* (unwaivable statutory rights based on claims under Consumer Legal Remedies Act [*Civ. Code § 1750 et seq.*] and Vehicle Leasing Act [Civ. Code § 2987.5 et seq.)].

Under the Federal Arbitration Act, the fact that an agreement is silent as to who bears the costs of arbitration is not in itself enough to establish that the party seeking to invalidate the arbitration agreement will be burdened with prohibitive costs that prevent him or her from vindicating his or her statutory rights. The party resisting arbitration has the burden of showing the likelihood of incurring prohibitive costs [*see Green Tree Financial Corp. v. Randolph (2000) 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373, 382-383* (Court did not discuss what showing would be sufficient)]. The *Armendariz* requirement that the party imposing the arbitration agreement bear all costs unique to arbitration was challenged on the basis of *Green Tree.* A majority of the California Supreme Court found that the FAA does not require

state courts to adopt precisely the same means as federal courts to ensure that the vindication of public rights will not be stymied by burdensome arbitration costs, and continued to believe that *Armendariz* represents the soundest approach to the problem of arbitration costs in the context of mandatory employment arbitration. The Court noted that it had considered a case-by-case approach to cost shifting in *Armendariz* and rejected that approach because the individualized consideration of an employee's ability to pay arbitration costs would further complicate the case-by-case calculation of prohibitive expense [*Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 130 Cal. Rptr. 2d 892, 63 P.3d 979* ; *accord Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (Mail Boxes Etc., USA, Inc.) (2005) 133 Cal. App. 4th 396* , (returning matter to superior court for determination of what fee allocation, if any, had to be made for franchisees to go forward in arbitration to vindicate unwaivable statutory claims that affect public interest as apposed to those that were only personal to franchisees)]. However, as noted in the last item listed, *above*, in consumer arbitration, one court has refused to apply *Armendariz* and required evaluation of affordability on a case-by-case basis [*Gutierrez v. Autowest (2004) 114 Cal. App. 4th 77, 83, 92-93, 96-99, 7 Cal. Rptr. 3d 267]* .

For complete discussion of awards of arbitral costs and attorney's fees, see *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.29*.

[c] Examples of Agreements Held Not To Meet Minimum Standards

As discussed at [b], *above*, the court cannot imply an agreement that the employer pay all arbitral forum costs in the face of an express provision to the contrary. Thus, an agreement explicitly imposing arbitral forum costs on the employee is unenforceable [*Abramson v. Juniper Networks, Inc. (2004) 115 Cal. App. 4th 638, 661, 668]* . Similarly, an agreement that explicitly limits the non-drafting party's discovery so that it inadequately provides an opportunity to vindicate unwaivable rights cannot be corrected by impliedly imposing other discovery rights and is therefore unenforceable [*Fitz v. NCR Corp. (2004) 118 Cal. App. 4th 702, 717-721, 13 Cal. Rptr. 3d 88]* .

ILLUSTRATION:

Discovery Inadequate to Allow Fair Presentation of Discrimination Claim. A former employee sued the former employer, including a claim for damages for age discrimination in violation of the Fair Housing and Employment Act (FEHA; *Gov. Code § 12940*). Defendant moved to compel arbitration in accordance with its dispute resolution policy. The motion was denied, primarily because the policy did not allow for adequate discovery. The defendant's dispute resolution policy limited discovery to the sworn depositions of two individuals and any expert witnesses expected to testify at the hearing. It also required all exhibits and a list of potential witnesses to be exchanged at least two weeks before the arbitration hearing. The arbitrator could allow additional discovery upon a showing that otherwise a fair hearing would be impossible. The policy also incorporated the American Arbitration Association's ("AAA") National Rules for the Resolution of Employment Disputes, one of which provides that if a party establishes any adverse material inconsistencies between the arbitration agreement and the AAA rules, the arbitrator is to apply the AAA rules. Another AAA rule allows whatever discovery the arbitrator considers necessary to a full and fair exploration of the issues in dispute.

Was discovery adequate to compel arbitration under this policy? Under the AAA rules? No to both: In view of plaintiff's estimated need to depose eight to ten witnesses, discovery under defendant's policy was not adequate. The court said that it would be an unusual instance of employment discrimination in which the depositions of two witnesses would be sufficient to present a case [*Fitz v. NCR Corp. (2004) 118 Cal. App. 4th 702, 717, 13 Cal. Rptr. 3d 88]* . Further, the discovery limitation did not have mutual effect--defendant employer was already in possession of many of the documents relevant to an employment discrimination case, and it employed many of the relevant witnesses [*Fitz v. NCR Corp. (2004) 118 Cal. App. 4th 702, 716, 13 Cal. Rptr. 3d 88]* . The burden to establish the need for more than two depositions was so high--and the rights to initial discovery so low--that employees could find themselves in the position of being unable to gain access to enough information to prove their claims or

to demonstrate to the arbitrator the need for more discovery. But because there was already an express agreement to the contrary, the court could not imply an agreement to allow sufficient discovery [*Fitz v. NCR Corp. (2004) 118 Cal. App. 4th 702, 718, 13 Cal. Rptr. 3d 88]* . Incorporating the AAA rules created a potential for preliminary legal battles over which rules applied and the risk of disparate enforcement of the rules. The court would not allow incorporation of the AAA rules to cure the defect inserted by the defendant [*Fitz v. NCR Corp. (2004) 118 Cal. App. 4th 702, 720-721, 13 Cal. Rptr. 3d 88]* .

[3] Waiver of Statutory Rights in Arbitration Clause

Despite the general presumption in favor of upholding agreements to submit statutory claims to arbitration, an arbitration clause may not be used by a party with dominant economic power to force another party to surrender statutorily-mandated rights and benefits [*Graham Oil v. Arco Products Co. (9th Cir. 1994) 43 F.3d 1244, 1247]* . If the arbitration procedure does not allow the plaintiff to vindicate his or her statutory rights, the arbitration clause cannot be enforced [*Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 101, 99 Cal. Rptr. 2d 745, 6 P.3d 669]* . For example, an arbitration clause under which a franchisee waived its rights to exemplary damages, recovery of attorney's fees, and a one-year statute of limitations under the Petroleum Marketing Practices Act (PMPA) has been held to contravene the PMPA [*Graham Oil v. Arco Products Co. (9th Cir. 1994) 43 F.3d 1244, 1247-1248]* .

If an arbitration clause contains invalid provisions of this nature, the court must determine whether the clause is severable from the contract, and applying the same principles, whether the invalid parts of the clause are severable from the remainder of the arbitration clause [*see Graham Oil v. Arco Products Co. (9th Cir. 1994) 43 F.3d 1244, 1248-1249* (striking the entire arbitration clause)]. In a mandate proceeding involving franchise agreements, under which franchisees asserted claims under the California Franchise Investment Law (*Corp. Code § 31000 et seq.*), the Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*), the Uniform Trade Secrets Act (*Civ. Code § 3426 et seq.*), and the Unfair Competition Law (*Bus. & Prof. Code § 17200 et seq.*) and challenged provisions in the arbitration agreements that prohibited recovery of exemplary damages, attorney's fees or costs, consequential or incidental damages, lost wages or profits, or any damages in excess of their franchise fee and the costs of building out their premises, the court of appeal declined to consider whether it should strike those limitations, finding that under the rules of the American Arbitration Association, the matter could be left to the arbitrators who would have authority to make contract interpretations and to grant any remedy or relief the arbitrator deemed just and equitable. Nevertheless, to the extent the arbitration clauses deprived the franchisees of statutorily authorized remedies, or relief that a court would otherwise be able to grant them, the limitations were unconscionable and the trial court was directed to strike them [*Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (Mail Boxes Etc., USA, Inc.) (2005) 133 Cal. App. 4th 396* .

[4] Statutory Claims Requiring Knowing Waiver of Right to Trial

Some statutes evidence a Congressional or Legislative intent to require a knowing waiver of statutory remedies in favor of arbitration. Two statutes that have been held to require a knowing waiver of the right to trial of claims under them are:

- Title VII of the Civil Rights Act of 1964 (*42 U.S.C. § 2000e et seq.* [*Renteria v. Prudential Ins. Co. of America (9th Cir. 1997) 113 F.3d 1104, 1108* ; *Prudential Ins. Co. of America v. Lai (9th Cir. 1994) 42 F.3d 1299, 1304-1305 , cert. denied, 516 U.S. 812 (1995)* (sexual harassment and sexual discrimination claims); *see Doyle v. Raley's Inc. (9th Cir. 1998) 158 F.3d 1012, 1015* (gathering cases and noting circuit split)]. *Prudential Ins. Co. of America v. Lai (9th Cir. 1994) 42 F.3d 1299* , restated in *Renteria v. Prudential Ins. Co. of America (9th Cir. 1997) 113 F.3d 1104* , and relied on in *Nelson v. Cyprus Bagdad Copper Corp. (9th Cir. 1997) 119 F.3d 756 below,* has been extensively criticized as being against the weight of authority [*see, e.g., Maye v. Smith Barney, Inc. (S.D.N.Y. 1995) 897 F. Supp. 100, 107* ; *Cione v. Foresters Equity Services, Inc. (1997) 58 Cal. App. 4th 625, 641, 68 Cal. Rptr. 2d*

167 ; *Brookwood v. Bank of America (1996) 45 Cal. App. 4th 1667, 1673 n.5, 53 Cal. Rptr. 2d 515]* , and may have been impliedly held unpersuasive and not to be followed in *California by the California Supreme Court in Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 99 n.7, 99 Cal. Rptr. 2d 745, 6 P.3d 669* , discussed at § 20.23[3][a]. *Armendariz* established minimum procedural safeguards for arbitration of claims under California's Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*). The *Armendariz* court declined to decide the knowing waiver issue. The arbitration clause at issue was fairly specific and referred to any termination of employment which employee contended was "wrongful or otherwise in violation of the conditions of employment or was in violation of any express or implied condition, term or covenant of employment, whether founded in fact or in law, including but not limited to the covenant of good faith and fair dealing, or otherwise in violation of any of my rights."

- The Americans with Disabilities Act of 1990 (*42 U.S.C. §§ 12101-12213*) [*Kummetz v. Tech Mold, Inc. (9th Cir. 1998) 152 F.3d 1153, 1155-1156* ; *Nelson v. Cyprus Bagdad Copper Corp. (9th Cir. 1997) 119 F.3d 756, 761, 763]* .

With this type of statute, the arbitration agreement must specifically refer to the type of statutory claim to be arbitrated in order for there to be knowing waiver of the right to trial [*Kummetz v. Tech Mold, Inc. (9th Cir. 1998) 152 F.3d 1153, 1155-1156* ; *Nelson v. Cyprus Bagdad Copper Corp. (9th Cir. 1997) 119 F.3d 756, 762* ; *Prudential Ins. Co. of America v. Lai (9th Cir. 1994) 42 F.3d 1299, 1304-1305]* . In interpreting an arbitration provision in a collective bargaining agreement, the Supreme Court found the language not "clear and unmistakable" enough to waive an employee's right to a judicial forum for determination of an ADA claim [*Wright v. Univ. Maritime Serv. Corp. (1998) 525 U.S. 70, 82, 119 S. Ct. 391, 142 L. Ed. 2d 361]* . Similarly, California courts of appeal have held that a union may not prospectively waive an employee's right to a judicial forum for his or her statutory discrimination or state claims by agreeing to arbitration in a collective bargaining agreement [*Deschene v. Pinole Point Steel Company (1999) 76 Cal. App. 4th 33, 48-49, 90 Cal. Rptr. 2d 15* (termination against public policy and discrimination on basis of health); *Torrez v. Consolidated Freightways, Corp. (1997) 58 Cal. App. 4th 1247, 1259, 68 Cal. Rptr. 2d 792 (FEHA)]* , at least not unless the waiver language is clear and unmistakable [*see* *Vasquez v. Superior Court (2000) 80 Cal. App. 4th 430, 435-436, 95 Cal. Rptr. 2d 294* (agreement did not specifically refer to ADA or FEHA)].

Even if an employee has entered into an arbitration agreement, the Equal Employment Opportunity Commission is not bound by it when enforcing the Americans with Disabilities Act (ADA) provisions on discrimination, which incidentally, adopt those of Title VII [*see* 42 U.S.C. §§ 2000e4, 2000e-5, 2000e-6, 2000e-8, 2000e-9 (Title VII), 12117(a) (ADA); *EEOC v. Waffle House, Inc. (2002) 534 U.S. 279, 291-292, 306, 122 S. Ct. 754, 151 L. Ed. 2d 755]* . If the employee files a complaint with the EEOC, rather than pursuing arbitration, and the EEOC brings an enforcement action, arbitration cannot be compelled against the EEOC, because it was not a party to the agreement; and the Federal Arbitration Act does not prohibit the EEOC from recovering victim-specific relief such as back pay, reinstatement, compensatory damages, and punitive damages in that action [*EEOC v. Waffle House, Inc. (2002) 534 U.S. 279, 306, 122 S. Ct. 754, 151 L. Ed. 2d 755]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsContracts LawContract Conditions & ProvisionsArbitration ClausesLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964RemediesAlternative Dispute ResolutionCivil ProcedureAlternative Dispute ResolutionJudicial Review

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Chapter 32 CONTRACTUAL ARBITRATION: AGREEMENTS AND COMPELLING ARBITRATION
PART II. LEGAL BACKGROUND
B. Arbitration Agreement

4-32 California Forms of Pleading and Practice--Annotated § 32.23

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§ 32.23 Self-Executing Agreements

[1] Procedure When Agreement Is Self-Executing

Agreements to arbitrate ordinarily are not self-executing [*Sauter v. Superior Court (1969) 2 Cal. App. 3d 25, 29, 82 Cal. Rptr. 395* ; *see American Home Assurance Co. v. Benowitz (1991) 234 Cal. App. 3d 192, 198-199, 285 Cal. Rptr. 626* (*Ins. Code § 11580.2(f)* (uninsured motorist statute) provides for non-self-executing type of arbitration)]. However, the parties may, by specific terms, make the arbitration agreement self-executing. Thus, when they expressly agree that, in the event there is a dispute and either party refuses to arbitrate, after demand is made the other party may unilaterally select one arbitrator and proceed with the arbitration, such an agreement is self-executing and it is not necessary that the party seeking arbitration first resort to the court for an order to arbitrate [*Brink v. Allegro Builders, Inc. (1962) 58 Cal. 2d 577, 579-580, 25 Cal. Rptr. 556, 375 P.2d 436* ; *see also Kustom Kraft Homes v. Leivenstein (1971) 14 Cal. App. 3d 805, 810-811, 92 Cal. Rptr. 650* ; *Smith v. Campbell & Facciolla, Inc. (1962) 202 Cal. App. 2d 134, 137, 20 Cal. Rptr. 606]* .

This is consistent with *Code Civ. Proc. § 1282.2(e)*, which provides that *unless* it is otherwise agreed by the parties, if a court has ordered a person to arbitrate a controversy, the arbitrators may hear and determine the controversy on the evidence produced notwithstanding the failure of a party ordered to arbitrate, who has been duly notified, to appear.

The party failing to select an arbitrator is still entitled to notice of the arbitration hearing and an opportunity to be heard [*see Code Civ. Proc. § 1282.2(a), (d), (e)*; *see also Smith v. Campbell & Facciolla, Inc. (1962) 202 Cal. App. 2d 134, 135, 137, 20 Cal. Rptr. 606* (notice of arbitration hearing and opportunity to be heard are required by the due process clause of the *U.S. Const., amend. XIV*)].

[2] Procedure for Objecting Party

When arbitration proceeds under a self-executing agreement without court order to arbitrate under *Code Civ. Proc. § 1281.2*, the objecting party is required to participate in the proceeding and then raise its objections by petition to vacate

the award under *Code Civ. Proc. § 1286.2* or by opposing the petition to confirm the award [*National Marble Co. v. Bricklayers & Allied Craftsmen (1986) 184 Cal. App. 3d 1057, 1064, 229 Cal. Rptr. 653]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionInsurance LawMotor Vehicle InsuranceArbitrationContracts LawContract Conditions & ProvisionsArbitration Clauses

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§ 32.24 Preemption by Federal Arbitration Act

[1] Goals of Act

The goals and policies of the Federal Arbitration Act (FAA), *9 U.S.C. § 1 et seq.*, are expressed in its substantive provisions, *9 U.S.C. §§ 1, 2*, which establish a federal policy favoring arbitration and enforcement of agreements to arbitrate. Those goals and policies do not require arbitration when the parties have not agreed to it, nor do they prevent parties who have agreed to arbitrate from excluding certain claims from the scope of their arbitration agreement or from specifying the rules under which their arbitration will be conducted [*Volt Information Sciences v. Board of Trustees (1989) 489 U.S. 468, 478-479, 109 S. Ct. 1248, 103 L. Ed. 2d 488]* .

The exclusion of Section 1 of the Federal Arbitration Act, *9 U.S.C. § 1*, for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" is limited to contracts of transportation workers only. All other employment contracts "evidencing transactions involving commerce," *9 U.S.C. § 2*, are governed by the FAA [*Circuit City Stores, Inc. v. Adams (2001) 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234* (overruling Ninth Circuit minority position articulated in *Craft v. Campbell Soup Co. (9th Cir. 1998) 177 F.3d 1083*)]. An example of employment involving interstate commerce so as to render the FAA inapplicable is driving for a delivery service [*see, e.g., Harden v. Roadway Packaging Sys. (9th Cir. 2001) 249 F.3d 1137, 1140-1142* (arbitration of former driver's wrongful termination claims could not be compelled under FAA)].

[2] Scope of Preemption

[a] Extends to Limits of Commerce Clause

The Federal Arbitration Act (FAA), *9 U.S.C. § 1 et seq.*, preempts state law that seeks to invalidate arbitration agreements [*Allied-Bruce Terminix Cos., Inc. v. Dobson (1995) 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753, 763* ; *Southland Corp. v. Keating (1984) 465 U.S. 1, 15-16, 104 S. Ct. 852, 79 L. Ed. 2d 1]* . In *Allied-Bruce Terminix Cos., Inc. v. Dobson (1995) 513 U.S. 265, 277, 115 S. Ct. 834, 130 L. Ed. 2d 753, 763* , the Court held that the FAA

reaches to the limits of Congress' Commerce Clause power and applies to actions brought in state court when the transaction involves interstate commerce in fact, whether or not the parties contemplated an interstate connection. In the case, arising out of the Alabama state court system, the contract at issue was a termite protection plan purchased from the local Alabama office of a multi-state company, which shipped treatment and repair material from out of state. The connection with interstate commerce was sufficient for the FAA to apply and to preempt application of an Alabama statute that made written predispute arbitration agreements invalid and unenforceable. The FAA encompasses a wider range of transactions than those actually "in commerce," that is, within the flow of interstate commerce. Therefore, it is not necessary to for any portion of the transaction to be attributable to interstate actions, or to originate out-of-state. Nor is the FAA inapplicable because the individual transactions, taken alone, did not have a "substantial effect on interstate commerce." It is enough that the aggregate economic activity in question represents a general practice subject to federal control. Commercial lending is an example of such a general practice that has broad impact on the national economy and is heavily regulated by Congress [*Citizens Bank v. Alafabco, Inc. (2003) 539 U.S. 52, 123 S. Ct. 2037, 2040-2041, 156 L. Ed. 2d 46]* .

Congress has not completely displaced state regulation of arbitration, but state law is preempted to the extent that it actually stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [*Volt Information Sciences v. Board of Trustees (1989) 489 U.S. 468, 477, 109 S. Ct. 1248, 103 L. Ed. 2d 488]* . Thus, the particular state law designated by the parties in their contract will not be preempted and will govern arbitration under the contract unless enforcement of the particular state provision would undermine the goals and policies of the FAA [*Volt Information Sciences v. Board of Trustees (1989) 489 U.S. 468, 477-478, 109 S. Ct. 1248, 103 L. Ed. 2d 488* ; *Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co. (1983) 140 Cal. App. 3d 251, 262, 191 Cal. Rptr. 15]* .

Arbitration clauses must be treated the same as any other contract clause under state law. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause on such grounds as exist at law or in equity for the revocation of any contract (citing *9 U.S.C. § 2*). However, states cannot decide that a contract is fair enough to enforce all its basic terms, such as price, service, and credit, but not fair enough to enforce its arbitration clause. The FAA makes such state policy unlawful because it would place arbitration clauses on an unequal footing from other contract provisions [*Allied-Bruce Terminix Cos., Inc. v. Dobson (1995) 513 U.S. 265, 281, 115 S. Ct. 834, 130 L. Ed. 2d 753]* .

[b] Substantive Versus Procedural Provisions

The substantive provisions of *9 U.S.C. §§ 1, 2* apply in state court proceedings, but the procedural terms of *9 U.S.C. §§ 3, 4* only apply, by their express terms, to proceedings in federal court [*Cronus Investments, Inc. v. Concierge Services (2005) 35 Cal. 4th 376, 390, 25 Cal. Rptr. 3d 540, 107 P.3d 217* ; *Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 405, 407, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* ; *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 185, 35 Cal. Rptr. 2d 747]* . Because the federal law does not govern procedure in state court, the state procedure may be followed as long as the state procedure does not defeat the rights granted by Congress [*Cronus Investments, Inc. v. Concierge Services (2005) 35 Cal. 4th 376, 390, 25 Cal. Rptr. 3d 540, 107 P.3d 217* ; *Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 406-407, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* ; *see, e.g., Siegel v. Prudential Insurance Company (1998) 67 Cal. App. 4th 1270, 1290-1291, 79 Cal. Rptr. 2d 726* (federal common law rule, derived from *9 U.S.C. §§ 10, 12*, and allowing review of an arbitration award for "manifest disregard of the law" is only applicable in federal court)]. Nevertheless, a state statute that purports to vest exclusive jurisdiction in an administrative agency to determine the validity of a contract containing an arbitration clause and arguably regulated by that agency is preempted, even if it is procedural. The statute is preempted both because it imposes prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally and because initial reference of the dispute to the agency would hinder speedy resolution of the controversy, thus frustrating the FAA's prime objective that arbitration agreements allow parties to achieve streamlined proceedings and expeditious results it [*see* *Preston v. Ferrer (2008) 552 U.S. 346, 128 S. Ct. 978, 169 L. Ed. 2d 917, 923, 927-929* (preempting *Lab. Code §*

1700.44(a))].

California classwide arbitration is not preempted by the Federal Arbitration Act [*Blue Cross of California v. Superior Court (1998) 67 Cal. App. 4th 42, 46, 65-66, 78 Cal. Rptr. 2d 779]* . On the other hand, *Civ. Code §§ 1781(a), 1783*, parts of the California Legal Remedies Act that prohibit waiver of a consumer's right to bring class action lawsuits within three years are contrary to, and therefore preempted by, the FAA, and thus, would not prevent enforcement of an arbitration agreement that prohibits class actions and imposes a two-year limitation period [*see Ting v. AT&T (9th Cir, 2003) 319 F. 3d 1126, 1148, 1150-1152* (despite preemption, class action prohibition was unconscionable and unenforceable under California doctrine of unconscionability)].

Although California procedure relating to the enforcement of arbitration agreements is substantially similar to federal law [*Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 406-407, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* (comparing *Code Civ. Proc. §§ 1281, 1281.2, 1281.3* with *9 U.S.C. §§ 2-4*)], a major difference is that where *9 U.S.C. § 4* provides for a jury trial on the issue of whether an arbitration agreement exists, California law does not, providing in *Code Civ. Proc. § 1290.2* for a summary determination in the manner provided for making and hearing motions [*Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 407, 58 Cal. Rptr. 2d 875, 926 P.2d 1061]* . Because this procedure actually furthers rather than defeats the federal policy encouraging enforcement of arbitration clauses, it is not preempted, and because the California Constitution provides no right to jury trial on a petition to compel arbitration, a party opposing contractual arbitration of a dispute has no right to a jury trial of the existence or validity of an arbitration agreement [*Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 409-410, 411-413, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* (disapproving cases to the contrary at page 407); *Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 185-186, 35 Cal. Rptr. 2d 747]* .

[c] Effect on California Law

Justice O'Connor, concurring in *Allied-Bruce Terminix Cos., Inc. v. Dobson (1995) 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753* , discussed in [a], *above*, found the decision troublesome because it would displace many state statutes calibrated to protect consumers by placing limited conditions on the enforceability of arbitration clauses. California has such statutes. For example, the case throws into question the enforceability of the *Code Civ. Proc. § 1295* requirement that contracts for medical services that have arbitration clauses must use a particular clause in a particular place and include a warning about the arbitration clause in 10-point bold red type immediately before the signature line. *Code Civ. Proc. § 1295(e)* provides that if a medical services contract complies with these requirements, the contract is not a contract of adhesion, nor unconscionable, nor otherwise improper. Under *Allied-Bruce Terminix Cos., Inc.*, if the contract affects interstate commerce, it is questionable whether an arbitration clause could be attacked for failure to comply with Section 1295 [*see Allied-Bruce Terminix Cos., Inc. v. Dobson (1995) 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753, 764-768]* . In fact, *Health & Safety Code § 1363.1*, which requires various disclosures regarding arbitration by health care service plans, and specifies where in the contract those disclosures must be made, has been held preempted by the Federal Arbitration Act with respect to contracts involving interstate commerce [*Erickson v. Aetna Health Plans of Cal. (1999) 71 Cal. App. 4th 646, 652, 84 Cal. Rptr. 2d 76 (4th Dist., Div. 2)]* . More recently, however, *Health & Safety Code § 1363.1* has been held *not* preempted, on the ground that the McCarran-Ferguson Act [*15 U.S.C., § 1012(b)*] bars the FAA, as a federal statute of general application which does not "specifically relate" to insurance, from interfering with the operation of *Health & Safety Code § 1363.1*. As a result, the arbitration provisions of a health care plan's subscriber agreement may not be enforced if they fail to satisfy the specific and unambiguous disclosure requirements imposed by Section 1363.1 [*Smith v. PacifiCare Behavioral Health Plan of California, Inc. (2001) 93 Cal. App. 4th 139, 144,162, 113 Cal. Rptr. 2d 140 (2nd Dist., Div.3)* (*rev. den.* S102718); *accord Imbler v. PacifiCare of California, Inc. (2002) 103 Cal. App. 4th 567, 576-577, 126 Cal. Rptr. 2d 715 (Fourth Appellate District, Division Two)* ; *Pagarigan v. Superior Court (Aetna U.S. Healthcare of California, Inc.) (2002) 102 Cal. App. 4th 1121, 1134, 126 Cal. Rptr. 2d 124 (Second Appellate District, Division Seven)]* .

The following statutes have been held preempted by the FAA:

- *Code Civ. Proc. § 1298* (purchase and sale of real estate), which imposes format and initialing requirements on arbitration agreements that are not imposed on other agreements, is preempted if the matter involves interstate commerce. Failure of the arbitration agreement to conform to the preempted statute does not bar its enforcement [*Hedges v. Carrigan (2004) 117 Cal. App. 4th 578, 587, 11 Cal. Rptr. 3d 787* ; *see also* *Westra v. Marcus & Millichap Real Estate Investment Brokerage Co. (2005) 129 Cal. App. 4th 759, 764, 28 Cal. Rptr. 3d 752* (finding *Code Civ. Proc. § 1298* preempted without discussion or evidence of interstate commerce involvement in transaction)].

- *Code Civ. Proc. § 1298.7*, which would otherwise allow a purchaser to pursue a court action against a developer for construction and design defects despite having signed an arbitration agreement, is preempted by the FAA. The purchaser would be compelled to arbitrate the construction or design defect claim [*Shepard v. Edward Mackay Enterprises, Inc. (2007) 148 Cal. App. 4th 1092, 1095, 1100-1102, 56 Cal. Rptr. 3d 326* ; *Basura v. U.S. Home Corp. (2002) 98 Cal. App. 4th 1205, 1213-1214, 120 Cal. Rptr. 2d 328* ; *see also* discussion at *§ 32.21[8], above*].

- *Corp. Code § 31512* is preempted to the extent that it cannot be interpreted to require a judicial forum for resolution of claims under the Franchise Investment Law. Those claims can be arbitrated [*Southland Corp. v. Keating (1984) 465 U.S. 1, 10-16, 104 S. Ct. 852]* .

- *Lab. Code § 1700.44(a)*, which purports to vest exclusive jurisdiction in the Labor Commissioner to determine application of the Talent Agency Act (TAA: *Lab. Code § 1700 et seq.*) is preempted by the Federal Arbitration Act. Thus, an arbitrator, not the Commissioner, should decide the legality of any contract arguably regulated by and voidable under the TAA [*Preston v. Ferrer (2008) 552 U.S. 346, 128 S. Ct. 978, 169 L. Ed. 2d 917, 923, 927-929*].

The determination of whether a specific California statute or policy is preempted by the FAA requires case by case analysis. For instance, the FAA does not provide for a stay of arbitration when third parties who have not agreed to arbitrate are necessary to the resolution of the dispute, but *Code Civ. Proc. § 1281.2(c)* does. *Code Civ. Proc. § 1281.2(c)* is not preempted by the FAA: first, because the FAA has no procedural provisions applicable in state court; second, because it is not a special rule limiting the authority of arbitrators. It is an evenhanded law designed to avoid conflicting rulings on common issue of fact and law among the interested parties. It allows the trial court to stay arbitration proceedings while the concurrent lawsuit proceeds, *or* to stay the lawsuit while arbitration proceeds [*Volt Info. Scis., Inc. v. Board of Trustees (1989) 489 U.S. 468, 476-479, 109 S. Ct. 1248, 103 L. Ed. 2d 488* ; *Cronus Invs., Inc. v. Concierge Servs. (2005) 35 Cal. 4th 376, 25 Cal. Rptr. 3d 540, 107 P.3d 217* (disapproving *The Energy Group, Inc. v. Liddington (1987) 192 Cal. App. 3d 1520, 238 Cal. Rptr. 202* and *Warren-Guthrie v. Health Net (2000) 84 Cal. App. 4th 804, 101 Cal. Rptr. 2d 260* to the extent their holdings are predicated on the conclusion that section 1281.2(c) limits the authority of arbitrators and conflicts with the FAA); *see also* *Mount Diablo Med. Ctr. v. Health Net of Cal., Inc. (2002) 101 Cal. App. 4th 711, 124 Cal. Rptr. 2d 607* (*Code Civ. Proc. § 1281.2* applicable and not preempted); *Henry v. Alcove Inv., Inc. (1991) 233 Cal. App. 3d 94, 101-102, 284 Cal. Rptr. 255* (following *Volt* to affirm stay)]. *Volt* and *Cronus* both involved arbitration agreements with choice-of-law provisions to apply California law; however, unless some other law were specified as applicable, California law automatically would have applied. Hence, a choice of California law clause should not be necessary for *Code Civ. Proc. § 1281.2(c)* to be part of the law under which a California court determines whether arbitration should be ordered.

Judicial refusal to enforce an arbitration clause clearly unconscionable under a general contract law principle not at all hostile to arbitration presents no obstacle to the objective of the FAA. The equitable doctrine of unconscionability set forth in *Civ. Code § 1670.5*, provides such grounds as exist at law or in equity for the revocation of any contract, within the meaning of *9 U.S.C. § 2*, and is therefore not preempted by the FAA [*Ting v. AT&T (9th Cir, 2003) 319 F. 3d 1126, 1150-1152* ; *Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1551-1552, 60 Cal. Rptr. 2d 138]* . While

the federal Ninth Circuit recently affirmed that stance in the context of a preemption challenge to a petition to compel arbitration in a class action [*Laster v. AT&T Mobility LLC (2009) 584 F.3d 849, 856]* , the decision, which only otherwise considers whether a class action waiver in the parties' agreement is unenforceable as unconscionable under California law, is currently under review by the United States Supreme Court as the result of a grant of certiorari [*sub. nom.*, *AT&T Mobility LLC v. Concepcion (May 24, 2010) -- U.S. --, -- S. Ct. --, 176 L. Ed. 2d 1218, 2010 U.S. LEXIS 4309 at 1]* . Some cases have held or suggested that California adhesion contract principles do not apply to determine the enforceability of an arbitration clause in contract governed by the Federal Arbitration Act [*Lewis v. Prudential-Bache Securities, Inc. (1986) 179 Cal. App. 3d 935, 940-941, 225 Cal. Rptr. 69* ; *Chan v. Drexel Burnham Lambert, Inc. (1986) 178 Cal. App. 3d 632, 638-639, 223 Cal. Rptr. 838* ; *see Thomas v. Perry (1988) 200 Cal. App. 3d 510, 513, 246 Cal. Rptr. 156]* . These cases, however, have arisen in the area of securities law, which is heavily regulated by the federal government, or have involved a statute that applied specifically to arbitration agreements and reflected an antiarbitration policy [*Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1548-1550, 60 Cal. Rptr. 2d 138]* . For discussion of unconscionability, see *§ 32.21[3]*.

For discussion of the California and federal rules regarding compelling or refusing to compel arbitration under a contract induced by fraud, *see § 32.21[4]*. For discussion of the California and federal rules regarding whether a nonsignatory may bind another to arbitration, see *§ 32.21[5]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActCoverage & ExceptionsCivil ProcedureFederal & State InterrelationshipsFederal Common LawPreemption

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Chapter 32 CONTRACTUAL ARBITRATION: AGREEMENTS AND COMPELLING ARBITRATION
PART II. LEGAL BACKGROUND
B. Arbitration Agreement

4-32 California Forms of Pleading and Practice--Annotated § 32.24A

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§ 32.24A Preemption by Medicare Law or Regulations

Recently, it has been argued that *Health & Safety Code § 1363.1* is preempted by Medicare law, with respect to certain health care plans, most notably those referred to in the Medicare law as Medicare+Choice plans [*see 42 U.S.C. §§ 1395w-21* to w-28]. *42 U.S.C. § 1395w-26(b)(3)(B)(iii)*, which specifically preempts state law with regard to coverage determinations, is narrowly construed and only preempts procedures for or claims seeking payment or reimbursement for medical services. Other state law causes of action against an HMO arising out of its denial of services under a Medicare-subsidized health plan, such as state law tort claims or consumer protection statues, specifically *Health & Safety Code § 1363.1*, are not preempted [*see Zolezzi v. PacifiCare of California (2003) 105 Cal. App. 4th 573, 576, 583-584, 129 Cal. Rptr. 2d 526* (causes of action for breaches of fiduciary duty and of duty of good faith and fair dealing; conspiracy to breach covenant of good faith and fair dealing; negligent and intentional interference with contractual relationship; intentional infliction of emotional distress; and unfair business practices in violation of *Bus. & Prof. Code § 17200* not preempted)].

Plan enrollment documents for Medicare+Choice plans, which are considered marketing materials in the context *42 U.S.C. § 1395w-26(b)(3)(B)(iv)* and which include the enrollment form that *Health & Safety Code § 1363.1* requires set forth the arbitration disclosure, must be approved by the Health Care Financing Administration (HCFA). It is clear at least with respect to plan enrollment documents for Medicare+Choice plans submitted to the HCFA for approval before December 21, 2000, that Medicare law and regulations do not preempt *Health and Safety Code Section 1363.1* [*Pagarigan v. Superior Court (Aetna U.S. Healthcare of California, Inc.) (2002) 102 Cal. App. 4th 1121, 1134, 1147-1150, 1150 n.23, 126 Cal. Rptr. 2d 124]* . Thus, an arbitration provision in such a plan will not be enforced unless it complies with *Health & Safety Code § 1363.1*.

42 U.S.C. § 1395w-26(b)(3)(B)(iv) was amended, effective December 21, 2000 [*see* Pub. L. No. 106-554, Dec. 21, 2000, 114 Stats. 2763, 2763A-560-561], to add Medicare plan marketing materials to the matters expressly preempting state laws, and to authorize regulations providing model language for marketing materials. That amendment was prospective only. *42 C.F.R. § 422.402*, which provided that state law was not preempted unless it was inconsistent with

the Medicare law, was changed in January, 2005, to provide that the Medicare regulations supersede any state law or regulation (other than state licensing laws or state laws relating to solvency) with respect to these plans. Whether *Health & Safety Code § 1363.1* is preempted by Medicare law with respect to health care plan marketing materials submitted for HCFA approval after the 2000 amendment awaits decisions in cases involving actions occurring, or enrollment documents submitted for approval, after December 21, 2000.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActCoverage & ExceptionsPublic Health & Welfare LawSocial SecurityMedicareCoverageGeneral OverviewCivil ProcedureFederal & State InterrelationshipsFederal Common LawPreemption

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PART II. LEGAL BACKGROUND
B. Arbitration Agreement

4-32 California Forms of Pleading and Practice--Annotated § 32.25

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§ 32.25 Waiver of Right to Arbitrate

[1] "Waiver" Defined

[a] Term Used to Refer to More Than One Concept

The term "waiver" refers to a number of different concepts. Generally, it denotes the voluntary relinquishment of a known right. But it can also mean the loss of an opportunity or a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to abandon or relinquish the right [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 982-983, 64 Cal. Rptr. 2d 843, 938 P.2d 903* ; *Platt Pacific, Inc. v. Andelson (1993) 6 Cal. 4th 307, 315, 24 Cal. Rptr. 2d 597, 862 P.2d 158* ; *Aviation Data, Inc. v. American Express Travel Related Services Company, Inc. (2007) 152 Cal. App. 4th 1522, 1537 n.10, 62 Cal. Rptr. 3d 396]* . It is also used as a shorthand statement for the conclusion that a contractual right to arbitration has been lost [*Platt Pacific, Inc. v. Andelson (1993) 6 Cal. 4th 307, 315-316, 24 Cal. Rptr. 2d 597, 862 P.2d 158]* . For example, when a contract provides that arbitration may be demanded within a stated time, failure to make a demand within that time constitutes a waiver of the right to arbitrate, in the sense of a forfeiture of a right resulting from failure to perform a required act [*Platt Pacific, Inc. v. Andelson (1993) 6 Cal. 4th 307, 315-316, 24 Cal. Rptr. 2d 597, 862 P.2d 158* ; *see* discussion in *§ 32.40, below*].

Three separate issues that courts loosely refer to as "waiver" may be identified, as has been done in one case in the insurance context [*Chase v. Blue Cross of California (1996) 42 Cal. App. 4th 1142, 1149, 1151, 50 Cal. Rptr. 2d 178]* :

- Waiver, an intentional relinquishment of a known right, demonstrated explicitly or implicitly.
- Estoppel, conduct by the insurer that reasonably causes the insured to rely to his or her detriment.
- Forfeiture, the assessment of a penalty against the insurer for either misconduct or failure to perform

an obligation under the contract.

[b] Issue of Waiver Is Preliminary Question for Court

Waiver of the right to compel arbitration is a preliminary question of fact that the trial court must decide in considering the petition to compel arbitration [*Code Civ. Proc. § 1281.2(a)*; *Saint Agnes Med. Ctr. v. PacifiCare of Cal. (2003) 31 Cal. 4th 1187, 1196, 8 Cal. Rptr. 3d 517* ; *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co. (1992) 6 Cal. App. 4th 1266, 1274, 8 Cal. Rptr. 2d 587]* , unless the matter is governed by the Federal Arbitration Act ("FAA"), there is no explicit choice of California law, and the waiver claim does not rest on litigation conduct. In that case, the arbitrator determines whether there has been a waiver [*Howsam v. Dean Witter Reynolds, Inc. (2002) 537 U.S. 79, 84, 123 S. Ct. 588, 154 L. Ed. 2d 491* ; *Omar v. Ralphs Grocery Co. (2004) 118 Cal. App. 4th 955, 962-965, 13 Cal. Rptr. 3d 562]* . Even if the matter is governed by the FAA, a waiver claim that involves litigation conduct is to be determined by the court [*see Omar v. Ralphs Grocery Co. (2004) 118 Cal. App. 4th 955, 962-965, 13 Cal. Rptr. 3d 562* ; *Thorup v. Dean Witter Reynolds, Inc. (1986) 180 Cal. App. 3d 228, 234, 225 Cal. Rptr. 521]* .

ILLUSTRATION:

Under Federal Arbitration Act, Waiver Claim Involving Contract Interpretation Is To Be Determined by Arbitrator. In a case governed by the Federal Arbitration Act ("FAA"), plaintiff claimed defendant had waived the right to compel arbitration. There was litigation-based conduct alleged as the basis for the claimed waiver, but not in time to be considered by the court of appeal [*Omar v. Ralphs Grocery Co. (2004) 118 Cal. App. 4th 955, 964, n.1, 13 Cal. Rptr. 3d 562]* . The bases for the claimed waiver that were properly before the court of appeal included defendant's (1) unreasonable delay in proceeding under its dispute resolution program, (2) failure to satisfy a condition precedent by refusing to engage in mediation, (3) failure to confirm whether it would pay all costs associated with an arbitration, and (4) failure to work with plaintiff to select an arbitrator. The agreement addressed each of those issues, providing that it was "aimed at resolving employment-related disputes quickly and fairly, that it did "not prevent Employees and Ralphs ... from agreeing voluntarily to submit such dispute(s) to mediation before beginning any arbitration proceedings," and that defendant would pay the arbitrator's and arbitration fees in all cases in which it was required by law to do so. The trial court denied the motion to compel arbitration, without specifying its reasons.

The court of appeal reversed and remanded, stating that on remand, if the trial court determined that a valid arbitration agreement existed which covered the parties' disputes, any issue of waiver of the right to compel arbitration was to be decided by the arbitrator and not the court. Was this correct? Yes; the matter was governed by the FAA and each of the waiver allegations involved contract interpretation and arbitration procedures. Thus, they were subject to determination by an arbitrator, not the court [*Omar v. Ralphs Grocery Co. (2004) 118 Cal. App. 4th 955, 964-965, 13 Cal. Rptr. 3d 562]* .

On appeal, the question is whether there is substantial evidence to support the trial court's finding of waiver [*Saint Agnes Med. Ctr. v. PacifiCare of Cal. (2003) 31 Cal. 4th 1187, 1196, 8 Cal. Rptr. 3d 517* ; *Groom v. Health Net (2000) 82 Cal. App. 4th 1189, 1198, 98 Cal. Rptr. 2d 836]* .

The burden of proving waiver is on the party resisting arbitration. The defense of waiver, like any other defense, must be proved by a preponderance of the evidence [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 984, 64 Cal. Rptr. 2d 843, 938 P.2d 903* ; *Rosenthal v. Great Western Financial Sec. (1996) 14 Cal. 4th 394, 413, 58 Cal. Rptr. 2d 875, 926 P.2d 1061]* .

It is ordinarily a question of fact whether there has been a waiver [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 983, 64 Cal. Rptr. 2d 843, 938 P.2d 903* ; *Platt Pacific, Inc. v. Andelson (1993) 6 Cal. 4th 307, 319, 24 Cal. Rptr. 2d 597, 862 P.2d 158* ; *Sawday v. Vista Irrigation Dist. (1966) 64 Cal. 2d 833, 836, 52 Cal. Rptr. 1, 415*

P.2d 816 ; *Guess?, Inc. v. Superior Court (2000) 79 Cal. App. 4th 553, 557, 94 Cal. Rptr. 2d 201]* . However, if the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law [*Platt Pacific, Inc. v. Andelson (1993) 6 Cal. 4th 307, 319, 24 Cal. Rptr. 2d 597, 862 P.2d 158]* .

[2] Express Waiver

A valid release in settlement of an arbitrable claim constitutes a waiver of the right to compel arbitration [*Gustafson v. State Farm Mut. Auto. Ins. Co. (1973) 31 Cal. App. 3d 361, 365, 107 Cal. Rptr. 243]* . For discussion and forms of release generally, *see Ch. 520, Settlement and Release, § 520.50* et seq.

[3] Implied Waiver

[a] Factors in Determining Implied Waiver

No single test delineates the nature of the conduct that will constitute waiver of arbitration [*Saint Agnes Med. Ctr. v. PacifiCare of Cal. (2003) 31 Cal. 4th 1187, 1195, 8 Cal. Rptr. 3d 517* ; *Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 983, 64 Cal. Rptr. 2d 843, 938 P.2d 903* ; *Sobremonte v. Superior Court (1998) 61 Cal. App. 4th 980, 992, 72 Cal. Rptr. 2d 43* ; *see Berman v. Health Net (2000) 80 Cal. App. 4th 1359, 1363, 96 Cal. Rptr. 2d 295* ; *Davis v. Continental Airlines, Inc. (1997) 59 Cal. App. 4th 205, 211, 69 Cal. Rptr. 2d 79]* .

Factors that will be considered in determining whether there has been an implied waiver include whether the party seeking arbitration has done any of the following [*Saint Agnes Med. Ctr. v. PacifiCare of Cal. (2003) 31 Cal. 4th 1187, 1196, 8 Cal. Rptr. 3d 517* ; *Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 983, 64 Cal. Rptr. 2d 843, 938 P.2d 903* ; *Christensen v. Dewor Developments (1983) 33 Cal. 3d 778, 782* al. Rptr. 8, *661 P.2d 1088* ; *Sobremente v. Superior Court (1998) 61 Cal. App. 4th 980, 992, 72 Cal. Rptr. 2d 43* ; *see Berman v. Health Net (2000) 80 Cal. App. 4th 1359, 1363, 96 Cal. Rptr. 2d 295* ; *Davis v. Continental Airlines, Inc. (1997) 59 Cal. App. 4th 205, 211, 69 Cal. Rptr. 2d 79]* :

- Previously taken steps inconsistent with an intent to invoke arbitration.
- Unreasonably delayed seeking arbitration.
- Acted in bad faith or with willful misconduct.
- Invoked the litigation machinery so substantially that the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate.
- Either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay.
- Filed a counterclaim without asking for a stay of the proceedings.
- Taken important intervening steps, such as one party's taking advantage of judicial discovery procedures not available in arbitration.
- Delayed the demand for arbitration in a way that affected, misled, or prejudiced the opposing party.

The presence or absence of prejudice is also an important consideration, as is whether or not the party who brought the action was a party to the arbitration agreement acting in knowing disregard of the arbitration agreement's provisions [*Christensen v. Dewor Developments (1983) 33 Cal. 3d 778, 782-783, 191 Cal. Rptr. 8, 661 P.2d 1088* ; *see Simms v.*

NPCK Enterprises, Inc. (2003) 109 Cal. App. 4th 233, 235, 244-245, 134 Cal. Rptr. 2d 557 (filing lawsuit, seeking temporary restraining order to preserve status quo, did not amount to waiver because other party was not prejudiced); *Berman v. Health Net (2000) 80 Cal. App. 4th 1359, 1363, 96 Cal. Rptr. 2d 295* ; *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co. (1992) 6 Cal. App. 4th 1266, 1275-1276, 8 Cal. Rptr. 2d 587* (unexcused delay of three years as not waiver when no prejudice was caused to defendant by delay)].

[b] Waiver by Acts Inconsistent With Agreement to Arbitrate

[i] Waiver Implied From Inconsistent Acts

Waiver may be implied by acts that are inconsistent with the agreement to submit to arbitration [*Palm Springs Homes, Inc. v. Western Desert, Inc. (1963) 215 Cal. App. 2d 270, 277, 30 Cal. Rptr. 34]* .

One party to an arbitration agreement may, by dilatory tactics or express refusal to proceed, place himself or herself in such a position that the other party may accede to the implied desire of the former, acquiesce in the abandonment of arbitration, and resort to court action [*Grunwald-Marx, Inc. v. Los Angeles Joint Board, Amalgamated Clothing Workers (1961) 192 Cal. App. 2d 268, 277, 280, 13 Cal. Rptr. 446]* .

At a minimum, the failure to plead arbitration as an affirmative defense is an act inconsistent with the later assertion of a right to arbitrate [*Guess?, Inc. v. Superior Court (2000) 79 Cal. App. 4th 553, 558, 94 Cal. Rptr. 2d 201]* . Moving to stay the action while arbitration involving a party to the action is pending, especially while acknowledging in that motion that one is not a party to the arbitration agreement, is also wholly inconsistent with a desire to arbitrate [*Guess?, Inc. v. Superior Court (2000) 79 Cal. App. 4th 553, 558, 94 Cal. Rptr. 2d 201]* .

[ii] Waiver by Ignoring Demands for Arbitration

An arbitration clause may not be used as a valid objection to a party's right to sue on an arbitrable dispute when the defendant ignored the party's prior demands for arbitration [*Grunwald-Marx, Inc. v. Los Angeles Joint Board, Amalgamated Clothing Workers (1961) 192 Cal. App. 2d 268, 280, 13 Cal. Rptr. 446]* .

[iii] Waiver by Conducting Discovery

Discovery which prejudices the party resisting arbitration may justify a finding of waiver of the right to compel arbitration [*Sobremonte v. Superior Court (1998) 61 Cal. App. 4th 980, 996, 72 Cal. Rptr. 2d 43* ; *Davis v. Continental Airlines, Inc. (1997) 59 Cal. App. 4th 205, 214-217, 69 Cal. Rptr. 2d 79]* .

Prejudice can result from the disclosure of defenses and strategies. If one party uses the discovery process to obtain information about the other party's case that they could not obtain in arbitration, and then, having gained that information, seeks to compel arbitration, the court may reasonably find that the party who conducted discovery has waived its right to compel arbitration. This is especially true if the party resisting arbitration will not have equivalent discovery rights [*Sobremonte v. Superior Court (1998) 61 Cal. App. 4th 980, 996-997, 72 Cal. Rptr. 2d 43* ; *Guess?, Inc. v. Superior Court (2000) 79 Cal. App. 4th 553, 558, 94 Cal. Rptr. 2d 201* ; *Davis v. Continental Airlines, Inc. (1997) 59 Cal. App. 4th 205, 215, 69 Cal. Rptr. 2d 79* ; *see also Berman v. Health Net (2000) 80 Cal. App. 4th 1359, 1370, 96 Cal. Rptr. 2d 295* (prejudice can still be found when both parties engaged in discovery)].

ILLUSTRATION:

Discovery Amounting to Waiver. In an action for sexual harassment in employment, defendant employer claimed the dispute had to be resolved by arbitration as specified in the employee handbook. Seven months after filing an answer in which the right to arbitrate was raised as an affirmative defense, defendants moved to compel arbitration. During those seven months, defendant obtained 1,600 pages of documents from plaintiff in 86 categories and took plaintiff's 2-day, 410-page videotaped deposition.

Although defendant claimed much of the discovery was designed to prove the agreement to arbitrate, the deposition covered typical broad-ranging issues, such as plaintiff's attitude towards vulgar remarks and how she handled them. The trial court denied the motion to compel arbitration. Was that proper? Yes. The record amply supported the inference that defendant unreasonably delayed the motion to compel arbitration to use discovery to learn plaintiff's strategies, evidence, and witnesses and to pin plaintiff down to a particular version of the facts. Plaintiff was prejudiced by incurring court costs and legal expenses and by disclosure of defenses and strategies [*Davis v. Continental Airlines, Inc. (1997) 59 Cal. App. 4th 205, 213-217, 69 Cal. Rptr. 2d 79]* .

[c] Waiver by Delay

[i] Nature of Delay That Results in Waiver

For delay to constitute waiver, the delay must be [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 984, 64 Cal. Rptr. 2d 843, 938 P.2d 903]* .

- Substantial;
- Unreasonable; and
- In spite of the reasonable diligence of the party claiming waiver.

In addition, the party asserting the defense of waiver must show delay amounting to laches, which requires a showing of prejudice, namely, that he or she did or omitted to do something which impaired his or her ability to participate in the arbitration in a meaningful way [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 983-984, 64 Cal. Rptr. 2d 843, 938 P.2d 903* ; *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co. (1992) 6 Cal. App. 4th 1266, 1275-1276, 8 Cal. Rptr. 2d 587* ; *see Sawday v. Vista Irrigation Dist. (1966) 64 Cal. 2d 833, 836-837, 52 Cal. Rptr. 1, 415 P.2d 816]* .

When the delay is in the selection of an arbitrator and is the result of reasonable and good faith disagreements between the parties, the remedy for the delay is to petition the court to choose an arbitrator under *Code Civ. Proc. § 1281.6*, rather than evasion of the agreement to arbitrate. The burden is on the party opposing the arbitration agreement to prove to the trial court that the other party's dilatory conduct rises to such a level of misfeasance as to constitute waiver [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 984, 64 Cal. Rptr. 2d 843, 938 P.2d 903* ; *see* [e], *below*].

[ii] Failure to Conclude Uninsured Motorist Arbitration Within Five Years

Effective January 1, 1996, uninsured motorist arbitration instituted pursuant to *Ins. Code § 11580.2*, other than one in which the insured also has a workers' compensation claim, must be concluded within five years from the institution of the arbitration proceeding [*Ins. Code § 11580.2(i)(2)(A)*]. If an insured does not conclude the arbitration within that five-year period, and he or she cannot establish any basis for waiver or estoppel of the five-year period for completion of arbitration, any petition for an order to compel that arbitration must be denied [*Santangelo v. Allstate Insurance Company (1998) 65 Cal. App. 4th 804, 812, 816-818, 76 Cal. Rptr. 2d 735]* . For further discussion, *see § 32.92[3][e]*.

[d] Waiver by Litigation of Arbitrable Dispute

[i] Prejudice to Other Party or Litigation on Merits Required for Waiver

Arbitration may be waived by litigating an arbitrable dispute without seeking arbitration [*Case v. Kadota Fig Asso. of Producers (1950) 35 Cal. 2d 596, 606, 220 P.2d 912]* , including conducting discovery which prejudices the party

resisting arbitration [*see* *Sobremonte v. Superior Court (1998) 61 Cal. App. 4th 980, 996, 72 Cal. Rptr. 2d 43* ; *Davis v. Continental Airlines, Inc. (1997) 59 Cal. App. 4th 205, 214-217, 69 Cal. Rptr. 2d 79* (discussed at [b][iii], *above*)]. To waive arbitration rights, a party must substantially invoke the litigation machinery in a way that prejudices the other party. Any ambiguity as to the scope of the waiver must be resolved in favor of arbitration [*Aviation Data, Inc. v. American Express Travel Related Services Company, Inc. (2007) 152 Cal. App. 4th 1522, 1537, 1538, 62 Cal. Rptr. 3d 396]* . Thus, the mere filing of a complaint (that is, commencement of a lawsuit) does not necessarily constitute a waiver of the right to arbitration [*Doers v. Golden Gate Bridge etc. Dist. (1979) 23 Cal. 3d 180, 183-189, 151 Cal. Rptr. 837, 588 P.2d 1261]* . Filing a lawsuit, even one that attacks the validity of the contract containing the arbitration clause, does not necessarily amount to waiver [*Saint Agnes Med. Ctr. v. PacifiCare of Cal. (2003) 31 Cal. 4th 1187, 1192, 1200-1205, 8 Cal. Rptr. 3d 517* (invalidity urged on basis of occurrence of condition subsequent, not lack of mutual assent or capacity to contract)]. Nor does filing a lawsuit and seeking a change of venue necessarily amount to waiver [*Saint Agnes Med. Ctr. v. PacifiCare of Cal. (2003) 31 Cal. 4th 1187, 1205, 8 Cal. Rptr. 3d 517]* . Similarly, demurring, even several times, and disposing of causes of action that are arbitrable on those demurrers, does not constitute litigation on the merits. Further, the court's opinion as to the validity of the legal theories "disposed of" on demurrer will not be binding on the arbitrator [*Groom v. Health Net (2000) 82 Cal. App. 4th 1189, 1195, 98 Cal. Rptr. 2d 836* (arbitration was not sought until one year after complaint was filed)]. Under federal law, settlement efforts, even those involving class actions in which court involvement is necessary, are not interpreted as waiving the right to arbitrate if the settlement is not finalized. This principle does not apply, however, when a party attempts to obtain settlement by misleading the court and proposed class members about the benefits of the proposed settlement and the other party or parties were prejudiced by those tactics. Then, based in part on the principle that one cannot profit from his or her own misconduct, the party who engaged in the misleading tactics has forfeited its right to arbitrate [*Aviation Data, Inc. v. American Express Travel Related Services Company, Inc. (2007) 152 Cal. App. 4th 1522, 1539-1542, 62 Cal. Rptr. 3d 396]* .

In the absence of prejudice to the other party, an action brought by a party to an arbitration agreement must ordinarily be litigated on the merits for a waiver of the right to arbitration to be found [*Saint Agnes Med. Ctr. v. PacifiCare of Cal. (2003) 31 Cal. 4th 1187, 1201, 8 Cal. Rptr. 3d 517* ; *Doers v. Golden Gate Bridge, Highway & Transp. Dist. (1979) 23 Cal. 3d 180, 188, 588 P.2d 1261* ; *McMillin Development, Inc. v. Home Buyers Warranty (1998) 68 Cal. App. 4th 896, 909, 80 Cal. Rptr. 2d 611]* . Thus, a dismissal that is not based on the merits of the action, such as a dismissal because of a lack of subject-matter jurisdiction, does not constitute a waiver of the right to arbitration absent prejudice to the other party [*Doers v. Golden Gate Bridge etc. Dist. (1979) 23 Cal. 3d 180, 188, 151 Cal. Rptr. 837, 588 P.2d 1261]* .

If prejudice is established, waiver of the right to arbitrate may be found even though the case was not litigated on the merits. It is sufficient that the litigation was undertaken in bad faith, for example, for the purpose of determining the other party's defenses in the arbitration proceeding [*Christensen v. Dewor Developments (1983) 33 Cal. 3d 778, 783-784, 191 Cal. Rptr. 8, 661 P.2d 1088]* .

Prejudice may consist of attorney's fees incurred and delays causing lost records and faded memories [*Saint Agnes Med. Ctr. v. PacifiCare of Cal. (2003) 31 Cal. 4th 1187, 1203, 8 Cal. Rptr. 3d 517* ; *Christensen v. Dewor Developments (1983) 33 Cal. 3d 778, 783-784, 191 Cal. Rptr. 8, 661 P.2d 1088]* . However, time and expense alone do not constitute the prejudice which bars a related petition to compel arbitration [*Groom v. Health Net (2000) 82 Cal. App. 4th 1189, 1197, 98 Cal. Rptr. 2d 836]* . Prejudice can be established when discovery and motions have given the party seeking to arbitrate an opportunity to test both the legal validity and the factual persuasiveness of its opponent's position, usually at considerable expense to that opponent and while depriving that opponent of the efficiencies that would have been available to it by way of arbitration [*McMillin Development, Inc. v. Home Buyers Warranty (1998) 68 Cal. App. 4th 896, 910, 80 Cal. Rptr. 2d 611]* . However, being forced to articulate a legal theory clear enough to withstand a demurrer is not prejudice [*Groom v. Health Net (2000) 82 Cal. App. 4th 1189, 1195, 98 Cal. Rptr. 2d 836]* .

If the litigation seeks relief that is not inconsistent with arbitration proceedings and not available in arbitration proceedings, the right to arbitrate will not be deemed waived [*Simms v. NPCK Enterprises, Inc. (2003) 109 Cal. App. 4th 233, 235, 244-245, 134 Cal. Rptr. 2d 557* (filing lawsuit, seeking injunction to protect status quo did not amount to waiver because other party was not prejudiced); *Schwartz v. Leibel (1967) 249 Cal. App. 2d 761, 763-764, 57 Cal. Rptr. 831* (party to arbitration agreement as not waiving right to arbitrate by suing for injunction to restrain breach of agreement containing arbitration clause), *disapproved on other grounds* in *Doers v. Golden Gate Bridge etc. Dist. (1979) 23 Cal. 3d 180, 188, 151 Cal. Rptr. 837, 588 P.2d 1261]* . Under Code Civ. Proc. § 1298.2, the simultaneous filing of a complaint and a motion to stay the filed proceeding allows the plaintiff to file a notice of lis pendens without the filing of that notice constituting a waiver of the right to arbitration [*Manhattan Loft, LLC v. Mercury Liquors, Inc. (2009) 173 Cal. App. 4th 1040, 1054, 93 Cal. Rptr. 3d 457* (filing lis pendens without filing any action in court is grounds for award of damages)]. Claims that are not arbitrable may be severed and arbitration compelled with respect to the claims that are arbitrable [*Groom v. Health Net (2000) 82 Cal. App. 4th 1189, 1199, 98 Cal. Rptr. 2d 836]* . *See also* the discussion in *§ 32.31, below.*

[ii] Effect of Arbitration Service Provider's Non-Waiver Rule

Rule 26(a) of the American Arbitration Association's Home Warranty Arbitration Rules states that no judicial proceeding by a party relating to the subject matter or the arbitration shall be deemed a waiver of the party's right to arbitrate. In a case of first impression, and in keeping with a Michigan case, it has been held that AAA can not by rule deprive courts of their power over parties who have appeared before for them, especially in light of *Code Civ. Proc. § 1281.2(a)*, which gives the court the power to deny arbitration if a party has waived its right thereto [*McMillin Development, Inc. v. Home Buyers Warranty (1998) 68 Cal. App. 4th 896, 909, 80 Cal. Rptr. 2d 611]* . Instead, the court said, AAA Rule 26(a) should be given a limited interpretation, such that arbitration would not be waived by mere participation in judicial litigation; there must be judicial litigation on the merits, although wavier can occur prior to a judgment on the merits if prejudice can be demonstrated. Thus, the rule remains the same under Rule 26(a) and under case law: parties may participate in judicial proceedings without losing the right to arbitrate only so long as their participation does not substantially prejudice the rights of their opponents [*McMillin Development, Inc. v. Home Buyers Warranty (1998) 68 Cal. App. 4th 896, 909, 80 Cal. Rptr. 2d 611]* .

[e] Heavy Burden of Proof to Establish Waiver

The party seeking to establish waiver of the right to arbitration pursuant to agreement has a heavy burden of proof. The court will closely scrutinize any claims of waiver and indulge every intendment to give effect to arbitration proceedings; it will not lightly infer waiver [*Saint Agnes Med. Ctr. v. PacifiCare of Cal. (2003) 31 Cal. 4th 1187, 1195, 8 Cal. Rptr. 3d 517* ; *Christensen v. Dewor Developments (1983) 33 Cal. 3d 778, 782, 191 Cal. Rptr. 8, 661 P.2d 1088* ; *Chase v. Blue Cross of California (1996) 42 Cal. App. 4th 1142, 1151, 50 Cal. Rptr. 2d 178]* .

Similarly, if the issue is framed as forfeiture rather than waiver, the burden of proof is on the party asserting forfeiture and must be demonstrated by clear and convincing evidence [*Chase v. Blue Cross of California (1996) 42 Cal. App. 4th 1142, 1157, 50 Cal. Rptr. 2d 178]* .

[4] Failure to Make Proper and Timely Demand

The Legislature plainly intended *Code Civ. Proc. § 1281.2* to provide a procedural device for enforcing the parties' written arbitration agreement if one or more of the parties does not comply with the agreement to arbitrate. The only reasonable construction of that statute is to require for a petition to compel arbitration the pleading and proof of a request or demand by one party to the other party or parties for arbitration of such controversy pursuant to and under the terms of their written arbitration agreement [*Mansouri v. Superior Court (2010) 181 Cal. App. 4th 633, 641-642, 104 Cal. Rptr. 3d 824]* .

When the parties have agreed that a demand for arbitration must be made within a certain time, that demand is a condition precedent that must be performed before the contractual duty to submit the dispute to arbitration arises. A party's failure to make a timely demand constitutes a waiver of the right to arbitrate in the sense of a loss of a right based on a failure to perform an obligation. It is not relevant that the party did not intend to waive the right to arbitrate the dispute [*Platt Pacific, Inc. v. Andelson (1993) 6 Cal. 4th 307, 313-314, 24 Cal. Rptr. 2d 597, 862 P.2d 158]* .

When the arbitration agreement does not specify a time within which arbitration must be demanded, an unreasonable delay in demanding arbitration may constitute a waiver of the right to arbitrate [*Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1043, 9 Cal. Rptr. 2d 381, 831 P.2d 821* ; *Sawday v. Vista Irrigation Dist. (1966) 64 Cal. 2d 833, 836-837, 52 Cal. Rptr. 1, 415 P.2d 816* ; *see also Civ. Code § 1657*].

PRACTICE TIP:

Medical Malpractice Cases. Plaintiff may wish to include a notice to arbitrate in the Notice of Intent to Commence Action that is required by *Code Civ. Proc. §§ 364* and *364.1* [for a form of notice, *see* Ch. 415, *Physicians: Medical Malpractice*, Form 1]. The notice of arbitration added to the Notice of Intent would read: "This notice is also a notice to arbitrate, if the parties have a valid arbitration agreement. If the noticee does not comply with this notice of arbitration, then such arbitration requirements are waived." There is no case law on the effect of such a clause. However, if the noticee ignore the Notice of Intent, as often happens, and does not promptly seek arbitration, the plaintiff's argument that the health care provider has waived arbitration by failure to demand it in a timely fashion should be strengthened by having included the clause. *By Michael S. Fields*

For further discussion relating to the necessity for a timely demand for relief, see *§ 32.40* et seq.

[5] Waiver Based on Insurer Misleading Insured

Waiver, or more properly, forfeiture, of the right to invoke arbitration based on an insurer's failure to adequately inform the insured of the arbitration provision requires consideration of all relevant circumstances and a determination of bad faith conduct by the insurer [*Chase v. Blue Cross of California (1996) 42 Cal. App. 4th 1142, 1148, 50 Cal. Rptr. 2d 178* (under *Davis v. Blue Cross of Northern California (1979) 158 Cal. Rptr. 828, 600 P.2d 1060* , and *Sarchett v. Blue Shield of California (1987) 43 Cal. 3d 1, 233 Cal. Rptr. 76, 729 P.2d 267* , mere failure to adequately inform was not enough to find that the insurer has relinquished its right to arbitration)].

To find that the insurer has forfeited the right to arbitration, there must be conduct designed to mislead the policyholders. The court's focus should be on the insurer's subjective intent. This distinguishes the situation from estoppel. Under estoppel, the insurer would be estopped from asserting arbitration even if it did not intend to mislead, as long as the insured reasonably relied to its detriment on the insurer's action. Forfeiture, however, requires intent to mislead and is satisfied whether or not the insured is, in fact, misled. Thus, even if the insured is aware of the arbitration right, bad faith tactics designed to mislead the insured merit the sanction of forfeiture. Conversely, even if the insured is not aware of the arbitration right, there is no forfeiture if the insurer did not engage in behavior designed to mislead the insured. The determination of bad faith involves consideration of the totality of the circumstances, so the policyholder's actual ignorance of the provision is relevant to the extent that ignorance is known to the insurer [*Chase v. Blue Cross of California (1996) 42 Cal. App. 4th 1142, 1157, 50 Cal. Rptr. 2d 178]* .

ILLUSTRATION:

No Forfeiture by Insurer's Failure to Mention Insured's Right to Arbitration. The arbitration agreement was part of a standard title insurance policy coverage form that was properly incorporated by reference in the preliminary title report and available for inspection by the insured. Eventually, the policy was issued and plaintiff filed a claim. By the time plaintiff filed the claim, plaintiff was in possession of the entire policy, including the arbitration provision. Plaintiff was represented by counsel initially during

> the claims process and plaintiff's counsel admitted knowing about the arbitration clause since the time plaintiff first provided him with a copy of the policy. Defendant denied the claim, without mentioning plaintiff's right to arbitrate, but advised plaintiff of his right to seek redress with the Department of Insurance. Plaintiff filed a lawsuit. Defendant answered without demanding arbitration or raising arbitration as an affirmative defense. Defendant did not demand arbitration until plaintiff served his first discovery. Did the insurer forfeit the right to compel arbitration? No. Although the court said defendant's conduct was somewhat questionable, the arbitration clause here was not obscure, it was presented in bold in a document which was both properly incorporated by reference into the terms of the parties' agreement and actually in plaintiff's possession at the time he filed his claim. Further, defendant had no reason to know that plaintiff was unaware of his arbitration rights. Nor did defendant unreasonably delay or act inconsistently with the right to demand arbitration. Defendant did not substantively engage in the litigation process; and there was no evidence of any appreciable prejudice to the plaintiff. Given the totality of the circumstances, there was no basis for denying the petition to compel arbitration [*Wolschlager v. Fidelity Nat'l Title Ins. Co. (2003) 111 Cal. App. 4th 784, 793, 4 Cal. Rptr. 3d. 179]* .

The principle that an insurer forfeits the right to arbitrate if the covenant of good faith and fair dealing is breached is an application of general contract principles and therefore is not preempted by the Federal Arbitration Act (*9 U.S.C. § 2*) [*Chase v. Blue Cross of California (1996) 42 Cal. App. 4th 1142, 1158, 1158-1160, 50 Cal. Rptr. 2d 178* ; for discussion of federal preemption, see *§ 32.24*].

[6] Enforcement of Mechanics' Lien

[a] Suit to Enforce Mechanics' Lien

[i] Right to Arbitrate Not Waived When Stay Requested

Any person who proceeds to record and enforce a claim of lien by beginning an action pursuant to *Civ. Code § 3082 et seq.* (liens on "works of improvement") does not necessarily waive his or her right of arbitration under a written agreement to arbitrate. The claimant does not waive the right to arbitration if, in filing an action to enforce the claim of lien, the claimant does either of the following [*Code Civ. Proc. § 1281.5(a)*]:

- Includes an allegation in the complaint that the claimant does not intend to waive any right of arbitration, and intends to move the court, within 30 days after service of the summons and complaint, for an order to stay further proceedings in the action.

- At the same time that the complaint is filed, the claimant files an application that the action be stayed pending the arbitration of any issue, question, or dispute that is claimed to be arbitrable under the agreement and that is relevant to the action to enforce the claim of lien.

[ii] Requirements for Request for Stay

Code Civ. Proc. § 1281.5(b) requires that claimant, within 30 days after service of the summons and complaint, file and serve a motion and notice of motion pursuant to *Code Civ. Proc. § 1281.4* to stay the action pending the arbitration of any issue, question, or dispute that is claimed to be arbitrable under the agreement and that is relevant to the action to enforce the claim of lien. The failure of a claimant to comply with this subdivision is a waiver of the claimant's right to compel arbitration [*Code Civ. Proc. § 1281.5(b)*]. For a form of motion for stay, see *§ 32.97*. For a form of an order staying proceedings, see *§ 32.97A*.

The sole effect of filing the application for the stay under *Code Civ. Proc. § 1281.5(b)* is to preclude a finding of waiver of the right to arbitrate because of the filing of the complaint to enforce the mechanics' lien [*Kaneko Ford Design v. Citipark, Inc. (1988) 202 Cal. App. 3d 1220, 1227, 249 Cal. Rptr. 544]* . However, the statute does not preclude a

finding of waiver based on facts other than the act of filing the complaint [*Kaneko Ford Design v. Citipark, Inc. (1988) 202 Cal. App. 3d 1220, 1228, 249 Cal. Rptr. 544]* .

[iii] Order Required for Stay

The application for the stay is simply a request, and the simple act of filing it does not create the stay; the court must act on the application by issuing an order, which may grant or deny the stay [*Kaneko Ford Design v. Citipark, Inc. (1988) 202 Cal. App. 3d 1220, 1226-1227, 249 Cal. Rptr. 544]* .

[b] Defendant's Response to Suit to Enforce Mechanics' Lien

The failure of a defendant to file a petition for an order to arbitrate pursuant to *Code Civ. Proc. § 1281.2* at or before the time he or she answers a complaint to enforce a mechanics' lien filed pursuant to *Code Civ. Proc. § 1281.5(a)* constitutes a waiver of that party's right to compel arbitration [*Code Civ. Proc. § 1281.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewReal Property LawNonmortgage LiensMechanics' LiensCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActStays Pending ArbitrationCivil ProcedureAlternative Dispute ResolutionArbitrationsWaivers

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Chapter 32 CONTRACTUAL ARBITRATION: AGREEMENTS AND COMPELLING ARBITRATION
PART II. LEGAL BACKGROUND
B. Arbitration Agreement

4-32 California Forms of Pleading and Practice--Annotated §§ 32.26-32.29

AUTHOR: Michael S. Fields Editorial Consultant

[Reserved]

§§ 32.26[Reserved]

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PART II. LEGAL BACKGROUND
C. Compelling Arbitration
1. Suit on Arbitrable Issue

4-32 California Forms of Pleading and Practice--Annotated § 32.30

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.30 Arbitration as Condition Precedent

An aggrieved party must seek to enforce his or her contractual right to arbitration before suing on the arbitrable controversy unless the other party waives arbitration. Arbitration, or an unsuccessful attempt to secure the same, is a condition precedent to the right to maintain a court action [Charles J. Rounds Co. v. Joint Council of Teamsters No. 42 *(1971) 4 Cal. 3d 888, 894, 95 Cal. Rptr. 53, 484 P.2d 1397]* . For forms of affirmative defense to an action on the ground that arbitration is a condition precedent to commencement and maintenance of a suit, see *§§ 32.98* and *32.99*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewContracts LawContract Conditions & ProvisionsConditions PrecedentCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil ProcedureAlternative Dispute ResolutionArbitrationsWaivers

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PART II. LEGAL BACKGROUND
C. Compelling Arbitration
1. Suit on Arbitrable Issue

4-32 California Forms of Pleading and Practice--Annotated § 32.31

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.31 Defendant's Remedies When Action Is Brought on Arbitrable Issue

[1] Petition to Compel Arbitration in Lieu of Answer

A defendant may file a petition to compel arbitration pursuant to *Code Civ. Proc. § 1281.2* in lieu of filing an answer to a complaint [*Code Civ. Proc. § 1281.7*; *see § 32.92*]. If the petition is denied, the defendant has 15 days from denial to plead to the complaint [*Code Civ. Proc. § 1281.7*].

If a controversy that is referable to arbitration under an alleged agreement is involved in an action or proceeding pending in a superior court, a petition for an order to arbitrate is to be filed in that action or proceeding [*Code Civ. Proc. § 1292.4*].

For discussion relating to petitions to compel arbitration, see Subpart 2, § 32.40 et seq. For forms relating to proceedings to compel arbitration, see *§ 32.91* et seq.

[2] Motion to Stay Action

[a] When Motion Is Available

A California court is required, on a party's motion, to stay an action or proceeding pending before the court if either of the following circumstances apply [*Code Civ. Proc. § 1281.4*]:

- A court of competent jurisdiction has ordered arbitration of a controversy that is an issue involved in the case.

- An application has been made to a court of competent jurisdiction, whether in California or not, for an order to arbitrate a controversy that is an issue in the case, and the application is undetermined.

The above applies whether the court entering the order, or before which an application for such an order is pending, is in California or not [*Code Civ. Proc. § 1281.4*].

Under these circumstances, the court must stay the action or proceeding until there is an arbitration in accordance with the order to arbitrate, or until such earlier time as the court specifies [*Code Civ. Proc. § 1281.4*]. *Code Civ. Proc. § 1281.4* is clear and unambiguous: it requires that the trial court stay an action pending before it while an application to arbitrate the subject matter of the action is pending in a court of competent jurisdiction. A single overlapping issue is sufficient to require imposition of a stay. The court has no discretion in the matter [*Heritage Provider Network, Inc. v. Superior Court (Eastland Medical Group) (2008) 158 Cal. App. 4th 1146, 1152-1153, 70 Cal. Rptr. 3d 645* ; *compare Code Civ. Proc. § 1281.2(c)*, discussed at *32.43[8][g]*, under which issue is decided on hearing of petition to compel arbitration]. There is no specific or implied exception contained within Section 1281.4 to preclude its application for dilatory action by a party seeking to arbitrate the matter. Relief based on a claim of delay, as well as any substantive arguments relating to whether arbitration is appropriate under the facts presented, should be presented to the court entertaining the application to arbitrate [*Twentieth Century Fox Film Corp. v. Superior Court (2000) 79 Cal. App. 4th 188, 192, 93 Cal. Rptr. 2d 896* (dicta, appeal was dismissed as moot)].

For a form of notice of motion to stay proceedings in pending action until arbitration is completed, see *§ 32.97*.

[b] Proper Court for Motion

The motion for a stay of proceedings is to be made in the court where the action is pending [*Code Civ. Proc. §§ 1281.4, 1292.8*; *see Code Civ. Proc. §§ 85, 86(a)(10)(A)* (when case is limited civil case)].

[c] Notice of Stay

If a case is stayed due to contractual arbitration under *Code Civ. Proc. § 1281.4*, the party that requested or caused the stay must serve and file a notice of the stay and attach a copy of the order or other document showing that the proceeding is stayed. If the person who requested or caused the stay has not appeared, or is not subject to the jurisdiction of the court, the plaintiff must immediately file the notice. The notice of stay must be served on all parties who have appeared in the case [*Cal. Rules of Ct., Rule 3.650(a), (b)(2)*. The notice must state both of the following [*Cal. Rules of Ct., Rule 3.650(c)*]:

- Whether the case is stayed with regard to all parties or only certain parties. If it is stayed with regard to only certain parties, the notice must specifically identify those parties.

- The reason for that the case is stayed.

When the stay is vacated, is no longer in effect, or is modified, the party who filed the notice of the stay must immediately serve and file a notice of termination or modification of stay. If that party fails to do so, any other party in the action who has knowledge of the termination or modification of the stay must serve and file a notice of termination or modification of stay. Once one party in the action has served and filed a notice of termination or modification of stay, other parties in the action are not required to do so [*Cal. Rules of Ct., Rule 3.650(d)*]. Judicial Council Form CM-181 Notice of Termination or Modification of Stay must be used after January 1, 2006 to give the required notice [*see § 32.97C*].

For a form of notice of stay of proceedings, see *32.97B*.

PRACTICE TIP:

Sanctions May Be Imposed. Failure to comply with this requirement may be deemed an unlawful

interference with the proceedings of the court [*Cal. Rules of Ct., Rule 2.30*]. Hence, counsel may be well-advised to prepare the notice in advance and have it ready for immediate filing once the court issues the order staying the action.

[d] Stay of Severable Issue

If the issue subject to arbitration is severable, the stay may be with respect to that issue only [*Code Civ. Proc. § 1281.4*]. Conversely, if arbitration could make trial of the severable issues unnecessary, the court may order arbitration and stay action on the severable issues or remedies, such as injunctions, pending resolution of the arbitration [*see, e.g., Coast Plaza Doctors Hospital v. Blue Cross of California (2000) 83 Cal. App. 4th 677, 691-692, 99 Cal. Rptr. 2d 809]* .

[3] Raising Request to Arbitrate by Demurrer or Summary Judgment

If the only issue to be litigated is covered by the arbitration clause and the plaintiff has not first pursued or attempted to pursue his or her arbitration remedy, the defendant may elect to demur or move for summary judgment on the ground that the plaintiff has failed to exhaust arbitration remedies [Charles J. Rounds Co. v. Joint Council of Teamsters No. 42 *(1971) 4 Cal. 3d 888, 899, 95 Cal. Rptr. 53, 484 P.2d 1397* ; *but see Kalai v. Gray (2003) 109 Cal. App. 4th 768, 774 n.1, 135 Cal. Rptr. 2d 449* (criticizing Rounds as 30-years old and inconsistent with *Code Civ. Proc. § 1281.4*, which specifies action is to be stayed, not dismissed, until completion of arbitration)].

If the complaint also raises issues not susceptible to arbitration, the defendant may not raise a request to arbitrate by way of demurrer. In this situation, the defendant must demand arbitration and seek a stay of the litigation [*Badgley v. Van Upp (1993) 20 Cal. App. 4th 218, 221, 24 Cal. Rptr. 2d 406]* . Similarly, if the arbitration agreement is binding only with respect to some defendants, summary judgment is proper only as to those defendants. Summary judgment should not be denied to all defendants merely because some of them are not bound by the arbitration agreement [*24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal. App. 4th 1199, 1204, 1212, 1215, 78 Cal. Rptr. 2d 533]* .

ILLUSTRATION:

Determining Summary Judgment With Respect to Applicability of Arbitration Agreement.
Plaintiff sued her former employer and various of its employees for sexual harassment in the workplace. The complaint alleged that the employee defendants, in doing the acts complained of, were acting within the course and scope of their employment. All defendants moved for summary judgment on the ground that the matter had to be arbitrated in accordance with the arbitration provision in the employment contract. Plaintiff relied on the former employer's answer, which alleged that any harassment was carried out by the individual employees acting beyond the course and scope of their employment, and an admission by one employee in discovery that he made certain objectionable statements to plaintiff outside the scope of his employment. The trial court denied summary judgment as to all defendants, stating that triable issues of fact existed regarding which defendants were bound by the arbitration agreement. Should summary judgment have been denied as to all defendants? No. Denial of summary judgment was proper only as to the employee who had admitted in discovery that his objectionable statements to plaintiff were made outside the course and scope of his employment. The former employer's answer did not constitute an admission by the individual employees, but the allegation in plaintiff's complaint could be taken as fact for purposes of the motion for summary judgment. The only evidence that anyone acted outside the scope of employment, and thus, outside the scope of the matters required by the agreement to be arbitrated, was the admission in discovery by one employee. Thus, denial of the motion was proper only as to that employee [*24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal. App. 4th 1199, 1210-1212, 1215, 78 Cal. Rptr. 2d 533]* .

A defendant may prefer to move for summary judgment instead of moving to compel arbitration. If the plaintiff, in resisting arbitration waives his or her right to arbitration, judgment can be entered in accordance with the defendant's

motion for summary judgment, and plaintiff will be left without a remedy [*Martinez v. Scott Specialty Gases, Inc. (2000) 83 Cal. App. 4th 1236, 1250-1251, 100 Cal. Rptr. 2d 403* ; *compare Johnson v. Siegel (2000) 84 Cal. App. 4th 1087, 1095-1100, 1102, 101 Cal. Rptr. 2d 412* (no waiver was found, so even though summary judgment was entered, it was not res judicata as to plaintiff's right to arbitrate and plaintiff could still file petition to compel arbitration)]. Usually, however, a plaintiff's merely initiating a lawsuit or contesting the validity of the arbitration clause will not be enough to waive his or her right to arbitrate [*see Kalai v. Gray (2003) 109 Cal. App. 4th 768, 776-778, 135 Cal. Rptr. 2d 449]* .

[4] Acquiescence in Lawsuit

If the only issue to be litigated is covered by the arbitration clause and plaintiff has not first pursued or attempted to pursue his or her arbitration remedy, plaintiff has impliedly waived his or her right to arbitrate, so that defendant may elect to submit the matter to the jurisdiction of the court [Charles J. Rounds Co. v. Joint Council of Teamsters No. 42 *(1971) 4 Cal. 3d 888, 899, 95 Cal. Rptr. 53, 484 P.2d 1397* ; *see also Northcutt Lumber Co. v. Goldeen's Peninsula, Inc. (1973) 30 Cal. App. 3d 440, 444-445, 106 Cal. Rptr. 353]* .

[5] Final Arbitration Award as Affirmative Defense

A party may raise the existence of a final and binding arbitration award that fully adjudicated the dispute as an affirmative defense [*see Archuleta v. Grand Lodge etc. of Machinists (1968) 262 Cal. App. 2d 202, 208, 68 Cal. Rptr. 694]* . For a form asserting this defense, see *§ 32.100*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActStays Pending ArbitrationCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel Arbitration

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1. Suit on Arbitrable Issue

4-32 California Forms of Pleading and Practice--Annotated § 32.32

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§ 32.32 Class Arbitration

[1] In General

Although the controlling opinion of the United State Supreme Court never addressed the issue of whether the Federal Arbitration Act prohibits enforcement of state laws allowing classwide arbitration, five Justices do believe that the Federal Arbitration Act does not prohibit classwide arbitration in accordance with a state law chosen by the parties as applicable to interpret and enforce their arbitration agreement, as long as the parties' arbitration agreement does not prohibit classwide arbitration [*Green Tree Fin. Corp. v. Bazzle (2003) 539 U.S. 444, 454-460, 123 S. Ct. 2402, 156 L. Ed. 2d 414* (concurring and dissenting opinion of Justice Stevens; dissenting opinions of Chief Justice Rehnquist and Justice Thomas)]. Former NASD Rule 10301(d) [*see now* NASD Rule 12204], approved by the Securities and Exchange Commission in 1992 with the intent to allow investor class actions to proceed in federal court, makes all actions agreed by the parties to be arbitrated under those rules ineligible when sought to be or actually certified as a class. Both the court and the arbitrator have authority to make the determination of ineligibility [*Clark v. First Union Securities, Inc. (2007) 153 Cal. App. 4th 1595, 1601, 1610-1613, 64 Cal. Rptr. 3d 313]* . If the arbitration agreement is silent on the issue of classwide arbitration, but one party claims that the manner of choosing the arbitrator impliedly prevents classwide arbitration, interpretation of the contract is necessary to determine whether it permits classwide arbitration. That interpretation addresses a procedural matter and, under an agreement that provides for arbitration of "all disputes relating to this contract," the arbitrator should make that interpretation after a court orders arbitration. The relevant question is what kind of arbitration the parties agreed to, and that concerns arbitration procedure [*Green Tree Financial Corp. v. Bazzle (2003) 539 U.S. 444, 452-453, 123 S. Ct. 2402, 2407-2408, 156 L. Ed. 2d 414* ; *accord Cable Connection, Inc. v. DirecTV, Inc. (2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586* (remanding for reconsideration because arbitrators wrongly interpreted American Arbitration Association, Supplementary Rules for Class Arbitration, Rule 3 in approving classwide arbitration)]. Thus, in cases governed by the Federal Arbitration Act, *Green Tree* has changed the practice in California of having the court certify a class at the same time it compels classwide arbitration; now, the arbitrator--not the court--interprets the arbitration agreement to determine whether it

prohibits class-wide arbitration [*Garcia v. DirecTV, Inc. (2004) 115 Cal. App. 4th 297, 300, 9 Cal. Rptr. 3d 190]* .

[2] Class Arbitration Waivers (Prohibitions)

[a] Unconscionablility

Nevertheless, if an arbitration agreement explicitly prohibits class-wide arbitration, even if it is governed by the FAA, a court still has authority to decide whether to refuse to enforce that prohibition on the ground that it is unconscionable [*Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 167-168, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* ; *Klussman v. Cross Country Bank (2005) 134 Cal. App. 4th 1283, 1287, 1290-1291, 36 Cal. Rptr. 3d 728* ; *accord Szetela v. Discover Bank (2002) 97 Cal. App, 4th 1094, 1101-1102, 118 Cal. Rptr. 2d 862* , *cert. denied 537 U.S. 1501 (2003)* (refusing to enforce prohibition on grounds of unconscionability without preemption analysis); *see also Murphy v. Check 'N Go of California, Inc. (2007) 156 Cal. App. 4th 138, 144-146, 67 Cal. Rptr. 3d 120* (court determined unconscionability even though agreement provided arbitrator should because it found provision for arbitrator to decide was itself unconscionable in contract of adhesion)].

PRACTICE TIP:

Class Arbitration. If the goal is to force arbitration to be *class* arbitration, rather than individual, then consider claims of unconscionability, fraud [*see § 32.21[4]*], or violation of law or public policy, *see § 32.32[2][c]*] to have the class arbitration waiver clause itself declared unenforceable and severed. However, if the goal is to avoid arbitration altogether, then in addition to having the clause itself declared unenforceable on one of those grounds, the unenforceability of the entire arbitration agreement must be pursued as well [*see § 32.32[2][d]*].

Unconscionability is a generally applicable contract defense, not one specifically applicable to arbitration agreements. Thus, it is not preempted by the FAA [*Discover Bank v. Superior Court (Boehr) (2005) 36 Cal. 4th 148, 167-168, 113 P.3d 1100* ; *accord Ting v. AT&T (9th Cir. 2003) 319 F.3d 1126, 1150, n.15* , *cert. denied, 124 S. Ct. 53, 157 L. Ed 2d 24 (2003)* ; *Ingle v. Circuit City Stores, Inc. (9th Cir. 2003) 328 F.3d 1165, 1170* ; *Klussman v. Cross Country Bank (2005) 134 Cal. App. 4th 1283, 1287, 1290-1291, 36 Cal. Rptr. 3d 728]* . Further, under *Code Civ. Proc. § 1281.2*, the question whether grounds exist for revocation of the arbitration agreement based on grounds that exist for the revocation of any contract, is for a court to decide, not an arbitrator [*Discover Bank v. Superior Court (Boehr) (2005) 36 Cal. 4th 148, 171, 30 Cal. Rptr. 3d 76, 113 P.3d 1100]* .

Severance is particularly appropriate in the case of class arbitration waivers because, unlike limitations on remedies or other limitations that are invalid on their face, class arbitration waivers will only be invalidated after the proper factual showing [*Gentry v. Superior Court (2007) 42 Cal. 4th 443, 445-446, 64 Cal. Rptr. 3d 773, 165 P.3d 556]* .

A finding of procedural unconscionability is not required to invalidate a class arbitration waiver if that waiver implicates unwaivable statutory rights. But such a finding is a prerequisite to determining that the arbitration agreement as a whole is unconscionable. An arbitration agreement may have an element of procedural unconscionability notwithstanding an opt-out provision [*see Gentry v. Superior Court (Circuit City Stores, Inc.) (2007) 42 Cal. 4th 443, 451, 64 Cal. Rptr. 3d 773* (remanding for determination of whether provisions of arbitration agreement were substantively unconscionable)]. An employee's signature on an arbitration agreement may reasonably lead the employer to believe that the employee's failure to opt out constituted acceptance of the arbitration agreement, but the question whether an arbitration agreement has been validly formed is different from whether that agreement was unconscionable. The lack of material information about the disadvantageous terms of the arbitration agreement, combined with the likelihood that employees felt at least some pressure not to opt out of the arbitration agreement, led the Supreme Court to conclude that the agreement was not entirely free from procedural unconscionability [*Gentry v. Superior Court (Circuit City Stores, Inc.) (2007) 42 Cal. 4th 443, 472, 64 Cal. Rptr. 3d 773* (finding *Circuit City Stores, Inc. v. Najd (9th Cir. 2002) 294 F.3d 1104* , and *Circuit City Stores, Inc. v. Ahmed (9th Cir. 2002) 283 F.3d 1198* , both of which

found the arbitration agreement not to be unconscionable and neither of which considered concealment of disadvantageous terms nor reality that Circuit City was in position to pressure employees to choose arbitration, unpersuasive)].

[b] Functional Equivalent of Exculpatory Clause

A class arbitration prohibition in a consumer contract of adhesion in a setting in which disputes between the contracting parties involve small amounts of damages and it is alleged that the party with the superior bargaining power has carried out a deliberate scheme to individually cheat large numbers of consumers of small sums of money, becomes in practice an exculpatory clause (at least to the extent the issue is governed by California law) [*Civ. Code § 1668*] and is unconscionable and unenforceable [*Discover Bank v. Superior Court (Boehr) (2005) 36 Cal. 4th 148, 162-163, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* ; *Gatton v. T-Mobile USA, Inc (2007) 152 Cal. App. 4th 571, 579-581, 61 Cal. Rptr. 3d 344* ; *Cohen v. DirecTV, Inc. (2006) 142 Cal. App. 4th 1442, 1451-1455, 48 Cal. Rptr. 3d 813* ; *Klussman v. Cross Country Bank (2005) 134 Cal. App. 4th 1283, 1293, 36 Cal. Rptr. 3d 728* ; *Aral v. Earthlink, Inc. (2005) 134 Cal. App. 4th 544, 548-549, 556, 36 Cal. Rptr. 3d 229]* . If the arbitration agreement has a choice of law clause providing that it be governed by law other than California's, the issue is further complicated. Even if under traditional conflicts analysis the chosen state has a substantial relationship to the parties or their transaction, or there is some other reasonable basis for the parties' choice of law, a California court may still refuse to enforce a class-arbitration prohibition if it is contrary to a strong public policy of California or if class-arbitration rules are procedural rules that California courts are to apply even if the contract's substantive law is from the other state [*Discover Bank v. Superior Court (Boehr) (2005) 36 Cal. 4th 148, 153, 173-174, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* (*Discover Bank*; remanding for determination of choice of law issue); *Klussman v. Cross Country Bank (2005) 134 Cal. App. 4th 1283, 1287, 1294-1300, 36 Cal. Rptr. 3d 728* (finding California law applicable, after choice of law analysis, and class action waiver unenforceable); *Aral v. Earthlink, Inc. (2005) 134 Cal. App. 4th 544, 563-564, 36 Cal. Rptr. 3d 229* (finding California law applicable, after choice of law analysis, and class action waiver unenforceable); *see, e.g., Civ. Code §§ 1668, 1751, 1781(a), 1783* (possible indications of strong California public policy militating against enforcement of class action prohibition)]. On remand, the court of appeal in *Discover Bank* found Delaware law applicable because the only statutory cause of action alleged was under a Delaware statute, and plaintiff sought to represent a nationwide class [*Discover Bank v. Superior Court (Boehr) (2005) 134 Cal. App. 4th 886, 889, 891-895, 36 Cal. Rptr. 3d 456*]. The cases finding California had a materially greater interest than the state whose law was specified by the contractual choice of law provision involved causes of action under California consumer protection statutes and proposed classes of only California residents [*Klussman v. Cross Country Bank (2005) 134 Cal. App. 4th 1283, 36 Cal. Rptr. 3d 728* ; *Aral v. Earthlink, Inc. (2005) 134 Cal. App. 4th 544, 36 Cal. Rptr. 3d 229*].

[c] In Context of Unwaivable Statutory Rights

The validity of class action waivers has also been considered in the context of employees' unwaivable statutory rights. When it is alleged that an employer has systematically denied an unwaivable statutory right to a class of employees and a class action is requested notwithstanding an arbitration agreement that contains a class arbitration waiver, the trial court must consider the following factors [*Gentry v. Superior Court (Circuit City Stores, Inc.) (2007) 42 Cal. 4th 443, 463-464, 64 Cal. Rptr. 3d 773* ; *Sanchez v. Western Pizza Enterprises, Inc. (2009) 172 Cal. App. 4th 154, 166-170, 90 Cal. Rptr. 3d 818* (ruling class arbitration waiver unenforceable after considering only first three factors); *Franco v. Athens Disposal Co., Inc. (2009) 171 Cal. App. 4th 1277, 1297, 90 Cal. Rptr. 3d 539* (class arbitration waiver unenforceable); *Murphy v. Check 'N Go of California, Inc. (2007) 156 Cal. App. 4th 138, 148-149, 67 Cal. Rptr. 3d 120]* :

- The modest size of the potential individual recovery,
- The potential for retaliation against members of the class if they sued individually,

- The fact that absent members of the class may be ill informed about their rights,

- Other real world obstacles to the vindication of class members' statutory right through individual arbitration.

If the court concludes, based on these factors, that a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class action will likely lead to a less comprehensive enforcement of an unwaivable statutory right for the employees alleged to be affected by the employer's violations, it must invalidate the class arbitration waiver to ensure that these employees can vindicate their unwaivable rights in an arbitration forum [*Gentry v. Superior Court (Circuit City Stores, Inc.) (2007) 42 Cal. 4th 443, 463, 64 Cal. Rptr. 3d 773* (remanding for trial court to make that determination with respect to unwaivable overtime pay claims); *Sanchez v. Western Pizza Enterprises, Inc. (2009) 172 Cal. App. 4th 154, 166-170, 90 Cal. Rptr. 3d 818* (claims based on employee's statutory right to reimbursement of job expenses under *Lab. Code §§ 2802, 2804* and to receive minimum wage under *Lab. Code, § 1194* were unwaivable); *Franco v. Athens Disposal Co., Inc. (2009) 171 Cal. App. 4th 1277, 1297, 90 Cal. Rptr. 3d 539* (overtime pay claims and claims of violation of meal and rest-period requirements in *Lab. Code § 226.7*, per *Lab. Code § 219*, are not waivable); *Murphy v. Check 'N Go of California, Inc. (2007) 156 Cal. App. 4th 138, 148-149, 67 Cal. Rptr. 3d 120]* regardless of whether the arbitration agreement as a whole is procedurally unconscionable [*Gentry v. Superior Court (Circuit City Stores, Inc.) (2007) 42 Cal. 4th 443, 451, 467, 64 Cal. Rptr. 3d 773* ; *Sanchez v. Western Pizza Enterprises, Inc. (2009) 172 Cal. App. 4th 154, 169 n.4, 90 Cal. Rptr. 3d 818*]. Under some circumstances a class arbitration waiver would lead to a de facto waiver and would impermissibly interfere with employees' ability to vindicate unwaivable rights and to enforce the labor laws [*Gentry v. Superior Court (Circuit City Stores, Inc.) (2007) 42 Cal. 4th 443, 456-457, 64 Cal. Rptr. 3d 773* ; *Murphy v. Check 'N Go of California, Inc. (2007) 156 Cal. App. 4th 138, 148-149, 67 Cal. Rptr. 3d 120]* .

[3] Procedural Issues and Considerations

Even when the arbitration clause is silent as to class arbitration, California courts have permitted arbitration on a class-wide basis rather than allow a defendant to automatically eliminate the right to a class proceeding by compelling individual arbitration [*Keating v. Superior Court (1982) 31 Cal. 3d 584, 609, 612-614, 183 Cal. Rptr. 360, 645 P.2d 1192* (*overruled on other grounds in Southland Corp. v. Keating (1984) 465 U.S. 1, 16, 104 S. Ct. 852, 79 L. Ed. 2d 1*); *Blue Cross of California v. Superior Court (1998) 67 Cal. App. 4th 42, 46, 65-66, 78 Cal. Rptr. 2d 779* (both adhesion contracts)]. *Keating* is not authority that class arbitration is a substantive right that would empower arbitrators to order arbitration without a finding of unconscionability (which in any event would ordinarily be made by the court) [*Cable Connection, Inc. v. DirecTV, Inc. (2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586*].

Class certification issues may be determined before arbitration is ordered; and arbitration may be stayed and a petition for individual arbitration denied "without prejudice," so class certification issues can be determined first [*Sanders v. Kinko's, Inc. (2002) 99 Cal. App. 4th 1106, 121 Cal. Rptr. 2d 766]* . Thus, when the class consists of persons who have signed arbitration agreements and persons who have not, and the only representative before the court at time of the motion to compel arbitration has not signed agreement, the court will not order arbitration but will wait to determine the issue until the putative representative moves to certify the class [*Lee v. Southern California Univ. for Professional Studies (2007) 148 Cal. App. 4th 782, 784, 788-789, 56 Cal. Rptr. 3d 134]* .

In ordering class arbitration, the trial court must consider not only the factors normally relevant to class certification, but also the special characteristics of arbitration, including the impact on arbitration of any courtsupervision necessary to protect the interests of absent class members. The court must also consider the possibility of prejudice to the legitimate interests of the party that drafted the adhesion agreement, and allow that party the option of remaining in court rather than submitting to class-wide arbitration. Additionally, members of the class may opt out if they prefer to arbitrate on an individual basis [*Keating v. Superior Court (1982) 31 Cal. 3d 584, 609, 612-614, 183 Cal. Rptr. 360, 645 P.2d 1192* (

overruled on other grounds in Southland Corp. v. Keating (1984) 465 U.S. 1, 16, 104 S. Ct. 852, 79 L. Ed. 2d 1); *see also Blue Cross of California v. Superior Court (1998) 67 Cal. App. 4th 42, 54-55, 78 Cal. Rptr. 2d 779]* .

Conversely, if an arbitration provision is unconscionable and unenforceable, the trial court in a class action, even one in which no class has yet been certified, has authority to order that the arbitration provision not be enforced against potential class members [*Patterson v. ITT Consumer Financial Corp. (1993) 14 Cal. App. 4th 1659, 1667-1668, 18 Cal. Rptr. 2d 563* , *cert. denied, 510 U.S. 1176 (1994)* ; *see also Code Civ. Proc. §§ 187* and *527* (court's authority)]. An unconscionable arbitration clause in an agreement between a credit card issuer and cardholders cannot be enjoined as a deceptive practice under the California Legal Remedies Act (CLRA; *Civ. Code § 1750 et seq.*) [*see Civ. Code § 1770(a)(19)* (insertion of unconscionable provision in contract as deceptive practice)] when the cardholder never used the credit card for the sale or lease of goods or services because the CLRA does not regulate an extension of credit separate and apart from a sale or lease [*Berry v. American Express Publishing Co. (2007) 147 Cal. App. 4th 224, 228, 233, 54 Cal. Rptr. 3d 91]* .

ILLUSTRATION:

Court Has Discretion to Protect Parties' Interests. In aclass action, before the class is certified, the defendant moves to compel arbitration. The trial court denies the motion, finding the arbitration clause to be unconscionable and thus, unenforceable. The court also orders the defendant not to seek confirmation of arbitration awards in the City and County of San Francisco, but allowed them to pursue collection claims in San Francisco in small claims or superior court actions. The order barred any consumer defendant in such an action from obtaining a stay based on the arbitration clause or from basing a claim against the class action defendant on its failure to arbitrate. The order further allowed any consumer defendants to ignore the order and assert the arbitration clause, and provided that in that event, the class action defendant was not to be penalized for having instituted a court action in compliance with the order. The class action defendant asserted that the order was over broad in reaching persons who were not named plaintiffs in the class action. Is the order appropriate? Yes. The court has properly tailored the order to effectuate its determination that the arbitration clause was unenforceable and to protect the class action defendant's collection rights, while permitting the plaintiff's to seek class certification [*Patterson v. ITT Consumer Financial Corp. (1993) 14 Cal. App. 4th 1659, 1668, 18 Cal. Rptr. 2d 563* , *cert. denied, 510 U.S. 1176 (1994)]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsContracts LawContract Conditions & ProvisionsArbitration ClausesContracts LawDefensesUnconscionabilityArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActCoverage & Exceptions

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AUTHOR: Michael S. Fields Editorial Consultant

§ 32.33 Dismissal for Delay in Prosecution

Several courts have held that the five-year dismissal statutes [*see Code Civ. Proc. § 583.310 et seq.*] apply to lawsuits subject to contractual arbitration, even if the case is in arbitration [*Kuzmanoff v. Kron (1988) 207 Cal. App. 3d Supp. 1, 3 , 255 Cal. Rptr. 168* (citing cases)]. The courts ofappeal, however, are not in complete agreement as to the manner in which the dismissal statutes apply [*see Brock v. Kaiser Foundation Hospitals (1992) 10 Cal. App. 4th 1790, 1801, 1805, 1808, 13 Cal. Rptr. 2d 678* ; *Preston v. Kaiser Foundation Hospitals (1981) 126 Cal. App. 3d 402, 406-407, 178 Cal. Rptr. 882]* . For further discussion regarding the relation of the dismissal statutes to controversies subject to arbitration, see Subpart 3, § 32.50 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActCoverage & Exceptions

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[Reserved]

§§ 32.34[Reserved]

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2. Judicial Proceedings to Compel Arbitration

4-32 California Forms of Pleading and Practice--Annotated § 32.40

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.40 Timely Demand as Condition Precedent

[1] Time Specified in Agreement

[a] As Condition Precedent

A contractual requirement that a party's demand for arbitration must be made within a certain time is a condition precedent to the right to arbitration. Absent a legal excuse or subsequent modification of the parties' agreement, the failure to submit the dispute to arbitration within the agreed time precludes judicial enforcement of the right to arbitrate [*Platt Pacific, Inc. v. Andelson (1993) 6 Cal. 4th 307, 319-321, 24 Cal. Rptr. 2d 597, 862 P.2d 158* (distinguishing *Napa Association of Public Employees v. County of Napa (1979) 98 Cal. App. 3d 263, 270, 159 Cal. Rptr. 522* , which held that failure to timely submit labor *grievance* was not "waiver" of right to arbitrate in absence of intentional relinquishment of right or substantial prejudice)].

[b] Tolling During Pendency of Civil Action

By statute effective January 1, 2007, if an arbitration agreement requires that arbitration of a controversy be demanded or initiated by a party to the arbitration agreement within a stated period of time, the commencement of a civil action by that party based upon that controversy, within that period of time, tolls the applicable time limitations contained in the agreement, from the date the civil action is commenced until 30 days after a final determination by the court hearing the action that the party is required to arbitrate the controversy, or 30 days after the final termination of the civil action, whichever date occurs first [*Code Civ. Proc. § 1281.12*]. The end of a tolling period under this provision, i.e., 30 days after the final determination, simply means that the contractual limitations clock begins to run again from where it stopped at the filing of the civil action [*Pearson Dental Supplies, Inc. v. Superior Court (2010) 48 Cal. 4th 665, 675, 108 Cal. Rptr. 3d 171, 229 P.3d 83* (arbitration award vacated)].

[2] Time Not Specified in Agreement

[a] Reasonable Time Requirement

When the arbitration agreement does not specify a time within which arbitration must be demanded, a reasonable time is allowed [*Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1043, 9 Cal. Rptr. 2d 381, 831 P.2d 821]* .

[b] Determining Reasonableness

What constitutes a reasonable time is a question of fact, depending on the situation of the parties, the nature of the transaction, and the facts of the particular case. An unreasonable delay in demanding arbitration may constitute a waiver of the right to arbitrate [*Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1043, 9 Cal. Rptr. 2d 381, 831 P.2d 821* ; *Sawday v. Vista Irrigation Dist. (1966) 64 Cal. 2d 833, 836-837, 52 Cal. Rptr. 1, 415 P.2d 816* ; *see also Civ. Code § 1657*].

In some cases, a delay of several years may be appropriate as, for example, when the delay is occasioned by the party opposing the demand for arbitration [*Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1043-1044, 9 Cal. Rptr. 2d 381, 831 P.2d 821]* .

ILLUSTRATION:

Delay Occasioned by Party Opposing Demand. An insured, while acting within the course and scope of his employment, is injured in an accident with an uninsured motorist. The insured files suit against the uninsured motorist and pursues a claim on the uninsured motorist provision of his own policy. The insurer learns that the insured is also pursuing workers' compensation benefits, including permanent disability, and informs the insured that it will not settle the uninsured motorist claim until the workers' compensation claim is resolved. The insured agrees to inform the insurer when that occurs. Some five years later and a month after the workers' compensation claim is settled, the insured so notifies the insurer, which in turn indicates it will not settle the uninsured motorist claim, that insured should do whatever he felt necessary to compel arbitration, and that the insurer would attempt to dismiss the claim. The insured petitions to compel arbitration, and the insurer opposes on the ground that the action was barred by the statute of limitations. The insured promptly petitions to compel arbitration. Is it too late? No. In this case, the court held that the statuteof limitations did not begin to run until the insurer refused to arbitrate. This holding was found to be consistent with the rule that a demand for arbitration must not be unreasonably delayed because under the facts it was reasonable for the insured to wait before demanding arbitration [*Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1043-1044, 9 Cal. Rptr. 2d 381, 831 P.2d 821]* .

[3] Time to Petition After Timely Demand

[a] Four Years From Refusal to Arbitrate

Once a timely demand for arbitration has been made, and refused, the party seeking arbitration has four years to petition to compel arbitration [Wagner Construction Co. v. Pacific Mechanical Corp. (2007) 41Cal. 4th 19, 29, *58 Cal. Rptr. 3d 434, 157 P.3d 1029* (distinguishing limitations defense on underlying claim, which is for arbitrator to decide); *Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1040-1043, 9 Cal. Rptr. 2d 381, 831 P.2d 821]* . An action to compel arbitration is in essence a suit in equity to compel specific performance of a contract. The contract is considered breached, and thus the cause of action accrues, when the other party refuses to comply with a demand to arbitrate [*Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1040-1043, 9 Cal. Rptr. 2d 381, 831 P.2d 821]* . Then, the four-year limitation of *Code Civ. Proc. § 337*, applicable to breach of contract, applies to require the petition to compel arbitration to be filed within four years from the refusal to arbitrate [*Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1039-1044, 9 Cal. Rptr. 2d 381, 831 P.2d 821]* .

[b] Uninsured Motorist Arbitration

In the case of uninsured motorist arbitration, since January 1, 1996, the insured has been required to conclude arbitration within five years after it is instituted [*Ins. Code § 11580.2(i)(2)(A)*]. Arbitration may be considered instituted on the date the insured sends his or her demand for arbitration [*Santangelo v. Allstate Insurance Company (1998) 65 Cal. App. 4th 804, 812, 76 Cal. Rptr. 2d 735]* . Thus, if an insured does not conclude the arbitration within five years after demanding it, and he or she cannot establish any basis for waiver or estoppel of the five-year period for completion of arbitration, any petition for an order to compel that arbitration must be denied [*Santangelo v. Allstate Insurance Company (1998) 65 Cal. App. 4th 804, 812, 816-818, 76 Cal. Rptr. 2d 735]* . For further discussion, see *§ 32.92[3][e]*.

[4] Determination of Timeliness

An issue regarding compliance with the limitation period applicable to the underling claim is also for the arbitrator to decide as an affirmative defense that falls naturally within the plain language of an agreement to arbitrate [*Wagner Construction Co. v. Pacific Mechanical Corp. (2007) 41 Cal. 4th 19, 23, 25-26, 28, 58 Cal. Rptr. 3d 434, 157 P.3d 1029* ; *Kennedy, Cabot & Co. v. National Assn. of Securities Dealers, Inc. (1996) 41 Cal. App. 4th 1167, 1176-1179, 49 Cal. Rptr. 2d 66]* . Compliance with any limitation period in an arbitration code designated by the parties in the arbitration agreement or in the arbitration agreement itself is generally determined in the arbitration proceeding, not by the court deciding whether to compel arbitration, as it is considered a question regarding the scope of arbitrable issues [*see Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co. (1992) 6 Cal. App. 4th 1266, 1276, 8 Cal. Rptr. 2d 587* (two-year limitation period in construction performance bond, commencing on date last payment under construction contract was due)]. Similarly, compliance with a limitation period in an arbitration code, the parties designated in their submission agreement to govern their arbitration is determined by the arbitrator [*Howsam v. Dean Witter Reynolds, Inc. (2002) 537 U.S. 79, 85-86, 123 S. Ct. 588, 593-594, 154 L. Ed. 2d 491* ; *Reed v. Mutual Service Corp. (2003) 106 Cal. App. 4th 1359, 131 Cal. Rptr. 2d 524* (compliance with NASD Code of Arbitration Procedure, Rule 10304 6-year limitation period)].

Affirmative defenses to the underlying claim based on the statute of limitations are to be distinguished from claims that one party to the arbitration agreement has waived the right to arbitrate. Claims of waiver are to be determined by the court at the time of the petition to compel arbitration [*Wagner Construction Co. v. Pacific Mechanical Corp. (2007) 41 Cal. 4th 19, 28-30, 58 Cal. Rptr. 3d 434, 157 P.3d 1029* ; *Freeman v. State Farm Mut. Auto. Ins. Co. (1975) 14 Cal. 3d 473, 477, 483-486, 121 Cal. Rptr. 477, 535 P.2d 341]* . Waiver is discussed at *§ 32.25, above.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewInsurance LawMotor Vehicle InsuranceArbitrationContracts LawContract Conditions & ProvisionsConditions PrecedentCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel Arbitration

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4-32 California Forms of Pleading and Practice--Annotated § 32.41

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.41 Form of Demand

A demand for arbitration has been analogized to a complaint in a civil lawsuit. Its purpose is to inform the other party of the fact that the party making the demand intends to ask for a determination of the dispute between them [*Blatt v. Farley (1990) 226 Cal. App. 3d 621, 627, 276 Cal. Rptr. 612]* . Although so analogized, an arbitration demand filed only in an agreed arbitral forum and not asserted by the claimant in any complaint, cross-complaint or petition filed in court is not a "complaint" within the meaning of *Code Civ. Proc. § 425.16*, and thus, is not subject to a motion to strike under that section [*Sheppard v. Lightpost Museum Fund (2006) 146 Cal. App. 4th 315, 319, 323-324, 52 Cal. Rptr. 3d 821]* . A demand for arbitration is usually submitted in the form of a letter. For a form of demand, see *§ 32.90*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-32 California Forms of Pleading and Practice--Annotated § 32.42

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§ 32.42 Provisional Remedies Related to Arbitrable Issue

[1] Application for Provisional Remedy

[a] Right to Relief

A party to an arbitration agreement may file an application for a provisional remedy in connection with an arbitrable controversy. The sole ground for the application is that the award to which the applicant may be entitled may be rendered ineffectual without provisional relief [*Code Civ. Proc. § 1281.8(b)*; *see also Code Civ. Proc. § 676.11(b)-(d)* (conversion calculations when provisional remedy relates to foreign money claim); *Jay Bharat Developers, Inc. v. Minidis (2008) 167 Cal. App. 4th 437, 442-444, 446-447, 84 Cal. Rptr. 3d 267* (regarding the termination of a franchise agreement that contained an arbitration provision that excluded disputes in which injunctive relief was sought; the court granted a preliminary injunction against the franchisees, holding that the injunction was warranted to prevent further irreparable economic harm); *Simms v. NPCK Enterprises, Inc. (2003) 109 Cal. App. 4th 233, 242, 134 Cal. Rptr. 2d 557* ; Titan/Value Equities Group, Inc. v. Superior Court (1994) *29 Cal. App. 4th, 482, 487* , *35 Cal. Rptr. 2d 4]* .

Conversely, it is improper for a court to grant provisional relief that could render the arbitration ineffective. For example, when the subject of the arbitration is whether a health insurance policy covers particular treatment, a mandatory preliminary injunction requiring the insurer to authorize and pay for treatment is improper, at least if the insured fails to make a showing that the injunction was necessary to preserve the status quo of his or her health and fails to attempt to move promptly through the arbitration process [*Davenport v. Blue Cross of California (1997) 52 Cal. App. 4th 435, 453-454, 60 Cal. Rptr. 2d 641* (recognizing that under both California law and the Federal Arbitration Act, trial court has authority to grant injunctive relief if necessary to preserve the effectiveness of arbitration, but noting that federal courts are split on the issue as to the FAA)].

[b] Provisional Remedies Available

"Provisional remedy" includes the following [*Code Civ. Proc. § 1281.8(a)*]:

- Attachments and temporary protective orders issued pursuant to *Code Civ. Proc. § 481.010 et seq.* [*see* Ch. 62, *Attachment*].

- Writs of possession issued pursuant to *Code Civ. Proc. § 512.010 et seq.* [*see* Ch. 119, *Claim and Delivery*].

- Preliminary injunctions and temporary restraining orders issued pursuant to *Code Civ. Proc. § 527* [*see* Ch. 303, *Injunctions*].

- Receivers appointed pursuant to *Code Civ. Proc. § 564* [*see* Ch. 486, *Receivers*].

[c] Relation of Section 1281.8(b) to Provisional Remedy Statutes

Code Civ. Proc. § 1281.8(b) does not supplant the requirements of various code sections governing the specific provisional remedies listed in *Code Civ. Proc. § 1281.8(a)*. Thus, for example, a showing that the arbitrator's award might be rendered ineffectual is not sufficient to obtain a preliminary injunction. The moving party must also meet the requirements of *Code Civ. Proc. §§ 526, 527* [*Woolley v. Embassy Suites, Inc. (1991) 227 Cal. App. 3d 1520, 1527-1529, 278 Cal. Rptr. 719* (dissolving injunction when no showing was made that plaintiff was likely to prevail, and contract under which arbitration was proceeding was one for personal services and thus could not be specifically enforced)]. Nor is an injunction a proper remedy to take possession of property that is subject to a security interest. A writ of possession under the claim and delivery law that meets the requirements of *Code Civ. Proc. §§ 512.010, 512.060*, including posting of a bond, is the provisional remedy by which a secured party enforces its rights to take possession of collateral under *Com. Code § 9609*. An injunction to restrain removal of the property from a particular place (to prevent the debtor from putting it beyond the reach of the creditor), may be appropriate; and the writ or possession may take the form of an injunction or order to transfer the property to the possession of the petitioner. However, if the only showing made was that all that was necessary to maintain the status quo during arbitration was to restrain removal of the collateral from the debtor's place of business, a writ of possession should not issue [*Simms v. NPCK Enterprises, Inc. (2003) 109 Cal. App. 4th 233, 134 Cal. Rptr. 2d 557]* .

[d] Proper Court

The application for a provisional remedy may be filed in the court in the county in which an arbitration proceeding is pending, or if an arbitration proceeding has not been commenced, in any proper court [*Code Civ. Proc. § 1281.8(b)*].

[e] Accompanying Papers

The application must be accompanied by a complaint and a statement stating whether or not the applicant is reserving his or her right to arbitration [*Code Civ. Proc. § 1281.8(b)*].

[f] No Objection Based on Denial of Arbitrability

A claim by the party opposing issuance of a provisional remedy that the controversy is not subject to arbitration is not grounds for denial of any provisional remedy [*Code Civ. Proc. § 1281.8(c)*].

[2] Arbitration Right Not Waived if Application Requests Stay

An application for a provisional remedy under *Code Civ. Proc. § 1281.8(b)* does not operate to waive any right of arbitration that the applicant may have pursuant to a written agreement to arbitrate if, at the same time as the application for provisional relief is presented, the applicant also presents to the court an application that all other proceedings in the

action be stayed pending the arbitration of any issue, question, or dispute that is claimed to be arbitrable under the agreement and that is relevant to the action pursuant to which the provisional remedy is sought [*Code Civ. Proc. § 1281.8(d)*].

For a form of notice of motion for a stay, see *§ 32.97*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureAlternative Dispute ResolutionArbitrationsWaiversCivil ProcedureRemediesProvisional RemediesGeneral Overview

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§ 32.43 Judicial Proceedings to Compel Arbitration

[1] Purpose of Proceedings

Code Civ. Proc. § 1281.2 prescribes and limits the power of the superior court in passing on a petition to compel arbitration. The clear purpose and effect of that section is to require the court to determine in advance whether there is a duty to arbitrate the controversy that has arisen. The performance of this duty necessarily requires the court to examine and, to a limited extent, construe the underlying agreement [*Freeman v. State Farm Mut. Auto. Ins. Co. (1975) 14 Cal. 3d 473, 479-480, 121 Cal. Rptr. 477, 535 P.2d 341* ; *State Farm Mut. Auto Ins. Co. v. Superior Court (1994) 23 Cal. App. 4th 1297, 1301, 28 Cal. Rptr. 2d 711]* .

Judicial review is strictly limited to a determination of whether the party resisting arbitration in fact agreed to arbitrate [*State Farm Mut. Auto Ins. Co. v. Superior Court (1994) 23 Cal. App. 4th 1297, 1301, 28 Cal. Rptr. 2d 711]* . Doubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration [*Service Employees Internat. Union v. City of Los Angeles (1994) 24 Cal. App. 4th 136, 143, 29 Cal. Rptr. 2d 357]* . For further discussion, see *§ 32.21[1]*.

If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate the controversy may not be refused on the ground that the petitioner's contentions lack substantive merit [*Valsan Partners Limited Partnership v. Calcor Space Facility, Inc. (1994) 25 Cal. App. 4th 809, 817, 30 Cal. Rptr. 2d 785]* . However, if the agreed method of arbitration is not possible, for example, when a party is no longer a member of the organization that was to conduct the arbitration and therefore not entitled to use that organization's services as arbitrator unless the other party consents, and that party does not consent, arbitration cannot be ordered [*Provencio v. WMA Securities, Inc. (2005) 125 Cal. App. 4th 1028, 1032, 23 Cal. Rptr. 3d 524* (defendant no longer member of NASD; plaintiff would not consent to arbitration before NASD)].

[2] Pleadings

A party to a written arbitration agreement may petition the court for an order to compel arbitration if another party to the agreement refuses to arbitrate a controversy covered by the agreement [*see Code Civ. Proc. §§ 1281, 1281.2, 1290*]. Any person named as a respondent in a petition may file a response to it. A respondent who fails to duly serve and file a response will be deemed to have admitted the allegations of the petition [*see Code Civ. Proc. § 1290.4* (manner of service)]. The allegations of a response are deemed controverted or avoided [*Code Civ. Proc. § 1290*]. For forms of petition to compel arbitration, see *§ 32.91* et seq.

[3] Jurisdiction

[a] In California Courts

When parties enter into an agreement to arbitrate a matter in California, the agreement is deemed a consent to the jurisdiction of California courts to enforce the agreement by issuing orders provided in *Code Civ. Proc. § 1280 et seq.* and by entering a judgment on an award under the agreement [*Code Civ. Proc. § 1293*].

[b] Superior Courts

The superior court has jurisdiction over arbitration-related matters [*Cal. Const., art. VI, § 10*], including limited civil cases [*see Code Civ. Proc. §§ 85, 86* (defining "limited civil case")].

With respect to arbitration, limited civil cases include all arbitration-related petitions filed under *Code Civ. Proc. §§ 1292-1293.2* if the petition is filed [*Code Civ. Proc. §§ 85.1, 86(a)(10)(A)*]:

- Before the arbitration award becomes final and the matter to be resolved by arbitration is a limited civil case under *Code Civ. Proc. § 86(a)(1)-(9)*; or

- After the arbitration award becomes final and the amount of the award and all other rulings, pronouncements, and decisions made in the award are within *Code Civ. Proc. § 86(a)(1)-(9)*.

Uninsured motorist proceedings under *Ins. Code § 11580.2*, however, are not limited civil cases [*Code Civ. Proc. § 86(a)(10)(A)*].

[c] Continuing Jurisdiction

After a petition has been filed, the court in which the petition was filed retains jurisdiction to determine any subsequent petition involving the same agreement to arbitrate and the same controversy, and any subsequent petition is to be filed in the same proceeding [*Code Civ. Proc. § 1292.6*].

[4] Venue

Except as otherwise provided in *Code Civ. Proc. §§ 1292-1293.2*, any petition made prior to the commencement of arbitration is to be filed in a court having jurisdiction in the following venues:

- The county where the agreement is to be performed or was made [*Code Civ. Proc. § 1292(a)*].

- If the agreement does not specify a county where the agreement is to be performed and the agreement was not made in any county in this state, the county where any party to the court proceeding resides or has a place of business [*Code Civ. Proc. § 1292(b)*].

- In any case not covered by *Code Civ. Proc. § 1292(a), (b), above*, in any county in this state [*Code*

Civ. Proc. § 1292(c)].

If a petition for an order to arbitrate under an alleged arbitration agreement relates to a controversy that is involved in an action or proceeding pending before a superior court, the petition must be filed in that action or proceeding [*Code Civ. Proc. § 1292.4*].

[5] Four-Year Limitation Period for Filing Action

The period of limitation to enforce an agreement to arbitrate is the four-year period of *Code Civ. Proc. § 337* [*Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1040, 9 Cal. Rptr. 2d 381, 831 P.2d 821* ; *Meyer v. Carnow (1986) 185 Cal. App. 3d 169, 173-174, 229 Cal. Rptr. 617]* . The limitation period commences when the other party refuses a demand to arbitrate [*Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1041-1043, 9 Cal. Rptr. 2d 381, 831 P.2d 821]* .

This statute of limitations merely defines the outside time limits in which an action to compel arbitration must be initiated. This period may be shortened by a provision in the arbitration agreement stating a time frame for either party to request arbitration, and when no such time is stated, a reasonable time is allowed. What constitutes a reasonable time is a question of fact depending on the situation of the parties, the nature of the transaction, and the facts of the particular case. Among the facts the court may consider is any prejudice the opposing party may have suffered because of the delay [*Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1043, 9 Cal. Rptr. 2d 381, 831 P.2d 821* ; *Meyer v. Carnow (1986) 185 Cal. App. 3d 169, 175, 229 Cal. Rptr. 617]* . When the underlying dispute involves medical malpractice, the four-year period of Section 337 governs, but in determining whether the party seeking arbitration has petitioned to compel within a reasonable time, the court may, by analogy, look to the provisions of *Code Civ. Proc. § 340.5* to the extent that section demonstrates the Legislatures's determination of what is a reasonable time in which to file a lawsuit based on medical malpractice [*Meyer v. Carnow (1986) 185 Cal. App. 3d 169, 175, 229 Cal. Rptr. 617]* .

For further discussion of time requirements for pursuing arbitration, see *§ 32.40*.

[6] Calendar Preference

Proceedings to compel arbitration are to be given preference over all other civil actions or proceedings, except older matters of the same character and matters to which special precedence may be given by law, in the matter of being set for hearing and being heard so they can be quickly determined [*see Code Civ. Proc. § 1291.2*].

[7] Summary Hearing

[a] Notice and Manner of Hearing

A petition for an order to compel arbitration is to be heard in a summary way in the manner and on the notice provided by law for the making and hearing of motions [*see Code Civ. Proc. § 1003 et seq.*; for discussion, *see* Ch. 372, *Motions and Orders*], except that not less than 10 days' notice of the date set for the hearing on the petition must be given [*Code Civ. Proc. § 1290.2*]. If the petition is served outside California, it may not be heard until at least 30 days after the date of service [*Code Civ. Proc. § 1290.4(b)(2)*]. For a form of notice of a hearing on a petition to compel arbitration, see *§ 32.91[2]*.

Because under *Code Civ. Proc. § 1290.2* the petition is made and heard in the manner provided for hearing motions, the facts are ordinarily to be proven by affidavit or declaration and documentary evidence, with oral testimony taken only in the court's discretion [*Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 413-414, 58 Cal. Rptr. 2d 875, 926 P.2d 1061]* . A trial court does not necessarily abuse its discretion by resolving evidentiary conflicts without hearing live testimony. It would, however, be better practice for the court to hear oral testimony, with an

opportunity for cross examination when the court is confronted with two sharply conflicting factual accounts, as is commonly the case when the enforcement of an arbitration clause is opposed based on alleged fraud [*Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 415, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* ; *but see Hotels Nevada v. L.A. Pacific Center, Inc. (2006) 144 Cal. App. 4th 754, 758, 762, 765, 50 Cal. Rptr. 3d 700* (court erred in denying motion to compel arbitration based on unverified pleading without holding evidentiary hearing, including testimony, to determine whether arbitrable agreement existed)].

This summary proceeding, however, is not analogous to a motion for summary judgment, in which the court does not resolve the dispute, but need only determine whether a legitimate factual dispute between the parties exists. On a petition to compel arbitration, the trial court is the trier of fact and must decide the fraud issue in order to dispose of the petition [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 972-973, 64 Cal. Rptr. 2d 843, 938 P.2d 903* ; *Hotels Nevada v. L.A. Pacific Center, Inc. (2006) 144 Cal. App. 4th 754, 758, 762, 765, 50 Cal. Rptr. 3d 700]* .

A party opposing contractual arbitration of a dispute has no right to a jury trial of the existence or validity of an arbitration agreement [*Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 409-410, 411-413, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* (disapproving cases to the contrary at page 407)].

[b] Evidence

In ruling on a petition to compel arbitration, the trial court may consider evidence on factual issues relating to the threshold issue of arbitrability, that is, whether, under the facts before the court, the contract excludes the dispute from its arbitration clause or includes the issue within that clause. Parties may submit declarations when factual issues are tendered with a motion to compel arbitration [*Engineers & Architects Assn. v. Community Development Dept. (1994) 30 Cal. App. 4th 644, 653, 35 Cal. Rptr. 2d 800* ; *see also* [a], *above*].

A party resisting arbitration must provide evidence by declaration or otherwise to support the facts underlying the argument in opposition to a petition to compel; otherwise the agreement must be enforced as a matter of law [*see Owens v. Intertec Design, Inc. (1995) 38 Cal. App. 4th 72, 74-75, 44 Cal. Rptr. 2d 840* ; *see also* [c], *below*].

[c] Raising Facts to Oppose Arbitration

A petition to compel arbitration may not be denied on the ground of fraud alleged in an unverified pleading, but only on evidentiary support by an affidavit or declaration under penalty of perjury [*Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 185-186, 35 Cal. Rptr. 2d 747* ; *see also Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 415, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* (matter heard on affidavits or declarations and documentary evidence, with evidentiary hearing in court's discretion, but better course to have live testimony when, as is common in fraud cases, court is confronted with two sharply conflicting factual accounts)]. Allegations in a verified complaint may sufficient to defeat a motion to compel arbitration [*see Rice v. Dean Witter Reynolds, Inc. (1991) 235 Cal. App. 3d 1016, 1027-1028, 1 Cal. Rptr. 2d 265* (under *Code Civ. Proc. §§ 2009, 2011* verified complaint constitutes prima facie evidence of facts stated therein)], but even if a complaint is verified, it may not necessarily be used to defeat a petition to compel arbitration because pleadings usually contain allegations of ultimate facts rather than evidentiary facts [*Strauch v. Eyring (1994) 30 Cal. App. 4th 181, 185-186, 35 Cal. Rptr. 2d 747]* .

[8] Order to Arbitrate

[a] Grounds for Order to Compel Arbitration

If the court determines that an agreement to arbitrate the controversy exists, the court will order the parties to arbitrate the controversy, unless it determines that any of the following apply [*Code Civ. Proc. § 1281.2*]:

- The right to compel arbitration has been waived by the petitioner [*Code Civ. Proc. § 1281.2(a)*; for discussion, *see § 32.25*].

- Grounds exist for revocation of the agreement [*Code Civ. Proc. § 1281.2(b)*; *compare 9 U.S.C. § 2* (arbitration agreement as valid, irrevocable, and enforceable except on grounds that exist at law or in equity for revocation of any contract); *see also* discussion in *§ 32.21[3], [4]*].

- A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions, and there is a possibility of conflicting rulings on a common issue of law or fact [*Code Civ. Proc. § 1281.2(c)*].

The latter ground includes proceedings initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition [*Code Civ. Proc. § 1281.2(c)*]. Subdivision (c) of section 1281.2 does not apply to agreements to arbitrate disputes as to the professional negligence of a health care provider made pursuant to *Code Civ. Proc. § 1295*. For further discussion relating to a determination of pending third party action, see [g], *below*.

The court's function in deciding whether a dispute is subject to arbitration is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract [Charles J. Rounds Co. v. Joint Council of Teamsters No. 42 *(1971) 4 Cal. 3d 888, 892, 95 Cal. Rptr. 53, 484 P.2d 1397]* .

A proceeding to compel arbitration has been described as a suit in equity to compel specific performance of a contract [*Brodke v. Alphatec Spine, Inc. (2008) 160 Cal. App. 4th 1569, 1574, 73 Cal. Rptr. 3d 554* ; *Saika v. Gold (1996) 49 Cal. App. 4th 1074, 1082, 56 Cal. Rptr. 2d 922]* . Thus, under the principle that specific performance cannot be enforced against a party to a contract which is not, as to that party, just and reasonable, equity will not enforce an arbitration clause that renders arbitration an illusory remedy for one party [*see Saika v. Gold (1996) 49 Cal. App. 4th 1074, 1082, 56 Cal. Rptr. 2d 922* (declining to enforce clause allowing either party to seek trial de novo if arbitration award exceeded $25,000, when in reality that provision benefited only the health care provider and not the patient)].

For forms of orders relating to proceedings to compel arbitration, see *§§ 32.95* and *32.96*.

[b] Right to Compel Arbitration Depends on Parties' Contract

Contractual arbitration is a highly favored means of dispute resolution [*Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 706-707, 131 Cal. Rptr. 882, 552 P.2d 1178* ; *Engineers & Architects Assn. v. Community Development Dept. (1994) 30 Cal. App. 4th 644, 652, 35 Cal. Rptr. 2d 800]* . Despite this strong policy, the right to pursue claims in a judicial forum is also a substantial right not lightly to be deemed waived [*Marsch v. Williams (1994) 23 Cal. App. 4th 250, 254, 28 Cal. Rptr. 2d 398]* . The right to compel arbitration depends on the parties' contract, and the general policy favoring arbitration cannot take the place of an agreement to arbitrate [*Marsch v. Williams (1994) 23 Cal. App. 4th 250, 254-255, 28 Cal. Rptr. 2d 398]* . There is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate [*Engineers & Architects Assn. v. Community Development Dept. (1994) 30 Cal. App. 4th 644, 653, 35 Cal. Rptr. 2d 800]* .

In determining whether a particular dispute falls within the purview of an arbitration agreement, effect must be given to the parties' intentions in light of the usual and ordinary meaning of the contractual language and the circumstances under which the agreement was made [*Baker v. Sadick (1984) 162 Cal. App. 3d 618, 623-625, 208 Cal. Rptr. 676* ; *see Victoria v. Superior Court (1985) 40 Cal. 3d 734, 744, 222 Cal. Rptr. 1, 710 P.2d 833]* . However, the parties to an arbitration agreement cannot expand the jurisdiction of the court by contract or contravene *Code Civ. Proc. §§ 1286.2* and *1286.6* by providing for judicial review of questions of law decided by the arbitrator or for review of whether the award is supported by substantial evidence [*Oakland-Alameda County Coliseum Authority v. CC Partners*

(2002) 101 Cal. App. 4th 635, 645, 124 Cal. Rptr. 2d 363 (errors of law); *Crowell v. Downey Community Hospital Foundation (2002) 95 Cal. App. 4th 730, 732, 739, 115 Cal. Rptr. 2d 810* (law and fact)]. Whether or not a provision for judicial review will invalidate the entire arbitration agreement depends on the agreement itself, especially whether it has a severance clause requiring the agreement to be enforced to the extent not invalid. The agreement in Oakland-Alameda had a severance clause; and the court of appeal affirmed the judgment based on the confirmed award without reviewing it for any errors of law [*Oakland-Alameda County Coliseum Authority v. CC Partners (2002) 101 Cal. App. 4th 635, 644-647, 124 Cal. Rptr. 2d 363]* . The agreement in *Crowell* provided for judicial review both for errors of law and to determine whether the award was supported by substantial evidence, but had no severance clause. That court of appeal found the provision for judicial review to be so central to the arbitration agreement as to render the entire arbitration agreement void and unenforceable [*Crowell v. Downey Community Hospital Foundation (2002) 95 Cal. App. 4th 730, 740, 115 Cal. Rptr. 2d 810]* .

[c] Agreement Construed in Favor of Arbitration

Doubts as to whether an arbitration clause applies to a particular dispute are to be resolved in favor of sending the parties to arbitration [*Engineers & Architects Assn. v. Community Development Dept. (1994) 30 Cal. App. 4th 644, 652, 35 Cal. Rptr. 2d 800]* . An order to arbitrate the particular controversy should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute [Charles J. Rounds Co. v. Joint Council of Teamsters No. 42 *(1971) 4 Cal. 3d 888, 892, 95 Cal. Rptr. 53, 484 P.2d 1397* ; *Northcutt Lumber Co. v. Goldeen's Peninsula, Inc. (1973) 30 Cal. App. 3d 440, 443, 106 Cal. Rptr. 353]* . Only a clear-cut expression to exclude a claim from arbitration can prevail, and absent an expressly stated exclusionary purpose, an ambiguity must be resolved in favor of the arbitration process [*East San Bernardino County Water Dist. v. City of San Bernardino (1973) 33 Cal. App. 3d 942, 953, 109 Cal. Rptr. 510]* . Any ambiguities in the scope of arbitration are resolved in favor of coverage. Because arbitration is a favored method of dispute resolution, arbitration agreements should be liberally construed [*Baker v. Sadick (1984) 162 Cal. App. 3d 618, 623-625, 208 Cal. Rptr. 676]* . Other rules of construction may prevail over this rule, however. For example, in some circumstances, ambiguities in an arbitration clause in a standardized contract may be construed against its drafter [*see Victoria v. Superior Court (1985) 40 Cal. 3d 734, 740-747, 222 Cal. Rptr. 1, 710 P.2d 833* (sexual assault by hospital employee on patient outside scope of arbitration provision requiring arbitration of all claims "arising from rendition or failure to render services")].

In construing an ambiguous arbitration clause, the court is guided by the rule that because contractual arbitration is a favored method of resolving disputes, every intendment in favor of arbitration will be indulged, and the rule that when two interpretations of a contract are reasonably permissible, the court will adopt the interpretation that renders the contract valid and effectual. The court may, however, also consider the right to jury trial and the rule that in cases of doubt, the issue should be resolved in favor of preserving a litigant's right to jury trial [*Titan Group, Inc. v. Sonoma Valley County Sanitation Dist. (1985) 164 Cal. App. 3d 1122, 1127-1129, 211 Cal. Rptr. 62* ; for discussion of waiver of jury trial, *see § 32.21[7]*].

ILLUSTRATION:

Policy Favoring Arbitration Versus Right to Jury Trial. A contract contains two arbitration clauses. One simply calls for "arbitration if the parties hereto mutually agree," and the other provides that any dispute under the contract "may be subject to the decision of some competent person to be agreed on by the [parties]" and further sets out a process for selecting a referee whose decision would be final and conclusive. Can the court compel arbitration based on these clauses? No. The contract does not clearly waive the right to a jury trial. The first clause adds nothing to the contract regarding arbitration, and is simply meaningless. The second clause has meaning even if it does not provide for mandatory arbitration, because it provides a procedure for arbitration if the parties should agree to arbitrate a dispute. There being no clear waiver of jury trial, the court in this case held that arbitration could not be compelled [*Titan Group, Inc. v. Sonoma Valley County Sanitation Dist. (1985) 164 Cal. App. 3d 1122, 1127-1129, 211 Cal. Rptr. 62]* .

Moreover, there is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate [*Engineers & Architects Assn. v. Community Development Dept. (1994) 30 Cal. App. 4th 644, 653, 35 Cal. Rptr. 2d 800]* .

[d] Lack of Substantive Merit Is Not a Factor

If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate may not be refused on the ground that the petitioner's contentions lack substantive merit [*Code Civ. Proc. § 1281.2*]. Even though the Federal Arbitration Act (*9 U.S.C. §§ 1-208*), which will apply to a case involving maritime law or interstate or foreign commerce, contains no provision for a stay of arbitration when third-party issues are involved, *Code Civ. Proc. § 1281.2* is not in conflict with the policies of the federal act and is therefore not preempted [*see Volt Info. Scis., Inc. v. Board of Trustees (1989) 489 U.S. 468, 476-479, 109 S. Ct. 1248, 103 L. Ed. 2d 488* ; *Cronus Invs., Inc. v. Concierge Servs. (2005) 35 Cal. 4th 376, 35 Cal. 4th 376, 25 Cal. Rptr. 3d 540, 107 P.3d 217* (discussed at *§ 32.24[2][c]*, addressing only *Code Civ. Proc. § 1281.2(c)*)].

[e] Court Must Order Entire Controversy Determined by Arbitrator

When the prerequisites of *Code Civ. Proc. § 1281.2* exist for ordering arbitration, that is, a valid agreement to arbitrate exists and neither has been waived nor is subject to revocation, the entirety of the controversy is to be determined by the arbitrators [*Orpustan v. State Farm Mut. Auto. Ins. Co. (1972) 7 Cal. 3d 988, 991-992, 103 Cal. Rptr. 919, 500 P.2d 1119* (disapproving earlier cases allowing preliminary judicial determination of jurisdictional facts other than the issues encompassed in *Code Civ. Proc. § 1281.2*); *Morris v. Zukerman (1967) 257 Cal. App. 2d 91, 95-96, 64 Cal. Rptr. 714]* ; the court has no discretion but to order arbitration, and its refusal to do so is reversible error [*Morris v. Zukerman (1967) 257 Cal. App. 2d 91, 97, 64 Cal. Rptr. 714* ; *see Pioneer Take Out Corp. v. Bhavsar (1989) 209 Cal. App. 3d 1353, 1358, 257 Cal. Rptr. 749* (abuse of discretion to fail to compel arbitration when concerns of parties could be satisfied by compelling arbitration but staying it until resolution of pending litigation of intertwined issues)].

[f] Severable Issues

If the court determines that there are other issues between the petitioner and respondent which are not subject to arbitration and which are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of such issues may make the arbitration unnecessary, the court may delay its order to arbitrate until a determination of such other issues or until such earlier time as the court specifies [*Code Civ. Proc. § 1281.2*]. Conversely, if arbitration could make trial of the severable issues unnecessary, the court may order arbitration and stay action on the severable issues or remedies, such as injunctions, pending resolution of the arbitration [*see, e.g., Coast Plaza Doctors Hospital v. Blue Cross of California (2000) 83 Cal. App. 4th 677, 691-692, 99 Cal. Rptr. 2d 809]* .

[g] Pending Action Involving Third Party

[i] Court's Discretion Under Code of Civil Procedure Section 1281.2(c)

If the court determines that a party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions, and there is a possibility of conflicting rulings on a common issue of law or fact, the court has the following options [*Code Civ. Proc. § 1281.2(c)*]:

- Refuse to enforce the arbitration agreement and order intervention or joinder of all parties in a single action or special proceeding; or

- Order intervention or joinder as to all or only certain issues; or

- Order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or

- Stay arbitration pending the outcome of the court action or special proceeding [*see One World Networks Integrated Technologies, Inc. v. Duitch (2002) 103 Cal. App. 4th 1038, 1044, 127 Cal. Rptr. 2d 843* (only party to arbitration has standing under *Code Civ. Proc. § 1281.2(c)* to seek stay of arbitration)].

In this context, a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration was filed, but on or before the date of hearing on the petition [*Code Civ. Proc. § 1281.2(c)*]. There is no requirement that a party invoking *Code Civ. Proc. § 1281.2(c)* to resist arbitration also be a party to litigation involving a third party (who has not signed the arbitration agreement). Neither the plain language of the statute nor its legislative history imposes such a requirement. It is enough that the party resisting arbitration be a party to the transaction that gave rise to the controversy being litigated and that there is a possibility of conflicting rulings on common issues in the litigation and in any arbitration proceeding [*Whalely v. Sony Computer Entm't Am., Inc. (2004) 121 Cal. App. 4th 479, 484-486, 488, 17 Cal. Rptr. 3d 88]* .

[ii] Cases Governed by Federal Arbitration Act

If the controversy is one involving interstate commerce, the matter will be governed by the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*), which unlike *Code Civ. Proc. § 1281.2(c)*, gives a court no option but to compel arbitration when a party to the arbitration agreement is also a party to a pending court action with a third party, and there is a possibility of conflicting rulings on a common issue of laws or fact [*Rodriguez v. American Technologies, Inc. (2006) 136 Cal. App. 4th 1110, 1115-1117, 39 Cal. Rptr. 3d 437]* . Nevertheless, *Code Civ. Proc. § 1281.2(c)*, is not automatically preempted by the FAA: first, because the FAA has no procedural provisions applicable in state court, and second, because it is not a special rule limiting the authority of arbitrators. It is an evenhanded law that is designed to avoid conflicting rulings on common issue of fact and law among the interested parties. It allows the trial court to stay arbitration proceedings while the concurrent lawsuit proceeds, *or* to stay the lawsuit while arbitration proceeds [*Volt Info. Scis., Inc. v. Board of Trustees (1989) 489 U.S. 468, 476-479, 109 S. Ct. 1248, 103 L. Ed. 2d 488* ; *Cronus Invs., Inc. v. Concierge Servs. (2005) 35 Cal. 4th 376, 389-392, 394, 35 Cal. 4th 376, 25 Cal. Rptr. 3d 540, 107 P.3d 217* (disapproving *Energy Group, Inc. v. Liddington (1987) 192 Cal. App. 3d 1520, 238 Cal. Rptr. 202* and *Warren-Guthrie v. Health Net (2000) 84 Cal. App. 4th 804, 101 Cal. Rptr. 2d 260* to the extent their holdings are predicated on the conclusion that section 1281.2(c) limits the authority of arbitrators and conflicts with the FAA); *see also Mount Diablo Medical Center v. Health Net of California, Inc. (2002) 101 Cal. App. 4th 711, 124 Cal. Rptr. 2d 607* (*Code Civ. Proc. § 1281.2* applicable and not preempted); *Henry v. Alcove Inv., Inc. (1991) 233 Cal. App. 3d 94, 101-102, 284 Cal. Rptr. 255* (following *Volt* to affirm stay)]. *Volt* and *Cronus* both involved arbitration agreements with choice-of-law provisions that indicated California law should be applicable.

However, in a situation in which the contract contains no explicit choice of law provision but a broad and unconditional provision calling for the parties to arbitrate "in conformance with" and "in agreement with" the FAA, the parties will be deemed to have adopted all of the FAA, including its procedural provisions; a California court will have no authority to exercise its discretion under *Code Civ. Proc. § 1281.2(c)* [*Rodriguez v. American Technologies, Inc. (2006) 136 Cal. App. 4th 1110, 1122, 39 Cal. Rptr. 3d 437]* . In that situation, the third party civil action which is not subject to arbitration is still subject to *Code Civ. Proc. § 1281.2(c)*. Thus, if any party to that action moves to stay the litigation pursuant to *Code Civ. Proc. § 1281.4*, the court must order a stay, except to the extent that arbitrable issues are severable [*Rodriguez v. American Technologies, Inc. (2006) 136 Cal. App. 4th 1110, 1122, 39 Cal. Rptr. 3d 437* ; *see also Marcus v. Superior Court (2977) 75 Cal. App. 3d 204, 209, 211-212, 141 Cal. Rptr. 890* (party moving to stay action under *Code Civ. Proc. § 1281.4* need not be party to arbitration agreement); for a form of motion to stay proceedings, *see § 32.97*].

[iii] Medical Malpractice Cases

These options do not apply when the arbitration agreement was made under *Code Civ. Proc. § 1295*, relating to arbitration of medical malpractice disputes [*Code Civ. Proc. § 1281.2(c)*]. However, many contracts for medical services are not subject to Section 1295, and the options available under Section 1281.2(c) are therefore available in may situations involving medical malpractice [*see Code Civ. Proc. § 1295(f)* (exception for health care service plan contracts offered by organizations registered under *Gov. Code § 12530 et seq.* or *Health & Safety Code § 1340 et seq.* that comply with Health & Safety Code requirements for arbitration clauses)]. Also, many arbitration agreements by physicians and hospitals provide for any third party who is not a party to the agreement, but is necessary for complete resolution of any matter required to be arbitrated under the agreement, to be joined in the arbitration and also provide, or incorporate the California Hospital Association-California Medical Association Rules for the Arbitration of Hospital and Medical Fee Disputes (CHA-CMA Rules), which provide, that the arbitrator determine whether anyone must be joined in the arbitration to insure a complete resolution of the dispute. Thus, an agreement to be arbitrated under the CHA-CMA Rules or similar rules will be enforced to refer the issue of the third party's joinder to the arbitrator [*Zakarian v. Bekov (2002) 98 Cal. App. 4th 316, 325-327, 119 Cal. Rptr. 2d 623* (agreement was governed by *Code Civ. Proc. § 1295*; third party wanted to be joined in arbitration)]. A well-drafted arbitration provision of this nature will include the signatories' consent to joinder of any person necessary to full resolution of an arbitrable dispute.

[iv] Joinder of Civil Case and Arbitration

The power of the court under *Code Civ. Proc. § 1281.2(c)* to order joinder of an arbitration proceeding and a civil action to avoid inconsistent rulings extends to cases involving uninsured motorist arbitration [*Mercury Insurance Group v. Superior Court (1998) 19 Cal. 4th 332, 345, 79 Cal. Rptr. 2d 308, 965 P.2d 1178* ; *Prudential Property & Casualty Ins. Co. v. Superior Court (1995) 36 Cal. App. 4th 275, 278-279, 42 Cal. Rptr. 2d 227* ; *see Ins. Code § 11580.2*]. Thus, inconsistent rulings may be avoided in cases involving a combination of insured and uninsured parties.

PRACTICE TIP:

Joinder Also Saves Expenses. In addition to avoiding inconsistent rulings, joinder, by avoiding two forums hearing the same facts and issues, will save time and money. *By Michael S. Fields*

[h] Unlawful Detainer Actions

Code Civ. Proc. § 1281.2(c) may even require arbitration of an unlawful detainer action, which is usually entitled to priority. Examples of circumstances in which this would be appropriate are the following [*Pioneer Take Out Corp. v. Bhavsar (1989) 209 Cal. App. 3d 1353, 1357-1358, 257 Cal. Rptr. 749]* :

- A license agreement provided for arbitration but the related lease did not.

- The franchisee and the franchisor were parties to pending class action regarding the license agreement.

- The grounds for the franchisor's termination of the lease were alleged breaches of the same provisions of the license agreement that were the subject of the class action, arbitration of the unlawful detainer action had to be compelled, but stayed until resolution of the class action in order to avoid conflicting rulings.

[i] No Jurisdiction to Compel Arbitration After Plaintiff's Voluntary Dismissal of Action

There is nothing to preclude a plaintiff's dismissal of a complaint after a case has been ordered into arbitration, but before an arbitration has commenced; after that dismissal, the trial court no longer has jurisdiction to order the parties to complete the arbitration [*Cardiff Equities, Inc. v. Superior Court (2008) 166 Cal. App. 4th 1541, 1549-1551, 83 Cal.*

Rptr. 3d 699]. To preclude a plaintiff from voluntarily dismissing a case ordered to arbitration before the arbitration had commenced would be at odds with the right of a plaintiff to dismiss a case voluntarily and without prejudice set forth in *Code Civ. Proc. § 581(b)(1)* and *(c)* [*Cardiff Equities, Inc. v. Superior Court (2008) 166 Cal. App. 4th 1541, 1548-1549, 83 Cal. Rptr. 3d 699* (criticizing *Blake v. Ecker (2001) 93 Cal. App. 4th 728, 113 Cal. Rptr. 2d 422*)].

[9] Statement of Decision

A court is not required to make a requested statement of decision when an order compelling arbitration has been issued [*Code Civ. Proc. §§ 1291, 1294*].

When a court has issued an order dismissing or denying a petition to compel arbitration, however, a statement of decision shall be made if requested pursuant to *Code Civ. Proc. § 632* [*Code Civ. Proc. §§ 1291, 1294(a)*; for procedure and forms dealing with statements of decision in civil actions, *see* Ch. 529, *Statement of Decision*].

[10] Costs and Fees

The Supreme Court has reversed lower court decisions refusing to grant costs and fees to a qualifying prevailing party who successfully opposed a petition to compel arbitration based on a contract providing for cost and fee awards, even though the underlying litigation on the merits was not final and further litigation was contemplated [*Christensen v. Dewor Developments (1983) 33 Cal. 3d 778, 786-787, 191 Cal. Rptr. 8, 661 P.2d 1088* (denial of fee award was abuse of discretion)]. In accordance with that decision, the Fourth District, Division One reversed a trial court order denying attorney's fees to a party who successfully opposed a petition to compel arbitration in a special proceeding [*Otay River Constructors v. San Diego Expressway (2008) 158 Cal. App. 4th 796, 807, 809, 70 Cal. Rptr. 3d 434*]. However, the First District, Division Five has concluded that the trial court acted properly in denying attorney fees to a party that successfully opposed a motion to compel arbitration, where the claims of the parties remain before the court and subject to judicial determination [*Green v. Mt. Diablo Hospital Dist. (1989) 207 Cal. App. 3d 63, 76-77, 254 Cal. Rptr. 689*].

In a case in which the prevailing party was the petitioner to compel arbitration [*Acosta v. Kerrigan (2007) 150 Cal. App. 4th 1124, 1127, 58 Cal. Rptr. 3d 865*], the Second District, Division Seven has ruled that where a contract containing an arbitration clause provides for attorney's fees and costs to one party when the other party initiates a court action based on the contract, the prevailing party in an action to compel arbitration may be entitled to an award of fees and costs under the applicable standards, regardless of who might become the prevailing party in any subsequent arbitration [*compare* *Acosta v. Kerrigan (2007) 150 Cal. App. 4th 1124, 1131-1132, 58 Cal. Rptr. 3d 865* (defendant in court action who filed successful petition to compel arbitration entitled to fees and costs under clause in lease), *with Lachkar v. Lachkar (1986) 182 Cal. App. 3d 641, 647-649, 227 Cal. Rptr. 501* (prevailing party under a prior version of *Civ. Code § 1717* not entitled to costs and fees after a successful petition to compel arbitration on those grounds due to lack of final determination)].

Furthermore, it is proper for the court to make the award of costs and fees, rather than to defer to the arbitrator in any subsequent arbitration [*Acosta v. Kerrigan (2007) 150 Cal. App. 4th 1124, 1130, 58 Cal. Rptr. 3d 865* (denying declaration that arbitration should not proceed)]. If *Civ. Code § 1717* applies, the prevailing party has to notice a motion for an award of costs and fees following judgment [*Civ. Code § 1717*; *see, e.g.,* *Christensen v. Dewor Developments (1983) 33 Cal. 3d 778, 786, 191 Cal. Rptr. 8, 661 P.2d 1088*].

For discussion of costs and fees generally, see Ch. 174, *Costs and Attorney's Fees* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsCivil ProcedureAlternative Dispute

ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActCoverage & ExceptionsCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel Arbitration

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AUTHOR: Michael S. Fields Editorial Consultant

§ 32.44 Appeal and Review

[1] Order Denying Petition to Compel

[a] Immediately Appealable

An aggrieved party may appeal from an order dismissing or denying a petition to compel arbitration [*Code Civ. Proc. § 1294(a)*; *Fireman's Fund Ins. Companies v. Younesi (1996) 48 Cal. App. 4th 451, 456-457, 55 Cal. Rptr. 2d 671* (no distinction between contractual and stautory schemes to enforce arbitration; involving motion to compel arbitration under *Civ. Code § 2860(c)*); *Gustafson v. State Farm Mut. Auto. Ins. Co. (1973) 31 Cal. App. 3d 361, 363, 107 Cal. Rptr. 243]* . An order denying arbitration in California is appealable under *Code Civ. Proc. § 1294(a)* even if it directs arbitration in another state [*Porter v. United Services Automobile Assn. (2001) 90 Cal. App. 4th 837, 838-840, 108 Cal. Rptr. 2d 860]* . However, in a unique situation in which the motion to compel arbitration sought only a determination of whether the court or the arbitrator would determine arbitrability, the trial court's order refusing to compel arbitration of the arbitrability issue was not appealable. Because the issue of whether any claims in the complaint were to be arbitrated remained for further determination in the trial court, there was no final judgment within the meaning of *Code Civ. Proc. § 1294*; and no appeal could be taken from the trial court's order [*Vivid Video, Inc. v. Playboy Entertainment Group, Inc. (2007) 147 Cal. App. 4th 434, 437, 439, 443-444, 54 Cal. Rptr. 3d 232* (dismissing appeal and noting that defendants could have filed mandate petition to challenge trial court's ruling)].

An immediate appeal must be taken under *Code Civ. Proc. § 1294(a)*, because subsequent review of an order dismissing or denying a petition to compel arbitration, on appeal from the final judgment, is precluded by *Code Civ. Proc. § 906* [*see* *Hobbs v. Eichler (1985) 164 Cal. App. 3d 174, 190-191, 210 Cal. Rptr. 387]* .

An order denying a motion to compel arbitration is immediately appealable even if it is denied "without prejudice," as may be the case when the court determines that class certification issues must be decided before referring the matter to arbitration [*Sanders v. Kinko's, Inc. (2002) 99 Cal. App. 4th 1106, 1110-1111, 121 Cal. Rptr. 2d 766]* .

There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. If the trial court's order is based on a decision of fact, then the reviewing court adopts a substantial evidence standard. Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed [; *Robertson v. Health Net of California, Inc. (2005) 132 Cal. App. 4th 1419, 1425, 34 Cal. Rptr. 3d 547*].

[b] Order Staying Arbitration Is Equivalent to Denial

An order staying arbitration is appealable because it is the functional equivalent of an order refusing to compel arbitration [*Sanders v. Kinko's, Inc. (2002) 99 Cal. App. 4th 1106, 1110-1111, 121 Cal. Rptr. 2d 766* (order stayed arbitration until class certification issues were resolved)]. Allowing appeal of an order staying arbitration implements the legislative intent to make arbitration available as a less costly and more expeditious manner of resolving disputes than litigation. Denying immediate review would subject the party who claimed to have a right to arbitrate to significant delay and defeats the purpose of arbitration [*Henry v. Alcove Investment, Inc. (1991) 233 Cal. App. 3d 94, 101-102, 284 Cal. Rptr. 255* (arbitration stayed under *Code Civ. Proc. § 1281.2(c)*)].

[2] Order Granting Petition

[a] Not Appealable

An order compelling arbitration is not appealable under *Code Civ. Proc. § 1294* [*Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 811 n.1, 171 Cal. Rptr. 604, 623 P.2d 165* ; *Fagelbaum & Heller LLP v. Smylie (2009) 174 Cal. App. 4th 1351, 1359, 95 Cal. Rptr. 3d 252* ; *Muao v. Grosvenor Properties (2002) 99 Cal. App. 4th 1085, 1090, 122 Cal. Rptr. 2d 131* ; *Hughes v. Blue Cross of Northern California (1989) 215 Cal. App. 3d 832, 847-848, 263 Cal. Rptr. 850* ; *see also Melchor Investment Co. v. Rolm Systems (1992) 3 Cal. App. 4th 587, 591, 4 Cal. Rptr. 2d 343* (order denying preliminary injunction barring arbitration as nonappealable)].

The fact that an arbitration proceeding is governed by the Federal Arbitration Act and in federal court, section 16(a)(3) of the FAA [*9 U.S.C. § 16(a)(3)*] would allow an immediate appeal from an order compelling arbitration does not allow an appeal of an order of a California state court compelling arbitration [*Muao v. Grosvenor Properties, Ltd. (2002) 99 Cal. App. 4th 1085, 122 Cal. Rptr. 2d 131]* .

The order compelling arbitration is reviewable on appeal from a judgment confirming an award, which itself is appealable under *Code Civ. Proc. § 1294(d)* [*Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 811 n. 1, 171 Cal. Rptr. 604, 623 P.2d 165* ; *Fagelbaum & Heller LLP v. Smylie (2009) 174 Cal. App. 4th 1351, 1359, 95 Cal. Rptr. 3d 252* ; *Hughes v. Blue Cross of Northern California (1989) 215 Cal. App. 3d 832, 847-848, 263 Cal. Rptr. 850* ; *La Pietra v. Freed (1978) 87 Cal. App. 3d 1025, 1030-1031, 151 Cal. Rptr. 554*]. If the court that orders arbitration also dismisses, rather than stays, the related civil action, the dismissal make be appealed [*Muao v. Grosvenor Properties (2002) 99 Cal. App. 4th 1085, 122 Cal. Rptr. 2d 131]* .

The standard of review of an order compelling arbitration is substantial evidence where the trial court's decision was based upon the resolution of disputed facts or de novo where the facts are not in conflict [*Fagelbaum & Heller LLP v. Smylie (2009) 174 Cal. App. 4th 1351, 1360, 95 Cal. Rptr. 3d 252*].

[b] Review by Writ of Mandate or Prohibition

An appeal from the judgment is not the exclusive remedy for testing the validity of an order compelling arbitration. If matters ordered arbitrated fall clearly outside the scope of the arbitration agreement and the arbitration process would appear to be unduly time consuming or expensive, relief may be sought by writ of prohibition, prohibiting the court from enforcing its order compelling arbitration, or by writ of mandate, compelling the trial court to set aside its order to arbitrate and, if such is the case, compelling the trial court to exercise its jurisdiction to hear and decide a pending civil

action involving the nonarbitrable dispute [*Lesser Towers, Inc. v. Roscoe-Ajax Constr. Co. (1969) 271 Cal. App. 2d 675, 692-693, 77 Cal. Rptr. 100* (dictum); *Cook v. Superior Court (1966) 240 Cal. App. 2d 880, 884, 50 Cal. Rptr. 81* (writ of mandate denied on the merits); *Bertero v. Superior Court (1963) 216 Cal. App. 2d 213, 222, 30 Cal. Rptr. 719* (peremptory writ of mandate issued); *see also Weiman v. Superior Court (1959) 51 Cal. 2d 710, 711-715, 336 P.2d 489* (order compelling arbitration was reviewed in prohibition and mandate proceeding without discussion of those remedies; both writs were denied on the merits); for procedure and forms, *see* Ch. 358, *Mandate and Prohibition*].

An appeal of an order compelling arbitration has been treated as a writ of mandate to allow immediate review of an order that compelled arbitration of an individual claim at the same time the lower court denied the appellant's motion to certify a class. There is a "death knell" doctrine which permits an appeal court to review an order denying a motion to certify a class when it is unlikely that the case will proceed as an individual action. Although the situation did not fall within the death knell doctrine, because of the unusual circumstances and the fact that the issue of class arbitration would otherwise likely evade appellate review, the court of appeal determined to review the matter and treated the appeal as a writ of mandate [*Szetela v. Discover Bank (2002) 97 Cal. App. 4th 1094, 1098, 118 Cal. Rptr. 2d 862]* .

[3] Procedure for Appeal and Scope of Review

An appeal is taken in the same manner as an appeal from an order or judgment in a civil action [*Code Civ. Proc. § 1294.2*].

On appeal, the court may review the decision and any intermediate ruling, proceeding, order, or decision that involves the merits or necessarily affects the order or judgment appealled from, or that substantially affects the rights of a party. The court may also review any order on motion for a new trial [*Code Civ. Proc. § 1294.2*].

The respondent on appeal, or the party in whose favor the judgment or order was given may, without appealing from the judgment, request the court to and it may review any of the matters noted above to determine whether or not the appellant was prejudiced by the error or errors on which he relies for reversal or modification of the judgment or order from which the appeal is taken [*Code Civ. Proc. § 1294.2*].

These provisions, however, do not authorize the court to review any decision or order from which an appeal might have been taken [*Code Civ. Proc. § 1294.2*].

For procedure and forms for use on appeal, generally, see Ch. 40, *Appeal: An Overview* , through Ch. 54, *Appeal: California Supreme Court Review* .

[4] Costs and Fees

Where a contract containing an arbitration clause provides for attorney's fees and costs to one party when the other party initiates a court action based on the contract, the prevailing party in an action to compel arbitration may be entitled to an award of fees and costs under the applicable standards, regardless of who might become the prevailing party in any subsequent arbitration [*Christensen v. Dewor Developments (1983) 33 Cal. 3d 778, 786-787, 191 Cal. Rptr. 8, 661 P.2d 1088* (ordering trial court to award fees on appeal)].

For discussion of costs and fees generally, see Ch. 174, *Costs and Attorney's Fees* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil

ProcedureRemediesWritsCommon Law WritsProhibitionCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel Arbitration

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2. Judicial Proceedings to Compel Arbitration

4-32 California Forms of Pleading and Practice--Annotated §§ 32.45-32.49

AUTHOR: Michael S. Fields Editorial Consultant

[Reserved]

§§ 32.45[Reserved]

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C. Compelling Arbitration
3. Dismissal for Delay in Prosecution

4-32 California Forms of Pleading and Practice--Annotated § 32.50

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§ 32.50 Dismissal of Suits Subject to Arbitration

By statute, an action is subject to mandatory dismissal for delay in prosecution unless it is brought to trial within five years after its commencement against the defendant [*Code Civ. Proc. §§ 583.310-583.360*], or to discretionary dismissal for failure to bring the matter to trial within two years after commencement of the action [*Code Civ. Proc. §§ 583.410, 583.420*; for general discussion and forms relating to these statutes, *see* Ch. 212, *Dismissal*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsFailures to Prosecute

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3. Dismissal for Delay in Prosecution

4-32 California Forms of Pleading and Practice--Annotated § 32.51

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.51 Dismissal of Arbitration Proceedings

[1] Indirect Application of Dismissal Statutes

Several courts have held that the five-year dismissal statutes apply to lawsuits subject to contractual arbitration, even if the case is in arbitration [*Kuzmanoff v. Kron (1988) 207 Cal. App. 3d Supp. 1, 3* , *255 Cal. Rptr. 168* (citing cases)]. While these courts agree that the dismissal statutes apply only to court actions and do not apply *directly* to arbitration proceedings, the statutory concepts and limits have, however, been imported into the guidelines for determining whether a matter submitted to contractual arbitration should be dismissed for unreasonable delay in bringing the matter to a conclusion [*Burgess v. Kaiser Foundation Hospitals (1993) 16 Cal. App. 4th 1077, 1081, 20 Cal. Rptr. 2d 488 (1st Dist., Div. 5)* ; *Byerly v. Sale (1988) 204 Cal. App. 3d 1312, 1315, 251 Cal. Rptr. 749 (4th Dist., Div. 3)* ; *Young v. Ross-Loos Medical Group Inc. (1982) 135 Cal. App. 3d 669, 673, 185 Cal. Rptr. 536 (2nd Dist., Div. 2)* ; *Preston v. Kaiser Foundation Hospitals (1981) 126 Cal. App. 3d 402, 408-409, 178 Cal. Rptr. 882 (2nd Dist., Div. 2)]* . As discussed below, these courts are not in complete agreement regarding the manner of indirectly applying the dismissal statutes to contractual arbitration proceedings.

[2] Procedure for Applying Dismissal Statutes

The first point of conflict among courts is the proper procedural context for applying the dismissal statutes in the arbitration context. One court of appeal has held that once a trial court orders a matter into contractual arbitration and stays the action pending arbitration, that court nevertheless retains jurisdiction to entertain either a petition by plaintiff to move the arbitration forward *or* a motion by defendant to dismiss the arbitration for plaintiff's unreasonable delay in prosecuting the matter. In the latter situation, the effect of the court's order of dismissal is to vacate the order for arbitration and terminate the arbitration itself [*Preston v. Kaiser Foundation Hospitals (1981) 126 Cal. App. 3d 402, 406-407, 178 Cal. Rptr. 882 (2nd Dist., Div. 2)]* . Other courts hold that the action at law and the arbitration proceeding are independent remedies, that dismissal of the action has no effect on the arbitration proceeding, and that the court has no jurisdiction to dismiss the arbitration proceeding, and indeed may not dismiss the action while it is stayed pending

arbitration because the time the action is stayed must be excluded from the calculation of the five-year period [*Brock v. Kaiser Foundation Hospitals (1992) 10 Cal. App. 4th 1790, 1792-1793, 13 Cal. Rptr. 2d 678* (3rd Dist.; applying *Code Civ. Proc. § 583.340(b)*); *see also Blake v. Ecker (2001) 93 Cal. App. 4th 728, 738, 113 Cal. Rptr. 2d 422* (2nd Dist., Div. 3; once arbitration is ordered, trial court no longer has jurisdiction to grant motion for dismissal; involved discretionary dismissal after two years pursuant to *Code Civ. Proc. §§ 583.410, 583.420*)].

Similarly, other courts of appeal hold that once a trial court has stayed an action and ordered the matter into contractual arbitration, its subsequent dismissal of the stayed complaint has absolutely no effect on the pending arbitration, which is a proceeding outside the judicial system [*Brock v. Kaiser Foundation Hospitals (1992) 10 Cal. App. 4th 1790, 1801, 1805, 1808, 13 Cal. Rptr. 2d 678 (3rd Dist.)* ; *Byerly v. Sale (1988) 204 Cal. App. 3d 1312, 1314-1316, 251 Cal. Rptr. 749 (4th Dist., Div. 3)* ; *see also Nanfito v. Superior Court (1991) 2 Cal. App. 4th 315, 318, 2 Cal. Rptr. 2d 876* (4th Dist., Div. 3; describing contractual arbitration as having life of its own outside judicial system); *Kuzmanoff v. Kron (1988) 207 Cal. App. 3d Supp. 1, 4-5* , *255 Cal. Rptr. 168* (affirming the trial court's order dismissing the complaint but reversing its order denying plaintiff's petition to move the arbitration forward)].

Most courts of appeal agree that the appropriate procedure is for the offended party to move in the arbitration proceeding to have the *arbitrator*, not the court, terminate or dismiss the arbitration if the matter is not brought to arbitration within five (or two) years because the other party has failed to proceed with reasonable diligence [*Blake v. Ecker (2001) 93 Cal. App. 4th 728, 737-738, 113 Cal. Rptr. 2d 422* (2nd Dist., Div. 3; involved discretionary dismissal after two years pursuant to *Code Civ. Proc. §§ 583.410, 583.420*); Titan/Value Equities Group, Inc. (1994) *29 Cal. App. 4th, 482, 487-488* , *35 Cal. Rptr. 2d 4 (4th Dist., Div. 1)* ; *Burgess v. Kaiser Foundation Hospitals (1993) 16 Cal. App. 4th 1077, 1081, 20 Cal. Rptr. 2d 488 (1st Dist., Div. 5)* ; *Brock v. Kaiser Foundation Hospitals (1992) 10 Cal. App. 4th 1790, 1808, 13 Cal. Rptr. 2d 678 (3rd Dist.)* ; *Byerly v. Sale (1988) 204 Cal. App. 3d 1312, 1316, 251 Cal. Rptr. 749 (4th Dist., Div. 3)]* . Even though the dismissal statutes do not directly apply to arbitration proceedings, their concepts and limits have been imported into the test of reasonable diligence in bringing a claim to arbitration, and an arbitrator may dismiss a matter for failure to proceed with reasonable diligence [*Burgess v. Kaiser Foundation Hospitals (1993) 16 Cal. App. 4th 1077, 1081, 20 Cal. Rptr. 2d 488 (1st Dist., Div. 5)]* .

A dismissal by the arbitrator is in effect its award in the matter, that plaintiff take nothing on his or her claim by reason of dilatory prosecution [*see Young v. Ross-Loos Medical Group, Inc. (1982) 135 Cal. App. 3d 669, 673, 185 Cal. Rptr. 536 (2nd Dist., Div. 2)]* . Thus, once an action is stayed and the matter ordered to contractual arbitration, the trial court has no reason to entertain a motion to dismiss the complaint; its involvement is limited merely to confirming, correcting, or vacating the arbitration award [*Byerly v. Sale (1988) 204 Cal. App. 3d 1312, 1315-1316, 251 Cal. Rptr. 749* (4th Dist., Div. 3; disagreeing with the opinion in *Preston v. Kaiser Foundation Hospitals (1981) 126 Cal. App. 3d 402, 406, 178 Cal. Rptr. 882 (2nd Dist., Div. 2)* , to the extent that it suggested that the trial court's dismissal of the underlying complaint somehow terminates the pending arbitration)].

An arbitrator's order dismissing the matter for failure to conclude the arbitration within five years may be confirmed or vacated by the trial court [*see Burgess v. Kaiser Foundation Hospitals (1993) 16 Cal. App. 4th 1077, 1081-1082, 20 Cal. Rptr. 2d 488 (1st Dist., Div. 5)]* . If the arbitrator is preventing the arbitration from going forward, the party's remedy is to petition the court for an appropriate order expediting the arbitration proceeding. Such a situation will not toll the five-year period on grounds of impossibility or impracticability [*Burgess v. Kaiser Foundation Hospitals (1993) 16 Cal. App. 4th 1077, 1081, 20 Cal. Rptr. 2d 488 (1st Dist., Div. 5)* ; *Boutwell v. Kaiser Foundation Health Plan (1988) 206 Cal. App. 3d 1371, 1374, 254 Cal. Rptr. 173 (1st Dist., Div. 5)* ; *see Code Civ. Proc. § 583.340(c)* (tolling period)].

[3] Calculating Five-Year Period

A second point of conflict among courts concerns the manner of calculating the five-year limitation period of *Code Civ. Proc. § 583.310*. One court, interpreting former *Code Civ. Proc. § 583(b)* (now *Code Civ. Proc. § 583.310*), held that,

when an action is subject to contractual arbitration, the plaintiff must bring the action to arbitration within five years after the filing of the complaint in order to avoid dismissal [*Lockhart-Mummery v. Kaiser Foundation Hospitals (1980) 103 Cal. App. 3d 891, 896, 163 Cal. Rptr. 325 (2nd Dist., Div. 1)]* .

Other courts of appeal, also interpreting former *Code Civ. Proc. § 583(b)*, hold that the five-year period does not properly begin with the filing of the complaint, but rather with the filing by the court of the order compelling arbitration [*Gainey v. Occidental Land Research (1986) 186 Cal. App. 3d 1051, 1054, 231 Cal. Rptr. 249 (2nd Dist., Div. 5)* ; Preston v. Kaiser *Foundation Hospitals (1981) 126 Cal. App. 3d 402, 408-410, 178 Cal. Rptr. 882 (2nd Dist., Div. 2)]* .

Yet another court of appeal, interpreting *Code Civ. Proc. §§ 583.310-583.360*, takes a third position. That is, the five-year period *normally* does not begin to run until the filing of the order compelling arbitration. This is because of the operation of *Code Civ. Proc. § 583.340*, which tolls the mandatory period during any time in which it is impossible, impracticable, or futile for plaintiff to bring the matter to trial. Thus, the five-year period is tolled between the date the complaint is filed and the date the order compelling arbitration is filed, because during this period it is generally not possible or practical to bring the matter either to arbitration or to trial. The tolling provision does not apply, however, if the plaintiff has not exercised reasonable diligence in pursuing the cause of action [*Boutwell v. Kaiser Foundation Health Plan (1988) 206 Cal. App. 3d 1371, 1374, 254 Cal. Rptr. 173 (1st Dist., Div. 5)]* .

All of these interpretations arose in cases in which the issue was whether the action at law should be dismissed. Therefore, these interpretations are not of great significance under the view that the action at law is stayed pending arbitration and that the issue of dismissal for delay is one for the arbitrator [*see* *Burgess v. Kaiser Foundation Hospitals (1993) 16 Cal. App. 4th 1077, 1081, 20 Cal. Rptr. 2d 488 (1st Dist., Div. 5)* ; *Brock v. Kaiser Foundation Hospitals (1992) 10 Cal. App. 4th 1790, 1808, 13 Cal. Rptr. 2d 678 (3rd Dist.)* ; for discussion, *see* [2], *above*]. These interpretations might, however, be persuasive in arguing to the arbitrator for or against dismissal of the arbitration proceeding.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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4-32 California Forms of Pleading and Practice--Annotated §§ 32.52-32.59

AUTHOR: Michael S. Fields Editorial Consultant

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AUTHOR: Michael S. Fields Editorial Consultant

§ 32.60 Related Matthew Bender Publications

For other forms of arbitration clauses and agreements, see California Legal Forms, Ch. 13, *Nonprofit Corporations and Associations*; Ch. 30A, *Construction Financing*; Ch. 30D, *Construction Contracts and Subcontracts*; Ch. 34B, *Residential Leases*; Ch. 34C, *Commercial, Industrial, and Office Leases*; Ch. 34D, *Ground Leases*; Ch. 75, *Formation of Contracts and Standard Contractual Provisions* (Matthew Bender)

For memoranda of points and authorities relating to arbitration agreements, see California Points and Authorities, Ch 20, *Arbitration: Compelling* and Ch. 20A, *Arbitration: Resisting* (Matthew Bender)

For memoranda of points and authorities supporting and opposing motions for summary judgment when a contract contains a provision for arbitration, see California Points and Authorities, Ch. 50, *Contracts* (Matthew Bender)

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4-32 California Forms of Pleading and Practice--Annotated § 32.61

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.61 Federal Statutes

Arbitration of maritime and interstate commerce disputes. *9 U.S.C. §§ 1-16*

Arbitration of international disputes. *9 U.S.C. §§ 201-208*

9 U.S.C. §§ 1-15 apply to proceedings under *9 U.S.C. §§ 201-208* to extent they do not conflict with *9 U.S.C. §§ 201-208* or with Convention. *9 U.S.C. § 208*

Legal Topics:

For related research and practice materials, see the following legal topics:
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PART III. RESEARCH GUIDE

4-32 California Forms of Pleading and Practice--Annotated § 32.62

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.62 State Statutes

[1] Definitions

"Agreement" defined. *Code Civ. Proc. § 1280(a)*

"Controversy" defined. *Code Civ. Proc. § 1280(c)*

"Party to the arbitration" defined. *Code Civ. Proc. § 1280(e)*

"Written agreement" defined. *Code Civ. Proc. § 1280(f)*

[2] Agreement to Arbitrate

Agreement to submit to arbitration as enforceable. *Code Civ. Proc. § 1281*

[3] Specific Types of Agreements

[a] Easements

Application to court for appointment of arbitrator to apportion cost of repair and maintenance of easement. *Civ. Code § 845*

[b] Eminent Domain

Agreements to arbitrate controversy over compensation for acquisition of property by eminent domain. *Code Civ. Proc.*

§§ 1273.010-1273.050

[c] Medical Malpractice

Required contents for medical services contract that contains provision for arbitration of any dispute as to professional negligence of health care provider. *Code Civ. Proc. § 1295*

[d] Partnership Disputes

Authority of partner to submit partnership claim or liability to arbitration. *Corp. Code § 15009(3)(e)* (applying to partnerships existing on January 1, 1997, that do not elect to be governed by the Uniform Partnership Act of 1994 (UPA of 1994); for partnerships formed after that date or electing to be governed by the UPA of 1994, and after January 1, 1999, for all partnerships, Section 15009 is superseded by *Corp. Code §§ 16301, 16306-16307*, which do not specifically mention arbitration)

[e] Public Construction Contracts

Parties to construction contract with public agency are permitted to expressly agree in writing that, in any arbitration to resolve dispute relating to contract, arbitrator's award is to be supported by law and substantial evidence; court vacation of award that is not so supported or that is based on error of law. *Code Civ. Proc. § 1296*

[f] Uninsured Motorists

Automobile liability policies are required to contain uninsured motorist coverage providing for arbitration of disputes over liability or amount of damages. *Ins. Code § 11580.2(f)*

[4] Jurisdiction and Venue

When arbitration-related petitions are limited civil cases. *Code Civ. Proc. §§ 85, 86(a)(10)(A)*

Jurisdiction and venue of court in proceedings to enforce arbitration agreements. *Code Civ. Proc. § 1292*

Continuing jurisdiction of court in which petition is filed under arbitration statutes (*Code Civ. Proc. §§ 1280-1294.2*). *Code Civ. Proc. § 1292.6*

Agreement to arbitrate in California is deemed consent to jurisdiction of state courts to enforce agreement. *Code Civ. Proc. § 1293*

[5] Pleadings

Permitted pleadings in judicial proceedings under arbitration statutes (*Code Civ. Proc. § 1280 et seq.*). *Code Civ. Proc. § 1290*

[6] Notice of Petition

Notice of petitions under statutes relating to contractual arbitration; petitions to be heard in summary fashion. *Code*

Civ. Proc. § 1290.2

[7] Stay of Court Proceedings

Stay of pending court proceedings while petition for arbitration or arbitration proceedings are pending. *Code Civ. Proc. § 1281.4*

Motion for stay to be made in court in which action is pending. *Code Civ. Proc. § 1292.8*

[8] Calendar Preference

Proceedings under arbitration statutes are given preference in setting for hearing. *Code Civ. Proc. § 1291.2*

[9] Summary Hearing

Petitions under arbitration statutes (*Code Civ. Proc. § 1280 et seq.*) to be heard in summary way and on notice. *Code Civ. Proc. § 1290.2*

[10] Court Order to Arbitrate

Determinations to be made by court prior to issuing order compelling arbitration. *Code Civ. Proc. § 1281.2*

Petition for order to arbitrate controversy at issue in pending superior court action or proceeding is required to be filed in that action or proceeding. *Code Civ. Proc. § 1292.4*

[11] Statement of Decision

Court is required to make statement of decision on request when order or judgment, other than special order after final judgment, is made appealable under *Code Civ. Proc. §§ 1280-1294.2*. *Code Civ. Proc. § 1291*

[12] Appeal

Order dismissing or denying petition to compel arbitration is appealable. *Code Civ. Proc. § 1294(a)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsInsurance LawMotor Vehicle InsuranceArbitrationPublic Contracts LawDispute ResolutionArbitration & MediationCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActStays Pending ArbitrationCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel Arbitration

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4-32 California Forms of Pleading and Practice--Annotated § 32.63

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.63 Decisions

[1] Policy Favoring Arbitration

Strong public policy is in favor of arbitration. *Taylor v. Crane (1979) 24 Cal. 3d 442, 452, 155 Cal. Rptr. 695, 595 P.2d 129* ; *United Firefighters v. City of Los Angeles (1984) 153 Cal. App. 3d 383, 389, 200 Cal. Rptr. 233*

Court is to grant order directing arbitration unless arbitration clause is not susceptible of interpretation that covers dispute. *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42 (1971) 4 Cal. 3d 888, 892, 95 Cal. Rptr. 53, 484 P.2d 1397* ; *Morris v. Zukerman (1967) 257 Cal. App. 2d 91, 96, 64 Cal. Rptr. 714*

Although strong policy exists in favor of enforcing agreements to arbitrate, no policy exists that compels persons to accept arbitration of controversies that they have not agreed to arbitrate. *Service Employees International Union v. County of Napa (1979) 99 Cal. App. 3d 946, 955, 160 Cal. Rptr. 810* ; *but see United Transportation Union v. Southern Cal. Rapid Transit Dist. (1992) 7 Cal. App. 4th 804, 808-809, 813-815, 9 Cal. Rptr. 2d 702* (rejecting *Service Employees* analysis)

[2] Agreement to Arbitrate

[a] Existence of Agreement

Arbitration provision in contract packed with computer ordered by telephone became binding when customer did not return computer within 30 days in accordance with statement in materials that contract would become binding on buyer who did not return computer within 30 days. *Hill v. Gateway 2000, (7th Cir. 1997) 105 F.3d 1147, 1148-1150*

Trial court erred by failing to determine whether party whose counsel signed on behalf of the party had expressly authorized counsel to do so or, in the absence of that authorization, ratified the stipulation to arbitrate by waiting until

the proceeding to confirm the arbitrator's award before raising the validity of the agreement. The confirmation was reversed and remanded. *Toal v. Tardif (2009) 178 Cal. App. 4th 1208, 1223, 101 Cal. Rptr. 3d 97*

Arbitration agreement subject to 30-day revocation period in *Code Civ. Proc. § 1295* and signed by an adult party four days before party's death never took effect because revocation period had not expired. There was no basis for tolling the revocation per iod or allowing a third party to rescind it. *Rodriguez v. Superior Ct. (2009) 176 Cal. App. 4th 1461, 1469-1474, 98 Cal. Rptr. 3d 728*

No agreement to arbitrate was created by dispute form employee signed because it did not look like contract and did not alert employee that he was agreeing to binding arbitration. *Metters v. Ralphs Grocery Co. (2008) 161 Cal. App. 4th 696, 701-704, 74 Cal. Rptr. 3d 210*

Defendant failed to prove existence of arbitration agreement because warranty booklets in which arbitration provisions were contained were not incorporated by reference or available to plaintiffs until after they had closed escrow. *Adajar v. RWR Homes, Inc. (2008) 160 Cal. App. 4th 563, 569-571, 73 Cal. Rptr. 3d 17*

Equitable contribution claim is not arbitrable because it does not arise from contract but from equity; insurers who may share responsibility for same loss have not contracted to arbitrate with each other, only with their insured. *Crowley Maritime Corp. v. Boston Old Colony Ins. Co. (2007) 158 Cal. App 4th 1061, 1065-1066, 1068-1071, 70 Cal. Rptr. 3d 605*

Standardized language in escrow agreement, apparently taken from *Code Civ. Proc. § 1298*, providing for arbitration of "all disputes to which it applies," was not itself arbitration agreement, thus, arbitration of claims for breach of underlying real estate purchase agreement and rescission should not have been compelled. *Villacreses v. Molinari (2005) 132 Cal. App. 4th 1223, 1230-1233, 34 Cal. Rptr. 3d 281*

Third step in multi-level grievance procedure was not arbitration because it did not provide for final and binding decision; decision was subject to review under *Code Civ. Proc. § 1094.5*, which is much more extensive than that allowed by arbitration statutes (*Code Civ. Proc. §§ 1286.2, 1286.6*). *American Federation of State, County & Municipal Employees v. Metropolitan Water Dist. (2005) 126 Cal. App. 4th 247, 258-259, 24 Cal. Rptr. 3d 285*

Arbitration agreement in employee handbook, which stated that it was severable and separate agreement from rest of handbook, was not enforceable because it had not been separately signed. *Romo v. Y-3 Holdings, Inc. (2001) 87 Cal. App. 4th 1153*

Employer's evidence that it mailed dispute resolution brochure and memorandum to employee created presumption affecting burden of producing evidence, which employee met by testimony that she did not receive them; however, contradictory evidence was still substantial evidence to support court's finding that employee received brochure and memorandum and thus was bound to arbitrate. *Craig v. Brown & Root, Inc. (2000) 84 Cal. App. 4th 416, 100 Cal. Rptr. 2d 818, 821*

Issuance of updated employee handbook which contained arbitration agreement and superseded original handbook (receipt of which employee/plaintiff had acknowledged, though refusing to acknowledge updated version) did not amount to repudiation by employer of original handbook or arbitration agreement, so dispute was still covered by arbitration agreement, at least to extent employee failed to carry his burden of proving to contrary on employer's motion for summary judgment. *Martinez v. Scott Specialty Gases, Inc. (2000) 83 Cal. App. 4th 1236, 1244-1245, 100 Cal. Rptr. 2d 403*

Uncommunicated subjective intent of patient as irrelevant to determination of arbitration agreement's coverage; applicable test as whether reasonable person would, from conduct of parties, determine there was mutual agreement.

Hilleary v. Garvin (1987) 193 Cal. App. 3d 322, 327, 238 Cal. Rptr. 247 (interpreting *Code Civ. Proc. § 1295*)

Grievance procedure adopted by city council is agreement to submit dismissal of city employee to arbitration. *Santos v. City of Brawley (1984) 162 Cal. App. 3d 203, 207, 208 Cal. Rptr. 297*

Defendant who claimed not to have known of arbitration clause in contract because plaintiff had translated contract between them into German without mentioning arbitration clause was not able to have arbitration award vacated after having submitted to arbitration. *Kemper v. Schardt (1983) 143 Cal. App. 3d 557, 560, 192 Cal. Rptr. 46*

Civ. Code § 1670, requiring independent arbitration of construction contract disputes involving public agencies, if mutually agreeable, otherwise by litigation, is inapplicable absent consent by public agency. *Pascal & Ludwig, Inc. v. State of California ex rel. Dept. Water Resources (1981) 127 Cal. App. 3d 178, 187, 179 Cal. Rptr. 403*

In contract for sale of goods, when buyer expressly limits acceptance to terms of offer, no agreement for arbitration exists when purchase order lists different situs for arbitration than seller's acknowledgment. *Lounge-A-Round v. GCM Mills, Inc. (1980) 109 Cal. App. 3d 190, 197-198, 166 Cal. Rptr. 920*

Agreement providing that an issue in dispute "may" be submitted to an impartial arbitrator is construed to require arbitration at option of either party and not to require mutual agreement to submit to arbitration. Service Employees Internat. Union, Local 18 v. *American Building Maintenance Co. (1972) 29 Cal. App. 3d 356, 358-361, 105 Cal. Rptr. 564*

[b] Rescission

Right of parties to mutually rescind arbitration agreement. Local 659, *I.A.T.S.E. v. Color Corp. Amer. (1956) 47 Cal. 2d 189, 195, 302 P.2d 294*

Arbitration procedures are no more binding on parties to contract than other contract terms; parties to agreement have power to rescind, repudiate, or avoid arbitration agreement. *Daugherty Co. v. Kimberly-Clark Corp. (1971) 14 Cal. App. 3d 151, 158, 92 Cal. Rptr. 120*

[c] Adhesion Contracts

Enforceability of arbitration clause in adhesion contract. *Dryer v. Los Angeles Rams (1985) 40 Cal. 3d 406, 415-417, 220 Cal. Rptr. 807, 709 P.2d 826* (arbitration warranted, even under *Graham v. Scissor-Tail* standard); *Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 819-828, 171 Cal. Rptr. 604, 623 P.2d 165* (arbitration clause not enforced as being unconscionable); *Parr v. Superior Court (1983) 139 Cal. App. 3d 440, 445-447, 188 Cal. Rptr. 801* (arbitration clause enforceable under *Scissor-Tail*); *Bos Material Handling, Inc. v. Crown Controls Corp. (1982) 137 Cal. App. 3d 99, 107-108, 186 Cal. Rptr. 740* (issue remanded for evidentiary hearing on whether agreement was adhesive); Frame v. Merrill Lynch, Pierce, *Fenner & Smith, Inc. (1971) 20 Cal. App. 3d 668, 672, 97 Cal. Rptr. 811* (arbitration clause deemed enforceable); *Player v. Geo. M. Brewster & Son, Inc. (1971) 18 Cal. App. 3d 526, 536, 96 Cal. Rptr. 149* (arbitration clause not enforced)

Arbitration provision in adhesion contract in commercial context is generally given affect unless it is structured or utilized in way that gives unfair advantage to party with superior bargaining power. *Keating v. Superior Court (1982) 31 Cal. 3d 584, 593-595, 183 Cal. Rptr. 360, 645 P.2d 1192* ; *Pacific Gas & Electric Co. v. Superior Court (1993) 15 Cal. App. 4th 576, 598, 19 Cal. Rptr. 2d 295*

Provision in employment contract between stock brokerage firm and its employee requiring compulsory arbitration of

disputes before New York Stock Exchange is enforceable; arbitration procedure before representatives of industry is not presumed biased, despite employee's claim that objectionable practice was industry-wide, when there was diversity of interest among firms, and employee must show actual bias. *Downs v. Prudential-Bache Securities, Inc. (1988) 202 Cal. App. 3d 616, 621-622, 248 Cal. Rptr. 734*

Agreement to arbitrate, contained in Uniform Application for Securities Industry Registration form that employee was required to execute in connection with application for employment with member-firm of New York Stock Exchange, is not, as matter of federal law, unconscionable and unenforceable contract of adhesion, even though employee was required to sign in order to work for any member-firms, arbitrator was to be selected by exchange, and only informal discovery was permitted. *Thomas v. Perry (1988) 200 Cal. App. 3d 510, 513-515, 246 Cal. Rptr. 156*

Failure of party to read arbitration clause before signing contract does not render arbitration clause unenforceable. *Izzi v. Mesquite Country Club (1986) 186 Cal. App. 3d 1309, 1317-1319, 231 Cal. Rptr. 315* ; *Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1972) 24 Cal. App. 3d 35, 40-42, 100 Cal. Rptr. 791* ; *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1971) 20 Cal. App. 3d 668, 671, 97 Cal. Rptr. 811*

Standardized form does not establish adhesive character of contract; relative bargaining powers and availability of subject matter from other sources is required to be considered; even if contract is adhesive, arbitration clause is enforceable if not in conflict with reasonable expectations of weaker party or unduly oppressive or unconscionable. *Izzi v. Mesquite Country Club (1986) 186 Cal. App. 3d 1309, 1317-1318, 231 Cal. Rptr. 315*

Relief fashioned in *Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 171 Cal. Rptr. 604, 623 P.2d 165* , in case of unenforceable arbitration agreement, of making neutral arbitration available to parties, is not available when one party has rejected arbitration. *Pascal & Ludwig, Inc. v. State of California ex rel. Dept. Water Resources (1981) 127 Cal. App. 3d 178, 189, 179 Cal. Rptr. 403*

Rearbitration provision in health care plan is unenforceable on adhesion contract principles and as violation of public policy when provision would have allowed medical malpractice defendants to unilaterally reject prior arbitration award without cause, and to require rearbitration before special panel of three doctors. *Beynon v. Garden Grove Medical Group (1980) 100 Cal. App. 3d 698, 705, 710-712, 161 Cal. Rptr. 146*

[d] No Mutuality Requirement

Although mutuality may not be required by *Code Civ. Proc. § 1298(c)*, parties are free to draft their contract so as not to give effect to arbitration clause unless it its accepted by all parties; arbitration was not to be compelled when only sellers had initialed arbitration provision. *Marcus & Millichap Real Estate Investment Brokerage Co. (1998) 68 Cal. App. 4th 83, 89-91, 93, 80 Cal. Rptr. 2d 147*

Neither common law of contracts nor *Code Civ. Proc. § 1298* imposes mutuality of arbitration; that is, both parties to agreement need not be subject to arbitration in order for arbitration provision to be enforceable. *Grubb & EllisCo. v. Bello (1993) 19 Cal. App. 4th 231, 238, 241, 23 Cal. Rptr. 2d 281* (party who did not initial arbitration clause could compel party who did initial it to go to arbitration); *but see* *Marcus & Millichap Real Estate Investment Brokerage Co. (1998) 68 Cal. App. 4th 83, 90-91, 80 Cal. Rptr. 2d 147* ; *Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1538-1539, 60 Cal. Rptr. 2d 138* (criticizing *Bello*)

[e] Choice of Law

Parties' agreement to be bound by California law is binding in case involving interstate commerce if California provisions do not conflict with Federal Arbitration Act (Title 9 of United States Code). *Volt Information Sciences v.*

Board of Trustees (1989) 489 U.S. 468, 477-479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 ; *Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co. (1983) 140 Cal. App. 3d 251, 262, 191 Cal. Rptr. 15*

Although arbitrators have no authority to award punitive damages under New York law, arbitrator is not precluded from awarding punitive damages despite choice of law provision when agreement evidences transaction in interstate commerce and Federal Arbitration Act vests arbitrators with authority to award punitive damages if parties' agreement contemplates such award; choice of law provision in such case is mere designation of substantive law arbitrators must apply in determining whether conduct warrants punitive damages. *J. Alexander Securities, Inc. v. Mendez (1993) 17 Cal. App. 4th 1083, 1090-1091, 21 Cal. Rptr. 2d 826*

Choice of law or forum selection clauses in contract of adhesion does not render arbitration provision unenforceable; however, in action to compel arbitration, respondent entitled to evidentiary hearing to determine whether or not forum selection and choice of law provisions comports with its reasonable expectations or is unduly oppressive. *Bos Material Handling, Inc. v. Crown Controls Corp. (1982) 137 Cal. App. 3d 99, 108, 186 Cal. Rptr. 740*

Provision of arbitration agreement that law of foreign state should apply is upheld in *California. Seidman & Seidman v. Wolfson (1975) 50 Cal. App. 3d 826, 831, 123 Cal. Rptr. 873*

[f] Scope of Arbitration

[i] Ambiguities Construed in Favor of Coverage

Although award may be vacated if arbitrator has exceeded his or her power [*Code Civ. Proc. § 1286.2*], ambiguities in scope of arbitration are resolved in favor of coverage. *Taylor v. Crane (1979) 24 Cal. 3d 442, 450, 155 Cal. Rptr. 695, 595 P.2d 129*

Doubts as to meaning or extent of arbitration agreement are to be resolved by arbitrators rather than by courts. *Morris v. Zuckerman (1968) 69 Cal. 2d 686, 690, 72 Cal. Rptr. 880, 446 P.2d 1000* ; *Felner v. Meritplan Ins. Co. (1970) 6 Cal. App. 3d 540, 543-544, 86 Cal. Rptr. 178*

Language of sublease agreement calling for arbitration of "claim arising out of or relating to" the agreement was broad enough to include a dispute resulting from the landlord-client's refusal to accept more offsets against outstanding legal fees and costs owed the tenant-law firm, based upon a claim of malpractice, and instead demanding cash rental payments. *Fagelbaum & Heller LLP v. Smylie (2009) 174 Cal. App. 4th 1351, 1364, 95 Cal. Rptr. 3d 252*

While doubts concerning the scope of arbitrable issues must be construed in favor of arbitration, neither the Federal Arbitration Act (FAA), *9 U.S.C. § 1 et seq.*, nor public policy under federal and California law favoring the arbitration of disputes can be used to compel arbitration of disputes that are plainly outside the scope of the arbitration agreement. *Valentine Capital Asset Management, Inc. v. Agahi (2009) 174 Cal. App. 4th 606, 627, 94 Cal. Rptr. 3d 526*

Ambiguities in contract providing for arbitration are to be resolved in favor of arbitration process. *East San Bernardino County Water Dist. v. City of San Bernardino (1973) 33 Cal. App. 3d 942, 953, 109 Cal. Rptr. 510* ; *LesserTowers, Inc. v. Roscoe-Ajax Constr. Co. (1969) 271 Cal. App. 2d 675, 695, 77 Cal. Rptr. 100*

Arbitration is preferred unless it may be said with positive assurance that arbitration clause of collective bargaining agreement is not susceptible of an interpretation that covers asserted dispute; doubts are resolved in favor of coverage. Leon Handbag Co. v. Local 213 *(1969) 276 Cal. App. 2d 240, 243, 81 Cal. Rptr. 63*

[ii] Antitrust Claims

Convention on Recognition and Enforcement of Foreign Arbitral Awards (21 U.S. Treaties 2517; for text see note to *9 U.S.C.A. § 201*), international comity, respect for capacities of foreign and transnational tribunals, and need of international commercial system for predictability requires arbitration of Sherman Act antitrust claims by Japanese Commercial Arbitration Association pursuant to agreement between Puerto Rican, Swiss, and Japanese corporations even though arbitration would not be proper in domestic context; Convention allows United States courts right to refuse enforcement of arbitration award if enforcement would frustrate public policy. *Mitsubishi Motors v. Soler Chrysler-Plymouth (1985) 473 U.S. 614, 628-640, 105 S. Ct. 3346, 87 L. Ed. 2d 444*

Arbitration of antitrust claims are not excluded by arbitration statutes or Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*). *Crown Homes, Inc. v. Landes (1994) 22 Cal. App. 4th 1273, 1280, 27 Cal. Rptr. 2d 827*

Parties are precluded from arbitrating antitrust claim because they cannot agree privately to exclude antitrust issues under federal or state antitrust provisions from judicial scrutiny and determination. *Bos Material Handling, Inc. v. Crown Controls Corp. (1982) 137 Cal. App. 3d 99, 109-111, 186 Cal. Rptr. 740*

[iii] Civil RICO Claims

Private treble-damages action authorized by *18 U.S.C. § 1964(c)* in Racketeer Influenced and Corrupt Organizations Act (*18 U.S.C. §§ 1961-1968*) is arbitrable; neither legislative intent nor public interest in enforcement prohibits arbitration pursuant to agreement. *Shearson/American Express, Inc. v. McMahon (1987) 482 U.S. 220, 238-242, 107 S. Ct. 2332, 96 L. Ed. 2d 185* (investor's claims against stockbroker)

Broker's submission of customer's claim and its counterclaim (to recover deficit in customer's account) to arbitration waives right to litigate federal securities claims and civil RICO (*18 U.S.C. §§ 1961-1968*) claims arising from same facts even though arbitration of federal securities claims could not have been compelled at time broker agreed to arbitrate counterclaim. *C.D. Anderson & Co., Inc. v. Lemos (9th Cir. 1987) 832 F.2d 1097, 1099-1100*

[iv] Collective Bargaining Agreements

Provision in Charter of City and County of San Francisco requiring binding arbitration of any dispute between City and union that comes to impasse was inapplicable to proposed new promotional system because proposed new system fell within exception in Charter applicable to any rule or policy necessary to ensure compliance with anti-discrimination laws. *San Francisco Firefighters Local 798 v. City and County of San Francisco (2006) 38 Cal. 4th 653, 42 Cal. Rptr. 3d 868, 133 P.3d 1028*

Educational Employee Relations Act (EERA; *Gov. Code § 3540 et seq.*), which precludes contract clause that would replace, set aside, or annul mandatory provision of Education Code, was not offended by *Ed. Code § 45113* or collective bargaining agreement that gave school district governing board power to review arbitration awards regarding disciplinary matters under standards imposed by *Code Civ. Proc. § 1280 et seq.* *California School Employees Assn. v. Bonita Unified School Dist. (2008) 163 Cal. App. 4th 387, 400-404, 77 Cal. Rptr. 3d 486*

Union members could not be compelled to arbitrate statutory claims under collective bargaining agreement because union could not waive members' rights to bring statutory claims in court and those claims did not arise under CBA, but under *Labor Code. Zavala v. Scott Brothers Dairy, Inc. (2006) 143 Cal. App. 4th 585, 593-596, 49 Cal. Rptr. 3d 503*

Ambiguous clauses in collective bargaining agreement did not, as district contended, give it unilateral right to determine whether faculty grievance should be resolved by means of redress other than arbitration; interpretation based in part on undisputed extrinsic evidence that for 18 years district never refused to arbitrate grievances, with single

exception of matter within jurisdiction of Public Employees Relations Board. *Hartnell Community College Dist. v. Superior Court (Hartnell College Faculty Assn.) (2004) 124 Cal. App. 4th 1443, 1446, 1451-1452, 22 Cal. Rptr. 3d 410*

Employee's claims for defamation, infliction of emotional distress, and related torts, arising out of investigation and police report of employee's behavior, which led to termination of employment with defendant, were arbitrable under applicable collective bargaining agreement (CBA) because those claims arose in connection with and were inextricable from disciplinary and investigative procedures set forth in *CBA. Ruiz v. Sysco Food Services (2004) 122 Cal. App. 4th 520, 531, 539-541, 18 Cal. Rptr. 3d 700*

Trigger for Labor Management Relations Act Section 301 (*29 U.S.C. § 185(a)*) preemption is whether application of state law requires interpretation of terms collective bargaining agreement (CBA); claims for termination in violation of public policy and discrimination based on health did not require interpretation of CBA and thus did not have to be arbitrated by former employee; former employee's initiation of arbitration did not preclude judicial action on those claims after withdrawal from arbitration which were not within scope of arbitration clause. *Deschene v. Pinole Point Steel Company (1999) 76 Cal. App. 4th 33, 40-42, 47-49, 90 Cal. Rptr. 2d 15*

[v] Dissolution of Partnership

Claims for dissolution of partnership and accounting were arbitrable under clause in partnership agreement providing for arbitration of "any controversy or claim arising out of or relating to any provisions of this Agreement or breach thereof." *Larkin v. Cogswell, Nakazawa & Russell (1999) 76 Cal App. 4th 227, 230-231, 90 Cal. Rptr. 2d 195*

Claims for dissolution of partnership, accounting, and appointment of receiver were not arbitrable under clause in partnership agreement providing for arbitration of any "difference of opinion arising between partners which appears incapable of determination between themselves." *Smith v. Superior Court (1962) 202 Cal. App. 2d 128, 132-134, 20 Cal. Rptr. 512*

[vi] Examples

Arbitration clause in standard form Real Estate Purchase Agreement that called for arbitration of any dispute or claim in law or equity arising out of agreement or any resulting transaction was broad enough to require arbitration of claims arising from fraudulent Transfer Disclosure Statement furnished in connection with the sale. *Johnson v. Siegel (2000) 84 Cal. App. 4th 1087, 1095, 1102, 101 Cal. Rptr. 2d 412*

Employment agreement of account executive for securities brokerage requires arbitration of his or her claim of wrongful termination based on racial discrimination, on grounds that agreement incorporated NASD rules requiring arbitration of disputes between member and associated person arising in connection with member's business or associated person's activities, and account executive's wrongful termination claim based on racial discrimination was dispute in that category. *Spellman v. Securities, Annuities & Ins. Services, Inc. (1992) 8 Cal. App. 4th 452, 457-458, 463-465, 10 Cal. Rptr. 2d 427*

Under doctrine of *ejusdem generis*, general words following enumeration of particular classes of things are interpreted to mean only other things of same nature or class as those enumerated; thus, agreement to arbitrate disputes regarding "fees, costs, or any other aspect of " parties' relationship only requires arbitration of financial matters similar to disputes regarding fees and costs. *Lawrence v. Walzer & Gabrielson (1989) 207 Cal. App. 3d 1501, 1506, 256 Cal. Rptr. 6*

Dispute based on claim of unfairness in Civil Service promotional evaluation was exclusively subject to grievance procedure mandated by city ordinance and not arbitrable pursuant to arbitration clause that specifically excluded matters for which an administrative remedy is provided before the *Civil Service Commission. Los Angeles Police Protective*

League v. City of Los Angeles (1988) 206 Cal. App. 3d 511, 513-514, 253 Cal. Rptr. 641

Arbitration provision in franchise agreement was susceptible to interpretation that it covered sublease dispute between franchisor-lessor and franchisee-lessee because franchise agreement and sublease referred to each other and agreement specifically required franchisee to perform all lease obligations. *Mleynek v. Headquarters Companies (1984) 165 Cal. App. 3d 1133, 1136, 209 Cal. Rptr. 593*

[vii] Fraud in Inducement of Contract

Absent indication of contrary intent and when arbitration clause is reasonably susceptible of such interpretation, claims of fraud in inducement of contract in which arbitration clause is contained are subject to arbitration. *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street (1983) 35 Cal. 3d 312, 323, 197 Cal. Rptr. 581, 673 P.2d 251* ; *King v. Prudential-Bache Securities, Inc. (1990) 226 Cal. App. 3d 749, 753, 277 Cal. Rptr. 214*

Broad arbitration clause of contract is held to encompass arbitration of claim that contract itself was induced by fraud when no claim is made that fraud was specifically directed at arbitration clause. *Downs v. Prudential-Bache Securities, Inc. (1988) 202 Cal. App. 3d 616, 620, 248 Cal. Rptr. 734*

[viii] Legal Malpractice

Although formal opinion of State Bar of California holds nothing to be inherently improper with agreement between attorney and client to arbitrate malpractice claims, client must be fully advised of consequences of agreement and agreement will be closely scrutinized for any unfairness to client; this consideration, plus regular rules of contract interpretation, limits application of arbitration clause to fee disputes. *Lawrence v. Walzer & Gabrielson (1989) 207 Cal. App. 3d 1501, 1506-1508, 256 Cal. Rptr. 6*

[ix] Medical Malpractice

An arbitration agreement, signed when defendant first treated plaintiff applied to medical malpractice claim arising from treatment for different condition two years later because agreement stated it was intended to bind the patient and health care provider who "now or in the future treat[s] the patient." Agreement contained language required by *Code Civ. Proc. § 1295*. Even though parties did not have open-book account relationship, arbitration was required under extra-statutory language, which was not prohibited by Section 1295. *Reigelsperger v. Siller (2007) 40 Cal. 4th 574, 578-580, 53 Cal. Rptr. 3d 887, 150 P. 3d 764*

Physician was not third-party beneficiary of health plan, therefore fact that plan did not require arbitration did not prevent arbitration of medical malpractice claim under separate agreement between physician and patient. *Hollister v. Benzl (1999) 71 Cal. App. 4th 582, 587-588, 83 Cal. Rptr. 2d 903*

Coverage of arbitration agreement entered into pursuant to *Code Civ. Proc. § 1295* extends not only to particular treatment contracted for at time agreement was signed, but also to later follow-up treatment performed pursuant to implied-in-fact contract between physician and patient. *Hilleary v. Garvin (1987) 193 Cal. App. 3d 322, 326-327, 238 Cal. Rptr. 247*

Physician as not having burden under *Code Civ. Proc. § 1295* to accompany arbitration agreement with contract delineating specific course of treatment to be administered, or to renew arbitration agreement each time there is a variation in treatment or ailment. *Hilleary v. Garvin (1987) 193 Cal. App. 3d 322, 326, 238 Cal. Rptr. 247*

[x] Punitive Damages

Agreement encompassing any "dispute or controversy" between parties "arising under any provision of Federal securities laws" and "all other disputes or controversies" between parties arising out of party's business or the agreement contemplates wide range of tort and contract claims, and is sufficiently broad to encompass awards of punitive damages. *J. Alexander Securities, Inc. v. Mendez (1993) 17 Cal. App. 4th 1083, 1091, 21 Cal. Rptr. 2d 826*

[xi] Reasonable Expectation of Parties

Bodily injury exclusion in arbitration clause in California standard form of real estate purchase agreement did not exclude claims for emotional distress derivative of failure to disclose structural defect. Those claims were not type parties would reasonably expect to be excluded (even if stress caused physical illness) and had to be arbitrated. *Gravillis v. Caldwell Banker Residential Brokerage Co. (2006) 143 Cal. App. 4th 761, 771-782*

Arbitration clause that governs one contractual relationship is not imposed in other relationship without undermining parties' reasonable expectations, when parties have separate contractual relationships that involve separate enterprises, and most importantly, separate commercial risks. *Marsch v. Williams (1994) 23 Cal. App. 4th 250, 256, 28 Cal. Rptr. 2d 398*

[xii] Scope to Be Determined by Court

When one party to contract containing arbitration clause refuses to arbitrate on ground that dispute lies beyond scope of clause, determination of issue is ordinarily for court and not for arbitrator. *Service Employees International Union v. County of Napa (1979) 99 Cal. App. 3d 946, 957, 160 Cal. Rptr. 810*

[xiii] Statutory Claims

When a benefits claim under an ERISA-regulated plan is governed by contractual terms of the plan rather than by statutory provisions of ERISA itself, the plaintiff must first arbitrate in accordance with benefit plan's claims procedure. *Chappel v. Laboratory Corp. of America (9th Cir. 2000) 232 F. 3d 719, 724*

Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*) claim for damages is arbitrable at least to extent it is governed by Federal Arbitration Act; however, CLRA claim for injunctive relief in which plaintiff is acting as private attorney general (*e.g.*, claim seeking to enjoin deceptive business practices) is not arbitrable. *Broughton v. Cigna Healthplans of California (1999) 21 Cal. 4th 1066, 1072, 1079-1080, 1088, 90 Cal. Rptr. 2d 334, 988 P. 2d 67* (remanding for determinations regarding existence of arbitration agreement and applicability of FAA); *but see* dissenting opinion with respect to nonarbitrability of claim for injunctive relief

Unwaivability of the public policies of an employee's statutory right to reimbursement of job expenses under *Lab. Code §§ 2802, 2804* and the statutory right to receive minimum wage under *Lab. Code § 1194* for purposes of *Gentry* factors resulted in class action waiver being ruled unenforceable. *Sanchez v. Western Pizza Enterprises, Inc. (2009) 172 Cal. App. 4th 154, 166-170, 90 Cal. Rptr. 3d 818*

Court fully discusses evidentiary sufficiency in plaintiff's meeting of four *Gentry* factors in finding class action waiver violated unwaivable statutory rights to meal and rest periods in *Labor Code § 226.7* and to overtime pay. *Franco v. Athens Disposal Co., Inc. (2009) 171 Cal. App. 4th 1277, 1295-1299, 90 Cal. Rptr. 3d 539*

Claims for violations of Patients *Bill of Rights* (*22 Cal. Code Reg. § 72527*), brought pursuant to *Health & Safety Code § 1430(b)*, were not arbitrable; court was not pursuaded by argument that any plaintiff could avoid arbitration by "tossing in" cause of action alleging violations of the Patients *Bill of Rights* and relied on legislative expression of public policy to protect particularly vulnerable portion of population that under no circumstances may patient or resident of nursing home waive his or her right to sue for violations of Patients *Bill of Rights*. *Fitzhugh v. Granada HealthCare and Rehabilitation Center, LLC (2007) 150 Cal. App. 4th 469, 476, 58 Cal. Rptr. 3d 585* ; *see also Welf. & Inst. Code § 15600(h)*

Although insurer must pay both *Cumis* attorney fees and *Cumis* defense expenses, *Civ. Code § 2860(c)* does not require arbitration of *Cumis* counsel's defense expenses. *Gray Cary Ware & Freidenrich v. Vigilant Ins. Co. (2004) 114 Cal. App. 4th 1185, 1193, 8 Cal. Rptr. 3d 475*

Damage claims under the Unfair Competition Act (*Bus. & Prof. Code § 17200 et seq.*) or Unfair Trade Practices Act (*Bus. & Prof. Code §§ 17020, 17070*) are arbitrable, but related remedy of injunction, in which plaintiff is acting as private attorney general (*e.g.*, seeking to enjoin deceptive business practices) is not arbitrable; action on injunctive remedies must be stayed until resolution of arbitration on the other causes of action and remedies. *Coast Plaza Doctors Hospital v. Blue Cross of California (2000) 83 Cal. App. 4th 677, 691-694, 99 Cal. Rptr. 2d 809*

Union cannot prospectively waive employee's right to judicial forum for his or her statutory discrimination or state claims by agreeing to arbitration in collective bargaining agreement. *Deschene v. Pinole Point Steel Company (1999) 76 Cal. App. 4th 33, 48-49, 90 Cal. Rptr. 2d 15* (termination against public policy and discrimination on basis of health); *Torrez v. Consolidated Freightways, Corp. (1997) 58 Cal. App. 4th 1247, 1259, 68 Cal. Rptr. 2d 792 (FEHA)*

[xiv] Torts Related to Contract

Arbitration clause in investment agreement requiring arbitration of any dispute or other disagreement arising from or out of agreement was broad enough to encompass claims for fraudulent inducement and negligence, breach of fiduciary duty, interference with contractual relations, and conversion, all based on various officers, directors, and employees diverting loan proceeds and primary assets to their personal use. *Efund Capital Partners v. Pless (2007) 150 Cal. App. 4th 1311, 1321, 1325-1330, 59 Cal. Rptr. 3d 340*

Party could not be compelled to arbitrate defamation claim under relatively narrow arbitration clause in agreement between tenants in common that required arbitration of any controversy involving construction or application of agreement even if defamatory statement was made in altercation related to agreement. *Bono v. David (2007) 147 Cal. App. 4th 1055, 1062-1069, 54 Cal. Rptr. 3d 837*

Defamation by insurer, in admittedly false press releases claiming doctors did unnecessary coronary bypass surgeries, was beyond scope of arbitration provision in service agreement between a medical group and insurance provider requiring arbitration of any dispute "concerning the terms of this agreement." *Medical Staff of Doctors Medical Center in Modesto v. Kamil (2005) 132 Cal. App. 4th 679, 683-684, 33 Cal. Rptr. 3d 853*

Employee's claims for defamation, infliction of emotional distress, and related torts, arising out of investigation and police report of employee's behavior, which led to termination of employment with defendant, were arbitrable under collective bargaining agreement (CBA) because those claims arose in connection with and were inextricable from disciplinary and investigative procedures set forth in *CBA. Ruiz v. Sysco Food Services (2004) 122 Cal. App. 4th 520, 531, 539-541, 18 Cal. Rptr. 3d 700*

Arbitration provision in employment agreement covering disputes concerning enforcement or interpretation of agreement encompassed tort claims for interference with prospective advantage and defamation based on employer's

conduct after employee was terminated; because tort claims were based on expectation of future income from plaintiff's patients, who consulted plaintiff as defendant's employee, employment agreement informed extent of any economic interest; temporal test was not applicable standard. *Buckhorn v. St. Jude Heritage Med. Group (2004) 121 Cal. App. 4th 1401, 1407-1408, 18 Cal. Rptr. 3d 215*

Tort claims that arise under or from the contractual relationship are arbitrable; cause of action arising out of contractual dispute need not be contractual, it need only arise out of contract. *Coast Plaza Doctors Hospital v. Blue Cross of California (2000) 83 Cal. App. 4th 677, 686, 99 Cal. Rptr. 2d 809*

Agreement that provided for arbitration of "all disputes arising out of or relating to this Agreement" is broad enough to encompass tort claims for unsuitable investment recommendations, misrepresentations, and omissions in connection with the sale of securities. *Blatt v. Farley (1990) 226 Cal. App. 3d 621, 628, 276 Cal. Rptr. 612*

Action alleging fraud, breach of statutory duty, negligence, and breach of fiduciary duty, based on seller's intentional nondisclosure of property assessments, is withinscope of arbitration clause of purchase and sale contract, because dispute has its root in purchaser-vendor relationship created by contract. *Izzi v. Mesquite Country Club (1986) 186 Cal. App. 3d 1309, 1315-1316, 231 Cal. Rptr. 315*

Contracts providing for arbitration for any controversy arising out of or relating to contract are sufficiently broad to include tort as well as contractual liabilities, so long as tort claims have their roots in relationship between parties are created by contract. *Bos Material Handling, Inc. v. Crown Controls Corp. (1982) 137 Cal. App. 3d 99, 105, 186 Cal. Rptr. 740*

Tort action for malicious prosecution and abuse of process based on defendant's having prosecuted claims through arbitration pursuant to collective bargaining agreement is itself subject to arbitration under sufficiently broad arbitration provisions of underlying agreement. *Merrick v. Writers Guild of America, West, Inc. (1982) 130 Cal. App. 3d 212, 219-220, 181 Cal. Rptr. 530*

[g] Unconscionability of Agreement or Clause

[i] Procedural Unconscionability

An employer's requirement that the employees sign a waiver of notice and acceptance of terms of an agreement that they had not read and that contained the arbitration clause and limits on remedies was procedurally unconscionable. *Suh v. Superior Court (2010) 181 Cal. App. 4th 1504, 1516, 105 Cal. Rptr. 3d 585*

A restriction on discovery had a low level of procedural unconscionability due to the fact that the contract offer was presented on a take-it-or-leave-it basis, because the plaintiff was an attorney who knowingly entered into a contract containing an arbitration provision in exchange for a generous compensation and benefits package. *Dotson v. Amgen, Inc. (2010) 181 Cal. App. 4th 975, 980-982, 104 Cal. Rptr. 3d 341*

Terms and conditions of a recreational release agreement that are nonnegotiable, and defendant's statement that plaintiffs would encounter the same requirements with any other recreational company. *Lhotka v. Geographic Expeditions, Inc. (2010) 181 Cal. App. 4th 816, 822, 104 Cal. Rptr. 3d 844*

Brokerage account agreements exhibited elements of procedural unconscionability in that they were contracts of adhesion, petitioners were in the weaker bargaining position and could not negotiate terms, the requirement of a three-judge arbitration panel and prohibition on consolidation or joinder were beyond petitioners' reasonable expectations, and broker did not call petitioners' attention to the Arbitration Panel paragraphs and No Consolidation

paragraphs. The agreements also exhibited elements *contrary* to procedural unconscionability: The arbitration provisions were not hidden in a prolix form, and petitioners had many realistic alternatives to opening the broker's accounts. Considered as a whole, the elements both supporting and contrary to a finding of procedural unconscionability led to a conclusion of a low to medium degree of procedural unconscionability in the agreements. *Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1573, 98 Cal. Rptr. 3d 743*

Arbitration agreement did not set forth a distorted presentation of the benefits of arbitration to the degree necessary for unconscionability. However, the court did find procedural unconscionability in respect to the inequality in bargaining power between the low-wage employees and their employer and the agreement's suggestion that there are multiple arbitrators to chose from and failure to mention that the designated arbitration provider offers only one arbitrator. *Sanchez v. Western Pizza Enterprises, Inc. (2009) 172 Cal. App. 4th 154, 174, 90 Cal. Rptr. 3d 818*

[ii] Substantive Unconscionability

American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration that limit the award of consequential, exemplary, incidental, punitive or special damages to narrow circumstances, were substantively unconscionable, because they force a party to separately sue to obtain those remedies. *Suh v. Superior Court (2010) 181 Cal. App. 4th 1504, 1515-1516, 105 Cal. Rptr. 3d 585*

A restriction on discovery was not narrow enough to be substantively unconscionable, because although the agreement purported to limit discovery to one deposition of a natural person, the agreement gave the arbitrator broad discretion to order the discovery needed to sufficiently litigate the parties' claims. *Dotson v. Amgen, Inc. (2010) 181 Cal. App. 4th 975, 980, 982-985, 104 Cal. Rptr. 3d 341*

Limitation of the amount of recovery to the cost of a recreational trip is without more substantively unconscionable. *Lhotka v. Geographic Expeditions, Inc. (2010) 181 Cal. App. 4th 816, 825-826, 104 Cal. Rptr. 3d 844*

Brokerage account agreements exhibited a high degree of substantive unconscionability where they called for an unjustified three-arbitrator panel and allowed for high fees compared with the ability to pay of the customers bringing claims against the brokerage. The fact that petitioners were investors did not detract from that finding that the fees of three arbitrators would exceed their reasonable expectations. *Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1579-1580, 98 Cal. Rptr. 3d 743*

The absence of express provisions requiring a written arbitration award and allowing discovery does not render the arbitration agreement unconscionable. Rather, those terms are implied as a matter of law as part of the agreement. However, the designation of a panel of arbitrators consisting of a single arbitrator selected by the employer created a false appearance of mutuality in the selection of an arbitrator that was substantively unconscionable. *Sanchez v. Western Pizza Enterprises, Inc. (2009) 172 Cal. App. 4th 154, 177, 90 Cal. Rptr. 3d 818*

[h] Unenforceability of Agreement or Clause

On the sliding scale, the low-to mid-range amount of procedural unconscionability and the high degree of substantive unconscionability rendered clauses requiring three arbitrators and barring consolidation of claims unconscionable and, hence, unenforceable. Broker's failure to offer a justification or explanation for requiring three arbitrators barring consolidation in the brokerage account agreements demonstrated that it included them deliberately for the improper purpose of discouraging or preventing its customers from vindicating their rights, rendering them unserverable as being in bad faith. *Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1585-1587, 98 Cal. Rptr. 3d 743*

Having ruled the class action waiver unenforceable as against public policy, regardless of whether the entire agreement

was unenforceable, and the arbitrator selection clause unconscionable, the court ruled that while it may be true that neither of these provisions alone would justify the refusal to enforce the entire arbitration agreement, considered together they indicate an effort to impose on the employee a forum with distinct advantages for the employer, permeating the agreement with an unlawful purpose. *Sanchez v. Western Pizza Enterprises, Inc. (2009) 172 Cal. App. 4th 154, 181, 90 Cal. Rptr. 3d 818*

On account of the fact that the arbitration agreement contained an unenforceable class arbitration waiver against public policy and also precluded the employee from seeking civil penalties on behalf of other employees, contrary to the Private Attorneys General Act, the agreement as a whole was tainted with illegality and was unenforceable. *Franco v. Athens Disposal Co., Inc. (2009) 171 Cal. App. 4th 1277, 1297, 90 Cal. Rptr. 3d 539*

[i] Severability of Unenforceable Clause

Provision limiting the award of consequential, exemplary, incidental, punitive or special damages to narrow circumstances in the American Health Lawyers Association Alternative Dispute Resolution Service Rules of Procedure for Arbitration could not be severed, because the rules are applicable as a whole. *Suh v. Superior Court (2010) 181 Cal. App. 4th 1504, 1516-1517, 105 Cal. Rptr. 3d 585*

Provisions greatly limiting plaintiffs' recovery, requiring plaintiffs to indemnify the other party for its legal costs and fees if plaintiffs pursued any claims covered by the release agreement, and to pay half of any mediation fees and mediate and arbitrate in defendant's choice of venue, far from plaintiffs [*Lhotka v. Geographic Expeditions, Inc. (2010) 181 Cal. App. 4th 816, 826, 104 Cal. Rptr. 3d 844*

[3] Self-Executing Agreement

Contract permitting party unilaterally to select arbitrator if other party refuses to arbitrate and permitting one arbitrator to proceed is self-executing. *Brink v. Allegro Builders, Inc. (1962) 58 Cal. 2d 577, 579-580, 25 Cal. Rptr. 556, 375 P.2d 436*

Proceeding with arbitration ex parte, without prior court order compelling unwilling party to arbitrate, is proper when arbitration agreement is self-executing. *Brink v. Allegro Builders, Inc. (1962) 58 Cal. 2d 577, 579-580, 25 Cal. Rptr. 556, 375 P.2d 436* ; *Kustom Kraft Homes v. Leivenstein (1971) 14 Cal. App. 3d 805, 810-811, 92 Cal. Rptr. 650* ; *Smith v. Campbell & Facciolla, Inc. (1962) 202 Cal. App. 2d 134, 137, 20 Cal. Rptr. 606*

When arbitration agreement is self-executing, court order to arbitrate under *Code Civ. Proc. § 1281.2* is unnecessary. National Marble Co. v. Bricklayers & Allied *Craftsmen (1986) 184 Cal. App. 3d 1057, 1062-1063, 229 Cal. Rptr. 653*

Arbitration agreement is self-executing if it provides for arbitration under rules incorporated or set forth in it. *National Marble Co. v. Bricklayers & Allied Craftsmen (1986) 184 Cal. App. 3d 1057, 1064, 229 Cal. Rptr. 653*

When arbitration proceeds under self-executing agreement, objecting party is required to participate in arbitration and to raise its objections by petition to vacate award under *Code Civ. Proc. § 1286.2* or by opposing petition to confirm award. *National Marble Co. v. Bricklayers & Allied Craftsmen (1986) 184 Cal. App. 3d 1057, 1063, 229 Cal. Rptr. 653*

When arbitration agreement provided that arbitration properly demanded by either disputant may proceed in absence of party who refuses to appear, agreement is self-executing, thereby obviating need to resort to statutory remedy to compel arbitration, pursuant to *Code Civ. Proc. § 1281.2*. *King v. Larsen Realty, Inc. (1981) 121 Cal. App. 3d 349, 354-356, 175 Cal. Rptr. 226*

When agreement to arbitrate is self-executing, arbitrator does not exceed powers in proceeding in which one party objects to proceedings and does not participate. *Northern Cal. Dist. Council of Hod Carriers v. Pennsylvania Pipeline, Inc. (1980) 103 Cal. App. 3d 163, 172-173, 162 Cal. Rptr. 851* (employer was not deprived of due process by ex parte arbitration proceeding conducted pursuant to master agreement between union and association of which employer was member at time dispute arose)

Arbitration clause incorporating entire scheme for arbitration established by rules of American Arbitration Association is comprehensive enough to be self-executing. *Kustom Kraft Homes v. Leivenstein (1971) 14 Cal. App. 3d 805, 811, 92 Cal. Rptr. 650*

Agreements to arbitrate are generally not self-executing. *Sauter v. Superior Court (1969) 2 Cal. App. 3d 25, 29, 82 Cal. Rptr. 395*

[4] Parties

[a] Parties Bound

When, by clerical error, contract named "Automatic Rain" as a party, but president of that company, at time of signing contract, objected and pointed out that contract was to have been in name of "Hayes Leasing" and other party agreed and sent corrected copy of contract naming only "Hayes Leasing," "Automatic Rain" was not bound by arbitration clause because it was not bound by contract at all; third party beneficiary theory could not be raised for first time on appeal, and at any rate there was no evidence that "Automatic Rain" was third party beneficiary. *Hayes Children Leasing Co. v. NCR Corp. (1995) 37 Cal. App. 4th 775, 789-790, 43 Cal. Rptr. 2d 650*

[b] Enforcement by or Against Person Not Party to Arbitration Agreement

Plan, but not plan participant who brought action on behalf of plan, could be compelled to arbitrate under agreement between plan manager and stock brokerage firm. Participant was not signatory of agreement and did not "knowingly exploit the agreements containing the arbitration clause." Thus, there was no basis for equitable estoppel. *Comer v. Micor, Inc. (9th Cir. 2006) 436 F.3d 1098, 1102*

Right to compel arbitration is contractual right; entity that is neither party nor agent for nor beneficiary of contract is without standing to compel arbitration. *Britton v. Co-op Banking Group (9th Cir. 1993) 4 F.3d 742, 744*

Doctors suing a medical group and a hospital for discrimination could not be compelled to arbitrate for having received the benefit of an agreement providing for arbitration of claims between the medical group and the hospital, and were not agents of the hospital for purposes of compelling them to arbitrate, because they were not agents of the corporate defendant or alleged to be parties to the agreement, and had not sought the benefit of the arbitration clause in the contract. *Suh v. Superior Court (2010) 181 Cal. App. 4th 1504, 1514, 105 Cal. Rptr. 3d 585*

Arbitration provision of student loan agreement did not apply to claims against school which were unrelated to terms of loan and sought no recovery from lender. Lender was not third party beneficiary of students' contracts with school nor was lender akin to introducing broker. *Smith v. Microskills San Diego, L.P. (2007) 153 Cal. App. 4th 892, 894, 897-900, 63 Cal. Rptr. 3d 608*

Neither "loan out" company nor decedent's son was third party beneficiary of contracts between actor and talent agency; nor was there agency relationship or any other legal principle applicable to allow agency to compel them to arbitrate claims for commissions on profit participations paid to them after actor's death. *Matthau v. Superior Court*

(William Morris Agency) (2007) 151 Cal. App. 4th 593, 598-600, 602-604, 60 Cal. Rptr. 3d 93

Party to subcontract, which did not have arbitration clause, was forced to arbitrate claims against nonsignatory to subcontract that was party to primary contract (which had arbitration clause), under doctrine of equitable estoppel because claims based on subcontract were based on and intertwined with primary contract. *Turtle Ridge Media Group, Inc. v. Pacific Bell Directory (2006) 140 Cal. App. 4th 828, 833-836, 44 Cal. Rptr. 3d 817*

Daughter who signed mother's agreement with residential health care facility was financially responsible party, but not as mother's agent; she could not be compelled to arbitrate claims against facility for mother's personal injuries or wrongful death. *Goliger v. AMS Properties, Inc. (2004) 123 Cal. App. 4th 374, 376-378, 19 Cal. Rptr. 3d 819*

Corporate officer whose only connection with arbitration agreement is to sign it as corporate officer on behalf of corporate party to agreement cannot be compelled to arbitrate under that agreement any claim he or she may have individually against other party to arbitration agreement. *Benasra v. Marciano (2001) 92 Cal. App. 4th 987, 990, 112 Cal. Rptr. 2d 358*

When introducing broker and clearing broker are completely independent entities and customer agreement between client and clearing broker does not manifest intent to extend arbitration clause to introducing broker, nonsignatory introducing broker cannot enforce arbitration clause against client. *Arista Films, Inc. v. Gilford Securities, Inc. (1996) 43 Cal. App. 4th 495, 500-503, 51 Cal. Rptr. 2d 35*

Arbitration clause in construction contract between general contractor and property owner as binding on subcontractors when subcontracts incorporate by reference terms of that contract. *Slaught v. Bencomo Roofing Co. (1994) 25 Cal. App. 4th 744, 748-749, 30 Cal. Rptr. 2d 618*

Surety that issued construction performance bond compelled to arbitrate liability under bond because bond incorporated construction contract and made it part of bond and construction contract contained arbitration clause. *Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co. (1992) 6 Cal. App. 4th 1266, 1272-1273, 8 Cal. Rptr. 2d 587*

Privity of estate as allowing sublessee to compel lessor to arbitrate under lease with arbitration clause even though sublessee did not expressly agree to be bound by lease. *Melchor Investment Co. v. Rolm Systems (1992) 3 Cal. App. 4th 587, 592-593, 4 Cal. Rptr. 2d 343* ; *Kelly v. Tri-Cities Broadcasting, Inc. (1983) 147 Cal. App. 3d 666, 676-679, 195 Cal. Rptr. 303* (lessor able to compel nonassuming assignee to arbitrate under lease with arbitration clause)

Under language of agreement, primary broker was third party beneficiary of agreement between investor and "clearing broker" and under terms of that contract was entitled to enforce its arbitration provision in litigation between it and investor. *Macaulay v. Norlander (1992) 12 Cal. App. 4th 1, 6-8, 15 Cal. Rptr. 2d 204*

In action by former employee of member-firm of New York Stock Exchange against other employees, defendants had standing to enforce arbitration clause in agreement signed by plaintiff, even though defendants were not parties to arbitration agreement, because, by plaintiff's own allegations, defendants were at all times acting on behalf of member-firm in course and scope of their employment. *Thomas v. Perry (1988) 200 Cal. App. 3d 510, 516, 246 Cal. Rptr. 156*

Successor of nonsignatory to contract containing arbitration provision is not able to require signatory to arbitrate; hence, trial court properly denied defendant's petition to compel arbitration in action by investor against introducing broker whose employee allegedly defrauded her when plaintiff had signed agreement to arbitrate only with clearing broker, defendant was not signatory to that agreement, and there was no evidence that agency or third-party beneficiary relationship existed between defendant, as introducing broker, and clearing broker. *Van Luven v. Rooney Pace, Inc.*

(1987) 195 Cal. App. 3d 1201, 1202, 1205-1208, 241 Cal. Rptr. 248

Physician who was not signatory to hospital's prepaid medical health services plan was bound by contractual agreement between hospital and enrollees and, thus, compelled to arbitrate medical malpractice claim because physician was third-party beneficiary of contractual provision requiring arbitration of enrollees' claims and was employee of party to contract. *Harris v. Superior Court (1986) 188 Cal. App. 3d 475, 477-479, 233 Cal. Rptr. 186*

Party who did not sign agreement containing arbitration clause is able to compel arbitration especially in view of allegation that all defendants were agents of all other defendants. *Izzi v. Mesquite Country Club (1986) 186 Cal. App. 3d 1309, 1319, 231 Cal. Rptr. 315*

Minor's claim for prenatal injuries against hospital and medical group is subject to arbitration under clause in group health plan agreement providing for arbitration of all claims arising from rendition of services under agreement although minor was not member of health plan until time of birth. *Wilson v. Kaiser Foundation Hospitals (1983) 141 Cal. App. 3d 891, 896-899, 190 Cal. Rptr. 649*

In arbitration agreement between hospital and expectant mother that named mother but made no reference to expected child, court properly refused to compel arbitration in dispute over alleged wrongful death of child since parties did not agree to arbitrate that particular dispute. *Weeks v. Crow (1980) 113 Cal. App. 3d 350, 352-353, 169 Cal. Rptr. 830*

Federal employees are bound by health service contract containing arbitration provision that was negotiated by hospital and civil service commission when commission was authorized to contract for group health benefit plans for federal employees, petitioners selected plan from several available plans, and arbitration clause was disclosed in brochure available at time petitioners could have elected different plan. *Dinong v. Superior Court (1980) 102 Cal. App. 3d 845, 852, 162 Cal. Rptr. 606*

Arbitration is matter of contract (see *Code Civ. Proc. §§ 1281, 1281.2*); party is not required to submit to arbitration any dispute party has not agreed to submit. *Unimart v. Superior Court (1969) 1 Cal. App. 3d 1039, 1045, 82 Cal. Rptr. 249*

[c] Particular Parties

[i] Cities

City may agree to arbitrate any matter that could be subject of civil suit when not expressly prohibited by city charter from doing so. *Taylor v. Crane (1979) 24 Cal. 3d 442, 451, 155 Cal. Rptr. 695, 595 P.2d 129*

Long recognized that city may agree to arbitrate any matter which could be subject of civil suit. *City of Vista v. Sutro & Co. (1997) 52 Cal. App. 4th 401, 409, 60 Cal. Rptr. 2d 488*

City's express delegation to city treasurer and director of finance of power to contract with regard to investment of city funds implicitly authorized him to contract for arbitration. *City of Vista v. Sutro & Co. (1997) 52 Cal. App. 4th 401, 410, 60 Cal. Rptr. 2d 488*

Grievance concerning arbitrary selection of city employee for random drug testing was not subject to arbitration under collective bargaining agreement, given federal law requiring testing of transportation workers in "safety-sensitive" positions and fact that city's classification of positions was excluded from scope of bargaining by city charter. *United Public Employees v. City and County of San Francisco (1997) 53 Cal. App. 4th 1021, 1024, 1031, 62 Cal. Rptr. 2d 440*

City attorney of general law city has no authority to bind city to arbitration agreement in absence of authorization by ordinance or city council resolution. *Tri-Cor, Inc. v. City of Hawthorne (1970) 8 Cal. App. 3d 134, 139, 87 Cal. Rptr. 311*

[ii] Native American Tribes

Contract, drafted by Tribe for roof repair on commercial property located off reservation, waived sovereign immunity despite claim by Tribe that waiver had to be express; arbitration clause agreed to arbitrate, to governance of Oklahoma law ("law of place where this Project is located"), and to enforcement of arbitral awards in any court having jurisdiction thereof, which was sufficiently explicit waiver. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla (2001) 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623*

Native American Tribe decides extent to which it will waive sovereign immunity and subject itself to suit. Under particular tribal regulation, waiver was not so broad as to allow any suit to compel arbitration of claim against tribe, but only suit by claimant who had properly submitted claim; therefore, court could not compel arbitration of claim, but only arbitration of issue whether claimant had properly complied with procedural requirements for lodging claim. If claimant had complied, arbitration on merits would be required. *Campo Band of Mission Indians v. Superior Court (Bluehawk) (2006) 137 Cal. App. 4th 175, 178, 183-186, 39 Cal. Rptr. 3d 875*

Arbitration clause did not waive tribal immunity for cause of action on contract. *Big Valley Band of Pomo Indians v. Superior Court (McAllister) (2005) 133 Cal. App. 4th 1185, 1187, 1193-1194, 35 Cal. Rptr. 3d 357* (discussing federal authority that any waiver would be limited to petition to compel arbitration or enforce arbitration award, but not deciding that issue)

Tribal immunity was waived by agreement's arbitration clause and choice of law clause; agreement was explicit enough to satisfy tribal ordinance although Tribal Council did not pass separate ordinance or resolution explicitly waiving tribal immunity, it passed resolution approving final version of contract and authorizing Tribal Chairperson to execute agreement. *Smith v. Hopland Band of Pomo Indians (2002) 95 Cal. App. 4th 1, 6, 8-9, 12, 115 Cal. Rptr. 2d 455*

When contract was signed by tribal chairman but tribal council had not approved it and other party knew council approval was required, Native American tribe has not waived tribal immunity, consented to jurisdiction of California courts, or agreed to arbitrate by contract provision. Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council (l985) *170 Cal. App. 3d 489, 495-496, 216 Cal. Rptr. 59*

[d] Class Arbitration

In cases governed by Federal Arbitration Act, arbitrator, not court, must decide whether particular agreement prohibits classwide arbitration. *Green Tree Fin. Corp. v. Bazzle (2003) 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414, 423-424* ; *Garcia v. DIRECTV, Inc. (2004) 115 Cal. App. 4th 297, 297, 300, 9 Cal. Rptr. 3d 190*

Class-arbitration prohibitions in consumer contracts of adhesion (to extent governed by California law), when applied to disputes that involve small amounts of individual damages, and the enforcement of which would effectively cut off only redress, are exculpatory clauses [*Civ. Code § 1668*], which are unconscionable, and unenforceable. *Discover Bank v. Superior Court (Boehr) (2005) 36 Cal. 4th 148, 162-163, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* ; *Keating v. Superior Court (1982) 31 Cal. 3d 584, 609, 612-614, 183 Cal. Rptr. 360, 645 P.2d 1192* (*overruled on other grounds* in *Southland Corp. v. Keating (1984) 465 U.S. 1, 16, 104 S. Ct. 852, 79 L. Ed. 2d 1*); *Klussman v. Cross Country Bank (2005) 134 Cal. App. 4th 1283, 1287, 1290, 1293-1294, 36 Cal. Rptr. 3d 728* ; *Aral v. Earthlink, Inc. (2005) 134 Cal. App. 4th 544, 548-549, 36 Cal. Rptr. 3d 229* ; *Blue Cross of California v. Superior Court (1998) 67 Cal. App. 4th 42, 46, 65-66, 78 Cal. Rptr. 2d 779*

Class-wide arbitration is only acceptable alternative to either not enforcing arbitration agreement and requiring class litigation or allowing arbitration agreement to be used to completely inoculate drafting party against class liability; enforcement of class arbitration prohibition is not required by either Federal Arbitration Act (*9 U.S.C. § 1 et. seq*) or by *Green Tree Financial Corp.v. Bazzle (2003) 539 U.S. 444, 123 S. Ct. 2402, 156 L. Ed. 2d 414* . *Discover Bank v. Superior Court (Boehr) (2005) 36 Cal 4th 148, 172, 30 Cal. Rptr. 3d 76, 113 P.3d 1100*

Class-wide arbitration of disputes arising from adhesion contract that contains arbitration clause is permitted; trial court has authority to order arbitration on consideration of factors relevant to class certification and special characteristics of arbitration. *Keating v. Superior Court (1982) 31 Cal. 3d 584, 611-613, 183 Cal. Rptr. 360, 645 P.2d 1192* (overruled on other grounds, *Southland Corp. v. Keating (1984) 465 U.S. 1, 16-17, 104 S. Ct. 852, 79 L. Ed. 2d 1*)

Class certification issues may be determined before arbitration is ordered; arbitration may be stayed and petition for individual arbitration denied "without prejudice," so class certification issues can be determined first. *Sanders v. Kinko's, Inc. (2002) 99 Cal. App. 4th 1106, 121 Cal. Rptr. 2d 766*

Fact that Federal Arbitration Act does not authorize class arbitration does not prevent California procedure form doing so. *Sanders v. Kinko's, Inc. (2002) 99 Cal. App. 4th 1106, 121 Cal. Rptr. 2d 766* ; *Blue Cross of California v. Superior Court (1998) 67 Cal. App. 4th 42, 46, 65-66, 78 Cal. Rptr. 2d 779*

[e] Determining Who Is Bound by Agreement

Arbitration agreement, and/or rules incorporated therein [such as California Hospital Association-California Medical Association Rules for the Arbitration of Hospital and Medical Fee Disputes (CHA-CMA Rules)] which require joinder in arbitration of any third party who is not party to agreement but is necessary for complete resolution of matter required to be arbitrated under agreement and provide that arbitrator determine whether anyone must be joined in arbitration to insure complete resolution of dispute will be enforced to refer the issue of third party's joinder to arbitrator. *Zakarian v. Bekov (2002) 98 Cal. App. 4th 316, 325-327, 119 Cal. Rptr. 2d 623* (third party wanted to be joined in arbitration agreement also contained signatories' consent to joinder of any person necessary to full resolution of an arbitrable dispute)

Whether person is party to arbitration is matter for court rather than arbitrator to determine. *Lovret v. Seyfarth (1972) 22 Cal. App. 3d 841, 859, 101 Cal. Rptr. 143* ; *Unimart v. Superior Court (1969) 1 Cal. App. 3d 1039, 1045, 82 Cal. Rptr. 249*

Person not bound by arbitration agreement is not subject to court order compelling arbitration. *Unimart v. Superior Court (1969) 1 Cal. App. 3d 1039, 1045, 82 Cal. Rptr. 249*

[5] Demand for Arbitration

If agreement does not specify time, arbitration must be demanded within reasonable time or is waived; what constitutes reasonable time is question of fact. *Sawday v. Vista Irrigation Dist. (1966) 64 Cal. 2d 833, 836, 52 Cal. Rptr. 1, 415 P.2d 816*

Demand for single-arbitrator arbitration under agreement calling for three arbitrators was not valid. *Mansouri v. Superior Court (2010) 181 Cal. App. 4th 633, 642, 104 Cal. Rptr. 3d 824*

Failure to request arbitration within statutory period is fatal to claim. *Arrasmith v. State Farm Ins. Co. (1994) 24 Cal. App. 4th 12, 16-17, 21, 29 Cal. Rptr. 2d 53* (construing *Ins. Code § 11580.2(i)*)

Demurrer is normally improper vehicle for requesting arbitration. *Badgley v. Van Upp (1993) 20 Cal. App. 4th 218, 221, 24 Cal. Rptr. 2d 406*

Defendant is not permitted to assert failure to arbitrate issue as affirmative defense, but must demand arbitration and seek stay of litigation. *Badgley v. Van Upp (1993) 20 Cal. App. 4th 218, 221, 24 Cal. Rptr. 2d 406*

Determining claim barred by limitation period established by industry rules governing parties' dispute would be in excess of arbitrator's powers, but six-year period established by Municipal Securities Rulemaking Board for arbitration of claim for reclamation (rescission) of transaction involving stolen bearer bonds commences on seller's refusal of demand for reclamation, not on date of theft, so claim was timely filed and confirmation of award was proper. *Citibank v. Crowell, Weedon& Co. (1992) 4 Cal. App. 4th 844, 848-850, 5 Cal. Rptr. 2d 906*

[6] Compelling Arbitration

[a] Right to Arbitration If Agreement Exists

Court is required to compel arbitration of entire controversy when valid agreement to arbitrate exists and right to arbitrate has neither been waived nor is subject to revocation. *Orpustan v. State Farm Mut. Auto. Ins. Co. (1972) 7 Cal. 3d 988, 991-992, 103 Cal. Rptr. 919, 500 P.2d 1119* (construing uninsured motorist clause mandated by *Ins. Code § 11580.2*)

Function of court in deciding whether dispute is subject to arbitration is confined to ascertaining whether party seeking arbitration is making claim that, on its face, is governed by arbitration contract. Charles J. Rounds Co. v. Joint Council of Teamsters No. 42 *(1971) 4 Cal. 3d 888, 892, 95 Cal. Rptr. 53, 484 P.2d 1397* ; *East San Bernardino County Water Dist. v. City of San Bernardino (1973) 33 Cal. App. 3d 942, 952, 109 Cal. Rptr. 510* ; *Northcutt Lumber Co. v. Goldeen's Peninsula Inc. (1973) 30 Cal. App. 3d 440, 443, 106 Cal. Rptr. 353*

If a class action settlement contains a clause calling for arbitration of claims, the validity of the arbitration clause will rest not only on principles applicable to arbitration clauses generally, but on the standards of fairness applicable to court approval of the class action settlement itself. *Cellphone Termination Fee Cases (2009) 180 Cal. App. 4th 1110, 1123-1125, 104 Cal. Rptr. 3d 275*

Petition to compel arbitration of dispute between members of realtors' association was properly denied when arbitration panel of realtors' association refused, in accordance with association's bylaws, to arbitrate because dispute was too legally complex. *Berke v. TRI Realtors (1989) 208 Cal. App. 3d 463, 467-469, 257 Cal. Rptr. 738*

Action to compel arbitration as, in essence, action to compel specific performance of contractual agreement to arbitrate. *Harris v. Superior Court (1986) 188 Cal. App. 3d 475, 478, 233 Cal. Rptr. 186* ; *Los Angeles Police Protective League v. City of Los Angeles (1985) 163 Cal. App. 3d 1141, 1146 n.3, 209 Cal. Rptr. 890*

Demurrer to petition to compel arbitration is improperly sustained when petitioner is entitled to arbitration hearing under city grievance procedure. *Santos v. City of Brawley (1984) 162 Cal. App. 3d 203, 207, 208 Cal. Rptr. 297*

Order compelling arbitration is improper under *Code Civ. Proc. § 1281.2* if court fails to determine issue of revocability of contract when properly raised. *Bianco v. Superior Court (1968) 265 Cal. App. 2d 126, 129-130, 71 Cal. Rptr. 322*

Refusal by superior court to order arbitration in proceedings under *Code Civ. Proc. § 1281.2* is reversible error if such

court determines that agreement to arbitrate controversy exists. *Morris v. Zukerman (1967) 257 Cal. App. 2d 91, 97, 64 Cal. Rptr. 714*

[b] Procedure for Compelling Arbitration

No consent rule should apply, whereby the union must obtain the consent of retirees before compelling arbitration under the Labor Management Relations Act, *29 U.S.C. § 185* of their claims concerning employer's cancellation of certain medical benefits for retirees. *IBEW, AFL-CIO Local 1245 v. Citizens Telecoms. Co. (9th Cir. 2008) 549 F.3d 781, 788*

Question of right to arbitration to be asserted in pending judicial action on arbitrable matter either by request for order to compel arbitration under *Code Civ. Proc. § 1281.2* or by plea in abatement alleging that action is prematurely brought. *Northcutt Lumber Co. v. Goldeen's Peninsula, Inc. (1973) 30 Cal. App. 3d 440, 444, 106 Cal. Rptr. 353*

Demurrer to complaint is improper method for asserting right to arbitration. *Northcutt Lumber Co. v. Goldeen's Peninsula, Inc. (1973) 30 Cal. App. 3d 440, 445, 106 Cal. Rptr. 353* (demurrer treated as request for arbitration); *Kustom Kraft Homes v. Leivenstein (1971) 14 Cal. App. 3d 805, 811, 92 Cal. Rptr. 650* (demurrer treated as request for arbitration)

[c] Stay of Court Proceedings

Application for stay of action to enforce mechanic's lien pending arbitration under *Code Civ. Proc. § 1281.5* is request only and does not create stay, which can only be ordered by court. *Kaneko Ford Design v. Citipark, Inc. (1988) 202 Cal. App. 3d 1220, 1226-1227, 249 Cal. Rptr. 544*

Institution of administrative mandate proceedings does not preclude relief under subsequently filed petition to compel arbitration, since any party to mandate proceedings is entitled under *Code Civ. Proc. § 1281.4* to stay of proceedings until arbitration is had in accordance with order. *Los Angeles Police Protective League v. City of Los Angeles (1985) 163 Cal. App. 3d 1141, 1149, 209 Cal. Rptr. 890*

Granting of demurrer and staying of proceedings pending arbitration confers jurisdiction on arbitrator. *Kustom Kraft Homes v. Leivenstein (1971) 14 Cal. App. 3d 805, 811, 92 Cal. Rptr. 650*

[d] Attorney's Fees for Compelling Arbitration

Lower court rejection of award of attorney's fees to prevailing party in an action to compel arbitration under a contract providing that if either party becomes involved in litigation arising out of the contract, the court in such litigation, or in a separate suit, must award reasonable costs and expenses, including attorney's fees, to the party justly entitled thereto, was reversed with orders to award fees for trial and on appeal. *Christensen v. Dewor Developments (1983) 33 Cal. 3d 778, 786-787, 191 Cal. Rptr. 8, 661 P.2d 1088*

Party opposing petition to compel arbitration was the prevailing party as a matter of law because it defeated the only contract claim before the trial court in the proceeding. *Otay River Constructors v. San Diego Expressway (2008) 158 Cal. App. 4th 796, 807, 809, 70 Cal. Rptr. 3d 434*

[7] Civil Action on Arbitrable Dispute

[a] Arbitration Is Condition Precedent

Arbitration or unsuccessful attempt to secure arbitration is condition precedent to right to maintain action on arbitrable dispute. Charles J. Rounds Co. v. Joint Council of Teamsters No. 42 *(1971) 4 Cal. 3d 888, 894, 95 Cal. Rptr. 53, 484 P.2d 1397*

Elections available to defendant in action on arbitrable controversy. Charles J. Rounds Co. v. Joint Council of Teamsters No. 41 *(1971) 4 Cal. 3d 888, 899, 95 Cal. Rptr. 53, 484 P.2d 1397* (affirming dismissal)

Defendant in dispute that defendant contends is subject to arbitration is permitted to elect to demur or move for summary judgment on ground that plaintiff failed to exhaust arbitration remedies or to move for stay of proceedings pending arbitration if defendant also moves to compel arbitration. *Hayworth v. City of Oakland (1982) 129 Cal. App. 3d 723, 729, 181 Cal. Rptr. 214*

[b] Relationship to Actions Involving Third Party Not Subject to Arbitration

Fact that arbitration was pending between claimants of fund did not deprive court of jurisdiction over interpleader action, which it should not have dismissed. Plaintiffs, partnership and L.L.C. which were not parties to arbitration, were entitled to discharge; court had discretion to stay remainder of interpleader until outcome of arbitration between claimants/partners. *Dial 800 v. Fesbinder (2004) 118 Cal. App. 4th 32, 12 Cal. Rptr. 3d 711*

In action in which defendant sought arbitration of controversy in accord with arbitration provision of dealership agreement between parties, mere inclusion of unnamed third-party "Does" in complaint is insufficient to deny enforcement of arbitration agreement when there was no showing that third-party claims would create possibility of conflicting rulings on common issue of law or fact (see *Code Civ. Proc. § 1281.2(c)*). *Bos Material Handling, Inc. v. Crown Controls Corp. (1982) 137 Cal. App. 3d 99, 112, 186 Cal. Rptr. 740*

[8] Stay of Arbitration

When debtor seeks to stay arbitration proceedings to which it is not party between nonparties, claiming outcome may effect bankruptcy estate, under *11 U.S.C. § 105(a)*, court must balance hardship to nonparties with likelihood of debtor's success in reorganization, and any public interest concerns if relevant; it is not enough that award could conceivably have any effect on administration of bankruptcy estate; fact that debtor might expend money to protect privilege in arbitration proceeding was not by itself sufficient to establish irreparable harm; debtor must show that expenses will be substantial enough to interfere with its reorganization or harm creditors. *In re Excel Innovations, Inc. (9th Cir 2007) 502 F. 3d 1086, 1093-1100*

Arbitration of cross complaint against agent of party who opposed arbitration (claiming fraud in inception) is stayed pending court determination whether agreement existed or was vitiated by fraud. *Rice v. Dean Witter Reynolds, Inc. (1991) 235 Cal. App. 3d 1016, 1029-1030, 1 Cal. Rptr. 2d 265*

Institution of administrative mandate proceedings does not preclude relief under subsequently filed petition to compel arbitration, since any party to mandate proceedings is entitled under *Code Civ. Proc. § 1281.4* to stay of proceedings until arbitration is had in accordance with order. *Los Angeles Police Protective League v. City of Los Angeles (1985) 163 Cal. App. 3d 1141, 1149, 209 Cal. Rptr. 890*

[9] Waiver of Arbitration In General

Relevant factors in establishing waiver of arbitration includes whether or not party seeking arbitration took steps

inconsistent with intent to invoke arbitration, unreasonably delayed in seeking arbitration, or acted in bad faith or with willful misconduct; mere participation in litigation does not constitute waiver. *Keating v. Superior Court (1982) 31 Cal. 3d 584, 605, 183 Cal. Rptr. 360, 645 P.2d 1192* (overruled on other grounds, *Southland Corp. v. Keating (1984) 465 U.S. 1, 16-17, 104 S. Ct. 852, 79 L. Ed. 2d 1*)

Waiver of contractual right to arbitrate is ordinarily a question of fact. *Doers v. Golden Gate Bridge etc. Dist. (1979) 23 Cal. 3d 180, 185, 151 Cal. Rptr. 837, 588 P.2d 1261* ; *Sawday v. Vista Irrigation Dist. (1966) 64 Cal. 2d 833, 836, 52 Cal. Rptr. 1, 415 P.2d 816* ; *Weisman v. Johnson (1982) 133 Cal. App. 3d 289, 293, 183 Cal. Rptr. 792* ; *Daugherty Co. v. Kimberly-Clark Corp. (1971) 14 Cal. App. 3d 151, 158, 92 Cal. Rptr. 120* ; *Nathan v. French American Bilingual School (1969) 2 Cal. App. 3d 279, 282-283, 82 Cal. Rptr. 605* ; *Martinez Typographical Union v. Silversun Corp. (1967) 256 Cal. App. 2d 255, 260, 63 Cal. Rptr. 760* ; *Palm Springs Homes, Inc. v. Western Desert, Inc. (1963) 215 Cal. App. 2d 270, 276, 30 Cal. Rptr. 34* ; *Grunwald-Marx, Inc. v. Los Angeles Joint Board, Amalgamated Clothing Workers (1961) 192 Cal. App. 2d 268, 277, 13 Cal. Rptr. 446* ; *Tas-T-Nut Co. v. Continental Nut Co. (1954) 125 Cal. App. 2d 351, 355, 270 P.2d 43* ; *compare Roberts v. Fortune Homes, Inc. (1966) 240 Cal. App. 2d 238, 241, 49 Cal. Rptr. 429* (holding trial court abused its discretion by refusing to compel arbitration when waiver was not established as matter of law)

If trial court finds no waiver or makes no finding regarding waiver even though record establishes waiver as matter of law, appellate court properly reverses trial court's finding or holding that there is waiver as matter of law if issue was raised but no finding was made. *Mayflower Ins. Co. v. Pellegrino (1989) 212 Cal. App. 3d 1326, 1335, 261 Cal. Rptr. 224*

Arbitration clause is waivable due to prejudice; when defendant moved for arbitration shortly before fourth continued trial date after six years of very active litigation, prejudice is derived from fact that opposing party would be required to bear costs of trial preparation, which arbitration is designed to avoid, and from disclosure of defenses and strategies. *Zimmerman v. Drexel Burnham Lambert, Inc. (1988) 205 Cal. App. 3d 153, 157-160, 252 Cal. Rptr. 115*

To find waiver, court is required to be satisfied not only that party seeking arbitration acted inconsistently with right to arbitrate but also that objecting party was prejudiced by action. *Thorup v. Dean Witter Reynolds, Inc. (1986) 180 Cal. App. 3d 228, 235, 225 Cal. Rptr. 521* (applying federal law)

In ruling on petition to compel arbitration, court is required under *Code Civ. Proc. § 1281.2* to decide preliminary question of whether right to arbitration has been waived. *Gustafson v. State Farm Mut. Auto. Ins. Co. (1973) 31 Cal. App. 3d 361, 365, 107 Cal. Rptr. 243* ; *California State Council of Carpenters v. Superior Court (1970) 11 Cal. App. 3d 144, 155-156, 89 Cal. Rptr. 625*

[10] Acts Constituting Waiver of Arbitration

[a] Action Instituted in Bad Faith

Action instituted in bad faith by party to arbitration agreement is waiver of right to arbitrate when prejudice to other party results from suit. *Christensen v. Dewor Developments (1983) 33 Cal. 3d 778, 783-784, 191 Cal. Rptr. 8, 661 P.2d 1088*

Filing of lawsuit on arbitrable issue to ascertain other party's defenses constitutes bad faith for purposes of determining waiver of right to arbitrate. *Christensen v. Dewor Developments (1983) 33 Cal. 3d 778, 783-784, 191 Cal. Rptr. 8, 661 P.2d 1088*

[b] Acts Inconsistent With Arbitration Agreement

Defendant who without mentioning arbitration, filed a demurrer and served objections to discovery requests, and a few weeks after filing a motion to compel arbitration, served and filed a motion in superior court to compel the other party's deposition, asserting in that motion it intended to file a motion for summary judgment immediately upon gathering the story underlying plaintiff's claims, did not act inconsistent with arbitration. *Roman v. Superior Court (2009) 172 Cal. App. 4th 1462, 1478-1479, 92 Cal. Rptr. 3d 153*

Waiver of right to arbitrate by acts inconsistent with agreement to submit to arbitration. *Palm Springs Homes, Inc. v. Western Desert, Inc. (1963) 215 Cal. App. 2d 270, 276-277, 30 Cal. Rptr. 34*

[c] Delaying Tactics and Bad Faith

Waiver of right to arbitrate by delaying tactics and bad faith. *Weisman v. Johnson (1982) 133 Cal. App. 3d 289, 293-296, 183 Cal. Rptr. 792*

[d] Failure to Pursue Available Remedies

Plaintiff's failure to pursue available remedies is waiver of right to arbitrate, thereby allowing defendant to demur on grounds that plaintiff failed to exhaust arbitration remedies; acceptance of arbitrator's failure to sever arbitration hearings is neglect. *Cusenza v. Construction Design & Consulting, Inc. (1984) 157 Cal. App. 3d 201, 203-204, 203 Cal. Rptr. 605*

[e] Failure to Proceed With Arbitration in Timely Manner

District court properly refused to compel arbitration on petition of former employer that was in material breach of arbitration agreement because of its refusal to participate in arbitration when previously demanded by former employee. Whether considered breach or wavier, one who is in breach of agreement to arbitrate cannot enforce it. *Brown v. Dillard's, Inc. (9th Cir, 2005) 430 F.3d 1004, 1010-1012*

Failure by party to proceed to arbitrate in manner and at time provided in arbitration provision is waiver of right to insist on arbitration as defense to action on contract; party's statment that question be resolved by court is conduct indicating waiver of its right to arbitration on that point. National Farm Workers Service Center, Inc. v. *M. Caratan, Inc. (1983) 146 Cal. App. 3d 796, 803-804, 194 Cal. Rptr. 617*

[f] Failure to Raise Issue Properly

Waiver of right to arbitration by suggestion that question be resolved by court ruling and by failing to move court either for order staying proceeding pending arbitration pursuant to *Code Civ. Proc. § 1281.4* or for order compelling arbitration pursuant to *Code Civ. Proc. § 1281.2*. *National Farm Workers Service Center, Inc. v. M. Caratan, Inc. (1983) 146 Cal. App. 3d 796, 802-803, 804, 194 Cal. Rptr. 617*

[g] Insurer's Failure to Advise Insured of Arbitration

Insurer waives right to arbitration by failing to advise insured of availability of, and procedure for, initiating arbitration. *Davis v. Blue Cross of Northern California (1979) 25 Cal. 3d 418, 431, 158 Cal. Rptr. 828, 600 P.2d 1060*

[h] Litigating Merits of Dispute

Right to arbitration is waived by parties' litigating merits of arbitrable dispute. *Doers v. Golden Gate Bridge etc. Dist. (1979) 23 Cal. 3d 180, 185-189, 151 Cal. Rptr. 837, 588 P.2d 1261* ; *Hayworth v. City of Oakland (1982) 129 Cal. App. 3d 723, 730, 181 Cal. Rptr. 214*

[i] Making Final Payment Under Building Contract

Property owners waives right to arbitrate against builder by making final payment, although defect in building was known to them, when final payment constituted waiver of right to arbitrate under terms of construction contract. *Renown, Inc. v. Hensel Phelps Construction Co. (1984) 154 Cal. App. 3d 413, 417-418, 201 Cal. Rptr. 242* (questioned on other grounds in *Geertz v. Ausonio (1992) 4 Cal. App. 4th 1363, 1368 n.3, 6 Cal. Rptr. 2d 318*)

[j] Participation in Litigation

In action for breach of contract and breach of warranty, defendant waives right to compel arbitration when participation in initial litigation proceedings has worked substantial prejudice to plaintiff. *Lounge-A-Round v. GCM Mills, Inc. (1980) 109 Cal. App. 3d 190, 200-202, 166 Cal. Rptr. 920*

Right to arbitration is waived when party, prior to requesting arbitration, participates in litigation by moving case to federal court and by vigorously opposing motion for class certification on merits. *McConnell v. Merrill, Lynch, Pierce, Fenner & Smith, Inc. (1980) 105 Cal. App. 3d 946, 950-952, 164 Cal. Rptr. 751*

[k] Release of Claim

Right to arbitrate claim is waived by release of claim. *Gustafson v. State Farm Mut. Auto. Ins. Co. (1973) 31 Cal. App. 3d 361, 365, 107 Cal. Rptr. 243* ; *Commercial Ins. Co. v. Copeland (1967) 248 Cal. App. 2d 561, 565, 56 Cal. Rptr. 794* (criticized for transferring factual and legal issues regarding scope of release from arbitrator to courts in *Felner v. Meritplan Ins. Co. (1970) 6 Cal. App. 3d 540, 547 n.1, 86 Cal. Rptr. 178*)

[11] Acts Not Constituting Waiver of Arbitration

[a] Attachment

Because attachment is not available in arbitration, unsuccessful attempt to seek attachment in court does not constitute waiver of right to arbitrate. *Outdoor Services, Inc. v. Pabagold, Inc. (1986) 185 Cal. App. 3d 676, 684-685, 230 Cal. Rptr. 73*

[b] Demands for Arbitration Ignored

Arbitration clause is not valid objection to party's right to sue on arbitrable dispute when such party's prior demands for arbitration were ignored by defendant. *Grunwald-Marx, Inc. v. Los Angeles Joint Board, Amalgamated Clothing Workers (1961) 192 Cal. App. 2d 268, 280, 13 Cal. Rptr. 446*

[c] Discovery

Simple notices of depositions do not waive right to compel arbitration when letter accompanying notices contained

express reservation of right to compel arbitration. *Hall v. Nomura Securities International (1990) 219 Cal. App. 3d 43, 51, 268 Cal. Rptr. 45*

Seeking and obtaining protective order to reschedule deposition for convenience of attorney and deponent do not constitute waiver of right to compel arbitration. *Hall v. Nomura Securities International (1990) 219 Cal. App. 3d 43, 51, 268 Cal. Rptr. 45*

[d] Dismissal From Employment

When contract provided for arbitration of controversy arising from termination of employment, employer as not waiving right to arbitrate actual controversy over termination simply because employer fired opposing party before requesting arbitration; mere fact of contractual breach does not impair continuing efficacy of arbitration provision; rather, arbitration will resolve controversy created by breach. *Thorup v. Dean Witter Reynolds, Inc. (1986) 180 Cal. App. 3d 228, 237, 225 Cal. Rptr. 521* (applying federal law)

[e] Filing Application for Stay of Action to Enforce Mechanic's Lien

Filing of application for stay of action to enforce mechanic's lien pending arbitration under *Code Civ. Proc. § 1281.5* has sole effect of precluding finding of waiver of right to arbitrate because of act of filing complaint; such filing, however, does not preclude finding of waiver based on other facts. *Kaneko Ford Design v. Citipark, Inc. (1988) 202 Cal. App. 3d 1220, 1227-1228, 249 Cal. Rptr. 544*

[f] Filing Complaint or Securing Judgment Otherwise Than on Merits

Merely commencing lawsuit for purpose of litigating merits, or obtaining judgment in such lawsuit otherwise than on merits, does not constitute waiver. *Doers v. Golden Gate Bridge, Highway & Transp. Dist. (1979) 23 Cal. 3d 180, 183-189, 151 Cal. Rptr. 837* P.2d 1261; *Hayworth v. City of Oakland (1982) 129 Cal. App. 3d 723, 730, 181 Cal. Rptr. 214*

[g] Filing Cross Complaint

Filing of cross complaint against defendant in action initiated by third party does not constitute waiver of right to arbitrate because such protective measure is not inconsistent with intent to arbitrate. *Outdoor Services, Inc. v. Pabagold, Inc. (1986) 185 Cal. App. 3d 676, 684-685, 230 Cal. Rptr. 73*

[h] Participation in Initial Court Proceedings

Participation in certain initial court proceedings does not constitute waiver if defendant promptly petitions for stay of court proceedings and to compel arbitration. *Pacific Inv. Co. v. Townsend (1976) 58 Cal. App. 3d 1, 11-12, 129 Cal. Rptr. 489*

[i] Raising Arbitration Issue as Affirmative Defense

Raising arbitration issue is affirmative defense in litigation brought by opposing party does not constitute evidence of intent to submit dispute to courts, thus waiver is not established. *Thorup v. Dean Witter Reynolds, Inc. (1986) 180 Cal. App. 3d 228, 235, 225 Cal. Rptr. 521* (applying federal law)

[j] Seeking Protective Relief

Party to arbitration agreement does not waive right to arbitration by suing for injunction to restrain breach of contract, when suit for injunction was for protective relief not available in, and hence not inconsistent with, arbitration proceedings. *Schwartz v. Leibel (1967) 249 Cal. App. 2d 761, 763-764, 57 Cal. Rptr. 831* , disapproved on another ground in *Doers v. Golden Gate Bridge etc. Dist. (1979) 23 Cal. 3d 180, 188, 151 Cal. Rptr. 837, 588 P.2d 1261*

[12] Estoppel

Health plan member who represented self as plan member in good standing at time of exploratory surgery despite request six months earlier to be enrolled in different plan, is estopped to deny being bound by plan's arbitration provision. *Avina v. Cigna Healthplans of California (1989) 211 Cal. App. 3d 1, 3, 259 Cal. Rptr. 105*

Estoppel to assert that allegations of petition to compel arbitration are deemed admitted by failure to serve and file response [*Code Civ. Proc. § 1290*], when defenses to petition were same as those raised on two prior occasions contesting petitioner's attempts to seek arbitration and it would have been useless redundancy to recite such defenses a third time. *Player v. Geo. M. Brewster & Son, Inc. (1971) 18 Cal. App. 3d 526, 532, 96 Cal. Rptr. 149* (rule of estoppel applied in preliminary hearing)

Estoppel to deny standing in arbitration proceedings when party estopped demurred to other party's complaint on basis that contract sued on required arbitration. *Kustom Kraft Homes v. Leivenstein (1971) 14 Cal. App. 3d 805, 809-810, 92 Cal. Rptr. 650*

[13] Federal Arbitration Act

[a] In General

Under the Federal Arbitration Act, when challenge is to validity of contract as a whole, not just arbitration clause, issue of illegality of that contract is to be determined by arbitrator. *Buckeye Check Cashing, Inc. v. Cardegna (2006) 546 U.S. 440, 446, 126 S. Ct. 1204, 163 L. Ed. 2d 1038* ; *see 9 U.S.C. § 2*

Even claims arising under statute designed to further important social policies may be arbitrated because so long as prospective litigant effectively may vindicate his or her statutory cause of action in arbitral forum, statute serves its functions; party seeking to invalidate arbitration clause has burden of proving arbitration costs would be so great as to prohibit vindication of statutory rights. *Green Tree Financial Corp. v. Randolph (2000) 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373, 382-383*

Federal Arbitration Act (Title 9 of the United States Code) requires court to compel arbitration of pendent arbitrable state claims when one party files motion to compel, even when result would be possibly inefficient maintenance of separate proceedings in different forums. *Dean Witter Reynolds v. Byrd (1985) 470 U.S. 213, 217, 105 S. Ct. 1238, 84 L. Ed. 2d 158*

Under Federal Arbitration Act, res judicata effect of prior arbitration award is matter of defense necessarily intertwined with merits and thus to be determined by arbitrator, not by court that determines to compel arbitration. *Chiron Corp. v. Ortho Diagnostic Systems, Inc. (9th Cir. 2000) 207 F. 3d 1126, 1128, 1132-1134*

Federal Arbitration Act does not provide federal question jurisdiction on its own; federal district court must have some basis for jurisdiction over underlying dispute, such as diversity of citizenship, before federal district court can compel

arbitration. *Blue Cross of California v. Anesthesia Care Assoc. (9th Cir. 1999) 187 F.3d 1045, 1050* ; *but see* n.5

Under Federal Arbitration Act, one who is fraudulently induced to enter into agreement to arbtirate is entitled to adjudication regarding fraud in inducement before being compelled to arbitrate in accordance with agreement if fraud in inducement goes to abritration clause rather than to contract in general. *Cohen v. Wedbush, Noble, Cooke, Inc. (9th Cir. 1988) 841 F.2d 282, 286-287*

Authority of federal court under United States Arbitration Act (*9 U.S.C. § 4*), is narrowly circumscribed; thus, court can only determine whether written arbitration agreement exists, and if it does, enforce it in accordance with its terms. *Weyerhaeuser Co. v. Western Seas Shipping Co. (9th Cir. 1984) 743 F.2d 635, 637*

Federal Arbitration Act controls actions by employees against securities brokerage firms. *Heily v. Superior Court (1988) 202 Cal. App. 3d 255, 258, 248 Cal. Rptr. 673*

9 U.S.C. § 2 effectively creates body of federal substantive law of arbitrability applicable to any arbitration agreement within coverage of Federal Arbitration Act. *Heily v. Superior Court (1988) 202 Cal. App. 3d 255, 258-259, 248 Cal. Rptr. 673*

State law adhesion contract principles is not applicable to determine arbitrability of disputes under Federal Arbitration Act. *Heily v. Superior Court (1988) 202 Cal. App. 3d 255, 262-263, 248 Cal. Rptr. 673*

Although federal law governs construction and scope of agreements to arbitrate contracts covered by Federal Arbitration Act, California law governs whether or not arbitration clause is part of contract. *Chan v. Drexel Burnham Lambert, Inc. (1986) 178 Cal. App. 3d 632, 643-645, 223 Cal. Rptr. 838*

[b] Federal Securities Claims

Claims arising under Securities Act of 1933 [*15 U.S.C. § 77 l* (2)] are arbitrable pursuant to agreement; arbitrability required to promote consistency with claims under Securities and Exchange Act of 1934. *Rodriguez de Quijas v. Shearson/American Express, Inc. (1989) 490 U.S. 477, 481-485, 109 S. Ct. 1917, 104 L. Ed. 2d 526* (overruling *Wilko v. Swan (1953) 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168* , to harmonize with *Shearson/American Express, Inc. v. McMahon (1987) 482 U.S. 220, 231-234, 107 S. Ct. 2332, 96 L. Ed. 2d 185*); *Elliot v. Albright (1989) 209 Cal. App. 3d 1028, 1036-1037, 257 Cal. Rptr. 762* (decided before *Rodriguez*, but reaching same result)

10b-5 fraud claims (*15 U.S.C. § 78j(b)*) under Securities Act of 1934 are arbitrable under Federal Arbitration Act (*9 U.S.C. § 3*) pursuant to agreement and procedures approved and prescribed by Securities and Exchange Commission (SEC), in part because mistrust of arbitration that formed basis of opinion in *Wilko v. Swan (1953) 346 U.S. 427, 432-437, 74 S. Ct. 182, 98 L. Ed. 168* is no longer well founded in view of intervening regulatory developments. *Shearson/American Express, Inc. v. McMahon (1987) 482 U.S. 220, 233-238, 107 S. Ct. 2332, 96 L. Ed. 2d 185* , citing *Scherk v. Alberto Culver Co. (1974) 417 U.S. 506, 520, 94 S. Ct. 2449, 41 L. Ed. 2d 270*

Federal Arbitration Act as requiring court to compel arbitration of arbitrable pending state claims despite possible inefficiencies; stay of arbitration pending determination of federal securities action as not necessary because res judicata or collateral estoppel effect of arbitration on federal securities action is questionable. *Dean Witter Reynolds v. Byrd (1985) 470 U.S. 213, 222-223, 105 S. Ct. 1238, 84 L. Ed. 2d 158*

Arbitration of federal securities claims are not to be compelled under arbitration provision that expressly provided that it did not apply to controversies "for which a remedy may exist ... under certain ... federal securities laws." *Gooding v. Shearson Lehman Bros. Inc. (9th Cir. 1989) 878 F.2d 281, 283-284* (compelling arbitration of state claims and staying

action on pending federal arbitration)

Investors are required to arbitrate 10b-5 fraud claims (*15 U.S.C. § 78j(b)*) under Securities Act of 1934 when agreement between investor and broker clearly provided for arbitration without limitation, but not when agreement specifically reserved right to ligitate any controversy arising under federal securities laws. *Leicht v. Bateman Eichler, Hill Richards, Inc. (9th Cir. 1988) 848 F.2d 130, 131-134*

Investors' claims against securities brokers are arbitrable under Federal Arbitration Act; state concepts of adhesion and unconscionability are preempted by federal standards; agreements to arbitrate in accordance with procedures approved by Securites and Exchange Commisssion are not unconscionable as matter of law. *Cohen v. Wedbush, Noble, Cooke, Inc. (9th Cir. 1988) 841 F.2d 282, 285-286*

In view of confusion created by *Dean Witter Reynolds Inc. v. Byrd (1985) 470 U.S. 213, 215-217, 105 S. Ct. 1238, 84 L. Ed. 2d 158 , above*, and fact that arbitrability of federal securities claims was not clear until *Shearson/American Express, Inc. v. McMahon (1987) 482 U.S. 220, 233-238, 107 S.Ct. 2332, 96 L. Ed. 2d 185 , above*, broker's waiting until two years after commencement of litigation to move to compel arbitration did not waive right to compel arbitration. *Conover v. Dean Witter Reynolds, Inc. (9th Cir. 1988) 837 F.2d 867, 868*

Because 10b-5 claims (*15 U.S.C. § 78j(b)*) under Securities Act of 1934 were not arbitrable until after *Dean Witter Reynolds Inc. v. Byrd (1985) 470 U.S. 213, 215-217, 105 S. Ct. 1238, 84 L. Ed. 2d 158 , above*, failure to seek to compel arbitration until 1986 in case filed in 1983 did not waive right to compel arbitration. *Conover v. Dean Witter Reynolds, Inc. (9th Cir. 1988) 837 F.2d 867, 868*

Broker's submission of customer's claim and its counterclaim (to recover deficit in customer's account) to arbitration waives right to litigate federal securities claims and civil RICO (Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C. § 1961 et seq.*) claims arising from same facts even though arbitration of federal securities claims could not have been compelled at time broker agreed to arbitrate counterclaim. *C.D. Anderson & Co. v. Lemos (9th Cir. 1987) 832 F.2d 1097, 1099-1100*

Investors are required to arbitrate claims arising under §§ 10b-5, 15, and 20(a) of the Securities Act of 1934. *Badart v. Merrill, Lynch, Pierce, Fenner & Smith (9th Cir. 1987) 823 F.2d 333, 333*

[c] Preemption of State Law

State law lodging primary jurisdiction in administrative agency is superseded by Federal Arbitration Act. Thus, *Lab. Code § 1700.44(a)*, which purports to vest exclusive jurisdiction in Labor Commissioner to determine application of Talent Agency Act (TAA: *Lab. Code § 1700 et seq.*) is preempted by the Federal Arbitration Act, and arbitrator should decide legality of any contract arguably regulated by and voidable under *TAA. Preston v. Ferrer (2008) 552 U.S. 346, 128 S. Ct. 978, 169 L. Ed. 2d 917, 923, 927-929* .

As matter of substantive federal law, *9 U.S.C. § 2* preempts state law with respect to severability of arbitration provision from remainder of contract, and unless challenge is to legality of arbitration clause itself, arbitrator, not court determines a challenge to contract's legality. *Preston v. Ferrer (2008) 552 U.S. 346, 128 S. Ct. 978, 169 L. Ed. 2d 917, 923, 925-926* ; *Buckeye Check Cashing, Inc. v. Cardegna (2006) 546 U.S. 440, 446, 126 S. Ct. 1204, 163 L. Ed. 2d 1038*

The Federal Arbitration Act preempts state law that seeks to invalidate arbitration agreements, reaches to the limits of Congress' Commerce Clause power, and applies to actions brought in state court when the transaction involves interstate commerce. *Allied-Bruce Terminix Cos., Inc. v. Dobson (1995) 513 U.S. 265, 115 S. Ct. 834, 843, 130 L. Ed.*

2d 753, 762-763

When contract provides for arbitration in accordance with California law, *Code Civ. Proc. § 1281.2* is not in conflict with policies of FAA and is therefore not preempted by it. *Volt Information Sciences v. Board of Trustees (1989) 489 U.S. 468, 477-479, 109 S. Ct. 1248, 103 L. Ed. 2d 488*

Code Civ. Proc. § 1281.2(c) is not preempted by the FAA: FAA has no procedural provisions applicable in state court, and *Code Civ. Proc. § 1281.2(c)* is not special rule limiting the authority of arbitrators, but an evenhanded law that allows trial court to stay arbitration proceedings or related lawsuit(s) to avoid conflicting rulings on common issue of fact. *Cronus Investments, Inc. v. Concierge Services (2005) 35 Cal. 4th 376, 380, 25 Cal. Rptr. 3d 540, 107 P.3d 217* (disapproving *Energy Group, Inc. v. Liddington (1987) 192 Cal. App. 3d 1520, 238 Cal. Rptr. 202* and *Warren-Guthrie v. Health Net (2000) 84 Cal. App. 4th 804, 101 Cal. Rptr. 2d 260* to the extent their holdings are predicated on the conclusion that section 1281.2(c) limits the authority of arbitrators and conflicts with the FAA)

Federal Arbitration Act applies to all written contracts containing arbitration provisions and involving interstate commerce, and when applicable, preempts California law governing validity of arbitration clause. *Van Luven v. Rooney Pace, Inc. (1987) 195 Cal. App. 3d 1201, 1205, 241 Cal. Rptr. 248*

Federal Arbitration Act does not apply to oral agreements to arbitrate (*9 U.S.C. § 2*). *Van Luven v. Rooney Pace, Inc. (1987) 195 Cal. App. 3d 1201, 1206 n. 1, 241 Cal. Rptr. 248*

Federal Arbitration Act makes state issues in fraud complaint by customer against securities dealer subject to arbitration; California state law limiting enforceability of arbitrable contracts deemed adhesive is inapplicable. *Lewis v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1986) 183 Cal. App. 3d 1097, 1101-1102, 228 Cal. Rptr. 345*

California adhesion contract principles are not applicable when determining enforceability of arbitration clause in contract governed by *Federal Arbitration Act. Lewis v. Prudential-Bache Securities, Inc. (1986) 179 Cal. App. 3d 935, 940-941, 225 Cal. Rptr. 69* ; *Chan v. Drexel Burnham Lambert, Inc. (1986) 178 Cal. App. 3d 632, 638-639, 223 Cal. Rptr. 838* ; *Tonetti v. Shirley (1985) 173 Cal. App. 3d 1144, 1147-1149, 219 Cal. Rptr. 616*

[d] Venue

When one party to contract commenced arbitration in Georgia, and other party (correctly) claimed that arbitration clause on back of invoice was not part of contract, action to enjoin arbitration was proper under *28 U.S.C. § 1391* in Central District of California, where plaintiff maintained its business and where defendant was subject to in personam jurisdiction. *Textile Unlimited, Inc. v. A. BMH Co., Inc. (9th Cir. 2001) 240 F. 3d 781, 786, 789*

[14] Review

[a] Appeal

City was entitled to appeal without first having petitioned to vacate award when issue was not correctness of award but court's jurisdiction to compel arbitration; order compelling arbitration is interlocutory order that may be appealed from judgment confirming arbitration award and right to attack order compelling arbitration is not waived by proceeding to arbitration. *United Firefighters of Los Angeles v. City of Los Angeles (1991) 231 Cal. App. 3d 1576, 1581-1582, 283 Cal. Rptr. 8*

Order compelling arbitration is not appealable under *Code Civ. Proc. § 1294* (appealable orders and judgments in arbitration proceedings). *Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 811 n. 1, 171 Cal. Rptr. 604, 623 P.2d*

165 ; *Argo Constr. Co. v. County of Los Angeles (1969) 271 Cal. App. 2d 54, 57, 76 Cal. Rptr. 361*

Order compelling arbitration is reviewable on appeal from judgment confirming award. *Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 811 n.1, 171 Cal. Rptr. 604, 623 P.2d 165* ; *Lesser Towers, Inc. v. Roscoe-Ajax Constr. Co. (1969) 271 Cal. App. 2d 675, 692, 77 Cal. Rptr. 100* (citing *Code Civ. Proc. §§ 1294, 1294.2*, relating to appealable orders and scope of review in arbitration matters)

Appeal from order compelling arbitration affects entire case; further trial court proceedings are therefore stayed under *Code Civ. Proc. § 916*. *Prudential-Bache Securities, Inc. v. Superior Court (1988) 201 Cal. App. 3d 924, 925, 247 Cal. Rptr. 477*

Code Civ. Proc. § 906 precludes review, on appeal from final judgment, of orders denying motion to compel arbitration that were appealable under *Code Civ. Proc. § 1294(a)*. *Hobbs v. Bateman Eichler, Hill Richards, Inc. (1985) 164 Cal. App. 3d 174, 190-191, 210 Cal. Rptr. 387*

Order denying petition to compel arbitration is appealable under *Code Civ. Proc. § 1294*, whereas order denying motion to compel arbitration is not appealable. *Los Angeles Police Protective League v. City of Los Angeles (1985) 163 Cal. App. 3d 1141, 1144 n. 1, 209 Cal. Rptr. 890* (nevertheless treating appeal from denial of motion to compel arbitration as appeal from petition to compel arbitration, which was filed prior to motion and on which trial court apparently took no action, on ground plaintiff's motion sought same relief as that requested in petition)

Order denying petition to compel arbitration is appealable under *Code Civ. Proc. § 1294(a)*. *Wilson v. Kaiser Foundation Hospitals (1983) 141 Cal. App. 3d 891, 893 n.1, 190 Cal. Rptr. 649* ; *Gustafson v. State Farm Mut. Auto. Ins. Co. (1973) 31 Cal. App. 3d 361, 363, 107 Cal. Rptr. 243*

[b] Review by Extraordinary Writ

Availability of writs of prohibition and mandate to review order compelling arbitration. *Lesser Towers, Inc. v. Roscoe-Ajax Constr. Co. (1969) 271 Cal. App. 2d 675, 692-693, 77 Cal. Rptr. 100* (dictum); *Cook v. Superior Court (1966) 240 Cal. App. 2d 880, 884, 50 Cal. Rptr. 81* ; *Bertero v. Superior Court (1963) 216 Cal. App. 2d 213, 222, 30 Cal. Rptr. 719* ; *see also* *Weiman v. Superior Court (1959) 51 Cal. 2d 710, 711-715, 336 P.2d 489*

[15] Statutes Held Unconstitutional

Gov. Code § 18670(c)-(e) and memoranda of understanding purportedly authorized thereby as unconstitutional in permitting grievance procedures that bypass review by State Personnel Board and go to grievance/arbitration at agency created by memoranda of understanding. *State Personnel Bd. v. Department of Personnel Admin. (2005) 37 Cal. 4th 512, 526-527, 36 Cal. Rptr. 3d 142, 123 P.3d 169*

Code Civ. Proc. § 1299 et seq. added by Stats. 2000, ch. 906, requiring arbitration of firefighters' and public safety officers' wages when impasse occurs during contract negotiations is unconstitutional grant of authority delegated local jurisdictions by *Cal Const. art. XI, § 1(b)* to compensate their employees. County of Riverside v. *Superior Court (Riverside Sheriff's Association) (2003) 30 Cal. 4th 278, 282, 296, 132 Cal. Rptr. 2d 713, 66 P.3d 718* ; *but see* Stats. 2003, ch. 877 (amending *Code Civ. Proc. §§ 1299.7, 1299.9* to give public entity power to accept or reject arbitrator's decision, thus saving statutory scheme)

Code Civ. Proc. § 1299 et seq. added by Stats. 2003, ch. 877, requiring arbitration of firefighters' and public safety officers' wages when impasse occurs during contract negotiations, but providing for a local governmental veto of the arbitration award, is unconstitutional grant of authority delegated local jurisdictions by *Cal Const. art. XI, § 1(b)* to

compensate their employees and impermissibly delegates to the arbitration panel the power to interfere with county money and to perform municipal functions in violation of *Cal Const. art. XI, § 11(a).* *County of Sonoma v. Superior Court (2009) 173 Cal. App. 4th 322, 346, 355, 93 Cal. Rptr. 3d 39*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActStays Pending ArbitrationCivil ProcedureFederal & State InterrelationshipsFederal Common LawPreemptionCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel ArbitrationCivil ProcedureAlternative Dispute ResolutionArbitrationsWaivers

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4-32 California Forms of Pleading and Practice--Annotated § 32.64

AUTHOR: Michael S. Fields Editorial Consultant

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4-32 California Forms of Pleading and Practice--Annotated § 32.65

AUTHOR: Michael S. Fields Editorial Consultant

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4-32 California Forms of Pleading and Practice--Annotated §§ 32.66-32.69

AUTHOR: Michael S. Fields Editorial Consultant

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§§ 32.66[Reserved]

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PART IV. PROCEDURAL CHECKLIST

4-32 California Forms of Pleading and Practice--Annotated § 32.70

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.70 Initiation of Arbitration Based on Contract

[1] Party Seeking Arbitration

The following checklist is illustrative only of the procedures commonly utilized by counsel in arbitration matters.

☐ Demand arbitration:

☐ Prepare demand [for a form, *see § 32.90*].

☐ Serve demand on other parties to agreement containing arbitration clause.

☐ If the parties can agree on what issues are and are not arbitrable [*see § 32.80[1]*]:

☐ Prepare submission agreement.

☐ Have parties to dispute execute submission agreement.

☐ If any party refuses to arbitrate and the agreement is not self executing, petition to compel arbitration:

☐ Prepare petition to compel arbitration [for forms, *see §§ 32.91 -32.93*].

☐ Prepare notice of hearing and other papers, if any, on which petition is based [*see Code Civ. Proc. §§ 1281.2, 1290-1290.4*; for a form, *see § 32.91[2]*].

☐ Serve and file petition in appropriate court of proper county [*see Code Civ. Proc. §§ 85, 86(a)(10)(A), 1292, 1292.4, 1292.8* (venue and jurisdiction)], together with notice of hearing and any other papers.

Note:

If a party commences action on a dispute subject to an arbitration agreement, the defendant may file a petition to compel arbitration [*Code Civ. Proc. § 1281.2*] in lieu of filing an answer to the complaint. If the petition is denied, the petitioning defendant will have 15 days after the denial to plead to the complaint [*Code Civ. Proc. § 1281.7*].

Practice Tip: File Complaint. It is always a good idea to file a complaint. The reasons are:

The arbitration agreement may not apply to the subject matter of the dispute or may, for some other reason, be unenforceable. In that event, failure to have filed a complaint may result in violation of a statute of limitation.

The courts today have frequent and required status conferences even when a complaint is stayed and the matter is compelled into arbitration. The status conferences act as a prod to move the arbitration procedure; thus, the dilemma of protracted delay in the arbitration could be avoided. Additionally, the court prodding will be an impetus for the parties to move the case and avoid the discretionary and mandatory dismissals so allowed by case law.

If there are parties to the dispute who are not parties to the contract, it may be possible to join all of the parties into the court action as allowed by *Code Civ. Proc. § 1281.2(c)*. Such a joinder may be possible even though one of the parties is contractually bound through statutory requirements such as the uninsured motorist requirements of *Ins. Code § 11580.2(f)* [*see Prudential Property & Casualty Ins. Co. v. Superior Court (1995) 36 Cal. App. 4th 275, 277-279, 42 Cal. Rptr. 2d 227* (joinder of uninsured motorist arbitration proceeding with civil action against insured driver to avoid potential inconsistent rulings when plaintiff alleged that two different accidents contributed to back injury)]. Conversely, it may be necessary to join the third party in the arbitration [*see Zakarian v. Bekov (2002) 98 Cal. App. 4th 316, 325-327, 119 Cal. Rptr. 2d 623* (enforcing California Hospital Association-California Medical Association Rules for the Arbitration of Hospital and Medical Fee Disputes [CHA-CMA Rules] which require joinder in arbitration of any third party who is not party to agreement but is necessary for complete resolution of matter required to be arbitrated and require arbitrator to determine whether anyone must be so joined; agreement contained signatories' consent to joinder of any person necessary to full resolution of arbitrable dispute)]. *By Michael S. Fields*

☐ If a party has initiated litigation of an arbitrable controversy:

☐ Prepare notice of motion to stay proceedings in that court [for a form, *see § 32.97*].

For procedure and forms for use in motion proceedings generally, see Ch. 372, *Motions and Orders* .

☐ Prepare supporting declarations and points and authorities [*see Code Civ. Proc. §*

1281.4; for a form, *see § 32.97[2]*].

☐ Serve and file notice of motion and accompanying papers.

☐ If a case is stayed, immediately file a notice of the stay and attach a copy of the order or other document staying the proceedings [*Cal. Rules of Ct., Rule 3.650*; for discussion, *see § 32.31[2][c]*].

[2] Party Opposing Petition to Compel Arbitration

☐ Prepare response, setting forth any denials and defenses [*see Code Civ. Proc. §§ 1290, 1290.6, 1290.8*; for forms, *see also §§ 32.94[1], 32.98 -32.100*].

☐ Serve and file response.

[3] Hearing and Order

☐ Attend hearing on petition to compel arbitration and present evidence [*see Code Civ. Proc. § 1290.2* (summary hearing)].

☐ If court dismisses or denies the petition to compel arbitration, request statement of decision [*see Code Civ. Proc. §§ 1291, 1294(a)*]. For procedure and forms see Ch. 529, *Statement of Decision* .

☐ Prepare order granting or denying petition to compel arbitration as directed by court [*see Code Civ. Proc. § 1281.2*; for a form, *see § 32.95[1]*].

[4] Appeal

☐ File appeal. If appropriate, counsel for a party aggrieved by order dismissing or denying petition to compel arbitration files appeal [*Code Civ. Proc. § 1294(a)*].

☐ Procedure. The appeal is taken in the same manner as from order or judgment in civil action [*Code Civ. Proc. § 1294.2*]. For procedure and forms, see Ch. 42, *Appeal: Notice of Appeal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsContracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel Arbitration

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4-32 California Forms of Pleading and Practice--Annotated §§ 32.71-32.79

AUTHOR: Michael S. Fields Editorial Consultant

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§§ 32.71[Reserved]

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PART V. FORMS
A. Arbitration Agreement

4-32 California Forms of Pleading and Practice--Annotated § 32.80

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.80 Submission Agreement--General Form

[1] FORM Submission Agreement--General Form

This agreement, by and between _____ [*name*] of _____ [*address*], _____ [*city*], California, _____ [*set forth shortened identity, e.g.,* "Lessor"], and _____ [*name*] of _____ [*address*], _____ [*city*], California, _____ [*set forth shortened identity, e.g.,* "Lessee"].

RECITALS

On _____ [*date*], the parties hereto entered into a written agreement whereby _____ [*describe agreement, e.g.,* Lessee received the exclusive use of a portion of _____ (*premises*) operated by Lessor at a rental of _____ (*specify*)].

Disputes have arisen between the parties regarding _____ [*describe controversy*].

NOW, THEREFORE, the parties hereby agree to submit to arbitration the respective claims and controversies mentioned above, together with all demands and differences arising out of the agreement. [The following issues are not submitted to arbitration, however: _____ (*specify*).]

The parties understand that by submitting their dispute to arbitration, they are waiving their right to a jury trial.

The submission shall be under the following terms and conditions:

[*EITHER, if single arbitrator*]

1. The parties _____ [appoint _____ (*name*) of (*address*), _____ (*city*), California, as neutral arbitrator *or* agree to engage the services of _____ (*name of provider*) to administer this arbitration]. [*Unless you are sure the named arbitrator is available to serve, consider naming an alternate:* If _____ (*name*) is unavailable or unwilling to serve as neutral arbitrator, (or is disqualified after disclosures are made,) we appoint _____ (*name*) of (*address*), _____ (*city*), California, to serve as neutral arbitrator.]

[*OR, if three arbitrators*]

1. _____ [*Identity of party, e.g.*, Lessor] appoints _____ [*name*] of _____ [*address*], _____ [*city*], California, as an arbitrator.

2. _____ [*Identity of other party, e.g.*, Lessee] appoints _____ [*name*] of _____ [*address*], _____ [*city*], California, as an arbitrator.

3. Within _____ days after the date hereof, the arbitrators shall by an instrument in writing signed by them appoint a third person as an additional arbitrator.

[*CONTINUE*]

4. The arbitrator(s) so appointed shall commence hearings within _____ days after _____ [accepting appointment *or* the appointment of the third arbitrator].

5. Hearings shall not be adjourned for periods longer than _____ days.

6. All hearings shall be held in _____ [*city*], California [_____ *Include as much specificity as desired or available, e.g.*, in the conference room at the law firm of Black and White at 123Green Street, Suite 1205].

7. Subject to the above, the arbitrators shall appoint the times and places for all hearings, _____ days' notice in writing for such hearings shall be given by the arbitrators except that no notice shall be required for adjourned hearings. [*If desired, specify what discovery, if any, may be conducted by the parties, e.g,*]

8. For purposes of discovery, each party shall be entitled to conduct one deposition, serve three sets of interrogatories of no more than 30 questions, each, including subparts, and issue one request for production of documents, seeking no more than 10 documents. Each party must have completed this discovery within _____ days of the date hereof.

[*AND/OR*]

8. Each party agrees to furnish on _____ days' notice all books and records in his or her possession that _____ [a majority of the arbitrators *or* the abitrator] consider(s) necessary for a proper determination of the controversy.

9. Any notices provided for herein may be given to _____ [*identity of party, e.g.*, Lessor] by mailing

the notices to him or her at _____ [*street*], _____ [*city*], California, and to _____ [*identity of other party, e.g.,* Lessee] by mailing the notice to him or her at _____ [*street*], _____ [*city*], California.

10. The arbitrator(s) shall exercise the powers conferred by law and by this agreement subject to the following limitations: _____ [*specify, e.g.,* The arbitrator(s) shall not have the power to grant any remedy that could not be granted by a California court applying California law].

11. The arbitrator(s) shall reach a final determination on or before _____ [*date*], in respect to all matters submitted to him/her/them and shall make their award on or before that day. The award and judgment shall be a complete bar to any claims or demands in favor of either party against the other.

[11A. The parties agree that the arbitration award shall not be less than $50,000.00 nor more than $250,000.00. This minimum and maximumshall not be disclosed to the arbitrator. If the award is less than $50,000.00, it shall be raised to $50,000.00; and if the award is greater than $250,000.00, it shall be reduced to $250,000.00. If the award is between the stated minimum and maximum, that amount shall be the full amount of the award.]

[12. The parties further agree that they will continue to conduct their business for the period covered in the agreement in accordance with the interpretation of the agreement made by the arbitrators.]

13. The compensation of the neutral arbitrator shall be borne by the parties equally. Statutory costs (*Code of Civil Procedure § 1033.5*) are recoverable by the prevailing party, if so ordered by the neutral arbitrator. The prevailing party shall submit the statutory costs to the neutral arbitrator within 10 days after receiving the arbitration award. Objections to the cost bill by shall be made within 10 days after receipt of the cost bill by the nonprevailing party. The award is not final until the neutral arbitrator makes a final ruling on the cost bill, which shall be made no longer than 30 days from the original award date, unless the parties agree otherwise. If the arbitrator fails to award costs pursuant to this provision, the prevailing party can seek recovery in the superior court at the time the prevailing party seeks to compel the award.

EXECUTED on _____ [*date*], at _____, California.

_____ [*signature*]
_____ [*typed name and identity, e.g.,*
Anne A. Adams, Lessor]
_____ [*signature*]
_____ [*typed name and identity, e.g.,*
Walter W. Whitacre, Lessee]

[2] Use of Form

The form in [1], *above*, is for use to submit an existing controversy to arbitration. A written agreement to submit an existing controversy to arbitration is valid, enforceable, and irrevocable, except on the grounds that exist for the revocation of any contract [*Code Civ. Proc. § 1281*]. If the matter is in litigation when the parties decide to submit it to arbitration, this agreement must be in the form of a stipulation. A form of stipulation to ADR process will be provided by the clerk as part of an ADR information package when the complaint is filed, and which the plaintiff must serve with the complaint [*see Cal. Rules of Ct., Rule 3.221*; *Cal. Rules of Ct. Rule 3.800(a)* (definition of "ADR process")]. Cross complainants must serve copies of the ADR information package on any new parties to the action along with the cross complaint [*see Cal. Rules of Ct., Rule 3.221*]. If the parties agree to use an ADR process, they are to complete the form jointly and file it with the court [*see Cal. Rules of Ct., Rule 3.726*].

The agreement in [1], *above*, is signed by the parties rather than by their attorneys. This helps to avoid problems of attempted revocation of the attorneys' authority to agree to arbitration [*see, e.g., CPI Builders, Inc. v. Impco Technologies, Inc. (2001) 94 Cal. App. 4th 1167, 1172-1174, 114 Cal. Rptr. 2d 851* (when client communicated to its attorney its revocation of authority to stipulate to binding arbitration, but attorney did not communicate that revocation to opposing counsel until after opposing counsel [not knowing of revocation] had accepted and filed stipulation, parties had binding stipulation to arbitration, which would be compelled)].

PRACTICE TIP:

Negotiate Submission Agreement When Parties Have Agreement to Arbitrate Future Controversies. When an agreement exists to submit future controversies to arbitration [*see §§ 32.20 -32.23*], it has been considered a good practice when an actual arbitrable controversy arises to negotiate a submission agreement in order to more clearly define the precise issues to be arbitrated and the powers of the arbitrators. A submission agreement in such a case is not necessary, however, because the scope of arbitrators' powers are determined by the agreement to arbitrate, and not by the demand [*see Blatt v. Farley (1990) 226 Cal. App. 3d 621, 626-628, 276 Cal. Rptr. 612] . By Michael S. Fields*

[3] Requirement of "Writing"

To be valid and enforceable under the arbitration statutes [*see Code Civ. Proc. § 1280 et seq.*] an arbitration agreement must be written [*Code Civ. Proc. § 1281*]. The term "written agreement" includes a written agreement that has been extended or renewed by an oral or implied agreement [*Code Civ. Proc. § 1280(f)*].

[4] Contents of Agreement

After noting the existence of the dispute, agreeing to arbitration of the issues, expressly identifying any issues that are not to be arbitrated, and expressly waiving any right to a jury trial in the matter, the agreement addresses specific terms and conditions of the arbitration:

- Identifying the single neutral arbitrator, and an alternate if desired, (First Alternative Paragraph 1) or stating the method in which two party and one neutral arbitrators will be selected (Second Alternative Paragraph 1 and Paragraphs 2, 3).

PRACTICE TIP:

Multiple Arbitrators Are Expensive. Arbitration before a panel of three arbitrators is extremely costly. Given the high cost of using a panel of arbitrators, this practice should be avoided unless there are clear reasons for wanting a panel. The cost makes use of a panel particularlyinappropriate in small disputes and in disputes in which one party has much less economic power than the other, as will usually be the case in consumer disputes. In those situations the economically weaker party should, if possible, resist attempts by the stronger party to require a panel. On the other hand, a panel may be appropriate in a high stakes, complex dispute between parties with ample resources who place a value the interaction of the panel in solving the dispute because of its complexity. *By Michael S. Fields*

- Providing for a time within which the arbitration must commence (Paragraph 4).

- Limiting the period of any adjournment of the hearings (Paragraph 5).

- Requiring all hearings to be held in a specific location or a limited geographical area, such as a particular city (Paragraph 6).

- Authorizing the arbitrators, within the parameters set out in the prior paragraphs, to set the times and

places for all hearings, and establishing a notice requirement (Paragraph 7).

PRACTICE TIP:

Consider Expenses When Drafting Agreement. This agreement provides for the arbitrator to appoint the time and place of the hearing. Every act undertaken by the arbitrator is costly to the parties. Thus, from the plaintiff's perspective, where the costs are advanced by the plaintiff's attorney, in practice it is normally more economical for the parties to do all the administrative work. Where parties are being paid by the hour, the costs probably shift from payment of attorney's fees to payment of arbitrator's fees, so that the issue becomes one of respective rates.

The cost of the hearing room may also be a factor in choosing the place for the hearing, so that counsel may wish to retain control or a veto power over that decision or make the agreement more specific as to a known location. *By Michael S. Fields*

- Providing for discovery in excess of that allowed by applicable statutes [*see Code Civ. Proc. §§ 1283.1, 1283.05* (discussed at *§ 33.25*); *Ins. Code § 11580.2(f)(3)-(7)* (uninsured motorist cases)] and/or providing for each party to comply with discovery called for by the arbitrator (Paragraphs 8).

- Stating where notices are to be given (Paragraph 9).

- Specifying any limitations on the arbitrators power (Paragraph 10).

- Requiring the final determination to be made by a certain date, and specifying its conclusiveness (Paragraph 11).

- If desired, providing a minimum and maximum amount of the award, and that those not be disclosed to the arbitrator (Paragraph 11A).

- Providing, for use in an ongoing contractual relationship, that the parties further dealings under the contract will be conducted inaccordance with the interpretation of the agreement made by the arbitrator (Paragraph 12).

- Providing for the parties to equally bear the arbitrator's compensation and expenses of arbitration, and including an optional clause for the prevailing party to recover costs (Paragraph 13).

PRACTICE TIP:

Specify Arbitration Expenses Covered by Clause. The agreement should be explicit as to what arbitration expenses are to be borne equally by the parties. Common expenses would be subpoenas, witness fees, transcripts, cost of a hearing room. Counsel should consider including other expenses that are likely to arise in their particular situation. *By Michael S. Fields*

PRACTICE TIP: Must Provide for Prevailing Party to Recover Costs, if so Desired. Costs are not recoverable in contractual arbitrations [*Code Civ. Proc. § 1284.2*; *Dickinson v. Kaiser Foundation Hospitals (1980) 112 Cal. App. 3d 952, 954, 169 Cal. Rptr. 493]* . Therefore, if it is the parties' intention for the prevailing party to recover costs, this must be spelled out in the submission agreement or stipulation. *By Michael S. Fields*

[5] Scope of Arbitration Defined by Agreement

The general rule is that the entirety of the controversy is to be determined by arbitration when an arbitration agreement exists [*Orpustan v. State Farm Mut. Auto. Ins. Co. (1972) 7 Cal. 3d 988, 991-992, 103 Cal. Rptr. 919, 500 P.2d 1119* ; *Morris v. Zukerman (1967) 257 Cal. App. 2d 91, 95-96, 64 Cal. Rptr. 714]* . Only a clear expression to exclude a claim from arbitration can prevail [*East San Bernardino County Water Dist. v. City of San Bernardino (1973) 33 Cal. App. 3d 942, 953, 109 Cal. Rptr. 510]* .

Hence, it is of the utmost importance that the parties clearly delineate the scope of arbitration in their agreement. Specific issues that are not intended to be decided by the arbitrators, but rather are reserved for judicial determination, should be clearly and expressly excluded in the agreement [*see Unimart v. Superior Court (1969) 1 Cal. App. 3d 1039, 1045, 82 Cal. Rptr. 249* (a person is not required to submit to arbitration any dispute he has not agreed to arbitrate); *Morris v. Zukerman (1967) 257 Cal. App. 2d 91, 96, 64 Cal. Rptr. 714* (the parties are free to delineate the scope of arbitration)].

[6] Arbitrator's Powers Defined by Agreement

The scope of the arbitrator's authority is determined by the arbitration agreement, and ambiguities in the scope are resolved in favor of arbitrability [*Luster v. Collins (1993) 15 Cal. App. 4th 1338, 1346, 19 Cal. Rptr. 2d 215* (holding part of award within arbitrator's power and part in excessof arbitrator's power)]. Generally, the arbitrators may base their determinations on broad principles of justice and equity, and in doing so, they have the power to expressly or impliedly reject any claim that a party might successfully assert in a judicial action [*Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 10-11, 10 Cal. Rptr. 2d 183, 832 P.2d 899* ; *Grunwald-Marx, Inc. v. Los Angeles Joint Board (1959) 52 Cal. 2d 568, 589, 343 P.2d 23* ; *Sapp v. Barenfeld (1949) 34 Cal. 2d 515, 523, 212 P.2d 233]* .

If the parties desire any limitations on these broad powers, they must explicitly and unambiguously spell them out in the agreement [*Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 383, 36 Cal. Rptr. 2d 581, 885 P.2d 994]* . For discussion of the specificity required to constrain an arbitrator to rule in conformity with applicable law [*Cable Connection, Inc. v. DirecTV, Inc. (2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586]* , see *Ch. 34, Contractual Arbitration: Judicial Review, § 34.10[2]*.

If the arbitrators exceed their powers and the award cannot be corrected without affecting the merits of the decision on the controversy submitted, their award may be vacated on that ground [*see Code Civ. Proc. § 1286.2(a)(4)*].

[7] Forms Available From Arbitration Service Providers

When the parties elect to have arbitration under the auspices of an arbitration service provider, a form of agreement to submit existing disputes to arbitration may also be available from the provider, such as the American Arbitration Association. The form will be tailored to that provider's rules and procedures. In some cases, such as the American Arbitration Association, the forms may also be tailored to the particular type of dispute involved (such as commercial versus accident).

[8] Cross References

For discussion relating to contracts generally, see Ch.140, *Contracts* .

For forms of agreements and clauses to arbitrate future disputes, see California Legal Forms, ch. 13, *Nonprofit Corporations and Associations*; ch. 30A, *Construction Financing*; ch. 30D, *Construction Contracts and Subcontracts*; ch. 34B, *Residential Leases*; 34C, *Commercial, Industrial, and Office Leases*; ch. 34D, *Ground Leases*; Ch. 75, *Formation of Contracts and Standard Contractual Provisions* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActCoverage & ExceptionsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel Arbitration

California Forms of Pleading and Practice--Annotated

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 32 CONTRACTUAL ARBITRATION: AGREEMENTS AND COMPELLING ARBITRATION
PART V. FORMS
A. Arbitration Agreement

4-32 California Forms of Pleading and Practice--Annotated §§ 32.81-32.89

AUTHOR: Michael S. Fields Editorial Consultant

[Reserved]

§§ 32.81[Reserved]

California Forms of Pleading and Practice--Annotated

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 32 CONTRACTUAL ARBITRATION: AGREEMENTS AND COMPELLING ARBITRATION
PART V. FORMS
B. Compelling Arbitration

4-32 California Forms of Pleading and Practice--Annotated § 32.90

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.90 Demand for Arbitration

[1] FORM Demand for Arbitration

Demand for Arbitration

_____ [*name of addressee*]
_____ [*street address*]
_____ [*city, state, zip code*]

Re: Agreement dated _____

DEMAND FOR ARBITRATION

There is a dispute between you and the undersigned relating to the agreement dated _____, for _____ [*state nature of agreement or otherwise identify it*] ("Agreement").

Under Paragraph _____ of the Agreement, disputes arising under the Agreement are to be settled by arbitration. That provision states the following: _____ [*set out paragraph of agreement providing for arbitration*].

THEREFORE, THE UNDERSIGNED HEREBY DEMAND that the following dispute(s) be submitted to arbitration: _____ [*set forth nature of dispute, e.g.,* the undersigned's entitlement to damages in the amount of $65,000, which resulted from defects in the packaging equipment delivered to the undersigned on March 12, 1996].

[*EITHER, if single neutral arbitrator is to be used and contract specifies method of selection, demand compliance with*

the contractual procedure in as many paragraphs as necessary, for example]

TAKE NOTICE that the undersigned proposes any the following three persons as the neutral arbitrator: _____ [*list names, addresses, and telephone numbers of proposed arbitrators*].

TAKE FURTHER NOTICE that under Paragraph _____ of the Agreement, you have 30 days to agree to one of these persons as neutral arbitrator or to propose a counter list, and if you fail to do so the undersigned has the right to petition the court for appointment of a neutral arbitrator pursuant to *Code of Civil Procedure Section 1281.6*.

[*OR, if single neutral arbitrator is to be used and contract does not specify method of selection, request agreement on a procedure in as many paragraphs as necessary, for example*]

TAKE NOTICE that the undersigned intends to exercise his/her/its right to petition the court for appointment of a neutral arbitrator under *Code of Civil Procedure Section 1281.6* if we have not selected a neutral arbitrator by _____ [*date*]. The undersigned suggests _____ [*name persons who would be acceptable as neutral arbitrator or outline a procedure for selecting an arbitrator*].

[*OR, if panel of arbitrators it to be used, initiate contractual procedure for selecting panel, for example*]

TAKE NOTICE that the undersigned, under that Paragraph, has selected _____ [*name*] as a party arbitrator to act on their behalf in the dispute and hereby demand that you select a party arbitrator to act on your behalf in the dispute. Your selection must be made within _____ days after this demand is served on you.

TAKE FURTHER NOTICE that the party arbitrator acting on behalf of the undersigned will be ready to cooperate with the party arbitrator acting on your behalf, in the selection of a third, neutral arbitrator; in the settlement of the claims, controversies, and disputes existing between yourselves and the undersigned; and in the determination of all demands and differences arising out of the Agreement.

TAKE FURTHER NOTICE that should you refuse to select a party arbitrator to act on your behalf, as stated above, or should you otherwise refuse to arbitrate the disputes mentioned above, the undersigned will take further steps to proceed with arbitration according to law.

[*CONTINUE*]

Dated: _____.

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is a demand for arbitration for use to initiate arbitration once a controversy has arisen, and to notify the other parties that they must select an arbitrator within a certain time as required by the agreement to arbitrate. A demand for arbitration will cause the other parties either to submit voluntarily to arbitration proceedings or to refuse to arbitrate the matter, in which event court proceedings may be commenced to compel arbitration [*see Code Civ. Proc. § 1281.2*].

PRACTICE TIP:

File Complaint. It is always a good idea to file a complaint when demanding arbitration. The reasons are:

The arbitration agreement may not apply to the subject matter of the dispute or may, for some other reason, be unenforceable. In that even, failure to have filed a complaint may result in violation of a statute of limitation.

The courts today have frequent and required status conferences even when a complaint is stayed and the matter is compelled into arbitration. The status conferences act as a prod to move the arbitration procedure; thus, the dilemma of protracted delay in the arbitration could be avoided. Additionally, the court prodding will be an impetus for the parties to move the case and avoid the discretionary and mandatory dismissals so allowed by case law.

If there are parties to the dispute who are not parties to the contract, it may be possible to join all of the parties into the court action as allowed by *Code Civ. Proc. § 1281.2(c)*. Such a joinder may be possible even though one of the parties is contractually bound through statutory requirements such as uninsured motorist requirements of *Ins. Code § 11580.2(f)* [*see Prudential Property & Casualty Ins. Co. v. Superior Court (1995) 36 Cal. App. 4th 275, 277-279, 42 Cal. Rptr. 2d 227* (joinder of uninsured motorist arbitration proceeding with civil action against insured driver to avoid potential inconsistent rulings when plaintiff alleged that two different accidents contributed to back injury)]. Conversely, it may be necessary to join the third party in the arbitration [*see Zakarian v. Bekov (2002) 98 Cal. App. 4th 316, 325-327, 119 Cal. Rptr. 2d 623* (enforcing California Hospital Association-California Medical Association Rules for the Arbitration of Hospital and Medical Fee Disputes [CHA-CMA Rules] which require joinder in arbitration of any third party who is not party to agreement but is necessary for complete resolution of matter required to be arbitrated and require arbitrator to determine whether anyone must be so joined; agreement contained signatories' consent to joinder of any person necessary to full resolution of arbitrable dispute)]. *By Michael S. Fields*

[3] Form of Demand

A demand for arbitration is usually submitted in the form of a letter, and need not be as formal as the form set out in [1], *above*.

If, under the agreement, arbitration is to be conducted pursuant to the rules of the American Arbitration Association, the Association has its own printed forms of demand that are available at any of its regional offices. Counsel should review any arbitration rules adopted by the parties' agreement to determine what has to be included in the demand. For instance, Rule 7 of AAA's Commercial Arbitration Rules (1988) requires the demand to contain a statement of the matter in dispute, the amount of money involved, if any, the remedy sought, and the hearing locale requested. Three copies of the demand must be submitted to the regional office.

A demand for arbitration has been analogized to a complaint in a civil lawsuit. Its purpose is to inform the other party of the fact that the party making the demand intends to ask for a determination of the dispute between them [*see Blatt v. Farley (1990) 226 Cal. App. 3d 621, 627, 276 Cal. Rptr. 612]* . Although so analogized, an arbitration demand filed only in an agreed arbitral forum and not asserted by the claimant in any complaint, cross-complaint or petition filed in court is not a "complaint" within the meaning of *Code Civ. Proc. § 425.16*, and thus, is not subject to a motion to strike under that section [*Sheppard v. Lightpost Museum Fund (2006) 146 Cal. App. 4th 315, 319, 323-324, 52 Cal. Rptr. 3d 821]* . The scope of the arbitrators' powers is determined by the underlying agreement to arbitrate, not by the demand [*Blatt v. Farley (1990) 226 Cal. App. 3d 621, 626-628, 276 Cal. Rptr. 612]* .

For further discussion relating to the form of a demand for arbitration, see *§ 32.41*.

[4] Contents of Demand

The demand identifies the underlying contract and describes the dispute. This form includes alternative paragraphs for selecting a sole neutral arbitrator or naming a party arbitrator and setting the stage for the ultimate selection of a neutral arbitrator. Whether the arbitration is to be before a sole neutral arbitrator or before a neutral and party arbitrators, the form also provides alternative language for invoking a selection procedure specified in the underlying contract or if the contract is silent on the procedure, for suggesting and initiating a procedure.

PRACTICE TIP:

Be Fully Familiar With Underlying Contract. Prior to demanding arbitration, counsel should study the contract requiring arbitration. Many arbitration clauses have preconditions, time limits [*see* [6], *below*], fee posting requirements, arbitration requirements under certain rules of arbitration companies such as the American Arbitration Association or J.A.M.S./Endispute. A demand for arbitration should comply with the contract. *By Michael S. Fields*

PRACTICE TIP: Consider Stipulation Relaxing Rules of Evidence. Additionally, the parties should be familiar with *Civ. Proc. § 1280 et seq.*, and understand that a contractual arbitration differs from a judicial arbitration, especially in the production of evidence. Whereas, in judicial arbitrations, *Cal. Rules of Ct., Rule 3.823* allows introduction of evidence by declaration, the contractual arbitrations under *Code Civ. Proc. § 1280 et seq.* require, for the most part, that the rules of evidence apply. It may be wise for the parties to agree that Rule 3.823 applies to their matter when they bind the matter to an arbitration. Even when there is a pre-existing contract, the parties may stipulate to the relaxed rules of Rule 1613. *By Michael S. Fields*

[5] Copies

The following copies of a demand for arbitration should be prepared:

- Original for mailing or other delivery to the other parties;
- One or more copies to be filed with the arbitrators or association conducting the arbitration;
- One copy for each client, if desired;
- One office file copy;
- Other copies as desired.

[6] Time to Submit Demand

If the arbitration agreement does not specify a time within which arbitration must be demanded, a reasonable time is allowed. What constitutes a reasonable time is a question of fact depending on the situation of the parties, the nature of the transaction, and the facts of the particular case. Unreasonable delay in demanding arbitration may be deemed a waiver of the right to arbitrate [*Sawday v. Vista Irrigation Dist. (1966) 64 Cal. 2d 833, 836-837, 52 Cal. Rptr. 1, 415 P.2d 816]* .

PRACTICE TIP:

Send Demand by Certified Mail. The demand for arbitration should be sent by certified letter to be certain of its receipt. This is especially so where there are built-in time limits in the contract. *By Michael S. Fields*

For further discussion relating to the timeliness of a demand for arbitration, see *§§ 32.25[4], 32.40*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel Arbitration

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 32 CONTRACTUAL ARBITRATION: AGREEMENTS AND COMPELLING ARBITRATION
PART V. FORMS
B. Compelling Arbitration

4-32 California Forms of Pleading and Practice--Annotated § 32.91

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.91 Petition to Compel Arbitration [Code Civ. Proc. §§ 1281.2, 1290]

[1] Petition

[a] FORM Petition to Compel Arbitration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION TO COMPEL ARBITRATION
_____ [*name*],	)	[LIMITED CIVIL CASE]
Petitioner,	)	[Amount demanded _____
vs.	)	(exceeds *or* does not exceed) $10,000]
_____ [*name*],	)	Date: _____
Respondent.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

Petitioner alleges:

[*EITHER*]

1. The agreement alleged below _____ [is to be performed *or* was made] in _____ County, California.

[*OR*]

1. The agreement alleged below does not specify a county where it is to be performed and was not made in California. _____ [Petitioner *or* Respondent] _____ [resides *or* has a place of business] in _____ County, California [at _____ (*address*)].

[*CONTINUE*]

2. On or about _____ [*date*], petitioner and respondent entered into a written agreement [in which, at Paragraph _____, the parties agreed] to arbitrate _____ [*specify controversy subject to arbitration, e.g.,* all disputes arising out of the agreement]. A copy of the agreement is attached as Exhibit "A" and made a part hereof.

3. On or about _____, a controversy arose between petitioner and respondent in that _____ [*describe controversy*]. The arbitration agreement herein alleged requires that petitioner and respondent arbitratetheir controversy _____ [as to the following issues: _____ (*specify*) *or* in its entirety].

4. On or about _____, petitioner demanded that respondent submit the _____ [issues *or* controversy] to arbitration as agreed. Respondent has at all times refused, and still refuses, to arbitrate.

[*If agreement provides for joinder in arbitration of any third party who is not a party to the agreement but who is necessary for complete resolution of any matter required to be arbitrated and requires the arbitrator to determine whether anyone must be so joined, ADD*]

5. The arbitration agreement which is Exhibit "A" to this petition includes at Paragraph _____ respondent's consent to the intervention or joinder in the arbitration proceeding of all parties relevant to a full and complete settlement of any dispute arbitrated under the agreement _____ [as set forth in the _____ (*specify any rules incorporated in agreement*), which provide *or* and further provides] that the arbitrator determine, prior to the date set for the arbitration hearing, any person whose participation is material or relevant to a complete resolution of this dispute. Thus, the fact that _____ [*name*] has been named in the complaint but is not a party to the arbitration agreement does not prevent arbitration of this matter because petitioner contends, and will seek to have the neutral arbitrator determine before the arbitration hearing, that _____ [*name*] is required to be joined in the arbitration.

WHEREFORE, petitioner prays:

1. That the court order respondent to arbitrate the controversy as herein alleged.

2. That petitioner be awarded costs of suit [and attorney's fees] herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[b] Use of Form

The form of petition in [a], *above*, is for use to commence a proceeding to obtain a court order compelling arbitration [*see Code Civ. Proc. §§ 1281.2, 1290*].

The petition also may be used when a defendant, pursuant to *Code Civ. Proc. § 1281.7*, opts to file a petition to compel arbitration in lieu of an answer to a complaint. If the petition is denied, the defendant has 15 days from denial to plead the complaint [*Code Civ. Proc. § 1281.7*].

The bracketed language in item 2 of the prayer is for use if the arbitration agreement has a special penalty clause that provides for any party who institutes any legal action or administrative proceeding against the other by any method other than arbitration, to pay the responding party any damages, costs, expenses, and attorneys' fees required to bring the matter to arbitration [*see Acosta v. Kerrigan (2007) 150 Cal. App. 4th 1124, 1129-1133, 59 Cal. Rptr. 3d 865]* .

[c] Allegations

A petition to compel arbitration must allege the following [*see Code Civ. Proc. § 1281.2*]:

- An agreement to arbitrate (Paragraph 2).
- A controversy within the scope of arbitration as agreed (Paragraph 3).
- Refusal by respondent to arbitrate (Paragraph 4).

Optional Paragraph 5 is for use to anticipate respondent's objection that a third party who is not a party to the arbitration agreement is necessary to the resolution of the dispute when the arbitration agreement or the rules incorporated therein, such as California Hospital Association-California Medical Association Rules for the Arbitration of Hospital and Medical Fee Disputes (CHA-CMA Rules) require joinder in arbitration of any third party who is not party to agreement but is necessary for complete resolution of the matter required to be arbitrated. The allegations of that optional paragraph conform to the CHA-CMA Rules in alleging that the arbitrator, not the court, determine who must be joined. If counsel's situation differs, the allegations should be changed accordingly and the petition should include allegations and be accompanied by declarations and points and authorities from which the court can make the determination that the third party is necessary to the resolution of the matter required to be arbitrated. For joinder of a person who is not a party to the arbitration agreement as being generally prohibited, see *§ 32.43[8][g]*. For discussion and forms relating to joinder in civil actions, see Ch. 395, *Parties* .

Additionally, the petition must state the provisions of the written agreement and the paragraph that provides for arbitration verbatim or by a copy attached to the petition and incorporated by reference (Paragraph 2) [*Cal. Rules of Ct., Rule 3.1330*].

Petitioner need only allege the *existence* of an agreement and support the allegation as provided in *Cal. Rules of Ct, Rule 3.1330*. Once the petitioner has alleged that the agreement exists, the burden shifts to the party resisting arbitration to prove the falsity of the purported agreement [*Hotels Nevada v. L.A. Pacific Center, Inc. (2006) 144 Cal. App. 4th 754, 765, 50 Cal. Rptr. 3d 700* ; *Condee v. Longwood Management Corp. (2001) 88 Cal. App. 4th 215, 105 Cal. Rptr. 2d 597]* . However, it is fatal not to allege the existence of an agreement to arbitrate. Arbitration could not be compelled

when the party seeking arbitration does not meet the basic statutory requirements by affirmatively alleging the existence of a written agreement to arbitrate [*Brodke v. Alphatec Spine, Inc. (2008) 160 Cal. App. 4th 1569, 1574-1577, 73 Cal. Rptr. 3d 554* (merely alleged that plaintiffs had alleged existence of "alleged agreements" to arbitrate, but denied existence of any such agreements)].

Paragraph 1 of the petition is included to show venue [*see Code Civ. Proc. §§ 1292, 1292.4*; for discussion, *see* [g], *below*]. If the petition is filed in a pending action or proceeding involving the controversy to be arbitrated [*see Code Civ. Proc. § 1292.4*], the caption would be similar to the ones on the other papers filed in the pending action or proceeding, except that the status of the parties in both roles would be shown, for example, "Defendant and Petitioner" if defendant is seeking an order compelling arbitration. Also, the prayer would include a request that the other proceedings be stayed pursuant to *Code Civ. Proc. § 1281.4*.

If the arbitration agreement has a special penalty clause that provides for any party who institutes any legal action or administrative proceeding against the other by any method other than arbitration, to pay the responding party damages, costs, expenses, and attorneys' fees incurred as a result of that action, the trial court may award petitioner its attorney's fees reasonably expended in moving this matter to arbitration, even though it is an interim award and even though petitioner may not be the ultimate prevailing party [*Acosta v. Kerrigan (2007) 150 Cal. App. 4th 1124, 1129-1133, 59 Cal. Rptr. 3d 865]* .

[d] Copies

The following copies of the petition should be prepared:

- Original to be filed in the court and conformed copy for the court to stamp and return.
- One copy to be served on each of the other parties.
- One copy for the client, if desired.
- Office file copy.
- Other copies as desired.

[e] Service

A copy of the petition and a written notice of time and place of the hearing and any other papers on which the petition is based are to be served in the manner provided in the arbitration agreement if it so provides [*Code Civ. Proc. § 1290.4(a)*]. For a form of notice of hearing on petition to compel arbitration, see [2], *below*. For a form of notice of motion and discussion of papers required to accompany any motion filed in connection with the petition, see Ch. 372, *Motions and Orders* .

If the arbitration agreement does not provide the manner of service and the person on whom service is to be made has not previously appeared in the proceeding or has not previously been served in accordance with *Code Civ. Proc. § 1290.4(b)*, service within the state is to be performed in the manner provided by law for the service of summons in an action [*Code Civ. Proc. § 1290.4(b)(1)*; *see Code Civ. Proc. §§ 413.10-417.40* (governing service of summons generally)]. If service is to be made outside the state, it is to be made by mailing a copy of the petition, notice, and other papers on which the petition is based by registered or certified mail [*Code Civ. Proc. § 1290.4(b)(2)*].

If the arbitration agreement does not provide the manner in which service is to be made and the person to be served has previously appeared in the proceeding or has previously been served in accordance with *Code Civ. Proc. § 1290.4(b)*,

service is to be made in the manner provided in *Code Civ. Proc. §§ 1010-1020* governing service of papers other than summons [*Code Civ. Proc. § 1290.4(c)*]. A petition under the arbitration statutes is heard on the notice provided by law for the making and hearing of motions [*see Code Civ. Proc. § 1010* (notice of motion)], except that not less than 10 days' notice of the date set for the hearing on the petition shall be given [*Code Civ. Proc. § 1290.2*]. If the petition is served out of state it may not be heard until at least 30 days after the date of service [*Code Civ. Proc. § 1290.4(b)(2)*].

For procedure and forms dealing with service of summons and papers generally, see Ch. 518, *Service of Summons and Papers* .

[f] Jurisdiction

The superior court has jurisdiction over a petition to compel arbitration as either a limited or unlimited civil case. A petition to compel arbitration is classified as a limited civil case if the matter to be resolved by arbitration is a limited civil case under *Code Civ. Proc. § 86(a)(1)-(9)*, inclusive, unless the petition involves uninsured motorist arbitration proceedings in accordance with *Ins. Code § 11580.2* [*Code Civ. Proc. § 86(a)(10)(A*); *see Code Civ. Proc. § 85* (defining "limited civil case")].

If the proceeding is a limited civil case, and the petition is the first paper filed, the caption must state whether the demand exceeds or does not exceed $10,000. The caption must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 72055*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

Otherwise, a petition to compel arbitration is classified as a case of unlimited jurisdiction [*see Cal. Const., art. VI, § 10*]. For further discussion, see *§ 32.43[3]*. For discussion of the jurisdictional classification of cases, see Ch. 324, *Jurisdiction: Subject Matter* .

[g] Venue

The petition is to be filed in a court having jurisdiction in:

- The county where the agreement is to be performed or was made [*Code Civ. Proc. § 1292(a)*].

- The county where any party resides or has a place of business if the agreement does not specify the county where it is to be performed and the agreement was not made in any county in the state [*Code Civ. Proc. § 1292(b)*].

- Any county in the state if the case is not covered by *Code Civ. Proc. § 1292(a)* or *(b), above* [*Code Civ. Proc. § 1292(c)*].

An exception is provided when the controversy to be arbitrated is involved in a pending court action or proceeding, in which case the petition is required to be filed in the action or proceeding [*Code Civ. Proc. § 1292.4*].

[h] Statute of Limitations

Apart from the issue of timely demand for arbitration [for discussion, *see § 32.40*], the party seeking arbitration must petition to compel it within four years after the other party has refused to arbitrate. An action to compel arbitration is in essence a suit in equity to compel specific performance of a contract. The contract is considered breached, and thus the cause of action accrues, when the other party refuses to comply with a demand to arbitrate [*Wagner Construction Co. v. Pacific Mechanical Corp. (2007) 41 Cal. 4th 19, 29, 58 Cal. Rptr. 3d 434, 157 P.3d 1029* (distinguishing limitations defense on underlying claim, which is for arbitrator to decide); *Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1040-1043, 9 Cal. Rptr. 2d 381, 831 P.2d 821]* . Then, the four-year limitation of *Code Civ. Proc. § 337*,

applicable to breach of contract, applies to require the petition to compel arbitration to be filed within four years from the refusal to arbitrate [*Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1040, 9 Cal. Rptr. 2d 381, 831 P.2d 821]* .

[i] Cross References

For further discussion regarding proceedings to compel arbitration, see *§ 32.43*

For memoranda of points and authorities supporting and opposing the petition, see California Points and Authorities, Ch 20, *Arbitration: Compelling* and Ch. 20A, *Arbitration: Resisting* (Matthew Bender)

[2] Notice of Hearing on Petition to Compel Arbitration [Code Civ. Proc. § 1290.4]

[a] FORM Notice of Hearing on Petition to Compel Arbitration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Petitioner,	)	NOTICE OF HEARING ON PETITION TO COM-
vs.	)	PEL ARBITRATION
_____ [*name*],	)	Date: _____
Respondent.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To respondent _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter can be heard, in [Department _____ of] this court, located at _____ [*street address*], _____ [*city*], California, the petition of _____ [*name*] for an order to arbitrate certain controversies specified in the petition, a copy of which is served herewith, will be heard by the court.

This petition is based on the following described papers which are served with this petition: _____ [*describe*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[b] Use of Form

The form in [a], *above*, is a notice of hearing to be served with a petition to compel arbitration [*see Code Civ. Proc. §*

1290.4]. The notice is for informing respondent of the time and place of the hearing on the petition. It accompanies, or is attached to, the petition and other papers on which the petition is based at the time of service on respondent.

The same number of copies as the petition should be prepared [*see* [1][d], *above*].

Written notice of the time and place of the hearing is required to be served with a copy of the petition and any other papers on which the petition is based, in the manner and time provided in *Code Civ. Proc. § 1290.4* [*see* [1][d], *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel Arbitration

California Forms of Pleading and Practice--Annotated

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 32 CONTRACTUAL ARBITRATION: AGREEMENTS AND COMPELLING ARBITRATION
PART V. FORMS
B. Compelling Arbitration

4-32 California Forms of Pleading and Practice--Annotated § 32.92

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.92 Petition to Compel Arbitration [Code Civ. Proc. §§ 1281.2, 1290]--Uninsured or Underinsured Motorists Claim [Ins. Code § 11580.2(f)]--By Insured Against Insurer

[1] FORM Petition to Compel Arbitration--Uninsured or Underinsured Motorists Claim--By Insured Against Insurer

[*Caption. See § 32.91[1], above.*]

Petitioner alleges:

1. At all times herein mentioned, petitioner was insured by a bodily injury insurance policy issued by respondent as insurer, containing uninsured motorists coverage insuring petitioner for all sums petitioner is entitled to recover as damages for bodily injury from the owner or operator of an uninsured motor vehicle. Regarding this uninsured motorists coverage, the policy contains an arbitration clause which provides as follows: _____ [*set forth arbitration provisions*]. A copy of the policy is attached to as Exhibit "A" and made a part hereof.

2. On or about _____ [*date*], petitioner sustained bodily injuries caused by an uninsured motor vehicle in _____ [*city*], _____ [*county*], California. Petitioner and respondent are unable to agree regarding _____ [*describe dispute, e.g.,* whether petitioner is legally entitled to recover damages for these injuries and the amount of damages for these injuries] and a controversy exists between petitioner and respondent that must be determined by arbitration under the terms of the insurance policy alleged in this petition.

3. On or about _____ [*date*], petitioner demanded that respondent arbitrate this matter. Respondent has at all times refused, and still refuses, to so arbitrate.

[*Prayer. See § 32.91[1], above.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], say:

I am the petitioner in this proceeding.

[*EITHER*]

I have no worker's compensation claim based on the accident and injury alleged in the above petition.

[*OR*]

I have a worker's compensation claim based on the accident and injuries alleged in the above petition. This claim has proceeded to findings and _____[award *or* settlement] on all issues reasonably contemplated to be determined in that claim.

[*OR*]

I have a worker's compensation claim based on the accident and injuries alleged in the above petition. The claim has not proceeded to findings and award or settlement on all of the issues reasonably contemplated to be determined in that claim.

[*CONTINUE*]

There is good cause for the arbitration to proceed immediately for the following reasons: _____ [*specify*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting petition*]

[2] Use of Form

The form of petition in [1], *above*, is for use to compel arbitration of an insurance claim under an uninsured motorists liability clause, when the insured and the insurer disagree as to the insured's entitlement to damages or the amount of the damages [*see Ins. Code § 11580.2(f)* (requiring that bodily injury liability policies provide for arbitration of such determinations); *see also Ins. Code § 11580.2(p)(7)* (underinsured motorist coverage shall be included in all policies of bodily injury liability insurance providing uninsured motorist coverage issued or renewed on or after July 1, 1985)].

A written notice of the time and place of the hearing and any papers on which the petition is based are to be served with the petition in the manner provided in *Code Civ. Proc. § 1290.4* [*Code Civ. Proc. § 1290.4*]. For a form of notice of hearing, see *§ 32.91[2]*.

[3] Arbitration Under Uninsured Motorists Statute

[a] Terms Required by Statute

Automobile insurance policies containing uninsured motorists coverage (insuring for all sums the insured or his or her heirs or legal representative is entitled to recover as damages for bodily injury or wrongful death fromthe owner or operator of an uninsured or underinsured motor vehicle) are required to provide that the determination as to whether the insured is legally entitled to recover damages, and if so entitled, the amount of the damages, is to be made by agreement between the insured and the insurer, or, in the event of disagreement, by arbitration conducted by a single neutral arbitrator [*Ins. Code § 11580.2(a), (f)*].

[b] Limit on Deceased Passenger's Heirs' Right to Compel

Arbitration between the insured and the insured's deceased passenger's heirs cannot be compelled under an arbitration clause in an uninsured motorist provision that is no broader than *Ins. Code § 11580.2(f)* after the insurer has interpleaded proceeds equal to the policy limits when the only dispute is between the claimants regarding their respective shares of those proceeds. Section 11580.2(f) only contemplates arbitration of controversies involving the insurer [*Mayflower Ins. Co. v. Pellegrino (1989) 212 Cal. App. 3d 1326, 1332-1335, 261 Cal. Rptr. 224]* .

[c] Relationship to Arbitration Act

The uninsured motorist statute provides for a non-self-executing type of arbitration in that it requires resolution by a single neutral arbitrator [*American Home Assurance Co. v. Benowitz (1991) 234 Cal. App. 3d 192, 198-199, 285 Cal. Rptr. 626]* . The uninsured motorist statute provides only skeletal provision for arbitration. If the particular policy is silent on parts of the process, the provisions of the Arbitration Act (*Code Civ. Proc. § 1280 et seq.*) govern [*American Home Assurance Co. v. Benowitz (1991) 234 Cal. App. 3d 192, 201, 201 n.3, 285 Cal. Rptr. 626]* . Thus, if the parties cannot agree on an arbitrator or, after demand by the insured, the insurer is not forthcoming, the insured's remedy is to invoke the Arbitration Act. The insured has no authority to select his or her own arbitrator and compel the insurer to submit to arbitration before that person [*American Home Assurance Co. v. Benowitz (1991) 234 Cal. App. 3d 192, 201, 285 Cal. Rptr. 626]* .

Uninsured motorist arbitration conducted pursuant to *Ins. Code § 11580.2*, is a form of contractual arbitration governed by *Code Civ. Proc. § 1280 et seq.*, and thus is an arbitration within the meaning of *Code Civ. Proc. § 998* (discussed at *§ 33.29[2]*) [*Pilimai v. Farmers Ins. Exch. Co. (2006) 39 Cal. 4th 133, 142, 45 Cal. Rptr. 3d 760, 137 P.3d 939]* . When the insured's Section 998 offer is not accepted and an arbitration award for a larger amount is granted, the maximum liability provision of *Ins. Code § 11580.2(p)(4)* does not preclude the successful insured's recovery of costs under *Code Civ. Proc § 998* even if those costs, when added to the award, exceed the coverage limits [*Pilimai v. Farmers Ins. Exch. Co. (2006) 39 Cal. 4th 133, 145, 45 Cal. Rptr. 3d 760, 137 P.3d 939]* .

[d] Joinder With Civil Action Against Insured Motorist

The power of the court under *Code Civ. Proc. § 1281.2(c)* to order joinder of an arbitration proceeding and a civil action to avoid inconsistent rulings extends to cases involving uninsured motorist arbitration [*Mercury Insurance Group v. Superior Court (1998) 19 Cal. 4th 332, 345, 79 Cal. Rptr. 2d 308, 965 P.2d 1178* ; *Prudential Property & Casualty Ins. Co. v. Superior Court (1995) 36 Cal. App. 4th 275, 278-279, 42 Cal. Rptr. 2d 227* ; *see Ins. Code § 11580.2*]. Thus, inconsistent rulings may be avoided in cases involving a combination of insured and uninsured parties.

[e] Time Limit for Concluding Arbitration

[i] Five Year Limit

Effective January 1, 1996, uninsured motorist arbitration instituted pursuant to *Ins. Code § 11580.2*, other than one in which the insured also has a workers' compensation claim, must be concluded within five years from the institution of the arbitration proceeding [*Ins. Code § 11580.2(i)(2)(A)*].

[ii] Three Year Limit in Case of Related Workers' Compensation Claim

If the insured has a workers' compensation claim arising from the same accident, the arbitration must be concluded within three years of the date the claim is concluded, or within the five years after the arbitration proceeding is instituted, whichever occurs later [*Ins. Code § 11580.2(i)(2)(B)*].

[iii] Excuses From Compliance

The doctrines of estoppel, waiver, impossibility, impracticality, and futility apply to excuse a party's compliance with the statutory time frame, as determined by the court [*Ins. Code § 11580.2(i)(3)*]. Also, the parties to the insurance contract may stipulate in writing to extending the time to conclude arbitration [*Ins. Code § 11580.2(i)(4)*].

[iv] Calculation of Time; Denial of Untimely Petition to Compel

The arbitration may be considered to have been instituted on the date the claimant sends his or her demand for arbitration [*Santangelo v. Allstate Insurance Company (1998) 65 Cal. App. 4th 804, 812, 76 Cal. Rptr. 2d 735]* . If the insured does not conclude the arbitration within five years after demanding it, and he or she cannot establish any basis for waiver or estoppel of the five-year period for completion of arbitration, any petition for an order to compel that arbitration must be denied [*Santangelo v. Allstate Insurance Company (1998) 65 Cal. App. 4th 804, 812, 816-818, 76 Cal. Rptr. 2d 735]* .

[v] Application to Cases in Which Accident Occurred Prior to Enactment of Five Year Limit

Application of *Ins. Code § 11580.2(i)(2)(A)* to refuse to compel arbitration arising out of an accident that occurred before enactment of the five-year limitation is proper if, under the circumstances of the particular case, plaintiff had a reasonable time after the legislation became operative within which to conclude the arbitration and failed to do so [*Santangelo v. Allstate Insurance Company (1998) 65 Cal. App. 4th 804, 815-818, 76 Cal. Rptr. 2d 735]* .

[4] Venue

The uninsured motorists statute does not specify venue for the purpose of filing a petition to compel arbitration.

For the purpose of discovery in uninsured motorists arbitration, the statute provides that whenever reference is made in *Code Civ. Proc. § 2016.010 et seq.* (general discovery laws incorporated into *Ins. Code § 11580.2(f)* with limitations) to the court in which the action is pending, or provision is made for application to the court or obtaining leave of court or approval by the court, the court that has jurisdiction for the purposes of *Ins. Code § 11580.2* is the superior court of

California in the county which is a proper county for the filing of a suit for bodily injury arising out of the accident, against the uninsured motorist [*see Code Civ. Proc. § 395* (venue of personal injury actions)], or any county specified in the policy or an endorsement added thereto as a proper county for arbitration or action thereon [*Ins. Code § 11580.2(f)(1)*]. Change of venue for discovery purposes may be made as provided in *Ins. Code § 11580.2(f)(2)*. It is unclear, therefore, whether *Ins. Code § 11580.2(f)(1)* applies by implication to govern venue of petition to compel arbitration of an uninsured motorist matter or whether *Code Civ. Proc. §§ 1292, 1292.4*, governing venue of pre-arbitration proceedings generally, applies.

[5] Scope of Arbitration

[a] Only Two Issues If Clause Is No Broader Than Insurance Code § 11580.2(f)

The courts look to the arbitration clause in the insurance policy to determine whether a particular issue in a controversy over uninsured motorists coverage is to be decided by arbitration or by litigation [*see Orpustan v. State Farm Mut. Auto. Ins. Co. (1972) 7 Cal. 3d 988, 991-992, 103 Cal. Rptr. 919, 500 P.2d 1119* ; *Felner v. Meritplan Ins. Co. (1970) 6 Cal. App. 3d 540, 543, 86 Cal. Rptr. 178]* . If the language of the arbitration clause is that of *Ins. Code § 11580.2(f)*, only two issues are required to be submitted to arbitration:

- Whether or not the insured is entitled to recover against the uninsured motorist; and

- If so, the amount of the damages [*Freeman v. State Farm Mut. Auto. Ins. Co. (1975) 14 Cal. 3d 473, 480, 121 Cal. Rptr. 477, 535 P.2d 341* ; *Hartford Acc. & Indem. Co. v. Jackson (1983) 150 Cal. App. 3d 111, 114-115, 197 Cal. Rptr. 477]* .

The question of whether the insurer is bound by a default judgment against the driver who was at fault is to be arbitrated because it falls squarely within the questions of liability and damages statutorily subject to arbitration [*Bouton v USAA Casualty Insurance Company (2008) 43 Cal. 4th 1190, 1194, 1201-1203, 78 Cal. Rptr. 3d 519, 186 P.3d 1*]. This issue that whether the insurer is bound by default judgment is arbitrable was resolved in *Bouton v. USAA Casualty Insurance Company (2008) 43 Cal. 4th 1190, 78 Cal. Rptr. 3d 519* , and not addressed in the subsequent case of *Bouton v. USAA Casualty Insurance Company (2008) 167 Cal. App. 4th 412, 84 Cal. Rptr. 3d 152* (holding that coverage questions are not arbitrable). When the policy is limited to the statutory language, other issues, such as coverage, are not arbitrable and must be decided by the court [*Bouton v. USAA Casualty Insurance Company (2008) 167 Cal. App. 4th 412, 420, 84 Cal. Rptr. 3d 152* (coverage includes question whether claimant is an insured within policy definitions); *Hartford Acc. & Indem. Co. v. Jackson (1983) 150 Cal. App. 3d 111, 114, 197 Cal. Rptr. 477]* . In addition, an insurer that has paid its insured the full amount of the uninsured motorist coverage cannot be compelled to arbitrate. Any of the insured's damages attributable to the accident that exceed the policy's uninsured-motorist limits have no relevance in uninsured motorist arbitration [*State Farm Mutual Automobile Ins. Co. v. Superior Court (Balen) (2004) 123 Cal. App. 4th 1424, 1432-1433, 20 Cal. Rptr. 3d 850]* . Similarly, there is nothing relevant to any bad faith claim by the insured that can be arbitrated. The insured's damages in a bad faith action against his or her insurer derive from actions taken by the insurer after the accident. Unlike the traditional third-party bad faith situation, in an uninsured-motorist context, the personal injury and property damage sustained by the insured occur before any bad faith on the insurer's part. They cannot be a proximate result of any bad faith conduct, and cannot serve as a proper measure of damages in any bad faith action [*State Farm Mutual Automobile Ins. Co. v. Superior Court (Balen) (2004) 123 Cal. App. 4th 1424, 1432-1434, 20 Cal. Rptr. 3d 850]* .

[b] Additional Issues If Clause Is Broader Than Insurance Code § 11580.2(f)

If the policy language is broader than that required by *Ins. Code § 11580.2(f)*, the arbitration of additional issues may be required [*see Freeman v. State Farm Mut. Auto. Ins. Co. (1975) 14 Cal. 3d 473, 481, 121 Cal. Rptr. 477, 535 P.2d 341]* . For example, when a policy provided that the arbitrators would "hear and determine the question or questions so

in dispute" if the parties did "not agree on the amount payable" under the policy, the arbitrator was empowered to decide the coverage issue of whether or not there was contact between the other vehicle and the insured vehicle as required by *Ins. Code § 11580.2(b)(1)* [*Orpustan v. State Farm Mut. Auto. Ins. Co. (1972) 7 Cal. 3d 988, 991-992, 103 Cal. Rptr. 919, 500 P.2d 1119* ; *see also Freeman v. State Farm Mut. Auto. Ins. Co. (1975) 14 Cal. 3d 473, 482, 121 Cal. Rptr. 477, 535 P.2d 341* (characterizing the holding in *Orpustan* as based on the policy language rather than the statutory language)].

[c] Waiver of Objection to Arbitration of Issue

Additionally, a dispute that would otherwise not be subject to arbitration may be decided by the arbitrator or arbitrators if the party that could object to the submission fails to do so and thereby waives the right to object [*see Felner v. Meritplan Ins. Co. (1970) 6 Cal. App. 3d 540, 544, 86 Cal. Rptr. 178]* .

[6] Declaration Regarding Worker's Compensation

Uninsured motorists coverage does not apply in any instance in which it would inure directly or indirectly to the benefit of any worker's compensation carrier or to any person qualified as a self-insurer under any worker's compensation law, or directly to the benefit of the United States, or any state or any political subdivision of the United States [*Ins. Code § 11580.2(c)(4)*].

If the insured has or may have rights to benefits, other than nonoccupational disability benefits, under any worker's compensation law, the arbitrator may not proceed with the arbitration until the insured's physical condition is stationary and ratable. In those cases in which the insured claims a permanent disability, the claims must, unless good cause is shown, be adjudicated by award or settled by compromise and release before the arbitration may proceed [*Ins. Code § 11580.2(f)*].

A petition for arbitration of a dispute over uninsured motorists coverage is required to contain a declaration under penalty of perjury stating whether the insured has a worker's compensation claim. If there is a claim, the declaration must state whether the claim has proceeded to findings and award or settlement on all issues reasonably contemplated to be determined in the claim. If it has not proceeded to findings and award or settlement, the declaration must state reasons amounting to good cause as grounds for the arbitration to proceed immediately [*Ins. Code § 11580.2(f)*].

[7] Prerequisites to Accrual of Action

Ins. Code § 11580.2(i)(1) provides that no cause of action accrues in the insured's favor unless one of the following actions has occurred within two years from the date of the accident:

- Suit for bodily injury has been filed against the uninsured motorist;
- Agreement as to the amount due under the policy had been concluded; or
- The insured has formally instituted arbitration proceedings by notifying the insurer in writing sent by certified mail, return receipt requested. The notice must be sent to the insurer or to the agent for process designated by the insurer filed with the Department of Insurance.

The statutory period for completion of one of the prerequisites listed above was increased from one year to two years effective January 1, 2004, but that amendment was not retroactive. Thus, insureds who were injured by an uninsured motorist on June 16, 2003, lost any cause of action against their insurer by failing to demand arbitration and by not filing suit against the uninsured motorist until June 19, 2004 *[Bullard v. California State Automobile Assn. (2005) 129 Cal. App. 4th 211, 218-221, 28 Cal. Rptr. 3d 225]* .

Although some cases have held that *Ins. Code § 11580.2(i)* establishes a limitation period for petitioning to compel arbitration of an uninsured motorist claim [*see, e.g., Freeman v. State Farm Mut. Auto. Ins. Co. (1975) 14 Cal. 3d 473, 484, 121 Cal. Rptr. 477, 535 P.2d 341]* , that position has been abrogated by the California Supreme Court, which has held that Section 11580.2(i) instead establishes prerequisites to accrual of an action on an uninsured motorist claim, and that no cause of action accrues until and unless the insurer refuses to arbitrate [*Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1040-1042, 9 Cal. Rptr. 2d 381, 831 P.2d 821]* . Then, the four-year limitation of *Code Civ. Proc. § 337*, applicable to breach of contract, applies [*Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1040, 9 Cal. Rptr. 2d 381, 831 P.2d 821]* .

PRACTICE TIP:

Protecting Against Two Year Period. There are three ways to protect the two year period when an uninsured motorist is involved: (1) demand arbitration; (2) resolve the dispute; and/or (3) file a complaint [*see Ins. Code § 11580.2(i)*].

If in fact a defendant is uninsured, the demand for arbitration should be filed before the two year period expires. If the fact of uninsurance of the defendant is discovered during litigation, the demand for uninsured motorist arbitration can be served within a reasonable time after such discovery [*see Ins. Code § 11580.2(i)(1)(A)*]. The two-year period applies to actions in behalf of a minor or incompetent [*see Republic Indem. Co. v. Barn Furniture Mart, Inc. (1967) 248 Cal. App. 2d 517, 518-519, 56 Cal. Rptr. 609]* .

The complaint against all potential defendants should always be filed before the running of the two year statute of limitations. Although the parties may believe that certain motorists are uninsured, if it is later discovered that insurance exists after the running of the two year statute, then there is a violation of the statute, and it is time to call your malpractice carrier. *By Michael S. Fields*

PRACTICE TIP: Make Prompt Demand After Settlement With Underinsured Motorist. A demand for arbitration should be made immediately after settlement with the underinsured motorist. The demand should contain a copy of the certification proving the insurance limits, copy of the settlement draft and copy of the release document, all of which are prima facie evidence of the payment by the underinsured motorist of the policy limit. Some carriers who insure the party who is underinsured will not cooperate and send certification of the amount of insurance. It is best to obtain this information by way of verified interrogatory responses that set out the amount of insurance. Also limits of insurance can be obtained by demanding the insurance policy and the declaration page through *Code Civ. Proc. § 2031.010 et seq.* [*see Code Civ. Proc. § 2017(b)* (*Code Civ. Proc. § 2017.210*, effective July 1, 2005)]. *By Michael S. Fields*

[8] Cross References

For discussion relating to the requirements for a petition to compel arbitration, see *§ 32.91[1]*

For further discussion relating to proceedings to compel arbitration, see *§ 32.43*

Eisler, California Uninsured Motorist Law Handbook, Ch. 19, *Arbitration* (Parker 5th ed. 1993)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureAlternative Dispute

ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsInsurance LawMotor Vehicle InsuranceArbitrationCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel Arbitration

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4-32 California Forms of Pleading and Practice--Annotated § 32.93

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.93 Petition to Compel Arbitration [Code Civ. Proc. §§ 1281.2, 1290]--Uninsured Motorists Claim [Ins. Code § 11580.2(f)]--By Insured Against Insurer--Based on Physical Contact With Unidentified Motorist

[1] FORM Petition to Compel Arbitration--Uninsured Motorists Claim--By Insured Against Insurer--Based on Physical Contact With Unidentified Motorist

[*Caption. See § 32.91[1].*]

Petitioner alleges:

1. Petitioner is, and at all times herein mentioned was, a resident of _____ County, California.

2. Respondent is, and at all times herein mentioned was, a corporation organized and existing under the laws of California, with its principal place of business in _____ County, California and authorized to do, and doing, business as an automobile liability insurer.

3. On or about _____ [*date*], respondent issued to petitioner an automobile liability insurance policy, a copy of which is attached to as Exhibit "A" and made a part hereof.

4. On or about _____ [*date*], while the policy was in full force and effect but prior to its actual delivery to petitioner, petitioner was involved in a vehicular accident with an uninsured motorist whose identity is unknown to petitioner. Petitioner sustained bodily injury arising out of physical contact of the automobile operated by that uninsured motorist with _____ [petitioner *or* the automobile which petitioner was at that time occupying].

5. Within 24 hours after the accident petitioner reported the accident to the _____ [Police Department

of the City of _____ (*city where the accident occurred*) *or if the accident occurred in unincorporated territory, either* Sheriff of the County of _____ (*county where the accident occurred*) *or* local headquarters of the California Highway Patrol in _____ (*city or town*)].

6. On or about _____ [*date, within 30 days of the accident*], petitioner filed with respondent a verified statement pursuant to *Insurance Code Section 11580.2(b)(2)* that petitioner had a cause of action arising out of the accident against an uninsured motorist and setting forth facts in support that cause of action. Respondent failed and refused, and continues to fail and refuse, to settle the claim presented by the verified statement.

7. On or about _____ [*date*], petitioner demanded arbitration of the claim. Respondent failed and refused, and continues to fail and refuse, to submit to arbitration of the claim.

WHEREFORE, petitioner prays that the court order arbitration of the controversy described above, as required by *Section 11580.2(f) of the Insurance Code*, and award petitioner his/her costs herein incurred.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

SUPPORTING DECLARATION OF _____ [*name*]

[*Set forth declaration regarding worker's compensation claim. See § 32.92[1].*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting petition*]

[2] Use of Form

The form of petition in [1], *above*, is for use to compel arbitration of a personal injury claim under uninsured motorists coverage of an automobile liability insurance policy when uninsured motorist status is based on physical contact with an unidentified motorist [*see Ins. Code § 11580.2(b)* (defining "uninsured motor vehicle")]. The form is adapted from the petition as amended and filed in *Bohlert v. Spartan Ins. Co. (1969) 3 Cal. App. 3d 113, 116, 83 Cal. Rptr. 515* . For discussion regarding the requirements for a petition to compel arbitration, see *§§ 32.91[1]* and *32.92*.

A written notice of the time and place of the hearing and any papers on which the petition is based are to be served with the petition in the manner provided in *Code Civ. Proc. § 1290.4* [*Code Civ. Proc. § 1290.4*]. For a form of notice of hearing, see *§ 32.91[2]*.

PRACTICE TIP:

File Complaint in Case Driver Is Identified. The plaintiff should always file a "Doe" complaint in case the hit and run driver or vehicle are subsequently identified and discovered to have insurance coverage, after the statute date. The insurance coverage may come from the driver or the vehicle owner, if different from the driver. *By Michael S. Fields*

[3] Allegations

For the purpose of uninsured motorists coverage [*see Ins. Code § 11580.2(a)*; *see § 32.92[3]*] the term "uninsured motor vehicle" includes a motor vehicle with respect to which the owner or operator is unknown, provided that:

- The bodily injury has arisen out of physical contact of that automobile with the insured or with an automobile which the insured is occupying [*Ins. Code § 11580.2(b)(1)*]; and

- The insured or someone on his or her behalf has reported the accident within 24 hours to the law enforcement authorities and has filed with the insurer within 30 days thereafter a statement under oath setting forth the claim and supporting facts [*Ins. Code § 11580.2(b)(2)*].

When the scope of arbitration is as broad as that specified in *Ins. Code § 11580.2(f)*, that is, to determine whether the insured is legally entitled to recover damages, and, if so, the amount of the damages, a dispute as to whether or not the vehicle causing the injury was an uninsured motor vehicle is to be submitted to arbitration and not decided by the court [*Orpustan v. State Farm Mut. Auto. Ins. Co. (1972) 7 Cal. 3d 988, 991-992, 103 Cal. Rptr. 919, 500 P.2d 1119* ; *Felner v. Meritplan Ins. Co. (1970) 6 Cal. App. 3d 540, 543, 86 Cal. Rptr. 178]* . It seems, therefore, that specifically pleading facts showing the status of the vehicle (Paragraphs 4-6) is necessary only if the scope of arbitration is limited and the issue as to the status of the vehicle is to be decided by the court.

[4] Declaration Regarding Worker's Compensation Is Required

A petition for arbitration of an uninsured motorists coverage claim is also required to contain a declaration under penalty of perjury stating whether a worker's compensation claim arises from the injuries and the status of any such claim [*Ins. Code § 11580.2(f)*; *see § 32.92[1], [6]*].

[5] Cross References

For further discussion relating to proceedings to compel arbitration, see *§ 32.43*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsInsurance LawMotor Vehicle InsuranceArbitrationCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel Arbitration

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4-32 California Forms of Pleading and Practice--Annotated § 32.94

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.94 Response [Code Civ. Proc. § 1290] to Petition to Compel Arbitration--Admissions, Denials, and Defenses

[1] FORM Response to Petition to Compel Arbitration--Admissions, Denials, and Defenses

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Petitioner,	)	RESPONSE TO PETITION TO COMPEL ARBIT-
vs.	)	RATION
_____ [*name*],	)	Date: _____
Respondent.	)	Time: _____
	)	Dept: _____
	)	Judge: _____Trial Date:
	)	_____
		Date Action Filed: _____

_____

Respondent _____ [*name*] answers and responds to the petition herein as follows:

1. Answering [Paragraph(s) _____ of] the petition, respondent denies each and every, all and singular, generally and

specifically, the allegations therein [, except that respondent admits _____ (*specify*)].

2. _____ [*Continue with denials*].

FIRST AFFIRMATIVE DEFENSE
(Waiver of Arbitration)

1. The alleged controversy that petitioner seeks to arbitrate allegedly arose on or about _____ [*date*], and any right to arbitrate existed, if at all, at that time.

[*EITHER, if written agreement specifies a time within which to demand arbitration*]

2. Under the terms of the arbitration agreement of _____ [*date*], between petitioner and respondent, a demand for arbitration must be filed not later than _____ [*specify time limitation on demand, e.g.,* 60 days after the occurrence of the disputed event].

3. _____ [*Set forth facts showing waiver, e.g.,* Petitioner did not make any demand on respondent to arbitrate the controversy and did not take any steps to enforce his/her right to arbitrate until _____ (*date*), when for the first time petitioner demanded that the controversy be submitted to arbitration].

4. This failure to make a timely demand constitutes a waiver and forfeiture of any right petitioner may have to arbitrate this controversy.

[*OR, if written agreement does not specify a certain time within which to demand arbitration*]

2. _____ [*Set forth facts showing waiver, e.g.,* Petitioner did not make any demand on respondent to arbitrate the controversy and did not take any steps to enforce his/her right to arbitration until _____ [*date*], when for the first time petitioner demanded that the controversy be submitted to arbitration. The delay was unreasonable in that _____ (*set forth circumstances showing delay was unreasonable*)].

3. In so doing petitioner, with full knowledge of the existence of the controversy and his/her alleged right to arbitrate, intentionally waived and relinquished any such right to settle the controversy by arbitration.

[*CONTINUE*]

SECOND AFFIRMATIVE DEFENSE
(Grounds for Revoking Agreement to Arbitrate)

1. Respondent admits that on or about _____ [*date*] petitioner and respondent entered into a written agreement requiring that the controversy alleged in the petition be submitted to arbitration.

2. Grounds exist for revocation of the agreement to arbitrate the alleged controversy in that _____ [*specify*].

THIRD AFFIRMATIVE DEFENSE

(Insufficient Facts Alleged)

The facts alleged in the petition are insufficient for the court to order arbitration in that _____ [*specify, e.g.,* the petition does not allege that there is a written agreement to arbitrate].

FOURTH AFFIRMATIVE DEFENSE
(Possibility of Conflicting Rulings)

1. _____ [*Party designation*] is also a party to the proceeding now pending in the _____ [*specify court, e.g.,* United States District Court for the Northern District of California], entitled _____ [*title of case*], No. _____, which arises out of the same _____ [transaction *or* series of related transactions] from which the present matter arose.

2. If that proceeding and the present proceeding are both allowed to proceed simultaneously, there is a possibility of conflicting rulings on a common issue of _____ [law *or* fact], namely _____ [*specify common issue*].

FIFTH AFFIRMATIVE DEFENSE
(The Parties Have No Agreement to Arbitrate)

1. Respondent admits that on or about _____ [*date*], petitioner and respondent began negotiations for a contract [and exchanged drafts of proposed agreements], but the parties intended[, and the draft agreements specifically provided,] that no agreement between the parties would constitute a legal and binding obligation of the parties until and unless it was signed. [A copy of the draft agreement dated _____ and incorporating that provision at paragraph _____ is attached hereto and made a part hereof by this reference.]

2. Respondent never signed the agreement and notified petitioner on or about _____ [*date*], that it was terminating their negotiations because agreement could not be reached on material terms.

3. No contract to arbitrate was ever formed between petitioner and respondent.

WHEREFORE, respondent prays:

1. That the petition be denied;

2. That respondent be awarded costs of suit [and attorney's fees] herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent

[2] Use of Form

The form of response in [1], *above*, is for use to contest a petition to compel arbitration. In additional to denials, the

form sets out a number of possible affirmative defenses. Counsel should use as many of those defenses as are applicable to the case.

A party who is aware of a basis for finding the arbitration process invalid must raise its objection at the outset, or as soon as they learn of it, so that prompt judicial resolution may take place before wasting the time of the adjudicator(s) and the parties. A party who participates in arbitration and does not raise the invalidity until a petition to confirm or vacate the award will have forfeited the right to contest the arbitration process at that stage. The rationale is twofold: to avoid gamesmanship and to avoid wasting time and resources [*Cummings v. Future Nissan (2005) 128 Cal. App. 4th 321, 328-329* ; *but see Bayscene Resident Negotiators v. Bayscene Mobile Home Park (1993) 15 Cal. App. 4th 119, 129, 18 Cal. Rptr. 2d 626* (exception when participation in arbitration is under protest due to threat of criminal sanctions)].

[3] Contents

[a] Denials

If respondent controverts the material allegations of the petition, the response should deny those allegations (Paragraphs 1 and 2) [*see Code Civ. Proc. § 1290* (allegations of petition deemed admitted unless response is served and filed)].

[b] Affirmative Defenses

[i] Waiver of Arbitration

If respondent contests the petition on ground that the petitioner's waived arbitration, respondent should set forth facts showing waiver (First Affirmative Defense, first and second alternatives) [*see Code Civ. Proc. § 1281.2(a)*].

The first alternative may be used when the arbitration agreement specifies a certain time for demanding arbitration and the petitioner has failed to submit his or her demand within that time [*see Platt Pacific, Inc. v. Andelson (1993) 6 Cal. 4th 307, 321, 24 Cal. Rptr. 2d 597, 862 P.2d 158]* .

The second alternative may be used when the arbitration agreement does not specify a certain date, but the petitioner's demand was unreasonably delayed [*see Sawday v. Vista Irrigation Dist. (1966) 64 Cal. 2d 833, 836, 52 Cal. Rptr. 1, 415 P.2d 816]* . For discussion, see *§ 32.40[1]*.

[ii] Revocation of Arbitration Agreement

If the respondent contests on the basis that grounds exist for revoking the agreement to arbitrate, the response should set forth those grounds and supportive facts (Second Affirmative Defense, Paragraphs 1 and 2) [*see Code Civ. Proc. § 1281.2(b)*]. For discussion of grounds for revocation of arbitration agreements, see *§ 32.21*.

[iii] Insufficient Facts Alleged

If the petition does not allege sufficient facts for the court to order arbitration the response should raise that point as an affirmative defense (Third Affirmative Defense) [*see Bertero v. Superior Court (1963) 216 Cal. App. 2d 213, 218, 30 Cal. Rptr. 719* (notice of motion to compel arbitration which did not allege the existence of a written agreement to arbitrate did not state sufficient facts for an order to arbitrate)].

[iv] Possibility of Conflicting Rulings

If the respondent contests the petition on the basis that a party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions,

and there is a possibility of conflicting rulings on a common issue of law or fact, respondent should set forth facts showing the existence of the other action or proceeding and a common issue (Fourth Affirmative Defense) [*see Code Civ. Proc. § 1281.2(c)*; *see also Best Interiors, Inc. v. Millie and Severson, Inc. (2008) 161 Cal. App. 4th 1320, 1326-1330, 75 Cal. Rptr. 3d 1* (arbitration properly denied because of possibility of conflicting rulings as to inspectors, not parties to arbitration agreements, who were chosen by owner, controlled by owner and primary contractor and whom plaintiff/subcontractor alleged were responsible for delays; decision based on California choice of law incorporated from related agreement)].

This defense is not available when the agreement is one to arbitrate disputes as to the professional negligence of a health care provider made pursuant to *Code Civ. Proc. § 1295* [*Code Civ. Proc. § 1281.2*]. Section 1295, however, does not apply to all contracts for medical services [*see Code Civ. Proc. 1295(f)*; for discussion of the exceptions, *see § 32.43[8][g]*].

If the pending action or proceeding in question was commenced by the party refusing to arbitrate, the defense is available even when the action or proceeding was commenced after the petition to compel arbitration was filed, provided it was commenced on or before the date of the hearing on the petition [*Code Civ. Proc. § 1281.2(c)*].

Code Civ. Proc. § 1281.2 does not conflict with policies of the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*), which applies to maritime transactions and contracts involving interstate and foreign commerce, and is therefore not preempted by it [*Volt Information Sciences v. Board of Trustees (1989) 489 U.S. 468, 477-479, 109 S. Ct. 1248, 103 L. Ed. 2d 488* ; *Cronus Investments, Inc. v. Concierge Services (2005) 35 Cal. 4th 376, 380, 393-394, 25 Cal. Rptr. 3d 540, 107 P.3d 217* (disapproving *The Energy Group, Inc. v. Liddington (1987) 192 Cal. App. 3d 1520, 238 Cal. Rptr. 202* and *Warren-Guthrie v. Health Net (2000) 84 Cal. App. 4th 804, 101 Cal. Rptr. 2d 260* to the extent their holdings are predicated on the conclusion that section 1281.2(c) limits the authority of arbitrators and conflicts with the FAA); *see also Mount Diablo Medical Center v. Health Net of California, Inc. (2002) 101 Cal. App. 4th 711, 124 Cal. Rptr. 2d 607* (*Code Civ. Proc. § 1281.2* applicable and not preempted); *Henry v. Alcove Investment, Inc. (1991) 233 Cal. App. 3d 94, 101-102, 284 Cal. Rptr. 255* (following *Volt* to affirm stay)]. Nevertheless, if the parties' agreement contains a choice-of-law clause that makes some other law applicable to determine whether arbitration is required, *Code Civ. Proc. § 1281.2(c)* may not apply.

For further discussion of factors militating in favor of denying a motion to compel based on the existence of related litigation involving third parties not subject to the arbitration agreement, see *§ 32.101[2]*.

[v] No Agreement to Arbitrate

The most basic requirement for arbitration is an agreement to arbitrate [*Code Civ. Proc. § 1281*; *see* discussion at *§ 32.21[1]*]. Therefore, if there is no valid contract to arbitrate, a petition to compel arbitration must be denied [*Banner Entertainment, Inc. v. Superior Court (1998) 62 Cal. App. 4th 348, 356, 72 Cal. Rptr. 2d 598]* . The fifth affirmative defense contemplates a situation in which (1) the parties made it clear, from a provision that a proposed written contract, that they intended the contract to become operative *only* when signed by them and (2) the contract was never signed. That failure to sign the agreement means no binding contract was created [*Banner Entertainment, Inc. v. Superior Court (1998) 62 Cal. App. 4th 348, 358, 72 Cal. Rptr. 2d 598]* .

[vi] Attorney's Fees

When an action is brought solely to compel arbitration of contractual disputes between the parties, and the contract contains a provision entitling the prevailing party to attorney's fees, the fact that the parties will probably pursue their underlying claims in another action will not lessen respondent's victory in this discrete legal proceeding. Thus, a respondent who is successful in obtaining an order denying the petition to compel arbitration, will be entitled to its attorney's fees incurred in responding to the petition as a function of his or her costs under *Code Civ. Proc. §*

1033.5(a)(10)(A). Civ. Proc. § 1293.2 requires the court to award costs in any judicial proceeding under *Code Civ. Proc. § 1280 et seq.* [*Otay River Constructors v. San Diego Expressway (2007) 158 Cal. App. 4th 796, 799, 805-808, 70 Cal. Rptr. 3d 434*].

[4] Copies

The following copies of the response should be prepared:

- Original to be filed in the superior court in which the petition is pending and conformed copy for the court to stamp and return.
- One copy to be served on each of the other parties.
- One copy for the client.
- Office file copies.
- Other copies as desired.

[5] Service and Filing of Response

[a] Effect

Any person named as a respondent in a petition may file a response to it. The allegations of a petition are deemed admitted by a respondent on whom it has been duly served unless a response is duly served and filed. The allegations of a response are deemed controverted or avoided [*Code Civ. Proc. § 1290*].

[b] Time

A response must be served and filed within 10 days after service of the petition except that if the petition is served in the manner provided in *Code Civ. Proc. § 1290.4(b)(2)* (service by mail outside the state) the response is to be served and filed within 30 days after service of the petition. Time for service and filing of the response may be extended by an agreement in writing between the parties to the court proceeding or by order of the court for good cause [*Code Civ. Proc. § 1290.6*]. For forms dealing with extension of time, see Ch. 524, *Shortening and Extension of Time* .

[c] Manner of Service

A response must be served as provided in *Code Civ. Proc. § 1010 et seq.*, governing service of papers other than summons [*Code Civ. Proc. § 1290.8*; for forms dealing with service of papers, see Ch. 518, *Service of Summons and Papers*].

[6] Cross References

For memoranda of points and authorities in support of the form of response in [1], *above*, see California Points and Authorities, Ch 20, *Arbitration: Compelling* and Ch. 20A, *Arbitration: Resisting* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil

ProcedurePleading & PracticePleadingsAnswersInsurance LawMotor Vehicle InsuranceArbitrationCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel Arbitration

California Forms of Pleading and Practice--Annotated

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 32 CONTRACTUAL ARBITRATION: AGREEMENTS AND COMPELLING ARBITRATION
PART V. FORMS
B. Compelling Arbitration

4-32 California Forms of Pleading and Practice--Annotated § 32.95

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.95 Order Compelling Arbitration [Code Civ. Proc. § 1281.2]

[1] FORM Order Compelling Arbitration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Respondent.	)	
	)	
	)	

The petition of _____ [*name*] for an order compelling arbitration came on regularly for hearing on _____ [*date*]. Petitioner appeared through his/her counsel _____ [*name*] and respondent appeared through his/her counsel _____ [*name*].

Due and proper notice of the hearing of the petition having been given and proof having been made to the satisfaction of the court that the petition should be granted,

IT IS ORDERED that petitioner _____ [*name*] and respondent _____ [*name*] arbitrate the controversies existing between them in accordance with the provisions of their agreement dated _____ [*date*], and that petitioner recover his/her costs of this proceeding.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, is for use in granting a petition to compel an unwilling party to arbitrate. Customarily the order is prepared by counsel for petitioner and submitted to the court for signature when the petition is granted after the hearing. Occasionally the court, before signing the order, may require that opposing counsel approve the order as to form, in which case the words "Approved as to form" would be typed in the lower left corner of the order, or on a separate page attached to the order, with a date and signature line for the opposing counsel's endorsement on the original. Once the order is signed by the court it is delivered to the clerk of the court for filing.

If a judge who is disqualified [*see Code Civ. Proc. § 170.1(a)(8)* (employment discussions with dispute resolution provider)] does not disclose the disqualification but instead hears and determines the petition to compel arbitration, the order compelling arbitration must be vacated, because a disqualified judge's rulings are void regardless of their legal correctness. Another judge must reconsider the petition to compel arbitration [*see Rossco Holdings, Inc. v. Bank of America (2007) 149 Cal. App. 4th 1353, 1356, 1363, 1366-1368, 58 Cal. Rptr. 3d 141* (disqualification occurs when facts creating it arise, not when disqualification is established)]. That does not necessarily mean that any arbitration award based on the ensuing arbitration needs to be vacated [*Rossco Holdings, Inc. v. Bank of America (2007) 149 Cal. App. 4th 1353, 1364-1368, 58 Cal. Rptr. 3d 141* ; *see* discussion at *§ 34.19[1][b][v]* (regarding vacating award)].

[3] Contents

The order specifies the acts directed by the court and is made or entered in writing [*Code Civ. Proc. §§ 1003, 1064*].

[4] Copies

The order should be prepared in the same number of copies as the petition [*see § 32.91[1][d]*].

[5] Requirements for Order

[a] When Order Is Required

If the court determines at the hearing that an agreement to arbitrate the controversy exists, it is required to order the petitioner and the respondent to arbitrate the controversy unless it determines that [*Code Civ. Proc. § 1281.2*]:

- The right to compel arbitration has been waived by the petitioner [*see § 32.94[3][b][i]*]; or

- Grounds exist for the revocation of the agreement [*see § 32.94[3][b][ii]*]; or

- A party to the arbitration agreement (other than one to arbitrate disputes as to the professional negligence of a health care provider made pursuant to *Code Civ. Proc. § 1295*) is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions, and there is a possibility of conflicting rulings on a common issue of law or fact [*see § 32.94[3][b][iv]*].

If the court makes the third determination, the court [*Code Civ. Proc. § 1281.2*]:

- May refuse to enforce the arbitration agreement and may order intervention or joinder of all parties in a single action or special proceeding; or

- May order intervention or joinder as to all or only certain issues; or

- May order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or

- May stay arbitration pending the outcome of the court action or special proceeding.

[b] Court's Function Is Limited to Determining Arbitrability Under Agreement

The function of the court is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the arbitration agreement [Charles J. Rounds Co. v. Joint Council of Teamsters No. 42 *(1971) 4 Cal. 3d 888, 892, 95 Cal. Rptr. 53, 484 P.2d 1397* ; *East San Bernardino County Water Dist. v. City of San Bernardino (1973) 33 Cal. App. 3d 942, 952, 109 Cal. Rptr. 510* ; *Northcutt Lumber Co. v. Goldeen's Peninsula, Inc. (1973) 30 Cal. App. 3d 440, 443, 106 Cal. Rptr. 353]* .

An order to arbitrate may not be refused on the ground that the petitioner's contentions lack substantive merit [*Code Civ. Proc. § 1281.2*]. The court is required to grant the order, absent waiver or revocability of the agreement, unless the arbitration clause is not susceptible of interpretation that it covers the dispute [Charles J. Rounds Co. v. Joint Council of Teamsters No. 42 *(1971) 4 Cal. 3d 888, 892, 95 Cal. Rptr. 53, 484 P.2d 1397* ; *Morris v. Zukerman (1967) 257 Cal. App. 2d 91, 96, 64 Cal. Rptr. 714]* . Doubts are to be resolved in favor of coverage [Leon Handbag Co. v. Local 213 *(1969) 276 Cal. App. 2d 240, 243, 81 Cal. Rptr. 63]* .

[c] Statement of Decision

Because an order compelling arbitration is not appealable, a statement of decision is not required to be given by the court when an order compelling arbitration is made [*Code Civ. Proc. §§ 1291, 1294(a)*].

[6] Cross References

For further discussion relating to orders in proceedings to compel arbitration, see *§ 32.43[8]*

For procedure and forms dealing with orders generally, see Ch. 372, *Motions and Orders*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel Arbitration

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Chapter 32 CONTRACTUAL ARBITRATION: AGREEMENTS AND COMPELLING ARBITRATION
PART V. FORMS
B. Compelling Arbitration

4-32 California Forms of Pleading and Practice--Annotated § 32.96

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.96 Order Denying Arbitration and Dismissing Proceedings

[1] FORM Order Denying Arbitration and Dismissing Proceedings

[*Caption. See § 32.95[1].*]

The petition of _____ [*name*] for an order compelling arbitration came on regularly for hearing on this date. Petitioner appeared through his/her counsel, _____ [*name*] and respondent appeared through his/her counsel, _____ [*name*].

The court, having considered the _____ [affidavit(s) *or* declaration(s)] and other documents and evidence in support of and in opposition to the petition, having heard the arguments of counsel, [and] being fully advised in the premises,

IT IS ORDERED that the petition to order arbitration is denied and the proceeding is dismissed, respondent to recover his/her costs [and attorney's fees] herein incurred.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form or order in [1], *above*, is for use when the court denies a petition to order arbitration and dismiss the proceedings. It is presented to the court for signature and then delivered to the clerk of the court to be filed.

For discussion of the function of the court in deciding whether to grant or deny a petition to compel arbitration, see *§*

32.95. For discussion of the basis for an award of attorney's fees, see *§ 32.94[3][vi]*.

[3] Statement of Decision

An order dismissing or denying a petition to compel arbitration is an appealable order [*Code Civ. Proc. § 1294(a)*] and is therefore subject to *Code Civ. Proc. § 1291*, which provides that a statement of decision shall be made by the court on request pursuant to *Code Civ. Proc. § 632* when an order or judgment is appealable. A statement of decision must be requested within 10 days after the court announces a tentative decision, or if the trial has lasted less than one calendar day, or less than eight hours over more than one day, the statement of decision must be requested prior to the submission of the matter for decision [*Code Civ. Proc. § 632*].

For procedure and forms dealing with statements of decisions, see Ch. 529, *Statement of Decision* .

[4] Cross References

For further discussion relating to orders in proceedings to compel arbitration, see *§ 32.43[8]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActOrders to Compel Arbitration

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4-32 California Forms of Pleading and Practice--Annotated § 32.97

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.97 Motion to Stay Proceedings in Pending Action Until Arbitration Is Completed [Code Civ. Proc. § 1281.4]

[1] FORM Motion to Stay Proceedings in Pending Action Until Arbitration Is Completed

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Petitioner,	)	NOTICE OF MOTION AND MOTION FOR ORDER TO STAY PROCEEDINGS IN PENDING ACTION UNTIL ARBITRATION COMPLETED; SUPPORTING DECLARATION OF _____[*name*]; AND MEMORANDUM OF POINTS AND AUTHORITIES
vs.	)	
_____ [*name*],	)	
Respondent.	)	
	)	[LIMITED CIVIL CASE]
	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.*, plaintiff] _____ [*name*], and to his/her attorney of record:

[*EITHER*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify moving party, e.g.,* defendant] will, and hereby does, move for an order staying the proceedings herein until _____ [*identify party, e.g.,* defendant's] application to arbitrate, now pending before _____ (*specify court*), is determined and there is an arbitration, if it is ordered. The motion will be made on the ground that the controversy to be arbitrated pursuant to the _____ [application *or* order] is an issue involved in the above entitled cause now pending before this court.

[*OR*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify moving party, e.g.,* defendant] will move for an order staying the proceedings herein until there is an arbitration in accordance with the order by _____ (*specify court*), a copy of which is attached to, and served with, this notice of motion] or until such earlier time as the court may order. The motion will be made on the ground that the controversy to be arbitrated pursuant to the _____ [application *or* order] is an issue involved in the above entitled cause now pending before this court.

[*CONTINUE*]

The motion will be based on this notice of motion, the declaration of _____ [*name*], and the memorandum of points and authorities served and filed with this notice, on the records and file of this case, and on any evidence that may be presented at the hearing of the motion.
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*party's status, e.g.,* Defendant]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], say:

1. I am _____ [*specify, e.g.,* the defendant in this action].

2. On _____ [*date*], I _____ [filed a petition to compel arbitration which is now pending in *or* obtained an order compelling arbitration from] the Superior Court of California, County of _____.

3. The controversy subject to arbitration as _____ [stated in the petition mentioned above *or* ordered] is _____ [*describe*]. This controversy is an issue involved in the above entitled cause now pending before this court in that _____ [*specify*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion.*]

[2] Use of Form

The form in [1], *above*, is a notice of motion and supporting declaration for use by a party to a pending action or proceeding involving an arbitrable issue, to stay the proceeding until there is an arbitration in accordance with an existing order to arbitrate or a pending application for an order to arbitrate [*Code Civ. Proc. § 1281.4*; for discussion, *see 32.31[2]*]. This motion need not be made by a party to the arbitration agreement, but may be made by any party to the action or proceeding so long as the same issue is involved in both the arbitration and the proceeding, and its determination in arbitration may serve to simplify the pending action or prevent multiple litigation of issues [*Federal Ins. Co. v. Superior Court (1998) 60 Cal. App. 4th 1370, 1374-1375, 71 Cal. Rptr. 2d 164* ; *Marcus v. Superior Court (1977) 75 Cal. App. 3d 204, 209, 211-212, 141 Cal. Rptr. 890]* . A single overlapping issue is sufficient to require imposition of a stay [*Heritage Provider Network, Inc. v. Superior Court (Eastland Medical Group) (2008) 158 Cal. App. 4th 1146, 1152-1153, 70 Cal. Rptr. 3d 645* ; *compare Code Civ. Proc. § 1281.2(c)*, discussed at *32.43[8][g]*, under which issue may be raised on petition to compel arbitration].

This motion is filed in the court in which the action or proceeding sought to be stayed is pending [*Code Civ. Proc. § 1292.8*]. The title of the court and description of the parties would therefore be the same as on previous papers filed in the action or proceeding.

If the action or proceeding sought to be stayed is commenced prior to the filing of a petition to compel arbitration, the petition must be filed in the action or proceeding [*Code Civ. Proc. § 1292.4*]. If that is the case, it appears unnecessary to file a separate motion to stay the action or proceeding because the petitioner could request a stay in the prayer of the petition itself [*see § 32.91*].

If the party opposing litigation of arbitrable issues does not choose to compel arbitration he or she may elect to assert as an affirmative defense that arbitration is a condition precedent to commencement of the suit, and seek dismissal of the action or proceeding rather than make a motion for stay of proceedings [Charles J. Rounds Co. v. Joint Council of Teamsters No. 42 *(1971) 4 Cal. 3d 888, 894, 899, 95 Cal. Rptr. 53, 484 P.2d 1397* ; *see § 32.98[1]*].

[3] Accompanying Papers

[a] Arbitration Agreement

Provisions of the written agreement and the paragraph that provides for arbitration must be stated verbatim or attached and incorporated by reference in the notice of motion [*see Cal. Rules of Ct., Rule 3.1330*].

[b] Supporting Declaration

The declaration is used to establish the fact that the issue involved in the litigation is subject to arbitration and that either an application has been made or a court order obtained to arbitrate the issue. The declaration would be unnecessary when those facts are otherwise established by other papers and records on file in the action or proceeding, such as, for example, when the petition to compel arbitration has been filed in the action or proceeding sought to be stayed.

A declaration under penalty of perjury may be used in lieu of an affidavit [*see Code Civ. Proc. § 2009* (use of affidavits on motion)] under *Code Civ. Proc. § 2015.5* if it is executed in California [for forms of affidavit, *see* Ch. 15, *Affidavits, Certificates, and Declarations*].

[c] Memorandum of Points and Authorities

A memorandum of points and authorities must accompany this notice of motion when it is served and filed; the absence of the memoradum may be construed by the court as an admission that the motion is not meritorious and cause for its denial [*Cal. Rules of Ct., Rule 3.1113(a)*].

[4] Copies

The following copies of the notice of motion should be prepared:

- Original to be filed in the court in which the action or proceeding is pending and conformed copy for the court to stamp and return.
- One copy to be served on the attorney for each party to the action or proceeding.
- One copy for the client, if desired.
- One copy for the office files.
- Other copies as desired.

[5] Service and Filing

Notice of motion is to be given at least 16 court days before the time appointed for the hearing. The court or judge may, however, prescribe a shorter time [*Code Civ. Proc. § 1005(b)*; for procedure and foms dealing with shortening time, *see* Ch. 524, *Shortening and Extension of Time*]. It may be served on a party or on his or her attorney by personal service or in a manner specified in *Code Civ. Proc. § 1011*, or by mail as specified in *Code Civ. Proc. § 1012* [*Code Civ. Proc. § 1010*; for procedure and forms dealing with service of papers, *see* Ch. 518, *Service of Summons and Papers*]. However, if service is by mail, the 16-day period of notice required by Section 1005(b) is increased by five calendar days if the place of mailing and address are in California, by 10 calendar days if either the place of mailing or address is outside California but within the United States, or 20 calendar days if either the place of mailing or address is outside the United States; if notice is served by fax or Express Mail or other overnight delivery, the period is extended by two calendar days [*Code Civ. Proc. § 1005(b)*]. An extension of two court days, as opposed to calendar days, may apply in case of electronic service made pursuant to a local rule adopted under *Code Civ. Proc. § 1010.6* [*see Code Civ. Proc. § 1010.6(a)(6)*; for discussion, see *Ch. 518, Service of Summons and Papers, § 518.41[8]*].

[6] Cross References

For memoranda of points and authorities supporting and opposing the foregoing motion, see California Points and Authorities, Ch 20, *Arbitration: Compelling* and Ch. 20A, *Arbitration: Resisting* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActStays Pending Arbitration

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B. Compelling Arbitration

4-32 California Forms of Pleading and Practice--Annotated § 32.97A

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.97A Order Staying Proceedings in Pending Action Until Arbitration is Completed

[1] FORM Order Staying Proceedings in Pending Action Until Arbitration is Completed

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	ORDER STAYING PROCEEDINGS IN PENDING
_____ [*name*],	)	ACTION UNTIL ARBITRATION IS COMPLETED
Respondent.	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

The motion of _____ [*name*] for an order to stay proceedings in the above entitled cause came on regularly for hearing this date. _____ [*identify party, e.g.*, Plaintiff] appeared by his/her counsel _____ [*name*] and _____ [*identify party, e.g.*, defendant] appeared by his/her counsel _____ [*name*].

Proof having been made to the satisfaction of the court that the motion should be granted and good cause appearing therefor,

IT IS ORDERED that the above entitled _____ [action *or* proceeding] be stayed _____ [with respect to the following issues only: _____ (*specify*) *or* as to all proceedings therein] until _____ [arbitration has been concluded and award made in accordance with

the Order Compelling Arbitration made by the Superior Court of California, County of _____, dated _____, *or* the Petition to Compel Arbitration now pending before the Superior Court of California, County of _____, is determined and arbitration is concluded if ordered therein *or* _____ (*specify other time ordered by the court*)].
Dated: _____

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of order in [1], *above*, is for use when the court grants a stay of proceedings until the parties have arbitrated a controversy at issue in the action or proceeding or until a party's right to arbitrate has been determined. Ordinarily counsel for the moving party prepares the order, has it signed by the court, and files it with the clerk of the court [*see generally* Ch. 372, *Motions and Orders*].

The party who requested or caused the stay must immediately serve and file a notice of the stay and attach a copy of the order or other document showing that the proceeding is stayed. [*Cal. Rules of Ct., Rule 3.650(a)-(c)*]. For a form of notice of stay of proceedings, see *§ 32.97B*.

[3] Contents

The order directs that the proceedings be stayed either as to certain issues alone which are subject to the arbitration and severable from the others subject to the litigation or as to all proceedings [*see Code Civ. Proc. § 1281.4*; *see also Cook v. Superior Court (1966) 240 Cal. App. 2d 880, 885, 50 Cal. Rptr. 81* (discretion of court under *Code Civ. Proc. § 1281.4* to order that all proceedings be stayed or that they be stayed only as to severable issues subject to arbitration)]. Stay of proceedings is directed until either the application for arbitration is determined or there is an arbitration in accordance with an order to arbitrate, as the case may be, or until such earlier time specified by the court [*Code Civ. Proc. § 1281.4*].

Since an order granting a stay of proceedings is not expressly made appealable by *Code Civ. Proc. § 1294*, a statement of decision is not required to be made by a court on request [*see Code Civ. Proc. § 1291*].

[4] Copies

The order is prepared in the same number of copies as the notice of motion [*see § 32.97*].

[5] Cross References

For discussion of order staying arbitration as equivalent to order denying petition for purposes of appeal, see *§ 32.44[1][b]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActStays Pending Arbitration

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B. Compelling Arbitration

4-32 California Forms of Pleading and Practice--Annotated § 32.97B

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.97B Notice of Stay of Proceedings [Cal. Rules of Ct., Rule 3.650]--Judicial Council Form CM-180

[1] FORM Notice of Stay of Proceedings [Cal. Rules of Ct., Rule 3.650]--Judicial Council Form CM-180

Click here to view image.

[2] Use of Form

The form of notice of stay of proceedings in [1], *above*, is an illustration of Judicial Council Form CM-180 and is the mandatory form to be used by the party who requested and caused a stay of proceedings until arbitration is completed; and this notice must be immediately served and filed on all parties who have appeared in the action [*Cal. Rules of Ct., Rule 3.650(a), (b)(2)*]. If the person who requested or caused the stay has not appeared, or is not subject to the jurisdiction of the court, the plaintiff must immediately serve and file this notice [*Cal. Rules of Ct., Rule 3.650(a)*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents

The notice must state whether the case is stayed with regard to all parties or only certain parties; if it is stayed with regard to only certain parties, the notice must specifically identify those parties; and the notice must also state the reason the case is stayed [*Cal. Rules of Ct., Rule 3.650(c)*].

[4] Accompanying Papers

A copy of the order or other document showing that the proceeding is stayed must be attached to the notice of stay of proceedings [*Cal. Rules of Ct., Rule 3.650(a)*].

[5] Subsequent Requirements

When the stay is vacated, is no longer in effect, or is modified, the party who filed the notice of the stay must immediately serve and file a notice of termination or modification of stay. If that party fails to do so, any other party in the action who has knowledge of the termination or modification of the stay must serve and file a notice of termination or modification of stay. Once one party in the action has served and filed a notice of termination or modification of stay, other parties in the action are not required to do so [*Cal Rules of Ct., Rules 3.650(d)*]. Judicial Council Form CM-181 Notice of Termination or Modification of Stay must be used after January 1, 2006 to give the required notice [*see § 32.97C*].

[6] Cross References

For discussion of a motion to stay proceedings, see *§ 32.31[2]*.

For a notice of motion and motion to stay proceedings pending completion of arbitration, see *§ 32.97*.

For an order staying proceedings pending completion of arbitration, see *§ 32.97A*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActStays Pending Arbitration

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4-32 California Forms of Pleading and Practice--Annotated § 32.97C

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.97C Notice of Termination or Modification of Stay [Cal. Rules of Ct., Rule 3.650]--Judicial Council Form CM-181

[1] FORM Notice of Termination or Modification of Stay [Cal. Rules of Ct., Rule 3.650]--Judicial Council Form CM-181

Click here to view image.

[2] Use of Form

The form of Notice of Termination or Modification of Stay is an illustration of Judicial Council Form CM-181, and its use is mandatory. It must be filed by the party who filed the notice of the stay. That party must immediately serve and file a notice of termination or modification of stay when applicable. If that party fails to do so, any other party in the action who has knowledge of the termination or modification of the stay must serve and file a notice of termination or modification of stay. Once one party in the action has served and filed a notice of termination or modification of stay, other parties in the action are not required to do so [*Cal. Rules of Ct., Rules 3.650(d)*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActStays Pending Arbitration

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4-32 California Forms of Pleading and Practice--Annotated § 32.98

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.98 Affirmative Defense to Action--Arbitration Is Condition Precedent to Suit

[1] FORM Affirmative Defense to Action--Arbitration Is Condition Precedent to Suit

AFFIRMATIVE DEFENSE
(Arbitration Is Condition Precedent to Suit)

1. Paragraph _____ of the written agreement sued on by plaintiff herein provides as follows: _____ [*set out provision requiring arbitration*]. This provision requires that plaintiff and defendant arbitrate the controversy that is at issue in this action.

2. Defendant has not waived arbitration but plaintiff has at all times failed and refused to arbitrate the controversy and has made no attempt to submit the matter to arbitration. The matter has not been arbitrated.

3. Arbitration is a condition precedent to commencement and maintenance of this action and the action is barred by the absence of an arbitration.

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer to a complaint when the issues raised by the complaint are subject to arbitration but have not been arbitrated.

For alternative methods of pleading affirmative defenses, see Ch. 26, *Answers* .

[3] Allegations

The affirmative defense alleges [*see* Charles J. Rounds Co. v. Joint Council of Teamsters No. 42 *(1971) 4 Cal. 3d*

888, 894-899, 95 Cal. Rptr. 53, 484 P.2d 1397] :

- The agreement to arbitrate the controversy sued on (Paragraph 1).
- There has been no arbitration nor any attempt by plaintiff to arbitrate (Paragraph 2).
- Defendant elects that the action be barred (Paragraph 3).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewContracts LawContract Conditions & ProvisionsConditions Precedent

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4-32 California Forms of Pleading and Practice--Annotated § 32.99

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.99 Affirmative Defense to Action--Arbitration as Sole Remedy and Not Conducted Within Time Specified

[1] FORM Affirmative Defense to Action--Arbitration as Sole Remedy and Not Conducted Within Time Specified

AFFIRMATIVE DEFENSE
(Arbitration Is Sole Remedy and Was Not Held Within Specified Time)

1. The contract referred to in the complaint provides, in Paragraph _____, as follows: _____ [*set forth arbitration provisions and time limitations, e.g.,* All disputes that may arise in connection with this contract must be settled and resolved solely by arbitration by a single arbitrator mutually appointed by the parties. _____ (*Set forth any further terms that are relevant*). The right of each party to request arbitration shall automatically cease within 30 calendar days from and excluding the delivery date set forth above].

2. Plaintiff's sole remedy was under the clause above set forth; he/she did not within the _____ [*e.g.,* 30-day] period specified in the clause ask or demand that defendant proceed to arbitrate any alleged claim, dispute, or right he/she may have, if any, by reason of the matters and alleged facts set forth in the complaint; and this action is therefore barred under the above clause.

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer to a complaint relating to a dispute in which the parties:

- Agreed that arbitration would be a condition precedent to litigation.
- But no arbitration was held during the period specified in the agreement.

[3] Allegations

The form of affirmative defense alleges [see Charles J. Rounds Co. v. Joint Council of Teamsters No. 42 *(1971) 4 Cal. 3d 888, 894, 95 Cal. Rptr. 53, 484 P.2d 1397* (exhausting arbitration remedy as condition precedent to maintaining suit on arbitrable dispute)]:

- The agreement to arbitrate the dispute which is the subject of the pending suit and the time limitations thereon (Paragraph 1).

- Plaintiff's failure to seek or enforce his or her right to arbitration within the applicable time (Paragraph 2).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsWaivers

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4-32 California Forms of Pleading and Practice--Annotated § 32.100

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.100 Affirmative Defense to Action--Satisfaction of Arbitration Award

[1] FORM Affirmative Defense to Action--Satisfaction of Arbitration Award

AFFIRMATIVE DEFENSE
(Satisfaction of Arbitration Award)

1. On or about _____ [*date*], plaintiff and defendant entered into an agreement in writing by which they _____ [agreed to submit any and all controversies that might arise between them to arbitration *or* submitted to arbitration the controversy alleged in the complaint] by arbitrators to be selected as set forth in the agreement. A copy of the agreement is attached to this answer as Exhibit "A" and made a part of this answer. The controversy was submitted to the arbitration of _____ [*name*], _____ [*name*], and _____ [*name*], were appointed arbitrators.

2. The arbitrators duly heard the proofs and allegations of the parties and made their award on _____ [*date*]. Under that award, the arbitrators found that there was due and owing by this defendant to the plaintiff the sum of $_____. Thereafter, on or about _____ [*date*], a judgment on an order confirming said award was duly entered. A copy of said order and judgment is attached to this answer as Exhibit "B" and made a part of this answer.

3. On or about _____ [*date*], and prior to the commencement of this action, defendant duly performed all the conditions of the award on his/her part and duly paid and satisfied the judgment. A copy of the satisfaction of judgment is attached to this answer as Exhibit "C" and made a part of this answer.

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer to a complaint on a dispute that has gone to

arbitration when the arbitration award has been confirmed by court judgment, and the judgment has been satisfied.

[3] Allegations

The form of affirmative defense alleges [*see Archuleta v. Grand Lodge etc. of Machinists (1968) 262 Cal. App. 2d 202, 208, 68 Cal. Rptr. 694]* :

- The arbitration agreement (Paragraph 1);
- The arbitration award and judgment confirming it (Paragraph 2); and
- Performance and payment of the award by defendant and satisfaction of the judgment (Paragraph 3).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral Overview

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4-32 California Forms of Pleading and Practice--Annotated § 32.101

AUTHOR: Michael S. Fields Editorial Consultant

§ 32.101 Motion to Set Aside Stay of Pending Action Involving Third Party and to Reverse Order Compelling Arbitration [Code Civ. Proc. §§ 1281.2(c), 1281.4]

[1] FORM Motion to Set Aside Stay of Pending Action Involving Third Party and to Reverse Order Compelling Arbitration [Code Civ. Proc. §§ 1281.2(c), 1281.4]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*names*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER REMOVING STAY AND REVERSING PRIOR ARBITRATION ORDER; SUPPORTING DECLARATION OF _____ [*name*]; AND MEMORANDUM OF POINTS AND AUTHORITIES;
vs.	)	
_____ [*names*],	)	
Defendants.	)	
	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: Not Assigned

_____

To _____ [*identify party, e.g.,* defendants] _____ [*names*] and to their attorneys of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* plaintiff] will and does hereby move for an order removing this court's _____ [*date*] stay and reversing its ruling of _____ [*date*] that plaintiff and defendant _____ [*name*] arbitrate the issue of defendant _____ [*name*]'s liability. The motion will be and is made pursuant to *Code of Civil Procedure sections 1281.2* and *1281.4* on the ground that allowing the stay to remain in place and compelling the _____ [*party, e.g.,* plaintiff] and _____ [*party, e.g.,* defendant] _____ [*name*] to arbitrate the issue of liability, while having the liability of the other defendants separately litigated when the arbitration is concluded and the stay is lifted, raises the possibility of conflicting rulings on common issues of law or fact.

The motion will be and is based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. At the time of _____ [*describe event which is subject of dispute*], _____ [plaintiff *or* plaintiff's decedent] _____ [*name*] and defendant _____ [*name*] were parties to a contract for _____ [*type of contract out of which dispute arose*]. That contract contained an arbitration clause which is attached as Exhibit _____ hereto.

3. On motion of defendant _____ [*name*], the court ordered plaintiff to arbitrate its claims against defendant _____ [*name*] and stayed plaintiff's action as to all other defendants. This _____ [*date*] order is attached as Exhibit _____ hereto.

[4. Set out any additional supporting facts in as many paragraphs as appropriate.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES
[*Add memorandum of points and authorities supporting motion*]

[2] Use of Form

The form of notice of motion in [1], *above*, is for use to set aside an order compelling arbitration and staying an action when the action involves third parties not subject to an arbitration agreement as well as parties that are subject to the agreement. The basis of the motion is that there is a possibility of conflicting rulings on a common issue of law or fact if proceedings are allowed both in court and in an arbitration proceeding [*see* Code *Civ. Proc. § 1281.2(c)*; *see also Code Civ. Proc. § 1281.4* (court to stay action until arbitration is had or until such earlier time as the court specifies); *Mercury Insurance Group v. Superior Court (1998) 19 Cal. 4th 332, 345-348, 79 Cal. Rptr. 2d 308, 965 P.2d 1178* ; *Prudential Property & Casualty Ins. Co. v. Superior Court (1995) 36 Cal. App. 4th 275, 278-279, 42 Cal. Rptr. 2d 227* ; for discussion, *see § 32.43[8][g]*].

Factors that may support this motion include:

- Inability to conduct discovery in the stayed action when information needed in both the arbitration and the action is solely within the knowledge of the parties to the stayed action who are not parties to the arbitration.

- In the case of a personal injury, property damage, or wrongful death action, the possibility of grossly inadequate recovery of noneconomic damages if each forum allocates most of the comparative fault against the parties who are not before the forum or grossly excessive recovery of noneconomic damages if each form allocate most of the fault against the parties who are before that forum [*see Civ. Code § 1431.2* (several liability for noneconomic damages); *see Mercury Insurance Group v. Superior Court (1998) 19 Cal. 4th 332, 350, 79 Cal. Rptr. 2d 308, 965 P.2d 1178* ; *Prudential Property & Casualty Ins. Co. v. Superior Court (1995) 36 Cal. App. 4th 275, 278-279, 42 Cal. Rptr. 2d 227* (upholding order granting joinder of uninsured motorist arbitration proceeding with civil action because involvement of insured and uninsured motorists created possibility of conflicting determination of comparative fault)].

This motion can only be made a party to the arbitration agreement. One who is involved only in the litigation has no standing under *Code Civ. Proc. § 1281.2(c)* to seek to have the arbitration stayed. It is not enough that one be a party to litigation that has some factual nexus to the matters being arbitrated. Further, a third party involved only in the litigation should not need the protection of a stay of the arbitration because the arbitrator's award will have no res judicata or collateral estoppel effect against a person or entity who is was not a party to the arbitration, and does not claim to be in privity with any party to the arbitration [*One World Networks Integrated Technologies, Inc. v. Duitch (2002) 103 Cal. App. 4th 1038, 1043-1044, 127 Cal. Rptr. 2d 843]* .

[3] Time for Raising Issues on Which Motion Is Based

Better practice is to ask for the stay of arbitration at time a party moves to compel arbitration. As a practical matter, however, in many instances facts may develop after the motion to compel arbitration has been granted that may demand reconsideration and provide for staying the arbitration rather than the action. Counsel should exercise caution in this situation however, given the restrictions on motions for reconsiderationimposed by *Code Civ. Proc. § 1008*, which imposes a short time limit for bringing a motion to reconsider, requires an affidavit showing new or different facts,

circumstances or law, and makes violation of its requirements sanctionable [for discussion of *Code Civ. Proc. § 1008, see* Ch. 372, *Motions and Orders*].

[4] Accompanying Papers

A memorandum of points and authorities is required to be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActStays Pending Arbitration

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Chapter 33 CONTRACTUAL ARBITRATION: APPOINTMENT OF ARBITRATOR AND CONDUCT OF PROCEEDING

4-33 California Forms of Pleading and Practice--Annotated 33.syn

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.syn Synopsis to Chapter 33: CONTRACTUAL ARBITRATION: APPOINTMENT OF ARBITRATOR AND CONDUCT OF PROCEEDING

§ 33.01 Scope of Chapter

§ 33.02 Cross References

§ 33.03 Governing Law

§§ 33.04-33.09 [Reserved]

§ 33.10 Definitions

[1] Arbitrator

[a] Neutral Arbitrator

[b] Party Arbitrator

[2] Controversy

[3] Party to the Arbitration

[4] Award

§ 33.11 Party Arbitrator and Neutral Arbitrator Compared

§ 33.12 Agreement on Method of Appointment

§ 33.13 Petition for Court Appointment of Arbitrator

[1] Circumstances for Making Petition

[a] Failure to Agree

[b] Arbitrator's Failure to Act

[c] Dispute Involving Health Care Service Plan

[2] Procedure for Court Appointment

§ 33.14 Disclosures by Neutral Arbitrators

[1] Disclosure Requirements

[a] Disclosure Requirements Enumerated

[b] Time Limits for Making Disclosures

[2] Disclosures Required by Ethical Standards

[a] Matters That Neutral Arbitrator Must Disclose

[b] Definitions and Compliance Regarding Arbitrator's Family

[c] Other Applicable Definitions

[i] "Any Arbitration" and "Case"

[ii] "Conclusion of the Arbitration"

[iii] "Dispute Resolution Neutral"

[iv] "Dispute Resolution Provider Organization"

[v] "Financial Interest"

[vi] "Lawyer in the Arbitration"

[vii] "Lawyer for a Party"

[d] Who Must Make Disclosures

[e] Time When Disclosures Must Be Made

[f] Continuing Duty of Disclosure

[g] Disclosures Regarding Provider Organizations in Consumer Arbitrations

[i] Definitions and Matters Required To Be Disclosed

[ii] Arbitrator May Rely on Information Supplied by Provider Organization

[iii] Arbitrator May Rely on Consumer Party's Representation

[h] Disqualification Based on Ethics Standard or Code Civ. Proc. § 1281.91

[i] Consent to New Employment of Arbitrator

[3] Disclosures Under Code of Civil Procedure Section 1281.9(a)

[a] Matters to Be Disclosed

[i] Prior Service as Party Arbitrator

[ii] Prior Service as Neutral Arbitrator

[iii] Attorney-Client Relationship

[iv] Professional or Significant Personal Relationship

[b] Definitions

[i] "Lawyer for Party" Defined

[ii] "Prior Case" Defined

[iii] "Any Arbitration" Defined

[c] Who Must Disclose

[d] Time for Making Disclosures

[e] Disqualification

[i] Noncompliance With Disclosure Requirements

[ii] Based on Disclosure Statement

[iii] Court-Appointed Arbitrators

[f] Waiver of Right to Disqualify

[4] Residential Construction Contract Arbitration

[a] Declaration Requirement

[b] Grounds for Disqualification

[c] Notice of Disqualification

[d] Waiver of Right to Disqualify

[e] Comparison of Code Civ. Proc. §§ 1281.9 and 1281.95 Disclosure Provisions

§ 33.15 Disclosure of Grounds for Disqualification of Judge

[1] Disclosures Required

[2] Failure of Arbitrator to Disqualify Self

§ 33.16 Private Arbitration Companies and Consumer Arbitrations

[1] Prohibited Financial Interests

[2] Publication of Five Years' Historical Data

§§ 33.17-33.19 [Reserved]

§ 33.20 Powers of Arbitrators

[1] Source of Powers

[2] Scope of Powers

[3] Exercise of Powers

[a] Limited to Submitted Issues

[b] Statutory Powers

[c] Reference to Principles of Law and Equity

[d] Punitive Damages Award

[e] Waiver of Objection of Lack of Authority

[4] Powers and Duties in Plurality of Arbitrators

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FOOTNOTES:
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4-33 California Forms of Pleading and Practice--Annotated § 33.01

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.01 Scope of Chapter

This chapter provides discussion and forms relating to the selection of an arbitrator and the conduct of the arbitration hearing pursuant to a contract to arbitrate.

Regarding the selection of the arbitrator, it discusses the nature of neutral and party arbitrators [*see § 33.11*], appointment by the parties' agreement [*see § 33.12*] or by petition to the court [*see § 33.13*], disclosures required of neutral arbitrators [*see §§ 33.14, 33.15*], and disqualification of arbitrators [*see §§ 33.14 -33.15*]. A Procedural Checklist is included [*see § 33.50*], as well as the following related forms:

- Petition and order for appointment of neutral arbitrator [*see § 33.60*].
- Notices of disqualification of neutral arbitrator in cases involving claims for damages generally [*see § 33.61*] or in cases involving residential construction or improvement contracts [*see § 33.62*].

Regarding the arbitration hearing, the chapter discusses the power of arbitrators [*see § 33.20*], consolidation of arbitration proceedings [*see § 33.21*], and restraining arbitration [*see § 33.22*]. It also discusses the right to counsel [*see § 33.23*], the issuance of subpoenas [*see § 33.24*] and discovery [*see § 33.25*], the informal nature of [*see § 33.26*] and statutory rules applicable to [*see § 33.27*] arbitration hearings, the award [*see § 33.28*], costs and attorney's fees [*see § 33.29*], and the immunity of participants from liability to the parties [*see § 33.30*]. A Procedural Checklist is included [*see § 33.51*], as well as the following related forms:

- Notice of an arbitration hearing [*see § 33.70*].
- Demand for lists of witnesses and documents [*see § 33.71*].
- Arbitration award [*see § 33.72*].

- Application to the arbitrator for correction of the award [*see § 33.73*].

- Complaints for declaratory relief and injunctive relief to prevent arbitration in general [*see § 33.74*] or in uninsured motorist claims cases [*see § 33.75*].

- Petition for the consolidation of separate arbitration proceedings [*see § 33.76*].

The chapter also includes a Research Guide with additional references [*see § 33.40* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActCoverage & ExceptionsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral Overview

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AUTHOR: Michael S. Fields Editorial Consultant

§ 33.02 Cross References

Additional information about contractual arbitration may be found in two other chapters:

- Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*, discusses arbitration agreements, including the scope of arbitration and judicial proceedings to compel arbitration.

- Ch. 34, *Contractual Arbitration: Judicial Review*, discusses the limited scope of review and the procedure for reviewing arbitration awards.

Related topics are listed in Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*, § 32.02.

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4-33 California Forms of Pleading and Practice--Annotated § 33.03

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.03 Governing Law

Arbitration by agreement is governed generally by *Code Civ. Proc. §§ 1280-1294.2*.

Disclosures relating to a neutral arbitrator's impartiality are governed by *Code Civ. Proc. §§ 170.1, 1281.85, 1281.9, 1281.91, 1281.95*.

Various statutes govern agreements to arbitrate a variety of specific types of controversies, such as the following:

- Compensation in eminent domain proceedings [*Code Civ. Proc. §§ 1273.010-1273.050*; *see Ch. 247, Eminent Domain, § 247.10* et seq.].

- Professional negligence of health care providers [*Code Civ. Proc. § 1295*; *see* Ch. 415, *Physicians: Medical Malpractice*].

- Disputes involving public construction contracts [*Code Civ. Proc. § 1296*].

- International commercial arbitration and conciliation [*Code Civ. Proc. §§ 1297.11-1297.432*; *see* Ch. 35, *Arbitration and Conciliation of International Commercial Disputes*].

- Real estate contract disputes [*Code Civ. Proc. §§ 1298-1298.8*].

- Uninsured motorist and underinsured motorist claims [*Ins. Code § 11580.2*; *see* Ch. 88A *Automobiles: Uninsured Motorist Claims*].

- Wage claims [*Lab. Code § 229*].

- Labor contracts with talent agencies [*Lab. Code § 1700.45*; *see* Ch. 370, *Motion Pictures*].
- State employees' workmen's compensation and insurance [*Lab. Code §§ 6144-6146*].

If a dispute involves interstate or foreign commerce or maritime law, *9 U.S.C. §§ 1-15* will also govern.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActCoverage & ExceptionsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsInsurance LawMotor Vehicle InsuranceArbitrationInternational Trade LawDispute ResolutionArbitration

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4-33 California Forms of Pleading and Practice--Annotated §§ 33.04-33.09

AUTHOR: Michael S. Fields Editorial Consultant

[Reserved]

§§ 33.04[Reserved]

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A. Appointment of Arbitrator

4-33 California Forms of Pleading and Practice--Annotated § 33.10

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.10 Definitions

[1] Arbitrator

[a] Neutral Arbitrator

"Neutral arbitrator" means an arbitrator who is either selected jointly by the parties or by the arbitrators selected by the parties, or appointed by the court when a mutual agreement cannot be reached [*Code Civ. Proc. § 1280(d)*].

In the Ethics Standards for Neutral Arbitrators, the terms "arbitrator" and "neutral arbitrator" are used interchangeably and mean any arbitrator who is subject to the standards and is to serve impartially, whether selected or appointed in any of the following ways [Cal. Rules of Ct., Appen., Div. VI, Standard 2(a)(1); *see § 33.14[2][d]* for discussion of who is subject to standards]:

(A) Jointly by the parties or by the arbitrators selected by the parties;

(B) By the court, when the parties or the arbitrators selected by the parties fail to select an arbitrator who was to be selected jointly by them; or

(C) By a dispute resolution provider organization, under agreement of the parties.

If the context includes events or acts occurring before an appointment is final, "arbitrator" and "neutral arbitrator" include a person who has been served with notice of a proposed nomination or appointment [Cal. Rules of Ct., Appen., Div. VI, Standard 2(a)(2)].

[b] Party Arbitrator

"Party arbitrator" is an arbitrator selected to represent a party as an arbitrator [*see Good v. Kaiser Foundation Hospital (1984) 152 Cal. App. 3d 819, 823, 199 Cal. Rptr. 581* , citing 3 Cal. L. Rev. Comm'n Reports G-42].

In the Ethics Standards for Neutral Arbitrators, "party arbitrator" means an arbitrator selected unilaterally by a party [Cal. Rules of Ct., Appen., Div. VI, Standard 2(q)].

[2] Controversy

As used in the arbitration statutes and in this subpart "controversy" means any question arising between parties to an agreement whether such question is one of law or of fact or both [*Code Civ. Proc. § 1280(c)*].

[3] Party to the Arbitration

"Party to the arbitration" means a party to the arbitration agreement who seeks to arbitrate a controversy pursuant to the agreement, or against whom arbitration is sought pursuant to the agreement. It also includes one who is made a party to arbitration by order of the neutral arbitrator on that party's application, on the application of any other party to the arbitration, or on the neutral arbitrator's own determination [*Code Civ. Proc. § 1280(e)*].

In the Ethics Standards for Neutral Arbitrators, "party" means as party to the arbitration agreement [Cal. Rules of Ct., Appen., Div. VI, Standard 2(p)(1)]:

(A) Who seeks to arbitrate a controversy pursuant to the agreement;

(B) Against whom such arbitration is sought; or

(C) Who is made a party to the arbitration by order of a court or the arbitrator on that party's application, on the application of any other party to the arbitration, or on the arbitrator's own determination.

"Party" includes a representative of a party, unless the context requires a different meaning [Cal. Rules of Ct., Appen., Div. VI, Standard 2(p)(2)].

[4] Award

As used in the arbitration statutes and in this subpart "award" includes, but is not limited to, an award made pursuant to an agreement not in writing [*Code Civ. Proc. § 1280(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-33 California Forms of Pleading and Practice--Annotated § 33.11

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.11 Party Arbitrator and Neutral Arbitrator Compared

Essentially, the neutral arbitrator is impartial, while party arbitrators are more like advocates. As described by the California Law Revision Commission, when a tripartite arbitration board is appointed, it is usually composed of a representative of each of the contending parties and a third arbitrator chosen by the other two or by some other predetermined procedure. The third arbitrator, who is the neutral arbitrator, often acts as the chairman of the board. In this type of arbitration only the neutral arbitrator is an impartial party and an arbitrator in the usual sense. The arbitrators representing the parties frequently behave more like advocates than arbitrators. The practice of referring to "arbitrator" as including both the party arbitrators and the neutral arbitrators leads to confusion as to their functions and responsibilities [*Good v. Kaiser Foundation Hospital (1984) 152 Cal. App. 3d 819, 823, 199 Cal. Rptr. 581* , citing 3 Cal. L. Rev. Comm'n Reports G-42].

PRACTICE TIP:

Multiple Arbitrators Are Expensive. Arbitration before a panel of three arbitrators is extremely costly. Given the high cost of using a panel of arbitrators, this practice should be avoided unless there are clear reasons for wanting a panel. The cost makes use of a panel particularly inappropriate in small disputes and in disputes in which one party has much less economic power than the other, as will usually be the case in consumer disputes. In those situations the economically weaker party should, if possible, resist attempts by the stronger party to require a panel. On the other hand, a panel may be appropriate in a high stakes, complex dispute between parties with ample resources who place a value the interaction of the panel in solving the dispute because of its complexity. *By Michael S. Fields*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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4-33 California Forms of Pleading and Practice--Annotated § 33.12

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.12 Agreement on Method of Appointment

If the arbitration agreement provides a method of appointing an arbitrator, that method is to be followed. If the arbitration agreement does not provide a method for appointing an arbitrator, the parties to the agreement who seek arbitration and against whom arbitration is sought may agree on a method of appointing an arbitrator and that method will be followed [*Code Civ. Proc. § 1281.6*]. However, if the agreed method has failed and the other party does not consent to the proposed method, arbitration cannot be ordered. For example, if a party is no longer a member of the organization that was to conduct the arbitration and therefore not entitled to use that organization's arbitration services absent consent, which is not forthcoming, a court will not order arbitration [*Provencio v. WMA Securities, Inc. (2005) 125 Cal. App. 4th 1028, 1032-1033, 23 Cal. Rptr. 3d 524* (defendant no longer member of NASD; plaintiff would not consent to arbitration before NASD)].

PRACTICE TIP:

Considerations in Selecting an Arbitrator. From an attorney's perspective, an expert on the subject matter should not be chosen as an arbitrator unless the parties want that expertise to determine the issue. Otherwise, the expert arbitrator will probably assert his or her expertise in determining an issue in lieu of considering the expert witness testimony.

It is always best to discuss proposed arbitrators with colleagues, who may know about the history and background of a proposed arbitrator. Many bar associations, such as Consumer Attorneys Association of Los Angeles (CAALA) have yearly open meetings to discuss the decision and attitudes of persons available to arbitrators.

One should consider past dealings with prospective arbitrators, as well as reputation in the community.
By Michael S. Fields

Legal Topics:

For related research and practice materials, see the following legal topics:
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A. Appointment of Arbitrator

4-33 California Forms of Pleading and Practice--Annotated § 33.13

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.13 Petition for Court Appointment of Arbitrator

[1] Circumstances for Making Petition

[a] Failure to Agree

Absent an agreed method, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails to act and a successor has not been appointed, the court, on petition of a party to the arbitration agreement, appoints the arbitrator [*Code Civ. Proc. § 1281.6*].

For a form of petition and order to appoint a neutral arbitrator, see *§ 33.60*.

[b] Arbitrator's Failure to Act

There is a distinction between failure of the agreed method for choosing an arbitrator and the chosen agency's refusal to conduct the arbitration. When the chosen agency refuses to conduct the arbitration, *Code Civ. Proc. § 1281.6* does not permit a court to choose an alternative forum by appointing substitute arbitrators [*Martinez v. Master Protection Corp. (2004) 118 Cal. App. 4th 107, 121 (AAA)* ; *Alan v. Superior Court (USB Painewebber, Inc.) (2003) 111 Cal. App. 4th 217, 227-228, 3 Cal. Rptr. 3d 377 (NYSE, NASD)]* . An agreement for arbitration "in accordance with" American Arbitration Association procedures has been held to mean that the arbitration had to take place before that agency, that is, in an AAA forum. On AAA's refusal to conduct the arbitration, the court should have returned the matter to the civil active list [*Martinez v. Master Protection Corp. (2004) 118 Cal. App. 4th 107, 120-122 compare Reddam v. KPMG LLP (9th Cir. 2006) 457 F.3d 1054, 1060-1061* (agreement to arbitrate under NASD Rules was neither choice of forum clause nor so integral to agreement as to prevent court from ordering arbitration before another arbitrator when NASD refused to act)].

Code Civ. Proc. § 1281.6, set forth at [a], *above*, also gives a court authority to appoint a successor arbitrator in some

situations in which the original arbitrator fails to act. Although a trial court has authority to set a completion date within which the arbitrator must render his or her award, and although an arbitrator may be removed for failure to act, when the delays in concluding the arbitration are not chargeable to the arbitrator, but to the parties and/or the arbitration administrator, there is no failure to act within the meaning of *Code Civ. Proc. § 1281.6*. Thus, in that situation, a court has no authority to remove the arbitrator and appoint a successor. When a court removes an arbitrator and appoints a successor without authority, any award made by the successor is void [Bosworth v. Whitmore (2006) 135 Cal. App. 4th 536, 546-553, 37 Cal. Rptr. 3d 560].

[c] Dispute Involving Health Care Service Plan

If a health care service plan [*see Health & Safety Code § 1345(f)* (definition)] uses arbitration to settle disputes with enrollees or subscribers, and does not use a professional dispute resolution organization independent of the plan that has a procedure for a rapid selection, or default appointment, of neutral arbitrators, the plan must comply with the following requirements, which are not subject to waiver [*Health & Safety Code § 1373.20(a)*]:

> (1) In cases or disputes requiring a single neutral arbitrator, if the party seeking arbitration and the plan against which arbitration is sought are unable to select a neutral arbitrator within 30 days after service of a written demand requesting the designation, it shall be conclusively presumed that the agreed method of selection has failed and the method provided in *Code Civ. Proc. § 1281.6* [*see* [a], *above*, and [2], *below*] may be utilized.
>
> (2) In cases or disputes in which the parties have agreed to use a tripartite arbitration panel consisting of two party arbitrators and one neutral arbitrator, and the party arbitrators are unable to agree on the designation of a neutral arbitrator within 30 days after service of a written demand requesting the designation, it shall be conclusively presumed that the agreed method of selection has failed and the method provided in *Code Civ. Proc. § 1281.6* may be utilized.

In disputes involving $200,000 or less, a health care service plan providing for binding arbitration cannot provide for more than a single neutral arbitrator. This limitation cannot be waived, except that after a dispute has arisen, the parties may agree to a tripartite panel [*Health & Safety Code § 1373.19* (also including regulation of such agreements to a tripartite panel)]. Similarly to Section 1373.20(a), Section 1373.19 provides that if the parties are unable to agree on the selection of a neutral arbitrator, and the plan does not use a professional dispute resolution organization independent of the plan that has a procedure for a rapid selection or default appointment of a neutral arbitrator, the method provided in *Code Civ. Proc. § 1281.6* may be utilized.

If a court reviewing a petition filed pursuant to *Health & Safety Code § 1373.19* or *1373.20(a)* finds that a party has engaged in dilatory conduct intended to cause delay in proceeding under the arbitration agreement, the court, by order, may award reasonable costs, including attorney fees, incurred in connection with the filing of the petition [*Health & Safety Code § 1373.20(b)*].

If a plan uses arbitration to settle disputes with enrollees or subscribers, the following requirements must be met with respect to extreme hardship cases [*Health & Safety Code § 1373.20(c)*]:

> (1) The plan contract is required to provide for the assumption of all or a portion of an enrollee's or subscriber's share of the fees and expenses of the neutral arbitrator in cases of extreme hardship.
>
> (2) The plan must disclose this provision to subscribers in any evidence of coverage issued or amended after August 1, 1997.
>
> (3) The plan must provide enrollees, upon request, with an application for relief under Subdivision

1373.20(c), or information on how to obtain an application from the professional dispute resolution organization that will administer the arbitration process. If the plan uses a professional dispute resolution organization independent of the plan, the provision for assumption of the arbitration fees in cases of extreme hardship shall be established and administered by the dispute resolution organization.

(4) Approval or denial of the application must be determined by either (A) a professional dispute resolution organization independent of the plan if the plan uses a professional dispute resolution organization, or (B) a neutral arbitrator who is not assigned to hear the underlying dispute, who has been selected pursuant to paragraph (1) of subdivision (a), and whose fees and expenses are paid for by the plan.

[2] Procedure for Court Appointment

When a petition is made to the court to appoint a neutral arbitrator, the court nominates five persons from lists of persons supplied jointly by the parties to the arbitration or obtained from a governmental agency concerned with arbitration or a private disinterested association concerned with arbitration. Within five days of receiving the notice of the nominees from the court, the parties to the agreement who seek arbitration and against whom arbitration is sought may jointly select the arbitrator whether or not that arbitrator is among the nominees. If the parties fail to select an arbitrator within the five day period, the court appoints the arbitrator from the nominees [*Code Civ. Proc. § 1281.6*].

If the arbitration involves a dispute with regard to a project governed by the Public Contract Code, an arbitrator appointed pursuant to *Code Civ. Proc. § 1281.6* must be from the list of arbitrators approved by the Public Works Contract Arbitration Board [*see Pub. Contract Code § 10240 et seq.*; *Brutuco Engineering & Construction, Inc. v. Superior Court (2003) 107 Cal. App. 4th 1326, 1334-1335, 132 Cal. Rptr. 2d 866* (contract provided arbitration was to be conducted in accordance with *Pub. Contract Code § 10240 et seq.*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration Clauses

California Forms of Pleading and Practice--Annotated

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 33 CONTRACTUAL ARBITRATION: APPOINTMENT OF ARBITRATOR AND CONDUCT OF PROCEEDING
PART II. LEGAL BACKGROUND
A. Appointment of Arbitrator

4-33 California Forms of Pleading and Practice--Annotated § 33.14

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§ 33.14 Disclosures by Neutral Arbitrators

[1] Disclosure Requirements

[a] Disclosure Requirements Enumerated

In an arbitration pursuant to an arbitration agreement, *Code Civ. Proc. § 1281.9(a)* and the Ethics Standards, Cal. Rules of Ct., Appen., Div. VI, require a proposed neutral arbitrator to disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that he or she would be able to be impartial, including all of the following:

- Any ground specified in *Code Civ. Proc. § 170.1* for disqualification of a judge [*Code Civ. Proc. § 1281.9(a)(1)*], discussed in *§ 33.15*.

- Prior or pending cases in which he or she has acted or is acting as neutral arbitrator [*Code Civ. Proc. § 1291(a)(4)*, discussed at [3][a][ii], *below*; Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(4)(A)(i), (iii), discussed at [2][a], *below*], a party arbitrator [*Code Civ. Proc. § 1291(a)(3)*, discussed at [3][a][i], *below*; Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(4)(ii), discussed at [2][a], *below*], or compensated other dispute resolution neutral [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(5), discussed at [2][a], *below*; *compare Guseinov v. Burns (2006) 145 Cal. App. 4th 944, 958-961, 51 Cal. Rptr. 3d 903* (service as uncompensated mediator need not be disclosed)].

- Attorney-client, and other professional or significant personal relationships, including those of the arbitrator's family, with any party or lawyer for a party [*Code Civ. Proc. § 1291(a)(5), (6)*], discussed at [3][a][iii], [iv], *below*; Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(1)-(3), (7)-(8), discussed at [2][a], *below*; *compare Agri-Systems v. Foster Poultry Farms (2008) 168 Cal. App. 4th 1128, 1140, 85 Cal. Rptr. 3d 917* (arbitrator's law firm's past representation of a third party who had an adversarial relationship with a party to the arbitration need not be disclosed)].

- Whether the proposed neutral arbitrator has any current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral, or is participating in, or within the last two has participated in, any discussions regarding such prospective employment with a party to the proceeding [*Code Civ. Proc. §§ 170.1(a)(8), 1281.9(a)(1)*, discussed at *§ 33.15[1], below*; Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(6), discussed at [2][a], *below*].

- Financial interests of the arbitrator and his or her extended family [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(9)-(11), discussed at [2][a], *below*].

- Physical or scheduling problems that might affect his or her ability to perform as arbitrator [Cal. Rules of Ct., Appen., Div. VI, Standard 7(e), discussed at [2][a], *below*].

- Beginning January 1, 2003, financial and professional relationships between the dispute resolution provider organization which is coordinating, administering, or providing the arbitration services in a consumer arbitration and any other party or lawyer in the proceeding [Cal. Rules of Ct., Appen., Div. VI, Standard, discussed at [2][g], *below*; *see also, Code Civ. Proc. § 1281.92* (discussed at *§ 33.16[1]*, prohibits provider organization from administering consumer arbitration if it has, or had, financial interest, as defined in *Code Civ. Proc. § 170.5* in any party or attorney for a party or vice versa)].

All of the foregoing are subject to the definitions set forth in *Code Civ. Proc. § 1291(c)-(e)*, discussed at [3][b], *below*, and in Cal. Rules of Ct., Appen., Div. VI, Standards 2 and 7.

The disclosures required by the Ethics Standards do not apply to an arbitration conducted pursuant to a public or private sector collective bargaining agreement [*Code Civ. Proc. § 1281.85(b)*] or in any arbitration pursuant to the New York Stock Exchange (NYSE) Arbitration Rules or the National Association of Securities Dealers (NASD) Code of Arbitration Procedure [Credit Suisse First Boston Corp. v. Grunwald (9th Cir. 2005) *400 F.3d 1119 (NASD rules)* ; *Mayo v. Dean Witter Reynolds (N.D. Cal. 2003) 258 F. Supp. 2d 1097, 1112* , as corrected at *260 F. Supp. 2d 979* ; *accord Wilmot v. McNabb (N.D. Cal. 2003) 269 F. Supp. 2d 1203* ; *Jevne v. Superior Court (JB Oxford Holdings, Inc.) (2005) 35 Cal. 4th 935, 945, 28 Cal. Rptr. 3d 685]* .

In addition, in the narrow context of residential construction or improvement contracts involving claims in excess of $3000, *Code Civ. Proc. § 1281.95* requires arbitrators (without specifically limiting the requirment to neutral arbitrators) to disclose affiliation with either party or service as an arbitrator in another matter involving either party [for discussion, *see* [4], *below*].

[b] Time Limits for Making Disclosures

Code Civ. Proc. § 1281.9 disclosures and the disclosures required by the Ethics Standards must be made in writing to all parties within 10 calendar days of service of notice of the proposed nomination or appointment [*Code Civ. Proc. § 1281.9(b)*; Cal. Rules of Ct., Appen., Div. VI, Standard 7(c); *Jakks Pacific, Inc. v. Superior Court (THQ, Inc.) (2008) 160 Cal. App. 4th 596, 600, 604-607, 72 Cal. Rptr. 3d 914]* ; certainly not, in the case of arbitrators appointed pursuant to *Code Civ. Proc. § 1281.6*, when the court nominates the five from whom the parties are to chose [*Jakks Pacific, Inc.v. Superior Court (THQ, Inc.) (2008) 160 Cal. App. 4th 596, 600, 603-607, 72 Cal. Rptr. 3d 914*]. The arbitrator's disclosure obligations are not triggered until he or she is notified that he or she has been selected by the parties or appointed by the court to serve as a neutral arbitrator [*Jakks Pacific, Inc. v. Superior Court (THQ, Inc.) (2008) 160 Cal. App. 4th 596, 607, 72 Cal. Rptr. 3d 914*].

Code Civ. Proc. § 1281.95 requires disclosures to be made within 10 days after appointment [*Code Civ. Proc. § 1281.95(a)*].

[2] Disclosures Required by Ethical Standards

[a] Matters That Neutral Arbitrator Must Disclose

CAUTION:

Arbitration under NYSE Arbitration Rules or NASD Code of Arbitration Procedure. On July 30, 2007, National Association of Securities Dealers (NASD) Dispute Resolution and New York Stock Exchange (NYSE) Dispute Resolution combined operations as the Financial Industry Regulatory Authority (FINRA). The rules under which a pending case was filed will continue to be used for that case, but cases filed on or after August 6, 2007, will be administered using the NASD Code of Arbitration Procedure [*see* http://www.finra.org/ArbitrationMediation/index.htm].

Both the NASD and the NYSE suspended arbitrations in California when the Ethics Standards became effective, unless the California party agreed to waive the Ethics Standards and proceed in accordance with the NYSE Arbitration Rules or the NASD Code of Arbitration Procedure, as was applicable to the contract involved. NASD and NYSE claimed that the NYSE Rules and NASD Code, which are approved by the Securities and Exchange Commission under the mandate of the Securities Exchange Act of 1934 [*see 15 U.S.C. § 78s(b)*], preempt application of the California Ethics Standards in any arbitration in accordance with those rules or procedures. That position has now been upheld by the California Supreme Court [*Jevne v. Superior Court (JB Oxford Holdings, Inc.) (2005) 35 Cal. 4th 935, 958, 28 Cal. Rptr. 3d 685]* , the Ninth Circuit Court of Appeals [*Credit Suisse First Boston Corp. v. Grunwald (9th Cir. 2005) 400 F.3d 1119, 1121]* , and the federal district court [*Mayo v. Dean Witter Reynolds (N.D. Cal. 2003) 258 F. Supp. 2d 1097, 1112* , as corrected at *260 F. Supp. 2d 979* ; *accord Wilmot v. McNabb (N.D. Cal. 2003) 269 F. Supp. 2d 1203, 1212* (but compelling arbitration in California of claims against defendants whose agreements called for arbitration in Denver, on ground that venue was unconscionable for California residents)]. Thus, California Ethics Standards will not apply to arbitration under a contract that calls for arbitration in accordance with the NYSE Rules or the NASD Code. Those Rules and that Code have their own disclosure requirements.

Although Rule 12206 of the NASD Code, formerly Rule 10304, of the NASD Code contains a six-year limitation period, commencing on the occurrence or event giving rise to the act or dispute, claim, or controversy, any delay necessitated by the uncertainty regarding the application of the California Standards will not excuse a plaintiff from arbitration under the NASD Code, at least when the six-year period has not expired as to all of the transactions in dispute [*Jevne v. Superior Court (JB Oxford Holdings, Inc.) (2005) 35 Cal. 4th 935, 964, 28 Cal. Rptr. 3d 685]* .

Before accepting appointment, a person who is nominated or appointed as a neutral arbitrator on or after July 1, 2002 [Cal. Rules of Ct., Appen., Div. VI, Standards 1(a), 2(a), 3], a dispute resolution provider organization, or another person or entity acting on the arbitrator's behalf must inform all parties in writing of the terms and conditions of the arbitrator's compensation. This information must include any basis to be used in determining fees and any special fees for cancellation, research and preparation time, or other purposes [Cal. Rules of Ct., Appen., Div. VI, Standard 16(b)]. Arbitrators cannot charge any fee for services or expenses that is in any way contingent on the result or outcome of the arbitration [Cal. Rules of Ct., Appen., Div. VI, Standard 16(a)].

Throughout this discussion, the terms "arbitrator" and "neutral arbitrator" are used interchangeably, as in the definition governing these standards, to mean any arbitrator who is to serve impartially [*see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(a)(1); *see § 33.10*(1)(a) (definitions)].

A person who is nominated or appointed as a neutral arbitrator on or after July 1, 2002 [Cal. Rules of Ct., Appen., Div. VI, Standards 1(a), 2(a), 3], must make a reasonable effort to inform himself or herself of any matters that could cause a

person aware of he facts to reasonably entertain a doubt that the proposed arbitrator would be able to be impartial and must disclose all such matters to the parties. Matters that must be disclosed include [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d), 9(a), 12(b)]:

(1) The arbitrator or a member of the arbitrator's immediate or extended family is a party, a party's spouse or domestic partner, or an officer, director, or trustee of a party [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(1)].

(2) The arbitrator, or the spouse, former spouse, domestic partner, child, sibling, or parent of the arbitrator or the arbitrator's spouse or domestic partner is (A) a lawyer in the arbitration; (B) the spouse or domestic partner of a lawyer in the arbitration; or (C) currently associated in the private practice of law with or a lawyer in the arbitration [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(2); *see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(*l*) (definition of "lawyer in the arbitration" set forth at [c][vi], *below*)].

(3) The arbitrator or a member of the arbitrator's immediate family has or has had a significant personal relationship with any party or a lawyer for a party [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(3)]. "Significant personal relationship" includes a close personal friendship [Cal. Rules of Ct., Appen., Div. VI, Standard 2(s); *see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(m) (definition of "lawyer for a party" set forth at [c][vii], *below*)].

(4) The arbitrator is serving, or within the preceding five years, has served as a neutral arbitrator in another prior or pending non-collective--bargaining case involving a party to the current arbitration or a lawyer for a party [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(4)(A)(i); *see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(m) (definition of "lawyer for a party" set forth at [c][vii], *below*)]. If the arbitrator is serving or has served in this capacity, he or she must disclose the following [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(4)(B)]:

> i. The names of the parties to each prior or pending case, and where applicable, the name of the attorney representing the party in the current arbitration who is involved in the pending case, who was involved in the prior case, or whose current associate is involved in the pending case or was involved in the prior case; and
>
> ii. The results of each prior case arbitrated to conclusion, including the date of the arbitration award, identification of the prevailing party, the amount of monetary damages awarded, if any, and the names of the parties' attorneys [*but see Dornbirer v. Kaiser Foundation Health Plan, Inc. (2008) 166 Cal. App. 4th 831, 836, 846* ; *83 Cal. Rptr. 3d 116* (an arbitration award was not vacated when the arbitrator generally disclosed his relationships and prior interactions with the parties to the arbitration but did not provide all of the specific details, i.e., dates and results of the prior arbitrations, required under *Code Civ. Proc. § 1281.9*, and despite the omissions, the parties agreed to go forward with the arbitration)].

NOTE:

When making disclosures about other pending or prior cases, in order to preserve confidentiality, it is sufficient to give the name of any party who is not a party to the pending arbitration as "claimant" or "respondent" if the party is an individual and not a business or corporation [Cal. Rules of Ct., Appen., Div. VI, Standard 7(b)(3)].

(5) The arbitrator is serving, or within the preceding five years, has served as a party-appointed arbitrator in another prior or pending non-collective-bargaining case for either a party to the current arbitration or a lawyer for a party [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(4)(A)(ii); *see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(m) (definition of "lawyer for a party" set forth at [c][vii], *below*)]. If the arbitrator is serving or has served in this capacity, he or she must disclose the information required by Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(4)(B), discussed at item (4), *above*.

(6) The arbitrator is serving, or within the preceding five years, has served as a neutral arbitrator in another prior or pending non-collective bargaining case in which he or she was selected by a person serving as a party-appointed arbitrator in the current arbitration [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(4)(A)(iii)]. If the arbitrator is serving or has served in this capacity, he or she must disclose the information required by Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(4)(B), discussed at item (4), *above*.

NOTE:

Summary Required--if the total number of the cases disclosed under (4), (5), and (6) *above* is greater than five, the arbitrator must provide a summary of these cases that states (i) the number of pending cases in which the arbitrator is currently serving in each capacity; (ii) the number of prior cases in which the arbitrator previously served in each capacity; (iii) the number of prior cases arbitrated to conclusion; and (iv) the number of those prior cases in which the party to the current arbitration, the party represented by the lawyer for a party in the current arbitration, or the party represented by the party-arbitrator in the current arbitration was the prevailing party [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(4)(C); *see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(m) (definition of "lawyer for a party" set forth at [c][vii], *below*)].

(7) The arbitrator is serving or has served as a dispute resolution neutral other than an arbitrator in another pending or prior non-collective-bargaining case involving a party or lawyer for a party and the arbitrator received or expects to receive any form of compensations for serving in this capacity [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(5); *see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(f), (m) (definitions of "dispute resolution neutral" and "lawyer for a party" set forth at [c][iii] and [c][vii], respectively, *below*); *compare Guseinov v. Burns (2006) 145 Cal. App. 4th 944, 958-961, 51 Cal. Rptr. 3d 903* (service as uncompensated mediator need not be disclosed)]. For purposes of subdivision (d)(5), "prior case" means any case in which the arbitrator concluded his or her service as a dispute resolution neutral within two years before the date of the arbitrator's proposed nomination or appointment, but does not include any case in which the arbitrator concluded his or her service before January 1, 2002 [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(5)(A)]. An arbitrator can fulfill his or her obligation under Cal. Rules of Ct., Appen., Div. VI, Standard 9--to inform himself or herself of his or her service as a dispute resolution neutral, other than as an arbitrator, in cases that commenced prior to July 1, 2002--by (1) asking any dispute resolution provider organization that administered those prior services for this information and (2) declaring in writing that he or she has requested the required information from any dispute resolution provider organization administering those prior services and attaching to this declaration copies of his or her inquiry and any response from the provider organization [Cal. Rules of Ct., Appen., Div. VI, Standard 9(d)]. If the arbitrator is serving or has served as a dispute resolution neutral in any of the foregoing capacities, he or she must disclose the following [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(5)(B)]:

i. The names of the parties in each prior or pending cases, and, if applicable, the name of the attorney in the current arbitration who is involved in the pending case, who was involved in the prior case, or whose current associate is involved in the pending case or was involved in the prior case;

ii. The dispute resolution neutral capacity (mediator, referee, etc.) in which the arbitrator is serving or served in the case; and

iii. In each such case in which the arbitrator rendered a decision as a temporary judge or referee, the date of the decision, the prevailing party, the amount of monetary damages awarded, if any, and the names of the parties' attorneys.

NOTE:

A Summary Is Required--if the total number of cases disclosed under Standard 7(d)(5) is greater than five, the arbitrator must also provide a summary of the cases that states (i) the total number of pending cases in which the arbitrator is currently serving in each capacity; (ii) the number of prior cases in which

the arbitrator previously served in each capacity; (iii) the number of prior cases in which the arbitrator rendered a decision as a temporary judge or referee; and (iv) the number of such prior cases in which the party to the current arbitration or the party represented by the lawyer for a party in the current arbitration was the prevailing party [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(5)(C)].

(8) Whether the arbitrator has any current arrangement with a party concerning prospective employment or other compensated service as a dispute resolution neutral, or is participating in, or within the last two has participated in, any discussions regarding such prospective employment with a party to the proceeding [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(6)].

(9) Any attorney-client relationship the arbitrator has or has had with a party or a lawyer for a party [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(7); *see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(m) (definition of "lawyer for a party" set forth at [c][vii], *below*); *compare Agri-Systems v. Foster Poultry Farms (2008) 168 Cal. App. 4th 1128, 1140, 85 Cal. Rptr. 3d 917* (arbitrator's law firm's past representation of a third party who had an adversarial relationship with a party to the arbitration need not be disclosed)]. An arbitrator can fulfill his or her obligation under Cal. Rules of Ct., Appen., Div. VI, Standard 9 to inform himself or herself of relationships with any lawyer associated in the practice of law with the lawyer in the arbitration that are required to be disclosed under this standard by (1) informing the lawyer in the arbitration, in writing, of all such relationships within the arbitrator's knowledge and asking the lawyer if the lawyer is aware of any other such relationships; and (2) declaring in writing that he or she has made that inquiry and attaching to this declaration copies of his or her inquiry and any response from the lawyer in the arbitration [Cal. Rules of Ct., Appen., Div. VI, Standard 9(c)]. An attorney-client relationship includes the following [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(7)]:

(A) An officer, a director, or a trustee of a party is or, within the preceding two years, was a client of the arbitrator in the arbitrator's private practice of law or a client of a lawyer with whom the arbitrator is or was associated in the private practice of law;

(B) In any other proceeding involving the same issues, the arbitrator gave advice to a party or a lawyer in the arbitration concerning any matter involved in the arbitration [*see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(*l*) (definition of "lawyer in the arbitration" set forth at [c][vi], *below*)]; and

(C) The arbitrator served as a lawyer for or as an officer of a public agency which is a party and personally advised or in any way represented the public agency concerning the factual or legal issues in the arbitration.

(10) Any other professional relationship not already disclosed under Standard 7(d)(2)-(7) that the arbitrator or a member of the arbitrator's immediate family has or has had with a party or a lawyer for a party, including the following [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(8); *see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(m), (n) (definitions of "lawyer for a party" and "member of the arbitrator's immediate family" set forth at [c][vii] and [b], respectively, *below*); *see Guseinov v. Burns (2006) 145 Cal. App. 4th 944, 958-959* , Cal. Rptr. 3d 903 (acting as uncompensated mediator in single matter did not constitute professional relationship between arbitrator and plaintiff's counsel, and thus, was not required to be disclosed)].

(A) The arbitrator was associated in the private practice of law with a lawyer in the arbitration within the last two years [*see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(*l*) (definition of "lawyer in the arbitration" set forth at [c][vi] *below*)].

(B) The arbitrator or a member of the arbitrator's immediate family is or, within the preceding two years, was an employee of or an expert witness or a consultant for a party; and

(C) The arbitrator or a member of the arbitrator's immediate family is or, within the preceding two years, was an employee of or an expert witness or a consultant for a lawyer in the arbitration.

(11) The arbitrator or a member of the arbitrator's immediate family has a financial interest in a party [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(9); *see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(*i*), (n) (definitions of "financial interest" and "member of the arbitrator's immediate family" set forth at [c][v] and [b], respectively, *below*)].

(12) The arbitrator or a member of the arbitrator's immediate family has a financial interest in the subject matter of the arbitration [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(10); *see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(*i*), (n) (definitions of "financial interest" and "member of the arbitrator's immediate family" set forth at [c][v] and [b], respectively, *below*)].

(13) The arbitrator or a member of the arbitrator's immediate family has an interest that could be substantially affected by the outcome of the arbitration [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(11); *see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(n) (definition of "member of the arbitrator's immediate family" set forth at [b], *below*)].

(14) The arbitrator or a member of the arbitrator's immediate or extended family has personal knowledge of disputed evidentiary facts relevant to the arbitration. A person who is likely to be a material witness in the proceeding is deemed to have personal knowledge of disputed evidentiary facts concerning the proceeding [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(12); *see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(n), (*o*) (definitions of "member of the arbitrator's immediate family" and "member of arbitrator's extended family" set forth at [b], *below*)].

(15) The arbitrator's membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation. Membership in a religious organization, an official military organization of the United States, or a nonprofit youth organization need not be disclosed unless it would interfere with the arbitrator's proper conduct of the proceeding or would cause a person aware of the facts to reasonably entertain a doubt concerning the arbitrator's ability to act impartially [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(13)].

(16) If the arbitrator is not able to properly perceive the evidence or properly conduct the proceeding because of a permanent or temporary physical impairment [Cal. Rules of Ct., Appen., Div. VI, Standard 7(e)(1)].

(17) Any constraint on his or her availability known to the arbitrator that will interfere with his or her ability to commence or complete the arbitration in a timely manner [Cal. Rules of Ct., Appen., Div. VI, Standard 7(e)(2)].

(18) Any other matter that might cause a person aware of the facts to reasonably entertain a doubt that the arbitrator would be able to be impartial [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(14)(A); *see* *Advantage Medical Services, LLC v. Hoffman (2008) 160 Cal. App. 4th 806, 809, 818, 72 Cal. Rptr. 3d 935* (person aware of fact that arbitrator and his law firm represented several entities that provided insurance and reinsurance to syndicate by which plaintiff was insured and representative of which was present throughout the arbitration might reasonably entertain doubt that proposed neutral arbitrator would be able to be impartial); *compare* *Guseinov v. Burns (2006) 145 Cal. App. 4th 944, 959-961* , Cal. Rptr. 3d 903 (arbitrator's acting as uncompensated mediator in single matter would not cause reasonable person to entertain doubt whether arbitrator was impartial and thus, prior service need not be disclosed)].

(19) Any other matter that leads the proposed arbitrator to believe there is a substantial doubt as to his or her capacity to be impartial, including, but not limited to, bias or prejudice toward a party, lawyer, or law firm in the arbitration [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(14)(B)].

(20) Any other matter that otherwise leads the arbitrator to believe that his or her disqualification will further the interests of justice [Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(14)(C)].

(21) If, while the arbitration is pending, he or she will entertain offers of employment or new professional relationships in any capacity other than as lawyer, expert witness, or consultant [*see* Cal. Rules of Ct., Appen., Div. VI, Standard 12(a) (prohibiting arbitrator from entertaining or accepting offers of employment or new professional relationships as lawyer, expert witness, or consultant for party or lawyer for party until conclusion of arbitration)] from a party or a lawyer for a party, including offers to serve as a dispute resolution neutral in another case [Cal. Rules of Ct., Appen., Div. VI, Standard 12(b)]. If the arbitrator has made this disclosure, the arbitrator is not required to disclose to the parties in writing any such offer from a party or lawyer for a party that he or she subsequently receives or accepts while that arbitration is pending [Cal. Rules of Ct., Appen., Div. VI, Standards 7(b)(2)].

[b] Definitions and Compliance Regarding Arbitrator's Family

"Member of the arbitrator's immediate family" means the arbitrator's spouse or domestic partner (as defined in *Fam. Code § 297*) and a minor child living in the arbitrator's household [Cal. Rules of Ct., Appen., Div. VI, Standard 2(n); *see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(h) (defining "domestic partner")].

"Member of the arbitrator's extended family" means the parents, grandparents, great-grandparents, children, grandchildren, great-grandchildren, siblings, uncles, aunts, nephews, and nieces of the arbitrator or the arbitrator's spouse or domestic partner or the spouse of that person [Cal. Rules of Ct., Appen., Div. VI, Standard 2(o); *see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(h) (defining "domestic partner" as in *Fam. Code § 297*)].

An arbitrator can fulfill his or her obligation to make a reasonable effort to inform himself or herself of relationships and other matters that must be disclosed involving his or her extended family and former spouse by doing the following [Cal. Rules of Ct., Appen., Div. VI, Standard 9(b)]:

(1) Seeking information about theses relationships and matters from members of his or her immediate family and any members of his or her extended family living in his or her household; and

(2) Declaring in writing that he or she has made the inquiry in (1).

[c] Other Applicable Definitions

[i] "Any Arbitration" and "Case"

For purposes of Standard 7, the terms "cases" and "any arbitration" do not include collective bargaining cases or arbitrations conducted under or arising out of collective bargaining agreements between employers and employees or between their respective representatives [Cal. Rules of Ct., Appen., Div. VI, Standard 7(b)(1)].

[ii] "Conclusion of the Arbitration"

"Conclusion of the arbitration" means the following [Cal. Rules of Ct., Appen., Div. VI, Standard 2(c)]:

- When the arbitrator is disqualified or withdraws or the case is settled or dismissed before the arbitrator makes an award, the date on which the arbitrator's appointment is terminated;

- When the arbitrator makes an award and no party makes a timely application to the arbitrator to correct the award, the final date for making an application to the arbitrator for correction; or

- When a party makes a timely application to the arbitrator to correct the award, the date on which the arbitrator serves a corrected award or a denial on each party, or the date on which denial occurs by operation of law.

[iii] "Dispute Resolution Neutral"

"Dispute resolution neutral" means a temporary judge appointed under *article VI, section 21 of the California Constitution*, a referee appointed under *Code Civ. Proc. § 638* or *639*, an arbitrator, a neutral evaluator, a special master, a mediator, a settlement officer, or a settlement facilitator [Cal. Rules of Ct., Appen., Div. VI, Standard 2(f)].

[iv] "Dispute Resolution Provider Organization"

"Dispute resolution provider organization" and "provider organization" mean any nongovernmental entity that, or individual who, coordinates, administers, or provides the services of two or more dispute resolution neutrals [Cal. Rules of Ct., Appen., Div. VI, Standard 2(g)].

[v] "Financial Interest"

For purposes of these standards, "financial interest" has the same meaning set forth in *Code Civ. Proc. § 170.5*, regarding disqualification of judges [Cal. Rules of Ct., Appen., Div. VI, Standard 2(*i*)]. "Financial interest" is defined by *Code Civ. Proc. § 170.5* as ownership of more than a one percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value in excess of $1,500, or a relationship as director, advisor, or other active participant in the affairs of a party, except as follows:

(1) Ownership in a mutual or common investment fund that holds securities is not a financial interest in those securities unless the judge participates in the management of the fund.

(2) An office in an educational, religious, charitable, fraternal, or civic organization is not a financial interest in securities held by the organization.

(3) The proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a financial interest in the organization only if the outcome of the proceeding could substantially affect the value of the interest.

[vi] "Lawyer in the Arbitration"

"Lawyer in the arbitration" is defined in the Ethics Standards to mean the lawyer hired to represent a party in the arbitration [Cal. Rules of Ct., Appen., Div. VI, Standard 2(*l*)].

[vii] "Lawyer for a Party"

"Lawyer for a party" is defined in the Ethics Standards to mean the lawyer hired to represent a party in the arbitration and any lawyer or law firm currently associated in the private practice of law with the lawyer hired to represent a party in the arbitratio n [Cal. Rules of Ct., Appen., Div. VI, Standard 2(m)].

[d] Who Must Make Disclosures

Except as provided in Standard 8 [*see* discussion at [g], *below*], the disclosures in the Ethics Standards for Neutral Arbitrators in Contractual Arbitration must be made by all persons who are appointed to serve as neutral arbitrators on or after July 1, 2002, in any arbitration under an arbitration agreement if the arbitration agreement is subject to the provisions of *Code Civ. Proc. §§ 1280-1294.2* or the arbitration hearing is conducted in California [Cal. Rules of Ct., Appen., Div. VI, Standard 3(a)]. Persons serving in arbitrations in which they were appointed to serve as arbitrators before July 1, 2002, are not subject to these standards. Persons who are serving in arbitrations in which they were appointed to serve as arbitrators before January 1, 2003, are not subject to Standard 8 in those arbitrations [Cal. Rules of Ct., Appen., Div. VI, Standard 3(c)].

These standards do not apply to any of the following:

(1) Party arbitrators, which are defined in Standard 2(q) as arbitrators selected unilaterally [Cal. Rules of Ct., Appen., Div. VI, Standard 3(b)(1)];

(2) An arbitrator acting in an international arbitration proceeding subject to the provisions of *Code Civ. Proc. § 1297.11 et seq.* [Cal. Rules of Ct., Appen., Div. VI, Standard 3(b)(2)(A)];

(3) An arbitrator acting in a judicial arbitration proceeding subject to the provisions of *Code Civ. Proc. § 1141.10 et seq.* [Cal. Rules of Ct., Appen., Div. VI, Standard 3(b)(2)(B)];

(4) An arbitrator acting in an attorney-client fee arbitration proceeding subject to the provisions of *Bus. & Prof. Code § 6200 et seq.* [Cal. Rules of Ct., Appen., Div. VI, Standard 3(b)(2)(C)];

(5) An arbitrator acting in an automobile warranty dispute resolution process certified under *16 Cal. Code. Reg. § 3396.1 et seq.* [Cal. Rules of Ct., Appen., Div. VI, Standard 3(b)(2)(D)];

(6) An arbitrator acting in an arbitration of a workers' compensation dispute under *Lab. Code §§ 5270-5277* [Cal. Rules of Ct., Appen., Div. VI, Standard 3(b)(2)(E)];

(7) An arbitrator acting in an arbitration conducted by the Workers' Compensation Appeals Board under *Lab. Code § 5308* [Cal. Rules of Ct., Appen., Div. VI, Standard 3(b)(2)(F)];

(8) An arbitrator acting in an arbitration of a complaint filed against a contractor with the Contractors State License Board under *Bus. & Prof. Code §§ 7085-7085.7* [Cal. Rules of Ct., Appen., Div. VI, Standard 3(b)(2)(G)];

(9) An arbitrator acting in an arbitration conducted under or arising out of a public or private sector collective bargaining agreement [*Code Civ. Proc. § 1281.85(b)*], public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements [Cal. Rules of Ct., Appen., Div. VI, Standard 3(b)(2)(H)].

[e] Time When Disclosures Must Be Made

A proposed neutral arbitrator must disclose to all parties in writing all matters listed in Standards 7(d) and (e) and 12(b) [*see* [a], *above*] and 8(b) [*see* [g], *below*] of which the arbitrator is then aware within the time specified in *Code Civ. Proc. § 1281.9(b)*], which is within 10 calendar days of service of notice of the proposed nomination or appointment [Cal. Rules of Ct., Appen., Div. VI, Standards 7(c), 12(b)]. If an arbitrator subsequently becomes aware of a matter that must be disclosed under either subdivision (d) or (e) of Standard 7, the arbitrator must disclose that matter to the parties in writing within 10 calendar days after the arbitrator becomes aware of the matter [Cal. Rules of Ct., Appen., Div. VI, Standard 7(c); *see also* Cal. Rules of Ct., Appen., Div. VI, Standard 12(b) (adopts time and manner provision of Standard 7(c)].

[f] Continuing Duty of Disclosure

A person who is nominated or appointed as an arbitrator must make a reasonable effort to inform himself or herself of matters that must be disclosed under Standards 7 and 8 [Cal. Rules of Ct., Appen., Div. VI, Standard 9(a)]. An arbitrator's duty to disclose the matters described in Standard 7(d) and (e) [*see* [a], *above*] is a continuing duty, applying from service of the notice of the arbitrator's proposed nomination or appointment until the conclusion of the arbitration proceeding [Cal. Rules of Ct., Appen., Div. VI, Standard 7(f)].

[g] Disclosures Regarding Provider Organizations in Consumer Arbitrations

[i] Definitions and Matters Required To Be Disclosed

In addition to the disclosures required under Standard 7, in any consumer arbitration in which a dispute resolution provider organization is coordinating, administering, or providing arbitration services, a person who is proposed to be nominated or appointed as an arbitrator on or after January 1, 2003, must disclose, to all parties in writing within 10 calendar days after service of the nomination or appointment, any significant past, present, or currently expected financial or professional relationship or affiliation between the administering dispute resolution provider organization and a party or lawyer in the arbitration [Cal. Rules of Ct., Appen., Div. VI, Standard 8(b), (d); *see also Code Civ. Proc. § 1281.92* (discussed at *§ 33.16[1]*), which prohibits provider organization from providing services in consumer arbitration if financial relationship rises to level of "financial interest" as defined in *Code Civ. Proc. § 170.5*, set forth at [c][v], *above*]. "Consumer arbitration" means an arbitration conducted under a predispute arbitration provision contained in a contract that [Cal. Rules of Ct., Appen., Div. VI, Standard 2(d)]:

- Is with a consumer party, as defined by these standards;
- Was drafted by or on behalf of the non-consumer party; and
- The consumer party was required to accept the arbitration provision in the contract.

"Consumer party" is a party to an arbitration agreement who, in the context of that arbitration agreement is any of the following [Cal. Rules of Ct., Appen., Div. VI, Standard 2(e)]:

- An individual who seeks or acquires, including by lease, any goods or services primarily for personal, family, or household purposes including, but not limited to, financial services, insurance, and other goods and services as defined in *Civ. Code § 1761*;
- An individual who is an enrollee, a subscriber, or insured in a health-care service plan within the meaning of *Health & Safety Code § 1345* or health-care insurance plan within the meaning of *Ins. Code § 106*;
- An individual with a medical malpractice claim that is subject to the arbitration agreement; or
- An employee or an applicant for employment in a dispute arising out of or relating to the employee's employment or the applicant's prospective employment that is subject to the arbitration agreement.

"Consumer arbitration" excludes arbitration proceedings conducted under or arising out of a public or private sector labor-relations laws, regulations, charter provisions, ordinances, statutes, or agreements [Cal. Rules of Ct., Appen., Div. VI, Standard 3(d)].

Information about the relationships or affiliations between the dispute resolution provider organization and a party or lawyer in the arbitration that must be disclosed are the following [Cal. Rules of Ct., Appen., Div. VI, Standard 8(b)]:

(1) A party, a lawyer in the arbitration, or a law firm with which a lawyer in the arbitration is currently associated is a member of the provider organization.

(2) Within the preceding two years, the provider organization has received a gift, bequest, or favor from a party, a lawyer in the arbitration, or a law firm with which a lawyer in the arbitration is currently associated.

(3) The provider organization has entered into, or the arbitrator currently expects that the provider organization will enter into, an agreement or relationship with any party or lawyer in the arbitration or a law firm with which a lawyer in the arbitration is currently associated under which the provider organization will administer, coordinate, or provide dispute resolution services in other non-collective bargaining matters or will provide other consulting services for that party, lawyer, or law firm.

(4) The provider organization is coordinating, administering, or providing dispute resolution services or has coordinated, administered, or provided such services in another pending or prior non-collective bargaining case in which a party or lawyer in the arbitration was a party or a lawyer. For purposes of this paragraph, "prior case" means a case in which the dispute resolution neutral affiliated with the provider organization concluded his or her service within the two years before the date of the arbitrator's proposed nomination or appointment, but does not include any case in which the dispute resolution neutral concluded his or her service before July 1, 2002.

If the provider organization is acting or has acted in any of the capacities described in paragraph (4), *above*, the arbitrator must disclose the following [Cal. Rules of Ct., Appen., Div. VI, Standard 8(b)(2)]:

(A) The names of the parties in each prior or pending case and, if applicable, the name of the attorney in the current arbitration who is involved in the pending case or was involved in the prior case;

(B) The type of dispute resolution service (arbitration, mediation, reference, etc.) coordinated, administered, or provided by the provider organization in the case; and

(C) In each prior case in which a dispute resolution neutral affiliated with the provider organization rendered a decision as an arbitrator, a temporary judge appointed under *article VI, § 4 of the California Constitution*, or a referee appointed under *Code Civ. Proc. § 638* or *639*, the date of the decision, the prevailing party, the amount of monetary damages awarded, if any, and the names of the parties' attorneys.

If the number of cases disclosed under paragraph (4), *above*, is greater than five, the arbitrator must also provide a summary of these cases that states [Cal. Rules of Ct., Appen., Div. VI, Standard 8(b)(3)]:

(A) The number of pending cases in which the provider organization is currently providing each type of dispute resolution services;

(B) The number of prior cases in which the provider organization previously provided each type of dispute resolution services;

(C) The number of those prior cases in which a neutral affiliated with the provider organization rendered a decision as an arbitrator, temporary judge, or a referee; and

(D) The number of prior cases in which the party to the current arbitration or the party represented by the lawyer in the current arbitration was the prevailing party.

If a relationship is disclosed under (1) through (4), *above*, the arbitrator must also provide information about the following [Cal. Rules of Ct., Appen., Div. VI, Standard 8(c)]:

(1) Any financial relationship or affiliation the arbitrator has with the provider organization other than receiving referrals of cases, including whether the arbitrator has a financial interest in the provider organization or is an employee of the provider organization;

(2) The provider organizations' process and criteria for recruiting, screening, and training the panel of arbitrators from

which the arbitrator in this case is to be selected;

(3) The provider organizations' process for identifying, recommending, and selecting potential arbitrators for specific cases; and

(4) Any role the provider organization plays in ruling on requests for disqualification of the arbitrator.

[ii] Arbitrator May Rely on Information Supplied by Provider Organization

Except as to the information in (c)(1) (financial relationship or affiliation the arbitrator has with the provider organization other than receiving referrals of cases), an arbitrator may rely on information supplied by the provider organization in making the disclosures required by Standard 8 [*see* [i], *above*]. If the information that must be disclosed is available on the Internet, the arbitrator may comply with the obligation to disclose this information by providing the Internet address at which the information is located and notifying the party that the arbitrator will supply hard copies of this information on request [Cal. Rules of Ct., Appen., Div. VI, Standard 8(a)(1)].

An arbitrator can fulfill his or her obligation under Standard 9 to inform himself or herself of the information that is required to be disclosed under Standard 8 [*see* [i], *above*] by [Cal. Rules of Ct., Appen., Div. VI, Standard 9(e)]:

(1) Asking the dispute resolution organization for this information; and

(2) Declaring in writing that he or she had made that inquiry and attaching to the declaration copies of his or her inquiry and any response from the provider organization.

[iii] Arbitrator May Rely on Consumer Party's Representation

An arbitrator is not required to make the disclosures required by Standard 8 if he or she reasonably believes that the arbitration is not a consumer arbitration based on reasonable reliance on a consumer party's representation that the arbitration is not a consumer arbitration [Cal. Rules of Ct., Appen., Div. VI, Standard 8(a)(2)].

[h] Disqualification Based on Ethics Standard or Code Civ. Proc. § 1281.91

For purposes of Standard 10, regarding disqualification of a neutral arbitrator, "obligation to make disclosure" means an arbitrator's obligation to make disclosures required under Standards 7 or 8, discussed at [a] and [i], *above*, or under *Code Civ. Proc. § 1281.9*, discussed at [3][a], *below* [Cal. Rules of Ct., Appen., Div. VI, Standard 10(b)]. The Ethics Standards adopt the disqualification requirements and procedures of *Code Civ. Proc. § 1281.91*, discussed at [3][e], *below*, and add clarification with respect to the requirements relating to disqualification based on disclosure made by the neutral arbitrator after appointment or based on the discovery by the party of a material omission or misrepresentation in the arbitrator's disclosure [Cal. Rules of Ct., Appen., Div. VI, Comment to Standard 10(b)]. Thus, an arbitrator is disqualified, if:

(1) The arbitrator fails to comply with his or her obligation to make disclosures and a party serves a notice of disqualification in the manner and within the time specified in *Code Civ. Proc. § 1281.91* [Cal. Rules of Ct., Appen., Div. VI, Standard 10(a)(1); *see Code Civ. Proc. § 1281.91(a)* (discussed at [3][e][i], *below*, notice of disqualification must be served within 15 calendar days after proposed nominee or appointee fails to comply)];

(2) The arbitrator complies with his or her obligation to make disclosures within 10 calendar days of service of notice of the proposed nomination or appointment and, based on that disclosure, a party serves a notice of disqualification in the manner and within the time specified in *Code Civ. Proc. § 1281.91* [Cal. Rules of Ct., Appen., Div. VI, Standard 10(a)(2); *see Code Civ. Proc. § 1281.91(b)(1)* (discussed at [3][e][ii], *below*, notice of disqualification must be served

within 15 calendar days after service of disclosure statement); *see also* Cal. Rules of Ct., Appen., Div. VI, Standard 12(b) (set forth as item (21) at [a], *above*, which allows party to disqualify arbitrator based on his or her disclosure that he or she will entertain offers of employment or new professional relationship with party, or lawyer for party)];

(3) The arbitrator makes a required disclosure more than 10 calendar days after service of notice of the proposed nomination or appointment and, based on that disclosure, a party serves a notice of disqualification in the manner and within the time specified in *Code Civ. Proc. § 1281.91* [Cal. Rules of Ct., Appen., Div. VI, Standard 10(a)(3); *see Code Civ. Proc. § 1281.91* (discussed at [3][e] and [f], *below*];

(4) A party becomes aware that an arbitrator made a material omission or material misrepresentation in his or her disclosure, and a party, within 15 days after becoming aware of the omission or misrepresentation and within the time specified in *Code Civ. Proc. § 1281.91(c)* serves a notice of disqualification that clearly describes the material omission or material misrepresentation and how and when the party became aware of this omission or misrepresentation [Cal. Rules of Ct., Appen., Div. VI, Standard 10(a)(4); *see Code Civ. Proc. § 1281.91(c)* (discussed at [3][f], *below*, notice of disqualification must be served before hearing of contested issue of fact relating merits of claim to or ruling by arbitrator regarding contested matter); *see Fininen v. Barlow (2006) 142 Cal. App. 4th 185, 190-191, 47 Cal. Rptr. 3d 687* (court of appeal upheld confirmation of award challenged on basis of arbitrator's failure to disclose prior service as mediator in matter settled by party to arbitration because that party participated in nondisclosed case, recognized arbitrator before arbitration hearing commenced, and failed object until nearly two months after arbitrator issued the award in favor of opponents)]. A party who did not investigate or discover the arbitrator's undisclosed connections to the opposing party's insurer until after the arbitrator had issued an interim award could not obtain disqualification under *Code Civ. Proc. § 1281.91(c)* but still had the right to seek vacatur of the interim award under *Code Civ. Proc. § 1286.2(a)(6)(A)*, discussed at *§ 34.19[1][d]* [*Advantage Medical Services, LLC v. Hoffman (2008) 160 Cal. App. 4th 806, 820-823, 72 Cal. Rptr. 3d 935*]; or

(5) Any ground (for disqualification of judge) specified in *Code Civ. Proc. § 170.1*, which are briefly enumerated at § 33.15[1], exists and the party makes a demand that the arbitrator disqualify himself or herself, in the manner and within the time specified *Code Civ. Proc. § 1281.91(d)* [Cal. Rules of Ct., Appen., Div. VI, Standard 10(a)(5); *see Code Civ. Proc. § 1281.91(d)* (discussed at *§ 33.15[1], below*, demand for disqualification must be made before conclusion of arbitration proceeding); *see also* Cal. Rules of Ct., Appen., Div. VI, Standard 2(c) (defining "conclusion of the arbitration")].

Notwithstanding any contrary request, consent, or waiver by the parties, an arbitrator must disqualify himself or herself if he or she concludes at any time during the arbitration that he or she is not able to conduct the arbitration impartially [Cal. Rules of Ct., Appen., Div. VI, Standard 10(c)].

For a form of notice of disqualification, see *§ 33.61*.

[i] Consent to New Employment of Arbitrator

From the time of appointment until the conclusion of the arbitration, an arbitrator must not entertain or accept any offers of employment or new professional relationships as a lawyer, an expert witness, or a consultant from a party or a lawyer for a party in the pending arbitration [Cal. Rules of Ct., Appen., Div. VI, Standard 12(a)].

If an arbitrator fails to make the disclosure required by Standard 12(b) [*see* item (21) at [a], *above*], from the time of appointment until the conclusion of the arbitration, the arbitrator must not entertain or accept any offers of employment or new professional relationships, including offers to serve as a dispute resolution neutral [Cal. Rules of Ct., Appen., Div. VI, Standard 12(c); *see also* Cal. Rules of Ct., Appen., Div. VI, Standard 7(b)(2) (discussed at item (21) at [a], *above*)].

Without the informed written consent of all parties, an arbitrator must not at any time enter into any professional relationship or accept any professional employment as a lawyer, expert witness, or a consultant relating to the case arbitrated [Cal. Rules of Ct., Appen., Div. VI, Standard 12(d)(1)]. Similarly, without the informed written consent of the party, an arbitrator must not at any time enter into any professional relationship or accept employment in another matter in which information that he or she has received in confidence from a party by reason of serving as an arbitrator in a case is material [Cal. Rules of Ct., Appen., Div. VI, Standard 12(d)(2)].

[3] Disclosures Under Code of Civil Procedure Section 1281.9(a)

[a] Matters to Be Disclosed

[i] Prior Service as Party Arbitrator

In addition to the general requirement that proposed neutral arbitrator to disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that he or she would be able to be impartial, when a person is to serve as a neutral arbitrator, subject only to the disclosure requirements of law, the proposed neutral arbitrator must disclose, in writing, to all of the parties, the names of the parties to all prior or pending noncollective bargaining cases in which the proposed neutral arbitrator served or is serving as a party arbitrator for any party to the arbitration proceeding or for a lawyer for a party and the results of each case arbitrated to conclusion, including [*Code Civ. Proc. § 1281.9(a)(3)*; *see also Code Civ. Proc. § 1281.9(c)* ("lawyer for party" defined), discussed in [b][i], *below*; *Code Civ. Proc. § 1281.9(d)* ("prior cases" defined), discussed in [b]ii], *below*; *but see Dornbirer v. Kaiser Foundation Health Plan, Inc. (2008) 166 Cal. App. 4th 831, 836, 846* ; *83 Cal. Rptr. 3d 116* (an arbitration award was not vacated when the arbitrator generally disclosed his relationships and prior interactions with the parties to the arbitration but did not provide all of the specific details, i.e., dates and results of the prior arbitrations, required under *Code Civ. Proc. § 1281.9*, and despite the omissions, the parties agreed to go forward with the arbitration)]:

- The date of the arbitration award.
- Identification of the prevailing party.
- The names of the parties' attorneys.
- The amount of monetary damages awarded, if any.

To preserve confidentiality, it is sufficient to give the name of any party who is not a party to the pending arbitration as "claimant" or "respondent" if that party is an individual and not a business or corporate entity [*Code Civ. Proc. § 1281.9(a)(3)*].

[ii] Prior Service as Neutral Arbitrator

In addition to the general requirement that proposed neutral arbitrator to disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that he or she would be able to be impartial, when a person is to serve as a neutral arbitrator, subject only to the disclosure requirements of law, the proposed neutral arbitrator must disclose, in writing, to all of the parties, the names of the parties to all prior or pending noncollective bargaining cases involving any party to the arbitration or lawyer for a party for which the proposed neutral arbitrator served or is serving as neutral arbitrator and the results of each case arbitrated to conclusion, including [*Code Civ. Proc. § 1281.9(a)(4)*; *International Alliance of Theatrical Stage Employees, etc. v. Laughon (2004) 118 Cal. App. 4th 1380, 1382, 1385, 1394-1395, Cal. Rptr. 3d 341* (prior service as neutral arbitrator in non-collective bargaining case in which attorneys for party to present arbitration represented party had to be disclosed, but not prior service as neutral arbitrator in collective bargaining matter); *see also Code Civ. Proc. § 1281.9(c)*] ("lawyer for party" defined), discussed in [b][i], *below*; *Code Civ. Proc. § 1281.9(d)* ("prior cases" defined), discussed in [b][ii], *below; but see Dornbirer v. Kaiser Foundation Health Plan,*

Inc. (2008) 166 Cal. App. 4th 831, 836, 846, 83 Cal. Rptr. 3d 116 (an arbitration award was not vacated when the arbitrator generally disclosed his relationships and prior interactions with the parties to the arbitration but did not provide all of the specific details, i.e., dates an results of the prior arbitrations, required under *Code Civ. Proc. § 1281.9*, and despite the omissions, the parties agreed to go forward with the arbitration]:

- The date of the arbitration award.
- Identification of the prevailing party.
- The names of the parties' attorneys.
- The amount of monetary damages awarded, if any.

To preserve confidentiality, it is sufficient to give the name of any party who is not a party to the pending arbitration as "claimant" or "respondent" if that party is an individual and not a business or corporate entity [*Code Civ. Proc. § 1281.9(a)(4)*].

[iii] Attorney-Client Relationship

When a person is to serve as a neutral arbitrator, subject only to the disclosure requirements of law, the proposed neutral arbitrator must disclose, in writing, to all of the parties any attorney-client relationship the proposed neutral arbitrator has or had with any party or lawyer for a party to the arbitration proceeding [*Code Civ. Proc. § 1281.9(a)(5)*; *but see Agri-Systems v. Foster Poultry Farms (2008) 168 Cal. App. 4th 1128, 1140, 85 Cal. Rptr. 3d 917* (arbitrator's law firm's past representation of a third party who had an adversarial relationship with a party to the arbitration need not be disclosed)].

[iv] Professional or Significant Personal Relationship

When a person is to serve as a neutral arbitrator, subject only to the disclosure requirements of law, the proposed neutral arbitrator must disclose, in writing, to all of the parties any professional or significant personal relationship the proposed neutral arbitrator, or his or her spouse or minor child living in the household, has, or has had with any party to the arbitration proceeding or a lawyer for a party [*Code Civ. Proc. § 1281.9(a)(6)*; *see Advantage Medical Services, LLC v. Hoffman (2008) 160 Cal. App. 4th 806, 809, 818, 72 Cal. Rptr. 3d 935* (person aware of fact that arbitrator and his law firm represented several entities that provided insurance and reinsurance to syndicate by which plaintiff was insured and representative of which was present throughout the arbitration might reasonably entertain doubt that proposed neutral arbitrator would be able to be impartial); *compare Guseinov v. Burns (2006) 145 Cal. App. 4th 944, 958-959* , Cal. Rptr. 3d 903 (acting as uncompensated mediator in single matter did not constitute professional relationship between arbitrator and plaintiff's counsel, and thus, was not required to be disclosed)].

By virtue of amendment to *Code Civ. Proc. §§ 170.1* and *1281.9(a)(1)* operative January 1, 2003, a proposed neutral arbitrator must also disclose whether or not he or she has any current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral, or is participating in, or within the last two has participated in, any discussions regarding such prospective employment with a party to the proceeding [*see Code Civ. Proc. §§ 170.1(a)(8), 1281.9(a)(1)*].

[b] Definitions

[i] "Lawyer for Party" Defined

For purposes of *Code Civ. Proc. § 1281.9*, the term "lawyer for a party" includes any lawyer or law firm currently associated in the practice of law with the lawyer hired to represent a party [*Code Civ. Proc. § 1281.9(c)*].

[ii] "Prior Case" Defined

For purposes of *Code Civ. Proc. § 1281.9*, the term "prior cases" means noncollective bargaining cases in which an arbitration award was rendered within five years prior to the date of the proposed nomination or appointment [*Code Civ. Proc. § 1281.9(d)*].

[iii] "Any Arbitration" Defined

For purposes of *Code Civ. Proc. § 1281.9*, "any arbitration" does not include an arbitration conducted pursuant to the terms of a public or private sector collective bargaining agreement [*Code Civ. Proc. § 1281.9(e)*].

[c] Who Must Disclose

The disclosures stated in *Code Civ. Proc. § 1281.9(a)* (*see* discussions in [1], [2] and [a], *above* and § 33.15) are required when a person is [*Code Civ. Proc. § 1281.9(a)*]:

- Proposed for nomination by all parties or all party arbitrators to serve as a neutral arbitrator, or

- Proposed for appointment by the court to serve as a neutral arbitrator in response to any petition brought under *Code Civ. Proc. § 1281.6* (petition for court appointment; *see § 33.13*).

[d] Time for Making Disclosures

The proposed nominee or appointee must make the disclosures discussed at [1], [2] and [3][a], *above* and § 33.15, to all parties, in writing, within 10 calendar days of service of notice of the proposed nomination or appointment [*Code Civ. Proc. § 1281.9(b)*; *Jakks Pacific, Inc. v. Superior Court (THQ, Inc.) (2008) 160 Cal. App. 4th 596, 600, 604-607, 72 Cal. Rptr. 3d 914]* ; certainly not, in the case of arbitrators appointed pursuant to *Code Civ. Proc. § 1281.6*, when the court nominates the five from whom the parties are to choose [*Jakks Pacific, Inc. v. Superior Court (THQ, Inc.) (2008) 160 Cal. App. 4th 596, 600, 603-607, 72 Cal. Rptr. 3d 914*]. The arbitrator's disclosure obligations are not triggered until he or she is notified that he or she has been selected by the parties or appointed by the court to serve as a neutral arbitrator [*Jakks Pacific, Inc. v. Superior Court (THQ, Inc.) (2008) 160 Cal. App. 4th 596, 607, 72 Cal. Rptr. 3d 914*].

[e] Disqualification

[i] Noncompliance With Disclosure Requirements

A proposed neutral arbitrator is disqualified if he or she fails to comply with *Code Civ. Proc. § 1281.9* and any party entitled to receive the disclosure serves a notice of disqualification within 15 calendar days after the proposed nominee or appointee fails to comply with *Code Civ. Proc. § 1281.9* [*Code Civ. Proc. § 1281.91(a)*]. For a form of notice of disqualification under *Code Civ. Proc. § 1281.91(a)*, see *§ 33.61*.

[ii] Based on Disclosure Statement

If the proposed neutral arbitrator complies with *Code Civ. Proc. § 1281.9*, he or she is disqualified on the basis of the disclosure statement if any party entitled to receive the disclosure serves a notice of disqualification within 15 calendar days after service of the disclosure statement [*Code Civ. Proc. § 1281.91(b)(1)*]. The right to disqualify a proposed neutral arbitrator in accordance with *Code Civ. Proc. §§ 1281.9, 1281.91* cannot be waived by agreeing to arbitrate in accordance with rules that provide some other means of determining whether the proposed neutral arbitrator is to be disqualified. The statutory scheme primarily exists to serve the public purpose of promoting public confidence in the arbitration process and does not allow an individual right of waiver to take precedence [*Azteca Constr., Inc. v. ADR*

Consulting, Inc. (2004) 121 Cal. App. 4th 1156, 1164-1168, 18 Cal. Rptr. 3d 142] . For a form of notice of disqualification under *Code Civ. Proc. § 1281.91(b)(1)*, see *§ 33.61*.

[iii] Court-Appointed Arbitrators

A party has the right to disqualify one court-appointed arbitrator without cause in any single arbitration [*Code Civ. Proc. § 1281.91(b)(2)*]. Thus, when the parties have failed to agree on an arbitrator and the court appoints one on petition of one of the parties [*see Code Civ. Proc. § 1281.6, discussed under § 33.13*], a party may disqualify the appointed arbitrator.

A party may petition the court to disqualify a subsequent appointee only on a showing of cause [*Code Civ. Proc. § 1281.91(b)(2)*].

For a form of notice of disqualification that may be modified for use in noticing the disqualification of a court-appointed arbitrator under *Code Civ. Proc. § 1281.91(b)(2)*, see *§ 33.61*.

[f] Waiver of Right to Disqualify

A party's right to disqualify a proposed neutral arbitrator is waived if the party fails to serve the notice within the times set forth in *Code Civ. Proc. § 1281.91* [*Code Civ. Proc. § 1281.91(c)*; for time limits, *see* [e], *above*]. The party's right to disqualify is not waived, however, if the proposed nominee or appointee makes a material omission or material misrepresentation in his or her disclosure [*Code Civ. Proc. § 1281.9(c)*; *but see Dornbirer v. Kaiser Foundation Health Plan, Inc. (2008) 166 Cal. App. 4th 831, 836, 846* ; *83 Cal. Rptr. 3d 116* (an arbitration award was not vacated when the arbitrator generally disclosed his relationships and prior interactions with the parties to the arbitration but did not provide all of the specific details, i.e., dates and results of the prior arbitrations, required under *Code Civ. Proc. § 1281.9*, and despite the omissions, the parties agreed to go forward with the arbitration)]. Nor may a party waive his or her right to disqualify a proposed neutral arbitrator in accordance with *Code Civ. Proc. § 1281.91* by agreeing to arbitrate in accordance with rules that provide some other means of determining whether the proposed neutral arbitrator is to be disqualified. The statutory scheme primarily exists to serve the public purpose of promoting public confidence in the arbitration process and does not allow an individual right of waiver to take precedence [*Azteca Constr., Inc. v. ADR Consulting, Inc. (2004) 121 Cal. App. 4th 1156, 1164-1168, 18 Cal. Rptr. 3d 142]* .

Except with respect to *Code Civ. Proc. § 1281.91(d)* (disclosure of grounds specified in *Code Civ. Proc. § 170.1*, discussed at *§ 33.15*) in no event may a notice of disqualification be given after a hearing of any contested issue of fact relating to the merits of the claim or after any ruling by the arbitrator regarding any contested matter [*Code Civ. Proc. § 1281.91(c)*; *Advantage Medical Services, LLC v. Hoffman (2008) 160 Cal. App. 4th 806, 819-820, 72 Cal. Rptr. 3d 935]* . Manifestly, *Code Civ. Proc. § 1281.91(c)* applies only when the proposed neutral arbitrator has made the relevant disclosure [*International Alliance of Theatrical Stage Employees, etc. v. Laughon (2004) 118 Cal. App. 4th 1380, 1392*].

ILLUSTRATION:

No Disclosure; No Waiver. On the first day of arbitration, plaintiff/appellant's attorney presented to be marked for identification and then introduced as evidence an arbitration award in a previous matter in which the same arbitrator had served as neutral arbitrator and in which plaintiff/respondent's law firm had acted a counsel for a party. Although close scrutiny of the award would have revealed that the same person served as neutral arbitrator in both matters and that plaintiff/respondent's law firm had represented a party to the earlier arbitration, no one at the hearing explicitly mentioned the arbitrator's disclosure obligation, and there was no discussion of the possible conflict. The award was presented as an exhibit purportedly only to support plaintiff/respondent's legal position. The trial court affirmed an award for plaintiff/respondent, finding that appellant had waived the right to disqualify the neutral arbitrator.

> Was that correct? No. The record did not demonstrate that defendant/appellant actually knew, understood, and acknowledged the presence of a conflict before the conclusion of the arbitration proceedings. There was neither a disclosure nor a waiver of the arbitrator's conflict. An explicit, formal proffer of the disqualifying information was required [*International Alliance of Theatrical Stage Employees, etc. v. Laughon (2004) 118 Cal. App. 4th 1380, 1389-1392, 14 Cal. Rptr. 3d 341* ; *compare Dornbirer v. Kaiser Foundation Health Plan, Inc. (2008) 166 Cal. App. 4th 831, 836, 846* ; *83 Cal. Rptr. 3d 116* (an arbitration award was not vacated when the arbitrator generally disclosed his relationships and prior interactions with the parties to the arbitration but did not provide all of the specific details, i.e., dates and results of the prior arbitrations, required under *Code Civ. Proc. § 1281.9*, and despite the omissions, the parties agreed to go forward with the arbitration)].

Nothing in *Code Civ. Proc. § 1281.91(c)* limits the right of a party to vacate an award pursuant to *Code Civ. Proc. § 1286.2* or to disqualify the arbitrator pursuant to any other law or statute [*Code Civ. Proc. § 1281.91(c)*; *see Advantage Medical Services, LLC v. Hoffman (2008) 160 Cal. App. 4th 806, 820-822, 72 Cal. Rptr. 3d 935* ; *International Alliance of Theatrical Stage Employees, etc. v. Laughon (2004) 118 Cal. App. 4th 1380, 1392, 14 Cal. Rptr. 3d 341* (award must be vacated when required disclosure was not made); *see also § 34.19*]. Grounds for vacating an award include corruption, fraud, prejudicial misconduct of a neutral arbitrator, and failure of an arbitrator to make required disclosures or, if subject to disqualification, to disqualify himself or herself on receipt of a timely demand for disqualification [*Code Civ. Proc. § 1286.2*; *see Code Civ. Proc. § 1281.91(d)* (relating to grounds for disqualification of a judge under *Code Civ. Proc. § 170.1*, discussed in *§ 33.15[1]*)]. Though not characterizing its decision as based on waiver, a court of appeal upheld the confirmation of an award challenged on the basis of the arbitrator's failure to disclose prior service as a mediator in a matter settled by one of the parties to the arbitration because that party: (1) participated in the nondisclosed case; (2) had access to his own file regarding that case before, during and after the arbitration hearings; (3) recognized the arbitrator visually before the arbitration hearing commenced; (4) failed to request a continuance to investigate the arbitrator; (5) consented to proceed with the arbitration when the arbitrator partially described the nondisclosed case to all parties; and (6) failed to notify the arbitrator or the other parties that he objected to the arbitrator's participation until nine months after signing the stipulation naming the arbitrator, six months after seeing and recognizing the arbitrator, and nearly two months after the arbitrator issued the award in favor of his opponents. The court of appeal said any other interpretation of *Code Civ. Proc. § 1286.2(a)(6)* would be absurd [*Fininen v. Barlow (2006) 142 Cal. App. 4th 185, 190-191, 47 Cal. Rptr. 3d 687]* .

A party cannot waive this right to seek vacatur by agreeing to arbitrate under rules that purportedly give the sponsoring organization the right to conclusively determine all claims. AAA rule 17 provided that AAA's challenges regarding disqualification were conclusive. The statutes were passed to advance a public purpose of crucial importance over which the state retained ultimate control [*Advantage Medical Services, LLC v. Hoffman (2008) 160 Cal. App. 4th 806, 820-822, 72 Cal. Rptr. 3d 935*].

For discussion regarding vacating or refusing to confirm awards due to failure to make required disclosures, see also *§ 34.19[1][d]*.

[4] Residential Construction Contract Arbitration

[a] Declaration Requirement

In a binding arbitration of any claim for more than $3,000 pursuant to a contract for the construction or improvement of residential property consisting of one to four units, the arbitrator must, within 10 days following his or her appointment, provide each party a written declaration under penalty of perjury [*Code Civ. Proc. § 1281.95(a)*].

The declaration must disclose the following:

- Whether the arbitrator or his or her employer or arbitration service had or has a personal or professional affiliation with either party [*Code Civ. Proc. § 1281.95(a)(1)*].

- Whether the arbitrator or his or her employer or arbitration service has been selected or designated as an arbitrator by either party in another transaction [*Code Civ. Proc. § 1281.95(a)(2)*].

[b] Grounds for Disqualification

The arbitrator may be disqualified from the arbitration by either party if the arbitrator [*Code Civ. Proc. § 1281.95(b)*]:

- Discloses an affiliation with either party;

- Discloses that he or she has been selected or designated as an arbitrator by either party in another arbitration; or

- Fails to comply with Section 1281.95.

Section 1281.95 does not limit a party's right to vacate an award pursuant to *Code Civ. Proc. § 1286.2* or to disqualify an arbitrator pursuant to any other law or statute [*Code Civ. Proc. § 1281.95(c)*]. Grounds for vacating an award are discussed in *Ch. 34, Contractual Arbitration: Judicial Review, § 34.19[1]*.

[c] Notice of Disqualification

Notice of disqualification must be served within 15 days after the arbitrator makes the required disclosures or fails to comply. For a form of notice of disqualification under *Code Civ. Proc. § 1281.95*, see *§ 33.62*.

[d] Waiver of Right to Disqualify

A party waives his or her right to disqualify an arbitrator if he or she fails to serve the notice of disqualification under *Code Civ. Proc. § 1281.95(c)*, unless the arbitrator makes a material omission or material misrepresentation in his or her disclosure [*Code Civ. Proc. § 1281.95(c)*].

[e] Comparison of Code Civ. Proc. §§ 1281.9 and 1281.95 Disclosure Provisions

Of the two schemes providing for notice of disqualification, *Code Civ. Proc. § 1281.9* and *Code Civ. Proc. § 1281.95*, discussed under [4][a]-[d], *above*, Section 1281.95 appears to provide the greater protection for a party:

- Under section 1281.95 no time limit is specified regarding the past incidents that must be disclosed, compared with Section 1281.9 which defines reportable "prior cases".

- The disclosure under Section 1281.95 must be made as a written declaration under penalty of perjury [*see Code Civ. Proc. § 1281.95(a)*], whereas the more general Section 1281.9 scheme specifies no such requirement, referring only to a disclosure in writing [*see Code Civ. Proc. § 1281.9(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesSecurities LawLiabilitySecurities Exchange Act of 1934 ActionsExpress LiabilitiesValidity of ContractsArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute

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A. Appointment of Arbitrator

4-33 California Forms of Pleading and Practice--Annotated § 33.15

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.15 Disclosure of Grounds for Disqualification of Judge

[1] Disclosures Required

A neutral arbitrator is required to disclose to all parties the existence of any grounds specified in *Code Civ. Proc. § 170.1* for disqualification of a judge [*Code Civ. Proc. § 1281.9(a)(1)*]; and if any such ground exists, to disqualify himself or herself on demand of any party made before the conclusion of the arbitration proceeding [*Code Civ. Proc. § 1281.91(d)*]. This provision is not applicable to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or their respective representatives [*Code Civ. Proc. § 1281.91(d)*].

These disclosures must be made to all parties in writing within 10 calendar days of service of notice of the proposed nomination or appointment [*Code Civ. Proc. § 1281.9(a)(2), (b)*].

The grounds specified in *Code Civ. Proc. § 170.1* for disqualification of judges are discussed in Ch. 317, *Judges* , Pt. III. Briefly, they involve [*see Code Civ. Proc. § 170.1(a)*]:

(1) Personal knowledge of disputed evidentiary facts concerning the proceeding.

(2) Service as a lawyer in the proceeding or for any party in the proceeding.

(3) Financial interest in the subject matter.

(4) Personal relationships of the judge, judge's spouse, or person within third degree of relationship to either of them with a party.

(5) Lawyer or spouse of lawyer in the proceeding is related to, or associated in the practice of law with,

the judge, judge's spouse, former spouse, sibling, or parent.

(6) Belief that recusal is in the best interests of justice, actual bias or prejudice toward a party or lawyer in the proceeding, or facts that would make a reasonable person doubt the judge's impartiality.

(7) Physical impairment.

(8) Whether or not the judge has any current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral, or is participating in, or within the last two years has participated in, any discussions regarding such prospective employment with a party to the proceeding [*see Code Civ. Proc. § 1281.9(a)(1)*]. To be a "party" for purposes of triggering the disclosure requirement based on employment of the arbitrator by a party, an affiliate of the named party must have been involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding [*Hayden v. Robertson Stephens, Inc. (2007) 150 Cal. App. 4th 360, 365-368, 58 Cal. Rptr. 3d 333* ; *see Code Civ. Proc. § 170.1(a)(8)(B)(ii)* (defining "party")].

[2] Failure of Arbitrator to Disqualify Self

If an arbitrator making the award was subject to disqualification on grounds specified in *Code Civ. Proc. § 1281.91*, but failed, on receipt of a timely demand, to disqualify himself or herself as required by *Code Civ. Proc. § 1281.9*, the court must vacate the award. Again, this provision is not applicable to arbitration proceedings conducted under a collective bargaining agreement between employers and employees or between their respective representatives [*Code Civ. Proc. § 1286.2(a)(6)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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A. Appointment of Arbitrator

4-33 California Forms of Pleading and Practice--Annotated § 33.16

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.16 Private Arbitration Companies and Consumer Arbitrations

[1] Prohibited Financial Interests

No private arbitration company may administer a consumer arbitration [*see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(d), (e) (definition, discussed at *§ 33.14[2][g][i]*)], or provide any other services related to a consumer arbitration, if:

- The company has, or within the preceding year has had, a financial interest, as defined in *Code Civ. Proc. § 170.5* (discussed at *§ 33.14[2][c][v]*), in any party or attorney for a party [*Code Civ. Proc. § 1281.92(a)*], or

- If any party or attorney for a party has, or within the preceding year has had, any type of financial interest in the private arbitration company [*Code Civ. Proc. § 1281.92(b)*].

Code Civ. Proc. § 1281.92 became operative January 1, 2003, and operates only prospectively so as not to prohibit the administration of consumer arbitrations on the basis of financial interests held prior to January 1, 2003 [*Code Civ. Proc. § 1281.92(c), (e)*]. *Code Civ. Proc. § 1281.92* applies to all consumer arbitration agreements subject to *Code Civ. Proc. §§ 1280-1294.2*, and to all consumer arbitration proceedings conducted in California [*Code Civ. Proc. § 1281.92(d)*].

[2] Publication of Five Years' Historical Data

Any private arbitration company that administers or is otherwise involved in, a consumer arbitration [*see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(d), (e) (definition, discussed at *§ 33.14[2][g][i]*)], must collect, publish at least quarterly, and make available to the public in a computer-searchable format, which must be accessible at the Internet Web site of the private arbitration company, if any, and on paper on request, all of the following information with respect to any consumer arbitration commenced on or after January 1, 2003, and regarding each consumer arbitration within the preceding five years [*Code Civ. Proc. § 1281.96(a), (c)*]:

(1) The name of any nonconsumer party, that is a corporation or other business entity.

(2) The type of dispute involved, including goods, banking, insurance, health care, employment, and, if it involves employment, the amount of the employee's annual wage divided into the following ranges:

- Less than one hundred thousand dollars ($100,000),
- One hundred thousand dollars ($100,000) to two hundred fifty thousand dollars ($250,000), inclusive, and
- Over two hundred fifty thousand dollars ($250,000).

(3) Whether the consumer or nonconsumer party was the prevailing party.

(4) On how many occasions, if any, the nonconsumer party has previously been a party in an arbitration or mediation administered by the private arbitration company.

(5) Whether the consumer party was represented by an attorney.

(6) The date the private arbitration company received the demand for arbitration, the date the arbitrator was appointed, and the date of disposition by the arbitrator or private arbitration company.

(7) The type of disposition of the dispute, if known, including withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing.

(8) The amount of the claim, the amount of the award, and any other relief granted, if any.

(9) The name of the arbitrator, his or her total fee for the case, and the percentage of the arbitrator's fee allocated to each party.

A private arbitration company that receives funding pursuant to Chapter 8 of Division 1 of the Business and Professions Code (*Bus. & Prof. Code § 465 et seq.*) and that administers or conducts fewer than 50 consumer arbitrations per year may collect and publish the foregoing information semiannually, provide the information only on paper, and charge the actual cost of copying [*Code Civ. Proc. § 1281.96(b)(2)*]. All other private arbitration companies may charge the actual cost of copying to any person who requests the information on paper if that company provides the foregoing information in a computer-searchable format at the company's Internet Web site and that information may be downloaded without any fee. If the private arbitration company does not make the foregoing information accessible by the Internet, the company shall provide that information without charge to any person who requests the information on paper [*Code Civ. Proc. § 1281.96(b)(1)*].

No private arbitration company has any liability for collecting, publishing, or distributing the information required by *Code Civ. Proc. § 1281.96* [*Code Civ. Proc. § 1281.96(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration Clauses

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[Reserved]

§§ 33.17[Reserved]

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PART II. LEGAL BACKGROUND
B. Conduct of Arbitration Proceeding

4-33 California Forms of Pleading and Practice--Annotated § 33.20

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.20 Powers of Arbitrators

[1] Source of Powers

The arbitrator's jurisdiction or authority to act is derived from and limited by the agreement to arbitrate [*Hall v. Superior Court (1993) 18 Cal. App. 4th 427, 22 Cal. Rptr. 2d 376* ; *Department of Public Health v. Service Employees Internat. Union (1989) 215 Cal. App. 3d 429, 434, 263 Cal. Rptr. 711]* . The arbitrator's powers may be limited by the agreement or stipulation of submission [*San Luis Obispo Bay Properties, Inc. v. Pacific Gas & Elec. Co. (1972) 28 Cal. App. 3d 556, 564, 104 Cal. Rptr. 733]* . For further discussion, see *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21*.

If the arbitration clause is silent on the arbitrator's authority to determine which issues are arbitrable, a judicial determination of his or her jurisdiction and scope of authority is generally required [*Parker v. Twentieth Century-Fox Film Corp. (1981) 118 Cal. App. 3d 895, 901-904, 173 Cal. Rptr. 639* ; *see First Options of Chicago, Inc. v. Kaplan (1995) 514 U.S. 938, 115 S. Ct. 1920, 131 L. Ed. 2d 985, 993* (under the Federal Arbitration Act, the court has the primary power to decide arbitrability of a dispute unless there is clear and unmistakable evidence that the parties have agreed for the arbitrator to decide arbitrability)]. Some provider's rules, e.g., the American Arbitration Association (AAA) Commercial Arbitration Rules, provide for the arbitrator to determine arbitrability. If the parties' agreement provides for arbitration in accordance with those or similar rules, it is for the arbitrator--not the court--to determine whether that matter is subject to arbitration [*Dream Theater, Inc. v. Dream Theater (2004) 124 Cal. App. 4th 547, 557-558, 21 Cal. Rptr. 3d 322* (trial court must stay action until arbitrator determines arbitrability)].

Once the court has ordered arbitration, however, the arbitrator has no power to dismiss the arbitration by reexamining whether the parties were bound by the arbitration provision, even if the law has changed while the matter was being arbitrated [*Malek v. Blue Cross of California (2004) 121 Cal. App. 4th 44, 56, 16 Cal. Rptr. 3d 687]* . If the law changes, the proper recourse is to petition the trial court to reconsider its original order compelling arbitration [*see Code*

Civ. Proc. § 1008(c); *Malek v. Blue Cross of California (2004) 121 Cal. App. 4th 44, 59-60, 16 Cal. Rptr. 3d 687]* . For discussion of an arbitrator's power to dismiss an arbitration for unreasonable delay in bringing the matter to a conclusion, akin to the five-year dismissal statute applicable to actions, see *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.51[2]*.

[2] Scope of Powers

As a contractual matter between the parties involved, the arbitrator derives his or her power solely from the arbitration agreement and cannot exceed those derived powers. Although there is a strong policy in favor of enforcing agreements to arbitrate, there is no policy compelling persons to accept arbitration of controversies that they have not agreed to arbitrate. An arbitrator's powers are limited and circumscribed by the agreement or stipulation of submission [*Pacific Crown Distributors v. Brotherhood of Teamsters (1986) 183 Cal. App. 3d 1138, 1144, 228 Cal. Rptr. 645]* .

An arbitrator who issued an award in an initial dispute between the parties does not exceed his or her powers by hearing and deciding a second arbitration when the parties' agreement provided that all disputes of any nature arising from the agreement would be settled by one arbitrator. This is true even if the language "shall be settled by one arbitrator" did not mean that the parties would pick one arbitrator "for life," but merely that each dispute would be settled by one arbitrator rather than three. That language is equally susceptible to both meanings and if the arbitrator interpreted it incorrectly, that would be at most an error of law, which would not be grounds to prohibit confirmation of the award [*Patchett v. Bergamot Station, Ltd. (2006) 143 Cal. App. 4th 1390, 1392, 1395-1398, 49 Cal. Rptr. 3d 941]* .

[3] Exercise of Powers

[a] Limited to Submitted Issues

Arbitrators must decide all issues that are submitted to them but have no power to decide issues not submitted. They have the power to determine which issues are actually necessary to the ultimate decision [*Jones v. Humanscale Corp. (2005) 130 Cal. App. 4th 401, 413-414, 29 Cal. Rptr. 3d 881* ; *Hall v. Superior Court (1993) 18 Cal. App. 4th 427, 434, 22 Cal. Rptr. 2d 376* ; *East San Bernardino County Water Dist. v. City of San Bernardino (1973) 33 Cal. App. 3d 942, 953, 954, 109 Cal. Rptr. 510]* .

Parties may submit for decision issues they are not contractually compelled to submit to arbitration. Thus, a court will look both to the contract and to the scope of the submissions to determine the arbitrator's authority [*J.C.Gury Co. v. Nippon Carbide Indus. (USA), Inc. (2007) 152 Cal. App. 4th 1300, 1305, 62 Cal. Rptr. 3d 118* ; *see also* [e], *below*].

[b] Statutory Powers

The arbitration statutes set forth certain powers of arbitrators with respect to the following:

- Conducting the arbitration hearings [*Code Civ. Proc. § 1282.2*].
- Issuing subpoenas [*Code Civ. Proc. § 1282.6*].
- Administering oaths [*Code Civ. Proc. § 1282.8*].
- Ordering depositions [*Code Civ. Proc. § 1283*].
- Enforcing discovery obligations [*Code Civ. Proc. § 1283.05*].
- Making the award [*Code Civ. Proc. §§ 1283.4-1283.8*].

- Correcting the award [*Code Civ. Proc. § 1284*].

[c] Reference to Principles of Law and Equity

Arbitrators may base their decisions on broad principles of justice and equity and have the power to expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action, unless they are specifically required by the arbitration agreement to act in conformity with rules of law [*Sapp v. Barenfeld (1949) 34 Cal. 2d 515, 523, 212 P.2d 233* ; *Interinsurance Exchange v. Bailes (1963) 219 Cal. App. 2d 830, 835, 33 Cal. Rptr. 533]* . They can apply both legal and equitable principles in deciding the ultimate issue submitted to them [*Morris v. Zuckerman (1968) 69 Cal. 2d 686, 691, 72 Cal. Rptr. 880, 446 P.2d 1000]* .

[d] Punitive Damages Award

An express agreement is not required to empower arbitrators to award punitive damages. If the arbitration provision contemplates arbitration of claims giving rise to punitive damages, the arbitrators have authority to award punitive damages [*Tate v. Saratoga Savings & Loan Assn. (1989) 216 Cal. App. 3d 843, 854-856, 265 Cal. Rptr. 440* (joint venture agreement providing for arbitration of any controversy between venturers concerning venture, construction of specific project, or rights and duties of any party under agreement as encompassing tort claims for breach of fiduciary duty); *Baker v. Sadick (1984) 162 Cal. App. 3d 618, 622-626, 208 Cal. Rptr. 676* (medical malpractice)].

ILLUSTRATION:

Intent to Empower Arbitrator to Award Punitive Damages. An arbitration clause provides: "If any controversy shall arise between the parties hereto arising from or with respect to this Agreement, the controversy shall be submitted to mandatory, binding arbitration." Does the arbitrator have power to award punitive damages? Yes. In this case, the court agreed with other recent decisions that had held that similar language expresses a remedial intent sufficiently broad to empower the arbitrator to entertain a claim for punitive damages [*see* *Rifkind & Sterling, Inc. v. Rifkind (1994) 28 Cal. App. 4th 1282, 1288-1289, 33 Cal. Rptr. 2d 828]* .

Due Process Clause requirements that punitive damages awards assessed and imposed by state courts be subject to some degree of judicial review do not apply to punitive damage awards by arbitrators, because no state action is involved in the award [*Rifkind & Sterling, Inc. v. Rifkind (1994) 28 Cal. App. 4th 1282, 1288-1291, 33 Cal. Rptr. 2d 828]* . Moreover, if due process did apply, the arbitration agreement would have been sufficient to waive the constitutional right to judicial review of the punitive damage award, even though the agreement did not contain an express waiver of that particular constitutional right, at least when the party is a sophisticated attorney or business person [*Rifkind & Sterling, Inc. v. Rifkind (1994) 28 Cal. App. 4th 1282, 1290, 33 Cal. Rptr. 2d 828* (analogizing to the issue of waiver of jury trial)]. Also, although the limited degree of state action involved in confirming of an arbitration award requires the traditional measure of due process notice and hearing, it does not require that a punitive damage component of an arbitration award be given any different standard of review than applies to the rest of the award [*Rifkind & Sterling, Inc. v. Rifkind (1994) 28 Cal. App. 4th 1282, 1291-1293, 33 Cal. Rptr. 2d 828]* .

For a discussion of the arbitrator's award generally, see *§ 33.28*.

[e] Waiver of Objection of Lack of Authority

The objection that an arbitrator lacks authority to decide an issue may be waived by submission of the issue by the parties [*J.C.Gury Co. v. Nippon Carbide Indus. (USA), Inc. (2007) 152 Cal. App. 4th 1300, 1302, 1304-1306, 62 Cal. Rptr. 3d 118* ; *Felner v. Meritplan Ins. Co. (1970) 6 Cal. App. 3d 540, 544, 86 Cal. Rptr. 178]* . If the parties submit an issue not covered by the order of arbitration they are bound by the decision of the arbitrators and are not entitled to relitigate the issue in another proceeding [*Lesser Towers, Inc. v. Roscoe-Ajax Constr. Co. (1969) 271 Cal. App. 2d 675, 698-699, 77 Cal. Rptr. 100]* . Nor can a party argue on appeal that the arbitrator exceeded his or her powers as

specified in the arbitration clause after arguing and presenting evidence relative to an issue without arguing during the arbitration hearing that the arbitrator had no authority to find on that issue [*see J.C.Gury Co. v. Nippon Carbide Indus. (USA), Inc. (2007) 152 Cal. App. 4th 1300, 1302, 1304-1306, 62 Cal. Rptr. 3d 118* (warranty disclaimer held unconscionable and unenforceable and consequential damage award affirmed despite contract provision that arbitrator had no power to make an award that changed, modified, or altered any provision of contract)].

[4] Powers and Duties in Plurality of Arbitrators

Unless the arbitration agreement otherwise provides, or unless the parties to the arbitration otherwise provide by an agreement which is not contrary to the arbitration agreement as made or as modified by all of the parties thereto, the following rules govern the exercise of powers by the arbitrators:

- The arbitration is to be conducted by a single neutral arbitrator [*Code Civ. Proc. § 1282(a)*].

- If there is more than one arbitrator the powers and duties of the arbitrators, other than the powers and duties of a neutral arbitrator, may be exercised by a majority of them if reasonable notice of all proceedings has been given to all arbitrators [*Code Civ. Proc. § 1282(b)*].

- If there is more than one neutral arbitrator the powers and duties of a neutral arbitrator may be exercised by a majority of the neutral arbitrators [*Code Civ. Proc. § 1282(c)(1)*] or, by unanimous agreement of the neutral arbitrators, those powers and duties may be delegated to one of their number but the power to make or correct the award may not be so delegated [*Code Civ. Proc. § 1282(c)(2)*].

- If there is no neutral arbitrator, the powers and duties of a neutral arbitrator may be exercised by a majority of the arbitrators [*Code Civ. Proc. § 1282(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureRemediesDamagesPunitive DamagesCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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Chapter 33 CONTRACTUAL ARBITRATION: APPOINTMENT OF ARBITRATOR AND CONDUCT OF PROCEEDING
PART II. LEGAL BACKGROUND
B. Conduct of Arbitration Proceeding

4-33 California Forms of Pleading and Practice--Annotated § 33.21

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.21 Consolidation of Arbitration Proceedings

[1] When Consolidation May Be Ordered

[a] Proper Circumstances Generally

A party to an arbitration agreement, except one to arbitrate disputes as to the professional negligence of a health care provider made pursuant to *Code Civ. Proc. § 1295*, may petition the court to consolidate separate arbitration proceedings, and the court may order consolidation of separate arbitration proceedings, when [*Code Civ. Proc. § 1281.3*]:

- Separate arbitration agreements or proceedings exist between the same parties, or one party is a party to a separate arbitration agreement or proceedings with a third party,
- The disputes arise from the same transaction or series of related transactions, and
- There is a common issue, or there are common issues, of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.

When the requirements for consolidation contained in *Code Civ. Proc. § 1281.3* are met, and no impairment of a substantial right or obligation of a party will result, a court has discretion to order combined arbitration of uninsured motorist claims that are arbitrable under *Ins. Code § 11580.2(f)* and third-party claims arising from the same incident that are subject to judicial arbitration under *Code Civ. Proc. § 1141.10 et seq.* [*Gordon v. G.R.O.U.P, Inc. (1996) 49 Cal. App. 4th 998, 1007, 56 Cal. Rptr. 2d 914* ; *but see Mercury Insurance Group v. Superior Court (1998) 19 Cal. 4th 332, 351-352, 79 Cal. Rptr. 2d 308* (dictum that consolidation of contractual and judicial arbitrations is not authorized by *Code Civ. Proc. § 1281.3* and would be awkward)].

For a form of petition that may be used by a party to an arbitration who wishes to have separate arbitration proceedings consolidated, or partially consolidated, see *§ 33.76*.

[b] Effect of Clause Excluding Another Person From Arbitration

The consolidation of separate proceedings may be ordered notwithstanding language in the arbitration agreement that no arbitration shall include another party without the consent of the parties to the arbitration agreement. The consolidation of separate proceedings that include a common party does not make the parties that are signatory to only one agreement parties to the other agreement. The consolidation merely provides that the separate claims will be heard at the same time, and will presumably be resolved in a consistent manner because the consolidation eliminates the danger that the issues common to the claims will be resolved inconsistently in separate proceedings. In such a situation, the arbitrator cannot order relief between the parties that do not have an agreement to arbitrate [*Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co. (1983) 140 Cal. App. 3d 251, 264-265, 191 Cal. Rptr. 15]* .

[c] Construction Subcontract Incorporating Clause of General Contract

When construction subcontracts incorporate by reference the arbitration clause of a general contract, the subcontractors may be required to join in the arbitration proceedings under general contract involving defective work [*Slaught v. Bencomo Roofing Co. (1994) 25 Cal. App. 4th 744, 751, 30 Cal. Rptr. 2d 618]* . Consolidation may be required when the general contract controls disputes between the owner, contractor, and subcontractors even if the subcontracts contain their own arbitration clauses that govern controversies between the subcontractors and the general contractor [*Slaught v. Bencomo Roofing Co. (1994) 25 Cal. App. 4th 744, 750, 30 Cal. Rptr. 2d 618]* .

[d] Class Actions

Trial courts have the authority to order arbitration in class action cases under the penumbra of the express statutory powers of *Code Civ. Proc. § 1281.3*. If the alternative is to force numerous individual parties to individually litigate their causes in a separate arbitral forum, then the prospect of classwide arbitration, for all its difficulties, may offer a better, more efficient, and fairer solution [*Izzi v. Mesquite Country Club (1986) 186 Cal. App. 3d 1309, 1321, 231 Cal. Rptr. 315* , citing *Keating v. Superior Court (1982) 31 Cal. 3d 584, 183 Cal. Rptr. 360, 645 P.2d 1192 , reversed on other grounds sub nom. Southland Corp. v. Keating (1984) 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1]* .

If the matter is governed by the Federal Arbitration Act and the arbitration agreement is silent on the issue of classwide arbitration, interpretation of the contract is necessary to determine whether it permits classwide arbitration. That interpretation addresses a procedural matter and, under an agreement that provides for arbitration of "all disputes relating to this contract," the arbitrator should make that interpretation after a court orders arbitration [*Green Tree Fin. Corp. v. Bazzle (2003) 539 U.S. 444, 452-453, 123 S. Ct. 2402* ; *Garcia v. DIRECTV, Inc. (2004) 115 Cal. App. 4th 297, 302-304, 9 Cal. Rptr. 3d 190]* . Conversely, if the arbitration agreement prohibits classwide arbitration and is challenged on the basis that the class action waiver is unconscionable, the court, not the arbitrator, should determine the issue, even if the matter is governed by the FAA [*Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 163, 167, 170-173* ; *accord* Szetela v. Discover Bank (2002) 97 Cal. App, 4th 1094, 1101-1102, *118 Cal. Rptr. 2d 862 , cert. denied, 537 U.S. 1501 (2003)* (refusing to enforce prohibition on grounds of unconscionability without preemption analysis)]. For detailed discussion of classwide arbitration, see *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.32*.

[e] Effect of Clause Prohibiting Consolidation

Like a clause in an arbitration agreement prohibiting classwide arbitration [*see* [d], *above*], a prohibition on consolidation of arbitrations may be unconscionable, and thus, void and unenforceable. The determination of unconscionability is for the court to make. The court has both the duty and the discretion to make that determination [*Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (Mail Boxes Etc., USA, Inc.) (2005) 133 Cal. App.*

4th 396, 412-413, 34 Cal. Rptr. 3d 659 ; *see Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1585-1587, 98 Cal. Rptr. 3d 743* ("No Consolidation" clause unconscionable, unenforceable, and, with another provision, unseverable)]. *Independent Assn. of Mailbox Center Owners* involved some agreements that were silent on the issues of consolidation and class wide arbitration and appointed the American Arbitration Association as arbitration administrator and other agreements that prohibited consolidation or classwide arbitration and appointed JAMS as arbitrator. AAA decided as an administrative matter not to consolidate the arbitrations. Whether the issue is decided by an arbitrator or the court, it should not be done as an administrative proceeding without at least referring the matter to an arbitrator [*Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (Mail Boxes Etc., USA, Inc.) (2005) 133 Cal. App. 4th 396, 410-411, 34 Cal. Rptr. 3d 659]* . *Independent Assn. of Mailbox Center Owners* most probably involved interstate commerce and would be governed by the Federal Arbitration Act [*see* [1A], *below*], but the issue was not before the court of appeal.

[1A] If Federal Arbitration Act Governs

If the matter is governed by the Federal Arbitration Act, and the arbitration agreements are silent on the issue of consolidation, even if the arbitration agreements contain a specific choice of California law, it is up to the arbitrator, not the court, to determine whether two or more arbitrations should be consolidated. The court determines only the validity of the arbitration clause and its applicability to the underlying dispute. Questions regarding the kind of arbitration proceeding the parties agreed to, which concern contract interpretation and arbitration procedures, are for the arbitrator, not the courts, to decide [*Yuen v. Superior Court (Gemstar-TV Guide International, Inc.) (2004) 121 Cal. App. 4th 1133, 1138, 18 Cal. Rptr. 3d 127* (agreements provided any dispute or action thereunder was to be governed by California law); *see also* [e], *above*].

[2] Designation of Arbitrator

If all of the applicable arbitration agreements name the same arbitrator, arbitration panel, or arbitration tribunal, the court ordering consolidated arbitration is required to order all matters to be heard before the arbitrator, panel, or tribunal agreed to by the parties [*Code Civ. Proc. § 1281.3*].

If the applicable arbitration agreements name separate arbitrators, panels, or tribunals, the court ordering consolidation is required to appoint an arbitrator in accord with the procedures set forth in *Code Civ. Proc. § 1281.6* unless all parties to the consolidated arbitration agree on a method of selection [*Code Civ. Proc. § 1281.3*; for discussion of § 1281.6, *see § 33.11* et seq.].

[3] Inconsistent Arbitration Agreements

If the arbitration agreements in consolidated proceedings contain inconsistent provisions, the court is required to resolve the conflicts and to determine the rights and duties of the various parties so as to achieve substantial justice under all the circumstances [*Code Civ. Proc. § 1281.3*].

If the inconsistency is that one arbitration agreement provides for a single arbitrator and another provides for a three-arbitrator panel, the court must order arbitration before a three-arbitrator panel. The right to a three-arbitrator panel is a substantial contractual right. It minimizes the risks of factual or legal error, which are subject to only limited judicial review [*Parker v. McCaw (2005) 125 Cal. App. 4th 1494, 1505-1509, 24 Cal. Rptr. 3d 55* (vacating portion of award--rendered by single arbitrator in consolidated arbitrations--based on causes of action under agreement that provided for three-arbitrator panel)].

[4] Partial Consolidation

The court may, in its discretion, deny consolidation or consolidate separate proceedings only as to certain issues, leaving other issues to be resolved in separate proceedings [*Code Civ. Proc. § 1281.3*].

[5] Effect of Consolidation

When separate arbitration hearings are consolidated for the purpose of resolving common factual issues, a party to only one of the arbitration agreements does not become a party to another agreement because of the consolidation. Therefore, language in an arbitration agreement precluding arbitration if another party is included without the consent of the contracting party does not preclude consolidation that is otherwise appropriate [*Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co. (1983) 140 Cal. App. 3d 251, 265-266, 191 Cal. Rptr. 15]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureRemediesDamagesPunitive DamagesCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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4-33 California Forms of Pleading and Practice--Annotated § 33.22

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.22 Restraint of Arbitration

A party to an arbitration agreement cannot obtain an injunction against arbitration unless grounds exist for resisting a petition to compel arbitration under *Code Civ. Proc. § 1281.2* [*California State Council of Carpenters v. Superior Court (1970) 11 Cal. App. 3d 144, 155, 89 Cal. Rptr. 625* ; *see Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.31* et seq.]. Thus, if the agreement requiring arbitration itself is illegal and subject to revocation, a party to it may seek injunctive relief [*California State Council of Carpenters v. Superior Court (1970) 11 Cal. App. 3d 144, 156-159, 89 Cal. Rptr. 625]* .

When a party has not submitted to arbitration and the arbitration agreement is not self executing, a court cannot grant an injunction restraining a party from improperly proceeding with arbitration [*see* *Sauter v. Superior Court (1969) 2 Cal. App. 3d 25, 29, 82 Cal. Rptr. 395]* . The party seeking arbitration must take affirmative steps to secure it by applying for judicial relief under the arbitration statutes [*Sauter v. Superior Court (1969) 2 Cal. App. 3d 25, 29, 82 Cal. Rptr. 395]* .

Where a contract containing an arbitration clause allows for court actions under the contract and provides for attorney's fees and costs to the prevailing party in an action on the contract, the prevailing party in an action based on an independent complaint for declaratory and injunctive relief that addresses only the issue of whether an arbitration must proceed may be entitled to an award of fees and costs under the applicable standards, regardless of who might become the prevailing party in any subsequent arbitration [*Turner v. Schultz (2009) 175 Cal. App. 4th 974, 981-983, 96 Cal. Rptr. 3d 659* (defendant entitled to attorney's fees under *Civ. Code § 1717*, including on appeal); on costs and fees generally, see Ch. 174, *Costs and Attorney's Fees*]. Furthermore, it is proper for the court to make the award, rather than to defer to the arbitrator in any arbitration [*Turner v. Schultz (2009) 175 Cal. App. 4th 974, 983, 96 Cal. Rptr. 3d 659* (denying declaration that arbitration should not proceed)]. If *Civ. Code § 1717* applies, the prevailing party has to notice a motion for an award of costs and fees following judgment [*Civ. Code § 1717*; *see, e.g.,* *Turner v. Schultz (2009) 175 Cal. App. 4th 974, 978, 96 Cal. Rptr. 3d 659*].

For forms of complaint for use by a party to an arbitration agreement to seek a declaratory judgment determining that a controversy, or certain issues thereof, is not subject to arbitration and seeking to enjoin pending arbitration of such controversy or issues, see *§§ 33.74* and *33.75*.

For procedures and forms for use in actions for injunctive relief generally, see Ch. 303, *Injunctions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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4-33 California Forms of Pleading and Practice--Annotated § 33.23

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.23 Right to Counsel

[1] Representation at Any Proceeding or Hearing

A party to the arbitration has the right to be represented by an attorney at any proceeding or hearing in arbitration under *Code Civ. Proc. § 1280 et seq.* [*Code Civ. Proc. § 1282.4(a)*].

[2] Waiver and Revocation of Waiver of Right to Counsel

A party who has waived the right to counsel may revoke that waiver. However, if a party revokes the waiver, the other party is entitled to a reasonable continuance for the purpose of procuring an attorney [*Code Civ. Proc. § 1282.4(a)*].

[3] Representation by Attorney Who Is Not Admitted to Practice in California

[a] Certificate Required

An attorney admitted to the bar of a state other than California who represents a party in connection with, or in the course of, an arbitration in California must file a certificate in accordance with *Code Civ. Proc. § 1282.4(c)* and have his or her appearance approved in writing, on that certificate, by the arbitrator(s) or the arbitral forum [*Code Civ. Proc. § 1282.4(b)*; *see Cal. Rules of Ct., 9.43(a)* (defining out-of-state attorney arbitration counsel)].

The attorney must serve the certificate within a reasonable period of time after the attorney indicates an intention to appear in the arbitration on the arbitrator, arbitrators, or arbitral forum, the State Bar of California, and all other parties and counsel in the arbitration whose addresses are known to the attorney arbitration [*Code Civ. Proc. § 1282.4(c)*]. The out-of-state attorney must pay a reasonable fee, not exceeding $50, to the State Bar of California with the copy of the certificate that is served on the State Bar [*Cal. Rules of Ct., Rule 9.43(f)*].

The certificate must state the following [*Code Civ. Proc. § 1282.4(c)*; Cal. State B. Rules, Out-of-State Arbitration Counsel Program, Rule 3.2.3]:

- The case name and number, and the name of the arbitrator, arbitrators, or arbitral forum assigned to the proceeding in which the attorney seeks to appear.

- The attorney's residence and office address.

- The courts before which the attorney has been admitted to practice and the dates of admission.

- That the attorney is currently a member in good standing of, and eligible to practice law before, the bar of those courts.

- That the attorney is not currently on suspension or disbarred from the practice of law before the bar of any court.

- That the attorney is not a resident of the State of California.

- That the attorney is not regularly employed in the State of California.

- That the attorney is not regularly engaged in substantial business, professional, or other activities in the State of California.

- That the attorney agrees to become familiar with and comply with the standards of conduct required of members of the State Bar of California and agrees to be subject to the jurisdiction of the courts of this state with respect to the law of California governing the conduct of attorneys to the same extent as a member of the State Bar of California.

- The title of the court and the cause in which the attorney has filed an application to appear as counsel pro hac vice in this state or filed a certificate pursuant to *Code Civ. Proc. § 1282.4* in the preceding two years, the date of each application or certificate, and whether or not it was granted. If the attorney has made repeated appearances, the certificate shall reflect the special circumstances that warrant the approval of the attorney's appearance in the arbitration.

- The name, address, and telephone number of the active member of the State Bar of California who is the attorney of record.

The arbitrator, arbitrators, or arbitral forum may approve the attorney's appearance if the certificate complies with *Code Civ. Proc. § 1282.4(c)*. In the absence of special circumstances, repeated appearances are grounds for disapproval of the appearance and disqualification from serving as an attorney in the arbitration in which the certificate was filed [*Code Civ. Proc. § 1282.4(d)*]. Within a reasonable period of time after the arbitrator, arbitrators, or arbitral forum approves the certificate, the attorney must file the certificate with the State Bar of California and serve the certificate as described in *Code Civ. Proc. § 1013a* on all parties and counsel in the arbitration whose address is known to the attorney [*Code Civ. Proc. § 1282.4(e)*].

The certificate must be verified and contain proof of service by mail in accordance with *Code Civ. Proc. § 1013a* on all parties and on the State Bar of California at the San Francisco office [Cal. State B. Rules, Out-of-State Arbitration Counsel Program, Rule 3.2.2].

Lawyers with questions about compliance with Section 1282.4 should write or call the State Bar of California Office of

Certification (180 Howard Street, San Francisco, CA 94105; (415) 538-2100). The rules for the Out-of-State Arbitration Counsel Program are online at the State Bar website (http://www.calbar.org) at the Office of Certification.

[b] Purpose to Abrogate *Birbower*

Code Civ. Proc. § 1282.4, as amended by the Stats. 1998, ch. 915, § 1, was enacted in response to *Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 Cal. 4th 119, 70 Cal. Rptr. 2d 304, 949 P.2d 1* , to provide a procedure by which nonresident attorneys who are not licensed in California to appear in California arbitration proceedings [*see Code Civ. Proc. § 1282.4(j)(1)*].

Section 1284.2 is intended to reinstate the status quo as it existed prior to *Birbower* with respect to the power of a person to elect to be represented by any person in a nonjudicial arbitration proceeding [*see Code Civ. Proc. § 1282.4(j)(3)*].

[c] Sunset Clause

The version of Section 1284.2, which adds subsections (b)-(j) to abrogate *Birbower* [*see* [a], [b], *above*], is subject to a sunset clause under which it is repealed by its own terms on January 1, 2011 [*see Code Civ. Proc. § 1282.4(k)*], at which time a version of the section that does not include those terms is reinstated [*see Code Civ. Proc. § 1282.4(b)*, as amended by Stats. 2000, ch. 1011, §§ 2, 3, Stats. 2005, ch. 607, § 2, Stats. 2006, ch. 357, § 2].

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Michael S. Fields Editorial Consultant

§ 33.24 Issuance of Subpoenas

A subpoena requiring the attendance of witnesses, and a suppoena duces tecum for the production of books, records, documents, and other evidence, must be issued as provided in *Code Civ. Proc. § 1282.6* when attendance or production is sought at an arbitration proceeding or at a deposition under *Code Civ. Proc. § 1283* (depositions for use as evidence), and if *Code Civ. Proc. § 1283.05* (depositions for use in discovery) is applicable, for the purposes of discovery. In addition, the neutral arbitrator on his or her own determination may issue subpoenas for the attendance of witnesses and subpoenas duces tecum for the production of books, records, documents, and other evidence [*Code Civ. Proc. § 1282.6(a)*].

Subpoenas are to be issued, as a matter of course, signed but otherwise in blank, to the party requesting them, by a neutral association, organization, governmental agency, or office if the arbitration agreement provides for administration of the arbitration proceedings by, or under the rules of, a neutral association, organization, governmental agency or office, or by the neutral arbitrator [*Code Civ. Proc. § 1282.6(b)*]. The party serving the subpoena must fill it in before service. Service and enforcement of the subpoena is to be in accordance with *Code Civ. Proc. §§ 1985-1997* [*Code Civ. Proc. § 1282.6(c)*; for discussion and forms concerning service and enforcement, *see* Ch. 535, *Subpoena*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSubpoenasContracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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4-33 California Forms of Pleading and Practice--Annotated § 33.25

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.25 Discovery

[1] Availability of Discovery

[a] Right to Conduct Discovery

The availability of depositions and other forms of discovery in arbitration proceedings is set forth in *Code Civ. Proc. § 1283.05*, which is discussed in [b] and [c], *below*. Whether the provisions of Section 1283.05 apply in any given arbitration proceeding is governed by *Code Civ. Proc. § 1283.1*.

Under Section 1283.1, all of the provisions of *Code Civ. Proc. § 1283.05* are conclusively deemed to be incorporated into and to be made a part of, and are applicable to, every agreement to arbitrate any dispute, controversy, or issue arising out of or resulting from any injury to, or death of, a person caused by the wrongful act or neglect of another [*Code Civ. Proc. § 1283.1(a)*].

With respect to any other arbitration agreement, the Section 1283.05 provisions do not apply unless the parties by their agreement so provide [*Code Civ. Proc. § 1283.1(b)*].

[b] Scope of Available Discovery

[i] Under the Statute

After the appointment of the arbitrator or arbitrators, the parties to the arbitration have the right to take depositions and to obtain discovery regarding the subject matter of the arbitration, and, to that end, to use and exercise all of the same rights, remedies, and procedures, and be subject to all of the same duties, liabilities, and obligations in the arbitration with respect to the subject matter thereof as provided in *Code Civ. Proc. §§ 1985-1997* (governing subpoenas), and *Code Civ. Proc. §§ 2016.010-2036.050*, governing depositions and discovery), as if the subject matter of the arbitration

were pending in a civil action before a superior court, in a civil action other than a limited civil case, subject to the limitations as to depositions set forth in *Code Civ. Proc. § 1283.05(e)* (*see* [2], *below*) [*Code Civ. Proc. § 1283.05(a)*; *see Code Civ. Proc. § 85 et seq.* (defining "limited civil case")].

For discussion and forms dealing with depositions and discovery, *see* Ch. 190- 200, *Discovery* .

[ii] Agreed Limitation on Discovery

Parties may agree to something less than the full panoply of discovery permitted under the California Arbitration Act, *Code Civ. Proc. § 1283.05* [*Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 105-106, 99 Cal. Rptr. 2d 745, 6 P.3d 669]* . Limitations on discovery contained in arbitration agreements are generally enforceable so long as they entitle the parties to discovery sufficient to adequately arbitrate their claims, including access to essential documents and witnesses, as determined by the arbitrator [*Dotson v. Amgen, Inc. (2010) 181 Cal. App. 4th 975, 984, 104 Cal. Rptr. 3d 341* (discovery limitation not unconscionable); *Roman v. Superior Court (2009) 172 Cal. App. 4th 1462, 1468-1469, 92 Cal. Rptr. 3d 153* (restriction on discovery under rules of American Arbitration Association not unconscionable)]. In challenges to clauses of arbitration agreements limiting discovery [*see, generally, Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21[3]*], the courts assume that the arbitrator will operate in a reasonable manner in conformity with the law [*Dotson v. Amgen, Inc. (2010) 181 Cal. App. 4th 975, 984, 104 Cal. Rptr. 3d 341]* .

[c] Enforcement of Discovery Rights

[i] Authority of Arbitrators

The arbitrator or arbitrators themselves have the power, in addition to the power of determining the merits of the arbitration, to enforce the rights, remedies, procedures, duties, liabilities, and obligations of discovery by the imposition of the same terms, conditions, consequences, liabilities, sanctions, and penalties as can be or may be imposed in like circumstances in a civil action by a superior court under the provisions of the Code of Civil Procedure, except the power to order the arrest or imprisonment of a person [*Code Civ. Proc. § 1283.05(b)*].

Code Civ. Proc. § 1283.05(b) gives an arbitrator the power, but not the duty, to impose discovery sanctions. Thus, it is not in excess of an arbitrator's power so as to require vacating an award for an arbitrator to order that a resisting party respond to requests for admission without objection instead of deeming the unanswered requests to have been admitted as would have been required in a court under *Code Civ. Proc. §§ 2033.280, 2033.290* [*Alexander v. Blue Cross of California (2001) 88 Cal. App. 4th 1082, 106 Cal. Rptr. 2d 431]* .

The arbitrator or arbitrators may consider, determine, and make orders imposing those terms, conditions, consequences, liabilities, sanctions, and penalties, whenever necessary or appropriate at any time or stage in the course of the arbitration, and the orders shall be as conclusive, final, and enforceable as an arbitration award on the merits, if the making of the order that is equivalent to an award or correction of an award is subject to the same conditions, if any, as are applicable to the making of an award or correction of an award [*Code Civ. Proc. § 1283.05(c)*].

The arbitrator even has the power to hear and determine discovery matters involving nonparties, for example a challenge by a nonparty to a subpoena issued by a party for documents. The matter is to be heard and determined first by the arbitrator, but the nonparty has the right to full judicial review of the arbitrator's discovery order. If the court determines that the arbitrator erred, the court's determination supersedes that of the arbitrator [*Berglund v. Arthroscopic Laser & Surgery Center of San Diego, LP (2008) 44Cal. 4th 528, 79 Cal. Rptr. 3d 370, 187 P.3d 86, 2008 Cal. LEXIS 8801*].

[ii] "Party" Includes Affiliate

For the purpose of enforcing the duty to make discovery, to produce evidence or information, including books and records, and to produce persons to testify at a deposition or at a hearing, and to impose terms, conditions, consequences, liabilities, sanctions, and penalties on a party for violation of any such duty, a party is deemed to include every affiliate of the party [*Code Civ. Proc. § 1283.05(d)*].

An affiliate, for this purpose, is defined as any party or person for whose immediate benefit the action or proceeding is prosecuted or defended, or an officer, director, superintendent, member, agent, employee, or managing agent of such a party or person [*Code Civ. Proc. § 1283.05(d)*].

Also, the personnel of every affiliate shall be deemed to be the officers, directors, managing agents, agents, and employees of the party to the same degree that each of them bears that status to the affiliate. Similarly, the files, books, and records of every affiliate shall be deemed to be in the possession and control of, and capable of production by, the party [*Code Civ. Proc. § 1283.05(d)*].

[2] Depositions

[a] Deposition as Discovery

Depositions for discovery may not be taken unless leave to do so is first granted by the arbitrator or arbitrators [*Code Civ. Proc. § 1283.05(e)*].

PRACTICE TIP:

Agreeing to Depositions. Most depositions are agreed to by the parties without the involvement of the arbitrators and the expense of obtaining the approval of the arbitrator. *By Michael S. Fields*

[b] Deposition as Evidence

A party to the arbitration may apply to the neutral arbitrator for an order that a witness' deposition be taken for use as evidence. The arbitrator may grant the order if the witness cannot be compelled to attend the hearing, or if such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally at the hearing, to allow a deposition to be taken. This deposition may not be used for discovery [*Code Civ. Proc. § 1283*].

The deposition is taken in the manner prescribed by law for the taking of depositions in civil actions. If the neutral arbitrator orders the taking of the deposition of a witness who resides outside the state, the party who applied for the taking of the deposition is required to obtain a commission therefor from the superior court in accordance with *Code Civ. Proc. §§ 2024-2028* [*Code Civ. Proc. § 1283* (*Code Civ. Proc. §§ 2024-2028* repealed; *now see Code Civ. Proc. §§ 2026, 2027* (*Code Civ. Proc. §§ 2026.010, 2027.010*, effective July 1, 2005); for procedure and forms dealing with depositions, *see* Ch. 193, *Discovery: Depositions*].

[3] Discovery in Uninsured Motorist Arbitration

Discovery in uninsured motorist arbitration is governed by *Ins. Code § 11580.2(f)*, which adopts the entire California Civil Discovery Act [*Code Civ. Proc. § 2016 et seq.* (*Code Civ. Proc. § 2016.010 et seq.*, effective July 1, 2005)] and grants jurisdiction to the court (rather than the arbitrator) to hear and determine discovery motions, including sanctions. Thus, the superior court has jurisdiction to dismiss uninsured motorist arbitration for the insured's refusal to authorize release of medical records in accordance with a previous order [Miranda v. 21st *Century Ins. Co. (2004) 117 Cal. App. 4th 913, 926, 928-929, 12 Cal. Rptr. 3d 159]* . One rationale for having the court rather than the arbitrator determine motions with respect to uninsured motorist discovery is that discovery in uninsured motorist matters may take place any time after the accident, including before an arbitrator is appointed [Miranda v. 21st *Century Ins. Co. (2004) 117 Cal. App. 4th 913, 923, 12 Cal. Rptr. 3d 159* ; *see Ins. Code § 11580.2(f)*]. Discovery motions relating to uninsured motorist

claims may be heard in the superior court in and for any county that is a proper county for the filing of a suit for bodily injury arising out of the accident, against the uninsured motorist, or any county specified in the policy or an endorsement thereto as a proper county for arbitration or action thereon [*Ins. Code § 11580.2(f)(1)*; Miranda v. 21st *Century Ins. Co. (2004) 117 Cal. App. 4th 913, 921, 12 Cal. Rptr. 3d 159]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsInsurance LawMotor Vehicle InsuranceArbitrationCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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Chapter 33 CONTRACTUAL ARBITRATION: APPOINTMENT OF ARBITRATOR AND CONDUCT OF PROCEEDING
PART II. LEGAL BACKGROUND
B. Conduct of Arbitration Proceeding

4-33 California Forms of Pleading and Practice--Annotated § 33.26

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.26 Informal Nature of Hearing

The essence of arbitration is its freedom from the formality of ordinary judicial procedure. When the parties have adopted arbitration, they must be content with its informalities. They may not hedge it about with those procedural limitations which it is precisely its purpose to avoid [*Sapp v. Barenfeld (1949) 34 Cal. 2d 515, 520-521, 212 P.2d 233]* . All relevant evidence may be freely admitted and rules of judicial procedure need not be observed so long as the hearing is fairly conducted. The hearing may be conducted in the nature of an informal conference rather than a judicial trial [*Sapp v. Barenfeld (1949) 34 Cal. 2d 515, 520, 212 P.2d 233]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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AUTHOR: Michael S. Fields Editorial Consultant

§ 33.27 Rules Applicable to Conduct of Hearing

[1] Statutory Rules Apply Unless Parties Agree Otherwise

Code Civ. Proc. § 1282.2 provides rules that govern the conduct of the arbitration hearing, unless the arbitration agreement otherwise provides or unless the parties to the arbitration otherwise provide by an agreement that is not contrary to the arbitration agreement as made or as modified by all the parties thereto. Those rules are discussed in [2] et seq., *below*.

[2] Arbitrator May Hear Case Through Motions Rather Than Trial

The arbitrator's obligation to hear evidence does not mean that the evidence must be orally presented or that live testimony and an opportunity for cross examination is required. An arbitrator hears evidence by affording an opportunity to present one's side of a case, which includes considering a motion presented by counsel [*Schlessinger v. Rosenfeld, Meyer & Susman (1995) 40 Cal. App. 4th 1096, 1105, 47 Cal. Rptr. 2d 650* (construing "to hear evidence" in *Code Civ. Proc. § 1286.2(a)(5)*, which is discussed in *Ch. 34, Contractual Arbitration: Judicial Review, § 34.19[1]*)].

To require a full-blown trial when a case may be disposed of on a motion would defeat the objective of arbitration to provide speedy resolution of a dispute. Thus, an arbitrator may use the arbitral equivalent of summary judgment or summary adjudication motions, motions in limine, motions to dismiss for failure to state a claim, and motions for nonsuit or directed verdict [*Schlessinger v. Rosenfeld, Meyer & Susman (1995) 40 Cal. App. 4th 1096, 1105-1106, 1106 n.12, 47 Cal. Rptr. 2d 650* (holding arbitrator had authority to hear motions for summary adjudication)].

The arbitrator's authority under *Code Civ. Proc. § 1282.2(c)*, discussed in [6], *below*, to rule on hearing procedure, supports the use of motion practice. The scope of the arbitrator's powers under the arbitration agreement must also be considered in determining his or her power to hear motions [*Schlessinger v. Rosenfeld, Meyer & Susman (1995) 40 Cal. App. 4th 1096, 1106-1107, 1106 n.12, 47 Cal. Rptr. 2d 650* (holding that arbitrator had power under statutory

scheme, but also that if that were not true, the arbitration agreement, which incorporated AAA Commercial Arbitration Rules, also supported that power)].

[3] Time and Place of Hearing

[a] Arbitrator Sets Time and Place

The neutral arbitrator appoints a time and place for the hearing [*Code Civ. Proc. § 1282.2(a)(1)*].

If the aggregate amount in controversy exceeds $50,000 and the arbitrator is so informed by any party in writing by personalservice or registered or certified mail, prior to designating a time and place of hearing pursuant to *Code Civ. Proc. § 1282.2(a)(1)*, the neutral arbitrator by the means prescribed in *Code Civ. Proc. § 1282.2(a)(1)* must appoint the time and place for hearing not less than 60 days before the hearing [*Code Civ. Proc. § 1282.2(a)(2)* (also providing requirements pertaining to lists of witnesses and documents, *see* [4], *below*)]. This requirement does not apply to matters arising out of collective-bargaining agreements, those described in *Code Civ. Proc. § 1283.05* (depositions and discovery in arbitration proceedings), actions involving personal injury or death, or as provided in the parties' agreement to arbitrate [*Code Civ. Proc. § 1282.2(a)(2)*].

[b] Notice to Parties and Arbitrators

The neutral arbitrator causes notice of the time and place of the hearing to be served personally or by registered or certified mail on the parties to the arbitration and on the other arbitrators not less than seven days before the hearing. Appearance at the hearing waives the right to notice [*Code Civ. Proc. § 1282.2(a)(1)*]. For a form of notice for use by the neutral arbitrator in notifying the parties of the time and place appointed for the hearing, see *§ 33.70*.

[4] Demand for Lists of Documents and Witnesses

[a] Applicable Cases

If the aggregate amount in controversy exceeds $50,000 and the arbitrator is so informed by any party in writing by personal service or registered or certified mail, prior to designating a time and place of hearing pursuant to *Code Civ. Proc. § 1282.2(a)(1)*, the parties must comply with rules pertaining to service of lists of witnesses and documents, as set forth below [*Code Civ. Proc. § 1282.2(a)(2)*].

This requirement does not apply to matters arising out of collective-bargaining agreements, those described in *Code Civ. Proc. § 1283.05* (depositions and discovery in arbitration proceedings), actions involving personal injury or death, or as provided in the parties' agreement to arbitrate [*Code Civ. Proc. § 1282.2(a)(2)*].

For a form for use by a party to arbitration in demanding from the other party a list of witnesses the other party intends to call at the hearing and a list of documents the other party intends to introduce, see *§ 33.71*.

[b] Time for Demand

Either party, within 15 days of receipt of the notice of hearing, has the right to demand in writing, served personally or by registered or certified mail, that the other party provide a list of witnesses it intends to call, designating which witnesses will be called as expert witnesses and a list of documents it intends to introduce at the hearing, provided that the demanding party provides these lists at the time of its demand [*Code Civ. Proc. § 1282.2(a)(2)(A)*].

A copy of the demand and the demanding party's lists must be served on the arbitrator [*Code Civ. Proc. § 1282.2(a)(2)(A)*].

[c] Manner of Service of Lists

The lists must be served personally or by registered or certified mail on the requesting party 15 days after the request was made. Copies of the lists must be served on the arbitrator [*Code Civ. Proc. § 1282.2(a)(2)(B)*].

[d] Inspection and Copying of Documents

Listed documents must be made available for inspection and copying at reasonable times prior to the hearing [*Code Civ. Proc. § 1282.2(a)(2)(C)*].

[e] Waiver of Time Limits

Time limits provided in *Code Civ. Proc. § 1282.2* may be waived by mutual agreement of the parties if approved by the arbitrator [*Code Civ. Proc. § 1282.2(a)(2)(D)*].

[f] Failure to List Witness or Document

The failure to list a witness or a document must not bar the testimony of an unlisted witness or the introduction of an undesignated document at the hearing, provided that good cause for omission from the requirements of *Code Civ. Proc. § 1282.2(a)(2)(A)* is shown, as determined by the arbitrator [*Code Civ. Proc. § 1282.2(a)(2)(E)*].

[g] Administration and Enforcement

The authority of the arbitrator to administer and enforce *Code Civ. Proc. § 1282.2(a)* is as provided in *Code Civ. Proc. § 1283.05(b)-(e)* (manner of taking depositions) [*Code Civ. Proc. § 1282.2(a)(2)(F)*].

[5] Adjournment

On request of a party to the arbitration for good cause, or on his own determination, the neutral arbitrator may postpone the hearing to a time not later than the date fixed by the agreement for making the award or, with the parties' consent, to a later date [*Code Civ. Proc. § 1282.2(b)*].

[6] Evidentiary Rulings

The neutral arbitrator presides at the hearing, rules on the admission and exclusion of evidence and on questions of hearing procedure, and exercises all powers relating to the conduct of the hearing [*Code Civ. Proc. § 1282.2(c)*].

[7] Testimony, Right to Present Evidence, and Cross Examination of Witnesses

The parties to the arbitration are entitled to be heard, to present evidence, and to cross examine witnesses appearing at the hearing, but rules of evidence and rules of judicial procedure need not be observed. On request of any party to the arbitration, the testimony of witnesses is given under oath [*Code Civ. Proc. § 1282.2(d)*; *see also Code Civ. Proc. § 1282.8* (power of arbitrator to administer oaths)].

The provision allowing cross examination does not give the parties an absolute right to present oral testimony in every case, but merely means that if witnesses appear at a hearing a party has a right to cross examine. Thus, this right does not preclude the arbitrator from disposing of the matter without a hearing involving live testimony [*Schlessinger v. Rosenfeld, Meyer & Susman (1995) 40 Cal. App. 4th 1096, 1106, 47 Cal. Rptr. 2d 650* ; for discussion, *see* [2], *above*].

[8] Proceedings May Be Heard Despite Party's Failure to Appear

If a court has ordered a person to arbitrate a controversy, the arbitrators may hear and determine the controversy on the evidence produced even if a party ordered to arbitrate, who has been duly notified, fails to appear [*Code Civ. Proc. § 1282.2(e)*].

[9] Effect of Arbitrator's Failure to Participate

If an arbitrator, who has been duly notified, for any reason fails to participate in the arbitration, the arbitration continues but only the remaining neutral arbitrator or neutral arbitrators may make the award [*Code Civ. Proc. § 1282.2(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration Agreements

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AUTHOR: Michael S. Fields Editorial Consultant

§ 33.28 Award

[1] Form and Content

The award is required to be in writing and signed by the arbitrators concurring therein. It is also required to include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy [*Code Civ. Proc. § 1283.4*; *see also East San Bernardino County Water Dist. v. City of San Bernardino (1973) 33 Cal. App. 3d 942, 953-954, 109 Cal. Rptr. 510]* .

The arbitrators are not required to find facts and give reasons for their awards [*Sapp v. Barenfeld (1949) 34 Cal. 2d 515, 522-523, 212 P.2d 233* ; *Severtson v. Williams Construction Co. (1985) 173 Cal. App. 3d 86, 92, 220 Cal. Rptr. 400* ; *Shammas v. National Telefilm Associates (1970) 11 Cal. App. 3d 1050, 1056, 90 Cal. Rptr. 119]* . The award is valid if it serves to settle the entire controversy. A decision that one of the parties should pay the other a sum of money is sufficiently determinative of all items embraced in the submission [*Sapp v. Barenfeld (1949) 34 Cal. 2d 515, 522-523, 212 P.2d 233]* .

A party contending that an award is not complete under *Code Civ. Proc. § 1283.4* must apply to correct or vacate the award. If the party does not apply within the time period allowed for it, ordinarily the issue may not thereafter be raised [*Retail Clerks Union v. Food Employers Council, Inc. (1978) 85 Cal. App. 3d 286, 290, 149 Cal. Rptr. 428]* .

For a form for use by arbitrators in making an award, *see § 33.72*. For discussion of the powers of an arbitrator generally, *see § 33.20*.

[1A] Partial Final Award

In some circumstances, it may be appropriate for an arbitrator to issue a partial final award and to reserve jurisdiction over other issues [*see Roehl v. Ritchie (2007) 147 Cal. App. 4th 338, 351-352, 54 Cal. Rptr. 3d 185* (trust

administration); *Hightower v. Superior Court (O'Dowd) (2001) 86 Cal. App. 4th 1415, 1419-1420, 104 Cal. Rptr. 2d 209* (involving shareholder buy-out)]. As long as the arbitrator has not improperly left undecided issues "necessary in order to determine the controversy," a partial final award meets the requirements of *Code Civ. Proc. § 1283.4* [*Roehl v. Ritchie (2007) 147 Cal. App. 4th 338, 351, 54 Cal. Rptr. 3d 185* ; *Hightower v. Superior Court (O'Dowd) (2001) 86 Cal. App. 4th 1415, 1439, 104 Cal. Rptr. 2d 209]* . The partial final award may be confirmed and an interlocutory judgment entered thereon. Thus, the party who is unsatisfied with the partial final award will be able to seek judicial review by way of extraordinary writ [*Hightower v. Superior Court (O'Dowd) (2001) 86 Cal. App. 4th 1415, 1440, 104 Cal. Rptr. 2d 209]* .

ILLUSTRATION:

Partial Final Award Is Proper. D and H each owned 50% of the stock of a corporation. Their shareholders agreement provided for arbitration of any disputes arising under it and procedures by which either could buy out the other's shares. D obtained financing and offered to by buy H's shares. H set out to obtain financing to purchase D's shares. Employees and officers of the company wrote to the entities from which H was seeking financing and told them they would resign if H acquired D's interests. H demanded arbitration of claims against D including interference with contract and breach of fiduciary duties by inciting the officers' and employees' actions. The arbitrator ruled in favor of D and found that D was legally entitled to complete the purchase of H's shares on September 24, 1998. However, the award was not entered until April 25, 2000, and by then D's financing had expired, so the arbitrator designated the award a "partial final award" which gave D six months from the date of confirmation of the award to obtain financing and complete the purchase, and the arbitrator reserved jurisdiction to determine specific additional issues, such as the amount to be awarded to D for additional costs incurred to obtain new financing. Was this partial final award proper? Yes, under *Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 374-375, 381, 36 Cal. Rptr. 2d 581, 885 P.2d 994* , an arbitrator is empowered to fashion appropriate relief, which in this case meant a remedy that would give D the benefit of his bargain. The particular terms of the shareholder agreement implied the parties' consent to the remedy provided by the arbitrator [*Hightower v. Superior Court (O'Dowd) (2001) 86 Cal. App. 4th 1415, 1419-1420, 104 Cal. Rptr. 2d 209]* .

[2] Award Based on Information Not Obtained at Hearing

If a neutral arbitrator intends to base an award on information not obtained at the hearing, he or she is required to disclose that information to all parties to the arbitration and give the parties an opportunity to meet it [*Code Civ. Proc. § 1282.2(g)*; *cf. A.M. Classic Const. v. Tri-Build Dev. Co. (1999) 70 Cal. App. 4th 1470, 1475-1477, 83 Cal. Rptr. 2d 449* (discussed in [6], *below*, after ex parte communication and without informing other party, arbitrator amended award, based on information already in the record, to add previously omitted finding)].

[3] Time

The arbitrator must make the award within the time stated in the agreement, or, if the agreement does not fix a time, within the time ordered by the court on petition of a party to the arbitration [*Code Civ. Proc. § 1283.8*]. Rendition of the award within the time specified in the submission agreement is mandatory and jurisdictional [*Librascope Inc. v. Precision Lodge No. 1600, Internat. Assn. of Machinists (1961) 189 Cal. App. 2d 71* ; *Rusnak v. General Controls Co. (1960) 183 Cal. App. 2d 583, 584, 7 Cal. Rptr. 71]* .

The parties may, however, extend the time either before or after it expires. A party waives the objection that an award was not made within the time required unless he or she gives the arbitrators written notice of the objection prior to the service of a signed copy of the award on him or her [*Code Civ. Proc. § 1283.8*]. Waiver of the time limitation validates the award made after expiration of the specific time [*Librascope Inc. v. Precision Lodge No. 1600, Internat. Assn. of Machinists (1961) 189 Cal. App. 2d 71, 75*].

An award based on an accepted "998" offer must be rendered by the arbitrator or arbitrators promptly after the offer, with proof of acceptance, is filed with the arbitrator or arbitrators [*Code Civ. Proc. § 998(b)(1)*].

[4] Service

The neutral arbitrator is required to serve a signed copy of the award on each party to the arbitration personally or by registered or certified mail or as provided in the agreement [*Code Civ. Proc. § 1283.6*].

PRACTICE TIP:

When Is Service by Mail Complete? Many contracts provide that all notices and communications shall be sent by regular mail. Unfortunately, the arbitration statutes do not state when service of the award takes place. Although the statutes do incorporate general provisions on service of papers with respect to the service of a response [*see Code Civ. Proc. § 1290.8*; (incorporating *Code Civ. Proc. § 1010 et seq.* for that purpose)], they do not generally incorporate those rules for other papers served in arbitration proceedings. The question is therefore open whether service is complete on the day mailed or on the day actually received. Also, because the general provisions are not incorporated, the *Code Civ. Proc. § 1013* five-day extension for service by mail does not appear to apply.

The timing of the service of the award is important when calculating the timing of an application for correction of the award, and an ambiguity arises because the actual date of receipt or the date of mailing may be the calculating date for determination of the 30-day time frame for amending or correcting an award [*see Code Civ. Proc. § 1284*; for discussion, *see* [5][b], *below*]. Because of this ambiguity, counsel may wish to calculate the shortest possible date and include it in any application for correction of an award, to draw the arbitrator's attention to the earliest date on which the arbitrator may be argued to lose jurisdiction to correct the award under *Code Civ. Proc. § 1284. By Michael S. Fields*

[5] Correction of Award by Arbitrators

[a] Grounds

The arbitrators, on written application of a party to the arbitration, may correct the award on any of the grounds set forth in *Code Civ. Proc. § 1286.6(a)* and *(c)* not later than 30 days after service of a signed copy of the award on the applicant [*Code Civ. Proc. § 1284*].

The grounds for correction are:

- An evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award [*Code Civ. Proc. §§ 1284, 1286.6(a)*]; or

- Imperfection in a matter of form, not affecting the merits of the controversy [*Code Civ. Proc. §§ 1284, 1286.6(c)*].

To be evident, a miscalculation must appear on the face of the award or be so readily apparent from the documentation in the case that explanation by proofs is not necessary. The arbitrator cannot correct mistakes of fact, because the statute does not provide for such corrections [*Severtson v. Williams Construction Co. (1985) 173 Cal. App. 3d 86, 94, 220 Cal. Rptr. 400]* .

Arbitrators do not have power under *Code Civ. Proc. § 1284* to substantively revise an award, for example, by adding an element of damages [*Banks v. Milwaukee Ins. Co. (1966) 247 Cal. App. 2d 34, 37, 55 Cal. Rptr. 139]* , or by striking an element of damages [*Landis v. Pinkertons, Inc. (2004) 122 Cal. App. 4th 985, 992, 18 Cal. Rptr. 3d 890*

(striking damages for emotional distress amounted to correction for error of law, which arbitrator did not have power to make)].

However, it has been held that arbitrators can correct an omission of information required by statute [*Schneider v. Kaiser Foundation Hospitals (1989) 215 Cal. App. 3d 1311, 1317 n.3, 264 Cal. Rptr. 227* (correction of award to set total value of award as required by *Bus. & Prof. Code § 6146(b)* for an award of periodic payments in a medical malpractice action for purposes of calculating the attorney's contingent fee; overruled on other grounds in *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 27, 10 Cal. Rptr. 2d 183, 832 P.2d 899*)].

[b] Application

An application for correction must be made not later than 10 days after service of a signed copy of the award on the applicant. On or before making the application, the applicant must deliver or mail a copy of it to all of the other parties to the arbitration [*Code Civ. Proc. § 1284*; for discussion of service, *see* [4], *above*].

For a form of application for use by a party to arbitration to seek correction of the award by the arbitrator, see *§ 33.73*.

[c] Objection

Any party to the arbitration may make a written objection to the application not later than 10 days after the application is delivered or mailed to the objector. On or before making the objection, the objector must deliver or mail a copy of it to the applicant and all other parties to the arbitration [*Code Civ. Proc. § 1284*].

[d] Denial or Correction

The arbitrators will either deny the application or correct the award. The denial of the application or the correction of the award must be made in writing and signed by the arbitrators concurring in it, and the neutral arbitrator is required to serve a signed copy of such denial or correction on each party to the arbitration personally, or by registered or certified mail, or as provided in the agreement [*Code Civ. Proc. § 1284*].

The application for correction is deemed denied if no denial of the application or correction of the award is served within the 30-day period after the service of the original award on the applicant [*Code Civ. Proc. § 1284*; *Landis v. Pinkertons, Inc. (2004) 122 Cal. App. 4th 985, 990, 993, 18 Cal. Rptr. 3d 890* ; for discussion of service, *see* [4], *above*].

[6] Amendment of Award by Arbitrator on Own Initiative

Although no statute grants an arbitrator the authority to amend an award, no statute prohibits it and thus, several cases have held that an arbitrator has the power to issue an amended award to address an issue omitted from the original award through the arbitrator's own mistake, inadvertence, or excusable neglect if the amendment:

- Is requested and acted on within the time allowed for correction of the award by either statute or controlling rules appliable to the arbitration for made before judicial confirmation of the original award [*Century City Medical Plaza v. Sperling, Isaacs & Eisenberg (2001) 86 Cal. App. 4th 865, 881, 103 Cal. Rptr. 2d 605* ; *but see Delaney v. Dahl (2002) 99 Cal. App. 4th 647, 659-660, 121 Cal. Rptr. 2d 663* (finding this requirement unnecessary as long as amendment is made before confirmation of award)];

- Is made prior to confirmation of the original award [*Law Offices of David S. Karton v. Segreto (2009) 176 Cal. App. 4th 1, 10 n.14, 97 CR3d 329* ; *Delaney v. Dahl (2002) 99 Cal. App. 4th 647, 659-660, 121 Cal. Rptr. 2d 663* ; *Century City Medical Plaza v. Sperling, Isaacs & Eisenberg (2001) 86 Cal. App. 4th 865, 867, 881-883, 103 Cal. Rptr. 2d 605* ; *A.M. Classic Const. v. Tri-Build Dev. Co.*

(1999) 70 Cal. App. 4th 1470, 1476-1478, 83 Cal. Rptr. 2d 449] ;

- Does not alter the merits and is not inconsistent with other findings on the merits of the controversy [*Delaney v. Dahl (2002) 99 Cal. App. 4th 647, 658, 121 Cal. Rptr. 2d 663* ; *Century City Medical Plaza v. Sperling, Isaacs & Eisenberg (2001) 86 Cal. App. 4th 865, 867, 881-883, 103 Cal. Rptr. 2d 605* ; *A.M. Classic Const. v. Tri-Build Dev. Co. (1999) 70 Cal. App. 4th 1470, 1476-1478, 83 Cal. Rptr. 2d 449]* ; and

- Does not cause demonstrable prejudice to the legitimate interest of any party [*Delaney v. Dahl (2002) 99 Cal. App. 4th 647, 658, 121 Cal. Rptr. 2d 663* ; *Century City Medical Plaza v. Sperling, Isaacs & Eisenberg (2001) 86 Cal. App. 4th 865, 867, 881-883* Cal. Rptr. 2d 609; *A.M. Classic Const. v. Tri-Build Dev. Co. (1999) 70 Cal. App. 4th 1470, 1476-1478, 83 Cal. Rptr. 2d 449]* .

Delaney involved addition of a party's name to the award as not having prevailed on and taking nothing by way of a cross-claim. Although that party urged the court to impose the additional requirement that there be admissible evidence of the arbitrator's intent in making the amendment, the court refused to do so noting that the arbitrator had explained the reason for the amendment in the amended award itself [*Delaney v. Dahl (2002) 99 Cal. App. 4th 647, 653, 660, 121 Cal. Rptr. 2d 663]* .

Century City Medical Plaza involved a landlord-tenant dispute arbitrated pursuant to a stipulation that provided the arbitrator could award interest, attorney's fees, and costs to the prevailing party if authorized by the contract or the parties' statutory rights. The original award was in favor of the landlord, but did not award attorney's fees, interest, or costs. A second award did provide for these items. The trial court confirmed the original award and vacated the second award. What was required, the court of appeal said, was for the trial court to hold an evidentiary hearing and to confirm the second award if the evidence established that the arbitrator's failure to include an award of attorney's fees, costs, and interest in the original award was due to an *inadvertent omission* and that each of the conditions described above had been met [*Century City Medical Plaza v. Sperling, Isaacs & Eisenberg (2001) 86 Cal. App. 4th 865, 881-883, 103 Cal. Rptr. 2d 605]* .

A.M. Classic Const. involved a suit by a subcontractor against the contractor and the school district for which the building was built. All parties stipulated to arbitration. The arbitrator issued an award against the contractor and in favor of the subcontractor, which was sent to all parties. Before any party had moved to confirm the award, subcontractor's counsel wrote a letter to the arbitrator and pointed out that the award failed to make any finding as to the stop notice cause of action against the school district, which was the only way the subcontractor could collect from the school district, and that the proposed judgments submitted by all parties included findings on the stop notice cause of action. Four days later, subcontractor's counsel called the arbitrator, who acknowledged the mistake, and receipt of the letter, and stated that he would make an amended award in a few days. In determining whether the amended award was proper, the court of appeal noted the following:

- All the information the arbitrator needed to make the award on the stop notice cause of action was already available in the record and in the arbitrator's notes [*A.M. Classic Const. v. Tri-Build Dev. Co. (1999) 70 Cal. App. 4th 1470, 1475, 83 Cal. Rptr. 2d 449]* ;

- Although the arbitrator should have informed the other parties of the ex parte communication and of the fact that he was going to amend the award, because there was no showing that the arbitrator considered evidence outside the original record [*see Code Civ. Proc. § 1282.2(g)* (discussed at [2], *above*)], there was no fraud, corruption, undue influence, or misconduct of the arbitrator so as to require vacating the amended award under *Code Civ. Proc. § 1286.2(a), (1)-(3)* [*A.M. Classic Const. v. Tri-Build Dev. Co. (1999) 70 Cal. App. 4th 1470, 1476, 83 Cal. Rptr. 2d 449]* ;

- This was not a situation that came within the scope of *Code Civ. Proc. § 1286.6(a)* or *(c)*, relating to correction of awards, because the mistake was more than a miscalculation or a mistake as to form [*A.M. Classic Const. v. Tri-Build Dev. Co. (1999) 70 Cal. App. 4th 1470, 1476, 83 Cal. Rptr. 2d 449]* ;

- Older cases holding that an incomplete award is a nullity and must be vacated and the entire matter re-arbitrated were to be disregarded as inconsistent with the current California Arbitration Act and the views expressed in *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 12, 10 Cal. Rptr. 2d 183, 832 P. 2d 899* ; that to discard all the time and money spent on the first arbitration or to deny arbitrators the power to complete their tasks would be irrational and elevate form over substance [*A.M. Classic Const. v. Tri-Build Dev. Co. (1999) 70 Cal. App. 4th 1470, 1476-1478, 83 Cal. Rptr. 2d 449]* ; and

- That the opinion should not be read to condone the ex parte communications by A.M. Classic's counsel, which were inappropriate and under other circumstances might require vacation of the award [*A.M. Classic Const. v. Tri-Build Dev. Co. (1999) 70 Cal. App. 4th 1470, 1478, 83 Cal. Rptr. 2d 449]* .

[7] Review of Award by Second Arbitrator

If it is truly bilateral, a provision for review by a second arbitrator is enforceable [*Cummings v. Future Nissan (2005) 128 Cal. App. 4th 321, 330-331, 27 Cal. Rptr. 3d 10* ; *see Finley v. Saturn of Roseville (2004) 117 Cal. App. 4th 1253, 1255, 12 Cal. Rptr. 3d 561* (trial court's confirmation of arbitration award on ground of untimeliness reversed and returned to trial court to vacate order and reverse arbitration award on ground of lack of jurisdiction arising from parties' agreement to submit issues for review to second arbitrator)]. Once a court orders arbitration, there is no need for a further petition to compel review by a second arbitrator. Any question of waiver of the right to review by the second arbitrator, for instance, as untimely, is for the second arbitrator to decide. The court has no jurisdiction to order, nor to determine grounds for denial of an order, review by the second arbitrator [*see Finley v. Saturn of Roseville (2004) 117 Cal. App. 4th 1253, 1258-1260, 12 Cal. Rptr. 3d 561* (reversing confirmation of award and returning to trial court with instructions to vacate order denying review by second arbitration on ground of waiver and to deny on ground of lack of jurisdiction)].

The point of a second-level review by a second arbitrator is usually to do what a trial court or appellate court could not do: review the award for errors of law. This contractual review for errors of law is not prohibited by the statutory standards for vacating an award [*see Code Civ. Proc. § 1286.2*]; *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 25, 10 Cal. Rptr. 2d 183, 832 P.2d 899* (discussed at *Ch. 34, Contractual Arbitration: Judicial Review, §§ 34.10[2], 34.19[1][b]*). There is nothing unconscionable about such a review [*Cummings v. Future Nissan (2005) 128 Cal. App. 4th 321, 330-331, 27 Cal. Rptr. 3d 10* (second arbitrator to review "proceeding according to the law and procedures applicable to appellate review by the California Court of Appeal of a civil judgment following a court trial")]. In *Cummings*, the second arbitrator reversed an initial award for plaintiff employee, based in an error of law, finding that the that practice of fraudulently overstating vehicle values in loan applications did not rise to the level of general public importance such that damages would be available for dismissal in retaliation for plaintiff's reporting them. Defendant/employer bore the costs of the review and it was completed within a reasonable time [*Cummings v. Future Nissan (2005) 128 Cal. App. 4th 321, 330, 27 Cal. Rptr. 3d 10]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration Agreements

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 33 CONTRACTUAL ARBITRATION: APPOINTMENT OF ARBITRATOR AND CONDUCT OF PROCEEDING
PART II. LEGAL BACKGROUND
B. Conduct of Arbitration Proceeding

4-33 California Forms of Pleading and Practice--Annotated § 33.29

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.29 Expenses, Costs, and Fees

[1] Expenses, Costs, and Fees Other Than Attorney's Fees

[a] General Rule Requires Pro Rata Payment of Approved Costs

Each party to the arbitration pays his or her pro rata share of the expenses and fees of the neutral arbitrator, together with other expenses of the arbitration incurred or approved by the neutral arbitrator, not including counsel fees or witness fees or other expenses incurred by a party for his or her own benefit [*Code Civ. Proc. § 1284.2*].

In a proceeding to confirm an award, the usual rules on costs apply to the judicial proceedings [*see Code Civ. Proc. § 1293.2*; *Austin v. Allstate Ins. Co. (1993) 16 Cal. App. 4th 1812, 1815-1816, 21 Cal. Rptr. 2d 56*]. Thus, if there is no agreement to the contrary, so that Section 1284.2 requires each party to pay the arbitration expenses pro rata, the confirming court cannot award the costs of *arbitration* as an award of costs to the prevailing party [*see Austin v. Allstate Ins. Co. (1993) 16 Cal. App. 4th 1812, 1815-1816, 21 Cal. Rptr. 2d 56* (uninsured motorist claim arbitration; fee for filing petition to confirm award as only cost recoverable); *cf. Cobler v. Stanley, Barber, Southard, Brown & Associates (1990) 217 Cal. App. 3d 518, 530-533, 265 Cal. Rptr. 868* (stating that cost provisions of *Code Civ. Proc. § 1032 et seq.* applies to judgment on order confirming award, but actually affirming arbitrator's award regarding compensation without indicating whether or not contract allowed award); *see Ch. 34, Contractual Arbitration: Judicial Review, § 34.54*].

[b] Exceptions to the Rule Generally

Grounds for exception to the rule that each party pays a pro rata share of costs approved by the neutral arbitrator apply under the following circumstances:

- A statute provides for award of court costs [*see § 33.29[1][c]* below].

- The arbitration agreement otherwise provides or the parties to the arbitration otherwise agree [*Code Civ. Proc. § 1284.2*].

- The arbitration is a consumer arbitration [*see § 33.29[1A]* below].

- The arbitrator's award is more favorable to the offering party than a settlement offer subject to *Code Civ. Proc. § 998* that the other party rejected [*see § 33.29[2]* below].

Counsel seeking authorized arbitral costs should file a memorandum of costs. For discussion of memorandum of costs, see *Ch. 174, Costs and Attorney's Fees, § 174.28*. For forms of memorandum of costs and motions to strike memorandum of costs, see *Ch. 174, Costs and Attorney's Fees, § 174.240* et seq. For a form of arbitrator's award including award of arbitral costs, see *§ 33.72*.

[c] Exception for Statutory Authorization of Award of Court Costs

When parties agree to arbitrate claims under a consumer protective statute that has as an integral part a provision allowing prevailing plaintiffs to recover costs and attorneys fees, *Code Civ. Proc. § 1284.2* will be viewed as a default provision, and costs will be awarded under the particular statute [*Broughton v. Cigna Healthplans of California (1999) 21 Cal. 4th 1066, 1086-1087, 90 Cal. Rptr. 2d 334, 988 P.2d 67* (claim for damages under the Consumer Legal Remedies Act, *Civ. Code § 1750 et seq., Civ. Code § 1780(d)*, of which mandates an award of costs and attorney's fees for a prevailing plaintiff)].

[d] Exception for Agreement Providing Other Cost-Allocation Rule

[i] Agreement May Generally Allocate Costs by Different Rule

A contract or arbitration agreement that authorizes an award of costs in a judicial action is broad enough to include the award of arbitration costs by an arbitrator [*Tate v. Saratoga Savings & Loan Assn. (1989) 216 Cal. App. 3d 843, 856-857, 265 Cal. Rptr. 440*]. The different rule prescribed by a contract or agreement may be contained in formal arbitration rules that the contract or agreement makes applicable to the conduct of the arbitration [*Gravillis v. Coldwell Banker Residential Brokerage Co. (2010) 182 Cal. App. 4th 503, 520, 106 Cal. Rptr. 3d 70* ; *see, e.g., Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (2005) 133 Cal. App.4th 396, 416-417, 34 Cal. Rptr. 3d 659*].

[ii] Exception to the Exception for Statutory Claims

The Supreme Court ruled in *Armendariz* [*Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83, 101-112, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; for full discussion of *Armendariz*, see *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.22[2*]] that if an employee or former employee is seeking to vindicate an unwaivable statutory right, the employee cannot be required, despite contrary language in the arbitration agreement or the arbitration process, to bear any of the arbitral fees or costs [*accord*, *Jones v. Humanscale Corp. (2005) 130 Cal. App. 4th 401, 411-412, 29 Cal. Rptr. 3d 881* (requiring trial court on remand to correct award by amending it to require employer to pay all arbitral costs and fees)].

The court of appeals has expanded the use of this rule in the context of nonemployment unwaivable statutory rights [*D.C. v. Harvard-Westlake Sch. (2009) 176 Cal. App. 4th 836, 863, 98 Cal. Rptr. 3d 300*], suggesting that it "should apply to the enforcement of rights under any statute enacted 'for a public reason' " [*Mercuro v. Superior Court (2002) 96 Cal. App. 4th 167, 180, 116 Cal. Rptr. 2d 671*]. Accordingly, statutory claims, for the cost of the arbitration of which the rightholder cannot be required by agreement to pay, include those for hate crimes under Ralph Civil Rights Act, *Civ. Code § 51.7*, or Tom Bane Civil Rights Act, *Civ. Code § 52.1* [*D.C. v. Harvard-Westlake Sch. (2009) 176*

Cal. App. 4th 836, 865-866, 98 Cal. Rptr. 3d 300]; violations of California Franchise Investment Law, *Corp. Code § 31000 et seq.*, the Cartwright Act, *Bus. & Prof. Code § 16700 et seq.*, the Uniform Trade Secrets Act, *Civ. Code § 3426 et seq.*, and the Unfair Competition Law, *Bus. & Prof. Code § 17200 et seq.* [*Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (2005) 133 Cal. App. 4th 396, 402, 417, 34 Cal. Rptr. 3d 659*]; and violations of the California Vehicle Leasing Act, *Civ. Code § 2985.7 et seq.*, and the California Consumers Legal Remedies Act, *Civ. Code § 1750 et seq.* [*Gutierrez v. Autowest, Inc. (2003) 114 Cal. App. 4th 77, 100-101, 7 Cal. Rptr. 3d 267*].

However, the courts of appeal split on how the rule is to be applied in these other areas. The Fourth District, Division One in *Independent* [*Independent Assn. of Mailbox Center Owners, Inc. v. Superior Court (2005) 133 Cal. App. 4th 396, 416-417, 34 Cal. Rptr. 3d 659*] and the First District, Division Five in *Gutierrez* [*Gutierrez v. Autowest, Inc. (2003) 114 Cal. App. 4th 77, 100, 7 Cal. Rptr. 3d 267*] adopted a case-by-case approach in determining whether the claims under the respective statutes warranted disregarding the contractual allocation of arbitral costs. The Second District, Division One rejected this approach in *D.C.* on the grounds that *Armendariz* rejected it in favor of a categorical rule barring imposition of arbitral costs on a statutory claimant [*D.C. v. Harvard-Westlake Sch. (2009) 176 Cal. App. 4th 836, 863, 98 Cal. Rptr. 3d 300*]. The Second District, Division One distinguished *Independent* and *Gutierrez* on the basis that in those cases, the applicable formal arbitration rules provided claimants protection from adverse awards of unaffordable or inappropriate arbitral costs [*D.C. v. Harvard-Westlake Sch. (2009) 176 Cal. App. 4th 836, 862-863, 98 Cal. Rptr. 3d 300*]. In contrast, the applicable rules in *D.C.* required pro rata allocation of arbitral costs, thus warranting application of the categorical bar of the award of arbitral costs [*D.C. v. Harvard-Westlake Sch. (2009) 176 Cal. App. 4th 836, 863, 98 Cal. Rptr. 3d 300*].

[e] Exception for Clauses Generating Unconscionable Costs

Clauses of arbitration agreements other than any cost allocation clause that generate arbitration costs in excess of reasonable expectations may be unconscionable and unenforceable [*Parada v. Superior Ct. (2009) 176 Cal. App. 4th 1554, 1570-1584, 98 Cal. Rptr. 3d 743* (clause requiring three arbitrators to arbitrate disputes about brokerage accounts was unconscionable and unenforceable where applicable rules did not limit arbitrators' fees)].

[1A] Fees and Costs in Consumer Arbitrations

[a] Cannot Be Shifted to Consumer Who Does Not Prevail

No neutral arbitrator or private arbitration company is permitted to administer a consumer arbitration under any agreement or rule requiring that a consumer who is a party to the arbitration pay the fees and costs incurred by an opposing party if the consumer does not prevail in the arbitration. These fees and costs include, but are not limited to, the fees and costs of the arbitrator, provider organization, attorney, or witnesses [*Code Civ. Proc. § 1284.3(a)*; *see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(d), (e) (defining "consumer arbitration" and "consumer party," discussed at *§ 33.14[2][g][i]*)]. *Code Civ. Proc. § 1284.3* applies to all consumer arbitration agreements subject to *Code Civ. Proc. §§ 1280-1294.2*, and to all consumer arbitration proceedings conducted in California [*Code Civ. Proc. § 1284.3(c)*].

[b] Must Be Waived for Indigent Consumer

A private arbitration company must waive all fees and costs charged to or assessed on a consumer party by in a consumer arbitration, exclusive of arbitrator fees, if the consumer is indigent. For the purposes of this section, a consumer is indigent if he or she has a gross monthly income that is less than 300 percent of the federal poverty guidelines. Nothing in this section affects the ability of a private arbitration company to shift fees that would otherwise be charged or assessed on a consumer party to a nonconsumer party [*Code Civ. Proc. § 1284.3(b)(1)*; *see* Cal. Rules of Ct., Appen., Div. VI, Standard 2(d), (e) (defining "consumer arbitration" and "consumer party," discussed at *§ 33.14[2][g][i]*)]. *Code Civ. Proc. § 1284.3* applies to all consumer arbitration agreements subject to *Code Civ. Proc. §§ 1280-1294.2*, and to all consumer arbitration proceedings conducted in California [*Code Civ. Proc. § 1284.3(c)*].

Prior to requesting or obtaining any fee, a private arbitration company must provide written notice of the right to obtain a waiver of fees to a consumer or prospective consumer in a manner calculated to bring the matter to the attention of a reasonable consumer, including, but not limited to, prominently placing a notice in its first written communication to the consumer and in any invoice, bill, submission form, fee schedule, rules, or code of procedure [*Code Civ. Proc. § 1284.3(b)(2)*].

To establish his or her eligibility for this waiver of fees and costs, the consumer must make a declaration under oath on a form provided to the consumer by the private arbitration company for signature stating his or her monthly income and the number of persons living in his or her household. No private arbitration company may require a consumer to provide any further statement or evidence of indigence [*Code Civ. Proc. § 1284.3(b)(3)*]. Any information obtained by a private arbitration company about a consumer's identity, financial condition, income, wealth, or fee waiver request must be kept confidential and may not be disclosed to any adverse party or any nonparty to the arbitration, except a private arbitration company may not keep confidential the number of waiver requests received or granted, or the total amount of fees waived [*Code Civ. Proc. § 1284.3(b)(4)*].

[2] Code of Civil Procedure Section 998 Offers

Beginning January 1, 1998, *Code Civ. Proc. § 998* applies to arbitration under *Code Civ. Proc. § 1281* or *Code Civ. Proc. § 1295* [*Code Civ. Proc. § 998(b)*], and to uninsured motorist arbitrations conducted pursuant to *Ins. Code 11580*. *Pilimai v. Farmers Ins. Exchange Co. (2006) 39 Cal. 4th 133, 142, 45 Cal. Rptr. 3d 760, 137 P.3d 393*]. Section 998 does not apply to labor arbitrations filed pursuant to memoranda of understanding under the Ralph C. Dills Act (*Gov. Code § 3512 et seq.*), an enforcement action brought by specified public officials, in the name of the people of the State of California, or to offers by made by plaintiffs in eminent domain actions [*Code Civ. Proc. § 998(b), (g), (i)*]. If a Section 998 offer made by a defendant is not accepted, and the plaintiff does not obtain a more favorable award, the plaintiff [*Code Civ. Proc. § 998(c)(1)*]:

- Cannot recover his or her postoffer costs.
- Must pay the defendant's costs from the time of the offer.
- May, other than in an eminent domain action, in the arbitrator's discretion, be required to pay a reasonable sum to cover costs for the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary either or both in preparation for, or during, arbitration of the case by the defendant [*see Code Civ. Proc. § 998(h)* (expert witness fees cannot exceed those specified in *Gov. Code § 68092.5*)].

In determining whether the plaintiff obtains a more favorable award, the arbitrator shall exclude the postoffer costs, including attorney's fees awarded to the prevailing party [*Code Civ. Proc. § 998(c)(2)*]. If the costs from the time of an unaccepted offer awarded to a defendant under *Code Civ. Proc. § 998* exceed the amount of damages awarded to the plaintiff, the net amount is awarded to the defendant, and the arbitration award entered accordingly [*Code Civ. Proc. § 998(e)*].

A plaintiff may make a Section 998 offer. If it is not accepted and the defendant fails to obtain a more favorable award, the arbitrator has discretion to require the defendant to pay plaintiff's expert witness fees, in addition to plaintiff's costs (with an exception for eminent domain actions) [*Code Civ. Proc. § 998(d)*; *see Weinberg v. Safeco Ins. Co. of Am. (2004) 114 Cal. App. 4th 1075, 1085, 8 Cal. Rptr. 3d 224* (defendant was estopped to attack court's grant of costs and prejudgment interest on confirming award because before arbitrator it argued arbitrator could not award them)]. In addition, a plaintiff in a personal injury action who obtains an arbitration award more favorable than his or her Section 998 offer is entitled to prejudgment interest under *Civ. Code § 3291* [*Weinberg v. Safeco Ins. Co. of Am. (2004) 114 Cal. App. 4th 1075, 1085, 8 Cal. Rptr. 3d 224* ; *Caro v. Smith (1997) 59 Cal. App. 4th 725, 735-737, 69 Cal. Rptr. 2d*

306 ; *cf.* *Woodard v. Southern Cal. Permanente Medical Group (1985) 171 Cal. App. 3d 656, 666, 217 Cal. Rptr. 514* (court had no power to award prejudgment interest after arbitrators denied it)]. In an uninsured motorist arbitration conducted pursuant to *Ins. Code § 11580.2*, when the insured's Section 998 offer is not accepted and an arbitration award for a larger amount is granted, the maximum liability provision of *Ins. Code § 11580.2(p)(4)* does not preclude the successful insured's recovery of costs under *Code Civ. Proc § 998* even if those costs, when added to the award, exceed the coverage limits. Those costs may include deposition and exhibit preparation expenses, but would not include prejudgment interest within the meaning of *Civ. Code § 3291*, because an uninsured motorist arbitration is not a personal injury action within the meaning of *Civ. Code § 3291* [*Pilimai v. Farmers Ins. Exchange Co. (2006) 39 Cal. 4th 133, 147, 45 Cal. Rptr. 3d 760, 137 P.3d 393]* .

In the case of an automobile accident caused by an underinsured motorist, where there is no issue reasonably to be resolved by arbitration, the failure to attempt to effectuate a prompt and fair settlement violates the insurer's statutory duties and gives rise to tort liability. Similarly, an insurer cannot shield other dilatory conduct, such as failing to investigate a claim, by the mere act of requesting uninsured motorist arbitration [Brehm v. 21st *Century Ins. Co. (2008) 166 Cal. App. 4th 1225, 1244, 83 Cal. Rptr. 3d 410]* .

The 1997 amendment of *Code Civ. Proc. § 998* nullifies *Woodard v. Southern Cal. Permanente Medical Group (1985) 171 Cal. App. 3d 656, 666-668, 217 Cal. Rptr. 514* , which found *Code Civ. Proc. § 998* cost awards by arbitrators to be in excess of the arbitrator's authority. Whether this amendment also nullifies *Dickinson v. Kaiser Foundation Hospitals (1980) 112 Cal. App. 3d 952, 954-955, 169 Cal. Rptr. 493* , is yet to be decided. *Dickinson* states that arbitrators do not have the power to award statutory costs unless so provided in the contract.

For a discussion of the effect of *Code Civ. Proc. § 998* on offers to compromise, see Ch. 520, *Settlement and Release* .

[3] Attorney's Fees

[a] When Arbitrator May Award Attorney's Fees

If both the underlying agreement and the submission to arbitration are silent on the matter, the arbitrator has no jurisdiction to award attorney's fees to the prevailing party [*Thompson v. Jespersen (1990) 222 Cal. App. 3d 964, 968, 272 Cal. Rptr. 132* (construction industry rule of AAA, Rule 43, incorporated by agreement, did not authorize award of attorney's fees)]. However, an agreement that authorizes an award of attorney's fees to the prevailing party in any action related to the contract or if a party is required to bring suit on the contract is usually broad enough to support an award of attorney's fees and costs to the prevailing party in an arbitration. If any dispute under the contract must be submitted to arbitration, any other result would make the attorney's fee provision in the contract meaningless [*Tate v. Saratoga Savings & Loan Assn. (1989) 216 Cal. App. 3d 843, 856-857, 265 Cal. Rptr. 440* ; *Taranow v. Brokstein (1982) 135 Cal. App. 3d 662, 665-666, 185 Cal. Rptr. 532]* . The reverse is not true, however: an arbitration clause that allows attorney's fees for the party who prevails in arbitration will not support an award of attorney's fees to a party who "prevails" by obtaining summary judgment without arbitration [*Kalai v. Gray (2003) 109 Cal. App. 4th 768, 777-778, 135 Cal. Rptr. 2d 449* (reversing award made on so-called equitable basis)].

When the contract gives the arbitrator the power to award attorney's fees, the arbitrator does not exceed his or her powers by awarding attorney's fees if that award is based on a reasonable interpretation of the contract involved and evidence submitted at the arbitration hearing [*Kahn v. Chetcuti (2002) 101 Cal. App. 4th 61, 67-68, 123 Cal. Rptr. 2d 606* ; *Delaney v. Dahl (2002) 99 Cal. App. 4th 647, 655-657, 121 Cal. Rptr. 2d 663]* . Thus, under an agreement that required mediation before arbitration, but prevented a party who resisted mediation from being awarded attorney's fees, the award of attorney's fees was not in excess of the arbitrator's powers. The arbitrator was within his power to conclude that the prevailing party's filing of a complaint, which it never intended to pursue, before mediation in order to prevent the running of the statute of limitations did not amount to "resisting mediation" [*Kahn v. Chetcuti (2002) 101 Cal. App. 4th 61, 67-68, 123 Cal. Rptr. 2d 606* ; *compare* *Leamon v. Krajkiewcz (2003) 107 Cal. App. 4th 424, 433, 132*

Cal. Rptr. 2d 362 (prevailing party who did not first submit dispute to mediation as required by contract is not entitled to attorney's fees; contract was found voidable for duress; requiring party to mediate validity of contract does not mean that party concedes contract is voidable)].

Similarly, an arbitrator may award attorney's fees when the issue involved in the arbitration is governed by a statute that provides for attorney's fees [*Coutee v. Barington Capital Group, L.P. (9th Cir. 2003) 336 F.3d 1128, 1135-1136* (award previously available under *Welf. & Inst. Code § 15657(a)* [*now see Welf. & Inst. Code § 15657.5(a)*] against defendant securities brokers based on financial abuse of elder); *see Broughton v. Cigna Healthplans of California (1999) 21 Cal. 4th 1066, 1086-1087, 90 Cal. Rptr. 2d 334, 988 P.2d 67* (claim for damages under the Consumer Legal Remedies Act, Civ. Code *§ 1750 et seq., Civ. Code* § 1780(d), of which mandates an award of costs and attorney's fees for a prevailing plaintiff); *Caro v. Smith (1997) 59 Cal. App. 4th 725, 734-735, 69 Cal. Rptr. 2d 306* (reasonable interpretation of stipulation to arbitrate worker's injury claim gave arbitrator authority to award employee attorney's fees pursuant to *Lab. Code § 3709*)]. In a federal case involving an arbitration clause with a New York choice of law, an award of attorney's fees under a California statute was at most harmless error because New York law allows an arbitrator to award attorney's fees when not otherwise authorized to do so if the parties submit the matter to arbitration. The fact that California statute relied on was mandatory and the New York rule of law was permissive did not matter [*Coutee v. Barington Capital Group, L.P. (9th Cir. 2003) 336 F.3d 1128, 1135-1136]* .

Conversely, a statutory prohibition on suffering an adverse award of arbitral attorney fees is a statutory right that cannot be waived [*D.C. v. Harvard-Westlake Sch. (2009) 176 Cal. App. 4th 836, 865-866, 98 Cal. Rptr. 3d 300* (arbitral attorney fees cannot be awarded against party bringing claim under Ralph Civil Rights Act, *Civ. Code § 51.7*, or Tom Bane Civil Rights Act, *Civ. Code § 52.1*)].

PRACTICE TIP:

Include Attorney's Fees in Award. The arbitration award should include the attorney's fees award. Otherwise, it will be necessary to apply for correction of the award to include the attorney's fees, running the risk of violating the time limits for seeking correction of an award [*see § 33.28[5][b], [d]*] and confronting the possibility that a court might hold that adding attorney's fees is not within the scope of corrections an arbitrator is allowed to make [*see § 33.28[5][a]*]. Thus, it may be advisable to pre-determine a second arbitration date so that the issue of attorney's fees can be decided before the "final award" is executed by the arbitrator [*see Moore v. Bank of San Luis Obispo (2000) 22 Cal. 4th 782, 788-789, 94 Cal. Rptr. 2d 603, 996 P.2d 706* ; *Corona v. Amherst Partners (2003) 107 Cal. App. 4th 701, 706-707, 132 Cal. Rptr. 2d 250* (discussed at [b], *below*)]. *By Michael S. Fields*

Counsel seeking authorized arbitral attorney fees should include fees in a memorandum of costs. For discussion of memorandum of costs, see *Ch. 174, Costs and Attorney's Fees, § 174.28*. For forms of memorandum of costs and motions to strike memorandum of costs, see *Ch. 174, Costs and Attorney's Fees, § 174.240* et seq. For discussion of motions for attorney's fees, see *Ch. 174, Costs and Attorney's Fees, § 174.29*. For discussion of calculation of attorney's fees, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq. For forms on setting forth claimed attorney's fees, see *Ch. 174, Costs and Attorney's Fees, § 174.270* et seq. For a form of arbitrator's award including award of attorney's fees, see *§ 33.72*.

[b] Remedy for Arbitrator's Failure to Award Attorney's Fees

One case has held that when the underlying contract provides that the prevailing party "shall" be entitled to attorney's fees, the arbitrator exceeds his or her powers within the meaning of *Code Civ. Proc. § 1286.2(a)(4)* if the arbitrator fails to award attorney's fees after finding that a party prevailed [*see DiMarco v. Chaney (1995) 31 Cal. App. 4th 1809, 1815, 37 Cal. Rptr. 2d 558* (noting that arbitrator could deny award of attorney's fees if he or she found that no party prevailed)].

If the arbitrator exceeds his or her power by failing to award attorney's fees, the proper remedy is to petition the court to correct the award. The court cannot determine the amount of the fees, but must return the matter to the arbitrator to determine the amount. The *Code Civ. Proc. § 1033.5(c)(5)* requirement of a noticed motion for attorney's fees does not apply; it would apply only to the procedure for obtaining attorney's fees incurred in the judicial proceedings to confirm, correct, or vacate an award, not to fees incurred in the underlying arbitration proceeding [*see DiMarco v. Chaney (1995) 31 Cal. App. 4th 1809, 1816-1817, 37 Cal. Rptr. 2d 558]* .

DiMarco is limited, however, and distinguishable from certain other situations. First, if the arbitrator determines the prevailing party, but refuses to award attorney's fees, and explains his or her reasoning, for instance that the causes of action on which the award was based were tort claims beyond the scope of the attorney's fees clause, the arbitrator has not exceeded his or her powers. Nor can the court grant relief from that failure to award attorney's fees because of the limited scope of judicial review for an arbitrator's errors of law or fact, as discussed in *Ch. 34, Contractual Arbitration: Judicial Review, §§ 34.10, 34.19 -34.20* [*Moshonov v. Walsh (2000) 22 Cal. 4th 771, 773, 779, 94 Cal. Rptr. 2d 597, 996 P.2d 699]* . Secondly, if the arbitrator is asked to determine the prevailing party but does not name one, that also is not considered in excess of the arbitrator's powers, but is at most an error of law or fact beyond the power of the court to correct [*Moore v. Bank of San Luis Obispo (2000) 22 Cal. 4th 782, 788-789, 94 Cal. Rptr. 2d 603, 996 P.2d 706* (plaintiffs prevailed on equitable claims but were not awarded any money damages on contract claims; arbitration award provided that each party pay its own attorney's fees); *Corona v. Amherst Partners (2003) 107 Cal. App. 4th 701, 706-707, 132 Cal. Rptr. 2d 250* (having submitted matter to binding arbitration, scope of arbitration was not limited and would include entitlement to attorney's fees and costs as requested in complaint; plaintiff who made no specific request of arbitrator to award fees and costs could not obtain them in trial court)]. Because of the foregoing, the Practice Tip at [a], *above*, is doubly important. Lastly, if there is clearly a prevailing party and the failure to award attorney's fees is due to the arbitrator's mistake or inadvertence, the arbitrator may issue an amended award, if he or she does so in a timely manner and the conditions discussed in *§ 33.28[6]* are met [*Century City Medical Plaza v. Sperling, Isaacs & Eisenberg (2001) 86 Cal. App. 4th 865, 867, 881-883, 103 Cal. Rptr. 2d 605]* .

For discussion of attorney's fees incurred in proceedings to confirm an award, see *Ch. 34, Contractual Arbitration: Judicial Review, § 34.18[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral Overview

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4-33 California Forms of Pleading and Practice--Annotated § 33.30

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.30 Immunity From Liability to Parties

[1] Arbitrator

Under 1985 legislation repealed by its own terms, after several extensions, on January 1, 1997, an arbitrator had the immunity of a judicial officer from civil liability when acting in the capacity of arbitrator under any statute or contract [former *Code Civ. Proc. § 1280.1*; *see Coopers & Lybrand v. Superior Court (1989) 212 Cal. App. 3d 524, 536, 260 Cal. Rptr. 713* ; for discussion of immunity of judicial officers, *see Ch. 340, Libel and Slander, § 340.50* et seq., and Ch. 464, *Public Entities and Officers: California Tort Claims Act*]. The immunity granted by *Code Civ. Proc. § 1280.1* was supplemental to, and did not supplant, any otherwise applicable common law or statutory immunity [*Code Civ. Proc. § 1280.1*; *see also Olson v. National Ass'n of Security Dealers (8th Cir. 1996) 85 F.3d 381, 382-383* (recognizing immunity in absence of statute)].

Former *Code Civ. Proc. § 1280.1* was enacted to overrule *Baar v. Tigerman, (1983) 140 Cal. App. 3d 979* , which held that an arbitrator and a sponsoring organization (the AAA) were not entitled to the same immunity as a judge and could be found liable for breach of contract because the arbitrator failed to make a timely award [*Stasz v. Charles R. Schwab (2004) 121 Cal App. 4th 420, 434, 17 Cal. Rptr. 3d 116]* . Since then, it has evolved that there is indeed no immunity for an arbitrator who, for no stated reason, withdraws as arbitrator after hearing all the evidence and thereafter fails and refuses to render an award. An arbitrator's liability for breach of contract in that way is an exception to arbitral immunity, an extension of that first recognized in *Baar v. Tigerman (1983) 140 Cal. App. 3d 979, 983-985, 198 Cal. Rptr. 834, 211 Cal. Rptr. 426* [*Morgan Phillips, Inc. v JAMS/Endispute, L.L.C. (2006) 140 Cal. App. 4th 795, 801, 44 Cal. Rptr. 3d 782]* . The court in *Morgan Phillips* pointed out that its holding did not apply to a situation in which an arbitrator stated ethical grounds for his or her recusal [*Morgan Phillips, Inc. v JAMS/Endispute, L.L.C. (2006) 140 Cal. App. 4th 795, 803, 44 Cal. Rptr. 3d 782]* .

Since the repeal of former *Code Civ. Proc. § 1280.1*, arbitral immunity is determined under California common law.

However, the common law is not static, but grows and changes to meet the social needs of the community which it serves. It is constantly expanding and developing [*see 79 Ops. Cal. Atty. Gen. 294 (1996)* (common law immunity of arbitrators); *Stasz v. Charles R. Schwab (2004) 121 Cal App. 4th 420, 436, 17 Cal. Rptr. 3d 116]* .

The application of arbitral immunity does not turn on whether the act at issue is discretionary instead of ministerial or administrative. Arbitral immunity shields all functions which are integrally related to the arbitral process. Arbitrators are exempt from civil liability for failure to exercise care or skill in the performance of their arbitral functions. Federal law is in accord [*Stasz v. Charles R. Schwab (2004) 121 Cal App. 4th 420, 431-432, 17 Cal. Rptr. 3d 116]* . The proper remedy for any bias on the part of an arbitrator or sponsoring organization is a challenge of the arbitration award, not an attempt to impose liability on the arbitrator or the sponsoring organization, which would be nothing more than a collateral attack on the arbitration award [*Stasz v. Charles R. Schwab (2004) 121 Cal App. 4th 420, 439-441, 17 Cal. Rptr. 3d 116]* .

Federal courts have recognized a jurisdictional exception to immunity, which is applicable only if the record before the arbitrator is so deficient on its face that it signals a clear absence of jurisdiction [*Stasz v. Charles R. Schwab (2004) 121 Cal App. 4th 420, 442, 17 Cal. Rptr. 3d 116]* . The contention that *Code Civ. Proc. § 916(a)* provides such a clear lack of jurisdiction for arbitration conducted when an appeal is pending challenging the arbitration process has been rejected. Even assuming *Code Civ. Proc. § 916* mandates a delay in the arbitration proceedings, it would not effect a clear absence of jurisdiction. The statute would not divest the arbitrator of jurisdiction to hear the matter; it would only affect the timing of the proceedings. The proper remedy for an alleged violation of *Code Civ. Proc. § 916* is to seek a stay of the arbitration proceedings and, possibly, to petition the trial court to vacate the award on that ground, not to seek to impose liability on the arbitrator or the sponsoring organization [*Stasz v. Charles R. Schwab (2004) 121 Cal App. 4th 420, 443, 17 Cal. Rptr. 3d 116]* .

Under *Code Civ. Proc. § 1280(a)* (defining "agreement" and discussed in *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.20*), an accountant making a valuation for the parties would be entitled to arbitral immunity if, under the terms of the particular agreement, the parties intended the accountant to function as an arbitrator with respect to specific issues. The immunity does not attach by virtue of the accountant's professional status but by virtue of the fact that a proceeding is deemed to be an arbitration [*Coopers & Lybrand v. Superior Court (1989) 212 Cal. App. 3d 524, 536, 260 Cal. Rptr. 713* (overruling of demurrer affirmed because factual determination was required to determine whether parties intended valuation to be arbitration)]. Similarly, an appraiser in an appraisal under *Ins. Code § 2071* is functioning as an arbitrator and is entitled to immunity [*Lambert v. Carneghi (2008) 158 Cal. App. 4th 1120, 1129-1137, 70 Cal. Rptr. 3d 626*]. If arbitral immunity has attached, a party to the arbitration has no cause of action arising from the arbitrator's misconduct, professional negligence, or fraud. The party's recourse, unless the particular arbitration agreement adopts alternative procedures, is to seek to have the award vacated pursuant to *Code Civ. Proc. § 1286.2* [*Coopers & Lybrand v. Superior Court (1989) 212 Cal. App. 3d 524, 536, 260 Cal. Rptr. 713]* .

For discussion of immunity of arbitrators and their sponsoring association in conducting arbitration of attorney's fee disputes, see *Ch. 72, Attorney Practice and Ethics, § 72.350* et seq.

[2] Sponsoring Organization

The sponsoring organization is also immune from liability to the parties to an arbitration proceeding [*Stasz v. Charles R. Schwab (2004) 121 Cal App. 4th 420, 433, 17 Cal. Rptr. 3d 116* ; *Thiele v. RML Realty Partners (1993) 14 Cal. App. 4th 1526, 1528-1530, 18 Cal. Rptr. 2d 416* ; *American Arbitration Ass'n v. Superior Court (1992) 8 Cal. App. 4th 1131, 1133, 10 Cal. Rptr. 2d 899* ; *accord Olson v. NASD (8th Cir. 1996) 85 F.3d 381, 382-383]* . The scope of a sponsoring organization's arbitral immunity is defined by the functions it protects and serves. Acts that are integrally related to the arbitral process and sufficiently associated with the adjudicative phase of arbitration, such as sending out the award, are protected by the immunity [*Thiele v. RML Realty Partners (1993) 14 Cal. App. 4th 1526, 1530, 1532, 18 Cal. Rptr. 2d 416* (award sent out contrary to one party's instructions not to send it because parties had negotiated a

settlement); *see also Stasz v. Charles R. Schwab (2004) 121 Cal App. 4th 420, 437, 17 Cal. Rptr. 3d 116* (no distinction between sponsoring organization's discretionary acts and administrative acts; immunity applies to both); *Olson v. National Ass'n of Security Dealers (8th Cir. 1996) 85 F.3d 381, 382-383* (immunity extends to appointment of arbitrator with "evident partiality")]. A sponsoring organization is not entitled to immunity for breach of contract actions based on the arbitrator's withdrawal after hearing all the evidence and subsequent failure and refusal to enter an award [*Morgan Phillips, Inc. v JAMS/Endispute, L.L.C. (2006) 140 Cal. App. 4th 795, 803-804, 44 Cal. Rptr. 3d 782]* .

[3] Witnesses

Statements made in the course of a private, contractual arbitration proceeding are protected by the litigation privilege of *Civ. Code § 47(b)* [*Moore v. Conliffe (1994) 7 Cal. 4th 634, 637-638, 29 Cal. Rptr. 2d 152, 871 P. 2d 204* (deposition witness allegedly committed perjury)]. However, the litigation privilege is not so broad as to extend to one's own expert witness. A party may sue his or her own expert for negligence, even if that suit is based on the expert's testimony [*Lambert v. Carneghi (2008) 158 Cal. App. 4th 1120, 1129-1137, 1145, 70 Cal. Rptr. 3d 626* (in appraisal under *Ins. Code § 2071*, which is functional equivalent of arbitration)]. For discussion of the litigation privilege, see *Ch. 340, Libel and Slander, § 340.50* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Michael S. Fields Editorial Consultant

[Reserved]

§§ 33.31[Reserved]

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AUTHOR: Michael S. Fields Editorial Consultant

§ 33.40 Related Matthew Bender Publications

For memoranda of points and authorities related to forms in this part, see California Points and Authorities, Ch 20B, *Arbitration: Selecting Arbitrators; Arbitral Immunity* (Matthew Bender)

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4-33 California Forms of Pleading and Practice--Annotated § 33.41

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.41 State Statutes

[1] Definitions

"Award." *Code Civ. Proc. § 1280(b)*

"Controversy." *Code Civ. Proc. § 1280(c)*

"Neutral arbitrator." *Code Civ. Proc. § 1280(d)*

"Party to arbitration." *Code Civ. Proc. § 1280(e)*

[2] Arbitrators

Petition to appoint arbitrator to apportion costs for repair and maintenance of easement. *Civ. Code § 845(c)*

Court appointed arbitrator is "neutral arbitrator." *Code Civ. Proc. § 1280(d)*

Appointment of arbitrators. *Code Civ. Proc. § 1281.6*

Disclosure of information relating to arbitrator's impartiality. *Code Civ. Proc. §§ 170.1, 1281.85, 1281.9*. and 1281.95

Exercise of powers by arbitrators. *Code Civ. Proc. § 1282*

Incompetency of arbitrator to testify in subsequent civil proceeding as to statement or conduct occurring at or in conjunction with prior proceeding; exceptions. *Evid. Code § 703.5*

[3] Public Agencies as Arbitrators

Director of Food and Agriculture has power to arbitrate disputes concerning dairy produce exchanges. *Food & Agric. Code §§ 35, 50, 57161*

Director of Food and Agriculture has power to act as arbitrator as to controversies arising between producers and distributors. *Food & Agric. Code §§ 35, 50, 58036*

[4] Consolidation

Consolidation of seperate arbitration proceedings. *Code Civ. Proc. § 1281.3*

[5] Depositions and Discovery

Right of parties to take depositions and conduct discovery in arbitration proceedings; powers of arbitrator to enforce discovery rights. *Code Civ. Proc. §§ 1283-1283.1*

Depositions and discovery in arbitration proceedings under uninsured motorists statute. *Ins. Code § 11580.2(f)(3)*

[6] Hearing

Conduct of arbitration hearings. *Code Civ. Proc. § 1282.2*

Right to counsel at arbitration hearing. *Code Civ. Proc. § 1282.4*

Administration of oaths in arbitration proceedings. *Code Civ. Proc. § 1282.8*

Fees and mileage for witnesses. *Code Civ. Proc. § 1283.2*

Expenses and fees. *Code Civ. Proc. § 1284.2*

[7] Award

Form of award. *Code Civ. Proc. §§ 998(b)(i), 1283.4*

Service of award. *Code Civ. Proc. § 1283.6*

Time for making award. *Code Civ. Proc. § 1283.8*

Correction of award by arbitrators. *Code Civ. Proc. § 1284*

[8] Crimes Relating to Arbitrators

Bribery of arbitrator or accepting such bribe is criminal offense. *Penal Code §§ 92, 93*

Corrupt attempt to influence arbitrator is criminal offense. *Penal Code § 95*

Improper conduct by arbitrator is criminal offense. *Penal Code § 96*

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Michael S. Fields Editorial Consultant

§ 33.42 California Rules of Court

Ethics Standards for Neutral Arbitrators in Contractual Arbitration. Cal. Rules of Ct., Appen., Div. VI

Notice to arbitrator and arbitration clerk of settlement of arbitration; sanctions for failure to comply is paid by counsel. Los Angeles Co. Super. Ct. Rules, Rule 12.5

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Michael S. Fields Editorial Consultant

§ 33.43 Decisions

[1] Appointment of Arbitrators

Code Civ. Proc. §§ 1281.6, 1282 does not prohibit contract of arbitration that gives each party an unqualified right to nominate anyone as arbitrator, regardless of neutrality or impartiality. *Dinong v. Superior Court (1981) 120 Cal. App. 3d 300, 302-303, 174 Cal. Rptr. 590*

No statutory requirement that arbitrators appointed by parties be neutral or impartial. *Tipton v. Systron Donner Corp. (1979) 99 Cal. App. 3d 501, 505, 160 Cal. Rptr. 303*

[2] Bias

Arbitrator was not required to disclose that one of party's counsel and proposed expert witness (later stricken from witness list) were attorneys with whom he sat on 36-member board of professional association; fact that arbitrator disclosed that out of excess of caution did not give party right to disqualify him. *Luce, Forward, Hamilton & Scripps, LLP v. Koch (2008) 162 Cal. App. 4th 720, 724-725, 734-736, 75 Cal. Rptr. 3d 869*

Only significant or substantial business relationships between neutral arbitrator and party or its representative must be disclosed; ordinary and insubstantial business dealings do not require disclosure; $500 contribution to party arbitrator's mayoral campaign was ordinary and insubstantial; neutral arbitrator who had no financial interest in or knowledge of other party's, party arbitrator's, employer's, or fellow employee's contributions to same campaign had no duty to disclose those transactions. *Casden Park La Brea Retail LLC v. Ross Dress for Less, Inc. (2008) 162 Cal. App. 4th 468, 476-478, 75 Cal. Rptr. 3d 763*

Person aware that arbitrator and his law firm represented several entities that provided insurance and reinsurance to

syndicate by which plaintiff was insured and representative of which was present throughout arbitration might reasonably entertain doubt that proposed neutral arbitrator would be able to be impartial. *Advantage Medical Services, LLC v. Hoffman (2008) 160 Cal. App. 4th 806, 809, 818, 72 Cal. Rptr. 3d 935*

Party who did not investigate or discover arbitrator's undisclosed connections to opposing party's insurer until after arbitrator had issued interim award could not obtain disqualification under *Code Civ. Proc. § 1281.91(c)* but still had right to seek vacatur of interim award under *Code Civ. Proc. § 1286.2(a)(6)(A)*, discussed at *§ 34.19[1][d]*. *Advantage Medical Services, LLC v. Hoffman (2008) 160 Cal. App. 4th 806, 820-823, 72 Cal. Rptr. 3d 935*

In case of arbitrators appointed pursuant to *Code Civ. Proc. § 1281.6*, no disclosures are required when court nominates five from whom parties are to chose. Disclosure obligations are not triggered until proposed arbitrator is notified that he or she has been selected by parties or appointed by court to serve as neutral arbitrator. *Jakks Pacific, Inc. v. Superior Court (THQ, Inc.) (2008) 160 Cal. App. 4th 596, 600, 603-607, 72 Cal. Rptr. 3d 914*

Matters enumerated in *Code Civ. Proc. § 1281.9(a)*, by Legislative intent behind 2001 amendment to *Code Civ. Proc. §§ 1281.9* and *1286.2(a)(6)(A)*, are presumed to cause reasonable person to question arbitrator's ability to be impartial. *International Alliance of Theatrical Stage Employees, etc. v. Laughon (2004) 118 Cal. App. 4th 1380, 13861387* (including comparison of cases decided before 2001 amendments); *see* Stats. 2001, Ch. 352, § 8

"Impression of possible bias" rule. *Cobler v. Stanley, Barber, Southard, Brown & Associates (1990) 217 Cal. App. 3d 518, 527, 265 Cal. Rptr. 868* ; *San Luis Obispo Bay Properties, Inc. v. Pacific Gas & Elec. Co. (1972) 28 Cal. App. 3d 556, 567, 104 Cal. Rptr. 733* ; *Johnston v. Security Ins. Co. (1970) 6 Cal. App. 3d 839, 842-844, 86 Cal. Rptr. 133*

Evid. Code § 703.5 is applicable to limit testimony of arbitrator regarding alleged bias; thus, court was not entitled to consider portion of arbitrator's declaration describing basis for award, but could consider statement that arbitrator did not know until after rendition of award that law partner represented party's adversary in another matter. *Cobler v. Stanley, Barber, Southard, Brown & Associates (1990) 217 Cal. App. 3d 518, 528-529, 265 Cal. Rptr. 868*

Bias in party arbitrator is expected and furnishes no ground for vacating award unless it amounts to corruption under *Code Civ. Proc. § 1286.2*. *Tate v. Saratoga Savings & Loan Assn. (1989) 216 Cal. App. 3d 843, 858, 265 Cal. Rptr. 440* ; *Baker v. Sadick (1984) 162 Cal. App. 3d 618, 622-626, 208 Cal. Rptr. 676*

Failure of arbitrator appointed by corporation to reveal that he had been corporation's attorney for period of time does not vitiate his or her right to act as party-arbitrator under statutory or case law or under terms of agreement providing that each party could select arbitrator to resolve dispute and, if arbitrators could not agree, they could appoint third arbitrator. *Tipton v. Systron Donner Corp. (1979) 99 Cal. App. 3d 501, 507, 160 Cal. Rptr. 303*

Arbitrators is under legal duty to disclose to parties any dealings that might create impression of possible bias at outset of arbitration hearings. *Johnston v. Security Ins. Co. (1970) 6 Cal. App. 3d 839, 843, 844, 86 Cal. Rptr. 133*

[3] Abandonment

Though court did not refer to it as abandonment, when, after having been ordered to arbitrate, party responsible for paying arbitrator's fees necessary to initiate arbitration failed to do so, court properly lifted stay and sent matter to be tried. *Sink v. Aden Enters. (9th Cir. 2003) 352 F.3d 1197*

Right of parties to mutually abandon one arbitration proceeding and proceed with new arbitration covering subject matter of abandoned proceeding. *Goossen v. Adair (1960) 185 Cal. App. 2d 810, 817, 8 Cal. Rptr. 855*

[4] Withdrawal of Arbitrator

Arbitrator's withdrawal, for no stated reason and without parties' consent, after hearing all the evidence and subsequent failure and refusal to render an award is basis for breach of contract action, for which there is no arbitral immunity for arbitrator or his or her sponsoring organization. *Morgan Phillips, Inc. v JAMS/Endispute, L.L.C. (2006) 140 Cal. App. 4th 795, 803, 44 Cal. Rptr. 3d 782*

Withdrawal from arbitration is permitted if parties agree that preliminary error will invalidate arbitration proceeding. *Helzel v. Superior Court (1981) 123 Cal. App. 3d 652, 664, 176 Cal. Rptr. 740* (dicta)

[5] Removal of Arbitrator

While a jointly selected, or court-appointed, proposed neutral arbitrator or, in the case of a contested appraisal proceeding, the competent and disinterested umpire, is subject to mandatory disqualification for disclosures under *Code Civ. Proc. § 1281.9(e)*, the court declined to recognize an automatic and unlimited right of disqualification for disclosures made by party-appointed appraisers subject to *Ins. Code § 2071*. *Mahnke v. Superior Court (2009) 180 Cal. App. 4th 565, 576-578, 103 Cal. Rptr. 3d 197*

Failure of arbitrator to act within reasonable period to select neutral arbitrator is proper basis for removal and court appointment of substitute arbitrator. *Cathcart v. Security Title Ins. etc. Co. (1944) 66 Cal. App. 2d 469, 474, 475, 152 P.2d 336*

[6] Scope of Arbitration

Agreement to settle any controversy arising out of employment is sufficiently broad to include arbitration of claim of intentional torts of fraud and libel. *Lewsadder v. Mitchum, Jones & Templeton, Inc. (1973) 36 Cal. App. 3d 255, 258-259, 111 Cal. Rptr. 405*

Unless limited by arbitration clause, entirety of controversy is to be determined by arbitrator. *Orpustan v. State Farm Mut. Auto. Ins. Co. (1972) 7 Cal. 3d 988, 991, 103 Cal. Rptr. 919, 500 P.2d 1119* (arbitration under uninsured motorists statute [*Ins. Code § 11580.2*]); *Morris v. Zukerman (1967) 257 Cal. App. 2d 91, 95, 64 Cal. Rptr. 714*

Under *Code Civ. Proc. § 1283.4*, requiring that award include determination of all questions submitted, decision of which is necessary in order to determine controversy, determination of which issues are actually necessary to ultimate decision is for arbitrators to make. *Morris v. Zuckerman (1968) 69 Cal. 2d 686, 690, 72 Cal. Rptr. 880, 446 P.2d 1000* ; *East San Bernardino County Water Dist. v. City of San Bernardino (1973) 33 Cal. App. 3d 942, 953, 109 Cal. Rptr. 510* ; *Jones v. Kvistad (1971) 19 Cal. App. 3d 836, 843, 97 Cal. Rptr. 100* ; *Felner v. Meritplan Ins. Co. (1970) 6 Cal. App. 3d 540, 543, 86 Cal. Rptr. 178* ; *Lesser Towers, Inc. v. Roscoe-Ajax Constr. Co. (1969) 271 Cal. App. 2d 675, 702, 77 Cal. Rptr. 100*

All disputes as to meaning, interpretation, and application of any clause of agreement containing arbitration clause, even disputes that prima facie appear without merit, are subject of arbitration. *Posner v. Grunwald-Marx, Inc. (1961) 56 Cal. 2d 169, 184, 14 Cal. Rptr. 297, 363 P.2d 313* (collective bargaining agreement); *East San Bernardino County Water Dist. v. City of San Bernardino (1973) 33 Cal. App. 3d 942, 951, 109 Cal. Rptr. 510* ; *see also Jones v. Kvistad (1971) 19 Cal. App. 3d 836, 843, 97 Cal. Rptr. 100*

Arbitrability of dispute is itself subject to arbitration if parties have so provided in contract. *McCarroll v. L. A. County etc. Carpenters (1957) 49 Cal. 2d 45, 65, 315 P.2d 322*

Only clear cut expression to exclude claim from arbitration is prevailing. *East San Bernardino County Water Dist. v. City of San Bernardino (1973) 33 Cal. App. 3d 942, 953, 109 Cal. Rptr. 510* ; *see also Morris v. Zukerman (1967) 257 Cal. App. 2d 91, 96, 64 Cal. Rptr. 714*

[7] Restraining Arbitration

Defendant prevailing in declaratory action to stop arbitration was entitled to attorney's fees for trial an appeal under *Civ. Code § 1717*, because the contract containing the arbitration clause contemplated court actions "on contract" and provided for fees and costs to the prevailing party in any such action. *Turner v. Schultz (2009) 175 Cal. App. 4th 974, 981-985, 96 Cal. Rptr. 3d 659*

Injunction against arbitration process is not available to party to arbitration agreement unless grounds exist for resisting petition to compel arbitration under *Code Civ. Proc. § 1281.2*. *California State Council of Carpenters v. Superior Court (1970) 11 Cal. App. 3d 144, 156, 89 Cal. Rptr. 625*

Party to illegal arbitration agreement has right to injunctive relief against threatened arbitration proceedings. *California State Council of Carpenters v. Superior Court (1970) 11 Cal. App. 3d 144, 157, 89 Cal. Rptr. 625* (dictum)

Court does not have power to enjoin arbitration that is not self executing. *Sauter v. Superior Court (1969) 2 Cal. App. 3d 25, 29, 82 Cal. Rptr. 395*

Failure to appeal from appealable order granting preliminary injunction against arbitration proceedings does not preclude appellate review of arbitration issue on appeal from judgment granting permanent injunction against arbitration. *American Ins. Co. v. Gernand (1968) 262 Cal. App. 2d 300, 305, 68 Cal. Rptr. 810*

[8] Hearing

[a] Notice

Right of party to arbitration agreement to notice of hearing and opportunity to be heard thereat. *Smith v. Campbell & Facciolla, Inc. (1962) 202 Cal. App. 2d 134, 135, 20 Cal. Rptr. 606*

[b] Evidence

Timely offer of evidence at arbitration proceeding is required for orderly administration of justice. *Grunwald-Marx, Inc. v. Los Angeles Joint Board (1959) 52 Cal. 2d 568, 587, 343 P.2d 23*

Testimony of arbitrator at contested hearing on petition to confirm award, though not to be used to impeach award, is admissible to show what matters were submitted for decision and were considered by arbitrators. *Sapp v. Barenfeld (1949) 34 Cal. 2d 515, 523, 212 P.2d 233* ; *Jones v. Kvistad (1971) 19 Cal. App. 3d 836, 842, 97 Cal. Rptr. 100*

Admissibility in court action of testimony of arbitrator to show what matters were submitted for decision and considered by arbitrators. *Key Ins. Exch. v. Biagini (1967) 250 Cal. App. 2d 143, 145-147, 58 Cal. Rptr. 408* ; *Banks v. Milwaukee Ins. Co. (1966) 247 Cal. App. 2d 34, 39, 55 Cal. Rptr. 139*

[c] Powers of Arbitrators

[i] In General

Arbitrator has power to hear and determine discovery matters involving nonparties, for example challenge by nonparty to subpoena issued by party for documents; arbitrator is to hear and determine issue first, but nonparty has right to full judicial review of arbitrator's discovery order. If court determines that arbitrator erred, court's determination supersedes that of arbitrator. *Berglund v. Arthroscopic Laser & Surgery Center of San Diego, LP (2008) 44 Cal. 4th 528, 79 Cal. Rptr. 3d 370, 187 P.3d 86, 2008 Cal. LEXIS 8801*

Arbitrators are permitted to apply both legal and equitable principles in deciding ultimate issue submitted to them. *Morris v. Zuckerman (1968) 69 Cal. 2d 686, 691, 72 Cal. Rptr. 880, 446 P.2d 1000*

Broad principles of justice and equity are bases for arbitrators' decisions. *Grunwald-Marx, Inc. v. Los Angeles Joint Board (1959) 52 Cal. 2d 568, 589, 343 P.2d 23* ; *Sapp v. Barenfeld (1949) 34 Cal. 2d 515, 523, 212 P.2d 233* ; *Interinsurance Exchange v. Bailes (1963) 219 Cal. App. 2d 830, 835, 33 Cal. Rptr. 533*

Lack of authority of arbitrator to decide issue is waived by submission of issue. *J.C.Gury Co. v. Nippon Carbide Indus. (USA), Inc. (2007) 152 Cal. App. 4th 1300, 1302, 1304-1306, 62 Cal. Rptr. 3d 118* ; *Felner v. Meritplan, Ins. Co. (1970) 6 Cal. App. 3d 540, 544, 86 Cal. Rptr 178* ; *Lesser Towers, Inc. v. Roscoe-Ajax Constr. Co. (1969) 271 Cal. App.2d 675, 698-699, 77 Cal. Rptr. 100*

Arbitrator has power to modify award that granted injunction, when facts or circumstances on which it was based have changed; arbitrator's power is derived from inherent modifiability of injunctions and parties' agreement to arbitrate. *Swan Magnetics v. Superior Court (1997) 56 Cal. App. 4th 1504, 1512, 66 Cal. Rptr. 2d 541* (injunction enforcing noncompetition clause; after award, competitor acquired party to arbitration)

Arbitrator's authority is derived from contract between parties, not from court's order compelling arbitration. *Social Services Union v. Alameda County Training & Employment Bd. (1989) 207 Cal. App. 3d 1458, 1463, 255 Cal. Rptr. 746*

Arbitrator's jurisdiction is limited to disputes covered by arbitration clause or superseding submission agreement. *Mansdorf v. California Physicians' Service, Inc. (1978) 87 Cal. App. 3d 412, 417, 151 Cal. Rptr. 388*

Arbitrators are required to decide all issues submitted to them but have no legal right to decide issues not submitted. *East San Bernardino County Water Dist. v. City of San Bernardino (1973) 33 Cal. App. 3d 942, 953-954, 109 Cal. Rptr. 510*

Arbitrators have power to determine which issues are necessary to ultimate decision. *East San Bernardino County Water Dist. v. City of San Bernardino (1973) 33 Cal. App. 3d 942, 953, 109 Cal. Rptr. 510*

Powers of arbitrator are limited by agreement or stipulation of submission. *San Luis Obispo Bay Properties, Inc. v. Pacific Gas & Elec. Co. (1972) 28 Cal. App. 3d 556, 564, 104 Cal. Rptr. 733* ; *Jones v. Kvistad (1971) 19 Cal. App. 3d 836, 842, 97 Cal. Rptr. 100* ; *Brotherhood of Ry. etc. Employees v. Universal Carloading etc. Co. (1969) 1 Cal. App. 3d 145, 149, 81 Cal. Rptr. 516* ; *B. S. B. Constr. Co. v. Rex Constr. Co. (1962) 200 Cal. App. 2d 327, 331, 19 Cal. Rptr. 167*

Arbitrator have no power to determine rights and obligations of person who is not party to arbitration agreement. *Unimart v. Superior Court (1969) 1 Cal. App. 3d 1039, 1045, 82 Cal. Rptr. 249*

[ii] Misconduct

Failure by arbitrator to fully exercise powers do not constitute misconduct under *Code Civ. Proc. § 1286.2(a)(3)* (misconduct is ground for vacating award). *Banks v. Milwaukee Ins. Co. (1966) 247 Cal. App. 2d 34, 38, 55 Cal. Rptr. 139*

[d] Award

[i] In General

Damages are properly to be included in award even though not expressly submitted as issue, when submitted controversy is breach of contract and when proof of damages is made at hearing. *Grunwald-Marx, Inc. v. Los Angeles Joint Board (1959) 52 Cal. 2d 568, 590, 343 P.2d 23*

Decision of arbitrators is final and binding on parties and preclude further litigation of controversy on merits when arbitration award fully adjudicates dispute. *Archuleta v. Grand Lodge etc. of Machinists (1968) 262 Cal. App. 2d 202, 208, 68 Cal. Rptr. 694*

Arbitrators are not required to find facts and give reasons for their awards. *Sapp v. Barenfeld (1949) 34 Cal. 2d 515, 522, 212 P.2d 233* ; *Frantz v. Inter-Insurance Exchange of Auto. Club (1964) 229 Cal. App. 2d 269, 273, 40 Cal. Rptr. 218* ; *see also Shammas v. National Telefilm Associates (1970) 11 Cal. App. 3d 1050, 1056, 90 Cal. Rptr. 119* ; *Interinsurance Exchange v. Bailes (1963) 219 Cal. App. 2d 830, 837, 33 Cal. Rptr. 533*

[ii] Consolidation of Arbitration Proceedings

When resolution of dispute depends on resolution of another dispute between one party to first dispute and third party, both of which are subject to arbitration, consolidation is permissible notwithstanding provision in agreement precluding addition of new party. *Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co. (1983) 140 Cal. App. 3d 251, 264-265, 191 Cal. Rptr. 15*

Consolidation of separate but related arbitration hearings does not add parties to agreements or permitting relief between parties not signatory to common agreement. *Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co. (1983) 140 Cal. App. 3d 251, 264-265, 191 Cal. Rptr. 15*

When contractor filed claim against school district for added time spent due to allegedly faulty architectural plans, and district sought indemnification from architect, arbitration is proper between architect and school district since dispute arose under their contract, and consolidation of proceedings is permitted. *Conejo Valley Unified School Dist. v. William Blurock & Partners, Inc. (1980) 111 Cal. App. 3d 983, 987, 169 Cal. Rptr. 102*

[iii] Costs

The rules of ADR Services, Inc. govern the allocation of costs and require equal allocation of costs. *Gravillis v. Coldwell Banker Residential Brokerage Co. (2010) 182 Cal. App. 4th 503, 520, 106 Cal. Rptr. 3d 70*

Code Civ. Proc. § 1284.2, providing that, unless agreement prescribes otherwise, no party may recover costs, is constitutional, and not violative of equal protection. *Dickinson v. Kaiser Foundation Hospitals (1980) 112 Cal. App. 3d 952, 954-955, 169 Cal. Rptr. 493*

Award of costs for both arbitration and court proceedings to corporation when shareholder petitioned to vacate arbitration award is proper when parties' arbitration agreement provided that if one party refused to abide by award, all

costs, including those incurred in court proceedings, would be assessed against and borne by disaffirming party and there was no evidence that parties modified agreement. *Tipton v. Systron Donner Corp. (1979) 99 Cal. App. 3d 501, 507, 160 Cal. Rptr. 303*

[iv] Declaratory Relief

Declaratory relief action brought by insured prior to demanding arbitration is proper to obtain judicial determination of non-arbitrable issue of coverage of uninsured motorist liability clause in insurance policy. *Calhoun v. State Farm Mutual Auto Ins. Co. (1967) 254 Cal. App. 2d 407, 414, 62 Cal. Rptr. 177* (insurer denied coverage)

Dismissal of declaratory relief action pursuant to *Code Civ. Proc. § 1061* is available remedy when issues sought to be litigated therein are within jurisdiction of arbitrator. *California State Auto. Asso. v. Blanford (1970) 4 Cal. App. 3d 186, 189, 84 Cal. Rptr. 333* ; *Interinsurance Exchange v. Bailes (1963) 219 Cal. App. 2d 830, 834, 33 Cal. Rptr. 533*

[v] Correction by Arbitrators

Arbitrator has no power to correct award for error of law by striking element of damages. *Landis v. Pinkertons, Inc. (2004) 122 Cal. App. 4th 985, 992, 18 Cal. Rptr. 3d 890*

Corrected award served more than 30 days after service of original award is not to be given effect; request for correction is deemed denied if no corrected award is served within that 30-day period. *Landis v. Pinkertons, Inc. (2004) 122 Cal. App. 4th 985, 990, 993, 18 Cal. Rptr. 3d 890*

Aggrieved party's request for trial after service of arbitration award tolls 100-day time period in which prevailing party must seek correction of award under *Code Civ. Proc. § 1288.2*. *Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 994, 230 Cal. Rptr. 233*

Substantive revision of award by adding element of damages is not within limited power of arbitrator to correct award under *Code Civ. Proc. § 1284*. *Banks v. Milwaukee Ins. Co. (1966) 247 Cal. App. 2d 34, 37, 55 Cal. Rptr. 139*

[vi] Time

Rendition of award within time specified in submission agreement is jurisdictional. Librascope Inc. v. Precision Lodge No. 1600, *Librascope, Inc. (1961) 189 Cal. App. 2d 71, 75, 10 Cal. Rptr. 795* ; *Rusnak v. General Controls Co. (1960) 183 Cal. App. 2d 583, 584, 7 Cal. Rptr. 71*

Waiver of time limitation on making award violates award made after expiration of specified time. *Librascope Inc. v. Precision Lodge No. 1600, Internat. Assn. of Machinists (1961) 189 Cal. App. 2d 71, 75*

[9] Validity of Proceedings

Every intendment is to be indulged to give effect to arbitration proceedings. *Lewsadder v. Mitchum, Jones & Templeton, Inc. (1973) 36 Cal. App. 3d 255, 259, 111 Cal. Rptr. 405*

[10] Specific Proceedings

[a] Uninsured Motorists Arbitration

Issues subject to arbitration under uninsured motorist statute [*Ins. Code § 11580.2(f)*]. *Orpustan v. State Farm Mut. Auto. Ins. Co. (1972) 7 Cal. 3d 988, 991, 992, 103 Cal. Rptr. 919, 500 P.2d 1119* ; *State Farm Mut. Auto. Ins. Co. v. Guleserian (1972) 28 Cal. App. 3d 397, 401-402, 104 Cal. Rptr. 683* ; *Felner v. Meritplan Ins. Co. (1970) 6 Cal. App. 3d 540, 543, 86 Cal. Rptr. 178* ; *American Ins. Co. v. Gernand (1968) 262 Cal. App. 2d 300, 304, 305, 68 Cal. Rptr. 810* ; *Esparza v. State Farm Mut. Auto. Ins. Co. (1967) 257 Cal. App. 2d 496, 500, 65 Cal. Rptr. 245*

Entirety of controversy to be determined by arbitrator in uninsured motorist cases; preliminary court hearings on jurisdictional facts is improper. *Orpustan v. State Farm Mut. Auto. Ins. Co. (1972) 7 Cal. 3d 988, 991, 992, 103 Cal. Rptr. 919, 500 P.2d 1119* ; *State Farm Mut. Auto. Ins. Co. v. Guleserian (1972) 28 Cal. App. 3d 397, 401, 104 Cal. Rptr. 683* ; *compare Pacific Indem. Co. v. Superior Court (1966) 246 Cal. App. 2d 63, 67, 54 Cal. Rptr. 470* (court, rather than arbitrator, to determine whether insured instituted arbitration within statute of limitations set forth in former *Ins. Code § 11580.2(h)* [*now see Ins. Code § 11580.2(i)(1)*])

Uninsured motorist arbitration conducted pursuant to *Ins. Code § 11580.2*, is form of contractual arbitration governed by *Code Civ. Proc. § 1280 et seq.*, and thus is arbitration within meaning of *Code Civ. Proc. § 998*; when insured's Section 998 offer is not accepted and arbitration award for larger amount is granted, maximum liability provision of *Ins. Code § 11580.2(p)(4)* does not preclude successful insured's recovery of costs under *Code Civ. Proc § 998* even if those costs, when added to the award, exceed coverage limits. *Pilimai v. Farmers Ins. Exchange Co. (2006) 39 Cal. 4th 133, 142, 45 Cal. Rptr. 3d 760, 137 P.3d 393* ; *see* discussion at *§ 33.29[2]*

Under policy that adopts statutory language, arbitrator cannot make award in excess of uninsured motorist policy limits; thus, insurer that has paid its insured full amount of its uninsured motorist coverage cannot to be compelled to arbitrate; any damages sustained by insured attributable to accident that are over and above uninsured motorist policy limits have no relevance in uninsured motorist arbitration. *State Farm Mutual Automobile Ins. Co. v. Superior Court (Balen) (2004) 123 Cal. App. 4th 1424, 1432-1433, 20 Cal. Rptr. 3d 850*

Statute of limitations for initiating arbitration proceedings under uninsured motorist coverage is tolled by insurer's failure to give notice to insured of applicable limitation period, pursuant to *Ins. Code § 11580.2(k)*. *Gefrich v. State Farm Mut. Auto. Ins. Co. (1980) 109 Cal. App. 3d 500, 503-504, 166 Cal. Rptr. 516*

[b] Self-Executing Arbitration

Proceeding with arbitration ex parte and without prior court order compelling unwilling party to arbitrate is proper when arbitration agreement is self-executing. *Brink v. Allegro Builders, Inc. (1962) 58 Cal. 2d 577, 579, 580, 25 Cal. Rptr. 556, 375 P.2d 436* ; *Kustom Kraft Homes v. Leivenstein (1971) 14 Cal. App. 3d 805, 810-811, 92 Cal. Rptr. 650* ; *Smith v. Campbell & Facciolla, Inc. (1962) 202 Cal. App. 2d 134, 137, 20 Cal. Rptr. 606*

Contract permitting one party to unilaterally select arbitrator if other party refuses to arbitrate and permitting one arbitrator to proceed is self-executing. *Brink v. Allegro Builders, Inc. (1962) 58 Cal. 2d 577, 579, 580, 25 Cal. Rptr. 556, 375 P.2d 436*

Arbitration clause incorporating entire scheme for arbitration established by rules of American Arbitration Association is comprehensive enough to be self-executing. *Kustom Kraft Homes v. Leivenstein (1971) 14 Cal. App. 3d 805, 811, 92 Cal. Rptr. 650* ; *compare Sauter v. Superior Court (1969) 2 Cal. App. 3d 25, 29, 82 Cal. Rptr. 395* (holding that arbitration that was pending before the American Arbitration Association was not self-executing)

Agreements to arbitrate is generally not self-executing. *Sauter v. Superior Court (1969) 2 Cal. App. 3d 25, 29, 82 Cal. Rptr. 395*

Party who fails to select arbitrator under self-executing arbitration agreement is nevertheless entitled to notice of arbitration hearing and to be heard thereat. *Smith v. Campbell & Facciolla, Inc. (1962) 202 Cal. App. 2d 134, 135, 20 Cal. Rptr. 606*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewGovernmentsCourtsJudicial ImmunityCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActCoverage & ExceptionsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration Agreements

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AUTHOR: Michael S. Fields Editorial Consultant

§ 33.44 Attorney General Opinions

Common law immunity from civil liability of judicial officers applies to judicial arbitrators and to private arbitrators when the latter are acting in their quasi-judicial capacities; enactment of statutory immunity from civil liability did not affect judicial officers, but expanded scope of immunity for private arbitrators, and repeal of statute reinstated common law immunity for quasi-judicial acts of private arbitrators. *79 Ops. Cal. Att'y Gen. 294 (1996)*

Written agreement that does not otherwise violate state law or public policy, between parties to civil dispute to submit dispute to arbitration by third party who is not member of California State Bar for resolution pursuant to and in accordance with tenets of parties' religious affiliation, is valid and enforceable. *70 Ops. Cal. Att'y Gen. 203 (1987)*

Legal Topics:

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AUTHOR: Michael S. Fields Editorial Consultant

§ 33.45 Law Reviews and Legal Periodicals

T. Brom, *Full Disclosure, 24 Cal. Lawyer 33 (2004)*

S. Kostel, *Whom Should Arbitrators Charge? 24 Cal. Lawyer 14 (2004)*

J. Folberg, *Arbitration Ethics: Is California the Future?* 18 Ohio State J. Disp. Resol. 343 (2003)

M. G. Teso, *Stock Answer to Ethics Spat*, 89 Am. Bar Assoc. J. 14 (2003)

R. Cherwick, *Disclose or Decline, 22 Cal. Lawyer 34 (2002)*

M. Perlman, *Authority of Arbitrators to Award Treble Damages and Attorney Fees*, 19 Intern'l. Construction L.R. 405 (2002)

D. Rosenthal, *New Rules for Neutrals, 22 Cal. Lawyer 17 (2002)*

Goldberger and Gurahian, *Six Steps to Succeeding in Arbitration*, 31(6) Trial 36 (1995)

Sherman, *The NAA: Looking for a Few Good Arbitrators*, 50(1) Disp. Resol. J. 82 (1995)

Symposium, *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. Disp. Resol. 95 (1995)

(Transcript), *Standards of Conduct for Mediators: Text of Agreement Between AAA, ABA & SPIDR*, 50(4) Disp. Resol. J. 78 (1995)

Disco, *The Impression of Possible Bias: What a Neutral Arbitrator Must Disclose in California, 45 Hastings L.J. 113 (1993)*

Comment, *Reassessing the Architect's Role as Arbiter, 27 U.S.F. L. Rev. 873 (1993)*

Note, *Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators, 44 Hastings L.J. 421 (1993)*

Sauer, *Preventing Mistakes in Arbitration: An Arbitrator's Perspective, 23 U. West L.A. L. Rev. 351 (1992)*

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4-33 California Forms of Pleading and Practice--Annotated § 33.46

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.46 Text References

Eisler, California Uninsured Motorist Law Handbook, ch. 19, *Arbitration*, § 19.50 et seq. (Parker 5th ed. 1993)

Knight, Fannin, & Disco, Cal. Practice Guide: Alternative Dispute Resolution, ch. 5 (The Rutter Group 1995)

Chernick, ADR for the Commercial Litigator, ch. IV-A(5-8) (The Rutter Group 1989)

Toker, California Arbitration Practice Guide, ch. 3-5 (Lawpress 3d ed. 1996)

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[Reserved]

§§ 33.47[Reserved]

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AUTHOR: Michael S. Fields Editorial Consultant

§ 33.50 Appointment of Arbitrators

NOTE:
The following checklist is illustrative only of the procedures commonly utilized by counsel in arbitration matters.

[1] Agreement to Select Neutral Arbitrator

☐ Negotiate agreement by parties to select person to serve as neutral arbitrator.

[2] Petition for Court Appointment of Neutral Arbitrator

☐ If parties cannot agree or if the person selected fails to act as arbitrator:

☐ Prepare petition for court appointment of a neutral arbitrator, together with notice of hearing and other papers on which petition is based [*see Code Civ. Proc. §§ 1281.6, 1290-1290.4*; for a form, *see* § 33.260[1]].

PRACTICE TIP:
List Proposed Arbitrators. The code does not preclude the petitioner from including a list of arbitrators proposed by the petitioner within the petition. Such a list alerts the court as to which side chooses which arbitrators. This may be especially in areas of abuse where some defendants have a stable of arbitrators, and the choice of one would be disastrous to any plaintiff. The courts are becoming more familiar with defense abuses and watching for them. *By Michael S. Fields*

☐ Serve and file petition, notice, and other papers [*see Code Civ. Proc. §§ 86, 1292, 1292.6* (venue and jurisdiction); for discussion, *see Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.43[3], [4]*].

☐ Opposition to petition for court appointment of neutral arbitrator:

☐ Prepare response to the petition, setting forth any denials and defenses [*see Code Civ. Proc. §§ 1290, 1290.6, 1290.8*].

☐ Serve and file response.

☐ Attend hearing:

☐ Present evidence [*see Code Civ. Proc. § 1290.2* (summary hearing)].

☐ Submit jointly with other parties to arbitration list of persons proposed as nominees, if agreement can be reached on list [*see Code Civ. Proc. § 1281.6*].

☐ Nomination by Court:

☐ Court gives notice to parties of five nominees [*see Code Civ. Proc. § 1281.6*; *see also Cal. Rules of Ct., Rule 10.781* (information about each neutral that is required to be included on court-supplied list)].

☐ Hearing may be continued for five days after parties receive court's notice of nominees, so that parties can try to select neutral arbitrator [*see Code Civ. Proc. § 1281.6*].

☐ If the parties cannot reach agreement as to the selection:

☐ Attend the hearing on continued date.

☐ Court makes appointment from list of nominees [*see Code Civ. Proc. § 1281.6*; for a form, *see § 33.60[2]*].

[3] Disqualification of Arbitrator

☐ Review disclosures made by arbitrator:

☐ Information that might bring impartiality into questions, which arbitrator must disclose within 10 calendar days of service of notice of nomination or appointment [*Code Civ. Proc. § 1281.9(a), (b)*; for discussion *see § 33.14[1]*].

☐ Information regarding prior or pending cases in which arbitrator served as arbitrator, attorney-client relationships, personal, and professional relationships, which arbitrator must disclose within 10 calendar days of appointment [*see Code Civ. Proc. §§ 1281.9(a)(3)-(6), 1281.95(a)*; for discussion, *see § 33.14[3], [4]*].

☐ Existence of ground for disqualification of judge under *Code Civ. Proc. § 170.1*, which arbitrator must disclose within 10 calendar days of service of notice of nomination or appointment [*Code Civ. Proc. § 1281.9(a)(1), (b)*; for discussion *see §§ 33.14[1]* and *33.15*].

☐ Any matters required to be disclosed by the ethics standards for neutral arbitrators adopted by the Judicial Council, which arbitrator must disclose within 10 calendar days of service of notice of nomination or appointment [*Code Civ. Proc. § 1281.9(a)(2), (b)*; for discussion *see § 33.14[2]*].

☐ If desired, prepare and file notice of disqualification [for forms, *see §§ 33.61, 33.62*] of first court-appointed neutral arbitrator without cause within 15 calendar days of:

☐ Arbitrator's failure to make *Code Civ. Proc. § 1281.9(a)* or *1281.95* disclosures; or

☐ Service of the disclosure statement under *Code Civ. Proc. § 1281.9(a)* or *1281.95*.

NOTE:
Disqualification of subsequent appointees can only be by petition and for cause [*Code Civ. Proc. § 1281.91(b)(2)*].

☐ If desired, demand that arbitrator to disqualify himself or herself:

☐ On grounds specified in *Code Civ. Proc. § 170.1* (disqualification of judge) [*see Code Civ. Proc. § 1281.91(d)*, for discussion, *see § 33.15*].

☐ Make demand before conclusion of arbitration [*see Code Civ. Proc. § 1281.91(d)* (provision not applicable to arbitration proceedings conducted under collective agreement)].

Legal Topics:

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AUTHOR: Michael S. Fields Editorial Consultant

§ 33.51 Discovery

Although formal discovery is not available in contractual arbitration unless the parties' agreement provides for it, or unless the case involves personal injury, wrongful death [*see Code Civ. Proc. § 1283.1, 1283.05* (discussed at *§ 33.25*)] or an uninsured motorist claim [*Ins. Code § 11580.2(f)(3)-(7)*], informal discovery is essential. For forms and procedure in conducting discovery, see Ch. 190- 200, *Discovery* , and Ch. 535, *Subpoena* . Develop a discovery plan as early as possible [*see Code Civ. Proc. § 1282.2* (discussed at *§§ 33.27, 33.71*; you may have to response to a demand for witnesses and documents 45 days before the hearing)] by

- ☐ Examining the pleadings, including affirmative defenses and cross-complaints, if any.
- ☐ Thoroughly interviewing of the parties and witnesses available to you.
- ☐ Understanding your position.
- ☐ Understanding the probable position of your adversary.
- ☐ Determining, if possible, what evidence exists.

Consider the following types of evidence and discovery methods:

- ☐ Photographs. Examine photographs for lighting and perspective. Understand what the photographs was meant to show and how it was set up. If possible, obtain photographs of the same thing over time, especially anything with regard to which damages are sought.

☐ Medical imagery, such as x-rays, ultra-sound, MRI. Understand the perspective from which they were taken. If necessary, have an expert [radiologist] interpret them for you.

☐ Physical evidence: examine it and determine how it fits in with other evidence. Any inconsistencies?

☐ Official documents, e.g., accident reports, licensing information, DMV ownership record.

☐ Interrogatories, requests for admission, requests for production of documents, such as bills, invoices, reports. Again, examine all documentary evidence for internal inconsistencies or inconsistencies with other evidence. If a document has been handled by different people over time, obtain a copy from each of them and examine the copies for changes.

☐ Depositions or less formal statements or interviews.Begin with generalities and allow the witness to narrate as much as they want. Determine everything that witness knows, including the existence and location of other witnesses, documentary and/or physical evidence, photographs, etc. If the witness has physical or documentary evidence, try to obtain it. Do background checks on both your witnesses and opposing witnesses, including expert.

☐ Maps that may be significant.

☐ Time lines and dates that may be of significance

☐ Expert witnesses, both yours and your adversary's: obtain their resumes or curriculum vitae as soon as possible. Investigate them through professional associations, on the Internet, through licensing agencies, and through any network you may have.

☐ Your expert witness: make sure there are no skeletons in his or her closet. Pay him or her an interview fee, thus assuring he or she is no longer available to be the opposition's expert. Be careful what you give your expert to form his or her opinion: everything in an expert's file is discoverable.

☐ Your adversary's expert(s): seek and review prior depositions of the adversary's expert(s) and court transcripts of their prior testimony. Read any books and article the adversary's expert(s) have published. Look for skeletons in his or her closet. Obtain the expert's file.

Revise your discovery plan as the case develops.

Once you believe you have everything you need to establish your case, and everything the opposition has to support its case, determine whether there is reason NOT to use some of this information as evidence. Much evidence has some unfavorable aspect and it is not appropriate to "over try" your case.

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Michael S. Fields Editorial Consultant

§ 33.52 Notice That Amount in Controversy Exceeds $50,000

If the aggregate amount in controversy exceeds $50,000, so inform the arbitrator, in writing by personal service or registered or certified mail [*see Code Civ. Proc. § 1282.2(a)(1)*]. This will trigger other requirements, as discussed at *§§ 33.27[3] -[4], 33.70*, and *33.71*. This requirement is not applicable to matters arising out of collective-bargaining agreements, actions involving personal injury or death, or as provided in the parties' agreement to arbitrate [*Code Civ. Proc. § 1282.2(a)(2)*].

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AUTHOR: Michael S. Fields Editorial Consultant

§ 33.53 Demand for List of Witnesses and Documents

If the requirements of *Code Civ. Proc. § 1282.2(a)(2)* have been triggered [*see § 33.52, above*], the arbitrator will give 60 days notice of the time and place of the arbitration hearing. Within 15 days of receipt of that notice, demand from the other parties a list of documents and witnesses each intends to introduce at the arbitration hearing [*see Code Civ. Proc. § 1282.2(a)(2)*; §§ 33.27[4], 33.71].

The demand must be in writing and served personally or by registered or certified mail. A copy of the demand must be served on the arbitrator.

Obviously, if you are served with a demand for a list of documents and witnesses, respond to it [*see Code Civ. Proc. § 1282.2(a)(2)*; § 33.27[4]].

A copy of a response to the demand also must be served on the arbitrator.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral Overview

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Chapter 33 CONTRACTUAL ARBITRATION: APPOINTMENT OF ARBITRATOR AND CONDUCT OF PROCEEDING
PART IV. PROCEDURAL CHECKLIST

4-33 California Forms of Pleading and Practice--Annotated § 33.54

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.54 Arbitration Book

Prepare an arbitration book. The arbitration book will be your guide during the arbitration hearing. A copy should be given to the arbitrator(s), at least a few days before the arbitration hearing (or not, depending on the arbitrator(s)' preference and practice), to orient them, to help save time in their understanding and evaluation of the case, and so they will have available at their fingertips the evidence you think is most persuasive. You may wish to give your client a copy of the arbitration book. In some cases, providing your opponent with a copy may enhance your ability to settle the matter.

The arbitration book contains the following:

- ☐ A table of contents. Consider formatting parts of it to parallel any response to demand for list of witnesses and documents [*see Code Civ. Proc. § 1282.2(a)(2)*].
- ☐ An arbitration brief that sets forth
  - ☐ The caption,
  - ☐ The parties and their attorneys,
  - ☐ A brief statement of the procedural position of the case, including mention any relevant stipulations, copies of which should be provided in the Pleadings section of the book.

☐ A statement of the facts. Each fact should be cross referenced to the evidence that establishes it, e.g., Deposition of _____, page _____ line _____ through page _____, line _____.

☐ The damages sought (non-economic injuries, property damage, loss of earnings). Summarize each component of damages and total them.

☐ Contentions, if desired,

☐ Points and authorities, if necessary or desired; usually only necessary if there is some unusual aspect of law involved. Consider using standardized jury instructions to set forth the relevant points of law.

☐ The pleadings or other documents that frame the issues.

☐ Official records. Have them certified.

☐ Deposition transcripts or excerpts from them: Highlight the portions you want the arbitrator to read.

☐ Written documents or responses to demand or discovery.

☐ Medical records, reports, and bills.

☐ Maps or diagrams. Official government maps can be judicially noticed.

☐ Experts' reports. Include the expert's curriculum vitae and the information to lay the foundation for the expert's conclusions, i.e., any other documents relied on by the expert to form his or her opinion.

☐ Photographs.

☐ Calendars or time lines.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration Agreements

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4-33 California Forms of Pleading and Practice--Annotated § 33.55

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.55 Prepare Client and Witnesses

At some point before the arbitration hearing, have a full discussion with your client so your client fully understands the following:

☐ His or her case, position, and points to be presented, including the strengths and weaknesses of the case.

☐ The opposition's position and probable points to be presented and/ or rebutted.

☐ The probabilities that you can prevail and the chances of losing.

☐ Whether you want to consider or settlement; whether to initiate settlement discussions, and how to respond if the opposition initiates settlement discussions.

☐ Whether you wish to consider mediation at this point.

☐ Whether you are ready for arbitration.

If you are representing a defendant, consider whether to let your client's default be taken. This will be appropriate only when there is a possibility of a much larger plaintiff's award if the arbitration goes to full hearing or if there is the possibility of damaging disclosures, publicity, or breach of privacy.

Prepare your client and other witnesses to be a witness, by going over their testimony and reminding them of the

following:

- ☐ Be sure you hear each question.
- ☐ Be sure you understand each question.
- ☐ Answer precisely and literally the question asked.
- ☐ The briefest possible answer is the best answer. Use one word answers whenever possible, e.g., "Yes." "No." "Left." Right."
- ☐ Never anticipate what the next question might be.
- ☐ Do not try to remember any answers to any prior questions.
- ☐ Your job is to treat each question as a distinctly separate question.
- ☐ If you do not remember something or you do not know something, the responses that are appropriate are "I do not remember" or "I do not know." If you remember the answer later, tell me at the next break.
- ☐ Do not nod, point, grunt, or use your hands to show size. Your testimony must be spoken.
- ☐ Do not guess at an answer.
- ☐ Do not react in any manner to the person asking the questions, whether friendly or unfriendly and argumentative.
- ☐ If you need a break during your testimony, say so.
- ☐ If your testimony is going smoothly when the other side is questioning you, I will probably be quiet. If I speak up, you should stop talking immediately. Do not even finish the word you are saying. I will make the objection and we will continue from there.
- ☐ Do not be thrown if you break one of these rules. Just go on and do your best. If you dwell on a mistake, it will take your mind off the current question and your answer to it.

Consider how to handle any potentially damaging evidence.It is generally less damaging if you bring out potentially damaging evidence than if the opposition presents its. Tell your client this, so the client understands why you will be brining out this matter and is prepared for it.

Determine whether any of your witnesses have language problems or cultural differences that may cause confusion and

if so, how to handle them.

If you need an interpreter, consider arranging for the interpreter to both prepare the witness and to be at the arbitration hearing. Explain the expense and necessity for it to the client and consider whether this is so significant that you should settle the case rather than go forward.

Either use someone the witness is familiar with and get the opposition to agree [by written stipulation] that someone other than a certified interpreter will be acting as interpreter or use a certified interpreter, certified in the language he or she will be translating.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration Agreements

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4-33 California Forms of Pleading and Practice--Annotated § 33.56

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.56 Pre-arbitration Conference

A pre-arbitration conference is a common practice among arbitrators so that preliminary matters can be discussed/arranged, such as scheduling, procedure. A good time to give the arbitrator(s) your arbitration book. Additional discussion is likely to focus on the following:

- ☐ The pleadings.
- ☐ The status of the process of the case.
- ☐ The factual basis of the claims.
- ☐ Affirmative defenses.
- ☐ Pre-arbitration conference can be in person or by phone (conference call).

Certified court reporter. There is no requirement for or prohibition against a party having an arbitration hearing reported [*Compare Cal. Rules of Ct., Rule 3.824(b)* (in judicial arbitration no record shall be made of arbitration hearing and arbitrator shall not permit court reporter except one to make nondiscoverable record of proceedings for arbitrator alone)]. If you want one, tell the arbitrator and the opposing party.

If the arbitrator does not have a pre-arbitration conference, you can contact the arbitrator's office to get information as to the procedures the arbitrator follows. It would be an improper ex parte communication to speak to the arbitrator, but communication with office staff about these matters is permissible.

Any stipulation or agreement between the parties regarding procedure can be given to the arbitrator at the pre-arbitration conference.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration Agreements

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4-33 California Forms of Pleading and Practice--Annotated § 33.57

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.57 Arbitration Hearing

NOTE:
The neutral arbitrator appoints time and place of hearing and serves notice of hearing on parties and on other arbitrators [*see Code Civ. Proc. § 1282.2(a)*; for forms, *see § 33.70*].

☐ Attend the arbitration hearing.

☐ Discuss preliminary agreements regarding scheduling, procedure, and evidence. This includes determining number of witnesses, order of witness, and likely amount of time required for each.

☐ Unless sufficiently addressed in your arbitration brief, counsel may with to have prepared a witness list with summary of testimony.

☐ If not presented to the arbitrator at a pre-arbitration conference, present any stipulations or agreements between the parties regarding procedure and evidence.

☐ Either side may present it's evidence first. It may save time to try an affirmative defense first, if that could dispose of the entire matter.

☐ Opening statements if desired. Pre-arbitration conference and/or arbitration briefs may make opening statements unnecessary, but counsel should be prepared to make on opening statement.

☐ Present evidence. Remember proper foundations for documentary, photographic, and physical evidence.

☐ Usual order of examination of each witness is as follows:

☐ Direct examination.

☐ Cross examination. Do not cross examine a witness unless there is a need to cross examine that witness. If the witness has not made any points that were damaging or harmful to your case, avoid the temptation to cross-examine just to look like you are doing your job.

☐ Redirect examination, if necessary.

☐ Rebuttal, if necessary.

☐ Closing argument. You can only argue from evidence you have presented.

☐ Award:

☐ Arbitrators make their award and serve signed copies on parties to the arbitration [*see Code Civ. Proc. §§ 1283.4-1283.8*; for a form, *see § 33.72*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsEvidenceTestimonyExaminationGeneral Overview

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4-33 California Forms of Pleading and Practice--Annotated § 33.58

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.58 Correction or Amendment of Award

☐ Apply to the arbitrators for correction of the award, if desired, within 10 days of being served with award [*see Code Civ. Proc. §§ 1284, 1286.6(a), (c)*]:

☐ Prepare application to correct the award with the arbitrators [*see Code Civ. Proc. § 1284*; for a form, *see § 33.73*].

☐ Deliver or mail application to all other parties at same time as or before making application to arbitrators.

☐ Oppose petition for correction of award, if desired, within 10 days of delivery or mainling of application for correction:

☐ Prepare written objection to the application [*see Code Civ. Proc. § 1284*].

☐ Deliver or mail objection to all other parties at same time as or before making objection to arbitrators.

☐ If arbitrators do not deny application or correct award and serve signed copy of such denial or correction on parties within 30 days of service of original award on the applicant, the application for correction is deemed denied [*see Code Civ. Proc. § 1284*].

☐ Arbitrators also have the power to amend an award, before it is confirmed, on their own initiative [*see* discussion at *§ 33.28[6]*].

☐ If you believe the arbitrator has inadvertently neglected to include an issue or party in the award, inform the arbitrator and opposing parties and request amendment as soon as possible.

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4-33 California Forms of Pleading and Practice--Annotated § 33.59

AUTHOR: Michael S. Fields Editorial Consultant

[Reserved]

§ 33.59[Reserved]

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A. Appointment of Arbitrator

4-33 California Forms of Pleading and Practice--Annotated § 33.60

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.60 Petition to Appoint and Order Appointing Neutral Arbitrator [Code Civ. Proc. § 1281.6]

[1] Petition

[a] FORM Petition to Appoint Neutral Arbitrator [Code Civ. Proc. § 1281.6]--Petition

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION TO APPOINT ARBITRATOR
_____ [*name*],	)	[LIMITED CIVIL CASE]
Petitioner,	)	[Amount demanded _____
vs.	)	(exceeds *or* does not exceed) $10,000]
_____ [*name*],	)	Date: _____
Respondent.	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

Petitioner alleges:

[*EITHER*]

1. The agreement herein alleged _____ [is to be performed *or* was made] in _____ County, California.

[*OR*]

1. The agreement herein alleged does not specify a county where it is to be performed and was not made in California. _____ [*Identify party, e.g.,* Petitioner] _____ [resides *or* has a place of business] in _____ County, California.

[*CONTINUE*]

2. On or about _____ [*date*], petitioner and respondent entered into a written agreement ("Agreement"), by which it was agreed that _____ [*set forth the general nature of the agreement*]. Paragraph _____of the agreement provides for arbitration of _____ [*describe the controversies subject to arbitration*]. The Agreement _____ [provides for the selection of arbitrators in the following manner: _____ (*specify*) *or* does not provide a method for appointing an arbitrator]. A copy of the Agreement is attached as Exhibit "A" and made a part of hereof.

3. On or about _____ [*date*], a controversy arose between petitioner and respondent over _____ [*describe controversy*]. Petitioner and respondent are required by the Agreement [and by an order by this court dated _____] to arbitrate that controversy.

[*EITHER*]

4. Petitioner and respondent have been, and still are, unable to agree on the method of appointing an arbitrator and there is no agreed method for an appointment.

[*OR*]

4. The method agreed on by petitioner and respondent for the appointment of an arbitrator has failed and cannot be followed bercause _____ [*state reasons why agreed method cannot be followed*].

[*OR*]

4. _____ [*Name*] was duly appointed as arbitrator on _____ [*date*], but has failed to act as an arbitrator and his/her successor has not been appointed.

[*CONTINUE*]

WHEREFORE, petitioner prays this court, pursuant to the provisions of *Code of Civil Procedure Section 1281.6*, to nominate five persons qualified to act as arbitrators; to notify petitioner and respondent of those nominees; and, if petitioner and respondent have failed within five days to agree on a neutral arbitrator, to appoint a neutral arbitrator

from those nominees.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[b] Use of Form

The form of petition in [a], *above,* is for use in obtaining a court order appointing an arbitrator when the parties to an arbitration agreement are unable to do so. An oral agreement to appoint a particular arbitrator in derogation of the parties' written agreement providing for another arbitrator or arbitration provider organization is not enforceable. An arbitrator's powers derive from, and cannot exceed, the contract to arbitrate and the parties' submission to arbitration. Thus, election of an arbitrator who is not authorized by the arbitration contract confers no authority on the person selected [*Magness Petroleum Company v. Warren Resources of California, Inc. (2002) 103 Cal. App. 4th 901, 907-909, 127 Cal. Rptr. 2d 159* (alleged oral agreement was not enforceable as stipulation); *American Home Assurance Co. v. Benowitz (1991) 234 Cal. App. 3d 192, 200-201, 285 Cal. Rptr. 626]* .

[c] Allegations

A petition to appoint an arbitrator should allege facts showing [*see Code Civ. Proc. § 1281.6*]:

- A written agreement to arbitrate (Paragraph 2).
- The agreement does or does not provide for the manner of appointing an arbitrator (Paragraph 2).
- The controversy that is subject to arbitration (Paragraph 3).
- Either there is no agreed method for appointing an arbitrator or the method agreed on has failed for specified reasons or an arbitrator appointed by the parties has failed to act and his or her successor has not been appointed (Paragraph 4).

The petition also alleges facts to show that the court and the county in which the petition is filed has proper jurisdiction and venue (Paragraph 1) [*see Code Civ. Proc. §§ 85, 86(a)(10)(A), 1292*].

In the prayer the petition requests that the court nominate five persons as possible arbitrators and notify the parties of the nominees, and to appoint the arbitrator if the parties do not agree to one within five days after that notice [*see Code Civ. Proc. § 1281.6*].

[d] Copies

The following copies of the petition should be prepared:

- Original to be filed in the court and conformed copy for the court to stamp and return.
- One copy to be served on each of the other parties.
- One copy for the client, if desired.
- One office file copy.

- Other copies as desired.

[e] Service

A copy of the petition and a written notice of time and place of the hearing and any other papers on which the petition is based are to be served in the manner provided in the arbitration agreement, if it so provides [*Code Civ. Proc. § 1290.4(a)*].

If the arbitration agreement does not provide the manner of service and the person on whom service is to be made has neither previously appeared in the proceeding nor been served in the following manner, service within the state is to be performed in the manner provided by law for the service of summons in an action [*Code Civ. Proc. § 1290.4(b)(1)*; *see Code Civ. Proc. §§ 413.10-417.40* (governing service of summons)]. Service outside the state is to be made by registered or certified mail [*Code Civ. Proc. § 1290.4(b)(2)*].

If the arbitration agreement does not provide the manner in which service is to be made and the person to be served has previously appeared in the proceeding or has previously been served in accordance with *Code Civ. Proc. § 1290.4(b), above*, service is to be made in the manner provided in *Code Civ. Proc. §§ 1010-1020*, governing service of papers other than summons [*Code Civ. Proc. § 1290.4(c)*].

For procedure and forms dealing with service generally, see Ch. 518, *Service of Summons and Papers* .

[f] Jurisdiction and Venue

Jurisdiction and venue of petitions to appoint an arbitrator are the same as on a petition to compel arbitration [*see Code Civ. Proc. § 1292*]. For discussion, see *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.91[1][f], [g]*.

[g] Cross References

For further discussion relating to proceedings for court appointment of an arbitrator, see *§ 33.13[2]*

[2] Order Appointing Neutral Arbitrator [Code Civ. Proc. § 1281.6]

[a] FORM Petition to Appoint Neutral Arbitrator [Code Civ. Proc. § 1281.6]--Order Appointing Neutral Arbitrator [Code Civ. Proc. § 1281.6]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Petitioner,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Dept.: _____
Respondent.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The petition of _____ [*name*] for an order appointing an arbitrator came on regularly for hearing by the court on _____ [*date*], and was continued until _____ [*date*]. Petitioner _____ [*name*] appeared by his/her/its counsel _____ [*name*] and respondent _____ [*name*] appeared by his/her/its counsel _____ [*name*].

The court having nominated five persons for appointment as arbitrator, namely, _____ [*names*], and the parties having received notice of those nominees on _____ [*date*] and having failed to select an arbitrator within five days thereafter, and proof having been made to the satisfaction of the court that the petition should be granted,

IT IS ORDERED that _____ [*name*] is appointed as arbitrator in the above-entitled matter.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[b] Use of Form

The form of order in [a], *above*, is for use to grant a petition for appointment of an arbitrator. Customarily, the order is prepared by counsel for the petitioner and submitted to the judge at the hearing after the parties have failed to select the arbitrator. The judge will fill in the name of the appointee, sign and date the order, and return it to counsel for service and filing.

[c] Contents

The order recites that the court nominated five persons to be selected as arbitrator and that the parties failed to select an arbitrator within five days after receipt of notice of the nominees. The order then directs that one of the nominees is appointed as arbitrator [*Code Civ. Proc. § 1281.6*].

[d] Copies

The order should be prepared in the same number of copies as the petition [*see* [1][d], *above*].

[e] Procedure

Code Civ. Proc. § 1281.6 contemplates two stages of the hearing:

- At the first stage the court nominates five persons from lists which are either jointly submitted by the parties to the arbitration or are submitted by a governmental agency or a private disinterested association concerned with arbitration. The court then continues the hearing for at least five days after the parties have received notice of the nominees so that they may select an arbitrator (which need not be one of the nominees).

- At the subsequent stage of the hearing the court determines whether or not the parties have selected the arbitrator and, if not, appoints one of the nominees as arbitrator.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute

ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration Agreements

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PART V. FORMS
A. Appointment of Arbitrator

4-33 California Forms of Pleading and Practice--Annotated § 33.61

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.61 Notice of Disqualification--Disqualification of Proposed Neutral Arbitrator of Claim for Damages [Code Civ. Proc. § 1281.9(a), 1281.91(a), (b)(1)]

[1] FORM Notice of Disqualification--Disqualification of Proposed Neutral Arbitrator of Claim for Damages [Code Civ. Proc. § 1281.9(a), 1281.91(a), (b)(1)]

In the Matter of the Arbitration Between	)	
_____ [*name*],	)	NOTICE OF DISQUALIFICATION OF ARBIT-
vs.	)	RATOR
_____ [*name*].	)	
	)	

To _____ [*name of each party*] and their attorneys and to the _____ [arbitrator(s) *or* persons proposed for _____ (nomination *or* appointment) as neutral arbitrators] herein:

NOTICE IS HEREBY GIVEN that _____ [*name*], who has been proposed for _____ [nomination *or* appointment] as a neutral arbitrator herein, is disqualified as a neutral arbitrator in these proceedings.

[*EITHER, if disqualification is under Code Civ. Proc. § 1281.91(a) and Cal. Rules of Ct., Appen., Div. VI, Standard 10(a)(1) for noncompliance with disclosure requirements*]

The disqualification is made on the ground that _____ [*name*] failed to comply with the requirements set forth in subdivision (a) of *Code of Civil Procedure Section 1281.9*, in that _____ [*state manner of*

noncompliance, e.g., he/she failed to disclose that on or about August 25, 2004, approximately 14 months prior to October 27, 2005, the date he/she was nominated for appointment as a neutral arbitrator herein, an award was rendered in an arbitration in which he/she served as a party arbitrator on behalf of _____ (*name*), the opposing party in these proceedings].

[*OR, if disqualification is under Code Civ. Proc. § 1281.91(b)(1) and Cal. Rules of Ct., Appen., Div. VI, Standard 10(a)(2)-(3) (disqualification based on disclosure statement)*]

The disqualification is made on the ground that the disclosure statement served by _____ [*name*] on _____ [*date*] discloses _____ [*set forth grounds for disqualification, e.g.,* that on or about August 25, 2004, approximately 14 months prior to October 27, 2005, the date he/she was nominated for appointment as a neutral arbitrator herein, an award was rendered in an arbitration in which he/she served as a party arbitrator on behalf of _____ (*name*), the opposing party in these proceedings].

[*CONTINUE*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
_____ [*party's status and name*]

[2] Use of Form

The form in [1], *above,* is for use by a party to give notice of disqualification of a proposed neutral arbitrator [*see Code Civ. Proc. § 1281.91(a), (b)(1)*; Cal. Rules of Ct., Appen., Div. VI, Standard 10(a)(1)-(3)]. The right to disqualify a proposed neutral arbitrator in accordance with *Code Civ. Proc. § 1281.91* cannot be waived by agreeing to arbitrate in accordance with rules that provide some other means of determining whether the proposed neutral arbitrator should be disqualified. The statutory scheme exists primarily to serve the public purpose of promoting public confidence in the arbitration process and does not allow an individual right of waiver to take precedence [*Azteca Constr., Inc. v. ADR Consulting, Inc. (2004) 121 Cal. App. 4th 1156, 1166-1168, 18 Cal. Rptr. 3d 142]* .

It appears that the form may also be modified for use in disqualifying a court-appointed arbitrator under *Code Civ. Proc. § 1281.91(b)(2)*. The statute does not, however, specifically state whether the disqualification in that case is also by means of notice of disqualification.

For further discussion of the disclosure and disqualification provisions under *Code Civ. Proc. § 1281.91*, see *§ 33.14[3]*. Disclosure requirements and disqualification procedures under the Ethics Standards [Cal. Rules of Ct., Appen., Div. VI, Standards 7, 8, and 10] are discussed at *§ 33.14[2]*.

[3] Statement of Grounds for Disqualification

Neither *Code Civ. Proc. § 1281.91(b)(1)* nor Cal. Rules of Ct., Appen., Div. VI, Standard 10(a)(2)-(3) expressly state whether a party is required to set forth the grounds for disqualification in the notice [*compare* Cal. Rules of Ct., Appen., Div. VI, Standard 10(a)(4) (notice of disqualification based on material omission or misrepresentation in disclosure must clearly describe omission or misrepresentation and how and when party became aware of it)]. When the disqualification is of a court-appointed neutral arbitrator, *Code Civ. Proc. § 1281.91(b)(2)* provides for one disqualification of right, but that any additional disqualifications must be for cause. Thus, if the party seeking the

disqualification has already exercised the right to disqualify a court-appointed neutral arbitrator, the grounds will have to be given. Otherwise counsel should consider whether or not to state the grounds.

[4] Contents

The first alternative in the form gives notice of disqualification on the ground that the person proposed for nomination by the parties, or proposed for appointment by the court on petition of a party under *Code Civ. Proc. § 1281.6*, failed to comply with the disclosure requirements stated in *Code Civ. Proc. § 1281.9* or Cal. Rules of Ct., Appen., Div. VI, Standard 7 or 8 [*see Code Civ. Proc. § 1281.91(a)*; Cal. Rules of Ct., Appen., Div. VI, Standard 10(a)(1)].

The second alternative gives notice of disqualification based on a disclosure statement submitted by the proposed nominee or appointee that complies with *Code Civ. Proc. § 1281.9* and Cal. Rules of Ct., Appen., Div. VI, Standard 7 or 8 [*see Code Civ. Proc. § 1281.91(b)(1)*; Cal. Rules of Ct., Appen., Div. VI, Standard 10(a)(2)], or that complied except that it was served after the time required by *Code Civ. Proc. § 1281.9(b)* [*see Code Civ. Proc. § 1281.91*; Cal. Rules of Ct., Appen., Div. VI, Standard 10(a)(3)].

[5] Service

When the notice for disqualification is based on the noncompliance provision, the party entitled to receive the disclosure must serve the notice within 15 calendar days after the proposed nominee or appointee fails to comply [*see Code Civ. Proc. § 1281.91(a)*; Cal. Rules of Ct., Appen., Div. VI, Standard 10(a)(1)].

When the notice for disqualification is based on a disclosure statement that complies with the disclosure requirements, the party entitled to receive the disclosure must serve the notice within 15 calendar days after service of the disclosure statement [*see Code Civ. Proc. § 1281.91(b)(1)*; Cal. Rules of Ct., Appen., Div. VI, Standard 10(a)(2)]. When notice of disqualification is based on a disclosure statement that was served after the time required in *Code Civ. Proc. § 1281.9(b)*, it is not clear when the notice disqualification must be served. If the arbitrator serves a disclosure statement late, that would constitute failure to comply with *Code Civ. Proc. § 1281.9(b)* and would seem to be within *Code Civ. Proc. § 1281.91(a)*, which requires that the notice of disqualification be served within 15 calendar days of the failure to comply. Cal. Rules of Ct., Appen., Div. VI, Standard 10(a)(3) refers to a disclosure statement that is served more than 10 calendar days after notice of service of the proposed nomination or anointment "and is based on that statement," which seems to imply that a notice of disqualification would be timely if served within 15 days of receipt of the late disclosure statement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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PART V. FORMS
A. Appointment of Arbitrator

4-33 California Forms of Pleading and Practice--Annotated § 33.62

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.62 Notice of Disqualification--Disqualification of Arbitrator of Claim Involving Residential Construction or Improvement Contract [Code Civ. Proc. § 1281.95(c)]

[1] FORM Notice of Disqualification--Disqualification of Arbitrator of Claim Involving Residential Construction or Improvement Contract [Code Civ. Proc. § 1281.95(c)]

[Caption. *See § 33.61[1], above*.]

To _____ [*name of each party*] and their attorneys and to the arbitrator herein:

NOTICE IS HEREBY GIVEN that _____ [*name*], arbitrator herein, is disqualified as a neutral arbitrator in these proceedings.

[*EITHER, if disqualification is for noncompliance with disclosure requirement under Code Civ. Proc. § 1281.95(a)*]

The disqualification is made on the ground that _____ [*name*] failed to comply with the requirements set forth in *Code of Civil Procedure Section 1281.95,* in that _____ [*state manner of noncompliance, e.g.,* he/she failed to disclose that for a period of about three years, beginning on or about January 31, 1992, until on or about February 2, 1995, _____ (*name*) served as an attorney for _____ (*name*), the opposing party in these proceedings].

[*OR, if disqualification is based on disclosure by the arbitrator of affiliation with a party or selection or designation by a party as an arbitrator in another arbitration*]

The disqualification is made on the ground that the disclosure statement served by _____ [*name*] on _____ [*date*] discloses _____ [*set forth grounds for disqualification*].

[*CONTINUE*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
_____ [*party's status and name*]

[2] Use of Form

The form in [1], *above,* is for use by a party to give notice of disqualification of an arbitrator in a binding arbitration of a claim for more than $3,000 pursuant to a contract for the construction or improvement of residential property consisting of one to four units [*see Code Civ. Proc. § 1281.95*]. For discussion, *see § 33.14[4]*.

[3] Contents

The first alternative in the form gives notice of disqualification on the ground that the arbitrator failed to comply with the disclosure requirements stated in *Code Civ. Proc. § 1281.95(a)* [*see Code Civ. Proc. § 1281.95(b)*].

The second alternative gives notice of disqualification on the ground that the arbitrator disclosed an affiliation with either party or that he or she has been selected or designated as an arbitrator by either party in another arbitration [*Code Civ. Proc. § 1281.95(b)*].

[4] Service

Notice of disqualification must be served within 15 days after the arbitrator makes the required disclosures or fails to comply [*Code Civ. Proc. § 1281.95(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewReal Property LawConstruction LawContractsCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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PART V. FORMS
A. Appointment of Arbitrator

4-33 California Forms of Pleading and Practice--Annotated §§ 33.63-33.69

AUTHOR: Michael S. Fields Editorial Consultant

[Reserved]

§§ 33.63[Reserved]

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PART V. FORMS
B. Conduct of Arbitration Proceeding

4-33 California Forms of Pleading and Practice--Annotated § 33.70

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.70 Notice of Arbitration Hearing [Code Civ. Proc. § 1282.2(a)(1)]

[1] FORM Notice of Arbitration Hearing [Code Civ. Proc. § 1282.2(a)(1)]

In the Matter of the Arbitration Between	)	
_____ [*name*],	)	NOTICE OF HEARING
vs.	)	
_____ [*name*].	)	
	)	

To _____ [*name of each party*] and their attorneys and to the arbitrators appointed herein:

NOTICE IS HEREBY GIVEN that a hearing of the above entitled arbitration matter will be held on _____ [*date*], at _____ [*time*], at _____ [*street address*], _____ [*city*], California.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]
Arbitrator

[2] Use of Form

The form in [1], *above,* is a notice for use by the neutral arbitrator in notifying the parties of the time and place appointed for the hearing [*see Code Civ. Proc. § 1282.2(a)(1), (2)*].

If the arbitration is being administered by a provider, such as the American Arbitration Association, the provider may have its own form of notice of hearing that the arbitrator will use.

[3] Copies

The following copies of the notice of hearing should be prepared:

- Original for the files of the neutral arbitrator.
- One copy for each party to the arbitration and each of the other arbitrators.

[4] Time for Notice

[a] Seven-Day Notice

Generally, the neutral arbitrator is required to appoint a time and place for the hearing and cause notice of the hearing to be served personally or by registered or certified mail on the parties to the arbitration and on the other arbitrators not less than seven days before the hearing, unless the parties agree otherwise [*Code Civ. Proc. § 1282.2(a)(1)*]. If the arbitration agreement incorporated the rules of an arbitration service provider, those rules may include different time limits. For example, Section 21 of the Commercial Arbitration Rules of the American Arbitration Association provides that the arbitrator shall fix the time and place for each hearing and that the Association mails to each party notice of the hearing at least five days in advance, unless the parties by mutual agreement waive notice or modify the terms of notice.

[b] Sixty-Day Notice

If a party notifies the abritrator that the aggregate amount in controversy exceeds $50,000, the neutral arbitrator must give 60 days notice. This requirement does not apply if the matter arises from a collective-bargaining agreement, involves personal injury or death, or if the parties' agreement is to the contrary. To invoke the 60-day notice provision, the party must notify the arbitrator by personal service or registered or certified mail [*Code Civ. Proc. § 1282.2(a)(2)*]. When the 60-day notice requriement applies, the parties also have the right to demand witness lists [*Code Civ. Proc. § 1282.2(a)(2)*; for a form of demand, see *§ 33.71*].

[5] Cross References

For further discussion of notice of hearing, see *§ 33.27[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration Agreements

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B. Conduct of Arbitration Proceeding

4-33 California Forms of Pleading and Practice--Annotated § 33.71

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.71 Demand for List of Witnesses and List of Documents [Code Civ. Proc. § 1282.2(a)(2)]

[1] FORM Demand for List of Witnesses and List of Documents [Code Civ. Proc. § 1282.2(a)(2)]

In the Matter of the Arbitration Between	)	
_____ [*name*],	)	DEMAND FOR LIST OF WITNESSES AND LIST
vs.	)	OF DOCUMENTS
_____ [*name*].	)	
	)	

_____

To _____ [*name of party*],

You are requested to provide a list of witnesses you intend to call, designating which witnesses will be called as expert witnesses, and a list of documents you intend to introduce at the hearing. Your failure to list a witness or document will bar the testimony of the unlisted witness or the introduction of the undesignated document at the hearing unless good cause is shown, as determined by the arbitrator.

A list of witnesses that the requesting party intends to call and a list of documents that the requesting party intends to introduce at the hearing is attached to this demand.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for _____ [*name of party*]

[2] Use of Form

The form in [1], *above*, is for use by a party to arbitration to demand from the other party a list of witnesses the other party intends to call at the hearing and a list of documents the other party intends to introduce. The demand must be made within 15 days of receipt of the notice of hearing [*Code Civ. Proc. § 1282.2(a)(2)(A)*]. The demand is only available in the limited circumstances when a 60-day notice of hearing has been given [*Code Civ. Proc. § 1282.2(a)(2)*; for discussion, *see § 33.70[4][b]*].

The demand must be in writing and served personally or by registered or certified mail. A copy of the demand and the demanding party's lists must be served on the arbitrator [*Code Civ. Proc. § 1282.2(a)(2)(A)*].

[3] Failure to List Witness or Document

A party who fails to list a witness or a document will be barred from introducing the unlisted witness' testimony or the undesignated document at the hearing, unless the party shows good cause, as determined by the arbitrator, for omission from the requirements of *Code Civ. Proc. § 1282.2(a)(2)(A)* [*Code Civ. Proc. § 1282.2(a)(2)(E)*].

[4] Waiver of Time Limits

Time limits provided by *Code Civ. Proc. § 1282.2(a)(2)* may be waived by mutual agreement of the parties if approved by the arbitrator [*Code Civ. Proc. § 1282.2(a)(2)(D)*].

[5] Cross References

For further discussion of demand for lists of documents and witnesses, see *§ 33.27[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration Agreements

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4-33 California Forms of Pleading and Practice--Annotated § 33.72

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.72 Award of Arbitrators [Code Civ. Proc. § 1283.4]--General Form

[1] FORM Award of Arbitrators [Code Civ. Proc. § 1283.4]--General Form

In the Matter of the Arbitration Between	)	
_____ [*name*],	)	AWARD OF ARBITRATORS
vs.	)	
_____ [*name*].	)	
	)	

Before:

_____ [*Name*], Neutral Arbitrator selected by _____ [*identify court, e.g.*, the Superior Court of California, County of _____]

[_____ (*Name*), Arbitrator selected by _____ (*name of party*)]

[_____ (*Name*), Arbitrator selected by _____ (*name of party*)]

The above named arbitrator(s) duly appointed and selected in this arbitration proceeding, pursuant to the provisions of a contract between _____ [*name*] and _____ [*name*], dated _____, having duly met at the office of _____ [*name*] in _____, California on _____ [*date*], and times prior thereto, and having received and heard the proof of the parties on all the issues between them award as follows:

_____ [*Name*] is required to pay to _____ [*name*] the sum of $_____.

_____ [*Name*] is hereby required to pay the fees of the arbitrator(s) in this proceeding in the sum of $_____.

[_____[*Name*] is hereby required to pay attorney's fees to _____[*name*], pursuant to [_____ *source of authority to order payment of fees, e.g.,* "the aforementioned contract"], in the amount of $_____]

[The compensation of _____ (*name*), official stenographer, is hereby fixed at $_____ for each session at which (s)he took the minutes of this proceeding, as disclosed by the stenographic record, and compensation is to be an expense to be borne equally by both parties.]
Dated: _____.

_____ [*signature*]
[_____ (*signature*)]
[_____ (*signature*)]

[2] Use of Form

The form in [1], *above,* is for use by the arbitrator or arbitrators to make an award [*see Code Civ. Proc. § 1283.4*]. The optional paragraph awarding attorney's fees is to be used only if attorney's fees are awarded under authority granted to the arbitrator to do so.

[3] Contents

An award must be in writing and signed by the arbitrators concurring therein. It includes a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy [Corp. Code 1283.4].

Arbitrators are not required to make findings of facts or give reasons for their awards [*Sapp v. Barenfeld (1949) 34 Cal. 2d 515, 522, 212 P.2d 233* ; *Frantz v. Inter-Insurance Exchange of Auto. Club (1964) 229 Cal. App. 2d 269, 273, 40 Cal. Rptr. 218]* .

Arbitrators may only award attorney's fees if authorized by the contract [*Tate v. Saratoga Savings & Loan Assn. (1989) 216 Cal. App. 3d 843, 856-857, 265 Cal. Rptr. 440* (attorney's fee authorization in judicial action included award in arbitration)] or arbitration agreement [*Kahn v. Chetcuti (2002) 101 Cal. App. 4th 61, 67-68, 123 Cal. Rptr. 2d 606*] or by statute [*see Broughton v. Cigna Healthplans of California (1999) 21 Cal. 4th 1066, 1086-1087, 90 Cal. Rptr. 2d 334, 988 P.2d 67*]. Any authorized award must be included in the final award, or the entitled party must move to correct the award [*see Moore v. Bank of San Luis Obispo (2000) 22 Cal. 4th 782, 788-789, 94 Cal. Rptr. 2d 603, 996 P.2d 706* ; for discussion, *see § 33.29[3][b*]].

[4] Copies

The following copies of the award should be prepared [*see Code Civ. Proc. § 1283.6*]:

- Original for the files of the neutral arbitrator.
- One copy (signed) to be served on each party to the arbitration.

- Other copies as desired.

[5] Time

The award is required to be made within the time fixed for the award by the agreement, or, if not so fixed, within such time as the court orders on petition of a party to the arbitration [*Code Civ. Proc. § 1283.8*]. Rendition of the award within the time specified in the submission agreement is jurisdictional [*Librascope Inc. v. Precision Lodge No. 1600, Internat. Assn. of Machinists (1961) 189 Cal. App. 2d 71, 75* ; *Rusnak v. General Controls Co. (1960) 183 Cal. App. 2d 583, 584, 7 Cal. Rptr. 71]* . The parties, however, may extend the time either before or after it expires. A party waives the objection that an award was not made within the time required unless he or she gives the arbitrators written notice of objection prior to the service of a signed copy of the award on him or her [*Code Civ. Proc. § 1283.8*]. Waiver of the time limitation validates the award made after expiration of the specified time [*Librascope Inc. v. Precision Lodge No. 1600, Internat. Assn. of Machinists (1961) 189 Cal. App. 2d 71, 75*].

[6] Service

The neutral arbitrator is required to serve a signed copy of the award on each party to the arbitration personally or by registered or certified mail, or as provided in the agreement [*Code Civ. Proc. § 1283.6*].

[7] Cross References

For further discussion relating to arbitration awards, see *§ 33.28*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration Agreements

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4-33 California Forms of Pleading and Practice--Annotated § 33.73

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.73 Application to Arbitrators for Correction of Award [Code Civ. Proc. § 1284]

[1] FORM Application to Arbitrators for Correction of Award [Code Civ. Proc. § 1284]

In the Matter of the Arbitration Between	)	
_____ [*name*],	)	APPLICATION FOR CORRECTION OF AWARD
vs.	)	
_____ [*name*].	)	
	)	

To _____ [*name(s)*], arbitrator(s):

Applicant _____ [*name*] prays correction of the award made in the above-entitled matter, dated _____, and _____ [mailed by the neutral arbitrator _____ (*name*) *or* personally served on this applicant] on _____ [*date 10 days or less before the date of the application*]. The grounds and reasons for this application are as follows:

[*LIST all corrections in separate paragraphs, including page and line of the award to be corrected when appropriate to the requested correction, e.g.:*]

1. The award lacks specificity as to which respondents are liable to the claimant, which is likely to cause difficulty in confirming the award and obtaining an enforceable judgment.

2. The award contains a _____ [miscalculation *or* misstatement] at page _____, line _____, which should read _____ [*state correction*] instead of _____ [*quote error in award*].

3. The award is imperfect in form in that: _____ [*set forth defect, e.g.,* all the concurring arbitrators have not signed the award].

[*CONTINUE*]

[This application is made pursuant to *Code of Civil Procedure Section 1284,* _____ (*list supporting papers, e.g.,* the attached memorandum of points and authorities, and the declaration of _____ (*name*)].

[The arbitrators should be aware that *Code of Civil Procedure Section 1284* requires any corrected award to be served within 30 days after service of the original copy of the award on the applicant. Thus, by the narrowest terms of *Code of Civil Procedure Section 1284,* the corrected copy of the award must be served by _____ (*date*), or the application will be denied by operation of law and the arbitrators will lose jurisdiction.]

WHEREFORE, applicant respectfully requests that the award of the arbitrator(s) in the above entitled matter, dated _____, be corrected as follows:

1. _____ [*Specify, e.g.,* To add the signature of _____ (*name*).]

2. _____ [*Specify any other corrections to be made.*]
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Applicant

[2] Use of Form

The form in [1], *above,* is an application for use by a party to an arbitration to seek correction of the award by the arbitrators *see Code Civ. Proc. § 1284*]. For forms dealing with correction of the award by the court, see *§§ 33.52* and *33.59*.

[3] Contents

The application is in writing and recites the date of service of the award on the applicant [*see Code Civ. Proc. § 1284* (application must be made no later than 10 days after that service)], and sets forth as grounds for correction that there is a miscalculation or that the award is imperfect in a matter of form [*see Code Civ. Proc. §§ 1284, 1286.6(a), (c)*].

The form also includes an optional paragraph to state what papers are submitted in support of the application and another to state the date by which the corrected award must be served on the applicant in order to be effective [*see Code Civ. Proc. § 1284*; for discussion of timing issues, *see* [4], *below*].

[4] Time Requirements

Application to the arbitrator for correction of the award must be made no later than 10 days after service of a signed copy of the award on the applicant [*Code Civ. Proc. § 1284*]. If the arbitrator does not serve a corrected award within 30

days after service of the award on the applicant, the application for correction is deemed denied [*Code Civ. Proc. § 1284*].

PRACTICE TIP:

Protect Against Code's Vague Timing Requirements. The code is not clear when the 10- and 30-day periods commence. The code calculates both from service of the award on the applicant, but it does not state what is service [*see Code Civ. Proc. § 1284*]. Certainly, in the case of personal service, there is no problem figuring the 10 days. However, when the arbitrator mails the award, counsel should assume (to err on the side of caution) that service is complete on the day the award is mailed.

Additionally, in the application to the arbitrator, the 30-day time limit commencement should be stated. Including this statement allows all parties to know when the arbitrator's 30 days of extended jurisdiction for making corrections terminates. It forewarns the opposing party as well as the arbitrator.

Because the arbitrators must respond within 30 days of the service of the award, it is best to request that the arbitrator have the corrected award personally served on the parties within the 30-day period, or stipulate that service of the corrected award is complete on the date of mailing or the date of faxing. *By Michael S. Fields*

[5] Copies

The following copies of the application should be prepared:

- Original for filing with the arbitrators.
- One copy to be delivered or mailed to each of the other parties to the arbitration.
- One copy for the client, if desired.
- One copy for the office file.
- Other copies as desired.

[6] Delivery of Copies to Parties

On or before making the application, the applicant is required to deliver or mail a copy of the application to all of the other parties to the arbitration [*Code Civ. Proc. § 1284*].

PRACTICE TIP:

Use Personal Service to Clarify Time Limits for Objection. The opposing party has 10 days to object to the application. The code is not specific as to when the 10-day period commences. Thus, it is best for the applying party to personally serve the opposing party. This clearly defines the 10-day period. To do otherwise creates confusion, and the arbitrator may not have sufficient time to evaluate the application and opposition with the balance of time remaining on the 30-day period within which the arbitrator must act [for further discussion of timing issues, *see* [4], *above*]. *By Michael S. Fields*

[7] Objection to Application

Any party to the arbitration may make written objection to the application no later than 10 days after the application is delivered or mailed to him or her. On or before making that objection, the objector must deliver or mail a copy of the objection to the applicant and all the other parties to the arbitration [*Code Civ. Proc. § 1284*].

[8] Denial or Correction

The arbitrators must either deny the application or correct the award no later than 30 days after service of a signed copy of the award on the applicant. A denial or correction is to be in writing signed by the arbitrators concurring in it. The neutral arbitrator must serve a copy of the denial or correction on each of the parties personally or by registered or certified mail, or as provided in the agreement. If no denial or correction is served within 30 days after service of a signed copy of the award on the applicant, the application is deemed denied on the last day of that period [*Code Civ. Proc. § 1284*].

[9] Cross References

For further discussion, see *§ 33.28[5]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration Agreements

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4-33 California Forms of Pleading and Practice--Annotated § 33.74

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.74 Complaint for Declaratory Relief, Temporary Restraining Order, and Preliminary and Permanent Injunction to Prevent Arbitration--General Form

[1] FORM Complaint for Declaratory Relief, Temporary Restraining Order, and Preliminary and Permanent Injunction to Prevent Arbitration--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DECLARATORY RELIEF,
Defendant(s).	)	TEMPORARY RESTRAINING ORDER AND PRE-
	)	LIMINARY AND PERMANENT INJUNCTION
	)	

_____

1. Defendant is a domestic corporation and has its principal place of business in _____ County, California [*or allege other capacity and residence*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

[3. *Agency allegation, if desired, e.g.,* At all times herein mentioned, defendant _____ (*name*) was the

agent and employee of defendant _____ (*name*) and, in doing the things herein mentioned, was acting in the scope of his/her authority and employment.]

4. On or about _____ [*date*], plaintiff and defendant entered into a written contract by which _____ [*describe general effect of agreement*]. The agreement contains an arbitration clause which provides in Paragraph _____ as follows: _____ [*set forth relevant portions of clause*]. A copy of the agreement is attached as Exhibit "A" and made a part of hereof.

5. On or about _____ [*date*], a controversy arose between plaintiff and defendant concerning _____ [*describe controversy*].

6. _____ [*Allege facts showing why the controversy, or any particular issues thereof, is not subject to arbitration, e.g.,* The arbitration clause herein set forth expressly excludes from arbitration the issues as to _____ (*specify*) which are directly involved in the present dispute between plaintiff and defendant. Plaintiff has not agreed to submit those issues to arbitration.]

7. On or about _____ [*date*], defendant delivered to plaintiff a demand for arbitration and initiated arbitration before _____ [*specify agency conducting arbitration, e.g.,* the American Arbitration Association] and threatens to submit the full controversy alleged herein to that arbitration. The arbitration clause herein set forth permits either party to proceed with arbitration ex parte if the other party does not appoint an arbitrator and does not participate in the arbitration.

8. A bona fide dispute exists between plaintiff and defendant in that:

a. Defendant contends that _____ [*set forth contentions, e.g.,* the entire controversy set forth in this complaint is subject to arbitration, and the arbitrators have exclusive jurisdiction to determine whether or not any issues are to be excluded from arbitration].

b. Plaintiff, however, contends that _____ [*set forth opposing contentions, e.g.,* the arbitration is limited in scope to the issues which the parties agreed to arbitrate; the agreement of the parties set forth herein expressly excludes from arbitration the issues as to _____ (*specify*); settlement of the existing controversy between the parties involves a determination of those nonarbitrable issues; and the entirety of the controversy is not subject to arbitration and that arbitration may not proceed until those nonarbitrable issues are first determined by a court of competent jurisdiction].

9. Unless defendant is restrained by the court from proceeding with the arbitration pending hearing on plaintiff's Order to Show Cause and pending trial of this action, and unless he/she is permanently enjoined as herein prayed, defendant threatens to proceed with arbitration as herein alleged and plainttiff will, as a proximate result, suffer great and irreparable injury and will be compelled to submit to arbitration and to subsequent court action. Plaintiff has no adequate remedy at law.

[10. The agreement herein alleged provides for recovery of attorney's fees as follows: _____ (*set forth relevant provision*). Plaintiff has incurred reasonable attorney's fees to date in the sum of $_____ and will incur additional attorney's fees according to proof.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. That the court determine that the existing controversy between plaintiff and defendant [regarding the issues of whether _____ (*specify*)] is not subject to arbitration under the agreement alleged in this complaint.

2. For an order requiring defendant to show cause, if any, why he/she should not be enjoined during the pendency of this action from further proceeding with arbitration.

3. For a temporary restraining order, apreliminary injunction, and a permanent injunction, all enjoining defendant from proceeding with arbitration of the controversy alleged herein [until the issues of whether _____ (*specify*) are first determined by a court of competent jurisdiction].

4. For costs of suit incurred herein [including a reasonable attorney's fee in the sum of $_____, and additional fees according to proof].

5. For such order and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in this action. I have read the foregoing complaint and know its contents. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

CERTIFICATION RE NOTICE

[*EITHER*]

I hereby certify that on _____ [*date*], I informed the opposing _____ [party *or* party's attorney] of the time and place this application for a temporary restraining order would be made.

[*OR*]

I hereby certify that in good faith I attempted to inform the opposing party of the time and place this application for a temporary restraining order would be made, by _____ [*specify efforts*], but I was unable to do so.

[*OR*]

I hereby certify that notice to defendant of the foregoing application for a temporary restraining order should not be

required because _____ (*specify reason*)].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a party to an arbitration agreement to seek a declaratory judgment determining that a controversy, or certain issues of the controversy, is not subject to arbitration under the agreement and to seek an injunction pending arbitration of the controversy or issues [for discussion, *see § 33.22*].

For other forms dealing with declaratory relief and injunction, see Chs. 182, *Declaratory Relief* , and 303, *Injunctions* , respectively.

[3] Allegations

The complaint alleges the following [*see Code Civ. Proc. § 1060* (declaratory relief)]:

- The arbitration agreement (Paragraph 4).
- The controversy (Paragraph 5).
- Facts showing that the controversy, or certain issues thereof, is not arbitrable (Paragraph 6).
- The threat of pending arbitrations initiated by defendant (Paragraph 7).
- The contentions of the parties showing an actual controversy meriting declaratory relief (Paragraph 8).

The complaint also alleges facts showing threat of irreparable injury to plaintiff, multiplicity of proceedings, and no adequate remedy at law if a temporary restraining order, and preliminary and permanent injunction are not granted (Paragraph 9) [*see Civ. Code § 3422*; *Code Civ. Proc. §§ 525, 527(c)(1)*]. The facts showing sufficient grounds for a preliminary injunction and showing great or irreparable injury for granting a temporary restraining order (see Paragraph 9) may be presented either by verified complaint or by affidavit or declaration under penalty of perjury [*see Code Civ. Proc. §§ 527(a), 2015.5*].

If the agreement provides for attorney's fees, the complaint should also contain an allegation setting forth the provision and the fact that fees have been incurred (Paragraph 10) [*see Code Civ. Proc. § 1021* (recovery of attorney fees as based on agreement or statute)].

[4] Preliminary Injunction and Verification

An injunction may be granted at any time before judgment on a verified complaint or on affidavits (or declarations under penalty of perjury under *Code Civ. Proc. § 2015.5*). The injunction may be granted if the complaint in the one case, or the affidavits in the other, show satisfactorily that sufficient grounds exist for the injunction [*see Code Civ.*

Proc. § 526 (grounds)]. As cause for a temporary restraining order, the verified complaint or affidavits must show that great or irreparable injury will be caused plaintiff before the matter can be heard on notice [*Code Civ. Proc. § 527(c)(1)*].

Verification may also be desirable although it is not required, because in an action in superior court, verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. § 446*] and precludes a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* . For alternative forms of verification, see Ch. 572, *Verification* .

[5] Certification re Notice

When a temporary restraining order is sought without formal notice, the applicant or the applicant's attorney must certify one of the following to the court under oath:

- Within a reasonable time prior to the application the applicant informed the opposing party or the opposing party's attorney at what time and where the application would be made [*Code Civ. Proc. § 527(c)(2)(A)*].

- He or she in good faith attempted to inform the opposing party (or attorney) but was unable to do so, specifying the efforts made to do so [*Code Civ. Proc. § 527(c)(2)(B)*].

- For reasons specified he or she should not be required to inform the opposing party (or attorney) [*Code Civ. Proc. § 527(c)(2)(C)*].

This requirement for certification regarding notice does not apply when an order is being issued under the Family Code [*Code Civ. Proc. § 527(g)*].

[6] Copies

The following copies should be prepared:

- Original to be filed with the court and conformed copy for the court to stamp and return.

- One copy to be served on the defendant together with the summons and other papers, such as the order to show cause and temporary restraining order.

- One copy for the client, if desired.

- One copy for the office file.

- Other copies as desired.

[7] Jurisdiction

Becuase this petition seeks permanent injunctive relief and declaratory relief, it is in the jurisdiction of the superior court as a case of unlimited jurisdiction [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(7), (8),* 580(b)(2), (4)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration

ClausesCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral Overview

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Chapter 33 CONTRACTUAL ARBITRATION: APPOINTMENT OF ARBITRATOR AND CONDUCT OF PROCEEDING
PART V. FORMS
B. Conduct of Arbitration Proceeding

4-33 California Forms of Pleading and Practice--Annotated § 33.75

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.75 Complaint for Declaratory Relief, Temporary Restraining Order, and Preliminary and Permanent Injunction to Prevent Arbitration--Arbitration of Dispute Under Uninsured Motorist Coverage Barred by Executed Release of Claim

[1] FORM Complaint for Declaratory Relief, Temporary Restraining Order, and Preliminary and Permanent Injunction to Prevent Arbitration--Arbitration of Dispute Under Uninsured Motorist Coverage Barred by Executed Release of Claim

[*Caption. See § 33.74[1]* .]

1. [*Capacity and residence of defendant. See § 33.74[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 33.74[1], Paragraph 2.*]

3. [*Agency allegation, if appropriate. See § 33.74[1], Paragraph 3.*]

4. On or before, _____ [*date*], in California, plaintiff issued its insurance policy numbered _____ known and designated as an _____ [*identify policy, e.g.,* Auto Garage Policy], to defendant _____ [*name*], insuring him/her against liability in operation of the automobile described therein from _____ [*date*], to _____ [*date*]. A copy of the policy is attached as Exhibit "A" and made a part hereof.

5. _____ [*Identify relevant portion of the policy, e.g.,* Part _____, Paragraph _____, of the policy provides uninsured motorist coverage by the terms of which plaintiff agreed to _____ (*e.g.,* pay all sums that the insured shall be legally entitled to recover as damages from the

owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, sustained by the insured, caused by accident and arising out of the ownership, maintenance, or use of such uninsured automobile; this coverage by its terms further provides that if the insured and the company are unable to agree whether the insured is legally entitled to recover such damages and, if so, the amount thereof, then determination thereof is to be made by arbitration)].

[Part _____, Paragraph _____ of the policy further provides that the word "insured" includes any person while occupying the insured automobile.]

6. On or about _____ [*date*], while the policy was in effect, defendant _____ [*name*] was involved in an accident in which the automobile he/she was driving and an automobile allegedly operated and owned by one _____ [*name*] collided. Defendant claimed that _____ [*name of operator and owner*] was uninsured at the time of the accident, that the accident was caused solely by _____'s [*name of uninsured motorist*] negligence, and that _____ [*name of uninsured motorist*] was legally liable to defendant for damages. After the accident, defendant submitted a claim to plaintiff for injury and damages under the uninsured motorist coverage of the policy described in this complaint.

7. On or about _____ [*date*], defendant entered into an agreement with plaintiff to settle all claims he/she might have under the uninsured motorist coverage of the policy for the sum of $_____. On the same date, plaintiff paid defendant that sum in full and defendant, in consideration of the payment, executed a full and final release releasing plaintiff herein from any and all claims he/she had, or might have, for both personal injuries, known and unknown, and property damage sustained by him/her arising out of the accident of _____ [*date*]. A copy of the release is attached as Exhibit "B" and made a part hereof.

8. Notwithstanding execution of the release, defendant _____ [*name*] filed with _____ [*e.g.*, the American Arbitration Association], on _____ [*date*], a demand for arbitration in which a claim against plaintiff was asserted under the uninsured motorist coverage for alleged injuries sustained by defendant _____ [*name*] in the accident in this complaint. A copy of the demand is attached as Exhibit "C" and made a part hereof.

9. _____ [*Identify arbitration organization, e.g.,* The American Arbitration Association] is proceeding to appoint an arbitrator and hold a hearing on the demand and will continue with such proceeding unless restrained and enjoined by this court from so doing.

10. A bona fide dispute exists between plaintiff and defendant _____ in that:

a. Defendant contends that _____ [*set forth contentions, e.g.,* his/her present claim is not barred by the release herein described because he/she did not know at the time of executing it that the injuries for which he/she now seeks damages were proximately caused by the accident of _____ (*date*). Defendant contends that he/she did not learn that the damages were proximately caused by the accident until _____ (*date*), and defendant's failure to learn was a result of _____ (*specify reason for delay*). Defend further contends that he/she has a valid claim, that claim entitles him/her to arbitration under the terms of the policy because plaintiff refused to pay it; and the effect of the release agreement can be determined by the arbitrator].

b. Plaintiff, however, contends that _____ [*set forth opposing contentions, e.g.,* the release constitutes a waiver of arbitration and bars the present claim and any and all other claims that defendant _____ (*name*) has or may have, arising out of the accident of _____ (*date*). Plaintiff further contends that whether the claim is properly made depends solely on the validity and effect to be given the release agreement, and the effect and validity of the release agreement are matters that are not within the scope of the arbitration provisions of the policy and therefore may not be determined by the arbitrator].

11. Plaintiff has no plain, speedy, or adequate remedy at law and will, unless this court declares the rights of the parties to be otherwise and enjoins the arbitration, be compelled to submit to arbitration and further court action under the provisions of *Section 1285 of the Code of Civil Procedure* should an award be made.

WHEREFORE, plaintiff prays:

1. For an order requiring defendant to show cause, if any, why he/she should not be enjoined during the pendency of this action from further proceeding with arbitration.

2. For a temporary restraining order, preliminary injunction, and permanent injunction, all enjoining defendant from proceeding to determine the arbitration demand now before _____ [*identify arbitration organization, e.g.,* the American Arbitration Association].

3. For a judgment declaring that any and all claims of defendant _____ [*name*] arising out of the accident of _____ [*date*], against plaintiff under the provisions of the policy attached to this complaint as Exhibit "A" have been compromised, settled, and released by the release attached to this complaint as Exhibit "B," and that the release is valid and bars any further such claims against plaintiff under the uninsured motorist coverage of the policy.

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification. See § 33.74[1].*]

[*Certification re notice. See § 33.74[1].*]

[2] Use of Form

The form of complaint in [1], *above,* is for use by an insurer to seek declaratory judgment determining the validity of a release and its effect on defendant's right to arbitrate an uninsured motorist claim and to enjoin threatened arbitration of the claim [*see Commercial Ins. Co. v. Copeland (1967) 248 Cal. App. 2d 561, 56 Cal. Rptr. 794]* . For additional comments relating to a complaint to prevent arbitration, see *§ 33.74*.

[3] Cross References

For a complaint for declaratory relief to determine liability for wrongful death under uninsured motorist provision of insurance policy, see Ch. 182, *Declaratory Relief* .

Clifford and Eisler, California Uninsured Motorist Law (Matthew Bender, 6th ed.1999)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsInsurance LawMotor Vehicle InsuranceArbitrationCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral Overview

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B. Conduct of Arbitration Proceeding

4-33 California Forms of Pleading and Practice--Annotated § 33.76

AUTHOR: Michael S. Fields Editorial Consultant

§ 33.76 Petition for Order Consolidating Separate Arbitration Proceedings [Code Civ. Proc. § 1281.3]

[1] FORM Petition for Order Consolidating Separate Arbitration Proceedings [Code Civ. Proc. § 1281.3]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION TO CONSOLIDATE SEPARATE PRO-
_____ [*name*],	)	CEEDINGS
Respondent.	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]

_____

Petitioner alleges:

1. _____ [*Allege existence of separate arbitration agreements or proceedings between same parties, or separate agreement or proceeding between petitioner and third party, e.g.,* There are now pending between petitioner and respondent two separate arbitration proceedings. One of them is pending before _____ (*names*), arbitrators appointed pursuant to the Commercial Arbitration Rules of the American Arbitration Association].

2. Both proceedings concern disputes arising between the parties out of the same _____ [transaction *or* series of transactions], namely, _____ [*specify transaction or transactions, e.g.,* a lease of commercial premises, petitioner being lessor and respondent being lessee].

3. There is a common issue of _____ [law *or* fact] in both proceedings, namely, _____ [*specify, e.g.,* whether a fire which destroyed part of the roof of the premises was caused by petitioner's employees in the course of repairing the roof or by respondent in the course of using and occupying the premises].

4. There is a possibility that the separate arbitrators will reach opposite or otherwise conflicting decisions on this issue, and that the resolution of other issues related to it may therefore produce conflicting decisions as to the parties' rights and duties.

WHEREFORE, petitioner prays:

1. That the court order the two proceedings consolidated for hearing before _____ [*specify, if petitioner prefers particular arbitrators, e.g.,* the arbitrators heretofore appointed pursuant to the Commercial Arbitration Rules of the American Arbitration Association];

2. That, in the event complete consolidation of the proceedings be not ordered, the court order consolidation, before the above-mentioned arbitrators, of the proceedings insofar as they involve common issues of law or fact;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[2] Use of Form

The form of petition in [1], *above,* is for use by a party to an arbitration agreement wishing to have separate arbitration proceedings consolidated, or partially consolidated, as provided in *Code Civ. Proc. § 1281.3*. The form may not be used, however, in a dispute regarding the professional negligence of a health care provider made pursuant to *Code Civ. Proc. § 1295*.

If the matter is governed by the Federal Arbitration Act, the arbitrator--not the court--will decide whether the arbitration should be consolidated [*See Yuen v. Superior Court (Gemstar--TV Guide International, Inc.) (2004) 121 Cal. App. 4th 1133* (discussed at *§ 33.21[1A]*)]. The petition may be modified for presentation before an arbitrator, but counsel should first consult any rules the sponsoring organization may have regarding consolidation.

[3] Allegations

The petition should allege facts showing that the three conditions for consolidation exist. They are [*Code Civ. Proc. § 1281.3*]:

- Separate arbitration agreements or proceedings exist between the same parties, or the petitioner is a party to a separate arbitration agreement or proceeding with a third party.

- The disputes arise from the same transaction or series of related transactions.

- There is at least one common issue of law or fact creating the possibility of conflicting decisions by the arbitrators.

[4] Costs

The prevailing party is entitled to recover costs as a matter of right [*Code Civ. Proc. §§ 1032(b), 1293.2*]. Items allowed or not allowed as costs are set forth in *Code Civ. Proc. § 1033.5*.

[5] Jurisdiction and Venue

Superior courts have jurisdiction over arbitration-related petitions whether the matter is a limited or unlimited civil case [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. § 86(a)(10)(A)*; *see also Code Civ. Proc. § 85* (defining "limited civil case")].

If the proceeding is a limited civil case, and the petition is the first paper filed, the caption must state whether the demand exceeds or does not exceed $10,000. The caption must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 72055*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

Venue is in the county in which the arbitration is being held [*Code Civ. Proc. § 1292.2*]. If arbitration is not being held exclusively in one county in California, or if held outside California, then venue is in accordance with *Code Civ. Proc. § 1292* [*Code Civ. Proc. § 1292.2*; for diiscussion of section 1292, *see Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.43[4]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration Agreements

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Chapter 34 CONTRACTUAL ARBITRATION: JUDICIAL REVIEW

4-34 California Forms of Pleading and Practice--Annotated 34.syn

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§ 34.syn Synopsis to Chapter 34: CONTRACTUAL ARBITRATION: JUDICIAL REVIEW

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§ 34.02 Cross References

§ 34.03 Governing Law

§§ 34.04-34.09 [Reserved]

§ 34.10 Scope of Review

[1] Statutory Grounds for Review

[2] Review of Error of Fact or Law in Award

[a] Judicial Review of Merits Under California Statutes

[i] General Rule

[ii] Specific Statutory Authorizations of Merit Review

[b] Expanded Judicial Review Under California Rule

[i] The California Rule

[ii] Agreements Successfully Conferring Judicial Review of Merits

[iii] Agreements Unsuccessfully Conferring Judicial Review of Merits

[c] Effect of Federal Arbitration Act on Judicial Review

[d] Expanded Arbitral Review

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§ 34.11 Effect of Unreviewed Award

[1] Same as Written Contract Between Parties

[2] Effect of Death of Party

[3] Res Judicata and Collateral Estoppel

§ 34.12 Petition for Review

[1] To Confirm, Vacate, or Correct Award

[2] Contents of Petition

[3] Service and Filing of Petition

[a] Manner Stated in Agreement

[b] Manner Not Stated in Agreement

[i] Service in California

[ii] Service Outside California

[iii] Service When Person Has Already Appeared or Been Served in the Proceeding

[c] Time for Service and Filing

[i] Minimum Time After Service of Award

[ii] Petition to Confirm Award

[iii] Petition to Vacate or Correct Award

[iv] No First Challenge on Appeal

§ 34.13 Jurisdiction and Venue

§ 34.14 Response to Petition

[1] Contents of Response

[2] Service and Filing

[a] Manner

[b] Time

[i] Ten Day Limit for Response; Exceptions

[ii] Response Including Request That Award Be Vacated or Corrected

[iii] Consequence of Untimely Filing

§ 34.15 Hearing

§ 34.16 Calendar Preference

§ 34.17 Action by Court

§ 34.18 Judgment Confirming Award

[1] Entry of Judgment; Same Effect as Judgment in Civil Action

[2] Costs

[3] Attorney's Fees

[3A] Post-Award, Pre-Judgment Interest

[4] Amendment of Judgment to Add Alter Ego

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[1] Grounds

[a] Statutory Grounds Enumerated

[b] Relief Limited to Statutory Grounds

[i] Statutory Ground Plus Substantial Prejudice Required

[ii] Relief Under Code of Civil Procedure Section 473

[iii] Exception in Case of Illegal Contract

[iv] Illegality of Arbitration Clause

[v] Award Contrary to Statute or Public Policy

[vi] Invalid Arbitration Agreement

[c] Corruption, Fraud, or Undue Means

[d] Impression of Possible Bias of Arbitrator

[i] Test for Bias

[ii] Failure to Disclose Prior Business Relationships

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[f] Failure to Postpone Hearing or Hear Material Evidence

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§ 34.20 Judgment Correcting Award

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§ 34.21 Dismissal of Proceeding

§ 34.22 Appeal

§ 34.23 Award Will Not Support Malicious Prosecution Action

§ 34.24 Res Judicata and Collateral Estoppel

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§ 34.30 State Statutes

[1] Petition to Review Award

[2] Response

[3] Dismissal

[4] Judicial Review of Award

[5] Hearing

[6] Confirming Award

[7] Correction of Award

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§ 34.31 Decisions

[1] Scope of Review

[2] Interpretation of Award

[3] Attorney's Fees

[4] Validity

[5] Preserving Objections for Review

[6] Arbitration Under Self-Executing Agreement

[7] Cross Complaints

[8] Discovery

[9] Evidence

[10] Determination of Issues

[11] Binding Effect

[12] Confirming Award

[13] Correcting Award

[14] Setoff

[15] Vacating Award

[a] In General

[b] Bias or Corruption of Arbitrator

[c] Disqualification of Arbitrator

[d] Error of Law

[e] Exceeded Arbitrator's Powers

[f] Failure to Find on All Issues

[g] Failure to Postpone Hearing

[h] Illegal Contract and Contract Against Public Policy

[i] Misconduct of Neutral Arbitrator

[j] Award Contrary to Statute or Public Policy

[16] Appeal

[17] Federal Arbitration Act

§ 34.32 Law Reviews and Legal Periodicals

§ 34.33 Text References

§§ 34.34-34.39 [Reserved]

§ 34.40 Judicial Review of Award

[1] Petition to Confirm Award

[2] Petition to Vacate Award

[3] Petition to Correct Award

§ 34.41 Appeal

§ 34.42 Enforcement of Judgment

§§ 34.43-34.49 [Reserved]

§ 34.50 Petition to Confirm Arbitration Award and for Entry of Judgment [Code Civ. Proc. § 1285]--Judicial Council Form ADR-106

[1] FORM

[2] Use of Form

[3] Confirmation of Award in Arbitration Between Party to Contract and Nonparty

[4] Awards Entitled to Confirmation

[5] Allegations

[6] Copies

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[8] Venue

[9] Service

[10] Time for Service and Filing

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[12] Cross References

§ 34.51 [Reserved]

§ 34.52 Response [Code Civ. Proc. § 1290] to Petition to Confirm Arbitration Award--Requesting Correction or Vacation of Award [Code Civ. Proc. § 1285.2]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Copies

[5] Time for Service and Filing

[6] Cross References

§ 34.53 Order Confirming Arbitration Award [Code Civ. Proc. § 1286]

[1] FORM

[2] Use of Form

[3] Contents

[4] Copies

§ 34.54 Judgment on Order Confirming Arbitration Award [Code Civ. Proc. § 1287.4]

[1] FORM

[2] Use of Form

[3] Contents

[4] Interest and Costs

[5] Copies

[6] Cross References

§ 34.55 Combined Order and Judgment Confirming Arbitration Award After Correction [Code Civ. Proc. § 1286]

[1] FORM

[2] Use of Form

§ 34.56 Petition to Vacate Award and for Rehearing [Code Civ. Proc. §§ 1285, 1287]--Judicial Council Form ADR-106

[1] FORM

[2] Use of Form

[3] Service

[4] Time for Service and Filing

[5] Cross References

§ 34.57 Response [Code Civ. Proc. § 1290] to Petition to Vacate Award--Request That Award Be Confirmed [Code Civ. Proc. § 1285.2]

[1] FORM

[2] Use of Form

[3] Allegations

§ 34.58 Order Vacating Award of Arbitrators [Code Civ. Proc. § 1286] and for Rehearing [Code Civ. Proc. § 1287]

[1] FORM

[2] Use of Form

[3] Contents

§ 34.59 Petition to Correct Award [Code Civ. Proc. §§ 1285, 1287]--Judicial Council Form ADR-106

[1] FORM

[2] Use of Form

[3] Service

[4] Cross References

Michael S. Fields
Editorial Consultant n*

FOOTNOTES:
(n22)Footnote *.
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Chapter 34 CONTRACTUAL ARBITRATION: JUDICIAL REVIEW
PART I. SCOPE

4-34 California Forms of Pleading and Practice--Annotated § 34.01

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§ 34.01 Scope of Chapter

This chapter provides discussion and forms relating to judicial review of contractual arbitration. Topics covered include the effect of the arbitration award [*see § 34.11*], procedure [*see §§ 34.12, 34.13*] and grounds [*see §§ 34.18 -34.20*] for petitions to confirm, vacate, or correct an award, the procedure for opposing those petitions [*see § 34.14*], and appeal from judgments on those petitions [*see § 34.22*].

The chapter also provides a Research Guide [*see § 34.30* et seq.] and a Procedural Checklist [*see § 34.40* et seq.], and the following forms:

- Petition to confirm award [*see § 34.50*].
- Response requesting correction or vacation of award [*see § 34.52*].
- Petition to vacate award [*see § 34.56*].
- Response requesting confirmation of award [*see § 34.57*].
- Petition to correct award [*see § 34.59*].
- Orders and judgments confirming award [*see §§ 34.53 -34.55*].
- Order vacating award [*see § 34.58*].

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4-34 California Forms of Pleading and Practice--Annotated § 34.02

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§ 34.02 Cross References

Additional information about contractual arbitration may be found in two other chapters:

- For discussion of arbitration agreements, including the scope of arbitration and judicial proceedings to compel arbitration, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

- For discussion of selecting the arbitrator and the arbitration proceeding itself, see Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* .

Related topics are listed in Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*, § 32.02.

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PART I. SCOPE

4-34 California Forms of Pleading and Practice--Annotated § 34.03

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§ 34.03 Governing Law

Arbitration by agreement is governed generally by *Code Civ. Proc. §§ 1280-1294.2*. In addition, disclosures relating to a neutral arbitrator's impartiality are governed by *Code Civ. Proc. §§ 170.1*, *1281.85*, *1281.9*. 1281.91, 1281.95 and the Ethics Standards for Neutral Arbitrators in Contractual Arbitration, Cal. Rules of Ct., Appen., Div. VI, Standards 7, 8, 10, and 14.

Various statutes govern agreements to arbitrate a variety of specific types of controversies, such as the following:

- Compensation in eminent domain proceedings [*Code Civ. Proc. §§ 1273.010-1273.050*; *see Ch. 247, Eminent Domain, § 247.190* et seq.].

- Professional negligence of health care providers [*Code Civ. Proc. § 1295*; *see* Ch. 415, *Physicians: Medical Malpractice*].

- Disputes involving public construction contracts [*Code Civ. Proc. § 1296*].

- International commercial arbitration and conciliation [*Code Civ. Proc. §§ 1297.11-1297.432*; *see* Ch. 35, *Arbitration and Conciliation of International Commercial Disputes*].

- Real estate contract disputes [*Code Civ. Proc. §§ 1298-1298.8*].

- Uninsured motorist and underinsured motorist claims [*Ins. Code § 11580.2*; *see* Ch. 88A, *Automobiles: Uninsured Motorist Claims*].

- Wage claims [*Lab. Code § 229*].
- Labor contracts with talent agencies [*Lab. Code § 1700.45*; *see* Ch. 370, *Motion Pictures*].
- State employees' workmen's compensation and insurance [*Lab. Code §§ 6144-6146*].

If a dispute involves interstate or foreign commerce or maritime law, *9 U.S.C. §§ 1-15* will also govern.

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4-34 California Forms of Pleading and Practice--Annotated §§ 34.04-34.09

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[Reserved]

§§ 34.04[Reserved]

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4-34 California Forms of Pleading and Practice--Annotated § 34.10

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§ 34.10 Scope of Review

[1] Statutory Grounds for Review

The powers of the court in proceedings for judicial review of an arbitration award are set forth in *Code Civ. Proc. §§ 1286, 1287-1287.4*, and the court's scope of review in such proceedings is defined by those provisions.

The court's powers include the following:

- To confirm the award as made [*Code Civ. Proc. § 1286*; for discussion, *see § 34.18*].
- To correct the award and confirm it as corrected [*see Code Civ. Proc. § 1286.6*; for discussion, *see § 34.20*].
- To vacate the award [*see Code Civ. Proc. § 1286.2*; for discussion, *see § 34.19*].
- To order a rehearing [*see Code Civ. Proc. § 1287*; for discussion, *see § 34.19[2][b]*].
- To dismiss the proceeding [*see Code Civ. Proc. § 1287.2*; for discussion, *see § 34.21*].

For discussion of review of an award by a second arbitrator, see *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.28[7]*.

[2] Review of Error of Fact or Law in Award

[a] Judicial Review of Merits Under California Statutes

[i] General Rule

Absent some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be judicially reviewed except as provided in the arbitration statutes [*Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 25, 10 Cal. Rptr. 2d 183, 832 P.2d 899]* . Under the statutory criteria, neither the merits of the controversy nor the sufficiency of the evidence to support the arbitrator's award are matters for judicial review. The court may not substitute its judgment for that of the arbitrators [*Morris v. Zuckerman (1968) 69 Cal. 2d 686, 691, 72 Cal. Rptr. 880, 446 P.2d 1000* ; *Woodard v. Southern Cal. Permanente Medical Group (1985) 171 Cal. App. 3d 656, 661, 217 Cal. Rptr. 514]* . Unless specifically required to act in conformity with rules of law, arbitrators may base their decision on broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action [Cable Connection, Inc. v. DirecTV, Inc. (2008) *Cable Connection, Inc. v. DirecTV, Inc. (2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586* ; *Moncharsh v. Heily & Blasee (1993) 3 Cal. 4th 1, 10-11, 10 Cal. Rptr. 2d 183, 832 P. 2d 899* ; *Sapp v. Barenfeld (1940) 34 Cal. 2d 515, 523, 212 P.2d 233*].

PRACTICE TIP:

If the arbitration award consists of an injunction, and the facts or circumstances on which the injunction was based have changed so that the award is no longer appropriate, the court cannot modify or vacate the injunction. The proper remedy is to request that the arbitrator modify the award or to initiate a new arbitration proceeding for that purpose [*Swan Magnetics v. Superior Court (1997) 56 Cal. App. 4th 1504, 1512, 66 Cal. Rptr. 2d 541* (injunction enforcing noncompetition clause allegedly rendered unfair and obsolete by competitor's acquisition of party to arbitration)].

[ii] Specific Statutory Authorizations of Merit Review

When an arbitration clause in a public construction contract requires that the arbitration award be supported by law and substantial evidence, the court will vacate the award if it determines on review that the award is not supported by substantial evidence or is based on an error of law [*Code Civ. Proc. § 1296*].

[b] Expanded Judicial Review Under California Rule

[i] The California Rule

Provisions of the arbitration agreement may alter the statutory limits on judicial review of contractual arbitration awards. The California rule is that the parties may obtain judicial review of the merits by express agreement [*Cable Connection, Inc. v. DirecTV, Inc. (2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586* (disapproving, to extent they conflict with opinion expressed therein), *Crowell v. Downey Community Hospital Foundation (2002) 95 Cal. App. 4th 730, 735, 115 Cal. Rptr. 2d 810* ; *Oakland-Alameda County Coliseum Authority v. CC Partners (2002) 101 Cal. App. 4th 635, 645, 124 Cal. Rptr. 3d 363* ; *Old Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co. (1996) 45 Cal. App. 4th 631, 638-639, 53 Cal. Rptr.2d 50*)]. The failure to provide for that scope of review by statute does not mean the parties themselves may not do so by contract [*Cable Connection, Inc. v. DirecTV, Inc. (2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586*]. There is a statutory as well as a contractual basis for this rule; one of the grounds for review of an arbitration award is that the arbitrators exceeded their powers [*Code Civ. Proc. §§ 1282.6(a)(4), 1286.6(b)*].

[ii] Agreements Successfully Conferring Judicial Review of Merits

If the parties constrain the arbitrators' authority by requiring a dispute to be decided according to the rule of law, and make plain their intention that the award is reviewable for legal error, the general rule of limited review is displaced by the parties' agreement [*Cable Connection, Inc. v. DirecTV, Inc. (2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586]* . The merits of an award may come within the ambit of the statutory grounds of review for excess of the arbitrators' powers [*Cable Connection, Inc. v. DirecTV, Inc. (2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d*

586] . To take themselves out of the general rule that the merits of the award are not subject to judicial review, the parties must clearly agree that legal errors are an excess of arbitral authority that is reviewable by the courts. In *Cable Connection*, the parties expressly so agreed, depriving the arbitrators of the power to commit legal error. They also specifically provided for judicial review of any error. The Court stressed that it did not decide whether one or the other of the clauses alone, or some different formulation, would be sufficient to confer an expanded scope of review, but emphasized that parties seeking to allow judicial review of the merits, and to avoid an additional dispute over the scope of review, would be well advised to provide for that review explicitly and unambiguously [*Cable Connection, Inc. v. DirecTV, Inc. (2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586]* .

EXAMPLE:

The applicable contract language in Cable Connection provided that "[t]he arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error" [*Cable Connection, Inc. v. DirecTV, Inc. (2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586]* .

[iii] Agreements Unsuccessfully Conferring Judicial Review of Merits

The courts have ruled that arbitration agreements containing the following provisions failed to bestow judicial review under California law:

- The arbitrator ... shall render an award in accordance with substantive California Law" [*Gravillis v. Coldwell Banker Residential Brokerage Co. (2010) 182 Cal. App. 4th 503, 508, 106 Cal. Rptr. 3d 70]* .

- "The arbitrator shall make all rulings in accordance with ... governing law ... and shall have authority equivalent to that of a California Superior Court judge, including the right to grant equitable relief, to the same extent as such relief would be available in an action pending in the Los Angeles Superior Court in which all parties have appeared" [*Oaktree Cap. Mgmt., L.P. v. Bernard (2010) 182 Cal. App. 4th 60, 71, 106 Cal. Rptr. 3d 16]* .

- The arbitrator "shall apply" California law and "shall be constrained by the rule of law" [*Baize v. Eastridge Companies, LLC (2006) 142 Cal. App. 4th 293, 297, 47 Cal. Rptr. 3d 763]* .

The Court did not exclude expanded review based on authority outside the Federal Arbitration Act (FAA; *9 U.S.C. § 1 et seq.*), such as state statutory or common law, or a federal trial court's case management authority under *Fed. R. Civ. P., Rule 16* [*Hall Street Assocs., L.L.C. v. Mattel, Inc. (2008) 552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254, 259, 263-265, 268* (*Hall Street*; provision for expanded review was part of arbitration agreement negotiated during litigation, which was approved and entered as an order by trial court; remanded for consideration of trial court's authority to approve agreement as matter of case management under Federal Rules of Civil Procedure); *see also Kyocera Corp. v. Prudential-Bache Trade Servs., Inc. (9th Cir. 2003) 341 F. 3d 987, 1000, 1003 (Ninth Circuit rule)* ; *accord Christensen v. Smith (2009) 171 Cal. App. 4th 931, 937, 90 Cal. Rptr. 3d 57* (unlike the California Arbitration Act, the Federal Arbitration Act does not permit an arbitration agreement to expressly authorize judicial review of legal error; agreement specified application of FAA)]. Nor did *Hall Street* consider whether the FAA provision for vacatur "where the arbitrators exceeded their powers" [*9 U.S.C. § 10(a)(4)*] would be applicable if the agreement specifically limited the arbitrators' powers by providing for an award governed by law and reviewable for legal error arrangements [*Cable Connection, Inc. v. DirecTV, Inc. (2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586*]. *Hall Street* is restricted to proceedings to review arbitration awards under the FAA, and does not require state law to conform with its limitations. Furthermore, a reading of the California Arbitration Act (CAA; *Code Civ. Proc. § 1280 et seq.*) that permits the enforcement of agreements for merits review is fully consistent with the FAA policy guaranteeing the enforcement of private contractual arrangements [*Cable Connection, Inc. v. DirecTV, Inc. (2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586*]. For discussion of the limited review that is allowed, see *§ 34.19[1]*.

[c] Effect of Federal Arbitration Act on Judicial Review

The U.S. Supreme Court has ruled that the Federal Aribtration Act, *9 U.S.C.S. § 1 et seq.*, bars parties from giving courts authority review arbitration awards for errors of law or fact [*Hall Street Assocs., L.L.C. v. Mattel, Inc. (2008) 552 U.S. 576, 585-586, 128 S. Ct. 1396, 170 L. Ed. 2d 254, 259, 263-265, 268]* .

[d] Expanded Arbitral Review

A provision in an arbitration agreement for review of the award by a second arbitrator also has been held enforceable [*Finley v. Saturn of Roseville (2004) 117 Cal. App. 4th 1253, 1255, 1258-1260, 12 Cal. Rptr. 3d 561* (trial court's confirmation of arbitration award on ground of untimeliness reversed and returned to trial court to vacate order and reverse arbitration award on ground of lack of jurisdiction arising from parties' agreement to submit issues for review to second arbitrator); *see § 33.28[7]*].

[3] Arbitration Pursuant to Stipulation

A party who knows that his or her attorney has stipulated to binding arbitration, participates in the arbitration, and never seeks to repudiate the stipulation, has ratified the stipulation; and the resulting award may properly be confirmed [*Caro v. Smith (1997) 59 Cal. App. 4th 725, 732-733, 69 Cal. Rptr. 2d 306]* . Similarly, although *Code Civ. Proc. § 1281 et seq.* permit courts to enforce only written agreements to arbitrate, once the parties have arbitrated and a written award is made, courts can enforce that award even if the underlying agreement to arbitrate was oral [*Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredrics (1998) 61 Cal. App. 4th 672, 677, 71 Cal. Rptr. 2d 771]* .

If the award is challenged, based on a claim that the parties' written agreement was orally modified at the time of the arbitration hearing, no statement by the arbitrator can be considered in determining whether the parties actually did orally modify their written agreement during the hearing. An arbitrator's testimony concerning any statements or conduct that occurred at or in conjunction with the arbitration is prohibited by *Evid. Code § 703.5* [*Trabuco Highlands Community Assn. v. Head (2002) 96 Cal. App. 4th 1183, 1191, 117 Cal. Rptr. 2d 842]* .

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§ 34.11 Effect of Unreviewed Award

[1] Same as Written Contract Between Parties

An award that has not been confirmed or vacated has the same force and effect as a contract in writing between the parties to the arbitration [*Code Civ. Proc. § 1287.6*].

[2] Effect of Death of Party

Thus, an unconfirmed award against a person who dies pending its confirmation becomes a liability of that party's estate [*Lovret v. Seyfarth (1972) 22 Cal. App. 3d 841, 859, 101 Cal. Rptr. 143]* . If the party in whose favor an unconfirmed award is made dies before its confirmation, the award becomes an asset of his or her estate [*Walter v. National Indem. Co. (1970) 3 Cal. App. 3d 630, 634, 83 Cal. Rptr. 803]* .

[3] Res Judicata and Collateral Estoppel

Although a federal district court has held that an unconfirmed arbitrator's award does not constitute a final judgment that enables a party to invoke the doctrine of collateral estoppel [*see Scott v. Snelling and Snelling, Inc. (N.D. Cal. 1990) 732 F. Supp. 1034, 1039]* , a California court of appeal has held an unconfirmed award sufficient to bar subsequent action by one party to the arbitration against a party in privity with the other party to the arbitration on the basis of res judicata [*Thibodeau v. Crum (1992) 4 Cal. App. 4th 749, 756-761, 6 Cal. Rptr. 2d 27* (only objection to confirmation was attorney's fees, not substantive issue that was subject of arbitration); *see also Kelly v. Vons Companies, Inc. (1998) 67 Cal. App. 4th 1329, 1335-1337, 1341, 79 Cal. Rptr. 2d 763* (without mentioning whether previous award was confirmed, holding that labor arbitration award prevented employee from relitigating issue of company's motivation for store closure in later lawsuit)].

A private arbitration award is not, however, entitled to collateral estoppel effect ("issue preclusion") against a nonparty unless the parties to the arbitration so agree [*Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 836, 88 Cal. Rptr. 2d 366, 982 P.2d 229* (involving award confirmed by court)]. In so holding, the Supreme Court noted that it was making a very narrow holding. In particular, the Court stated that nothing in it's decision imposed or implied any limitations on the strict res judicata ("claim preclusion") effect of a private arbitration award and that the Court was not addressing the circumstances, if any, in which a private arbitration award would have collateral estoppel effect in subsequent litigation between the same parties on a different cause of action [*Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 824 n.2, 88 Cal. Rptr. 2d 366, 982 P.2d 229]* .

For further discussion, see *§ 34.24*.

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§ 34.12 Petition for Review

[1] To Confirm, Vacate, or Correct Award

Any party to an arbitration in which an award has been made may petition the court to confirm, correct, or vacate the award. The petition must name as respondents all parties to the arbitration and may name as respondents any other persons bound by the arbitration award [*Code Civ. Proc. § 1285*].

[2] Contents of Petition

The petition is to set forth the substance, or have attached a copy, of the agreement to arbitrate unless the petitioner denies the existence of such an agreement. It also is required to set forth the names of the arbitrators and set forth or have attached a copy of the award and the written opinion of the arbitrators, if any [*Code Civ. Proc. § 1285.4*]. If the petition seeks to correct or vacate the award, it is required to set forth the grounds on which the request for relief is based [*Code Civ. Proc. § 1285.8*]. For forms of petitions, *see §§ 34.50*, *34.51*, and *34.56*.

[3] Service and Filing of Petition

[a] Manner Stated in Agreement

A copy of the petition and a written notice of the time and place of the hearing and any other papers on which the petition is based must be served in the manner, if any, provided in the arbitration agreement [*Code Civ. Proc. § 1290.4(a)*].

[b] Manner Not Stated in Agreement

[i] Service in California

If the agreement does not provide for a manner of service and the person to be served has not previously appeared or been served in the following manner, then if service is within California it is to be made in the manner provided by law for the service of summons in an action [*Code Civ. Proc. § 1290.4(b)*; *see Code Civ. Proc. § 415.10 et seq.* and Ch. 518, *Service of Summons and Papers*].

[ii] Service Outside California

When service is outside the state, it is to be made by certified or registered mail or by personal service. Proof of service by mail must be made by affidavit (or declaration under *Code Civ. Proc. § 2015.5*) showing the mailing together with the United States Post Office return receipt bearing the signature of the person served [*Code Civ. Proc. § 1290.4(b)(2)*].

When service is made outside the state the petition may not be heard until at least 30 days after the date of such service [*Code Civ. Proc. § 1290.4(b)(2)*].

[iii] Service When Person Has Already Appeared or Been Served in the Proceeding

If the agreement does not provide the manner of service and the person to be served has previously been served in accordance with *Code Civ. Proc. § 1290.4(b)*, or has previously appeared, service is to be made in the manner provided in *Code Civ. Proc. §§ 1010-1020* (service of papers other than summons) [*Code Civ. Proc. § 1290.4(c)*; *see* Ch. 518, *Service of Summons and Papers*].

[c] Time for Service and Filing

[i] Minimum Time After Service of Award

No petition may be served and filed until at least 10 days after service of the signed copy of the award on the petitioner [*Code Civ. Proc. § 1288.4*].

[ii] Petition to Confirm Award

A petition to confirm an award must be served and filed no later than four years after the date of service of a signed copy of the award on the petitioner [*Code Civ. Proc. § 1288*; *see Jannis v. Ellis (1957) 149 Cal. App. 2d 751, 753, 308 P.2d 750* (when parties consent to resubmit arbitration award to arbitrator for clarification, time for petitioning to confirm award commences when the corrected award is made; applying prior law)].

[iii] Petition to Vacate or Correct Award

A petition to vacate or correct an award must be served and filed not later than 100 days after the date of the service of a signed copy of the award on the petitioner [*Code Civ. Proc. § 1288*]. That 100-day time limit may not be circumvented by appealing the judgment confirming the award [*Louise Gardens of Encino Homeowners' Association, Inc. v. Truck Insurance Exchange (2000) 82 Cal. App. 4th 648, 658-660, 98 Cal. Rptr. 2d 378* ; *Knass v. Blue Cross of California (1991) 228 Cal. App. 3d 390, 395-396, 279 Cal. Rptr. 124]* . However, an objection to confirmation of an award based on the illegality of the contract under which arbitration was compelled is not waived by failure to move to vacate the arbitration award within 100 days as required by *Code Civ. Proc. § 1288*, but may be raised in opposition to the other party's motion to confirm the award [*South Bay Radiology Medical Associates v. Asher (1990) 220 Cal. App. 3d 1074, 269 Cal. Rptr. 15]* .

If an application is made to the arbitrators for correction of the award, a petition may not be served and filed under *Code Civ. Proc. §§ 1285-1288.8*, until the determination of that application [*Code Civ. Proc. § 1288.6*]. For the purpose of

Code Civ. Proc. § 1288.4 (*see* [i], *above*) the date of service of the award in such case is deemed to be the earlier of the following dates [*Code Civ. Proc. § 1288.8*]:

- The date of service on the petitioner of a signed copy of the correction of the award or of the denial of the application; or

- The date that the application is deemed denied under *Code Civ. Proc. § 1284* (30 days after service of a signed copy of the award on the applicant).

[iv] No First Challenge on Appeal

Code Civ. Proc. § 1287.4 does not allow a party to challenge an arbitration award for the first time on appeal [*Louise Gardens of Encino Homeowners' Association, Inc. v. Truck Insurance Exchange (2000) 82 Cal. App. 4th 648, 659-660, 98 Cal. Rptr. 2d 378]* .

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§ 34.13 Jurisdiction and Venue

Except as otherwise provided, any petition made after the commencement or completion of arbitration is to be filed in a court having jurisdiction in the county where the arbitration is being or has been held, or, if not held exclusively in any one county of this state, or, if held outside California, then the petition is to be filed as provided in *Code Civ. Proc. § 1292* [*Code Civ. Proc. § 1292.2*].

Under *Code Civ. Proc. § 1292*, a petition is to be filed:

- In the county where the agreement is to be performed or was made [*Code Civ. Proc. § 1292(a)*].

- If the agreement does not specify a county where the agreement is to be performed and the agreement was not made in any county in California, in the county where any party to the court proceeding resides or has a place of business [*Code Civ. Proc. § 1292(b)*].

- In any case not covered by either of the above circumstances, in any county in California [*Code Civ. Proc. § 1292(c)*].

Superior courts have jurisdiction over arbitration-related petitions whether the matter is a limited or unlimited civil case [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. § 86(a)(10)(A)*].

The small claims court has jurisdiction to confirm, correct, or vacate a fee arbitration award not exceeding $5,000 between an attorney and client that is binding or has become binding [*Code Civ. Proc. § 116.220(a)(4)*; *see Bus. & Prof. Code § 6200 et seq.*; for further discussion, *see Ch. 72, Attorney Practice and Ethics, § 72.430* et seq.].

After a petition has been filed under *Code Civ. Proc. § 1280 et seq.* (governing arbitration), the court in which the petition was filed retains jurisdiction to determine any subsequent petition involving the same agreement to arbitrate and the same controversy, and any subsequent petition is required to be filed in the same proceeding [*Code Civ. Proc. § 1292.6*].

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§ 34.14 Response to Petition

[1] Contents of Response

A response to a petition may request the court to dismiss the petition, or to confirm, correct, or vacate the award [*Code Civ. Proc. § 1285.2*].

Unless the following are set forth in or attached to the petition, a response to the petition must:

- Set forth the substance or attach a copy of the agreement to arbitrate unless respondent denies the existence of such an agreement [*Code Civ. Proc. § 1285.6(a)*].

- Set forth the arbitrators' names [*Code Civ. Proc. § 1285.6(b)*].

- Set forth or attach a copy of the award and the written opinion of the arbitrators, if any [*Code Civ. Proc. § 1285.6(c)*].

- Set forth the grounds on which a request for correcting or vacating the award is based [*Code Civ. Proc. § 1285.8*].

For a form of response for use in contesting a petition to confirm an arbitration award and to request that the award either be corrected or vacated, see *§ 34.52*.

[2] Service and Filing

[a] Manner

A response is required to be served as provided in *Code Civ. Proc. §§ 1010-1020* (service of papers other than summons in civil actions) [*Code Civ. Proc. § 1290.8*; *see* Ch. 518, *Service of Summons and Papers*].

[b] Time

[i] Ten Day Limit for Response; Exceptions

A response must be served and filed within 10 days after service of the petition, unless the petition was served outside of California under *Code Civ. Proc. § 1290.4(b)(2)*. If the petition was served outside California, the response must be served and filed within 30 days after service of the petition [*Code Civ. Proc. § 1290.6*]. These time requirements may be extended by written agreement between the parties to the court proceeding or by order of the court for good cause [*Code Civ. Proc. § 1290.6*].

PRACTICE TIP:

Calculating the Ten-Day Period. To determine when the ten-day period for responding expires, counsel must, of course, know when service of the petition was complete. If, as commonly occurs, the arbitration agreement provides for service by mail and is silent as to when that service is complete, the ten-day period might be calculated either from the date of mailing or the date of receipt [*see Code Civ. Proc. § 1290.4(a)*]. To avoid dispute over the timeliness of the response, counsel should plan to respond within the shorter of the two possible periods, that is, within ten days of the date the petition was mailed.

If the contract is silent on the method of service, the same issue arises if service is made outside of California by mail on a person who has not yet appeared in the proceeding. In that case, service is governed by *Code Civ. Proc. § 1290.4(b)(2)*, which fails to provide when service is complete. This issue does not arise if service is within California or is on a person who has already appeared in the proceeding, because in those situations service is to be accomplished in the regular manner used for service of summons [*Code Civ. Proc. § 1290.4(b)(1)*] or other papers [*Code Civ. Proc. § 1290.4(c)*], respectively, both of which specify when service is complete [for discussion of the methods of service, *see § 34.12[3][b]*]. *By Michael S. Fields*

The trial court can find that a response served and filed over 10 days after date of service of petition as shown by proof of service, is timely under *Code Civ. Proc. § 1290.6* if the respondent establishes that he or she was never actually served [*see MJM, Inc. v. Tootoo (1985) 173 Cal. App. 3d 598, 603, 219 Cal. Rptr. 100]* .

[ii] Response Including Request That Award Be Vacated or Corrected

A response requesting that an award be vacated or corrected must be served and filed not later than 100 days after the date of service of a signed copy of the award on the respondent if he or she was a party to the arbitration, or on the respondent's representative if the respondent was not a party to the arbitration [*Code Civ. Proc. § 1288.2*; *see also Code Civ. Proc. § 1288* (petition to vacate or correct award must be served and filed not later than 100 days after date of service of award on petitioner); *Eternity Investments, Inc. v. Brown (2007) 151 Cal. App. 4th 739, 744, 60 Cal. Rptr. 3d 134]* .

Under *Code Civ. Proc. § 1290.6*, a response requesting that an award be vacated or corrected must, like all other responses, be served and filed within 10 days after service of the petition, even though the 100-day period set forth in *Code Civ. Proc. § 1288.2* has not otherwise lapsed [*Coordinated Constr., Inc. v. Canoga Big "A," Inc. (1965) 238 Cal. App. 2d 313, 316-317* ; *see also Hirsch v. Ensign (1981) 122 Cal. App. 3d 521, 531, 176 Cal. Rptr. 17* (disapproved on other grounds in *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 27-28, 10 Cal. Rptr. 2d 183, 832 P.2d 899*)]. A response to a timely-filed petition to confirm that includes a petition to vacate or correct must only comply with the 10-day deadline in *Code Civ. Proc. § 1290.6*, beginning upon the service of the petition to confirm, and does not have to

be filed within 100 days of the service of the award under *Code Civ. Proc. § 1288* [*Oaktree Cap. Mgmt., L.P. v. Bernard (2010) 182 Cal. App. 4th 60, 66, 106 Cal. Rptr. 3d 16]* . However, a response to a petition to confirm can in no event request that an award be vacated or corrected unless the petition to confirm itself was served and filed within 100 days after the service of the award as required by *Code Civ. Proc. § 1288.2* [*Eternity Investments, Inc. v. Brown (2007) 151 Cal. App. 4th 739, 744-747, 60 Cal. Rptr. 3d. 134* (confirming award in absence of vacatur or correction in accordance with *Code Civ. Proc. § 1286*)].

ILLUSTRATION:

Example of Untimely Service and Filing. If a petition to confirm an award is served and filed 101 days after the service of the award, any response to that petition is precluded from requesting that the award be vacated or corrected [*see Coordinated Constr., Inc. v. Canoga Big "A," Inc. (1965) 238 Cal. App. 2d 313, 317-318* ; *see also De Mello v. Souza (1973) 36 Cal. App. 3d 79, 83-84, 111 Cal. Rptr. 274]* .

[iii] Consequence of Untimely Filing

If the response is not timely filed, the allegations in the petition may be deemed to be admitted [*Code Civ. Proc. § 1290*; Evans Products Co. v. Millmen's Union No. 550 *(1984) 159 Cal. App. 3d 815, 819, 205 Cal. Rptr. 731]* . Moreover, if the court determines that a response is not timely under *Code Civ. Proc. § 1288.2* or *1290.6*, it is barred under *Code Civ. Proc. § 1286.8* from vacating or correcting the award pursuant to that response unless the respondent can obtain relief from these time requirements under *Code Civ. Proc. § 473* (mistake, inadvertence, surprise, or excusable neglect) or under the court's inherent equity power (extrinsic fraud or mistake) [*see Eternity Investments, Inc. v. Brown (2007) 151 Cal. App. 4th 739, 747, 60 Cal. Rptr. 3d 134* (discussing exceptions, none of which applied); *De Mello v. Souza (1973) 36 Cal. App. 3d 79, 84-86, 111 Cal. Rptr. 274* (stating rule but denying relief); *see also Hirsch v. Ensign (1981) 122 Cal. App. 3d 521, 531, 176 Cal. Rptr. 17* (disapproved on other grounds in *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 27-28, 10 Cal. Rptr. 2d 183, 832 P.2d 899*); for further discussion relating to relief from default, *see* Ch. 489, *Relief From Judgments and Orders*].

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4-34 California Forms of Pleading and Practice--Annotated § 34.15

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§ 34.15 Hearing

A petition under *Code Civ. Proc. § 1280 et seq.* (governing arbitration) is to be heard in a summary way in the manner and on the notice provided by law for the making and hearing of motions, except that not less than 10 days' notice of the date set for the hearing on the petition is to be given [*Code Civ. Proc. § 1290.2*]. If the petition is served in the manner provided in *Code Civ. Proc. § 1290.4(b)(2)* (out-of-state service), the petition may not be heard until at least 30 days after the date of such service [*Code Civ. Proc. § 1290.4(b)(2)*].

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4-34 California Forms of Pleading and Practice--Annotated § 34.16

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§ 34.16 Calendar Preference

All courts are required to give preference to proceedings pending under *Code Civ. Proc. § 1280 et seq.* over all other civil actions or proceedings, except older matters of the same character and matters to which special precedence may be given by law, in the matter of setting the proceedings for hearing and in hearing them to the end that all such proceedings shall be quickly heard and determined [*Code Civ. Proc. § 1291.2*].

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4-34 California Forms of Pleading and Practice--Annotated § 34.17

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§ 34.17 Action by Court

If a petition or response is duly served and filed, the court is required to confirm the award as made, whether rendered in this state or another state, unless it corrects the award and confirms it as corrected, vacates the award, or dismisses the proceeding [*Code Civ. Proc. § 1286*; *Law Offices of David S. Karton v. Segreto (2009) 176 Cal. App. 4th 1, 9, 97 Cal. Rptr. 3d 329* ; *see also Code Civ. Proc. § 1293.2* (discussed at *§ 34.18[2]* and *[3], below*)]. For a form of order for use when the court grants a petition to confirm an arbitration award, see *§ 34.53*. For a form of combined order and judgment when the court corrects an award and confirms the award as correct, see *§ 34.55*.

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4-34 California Forms of Pleading and Practice--Annotated § 34.18

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§ 34.18 Judgment Confirming Award

[1] Entry of Judgment; Same Effect as Judgment in Civil Action

If an award is confirmed, judgment must be entered in conformity with it. The judgment so entered has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action of the same jurisdictional classification, and it may be enforced like any other judgment of the court in which it was entered, in an action of the same jurisdictional classification [*Code Civ. Proc. § 1287.4*; *see Code Civ. Proc. § 32.5* (defining "jurisdictional classification"); *see also Devonwood Condominium Owners Assn. v. Farmers Ins. Exchange (2008) 162 Cal. App. 4th 1498, 1500-1501, 1506, 1508-1509, 77 Cal. Rptr. 3d 88* (judgment had to be vacated because it did not conform to fire insurance appraisal award but went beyond determination of loss, *i.e.*, replacement cost values, and gave judgment for that amount, thus determining coverage and liability that were beyond scope of *Ins. Code § 2071* and parties' submission)].

For a form of judgment for use when the court has earlier confirmed the arbitration award and enters judgment thereon, see *§ 34.54*. For a form of combined order and judgment when the court corrects an award and confirms the award as correct, see *§ 34.55*.

[2] Costs

The court must award costs, as provided in *Code Civ. Proc. §§ 1021-1038*, in any judicial proceeding under *Code Civ. Proc. §§ 1280-1294.2* connected with arbitration [*Code Civ. Proc. § 1293.2*]. This of course includes petitions to confirm and to vacate awards [*Marcus & Millichap Real Estate Investment Brokerage Co. v. Woodman Investment Group, Inc. (2005) 129 Cal. App. 4th 508, 513, 28 Cal. Rptr. 3d 584]* . The award of costs pursuant to *Code Civ. Proc. § 1293.2* is mandatory; and the court's determination under *Code Civ. Proc. § 1293.2* which party, if either, is the prevailing party in a post-arbitration judicial proceeding is a judicial function distinct from the arbitrator's decision to

award or not to award fees in the arbitration itself [*Marcus & Millichap Real Estate Investment Brokerage Co. v. Woodman Investment Group, Inc. (2005) 129 Cal. App. 4th 508, 513, 28 Cal. Rptr. 3d 584* ; *see also* [3], *below*].

[3] Attorney's Fees

The mandatory award of costs to the prevailing party in any judicial proceeding under *Code Civ. Proc. §§ 1280-1294.2* [*see* [2], *above*], includes attorney's fees pursuant to Code Civ. Proc. § 1033.3(a)(10)(A) when they are authorized by the contract [*Code Civ. Proc. § 1293.2*; *Marcus & Millichap Real Estate Investment Brokerage Co. v. Woodman Investment Group, Inc. (2005) 129 Cal. App. 4th 508, 513, 28 Cal. Rptr. 3d 584* ; *compare Green v. Mount Diablo Hospital Dist. (1989) 207 Cal. App. 3d 63, 76, 254 Cal. Rptr. 689* (refusing to award attorney's fees to party successfully opposing petition to compel arbitration reasoning that did not constitute final determination, so there was no prevailing party) *with MBNA America Bank, N.A. v. Gorman (2006) 147 Cal. App. 4th Supp 1, 7-8, 54 Cal. Rptr. 3d 724* (awarding attorney's fees to party who successfully opposed petition to confirm award finding petition was final for purposes of awarding those fees)]. Thus, if the arbitration arises out of a contract under which the prevailing party is entitled to attorney's fees, the prevailing party is entitled to attorney's fees incurred in the proceeding to confirm the award [*see Stermer v. Modiano Constr. Co. (1975) 44 Cal. App. 3d 264, 272-273, 118 Cal. Rptr. 309]* , as well as those incurred in opposing a petition to vacate the award [*Carole Ring & Associates v. Nicastro (2001) 87 Cal. App. 4th 253, 255, 260-262, 104 Cal. Rptr. 2d 519]* , and on appeal [*Ajida Technologies, Inc. v. Roos Instruments, Inc. (2001) 87 Cal. App. 4th 534, 552-552, 104 Cal. Rptr. 2d 686* ; *Carole Ring & Associates v. Nicastro (2001) 87 Cal. App. 4th 253, 255, 260-262, 104 Cal. Rptr. 2d 519]* . If the attorney's fee provision in the contract is unilateral, *Civ. Code § 1717(a)* will imply a bilateral provision allowing the "unnamed" prevailing party to recover attorney's fees [*MBNA America Bank, N.A. v. Gorman (2006) 147 Cal. App. 4th Supp 1, 7, 54 Cal. Rptr. 3d 724]* . An award of post arbitration attorney's fees is based on *Code Civ. Proc. §§ 1033.5(a)(10)(A)* and *1293.2* and is available to the prevailing party even though the arbitrator who named the prevailing party directed each party to bear their own attorney's fees and costs incurred in the arbitration itself [*Carole Ring & Associates v. Nicastro (2001) 87 Cal. App. 4th 253, 255, 260-262, 104 Cal. Rptr. 2d 519]* .

If, however, neither the underlying contract nor a statute provides for attorney's fees, the court cannot award fees incurred in a proceeding to confirm an arbitration award [*Villinger/Nicholls Development Co. v. Meleyco (1995) 31 Cal. App. 4th 321, 326-329, 37 Cal. Rptr. 2d 36* (attorney's fees clause of *Civ. Code § 3176*, relating to claims stated in bonded stop notices, does not authorize award of attorney's fees incurred in proceedings to confirm arbitration award)].

In the case of an automobile accident caused by an underinsured motorist, where there is no issue reasonably to be resolved by arbitration, the failure to attempt to effectuate a prompt and fair settlement violates the insurer's statutory duties and gives rise to tort liability. Similarly, an insurer cannot shield other dilatory conduct, such as failing to investigate a claim, by the mere act of requesting uninsured motorist arbitration [*Brehm v. 21st Century Ins. Co. (2008) 166 Cal. App. 4th 1225, 1244, 83 Cal. Rptr. 3d 410*].

For discussion of the award of attorney's fees incurred within the arbitration itself, see *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.29[3]*.

[3A] Post-Award, Pre-Judgment Interest

A successful party to arbitration is entitled to "recover damages certain" within the meaning of *Civ. Code § 3287(a)* on the date the arbitrator renders the award. The arbitration award itself results in a new and fixed liability regardless of the elements that comprised that liability [*County of Solano v. Lionsgate Corporation (2005) 126 Cal. App. 4th 741, 752-754, 24 Cal. Rptr. 3d 362* (but it was error to award interest from date of entry of findings and conclusions, so award for interest prior to date of filing of award had to be vacated); *Pierotti v. Torian (2000) 81 Cal. App. 4th 17, 27, 96 Cal. Rptr. 2d 553* ; *Britz, Inc. v. Alfa-Laval Food & Dairy Co. (1995) 34 Cal. App. 4th 1085, 1106-1107, 40 Cal. Rptr. 2d 700]* . Thus, an order or judgment confirming an arbitration award should include interest on the award from

the date of the award to the date of judgment [*Pierotti v. Torian (2000) 81 Cal. App. 4th 17, 27-28, 96 Cal. Rptr. 2d 553* ; *Britz, Inc. v. Alfa-Laval Food & Dairy Co. (1995) 34 Cal. App. 4th 1085, 1107, 40 Cal. Rptr. 2d 700]* . Denying the successful party interest would punish that party for using arbitration instead of the court system [*Pierotti v. Torian (2000) 81 Cal. App. 4th 17, 27, 96 Cal. Rptr. 2d 553* ; *Britz, Inc. v. Alfa-Laval Food & Dairy Co. (1995) 34 Cal. App. 4th 1085, 1107, 40 Cal. Rptr. 2d 700]* .

[4] Amendment of Judgment to Add Alter Ego

The trial court has the power to amend a judgment confirming an arbitration award to add an alter ego of a party. This power is based on the provision of *Code Civ. Proc. § 1287.4* that a judgment confirming an award is subject to all the provisions of law relating to a judgment in a civil action. Under *Code Civ. Proc. § 187*, civil judgments may be amended to add an alter ego as an equitable procedure based on the theory that the court is not amending the judgment to add a new defendant, but is merely inserting the correct name of the real defendant [*Hall, Goodhue, Haisley, & Barker, Inc. v. Marconi Conf. Center Bd. (1996) 41 Cal. App. 4th 1551, 1555, 49 Cal. Rptr. 2d 286* (noting that only the court, not the arbitrator, has power to amend the award to add an alter ego)].

For discussion of what constitutes an alter ego, see Ch. 161, *Corporations: Alter Ego Liability* .

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§ 34.19 Judgment Vacating Award

[1] Grounds

[a] Statutory Grounds Enumerated

Subject to the procedural requirements of *Code Civ. Proc. § 1286.4* (*see* [2], *below*) the court is required to vacate the award if it determines any of the following [*Code Civ. Proc. § 1286.2*]:

- The award was procured by corruption, fraud, or other undue means [*Code Civ. Proc. § 1286.2(a)(1)*];

- There was corruption in any of the arbitrators [*Code Civ. Proc. § 1286.2(a)(2)*];

- A party's rights were substantially prejudiced by misconduct of a neutral arbitrator [*Code Civ. Proc. § 1286.2(a)(3)*];

- The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision on the controversy submitted [*Code Civ. Proc. § 1286.2(a)(4)*]; or

- The rights of a party were substantially prejudiced by the refusal of the arbitrators to postpone the hearings on sufficient cause being shown therefor or the the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of *Code Civ. Proc. § 1280 et seq.* [*Code Civ. Proc. § 1286.2(a)(5)*].

- An arbitrator making the award either:

- Failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware [*Code Civ. Proc. § 1286.2(a)(6)(A)*]; intended to be declarative of existing case law allowing vacation of an arbitration award when a neutral arbitrator fails to disclose a matter that might cause a reasonable person to question the arbitrator's ability to conduct the arbitration proceeding impartially; or

- Was subject to disqualification on grounds specified in *Code Civ. Proc. § 1281.91* but failed on receipt of timely demand to disqualify himself or herself as required by that provision [*Code Civ. Proc. § 1286.2(a)(6)(B)*; *see Code Civ. Proc. § 1281.91(d)* (refers to grounds for disqualification of judge in *Code Civ. Proc. § 170.1*), discussed in *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, §§ 33.14[3], 33.15*].

The right to seek to vacate an award under *Code Civ. Proc. § 1286.2(a)(6)(A)* is available even if the party did not seek disqualification in a timely fashion under *Code Civ. Proc. § 1281.91(c)* [*Advantage Medical Services, LLC v. Hoffman (2008) 160 Cal. App. 4th 806, 820-822, 72 Cal. Rptr. 3d 935*]. Further, this right cannot be waived by agreeing to arbitrate under rules that state the arbitration provider's determinations regarding disqualification will be conclusive. The statutes were passed to advance a public purpose of crucial importance over which the state retained ultimate control [*Advantage Medical Services, LLC v. Hoffman (2008) 160 Cal. App. 4th 806, 820-823, 72 Cal. Rptr. 3d 935* (AAA Rule 17)]. The ground for vacating the award that the arbitrator failed to make disclosures or to disqualify himself or herself, does not apply to arbitration proceedings conducted under a collective agreement between employers and employees or between their respective representatives [*Code Civ. Proc. § 1286.2(a)(6)*].

Neutral arbitrators, except those conducting an arbitration pursuant to a public or private sector collective bargaining agreement, must comply with ethical standards adopted by the Judicial Council [*Code Civ. Proc. § 1281.85*; Cal. Rules of Ct., Appen., Div. VI]. Those standards may expand but not limit the disclosure and disqualification requirements established by *Code Civ. Proc. §§ 1281-1281.95*, and are discussed in *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.14[2]*. Comments to those standards indicate that in addition to providing grounds for vacatur of an arbitrator's award based on a neutral arbitrator's failure to comply with disclosure requirements, other obligations under the standards may also constitute grounds for vacating an arbitration award under *Code Civ. Proc. § 1286.2(a)(3)* if the rights of a party were substantially prejudiced by a violation of those standards [*see* Cal. Rules of Ct., Appen., Div. VI, Comment to Standard 1].

Petitions to vacate an arbitration award pursuant to *Code Civ. Proc. § 1285* are subject to the provisions *Code Civ. Proc. § 128.7* [*Code Civ. Proc. § 1286.2(b)*], which relates to sanctions, requires the petition to be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, by the party. It also requires each paper to state the signer's address and telephone number, if any. *Code Civ. Proc. § 128.7* is discussed in Ch 510, *Sanctions* .

Code Civ. Proc. § 1286.2 is not preempted by Sections 10 and 12 of the Federal Arbitration Act (*9 U.S.C. §§ 10, 12*) nor by the federal common law rule which allows review of an arbitration award in federal court for "manifest disregard of the law" [*Siegel v. Prudential Insurance Company (1998) 67 Cal. App. 4th 1270, 1290-1291, 79 Cal. Rptr. 2d 726* ; *see also Ovitz v. Schulman (2005) 133 Cal. App. 4th 830, 849-854, 35 Cal. Rptr. 3d. 117* (considered preemption only as to *9 U.S.C. § 10(a)(2)* and *Code Civ. Proc. § 1286.2(a)(6)(A)*)].

[b] Relief Limited to Statutory Grounds

[i] Statutory Ground Plus Substantial Prejudice Required

Unless the parties' agreement provides otherwise [*see* *Cable Connection, Inc. v. DirecTV, Inc. (2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586* , discussed at *§ 34.10[2], above*], *Code Civ. Proc. § 1286.2* describes the only grounds for setting aside an arbitration award [*Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 25, 10 Cal. Rptr. 2d 183, 832 P.2d 899* ; *State Farm Mut. Auto. Ins. Co. v. Guleserian (1972) 28 Cal. App. 3d 397, 402, 104 Cal. Rptr. 683]* . *Code Civ. Proc. § 1286.2* is substantially similar to section 12 of the Uniform Arbitration Act. In 1961 when the arbitration provisions were revised, the Legislature intended to exclude nonstatutory grounds for vacating an award [*Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 25-28, 10 Cal. Rptr. 2d 183, 832 P.2d 899]* . To succeed in having an award vacated, a party must demonstrate that the ground for vacating the award is supported by the provisions of *Code Civ. Proc. § 1286.2*, and also must show substantial prejudice [United Brotherhood of Carpenters etc., Local 642 v. *DeMello (1972) 22 Cal. App. 3d 838, 840, 100 Cal. Rptr. 564]* .

[ii] Relief Under Code of Civil Procedure Section 473

Prior to the decision in *Moncharsh*, at least one court had held that an award against a party who failed to respond to arbitration notices or to appear at the arbitration hearing may be vacated for mistake, inadvertence, surprise, and excusable neglect under *Code Civ. Proc. § 473* [*MJM, Inc. v. Tootoo (1985) 173 Cal. App. 3d 598, 603-604, 219 Cal. Rptr. 100* (trial court did not abuse its discretion by refusing to confirm award based on excusable neglect of party who was not proficient in English, did not understand the nature of the arbitration documents sent to him, and thought the underlying contract had been cancelled)]. *Moncharsh* calls this decision into question, but might be distinguishable in that *Moncharsh* dealt with review of an arbitrator's decision, and a Section 473 motion relating based on failure to have appeared in the arbitration would not necessary require that type of review.

[iii] Exception in Case of Illegal Contract

One type of error of law that will warrant vacating an award is an award based on an illegal contract [*Loving & Evans v. Blick (1949) 33 Cal. 2d 603, 607, 609-610, 204 P.2d 23]* . A contract provision may be illegal on its face or as applied [*Paramount Unified School Dist. v. Teachers Assn. of Paramount (1994) 26 Cal. App. 4th 1371, 1381, 32 Cal. Rptr. 2d 311]* .

The issue of the legality of the underlying agreement is a matter for judicial determination, although an arbitrator may make a preliminary finding that is not binding on the court. Vacating an award based on an illegal contract is required under the general rule that an illegal contract cannot be enforced and a claim arising out of an illegal transaction is not a proper matter for submission to arbitration [*Loving & Evans v. Blick (1949) 33 Cal. 2d 603, 607, 609-610, 204 P.2d 23* ; *All Points Traders, Inc. v. Barrington Associates (1989) 211 Cal. App. 3d 723, 736-738, 259 Cal. Rptr. 780* ;*compare 9 U.S.C. § 2*; *Buckeye Check Cashing, Inc. v Cardegna (2006) 546 U.S. 440, 446* (under the Federal Arbitration Act (FAA) if illegality of contract containing arbitration clause is raised in petition to compel arbitration, matter is to be ordered arbitrated and issue is to be determined by arbitrator even if court later refuses to enforce award)].

However, a distinction must be made between an illegal contract and an illegal clause in a contract. *Loving & Evans* and *All Points Traders, Inc., above*, both allow judicial review of an arbitrator's ruling when a party claimed the entire contract or transaction was illegal [*Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 32, 10 Cal. Rptr. 2d 183, 832 P.2d 899* ; *see* *Jones v. Humanscale Corp. (2005) 130 Cal. App. 4th 401, 413, 29 Cal. Rptr. 3d 881* (only noncompetititon clause claimed to be illegal)]. The normal standard of limited judicial review applies to claims that a provision of the contract construed or applied by the arbitrator is illegal, except in rare cases in which according finality to the arbitrator's decision would be incompatible with the protection of a statutory right. The award will ordinarily stand immune from judicial scrutiny absent a clear expression from the Legislature of illegality or public policy undermining the strong presumption in favor of private arbitration [*Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 32-33, 10 Cal. Rptr. 2d 183, 832 P.2d 899]* .

A further distinction involves a contract that covers a series of transactions, all of which are challenged as illegal. The court should review the evidence de novo on a transaction by transaction basis [*Lindenstadt v. Staff Builders, Inc. (1997) 55 Cal. App. 4th 882, 888-889, 893, 895, 64 Cal. Rptr. 2d 484]* . If only some of the transactions were illegal, and the policy of the statute involved would not be furthered by requiring one party to forfeit the benefits of the contract with respect to the legal transactions, an award regarding the legal transactions should not be vacated because other transactions were illegal [*Lindenstadt v. Staff Builders, Inc. (1997) 55 Cal. App. 4th 882, 893-895, 64 Cal. Rptr. 2d 484]* .

[iv] Illegality of Arbitration Clause

Ordinarily, a party who questions the validity of the arbitration clause itself cannot proceed with arbitration and still preserve the issue for later consideration by a court. However, if that party's participation in the arbitration was not voluntary [*see* *Bayscene Resident Negotiators v. Bayscene Mobilehome Park (1993) 15 Cal. App. 4th 119, 129, 18 Cal. Rptr. 2d 626* (participation in arbitration was under threat of criminal prosecution)], or that party pursued motions to stay arbitration or set aside the order compelling it and refused to participate in the arbitration hearing in protest, that party may raise the issue of the legality of the arbitration clause for later review by the court [*see* *Alternative Systems, Inc. v. Carey (1998) 67 Cal. App. 4th 1034, 1039-1041, 79 Cal. Rptr. 2d 567* (pre-dispute arbitration clause using American Arbitration Association found to contravene public policy of mandatory fee arbitration of *Bus. & Prof. Code § 6200 et seq.*)].

[v] Award Contrary to Statute or Public Policy

The normal rule of limited judicial review can also be avoided in those rare cases when according finality to the arbitrator's decision would be incompatible with the protection of a statutory right or when the award contravenes an explicit legislative expression of public policy. Vacating an award on this ground requires a clear expression of illegality or public policy [*Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 32-33, 10 Cal. Rptr. 2d 183, 832 P.2d 899* ; *City of Palo Alto v. Service Employees Internat. Union (1999) 77 Cal. App. 4th 327, 334, 91 Cal. Rptr. 2d 500]* .

IILLUSTRATION: Award Violated Public Policy Requiring Obedience to Court Order. Employee A, who already had two disciplinary actions based on threats of violence, threatened to shoot and kill employee B and B's wife and child. The employer, ("City") sought and obtained an injunction under *Code Civ. Proc. § 527.8*. The injunction provided, among other things, that employee A not make any contact with employee B, that employee A stay at least 100 yards away from employee B, B's residence, B's place of work, B's children's school or place of child care, and the City's "Utility Department-Water/Wastewater/Gas Division work crew sites." City then terminated A's employment. A contested the termination and the matter was submitted to arbitration pursuant to a Memorandum of Understanding between City and the Union. The arbitrator awarded A reinstatement to his former position as "leadman" with back pay, finding that the threats were merely "tough talk" and that City could find ways to insure B's workplace safety, as required by *Lab. Code § 6400 et seq.* without terminating A. The City petitioned to vacate the arbitration award on the grounds that it violated "the express legislated public policy of the State of California requiring employer intervention against threats of violence and it commands an illegal act." The Union cross-petitioned to confirm the award. Can the award be confirmed? No. Although the City failed to establish that public policy requires an employer automatically to fire any employee who makes a threat of violence, it was clear that the injunction, which was based on clear and convincing evidence, could not be complied with if the award was confirmed and A was reinstated. Thus, the public policy requiring obedience to court orders required the award to be vacated [*City of Palo Alto v. Service Employees Internat. Union (1999) 77 Cal. App. 4th 327, 338-340, 91 Cal. Rptr. 2d 500]* .

When a judge who is disqualified [*see Code Civ. Proc. § 170.1(a)(8)* (employment discussions with dispute resolution provider)] does not disclose the disqualification but instead hears and determines the petition and makes an order

compelling arbitration, that order must be vacated. However, that does not necessarily mean that any arbitration award based on the ensuing arbitration needs to be vacated. Another judge should reconsider the petition to compel, and if the court grants the motion to compel, then it should proceed to hear and decide the petition(s) to confirm and/or vacate the arbitration award considering whether the disqualified judge did anything that could have tainted the arbitration award. The appropriate standard for determining that issue is whether a person aware of the facts might reasonably entertain a doubt that the *arbitrators* would be able to be impartial. Only if the trial court concludes that the arbitration was tainted by the disqualified judge will the disqualification require the trial court to vacate the arbitration award [*Rossco Holdings, Inc. v. Bank of America (2007) 149 Cal. App. 4th 1353, 1366-1368, 58 Cal. Rptr. 3d 141]* .

Another of the exceptional circumstances justifying vacating an arbitration award on other than the grounds listed in *Code Civ. Proc. § 1286.2* rests on a minor's statutory right to disaffirm a contract before majority or within a reasonable time thereafter. This includes contracts containing arbitration clauses. No special words are necessary to disaffirm the contract [*Fam. Code §§ 6700, 6710*; *Berg v. Traylor (2007) 148 Cal. App. 4th 809, 812, 816-820, 56 Cal. Rptr. 3d 140* (finding contract was not one for necessities within exception of *Fam. Code § 6712*)]. If a minor disaffirms the contract, even as late as beyond the deadline for responding to a petition to confirm the award or moving to vacate the award, any award based on that contract will have to be vacated; and any judgment confirming the award, reversed [*Berg v. Traylor (2007) 148 Cal. App. 4th 809, 820, 56 Cal. Rptr. 3d 140]* .

If the minor did not disaffirm the contract containing the arbitration clause, that award may still be vacated on the separate ground that no guardian at litem was appointed to represent the minor in the arbitration, especially if the parent's interests were adverse to the minor's, for instance if the parent will be liable in the event of the minor's disaffirmance [*Berg v. Traylor (2007) 148 Cal. App. 4th 809, 821-822, 56 Cal. Rptr. 3d 140]* .

[vi] Invalid Arbitration Agreement

Another nonstatutory ground for vacation of an arbitration agreement is when the agreement is invalid. Absent an enforceable agreement, an arbitration award is invalid. Before a court may confirm an arbitration award, the court must find the existence of a valid arbitration agreement, unless a judicial determination of the issue has already been made [*Toal v. Tardif (2009) 178 Cal. App. 4th 1208, 1220, 101 Cal. Rptr. 3d 97* (agreement invalid for lack of parties' signatures)].

[c] Corruption, Fraud, or Undue Means

The Law Revision Commission that considered the arbitration statutes in 1960 described the conduct necessary to set aside an award under *Code Civ. Proc. § 1286.2(a)(1)* as "any conduct which amounts to fraud or which results in depriving either of the parties of a fair and impartial hearing to their substantial prejudice" [*Pour Le Bebe, Inc. v. Guess?, Inc. (2003) 112 Cal. App. 4th 810, 827* ; *Stockwell v. Equitable Fire & Marine Ins. Co. (1933) 134 Cal. App. 534, 540, 25 P.2d 873]* . Although some cases state that vacation of an award under *Code Civ. Proc. § 1286.2(a)(1)* is required only if the fraud is extrinsic [*see Pac. Crown Distrib. v. Bhd. of Teamsters (1986) 183 Cal. App. 3d 1138, 1146-1147, 228 Cal. Rptr. 645]* , others hold that the test is whether the aggrieved party had a chance to make its challenge at the arbitration hearing [*see Pour Le Bebe, Inc. v. Guess? Inc. (2003) 112 Cal. App. 4th 810, 831-832*]. Rather than rely on the distinction between intrinsic and extrinsic fraud, federal courts use a three-part test to determine whether to vacate an arbitration award for fraud [*Pour Le Bebe, Inc. v. Guess? Inc. (2003) 112 Cal. App. 4th 810, 830*]:

- First, the movant must establish the fraud by clear and convincing evidence.

- Second, the fraud must not have been discoverable on the exercise of due diligence prior to or during the arbitration.

- Third, the person seeking to vacate the award must demonstrate that the fraud materially related to an issue in the arbitration.

In *Pour le Bebe*, the "undue means" at issue was the prevailing party's representation in the arbitration by the same counsel who had represented the challenging party (and some of its employees and relatives) in other matters. Finding that the arbitrator's consideration of the motion to disqualify counsel was raised as an ancillary issue and did not provide an opportunity to prosecute a full-blown claim for breach of duty of loyalty, the court would not say that plaintiff ever had an opportunity to discover and reveal the alleged undue means at the arbitration hearing [*Pour Le Bebe, Inc. v. Guess? Inc. (2003) 112 Cal. App. 4th 810, 833*]. Nevertheless, a court may not presume that evidence procured by undue means had an impact on the arbitrators, but must presume instead that the arbitrators took a permissible route to the award. The party challenging the award must establish by clear and convincing evidence some nexus between the fraud or undue means and the award and that the fraud or undue means had a substantial impact on the panel's decision [*Pour Le Bebe, Inc. v. Guess? Inc. (2003) 112 Cal. App. 4th 810, 833-837*].

[d] Impression of Possible Bias of Arbitrator

[i] Test for Bias

To support a claim of bias, a party must demonstrate that the arbitrator had an interest in the subject matter of the arbitration or a preexisting social or business relationship with one of the parties that would color the arbitrator's judgment [*Luster v. Collins (1993) 15 Cal. App. 4th 1338, 1345, 19 Cal. Rptr. 2d 215* (holding that party pointed to no evidence to support claim of bias)]. An impression of possible bias in the arbitration context means that one could reasonably form a belief that an arbitrator was biased for or against a party for a particular reason [*Betz v. Pankow (1995) 31 Cal. App. 4th 1503, 1511, 38 Cal. Rptr. 2d 107]* . The right to seek to vacate an award for bias is available even if the party did not seek disqualification in a timely fashion under *Code Civ. Proc. § 1281.91(c)* [*Advantage Medical Services, LLC v. Hoffman (2008) 160 Cal. App. 4th 806, 820-822, 72 Cal. Rptr.3d 935*]. Further, this right cannot be waived by agreeing to arbitrate under rules that state the arbitration provider's determinations regarding disqualification will be conclusive. The statutes were passed to advance a public purpose of crucial importance over which the state retained ultimate control [*Advantage Medical Services, LLC v. Hoffman (2008) 160 Cal. App. 4th 806, 820-823, 72 Cal. Rptr. 3d 935* (AAA Rule 17)].

The determination is based on whether a reasonable person knowing all of the facts and looking at the circumstances at the time the challenge is made would question the arbitrator's impartiality [*Ceriale v. AMCO Ins. Co. (1996) 48 Cal. App. 4th 500, 504, 55 Cal. Rptr. 2d 685* ; *Betz v. Pankow (1995) 31 Cal. App. 4th 1503, 1512, 38 Cal. Rptr. 2d 107]* . An award may be vacated even though the arbitrators involved are recognized as being beyond reproach and as maintaining the highest ethical standards [*Ceriale v. AMCO Ins. Co. (1996) 48 Cal. App. 4th 500, 506, 55 Cal. Rptr. 2d 685]* . However, an award cannot be vacated because an arbitrator disclosed, out of an excess of caution, a matter that was not required to be disclosed [*Luce, Forward, Hamilton & Scripps, LLP v. Koch (2008) 162 Cal. App. 4th 720, 734-736, 75 Cal. Rptr. 3d 869* (service on 36-member board of professional organization with party's counsel and proposed expert witness who was later stricken from witness list)].

Most of the relationships and interests that could give rise to an impression of possible bias on the part of an arbitrator must now be disclosed pursuant to *Code Civ. Proc. § 1281.9(a)*, which incorporates the disclosures required by judges under *Code Civ. Proc. § 170.1* and matters enumerated in the Ethics Standards for Neutral Arbitrators, Cal. Rules of Ct., Appen., Div. VI. A court is required by *Code Civ. Proc. § 1286.2(a)(6)(A)* to vacate an award once it is shown that the neutral arbitrator failed to disclose in a timely fashion one of the matters required to be disclosed by *Code Civ. Proc. § 1281.9(a)*. There is no room for argument that the undisclosed matter is not one that might cause a reasonable person to question the arbitrator's impartiality. By its 2001 amendments to *Code Civ. Proc. §§ 1281.9* and *1286.2(a)(6)(A)*, the Legislature intended that failure to disclose any of the matters enumerated in *Code Civ. Proc. § 1281.9(a)* satisfy the "might-cause-a-reasonable-person-to-question" standard [*International Alliance of Theatrical Stage Employees, etc. v.*

Laughon, (2004) 118 Cal. App. 4th 1380, 1386-1387, 1392-1394, 14 Cal. Rptr. 3d 341 (including comparison of cases decided before 2001 amendments); *see* Stats. 2001, Ch. 352, § 8]. The Federal Arbitration Act, specifically *9 U.S.C. § 10(a)(2)*, which requires vacating an award for evident partiality of the arbitrator, does not preempt *Code Civ. Proc. § 1286.2(a)(6)(A)*, which requires an award to be vacated for the arbitrator's failure to make any of the required disclosures. *9 U.S.C. § 10(a)* applies only in federal court. Further, *Code Civ. Proc. § 1286.2(a)(6)(A)* is not inconsistent with the FAA, nor does it undermine the purposes of the FAA [*Ovitz v. Schulman (2005) 133 Cal. App. 4th 830, 849-854, 35 Cal. Rptr. 3d. 117]* . The Ethics Standards and *Code Civ. Proc. § 1281.9(a)* are discussed in *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.14[1] -[3]*. *Code Civ. Proc. § 170.1* is discussed briefly in Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding*, § 33.15 and in more detail in Ch. 317, *Judges*.

[ii] Failure to Disclose Prior Business Relationships

Under *Code Civ. Proc. § 1286.2(a)(1), (2)* (award procured by corruption, fraud, or other undue means and corrupt arbitrator, respectively), failure of a neutral arbitrator to disclose any dealings that might create an impression of possible bias is grounds for vacating an award. There need be no proof of actual fraud, corruption, or bias [*Neaman v. Kaiser Foundation Hospital (1992) 9 Cal. App. 4th 1170, 1174, 11 Cal. Rptr. 2d 879* (construing section 1286.2(a), (b), which have been renumbered as (a)(1) and (a)(2))]. The impression must, however, be a reasonable one [*Neaman v. Kaiser Foundation Hospital (1992) 9 Cal. App. 4th 1170, 1175, 11 Cal. Rptr. 2d 879]* .

As discussed at [i], *above*, failure to disclose many relationships now requires vacation of the award because an impression of bias is presumed by the statute [*see Code Civ. Proc. §§ 1281.9(a), 1286.2(a)(6)(A)*; International Alliance of Theatrical Stage Employees, etc. v. *International Alliance of Theatrical Stage Employees, etc. v. Laughon, (2004) 118 Cal. App. 4th 1380, 1386-1387, 1392-1394, 14 Cal. Rptr. 3d 341]* .

ILLUSTRATION:

Arbitrator's Past Affiliation With Law Firm. After arbitration was concluded, the losing party learns that the arbitrator had been a partner in a firm which had represented three business entities in which the other party was an officer and/or shareholder. Can the losing party have the award vacated based on the impression of bias? Maybe. It is necessary to look in much more detail to find the answer. In *Betz v. Pankow (1995) 31 Cal. App. 4th 1503, 38 Cal. Rptr. 2d 107* , the trial court vacated the award, but the court of appeal, looking closely at the circumstances, reversed. In that case, the court held that when all the facts were known, they did not suggest any bias. Those facts included the size of the law firm at the time the party had been represented by it (127 to 147 attorneys), that the firm apparently only reprsented the party in one unrelated matter, that the arbitrator was unaware of that representation, and did not know the party, and was not a member of the firm at the time of the arbitration. One of the court's concerns was the impracticality of an attorney conducting a conflict check with a former firm [*Betz v. Pankow (1995) 31 Cal. App. 4th 1503, 1511-1512, 38 Cal. Rptr. 2d 107* ;*compare Code Civ. Proc. §§ 170.1(a)(2), 1281.2(a)(1), (2)*; Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(7)(A) (disclosure would be required if, within preceding two years, arbitrator, or lawyer associated in practice of law with arbitrator, represented officer, director, or trustee of party)].

[iii] Failure to Disclose Acceptance of Work as Neutral During Pendency of Arbitration

If an arbitrator intends to entertain other offers of employment from the parties or their lawyers while the current arbitration is pending, the arbitrator must disclose that intention in writing within 10 calendar days of service of notice of the arbitrator's proposed nomination or appointment [*Code Civ. Proc. § 1281.9(a)*; Cal Rules of Ct, Appen., Div. VI, Standard 12(b)]. An arbitrator who does not disclose an intent to entertain additional offers from the parties or their lawyers, and despite the prohibition of Standard 12(c), accepts such an offer, must disclose that fact to the parties in writing within 10 calendar days [*Code Civ. Proc. § 1281.9(a)*; Cal Rules of Ct, Appen., Div. VI, Standards 7(c),

(d)(4)(A)(i), 12(b); *Ovitz v. Schulman (2005) 133 Cal. App. 4th 830, 838, 841, 35 Cal. Rptr. 3d 117]* . If an arbitrator who has not disclosed his or her intention to accept employment from a party of lawyer for a party accepts employment as a dispute resolution neutral from a party or lawyer while the arbitration is pending and fails to disclose that fact, any award rendered by that arbitrator must be vacated [*Code Civ. Proc. § 1286.2(a)(6)(A)*; Cal Rules of Ct, Appen., Div. VI, Standards 7(d)(4)(A)(i), 12(b), (c); *Ovitz v. Schulman (2005) 133 Cal. App. 4th 830, 844-846, 35 Cal. Rptr. 3d 117]* .

[e] Arbitrator Exceeded Powers

For discussion of the parties' ability to contractually limit arbitrator's powers, see *§ 34.10[2]*. Generally, when the parties submit issues to arbitration that they were not contractually compelled to submit, the court, in considering whether the award should be vacated under *Code Civ. Proc. § 1286.2*, looks both to the contract and to the scope of the submissions to determine whether the arbitrator exceeded his or her powers. If a party unequivocally submits an issue to arbitration without objection, that party may not later complain that the arbitrator exceeded his or her powers [*J.C.Gury Co. v. Nippon Carbide Indus. (USA), Inc. (2007) 152 Cal. App. 4th 1300, 1305, 62 Cal. Rptr. 3d 118* ; *Porter v. Golden Eagle Ins. Co. (1996) 43 Cal. App. 4th 1282, 1285, 51 Cal. Rptr. 2d 338* ; *see also Blatt v. Farley (1990) 226 Cal. App. 3d 621, 625-627, 629, 276 Cal. Rptr. 612* (award may not be set aside on ground it exceeds amount stated in American Arbitration Association demand for arbitration, which is a unilateral communication to be distinguished from the parties' submission agreement)]. By actually submitting an issue to the arbitrator for decision, the party waives any defect in the arbitrator's authority to decide the issue and also waives any right to litigate the same issue in the courts [*see J.C.Gury Co. v. Nippon Carbide Indus. (USA), Inc. (2007) 152 Cal. App. 4th 1300, 1305-1306, 62 Cal. Rptr. 3d 118* (warranty disclaimer held unconscionable and unenforceable and consequential damage award affirmed despite contract provision that arbitrator had no power to make an award that changed, modified, or altered any provision of contract); *Felner v. Meritplan Ins. Co. (1970) 6 Cal. App. 3d 540, 544, 86 Cal. Rptr. 178]* . On the other hand, a party who pursues motions to stay arbitration or set aside the order compelling it and refuses to participate in the arbitration hearing in protest, is not estopped to raise the issue of the legality of the arbitration clause on the ground that the arbitrator exceeded his or her powers [*Alternative Systems, Inc. v. Carey (1998) 67 Cal. App. 4th 1034, 1039-1041, 79 Cal. Rptr. 2d 567]* .

An arbitrator who issued an award in an initial dispute between the parties does not exceed his or her powers by hearing and deciding a second arbitration when the parties' agreement provided that all disputes of any nature arising from the agreement would be settled by one arbitrator. This is true even if the language "shall be settled by one arbitrator" did not mean that the parties would pick one arbitrator "for life," but merely that each dispute would be settled by one arbitrator rather than three. That language is equally susceptible to both meanings and if the arbitrator interpreted it incorrectly, that would be at most an error of law, which would not be grounds to prohibit confirmation of the award [*Patchett v. Bergamot Station, Ltd. (2006) 143 Cal. App. 4th 1390, 1392, 1395-1398, 49 Cal. Rptr. 3d 941]* .

ILLUSTRATION:

Submission Under Rules Allowing Telephonic Pre-hearing Conference. Plaintiff/investors submitted claims against their securities brokers to arbitration under submission agreements stating that they had read the procedures and rules of the National Association of Securities Dealers (NASD) relating to arbitration, and acknowledging that the proceeding would be governed by the NASD Code of Arbitration Procedure. Rule 10321 of that Code provides for a telephonic pre-hearing conference. Rule 10304 of that Code provides that no claim is eligible for arbitration if six years have elapsed from date of the occurrence or event giving rise to the dispute. Plaintiffs acknowledged their claims were barred by the six-year limitation [*Reed v. Mutual Service Corp. (2003) 106 Cal. App. 4th 1359, 1360 n.4, 131 Cal. Rptr. 2d 524]* . Defendants moved in the arbitration proceeding to dismiss the arbitration based on the six-year limitation period. Plaintiffs opposed that motion. A panel of three arbitrators conducted a telephonic pre-hearing conference in which the parties' attorneys, but not the parties themselves, participated. Based on that conference, and the pleadings, testimony, and evidence presented at that conference, the arbitrators issued an award granting the motion to dismiss the claim with prejudice.

> Defendants petitioned to confirm the award. Plaintiffs petitioned to vacate it, in part on the ground that by deciding the matter at a pre-hearing telephonic conference, the arbitrators exceeded their powers. Did they? No, the plaintiffs clearly agreed to the pre-hearing procedure in their submission agreements [*Reed v. Mutual Service Corp. (2003) 106 Cal. App. 4th 1359, 131 Cal. Rptr. 2d 524]* .

Ordinarily an arbitrator does not exceed his or her powers by granting relief not specifically authorized by the arbitration agreement because an arbitrator is not required to follow legal rules, but may base the decision on broad principles of justice and equity [*Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 374-375, 381, 36 Cal. Rptr. 2d 581, 885 P.2d 994* ; *Bonshire v. Thompson (1997) 52 Cal. App. 4th 803, 809-810, 60 Cal. Rptr. 2d 716* ; *see* [h], *below*]. Similarly, an arbitrator does not usually exceed his or her powers by excusing a performance that would have been futile. That comes within the arbitrator's general power to find the facts, interpret the contract, decide general law, and award any relief rationally related to his or her factual findings and contractual interpretation. An exception to this general power would be a clause in the arbitration agreement that explicitly and unambiguously bars the arbitrator from modifying the contract or excusing any performance [*Gueyffier v. Ann Summers, Ltd. (2008) 43 Cal. 4th 1179, 1181-1182, 1184-1188* , -- Cal. Rpr. 3d --, *184 P.3d 739* (excused notice of breach finding it was not curable)]. However, an arbitration agreement with an integration clause that specifically prohibits introduction of any extrinsic evidence whatsoever in any judicial or arbitration proceeding involving the contract, prohibits reformation of the contract. An award for reformation of such a contract should be vacated as in excess of the arbitrator's powers [*Bonshire v. Thompson (1997) 52 Cal. App. 4th 803, 812, 60 Cal. Rptr. 2d 716]* . An arbitrator exceeds his or her powers by ordering relief that is contrary to the parties' agreement [*see* *O'Flaherty v. Belgum (2004) 115 Cal. App. 4th 1044, 1057-1061, 9 Cal. Rptr. 3d 286* (award forfeiting wrongfully withdrawing partner's capital accounts was contrary to partnership agreement, 1994 Uniform Partnership Act (*Corp. Code § 16602*) and case law)]. If a receiver has been appointed for a party to the arbitration, generally only the receiver will have standing to represent that party. If the receiver declines to participate in the arbitration, any award purporting to determine claims of the entity in receivership will be in excess of the arbitrator's powers [*see* *O'Flaherty v. Belgum (2004) 115 Cal. App. 4th 1044, 1061-1063, 9 Cal. Rptr. 3d 286* (receiver of dissolving partnership declined to participate in arbitration)].

When an arbitration agreement calls for binding arbitration, the inclusion in the agreement of a clause that requires the arbitrator to decide the case as would a court, does not allow the award to be reviewed for errors of law [*Pacific Gas & Electric Co. v. Superior Court (1993) 15 Cal. App. 4th 576, 587-589, 19 Cal. Rptr. 2d 295]* . Similarly, requiring the arbitrator to state reasons for the award in the nature of a statement of decision does not imply that the parties intend to afford the basis for broad-ranging judicial review [*Pacific Gas & Electric Co. v. Superior Court (1993) 15 Cal. App. 4th 576, 589, 19 Cal. Rptr. 2d 295]* .

[f] Failure to Postpone Hearing or Hear Material Evidence

[i] Limited Ground for Vacating Award

The contention that the arbitrator refused to hear evidence could be made in virutally every case in which the arbitrator has excluded some evidence or limited discovery. Therefore, under *Code Civ. Proc. § 1286.2(a)(5)*, a challenge to an arbitrator's evidentiary rulings or limitations on discovery should not provide a basis for vacating an award unless the error substantially prejudiced a party's ability to present material evidence in support of its case [*Schlessinger v. Rosenfeld, Meyer & Susman (1995) 40 Cal. App. 4th 1096, 1110, 47 Cal. Rptr. 2d 650]* . Section 1286.2(a)(5) acts as a safety valve that permits a court to intercede when an arbitrator has prevented a party from fairly presenting its case [*Schlessinger v. Rosenfeld, Meyer & Susman (1995) 40 Cal. App. 4th 1096, 1111, 47 Cal. Rptr. 2d 650* ; *Hall v. Superior Court (1993) 18 Cal. App. 4th 427, 22 Cal. Rptr. 2d 376]* .

This ground for vacating an award may not be used to preclude an arbitrator from disposing of a matter on the arbitral equivalent of a motion, such as a motion for summary adjudication [*Schlessinger v. Rosenfeld, Meyer & Susman (1995) 40 Cal. App. 4th 1096, 1105-1106, 47 Cal. Rptr. 2d 650* ; for discussion, *see* § 34.77[2]].

[ii] Test for Substantial Prejudice

When a party complains of excluded material evidence, the reviewing court should generally focus first on prejudice, not materiality. To find substantial prejudice, the court must accept, for purposes of analysis, the arbitrator's legal theory and conclude that the arbitrator might well have made a different award had the evidence been allowed [*Schlessinger v. Rosenfeld, Meyer & Susman (1995) 40 Cal. App. 4th 1096, 1111, 47 Cal. Rptr. 2d 650* , quoting *Hall v. Superior Court (1993) 18 Cal. App. 4th 427, 22 Cal. Rptr. 2d 376]* .

An arbitrator's refusal to admit evidence that directly affects the issue of damages substantially prejudices the proffering party's ability to dispute the amount of damage and constitutes grounds for vacating an award [*Burlage v. Superior Ct. (2009) 178 Cal. App. 4th 524, 531-532, 100 Cal. Rptr. 3d 531* (affirmating vacation of award for prejudice)].

In *Schlessinger v. Rosenfeld, Meyer & Susman (1995) 40 Cal. App. 4th 1096, 47 Cal. Rptr. 2d 650* , the arbitrator disposed of the case by means of two rounds of cross motions for summary adjudication. No discovery had been conducted prior to the first motions, but because the ruling on these motions turned on a pure question of law based on a contract, there was no prejudice from the lack of discovery. Before the second round of motions, the arbitrator permitted discovery, and the parties presented evidence in support of their motions. The court concluded that given the arbitrator's legal theory of the case, the court could not say a different result might have been reached had the complaining party been allowed to conduct additional discovery. The court also expressed its belief that further discovery would not have uncovered any new, material evidence. Thus, in that case the court concluded that the complaining party was not precluded from presenting any material evidence and had a fair opportunity to present his case [*Schlessinger v. Rosenfeld, Meyer & Susman (1995) 40 Cal. App. 4th 1096, 1111, 47 Cal. Rptr. 2d 650]* .

[iii] Refusal to Postpone Hearing on Showing of Sufficient Cause

An award must be vacated if the rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing on sufficient cause being shown therefor [*Code Civ. Proc. § 1286.2(a)(5)*].

An arbitrator does not necessarily abuse his or her power by refusing to continue the hearing. After a plaintiff had engaged in various delaying tactics, including filing three lawsuits, all of which were either dismissed or stayed so the arbitration could continue, challenging an arbitrator, who recused himself, seeking to add a new claim almost a year after the arbitration was originally set for hearing, and failing to appear at the arbitration hearing, which was reset approximately one year after it had been originally scheduled, it was within the arbitrator's discretion to hear and determine the matter even though the plaintiff did not appear at the hearing. The request for continuance came more than three years after plaintiff first initiated the arbitration; more than one year beyond the original arbitration date; after plaintiff had already once refused to appear at the arbitration hearing. Plaintiff offered no excuse for failing to earlier assert its additional claims, which arose out of the same facts. Under these circumstances, the arbitrators could reasonably conclude there was no good cause to further delay the arbitration [SWAB Financial, LLC v. E* *Trade Securities, LLC (2007) 150 Cal. App. 4th 1181, 1196-1202, 58 Cal. Rptr. 3d 904]* .

[g] Vacation Not Permitted for Error of Law

[i] General Rule

Unless the parties have contractually agreed to limit arbitrator's powers [*see* *Cable Connection, Inc. v. DirecTV, Inc. (2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586* , discussed at *§ 34.10[2], above*], an arbitrator may make a binding award which a court is required to enforce even though the award conflicts with substantive law. An error of law committed by the arbitrator, no matter how gross, is not one of the grounds for setting aside an award [*Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 6, 14, 27-28, 33, 10 Cal. Rptr. 2d 183, 832 P.2d 899* ; *Baize v. Eastridge Companies (2006) 142 Cal. App. 4th 293, 300, 47 Cal. Rptr. 3d 763* ; *Jones v. Humanscale Corp. (2005)*

130 Cal. App. 4th 401, 411, 29 Cal. Rptr. 3d 881 ; *Severtson v. Williams Construction Co. (1985) 173 Cal. App. 3d 86, 92-93, 220 Cal. Rptr. 400* ; *State Farm Mut. Auto. Ins. Co. v. Guleserian (1972) 28 Cal. App. 3d 397, 402, 104 Cal. Rptr. 683]* .

One reason for this arguably harsh rule is that the risk of error is something the parties agree to bear in return for a quick, inexpensive, and conclusive resolution or their dispute. By enacting *Code Civ. Proc. §§ 1286.2* and *1286.6*, allowing vacation or correction of an award on specified grounds, the Legislature substantially reduced the risk of certain types of error. The residual risk of error is considered an acceptable cost of obtaining the expedience and financial savings that the arbitration process provides compared to the judicial process [*Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 11-12, 10 Cal. Rptr. 2d 183, 832 P.2d 899]* . *Moncharsh* disapproved all cases allowing review for an error of law on the face of an award causing substantial injustice [*Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 27-28, 33, 10 Cal. Rptr. 2d 183, 832 P.2d 899]* .

Nor does an error of law or assignment of an erroneous reason for an award constitute an act in excess of the arbitrator's powers which would provide grounds for vacating an award under *Code Civ. Proc. § 1286.2(a)(4)* [*Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 28, 10 Cal. Rptr. 2d 183* P.2d 899; *Baize v. Eastridge Companies (2006) 142 Cal. App. 4th 293, 300-301, 47 Cal. Rptr. 3d 763* ; *Jones v. Humanscale Corp. (2005) 130 Cal. App. 4th 401, 411, 29 Cal. Rptr. 3d 881* ; *Pacific Gas & Electric Co. v. Superior Court (1993) 15 Cal. App. 4th 576, 587-590, 19 Cal. Rptr. 2d 295]* .

The prohibition on reviewing an award for an error of law is not preempted by Sections 10 and 12 of the Federal Arbitration Act (*9 U.S.C. §§ 10, 12*) nor by the federal common law rule which allows review of an arbitration award in federal court for "manifest disregard of the law" [*Siegel v. Prudential Insurance Company (1998) 67 Cal. App. 4th 1270, 1290-1291, 79 Cal. Rptr. 2d 726* ; *see also Comedy Club, Inc. v. Improv West Associates (9th Cir. 2007) 514 F. 3d 833, 847* (to vacate award for "manifest disregard of law," it must be clear that arbitrator recognized applicable law and then ignored it); *Coutee v. Barington Capital Group, L.P. (9th Cir. 2003) 336 F.3d 1128, 1134-1136* (award in excess of arbitrator's power or in "manifest disregard of law" is to be upheld if error is harmless)].

[ii] Exception for Arbitrary Decision

Arbitrators may exceed their power when the situation transcends simple error and involves such a completely irrational construction of the provision in dispute as to remake the parties' contract [*Pacific Gas & Electric Co. v. Superior Court (1993) 15 Cal. App. 4th 576, 591, 19 Cal. Rptr. 2d 295* ; *Cobler v. Stanley, Barber, Southard, Brown & Associates (1990) 217 Cal. App. 3d 518, 532, 265 Cal. Rptr. 868* ; *Hacienda Hotel v. Culinary Workers Union (1985) 175 Cal. App. 3d 1127, 1133, 223 Cal. Rptr. 305* ; *Jones v. Kvistad (1971) 19 Cal. App. 3d 836, 843, 97 Cal. Rptr. 100* ;*compare Comedy Club, Inc. v. Improv West Associates (9th Cir. 2007) 514 F.3d 833, 846* (federal standard for vacating award that is "completely irrational" is extremely narrow and is satisfied only if award fails to draw its essence from agreement)]. *Pacific Gas & Electric* reasoned that *Moncharsh*'s citation of *Hacienda Hotel* indicates that *Moncharsh* did not go so far as to limit or disapprove this ground for vacating an award [*Pacific Gas & Electric Co. v. Superior Court (1993) 15 Cal. App. 4th 576, 590-591, 19 Cal. Rptr. 2d 295]* .

This exception is narrow, however, and applies only to the most serious claims of abuse. It does not allow for vacating an award when the arbitrator's construction of the contract is clearly within the range of ambiguity. If the arbitrator's construction is within the ordinary bounds of semantic permissibility, the contract has not been arbitrarily remade. The test is one of arbitrariness, not correctness [*Pacific Gas & Electric Co. v. Superior Court (1993) 15 Cal. App. 4th 576, 594, 598-609, 19 Cal. Rptr. 2d 295* (none of challenged constructions as amounting to remake of contract)].

[h] Vacation Not Permitted if Remedy Is Rationally Related to Contract

Absent more specific restrictions in the arbitration agreement, the submission, or the rules of arbitration, the remedy an

arbitrator fashions does not exceed his or her powers if it bears a rational relationship to the underlying contract as interpreted, expressly or impliedly, by the arbitrator [*Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 367, 383, 36 Cal. Rptr. 2d 581, 885 P.2d 994* ; *San Francisco Housing Auth. v. Service Employees Int'l Union, Local 790 (2010) 182 Cal. App. 4th 933, 944, 107 Cal. Rptr. 3d 62* ; *see Bonshire v. Thompson (1997)52 Cal. App. 4th 803, 812, 60 Cal. Rptr. 2d 716* (vacating award for reformation of contract with integration clause that prohibited consideration of extrinsic evidence in any judicial or arbitration proceeding involving the contract)]. The award will be upheld if it was even arguably based on the contract; it may be vacated only if the reviewing court is compelled to infer the award was based on an extrinsic source [*Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 381, 36 Cal. Rptr. 2d 581, 885 P.2d 994]* .

Moreover, a court may not vacate an award because the arbitrator exceeded the power a court would have had if the parties had chosen to litigate rather than arbitrate their dispute [*Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 388, 36 Cal. Rptr. 2d 581, 885 P.2d 994]* . In many cases, however, the required rational relationship between breach of contract and the award may be found in the fact the arbtitrator has awarded the injured party relief of the same general type as that a jury or court could have provided had the claim been litigated, even though the quantity, extent or parameters of the award differ in some respects from that to which the party was legally entitled [*Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 384, 36 Cal. Rptr. 2d 581, 885 P.2d 994]* .

In upholding the arbitrator's award in *Advanced Micro Devices, Inc.*, the Court noted that the parties had not by agreement restricted the arbitrator to remedies available in a court of law [*Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 389, 36 Cal. Rptr. 2d 581, 885 P.2d 994]* . Practitioners should note that the contract clause regarding the scope of the award involved in the case was identical to the American Arbtiration Association, Commercial Arbitration Rules (1993), Rule 43, and that the Court has held that that clause does not restrict the arbitrator to remedies authorized by law or express agreement [*Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 383-384, 389, 36 Cal. Rptr. 2d 581, 885 P.2d 994]* .

The dissent contends that this decision will discourage arbitration because of the greatly increased risks and uncertainty of arbitration it generates [*Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 391-392, 36 Cal. Rptr. 2d 581, 885 P.2d 994* (J. Kennard, dissenting)]. The majority rejected this contention, noting that the parties to an arbitration agreement may limit the possible remedies under it. They advised however, that if the parties wish the arbitrator's powers to be specially restricted, they would be well advised to set out those limitations explicitly and unambiguously in the arbitration clause [*Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 383, 36 Cal. Rptr. 2d 581, 885 P.2d 994]* .

[i] Public Construction Contracts

If the parties to a public construction contract expressly agree in writing that an arbitration award resolving a future dispute be supported by law and substantial evidence, then a court shall vacate the arbitration award if it determines on review that the award is not supported by substantial evidence or that it is based on an error of law [*Code Civ. Proc. § 1296*]. In vacating the award, however, the court is subject to the restrictions stated in *Code Civ. Proc. § 1286.4* and discussed under [2], *below*.

[2] Procedure

[a] Filing and Service of Petition

The court may not vacate an award unless [*Code Civ. Proc. § 1286.4*]:

- A petition or response requesting that the award be vacated has been duly served and filed [*Code Civ. Proc. § 1286.4(a)*]; or

- A petition or response requesting that the award be corrected has been duly served and filed and [*Code Civ. Proc. § 1286.4(b)*]:

  - All the petitioners and respondents either are before the court; or

  - All the petitioners and respondents have been given reasonable notice that the court will be requested at the hearing to vacate the award or that the court on its own motion has determined to vacate the award and all petitioners and respondents have been given an opportunity to show why the award should not be vacated.

For forms of petition to vacate award, response, and order, *see §§ 34.56 -34.58*, respectively.

[b] Partial Vacatur Not Authorized

An order partially vacating an arbitration award is not authorized by *Code Civ. Proc. § 1286*. An appellate court reviewing such an order may treat it as a vacation of the entire arbitration award [*Sunnyvale Unified Sch. Dist. v. Jacobs (2009) 171 Cal. App. 4th 168, 174-175, 89 Cal. Rptr. 3d 546* (affirming vacatur of entire arbitration award)].

[c] Rehearing

If the award is vacated, the court may order a rehearing before new arbitrators. If the award is vacated on grounds set forth in *Code Civ. Proc. § 1286.2(a)(4), (5)* (*see* [1][a], *above*), the court with the consent of the parties to the court proceeding may order a rehearing before the original arbitrators [*Code Civ. Proc. § 1287*].

If the arbitration agreement requires that the award be made within a specified period of time, the rehearing may nevertheless be held and the award made within an equal period of time beginning with the date for the order for rehearing but only if the court determines that the purpose of the time limit agreed on by the parties to the arbitration agreement will not thereby be frustrated [*Code Civ. Proc. § 1287*].

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§ 34.20 Judgment Correcting Award

[1] Grounds

Subject to *Code Civ. Proc. § 1286.8* [*see* [2], *below*] the court, unless it vacates the award pursuant to *Code Civ. Proc. § 1286.2* [*see § 34.19*], is required to correct the award and confirm it as corrected if it determines any of the following [*Code Civ. Proc. § 1286.6*; *see Allstate Ins. Co. v. Superior Court (Jessel) (2006) 142 Cal. App. 4th 356, 362-363, 48 Cal. Rptr. 3d 266* ; *Schneider v. Kaiser Foundation Hospitals (1989) 215 Cal. App. 3d 1311, 1317, 264 Cal. Rptr. 227* (disapproved on other grounds in *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 27-28, 10 Cal. Rptr. 2d 183, 832 P.2d 899*)]:

- There was an evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award;

- The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision on the controversy submitted; or

- The award is imperfect in a matter of form, not affecting the merits of the controversy.

Generally speaking, an arbitrator's failure to award attorney's fees in accordance with a contract providing for them is not considered an act in excess of his or her powers, but an error of law or fact, and cannot be corrected by the court [*see Moore v. Bank of San Luis Obispo (2000) 22 Cal. 4th 782, 788-789, 94 Cal. Rptr. 2d 603, 996 P.2d 706* (plaintiffs prevailed on equitable claims but were not awarded any money damages on contract claims; arbitration award provided that each party pay its own attorney's fees); *Moshonov v. Walsh (2000) 22 Cal. 4th 771, 773, 779, 94 Cal. Rptr. 2d 597, 996 P.2d 699* (arbitrator explained attorney's fees were not warranted to party prevailing on tort claims

under limited scope of attorney's fee clause)]. Conversely, if the arbitrator makes an error of law in awarding attorney's fees, the trial court has no authority to correct that mistake by deleting the attorney's fees from the judgment or award [*Taylor v. Van-Catlin Construction (2005) 130 Cal. App. 4th 1061, 1064, 1068, 30 Cal. Rptr. 3d 690* (arbitrator in fact did not misconstrue statute under which fees were awarded)]. Similarly, neither an arbitrator's designation of the prevailing party, nor the amount of attorney's fees awarded to a prevailing party can be corrected, modified, or reversed by a court as "in excess of the arbitrator's powers." If the matter was submitted to the arbitrator, any error in deciding that issue is beyond the scope of review [*Pierotti v. Torian (2000) 81 Cal. App. 4th 17, 24-26, 96 Cal. Rptr. 2d 553* ; *Creative Plastering, Inc. v. Hedley Builders, Inc. (1993) 19 Cal. App. 4th 1662, 1666, 24 Cal. Rptr. 2d 216]* . Likewise, correction of the award to provide for prejudgment interest not previously awarded or compensation for additional fees and costs not previously awarded is outside the scope of a statutorily permitted correction [*Law Offices of David S. Karton v. Segreto (2009) 176 Cal. App. 4th 1, 10, 97 Cal. Rptr. 3d 329*].

There is a narrow exception, however, when the arbitrator designates a prevailing party, but then fails to award attorney's fees or to explain the lack of such an award. In that case, the court still cannot award the fees, but, as discussed in Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* , at § 33.29[3][b], should return the matter to the arbitrator for determination of the amount of attorney's fees [*see* *DiMarco v. Chaney (1995) 31 Cal. App. 4th 1809, 1816-1817, 37 Cal. Rptr. 2d 558]* .

Also, a court can correct an award requiring an employee or former employee to pay fees and expenses of arbitration. If the arbitration involved an employee's unwaivable statutory rights, the minimum requirements set forth in *Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83, 101-112, 99 Cal. Rptr. 2d 745, 6 P.3d 669* (discussed in *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.22[2]*), prohibit the employee from being required by the arbitration agreement or the arbitration process to pay any of the arbitral fees or costs. Thus, an award that imposes any of the arbitral costs on an employee should be corrected by amending it to require the employer to pay all fees and expenses of arbitration [*Jones v. Humanscale Corp. (2005) 130 Cal. App. 4th 401, 411-412, 29 Cal. Rptr. 3d 881* (reversing judgment vacating award and ordering it corrected instead)].

Furthermore, a court has the authority to correct and offset an arbitration award by awarding a settlement credit for a pre-arbitration settlement. Pursuant to *Code Civ. Proc. § 877*, the court can reduce an arbitration award against a nonsettling defendant by awarding a settlement credit of the amount paid to plaintiff by other defendants in prior settlements on the same issue [*Wade v. Schrader (2008) 168 Cal. App. 4th 1039, 1046, 85 Cal. Rptr. 3d 865*]. Since nonsettling defendants were entitled to settlement credit as a matter of law, and since the arbitrator did not take the settlement credit into account in making the arbitration award, applying the settlement credit in satisfaction of the judgment was not really a modification of the arbitration award. Allowing the nonsettling defendants a credit against a future judgment promotes equitable sharing of fault and prevents the plaintiff from obtaining an unfair double recovery [*Wade v. Schrader (2008) 168 Cal. App. 4th 1039, 1046, 85 Cal. Rptr. 3d 865*].

[2] Procedure

The court may not correct an award unless:

- A petition or response requesting that the award be corrected has been duly served and filed [*Code Civ. Proc. § 1286.8(a)*]; or

- A petition or response requesting that the award be vacated has been duly served and filed and [*Code Civ. Proc. § 1286.8(b)*]:

  - All petitioners and respondents are before the court; or

  - All petitioners and respondents have been given reasonable notice that the court will

be requested at the hearing to correct the award or that the court on its own motion has determined to correct the award and all petitioners and respondents have been given an opportunity to show why the award should not be corrected.

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§ 34.21 Dismissal of Proceeding

The court will dismiss the proceeding as to any person named as a respondent if the court determines that that person was not bound by the arbitration award and was not a party to the arbitration [*Code Civ. Proc. § 1287.2*].

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§ 34.22 Appeal

An aggrieved party may appeal from

- An order dismissing a petition to conform, correct, or vacate an award [*Code Civ. Proc. § 1294(b)*];
- An order vacating an award unless a rehearing in arbitration is ordered [*Code Civ. Proc. § 1294(c)*];
- A judgment entered pursuant to *Code Civ. Proc. §§ 1280-1294.2* [*Code Civ. Proc. § 1294(d)*]; or
- A special order after final judgment [*Code Civ. Proc. § 1294(e)*].

An appeal is taken in the same manner as an appeal from an order or judgment in a civil action [*Code Civ. Proc. § 1294.2*; for discussion, *see Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.43[3]*].

With respect to the judgments entered under *Code Civ. Proc. § 1280 et seq.* [*see Code Civ. Proc. § 1294(d)*], this requires that the judgment be final in accordance with *Code Civ. Proc. § 904.1(a)*, and the one-final-judgment rule applies [*Rubin v. Western Mutual Insurance. Co. (1999) 71 Cal. App. 4th 1539, 1547-1548, 84 Cal. Rptr. 2d 648* (judgment confirming arbitration award that only appraised damage was not final for purposes of appeal because merits of action remained to be determined)]. The one-final-judgment rule for appellate proceedings does not prohibit separate or partial judgments against some, but not all, defendants. What the one-final-judgment rule prohibits is appealing from partial disposition while other unresolved matters remain pending. Thus, the fact that judgment had been entered as to some parties based on arbitration did not mean the trial court was prohibited by the one-final-judgment rule from hearing matters relating to the parties who did not participate in the arbitration [*Cuevas v. Truline Corp. (2004) 118 Cal. App. 4th 56, 60-62, 12 Cal. Rptr. 3d 706]* .

The parties may waive their right to appeal [*see Pratt v. Gursey, Schneider & Co. (2000) 80 Cal. App. 4th 1105, 1110, 95 Cal. Rptr. 2d 695* (dismissing appeal because parties' stipulation to arbitrate expressly waived right to appeal any judgment or order)].

A court of appeal may award sanctions for a frivolous appeal, including one that has no merit [*see Code Civ. Proc. § 907*; *Evans v. Centerstone Development Co. (2005) 134 Cal. App. 4th 151, 168, 35 Cal. Rptr. 3d 745* ; *Harris v. Sandro (2002) 96 Cal. App. 4th 1310, 1315, 117 Cal. Rptr. 2d 910]* . Given the frequency and clarity with which the California Supreme Court has rejected attempts to obtain judicial review of contractual arbitration awards, an appeal based on claims that the arbitrator exceeded his powers by making errors of law and committed misconduct by failing to specify the basis for the award would be seen by any reasonable attorney as transparently without merit. A generally accepted measure of sanctions for a frivolous appeal is the amount of attorney's fees the respondent had to expend in opposing the appeal. The sanction may be imposed, jointly and severally, on both the appellant and his or her attorneys [*Harris v. Sandro (2002) 96 Cal. App. 4th 1310, 1316, 117 Cal. Rptr. 2d 910* (imposing sanctions of $11,062; appeal also appeared to have been taken to delay enforcement of unlawful detainer judgment)].

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§ 34.23 Award Will Not Support Malicious Prosecution Action

The California Supreme Court has held, in a four-to-three decision, that a contractual arbitration award is not a "favorable termination of a prior action" that will support an action for malicious prosecution [*Brennan v. Tremco Incorporated (2001) 25 Cal. 4th 310, 314, 105 Cal. Rptr. 2d.790, 20 P.3d 1086]* . The majority in *Brennan* upheld *Sagonowsky v. More (1998) 64 Cal. App. 4th 122, 125, 134, 75 Cal. Rptr. 2d 118* , in which the First District, Division Four, did not allow a malicious prosecution action against an attorney for one of the parties to a contractual arbitration [*Brennan v. Tremco Incorporated (2001) 25 Cal. 4th 310, 314, 105 Cal. Rptr. 2d.790, 20 P.3d 1086]* and disapproved, to the extent it is inconsistent, *Rogers v. Peinado (2000) 85 Cal. App. 4th 1, 8-9, 101 Cal. Rptr. 2d 817* , in which the First District, Division Five, distinguished between parties to the arbitration agreement and non-parties, specifically attorneys for a party to the arbitration, by allowing a malicious prosecution action to proceed against the attorneys for the other party to the contractual arbitration but not against the other party to the arbitration [*Brennan v. Tremco Incorporated (2001) 25 Cal. 4th 310, 317, 105 Cal. Rptr. 2d.790, 20 P.3d 1086]* . The attorneys named in the malicious prosecution action in *Brennan* had settled before Tremco demurred, so only the validity of a malicious prosecution action against the other party to contractual arbitration was at issue in *Brennan*.

The minority in *Brennan* believed that because the parties to the arbitration stipulated to arbitration of remaining claims between them only after four years of litigation and termination of several claims (by summary judgment) in Brennan's favor, the majority's holding did not validate the usual reasons for denying the judicial remedy of malicious prosecution. They saw the arbitration as a "terminating mechanism" agreed to only after Brennan and the court system had suffered all the harms which a malicious prosecution claim is designed to vindicate [*Brennan v. Tremco Incorporated (2001) 25 Cal. 4th 310, 321, 105 Cal. Rptr. 2d.790, 20 P.3d 1086]* . The minority also felt their view was consistent with *Stanley v. Superior Court (1982) 130 Cal.App.3d 460, 181 Cal. Rptr. 878* , which allowed a malicious prosecution action after conclusion of judicial arbitration, which had also been used as a "terminating mechanism" to the prior action [*Brennan v. Tremco Incorporated (2001) 25 Cal. 4th 310, 322, 105 Cal. Rptr. 2d. 790, 20 P.3d 1086]* .

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§ 34.24 Res Judicata and Collateral Estoppel

[1] Issue Preclusion: Collateral Estoppel

A private arbitration award, even if judicially confirmed, is not entitled to collateral estoppel effect ("issue preclusion") against a nonparty unless the parties to the arbitration so agree [*Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 824, 834, 836-837, 88 Cal. Rptr. 2d 366, 982 P.2d 229* ; *see also Cuevas v. Truline Corp. (2004) 118 Cal. App. 4th 56, 62, 12 Cal. Rptr. 3d 706* ; *Flores v Transamerica HomeFirst, Inc. (2001) 93 Cal. App. 4th 846, 852, 113 Cal. Rptr. 2d 376* (court of appeal refused to give collateral estoppel effect to unreported decision regarding unconscionability of arbitration provision in identical loan documents signed by different parties under different circumstances)].

In so holding, the Supreme Court noted that it was making a very narrow holding, and listed a number of issues it was not addressing [*Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 824 n.2, 88 Cal. Rptr. 2d 366, 982 P.2d 229]* :

- The strict res judicata ("claim preclusion") effect of a private arbitration award [citing *Thibodeau v. Crum (1992) 4 Cal. App. 4th 749, 756-761, 6 Cal. Rptr. 2d 27* (award between homeowner and general contractor barred homeowner action against subcontractor); *Sartor v. Superior Court (1982) 136 Cal. App. 3d 322, 327-328, 187 Cal. Rptr. 247* (award between homeowner and architectural firm barred homeowner's identical action against firm's employees)].

- The circumstances, if any, in which a private arbitration award would have collateral estoppel effect in subsequent litigation between the same parties on a different cause of action. A situation of this type was addressed in *Grinham v. Fielder (2002) 99 Cal. App. 4th 1049, 121 Cal. Rptr. 2d 468* , decided after *Vanderburg*. In *Grinham*, employers who had not signed the arbitration agreement participated in

arbitration for the purpose of proving they had no liability to the party with whom their employee had contracted in excess of the scope of his agency and employment. That award and its resulting judgment were entitled to res judicata and collateral estoppel effect in a cross complaint (to an action by the prevailing third party to set aside employee's allegedly fraudulent transactions) by the employee seeking declaratory relief, contribution, and equity indemnity. The issues of employee's actual or ostensible agency and the employer's liability for employee's actions were determined in the arbitration, in which employers participated. Therefore, it was appropriate to grant their motion for summary judgment in the later action for indemnity [*Grinham v. Fielder (2002) 99 Cal. App. 4th 1049, 1054-1055, 121 Cal. Rptr. 2d 468]* .

- Whether the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*) would alter the ruling.

- The application of collateral estoppel to arbitrations under collective bargaining agreements within the purview of federal or state labor relations laws [citing *Kelly v. Vons Companies, Inc. (1998) 67 Cal. App. 4th 1329, 1339-1341, 79 Cal. Rptr. 2d 763* (arbitration between union and employer bound employees on similar issues in later litigation with employer) and *Lehto v. Underground Constr. Co. (1977) 69 Cal. App. 3d 933, 939-944, 138 Cal. Rptr. 419* (union-employer arbitration not preclusive against union member's subsequent unfair representation claim)].

- The collateral estoppel effect of arbitrations under various other California statutory schemes, including:

  - Mandatory judicial arbitration under *Code Civ. Proc. § 1141.10 et seq.*

  - Statutory arbitration of uninsured motorist claims under *Ins. Code §§ 11580.2(f), 11580.5*.

  - Statutory arbitration of attorney-client fee disputes under *Bus. & Prof. § 6204*.

The Court reasoned that because the decision to arbitrate involves each party's conclusion, based on the dispute immediately at stake, that the benefits of arbitration outweigh the risk of losing a binding arbitration even if they could win in court, a party's consent to arbitration should not be read to include consent that they will be bound in all future disputes, regardless of the stakes, against all adversaries, known and unknown [*Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 832, 88 Cal. Rptr. 2d 366, 982 P.2d 229]* . The court suggested that parties would not routinely make a conscious agreement to give arbitrator's decisions nonmutual collateral estoppel effect, and that mere silence should not imply the arbitral parties' acceptance of nonmutual collateral estoppel [*Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 835, 88 Cal. Rptr. 2d 366, 982 P.2d 229]* .

A confirmed award that was the result of arbitration under a collective bargaining agreement has been held not to collaterally estop the plaintiff from pursuing an action for claims under the Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*, "FEHA"), because there was no showing: (1) that the agreement "clearly and unmistakably" provided for binding arbitration of an employee's statutory FEHA claims, or (2) that the arbitration was conducted pursuant to procedures that allowed for the full litigation and fair adjudication of the FEHA claims [*Camargo v. California Portland Cement Company (2001) 86 Cal. App. 4th 995, 999, 1018-1019, 103 Cal. Rptr. 2d 841* ; *see Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.22[2]* and *[4]*, for discussion of the requirements for arbitration of FEHA claims].

For discussion of the res judicata and collateral estoppel effect of an unconfirmed award in particular, see *§ 34.11[3]*.

[2] Claim Preclusion Effect: Strict Res Judicata

A judgment based on a confirmed arbitration award should be given claim preclusion, or strict res judicata, effect, to bar a subsequent lawsuit on the same cause of action [*Brinton v. Bankers Pension Services, Inc. (1999) 76 Cal. App. 4th 550, 558 , 90 Cal. Rptr. 2d 469* ; *see In re Khaligh (2006 9th Cir. BAP) 338 B. R. 817, 830-832 , aff'd 506 F. 3d 956, 957 (9th Cir. 2007)* (arbitration award for defamation that included punitive damages was entitled to preclusive effect to allow summary judgment in adversary proceeding establishing debt as malicious and willful and nondischargeable under *11 U.S.C. 523(a)(6)*)] or another cause of action based on the same primary right [*Richard B. LeVine, Inc. v. Higashi (2006) 131 Cal. App. 4th 566, 576-579, 32 Cal. Rptr. 3d 244]* .

ILLUSTRATION:

Derivative Claim Is Barred by Arbitration Award. Plaintiff arbitrated fraud claims against an individual securities representative and one of the brokerage firms for which the representative worked. The statement requesting arbitration said that the individual was acting as agent of both firms, but only one firm was party to the arbitration agreement, so the other firm declined to arbitrate. After the arbitration award in favor of one firm and the individual representative was confirmed and judgment entered thereon, plaintiff filed suit against the second brokerage firm. The trial court granted defendant firm's motion for summary judgment based on res judicata. Was that correct? Yes. *Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 824 n.2, 88 Cal. Rptr. 2d 366, 982 P.2d 229* , made clear that nothing in that decision imposed or implied any limitation on strict res judicata or the claim preclusion effect of a California private arbitration award [*Brinton v. Bankers Pension Services, Inc. (1999) 76 Cal. App. 4th 550, 557, 90 Cal. Rptr. 2d 469]* . Applying the primary rights theory, the record established that the arbitrated claim and the lawsuit sought recovery for the same injury. Further, each sought to hold the firm liable based on the agency theory. Thus, the claim asserted in the lawsuit was derivative of plaintiff's claim against the individual representative, so it was not necessary for the firm named in the lawsuit to have been a party to the arbitration in order to assert the claim preclusion defense [*Brinton v. Bankers Pension Services, Inc. (1999) 76 Cal. App. 4th 550, 557-558, 90 Cal. Rptr. 2d 469]* .

The "derivative claim" situation is relatively unique, however. Generally, if the earlier award was not against a party to the later litigation, the award will not bar the later action on the basis of res judicata (claim preclusion) if the later litigation does not involve the same primary right or seek the same damages or other relief, and the earlier arbitration did not afford the party against whom the arbitration award is sought to be enforced the opportunity for full presentation of the claim [*see, e.g.,* *Benasra v. Mitchell Silberberg & Knupp (2002) 96 Cal. App. 4th 96, 108-114, 116 Cal. Rptr. 2d 644* (denial of plaintiff's motion before arbitration panel to disqualify attorneys for opposing party in that arbitration on the basis of conflict of interest due to firm's previous representation of plaintiff, which was encompassed in eventual award, did not bar later action against those attorneys for breach of loyalty); *compare* *Richard B. LeVine, Inc. v. Higashi (2006) 131 Cal. App. 4th 566, 570, 573, 575-579, 32 Cal. Rptr. 3d 244* (earlier award against plaintiff in later action barred claims against alleged co-conspirator based on same primary right)].

A federal court judgment confirming an arbitration award is not subject to collateral attack in a state court action involving the same parties and the same contract, but other allegations, even if the award confirmed was based on arbitration held at an improper venue [*G.C. & K.B. Investments, Inc. v. Wilson (9th Cir. 2003) 326 F. 3d 1096, 1105-1107* (wrong venue was at most error of law which is not judicially reviewable)]. Similarly, the Anti-Injunction Act [*28 U.S.C. § 2283*] does not prevent a federal district court from enjoining a state court from preventing, or interfering with, enforcement of the federal court's judgment. This "relitigation" exception grants a federal court the authority to issue injunctions in aid of its jurisdiction and to protect or effectuate its judgments [*G.C. & K.B. Investments, Inc. v. Wilson (9th Cir. 2003) 326 F. 3d 1096, 1107]* .

For discussion of the res judicata and collateral estoppel effect of an unconfirmed arbitration award, see *§ 34.11[3]*.

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Chapter 34 CONTRACTUAL ARBITRATION: JUDICIAL REVIEW
PART II. LEGAL BACKGROUND

4-34 California Forms of Pleading and Practice--Annotated §§ 34.25-34.29

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[Reserved]

§§ 34.25[Reserved]

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§ 34.30 State Statutes

[1] Petition to Review Award

Petition for judicial review of award. *Code Civ. Proc. §§ 1285, 1285.4, 1285.8, 1290*

Time to file petition for judicial review. *Code Civ. Proc. §§ 1288, 1288.4, 1288.6*

Service and filing of petitions. *Code Civ. Proc. § 1290.4*

[2] Response

Response to petition for judicial review of award. *Code Civ. Proc. §§ 1285.2, 1285.6, 1285.8, 1290*

Time to file response to petition for judicial review. *Code Civ. Proc. §§ 1288.2, 1290.6*

Manner of service of response. *Code Civ. Proc. § 1290.8*

[3] Dismissal

Dismissal of judicial review proceeding. *Code Civ. Proc. § 1287.2*

[4] Judicial Review of Award

Effect of unconfirmed or unvacated award. *Code Civ. Proc. § 1287.6*

[5] Hearing

Summary hearing on notice. *Code Civ. Proc. § 1290.2*

Calendar preference. *Code Civ. Proc. § 1291.2*

Venue and jurisdiction. *Code Civ. Proc. §§ 85, 86(a)(10)(A), 1292, 1292.2, 1292.6, 1293*

Cost of proceeding. *Code Civ. Proc. § 1293.2*

[6] Confirming Award

Judgment confirming award. *Code Civ. Proc. § 1287.4*

[7] Correction of Award

Correction of award; grounds; requisites. *Code Civ. Proc. §§ 1286.6, 1286.8*

[8] Vacating Award

Vacating award; grounds; requisites. *Code Civ. Proc. §§ 1286.2, 1286.4*

Order for rehearing when award is vacated. *Code Civ. Proc. § 1287*

Public construction contracts; grounds for vacating award. *Code Civ. Proc. § 1296*

[9] Statement of Decision

Statement of decision is required to be made by court on request made pursuant to *Code Civ. Proc. § 632* when order or judgment appealable. *Code Civ. Proc. § 1291*

[10] Appeal

Appealable orders. *Code Civ. Proc. § 1294*

Proceedings on appeal. *Code Civ. Proc. § 1294.2*

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§ 34.31 Decisions

[1] Scope of Review

Parties cannot by their agreement require court to review award for errors of law, sufficiency of evidence, or other nonstatutory ground; provisions so attempting are to be severed or ignored. *Hall Street Assocs., L.L.C. v. Mattel, Inc. (2008) 552 U.S. 576, 128 S. Ct. 1396, 170 L. Ed. 2d 254, 259, 263-265, 268* ; *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc. (9th Cir. 2003) 341 F. 3d 987, 1000, 1003* (rule under Federal Arbitration Act).

California rule is that parties may obtain judicial review of merits by express agreement providing that arbitrators shall not have power to commit errors of law or legal reasoning, and that award may be vacated or corrected on appeal to court of competent jurisdiction for any such error. *Cable Connection, Inc. v. DirecTV, Inc. (2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586* (disapproving, to extent they conflict with opinion expressed therein, *Crowell v. Downey Community Hospital Foundation (2002) 95 Cal. App. 4th 730, 735, 115 Cal. Rptr. 2d 810* ; *Oakland-Alameda County Coliseum Authority v. CC Partners (2002) 101 Cal. App. 4th 635, 645, 124 Cal. Rptr. 2d 363* ; *Old Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co. (1996) 45 Cal. App. 4th 631, 638-639, 53 Cal. Rptr.3d 50*)

Neither merits of controversy nor sufficiency of evidence to support arbitrator's award is matter for judicial review; court is not permitted to substitute its judgment for that of arbitrators. *Morris v. Zuckerman (1968) 69 Cal. 2d 686, 691, 72 Cal. Rptr. 880, 446 P.2d 1000* ; *Pacific Vegetable Oil Corp. v. C.S.T., Ltd. (1946) 29 Cal. 2d 228, 233, 238, 174 P.2d 441* ; *Rodrigues v. Keller (1980) 113 Cal. App. 3d 838, 843, 170 Cal. Rptr. 349* ; *Santa Clara-San Benito etc. Elec. Contractors' Assn. v. Local Union No. 332,. (1974) 40 Cal. App. 3d 431, 437, 114 Cal. Rptr. 909* ; *Jones v. Kvistad (1971) 19 Cal. App. 3d 836, 843, 97 Cal. Rptr. 100* ; *Canadian Indem. Co. v. Ohm (1969) 271 Cal. App. 2d 703, 709, 76 Cal. Rptr. 902* ; *Horn v. Gurewitz (1968) 261 Cal. App. 2d 255, 261-262, 67 Cal. Rptr. 791*

Review of uninsured motorist arbitration proceedings that are mandated by *Ins. Code § 11580.2* is limited to grounds allowed by *Code Civ. Proc. § 1286.2*. *Porter v. Golden Eagle Ins. Co. (1996) 43 Cal. App. 4th 1282, 1285, 51 Cal. Rptr. 2d 338*

Because agreement to arbitrate child support would be void to extent it deprived court of jurisdiction to modify child support or to review future child support awards, parties' agreement to arbitrate future child support was valid only because order approving it reserved jurisdiction to court to review any award; thus, arbitration award modifying child support could not be confirmed or vacated in accordance with contractual arbitration statutes (*Code Civ. Proc. §§ 1285-1287.6*). *In re Marriage of Bereznak (2003) 110 Cal. App. 4th 1062, 1068-1070, 2 Cal. Rptr. 3d 351*

Role of court in reviewing validity of arbitration award under collective bargaining agreement is extremely narrow; arbitrator's findings of law or fact are final and conclusive; neither merits of controversy nor sufficiency of evidence are subject to judicial review; court must affirm award if it can in any rational way be derived from agreement, and can only reverse for manifest disregard of agreement, totally unsupported by principles of contract construction and law of shop. *Social Services Union v. Alameda County Training & Employment Bd. (1989) 207 Cal. App. 3d 1458, 1463, 255 Cal. Rptr. 746*

Court is required to defer to any arbitrator's decision involving contract interpretation that draws its essence form parties' agreement and is required to enforce any award that, on its face, represents plausible interpretation unless award manifestly disregards law. *National Football League Players' Assn. v. National Football League Management Council (1986) 188 Cal. App. 3d 192, 198-199, 233 Cal. Rptr. 147*

In action to have arbitration award vacated on basis that arbitrators exceeded their powers (*Code Civ. Proc. § 1286.2*) in interpretation of contract, court is not required to inquire into possible legal error by arbitrators when arbitrators properly assessed evidence and reasonably made findings as to parties' contractual intent. *Summit Industrial Equipment, Inc. v. Koll/Wells Bay Area (1986) 186 Cal. App. 3d 309, 320, 230 Cal. Rptr. 565*

Policy of law are to encourage and foster arbitration, and arbitrator's award is generally conclusive on matters of fact and law. *Severtson v. Williams Construction Co. (1985) 173 Cal. App. 3d 86, 91, 220 Cal. Rptr. 400*

When losing party attacks arbitration award as in excess of arbitrator's powers under *Code Civ. Proc. § 1286.2(d)* [*see now Code Civ. Proc. § 1286.2(a)(4)*] on ground that contract on which award was based was illegal, trial court is entitled to review issue of illegality without being bound by findings of arbitrator. *Webb v. West Side District Hospital (1983) 144 Cal. App. 3d 946, 949, 193 Cal. Rptr. 80* (disapproved in *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 32 n.14, 10 Cal. Rptr. 2d 183, 832 P.2d 899* to extent it suggests review is routinely available if party claims merely a portion of the contract is illegal)

Court is without power to reexamine question whether or not plaintiffs had shown reasonable diligence in prosecution of their claims. *Young v. Ross-Loos Medical Group, Inc. (1982) 135 Cal. App. 3d 669, 673-674, 185 Cal. Rptr. 536*

Scope of review of arbitration award under collective bargaining agreement is limited to determination of whether arbitrator acted in manifest disregard of agreement; court is not permitted to review merits of controversy or sufficiency of evidence. *Foreman Roofing Inc. v. United Union of Roofers etc. Workers (1983) 144 Cal. App. 3d 99, 105-106, 192 Cal. Rptr. 439* ; *Department Store Employees Union v. Joseph Magnin Co. (1981) 123 Cal. App. 3d 410, 417, 176 Cal. Rptr. 650*

Argument that arbitration agreement is void is not permitted to be made on appeal even if agreement authorizes penalties as long as face of award or record sustains finding of nonforfeiture. *Northern Cal. Dist. Council of Hod Carriers v. Pennsylvania Pipeline, Inc. (1980) 103 Cal. App. 3d 163, 173, 162 Cal. Rptr. 851*

Court has no power to review sufficiency of evidence in arbitration proceeding. *Shammas v. National Telefilm Associates (1970) 11 Cal. App. 3d 1050, 1056, 90 Cal. Rptr. 119*

Merits of controversy, form and sufficiency of evidence to support award, and credibility and good faith of parties are not subject to judicial review in absence of corruption, fraud, or undue means in obtaining award. *Archuletav. Grand Lodge etc. of Machinists (1968) 262 Cal. App. 2d 202, 208, 68 Cal. Rptr. 694* ; *see also Interinsurance Exchange v. Bailes (1963) 219 Cal. App. 2d 830, 835, 33 Cal. Rptr. 533*

Statutory methods of review of arbitration award is exclusive. *Government Employees Ins. Co. v. Brunner (1961) 191 Cal. App. 2d 334, 340, 12 Cal. Rptr. 547*

Substantial compliance with arbitration statutes as all that is necessary to support arbitration award. *Canadian Indem. Co. v. Ohm (1969) 271 Cal. App. 2d 703, 707, 76 Cal. Rptr. 902*

[2] Interpretation of Award

Declaratory judgment is available to clarify or interpret rights and duties under arbitrator's award when actual dispute exists over meaning of award, as long as clarification or interpretation does not involve modification of award. *Sandler v. Casale (1981) 125 Cal. App. 3d 707, 713, 178 Cal. Rptr. 265*

Rules applied in ascertaining meaning of court order or judgment also applies to arbitration awards. *L. A. Local etc. Bd. v. Stan's Drive-Ins, Inc. (1955) 136 Cal. App. 2d 89, 94, 288 P.2d 286*

[3] Attorney's Fees

Arbitrator's award of attorney's fees pursuant to *Civ. Code § 1738.16* was not in manifest disregard of law. Although agreement was governed by New York law, manufacturer violated *Civ. Code § 1738.13* (which cannot be waived by any manufacturer or sales representative doing business in California) by failing to enter into contract governing transaction at issue. Commissions earned on transaction were properly awarded under New York doctrine of quasi-contract. *Schoenduve Corp. v. Lucent Technologies, Inc. (9th Cir, 2006) 442 F.3d 727, 735-736*

It would be an abuse of discretion to award either party attorney's fees for obtaining an order confirming the initial arbitration award, where neither party sought an order confirming the award, or called to the trial court's attention its obligation to confirm the award under *Code Civ. Proc. § 1286*. *Law Offices of David S. Karton v. Segreto (2009) 176 Cal. App. 4th 1, 10-11, 97 Cal. Rptr. 3d 329*

Code Civ. Proc. § 1293.2 mandates that court award costs in any judicial proceeding under *Code Civ. Proc. § 1280 et seq.* [*see Code Civ. Proc. § 1285*], and thus requires award of attorney's fees to prevailing party, which *Code Civ. Proc.§ 1032(a)(4)* defines to include defendant against whom plaintiff does not recover any relief. Thus, defendant who successfully opposed petition to confirm award must be awarded attorney's fees incurred in that proceeding. *MBNA America Bank, N.A. v. Gorman (2006) 147 Cal. App. 4th Supp 1, 7-8, 54 Cal. Rptr. 3d 724*

Award of attorney's fees to defendant who successfully opposed petition to confirm award was proper under *Code Civ. Proc. § 1021.5*, when basis for denial of confirmation was that arbitration provision was added unilaterally by "bill stuffer" and thus could not serve as waiver of right to trial by jury; fact that order did not formally enjoin plaintiff from enforcing arbitration provision against other customers did not mean no public good was served; order would still effectively deter plaintiff from enforcing arbitration provision against customers similarly situated to defendant. *MBNA America Bank, N.A. v. Gorman (2006) 147 Cal. App. 4th Supp 1, 8-10, 54 Cal. Rptr. 3d 724*

When both underlying agreement and submission to arbitration were silent on matter of attorney's fees, arbitrator is without jurisdiction to award them; construction industry rule of AAA, Rule 43, incorporated by agreement, also does not authorize award of attorney's fees. *Thompson v. Jespersen (1990) 222 Cal. App. 3d 964, 967-969, 272 Cal. Rptr. 132*

Attorney's fees are awarded to successful party according to terms of agreement, including attorney's fees on appeal. *Stermer v. Modiano Constr. Co. (1975) 44 Cal. App. 3d 264, 272-273, 118 Cal. Rptr. 309*

[4] Validity

Erroneous reasoning does not invalidate otherwise proper arbitration award. *Grunwald-Marx, Inc. v. Los Angeles Joint Board (1959) 52 Cal. 2d 568, 589, 343 P.2d 23*

Every intendment of validity is to be given award. *Grunwald-Marx, Inc. v. Los Angeles Joint Board (1959) 52 Cal. 2d 568, 589, 343 P.2d 23* ; United Brotherhood of Carpenters etc., Local 642 v. *DeMello (1972) 22 Cal. App. 3d 838, 840, 100 Cal. Rptr. 564* ; *Jones v. Kvistad (1971) 19 Cal. App. 3d 836, 840, 97 Cal. Rptr. 100* ; *Walter v. National Indem. Co. (1970) 3 Cal. App. 3d 630, 633, 83 Cal. Rptr. 803* ; *Frantz v. Inter-Insurance Exchange of Auto. Club (1964) 229 Cal. App. 2d 269, 273, 40 Cal. Rptr. 218* ; *Turner v. Cox (1961) 196 Cal. App. 2d 596, 603, 16 Cal. Rptr. 644*

Failure by arbitrators to consider claim does not invalidate award. *Sapp v. Barenfeld (1949) 34 Cal. 2d 515, 523, 524, 212 P.2d 233* ; *Jones v. Kvistad (1971) 19 Cal. App. 3d 836, 844, 97 Cal. Rptr. 100*

Portion of award arising from consolidated arbitrations before single arbitrator that was based on causes of action under agreement that provided for three-arbitrator panel had to be vacated because court had no power to order consolidated arbitration before single arbitrator (as provided in one contract); right to three-arbitrator panel is substantial contractual right; it minimizes the risk of factual or legal error, which are subject to only limited judicial review. *Parker v. McCaw (2005) 125 Cal. App. 4th 1494, 1505-1509, 24 Cal. Rptr. 3d 55*

Burden is on party claiming invalidity to support such claim with evidence. *Walter v. National Indem. Co. (1970) 3 Cal. App. 3d 630, 633, 83 Cal. Rptr. 803* ; *Frantz v. Inter--Insurance Exchange of Auto. Club (1964) 229 Cal. App. 2d 269, 274, 40 Cal. Rptr. 218* ; *Turner v. Cox (1961) 196 Cal. App. 2d 596, 603, 16 Cal. Rptr. 644*

[5] Preserving Objections for Review

Party is not permitted to sit idle through arbitration procedure and then collaterally attack that procedure on grounds not raised before the arbitrators when result turns out to be adverse. *Marino v. Writers Guild of America, East, Inc. (9th Cir. 1993) 992 F.2d 1480, 1484*

When arbitration agreement allowed review only to determine whether procedures were followed and only after review by internal oversight committee, party seeking writ of mandate to vacate award is required to have first presented objections to oversight committee. *see* *Ferguson v. Writers Guild of America (1991) 226 Cal. App. 3d 1382, 1389-1390, 277 Cal. Rptr. 450*

[6] Arbitration Under Self-Executing Agreement

When arbitration proceeds under self-executing agreement without court order to arbitrate under *Code Civ. Proc. § 1281.2,* objecting party is required to participate in arbitration and to raise objections by petition to vacate award under

Code Civ. Proc. § 1286.2 or by opposing petition to confirm award. *National Marble Co. v. Bricklayers & Allied Craftsmen (1986) 184 Cal. App. 3d 1057, 1064, 229 Cal. Rptr. 653*

[7] Cross Complaints

Provisions for compulsory cross complaints do not apply to special proceedings, such as hearings to confirm arbitration awards, and permissive cross complaints are allowed only when cross complaint responds to complaint or another cross complaint, not to petition. *Airfloor Co. of California, Inc. v. Regents of University of California (1978) 84 Cal. App. 3d 1004, 1009, 149 Cal. Rptr. 130*

[8] Discovery

Losing party is not permitted to conduct inquisition into arbitrators' thought processes in reaching their award. *Ferguson v. Writers Guild of America (1991) 226 Cal. App. 3d 1382, 1390-1391, 277 Cal. Rptr. 450* ; *Cobler v. Stanley, Barber, Southard, Brown & Associates (1990) 217 Cal. App. 3d 518, 528-529, 265 Cal. Rptr. 868*

Petitioners seeking to vacate arbitration award on ground that arbitrators acted in excess of their powers are not entitled to discover mental processes or deliberations of arbitrators. *Arco Alaska, Inc. v. Superior Court (1985) 168 Cal. App. 3d 139, 147-149, 214 Cal. Rptr. 51*

[9] Evidence

Arbitrator is not permitted to testify as to his or her own fraud or misconduct to impeach award. *Sapp v. Barenfeld (1949) 34 Cal. 2d 515, 523, 212 P.2d 233* ; *Lauria v. Soriano (1960) 180 Cal. App. 2d 163, 171, 4 Cal. Rptr. 328*

Arbitrator, although unable to impeach own award on grounds of fraud or misconduct, is able to testify to what matters were considered in making decision. *Severtson v. Williams Construction Co. (1985) 173 Cal. App. 3d 86, 92, 220 Cal. Rptr. 400*

Dissenting arbitrator is permitted to testify as to bias, partiality, or other misconduct of arbitrators who render award. *Lauria v. Soriano (1960) 180 Cal. App. 2d 163, 171, 4 Cal. Rptr. 328*

[10] Determination of Issues

Decision that one party should pay other party sum of money is sufficiently determinative of all items embraced in submission. *Sapp v. Barenfeld (1949) 34 Cal. 2d 515, 523, 212 P.2d 233* ; *B. S. B. Constr. Co. v. Rex Constr. Co. (1962) 200 Cal. App. 2d 327, 332, 19 Cal. Rptr. 167*

[11] Binding Effect

Award against deceased partner's surviving spouse in favor of partnership and other partners finding that spouse was not entitled to share in profits after decedent's death was res judicata so as to bar surviving spouse's claims against partnership's accountants on any aiding and abetting or conspiracy theories. *Richard B. LeVine, Inc. v. Higashi (2006) 131 Cal. App. 4th 566, 570, 573, 575-579, 32 Cal. Rptr. 3d 244*

Claim relating to allocation of arbitration costs is subject to res judicata if it should have been litigated at arbitration hearing. *Mansdorf v. California Physicians' Service, Inc. (1978) 87 Cal. App. 3d 412, 416, 151 Cal. Rptr. 388*

Party to arbitration proceedings benefiting from award is estopped from claiming not to be bound by award. *Lovret v. Seyfarth (1972) 22 Cal. App. 3d 841, 862, 101 Cal. Rptr. 143*

One who voluntarily joins arbitration proceedings is bound by award. *Lovret v. Seyfarth (1972) 22 Cal. App. 3d 841, 859-860, 101 Cal. Rptr. 143*

Binding effect of award in matters properly before arbitrators. *Fidelity & Cas. Co. v. Dennis (1964) 229 Cal. App. 2d 541, 40 Cal. Rptr. 418*

Except for matters expressly provided for in *Code Civ. Proc. § 1286.2* (grounds for vacating award), decision of arbitrator is binding, whether or not correct in law or in fact, when agreement to submit disputes to arbitration is "general." *Interinsurance Exchange v. Bailes (1963) 219 Cal. App. 2d 830, 834, 33 Cal. Rptr. 533* ; *see also B. S. B. Constr. Co. v. Rex Constr. Co. (1962) 200 Cal. App. 2d 327, 334, 19 Cal. Rptr. 167*

[12] Confirming Award

Arbitrator did not exceed powers or decide matter not submitted by awarding commissions for transaction which was not covered by contract; award was properly made pursuant to doctrine of quasi-contract recognized in New York under agreement governed by New York law; demand for arbitration was very broad, covering recovery of "those commissions, interest and other damages arising from the wrongful conduct of *Lucent." Schoenduve Corp. v. Lucent Technologies, Inc. (9th Cir. 2006) 442 F.3d 727, 732-735*

Parties' stipulation which provided that calculation of net cash recovery and judgment remain open until resolution of litigation on related issues, to arbitrate one issue does not amount to waiver of interest under *Civ. Code § 3287(a)* on basic amount of arbitration award on that issue. *FDIC v. Air Florida System, Inc. (9th Cir. 1987) 822 F.2d 833, 843*

Arbitration award is required to be upheld in federal district court unless it is shown that there was partiality on part of arbitrator, or that arbitrator exceeded his or her authority, or that award was rendered in manifest disregard of law. *Thompson v. Tega-Rand Intern. (9th Cir. 1984) 740 F.2d 762, 763*

Applicants who seek confirmation of arbitration award under Arbitration Act (*9 U.S.C. § 9*) in federal district court is required to demonstrate independent grounds of federal subject matter jurisdiction since Arbitration Act does not confer subject matter jurisdiction on federal district court. *General Atomic Co. v. United Nuclear Corp. (9th Cir. 1981) 655 F.2d 968, 969*

Objection to confirmation of an award based on illegality of contract under which arbitration was compelled is not waived by failure to move to vacate award within 100 days as required by *Code Civ. Proc. § 1288*, but may be raised in response to other party's motion to confirm award. *South Bay Radiology Medical Associates v. Asher (1990) 220 Cal. App. 3d 1074, 269 Cal. Rptr. 15*

Nonjudicial arbitration award is properly vacated on ground of excusable neglect pursuant to *Code Civ. Proc. § 473. MJM, Inc. v. Tootoo (1985) 173 Cal. App. 3d 598, 603-604, 219 Cal. Rptr. 100*

When parties to pending civil action agreed that matter be tried by retired judge and that arbitration would be governed by all rules of civil procedure, rules for ordinary civil actions is applicable and prevailing party is properly awarded one-half of his or her arbitration fee as costs, even though rules on arbitration (*Code Civ. Proc. §§ 1280-1294.2*) provide no direct authority therefor. *Kauffman v. Shearson Hayden Stone, Inc. (1982) 128 Cal. App. 3d 809, 812, 180 Cal. Rptr. 566*

Rendering judgment against individual defendant in summary proceeding under *Code Civ. Proc. §§ 1287.4* and *1290.2* to confirm arbitration award that was against corporation only, based on trial court's finding that corporation was alter ego of individual defendant is error when record did not show that individual defendant had been served in any capacity other than that of corporate officer, or that individual defendant had been party to arbitration proceeding. Southern Cal. Pipe Trades Dist. Council No. 16 v. *Merritt (1981) 126 Cal. App. 3d 530, 539, 179 Cal. Rptr. 794*

Failure to file motion to vacate arbitration award within time limits prescribed by *Code Civ. Proc. §§ 1013* and *1290.6* bars trial court from vacating award. *Hirsch v. Ensign (1981) 122 Cal. App. 3d 521, 530-531, 176 Cal. Rptr. 17* (disapproved on other grounds in *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 27-28, 10 Cal. Rptr. 2d 183, 832 P.2d 899*)

Even though party was absent from hearing, trial court properly confirmed award made by interboard arbitration over dispute concerning real estate commission, when court found underlying agreement to arbitrate permitted arbitration to proceed in absence of party refusing to appear. *King v. Larsen Realty, Inc. (1981) 121 Cal. App. 3d 349, 356-358, 175 Cal. Rptr. 226*

Hearings to confirm arbitration award are "special proceedings" as contrasted with "actions" [*Code Civ. Proc. §§ 22, 23*]; special proceedings are creatures of statute and court's jurisdiction in such proceedings is limited by statutory authority; legislation providing for enforcement of arbitration awards gives priority to such proceedings [*Code Civ. Proc. § 1291.2*], narrowly limiting issues [*Code Civ. Proc. § 1286.2*], and providing for presenting of evidence in summary way. *Airfloor Co. of California, Inc. v. Regents of University of California (1978) 84 Cal. App. 3d 1004, 1007-1008, 149 Cal. Rptr. 130*

Code Civ. Proc. § 1286.2 describes exclusive grounds for setting aside arbitration award. *State Farm Mut. Auto. Ins. Co. v. Guleserian (1972) 28 Cal. App. 3d 397, 402, 104 Cal. Rptr. 683*

Code Civ. Proc. § 1286.6 comprises exclusive grounds for correcting award. *Jones v. Kvistad (1971) 19 Cal. App. 3d 836, 841, 97 Cal. Rptr. 100*

Award is required to be certain before it may be confirmed by court. *Bowman v. Ruchti Brothers (1970) 4 Cal. App. 3d 897, 902-903, 84 Cal. Rptr. 563*

Award that is against public policy is not to be confirmed by court. *Black v. Cutter Laboratories (1955) 43 Cal. 2d 788, 798-799, 278 P.2d 905* ; *Viola, Inc. v. Santa Barbara High Sch. Dist. (1969) 276 Cal. App. 2d 425, 427, 80 Cal. Rptr. 784*

Duly appointed representative of estate of deceased award recipient is necessary and proper party to petition court to confirm award. *Walter v. National Indem. Co. (1970) 3 Cal. App. 3d 630, 634-635, 83 Cal. Rptr. 803*

[13] Correcting Award

In accordance with the general rule that a trial court may not decline to confirm an arbitration award under *Code Civ. Proc. § 1286.6* because it disagrees with the merits of the decision, a trial court may not delete an award of sanctions against a party's attorney from a contractual arbitration award. *Bak v. MCL Financial Group, Inc. (2008) 170 Cal. App. 4th 1118, 1127, 88 Cal. Rptr. 3d 800*

Court has the authority to reduce arbitration award against nonsettling defendant by awarding a settlement credit, pursuant to *Code Civ. Proc. § 877*, of amount paid to plaintiff by other defendants in prior settlements on same issue.

Wade v. Schrader (2008) 168 Cal. App. 4th 1039, 1046 85 Cal. Rptr. 3d 865

When arbitrator issued five-page ruling for arbitration submitted under agreement that provided for issuance of award without written opinion which would state only which party prevailed and how much, if anything, was owed, award should not have been vacated, but corrected by deletion of surplusage (everything beyond statement of amount to be recovered), and confirmed as corrected. *Allstate Ins. Co. v. Superior Court (Jessel) (2006) 142 Cal. App. 4th 356, 362-364, 48 Cal. Rptr. 3d 266*

Court has no authority to correct, modify, or reverse arbitrator's error in awarding attorney's fees as either in excess of powers or error of law. *Taylor v. Van-Catlin Construction (2005) 130 Cal. App. 4th 1061, 1064, 1068, 30 Cal. Rptr. 3d 690* ; *Pierotti v. Torian (2000) 81 Cal. App. 4th 17, 24-26, 96 Cal. Rptr. 2d 553* ; *Creative Plastering, Inc. v. Hedley Builders, Inc. (1993) 19 Cal. App. 4th 1662, 1666, 24 Cal. Rptr. 2d 216* , *cf. DiMarco v. Chaney (1995) 31 Cal. App. 4th 1809, 1816-1817, 37 Cal. Rptr. 2d 558* (when arbitrator designates prevailing party, but then fails to award attorney's fees or to explain lack of such award)

Errors that may be corrected is required to be manifest; i.e., apparent by examination of document, needing no evidence to make it more clear, or open, palpable, incontrovertible. *Severtson v. Williams Construction Co. (1985) 173 Cal. App. 3d 86, 93, 220 Cal. Rptr. 400*

Court is without power to correct award even though award conflicts with substantive law. *Woodard v. Southern Cal. Permanente Medical Group (1985) 171 Cal. App. 3d 656, 662, 217 Cal. Rptr. 514*

Categories listed in *Code Civ. Proc. § 1286.6* (grounds for correcting award) is exclusive. M. B. Zaninovich, Inc. v. Teamster Farmworker Local Union 946 *(1978) 86 Cal. App. 3d 410, 416, 150 Cal. Rptr. 233*

Court is without power to correct award as requested by response to petition to confirm award, when response is not timely filed. *De Mello v. Souza (1973) 36 Cal. App. 3d 79, 84, 111 Cal. Rptr. 274*

Failure of arbitrators to find on particular issue is not ground for correction of award by court under *Code Civ. Proc. § 1286.6*. *Jones v. Kvistad (1971) 19 Cal. App. 3d 836, 841, 97 Cal. Rptr. 100*

Arbitration award is not subject to correction by reviewing court pursuant to *Code Civ. Proc. § 1286.6(a)* when there is no way to determine how or why arbitrators arrived at their particular figures and any error in amount of damages is suppositional, not evident. *Shammas v. National Telefilm Associates (1970) 11 Cal. App. 3d 1050, 1056, 90 Cal. Rptr. 119*

Inclusion of damages for unliquidated claim is not within judicial power of correction of award under *Code Civ. Proc. § 1286.6*. *Banks v. Milwaukee Ins. Co. (1966) 247 Cal. App. 2d 34, 37, 55 Cal. Rptr. 139*

[14] Setoff

Setoff is permitted to be alleged only in actions, not special proceedings such as hearings to confirm arbitration awards. *Airfloor Co. of California, Inc. v. Regents of University of California (1978) 84 Cal. App. 3d 1004, 1009, 149 Cal. Rptr. 130* (pointing out that appellant could have moved in trial court to abate confirmation hearings pending determination of its action at law on its claim against other party in another court and that if that litigation had been resolved in its favor it then could have set off judgment in confirmation proceedings with judgment in action at law)

[15] Vacating Award

[a] In General

Independent federal question jurisdiction for federal courts to review arbitration award is not granted by Federal Arbitration Act provision that sets forth grounds for vacating arbitration award (*9 U.S.C. § 10*). *Garrett v. Merrill Lynch, Pierce, Fenner & Smith (9th Cir. 1993) 7 F.3d 882, 884*

One-hundred-day California limitation period for petitions to vacate arbitration award (*Code Civ. Proc. § 1288*), and not three-month period under federal Arbitration Act (*9 U.S.C. § 12*), applies to California action under Labor Management Relations Act, § 301 (*29 U.S.C. § 185*) to vacate arbitration award entered under collective bargaining agreement. *San Diego County Dist. Council v. Cory (9th Cir. 1982) 685 F.2d 1137, 1138*

Party seeking to vacate arbitration award on all grounds listed in *Code Civ. Proc. § 1286.2* failed to substantiate any grounds for vacating the award. *Taheri Law Group, A.P.C. v. Sorokurs (2009) 176 Cal. App. 4th 956, 964, 98 Cal. Rptr. 3d 634*

Code Civ. Proc. § 1286.2 describes exclusive grounds for setting aside arbitration award. *Rosenquist v. Haralambides (1987) 192 Cal. App. 3d 62, 66, 237 Cal. Rptr. 260* ; *Canadian Indem. Co. v. Ohm (1969) 271 Cal. App. 2d 703, 707, 76 Cal. Rptr. 902* ; *Durand v. Wilshire Ins. Co. (1969) 270 Cal. App. 2d 58, 61, 75 Cal. Rptr. 415*

Award is not vacated when party attacking it fails to sustain burden of showing that arbitrator did not consider particular claim that was raised prior to award. *Rodrigues v. Keller (1980) 113 Cal. App. 3d 838, 842, 170 Cal. Rptr. 349*

Failure of concurring arbitrators to sign award in conformity with *Code Civ. Proc. § 1283.4* is not irregularity requiring award to be vacated unless substantial prejudice is shown. United Brotherhood of Carpenters etc., Local 642 v. *DeMello (1972) 22 Cal. App. 3d 838, 840, 100 Cal. Rptr. 564*

To vacate award on basis of misconduct of arbitrator under former *Code Civ. Proc. § 1288(c)* [*see now Code Civ. Proc. § 1286.2(a)(5)*], prejudice to complaining party by misconduct is required to be shown from nature of misconduct or from explanatory facts. *Lauria v. Soriano (1960) 180 Cal. App. 2d 163, 170, 4 Cal. Rptr. 328*

[b] Bias or Corruption of Arbitrator

Award could be confirmed, despite claim of evident partiality when party knew of undisclosed relationship but did not raise issue until after entry of interim award; federal not California law governed question of confirmation. *Federal Fidelity Bank FSB v. Durga MA Corp. (9th Cir. 2004) 386 F.3d 1306, 1311-1314*

Under *9 U.S.C. § 10(a)(2)* of the Federal Arbitration Act, "evident partiality" is present when undisclosed facts show reasonable impression of partiality; proof of actual bias in showing evident partiality is not required by courts examining nondisclosure cases; different standard for nondisclosure cases compared to actual bias cases is supported by policies of Act; arbitrator is required to make independent investigation even though he or she lacks actual knowlege of conflict because he or she may have constructive knowledge. *Schmitz v. Zilveti (9th Cir. 1994) 20 F.3d 1043, 1046-1049*

Code Civ. Proc. § 1286.2(a)(6)(A) requires court to vacate award once it is shown that neutral arbitrator failed to make timely disclosure of matter required to be disclosed by *Code Civ. Proc. § 1281.9(a)*; it can no longer be argued that undisclosed matter is not one that might cause reasonable person to question arbitrator's impartiality; Legislature intended, by its 2001 amendments to *Code Civ. Proc. §§ 1281.9* and *1286.2(a)(6)(A)*, that failure to disclose any matter enumerated in *Code Civ. Proc. § 1281.9(a)* satisfies "might-cause-a-reasonable-person-to-question" standard. *International Alliance of Theatrical Stage Employees, etc. v. Laughon, (2004) 118 Cal. App. 4th 1380, 1386-1387,*

1392-1394, 14 Cal. Rptr. 3d 341 (including comparison of cases decided before 2001 amendments); *see* Stats. 2001, Ch. 352, § 8

Gender bias is not established by contested declaration of third arbitrator that other two considered and relied on matters not presented in evidence (that parties travelled together, one was much younger than other, and male partner bought gifts of jewelry from female, to assume that parties had long term sexual relationship and that partnership was formed and operated is part of parties' sexual relationship); evidence is insufficient to establish arbitrators' inability to determine issues. *Betz v. Pankow (1993) 16 Cal. App. 4th 919, 927-930, 20 Cal. Rptr. 2d 834*

Bias in party arbitrator is expected and furnishes no ground for vacating award unless it amounts to corruption under *Code Civ. Proc. § 1286.2*. *Tate v. Saratoga Savings & Loan Assn. (1989) 216 Cal. App. 3d 843, 858, 265 Cal. Rptr. 440* ; *Baker v. Sadick (1984) 162 Cal. App. 3d 618, 622-626, 208 Cal. Rptr. 676*

In arbitration under three-party agreement, which provides for each party to appoint one arbitrator and those arbitrators to choose a neutral fourth, fact that two parties' interests had become aligned by time dispute arose does not create sufficient unfairness or bias to prevent compelling arbitration or to void award. *Tate v. Saratoga Savings & Loan Assn. (1989) 216 Cal. App. 3d 843, 852-854, 265 Cal. Rptr. 440*

Trial court is not required to vacate arbitration award on ground of bias under *Code Civ. Proc. § 1286.2(b)* [*now Code Civ. Proc. § 1286.2(a)(2)*] (corruption in arbitrator) when no business relationship existed between arbitrator and party's attorneys, the arbitrator merely having served is court-appointed discovery referee in unrelated case litigated by same attorneys. *Park Plaza, Ltd. v. Pietz (1987) 193 Cal. App. 3d 1414, 1418-1419, 239 Cal. Rptr. 51* (disapproved on other grounds in *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 27-28, 10 Cal. Rptr. 2d 183, 832 P.2d 899*); *but see* Cal. Rules of Ct., Appen., Div. VI, Standard 7(d)(5)(B) (would require disclosure if service as referee was compensated and concluded within two years before date of arbitrator's proposed nomination or appointment and after January 1, 2002)

[c] Disqualification of Arbitrator

Award cannot be vacated because arbitrator disclosed, out of excess of caution, matter that was not required to be disclosed. *Luce, Forward, Hamilton & Scripps, LLP v. Koch (2008) 162 Cal. App. 4th 720, 734-736, 75 Cal. Rptr. 3d 869* (service on 36-member board of professional organization with party's counsel and proposed expert witness who was later stricken from witness list)

Right to seek to vacate award under *Code Civ. Proc. § 1286.2(a)(6)(A)* is available even if party did not seek disqualification in timely fashion under *Code Civ. Proc. § 1281.91(c)* and cannot be waived by agreeing to arbitrate under rules that state arbitration provider's determinations regarding disqualification will be conclusive. *Advantage Medical Services, LLC v. Hoffman (2008) 160 Cal. App. 4th 806, 820-823, 72 Cal. Rptr. 3d 935* (AAA Rule 17)

Arbitration award in medical malpractice matter is required to be vacated because neutral arbitrator failed to disclose to patient's arbitrator that in several other arbitrations he had served is party arbitrator for health care provider that opposed patient's claim in current matter. *Neaman v. Kaiser Foundation Hospital (1992) 9 Cal. App. 4th 1170, 1177, 11 Cal. Rptr. 2d 879*

Order confirming award is sufficiently supported by arbitrator's declaration that arbitrator did not know until after rendition of award that law partner represented party's adversary in another matter. *Cobler v. Stanley, Barber, Southard, Brown & Associates (1990) 217 Cal. App. 3d 518, 528-529, 265 Cal. Rptr. 868*

Former *Code Civ. Proc. § 602(4)* (*now see Code Civ. Proc. § 229(b)*), relating to challenges to jurors on ground of prior client relationship with party's attorney, is not applicable to set aside arbitration award based on neutral arbitrator's

prior client relationship with law firm of party to arbitration. *Banwait v. Hernandez (1988) 205 Cal. App. 3d 823, 831-832, 252 Cal. Rptr. 647*

Attorney appointed is neutral arbitrator under *Code Civ. Proc. § 1281.6* is not required to disclose that he or she had been represented as client by law firm representing party to arbitration, on ground that record showed no substantial business relationship or circumstances creating a reasonable impression of possible bias. *Banwait v. Hernandez (1988) 205 Cal. App. 3d 823, 831, 252 Cal. Rptr. 647* ; *but see Code Civ. Proc. § 1281.9(a)(3)*, which, beginning January 1, 1998, requires a proposed neutral arbitrator to disclose prior attorney-client relationships with a party

Arbitration award in insurance appraisal proceeding is required to be vacated when fact that "neutral" appraiser/arbitrator had done business with appraiser/arbitrator selected by insurance company while proceeding pending was not disclosed to insured. *Figi v. New Hampshire Ins. Co. (1980) 108 Cal. App. 3d 772, 775-778, 166 Cal. Rptr. 774*

Arbitrator's undisclosed personal acquaintance with senior partner of law firm representing other party, and arbitrator's undisclosed personal experience of injuries similar to aggrieved party's injuries, are not grounds for vacating award. *Gonzales v. Interinsurance Exchange (1978) 84 Cal. App. 3d 58, 64-66, 148 Cal. Rptr. 282*

[d] Error of Law

The Supreme Court's decision in *Hall Street Associates L.L.C. v. Mattel, Inc., 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008)* , did not preclude ruling that vacatur on grounds that the arbitrator's award manifestly disregarded the law was still valid under the Federal Arbitration Act, *9 U.S.C. § 10(a)(4)*, in the Ninth Circuit. For an arbitrator's award to be in manifest disregard of the law, it must be clear from the record that the arbitrator recognized the applicable law and then ignored it. *Comedy Club, Inc. v. Improv West Associates (9th Cir. 2009) 553 F.3d 1277, 1281, 1290*

Under rule of deferential review of arbitration awards, mere error in interpretation of California law is insufficient to justify refusal to enforce arbitrators' decision. *Northrop Corp. v. Triad Intern. Marketing S.A. (9th Cir. 1987) 811 F.2d 1265, 1269 , modified by, 842 F.2d 1154* (as to date post judgment interest begins to accrue)

Arbitrator's failure to award restitution after rescission by mutual agreement is neither error of law nor failure to determine issue presented warranting vacation; plaintiff had burden of proving land returned had not decreased in value or had decreased by less than payments made to defendant, thus, no restitution could properly be awarded. *Grill v. Hunt (1992) 6 Cal. App. 4th 73, 78-79, 7 Cal. Rptr. 2d 768*

Unless specifically required under terms of arbitration agreement to act in conformity with rules of law, arbitrators of medical malpractice claim are able to base their award on broad principles of justice and equity without regard to any limit imposed by *Civ. Code § 3333.2(b)*. *Nogueiro v. Kaiser Foundation Hospitals (1988) 203 Cal. App. 3d 1192, 1194-1195, 250 Cal. Rptr. 478*

Arbitration award is not subject to vacation on grounds that medical evidence rendered subsequent to hearing revealed possible permanent damage that rendered award inadequate. *National Auto. & Casualty Ins. Co. v. Superior Court (1986) 184 Cal. App. 3d 948, 955-956, 229 Cal. Rptr. 366*

[e] Exceeded Arbitrator's Powers

Board improperly applied standards granted by *Ed. Code § 45113(e)* and collective bargaining agreement under which it was authorized to review arbitration award; those standards [*see* California Arbitration Act; CAA; *Code Civ. Proc. § 1280 et seq.*] did not allow board vacate award based on arbitrator's interpretation of contract or seriousness of offense;

arbitrator did not exceed his powers [*see Code Civ. Proc. § 1286.2(a)(4)*] by improperly defining "serious nature of the offense"; interpreting contract is part of arbitrator's task. *California School Employees Assn. v. Bonita Unifies School District (2008) 163 Cal. App. 4th 387, 404-408, 77 Cal. Rptr. 3d 486*

Arbitrator does not usually exceed powers by excusing performance that would have been futile; that comes within arbitrator's general power to find facts, interpret contract, decide general law, and award any relief rationally related to those findings and interpretation; exception to this power would be clause in arbitration agreement that explicitly and unambiguously bars arbitrator from modifying the contract or excusing any performance. *Gueyffier v. Ann Summers, Ltd. (2008) 43 Cal. 4th 1179, 1181-1182, 1184-1188* , 77 Cal. Rpr. 3d 613, *184 P.3d 739* (excused notice of breach finding it was not curable)

The arbitrator's interpretation of the contract in deciding whether the employer improperly laid off a particular employee allowed her to frame a remedy that, although not expressly provided for in the agreement, was reasonably related to the arbitrator's interpretation of the contract and was not prohibited. *San Francisco Housing Auth. v. Service Employees Int'l Union, Local 790 (2010) 182 Cal. App. 4th 933, 951, 107 Cal. Rptr. 3d 62*

Arbitrators functioning as appraisal panel [*see Ins. Code § 2071*] have authority to determine only actual case value of insured item; appraisal that determines coverage is in excess of appraisers' authority and cannot be confirmed, but must be vacated. *Kacha v. Allstate Ins. Co. (2006) 140 Cal. App. 4th 1023, 1026*

Arbitrator exceeds his or her powers by dismissing arbitration for change in law occurring after court ordered arbitration; arbitrator has no power to reexamine whether parties were bound by arbitration agreement. *Malek v. Blue Cross of California (2004) 121 Cal. App. 4th 44, 56, 59-60, 16 Cal. Rptr. 3d 687*

Under agreement that provided for arbitrator only to review procedural issues relating to faculty status decisions, unless faculty decision was "not based on reasoned judgment," arbitrator's award granting tenure and promotion failed to conform to parties' agreement, exceeded scope of arbitrator's authority, and had to be vacated. *California Faculty Ass'n v. Superior Court (1998) 63 Cal. App. 4th 935, 937, 951-954, 75 Cal. Rptr. 2d 1*

Arbitrator is without power (statutory or from parties' agreement) to compel compliance with order by imposing monetary sanctions ($50 per day per tree for each tree not removed from easement) for future violations of award, or to award damages for relative's harassment (while attempting to use easement). *Luster v. Collins (1993) 15 Cal. App. 4th 1338, 1350, 19 Cal. Rptr. 2d 215*

For arbitrator to determine claim barred by limitation period established by industry rules governing parties' dispute would be in excess of arbitrator's powers, but arbitration claim was timely filed, so confirmation of award was proper. *Citibank v. Crowell, Weedon & Co. (1992) 4 Cal. App. 4th 844, 848-850, 5 Cal. Rptr. 2d 906*

Arbitrator's authority is derived from contract, collective bargaining agreement, or memorandum of understanding between parties, not from court's order compelling arbitration; therefore, arbitrator is authorized to award remedy pursuant to authority in memorandum even though order compelling arbitration did not so charge arbitrator. *Social Services Union v. Alameda County Training & Employment Bd. (1989) 207 Cal. App. 3d 1458, 1463, 255 Cal. Rptr. 746*

Arbitrator does not exceed his or her powers under *Code Civ. Proc. § 1286.2(d)* [*see now Code Civ. Proc. § 1286.2(a)(4)*] in determining that part of collective bargaining agreement at issue was illegal and unenforceable because issue was submitted to arbitrator and was not objected to until after award was made, and award is therefore not to be vacated. *United Food & Commercial Workers Union v. Clougherty Packing Co. (1984) 154 Cal. App. 3d 282, 288-289, 201 Cal. Rptr. 183*

Arbitration award is properly vacated under *Code Civ. Proc. § 1286.2(d)* [*see now Code Civ. Proc. § 1286.2(a)(4)*] when prehire agreement under *29 U.S.C. § 158(f)*, containing arbitration clause, had been effectively repudiated by employer. *Northern Cal. Dist. Council of Laborers v. Robles Concrete Co. (1983) 149 Cal. App. 3d 289, 294, 196 Cal. Rptr. 776*

Power of court under *Code Civ. Proc. § 1286.2(d)* [*see now Code Civ. Proc. § 1286.2(a)(4)*] to vacate award in excess of arbitrator's powers when award cannot be corrected without affecting merits. *Department of Public Health v. Service Employees Internat. Union (1989) 215 Cal. App. 3d 429, 434, 263 Cal. Rptr. 711* ; *San Luis Obispo Bay Properties, Inc. v. Pacific Gas & Elec. Co. (1972) 28 Cal. App. 3d 556, 564, 104 Cal. Rptr. 733*

Award to be vacated when arbitrators exceed express limitations of submission agreement. *William B. Logan & Associates v. Monogram Precision Industries (1960) 184 Cal. App. 2d 12, 17, 7 Cal. Rptr. 212*

[f] Failure to Find on All Issues

The failure of a contractual arbitration award to be enforceable as a judgment does not itself provide grounds for vacating the award. The principle of arbitral finality does not preclude the arbitrator from making a final disposition of a submitted matter in more than one award. The normal course of action when the financial terms of an award are unenforceable due to ambiguity is to remand the matter to the original arbitrator for clarification. *Mossman v. City of Oakdale (2009) 170 Cal. App. 4th 83, 90-92, 87 Cal. Rptr. 3d 764*

Failure of arbitration to make finding on express claim does not invalidate award as long as award settles entire controversy. *Rodrigues v. Keller (1980) 113 Cal. App. 3d 838, 843, 170 Cal. Rptr. 349*

Possession of information by one party does not cure uncertainty in award or in judgment, since law does not require party to make computation in order to render judgment certain; hence, when amount to be paid under arbitrators' award cannot be established by award but requires additional information not present in award, award must be vacated. M. B. Zaninovich, Inc. v. Teamster Farmworker Local Union 946 *(1978) 86 Cal. App. 3d 410, 413 n.1, 416, 150 Cal. Rptr. 233*

Award of arbitrator who fails to decide all questions submitted is void and entire cause is required to be returned to arbitrator for redetermination. M. B. Zaninovich, Inc. v. Teamster Farmworker Local Union 946 *(1978) 86 Cal. App. 3d 410, 416, 150 Cal. Rptr. 233*

Failure of arbitrators to find on all issues submitted to arbitration is proper ground for vacation award. *Jones v. Kvistad (1971) 19 Cal. App. 3d 836, 841, 97 Cal. Rptr. 100*

Arbitrator's failure to consider issue of general damages that was properly before him or her in arbitration of personal injury claim is proper basis for vacating award under *Code Civ. Proc. § 1286.2(e)* [*see now Code Civ. Proc. § 1286.2(a)(5)*] and for directing rehearing under *Code Civ. Proc. § 1287*. *Banks v. Milwaukee Ins. Co. (1966) 247 Cal. App. 2d 34, 38-40, 55 Cal. Rptr. 139*

[g] Failure to Postpone Hearing

Failure to postpone hearing so treating doctors could testify did not amount to failure to hear evidence [*Code Civ. Proc. § 1286.2(a)(5)*] that would require vacating award when arbitrator had doctors' records and proponent made no showing that doctors were needed at hearing or that any attempts had been made to ascertain if hearing date was convenient for them. *Roitz v. Coldwell Banker Residential Brokerage Co. (1998) 62 Cal. App. 4th 716, 724-726, 73 Cal. Rptr. 2d 85*

Vacation of award under *Code Civ. Proc. § 1286.2(e)* [*see now Code Civ. Proc. § 1286.2(a)(5)*] (prejudice by refusal of arbitrator to grant continuance) is not necessary when prior continuance had been given, later requests for continuance were required by counsel's lack of preparation, and party's problems with counsel's lack of diligence predated hearing by several months, which was ample time for party to obtain other representation. *Outdoor Services, Inc. v. Pabagold, Inc. (1986) 185 Cal. App. 3d 676, 685-686, 230 Cal. Rptr. 73*

Defendant's incarceration, his or her having sent letter requesting delay of hearing before Labor Commissioner because of inability to appear at hearing due to incarceration, and hearing officer's holding of hearing in defendant's absence in disregard of request for delay, raises grounds that may support vacation of determination under *Code Civ. Proc. § 1286.2(e)*; [*see now Code Civ. Proc. § 1286.2(a)(5)*] superior court required to determine if defendant presented sufficient cause for postponement to hearing officer, and if refusal to postpone substantially prejudiced defendant's rights. *Humes v. MarGil Ventures, Inc. (1985) 174 Cal. App. 3d 486, 497, 220 Cal. Rptr. 186*

Arbitrator's rejection of hearsay statements of grievant, who could not be located at time of hearing, and subsequent conduct of hearing when nocontinuance was requested to locate grievant, is not sufficient for granting petition to vacate award under *Code Civ. Proc. § 1286.2* (grounds for vacation of arbitration award). *Communications Workers v. General Telephone Co. (1981) 127 Cal. App. 3d 82, 87, 179 Cal. Rptr. 204*

Award is not required to be vacated for refusal to postpone hearing when pendency of proceedings provided ample time to procure evidence as to one issue and other issue is susceptible of resolution in same fashion is legal question. *Shammas v. National Telefilm Associates (1970) 11 Cal. App. 3d 1050, 1055-1056, 90 Cal. Rptr. 119*

[h] Illegal Contract and Contract Against Public Policy

Award had to be vacated in part because it was contrary to *Bus. & Prof. Code § 16600*, which provides that contracts prohibiting competition are void, in that award enjoined nonsignatory relatives from owning competing businesses; noncompetition clause provisions precluding non-party relatives or ex-spouses from opening or operating improv-comedy-related businesses or restaurants violated *Bus. & Prof. Code § 16600*. *Comedy Club, Inc. v. Improv West Associates (9th Cir. 2007) 514 F. 3d 833, 848-851*

Whether arbitrators' interpretation and application of agreement is unenforceable on ground that it is contrary to public policy is question for court alone to decide. *Northrop Corp. v. Triad Intern. Marketing S.A. (9th Cir. 1987) 811 F.2d 1265, 1268* , modified by *842 F.2d 1154* (as to date post judgment interest begins to accrue)

Award is not to be vacated at request of seller because it required buyer to pay more for gas than price ceiling imposed by Natural Gas Policy Act of 1978 (*15 U.S.C. § 3301 et seq.*); award does not compel seller to do illegal act; proper remedy is correction of award (though neither party sought it). *Pacific Gas & Electric Co. v. Superior Court (1993) 15 Cal. App. 4th 576, 610-612, 19 Cal. Rptr. 2d 295*

Award based on illegal contract is vacated when error appears on face of award and causes substantial injustice. *All Points Traders, Inc. v. Barrington Associates (1989) 211 Cal. App. 3d 723, 736-738, 259 Cal. Rptr. 780* (vacating award of commission to unlicensed investment banker); *see Bus. & Prof. Code § 10008.5* (real estate and business opportunity broker licensing requirements do not apply to person licensed as security broker); *see also* Stats. 1989, ch. 1116, § 8 (statement of legislative intent that rights and obligations of parties in *All Points Traders* not be affected)

Under *Bus. & Prof. Code § 7031*, defense that party seeking arbitration award was acting as contractor and was not licensed is available in proceedings to confirm arbitration awards; defense is issue under *Code Civ. Proc. § 1286.2(d)* [*see now Code Civ. Proc. § 1286.2(a)(4)*], because award to contractor without license would be in excess of arbitrator's powers. *Airfloor Co. of California, Inc. v. Regents of University of California (1978) 84 Cal. App. 3d 1004, 1009, 149*

Cal. Rptr. 130 (defense not sustained); *see Bus. & Prof. Code § 7031(a), (c)* as amended effective January 1, 1993 (licensure must be alleged but need be proven only if controverted)

[i] Misconduct of Neutral Arbitrator

Trial court is not required to vacate arbitration award on ground of misconduct by arbitrator, when misconduct was that of party-appointed arbitrator, not neutral arbitrator is required by *Code Civ. Proc. § 1286.2(c)* [*see now Code Civ. Proc. § 1286.2(a)(3)*], and petitioners failed to show its prejudicial effect. *Good v. Kaiser Foundation Hospital (1984) 152 Cal. App. 3d 819, 822-823, 199 Cal. Rptr. 581*

[j] Award Contrary to Statute or Public Policy

Award reinstating fired workers with back pay should not have been vacated; employer had no "convincing information" of immigration violations; thus, reinstatement would not violate federal immigration law or pubic policy; given short time within which employees were required to respond (three days), employees' failure to return documents that explained discrepancies was not probative enough of immigration status to indicate that public policy would be violated if they were reinstated and given back pay. *Aramark Facility Services v. Service Employees International Union, Local 1877 AFL (9th Cir. 2008) 530 F. 3d 817, 824-832*

Given that under *Educ. Code § 44929.21*, nonreelection of probationary employees is not subject to collective bargaining and, therefore, a proper subject of arbitration, the same reasoning applies to claims of nonreelection for retaliatory reasons. Award by ordering reinstatement of a probationary teacher to teaching position with respondent school district thus exceeded arbitrator's authority. *Sunnyvale Unified Sch. Dist. v. Jacobs (2009) 171 Cal. App. 4th 168, 176, 179, 180-181, 89 Cal. Rptr. 3d 546*

In addition to statutory grounds, award against minor may be vacated based on minor's right to disaffirm contract, even if disaffirmance comes after deadline for responding to petition to confirm award or moving to vacate the award; any award based on disaffirmed contract must be vacated, and any judgment confirming award, reversed. *Fam. Code §§ 6700, 6710*; *Berg v. Traylor (2007) 148 Cal. App. 4th 809, 812, 816-820, 56 Cal. Rptr. 3d 140* (finding contract was not one for necessities within exception of *Fam. Code § 6712*)

Even if minor did not disaffirm the contract containing arbitration clause, award may still be vacated on separate ground that no guardian at litem was appointed to represent minor in arbitration, especially when parent's interests were adverse to the minor's, for instance when parent will be liable in event of minor's disaffirmance. *Berg v. Traylor (2007) 148 Cal. App. 4th 809, 821-822, 56 Cal. Rptr. 3d 140*

Award reinstating employee who was fired after threatening to kill co-worker and being enjoined from contact with co-worker had to be vacated because it could not be reconciled with terms of injunction and public policy which requires obedience to court orders. *City of Palo Alto v. Service Employees Internat. Union (1999) 77 Cal. App. 4th 327, 338-340, 91 Cal. Rptr. 2d 500*

For court to refuse to enforce arbitrator's award on grounds of public policy, policy must be well defined and dominant, and be ascertained by reference to laws and legal precedents and not from general considerations supposed to be public interests. *Social Services Union v. Alameda County Training & Employment Bd. (1989) 207 Cal. App. 3d 1458, 1465, 255 Cal. Rptr. 746*

[16] Appeal

Notice of appeal naming judgment against husband and wife but not naming party appealing was sufficient under *Cal Rules Ct 8.100(a)* to provide notice of appeal of the judgment by the husband and wife. *Toal v. Tardif (2009) 178 Cal. App. 4th 1208, 1216-1217, 101 Cal. Rptr. 3d 97*

Party who discovers new evidence to support disqualification of arbitrator after notice of appeal has been given with respect to judgment based on award is properly raising issue at earliest opportunity, by writ of coram vobis to court of appeal or by writ of coram nobis to trial court. *Betz v. Pankow (1993) 16 Cal. App. 4th 931, 941-942, 20 Cal. Rptr. 2d 841*

Code Civ. Proc. § 1294(b) does not authorize aggrieved party to appeal from order *denying* vacation or correction of arbitration award; review of denial order is only available on appeal of judgment of confirmation. *Mid-Wilshire Associates v. O'Leary (1992) 7 Cal. App. 4th 1450, 1453-1455, 9 Cal. Rptr. 2d 862*

Permitting arbitration to proceed is generally preferred, with later review of intermediate rulings on petition to vacate or affirm arbitrator's award or on appeal from judgment confirming award; jurisdictional issues are not waived by participating in arbitration so long as jurisdictional objection raised prior to participation. *International Film Investors v. Arbitration Tribunal of Directors Guild (1984) 152 Cal. App. 3d 699, 706, 199 Cal. Rptr. 690*

Under *Code Civ. Proc. § 1294*, interlocutory rulings as to arbitrability and ultimate orders compelling arbitration are nonappealable, while order denying petition to compel arbitration is appealable; judgment denying petition for writ of prohibition to restrain commencement of arbitration is deemed equivalent to nonappealable order compelling arbitration, despite general appealability of judgment denying petition for extraordinary writ or injunction. *International Film Investors v. Arbitration Tribunal of Directors Guild (1984) 152 Cal. App. 3d 699, 703-706, 199 Cal. Rptr. 690*

Party compelled to submit to court-ordered arbitration is entitled to have validity of that order reviewed on appeal from judgment confirming award. *Kelly v. Tri-Cities Broadcasting, Inc. (1983) 147 Cal. App. 3d 666, 672, 195 Cal. Rptr. 303* ; *Lesser Towers, Inc. v. Roscoe-Ajax Constr. Co. (1969) 271 Cal. App. 2d 675, 692, 77 Cal. Rptr. 100*

Trial court finding of agreement to arbitrate when one does not exist is abuse of discretion because essential jurisdictional fact is missing. *Kelly v. Tri-Cities Broadcasting, Inc. (1983) 147 Cal. App. 3d 666, 672, 195 Cal. Rptr. 303*

Order dismissing action for failing to bring action to trial within five years is appealable award. *Young v. Ross-Loos Medical Group, Inc. (1982) 135 Cal. App. 3d 669, 672, 185 Cal. Rptr. 536*

Preliminary appraisal of stock pursuant to multi-phase appraisal procedure does not constitute statutory award for purpose of review when initial appraisal was not determinative of controversy over stock value. *Helzel v. Superior Court (1981) 123 Cal. App. 3d 652, 662, 176 Cal. Rptr. 740*

Time for appeal from trial court's denial of petition to confirm arbitration award is 180 days, running from date trial court dismissed petition, although "judgment" was entered later. *Carpenters 46 Northern Cal. Counties Conf. Bd. v. David D. Bohannon Organization (1980) 102 Cal. App. 3d 360, 362*

Order directing issuance of writ of execution for collection of award is appealable special order after final judgment under *Code Civ. Proc. § 1294(e)*. *Lovret v. Seyfarth (1972) 22 Cal. App. 3d 841, 851-852, 101 Cal. Rptr. 143*

[17] Federal Arbitration Act

9 U.S.C. §§ 9-11 are permissive, not exclusive, allowing motion to vacate, confirm, or modify award under Federal Arbitration Act to be brought not only in district where award was made, but in any district proper under general venue statute [*28 U.S.C. § 1391(a)(2)*], *e.g.*, in district where contract was performed. *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co. (2000) 529 U.S. 193, 120 S. Ct. 1331, 146 L. Ed. 2d 171*

Federal district court had discretion to correct its mistake on Rule 60 motion to change rate on post-judgment interest from California statutory rate (10%) to federal rate (1.76%) [*see 28 U.S.C. § 1961*]; award provided it would "bear interest at statutory rate" from date specified; although California rate might apply to pre-judgment interest from date specified, California choice-of-law provision in parties' contract was not specific enough to require California rate to apply after judgment. *Federal Fidelity Bank FSB v. Durga MA Corp. (9th Cir. 2004) 387 F.3d 1021, 1023-1024*

Diversity jurisdiction under *28 U.S.C. § 1332(a)* for purposes of vacating award is based on amount at issue in underlying controversy, not amount of award. *Theis Research, Inc. v. Brown & Bain (9th Cir. 2004) 386 F.3d 1180, 1184-1185* as amended on rehearing *400 F.3d 659 (2005)* (affirming award for zero dollars); *American Guaranty Co. v. Caldwell (9th Cir. 1934) 72 F.2d 209, 211*

To be heard in federal court, petition to confirm or vacate award under *Code Civ. Proc. § 1280 et seq.* must be based on diversity jurisdiction or involve some federal question; request for attorney's fees under ERISA fee-shifting provision [*29 U.S.C. § 502(g)(1)*] does not confer federal subject matter jurisdiction. *Carter v. Health Net of Cal., Inc. (9th Cir. 2004) 374 F.3d 830, 833-834*

It is not presence of federal issues in underlying arbitration that determines whether federal question jurisdiction exists, but grounds asserted for federal review in petition; thus petition to confirm or deny that relies on state arbitration statute must establish that disposition depends on resolution of substantial federal question. *Carter v. Health Net of Cal., Inc. (9th Cir. 2004) 374 F.3d 830, 836-837*

Claim that arbitrator manifestly disregarded federal law [*see 9 U.S.C. § 10*] cannot confer federal question subject matter jurisdiction when issue in dispute (i.e., whether plan administrator/alter ego is proper party to arbitration) is unsettled in circuit. *Carter v. Health Net of Cal., Inc. (9th Cir. 2004) 374 F.3d 830, 838-839*

Unless there is federal question involved, federal court must have independent basis for federal jurisdiction to hear claims under Federal Arbitration Act; *9 U.S.C. § 10* does not confer federal question subject matter jurisdiction, but claim that arbitrator rendered award in manifest disregard of federal law (here Americans with Disabilities Act; *42 U.S.C. § 12101 et seq.*) does confer jurisdiction. *Vu Luong v. Circuit City Stores, Inc. (9th Cir. 2004) 368 F. 3d 1109, 1112*

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4-34 California Forms of Pleading and Practice--Annotated § 34.32

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§ 34.32 Law Reviews and Legal Periodicals

C.W. Shapre, *Integrity Review of Statutory Arbitration Awards, 54 Hastings L. J. 311 (2003)*

E. VanGinkel, *"Expanded" Judicial Review: Kyocera Overturns LaPine, 4 Pepp. Disp. Resol. L.J. 47 (2003)*

Note, *Has the California Supreme Court Sanctioned Perjury in Private Arbitration? 30 U.S.F. L. Rev. 861 (1996)*

Note, *Arbitration and award; a remedy fashioned by an arbitrator is within the scope of the arbitrator's authority if the remedy is rationally related to the contract and to the breach, as interpreted by the arbitrator, 23 Pepp. L. Rev. 247 (1995)*

Note, *Judicial Review of Commercial Arbitration Awards: When Does a Remedy 'Exceed' Arbitral Powers? 46 Hastings L.J. 1907 (1995)*

Davis, *Due Process Right to Judicial Review of Arbitral Punitive Damages Awards, 32 Am. Bus. L.J. 583 (1995)*

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§ 34.33 Text References

Knight, Fannin, & Disco, Cal. Practice Guide: Alternative Dispute Resolution, 5:115 et seq. (The Rutter Group 1995)

Chernick, ADR for the Commercial Litigator, Ch. IV-A(9-10) (The Rutter Group 1989)

Toker, California Arbitration Practice Guide, Ch. 6-7 (Lawpress 3d ed. 1996)

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4-34 California Forms of Pleading and Practice--Annotated §§ 34.34-34.39

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[Reserved]

§§ 34.34[Reserved]

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4-34 California Forms of Pleading and Practice--Annotated § 34.40

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§ 34.40 Judicial Review of Award

NOTE:

Any party to an arbitration in which an award has been made may petition the court either to confirm, correct, or vacate the award [*Code Civ. Proc. § 1285*]. The steps set forth in [1] through [4], *below*, are to be followed alternatively. A petition to correct an award could probably, as alternative relief if correction is denied, seek either to confirm the award as made or to vacate the award.

The following checklist is illustrative only of the procedures commonly utilized by counsel in arbitration matters.

[1] Petition to Confirm Award

☐ Counsel for proponent of award petitions superior court in proper county [*see Code Civ. Proc. §§ 85, 86(a)(10)(A), 1292.2, 1292.6* (venue and jurisdiction)] to confirm award [*see Code Civ. Proc. § 1285*].

☐ Prepare petition to confirm award, together with notice of hearing and other papers on which petition is based [*see Code Civ. Proc. §§ 1285, 1285.4, 1288-1288.6, 1290-1290.4*; for a form, *see § 34.50[1]*].

☐ Serve and file a petition to confirm award, notice of hearing, and other.

☐ Opposition to petition. Counsel for opponent of award submits papers opposing petition.

☐ Prepare response [*see Code Civ. Proc. §§ 1285.2, 1288.2, 1290, 1290.6, 1290.8*], setting forth denials and defenses, and requesting either that award be vacated, that it be corrected and confirmed as corrected, or that proceeding be dismissed [*see Code Civ. Proc. § 1285.2*; *see § 34.52[1]*].

☐ Serve and file response.

☐ Hearing. Attend the hearing and present evidence to the court [*see Code Civ. Proc. § 1290.2* (summary hearing)].

☐ Statement of Decision. Request a statement of decision, if court does any of the following [*see Code Civ. Proc. §§ 1291, 1294(a), (c)*; for procedure and forms, *see* Ch. 529, *Statement of Decision*]:

☐ Grants judgment confirming the award.

☐ Dismisses a petition to confirm, correct, or vacate the award.

☐ Vacates award and does not order rehearing.

☐ Order. As directed by the court, counsel for prevailing party should prepare either:

☐ Order and judgment confirming award [*see §§ 34.53[1] -34.54*].

☐ Order denying petition and granting any relief requested by respondent, and deliver such to the court for signature and filing.

[2] Petition to Vacate Award

☐ If award is opposed, counsel for party seeking order vacating award petitions court in proper county [*see Code Civ. Proc. § 85, 86(a)(10)(A), 1292.2, 1292.6*] to vacate award [*see Code Civ. Proc. § 1285*].

☐ Prepare petition to vacate award, together with notice of hearing and other papers on which petition is based [*see Code Civ. Proc. §§ 1285, 1285.4, 1288-1288.6, 1290-1290.4*; *see § 34.56[1]*].

☐ Serve and file petition to vacate award.

☐ Opposition to petition. Counsel for party opposing petition submits papers opposing petition:

☐ Prepare response [*Code Civ. Proc. §§ 1285.2, 1285.6, 1288.2, 1290, 1290.6, 1290.8*

] to petition, setting forth denials and defenses, and requesting either that award be confirmed or corrected and confirmed, or that petition be dismissed [*see Code Civ. Proc. § 1285.2*; *see § 34.57[1]*].

☐ Serve and file response.

☐ Hearing. Attend hearing and present evidence [*see Code Civ. Proc. § 1290.2* (summary hearing)].

☐ Statement of decision. Request statement of decision if court does any of the following [*see Code Civ. Proc. §§ 1291, 1294(a)-(c)*; for procedure and forms, *see* Ch. 529, *Statement of Decision*]:

☐ Grants judgment confirming award.

☐ Dismisses petition to confirm, correct, or vacate award.

☐ Vacates award and does not order rehearing, request statement of decision.

☐ Order. As directed by the court:

☐ Prepare order and judgment, if appropriate [*see § 34.58[1]*].

☐ Deliver documents to court for court's signature and filing.

☐ Prepare for rehearing: if rehearing in arbitration is directed in court's order [*see § 34.19[2]*].

[3] Petition to Correct Award

☐ If correction of the award is desired, counsel for party seeking correction petitions the court in the proper county [*see Code Civ. Proc. §§ 85, 86(a)(10)(A), 1282.2, 1292.6*] to correct the award [*Code Civ. Proc. § 1285*].

☐ Prepare petition to correct award and to confirm it as corrected, together with notice of hearing and other papers on which petition is based [*see Code Civ. Proc. § 1285, 1285.4, 1288-1288.6, 1290-1290.4*].

☐ Serve and file petition, notice of hearing and other papers.

☐ Opposition to petition to correct award.

☐ Prepare response [*see Code Civ. Proc. §§ 1285.2, 1288.2, 1290, 1290.6, 1290.8*] setting forth denials and defenses, and requesting that the court confirm the award as it is, vacate the award, or dismiss the petition [*see Code Civ. Proc. § 1285.2*].

☐ Serve and file response.

☐ Hearing. Attend hearing and present evidence [*see Code Civ. Proc. § 1290.2* (summary hearing)].

☐ Statement of decision. Request statement of decision if court does any of the following [*see Code Civ. Proc. §§ 1291, 1294(a)-(c)*; for procedure and forms, *see* Ch. 529, *Statement of Decision*]:

☐ Grants judgment confirming award.

☐ Dismisses petition to confirm, correct, or vacate award.

☐ Vacates award and does not order rehearing, request statement of decision.

☐ Order. As directed by the court, counsel:

☐ Prepares the order and judgment correcting the award and confirming it as corrected, or the order denying the petition and granting any relief requested by respondent.

☐ Deliver documents to court for court's signature and filing.

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4-34 California Forms of Pleading and Practice--Annotated § 34.41

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§ 34.41 Appeal

☐ File appeal. If appropriate, counsel for a party aggrieved by any of following orders or judgments files appeal:

☐ Order dismissing or denying petition to compel arbitration [*Code Civ. Proc. § 1294(a)*].

☐ Order dismissing petition to confirm, correct, or vacate award [*Code Civ. Proc. § 1294(b)*].

☐ Order vacating award unless rehearing in arbitration is ordered [*Code Civ. Proc. § 1294(c)*].

☐ Judgment entered pursuant to *Code Civ. Proc. §§ 1280-1294.2* [*Code Civ. Proc. § 1294(d)*]. To be appealable, the judgments must be final within the meaning of *Code Civ. Proc. § 904.1(a)* [Rubin v. Western Mutual Insurance Co. (1999) 71Cal. App. 4th 1539, 1547, *84 Cal. Rptr. 2d 648* (judgment confirming appraisal award was not final for purposes of appeal because all four causes of action remained to be determined; arbitration award only determined amount of damages)].

☐ Special order after final judgment [*Code Civ. Proc. § 1294(e)*].

☐ Procedure. The appeal is taken in the same manner as from order or judgment in civil action [*Code Civ. Proc. § 1294.2*]. For procedure and forms, *see* Ch. 42, *Appeal: Notice of Appeal* .

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4-34 California Forms of Pleading and Practice--Annotated § 34.42

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§ 34.42 Enforcement of Judgment

☐ Levy on judgment. If judgment is entered in conformity with confirmed award, levy execution on judgment [*see Code Civ. Proc. § 1287.4* (judgment is to be enforced like any other judgment of the court in which it is entered, in an action of the same jurisdictional classification); *see also Code Civ. Proc. § 32.5* (defining "jurisdictional classification")]. For procedure and forms dealing with execution, *see* Ch. 254, *Executions and Enforcement of Judgments* .

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4-34 California Forms of Pleading and Practice--Annotated §§ 34.43-34.49

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§§ 34.43[Reserved]

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4-34 California Forms of Pleading and Practice--Annotated § 34.50

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§ 34.50 Petition to Confirm Arbitration Award and for Entry of Judgment [Code Civ. Proc. § 1285]--Judicial Council Form ADR-106

[1] FORM Petition to Confirm Arbitration Award and for Entry of Judgment [Code Civ. Proc. § 1285]--Judicial Council Form ADR-106

Click here to view image.

[2] Use of Form

The form of petition in [1], *above*, is a reproduction of Judicial Council form ADR 106, which is mandatory after January 1, 2004, to petition to correct, confirm, or vacate a contractual arbitration award. It is shown above being used to obtain a court order confirming an arbitration award and a judgment in conformity with the order [*see Code Civ. Proc. § 1285*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Once an arbitration award has been rendered, the award becomes a new and fixed liability regardless of the elements that comprised that liability. Hence, the successful party is entitled to "recover damages certain" within the meaning of *Civ. Code § 3287(a)* and thus is entitled to interest on the amount of the award from the date the arbitrator renders the award until the date of the judgment confirming the award (Paragraph 10d) [*County of Solano v. Lionsgate Corporation (2005) 126 Cal. App. 4th 741, 752-754, 24 Cal. Rptr. 3d 362* (but it was error to award interest from date of entry of findings and conclusions, so award for interest prior to date of filing of award had to be vacated); *Pierotti v. Torian (2000) 81 Cal. App. 4th 17, 27-28, 96 Cal. Rptr. 2d 553* ; *Britz, Inc. v. Alfa-Laval Food & Dairy Co. (1995) 34*

Cal. App. 4th 1085, 1106-1107, 40 Cal. Rptr. 2d 700] . In addition, if a plaintiff in a personal injury action has obtained a judgment based on an arbitration award more favorable than his or her Section 998 offer, that plaintiff is entitled to prejudgment interest pursuant to *Civ. Code § 3291* [*Weinberg v. Safeco Ins. Co. of Am. (2004) 114 Cal. App. 4th 1075, 1084-1085, 8 Cal. Rptr. 3d 224* (uninsured motorist arbitration); *Caro v. Smith (1997) 59 Cal. App. 4th 725, 735-737, 69 Cal. Rptr. 2d 306* ; *cf. Woodard v. Southern Cal. Permanente Medical Group (1985) 171 Cal. App. 3d 656, 666, 217 Cal. Rptr. 514* (court had no power to award prejudgment interest after arbitrators denied it); for further discussion, *see Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.29[2]*].

Code Civ. Proc. § 1293.2 mandates that the trial court award costs to the prevailing party in any judicial proceeding under *Code Civ. Proc.§ 1280 et seq.* as provided in *Code Civ. Proc. § 1021 et seq.* Petitions to confirm or vacate arbitration awards are covered by *Code Civ. Proc. § 1280 et seq.* [*see Code Civ. Proc.§ 1285*], and require an award of attorney's fees to the prevailing party if provided for in their contract (Paragraph 10 (f)). *Code Civ. Proc. § 1032(a)(4)* defines "prevailing party" to include a defendant as against whom plaintiff does not recover any relief. Thus, a defendant who successfully opposes a petition to confirm award must be awarded attorney's fees incurred in that proceeding [*MBNA America Bank, N.A. v. Gorman (2006) 147 Cal. App. 4th Supp 1, 7-8, 54 Cal. Rptr. 3d 724* ; *see also* discussion at *§ 34.18[3]*]. An award of attorney's fees has also been upheld under *Code Civ. Proc. § 1021.5*, when the basis for denial of confirmation was that the arbitration provision was added unilaterally by a "bill stuffer" and thus could not serve as a waiver of the right to trial by jury. The fact that the order did not formally enjoin plaintiff from enforcing the arbitration provision against other customers did not mean that no public good was served. The order would still effectively deter plaintiff from the enforcing arbitration provision against customers similarly situated to defendant [*MBNA America Bank, N.A. v. Gorman (2006) 147 Cal. App. 4th Supp 1, 8-10, 54 Cal. Rptr. 3d 724]* .

If a party to the arbitration initiates judicial review of the award by petitioning the court to correct or vacate the award, the other party, seeking to enforce the award, may file a response to the petition requesting the court to confirm the award [*see Code Civ. Proc. § 1285.2*].

[3] Confirmation of Award in Arbitration Between Party to Contract and Nonparty

In some cases, this form may be modified to seek confirmation of an award rendered in arbitration between one party to the contract containing the arbitration provision and someone who was not a party to the agreement but is bound by it. The most common applications of arbitration provisions to persons not parties to the contract are medical malpractice and wrongful death claims by members of the party's family [*see, e.g., Herbert v. Superior Court (1985) 169 Cal. App. 3d 718, 720-721, 215 Cal. Rptr. 477* (infant's claim for prenatal injuries compelled to be arbitrated under parents' agreement with group health provider); *Hawkins v. Superior Court (1979) 89 Cal. App. 3d 413, 415-417, 419, 152 Cal. Rptr. 491* (surviving spouse required to arbitrate wrongful death claim)]. Confirmation of an arbitration award has also been upheld after arbitration was compelled between the sole general partner of a limited partnership and the entity with which the partnership had contracted. The arbitration provision was in a contract between the partnership and the third party, but the partnership was in bankruptcy and the stay prevented it from being compelled to arbitrate [*see Keller Constr. Co. v. Kashani (1990) 220 Cal. App. 3d 222, 227-229, 269 Cal. Rptr. 259* (decision was based in part on general partner's liability for obligations of limited partnership; decided under *Corp. Code § 15015(b)* [Uniform Partnership Act, repealed 1999]; *Corp. Code § 15507(a)* [Uniform Limited Partnership Act, repealed Jan. 1, 2010]; *now see Corp. Code §§ 15509(1), 15643(b), 15904.04(a)* [Uniform Limited Partnership Act of 2008]; *Corp. Code § 16306* [Uniform Partnership Act of 1994])].

[4] Awards Entitled to Confirmation

All awards are entitled to confirmation, not just unpaid ones. Thus, a successful defendant, who is found not to be liable, is entitled to have that award confirmed [*Pacific Law Group: USA v. Gibson (1992) 6 Cal. App. 4th 577, 581-583, 7 Cal. Rptr. 2d 878]* .

[5] Allegations

A petition to confirm an arbitration award is required to name as respondents all parties to the arbitration. It may also name as respondents any other persons bound by the arbitration award [*Code Civ. Proc. § 1285*]. The petition must also:

- Set forth the substance of or have attached a copy of the agreement to arbitrate (Paragraph 4) [*Code Civ. Proc. § 1285.4(a)*].

- Set forth the names of the arbitrators (Paragraph 6) [*Code Civ. Proc. § 1285.4(b)*].

- Set forth or have attached a copy of the award and the written opinion of the arbitrators, if any (Paragraph 8) [*Code Civ. Proc. § 1285.4(c)*].

- For the purpose of establishing venue, the petition also discloses the county in which the arbitration was conducted (Paragraph 3(b)(4)) [*see Code Civ. Proc. § 1292.2*; *see also Code Civ. Proc. §§ 1292-1292.6, 1293* (other venue and jurisdiction provisions)].

[6] Copies

The following copies of a petition to confirm an arbitration award should be prepared:

- Original to be filed in the court and conformed copy for the court to stamp and return.

- One copy to be served on each of the other parties.

- One copy for the client, if desired.

- One office file copy.

- Other copies as desired.

[7] Jurisdiction

When parties enter into an agreement in California that provides for arbitration to be conducted within California, the parties are deemed to have consented to the jurisdiction of California courts to enforce the agreement by issuing any of the orders provided for in *Code Civ. Proc. §§ 1280-1294.2*, and by entering judgment on an award under the agreement [*Code Civ. Proc. § 1293*].

Superior courts have jurisdiction over arbitration-related petitions whether the matter is a limited or unlimited civil case [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. § 86(a)(10)(A)*].

If the proceeding is a limited civil case, and the petition is the first paper filed, the caption must state whether the demand exceeds or does not exceed $10,000. The caption must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 72055*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

The court in which a prior petition was filed under *Code Civ. Proc. §§ 1280-1294.2* retains jurisdiction to determine any subsequent petition involving the same agreement to arbitrate and the same controversy, and any such subsequent petition is required to be filed in that proceeding [*Code Civ. Proc. § 1292.6*].

[8] Venue

Except as otherwise provided, any petition made after the commencement or completion of arbitration must be filed in a court having jurisdiction in the county where the arbitration is being or has been held, or, if not held exclusively in any one county of this state, or if held outside of this state, then the petition is to be filed as provided in *Code Civ. Proc. § 1292* [*Code Civ. Proc. § 1292.2*].

Under *Code Civ. Proc. § 1292*, venue is in the appropriate court:

- In the county where the agreement is to be performed or was made; or
- In the county where any party to the court proceeding resides or has a place of business if the agreement does not specify a county where it is to be performed and was not made in California; or
- In any county in California in any case not covered by either of the above alternatives.

[9] Service

Under *Code Civ. Proc. § 1290.4*, a copy of the petition and a written notice of the time and place of hearing and any other papers on which the petition is based must be served in the manner provided in the arbitration agreement [*Code Civ. Proc. § 1290.4(a)*; for a form of notice of hearing that may be adapted for use with the form in [1], *above*, *see Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.91[2]*]. If the agreement does not provide the manner of service, then service must be made in the manner specified in *Code Civ. Proc. § 1290.4(b), (c)* [for discussion, *see § 34.12[3]*; for procedure and forms dealing with service of process, *see* Ch. 518, *Service of Summons and Papers*].

[10] Time for Service and Filing

A petition to confirm an award is to be served and filed not later than four years after the date of service of a signed copy of the award on the petitioner [*Code Civ. Proc. § 1288*]. It may not be served and filed until at least 10 days after such service [*Code Civ. Proc. § 1288.4*] and if an application is made to the arbitrators to correct the award, the petition may not be served and filed until determination of the application [*Code Civ. Proc. § 1288.6*].

In the latter event *Code Civ. Proc. § 1288.8* provides that the date of service of the award is deemed to be the earlier of the following:

- The date of service on the petitioner of a signed copy of the correction of the award or of the denial of the application.
- The date that such application is deemed denied under *Code Civ. Proc. § 1284* (30 days after service of a signed copy of the award on the applicant).

[11] Hearing

The petition is heard in a summary way in the manner and on the notice provided by law for the making and hearing of motions [*see Code Civ. Proc. § 1010* (notice of motion)], except that not less than 10 days' notice (30 days, if the petition is served out of the state [*Code Civ. Proc. § 1290.4(b)(2)*]) of the dateset for the hearing shall be given [*Code Civ. Proc. § 1290.2*]. If the petition is served out of state, it may not be heard until at least 30 days after the date of service [*Code Civ. Proc. § 1290.4(b)(2)*].

[12] Cross References

For further discussion relating to proceedings to confirm, vacate, or correct award, see *§ 34.12*

For a memorandum of points and authorities in support of the foregoing petition, see California Points and Authorities, Ch 20C, *Arbitration: Confirming, Correcting, or Vacating the Award* (Matthew Bender)

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Chapter 34 CONTRACTUAL ARBITRATION: JUDICIAL REVIEW
PART V. FORMS

4-34 California Forms of Pleading and Practice--Annotated § 34.51

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[Reserved]

§ 34.51[Reserved]

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§ 34.52 Response [Code Civ. Proc. § 1290] to Petition to Confirm Arbitration Award--Requesting Correction or Vacation of Award [Code Civ. Proc. § 1285.2]

[1] FORM Response [Code Civ. Proc. § 1290] to Petition to Confirm Arbitration Award--Requesting Correction or Vacation of Award [Code Civ. Proc. § 1285.2]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	RESPONSE TO PETITION
Petitioner, vs.	)	Date: _____
_____ [*name*]	)	Time: _____
Respondent.	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

Respondent _____ [*name*] responds to the petition to confirm the arbitration award as follows:

1. Respondent admits _____ [*set forth allegations of petition admitted*]. Except as expressly admitted, respondent denies each and every, all and singular, both generally and specifically, the allegations of the petition herein.

2. [*If the petition does not already do so, set forth in this and in subsequent paragraphs allegations showing the arbitration agreement, the names of the arbitrators, and the award. See § 34.50, Paragraphs 4, 6, and 8.*]

3. Respondent requests that the court correct the award rendered by the arbitrators on the following grounds:

[*EITHER*]

There was an evident miscalculation of the following figures in the award: _____ [*specify*].

[*OR*]

There is an evident mistake in the description of _____ [*specify person, thing, or property referred to in the award*] in that _____ [*specify*].

[*OR*]

The arbitrators exceeded their powers in that _____ [*specify*] but the award may be corrected without affecting the merits of the decision on the controversy submitted in that _____ [*specify*].

[*OR*]

The award is imperfect in a matter of form not affecting the merits of the controversy in that _____ [*specify*].

[*CONTINUE*]

4. Respondent requests that the award be corrected as follows: _____ [*specify*].

5. Respondent requests alternatively that the award be vacated and the matter reheard on the following grounds:

[*EITHER*]

The award was procured by _____ [corruption *or* fraud *or* undue means] in the following respects _____ [*specify*].

[*OR*]

There was corruption in _____ [*of arbitrator*] in that _____ [*specify*].

[*OR*]

The neutral arbitrator _____ [*name*] committed misconduct substantially prejudicing respondent's rights in that _____ [*specify*].

The arbitrators exceeded their powers in _____ [*set forth acts exceeding powers*] and the award cannot be corrected without affecting the merits of the decision on the controversy submitted.

[*OR*]

The arbitrators refused _____ [to postpone the hearing after respondent showed sufficient cause for postponement *or* to hear evidence as to _____ (*show relevancy and materiality to controversy*)].

[*OR*]

The conduct of the arbitrators was contrary to the provisions of Section(s) _____ of the Code of Civil Procedure in that _____ [*specify*].

[*OR*]

The public construction contract requires that an arbitration award be supported by law and substantial evidence and this award is _____ [based on an error of law *or* not supported by substantial evidence *or* based on an error of law and not supported by substantial evidence].

[*CONTINUE*]

[6. Respondent (does not) consent(s) to a rehearing before the original arbitrators if a rehearing is ordered by the court.]

WHEREFORE, respondent prays as follows:

1. That the petition to confirm the award be denied.

2. That the award be corrected as herein requested and confirmed as so corrected and judgment be entered in conformity with such corrected award.

3. That the award be vacated if it cannot be corrected as herein requested, and that the court order that the matter be reheard.

4. For costs of suit herein incurred.

5. For such further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent

[2] Use of Form

The form of response in [1], *above*, is for use to contest a petition to confirm an arbitration award and to request that the award either be corrected or vacated.

A party to the arbitration seeking to correct or vacate an award may initiate judicial review by filing a petition to correct or vacate the award if another party has not already filed a petition to confirm the award [*see Code Civ. Proc. §§ 1285, 1290*].

Effective January 1, 2002, a petition requesting the award be vacated under *Code Civ. Proc. § 1285* is subject to the provisions of *Code Civ. Proc. § 128.7* [*Code Civ. Proc. § 1286.2(b)*], which requires the paper to be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, by the party. It also requires each paper to state the signer's address and telephone number, if any. *Code Civ. Proc. § 128.7*, which relates to sanctions, is discussed in Ch. 510, *Sanctions* .

[3] Allegations

Code Civ. Proc. § 1285.6 provides that unless a copy thereof is set forth in or attached to the petition, a response to a petition is required to:

- Set forth the substance of or have attached a copy of the arbitration agreement unless the respondent denies the existence thereof [*Code Civ. Proc. § 1285.6(a)*].

- Set forth the names of the arbitrators [*Code Civ. Proc. § 1285.6(b)*], (3) set forth or have attached a copy of the award and the written opinion of the arbitrators, if any [*Code Civ. Proc. § 1285.6(c)*]. Since a petition to confirm an award would generally contain such matters [*see Code Civ. Proc. § 1285.4* (contents of petition)] they would ordinarily not be contained in the response.

If a response requests that the award be corrected or vacated, it must set forth the grounds on which the request is based (Paragraphs 3 and 5) [*Code Civ. Proc. § 1285.8*]. Proper grounds for vacating the award are specified in *Code Civ. Proc. §§ 1286.2* and *1296* and for correcting the award in *Code Civ. Proc. § 1286.6*.

If the award is to be vacated on the grounds set forth in *Code Civ. Proc. § 1286.2(a)(4)* or *(5)* (arbitrators exceeded their powers or refused to postpone the hearing or to hear material evidence or acted contrary to *Code Civ. Proc. §§ 1280-1294.2*) the response should state whether or not respondent consents to a rehearing before the original arbitrators (Paragraph 6) [*Code Civ. Proc. § 1287*]. There is a difference between "hearing" evidence and "considering" evidence. The ground mentioned in *Code Civ. Proc. § 1286.2(a)(5)* is a refusal to "hear" evidence. Legally speaking, the admission of evidence is to hear it, and the weighing of it is to give it consideration. Failure to allege a refusal to "hear" evidence would render the petition fatally defective on this point, since failure to "consider" evidence is not a ground to vacate the award [*Gonzales v. Interinsurance Exch. (1978) 84 Cal. App. 3d 58, 63, 148 Cal. Rptr. 282]* .

[4] Copies

The response to a petition should be prepared in the following copies:

- Original to be filed with the court and conformed copy for the court to stamp and return.

- One copy to be served on each of the other parties.

- One copy for office files.
- One copy for the client, if desired.
- Other copies as desired.

[5] Time for Service and Filing

Generally, a response to a petition in arbitration proceedings is required to be served and filed within 10 days after service of the petition except that it is to be served and filed within 30 days after service of the petition when the latter is served outside the State of California under *Code Civ. Proc. § 1290.4(b)(2)*. These time requirements may be extended by an agreement (stipulation) in writing between the parties to the court proceeding, or, for good cause, by order of the court [*Code Civ. Proc. § 1290.6*].

If a response requests that the award be vacated or corrected it is required to be served and filed not later than 100 days after the date of service of a signed copy of the award on the respondent if he or she was a party to the arbitration or on his or her representative if he or she was not a party [*Code Civ. Proc. § 1288.2*; *Eternity Investments, Inc. v. Brown (2007) 151 Cal. App. 4th 739, 744-747, 60 Cal. Rptr. 3d 134* (court has no alternative but to confirm award if request to vacate is filed after 100-day limit); *see also Code Civ. Proc. § 1288.8* (date of service of award when application is made to the arbitrators for correction)].

A response is required to be served in the manner provided in *Code Civ. Proc. § 1010 et seq.* (service of papers other than summons) [*Code Civ. Proc. § 1290.8*; *see* Ch. 518, *Service of Summons and Papers*].

[6] Cross References

For memoranda of points and authorities in support of a petition to vacate an award and to correct an award, see California Points and Authorities, Ch 20C, *Arbitration: Confirming, Correcting, or Vacating the Award* (Matthew Bender)

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§ 34.53 Order Confirming Arbitration Award [Code Civ. Proc. § 1286]

[1] FORM Order Confirming Arbitration Award [Code Civ. Proc. § 1286]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Arbitration Between	)	
_____ [*name*],	)	NO. _____
vs.	)	ORDER
_____ [*name*].	)	
	)	
	)	

The petition of _____ [*name*] for an order confirming an arbitration award came on regularly this date for hearing by the court. Petitioner _____ [*name*] appeared by his/her counsel _____ [*name*] and respondent _____ [*name*] appeared by his/her counsel _____ [*name*].

Proof having been made to the satisfaction of the court that the petition should be granted,

IT IS ORDERED that the award of _____ [*names of arbitrators*] dated _____, is confirmed in all respects and that judgment be entered in conformity therewith, including interest on the amount of the award at the legal rate from _____ [*date*], the date the award was rendered [, (and) costs of this proceeding in the sum of $_____] [, and attorney's fees for this proceeding in the amount of

$_____].
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, is for use when the court grants a petition to confirm an arbitration award. The order includes post-award interest at the legal rate according to *Civ. Code § 3287(a)* from the date the arbitrator rendered the award [*Pierotti v. Torian (2000) 81 Cal. App. 4th 17, 27, 96 Cal. Rptr. 2d 553* ; *Britz, Inc. v. Alfa-Laval Food & Dairy Co. (1995) 34 Cal. App. 4th 1085, 1106-1107, 40 Cal. Rptr. 2d 700* ; for discussion, *see § 34.18[3A]*]. If there is a contractual provision for interest at some other rate or from some other date, counsel should modify the form accordingly. In addition, if the dispute involves personal injury and interest is claimed under *Civ. Code § 3291* and *Code Civ. Proc. § 998* (interest at the legal rate from date of plaintiff's first offer that exceeded amount of award), but the arbitrator did not award interest on that basis, counsel may wish to modify the form accordingly [for discussion, *see Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.29[2]].* Optional provisions are included for awarding costs of the confirmation proceeding or attorney's fees incurred in the confirmation proceeding [for discussion, *see § 34.18[2]* and *[3]*] For discussion of the related petition, see *§ 34.50[4]*.

The order would usually be prepared by counsel for petitioner and delivered to the court for signature and then filed by the clerk of the court.

[3] Contents

The order directs that the arbitration award is confirmed [*see Code Civ. Proc. § 1286*].

Because an order confirming an arbitration award is not listed among the appealable orders in arbitration proceedings set forth in *Code Civ. Proc. § 1294*, the court is not required to make a statement of decision on request [*Code Civ. Proc. § 1291*].

[4] Copies

The order should be prepared in the same number of copies as the petition [*see § 34.50[4]*].

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§ 34.54 Judgment on Order Confirming Arbitration Award [Code Civ. Proc. § 1287.4]

[1] FORM Judgment on Order Confirming Arbitration Award [Code Civ. Proc. § 1287.4]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Arbitration Between	)	
_____ [*name*],	)	NO. _____
vs.	)	JUDGMENT
_____ [*name*].	)	
	)	
	)	

_____

The award of _____ [*names of arbitrators*] having been confirmed by order of this court on _____ [*date*], and _____ [this court having made and caused to be filed herein its statement of decision *or* no statement of decision having been requested by any party],

IT IS ADJUDGED that petitioner _____ [*name*] recover from respondent _____ [*name*] the sum of $_____, together with interest thereon at the rate of _____ [*specify applicable legal or contract rate*] percent per year from _____ [*date*], and costs of this proceeding in the sum of $_____.
Dated: _____

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

The form of judgment in [1], *above*, is for use when the court has earlier confirmed the arbitration award and enters judgment on it. the judgment is usually prepared by counsel for petitioner for the court's signature after the award has been confirmed.

This form may be adapted for use if the arbitration award is confirmed at the request of the respondent in a proceeding initiated by a petition to vacate or correct the award.

This form may also be combined with § 34.53[1] so that both the order and judgment are included in one paper.

[3] Contents

The judgment is for a sum of money in conformity with the confirmed arbitration award [*see Code Civ. Proc. § 1287.4*], and awards costs [*Code Civ. Proc. § 1293.2*].

A judgment entered pursuant to *Code Civ. Proc. § 1280 et seq.* is appealable [*Code Civ. Proc. § 1294*] and therefore the court, on request pursuant to *Code Civ. Proc. § 632*, shall make a statement of decision [*Code Civ. Proc. § 1291*; for forms and procedure dealing with statements of decision, *see* Ch. 529, *Statement of Decision*].

[4] Interest and Costs

On a petition to confirm an arbitration award, the court awards costs under *Code Civ. Proc. § 1032 et seq.* as in any other civil proceeding [*see Code Civ. Proc. § 1293.2*; *see also Cobler v. Stanley, Barber, Southard, Brown & Associates (1990) 217 Cal. App. 3d 518, 533, 265 Cal. Rptr. 868]* . In addition, the successful party is entitled to recover interest on the amount of the award from the date the arbitrator renders the award until the date of the judgment confirming the award [*Civ. Code § 3287(a)*; *Pierotti v. Torian (2000) 81 Cal. App. 4th 17, 27-28, 96 Cal. Rptr. 2d 553* ; *Britz, Inc. v. Alfa-Laval Food & Dairy Co. (1995) 34 Cal. App. 4th 1085, 1106-1107, 40 Cal. Rptr. 2d 700]* . Similarly, a plaintiff in a personal injury action who obtains a judgment based on an arbitration award more favorable than his or her Section 998 offer is entitled to prejudgment interest under *Civ. Code § 3291* [*Weinberg v. Safeco Ins. Co. of Am. (2004) 114 Cal. App. 4th 1075, 1085, 8 Cal. Rptr. 3d 224* (uninsured motorist arbitration); *Caro v. Smith (1997) 59 Cal. App. 4th 725, 735-737, 69 Cal. Rptr. 2d 306* ; *cf. Woodard v. Southern Cal. Permanente Medical Group (1985) 171 Cal. App. 3d 656, 666, 217 Cal. Rptr. 514* (court had no power to award prejudgment interest after arbitrators denied it)]. For discussion and forms relating to recovery of costs under *Code Civ. Proc. § 1032 et seq.*, see Ch. 174, *Costs and Attorney's Fees* .

Unless the parties' agreement to arbitrate provides otherwise, *Code Civ. Proc. § 1293.2* does not allow the court to award cost incurred in the arbitration proceeding. The legislature has distinguished between costs incurred in the arbitration proceedings [*see Code Civ. Proc. § 1284.2*] and costs incurred in court to enforce an arbitration award [*see Code Civ. Proc. § 1293.2*], allowing costs only in the latter [*Austin v. Allstate Ins. Co. (1993) 16 Cal. App. 4th 1812, 1815-1816, 21 Cal. Rptr. 2d 56* (fee for filing petition to confirm award as only cost recoverable)]. Presumably however, an exception will be implied when parties agree to arbitrate claims under a consumer protection statute that has as an integral part a provision allowing prevailing plaintiffs to recover costs and attorneys fees. Then costs and attorneys' fees will be awarded under the particular statute [*Broughton v. Cigna Healthplans of California (1999) 21 Cal. 4th 1066, 1086-1087,90 Cal. Rptr. 2d 334, 988 P.2d 67* (claim for damages under the Consumer Legal Remedies Act, Civ. Code *§ 1750 et seq., Civ. Code* § 1780(d), of which mandates an award of costs and attorney's fees for a prevailing plaintiff)], in which case the form at [1], *above*, will have to be modified to include those costs and attorneys'

fees.

[5] Copies

The judgment should be prepared in the following number of copies:

- Original to be signed by the court and filed in the action.
- Copy for the client, if desired.
- Office file copy.
- Other copies, if desired.

[6] Cross References

For forms relating to judgments generally, see Ch. 318, *Judgments*

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§ 34.55 Combined Order and Judgment Confirming Arbitration Award After Correction [Code Civ. Proc. § 1286]

[1] FORM Combined Order and Judgment Confirming Arbitration Award After Correction [Code Civ. Proc. § 1286]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Arbitration Between	)	
_____ [*name*],	)	NO. _____
vs.	)	JUDGMENT
_____ [*name*].	)	
	)	
	)	

The _____ [*specify, e.g.*, petition of _____ (*name*) to confirm an arbitration award and response of _____ (*name*) to correct such award] in the above-entitled proceeding came on regularly this date for hearing by the court. Petitioner _____ [*name*] appeared by his/her counsel _____ [*name*] and respondent _____ [*name*] appeared by his/her counsel _____ [*name*].

On proof having been made to the satisfaction of the court that respondent's request for correction of the award should be granted and _____ [this court having caused to be filed herein its written statement of decision *or* a

statement of decision not having been requested by any party],

IT IS ORDERED AND ADJUDGED:

1. That the award of arbitrators _____ [*names*] dated _____, be corrected as follows: _____ [*specify*].

2. That the award be confirmed as so corrected.

3. That _____ [*specify, e.g.*, petitioner _____ (*name*) recover from respondent _____ (*name*) the sum of $_____, together with interest thereon at the rate of _____ (*specify applicable legal or contract rate*) percent per year from _____ (*date*)].
Dated: _____

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

The form of judgment in [1], *above*, is for use when the court corrects an award and confirms the award as corrected. For discussion relating to petition, response, and order in proceedings to confirm arbitration award, see *§§ 34.50 -34.54*.

This form illustrates the combined form of order and judgment which is frequently used in practice.

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4-34 California Forms of Pleading and Practice--Annotated § 34.56

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§ 34.56 Petition to Vacate Award and for Rehearing [Code Civ. Proc. §§ 1285, 1287]--Judicial Council Form ADR-106

[1] FORM Petition to Vacate Award and for Rehearing [Code Civ. Proc. §§ 1285, 1287]--Judicial Council Form ADR-106

Click here to view image.

[2] Use of Form

The form of petition in [1], *above*, is a reproduction of Judicial Council form ADR 106, which is mandatory after January 1, 2004, to petition to correct, confirm, or vacate a contractual arbitration award. It is shown above being used to seek a court order vacating an arbitration award and directing a new hearing either before the same or different arbitrators (Paragraph 10c.).

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

A request to vacate an award may also be made in a response to a petition to confirm the award [*Code Civ. Proc. § 1285.2*; for a form, *see § 34.52*].

A petition requesting the award be vacated under *Code Civ. Proc. § 1285* is subject to the provisions of *Code Civ. Proc. § 128.7* [*Code Civ. Proc. § 1286.2(b)*], which requires the paper to be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, by the party. It also requires each paper to state the signer's address and telephone number, if any. *Code Civ. Proc. § 128.7*, which relates to sanctions, is discussed

in Ch. 510, *Sanctions* .

[3] Service

A notice of hearing and any other papers on which the petition is based are to be served with the petition in the manner specified in *Code Civ. Proc. § 1290.4* [*Code Civ. Proc. § 1290.4*]. For a notice of hearing that may be adapted for use with the form in [1], *above*, see *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.91[2]*.

[4] Time for Service and Filing

A petition to vacate or correct an award must be served and filed not later than 100 days after the date of service of a signed copy of the award on the petitioner [*Code Civ. Proc. § 1288*; *see also Code Civ. Proc. § 1288.8* (date of service of award when application is made to the arbitrators for correction)].

[5] Cross References

For discussion of jurisdiction, venue, and hearings for arbitration-related petitions, see *§ 34.50[7], [8], [11]*

For further discussion relating to proceedings to vacate arbitration award, see *§ 34.19*

For a memorandum of points and authorities in support of the foregoing petition, see California Points and Authorities, Ch 20C, *Arbitration: Confirming, Correcting, or Vacating the Award* (Matthew Bender)

California Forms of Pleading and Practice--Annotated

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 34 CONTRACTUAL ARBITRATION: JUDICIAL REVIEW
PART V. FORMS

4-34 California Forms of Pleading and Practice--Annotated § 34.57

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§ 34.57 Response [Code Civ. Proc. § 1290] to Petition to Vacate Award--Request That Award Be Confirmed [Code Civ. Proc. § 1285.2]

[1] FORM Response [Code Civ. Proc. § 1290] to Petition to Vacate Award--Request That Award Be Confirmed [Code Civ. Proc. § 1285.2]

[*Caption. See § 34.52* .]

Respondent_____ [*name*] responds to the petition to vacate the arbitration award as follows:

1. Respondent admits Paragraphs _____ [*specify*].

Except as expressly admitted, respondent denies each and every, all and singular, both generally and specifically, the allegations of the petition.

2. [*If the petition does not already do so, set forth in this and in subsequent paragraphs allegations showing the arbitration agreement, the names of the arbitrators, and the award. See § 34.50, Paragraphs 4, 6, and 8.*]

WHEREFORE, respondent prays:

1. For an order confirming the award as made.

2. For judgment against respondent in conformity with the award in the sum of $_____.

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent

[2] Use of Form

The form of response in [1], *above*, is for use in requesting that the court confirm an arbitration award, in response to a petition that the award be vacated.

The court can also be requested to confirm an award by way of a petition to confirm [*Code Civ. Proc. § 1285*; for a form, *see § 34.50*].

[3] Allegations

The response seeking to confirm an award should deny any allegations in the petition which are contested, such as the allegations setting forth the ground for vacating or correcting the award (Paragraph 1) [*see Code Civ. Proc. § 1290* (allegations of a petition as deemed admitted unless response is duly served and filed)].

The response is also required, unless the information is already contained in the petition, to

- Set forth the substance of or have attached a copy of the arbitration agreement [*Code Civ. Proc. § 1285.6(a)*].

- Set forth the names of the arbitrators [*Code Civ. Proc. § 1285.6(b)*].

- Set forth or have attached a copy of the award and written opinion of the arbitrators, if any [*Code Civ. Proc. § 1285.6(c)*].

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California Forms of Pleading and Practice--Annotated

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Chapter 34 CONTRACTUAL ARBITRATION: JUDICIAL REVIEW
PART V. FORMS

4-34 California Forms of Pleading and Practice--Annotated § 34.58

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§ 34.58 Order Vacating Award of Arbitrators [Code Civ. Proc. § 1286] and for Rehearing [Code Civ. Proc. § 1287]

[1] FORM Order Vacating Award of Arbitrators [Code Civ. Proc. § 1286] and for Rehearing [Code Civ. Proc. § 1287]

[*Caption. See § 34.53[1].*]

The _____ [*e.g.*, petition of _____ (*name*) for an order vacating the arbitration award made on _____ [*date*] and the response of _____ (*name*) requesting that the award be confirmed] came on regularly this date for hearing by the court. Petitioner _____ [*name*] appeared by his or her counsel _____ [*name*] and respondent _____ [*name*] appeared by his or her counsel _____ [*name*].

Proof having been made to the satisfaction of the court that _____ [*e.g.*, the petition should be granted and the response denied], and good cause appearing therefor,

IT IS ORDERED:

1. That the award made by _____ [*names of arbitrators*] on _____ [*date*], is vacated.

2. That a rehearing in arbitration be held within _____ days from the date of entry of this order, before _____ [the original arbitrators *or* new arbitrators to be appointed as follows:

_____ (*specify*) *or* _____ (*names of new arbitrators*)], for determination of the _____ [controversy set forth in the petition herein *or* following questions: _____ (*specify limited issues*)].

3. That petitioner recover from respondent his or her costs of this proceeding in the sum of $_____ [and attorney's fees incurred in this proceeding in the sum of $_____].
Dated: _____ [*date*].

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, is for use when the court vacates an arbitration award and orders a new hearing. Although rehearing is not always ordered [*see Marcus & Millichap Real Estate Investment Brokerage Co. v. Woodman Investment Group, Inc. (2005) 129 Cal. App. 4th 508, 28 Cal. Rptr. 3d 584]* , it is the more usual course. If rehearing is not ordered, omit paragraph 2 from the order and renumber paragraph 3 as paragraph 2.

[3] Contents

The order directs that the award be vacated [*see Code Civ. Proc. § 1286*], that a rehearing be held before the same or different arbitrators [*see* Code *Civ. Proc. § 1287*], and that petitioner recover costs of the proceeding, including attorney's fees incurred in that post arbitration judicial proceeding if they are provided for by the contract [*see Code Civ. Proc. § 1293.2*; *Marcus & Millichap Real Estate Investment Brokerage Co. v. Woodman Investment Group, Inc. (2005) 129 Cal. App. 4th 508, 513-516, 28 Cal. Rptr. 3d 584* (distinguishing situation in which it may be too soon to tell which is prevailing party for purposes of award of costs and attorney's fees)].

Since an order vacating an award is not appealable when it also orders a rehearing [*Code Civ. Proc. § 1294*], it is not necessary to prepare written findings of fact or conclusions of law [*see Code Civ. Proc. § 1291*].

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Chapter 34 CONTRACTUAL ARBITRATION: JUDICIAL REVIEW
PART V. FORMS

4-34 California Forms of Pleading and Practice--Annotated § 34.59

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§ 34.59 Petition to Correct Award [Code Civ. Proc. §§ 1285, 1287]--Judicial Council Form ADR-106

[1] FORM Petition to Correct Award [Code Civ. Proc. §§ 1285, 1287]--Judicial Council Form ADR-106

Click here to view image.

[2] Use of Form

The form of petition in [1], *above*, is a reproduction of Judicial Council form ADR-106, which is mandatory after January 1, 2004, to petition to correct, confirm, or vacate a contractual arbitration award. It is shown above being used to seek a court order correcting an arbitration award [*see Code Civ. Proc. §§ 1286.6, 1286.8*; for discussion, *see § 34.20*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form may be adapted for use in a response to a petition to confirm or to vacate the award [*see Code Civ. Proc. § 1286.8(a)*].

[3] Service

A notice of hearing and any other papers on which the petition is based are to be served with the petition in the manner specified in *Code Civ. Proc. § 1290.4* [*Code Civ. Proc. § 1290.4*]. For a notice of hearing that may be adapted for use with the form in [1], *above*, see *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.91[2]*.

[4] Cross References

For discussion of jurisdiction, venue, and hearings for arbitration-related petitions, see *§ 34.50[7], [8], [11]*

For discussion of time for service and filing of a petition to correct an arbitration award, see *§ 34.56[4]*

For a memorandum of points and authorities in support of the foregoing petition, see California Points and Authorities, Ch 20C, *Arbitration: Confirming, Correcting, or Vacating the Award* (Matthew Bender)

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 35 ARBITRATION AND CONCILIATION OF INTERNATIONAL COMMERCIAL DISPUTES

4-35 California Forms of Pleading and Practice--Annotated 35.syn

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§ 35.71 Application for Order to Stay Proceedings and to Compel Arbitration Under International Commercial Agreement [9 U.S.C. § 206; Code Civ. Proc. § 1297.81]--Notice of Motion and Supporting Declaration

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§ 35.72 Petition to Appoint, or Secure Appointment of, Arbitrator Under International Commercial Agreement [Code Civ. Proc. §§ 1297.114-1297.116]

[1] FORM

[2] Use of Form

[3] Allegations

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§ 35.73 Petition to Determine Challenge to Arbitrator Appointed Under International Commercial Agreement [Code Civ. Proc. § 1297.134]

[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Venue

[4] Allegations

[5] Superior Court's Decision

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Editorial Consultant n*

FOOTNOTES:
(n24)Footnote *.
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Chapter 35 ARBITRATION AND CONCILIATION OF INTERNATIONAL COMMERCIAL DISPUTES
PART I. SCOPE

4-35 California Forms of Pleading and Practice--Annotated § 35.01

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§ 35.01 Scope of Chapter

This chapter discusses:

- Procedures applicable to arbitration and conciliation proceedings conducted in California to resolve international commercial disputes.
- Access to California courts, by parties to international commercial arbitration agreements, to either:
  - Stay a California judicial proceeding seeking relief with respect to a matter covered by an agreement to arbitrate.
  - Seek or enforce an interim arbitral award for interim protective measures in California while arbitration is proceeding anywhere.
- Federal law interpreting the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, entered into force in the United States on December 29, 1970.

Although the underlying international commercial agreement of the parties is likely to establish procedures governing many aspects of the arbitration or conciliation process and to designate the substantive law that they wish to apply, the procedures discussed in this chapter apply to powers of the California courts and govern when the agreement of the parties does not address a particular issue.

This chapter contains the following forms:

- Demand for arbitration under an international commercial agreement [*see § 35.70*].

- Notice of motion and declaration in support of motion for orders staying a judicial proceeding in California and compelling arbitration under an international commercial agreement [*see § 35.71*].

- Petition to appoint, or secure appointment of, an arbitrator [*see § 35.72*].

- Petition to determine a challenge against an arbitrator [*see § 35.73*].

- Petition to determine whether an arbitrator's mandate has terminated for failure or inability to perform or after withdrawal [*see § 35.74*].

- Petition to determine the jurisdiction of the arbitral tribunal [*see § 35.75*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsForeign Arbitral AwardsInternational LawDispute ResolutionArbitration & MediationGeneral OverviewInternational LawDispute ResolutionArbitration & MediationAgreementsInternational Trade LawDispute ResolutionArbitrationInternational Trade LawDispute ResolutionConvention on the Recognition & Enforcement of Foreign Arbitral Awards

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Chapter 35 ARBITRATION AND CONCILIATION OF INTERNATIONAL COMMERCIAL DISPUTES
PART I. SCOPE

4-35 California Forms of Pleading and Practice--Annotated § 35.02

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§ 35.02 Cross References

For discussion and forms regarding removal to federal courts, see Ch. 265, *Federal Courts: Jurisdiction and Removal* , Pt. II

For discussion and forms relating to personal jurisdiction over nonresidents, see Ch. 323, *Jurisdiction: Personal* , and Ch. 518, *Service of Summons and Papers*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureRemovalGeneral OverviewCivil ProceduresPleading & PracticeService of ProcessGeneral Overview

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Chapter 35 ARBITRATION AND CONCILIATION OF INTERNATIONAL COMMERCIAL DISPUTES
PART I. SCOPE

4-35 California Forms of Pleading and Practice--Annotated § 35.03

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§ 35.03 Governing Law

[1] Federal Law and Treaties

Enforcement of international arbitration agreements and arbitral awards is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, entered into force in the United States on December 29, 1970 ("the Convention"). The Convention has been signed by approximately 76 other countries and is enforced in United States courts in accordance with *9 U.S.C. §§ 201-208* [*9 U.S.C. § 201*]. The United States is also a party to various trade agreements and bilateral investment treaties that encourage private resolution of commercial disputes, for example, the U.S.S.R. (1972), Poland (1972), Romania (1975), Hungary (1978), the People's Republic of China (1980), Egypt (1984), and Austria (1984).

The Federal Arbitration Act, *9 U.S.C. §§ 1-16*, applies to actions and proceedings brought under *9 U.S.C. §§ 201-208* to the extent that *9 U.S.C. §§ 1-16* are not in conflict with *9 U.S.C. §§ 201-208* or with the Convention as ratified by the United States [*9 U.S.C. § 208*].

If one party to the international commercial agreement is a foreign sovereign engaged in commerce, the Foreign Sovereign Immunities Act of 1976 (Pub. L. No. 94-583; *28 U.S.C. §§ 1330*, *1332*, *1391*, *1441*, *1602*-1611) also will apply.

[2] California Law

Arbitration and conciliation proceedings conducted in California to resolve international commercial disputes and the use of California courts to stay California judicial proceedings and to obtain or enforce interim protective measures

while arbitration concerning an international commercial dispute is being conducted anywhere are governed by Code Civ. Proc. §§ 1297.11-1297.432. *Code Civ. Proc. § 1297.61* adopts the jurisdiction and venue provisions of *Code Civ. Proc. §§ 1292-1293.2* for the matters to which it refers. *Code Civ. Proc. §§ 1285-1288.8* and *1290-1294.2* govern enforcement of arbitral awards and procedural matters in judicial proceedings related to arbitration, respectively, to the extent that they are not superseded by *Code Civ. Proc. §§ 1297.11-1297.432* [*see Code Civ. Proc. § 1297.17*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewInternational Trade LawDispute ResolutionConvention on the Recognition & Enforcement of Foreign Arbitral Awards

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PART I. SCOPE

4-35 California Forms of Pleading and Practice--Annotated § 35.04

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§ 35.04 Institutional Arbitration Procedures

The American Arbitration Association ("AAA") has established Commercial Arbitration Rules that may be used in international commercial disputes in connection with its Supplementary Procedures for International Commercial Arbitration.

The International Chamber of Commerce Court of Arbitration has also issued rules applicable to the arbitration of international commercial disputes.

The United Nations General Assembly has recommended the use of the Arbitration Rules adopted by the United Nations Commission on International Trade Law (hereinafter "UNCITRAL Arbitration Rules") [*see* General Assembly Resolution 31/98 (Dec. 15, 1976)]. *Code Civ. Proc. §§ 1297.11-1297.432* conform in many respects to the UNCITRAL Arbitration Rules. The AAA is willing to provide administrative services and act as appointing authority under the UNCITRAL Arbitration Rules. If the parties agree to apply the UNCITRAL Arbitration Rules but do not agree on an appointing authority, a party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority [*see* UNCITRAL Arbitration Rules, art. 6-8].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewInternational LawDispute ResolutionArbitration & MediationGeneral OverviewInternational LawDispute ResolutionInternational Chamber of Commerce RulesInternational Trade LawDispute ResolutionArbitration

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PART I. SCOPE

4-35 California Forms of Pleading and Practice--Annotated §§ 35.05-35.09

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§§ 35.05[Reserved]

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A Considerations Applicable to Both Arbitration and Conciliation

4-35 California Forms of Pleading and Practice--Annotated § 35.10

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§ 35.10 Application of Convention

The Convention applies to arbitral awards made in the territory of a country other than the country in which recognition and enforcement of those awards are sought, and to arbitral awards that are not considered as domestic awards in the country in which their recognition and enforcement are sought [Convention on Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, art. I, para. 1]. An agreement or award arising out of a relationship that is entirely between citizens of the United States is not deemed to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states [*9 U.S.C. § 202*]. For the purposes of *9 U.S.C. § 202*, a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States [*9 U.S.C. § 202*].

The United States applies the Convention, on the basis of reciprocity, to the recognition and enforcement only of those awards made in the territory of another country in which the Convention is in force. The Convention applies to all of the territories whose international relations are the responsibility of the United States [Convention on Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, n. 43 (declarations of United States in accordance with art. X, para. 1)].

The United States applies the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law of the United States, including a transaction, contract, or agreement defined in *9 U.S.C. § 2* [Convention on Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, n. 43 (declarations of United States in accordance with art. X, para. 1); *9 U.S.C. § 202*; *see 9 U.S.C. § 1* (discussed in *§ 35.11[3]*)].

The Convention creates a body of federal substantive law that establishes and regulates the duty to honor an agreement to arbitrate. This law is equally applicable in state as well as federal courts [*see Mitsubishi Motors v. Soler Chrysler-Plymouth (1985) 473 U.S. 614, 625-627, 105 S. Ct. 3346, 87 L. Ed. 2d 444*]. The Convention supersedes conflicting law, and any prior law or decision inconsistent with the Convention is set aside or must be construed to be consistent with the Convention [*see Sedco v. Petroleos Mexicanos Mexican Nat. Oil (5th Cir. 1985) 767 F.2d 1140, 1149* (disregarding admiralty rules in conflict with Convention)].

Legal Topics:

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4-35 California Forms of Pleading and Practice--Annotated § 35.11

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§ 35.11 Application of California Law

[1] Arbitration or Conciliation of International Commercial Dispute in California

Code Civ. Proc. §§ 1297.11-1297.432 apply to international commercial arbitration and conciliation, subject to any agreement that is in force between the United States and any other state or states [*Code Civ. Proc. § 1297.11*]. Except for *Code Civ. Proc. §§ 1297.81-1297.82*, relating to compelling arbitration and staying a judicial proceeding seeking relief with respect to a matter covered by an agreement to arbitrate, and *Code Civ. Proc. §§ 1297.91-1297.95*, relating to interim protective measures, *Code Civ. Proc. §§ 1297.11-1297.432* apply only if the place of arbitration or conciliation is in California [*Code Civ. Proc. § 1297.12*]. It is not clear how the application of *Code Civ. Proc. §§ 1297.11-1297.432* can be established when the agreement of the parties does not designate a place for arbitration or allow the arbitral tribunal to designate the place for arbitration [*see Code Civ. Proc. § 1297.202* (when parties fail to designate place of arbitration, tribunal determines place having regard to circumstances of case)].

[2] When Agreement Is "International"

An arbitration or conciliation agreement is international if any of the following applies [*Code Civ. Proc. § 1297.13*; *see Code Civ. Proc. § 1297.15* (for the purpose of *Code Civ. Proc. § 1297.13*, the states of the United States, including the District of Columbia, are considered one state); *see also § 35.10*]:

(a) The parties to an arbitration or conciliation agreement have, at the time of the conclusion of that agreement, their places of business in different states;

(b) One of the following places is situated outside the state in which the parties have their places of business:

(i) The place of arbitration or conciliation if determined in, or pursuant to, the arbitration or conciliation agreement;

(ii) Any place where a substantial part of the obligations of the commercial relationship is to be performed; or

(iii) The place with which the subject matter of the dispute is most closely connected;

(c) The parties have expressly agreed that the subject matter of the arbitration or conciliation agreement relates to commercial interests in more than one state; or

(d) The subject matter of the arbitration or conciliation agreement is otherwise related to commercial interests in more than one state.

For the purposes of *Code Civ. Proc. § 1297.13*, if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement; if a party does not have a place of business, reference is to be made to his or her habitual residence [*Code Civ. Proc. § 1297.14*].

[3] When Agreement Is "Commercial"

The Convention applies only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law of the United States [*see 9 U.S.C. § 202*; for further discussion, *see § 35.10*].

The Federal Arbitration Act, *9 U.S.C. §§ 1-16*, defines "commerce" to mean commerce among the several States or with foreign nations, or in any Territory of the United States or the District of Columbia, or between any such Territory and another, or between the District of Columbia and any State or Territory or foreign nation; but the term does not apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce [*9 U.S.C. § 1*]. The last clause in that provision is neither part of the definition of commerce, nor a limitation on which relationships are "considered as commercial" pursuant to *9 U.S.C. § 2*. Rather, it operates as an exemption. In other words, the clause does not state that transportation workers are not engaged in commerce or that their employment contracts are not "considered as commercial." Instead, it states that even though such workers are engaged in commerce and even though their employment contracts are considered as commercial, the FAA does not apply to them. Because the exemption clause does not affect the definition of "commerce" or the statutory description of which relationships are "considered as commercial," the exemption is not incorporated into the Convention Act by virtue of *9 U.S.C. § 202*. The only limitation placed on the scope of the Convention Act, other than the language of the Convention itself, is the limitation in *9 U.S.C. § 202* that "[a]n arbitration agreement ... arising out of a legal relationship ... which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the convention" [*Rogers v. Royal Caribbean Cruise Line (9th Cir. 2008) 547 F.3d 1148, 1155* ; *see Balen v. Holland America Line Inc. (9th Cir. 2009) 583 F.3d 647, 652* (following *Rogers*)].

California law provides additional guidance, providing that an arbitration or conciliation agreement is commercial if it arises out of a relationship of a commercial nature including, but not limited to, any of the following [*Code Civ. Proc. § 1297.16*]:

(a) A transaction for the supply or exchange of goods or services;

(b) A distribution agreement;

(c) A commercial representation or agency;

(d) An exploitation agreement or concession;

(e) A joint venture or other, related form of industrial or business cooperation;

(f) The carriage of goods or passengers by air, sea, rail, or road;

(g) Construction;

(h) Insurance;

(i) Licensing;

(j) Factoring;

(k) Leasing;

(l) Consulting;

(m) Engineering;

(n) Financing;

(o) Banking;

(p) The transfer of data or technology;

(q) Intellectual or industrial property, including trademarks, patents, copyrights, and software programs; or

(r) Professional services.

[4] Effect on Other California Arbitration Statutes

Code Civ. Proc. §§ 1297.11-1297.432 supersede *Code Civ. Proc. §§ 1280-1284.2*, inclusive (nonjudicial arbitration: general provisions, enforcement of agreements, and conduct of arbitration proceedings), with respect to international commercial arbitration and conciliation [*Code Civ. Proc. § 1297.17*].

Otherwise, *Code Civ. Proc. §§ 1297.11-1297.432* shall not affect any other law in force in California by virtue of which certain disputes may not be submitted to arbitration, or may be submitted to arbitration only in accordance with provisions other than those of *Code Civ. Proc. §§ 1297.11-1297.432* [*Code Civ. Proc. § 1297.17*; *see, e.g., Code Civ. Proc. § 1295* (special provisions relating to medical malpractice)]. It is, however, unlikely that any California law restricting arbitration arising out of an agreement affecting interstate commerce, and all the more, international commerce, would be constitutional [*see Allied-Bruce Terminix Companies, Inc. v. Dobson (1995) 513 U.S. 265, 115 S. Ct. 834, 843, 130 L. Ed. 2d 753* ; for further discussion, *see Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.24*], so this protective provision of Section 1297.17 is of little or no practical meaning.

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-35 California Forms of Pleading and Practice--Annotated § 35.12

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§ 35.12 Definitions

[1] Arbitration; Conciliation

For the purposes of *Code Civ. Proc. §§ 1297.11-1297.432*, "arbitration" means any arbitration, whether or not administered by a permanent arbitral institution [*Code Civ. Proc. § 1297.21(c)*]. Similarly, "conciliation" means any conciliation, whether or not administered by a permanent conciliation institution [*Code Civ. Proc. § 1297.21(d)*].

[2] Arbitration Agreement

An "arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes that have arisen or that may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement [*Code Civ. Proc. § 1297.71*].

The arbitration agreement must be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams, or other means of telecommunication providing a record of this agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another [*Code Civ. Proc. § 1297.72*; *cf. Beromun Aktiengesellschaft v. Societa, Etc. (S.D. N.Y. 1979) 471 F. Supp. 1163, 1170* (dicta; signed contract is not required to compel arbitration under Convention if contract containing arbitration clause is enforceable under ordinary contract principles)]. The reference in a contract to a separate document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract [*Code Civ. Proc. § 1297.72*; *cf. Beromun*

Aktiengesellschaft v. Societa, Etc. (S.D. N.Y. 1979) 471 F. Supp. 1163 , 1171-1172 (telexes held not to incorporate alleged prior oral agreement to arbitrate)]. Thus, under the Convention definition, purchase orders signed by the buyer and containing arbitration clauses on their reverse sides did not constitute arbitration agreements because the seller never signed them [*Kahn Lucas Lancaster, Inc. v. Lark Intern. Ltd. (2d Cir. 1999) 186 F.3d 210* , 218-219].

The California definition is similar to that of the Convention, which specifies that the term "agreement in writing" includes an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams [Convention on Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, art. II, para. 2].

[3] Arbitral Award; Arbitral Tribunal

For the purposes of *Code Civ. Proc. §§ 1297.11-1297.432*, "arbitral award" means any decision of the arbitral tribunal on the substance of the dispute submitted to it, and includes an interim, interlocutory, or partial arbitral award [*Code Civ. Proc. § 1297.21(a)*]. An "arbitral tribunal" means a sole arbitrator or a panel of arbitrators [*Code Civ. Proc. § 1297.21(b)*].

The Convention specifies that the term "arbitral award" includes not only awards made by arbitrators appointed for each case, but also those made by permanent arbitral bodies to which the parties have submitted [Convention on Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, art. I, para. 2].

[4] Chief Justice

For the purposes of *Code Civ. Proc. §§ 1297.11-1297.432*, "Chief Justice" means the Chief Justice of California or his or her designee [*Code Civ. Proc. § 1297.21(e)*].

[5] Court; Superior Court; Supreme Court

For the purposes of *Code Civ. Proc. §§ 1297.11-1297.432*, "court" means a body or an organ of the judicial system of a state [*Code Civ. Proc. § 1297.21(f)*]. But "superior court" means the superior court in the county in California that is selected pursuant to *Code Civ. Proc. § 1297.61* [*Code Civ. Proc. § 1297.21(h)*], and "Supreme Court" means the Supreme Court of California [*Code Civ. Proc. § 1297.21(i)*].

[6] Party

For the purposes of *Code Civ. Proc. §§ 1297.11-1297.432*, "party" means a party to an arbitration or conciliation agreement [*Code Civ. Proc. § 1297.21(g)*].

Legal Topics:

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§ 35.13 Authorization of Third Party to Make Determinations

When a provision of *Code Civ. Proc. §§ 1297.11-1297.432*, except *Code Civ. Proc. §§ 1297.281-1297.285* (*discussed under § 35.28[14]*), leaves the parties free to determine a certain issue, that freedom includes the right of the parties to authorize a third party, including an institution, to make that determination [*Code Civ. Proc. § 1297.22*].

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§ 35.14 Interpretation of Agreements

[1] Rules Incorporated by Reference

When a provision in *Code Civ. Proc. §§ 1297.11-1297.432* refers to the fact that the parties have agreed, or that they may agree, or in any other way refers to an agreement of the parties, the agreement shall be deemed to include any arbitration or conciliation rules referred to in that agreement [*Code Civ. Proc. § 1297.23*].

[2] "Claim" Includes Counterclaim

When *Code Civ. Proc. §§ 1297.11-1297.432*, other than Code Civ. Proc. *§§ 1297.251-1297.253, Code Civ. Proc.* §§ 1297.321-1297.323, or *Code Civ. Proc. § 1297.322(a)*, refer to a "claim," the reference also applies to a counterclaim. Similarly, a reference to a defense also applies to a defense to that counterclaim [*Code Civ. Proc. § 1297.24*].

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§ 35.15 Receipt of Written Communications

Unless otherwise agreed by the parties, any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his or her place of business, habitual residence, or mailing address; the communication is deemed to have been received on the day it is so delivered [*Code Civ. Proc. § 1297.31*]. If none of the places referred to in *Code Civ. Proc. § 1297.31* can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence, or mailing address by registered mail or by any other means that provides a record of the attempt to deliver it [*Code Civ. Proc. § 1297.32*]. *Code Civ. Proc. §§ 1297.31* and *1297.32* do not apply to written communications in respect of court proceedings [*Code Civ. Proc. § 1297.33*].

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§ 35.16 Waiver of Right to Object

A party who knows that any provision of *Code Civ. Proc. §§ 1297.11-1297.432*, or any requirement under the arbitration agreement, has not been complied with, but proceeds with the arbitration without stating his or her objection to noncompliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his or her right to object [*Code Civ. Proc. § 1297.41*]. For purposes of *Code Civ. Proc. § 1297.41*, "any provision of *Code Civ. Proc. §§ 1297.11-1297.432*" means any provision of those sections in respect of which the parties may otherwise agree [*Code Civ. Proc. § 1297.42*].

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§§ 35.17[Reserved]

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§ 35.20 Extent of Judicial Intervention

[1] California Courts

In matters governed by *Code Civ. Proc. §§ 1297.11-1297.432*, no court shall intervene except when so provided by *Code Civ. Proc. §§ 1297.11-1297.432*, or by applicable federal law [*Code Civ. Proc. § 1297.51*].

The federal law grants authority to the United States district courts, on application of a party aggrieved by the failure, neglect, or refusal of another to arbitrate under a written agreement, to make an order directing the parties to proceed to arbitration in accordance with the terms of their agreement [*9 U.S.C. § 4*]. The federal Arbitration Act also grants the court power to appoint an arbitrator or arbitrators or an umpire (a neutral third party working with two partisan arbitrators) to act in accordance with the agreement of the parties [*9 U.S.C. § 5*]. Powers granted to courts by the Convention and related federal law are discussed under [2], *below* and in § 35.21[2].

The superior court of the county in which the place of arbitration is located shall perform the functions referred to in the following sections [*Code Civ. Proc. § 1297.61*]:

- *Code Civ. Proc. §§ 1297.114-1297.116* (appointment of arbitrators) [for discussion, *see § 35.23*];
- *Code Civ. Proc. §§ 1297.134-1297.136* (challenge of arbitrators) [for discussion, *see § 35.24*]; and
- *Code Civ. Proc. §§ 1297.165-1297.167* (arbitral panel's jurisdiction and scope of authority) [for

discussion, *see § 35.26*].

The functions referred to in *Code Civ. Proc. § 1297.81* (stay of judicial proceedings covered by agreement to arbitrate; order compelling arbitration) shall be performed by the superior court selected pursuant to *Code Civ. Proc. §§ 1292-1293.2* (discussed in *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.43[3],[4]*) [*Code Civ. Proc. § 1297.61*; *see, e.g., Code Civ. Proc. §§ 1292.4* (petition to compel arbitration is made in pending action or proceeding involving arbitrable matter), 1292.8 (motion to stay proceeding regarding matter agreed to be arbitrated is made in court in which proceeding is pending)].

[2] Jurisdiction and Venue of Federal Courts Under Convention

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States, including the United States Claims Courts, and any court created by Act of Congress in a territory that is invested with any jurisdiction of a district court, shall have original jurisdiction over those actions and proceedings, regardless of the amount in controversy [*9 U.S.C. § 203*; *28 U.S.C. § 460*]. An action of proceeding over which the district courts have jurisdiction pursuant to *9 U.S.C. § 203* may be brought in any district court in which, save for the arbitration agreement, an action or proceeding with respect to the controversy between the parties could be brought, or in the court for the district and division that embraces the place designated in the agreement as the place of arbitration if that place is within the United States [*9 U.S.C. § 204*].

[3] When Party to Arbitration Agreement Is Foreign Sovereign

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution on judgments based on orders confirming arbitral awards shall not be refused on the basis of the "Act of State" doctrine [*9 U.S.C. § 15*; *see West v. Multibanco Comermex, S.A. (9th Cir. 1987) 807 F.2d 820, 827-829 , cert. denied 482 U.S. 906* (statement of doctrine); Libyan Am. Oil Co. v. Socialist People's, etc. *(D. D.C. 1980) 482 F. Supp. 1175* , 1178-1179 (abrogated by *9 U.S.C. § 15*, but example of prior law applying doctrine to refuse to compel arbitration)]. Pub. L. No. 100-669, 102 Stat. 3969 (1988) added *9 U.S.C. § 15* and amended *28 U.S.C. §§ 1605(a)* and *1610(a)* to codify and expand the rationale applied in *Ipitrade Intern. v. Federal Republic of Nigeria (D. D.C. 1978) 465 F. Supp. 824* , that a foreign sovereign can waive immunity and that an agreement to arbitrate constitutes a waiver of sovereign immunity that cannot be revoked by unilateral action [*Ipitrade Intern. v. Federal Republic of Nigeria (D. D.C. 1978) 465 F. Supp. 824* , 826]. Thus, a foreign state is not immune from the jurisdiction of courts of the United States or of the States in any case in which an action is brought to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences that have arisen or that may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to an agreement to arbitrate, if any of the following apply [*28 U.S.C. § 1605(a)(6)*; *see 28 U.S.C. §§ 1603(a),(b)* (defining "foreign state"), 1608 (service on foreign state); *see also U.S. Titan, Inc. v. Guangzhou Hua Shipping (2nd Cir. 2001) 241 F.3d 135* , 150-151]:

- The arbitration takes place or is intended to take place in the United States;

- The agreement or award is or may be governed by a treaty or other international agreement in force in the United States calling for the recognition and enforcement of arbitral awards;

- The underlying claim, except for the agreement to arbitrate, could have been brought in a United States court under *28 U.S.C. § 1605* or *1607*; or

- The foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver that the foreign state may purport to effect except in accordance with the terms of the waiver.

The foregoing is limited, however, in the case of a foreign sovereign that is not party to the so-called New York Convention but agrees to arbitrate in country other than the United States, that is party to Convention (France). In such a case, United States courts have subject matter jurisdiction to enforce the arbitral award, but, at least when the party seeking to enforce the award in a United States court makes no challenge that the foreign state is not a "person" within the meaning of U.S. Constitution's due process clause, the foreign state must have minimum contacts with the United States in order for the United States court to have personal jurisdiction over the foreign sovereign [*Creighton Ltd. Government of State of Qatar (D.C. Cir, 1999) 181 F.3d 118* , 124-128].

The property in the United States of a foreign sovereign is generally immune from attachment or execution [*28 U.S.C. § 1609*]. However, property in the United States of a foreign sovereign, used for a commercial activity in the United States, is not immune from attachment in aid of execution or execution on a judgment entered by a court of the United States or of a state after January 19, 1977, if (1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver that the foreign state may purport to effect except in accordance with the terms of the waiver; or (2) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement [*28 U.S.C. § 1610(a)(1), (6)*; *see also 28 U.S.C. §§ 1605(a)(7), 1610(a)(7)* (other property not immune from execution even though not being used in commercial activity)].

"Commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity must be determined with reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose [*28 U.S.C. § 1603(d)*; *see, e.g., West v. Multibanco Comermex, S.A. (9th Cir. 1987) 807 F.2d 820 , cert. denied, 482 U.S. 906, 107 S. Ct. 2483, 96 L. Ed. 2d 375* (Mexican bank that issued peso and dollar-denominated certificates of deposit to United States investors is engaged in commercial activity)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-35 California Forms of Pleading and Practice--Annotated § 35.21

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§ 35.21 Staying Judicial Proceedings; Compelling Arbitration

[1] In General

When a party to an international commercial arbitration agreement as defined in *Code Civ. Proc. §§ 1297.11-1297.432* commences judicial proceedings seeking relief with respect to a matter covered by the agreement to arbitrate, any other party to the agreement may apply to the superior court in which that judicial proceeding is pending for an order to stay the proceedings and to compel arbitration [*Code Civ. Proc. §§ 1297.61, 1297.81*; *see Code Civ. Proc. §§ 1292.4* (petition to compel arbitration is made in pending action or proceeding involving arbitrable matter), 1292.8 (motion to stay proceeding)]. A timely request for a stay of judicial proceedings made under *Code Civ. Proc. § 1297.81* shall be granted [*Code Civ. Proc. §§ 1297.82*]. For a form of notice of motion and declaration for an order to stay proceedings and to compel arbitration under an international commercial agreement, *see § 35.71*.

The Convention requires each signatory country to recognize any written arbitration agreement [Convention on Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, art. II, para. 1]. The Convention also provides that the courts of any country that is a party to the Convention in which an action or proceeding is pending regarding a matter covered by the agreement to arbitrate must, on application of a party to the arbitration agreement, refer the parties to arbitration unless that court finds that the arbitration agreement is null and void, inoperative, or incapable of being performed [Convention on Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, art. II, para. 3]. The federal statutes implementing the Convention provide that a court having jurisdiction under *9 U.S.C. §§ 201-208* may direct that arbitration be held in accordance with the agreement at any place provided for in the agreement, whether that place is within the United States or outside it, and may also appoint

arbitrators in accordance with the provisions of the agreement [*9 U.S.C. § 206*].

The provision regarding stays in the federal Arbitration Act requires the court, on application of a party to the arbitration agreement, to stay the trial of the action until arbitration has been had in accordance with the parties' agreement if the subject of the action or proceeding is referable to arbitration and if the party applying for the stay is not in default in proceeding with arbitration [*9 U.S.C. § 3*]. The federal Arbitration Act requires the court to make an order directing the parties to proceed to arbitration in accordance with the terms of their agreement if the court is satisfied that the making of the agreement for arbitration or the failure to comply with the agreement is not in issue [*9 U.S.C. § 4*]. If the making of the agreement, or the failure, neglect, or refusal to perform in accordance with the agreement, is at issue, the court must proceed summarily to trial of the matter. The party alleged to be in default may demand a jury trial [*9 U.S.C. § 4*].

[2] Removal of Cases Under Convention

If an action or proceeding pending in a state court relates to an arbitration agreement or award falling under the Convention, the defendant or defendants may, at any time before trial, remove the action or proceeding to the United States district court for the district and division embracing the place in which the action or proceeding is pending. The procedure for removal otherwise provided by law shall apply, except that the ground of removal provided in *9 U.S.C. § 205* need not appear on the face of the complaint but may be shown in the petition for removal [*9 U.S.C. § 205* (note that "petition for removal" was renamed by 1988 legislation to "notice of removal"); *see Dale Metals Corp. v. Kiwa Chem. Industry Co., Ltd. (S.D. N.Y. 1977) 442 F. Supp. 78* , 81 n. 1 (*28 U.S.C. § 1446*, requiring petition for removal to be filed within 30 days after receipt of initial pleading, does not apply to removal pursuant to *9 U.S.C. § 205*)]. For purposes of *9 U.S.C. §§ 1-16*, any action or proceeding removed under *9 U.S.C. § 205* shall be deemed to have been brought in the district to which it is removed [*9 U.S.C. § 205*]. For further discussion of the procedures for removal, see Ch. 265, *Federal Courts: Jurisdiction and Removal* , Pt. II.

[3] Narrow Inquiry Under Convention

The Convention contemplates very limited inquiry by the courts when considering a motion to compel arbitration. Generally, four factors to determine whether to enforce an arbitration agreement under the Convention, which require that [*Balen v. Holland America Line Inc. (9th Cir. 2009) 583 F.3d 647, 654-655*]:

- There is an agreement in writing within the meaning of the Convention.
- The agreement provides for arbitration in the territory of a signatory of the Convention.
- The agreement arises out of a legal relationship, whether contractual or not, which is considered commercial.
- A party to the agreement is not an American citizen, or the commercial relationship has some reasonable relation with one or more foreign states.

In considering whether to compel arbitration under an agreement to which the Convention applies, there is a presumption that arbitration should be compelled unless it can be said with positive assurance that the arbitration clause at issue is not susceptible of an interpretation that would cover the dispute at issue [*Sedco v. Petroleos Mexicanos Mexican Nat. Oil (5th Cir. 1985) 767 F.2d 1140* , 1145]. Absent allegations of fraud in the inducement of the arbitration clause itself, arbitration must proceed when the arbitration clause on its face appears broad enough to encompass the parties' claims. Arbitration may even be compelled when other parties to the underlying dispute are not parties to the arbitration agreement [*Sedco v. Petroleos Mexicanos Mexican Nat. Oil (5th Cir. 1985) 767 F.2d 1140* , 1148]. Further, assignees and alter egos of signatories to an arbitration agreement within the scope of the Convention can be compelled

to arbitrate in accordance with the agreement, even though the states where the parties to the agreement were incorporated and where the contract was to be performed are not signatories to the Convention. The fact that the agreement specifies arbitration in a state that is a signatory to the Convention, such as New York, is sufficient [*Smith/Enron Cogeneration v. Smith Cogeneration (2nd Cir. 1999) 198 F.3d 88* , 93, 97-98].

The federal Arbitration Act provides that a written provision for arbitration in any maritime transaction or a contract evidencing a commercial transaction shall be valid, irrevocable, and enforceable, except on grounds that exist at law or in equity for the revocation of any contract [*9 U.S.C. § 2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 35.22 Interim Protective Measures for Parties

[1] Powers of Court

It is not incompatible with an arbitration agreement for a party to request from a superior court, before or during arbitral proceedings, an interim measure of protection, or for the court to grant such a measure [*Code Civ. Proc. § 1297.91*]. Measures that the court may grant in connection with a pending arbitration include, but are not limited to (1) an order of attachment issued to assure that the award to which applicant may be entitled is not rendered ineffectual by the dissipation of a party's assets [*Code Civ. Proc. § 1297.93(a)*; *see Carolina Power & Light Co. v. Uranex (D.C. Cal. 1977) 451 F. Supp. 1044* , 1051-1052 (convention does not bar attachment pending arbitration)]; and (2) a preliminary injunction granted in order to protect trade secrets or to conserve goods that are the subject matter of the arbitral dispute [*Code Civ. Proc. § 1297.93(b)*]. *Code Civ. Proc. §§ 1297.91* and *1297.93* are consistent with article 26(3) of the UNCITRAL Arbitration Rules and serve to clarify disparate opinions from other states and circuits [*see, e.g., PMS Distributing Co., Inc. v. Huber & Suhner, A.G. (9th Cir. 1988) 854 F.2d 355* , 358 (decided under *9 U.S.C. § 4*, adopting approach of First, Second, and Seventh Circuits that pendency of arbitration does not deprive courts of power to grant interim relief, here writ of possession, pending outcome of arbitration); *Pilkington Bros. P.L.C. v. AFG Industries Inc. (D.C. Del. 1984) 581 F. Supp. 1039* , 1047 (refusing to restrain use of trade secrets during pendency of arbitration in Britain)]. For discussion and forms that may be used to seek interim relief, see generally Ch. 62, *Attachment* , Ch. 303, *Injunctions* , Ch. 549, *Trademarks and Tradenames* , and Ch. 565, *Unfair Competition* , Pt. III. When using forms in those chapters, additional allegations such as those in Paragraphs 2-4 of the *form in § 35.72[1]* should be added to establish that *Code Civ. Proc. §§ 1297.11-1297.432* apply.

Similarly, any party to an arbitration governed by *Code Civ. Proc. §§ 1297.11-1297.432* may request the superior court to enforce an award of an arbitral tribunal for any interim measure of protection pursuant to *Code Civ. Proc. §§ 1297.171* and *1297.172*, discussed in *§ 35.27*. Enforcement shall be granted pursuant to the law applicable to the granting of the type of interim relief requested [*Code Civ. Proc. § 1297.92*; *see Code Civ. Proc. § 1297.316* (discussed in *§ 35.30[2]*)].

[2] Preclusive Effect of Arbitral Tribunal's Findings

In considering a request for interim relief, the court shall give preclusive effect to any and all findings of fact of the arbitral tribunal, including the probable validity of the claim that is the subject of the award for interim relief and that the arbitral tribunal has previously granted in the proceeding in question, provided that the interim award is consistent with public policy [*Code Civ. Proc. § 1297.94*]. If the arbitral tribunal has not ruled on an objection to its jurisdiction, the court shall not grant preclusive effect to the tribunal's findings until the court has made an independent finding regarding the jurisdiction of the arbitral tribunal. If the court rules that the arbitral tribunal did not have jurisdiction, the application for interim measures of relief shall be denied. A ruling that the arbitral tribunal lacks jurisdiction is not binding on the arbitral tribunal or subsequent judicial proceedings [*Code Civ. Proc. § 1297.95*]. Provisions applicable to determinations regarding an arbitral tribunal's jurisdiction are discussed in *§ 35.26* and in the discussion following the form of petition to determine the jurisdiction of an arbitral tribunal *set out in § 35.75*.

Legal Topics:

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§ 35.23 Qualifications, Number, and Appointment of Arbitrators

[1] In General

The parties may agree on the number of arbitrators. Otherwise, there shall be one arbitrator [*Code Civ. Proc. § 1297.101*]. *Code Civ. Proc. § 1297.101* addresses a difference between Rule 17 of the Commercial Arbitration Rules of the American Arbitration Association (hereinafter "AAA") and article 5 of the UNCITRAL Arbitration Rules. Rule 17 provides that there shall be one arbitrator if the arbitration agreement does not specify the number of arbitrators unless the AAA, in its discretion, directs a greater number of arbitrators. Article 5, however, provides that if the parties have not previously agreed on the number of arbitrators and within 15 days after receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

PRACTICE TIP:

Consider the Number of Arbitrators. If there is to be only one, note the probability of a failure of the parties to agree on a single name. Also, with one arbitrator the parties may obtain a wild card. With three arbitrators, there is a better chance for careful consideration on the merits although the costs of arbitration will increase and the time involved will increase (as additional scheduling conflicts arise). By Steven Hecht

A person of any nationality may be an arbitrator [*Code Civ. Proc. § 1297.111*].

PRACTICE TIP:

Be Alert to Cultural Differences. Sensitivity to cross-cultural issues is essential. There may be a

significant cultural differences among the arbitrators themselves and the parties. *By Steven Hecht*

Subject to *Code Civ. Proc. §§ 1297.115* and *1297.116* (discussed under [3] and [4], respectively, *below*), the parties may agree on a procedure for appointing the arbitral tribunal [*Code Civ. Proc. § 1297.112*].

PRACTICE TIP:

Learn as Much as Possible About Potential Arbitrators. It is always helpful to do as much due diligence as possible to learn about the background of a potential arbitrator. Information may be scarce, but search sources increase all the time. Information may be readily available if a proposed arbitrator is a former judge. *By Steven Hecht*

[2] Three Arbitrators and Two Parties

If the parties fail to agree on a procedure for appointing the arbitral tribunal, in an arbitration with three arbitrators and two parties, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator [*Code Civ. Proc. § 1297.113*].

PRACTICE TIP:

Seek a Persuasive Person as Your Appointee. In a three-person arbitration, choose as your arbitrator one with the quality of persuasion. The arbitrator will ultimately be required to carry one additional vote to achieve your favorable ruling. In some respects, your arbitrator is your agent and you should utilize that model in making the selection. *By Steven Hecht*

If this appointment procedure applies and either party fails to appoint an arbitrator within 30 days after receipt of a request to do so from the other party, or the two appointed arbitrators fail to agree on the third arbitrator within 30 days after their appointment, the appointment shall be made, on request of a party, by the superior court of the county in which the place of arbitration is located [*Code Civ. Proc. § 1297.114*; *see Code Civ. Proc. § 1297.61* (functions of court); for a form of petition for appointment, *see § 35.72*].

The superior court, in appointing an arbitrator, shall have due regard to all of the following [*Code Civ. Proc. § 1297.118*]:

- Any qualifications required of the arbitrator by the agreement of the parties;
- Other considerations likely to secure the appointment of an independent and impartial arbitrator; and
- In the case of a sole or third arbitrator, the advisability of appointing an arbitrator of a nationality other than those of the parties.

The superior court's decision on a matter entrusted to it pursuant to *Code Civ. Proc. § 1297.114* is final and is subject to appeal [*Code Civ. Proc. § 1297.117*].

[3] Failure to Agree on Sole Arbitrator

If there is no agreement on a procedure for appointing the arbitral tribunal in an arbitration with a sole arbitrator, and if the parties fail to agree on the arbitrator, the superior court of the county in which the place of arbitration is located shall make the appointment at the request of a party [*Code Civ. Proc. § 1297.115*; *see Code Civ. Proc. § 1297.61* (functions of court); for a form of petition for appointment, *see § 35.72*]. The superior court, in appointing an arbitrator, shall have due regard for all of the considerations discussed under [2], *above* [*Code Civ. Proc. § 1297.118*].

The superior court's decision on a matter entrusted to it pursuant to *Code Civ. Proc. § 1297.115* is final and is subject to

appeal [*Code Civ. Proc. § 1297.117*].

[4] Court Enforcement of Appointment Procedure

Unless the agreement on the appointment procedure provides other means for securing the appointment, the superior court of the county in which the place of arbitration is located, on the request of a party, may take the necessary measures if there is an appointment procedure agreed on by the parties, and if any of the following occurs [*Code Civ. Proc. § 1297.116*; *see Code Civ. Proc. § 1297.61* (functions of court); for a form of petition for appointment, *see § 35.72*]:

- A party fails to act as required under that procedure;

- The parties, or two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

- A third party, including an institution, fails to perform any function entrusted to it under that procedure.

The superior court's decision on a matter entrusted to it pursuant to *Code Civ. Proc. § 1297.116* is final and is subject to appeal [*Code Civ. Proc. § 1297.117*].

Legal Topics:

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§ 35.24 Challenging Arbitrators

[1] Disclosures by Arbitrators and Conciliators

Except as otherwise provided in *Code Civ. Proc. §§ 1297.11-1297.432*, all persons whose names have been submitted for consideration for appointment or designation as arbitrators or conciliators, or who have been appointed or designated as such, shall, within 15 days, make a disclosure to the parties of any information that might cause their impartiality to be questioned, including, but not limited to, any of the following instances [*Code Civ. Proc. § 1297.121*]:

- The person has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

- The person served as a lawyer in the matter in controversy, or the person is or has been associated with another who has participated in the matter during such association, or he or she has been a material witness concerning it;

- The person served as an arbitrator or conciliator in another proceeding involving one or more of the parties to the proceeding;

- The person, individually or as a fiduciary, or that person's spouse or minor child residing in his or her household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

- The person, his or her spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person, meets any of the following conditions:

  - The person is or has been a party to the proceeding, or an officer, director, or trustee of a party;

  - The person is acting or has acted as a lawyer in the proceeding;

  - The person is known to have an interest that could be substantially affected by the outcome of the proceeding; or

  - The person is likely to be a material witness in the proceeding;

- The person has a close personal or professional relationship with a person who meets any of the following conditions:

  - The person is or has been a party to the proceeding, or an officer, director, or trustee of a party;

  - The person is acting or has acted as a lawyer or representative in the proceeding;

  - The person is or expects to be nominated as an arbitrator or conciliator in the proceedings;

  - The person is known to have an interest that could be substantially affected by the outcome of the proceeding; or

  - The person is likely to be a material witness in the proceeding.

The obligation to disclose information set forth in *Code Civ. Proc. § 1297.121* is mandatory and cannot be waived as to the parties with respect to persons serving either as the sole arbitrator or sole conciliator or as the chief or prevailing arbitrator or conciliator. The parties may otherwise agree to waive that disclosure [*Code Civ. Proc. § 1297.122*]. *Code Civ. Proc. §§ 1297.121-1297.123* are apparently an attempt to articulate a public policy of California in order to avoid the result reached in other jurisdictions that have determined that an arbitrator's failure to disclose facts indicating less than total neutrality does not rise to the level of being against public policy, which is the criteria specified in art. V, para. 2(b) of the Convention for denial of enforcement of an arbitral award [*see, e.g., Fertilizer Corp. of India v. IDI Management, Inc. (S.D. Ohio 1982) 530 F. Supp. 542* , 545-546, *reconsideration of decision at 517 F. Supp. 948* (prior representation of party that appointed arbitrator)]. In *Fertilizer Corp.* the arbitrator in question was the arbitrator appointed by one of the parties in a proceeding with three arbitrators [*see Fertilizer Corp. of India v. IDI Management, Inc. (S.D. Ohio 1981) 517 F. Supp. 948* , 950].

From the time of appointment and throughout the arbitral proceedings, an arbitrator, shall, without delay, disclose to the parties any circumstances referred to in *Code Civ. Proc. § 1297.121* that were not previously disclosed [*Code Civ. Proc. § 1297.123*].

[2] Grounds for Challenging Arbitrator

Unless otherwise agreed by the parties or the rules governing the arbitration, an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts regarding his or her independence or impartiality, or his or her

possession of the qualifications on which the parties have agreed [*Code Civ. Proc. § 1297.124*]. A party may challenge an arbitrator appointed by it, or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment has been made [*Code Civ. Proc. § 1297.125*].

[3] Challenge Procedure

The parties may agree on a procedure for challenging an arbitrator. The decision reached pursuant to that procedure shall be final [*Code Civ. Proc. § 1297.131*]. If the parties do not have an agreement on a procedure for challenging an arbitrator, a party may challenge an arbitrator, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances that are the basis for the challenge, whichever is later, by sending a written statement of the reasons for the challenge to the arbitral tribunal [*Code Civ. Proc. § 1297.132*]. An arbitrator's withdrawal from office, or a party's agreement to the termination of the mandate of an arbitrator, does not imply acceptance of the validity of any ground contained in a written challenge [*Code Civ. Proc. § 1297.144*].

Unless the arbitrator challenged under *Code Civ. Proc. § 1297.132* withdraws from his or her office, or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge [*Code Civ. Proc. § 1297.133*]. If a challenge following this procedure is not successful, the challenging party may request the superior court, within 30 days after having received notice of the decision rejecting the challenge, to decide on the challenge. If a challenge is based on the grounds set forth in *Code Civ. Proc. § 1297.121* (discussed under [1], *above*), and the superior court determines that the facts support a finding that the ground or grounds fairly exist, then the challenge should be sustained [*Code Civ. Proc. § 1297.134*]. The superior court's decision is final and is not subject to appeal [*Code Civ. Proc. § 1297.135*]. For a form of petition to determine a challenge to an arbitrator appointed under an international commercial agreement, see *§ 35.73*.

[4] Continuation of Arbitral Proceedings Pending Challenge

While a request under *Code Civ. Proc. § 1297.134* is pending, the arbitral tribunal, including the challenged arbitrator, may continue with the arbitral proceedings and make an arbitral award [*Code Civ. Proc. § 1297.136*].

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4-35 California Forms of Pleading and Practice--Annotated § 35.25

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§ 35.25 Termination of Arbitrator's Mandate

[1] Failure or Impossibility to Act

The mandate of an arbitrator terminates if he or she becomes de jure or de facto unable to perform his or her functions or for other reasons fails to act without undue delay, and withdraws from his or her office, or the parties agree to the termination of his or her mandate [*Code Civ. Proc. § 1297.141*]. If a controversy remains concerning any of the grounds referred to in *Code Civ. Proc. § 1297.141*, a party may request the superior court to decide on the termination of the mandate [*Code Civ. Proc. § 1297.142*]. A decision of the superior court under *Code Civ. Proc. § 1297.142* is not subject to appeal [*Code Civ. Proc. § 1297.143*]. For a form of petition to determine the termination of an arbitrator's mandate under an international commercial agreement, see *§ 35.74*.

An arbitrator's withdrawal from office, or a party's agreement to the termination of the mandate of an arbitrator, does not imply acceptance of the validity of any ground contained in a written challenge [*Code Civ. Proc. § 1297.144*].

[2] Termination by Withdrawal or Agreement of Parties

In addition to termination under challenge [*see § 35.24*], or because of a failure or inability to act [*see* [1], *above*], the mandate of an arbitrator terminates on his or her withdrawal from office for any reason, or by or pursuant to agreement of the parties [*Code Civ. Proc. § 1297.151*].

[3] Substitution of Arbitrator

When the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced [*Code Civ. Proc. § 1297.152*].

Unless otherwise agreed by the parties, (1) when the sole or presiding arbitrator is replaced, any hearings previously held shall be repeated [*Code Civ. Proc. § 1297.153(a)*]; and (2) when an arbitrator other than the sole or presiding arbitrator is replaced, any hearings previously held may be repeated at the discretion of the arbitral tribunal [*Code Civ. Proc. § 1297.153(b)*]. Also, unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under these provisions is not invalid because there has been a change in the composition of the tribunal [*Code Civ. Proc. § 1297.154*].

Legal Topics:

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4-35 California Forms of Pleading and Practice--Annotated § 35.26

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§ 35.26 Tribunal's Competence to Determine Its Jurisdiction

[1] Validity of Agreement

The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure (by operation of law) the invalidity of the arbitration clause [*Code Civ. Proc. § 1297.161*].

PRACTICE TIP:

Consider validity of arbitration clause or agreement under applicable California law. The Ninth Circuit has considered arguments that an arbitration agreement was null and void under the Convention's validity provision, Convention on Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, TI.I.A.S. No. 6997, 330 U.N.T.S. 38, art. II, para. 3, on the basis that the clause or agreement was against public policy [*Balen v. Holland America Line Inc. (9th Cir. 2009) 583 F.3d 647, 653-654* ; *Rogers v. Royal Caribbean Cruise Line (9th Cir. 2008) 547 F.3d 1148, 1157-1159*]. The court ruled that public policy favored arbitration of mariners' Wage Act claims. Therefore, succeeding at obtaining judgment that a clause or agreement is null and void on the basis of public policy will be difficult at best.

A second basis argued for the invalidity of an arbitration clause or agreement subject to the Convention is that the agreement was unconscionable [*Rogers v. Royal Caribbean Cruise Line (9th Cir. 2008) 547 F.3d 1148, 1157-1159*]. In that case, the Court avoided ruling specifically that those were grounds for

ruling an agreement null and void, because the evidence failed to establish it. But the Court applied the applicable state's law on these issues (Florida, in this case). Therefore, the case suggests that counsel should follow the applicable state law in arguing for the unconscionability of a clause or agreement subject to the Convention, which in California is quite well developed. For discussion of unconscionability of arbitration clauses or agreements under California law, see *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21[3]*.

[2] Challenges to Tribunal's Jurisdiction or Authority

A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense. However, a party is not precluded from raising a plea that the arbitral tribunal does not have jurisdiction by the fact that he or she has appointed, or participated in the appointment of, an arbitrator [*Code Civ. Proc. § 1297.162*; for discussion, *see § 35.28[6]*].

A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings [*Code Civ. Proc. § 1297.163*].

The arbitral tribunal may, in the case of either type of challenge, admit a later plea if it considers the delay justified [*Code Civ. Proc. § 1297.164*].

[3] Ruling on Challenge

The arbitral tribunal may rule on a challenge to its jurisdiction or authority either as a preliminary question or in an award on the merits [*Code Civ. Proc. § 1297.165*]. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party shall be deemed to have waived objection to that finding unless, within 30 days after having received notice of that ruling, the party requests that the superior court decide the matter [*Code Civ. Proc. § 1297.166*]. For a form of petition to determine the jurisdiction of an arbitral tribunal appointed under an international commercial agreement, see *§ 35.75*.

While a request to the superior court is pending, the arbitral tribunal may continue with the arbitral proceedings, and may make an arbitral award [*Code Civ. Proc. § 1297.167*]. *Code Civ. Proc. § 1297.167* is consistent with federal decisions interpreting the Convention as creating a presumption that an arbitral body has acted within the scope of its powers. The policy favoring arbitration operates with special force in the field of international commerce. The federal courts will review de novo a contention that the subject matter of the arbitration lies outside the scope of a contract, because the arbitrability of a dispute concerns contract interpretation. However, those courts will construe arbitral authority broadly to comport with the enforcement-facilitating thrust of the Convention and the policy favoring arbitration [*Management & Tech. Consultants v. Parsons-Jurden (9th. Cir. 1987) 820 F.2d 1531* , 1534].

If the arbitral tribunal rules on a jurisdictional challenge in its award on the merits, the party wishing to challenge the award could petition to vacate the award or oppose a petition to confirm it [*see* Convention on Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, art. V, para. 1(c) (*discussed under § 35.31[4]*); *9 U.S.C. § 207*; *see also 9 U.S.C. §§ 9, 10*; *Code Civ. Proc. §§ 1285, 1286.2(a)(4)*; for forms, *see Ch. 34, Contractual Arbitration: Judicial Review, § 34.52* (response to petition to confirm) and § 34.56 (petition to vacate)].

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4-35 California Forms of Pleading and Practice--Annotated § 35.27

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§ 35.27 Interim Protective Measures Ordered by Arbitral Tribunals

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection that the arbitral tribunal considers necessary in respect to the subject matter of the dispute [*Code Civ. Proc. § 1297.171*]. The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under *Code Civ. Proc. § 1297.171* [*Code Civ. Proc. § 1297.172*]. *Code Civ. Proc. § 1297.171* adopts the position taken by article 26(1) of the UNCITRAL Arbitration Rules, which cites measures for the conservation of goods forming the subject matter of the dispute, such as ordering the deposit of goods with a third person or the sale of perishable goods as examples of interim measures that may be awarded by the arbitral tribunal. Like *Code Civ. Proc. § 1297.172*, article 26(2) of the UNCITRAL Arbitration Rules provides that the tribunal may require security for the costs of the interim measures.

PRACTICE TIP:

Use the Arbitrator's Broad Powers. Remember that the mandate of arbitrators is extremely broad. Arbitrators now have the right to order injunctive relief and award punitive damages. The standard of review of arbitration is "abuse of discretion" and this may embolden an arbitrator to do more. Take advantage of this. *By Steven Hecht*

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§ 35.28 Manner and Conduct of Arbitration

[1] General Protocol

The parties shall be treated with equality, and each party shall be given a full opportunity to present his or her case [*Code Civ. Proc. § 1297.181*].

[2] Commencement of Arbitral Proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent [*Code Civ. Proc. § 1297.211*]. For a form of demand for arbitration under an international commercial agreement, see *§ 35.70*.

[3] Determination of Rules of Procedure

Subject to *Code Civ. Proc. §§ 1297.11-1297.432*, the parties may agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings [*Code Civ. Proc. § 1297.191*]. If the parties to not agree on the procedures to be followed, the arbitral tribunal may, subject to *Code Civ. Proc. §§ 1297.11-1297.432*, conduct the arbitration in the manner it considers appropriate [*Code Civ. Proc. § 1297.192*]. The power of the arbitral tribunal under *Code Civ. Proc. § 1297.192* includes the power to determine the admissibility, relevance, materiality, and weight of any evidence [*Code Civ. Proc. § 1297.193*].

[4] Place of Arbitration

The parties may agree on the place of arbitration. If they do not, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties [*Code Civ. Proc. §§ 1297.201-1297.202*].

Even if the parties make an agreement on the place of arbitration, unless the agreement provides otherwise, the arbitral tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts, or the parties, or for inspection of documents, goods, or other property [*Code Civ. Proc. § 1297.203*].

PRACTICE TIP:

Logistical Considerations. The logistical issues are important in arbitration. The proceeding will usually take place in smaller rooms then courts. Witnesses may be excluded until their turn to be called. Consider carefully how to bring in and introduce witnesses. Take advantage of conference telephone calls or video equipment to ensure that witnesses may appear if not able to be physically present. *By Steven Hecht*

[5] Language and Translation

The parties may agree on the language or languages to be used in the arbitral proceedings [*Code Civ. Proc. § 1297.221*]. If the parties do not agree on the language or languages to be used in the arbitral proceedings, the arbitral tribunal shall make that determination [*Code Civ. Proc. § 1297.222*]. Unless otherwise specified, the agreement or determination shall apply to any written statement by a party, any hearing, and any arbitral award, decision, or other communication by the arbitral tribunal [*Code Civ. Proc. § 1297.223*].

The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed on by the parties or determined by the arbitral tribunal [*Code Civ. Proc. § 1297.224*].

[6] Statements of Claim and Defense

Within the period of time agreed on by the parties or determined by the arbitral tribunal, and unless the parties have otherwise agreed on the required elements of the following statements, the claimant shall state (1) the facts supporting his or her claim, (2) the points at issue, and (3) the relief or remedy sought, and the respondent shall state his or her defense in respect of those particulars [*Code Civ. Proc. § 1297.231*]. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit [*Code Civ. Proc. § 1297.232*].

PRACTICE TIP:

Timing of Statement. Even though arbitration proceedings are more informal, it is imperative to make careful preparation for presentation of the case. The arbitrators may lack any understanding of the background of the case (especially in the absence of discovery). Submission of the statement prior to the arbitration is an excellent idea. If possible, submit it at least 10 days prior to the arbitration and try to obtain the right to respond (no later than five days is suggested) to the opposing party's statement. *By Steven Hecht*

Unless otherwise agreed by the parties, either party may amend or supplement his or her claim or defense during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement because of the delay in making it [*Code Civ. Proc. § 1297.233*].

[7] Decision to Hold Hearings; Notice of Hearings

Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the

presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials [*Code Civ. Proc. § 1297.241*].

PRACTICE TIP:

Agreement to Have Oral Hearing. Obtaining agreement to an oral hearing is often vital. Cross-examination is where the truth emerges. It is preferable to utilizing declarations which have been carefully crafted by lawyers. *By Steven Hecht*

Unless the parties have agreed that no oral hearings shall be held, the arbitral tribunal shall hold oral hearings at an appropriate state of the proceedings, if so requested by a party [*Code Civ. Proc. § 1297.242*].

The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purpose of inspection of documents, goods, or other property [*Code Civ. Proc. § 1297.243*].

Unless otherwise agreed by the parties, all oral hearings and meetings in arbitral proceedings shall be held in camera [*Code Civ. Proc. § 1297.245*].

PRACTICE TIP:

Agreement to Have Oral Hearing. Arbitrators are often busy. They do not have law clerks. Make your statements as easy as possible for an arbitrator to understand and to have confidence in its accuracy. Impress with brevity. *By Steven Hecht*

[8] Communication of Evidence to Opposing Party

All statements, documents, or other information supplied to, or applications made to, the arbitral tribunal by one party shall be communicated to the other party. Any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties [*Code Civ. Proc. § 1297.244*].

[9] Default of Party

Unless otherwise agreed by the parties, if, without showing sufficient cause, the claimant fails to communicate his or her statement of claim in accordance with *Code Civ. Proc. §§ 1297.231-1297.232*, the arbitral tribunal shall terminate the proceedings [*Code Civ. Proc. § 1297.251*]. However, unless otherwise agreed by the parties, if, without showing sufficient cause, the respondent fails to communicate his or her statement of defense in accordance with *Code Civ. Proc. §§ 1297.231-1297.232*, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the claimant's allegations [*Code Civ. Proc. § 1297.252*].

[10] Failure to Appear or to Produce Documentary Evidence

Unless otherwise agreed by the parties, if, without showing sufficient cause, a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue with the proceedings and make the arbitral award on the evidence before it [*Code Civ. Proc. § 1297.253*].

[11] Appointment of Experts by Arbitral Tribunal

Unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal. If an expert is appointed, the arbitral tribunal may require a party to give the expert any relevant information or to produce, or provide access to, any relevant documents, goods, or other property for his or her inspection [*Code Civ. Proc. § 1297.261*].

Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert

shall, after delivery of his or her written or oral report, participate in an oral hearing at which the parties have the opportunity to question the expert and to present expert witnesses on the points at issue [*Code Civ. Proc. § 1297.262*].

[12] Court Assistance in Taking Evidence

The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the superior court assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence. In addition, a subpoena may issue as provided in *Code Civ. Proc. § 1282.6* (discussed in *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.24*), in which case the witness compensation provisions of *Code Civ. Proc. § 1283.2* shall apply [*Code Civ. Proc. § 1297.271*; *see 9 U.S.C. § 7* (comparable federal provision)].

PRACTICE TIP:

Discovery. Availability of discovery is a key issue in arbitration. Be prepared to request and advocate for it. *By Steven Hecht*

[13] Court Assistance in Consolidating Arbitrations

If the parties to two or more arbitration agreements have agreed, in their respective arbitration agreements or otherwise, to consolidate the arbitrations arising out of those arbitration agreements, the superior court may, on application by one party with the consent of all the other parties to those arbitration agreements, do one or more of the following [*Code Civ. Proc. § 1297.272*]:

- Order the arbitrations to be consolidated on terms the court considers just and necessary;

- If all the parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal in accordance with *Code Civ. Proc. § 1297.118* (discussed in *§ 35.23[2], above*); or

- If all the parties cannot agree on any other matter necessary to conduct the consolidated arbitration, make any other order it considers necessary.

Nothing in *Code Civ. Proc. § 1297.271* or *1297.272* shall be construed to prevent the parties to two or more arbitrations from agreeing to consolidate those arbitrations and taking any steps that are necessary to effect that consolidation [*Code Civ. Proc. § 1297.273*]. Although *Code Civ. Proc. § 1281.3*, which governs consolidation of nonjudicial arbitration proceedings, has been superseded by *Code Civ. Proc. §§ 1297.11-1297.432* in the context of international commercial arbitration [*Code Civ. Proc. § 1297.17*], the form *set out in Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.76*, may be modified for use as a petition under *Code Civ. Proc. § 1297.272* by the addition of allegations establishing that *Code Civ. Proc. §§ 1297.11-1297.432* apply [for those allegations, *see, e.g.*, Paragraphs 2-4 in the form *set out in § 35.72[1]*].

[14] Rules Applicable to Substance of Dispute

The arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute [*Code Civ. Proc. § 1297.281*]. Any designation by the parties of the law or legal system of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not to its conflict of laws rules [*Code Civ. Proc. § 1297.282*].

If the parties have not designated the law to be applicable to the substance of the dispute, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute [*Code Civ. Proc. § 1297.283*]. The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* (on grounds of equity and fairness; having authority to disregard specific points of law to achieve an equitable result), if the parties have expressly

authorized it to do so [*Code Civ. Proc. § 1297.284*]. *Code Civ. Proc. § 1297.283* is consistent with federal law, which would have to be applied by a state court to any arbitration involving foreign commerce [*ATSA of California, Inc. v. Continental Ins. Co. (9th Cir. 1983) 702 F.2d 172* , 175, *modified, 754 F.2d 1394, 1396]* .

In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction [*Code Civ. Proc. § 1297.285*].

[15] Requisite Majority for Decision

Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all of its members [*Code Civ. Proc. § 1297.291*]. Notwithstanding this section, if authorized by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by a presiding arbitrator [*Code Civ. Proc. § 1297.291*].

PRACTICE TIP:

Tailor Presentation for Any Non-Lawyer Arbitrator. Arbitrators are not judges and often are not even lawyers. Do not assume that a lawyer/arbitrator will explain legal matters to any non-lawyer arbitrator. Therefore, presentation should be aimed at a non-lawyer arbitrator utilizing techniques to assure that a non-lawyer will understand any important legal concepts. *By Steven Hecht*

Legal Topics:

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§ 35.29 Settlement; Arbitral Award Based on Settlement

It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the disputes. With the agreement of the parties, the arbitral tribunal may use mediation, conciliation, or other procedures at any time during the arbitral proceedings to encourage settlement [*Code Civ. Proc. § 1297.301*].

PRACTICE TIP:

Be Open to Consider Arbitrators' Offer to Act as Conciliators. The arbitrators may offer to act as conciliators during the arbitration proceeding. Permitting this may provide valuable information and give a preview of how the arbitrators are thinking about the case. The arbitrators must provide assurances that the failure of a conciliation will not prejudice a later return to the arbitration procedure. However, in accepting conciliation efforts and later rejecting them consider whether or not arbitrators will feel their better efforts have been hampered and the party may not be able to expect as impartial and effective a result. *By Steven Hecht*

If, during the arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms [*Code Civ. Proc. § 1297.302*].

An arbitral award on agreed terms shall be made in accordance with *Code Civ. Proc. §§ 1297.311-1297.318* (discussed in *§ 35.30*), and shall state that it is an arbitral award [*Code Civ. Proc. § 1297.303*]. An arbitral award on agreed terms has the same status and effect as any other arbitral award on the substance of the dispute [*Code Civ. Proc. § 1297.304*].

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§ 35.30 Arbitral Award

[1] Form, Contents, and Delivery

An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal [*Code Civ. Proc. § 1297.311*]. For the purposes of *Code Civ. Proc. § 1297.311*, in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated [*Code Civ. Proc. § 1297.312*].

The arbitral award shall state the reasons on which it is based, unless the parties have agreed that no reasons are to be given, or the award is an arbitral award on agreed terms under *Code Civ. Proc. §§ 1297.301-1297.304* (discussed in *§ 35.29*) [*Code Civ. Proc. § 1297.313*].

PRACTICE TIP:

Carefully Document Requested Damages. Often parties will request that an arbitrator determine damages. The arbitrators are not accountants. Prepare the damage portion of the case as carefully as any other. Set out specifically how any damage calculations were arrived at. *By Steven Hecht*

The arbitral award shall state its date and the place of arbitration as determined in accordance with *Code Civ. Proc. §§ 1297.201-1297.203* (discussed in *§ 35.28[4]*), and the award shall be deemed to have been made at that place [*Code Civ. Proc. § 1297.314*].

After the arbitral award is made, a signed copy shall be delivered to each party [*Code Civ. Proc. § 1297.315*].

[2] Interim Award

The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award. The interim award may be enforced in the same manner as a final arbitral award [*Code Civ. Proc. § 1297.316*].

[3] Interest and Costs

Unless otherwise agreed by the parties, the arbitral tribunal may award interest [*Code Civ. Proc. § 1297.317*]. *Code Civ. Proc. § 1297.317* is consistent with decisions interpreting the Convention to allow postaward, prejudgment interest on an arbitral award [*see Waterside Ocean Nav. v. International Nav. Ltd. (2nd Cir. 1984) 737 F.2d 150* , 154-155].

Unless otherwise agreed by the parties, the costs of an arbitration shall be at the discretion of the arbitral tribunal [*Code Civ. Proc. § 1297.318(a)*]. In making an order for costs, the arbitral tribunal may include as costs any of the following [*Code Civ. Proc. § 1297.318(b)*]:

- The fees and expenses of the arbitrators and expert witnesses;
- Legal fees and expenses;
- Any administration fees of the institution supervising the arbitration, if any; or
- Any other expenses incurred in connection with the arbitral proceedings.

In making an order for costs, the arbitral tribunal may specify any of the following [*Code Civ. Proc. § 1297.318(c)*]:

- The party entitled to costs;
- The party who shall pay costs;
- The amount of costs or method of determining that amount; or
- The manner in which the costs shall be paid.

[4] Termination of Proceedings

The arbitral proceedings are terminated by the final arbitral award or by an order of the arbitral tribunal under *Code Civ. Proc. § 1297.322*. The award shall be final on the expiration of the applicable periods in *Code Civ. Proc. §§ 1297.331-1297.337*, discussed under [5], *below* [*Code Civ. Proc. § 1297.321*]. The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when any of the following occurs [*Code Civ. Proc. § 1297.322*]:

- The claimant withdraws his or her claim, unless the respondent objects to the order and the arbitral tribunal recognizes a legitimate interest on the respondent's part in obtaining a final settlement of the dispute;
- The parties agree on the termination of the proceedings; or
- The arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

Subject to *Code Civ. Proc. §§ 1297.331-1297.337* (discussed under [5], *below*), the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings [*Code Civ. Proc. § 1297.323*].

[5] Correction and Interpretation of Awards; Additional Awards

Within 30 days after receipt of the arbitral award, unless another period of time has been agreed on by the parties [*Code Civ. Proc. § 1297.331*]:

(a) A party may request the arbitral tribunal to correct in the arbitral award any computation errors, any clerical or typographical errors, or any other errors of a similar nature;

(b) A party may, if agreed by the parties, request the arbitral tribunal to give an interpretation of a specific point or part of the arbitral award.

If the arbitral tribunal considers any request made under *Code Civ. Proc. § 1297.331* to be justified, it shall make the correction or give the interpretation within 30 days after receipt of the request. Any interpretation shall form part of the arbitral award [*Code Civ. Proc. § 1297.332*].

The arbitral tribunal may correct any computation, clerical, or typographical error, or any other error of a similar nature, on its own initiative, within 30 days after the date of the arbitral award [*Code Civ. Proc. § 1297.333*].

The Federal Arbitration Act authorizes the district court for the district in which the arbitral award was made to modify or correct the award so as to effect the intent of the award and to promote justice between the parties, on the application of a party to the arbitration, in any of the following situations [*9 U.S.C. § 11*; *see 9 U.S.C. § 208* (*9 U.S.C. §§ 1-16* applicable to proceedings under *9 U.S.C. §§ 201-208* to extent they do not conflict with *9 U.S.C. §§ 201-208* or with Convention)]:

- When there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award;

- When the arbitrators have awarded on a matter not submitted to them, unless it is a matter not affecting the merits of the decision on the matter submitted; or

- When the award is imperfect in matter of form not affecting the merits of the controversy.

Unless otherwise agreed by the parties, a party may request, within 30 days after receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award relating to the claims presented in the arbitral proceedings but omitted from the arbitral award [*Code Civ. Proc. § 1297.334*]. If the arbitral tribunal considers any request for an additional award to be justified, it shall make the additional arbitral award within 60 days after receipt of the request [*Code Civ. Proc. § 1297.335*].

If necessary, the arbitral tribunal may extend the period of time within which it shall make a correction, give an interpretation, or make an additional arbitral award under *Code Civ. Proc. § 1297.331* or *1297.334* [*Code Civ. Proc. § 1297.336*]. It is unclear whether the reference in *Code Civ. Proc. § 1297.336* to *Code Civ. Proc. §§ 1297.331* and *1297.334* is inadvertent, because the tribunal's time to act is governed by *Code Civ. Proc. § 1297.332* or *1297.335*, or whether *Code Civ. Proc. § 1297.336* is to be construed to allow extension of the time within which a party may request a correction, interpretation, or additional award [*see Code Civ. Proc. §§ 1297.331, 1297.334* (times for request)].

The requirements regarding form, content, and delivery of an arbitral award apply to a correction or interpretation of the

arbitral award or to an additional arbitral award [*Code Civ. Proc. § 1297.337*; *see Code Civ. Proc. §§ 1297.311-1297.318* (discussed under [1], *above*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsForeign Arbitral AwardsCivil ProcedureRemediesJudgment InterestGeneral OverviewInternational LawDispute ResolutionArbitration & MediationGeneral OverviewInternational LawDispute ResolutionArbitration & MediationAwardsInternational LawDispute ResolutionArbitration & MediationReview

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4-35 California Forms of Pleading and Practice--Annotated § 35.31

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§ 35.31 Confirmation and Enforcement Under Convention

[1] Recognition Required

Each country that has ratified the Convention shall recognize arbitral awards and enforce them in accordance with the rules of procedure of the territory in which the award is relied on, under the conditions laid down in the Convention. The courts of those countries shall not impose substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which the Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards [Convention on Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, art. III]. The list of nations that have ratified the Convention, along with notes regarding any applicable limitations to their application of the Convention, is given after the text of the Convention as an annotation to *9 U.S.C.A. 201*.

The California confirmation procedures of *Code Civ. Proc. §§ 1285-1288.8*, and related forms, are contained in Ch. 34, *Contractual Arbitration: Judicial Review*. *Code Civ. Proc. §§ 1285-1288.8* have not been specifically superseded by *Code Civ. Proc. §§ 1297.11-1297.432* [*see Code Civ. Proc. § 1297.17*], but there are superseding aspects of the federal law, such as the three-year limitation for confirmation of an award to which the Convention applies [*compare 9 U.S.C. § 207* (three-year period) *with Code Civ. Proc. § 1288* (four-year period)].

[2] Contents of Application

To obtain recognition and enforcement of an arbitral award to which the Convention applies, the party making application for recognition or enforcement must supply, at the time of the application, the duly authenticated original

award or a duly certified copy of it and the original, or a duly certified copy, of the arbitration agreement [Convention on Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, art. IV, para. 1; *cf. Code Civ. Proc. § 1285.4* (imposing additional requirement that application include names of arbitrators and any written opinion of arbitrators)]. If the award or agreement is not made in an official language of the country in which the award is relied on, the party applying for recognition and enforcement of the award shall produce a translation of the award and agreement into an official language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent [Convention on Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, art. IV, para. 2].

To confirm an arbitral award under the federal Arbitration Act, in addition to the agreement and the award, the moving party must file the following documents with the clerk at the time the order is filed with the clerk for the entry of judgment [*9 U.S.C. § 13*; *see 9 U.S.C. § 208* (*9 U.S.C. §§ 1-16* applicable to proceedings under *9 U.S.C. §§ 201-208* to extent they do not conflict with *9 U.S.C. §§ 201-208* or with Convention)]:

- The selection or appointment, if any, of an additional arbitrator or umpire;

- Each written extension of the time, if any, within which to make the award; and

- Each notice, affidavit, or other paper used on an application to confirm, modify, or correct the award, and a copy of each order of the court on such an application.

The judgment is docketed as if it was rendered in an action, and has the same force and effect in all respects as if it had been rendered in an action in the court in which it is entered [*9 U.S.C. § 13*].

[3] Time for Confirmation

Within three years after an award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under *9 U.S.C. §§ 201-208* for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the Convention [*9 U.S.C. § 207*; *but cf. Code Civ. Proc. § 1288* (four-year limitation period)].

[4] Grounds for Refusal of Recognition or Enforcement

PRACTICE TIP:
Delaying the Finality of Arbitration. A party wishing to delay the arbitration has numerous grounds to assert before the court. Although often unsuccessful, delay may have its advantages. *By Steven Hecht*

Recognition and enforcement of an arbitral award to which the Convention applies may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority from which recognition and enforcement are sought proof that any of the following applies [Convention on Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, art. V, para. 1; *see China Nat'l Metal Prods. Import/Export Co. v. Apex Digital, Inc. (9th Cir 2004) 379 F.3d 796, 799* (confirmation may be refused only on grounds set forth in Convention)]:

- The parties to the agreement were, under the law applicable to them, under some incapacity, or the agreement is not valid under the law to which the parties have subjected it, or if the parties have not specified which law is applicable, under the law of the country in which the award was made;

- The party against whom the award is invoked was not given proper notice of the appointment of the

arbitrator or of the arbitration proceeding or was otherwise unable to present its case;

- The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration; provided that, if the decisions on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on the matters submitted to arbitration may be recognized and enforced;

- The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country in which the arbitration took place; or

- The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made [*see, e.g, Baker Marine (Nig.) Ltd. V. Chevron (Nig.) Ltd. (2nd Cir. 1999) 191 F.3d 194* , 196-198 (denied enforcement of awards rendered in Nigeria but set aside by Nigerian High Court; fact that awards were set aside based on Nigerian law which would not provide grounds to set them aside under U.S. law was irrelevant because arbitration agreement specified that Nigerian law should apply)].

ILLUSTRATION:

No Violation of Convention; Contract Gave Arbitrator Power to Interpret Indeterminate Forum-Selection Clause. Manufacturer and buyer had a dispute regarding defects in DVD players. Buyer withheld payment and commenced arbitration in Shanghai. Manufacturer commenced arbitration of claim for payment in Beijing. Parties' agreement provided for arbitration in either place. Buyer claimed agreement limited parties to one arbitration and manufacturer's claim had to be brought as counter-claim in Shanghai arbitration. China International Economic and Trade Arbitration Commission ("CIETAC"), the arbitral body provided for in the agreement, interpreted the contract to allow for two arbitrations. The Beijing award against buyer for "net" payment for non-defective DVDs was entered first and confirmed in U.S. district court over buyer's objection that the award violated the Convention, Art. V, § 1(d) because it arose from an arbitral procedure not in accord with the agreement of the parties. Should the Beijing award have been confirmed? Yes. Because the arbitration clause was admittedly indeterminate and did not resolve the matter, CIETAC was free to interpret its own rules and allow two arbitrations [*China Nat'l Metal Prods. Import/Export Co. v. Apex Digital, Inc. (9th Cir. 2004) 379 F.3d 796, 801-802*].

Recognition and enforcement of an arbitral award to which the Convention applies may also be refused if the competent authority in the country in which recognition and enforcement is sought finds either (a) that the subject matter of the difference is not capable of settlement by arbitration under the law of that country, or (b) that recognition or enforcement of the award would be contrary to the public policy of that country [Convention on Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, art. V, para. 2; *see Northrop Corp. v. Triad Intern. Marketing S.A. (9th Cir. 1987) 811 F.2d 1265* , 1268-1271, *modified as to other issue 842 F.2d 1154 (1988) , cert. denied, 484 U.S. 914, 108 S. Ct. 261, 98 L. Ed. 2d 219* (standard of review regarding public policy)].

In addition, due process requires that the court have jurisdiction over the defendant against whom the award is sought to be enforced or his or her property. Thus, an award obtained in London could not be confirmed in the Northern District of California against an entity who did business in the United States only through a sales agent [*Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co. (9th Cir. 2002) 284 F.3d 1114* , 1122, 1128].

[5] Grounds for Vacating Award Under Federal Arbitration Act

The federal Arbitration Act provides for vacating an arbitral award, on application of a party to the arbitration, in any of the following cases [*9 U.S.C. 10*]:

- If the award was procured by fraud, corruption, or undue means;

- If there was evident partiality or corruption in the arbitrators, or either of them;

- If the arbitrators were guilty of misconduct in refusing to postpone the hearing, on a showing of sufficient cause, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced; or

- If the arbitrators exceeded their powers, or so imperfectly executed them that no mutual, final, and definite award was made on the subject matter submitted.

If the award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators [*9 U.S.C. 10(c)*]. Application for an order vacating an arbitral award is made in the court in and for the district in which the award was made [*9 U.S.C. 10*].

[6] Adjournment Pending Application to Set Aside or Suspend

If an application for setting aside or suspension of the award has been made to a competent authority of the country in which, or under the law of which, that award was made, the authority before which the award is sought to be relied on may, if it considers it proper, adjourn the decision on enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security [Convention on Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, art. VI].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-35 California Forms of Pleading and Practice--Annotated § 35.32

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§ 35.32 Immunity of Arbitrator

An arbitrator has the immunity of a judicial officer from civil liability when acting in the capacity of arbitrator under any statute or contract [*Code Civ. Proc. § 1297.119*]. For discussion of the immunity of judicial officers, *see* Ch. 340, *Libel and Slander* , Pt. II, and Ch. 464, *Public Entities and Officers: California Tort Claims Act*.

The immunity granted by *Code Civ. Proc. § 1297.119* supplements, and does not supplant, any otherwise applicable common law or statutory immunity [*Code Civ. Proc. § 1297.119*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-35 California Forms of Pleading and Practice--Annotated §§ 35.33-35.39

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[Reserved]

§§ 35.33[Reserved]

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4-35 California Forms of Pleading and Practice--Annotated § 35.40

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§ 35.40 Statement of California Policy

It is the policy of the State of California to encourage parties to an international commercial agreement or transaction that qualifies for arbitration or conciliation pursuant to *Code Civ. Proc. § 1297.13* to resolve disputes arising from such agreements or transactions through conciliation. The parties may select or permit an arbitral tribunal or other third party to select one or more persons to serve as the conciliator or conciliators who shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute [*Code Civ. Proc. § 1297.341*; *see Code Civ. Proc. § 1297.13* (*discussed under § 35.11[2]*)].

PRACTICE TIP:

Selection of Conciliator. Choose the conciliator carefully since the conciliator should often be the smartest person in the room. The conciliator can tell the participants the absolute truth of her or her impressions and views, for example, that a party will make a terrible witness. This may have an important impact on obtaining a settlement. *By Steven Hecht*

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-35 California Forms of Pleading and Practice--Annotated § 35.41

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§ 35.41 Conduct of Conciliation Proceedings

[1] General Principles

The conciliator or conciliators shall be guided by principles of objectivity, fairness, and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned, and the circumstances surrounding the dispute, including any previous practices between the parties [*Code Civ. Proc. § 1297.342*]. The conciliator or conciliators may conduct the conciliation proceedings in any manner they consider appropriate, taking into account the circumstances of the case, the wishes of the parties, and the desirability of a speedy settlement of the dispute [*Code Civ. Proc. § 1297.343*].

[2] Relation to Other California Law

Except as otherwise provided in *Code Civ. Proc. §§ 1297.11-1297.432*, other provisions of the Code of Civil Procedure, the Evidence Code, or the California Rules of Court shall not apply to conciliation proceedings brought under *Code Civ. Proc. §§ 1297.11-1297.432* [*Code Civ. Proc. § 1297.343*].

[3] Representation and Assistance

The parties may appear in person or be represented or assisted by any person of their choice. A person assisting or representing a party need not be a member of the legal profession or licensed to practice law in California [*Code Civ. Proc. § 1297.351*].

[4] Report of Conciliators

At any time during the proceedings, the conciliator or conciliators may prepare a draft conciliation settlement, which may include the assessment and apportionment of costs between the parties, and send copies to the parties, specifying the time within which they must signify their approval [*Code Civ. Proc. § 1297.361*]. No party may be required to accept any settlement proposed by the conciliator or conciliators [*Code Civ. Proc. § 1297.362*].

[5] Confidentiality

When persons agree to participate in conciliation under *Code Civ. Proc. §§ 1297.11-1297.432*, evidence of anything said or of any admission made in the course of the conciliation is not admissible in evidence, and disclosure of any such evidence shall not be compelled, in any civil action in which, pursuant to law, testimony may be compelled to be given [*Code Civ. Proc. § 1297.371(a)*]. However, *Code Civ. Proc. § 1297.371(a)* does not limit the admissibility of evidence if all parties participating in conciliation consent to its disclosure [*Code Civ. Proc. § 1297.371(a)*]. Similarly, unless the document otherwise provides, no document prepared for the purpose of, or in the course of, or pursuant to, the conciliation, or any copy of such a document, is admissible in evidence, and disclosure of any such document shall not be compelled, in any arbitration or civil action in which, pursuant to law, testimony may be compelled to be given [*Code Civ. Proc. § 1297.371(c)*].

In the event that any evidence is offered in contravention of *Code Civ. Proc. § 1297.371*, the arbitration tribunal or the court shall make any order that it considers to be appropriate to deal with the matter, including, without limitation, orders restricting the introduction of evidence, or dismissing the case without prejudice [*Code Civ. Proc. § 1297.371(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-35 California Forms of Pleading and Practice--Annotated § 35.42

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§ 35.42 Stay of Judicial or Arbitral Proceedings

The agreement of the parties to submit a dispute to conciliation shall be deemed an agreement between or among those parties to stay all judicial or arbitral proceedings from the commencement of conciliation until the termination of conciliation proceedings [*Code Civ. Proc. § 1297.381*]. All applicable limitation periods, including periods of prescription, shall be tolled or extended on the commencement of conciliation proceedings to conciliate a dispute under *Code Civ. Proc. §§ 1297.11-1297.432*. All limitation periods shall remain tolled, and periods of prescription extended, as to all parties to the conciliation proceedings until the 10th day following the termination of conciliation proceedings [*Code Civ. Proc. § 1297.382*]. For purposes of *Code Civ. Proc. §§ 1297.381-1297.382*, conciliation proceedings are deemed to have commenced as soon as (a) a party has requested conciliation of a particular dispute or disputes, and (b) the other party or parties agree to participate in the conciliation proceeding [*Code Civ. Proc. § 1297.382*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-35 California Forms of Pleading and Practice--Annotated § 35.43

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§ 35.43 Termination of Conciliation Proceedings

[1] All Parties

The conciliation proceedings may be terminated as to all parties by any of the following methods [*Code Civ. Proc. § 1297.391*]:

(a) A written declaration of the conciliator or conciliators, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;

(b) A written declaration of the parties addressed to the conciliator or conciliators to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(c) The signing of a settlement agreement by all of the parties on the date of the agreement.

[2] Particular Parties

The conciliation proceedings may be terminated as to particular parties by either of the following methods [*Code Civ. Proc. § 1297.392*]:

- A written declaration of a party to the other party and to the conciliator or conciliators, if appointed, to the effect that the conciliation proceedings shall be terminated as to that particular party, on the date of the declaration; or

- The signing of a settlement agreement by some of the parties, on the date of the agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediationsInternational LawDispute ResolutionArbitration & MediationGeneral OverviewInternational Trade LawDispute ResolutionArbitration

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4-35 California Forms of Pleading and Practice--Annotated § 35.44

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§ 35.44 Appointment of Conciliator as Arbitrator

No person who has served as conciliator may be appointed as an arbitrator for, or take part in any arbitral or judicial proceedings in, the same dispute unless all parties manifest their consent to his or her participation or the rules adopted for conciliation or arbitration otherwise provide [*Code Civ. Proc. § 1297.393*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediationsInternational LawDispute ResolutionArbitration & MediationGeneral OverviewInternational Trade LawDispute ResolutionArbitration

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4-35 California Forms of Pleading and Practice--Annotated § 35.45

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§ 35.45 Nonwaiver of Rights

By submitting to conciliation, no party shall be deemed to have waived any rights or remedies that that party would have had if conciliation had not been initiated, other than those set forth in any settlement agreement that results from the conciliation [*Code Civ. Proc. § 1297.394*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-35 California Forms of Pleading and Practice--Annotated § 35.46

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§ 35.46 Enforceability of Conciliation Decree

If the conciliation succeeds in settling the dispute, and the result of the conciliation is reduced to writing and signed by the conciliator or conciliators and the parties or their representatives, the written agreement shall be treated as an arbitral award rendered by an arbitral tribunal duly constituted in and pursuant to the laws of California, and shall have the same force and effect as a final award in arbitration [*Code Civ. Proc. § 1297.401*; *see Code Civ. Proc. §§ 1287.4, 1287.6* (discussed in Ch. 34, *Contractual Arbitration: Judicial Review*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral OverviewInternational LawDispute ResolutionArbitration & MediationGeneral OverviewInternational LawDispute ResolutionArbitration & MediationAwardsInternational Trade LawDispute ResolutionArbitration

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4-35 California Forms of Pleading and Practice--Annotated § 35.47

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§ 35.47 Costs of Conciliation

On termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice of these costs to the parties. As used in *Code Civ. Proc. §§ 1297.411-1297.412*, the term "costs" includes only the following items [*Code Civ. Proc. § 1297.411*]:

- A reasonable fee to be paid to the conciliator or conciliators;
- The travel and other reasonable expenses of the conciliator or conciliators;
- The travel and other reasonable expenses of witnesses requested by the conciliator or conciliators with the consent of the parties;
- The cost of any expert advice requested by the conciliator or conciliators with consent of the parties; and
- The cost of any court.

These costs shall be borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party shall be borne by that party [*Code Civ. Proc. § 1297.412*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewInternational LawDispute ResolutionArbitration & MediationGeneral OverviewInternational LawDispute ResolutionArbitration & MediationAwardsInternational Trade LawDispute ResolutionArbitration

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4-35 California Forms of Pleading and Practice--Annotated § 35.48

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§ 35.48 Effect of Conciliation on Jurisdiction of California Courts

Neither the request for conciliation, the consent to participate in the conciliation proceedings, the participation in those proceedings, nor the entering into a conciliation agreement or settlement shall be deemed as consent to the jurisdiction of any court in California in the event conciliation fails [*Code Civ. Proc. § 1297.421*].

Neither the conciliator or conciliators, the parties, nor their representatives shall be subject to service of process on any civil matter while they are present in California for the purpose of arranging for or participating in conciliation pursuant to *Code Civ. Proc. §§ 1297.11-1297.432* [*Code Civ. Proc. § 1297.431*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsInternational LawDispute ResolutionArbitration & MediationGeneral OverviewInternational Trade LawDispute ResolutionArbitration

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4-35 California Forms of Pleading and Practice--Annotated § 35.49

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§ 35.49 Immunity of Conciliators

No person who serves as a conciliator shall be held liable in an action for damages resulting from any act or omission in the performance of his or her role as a conciliator in any proceeding subject to *Code Civ. Proc. §§ 1297.11-1297.432* [*Code Civ. Proc. § 1297.432*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-35 California Forms of Pleading and Practice--Annotated §§ 35.50-35.59

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[Reserved]

§§ 35.50[Reserved]

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4-35 California Forms of Pleading and Practice--Annotated § 35.60

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§ 35.60 Related Matthew Bender Publications

s Moore's Federal Practice, Ch. 107 (3rd ed. Matthew Bender)

4 Frumer and Hall, sBender's Federal Practice Forms, Part XI, *General Provisions: American Arbitration Act* and *Removal of Actions from State Court to Federal District Court* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-35 California Forms of Pleading and Practice--Annotated § 35.61

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§ 35.61 Federal Treaties

Convention on Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, entered into force in the United States on December 29, 1970. 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-35 California Forms of Pleading and Practice--Annotated § 35.62

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§ 35.62 Federal Statutes

General provisions. *9 U.S.C. §§ 1-16*

Federal Arbitration Act. *9 U.S.C. §§ 1-208*

Jurisdiction to enforce arbitration agreement by or against foreign sovereigns engaged in commerce in United States. *9 U.S.C. § 15*; *28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602*-1611

Enforcement of Convention. *9 U.S.C. §§ 201-208*

9 U.S.C. §§ 1-16 apply to enforcement of Convention to extent those sections are not in conflict with *9 U.S.C. §§ 201-208* or with Convention. *9 U.S.C. § 208*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsForeign Arbitral AwardsInternational LawDispute ResolutionArbitration & MediationGeneral OverviewInternational Trade LawDispute ResolutionConvention on the Recognition & Enforcement of Foreign Arbitral Awards

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§ 35.63 State Statutes

[1] General Provisions

Application of *Code Civ. Proc. §§ 1297.11-1297.432*. *Code Civ. Proc. §§ 1297.11-1297.17*

Definitions and interpretation. *Code Civ. Proc. §§ 1297.21-1297.24, 1297.71, 1297.72*

Receipt of written communications. *Code Civ. Proc. §§ 1297.31-1297.33*

Waiver of right to object. *Code Civ. Proc. §§ 1297.41-1297.42*

[2] Arbitration of International Commercial Disputes

Extent of judicial intervention. *Code Civ. Proc. §§ 1297.51, 1297.61*

Stay of proceedings. *Code Civ. Proc. §§ 1297.81-1297.82*

Interim protective measures. *Code Civ. Proc. §§ 1297.91-1297.95, 1297.171-172*

Number and appointment of arbitrators to arbitral tribunal. *Code Civ. Proc. §§ 1297.101-1297.118*

Grounds and procedure for challenging arbitrator. *Code Civ. Proc. §§ 1297.121-1297.136*

Termination of mandate and substitution of arbitrators. *Code Civ. Proc. §§ 1297.141-1297.154*

Jurisdiction of arbitral tribunal. *Code Civ. Proc. §§ 1297.161-1297.172*

Manner and conduct of arbitration. *Code Civ. Proc. §§ 1297.181-1297.273*

Arbitral awards and termination of proceedings. *Code Civ. Proc. §§ 1297.281-1297.337*

[3] Conciliation of International Commercial Disputes

Statement of policy. *Code Civ. Proc. § 1297.341*

Appointment of conciliators; representation and assistance. *Code Civ. Proc. §§ 1297.341-1297.351*

Report of conciliators. *Code Civ. Proc. §§ 1297.361-1297.362*

Confidentiality of statements and evidence. *Code Civ. Proc. § 1297.371*

Stay of judicial and arbitral proceedings. *Code Civ. Proc. §§ 1297.381-1297.382*

Termination of conciliation proceedings. *Code Civ. Proc. §§ 1297.391-1297.394*

Force and effect of conciliation decree. *Code Civ. Proc. § 1297.401*

Conciliation costs. *Code Civ. Proc. §§ 1297.411-1297.412*

Effect of conciliation on jurisdiction. *Code Civ. Proc. § 1297.421*

Immunities of conciliators and parties. *Code Civ. Proc. §§ 1297.431-1297.432*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsForeign Arbitral AwardsCivil ProcedureAlternative Dispute ResolutionMediationsInternational LawDispute ResolutionArbitration & MediationReviewInternational LawDispute ResolutionArbitration & MediationStays Pending ArbitrationInternational Trade LawDispute ResolutionArbitration

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4-35 California Forms of Pleading and Practice--Annotated § 35.64

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§ 35.64 Decisions

[1] Compelling Arbitration

[a] Jurisdiction and Procedure

The Convention overcomes any presumption deriving from *46 U.S.C. § 10313(i)* that the courts remain open to foreign seafarers in a case in which a seafarer has signed an otherwise enforceable agreement to arbitrate a wage claim. Furthermore, the arbitration agreement was not void under *46 U.S.C. § 10317*, in that the statute does not require the abandonment of the Wage Act claim. *Balen v. Holland America Line Inc. (9th Cir. 2009) 583 F.3d 647, 652-653*

The exemption clause of *9 U.S.C. § 1* is not incorporated into the Convention by *9 U.S.C. § 208*. Furthermore, the Convention overcomes any presumption deriving from *46 U.S.C. § 10313(i)* that the courts remain open to foreign seafarers in a case in which a seafarer has signed an otherwise enforceable agreement to arbitrate a wage claim. *Rogers v. Royal Caribbean Cruise Line (9th Cir. 2008) 547 F.3d 1148, 1155*

Under *9 U.S.C. § 4*, court as only empowered to compel arbitration within district; under *9 U.S.C. § 206*, court as only empowered to compel arbitration at place specified in contract; when contract has two ambiguous forum selection clauses, *9 U.S.C. § 4* as determinative, and arbitration can only be compelled in district. *Bauhinia Corp. v. China Nat. Machinery & Equipment (9th Cir. 1987) 819 F.2d 247, 250*

Under *9 U.S.C. § 5*, court as not empowered to order arbitration on terms other than those provided in contract unless or until procedure intended by parties (here to use two partisan arbitrators and one neutral umpire) proves impossible.

ATSA of California, Inc. v. Continental Ins. Co. (9th Cir. 1983) 702 F.2d 172, 175-176 , on modification 754 F.2d 1394, 1395-1396

Federal court hearing case to which Convention applies as having discretion to dismiss petition to compel arbitration on ground of forum non conveniens as long as agreement does not specify district as place for arbitration. *Oil Basins Ltd. v. Broken Hill Proprietary Co. (S.D.N.Y. 1985) 613 F. Supp. 483, 489* ; *Dale Metals Corp. v. Kiwa Chem. Industry Co., Ltd. (S.D. N.Y. 1977) 442 F. Supp. 78, 80-81*

Under *9 U.S.C. § 4*, federal court as only able to compel arbitration within district; under *9 U.S.C. § 206*, federal court as only able to compel arbitration at place specified in contract; thus *9 U.S.C. § 4* as superseded by *9 U.S.C. § 206* when contract specifies place for arbitration, but not when contract does not. *Oil Basins Ltd. v. Broken Hill Proprietary Co. (S.D.N.Y. 1985) 613 F. Supp. 483, 486-488* (dismissing petition to compel arbitration on ground of forum non conveniens when contract was silent regarding place of arbitration and similar petition was pending in Australia)

Definition of commerce in *9 U.S.C. § 1* as not controlling under *9 U.S.C. §§ 202, 203*; district court as having jurisdiction under Convention when only foreign entities are involved. *Sumitomo Corp. v. Parakopi Compania Maritima (S.D.N.Y. 1979) 477 F. Supp. 737, 740*

Proceedings in federal district court to compel arbitration under *9 U.S.C. § 4* as properly stayed in view of similar state court petition that had been filed and on which hearing had been directed under contract that provided it was to be governed by state law. *E.C. Ernst, Inc. v. Potlatch Corp. (S.D.N.Y. 1978) 462 F Supp. 694, 700-701*

Stay of judicial proceeding pending completion of arbitration as proper even when parties who were not party to arbitration were involved in judicial proceeding. *Dale Metals Corp. v. Kiwa Chem. Industry Co., Ltd. (S.D.N.Y. 1977) 442 F. Supp. 78, 81-82*

Demand for arbitration and notice of default under contract as properly served even though they were sent to address other than that specified in contract if respondent received timely notice and replied admitting nonperformance and acknowledged receipt of notice sent by American Arbitration Association to address specified in contract; notice of hearing mailed by AAA as relevant notice anyway. *Matter of Ferrara S.p.A. (S.D.N.Y. 1977) 441 F. Supp. 778, 782*

Taking of deposition as not waiving right to arbitrate. *Shinto Shipping Co. Ltd. v. Fibrex & Shipping Co. (N.D. Cal. 1976) 425 F. Supp. 1088, 1092-1093 , aff'd, 572 F.2d 1328 (1978)*

[b] Validity and Scope of Clause

Employment contracts of seafarers arise out of legal relationships that are commercial, and enforcement of them is not generally against public policy. The contract in question met the four-part test for enforceability under the Convention and was enforceable against the defendant. *Balen v. Holland America Line Inc. (9th Cir. 2009) 583 F.3d 647, 653*

Employment contracts of seafarers arise out of legal relationships that are commercial, and enforcement of them is not generally unconscionable or against public policy. *Rogers v. Royal Caribbean Cruise Line (9th Cir. 2008) 547 F.3d 1148, 1157-1159*

Agreement to arbitrate "any dispute" without strong limiting or excepting language as granting authority to arbitral tribunal to determine not only dispute but also any consequences naturally flowing from it. *Management & Tech. Consultants v. Parsons-Jurden (9th. Cir. 1987) 820 F.2d 1531, 1534-1535*

Federal law as establishing presumption that arbitral body acted within scope of its powers; contention that subject

matter of arbitration lies outside scope of contract as subject to de novo review; however, arbitral authority as to be broadly construed to comport with thrust of Convention and policy favoring arbitration. *Management & Tech. Consultants v. Parsons-Jurden (9th. Cir. 1987) 820 F.2d 1531, 1534* ; *Mediterranean Enterprises, Inc. v. Ssangyong (9th Cir. 1983) 708 F.2d 1458, 1463*

Arbitral tribunal's authority to determine amount of gross billings as including authority to determine amount of additional compensation due. *Management & Tech. Consultants v. Parsons-Jurden (9th. Cir. 1987) 820 F.2d 1531, 1534*

Validity of arbitration clause affecting foreign commerce and determinations regarding scope of arbitration clause and which claims fall within clause as to be determined by federal law; arbitration clauses to be liberally construed in favor of arbitration; arbitration as compellable even when contract does not specify governing law or forum for arbitration. *Bauhinia Corp. v. China Nat. Machinery & Equipment (9th Cir. 1987) 819 F.2d 247, 249* ; *ATSA of California, Inc. v. Continental Ins. Co. (9th Cir. 1983) 702 F.2d 172, 174-175 , modified 754 F.2d 1394*

Language providing for arbitration of all disputes "arising hereunder" as relatively narrow in scope; causes of action for conspiracy to induce breach of contract, quantum meruit, and conversion as beyond scope of that clause, but claims relating to breach of fiduciary duties arising from contract as within scope of clause; judicial action as properly stayed pending outcome of arbitration. *Mediterranean Enterprises, Inc. v. Ssangyong (9th Cir. 1983) 708 F.2d 1458, 1464-1465*

Under federal law, if parties agree to arbitration, arbitrators as presumed to be authorized to determine what law is applicable. *ATSA of California, Inc. v. Continental Ins. Co. (9th Cir. 1983) 702 F.2d 172, 175 , on modification 754 F.2d 1394, 1396* ; *see Code Civ. Proc. § 1297.283* (accord)

Although art. II(3) of Convention contemplates possibility of waiver, mere passage of time as not sufficient to constitute waiver; under *9 U.S.C. § 206,* court's only discretion is regarding place of arbitration, not waiver. *I.T.A.D. Associates, Inc. v. Podar Bros. (4th Cir. 1981) 636 F.2d 75, 77*

Under Convention, agreement containing arbitration clause as required to be in writing, but does not have to be signed; whether unsigned contract is enforceable under Convention as deter mined by ordinary contract principles. *Beromun Aktiengesellschaft v. Societa, Etc. (S.D.N.Y. 1979) 471 F. Supp. 1163, 1170* (oral agreement of parties did not contain arbitration provision)

Time drafts given in payment as not superseding arbitration clause contained in confirmations of sale. *Dale Metals Corp. v. Kiwa Chem. Industry Co., Ltd. (S.D.N.Y. 1977) 442 F. Supp. 78, 81 n.1*

Federal law as governing arbitrability under Convention; body of international law as requiring court to compel arbitration even though formalities regarding placement of signatures did not comply with Italian law. *Matter of Ferrara S.p.A. (S.D.N.Y. 1977) 441 F. Supp. 778, 780*

Arbitration not to be stayed when contract contained all essential terms, no fraud or duress in inducing or signing it were alleged, and substantially unequal bargaining power or sophistication was not involved; general rule that person of ordinary understanding and competence is bound by provision of contract that he or she signs whether or not he or she read it as applicable to arbitration clause; subjective agreement as irrelevant as long as clause would have given notice to reasonably prudent person. *Matter of Ferrara S.p.A. (S.D.N.Y. 1977) 441 F. Supp. 778, 781*

Validity of arbitration and consent to jurisdiction clauses as determined under federal law, not law of state in which transaction occurred or that was designated as place of arbitration. *Avila Group, Inc. v. Norma J. of California (S.D.N.Y. 1977) 426 F. Supp. 537, 540*

Choice of law as not implying designation of place for arbitration. *Oil Basins Ltd. v. Broken Hill Proprietary Co. (S.D.N.Y. 1985) 613 F. Supp. 483, 487*

[2] Confirming Arbitral Award

9 U.S.C. §§ 9-11 are permissive, not exclusive, allowing motion to vacate, confirm, or modify award under Federal Arbitration Act to be brought not only in district where award was made, but in any district proper under general venue statute [*28 U.S.C. § 1391(a)(2)*], *e.g.*, in district where contract was performed. *Cortez Byrd Chips, Inc. v. Halbart Construction Co. (2000) 529 U.S. 193, 203-204, 120 S. Ct. 1331, 146 L. Ed.2d 171*

Award was properly confirmed even though tribunal allowed two arbitrations: one initiated by manufacturer and one initiated by buyer: parties' agreement was indeterminate and decision to allow two arbitrations (rather than require one be brought as counter-claim to other) was within arbitrator's power as granted by contract; thus, there was no violation of Convention, Art. V, § 1(d) or of contract. *China Nat'l Metal Prods. Import/Export Co. v. Apex Digital, Inc. (9th Cir. 2004) 379 F.3d 796, 801-802*

If respondent did business in district, district court as proper for confirmation of award under *9 U.S.C. §§ 9, 204, 207*; prior exhaustion of remedies under Friendly Nations Treaty as not necessary to confirmation of award. *Audi NSU A.U. Aktiengesellschaft v. Overseas Motors (E.D. Mich, 1976) 418 F. Supp. 982, 983, 985*

Fact that arbitration between business partners was before religious body, rabbinical council (*beth din*), in Israel would not bar enforcement of any award it rendered as judgment in Los Angeles County in accordance Convention [*9 U.S.C. § 207*] and parties' agreement. Dial 800 v. *Fesbinder (2004) 118 Cal. App. 4th 32, 43, 46-50, 12 Cal. Rptr. 3d 711*

[3] Denial of Enforcement of Arbitral Award

To justify refusal to enforce award on ground of public policy, that policy must be clear and well defined; here, Department of Defense regulations as not such clear and defined determination to adopt Saudi decree as United States policy as to require refusal to enforce award. *Northrop Corp. v. Triad Intern. Marketing S.A. (9th Cir. 1987) 811 F.2d 1265, 1271 , modified as to other issue 842 F.2d 1154 (1988) , cert. denied 484 U.S. 914, 108 S. Ct. 261, 98 L. Ed. 2d 219*

Choice of law provision as not to be set aside; fact that enforcement of award would be contrary to public policy of Saudi Arabia as irrelevant when contract made California law applicable. *Northrop Corp. v. Triad Intern. Marketing S.A. (9th Cir. 1987) 811 F.2d 1265, 1270-1271 , modified as to other issue 842 F.2d 1154 (1988) , cert. denied 484 U.S. 914, 108 S. Ct. 261, 98 L. Ed. 2d 219*

Even arbitrators' erroneous findings of facts and misinterpretations of California law as not to be subjected to de novo review by court, but to be upheld; mere error of law as not enough to justify refusal to enforce arbitral award. *Northrop Corp. v. Triad Intern. Marketing S.A. (9th Cir. 1987) 811 F.2d 1265, 1269 , modified as to other issue 842 F.2d 1154 (1988) , cert. denied 484 U.S. 914, 108 S. Ct. 261, 98 L. Ed. 2d 219*

Court asked to enforce arbitral award as able to make de novo review regarding whether enforcement of award is contrary to public policy; in contract making California law determinative, effect of foreign law on parties as determined under *Civ. Code 1511*; question under *Civ. Code § 1511* as not whether payment of award would be illegal under foreign law, but whether foreign law would prevent or excuse performance under *Civ. Code § 1511*. *Northrop Corp. v. Triad Intern. Marketing S.A. (9th Cir. 1987) 811 F.2d 1265, 1268, 1270 , modified as to other issue 842 F.2d 1154 (1988) , cert. denied 484 U.S. 914, 108 S. Ct. 261, 98 L. Ed. 2d 219*

Failure of arbitrator to disclose having served as counsel for party in two other legal or arbitral matters as not rising to level that would make enforcement of award against public policy, which is criteria established by art. V, para. 2(b) of Convention; thus judgment confirming award as sustained. *Fertilizer Corp. of India v. IDI Management, Inc. (S.D. Ohio 1982) 530 F. Supp. 542, 545-546* ; *but see Code Civ. Proc. §§ 1297.121-1297.123* (discussed in *§ 35.24[1]*)

[4] Foreign Sovereigns; Act of State Doctrine

Under *28 U.S.C. § 1605(a)(1)* (Foreign Sovereign Immunities Act), sovereign that is not party to so-called New York Convention but agrees to arbitrate in country that is party to Convention (France) does not waive immunity to suit in other countries that are parties to convention; however, under *28 U.S.C. § 1605(a)(6)* sovereign that is not party to Convention but agrees to arbitrate in country that is party to Convention is not immune from suit in United States to enforce arbitral award governed by *Convention. Creighton Ltd. Government of State of Qatar (D.C. Cir, 1999) 181 F.3d 118, 122-124*

Enforcement, in United States court pursuant to *28 U.S.C. § 1605(a)(6)* (Foreign Sovereign Immunities Act), of award governed by so-called New York Convention against foreign sovereign that is not party to Convention is not retroactive because *28 U.S.C. § 1605(a)(6)* was added to FSIA in 1988, after parties signed contract containing agreement to arbitrate; FSIA speaks not to conduct of parties but to question of which tribunals may enforce arbitral award and confers subject matter jurisdiction for enforcement of award. *Creighton Ltd. Government of State of Qatar (D.C. Cir, 1999) 181 F.3d 118, 124*

Sovereign that is not party to so-called New York Convention but agrees to arbitrate in country that is party to Convention (France) does not waive its objections to personal jurisdiction in United States, at least when party seeking to enforce award in United States court makes no challenge that foreign state is not "person" within meaning of U.S. Constitution's due process clause; sovereign's contact of builder in United States and telexing of weekly reports to builder's office in United States during construction in foreign state did not constitute minimum contacts with United States sufficient to confer jurisdiction on United States court to enforce award. *Creighton Ltd. Government of State of Qatar (D.C. Cir, 1999) 181 F.3d 118, 124-128*

Act of State doctrine as precluding inquiry into validity of acts of foreign sovereigns committed within their own territory, but as not preventing judicial resolution of commercial consequences arising from foreign government's public acts. *Barragan v. Banco BCH (1986) 188 Cal. App. 3d 283, 295-296, 232 Cal. Rptr. 758*

Party claiming immunity as having burden of establishing that no exceptions apply; immunity as waived by failure to raise it prior to entry of default against party claiming immunity. *Barragan v. Banco BCH (1986) 188 Cal. App. 3d 283, 294, 295, 232 Cal. Rptr. 758*

Corporate entity, majority of whose stock was owned by government of Mexico, as foreign state within meaning of FSIA (*28 U.S.C. § 1603(a), (b)*). *Barragan v. Banco BCH (1986) 188 Cal. App. 3d 283, 293, 232 Cal. Rptr. 758*

[5] Interim Protective Measures

Selection of foreign forum for arbitration as not prohibiting attachment under admiralty rules pending arbitration. *Polar Shipping Ltd. v. Oriental Shipping Corp. (9th Cir. 1982) 680 F.2d 627, 632-633*

Maritime contract between foreign corporations as governed by Convention; attachment as not contrary to policy underlying Convention; although respondent of petition to compel arbitration could not be found in district, district court still had jurisdiction over local garnishee banks to perfect attachment of monies and other credits belonging to

absent respondent under supplementary admiralty rules. *Atlas Chartering Services v. World Trade Group (S.D. N.Y. 1978) 453 F. Supp. 861, 863-864*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsForeign Arbitral AwardsInternational LawDispute ResolutionArbitration & MediationReviewInternational LawDispute ResolutionArbitration & MediationStays Pending ArbitrationInternational Trade LawDispute ResolutionArbitrationInternational Trade LawDispute ResolutionConvention on the Recognition & Enforcement of Foreign Arbitral Awards

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Delaume, *Choice-of-Forum and Arbitration Clauses in the United States: A Judicial Crusade*, 13 J. Int'l Arb. 81 (1996)

Donahey, *Defending the Arbitration Against Sabotage*, 13 J. Int'l Arb. 93 (1996)

Donovan, *International Commercial Arbitration and Public Policy, 27 N.Y.U. J. Int'l L. & Pol. 645 (1995)*

Fischer and Haydock, *International Commercial Disputes: Drafting an Enforceable Arbitration Agreement, 21 Wm. Mitchell L. Rev. 941 (1996)*

Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments, 90 Am. J. Int'l Law 193 (1996)*

Thirteenth Annual Symposium on International Legal Practice: *The Current State of International Alternative Dispute*

Resolution, 18 Hastings Int'l & Comp. L. Rev. -- (1995)

Schachter, *Dispute Settlement and Countermeasures in the International Law Commission, 88 Am. J. Int'l Law 471 (1994)*

Webster, *Amerada Hess Shipping Corp. v Argentine Republic: Denying Sovereign Immunity to Violators of International Law, 39 Hastings L.J. 1099 (1988)*

Weber, *International Arbitration Is Gaining Acceptance Among Pacific Rim Traders, 7 Cal. Law. 28 (1987)*

Comment, *Punitive Damage Awards in International Arbitration: Does the "Safety Valve" of Public Policy Render Them Unenforceable in Foreign States? 20 Loyola L. Rev. 455 (1987)*

Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049 (1961)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsForeign Arbitral AwardsCivil ProcedureRemediesDamagesPunitive DamagesInternational LawDispute ResolutionArbitration & MediationGeneral OverviewInternational Trade LawDispute ResolutionArbitrationInternational Trade LawDispute ResolutionConvention on the Recognition & Enforcement of Foreign Arbitral Awards

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§ 35.66 Text References

Knight, Fannin, & Disco, Cal. Practice Guide: Alternative Dispute Resolution, 5:141 et seq. (The Rutter Group 1995)

Chernick, ADR for the Commercial Litigator, Ch. IV-A(11) (The Rutter Group 1989)

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[Reserved]

§§ 35.67[Reserved]

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PART IV. FORMS

4-35 California Forms of Pleading and Practice--Annotated § 35.70

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§ 35.70 Demand for Arbitration Under International Commercial Agreement [Code Civ. Proc. § 1297.211]

[1] FORM Demand for Arbitration Under International Commercial Agreement [Code Civ. Proc. § 1297.211]

_____ [*name of addressee*]
_____ [*street address*]
_____ [*city, state, zip code*]
[_____ (*country*)]

Re: Agreement Dated _____

DEMAND FOR ARBITRATION

Reference is made to the contract executed on _____ [*date*] by and between _____ [*names and addresses of the parties*], relating to _____ [*subject matter of contract, e.g.,* issuance of a license agreements for the manufacture of glass in the United States in accordance with a process patented by _____ (*name*)].

As you know, a dispute has arisen under that agreement, in that _____ [*name*] contends that _____ [*specify, e.g.,* the license includes the right to authorize agents in the United States to engage in the manufacture of glass under the process subject to the license and to charge and retain a fee paid by those agents based on their gross sales], while _____ [*name*] contends that _____ [*specify, e.g.,*

the disclosure of the process to third parties and the collection and retention of fees from them constitutes a breach of the parties' agreement, a violation of _____'s (*name*) patents and trade secrets, and demands that the use of the process by third parties be stopped immediately, that an accounting of fees taken from third parties be made, and all fees paid to _____ (*name*) by third parties, estimated to total $_____, through _____ (*date*), be remitted to _____ (*name*)].

_____ [*name*] hereby demands, pursuant to Paragraph/Section _____ of the above-referenced agreement, that this dispute be submitted to arbitration in _____ [*specify place, e.g.* Los Angeles, California], under the Arbitration Rules of the United Nations Commission on International Trade Law in effect on the date of the agreement ("UNCITRAL Arbitration Rules"), using the American Arbitration Association as appointing authority.

[The following person is proposed as sole arbitrator: _____ (*names and addresses*).]

[In accordance with Paragraph _____ of the parties' agreement, _____ (*name and address*) is appointed by the undersigned as arbitrator.]

[Enclosed is a statement of claim, a copy of which is also being forwarded to (each of) the arbitrator(s).]

_____ [*date and place*]

_____ [*company name*]

by _____

_____ [*signature and title*]

[2] Use of Form

The form of demand for arbitration in [1], *above*, conforms to the requirements of Article 3 of the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Arbitration Rules") adopted by the United Nations General Assembly on December 15, 1976, as Resolution 31/98. Under both that article and *Code Civ. Proc. § 1297.211*, the arbitration proceedings are deemed to commence on the date on which the demand is received by the party to whom it is sent (hereinafter "the respondent") [*Code Civ. Proc. § 1297.211*]. Under Article 3, the notice of arbitration need only be sent to the respondent.

Although Article 3 uses the term "notice" of arbitration, the foregoing form is entitled a "demand" to distinguish it from other notice procedures that may occur during the course of arbitration, and to ensure that the recipient is provided clear notice in the form of the "demand" of the commencement of arbitral proceedings [*see also Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.90* (form of demand for arbitration under *Code Civ. Proc. § 1281.2*)].

[3] Contents of Demand

Article 3 of the UNCITRAL Arbitration Rules provides that the notice of arbitration shall include the following:

- A demand that the dispute be referred to arbitration;
- The names and addresses of the parties;

- A reference to the arbitration clause or to the separate arbitration agreement that is invoked;
- A reference to the contract out of or in relation to which the dispute arises;
- The general nature of the claim and an indication of the amount involved;
- The relief or remedy sought; and
- A proposal for the number of arbitrators (one or three), if the parties have not previously agreed on the number of arbitrators. Note that this last item is superseded by *Code Civ. Proc. § 1297.101*, which provides that if the parties have not agreed on the number of arbitrators, there shall be one arbitrator [*Code Civ. Proc. § 1297.101*]. However, if the agreement of the parties has specified that the arbitration shall be in accordance with the UNCITRAL Arbitration Rules it is not clear whether *Code Civ. Proc. § 1297.101* or article 5 of the UNCITRAL Arbitration Rules applies. Article 5 of the UNCITRAL Arbitration Rules provides that if the parties have not previously agreed on the number of arbitrators and within 15 days after receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

Article 3 of the UNCITRAL Arbitration Rules provides that the notice of arbitration may also include (1) the proposals for the appointments of a sole arbitrator and an appointing authority referred to in article 6, paragraph 1 of those rules; (2) notification of the appointment of the arbitrator selected by the claimant if the parties have agreed that there will be three arbitrators chosen in the usual manner; and (3) the statement of claim.

[4] Contents of Statement of Claim

Article 18 of the UNCITRAL Arbitration Rules provides that the statement of claim shall include the following items:

- The names and addresses of the parties;
- A statement of the facts supporting the claim;
- The points at issue; and
- The relief or remedy sought.

The last three are the same as those required by *Code Civ. Proc. § 1297.231* [*Code Civ. Proc. § 1297.231*; for discussion, *see § 35.28[6]*]. Article 18 of the UNCITRAL Arbitration Rules provides that the statement of claim shall be provided to the respondent and to each of the arbitrators and shall be accompanied by a copy of the contract and of any separate arbitration agreement. Under both article 18 of the UNCITRAL Arbitration Rules and *Code Civ. Proc. § 1297.232*, the claimant may submit with the statement of claim all documents it deems relevant or may add a reference to the document or other evidence it intends to submit [*Code Civ. Proc. § 1297.232*].

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§ 35.71 Application for Order to Stay Proceedings and to Compel Arbitration Under International Commercial Agreement [9 U.S.C. § 206; Code Civ. Proc. § 1297.81]--Notice of Motion and Supporting Declaration

[1] FORM Application for Order to Stay Proceedings and to Compel Arbitration Under International Commercial Agreement [9 U.S.C. § 206; Code Civ. Proc. § 1297.81]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	NOTICE OF MOTION FOR ORDER TO STAY
_____ [*name*], Plaintiff, vs.	)	PROCEEDINGS AND TO COMPEL ARBITRA-
_____ [*name*], Defendant.	)	TION, SUPPORTING DECLARATION OF
	)	_____ [*name*], AND MEMOR-
	)	ANDUM OF POINTS AND AUTHORITIES
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		[Trial Date: _____]

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matters may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] will move for an order (1) staying the proceedings in the above-entitled action until arbitration is had in accordance with the agreement of the parties, and (2) compelling plaintiff to submit the matter to arbitration in accordance with the agreement of the parties. The motion will be made on the ground that the subject of the above-entitled action is a dispute that plaintiff and defendant agreed to submit to arbitration under an international commercial agreement within the meaning of Title 9.3 (*Sections 1297.11-1297.432 of the Code of Civil Procedure*); that defendant has demanded that plaintiff submit the matter to arbitration in accordance with the agreement of the parties, but plaintiff has refused to do so and has instead commenced this action; and that this Court is required by Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, by Section Title *9 United States Code Section 206*, and by *Sections 1297.81* and *1297.82 of the Code of Civil Procedure* to stay this proceeding and to compel arbitration in accordance with the agreement of the parties.

The motion will be based on this notice of motion, on the declaration(s) of _____[*name(s)*] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* vice-president in charge of international operations for defendant in this action. In that capacity, I am responsible for implementing and managing defendant's performance under the contract here at issue].

2. On or about _____ [*date*], plaintiff and defendant entered into a written agreement relating to _____ [*specify commercial nature of agreement or relationship, including, but not limited to, those listed in Code Civ. Proc. § 1297.16, e.g.,* a joint venture for the constitution and development of a retail, office, and residential condominium complex] [_____ (*if relevant to status of agreement as "international" or to place sought for arbitration, state location:* in Los Angeles, California)]. Under the terms of [Paragraph _____ of] that agreement, plaintiff and defendant agreed to arbitrate _____ [*describe scope of arbitration provision, e.g.,* any and all disputes arising under the agreement]. A copy of that agreement is attached hereto marked Exhibit "A"

and made a part hereof.

3. On or about _____ [*date*], a controversy arose between plaintiff and defendant in that _____ [*describe nature of controversy, e.g.,* defendant demanded that plaintiff contribute $534,200 for cost overruns, which plaintiff contends it is not required to do].

4. Their agreement requires that plaintiff and defendant submit this controversy for arbitration in _____ [a location determined by the arbitral tribunal *or specify location given in agreement, e.g.,* Los Angeles, California], in accordance with _____ [the procedures provided in that agreement *or as otherwise specified in agreement, e.g.,* the Commercial Arbitration Rules and Supplementary Procedures for International Commercial Arbitration of the American Arbitration Association].

5. By written notice dated _____, and received by plaintiff on _____ [*date*], defendant demanded that plaintiff submit this controversy to arbitration as agreed. A copy of that notice is attached hereto marked Exhibit "B" and made a part hereof.

6. Plaintiff has refused, and continues to refuse, to submit this controversy to arbitration, and instead on _____ [*date*] commenced this action relating to the same controversy.

[*EITHER*]

7. _____ [*Specify evidence or agreement that establishes that parties' places of business are located in different countries or that the subject matter of the agreement is related to commercial interests in more than one state, e.g.,* (As set forth in the initial recitals of their agreement,) (P)laintiff and defendant have their places of business in different states within the meaning of Sections 1297.13 and *1297.15 of the Code of Civil Procedure* in that plaintiff is incorporated under the laws of _____ [*country*] and has its place of business in _____ [*city and country*], while defendant is incorporated under the laws of _____ [*country*] and has its place of business in _____ [*city and country*].

[*OR*]

7. Plaintiff and defendant have expressly agreed [in Paragraph _____ of their agreement] that the subject matter of the agreement relates to commercial interests in more than one state within the meaning of *Sections 1297.13* and *1297.15 of the Code of Civil Procedure.*

[*OR*]

7. _____ [*Specify evidence or agreement that establishes the country in which both parties' places of business are located, e.g.,* (As seen from Paragraph _____ of their agreement,) (T)he places of business of both plaintiff and defendant (that have the closest relationship to the arbitration agreement) are in _____ (*country*); and _____ (*continue with as many of the following as are applicable*)].

[*EITHER*]

[Paragraph _____ of] the agreement provides that arbitration shall be conducted in _____ [*specify place in country other than the one in which plaintiff and defendant have their places of business, e.g.,* the United

States, specifically at Los Angeles, California].

[*AND/OR*]

_____ [*describe obligations to be performed in country other than the one in which plaintiff and defendant have their places of business, e.g.,* as seen from Paragraph _____ of the agreement, the construction is to occur in Los Angeles]; thus, a substantial part of the obligations of the commercial relationship here at issue is to be performed in _____ [*specify place in country other than the one in which plaintiff and defendant have their places of business, e.g.,* the United States, specifically at Los Angeles, California].

[*AND/OR*]

_____ [*describe why place in country other than the one in which plaintiff and defendant have their places of business has closest connection with matter to be arbitrated, e.g.,* because all planning meetings, all constructions, and all payments are to occur or be made in Los Angeles, California; Los Angeles permit procedures and building codes will apply; and the law of California was designated as controlling in Paragraph _____ of the agreement; thus, the United States, specifically Los Angeles, California, is most closely connected with the subject matter of this dispute].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion.*]

[2] Use of Form

The form of notice of motion with supporting declaration in [1], *above*, is for use by a party to an international commercial arbitration agreement as defined in *Code Civ. Proc. §§ 1297.11-1297.432* to apply for an order (1) to stay judicial proceedings commenced by another party to that agreement and seeking relief with respect to a matter covered by the arbitration agreement, and (2) to compel arbitration [*see Code Civ. Proc. § 1297.81*, discussed in *§ 35.21*; *see also 9 U.S.C. § 202*; *Code Civ. Proc. §§ 1297.13, 1297.15* (defining international and commercial and discussed in the § 35.11[2], [3])]. A memorandum of points and authorities must be served and filed with the form [*see Code Civ. Proc. §§ 1003, 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*].

A timely request for a stay of judicial proceedings made under *Code Civ. Proc. § 1297.81* shall be granted [*Code Civ. Proc. §§ 1297.82*]. The Convention and *9 U.S.C. § 206* also leave no discretion. The court must compel arbitration in accordance with an agreement covered by the Convention [Convention on Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, art. II; *9 U.S.C. § 206*; *see Bauhinia Corp. v. China Nat. Machinery & Equipment (9th Cir. 1987) 819 F.2d 247* , 249; *ATSA of California, Inc. v. Continental Ins. Co. (9th Cir. 1983) 702 F.2d 172* , 174-175, *modified with regard to other issues 754 F.2d 1394]* . The forms of orders in Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration,* §§ 32.96 and 32.98[2], may be combined, with appropriate

modifications, for use as an order to stay the proceeding and to compel arbitration under *Code Civ. Proc. §§ 1297.81-1297.82*. For a form of order denying a petition to compel arbitration, see *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.97*.

[3] Elements of Supporting Declaration

The supporting declaration in the form is designed to establish the following facts:

- That the parties agreed to submit to arbitration under an international commercial agreement within the meaning of *Code Civ. Proc. §§ 1297.11-1297.16* (Paragraphs 2 and 7);

- That the controversy is within the scope of the arbitration provision (Paragraphs 2 and 3);

- That defendant made a timely demand for arbitration in accordance with any procedures set forth or adopted by their agreement, and took any other steps required under that procedure (Paragraphs 4 and 5);

- Plaintiff's failure or refusal to submit to arbitration and commencement of the action (Paragraph 6); and

- The location at which the moving party seeks to have arbitration ordered, and the rules and procedures under which arbitration is to be conducted (Paragraph 4) [*see 9 U.S.C. § 206* (under Convention, court may compel arbitration at any place provided for in agreement); *Code Civ. Proc. § 1297.202* (when parties fail to designate place of arbitration, tribunal determines place having regard to circumstances of case)].

The alternative selections for Paragraphs 7 reflect the various subdivisions of *Code Civ. Proc. § 1297.13*, defining "international" [*see also* Convention on Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, art. I, para. 1; *9 U.S.C. § 202*; and discussions in *§§ 35.10* and *35.11[2]*]. For the purposes of *Code Civ. Proc. § 1297.13*, if a party has more than one place of business, "place of business" is the one that has the closest relationship to the arbitration agreement. If a party does not have a place of business, reference is to be made to his or her habitual residence [*Code Civ. Proc. § 1297.14*]. Also for the purpose of *Code Civ. Proc. § 1297.13*, the states of the United States, including the District of Columbia, are considered one state [*Code Civ. Proc. § 1297.15*].

[4] Motion or Petition

The motion is brought in the pending action or proceeding involving the arbitral matter [*Code Civ. Proc. § 1297.61*; *see Code Civ. Proc. §§ 1292.4, 1292.8* (motion to stay proceeding regarding matter agreed to be arbitrated; petition to compel arbitration; discussed in *§ 35.20[1]*]. Presumably, a state court would have jurisdiction to enforce the Convention and *9 U.S.C. § 206* by compelling arbitration when no action was pending regarding the arbitrable matter or when an action was pending in a foreign court [*see 9 U.S.C. § 203* (stating only that federal district courts have original jurisdiction, discussed in *§ 35.20[2]*); *see also Code Civ. Proc. § 1297.51* (California court is not prohibited from intervening when federal law provides for court intervention) and discussion in *§ 35.21*]. Then, the form would have to be adapted as a petition, and the matter would be subject to removal to a federal district court [*9 U.S.C. § 203* (original jurisdiction of federal district courts); *28 U.S.C. § 1441(a)* (removal of cases subject to federal district court's original jurisdiction); *see also 9 U.S.C. § 205* (removal of proceeding involving arbitrable matter)].

For a form of petition and a caption that may be adapted to compel arbitration in the context of an international commercial dispute, see *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.92*. The form should be modified by deleting allegations that relate only to California disputes and by including the statements in the supporting declaration of this form as allegations of the petition.

[5] Removal to Federal District Court

In addition to proceeding under *Code Civ. Proc. § 1297.81*, a party to an international commercial arbitration agreement who is faced with a judicial proceeding involving the arbitrable matter commenced by another party to that agreement may remove the state court proceeding to federal district court and move in federal court to compel arbitration [*9 U.S.C. § 205*; *see, e.g., I.T.A.D. Associates, Inc. v. Podar Bros. (4th Cir. 1981) 636 F.2d 75* , 76-77]. For discussion and forms relating to removal to federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal* , Pt. II.

[6] Cross References

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For discussion and forms relating to noticed motions and accompanying papers in general, see Ch. 372, *Motions and Orders*

For discussion and forms relating to service of papers generally, see Ch. 518, *Service of Summons and Papers* , Pt. II

For discussion and forms for use in shortening or extending time requirements, see Ch. 524, *Shortening and Extension of Time*

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Chapter 35 ARBITRATION AND CONCILIATION OF INTERNATIONAL COMMERCIAL DISPUTES
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4-35 California Forms of Pleading and Practice--Annotated § 35.72

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§ 35.72 Petition to Appoint, or Secure Appointment of, Arbitrator Under International Commercial Agreement [Code Civ. Proc. §§ 1297.114-1297.116]

[1] FORM Petition to Appoint, or Secure Appointment of, Arbitrator Under International Commercial Agreement [Code Civ. Proc. §§ 1297.114-1297.116]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Arbitration Between	)	
_____ [*name*], Petitioner, vs.	)	NO. _____
_____ [*name*], Respondent.	)	PETITION TO _____ [APPOINT
	)	ARBITRATOR *or specify other measures sought, e.g.,* DESIGNATE PANEL OF PROPOSED ARBITRATORS]

_____

Petitioner alleges:

1. Under the terms of [Paragraph _____ of] the agreement herein alleged, arbitration of the controversy herein alleged is to be conducted in _____ County, California.

2. On or about _____ [*date*], petitioner and respondent entered into a written agreement relating to

_____ [*specify commercial nature of agreement or relationship, including, but not limited to, those listed in Code Civ. Proc. § 1297.16, e.g.,* manufacture, distribution, and sale of automobiles]. Under the terms of [Paragraph _____ of] that agreement, petitioner and respondent agreed to arbitrate _____ [*describe scope of arbitration clause, e.g.,* any and all disputes arising under the agreement]. A copy of that agreement is attached hereto marked Exhibit "A" and made a part hereof.

3. _____ [*Specify evidence or portions of agreement that establish that the agreement is "international" within the meaning of Code Civ. Proc. §§ 1297.13-1297.15, e.g.,* (As set forth in the initial recitals of their agreement,) (P)etitioner and respondent have their places of business in different states within the meaning of Sections 1297.13 through 1297.15 of the Code of Civil Procedure in that petitioner is incorporated under the laws of _____ (*country*) and has its place of business in _____ (*city and country*), while respondent is incorporated under the laws of _____ (*country*) and has its place of business in _____ (*city and country*)].

4. On or about _____ [*date*], a controversy arose between petitioner and respondent in that _____ [*describe nature of controversy, e.g.,* respondent demanded that petitioner purchase from respondent for resale 250,000 more automobiles and trucks than petitioner purchased from respondent during the previous fiscal year or suffer termination of its exclusive distributor status in the United States. Petitioner contends that respondent's demand constitutes a breach of their agreement]. Petitioner and respondent are required by their agreement [and by an order by this court dated _____] to submit this controversy to arbitration [in accordance with _____ (the procedures provided in that agreement *or as otherwise specified in agreement, e.g.,* the Arbitration Rules of the United Nations Commission on International Trade Law in effect on the date of the agreement ("UNCITRAL Arbitration Rules"), using the American Arbitration Association as appointing authority)].

[*EITHER*]

5. [Paragraph _____ of] [T]he agreement provides that there shall be _____ [one *or* three *or specify other number*] arbitrators.

[*OR*]

5. The parties have not agreed on the number of arbitrators.

[*CONTINUE*]

[6. Petitioner and respondent have been, and still are, unable to agree on a procedure for appointing the arbitrator(s).]

[*EITHER, if there is no agreed procedure for appointment of sole arbitrator*]

7. Petitioner and respondent have been unable to agree on the sole arbitrator.

[*OR*]

7. The appointment procedure set forth in _____ [*specify paragraph of parties' agreement or number of institutional rule adopted, e.g.,* Article 7 of the UNCITRAL Arbitration Rules *or, if no appointment procedure has*

been agreed on by two parties to appoint three arbitrators, Section 1297.113 of the Code of Civil Procedure] has failed in that

[*CHOOSE whichever of the following is applicable or give other details of failure of appointment, e.g., EITHER*]

petitioner requested that respondent appoint an arbitrator. That request was received by respondent at its _____ (*specify place for receipt designated in Code Civ. Proc. § 1297.31 or 1297.32, e.g.,* mailing address as provided in the agreement,) on _____ (*date, which if proceeding under Code Civ. Proc. § 1297.114, is 30 days before date on which petition will be filed*). Respondent has failed and refused, and continues to fail and refuse, to appoint an arbitrator].

[*OR*]

respondent appointed _____ (*name*) as arbitrator, and petitioner received notice of that appointment on _____ (*date*); petitioner appointed _____ (*name*) as arbitrator, and respondent received notification of that appointment on _____ (*date*). _____ (Thirty *or other number of days specified by agreement or by institutional procedure adopted by parties*) days have elapsed and the two duly appointed arbitrators have failed to agree on the third arbitrator].

[*CONTINUE*]

WHEREFORE, petitioner prays this court, pursuant to Section _____ 1297.114 *or 1297.115 or 1297.116 of the Code of Civil Procedure*, to _____ [*specify relief sought, e.g.,* appoint the third arbitrator].

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party*]

[2] Use of Form

The petition in [1], *above*, is for use to obtain a court order to rectify any failure to appoint an arbitrator or to otherwise comply with any appointment procedure agreed on by the parties. It may be used in the following situations:

- When there is to be one arbitrator, but the parties have neither adopted an appointment procedure nor been able to agree on the sole arbitrator (Paragraphs 6 and first alternative 7) [*see Code Civ. Proc. § 1297.101* (one arbitrator when parties do not agree on number of arbitrators), *Code Civ. Proc. § 1297.115*, discussed in *§ 35.23[3]*];

- When the arbitration involves two parties who have agreed that there are to be three arbitrators, but have not adopted any appointment procedure, and either party has failed, for more than 30 days after receipt of a request to do so, to appoint an arbitrator (Paragraphs 6 and second alternative 7, first choice for conclusion) [*see Code Civ. Proc. § 1297.114*, discussed in *§ 35.23[2]*];

- When the arbitration involves two parties who have agreed that there are to be three arbitrators, but have not adopted any appointment procedure, each party has appointed an arbitrator, but the two appointed arbitrators have failed to agree on the third arbitrator within 30 days after their appointment (Paragraphs 6 and second alternative 7, second choice for conclusion) [*see Code Civ. Proc. § 1297.114*, discussed in *§ 35.23[2]*];

- When there is an agreed appointment procedure that does not provide any other means for securing appointment, and the parties, or two appointed arbitrators, fail to reach an agreement expected of them under that procedure (second alternative Paragraph 7) [*see Code Civ. Proc. § 1297.116(b)*, discussed in *§ 35.23[4]*]; or

- When there is an agreed appointment procedure that does not provide any other means for securing appointment, and a party to the agreement or any third party, including an institution, fails to act as required or to perform any function entrusted to it under that procedure (second alternative Paragraph 7) [*see Code Civ. Proc. § 1297.116(a),(c)*, discussed in *§ 35.23[4]*].

[3] Allegations

The form of petition alleges the following:

- Place at which venue lies (Paragraph 1) [*see Code Civ. Proc. § 1297.12* (*Code Civ. Proc. §§ 1297.114-1297.116* only applicable if place of arbitration is in California)].

- The formation of an agreement by the parties that is international within the meaning of *Code Civ. Proc. §§ 1297.13-1297.15* (Paragraph 3) and deals with a commercial subject matter (Paragraph 2) [*see Code Civ. Proc. § 1297.16*].

- The scope of the arbitration clause in that agreement (Paragraph 2).

- The existence of a controversy between the parties that is within the scope of the arbitration clause (Paragraph 4).

- The number of arbitrators agreed on by the parties or the fact that the parties have not agreed on the number of arbitrators (alternative Paragraphs 5) [*see Code Civ. Proc. § 1297.101* (one arbitrator when parties do not agree on number of arbitrators)].

- Whether there is a procedure for appointment of the arbitral tribunal (Paragraph 4 if yes; Paragraph 6 if no).

- The specifics of the breakdown of the appointment procedure (alternative Paragraphs 7).

[4] Jurisdiction and Venue

The superior court of the county in which the place of arbitration is located is the proper court for hearing of petitions in aid of the appointment procedure (see Paragraph 1) [*Code Civ. Proc. § 1297.61*].

It is not clear whether a California superior court would have jurisdiction under *Code Civ. Proc. §§ 1297.12, 1297.114-1297.116* if the agreement of the parties provides that the arbitral tribunal is to determine the place for arbitration. A similar situation would arise if the agreement is silent and *Code Civ. Proc. § 1297.202* governs to have

the tribunal determine the place for arbitration [*see Code Civ. Proc. § 1297.202*].

[5] Procedure

It appears that this petition, any papers on which it is based, and a notice of hearing of the petition should be served in accordance with *Code Civ. Proc. §§ 1290.2* and *1290.4*. Although *Code Civ. Proc. §§ 1290, 1290.2*, and *1290.4* (governing arbitration petitions, notice of hearings, and service of the petitions and notices, respectively) refer to proceedings under *Code Civ. Proc. §§ 1280-1294.2*, no other procedures are adopted by the sections on international commercial arbitration (*Code Civ. Proc. §§ 1297.11-1297.432*), and *Code Civ. Proc. §§ 1290-1291.2* are not specifically superseded by *Code Civ. Proc. §§ 1297.11-1297.432* [*see Code Civ. Proc. § 1297.17*]. *Code Civ. Proc. § 1290.4* is discussed in *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.92[1][e]*. For a form of notice of hearing of petition, see *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.92[2]*.

[6] Order

For a form of order that may be adapted for use with this petition, see *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, § 33.60[2]*.

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4-35 California Forms of Pleading and Practice--Annotated § 35.73

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§ 35.73 Petition to Determine Challenge to Arbitrator Appointed Under International Commercial Agreement [Code Civ. Proc. § 1297.134]

[1] FORM Petition to Determine Challenge to Arbitrator Appointed Under International Commercial Agreement [Code Civ. Proc. § 1297.134]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Arbitration Between	)	
_____ [*name*], Petitioner, vs.	)	NO. _____
_____ [*name*], Respondent.	)	PETITION TO DETERMINE CHALLENGE TO
	)	APPOINTMENT OF ARBITRATOR

_____

Petitioner alleges:

1. [*Venue. See § 35.72[1], Paragraph 1.*]

2. [*Formation of commercial agreement. See § 35.72[1], Paragraph 2.*]

3. [*International character of agreement. See § 35.72[1], Paragraph 3.*]

4. [*Existence of arbitrable controversy. See § 35.72[1], Paragraph 4, excluding final bracketed clause concerning institutional rules and procedures.*]

5. On _____ [*date*], _____ [petitioner *or* respondent] mailed a demand for arbitration to _____ [respondent *or* petitioner]. A copy of that demand is attached hereto, marked Exhibit "B," and made a part hereof. _____ [Respondent *or* Petitioner] received that demand for arbitration on _____ [*date*].

6. The parties have agreed that there shall be _____ [*number*] arbitrator(s) [and have adopted an appointment procedure], but they have not agreed on a procedure for challenging an arbitrator.

7. Petitioner first learned of the _____ [constitution of the arbitral tribunal *or* circumstances that were the basis of the challenge] on _____ [*date*].

8. On _____ [*date within 15 days after date in Paragraph 7*], petitioner sent written notice of challenge of _____ [*name of challenged arbitrator*] to the arbitral tribunal at _____ [*address*]. A copy of that challenge is attached hereto, marked Exhibit "C," and made a part hereof.

9. _____ [*Name of challenged arbitrator*] did not withdraw, nor did the parties agree to terminate his/her mandate. The arbitral tribunal considered the challenge and issued its determination rejecting the challenge on _____ [*date*]. [A copy of the determination rejecting the challenge is attached hereto, marked Exhibit "D," and made a part hereof.]

10. Petitioner received notice of the arbitral tribunal's rejection of the challenge on _____ [*date within 30 days before filing of petition*].

WHEREFORE, petitioner prays:

1. For a determination by this court that _____ [*name of challenged arbitrator*] is disqualified from serving as arbitrator is this matter;

2. For an order requiring _____ [*specify replacement procedure desired, e.g.* the two remaining arbitrators to select a third arbitrator to replace _____ (*name of challenged arbitrator*)];

3. For costs of suit incurred herein [including reasonable attorney's fees]; and

4. For such other and further relief as to the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party*]

[2] Use of Form

The form of petition in [1], *above*, is for use by a party to an international commercial dispute whose challenge of an arbitrator under *Code Civ. Proc. § 1297.132* has been rejected by the arbitral tribunal. The petition is used to seek a

determination of the challenge by the superior court of the county in which the place of arbitration is located [*Code Civ. Proc. § 1297.134*; *see Code Civ. Proc. § 1297.61* (venue); *see also* discussion in *§ 35.24[3]*].

For discussion of notice of hearing and service, see *§ 35.72[5]*.

If the parties have agreed on a challenge procedure, a decision under that procedure is final, and this form will not be applicable [*see Code Civ. Proc. § 1297.131*].

It is not clear whether a California superior court would have jurisdiction under *Code Civ. Proc. §§ 1297.61*, *1297.132-1297.134* if the agreement of the parties provides that the arbitral tribunal is to determine the place for arbitration (see Paragraph 1). A similar situation would arise if the agreement was silent and *Code Civ. Proc. § 1297.202* governs to have the tribunal determine the place for arbitration [*see Code Civ. Proc. § 1297.202*].

For a discussion of the procedures applicable to replacement of an arbitrator who is challenged or whose mandate terminates for any reason, see *§ 35.25[3]*.

[3] Allegations

The form of petition alleges the following:

- The commencement of the arbitration (Paragraph 5) [*see Code Civ. Proc. § 1297.211*].

- The number of arbitrators agreed on by the parties and their lack of agreement on a challenge procedure (Paragraph 6).

- The appointment of the arbitral tribunal, and the date on which petitioner first learned of the constitution of the tribunal or the grounds for the challenge (Paragraph 7).

- Petitioner's challenge, and the date on which it was made (Paragraph 8).

- The failure of the challenged arbitrator to withdraw, and of the parties to agree to terminate the mandate of the challenged arbitrator (Paragraph 9).

- The arbitral tribunal's rejection of the challenge (Paragraph 9).

- The date on which petitioner received the rejection (Paragraph 10).

Note that Paragraph 8 incorporates the challenge and assumes that the grounds stated in that challenge are sufficient for purposes of this petition [*see Code Civ. Proc. § 1297.124*].

[4] Superior Court's Decision

If a challenge is based on the grounds set forth in *Code Civ. Proc. § 1297.121* (discussed in the Introduction under Challenging Arbitrators--Disclosures by Arbitrators and Conciliators, *above*), and the superior court determines that the facts support a finding that the ground or grounds fairly exist, then the challenge should be sustained [*Code Civ. Proc. § 1297.134*]. The superior court's decision is final and is not subject to appeal [*Code Civ. Proc. § 1297.135*].

[5] Continuation of Arbitral Proceedings Pending Challenge

While a request under *Code Civ. Proc. § 1297.134* is pending, the arbitral tribunal, including the challenged arbitrator,

may continue with the arbitral proceedings and make an arbitral award [*Code Civ. Proc. § 1297.136*].

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4-35 California Forms of Pleading and Practice--Annotated § 35.74

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§ 35.74 Petition to Determine Termination of Mandate of Arbitrator Appointed Under International Commercial Agreement for Failure or Inability to Perform or After Withdrawal [Code Civ. Proc. § 1297.142]

[1] FORM Petition to Determine Termination of Mandate of Arbitrator Appointed Under International Commercial Agreement for Failure or Inability to Perform or After Withdrawal [Code Civ. Proc. § 1297.142]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Arbitration Between	)	
_____ [*name*], Petitioner, vs.	)	NO. _____
_____ [*name*], Respondent.	)	PETITION TO DETERMINE TERMINATION OF MANDATE OF ARBITRATOR _____ [FOR FAILURE OR INABILITY TO PERFORM *or* AFTER WITHDRAWAL]
	)	

_____

Petitioner alleges:

1. [*Venue. See § 35.72[1], Paragraph 1.*]

2. [*Formation of commercial agreement. See § 35.72[1], Paragraph 2.*]

3. [*International character of agreement. See § 35.72[1], Paragraph 3.*]

4. [*Existence of arbitrable controversy. See § 35.72[1], Paragraph 4.*]

5. [*Commencement of arbitration. See § 35.73[1], Paragraph 5.*]

6. On _____ [*date*], the arbitral tribunal was appointed. That panel consisted of _____[*name(s)*].

7. On _____ [*date*], _____ [petitioner *or* respondent] submitted its statement of claim. On _____ [*date*], _____ [respondent *or* petitioner] submitted its statement of defense. [*Continue as necessary to specify point in arbitration process at which arbitrator ceased to act.*].

8. _____ [*Specify instance(s) of arbitrator's failure or impossibility to act or withdrawal, e.g.,* On _____ (*date*) _____ (*name of arbitrator who has withdrawn, etc.*) became ill, was hospitalized, and ever since has failed to act in this matter].

9. A controversy exists between petitioner and respondent in that petitioner contends that _____ [*name of arbitrator who has withdrawn, etc.*] _____ [is unable to act *or* has failed to act *or* has withdrawn] and that his/her mandate as arbitrator is terminated and appointment of a replacement is required, whereas respondent contends that _____ [*specify, e.g.,* _____'s (*name of arbitrator who has withdrawn, etc.*) illness is temporary, has caused no prejudice to either party,] and does not constitute grounds for termination of his/her mandate as arbitrator.

WHEREFORE, petitioner prays:

1. For a determination by this court that _____ [*name of arbitrator who has withdrawn, etc.*] _____ [is unable to act *or* has failed to act *or* has withdrawn] and that his/her mandate as arbitrator is terminated;

2. For an order requiring _____ [*specify replacement procedure desired, e.g.* the two remaining arbitrators to select a third arbitrator to replace _____ (*name of arbitrator who has withdrawn, etc.*)];

3. For costs of suit incurred herein [including reasonable attorney's fees]; and

4. For such other and further relief as to the court may deem proper.

_____[*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party*]

[2] Use of Form

The form of petition in [1], *above*, is for use by a party to an international commercial dispute to seek a judicial determination of a controversy regarding the termination of an arbitrator's mandate because of that arbitrator's de facto or de jure inability to perform, or failure to act without undue delay, or withdrawal from office [*Code Civ. Proc. §§*

1297.141-1297.142; *see* discussion in *§ 35.25[1], [2]*]. In addition to termination under challenge or because of a failure or inability to act, the mandate of an arbitrator terminates on his or her withdrawal from office for any reason, or by or pursuant to agreement of the parties [*Code Civ. Proc. § 1297.151*]. For discussion of the procedures for replacement of an arbitrator whose mandate has terminated, see the discussion in *§ 35.25[3]*.

For discussion of notice of hearing on this petition and discussion of service, see *§ 35.72[5]*.

[3] Venue

No venue is specified for this petition. However, because most other judicial functions relating to the arbitration process, such as petitions regarding appointment and challenge of arbitrators, are properly addressed to the superior court in the county in which the place of arbitration is located, it appears that failure to specify the superior court of the county in which the place of arbitration is located as the proper court for the foregoing petition was a legislative oversight [*see Code Civ. Proc. § 1297.61* (venue for other matters)]. Still, if the agreement of the parties provides that the arbitral tribunal is to determine the place for arbitration or the agreement is silent and *Code Civ. Proc. § 1297.202* governs to have the tribunal determine the place for arbitration, and the failure, impossibility, or withdrawal occur before the tribunal has determined the place for arbitration, it is unclear where venue would lie.

[4] Allegations

The form of petition alleges the following:

- The appointment of the arbitral tribunal, and the date of appointment (Paragraph 6).
- The stage of the arbitration process at which the arbitrator ceased to act (Paragraph 7).
- The specific failure or impossibility of performance by the arbitrator, or his or her withdrawal (Paragraph 8).
- The existence of a controversy between the parties regarding the termination of the arbitrator's mandate (Paragraph 9).

[5] Superior Court's Decision

The decision of the superior court under *Code Civ. Proc. § 1297.142* is final and is not subject to appeal [*Code Civ. Proc. § 1297.143*].

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§ 35.75 Petition to Determine Jurisdiction of Arbitral Tribunal Appointed Under International Commercial Agreement [Code Civ. Proc. § 1297.166]

[1] FORM Petition to Determine Jurisdiction of Arbitral Tribunal Appointed Under International Commercial Agreement [Code Civ. Proc. § 1297.166]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Arbitration Between	)	
_____ [*name*], Petitioner, vs.	)	NO. _____
_____ [*name*], Respondent.	)	PETITION TO DETERMINE JURISDICTION OF
	)	ARBITRAL TRIBUNAL

_____

Petitioner alleges:

1. [*Venue. See § 35.72[1], Paragraph 1.*]

2. [*Formation of commercial agreement. See § 35.72[1], Paragraph 2.*]

3. [*International character of agreement. See § 35.72[1], Paragraph 3.*]

4. On or about _____ [*date*], a controversy arose between petitioner and respondent in that _____ [*describe nature of controversy, e.g.,* after the basic engineering studies had been completed and bids submitted to local contractors, respondent failed and refused to perform under the parties' joint venture agreement and submitted bids on its own behalf to complete the construction as sole developer. Petitioner contends that respondent's actions constitute a breach of the parties' agreement, breach of respondent's fiduciary duties to petitioner, and conversion of proprietary information of the joint venture].

5. [*Commencement of arbitration. See § 35.73[1], Paragraph 5.*]

[6. *Appointment of arbitral tribunal. See § 35.74[1], Paragraph 6.*]

[*EITHER, if jurisdictional challenge raised in statement of defense*]

7. On _____ [*date*], petitioner submitted its statement of defense, which included a plea that the arbitral tribunal has no jurisdiction to determine this controversy because _____ [*specify, e.g.* Paragraph 14 of the agreement provides that disputes arising under the contract be submitted to arbitration, whereas the claim for conversion did not arise under the contract]. A copy of [the statement of defense and] the plea that the arbitral tribunal has no jurisdiction to determine this controversy is attached hereto, marked Exhibit "C," and made a part hereof.

[*OR, if jurisdictional challenge raised during arbitral proceeding*]

7. On _____ [*date*], petitioner submitted its statement of defense. Petitioner and respondent submitted documents and written evidence to the arbitral tribunal[; and the arbitral tribunal conducted oral hearings regarding this controversy] on _____ [*date(s)*]. On _____ [*date*], petitioner first learned that the tribunal was taking evidence and considering the issue of _____ [*specify, e.g.,* conversion]. Petitioner immediately objected orally that the arbitral tribunal was exceeding the scope of its authority by considering _____ [*specify, e.g.,* the conversion claim]. On _____ [*date*], petitioner submitted a similar plea to the tribunal in writing. A copy of that plea is attached hereto, marked Exhibit "C," and made a part hereof.

[*CONTINUE*]

8. The arbitral tribunal ruled as a preliminary matter that it has jurisdiction to determine _____ [*specify issue(s) or entire controversy, e.g.,* this controversy]. Petitioner received notice of that ruling, a copy of which is attached hereto, marked Exhibit "D," and made a part hereof, on _____ [*date within 30 days before date on which this petition is to be filed*].

WHEREFORE, petitioner prays:

1. For a determination by this court that the _____ [*specify issue(s) or entire controversy, e.g.,* existing controversy between petitioner and respondent] is not subject to arbitration under the agreement, and therefore, the arbitral tribunal does not have jurisdiction to determine _____ [*specify issue(s) or entire controversy claimed to be beyond scope of tribunal's authority, e.g.,* this controversy];

2. For an order requiring respondent to cease and refrain from proceeding with the arbitration of the _____ [*specify issue(s) or entire controversy claimed to be beyond scope of tribunal's authority, e.g.,*

controversy herein alleged];

3. For costs of suit incurred herein [including reasonable attorney's fees]; and

4. For such other and further relief as to the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party*]

[2] Use of Form

The form of petition in [1], *above*, is for use by a party to an international commercial dispute to seek a judicial determination that the arbitral tribunal is without jurisdiction, or is exceeding the scope of its jurisdiction. This procedure is only available if the three following conditions are satisfied:

- The plea regarding the tribunal's lack of, or acts in excess of, jurisdiction was first raised in a timely manner [*Code Civ. Proc. §§ 1297.162-1297.164*];

- The arbitral tribunal ruled as a preliminary matter that is has jurisdiction [*see Code Civ. Proc. § 1297.161*, discussed in *§ 35.26[1]*]; and

- The petitioner filed the request with the superior court within 30 days after receiving notice of the tribunal's ruling [*Code Civ. Proc. § 1297.166*; *see* discussion in *§ 35.26[2]*].

For discussion of notice of hearing on the petition and discussion of service, see *§ 35.72[5]*.

[3] Arbitration Not to Be Restrained

Unlike domestic arbitration under *Code Civ. Proc. §§ 1280-1284.2* [*see Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, §§ 33.74, 33.75*], international commercial arbitration cannot be restrained during the pendency of a superior court's consideration of a request for determination of the arbitral tribunal's jurisdiction. While a request to the superior court is pending, the arbitral tribunal may continue with the arbitral proceedings, and may make an arbitral award [*Code Civ. Proc. § 1297.167*]. *Code Civ. Proc. § 1297.167* is in accord with federal decisions interpreting the Convention as creating a presumption in favor of arbitrability, even if, after permitting the arbitration to go forward, a United States court could refuse enforcement of the arbitral award [*see, e.g., Mitsubishi Motors v. Soler Chrysler-Plymouth (1985) 473 U.S. 614, 629-639, 105 S. Ct. 3346, 87 L. Ed. 2d 444* ; *Management & Tech. Consultants v. Parsons-Jurden (9th. Cir. 1987) 820 F.2d 1531* , 1534].

[4] Allegations

The form of petition alleges the particulars of the controversy at issue (Paragraph 4), which are to be compared with the particulars of the arbitration clause as alleged in Paragraph 2. Paragraphs 5-7 are designed to allege the stage of the arbitration proceeding at which petitioner first raised the plea that the arbitral tribunal did not have jurisdiction or was acting in excess of its jurisdiction [*see Code Civ. Proc. §§ 1297.162-1297.164*]. Paragraph 8 alleges the receipt by petitioner of the tribunal's ruling within 30 days before the date on which the petition was filed with the superior court [

Code Civ. Proc. § 1297.166].

[5] Jurisdiction and Venue

The superior court of the county in which the place of arbitration is located is the proper court for the hearing of a petition to determine whether the arbitral tribunal has jurisdiction or is exceeding the scope of its authority [*Code Civ. Proc. § 1297.61*].

[6] Award in Excess of Jurisdiction

It is not likely that *Code Civ. Proc. § 1297.166* grants authority to the superior court to enjoin the respondent or the arbitral tribunal from continuing with the arbitration if the court determines that the arbitral tribunal is acting in excess of its jurisdiction. Generally, the appropriate procedure would be to attack the award by a petition to vacate it, or by opposing a petition to confirm it [*see* Convention on Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, art. V, para. 1(c) (refusing enforcement of award in excess of powers granted by arbitration clause); *9 U.S.C. § 207*; *see also 9 U.S.C. §§ 9, 10*; *Code Civ. Proc. § 1285* (petitions to vacate or confirm arbitral awards); *Mediterranean Enterprises, Inc. v. Ssangyong (9th Cir. 1983) 708 F.2d 1458* , 1465 (arbitral award regarding matter beyond scope of arbitration clause is not to be given effect by court)]. For forms that may be adapted for use to oppose confirmation of or to vacate an international commercial arbitral award, see *Ch. 34, Contractual Arbitration: Judicial Review, § 34.52* (response to petition to confirm) and § 34.56 (petition to vacate).

California Forms of Pleading and Practice--Annotated

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 36 JUDICIAL ARBITRATION

4-36 California Forms of Pleading and Practice--Annotated 36.syn

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§ 36.syn Synopsis to Chapter 36: JUDICIAL ARBITRATION

§ 36.01 Scope of Chapter

§ 36.02 Cross References

§§ 36.03-36.09 [Reserved]

§ 36.10 Governing Statutes

§ 36.11 Terminology

§ 36.12 Judicial Arbitration in Civil Cases

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§ 36.14 Nature of Judicial Arbitration

[1] Generally

[2] Res Judicata and Collateral Estoppel Effect of Award

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§ 36.15 When Compulsory Arbitration Required

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[b] Motor Vehicle Collisions

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§ 36.16 Arbitration by Stipulation or by Plaintiff's Election

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§ 36.17 Actions Exempt From Arbitration

§ 36.18 Determination Regarding Judicial Arbitration at Case Management Conference

§ 36.19 Determination of Amount in Controversy

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[2] Basis for Determination

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[4] Earliest Time for Arbitration Hearing

§ 36.20 Panel of Arbitrators

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§ 36.21 Selection of Arbitrator

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[2] In Accordance With Local Rules

[3] When First Arbitrator Chosen Declines to Serve

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§ 36.22 Disqualification of Arbitrator

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§ 36.23 Setting Arbitration Hearing Date and Location

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§ 36.25 Continuances of Arbitration Hearing Dates

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§ 36.29 Arbitration Hearing

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[2] Rules of Evidence

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§ 36.30 Arbitration Award

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[2] Service of Notice of Award

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§ 36.32 Relief Based on Mistake, Inadvertence, Surprise, or Excusable Neglect

§ 36.33 Appeal Regarding Costs Determined by Trial Court

§ 36.34 Trial de Novo

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[4] Party Proceeding in Forma Pauperis

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[1] Application of Dismissal Statutes to Action Submitted to Judicial Arbitration

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[iii] Period Tolled Whether Action Is Arbitrated by Election or Under Court Order

[c] Post-Arbitration Tolling Under Code Civ. Proc. § 1141.20

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[iii] What Constitutes Reasonable Diligence

[d] Post-Arbitration Tolling for Impossibility, Impracticability, or Futility Under Code Civ. Proc. § 583.340(c)

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§ 36.39 Sanctions

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[3] Judicial Council Rules

[4] Arbitrators

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[1] Actions Subject to Arbitration

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[5] Plaintiff's Election to Arbitrate

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[1] Alameda County

[2] Contra Costa County

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[6] Discovery

[7] Interest on Award

[8] Right to Trial de Novo

[9] Request for Trial de Novo

[10] Procedure After Request for Trial de Novo

[11] Dismissal for Delay in Prosecution

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[b] Tolling Under Code Civ. Proc. § 1141.20

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§ 36.60 Initiation of Arbitration

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[3] Defendant or Cross Complainant's Response to Plaintiff's Election

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§ 36.61 Appointment of Arbitrator

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§ 36.63 Prepare Client and Witnesses

§ 36.64 Pre-arbitration Conference

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§ 36.66 Trial de Novo

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§ 36.70 Stipulation for Judicial Arbitration With Consent of Arbitrator [Code Civ. Proc. §§ 1141.12(a); Cal. Rules of Ct., Rules 3.726, 3.811(a)(4), 3.812(a)]

[1] FORM

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[3] Contents of Stipulation

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[5] Tolling of Time Periods for Bringing Action to Trial

[6] Cross References

§ 36.71 Plaintiff's Election of Judicial Arbitration [Code Civ. Proc. § 1141.12(b); Cal. Rules of Ct., Rule 3.811(a)(5)].

[1] FORM

[2] Use of Form

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§ 36.73 Proceedings for Order To Delay Arbitration Hearing--By Defendant [Cal. Rules of Ct., Rule 3.812(b)]

[1] Notice of Motion and Supporting Declaration

[a] FORM

[b] Use of Form

[c] Points and Authorities

[2] Order

[a] FORM

[b] Use of Form

§ 36.74 Proceedings for Order To Determine Amount in Controversy on Cross Complaint and Remove Case From List of Cases Assigned to Arbitration Hearing List--By Cross Complainant [Cal. Rules of Ct., Rule 3.812(c)]

[1] Notice of Motion and Supporting Declaration

[a] FORM

[b] Use of Form

[c] Points and Authorities

[2] Order

[a] FORM

[b] Use of Form

§ 36.75 Rejection of Arbitrator [Code Civ. Proc. § 1141.18; Cal. Rules of Ct., Rule 3.815]

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[2] Use of Form

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§ 36.76 Request for Disqualification of Arbitrator [Code Civ. Proc. § 1141.18; Cal. Rules of Ct., Rule 3.816]

[1] FORM

[2] Use of Form

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§ 36.77 Proceedings for Order to Vacate Appointment of Arbitrator [Code Civ. Proc. § 1141.18(d); Cal. Rules of Ct., Rule 3.816(d)]

[1] Notice of Motion and Supporting Declaration

[a] FORM

[b] Use of Form

[c] Points and Authorities

[2] Order

[a] FORM

[b] Use of Form

§ 36.78 Proceedings for Order to Continue Arbitration Hearing [Cal. Rules of Ct., Rule 3.818(b)]

[1] Notice of Motion and Supporting Declaration

[a] FORM

[b] Use of Form

[c] Points and Authorities

[2] Order

[a] FORM

[b] Use of Form

§ 36.79 Proceedings to Offer Written Statement or Deposition in Evidence [Cal. Rules of Ct., Rule 3.823]

[1] Notice of Intent to Offer Written Statement or Deposition in Evidence

[a] FORM

[b] Use of Form

[c] Time Requirement

[d] Response

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[a] FORM

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§ 36.80 Proceedings for Order to Vacate Judgment--Arbitrator Subject to Disqualification [Cal. Rules of Ct., Rule 3.828]

[1] Notice of Motion and Supporting Declaration

[a] FORM

[b] Use of Form

[c] Points and Authorities

[2] Order

[a] FORM

[b] Use of Form

§ 36.81 Request for Trial de Novo After Arbitration [Code Civ. Proc. § 1141.20; Cal. Rules of Ct., Rule 3.826]--Judicial Council Form ADR-102

[1] FORM

[2] Use of Form

[3] Time for Request Cannot Be Extended

[4] Cross References

§ 36.82 Proceedings for Order Finding Imposition of Costs and Fees to Create Substantial Economic Hardship [Code Civ. Proc. § 1141.21; Cal. Rules of Ct., Rule 3.826(d)]

[1] Notice of Motion and Supporting Declaration

[a] FORM

[b] Use of Form

[c] Points and Authorities

[2] Order

[a] FORM

[b] Use of Form

Hon. Richard C. Neal
Editorial Consultant n*

FOOTNOTES:
(n26)Footnote *.
Richard C. Neal is an Associate Justice, California Court of Appeal, Second District. He was appointed to the Los Angeles Superior Court in 1992 after nearly twenty years in private practice in Los Angeles. Justice Neal served for several years as Chair of the Superior Court's Alternative Dispute Resolution Committee and oversaw implementation in Los Angeles County of the pilot civil action mediation program mandated by *Code of Civil Procedure Section 1775 et seq.*

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Chapter 36 JUDICIAL ARBITRATION
PART I. SCOPE

4-36 California Forms of Pleading and Practice--Annotated § 36.01

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§ 36.01 Scope of Chapter

This chapter discusses judicially mandated non-binding arbitration pursuant to *Code Civ. Proc. § 1141.10 et seq.* and *Cal. Rules of Ct., Rule 3.810 et seq.* The chapter contains the following forms:

- Forms of stipulation or election of judicial arbitration [*see §§ 36.70 -36.71*].
- Forms to delay, continue, or remove a case from arbitration [*see §§ 36.73 -36.74, 36.78*].
- Forms pertaining to the rejection or appointment of an arbitrator [*see §§ 36.75 -36.77*].
- Forms to offer writings and depositions in evidence [*see § 36.79*].
- Forms of motion and order to vacate a judgment [*see § 36.80*].
- Forms to request a trial de novo and for use after the trial de novo [*see § 36.81 -36.82*].

This chapter also contains a Procedural Checklist of matters to consider before, during, and after judicial arbitration [*see §§ 36.60* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute

ResolutionArbitrationsGeneral Overview

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Chapter 36 JUDICIAL ARBITRATION
PART I. SCOPE

4-36 California Forms of Pleading and Practice--Annotated § 36.02

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§ 36.02 Cross References

For discussion and forms pertaining to contractual arbitration pursuant to *Code Civ. Proc. § 1280 et seq.*, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration ;* Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding ;* and Ch. 34, *Contractual Arbitration: Judicial Review* .

For discussion and forms pertaining to civil action mediation under *Code Civ. Proc. § 1775 et seq.* see Ch. 37, *Judicially Mandated Civil Action Mediation* .

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PART I. SCOPE

4-36 California Forms of Pleading and Practice--Annotated §§ 36.03-36.09

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[Reserved]

§§ 36.03[Reserved]

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Chapter 36 JUDICIAL ARBITRATION
PART II. LEGAL BACKGROUND

4-36 California Forms of Pleading and Practice--Annotated § 36.10

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§ 36.10 Governing Statutes

The judicially mandated non-binding arbitration of civil cases is governed by *Code Civ. Proc. §§ 1141.10-1141.31, Cal. Rules of Ct., Rules 3.720 et seq., 3.810 et seq.*, and local court rules.

Code Civ. Proc. §§ 1141.10-1141.31 apply to any civil action in which a party to the action is a public agency or public entity [*Code Civ. Proc. § 1141.27*]. The provisions of *Code Civ. Proc. §§ 1141.10-1141.31* governing judicial arbitration are not to be construed in derogation of the provisions of *Code Civ. Proc. §§ 1280-1294.2* governing enforcement of arbitration agreements. To that extent, the provisions of *Code Civ. Proc. §§ 1141.10-1141.31* and *Code Civ. Proc. §§ 1280-1294.2* are mutually exclusive and independent of one another [*Porreco v. Red Top RV Center (1989) 216 Cal. App. 3d 113, 118-119, 264 Cal. Rptr. 609* (citing *Code Civ. Proc. § 1141.30*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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Chapter 36 JUDICIAL ARBITRATION
PART II. LEGAL BACKGROUND

4-36 California Forms of Pleading and Practice--Annotated § 36.11

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§ 36.11 Terminology

Some courts have stated that "judicial arbitration" is obviously an inept term, for the system it describes is neither judicial nor arbitration; the hearing is not necessarily conducted by a judge, and the right to a trial de novo removes the finality of true arbitration [*Flynn v. Gorton (1989) 207 Cal. App. 3d 1550, 1555 n.2, 255 Cal. Rptr. 768* , generally quoting *Dodd v. Ford (1984) 153 Cal. App. 3d 426, 432 n.7, 200 Cal. Rptr. 256]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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Chapter 36 JUDICIAL ARBITRATION
PART II. LEGAL BACKGROUND

4-36 California Forms of Pleading and Practice--Annotated § 36.12

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§ 36.12 Judicial Arbitration in Civil Cases

Judicial arbitration in civil cases is intended to provide parties already involved in legal proceedings a simplified and economical alternative to a trial for obtaining prompt and equitable resolution of their disputes while retaining their right to civil trial by jury or before the court if they are not satisfied with the results of arbitration hearings [*Code Civ Proc. § 1141.10*; *see Code Civ. Proc. § 1141.20*]. Judicial arbitration of civil cases will occur under any of the following circumstances [*Code Civ. Proc. §§ 1141.11, 1141.12*; *Cal. Rules of Ct., Rule 3.811(a)*]:

- When the court determines the amount in controversy in the action will not exceed $50,000 for each plaintiff [*see § 36.19*].

- When each plaintiff elects to place the matter into arbitration and agrees the arbitration award will not exceed $50,000 as to that plaintiff [*see § 36.16*].

- When the parties to a legal action agree by stipulation to submit the matter to arbitration prior to any trial [*see § 36.16*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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Chapter 36 JUDICIAL ARBITRATION
PART II. LEGAL BACKGROUND

4-36 California Forms of Pleading and Practice--Annotated § 36.13

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§ 36.13 Trial Court Delay Reduction Act

Superior courts in all California counties are required to implement delay reduction programs [*Gov. Code §§ 68605.5, 68620*].

An order may be made referring an action to mediation at any status conference held 30 or more days after service of first responsive pleadings [*Gov. Code § 68616(e), (g)*]. However, no case may be referred to arbitration prior to 210 days after the filing of the complaint, exclusive of the stipulated period provided for by Gov. Code § 68816(d) [Gov. Code § 68816(g)].

PRACTICE TIP:

Mediation Alternative May Be Held Sooner. Judicially mandated mediation is an alternative to judicially mandated arbitration in counties that have adopted the mediation program established under *Code Civ. Proc. § 1775 et seq.* [for discussion of this type of mediation, *see* Ch. 37, *Judicially Mandated Civil Action Mediation*]. Mediations are not subject to the requirement that 210 days elapse between filing and hearing, hence mediations can be held sooner than arbitrations. *Hon. Richard C. Neal*

For further discussion of the act and the local delay reduction rules, see Ch. 552, *Trial Court Delay Reduction* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 36 JUDICIAL ARBITRATION
PART II. LEGAL BACKGROUND

4-36 California Forms of Pleading and Practice--Annotated § 36.14

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§ 36.14 Nature of Judicial Arbitration

[1] Generally

Unlike commercial or true arbitration, judicial arbitration is not binding to the extent that any party dissatisfied with an award may, under Code Civ. Proc. § 1411.20, elect trial de novo [*see § 36.34*]. The Legislature, however, seeking to encourage finality of judicial arbitration awards, enacted disincentives to trial de novo. For example, if a party requesting trial do novo does not obtain a more favorable judgment, he or she is liable for significant costs and fees under *Code Civ. Proc. § 1141.21* [*Flynn v. Gorton (1989) 207 Cal. App. 3d 1550, 1555, 255 Cal. Rptr. 768* ; *see § 36.36*].

Discouraging trial de novo is essential to the proper functioning of the judicial arbitration system. Along with its goal of resolving small claims efficiently and affordably, judicial arbitration is intended to ease court caseloads, and the success of judicial arbitration in achieving these goals is partially dependent on a small incidence of trial de novo elections [*Flynn v. Gorton (1989) 207 Cal. App. 3d 1550, 1555, 255 Cal. Rptr. 768* , citing Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience, 38 Hastings L.J. 239, 292 (1987)*]. In addition, anecdotal evidence suggests that a number of cases in which requests for trial de novo are filed settle soon after the request is made, for a sum closely similar to the amount awarded in the arbitration. In these cases it appears that the trial de novo request was filed simply to preserve negotiating room, not because the requesting party intended to go to trial. A degree of relief from court congestion is achieved in these cases as well.

[2] Res Judicata and Collateral Estoppel Effect of Award

[a] Res Judicata

Code Civ. Proc. § 1141.23 provides that a final award shall have the same force and effect as a judgment in any civil action or proceeding, except that it shall not be subject to appeal and it may not be attacked or set aside except as provided in *Code Civ. Proc. §§ 473, 1286.2,* or Judicial Council rule [*see § 36.30*[4]]. Thus, if a trial de novo is not requested within the statutory period, a judicial arbitration award becomes final and is not subject to appeal. Accordingly, a final judicial arbitration award, if clear and unambiguous and not set aside as indicated above, is res judicata in any subsequent proceeding on the same cause of action [*Flynn v. Gorton (1989) 207 Cal. App. 3d 1550, 1555, 255 Cal. Rptr. 768* ; *see also State Farm Mut. Auto. Ins. Co. v. Superior Court (1989) 211 Cal. App. 3d 5, 11-12, 12 n.6, 259 Cal. Rptr. 50* ; compare *Nicholson v. Fazeli (2003) 113 Cal. App. 4th 1091, 1102-1103, 6 Cal. Rptr. 3d 881* (res judicata did not bar malicious prosecution action after judicial arbitration of character of marital property pursuant to *Fam. Code § 2554* because different primary rights were involved and compensation in family court was limited by *Fam. Code §§ 271* and *2030*)].

[b] Collateral Estoppel

While judicial arbitration awards are accorded claim preclusion (res judicata) effect [*see* [a], *above*], they may not have issue preclusion (collateral estoppel) effect in a subsequent suit between the parties on a different cause of action [*see State Farm Mut. Auto. Ins. Co. v. Superior Court (1989) 211 Cal. App. 3d 5, 259 Cal. Rptr. 50* ; *Flynn v. Gorton (1989) 207 Cal. App. 3d 1550, 1552-1553, 1555-1556, 255 Cal. Rptr. 768]* . In *Flynn* the court held that judicial arbitration awards do not have collateral estoppel effect for the following reasons [*Flynn v. Gorton (1989) 207 Cal. App. 3d 1550, 1552-1553, 1555-1556, 255 Cal. Rptr. 768]* :

- Because no record is made of arbitration proceedings and generally no findings of fact or conclusions of law are required, it is difficult to determine from the award alone what issues were actually litigated and how they were resolved.

- Even if it could be determined from the award alone what issues were actually litigated and how they were resolved, it would still be unfair to bind the parties to judicially arbitrated resolutions of issues since the doctrine of collateral estoppel is based on the premise that a thorough fact-finding process was completed in the first proceeding, but in judicial arbitration the low monetary amount in controversy and the option of trial de novo can leave parties without a serious incentive to thoroughly litigate the issues.

- It is unlikely that parties would expect a judicial arbitration award to have collateral estoppel effect in other proceedings in which the stakes may be higher than they were in the arbitration proceeding.

- If they did so expect, the result might be intensified litigation, delays, and costs, as well as an increased rate of trial de novo election, which would be directly contrary to the purposes underlying judicial arbitration legislation.

The court in *State Farm Mut. Auto. Ins. Co. v. Superior Court (1989) 211 Cal. App. 3d 5, 259 Cal. Rptr. 50* agreed with the result reached in *Flynn*, but disagreed with *Flynn's* position that a judicial arbitration award can never have collateral estoppel effect [*State Farm Mut. Auto. Ins. Co. v. Superior Court (1989) 211 Cal. App. 3d 5, 14, 259 Cal. Rptr. 50]* . In *State Farm*, the issue before the court of appeal was whether State Farm's insureds had any liability to claimants seeking to prosecute an underlying third-party bad faith action. The court held that the issue was actually, necessarily, and finally resolved in plaintiffs' favor by a judgment entered under *Code Civ. Proc. § 1141.23* arising from an arbitration award. Without such a finding of liability, there could be no basis for the arbitrator's award. This was a final resolution of the issue of their insureds' liability, and therefore State Farm would be collaterally estopped by the judgment from relitigating that issue in the bad faith action [*State Farm Mut. Auto. Ins. Co. v. Superior Court (1989) 211 Cal. App. 3d 5, 14, 259 Cal. Rptr. 50]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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4-36 California Forms of Pleading and Practice--Annotated § 36.15

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§ 36.15 When Compulsory Arbitration Required

[1] In Large Superior Courts

In each superior court with 18 or more judges, nonexempt unlimited civil cases must be submitted to arbitration pursuant to *Code Civ. Proc. § 1141.10 et seq.* [*see Cal. Rules of Ct., Rules 3.810 et seq.*], if the amount in controversy in the opinion of the court will not exceed $50,000 for each plaintiff [*Code Civ. Proc. § 1141.11(a)*; *Cal. Rules of Ct., Rule 3.811(a)(1)*; *see Code Civ. Proc. § 85 et seq.* (defining "unlimited civil case" and "limited civil case")]. These superior courts include those in Alameda, Contra Costa, Fresno, Kern, Los Angeles, Monterey, Orange, Riverside, Sacramento, San Bernardino, San Diego, San Francisco, San Joaquin, San Mateo, Santa Barbara, Santa Clara, and Ventura Counties [*Gov. Code §§ 69580, 69582, 69583, 69585, 69586, 69590-69596, 69599-69600, 69606*].

PRACTICE TIP:

Flexibility in Ordering Arbitration. Although the statute indicates that in Superior Courts with 10 or more judges *all* nonexempt unlimited civil cases must submitted to arbitration under *Code Civ. Proc. § 1141.10*, the actual practice does not conform to this requirement. Even before the alternative mediation process [for discussion, *see* Ch. 37, *Judicially Mandated Civil Action Mediation*] became available, courts exercised discretion, declining to order arbitration in cases where the procedure did not appear to yield any benefit. With the advent of judicially mandated mediation, the court now has available (in counties which have the procedure) an alternative. And, a judge ordering a judicially mandated mediation is forbidden to later order the same case to judicially mandated arbitration [*Code Civ. Proc. § 1775.4*]. Thus, counsel should be prepared to argue at the status conference why the case is better suited for one process or the other or is not suitable for either. *Hon. Richard C. Neal*

[2] By Local Rule

[a] In General

In each superior court with fewer than 18 judges, local rules may provide that when it is in the best interests of justice, all nonexempt unlimited civil cases must be submitted to arbitration if the amount in controversy in the opinion of the court will not exceed $50,000 for each plaintiff [*Code Civ. Proc. § 1141.11(b)*; *Cal. Rules of Ct., Rule 3.811(a)(2)*; *see Code Civ. Proc. § 85 et seq.* (defining "limited civil case" and "unlimited civil case"); *see also § 36.19*[1], [2]].

Each superior court may provide by local rule, when it is determined to be in the best interests of justice, that all nonexempt limited civil cases must be submitted to arbitration by the presiding judge or other designated judge [*Code Civ. Proc. § 1141.11(c)*; *Cal. Rules of Ct., Rule 3.811(a)(3)*; *see Code Civ. Proc. § 85 et seq.* (defining "limited civil case")]. This rule does not apply to any action maintained pursuant to the following [*Code Civ. Proc. § 1141.11(c)*]:

- *Civ. Code § 1781* (Consumers Legal Remedies Act).
- *Code Civ. Proc. § 116.210* (small claims court).
- *Code Civ. Proc. § 1161* (unlawful detainer).

[b] Motor Vehicle Collisions

[i] To Be Submitted to Arbitration Within 120 Days of Answer

In each court that has adopted judicial arbitration pursuant to *Code Civ. Proc. § 1141.11(c)*, all limited civil cases that involve a claim for money damages against a single defendant [*see* [ii], *below*] as a result of a motor vehicle collision, except those heard in the small claims division, must be submitted to arbitration within 120 days of the filing of the defendant's answer to the complaint (except as extended by the court for good cause) before an arbitrator selected by the court [*Code Civ. Proc. § 1141.11(d)*; *see Code Civ. Proc. § 85 et seq.* (defining "limited civil case"); *see § 36.22*].

[ii] Definition of "Single Defendant"

For purposes of *Code Civ. Proc. § 1141.11(d)*, the term "single defendant" means any of the following [*Code Civ. Proc. § 1141.11(d)*]:

- An individual defendant, whether a person or an entity.
- Two or more persons covered by the same insurance policy applicable to the motor vehicle collision.
- Two or more persons residing in the same household when no insurance policy exists that is applicable to the motor vehicle collision.

If a party files a cross compliant naming one or more cross defendants who are not plaintiffs, the case constitutes a multiple-defendant case not subject to the provisions of *Code Civ. Proc. § 1141.11(d)* [*Code Civ. Proc. § 1141.11(d)*].

[iii] Case Questionnaires

The court may provide by local rule for the voluntary or mandatory use of case questionnaires, established under *Code Civ. Proc. § 93*, in any proceeding subject to mandatory arbitration under *Code Civ. Proc. § 1141.11(d)*. When local rules provide for the use of case questionnaires, the questionnaires must be exchanged by the parties on the defendant's answer, and completed and returned within 60 days [*Code Civ. Proc. § 1141.11(d)*; for an illustration of the Judicial Council form of case questionnaire, *see Ch. 345A, Limited Civil Cases, § 345A.100*].

[3] Civil Action Mediation

Code Civ. Proc. § 1775 et seq. establishes a pilot project in Los Angeles County, and in other counties which elect to apply it, under which courts may refer cases to mediation as an alternative to judicial arbitration [*see Code Civ. Proc. §§ 1775.2, 1775.4*]. For discussion and illustrations of related Judicial Council forms, *see* Ch. 37, *Judicially Mandated Civil Action Mediation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionMediationsInsurance LawMotor Vehicle InsuranceArbitrationCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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4-36 California Forms of Pleading and Practice--Annotated § 36.16

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§ 36.16 Arbitration by Stipulation or by Plaintiff's Election

[1] Stipulation

The parties may stipulate to have any action submitted to judicial arbitration, regardless of the amount in controversy [*Code Civ. Proc. § 1141.12(a)*; *Cal. Rules of Ct., Rule 3.811(a)(4)*; *see Code Civ. Proc. § 1141.26* (nothing in *Code Civ. Proc. § 1141.10 et seq.* prevents arbitration award in excess of $50,000)]. For a form of stipulation and discussion of matters relating to the arbitration proceedings that may be included in the stipulation, *see § 36.70*].

A stipulation for arbitration must be filed with the court no later than the time the initial case management statement is filed, unless the court orders otherwise [*Cal. Rules of Ct., Rule 3.812(a)*].

When the parties stipulate to arbitration, the case must be set for arbitration forthwith [*Cal. Rules of Ct., Rule 3.812(a)*; see *§ 36.19*[3], [4]].

[2] Plaintiff's Election

The plaintiff may elect for any case to be submitted to judicial arbitration if he or she agrees that the arbitration award will not exceed $50,000 [*Code Civ. Proc. § 1141.12(b)*; *Cal. Rules of Ct., Rule 3.811(a)(5)*]. If there is more than one plaintiff, each plaintiff must file the election and agree that the arbitration award will not exceed $50,000 as to that plaintiff [*Cal. Rules of Ct. Rule 3.811(a)(5)*; for a form of election, *see § 36.71*].

The election must be filed no later than the time the initial case management statement is filed, unless the court orders otherwise. Upon written election of all plaintiffs to submit a case to arbitration, the case must be set for arbitration forthwith, subject to a motion by defendant for good cause to delay the arbitration hearing [*Cal. Rules of Ct., Rule*

3.812(b)].

If a case in which all plaintiffs have elected to arbitrate involves a cross-complaint, that case must be removed from the list of cases assigned to arbitration if the court determines that the amount in controversy on the cross complaint involves more than $50,000. The motion must be made within 15 days of notice of the election [*Cal. Rules of Ct., Rule 3.812(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-36 California Forms of Pleading and Practice--Annotated § 36.17

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§ 36.17 Actions Exempt From Arbitration

The following actions, are exempt from arbitration:

- Consumer class actions pursuant to *Civ. Code § 1781* [*Code Civ. Proc. § 1141.11(c)*] or any class action [*Cal. Rules of Ct., Rule 3.811(b)(2)*; *see Code Civ. Proc. § 1141.15*].

- Small claims actions pursuant to [*Code Civ. Proc. § 1141.11(c)*; *Cal. Rules of Ct. Rule 3.811(b)(3)*; *see Code Civ. Proc. § 116.220 et seq.*] or trials de novo on appeal from the small claims court [*Cal. Rules of Ct., Rule 3.811(b)(3)*; *see* Code Civ. Proc. § 1141.l5].

- Unlawful detainer proceedings pursuant to *Code Civ. Proc. § 1161* [*Code Civ. Proc. § 1141.11(c)*] or any unlawful detainer proceeding [*Cal. Rules of Ct., Rule 3.811(b)(4)*; *see Code Civ. Proc. § 1141.15*].

- Actions that include a prayer for equitable relief that is not frivolous or insubstantial [*Code Civ. Proc. § 1141.13*; *Cal. Rules of Ct., Rule 3.811(b)(1)*].

- Proceedings under the Family Law Act except as provided in *Fam. Code § 2554* (character, valuation, and division of property) [*Cal. Rules of Ct., Rule 3.811(b)(5)*; *see Code Civ. Proc. § 1141.15*].

- Any case otherwise subject to arbitration that is found by the court to not be amenable to arbitration on the ground that arbitration would not reduce the probable time and expense necessary to resolve the litigation [*Cal. Rules of Ct., Rule 3.811(b)(6)*; *see Code Civ. Proc. § 1141.15*; *see also Manatt, Phelps, Rothenberg & Tunney v. Lawrence (1984) 151 Cal. App. 3d 1165, 1172, 199 Cal. Rptr. 246* ; *Invicta*

Plastics, U.S.A., Ltd. v. Superior Court (1981) 120 Cal. App. 3d 190, 193, 174 Cal. Rptr. 476] (judicial authority to remove action from arbitration inferred from former Cal. Rules of Ct., Rule 1600.5(f)).

- Any category of cases otherwise subject to arbitration but which are excluded by local rule as not being amenable to arbitration on the ground that under the circumstances relating to the particular court, arbitration of that category of cases would not reduce the probable time and expense necessary to resolve the litigation [*Cal. Rules of Ct., Rule 3.811(b)(7)*; *see Code Civ. Proc. § 1141.15*].

- Cases involving multiple causes of action or a cross complaint if the court determines that the amount in controversy as to any given cause of action or cross complaint exceeds $50,000 [*Cal. Rules of Ct., Rule 3.811(b)(8)*; *see Code Civ. Proc. § 1141.15*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration ClausesCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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4-36 California Forms of Pleading and Practice--Annotated § 36.18

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§ 36.18 Determination Regarding Judicial Arbitration at Case Management Conference

In courts having a judicial arbitration program under *Code Civ. Proc. § 1141.10 et seq.*, at the time of the case management conference, the court must review the case and determine if it is suitable for judicial arbitration [*Cal. Rules of Ct., Rules 3.722(a), 3.727(6)*]. Also at the case management conference, the parties must address, and the court must take appropriate action with respect to whether the parties have stipulated to, or the case should be referred to, judicial arbitration or any other form of alternative dispute resolution (ADR), and if so, the date by which the ADR must be completed [*Cal. Rules of Ct., Rule 3.727(6)*].

No later than 30 calendar days before the date set for the case management conference, the parties must meet and confer, in person or by phone, to consider, among other things, whether the parties wish to stipulate to, or the case should be referred to, judicial arbitration or any other form of alternative dispute resolution, and if so, the date by which the ADR must be completed, as well as possible settlement [*Cal. Rules of Ct., Rules 3.724, 3.727(6)*]. If all the parties agree to an ADR process, they must jointly complete the form of ADR stipulation served with the complaint in accordance with *Cal. Rules of Ct., Rule 3.221* [*Cal. Rules of Ct., Rule 3.726*]. For an illustrative form of ADR stipulation, see *§ 36.70*. The parties must also complete a mandatory case management statement 15 calendar days before the date set for the case management conference [*Cal. Rules of Ct., Rule 3.725*; *see generally*, Ch. 425, *Pretrial Proceedings*].

If, at the case management conference, the court determines to refer the case to judicial arbitration or some other form of ADR, the case management order will reflect that, together with a date for completion of the arbitration process or other form of ADR [*Cal. Rules of Ct., Rule 3.728(1), (2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-36 California Forms of Pleading and Practice--Annotated § 36.19

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§ 36.19 Determination of Amount in Controversy

[1] Procedure

The determination of the amount in controversy is made by the court and the case referred to arbitration at the first case management conference or review under *Cal. Rules of Ct., Rules 3.720 et seq.* that takes place after all named parties have appeared or defaulted [*Code Civ. Proc. § 1141.16(a)*; *Cal. Rules of Ct., Rule 3.812(d)*; *see Cal. Rules of Ct., Rules 3.720 et seq.* (discussed at *§ 36.18, above*)]. The determination is made at that case management conference or based on review of the written submissions of the parties, as provided in rules adopted by the Judicial Council. At that time the court also makes a determination whether any prayer for equitable relief is frivolous or insubstantial. The determination of the amount in controversy and whether any prayer for equitable relief is frivolous or insubstantial may not be appealable. However, the foregoing determinations need not be made if all parties stipulate in writing that the amount in controversy exceeds $50,000 [*Code Civ. Proc. § 1141.16(a)*; *Cal. Rules of Ct., Rule 3.812(d)*; *see also Code Civ. Proc. § 367.5(b)(1)* (unless court has determined otherwise, party who has given notice, made good faith attempt to meet and confer before conference, and filed case management statement may appear by telephone)].

[2] Basis for Determination

The determination of the amount in controversy is based on the total amount of damages; the judge may not consider questions of liability or comparative negligence or other defenses [*Code Civ. Proc. § 1141.16(a)*]. Discretion is assigned to the court to make a practical assessment of the maximum damages recoverable. If the amount in controversy is disputed, the parties should offer representations in the nature of an offer of proof of damages. The court can form an opinion based on these representations, akin to opening statements concerning what the admissible evidence revealed in discovery will show with respect to potential damages [*Sharples v. Chole (1994) 29 Cal. App. 4th 1213, 1219, 35 Cal. Rptr. 2d 208]* .

The determination and any stipulation of the amount in controversy are without prejudice to any finding on the value of the case by an arbitrator or in a subsequent trial de novo [*Code Civ. Proc. § 1141.16(b)*].

The court will make no determination of an amount in controversy if all parties stipulate in writing that the amount in controversy exceeds $50,000 [*Code Civ. Proc. § 1141.16(a)*].

Neither the court's determination of the amount in controversy nor the court's determination whether a prayer for equitable relief is frivolous or insubstantial is appealable [*Code Civ. Proc. § 1141.16(a)*; *see Code Civ. Proc. § 1141.11*; *but see Sharples v. Chole (1994) 29 Cal. App. 4th 1213, 1220, 35 Cal. Rptr. 2d 208* (court failed to exercise, or abused, its discretion in determining amount in controversy)].

[3] Setting Action for Arbitration

Absent a stipulation or an election by all plaintiffs to submit the case to arbitration, the case must be set for arbitration when the court determines that the amount in controversy does not exceed $50,000. That determination must be made at the first cases management conference or review under *Cal. Rules of Ct., Rules 3.720 et seq.* that takes place after all named parties have appeared or defaulted [*Cal. Rules of Ct., Rule 3.812(d)*; *see* [2], *above; see also Cal. Rules of Ct., Rule 3.817* (times when hearings must or may not be set, discussed at *§ 36.23*)].

[4] Earliest Time for Arbitration Hearing

Except as provided below, the arbitration hearing may not be held until 210 days after the filing of the complaint, or 240 days after the filing of a complaint if the parties have stipulated to a continuance pursuant to *Gov. Code § 68616(d)*. A case must be submitted to arbitration at an earlier time on any of the following [*Code Civ. Proc. § 1141.16(c)*; *see also Cal. Rules of Ct., Rule 3.817* (times when hearings must or may not be set, discussed at *§ 36.23*)]:

- The stipulation of the parties to an earlier arbitration hearing.

- The written request of all plaintiffs, subject to a motion by a defendant for good cause shown to delay the arbitration hearing.

- An order of the court if the parties have stipulated, or the court has ordered under *Code Civ. Proc. § 1141.24*, that discovery other than that permitted under *Code Civ. Proc. § 2034.010 et seq.* will be permitted after the arbitration award is rendered.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionAmount in ControversyCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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§ 36.20 Panel of Arbitrators

[1] Supervision by Administrator

A panel of arbitrators, supervised by an arbitration administrator, exists in each court in which arbitration proceedings in lieu of trial are held. Members of the panel must be retired judges, retired court commissioners who were licensed to practice law prior to their appointment as a commissioner, and members of the State Bar, and sit individually. A judge may also serve as an arbitrator without compensation. People who are not attorneys may serve as arbitrators on the stipulation of all parties [*Code Civ. Proc. § 1141.18(a)*; *Cal. Rules of Ct., Rules 3.813-3.814*].

In a case submitted to arbitration under *Code Civ. Proc. § 1141.11* or *1141.12*, an arbitrator must be assigned within 30 days from the time of submission to arbitration [*Code Civ. Proc. § 1141.18(c)*].

[2] Compensation

Compensation for arbitrators, unless waived in whole or in part, may not be less than $150 per case, or $150 per day, whichever is greater. A superior court may set a higher level of compensation for that court [*Code Civ. Proc. § 1141.18(b)*]. In Los Angeles County, there are two panels: one of paid arbitrators and one of arbitrators who are less experienced and volunteer their services.

Before a fee may be paid to the arbitrator, the arbitrator must have timely filed his or her award with the clerk of the court in accordance with *Cal. Rules of Ct., Rule 3.825(b)* or the parties must have settled the case and filed notice of settlement [*Code Civ. Proc. § 1141.18(b)*; *Cal. Rules of Ct., Rule 3.819(a)*]. The arbitrator's fee statement must be submitted to the administrator promptly on the completion of the arbitrator's duties. The statement must set forth the title and number of the cause arbitrated, the date of the hearing, and the date the award or settlement was filed [*Cal.*

Rules of Ct., Rule 3.819(c)].

If the arbitrator devoted a substantial amount of time to a case that was settled without a hearing, or if the award was not timely filed, the court may for good cause authorize payment of a fee on the arbitrator's verified ex parte application [*Cal. Rules of Ct., Rule 3.819(b)*].

[3] Powers of Arbitrators

Arbitrators approved to serve in arbitration hearings may administer oaths or affirmations to witnesses and take adjournments on the request of a party or on the arbitrator's own initiative when deemed necessary. The arbitrator also has the power to do the following [*Cal. Rules of Ct., Rule 3.824(a)*];

- Permit testimony to be offered by deposition.
- Permit evidence to be offered and introduced as provided in *Cal. Rules of Ct., Rule 3.810 et seq*, [*see Cal. Rules of Ct., Rule 3.823, discussed under § 36.29[2]*].
- Rule on the admissibility and relevancy of evidence offered by the parties to a case.
- Invite the parties, on reasonable notice, to submit trial briefs.
- Decide the law and facts of the case and make an award accordingly.
- Award costs, not to exceed the statutory costs of the suit.
- Examine any site or object relevant to the case.

All other questions arising out of the case are reserved to the court [*Cal. Rules of Ct., Rule 3.824(a)*].

[4] Immunity of Arbitrators

Until the end of 1996, arbitrators were granted immunity from civil liability by former *Code Civ. Proc. § 1280.1* to the same extent as judicial officers. That immunity supplemented, and did not supplant, any otherwise applicable common law or statutory immunity [former *Code Civ. Proc. § 1280.1* (automatically repealed January 1, 1997); *see also Olson v. NASD (8th Cir. 1996) 85 F.3d 381, 382-383* (recognizing immunity in absence of statute)]. Since repeal of former *Code Civ. Proc. § 1280.1*, common law governs arbitral immunity, and is discussed at *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Hearing, § 33.30*.

This common law immunity extends to any sponsoring organization [*Stasz v. Charles R. Schwab (2004) 121 Cal. App. 4th 420, 433]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRGovernmentsCourtsJudicial ImmunityCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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4-36 California Forms of Pleading and Practice--Annotated § 36.21

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§ 36.21 Selection of Arbitrator

[1] When No Local Rules Have Been Promulgated

Unless the arbitrator has been designated by stipulation of the parties [for form, *see § 36.70*], or the court has local rules or procedures for the selection of the arbitrator, within 15 days after the case is set for arbitration [*see Cal. Rules of Ct., Rule 3.812*, discussed at *§ 36.19[3], [4], above*], the administrator must determine the number of clearly adverse sides in the case and select a number of names of arbitrators from the panel equal to the number of sides, plus one. The administrator mails the list of randomly selected names to counsel for each party. Each side has 10 days from the date of the mailing to file a rejection, in writing, of no more than one name on the list. If there are two or more parties on a side, they must join in the rejection of a single name. Promptly on expiration of the 10-day period, the administrator must appoint, at random, one of the persons on the list whose name was not rejected, if more than one name remains. The administrator must assign the case to the arbitrator appointed and must give notice of the appointment to the arbitrator and to all parties [*Cal. Rules of Ct., Rule 3.815(b)*]. In the absence of a cross-complaint bringing in a new party, the administrator may assume there are two sides. A dispute as to the number or identity of sides must be decided by the presiding judge in the same manner as disputes determining sides entitled to peremptory challenges of jurors [*Cal. Rules of Ct., Rule 3.815(b)(1)*].

[2] In Accordance With Local Rules

In lieu of selection in accordance with the California Rules of Court [*see* [1], *above*], a court having an arbitration program may, by local rule or by procedures adopted by its ADR committee, establish any fair method of selecting an arbitrator that does both of the following [*Cal. Rules of Ct., Rule 3.815(c)*]:

- Affords each side an opportunity to challenge at least one listed arbitrator peremptorily.

- Ensures that an arbitrator is appointed within 30 days from the submission of the case to arbitration.

The local rule or procedure may require that all steps leading to the selection of the arbitrator take place during or immediately following the case management conference or review under *Cal. Rules of Ct., Rule 3.720 et seq.* at which the court determines the amount in controversy and the suitability of the case for arbitration (*discussed under § 36.19*) [*Cal. Rules of Ct., Rule 3.815(c)*].

[3] When First Arbitrator Chosen Declines to Serve

If the first arbitrator selected declines to serve, the administrator must vacate the appointment of that arbitrator and either [*Cal. Rules of Ct., Rule 3.815(d)*]:

- Return the case to the top of the arbitration hearing list, restore the arbitrator's name to the list of those available for selection to hear cases, and appoint a new arbitrator, or

- Certify the case to the court [*see* [4], *below*].

[4] When Second Arbitrator Chosen Declines to Serve

If the second arbitrator selected declines to serve, the administrator must certify the case to the court [*Cal. Rules of Ct., Rule 3.815(e)*].

If the case is certified to the court under either *Cal. Rules of Ct., Rule 3.815(d)* or *(e)*, the court must hold a case management conference. If the inability to hold an arbitration hearing is due to the neglect or lack of cooperation of a party who elected or stipulated to arbitration, the court may set the case for trial and may make any other appropriate orders. In all other circumstances, the court may reassign the case to arbitration or make any other appropriate orders to expedite disposition of the case [*Cal. Rules of Ct., Rule 3.815(f)*].

PRACTICE TIP:

Selection in Los Angeles ADR Office. In Los Angeles County Superior Court, selections of arbitrators are typically made during a visit by counsel to the ADR Office immediately following the morning status conference at which the order to arbitrate is issued. The ADR Office presents counsel with a list of seven candidates, and biographical information, and counsel then choose either by agreement or striking names from the list in alternation. *Hon. Richard C. Neal*

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-36 California Forms of Pleading and Practice--Annotated § 36.22

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§ 36.22 Disqualification of Arbitrator

[1] Request by Party

Any party may request the disqualification of the arbitrator selected for his or her case on the grounds and by the procedures specified in *Code Civ. Proc. § 170.1* (disqualification of judge for cause) or *Code Civ. Proc. § 170.6* (peremptory challenge for prejudice) [*Code Civ. Proc. § 1141.18(d)*].

A party must make any request for Section 170.6 peremptory disqualification within five days of the naming of the arbitrator [*Code Civ. Proc. § 1141.18(d)*].

On any party's motion [for form, *see § 36.77*], made as promptly as possible under *Code Civ. Proc. § 170.1* and *Code Civ. Proc. § 1141.18(d)*, before the conclusion of arbitration proceedings, the appointment of an arbitrator to a case is to be vacated if the court finds that the party has demanded that the arbitrator disqualify himself or herself and the arbitrator has failed to do so and any of the grounds for disqualification specified in Section 170.1 exists [*Cal. Rules of Ct., Rule 3.816(d)*].

For discussion of grounds and procedures for disqualification under Section 170.1 and Section 170.6, see Ch. 317, *Judges* , Pts. III and IV, respectively.

[1A] Disclosures Required of Arbitrator

In addition to any other disclosure required by law, no later than five days before the deadline for parties to file a motion for disqualification of the arbitrator under *Code Civ. Proc. § 170.6* or, if the arbitrator is not aware of his or her appointment or of a matter subject to disclosure at that time, as soon as practicable thereafter, an arbitrator must disclose

to the parties [*Cal. Rules of Ct., Rule 3.816(b)*]:

- Any matter subject to disclosure under subdivisions (D)(5)(a) and (D)(5)(b) of canon 6 of the Code of Judicial Ethics [*see* Cal. Rules of Ct, Appendix: Judicial Code of Ethics]; and

- Any significant personal or professional relationship the arbitrator has or has had with a party, attorney, or law firm in the instant case, including the number and nature of any other proceedings in the past 24 months in which the arbitrator has been privately compensated by a party, attorney, law firm, or insurance company in the instant case for any services, including, but not limited to, service as an attorney, expert witness, or consultant or as a judge, referee, arbitrator, mediator, settlement facilitator, or other alternative dispute resolution neutral.

Canon 6(D)(5)(a) relates to information that is reasonably relevant to the issue of disqualification even though the arbitrator concludes there is no actual basis for disqualification. Canon 6(D)(5)(b) relates to membership in any organization that practices invidious discrimination, with the exception of certain religious, military and youth organizations.

[2] Duty of Arbitrator

An arbitrator must disqualify himself or herself, on the demand of any party to the arbitration made before the conclusion of the arbitration proceedings on any of the disqualification for cause grounds specified in Section 170.1 [*Code Civ. Proc. § 1141.18(d)*]. Moreover, the arbitrator has the duty of determining whether any cause exists for disqualification under Section 170.1 [*Cal. Rules of Ct., Rule 3.816(a)*].

The arbitrator is disqualified if any member of his or her law firm would be disqualified under *Code Civ. Proc. § 170.1(a)(2)*, which applies when the judge served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for any party in the present proceeding or gave advice to any party in the present proceeding on any matter involved in the action or proceeding [*Cal. Rules of Ct., Rule 3.816(a)*].

Unless the ground for disqualification is disclosed to the parties in writing and is expressly waived by all parties in writing, the arbitrator must promptly notify the administrator of any known ground for disqualification and another arbitrator will be selected in the case [*Cal. Rules of Ct., Rule 3.816(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 36.23 Setting Arbitration Hearing Date and Location

Within 15 days after the appointment of the arbitrator, the arbitrator must set the time, date, and place of the arbitration hearing and give notice in writing to each party and to the administrator of the time, date, and place set [*Cal. Rules of Ct., Rule 3.817(a)*]. Except on the agreement of all parties and the arbitrator, the arbitration hearing date must not be set earlier than 30 days after the arbitrator sent the notice of the hearing under *Cal. Rules of Ct., Rule 3.817(a)* or on Saturdays, Sundays, or legal holidays [*Cal. Rules of Ct., Rule 3.817(b)*; *see also Code Civ. Proc. § 1141.16(c)*, discussed at *§ 36.19*[4]].

Hearings must be scheduled so as to be completed no later than 90 days from the date of the assignment of the case to the arbitrator, including any time due to continuances granted under *Cal. Rules of Ct., Rule 3.818* [*Cal. Rules of Ct., Rule 3.817(c)*].

Hearings are required to take place in appropriate facilities provided by the court or selected by the arbitrator [*Cal. Rules of Ct., Rule 3.817(d)*; *see § 36.25*].

Legal Topics:

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4-36 California Forms of Pleading and Practice--Annotated § 36.24

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§ 36.24 Failure to Hold Timely Arbitration Hearing

[1] Vacation of Appointment

If the arbitrator fails to complete a hearing within 90 days after the date of the assignment of the case to him or her, including any time due to continuances granted under *Cal. Rules of Ct., Rule 3.818*, the administrator must certify the case to the court [*Cal. Rules of Ct., Rule 3.815(e)*; *see* [2], *below*]. The 90-day period may be extended only by court order on the motion of a party as provided in *Cal. Rules of Ct., Rule 3.818(b)* [*Cal. Rules of Ct., Rule 3.818(c)*; for discussion of Rule 3.818, *see § 36.25*; for forms to seek continuance of an arbitration hearing, *see § 36.78*].

[2] Return to Court

After the case is certified to the court, the court must hold a case management conference. If the inability to hold an arbitration hearing is due to the neglect or lack of cooperation of a party who elected or stipulated to arbitration, the court may set the case for trial and may make any other appropriate orders. In all other circumstances, the court may reassign the case to arbitration or make any other appropriate orders to expedite disposition of the case [*Cal. Rules of Ct., Rule 3.815(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-36 California Forms of Pleading and Practice--Annotated § 36.25

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§ 36.25 Continuances of Arbitration Hearing Dates

Except as noted below, the parties may stipulate to a continuance in the case, with the assigned arbitrator's consent. The arbitrator is required to consent to a request for a continuance if it appears that good cause exists. Notice of the continuance must be sent to the ADR administrator [*Cal. Rules of Ct., Rule 3.818(a)*]. If the arbitrator declines to consent, the court may grant the continuance on a party's motion for good cause shown [*Cal. Rules of Ct., Rule 3.818(b)*; for forms, *see § 36.78*]. If the court grants the motion, the party who requested the continuance must notify the arbitrator, who must reschedule the hearing, giving notice to all the parties [*Cal. Rules of Ct., Rule 3.818(b)*].

An arbitration hearing is not to be continued to a date later than 90 days after the assignment of the case to the arbitrator, including any time due to continuances granted under Rule 3.818, except by court order on a party's motion as provided in *Cal. Rules of Ct., Rule 3.818(b)* [*Cal. Rules of Ct., Rule 3.818(c)*; for forms *see § 36.78*].

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For related research and practice materials, see the following legal topics:
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4-36 California Forms of Pleading and Practice--Annotated § 36.26

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§ 36.26 Representation by Counsel at Arbitration Hearing

A party to the arbitration has a right to be represented by an attorney at any proceeding or hearing in arbitration but may waive this right. A waiver of this right may be revoked, but if revoked, the other party is entitled to a reasonable continuance for the purpose of obtaining counsel [*Cal. Rules of Ct., Rule 3.821(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-36 California Forms of Pleading and Practice--Annotated § 36.27

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§ 36.27 Discovery

[1] Authorized

The parties to the arbitration proceeding have the right to take depositions and to obtain discovery, with the same rights, remedies, and procedures, and subject to all of the same duties, liabilities, and obligations as provided in *Code Civ. Proc. §§ 1985-2036.050*. All discovery must be completed at least 15 days before the date set for the arbitration hearing unless the court, on a showing of good cause, grants an extension of the time within which discovery must be completed [*Cal. Rules of Ct., Rule 3.822*].

PRACTICE TIP:

Status of Discovery as Factor in Determining Whether to Seek Arbitration or Mediation. Note that completion of discovery is not a requirement for judicially mandated mediation. This is one consideration in determining whether to seek an order of arbitration or mediation. *Hon. Richard C. Neal*

Despite this restriction, postarbitration discovery, other than the exchange of information regarding expert trial witness [*see Code Civ. Proc. § 2034.010 et seq.*], is permitted only by the parties' stipulation or by a court order made on good cause shown [*see Code Civ. Proc. § 1141.24*; for discussion, *see § 36.35*].

[2] Punitive Damages Evidence

In a judicial arbitration proceeding, no party may require the production of evidence of either of the following, unless the court enters an order permitting its pretrial discovery pursuant to *Civ. Code § 3295(c)* [*Civ. Code § 3295(a)*; *Code Civ. Proc. § 1141.19*.5]:

- The profits the defendant has gained by virtue of the wrongful course of conduct of the nature and type shown by the evidence.

- The defendant's financial condition.

For discussion and forms relating to *Civ. Code § 3295*, and obtaining pretrial discovery under it, see Ch. 177, *Damages* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-36 California Forms of Pleading and Practice--Annotated § 36.28

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§ 36.28 Communication With Arbitrator

An arbitrator must not initiate, permit, or consider any ex parte communications or consider other communications made to the arbitrator outside the presence of all of the parties concerning a pending arbitration, except as follows [*Cal. Rules of Ct., Rule 3.820(b)*]:

- An arbitrator may communicate with a party in the absence of other parties about administrative matters, such as setting the time and place of hearings or making other arrangements for the conduct of the proceedings, as long as the arbitrator reasonably believes that the communication will not result in a procedural or tactical advantage for any party. When such a discussion occurs, the arbitrator must promptly inform the other parties of the communication and must give the other parties an opportunity to respond before making any final determination concerning the matter discussed.

- An arbitrator may initiate or consider any ex parte communication when expressly authorized by law to do so.

In addition, no disclosure of any offers of settlement made by any party may be made to the arbitrator prior to the filing of the award [*Cal. Rules of Ct., Rule 3.820(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-36 California Forms of Pleading and Practice--Annotated § 36.29

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§ 36.29 Arbitration Hearing

[1] Absence of Party at Hearing

The arbitration may proceed in the absence of any party, who, after due notice, fails to be present and to obtain a continuance of the hearing [*see discussion under § 36.25*]. An award must not be based solely on a party's absence. If defendant defaults, the arbitrator must require the plaintiff to submit such evidence as may be appropriate for the making of an arbitration award [*Cal. Rules of Ct., Rule 3.821(b)*].

[2] Rules of Evidence

[a] Generally as in Civil Actions

The rules of evidence governing civil cases apply to the conduct of arbitration hearings, with the exceptions discussed in [b]-[d], *below* [*Cal. Rules of Ct., Rule 3.823(b)*].

[b] Expert Reports, Police Reports, and Business Records

[i] Admissibility

Any party may offer the following [*Cal. Rules of Ct., Rule 3.823(b)(1)*]:

- Written reports of any expert witness.
- Medical records and bills (including physiotherapy, nursing, and prescription bills).

- Documentary evidence of loss of income.
- Property damage repair bills or estimates.
- Police reports concerning an accident that gave rise to the case.
- Other bills and invoices, purchase orders, checks, written contracts, and similar documents prepared and maintained in the ordinary course of business.

[ii] Procedure; Delivery to Other Parties

The arbitrator is required to receive the type of documents listed in [i], *above*, in evidence if copies have been delivered to all opposing parties at least 20 days before the hearing. Any other party may subpoena the author or custodian of the document as a witness and examine the witness as if under cross-examination. Any repair estimate offered as an exhibit, and the copies delivered to opposing parties, must be accompanied by the following [*Cal. Rules of Ct., Rule 3.823(b)(1)*]:

- A statement indicating whether or not the property was repaired, and, if it was, whether the estimated repairs were made in full or in part.
- A copy of the receipted bill showing the items of repair made and the amount paid.

The arbitrator must not consider any opinion as to ultimate fault expressed in a police report [*Cal. Rules of Ct., Rule 3.823(b)(1)*].

For the definition of "delivery," see [e], *below.*

[c] Other Written Statements

The written statement of any other witness may be offered and must be received in evidence if the following requirements are met [*Cal. Rules of Ct., Rule 3.823(b)(2)*]:

- They are made by declaration under penalty of perjury.
- Copies have been delivered to all opposing parties at least 20 days before the hearing.
- No opposing party has, at least 10 days before the hearing, delivered to the proponent of the evidence a written demand that the witness be produced in person to testify at the hearing.

The arbitrator must disregard any portion of a statement received under this rule that would be inadmissible if the witness were testifying in person, but the inclusion of inadmissible matter does not render the entire statement inadmissible [*Cal. Rules of Ct., Rule 3.823(b)(2)*].

For the definition of "delivery," see [e], *below.*

[d] Depositions

The deposition of any witness may be offered by any party and is to be received in evidence, subject to objections available under *Code of Civ. Proc. § 2025.410* (relating to errors in deposition notices), even if the deponent is not

"unavailable as a witness" within the meaning of *Evid. Code § 240* and no exceptional circumstances exist, if both of the following requirements are met [*Cal. Rules of Ct., Rule 3.823(b)(3)*]:

- The deposition was taken in the manner provided for by law or by stipulation of the parties and within the time provided for in these rules.

- Not less than 20 days before the hearing the proponent of the deposition delivered to all opposing parties notice of intention to offer the deposition in evidence. For the definition of "delivery," see [e], *below.*

The opposing party, on receiving the notice, may subpoena the deponent and, at the arbitrator's discretion, either the deposition may be excluded from evidence or the deposition may be admitted and the deponent may be further cross-examined by the subpoenaing party. These limitations do not apply to a deposition admissible under the terms of *Code Civ. Proc. § 2025.620*, which governs the admissibility of depositions at trials and hearings generally [*Cal. Rules of Ct., Rule 3.823(b)(3)*].

[e] "Delivery" Defined

For purposes of *Cal. Rules of Ct., Rule 3.823*, "delivery" of a document or notice may be accomplished manually or by mail in the manner provided by *Code Civ. Proc. § 1013*. If service is by mail, the times prescribed in this rule for delivery of documents, notices, and demands are increased by five days [*Cal. Rules of Ct., Rule 3.823(d)*]. For discussion of notice, see Ch. 518, *Service of Summons and Papers* .

[3] Compelling Attendance of Witnesses; Subpoenas

Subpoenas may be issued for the attendance of witnesses at arbitration hearings as provided in the *Code Civ. Proc. §§ 1985-2015.6*. The party requesting the subpoena must modify the form of subpoena so as to show that the appearance is before an arbitrator, and to give the time and place set for the arbitration hearing. At the arbitrator's discretion, nonappearance of a properly subpoenaed witness may be a ground for an adjournment or continuance of the hearing. If any witness properly served with a subpoena fails to appear at the arbitration hearing or, having appeared, refuses to be sworn or to answer, proceedings to compel compliance with the subpoena on penalty of contempt may be had before the superior court as provided in *Code Civ. Proc. § 1991* for other instances of refusal to appear and answer before an officer or commissioner out of court [*Cal. Rules of Ct., Rule 3.823(c)*]. For further discussion and forms, see Ch. 535, *Subpoena* .

[4] Presence of Arbitrators and Parties When Evidence Is Taken

All evidence is required to be taken in the presence of the arbitrator and all parties, except when any of the parties has waived the right to be present or is absent after due notice of the hearing [*Cal. Rules of Ct., Rule 3.823(a)*].

[5] Recording of Hearings

The arbitrator may, but is not required to, make a record of the proceedings. Any record of the proceedings made by or at the direction of the arbitrator is deemed the arbitrator's personal notes and is not subject to discovery. The arbitrator may not deliver them to any party in the case or to any other person, except to an employee using the records/notes under the arbitrator's supervision or pursuant to a subpoena issued in a criminal investigation or prosecution for perjury. No other record may be made of the hearing and the arbitrator must not permit the presence of a stenographer or court reporter or the use of any recording device at the hearing [*Cal. Rules of Ct., Rule 3.824(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 36.30 Arbitration Award

[1] Entry as Judgment

[a] Filing the Award

Within 10 days after the conclusion of the arbitration hearing, the arbitrator must file his or her award with the clerk, with proof of service on each party to the arbitration. On the arbitrator's application in cases of unusual length or complexity, the court may allow up to 20 additional days for the filing and service of the award [*Cal. Rules of Ct., Rule 3.825(b)(1)*].

Within the time for filing the award the arbitrator may file and serve an amended award [*Cal. Rules of Ct., Rule 3.825(b)(2)*].

The 10-day filing rule is directory only and not jurisdictional [*Koll Hancock Torrey Pines v. Biophysica Foundation, Inc. (1989) 215 Cal. App. 3d 883, 885-886, 264 Cal. Rptr. 36* (arbitration award filed five days later than 10-day requirement was not invalid; arbitrator did not lose jurisdiction to file award when 10-day period expired)].

[b] Contents of Award

The arbitration award is required to be in writing, signed by the arbitrator, and filed in the court in which the action is pending [*Code Civ. Proc. § 1141.23*; *see also Cal. Rules of Ct., Rule 3.825(a)*].

It is required to determine all issues properly raised by the pleadings, including a determination of any damages and award of costs if appropriate, but the arbitrator is not required to make findings of fact or conclusions of law [*Cal. Rules*

of Ct., Rule 3.825(a)].

[c] Finality of Award

An arbitration award is final unless a request for a de novo trial [*see § 36.34*] is filed within 30 days after the date the arbitrator files the award [*Code Civ. Proc. § 1141.20(a)*]. If there is no request for a de novo trial and the award is not vacated [*see § 36.31*], the award is to be entered in the judgment book in the amount of the award [*Code Civ. Proc. § 1141.23*; *see also Cal. Rules of Ct., Rule 3.827(a)* (on expiration of 30-day period after award is filed, clerk enters award as judgment if no party has, during that period, served and filed request for trial)]. Promptly on entry of the award as a judgment the clerk must mail notice of entry of judgment to all parties who have appeared in the case and execute a certificate of mailing and place it in the court's file in the case [*Cal. Rules of Ct., Rule 3.827(b)*]. The award has the same force and effect as a judgment in any civil action or proceeding except that it is not subject to appeal and it may not be attacked or set aside except as provided by *Code Civ. Proc. § 473* or *1286.2*, or Judicial Council rule, discussed at [4], *below* [*Code Civ. Proc. §§ 1141.22-1141.23*; *Cal. Rules of Ct., Rule 3.827(c)*].

PRACTICE TIP:

Imperative to File Request for Trial de Novo in Case of Any Doubt Regarding Award. If counsel has any doubt at all about the propriety or correctness of the award, the conduct of the arbitrator, or any other dissatisfaction with the proceeding, it is *imperative to file a request for trial de novo* [*see § 36.34*]. While awards reduced to judgment may be attacked, the grounds are limited, and the threshold for success high [*see* [4], *below*]. In contrast, no grounds whatsoever are necessary in order to avoid the entry of judgment by filing a request for trial de novo. *Hon. Richard C. Neal*

The judgment so entered may be enforced as if it had been rendered by the court in which it is entered [*Cal. Rules of Ct, Rule 3.827(c)*].

[2] Service of Notice of Award

For a filing of an arbitration award to be effective actual service on the parties is required; until a party is actually served with notice of the award, the 30-day period within which a request for a trial de novo may be filed under *Cal. Rules of Ct., Rule 3.826(a)* does not begin to run, and the court is without jurisdiction to enter the award as a judgment [Oats v. Oats (l983) *148 Cal. App. 3d 416, 420-421, 196 Cal. Rptr. 20]* .

[3] Costs Recoverable by Prevailing Party

An arbitration award has the same force and effect as a judgment in a civil action or proceeding, and is subject to all provisions of law relating to a civil judgment [*Code Civ. Proc. § 1141.23*; *Cal. Rules of Ct., Rule 3.827(c)*]. Accordingly, the prevailing party is entitled to recover costs as a matter of right [*Code Civ. Proc. § 1032(b)*; *Cal. Rules of Ct., Rule 3.825(a)*]. If the arbitrator's award does not mention costs, it is appropriate for the prevailing party to file a memorandum of costs pursuant to *Cal. Rules of Ct., Rule 3.1700* [*Guevara v. Brand (1992) 8 Cal. App. 4th 995, 997, 10 Cal. Rptr. 2d 780]* .

For discussion and forms relating to costs, see Ch. 174, *Costs and Attorney's Fees* .

[4] Attack by Appeal or Otherwise

The arbitration award, after it is entered as a judgment, is subject to all provisions of law relating to a judgment in a civil action or proceeding, except that it is not, other than as noted below, subject to appeal and may not be attacked or set aside except as provided by *Code Civ. Proc. § 473* or *1286.2*, or Judicial Council rule [*Code Civ. Proc. § 1141.23*; *Cal. Rules of Ct., Rule 3.827(c)*; *see also Pierson v. Honda (1987) 194 Cal. App. 3d 1411, 1415, 240 Cal. Rptr. 148* (court without jurisdiction to modify arbitration award by granting setoff against it)]. For discussion of Section 473

motions, see *§ 36.32*. For discussion of Section 1286.2 motions, see *§ 36.31*.

A judgment on an arbitration award is appealable as to pre-arbitration judicial rulings on claims not submitted to arbitration which are independent of the arbitrated claim [*Jennings v. Marralle (1994) 8 Cal. 4th 121, 129, 32 Cal. Rptr. 2d 275, 876 P.2d 1074]* .

Cal. Rules of Ct., Rule 3.828(a) limits the grounds on which a judicial arbitration award may be vacated to the fact that the arbitrator was subject to a disqualification not disclosed before the hearing and of which the arbitrator was then aware [*compare Code Civ. Proc. § 1286.2(a)(6)(A)* (similar ground for vacating contractual arbitration award)] or to the grounds set forth in *Code Civ. Proc. § 473* or *1286.2(a)(1)-(3)* [*see Code Civ. Proc. § 1141.22* (Judicial Council rules shall specify grounds on which arbitrator or court may correct, modify, or vacate award); *see § 36.31*].

The parties may waive their right to appeal [*see Pratt v. Gursey, Schneider & Co. (2000) 80 Cal. App. 4th 1105, 1110, 95 Cal. Rptr. 2d 695* (dismissing appeal because parties' stipulation to arbitrate, though ambiguous as to whether it intended contractual arbitration or judicial arbitration, was clear in express waiver of right to appeal any judgment or order)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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Chapter 36 JUDICIAL ARBITRATION
PART II. LEGAL BACKGROUND

4-36 California Forms of Pleading and Practice--Annotated § 36.31

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§ 36.31 Motion to Vacate Judgment

A motion to vacate a judgment based on an award may be brought by a party against whom the judgment was entered no later than six months after its entry [*Cal. Rules of Ct., Rule 3.828(a)*]. Under *Cal. Rules of Ct., Rule 3.828(a)*, an arbitration award may be vacated on the following grounds [*see Code Civ. Proc. § 1141.22* (Judicial Council rules shall specify grounds on which arbitrator or court may correct, modify, or vacate award)]:

- The award was procured by corruption, fraud, or other undue means [*Code Civ. Proc. § 1286.2(a)(1)*].

- There was corruption in any one of the arbitrators [*Code Civ. Proc. § 1286.2(a)(2)*].

- The rights of the moving party were substantially prejudiced by misconduct of a neutral arbitrator [*Code Civ. Proc. § 1286.2(a)(3)*].

- The arbitrator was subject to a disqualification [*see Code Civ. Proc. § 1141.18(d)*] not disclosed before the hearing and of which the arbitrator was then aware [*Cal. Rules of Ct., Rule 3.828(a)*; *see also Code Civ. Proc. § 1286.2(a)(6)* (arbitrator making award either (A) failed to timely disclose ground for disqualification of which he or she was then aware or (B) was subject to disqualification on grounds specified in *Code Civ. Proc. § 170.1* but failed on receipt of timely demand to disqualify himself or herself as required by that provision); *compare Code Civ. Proc. § 1141.18(d)* refers to disqualification under both *Code Civ. Proc. §§ 170.1* and *170.6*)].

The motion to vacate must be heard on notice to the adverse parties and to the arbitrator, and may be granted only on

clear and convincing evidence that the grounds alleged are true, and that the motion was made as soon as practicable after the moving party learned of the existence of those grounds [*Cal. Rules of Ct., Rule 3.828(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 36.32 Relief Based on Mistake, Inadvertence, Surprise, or Excusable Neglect

A party may be relieved of an arbitration award or a judgment entered pursuant to an award on the grounds that it was taken against the party through his or her mistake, inadvertence, surprise, or excusable neglect [*Code Civ. Proc. § 1141.23, see Code Civ. Proc. § 473(b)*]. Further, relief is mandatory if it is based on mistake, inadvertence, surprise, or neglect of the attorney for the party against whom the award was made, even if that neglect is not excusable [*Code Civ. Proc. § 473(b)*; *Yeap v. Leake (1997) 60 Cal. App. 4th 591, 598-601, 70 Cal. Rptr. 2d 680]* .

ILLUSTRATION:

Attorney's Neglect Requires Relief. Plaintiff's attorney failed to calendar the arbitration date; thus, neither plaintiff nor plaintiff's attorney appeared at the arbitration. The arbitrator entered an award that plaintiff recover nothing. After learning of the arbitration and award, plaintiff's attorney further neglected to request a trial de novo until more than 30 days after entry of the award, which by then had been entered as a judgment. Plaintiff moved to set aside the award and vacate the judgment. Did this situation require mandatory relief? Yes. When a plaintiff loses the opportunity to participate in judicial arbitration through the neglect of counsel, the mandatory provision of *Code Civ. Proc. § 473(b)* applies, and the judgment must be vacated [*Yeap v. Leake (1997) 60 Cal. App. 4th 591, 594, 601, 70 Cal. Rptr. 2d 680]* .

However, the ordinary situation, after plaintiff has had his or her "day in court" in arbitration, will not come within the mandatory provision of *Code Civ. Proc. § 473(b)*, which was applied to a judgment based on the "default" arbitration award in *Yeap v. Leake (1998) 60 Cal. App. 4th 591, 594, 70 Cal. Rptr. 2d 680* , but within the general rule expressed in *Ayala v. Southwest Leasing & Rental, Inc. (1992) 7 Cal. App. 4th 40, 44-45, 8 Cal. Rptr. 2d 637* , that there is no mandatory relief for negligence which consists of failing to timely request a trial de novo after there has been an

arbitration hearing in which the plaintiff and his or her attorney actually participated [*Brown v. Williams (2000) 78 Cal. App. 4th 182, 188-189, 92 Cal. Rptr. 2d 634]* .

ILLUSTRATION:

No Excuse for Failure to Make Timely Request for Trial de Novo. Plaintiff's attorney failed to file a timely request for trial de novo after a defense award in a premises liability case. Some of the time during the 30 days after the award was filed was consumed by plaintiff's attorney seeking an expert witness who could testify as to conditions on the premises. After the expert viewed the premises and made a report, plaintiff's attorney believed there was evidence to meet plaintiff's burden of proof, which the arbitrator indicated had not been done in the arbitration. After the expert's report, 21 days remained within which plaintiff's attorney could have filed timely request for trial de novo, except plaintiff's attorney had changed secretaries, and the notice of award had been lost. After entry of judgment, plaintiff moved to have the judgment set aside under *Code Civ. Proc. § 473*. The trial court refused to set aside the judgment. Was plaintiff entitled to mandatory relief under *Code Civ. Proc. § 473(b)*? No. This plaintiff, unlike the plaintiff in *Yeap* had been through an arbitration and lost. So, Section 473(b)'s mandatory provision did not apply. Under the general discretionary provisions of Section 473, the fact that the attorney had three "excuse-free" weeks to file the request for trial de novo did not warrant setting aside the judgment [*Brown v. Williams (2000) 78 Cal. App. 4th 182, 188-190, 92 Cal. Rptr. 2d 634]* .

The application for relief must be brought within a reasonable time but not exceeding six months after the award or judgment was taken against the party [*Code Civ. Proc. § 473*]. For discussion and forms relating to Section 473 motions, see Ch. 489, *Relief From Judgments and Orders* , Pt. I.

Although *Code Civ. Proc. § 1141.23* deprives the parties of an appeal from a judgment properly entered under that section, it does not deprive parties of an appeal from a postjudgment order on a motion to set aside and vacate the judgment [*Cabrera v. Plager (1987) 195 Cal. App. 3d 606, 609-610, 241 Cal. Rptr. 731* (relying on former *Code Civ. Proc. § 904.1(a), (b)*, now renumbered as *Code Civ. Proc. § 904.1(a)(1), (a)(2)*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 36.33 Appeal Regarding Costs Determined by Trial Court

Although a judgment on a judicial arbitration award is not appealable, an exception exists when the arbitrator's award does not specify the amount of recoverable costs. In that case, because the court determines costs in the first instance, the portion of the court's judgment awarding costs must be appealable; otherwise there would be no opportunity for appellate review. In contrast, if the arbitrator specifies the amount of recoverable costs, the costs portion of the judgment is not appealable because a dissatisfied party can request a trial de novo as to costs and subsequently can obtain review of the costs award on appeal from the court's de novo judgment [*Dickens v. Lee (1991) 230 Cal. App. 3d 985, 987-988, 281 Cal. Rptr. 783]* .

Legal Topics:

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§ 36.34 Trial de Novo

[1] Request for Trial de Novo

[a] Right to and Time for Request

Within 30 days after the arbitration award is filed with the court clerk and prior to its becoming a final judgment, any party to the proceedings may request a trial de novo by filing a request [for form, *see § 36.81*] with the clerk, along with proof of service on all other parties appearing in the case. A request for trial filed after the parties have been served with a copy of the award by the arbitrator, but before the award has been filed with the clerk, is valid and timely. The 30-day period within which to request the trial may not be extended [*Code Civ. Proc. § 1141.20*; *Cal. Rules of Ct., Rule 3.826(a)*]. Nor does the trial court have the authority to shorten the time to file a request for a de novo trial [*Karamzai v. Digitcom (1996) 51 Cal. App. 4th 547, 551, 59 Cal. Rptr. 2d 139]* .

Although *Cal. Rules of Ct., Rule 3.826(a)* does not mention service of process of the award as triggering the 30-day period for filing a request for trial de novo, such a requirement may be found [*Domingo v. Los Angeles County Metropolitan Transportation Authority (1999) 74 Cal. App. 4th 550, 553-554, 88 Cal. Rptr. 2d 224* ; *see Cal. Rules of Ct., Rule 3.825(b)* (arbitrator required to serve copies of award)]. Thus, if a party is never properly served a copy of the award, the 30-day period does not begin to run until that party actually receives notice of the award [*Domingo v. Los Angeles County Metropolitan Transportation Authority (1999) 74 Cal. App. 4th 550, 554, 88 Cal. Rptr. 2d 224]* .

A party's right to a trial de novo following court-ordered arbitration is not lost by failure of the party to participate in the arbitration [*see Lyons v. Wickhorst (1986) 42 Cal. 3d 911, 918-919, 231 Cal. Rptr. 738, 727 P.2d 1019]* . The failure to participate may, however, result in sanctions [*see § 36.36*[3]].

[b] Restoration of Case to Civil Active List

When a trial de novo request is received, the case will be restored to the civil active list for prompt disposition, in the same position on the list it would have had if there had been no arbitration in the case [*Code Civ. Proc. § 1141.20(b)*; *Mentzer v. Hardoin (1994) 28 Cal. App. 4th 1365, 1369-1370, 34 Cal. Rptr. 2d 214* ; *see Barna v. Passage 350 Canon (1986) 186 Cal. App. 3d 440* (trial court must recalendar case sua sponte); *but see Robinson v. Superior Court (1984) 158 Cal. App. 3d 98, 106, 204 Cal. Rptr. 366* (plaintiff who unilaterally elected arbitration and received maximum award as ordinarily not permitted to seek trial de novo)].

If a party makes a timely request for a trial, the case must proceed as provided under an applicable case management order. If no pending order provides for the prosecution of the case after a request for a trial after arbitration, the court must promptly schedule a case management conference [*Cal. Rules of Ct., Rule 3.826(b)*].

[c] Rescission of Request for Trial de Novo

A party who requested trial de novo is not permitted to withdraw the request after the 30-day period has expired [*Marracino v. Brandstetter (1993) 14 Cal. App. 4th 543, 546-547, 17 Cal. Rptr. 2d 700]* .

[2] Multiparty Actions

In the mandatory arbitration of a multiparty action, a request for a trial de novo by one plaintiff does not necessarily require that coplaintiffs also retry their cases. If the claim of the plaintiff requesting the trial de novo is distinct from and unaffected by the claims of the coplaintiffs, the court may order a partial trial de novo of that claim alone [*Demirgian v. Superior Court (1986) 187 Cal. App. 3d 372, 374-378, 231 Cal. Rptr. 698* ; *but see Dibble v. Superior Court (1999) 76 Cal. App. 4th 837, 842-844, 90 Cal. Rptr. 2d 671* (criticizing *Demirgian* as contrary to literal interpretation of *Code Civ. Proc. §§ 1141.20, 1141.23*; former Rules of Ct., Rules 1615(c), 1616(b), (c) [*see now Cal. Rules of Ct. Rules 3.826(b), 3.827(a)*]].

The general rule, however, is that if the claims are interdependent, all parties are required to retry their cases even though only one party requests trial de novo [*Southern Pacific Transportation Co. v. Mendez Trucking, Inc. (1998) 66 Cal. App. 4th 691, 694-696, 78 Cal. Rptr. 2d 236* ; *Trump v. Superior Court (1981) 118 Cal. App. 3d 411, 415-417, 173 Cal.Rptr. 403]* . *Cal. Rules of Ct., Rule 3.826(c)* provides that after a timely request for trial de novo and restoration of the action to the calendar, "[t]he case shall be tried as though no arbitration proceeding had occurred." Thus, in a multiparty action involving one plaintiff, multiple defendants and a compulsory cross complaint in which all claims and cross claims emanate from a single integrated set of facts and resolution of one factual issue may affect several theories of liability, a request for a partial trial de novo effects a full trial as to all parties and on all issues raised by the pleading [*Trump v. Superior Court (1981) 118 Cal. App. 3d 411, 415-417, 173 Cal. Rptr. 403]* . Language in *Code Civ. Proc. §§ 1141.20, 1141.23* and former Cal. Rules of Ct., Rules 1615(c), 1616(b), (c) [*see now Cal. Rules of Ct., Rules 3.826(b), 3.827(a)*] have also been relied on to support the conclusion that the applicable statutes and rules do not contemplate any exception for partial trial de novo, even if partial trial de novo would be more prompt and economical and thus more in keeping with the stated purpose of judicial arbitration [*Dibble v. Superior Court (1999) 76 Cal. App. 4th 837, 842-844, 846-847, 90 Cal. Rptr. 2d 671]* .

ILLUSTRATION:

Only One Party Requested Trial De Novo. Plaintiff was injured in a truck accident and sued the owners of both vehicles and the driver of the other vehicle. Both vehicle owners cross-complained against each other for indemnity. The arbitration award was in favor of plaintiff, denied recovery on both cross-complaints, and made no allocation of fault among the co-defendants. Plaintiff requested trial de novo, but settled with both owners/cross-complainants before the scheduled trial date. The cross-complaints never went to trial, and the award was entered as the judgment on the cross complaints.

> Was that correct? No. Appellant's cross complaint for equitable indemnity was necessarily related to plaintiff's complaint against both appellant and respondent; it was not "totally unrelated, both legally and factually" to the complaint. Thus, plaintiff's request for trial de novo vacated the arbitration award in toto and put the entire case at issue [*Southern Pacific Transportation Co. v. Mendez Trucking, Inc. (1998) 66 Cal. App. 4th 691, 696, 78 Cal. Rptr. 2d 236]* .

Even if a party attempts to request only a partial trial de novo, the request will operate to vacate the arbitration award in its entirety, and may expose the party seeking trial de novo to liability for costs under *Code Civ. Proc. § 1141.21* as to the party they sought to exclude from the trial de novo request [*Muega v. Menocal (1996) 50 Cal. App. 4th 868, 876-877, 57 Cal. Rptr. 2d 697* ; for discussion of section 1141.21, *see § 36.36*].

[3] Proceedings on Trial de Novo

The case must be tried as though no arbitration proceeding had occurred. No reference may be made during the trial to the arbitration award, to the fact that there had been arbitration proceedings, to the evidence adduced at the arbitration hearing, or to any other aspect of the arbitration proceedings. Nothing that occurred at the arbitration hearing may be used as affirmative evidence, by way of impeachment or for any other purpose at the trial [*Code Civ. Proc. § 1141.25*; *Cal. Rules of Ct., Rule 3.826(c)*].

Code Civ. Proc. § 1141.25 and *Cal. Rules of Ct., Rule 3.826(c)* appear to be in conflict with *Code Civ. Proc. § 1141.21* [*see § 36.36*], which states that if the results of the trial de novo are not more favorable than the results of the arbitration award to the requesting party, the court may order that party to reimburse the county for the compensation paid to the arbitrator. In order to comply with *Code Civ. Proc. § 1141.21*, the court must refer to the arbitrator's findings at some point before entry of judgment. This conflict may be avoided if the phrase "during the trial" is interpreted to mean the portion of the proceeding during which the trier of fact hears the evidence and makes its decision based on that evidence [*Weber v. Kessler (1981) 126 Cal. App. 3d 1033, 1036, 179 Cal. Rptr. 299]* . It is imperative that the trial record clearly show that the court's decision as to which party will prevail was reached independently and without any reference to the arbitrator's findings [*Weber v. Kessler (1981) 126 Cal. App. 3d 1033, 1036, 179 Cal. Rptr. 299]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionJudicial ReviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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§ 36.35 Discovery for Trial de Novo

In cases in which the parties were ordered into arbitration by the judge because the case was determined to have an amount in controversy not exceeding $50,000, no discovery other than that permitted by *Code Civ. Proc. § 2034.010 et seq*, (demands to exchange expert witness lists) is permissible after an arbitration award except by leave of court on a showing of good cause or on the stipulation of the parties [*Code Civ. Proc. § 1141.24*; *see McCormick v. Sentinel Life Ins. Co. (1984) 153 Cal. App. 3d 1030, 1051-1052, 200 Cal. Rptr. 732* (good cause not shown by argument that case was complex or witnesses could not be compelled to testify)].

In determining whether or not good cause for discovery exists, factors the court may want to consider include the following [*Regan v. Lanet (1987) 197 Cal. App. 3d 353, 360-361, 243 Cal. Rptr. 20]* :

- The necessity and reasons for the discovery.
- The diligence of the party seeking discovery.
- Whether delay in the trial of the action will result.
- Whether the purposes of arbitration, namely prompt, equitable, and efficient resolution of cases, are being served.
- Whether the party seeking discovery is also the party who requested trial de novo.
- The prejudice and hardship to both parties.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 36.36 Assessment of Trial de Novo Costs

[1] Penalty If Award Not More Favorable

[a] Penalty Provision

If the judgment on the trial de novo is not more favorable in either the amount of damages awarded or the type of relief granted for the party electing the trial de novo than the arbitration award, the court will order that party to pay the following nonrefundable costs and fees, unless the court finds in writing and on motion [for forms, *see § 36.82*] that the imposition of those costs and fees would create such a substantial economic hardship as not to be in the interests of justice [*Code Civ. Proc. § 1141.21(a), Cal. Rules of Ct., Rule 3.826(d)*; *see Sharples v. Chole (1994) 29 Cal. App. 4th 1213, 1221, 35 Cal. Rptr. 2d 208* (fees not required to be paid where court assignment to arbitration was in error)]:

- To the court, the compensation actually paid to the arbitrator, less any amount paid pursuant to *Code Civ. Proc. § 1141.21(a)(1)(D), below* [*Code Civ. Proc. § 1141.21(a)(1)(A)*].

- To the other party or parties, costs specified in *Code Civ. Proc. § 1033.5*, with the party electing the trial de novo not recovering his or her costs [*Code Civ. Proc. § 1141.21(a)(1)(B)*].

- To the other party or parties, the reasonable costs of the services of expert witnesses, who are not regular employees of any party, actually incurred or reasonably necessary in the preparation or trial of the case [*Code Civ. Proc. § 1141.21(a)(1)(C)*].

- To the other party or parties, the compensation paid by the other party or parties to the arbitrator pursuant to *Code Civ. Proc. § 1141.28(b)* [*Code Civ. Proc. § 1141.21(a)(1)(D)*; *see § 36.38*].

Those costs and fees, other than the compensation of the arbitrator, can include only those incurred from the time of election of the trial de novo [*Code Civ. Proc. § 1141.21(a)(2)*].

[b] Harmonized With Labor Code Section 3856

Labor Code § 3856 governs allocation between the employer and the employee of a judgment obtained against a negligent third party. Any such judgment is to be used first to pay reasonable litigation expenses incurred in preparation or prosecution of that action, together with a reasonable attorney's fee. Next, the judgment is to be used to reimburse the employer for the amount of compensation paid to the employee. Any remaining portion of the judgment goes to the injured employee.

An employee who obtains a less favorable result against a third party on trial de novo following judicial arbitration, and therefore cannot recover his or her costs under *Code Civ. Proc. § 1141.21(a)(1)(B)*, may still have the judgment allocated in accordance with *Labor Code § 3856*, including use of the judgment to pay his or her reasonable litigation expenses and reasonable attorney's fees [*Phelps v. Stostad (1997) 16 Cal. 4th 23, 34, 65 Cal. Rptr. 2d 360, 939 P.2d 760* (disapproving dictum to the contrary in *Crampton v. Takegoshi (1993) 17 Cal. App. 4th 308, 319, 21 Cal. Rptr. 2d 284*)].

By their terms, there is no conflict between *Code Civ. Proc. § 1141.21(a)(1)(B)* and *Labor Code § 3856*. They apply to different relationships. The phrase "shall not recover his or her costs" in *Code Civ. Proc. § 1141.21(a)(1)(B)* does not preclude a party from using part of a judgment to pay costs incurred during the litigation. A party would "recover his or her costs" within the meaning of *Code Civ. Proc. § 1141.21(a)(1)(B)* if the trial court were to order the third party tortfeasor to pay those costs *in addition to* paying the amount of the damages awarded by the judgment [*Phelps v. Stostad (1997) 16 Cal. 4th 23, 32-33, 65 Cal. Rptr. 2d 360, 939 P.2d 760]* . In determining what litigation expenses and attorney's fees are reasonable within the meaning of *Labor Code § 3856*, the court may consider whether it was reasonable to request a trial de novo. If, at the time the party elected the trial de novo, there was no reasonable prospect of a recovery significantly greater than the arbitration award, the court could exclude expenses incurred for the trial de novo [*Phelps v. Stostad (1997) 16 Cal. 4th 23, 33, 65 Cal. Rptr. 2d 360, 939 P.2d 760]* .

[2] Election of Trial de Novo by Two or More Parties

The judicial arbitration statutes do not preclude more than one party per arbitration from electing a trial de novo. If two or more parties do so, each is subject to being held liable for costs under *Code Civ. Proc. § 1141.21* if unsuccessful in the trial de novo [*Boyd v. Oscar Fisher Co. (1989) 210 Cal. App. 3d 368, 382, 258 Cal. Rptr 473]* .

[3] Litigant Refused to Participate in Arbitration

If a litigant refused to participate in judicial arbitration as a means of avoiding costs under *Code Civ. Proc. § 1141.21*, the court may award such costs as an element of monetary sanctions authorized by *Code Civ. Proc. § 128.5* [*see* *Lyons v. Wickhorst (1986) 42 Cal. 3d 911, 926, 928, 231 Cal. Rptr. 738, 727 P.2d 1019* (majority of Court on this issue based on two concurring opinions)].

Code Civ. Proc. § 128.5 specifically applies only to actions filed or proceedings initiated on or before December 31, 1994. A significantly different statute, *Code Civ. Proc. § 128.7*, governs sanctions for frivolous and delaying tactics in actions in which the complaint was filed on and after January 1, 1995. Section 128.7 does not expressly apply to judicial arbitration proceedings, and whether or not it will be so applied is an open question [*Code Civ. Proc. § 128.7(i)*]. For discussion of sanctions under Sections 128.5 and 128.7, see Ch. 510, *Sanctions* .

[4] Party Proceeding in Forma Pauperis

If the party electing the trial de novo has proceeded in the action in forma pauperis and has failed to obtain a more favorable judgment, the costs and fees under *Code Civ. Proc. § 1141.21(a)(1)(B), (C)* will be imposed only as an offset against any damages awarded in favor of that party [*Code Civ. Proc. § 1141.21(b)*]. Also, the costs under *Code Civ. Proc. § 1141.21(a)(1)(A)* will be imposed only to the extent that there remains a sufficient amount in the judgment after the amount offset under *Code Civ. Proc. § 1141.21(b)* has been deducted from the judgment [*Code Civ. Proc. § 1141.21(c)*]. For discussion of what costs are covered by the various subsections of Section 1141.21(a), see [1], *above*.

[5] No Liability If Arbitration Award Exceeds $50,000

No party electing a trial de novo for an arbitration award which exceeded $50,000 will be subject to the cost provisions of *Code Civ. Proc. § 1141.21* if the judgment on the trial de novo is in excess of $50,000 [*Code Civ. Proc. § 1141.26*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionJudicial ReviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 36 JUDICIAL ARBITRATION
PART II. LEGAL BACKGROUND

4-36 California Forms of Pleading and Practice--Annotated § 36.37

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§ 36.37 Dismissal for Delay in Prosecution

[1] Application of Dismissal Statutes to Action Submitted to Judicial Arbitration

A civil action is subject to dismissal for delay in prosecution if it is not brought to trial as follows [*see Code Civ. Proc. § 583.110 et seq.*]:

- Dismissal is mandatory if the action is not brought to trial within five years after its commencement against the defendant [*Code Civ. Proc. §§ 583.310, 583.360*].

- Dismissal is discretionary if the action is not brought to trial within two years after its commencement against the defendant [*Code Civ. Proc. §§ 583.410, 583.420(a)(2)*; *Cal. Rules of Ct., Rule 3.1340(a)*].

These provisions apply to actions submitted to judicial arbitration as well as to other actions [*see Code Civ. Proc. § 583.120(a)* (application of dismissal provisions)].

For discussion and forms relating to dismissal for delay in prosecution generally, see Ch. 212, *Dismissal* .

[2] Tolling of Dismissal Statutes If Case Is Submitted to Judicial Arbitration

[a] Potential Grounds

Three possible grounds for tolling the five-year mandatory dismissal statute may arise if a case has been submitted to judicial arbitration:

- Submission of an action to arbitration will result in the tolling of the five-year mandatory statute only under the terms of *Code Civ. Proc. § 1141.17* [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 434, 41 Cal. Rptr. 2d 362, 895 P.2d 469* ; for discussion, *see* [b], *below*].

- After arbitration, if a trial de novo has been requested, tolling of the mandatory dismissal statute may be implied from *Code Civ. Proc. § 1141.20* if the court does not properly calendar or recalendar the case [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 434-435, 41 Cal. Rptr. 2d 362, 895 P.2d 469* ; for discussion, *see* [c], *below*].

- After arbitration, the mandatory dismissal statute may be tolled by impossibility, impracticability, or futility to prosecute the action under *Code Civ. Proc. § 583.340(c)* [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 437-438, 41 Cal. Rptr. 2d 362, 895 P.2d 469* ; for discussion *see* [d], *below*].

Other grounds for tolling the five-year period that are not related to arbitration may also be present in the case. Also, tolling for impossibility, impracticability, or futility may arise from circumstances that are totally unrelated to arbitration of the case. For discussion of these issues, see Ch. 212, *Dismissal* .

[b] Automatic Tolling Under Code Civ. Proc. § 1141.17

[i] From Four Years Six Months After Filing Action Until Request for Trial de Novo

If an action is or remains submitted to judicial arbitration more than four years and six months after the plaintiff has filed the action, then the following time period is not included in computing the five-year period within which the case must be brought to trial under *Code Civ. Proc. § 583.310*: The time beginning on the date four years and six months after the plaintiff filed the action and ending on the date on which a request for a de novo trial is filed under *Code Civ. Proc. § 1141.20* [*Code Civ. Proc. § 1141.17(b)*; *see* *Santa Monica Hospital Medical Center v. Superior Court (1988) 203 Cal. App. 3d 1026, 1030 n.1, 250 Cal. Rptr. 384* (computation of five-year period extended under *Code Civ. Proc. § 1141.17(b)*)].

Under *Code Civ. Proc. § 1141.17(b)*, plaintiff has six months from the time the request for trial de novo is made to bring the case to trial [*see* *Drummond v. Murata (1991) 227 Cal. App. 3d 44, 49, 277 Cal. Rptr. 727* (citing *Code Civ. Proc. § 1141.17(b)* and holding *Code Civ. Proc. § 583.350* inapplicable); *Marchuk v. Ralphs Grocery Co. (1990) 226 Cal. App. 3d 1273, 1276 n.1, 276 Cal. Rptr. 627* (citing *Code Civ. Proc. § 583.350*); *see also* *Messih v. Levine (1991) 228 Cal. App. 3d 454, 458, 278 Cal. Rptr. 825]* . "Six months" means six calendar months or 182 days, whichever is longer [*Marchuk v. Ralphs Grocery Co. (1990) 226 Cal. App. 3d 1273, 1276 n.2, 276 Cal. Rptr. 627* (reconciling *Gov. Code §§ 6803, 6804*)].

Section 1141.17 is the only ground under which the submission of an action to judicial arbitration can toll the running of the time periods specified in *Code Civ. Proc. § 583.110 et seq.* [*Code Civ. Proc. § 1141.17(a)*; *Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 434-435, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* . The ruling of *Moran v. Superior Court (1983) 35 Cal. 3d 229, 197 Cal. Rptr. 546, 673 P.2d 216* that, based on *Code Civ. Proc. § 1141.20*, the five-year period is automatically tolled from the date a request for trial de novo is filed until the date a new trial is set is no longer tenable under amendments to *Code Civ. Proc. § 1141.17* that occurred after *Moran*. For discussion of how Section 1141.20 may nonetheless toll the five-year period, see [c], *below*.

[ii] Earlier Events That May End Tolling

Although the period tolled under *Code Civ. Proc. § 1141.17(b)* ends specifically "on the date on which a request for a

trial de novo is filed," it may also end earlier, for example, when the arbitration process ends on a party's motion [*see, e.g., Invicta Plastics, U.S.A., Ltd. v. Superior Court (1981) 120 Cal. App. 3d 190, 174 Cal. Rptr. 476]* . Thus, if a request for a trial de novo is never made because arbitration never occurs, the tolling provision of *Code Civ. Proc. § 1141.17(b)* nevertheless applies so long as the action is or remains submitted to arbitration more than four years and six months after the plaintiff has filed the action.

In this situation, the period tolled ends on the date the case is removed from the arbitration hearing list [*Niesner v. Kusch (1986) 186 Cal. App. 3d 291, 296-297, 230 Cal. Rptr. 613* ; *see also Winston v. Woodward (1992) 3 Cal. App. 4th 361, 367, 4 Cal. Rptr. 2d 126* (tolling period ends on date arbitrator ruled case not amenable to arbitration with directions to restore it to civil active list)].

[iii] Period Tolled Whether Action Is Arbitrated by Election or Under Court Order

The tolling provision of *Code Civ. Proc. § 1141.17(b)* applies regardless of whether an action is submitted to judicial arbitration by the plaintiff's election under *Code Civ. Proc. § 1141.12* or by a court order under *Code Civ. Proc. § 1141.11* [*see Lazelle v. Lovelady (1985) 171 Cal. App. 3d 34, 43-44, 217 Cal. Rptr. 145* ; *see also Jackson v. Garmon (1990) 217 Cal. App. 3d 860, 863-866, 266 Cal. Rptr. 201]* .

[c] Post-Arbitration Tolling Under Code Civ. Proc. § 1141.20

[i] Based on Court's Failure to Calendar or Recalendar Case

When a party requests a trial de novo under *Code Civ. Proc. § 1141.20*, discussed in *§ 36.34[1]*, the court has a duty to calendar or recalendar the case for trial to prevent plaintiffs from being penalized for having undergone the arbitration process. The court's failure to fulfill this duty may result in tolling the five-year mandatory dismissal deadline of *Code Civ. Proc. §§ 583.310, 583.360*. The period tolled would be from the date of the trial de novo request until the date of the new trial [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 434-435, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* .

Although *Code Civ. Proc. § 1141.17* is the exclusive ground for tolling the five-year mandatory dismissal deadline for bringing a case to trial based on submission of the case to arbitration, *Code Civ. Proc. § 1141.20* may be the basis of implied tolling of the five-year period. This tolling is not based on "submission to arbitration," but on the court's failure in the post-arbitration period to fulfill its duty under Section 1141.20 [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 434-435, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* .

[ii] Reasonable Diligence Required

The plaintiff must exercise some initial reasonable diligence to benefit from the implied tolling provisions of Code Civ. Proc. § 1140.20. It is the plaintiff's task, rather than that of the court, to keep track of pertinent dates, and to inform the court of these dates. Once a plaintiff has informed the court, during or shortly after a trial de novo request, of the five-year trial date, the court then has the duty under *Code Civ. Proc. § 1141.20* to schedule the case insofar as possible, so that the trial will be given the same place on the active list as it had prior to arbitration or to receive civil priority [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 435, 41 Cal. Rptr. 2d 362, 895 P.2d 469* ; *Code Civ. Proc. §§ 583.310, 583.360* (five-year limit)]. Thus, if, prior to arbitration, a plaintiff was eligible to receive a trial date within the five year statute, then plaintiff is entitled to receive such a trial date on a timely post-arbitration request [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 435, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* .

If the trial court fails to correctly calendar or recalendar the case after having been properly notified, only then will the action be tolled pursuant to *Code Civ. Proc. § 1141.20* from the date of the trial de novo request until the date of the new trial [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 435, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* .

The plaintiff is under this duty of diligence regardless of whether the plaintiff or the defendant is the party requesting trial de novo [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 435-436, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* .

[iii] What Constitutes Reasonable Diligence

The degree of diligence that is considered reasonable in order to toll the five-year period under *Code Civ. Proc. § 1141.20* is not precisely defined. Some courts require only that the plaintiff request that the trial court set a date for the trial de novo within the five-year period [*Santa Monica Hospital Medical Center v. Superior Court (1988) 203 Cal. App. 3d 1026, 1028, 250 Cal. Rptr. 384]* .

Other courts require that the plaintiff must not only call the court's attention to the time frame of the case on a request for a trial de novo, but must also continue to move the case along to bring it to trial within the statutory period, rather than casually awaiting the new trial date selected by the trial court [*Berry v. Weitzman (1988) 203 Cal. App. 3d 351, 356-357, 249 Cal. Rptr. 816]* . In *Dresser v. Bindi (1990) 221 Cal. App. 3d 1493, 271 Cal. Rptr. 137* , the court ruled that a plaintiff, although entitled to presume a trial court will perform its duty to set a preferential trial date following a request for a trial de novo, must nonetheless diligently perform his or her independent duty at all times to keep track of the five-year deadline and to inform the trial court of that deadline [*Dresser v. Bindi (1990) 221 Cal. App. 3d 1493, 1494-1495, 1498, 271 Cal. Rptr. 137* ; *Serrano v. FMC Corp. (1990) 221 Cal. App. 3d 1027, 271 Cal. Rptr. 41* ; *see also Marchuk v. Ralphs Grocery Co. (1990) 226 Cal. App. 3d 1273, 1277, 276 Cal. Rptr. 627]* .

The degree of diligence required may not have been fully resolved by *Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 41 Cal. Rptr. 2d 362, 895 P.2d 469* . *Howard* clearly confirms the diligence requirement that has been applied by the courts of appeal. Also, *Howard* states that if the plaintiff was entitled to a trial date within the five-year statute prior to arbitration, then plaintiff is entitled to receive such a date "upon a timely postarbitration request" [*see Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 435, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* . From this language, one could argue that the court of appeal cases, such as *Santa Monica Hospital Medical Center, above*, are correct in requiring only a lesser degree of diligence. However, *Howard* held that the plaintiff had not been diligent. The plaintiff did not inform the court of the impending deadline or seek to have a trial date set until raising the issue on a motion to specially set the case for trial made some six months after defendant's request for trial de novo and 44 days before expiration of the five-year period [*see Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 430-431, 435, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* . Therefore, although *Howard* shows one situation of inadequate diligence, it does not directly provide a holding on the degree of diligence that is required to obtain *Code Civ. Proc. § 1141.20* tolling.

[d] Post-Arbitration Tolling for Impossibility, Impracticability, or Futility Under Code Civ. Proc. § 583.340(c)

Although *Code Civ. Proc. § 1141.17* is the exclusive provision governing tolling of the five-year mandatory dismissal provisions based on submission to arbitration, Section 1141.17 does not govern post-arbitration tolling caused by other means. Once the Section 1141.17 tolling expires (when the case is no longer submitted to arbitration), a post-arbitration period commences during which the five-year period may be tolled under *Code Civ. Proc. § 583.340(c)* if it is impossible, impracticable, or futile to prosecute the action [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 437-438, 41 Cal. Rptr. 2d 362, 895 P.2d 469* ; *see Code Civ. Proc. §§ 583.310, 583.360* (five-year limit)].

For example, if the plaintiff prevails in arbitration and the defendant fails to request trial de novo, the case is no longer submitted to arbitration after the time to request trial de novo expires. If the plaintiff obtains entry of a judgment on the award, the period from the entry of the judgment until the defendant succeeds in having the judgment set aside will almost invariably be a circumstance in which it is impossible, impracticable, or futile to bring the case to trial, and the

five-year statute will be considered tolled during that period [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 438-439, 41 Cal. Rptr. 2d 362, 895 P.2d 469* ; *see Code Civ. Proc. § 1141.20(a)* (time for requesting trial de novo)].

This tolling is analogous to the tolling recognized when a default judgment has been taken in a plaintiff's favor. Thus, tolling may include the period between the expiration of the time to request trial de novo (or taking a defendant's default) and the judgment on the arbitration award (or entry of a default judgment) if the plaintiff obtains entry of the judgment within a reasonable period. One week is a reasonable period for obtaining entry of the judgment, and allows the time before, as well as after, the entry of the judgment to be tolled [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 438-439, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* .

[e] Discretionary Dismissal on Post-Arbitration Motion to Specially Set

Motions to specially set a case to avoid the five-year mandatory dismissal statute raise the same issues as a motion for discretionary dismissal for delay in prosecution [*Salas v. Sears, Roebuck & Co. (1986) 42 Cal. 3d 342, 346, 228 Cal. Rptr. 504, 721 P.2d 590]* . For general discussion of these motions, and the factors usually considered, including the plaintiff's diligence and the preference for disposition of cases on their merits [*see Code Civ. Proc. § 583.130*], see Ch. 212, *Dismissal* .

A plaintiff's post-arbitration motion to specially set can be characterized as a belated attempt by a plaintiff to compel the court to fulfill its duty to recalendar the case, rather than simply plaintiff's attempt to regain time lost by his or her own procrastination. Thus, the preference for disposition of cases on their merits [*see Code Civ. Proc. § 583.130*] is reinforced by the *Code Civ. Proc. § 1141.20* mandate that plaintiffs not be penalized for undergoing arbitration. The fact that the motion to specially set seeks to rectify the court's error should weigh in plaintiff's favor [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 441-442, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* . Nonetheless, the trial court retains discretion to deny the motion when the plaintiff has failed to promptly request a timely trial date in the post-arbitration period. A showing by the defendant that the accelerated trial date will cause actual prejudice can be a critical factor in denying the motion [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 442, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* .

Plaintiff's pre-arbitration conduct of the litigation may also be considered. If a plaintiff is vulnerable to discretionary dismissal before arbitration, then undergoing arbitration and benefiting from the recalendaring under *Code Civ. Proc. § 1141.20* does not necessarily immunize plaintiff against such a motion [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 442, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* .

Thus, a trial court may use a plaintiff's motion to specially set the case for trial as an opportunity to correct its own failure to calendar or recalendar the case under *Code Civ. Proc. § 1141.20*; but these considerations may be outweighed by plaintiff's unreasonable delay before or after arbitration, as well as by prejudice to the defendant from the accelerated trial date [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 443, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* .

[3] When Plaintiff Elects to Arbitrate to Avoid Mandatory Dismissal

When a plaintiff elects to submit his or her action to arbitration under *Code Civ. Proc. § 1141.12* (*discussed under § 36.16*), but does so just before the lapse of the five-year period in order to avoid mandatory dismissal, the trial court, before entering any order on the merits, should consider the factors relevant to a motion to dismiss under the discretionary dismissal provisions of *Code Civ. Proc. § 583.420* [*Sisler v. Superior Court (1988) 205 Cal. App. 3d 864, 868, 252 Cal. Rptr. 665* (trial court erred in granting plaintiff's motion to refer matter to arbitration when order was entered on last day of five-year period and trial court based its ruling solely on imminent expiration of that period)]. For further discussion relating to discretionary dismissal for delay in prosecution, see Ch. 212, *Dismissal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultFailure to Pursue the CauseCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionJudicial ReviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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4-36 California Forms of Pleading and Practice--Annotated § 36.38

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§ 36.38 Costs of Arbitration

All administrative costs of arbitration, including compensation of arbitrators, must be paid for by the court in which the arbitration costs are incurred, except as otherwise provided in *Code Civ. Proc. § 1141.21(b)* [*Code Civ. Proc. § 1141.28(a)*; *see § 36.36*[4]].

The actual costs of compensation of arbitrators in any proceeding which would not otherwise be subject to the provisions of *Code Civ. Proc. § 1141.10 et seq.*, but in which arbitration is conducted under those provisions solely because of the stipulation of the parties, must be paid for in equal shares by the parties. If the imposition of these costs would create such a substantial economic hardship for any party as not to be in the interest of justice, as determined by the arbitrator, that party's share of costs must be paid for by the court in which the arbitration costs are incurred. The determination as to substantial economic hardship may be reviewed by the court [*Code Civ. Proc. § 1141.28(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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§ 36.39 Sanctions

A court may, on its own motion or on that of a party, impose monetary sanctions for expenses, including attorney's fees, incurred as a result of tactics or actions in a judicial arbitration proceeding which are frivolous or solely intended to cause unnecessary delay [*Code Civ. Proc. § 128.5*; *see Zatkin v. Cesare (1988) 199 Cal. App. 3d 756, 759, 245 Cal. Rptr. 222]* . Any order imposing sanctions must be in writing and must recite in detail the conduct or circumstances justifying the order [*Code Civ. Proc. § 128.5(c)*; *see Hearst v. Ferrante (1987) 189 Cal. App. 3d 201, 202, 234 Cal. Rptr. 385]* . *Code Civ. Proc. § 128.5* specifically applies only to actions filed or proceedings initiated on or before December 31, 1994. A significantly different statute, *Code Civ. Proc. § 128.7*, governs sanctions for frivolous and delaying tactics in actions filed on and after January 1, 1995. Section 128.7 does not expressly apply to judicial arbitration proceedings, and whether or not it will be so applied is an open question [*Code Civ. Proc. § 128.7(i)*]. For discussion of sanctions under Sections 128.5 and 128.7, see Ch. 510, *Sanctions* .

In addition, if a local rule of court so provides, the court, on noticed motion, may impose sanctions on a party or an attorney for failure to meaningfully participate in judicial arbitration [*Code Civ. Proc. § 575.2*; *Rietveld v. Rosebud Storage Partners, L.P. (2004) 121 Cal. App. 4th 250, 255-257, 16 Cal. Rptr. 3d 791* (sanction imposed under authority of former Sacramento Co. Super. Ct. Rules, Rule 12.04(A) [*see now* Sacramento Co. Super. Ct. Rules, Rule 12.03(A)])].

ILLUSTRATION:

Conduct of Attorney Warranting Sanctions. A case was ordered to judicial arbitration, a hearing date set, and plaintiffs' attorney notified that 10 days before the hearing he was to provide copies of the complaint, the answer, and a short arbitration brief. The attorney arrived 25 minutes late for the hearing and failed to provide any of the required documents. Plaintiffs did not attend the hearing and were not

available by phone. Plaintiffs' attorney did not provide any evidence at the hearing, but stated that he agreed with the facts set forth in defendant's arbitration brief. The arbitrator entered an award for defendant. Plaintiffs' attorney requested a trial do novo. Defendant filed a motion for sanctions against plaintiffs and their attorney for failure to participate meaningfully in judicial arbitration. In opposing the motion, plaintiffs' attorney claimed there had been no reason to present evidence at the arbitration hearing because judicial arbitration often proceeds by way of mediation and settlement; he also argued that the right to request trial de novo renders judicial arbitration essentially meaningless. The trial court found plaintiffs' attorney had violated a local rule [former Sacramento Co. Super. Ct. Rules, Rule 12.04(A) (*see now* Sacramento Co. Super. Ct. Rules, Rule 12.03(A))] and imposed sanctions of $2,380 against the attorney, only, based on the fees and costs incurred by defendant in the arbitration and in moving for sanctions. Should the sanctions be upheld? Yes. [*Rietveld v. Rosebud Storage Partners, L.P. (2004) 121 Cal. App. 4th 250, 255-257, 16 Cal. Rptr. 3d 791]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral Overview

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4-36 California Forms of Pleading and Practice--Annotated § 36.40

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§ 36.40 Notice If Case Settled

If an entire case is settled, each plaintiff or other party seeking affirmative relief must immediately file written notice of the settlement or other disposition with the court and serve the notice on all parties and any arbitrator as well as any other court-connected alternative dispute resolution (ADR) neutral involved in the case [*Cal. Rules of Ct., Rules 3.829, 3.1385(a)(1)*]. Each plaintiff or other party seeking affirmative relief must also immediately give oral notice to all of the above if a hearing, conference, or trial is scheduled to take place within 10 days [*Cal. Rules of Ct., Rule 3.1385(a)(1)*]. Judicial Council form CM-200, which is reproduced in Ch. 502, *Settlement and Release*, at § 520.114, is mandatory for use to give the notice of settlement.

If the plaintiff or other party seeking affirmative relief does not notify an arbitrator or other court-connected ADR neutral involved in the case of a settlement at least 2 days before a scheduled hearing or session with the arbitrator or neutral, the court may order the party to compensate the arbitrator or other neutral for the scheduled hearing time. The court cannot award compensation that exceeds the maximum amount the arbitrator would be entitled to receive for service as an arbitrator under *Code Civ. Proc. § 1141.18(b)* (discussed at *§ 36.20*[2], *above*) or that the neutral would have been entitled to receive for service as a neutral at the scheduled hearing or session [*Cal. Rules of Ct., Rule 3.1385(a)(2)*].

Unless the settlement is conditional [*see Cal. Rules of Ct., Rule 3.1385(c), below*], each plaintiff or other party seeking affirmative relief must also file and serve a request for dismissal of the entire case within 45 days after the date of settlement of the case. If the plaintiff or other party required to serve and file the request for dismissal does not do so, the court must dismiss the entire case 45 days after it received notice of settlement unless good cause is shown why the case should not be dismissed [*Cal. Rules of Ct., Rule 3.1385(b)*]. If the settlement of the case involves the compromise of the claim of a minor or person with a disability, the court must not hold a hearing for dismissal before the court has

held a hearing to approve the settlement, provided the parties have filed appropriate papers to seek court approval of the settlement [*Cal. Rules of Ct., Rule 3.1385(d)*].

If the settlement agreement conditions dismissal on the satisfactory completion of specified terms that are not to be performed within 45 days of the settlement, the notice of conditional settlement served and filed by each plaintiff or other party seeking affirmative relief must specify the date by which the dismissal is to be filed. If the plaintiff or other party required to serve and file a request for dismissal within 45 days after the dismissal date specified in the notice does not do so, the court must dismiss the entire case unless good cause is shown why the case should not be dismissed [*Cal. Rules of Ct., Rule 3.1385(c)*]. If a party who has served and filed a notice of settlement determines that the case cannot be dismissed within 45 days of the settlement, that party must serve and file a notice and supporting declaration advising the court of that party's inability to do so, showing good cause and proposing an alternative date for dismissal [*Cal. Rules of Ct., Rule 3.1385(e)*]. A party cannot use a *Cal. Rules of Ct., Rule 3.1385* hearing to obtain a court determination that a settlement is unenforceable. Rule 3.185 is only a case management tool for delay reduction. At a Rule 3.1385 hearing, the trial court's only options are to dismiss the case or to restore it to the civil active list. By alleging a dispute over whether the parties have reached a binding settlement, a party demonstrates good cause to restore the case to the civil active list [*Irvine v. Regents of the University of California (2007) 149 Cal. App. 4th 994, 1001-1002, 57 Cal. Rptr. 3d 500]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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4-36 California Forms of Pleading and Practice--Annotated §§ 36.41-36.49

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[Reserved]

§§ 36.41[Reserved]

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4-36 California Forms of Pleading and Practice--Annotated § 36.50

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§ 36.50 Related Matthew Bender Publications

For memoranda of points and authorities relating to arbitration, see California Points and Authorities, Ch. 20, *Arbitration: Compelling* , Ch. 20A, *Arbitration: Resisting* , Ch. 20B, *Arbitration: Selecting Arbitrators; Arbitral Immunity* , Ch 20C, *Arbitration: Confirming, Correcting, or Vacating the Award* , Ch. 20D, *Arbitration: Dismissing* , Ch. 20E, *Arbitration: Effect of Award* (Matthew Bender)

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4-36 California Forms of Pleading and Practice--Annotated § 36.51

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§ 36.51 State Statutes

[1] Actions Subject to Arbitration

[a] Mandatory Arbitration

Authority for mandatory aribtration of actions in which amount in controversy does not exceed $50,000. *Code Civ. Proc. § 1141.11*

Exclusion of actions for equitable relief from arbitration. *Code Civ. Proc. § 1141.13*

[b] Plaintiff's Election to Arbitrate

Arbitration on plaintiff's election. *Code Civ. Proc. § 1141.12(b)*

[c] Stipulation of Parties

Any case in any court to be submitted to arbitration on stipulation of parties. *Code Civ. Proc. § 1141.12(a)*

Court not to determine amount in controversy if defendants stipulate in writing that amount exceeds $50,000. *Code Civ. Proc. § 1141.16(a)*

Selection of arbitrator by stipulation of parties. *Code Civ. Proc. § 1141.18(a)*

Discovery permitted after arbitration award in cases under Code Civ. Proc. § 1411.11 by stipulation of parties. *Code Civ. Proc. § 1141.24*

[d] Public Entity

Public entity or public agency as party to civil action required to be arbitrated. *Code Civ. Proc. § 1141.27*

[2] Determination of Amount in Controversy

Amount in controversy determined by court a case management conference after all parties have appeared or defaulted. *Code Civ. Proc. § 1141.16*

Determination of amount in controversy based on total amount of damages. *Code Civ. Proc. § 1141.16*

Questions of liability or comparative negligence or other defenses are not part of determination of amount in controversy. *Code Civ. Proc. § 1141.16*

[3] Judicial Council Rules

Judicial Council to provide rules to implement arbitration statutes. *Code Civ. Proc. § 1141.14*

[4] Arbitrators

Qualifications. *Code Civ. Proc. § 1141.18*

Disqualification. *Code Civ. Proc. § 1141.18*

Selection of arbitrators by stipulation of parties. *Code Civ. Proc. § 1141.18*

Powers of arbitrators. *Code Civ. Proc. § 1141.19*

Arbitration award requires signature of arbitrator. *Code Civ. Proc. § 1141.23*

Compensation. *Code Civ. Proc. §§ 1141.18, 1141.28*

[5] Discovery

Limitation on discovery of information related to punitive damages. *Civ. Code § 3295*; *Code Civ. Proc. § 1141.19*.5

Discovery limited after arbitration award when case was ordered to arbitration pursuant to *Code Civ. Proc. § 1141.11*. *Code Civ. Proc. § 1141.24*

[6] Tolling of Dismissal Statutes

Tolling of *Code Civ. Proc. § 583.310* period for bringing action to trial to avoid dismissal for delay in prosecution

based on submission of action to arbitration. *Code Civ. Proc. § 1141.17*

[7] Arbitration Awards

Award final within 30 days if trial de novo not requested. *Code Civ. Proc. § 1141.20*

California Rules of Court determine grounds for correction, modification, or vacating of award. *Code Civ. Proc. § 1141.22*

Award to be in writing signed by arbitrator. *Code Civ. Proc. § 1141.23*

Award has same force and effect as any civil judgment. *Code Civ. Proc. § 1141.23*

Award in excess of $50,000 not prohibited. *Code Civ. Proc. § 1141.26*

[8] Trial de Novo

Any party is entitled to request trial de novo within 30 days of filing of arbitration award. *Code Civ. Proc. § 1141.20*

Party requesting trial de novo must pay costs of other party and county arbitration fees if trial judgment is less favorable than arbitration award. *Code Civ. Proc. § 1141.21(a)*

Discovery limited after arbitration award when case was ordered to arbitration pursuant to Code Civ. Proc. § 1411.11. *Code Civ. Proc. § 1141.24*

References to arbitration proceedings or award are prohibited in trial de novo. *Code Civ. Proc. § 1141.25*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionJudicial ReviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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4-36 California Forms of Pleading and Practice--Annotated § 36.52

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§ 36.52 California Rules of Court

[1] Actions Subject to Arbitration

Arbitration on stipulation of parties. *Cal. Rules of Ct., Rule 3.811(a)(4)*

Arbitration on plaintiff's election. *Cal. Rules of Ct., Rule 3.811(a)(5)*

Arbitration in superior courts with 18 or more authorized judges where amount in controversy does not exceed $50,000. *Cal. Rules of Ct., Rule 3.811(a)(1)*

Arbitration in superior courts with fewer than 18 authorized judges if required by local rule and if amount in controversy does not exceed $50,000. *Cal. Rules of Ct., Rule 3.811(a)(2)*

Arbitration in limited civil cases provided by local rule. *Cal. Rules of Ct., Rule 3.822(a)(3)*

Applicability of *Cal. Rules of Ct., Rules 3.810 et seq.*

[2] Administration of Arbitration Proceedings

Stipulations and requests for arbitration. *Cal. Rules of Ct., Rule 3.812*

ADR program administrator and ADR committees. *Cal. Rules of Ct., Rules 3.813,* 10.873

Composition of arbitration panels. *Cal. Rules of Ct., Rule 3.814*

Selection and rejection of arbitrator. *Cal. Rules of Ct., Rule 3.815*

[3] Arbitrators

Designation of arbitrator by stipulation of parties. *Cal. Rules of Ct., Rule 3.815(a)*

Active or inactive members of State Bar, retired judges, retired court commissioners who were licensed to practice law before their appointment as a commissioner, and former California judicial officers who are active or inactive members of State Bar are to compose panels of arbitrators. *Cal. Rules of Ct., Rule 3.814(b)*

Selection and rejection of arbitrator. *Cal. Rules of Ct., Rule 3.815*

Disqualification of arbitrator. *Cal. Rules of Ct., Rule 3.816*

Fees. *Cal. Rules of Ct., Rule 3.819*

Communication with arbitrator by parties. *Cal. Rules of Ct., Rule 3.820*

Powers. *Cal. Rules of Ct., Rule 3.824(a)*

Arbitrator required to sign arbitration award. *Cal. Rules of Ct., Rule 3.825(a)*

Authority of trial court having arbitration program to adopt local procedures for selecting arbitrator. *Cal. Rules of Ct., Rule 3.815(c)*

[4] Discovery

Parties to arbitration have right to discovery pursuant to *Code Civ. Proc. §§ 1985-2036.050*. *Cal. Rules of Ct., Rule 3.822(a)*

Discovery in arbitration proceedings required to be completed not later than 15 days before hearing date. *Cal. Rules of Ct., Rule 3.822(b)*

[5] Plaintiff's Election to Arbitrate

Arbitration on plaintiff's election. *Cal. Rules of Ct., Rule 3.812(b)*

[6] Hearing

[a] Timing and Notice of Hearing

Consent of arbitrator to continuance of hearing. *Cal. Rules of Ct., Rule 3.818(a)*

Arbitration hearing may proceed in absence of party given due notice of hearing. *Cal. Rules of Ct., Rule 3.821(b)*

Arbitrator sets time, date, and place of hearing. *Cal. Rules of Ct., Rule 3.817(a)*

Arbitration hearing must be scheduled so as to be completed no later than 90 days from date case is assigned to arbitrator. *Cal. Rules of Ct., Rule 3.817(c)*

Thirty days' notice of hearing required. *Cal. Rules of Ct., Rule 3.817(a), (b)*

Hearings not to be scheduled for Saturdays or legal holidays except on stipulation of parties. *Cal. Rules of Ct., Rule 3.817(b)*

[b] Conduct of Hearing

Right to representation by attorney at hearing. *Cal. Rules of Ct., Rule 3.821(a)*

Arbitrator need not make record of proceedings. *Cal. Rules of Ct., Rule 3.824(b)*

[7] Trial de Novo

Trial de novo may be requested within 30 days of filing of arbitration award. *Cal. Rules of Ct., Rule 3.826(a)*

Thirty-day period to request trial de novo is not extendible. *Cal. Rules of Ct., Rule 3.826(a)*

Request for trial de novo requires case to proceed as provided in applicable case management order; if there is no such order, court must promptly schedule case management conference. *Cal. Rules of Ct., Rule 3.826(b)*

Trial de novo to be tried as if no arbitration hearing had occurred. *Cal. Rules of Ct., Rule 3.826(c)*

References to arbitration proceedings or award are prohibited in trial de novo. *Cal. Rules of Ct., Rule 3.826(c)*

Assessment of costs after trial are governed by *Code Civ. Proc. § 1141.21*. *Cal. Rules of Ct., Rule 3.826(d)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 36.53 Local Rules of Court

[1] Alameda County

Requirements and procedure for judicial arbitration. Alameda Co. Super. Ct. Rules, Rule 6.8 et seq.

[2] Contra Costa County

Requirements of judicial arbitration. Contra Costa Co. Super. Ct. Rules, Rules 11, 12.4-12.7, Appendix C, Section Three

[3] Los Angeles County

Time for initial case management conference. Los Angeles Co. Super. Ct. Rules, Rule 7.9(a)

Referral to arbitration; selection of arbitrator. Los Angeles Co. Super. Ct. Rules, Rule 7.9(c)

Requirements and procedure for judicial arbitration. Los Angeles Co. Super. Ct. Rules, Rule 12.0 et seq.

[4] Orange County

Requirements and procedure for judicial arbitration. Orange Co. Super. Ct. Rules, Rules 360, 446

Discovery. Orange Co. Super. Ct. Rules, Rule 360(L), (Q)(6)

Procedure for selection of arbitrators. Orange Co. Super. Ct. Rules, Rule 360(G)

Disqualification of arbitrator or member of arbitrator's law firm for conflict of interest. Orange Co. Super. Ct. Rules, Rule 360(H)

Trial after arbitration award. Orange Co. Super. Ct. Rules, Rule 360(Q)

Limitation on withdrawal of request for trial de novo. Orange Co. Super. Ct. Rules, Rule 360(Q)(7)

[5] Sacramento County

Requirements and procedure for judicial arbitration. Sacramento Co. Super. Ct. Rules, Rule 12.00 et seq.

[6] City & County of San Francisco

Requirements and procedure for judicial arbitration. San Francisco Uniform Local Ct. Rules, Rule 4.1

Determination of amount in controversy to be heard by arbitration conference judge. San Francisco Uniform Local Ct. Rules, Rule 4.1(C)

Discovery. San Francisco Uniform Local Ct. Rules, Rule 4.1(D)

Procedure for selection or rejection of arbitrators. San Francisco Uniform Local Ct. Rules, Rule 4.1(E)

[7] San Mateo County

Requirements and procedure for judicial arbitration. San Mateo Co. Super. Ct. Rules, Rule 10.1

[8] Santa Clara County

Procedure. Santa Clara Co. Super. Rules, Rules 2, 4

[9] Santa Cruz County

Requirements and procedure for judicial arbitration. Santa Cruz Co. Coordinated Rules, Rule 7.1

Legal Topics:

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

[1] Arbitration Conference

Provision of former *Code Civ. Proc. § 1141.16(a)* that conference at which arbitration is ordered shall be held no later than 90 days before trial is not jurisdictional and does not create vested entitlement of party to trial if conference held within 90 days of trial date. *Moran v. Superior Court (1983) 35 Cal. 3d 229, 236 n.7, 197 Cal. Rptr. 546, 673 P.2d 216*

[1A] Attorney/Arbitrator

Requiring attorney to serve as arbitrator in court's program for two days per year with minimal compensation did not amount to taking which would entitle attorney to compensation under *Fifth Amendment*. *Scheele v. Justices of the Supreme Court of Arizona (9th Cir. 2007) 508 F. 3d 887, 896*

[2] Election to Arbitrate

Court retained jurisdiction to dismiss for lack of diligent prosecution while case ordered to mandatory arbitration; court may refuse to order judicial arbitration if plaintiff has waited unreasonable time before electing arbitration. *Nanfito v. Superior Court (1991) 2 Cal. App. 4th 315, 319-320, 2 Cal. Rptr. 2d 876*

Once court grants plaintiff's motion for election to arbitrate and places action on arbitration list, if it was either placed

there or remained there for more than four years and six months after action was originally filed, *Code Civ. Proc. § 1141.17(b)* applies to toll five-year mandatory dismissal statute (*Code Civ. Proc. § 583.310 et seq.*); however, because *Code Civ. Proc. § 1141.12(c)* requires that plaintiff's election to arbitrate be filed no later than 90 days before trial, or at a later time if permitted by court, plaintiff's unilateral election to arbitrate in last three months before running of five-year diligent prosecution statute (*Code Civ. Proc. § 583.310 et seq.*) requires court's permission; court considers factors relevant to motion to dismiss under discretionary dismissal provisions of *Code Civ. Proc. § 583.420* prior to entry of any order on merits of motion. *Jackson v. Garmon (1990) 217 Cal. App. 3d 860, 866, 866 n.6, 266 Cal. Rptr. 201*

[3] Stipulation for Arbitration

[a] Interpretation of Stipulation

Stipulation for arbitration to be interpreted according to ordinary rules for interpretation of contracts, with paramount consideration on parties' objective intention at time of agreement. *Winograd v. American Broadcasting Company (1998) 68 Cal. App. 4th 624, 632-636, 80 Cal. Rptr. 2d 378* (including rules for resolving conflicting inferences to be drawn from objective evidence); *Porreco v. Red Top RV Center (1989) 216 Cal. App. 3d 113, 118 n.5, 119, 264 Cal. Rptr. 609*

Stipulation entitled "Stipulation for Judicial Arbitration; Order Thereon," which referred to *Code Civ. Proc. § 1141.10* and former Cal. Rules of Ct. Rule 1616 [*see now Cal. Rules of Ct. Rule 3.826*], and by which each party waived right to trial de novo, contemplated judicial arbitration, not contractual arbitration. *Porreco v. Red Top RV Center (1989) 216 Cal. App. 3d 113, 119-120, 264 Cal. Rptr. 609*

[b] Waiver of Trial de Novo

Judgment entered on arbitration award set aside when plaintiff's attorney exceeded scope of implied authority by entering into agreement with defendants for binding arbitration by waiving trial de novo in advance of arbitrtion without client's consent, client did nothing beyond retaining attorney to suggest that attorney had authority to agree on her behalf, and, after learning of agreement, client repudiated it. *Blanton v. Womancare, Inc. (1985) 38 Cal. 3d 396, 399, 402, 212 Cal. Rptr. 151, 696 P.2d 645*

[4] Disqualification of Arbitrator

Violation of former Cal. Rules of Ct., Rule 1605(b) [*see now Cal. Rules of Ct., Rule 3.817(c)*] time limit for holding hearing does not subject arbitrator to "disqualification" as contemplated by former or current rules and is not basis for setting aside judgment. *Cabrera v. Plager (1987) 195 Cal. App. 3d 606, 612, 241 Cal. Rptr. 731* (rejecting contrary holding in *Lilly v. Lilly (1982) 129 Cal. App. 3d 925, 929, 181 Cal. Rptr. 375*)

In civil action ordered to arbitration by trial court, arbitrator's action in unilaterally continuing hearing on case to more than 10 months from date case was assigned to him and more than 5 months after date scheduled for hearing after case was continued by stipulation of parties violated former Cal. Rules of Ct., Rule 1605(b) [*see now Cal. Rules of Ct., Rule 3.817(c)*] and therefore, rendered arbitrator subject to disqualification. *Lilly v. Lilly (1982) 129 Cal. App. 3d 925, 928, 181 Cal. Rptr. 375*

Arbitrator's action in unilaterally continuing hearing on case, which rendered him subject to disqualification under former Cal. Rules of Ct., Rule 1615(d) [*see now Cal. Rules of Ct., Rule 3.828(a)*] was reversible error on appeal, not waived by plaintiff's failure to move in trial court to vacate arbitrator's judgment, because issue concerned error that

could have been basis of motion to vacate judgment, and involved only legal question based on California Rules of Court and uncontroverted facts unaltered by presentation of additional evidence, and because arbitration is matter of great public interest in efficient administration of justice. *Lilly v. Lilly (1982) 129 Cal. App. 3d 925, 928-929, 181 Cal. Rptr. 375*

[5] Jurisdiction

Party's appearance and participation at arbitration hearing without raising objection to jurisdiction of arbitrator estopped party from later challenging jurisdiction. *Cabrera v. Plager (1987) 195 Cal. App. 3d 606, 613 n.8, 241 Cal. Rptr. 731*

[6] Discovery

Postarbitration discovery not precluded pursuant to *Code Civ. Proc. § 1141.24* when case was submitted to arbitration by plaintiff's election and not by court order. *McMillan v. Superior Court (1983) 146 Cal. App. 3d 1014, 1018, 194 Cal. Rptr. 670*

Right to conduct discovery proceedings, although barred under former Cal. Rules of, Rule 222 (*now see Code Civ. Proc. § 2024.020*), for 30 days before trial date, reinstated by submission of action to judicial arbitration under former Cal. Rules of Ct. Rule 1612 [*see now Cal. Rules of Ct., Rule 3.822(b)*], up to 15 days before date set for arbitration hearing. *Zinn v. Superior Court (1980) 108 Cal. App. 3d 583, 588-589, 166 Cal. Rptr. 640*

Party failed to meet burden of establishing good cause for discovery before trial de novo when reasons for discovery existed before arbitration, there was no excuse for delay in seeking discovery, grant of request would have delayed trial and resulted in prejudice to other party, and denial of request would have minimal prejudice because party seeking discovery was already familiar with evidence. *Regan v. Lanet (1987) 197 Cal. App. 3d 353, 359-360, 243 Cal. Rptr. 20*

[7] Interest on Award

Award of prejudgment interest on judicial arbitration award pursuant to *Civ. Code § 3291* and *Code Civ. Proc. § 998* was proper when plaintiffs made settlement offer pursuant to *Code Civ. Proc. § 998*, defendant refused, and after judicial arbitration, amount greater than settlement offer was awarded plaintiffs and entered as judgment. *Joyce v. Black (1990) 217 Cal. App. 3d 318, 320, 322-323, 266 Cal. Rptr. 8*

[8] Right to Trial de Novo

Trial de novo is only means for plaintiff to challenge court order striking plaintiff's cost memorandum after arbitration. *Wagy v. Brown (1994) 24 Cal. App. 4th 1, 7, 29 Cal. Rptr. 2d 48*

Because neither judicial arbitration statutes (*Code Civ. Proc. §§ 1141.10 et seq.*) nor rules of judicial arbitration (*Cal. Rules of Ct., Rule 3.810 et seq.*) permit trial court to dismiss action because of party's failure to participate in arbitration proceeding, trial court's dismissal of defendant's motion for trial de novo because of its failure to participate in arbitration is not expressly authorized by statute; trial court is limited to imposition of sanctions in form of award of attorney's fees and costs as provided in *Code Civ. Proc. § 128.5*. *Salowitz Organization, Inc. v. Traditional Industries, Inc. (1990) 219 Cal. App. 3d 797, 802-807, 802 n.4, 268 Cal. Rptr 493*

Plaintiff who receives judicial arbitration award equal to amount in controversy may not request trial de novo. *Jackson v. Garmon (1990) 217 Cal. App. 3d 860, 864, 266 Cal. Rptr. 201*

Request by one plaintiff in multiparty litigation for trial de novo does not require second plaintiff to retry case when second plaintiff's claim was distinct from and unaffected by first plaintiff's claim and retrial of second plaintiff's claim would defeat purpose of judicial arbitration act to provide economical procedure for obtaining prompt equitable relief. *Demirgian v. Superior Court (1986) 187 Cal. App. 3d 372, 374-378, 231 Cal. Rptr. 698*

Request for trial de novo by defaulting party was proper and should have been granted when defaulting party failed to appear at arbitration hearing as result of mistake of party's attorney's secretary in not noting hearing date on calendar, which did not show premeditated, intentional, and purposeful course of action by defaulting party that is required before request for trial de novo may be denied. *Merritt v. Marks (1985) 175 Cal. App. 3d 825, 827-828, 221 Cal. Rptr. 88*

Court clerk's entering of judgment on arbitration award after request for trial filed violates former Cal. Rules of Ct., Rule 1615(c) [*see now Cal. Rules of Ct. Rule 3.827(a)*] (rules for entry of judgment), thereby entitling party to relief from judgment and order restoring case to trial list. *Fox Industrial Realty v. Dio Dix, Inc. (1982) 136 Cal. App. 3d 787, 790-792, 186 Cal. Rptr. 449*

Local court rule requiring party who failed to appear at arbitration hearing to file noticed motion and to show good cause in order to obtain trial de novo pursuant to *Code Civ. Proc. § 1141.20* and former Cal. Rules of Ct., Rule 1616 [*see now Cal. Rules of Ct. Rule 3.826*] is invalid to extent of good cause requirement because of legislative intent that access to court for trial de novo be procedurally unfettered. *Hebert v. Harn (1982) 133 Cal. App. 3d 465, 470, 184 Cal. Rptr. 83*

Postarbitration request for trial de novo, limited to certain issues and parties, is impermissible under *Code Civ. Proc. § 1141.20*; new trial proceeds on all issues with all parties. *Trump v. Superior Court (1981) 118 Cal. App. 3d 411, 413-417, 173 Cal. Rptr. 403*

[9] Request for Trial de Novo

Failure to attach proof of service to request for trial pursuant to former Cal. Rules of Ct., Rule 1616(a) [*see now Cal. Rules of Ct. Rule 3.826(a)*] was not jurisdictional defect because defendants obtained actual knowledge of filing of request for trial within statutory period, which fulfilled purpose of service requirement. *Lum v. Mission Inn Foundation, Inc. (1986) 180 Cal. App. 3d 967, 970, 226 Cal. Rptr. 22*

Arbitration award is final by operation of law under *Code Civ. Proc. § 1141.20* when proof of service of request for trial de novo is not filed pursuant to former Cal. Rules of Ct., Rule 1616(a) [*see now Cal. Rules of Ct. Rule 3.826(a)*]; proof of service by mail of request for trial de novo was fatally defective when first affidavit did not state address to which request had been mailed and second affidavit, prepared 11 months after mailing, did not explain how affiant had recollected address. Dobrick v. Hathaway (l984) *160 Cal. App. 3d 913, 921-923, 207 Cal. Rptr. 50*

Actual notice of arbitrator's award is necessary to commence running of period within which to file request for trial de novo under former Cal. Rules of Ct., Rule 1616(a) [*see now Cal. Rules of Ct. Rule 3.826(a)*], *Oats v. Oats (1983) 148 Cal. App. 3d 416, 420-421, 196 Cal. Rptr. 20*

Form entitled "At-Issue Memorandum," which was designed to inform court, with notice to opposing parties, of moving party's desire for civil trial and which apprised court and opposing counsel that former Cal. Rules of Ct., Rule 1616 [*see now Cal. Rules of Ct. Rule 3.826(a)*] was reason for request was in substantial compliance with Rule's requirement regarding request for trial de novo. *Fox Industrial Realty v. Dio Dix, Inc. (1982) 136 Cal. App. 3d 787,*

792, 186 Cal. Rptr. 449

When defendant's request for trial de novo was filed 23 days after judicial arbitration award was filed but rejection of arbitrator's award was filed within 20-day period, filing of rejection gave sufficient notice of defendant's decision to take case to trial, and substantially complied with time limitation for request for trial de novo imposed by *Code Civ. Proc. § 1141.20* and former Cal. Rules of Ct., Rules 1615(c), 1616(a) [*see now Cal. Rules of Ct. Rules 3.826(a), 3.827(a)*]. *Hanf v. Sunnyview Development, Inc. (1982) 128 Cal. App. 3d 909, 915-916, 180 Cal. Rptr. 718* (decided prior to amendment of *Code Civ. Proc. § 1141.20* in 1984 to allow 30 days to file request)

[10] Procedure After Request for Trial de Novo

After plaintiff, deeming award inadequate to cover losses, requests trial de novo, trial court is not required to permit defendant to delay and complicate action by allowing defendant to bring third party into action by way of cross complaint. *Brown v. Presley of So. California (1989) 213 Cal. App. 3d 612, 620-621, 261 Cal. Rptr. 779*

Party requesting trial de novo after arbitration is not entitled to dismiss action to avoid unfavorable arbitration award; dismissal reinstates award finalization procedure of *Code Civ. Proc. § 1141.20*. *Herbert Hawkins Realtors, Inc. v. Milheiser (1983) 140 Cal. App. 3d 334, 339-340, 189 Cal. Rptr. 450*

[11] Dismissal for Delay in Prosecution

[a] Tolling Under Code Civ. Proc. § 1141.17

Code Civ. Proc. § 1141.17 is exclusive ground for tolling time to bring case to trial based on submission to arbitration; but other grounds for tolling based on other reasons may also apply to a case submitted to arbitration. *Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 434-435, 41 Cal. Rptr. 2d 362, 895 P.2d 469*

Code Civ. Proc. § 1141.17 is designed to protect against harsh rule of *mandatory* dismissal for failure to bring case to trial; thus, when Section 1141.17 applies, it tolls mandatory five-year period regardless of plaintiff's exercise of reasonable diligence during this period. *Niesner v. Kusch (1986) 186 Cal. App. 3d 291, 297-298, 230 Cal. Rptr. 613*

Defective notice of request for trial de novo following mandatory judicial arbitration is inadequate to terminate tolling of time period for bringing action to trial under *Code Civ. Proc. § 1141.17*. *Dobrick v. Hathaway (1984) 160 Cal. App. 3d 913, 923, 207 Cal. Rptr. 50*

Tolling provision of *Code Civ. Proc. § 1141.17* does not wholly preclude trial court from dismissing case while it is submitted to judicial arbitration, since court still has discretionary power to dismiss for plaintiff's lack of diligence in bringing case to trial (*see Code Civ. Proc. §§ 583.410-583.430*). *D'Hondt v. Regents of University of California (1984) 153 Cal. App. 3d 723, 727-730, 200 Cal. Rptr. 628*

Five-year period of limitation of former *Code Civ. Proc. § 583(b)* (*now see Code Civ. Proc. § 583.310*) for bringing case to trial had run, resulting in dismissal of action when insufficient period of time tolled under Code Civ. Proc. § 1141.7. *Evans v. City of Los Angeles (1983) 145 Cal. App. 3d 142, 146, 193 Cal. Rptr. 282*

Under former Cal Rule of Ct., Rule 1601(c) (extent to which time action is pending on arbitration list tolls five year period of former *Code Civ. Proc. § 583* (*now see Code Civ. Proc. § 583.310*) for bringing case to trial when action is on arbitration list), case ceased to be pending on arbitration list when award filed with court. *Evans v. City of Los Angeles (1983) 145 Cal. App. 3d 142, 147, 193 Cal. Rptr. 282*

[b] Tolling Under Code Civ. Proc. § 1141.20

Although *Code Civ. Proc. § 1141.17* is exclusive ground for tolling time to bring case to trial based on submission to arbitration, post-arbitration tolling may be implied from *Code Civ. Proc. § 1141.20* based on trial court's failure to schedule case for trial within the five-year period of *Code Civ. Proc. § 583.310* if prior to arbitration plaintiff would have been eligible for trial date within five-year period and at time of or shortly after de novo request plaintiff informs court of five-year date. *Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 434-435, 41 Cal. Rptr. 2d 362, 895 P.2d 469*

Automatic tolling rule of *Moran v. Superior Court (1983) 35 Cal. 3d 229, 197 Cal. Rptr. 546, 673 P.2d 216* , based on *Code Civ. Proc. § 1141.20* whatever its original viability, is now untenable under subsequent amendments to *Code Civ. Proc. § 1141.17*. *Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 434, 41 Cal. Rptr. 2d 362, 895 P.2d 469* ; *see* *Messih v. Levine (1991) 228 Cal. App. 3d 454, 458, 278 Cal. Rptr. 825* ; *Marchuk v. Ralphs Grocery Co. (1990) 226 Cal. App. 3d 1273, 1277-1278, 276 Cal. Rptr. 627* ; *Baccus v. Superior Court (1989) 207 Cal. App. 3d 1526, 1535, 255 Cal. Rptr. 781* ; *Santa Monica Hospital Medical Center v. Superior Court (1988) 203 Cal. App. 3d 1026, 1031, 250 Cal. Rptr. 384* ; *Berry v. Weitzman (1988) 203 Cal. App. 3d 351, 356-357, 249 Cal. Rptr. 816*

Removal of case from arbitration by arbitrator is functional equivalent of filing of request for trial de novo; plaintiff's lack of diligence, not impossibility due to nonperformance of arbitrator or clerk, prevented case from being tried within five years. *Winston v. Woodward (1992) 3 Cal. App. 4th 361, 368, 4 Cal. Rptr. 2d 126*

[c] Impossibility, Impracticability, or Futility

Although *Code Civ. Proc. § 1141.17* is exclusive ground for tolling time to bring case to trial based on submission to arbitration, post-arbitration tolling may arise under *Code Civ. Proc. § 583.340(c)* based on impossibility, impracticability, or futility of bringing case to trial; when defendant failed to timely request trial de novo, time for bring case to trial was tolled from entry of judgment on arbitration award until defendant paid sanctions that were condition of order vacating the judgment; period also tolled from expiration of time to request trial de novo until entry of judgment if plaintiff obtains entry of judgment within reasonable time; one week is reasonable. *Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 437-439, 41 Cal. Rptr. 2d 362, 895 P.2d 469*

[d] Under Stipulation

Petition to compel arbitration was properly denied, after case had been dismissed, pursuant to stipulation that extended five-year dismissal date and provided for judicial arbitration to be conducted before extended date. *Winograd v. American Broadcasting Company (1998) 68 Cal. App. 4th 624, 636, 80 Cal. Rptr. 2d 378*

[12] Sanctions

Trial court erred in dismissing plaintiff's personal injury action as sanction for misuse of arbitration process, even though plaintiff had voluntarily elected arbitration; finding that plaintiff's action could be dismissed if he or she elects arbitration, but not if court orders arbitration, defeats purpose of judicial arbitration legislation and discouraging voluntary elections by plaintiffs who would fear potential consequences. *Zatkin v. Cesare (1988) 199 Cal. App. 3d 756, 758, 760-761, 245 Cal. Rptr. 222*

[13] Relief From Entry of Judgment

Motion to set aside default is not proper before arbitrator, but rather before trial court after arbitration award becomes final judgment. *Merritt v. Marks (1985) 175 Cal. App. 3d 825, 828, 221 Cal. Rptr. 88*

Code Civ. Proc. § 473 applies to arbitration proceedings prior to 1982 amendment of *Code Civ. Proc. § 1141.23*. *Alvarado v. City of Port Hueneme (1982) 133 Cal. App. 3d 695, 184 Cal. Rptr. 154* ; *contra Usher v. Soltz (1981) 123 Cal. App. 3d 692, 176 Cal. Rptr. 746*

Failure to request trial de novo within time limit of *Code Civ. Proc. § 1141.20* is not excusable neglect under *Code Civ. Proc. § 473* justifying relief from judgment entered pursuant to award when attorney knew of granting of nonsuit but had not received notice of award and failed to adequately ascertain when award filed. *Alvarado v. City of Port Hueneme (1982) 133 Cal. App. 3d 695, 703-705, 184 Cal. Rptr. 154*

[14] Appeal

Although judgment on judicial arbitration award is nonappealable (*Code Civ. Proc. § 1141.23*), order granting motion to strike costs filed after entry of judgment on award is deemed final judgment and hence appealable under *Code Civ. Proc. § 904.1(a)*. *Joyce v. Black (1990) 217 Cal. App. 3d 318, 321-322, 266 Cal. Rptr. 8*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 36.55 Law Reviews and Legal Periodicals

Shuyler, *Coercive Harmony: An Anthropologist and Former Federal Judge Debate the Purpose of Mandatory ADR*, 15(5) Cal. Lawyer 37 (1995)

Harris, *The Mandatory Dispute Resolution Conference: A Rose by Another Name? 23 U. West L.A. L. Rev. 345 (1992)*

Folberg, Rosenberg, and Barrett, *Use of ADR in California Courts: Findings & Proposals, 26 U.S.F. L. Rev. 343 (1992)*

Scharf, *Judicial Arbitration Hearings; appearances are not mandatory but sanctions may result*, 14(4) L.A. Lawyer 21 (1991)

Comment, *Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes, 29 Hastings L.J. 475 (1978)*

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§ 36.56 Text References

Continuing Education of the Bar, California Civil Procedure Before Trial, Ch. 55 (CEB 3d ed. 2000)

Knight, Fannin, & Disco, Cal. Practice Guide: Alternative Dispute Resolution, Ch. 4 (The Rutter Group 1995)

Chernick, ADR for the Commercial Litigator, Ch. V-D (The Rutter Group 1989)

State Bar of California Office of Research, Guide to Court-Related ADR (State Bar of California 1993)

Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, Ch. 13 (The Rutter Group 1996)

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4-36 California Forms of Pleading and Practice--Annotated §§ 36.57-36.59

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[Reserved]

§§ 36.57[Reserved]

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§ 36.60 Initiation of Arbitration

[1] Stipulation to Arbitrate

☐ Secure agreement to arbitrate the case.

☐ Prepare stipulation for signature by all parties and their attorneys [*Code Civ. Proc. § 1141.12(a)*; *Cal. Rules of Ct., Rule 3.812(a)*; for discussion, *see, § 36.16*; for form, *see § 36.70*[1]].

☐ Include any or all of the following provisions if all parties so agree:

☐ Maximum amount of arbitrator's award [*Cal. Rules of Ct., Rule 3.815(a)*]. For a paragraph that can be used or adapted, see *§ 32.80*[1], Paragraph 11A.

☐ Designation of person to serve as arbitrator [*Code Civ. Proc. § 1141.18(a)*; *Cal. Rules of Ct., Rule 3.815(a)*].

☐ Waiver of disqualification of arbitrator under *Code Civ. Proc. § 170.1* in writing [*Cal. Rules of Ct., Rule 3.816(a)*].

☐ Designation of number of sides to case.

☐ All parties must sign stipulation.

☐ All attorneys must sign stipulation.

☐ File stipulation with court [*Cal. Rules of Ct., Rule 3.812(a)*].

[2] Election by Plaintiff

☐ Determine whether each plaintiff will agree to limit any possible recovery to $50,000 [*Code Civ. Proc. § 1141.12(b)*; *Cal. Rules of Ct., Rule 3.811(a)(5)*].

☐ Prepare election [*Code Civ. Proc. § 1141.12(b)*; *Cal. Rules of Ct., Rule 3.812(b)*; for discussion, *see § 36.16*; for form, *see § 36.71*[1]].

☐ File election no later than the time the initial case management statement is filed, unless the court orders otherwise [*Cal. Rules of Ct., Rule 3.812(b)*].

[3] Defendant or Cross Complainant's Response to Plaintiff's Election

[a] Defendant's Motion

☐ Prepare motion to delay arbitration hearing for good cause [*Cal. Rules of Ct., Rule 3.812(b)*; for forms, *see § 36.73*].

☐ File motion as soon as possible after notice of plaintiff's election to arbitrate [*Cal. Rules of Ct., Rules 3.812(b), 3.817*].

[b] Cross Complainant's Motion

☐ Prepare motion to remove case from arbitration if court determines amount in controversy will exceed $50,000 [*Cal. Rules of Ct., Rule 3.812(c)*; for forms, *see § 36.74*].

☐ File motion within 15 days after notice of pl aintiff's election to arbitrate [*Cal. Rules of Ct., Rule 3.812(c)*].

[4] Discovery

☐ Develop a discovery plan as early as possibl [*see Cal. Rules of Ct., Rule 3.822* (discovery must be complete 15 days prior to arbitration hearing); discussion at *§ 36.29*[2]] by:

☐ Examining the pleadings, including affirmative defenses and cross-complaints, if any.

- ☐ Thoroughly interviewing of the parties and witnesses available to you.
- ☐ Understanding your position.
- ☐ Understanding the probable position of your adversary.
- ☐ Determining, if possible, what evidence exists.

☐ Consider the following types of evidence and discovery methods:

- ☐ Photographs. Examine photographs for lighting and perspective. Understand what the photographs was meant to show and how it first was set up. If possible, obtain photographs of the same thing over time, especially anything with regard to which damages are sought.
- ☐ Medical imagery, such as x-rays, ultra-sound, MRI. Understand the perspective from which they were taken. If necessary, have an expert [radiologist] interpret them for you.
- ☐ Physical evidence: examine it first and determine how it fits in with other evidence. Any inconsistencies?
- ☐ Official documents, e.g., accident reports, licensing information, DMV ownership record.
- ☐ Interrogatories, requests for admission, requests for production of documents, such as bills, invoices, reports. Again, examine all documentary evidence for internal inconsistencies or inconsistencies with other evidence. If a document has been handled by different people over time, obtain a copy from each of them and examine the copies for changes.
- ☐ Depositions or less formal statements or interviews.
  - ☐ Begin with generalities and allow the witness to narrate as much as they want.
  - ☐ Determine everything that witness knows, including the existence and location of other witnesses and/or physical evidence, photographs, etc.
  - ☐ If the witness has physical or documentary evidence, try to obtain it.
  - ☐ Do background checks on both your witnesses and opposing witnesses, including expert.

☐ Maps that may be significant.

☐ Time lines and dates that may be of significance.

☐ Expert witnesses, both yours and your adversary's: obtain their resumes or curriculum vitae as soon as possible. Investigate them through professional associations, on the Internet, through licensing agencies, and through any network you may have.

☐ Your expert witness: make sure there are no skeletons in his or her closet. Pay him or her an interview fee, thus assuring he or she is no longer available to be the opposition's expert. Be careful what you give your expert to form his or her opinion: everything in an expert's file is discoverable.

☐ Your adversary's expert(s): seek and review prior depositions of the adversary's expert(s) and court transcripts of their prior testimony. Read any books and article the adversary's expert(s) have published. Look for skeletons in his or her closet. Obtain the expert's file.

☐ Revise your discovery plan as the case develops.

☐ Once you believe you have everything you need to establish your case, and everything the opposition has to support its case, determine whether there is reason NOT to use some of this information as evidence. Much evidence has some unfavorable aspect and it is not appropriate to "over try" your case.

[5] Mandatory Arbitration

NOTE:
The determination whether to order arbitration is generally made at the initial case management conference after all parties have appeared or defaulted

☐ Prepare for conference:

☐ Gather facts relating to valuation of the case [*see* [4], *above*].

☐ Gather facts supporting prayer for equitable relief or facts that tend to show the prayer is frivolous or insubstantial [*Code Civ. Proc. §§ 1141.13, 1141.16(a)*; *see* [4], *above*].

☐ Determine whether to stipulate, and whether opposing party will stipulate that the amount in controversy exceeds $50,000 [*Code Civ. Proc. § 1141.16(a)*].

☐ Attend conference [*Code Civ. Proc. § 1141.16(a)*].

NOTE:

If the judge determines at the conference that the amount in controversy will not exceed $50,000 per plaintiff and that any claim for equitable relief is frivolous or insubstantial, the judge will order the case to arbitration [*Code Civ. Proc. § 1141.16(a)*; *Cal. Rules of Ct., Rules 3.811, 3.812(d)*; for discussion, *see § 36.15*].

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§ 36.61 Appointment of Arbitrator

CAUTION:
Check local court rules, which may vary from the procedure outlined below [*see Cal. Rules of Ct., Rule 3.815(c)*].

☐ Prepare stipulation if parties agree to arbitrator [*Cal. Rules of Ct., Rule 3.815(a)*; for form, *see § 36.70*[1]].

☐ If no stipulation, accept or reject arbitrators on list prepared by administrator [for discussion, *see § 36.21*].

☐ Prepare rejection, if desired, and deliver to administrator within 10 days of receiving list [*Code Civ. Proc. § 1141.18(d)*; *Cal. Rules of Ct., Rule 3.815(b)(3)*; for form, *see § 36.75*[1]].

☐ After appointment, determine whether to object to disqualified arbitrator.

☐ To make a peremptory challenge under *Code Civ. Proc. § 170.6*, prepare objection and deliver to administrator within 5 days of the naming of the arbitrator [*Code Civ. Proc. § 1141.18(d)*; *Cal. Rules of Ct., Rule 3.816(b), (c)*; for discussion, *see § 36.22*[1]; for

form, *see § 36.76*[1]].

☐ To challenge an appointed arbitrator for cause under *Code Civ. Proc. § 170.1*, prepare and file motion as promptly as possible before conclusion of arbitration proceedings [*Code Civ. Proc. § 1141.18(d)*; *Cal. Rules of Ct., Rule 3.816(d)*; for discussion, *see § 36.22*[1]; for form, *see § 36.76*[1]].

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§ 36.62 Arbitration Book

☐ Prepare an arbitration book. The arbitration book will be your guide during the arbitration hearing. A copy should be given to the arbitrator(s), at least a few days before the arbitration hearing (or not, depending on the arbitrator(s)' preference and practice), to orient them, to help save time in their understanding and evaluation of the case, and so they will have available at their fingertips the evidence you think is most persuasive. You may wish to give your client a copy of the arbitration book. In some cases, providing your opponent with a copy may enhance your ability to settle the matter.

☐ The arbitration book contains the following:

☐ A table of contents. Consider using your *Cal. Rules of Ct, Rule 3.823* notice [*see § 36.79*] as a table of contents (with proof of service attached) or arranging the book to parallel *Cal. Rules of Ct, Rule 3.823*

☐ An arbitration brief that sets forth:

☐ The caption,

☐ The parties and their attorneys,

☐ A brief statement of the procedural position of the case, including mention any

relevant stipulations, copies of which should be provided in the Pleadings section of the book.

☐ A statement of the facts. Each fact should be cross referenced to the evidence that establishes it is, e.g., Request for Admissions and Response thereto number _____, page _____ line _____ through_____; Deposition of _____, page _____ line _____ through page _____, line _____.

NOTE:
Do not mention here or include in the documents section of the arbitration book documents that, although mentioned in *Cal. Rules of Ct, Rule 3.823* are inadmissable as evidence. e.g., an expression of ultimate fault from a police report of an accident [*see Cal. Rules of Ct, Rule 3.823(b)*].

☐ The damages sought (non-economic injuries, property damage, loss of earnings).

☐ Summarize each component of damages and total them.

☐ Contentions, if desired,

☐ Points and authorities, if necessary or desired; usually only necessary if there is some unusual aspect of law involved. Consider using BAJI (Basic Approved Jury Instructions) to set forth the relevant points of law.

☐ The pleadings or other documents that frame the issues.

☐ Official records. Have them certified.

☐ Deposition transcripts or excerpts from them: Highlight the portions you want the arbitrator to read.

☐ Written discovery such as interrogatories, requests for admission, requests for production and responses thereto.

☐ Medical records, reports, and bills.

☐ Maps or diagrams. Official government maps can be judicially noticed.

☐ Experts' reports. Include the expert's curriculum vitae and the information to lay the foundation for the expert's conclusions, i.e., any other documents relied on by the expert to form his or her opinion.

☐ Photographs.

☐ Calendars or time lines.

☐ Witness' statements [*see Cal. Rules of Ct, Rule 3.823(b)(2)* (notice that must be given to use witness statement)].

Legal Topics:

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§ 36.63 Prepare Client and Witnesses

☐ At some point before the arbitration hearing, have a full discussion with your client so your client fully understands the following:

- ☐ His or her case, position, and points to be presented, including the strengths and weaknesses of the case.
- ☐ The opposition's position and probable points to be presented and/or rebutted.
- ☐ The probabilities that you can prevail and the chances of losing.
- ☐ Whether you want to consider or settlement; whether to initiate settlement discussions, and how to respond if the opposition initiates settlement discussions.
- ☐ Whether you wish to consider mediation at this point.
- ☐ Whether you are ready for arbitration.

☐ If you are representing a defendant, consider whether to let your client's default be taken. This will

be appropriate only when there is a possibility of a much larger plaintiff's award if the arbitration goes to full hearing or if there is the possibility of damaging disclosures, publicity, or invasion of privacy.

☐ Prepare your client and other witnesses to be a witness, by going over their testimony and reminding them of the following:

☐ Be sure you hear each question.

☐ Be sure you understand each question.

☐ Answer precisely and literally the question asked.

☐ The briefest possible answer is the best answer. Use one word answers whenever possible, e.g., "Yes," "No." "Left." Right."

☐ Never anticipate what the next question might be.

☐ Do not try to remember any answers to any prior questions.

☐ Your job is to treat each question as a distinctly separate question.

☐ If you do not remember something or you do not know something, the responses that are appropriate are "I do not remember" or "I do not know." If you remember the answer later, tell me at the next break.

☐ Do not nod, point, grunt, or use your hands to show size. Your testimony must be spoken.

☐ Do not guess at an answer.

☐ Do you react in any manner to the person asking the questions, whether friendly or unfriendly and argumentative.

☐ If you need a break during your testimony, say so.

☐ If your testimony is going smoothly when the other side is questioning you, I will probably be quiet. If I speak up, you should stop talking immediately. Do not even finish the word you are saying. I will make the objection and we will continue from there.

☐ Do not be thrown if you break one of these rules. Just go on and do your best. If you dwell on a mistake, it is will take your mind off the current question and what your

answer to it is.

☐ Consider how to handle any potentially damaging evidence.

☐ It is generally less damaging if you bring out potentially damaging evidence than if the opposition presents its. Tell your client this, so the client understands why you will be bringing out this matter and is prepared for it is.

☐ Determine whether any of your witnesses have language problems or cultural differences that may cause confusion and if so, how to handle them.

☐ If you need an interpreter, consider arranging for the interpreter to both prepare the witness and to be at the arbitration hearing. Explain the expense and necessity for it is to the client and consider whether this is so significant that you should settle the case rather than go forward.

☐ Either use someone the witness is familiar with and get the opposition to agree [by written stipulation] that someone other than a certified interpreter will be acting as interpreter or use a certified interpreter, certified in the language he or she will be translating.

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-36 California Forms of Pleading and Practice--Annotated § 36.64

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§ 36.64 Pre-arbitration Conference

- A common practice among arbitrators so that preliminary matters can be discussed/arranged, such as scheduling and procedure. A good time to give the arbitrator(s) your arbitration book, although some arbitrators will want only the arbitration brief before the hearing. Additional discussion is likely to focus on the following:
  - The pleadings
  - The status of the process of the case.
  - The factual basis of the claims.
  - Affirmative defenses.
- Pre-arbitration conference can be in person or by phone (conference call).
- Possible time to determine whether the arbitrator will use a certified court reporter. In judicial arbitration, no record shall be made of arbitration hearing and arbitrator shall not permit court reporter except one to make a nondiscoverable record of proceedings for the arbitrator alone [*Cal. Rules of Ct.,*

Rule 3.824(b)].

☐ If the arbitrator does not have a pre-arbitration conference, you can contact the arbitrator's office to get information as to the procedures the arbitrator follows. It would be an improper ex parte communication to speak to the arbitrator [*see Cal. Rules of Ct., Rules 3.820*], but communication with office staff about these matters is permissible.

☐ Any stipulation or agreement between the parties regarding procedure can be given to the arbitrator at the pre-arbitration conference.

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§ 36.65 Arbitration Hearing

NOTE:
The parties are entitled to at least 30 days' notice of hearing, which is set by the arbitrator [*Cal. Rules of Ct., Rules 3.817(a), (b)*; for discussion, *see § 36.23*].

☐ Do not communicate ex parte with arbitrator [*Cal. Rules of Ct., Rule 3.820*; for discussion, *see § 36.28*].

☐ Deliver to opposing party at least 20 days before hearing, or 25 days if delivered by mail, any or all of the following that are to be introduced in evidence [*Cal. Rules of Ct., Rule 3.823*; for discussion, *see § 36.29*[2]; for a form, *see § 36.79*]:

☐ Copies of expert witness reports, medical records and bills, police reports, and business records.

☐ Affidavits or declarations under penalty of perjury.

☐ Depositions.

NOTE: Response.

A party receiving a copy of an expert witness report, medical records and bills, police report, or business record may subpoena the author or custodian of the document as a witness [*Cal. Rules of Ct., Rule 3.823(b)(1)(B)*]. A party receiving a notice that a witness's deposition will be offered in evidence may subpoena the deponent [*Cal. Rules of Ct., Rule 3.823(b)(3)(B)*]. A party receiving a notice that a witness's affidavit or declaration under penalty of perjury will be offered in evidence may, at least 10 days before the hearing, or 15 days if delivery is by mail, deliver on the proponent a written demand that the person be produced at the hearing [*Cal. Rules of Ct., Rule 3.823(b)(2)(C), (d)*; for a form, *see § 36.79*].

☐ Stipulate to continuance, if desired and other party agrees [*Cal. Rules of Ct., Rule 3.818(a)*].

☐ Obtain arbitrator's consent to continuance [*Cal. Rules of Ct., Rule 3.818(a)*].

☐ Give notice of continuance to arbitration administrator [*Cal. Rules of Ct., Rule 3.818(a)*].

☐ If arbitrator withholds consent, move the court to continue the arbitration hearing [*Cal. Rules of Ct., Rule 3.818(b)*; for forms, *see § 36.78*].

☐ Support motion with facts showing good cause under [*Cal. Rules of Ct., Rule 3.818(b)*].

☐ If motion is granted, give notice to arbitrator.

☐ Attend arbitration hearing, which may proceed in the absence of any party if the party received due notice [*Cal. Rules of Ct., Rule 3.821(b)*; for discussion, *see § 36.29*[1]].

☐ Discussion of preliminary agreements regarding scheduling, procedure, and evidence. This includes determining number of witnesses, order of witness, and likely amount of time required for each.

☐ Unless sufficiently addressed in your arbitration brief, counsel may with to have prepared a witness list with summary of testimony.

☐ If not presented to the arbitrator at a pre-arbitration conference, present any stipulations or agreements between the parties regarding procedure and evidence.

☐ Either side may present it is's evidence first. It is may save time to try an affirmative defense first, if that could dispose of the entire matter.

☐ Opening statements if desired. Pre-arbitration conference and/or arbitration briefs may make opening statements unnecessary, but counsel should be prepared to make on opening statement.

☐ Present evidence in presence of arbitrator and all parties, unless a party has waived the right or is absent after due

notice [*Cal. Rules of Ct., Rule 3.823(b)*; for discussion, *see § 36.29*[4]].

☐ Remember proper foundations for documentary, photographic, and physical evidence.

☐ Usual order of examination of each witness is as follows:

☐ Direct examination.

☐ Cross examination. Do not cross examine a witness unless there is a need to cross examine that witness. If the witness has not made any points that were damaging or harmful to your case, avoid the temptation to cross-examine just to look like you are doing your job.

☐ Redirect examination, if necessary.

☐ Rebuttal, if necessary.

☐ Closing argument. You can only argue from evidence you have presented.

Legal Topics:

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§ 36.66 Trial de Novo

NOTE:
The arbitrator must file the award and proof of service with the court clerk within 10 days after the hearing [*Cal. Rules of Ct., Rule 3.825(b)*]. The award will become final, unless a request for trial de novo is filed within 30 days [*Code Civ. Proc. § 1141.20(a)*; *Cal. Rules of Ct., Rule 3.827(c)*; for discussion, *see § 36.30*[1]].

☐ Determine whether to seek trial de novo [for discussion, *see § 36.34*].

☐ Consider likelihood of obtaining judgment more favorable than the award and potential liability for costs if judgment is not more favorable than award.

☐ Consider likelihood of judment on trial de novo being so much more favorable than award that it will more than offset litigation costs.

☐ Prepare request for trial de novo [*Code Civ. Proc. § 1141.20*; *Cal. Rules of Ct., Rule 3.826*; for discussion, *see § 36.34*[1]; for form, *see § 36.81*[1]].

☐ Serve request on all other parties [*Code Civ. Proc. § 1141.20*; *Cal. Rules of Ct., Rule 3.826(a)*].

☐ File request with proof of service on all other parties within 30 days after arbitration award is filed [*Code Civ. Proc. § 1141.20*; *Cal. Rules of Ct., Rule 3.826(a)*].

☐ Court has duty to return case to same place on civil active list as it would have been had no arbitration taken place [*Code Civ. Proc. § 1141.20(b)*; *Cal. Rules of Ct., Rule 3.826(a)* (if no case management order provides for prosecution of case after request for trial de novo, court must promptly schedule case management conference)].

☐ Inform court of five-year mandatory dismissal deadline [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 434-435, 41 Cal. Rptr. 2d 362, 895 P.2d 469* ; for discussion, *see § 36.37*].

☐ Continue to exercise diligence in bringing case to trial to avoid mandatory or discretionary dismissal for delay in prosecution [*Code Civ. Proc. §§ 583.310, 583.410 et seq.*].

☐ Prepare evidence for trial with no reference to arbitration proceedings or award [*Cal. Rules of Ct., Rule 3.826(c)*].

☐ Make demand for exchange of expert witness lists [*Code Civ. Proc. §§ 1141.24, 2034* (*Code Civ. Proc. § 2034.010 et seq.*, effective July 1, 2005); for discussion, *see § 36.35*].

☐ If other post-arbitration discovery is desired either [*Code Civ. Proc. §§ 1141.24,* 2034.010 et seq.; for discussion, *see § 36.35*]:

☐ Obtain stipulation allowing further discovery, or

☐ Obtain leave of court for good cause.

☐ If party electing trial de novo failed to obtain judgment more favorable than arbitration award, consider moving the court that imposition of costs and fees would create substantial hardship not in the interest of justice [*Code Civ. Proc. § 1141.21(a)*; for forms, *see § 36.82*].

Legal Topics:

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4-36 California Forms of Pleading and Practice--Annotated §§ 36.67-36.69

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[Reserved]

§§ 36.67[Reserved]

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4-36 California Forms of Pleading and Practice--Annotated § 36.70

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§ 36.70 Stipulation for Judicial Arbitration With Consent of Arbitrator [Code Civ. Proc. §§ 1141.12(a); Cal. Rules of Ct., Rules 3.726, 3.811(a)(4), 3.812(a)]

[1] FORM Stipulation for Judicial Arbitration With Consent of Arbitrator [Code Civ. Proc. §§ 1141.12(a); Cal. Rules of Ct., Rules 3.726, 3.811(a)(4), 3.812(a)]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of the Santa Clara County form of Stipulation to ADR, showing its use to stipulate to judicial arbitration, instead of a trial, for any cause of action, regardless of the amount in controversy [*Code Civ. Proc. § 1141.12(a)*; *Cal. Rules of Ct., Rules 3.726, 3.811(a)(4)*; *see* Santa Clara Co. Super. Rules, Rules 2-4]. By local rule in Santa Clara County, judicial arbitration hearings are limited to three hours, or in the arbitrator's discretion on a showing of good cause, five hours. A stipulation or court order is required for a longer hearing [Santa Clara Co. Super. Rules, Rule 4C].

Every county is required to have a form of stipulation to alternative dispute resolution, which is to be provided by the clerk as part of an ADR information package when the complaint is filed, and which the plaintiff must serve with the complaint [*see Cal. Rules of Ct., Rule 3.221*; *Cal. Rules of Ct., Rule 3.800(1)* (definition of "ADR process")]. Cross complainants must serve copies of the ADR information package on any new parties to the action along with the cross complaint [*see Cal. Rules of Ct., Rule 3.221*]. If the parties agree to use an ADR process, they are to complete the form jointly and file it with the court [*see Cal. Rules of Ct., Rule 3.726*].

[3] Contents of Stipulation

The illustrative form of stipulation in [1], *above*, as with most forms of stipulation to ADR, allows the parties to designate the arbitrator. The parties may by stipulation designate any person to serve as arbitrator, including persons who are not on the court's panel and are not attorneys [*Code Civ. Proc. § 1141.18(a)*; *Cal. Rules of Ct., Rule 3.815(a)*]. If the parties designate a person who is not on the court's arbitration panel to serve as arbitrator, the stipulation will not be effective until the selected person completes a written consent to serve and the oath required of panel arbitrators, both of which should be attached to the stipulation [*Cal. Rules of Ct., Rule 3.815(a)*; *see Cal. Rules of Ct., Rule 3.814(d)* (oath requires certification of compliance with Code of Judicial Ethics)]. An unsworn affirmation may be filed in lieu of the oath [*see Code Civ. Proc. § 2015.6*]. If the parties do not designate an arbitrator in their stipulation, in Santa Clara County Superior Court, within 15 days of receiving a court-approved order to judicial arbitration, the court's arbitration administrator will send each party a list of names of arbitrators from the court's judicial arbitrator list. Each party has 10 days to strike one name from the list and return it. Thereafter, the court's arbitration administrator will appoint a random one of the remaining arbitrators [Santa Clara Co. Super. Rules, Rule 4A].

For discussion of the selection process of the arbitrator if the parties do not designate the arbitrator or if the designated arbitrator cannot act, see *§ 36.21*.

A stipulation to arbitration may specify the maximum amount of the arbitrator's award [*Cal. Rules of Ct., Rule 3.815(a)*].

[4] Time for Filing Stipulation

A stipulation for arbitration must be filed with the court no later than the time the initial case management statement is filed, unless the court orders otherwise. When the parties stipulate to arbitration, the case must be set for arbitration forthwith [*Cal. Rules of Ct., Rule 3.812(a)*].

A stipulation to an arbitrator must be served and filed no later than 10 days after the case has been set for arbitration under *Cal. Rules of Ct., Rule 3.812* [*Cal. Rules of Ct., Rule 3.815(a)*].

[5] Tolling of Time Periods for Bringing Action to Trial

A stipulation for judicial arbitration signed by all the parties constitutes a submission to arbitration and starts the *Code Civ. Proc. § 1141.17* tolling of the five-year period for bringing a case to trial under *Code Civ. Proc. § 583.310 et seq.* [*Porreco v. Red Top RV Center (1989) 216 Cal. App. 3d 113, 122-123, 264 Cal. Rptr. 609* (citing *Code Civ. Proc. § 1141.12(a)*; former Cal. Rules of Ct., Rule 1601(a)) [*see now Cal. Rules of Ct., Rule 3.812(a)*]); for discussion of tolling, *see § 36.37*]. Under *Code Civ. Proc. § 1141.17(b)*, whether the stipulated arbitration is subject to a trial de novo or the parties have waived their right to a trial de novo by agreeing in their stipulation to binding arbitration, the stipulation tolls the running of the five-year period for mandatory dismissal under *Code Civ. Proc. §§ 583.310, 583.360*, even if the stipulation is not signed by the court until after expiration of that period [*Porreco v. Red Top RV Center (1989) 216 Cal. App. 3d 113, 122-129, 264 Cal. Rptr. 609* (distinguishing *Moran v. Superior Court (1983) 35 Cal. 3d 229, 235 n.5, 197 Cal. Rptr 546, 673 P.2d 216* , *Davenport v. Vido Artukovich & Son, Inc. (1983) 141 Cal. App. 3d 60, 64-65, 190 Cal. Rptr. 64* , and *Taylor v. County of San Bernardino (1983) 143 Cal. App. 3d 42, 46-47, 191 Cal. Rptr. 518* , on the ground they were decided under *Code Civ. Proc. § 1141.17* prior to its 1983 amendment)].

Moreover, a written stipulation to submit to binding arbitration is independently enforceable, notwithstanding expiration of the five-year period in which a party must bring his or her case to trial. Thus, even if the complaint is dismissed for failure to bring it to trial within the five-year period, the parties would be bound to arbitrate the controversy, and the superior court would retain the role of hearing motions to compel arbitration and of enforcing any award [*Porreco v. Red Top RV Center (1989) 216 Cal. App. 3d 113, 130-131, 264 Cal. Rptr. 609]* .

[6] Cross References

For discussion of, and forms for use in making, stipulations generally, see Ch. 533, *Stipulations*

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-36 California Forms of Pleading and Practice--Annotated § 36.71

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§ 36.71 Plaintiff's Election of Judicial Arbitration [Code Civ. Proc. § 1141.12(b); Cal. Rules of Ct., Rule 3.811(a)(5)].

[1] FORM Plaintiff's Election of Judicial Arbitration [Code Civ. Proc. § 1141.12(b); Cal. Rules of Ct., Rule 3.811(a)(5)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] [et al.],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name*] [et al.],	)	PLAINTIFF'S ELECTION OF JUDICIAL ARBIT-
Defendant(s).	)	RATION
	)	
	)	

_____ [*Name(s)*], plaintiff(s), hereby elect(s) to submit this cause to judicial arbitration pursuant to *Code of Civil Procedure Section 1141.12(a)* and *California Rules of Court, Rule 3.810 et seq.*, and expressly consent(s) that the award not exceed FIFTY THOUSAND DOLLARS ($50,000), exclusive of costs and interest [as to each plaintiff].

Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The form in [1], *above*, is for use by one or more plaintiffs to submit any limited or unlimited civil case to arbitration. All plaintiffs must join in the election and each must agree that the arbitration award will not exceed $50,000 as to that plaintiff [*Code Civ. Proc. § 1141.12(b)*; *Cal. Rules of Ct., Rule 3.811(a)(5)*].

The form must be filed no later than the time the initial case management statement is filed, unless the court orders otherwise. When plaintiffs elect to submit a case to arbitration, the case must be set for arbitration forthwith, subject to a motion by defendant for good cause to delay the arbitration hearing [*Code Civ. Proc. § 1141.16(c)(2)*; *Cal. Rules of Ct., Rule 3.812(b)*; *see § 36.73*[1] (form)].

A case involving a cross-complaint where all plaintiffs have elected to arbitrate must be removed from the list of cases assigned to arbitration if, on motion of the cross-complainant made within 15 days after notice of the election to arbitrate, the court determines the amount in controversy relating to the cross-complaint exceeds $50,000 [*Cal. Rules of Ct., Rule 3.812(c)*; *see § 36.74*[1] (form)].

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[Reserved]

§ 36.72[Reserved]

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§ 36.73 Proceedings for Order To Delay Arbitration Hearing--By Defendant [Cal. Rules of Ct., Rule 3.812(b)]

[1] Notice of Motion and Supporting Declaration

[a] FORM Proceedings for Order To Delay Arbitration Hearing--By Defendant [Cal. Rules of Ct., Rule 3.812(b)]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] [et al.],	)	NO. _____
Plaintiff(s),	)	NOTICE OF MOTION AND MOTION FOR ORDER TO DELAY ARBITRATION HEARING FOR GOOD CAUSE, SUPPORTING DECLARATION(S) OF _____ [*name(s)*], AND MEMORANDUM OF POINTS AND AUTHORITIES
vs.	)	
_____ [*name*] [et al.],	)	
Defendant(s).	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Arbitration Hearing Date: _____

_____

To Plaintiff _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], defendant will, and hereby does, move for an order to delay the arbitration hearing, which is scheduled to be held on _____ [*date*]. The motion will be made on the ground that good cause exists for the delay, in that _____ [*specify ground(s), e.g.,* defendant has not completed his/her discovery in this case and needs an additional _____ (*specify time period*) in which to do so].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum of points and authorities served and filed with this notice, on the records and file in this case, and on any evidence that may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Defendant [*name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*identify moving party, e.g.*, defendant) _____ (*name*)].

2. _____ [*Here and in subsequent paragraphs set forth in narrative form facts tending to show good cause to delay the hearing*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion.*]

[b] Use of Form

The form of notice of motion and supporting declaration in [a], *above*, is for use by a defendant to seek a court order to delay the arbitration hearing for good cause after the defendant receives notice that the plaintiff has elected [*see § 36.71*] to submit an action to arbitration [*Cal. Rules of Ct., Rule 3.812(b); see Code Civ. Proc. § 1141.16(c)(2)* (earliest time

that arbitration hearing may be held)].

Although no time limit is placed on a defendant to make a motion for delay of the arbitration hearing, it would appear that the motion should be made shortly after defendant receives notice of the plaintiff's election to arbitrate and in those instances when the defendant cannot secure the plaintiff's agreement by stipulation to continue the hearing or get the arbitrator to consent to a stipulation between the parties for a continuance [*see Cal. Rules of Ct., Rules Rules 3.812(b), 3.817*; *see also Code Civ. Proc. § 1141.16(a), Cal. Rules of Ct., Rule 3.812(d)* (amount in controversy usually determined at initial case management conference)].

[c] Points and Authorities

A memorandum of points and authorities must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For general discussion and forms relating to points and authorities, see Ch. 417, *Points and Authorities* .

[2] Order

[a] FORM Proceedings for Order To Delay Arbitration Hearing--By Defendant [Cal. Rules of Ct., Rule 3.812(b)]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*] [et al.],	)	ORDER
Plaintiff(s),	)	Date: _____
vs.	)	Time: _____
_____ [*name*] [et al.],	)	Location: _____
Defendant(s).	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of defendant _____ [*name*] for an order to delay the arbitration hearing in this matter for good cause came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court, and good cause appearing therefor, that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and _____ [*set out the particular order sought, e.g.*, any arbitration hearing in this matter is delayed 60 days from the date of this order].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[b] Use of Form

The form in [a], *above*, is an order for use if the court grants the defendant's motion for good cause to delay an arbitration hearing [*Cal. Rules of Ct., Rule 3.812(b)*; *see Code Civ. Proc. § 1141.16(c)(2)*].

For further discussion, see [1][b], *above.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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Chapter 36 JUDICIAL ARBITRATION
PART V. FORMS

4-36 California Forms of Pleading and Practice--Annotated § 36.74

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§ 36.74 Proceedings for Order To Determine Amount in Controversy on Cross Complaint and Remove Case From List of Cases Assigned to Arbitration Hearing List--By Cross Complainant [Cal. Rules of Ct., Rule 3.812(c)]

[1] Notice of Motion and Supporting Declaration

[a] FORM Proceedings for Order To Determine Amount in Controversy on Cross Complaint and Remove Case From List of Cases Assigned to Arbitration Hearing List--By Cross Complainant [Cal. Rules of Ct., Rule 3.812(c)]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*] [et al.],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff(s),	)	DER TO DETERMINE AMOUNT IN CONTRO-
vs.	)	VERSY ON CROSS COMPLAINT AND REMOVE
_____ [*name*] [et al.],	)	CASE FROM LIST OF CASES ASSIGNED TO AR-
Defendant(s).	)	BITRATION, SUPPORTING DECLARATION(S)
	)	OF _____ [*name(s)*], AND
	)	MEMORANDUM OF POINTS AND AUTHORIT-
	)	IES
		Date: _____
		Time: _____
		Location: _____
		Judge: _____

Date Action Filed: _____
Arbitration Hearing Date: _____

_____

To Plaintiff _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], defendant cross complainant will, and hereby does, move for an order that this case should be removed from the list of cases assigned to arbitration pursuant to *California Rules of Court, Rule 3.812(c)*. The motion will be made on the ground that the amount in controversy relating to the cross complaint exceeds fifty thousand dollars ($50,000).

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum of points and authorities served and filed with this notice, on the records and file in this case, and on any evidence that may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Defendant [*name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*identify moving party, e.g.*, defendant cross complainant) _____ (*name*)].

2. _____ [*Here and in subsequent paragraphs set forth applicable facts in narrative form showing that amount in controversy based on the cross complaint alone, excluding questions of liability or comparative negligence or other defenses, exceeds $50,000*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*].

_____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion.*]

[b] Use of Form

The form of notice of motion and supporting declaration in [a], *above*, is for use by a cross complainant to seek a court order removing the case from the list of cases assigned to arbitration on the ground that the amount in controversy relating to the cross complaint exceeds $50,000. The motion must be made within 15 days after notice of the plaintiff's election to place the case in arbitration. The court will determine whether the amount in controversy exceeds $50,000 [*Cal. Rules of Ct., Rule 3.812(c)*; *see also Code Civ. Proc. § 1141.16(a), Cal. Rules of Ct., Rule 3.812(d)* (amount in controversy usually determined at initial case management conference)].

[c] Points and Authorities

A memorandum of points and authorities must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For general discussion and forms relating to points and authorities, see Ch. 417, *Points and Authorities* .

[2] Order

[a] FORM Proceedings for Order To Determine Amount in Controversy on Cross Complaint and Remove Case From List of Cases Assigned to Arbitration Hearing List--By Cross Complainant [Cal. Rules of Ct., Rule 3.812(c)]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*] [et al.],	)	ORDER
Plaintiff(s),	)	Date: _____
vs.	)	Time: _____
_____ [*name*] [et al.],	)	Location: _____
Defendant(s).	)	Judge: _____
	)	Date Action Filed: _____
	)	Arbitration Hearing Date: _____
	)	

_____

The motion of defendant cross complainant _____ [*name*] for an order to remove this case from the list of cases assigned to arbitration on the ground that the amount in controversy relating to the cross complaint exceeds fifty thousand dollars ($50,000) came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant cross complainant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and the amount in controversy relating to the cross complaint is determined to exceed fifty thousand dollars ($50,000).

IT IS FURTHER ORDERED that this case be removed from the list of cases assigned to arbitration.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[b] Use of Form

The form in [a], *above*, is an order for use if the defendant's motion for a determination of the amount in controversy relating to the cross complaint and removal of the case from the list of cases assigned to arbitration is granted [*Cal. Rules of Ct., Rule 3.812(c)*.].

For further discussion, see [1][b], *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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4-36 California Forms of Pleading and Practice--Annotated § 36.75

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§ 36.75 Rejection of Arbitrator [Code Civ. Proc. § 1141.18; Cal. Rules of Ct., Rule 3.815]

[1] FORM Rejection of Arbitrator [Code Civ. Proc. § 1141.18; Cal. Rules of Ct., Rule 3.815]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] [et al.],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name*] [et al.],	)	REJECTION OF ARBITRATOR
Defendant(s).	)	
	)	
	)	

_____ [*Name(s)*], _____ [*specify party or parties, e.g.,* plaintiff(s)], reject(s), _____ [*name(s)*] as arbitrator(s) in this case pursuant to *Rule 3.815 of the California Rules of Court* [and Rule _____ (*specify any applicable local rules of court*)].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Use of Form

The form in [1], *above*, is for use by any party to an arbitration proceeding to reject particular persons as arbitrators after the arbitration administrator for the court has submitted a list of potential arbitrators to the parties [*Cal. Rules of Ct., Rule 3.815*].

[3] Procedure for Selecting Arbitrator

If the parties do not stipulate to an arbitrator [*see* [4], *below*], local rules commonly will govern the process for selecting the arbitrator [*see Cal. Rules of Ct., Rule 3.815*, discussed in *§ 36.21*[2]].

The basic procedure for selecting an arbitrator if an alternative method has not been adopted by local rule, provides for the ADR administrator to randomly select the names of at least three persons from the appropriate panel of arbitrators within 15 days after a case is set for arbitration. After the administrator mails the list of potential arbitrators to counsel for each party, each side has 10 days from the date of the mailing to file a rejection, in writing, of no more than one name on the list. If there are two or more parties on a side, they must join in the rejection of a single name. Promptly on expiration of the 10-day period, the administrator must appoint, at random, one of the persons on the list whose name was not rejected, if more than one name remains [*Cal. Rules of Ct., Rule 3.815(b), see § 36.21*[1]]. Local rules must assure that an arbitrator is appointed within 30 days from the submission of the case to arbitration [*Cal. Rules of Ct., Rule 3.815(c)*; *see § 36.21*[2]].

If the rejection of potential arbitrators is done by sides to the case, rather than by parties, the administrator will determine the number of clearly adverse sides in the case. Absent a cross complaint bringing in a new party, the administrator may assume there are two sides. A dispute as to the number or identity of sides is decided by the presiding judge [*Cal. Rules of Ct., Rule 3.815(b)(1)*].

[4] Stipulation of Arbitrator in Lieu of Rejection

In lieu of having the administrator propose potential arbitrators and the rejection procedure by the parties or sides to determine one arbitrator, the parties may stipulate as to the selection of the arbitrator, who may be any person, and is not limited to an attorney or judge [*Code Civ. Proc. § 1141.18(a)*; *Cal. Rules of Ct., Rule 3.815(a)*; for a form of stipulation, *see § 36.70*[1]].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-36 California Forms of Pleading and Practice--Annotated § 36.76

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§ 36.76 Request for Disqualification of Arbitrator [Code Civ. Proc. § 1141.18; Cal. Rules of Ct., Rule 3.816]

[1] FORM Request for Disqualification of Arbitrator [Code Civ. Proc. § 1141.18; Cal. Rules of Ct., Rule 3.816]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] [et al.],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name*] [et al.],	)	REQUEST FOR DISQUALIFICATION OF ARBIT-
Defendant(s).	)	RATOR
	)	
	)	

_____ [*Specify party or parties, e.g.*, Plaintiff(s)], _____ [*name(s)*], object(s) to the appointment of _____ [*name*] as arbitrator in this case pursuant to *Code of Civil Procedure Section 1141.18* and *California Rules of Court, Rule 3.816* for the reason that he/she is disqualified on the ground that _____ [*specify any ground(s) in Code Civ. Proc. §§ 170.1 or 170.6 with appropriate statutory citation*].
Dated: _____.

_____ [*firm name, if any*]

By:_____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form in [1], *above*, is for use by any party in an arbitration proceeding to request the disqualification of the arbitrator selected for the case on the grounds specified in *Code Civ. Proc. §§ 170.1* or *170.6* [*see* [3]-[5], *below*]. A copy of the request must be sent to the ADR administrator [*Cal. Rules of Ct., Rule 3.816(c)*].

For a discussion of the arbitrator's duty to disqualify himself or herself, see *§ 36.22*.

[3] Disqualification Under Code Civ. Proc. § 170.6

[a] Grounds and Procedure

Under *Code Civ. Proc. § 170.6*, a party to the arbitration hearing has the right to one peremptory challenge of an arbitrator. The challenge is made on the party's motion and declaration showing his or her good-faith belief that the arbitrator is prejudiced against the party or the interest of the party or his or her attorney [*see Code Civ. Proc. §§ 170.6(a)(1), (3), 1141.18(d)*; *Cal. Rules of Ct., Rule 3.816*; *see also McCartney v. Commission on Judicial Qualifications (1974) 12 Cal. 3d 512, 531-532, 116 Cal. Rptr. 260, 526 P.2d 268]* .

If the disqualification is sought under *Code Civ. Proc. § 170.6*, the request for disqualification must be accompanied by an affidavit [*Code Civ. Proc. § 170.6(a)(5)*] or declaration under penalty of perjury [*Code Civ. Proc. §§ 170.6(a)(6), 2015.5*] in the form set forth in *Code Civ. Proc. § 170.6(a)(5)*. Alternatively, the required information may be given by oral statement under oath [*see Code Civ. Proc. § 170.6(a)(6)*].

The discqualification follows the procedure provided for in *Code Civ. Proc. § 170.6(a)*. For discussion and forms relating to peremptory disqualification under Section 170.6, including a form based on the Section 170.6(a)(5) statutory form, see Ch. 317, *Judges* .

[b] Time to Request Disqualification

A request for peremptory disqualification under *Code Civ. Proc. § 170.6* must be made within five days of the naming of the arbitrator [*Code Civ. Proc. § 1141.18(d)*].

[4] Disqualification for Cause Under Code Civ. Proc. § 170.1

[a] Grounds and Procedure

A party may disqualify an arbitrator for cause on the grounds and by the procedure specified in *Code Civ. Proc. § 170.1* [*see Code Civ. Proc. § 1141.18(d)*; *Cal. Rules of Ct., Rule 3.816*]. The grounds for disqualification for cause are as follows [*Code Civ. Proc. § 170.1(a)*; *Cal. Rules of Ct., Rule 3.816(d)*]:

- The arbitrator has personal knowledge of disputed evidentiary facts concerning the proceeding.

- The arbitrator served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for any party in the present proceeding or gave advice to any party in the present proceeding on any matter involved in the action or proceeding.

- The arbitrator has a financial interest in the subject matter in a proceeding or in a party to the

proceeding.

- The arbitrator, or his or her spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person is a party to the proceeding or an officer, director, or trustee of a party.

- A lawyer or spouse of a lawyer in the proceeding is the spouse, former spouse, child, sibling, or parent of the arbitrator or the arbitrator's spouse or if such a person is associated in the private practice of law with a lawyer in the proceeding.

- For any reason the arbitrator believes his or her recusal would further the interests of justice, or the arbitrator believes there is a substantial doubt as to his or her capacity to be impartial, or a person aware of the facts might reasonably entertain a doubt that the arbitrator would be able to be impartial. Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification.

- By reason of permanent or temporary physical impairment, the arbitrator is unable to properly conduct the proceeding.

- Whether the judge has any current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral, or is participating in, or within the last two years has participated in, any discussions regarding such prospective employment or service, or has been engaged in such employment or service and any of four other situations apply, including that the arrangement is, or the prior employment or discussion was, with a party to the proceeding [*see Code Civ. Proc. § 170.1(a)(8)(B)(i)* (defining "participating in discussions" or "has participated in discussion")].

Factors that are not grounds for disqualification are set out in *Code Civ. Proc. §§ 170.1* and *170.2*. Related definitions appear in *Code Civ. Proc. § 170.5*. For discussion of the grounds and procedure for disqualification for cause and forms alleging various grounds under *Code Civ. Proc. § 170.1*, see Ch. 317, *Judges* .

If the arbitrator has fails to disqualify himself or herself on a party's demand, the party may move the court to vacate the appointment of the arbitrator to the case [*Code Civ. Proc. § 170.1(a)*; *Cal. Rules of Ct., Rule 3.816(d)*; for a form of notice of motion, *see § 36.77*].

[b] Time to Request Disqualification

A request for disqualification for cause under *Code Civ. Proc. § 170.1* may be made any time before the conclusion of the arbitration proceedings [*Code Civ. Proc. § 1141.18(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-36 California Forms of Pleading and Practice--Annotated § 36.77

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§ 36.77 Proceedings for Order to Vacate Appointment of Arbitrator [Code Civ. Proc. § 1141.18(d); Cal. Rules of Ct., Rule 3.816(d)]

[1] Notice of Motion and Supporting Declaration

[a] FORM Proceedings for Order to Vacate Appointment of Arbitrator [Code Civ. Proc. § 1141.18(d); Cal. Rules of Ct., Rule 3.816(d)]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] [et al.],	)	NO. _____
Plaintiff(s),	)	NOTICE OF MOTION AND MOTION FOR OR-
vs.	)	DER TO VACATE APPOINTMENT OF ARBIT-
_____ [*name*] [et al.],	)	RATOR _____ [*name*], SUPPORT-
Defendant(s).	)	ING DECLARATION(S) OF _____
	)	[*name(s)*], AND MEMORANDUM OF POINTS
	)	AND AUTHORITIES
	)	Date: _____
	)	Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Arbitration Hearing Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify moving party, e.g.,* defendant] will, and hereby does, move for an order vacating the appointment of _____ [*name*] as arbitrator in this proceeding pursuant to *California Rules of Court, Rule 3.816(d)*. The motion will be made on the ground that _____ [*specify ground(s), e.g.,* the arbitrator named herein has personal knowledge of disputed evidentiary facts concerning this proceeding].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum of points and authorities served and filed with this notice, on the records and file in this case, and on any evidence that may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*identify moving party, e.g.,* defendant) _____ (*name*)].

2. I was notified on _____ [*date*] that _____ [*name*] was appointed arbitrator in this matter.

3. _____ [*Set forth, in many paragraphs as necessary, the facts showing the discovery and existence of a ground of disqualification*].

4. On _____ [*date*], I demanded that _____ [*name*] disqualify himself/herself as arbitrator. [A copy of the Request for Disqualification of Arbitrator is attached as Exhibit _____ and made a part hereof.]

5. _____ [*Name*] has failed to disqualify himself/herself as arbitrator.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

Attorney for Defendant [*name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion.*]

[b] Use of Form

The form of notice of motion and supporting declaration in [a], *above*, is for use by any party in an arbitration proceeding to seek a court order vacating the appointment of an arbitrator [*Code Civ. Proc. § 1141.18(d)*; *Cal. Rule of Ct., Rule 3.816(d)*]. The motion must be made as promptly as possible under *Code. Civ. Proc. §§ 170.1* and *1141.18(d)* before the conclusion of arbitration proceedings. However, before making the motion, the moving party must first have demanded that the arbitrator disqualify himself or herself [*Cal. Rule of Ct., Rule 3.816(d)*]. For further discussion of disqualification of an arbitrator, see discussion under *§ 36.22*; see also *§ 36.76*[2]-[4].

[c] Points and Authorities

A memorandum of points and authorities must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For general discussion and forms relating to points and authorities, see Ch. 417, *Points and Authorities* .

[2] Order

[a] FORM Proceedings for Order to Vacate Appointment of Arbitrator [Code Civ. Proc. § 1141.18(d); Cal. Rules of Ct., Rule 1606(d)]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] [et al.],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name*] [et al.],	)	ORDER
Defendant(s).	)	
	)	
	)	

The motion of _____ [*identify party, e.g.,* defendant] for an order vacating the appointment of _____ [*name*] as arbitrator in this proceeding came on regularly for hearing by the court on _____ [*date*]. Defendant appeared by counsel _____ [*name*]; plaintiff appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and the appointment of _____ [*name*] as arbitrator to this proceeding is vacated.

[IT IS FURTHER ORDERED that the circumstances of the disqualification of _____ (*name*) be reviewed by _____ (*specify, e.g.,* the arbitration administrative committee).]

Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[b] Use of Form

The form in [a], *above*, is an order for use if the court grants a motion to vacate the appointment of an arbitrator in a proceeding. The form includes an optional paragraph for use if the court also orders that the circumstances of the disqualification be reviewed [*Cal. Rules of Ct., Rule 3.816(d)*].

For further discussion, see [1][b], [c], *above.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 36 JUDICIAL ARBITRATION
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4-36 California Forms of Pleading and Practice--Annotated § 36.78

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§ 36.78 Proceedings for Order to Continue Arbitration Hearing [Cal. Rules of Ct., Rule 3.818(b)]

[1] Notice of Motion and Supporting Declaration

[a] FORM Proceedings for Order to Continue Arbitration Hearing [Cal. Rules of Ct., Rule 3.818(b)]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*] [et al.],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff(s),	)	DER TO CONTINUE ARBITRATION HEARING,
vs.	)	SUPPORTING DECLARATION(S) OF
_____ [*name*] [et al.],	)	_____ [*name(s)*], AND MEMOR-
Defendant(s).	)	ANDUM OF POINTS AND AUTHORITIES
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Arbitration Hearing Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify moving party, e.g.,* defendant] will, and hereby does, move for an order to continue the arbitration hearing in this proceeding pursuant to *California Rules of Court, Rule 3.816(b)*. The motion will be made on the ground that _____ [*specify ground(s), e.g.,* the defendant has taken ill and his/her incapacity will continue for an extended period].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum of points and authorities served and filed with this notice, on the records and file in this case, and on any evidence that may be presented at the hearing of the motion.
Dated: _____

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*identify moving party, e.g.,* defendant) _____ (*name*)].

2. _____ [*Set forth in as many paragraphs as needed facts supportng the claimed ground for a continuance*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion.*]

[b] Use of Form

The form of notice of motion and supporting declaration in [a], *above*, is for use by any party in an arbitration proceeding to seek a court order to continue the arbitration hearing for good cause shown [*Cal. Rule of Ct., Rule 3.818(b)*]. The form should be used if the arbitrator declines to give consent to a continuance on a party's request for good cause [*Cal. Rule of Ct., Rule 3.818(a), (b)*]. For further discussion of continuances, see *§§ 36.24*[1], 36.25.

[c] Points and Authorities

A memorandum of points and authorities must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For general discussion and forms relating to points and authorities, see Ch. 417, *Points and Authorities* .

[2] Order

[a] FORM Proceedings for Order to Continue Arbitration Hearing [Cal. Rules of Ct., Rule 3.816(b)]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] [et al.],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name*] [et al.],	)	ORDER
Defendant(s).	)	
	)	
	)	

_____

The motion of _____ [*identify party, e.g.,* defendant] for an order continuing the arbitration hearing in this proceeding came on regularly for hearing by the court on _____ [*date*]. Defendant appeared by counsel _____ [*name*]; plaintiff appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court, and good cause appearing therefor, that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and this arbitration hearing is continued to [*date*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[b] Use of Form

The form in [a], *above*, is an order for use if the court grants a motion to continue an arbitration hearing [*Cal. Rules of Ct., Rule 3.818(b)*].

For further discussion, see *§ 36.25*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedurePretrial MattersContinuancesCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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Chapter 36 JUDICIAL ARBITRATION
PART V. FORMS

4-36 California Forms of Pleading and Practice--Annotated § 36.79

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§ 36.79 Proceedings to Offer Written Statement or Deposition in Evidence [Cal. Rules of Ct., Rule 3.823]

[1] Notice of Intent to Offer Written Statement or Deposition in Evidence

[a] FORM Proceedings to Offer Written Statement or Depos ition in Evidence [Cal. Rules of Ct., Rule 3.823]--Notice of Intent to Offer Written Statement or Deposition in Evidence

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] [et al.],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name*] [et al.],	)	NOTICE OF INTENTION TO OFFER
Defendant(s).	)	_____ [RECORDS *or* WRITTEN
	)	STATEMENT(S) *or* DEPOSITION(S) *or any com-*
	)	*bination of the three*] IN EVIDENCE

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that _____ [*identify party, e.g.,* defendant] _____ [*name*] intends to introduce the attached _____ [record(s) *and/or* written statement(s) *and/or*

deposition(s)] in evidence at the arbitration hearing in this matter scheduled for _____ [*date*].

This notice is given pursuant to *California Rules of Court, Rule 3.823*.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[b] Use of Form

The form of notice in [a], *above*, is for use by any party in an arbitration proceeding to give notice of intent to introduce in evidence expert witness reports, medical records and bills, police reports, business records, written statements, or depositions [*see Cal. Rule of Ct., 3.823(b)*]. Written statements must be in the form of declarations under penalty of perjury [*Cal. Rules of Ct., Rule 3.823(b)(2)*]. For discussion of the requirements for admissibility under Rule 3.823, see *§ 36.29*[2].

[c] Time Requirement

The notice of intent, as well as copies of the reports, other writings, or statements of witnesses sought to be introduced, must be delivered to all opposing parties at least 20 days before the hearing [*Cal. Rules of Ct., Rule 3.823(b)(1)(A), (2)(B)*; *see also Cal. Rules of Ct., Rule 3.823(b)(3)(A)* (notice of intention to introduce deposition in evidence)]. Delivery may be accomplished manually or by mail as provided in *Code Civ. Proc. § 1013*. If service is by mail, the times prescribed in Rule 3.823 for delivery of documents, notices, and demands are extended by five days [*Cal. Rule of Ct., Rule 3.823(d)*].

[d] Response

The opposing party may respond to the notice regarding a written statement by a written demand that the witness be produced to testify at the hearing [*Cal. Rule of Ct., Rule 3.823(b)(2)(C)*; for a form, *see* [2], *below*].

The opposing party may respond to the notice regarding a expert witness report, medical record and bills, police report, business record or deposition by subpoenaing the author or custodian of the document or the deponent [*Cal. Rule of Ct., Rule 3.823(b)(1)(B), (3)(B)*]. The subpoena is issued as provided in *Code Civ. Proc. § 1985* and elsewhere in Code of Civil Procedure Part 4, Title 3, Chapter 2 and 3 [*Cal. Rule of Ct., Rule 3.823(c)(1)*; *see Code Civ. Proc. §§ 1985 et seq., 2002 et seq.*]. For an illustration of the Judicial Council form of subpoena that the person requesting issuance of the subpoena must modify to showing that the appearance is before an arbitrator and giving the time and place of the arbitration hearing, see Ch. 535, *Subpoena* .

[2] Written Demand That Person Be Produced in Person to Testify at Hearing

[a] FORM Proceedings to Offer Written Statement or Depos ition in Evidence [Cal. Rules of Ct., Rule 3.823]--Written Demand That Person Be Produced in Person to Testify at Hearing

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] [et al.],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name*] [et al.],	)	DEMAND THAT WITNESS BE PRODUCED IN
Defendant(s).	)	PERSON TO TESTIFY AT ARBITRATION HEAR-
	)	ING

)
_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

_____ [*Identify party, e.g.,* Plaintiff] hereby demands pursuant to *California Rules of Court, Rule 3.823(b)(2)* that _____ [*name(s)*] be produced in person to testify at the arbitration hearing scheduled for _____ [*date*].

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[b] Use of Form

The form in [a], *above*, is for use by any party to demand that a witness be produced to testify at an arbitration hearing after the party has received notice of intent to introduce the witness's written statement in evidence [*see Cal. Rule of Ct., Rule 3.823*; for a form of notice of intent, *see* [1], *above*]. The demand must be delivered to the proponent of the evidence at least ten days before the hearing [*Cal. Rule of Ct., Rule 3.823(b)(2)*; for discussion of the method of delivery and extension for mailing, *see* [1][c], *above*]. For discussion of the requirements for admission of evidence under Rule 3.823; see *§ 36.29*[2].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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Chapter 36 JUDICIAL ARBITRATION
PART V. FORMS

4-36 California Forms of Pleading and Practice--Annotated § 36.80

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§ 36.80 Proceedings for Order to Vacate Judgment--Arbitrator Subject to Disqualification [Cal. Rules of Ct., Rule 3.828]

[1] Notice of Motion and Supporting Declaration

[a] FORM Proceedings for Order to Vacate Judgment--Arbitrator Subject to Disqualification [Cal. Rules of Ct., Rule 3.828]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] [et al.],	)	NO. _____
Plaintiff(s),	)	NOTICE OF MOTION AND MOTION FOR ORDER TO VACATE JUDGMENT, SUPPORTING DECLARATION(S) OF _____ [*name(s)*], AND MEMORANDUM OF POINTS AND AUTHORITIES
vs.	)	
_____ [*name*] [et al.],	)	
Defendant(s).	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: None set

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify moving party, e.g.,* defendant] will, and hereby does, move for an order to vacate judgment on the arbitration award entered against him/her, pursuant to *California Rules of Court, Rule 3.828*. The motion will be made on the ground that _____ [*specify ground(s), e.g.,* the arbitrator in this proceeding was subject to a disqualification not disclosed before the arbitration hearing and of which the arbitrator was then aware].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum of points and authorities served and filed with this notice, on the records and file in this case, and on any evidence that may be presented at the hearing of the motion.
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*identify moving party, e.g.,* defendant) _____ (*name*)].

2. _____ [*Set forth in as many paragraphs as necessary facts tending to establish the discovery and existence of the alleged grounds of disqualification and the arbitrator's awareness of them*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion.*]

[b] Use of Form

The form of notice of motion and supporting declaration in [a], *above*, is for use by any party against whom a judgment is entered pursuant to an arbitration award to request the court to vacate the judgment. This form is based on the ground

that the arbitrator was subject to a disqualification not disclosed before the arbitration hearing and of which the arbitrator was then aware [*Code Civ. Proc. §§ 1141.22-1141.23*; *Cal. Rules of Ct., Rule 3.828(a)*]. This motion must be brought within six months after entry of the judgment [*Cal. Rules of Ct., Rule 3.828(a)*]. For the grounds of disqualification, see *§ 36.76*[4].

A judgment entered pursuant to an arbitration award may also be vacated on grounds set forth in *Code Civ. Proc. § 473* or *1286.2(a)(1)-(3)* [*Cal. Rules of Ct., Rule 3.828(a)*; for discussion, *see §§ 36.31* and *36.32*]. For a motion to vacate judgment on these grounds, see Ch. 34, *Contractual Arbitration: Judicial Review* .

For further discussion, see *§ 36.31*.

[c] Points and Authorities

A memorandum of points and authorities must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For general discussion and forms relating to points and authorities, see Ch. 417, *Points and Authorities* .

[2] Order

[a] FORM Proceedings for Order to Vacate Judgment--Arbitrator Subject to Disqualification [Cal. Rules of Ct., Rule 3.828]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*] [et al.],	)	ORDER
Plaintiff(s),	)	Date: _____
vs.	)	Time: _____
_____ [*name*] [et al.],	)	Location:_____
Defendant(s).	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.,* defendant] for an order vacating judgment pursuant to an arbitration award entered against him/her came on regularly for hearing by the court on _____ [*date*]. Defendant appeared by counsel _____ [*name*]; plaintiff appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and the judgment against [*identify party, e.g.,* defendant] is vacated.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[b] Use of Form

The form in [a], *above*, is an order for use by a party if the court grants his or her motion to vacate a judgment entered pursuant to an arbitration award [*Cal. Rules of Ct., Rule 3.828*].

For further discussion, see *§ 36.31*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionJudicial ReviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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Chapter 36 JUDICIAL ARBITRATION
PART V. FORMS

4-36 California Forms of Pleading and Practice--Annotated § 36.81

AUTHOR: Hon. Richard C. Neal Editorial Consultant Richard C. Neal is an Associate Justice, California Court of Appeal, Second District. He was appointed to the Los Angeles Superior Court in 1992 after nearly twenty years in private practice in Los Angeles. Justice Neal served for several years as Chair of the Superior Court's Alternative Dispute Resolution Committee and oversaw implementation in Los Angeles County of the pilot civil action mediation program mandated by Code of Civil Procedure Section 1775 et seq.

§ 36.81 Request for Trial de Novo After Arbitration [Code Civ. Proc. § 1141.20; Cal. Rules of Ct., Rule 3.826]--Judicial Council Form ADR-102

[1] FORM Request for Trial de Novo After Arbitration [Code Civ. Proc. § 1141.20; Cal. Rules of Ct., Rule 3.826]--Judicial Council Form ADR-102

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustration of Judicial Council Form ADR-102 and is used to request a trial de novo after an arbitration award has been filed with the court by the arbitrator. Any party to the case may elect to have a de novo trial, by court or jury, both as to law and facts by filing this form within 30 days after the award is filed with the court clerk [*Code Civ. Proc. § 1141.20*; *Cal. Rules of Ct., Rule 3.826(a)*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. However, courts may preprint the address to which the form should be returned in the box at the top of the page. Therefore, if the form is not obtained from the court, the exact address, including the specific department to which the form should be sent should be determined before filling it out.

[3] Time for Request Cannot Be Extended

The 30-day time period for requesting trial de novo cannot be extended. The request must be served on all other parties appearing in the case, and proof of such service must be filed with the court clerk along with the trial request [*Code Civ.*

Proc. § 1141.20; *Cal. Rules of Ct., Rule 3.826(a)*]. However, if a party was never properly served a copy of the award, the 30-day period does not begin to run until that party actually received notice of the award [*Domingo v. Los Angeles County Metropolitan Transportation Authority (1999) 74 Cal. App. 4th 550, 554, 88 Cal. Rptr. 2d 224]* .

[4] Cross References

For a discussion of the proceedings at the trial de novo, see *36.34*[3]

For a discussion of discovery after arbitration, see *§ 36.35*

For a discussion of the costs after trial de novo, see *§ 36.36*[1]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionJudicial ReviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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Chapter 36 JUDICIAL ARBITRATION
PART V. FORMS

4-36 California Forms of Pleading and Practice--Annotated § 36.82

AUTHOR: Hon. Richard C. Neal Editorial Consultant Richard C. Neal is an Associate Justice, California Court of Appeal, Second District. He was appointed to the Los Angeles Superior Court in 1992 after nearly twenty years in private practice in Los Angeles. Justice Neal served for several years as Chair of the Superior Court's Alternative Dispute Resolution Committee and oversaw implementation in Los Angeles County of the pilot civil action mediation program mandated by Code of Civil Procedure Section 1775 et seq.

§ 36.82 Proceedings for Order Finding Imposition of Costs and Fees to Create Substantial Economic Hardship [Code Civ. Proc. § 1141.21; Cal. Rules of Ct., Rule 3.826(d)]

[1] Notice of Motion and Supporting Declaration

[a] FORM Proceedings for Order Finding Imposition of Costs and Fees to Create Substantial Economic Hardship [Code Civ. Proc. § 1141.21; Cal. Rules of Ct., Rule 3.826(d)]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] [et al.],	)	NO. _____
Plaintiff(s),	)	NOTICE OF MOTION AND MOTION FOR OR-
vs.	)	DER FINDING IMPOSITION OF COSTS AND
_____ [*name*] [et al.],	)	FEES TO CREATE SUBSTANTIAL ECONOMIC
Defendant(s).	)	HARDSHIP, SUPPORTING DECLARATION(S) OF
	)	_____ [*name(s)*], AND MEMOR-
	)	ANDUM OF POINTS AND AUTHORITIES
	)	Date: _____
	)	Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.*, plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify moving party, e.g.*, defendant] will, and hereby does, move for an order that _____ [*identify party, e.g.*, defendant] not be required to pay costs and fees after obtaining a less favorable judgment on the trial de novo than was obtained in arbitration on the ground that the imposition of costs and fees would create such a substantial economic hardship as not to be in the interest of justice pursuant to *California Rules of Court, Rule 3.826(d)* and *Code of Civil Procedure Section 1141.21*.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum of points and authorities served and filed with this notice, on the records and file in this case, and on any evidence that may be presented at the hearing of the motion.
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, the defendant in this action].

2. _____ [*Set forth in as many paragraphs as necessary facts tending to show such substantial economic hardship that it would not be in the interest of justice to require the moving party to pay costs and fees under Code Civ. Proc. § 1141.21*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion.*]

[b] Use of Form

The form in [a], *above*, is for use by any party who elected trial de novo after an arbitration hearing and for whom the judgment on the trial de novo was not more favorable to seek an order relieving him or her from liability for costs and fees [*see Code Civ. Proc. § 1141.21(a)*; *Cal. Rules of Ct., Rule 3.826(d)*]. The party will be ordered to pay specified nonrefundable costs and fees, unless the court finds in writing and on motion that the imposition of such costs and fees would create such a substantial economic hardship as not to be in the interest of justice [*Code Civ. Proc. § 1141.21(a)*; *Cal. Rules of Ct., Rule 3.826(d)*]. For further discussion and a list of the costs and fees, see *§ 36.36*.

[c] Points and Authorities

A memorandum of points and authorities must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For general discussion and forms relating to points and authorities, see Ch. 417, *Points and Authorities* .

[2] Order

[a] FORM Proceedings for Order Finding Imposition of Costs and Fees to Create Substantial Economic Hardship [Code Civ. Proc. § 1141.21; Cal. Rules of Ct., Rule 3.826(d)]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] [et al.],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name*] [et al.],	)	ORDER
Defendant(s).	)	
	)	
	)	

_____

The motion of _____ [*identify party, e.g.*, defendant] for an order continuing the arbitration hearing in this proceeding came on regularly for hearing by the court on _____ [*date*]. Defendant appeared by counsel _____ [*name*]; plaintiff appeared by counsel _____ [*name*].

The Court, having considered the _____ [affidavit *or* declaration] and other documents in support of and in opposition to the miton, having heard the arguments of counsel, and being fully advised int he matter, finds that the imposition of the costs and fees specified in *Code of Civil Procedure Section 1141.21(a)* would create such a substantial economic hardship as not to be in the interest of justice.

IT IS, THEREFORE, ORDERED that the motion be, and hereby is, granted and that _____ [*identify party, e.g.*, defendant] is not required to pay costs and fees under *Code Civ. Proc. § 1141.21* in this matter].
Dated: _____

_____ [*signature*]
Judge of the Superior Court

[b] Use of Form

The form in [a], *above*, is an order for use by a party if the court grants a motion relieving a party who requested trial de novo after arbtiration from liability for costs and fees after obtaining a less favorable judgment in the trial de novo. To grant the motion, the court is required to make finding in writing that the imposition of the costs and fees would create

such a substantial economic hardship as not to be in the interest of justice [*Code Civ. Proc., § 1141.21*; *Cal. Rules of Ct., Rule 3.826(d)*].

For further discussion, see *§ 36.36*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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Chapter 37 JUDICIALLY MANDATED CIVIL ACTION MEDIATION

4-37 California Forms of Pleading and Practice--Annotated 37.syn

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.syn Synopsis to Chapter 37: JUDICIALLY MANDATED CIVIL ACTION MEDIATION

§ 37.01 Scope of Chapter

§ 37.02 Governing Law

§ 37.03 Cross References

§§ 37.04-37.09 [Reserved]

§ 37.10 Began as Pilot Project

§ 37.11 Objective

§ 37.12 Diversion to Alternative Procedure at Early Stage of Action

§ 37.13 Other Programs Not Affected

§ 37.14 [Reserved]

§ 37.15 "Mediation" Defined

§ 37.16 Authority of Attorney to Act for Party

§ 37.17 Stipulation for Mediation

§ 37.18 Cases That May Be Ordered to Mediation

[1] Alternative to Mandatory Judicial Arbitration

[2] When Judicial Arbitration Is Required

[3] Actions Exempt From Arbitration

[4] Action Exempt From Judicial Arbitration Because It Seeks Equitable Relief Is Subject to Mediation

[5] Actions Involving Public Agency or Entity

§ 37.19 Determining the Amount in Controversy and Ordering a Case to Mediation

[1] Case-by-Case Determination

[2] Conference

[3] Basis for Determination

§ 37.20 Mutually Exclusive Alternative to Judicial Arbitration

§ 37.21 Selection of Mediator

§ 37.22 Compensation of Mediator

§ 37.23 Payment of Mediation Costs

§ 37.24 Appearances at Mediation Sessions

§ 37.24A Participant Lists and Mediation Statements

§ 37.25 Discovery While Mediation Is Pending

§ 37.26 Termination of Mediation

§ 37.27 Statement of Agreement or Nonagreement

§ 37.28 ADR Information Form

§ 37.29 Trial After Mediation; Duty to Prosecute Diligently

§ 37.30 Dismissal for Delay in Prosecution; Tolling of Dismissal Statute

§ 37.31 Coordination With Trial Court Delay Reduction Act

§ 37.32 Evidentiary Protection for Statements Made in Mediation and Fact of Mediation

§ 37.33 Award of Mediation Expenses as Costs

§ 37.34 Conduct of Mediators in Court-Connected Mediations

[1] Purpose and Application

[2] Definitions

[a] Mediation

[b] Mediator

[c] Participant

[d] Party

[3] Criteria for Competence

[4] Impartiality and Disclosure

[a] Matters to Be Disclosed and Timing of Disclosures

[b] Objections, Addressing Questions and Concerns

[c] When Recusal Is Required Despite Parties' Consent

[5] Marketing Activities

[6] Compensation and Gifts

[7] Voluntary Participation and Self-Determination

[8] Confidentiality

[9] Quality of the Mediation Process

[a] In General

[b] Representation and Other Professional Services

[c] Nonparticipants' Interests

[d] Combining Mediation with Other ADR Processes

[e] Settlement Agreements

[f] Discretionary Termination and Withdrawal

§ 37.35 Complaints Against Mediators

[1] Which Courts Must Establish Procedures to Resolve Complaints

[2] Confidentiality of Complaint, Procedures, Information, and Records

[3] Attendance Sheet and Agreement to Disclose

[3A] Court Resolution of Complaint

[4] Disqualification Based on Investigation or Involvement in Complaint

§§ 37.36-37.39 [Reserved]

§ 37.40 State Statutes

[1] Civil Action Mediation Act--In General

[2] Cases Subject to Civil Action Mediation Act

[3] Mediation Process

[4] Relationship to Other Civil Procedure

§ 37.41 California Rules of Court

[1] Civil Action Mediation Act (formerly Los Angeles Pilot Program)

[2] Conduct of Mediators in Court-Connected Mediation

§ 37.42 Local Rules of Court

§ 37.43 Text References

§§ 37.44-37.49 [Reserved]

§ 37.50 Initiation of Mediation

§ 37.51 Selection of Mediator

§ 37.52 Mediation

§ 37.53 Discovery

§ 37.54 Conclusion of Mediation

§§ 37.55-37.69 [Reserved]

§ 37.70 Stipulation to Submit Civil Action to Mediation

[1] FORM

[2] Use of Form

§§ 37.71-37.74 [Reserved]

§ 37.75 Form of Statement of Agreement or Nonagreement [Code Civ. Proc. § 1775.9; Cal. Rules of Ct., Rule 3.895]--Judicial Council Form ADR-100

[1] FORM

[2] Use of Form

§ 37.76 ADR Information Form [Code Civ. Proc. § 1775.14; Cal. Rules of Ct., Rule 3.897]--Judicial Council Form ADR-101

[1] FORM

[2] Use of Form

§ 37.77 Attendance Sheet for Court-Program Mediation of Civil Case [Cal. Rules of Ct., Rule 3.860]--Judicial Council Form ADR-107

[1] FORM

[2] Use of Form

Hon. Richard C. Neal n*
Editorial Consultant

FOOTNOTES:
(n28)Footnote *. **Richard C. Neal** is an Associate Justice, California Court of Appeal, Second District. He was appointed to the Los Angeles Superior Court in 1992 after nearly twenty years in private practice in Los Angeles. Justice Neal served for several years as Chair of the Superior Court's Alternative Dispute Resolution Committee and oversaw implementation in Los Angeles County of the pilot civil action mediation program mandated by *Code of Civil Procedure Section 1775 et seq.*

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I. SCOPE

4-37 California Forms of Pleading and Practice--Annotated § 37.01

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.01 Scope of Chapter

This chapter discusses civil action mediation under the Civil Action Mediation Act (*Code Civ. Proc. § 1775 et seq.*). It contains procedural a checklist and a form of stipulation to mediate under the Civil Action Mediation Act [*see § 37.70*], as well as the Judicial Council form of Statement of Agreement or Nonagreement, which must be filed on termination of mediation [*see § 37.75*], the Judicial Council ADR Information form [*see § 37.76*], and the Judicial Council form of Attendance Sheet for Court-Program Mediation of Civil Case [*see § 37.77*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureAlternative Dispute ResolutionGeneral Overview

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4-37 California Forms of Pleading and Practice--Annotated § 37.02

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.02 Governing Law

The Civil Action Mediation Act is governed by *Code Civ. Proc. § 1775 et seq.* and *Cal. Rules of Ct., Rule 3.890 et seq.*

The conduct of mediators in court-connected mediation programs for civil cases is governed by *Cal. Rules of Ct., Rule 3.850 et seq.*

Complaints about court-program mediators are governed by *Cal. Rules of Ct., Rule 3.865 et seq.*

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4-37 California Forms of Pleading and Practice--Annotated § 37.03

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.03 Cross References

For discussion and forms relating to judicial arbitration, see Ch. 36, *Judicial Arbitration*

For discussion and a form of certificate regarding alternative dispute resolution attempt (mediation, arbitration, or conciliation), which is a prerequisite to filing a complaint in specified actions relating to common interest developments [*Civ. Code § 1369.510 et seq.*], *see* Ch. 124, *Condominiums and Other Common Interest Developments* .

For discussion of, and forms for use in making, stipulations generally, see Ch. 533, *Stipulations*

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4-37 California Forms of Pleading and Practice--Annotated §§ 37.04-37.09

AUTHOR: Hon. Richard C. Neal Editorial Consultant

[Reserved]

§§ 37.04[Reserved]

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AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.10 Began as Pilot Project

The Civil Action Mediation Act (*Code Civ. Proc. § 1775 et seq.*) began as a pilot program in Los Angeles for actions filed on or after January 1, 1994. The program became permanent on repeal of the sunset clause that would otherwise have terminated it on January 1, 1999. The Civil Action Mediation Act establishes a procedure in Los Angeles County, under which the court may refer cases to appropriate dispute resolution processes such as judicial arbitration and mediation as an alternative to trial, consistent with the parties' right to obtain a trial if a dispute is not resolved through an alternative process [*Code Civ. Proc. §§ 1775(e), 1775.2*]. Despite the statute's broad statement allowing referral of cases to alternative dispute resolution, nothing in Section 1775 et seq. actually authorizes the court to refer a case to any process other than mediation. The authority for other processes, including judicial arbitration and mandatory settlement conferences is found in other statutes and rules.

Any other county may elect to apply the program [*Code Civ. Proc. §§ 1775(e), 1775.2(b)*].

The program applies to all at issue civil cases in which judicial arbitration is otherwise required under *Code Civ. Proc. § 1141.11* whether or not the action includes a prayer for equitable relief [*Code Civ. Proc. § 1775.3(a)*].

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§ 37.11 Objective

The objective is to use alternative processes for reducing the cost, time, and stress of dispute resolution [*see Code Civ. Proc. § 1775(a)-(c), (f)*].

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AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.12 Diversion to Alternative Procedure at Early Stage of Action

Mediation and similar alternative processes can have the greatest benefit for the parties in a civil action when used early, before substantial discovery and other litigation costs have been incurred. If appropriate, participants in disputes should be encouraged to utilize mediation and other alternatives to trial for resolving their differences in the early stages of a civil action [*Code Civ. Proc. § 1775(d)*]. Thus, effective July 1, 2002, in all general civil cases, unless certain limited civil cases are excepted by local rule, there will be a case management conference at which the court must review the case and determine if it is suitable for alternative dispute resolution, including mediation [*Cal. Rules of Ct., Rule 3.727(6)*]. No later than 30 calendar days before the date set for the case management conference, the parties must meet and confer, in person or by phone, to consider, among other things, whether the parties wish to stipulate to, or the case should be referred to, mediation or any other form of alternative dispute resolution, and if so, the date by which the ADR must be completed, as well as possible settlement [Cal. Rules of Ct., Rule Rules 3.724, 3.727(6)]. If all the partiesagree to an ADR process, they must jointly complete the form of ADR stipulation served with the complaint in accordance with Cal. Rules of Ct., Rule3.221 [*Cal. Rules of Ct., Rule 3.726*]. The parties must also file and serve a mandatory case management statement 15 calendar days before the date set for the case management conference [*Cal. Rules of Ct., Rule 3.725*; *see generally*, Ch.425, *Pretrial Proceedings*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediations

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§ 37.13 Other Programs Not Affected

The Legislature does not intend that any provisions of the pilot project be construed to preempt other current or future alternative dispute resolution programs operating in the trial courts [*Code Civ. Proc. § 1775.13*].

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[Reserved]

§ 37.14[Reserved]

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AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.15 "Mediation" Defined

"Mediation" means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement [*Code Civ. Proc. § 1775.1(a)*; *see Cal. Rules of Ct., Rule 3.800(2)* (under which mediation does not include a settlement conference under *Cal. Rules of Ct., Rule 3.1380*)].

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AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.16 Authority of Attorney to Act for Party

Any act to be performed by a party may also be performed by his or her counsel of record unless otherwise specified in *Code Civ. Proc. § 1775 et seq.* or ordered by the court [*see Code Civ. Proc. § 1775.1(b)*].

PRACTICE TIP:

Counsel May Not Be Excluded. Some mediators may attempt to require the parties to participate in mediation sessions without their counsel present. This practice is contrary to *Cal. Rules of Ct., Rule 3.894(a)(4)*, which provides that each party is entitled to have counsel present at all mediation sessions that concern it [*see § 37.24*]. *By Hon. Richard C. Neal*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewBusiness & Corporate LawAgency RelationshipsAgents DistinguishedGeneral AgentsCivil ProcedureAlternative Dispute ResolutionMediations

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AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.17 Stipulation for Mediation

Any action, regardless of the amount in controversy (*see § 37.18*), may be submitted to mediation under the project if all the parties so stipulate [*Cal. Rules of Ct., Rule 3.891(a)(2)*].

The stipulation must be filed not later than 90 days before trial unless the court permits it to be filed later [*Cal. Rules of Ct., Rule 3.891(a)(2)*; *see Cal Rules of Ct., Rules 3.221* (form of stipulation to ADR)].

PRACTICE TIP:

Court Mediator When More Than $50,000 in Controversy. Los Angeles County Superior Court will provide a volunteer mediator, from its list of approved mediators, for cases in which the amount in controversy exceeds $50,000, but the parties stipulate to mediate. *By Hon. Richard C. Neal*

For a form of stipulation, see *§ 37.70*. For discussion of when the court may order the case to mediation, see *§ 37.18*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.18 Cases That May Be Ordered to Mediation

[1] Alternative to Mandatory Judicial Arbitration

Any civil action in which arbitration is otherwise required pursuant to *Code Civ. Proc. § 1141.11* (discussed in [2], [3], *below*) may be submitted to mediation by the presiding judge, or the judge designated under this title, as an alternative to judicial arbitration pursuant to *Code Civ. Proc. § 1141.10 et seq.*, regardless of whether the action includes a prayer for equitable relief [*Code Civ. Proc. § 1775.3(a)*].

PRACTICE TIP:

Orders to Mediate Made at Status Conference. In Los Angeles Superior Court the mediation order is made at a status conference, by the individual calendar judge to whom the case is assigned, or by the supervising judge in those districts using a master calendar system. *By Hon. Richard C. Neal*

The court is not to order a case into mediation if the amount in controversy exceeds $50,000 [*Code Civ. Proc. § 1775.5*; *see Cal. Rules of Ct., Rule 3.891(a)(1)*].

Regardless of these restrictions, the parties may stipulate to mediation in any case *see* [*Cal. Rules of Ct., Rule 3.891(a)(2)*; for discussion, *see § 37.17*].

[2] When Judicial Arbitration Is Required

In each superior court with 18 or more judges, all nonexempt unlimited civil cases must be submitted to arbitration, by the presiding judge or other designated judge, if the amount in controversy, in the court's opinion, will not exceed $50,000 for each plaintiff [*Code Civ. Proc. § 1141.11(a)*; *see Code Civ. Proc. § 85 et seq.* (defining "limited civil case")]. This includes superior courts in Alameda, Contra Costa, Fresno, Kern, Los Angeles, Monterey, Orange, Riverside, Sacramento, San Bernardino, San Diego, San Francisco, San Joaquin, San Mateo, Santa Barbara, Santa Clara, andVentura Counties [*Gov. Code §§ 69580, 69582, 69583, 69585, 69586, 69590-69598, 69599-69600, 69606*].

In each superior court with fewer than 18 judges, local rules may provide that when it is in the best interests of justice, all nonexempt unlimited civil cases must be submitted to arbitration if the amount in controversy in the opinion of the court will not exceed $50,000 for each plaintiff [*Code Civ. Proc. § 1141.11(b)*].

Each superior court may provide by local rule, when it is determined to be in the best interests of justice, that all nonexempt unlimited civil cases must be submitted to arbitration by the presiding judge or other designated judge [*Code Civ. Proc. § 1141.11(c)*; *see Code Civ. Proc. § 85 et seq.* (defining "limited civil case")].

[3] Actions Exempt From Arbitration

The following actions are exempt from judicial arbitration:

(a) Consumer class actions pursuant to *Civ. Code § 1781* [*Code Civ. Proc. § 1141.11(c)*] or any class action [Cal. Rules of Ct., Rule 3.801(b)(2); *see Code Civ. Proc. § 1141.15*].

(b) Small claims actions pursuant to *Code Civ. Proc. § 116.110 et seq.* [*Code Civ. Proc. § 1141.11(c)*; Cal. Rules of Ct., Rule 3.801(b)(3)] or trials de novo on appeal from the small claims court [Cal. Rules of Ct., Rule 3.801(b)(3); *see Code Civ. Proc. § 1141.15*].

(c) Unlawful detainer proceedings pursuant to *Code Civ. Proc. § 1161* [*Code Civ. Proc. § 1141.11(c)*] or any unlawful detainer proceeding [Cal. Rules of Ct., Rule 3.801(b)(4); *see Code Civ. Proc. § 1141.15*].

(d) Proceedings under the Family Law Act except as provided in *Fam. Code § 2554* (character, valuation, and division of property) [Cal. Rules of Ct., Rule 3.801(b)(5); *see Code Civ. Proc. § 1141.15*].

(e) Any case otherwise subject to arbitration that the court finds to be not amenable to arbitration on the grounds that arbitration would not reduce the probable time and expense necessary to resolve the litigation [Cal. Rules of Ct., Rule 3.801(b)(6); *see Code Civ. Proc. § 1141.15*].

(f) Any category of case otherwise subject to arbitration but excluded by local rule as not amenable to arbitration on the grounds that under the circumstances relating to the particular court, arbitration of such cases would not reduce the probable time and expense necessary to resolve the litigation [Cal. Rules of Ct., Rule 3.801(b)(7); *see Code Civ. Proc. § 1141.15*].

(g) Cases involving multiple causes of action or a cross complaint, if the court determines that the amount in controversy as to any given cause of action or cross complaint exceeds $50,000 [Cal. Rules of Ct., Rule 3.801(b)(8); *see Code Civ. Proc. § 1141.15*].

These actions would therefore not be subject to civil action mediation [*see Code Civ. Proc. § 1775.3(a)*].

[4] Action Exempt From Judicial Arbitration Because It Seeks Equitable Relief Is Subject to Mediation

However, civil action mediation does expressly apply to one category of cases that is excepted from mandatory judicial arbitration--actions that include a prayer for equitable relief [*compare Code Civ. Proc. § 1775.3(a) with Code Civ. Proc. § 1141.13*; Cal. Rules of Ct., Rule 3.801(b)(1)].

[5] Actions Involving Public Agency or Entity

The presence of a public agency or public entity as a party does not preclude submission to mediation [*Code Civ. Proc. § 1775.3(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionMediationsReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.19 Determining the Amount in Controversy and Ordering a Case to Mediation

[1] Case-by-Case Determination

The determination of the amount in controversy is made in the manner provided in *Code Civ. Proc. § 1141.16* (regarding judicial arbitration), which requires the determination to be made at a conference with all parties in attendance or represented. In making this determination, the court is not to consider the merits of questions of liability, defenses, or comparative negligence [*Code Civ. Proc. § 1775.5*; *see Cal. Rules of Ct., Rule 3.891(a)(1)*].

The amenability of a particular action for mediation is to be determined on a case-by-case basis, rather than categorically [*Cal. Rules of Ct., Rule 3.891(b)*]. The determination to send a case to mediation is to be made by the court after considering the parties' expressed views on the amenability of the case to mediation. The court is not to require the parties or their counsel to appear personally in court for a conference held solely to determine whether to send their case to mediation [*Cal. Rules of Ct., Rule 3.891(a)(1)*].

PRACTICE TIP:

Which Cases to Mediate. Experts on mediation disagree concerning what types of cases are best suited to mediation. Some urge that cases involving a continuing relationship (e.g., employer-employee, landlord-tenant) or high emotional level are better suited to mediation than purely monetary disputes between strangers, such as the typical personal injury case. However, many insurance industry representatives and personal injury lawyers believe that mediation also works well in the latter category of cases. First year results in Los Angeles Superior court show considerable success in mediations in all types of cases. *By Hon. Richard C. Neal*

PRACTICE TIP: Advantages of Mediation Over Arbitration. Several features of judicially mandated mediation may make it more attractive than judicially mandated arbitration in a particular case. These include:

The parties (and in the case of a party who is not an individual, a representative with settlement

authority), must attend the mediation [*see § 37.24*]; no such attendance is required at an arbitration. In many cases the presence of someone with the power of the checkbook greatly enhances the prospects for settlement.

A mediation order does not cut off discovery, whereas in cases ordered to arbitration, all discovery must be completed 15 days before the arbitration hearing [*see § 37.25*].

No definitive evaluation of either side's case is made at a mediation, so the possibility of further settlement negotiations post-mediation is optimized. By contrast, the award made after arbitration may tend to harden the winning party's resolve not to compromise.

No evidentiary hearing or presentation need be prepared for a mediation, whereas this is necessary for an arbitration. This difference may be especially significant where a case relies centrally on expert testimony.

Mediation potentially can occur much earlier than arbitration. A status conference may occur as early as 30 days after a responsive pleading is filed [*Gov. Code § 68616(e)*], in other words, as early as 60 days after filing. Mediations in the normal course must be completed within 60 days after referral [*see § 37.26*]. By contrast, an arbitration hearing cannot occur until a minimum of 210 days after filing of the complaint [*Gov. Code § 68616(g)*]. *By Hon. Richard C. Neal*

[2] Conference

The determination of the amount in controversy is made by the court and the case referred to arbitration or mediation at the first case management conference or review under *Cal. Rules of Ct., Rules 3.720 et seq.* that takes place after all named parties have appeared or defaulted [*see Code Civ. Proc. § 1141.16(a)*; *but see Code Civ. Proc. § 367.5(b)(1)* (unless court has determined otherwise, party who has given notice, made good faith attempt to meet and confer before conference, and filed case management statement may appear by telephone)]. No determination of the amount in controversy need be made if all parties stipulate in writing that the amount in controversy exceeds $50,000 [*Code Civ. Proc. § 1141.16(a)*; *Cal. Rules of Ct., Rule 3.812(d)*].

In Los Angeles County Superior Court, this will be the first case management conference. It will be held no later than 180 days after the complaint is filed [Los Angeles Co. Super. Ct. Rules, Rule 7.9(a); *see Gov. Code § 68616(e), (g)*].

[3] Basis for Determination

The determination of the amount in controversy is based on the total amount of damages [*Code Civ. Proc. § 1141.16(a)*]. In making this determination, the court is not to consider the merits of questions of liability, defenses, or comparative negligence [*Code Civ. Proc. § 1775.5*; *see Cal. Rules of Ct., Rule 3.891(a)(1)*; *see also Code Civ. Proc. § 1141.16(a)*]. The determination is without prejudice to any finding on the value of the case by an arbitrator or in a subsequent trial de novo [*Code Civ. Proc. § 1141.16(b)*].

The court will not make the determination if all parties stipulate in writing that the amount in controversy exceeds $50,000 [*Code Civ. Proc. § 1141.16(a)*]. The court's determination of the amount in controversy is not appealable [*Code Civ. Proc. § 1141.11(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.20 Mutually Exclusive Alternative to Judicial Arbitration

An action that has been ordered into compulsory arbitration pursuant to *Code Civ. Proc. § 1141.11* or stipulated arbitration or arbitration at plaintiff's request under *Code Civ. Proc. § 1141.12* may not be ordered into mediation under this project. Conversely, an action that has been ordered into mediation pursuant to *Code Civ. Proc. § 1775.3* may not be ordered into arbitration pursuant to *Code Civ. Proc. § 1141.11* [*Code Civ. Proc. § 1775.4*].

PRACTICE TIP:

Mediation Order Does Not Bar Later MSC. The prohibition on ordering a case to arbitration which has been previously ordered to mediation, and vice versa, apparently does not prohibit a later order under *Cal Rules of Ct., Rule 3.1380(a)* requiring a mandatory settlement conference. In practice, however, many judges may be reluctant to require the parties to incur the cost of an MSC where a prior ADR procedure such as mediation or arbitration has been unsuccessful. *By Hon. Richard C. Neal*

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.21 Selection of Mediator

A mediator must be selected for the action within 30 days of its submission to mediation [*Code Civ. Proc. § 1775.6*]. The method of selection and qualification of the mediator will be as the parties determine [*Code Civ. Proc. § 1775.6*]. The parties have 15 days from the date the action is submitted to mediation in which to stipulate to a mediator [*Cal. Rules of Ct., Rule 3.893*]. The parties may, but need not, select a mediator identified by the court as a person who the court may appoint as a mediator [*Cal. Rules of Ct., Rule 3.893*].

PRACTICE TIP:

Composition of Los Angeles Superior Court Mediator List. Mediators on the court's list meet the minimum qualifications under the Dispute Resolution Programs Act, *Bus. & Prof. Code § 465*, and *16* Cal. Code Reg. 3622. In summary, they have 25 hours of classroom mediation training, or 25 hours of actual dispute resolution experience. Hours of service as a volunteer settlement officer are accepted under the latter standard. *By Hon. Richard C. Neal*

PRACTICE TIP: Selecting Court List Mediator. In Los Angeles County almost all litigants ordered to mediation elect to use a free volunteer mediator from the court's list. Litigants or their counsel are required to select from a list of mediators with expertise in the subject area of the dispute. The selection is made at the ADR Office immediately following the status conference at which the mediation order is made. The ADR Office then notifies the mediator of assignment, and the mediator contacts the parties to arrange the date, time, and place of the mediation. *By Hon. Richard C. Neal*

If the parties are unable to agree on a mediator within the 15-day period, the court may select a mediator [*Code Civ. Proc. § 1775.6*; *Cal. Rules of Ct., Rule 3.893*; *see Cal. Rules of Ct., Rule 3.892* (standards for identifying persons who may be appointed as mediators)].

Legal Topics:

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

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AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.22 Compensation of Mediator

Court-appointed mediators are paid $150 per case or per day, whichever is greater, except that no compensation shall be paid before the mediator files a statement of nonagreement pursuant to *Code Civ. Proc. § 1775.9* or the parties settle the action [*Code Civ. Proc. § 1775.8(a)*; *see Code Civ. Proc. § 1141.18(b)*]. Higher rates may be set in a county or city and county by the board of supervisors [*Code Civ. Proc. § 1775.8(a)*; *see Code Civ. Proc. § 1141.18(b)*]. Volunteers may also be available who will serve without compensation, as has been the case with mediators on the Los Angeles County Superior Court Mediator List.

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AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.23 Payment of Mediation Costs

Administrative costs of mediation, including compensation of mediators, are to be paid in the same manner as for arbitration under *Code Civ. Proc. § 1141.28* [*Code Civ. Proc. § 1775.8(b)*]. Section 1141.28 generally provides for payment by the court [*Code Civ. Proc. § 1141.28(a)*]. The arbitrator's compensation is payable by the parties, however, if the action would not have been subject to arbitration but for the parties' stipulation. In that case, the parties pay the arbitrator's compensation in equal shares. If the imposition of these costs would create such a substantial economic hardship for any party as not to be in the interest of justice, as determined by the arbitrator, that party's share of the costs will be paid for by the court.The determination of hardship may be reviewed by the court [*Code Civ. Proc. § 1141.28(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediations

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4-37 California Forms of Pleading and Practice--Annotated § 37.24

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.24 Appearances at Mediation Sessions

All parties and attorneys of record must attend all mediation sessions in person unless excused or permitted to attend by telephone [*Cal. Rules of Ct., Rule 3.894(a)(1), (3)*]. A party that is not a natural person must appear by a representative who has authority to resolve the dispute or, in the case of a governmental entity that requires an agreement to be approved by an elected official or a legislative body, a representative with authority to recommend such agreement must attend all mediation sessions in person, unless excused or permitted to attend by telephone [*Cal. Rules of Ct., Rule 3.894(a)(1), (3)*]. The mediator may excuse a party, attorney, or representative from the requirement to attend a mediation session or permit attendance by telephone. The party, attorney, or representative who is excused or permitted to attend by telephone must promptly send a letter or an electronic communication to the mediator and to all parties confirming the excuse or permission [*Cal. Rules of Ct., Rule 3.894(a)(2)*].

Each party may have counsel present at all mediation sessions that concern that party [*Cal. Rules of Ct., Rule 3.894(a)(4)*].

If any party is insured under a policy that provides, or may provide, coverage for a claim that is a subject of the action, a representative of the insurer with authority to settle or recommend settlement of the claim must attend all mediation sessions in person, unless excused or permitted to attend by telephone [*Cal. Rules of Ct., Rule 3.894(a)(2), (3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-37 California Forms of Pleading and Practice--Annotated § 37.24A

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.24A Participant Lists and Mediation Statements

At least five court days before the first mediation session, each party must serve a list of its mediation participants on the mediator and all other parties. The list must include the names of all parties, attorneys, representatives of a party that is not a natural person, insurance representatives, and other persons who will attend the mediation with or on behalf of that party. A party must promptly serve a supplemental list if the party subsequently determines that other persons will attend the mediation with or on behalf of the party [*Cal. Rules of Ct., Rule 3.894(b)(1)*].

The mediator may request that each party submit a short mediation statement providing information about the issues in dispute and possible resolutions of those issues and other information or documents that may appear helpful to resolve the dispute [*Cal. Rules of Ct., Rule 3.894(b)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-37 California Forms of Pleading and Practice--Annotated § 37.25

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.25 Discovery While Mediation Is Pending

Any party who participates in mediation pursuant to *Code Civ. Proc. § 1775.3* retains the right to obtain discovery to the extent available under the Civil Discovery Act (*Code Civ. Proc. § 2016.010 et seq.*) [*Code Civ. Proc. § 1775.11*].

However, *Cal. Rules of Ct., Rule 3.896(d)* urges parties to exercise restraint in discovery while a case is in mediation. In appropriate cases, a protective order under *Code Civ. Proc. § 2017.020* and related provisions, may be issued by the court to accommodate that objective [*Cal. Rules of Ct., Rule 3.896(d)*].

For discussion and forms of protective orders, see *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.30* et seq.

PRACTICE TIP:

Discovery Before Mediation. Reasonable knowledge of the facts relevant to one's case is usually necessary for an effective mediation, and sometimes some discovery is needed to lay the informational foundation for a successful mediation. On the other hand, one of the important attractions of mediation is the possibility of reaching an early settlement and thus avoiding the substantial expense that can accompany full, complete discover. Counsel must exercise judgment to accommodate these competing concerns. *By Hon. Richard C. Neal*

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-37 California Forms of Pleading and Practice--Annotated § 37.26

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.26 Termination of Mediation

Neither *Code Civ. Proc. § 1775 et seq.* nor *Cal Rules of Ct., Rule 3.890 et seq.* establish a minimum time within which mediation must be completed.

Mediation must be completed within 60 days of a reference to a mediator, but that period may be extended by the court for up to 30 days on a showing of good cause [*Cal. Rules of Ct., Rule 3.896(c)*].

PRACTICE TIP:

Extending Time for Completion of Mediation. Trial judges may be willing in appropriate cases to extend the time within which mediation must occur beyond the 60-day initial/90-day extended periods specified in *Cal. Rules of Ct., Rule 3.896(c)*. Most judges will not wish to compel attendance at a mediation prior to the time all parties believe they have the necessary information in hand to negotiate meaningfully. *By Hon. Richard C. Neal*

If the parties to mediation are unable to reach a mutually acceptable agreement and any party to the mediation wishes to terminate the mediation, the mediator must file a statement of nonagreement [*Code Civ. Proc. § 1775.9(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-37 California Forms of Pleading and Practice--Annotated § 37.27

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.27 Statement of Agreement or Nonagreement

Within 10 days of the conclusion of mediation, the mediator must file a statement on Judicial Council form ADR-100, advising the court whether the mediation ended in full agreement or nonagreement as to the entire case or as to particular parties in the case [*Cal. Rules of Ct., Rule 3.895*]. For an illustration of the Judicial Council form of statement of agreement or nonagreement, see *§ 37.75*[1].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-37 California Forms of Pleading and Practice--Annotated § 37.28

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.28 ADR Information Form

The Judicial Council requires each court to submit quarterly reports regarding cost and time savings afforded by mediation, and information related to the effectiveness of mediation in resolving disputes [*see Cal. Rules of Ct., Rule 3.897(a)*]. Courts are directed to require parties and mediators to supply pertinent information for those reports [*see Cal. Rules of Ct., Rule 3.897(c)*; *see also Code Civ. Proc. § 1775.14*].

After mediation has concluded, the mediator should give an ADR Information Form to both parties and counsel to fill out separately and file with the court clerk [Administrative Office of the Courts News Release, March 1, 1994]. For an illustration of this Judicial Council form, see *§ 37.76*[1].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCourt RecordsCivil ProcedureAlternative Dispute ResolutionMediations

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AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.29 Trial After Mediation; Duty to Prosecute Diligently

When a statement of nonagreement is filed, the matter must be calendared for trial, insofar as possible, so that the trial shall be given the same place on the active list as it had prior to mediation, or shall receive civil priority on the next setting calendar [*Code Civ. Proc. § 1775.9(b)*].

PRACTICE TIP:

Post-Mediation Status Conference. Los Angeles County individual calendar courts no longer keep an "active list." Cases ordered to mediation will not be removed from such a list, so no necessity arises to "return a case to active status." These courts do routinely schedule a post-mediation status conference when making the mediation order, and a trial will be set at the post-mediation status conference if settlement is not achieved at mediation. *By Hon. Richard C. Neal*

For discussion of trial setting, including preferences and priorities generally, see *Ch. 425, Pretrial Proceedings, § 425.60* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedureAlternative Dispute ResolutionMediations

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4-37 California Forms of Pleading and Practice--Annotated § 37.30

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.30 Dismissal for Delay in Prosecution; Tolling of Dismissal Statute

Submission of an action to civil action mediation under *Code Civ. Proc. § 1775.1 et seq.* does not suspend the running of the *Code Civ. Proc. § 583.110 et seq.* time periods relating to dismissal for delay in prosecution, except as provided in *Code Civ. Proc. § 1775.7* [*Code Civ. Proc. § 1775.7(a)*].

If an action is or remains submitted to civil action mediation under *Code Civ. Proc. § 1775.1 et seq.* more than four years and six months after the plaintiff has filed the action, then the time beginning on the date four years and six months after the action was filed and ending on the date on which a statement of nonagreement is filed [*see § 37.27*] is excluded in computing the *Code Civ. Proc. § 583.310* five-year period for bringing the case to trial [*Code Civ. Proc. § 1775.7(b)*; *Gonzalez v. County of Los Angeles (2004) 122 Cal. App. 4th 1124, 1129, 1132, 19 Cal. Rptr. 3d 381*].

ILLUSTRATION:

Calculation of Tolling Period. The action was filed on May 13, 1998. At the final status conference on February 26, 2003, the matter was ordered to mediation, with a completion date of April 20, 2003. At that conference, plaintiff's attorney mistakenly stated the five-year dismissal date to be December 15, 2003, and the original trial date was put over until August 2003. Mediation on April 17, 2003, was unsuccessful and the mediator filed a statement of nonagreement on that date. On May 19, 2003, defendant moved for dismissal. The trial court calculated that the time from February 26, 2003, to April 17, 2003, was 51 days; and that the mandatory dismissal date should to be extended by 51 days: from May 13, 2003, until July 7, 2003. Because the case had not been tried by July 7, the court dismissed the action. Was that correct? No. In accordance with the plain language of *Code Civ. Proc. § 1775.7(b)*, the tolling period began four years and six months after the case is filed (November 14, 2002) and ended on the date the statement of nonagreement was filed (April 17, 2003). Thus, April 17, 2003, became the new "four-year-six-month" date, and the five-year deadline was extended until October 17, 2003 [*Gonzalez v. County of Los Angeles (2004) 122 Cal. App. 4th 1124, 1129, 1132, 19 Cal. Rptr. 3d 381*].

This provision parallels the tolling provision of *Code Civ. Proc. § 1141.17*. For discussion of how that tolling provision

has been applied, see Ch. 36, *Judicial Arbitration* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureAlternative Dispute ResolutionMediations

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4-37 California Forms of Pleading and Practice--Annotated § 37.31

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.31 Coordination With Trial Court Delay Reduction Act

Submission of an action to civil action mediation under Code Cov. Pro. § 1775.1 et seq. is not to affect the time periods specified in the Trial Court Delay Reduction Act, except as provided in *Cal. Rules of Ct., Rule 3.896* [*Cal. Rules of Ct., Rule 3.896(a)*; *see Gov. Code § 68600 et seq.*].

Under Rule 3.896, on the parties' written stipulation, the court may order an exception of up to 90 days to the delay reduction time standards to permit mediation of an action. The stipulation must be filed with the court [*Cal. Rules of Ct., Rule 3.896(b)*].].

The court is to coordinate the timing of the 90-day period with its delay reduction calendar [*Cal. Rules of Ct., Rule 3.896(b)*; *see also § 37.26*].

PRACTICE TIP:

Procedure Rarely Used. In practice, the provision for excepting up to 90 days of time for mediation is seldom if ever invoked. Los Angeles Superior Court has, accordingly, taken no steps to coordinate the timing of the 90-day period with the delay reduction calendar. *By Hon. Richard C. Neal*

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-37 California Forms of Pleading and Practice--Annotated § 37.32

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.32 Evidentiary Protection for Statements Made in Mediation and Fact of Mediation

All statements made by the parties during the mediation are subject to *Evid. Code §§ 703.5, 1115-1128*, and *1152*, which limit the admission in evidence of offers to compromise and generally exclude from evidence statements and admissions made in mediation [*Code Civ. Proc. § 1775.10*]. That privilege extends to documents prepared for the mediation [*see Rojas v. Superior Court (Coffin) (2004) 33 Cal. 4th 407, 422-423 n.8, 15 Cal. Rptr. 3d 643, 93 P.3d 260]* . Mediation confidentiality is discussed in *Ch. 31, Mediation, § 31.13*.

Any reference to the mediation or the statement of nonagreement filed pursuant to *Code Civ. Proc. § 1775.9* during any subsequent trial shall constitute an irregularity in the proceedings of the trial for the purposes of granting a new trial under *Code Civ. Proc. § 657* [*Code Civ. Proc. § 1775.12*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-37 California Forms of Pleading and Practice--Annotated § 37.33

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.33 Award of Mediation Expenses as Costs

The award of mediation expenses as costs is neither provided for nor proscribed by statute [*Gibson v. Bobroff (1996) 49 Cal. App. 4th 1202, 1207, 57 Cal. Rptr. 2d 235* (citing *Code Civ. Proc. § 1033.5*)].

When an unsuccessful mediation has been court-ordered, reasonably necessary expenses incident to the mediation may, in the sound discretion of the trial court, be awarded after trial to the prevailing party [*Gibson v. Bobroff (1996) 49 Cal. App. 4th 1202, 1209, 57 Cal. Rptr. 2d 235* (expressly refraining from deciding whether costs of an unsuccessful voluntary mediation would be recoverable after trial)]. The basis for the award is the discretionary authority of a court under *Code Civ. Proc. § 1033.5(c)(4)* to award costs reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation [*Gibson v. Bobroff (1996) 49 Cal. App. 4th 1202, 1207, 1209, 57 Cal. Rptr. 2d 235*].

Whether a cost is reasonably necessary to the conduct of the litigation is a question of fact for the trial court, whose decision will be reviewed for abuse of discretion. [*Gibson v. Bobroff (1996) 49 Cal. App. 4th 1202, 1209, 57 Cal. Rptr. 2d 235*].

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4-37 California Forms of Pleading and Practice--Annotated § 37.34

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.34 Conduct of Mediators in Court-Connected Mediations

[1] Purpose and Application

Cal. Rules of Ct., Rule 3.850 et seq. establish minimum standards of conduct for mediators in court-connected mediation programs for general civil cases [*Cal. Rules of Ct., Rule 3.850(a)*]. *Cal. Rules of Ct., Rule 3.850 et seq.* are not intended to do any of the following [*Cal. Rules of Ct., Rule 3.850(b)*]:

- Establish a ceiling on what is considered good practice in mediation or discourage efforts by courts, mediators, or others to educate mediators about best practices;
- Create a basis for a civil cause of action against a mediator; or
- Create a basis for challenging a settlement agreement reached in connection with the mediation.

Cal. Rules of Ct., Rule 3.850 et seq. apply to mediations in which a mediator [*Cal. Rules of Ct., Rule 3.851(a)*]:

- Has agreed to be included on a superior court's panel of mediators for general civil cases and is notified by the court or the parties that he or she has been selected to mediate a case within that court's mediation program; or
- Has agreed to mediate a general civil case pending in a superior court after being notified by the court or the parties that he or she was recommended, appointed, or selected by that court or will be compensated by that court to mediate a case within the court's mediation program.

However, a mediator who is not on a superior court list or panel and who is selected by the parties is not "recommended, selected, or appointed" by the court within the meaning of the latter option simply because the court approves the parties' agreement to use that mediator or states the parties' selection in a court order [*Cal. Rules of Ct.,*

Rule 3.851(a)(2)].

If a court's panel or list includes firms that provide mediation services, all mediators affiliated with a listed firm are required to comply with *Cal. Rules of Ct., Rules 3.850-3.860* when they are notified by the court or the parties that the firm was selected from the court list to mediate a general civil case within that court's mediation program [*Cal. Rules of Ct., Rule 3.851(b)*]. Except as otherwise provided in *Cal. Rules of Ct., Rules 3.850 et seq.*, these rules apply from the time the mediator agrees to mediate a case until the end of the mediation in that case [*Cal. Rules of Ct., Rule 3.851(c)*]. *Cal. Rules of Ct., Rules 3.850 et seq.*, do not apply to judges or other judicial officers while they are serving in a capacity in which they are governed by the Code of Judicial Ethics [*Cal. Rules of Ct., Rule 3.851(d)*], nor do they apply to settlement conferences conducted under *Cal. Rules of Ct., Rule 3.1380* [*Cal. Rules of Ct., Rule 3.851(e)*].

[2] Definitions

[a] Mediation

Mediation means a process in which a neutral person or persons facilitate communication between the disputants to assist them in reaching a mutually acceptable agreement [*Cal. Rules of Ct., Rule 3.852(1)*].

[b] Mediator

Mediator means a neutral person who conducts a mediation [*Cal. Rules of Ct., Rule 3.852(2)*]. This definition differs from the definition in *Evid. Code § 1115(b)* in that it does not include persons designated by the mediator to assist in the mediation or to communicate with a participant in preparation for the mediation. However, this definition is applicable to these rules of conduct and does not limit or expand mediation confidentiality under *Evid. Code § 1115(b)* (discussed in Ch. 31, *Mediation*) [Advisory Committee Comment to *Cal. Rules of Ct., Rule 3.852(2)*].

[c] Participant

Participant means any individual, entity, or group, other than the mediator, taking part in a mediation, including but not limited to attorneysfor the parties [*Cal. Rules of Ct., Rule 3.852(3)*]. Participant includes insurance adjusters, experts, and consultants as well as the parties and their attorneys [Advisory Committee Comment to *Cal. Rules of Ct., Rule 3.852(3)*].

[d] Party

Party means any individual, entity, or group taking part in a mediation that is a plaintiff, a defendant, a cross-complainant, a cross-defendant, a petitioner, a respondent, or an intervenor in the case [*Cal. Rules of Ct., Rule 3.852(4)*].

[3] Criteria for Competence

A mediator must comply with experience, training, education, and other requirements established by the court for appointment and retention [*Cal. Rules of Ct., Rule 3.856(a)*]. A mediator has a continuing obligation to truthfully represent his or her background to the court and participants. On request of any party, a mediator must provide truthful information regarding his or her experience, training, and education [*Cal. Rules of Ct., Rule 3.856(b)*]. A mediator must also inform the court if any of the following have occurred [*Cal. Rules of Ct., Rule 3.856(c)*]:

- Public discipline has been imposed on the mediator by any public disciplinary of professional licensing agency;

- The mediator has resigned his or her membership in the State Bar or another professional licensing

agency while disciplinary or criminal charges were pending;

- A felony charge is pending against the mediator;

- The mediator has been convicted of a felony or of a misdemeanor involving moral turpitude; or

- There has been an entry of judgment against the mediator in any civil action for actual fraud or punitive damages.

A mediator has a continuing obligation to assess whether his or her level of skill, knowledge, and ability is sufficient to conduct the mediation effectively. A mediator must decline to serve or withdraw from the mediation if the mediator determines that he or she does not have the level of skill, knowledge, or ability necessary to conduct the mediation effectively [*Cal. Rules of Ct., Rule 3.856(d)*].

[4] Impartiality and Disclosure

[a] Matters to Be Disclosed and Timing of Disclosures

A mediator must maintain impartiality toward all participants in the mediation process at all times [*Cal. Rules of Ct., Rule 3.855(a)*].

The mediator must make reasonable efforts to keep informed about matters that reasonably could raise a question about his or her ability to conduct the proceedings impartially, and must disclose these matters to the parties. These matters include:

- Past, present, and currently expected interests, relationships, and affiliations of a personal, professional, or financial nature [*Cal. Rules of Ct., Rule 3.855(b)(1)(A)*], and

- The existence of any grounds for disqualification of a judge specified in *Code Civ. Proc. § 170.1*, discussed in Ch. 317, *Judges* [*Cal. Rules of Ct., Rule 3.855(b)(1)(B)*].

The mediator's duty to disclose is a continuing duty from the inception of the mediation process through its completion. Disclosures must be made as soon as is practicable after a mediator becomes aware of a matter that must be disclosed. To the extent possible, disclosures should be made before the first mediation session, but in any event they must be made within the time required by applicable court rules or statutes [*Cal. Rules of Ct., Rule 3.855(b)(2)*].

[b] Objections, Addressing Questions and Concerns

Except as provided in *Cal. Rules of Ct., Rule 3.855(f)*, if, after a mediator makes disclosures, no party objects to the mediator and no participant raises any question or concerns about the mediators's ability to conduct the mediation process impartially, the mediator may proceed [*Cal. Rules of Ct., Rule 3.855(c)*].

If, after a mediator makes a disclosure or at any other point in the mediation process, a participant raises a question or concern about the mediator's ability to conduct the mediation impartially, the mediator must address the question or concern with the participants. Except as provided in *Cal. Rules of Ct., Rule 3.855(f)*, if, after the question or concern is addressed, no party object to the mediator, the mediator may proceed [*Cal. Rules of Ct., Rule 3.855(d)*].

In a two-party mediation, if any party objects to the mediator after the mediator makes disclosures or discusses a participant's question or concern regarding the mediator's ability to conduct the mediation impartially, the mediator must withdraw. In a mediation in which there are more than two parties, the mediator may continue the mediation with

the nonobjecting parties, provided that doing so would not violate any other provision of these rules, any law, or nay local court rule or program guideline [*Cal. Rules of Ct., Rule 3.855(e)*].

[c] When Recusal Is Required Despite Parties' Consent

Regardless of the consent of the parties, a mediator must either decline to serve as mediator, or, if already serving, must withdraw from the mediation if:

- The mediator cannot maintain impartiality toward all participants in the mediation process [*Cal. Rules of Ct., Rule 3.855(f)(1)*]; or

- Proceeding with the mediation would jeopardize the integrity of the court or the mediation process [*Cal. Rules of Ct., Rule 3.855(f)(2)*].

[5] Marketing Activities

A mediator must be truthful and accurate in marketing his or her mediation services. A mediator is responsible for ensuring that both his or her own marketing activities and any marketing activities carried out on his or her behalf comply with these rules [*Cal. Rules of Ct., Rule 3.858(a)*]. Mediator may indicate in his or her marketing materials that he or she is a member of a particular court's panel or list, but, unless specifically permitted by the court, must not indicate that he or she is approved, endorsed, certified, or licensed by the court [*Cal. Rules of Ct., Rule 3.858(b)*]. In marketing his or her mediation services, a mediator must not do either of the following [*Cal. Rules of Ct., Rule 3.858(c)*]:

- Promise or guarantee results; or

- Make any statement that directly or indirectly implies bias in favor of one party or participant over another.

A mediator must not solicit business from a participant in a mediation proceeding while that mediation is pending [*Cal. Rules of Ct., Rule 3.858(d)*], but a mediator may accept other employment from a participant while a mediation is pending provided that the mediator did not expressly solicit this business and that employment does not contravene any other provision of these rules, including the obligations to maintain impartiality, confidentiality, and the integrity of the process. If other employment is accepted from a participant while a mediation is pending, the mediator may be required to disclose this to the parties under *Cal. Rules of Ct., Rule 3.855* [Advisory Committee Comment to *Cal. Rules of Ct., Rule 3.858(d)*].

Cal. Rules of Ct., Rule 3.858 is not intended to prohibit a mediator from engaging in general marketing activities. General marketing activities include, but are not limited to, running an advertisement in a newspaper and sending out a general mailing (either of which may be directed to a particular industry or market) [Advisory Committee Comment to *Cal. Rules of Ct., Rule 3.858*].

[6] Compensation and Gifts

A mediator must comply with any applicable requirements concerning compensation established by statute or the court [*Cal. Rules of Ct., Rule 3.859(a)*]. Before commencing the mediation, the mediator must disclose to the parties in writing any fees, costs, or charges to be paid to the mediator by the parties. A mediator must abide by any agreement that is reached concerning compensation [*Cal. Rules of Ct., Rule 3.859(b)*]. Although it is good practice to put mediation fee agreements in writing, this rule is not intended to preclude enforcement of a compensation agreement for mediation services that is not in writing [Advisory Committee Comment to *Cal. Rules of Ct., Rule 3.859(b)*].

The amount and nature of a mediator's fees must not be made contingent on the outcome of the mediation [*Cal. Rules of Ct., Rule 3.859(c)*].

A mediator must not at any time solicit or accept from or give to any participant or affiliate of a participant any gift, bequests, or favor that might reasonable raise a question concerning the mediator's impartiality [*Cal. Rules of Ct., Rule 3.859(d)*]. Whether a gift, bequest, or favor might reasonably raise a question concerning the mediator's impartiality must be determined on a case-by-case basis. This rule is not intended to prohibit a mediator from accepting other employment from any of the participants, consistent with *Cal. Rules of Ct., Rule 3.858(d)* [Advisory Committee Comment to *Cal. Rules of Ct., Rule 3.859(d)*].

[7] Voluntary Participation and Self-Determination

A mediator must conduct the mediation in a manner that supports the principles of voluntary participation and self-determination by the parties. For this purpose, a mediator must do all of the following [*Cal. Rules of Ct., Rule 3.853*]:

- Inform the parties, at or before the outset of the first mediation session that any resolution of the dispute in mediation requires their voluntary agreement; and

- Respect the right of each participant to decide the extent of his or her participation in the mediation, including the right to withdraw from the mediation at any time; and

- Refrain from coercing any party to make a decision or to continue to participate in the mediation.

The principles of voluntary participation and self-determination apply even when the parties have been required by the court to go to mediation. Although the court may order participants to attend mediation, a mediator may not mandate the extent of their participation in the mediation process or coerce any party to settle the case [Advisory Committee Comment to *Cal. Rules of Ct., Rule 3.853*].

[8] Confidentiality

A mediator must at all times comply with the applicable law concerning mediation, which is discussed in Ch. 31, *Mediation* [*Cal. Rules of Ct., Rule 3.854(a)*]. At or before the outset of the first mediation session, a mediator must provide the participants with a general explanation of the confidentiality of mediation proceedings [*Cal. Rules of Ct., Rule 3.854(b)*]. If, after all the parties have agreed to participate in the mediation process and themediator has agreed to mediate the case, a mediator speaks separately with one or more participants out of the presence of the other participants, the mediator must first discuss with all participants the mediator's practice regarding confidentiality for separate communications with the participants. Except as required by law, a mediator must not disclose information revealed in confidence during such separate communications unless authorized to do so by the participant or participants who revealed the information [*Cal. Rules of Ct., Rule 3.854(c)*].

A mediator must not use information that is acquired in confidence in the course of a mediation outside that mediation or for personal gain [*Cal. Rules of Ct., Rule 3.854(d)*].

[9] Quality of the Mediation Process

[a] In General

A mediator must make reasonable efforts to advance the mediation in a timely manner. If a mediator schedules a mediation for a specific time period, he or she must keep that time period free or other commitments [*Cal. Rules of Ct.,*

Rule 3.857(a)]. A mediator must conduct the mediation proceedings in a procedurally fair manner. Procedural fairness means a balances process in which each party is given an opportunity to participate and make uncoerced decisions. A mediator is not obligated to ensure the substantive fairness of any agreement reached by the parties [*Cal. Rules of Ct., Rule 3.857(b)*].

In addition to the requirements of voluntary participation and self-determination [*see Cal. Rules of Ct., Rule 3.853* (discussed at [7], *above*)], confidentiality [*see Cal. Rules of Ct., Rule 3.854(a)* (discussed at [8], *above*)], and *Cal. Rules of Ct., Rule 3.857(d)* (regarding representation and other professional service [*see* [b], *below*], at or before the outset of the mediation, the mediator must provide all participants with a general explanation of all of the following [*Cal. Rules of Ct., Rule 3.857(c)*]:

- The nature of the mediation process; and
- The procedures to be used; and
- The roles of the mediator, the parties, and the other participants.

[b] Representation and Other Professional Services

A mediator must inform all participants, at or before the outset of the first mediation session, that during the mediation, he or she will not represent any participant as a lawyer or perform professional services in any capacity other than as an impartial mediator. Subject to the principles of impartiality and self-determination, a mediator may provide information or opinions that he or she is qualified by training or experience to provide [*Cal. Rules of Ct., Rule 3.857(d)*]. A mediator may recommend the use ofother services in connection with a mediation and may recommend particular providers of other services. However, a mediator must disclose any related personal or financial interests if recommending the services of specific individuals or organizations [*Cal. Rules of Ct., Rule 3.857(e)*].

[c] Nonparticipants' Interests

A mediator may bring to the attention of the parties the interests of others who are not participants in the mediation but who may be affected by agreements reached as a result of the mediation [*Cal. Rules of Ct., Rule 3.857(f)*].

[d] Combining Mediation with Other ADR Processes

A mediator must exercise caution in combining mediation with other alternative dispute resolution processes and may do so only with the informed consent of the parties and in a manner consistent with any applicable law or court order. The mediator must inform the parties of the general natures of the difference processes and the consequences of revealing information during any one of the process that might be used for decision making in another process, and must give the parties the opportunity to select another neutral for the subsequent process. If the parties consent to a combination of processes, the mediator must clearly inform the participants when the transition from one process to another is occurring [*Cal. Rules of Ct., Rule 3.857(g)*].

[e] Settlement Agreements

Consistent with *Cal. Rules of Ct., Rule 3.857(d)*, a mediator may present possible settlement options and terms for discussion. A mediator may also assist the parties in preparing a written settlement agreement, provided that in doing so the mediator confines the assistance to stating the settlement as determined by the parties [*Cal. Rules of Ct., Rule 3.857(h)*].

[f] Discretionary Termination and Withdrawal

A mediator may suspend or terminate the mediation or withdraw when he or she reasonably believes the circumstances require it, including when he or she suspects any of the following [*Cal. Rules of Ct., Rule 3.857(i)*]:

- The mediation is being used to further illegal conduct;
- A participant is unable to participate meaningfully in negotiations; or
- Continuation of the process would cause significant harm to any participant or third party.

When a mediator determines that it is necessary to suspend or terminate a mediation or to withdraw, the mediator must do so without violating the obligation of confidentiality and in a manner that will cause the least possible harm to the participants [*Cal. Rules of Ct., Rule 3.857(j)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 37 JUDICIALLY MANDATED CIVIL ACTION MEDIATION
II. LEGAL BACKGROUND

4-37 California Forms of Pleading and Practice--Annotated § 37.35

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.35 Complaints Against Mediators

[1] Which Courts Must Establish Procedures to Resolve Complaints

Cal. Rules of Ct., Rule 3.865 et seq., addressing complaints against court-program mediators, apply to each superior court that makes a list of mediators available to litigants in general civil cases or that recommends, selects, appoints, or compensates a mediator to mediate any general civil case pending in that court. However, a court that approves the parties' agreement to use a mediator who is selected by the parties and who is not on the court's list of mediators or that memorializes the parties' agreement in a court order has not thereby recommended, selected, or appointed that mediator within the meaning of these rules [*Cal. Rules of Ct., Rule 3.865(a)*].

Accordingly, each court to which these rules apply must establish complaint procedures by local rule of court that is consistent with these rules [*Cal. Rules of Ct., Rule 3.868*]. The rules set forth minimum requirements for the complaint procedures established by local rule [*see Cal. Rules of Ct., Rule 3.869*]. However, a court's failure to follow a requirement or procedure in *Cal. Rules of Ct., Rule 3.865 et seq.* will not invalidate any action taken by the court in addressing a complaint [*see* Advisory Comment to *Cal. Rules of Ct., Rule 3.865*].

The presiding judge of the subject superior court must designate a person who is knowledgeable about mediation to serve as the complaint coordinator [*Cal. Rules of Ct., Rule 3.867(a)*]. The court must make the complaint coordinator's identity and contact information readily accessible to litigants and the public [*Cal. Rules of Ct., Rule 3.867(b)*].

[2] Confidentiality of Complaint, Procedures, Information, and Records

The requirement that mediation complaint procedures be confidential is intended to accomplish the following [*Cal. Rules of Ct., Rule 3.871(a)*]:

- Preserve the confidentiality of mediation communications as required by *Evid. Code §§ 1115-1128*;
- Promote cooperation in the reporting, investigation, and resolution of complaints about

court-program mediators; and

- Protect mediators against damage to their reputations that might result from disclosure of unfounded complaints against them.

All complaint procedures and proceedings must be designed and conducted to preserve the confidentiality of mediation communications, including but not limited to the confidentiality of any communications between the mediator and individual mediation participants or subgroups of mediation participants [*Cal. Rules of Ct., Rule 3.871(b)*]. All complaint proceedings must occur in private and must be kept confidential. No information or records concerning the receipt, investigation, or resolution of an inquiry or complaint may be open to the public or disclosed outside the court of the complaint proceeding except as provided by *Cal. Rules of Ct., Rule 3.871(d)* or as otherwise required by law [*Cal. Rules of Ct., Rule 3.871(c)*].

After the decision on a complaint, the presiding judge or his or her designee may authorize the public disclosure of information or records concerning the complaint proceeding that do not reveal any mediation communications. The disclosures that may be thereby authorized include the name of a mediator against whom action has been taken under *Cal. Rules of Ct., Rule 3.870*, the action taken, and the general basis on which the action was taken. In determining whether to authorize the disclosure of information or records in this regard, the presiding judge or the designee is to consider the purposes of the confidentiality of complaint proceedings stated in *Cal. Rules of Ct., Rule 3.871(a)(2), (3)* [*Cal. Rules of Ct., Rule 3.871(d)*]. In determining whether the disclosure of information or records concerning a complaint proceeding is required by law, courts are to consider the purposes of the confidentiality of complaint proceedings stated in *Cal. Rules of Ct., Rule 3.871(a)*. If it appears that the disclosure of information or records concerning a complaint proceeding that would reveal mediation communications is required by law, before the information or records are disclosed, notice is to be given to any person whose mediation communications may thereby be revealed [*Cal. Rules of Ct., Rule 3.871(e)*]. *Cal. Rules of Ct., Rule 3.871(c)-(e)* do not create new exceptions to mediation confidentiality [*see* Advisory Committee Comment to *Cal. Rules of Ct., Rule 3.871*; *see also Evid. Code §§ 915, 1040* (criteria for deciding when information acquired in confidence by public employee is subject to disclosure)].

[3] Attendance Sheet and Agreement to Disclose

In each mediation to which *Cal. Rules of Ct., Rule 3.850 et seq.* apply under *Cal Rules of Ct., Rule 3.851(a)*, the mediator must do all of the following [*Cal. Rules of Ct., Rule 3.860(a)*]:

- Require that all participants in the mediation complete an attendance sheet stating their names, mailing addresses, and telephone numbers;

- Retain the attendance sheet for at least two years; and

- Submit it to the court on request.

Judicial Council Form ADR 107, which is reproduced at § 37.77, may be used to fulfill the requirements of *Cal. Rules of Ct., Rule 3.860(a)*. Use of ADR 107 is optional, not mandatory.

In each mediation to which *Cal. Rules of Ct., Rule 3.850 et seq.* apply under *Cal Rules of Ct., Rule 3.851(a)*, the mediator must agree that if an inquiry or complaint is made about the conduct of the mediator, mediation communications may be disclosed solely for purposes of a complaint procedure conducted pursuant to *Cal. Rules of Ct., Rule 3.865 et seq.* to address that complaint or inquiry [*Cal. Rules of Ct., Rule 3.860(b)*].

[3A] Court Resolution of Complaint

After an investigation has been conducted, the presiding judge or his or her designee may do one or more of the following [*Cal. Rules of Ct., Rule 3.870*]:

- Direct that no action be taken on the complaint;
- Counsel, admonish, or reprimand the mediator;
- Impose additional training requirements as a condition of the mediator remaining on the court's panel or list;
- Suspend the mediator from the court's panel or list or otherwise temporarily prohibit the mediator from receiving future mediation referrals from the court; or
- Remove the mediator from the court's panel or list or otherwise prohibit the mediator from receiving future mediation referrals from the court.

[4] Disqualification Based on Investigation or Involvement in Complaint

A person who has participated in a complaint proceeding or otherwise received information about the substance of a complaint, other than information that is publicly disclosed under *Cal. Rules of Ct., Rule 3.871(d)*, must not subsequently hear or determine any contested issue of law, fact, or procedure concerning the dispute that wasthe subject to the underlying mediation or any other dispute that arises from the mediation, as a judge, an arbitrator, a referee, or a juror, or in any other adjudicative capacity, in any court action or proceeding [*Cal. Rules of Ct., Rule 3.872*].

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II. LEGAL BACKGROUND

4-37 California Forms of Pleading and Practice--Annotated §§ 37.36-37.39

AUTHOR: Hon. Richard C. Neal Editorial Consultant

[Reserved]

§§ 37.36[Reserved]

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III. RESEARCH GUIDE

4-37 California Forms of Pleading and Practice--Annotated § 37.40

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.40 State Statutes

[1] Civil Action Mediation Act--In General

Definitions. *Code Civ. Proc. § 1775.1*

Objective of civil action mediation. *Code Civ. Proc. § 1775*

Civil action mediation project not to preempt other alternative dispute resolution programs operating in trial courts. *Code Civ. Proc. § 1775.13*

Judicial Council to provide mediation rules. *Code Civ. Proc. § 1775.15*

[2] Cases Subject to Civil Action Mediation Act

Project applicable in Los Angeles County and any other that elects to apply it. *Code Civ. Proc. § 1775.2(a), (b)*

Courts authorized to apply project to actions pending January 1, 1994, or filed thereafter. *Code Civ. Proc. § 1775.2(c)*

Actions subject to civil action mediation whether or not equitable relief is sought. *Code Civ. Proc. § 1775.3(a)*

Court not to order case to mediation if amount in controversy exceeds $50,000; determination of amount. *Code Civ. Proc. § 1775.5*

All at-issue actions subject to judicial arbitration as subject to submission to civil action mediation as alternative to judicial arbitration. *Code Civ. Proc. § 1775.3(a)*

Mutually exclusive procedure to judicial arbitration. *Code Civ. Proc. § 1775.4*

Civil action mediation of actions in which public entity is party. *Code Civ. Proc. § 1775.3(b)*

[3] Mediation Process

Selection of mediator. *Code Civ. Proc. § 1775.6*

Compensation of mediator; costs. *Code Civ. Proc. § 1775.8*

Statement of nonagreement. *Code Civ. Proc. § 1775.9*

[4] Relationship to Other Civil Procedure

Right to discovery. *Code Civ. Proc. § 1775.11*

Exclusion at trial of statements made by parties during mediation. *Code Civ. Proc. § 1775.10*; *Evid. Code §§ 703.5, 1115-1128*, and *1152*

Application of *Code Civ. Proc. § 583.110 et seq.* dismissal statutes to actions in civil action mediation; tolling of time periods. *Code Civ. Proc. § 1775.7*

Referring to mediation or statement of nonagreement as grounds for new trial. *Code Civ. Proc. §§ 657, 1775.12*

Legal Topics:

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4-37 California Forms of Pleading and Practice--Annotated § 37.41

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.41 California Rules of Court

[1] Civil Action Mediation Act (formerly Los Angeles Pilot Program)

Actions subject to civil action mediation. *Cal. Rules of Ct., Rule 3.891*

Cal. Rules of Ct., Rule 3.890 et seq. as implementing *Code Civ. Proc. § 1775 et seq.*; applicable in Los Angeles County and other courts that so elect. *Cal. Rules of Ct., Rule 3.890*

Panels of mediators. *Cal. Rules of Ct., Rule 3.892*

Selection of mediators. *Cal. Rules of Ct., Rule 3.893*

Appearance at mediation sessions. *Cal. Rules of Ct., Rule 3.894*

Statement of agreement or nonagreement by mediator. *Cal. Rules of Ct., Rule 3.895*

Coordination with Trial Court Delay Reduction Act. *Cal. Rules of Ct., Rule 3.896*

[2] Conduct of Mediators in Court-Connected Mediation

Conduct of mediators in court-connected mediation programs. *Cal. Rules of Ct., Rules 3.850 et seq.*

Cal. Rules of Ct., Rules 3.850 et seq. are not intended to create basis for challenging settlement agreement reached in connection with mediation. *Cal. Rules of Ct., Rule 3.850(b)(2)*

Cal. Rules of Ct., Rules 3.850 et seq. are not intended to create basis for civil cause of action against a mediator. *Cal.*

Rules of Ct., Rule 3.850(b)(3).

When *Cal. Rules of Ct., Rules 3.850 et seq.* apply. *Cal. Rules of Ct., Rule 3.851*

Definitions. *Cal. Rules of Ct., Rule 3.852*

Mediation must conduct mediation in manner that supports voluntary nature of mediation; mediator may not coerce a party. *Cal. Rules of Ct., Rule 3.853*

Confidentiality. *Cal. Rules of Ct., Rule 3.854*

Impartiality, conflicts of interest, disclosure of matters that reasonably could raise a question about the mediator's impartiality, and the mediator's withdrawal if a party objects after the mediator has made disclosures. *Cal. Rules of Ct., Rule 3.855*

Mediator's competence, experience, training, background, involvement in criminal or civil litigation. *Cal. Rules of Ct., Rule 3.856*

Quality of mediation process in terms of advancing the mediation in timely manner, explaining process and roles of mediator, party, and other participants, including fact that mediator will give legal or other professional advice and possibly recommending that participants use other professional services. *Cal. Rules of Ct., Rule 3.857(a)-(e)*

Caution must be used in combining mediation with other alternative dispute resolution processes; informed consent of the parties is required; mediator must clearly inform participants when transition from one process to another is occurring. *Cal. Rules of Ct., Rule 3.857(g)*

When and how mediator may present possible settlement options and terms for discussion and may assist the parties in preparing a written settlement agreement. *Cal. Rules of Ct., Rule 3.857(h)*

Circumstances under which mediator may suspend or terminate mediation or withdraw as mediator and manner in which mediator may do so: without violating the obligation of confidentiality and so as to cause least possible harm to the participants. *Cal. Rules of Ct., Rule 3.857(i), (j)*

Marketing must be truthful and accurate and must not promise or guarantee results or make any statement that implies bias in favor of one party over another; mediator must not solicit business from participant in mediation proceeding while that mediation is pending. *Cal. Rules of Ct., Rule 3.858*

Compensation and prohibitions against soliciting or accepting gifts, bequests, or favors from or giving gifts, bequests or favors to participants or their affiliates. *Cal. Rules of Ct., Rule 3.859*

Mediator to make and retain attendance record for two years. *Cal. Rules of Ct., Rule 3.860*

Superior court must establish procedures for receiving, investigating, and resolving complaints against mediators who are on court's list or who are recommended, selected, appointed, or compensated by court. *Cal. Rules of Ct., Rule 3.865 et seq.*

Court may reprimand mediator, remove mediator from its panel or list, or otherwise prohibit mediator from receiving future mediation referrals from the court if mediator fails to comply with *Cal. Rules of Ct., Rules 3.850 et seq.* when applicable. *Cal. Rules of Ct., Rule 3.865(b)*

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For related research and practice materials, see the following legal topics:
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4-37 California Forms of Pleading and Practice--Annotated § 37.42

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.42 Local Rules of Court

Los Angeles Co. Super. Ct. Rules, Rules 12.0 et seq.

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4-37 California Forms of Pleading and Practice--Annotated § 37.43

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.43 Text References

Knight, Fannin, & Disco, Cal. Practice Guide: Alternative Dispute Resolution, 4:202 et seq. (The Rutter Group 1995)

State Bar of California Office of Research, Guide to Court-Related ADR (State Bar of California 1993)

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AUTHOR: Hon. Richard C. Neal Editorial Consultant

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§§ 37.44[Reserved]

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4-37 California Forms of Pleading and Practice--Annotated § 37.50

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.50 Initiation of Mediation

☐ By court, at conference if court determines:

☐ $50,000 or less in controversy [*Code Civ. Proc. § 1775.5*].

☐ Case amenable to mediation [*Cal. Rules of Ct., Rule 3.891(a)(1), (b)*].

☐ By stipulation, regardless of amount in controversy [*Cal. Rules of Ct., Rule 3.891(a)(2)*; *see § 37.70*].

☐ Must file at least 90 days before trial.

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4-37 California Forms of Pleading and Practice--Annotated § 37.51

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.51 Selection of Mediator

☐ By stipulation of parties, not restricted to panel [*Cal. Rules of Ct., Rule 3.893*].

☐ If no stipulation, by court from panel of mediators [*Cal. Rules of Ct., Rule 3.893*].

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4-37 California Forms of Pleading and Practice--Annotated § 37.52

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.52 Mediation

☐ To be completed within 60 days of reference to mediator [*Cal. Rules of Ct., Rule 3.896(c)*].

☐ Thirty-day extension on showing good cause [*Cal. Rules of Ct., Rule 3.896(c)*].

☐ Trial Court Delay Reduction time standards are subject to an exception of up to 90 days to permit mediation [*Cal. Rules of Ct., Rule 3.896(b)*].

Legal Topics:

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4-37 California Forms of Pleading and Practice--Annotated § 37.53

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.53 Discovery

☐ Parties to exercise restraint pending mediation [*Cal. Rules of Ct., Rule 3.896(d)*].

☐ Protective order [*Cal. Rules of Ct., Rule 3.896(d)*].

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4-37 California Forms of Pleading and Practice--Annotated § 37.54

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.54 Conclusion of Mediation

☐ Mediator files statement of agreement or nonagreement within 10 days of conclusion of mediation [*Cal. Rules of Ct., Rule 3.895 see § 37.75*].

☐ Mediator provides parties and counsel with ADR Information Form to fill out separately and file with court [*see § 37.76*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-37 California Forms of Pleading and Practice--Annotated §§ 37.55-37.69

AUTHOR: Hon. Richard C. Neal Editorial Consultant

[Reserved]

§§ 37.55[Reserved]

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V. FORMS
A. Civil Action Mediation Act (formerly Los Angeles Pilot Program)

4-37 California Forms of Pleading and Practice--Annotated § 37.70

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.70 Stipulation to Submit Civil Action to Mediation

[1] FORM Stipulation to Submit Civil Action to Mediation

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of the Los Angeles County form of Stipulation to ADR, which may be used to stipulate to civil action mediation under *Code Civ. Proc. § 1775 et seq.*

The form in [1], *above*, is the general form of stipulation to ADR, which each county is required to provide as part of an ADR information package when the complaint is filed, and which the plaintiff must serve with the complaint [*see Cal. Rules of Ct., Rule 3.221*; *Cal. Rules of Ct. Rule 3.800(1)* (definition of "ADR process")]. Cross complainants must serve copies of the ADR information package on any new parties to the action along with the cross complaint [*see Cal. Rules of Ct., Rule 3.221*]. If the parties agree to use an ADR process, they are to complete the form jointly and file it with the court [*see Cal. Rules of Ct., Rule 3.726*].

The form provides for parties either to name a mediator or to allow the court to assign a mediator [*see Cal. Rules of Ct., Rule 3.893*].

The form includes signature blocks for the parties as well as their attorneys. It may not be necessary, however, for the parties to sign. An attorney may bind his or her client in any of the steps of an action or proceeding by agreement filed with the clerk [*Code Civ. Proc. § 283*]. With respect to civil action mediation, *Code Civ. Proc. § 1775.1(b)* provides that any act to be performed by a party may be performed by the party's counsel of record [*Code Civ. Proc. § 1775.1(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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A. Civil Action Mediation Act (formerly Los Angeles Pilot Program)

4-37 California Forms of Pleading and Practice--Annotated §§ 37.71-37.74

AUTHOR: Hon. Richard C. Neal Editorial Consultant

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§§ 37.71[Reserved]

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A. Civil Action Mediation Act (formerly Los Angeles Pilot Program)

4-37 California Forms of Pleading and Practice--Annotated § 37.75

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.75 Form of Statement of Agreement or Nonagreement [Code Civ. Proc. § 1775.9; Cal. Rules of Ct., Rule 3.895]--Judicial Council Form ADR-100

[1] FORM Form of Statement of Agreement or Nonagreement [Code Civ. Proc. § 1775.9; Cal. Rules of Ct., Rule 3.895]--Judicial Council Form ADR-100

Click here to view image.

[2] Use of Form

This form is an illustration of Judicial Council Form ADR-100, the form of statement of agreement or nonagreement a mediator must file at the conclusion of mediation of a civil action under *Code Civ. Proc. § 1775 et seq.* [*see Code Civ. Proc. § 1775.9*; *Cal. Rules of Ct., Rule 3.895*]. It must be filed within 10 days of the conclusion of mediation [*Cal. Rules of Ct., Rule 3.895*]. For discussion, see *§ 37.26* et seq.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 37 JUDICIALLY MANDATED CIVIL ACTION MEDIATION
V. FORMS
A. Civil Action Mediation Act (formerly Los Angeles Pilot Program)

4-37 California Forms of Pleading and Practice--Annotated § 37.76

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.76 ADR Information Form [Code Civ. Proc. § 1775.14; Cal. Rules of Ct., Rule 3.897]--Judicial Council Form ADR-101

[1] FORM ADR Information Form [Code Civ. Proc. § 1775.14; Cal. Rules of Ct., Rule 3.897]--Judicial Council Form ADR-101

Click here to view image.

[2] Use of Form

This form is an illustration of Judicial Council Form ADR-101, for collecting information about ADR [*see Cal. Rules of Ct., Rule 3.897(b)*]. The mediator should give the form to both parties and counsel to fill out separately and file with the court clerk after mediation has concluded [Administrative Office of the Courts News Release, March 1, 1994; *see § 37.28*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. However, courts may preprint the address to which the form should be returned in the box at the top of the page. Therefore, if the form is not obtained from the court, the exact address, including the specific department to which the form should be sent should be determined before filling it out.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediations

California Forms of Pleading and Practice--Annotated

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Chapter 37 JUDICIALLY MANDATED CIVIL ACTION MEDIATION
V. FORMS
A. Civil Action Mediation Act (formerly Los Angeles Pilot Program)

4-37 California Forms of Pleading and Practice--Annotated § 37.77

AUTHOR: Hon. Richard C. Neal Editorial Consultant

§ 37.77 Attendance Sheet for Court-Program Mediation of Civil Case [Cal. Rules of Ct., Rule 3.860]--Judicial Council Form ADR-107

[1] FORM Attendance Sheet for Court-Program Mediation of Civil Case [Cal. Rules of Ct., Rule 3.860]--Judicial Council Form ADR-107

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of Judicial Council form ADR-107, Attendance Sheet for Court-Program Mediation of Civil Case, which is optional after January 1, 2006. It may be used by a mediator to fulfill his or her obligation under *Cal. Rules of Ct., Rule 3.860(b)* to maintain such a record in the event it is needed to resolve a complaint of his or her conduct during the mediation [*see § 37.35*[3]].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediations

California Forms of Pleading and Practice--Annotated

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 38 REFERENCE

4-38 California Forms of Pleading and Practice--Annotated 38.syn

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

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[1] Reference Authorized

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[5] Evidence

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[2] Preparation of Papers

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[1] Objections to Referee's Report

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§§ 38.56-38.59 [Reserved]

§ 38.60 Stipulation or Motion for Order Appointing Referee [Code Civ. Proc. §§ 638, 639; Cal. Rules of Ct., Rules 3.901, 3.921]--Judicial Council Form ADR-109

[1] FORM

[2] Use of Form

[3] When Used as Stipulation

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[5] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

§ 38.62 Notice of Motion and Supporting Declaration for Appointment of Referee--Special Reference [Code Civ. Proc. § 639; Cal. Rules of Ct. Rule 3.921]

[1] FORM

[2] Use of Form

[3] Cross References

§ 38.62A Certificate of [Proposed] Referee [Cal. Rules of Ct., Rules 3.901(b)(4), 3.904(a), 3.921(a), 3.924(a)]

[1] FORM

[2] Use of Form

§ 38.63 Order Appointing Referee [Code Civ. Proc. §§ 638, 639; Cal Rules of Ct., Rules 3.902, 3.922]--Judicial Council Form ADR-110

[1] FORM

[2] Use of Form

[3] Items Applicable to Appointment Under Code Civ. Proc § 638

[4] Items Applicable to Section 639 Special Reference Other Than for Discovery

[5] Items Applicable to Appointment of Special Referee for Discovery

[6] Notice of Order

§§ 38.64-38.65 [Reserved]

§ 38.66 Notice of Motion and Supporting Declaration to Withdraw Stipulation for Appointment of Referee [Cal. Rules of Ct., Rule 3.906]

[1] FORM

[2] Use of Form

[3] Contents of Supporting Declaration

[4] Supporting Memorandum

[5] Service and Filing of Notice

[6] Cross References

§ 38.67 Order Granting Motion for Permission to Withdraw Stipulation for Appointment of Referee [Cal. Rules of Ct., Rule 3.906]

[1] FORM

[2] Use of Form

[3] Notice of Order

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[1] FORM

[2] Use of Form

[3] Hearing on Objections

[4] Cross References

§ 38.69 Order Granting Motion to Vacate Appointment of Referee [Code Civ. Proc. § 641] and to Appoint New Referee

[1] FORM

[2] Use of Form

[3] Notice of Order

§ 38.70 Report of Referee [Code Civ. Proc. § 643]--Judicial Council Form ADR-111

[1] FORM

[2] Use of Form

[3] Effect of Report

§ 38.71 Notice of Motion to Confirm or Adopt Report [Code Civ. Proc. § 645] and to Enter Judgment [Code Civ. Proc. § 664]

[1] FORM

[2] Use of Form

[3] Cross References

§ 38.72 Objections to Report of Referee Made Pursuant to Special Reference [Code Civ. Proc. §§ 643(c), 645]

[1] FORM

[2] Use of Form

[3] Time for Filing Objections and Responses

§ 38.73 Notice of Motion and Supporting Declaration to Set Aside Referee's Report [Code Civ. Proc. § 645] Made Pursuant to Special Reference [Code Civ. Proc. §§ 638, 639]

[1] FORM

[2] Use of Form

[3] Supporting Papers

[4] Cross References

§ 38.74 Order Granting Motion to Confirm or Adopt Referee's Report and to Enter Judgment [Code Civ. Proc. §§ 645, 664]

[1] FORM

[2] Use of Form

§ 38.75 Judgment [Code Civ. Proc. § 664; Cal. Rules of Ct., Rule 3.1590] Based on Decision of Referee in Special Reference Adopted or Confirmed by Court [Code Civ. Proc. §§ 644(b), 645]

[1] FORM

[2] Use of Form

§ 38.76 Notice of Intention to Move for New Trial After General Reference [Code Civ. Proc. §§ 644(a), 645, 659]

[1] FORM

[2] Use of Form

[3] Grounds for New Trial

[4] Time for Giving Notice

[5] Use of Affidavits or Declarations

[6] Cross References

§ 38.77 Order Granting Motion for New Trial [Code Civ. Proc. § 660]

[1] FORM

[2] Use of Form

[3] Statement of Grounds and Specification of Reasons

[4] Modifying or Vacating Statement of Decision

§ 38.78 Petition for Payment of Referee's Fees [Code Civ. Proc. §§ 645.1, 1023]

[1] FORM

[2] Use of Form

§ 38.79 Notice of Motion and Supporting Declaration to Seal Records in Cause Before Referee [Cal. Rules of Ct., Rule 3.932(a)]

[1] FORM

[2] Use of Form

[3] Supporting Memorandum

[4] Service and Filing of Notice

[5] Cross References

§ 38.80 Order Granting Motion to Seal Records in Cause Before Referee [Cal. Rules of Ct., Rule 3.907]

[1] FORM

[2] Use of Form

[3] Notice of Order

§ 38.81 Notice of Application and Application for Order That Case Referred to Referee Be Heard in Accessible and Appropriate Site, Supporting Declaration, and Memorandum [Cal. Rules of Ct., Rule 3.931(c)(1)]

[1] FORM

[2] Use of Form

[3] Supporting Declaration

[4] Supporting Memorandum

[5] Service and Filing of Notice, Application, Declaration, and Memorandum

[6] Cross References

§ 38.82 Order That Case Referred to Referee Be Heard in Accessible and Appropriate Site [Cal. Rules of Ct., Rule 3.931(c)(1)]

[1] FORM

[2] Use of Form

[3] Notice of Order

[4] Cross References

§ 38.83 Notice of Application and Application for Order Staying Case Referred to Referee Pending Application for Order That Case Be Heard in Accessible and Appropriate Site, Supporting Declaration, and Memorandum [Cal. Rules of Ct., Rule 3.931(c)(1)]

[1] FORM

[2] Use of Form

[3] Supporting Declaration

[4] Supporting Memorandum

[5] Service and Filing of Notice, Application, Declaration, and Memorandum

[6] Cross References

§ 38.84 Order Staying Case Referred to Referee Pending Application for Order That Case Be Heard in Accessible and Appropriate Site [Cal. Rules of Ct., Rule 3.931(c)(1)]

[1] FORM

[2] Use of Form

[3] Notice of Order

[4] Cross References

Hon. Bruce R. Geernaert, Judge (Ret.)
Editorial Consultant n*

FOOTNOTES:
(n30)Footnote *.
Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 38 REFERENCE
PART I. SCOPE

4-38 California Forms of Pleading and Practice--Annotated § 38.01

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.01 Scope of Chapter

This chapter discusses the practice and procedure for referring an action or proceeding, or a particular issue in an action or proceeding, to a referee for a report pursuant to *Code Civ. Proc. §§ 638* and *639*, and the effect of the report rendered [*see § 38.10* et seq.]. *Code Civ. Proc. §§ 638* and *639* apply only to references in civil actions or proceedings. Thus, while a discovery referee would be authorized pursuant to *Code Civ. Proc. § 639(a)(5)* to determine issues of privilege in a civil action, a reference under *Code Civ. Proc. § 639(a)(4)* is not available in a proceeding to determine whether documents seized from a criminal suspect are privileged because that is a criminal special proceeding and not the type of "special proceeding" to which section 639 applies [*People v. Los Angeles Superior Court (Laff) (2001) 25 Cal. 4th 703, 707, 727, 107 Cal. Rptr. 2d 323, 23 P.3d 563]* . Similarly, *Code Civ. Proc. §§ 638* and *639* do not apply to juvenile court referees [*In re M. (1975) 14 Cal.3d 727, 734, 122 Cal. Rptr. 574, 537 P.2d 406]* . General and special references are covered, and procedural checklists [*see § 38.50* et seq.] are included. The chapter includes forms for the following procedures:

- Appointment of a referee by stipulation [*see § 38.60*] or motion [*see § 38.60*] and order [*see § 38.63*].
- Withdrawal of a stipulation to the appointment of a referee [*see §§ 38.66* and *38.67*].
- Vacation of the appointment of a referee [*see §§ 38.68* and *38.69*].
- Referee's report [*see § 38.70*].
- Confirmation of a referee's report [*see §§ 38.71, 38.74, 38.75*].

- Objection to the referee's report [*see §§ 38.72, 38.73, 38.76, 38.77*].

- Petition for referee's fees [*see § 38.78*].

- Sealing of records in a cause heard by a privately compensated referee [*see §§ 38.79* and *38.80*].

- Requesting that a case referred to a privately compenstated referee be heard at a site accessible to the public [*see § 38.81*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesGeneral OverviewCivil ProcedureJudicial OfficersRefereesAppointments

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Chapter 38 REFERENCE
PART I. SCOPE

4-38 California Forms of Pleading and Practice--Annotated § 38.02

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.02 Cross References

For discussion of differences between contractual arbitration and general reference, *see Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.12*[2]

The appointment of referees in specific contexts is discussed, and forms often provided, in the chapter dealing with the specific cause of action involved:

- For forms relating to the appointment of a referee in an action for accounting, *see* Ch. 7, *Accounting, Action for*.

- For discussion of references in attachment proceedings [*see Code Civ. Proc. § 491.130*], *see* Ch. 62, *Attachment* .

- For a form of order appointing a commissioner in an action for the winding up and dissolution of a corporation, *see* Ch. 160, *Corporations: Capacity* and Ch. 170, *Corporations: Dissolution and Winding Up*.

- For discussion of referees in examination proceedings under the Enforcement of Judgments Law [*Code Civ. Proc. §§ 708.110, 708.140*], *see Ch. 254, Executions and Enforcement of Judgments, § 254.180* et seq.

- For discussion and forms relating to use of referees in juvenile court, see Ch. 327, *Juvenile Courts: Jurisdiction and General Procedures* .

- For discussion and forms relating to the appointment, instruction, and confirmation of acts of a referee in a partition action [*see Code Civ. Proc. §§ 872.630, 873.010 et seq.*], *see* Ch. 397, *Partition* .

- For discussion and a form of order to refer an action determining water rights to the State Water Control Board, *see Ch. 575, Waters, § 565.10* et seq.

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Chapter 38 REFERENCE
PART I. SCOPE

4-38 California Forms of Pleading and Practice--Annotated § 38.03

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.03 Governing Law

References in general are governed by *Code Civ. Proc. §§ 638-645.2*. *Code Civ. Proc. § 1023* pertains to referee's fees. References after the court clerk has entered a defendant's default are authorized by *Code Civ. Proc. § 585(b)*, and references to enable a court to complete a judgment are authorized by *Code Civ. Proc. § 636*.

The Judicial Council is to adopt all rules of court necessary to implement the statutes regarding reference [*Code Civ. Proc. § 645.2*]. Several California Rules of Court apply to references, including *Cal. Rules of Ct., Rules 2.100 et seq.* (form of papers presented for filing), *2.400* (court records), *3.900 et seq*. (reference by agreement), 3.920 et seq. (reference by order), and 3.930 et seq. (rules applicable to reference under *Code Civ. Proc. §§ 638* and *639*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesAppointments

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Chapter 38 REFERENCE
PART I. SCOPE

4-38 California Forms of Pleading and Practice--Annotated §§ 38.04-38.09

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

[Reserved]

§§ 38.04[Reserved]

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Chapter 38 REFERENCE
PART II. LEGAL BACKGROUND

4-38 California Forms of Pleading and Practice--Annotated § 38.10

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.10 Types of References

[1] Types of References Identified

A reference may be general or special. A general reference may only be made voluntarily, with the parties' consent [*Code Civ. Proc. § 638(a)*]. A special reference may be either voluntary [*Code Civ. Proc. § 638(b)*] or involuntary [*Code Civ. Proc. § 639*].

[2] General and Special Reference Distinguished

A general reference is a trial before a referee on all the issues of fact and law [*Code Civ. Proc. § 638(a)*; *Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 722, 269 P.2d 3* ; *see Murphy v. Padilla (1996) 42 Cal. App. 4th 707, 713, 49 Cal. Rptr. 2d 722]* . The decision of a referee in a consensual general reference stands as the decision of the court without any further action, and judgment may be entered in accordance with the report [*Code Civ. Proc. § 644(a)*].

In a special reference, however, the referee is appointed for one of the limited purposes listed in *Code Civ. Proc. § 639* to aid the court in reaching its decision [*Code Civ. Proc. § 639*; *Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 722-723, 269 P.2d 3* ; *see Dynair Electronics, Inc. v. Video Cable, Inc. (1976) 55 Cal. App. 3d 11, 20, 127 Cal. Rptr. 268]* . In all cases other than consensual general references, the decision of referee is only advisory. The court may adopt the referee's recommendations in whole or in part after independently considering the referee's findings and any objections and responses thereto filed with the court [*Code Civ. Proc. § 644(b)*]. When the reference is to report the facts, the decision has the effect of a special verdict [*Code Civ. Proc. § 645*].

[3] Clearly Identify Scope of and Authority for Reference

The stipulation or motion for appointment of a referee, as well an the order appointing the referee, must clearly state whether the scope of the requested reference includes all issues or is limited to specified issues [*Cal. Rule of Ct., Rules 3.901(b)(1), 3.902(2)* (voluntary reference under *Code Civ. Proc. § 368*); *Code Civ. Proc. § 639(d)(3), Cal Rules of Ct., Rules 3.921(a), 3.922(d)* (involuntary reference under *Code Civ. Proc. § 639*)].

PRACTICE TIP:

Pin Down Source of Authority for Reference. In seeking a reference or in responding to a court suggestion for a reference, counsel should determine the precise scope and nature of the reference by looking to the statutory or constitutional authority for it. That is, if, by stipulation of the parties whether the reference is pursuant to:

- *Code Civ. Proc. § 638(a)* (try a specific issue or the entire case and report a statement of decision).
- *Code Civ. Proc. § 638(b)* (ascertain a fact and report to the court).
- *Cal. Const., art. VI, § 21* (Judge Pro tem). Or, if the agreement is not by the agreement of the parties, whether the reference is pursuant to:
- *Code Civ. Proc. § 639(a)(1)* ("decide" a long account).
- *Code Civ. Proc. § 639(a)(1)* (report on a specific question of fact).
- *Code Civ. Proc. § 639(a)(2)* (taking an account).
- *Code Civ. Proc. § 639(a)(2)* (carrying a judgment or order into effect).
- *Code Civ. Proc. § 639(a)(3)* (question of fact on a motion or otherwise).
- *Code Civ. Proc. § 639(a)(4)* (in a special proceeding).
- *Code Civ. Proc. § 639(a)(5)* (discovery disputes).

Problems arise for the Court, the referee, or the judge pro tem and/or for counsel if the reference is not specifically keyed to a specific authority. *By Hon. Bruce R. Geernaert, Judge (Ret.)*

ILLUSTRATION: Unclear Reference Bars Enforcement of Settlement Under *Code Civ. Proc. § 664.6*. The parties are litigating a dispute. The trial court refers the matter "to mediation pursuant to section 638," without describing the scope of the reference. The parties did not agree to the reference. After two mediation sessions, the referee, a retired judge, wrote out a document memorializing the terms of the settlement. The parties did not sign the document, which was intended to be a draft for the attorneys to finalize later. Two weeks later, one of the defendants tells her attorney she has unresolved concerns and will not sign the agreement. The plaintiffs move to enforce the settlement pursuant to *Code Civ. Proc. § 664.6*. Should the court enter judgment on the settlement agreement? No. The retired judge was neither a general referee nor a special referee because the proceeding was not properly referenced in accordance with *Code Civ. Proc. § 638* [*Murphy v. Padilla (1996) 42 Cal. App. 4th 707, 714, 49 Cal. Rptr. 2d 722* ; for discussion of enforcement of settlements reached during reference, *see* [5], *below*].

Unless it clearly appears otherwise, a reference is presumed to be special and only for the benefit of the court [*Lewis v. Grunberg (1928) 205 Cal. 158, 161, 270 P. 181]* .

[4] Consent of Parties or Authorized Ground for Order Required for Reference

Unless a reference is made with the consent of the parties pursuant to *Code Civ. Proc. § 638* [*see also Cal. Const., art. VI, § 21* (authority for reference to judge pro tem)] or by authority of one of the grounds listed in *Code Civ. Proc. § 639*, the court may not order a matter to be heard by a referee [*Williams v. Benton (1864) 24 Cal. 424, 425-426* ; *Settlemire v. Superior Court (2003) 105 Cal. App. 4th 666, 673, 129 Cal. Rptr. 2d 560* ; *In re Marriage of Galis (1983) 149 Cal. App. 3d 147, 150, 196 Cal. Rptr. 659]* . For example, a referee does not have the powerto hear the issues of child support, spousal support, and attorney's fees in a contested dissolution when the parties do not consent [*In re Marriage of Galis (1983) 149 Cal. App. 3d 147, 154, 196 Cal. Rptr. 659* (dissolution action not "special proceeding" within meaning of former *Code Civ. Proc. § 639(d)* [*see now Code Civ. Proc. § 639(a)(4)*])]. Nor, without the consent of both parties, can a referee determine "any matter of fact on which information is required by the court." *Code Civ. Proc. § 639(a)(3)* requires that an order for nonconsentual reference specify the factual issues the court wishes the referee to resolve [*Settlemire v. Superior Court (2003) 105 Cal. App. 4th 666, 673, 129 Cal. Rptr. 2d 560]* . Similarly, before the Legislature explicity provided otherwise, a court lacked the power to refer all discovery matters in a pending action to a referee to hear and determine the issues presented without the consent of the parties [*see Bird v. Superior Court (1980) 112 Cal. App. 3d 595, 600, 169 Cal. Rptr. 530* (decided prior to 1981 amendment of *Code Civ. Proc. § 639*; *now see Code Civ. Proc. § 639(a)(5)*, authorizing reference of discovery matters)].

When an unauthorized reference is made, the resulting judgment may be reversed [*Williams v. Benton (1864) 24 Cal. 424, 425-426* (party had not consented to general reference)] or vacated [*In re Marriage of Galis (1983) 149 Cal. App. 3d 147, 154-155, 196 Cal. Rptr. 659* (interlocutory judgment vacated due to invalid special reference)].

[5] Enforcement of Oral Stipulation for Settlement Before Referee

Under *Code Civ. Proc. § 664.6*, if parties to pending litigation stipulate for settlement of the case (or part of the case), orally "before the court," the court, on motion, may enter judgment pursuant to the terms of the settlement. "Before the court" means a stipulation presented in a "judicially supervised" proceeding [*Murphy v. Padilla (1996) 42 Cal. App. 4th 707, 712, 49 Cal. Rptr. 2d 722* ; for further discussion and forms relating to *Code Civ. Proc. § 664.6, see Ch. 318, Judgments, § 318.40* et seq.]. However, outside of a pending action, the parties' stipulation that a referee be appointed will not confer subject matter jurisdiction on a court so that a referee can enter a settlement that would be enforceable under *Code Civ. Proc. § 664.6* [*The Housing Group v. United National Insurance Company (2001) 90 Cal. App. 4th 1106, 1107-1108, 1114-1115, 109 Cal. Rptr. 2d 497* (no complaint was filed; so-called 'action' was commenced by petition for appointment of referee to preside over entry of settlement)].

An oral stipulation before a general referee appointed pursuant to *Code Civ. Proc. § 638(a)* could support an enforceable settlement agreement pursuant to *Code Civ. Proc. § 664.6*. This is because the general referee may be empowered to make binding decisions about controverted issues [*Murphy v. Padilla (1996) 42 Cal. App. 4th 707, 713, 49 Cal. Rptr. 2d 722]* . A stipulation before a special reference, however, cannot satisfy the "before the court" requriement because of the nonbinding nature of the referee'sdecision [*Murphy v. Padilla (1996) 42 Cal. App. 4th 707, 713, 49 Cal. Rptr. 2d 722]* .

Also, if the proceedings identified as a reference actually fail to consititute either a general or a special reference, but is more akin to a mediation, an oral settlement made before the "referee" will not be enforeable [*Murphy v. Padilla (1996) 42 Cal. App. 4th 707, 713-714, 49 Cal. Rptr. 2d 722]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesAppointments

California Forms of Pleading and Practice--Annotated

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 38 REFERENCE
PART II. LEGAL BACKGROUND

4-38 California Forms of Pleading and Practice--Annotated § 38.11

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§ 38.11 General Reference

[1] Must Be Voluntary

A general reference may only be made with the consent of the parties; that is, it is a voluntary reference [*see Code Civ. Proc. § 638*; *Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 722, 269 P.2d 3]* .

A general reference may be ordered on the parties' agreement [for a form, *see § 38.60*] filed with the clerk, or judge, or entered in the minutes [*Code Civ. Proc. § 638*].

PRACTICE TIP:
Get the Stipulation on Record. If not written, the parties' agreement should be on the record of the official court reporter; it is doubtful whether a minute order would constitute a stipulation unless also on the reporter's transcript. *By Hon. Bruce R. Geernaert, Judge (Ret.)*

A general reference may also be ordered on the motion [*see §§ 38.60, 38.61* (forms)] of a party to a written contract or lease providing that any controversy arising therefrom must be heard by a reference, if the court finds that a reference agreement exists between the parties [*Code Civ. Proc. § 638(a)*].

PRACTICE TIP:
Rarity of Reference Under Pre-Dispute Agreement. It is very rare to see an agreement that includes an ADR provision for a court-appointed referee; more usual is a provision for arbitration, which falls under *Code Civ. Proc. § 1280 et seq. By Hon. Bruce R. Geernaert, Judge (Ret.)*

Without the parties' consent, a court has no power to make a general reference that conclusively decides a legal issue

that will determine liability. Such a reference is prohibited by both *Code Civ. Proc. § 638* and *Cal. Const., art. VI, § 22,* preventing delegation of judicial power except for the performance of "subordinate judicial duties" [*Greenbriar Homes Communities, Inc. v. Superior Court (2004) 117 Cal. App. 4th 337, 343, 11 Cal. Rptr. 3d 371* ; *Aetna Life Ins. Co. v. Superior Court (1986) 182 Cal.App. 3d 431, 436, 227 Cal. Rptr. 460]* ; *see also Woodside Homes of California, Inc. v. Superior Court (Wheeler) (2006) 142 Cal. App. 4th 99, 103-104, 47 Cal. Rptr. 3d 683* (neither *Code Civ. Proc. § 631* nor *Grafton Partners v. Superior Court (2005) 36 Cal 4th 944, 32 Cal. Rptr. 3d 5, 116 P.3d 479* , prohibits waiver of jury trial in pre-dispute agreement for judicial reference)]. Thus, a provision in a development contract for consensual reference of any disputes arising under the agreement cannot be enforced against a subsequent purchaser of the home built for the original contracting party [*Greenbriar Homes Communities, Inc. v. Superior Court (2004) 117 Cal. App. 4th 337, 343, 11 Cal. Rptr. 3d 371]* .

ILLUSTRATION:

Special Versus General Reference. The trial judge orders a special reference under *Code Civ. Proc. § 639*, without the parties' consent. On receiving the referee's findings the trial court treats them as binding and determinative. Has the trial court erred? Yes. The judgment may be vacated when, although a reference order purports to be a special reference, the judge treats it more like a general reference under *Code Civ. Proc. § 638*, and parties have not consented to general reference. In these circumstances, the reference is not authorized by law and amounts to an abdication of judicial responsibility [*Aetna Life Ins. Co. v. Superior Court (1986) 182 Cal. App. 3d 431, 436, 227 Cal. Rptr. 460]* .

[2] Scope

When a general reference is made, the referee is appointed to try any or all of the issues in the action or proceeding, whether of fact or of law, and to report a statement of decision [*see Code Civ. Proc. § 638(a)*; *Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 722, 269 P.2d 3]* . The referee's decision stands as the decision of the court; on filing of the statement of decision with the clerk of the court, judgment may be entered in accordance with that statement of decision in the same manner as if the action had been tried by the court [*Code Civ. Proc. § 644(a)*]. The referee's decision may be excepted to and reviewed in like manner as if made by the court [*Code Civ. Proc. § 645*; for further discussion, *see § 38.25*[1]].

A court must not use the reference procedure under *Code Civ. Proc. § 638* to appoint a person to conduct a mediation, but nothing prevents a court from appointing a referee to conduct a mandatory settlement conference or, following the termination of a reference, from appointing a person who previously served as a referee to conduct a mediation [*Cal. Rules of Ct., Rule 3.900*; Advisory Committee Comment to *Cal. Rules of ct., Rule 3.900*].

[3] Procedure for Code Civ. Proc. § 638 Reference

Parties seeking reference under *Code Civ. Proc. § 638* must present a written agreement for an order directing the reference, along with a proposed order, to the judge to whom the case is assigned, or to the presiding judge or law and motion department if the case has not been assigned. Both the agreement and order must clearly state whether the scope of the reference covers all issues or is limited to specific issues [*Cal. Rules of Ct.,Rule 3.901(a)*; for forms of stipulation and order and further discussion of their required contents, see *§§ 38.60* and *38.63*].

The agreement for a reference does not constitute a waiver of grounds for objecting to the appointment of a particular person as referee under *Code Civ. Proc. § 641* or *641.2* [*Code Civ. Proc. § 640(c)*], but any objection must be made with reasonable diligence [*Cal. Rules of Ct., Rule 3.905*]. For discussion of disclosures a referee must make and objections to appointment, see *§ 38.16*. A court does not have authority to deny a reference under a contract provision therefor on the ground that a multiplicity of suits might result, as it would under *Code Civ. Proc. § 1281.2(c)* if the contract called for arbitration [*Greenbriar Homes Communities, Inc. v. Superior Court (2004) 117 Cal. App. 4th 337, 347-348, 11 Cal. Rptr. 3d 371]* .

[4] Unconscionability

[a] In General

Though more commonly addressed in the context of contract provisions relating to arbitration, contract provisions requiring that disputes between parties to the contract be determined by a judicial referee rather than at trial are also subject to the general rules regarding unconscionability of contracts, set forth in Code Civ. Proc. § 1670.5, and discussed in *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21*[3]. Several appellate cases have considered the issue thus far, all in the context of contracts drafted by homebuilder/developers and challenged by buyers. The courts have come to different conclusions [*Trend Homes, Inc. v. Superior Court (Azperren) (2005) 131 Cal. App. 4th 950, 954, 965, 32 Cal. Rptr. 3d 411* (enforceable); *Greenbriar Homes Communities, Inc. v. Superior Court (2004) 117 Cal. App. 4th 337, 345, 11 Cal. Rptr. 3d 371* (enforceable against original but not subsequent purchasers); *Woodside Homes of Cal., Inc. v. Superior Court (Folger) (2003) 107 Cal. App. 4th 723, 735-736, 132 Cal. Rptr. 2d 35* (enforceable); *Pardee Construction Co. v. Superior Court (Rodriguez) (2002) 100 Cal. App. 4th 1081, 1084, 1092, 123 Cal. Rptr. 2d 288* (unconscionable)]. The cases of course agreed that unconscionability has both a "procedural" and a "substantive" element, the former focusing on "oppression" or "surprise" due to unequal bargaining power, the later on "overly harsh" or "one-sided" results. Procedural and substantive unconscionability must both be present in order for a court to refuse to enforce a contract or clause under the doctrine of unconscionability. But they need not be present in the same degree. A sliding scale may be invoked: the more substantively oppressive the contract term(s), the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa [*Woodside Homes of Cal., Inc. v. Superior Court (Folger) (2003) 107 Cal. App. 4th 723, 727, 132 Cal. Rptr. 2d 35* (enforceable); *Pardee Construction Co. v. Superior Court (Rodriguez) (2002) 100 Cal. App. 4th 1081,1088, 123 Cal. Rptr. 2d 288* (unconscionable)]. *Pardee* and *Woodside* also acknowledged that significant portions of construction defect cases are commonly sent to judicial reference.

The party who prepared and submitted the contract containing the terms challenged as unconscionable has the burden of showing that the other party had notice of them. The party asserting unconscionability as a defense to enforcement has the burden of establishing it [*Trend Homes, Inc. v. Superior Court (Azperren) (2005) 131 Cal. App. 4th 950, 956, 32 Cal. Rptr. 3d 411* ; *Woodside Homes of Cal., Inc. v. Superior Court (Folger) (2003) 107 Cal. App. 4th 723, 727-728, 132 Cal. Rptr. 2d 35]* .

[b] Procedural Unconscionability

The judicial reference provision in *Pardee* was found to be a contract of adhesion and procedurally unconscionable, primarily because the buyers had no bargaining power with respect to the judicial reference provision, and the judicial reference provision was buried in a form contract, was physically difficult to read because it was printed in dense single-spaced capital letters, and made no mention of referee's fees or responsibility for their payment [*Pardee Construction Co. v. Superior Court (Rodriguez) (2002) 100 Cal. App. 4th 1081, 1087-1090, 123 Cal. Rptr. 2d 288]* . The judicial reference provision in *Woodside* was held to evidence only a low level of unconscionability. Although the contract was several pages long, and contained a great deal of small print, the buyers were necessarily made aware of the existence of the judicial reference provision because they had to initial that paragraph separately. Immediately above the spaces for the buyers' initials was the large, bolded statement: "By initialing below, the parties acknowledge that they have read and understand the foregoing and accept that they are waiving their right to a jury trial." The caption "JUDICIAL REFERENCE OF DISPUTES" was clear; and the paragraph noted that a reference would require fees for the referee, and specified that the parties were to share costs and referee's fees equally, unless the referee ordered otherwise. Even assuming that buyers could not have eliminated the judicial reference provision, the buyers demonstrated only a low level of procedural unconscionability because there was no surprise or misrepresentation [*Woodside Homes of Cal., Inc. v. Superior Court (Folger) (2003) 107 Cal. App.4th 723, 728-730, 132 Cal. Rptr. 2d 35* ; *see also Trend Homes, Inc. v. Superior Court (Azperren) (2005) 131 Cal. App. 4th 950, 958, 960, 32 Cal. Rptr. 3d 411* ; *Greenbriar Homes Communities, Inc. v. Superior Court (2004) 117 Cal. App. 4th 337, 345, 11 Cal. Rptr. 3d 371* (not

procedurally unconscionable; no evidence any real parties tried to negotiate out of reference provision)].

[c] Substantive Unconscionability

The judicial reference provision in *Pardee* included waiver of the right to recover punitive damages. Although potentially severable from theremainder of the reference provision, this waiver was substantively unconscionable because in practical reality, it was only for Pardee's benefit. Further, the *Pardee* court said it would not uphold a provision waiving the right to a jury trial until there was evidence of some benefit to that waiver, such as speed or economy. Finding no such evidence, the court found the entire judicial reference provision unconscionable [*Pardee Construction Co. v. Superior Court (Rodriguez) (2002) 100 Cal. App. 4th 1081, 1090-1092, 123 Cal. Rptr. 2d 288]* . The *Woodside* court took a different approach to the buyers' waiver of the right to a jury trial, finding that they in return received Woodside's waiver to its right to a jury trial. Also, given the strong public policy in favor of alternative dispute resolution, the court assumed, and had no evidence to the contrary, that a party who gives up the right to a jury trial in favor of alternative dispute resolution gains the benefit of economies of time or expense [*Woodside Homes of Cal., Inc. v. Superior Court (Folger) (2003) 107 Cal. App.4th 723, 734-735, 132 Cal. Rptr. 2d 35]* . *Woodside* considered several other specific provisions challenged by buyers but found none of them to be substantively unconscionable:

- The judicial reference provision provided that builder/seller was not required to participate in the judicial reference unless it was satisfied that all necessary and appropriate parties would participate in the proceeding. This was designed to ensure that the entire dispute be resolved in one setting. There was nothing to indicate how or why defendant might manipulate this provision to its advantage [*Woodside Homes of Cal., Inc. v. Superior Court (Folger) (2003) 107 Cal. App. 4th 723, 730-731, 132 Cal. Rptr. 2d 35* ; *compare Greenbriar Homes Communities, Inc. v. Superior Court (2004) 117 Cal. App. 4th 337, 342, 11 Cal. Rptr. 3d 371* (developer's agreements with its subcontractors allowed the developer to require joinder of subcontractor in any reference in which it made a claim against that subcontractor)].

- A provision that each party bear their own attorneys' fees, takes nothing away from either party and is neither harsh nor oppressive [*Woodside Homes of Cal., Inc. v. Superior Court (Folger) (2003) 107 Cal. App. 4th 723, 731, 132 Cal. Rptr. 2d 35]* .

- A provision requiring that there be a stenographic record of the trial, and also requiring that record to be kept confidential except as necessary for posthearing motions and appeals, is not unfair or undesirable with respect to the parties themselves, but might interfere with the public interest in open proceedings. However, if the secrecy provision is challenged at some point in the proceedings and found to be unenforceable, it can be severed [*Woodside Homes of Cal., Inc. v. Superior Court (Folger) (2003)107 Cal. App. 4th 723, 731-732, 132 Cal. Rptr. 2d 35* ; *but see Ting v. AT&T (9th Cir, 2003) 319 F. 3d 1126, 1152* (holding secrecy provision unconscionable and unenforceable in context of arbitration clause in customer service agreements affecting 7 million Californians)].

- A provision requiring the expenses of a judicial reference to be shared evenly [*Greenbriar Homes Communities, Inc. v. Superior Court (2004) 117 Cal. App. 4th 337, 345-346, 11 Cal. Rptr. 3d 371* ; *Woodside Homes of Cal., Inc. v. Superior Court (Folger) (2003) 107 Cal. App. 4th 723, 731-734, 132 Cal. Rptr. 2d 35]* . *Greenbria* r and *Woodside* provide differing analyses of the issue. In *Greenbriar*, real parties' main argument about costs was based on the possibility of extra expenses caused by litigation in different forums. That prospect was removed by the provisions in the developer's agreements with its subcontractors, which required them to join in any reference implicating their work [*Greenbriar Homes Communities, Inc. v. Superior Court (2004) 117 Cal. App. 4th 337, 345-346, 11 Cal. Rptr. 3d 371]* . In *Woodside,* the court noted that a provision in that agreement allowing the referee to direct payment at his or her discretion may impose substantial expenses on a party, especially compared with the "free" access to the court itself. While a contract that imposes on the weaker party the possibility of

> substantial expense is unconscionable, to satisfy his or her burden of proof, the party seeking to establish that the expense renders their agreement unconscionable, must establish at the least that the fees they are likely to pay would be greater than those that would accrue in litigation before the court. Without such a showing, or even any showing that the probable additional expenses of a judicial reference, if any, would be impossible or unreasonably difficult for the party challenging the judicial reference provision to pay, the cost-sharing provision is not unconscionable [*Woodside Homes of Cal., Inc. v. Superior Court (Folger) (2003) 107 Cal. App. 4th 723, 731-734, 132 Cal. Rptr. 2d 35* ; *accord Trend Homes, Inc. v. Superior Court (Azperren) (2005) 131 Cal. App. 4th 950, 963, 32 Cal. Rptr. 3d 411* (buyers made no showing that fees for reference would be greater than those likely in litigation)].

When a judicial reference provision is silent regarding the costs of the reference, it is unlikely to be unconscionable because the referee will have authority under *Code Civ. Proc. § 645.1* to apportion fees in a fair and reasonable manner considering the parties' ability to pay [*Trend Homes, Inc. v. Superior Court (Azperren) (2005) 131 Cal. App. 4th 950, 961-962, 32 Cal. Rptr. 3d 411]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesUnconscionabilityGeneral OverviewCivil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesAppointments

California Forms of Pleading and Practice--Annotated

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 38 REFERENCE
PART II. LEGAL BACKGROUND

4-38 California Forms of Pleading and Practice--Annotated § 38.12

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§ 38.12 Special Reference

[1] Limited in Scope

Special references are made pursuant to *Code Civ. Proc. § 639* and the referee considers and determines only those issues specified in the order of appointment [*Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 722, 269 P.2d 3]* .

A court may order the appointment of a referee under *Code Civ. Proc. § 639* only for the purposes specified in that section. A court must not use a reference procedure under *Code Civ. Proc. § 639* to appoint a person to conduct a mediation, but nothing prevents a court from appointing a referee to conduct a mandatory settlement conference in a complex case or, following the termination of a reference, from appointing a person who previously served as a referee to conduct a mediation [*Cal. Rules of Ct., Rule 3.920(a), (b)*; Advisory Committee Comment to *Cal. Rules of Ct., Rule 3.920(b)*].

[2] May Be Voluntary or Involuntary

[a] Voluntary Under Code Civ. Proc. § 638

A special reference may be made on the agreement of the parties filed with the clerk or judge, or entered in the minutes [*Code Civ. Proc. § 638(b)*]. For a form of stipulation, see *§ 38.60*.

Although uncommon, if a written contract or lease provides that any controversy arising from the contract must be heard by a reference, a party to the contract or lease may make a motion for special reference. If the court finds that a reference agreement exists between the parties, the court may order the reference [*Code Civ. Proc. § 638(b)*; for forms of motion and notice of motion, see *§§ 38.60, 38.61*].

For discussion of the procedure for a voluntary special reference under *Code Civ. Proc. § 638*, see *§ 38.11*[3].

[b] Involuntary Under Code Civ. Proc. § 639

[i] By Party's or Court's Motion

A special reference may be made without the parties' consent for the purposes listed in *Code Civ. Proc. § 639(a)* [*see* [3], *below*] by order of the court on its own motion or on a party's motion (an involuntary reference) [*Code Civ. Proc. § 639*]. In an involuntary reference, the referee is chosen in accordance with the provisions of *Code Civ. Proc. § 640(b)*, discussed in *§ 38.15*[3][b] [*Code Civ. Proc. § 639(a)*]. The motion must specify the matter or matters to be included in the requested reference; and if the applicant is requesting the appointment of a particular referee, the motion must be accompanied by the proposed referee's certification as required by *Cal. Rules of Ct., Rule 3.924(a)* [*Cal. Rules of Ct., Rule 3.921(a)*]. The order must specify the reasons for the reference, the scope of the reference, and any conditions on the reference, including any limitation on the referee's total fees or hourly fee as well as the terms of the obligation of each party to pay the referee [*Cal. Rules of Ct., Rule 3.922*].

The motion must be served and filed and heard by the judge to whom the case has been assigned, or by the presiding judge or law and motion judge if the case has not been assigned [*Cal. Rules of Ct., Rule 3.921*]. For forms of motion and notice of motion, see *§§ 38.60, 38.62*.

All involuntary appointments of referees pursuant to *Code Civ. Proc. § 639* must be by written order, which must include the following [*Code Civ. Proc. § 639(d)*; *Cal Rules of Ct., Rule 3.924(b)-(d), (f)-(h)*; *see also* discussion at *§ 38.14[3][c]* (additional matters required in order appointing discovery referee)]:

- When the referee is appointed pursuant to *Code Civ. Proc. § 639(a)(1), (2), (3)*, or *(4)*, a statement of the reason the referee is being appointed.

- When a discovery referee is appointed pursuant to *Code Civ. Proc. § 639(a)(5)*, the exceptional circumstances requiring the reference, which must be specific to the circumstances of the particular case and whether the referee is being appointed for all discovery purposes in the action [*Code Civ. Proc. § 639(c)*].

- The subject matter or matters included in the reference.

- The name, business address, and telephone number of the referee.

- If the referee is a member of the State Bar, the order must include the referee's State Bar number.

- The maximum hourly rate the referee may charge and, at the request of any party, the maximum number of hours for which the referee may charge. On the written application of any party or the referee, the court may, for good cause shown, modify the maximum number of hours subject to any findings as set forth in *Code Civ. Proc. § 639(d)(6)*.

- Either of the two findings set forth in *Code Civ. Proc. § 639(d)(6)(A)*, regarding the parties' ability to pay the referee's fees, discussed at [iii], *below*.

- The extent, if any, to which court facilities and court personnel may be used in connection with the reference.

- The name and telephone number of a person to contact to arrange for attendance at any proceeding before the referee.

- Before an order appointing a referee is issued, the proposed referee must certify that he or she is aware of and will comply with applicable provisions of canon 6 of the Code of Judicial Ethics and the Rules of Court pertaining to references. That certification must be attached to the order [*Cal. Rules of Ct., Rule 3.924(a)*]. For a form of certification, see *§ 38.62A.*

When the issue of economic hardship is raised before the commencement of the referee's services, the court must determine a fair and reasonable apportionment of reference costs. The court may modify its order as to the apportionment and may consider a recommendation by the referee as a factor in determining any modification [*Cal. Rules of Ct., Rule 3.922(f)(3)*].

[ii] Court's Discretion

The court has discretion to deny a motion for reference, and the court's refusal to order a reference will not be reversed except for abuse of discretion [*Mashon v. Haddock (1961) 190 Cal. App. 2d 151, 168-169, 11 Cal. Rptr. 865* (no abuse of discretion to deny motion for reference to take account); *Puim v. Callahan (1955) 135 Cal. App. 2d 70, 76-77, 286 P.2d 526* (no abuse of discretion to deny motion for reference to take account)].

[iii] Economic Hardship Must Be Considered

In determining whether to order an involuntary reference, the court, must make either of the following findings [*Code Civ. Proc. § 639(d)(6)(A)*; *Cal. Rule of Ct., Rule 3.922(f)(2)*]:

- That no party has established an economic inability to pay a pro rata share of the referee's fee.

- That one or more parties has established an economic inability to pay a pro rata share of the referee's fees and that another party has agreed voluntarily to pay that additional share of the referee's fee.

A court cannot appoint a referee at a cost to the parties if neither of those findings is made [*Code Civ. Proc. § 639(d)(6)(A)*; *Cal. Rules of Ct., 3.922(f)(2)*; *see also Code Civ. Proc. § 639(d)(5)*; *Cal Rules of Ct., Rule 3.922(f)(1)* (at request of party, order appointing referee may provide maximum hours for which referee may charge)].

[iv] Factors to Be Considered Regarding Economic Hardship

In determining whether a party has established an inability to pay the referee's fees under *Code Civ. Proc. § 639(d)(6)(A)*, the court must consider only the ability of the party, not the party's counsel, to pay these fees [*Code Civ. Proc. § 639(d)(6)(B)*]. Under prior law, the court could consider the extent to which the attorney might be advancing an indigent litigant's expenses (recognizing that this information would be protected by the attorney-client privilege and that ultimately the referee's fee would be borne by the losing party as a recoverable cost) [*DeBlase v. Superior Court (1996) 41 Cal. App. 4th 1279, 1284-1285, 49 Cal. Rptr. 2d 229]* .

If a party is proceeding in forma pauperis, the party must be deemed by the court to have an economic inability to pay the referee's fees. However, a determination of economic inability to pay the fees need not be limited to parties that proceed in forma pauperis. For those parties who are not proceeding in forma pauperis, the court, in determining whether a party has established an inability to pay the fees, must consider, among other things, the estimated cost of the referral and the impact of the proposed fees on the party's ability to proceed with the litigation [*Code Civ. Proc. § 639(d)(6)(B)*].

When a party is proceeding in forma pauperis or otherwise claims indigence, the court should consider handling the dispute itself, appointing a referee willing to serve without compensation, or a retired judge sitting on assignment and paid by the public, or arranging for transfer to another amenable judicial officer, such as a superior court commissioner or a temporary judge [*Taggares v. Superior Court (1998) 62 Cal. App. 4th 94, 101, 105-106, 72 Cal. Rptr. 2d 387* ; *DeBlase v. Superior Court (1996) 41 Cal. App. 4th 1279, 1283, 1286, 49 Cal. Rptr. 2d 229* ; *Solorzano v. Superior Court (1993) 18 Cal. App. 4th 603, 22 Cal. Rptr. 2d 401* ; *see Hood v. Superior Court (1999) 72 Cal. App. 4th 446, 449-450, 85 Cal. Rptr. 2d 114* (court must determine that discovery reference is necessary)].

A party need not be proceeding in forma pauperis to have economic hardship considered. Indeed, the court make take it into account based on counsel's representations, without requiring a written or spoken declaration or documentary evidence, unless the court has reason to suspect the representations are inaccurate. If counsel anticipates that reference maybe contemplated counsel should, of course, bring a declaration to court [*DeBlase v. Superior Court (1996) 41 Cal. App. 4th 1279, 1283-1284, 49 Cal. Rptr. 2d 229]* . Absent extenuating circumstances, a party's declaration as to his or her inability to pay referee's fees should be sufficient evidence of that fact, and no more can be required, certainly not that party's tax returns, which are privileged [*Hood v. Superior Court (1999) 72 Cal. App. 4th 446, 449-450, 85 Cal. Rptr. 2d 114]* .

When a party claims indigence, the trial court should spend more time to study the the merits of a discovery dispute than it otherwise would to determine whether the dispute is really appropriate for reference [*DeBlase v. Superior Court (1996) 41 Cal. App. 4th 1279, 1284, 49 Cal. Rptr. 2d 229]* . The court should consider factors that might simplify the task, such as the possiblity of hearing multiple motions together or ensuring that the parties made adequate informal attempts to resolve the dispute [*DeBlase v. Superior Court (1996) 41 Cal. App. 4th 1279, 1284, 49 Cal. Rptr. 2d 229]* .

If the parties are to tentatively bear the cost unequally, court should also consider whether it is just or unjust for a particular party to bear the higher share of the cost [*DeBlase v. Superior Court (1996) 41 Cal. App. 4th 1279, 1285, 49 Cal. Rptr. 2d 229* ; *see Code Civ. Proc. § 639(d)(6)(A)* (party cannot be required to pay more than pro rata share and can do so only by voluntary agreement)].

The court does not have the option of ordering "waiver" of the referee's fee. The referee is a private person who the court cannot require to serve without compensation. Nor may the court allocate the entire cost of the referee to the nonindigent party and justify it as a fee "waiver" in favor of the nonindigent party [*DeBlase v. Superior Court (1996) 41 Cal. App. 4th 1279, 1285, 49 Cal. Rptr. 2d 229]* .

[v] Right to Jury Trial

When a party has a right to a jury trial, a court cannot order a matter to be heard by a referee [*see Grim v. Norris (1861) 19 Cal. 140, 142* ; *Smith v. Pollock (1852) 2 Cal. 92, 94* (both involving special reference)]. Any waiver of the right to trial by jury must appear affirmatively and not by implication [*Smith v. Pollock (1852) 2 Cal. 92, 94]* .

[3] Grounds for Involuntary Reference

An involuntary reference may be made pursuant to *Code Civ. Proc. § 639(a)* for the following purposes:

- When the trial of an issue of fact requires the examination of a long account on either side, in which case the referee may be directed to hear and decide the whole issue, or report on any specific question of fact involved therein [*Code Civ. Proc. § 639(a)(1)*].

PRACTICE TIP:
Report, Not Decide. This in reality means hear *and* report. *By Hon. Bruce R. Geernaert, Judge (Ret.)*

- When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect [*Code Civ. Proc. § 639(a)(2)*].

- When a question of fact, other than on the pleadings, arises on motion or otherwise, in any stage of the action [*Code Civ. Proc. § 639(a)(3)*].

- When it is necessary for the information of the court in a special proceeding [*Code Civ. Proc. § 639(a)(4)*].

- When the court in any pending action determines in its discretion that it is necessary for the court to appoint a referee to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon [*Code Civ. Proc. § 639(a)(5)*].

A matter referred without the consent of the parties must fall within one of the statutory classifications listed above in order to be authorized [*see Settlemire v. Superior Court (2003) 105 Cal. App. 4th 666, 673, 129 Cal. Rptr. 2d 560* (reference under *Code Civ. Proc. § 639(a)(3)* to determine "any matter of fact on which information is required by the court" was invalid; order must specify factual issues court wants referee to determine); *Dunner v. Hoover (1941) 43 Cal. App. 2d 753, 758-759, 111 P.2d 737* (action for breach of agreement to convey property improperly referred for special reference)]. For example, an order of reference is authorized in the following situations:

- For the accounting in an action to dissolve a partnership [*Chapman v. Gipson (1951) 103 Cal. App. 2d 585, 588, 229 P.2d 834]* .

- A proceeding for registration and certification of land titles [*In re Reed (1928) 204 Cal. 119, 121, 266 P. 948* (considered to be in the nature of a "special proceeding" as used in *Code Civ. Proc. § 639(a)(4)*)].

[4] Procedure on Reference for Accounting

When a reference for an accounting is made pursuant to *Code Civ. Proc. § 639(a)(1)* or *(2)*, the appointment of a referee is commonly made in an interlocutory judgment issued after a hearing, trial, or stipulation that determines the basis for ordering the accounting [*see, e.g., In re Marriage of Corona (2009) 172 Cal. App. 4th 1205, 1218, 92 Cal. Rptr. 3d 17* (order finding basis for reference for accounting not appealable); *Spadoni v. Maggenti (1932) 121 Cal. App. 147, 159* (interlocutory decree made after trial)]. However, it is well settled that a trial court may, whenever necessary, order an accounting with or without the entry of an interlocutory judgment [*Schefski v. Anker (1932) 216 Cal. 624, 627]* . For forms used in actions for an accounting, including a form of interlocutory judgment, see Ch. 7, *Accounting, Action for*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury TrialCivil ProcedureRemediesEquitable AccountingsGeneral OverviewCivil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureJudicial OfficersRefereesAppointments

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4-38 California Forms of Pleading and Practice--Annotated § 38.13

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§ 38.13 Waiver of Objections to Reference

[1] Objection Usually Waived Absent Timely Objection

[a] Timely Objection Required

Unless a party makes a timely objection to the propriety of an order of reference made without the party's consent, the objection may be considered waived [*Shain v. Peterson (1893) 99 Cal. 486, 487, 33 P. 1085* (objection first raised on appeal); *see Martino v. Denevi (1986) 182 Cal. App. 3d 553, 557, 227 Cal. Rptr. 354* (waived by failure to file written objection to referee's report as required by *Code Civ. Proc. § 645*)]. An objection to a reference must be made in writing, and must be heard and disposed of by the court, not by the referee [*Code Civ. Proc. § 642*]. If the objection is not made either at the time the order is made or during the hearing or trial of the matter, a party may not raise the objection on appeal as a ground for reversal [*see Hendy Machine W. v. Pac. C. C. Co. (1893) 99 Cal. 421, 423* ; *Shain v. Peterson (1893) 99 Cal. 486, 487, 33 P. 1085]* .

[b] Proceeding Under Uncertain Order of Reference

Even if the original minute order of reference is so brief as to be uncertain, if the subsequent developments must necessarily have made it clear that the referee was acting as a referee, participation in the hearing is indicative of prior consent to the reference or waiver of objection to it. In addition, recitation of the fact of reference in a judgment is presumed to be correct, although it is not conclusive [*Estate of Hart (1938) 11 Cal. 2d 89, 91-92, 77 P.2d 1082* (minute order simply stated, "Referred to J.W. Mullin, Jr.," affirming judgment that adopted referee's report on finding that court commissioner had acted as referee; if he had been acting as court commissioner, the proceedings would have violated appellant's statutory rights)].

[2] No Waiver if Court Treats Special Reference as General Reference

Voluntary participation in a reference hearing has been held not to amount to waiver, however, when the order was for a special reference, the parties neither consented nor objected to the reference, and subsequently, over objection, the court treated it as a general reference (which must be by consent) and treated the referee's findings and conclusions of law as binding and determinative of the issue [*Aetna Life Ins. Co. v. Superior Court (1986) 182 Cal. App. 3d 431, 436, 227 Cal. Rptr. 460]* .

[3] No Waiver in Order or Reference Is Nullity

However, if the order of reference is a nullity, participation in the proceeding cannot give it validity or constitute a waiver [*see* *Thompson v. Municipal Court (1958) 162 Cal. App. 2d 676, 678, 328 P.2d 514* (order of reference by a judge away from court by telephone was ineffective because power to order reference is vested in the court, and a judge may not make the order while absent from the court); *see also* *Aetna Life Ins. Co. v. Superior Court (1986) 182 Cal. App. 3d 431, 436, 227 Cal. Rptr. 460* (citing *Thompson* as authority that failure of the record to show some indication of reference order in accordance with statutory requirements is nonwaivable jurisdictional error); for discussion of the effect of proceeding under a vague order, *see* [1][b], *above*].

Legal Topics:

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

[1] Nature of Referee

A referee is essentially a hearing officer appointed by the court to hear testimony, try issues of fact or law, or both, and report findings to the court [*see Apartment etc. Financing Corp. v. Will (1924) 69 Cal. App. 276, 278, 231 P. 349]* .

[2] Referees and Court Commissioners Distinguished

A referee is not necessarily a regular officer of the court, as is a court commissioner [*compare Code Civ. Proc. § 640 with Code Civ. Proc. § 259*]. A referee is appointed to hear individual matters and the referee's powers are delineated by the order of appointment [*see Apartment etc. Financing Corp. v. Will (1924) 69 Cal. App. 276, 279, 231 P. 349]* . A court commissioner of the county in which the cause is pending may, however, act as a referee [*Code Civ. Proc. § 640*], and if appointed to act in that capacity, his or her powers and duties are governed by the reference order and the statutes dealing with reference generally, not by the statute defining the duties and powers of court commissioners [*Jackson v. Puget Sound Lumber Co. (1898) 123 Cal. 97, 101, 55 P. 788]* . For discussion of court commissioners, see Ch. 317, *Judges* .

[2A] Referee and Temporary Judges Compared

Cal Const. art. VI, § 21 provides for appointment of temporary judges. A temporary judge has broader powers than a referee, including the power to render a judgment that is appealable in the same manner as one rendered by a constitutional judge. In keeping with this broad authority, a temporary judge must take an oath of office before performing judicial functions [*see Kajima Engineering and Construction, Inc. v. Pacific Bell (2002) 103 Cal. App. 4th 1397, 1401, 127 Cal. Rptr. 2d 464* ; *Cal. Const., art. VI, § 21*; *Cal. Rules of Ct., Rules 2.814, 2.831(b)*]. A referee does

not have to take the oath [Kajima Engineering and Construction, Inc. v. Pacific Bell (2002 *103 Cal. App. 4th 1397, 1400, 127 Cal. Rptr. 2d 464]* . A referee's statement of decision on a general reference must stand as the finding of the court,judgment can be entered on it, and it can be excepted to [*see Code Civ. Proc. §§ 643-645*, discussed at *§§ 38.22, 38.24 -38.25*]. A general reference may reserve to the court the power to determine a motion for new trial or other postjudgment motions, such as those concerning costs [*see Kajima Engineering and Construction, Inc. v. Pacific Bell (2002) 103 Cal. App. 4th 1397, 1401-1402, 127 Cal. Rptr. 2d 464* ; discussion at *§ 38.25*].

[3] Powers and Duties

[a] Scope of Powers and Duties Defined by Order

A referee has the power to hear testimony, try issues of fact or law, or both, and report findings to the court [*Apartment etc. Financing Corp. v. Will (1924) 69 Cal. App. 276, 278, 231 P. 349]* . A referee's authority is derived from, and limited by, the order of appointment [*see Fooshe v. Sunshine (1950) 96 Cal. App. 2d 336, 344-346, 215 P.2d 66* (finding that referee acted within scope of reference)]. For example, in a general reference with consent of the parties, the referee has the power to report findings on all the issues in the case, while in a special, involuntary reference, the referee's power is limited to the findings of fact on the matter required by the court [*Weinfeld v. Weinfeld (1958) 159 Cal. App. 2d 608, 613, 324 P.2d 342]* . In a special reference, it is proper, when so ordered, for the referee to assess and make findings regarding the parties' credibility. As fact-finders, referees necessarily make credibility determinations [*In re Marriage of Petropoulos (2001) 91 Cal. App. 4th 161, 110 Cal. Rptr. 2d 111]* .

[b] Exercise by Multiple Referees

When a matter is referred to a panel of three referees all must meet, but two of them may do any act that might be done by all [*Code Civ. Proc. § 1053*].

[c] Discovery Referee

An order appointing a referee under *Code Civ. Proc. § 639(a)(5)* to assist in the resolution of a discovery dispute must grant the referee the following authority [*Cal. Rules of Ct., Rule 3.922(e)*]:

- To set the date, time and place for all hearings the referee determines to be necessary.
- To direct the issuance of subpoenas.
- To preside over hearings.
- To take evidence.
- To rule on objections, motions, and other requrests made during the course of the hearing.

An order appointing a discovery referee must indicate whether the referee is being appointed for all discovery purposes in the action or only for limitedpurposes *Code Civ. Proc. § 639(c)*; *Cal. Rules of Ct., Rule 3.922(d)(2)*], and must specify the exceptional circumstances requiring the reference, which must be specific to the circumstances of the particular case [*Code Civ. Proc. § 639(d)(2)*; *Cal Rules of Ct., Rule 3.922(c)(2)*, discussed at *§ 38.12*[2][b]]; for further discussion, *see § 38.22*].

For a form of order that can be used to appoint a discovery referee, see *§ 38.63*.

[d] Information to Be Filed With Court

A referee must file a statement that provides the name, telephone number, and mailing address of a person or persons who may be contacted to obtain in each case pending information about the date, time, location, and general nature of all hearings scheduled before the referee that would be open to the public if held before a judge [*Cal. Rules of Ct., Rule 3.931(b)(1)*] and access to any documents or exhibits submitted to the referee that would be open to the public if filed or lodged with the court [*Cal. Rules of Ct., Rule 2.400(d)(2)*]. This statement must be filed at the same time as the referee's certification under *Cal. Rules of Ct., Rule 3.904(a)* or *3.924(a)* [*see § 38.15[3]*]. If there is any change in the contact information, the referee must promptly file a revised statement with the court [*Cal. Rules of Ct., Rules 2.400(d)(2), 3.931(b)(1)*].

In addition, the statement filed by a referee may also provide the address of a publicly accessible website at which the referee will maintain a current calendar setting forth the aforementioned information [*Cal. Rules of Ct., Rule 3.931(b)(2)*].

[4] When Bond Required

If the duties of a referee or commissioner appointed by a court will, or are reasonably anticipated to, involve the custody of personal property or the receipt or disbursement of moneys, the order of appointment must provide that before entering on the duties, the referee or commissioner must execute an undertaking to the State of California. The undertaking must state that the referee or commissioner will faithfully discharge the duties of referee or commissioner, as the case may be, and will obey the orders of the court therein. In addition, the order of appointment must specify the amount of the undertaking, although a failure to do so will not invalidate the order [*Code Civ. Proc. § 571*; *see* the Bond and Undertaking Law (*Code Civ. Proc. § 995.010 et seq.*); for discussion and forms relating to undertakings, *see Ch. 538, Suretyship, Bonds, and Undertakings, § 538.40* et seq.].

[5] Referees' Immunity

As judicial officers, referees are entitled to immunity for acts done in the exercise of their judicial functions. The question of what constitutes an act in a referee's official capacity is determined by whether it is an act a referee usually does in the performance of his or her judicial functions. So while keeping order during a deposition or other proceeding which the referee is to oversee would be a normal judicial function, assaulting the deponent to keep him in the room is not. Thus, a discovery referee who assaulted and battered a litigant is not immune from civil liability for that act [*Regan v. Price (2005) 131 Cal. App. 4th 1491, 1493, 1495-1496, 1499, 33 Cal. Rptr. 3d 130]* . For a full discussion of judicial immunity, see Ch. 317, *Judges* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureJudicial OfficersReferencesGovernmentsCourtsJudicial ImmunityCivil ProcedureJudicial OfficersRefereesAppointments

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§ 38.15 Appointment of Referee

[1] One to Three Referees May Be Appointed

There may be one or more referees, not exceeding three [*Code Civ. Proc. § 640*].

[2] Court Selects Referee if Parties Do Not Agree on Referee

The parties may agree on who will act as referee [*Code Civ. Proc. § 640(a)*].

If the parties do not agree, the court must appoint a referee or referees [*Code Civ. Proc. § 640(a)*; *see Code Civ. Proc. §§ 641, 641.2* (objections); *see also* [3][b], *below*; *§ 38.16*]. For discussion of references for the examination of judgment debtors, see *Ch. 254, Executions and Enforcement of Judgments, § 254.180* et seq.

[3] Procedure

[a] General or Voluntary Special Reference Under Code Civ. Proc. § 638

If the applicant for a *Code Civ. Proc. § 638* reference is requesting, or the parties have stipulated to, the appointment of a particular referee, the motion must be accompanied by the referee's certificate required by *Cal. Rules of Ct., Rule 3.904(a)* and by a proposed order [*Cal Rules of Ct., Rule 3.901(b)(4), (5)*; *see also § 38.63[1]*, reproducing Judicial Council Form ADR-110, Order Appointing Referee, Item 9 of which is a form of referee's certificate)]. The proposed order must include the following [*Cal Rules of Ct., Rule 3.902*]:

- The business address, and telephone number of the proposed referee

- If the proposed referee is a member of the State Bar, his or her State Bar number.
- Whether the scope of the reference covers all issues or is limited to specified issues.
- Whether the referee will be privately compensated.
- Whether the use of court facilities and court personnel is authorized.
- The name and telephone number of a person to contact to arrange for attendance at any proceeding that would be open to the public if held in a courthouse.

If the proposed referee is a former California judicial officer, he or she must be an active or inactive member of the State Bar [*Cal. Rules of Ct., Rule 3.903*].

Before a referee begins to serve [*Cal. Rules of Ct., Rule 3.904(a)*]:

- He or she must certify in writing that he or she consents to serve as provided in the order of appointment and is aware of and will comply with applicable provisions of canon 6 of the Code of Judicial Ethics and the Rules of Court pertaining to references.
- The referee's certification must be filed with the court.

The parties' agreement for an order directing reference does not, however, constitute a waiver of grounds for objecting to the appointment under *Code Civ. Proc. § 641* or *641.2* [*Code Civ. Proc. § 640(c)*; *see § 38.16*]. Objections must, however, be brought with reasonable diligence [*Cal. Rules of Ct., Rule 3.905*].

[b] Involuntary Special Reference Under Code Civ. Proc. § 639

To select the referee in a *Code Civ. Proc. § 639* involuntary special reference, when the parties do not agree on the selection of the referee or referees, each party must submit to the court up to three nominees for appointment as referee and the court must appoint one or more referees, not exceeding three, from among the nominees against whom there is no legal objection [*Code Civ. Proc. § 640(b)*]. If no nominations are received from any of the parties, the court must appoint one or more referees, not exceeding three, against whom there is no legal objection, or the court may appoint a court commissioner of the county where the cause is pending as a referee [*Code Civ. Proc. § 640(b)*]. If the proposed referee is a former California judicial officer, he or she must be an active or inactive member of the State Bar [*Cal. Rules of Ct., Rule 3.923*].

An order for an involuntary reference must set forth the items required by *Code Civ. Proc. § 639(c)* and *(d)*, discussed at *§ 38.12*[2][b][i], including the referee's name, business address, and telephone number [*Code Civ. Proc. § 639(d)(4)*; *Cal. Rules of Ct., Rule 3.922(b)*].

Filing a motion for appointment of a referee under *Code Civ. Proc. § 639* does not constitute waiver of grounds for objecting to the appointment of a particular person as referee under *Code Civ. Proc. § 641* or *641.2* [*Code Civ. Proc. § 640(c)*; *see § 38.16*] or to the rate or apportionment of the referee's compensation. Objections must, however, be brought with reasonable diligence [*Cal. Rules of Ct., Rule 3.925*].

Legal Topics:

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§ 38.16 Objections to Appointment

[1] Peremptory Challenge

A referee or commissioner may be disqualified by a peremptory challenge under *Code Civ. Proc. § 170.6* [*see, e.g., Autoland, Inc. v. Superior Court (1988) 205 Cal. App. 3d 857, 859-860, 252 Cal. Rptr. 662* (upholding peremptory disqualification of discovery referee); *People v. Superior Court (1993) 4 Cal. 4th 1164, 1182-1185* ; *17 Cal. Rptr. 2d 815, 847 P.2d 1031* ; *Pedus Services, Inc. v. Superior Court (1999) 72 Cal. App. 4th 140, 143-144, 84 Cal. Rptr. 2d 771* ; *Stevens v. Superior Court (1997) 52 Cal.App.4th 55, 59, 60 Cal. Rptr. 2d 397* (so-called "10-day/5-day" rule governing time for filing peremptory challenge of referee who is not appointed "for all purposes")]. Generally, only a party to the action can challenge a discovery referee [*Sears Roebuck & Co. v. National Union Fire Ins. Co. (2005) 131 Cal. App. 4th 1342, 1349 n.4, 32 Cal. Rptr. 3d 717* (attorney for corporate principals, individual nonparty witnesses, who was himself subpoenaed to produce documents and to give deposition, had no standing to challenge discovery referee)].

A peremptory challenge against a discovery referee [*see Code Civ. Proc. § 170.6*] must be made to the court by a party either within the following time periods [*Code Civ. Proc. § 639(b)*]:

- If the discovery referee was appointed for all discovery purposes, within 10 days after notice of the appointment, or if the party has not yet appeared in the action, the motion must be made within 10 days after the that party's appearance.

- If the discovery referee has been assigned only for limited discovery purposes and the referee assigned is known at least 10 days before the date set for hearing, at least five days before the date set for

hearing.

A ruling regarding the disqualification of a referee is not an appealable order, but can be reviewed only by writ. This rule promotes judicial economy and prevents the waste of time and money that might otherwise result [*Sears Roebuck & Co. v. National Union Fire Ins. Co. (2005) 131 Cal. App. 4th 1342, 1348, 32 Cal. Rptr. 3d 717* (dismissing appeal)].

For discussion and forms relating to peremptory challenges, see Ch. 317, *Judges* .

[2] Challenge for Cause

[a] Grounds

A party may object to the appointment of any person as referee, on one or more of the following grounds [*Code Civ. Proc. § 641*]:

- A want of any of the qualifications prescribed by statute to render a person competent as a juror, except a requirement of residence within a particular county of California [*see Code Civ. Proc. § 203*; *see also* Ch. 322, *Juries and Jury Selection*].

- Consanguinity, or affinity, within the third degree to either party, or to an officer of a corporation that is a party, or to any judge of the court in which the appointment is being made.

- Standing in the relation of guardian and ward, conservator and conservatee, master and servant, employer and clerk, or principal and agent, to either party, or being a member of the family of either party, or a partner in business with either party, or security on any bond or obligation for either party.

- Having served as a juror or been a witness on any trial between the same parties for the same cause of action.

- Interest on the part of the person in the event underlying the action, or in the main question involved in the action.

- Having formed or expressed an unqualified opinion or belief as to the merits of the action.

- The existence of a state of mind in the potential referee evincing enmity against or bias toward either party.

For a form that may be adapted for use in making an objection to the appointment of a referee, see *§ 38.68*.

[b] In Environmental Pollution Action

In environmental actions brought under *Gov. Code § 12600 et seq.*, a party may object to the appointment of any person as referee on the ground that he or she is not technically qualified with respect to the particular subject matter of the proceeding [*Code Civ. Proc. § 641.2*].

[c] Disclosure of Grounds

[i] General or Voluntary Special Reference Under Code Civ. Proc. § 638

In addition to any other disclosure required by law, the referee must disclose to the parties, no later than five days prior to the deadline forparties to file a motion for disqualification of the referee under *Code Civ. Proc. § 170.6* or, if the

referee is not aware of his or her appointment or of a matter subject to disclosure at that time, as soon as practicable thereafter the following [*Cal. Rules of Ct., Rule 3.904(b)*]:

- Any matter subject to disclosure under subdivisions (D)(5)(a) and (D)(5)(b) of canon 6 of the Code of Judicial Ethics [*see* Cal. Rules of Ct., Appendix: Judicial Code of Ethics]; and

- Any significant personal or professional relationship the referee has or has had with a party, attorney, or law firm in the current case, including the number and nature of any other proceedings in the past24 months in which the referee has been privately compensated by a party, attorney, law firm, or insurance company in the current case for any services, including service as an attorney, expert witness, or consultant or as a judge, referee, arbitrator, mediator, settlement facilitator, or other alternative dispute resolution neutral.

Canon 6(D)(5)(a) relates to information the referee believes the parties or their lawyers might consider relevant to the issue of disqualification, even if the referee believes there is no actual basis for disqualification. Canon 6(D)(5)(b) relates to membership in any organization that practices invidious discrimination, with the exception of certain religious, military and youth organizations.

[ii] Involuntary Special Reference Under Code Civ. Proc. § 639

In addition to any other disclosure required by law, the referee must disclose to the parties, no later than five days prior to the deadline for parties to file a motion for disqualification of the referee under *Code Civ. Proc. § 170.6* or, if the referee is not aware of his or her appointment or of a matter subject to disclosure at that time, as soon as practicable thereafter the following [*Cal. Rules of Ct., Rule 3.924(b)*]:

- Any matter subject to disclosure under subdivisions (D)(5)(a) and (D)(5)(b) of canon 6 of the Code of Judicial Ethics [*see* Cal. Rules of Ct., Appendix: Judicial Code of Ethics; *see* [i], *above*]; and

- Any significant personal or professional relationship the referee has or has had with a party, attorney, or law firm in the current case, including the number and nature of any other proceedings in the past 24 months in which the referee has been privately compensated by a party, attorney, law firm, or insurance company in the current case for any services, including service as an attorney, expert witness, or consultant or as a judge, referee, arbitrator, mediator, settlement facilitator, or other alternative dispute resolution neutral.

[3] Procedure for Disqualification

The objections taken to the appointment of any person as referee must be heard and disposed of by the court. Objections must be in writing and must be filed and served on all parties and the referee [*Code Civ. Proc. § 642*; *Cal. Rules of Ct., Rule 3.905* (*Code Civ. Proc. § 368* references), *Cal Rules of Ct., Rule 3.925*) (*Code Civ. Proc. § 639* references)].

For forms of notice of motion, declaration, and order to vacate appointment of a referee, see *§§ 38.68* and *38.69*. The same procedure applies as in the case of disqualification of a judge under *Code Civ. Proc. § 170 et seq.* [*see Code Civ. Proc. § 170.5(a)* ("judge" defined to include referee); for discussion, including time limitations, *see* Ch. 317, *Judges*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureJudicial OfficersRefereesRemovals

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4-38 California Forms of Pleading and Practice--Annotated § 38.17

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§ 38.17 Location and Accessibility of Proceedings

[1] When Reference Is to Privately Compensated Referee Under Code Civ. Proc. § 638

A party who has elected to use the services of a referee pursuant to *Code Civ. Proc. § 638* is deemed to have elected to proceed outside court facilities. Therefore, court facilities, court personnel, and summoned jurors must not be used, except on a finding by the presiding judge that the use would further the interests of justice [*Cal. Rules of Ct., Rule 3.907*].

[2] When Reference Is by Court Order Under Code Civ. Proc. § 639

A reference ordered pursuant to *Code Civ. Proc. § 639* entitles the parties to the use of court facilities and court personnel to the extent provided in the order of reference. The proceedings may be held in a private facility, but if so, the private facility must be open to the public [*Cal. Rules of Ct., Rule 3.926*].

PRACTICE TIP:
Reference Heard Away From Courthouse as a Rule. Invariably, references pursuant to *Code Civ. Proc. § 639* are heard outside the courthouse. *By Hon. Bruce R. Geernaert, Judge (Ret.)*

[3] Proceedings Open to Public

All proceedings before a referee that would be open to the public if held before a judge must be open to the public, regardless of whether they are held in a court facility or in another location [*Cal. Rules of Ct., Rule 3.931(a)*].

[4] Application or Motion for Accessible and Appropriate Site

[a] Making the Application

The presiding judge or his or her designee, on application of any person or on the judge's own motion, may order that a case before a referee must be heard at a site easily accessible to the public and appropriate for seating those who have made known their plan to attend hearings [*see § 38.21[1]*]. The application must state facts showing good cause for granting the application, be served on all parties and the referee, and be filed with the court [*Cal. Rules of Ct., Rule 3.931(c)(1)*]. The issuance of an order for an accessible and appropriate hearing site is not grounds for withdrawal of a stipulation for the appointment of a referee [*Cal. Rules of Ct., Rules 3.906(a)(2), 3.931(c)(1)*].

For a form of application to obtain site easily accessible to the public and appropriate for seating and supporting declaration, see *§ 38.81*. For a form of proposed order that a case referred to a referee be heard in an accessible and appropriate site, see *§ 38.82*.

[b] Court May Order Stay

The reference proceedings are not stayed while the application for an order that a case before a referee must be heard at a site easily accessible to the public and appropriate for seating those who have made known their plan to attend hearings is pending unless the presiding judge or his or her designee orders that they be stayed [*Cal. Rules of Ct., Rule 3.931(c)(1)*].

For a form of application for stay of reference pending application for order that a case referred to a referee be heard in an accessible and appropriate site, see *§ 38.83*. For a form of order granting stay of reference pending application for order that a case referred to a referee be heard in an accessible and appropriate site, see *§ 38.84*.

[c] Special Considerations When Court Staff Must Attend

If a court staff mediator or evaluator is required to attend a hearing before a referee, the hearing must take place at a location requiring no more than 15 minutes' travel time from the mediator's or evaluator's work site, unless otherwise ordered by the presiding judge or his or her designee [*Cal. Rules of Ct., Rule 3.931(c)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-38 California Forms of Pleading and Practice--Annotated § 38.18

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.18 Motion to Withdraw Stipulation

A motion to withdraw a stipulation for the appointment of a referee must be supported by a declaration of facts establishing good cause for permitting the party to withdraw the stipulation and must be heard by the judge to whom the case is assigned or by the presiding judge or law and motion judge. A declaration that a ruling is based on an error of fact or law does not establish good cause for withdrawing a stipulation [*Cal. Rules of Ct., Rule 3.906*]; for a form of motion and supporting declaration, *see § 38.66*].

Notice of the motion must be served on all parties and the referee and filed with the court. If the motion is granted, the case must be transferred to the trial court docket [*Cal Rules of Ct., Rule 3.906*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesAppointments

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4-38 California Forms of Pleading and Practice--Annotated § 38.19

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§ 38.19 Filing, Accessing, and Sealing Reference Records

[1] Documents Must Be Filed With Court and Referee

All original documents in a case pending before a referee must be filed with the clerk in the same manner as would be required if the case were being heard by a judge. Filings must be made within applicable time limits, and required filing fees must be paid. The filing party must provide to the referee a file-stamped copy of each document relevant to the issues before the referee [*Cal. Rules of Ct., Rule 2.400(b)(1)*].

If a document must be filed with the court before it is considered by a judge, the referee must not accept or consider any copy of that document unless the document has the clerk's file stamp or is accompanied by a declaration stating that the original document has been submitted to the court for filing [*Cal. Rules of Ct., Rule 2.400(b)(2)*].

If a document would ordinarily be filed with the court after it is submitted to a judge, or if a party submits an ex parte application, the party that submits the document or application to a referee must file the original with the court no later than the next court day after the document or application was submitted to the referee and must promptly provide a filed-stamped copy of the document or application to the referee [*Cal. Rules of Ct., Rule 2.400(b)(3)*].

A party that has submitted a document to a referee must immediately notify the referee if the document is not accepted for filing by the court or if the filing is subsequently canceled [*Cal. Rules of Ct., Rule 2.400(b)(4)*].

[2] Handling of and Access to Exhibits

Referees appointed under *Code Civ. Proc. § 638* or *639* must comply with the applicable requirements of *Cal. Rules of Ct., Rule 2.400* concerning the handling of documents and exhibits [*Cal. Rules of Ct., Rule 3.930*].

Documents and exhibits in the possession of a temporary judge or referee that would be open to the public if filed or lodged with the court must be made available during business hours for inspection by any person within a reasonable time after request and under reasonable conditions [*Cal. Rules of Ct., Rule 2.400(d)(1)*].

For discussion of requirement that referees file statements giving contract information, see *§ 38.14[3][d]*. For discussion of requirement that court clerk post referees' contract information in court facilities, see *§ 38.21[1]*.

[3] Motion to Seal Reference Records

A motion or application to seal records in a case pending before a referee under either *Code Civ. Proc. § 638* or § 639 must be filed with the court and served on the referee and all parties who have appeared in the case. The motion or application must be heard by the trial court judge to whom the case is assigned or, if the case has not been assigned, by the presiding judge or his or her designee. *Cal. Rules of Ct., Rules 2.550* and *2.551* apply to the motion or application to seal the records [*Cal. Rules of Ct., Rule 3.932(a)*].

For a form of notice of motion to seal records and supporting declaration, see *§ 38.79*. For discussion of procedure to seal confidential records during discovery, see *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.37*. For detailed discussion and forms relating to the procedure for sealing records under *Cal. Rules of Ct., Rules 2.550-2.551*, see Ch. 551, *Trial* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCourt RecordsCivil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesAppointments

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4-38 California Forms of Pleading and Practice--Annotated § 38.20

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.20 Motion for Leave to File Complaint in Intervention

A motion for leave to file a complaint for intervention in a case pending before a referee must be served on all parties and the referee, and filed with the court. The motion must be heard by the judge to whom the case is assigned or by the presiding judge or his or her designee judge if the case has not been assigned. If the intervention is allowed, the case must be returned to the trial court docket unless all parties stipulate in the manner prescribed in Rule 3.901 to proceed before the referee [*Cal. Rules of Ct., Rule 3.932(b)*].

For discussion and forms relating to intervention, see Ch. 395, *Parties* , Pt. II.

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-38 California Forms of Pleading and Practice--Annotated § 38.21

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.21 Hearing Before Referee

[1] Notice of Hearing

Because the statutes governing reference do not provide for notice of the hearing before a referee, formal notice is not jurisdictional [*Spadoni v. Maggenti (1932) 121 Cal. App. 147, 160* ; *see Code Civ. Proc. § 638 et seq.*]. A party who has actual knowledge of the appointment of a referee must exercise reasonable diligence to ascertain the time and place of the hearing [*see Doudell v. Shoo (1912) 20 Cal. App. 424, 447, 129 P. 478]* .

After the referee files the requisite statement of information concerning a contact person from whom information about hearings before the referee may be obtained [see *§ 38.14[3][d]*], the clerk of the court with which the statement was filed must post the information from the statement filed by the referee in the court facility [*Cal. Rules of Ct., Rule 3.931(b)(3)*].

PRACTICE TIP:
Serving Notice Is Good Practice: Good practice is to serve written notice and file a proof of service re the initial hearing. *By Hon. Bruce R. Geernaert, Judge (Ret.)*

Objections to a referee's report on the grounds of lack of notice of the hearing should be made before the findings are made and filed, thus giving the court, in the exercise of its discretion, an opportunity to instruct the referee to proceed denovo [*see Doudell v. Shoo (1912) 20 Cal. App. 424, 453, 129 P. 478* (opinion on denial of rehearing); *see also Hoeft v. Hotchkiss (1926) 76 Cal. App. 670, 671]* . Failure either to exercise reasonable diligence to ascertain the time and place of the hearing or to make timely objections prior to the adoption of the referee's report by the court constitutes a waiver of the right to complain of the lack of notice or the opportunity to present evidence [*see Spadoni v. Maggenti (1932) 121 Cal. App. 147, 159-160]* .

[2] Conduct of Hearing

[a] Same as Trial Before a Court

A hearing before a referee is conducted in the same manner as a trial held before a court [*In re McNamee (1933) 131 Cal. App. 30, 31, 20 P.2d 722]* . The Evidence Code applies to proceedings conducted by a referee or commissioner [*Evid. Code § 300*].

A referee has no power to make findings not based on evidence regularly admitted at a trial or hearing. Thus, in a case in which the referee's reportwas rendered without a trial or hearing, no witnesses were sworn, no opportunity was given to the parties to examine witnesses or introduce evidence, and no documents were identified, the appellate court held that the conduct of the referee deprived appellants of their day in court [*Rice v. Brown (1951) 104 Cal. App. 2d 100, 106, 231 P.2d 65]* . An exception to the foregoing is a reference for an accounting which does not contemplate any hearing or taking of evidence but requires the parties to deliver to the referee/accountant all books, accountings, bank records, or any other documentation requested by the accountant [*Jones v. Wagner (2001) 90 Cal. App. 4th 466, 108 Cal. Rptr. 2d 669* (accounting on partnership dissolution); *see also* Ch. 7, *Accounting, Action for*].

[b] Improper Communication With Referee

A referee or party may be subject to criminal penalties for engaging in unlawful communications about a pending cause or action outside the regular course of the proceedings [*see Penal Code §§ 95, 96*]. Every person who corruptly attempts to influence a referee regarding his or her verdict or decision in any cause or proceeding pending or about to be brought before the referee, either by oral or written communications or by use of any book, paper, or instrument exhibited not in the regular course of proceedings, or by threat, intimidation, persuasion, or entreaty, or by any promise or assurance of pecuniary or other advantage, is punishable by fine or imprisonment [*see Penal Code § 95*].

Similarly, a referee who either makes a promise or agreement to give a verdict or decision for or against any party, or who willfully and corruptly permits any communication to be made to him or her, or receives any book, paper, instrument, or information relating to any cause or matter pending before the referee not in the regular course of proceedings, is punishable by fine or imprisonment [*see Penal Code § 96*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-38 California Forms of Pleading and Practice--Annotated § 38.22

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.22 Filing of Referee's Report

[1] Reference Under Code Civ. Proc. § 638

Unless otherwise directed by the court, the referees or commissioner must report their statement of decision in writing to the court within 20 days after the hearing, if any, has been concluded and the matter has been submitted [*Code Civ. Proc. § 643(a)*]. An earlier version of this provision has been held to be directory only, and failure to file the report within the statutory time limits does not invalidate a judgment based on the report [*Keller v. Sutrick (1863) 22 Cal. 472, 473*]. A referee appointed pursuant to *Code Civ. Proc. § 638* must report as agreed by the parties and approved by the court [*Code Civ. Proc. § 643(b)*].

For a form that may be used as a statement of decision, see *§ 38.70*.

[2] Reference Under Code Civ. Proc. § 639

Former *Code Civ. Proc. § 643* [*now see Code Civ. Proc. § 643(a)* (*see* [1], *above*)] has been held to apply only in the case of general references; a statement of decision is not required in a special reference [*Dallman Co. v. Southern Heater Co. (1968) 262 Cal. App. 2d 582, 589-590, 68 Cal. Rptr. 873]* .

In a special reference pursuant to *Code Civ. Proc. § 639*, the referee files a report to the court, which must include the following [*Code Civ. Proc. § 643(c)*]:

- A recommendation on the merits of any disputed issue.
- A statement of the total hours spent.

- The total fees charged by the referee.
- The referee's recommended allocation of payment.

The referee must serve the report on all parties [*Code Civ. Proc. § 643(c)*]. Any party may file objections to the report [*Code Civ. Proc. § 643(c)*], as discussed at *§ 38.25*[2].

A discovery referee's report should contain findings and make a recommendation thereon [*see Code Civ. Proc. § 639(a)(5)*].

For a form that may be used as a report, see *§ 38.70*.

[3] Failure to Report

If the referee fails to file a report, mandamus is proper to compel him or her to do so [*Apartment etc. Financing Corp. v. Will (1924) 69 Cal. App. 276, 278-279, 231 P. 349]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-38 California Forms of Pleading and Practice--Annotated § 38.23

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§ 38.23 Sufficiency of Referee's Report

The findings set forth in a referee's report must be supported by the evidence as set forth in the record [*In re Rose (1965) 62 Cal. 2d 384, 389, 42 Cal. Rptr. 236, 398 P.2d 428* (findings predicated on referee's implied disbelief of credibility of witness, but no finding of lack of credibility made in report)].

PRACTICE TIP:

Put on Record What Will Be Accepted as Transcript. A written transcript may not be available. It is advisable to clarify what the "record" of the hearing will be; that is, a reporter transcript, audio tape transcript, audio tape itself, or the referees notes. This should be memorialized in writing in some manner. *By Hon. Bruce R. Geernaert, Judge (Ret.)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-38 California Forms of Pleading and Practice--Annotated § 38.24

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.24 Effect of Referee's Report

[1] General Reference

In a consensual general reference pursuant to *Code Civ. Proc. § 638*, the decision of the referee or commissioner on the whole issue must stand as the decision of the court. On filing of the statement of decision with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court [*Code Civ. Proc. § 644(a)*].

PRACTICE TIP:

Act Immediately on Receipt of Report. Immediately on receipt of a referee's statement of decision, it is a good idea either to move for a court action based thereon or to file objections in the court. *By Hon. Bruce R. Geernaert, Judge (Ret.)*

[2] Special Reference

[a] Comparable to Special Verdict

In the case of all references other than consensual general references pursuant to *Code Civ. Proc. § 638*, the decision of the referee or commissioner is only advisory. The court may adopt the referee's recommendations in whole or in part after independently considering the referee's findings and any objections and responses thereto filed with the court [*Code Civ. Proc. § 644(b)*; *see § 38.25*[2], regarding objections]. When a reference is to report the facts, the decision reported has the effect of a special verdict [*Code Civ. Proc. § 645*; *see Code Civ. Proc. § 628* (entry of judgment or of order reserving case for argument or further consideration on receipt of special verdict)]. A special verdict must present the findings of fact as established by the evidence, and those findings must be presented so that nothing remains for the

court but to draw from them conclusions of law [*see Code Civ. Proc. § 624*]. The findings, however, are not indispensable, and a finding with respect to a fact does not become binding on the court until and unless adopted by it [*Chiarodit v. Chiarodit (1933) 218 Cal. 147, 150, 21 P.2d 562]* .

PRACTICE TIP:

Act Immediately on Receipt of Report. Immediately on receipt of a referee's report and recommendation following a special reference, it is a good idea either to move for a court action based thereon or to file objections in the court. *By Hon. Bruce R. Geernaert, Judge (Ret.)*

[b] Confirmation of Report

The party in whose favor the decision is made should serve and file a notice of motion and supporting papers for an order to confirm or adopt the referee's report [*see, e.g., Hall v. Bru (1932) 216 Cal. 153, 154, 13 P.2d 716* ; *Fooshe v. Sunshine (1950) 96 Cal. App. 2d 336, 345, 215 P.2d 66* ; for a form, *see § 38.71*].

If the report is incomplete and fails to find on all the issues submitted, the court should send the report back to the referee with instructions to complete it and resubmit it. In general, any omission from the report calls for a recommittal with instructions to supply the omission [*Apartment etc. Financing Corp. v. Will (1924) 69 Cal. App. 276, 279, 231 P. 349]* . On resubmission, if the subsequent report is based on evidence presented both before and after resubmission, it is considered a complete report and entirely supersedes the original report. In such a case, the court may not consider the superseded report [*see Brodie v. Barnes (1942) 56 Cal. App. 2d 315, 320, 132 P.2d 595]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-38 California Forms of Pleading and Practice--Annotated § 38.25

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§ 38.25 Objections to Referee's Report

[1] Reference Under Code Civ. Proc. § 638

The decision of the referee appointed pursuant to *Code Civ. Proc. § 638* or commissioner may be excepted to and reviewed in like manner as if made by the court [*Code Civ. Proc. § 645*]. Thus, a motion for a new trial or other appropriate proceeding is proper [*Lewis v. Grunberg (1928) 205 Cal. 158, 162, 270 P. 181* ; *see Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 722, 269 P.2d 3* ; *SFPP, L.P. v. Burlington N. & Santa Fe Ry. Co. (2004) 121 Cal. App. 4th 452, 465-466, 17 Cal. Rptr. 3d 96* (motion to vacate judgment suggested)]. For a form of notice of motion for new trial, see *§ 38.76*.

The objections supporting a motion for a new trial may be based on the ground that there is no finding as to a particular fact in issue or that the findings are contrary to or unsupported by the evidence [*Clark v. Hewitt (1902) 136 Cal. 77, 78-79, 68 P. 303* (no finding); *In re Riccardi (1926) 80 Cal. App. 66, 73, 251 P. 650* (contrary or unsupported)], unless the doctrine of implied findings is involved. The doctrine of implied findings will be applicable if the stipulation for general reference incorporates *Code Civ. Proc. § 634* or otherwise makes it applicable [*see SFPP, L.P. v. Burlington N. & Santa Fe Ry. Co. (2004) 121 Cal. App. 4th 452, 465, 17 Cal. Rptr. 3d 96* (stipulation that reference be conducted in accordance with Code of Civ. Proc. and Evid. Code as if proceedings were conducted by Superior Court)]. If *Code Civ. Proc. § 634* and the doctrine of implied findings are applicable, no challenge that the referee's findings were not supported by substantial evidence can be heard on appeal unless it was first raised in the trial court by motion under *Code Civ. Proc. § 657* (new trial) or *Code Civ. Proc. § 663* (to vacate judgment) [*SFPP, L.P. v. Burlington N. & Santa Fe Ry. Co. (2004) 121 Cal. App. 4th 452, 465-466, 17 Cal. Rptr. 3d 96]* .

The objections must be raised in the trial court before they will be reviewed on appeal; however, a motion for a new

trial is not a prerequisite to an appeal based on insufficiency of the evidence [*Estate of Raphael (1953) 115 Cal. App. 2d 525, 528-529, 252 P.2d 979]* .

The motion for new trial may be heard by the referee, absent any indication in the order of reference that his or her powers have expired [*Clark v. Rancho Santa Fe Assn. (1989) 216 Cal. App. 3d 606, 625-626, 265 Cal. Rptr. 41* (referee properly heard motion when reference was "for a complete and final adjudication"); *see Daverkosen v. Kelley (1872) 43 Cal.477, 478* (court could not return matter to referee when reference was to "take the evidence and report a judgment")].

For discussion of additional grounds for new trial and the time limitations for giving notice of intention to move for new trial, see *§ 38.76*[3].

If the parties wish the new trial of the case to be submited to a general reference, the parties should make a new stipulation for reference. Otherwise, because a general reference cannot be made without the parties' consent, the order granting a new trial would not include a provision for a general reference [*Daverkosen v. Kelley (1872) 43 Cal. 477, 478* ; *but see Clark v. Rancho Santa Fe Assn. (1989) 216 Cal. App. 3d 606, 625-626, 265 Cal. Rptr. 41* (referee properly heard motion for new trial when reference was "for a complete and final adjudication")].

[2] Reference Under Code Civ. Proc. § 639

Any party may file an objection to the report or recommendations of a referee appointed pursuant to *Code Civ. Proc. § 639* within 10 days after the referee serves and files the report, or within another time as the court may direct. The objection must be served on the referee and all other parties. Responses to the objections must be filed with the court and served on the referee and all other parties within 10 days after the objection is served. The court must review any objections to the report and any responses submitted to those objections and must thereafter enter appropriate orders [*Code Civ. Proc. § 643(c) see also Code Civ. Proc. § 259(b)* (commissioners)]. Objections to the referee's report are generally made either with a motion to set aside the report [*Code Civ. Proc. § 645*; *see, e.g., McHenry v. Moore (1855) 5 Cal. 90, 92* ; for forms, *see also §§ 38.72* (objections to report), 38.73 (notice of motion to set aside report)], or in opposing a motion to confirm the report [*Estate of Raphael (1953) 115 Cal. App. 2d 525, 529, 252 P.2d 979]* .

Nothing in *Code Civ. Proc. § 643* is intended to deprive the court of its power to change the terms of the referee's appointment or to modify or disregard the referee's recommendations, and this overriding power may be exercised at any time, either on the motion of any party for good cause shown or on the court's own motion [*Code Civ. Proc. § 643(c)*]. Thus, in a special reference pursuant to *Code Civ. Proc. § 639*, until the referee's report is confirmed or adopted by the trial court, it may be set aside without the necessity of granting a motion for a new trial [*Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 723, 269 P.2d 3]* .

If a party fails to file written objections to the referee's report or to move properly to set it aside, any objections will be deemed waived [*Martino v. Denevi (1986) 182 Cal. App. 3d 553, 557, 227 Cal. Rptr. 354]* .

Once the referee's report is confirmed or adopted by the trial court and judgment entered accordingly, review on appeal is of the trial court's judgment [*see National Brass Wks. v. Weeks (1928) 92 Cal. App. 318, 321-322, 268 P. 412]* .

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For related research and practice materials, see the following legal topics:
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PART II. LEGAL BACKGROUND

4-38 California Forms of Pleading and Practice--Annotated § 38.26

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§ 38.26 Referee's Fees

[1] Availability

When a referee is appointed pursuant to *Code Civ. Proc. § 638*, the referee's fees must be paid as agreed by the parties. If the parties do not agree on the payment of fees and request the matter to be resolved by the court, the court may order the parties to pay the referee's fees as set forth in *Code Civ. Proc. § 645.1(b)* [*Code Civ. Proc. § 645.1(a)*]. When a referee is appointed pursuant to *Code Civ. Proc. § 639*, at any time after a determination of ability to pay is made as specified in *Code Civ. Proc. § 639(d)(6)* [*see § 38.12*[2][b][iii], [iv]], the court may order the parties to pay the fees of referees who are not employees or officers of the court at the time of appointment, as fixed pursuant to *Code Civ. Proc. § 1023*, in any manner determined by the court to be fair and reasonable, including an apportionment of the fees among the parties. "Parties," for this purpose, does not include parties' counsel [*Code Civ. Proc. § 645.1(b)*; *see Huntoon v. Hurley (1955) 137 Cal. App. 2d 33, 40, 290 P.2d 14* (reference for accounting pursuant to parties' agreement; allocation of referee's fees to defendant was proper when court expressly reserved right to determine how fees should be allocated and defendant did not object)]. A party who did not agree to a reference should not be required to pay the fees if the reference was not necessary [*see Code Civ. Proc. § 639(d)(6)*, discussed at *§ 38.12*[2][b][i], [iii], [iv]; *Taggares v. Superior Court (1998) 62 Cal. App. 4th 94, 104, 72 Cal. Rptr. 2d 387* (it is not "fair and reasonable" for court to impose entire cost of reference on objecting affluent party when opposing party is indigent); *Utemark v. Samuel (1953) 118 Cal. App. 2d 313, 317-318, 257 P.2d 656* (order that plaintiff pay half of referee's fees was erroneous when reference appeared to be unnecessary and for defendant's sole benefit)]. Neither *Code Civ. Proc. § 128* nor a trial court's inherent powers allow it to sanction an attorney by requiring him or her to pay the share of referee's fees apportioned to his or her client [*Andrews v. Superior Court (2000) 82 Cal. App. 4th 779, 782-783, 98 Cal. Rptr. 2d 426]* . For discussion of allocation of the referee'sfees and consideration of a party's economic hardship at the time of making a *Code Civ. Proc. § 639* reference, see *§ 38.12*[2][b][iii], [iv].

If an application is made to the court or referee to postpone a trial, the payment of the expenses occasioned by the postponement may be imposed, in the discretion of the court or referee as a condition of granting the postponement [*Code Civ. Proc. § 1024*].

The fact that a judgment is reversed on appeal does not deprive the court of power to order payment of the referee's fees [*Most Worshipful Lodge v. Sons etc. Lodge (1956) 140 Cal. App. 2d 833, 835, 295 P.2d 912]* .

[2] Amount

Under *Code Civ. Proc. § 1023*, the fees allowed are such reasonable sum as the court fixes for the time spent in the reference [*see, e.g., Matoza v. Matoza (1954) 124 Cal. App. 2d 572, 576, 269 P.2d 51* (allowance of $3,000 as reasonable, when referee devoted 230 hours to partnership accounting matter, paid expenses, prepared accountings, marshalled assets, provided office space, appeared in court, and held hearings)]. Allowance of a sum in advance for referee's fees without regard to time spent is erroneous. [*Van Orden v. Anderson (1932) 122 Cal. App. 132, 145, 9 P.2d 572]* . However, if the parties agree in writing on any other rate of compensation, the court must allow these rates [*Code Civ. Proc. § 1023*].

In some specific types of actions, other statutes govern fees [*see, e.g., Code Civ. Proc. § 874.010* (partition actions)].

[3] Procedure for Referee to Recover Fees

The referee has standing to petition the court for fees at any time after his or her report is filed, and is not required to wait for the court or the parties to act on the fees [*Most Worshipful Lodge v. Sons etc. Lodge (1956) 140 Cal. App. 2d 833, 834, 295 P.2d 912]* . For a form of petition, see *§ 38.78*.

Referee's fees may be made a lien on the property in controversy [*Madison v. Moon (1957) 148 Cal. App. 2d 135, 146, 306 P.2d 15]* .

[4] Appeal of Award Charging Party With Referee's Fees

An award charging the parties with a portion of referee's fees is appealable, and if it is found that there was no necessity for a reference and the party did not agree to it, that party should not be required to pay the fees [*see Utemark v. Samuel (1953) 118 Cal. App. 2d 313, 317-318, 257 P.2d 656* (order that plaintiff pay half of referee's fees was erroneous when reference appeared to be unnecessary and for defendant's sole benefit)].

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[Reserved]

§§ 38.27[Reserved]

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§ 38.40 Other Matthew Bender Publications

For a memorandum of points and authorities opposing a motion to tax costs, including referee's fees, see California Points and Authorities, Ch. 60, *Costs*

For memoranda of points and authorities relating to a reference in a partition action, see California Points and Authorities, Ch. 169, *Partition*

For memoranda of points and authorities relating to references generally, see California Points and Authorities, Ch. 201, *Reference and Referees*

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§ 38.41 State Statutes

[1] Reference Authorized

Reference by consent of parties. *Code Civ. Proc. § 638*

Reference on motion of party or court's own motion. *Code Civ. Proc. § 639*

[2] Particular References

Default judgments. *Code Civ. Proc. §§ 585(b), 636*

Examination of judgment debtors. *Code Civ. Proc. §§ 708.110(a), 708.140*

Amount of damages in actions against state. *Code Civ. Proc. § 1095*

Appointment of commissioner in winding up of corporation. *Corp. Code § 1806(e)*

Determination of water rights. *Water Code §§ 2000-2048*

[3] Appointment of Referee

Peremptory challenge to referee. *Code Civ. Proc. § 170.6*

Number and residence. *Code Civ. Proc. § 640*

Grounds for disqualification of referee. *Code Civ. Proc. §§ 641, 641.2*

Procedure for disqualification of referee. *Code Civ. Proc. § 642*

Undertaking of referee handling money or property. *Code Civ. Proc. § 571*

Court Commissioners as referees. *Code Civ. Proc. § 640*

[4] Duties of Referee

Issues of fact and law decided by referee. *Code Civ. Proc. § 592*

Action allowed by two of three referees. *Code Civ. Proc. § 1053*

[5] Evidence

Evidence Code as applicable to proceedings before referee. *Evid. Code § 300*

[6] Fees and Expenses

Payment of referee's fees. *Code Civ. Proc. §§ 645.1, 1023*

Payment of expenses for postponing trial. *Code Civ. Proc. § 1024*

[7] Decision and Judgment

Statement of decision. *Code Civ. Proc. § 632*

Time limits for report. *Code Civ. Proc. § 643*

Referee's decision as basis of judgment in consensual general reference. *Code Civ. Proc. §§ 644(a), 645*

Effect of decision in special reference. *Code Civ. Proc. §§ 644(b), 645*

Objections to referee's report. *Code Civ. Proc. §§ 643(c), 645*

Finding of referee as judgment roll. *Code Civ. Proc. § 670*

[8] Review and Appeal

Review of referee's report. *Code Civ. Proc. § 645*

New trials generally. *Code Civ. Proc. §§ 655-663.2*

Grounds for new trial. *Code Civ. Proc. § 657*

Notice of intention to move for new trial. *Code Civ. Proc. § 659*

[9] Criminal Penalties

Attempt to influence referee as crime. *Penal Code § 95*

Criminal acts of referee. *Penal Code § 96*

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§ 38.42 California Rules of Court

Procedures regarding statements of decision. Cal. Rules of Ct., Rule 2.1590

References under *Code Civ. Proc. § 638. Cal. Rules of Ct., Rule 3.900 et seq.*

References under *Code Civ. Proc. § 639. Cal. Rules of Ct., Rule 3.920 et seq.*

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§ 38.43 Decisions

[1] General Reference

Consent of parties is necessary for general reference. *Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 722, 269 P.2d 3* ; *Weinfeld v. Weinfeld (1958) 159 Cal. App. 2d 608, 613, 324 P.2d 342*

Neither *Code Civ. Proc. § 631* nor *Grafton Partners v. Superior Court (2005) 36 Cal. 4th 944, 32 Cal. Rptr. 3d 5, 116 P.3d 479* , prohibits waiver of jury trial in predispute agreement for judicial reference; *Code Civ. Proc. § 638* contains express waiver of those prohibitions. *Woodside Homes of California, Inc. v. Superior Court (Wheeler) (2006) 142 Cal. App. 4th 99, 103-104, 47 Cal. Rptr. 3d 683*

[2] Special Reference

In complex litigation, *Code Civ. Proc. §§ 187, 639* and Standards of Judicial Administration § 19 (Cal. Rules of Ct., App., Div. I, § 19) give court authority to appoint (1) discovery referee, even in absence of discovery disputes, to manage discovery and (2) settlement referee, even though order mistakenly called settlement referee mediator. *Lu v. Superior Court (1997) 55 Cal. App. 4th 1264, 1267, 1269-1271, 64 Cal. Rptr. 2d 561*

Code Civ. Proc. § 638(2) [*now see Code Civ. Proc. § 638(b)*] provides for special reference; in case of special reference, court may make its own findings anddecision on evidence reported by probate commissioner. *Estate of Johnston (1970) 12 Cal. App. 3d 855, 859-860, 91 Cal. Rptr. 116*

Interlocutory order for reference and accounting in action involving trust is well-established procedure supported by statutory and case law. *Hillman v. Stults (1968) 263 Cal. App. 2d 848, 874, 70 Cal. Rptr. 295*

Reference is not mandatory in action for accounting. *Chazan v. Most (1962) 209 Cal. App. 2d 519, 521-522, 25 Cal. Rptr. 864* ; *Walsh v. Jack Rubin & Sons, Inc. (1960) 182 Cal. App. 2d 652, 654-655, 6 Cal. Rptr. 346*

Court has discretion to deny motion for special reference. *Mashon v. Haddock (1961) 190 Cal. App. 2d 151, 168, 11 Cal. Rptr. 865* ; *Puim v. Callahan (1955) 135 Cal. App. 2d 70, 76-77, 286 P.2d 526*

[3] General and Special Reference Compared

Even if order of involuntary reference broadly purported to be general reference, judgment based on it is to be affirmed when trial court gave it no more effect than special reference for examination of long account under *Code Civ. Proc. § 639(a)*. *Barker Bros., Inc. v. Coates (1931) 211 Cal. 756, 758-759, 297 P. 8*

Reference is presumed to be special unless it may be properly inferred by court from recitals in findings of referee and those of court that reference was general. *Lewis v. Grunberg (1928) 205 Cal. 158, 161, 270 P. 181* ; *Estate of Johnston (1970) 12 Cal. App. 3d 855, 860, 91 Cal. Rptr. 116*

Voluntary reference requiring examination of long account with instructions to hear and decide whole issue is general reference. *Rosati v. Heimann (1954) 126 Cal. App. 2d 51, 53, 271 P.2d 953*

"Whole issue" referred to in *Code Civ. Proc. § 639(a)* means the account, not other issues having no immediate connection to account. *Fredenhall v. Shrader (1920) 45 Cal. App. 719, 723, 188 P. 580*

[4] Unauthorized References

Special discovery referee had no authority to hear and determine motions for summary judgment; plaintiff's participation in those motions was no substitute for consent required by *Code Civ. Proc. § 638* and did not amount to waiver or estoppel of right to have referee's determinations voided. *Jovine v. FHP, Inc. (1998) 64 Cal. App. 4th 1506, 1509, 1523, 1526-1532, 76 Cal. Rptr. 2d 322*

Special referee appointed under *Code Civ. Proc. § 639(a)* (long account) exceeds his or her powers by interpreting contract; contract interpretation is question of law for court unless conflicting extrinsic evidence is admitted; and then jury or, in case of equitable remedy like accounting, special master, must make findings equivalent to special verdict. *De Guere v. Universal City Studios, Inc. (1997) 56 Cal. App. 4th 482, 501, 65 Cal. Rptr. 2d 438*

There is no statutory authority other than *Evid. Code § 730* (appointment of expert) and *Fam. Code § 3112* (appointment of investigator in child custody matters) for appointment of anyone to make findings of fact to aid court in determining child custody issues when parties do not consent to general reference; guardian ad litem cannot be appointed to "determine issues of custody" because only statutory authority for appointment of guardian ad litem for minor is when minor is party. *In re Marriage of Lloyd (1997) 55 Cal. App. 4th 216, 219-222, 64 Cal. Rptr. 2d 37*

Neither *Fam. Code § 290* (general authority of court to enforce its order) nor *Fam. Code § 3160* (mediation) provides authority for appointment of special master or referee to make findings of fact to aid court in determining child custody issues when parties do not consent to general reference; order of reference special master to determine "any and all issues regarding custody" is overbroad and without statutory authority. *Ruisi v. Thieriot (1997) 53 Cal. App. 4th 1197, 1207-1211, 62 Cal. Rptr. 2d 766*

Trial court's assignment of all law and motion summary judgment proceedings to referee without parties' consent is unauthorized under *Code Civ. Proc. § 638* and violates *Cal. Const., art. VI, § 22* (prohibiting delegation of judicial power except for performance of subordinate judicial duties). *Aetna Life Ins. Co. v. Superior Court (1986) 182 Cal. App. 3d 431, 435-436, 227 Cal. Rptr. 460*

Contested action for dissolution of marriage does not constitute special proceeding permitting reference over objection of party under former *Code Civ. Proc. § 639(d)* [*now see Code Civ. Proc. § 639(a)(4)*]. *In re Marriage of Galis (1983) 149 Cal. App. 3d 147, 151-152, 196 Cal. Rptr. 659*

[5] Objections to Reference

Objections to reference waived if party fails to take exception to reference order, appears before referee, and submits evidence without objection. *Garland v. Smith (1933) 131 Cal. App. 517, 525, 21 P.2d 688*

[6] Referees

[a] Disqualification

Party does not waive objections to referee when referee's bias does not appear until hearing was underway. *J. G. Boswell Co. v. Industrial Acci. Com. (1944) 67 Cal. App. 2d 347, 356, 154 P.2d 13*

Fact that referee made findings after original hearing did not disqualify him from rehearing cause on grounds of expressing opinion; no showing that referee's decision would be same if additional evidence were produced at rehearing. *Taylor v. Industrial Acci. Com. (1940) 38 Cal. App. 2d 75, 79-80, 100 P.2d 511*

[b] Duties

Referees are appointed to exercise judicial powers to take testimony, hear parties, and report findings. *Department of Motor Vehicles v. Superior Court (1969) 271 Cal. App. 2d 770, 774, 76 Cal. Rptr. 804*

Referee acted within scope of duties in taking evidence on all affairs of partnership; such evidence was necessary to make proper accounting pursuant to court's order. *Fooshe v. Sunshine (1950) 96 Cal. App. 2d 336, 345-346, 215 P.2d 66*

[7] Referee's Report

[a] General Reference

Code Civ. Proc. § 634, and thus doctrine of implied findings, was applicable to general reference stipulated to be conducted in accordance with Code of Civil Procedure and Evidence Code as if proceedings were conducted by *Superior Court. SFPP, L.P. v. Burlington N. & Santa Fe Ry. Co. (2004) 121 Cal. App. 4th 452, 465, 17 Cal. Rptr. 3d 96*

Referee's statement of decision was sufficient under relevant condemnation statute [*Code Civ. Proc. § 1240.510*], which required finding that pipeline would unreasonably interfere with or impair use of proposed second track, and was supported by substantial evidence under doctrine of implied findings [*see Code Civ. Proc. § 634*] although finding did not use word "unreasonably" but stated only that location of pipeline was not compatible with greatest public good and least private injury because other parts of decision made clear that referee understood correct legal standard under applicable statute. *SFPP, L.P. v. Burlington N. & Santa Fe Ry. Co. (2004) 121 Cal. App. 4th 452, 476-478, 17 Cal.*

Rptr. 3d 96

Objections not raised in trial court barred from being raised on appeal; however, sufficiency of evidence as issue that may always be raised on appeal. *Estate of Raphael (1953) 115 Cal. App. 2d 525, 529, 252 P.2d 979* ; *Standley v. Feather River Pine Mills, Inc. (1952) 112 Cal. App. 2d 101, 104, 245 P.2d 657*

Motion for new trial as remedy against findings in general reference. *In re Riccardi (1926) 80 Cal. App. 66, 73, 251 P. 650*

[b] Special Reference

Referee's findings in special reference are not binding on court, but entitled to great weight. *People v. Acosta (1969) 71 Cal. 2d 683, 687, 78 Cal. Rptr. 864, 456 P.2d 136* ; *People v. Hatten (1966) 64 Cal. 2d 224, 226, 49 Cal. Rptr. 373, 411 P.2d 101* (overruled on other grounds); *People v. Garcia (1965) 63 Cal. 2d 265, 268, 46 Cal. Rptr. 324, 405 P.2d 148*

Court has inherent power to set aside referee's report in special reference. *Clark v. Millsap (1926) 197 Cal. 765, 785, 242 P. 918*

On review of special referee's report (writ of habeas corpus for prosecutorial misconduct), referee's conclusions of law and resolution of mixed questions of law and fact are subject to independent review; referee's findings of fact, though not binding on court, are given great weight when supported by substantial evidence. *People v. Kasim (1997) 56 Cal. App. 4th 1360, 1379, 66 Cal. Rptr 2d 494*

Code Civ. Proc. § 643 requirement of referee's statement of decison does not require referee's statement of decision to contain sufficient explanation to satisfy the requirements for a judge's statement of decision under *Code Civ. Proc. § 632*; however also stating that Section 632 would not have required statement of decision stating resolution of motion regarding attorney's fees. *Rebney v. Wells Fargo Bank (1991) 232 Cal. App. 3d 1344, 1351, 284 Cal. Rptr. 113* (criticized in *In re Marriage of Demblewski (1994) 26 Cal. App. 4th 232, 236 n.7, 31 Cal. Rptr. 2d 533*)

Failure to file written objection to referee's report or to properly move to set aside report as resulting in waiver of right to object to referee's decision in special reference. *Martino v. Denevi (1986) 182 Cal. App. 3d 553, 557, 227 Cal. Rptr. 354* .

Court as having power to set aside findings in special reference without granting new trial. *Weinfeld v. Weinfeld (1958) 159 Cal. App. 2d 608, 613, 324 P.2d 342*

Court as justified in taking further evidence if referee's report in special reference was deficient. *San Diego Fruit & Prod. Co. v. Elster (1954) 127 Cal. App. 2d 80, 86, 273 P.2d 70*

Legal Topics:

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PART III. RESEARCH GUIDE

4-38 California Forms of Pleading and Practice--Annotated § 38.44

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.44 Law Reviews and Legal Periodicals

M. Trmusch, *Reference: An Arbitration Alternative*, 20 Cal. Real Property L. J. 31 (2002)

Evans Jr., *Pay-as-you-go Justice: Discovery Referees Take the Load Off Trial Judges and Shift Costs to the Parties*, 11(1) Cal. Law. 108 (1991)

Leland, *The Special Master Referee*, 4(4) Cal. Law. 35 (1984)

Comment, *Private Means to Public Ends: Implications of the Private Judging Phenomenon in California*, *17 U.C. Davis L. Rev. 611 (1984)*

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4-38 California Forms of Pleading and Practice--Annotated § 38.45

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.45 Text References

Knight, Fannin, & Disco, Cal. Practice Guide: Alternative Dispute Resolution, 6:22 et seq. (The Rutter Group 1995)

Chernick, ADR for the Commercial Litigator, ch. IV-B (The Rutter Group 1989)

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, §§ 58-71 (4th ed. 1997)

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4-38 California Forms of Pleading and Practice--Annotated §§ 38.46-38.49

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

[Reserved]

§§ 38.46[Reserved]

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4-38 California Forms of Pleading and Practice--Annotated § 38.50

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.50 Stipulation for Reference

☐ Determine whether reference should be general or special. Consider:

☐ Desireability of having referee try the issues and decide the case without any further action on the part of the court versus having the referee limited to ascertaining a fact and reserving the decision of the case to the court [*compare Code Civ. Proc. § 638(a) with Code Civ. Proc. § 638(b)*].

☐ Determine who should act as referee. Consider:

☐ Whether there is any reason to have more than one person act as referee.

☐ What qualifications the referee should possess to expeditiously handle the subject matter of the reference, such as being an accountant or an appraiser.

☐ Determine whether the parties wish to stipulate as to when and by whom the referee's fees will be paid or to allow the referee to determine who should pay the fees.

☐ Contact each proposed referee and determine whether he or she is agreeable and available to hear

the matter.

☐ If the reference is for an accounting pursuant to *Code Civ. Proc. § 639(a)(1)* or *(2)*, consider whether to stipulate to an interlocutory judgment as well as the reference. For further discussion and forms, see Ch. 7, *Accounting, Action for*.

☐ Prepare stipulation and order for reference [for forms, *see § 38.60* (stipulation) and § 38.63 (order)].

☐ Make the following copies:

☐ Original for filing;

☐ One copy for each party;

☐ One copy for each party's attorney;

☐ One copy for each referee; and

☐ Office copy.

☐ Present stipulation and order to the clerk of the court either in person or by mail with a cover letter requesting that they be presented to the judge for signature. Signature is by [*Cal. Rules of Ct., Rule 3.901(a)*]:

☐ The judge to which the case is assigned.

☐ If not assigned, the presiding judge or law and motion department.

☐ File original stipulation and order, conform copies with the date and signature of the judge and the file stamp, and transmit conformed copies to opposing counsel to each referee.

NOTE:

Caption of Papers. On any paper filed after a case is pending before a referee, the word "Referee:" followed by the referee's name must be included below the number of the case [*Cal. Rules of Ct., Rule 2.111(8)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesAppointments

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4-38 California Forms of Pleading and Practice--Annotated § 38.51

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.51 Motion for Order of Special Reference

[1] Preliminary Determinations

☐ Determine the specific fact or issue to be referred

☐ Determine whether the issue to be referred involves a right to jury trial.

☐ If so, consent of the parties is required [*see § 38.12*[2][b][v]].

☐ Determine whether grounds exist to order special reference [*see § 38.12*[3]].

☐ Determine the department in which the motion must be filed and heard [*Cal. Rules of Ct., Rule 3.921(b)*]:

☐ The judge to whom the case is assigned.

☐ If the case has not been assigned, the presiding judge or the law and motion judge.

[2] Preparation of Papers

☐ Prepare moving papers:

☐ Notice of motion for order for special reference and supporting declarations [for a form, *see § 38.62*; *see also § 38.60* (form of motion)].

☐ Supporting memorandum of points and authorities.

☐ Proposed order, if required by local rules. A written order will be required when the appointment is made [*see Code Civ. Proc. § 639(d)*; for a form, *see § 38.63*].

☐ If requesting the appointment of a particular referee, the proposed referee's certification that he or she is consents to serve as referee and that he or she is aware of and will comply with applicable provisions of Canon 6 of the Code of Judicial ethics and Rules of Court. The certification must accompany the motion [*Cal. Rules of Ct., Rules 3.921(a), 3.924(a)*; for a form of certification, *see § 38.62A*].

☐ Proof of service [*see Code Civ. Proc. § 1013a*; for forms, *see* Ch. 518, *Service of Summons and Papers*].

☐ Make the following copies:

☐ Original for filing;

☐ One copy for delivery to court clerk with original where filing in duplicate is required by local court rule;

☐ One copy for each adverse party or attorney representing an adverse party;

☐ Office copy; and

☐ Copy for client, if desired.

☐ Other copies as desired.

[3] Service and Filing

☐ Select a hearing date, allowing sufficient time for service, and if required by local practice, clear the date with the court.

☐ Serve a copy of the notice of motion and supporting papers on counsel for each party who has appeared in the action or proceeding or, if a party has appeared in propria persona, on the party [*Code Civ. Proc. § 1015*] at least 16 court days before hearing [*Code Civ. Proc. § 1005(b)*]:

☐ Make service by one of the following methods:

☐ Delivery by person or substituted personal service [*Code Civ. Proc. § 1011*].

☐ Regular mail (extends notice period by 5 calendar days if mailed in and to location in California; 10 calendar days if either location is outside California; or 20 calendar days if either location is outside the United States) [*Code Civ. Proc. §§ 1005(b), 1012, 1013(a), (b)*].

☐ Note the date and place of mailing on the papers or attach an unsigned copy of the proof of service to the papers being served [*Code Civ. Proc. § 1013(b), (d), (g)*].

☐ Express Mail or other overnight delivery (increases notice period by two calendar days) [*Code Civ. Proc. §§ 1005(b), 1012, 1013(a), (b)*].

☐ Note the date and place of deposit for delivery on the papers or attach an unsigned copy of the proof of service to the papers being served [*Code Civ. Proc. § 1013(b), (d), (g)*].

☐ Fax, if the parties have agreed to service by fax (increases notice period by two calendar days) [*Code Civ. Proc. §§ 1005(b), 1012, 1013(e), (f)*].

☐ The copy of a paper served by facsimile transmission, should bear a notation of the date and place of transmission that contains the facsimile number to which transmitted or be accompanied by an unsigned copy of the proof of transmission that contains the facsimile telephone number to which the paper was transmitted [*Code Civ. Proc. § 1013(f), (g)*].

☐ Electronic service, if parties have agreed to electronic service (two court day extension; unclear whether notice period or period to respond is extended, or both) [*Code Civ. Proc. § 1010.6(a)(6)*].

☐ Have proof of service executed, and attach the original to the original of the papers that were served.

☐ Present the original notice and supporting papers to the clerk of the court for filing [*Code Civ. Proc. §§ 1005, 1010*] within the same time period as is applicable to service.

☐ Submit office copy to clerk to be stamped together with the original.

☐ Pay motion filing fee [*Gov. Code § 26830*].

☐ File proof of service no later than five calendar days before hearing date [*Cal. Rules of Ct., Rule 3.1300(c)*].

☐ Lodge the proposed order with the court, if required by local practice.

☐ If the motion is opposed, review opposition papers and determine if a reply is appropriate.

☐ If replying, prepare reply memorandum of points and authorities in the same number of copies as the original and serve and file with proof of service at least 5 court days before the time appointed for the hearing [*Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(a)*; *but see Code Civ. Proc. § 1010.6(a)(6)* (two court day extension if opposition papers were electronically served)].

[4] Hearing and Order

☐ Determine whether to appear at the hearing.

☐ If submitting a motion without an appearance, prepare, serve, and file a notice of nonappearance in the same number of copies as the notice of motion [*see Cal. Rules of Ct., Rule 3.1304(c)*].

☐ Obtain tentative ruling, if available [*see Cal. Rules of Ct., Rule 3.1308*], and consult local rules for procedure, if any for appealing at hearing and stipulating to or contesting the tentative ruling.

☐ If appropriate, attend hearing.

☐ If the motion is granted, and counsel has not already done so:

☐ Prepare an order of reference [*see § 38.63*]. in the same number of copies as the notice of motion.

☐ Present the original and copies of the order to the clerk of the court or the judge's courtroom clerk with the request that he or she obtain the judge's signature, conform the copies, and file the original.

☐ Deliver or send a conformed copy of the order to opposing counsel, along with a notice of the court's decision or order to all other parties or their attorneys [*Code Civ. Proc.§ 1019.5(a)*; for a form of notice of order, *see* Ch. 372, *Motions and Orders*].

NOTE:

Caption of Papers. On any paper filed after a case is pending before a referee, the word "Referee:" followed by the referee's name must be included below the number of the case [*Cal. Rules of Ct., Rule 2.111(8)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesAppointments

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4-38 California Forms of Pleading and Practice--Annotated § 38.52

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.52 Objections to Appointment of Referee

[1] Preliminary Determinations

☐ Determine if there are any legal objections to the appointment of the proposed referee.

☐ Review grounds for objection set forth in *Code Civ. Proc. §§ 641, 641.2* and *170.6* [for discussion, *see § 38.16*].

☐ Agreement for an order directing a reference does not waive grounds for objection to the appointment under *Code Civ. Proc. § 641* or *641.2* [*Code Civ. Proc. § 640(c)*; *Cal. Rules of Ct., Rule 3.905*].

☐ Participation in the selection process of a referee in a special reference does not waive grounds for objection to the appointment under *Code Civ. Proc. § 641* or *641.2* [*Code Civ. Proc. § 640(c)*; *Cal. Rules of Ct., Rule 3.925*].

☐ Object in writing with reasonable diligence [*Cal. Rules of Ct., Rules 3.905, 3.925*].

☐ If referee has not yet been appointed, present objections at hearing on appointment of referee.

☐ If referee has been appointed, move to vacate appointment.

☐ If objecting to discovery referee on grounds set forth in *Code Civ. Proc. § 170.6* (peremptory challenge), make motion within following times [*Code Civ. Proc. § 639(b)*]:

☐ If the discovery referee was appointed for all discovery purposes, within 10 days after notice of the appointment, or if the party has not yet appeared in the action, the motion must be made within 10 days after the that party's appearance.

☐ If the discovery referee has been assigned only for limited discovery purposes and the referee assigned is known, at least 10 days before the date set for hearing, at least five days before the date set for hearing.

[2] Motion to Vacate Appointment and Appoint New Referee

☐ Prepare moving papers:

☐ Notice of motion, and supporting declaration [for a form, *see § 38.68*].

☐ Memorandum of points and authorities.

☐ Proposed order, if required by local rules [for a form, *see § 38.69*].

☐ Proof of service [*see Code Civ. Proc. § 1013(a)*; for forms, *see* Ch. 518, *Service of Summons and Papers*].

☐ Make the following copies:

☐ Original for filing;

☐ One copy for delivery to court clerk with original where filing in duplicate is required by local court rule;

☐ One copy for each adverse party or attorney representing an adverse party;

☐ One copy for referee;

☐ Office copy; and

☐ Copy for client, if desired.

☐ Other copies as desired.

☐ Serve and file papers:

☐ Follow steps *set forth in § 38.51*[3], but also serve the referee [*see Cal. Rules of Ct., Rules 3.905, 3.925*].

☐ Hearing and order:

☐ Follow steps *set forth in § 38.51*[3], but also deliver or send a copy of the order to the former and new referees [*see Cal. Rules of Ct., Rules 3.905, 3.925*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureJudicial OfficersRefereesRemovals

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4-38 California Forms of Pleading and Practice--Annotated § 38.53

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.53 Proceedings Before Referee on General or Special Reference

☐ Include the word "Referee:" followed by the name of the referee below the number of the case on any paper filed after a case is pending before a referee [*Cal. Rules of Ct., Rule 2.111(8)*].

☐ Prepare for hearing.

- ☐ Check court facility for posting of referee's statement of information, if needed, concerning contact person from whom information about hearings before referee may be obtained.
- ☐ Organize pleadings, exhibits, and other documents.
- ☐ Prepare an outline of the case.
- ☐ Secure attendance of witnesses [*see* Ch. 535, *Subpoena*].
- ☐ Provide referee with copies of pleadings.

☐ While the case is pending before the referee, tender all original papers accompanied by the required

fee to the clerk for filing within the time limits specified by law.

☐ Provide a file-stamped copy to the referee of each paper relevant to the issues before the referee. When the paper may be filed without payment of a fee, instead of filing a filed-stamped copy, the filing party may use a true copy of the paper accompanied by a declaration about the date of its filing [*Cal. Rules of Ct., Rule 2.400(b)*].

☐ Attend hearing.

☐ The Evidence Code applies in actions before referees [*Evid. Code § 300*], and during the hearing, if the referee excludes proper testimony, admits improper evidence, or does any other act that materially affects a party's rights, the party should take exception [*Martino v. Denevi (1986) 182 Cal. App. 3d 553, 557, 227 Cal. Rptr. 354]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesGeneral Overview

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4-38 California Forms of Pleading and Practice--Annotated § 38.54

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.54 Objections to Referee's Report in General Reference

☐ Determine whether legal grounds exist for objections to the referee's decision [*see Code Civ. Proc. § 657*, discussed in *§ 38.76*[3]].

☐ Prepare papers:

☐ Notice of intention to move for a new trial and supporting declaration [*see Code Civ. Proc. §§ 645, 657*; for a form, *see § 38.76*].

☐ Memorandum of points and authorities.

☐ Make the following copies:

☐ Original for filing;

☐ One copy for delivery to court clerk with original where filing in duplicate is required by local court rule;

☐ One copy for each adverse party or attorney representing an adverse party;

☐ One copy for referee;

☐ Office copy; and

☐ Copy for client, if desired.

☐ Other copies as desired.

☐ Serve and file papers:

☐ Follow steps *set forth in § 38.51*[3].

NOTE:

Time Constraints. The notice of intention to move for new trial must be filed and served before judgment is entered or, after judgment has been entered, within 15 days of the date of mailing notice of entry of judgment by the clerk of the court pursuant to *Code Civ. Proc. § 664.5*, or of service by any party on the moving party of written notice of entry of judgment, or 180 days after the entry of judgment, whichever is earliest. These periods cannot be extended by stipulation or order and are not extended by *Code Civ. Proc. § 1013* when service is by mail [*Code Civ. Proc. § 659*].

Supporting affidavits or declarations and a memorandum of points and authorities must be filed within 10 days of filing the notice of intention [*Code Civ. Proc. § 659a* (affidavits); *Cal. Rules of Ct., Rule 3.1600* (points and authorities)].

For further discussion of the time limitations, see *§ 38.76*[4].

☐ If motion is granted, and the case is to be resubmitted to a referee, prepare stipulation for a new reference [*see § 38.50*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesJudicial ReviewCivil ProcedureJudicial OfficersRefereesGeneral Overview

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§ 38.55 Court Action on Report of Referee in Special Reference

[1] Objections to Referee's Report

☐ Determine what objections to raise to the referee's report [*Code Civ. Proc. § 645*; *see Code Civ. Proc. § 259(b)* (commissioners); *see, e.g., McHenry v. Moore (1855) 5 Cal. 90, 92* ; *San Diego Fruit & Prod. Co. v. Elster (1954) 127 Cal. App. 2d 80, 82, 273 P.2d 70]* .

☐ Objections to the referee's report must be filed within 10 days after the referee serves and files the report, or within another time directed by the court. Similarly, responses to any objections filed by another party must be filed within 10 days after those objections are served. Both objections and responses to objections must be served on the referee and all other parties [*Code Civ. Proc. § 643(c)*].

☐ Prepare objections [for a form, *see § 38.72*].

☐ If the opposing party has already made a motion to confirm or adopt the report, prepare responsive papers to the motion, incorporating the objections.

☐ If the opposing party has not moved to confirm or adopt the report, prepare papers for motion to set aside referee's report.

☐ Notice of motion and supporting declaration [for a form, *see § 38.73*].

☐ Memorandum of points and authorities in support of motion to set aside report of referee.

☐ Proposed order, if required by local rules.

☐ Proof of service [*see Code Civ. Proc. § 1013(a)*; for forms, *see* Ch. 518, *Service of Summons and Papers*].

☐ Make copies:

☐ See *§ 38.51*[2].

☐ Serve and file papers [*Code Civ. Proc. § 643(c)*]:

☐ Follow steps *set forth in § 38.51*[3].

☐ Hearing and order:

☐ Follow steps *set forth in § 38.51*[4].

NOTE:

Procedure if Report Is Set Aside. If the order is made setting aside the report of the referee, a new reference may be made on motion [*see § 38.51*] or the matter may be heard and disposed of by the court.

[2] Motion for Order to Confirm or Adopt Referee's Report

☐ Prepare papers for motion to confirm or adopt referee's report:

☐ Notice of motion and memorandum of points and authorities in support of motion to confirm or adopt the report of referee [*see, e.g., Hall v. Bru (1932) 216 Cal. 153, 154, 13 P.2d 716* ; *Fooshe v. Sunshine (1950) 96 Cal. App. 2d 336, 345, 215 P.2d 66* ; *see also Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1113(a)*; for a form, *see § 38.71*].

☐ Proposed order, if required by local rules [for a form, *see § 38.74*].

☐ If no other issues are outstanding, and otherwise appropriate under local practice, proposed judgment [*see § 38.75*].

- ☐ Proof of service [*see Code Civ. Proc. § 1013a*; for forms, *see* Ch. 518, *Service of Summons and Papers*].

- ☐ Make copies:

  - ☐ See *§ 38.51*[2].

- ☐ Serve and file papers:

  - ☐ Follow steps *set forth in § 38.51*[3].

- ☐ Hearing and order:

  - ☐ Follow steps *set forth in § 38.51*[4].

NOTE:

Appeal. In a special reference, if the referee's report is confirmed or adopted by the trial court and judgment is entered accordingly, review on appeal is of the judgment of the trial court [*see National Brass Wks. v. Weeks (1928) 92 Cal. App. 318, 321-322, 268 P. 412]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesJudicial ReviewCivil ProcedureJudicial OfficersRefereesGeneral Overview

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4-38 California Forms of Pleading and Practice--Annotated §§ 38.56-38.59

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

[Reserved]

§§ 38.56[Reserved]

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PART V. FORMS

4-38 California Forms of Pleading and Practice--Annotated § 38.60

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.60 Stipulation or Motion for Order Appointing Referee [Code Civ. Proc. §§ 638, 639; Cal. Rules of Ct., Rules 3.901, 3.921]--Judicial Council Form ADR-109

[1] FORM Stipulation or Motion for Order Appointing Referee [Code Civ. Proc. §§ 638, 639; Cal. Rules of Ct., Rules 3.901, 3.921]--Judicial Council Form ADR-109

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of Judicial Council form ADR-109, which is optional after January 1, 2006, for use either

- To stipulate to a general or special reference under *Code Civ. Proc. § 638* [*see* Paragraphs 2a(1) and 4a], or

- To move for order appointing a general or special referee under *Code Civ. Proc. § 638* or *639*.

If attachments are necessary, counsel may put them on the Judicial Council form of Attachment, CM-025. There is also a Judicial Council form of Declaration CM-031, which counsel may use to submit testimony in support of the motion.

These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Both the fax number and e-mail address of the attorney for the party in whose behalf the paper is presented should be supplied in the form, if available [*Cal. Rules of Ct., Rule 2.111(1)*], although the clerk must not reject a paper for filing solely on the ground that it does not contain an attorney's or party's fax number or e-mail address on the first page [*Cal. Rules of Ct., Rule 2.118(b)*]. Inclusion of the fax number or e-mail address does not constitute consent to service by fax or e-mail unless otherwise provided by law [*Cal. Rules of Ct., Rule 2.111(1)*].

For the related form of Order Appointing Referee [Judicial Council form ADR-110], showing the findings that will be required for issuance of the order and discussion of various items, including payment and allocation of fees and use of court facilities, see *§ 38.63*.

[3] When Used as Stipulation

If the parties have agreed to a reference, they have the alternative of doing so orally, in which case the stipulation should be read into the record in open court and entered in the minutes or on the docket [*Code Civ. Proc. § 638*]. Under *Code Civ. Proc. § 638*, a general reference is one in which the referee tries the entire issue and the referee's statement of decision becomes the judgment of the court without any further court action [*Code Civ. Proc. § 638(a)*; *see* Paragraph 4a(1)]. In a special reference, the referee ascertains only facts necessary to enable the court to determine an action or proceeding [*Code Civ. Proc. § 638(b)*; *see* Paragraph 4a(1)].

The parties may agree on the terms for compensating the referee [*see* Paragraph 5]. If the parties do not, the court may fix a reasonable sum and order payment in a fair and reasonable manner, including apportionmentof the fees among the parties [see *Code Civ. Proc. §§ 645.1, 1023*, discussed at *§ 38.26*].

[4] When Used as Motion

When used as a motion, this form should be filed and served along with a notice of motion, a memorandum of points and authorities, and any attachment required by the form ADR-109 itself [*Code Civ. Proc. §§ 1005(b)*, 1010 *Cal. Rules of Ct., Rules 3.1100, 3.1113(a)*]. For example, if the motion is made on the basis of a written agreement for an order appointing a referee pursuant to *Code Civ. Proc. § 638*, that agreement must be identified and the provision for appointment of a referee set forth in the motion or an attachment thereto [*see* Paragraph 2a(2)]. The motion, any attachments, which must include a proposed order, and if the parties have stipulated to or the applicant is requesting a particular referee, that referee's certificate, must be presented to the judge to whom the case is assigned, or to the presiding judge or the law and motion department if the case has not been assigned [*Cal. Rules of Ct., Rule 3.901*; *see also* Judicial Council Form ADR 110, Order Appointing Referee, reproduced at § 38.63[1] (referee's certificate is Item 9 of order)]. For a form of notice of motion and supporting declaration for use in that situation, see *§ 38.61*. For a form of notice of motion and supporting declaration for use for appointment of a special referee under *Code Civ. Proc. § 639*, *see § 38.62*.

[5] Cross References

For a form of stipulation to an interlocutory judgment and reference for accounting, see Ch. 7, *Accounting, Action for*

For discussion and forms relating to stipulations, see Ch. 533, *Stipulations*

For memoranda of points and authorities relating to references and referees, see California Points and Authorities, Ch. 201, *Reference and Referees* (Matthew Bender)

Legal Topics:

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

Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesAppointments

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 38 REFERENCE
PART V. FORMS

4-38 California Forms of Pleading and Practice--Annotated § 38.61

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.61 Notice of Motion and Supporting Declaration for Appointment of Referee--General or Special Reference Based on Parties Predispute Agreement [Code Civ. Proc. § 638; Cal. Rules of Ct. Rule 3.901]

[1] FORM Notice of Motion and Supporting Declaration for Appointment of Referee--General or Special Reference Based on Parties Predispute Agreement [Code Civ. Proc. § 638; Cal. Rules of Ct. Rule 3.901]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR REFERENCE, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM OF POINTS AND AUTHORITIES
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

To _____ [*specify party, e.g.,* defendant] _____ [*name*] and to

_____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* plaintiff] _____ [*name*] will, and hereby does, move for an order pursuant to *Code of Civil Procedure Section 638* referring this _____ [action *or* proceeding] to _____ [a referee *or* referees] to hear, try, and determine _____ [all of the issues in the case and to report a statement of decision *or* the issue(s) of _____ (*specify*)]. The motion will be made on the grounds that the parties to this _____ [action *or* proceeding] are parties to a written _____ [contract *or* lease] which provides that any controversy arising therefrom shall be heard by a reference].

The motion, a copy of which is attached to this notice of motion, will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. On or about _____ [*date*], the parties to the above entitled _____ [action *or* proceeding] entered into a written _____ [contract *or* lease], which is attached hereto as Exhibit "_____," and made a part hereof.

3. Paragraph _____ [*number*] of the _____ [contract *or* lease] provides that _____ [*set forth language of reference agreement, e.g.,* any controversy arising therefrom shall be heard by a reference].

4. The above entitled _____ [action *or* proceeding] involves _____ [*state facts showing that the case arises under the contract, e.g.,* a dispute between the parties as to the sufficiency of defendant's performance of its obligations under Paragraph _____ (*number*) of the _____ (contract *or* lease)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion.*]

[2] Use of Form

The form of notice of motion and supporting declaration in [1], *above*, is for use to move the court for an order for a general or special reference under *Code Civ. Proc. § 638*, which applies when the dispute arises out of a written contract or lease which provides that any controversy arising under it shall be heard by a reference. Either party may move for an order of general or special reference, and the court may order the reference if it finds that a reference agreement exists between the parties [*see Code Civ. Proc. § 638*].

Counsel should attach a completed motion in the form of Judicial Council form ADR 109, which is reproduced at § 38.60, the proposed order and referee's certificate, if applicable (referee's certificate is Item 9 of Judicial Council Form ADR 110, Order Appointing Referee,) and present them to the judge to whom the case is assigned, or to the presiding judge or the law and motion department if the case has not been assigned [*Cal. Rules of Ct., Rule 3.901*].

A memorandum of points and authorities must be served and filed with the notice of motion [*Cal. Rules of Ct., Rules 3.1100, 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[3] Cross References

For a form of proposed order granting a motion for reference, see *§ 38.63*

For further discussion and forms for use in making a reference in an action for an accounting, see Ch. 7, *Accounting, Action for*

For additional discussion and forms relating to written motions, see Ch. 372, *Motions and Orders*

For alternative forms of affidavits and declaration, see Ch. 15, *Affidavits, Certificates, and Declarations*

For memoranda of points and authorities supporting and opposing a motion for a reference, see California Points and Authorities, Ch. 201, *Reference and Referees* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesAppointments

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Chapter 38 REFERENCE
PART V. FORMS

4-38 California Forms of Pleading and Practice--Annotated § 38.62

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.62 Notice of Motion and Supporting Declaration for Appointment of Referee--Special Reference [Code Civ. Proc. § 639; Cal. Rules of Ct. Rule 3.921]

[1] FORM Notice of Motion and Supporting Declaration for Appointment of Referee--Special Reference [Code Civ. Proc. § 639; Cal. Rules of Ct. Rule 3.921]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR REFERENCE, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM OF POINTS AND AUTHORITIES
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

To _____ [*specify party, e.g.,* defendant] _____ [*name*] and to

_____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* plaintiff] _____ [*name*] will, and hereby does, move for an order under *Code of Civil Procedure Section 639(a),* subparagraph _____, referring this _____ [action *or* proceeding] to _____ [a referee *or* referees] to hear, try, and determine the issue(s) of _____ (*specify*)]. The motion will be made on the grounds that _____ [*specify issues to be subject of special reference, e.g.,* the taking of an account is necessary for the information of the court before judgment].

The motion, a copy of which is attached to this notice of motion, will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*State facts, in as many paragraphs as necessary, establishing grounds for reference of the issue under Code Civ. Proc. § 639, e.g.,* The chief issue in this action for the dissolution of the parties' partnership and an accounting is the accounting between the parties. Two voluminous written accounts are in issue, one 80-page computer printout compiled by plaintiff and another compiled by a certified public accountant employed by defendant, both covering the partnership's business during the period from _____ (*date*), to _____ (*date*)].

[3. _____ (*State facts necessary for findings required by Code Civ. Proc. § 639(d)(6), e.g.,* Both parties are able, without economic hardship, to pay a pro rata share of referee's fees. Thus, it is appropriate that the referee's fees be allocated to be paid in equal shares by each party).]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion.*]

[2] Use of Form

The form of notice of motion and supporting declaration in [1], *above*, is for use to move the court pursuant to *Code Civ. Proc. § 639* for an order referring an issue to a referee [*see Code Civ. Proc. § 639*].

Counsel should attach a completed motion in the form of Judicial Council form ADR 109, which is reproduced at § 38.60. Any party may make a motion for a special reference for determination of a specific question or issue enumerated in *Code Civ. Proc. § 639(a)* [*see Code Civ. Proc. § 639(a)*; for discussion of grounds for involuntary reference, *see § 38.12*[3]]. The declaration is intended to supply the facts needed to be supplied as attachments to Judicial Council form ADR-109, for example, Attachment 2b(1) in the case of a discovery referee. The declaration or evidence produced at the hearing on the motion must give the court the information necessary to include in its order the items required by Code *Civ. Proc. § 639(d)*, relating to allocation of the referee's fee, and in the case of a discovery reference, *Code Civ. Proc. § 639(c)*, relating to whether the referee is being appointed for all discovery purposes in the action, discussed at *§ 38.12*[2][b].

A memorandum of points and authorities must be served and filed with the notice of motion [*Cal. Rules of Ct., Rules 3.1100, 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

A motion for the appointment of a referee under *Code Civ. Proc. § 639* must be served and filed and heard by the department to which the case is assigned, or if the case has not been assigned, by the presiding judge or the law and motion department [*Cal. Rules of Ct., Rule 3.921(b)*]. The motion must specify the matter or matters to be included in the requested reference [*Cal. Rules of Ct., Rule 3.921(a)*; *see also* Judicial Council form ADR-109 Paragraphs 2b and 4b].

If the applicant is requesting the appointment of a particular referee, that referee's certificate must accompany the motion [*Cal. Rules of Ct., Rule 3.921(a)*; *see also* Judicial Council Form ADR 110, Order Appointing Referee, reproduced at § 38.63[1] (referee's certificate is Item 9 of order)]. Before any referee begins to serve, he or she must certify in writing that he or she consents to serve as provided in the order of appointment and is aware of and will comply with applicable provision of canon 6 of the Code of Judicial Ethics and with the California Rules of Court [*Cal. Rules of Ct., Rule 3.924(a)*]. For a form of certificate, see *§ 38.62A.*

[3] Cross References

For a form of proposed order granting a motion for a special reference pursuant to *Code Civ. Proc. § 639*, see *§ 38.63*

For further discussion and forms for use in making a reference in an action for an accounting, see Ch. 7, *Accounting, Action for*

For additional discussion and forms relating to written motions, see Ch. 372, *Motions and Orders*

For alternative forms of affidavits and declaration, see Ch. 15, *Affidavits, Certificates, and Declarations*

For memoranda of points and authorities supporting and opposing a motion for a reference, see California Points and Authorities, Ch. 201, *Reference and Referees* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesAppointments

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Chapter 38 REFERENCE
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4-38 California Forms of Pleading and Practice--Annotated § 38.62A

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.62A Certificate of [Proposed] Referee [Cal. Rules of Ct., Rules 3.901(b)(4), 3.904(a), 3.921(a), 3.924(a)]

[1] FORM Certificate of [Proposed] Referee [Cal. Rules of Ct., Rules 3.901(b)(4), 3.904(a), 3.921(a), 3.924(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	CERTIFICATE OF [PROPOSED] REFEREE
Defendant.	)	
	)	
	)	

_____

I, _____ [*name, business address, telephone number, and if a member of the State Bar, his/her State Bar number*], certify that I am aware of the Rules of Court pertaining to references and of Canon 6 of the Code of Judicial Ethics and consent to serve as referee in this matter and will comply with those provisions and rules.
Dated: _____.

_____ [*signature*]

[2] Use of Form

The form of certificate in [1], *above*, is for use if necessary, that is if counsel does not use the referee's certificate that is Item 9 of Judicial Council form ADR-109, Order Appointing Referee, which is reproduced at § 38.63. If the moving party is requesting or the parties have stipulated to the appointment of a particular referee, his or her certificate must accompany the motion [*Cal. Rules of Ct., Rules 3.901(b)(1)* (*Code Civ. Proc. § 638* reference), 3.921(a) (*Code Civ. Proc. § 639* reference); *see also Cal. Rules of Ct., Rule 3.901(b)(5)* (proposed order must accompany motion for appointment of referee under *Code Civ. Proc. § 638*]. The referee's certificate must be filed with the court before the referee begins to serve [*Cal. Rules of Ct., Rules 3.904(a)* (*Code Civ. Proc. § 638* reference), 3.924(a) (*Code Civ. Proc. § 639* reference)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesAppointments

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4-38 California Forms of Pleading and Practice--Annotated § 38.63

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.63 Order Appointing Referee [Code Civ. Proc. §§ 638, 639; Cal Rules of Ct., Rules 3.902, 3.922]--Judicial Council Form ADR-110

[1] FORM Order Appointing Referee [Code Civ. Proc. §§ 638, 639; Cal Rules of Ct., Rules 3.902, 3.922]--Judicial Council Form ADR-110

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of Judicial Council form ADR-110, which is optional after January 1, 2006, to order the appointment of a general or special referee under *Code Civ. Proc. § 638* or *639* on the stipulation of the parties or after a motion [*see* Paragraphs 1 and 2].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Both the fax number and e-mail address of the attorney for the party in whose behalf the paper is presented should be supplied in the form, if available [*Cal. Rules of Ct., Rule 2.111(1)*], although the clerk must not reject a paper for filing solely on the ground that it does not contain an attorney's or party's fax number or e-mail address on the first page [*Cal. Rules of Ct., Rule 2.118(b)*]. Inclusion of the fax number or e-mail address does not constitute consent to service by fax or e-mail unless otherwise provided by law [*Cal. Rules of Ct., Rule 2.111(1)*].

The court can name one to three referees as agreed on by the parties, or as ordered by the court if they cannot agree [*see*

Code Civ. Proc. § 640; Paragraph 3], but Judicial Council form ADR-110 provides for only one referee.

[3] Items Applicable to Appointment Under Code Civ. Proc § 638

The order must clearly state whether the reference covers all issues or is limited to specified issues [*Cal. Rules of Ct., Rule 3.902(2)*; *see* Paragraph 4]. The parties have the option of providing a different manner or time for the referee to report, as long as it is approved by the court [*Code Civ. Proc. § 643(b)*; *see* Paragraph 8a(2) and 8b(1)]. Otherwise, the report must be made in writing within 20 days after the hearing is concluded and the matter submitted [*see Code Civ. Proc. § 643(a)*; Paragraph 8a(1)].

The order must include the referee's name, business address, telephone number, and if applicable, State Bar number [*Cal. Rules of Ct., Rule 3.902(1)*; Paragraph 3]. Whether done at Item 9 of Judicial Council form ADR-110 or filed as a separate document, the referee's certificate must be filed before the referee begins to serve [*Cal. Rules of Ct., Rule 3.904(a)*]. For discussion of the qualifications for referees, see *§§ 38.15, 38.16*.

The order must state whether the referee will be privately compensated [*Cal. Rules of Ct., Rule 3.902(3)*; Paragraph 5]. When a reference is made pursuant to *Code Civ. Proc. § 638*, the referee's fees are paid by the parties, unless the parties cannot agree, in which case the court may order apportionment of fees pursuant to *Code Civ. Proc. § 645.1(b)*, which provides for compensation of referees who are not employees or officers of the court at the time of their appointment [*Code Civ. Proc. § 645.1(a)*; *see* Paragraph 5a, b].

The order must specify whether the use of court facilities and court personnel is authorized [*Cal. Rules of Ct., Rule 3.902(4)*; Paragraph 6]. Parties electing to use a privately compensated referee pursuant to *Code Civ. Proc. § 638* are deemed to have elected to proceed outside the courthouse; therefore, court facilities and court personnel must not be used except on a finding by the presiding judge that use would further the interests of justice. For all matters pending before privately compensated referees, the clerk must post a notice indicating the case name and number as well as the telephone number of the person to contact to arrange for attendance at any proceeding that would be open to the public if held in a courthouse [*Cal. Rules of Ct., Rule 3.907, 3.931(b)(3)*; *see also Cal. Rules of Ct., Rule 3.931(c)(1)* (showing required of order for appropriate hearing site) and § 38.81].

The order must be fled with the clerk or entered in the minutes of the court [*Cal. Rules of Ct., Rule 3.902*].

[4] Items Applicable to Section 639 Special Reference Other Than for Discovery

The order must include the referee's name, business address, telephone number, and if applicable his or her State Bar number [*Code Civ. Proc. § 639(d)(4)*; *Cal. Rules of Ct., Rule 3.922(b)*; Paragraph 3]. Whether done at Item 9 of Judicial Council form ADR-110 or filed as a separate document, the referee's certificate must be filed before the referee begins to serve [*Cal. Rules of Ct., Rule 3.924(a)*]. For a form of certificate, see *§ 38.62A*.

In addition, the order must specify [*Code Civ. Proc. § 639(d)*; *Cal. Rules of Ct., Rule 3.922(c),(d),* (f)-(g)]:

- Whether the referee is appointed pursuant to *Code Civ. Proc. § 639(a)(1), (2), (3), (4),* or *(5)* [Paragraph 2(a), (b)].

- When the referee is appointed pursuant to *Code Civ. Proc. § 639(a)(1), (2), (3),* or *(4),* a statement of the reason the referee is being appointed (Paragraph 2).

- The subject matter or matters included in, and the scope of, the reference (Paragraph 4b).

- If the referee will be appointed at a cost to the parties, the maximum hourly rate the referee may

charge and, at the request of any party, the maximum number of hours for which the referee may charge (Paragraph 5c).

- If the referee will be appointed at a cost to the parties, either, the finding that no party has established an economic inability to pay a pro rata share of the referee's fee (first alternative Paragraph 4), or a finding that one or more parties has established an economic inability to pay a pro rata share of the referee's fees and that another party has agreed voluntarily to pay that additional share of the referee's fee (Paragraph 2c).

  - When the issue of economic hardship is raised before the referee begins performing services, a determination of fair and reasonable apportionment of references costs (Paragraphs 2c and 5c).

  - The extent, if any, to which court facilities and court personnel may be used in connection with the reference (Paragraph 6b).

- Any conditions on the reference including any additional terms of the obligation of each party to pay the referee (Paragraphs 5c(3), (4), 6 -8).

A reference under *Code Civ. Proc. § 639,* entitles the parties to the use of court facilities and court personnel to the extent provided in the order of reference. The proceedings may be held in a private facility, but if so the private facility must be open to the public [*Cal. Rules of Ct., Rule 3.926*; Paragraphs 6b and 7].

[5] Items Applicable to Appointment of Special Referee for Discovery

Like other references under *Code Civ. Proc. § 639,* an order appointing a referee pursuant to *Code Civ. Proc. § 639* contains a certification by the referee that he or she is aware of and will comply with applicable provisions of canon 6 of the Code of Judicial Ethics and the Rules of Court pertaining to references and that he or she consent to serve (Paragraph 9). Whether done at Item 9 of Judicial Council form ADR-110 or filed as a separate document, the referee's certificate must be filed before the referee begins to serve [*Cal. Rules of Ct., Rule 3.924(a)*]. For a form of certificate, see *§ 38.62A*. The order must include the referee's name, business address, telephone number, and if applicable his or her State Bar number [*Code Civ. Proc. § 639(d)(4)*; *Cal. Rules of Ct., Rule 3.922(b)*; Paragraph 3]. For discussion of the qualifications for referees, see *§§ 38.15, 38.16*.

In addition, an order appointing a discovery referee must specify [*Code Civ. Proc. § 639(c), (d)*; *Cal. Rules of Ct., Rule 3.922(c)-(h)*]:

- That the referee is appointed pursuant to *Code Civ. Proc. § 639(a)*((5) [Paragraph 2(a), (b)].

- Whether the referee is being appointed for all discovery purposes in the action, and the subject matter or matters included in the reference (Paragraphs 4b).

- The exceptional circumstances requiring the reference, which must be specific to the circumstances of the particular case (Paragraph 2a).

- That the referee is authorized to set the date, time, and place for all hearings determined by the referee to be necessary; direct the issuance of subpoenas; preside over hearings' take evidence; and rule on objections, motions, and other requests made during the course of the hearing [Paragraph 4b(2)(b)].

- If the referee will be appointed at a cost to the parties, the maximum hourly rate the referee may

charge and, at the request of any party, the maximum number of hours for which the referee may charge (Paragraph 5c(1) and (2)).

- If the referee will be appointed at a cost to the parties, either the finding that no party has established an economic inability to pay a pro rata share of the referee's fee a finding that one or more parties has established an economic inability to pay a pro rata share of the referee's fees and that another party has agreed voluntarily to pay that additional share of the referee's fee, or a finding that the referee is being appointed at no cost to the parties (Paragraph 2c).

- When the issue of economic hardship is raised before the referee begins performing services, a determination of fair and reasonable apportionment of references costs (Paragraphs 2c and 5c).

- The extent, if any, to which court facilities and court personnel may be used in connection with the reference (Paragraph 6b).

- The name and telephone number of a person to contact to arrange for attendance at any proceeding before the referee (Paragraph 7).

- The referee's authority and duty to report findings and make a recommendation thereon, including a recommendation for allocation of payment (Paragraph 8b(2)) [*Code Civ. Proc. §§ 639(a)(5), 643(a), (c)*].

The referee's report is required by *Code Civ. Proc. § 643(c)* to contain a recommendation for allocation of payment. When the issue of economic hardship is raised before the commencement of the referee's services, the court must determine a fair and reasonable apportionment of reference costs (Paragraph 5c(3) or (4)) [*Cal. Rules of Ct., Rule 3.922(f)(3)*]. The court may modify its order as to the apportionment and may consider a recommendation by the referee as a factor in determining any modification [*Cal. Rules of Ct., Rule 3.922(f)(3)*].

[6] Notice of Order

When a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order must be given by the prevailing party to all other parties or their attorneys, in the manner provided in *Code Civ. Proc. §§ 1010-1020* unless notice is waived by all parties in open court and is entered in the minutes [*Code Civ. Proc. § 1019.5(a)*; for discussion and a form of notice, *see* Ch. 372, *Motions and Orders*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesAppointments

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Chapter 38 REFERENCE
PART V. FORMS

4-38 California Forms of Pleading and Practice--Annotated §§ 38.64-38.65

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

[Reserved]

§§ 38.64[Reserved]

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4-38 California Forms of Pleading and Practice--Annotated § 38.66

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.66 Notice of Motion and Supporting Declaration to Withdraw Stipulation for Appointment of Referee [Cal. Rules of Ct., Rule 3.906]

[1] FORM Notice of Motion and Supporting Declaration to Withdraw Stipulation for Appointment of Referee [Cal. Rules of Ct., Rule 3.906]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MOTION AND NOTICE OF MOTION TO WITH-
vs.	)	DRAW STIPULATION FOR APPOINTMENT OF
_____ [*name*],	)	REFEREE, SUPPORTING DECLARATION OF
Defendant.	)	_____ [*name*], AND SUPPORT-
	)	ING MEMORANDUM
	)	Date: _____
	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____
		Referee: _____ [*name(s)*]

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant] will, and hereby does, move for an order to withdraw _____ [*moving party, e.g.,* defendant]'s stipulation for the appointment of a referee. The motion will be made on the grounds that good cause exists for permitting the _____ [*moving party, e.g.,* defendant] to withdraw the stipulation.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*State facts within declarant's knowledge showing good cause for permitting the moving party to withdraw the stipulation*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion*]

[2] Use of Form

The form of notice of motion in [1], *above*, is for use to move the court for permission to withdraw a stipulation for the appointment of a referee. The motion is to be heard by the judge to whom the case is assigned, or by the presiding judge or by the law and motion judge. If the motion is granted, the case must be transferred to the trial docket [*Cal. Rules of Ct., Rule 3.906(b)*; for discussion, *see § 38.18*].

[3] Contents of Supporting Declaration

The supporting declaration must establish facts showing good cause to permit the party to withdraw the stipulation. A declaration that a ruling is based on an error of fact or law does not establish good cause [*see Cal. Rules of Ct., Rule 3.906(a)(1)*]. The fact that the court orders the case to be heard at a site appropriate for public access is also not grounds for withdrawal of the stipulation [*Cal. Rule of Ct., Rules 3.906(a)(2), 3.931(c)(2)*].

[4] Supporting Memorandum

A supporting memorandum is required to be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*].

[5] Service and Filing of Notice

The notice of motion is to be served and filed 16 court days prior to the time appointed for the hearing, subject to the longer periods of notice required if service is by mail, fax, or overnight delivery [*see Code Civ. Proc. § 1005(a)(13), (b)*; *Cal. Rules of Ct., Rule 3.906(b)*]. For discussion of the procedure on noticed motions, see Ch. 372, *Motions and Orders* .

[6] Cross References

For general references relating to motions, see *§ 38.61*[3]

For a form of proposed order granting a motion to withdraw a stipulation, see *§ 38.67*

For a form of application for accessible and appropriate site, see *§ 38.81*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesRemovals

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Chapter 38 REFERENCE
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4-38 California Forms of Pleading and Practice--Annotated § 38.67

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.67 Order Granting Motion for Permission to Withdraw Stipulation for Appointment of Referee [Cal. Rules of Ct., Rule 3.906]

[1] FORM Order Granting Motion for Permission to Withdraw Stipulation for Appointment of Referee [Cal. Rules of Ct., Rule 3.906]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Dept.: _____
Defendant.	)	Trial Date: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Referee: _____ [*name(s)*]
	)	

_____

The motion of _____ [*identify party, e.g.,* defendant] for an order permitting _____ [*moving party, e.g.,* defendant] to withdraw his/her/its stipulation to the appointment of a referee came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof of good cause made to the satisfaction of the court,

IT IS ORDERED that the motion be, and it hereby is, granted and that the appointment of _____ [*name*] be hereby vacated.

IT IS FURTHER ORDERED that this matter be transferred to trial court docket.

Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above,* is for use when the court grants a motion to permit a party to withdraw his or her stipulation to appointment of a referee. If the motion is granted, the case is to be transferred to the trial court docket [*see Cal. Rules of Ct., Rule 3.906(b)*; for a related form of notice of motion, *see § 38.66*].

[3] Notice of Order

When a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order must be given by the prevailing party to all other parties or their attorneys, in the manner provided in *Code Civ. Proc. §§ 1010-1020* unless notice is waived by all parties in open court and is entered in the minutes [*Code Civ. Proc. § 1019.5(a)*; for discussion and a form of notice, *see* Ch. 372, *Motions and Orders*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesRemovals

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Chapter 38 REFERENCE
PART V. FORMS

4-38 California Forms of Pleading and Practice--Annotated § 38.68

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.68 Notice of Motion and Supporting Declaration to Vacate Appointment of Referee [Code Civ. Proc. § 641] and to Appoint New Referee

[1] FORM Notice of Motion and Supporting Declaration to Vacate Appointment of Referee [Code Civ. Proc. § 641] and to Appoint New Referee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	MOTION AND NOTICE OF MOTION TO VA-
vs.	)	CATE APPOINTMENT OF REFEREE AND AP-
_____ [*name*],	)	POINT NEW REFEREE, SUPPORTING DECLAR-
Defendant.	)	ATION OF _____ [*name*], AND
	)	MEMORANDUM OF POINTS AND AUTHORIT-
	)	IES
	)	Date: _____
	)	Time: _____
	)	Dept.: _____
		Judge: _____
		Date Action Filed: _____

Trial Date: _____
Referee: _____ [*name(s)*]

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* plaintiff] will, and hereby does, move for an order vacating the appointment of _____ [*name*] as referee and appointing a new referee to hear, try, and determine _____ [*specify issue(s) to be determined by referee*]. The motion will be made on the grounds that _____ [*specify ground or grounds under Code Civ. Proc. § 641 or 641.2 for disqualification of referee, e.g.,* he/she has an interest in the main question involved in this action].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

DECLARATION OF _____ [*name*] IN SUPPORT OF MOTION

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

[*EITHER, if grounds for disqualification exist under Code Civ. Proc. § 641(a)*]

2. _____ [*Name of referee*] lacks the qualification to render him/her competent to serve as a juror under *Code of Civil Procedure Section 203* [except a requirement of residence within a particular county in the state], in that _____ [*set forth nature of disqualifying facts, e.g.,* he/she is presently serving as a grand juror in the _____ Court of _____ County, State of California].

[*AND/OR, if grounds for disqualification exist under Code Civ. Proc. § 641(b)*]

2. _____ [*Name of referee*] is _____ [*specify nature of disqualifying relationship under Code Civ. Proc. § 641(b), e.g.,* the brother of the Secretary of _____ (*name of corporation*), the defendant in this action].

[*AND/OR, if grounds for disqualification exist under Code Civ. Proc. § 641(c)*]

2. _____ [*Name of referee*] is _____ [*specify nature of disqualifying relationship under Code Civ. Proc. § 641(c), e.g.,* the business partner of _____ (*name*), the defendant in this action, in _____ (*name of business*), a general partnership)].

[*AND/OR, if grounds for disqualification exist under Code Civ. Proc. § 641(d)*]

2. _____ [*Name of referee*] _____ [served as a juror *or* was a witness] in the trial held in _____ [*title of case*], Case Number _____, in the _____ Court, County of _____, California, which was an action between the same parties for the same cause of action as is this action.

[*AND/OR, if grounds for disqualification exist under Code Civ. Proc. § 641(e)*]

2. _____ [*Name of referee*] is _____ [*specify nature of disqualifying relationship under Code Civ. Proc. § 641(e), e.g.,* a creditor of thepartnership business for which an examination of a long account is necessary to the proceedings, and therefore has an interest in the main question involved in this action].

[*AND/OR, if grounds for disqualification exist under Code Civ. Proc. § 641(f)*]

2. _____ [*Name of referee*] has formed or expressed an unqualified opinion or belief as to the merits of this action in that _____ [*set forth supporting facts, e.g.,* he/she was quoted in the _____ (*date*), edition of _____ (*name of newspaper*) as stating that defendant _____ (*name*) had no chance of prevailing in this action because defendant had clearly been at fault. A copy of the interview is attached to this declaration as Exhibit "_____"].

[*AND/OR, if grounds for disqualification exist under Code Civ. Proc. § 641(g)*]

2. There exists in _____ [*name of referee*] a state of mind evincing _____ [enmity against *or* bias toward] _____ [*name*], _____ [*specify party, e.g.,* plaintiff] in this action, as shown by _____ [*state supporting facts, e.g.,* _____'s (*name of referee*) record of voting against admitting women as members of _____ (*name of organization*), an organization to which _____ (*name of referee*) belongs. _____ (Plaintiff *or* Defendant) _____ (*name*) is a woman and has applied for membership in this organization several times from _____ (*date*) to the present. A copy of the referee's voting record on the issue of admitting women as members of _____ (*name of organization*) is attached to this declaration as Exhibit "_____," and copies of _____ (plaintiff's *or* defendant's) applications for membership in _____ (*name of organization*) are attached as Exhibits "_____"].

[*AND/OR, if grounds for disqualification exist under Code Civ. Proc. § 641.2*]

2. This is an action brought under the provisions of *Government Code Sections 12600-12612*. _____ [*name of referee*] is not technically qualified with respect to the particular subject matter of this proceeding, that is the protection of natural resources from pollution, impairment, or destruction, in that _____ [*state supporting facts, e.g.,* her resume of qualifications states that she has only a Bachelor of Arts degree in English Literature, has been employed as an instructor in literature and the arts at the junior college level, and has no other educational background, employment, or other experience that would qualify her to hear the technical issues involved in this matter].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____.

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion.*]

[2] Use of Form

The form of notice of motion and supporting declaration in [1], *above,* is for use to move the court for an order disqualifying a referee who has been appointed to hear the matter and appoint a new referee. The grounds for disqualification of a referee are set forth in *Code Civ. Proc. § 641* (general provision) and *Code Civ. Proc. § 641.2* (environmental pollution action), and *Code Civ. Proc. § 170.6* (peremptory challenge, also applies to judges and commissioners). A peremptory challenge can be established by affadavit, and the matter transferred to another referee. For forms for use to make a peremptory challenge to a referee or commissioner under *Code Civ. Proc. § 170.6*, see Ch. 317, *Judges* , Pt. IV.

In a discovery matter, a motion to disqualify an appointed referee pursuant to *Code Civ. Proc. § 170.6* must be made to the court by a party either [*Code Civ. Proc. § 639(b)*]:

- In the case of a discovery referee has been appointed for all discovery purposes, within 10 days after notice of the appointment, or if the party has not yet appeared in the action, within 10 days after the appearance.

- In the case of discovery referee who has been assigned only for limited discovery purposes, at least five days before the date set for hearing, if the referee assigned is known at least 10 days before the date set for hearing.

The supporting declaration in this form may be adapted for use as an objection to the appointment of the referee [*Code Civ. Proc. § 642*] on the grounds set forth in *Code Civ. Proc. § 641* (general provision) and/or *Code Civ. Proc. § 641.2* (environmental pollution action). Counsel should use as many of the Paragraphs 2 as are applicable. The an objection

must be made with reasonable diligence and must be in writing and served on all parties and the referee and filed with the court [*Cal. Rules of Ct., Rules 3.905, 3.925*]. The objection may be used in opposition to a motion for reference [*see §§ 38.61, 38.62*]. Participation in the referee selection procedure [*see Code Civ. Proc. § 640*] does not constitute a waiver of grounds for objection to the appointment of a referee under *Code Civ. Proc. §§ 641* or *641.2*. [*Code Civ. Proc. § 640(c)*].

A memorandum of points and authorities must be served and filed with the notice of motion [*Cal. Rules of Ct., Rules 3.1100, 3.1113(a)*; *see Code Civ.Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities*
.

[3] Hearing on Objections

The court must hear and dispose of all objections taken to the appointment of any person as referee [*Code Civ. Proc. § 642*].

[4] Cross References

For general references relating to motions, see *§ 38.61*[3]

For a form of proposed order granting a motion to disqualify a referee, see *§ 38.69*

For memoranda of points and authorities supporting the contention that a referee should be disqualified, see California Points and Authorities, Ch. 201, *Reference and Referees* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesRemovals

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4-38 California Forms of Pleading and Practice--Annotated § 38.69

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.69 Order Granting Motion to Vacate Appointment of Referee [Code Civ. Proc. § 641] and to Appoint New Referee

[1] FORM Order Granting Motion to Vacate Appointment of Referee [Code Civ. Proc. § 641] and to Appoint New Referee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [*identify party, e.g.,* plaintiff] for an order vacating the appointment of

_____ [*name*] as referee and appointing a new referee came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted as follows:

1. The appointment of _____ [*name, business address, and telephone number*] is vacated.

[*EITHER, if parties have stipulated to a new referee or have submitted nominations and the same name appears on both lists of nominations*]

2. _____ [*name, business address, and telephone number*] is appointed in his/her stead to hear evidence and to determine _____ [any and all issues in this action/proceeding *or specify issue(s) to be determined*] pursuant to subsection _____ of Section [638 *or* 639] of the Code of Civil Procedure.

[*OR, if a new referee must be selected*]

2. The parties are ordered to meet and confer and attempt to agree on a nominee to act as replacement referee and to notify the court of their agreement or failing to agree, each party to file a written nomination of replacement nominees setting forth the name and address of three nominees each within _____ [*number, e.g.,* 10] days. Thereafter each nominee shall file with the court a declaration setting forth all priorcontacts with the parties and counsel herein and setting forth the nominees' consent to serve herein. Thereafter the court shall select and appoint a substitute referee by a separate order herein.

Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, is for use when the court grants a motion to vacate the appointment of a referee and appoint another referee to hear the matter [*see Code Civ. Proc. §§ 641, 642*; for a related form of notice of motion, *see § 38.68*].

The form in [1], *above*, contemplates naming the replacement referee in this order if the parties have stipulated to a particular referee or happen to have both nominated the same referee prior to the time of this order is made. The form contemplates that otherwise the parties will attempt to agree on a referee after the order vacating the appointment of the prior referee is made, or will each nominate up to three potential referees [*Code Civ. Proc. § 640(b)*; for discussion, *see § 38.15*[3]], and that after time for the proposed referee to make his or her disclosures [*see Code Civ. Proc. § 641*; for discussion, *see § 38.16*], the court will name the replacement referee in a separate order. Although this will often be a minute order, counsel should file a proposed order with a blank for the referee's name.

[3] Notice of Order

When a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order must be

given by the prevailing party to all other parties or their attorneys, in the manner provided in *Code Civ. Proc. §§ 1010-1020* unless notice is waived by all parties in open court and is entered in the minutes [*Code Civ. Proc. § 1019.5(a)*; for discussion and a form of notice, *see* Ch. 372, *Motions and Orders*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesRemovals

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4-38 California Forms of Pleading and Practice--Annotated § 38.70

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.70 Report of Referee [Code Civ. Proc. § 643]--Judicial Council Form ADR-111

[1] FORM Report of Referee [Code Civ. Proc. § 643]--Judicial Council Form ADR-111

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of Judicial Council form ADR-111, Report of Referee, which is optional after January 1, 2006. It may be used for either a general or special reference. If attachments are necessary the Judicial Council form of Attachment, CM-025, may be used.

Both forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. Unless otherwise directed by the court, the referee or commissioner must report his or her statement of decision in writing to the court within 20 days after the hearing, if any, has been concluded, and the matter submitted [*Code Civ. Proc. § 643(a)*]. A referee appointed pursuant to *Code Civ. Proc. § 638* must report as agreed by the parties and approved by the court [*Code Civ. Proc. § 638(b)*]. By analogy to the procedure on statements of decision after trial, it would appear that any party may make proposals as to the statement of decision [*see Code Civ. Proc. § 632*].

This form may be used in a special reference, in which the report must include [*Code Civ. Proc. § 643(c)*]:

- A recommendation on the merits of any disputed issue (Paragraph 4).

- A statement of the total hours spent and the total fees charged by the referee (Paragraph 3a and b).
- The referee's recommended allocation of payment (Paragraph 3c).

The referee must file the report with the court and serve the report on all parties [*Code Civ. Proc. § 643(c)*]. The form allows the court to adopt some or all of the factual and legal determinations set forth in the statement of decision. If used in a special reference, the Statement of Decision heading should be omitted, and Second Alternative Paragraphs 1 and 2 must be used.

[3] Effect of Report

In a consensual general reference [*see Code Civ. Proc. § 638(a)*], the referee's decision stands as the decision of the court, and on the filing of the referee's statement of decision with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court [*Code Civ. Proc. § 644(a)*]. The decision of a referee appointed pursuant to *Code Civ. Proc. § 638* or commissioner may be excepted to and reviewed in like manner as if made by the court [*Code Civ. Proc. § 645*].

In a special reference, the referee's decision is only advisory. The court may adopt the referee's recommendations in whole or in part after independently considering the referee's findings and any objections and responses thereto filed with the court [*Code Civ. Proc. § 644(b)*]. When a reference is to report the facts, the decision reported has the effect of a special verdict, that is, it does not become the decision of the court without further action [*Code Civ. Proc. § 645*; *Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 723, 269 P.2d 3]* . The court may refuse to accept the report of a referee made after a special reference if the decision is not supported by the evidence [*see Clark v. Millsap (1926) 197 Cal. 765, 784-785,242 P. 918* ; *McHenry v. Moore (1855) 5 Cal. 90, 92]* . It may also refuse to accept the report if the report is incomplete or ambiguous [*see Schefski v. Anker (1932) 216 Cal. 624, 627, 15 P.2d 744* ; *San Diego Fruit & Prod. Co. v. Elster (1954) 127 Cal. App. 2d 80, 85-86, 273 P.2d 70]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesJudicial Review

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PART V. FORMS

4-38 California Forms of Pleading and Practice--Annotated § 38.71

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.71 Notice of Motion to Confirm or Adopt Report [Code Civ. Proc. § 645] and to Enter Judgment [Code Civ. Proc. § 664]

[1] FORM Notice of Motion to Confirm or Adopt Report [Code Civ. Proc. § 645] and to Enter Judgment [Code Civ. Proc. § 664]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO
vs.	)	_____ [CONFIRM *or* ADOPT]
_____ [*name*],	)	REFEREE'S REPORT IN SPECIAL REFERENCE
Defendant.	)	AND TO ENTER JUDGMENT AND SUPPORTING
	)	MEMORANDUM OF POINTS AND AUTHORIT-
	)	IES
	)	Date: _____
	)	Time: _____
	)	Dept.: _____
		Judge: _____
		Date Action Filed: _____

Trial Date: _____
Referee: _____ [*name(s)*]

_____

To _____ [*specify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* plaintiff] will, and hereby does, move for an order to _____ [confirm *or* adopt] the referee's report filed in this matter on _____ [*date*], and to enter judgment in accordance with the findings set forth in the report. The motion will be made on the grounds that the report is supported by the evidence.

The motion will be based on this notice of motion and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion.*]

[2] Use of Form

The form of notice of motion in [1], *above,* is for use to move the court to confirm or to adopt the referee's statement of decision filed after the hearing of a special reference, and to enter judgment in accordance with the findings set forth in the decision [*see, e.g., Hall v. Bru (1932) 216 Cal. 153, 154, 13 P.2d 716* ; for discussion, *see § 38.24*[2]].

A special reference does not determine all the issues in an action or proceeding, and the decision of the referee is not binding on the court. In a special reference, the decision of the referee or commissioner is only advisory. The court may adopt the referee's recommendations in whole or in part after independently considering the referee's findings and any objections and responses thereto filed with the court [*Code Civ. Proc. § 644(b)*]. Unlike the referee's decision in a general reference, the decision in a special reference does not become the court's decision unless explicitly adopted by the court [*see Code Civ. Proc. §§ 624, 645* (special verdict); *Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 723, 269 P.2d 3* ; *Chiarodit v. Chiarodit (1933) 218 Cal. 147, 150, 21 P.2d 562]* . A report on a special reference should be sustained unless plainly not warranted by any reasonable view of the evidence [*Williams v. Flinn & Treacy (1923) 61 Cal. App. 352, 358-359, 214 P. 1024]* .

A memorandum of points and authorities must be served and filed with the notice of motion [*Cal. Rules of Ct., Rules*

3.1100, 3.1113(a); *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[3] Cross References

For a form of objections to the referee's report that may be used in response to this form, see *§ 38.72*

For a form of order granting this motion, see *§ 38.74*

For memoranda of points and authorities supporting and opposing a motion to confirm a referee's statement of decision, see California Points and Authorities, Ch. 201, *Reference and Referees* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesJudicial Review

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Chapter 38 REFERENCE
PART V. FORMS

4-38 California Forms of Pleading and Practice--Annotated § 38.72

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.72 Objections to Report of Referee Made Pursuant to Special Reference [Code Civ. Proc. §§ 643(c), 645]

[1] FORM Objections to Report of Referee Made Pursuant to Special Reference [Code Civ. Proc. §§ 643(c), 645]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

	)	
	)	NO. _____
_____ [*name*],	)	OBJECTIONS TO REPORT OF REFEREE MADE
Plaintiff,	)	PURSUANT TO SPECIAL REFERENCE
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept.: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	Referee: _____ [*name(s)*]

_____

_____ [*Identify moving party, e.g.,* Defendant] _____ [*name*] objects to the report of the referee(s) made pursuant to a special reference under *Code of Civil Procedure Section 639* _____ [*specify subsection under which reference was made*] and filed on _____ [*date*], on the following grounds:

1. The evidence does not support the decision of the referee.

[*ADD, in subsequently numbered paragraphs, other grounds as appropriate, e.g.:*]

2. Errors of law were committed in the _____ [introduction *or* exclusion] of evidence.

3. Newly discovered evidence.

4. Accident or surprise.

Summary Statement

The present action was commenced by plaintiff to _____ [*state nature of action*]. An order of reference under *Code of Civil Procedure Section 639* _____ [*specify subsection under which reference was made*] was made on the _____ [agreement of the parties *or* motion of _____ (*specify party, e.g.,* plaintiff) *or* court's own motion] and entered in this action on _____ [*date*], appointing _____ [*name of referee(s)*] to _____ [*specify duties*] and to report to this Court his/her/their decision on_____ [*facts to be determined*]. A hearing was held on _____ [*date*] by the referee at which the parties appeared, _____ [*specify, e.g.,* personally and by counsel], and at which evidence in the form of _____ [*specify, e.g.,* testimony and exhibits introduced by the parties] was admitted. The hearing was concluded and the matter submitted to the referee whose report was filed herein on _____ [*date*].

1. The Evidence Does Not Support the Decision of the Referee.

The referee decided that _____ [*set forth portion of decision to which exception is made*]. The only evidence before the referee on that issue was _____ [*specify, e.g.,* the testimony of _____ (*name*)], which showed _____ [*describe nature of pertinent evidence*]. There was no other evidence presented to rebut or contradict this evidence and no other evidence to support the referee's decision.

[2. *State additional grounds of exceptions as headings and develop each ground in the paragraph following the heading.*]

Dated: _____.

_____ [*signature*]
Attorney for _____ [*moving party*]

[2] Use of Form

The form of objections to a referee's report in [1], *above*, is for use by a party filing exceptions to the decision of a referee issued pursuant to a special reference. In a special reference, after a referee has filed a report with the court, and

served it on the parties, any party may file objections within 10 days (from the date of service) [*see Code Civ. Proc. §§ 643(c), 645*; *Branger v. Chevalier (1858) 9 Cal. 353, 362]* or make a motion to set aside the report [*Martino v. Denevi (1986) 182 Cal. App. 3d 553, 557, 227 Cal. Rptr. 354* ; for a form of notice of motion, *see § 38.73*]. The report in a special reference may be set aside without the necessity of one party moving for a new trial [*see Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 723, 269 P.2d 3]* .

This form may also be used with responsive papers opposing a motion to confirm the report of a referee [for discussion, *see § 38.24*[2]].

[3] Time for Filing Objections and Responses

Any party may file an objection to the referee's report or recommendations within 10 days after the referee serves and files the report, or within another time as the court may direct. The objection must be served on the referee and all other parties. Responses to the objections may be filed with the court and served on the referee and all other parties within 10 days after the objection is served. The court reviews any objections and any responses and then makes appropriate orders [*Code Civ. Proc. § 643(c)*].Objections are usually filed in connection with a motion to set aside the report [*see § 38.73*] or in response to a motion to confirm the award.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesJudicial Review

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4-38 California Forms of Pleading and Practice--Annotated § 38.73

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.73 Notice of Motion and Supporting Declaration to Set Aside Referee's Report [Code Civ. Proc. § 645] Made Pursuant to Special Reference [Code Civ. Proc. §§ 638, 639]

[1] FORM Notice of Motion and Supporting Declaration to Set Aside Referee's Report [Code Civ. Proc. § 645] Made Pursuant to Special Reference [Code Civ. Proc. §§ 638, 639]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO SET ASIDE REFEREE'S REPORT MADE PURSUANT TO SPECIAL REFERENCE, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM OF POINTS AND AUTHORITIES
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
		Date Action Filed: _____

Trial Date: _____
Referee: _____ [*name(s)*]

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant] will, and hereby does, move for an order setting aside the decision of the referee, issued pursuant to a special reference under *Code of Civil Procedure Section 639* _____ [*specify subsection under which reference was made*] made by _____ [agreement of the parties *or* order of this court] dated _____ [*date*], in this matter, that was filed with this court on _____ [*date*]. The motion will be made on the grounds set forth in the exceptions of _____ [*identify party e.g.,* defendant] to the referee's decision filed with this court on _____ [*date*], a copy of which is attached hereto.

The motion will be based on this notice of motion, on the [statement of objections,] declaration(s) of _____ [*name(s)*] and the memorandumof points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*State facts, in as many paragraphs as necessary, establishing grounds for setting aside referee's report, e.g.,* The referee _____ (rejected *or* overlooked) the following evidence presented during the hearing: _____ [*describe, e.g.,* Eight canceled checks made out to the order of _____ (*name*) plaintiff and paid from the personal account of _____ (*name*) defendant were introduced during the hearing in support of defendant's contention that he/she had made payments on the debt allegedly owing from him/her to plaintiff. Plaintiff did not dispute this evidence during the hearing and acknowledged that he/she endorsed each check. This evidence conclusively shows that defendant made payments to plaintiff in partial satisfaction of the debt allegedly owed to plaintiff. These amounts paid are not reflected in the referee's report as an offset against defendant's total liability for the original debt].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____.

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion.*]

[2] Use of Form

The form of notice of motion and supporting declaration in [1], *above*, is for use to move the court to set aside the report of a referee made pursuant to a special reference [*Martino v. Denevi (1986) 182 Cal. App. 3d 553, 557, 227 Cal. Rptr. 354* ; *see Code Civ. Proc. § 645*]. The referee's report in a special reference is only advisory. The court may adopt thereferee's recommendations in whole or in part after independently considering the referee's findings and any objections and responses thereto filed with the court [*Code Civ. Proc. § 644(b)*]. The report may be set aside without granting new trial unless report has been adopted by trial court [*Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 723, 269 P.2d 3]* .

[3] Supporting Papers

The notice of motion should be accompanied by a statement of objections to the report that set forth the particular grounds on which the motion is made [for a form, *see § 38.72*]. A report may also be challenged by opposing a motion to confirm a report [*see, e.g.,* *Hall v. Bru (1932) 216 Cal. 153, 154, 13 P.2d 716* ; *Fooshe v. Sunshine (1950) 96 Cal. App. 2d 336, 345, 215 P.2d 66* ; for discussion, *see § 38.24*[2]].

The papers supporting the motion must set forth the evidence that the referee allegedly rejected or overlooked [*Martino v. Denevi (1986) 182 Cal. App. 3d 553, 557, 227 Cal. Rptr. 354]* .

A memorandum of points and authorities must be served and filed with the notice of motion [*Cal. Rules of Ct., Rules 3.1100, 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[4] Cross References

For a form of objections that may be used to support this motion or may be used to oppose a motion to confirm or adopt the referee's report, see *§ 38.71*

For memoranda of points and authorities supporting the contention that a report should be set aside, see California Points and Authorities, Ch. 201, *Reference and Referees* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-38 California Forms of Pleading and Practice--Annotated § 38.74

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§ 38.74 Order Granting Motion to Confirm or Adopt Referee's Report and to Enter Judgment [Code Civ. Proc. §§ 645, 664]

[1] FORM Order Granting Motion to Confirm or Adopt Referee's Report and to Enter Judgment [Code Civ. Proc. §§ 645, 664]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Dept.: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	Referee: _____ [*name(s)*]
	)	

_____

The motion of _____ [*identify party, e.g.,* plaintiff] for an order confirming the referee's statement of decision filed with this court on _____ [*date*], came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that the referee's decision in this matter filed with this court on _____ [*date*], be _____ [confirmed *or* adopted] and judgment be entered in accordance with the findings set forth in the decision.

Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, is for use when the court grants a motion to confirm the referee's statement of decision filed after the hearing of a special reference, and to enter judgment in accordance with the findings set forth in the decision [*see Code Civ. Proc. § 645*]. For the related form of notice of motion, see *§ 38.71*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesJudicial Review

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4-38 California Forms of Pleading and Practice--Annotated § 38.75

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.75 Judgment [Code Civ. Proc. § 664; Cal. Rules of Ct., Rule 3.1590] Based on Decision of Referee in Special Reference Adopted or Confirmed by Court [Code Civ. Proc. §§ 644(b), 645]

[1] FORM Judgment [Code Civ. Proc. § 664; Cal. Rules of Ct., Rule 3.1590] Based on Decision of Referee in Special Reference Adopted or Confirmed by Court [Code Civ. Proc. §§ 644(b), 645]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	JUDGMENT
_____ [*name*],	)	Referee: _____ [*name(s)*]
Defendant.	)	
	)	
	)	

This cause came on regularly for hearing before _____ [*name*], the referee appointed to hear the

evidence and determine _____ [*specify issues the referee was appointed to determine*] between the parties, and to file a report on these issues to this Court. Hearings were held on _____ [*date*][, and on _____ (date)]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

The referee having heard the testimony and examined the evidence presented by the parties, and on motion duly made, the Court having _____ [confirmed *or* adopted] the referee's report, and good cause having been shown,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. _____ [*Set forth here and in subsequently numbered paragraphs the terms of the judgment that follow from the referee's factual findings and legal determinations stated in the report filed with the court*].

[2. *Add, if judgment is to include a provision for payment of referee's fees:* The fees of the referee are in the sum of $_____ and are to be paid by _____ (*name*), _____ (*specify party, e.g.*, plaintiff) in this action.]

Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of judgment in [1], *above*, is for use when the court has confirmed or adopted the decision of a referee made pursuant to a specialreference. The referee's decision issued pursuant to a special reference does not become the court's decision unless adopted or confirmed by the court [*see Code Civ. Proc. § 644(b), 645*; *Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 723, 269 P.2d 3]* .

For discussion and forms relating to judgments in general, see Ch. 318, *Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-38 California Forms of Pleading and Practice--Annotated § 38.76

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.76 Notice of Intention to Move for New Trial After General Reference [Code Civ. Proc. §§ 644(a), 645, 659]

[1] FORM Notice of Intention to Move for New Trial After General Reference [Code Civ. Proc. §§ 644(a), 645, 659]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF INTENTION TO MOVE FOR NEW TRIAL
_____ [*name*],	)	
Defendant.	)	Referee: _____ [*name(s)*]
	)	
	)	

To _____ [*specify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that _____ [*specify party, e.g.,* plaintiff] intends to move this court, at a time to be set by the court, to vacate and set aside the report of the referee issued pursuant to a general reference under *Code of Civil Procedure Section 638(a)* in favor of _____ [*specify party, e.g.,* defendant] and against _____ [*specify party, e.g.,* plaintiff] on _____ [*date*], [and the judgment entered thereon,] and grant _____ [*specify moving party, e.g.,* plaintiff] a new trial on _____ [all issues *or* the following issues: _____ (*specify*)]. This motion will be made on the following grounds:

[*LIST grounds of motion from list of grounds in Code Civ. Proc. § 657, e.g., as follows*]

1. Irregularity in the proceedings of the adverse party prevented plaintiff from having a fair trial.

2. The evidence is insufficient to justify the decision as shown by the referee's report.

[*CONTINUE with EITHER*]

With respect to the grounds specified in Paragraph(s) _____ [*specify number(s)*], above, this motion will be made on _____ [affidavits *or* declarations].

[*AND/OR*]

With respect to the grounds specified in Paragraph(s) _____ [*specify number(s)*], above, this motion will be made on the minutes of the referee and the Court.

[*CONTINUE*]

This motion is also based on the memorandum of points and authorities _____ [served and filed herewith *or* to be served and filed hereafter].

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form of notice in [1], *above*, is for use by a party to initiate a motion for a new trial on some or all of the issues after the referee has filed a report pursuant to a general reference [*Code Civ. Proc. § 638(a)*], which stands as the decision of the court [*see Code Civ. Proc. §§ 644(a), 645, 659*].

A memorandum of points and authorities is required to be served and filed within 10 days after filing the notice of intention to move for a new trial [*Cal. Rules of Ct., Rule 3.1600*].

For full discussion, a procedural checklist, and other forms relating to motions for new trial, see *Ch. 371, Motions After Trial, § 371.60* et seq.

[3] Grounds for New Trial

The statutory grounds for a new trial are governed by *Code Civ. Proc. § 657*. The grounds for a new trial, either in whole or in part, applicable after a general reference are as follows:

- Irregularity in the proceedings of the court or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial [*see Code Civ. Proc. § 657(1)*];

- Accident or surprise, which ordinary prudence could not have guarded against [*Code Civ. Proc. § 657(3)*];

- Newly discovered evidence, material for the party making the application, that the party could not, with reasonable diligence, have discovered and produced at the trial [*Code Civ. Proc. § 657(4)*];

- Excessive or inadequate damages [*Code Civ. Proc. § 657(5)*];

- Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law [*Code Civ. Proc. § 657(6)*];

- Error in law occurring at the trial and excepted to by the party making the application [*Code Civ. Proc. § 657(7)*].

In general, the objections must be raised in the trial court before they will be reviewed on appeal; however, a motion for a new trial is not a prerequisite to an appeal based on insufficiency of the evidence [*Estate of Raphael (1953) 115 Cal. App. 2d 525, 528-529, 252 P.2d 979]* .

[4] Time for Giving Notice

The notice of intention to move for new trial may be given before entry of the judgment [*Code Civ. Proc. § 659*]. It may also be made within the earliest of the following times after judgment has been entered [*Code Civ. Proc. § 659*]:

- Fifteen days after the date of mailing notice of entry of judgment by the clerk of the court pursuant to *Code Civ. Proc. § 664.5*;

- Fifteen days after service by any party on the moving party of written notice of entry of judgment; or

- One hundred eighty days after the entry of judgment.

Despite these limitations, on the filing of the first notice of intention to move for a new trial by a party, each other party has 15 days after service of the notice on him or her to file and serve a notice of intention to move for a new trial [*Code Civ. Proc. § 659*].

The time limits imposed in *Code Civ. Proc. § 659* are not extendable by stipulation or order or by those provisions of *Code Civ. Proc. § 1013* which extend the time for exercising a right or doing an act when service is by mail [*Code Civ. Proc. § 659*].

[5] Use of Affidavits or Declarations

When the application for a new trial is made on one of the first three grounds stated in [3], *above*, it must be made on affidavit (or declaration under *Code Civ. Proc. § 2015.5*). If made on any other grounds, it must be made on the minutes of the court [*Code Civ. Proc. § 658*].

Any supporting affidavits or declarations must be served on all other parties and filed within 10 days after filing the notice, after which the other parties will have 10 days to serve and file counteraffidavits or declarations [*Code Civ. Proc. § 659a* (extendable by not more than 20 additional days by stipulation or by judge on showing of good cause)].

[6] Cross References

For memoranda of points and authorities supporting and opposing a motion for a new trial, see California Points and Authorities, Ch. 155, *Motions After Trial* , and Ch. 201, *Reference and Referees* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-38 California Forms of Pleading and Practice--Annotated § 38.77

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.77 Order Granting Motion for New Trial [Code Civ. Proc. § 660]

[1] FORM Order Granting Motion for New Trial [Code Civ. Proc. § 660]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER
_____ [*name*],	)	Referee: _____ [*name(s)*]
Defendant.	)	
	)	
	)	

The motion of _____ [*specify party, e.g.*, plaintiff] for an order vacating and setting aside the referee's report filed on _____ [*date*], and for a new trial on _____ [all *or* some of the] issues came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel

_____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that the decision of the referee rendered on _____ [*date*], and the judgment entered on that decision be _____ [modified *or* set aside and vacated], and a new trial is ordered on _____ [all issues *or* the following issues: _____ (*specify*)].

SPECIFICATION OF REASONS

The court's reasons for granting the new trial on _____ [the *or, if more than one,* each] ground stated are as follows: _____ [*state reasons for each ground*].

Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order and specification of reasons in [1], *above*, is for use when the court grants a motion for a new trial. The decision of the referee and the judgment entered thereon will both be modified or set aside when a new trial is granted.

The order and reasons are prepared by the court, which may not request counsel to prepare them [*Code Civ. Proc. § 657*]. However, this form may be used if the court, in a minute order granting a new trial, directs the attorney to prepare a written order for signature and filing [*see Code Civ. Proc. § 660*].

For a related of notice of intention to move for new trial, see *§ 38.76*.

[3] Statement of Grounds and Specification of Reasons

The court must specify all grounds on which it grants the motion for a new trial and its reason or reasons for doing so. The court is required to state the ground or grounds for granting the motion in the order; moreover, the court does not have jurisdiction to correct the order nunc pro tunc by adding the ground or grounds after the expiration of the 60-day period allowed for making the order under *Code Civ. Proc. § 657* [*Sanchez-Corea v. Bank of America (1985) 38 Cal. 3d 892, 901-905, 215 Cal. Rptr. 679, 701 P.2d 826]* . The order may contain the court's specification of reasons or the specifications may be separately prepared, but the court must, in that case, prepare, sign, and file the specifications with the clerk within 10 days after the order is filed [*Code Civ. Proc. § 657*].

[4] Modifying or Vacating Statement of Decision

In ruling on a motion for a new trial in a matter heard by a referee, the court may, on such terms as may be just, change or add to the statement of decision, or vacate and set aside the statement of decision and reopen the case for further proceedings and the introduction of additional evidence with the same effect as if the case had been reopened after its submission and before a decision had been filed or judgment rendered [*see Code Civ. Proc. § 662*].

When a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order must be given by the prevailing party to all other parties or their attorneys, in the manner provided in *Code Civ. Proc. §§*

1010-1020 unless notice is waived by all parties in open court and is entered in the minutes [*Code Civ. Proc. § 1019.5(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesJudicial Review

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 38 REFERENCE
PART V. FORMS

4-38 California Forms of Pleading and Practice--Annotated § 38.78

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.78 Petition for Payment of Referee's Fees [Code Civ. Proc. §§ 645.1, 1023]

[1] FORM Petition for Payment of Referee's Fees [Code Civ. Proc. §§ 645.1, 1023]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	PETITION FOR PAYMENT OF REFEREE'S FEES
_____ [*name*],	)	Referee: _____ [*name(s)*]
Defendant.	)	
	)	
	)	

Petitioner alleges:

1. I, _____ [*name*], am the duly appointed referee in the above-entitled action, and I was appointed to

hear this action on _____ [*date*].

2. In performance of my duties as referee, I have spent _____ hours in preparation of my decision and obtaining facts therefor. I have also spent _____ hours in court relative to the hearing of objections to my report filed herein. [*Add any additional hours spent and explain what the time was spent on.*]

3. My report was filed herein on _____ [*date*]. I have no further duties to perform under my appointment as referee in this matter or otherwise.

4. The reasonable value of the services rendered is the sum of $_____. [_____ (*Name(s)*) have paid me the sum of $_____ on account of my services.]

WHEREFORE, petitioner prays this Court to issue its orders as follows:

1. That the reasonable value of the services of the referee stated herein is the sum of $_____.

2. That the manner of payment of the referee's fees that is fair and reasonable is as follows: _____ [*specify which party should be ordered to pay the fee, or how the fee should be apportioned between the parties*].

3. For such other and further orders as the Court deems just.

Dated: _____.

_____ [*signature*]
Referee-Petitioner

[2] Use of Form

The form of petition in [1], *above*, is for use by a referee to obtain a court order for the payment of his or her fees. When a referee is appointed pursuant to *Code Civ. Proc. § 638*, the referee's fees are paid as agreed by the parties, unless the parties do not agree on the payment of fees, and then the fees are determined as they would be in a special reference [*Code Civ. Proc. § 645.1(a)*]. When a referee is appointed pursuant to *Code Civ. Proc. § 639*, at any time after a determination of ability to pay is made as required by *Code Civ. Proc. § 639(d)(6)* [*see § 38.12*[2][b][i]], the court may order the parties to pay the fees of referees who are not employees who are not employees or officers of the court at the time of appointment in any fair or reasonable manner, including an apportionment of the fees among the parties [*Code Civ. Proc. § 645.1(b)*; *see Code Civ. Proc. § 1023*]. Alternatively, the parties may agree in writing on any other rate of compensation and those fees shall be allowed [*Code Civ. Proc. § 1023*]. A referee may petition the court for payment of fees at the time of filing the report, without waiting for the court or the parties to initiate action on the fees [*Most Worshipful Lodge v. Sons etc. Lodge (1956) 140 Cal. App. 2d 833, 834, 295 P.2d 912]* .

For additional discussion, see *§ 38.26*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesAppointmentsGovernmentsCourtsCourt Personnel

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Chapter 38 REFERENCE
PART V. FORMS

4-38 California Forms of Pleading and Practice--Annotated § 38.79

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§ 38.79 Notice of Motion and Supporting Declaration to Seal Records in Cause Before Referee [Cal. Rules of Ct., Rule 3.932(a)]

[1] FORM Notice of Motion and Supporting Declaration to Seal Records in Cause Before Referee [Cal. Rules of Ct., Rule 3.932(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	NO. _____
Plaintiff,	NOTICE OF MOTION AND MOTION TO SEAL RECORDS IN CAUSE BEFORE REFEREE, SUPPORTING DECLARATION OF _____ [*name*], AND SUPPORTING MEMORANDUM
vs.	
_____ [*name*],	
Defendant.	Date: _____
	Time: _____
	Dept.: _____
	Judge: _____
	Date Action Filed: _____
	Trial Date: _____
	Referee: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department or Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant] will, and hereby does, move for an order pursuant to *California Rules of Court, Rule 2.550 et seq.,* to seal in a reference made under Code of Civil Procedure Section _____[*either* 638 *or* 639] the following records filed with the referee: _____[*specify*]. The motion will be made on the grounds that _____[*specify*].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. This motion to seal records pertains to the following records[, which have been lodged with the court in connection with this motion on _____ (date)]: _____[*specify documents, papers, exhibits, transcripts, or other things, or portions of these, filed or lodged with the court*].

3. The sealing of these records is necessary to an overriding interest that overcomes the right of public access to these records. This overriding interest is _____[*specify overriding interest, which may consist of but is not necessarily limited to statutory privileges, trade secrets, privacy rights, contractual obligation of nondisclosure, and right of civil litigant to fair trial*].

4. There is a substantial probability that this overriding interest will be prejudiced if these records are not sealed, in that _____[*explain probably prejudice to overriding interest in the event that the records are not sealed*].

5. The following measures have been taken to ensure that the proposed sealing is narrowly tailored and no less restrictive means exist to protect the overriding interest: _____[*specify measures taken, e.g., documents proposed for sealing were specified only after selective analysis leaving other documents subject to public access*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion*]

[2] Use of Form

The form of notice of motion in [1], *above*, is for use to move the court to seal records in a reference made under *Code Civ. Proc. § 638* or § 639. The motion or application must be heard by the judge to whom the case is assigned or, if the case has not been assigned, by the presiding judge or his or her designee. *Cal. Rules of Ct., Rules 2.550*, *2.551*, discussed in Ch. 551, *Trial* , apply to the motion or application to seal the records [*Cal Rules of Ct., Rule 3.932(a)*; for discussion, *see § 38.19*].

[3] Supporting Memorandum

A supporting memorandum is required to be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*].

[4] Service and Filing of Notice

The motion or application to seal records must be served on the referee and all parties who have appeared in the case and be filed with the court 16 court days prior to the time appointed for the hearing, subject to the longer periods of notice required if service is by mail, fax, or overnight delivery [*see Code Civ. Proc. § 1005(a)(13), (b)*; *Cal. Rules of Ct., Rule 3.932(a)*]. For discussion of the procedure on noticed motions, see Ch. 372, *Motions and Orders* .

[5] Cross References

For general references relating to motions, see *§ 38.61*[3]

For a form of proposed order granting a motion to disqualify a referee, see *§ 38.69*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCourt RecordsCivil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesGeneral Overview

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4-38 California Forms of Pleading and Practice--Annotated § 38.80

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.80 Order Granting Motion to Seal Records in Cause Before Referee [Cal. Rules of Ct., Rule 3.907]

[1] FORM Order Granting Motion to Seal Records in Cause Before Referee [Cal. Rules of Ct., Rule 3.907]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Dept.: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	Referee: _____ [*name(s)*]
	)	

_____

The motion of _____ [*identify party, e.g.,* defendant] for an order to seal records in a cause before a referee came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel

_____ [*name*]; defendant appeared by counsel _____ [*name*].

The Court, having considered the declaration of _____[*name*] and other documents in support of and in opposition to the motion, having heard the arguments of counsel, and being fully advised in the matter, finds as follows:

1. There exists an overriding interest that overcomes the right of public access to the records specified below, in that _____[*specify overriding interest*].

2. This overriding interest support sealing the records specified below.

3. A substantial probability exists that this overriding interest will be prejudiced if the records specified below are not sealed, in that _____[*specify overriding interest*].

4. The records specified below have been tailored to limit narrowly the overall records to be sealed.

5. No less restrictive means exist to achieve the overriding interest than to seal the records specified below.

IT IS, THEREFORE, ORDERED that the motion be, and hereby is, granted and that the following records lodged with the referee, _____[*name*], and the court be _____[sealed *or* filed under seal]: _____[*specify records and/or portions of records lodged with the refereee to be sealed; if the specified records are lodged with the court, specify also whether, in addition to the lodged, the order itself, the register of actions, any other court or reference records, or any other records relating to the case are also to be sealed*].

IT IS FURTHER ORDERED that, other than the court and the referee, only the following person[s] is/are authorized to inspect the records sealed by this order: _____[*names of person(s) other than court authorized to inspect sealed records*].

Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of order in [1], *above*, is for use when the court grants a motion to seal records in a reference made under *Code Civ. Proc. § 638* or § 639 [*Cal Rules of Ct., Rule 3.932(a)*; for a related form of notice of motion, *see § 38.79*].

[3] Notice of Order

When a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order must be given by the prevailing party to all other parties or their attorneys, in the manner provided in *Code Civ. Proc. §§ 1010-1020* unless notice is waived by all parties in open court and is entered in the minutes [*Code Civ. Proc. § 1019.5(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCourt RecordsCivil ProcedureJudicial OfficersReferencesCivil ProcedureJudicial OfficersRefereesGeneral Overview

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4-38 California Forms of Pleading and Practice--Annotated § 38.81

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.81 Notice of Application and Application for Order That Case Referred to Referee Be Heard in Accessible and Appropriate Site, Supporting Declaration, and Memorandum [Cal. Rules of Ct., Rule 3.931(c)(1)]

[1] FORM Notice of Application and Application for Order That Case Referred to Referee Be Heard in Accessible and Appropriate Site, Supporting Declaration, and Memorandum [Cal. Rules of Ct., Rule 3.931(c)(1)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	NO. _____
Plaintiff, vs. _____[*name*],	)	NOTICE OF APPLICATION AND APPLICATION FOR ORDER THAT CASE REFERRED TO REFEREE BE HEARD IN ACCESSIBLE AND APPROPRIATE SITE, SUPPORTING DECLARATION OF _____[*name*], AND SUPPORTING MEMORANDUM
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	Referee: _____[*name(s)*]

_____

To _____[*specify party, e.g.*, defendant] _____[*name*] and to _____[*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], _____[*specify party, e.g.*, plaintiff] _____[*name*] will, and hereby does, apply for an order, pursuant to *Rule 3.931(c)(1) of the California Rules of Court* and to be made after hearing, directing that the referee, to whom this case has been referred pursuant to Section _____[638 *or* 639] of the Code of Civil Procedure, hear this case in a site easily accessible to the public and appropriate for seating those, including the undersigned, who have made known their plan to attend hearings in the case.

The reason for this request is _____ [*state reason(s) for request, e.g.*, that the current site for this hearing is not accessible to the public and/or the current site for this hearing is not appropriate for seating those who have made known their plan to attend hearings in the case].

Respectfully submitted,
_____[*signature(s)*]
_____[*typed name(s)*]

DECLARATION OF _____[*name*] IN SUPPORT OF APPLICATION FOR ORDER THAT CASE REFERRED TO REFEREE BE HEARD IN ACCESSIBLE AND APPROPRIATE SITE

I, _____[*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*)].

[*EITHER, if reason is easy access to public*]

2. _____ [*State facts establishing grounds for ordering a hearing site easily accessible to the public, e.g.*, The current location set for the site of the hearing, _____ (*name of site*), does not allow for easy access to the public, because _____ (*describe barriers to public access*)].

[*AND/OR, if reason is seating for those who have made known their plan to attend hearings in the case*]

2. _____ [*State facts establishing grounds for ordering a hearing site appropriate for seating those who have made known their plan to attend hearings in the case, e.g.*, The current location set for the site of the hearing, _____ (*name of site*), is appropriate for seating _____ (*number of people*) people. However, at least _____ (*number of people*) people have made known their plan to attend hearings in the case], including:

[*List names of people have made known their plan to attend hearings in the case*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]
_____[*signature*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion*.]

[2] Use of Form

The form of application in [1], *above*, is for use to apply for an order that a case referred to a referee pursuant to *Code Civ. Proc. § 638* or § 638 be heard at a site accessible to the public and appropriate for seating those who have made known their plan to attend hearings [*Cal. Rules of Ct., Rule 3.931(c)(1)*].

The presiding judge or his or her designee, on application of any person or on the judge's own motion, may order that a case before a referee must be heard at a site easily accessible to the public and appropriate for seating those who have made known their plan to attend hearings [*see § 38.17[4][a]*]. Whoever files the application must state in the application facts showing good cause for granting the application [*Cal. Rules of Ct., Rule 3.931(c)(1)*; for discussion, see *§ 38.17[3], [4]*].

[3] Supporting Declaration

The supporting declaration must establish facts showing good cause to grant the order. When the easy access to the public is the issue, use the first alternate paragraph 2. When the lack of sufficient seating is the issue, use the second alternate paragraph 2.

[4] Supporting Memorandum

A supporting memorandum must be served and filed with the notice of application [*Cal. Rules of Ct., Rules 3.1100, 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[5] Service and Filing of Notice, Application, Declaration, and Memorandum

The notice, application, declaration, and memorandum must be served on all parties and the referee, and be filed with the court [*Cal. Rules of Ct., Rule 3.931(c)(1)*]. These documents are to be served and filed 16 court days prior to the time appointed for the hearing, subject to the longer periods of notice required if service is by mail, fax, or overnight delivery [*see Code Civ. Proc. § 1005(a)(13), (b)*]. For discussion of the procedure on noticed motions, see Ch. 372, *Motions and Orders* . The documents are to be filed with the court that ordered reference.

For discussion of service of applications and proof of service, see Ch. 518, *Service of Summons and Papers* .

[6] Cross References

For a form of proposed order that case referred to referee be heard in accessible and appropriate site, see *§ 38.82*

For a form of application for stay of reference pending application for order that case referred to referee be heard in accessible and appropriate site, see *§ 38.83*

For a form of order granting stay of reference pending application for order that case referred to referee be heard in accessible and appropriate site, see *§ 38.84*

For additional discussion and forms relating to written motions, see Ch. 372, *Motions and Orders*

For alternative forms of affidavits and declaration, see Ch. 15, *Affidavits, Certificates, and Declarations*

For memoranda of points and authorities supporting and opposing a motion for a reference, see California Points and Authorities, Ch. 201, *Reference and Referees* (Matthew Bender)

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4-38 California Forms of Pleading and Practice--Annotated § 38.82

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.82 Order That Case Referred to Referee Be Heard in Accessible and Appropriate Site [Cal. Rules of Ct., Rule 3.931(c)(1)]

[1] FORM Order That Case Referred to Referee Be Heard in Accessible and Appropriate Site [Cal. Rules of Ct., Rule 3.931(c)(1)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER
_____[*name*],	)	Date: _____
Plaintiff, vs. _____[*name*],	)	Time: _____
Defendant.	)	Dept.: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	Referee: _____[*name(s)*]
	)	

_____

The application of _____[*identify party, e.g.*, defendant] for an order directing that the referee, to whom this case has been referred hear this case in a site easily accessible to the public and appropriate for seating those who have made known their plan to attend hearings in the case came on regularly for hearing by the court on _____[*date*]. Plaintiff appeared by counsel _____[*name*]; defendant appeared by counsel _____[*name*].

On proof of good cause made to the satisfaction of the court,

IT IS ORDERED that the application be, and it hereby is, granted and that the referee is ordered to hear this case in a site easily accessible to the public and appropriate for seating those who have made known their plan to attend hearings in the case.
Dated: _____ .

_____[*signature*]
Judge of the Superior Court

[2] Use of Form

The form of application in [1], *above*, is when the court grants an application for an order that a case referred to a referee pursuant to *Code Civ. Proc. § 638* or § 638 be heard at a site accessible to the public and appropriate for seating those who have made known their plan to attend hearings. If the application is granted, the reference hearing must be held in a site easily accessible to the public and appropriate for seating those who have made known their plan to attend hearings [*Cal. Rules of Ct., Rule 3.931(c)(1)*; for a related form of notice of application, see *§ 38.81*].

[3] Notice of Order

When a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order must be given by the prevailing party to all other parties or their attorneys, in the manner provided in *Code Civ. Proc. §§ 1010-1020* unless notice is waived by all parties in open court and is entered in the minutes [*Code Civ. Proc. § 1019.5(a)*; for discussion and a form of notice, see Ch. 372, *Motions and Orders*].

[4] Cross References

For a form of application for stay of reference pending application for order that case referred to referee be heard in accessible and appropriate site, see *§ 38.83*

For a form of order granting stay of reference pending application for order that case referred to referee be heard in accessible and appropriate site, see *§ 38.84*

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4-38 California Forms of Pleading and Practice--Annotated § 38.83

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.83 Notice of Application and Application for Order Staying Case Referred to Referee Pending Application for Order That Case Be Heard in Accessible and Appropriate Site, Supporting Declaration, and Memorandum [Cal. Rules of Ct., Rule 3.931(c)(1)]

[1] FORM Notice of Application and Application for Order Staying Case Referred to Referee Pending Application for Order That Case Be Heard in Accessible and Appropriate Site, Supporting Declaration, and Memorandum [Cal. Rules of Ct., Rule 3.931(c)(1)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*], Plaintiff, vs. _____[*name*], Defendant.	)	NO. _____
	)	NOTICE OF APPLICATION AND APPLICATION FOR ORDER STAYING CASE REFERRED TO REFEREE PENDING APPLICATION FOR ORDER THAT CASE BE HEARD IN ACCESSIBLE AND APPROPRIATE SITE, SUPPORTING DECLARATION OF _____[*name*], AND SUPPORTING MEMORANDUM
	)	Date: _____
	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
	)	Date Action Filed: _____

Trial Date: _____
Referee: _____[*name(s)*]

_____

To _____[*specify party, e.g.*, defendant] _____[*name*] and to _____[*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], _____[*specify party, e.g.*, plaintiff] _____[*name*] will, and hereby does, apply for an order, pursuant to *Rule 3.931(c)(1) of the California Rules of Court* and to be made after hearing, staying the reference hearing in this case, which has been referred to a referee pursuant to Section _____[638 *or* 639] of the Code of Civil Procedure, pending the court's decision on the application by the applicant for an order that the referee hear this case in a site easily accessible to the public and appropriate for seating those, including the undersigned, who have made known their plan to attend hearings in the case.

The reason for this request is _____ [*state reason(s) for request, e.g.*, that the referee has scheduled a reference hearing that occurs before the date of the hearing on the application by the applicant for an order that the referee hear this case in a site easily accessible to the public and appropriate for seating those who have made known their plan to attend hearings in the case].

Respectfully submitted,
_____[*signature(s)*]
_____[*typed name(s)*]

DECLARATION OF _____[*name*] IN SUPPORT OF APPLICATION FOR ORDER STAYING CASE REFERRED TO REFEREE PENDING APPLICATION FOR ORDER THAT CASE BE HEARD IN ACCESSIBLE AND APPROPRIATE SITE

I, _____[*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*)].

2. _____ [*state facts establishing grounds for ordering a hearing site easily accessible to the public, e.g.*, The current date set for the reference hearing is _____ (*date of reference hearing*), which is before the date for the court's hearing on the applicant's application for an order that the referee hear this case in a site easily accessible to the public and appropriate for seating those who have made known their plan to attend hearings in the case].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]
_____[*signature*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion*.]

[2] Use of Form

The form of application in [1], *above*, is for use to apply for an order that a case referred to a referee pursuant to *Code Civ. Proc. § 638* or § 638 be stayed while the applicant's application for a court order that the referee hear the case at a site accessible to the public and appropriate for seating those who have made known their plan to attend hearings [*Cal. Rules of Ct., Rule 3.931(c)(1)*; for discussion, *see § 38.17[4][b]*].

The presiding judge or his or her designee, on application of any person or on the judge's own motion, may order that a case before a referee must be heard at a site easily accessible to the public and appropriate for seating those who have made known their plan to attend hearings [*see § 38.17[4][a]*]. Whoever files the application must state in the application facts showing good cause for granting the application [*Cal. Rules of Ct., Rule 3.931(c)(1)*; for discussion, see *§ 38.17[4][b]*].

[3] Supporting Declaration

The supporting declaration must establish facts showing good cause to grant the order.

[4] Supporting Memorandum

A supporting memorandum must be served and filed with the notice of application [*Cal. Rules of Ct., Rules 3.1100, 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[5] Service and Filing of Notice, Application, Declaration, and Memorandum

The notice of application, application, supporting declaration, and memorandum are to be served and filed 16 court days prior to the time appointed for the hearing, subject to the longer periods of notice required if service is by mail, fax, or overnight delivery [*see Code Civ. Proc. § 1005(a)(13), (b)*]. For discussion of the procedure on noticed motions, see Ch. 372, *Motions and Orders* . The documents are to be filed with the court that ordered reference.

For discussion of service of applications and proof of service, see Ch. 518, *Service of Summons and Papers* .

[6] Cross References

For a form of application for order that case referred to referee be heard in accessible and appropriate site, see *§ 38.81*

For a form of proposed order that case referred to referee be heard in accessible and appropriate site, see *§ 38.82*

For a form of order granting stay of reference pending application for order that case referred to referee be heard in accessible and appropriate site, see *§ 38.84*

For additional discussion and forms relating to written motions and ex parte applications, see Ch. 372, *Motions and Orders*

For alternative forms of affidavits and declaration, see Ch. 15, *Affidavits, Certificates, and Declarations*

For memoranda of points and authorities supporting and opposing a motion for a reference, see California Points and Authorities, Ch. 201, *Reference and Referees* (Matthew Bender)

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Volume 4: Using Alternative Dispute Resolution thru Tactics and New Developments in ADR-Chs. 30-39
Chapter 38 REFERENCE
PART V. FORMS

4-38 California Forms of Pleading and Practice--Annotated § 38.84

AUTHOR: Hon. Bruce R. Geernaert, Judge (Ret.) Editorial Consultant Bruce Geernaert retired from the Los Angeles County Superior Court in 1996 after twenty-two years of service on the bench, during which he handled all aspects of civil litigation. He served on a special Settlement Panel for over five years, earning particular recognition for his effective handling of complex cases. Judge Geernaert is presently serving as a mediator, special master, referee, and arbitrator through JAMS/Endispute.

§ 38.84 Order Staying Case Referred to Referee Pending Application for Order That Case Be Heard in Accessible and Appropriate Site [Cal. Rules of Ct., Rule 3.931(c)(1)]

[1] FORM Order Staying Case Referred to Referee Pending Application for Order That Case Be Heard in Accessible and Appropriate Site [Cal. Rules of Ct., Rule 3.931(c)(1)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER
_____[*name*],	)	Date: _____
Plaintiff, vs. _____[*name*],	)	Time: _____
Defendant.	)	Dept.: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	Referee: _____[*name(s)*]
	)	

_____

The application of _____[*identify party, e.g.*, defendant] for an order staying the reference hearing this case pending the applicant's application for an order that the referee hear this case in a site easily accessible to the public and appropriate for seating those who have made known their plan to attend hearings in the case came on regularly for hearing by the court on _____[*date*]. Plaintiff appeared by counsel _____[*name*]; defendant appeared by counsel _____[*name*].

On proof of good cause made to the satisfaction of the court,

IT IS ORDERED that the application be, and it hereby is, granted and that the reference hearing in this case is stayed while the application for an order that the referee hear the case in a site easily accessible to the public and appropriate for seating those who have made known their plan to attend hearings in the case is pending.
Dated: _____ .

_____[*signature*]
Judge of the Superior Court

[2] Use of Form

The form of application in [1], *above*, is when the court grants an application for an order that the reference hearing a case referred to a referee pursuant to *Code Civ. Proc. § 638* or § 638 is stayed while the application for an order that the referee hear the case in a site easily accessible to the public and appropriate for seating those who have made known their plan to attend hearings in the case is pending. If the application is granted, the reference hearing is stayed until the court rules on the application for order that the referee hear the case in a site easily accessible to the public and appropriate for seating those who have made known their plan to attend hearings in the case [*Cal. Rules of Ct., Rule 3.931(c)(1)*; for a related form of notice of application, see *§ 38.83*].

[3] Notice of Order

When a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order must be given by the prevailing party to all other parties or their attorneys, in the manner provided in *Code Civ. Proc. §§ 1010-1020* unless notice is waived by all parties in open court and is entered in the minutes [*Code Civ. Proc. § 1019.5(a)*; for discussion and a form of notice, see Ch. 372, *Motions and Orders*].

[4] Cross References

For a form of application for an order that a case referred to a referee be heard in an accessible and appropriate site, see *§ 38.81*

For a form of order granting an application for an order that a case referred to a referee be heard in an accessible and appropriate site, see *§ 38.82*

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Chapter 39 TACTICS AND NEW DEVELOPMENTS IN ADR

4-39 California Forms of Pleading and Practice--Annotated 39.syn

AUTHOR: Los Angeles County Bar Association

§ 39.syn Synopsis to Chapter 39: TACTICS AND NEW DEVELOPMENTS IN ADR

§ 39.01 Scope of Chapter

§§ 39.02-39.09 [Reserved]

Scope

§ 39.10 Winning and What It Is

§ 39.11 Tools for Winning

[1] Meaning of Winning

[2] Negotiation and Collaboration

[3] Mediation

§§ 39.12-39.19 [Reserved]

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§ 39.20 Importance of Case Valuation

§ 39.21 The Components of Accurate Evaluation

[1] Factors Involved

[2] Expected Value of a Case

[3] Risk Aversion (Willingness to Pay a Premium for a Bird in the Hand)

[4] Making the Case More Realistic--Incorporating Costs

[5] Assessing the Other Side's Case Value

[6] More Realistic Still--Incorporating Other Possible Outcomes

[7] Evaluating the Likelihood of Multiple Events

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§ 39.22 Conclusion: Assessing Likelihoods and Outcomes in the Real World

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Scope

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§ 39.31 The Right to Know

§ 39.32 How Do Lawyers and Mediators View Disclosure?

§ 39.33 Sources of Disclosure in Mediation

§ 39.34 What Should Be Disclosed?

§ 39.35 Who Should Disclose?

§ 39.36 How Should Disclosure Be Made?

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[2] Text of Proposed Disclosure Regulation Legislative Policy

§ 39.40 Chart: State-by-State Comparison of Regulatory Provisions

§§ 39.41-39.49 [Reserved]

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§ 39.50 Use of Voluntary ADR to Distribute Nonliquid Assets

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§ 39.62 Health Care Arbitration Agreements Not Adhesion Contracts

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§§ 39.67-39.69 [Reserved]

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§ 39.71 The Theoretical and Practical Basis for Critical Path Dispute Management

§ 39.72 What Is Critical Path Dispute Management?

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[2] Specific Functions of the Construction Professional or "Field Neutral"

[3] Role of the Professional Construction Mediator or "Project Mediator"

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§ 39.74 How Does Critical Path Dispute Management Add Value?

§ 39.75 Guiding Principles of CPDM

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Chapter 39 TACTICS AND NEW DEVELOPMENTS IN ADR
PART I. SCOPE

4-39 California Forms of Pleading and Practice--Annotated § 39.01

AUTHOR: Los Angeles County Bar Association

§ 39.01 Scope of Chapter

This chapter presents discussion of tactics and new developments for various methods of alternative dispute resolution, as well as discussing alternative dispute resolution in specialized areas. It includes discussion of:

- The interrelationship between zealous advocacy and how the various ideas of winning impact decisions relating to resolving disputes [Part II].

- Valuation of cases for mediation and settlement negotiations within the concept of economic and probabilistic concepts [Part III].

- The right to know and disclosure in the context of the parties' and lawyers' need for reliable information in the selection of a mediator for their case [Part IV].

- Methods for valuing and distributing nonliquid assets which can assist in resolving disputes through mediation [Part V].

- Medical care providers and their arbitration clauses [Part VI].

- An innovative ADR technique for the construction industry--critical path dispute management (CPDM) [Part VII].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediations

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Chapter 39 TACTICS AND NEW DEVELOPMENTS IN ADR
PART I. SCOPE

4-39 California Forms of Pleading and Practice--Annotated §§ 39.02-39.09

AUTHOR: Los Angeles County Bar Association

[Reserved]

§§ 39.02[Reserved]

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4-II California Forms of Pleading and Practice--Annotated Scope

AUTHOR: Los Angeles County Bar Association

Scope

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FOOTNOTES:
(n31)Footnote *. **Jeffrey G. Kichaven** is a Los Angeles lawyer who serves as a mediator and arbitrator. He's chair of the Committee on Dispute Resolution in the American Bar Association's Section of Business Law and is a member of the board of the Los Angeles County Bar Association Dispute Resolution.

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4-39 California Forms of Pleading and Practice--Annotated § 39.10

AUTHOR: Los Angeles County Bar Association

§ 39.10 Winning and What It Is

"Winning isn't everything, it's the ONLY thing!"

"A winner never quits, and a quitter never wins."

"Just win, baby."

No matter how we put it, we are obsessed with "winning," both for our clients and for ourselves. Whether in court or the negotiation room, we go to great cost, risk and hassle to avoid the reality, the perception, and the stigma of "loss." Generally speaking, we are right to do so. Our duties are well stated in, for example, Ethical Consideration 7-1 of the American Bar Association's Model Code of Professional Responsibility: "The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law... ." California courts have long acknowledged this obligation [*see, e.g.,* *Smith v. Lewis (1975) 13 Cal. 3d 349, 365, 118 Cal. Rptr. 621, 530 P.2d 589* ; *Munoz v. Davis (1983)141 Cal. App. 3d 420, 430, 190 Cal. Rptr. 400* ; *Norton v. Hines (1975) 49 Cal. App. 3d 917, 924, 123 Cal. Rptr. 237*]. We are to press every lawful advantage, right up to the "bounds" of the law, to be zealous advocates for our clients. In other words, to *win*.

Nobody seriously questions this articulation of our obligations. But the trickier questions are, what does it mean to *win*, and which processes and tools are best designed to accomplish a *win*, properly defined?

Our clients--and we ourselves--generally have one of two conceptions of what it means to "win." Some of us define winning as "clobbering the other side." Others define winning as "the satisfaction of our own needs," regardless of whether or not the other side suffers along the way. The definition we favor informs how we handle the matters our clients entrust to us, and, in many cases, our ability to deliver to our clients processes and results which will produce client satisfaction--the critical measure of the degree to which we will succeed, prosper and flourish in the business and practice of law.

In the litigation context, and in many others as well, clients often start out in "clobbering" mode. They believe they have been "done wrong," and they want nothing more than revenge. And more revenge.

For us as lawyers, this is a serious problem. Such a client is almost never satisfied with the result, the process, or with our performance as counsel. This is because the other side, no matter how badly clobbered, rarely suffers enough in this client's eyes. A vengeful client out to clobber generally has a hard time planning, in advance, the specific result to be achieved or the goal against which success or failure will be measured. No matter what you do to the other side, it could always have been worse! Generally speaking, at the end of the day, the folks on the other side leave the courtroom under their own power, with the next stop being neither the ER nor the Bankruptcy Court. Not enough! As lawyers, these clients believe that we have failed them! Yet we have done all we can, and produced results which, objectively viewed, are probably pretty good. It hardly serves our interests, in the business and practice of law, to have clients who perceive us and our work in this way.

Far better is the situation in which the client focuses on the satisfaction of his or her own needs. This client is better able to give clear instructions, based on a clear definition of what "success" looks like in his or her own eyes; for example, recovering sufficient money to pay off a debt, buy a new building, or achieve some other concrete goal. If this client's own goals are satisfied, it doesn't matter very much whether the other side "suffers" a lot, a little, or even at all. After all, the other side's suffering generally cannot be used to pay your client's bills, grow your client's business, or otherwise make your client's life any better.

We have all been in the frustrating situation of having clients who insist that "winning" requires the infliction of unachievable amounts of suffering on the other side, when they would be much better off if they would only focus on setting realistic goals for themselves, and then work to accomplish them, regardless of what happens to the other side.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral Overview

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4-39 California Forms of Pleading and Practice--Annotated § 39.11

AUTHOR: Los Angeles County Bar Association

§ 39.11 Tools for Winning

[1] Meaning of Winning

Fortunately, there are tools which are designed to change our clients' conception of what it means to "win." The successful implementation of these tools serves our interest as lawyers and provides us the benefit of having more satisfied clients--the kind who pay bills, pay them more promptly, pay them more fully, and are less likely to sue for malpractice. To understand how to use those tools, it is first necessary to delve into the world of negotiation theory; then, a peek into the structure of mediation.

[2] Negotiation and Collaboration

Negotiation scholars such as the University of Michigan's Robert Axelrod who focus on *game theory* have developed an elaborate literature on the incentives for parties to approach a given negotiation in either the "clobber the other side" or "satisfy my own needs" mode [The topic is given perhaps its best treatment in Axelrod's book, "The Evolution of Cooperation."]. The game theorists believe that, in most cases, a party out to satisfy his or her own needs will likely end up with greater wealth at the end of a negotiation than a party out to clobber the other side, so long as everyone else in the negotiation also sets out to satisfy *their* own needs, or can be persuaded to do so. In most negotiations, parties are in fact out to maximize their own wealth; the rational party will, therefore, try to persuade others to negotiate in a "satisfy your own needs" (cooperative, or collaborative) mode, and will lead by example. The "clobber the other side" (defecting, or combative mode) will be used only where collaboration does not work.

What, then, are the situations in which collaboration does not work? What are the incentives to engage in combative negotiation, even though that style is likely to lessen the number of chips in your client's pile at game's end? Are there ways that lawyers can help clients stay in, or move into, the collaborative mode, knowing that collaboration (when reciprocated) leads to the greater accumulation or conservation of wealth, and accompanying client satisfaction?

Axelrod and other game theorists have identified two principal incentives which lead parties, and appropriately so, to define "winning" in terms of "clobbering the other side," and to negotiate in the combative style as a result. The first is

the situation in which the "other side" is irrational, and will not respond appropriately to a collaborative negotiation strategy. The second is the situation in which you believe that you can eat the other side alive.

Virtually all lawyers have been in situations where they believe that the other side will not respond appropriately to a collaborative negotiation strategy. You would be willing to take reasonable and rational positions; you would indicate an openness to persuasion if the other side will provide you with information; you would refrain from "take it or leave it" ultimata; you would be willing to do all this, and more, if only you thought that the other side would reciprocate. But you believe that the other side is incorrigibly combative, the stereotype of the "Rambo" litigator. So, why bother with collaboration? The other side will only exploit you.

Too, virtually all lawyers have been in situations where they believe that they can eat the other side alive. Even though we have all learned the hard way that "a case never again looks as good as it does on the day it walks into your office," human nature still impels us to get a little carried away with ourselves, and with our clients, when we prepare our own side of the case in the comfort and privacy of our own offices. So again, why bother with collaboration? Isn't it a waste of time and money to create "win-win" if you could get "win" right now?

These assumptions are easy to indulge when we are alone. When we sit in our own offices and conference rooms and confer with our own associates and clients, it is too easy to demonize the other side and overstate the strength of our own side of the case. We lawyers--sometimes inadvertently but perhaps sometimes not--frequently fuel those flames. We are concerned, often legitimately so, that if we do not express exceptional confidence in our clients' cases from the get-go, the business will shift to the lawyer down the street who will. But many times, we indulge our clients' expectations early at the expense of having to disappoint those expectations later, and pain of the latter is in direct proportion to the enthusiasm of the former. It can be excruciating, we have all been there, and ways to avoid the predicament are greatly to be desired.

[3] Mediation

Happily, mediation, through its very structure, is a helpful tool. In the hands of skilled mediators and counsel, the process can be designed to minimize the incentives to engage in combative negotiation and enhance the likelihood that the parties will engage in wealth-maximizing, client-satisfying, collaborative negotiation. It's not magic. It comes from the ability of all parties, and counsel, to listen, and to talk. It's typically set in motion at the very start of the process.

In the civil litigation context, most mediations begin with a "joint session," with the mediator, the plaintiff and defendant (or their representatives, if they are entities), and their lawyers present. Everyone is generally given the opportunity to talk and the accompanying responsibility to listen. Lawyers generally deliver a summation of the strengths of their case, based on the facts and law available to them at the time. These presentations resemble closing arguments to a jury. They can be forceful and persuasive. For each side, it is generally the first opportunity to see the case as the other side sees it, with the other side's spin and focus, with the vigor of the other side's advocacy, as it is likely to be seen by the judge and jury. Consider what this can accomplish:

When you address the other side. You have been concerned that the other side is incorrigibly combative; that they will not respond rationally to a presentation of the true strengths of your case. As a result, you have been reluctant to negotiate collaboratively. If they are dead-set on clobbering you, even the game theorists would acknowledge that you are correct to clobber right back. But when you actually present your case to the other side, face to face, their reaction is generally quite different. The folks on the other side are generally not stupid, and are rarely so stubborn or ideological about the litigation as to fail to respond appropriately to what you have to say. You can generally see it on their faces and in their body language, if not hear it in their words.

If your points appear to have merit, but somehow don't seem to be sinking in on the other side of the table, then part of the mediator's job is to catalyze that process. In later private caucuses as well as in the initial joint session, part of the

mediator's job is to sensitize the other side to the risks of letting you present your case to the trier of fact. Mediation provides the opportunity for the strengths and weaknesses of everyone's positions to be thoroughly analyzed and rationally taken into account. Once you sense--and you generally will--that the other side is not so incorrigible, but rather responds more or less rationally to what you have to say, the first incentive to engage in combative rather than collaborative negotiation goes by the boards.

When the other side addresses you. No longer are you and your client ensconced in the comfort and privacy of your office. In the adversary crucible of the mediation, you have the opportunity to listen to what the other side has to say. In almost every case, there are at least two sides to the story. When you hear the other side spin their tale, in their own words, with the vigor of their own advocate, you may well be disabused of the notion that your case is a lead-pipe cinch. And in truth, few cases are cinches, particularly when the task of adjudication is left to an often-unpredictable jury. So the second incentive to engage in combative rather than collaborative negotiation is minimized as well.

In mediation after mediation, clients and lawyers so chastened--both on your side and the other side--come to change their negotiating tune. The desire for clobbering is replaced by a desire for finality: a desire to eliminate the enhanced risks (newly perceived) of continued litigation, to eliminate the certainty of the mental, emotional and financial drains of continued litigation, and to get on with one's career and life with a "bird in the hand" settlement that satisfies the client's own needs reasonably well, as compared to the alternative. It is a clear "win," albeit differently defined. It is the best opportunity available for the satisfaction of the client's needs. When we enable our clients to achieve this goal, we exquisitely fulfill our obligation under Ethical Consideration 7-1 and California law to represent and advocate our clients' interests with zeal.

Although many clients (and lawyers) leave these mediations with some lingering sense of disappointment over not getting everything they came in to achieve, these settlements grow on your clients, and look better and better with each passing day. Like the person who did not realize how painful it was to bang his head against a brick wall until he stopped, many clients did not realize how painful litigation was until it ended. The lawyer's wisest strategy may well be to give the client time to appreciate the benefits of living litigation-free; and then to allow the client to give the lawyer the credit he or she deserves for that result.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediations

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4-39 California Forms of Pleading and Practice--Annotated §§ 39.12-39.19

AUTHOR: Los Angeles County Bar Association

[Reserved]

§§ 39.12[Reserved]

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PART III. VALUING CASES FOR MEDIATION AND SETTLEMENT NEGOTIATION

4-III California Forms of Pleading and Practice--Annotated Scope

AUTHOR: Los Angeles County Bar Association

Scope

David G. Gold n*

FOOTNOTES:
(n33)Footnote *. **David G. Gold** is the managing director of the Negotiation Strategy Group consulting firm. He consults widely on legal negotiation problems and leads seminars nationwide on negotiation strategy for attorneys.

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4-39 California Forms of Pleading and Practice--Annotated § 39.20

AUTHOR: Los Angeles County Bar Association

§ 39.20 Importance of Case Valuation

By far the most valuable strategic tool in mediation, as in settlement negotiation, is a clear understanding of a case's value. Law schools, however, do not teach (and law firm training usually ignores) the economic and probabilistic concepts central to every case valuation. Thus, for most attorneys these concepts lurk unstated and unexamined beneath estimates of value.

Attorneys entering negotiation or mediation without explicitly addressing these factors do so at their clients' peril. Effective case evaluation is crucial to the two key strategic assessments in settlement negotiation--assessment of the least your client should accept, and the most the opposition might give. Moreover, understanding case value well enough to articulate that understanding is essential for performing the three vital persuasive and educative functions in settlement--persuading the opposition to raise their offers, educating a client as to the relative merits of trial versus settlement, and convincing a settlement judge or mediator of the strength of your position.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediations

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Chapter 39 TACTICS AND NEW DEVELOPMENTS IN ADR
PART III. VALUING CASES FOR MEDIATION AND SETTLEMENT NEGOTIATION

4-39 California Forms of Pleading and Practice--Annotated § 39.21

AUTHOR: Los Angeles County Bar Association

§ 39.21 The Components of Accurate Evaluation

[1] Factors Involved

The legal factors central to case evaluation are familiar, though by no means easy to assess: the chances of winning or losing, the likely implications for each side of victory or defeat, the likely costs of litigating, and the likely timing of ultimate payout. Less familiar are the statistical and economic notions required to digest and interpret this information. Implicit in all estimates of case value are assumptions about, and calculations based on:

- Expected value,
- Risk aversion,
- The probabilistic principles governing calculation of the likelihoods of multiple independent events, and
- The time value of money.

Attorneys who attempt to combine and sort these factors in the absence of explicit analysis and careful calculation risk reaching case value estimates that are muddled and misleading. On the other hand those that master and apply a few basic economic and statistical principles can significantly enhance the clarity and precision of their valuations. A tool for combining these principles and clarifying analysis has long been taught to all first-year business-school students, but remains unfamiliar to most lawyers. Attorneys who master how to use this tool--known as decision analysis--and more particularly how to employ the underlying concepts, can greatly enhance their effectiveness in both negotiation and mediation.

[2] Expected Value of a Case

Crucial to assessing the least a client should accept to settle a case, and the most the opposition might be persuaded to

offer are the linked ideas of expected value and risk aversion. To some attorneys the ideas are already familiar, but to many they are not.

To illustrate these concepts, consider the following simplified case. Suppose you *know* that your client has a 70% chance of winning at trial and a 30% chance of losing. Suppose further that victory means the client gets $1 million, and loss means they get nothing--and that in this instance winning or losing have no other implications. Finally, assume it costs you and your client nothing to bring this suit. (The hypothetical is deliberately simplified for the sake of clarity--later, step-by-step we will tackle increasingly realistic circumstances.)

Click here to view image.

Notice how helpful this type of figure is for visually summarizing the decision the client faces. The figure represents decision analysis in its simplest form.

If your client were plaintiff in many such cases--in essence played this "game" many times--their optimum settlement strategy is readily identifiable; they should accept the other side's last, best settlement offer only when it is superior to the average court outcome. Over many such trials, on average your client would win $700,000 per trial. (To see this intuitively, consider that a client "playing this game" ten times would win 7 times on average, netting $7 million over the ten plays, or $700,000 per play.) The $700,000 average outcome of this case is known as the *expected value* of the case--a crucial economic concept.

For those of you who represent (or litigate against) banks, insurance companies, large businesses, large governmental agencies, or very wealthy individuals--more generally, parties who "play" investment and litigation "games" of this magnitude many times--their decision about accepting a settlement offer in this case hinges on expected value. As plaintiffs they would do best on average by rejecting any settlement below $700,000, and accepting any final offer greater than $700,000.

The graphic not only gives a concise way to summarize the case, but also offers an easy way to calculate its value for the wealthy client. (This approach will prove particularly useful for simplifying calculation of the value of more realistic, complex cases.)

Click here to view image.

To calculate the average outcome of trial, simply multiply each possible outcome (the numbers at the right) by the chances of attaining that outcome (the corresponding numbers at the left), and sum the results.

.70 x $1,000,000	=	$700,000
.30 x $0	=	+ $ 0
		$700,000

[3] Risk Aversion (Willingness to Pay a Premium for a Bird in the Hand)

To another identifiable subset of clients, this settlement decision looks radically different. Consider a personal injury plaintiff who is impoverished and in the hospital. He or she certainly does not "play" for sums this large many times--he or she gets only one chance--and if he or she loses, his or her bills go unpaid.

Faced with a 30% chance of getting nothing, most such clients, rather than risk losing, would accept settlements lower than $700,000--often well below $700,000. In essence they are willing to pay a premium for sure cash, a premium in the

form of a settlement below the expected value of the case. How far below $700,000 they would be willing to go depends on their preferences and circumstances. These are matters their counsel needs to discuss fully with them in order to negotiate effectively on their behalf.

Because these clients are averse to facing the risk of losing, they are labeled *risk averse*--a second crucial economic concept. Their risk aversion has two important implications in the negotiation. First, many settlements below expected value serve these clients' interests better than would trial. Second and relatedly, their risk aversion is a source of power to their adversaries, who can settle by paying less--often substantially less--than the case's expected value.

One of the most important assessments a lawyer can make in attempting to value a case for a client and in attempting to assess the value the opposition puts on their case, is to judge for each party whether they are likely to be expected valuers, or instead to be risk averse. If the amount at stake is a small percentage of the client's wealth, their best strategy is to take an expected value approach. If the amount in dispute is large relative to the client's wealth, they would do better to be risk averse.

The prior graphic summarizing this case is useful for the attorney representing the risk averse client by offering a concise way to describe the decision the client faces, and to structure discussion about the client's needs. Unlike the situation for expected valuers, however, the risk averse client's best decision cannot be determined simply by calculating the average outcome of the case, but instead depends on their individual circumstances.

[4] Making the Case More Realistic--Incorporating Costs

As a first step to making the above example more realistic, consider how the game changes if the cost of litigation is included. Legal fees and other litigation costs, along with disruption to a client's business and emotional life, all play important roles in determining litigation value. Simplifying once more, suppose that quantifying all these factors leads us to conclude the most likely total of these costs for this case is about $200,000, and suppose that none of this cost is reimbursed upon winning. Our graphic approach again gives a concise way to summarize the value of the client's case.

Click here to view image.

If going to trial costs $200,000, gaining is worth $1,000,000-$200,000 or $800,000, and losing now costs $200,000. To calculate the average outcome of trial, or the expected value, simply do as before, multiplying each possible outcome by the chances of attaining that outcome, and sum the results.

.70 x $800,000	=	$560,000
.30 x (-$200,000)	=	-$60,000
		$500,000

Over a large number of such trials, plaintiff would average winning $500,000 per trial. Thus, the expected valuer should reject any settlement offer below $500,000.

[5] Assessing the Other Side's Case Value

Notice that even if the other side agrees with you entirely about the likely outcome in court, valuing this simplified case from the defense perspective yields a different result. If defendant too faces unreimbursable litigation expenses of $200,000, the following figure summarizes their case.

Click here to view image.

If the likely award is $1 million and going to trial costs $200,000, then losing costs defendant $1,200,000. Winning would cost the $200,000 expenses of litigation. Again, to calculate the average outcome of trial--the expected value--simply multiply each outcome by the chances of attaining that outcome, and sum the results.

.70 x ($1,200,000)	=	-$840,000
.30 x (-$200,000)	=	-$60,000
		-$900,000

Defendant would do better on average settling at any amount below $900,000 than litigating. Since plaintiff prefers any settlement greater than $500,000 to going to trial, any settlement between $500,000 and $900,000 leaves both parties better off than would trial. (As the litigation proceeds, and costs accrue, the distance between these two figures will dwindle.) Thus, in this very simplified case, the two decision analyses have set an upper and lower bound for possible negotiated results. This is a very useful snapshot to have in preparing for mediation or settlement negotiation. Of course, in the real world, the two sides are not likely to quickly agree about probable trial outcomes. But if an attorney wishes to gain insight into the most the other side might be willing to offer, the best starting point is to ask what your analysis indicates they *should* be willing to offer. If your reading of the case is well-founded, it provides a good first estimate of the other side's bottom line, and forms a basis for persuading them about how and why their offers are inadequate and unrealistic.

[6] More Realistic Still--Incorporating Other Possible Outcomes

Returning to plaintiff's perspective, to make the case still more realistic, suppose that the plaintiff has a 2% chance of winning an additional $1,000,000 in punitive damages, on top of the actual damage award of $1,000,000. As the case gets more complex, the value of having a graphic snapshot becomes more apparent, as it renders simple the calculation of expected case value.

Click here to view image.

Now the client has a.02 chance of winning $1,800,000 (that is, $1 million of punitives plus $1 million of actuals minus $200,000 costs), a.68 chance of winning actual damages without punitives (or $1 million minus $200,000), and still the.30 chance of losing $200,000. To calculate the average outcome of trial, again simply multiply each outcome by its likelihood, and sum the results.

.02 x $1,800,000	=	$36,000
.68 x $800,000	=	$544,000
.30 x (-$200,000)	=	-$60,000
		$520,000

As the figure shows, incorporating the chance of the punitive damage award increases the expected value of the case by $20,000. The fact that the impact of punitive damages is so slight surprises many people. Of course, the impact is so small because we assessed a very low likelihood of a punitive damage award, but people's surprise is based on another factor as well--the well-documented bias virtually everyone exhibits for focusing on large events that have a small likelihood of actually occurring. For example, people bet on the lottery in large part because they focus on the big award, not the poor expected value of each bet. Similarly, though there are good reasons to be concerned about punitive damages, people's tendency to focus on "big events" tends to lead them to excessively inflate the importance of these events in the absence of careful analysis.

[7] Evaluating the Likelihood of Multiple Events

Suppose you believe that your only chance for motivating a jury to award punitive damages is if the witnesses perform extremely well, and even then you have only a 1 in 10 chance of punitives. Suppose further that you feel you have only a 1 in 5 chance of the witnesses performing that well. What are your chances of getting punitives? To calculate the answer you multiply the likelihood of the first event happening by the likelihood of the second event happening, or 1/10 x 1/5 = 1/50.

We are all familiar with the idea that it is harder to call 4 consecutive coin flips right than it is to call 1 coin flip right, but how much harder? The chances of calling the first flip right are, of course, 1 in 2. The chances of calling two in a row right are 1/2 x 1/2, or 1/4. Three in a row would be 1/8 and four would be 1/16. More generally, if consecutive things have to happen to reach a result, and if you have assessed likelihoods by asking "If the first thing happens, what are the chances the second will happen?", then the likelihood that both will happen is the likelihood of the first multiplied by the likelihood of the second. This law allows the calculation of the expected value of much more complex scenarios.

The next figure demonstrates how to calculate the expected value of a slightly more complex case in which you feel the outcomes are contingent on the performance of the witnesses.

Click here to view image.

To calculate the value of a multi-branch decision "tree" we simply start at the right side of the paper and work left, using the exact same approach as we have used before. Starting with the "game" at the top right, we multiply each of the three outcomes by the likelihood they will occur, as is shown in the top box, yielding a value if the witnesses are good of $650,000. Then we evaluate the game at the lower right, as shown in the lower box, yielding a value of $280,000 if the witnesses are bad. Finally we combine the two in the box at the left, again multiplying each result by the chance of getting to it. This yields an expected value for this case of $465,000.

[8] The Time Value of Money

The final economic principle that often has an enormous impact on the value of litigation is the idea that a dollar paid today is worth much more than a dollar paid several years down the line. If final payouts are likely to be years away, this factor can have a huge impact on case value.

For those to whom the concept is unfamiliar, consider that if your client invested his or her money in a conservative bond that yielded 10% interest, a dollar today would grow to $1.10 in one year, $1.21 in two years, $1.33 in 3 years, and so on. A client investing in this way would not care whether he or she received $1 this year, or $1.33 three years from now. If we wanted to calculate what it would be worth to the client to get $1 three years from now, the answer is 1/1.33, or $.75, which is the amount the client would have to invest today to yield $1 in year three. Indeed, if the client's payout will not come for three years, the *present value* of that payout is worth only 3/4 (or.75) as much as it would be if it came today.

Businesses routinely discount future values at rates of 10% and higher. Indeed rates as high as 15% are not uncommon. (Sophisticated business clients *know* their "discount rates," which they base on considerations like their profit rate, the interest rate at which they borrow money, and the internal rate of return they look for on investments.) To see how severely this would impact the value of an eventual award, an award paid five years from now to a client who discounts at 15% per year is worth less than *half* what it would be today.

Many unsophisticated clients discount at rates even higher than 15%, though they would not describe it in these terms.

Indeed, the impoverished hospitalized plaintiff may so strongly prefer receiving cash today to cash several years down the line that he or she might prefer well below $500,000 today to $1,000,000 five years from now.

In some cases, court-awarded interest partially mitigates the impact of present value considerations, but in many they do not. Consider the developer whose project is delayed until the litigation ends. Every day of delay further discounts the value of the stream of income the developer can earn from the project.

When considering the impact of court awards, those awards should be discounted to present value. If our hypothetical $1 million award would not be paid for three years, and would not be compensated by interest, its value falls to $750,000 for the client who discounts at 10% per year, and it should be represented that way in our decision analysis.

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4-39 California Forms of Pleading and Practice--Annotated § 39.22

AUTHOR: Los Angeles County Bar Association

§ 39.22 Conclusion: Assessing Likelihoods and Outcomes in the Real World

In the real world, an attorney never knows for certain what a client's chances are in court. The absence of that knowledge, however, does not excuse failing to analyze case value carefully. Certainly "best guesses" based on specific past trial outcomes, statutes, cases, and evidence, are better than failing to analyze value at all. Similarly we can't predict with certainty how much a client would win if they in fact prevail at trial. But we can give ranges of likely awards, can list the cases and evidence supporting those estimates, and can identify within those ranges what our best guess outcome would be. Finally, many of the costs of litigation, and many of the implications of winning or losing are difficult to quantify. Rather than being an argument against systematic analysis of case value, those factors belong in the analysis, at the very least by being listed alongside expenses and court awards as additional outcomes.

Case value hinges on many factors. In the face of such uncertainty and complexity we almost all do the same thing--the human thing. We wing it. We shoot from the hip in estimating value. Those instinctive judgments are useful, especially when enlightened by experience, but are best used in conjunction with more careful and formal analysis that take into account the economic and probabilistic considerations described above. Without such formal analysis, attorneys will have difficulty explaining the reasoning behind estimates of value to their clients, to the opposition, and perhaps most importantly to themselves in striving for the most accurate possible case evaluation.

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[Reserved]

§§ 39.23[Reserved]

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4-IV California Forms of Pleading and Practice--Annotated Scope

AUTHOR: Los Angeles County Bar Association

Scope

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FOOTNOTES:
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4-39 California Forms of Pleading and Practice--Annotated § 39.30

AUTHOR: Los Angeles County Bar Association

§ 39.30 Definition and Importance of Disclosure

> **D i s c l o s u r e,** *n* 1. To expose to view, as by removing a cover; uncover. 2. To make known; divulge. 3. *United States*, 20th-21st Century egalitarian theory that promotes open and efficient markets through the *disclosure* of meaningful information to buyers of goods and services. [Latin *dis-* (reversal) + *clore*, to CLOSE.]

Mediator impartiality and independence is core to the growth and acceptance of mediation as the process of choice in resolving disputes. n1 Confidentiality, while a close second, is dependent upon mediator *integrity* to drive the process.

At stake is public trust in the justice system. Parties to a mediation are encouraged by law and practice to reveal themselves, particularly in private caucus. If a party has the slightest doubt that his bared soul will forever be held confidential by the mediator, we will have not openness in mediation but inhibition resulting in deficient process and inferior outcomes [*see Cho v. Superior Court (1995) 39 Cal. App. 4th 113, 122-124, 45 Cal. Rptr. 2d 863* (sitting judge whose settlement conferences were *de facto* mediations retired and associated with a law firm that represented one of the parties to a still active case the judge had "mediated"; both the retired judge and the law firm were disqualified, notwithstanding the firm's firewall policy)].

This discussion examines mediator *disclosure* as a function of the parties' right to know. It primarily addresses the right to know and disclosure in the context of the parties and lawyers need for reliable information in the selection of a mediator for their case. We conclude that the *right to know* demands full and credible disclosure by the mediator to assure trust and confidence in mediation and the justice system. And maybe someday the third definition of *disclosure* will find its way into Webster.

A proposed uniform regulation is included to promote discussion [*see § 39.39*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediations

FOOTNOTES:
(n1)Footnote 1. Cornell University, Price Waterhouse and PERC jointly conducted an ADR survey of 1,000 of the largest U.S. corporations in early 1997. Findings include: (a) mediation is preferred over arbitration in all types of disputes; (b) extensive growth is expected for mediation whereas little is expected for arbitration; (c) company use of ADR does not depend on its status as plaintiff or defendant; (d) largest corporations employ ADR much more often than small companies who tend to be more litigious; (e) Nearly 90% of the companies view mediation as a cost-saving measure whereas cost is less important to those using arbitration; (f) quality of all neutrals is of concern, but more so for arbitrators. *The Use of ADR in U.S. Corporations: Executive Summary* (April, 1997); *see also Industry Giants Join Movement To Mediate*, Wall Street Journal (07/21/97)

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AUTHOR: Los Angeles County Bar Association

§ 39.31 The Right to Know

Buyers of goods and services have rights including the right to buy or not, and the right to select among competitors for their business. To make informed decisions, buyers need to have reliable information about the goods and services offered and the sellers that offer them. This *right to know* is fundamental to market integrity, as well-informed buyers will drive quality, accountability, and value into the markets. It is indispensable to high quality and affordable justice and shelters the right of disputants to reach a voluntary uncoerced agreement.

When markets fail to respond, buyers often turn to the legislative and regulatory arena to level the playing field. A frequently employed legislative tool is *disclosure*. Signs demonstrating the dramatic growth of *disclosure* as an open-market mechanism are much in evidence. Securities, healthcare, automotive, insurance, campaign financing, real estate, and food labeling are but a few. International trade is no less driven by information as illustrated by the IMF's recent proposal that the troubled Asian nations provide greater *disclosure* of economic and financial data "so that a larger number of countries can benefit from access to international capital" [Los Angeles Times, Section D, *Asian Watch*, Feb. 7, 1998.].

Physician-specific and stock broker-specific disciplinary and claims data, for example, are now available on the Internet. Massachusetts' far-reaching disclosure law begat a lighter bill (A.B. 103) in California which became effective January 1, 1998. And managed-care plans serving Medicare or Medicaid patients must now disclose physician financial incentives [*see Disclosing doc incentives*, Modern Healthcare, Jan. 6, 1998]. The National Association of Securities Dealers on March 26, 1998 launched its new system to advise investors of brokers' disciplinary history, customer complaints, claims, awards, judgments, and settlements over $10,000 [Wall Street Journal, Mar. 9, 1998].

Parties want high quality resolution of their disputes. That means a system that is accessible, affordable, comprehensible, user-friendly, and speedy so whatever the outcome the parties and lawyers can depart assured that a competent neutral has listened to and responded with courtesy, respect and sensitivity.

Disputants and their lawyers are increasingly demanding more information about the processes and the persons who

serve them. A dispute resolution system must therefore assure that reliable information is readily available to the parties and lawyers to enable them to knowledgeably participate in and influence the process. Without education and information the expectations of the parties and lawyers will be unrealistic with attendant surprise, frustration and dissatisfaction.

Legal Topics:

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4-39 California Forms of Pleading and Practice--Annotated § 39.32

AUTHOR: Los Angeles County Bar Association

§ 39.32 How Do Lawyers and Mediators View Disclosure?

Scientific information on the attitudes of lawyers and mediators is in short supply. A private study by *ADR Solutions* has been in progress since the fall of 1997 [*ADR Solutions* has granted limited permission for the publication of its anecdotal preliminary findings. Copyright 1997-1998 ADR Solutions, Inc. All rights reserved.]. Two groups were surveyed--lawyers from large multi-specialty law firms and members of the Southern California Mediation Association. Preliminary findings reflect a high correlation of views among the two groups:

Question	Lawyers	Mediators
• *Should disclosure be required for voluntary, court-annexed, community, peer-to-peer, and pro bono mediation including settlement conferences?*	Yes-78%	Yes-83%
• *Reasons for disclosure:*		
• Assist parties to make informed decisions	100%	94%
• Support integrity and acceptability of mediation	95%	100%
• Encourage party/counsel candor	93%	79%
• Reduce risk of selecting bias mediator	100%	96%
• *Should disclosure be made in writing declaring the absence or presence (and facts) of conflicts?*	N/A	Yes-57%
• *Frequency in which mediators disclosed the absence or presence of conflicts*	35%	N/A

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AUTHOR: Los Angeles County Bar Association

§ 39.33 Sources of Disclosure in Mediation

The sources of disclosure standards include the rules of ADR Providers such as the American Arbitration Association, professional associations such as SPIDR, court-annexed programs, community-based programs, private contract, statutory and case law. Although the generally unregulated ADR Provider industry is beyond the scope of this discussion, there may be reason to believe that an ADR Provider has greater incentive to enforce or adhere to disclosure standards than an individual mediator, though insulating marketing from provider services remains a challenge. Further study is needed as to whether and to what extent an ADR Provider should be held accountable for disclosure, confidentiality, quality assurance, and training.

A respected source of standards is found in *Model Standards of Conduct For Mediators*, a joint product of the American Arbitration Association, the American Bar Association's Dispute Resolution Section, and the Society of Professionals in Dispute Resolution (1994). The sponsors and other organizations have since adopted the *Model Standards*.

CPR Institute for Dispute Resolution (CPR) compiled a select list of conflict (disclosure) provisions in 1996 from ADR Providers, Professional Associations, and state regulations and proposals [*see Conflict of Interest in Mediation: Selected Provisions and Proposals Compiled by CPR*]. A study of CPR's state compilation by *ADR Solutions'* permits a state-by-state comparison by issue. The analysis is found at § 39.40. While specific coverage among the states varies, all efforts reflect a desire to grow mediation by protecting buyers of mediation services.

Based upon the author's interviews and the study conducted by *ADR Solutions* it appears that disclosure standards are not widely practiced [*see § 39.32*]. Several reasons may account for this: fear of the loss of income, fear of being sued, unfamiliarity with ethical or legal standards, and inadequate record keeping. These unethical practice patterns occur in fee-based mediation more often than, if at all, in community-based programs where economic incentives are lacking.

If we do not pass and enforce meaningful laws it should come as no surprise that unethical behavior prospers simply because it is successful and some mediators "will therefore stoop to it" [Gideon Kanner, *Rambo, Go Home - Of Ethics, Tactics and Judges*, Trial Magazine, September, 1991, pp. 104-106]. Such undisclosed conflicts will "compromise the

integrity of the court [for] it is the duty of the attorney to disclose conflicts of interests, not the obligation of the clients to ferret them out," wrote bankruptcy judge Stuart M. Bernstein in denying a major law firm half the legal fees it sought in a high profile New York bankruptcy case. [Wall Street Journal, *Legal Beat* (March 11, 1998)]. It is no different for mediation and other forms of dispute resolution.

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AUTHOR: Los Angeles County Bar Association

§ 39.34 What Should Be Disclosed?

Three areas are commonly scrutinized through disclosure:

- Professional, business, and close personal relationships;
- Financial interest in a disputant or the subject of the dispute; and
- Prior or pending case encounters involving the same disputants.

Parties and lawyers who inquire of a mediator or ADR Provider to mediate their dispute want to know about the mediators they are considering. Resumes help, but are self-serving and usually provide but a fraction of the information desired by parties and lawyers. Satisfaction and performance related data will likely be increasingly requested. But for now, most parties and lawyers rely upon disclosure as the primary if not only mechanism available to determine whether or not there are any circumstance that might reasonably raise a question concerning the proposed mediator's impartiality and independence.

Proper disclosure will also ameliorate the effects of the *repeat player*--that *de facto* inequality or unfairness in dispute resolution resulting from disputant-neutral propinquity. Frequent buyers of dispute resolution services secure strategic socio-economic advantages from frequent encounters with small groups of neutrals. "Repeat neutrals" similarly profit from continuing case encounters with repeat players. The risk of *biased neutrality* is real and statistically significant. A subtle but measurable bias is manifest in more positive outcomes and better outcomes [*see* Bingham, Lisa B., *Employment Arbitration: The Repeat Player Effect*, Employee Rights and Employment Policy Journal, Vol. 1, Issue 1, pp. 210, et seq. (Fall, 1997) (employment arbitration)]. While the repeat player bias has not, to this writer's knowledge, been studied in mediation, there is no reason to believe that the same dynamics would not be identified as the reasons for non-disclosure are the same.

Two cases involving the arbitration of medical malpractice claims, both involving the same party and same arbitrator,

illustrate the need for prior and pending case encounters to be properly disclosed in writing. Both cases were remanded for retrial before new arbitration panels [*Neaman v. Kaiser (1992) 9 Cal. App. 4th 1170, 11 Cal. Rptr. 2d 879* ; *Kaiser Foundation Hospitals v. Superior Court (1993) 19 Cal. App. 4th 513, 13 Cal. Rptr. 2d 431*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-39 California Forms of Pleading and Practice--Annotated § 39.35

AUTHOR: Los Angeles County Bar Association

§ 39.35 Who Should Disclose?

Most mediators are independent and provide their services directly and/or through one or more ADR Providers. As such, only the mediator has *all* the factual resources concerning case encounters and prohibited personal, professional or commercial conflicts. It follows that the mediator remains primarily responsible for disclosure to the parties and lawyers.

Support exists for others to also disclose what they know about the proposed mediator. One view is that parties to mediation should be required to disclose their experiences with the proposed mediator. Another is that the ADR Provider, if there is one, disclose the number of case encounters and neutrals with the parties, and the mean and median number of case encounters per neutral. Both views have merit. Both may provide useful information to the parties; the latter also targets the *repeat player* effect [*see* discussion in *§ 39.34*]. The employment of supplementary disclosure strategies, however, must not relieve the mediator of the primary responsibility for making proper disclosure.

Mediator accountability is consistent with public policy as it is the mediator alone whom the parties expect to protect their rights to confidentiality. Trust in the mediator and mediation and can best be served by holding the mediator responsible to make full and credible disclosure. Only then may mediation become accepted as the process of choice for dispute resolution.

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4-39 California Forms of Pleading and Practice--Annotated § 39.36

AUTHOR: Los Angeles County Bar Association

§ 39.36 How Should Disclosure Be Made?

Information about potential conflicts should be communicated in the most efficient manner practicable, free of ambiguity and risk of misunderstanding. That means a mediator should inform the parties and their lawyers in writing of the presence or absence of potential conflicts, and where potential conflicts exist to provide the circumstances. This is the practice of the American Arbitration Association in both mediated and arbitrated cases. Any valid waiver of conflicts should likewise be in writing.

Oral disclosure, urged by some, invites all the uncertainty of oral agreements, waivers, and other transactions that we are all too familiar with. Half-measures will not yield the high level of trust and confidence necessary to grow mediation.

A mediator's best compliance practice would be the utilization of an effective record keeping system to enable the accurate identification of prior and pending case encounters and investments. But privacy must be assured of the disputants in such cases who are not in business and not parties to the new mediation. One method is to replace the names of such individuals with their respective roles in the prior or pending case, such as "Claimant" or "Respondent." California uses this privacy approach in arbitrated cases [*Code Civ. Proc. § 1281.9(a)(3), (4)*]. On the other hand, California Law Review Commission Comments (b)(3) to *Evid. Code § 1119* (mediation confidentiality) "does not preclude a disputant from obtaining basic information which may be significant in selecting an impartial mediator."

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4-39 California Forms of Pleading and Practice--Annotated § 39.37

AUTHOR: Los Angeles County Bar Association

§ 39.37 When Should Disclosure Be Made?

Timely disclosure will assist the parties and lawyers in evaluating the mediator. A proposed mediator should therefore make disclosure as soon as possible following notice of consideration or proposed appointment. The mediator's duty continues during the mediation process and requires that new disclosures be made as soon as known in writing or orally, as circumstances permit.

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4-39 California Forms of Pleading and Practice--Annotated § 39.38

AUTHOR: Los Angeles County Bar Association

§ 39.38 Remedies

Courts have demonstrated a willingness to impose severe sanctions against those who have violated confidentiality of mediation [*See Paranzino v. Barnett Bank, 690 So. 2d 725 (Fla. App. 4th Dist. 1997)* ; *Bernard v. Galen Group, 901 F. Supp. 778 (S.D.N.Y., 1995)* . Compare *Doe v. State of Nebraska, 971 F.Supp. 1305 (D.Neb.1997)* (confidentiality is measured by statute)]. Providing remedial relief for those injured from the failure of a mediator to make required disclosure should be accorded greater attention. Disciplinary action may be sufficient where mediators are licensed, which may include restitution or public reproval.

In the absence of mediator regulation, a court clearly may impose sanctions in court-annexed mediation. But it is less clear in private mediation and equally unclear if injured parties have a private cause of action. In the absence of a comprehensive statutory scheme, a simple provision leaving the parties with whatever rights they have at law or equity may be sufficient.

Balancing may be necessary to avoid restricting the supply of qualified mediators. Factors to consider include malpractice insurance, liability caps, quasi-immunity, and agency subsidies for non-profit community programs. But care must be exercised so as to preserve the accountability flowing from baseline remedies.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsInvasion of PrivacyPublic Disclosure of Private FactsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsEvidenceProcedural ConsiderationsMediation Evidence

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AUTHOR: Los Angeles County Bar Association

§ 39.39 Proposed Regulation

[1] Proposal for a Regulation

A proposed regulation is included in [2], below. It is designed to facilitate dialogue among those responsible to regulate the scope and manner in which mediators effect their disclosures. It is a start, and together with other resources on mediator disclosure, should contribute to the evolution of a uniform process. The market in the long run will demonstrate that good ethics is good business and that the best practices serve mediator and parties alike.

[2] Text of Proposed Disclosure Regulation Legislative Policy

Parties want high quality resolution of their disputes. That means a system that is accessible, affordable, comprehensible, user-friendly, and speedy so whatever the outcome the parties and lawyers can depart assured that a competent neutral has listened to and responded with courtesy, respect and sensitivity.

Parties to a dispute and their lawyers are increasingly demanding more information about the processes and the persons who serve them. A dispute resolution system must therefore assure that reliable information is readily available to the parties and lawyers to enable them to knowledgeably participate in and influence the process. Without education and information the expectations of the parties and lawyers will be unrealistic with attendant surprise, frustration and dissatisfaction.

1. **Definitions**:

1.1 "Mediation" means a process in which a neutral person or persons facilitate communications between the disputants to assist them in reaching a mutually acceptable agreement. [*see, Cal. Evid. Code 1115(a)*]

1.2 "Mediator" means a neutral person who conducts mediation. [*see, Cal. Evid. Code 1115(b)*]

1.3 "Oral Agreement" means an oral agreement that satisfies all of the following conditions [*see Cal.*

Evid. Code 1118]

1.4 "Disputants" means natural or artificial persons who have legal rights and duties to participate in mediation and reach a mutually acceptable agreement.

1.5 "Family means the mediators's spouse or a person within the third degree of relationship to the mediator or the mediator's spouse, or the spouse of such person.

2. **Principals of Neutrality**:

2.1 A mediator shall be honest, impartial, and free from favoritism or bias in word, action, and appearance.

2.2 A mediator shall not give or accept any property of value, directly or indirectly, for the referral of cases.

2.3 A mediator shall be competent to handle the matters under dispute. If a case is beyond the mediator's competence, the mediator shall decline the case or withdraw from the case, seek appropriate assistance, or obtain the informed written consent of all parties to serve.

2.4 A mediator shall maintain the integrity of the mediator's position and shall not be influenced by outside pressure, fear of criticism or self-interest.

2.5 A mediator accepting an appointment must be able to and shall act promptly to meet all mediation commitments in a timely manner.

3. **Required Disclosures** means all reasonably known current, past or predictable future:

3.1 business, professional, or close personal relationship the mediator, including the mediator's firm or family, has with the (a) disputants, including all instances in which the mediator, including the mediator's firm or family, is now or has provided any services for any disputant or adverse to any disputant; (b) disputants' lawyers, law firms, and insurers representing a disputant; or,

3.2 financial interest the mediator, including the mediator's firm or family, has in any disputant or in the subject of the dispute; or,

3.3 business, professional, or close personal relationship the mediator, including the mediator's firm or family, has with an officer or management-level employee of a disputant, or with an individual or insurer representing a disputant; or,

3.4 circumstances that might reasonably raise a question under Section 2.

4. **Disclosure--Procedure:**

4.1 The mediator shall in writing indicate the absence or presence of any required disclosures. Where the mediator provides required disclosures the mediator shall disclose in writing the following where applicable:

(a) Where a disputant to a proposed mediation is also a disputant to a prior or pending mediation or arbitration of the neutral within the prior five years, the mediator shall

disclose the following for each such prior or pending case: (i) date case closed unless case not closed in which instance the date opened; (ii) names of all disputants, provided that the true names for any individuals not conducting business and not a disputant to the proposed mediation shall be described only by their role ("claimant" or "respondent"); (iii) names and representative interest of the lawyers and their law firms, if any.

(b) In all other instances the specific circumstances constituting the required disclosures;

(c) If the mediator fails to make required disclosures as required herein the mediator shall decline the case or withdraw from the case.

4.2 The mediator shall utilize an effective record keeping system to identify required disclosures and make all reasonable efforts to learn of facts warranting required disclosures.

5. **Disclosure--Timing:**

5.1 The mediator shall in writing indicate the absence or presence of any required disclosures as soon as possible following appointment or proposed appointment, but in all cases prior to convening the mediation.

5.2 The mediator's duty to disclose continues during the mediation process and shall be made orally or in writing, as circumstances permit, as soon as possible within 72 hours after the mediator becomes aware of any required disclosures.

5.3 The duty to make required disclosures runs to reasonably known disputants or their reasonably known counsel, and to the court or other referring organization if required by such court or organization.

5.4 After making required disclosures the mediator shall decline the case or withdraw from the case unless all disputants agree to retain or continue to retain the mediator. However, a mediator shall decline the case or withdraw from the case where there are clear and substantial required disclosures irrespective of the disputants' desires.

6. **Public Education**: Disputants and their counsel who use mediation to resolve disputes have the right to know of required disclosures so they may make informed decisions in selecting mediators. The fact and nature of this *Mediation Disclosure* Act shall be provided to Disputants and their counsel as follows:

6.1 Mediators who directly contract with disputants and/or their counsel for mediation services shall provide in separate writing or in their written communications, in 12-point bold font, the following: "Disputants to mediation have the right that mediators disclose in writing the absence or presence of any conflicts of interest. [Code Section]. Upon request a copy of the *Mediation Disclosure Act* will be provided to you."

6.2 Community Mediation Organizations [define] which provide or arrange to provide mediation services for disputants who often utilize the organization's facilities may, as an alternative or supplement to the notice in Section 6.1, conspicuously and prominently post in their facilities the following message: "Disputants to mediation have the right that mediators disclose in writing the absence or presence of any conflicts of interest. [Code Section]. Upon request a copy of the *Mediation Disclosure Act* will be provided to you."

6.3 All other organizations which provide or arrange to provide mediation services for disputants and/or

their counsel, shall provide in separate writing or in their written communications, in 12-point bold font, the following: "Disputants to mediation have the right that mediators disclose in writing the absence or presence of any conflicts of interest. [Code Section]. Upon request a copy of the *Mediation Disclosure Act* will be provided to you."

7. **Remedies**: Disputants to a mediation who sustain damage as a result of any violation of Sections 2-6 shall have such remedies as are provided in law or equity. Where there has been a finding that the mediator's violations of the *Mediation Disclosure Act* were willful or repetitious, the court may additionally impose the following sanctions suitable to protect the public interest:

7.1 A mediator may be suspended from providing any mediation services, not to exceed 12 months per single case encounter;

7.2 A mediator may be subject to public reproval published in a state-sponsored ADR web site;

7.3-7.10 [*Reserved*]

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4-39 California Forms of Pleading and Practice--Annotated § 39.40

AUTHOR: Los Angeles County Bar Association

§ 39.40 Chart: State-by-State Comparison of Regulatory Provisionsn2

The following is based upon CPR Institute for Dispute Resolution's 1996 compilation of state laws and recommendations [*see* discussion in *§ 39.33*].

Florida	Hawaii	Indiana	Maine	MA	Min	Neb	NY	TN	TX	Utah (USDC)
1,2, 4-11	1,5, 6,7	1,4-8, 10-12	1,2, 5,6, 7,11	1-8, 11	1-5, 11,14	1,2, 4-7, 11,13	1,2, 4-8, 11,13	1,2, 4-8	5-8	4-8, 12

Guide to provision numbers:

1. **Impartiality**--freedom from favoritism or bias in word, action, and appearance.

2. **Impartiality**--may not use mediation process to solicit, encourage, or incur future professional services with any party; may not provide services to a party for 6 or 12 months following mediation.

3. **Impartiality**--may not serve as mediator if previously provided services to a party

4. **Disclosure**--continuing duty to parties and/or court where applicable

5. **Disclosure**--current, past or possible future representation or consulting relationship with any party or attorney involved in the mediation.

6. **Disclosure**--close or significant personal relationship with party or attorney

7. **Disclosure**--financial interest/professional relationship with party, attorney; or insurer (Indiana)

8. **Disclosure**--any other circumstances which might reasonably raise a question as to the mediator's impartiality.

9. **Disclosure**--potential conflicts include fact of membership on board of directors, full-time or part-time service as a representative or advocate, consultation work for a fee, current stock ownership (with exceptions), or any other pertinent form of managerial, financial, or immediate family interest of party involved. A mediator who is member of law firm must disclose any representational relationship the member firm may have with the parties.

10. **Disclosure**--advise parties of their right to independent legal counsel.

11. **Freedom of choice**--parties may select another mediator, or proceed unless mediator believes there is a clear conflict of interest in which event the mediator must withdraw irrespective of the desires of parties.

12. **Records/Due Diligence**--utilize effective record keeping system to identify potential conflicts (Indiana); make reasonable efforts to be informed of facts warranting disclosure (Utah)

13. **Referrals**--avoid conflicts in recommending services of other professionals.

14. **Gifts**--may not give or receive anything of value to or from a party, attorney, or any other person involved in a pending or scheduled mediation.

Legal Topics:

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FOOTNOTES:
(n1)Footnote 2. *ADR Solutions* has granted limited permission to publish its comparative analysis. Copyright 1997-1998 © ADR Solutions, Inc., 16350 Ventura Blvd., Ste. 366, Encino, CA 91436. All rights reserved

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[Reserved]

§§ 39.41[Reserved]

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4-V California Forms of Pleading and Practice--Annotated Scope

AUTHOR: Los Angeles County Bar Association

Scope

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FOOTNOTES:
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4-39 California Forms of Pleading and Practice--Annotated § 39.50

AUTHOR: Los Angeles County Bar Association

§ 39.50 Use of Voluntary ADR to Distribute Nonliquid Assets

How can a group of nonliquid assets be fairly divided into equal shares when they have intangible or sentimental value for one or more of the potential recipients? What if the potential recipients value the items differently? For example, in the division of a family estate, one heir has always loved and cherished mother's wedding ring, and another has no interest in jewelry, nor a sentimental attachment to mother, and a third says he wants the ring, but only to create value in order to trade with the first heir on another asset. Or in a business partnership dissolution, one partner wants the proprietary computer program that was custom-written for the firm, and others want the collectable artwork displayed in the reception area, and another wants the firm's season Lakers or Forty-niners or Hollywood Bowl box tickets.

Partnership dissolutions, probates, and marital dissolutions can become nasty and bitter when the parties cannot agree on how to fairly distribute nonliquid assets with intangible value. By litigating such a dispute, the parties risk losing any control over disposition of these valued items. For example, a judge might require that an "irreplaceable" asset be sold or crudely partitioned, or the delays inherent in litigation may adversely harm other assets or lay them to waste. A voluntary form of ADR, such as mediation, permits the parties to jointly negotiate and promptly agree to a fair distribution method or system, thereby avoiding a delayed decision imposed by a disinterested outsider.

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4-39 California Forms of Pleading and Practice--Annotated § 39.51

AUTHOR: Los Angeles County Bar Association

§ 39.51 Objective Valuation and Distribution Methods

Distributing nonliquid assets fairly requires an objective system, i.e. a valuation and distribution method. If mediating parties perceive a proposed distribution system as fair and objective, there is an excellent chance that they will agree to settle through the mediation. Once the mediation identifies a system which all parties accept, then the calculations can be performed and the asset distribution accomplished without further litigation risks and expenses.

Professor Howard Raiffa of Harvard has considered the problem of fairly distributing nonliquid assets in his *The Art and Science of Negotiation*, Harvard University Press, 1982, pages 288-299. Professor Raiffa discusses three different systems, each of which is "fair." but somewhat different in result. In a mediation, one or more of these systems may be proposed by a party, by an attorney, or by the mediator. These three are: The Sealed Bid (Professor Raiffa calls this the "naive" system) system, the Auction system, and the Steinhaus Fair Division system (named after the Polish mathematician, Hugo Steinhaus). Although all three of these systems are objective and fair, the degree of "fairness" often depends upon one's viewpoint and one's stake in the outcome.

Suppose that there are four nonliquid assets, an Ansel Adams photograph, a Sam Francis lithograph, a custom computer program, and Hollywood Bowl box seats. Law partners Joe, Jan and Jerry are dissolving their firm and need help deciding how to distribute these assets fairly. All three would prefer not selling the assets in order to avoid the effort, time, expense, and tax liability, plus all recognize that the assets have aesthetic or non-economic value, at least to some of them.

Typically such parties try to divide the assets "fairly" but each person's concept of fairness differs according to his/her own perceptions and self-interest, usually resulting in stalemate, with angry and resentful comments, and a general deterioration of their relationship. Here is a how they each might view the problem at the outset, but without sharing this information with the others:

Joe adores the Sam Francis litho, which he selected for the firm years ago when it had far less value. Now, its fair market value is around $35,000 to $40,000, and he wants to make sure that when the dust settles, he gets it. Joe values

the Ansel Adams photo at around $15,000--he likes it, but can live without it. He could use the custom computer program in his new firm and values it at $10,000 which is what the firm paid two years ago. The Hollywood Bowl box holds no interest for Joe, so he values it at $5,000, the face value of the tickets. Joe values these assets, in total, as $70,000.

Jan values the Adams photo at $20,000 and the Francis litho at $16,000, which are what she believes to be the fair market values; she has no real interest in art. The computer program, a very useful and unique program which has made a big difference in the firm's productivity, would cost $16,000 to replace on today's market. Jan wants it, or in the alternative wants her partners to pay its full value in the dissolution. The Hollywood Bowl box is irreplaceable to Jan, it cannot be bought at any price, and should have much higher than face value, say $10,000. These assets have a total value, to Jan, of $62,000.

Jerry is moving to his ranch in Montana, retiring from the practice of law. The only asset he values is the Adams photo, which he understands just sold at auction for $30,000. He hates the Francis litho, but acknowledges its value is around $10,000. The computer program is two years old now, nearly useless, and worth no more than $2,000. He accepts the $5,000 fair market value on the box seats. In his mind, these assets value, in total, $47,000.

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AUTHOR: Los Angeles County Bar Association

§ 39.52 Sealed Bid System

Using the Sealed Bid system, give each asset to the person who values it most and collect that value for a pool of money to be divided equally. Thus the Francis litho goes to Joe for $40,000, the Adams photo to Jerry for $30,000, the computer program to Jan for $16,000, and the box seats to Jan for $10,000. The money in the pool, $96,000, is distributed equally to the three partners, $32,000 each. Therefore Joe pays $40,000 for the Francis litho, receives $32,000 from the pool, and therefore owes the difference, $8,000, to the pool. Jan pays $16,000 and $10,000 for the program and the box seats, a total of $26,000, receives $32,000 from the pool, and therefore nets the difference, $6,000, from the pool. Jerry pays $30,000 for the Adams photo, receives $32,000 from the pool, and therefore nets the difference, $2,000, from the pool. Thus, in the final arrangements, Joe pays $6,000 to Jan and $2,000 to Jerry.

Is everyone happy? Each person receives the assets he/she most valued, but Joe may have a nagging doubt that he paid too much. After the figures and computations are revealed, Joe might conclude that he overpaid for the Francis litho. He might then attempt to renege and a breach of contract lawsuit is born, or he might be resentful which could sour other aspects of the partnership dissolution. If there ever is a "next time" using a Sealed Bid system, these parties might undervalue (or strategically misrepresent the value of) the assets, in order to get more for less. Of course, undervalue an asset too much and it goes to someone else. In that event, however, the person who strategically undervalues an asset that he/she truly wants may purchase it later in a bilateral negotiation. Therefore, there might be a tendency for people familiar with the Sealed Bid system to strategically undervalue assets. If undervaluation becomes widespread and escalates, however, the Sealed Bid system could ultimately break down and be unworkable as everyone's bids are unrealistically low, with the expectation of buying the asset later.

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4-39 California Forms of Pleading and Practice--Annotated § 39.53

AUTHOR: Los Angeles County Bar Association

§ 39.53 Auction System

The Auction system avoids results skewed by the top value for each asset. This helps the parties avoid strategic undervaluing which they would learn under the Sealed Bid system. The math is the same as above, but instead of selling each asset at the highest value, it is sold at the next-to-highest value. This resembles an Auction in that the highest bidder does not bid the full value he places on the object, but only slightly more than the last bid by the last competitor. The Auction system results in the same distribution of assets, but with different prices paid: Joe pays $16,000 for the Francis litho, Jan pays $10,000 for the program and $5,000 for the box seats, and Jerry pays $20,000 for the Adams photo. The total in the pool, $51,000, is distributed equally, $17,000 to each. Therefore Joe pays $16,000 for the Francis litho, receives $17,000 from the pool, and thus nets the difference, $1,000, from the pool. Jan pays $10,000 for the program and $5,000 for the box seats, a total of $15,000, receives $17,000 from the pool, and thus nets $2,000 from the pool. Jerry pays $20,000 for the Adams photo, receives $17,000 from the pool, and thus owes the difference, $3,000, to the pool. Thus in the final arrangements, Joe receives $1,000, Jan receives $2,000 and Jerry must pay $3,000.

Joe likes the Auction system much better than the Sealed Bid system: he not only receives his treasured Francis litho, but nets $1,000. The Sealed Bid system, in comparison, was terrible for Joe--he had to pay $8,000 for the litho. Jerry and Jan, however, do better under the Sealed Bid system than the Auction system: Jerry nets the Adams photo and $2,000 under the Sealed Bid system, while he has to pay $3,000 for the Adams photo under the Auction system. Jan does even better under the Sealed Bid system: she receives the computer program, the box seats, and $6,000; under the Auction system, she nets only $2,000.

Is there any wonder that much disputation takes place in determining which system is to be used to divide assets? If there were a plurality vote taken, Jerry's and Jan's preference for the Sealed Bid system would outvote Joe's preference, but then Joe, and perhaps all of the parties, may start valuing the assets strategically.

Legal Topics:

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4-39 California Forms of Pleading and Practice--Annotated § 39.54

AUTHOR: Los Angeles County Bar Association

§ 39.54 Steinhaus Fair Division System

[1] Description of Steinhaus Fair Division

A third system, the Steinhaus Fair Division, also produces a "fair" result; some people may consider it "more fair" than the Sealed Bid or Auction systems.

Hugo Steinhaus, a Polish mathematician, suggested this method. Don't be daunted by the mathematics: Follow the seven steps. They involve only addition, subtraction, and division, which can be accomplished with a calculator. It would appear that Professor Raiffa liked this method at least as much as, and probably more than, the Sealed Bid and the Auction systems.

The virtue of the Steinhaus Fair Division system is that it is based on the value each person assigns to all of the assets, not only to the highest or the second highest bid on each asset. Table 1 set out in [2], *below*, illustrates the method used to determine the Steinhaus Fair Division. The first four lines, Lines A - D, of Table 1, summarize each person's valuation of the four assets. Three people want to allocate four assets which they each value differently. The Line E is the Total Valuation each person assigns to all of the assets. Lines A - E are the same values used in the prior examples.

To compute according to the Steinhaus system:

1. Line F is the "Initial Fair Share" determined by dividing each person's Total Valuation, Line E, by 3. The rationale is that from each person's perspective and Total Valuation, he/she expects to divide the assets equally amongst the three partners. Initial Fair Shares are: $23,333 for Joe, $20,667 for Jan, and $15,667 for Jerry.

2. Line G shows the distribution of the assets according to who has placed the highest value on each asset, i.e. who wants it most: Joe receives the Francis litho, Jan receives the computer program and the box seats, and Jerry receives the Adams photo.

3. Line H is the "Value (of the asset) Received": Joe receives the Francis litho at what he considers to be a value of $40,000. Jan receives the computer program and the box seats, which she values at $16,000 and $10,000, a total of $26,000 to her. Jerry receives the Adams photo at a value of $30,000 to him.

4. Line I is the difference between each person's Value Received, Line H, with each person's Initial Fair Share, Line F. Line I is called "Excess," which will be used to equalize the distributions. Joe's Excess is $16,667 ($40,000 less $23,333), Jan's Excess is $5,333 ($26,000 less $20,667), and Jerry's Excess is $14,333 ($30,000 less $15,667).

5. Line J is the mean of the three Excesses, i.e. the sum of the three items in Line I and divided by 3: $12,111 ($16,667 + $5,333 + $14,333 = $36,333 / 3 = $12,111). Line J is called "Adjustment." It will be used to adjust the Initial Fair Share, Line F, in the next step.

6. Line K, the "Adjusted Fair Share." is the sum of Line F and Line J. This adds to each person's Initial Fair Share the average of the excess amounts each person has received. By adding this adjustment, each person's fair share is adjusted to put it into parity with the others' fair shares. The Adjusted Fair Shares are: $35,444 for Joe, $32,778 for Jan, and $27,778 for Jerry.

7. Line L is the amount each person pays or receives for the Final Arrangement, in order to keep the asset listed in Line G. Line L is computed by subtracting Line H, the Value Received, from Line K, the Adjusted Fair Share. A negative number in Line L means that person must pay that money into the pool and a positive number in Line L means that person receives that amount from the pool; the total of all entries in Line L is 0. Joe gets the Francis litho and pays $4,556 ($35,444 less $40,000), Jan gets the computer program and the box seats and receives $6,778 ($32,778 less $26,000) and Jerry gets the Adams photo and pays $2,222 ($27,778 less $30,000). Note that the total of these three numbers is zero (-$4,556 + $6,778-$2,222).

[2] Table 1: Demonstration of the Steinhaus Fair Division System for the Three Law Partners

TABLE 1

LINES		**JOE**	**JAN**	**JERRY**
A	Ansel Adams Photo	15,000	20,000	30,000
B	Sam Francis Litho	40,000	16,000	10,000
C	Computer Program	10,000	16,000	2,000
D	Box Seats	5,000	10,000	5,000
E	Total Valuation	70,000	62,000	47,000
F	Initial Fair Share	23,333	20,667	15,667
G	Assets Received	Sam Francis Litho	Computer Program & Box Seats	Ansel Adams Photo
H	Value Received	40,000	26,000	30,000
I	Excess	16,667	5,333	14,333
J	Adjustment	12,111	12,111	12,111
K	Adjusted Fair Share	35,444	32,778	27,778
L	Final Arrangement	-4,556	6,778	-2,222

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AUTHOR: Los Angeles County Bar Association

§ 39.55 Results of the Three Systems Compared

[1] Discussion of Results

The net results for Joe, Jan and Jerry under these three objective and "fair" systems, the Sealed Bid, the Auction and the Steinhaus Fair Division systems, are compared in Table 2, set out in [2], *below*. Note that under each system, the assets are distributed to the same people: Joe gets the litho, Jerry gets the photo, and Jan gets the computer program and the box seats. Joe likes the Auction best because it gives him a net gain of $1,000; the Steinhaus system costs Joe $4,556 and the Sealed Bid costs him $8,000. Jan likes the Steinhaus system best, at a net gain of $6,778; the Sealed Bid gives her $6,000, a close second place, but the Auction gives her a disappointing $2,000. Jerry likes the Sealed Bid, which nets him $2,000; the other two systems cost him considerable money, Steinhaus costs him $2,222 and the Auction costs him $3,000.

These three systems each provide "fair." but different, ways to value and distribute nonliquid assets. There are, of course, other mathematical possibilities based upon different assumptions and expectations. (In writing this article, the author developed a different system, the Mean Value Auction, which is based not upon the highest value for each asset, as in the Sealed Bid, nor on the second highest value for each asset, as in the Auction, but upon the mean value which all participants have assigned to that asset. This would tend to lower the value paid by the highest bidder. In some economic systems, this might be a preferable result. However, in a fair market economy, purchase values usually approach that of the highest bidder, rather than the average asset value. Therefore the Mean Value Auction does not comport to basic capitalistic expectations and is not analyzed in this article).

A mediation can be a practical, cost-effective, problem-solving method for determining a fair distribution system of nonliquid assets and for avoiding the risks of losing all in litigation. Although such a mediation may involve intense negotiations, the parties stand a good chance of identifying and agreeing to a distribution system which is objective and fair, when the mediated outcome is compared to the risks and probabilities of doing better or worse outside of the mediation. Compared to the process and result through litigation, the three distribution systems described here offer mediating parties a fair, swift, and economical solution.

[2] Table 2: Comparison of Final Arrangements Under the Three Systems for the Three Law Partners

TABLE 2

[**Bold Indicates Best Outcome For Each Partner**]

SYSTEMS	JOE	JAN	JERRY
Sealed Bid	-$8,000	+$6,000	**+$2,000**
Auction	**+$1,000**	+$2,000	-$3,000
Steinhaus	-$4,556	**+$6,778**	-$2,222

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[Reserved]

§§ 39.56[Reserved]

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AUTHOR: Los Angeles County Bar Association

Scope

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FOOTNOTES:
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4-39 California Forms of Pleading and Practice--Annotated § 39.60

AUTHOR: Los Angeles County Bar Association

§ 39.60 Arbitration of Medical Malpractice Claims

There are two distinct groups of medical care providers who require arbitration of medical malpractice claims: viz., (1) Individual Health Care providers and (2) health care service plan providers. The former group is predominately comprised of individual doctors and small medical groups (hereinafter Individual Health Care providers). The latter group is commonly known as HMO (health maintenance organization) providers and includes Kaiser and CIGNA contracts among them (hereinafter Health Plan).

Code Civ. Proc. § 1295 sets forth the contractual language that must be used by an Individual Health Care provider in a medical services contract, in order to require issues of professional negligence to be decided by "neutral arbitration." *Code Civ. Proc. § 1295* does not compel Health Plan providers to include the same mandatory language in their contracts, so long as the Health Plan contract contains the notice of arbitration provisions required by *Health & Safety Code § 1363(a)(10)* and, presumably, *Health & Safety Code § 1363.1*. Nothing in *Code Civ. Proc. § 1295* prevents the individual health care provider from adding language in addition to that required by the statue so as to expand the scope of matters required to be arbitrated [*see Reigelsperger v. Siller (2007) 40 Cal. 4th 574, 578, 53 Cal. Rptr. 3d 887* , discussed at *§§ 39.61[1]* and *39.65*]. These code sections are discussed in this Part, *below*.

The California Supreme Court in Madden v. Kaiser Foundation Hospitals, (1976) 17 Cal. 3d 699, 706-707, 131 Cal. Rptr. 882, 552 P.2d 1178 made the oft-cited comment that there is a strong public policy in California favoring arbitration as a means of resolving disputes, including disputes over medical malpractice claims. The court reasoned arbitrations are expeditious, inexpensive, and relieve overburdened courts. For these reasons, the courts will compel arbitration under agreements that meet the minimal notice requirements of the above codes, and, thereby, deny the claimant's their guarantee, under *Cal. Const., art. I, § 16*, of a jury trial in civil cases.

Legal Topics:

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AUTHOR: Los Angeles County Bar Association

§ 39.61 Patient Must Be Aware of Arbitration Provision

[1] Disclosure by Individual Health Care Providers

In 1975, the Legislature, in extraordinary session, enacted the Medical Malpractice Act (MICRA), for the benefit of the medical community. As part of MICRA, the Legislature recognized that arbitrations were important in resolving medical negligence disputes. As discussed below, for an arbitration agreement to be effective, the potential patient must be advised of the contractual provision requiring arbitration.

For the Individual Health Care provider, *Code Civ. Proc. § 1295* was passed to allow arbitration in medical malpractice actions. The advisement requirements of *Code Civ. Proc. § 1295(a)-(c)* are specifically intended to promote the patients' awareness that execution of the contract will constitute a waiver of the patient's constitutional right to a jury trial or court trial [*Rosenfield v. Superior Court (1983) 143 Cal. App. 3d 198, 203, 191 Cal. Rptr. 611*]. In *Rosenfield*, the court ruled that the failure of a health care contract to contain the advisements specified in *Code Civ. Proc. § 1295(a), (b)* automatically renders unenforceable the arbitration of such contract [*Rosenfield v. Superior Court (1983) 143 Cal. App. 3d 198, 203, 191 Cal. Rptr. 611*]. *Code Civ. Proc. § 1295(a)-(c)* provides:

> (a) Any contract for medical services which contains provision for arbitration of any dispute as to professional negligence of a health care provider shall have such provision as the first article of the contract and shall be expressed in the following language: "It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration." Communications between a physician and his or her patient's disability insurer, at the request of the patient, regarding the diagnosis and/or treatment of the patient by that physician, constitute the rendering of medical services within the

meaning of the quoted language of the statute. Therefore, claims that the communications were unauthorized or improper must be arbitrated, even if pleaded as breach of fiduciary duty, violation of privacy rights, intentional interference with prospective economic advantage, or negligence [*Titolo v. Cano (2007) 157 Cal. App. 4th 310, 314, 318-319, 68 Cal. Rptr. 3d 616*].

(b) Immediately before the signature line provided for the individual contracting for the medical services must appear the following in at least 10-point bold red type:

"NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT."

(c) Once signed, such a contract governs all subsequent open-book account transactions for medical services for which the contract was signed until or unless rescinded by written notice within 30 days of signature. Written notice of such rescission may be given by a guardian or conservator of the patient if the patient is incapacitated or a minor.

It should be noted that *Code Civ. Proc. § 1295(a), above*, requires exact language to be in the first paragraph of the arbitration contract. It should be further noted that *Code Civ. Proc. § 1295(b), above*, must be set out in "at least 10-point bold red type." *Code Civ. Proc. § 1295(c)* is not explicitly set forth as a mandatory provision in the contract; however, in *Code Civ. Proc. § 1295(e)* it is implied that subdivision (c) be included in the contract as proof that the "contract is not a contract of adhesion, nor unconscionable nor otherwise improper... ."

Remember, the mandatory requirements of *Code Civ. Proc. § 1295* apply to the Individual Health Care provider contracts and not to the Health Plan contracts. The Individual Health Care arbitration agreement, however, will not be enforceable unless the above mandatory language is on the form in the manner required by the code. Nothing in *Code Civ. Proc. § 1295* prevents the individual health care provider from adding language in addition to that required by the statue, usually to expand the scope of matters required to be arbitrated [*Reigelsperger v. Siller (2007) 40 Cal. 4th 574, 578, 53 Cal. Rptr. 3d 887* ; *see also* discussion at *§ 39.65*]. Thus, contractual terms that further define the arbitration process may be placed in the contract, in addition to the mandatory terms set out above. Usually an Individual Health Care provider arbitration agreement is given to a prospective patient at the first visit to the doctor.

[2] Disclosure by Health Plan

The Health Plan also has statutory requirements for disclosure of the arbitration provisions of their contracts.

Usually the Health Plan is negotiated by an employer for the benefits of its employees. Thus, the employees are not privy to the contract terms, but, like the Health Plan, the employee is bound by the contractual provisions in exchange for the medical services provided by the Health Plan. To make the employee or beneficiary of the plan aware of the arbitration provisions, *Health & Safety Code §§ 1363(a)(10)* and *1363.1* have certain disclosure requirements. An arbitration disclosure in the master agreement between and employer and a health plan is no substitute for compliance with the arbitration disclosure requirements of *Health & Safety Code § 1363.1*. Further, the plan cannot avoid compliance by using a form provided by the employer to evidence an employee's election to enroll in the plan. If the employer-prepared form does not provide the required disclosures, the health plan must provide its own form for that purpose [*Medeiros v. Superior Court (Health Net of California) (2007) 146 Cal. App. 4th 1008, 1016-1019, 53 Cal. Rptr. 3d 307]* .

The mandatory arbitration disclosure requirement includes providing as set out in *Health & Safety Code § 1363(a)(10)*: "If the plan utilizes arbitration to settle disputes, a statement of that fact [in a notice to the employee or beneficiary]."

The code further requires, at *Health & Safety Code § 1373(i)*, that the plan contract itself set out the terms of the arbitration agreement. *Health & Safety Code § 1373(i)* states: "If the plan utilizes arbitration to settle disputes, the plan contracts shall set forth the type of disputes subject to arbitration, the process tobe utilized, and how it is to be initiated."

More specific mandatory requirements are set out in *Health & Safety Code § 1363.1*, which became effective on January 1, 1995. Like *Code Civ. Proc. § 1295*, *Health & Safety Code § 1363.1* is concerned about the waiver of a jury trial. The mandatory requirements in the notice to employees or beneficiaries for disclosure of the arbitration provision under *Health & Safety Code § 1363.1*, are:

1. A general statement that the plan uses binding arbitration to settle disputes (all disputes).

2. A specific statement that the plan uses binding arbitration to settle "medical malpractice" claims.

3. A separate article in the agreement issued to the employer group or individual subscriber shall set out the arbitration provision.

4. The enrollment form signed by each subscriber or enrollee shall contain a prominent display of the arbitration provision.

5. A statement that the subscriber or enrollee is waiving his or her right to a jury trial for "medical malpractice" claims or other disputes related to the delivery of medical services, or both, "and shall be substantially expressed in the wording provided in subdivision (a) of *Section 1295 of the Code of Civil Procedure*."

6. The enrollment agreement shall display the arbitration disclosure immediately before the signatures of both the contracting representative and the enrollee.

Unlike the *Code Civ. Proc. § 1295(b)* provision, however, there is no requirement that the waiver be stated in "at least 10-point bold red type." Section 1363.1 is not just a notice statute; it is also to ensure a knowing waiver of the right to a jury trial. Thus, an arbitration provision cannot be enforced on the basis of "substantial compliance" with *Health & Safety Code § 1363.1* if it is disputable whether the arbitration provision satisfies the prominence requirement, i.e., if there is no indication that the enrollee knowingly waived the right to a jury trial (even if the notice requirement satisfied by actual notice at a later date) [*Rodriguez v. Blue Cross of California (2008) 162 Cal. App. 4th 330, 338-341, 75 Cal. Rptr. 3d 754* (arbitration clause unenforceable in action for violation of unfair competition law, declaratory relief, and other causes of action not related to medical malpractice because arbitration disclosure did not make clear whether it applied to causes of action other than malpractice); *Burks v. Kaiser Foundation Health Plan, Inc. (2008) 160 Cal. App. 4th 1021, 1024, 1028-1029, 73 Cal. Rptr. 3d 257* ; *Zembsch v. Superior Court (Health Net of California, Inc.) (2006) 146 Cal. App. 4th 153, 156, 160-167, 53 Cal. Rptr. 3d 69* ; *Robertson v. Health Net of California, Inc. (2005) 132 Cal. App. 4th 1419, 1431, 34 Cal. Rptr. 3d 547* (noncompliance with respect both to placement of arbitration disclosure other than immediately before the enrollee's signature and to lack of prominent display); *Malek v. Blue Cross of California (2004) 121 Cal. App. 4th 44, 72-73, 16 Cal. Rptr. 3d 687*]. Courts have also held that administrative penalties are not enough to carry out the legislative intent, and are not a substitute for refusal to enforce a disclosure that does not comply with *Health & Safety Code § 1363.1* [*Medeiros v. Superior Court (2007) 146 Cal. App. 4th 1008, 1019, 53 Cal. Rptr. 3d 307* ; *Zembsch v. Superior Court (Health Net of California, Inc.) (2006) 146 Cal. App. 4th 153, 167-168, 53 Cal. Rptr. 3d 69* ; *Malek v. Blue Cross of California (2004) 121 Cal. App. 4th 44, 67-69, 16 Cal. App. 3d 687]* .

Because *Health & Safety Code § 1363.1* is admittedly a statute that governs arbitration contracts specifically, it has been held preempted by the Federal Arbitration Act (FAA) with respect to contracts involving interstate commerce [*Erickson v. Aetna Health Plans of Cal. (1999) 71 Cal. App. 4th 646, 652, 84 Cal. Rptr. 2d 76*]. However, more recently a court has ruled that *Health & Safety Code § 1363.1* is not preempted by the FAA, because the McCarran-Ferguson

Act [*15 U.S.C. § 1012(b)*] bars the FAA on the ground it is a federal statute of general application; as such, it does not "specifically relate" to insurance and should not interfere with the operation of *Health & Safety Code § 1363.1*, which does govern insurance [*Smith v. PacifiCare Behavioral Health Plan of California, Inc. (2001) 93 Cal. App. 4th 139, 144, 162, 113 Cal. Rptr. 2d 140 , cert denied,* (2002) *537 U.S. 818* ; *accord, Imbler v. PacifiCare of Cal., Inc. (2002) 103 Cal. App. 4th 567, 576-577, 126 Cal. Rptr. 2d 715* ; *Pagarigan v. Superior Court (Aetna U.S. Healthcare of California, Inc.) (2002) 102 Cal. App. 4th 1121, 1134, 126 Cal. Rptr. 2d 124*].

Legal Topics:

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AUTHOR: Los Angeles County Bar Association

§ 39.62 Health Care Arbitration Agreements Not Adhesion Contracts

Courts will not enforce a contract or contractual provision of adhesion which limits the duties and liabilities of the stronger party who drafted the agreement, unless such provisions are clear, conspicuous and will not operate to defeat the reasonable expectations of the weaker party [*Wheeler v. St. Joseph Hospital (1976) 63 Cal. App. 3d 345, 356-357, 133 Cal. Rptr. 775*].

A contract of adhesion usually refers to a contract drafted and imposed by a party enjoying a superior bargaining position, which is offered to a weaker party on a "take it or leave it" basis, without an opportunity to negotiate the contractual language [*Wheeler v. St. Joseph Hospital (1976) 63 Cal. App. 3d 345, 356, 133 Cal. Rptr. 775* (citing *Smith v. Westland Life Ins. Co. (1975) 15 Cal. 3d 111, 122, n.12, 123 Cal. Rptr. 649, 539 P.2d 433*)].

The general rule stated in *Bauer v. Jackson (1971) 15 Cal. App. 3d 358, 370, 93 Cal. Rptr. 43* , that: "Ordinarily when a person with capacity of reading and understanding an instrument signs it, he may not, in the absence of fraud, imposition or excusable neglect, avoid its terms on the ground he failed to read it before signing it" does not apply where the contract is one of adhesion [*Ramirez v. Superior Court (1980) 103 Cal. App. 3d 746, 754, 163 Cal. Rptr. 223*].

Code Civ. Proc. § 1295, however, precludes the adhesion argument for Individual Health Care contracts, provided the agreement meets the requirements of subdivisions (a), (b), and (c). *Code Civ. Proc. § 1295(a)* prescribes the form and placement of an advisement notice to the patient signing the contract that is exactly as stated in the code; *Code Civ. Proc. § 1295(b)* provides for a warning notice in "at least 10-point bold red type" that by signing the arbitration agreement, there is a waiver of the right to a jury or court trial; and *Code Civ. Proc. § 1295(c)* requires a notice that the arbitration agreement can be rescinded within 30 days after signing the agreement [*see* discussion in *§ 39.61[1]*].

Code Civ. Proc. § 1295(e), regarding adhesion, specifically states: "Such a contract is not a contract of adhesion, nor unconscionable nor otherwise improper, where it complies with subdivisions (a), (b) and (c) of this section."

Legal Topics:

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AUTHOR: Los Angeles County Bar Association

§ 39.63 Non Signatories May Be Bound to Arbitrate

Throughout the years, the courts have held that complainant plaintiffs who are non-signatory to the Kaiser arbitration agreement are bound by the agreement. The common thread in holding the non-signatory to the arbitration agreement is a "pre-existing relationship" between the nonsignatory and one of the parties to the arbitration agreement [*see County of Contra Costa v. Kaiser Foundation Health Plan, Inc. (1996) 47 Cal. App. 4th 237, 242-243, 54 Cal. Rptr. 2d 628* (court lists those bound by arbitration contract)].

"Absent a written agreement--or a pre-existing relationship or authority to contract for another that might substitute for an arbitration agreement--courts sitting in equity may not compel third party nonsignatories to arbitrate their disputes" [*County of Contra Costa v. Kaiser Foundation Health Plan, Inc. (1996) 47 Cal. App. 4th 237, 245, 54 Cal. Rptr. 2d 628*]. In *Contra Costa*, cross-complainants for indemnity by a non-signatory were held not bound by the arbitration contract between the injured party and the allegedly malpracticing Kaiser entity.

Those non-signatories who have been held to be bound by an arbitration provision of a contract are:

1. A person asserting a loss of consortium right [*Gross v. Recabaren (1988) 206 Cal. App. 3d 771, 781, 253 Cal. Rptr. 820* ; *but see Rhodes v. California Hospital Medical Center (1978) 76 Cal. App. 3d 606, 143 Cal. Rptr. 59* (husband and son not bound); *Pietrelli v. Peacock (1993) 13 Cal.App. 4th 943 947, n.1, 16 Cal. Rptr. 2d 688* (highly critical of *Rhodes*)].

2. Adult heirs and personal representatives [*Herbert v. Superior Ct. (1985) 169 Cal. App. 3d 718, 215 Cal. Rptr. 477*]. All heirs must be in the same wrongful death action, as it is a statutory action [*Mayerhoff v. Kaiser Foundation Health Plan, Inc. (1977) 71 Cal. App. 3d 803, 138 Cal. Rptr. 319*].

3. An agent, fiduciary or employer is authorized to enter into an agreement that provides for arbitration of a medical negligence claim by the non-signatory beneficiary of that agreement [*Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 709, 131 Cal. Rptr. 882, 552 P.2d 1178* ; *see also*

Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 64 Cal. Rptr. 2d 843, 938 P.2d 903].

4. Minors [*Doyle v. Giuliucci (1965) 62 Cal. 2d 606, 43 Cal. Rptr. 697, 401 P.2d 1* (for minor living at time contract signed); *Pietrelli v. Peacock (1993) 13 Cal. App. 4th 943, 947, 16 Cal. Rptr. 2d 688* (for contract entered before child is conceived)]. *Code Civ. Proc. § 1295(d)* precludes disaffirmance if the contract is signed by the minor's parent or legal guardian; *Code Civ. Proc. § 1295(c)*, however, does allow for rescission of the arbitration contract within 30 days of signature.

5. Unborn child [*Wilson v. Kaiser Foundation Hospitals (1983) 141 Cal. App. 3d 891, 190 Cal. Rptr. 649*].

6. A spouse's claim for personal medical negligence [*Hawkins v. Superior Court (1979) 89 Cal. App. 3d 413, 152 Cal. Rptr. 491* ; *but see* *Baker v. Birnbaum (1988) 202 Cal. App. 3d 288, 248 Cal. Rptr. 336* , which followed the highly criticized Rhodes case, *above*.

7. Emotional distress for a contemporaneous observation [*Bolanos v. Khalatian, M.D., (1991) 231 Cal. App. 3d 1586, 283 Cal. Rptr. 209*].

8. Claim for in utero injuries [*Bolanos v. Khalatian, M.D. (1991) 231 Cal. App. 3d 1586, 283 Cal. Rptr. 209*].

9. Claim by unmarried father is bound by the contract signed by mother during pregnancy [*Michaelis v. Schori (1993) 20 Cal. App. 4th 133, 24 Cal. Rptr. 2d 380*].

10. A general partner is bound by an arbitration provision in a contract with a third person [*Keller Construction Co. v. Kashani (1990) 220 Cal. App. 3d 222, 269 Cal. Rptr. 259*].

11. A doctor employee of a Health Plan being sued by a patient must arbitrate a medical malpractice claim by a patient against the doctor [*Harris v. Superior Court (1986) 188 Cal. App. 3d 475, 233 Cal. Rptr. 186*].

In all of these cases there was a common factor of a preexisting relationship between the nonsignatory and one of the contracting parties to the arbitration agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
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4-39 California Forms of Pleading and Practice--Annotated § 39.64

AUTHOR: Los Angeles County Bar Association

§ 39.64 Multiple Defendants

Contractual arbitrations, including medical malpractice agreements, are controlled primarily by *Code Civ. Proc. §§ 1280-1295*. *Code Civ. Proc. § 1281.2(c)* recognizes that if there are multiple party defendants and one or more, but not all, of the parties are signatories to an arbitration provision, there will be only one forum. The court will not order a division of the defendants that requires some to arbitrate and some to dispute at trial. The court can only order the parties to resolve their dispute through a trial [*Code Civ. Proc. § 1281.2(c)*].

The court must exclude from a single forum and require a dual forum, when, however, one of the defendants is an Individual Health Care provider and has an enforceable arbitration agreement that complies with *Code Civ. Proc. § 1295*. *Code Civ. Proc. § 1281.2(c)* states: "This subdivision shall not be applicable to an agreement to arbitrate disputes as to professional negligence of a health care provider made pursuant to Section 1295."

It should be noted that the mandatory arbitration agreement requirements of *Code Civ. Proc. § 1295* exclude Health Plans. *Code Civ. Proc. § 1295(f)* provides:

> (f) *Subdivisions (a), (b), and (c) shall not apply to any health care service plan contract* offered by an organization registered pursuant to Article 2.5 (commencing with *Section 12530) of Division 3 of Title 2 of the Government Code*, or licensed pursuant to Chapter 2.2 (commencing with *Section 1340) of Division 2 of the Health and Safety Code*, which contains an arbitration agreement if the plan complies with paragraph (10) of subdivision (a) of *Section 1363 of the Health and Safety Code*, or otherwise has a procedure for notifying prospective subscribers of the fact that the plan has an arbitration provision, and the plan contracts conform to subdivision (h) of *Section 1373 of the Health and Safety Code*. [Emphasis added.]

Health and Safety Code §§ 1363, 1373 are discussed in *§ 39.61[2]*.

It can therefore be argued that the Health Plan (unlike the Individual Health Care provider) does not qualify for a

separate arbitration forum pursuant to *Code Civ. Proc. § 1295* because *Code Civ. Proc. § 1295(f)* specially excludes Health Plans from the mandatory requirements of *Code Civ. Proc. § 1295(a)-(c)*. Certainly the Legislature specifically chose to exclude Health Plans from *Code Civ. Proc. § 1295*, as the mandatory provision of that section applies to Individual Health Care providers. Health Plans are controlled under different codes; viz., *Health & Safety Code §§ 1363(a)(10), 1363.1*.

Health Plans usually rely upon the multiple party case of *Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 131 Cal. Rptr. 882, 552 P.2d 1178* , wherein the court stayed the Kaiser action and compelled arbitration as to Kaiser only. The Madden court, however, did not reference the applicability of *Code Civ. Proc. § 1295* to a Kaiser agreement, and that issue has not been addressed by any known appellate court. It is this writer's assumption that *Madden* was briefed and argued before *Code Civ. Proc. § 1295* became effective. Otherwise, the court would probably have followed the legislative intent of *Code Civ. Proc.§ 1295* and ordered Kaiser to join the trial with the other defendants. *Code Civ. Proc. § 1295(f)* is quite clear that the mandated provision of *Code Civ. Proc. § 1295* do not apply to Health Plans.

The obvious logic is that under the strict requirements of *Code Civ. Proc. § 1295*, the arbitration agreement is required to have specific provisions when the signatory gives up his/her constitutional rights to a jury trial. These contractual requirements are:

(a) The parties give up their right to a jury trial;

(b) At least 10-point bold red type before the signature block regarding giving up the constitutional right to a jury or court trial; and

(c) 30 days rescission allowed.

Based upon the above evaluation, it can be argued that Health Plans should not be given the right to an arbitration when there are other defendants who are not signatories to the arbitration provision. To do so creates a burden on the plaintiff of two forums; i.e., an arbitration and a trial.

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For related research and practice materials, see the following legal topics:
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AUTHOR: Los Angeles County Bar Association

§ 39.65 Open-Book Accounts

There have been several interpretations of *Code Civ. Proc. § 1295(c)*, which provides that a contract for medical services with an arbitration agreement once signed "governs all subsequent open-book account transactions for medical services for which the contract was signed until or unless rescinded by written notice within 30 days of signature."

This section regarding open-book accounts applies to the Individual Health Care provider contract. It is designed to obviate the ongoing need for the patient to sign an arbitration agreement on each occasion the patient sees the medical provider [*Hilleary v. Garvin (1987) 193 Cal. App. 3d 322, 238 Cal. Rptr. 247*].

The court will refuse to enforce the open-book provision where the arbitration agreement fails to properly state the language of *Code Civ. Proc. § 1295* in the contract. However, as long as the statutory language is included in the agreement, a court will have to compel arbitration under additional language requiring it even if no open-book account relationship exists between the parties. Nothing in *Code Civ. Proc. § 1295* prevents the individual health care provider from adding language in addition to that required by the statue so as to expand the scope of matters required to be arbitrated. Thus, an agreement, signed when defendant first treated plaintiff applied to medical malpractice claim arising from treatment for different condition two years later because the agreement stated it was intended to bind the patient and any health care provider who "now or in the future treat[s] the patient" [*Reigelsperger v. Siller (2007) 40 Cal. 4th 574, 578-580, 53 Cal. Rptr. 3d 887]* .

Without extra-statutory language, however, the more usual situation would be like that considered in *Cochran v. Rubens (1996) 42 Cal. App. 4th 481, 49 Cal. Rptr. 2d 672* , where the court found that a three year gap in medical services was proof that there was not an open-book account. An open-book account exists, so that a prior arbitration agreement remains effective, only where the medical services are ongoing. The *Cochran* court stated that whether there is an open or closed-book account is a factual issue.

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Los Angeles County Bar Association

§ 39.66 Oral Agreements

To compel an arbitration agreement under *Code Civ. Proc. §§ 1281-1281.5*, the agreement must be in writing. However, a written award of an *oral* contract may be enforced under *Code Civ. Proc. § 1285* (petition to confirm) and *Code Civ. Proc.§ 1287.4* (entry of judgment upon the confirmed award) [*Horn v. Gurewitz (1968) 261 Cal. App. 2d 255, 67 Cal. Rptr. 791* ; *see also* *Herzog v. Fredrics 61 Cal. App. 4th 672, 71 Cal. Rptr. 2d 771, 98 Daily Journal D.A.R. 1639 (February 20, 1998)*].

Legal Topics:

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

§§ 39.67[Reserved]

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AUTHOR: Los Angeles County Bar Association

Scope

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FOOTNOTES:
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4-39 California Forms of Pleading and Practice--Annotated § 39.70

AUTHOR: Los Angeles County Bar Association

§ 39.70 Construction Industry and the ADR Process

No one will argue that the construction industry tends to generate more disputes than most any other industry. For some reason, there is an adversarial nature to the construction industry that makes disputes more common than uncommon. Perhaps it is because on almost all construction projects there are both financial and time pressures present.

Largely due to the adversarial nature of the construction industry, our industry for years has been in the forefront of creating new, alternative dispute resolution techniques. Members of the construction industry were arbitrating cases long before arbitration became popular. More recently, members of the construction industry were attempting to resolve their disputes through mediation. Now, we have seen the spread of mediation to other industries as well. Most recently, we have seen partnering come into vogue as the "latest" ADR technique to be applied on construction projects. All of these techniques recognize that there are cost savings and other advantages in utilizing ADR approaches to resolving disputes.

Now having been the leader in utilizing arbitration, mediation, and partnering, it is time for the construction industry to step forward once again with a further improvement in the ADR process. We call this process "Critical Path Dispute Management" (CPDM).

Legal Topics:

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AUTHOR: Los Angeles County Bar Association

§ 39.71 The Theoretical and Practical Basis for Critical Path Dispute Management

The fundamental building block upon which CPDM is built is that it is almost always better to resolve a dispute when it first arises than it is to wait and try to resolve the dispute at a later time. The tendency, of course, on many construction projects is to take disputes and to just "set them aside" for resolution at the conclusion of the project. This approach often results in unspoken animosities and strained relationships on a project. It also often results in the parties "papering" the project so as to preserve their rights under the technical requirements of the contract. All in all, the combination of the inherent adversarial nature of construction work and the typical delay in dispute resolution results in a large basketful of disputes at the end of the project. Many of these disputes may have festered and grown over a substantial period of time. Some of these disputes even may have created additional disputes that are now in the basket.

Many dispute resolution professionals have noticed that one of the most common barriers to dispute resolution is the dysfunctional nature of the manner in which many people approach their problems. In essence, their approach is often "fight or flight." That is, there can be a fight (e.g. angry words or worse) or there can be a "flight" (e.g. "you are irrational, we will deal with this later"). This dysfunctional approach to the resolution of disputes often results in making the disputes much worse. Problems are almost always easier to resolve when they first arise. Further, problems are almost always easier to resolve with the help of a neutral facilitator. These two facts are the fundamental grounds upon which CPDM is based.

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AUTHOR: Los Angeles County Bar Association

§ 39.72 What Is Critical Path Dispute Management?

[1] Description of Critical Path Dispute Management

CPDM is a coordinated approach to dispute resolution from the beginning of a construction project through its conclusion with the assistance of *on-site* ADR facilitation. This type of ADR service obviously is best suited for larger projects. Only the larger types of projects can justify having ADR facilitation available on more or less a full-time basis.

CPDM begins with an initial seminar session involving the key players on the project. Unlike the typical partnering session in which parties are engaged in a process which results in their signing of a charter setting forth their agreements for the project, the CPDM seminar is intended to get the parties to get to know each other on a personal basis and to understand how the on-site ADR facilitation process will work.

This seminar is taught by the professional construction mediator and field neutral who will provide the actual ADR services on-site.

Depending on the size and complexity of the project, the construction professional trained in the ADR area is on-site on a regular basis. This ADR neutral will not be an attorney or professional mediator but will be a person with technical construction expertise and specific ADR training and experience. The job of this individual will be to be on-site at the project and to be available to the parties to learn of any problems which involve conflicts between one or more of them.

This on-site person will not be in the role of being the project mediator. This person's role will be to ferret out problems and to then obtain an understanding of the viewpoints of the various parties involved in the dispute. For example, assume that there is a dispute about the preparation of the soil for pouring of a large concrete slab. Further assume that the dispute is between the earthwork subcontractor and the concrete subcontractor. The purpose of the on-site ADR facilitator would be to understand the nature of the problem. Further, this person would meet with the parties and obtain from them as much information as possible on their individual views of the dispute. This person would use his or her

ADR training to reflect back the statements of each side of their respective views of the dispute. The on-site facilitator would then write up a summary of the dispute which would be provided to the professional construction mediator.

The professional construction mediator is on-site on approximately a weekly basis. During this period of time, the professional construction mediator is available to meet with those parties having any dispute on the project. Time is allotted to address those specific disputes which the on-site facilitator has outlined as well as to meet with any parties who want to discuss any problems they perceive on the project. It is critical that the professional mediator be neutral and be viewed as a facilitator of the resolution of problems on the project, not the advocate of any one party.

These mediation sessions typically are held on the day on which there is an all-hands job meeting at the site. The on-site facilitator and project mediator attend that meeting and then are available for as long as needed on that particular day to meet with parties and to work to facilitate resolution of any on-going disputes.

[2] Specific Functions of the Construction Professional or "Field Neutral"

Let us describe in more detail the specific duties of the on-site facilitator or what we call the "field neutral".

In a typical day, the field neutral would be responsible for reviewing project correspondence, telephoning people on the project, meeting with people on the project, attending any job meetings or subcontractor meetings, compiling descriptions and/or summaries of claims for review by the project mediator, walking the jobsite, and generally keeping the professional construction mediator up-to-date on the "dispute status" of the project. The field neutral also would be responsible for discussing, in the field, perceived or claimed problems, setting up specific meetings for the project mediator, participating in the mediation sessions with the mediator, and doing follow-up on specific mediator sessions.

Among the goals of the field neutral are to gain the trust of the people on the project, identify perceived and actual disputes, describe those perceived/actual disputes, and facilitate resolution of perceived disputes when possible.

A sample day for a field neutral is as follows:

6:00 - 7:00 a.m.	Attend job meetings
7:00 - 9:00 a.m.	Review project correspondence
9:00 - 12:00 noon	Visit with people related to issues and disputes. Visit with the construction manager (owner's representative) project manager (prime contractor's representative), and other project people on the site. Walk the job site.
12:00 - 1:00 p.m.	Lunch
1:00 - 3:00 p.m.	Work on writing an "Issue Impact Analysis" on each project dispute for review and use by the professional construction mediator.

[3] Role of the Professional Construction Mediator or "Project Mediator"

The first job of the professional project mediator is to stay informed through the field neutral. Through this method, the professional project construction mediator is able to have a "handle" on how the project is going, understand what the problems are, and begin working on solutions to those problems. By attending at least one of the job meetings every week, the professional construction mediator will take a "hands on," "hard hat" approach to the resolution of problems on the project. In effect, the overall role of the professional construction mediator is to be an ombudsman for dispute resolution on the project.

On the dates on which mediation sessions will occur, a specific schedule is provided in advance through the field

neutral to all of the involved parties. The goal of the mediator is to resolve problems as soon as they arise on the project. To the extent that this is not able to be accomplished, the goal of the project mediator is to facilitate an early resolution of any dispute.

By being on-site, the project neutral's the purpose should be more apparent. This person must be someone who is comfortable on a construction site and who is comfortable in working with parties who are under severe time and financial pressures. The project mediator also would be available during off hours and, if necessary, on other days of the week in order to facilitate the resolution of on-going disputes. In short, the job of the project neutral is to take a pro-active approach to early resolution of disputes on the project.

It is critical that both the field neutral and the project mediator be, in fact, neutrals. As such, it is necessary that the cost of their services be paid for by all of the parties participating in the project. For each project there is an agreement in advance of what percentage of the cost of the CPDM service will be paid for by the parties participating in the project. Thus, for example, on a private project the owner might pay 25%, the lender and the insurance carriers 25%, the general contractor 25%, and the subcontractors and suppliers the remaining 25%. On a public project, the public entity might pay 50%, the general contractor 25%, and the subcontractors and suppliers the remaining 25%. Of course, obviously all such costs in the end are borne by the owner. However, there would be a budget for this service provided for in the bid documents and those participating in the project would be expected to include in their prices the funds necessary to cover their respective percentages. In this way, the money is being paid from a variety of sources who are individually invoiced by the CPDM provider.

Again, the CPDM service is not intended for small projects. Because of its cost, generally it is economically viable only on projects valued at in excess of $25,000,000. CPDM service typically would cost approximately $25,000 per month. Thus, a project that would be expected to last for 12 months would incur CPDM charges of approximately $300,000. A project expected to last for two years would incur CPDM charges of approximately $600,000. Included in the CPDM services is the full-time on-site construction person who acts as the field neutral. Also included are the services of a the professional construction mediator who available on-site on a regularly-scheduled basis, most likely one day per week.

Legal Topics:

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AUTHOR: Los Angeles County Bar Association

§ 39.73 Incentives

Part of the essence of this program is to provide financial incentives to the parties participating in the project to make the on-site ADR effort a success. Thus, a typical CPDM project includes a sum of money set aside by the owner which would be shared among all the participants in the project if certain goals agreed to in the initial seminar are reached. For example, the goal might be that the project be finished within its scheduled completion time, with a maximum of 5% in added change orders, and no unresolved disputes as of 90 days following project completion. If the agreed goals are met, those incentive funds are distributed to the parties participating in the project in the same ratio that they pay for the services of the CPDM team.

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AUTHOR: Los Angeles County Bar Association

§ 39.74 How Does Critical Path Dispute Management Add Value?

The CPDM approach to major projects adds value in several important ways. One way is that by resolving disputes as they arise there generally are fewer disputes as of the end of the project and the project is more smooth running while it is under construction. Further, unresolved disputes are better understood as of the end of the project and therefore are more likely to be resolved quickly, without litigation.

Everyone is familiar with the common statement that a typical project will have at least 10% in cost overruns. If a cost savings can be achieved on just those normal cost overruns, this type of program will more than pay for itself. Of course, some cost overruns have nothing to do with disputes or anything else that could be predicted by the parties. Sometimes additive change orders simply are necessary because of unexpected conditions or occurrences. However, this program will help to lessen the number and size of any disputes generated by such conditions because it helps resolve problems at an earlier stage of the project.

On a project costing $30,000,000 and which lasts for 12 months, the cost of the CPDM services would be only somewhat more than 1% of the project cost. This sum is small indeed compared to the great advantages available through the use of the CPDM system. A savings of about 1% on the overall project cost will pay for the entire CPDM team's services. If another 1% of the project is budgeted as an incentive, the overall cost for the service is only about two percent of the overall project cost. Most owners and developers would gladly pay two percent of the project cost up-front if they could be guaranteed that the project would be finished on time and on budget. While CPDM is not a panacea and obviously 100% guarantees are not possible, there certainly is a much greater likelihood that a project will be finished on time and within budget if CPDM is utilized than if it is not utilized.

Many of the most successful corporations in the world have used a system not unlike CPDM for years. Sometimes these programs are called company ombudsman or some other similar name. The point is that the company has realized that it is worth allocating a portion of its resources to encouraging a greater sense of esprit de corps among its employees and to resolving disputes so that the work force can fulfill its duties in a more complementary and efficient manner. The

problem with construction projects is that typically they are a "one-shot" deal. That is, the players may not soon get together again after the completion of the project. Thus, a greater effort must be made to tackle problems head on at the earliest possible stage. This effort must be made in an environment in which the parties are comfortable and feel confident that the neutrals are there for no other purpose than to provide the maximum level of assistance and to try to resolve problems.

Legal Topics:

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AUTHOR: Los Angeles County Bar Association

§ 39.75 Guiding Principles of CPDM

There are some overall guiding principles to the CPDM program. Among those guiding principles are to always do first things first. That is, dispute prevention is always preferable to dispute resolution. Next, it must be remembered that litigation is anathema. Litigation is something to be avoided unless it is absolutely necessary. Further, the CPDM team must remember the uniquely adversarial nature of the construction industry and, in particular, the "one project at a time" manner in which most construction work is accomplished. Finally, it must be remembered that there is a human side to every dispute. The CPDM team must do whatever is possible to encourage effective means of early dispute resolution.

Further, the team must remember that job site dispute resolution is always preferable to post project or courtroom dispute resolution. The team must do everything possible to establish a cooperative project environment. Participation in the non-binding ADR proceedings with the CPDM team must be a condition precedent to any other legal proceeding.

Overall, the goal of CPDM is to end dispute resolution dysfunction and reduce the "fight or flight" approach to construction dispute resolution. By taking a win-win approach, having an attitude of never, ever giving up on the process, CPDM has the potential for being the next dramatic leap forward in the construction industry's long history of innovation in the ADR area.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewContracts LawTypes of ContractsConstruction ContractsCivil ProcedureAlternative Dispute ResolutionMediations

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Chapter 40 APPEAL: AN OVERVIEW

5-40 California Forms of Pleading and Practice--Annotated 40.syn

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

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Hon. Patti S. Kitching, Elizabeth J. Buckley n*
Editorial Consultants

FOOTNOTES:
(n8)Footnote *. Justice Kitching is an Associate Justice in Division Three of that Court, while Ms. Buckley is a staff attorney with Division Four of the First Appellate District Court of Appeal. Barbara Sorem, a senior attorney with Division Four of the Second Appellate District Court of Appeal, contributed manuscript to this chapter in addition to her input as editorial consultant for other chapters in this volume. Douglas W. Coffee, a former research attorney for Division Three of the First Appellate District Court of appeal, and former member of this publication's Editorial Staff, prepared this overview chapter and was Editor of this volume (Chs. 40-54) during its restructuring.

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Volume 5: Appeal-Chs. 40-55
Chapter 40 APPEAL: AN OVERVIEW
PART I. SCOPE

5-40 California Forms of Pleading and Practice--Annotated § 40.01

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

§ 40.01 Scope of Chapter

This chapter provides an overview of civil appeals in California state courts and introduces the steps in the civil appeal process that are covered in greater detail in the remaining chapters of this volume. The chapter discusses the following:

- State appellate jurisdiction generally [*see § 40.11*].

- The nature and scope of a civil appeal and alternative methods of reviewing matters outside the scope of a civil appeal [*see § 40.12*].

- Various provisions relating to parties, nonparties, and counsel in a civil appeal, including discussion of who may take an appeal, the substitution of a party, the substitution or withdrawal of counsel, the appearance of a party *in forma pauperis*, the appearance of out-of-state counsel *pro hac vice*, and application of the vexatious litigant law to appellants [*see §§ 40.13, 40.14*]. Related forms include:

  - A request for substitution of parties on appeal [*see § 40.70*].

  - A stipulation and motion for substitution of appellate counsel [*see § 40.71*].

- Considerations in determining whether to take a civil appeal [*see § 40.15*].

- A summary of the overall process of a civil appeal [*see § 40.16*], as well as a procedural checklist for use in tracking the significant procedural deadlines when pursuing a civil appeal, with cross references to more detailed checklists set out elsewhere in this volume [*see* Part IV,*§ 40.60 et seq.*].

NOTE:

See Cross References Below Regarding Review in Special Proceedings. The appellate courts conduct review of special proceedings, many of which are beyond the scope of this chapter and the related

chapters in this volume; for example, final review by the Supreme Court of disciplinary proceedings of the State Bar, review of agency decisions, such as decisions of the Public Utilities Commission, on petition for writ of review, interlocutory review of other rulings by writ petitions, and appellate procedures that apply in special proceedings such as review of juvenile court rulings. See *§ 40.02[2]* for references to further discussion and forms relating to review of particular proceedings not covered in this volume.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewGovernmentsCourtsCreation & OrganizationCivil ProcedureAppealsAppellate JurisdictionState Court Review

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PART I. SCOPE

5-40 California Forms of Pleading and Practice--Annotated § 40.02

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

§ 40.02 Cross References

[1] Related Chapters in This Volume

- For discussion and forms concerning generally applicable rules of appellate review, specifically, the prejudicial error doctrine, the common standards of review in civil cases, the rules governing the application of substantive law (law of the case, stare decisis, retroactivity, etc.), and the rules governing the publication and consequent citability of appellate opinions, see Ch. 41, *Appeal: Review Standards and Appellate Rules of Law* .

- For discussion and forms relating to the initiation of a civil appeal by filing the notice of appeal, discussion of appealable judgments and orders from which an appeal may properly be taken, and proceedings to consolidate related appeals, see Ch. 42, *Appeal: Notice of Appeal* .

- For discussion and forms concerning proceedings to stay the enforcement or execution of a judgment or order pending its review on appeal, see Ch. 43, *Appeal: Stay of Proceedings* .

- For discussion and forms pertaining to the preparation and transmittal of the record on appeal, see Ch. 44, *Appeal: Preparing and Filing the Record* .

- For discussion and forms relating to appellate papers and motion procedure generally, see Ch. 45, *Appeal: Motion Procedure* .

- For discussion and forms pertaining to the more significant appellate motions, see respectively Ch. 46, *Appeal: Extending or Shortening Time* , Ch. 47, *Appeal: Relief From Default* , Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* , and Ch. 49, *Appeal: Sanctions* .

- For discussion and forms pertaining to the drafting and filing of appellate briefs and motions and

other proceedings relating to briefs, see Ch. 50, *Appeal: Briefs* .

- For discussion and forms concerning prehearing or settlement conference proceedings, calendar proceedings and motions for calendar preference, oral argument, and issuance and finality of the court of appeal decision, see Ch. 51, *Appeal: Hearing and Decision* .

- For discussion and forms pertaining to rehearing after issuance of the court of appeal decision, see Ch. 52, *Appeal: Rehearing* .

- For discussion and forms pertaining to the issuance of remittitur after the appellate court's decision has become final, and subsequent proceedings in the trial court to recover costs on appeal, see Ch. 53, *Appeal: Remittitur and Costs on Appeal* .

- For discussion and forms relating to review of a court of appeal decision by the California Supreme Court, and discussion of related proceedings in that Court, see Ch. 54, *Appeal: California Supreme Court Review* .

[2] Other Related Chapters

See the following chapters for coverage of topics closely related to civil appeals:

- For discussion and forms relating to proceedings by a nonparty to submit letters or briefs in a civil appeal as an amicus curiae, see Ch. 22, *Amicus Curiae* .

- For discussion of the review by extraordinary writ of mandate or prohibition, see Ch. 358, *Mandate and Prohibition* .

- For discussion and forms relating to civil appeals taken in limited civil cases to the appellate division of the Superior Court (as distinguished from civil appeals taken from the Superior Court to the court of appeal, which are the main focus of this volume), see Ch. 345A, *Limited Civil Cases* .

- For discussion of the review by extraordinary writ of review, see Ch. 492, *Review (Certiorari), Writ of*.

- For discussion and forms relating to appeals from judgments rendered in the Small Claims division of the Municipal Court, see Ch. 526, *Small Claims* .

See also the following chapters for coverage of topics relating to special review proceedings or post-trial proceedings generally:

- For discussion of review of contractual arbitration proceedings, see Ch. 34, *Contractual Arbitration: Judicial Review* .

- For discussion of review of State Bar proceedings in the State Bar Court, see Ch. 70, *Attorney Discipline* .

- For discussion and forms relating to post-judgment proceedings to enforce or stay enforcement of a judgment generally, see Ch. 254, *Executions and Enforcement of Judgments* .

- For discussion of review by extraordinary writ of habeas corpus, which has limited application in

civil proceedings, such as review of contempt orders, Ch. 292, *Habeas Corpus*.

- For discussion and forms relating to trial court judgments generally, including proceedings to modify a judgment, see Ch. 318, *Judgments* .

- For discussion of special appellate rules relating to review of juvenile court proceedings, see Ch. 327, *Juvenile Courts: Jurisdiction and General Procedures* , Ch. 328, *Juvenile Courts: Dependency Proceedings* , and Ch. 329, *Juvenile Courts: Delinquency Proceedings* .

- For discussion of post-trial motions and proceedings generally, see Ch. 371, *Motions After Trial* .

- For discussion of review of public agency decisions generally, by writ of administrative mandate, see Ch. 474, *Availability of Judicial Reviewof Agency Decisions* , Ch. 474A, *Timing of Judicial Review of Agency Decisions* , Ch. 474B, *Standards in Reviewing Agency Decisions* , and Ch. 474C, *Procedures in Reviewing Agency Decisions* . For a list of chapters covering specific adjudicatory agencies, see *Ch. 470, Overview of Public Administrative Law, § 470.02*.

- For discussion and forms of proceedings to obtaining relief in the trial court from a judgment or order, see Ch. 489, *Relief From Judgments and Orders* .

- For discussion and forms relating to petitions for writ of review of decisions by the Public Utilities Commission, see Ch. 480, *Public Utilities* .

- For discussion of the doctrines of res judicata and collateral estoppel and their application in the context of an appeal, see Ch. 491, *Res Judicata* .

- For discussion of the rules governing interpretation of statutes generally, see Ch. 531, *Statutes and Ordinances* .

Discussion of judicial review in other specific actions and proceedings not listed above is usually included in the chapter covering the particular action or proceeding. Consult the General Index of this publication for references or conduct a search query if using an electronic version of this publication.

[3] Other Related Coverage

For discussion and forms relating to civil appellate practice in the federal courts, see Moore's Federal Practice, Ch. 201 et seq. (3d ed., Matthew Bender).

For discussion and forms relating to California criminal, as distinguished from civil, appeals, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 101, *Appeal* (Matthew Bender).

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PART I. SCOPE

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AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

[Reserved]

§§ 40.03[Reserved]

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Chapter 40 APPEAL: AN OVERVIEW
PART II. LEGAL BACKGROUND

5-40 California Forms of Pleading and Practice--Annotated § 40.10

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

§ 40.10 Governing Law

California appellate courts and civil appeals are governed generally by the following constitutional provisions, statutes, and rules:

- *Cal. Const., art. VI, §§ 1-5, 10-14*.
- *Code of Civ. Proc. §§ 41-45, 901-936.1*.
- *Cal. Rules of Ct., Rules 8.1-8.1125*.

In addition, the Supreme Court and the six districts of the court of appeal have each adopted internal operating procedures and local rules.

PRACTICE TIP:

Access Governing Law on the Internet. The California Rules of Court, many local appellate rules, applicable constitutional and statutory provisions, and even applicable decisional law may be obtained from state government web sites. The rules of court, some local appellate rules, and recently filed slip opinions, for example, may all be obtained through the site maintained by the state's judicial branch [*see* http://www.courtinfo.ca.gov]. This site also provides access to court minutes and calendars, internal operating procedures, details regarding each of the courts, forms and other information promulgated by the Judicial Council, as well as many links to web sites maintained by local appellate and trial courts, state government organizations, federal courts and federal organizations, and other sources of legal information. Constitutional and statutory provisions may be obtained through the site maintained by the state's legislative branch [*see* http://www.leginfo.ca.gov].

Appellate provisions in the California constitution, statutes, and rules are, in turn, supplemented by decisional case law, for example, providing the various standards of review for determining whether reversible error exists in a given case [

see discussion of standards of review in Ch. 41, *Appeal: Review Standards and Appellate Rules of Law, § 41.10 et seq*.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionGeneral OverviewGovernmentsCourtsCreation & OrganizationCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureJurisdictionJurisdictional SourcesStatutory SourcesCivil ProcedureJurisdictionJurisdictional SourcesConstitutional Sources

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Chapter 40 APPEAL: AN OVERVIEW
PART II. LEGAL BACKGROUND

5-40 California Forms of Pleading and Practice--Annotated § 40.11

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

§ 40.11 Appellate Jurisdiction in Civil Cases

[1] Appellate Jurisdiction Defined

The term "appellate jurisdiction" means the power of a reviewing court to correct error in a trial court proceeding [*Leone v. Medical Bd. (2000) 22 Cal. 4th 660, 666, 94 Cal. Rptr. 2d 61, 995 P.2d 191* ; *Powers v. City of Richmond (1995) 10 Cal. 4th 85, 93, 40 Cal. Rptr. 2d 839, 893 P.2d 1160]* . The source of this power is the grant of judicial power by the state constitution and the distribution of that power by the Legislature [*Powers v. City of Richmond (1995) 10 Cal. 4th 85, 110, 40 Cal. Rptr. 2d 839, 893 P.2d 1160* ; *Modern Barber Col. v. Cal. Emp. Stab. Com. (1948) 31 Cal. 2d 720, 728, 192 P.2d 916* ; *see Cal. Const., art VI, §§ 11, 12*].

Appellate jurisdiction may be exercised by a reviewing court in the procedural context of a direct appeal or a writ petition. The Legislature may properly specify which of these procedures is to be utilized to invoke appellate jurisdiction in a particular cause, so long as it does not substantially impair the constitutional power of the courts or practically defeat the exercise of those powers [*Leone v. Medical Bd. (2000) 22 Cal. 4th 660, 666, 668, 94 Cal. Rptr. 2d 61, 995 P.2d 191* (affirming constitutionality of statute that specified writ petition, rather than direct appeal, as sole method for reviewing lower court decision in proceeding involving physician licensing); *Hollywood Park Land Co., LLC v. Golden State Transportation Financing Corp. (2009) 178 Cal. App. 4th 924, 938-948, 100 Cal. Rptr. 3d 752* (casino compact unconstitutional because it bypassed court of appeal and mandates direct review by California Supreme Court)].

Appellate jurisdiction may not be exercised unless it is properly invoked [*see* *Leone v. Medical Bd. (2000) 22 Cal. 4th 660, 669, 94 Cal. Rptr. 2d 61, 995 P.2d 191* (holding that reviewing court must excercise appellate jurisdiction once it has been properly invoked)]. For example, a reviewing court may exercise its appellate jurisdiction by direct appeal only when an appeal is taken from an appealable judgment or order and is timely noticed [*see, e.g.,* *Draus v. Alfred M. Lewis, Inc. (1968) 261 Cal. App. 2d 485, 489, 68 Cal. Rptr. 154* (appealable ruling requirement); *Hollister Convalescent Hosp., Inc. v. Rico (1975) 15 Cal. 3d 660, 669-670, 125 Cal. Rptr. 757, 542 P.2d 1349* (timely notice requirement)]. Thus, the procedural requirements for a notice of appeal are "jurisdictional" in the sense that they must

be satisfied before appellate jurisdiction may be assumed by the court that has the constitutional power to assume that jurisdiction [*see In re Estate of Crabtree (1992) 4 Cal. App. 4th 1119, 1123, 6 Cal. Rptr. 2d 224* , citing *Hollister Convalescent Hosp., Inc. v. Rico (1975) 15 Cal. 3d 660, 669-670, 125 Cal. Rptr. 757, 542 P.2d 1349]* . Any doubt concerning the appellate court's jurisdiction must be raised and resolved by the court on its own initiative [*In re Perris City News (2002) 96 Cal. App. 4th 1194, 1197, 118 Cal. Rptr. 2d 38* (holding court of appeal had appellate jurisdiction over judgment resolving petition to be declared a newspaper of general circulation)].

[2] Supreme Court

[a] Appellate Jurisdiction of the Supreme Court

The Supreme Court does not have appellate jurisdiction in civil causes. Thus, a civil appeal may not be taken directly to the Supreme Court [*see Cal. Const., art. VI, § 11(a)* (limiting Supreme Court appellate jurisdiction to criminal causes in which "the judgment of death has been pronounced"); *Hollywood Park Land Co., LLC v. Golden State Transportation Financing Corp. (2009) 178 Cal. App. 4th 924, 938-948, 100 Cal. Rptr. 3d 752* (casino compact unconstitutional because it bypassed court of appeal and mandates direct review by California Supreme Court); *see also* [1], *above*, for definition of appellate jurisdiction].

While the Supreme Court does not have civil appellate jurisdiction, it does have "review jurisdiction," that is, it has discretionary power to review a decision of the court of appeal rendered in a civil appeal [*Cal. Const., art. VI, § 12(b)*; *see Cal. Rules of Ct., Rule 8.500 et seq.* (procedures and grounds for Supreme Court review); *see also* [3], *below*, regarding jurisdiction of court of appeal].

When the Supreme Court has exercised its discretion to grant review of a court of appeal decision, its power of review extends to any or all issues in the case [*see Cal. Rules of Ct., Rule 8.516(b)(1)*]. As a matter of policy, the Court ordinarily exercises this power only with respect to issues raised in the court of appeal. The Court may, however, decide any other issue in the case, even though not raised in the court of appeal, if it deems it appropriate to do so [*see Cedars-Sinai v. Superior Court (1998) 18 Cal. 4th 1, 5-7, 7-8 n.2, 74 Cal. Rptr. 2d 248, 954 P.2d 511* (Court may review issue not raised in the court of appeal when it was squarely raised in the petition for review, was fully briefed and argued on review, does not turn on the facts of the case, and involves a significant issue of widespread importance)]. Conversely, the Court may limit the issues it will consider on a grant of review [*see Cal. Rules of Ct., Rule 8.516(a)*].

The Supreme Court also has power to transfer causes. It may in its discretion, transfer to itself a cause pending in the court of appeal before a decision has been reached in that cause, and after transfer has jurisdiction to review the cause [*Cal. Const., art. VI, § 12(a)*; *see Cal. Rules of Ct., Rule 8.552* (transfer by and to Supreme Court from court of appeal)]. The Supreme Court rarely determines a civil appeal by this method, however, and will transfer a cause from the court of appeal to itself only on a showing that the appeal involves "issues of imperative public importance that the Supreme Court must promptly resolve" [*Cal. Rules of Ct., Rule 8.552(c)*].

Additionally, the Supreme Court may, and more frequently does, transfer a cause pending in the Supreme Court to a division of the court of appeal. This type of transfer often occurs immediately after the Court has decided a controlling case [*see Cal. Const., art. VI, § 12(a)*; *Cal. Rules of Ct., Rule 10.1000(a)* (also providing for a transfer by the Supreme Court, from one district or division of the court of appeal to another)].

For further discussion and forms relating to Supreme Court proceedings to review a decision of the Court in Appeal, or to transfer an appeal before decision, see Ch. 54, *Appeal: California Supreme Court Review* .

In addition to its review and transfer powers, the Supreme Court also has original jurisdiction in civil writ proceedings, a jurisdiction that the Court shares with the courts of appeal and the superior courts [*see Cal. Const., art. VI, § 10*; for

discussion of these proceedings, *see* respectively Ch. 292, *Habeas Corpus* , Ch. 358, *Mandate and Prohibition* , and Ch. 492, *Review (Certiorari), Writ of*].

The Court's review power and its original jurisdiction in writ proceedings are both essentially methods of judicial review, but different rules apply to writ proceedings. Relief by extraordinary writ is generally not available when the Court's review power provides an adequate opportunity for review [*see Powers v. City of Richmond (1995) 10 Cal. 4th 85, 110, 40 Cal. Rptr. 2d 839, 893 P.2d 1160]* .

[b] Structure and Sessions of Supreme Court

The Supreme Court consists of the Chief Justice and six associate justices. The concurrence of four justices present at argument is necessary for a judgment by the Supreme Court [*Cal. Const., art. VI, § 2*].

The court holds regular sessions in San Francisco, Sacramento, and Los Angeles, at times specified by the court, and may hold special sessions elsewhere [*Cal. Rules of Ct., Rule 8.256*].

[3] Court of Appeal

[a] Appellate Jurisdiction of the Court of Appeal

Formerly, the courts of appeal had civil appellate jurisdiction over causes within the superior court's original jurisdiction, and the appellate department (now the appellate division) of the superior court had appellate jurisdiction over civil causes within the original jurisdiction of the municipal court. The original jurisdiction of the two trial courts over a given cause, and consequently the appellate jurisdiction over that cause, was determined generally by the amount in controversy involved.

This allocation of civil appellate jurisdiction remains fundamentally the same, but its expression has been conceptually altered by constitutional and statutory changes adopted in 1998 to implement the unificiation of trial courts.

A cause formerly within the original jurisdiction of the municipal court, generally one that involves an amount in controversy of $25,000 or less, is classified as a "limited civil case" [*see Code Civ. Proc. §§ 85, 86, 86.1*]. A limited civil case brought in a county that has unified its trial courts (since February 2001, every county in California), which therefore has no municipal court, is within the original jurisdiction of the superior court of that county [*Cal. Const., art VI, sec. 10*].

Nevertheless, a limited civil case, whether subject to the jurisdiction of the municipal court or the superior court, remains subject to procedures that formerly applied to actions exclusively within the jurisdiction of the municipal court [*see, e.g., Code Civ. Proc. § 91(a)*]. Thus, a limited civil case, whether brought in municipal or superior court, must be appealed to the appellate division of the superior court, rather than to the court of appeal [*see Code Civ. Proc. § 904.2* and further discussion in [4], *below*].

The superior court retains original jurisdiction of all causes that are not limited civil cases [*see Cal. Const., art. VI, § 10* ("[s]uperior courts have original jurisdiction of all ... causes except those given by statute to other trial courts")]. Cases brought in superior court and not classified as limited civil cases are by statute termed as "unlimited civil cases" [*Code Civ. Proc. § 88*]. Essentially it is these unlimited civil cases that are subject to the civil appellate jurisdiction of the courts of appeal [*see Code Civ. Proc. § 904.1(a)*; *see also* [1], *above*, for discussion of appellate jurisdiction]. In constitutional terminology, the courts of appeal have appellate jurisdiction over causes that are both within the original jurisdiction of the superior court and also would have been subject to appellate jurisdiction of the courts of appeal as of June 30, 1995 [*Cal. Const., art. VI, § 11(a)* (also providing that the court of appeal has appellate jurisdiction over "other causes prescribed by statute")].

A court of appeal has discretionary power to transfer to itself any appeal that is pending in the appellate division of the superior court [*see* discussion in [4], *below*]. This transfer for hearing and decision in the court of appeal is permitted when the superior court certifies, or the court of appeal determines, that a transfer is necessary to secure uniformity of decision or to settle an important question of law [*Code Civ. Proc. § 911*]. For more detailed discussion and a form relating to transfer under *Code Civ. Proc. § 911*, see *Ch. 345A, Limited Civil Cases, §§ 345A.71, 345A.125*.

While *Code Civ. Proc. § 396* gives a court authority to transfer a case over which it lacks subject matter jurisdiction to a court having subject matter jurisdiction, there is a split in authority concerning whether a superior court may transfer a case over which it lacks subject matter jurisdiction to a court of appeal or the Supreme Court. The Fifth Appellate District has concluded the authority for a superior court to transfer a case to a court of appeal is included in *Code Civ. Proc. § 396* [*Padilla v. Department of Alcoholic Beverage Control (1996) 43 Cal. App. 4th 1151, 1154-1157, 51 Cal. Rptr. 2d 133]* . Division Five of the Second Appellate District, however, has disagreed and held that *Code Civ. Proc. § 396* may not be used to transfer a case from a superior court to a court of appeal or the Supreme Court [*Trafficschoolonline, Inc. v. Superior Court (2001) 89 Cal. App. 4th 222, 234, 107 Cal. Rptr. 2d 412]* .

See also discussion in [2][a], *above*, concerning a court of appeal's original jurisdiction in writ proceedings. Original jurisdiction is in addition to, and is to be distinguished from, the appellate jurisdiction of the courts of appeal.

[b] Structure and Sessions of Court of Appeal

Under the state constitution, the Legislature is empowered to divide California into districts, "each containing a court of appeal with one or more divisions" [*Cal. Const., art. VI, § 3*]. The state currently has six district courts of appeal, with each district comprised of specified counties [*Gov. Code § 69100 et seq.*].

The six appellate districts, their geographical areas, and general composition are as follows [*Gov. Code § 69100*]:

- The First Appellate District consists of the City and County of San Francisco and the counties of Marin, Sonoma, Napa, Solano, Lake, Mendocino, Humboldt, Del Norte, Contra Costa, Alameda, and San Mateo. It has five divisions, one with three justices and the rest with four justices; all divisions hold their regular sessions in San Francisco [*Gov. Code §§ 69100(a), 69101*].

- The Second Appellate District consists of the counties of San Luis Obispo, Santa Barbara, Ventura, and Los Angeles. It has seven divisions of four justices each; Division Six holds its regular sessions in Ventura, Ventura County, but has discretion to hold regular sessions in Santa Barbara or San Luis Obispo Counties as well, and the other divisions hold their regular sessions in Los Angeles, Los Angeles County [*Gov. Code §§ 69100(b), 69102*].

- The Third Appellate District consists of the counties of Siskiyou, Modoc, Trinity, Shasta, Lassen, Tehama, Plumas, Colusa, Glenn, Butte, Sierra, Sutter, Yuba, Nevada, Yolo, Placer, Sacramento, El Dorado, San Joaquin, Amador, Calaveras, Alpine and Mono. It is a single division with ten justices and holds its regular sessions in Sacramento, Sacramento County [*Gov. Code §§ 69100(c), 69103*].

- The Fourth Appellate District consists of the counties of Inyo, San Bernardino, Riverside, Orange, San Diego, and Imperial. It has three divisions: Division One has nine justices and holds its regular sessions in San Diego, San Diego County; Division Two has six justices and holds its regular sessions in San Bernardino, San Bernardino County; and Division Three has six justices and holds its regular sessions in Santa Ana, Orange County [*Gov. Code §§ 69100(d), 69104*].

- The Fifth Appellate District consists of the counties of Stanislaus, Tuolumne, Merced, Mariposa,

Madera, Fresno, Kings, Tulare, and Kern. It is a single division with nine justices and holds its regular sessions in Fresno, Fresno County [*Gov. Code §§ 69100(e), 69105*].

- The Sixth Appellate District consists of the counties of Santa Clara, Santa Cruz, Monterey and San Benito. It is a single division with six justices and holds its regular sessions in San Jose, Santa Clara County [*Gov. Code §§ 69100(f), 69106*].

A civil appeal from a given superior court is properly taken to the appellate district within whose geographical boundaries that superior court is located [*see Cal. Rules of Ct., Rule 8.100(a)(2)* (appeal deemed taken to the court of appeal district for the superior court)]. However, an appeal taken to the wrong district court of appeal will not be dismissed, but will instead be transferred to the proper district court of appeal [*Gov. Code § 68915*].

Appeals are decided by a panel of three justices. That is, in each appeal, three justices within a division act as the court of appeal [*see* Cal. Const., *art. VI, § 3*]. The concurrence of two of the three justices present at argument is necessary for a judgment [*Cal. Const. art. VI, § 3*].

Each division of the district courts of appeal holds regular sessions at least once each quarter at times specified by the court [*Cal. Rules of Ct., Rule 8.256(a)(1)*]. Each district court of appeal is also required to adopt a policy for holding "circuit-riding" sessions, at places within the district other than the court's permanent location or locations. Sessions may be held at any time or place when it appears that suitable facilities are available and a sufficient number of cases may be set for at least one day of hearings [*Cal. Rules of Ct., Rule 8.256(a)(2)*; *see, e.g.*, Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 3d App. Dist., Rule 31; Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 6th App. Dist., Rule 1].

For further discussion of the structure of the court of appeal, and the manner in which appeals are assigned to particular divisions or panels within each appellate district, see *Ch. 51, Appeal: Hearing and Decision, § 51.11*.

[4] Appellate Jurisdiction of the Superior Court

In each superior court there is an appellate division [*Cal. Const., art. VI, § 11(b)*]. The appellate division of the superior court has appellate jurisdiction in causes prescribed by statute [*Cal. Const., art. VI, § 11(b)*]. By statute, the appellate division of the superior court has appellate jurisdiction over causes that are limited civil cases [*see Code Civ. Proc. § 904.2*].

A limited civil case is classified as such when it involves, generally speaking, an amount in controversy of $25,000 or less [*see Code Civ. Proc. §§ 85, 86, 86.1*; for detailed discussion of what constitutes a limited civil case, *see* Ch. 323, *Jurisdiction, Inconvenient Forum, and Appearances , Pt. I*]. The specified amount in controversy of a limited civil case is jurisdictional. In the event that legislation increases or otherwise changes this amount, that change automatically alters the respective appellate jurisdictions of the court of appeal and the appellate division of the superior court, such that a limited civil case within the newly specified limit will remain subject to the appellate jurisdiction of the superior court's appellate division [*see Cal. Const., art. VI, § 11(a)* ("[w]hen appellate jurisdiction in civil causes is determined by the amount in controversy, the Legislature may change the appellate jurisdiction of the courts of appeal by changing the jurisdictional amount in controversy")].

As discussed in [3][a], *above*, a limited civil case is one that, before 1998, would have been exclusively within the original jurisdiction of the municipal court. Following unification of all trial courts in California, a limited civil case is now within the original jurisdiction of the superior court, since all California counties now have unified their trial courts and no longer have municipal courts [*see Cal. Const., art. VI, sec. 10*].

If an action is commenced in superior court as an unlimited civil case, but is later reclassified a limited civil case (or is

later transferred to the municipal court, where there is one, as the court having proper subject matter jurisdiction), that action is treated as a limited civil case subject to the appellate jurisdiction of the superior court appellate division, as distinguished from the appellate jurisdiction of the court of appeal [*see Code Civ. Proc. §§ 396, 403.070* (case transferred to municipal court for jurisdictional purposes, or reclassified as a limited civil case, is treated as if it were commenced as such)]. This includes appellate jurisdiction to review orders made by the superior court before reclassification or transfer, at least with respect to orders not separately appealable from the final judgment [*see Estrada v. Ramirez (1999) 71 Cal. App. 4th 618, 621-622, 84 Cal. Rptr. 2d 73* (appeal to district court of appeal dismissed when it sought review of orders that were made by superior court before case was transferred to municipal court; the orders sought to be reviewed were not separately appealable and the appeal was proper to the appellate division of the superior court)].

For detailed discussion and forms relating to appeals from a limited civil case to the appellate division of a superior court, see Ch. 345A, *Limited Civil Cases* .

An appeal from a judgment rendered in the small claims division of a superior court is also taken to the superior court. This type of appeal is not, however, a review conducted by the appellate division of the superior court, exercising its constitutional appellate jurisdiction. It consists, rather, of a new hearing before a judicial officer of the superior court other than the one who heard the claim in the small claims division [*see Code Civ. Proc. § 904.5*]. For discussion and forms relating to these appeals, see Ch. 526, *Small Claims* .

See also [2][a], *above*, concerning the superior court's original jurisdiction to entertain extraordinary writs, a method of review distinguished from its appellate jurisdiction.

[5] Court's Subject Matter Jurisdiction May Be Challenged at Any Time

Since the appellate court may not proceed on the merits of a controversy without subject matter jurisdiction, it must determine whether it has jurisdiction any time the issue is raised [*Keiffer v. Bechtel Corp. (1998) 65 Cal. App. 4th 893, 896, 76 Cal. Rptr. 2d 827]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionGeneral OverviewGovernmentsCourtsCreation & OrganizationCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureJurisdictionJurisdictional SourcesStatutory SourcesCivil ProcedureJurisdictionJurisdictional SourcesConstitutional Sources

California Forms of Pleading and Practice--Annotated

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Volume 5: Appeal-Chs. 40-55
Chapter 40 APPEAL: AN OVERVIEW
PART II. LEGAL BACKGROUND

5-40 California Forms of Pleading and Practice--Annotated § 40.12

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§ 40.12 Nature and Scope of Appeal

[1] Nature of Appeal

An appeal is a process by which a higher court reviews the final judgment or appealable order of a lower court, tribunal, or adjudicatory body. In California, the procedure for a direct appeal includes the filing of written briefs, oral argument, and a written opinion in which the matter is decided on its merits [*Powers v. City of Richmond (1995) 10 Cal. 4th 85, 91 n.1, 97, 40 Cal. Rptr. 2d 839, 893 P.2d 1160]* .

An appeal is not a new trial, but a review, within established limits, of the action taken by the trial court [*see* discussion in [2], *below*]. After the appellate court has reviewed the written briefs and the appellate record and heard oral argument, it files a written decision in which it determines whether there was error in the lower court and if so, whether the error constitutes a miscarriage of justice justifying reversal [*Cal. Const., art. VI, §§ 13, 14*; *Moles v. Regents of University of California (1982) 32 Cal. 3d 867, 871, 187 Cal. Rptr. 557, 654 P.2d 740* ; *see also* [2][b], *below*].

[2] Limits on the Scope of Appeal

[a] Review Limited to Appealable Judgment or Order

The right to civil appeal is statutory [*Powers v. City of Richmond (1995) 10 Cal. 4th 85, 109, 40 Cal. Rptr 2d 839, 893 P.2d 1160* ; *Vivid Video, Inc. v. Playboy Entertainment Group, Inc. (2007) 147 Cal. App. 4th 434, 440-443, 2007 Cal. App. LEXIS 132* (ruling as to who decides arbitrability is not appealable final order); *Garau v. Torrance Unified School District (2006) 137 Cal. App. 4th 192, 199-200, 40 Cal. Rptr. 3d 108]* . Civil appeals are accordingly limited to the review of those judgments or orders that are appealable by express statutory provision [*Doe v. Luster (2006) 145 Cal. App. 4th 139, 147-148, 51 Cal. Rptr. 3d 403* (no statutory authorization of immediate appeal from award or denial of attorney's fees to prevailing party or from denial of attorney's fees to prevailing party opposing special motion to strike)]. For further discussion of this limitation and its effect, and of the statutory provisions that describe those judgments and orders that are appealable, see *Ch. 42, Appeal: Notice of Appeal, § 42.12* [*see also* [3], *below*, (alternative methods of reviewing nonappealable judgments or orders)].

[b] Review Limited to Determination of Prejudicial Error Under Established Standards of Review

Orders and judgments of the trial are presumed to be correct. An appellant therefore has the burden affirmatively to demonstrate error [*Interinsurance Exchange of Auto. Club of Southern California v. Collins (1994) 30 Cal. App. 4th 1445, 1448, 37 Cal. Rptr. 2d 126]* . Moreover, any error raised on appeal must appear in the record presented for review [*see Brosterhous v. State Bar of California (1995) 12 Cal. 4th 315, 325, 48 Cal. Rptr. 2d 87, 906 P.2d 1242]* .

An appellant must also have preserved an error raised on appeal, by neither inviting nor waiving the error in the trial court proceeding [*In re Marriage of Benjamin S. (1985) 171 Cal. App. 3d 738, 745, 217 Cal. Rptr. 561* ; *Stevens v. Owens-Corning Fiberglas Corp. (1996) 49 Cal. App. 4th 1645, 1655, 57 Cal. Rptr. 2d 525]* . Finally, the error must be demonstrably prejudicial, resulting in a miscarriage of justice that requires a reversal or other modification of the lower court's judgment or order by the appellate court [*Cal. Const., art. VI § 13*; *Moles v. Regents of University of California (1982) 32 Cal. 3d 867, 871, 187 Cal. Rptr. 557, 654 P.2d 740]* . For further discussion of these principles, see *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.10*.

Review is further prescribed by the application of review standards. There are essentially three standards of review:

- An independent or "de novo" review of questions of law, *e.g.*, the proper interpretation of a statute [*see, e.g., Professional Engineers in California Government v. Kempton (2007) 40 Cal. 4th 1016, 1032, 56 Cal. Rptr. 3d 814, 155 P.3d 226* ; 20th *Century Inc. Co. v. Garamendi (1994) 8 Cal. 4th 216, 271, 32 Cal. Rptr. 2d 807, 878 P.2d 566* ; *Pensinger v. Bowsmith Inc. (1998) 60 Cal. App. 4th 709, 714-717, 70 Cal. Rptr. 2d 531]* .

- A review of factual determinations under the "substantial evidence" standard [*see, e.g.*, 20th *Century Ins. Co. v. Garamendi (1994) 8 Cal. 4th 216, 271, 32 Cal. Rptr. 2d 807, 878 P.2d 566* ; *Barnum-Smith v. Joseph (1998) 17 Cal. 4th 203, 228, 70 Cal. Rptr. 2d 619, 949 P.2d 472]* .

- A review to determine whether the trial court's action was an "abuse of discretion" (e.g., evidentiary rulings, grant or denial of continuance, allowing leave to amend a pleading, etc.) [*see, e.g., Pate v. Channel Lumber (1997) 51 Cal. App. 4th 1447, 59 Cal. Rptr. 2d 919* (review of discovery order imposing sanction)].

For detailed discussion of appellate standards of review, as well as coverage of other appellate rules used to determine the substantive law applicable in a given case, see Ch. 41, *Appeal: Review Standards and Appellate Rules of Law* .

[3] Other Methods of Review When Appeal Is Not Available

As discussed in [2][a], *above*, an appeal may only be taken from an appealable order or judgment.

If an order is not appealable, it may usually be reviewed in an appeal taken from the final judgment in the action [*see, e.g., Stone v. City of Los Angeles (1975) 51 Cal. App. 3d 987, 990 n.1, 124 Cal. Rptr. 822]* .

Similarly, a party aggrieved by an unappealable order may seek review of that order by a petition for extraordinary relief, usually a petition for writ of mandate or prohibition [*see, e.g., Garau v. Torrance Unified School District (2006) 137 Cal. App. 4th 192, 198, 40 Cal. Rptr. 3d 108* ; *Rail-Transport Employees Ass'n v. Union Pacific Motor Freight (1996) 46 Cal. App. 4th 469, 54 Cal. Rptr. 2d 713* ; *Wheeler v. St. Joseph Hospital (1976) 63 Cal. App. 3d 345, 353, 133 Cal. Rptr. 775]* . If the circumstances are such that extraordinary relief is proper, appellate courts may even exercise their power to deem a purported appeal to be a petition for a writ. The courts do this only in unusual circumstances, however, such as when the issue raised is one of public importance [*see Olson v. Cory (1983) 35 Cal. 3d 390, 401* ; *San Joaquin County Department of Child Support Services v. Winn (2008) 163 Cal. App. 4th 296, 300-301, 77 Cal.*

Rptr. 3d 470 (refusing to do so); *Black Diamond Asphalt, Inc. v. Superior Court (2003) 114 Cal. App. 4th 109, 114-115, 7 Cal. Rptr. 3d 466* (court treated appeal as petition for writ of mandate because pure question of law at issue, which trial court decided incorrectly and which greatly prejudiced appellant's rights)].

For discussion and forms relating to proceedings for a writ of mandate or prohibition, see Ch. 358, *Mandate and Prohibition* .

[4] Waiver of Right to Appeal

[a] Waiver by Agreement Generally Must Be Express

A party may waive the right to appeal by agreement, but the waiver generally must be express, not implied [*Lovett v. Carrasco (1998) 63 Cal. App. 4th 48, 53, 73 Cal. Rptr. 2d 496]* . For example, an agreement that the parties will be bound by the trial court's decision "without the need for further litigation" is ambiguous concerning whether the right to appeal is waived. Therefore, it does not constitute an express waiver of the right to appeal [*Lovett v. Carrasco (1998) 63 Cal. App. 4th 48, 53, 73 Cal. Rptr. 2d 496]* .

PRACTICE TIP:

Evidence of Express Agreement Waiving Right to Appeal. A respondent may move to dismiss an appeal if the appellant has expressly agreed to waive the right to appeal. If, however, the agreement is outside the record on appeal, the respondent must move to have the reviewing court take additional evidence of the agreement [*see, e.g.,* *Stone v. Regents of University of California (1999) 77 Cal. App. 4th 736, 744, 92 Cal. Rptr. 2d 94* (stating court would not resolve conflicts in evidence concerning waiver because respondent had never requested that it take additional evidence); *see also Cal. Rules of Ct., Rule 8.252* (procedure for requesting taking of additional evidence in reviewing court)].

For discussion and forms relating to motions to dismiss, see Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* . For discussion relating to a request to take additional evidence in the appellate court, see *Ch. 50, Appeal: Briefs, §§ 50.21, 50.81*.

[b] Waiver by Acceptance of Benefits or Voluntary Satisfaction of Judgment

[i] Judgment Creditor

Generally, voluntary acceptance by a judgment creditor of the benefits of a judgment or order is a waiver of the right to appeal. An exception exists when the judgment creditor is concededly entitled to the benefits which are accepted and the entitlement will not be affected by a reversal on appeal. In such a case, acceptance of the benefits does not constitute waiver of the right to appeal [*see* *Mathys v. Turner (1956) 46 Cal. 2d 364, 365* ; *Shopoff & Cavallo LLP v. Hyon (2008) 167 Cal. App. 4th 1489, 1505-1506, 85 Cal. Rptr. 3d 268* (no waiver when appellant consistently argued on appeal that court should reduce respondent's share and increase judgment awarded to him); *Kacha v. Allstate Ins. Co. (2006) 140 Cal. App. 4th 1023, 1037*]. Furthermore, involuntary acceptance of the benefits of a judgment does not constitute waiver of the right to appeal [*Norco Delivery Service, Inc. v. Owens-Corning Fiberglas (1998) 64 Cal. App. 4th 955, 962, 75 Cal. Rptr. 2d 456* (no waiver when party accepted benefits of judgment with "a gun at its head")].

[ii] Judgment Debtor

Payment of a judgment does not waive the right to appeal. Payment is regarded as compulsory, and therefore does not release errors, unless it is by way of compromise and settlement, or pursuant to an agreement not to appeal, or under circumstances rendering moot any questions for determination by a reviewing court [*Stone v. Regents of University of California (1999) 77 Cal. App. 4th 736, 745, 92 Cal. Rptr. 2d 94]* .

Although a judgment debtor's voluntary compliance with the judgment by way of compromise may constitute a waiver of the right to appeal, a waiver is not implied when the satisfaction arises under compulsion of risk of forfeiture [*Lee v. Brown (1976) 18 Cal. 3d 110, 115-116, 132 Cal. Rptr. 649, 553 P.2d 1121* ; *see Satchmed Plaza Owners Association v. UWMC Hospital Corporation (2008) 167 Cal. App. 4th 1034, 1042-1043, 84 Cal. Rptr. 3d 585* (having to choose whether to file appeal to pursue greater award than judgment provided does not make choice involuntary)]. For discussion concerning satisfaction of judgments, see generally *Ch. 318, Judgments, § 318.120* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsReviewabilityPreservation for ReviewCivil ProcedureAppealsStandards of ReviewDe Novo ReviewCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsHarmless Error Rule

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Volume 5: Appeal-Chs. 40-55
Chapter 40 APPEAL: AN OVERVIEW
PART II. LEGAL BACKGROUND

5-40 California Forms of Pleading and Practice--Annotated § 40.13

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

§ 40.13 Parties and Nonparties Involved With Appeal

[1] Appellants

[a] Appellant Must Be Aggrieved Party

[i] General Rule

The appellant is a person or entity aggrieved by the judgment or order from which the appeal is taken [*Code Civ. Proc. § 902*; *see, e.g.,* *Ricketts v. McCormack (2009) 177 Cal. App. 4th 1324, 1335 n.12, 99 Cal. Rptr. 3d 817* ; *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America (2006) 141 Cal. App. 4th 46, 58, 45 Cal. Rptr. 3d 647]* . "Aggrieved" means having an interest in the subject matter of the judgment that has been injuriously affected by that judgment [*Serrano v. Stefan Merli Plastering Company, Inc. (2008) 162 Cal. App. 4th 1014, 1026-1027, 76 Cal. Rptr. 3d 559* ; *In re Marriage of Falcone v. Fyke (2008) 164 Cal. App. 4th 814, 827, 79 Cal. Rptr. 3d 588* (party not aggrieved when issue would not affect appellant); *In re Alex U. (2007) 158 Cal. App. 4th 259, 266, 69 Cal. Rptr. 3d 695* ; *Winter v. Gnaizda (1979) 90 Cal. App. 3d 750, 754, 152 Cal. Rptr. 700]* . The appellant's affected interest must be immediate, pecuniary, and substantial, not nominal or a remote consequence of the judgment [*In re FairWageLaw (2009) 176 Cal. App. 4th 279, 285, 97 Cal. Rptr. 3d 652* (dissenting shareholder in dissolution proceeding had standing to appeal imposition of litigation expenses against him); *Crook v. Contreras (2002) 95 Cal. App. 4th 1194, 1201, 116 Cal. Rptr. 2d 319* (decedent's former caretaker lacked standing to appeal lower court finding because it would not produce pecuniary benefit)]. Appellate standing is liberally construed, with any doubts resolved in favor of the right to appeal [*Van't Rood v. County of Santa Clara (2003) 113 Cal. App. 4th 549, 560, 6 Cal. Rptr. 3d 746* (although statute barred owner of less than two-thirds of affected property from initiating proceeding to exclude property from parcel map, owner could appeal unfavorable result)]. If there are several named plaintiffs or defendants, one or more of them may appeal whichever portion of the judgment that is adverse to their interests, unless the judgment is nonseverable [*Caruso v. Snap-Tite, Inc. (1969) 275 Cal. App. 2d 211, 214, 79 Cal. Rptr. 642]* .

Because appeals are limited to aggrieved parties, a party cannot appeal a *favorable* ruling [*State Water Resources Control Bd. Cases (2006) 136 Cal. App. 4th 674, 792-793, 39 Cal. Rptr. 3d 189* (because trial court's decision to reject

exhaustion arguments was in Board's favor, Board was not aggrieved and could not have waived right to appeal); *Gober v. Ralphs Grocery Co. (2006) 137 Cal. App. 4th 204, 211, 40 Cal. Rptr. 3d 92* (party not aggrieved when it requested trial court to remit punitive damages award or grant new trial, and trial court granted new trial)]. When a ruling is partially, but not completely, favorable, the party may appeal only the unfavorable part of the judgment [*Sampson v. Parking Service 2000 Com., Inc. (2004) 117 Cal. App. 4th 212, 217 n.4, 11 Cal. Rptr. 3d 595* (party awarded significantly less than requested was aggrieved party for purposes of appeal); *Barham v. Southern Cal. Edison Co. (1999) 74 Cal. App. 4th 744, 751, 88 Cal. Rptr. 2d 424* (party that prevails generally may appeal from unfavorable part of judgment when awarded less than was demanded); *Soldate v. Fidelity National Financial, Inc. (1998) 62 Cal. App. 4th 1069, 1073, 72 Cal. Rptr. 2d 404* (judgment awarding attorney's fees to appellant, in amount to be fixed later, was a *favorable* ruling, and notice of appeal from this judgment did not embrace subsequent order fixing the amount, because it did not put opposing party on notice that appellant was seeking to challenge the subsequent and separately appealable order)].

[ii] An Aggrieved Nonparty May Appeal in Some Circumstances

An appellant may be an aggrieved nonparty [*see In re FairWageLaw (2009) 176 Cal. App. 4th 279, 285, 97 Cal. Rptr. 3d 652* (dissenting shareholder in dissolution proceeding had standing to appeal imposition of litigation expenses against him)]. For example, an expert witness who is subject to a fee setting order may be aggrieved and may appeal even though he or she is not a party [*Marsh v. Mountain Zephyr, Inc. (1996) 43 Cal. App. 4th 289, 295, 50 Cal. Rptr. 2d 493]* .

[iii] Appellant May Act in Representative Capacity for Aggrieved Party

An appellant may be a person acting in a representative capacity, such as an administrator, executor, guardian, or trustee, who has a duty to protect the interests of an estate aggrieved by the judgment or order [*Graham v. Lenzi (1995) 37 Cal. App. 4th 248, 254, 43 Cal. Rptr. 2d 407]* .

However, in a class action, the named plaintiff may not appeal on behalf of nonappealing members of the class if the named plaintiff was not personally aggrieved [*Estrada v. RPS, Inc. (2005) 125 Cal. App. 4th 976, 985* (named plaintiff not considered "guardian" of class members)]. Class members who are themselves aggrieved by trial court errors may, on appeal, assert those errors on behalf of the entire class, but the appellants must show they were, in fact, harmed by the asserted errors [*Estrada v. RPS, Inc. (2005) 125 Cal. App. 4th 976, 985* (named plaintiff who could not show he was aggrieved by dismissal of nonresponding class members had no standing to appeal)].

If an aggrieved party dies before the notice of appeal is filed, the decedent's attorney of record or the executor or administrator of the decedent's estate may file a notice of appeal within the time the decedent could have filed the notice if he or she had survived [*Code Civ. Proc. § 903*].

For discussion of proceedings to substitute parties in an appeal, including the substitution of a personal representative for a deceased appellant, see [4], *below*.

[b] Appellant May Be Subject to Vexatious Litigant Statutes

The Vexatious Litigant provisions of *Code Civ. Proc. § 391 et seq.* have been held to apply to an appellant, if that appellant falls within the statutory definition of a "plaintiff," who "commences, institutes, or attempts to maintain" a "litigation," which includes a civil appeal [*In re R.H. (2009) 170 Cal. App. 4th 678, 691, 88 Cal. Rptr. 3d 650* ; *McColm v. Westwood Park Association (1998) 62 Cal. App. 4th 1211, 1216-1219, 73 Cal. Rptr. 2d 288* ; *see Code Civ. Proc. § 391(b)(1)*]. However, a court may not require a person who has been determined to be a vexatious litigant in prior litigation to seek leave of the court before he or she may file an appeal in a case in which he or she is the defendant [*Mahdavi v. Superior Court (2008) 166 Cal. App. 4th 32, 36, 82 Cal. Rptr. 3d 121*].

Thus, an appellant who falls within the definition of a vexatious litigant under *Code Civ. Proc. § 391(b)* (essentially, a litigant who undertakes unsuccessful actions or proceedings repeatedly while acting without the advice of counsel, *in propria persona*), may be determined to be vexatious by the trial or appellate court under *Code Civ. Proc. § 391 et seq.* Thereafter, such an appellant may be required to post security before proceeding with an appeal, as provided under *Code Civ. Proc. § 391.3*, or may be required to obtain permission from the presiding justice before proceeding with an appeal as provided under *Code Civ. Proc. § 391.7* (concerning a previously determined "vexatious litigant" who is subject to a prefiling order requiring permission to proceed) [*see Kobayashi v. Superior Court (2009) 175 Cal. App. 4th 536, 541, 96 Cal. Rptr. 3d 99* (vexatious litigant who in application falsely claims not to be vexatious litigant has manifestly failed to show arguable issue on appeal)]. Permission to proceed under *Code Civ. Proc. § 391.7* may itself include a condition that an appellant post an undertaking, and the appeal may be dismissed for failure to pay such an undertaking when required [*McColm v. Westwood Park Association (1998) 62 Cal. App. 4th 1211, 1213, 1217-1218, 73 Cal. Rptr. 2d 288* ; *but see Mahdavi v. Superior Court (2008) 166 Cal. App. 4th 32, 36, 82 Cal. Rptr. 3d 121* (court may not require vexatious litigant in prior litigation to seek leave of court before filing appeal in case in which he or she is defendant)].

A vexatious appellant may be required to post security or undertaking despite the fact that he or she has been granted permission to waive court fees under *Cal. Rules of Ct., Rule 3.50 et seq.* (discussed in [3], *below*), that is, to proceed without paying certain regular fees and costs [*McColm v. Westwood Park Association (1998) 62 Cal. App. 4th 1211, 1218-1219, 1221-1222, 73 Cal. Rptr. 2d 288]* .

For detailed discussion and forms relating to vexatious litigants under *Code Civ. Proc. § 391 et seq.*, see Ch. 573, *Vexatious Litigants* .

[2] Respondents

The respondent to an appeal is the adverse party [*Cal. Rules of Ct., Rule 8.10(2)*], that is, the party who prevailed in the trial court with respect to the issue raised on appeal.

A respondent may be entitled to file a cross appeal and therefore act as cross-appellant as well as respondent. For further discussion regarding the filing of a cross-appeal, see Ch. 42, *Appeal: Notice of Appeal* .

[3] Indigent Party to Appeal May Seek Fee Waiver

Fees are generally required to be paid at several stages of the appeal process, including the fee for filing a notice of appeal [*see Cal. Rules of Ct., Rule 8.100(b)(1)*], fees for the preparation, certification, and transmittal of the clerk's transcript [*see Cal. Rules of Ct., Rule 8.122(c)*], and charges for the preparation, by the trial court reporter, of the reporter's transcript [*see Cal. Rules of Ct., Rule 8.130(b)*].

An appellant or respondent may, however, obtain relief from many such fees and costs by making an application for a fee waiver [*see, e.g., Cal. Rules of Ct., Rules 8.26(e)*]. Such application is made in the appellate court pursuant to *Cal. Rules of Ct., Rule 8.26* [*Gov. Code § 68634.5*].

Waiver of fees and costs under *Gov. Code § 68634.5* does not include relief from the charges due to the trial court reporter for preparing a reporter's transcript [*see Mehdi v. Superior Court (1989) 213 Cal. App. 3d 1198, 1202-1203, 261 Cal. Rptr. 919* (noting that, while reporter's transcript costs are not expressly provided for under former *Cal. Rules of Ct., Rule 3.50-3.63* (*now see Cal. Rules of Ct., Rule 8.26(e)*), that rule does provide expressly for waiver of clerk's transcript fees)].

The appellant (or respondent seeking additions to the reporter's transcript) may sometimes obtain a waiver allowing the

filing of a notice to prepare a reporter's transcript without an accompanying deposit of any part of the reporter's fee, if the appellant (or respondent) shows that he or she is probably eligible for payment or reimbursement under the official shorthand reporter's Transcript Reimbursement Fund (*see* Gov. Code § 8030.2 et seq. when appealing through a qualified legal services project) [*see Cal. Rules of Ct., Rule 8.130(c)*].

For further discussion of waiver of the fee for filing the notice of appeal, see Ch. 42, *Appeal: Notice of Appeal* . For further discussion of waiver of the fees for preparation of the clerk's transcript, and waiver of deposit and reimbursement for costs of preparation of the reporter's transcript, see Ch. 44, *Appeal: Preparing and Filing the Record* .

For detailed discussion and forms relating to proceedings for a fee waiver under *Gov. Code § 68634.5* and *Cal. Rules of Ct., Rule 8.26*, see *Ch. 174, Costs and Attorney's Fees, § 174.110* et seq.

[4] Substitution of Parties to Appeal

Whenever a substitution of parties to a pending appeal is necessary, proper proceedings must be made by serving and filing a motion in the reviewing court. The clerk of that court must notify the superior court of any ruling on the motion [*Cal. Rules of Ct., Rule 8.36(a)*].

For a form of application to substitute a party on appeal, see *§ 40.70*.

For discussion and forms relating to substitution of parties, see Ch. 21, *Amended and Supplemental Pleadings*, §§ 27.27, 27.100 et seq. [*see also* Ch. 181, *Death and Survival Actions*].

[5] Nonparties Appearing as Amicus Curiae

An *amicus curiae* ("friend of the court") is a nonparty who, on request, is granted leave by the appellate court to brief and argue issues in support of or opposition to an appeal [*see Cal. Rules of Ct., Rules 8.200(c)* and *8.520(f)*]. For detailed discussion and forms relating to proceedings to obtain leave of court to appear as amicus curiae, see Ch. 22, *Amicus Curiae* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedureAppealsReviewabilityAdverse DeterminationsCivil ProcedureAppealsFrivolous AppealsCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsAppeals in Forma Pauperis

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Volume 5: Appeal-Chs. 40-55
Chapter 40 APPEAL: AN OVERVIEW
PART II. LEGAL BACKGROUND

5-40 California Forms of Pleading and Practice--Annotated § 40.14

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

§ 40.14 Attorneys Involved With Appeal

[1] Duties of Counsel in Taking or Maintaining Appeal

Counsel on appeal should keep the following duties in mind:

- Appellant's counsel should make a reasoned decision about whether to appeal [*see § 40.15*].

- Counsel (or any unrepresented party on appeal) must serve and file written notice of any change in address or telephone numbers, including the title and case number or numbers of all pending matters in the reviewing court to which the notice applies, as well as counsel's state bar membership number (if the notice is by counsel rather than unrepresented party) [*Cal. Rules of Ct., Rule 8.32*].

- Withdrawal or substitution of counsel is permitted only by leave of court absent filing of substitution [*see Cal. Rules of Ct., Rule 8.36* and discussion in [2], *below*].

- Counsel, in appellate briefing, must cite to specific pages of the record to support factual statements [*see Cal. Rules of Ct., Rule 8.204(a)(1)(c)*; *Kinney v. Overton (2007) 153 Cal. App. 4th 482, 496-497, 63 Cal. Rptr. 3d 136* ; *Green v. City of Los Angeles (1974) 40 Cal. App. 3d 819, 835, 115 Cal. Rptr. 685* ; *see* further discussion regarding briefing in Ch. 50, *Appeal: Briefs*].

- Counsel should, as always, comply with the Rules of Professional Conduct. For example, counsel may not intentionally attempt to mislead the court or misrepresent either the facts of the case on appeal or the language or holding of a legal authority. Counsel also must not intentionally cite authority that is no longer valid, as when a case which has been overruled, depublished, superseded by a grant of petition for review, or as when a statute has been repealed or declared unconstitutional [*see Cal. Rules Prof. Conduct, Rule 5-200*].

- Appellant's counsel must comply with appellant's duty to provide notice of a settlement made after the filing of the notice of appeal under *Cal. Rules of Ct., Rule 8.244* [*see* further discussion in *Ch. 51, Appeal: Hearing and Decision, § 51.12[1][d]*].

PRACTICE TIP:

Notify the Court of Any Actions That May Result in Stay or Dismissal of Appeal. Counsel should notify the court immediately of any other action that may result in a stay or dismissal of the appeal, for example, when a party has filed bankruptcy during the appeal and an automatic stay is in place under the bankruptcy law [*see 11 U.S.C. § 362* and discussion in Ch. 94, *Bankruptcy*]. In some situations it may also be appropriate to notify the court of settlement negotiations, as distinguished from notice of a final settlement, particularly if the negotiations are likely to result in a stipulated dismissal of the appeal.

- In those instances in which an indigent appellant is entitled to the appointment of counsel in a civil proceeding, such as in a civil commitment proceeding or a juvenile court delinquency proceeding, trial counsel must initiate an appeal and perform other duties for the indigent appellant in conformity with *Penal Code § 1240.1* [*Code of Civ. Proc. § 936.1*]. For further discussion of counsel's duties and appeal in civil commitment proceedings and juvenile delinquency proceedings, see respectively Ch. 304, *Insane and Other Incompetent Persons* , and Ch. 329, *Juvenile Courts: Delinquency Proceedings* . For further discussion of the requirements of *Penal Code § 1240.1*, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 101, *Appeal* (Matthew Bender).

- Appearance by out-of-state counsel *pro hac vice* is generally subject to the appellate court's grant of a written application, and subject to California laws and jurisdiction regarding professional conduct [*see Cal. Rules of Ct., Rule 9.40*, and discussion in [3], *below*].

[2] Substitution or Withdrawal of Appellate Counsel

Withdrawal or substitution of attorneys is accomplished by serving and filing a substitution in the reviewing court, signed by the party and any substituted attorney [*Cal. Rules of Ct., Rule 8.36(b)*]. In the absence of a substitution, withdrawal may be effected only by an order made pursuant to a motion in the reviewing court [*Cal. Rules of Ct., Rule 8.36(c)*].

PRACTICE TIP:

Withdrawal Not Permitted in Some Instances. The court will not allow a withdrawal, leaving a party unrepresented, in certain situations. For example, counsel may not leave a guardian or other representative in a *pro per* status. Similarly, a corporate party cannot appear except through counsel.

Unless otherwise ordered by the court, service of the motion need be made only on the party and attorneys directly affected by the withdrawal or substitution [*Cal. Rules of Ct., Rule 8.36(b)*]. Notice of the withdrawal or substitution shall be given by the reviewing court to the superior court and by substituted counsel to all parties [*Cal. Rules of Ct., Rule 8.36(b)*].

For forms of stipulation of and motion for substitution of attorney on appeal, see *§ 40.71*.

For further discussion concerning substitution, withdrawal, or other termination of the attorney-client relationship, see *Ch. 72, Attorney Practice and Ethics, § 72.350* et seq., "Terminating the Attorney-Client Relationship."

[3] Appearance of Out-of-State Counsel *Pro Hac Vice*

A person who is not a member of the State Bar, but who is a member in good standing of the bar of any court of the United States or of the highest court of any other state may, on written application, be permitted to appear in a particular proceeding as counsel *pro hac vice* ("for the particular proceeding only"), provided that he or she is associated in the case with an active member of the State Bar [*Cal. Rules of Ct., Rule 9.40(a)*]. The permission is granted in the discretion of the court in which the proceeding is pending. It will not be granted to persons who are residents of this state, regularly employed in this state, or regularly engaged in business, professional, or other activities in this state. Repeated requests for such appearances, absent special circumstances, are a ground for denial of the application [*Cal. Rules of Ct., Rule 9.40(b)*].

A person desiring to appear *pro hac vice* in an appeal pending in the court of appeal or the Supreme Court must make a motion conforming with *Cal. Rules of Ct., Rule 8.54*, with proof of service on all parties who have appeared and on the State Bar at its San Francisco office [Cal. State B. Rules, Counsel Pro Hac Vice Program, Rule 4.4]. The motion must state [Cal. State B. Rules, Counsel Pro Hac Vice Program, Rule 4.4]:

- The applicant's residence and office address.
- The courts to which the applicant has been admitted to practice and the dates of admission.
- That the applicant is a member in good standing in those courts.
- That the applicant is not currently suspended or barred in any court.
- The title of court and the cause in which the applicant has filed an application to appear as counsel *pro hac vice* in California in the preceding two years, the date of each application, and whether it was granted.
- The name, address, and telephone number of the active member of the State Bar who is attorney of record.
- A statement of agreement to comply with the requirements of the California State Bar Rules, Counsel Pro Hac Vice Program.

The application is subject to a fee [*Cal. Rules of Ct., Rule 9.40(e)*], and the applicant, if granted leave to appear, is subject to the jurisdiction of California courts, to California law governing professional conduct, and to the disciplinary jurisdiction of the State Bar [*Cal. Rules of Ct., Rule 9.40(c)*].

Cal. Rules of Ct., Rule 9.40 does not preclude the Supreme Court or a court of appeal from permitting argument in a particular case from a person who is not a member of the State Bar, but who is licensed to practice in another jurisdiction and who possesses special expertise in the particular field affected by the proceeding [*Cal. Rules of Ct., Rule 9.40(g)*].

For detailed discussion of the requirements of a motion under *Cal. Rules of Ct., Rule 8.54*, and a general form of motion under that rule, see *Ch. 45, Appeal: Motion Procedure, §§ 45.14, 45.70*. For further discussion relating to appearances *pro hac vice* and a form of application that may be modified for use in an appellate court, see *Ch. 72, Attorney Practice and Ethics, § 72.190* et seq., "Creation and Scope of Attorney-Client Relationship."

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsBriefsCivil

ProcedureCounselAdmissions Pro Hac ViceCivil ProcedureCounselWithdrawalsCivil ProcedureCounselSubstitutions

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Volume 5: Appeal-Chs. 40-55
Chapter 40 APPEAL: AN OVERVIEW
PART II. LEGAL BACKGROUND

5-40 California Forms of Pleading and Practice--Annotated § 40.15

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

§ 40.15 Legal and Practical Considerations in Determining Whether to Appeal

Before taking an appeal, counsel for a potential appellant must take into account two fundamental *legal* considerations:

- Whether the judgment or order is in fact appealable and a timely notice of appeal is possible. For discussion of appealable judgments and orders and notice of appeal, see Ch. 42, *Appeal: Notice of Appeal* .

- The likelihood of prevailing on appeal. This evaluation requires, first, a determination of the applicable standard of review as to each issue, and secondly the substantive law applicable to determine those issues. The errors to be raised on appeal, as presented by the record, must then be analyzed according to these applicable standards of review and substantive legal principles to determine if the errors are *reversible*, that is, whether they arguably resulted in a miscarriage of justice [*see Cal. Const., art. VI, § 13*; *see* discussion in *§ 40.12[2][b]*]. See Ch. 41, *Appeal: Review Standards and Appellate Rules of Law* , for detailed discussion of review standards, the determination of controlling or persuasive substantive law, and the appellant's burden of showing reversible error. See also Ch. 44, *Appeal: Preparing and Filing the Record* , for further discussion of the various options available in preparing the best possible record for review.

PRACTICE TIP:

Standards of Review and Appellate Rules. Determine the correct standard and keep it in mind when deciding whether to appeal. A separate standard may apply for each issue to be raised on appeal, so it is critical at the outset, as well as in brief-drafting and at oral argument, to identify the appropriate standard of review for each issue. Doing so will help you frame your analysis of the applicable law and facts to address the questions the court must consider in reaching its decision.

Keep the proper standard in mind at the outset because it can make or break your chances on appeal. For example, if you are unhappy with factual findings, do not count on the court of appeal to review and

interpret the evidence independently; it will only review the record to see whether there is substantial evidence to support the findings. If your only claims of error are governed by this "substantial evidence" standard, or by the equally deferential "abuse of discretion" standards, your chance of reversal is lessened accordingly. Consider carefully, therefore, as costs or other practical considerations may outweigh the risk of taking an appeal in which there is a formidable standard of review to overcome in order to convince the appellate court that the error is reversible.

Additionally, but not less importantly, read and familiarize yourself with the appellate rules before you begin working on an appeal [*see § 40.43* for a reference summary of these rules].

Counsel should also weigh carefully the following practical considerations as well, before advising a client to proceed with an appeal:

- **Client Expectations.** What does the client hope to accomplish by appeal? Is this the right case, the right facts, to further the client's expectations and overall position? What would be the effect on the client of a *published* opinion in an unsuccessful appeal? Pursuit of an appeal must be based on more that an emotional involvement with the case and dissatisfaction with the result in the trial court.

- **Costs.** The minimum cost of the appeal includes the filing fee, cost of the record, and attorney's fees. It may be necessary to associate, if not substitute, other counsel due to time constraints or competency concerns. If the appeal is unsuccessful, the client will also incur additional expenses of the opposing party, who, as prevailing party, will generally be entitled to an award of costs on appeal. While, conversely, the client may recover most expenses if the appeal is successful, he or she may nonetheless be subjected to further expenses if the opposing party petitions for review in the Supreme Court. See Ch. 53, *Appeal: Remittitur and Costs on Appeal* , for further discussion of recovery of costs and attorney's fees.

- **Risks.** The risks of taking an appeal include the possibility of getting a worse result on appeal. If the issue concerns a recurring matter, particularly a recurring matter that directly affects your client's business or other interests, the risk of making bad law should also be considered. In addition to paying costs and possibly even attorney's fees to the opposing and prevailing party, there may also be a risk of sanctions, which may be imposed on both the client and counsel if the court of appeal determines that the appeal is frivolous. See Ch. 49, *Appeal: Sanctions* , for further discussion of sanctions.

- **Time Delay.** Typically a considerable time elapses between the initiation and completion of a civil appeal. Counsel should consider the effect that this long period of uncertainty may have on a client's business or other interests. Counsel should also consider the effect the delay may have in subsequent proceedings on remand, such as the availability of a witness or other evidence [*see Code Civ. Proc. § 2036* and discussion in Ch. 199, *Discovery: Preservation of Evidence*]. Note, however, that sometimes the delay necessitated by an appeal may not be altogether disadvantageous. For example, when the case involves legal issues currently pending in higher courts, the ultimate rulings in those cases may ultimately help your case. The opposing party may wish to avoid delay as well, and may therefore be disposed to settle on terms more favorable to the appellant than those obtained at trial, rather than go through the lengthy and expensive process of opposing an appeal that has some merit.

- **Settlement.** Consider settlement negotiations as an alternative to proceed ing through the entire appeal process. Several districts encourage and even require settlement conferences in targeted cases pursuant to *Cal. Rules of Ct., Rule 8.244* [*see Ch. 51, Appeal: Hearing and Decision, § 51.12*]. Settlements, whether resulting in a stipulated dismissal of the appeal, or even a stipulated reversal of the trial court judgment, are generally favored, especially if they are conducted and completed early in the

appeal process, before there has been too much dedication of judicial resources to the appeal process [*see Ch. 48, Appeal: Abandonment, Dismissal, and Stipulated Reversal, §§ 48.11, 48.12*].

PRACTICE TIP:

Consider *Seriously* Having an Expert Review the Pros and Cons. If trial counsel is unfamiliar with appellate practice, it is usually well worth the expense to obtain an evaluation from an experienced appellate practitioner before proceeding with an appeal.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsStandards of ReviewGeneral OverviewCivil ProcedureAppealsCosts & Attorney FeesCivil ProcedureAppealsRemands

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5-40 California Forms of Pleading and Practice--Annotated § 40.16

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

§ 40.16 Summary of Appeal Process

[1] Entry of Judgment

An appeal is actually commenced with the filing of the notice of appeal, but such notice is premature when filed before the *entry* of the judgment or order from which the appeal is taken [*see Cal. Rules of Ct. Rule 8.104(e)* (noting also the circumstances under which a premature notice will be treated as one filed immediately after entry); *see also Code Civ. Proc. § 664.5* (entry and notice of entry)]. For discussion and forms relating to entry and notice of entry of judgment generally, see Ch. 318, *Judgments* , Part I, "Obtaining and Entering Judgments." For further discussion regarding premature notices of appeal, see Ch. 42, *Appeal: Notice of Appeal* .

[2] Stay of Judgment

When a judgment is rendered, a party or a party's attorney contemplating appeal of that judgment should consider whether a stay of the judgment pending appeal is desirable, and if so, should request immediately a temporary stay, pending the filing of a notice of appeal. Counsel should consider further proceedings for stay if the notice of appeal itself does not stay the judgment automatically under *Code Civ. Proc. § 916 et seq.* [*see Code Civ. Proc. § 918*]. For detailed discussion and forms relating to proceedings to stay enforcement or execution of a judgment pending appeal, see Ch. 43, *Appeal: Stay of Proceedings* .

[3] Notice of Appeal

An appeal is initiated by the filing of a notice of appeal in the superior court pursuant to the requirements of *Cal. Rules of Ct., Rules 8.100 et seq.*

The time requirements for filing the notice are critical; the court of appeal has no jurisdiction over, and must dismiss, an appeal in which the notice has not been timely filed [*see Silverbrand v. County of Los Angeles (2009) 46 Cal. 4th 106, 120-121, 92 Cal. Rptr. 3d 595, 205 P.3d 1047* (under prison-delivery rule, notice of appeal still must be filed within jurisdictional time period, but filing constructively occurs when prisoner delivers notice to prison authorities for

forwarding to court clerk); *Hollister Convalescent Hospital, Inc. v. Rico (1975) 15 Cal. 3d 660, 670, 125 Cal. Rptr. 757, 542 P.2d 1349* ; *Guillemin v. Stein (2002) 104 Cal. App. 4th 156, 161, 128 Cal. Rptr. 2d 65* (immaterial that trial court later confirmed sanctions award in postjudgment order from which there was timely appeal)]. The normal time limit is the earliest of the following dates [*Cal. Rules of Ct., Rule 8.104(a)*]:

- 60 days after the date of mailing by the clerk of the superior court of a document entitled "notice of entry" of judgment (or a file-stamped copy of the judgment).

- 60 days after the date of service of a document entitled "notice of entry" of judgment (or a file-stamped copy of the judgment) by any party upon the party filing the notice of appeal, or by the party filing the notice of appeal.

- 180 days after the date of entry of the judgment.

Cal. Rules of Ct., Rules 8.104 and *8.108* set out special time limits for certain actions involving a public entity and certain post-judgment orders, respectively.

For detailed discussion and forms relating to those judgments and orders that may be appealed, the timeliness and sufficiency of a notice of appeal, and other requirements such as the filing fee, see Ch. 42, *Appeal: Notice of Appeal* . For discussion and a form relating to dismissal of an appeal in which the notice was not timely filed, see *Ch. 48, Abandonment, Dismissal, and Stipulated Reversal, §§ 48.13[2][a], 48.50*.

Some districts or divisions of the Courts of Appeal, by local rule, require the filing of a docketing statement in the *appellate* court, typically within 10 days of the filing of the notice of appeal [Cal. Rules of Ct., Supp. First App. Dist. Local Rules of Ct., Rule 2; Cal. Rules of Ct., Supp. Fourth App. Dist. Local Rules of Ct., Rule 9; *cf.* deadline for filing notice in superior court designating the record, discussed in [5], *below*]. For further discussion and forms regarding locally required docketing statements, their time deadlines, and other requirements, see Ch. 42, *Appeal: Notice of Appeal* .

[4] Notice of Cross Appeal

Any party, other than the appellant, may file a notice of appeal after the timely filing of the first notice of appeal. The time for this notice is generally within 20 days after the mailing of notification by the superior court clerk of the first appeal, but there are special rules when the first appeal is taken from an order granting a motion for a new trial or a motion to vacate the judgment.

In most respects, the requirements relating to sufficiency, fees, etc., are identical to those governing the initial notice of appeal [*see Cal. Rules of Ct., Rule 8.100(f)*; *see also Gov. Code § 68926.1*]. For more detailed discussion and forms relating to the filing of a cross appeal, see Ch. 42, *Appeal: Notice of Appeal* .

[5] Designation, Preparation, Certification, and Transmittal of Record on Appeal

Within 10 days after the filing of the notice of appeal, the appellant must file a notice designating the record, most commonly designating both the clerk's and the reporter's transcript [*see Cal. Rules of Ct., Rule 8.121(a)*]. Designation of the record is accomplished by written notice in which the appellant specifies what is to be included in the record on appeal, usually in conjunction with an immediate or subsequent deposit of fees to cover the costs of preparation [*see Cal. Rules of Ct., Rule 8.121*; *see also* discussion in*§ 40.13[3]*].

A respondent may file a subsequent notice designating additional matters to be included in the reporter's or clerk's transcript, again, usually accompanied with a deposit to cover the estimated cost of these additions [*see Cal. Rules of*

Ct., Rules, 8.122(a)(2), 8.130(a)(3)].

For detailed discussion and forms relating to the deadlines, fees, and other requirements for designating the record on appeal, both in the more common situations involving both a clerk's and reporter's transcript and in other situations involving alternative methods of providing a record, see Ch. 44, *Appeal: Preparing and Filing the Record* .

[6] Appellate Motions

Not every appeal requires motions. Appellate motions may be made, whenever appropriate, at any time from the deadline for filing a notice of appeal to the date of decision.

The general procedural and format requirements applicable to all appellate motions and papers, are discussed in Ch. 45, *Appeal: Motion Procedure* , which also includes a summary, with cross references of more detailed treatment elsewhere, of the more common appellate motions and applications.

Among the more common appellate applications and motions are those for an extension of time in filing briefs or meeting other deadlines, or for relief from default in failing to meet various requirements of the appellate rules, discussed respectively in Ch. 46, *Appeal: Extending or Shortening Time* , and Ch. 47, *Appeal: Relief From Default* . Others include motions for involuntary dismissal, for a stipulated reversal of the trial court judgment, and for the imposition of sanctions, discussed respectively in Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* , and Ch. 49, *Appeal: Sanctions* .

[7] Appellate Briefs

The opening brief generally must be filed 40 days after the filing of the record or 70 days after the filing of a notice of election to proceed with an Appendix or Joint Appendix [*Cal. Rules of Ct., Rule 8.212(a)(1)*].

The respondent's brief must be filed 30 days after the filing of the appellant's opening brief [*Cal. Rules of Ct., Rule 8.212(a)(2)*]. If the respondent has cross appealed, the issues raised in the cross appeal may be covered in a separate section of the respondent's brief [*Cal. Rules of Ct., Rule 8.216(b)*].

An appellant may file a reply brief within 20 days after the filing of the Respondent's brief. In the case of a cross-appeal, a reply brief containing the cross respondent's brief may be filed 30 days after the filing of the respondent and cross appellant's brief [*Cal. Rules of Ct., Rule 8.212(a)(3)*].

For detailed discussion and forms relating to these deadlines and other requirements for preparing and filing appellate briefs, see Ch. 50, *Appeal: Briefs* .

For discussion of preparation and filing of a brief by *amicus curiae*, see Ch. 22, *Amicus Curiae* .

[8] Oral Argument

The clerk will give written notice of the time and place of the calendar hearing [*Cal. Rules of Ct., Rule 8.256(b)*]. A motion for calendar preference, if appropriate, must be filed no later than the last day for the filing of the appellant's reply brief (discussed in [7], *above*) [*Cal. Rules of Ct., Rule 8.240*].

The right to appear and argue the cause may be waived upon written notice to opposing counsel and the court. [*see People v. Camarillo (1967) 66 Cal. 2d 455, 456, 58 Cal. Rptr. 112, 426 P.2d 512]* . Counsel may also waive argument under local rule, for failure to request argument within the time specified in the notice of calendar setting. The time limits and other requirements relating to oral argument are set out in *Cal. Rules of Ct., Rule 8.256*.

For detailed discussion of calendar proceedings, motions for calendar preference, and oral argument, see Ch. 51, *Appeal: Hearing and Decision* .

[9] Rendition of Decision

Following hearing or waiver of oral argument, an appeal is submitted for decision, and decision must generally be rendered within 90 days after submission [*Cal. Const., art. VI, § 19*].

The decision of the lower court will be reversed only upon a showing of prejudicial error under the applicable standard of review and applicable substantive law. For detailed discussion of the various standards of review, of appellate rules for determining applicable substantive law, see Ch. 41, *Appeal: Review Standards and Appellate Rules of Law* .

The decision must be written and must state the reasons for its conclusion [*Cal. Const., art. VI, § 14*; *Amwest Sur. Ins. Co. v. Wilson (1995) 11 Cal. 4th 1243, 1265, 48 Cal. Rptr. 2d 12, 906 P.2d 1112]* . The reviewing court may affirm, modify, reverse (wholly or partially), and may give specific directions, for example, directing a particular judgment or order to be entered or directing that a new trial or other further proceedings be held.

If the matter is remanded for retrial, the reviewing court must determine all questions of law presented in the appeal which are necessary to the final determination of the case [*Code Civ. Proc. §§ 43, 906*].

For further discussion of the submission and rendition of the decision and the types of decisions that may be rendered, see Ch. 51, *Appeal: Hearing and Decision* .

[10] Award of Costs and Fees as Part of Decision

The prevailing party, as defined by rule, is generally entitled to costs on appeal, although the court of appeal may otherwise award or apportion costs as it deems proper. In some instances the appellate court is required to specify the award or denial of costs [*see Cal. Rules of Ct., Rule 8.278(a)*].

The court of appeal may also determine entitlement to an award of attorney's fees in the limited circumstances under which such fees are recoverable [*see Walsh v. New West Federal Sav. & Loan Assn. (1991) 234 Cal. App. 3d 1539, 1548, 1 Cal. Rptr. 2d 35* (reviewing court may determine a party's entitlement to attorney's fees as provided by contract or allowed by statute)].

Proceedings to determine the amount of costs and fees, and to recover these amounts, are usually conducted in the trial court following issuance of remittitur [*Cal. Rules of Ct., Rules 8.278(c), 3.1702(c)*; *see* [11], *below*].

For further discussion of the award of costs by the court of appeal and discussion and forms relating to proceedings to recover costs and fees in the trial court, see respectively *Ch. 51, Appeal: Hearing and Decision, § 51.18*, and *Ch. 53, Appeal: Remittitur and Costs on Appeal, § 53.30* et seq.

In addition to costs and fees, the court of appeal may impose sanctions after notice and hearing and upon a determination that the appeal was frivolous or for other infractions of the appellate rules [Cal. Rules of Ct., Rule 8.27(c); *see In re Marriage of Flaherty (1982) 31 Cal. 3d 637, 183 Cal. Rptr. 508, 646 P.2d 179]* . For detailed discussion and forms relating to the imposition of sanctions for a frivolous appeal, see Ch. 49, *Appeal: Sanctions* .

[11] Remittitur and Recovery of Costs After Decision

After the court of appeal has rendered a decision, if no rehearing or review is sought [*see* [12] and [13], *below*], a

remittitur is issued by the clerk of the court of appeal. It consists of a certified copy of the court's judgment, order or opinion, and a notice of judgment stating whether the judgment or order from which the appeal was taken has been affirmed, reversed or modified [*see Cal. Rules of Ct., Rule 8.272*]. The issuance of remittitur returns jurisdiction of the cause to the trial court for disposition or further proceedings in accordance with the appellate decision.

Within 40 days after notice of the issuance of remittitur, a party who claims costs or fees awarded by the court of appeal may file in the trial court a memorandum of costs, or a motion for fees, or both [*Cal. Rules of Ct., Rules 8.278(c)(1), 3.1702(c)*]. A motion to tax costs may be made in the trial court in the same manner and within a like time as in post-trial costs proceedings [*see Cal. Rules of Ct., Rules 8.278(c)(2), 3.1702(b)*].

For discussion and forms relating to remittitur and to the recovery of costs and fees in the trial court following remittitur, see Ch. 53, *Appeal: Remittitur and Costs on Appeal* .

[12] Rehearing

A petition for rehearing must be filed within 15 days after [*Cal. Rules of Ct., Rule 8.268(b)(1)*]:

- The filing of the decision by the court of appeal;
- A postfiling order of the court of appeal publishing its opinion;
- A modification order changing the appellate judgment; or
- The filing of a consent to an increase or decrease in the amount of a money judgment pursuant to *Cal. Rules of Ct., Rule 8.264(d)*.

A party *must* seek a rehearing in the court of appeal before seeking review of the decision by the California Supreme Court in cases in which an issue or material fact was omitted from or was misstated in the opinion of the court of appeal *see* Cal. Rules of Ct., Rule 8.506(c); *Torres v. Parkhouse Tire Service, Inc. (2001) 26 Cal. 4th 995, 1000, n.2, 111 Cal. Rptr. 2d 564, 30 P.3d 57* ; *see* [13], *below*].

A grant of rehearing is mandatory if the decision is based upon a new issue which the parties have not been afforded an opportunity to brief [*Gov. Code § 68081*].

Other grounds for rehearing include a substantial error of law or fact or a procedural error which affects the appellate rights of the parties [*Freedom Newspapers, Inc. v. Superior Court (Orange County) (1986) 186 Cal. App. 3d 1102, 1106-1107, 231 Cal. Rptr. 189]* .

For discussion and forms relating to rehearing, see *Ch. 52, Appeal: Rehearing, § 52.10* et seq.

[13] Review in Supreme Court

A petition for review in the Supreme Court must be filed within 10 days after the court of appeal decision becomes final as to that court [*Cal. Rules of Ct., Rule 8.500(e)(1)*; *see also § 40.11[2][a]* (discussing Supreme Court's discretionary power to review decisions of court of appeal)]. Grounds for review in the California Supreme Court include the following [*Cal. Rules of Ct., Rule 8.500(b)*]:

- Review appears to be necessary to secure uniformity of decision or the settlement of important questions of law.

- The court of appeal was without jurisdiction of the cause.

- Because of disqualification or other reason, the decision of the court of appeal lacks the concurrence of the required majority of qualified judges.

An answer to the petition for review may be served and filed within 20 days after the filing of the petition. If the answer raises additional issues for review, the petitioner may serve and file a reply limited to the additional issues within 10 days after the filing of the answer [*Cal. Rules of Ct., Rules 8.500(a)* and *8.500(e)*].

Within 60 days of the filing of the last timely petition for review, the Supreme Court may order review of a court of appeal decision [*Cal. Rules of Ct., 8.512(b)(1)*]. The Supreme Court may review and decide any or all issues and may order action deferred until disposition of another cause pending before the court [*Cal. Rules of Ct., Rule 8.512(d)(2)*].

For detailed discussion and forms relating to proceedings for review by the Supreme Court, including briefing and ultimate disposition of the cause upon denial or grant of review, see Ch. 54, *Appeal: California Supreme Court Review* .

Subsequent proceedings, for remittitur or rehearing, are much the same in the Supreme Court as in the court of appeal [*see Cal. Rules of Ct., Rules 8.536, 8.540* and discussion in [11], [12], *above*].

[14] Requests for Publication or Depublication of Court of Appeal Decision

Supreme Court opinions are always published. Court of appeal opinions are selectively published if they are certified by the deciding majority to meet the criteria for publication [*Cal. Rules of Ct., Rule 8.1105*]. A party or other interested person may seek to have a court of appeal opinion published or "depublished" by filing a request following rendition of the decision of the court of appeal [*Cal. Rules of Ct., Rules 8.1120, 8.1125*].

Only a published opinion may be cited as precedential case law authority under the doctrine of *stare decisis* [*see Cal. Rules of Ct., Rule 8.1115*].

An exception to this rule arises for an administrative decision when there is no system of publication for such decisions. The court may cite and consider the unpublished administrative decision as evidence of administrative construction; however, the lack of publication may weaken an inference that the legislature was aware of the prior administrative interpretation when adopting or amending statutory language [*Styne v. Stevens (2001) 26 Cal. 4th 42, 53, n.4, 109 Cal. Rptr. 2d 14, 26 P.3d 343]* .

For discussion of citability of case law and the doctrine of *stare decisis*, and for coverage relating to publication and depublication of court of appeal opinions, including a form to request publication, made to the court of appeal "promptly" after the decision, and a form for depublication, made to the Supreme Court within 30 days after the decision becomes final as to the court of appeal, see *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.50* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsBriefsCivil ProcedureAppealsCosts & Attorney FeesCivil ProcedureAppealsRecords on AppealCivil ProcedureAppealsRemands

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5-40 California Forms of Pleading and Practice--Annotated §§ 40.17-40.39

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

[Reserved]

§§ 40.17[Reserved]

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5-40 California Forms of Pleading and Practice--Annotated § 40.40

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

§ 40.40 Related Matthew Bender Publications

For forms of points and authorities relating to substantive topics of California law, which may be adapted for use in an appellate brief, see specific chapters in California Points and Authorities (Matthew Bender) and the *Index* in that publication

For discussion and forms relating to civil appellate practice in the federal courts, see Moore's Federal Practice, Ch. 201 et seq. (3d ed., Matthew Bender)

For discussion and forms relating to California criminal, as distinguished from civil, appeals, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 101, *Appeal* (Matthew Bender)

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5-40 California Forms of Pleading and Practice--Annotated § 40.41

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

§ 40.41 California Constitution

Composition of Supreme Court. *Cal. Const., art. VI, § 2*

Composition of courts of appeal and function of court in three-judge panels. *Cal. Const., art. VI, § 3*

Original jurisdiction of Supreme Court, courts of appeal, and superior courts. *Cal. Const., art. VI, § 10*

Appellate jurisdiction of Supreme Court, courts of appeal, and superior courts; power of appellate courts to take evidence. *Cal. Const., art. VI, § 11*

Power of Supreme Court to transfer causes pending in court of appeal or to review decisions of court of appeal. *Cal. Const., art. VI, § 12*

Error resulting in miscarriage of justice is required to set aside judgment or grant a new trial on the ground of misdirection of the jury, improper admission or rejection of evidence, or errors in pleading or procedure. *Cal. Const., art. VI, § 13*

Publication of appellate opinions; appellate decisions are required to be written with reasons stated. *Cal. Const., art. VI, § 14*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCreation & OrganizationCivil ProcedureAppealsCase TransfersCivil ProcedureJurisdictionJurisdictional SourcesConstitutional SourcesCivil ProcedureAppealsStandards of ReviewPlain ErrorMiscarriages of JusticeCivil ProcedureAppealsPublication of Opinions

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5-40 California Forms of Pleading and Practice--Annotated § 40.42

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

§ 40.42 State Statutes

[1] Appellate Administration, Procedural Actions, and Decisions

Appellate courts; transaction of business and adjournments. *Code of Civ. Proc. §§ 41, 42*

Affirming, reversing, modifying judgments by appellate courts. *Code of Civ. Proc. § 43*

Transference of cause pending in appellate department of superior court to court of appeal. *Code of Civ. Proc. § 911*

Remittitur of final determination of reviewing court to superior court. *Code of Civ. Proc. § 912*

Dismissal of appeal is with prejudice unless otherwise ordered. *Code of Civ. Proc. § 913*

Appeal from judgment in civil commitment or other civil proceeding in which indigent appellant would be entitled to appointment of appellate counsel. *Code of Civ. Proc. § 936.1*

Stay of judgment or other proceedings in trial court pending appeal. *Code of Civ. Proc. §§ 916-923*

Composition of districts of the court of appeal. *Gov. Code §§ 69100-69106*

[2] Statutory Calendar Preference

Calendar preference for probate and child custody appeals. *Code of Civ. Proc. §§ 44, 45*

[3] Adoption of Appellate Rules

Power of Judicial Council to prescribe rules for practice and procedure on appeal. *Code Civ. Proc. § 901*

[4] Parties, Nonparties, and Counsel Involved With Appeal

Aggrieved party may appeal. *Code of Civ. Proc. § 902*

Intervention by Attorney General in appeal after statute or regulation is ruled unconstitutional. *Code of Civ. Proc. § 902.1*

Representation of deceased appellant. *Code of Civ. Proc. § 903*

[5] Appealable Judgments and Orders

Superior court judgments or orders from which civil appeal may be taken. *Code of Civ. Proc. §§ 904, 904.1*

Powers of reviewing court; action when judgment is reversed or modified. *Code of Civ. Proc. §§ 906, 908*

Appealable judgments and order in contractual arbitration proceedings. *Code of Civ. Proc. § 1294*

[6] Frivolous Appeals

Frivolous appeals. *Code of Civ. Proc. § 907*

[7] Fact Finding on Appeal

Additional factual determination by reviewing court when there is no right to jury trial or jury trial is waived. *Code of Civ. Proc. § 909*

[8] Procedures on Loss or Destruction of Reporter's Transcript

Trial court, trial court judge, or reviewing court has power to set aside judgment from which appeal is taken, and to order new trial, when loss, destruction, or other circumstances preclude the preparation of reporter's transcript. *Code of Civ. Proc. § 914*

[9] Costs on Appeal

Judicial Council authorized to establish rules governing recovery of costs on appeal and procedures for claiming those costs. *Code Civ. Proc. § 1034(b)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleGovernmentsCourtsCreation & OrganizationCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsDismissals of AppealsInvoluntary DismissalsCivil ProcedureAppealsCase Transfers

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5-40 California Forms of Pleading and Practice--Annotated § 40.43

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

§ 40.43 California Rules of Court

[1] Filing Appeal

Filing notice of appeal. *Cal. Rules of Ct., Rules 8.100-8.108*

[2] Record on Appeal

Record on appeal. *Cal. Rules of Ct., Rules 8.120-8.155, 8.18, 8.23, 8.163*

[3] Briefs

Appellate briefs. *Cal. Rules of Ct., Rules 8.200-8.224, 8.18*

[4] Hearing and Determination of Appeal

Dismissal of appeal; showing in motion to dismiss made before record is filed. *Cal. Rule of Ct., Rules 8.244, 8.57*

Calendar preference motions. *Cal. Rule of Ct., Rule 8.240*

Settlement conferences, notice of settlement. *Cal. Rules of Ct., Rule 8.244(a)*

Transfer of cases, sessions of appellate court. *Cal. Rules of Ct., Rule 10.1000*

Oral argument. *Cal. Rules of Ct., Rule 8.256*

Submission of cause in court of appeal. *Cal. Rules of Ct., Rule 8.256(d)*

Findings and additional evidence on appeal. *Cal. Rules of Ct., Rule 8.252*

Decision of reviewing court; finality; modification; consent to modification. *Cal. Rules of Ct., Rule 8.264*

Remittitur. *Cal. Rules of Ct., Rule 8.540*

Costs and fees on appeal. *Cal. Rules of Ct., Rules 8.278, 3.1702(c)*

Sanctions. *Cal. Rules of Ct., Rule 8.276*

Rehearing. *Cal. Rules of Ct., Rule 8.268*

Transfer by Supreme Court, before decision, of cause pending in court of appeal. *Cal. Rules of Ct., Rule 10.1000*

Review by Supreme Court. *Cal. Rules of Ct., Rules 8.500-8.552*

Appeal from juvenile court. *Cal. Rules of Ct., Rules 8.400-8.474*

Conservatorship appeals. *Cal. Rules of Ct., Rule 8.480-8.482*

[5] General Provisions

Definition of terms used in appellate rules. *Cal. Rules of Ct., Rule 8.10*

Appellate motions generally. *Cal. Rules of Ct., Rule 8.54*

Applications to extend time or for other routine matters. *Cal. Rules of Ct., Rule 8.50*

Form and filing of appellate papers. *Cal. Rules of Ct., Rule 8.40*

Provisions applicable to motions to extend or shorten time; relief from default occasioned by failure to comply with appellate rules. *Cal. Rules of Ct., Rules 8.60-8.66*

Cal. Rules of Ct., Rule 8.18

Assignment of causes in multi-division districts of the court of appeal. *Cal. Rules of Ct., Rule 10.1008*

Substitution of parties and substitution or withdrawal of counsel. *Cal. Rules of Ct., Rule 8.36*

Writ of supersedeas to stay issues in trial court pending appeal. *Cal. Rules of Ct., Rules 8.112, 8.116*

Habeas corpus proceedings. *Cal. Rules of Ct., Rule 8.380-8.388*

Presumption where record is not complete. *Cal. Rules of Ct., Rule 8.163*

Scope and construction of appellate rules; amendments. *Cal. Rules of Ct., Rules 1.5, 8.4-8.16*

Brief, petition, motion, or other document complying with appellate rules must be accepted by clerk notwithstanding local appellate rules. *Cal. Rules of Ct., Rule 8.20*

Motion in trial court following remittitur to recover attorney's fees on appeal. *Cal. Rules of Ct., Rule 3.1702(c)*

Publication and depublication of appellate decisions; citability of unpublished appellate decisions. *Cal. Rules of Ct., Rules 8.1105-8.1125*

Appearance by out-of-state counsel *pro hac vice*. *Cal. Rules of Ct., Rule 9.40*

Legal Topics:

For related research and practice materials, see the following legal topics:
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5-40 California Forms of Pleading and Practice--Annotated § 40.44

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

§ 40.44 Decisions

[1] Statutory Right to Civil Appeal

There is no federal constitutional right to appeal in civil cases; the *Fourteenth Amendment* (*U. S. Const., amend. XIV*) does not even require states to establish a system for appellate review in civil cases if a full and fair trial on the merits is provided. *Lindsey v. Normet (1972) 405 U.S. 56, 74, 92 S. Ct. 862, 31 L. Ed. 2d 36*

The right to appeal is wholly statutory. *Vivid Video, Inc. v. Playboy Entertainment Group, Inc. (2007) 147 Cal. App. 4th 434, 440, 2007 Cal. App. LEXIS 132*

State constitution establishes the judicial branch of the government, including the Supreme Court and courts of appeal, and defines the jurisdiction of each; it does not guarantee a right to appeal in civil cases. *Powers v. City of Richmond (1995) 10 Cal. 4th 85, 115, 40 Cal. Rptr. 2d 839, 893 P.2d 1160*

The right to an appeal is entirely statutory; unless specified by statute no judgment or order is appealable. *Garau v. Torrance Unified School Dist. (2006) 137 Cal. App. 4th 192, 198, 40 Cal. Rptr. 3d 108*

Right to appeal in civil cases is entirely statutory; Legislature has the power to limit or abolish the right to appeal or change the appellate procedure. *In re Taya C. (1991) 2 Cal. App. 4th 1, 7, 2 Cal. Rptr. 2d 810*

[2] Appellate Jurisdiction

Appellate jurisdiction is the power of a reviewing court to correct error in a trial court proceeding. *Powers v. City of Richmond (1995) 10 Cal. 4th 85, 93, 40 Cal. Rptr. 2d 839, 893 P.2d 1160*

[3] Nature and Scope of Appeal

Appellant must present an adequate record to show prejudicial error and present argument and authorities on each point or else the issue is waived. *Kurinij v. Hanna and Morton (1997) 55 Cal. App. 4th 853, 865, 64 Cal. Rptr. 2d 324*

Error must be preserved for appeal, that is, raised in the trial court and not waived or invited. *Stevens v. Owens-Corning Fiberglas Corp. (1996) 49 Cal. App. 4th 1645, 1655, 57 Cal. Rptr. 2d 525*

Error raised on appeal must appear on the record. *Skoglie v. Crumley (1972) 26 Cal. App. 3d 294, 297-298, 103 Cal. Rptr. 205* ; *see* *Brosterhous v. State Bar of California (1995) 12 Cal. 4th 315, 325, 48 Cal. Rptr. 2d 87, 906 P.2d 1242*

The trial court's orders and judgment are presumed to be correct, and the burden is on the appellant affirmatively to demonstrate error. *Interinsurance Exchange of Auto. Club of Southern California v. Collins (1994) 30 Cal. App. 4th 1445, 1448, 37 Cal. Rptr. 2d 126*

It is the duty of appellate counsel to refer the reviewing court to the portions of the record which support his or her client's position. *Green v. City of Los Angeles (1974) 40 Cal. App. 3d 819, 835, 115 Cal. Rptr. 685*

No appeal may be taken from a nonappealable judgment or order. *Adohr Milk Farms, Inc. v. Love (1967) 255 Cal. App. 2d 366, 369, 63 Cal. Rptr. 123*

[4] Parties, Nonparties, and Counsel Involved With Appeal

Dissenting shareholder who was not a party in dissolution proceeding had standing to appeal imposition of litigation expenses against him. *In re FairWageLaw (2009) 176 Cal. App. 4th 279, 285, 97 Cal. Rptr. 3d 652*

Party not aggrieved when issue would not affect appellant one way or another. *In re Marriage of Falcone v. Fyke (2008) 164 Cal. App. 4th 814, 827, 79 Cal. Rptr. 3d 588*

Only a party aggrieved by a judgment or order has standing to appeal the judgment or order. A party who has an interest recognized by law that is adversely affected by the judgment or order is an aggrieved party. The interest must be immediate and substantial, and not nominal or remote. *Serrano v. Stefan Merli Plastering Company, Inc. (2008) 162 Cal. App. 4th 1014, 1026-1027, 76 Cal. Rptr. 3d 559*

Only an aggrieved party has the right to appeal. An aggrieved party is one who has an interest recognized by law in the subject matter of the judgment and whose interest is injuriously affected by the judgment. *In re Alex U. (2007) 158 Cal. App. 4th 259, 266, 69 Cal. Rptr. 3d 695*

A party is not aggrieved by a judgment or order rendered in its favor. *Gober v. Ralphs Grocery Co. (2006) 137 Cal. App. 4th 204, 211, 40 Cal. Rptr. 3d 92*

When trial court's decision to reject exhaustion arguments was in board's favor, board was not aggrieved and could not have waived right to appeal. *State Water Resources Control Bd. Cases (2006) 136 Cal. App. 4th 674, 792-793, 39 Cal. Rptr. 3d 189*

In class action, named plaintiff may not appeal on behalf of nonappealing class members if named plaintiff not personally aggrieved. *Estrada v. RPS, Inc. (2005) 125 Cal. App. 4th 976, 985*

Appellate standing is liberally construed, with any doubts resolved in favor of the right to appeal. *Van't Rood v. County of Santa Clara (2003) 113 Cal. App. 4th 549, 560, 6 Cal. Rptr. 3d 746*

Appeals are limited to aggrieved parties, and party therefore cannot appeal from a ruling that is favorable to that party; when a ruling is partially, but not completely, favorable to a party, he or she may appeal only from the unfavorable part of the judgment. *Soldate v. Fidelity National Financial, Inc. (1998) 62 Cal. App. 4th 1069, 1073, 72 Cal. Rptr. 2d 404*

An expert witness who is subject to a fee setting order may be aggrieved and may appeal even though he or she is not a party. *Marsh v. Mountain Zephyr, Inc. (1996) 43 Cal. App. 4th 289, 295, 50 Cal. Rptr. 2d 493*

A person acting in a representative capacity, such as an administrator, executor, guardian, or trustee, who has a duty to protect the interests of the appellant or the estate may be an appellant. *Graham v. Lenzi (1995) 37 Cal. App. 4th 248, 254, 43 Cal. Rptr. 2d 407*

An "aggrieved" party is a person or entity who has an interest in the subject matter of the judgment which has been injuriously affected by the judgment. *Winter v. Gnaizda (1979) 90 Cal. App. 3d 750, 754, 152 Cal. Rptr. 700*

If there are several named plaintiffs or defendants, one or more of them may appeal the portion of the judgment adverse to their interests unless the judgment is nonseverable. *Caruso v. Snap-Tite, Inc. (1969) 275 Cal. App. 2d 211, 214, 79 Cal. Rptr. 642*

[5] Liberal Construction of Appellate Rules

Appellate rules (former Cal. Rules of Ct., Rule 1 et seq.) are to be liberally construed to secure the just and speedy determination of appeals, transfers, and original proceedings pursuant to former *Cal. Rules of Ct., Rule 1.5*. *Jones v. Superior Court (1994) 26 Cal. App. 4th 92, 96-97, 31 Cal. Rptr. 2d 264* (construing rule regarding frivolous appeals to apply to frivolous writ petitions in reviewing court as well as to appeals)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityPreservation for ReviewCivil ProcedureAppealsReviewabilityAdverse DeterminationsCivil ProcedureCounselGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionState Court Review

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AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

§ 40.45 Law Reviews

Faigman, *Appellate Review of Scientific Evidence Under Daubert and Joiner, 48 Hastings L.J. 959 (1997)*

Margolin, *Amicus Curiae and Briefing Limitations*, 7(2) California Litigation 3 (1994)

Horvitz and Axelrad, *Supreme Court Review: Improving Your Chances for Success*, 7(2) California Litigation 9 (1994)

Lascher, *Oral Argument*, 7(2) California Litigation 16 (1994)

Sullwold, *So Your Brilliant Summary Judgment Motion Was Denied: Should You Take a Writ?*, 7(2) California Litigation 22 (1994)

Miller, *Effective Brief Writing; A Court of Appeal Staff Attorney's Perspective*, 7(2) California Litigation 27 (1994)

Marer, *Demystifying Appellate Review Standards*, 7(2) California Litigation 33 (1994)

Fischer and Yockelson, *Standards of Review on Appeal from Post-Trial Motions:Deference Given Where Deference Due*, 7(2) California Litigation 37 (1994)

Graber, *Timeline and Deadlines for Civil Appeals in California*, 7(2) California Litigation 43 (1994)

Kelso, *Report on the California Appellate System, 45 Hastings L.J. 433, 492-496 (1994)*].

Barnett, *Depublication Deflating: The California Supreme Court's Wonderful Law-Making Machine Begins to Self-Destruct, 45 Hastings L.J. 519 (1994)*

Comment, *Fee Simple? Indeterminable: Inconsistent Procedures Regarding Attorney Fees and Posting Appeal Bonds, 24 Pac. L.J. 141 (1992)*

Grodin, *The Depublication Practice of the California Supreme Court, 72 Cal. L.Rev. 514 (1984)*

Witkin, *New California Rules on Appeal, 17 So. Cal. L. Rev. 80, (1944)*

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5-40 California Forms of Pleading and Practice--Annotated § 40.46

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

§ 40.46 Text References

Witkin, California Procedure, vol. 9, *Appeal* (4th ed. 1997)

California Civil Appellate Practice (Cal. CEB 3d ed. 2000)

California Courts and Judges (James Publishing)

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§ 40.47 Internet References

California Courts. This site includes: general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most court of appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes: text of constitution, codes, and statutes; and information concerning pending legislation. http://www.leginfo.ca.gov

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AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

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§§ 40.48[Reserved]

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PART IV. PROCEDURAL CHECKLIST

5-40 California Forms of Pleading and Practice--Annotated § 40.60

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

§ 40.60 Appellant's Checklist

[1] Preliminary Steps

☐ Request temporary stay of trial court proceedings, immediately after pronouncement of the judgment or order [*see § 40.16[2]*; *see Code Civ. Proc. § 918* and Ch. 43, *Appeal: Stay of Proceedings*].

☐ Determine appealability of judgment or order [*see § 40.12[2][a]* and *Ch. 42, Appeal: Notice of Appeal, § 42.12*].

☐ Determine likelihood of success under applicable standard of review and other applicable law [*see § 40.12[2][b]*, and Ch. 41, *Appeal: Review Standards and Appellate Rules of Law*].

☐ Determine practical advisability of taking appeal from judgment or order [*see § 40.15*].

☐ For overview of appeal process, review Judicial Council Form APP-001, Information on Appeal Procedure for Unlimited Civil Cases,*§ 40.72*.

[2] File Notice of Appeal

☐ Notice must be filed in superior court in which judgment or ordered was entered [*see § 40.16[1],[3]* and Ch. 42, *Appeal: Notice of Appeal*].

☐ Notice must be filed within 60 days after notice of entry of judgment or 180 days after the date of entry of the judgment, whichever comes first [*see Cal. Rules of Ct., Rule 8.104*].

☐ Filing fee or request for waiver due to indigence must accompany notice [*see Cal. Rules of Ct., Rules 8.100(b)(1)* and *3.51*].

☐ Some districts or divisions require the filing of a docketing statement in the court of appeal within a short time, *e.g.*, 10 days, after the filing of the notice of appeal in the superior court [*see* Cal. Rules of Ct., Supp., First App. Dist. Rules, Rule 2].

[3] Give Notice of Any Settlement

☐ After the notice of appeal has been filed, appellant must provide notice of any settlement [*Cal. Rules of Ct., Rule 8.244(a)*; *but see* discussion construing this requirement more narrowly in Ch. 51, *Appeal: Hearing and Decision ,§ 51.12[1][d]*].

☐ Within 45 days after filing a notice of settlement, the appellant who filed the notice of settlement must file either an abandonment under Cal. *Rules of Ct., Rule 8.244(b)*, if the record has not yet been filed in the court of appeal, or a request to dismiss under *Cal. Rules of Ct., Rule 8.244(c)*, if the record has already been filed in the court of appeal [*Cal. Rules of Ct., Rule 8.244(a)(3)*].

[4] Designate Record

☐ Designation is served on respondent and filed with clerk of superior court [*see § 40.16[5]* and Ch. 44, *Appeal: Preparing and Filing the Record*].

☐ Designation notice, for both reporter's and a clerk's transcript, must be filed within 10 days of filing notice of appeal [*see Cal. Rules of Ct., Rule 8.121(a)*].

☐ Deposit of estimated cost of reporter's transcript must accompany designation notice [*see Cal. Rules of Ct., Rule 8.130(b)*]; deposit of estimated cost of clerk's transcript, over and above the $100 deposit required at the time of filing the notice of appeal [*see Cal. Rules of Ct., Rule 8.100(b)(2)*], must be made within 10 days after notification of clerk's estimate [*see Cal. Rules of Ct., Rules 8.122(a), 8.128(b)*].

☐ Designation notice for reporter's and clerk's transcript may be combined with each other and with notice of appeal [*see Cal. Rules of Ct., Rule 8.121(a)*].

[5] Obtain Stay Pending Appeal

☐ If judgment, order, or other trial court proceedings are not automatically stayed by filing of notice of appeal, and stay is desirable, obtain stay of trial proceedings pending disposition of appeal [*see § 40.16[2]* and Ch. 43, *Appeal: Stay of Proceedings*].

☐ Stay proceedings may be initiated by motion in the superior court [*see Code Civ. Proc. § 917 et seq.*], or by petition for writ of supersedeas in the court of appeal [*see Cal. Rules of Ct., Rule 8.112*], as necessary.

[6] Ensure Timely Completion of Record

☐ Track deadlines for completion of record by trial court reporter or clerk and take steps to enforce timely completion if necessary [*see Cal. Rules of Ct., Rules 8.130(f)*, 8.122d(d), *8.128(b)* (time deadlines); *see also Cal. Rules of Ct., Rules 8.60(a), 8.63* (extension of time), *Cal. Rules of Ct., Rule 8.23* (sanctions for delay), and Ch. 44, *Appeal: Preparing and Filing the Record*].

☐ Track preparation and transmittal of exhibits [*Cal. Rules of Ct., Rules 8.122(a), 8.224*]. Keep in mind it may take several weeks to copy and complete the transfer.

☐ When record is filed, review for completeness. If incomplete, seek correction or augmentation under *Cal. Rules of Ct., Rule 8.155*.

[7] Prepare, Serve and File Appellant's Briefs

☐ Appellant's opening brief must be served and filed in the court of appeal within 40 days after the filing of the record (or after filing of the reporter's transcript if there was an election to use an appendix under *Cal. Rules of Ct., Rule 8.124*, or within 70 days after the filing of a notice of election to use an appendix under Cal. *Rules of Ct., Rule 8.124* without a reporter's transcript [*see § 40.16[7]*; *see Cal. Rules of Ct., Rule 8.212(a)* and Ch. 50, *Appeal: Briefs*], absent an extension of time granted by the court.

☐ Appellant's reply brief must be served and filed in the court of appeal within 20 days after the filing of the respondent's brief or, if the respondent has cross-appealed, within 30 days after the filing of the respondent and cross-appellant's brief [*Cal. Rules of Ct., Rule 8.212(a)(3)*], absent an extension of time granted by the court.

[8] Motion for Calendar Preference

☐ If there is a motion for calendar preference, it must be filed and served promptly [*Cal. Rules of Ct., Rule 8.240*; *see § 40.16[8]* and Ch. 51, *Appeal: Hearing and Decision*].

[9] Oral Argument

☐ Prepare and provide oral argument at time noticed by court of appeal [*see § 40.16[8]*; *see Cal. Rules of Ct., Rule 8.256(b)* and Ch. 51, *Appeal: Hearing and Decision*].

[10] Subsequent Proceedings

☐ See *§ 40.62*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsStandards of ReviewGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsRecords on AppealCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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Volume 5: Appeal-Chs. 40-55
Chapter 40 APPEAL: AN OVERVIEW
PART IV. PROCEDURAL CHECKLIST

5-40 California Forms of Pleading and Practice--Annotated § 40.61

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

§ 40.61 Respondent's Checklist

[1] Review Notice of Appeal

☐ Determine whether the appeal is taken from an appealable judgment or order. If not, consider requesting a stipulation for abandonment [*Cal. Rules of Ct., Rule 8.244(b)*] or filing a motion to dismiss [*Cal. Rules of Ct., Rules 8.244(c), 8.57*; *see Ch. 48, Appeal: Abandonment, Dismissal, and Stipulated Reversal, §§ 48.13[2][b], 48.51*].

[2] File Cross Appeal

☐ If appropriate, file notice of cross appeal. The notice must be filed in superior court within 20 days after the mailing of notification by the superior court clerk of the first appeal [*§ 40.16[4]*; *see Cal. Rules of Ct., Rule 8.108(f)* and Ch. 42, *Appeal: Notice of Appeal* ; *see also § 40.60[2]* regarding filing fee and docketing statement]. Designation of record for cross appeal is generally like that for appeal [*see § 40.60[3]* and Ch. 44, *Appeal: Preparing and Filing the Record*].

[3] Additional Designation of Record

☐ If appropriate, respondent may, within 10 days after service of appellant's notice designating reporter's or clerk's transcripts, serve on appellant and file a notice designating additional items to be included in either transcript. Deposit of estimated costs of preparing additionally designated matters are handled in the same manner as the initial designations by appellant [*see § 40.60[3]*; *Cal. Rules of Ct., Rules 8.130(b), 8.122(c)* and Ch. 44, *Appeal: Preparing and Filing the Record*].

[4] Prepare, Serve and File Respondent's Briefs

☐ Respondent's brief must be served and filed in the court of appeal within 30 days after the filing of appellant's opening brief, absent an extension of time granted by the court [*see §§ 40.16[7], 40.60[6]*; *see Cal. Rules of Ct., Rule 8.212(a)(2)* and Ch. 50, *Appeal: Briefs*]. Points on any cross-appeal may be combined with the respondent's brief [*see Cal. Rules of Ct., Rule 8.216(b)*].

[5] Oral Argument

☐ Prepare and provide oral argument at time noticed by court of appeal [*see § 40.16[8]*; *see Cal. Rules of Ct., Rule 8.256(b)* and Ch. 51, *Appeal: Hearing and Decision*].

[6] Subsequent Proceedings

☐ See *§ 40.62*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsReviewabilityTime LimitationsCivil ProcedureAppealsBriefsCivil ProcedureAppealsRecords on Appeal

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Volume 5: Appeal-Chs. 40-55
Chapter 40 APPEAL: AN OVERVIEW
PART IV. PROCEDURAL CHECKLIST

5-40 California Forms of Pleading and Practice--Annotated § 40.62

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

§ 40.62 Post-Decision Checklist

[1] Rehearing

☐ If desired, petition for rehearing. Petition must be filed within 15 days after [*Cal. Rules of Ct., Rule 8.268(b)(1)*]:

☐ The filing of the decision by the court of appeal;

☐ A postfiling order of the court of appeal publishing its opinion;

☐ A modification order changing the appellate judgment; or

☐ The filing of a consent to an increase or decrease in the amount of a money judgment pursuant to *Cal. Rules of Ct., Rule 8.264(d)*.

☐ An answer to the petition is not permitted unless the court requests it. The clerk will promptly send to the parties copies of any order requesting an answer and immediately notify the parties by telephone or another expeditious method. Any answer must be served and filed within eight days after the order is filed unless the court orders otherwise. A petition for rehearing normally will not be granted unless the court has requested an answer [*Cal. Rules of Ct., Rule 8.268(b)(2)*]. See further discussion at*§ 40.16[12]* and, generally, Ch. 52, *Appeal: Rehearing* .

[2] Review in Supreme Court

☐ If desired, petition for review in Supreme Court. Petition must be served and filed within 10 days after decision of court of appeal becomes final as to that court [*see § 40.16[13]*; *see also Cal. Rules of Ct., Rule 8.500(e)*]. An answer to the petition may be served and filed within 20 days after the filing of the petition, and a reply within 10 days after the filing of the answer [*Cal. Rules of Ct., Rule 8.500(e)*]. See generally Ch. 54, *Appeal: California Supreme Court Review* .

[3] Memorandum to Recover Costs on Appeal

☐ The prevailing party must file a memorandum of costs in the superior court in order to recover costs awarded on appeal. The memorandum must be served and filed within 40 days after the reviewing court mails notice of the issuance of remittitur [*see § 40.16[11]*]. A motion to recover attorney's fees may be filed in the superior court within the same time period [*see Cal. Rules of Ct., Rules 3.1702(c)*, 8.278(c) and Ch. 53, *Appeal: Remittitur and Costs on Appeal*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsCosts & Attorney FeesCivil ProcedureAppealsRehearings

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Chapter 40 APPEAL: AN OVERVIEW
PART IV. PROCEDURAL CHECKLIST

5-40 California Forms of Pleading and Practice--Annotated §§ 40.63-40.69

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

[Reserved]

§§ 40.63[Reserved]

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Volume 5: Appeal-Chs. 40-55
Chapter 40 APPEAL: AN OVERVIEW
PART V. FORMS

5-40 California Forms of Pleading and Practice--Annotated § 40.70

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

§ 40.70 Request to Reviewing Court for Substitution of Party

[1] FORM Request to Reviewing Court for Substitution of Party

_____ [*name of attorney*]
_____ [*California State Bar No.*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone number*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, _____ APPELLATE DISTRICT[, DIVISION _____]

_____ [*name*],	)	
Plaintiff and _____ [*Appellant/ Respondent*],	)	CASE NO. _____
vs.	)	(Superior Court No. _____)
_____ [*name*],	)	
Defendant and _____ [*Appellant/Respondent*].	)	

_____

On Appeal from the Superior Court of the County of _____ [*name*], No. _____ [*number*].

The Honorable _____ [*name*], Judge.

REQUEST FOR SUBSTITUTION OF PARTY

_____ [*name of party substituted in*] hereby requests an order substituting _____ [*name of party substituted in*] in the place of _____ [*name of party substituted out*] in this court. _____ [*name of party substituted in*] makes this request based on the following grounds: [*explain grounds for substitution*].

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

PROOF OF SERVICE

I, _____ [*name*], declare that:

I am at least 18 years of age and not a party to the above-entitled action. My _____ [residence *or* business] address is _____, California; I am _____ [a resident *or* employed in] _____ County, California [*county where mailing occurs*].

I served the foregoing motion on _____ [*date*], by depositing _____ [a copy *or* copies] thereof in the United States mail in _____, California, enclosed in [a] sealed envelope[s], with postage fully prepaid, addressed to _____ [*state name and full address of each party served*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form set out in [1], *above*, is for use by a party to obtain an order of substitution of the party in the appellate court. Substitution of parties in an appeal or original proceeding must be made by serving and filing a motion in the reviewing court. The clerk of that court must notify the superior court of any ruling on the motion [*Cal. Rules of Ct., Rule 8.36(a)*]. The request must be accompanied by a proof of service on all parties [*see Cal. Rules of Ct., Rule 8.25(a)(2)*].

For discussion concerning the request for an order of substitution, see *§ 40.14[4]*. For discussion of service and other procedural and format prerequisites generally, see *Ch. 45, Appeal: Motion Procedure, §§ 45.13, 45.14*. For discussion and additional forms relating to proof of service of papers, see Ch. 518, *Service of Summons and Papers* . For discussion and forms relating to proceedings in the superior court for an order substituting parties, see Ch. 21, *Amended and Supplemental Pleadings*, §§ 27.27, 27.100 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedureAppealsGeneral Overview

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Volume 5: Appeal-Chs. 40-55
Chapter 40 APPEAL: AN OVERVIEW
PART V. FORMS

5-40 California Forms of Pleading and Practice--Annotated § 40.71

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

§ 40.71 Substitution of Appellate Counsel

[1] Stipulation to Substitute Attorneys

[a] FORM Substitution of Appellate Counsel--Stipulation to Substitute Attorneys

_____ [*name of attorney*]
_____ [*California State Bar No.*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone number*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, _____ APPELLATE DISTRICT[, DIVISION _____]

_____ [*name*],	)	
Plaintiff and _____	)	
[*Appellant/Respondent*],	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	(Superior Court No. _____)
Defendant and _____	)	
[*Appellant/Respondent*].	)	
	)	
	)	

_____

On Appeal from the Superior Court of the County of _____ [*name*], No. _____ [*number*].
The Honorable _____ [*name*], Judge.

STIPULATION FOR SUBSTITUTION OF COUNSEL

IT IS HEREBY STIPULATED AND AGREED that _____ [*name of substituted attorney*] shall be substituted in the place of _____ [*name of retiring attorney*] as counsel for _____ [*name of party*] in the appeal referenced above, now pending before this court.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature of substituted attorney*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature of retiring attorney*]
_____ [*typed name*]
Former Attorney for _____ [*party's status and name*]

PROOF OF SERVICE

I, _____ [*name*], declare that:

I am at least 18 years of age and not a party to the above-entitled action. My _____ [residence *or* business] address is _____, California; I am _____ [a resident *or* employed in] _____ County, California [*county where mailing occurs*].

I served the foregoing motion on _____ [*date*], by depositing _____ [a copy *or* copies] thereof in the United States mail in _____, California, enclosed in [a] sealed envelope[s], with postage fully prepaid, addressed to _____ [*state name and full address of each party served*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[b] Use of Form

The form set out in [a], *above*, is for use by a party to an appeal who is substituting counsel. It must be served on all parties and filed in the appellate court. For discussion of substitution of counsel on appeal, see *§ 40.14[2]*. For discussion concerning service and other procedural and format requirements, see *Ch. 45, Appeal: Motion Procedure, §§*

45.13, 45, 14.

For detailed discussion and additional forms relating to stipulations generally, see Ch. 533, *Stipulations* . For further discussion and forms relating to substitution and withdrawal of attorneys generally, see *Ch. 72, Attorney Practice and Ethics, § 72.350* et seq., "Terminating the Attorney-Client Relationship."

[2] Motion for Substitution or Withdrawal of Attorney

[a] FORM Substitution of Appellate Counsel--Motion for Substitution or Withdrawal of Attorney

_____ [*name of attorney*]
_____ [*California State Bar No.*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone number*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, _____ APPELLATE DISTRICT[, DIVISION _____]

_____ [*name*],	)	
Plaintiff and _____	)	
[*Appellant/Respondent*],	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	(Superior Court No. _____)
Defendant and _____	)	
[*Appellant/Respondent*].	)	
	)	
	)	

_____

On Appeal from the Superior Court of the County of _____ [*name*], No. _____ [*number*].
The Honorable _____ [*name*], Judge.

MOTION FOR WITHDRAWAL/SUBSTITUTION OF COUNSEL, SUPPORTING DECLARATION, AND MEMORANDUM OF POINTS AND AUTHORITIES

_____ [*Name of attorney*], attorney for _____ [*name of party*], _____ [*designate party's title, e.g.*, plaintiff and appellant] in _____ [*specify case number*] moves this court for an order relieving _____ [*him/her*] as counsel in this case.

This motion is made on the ground that _____ [*specify grounds*].

This motion is based on the declaration(s) of _____ [*name*(*s*)], and the memorandum of points and

authorities, accompanying this motion [, and on the record on file herein].

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION

I, _____ [*name*], declare:

I am [currently attorney of record for] _____ [*party, e.g.,* the plaintiff and appellant] herein.

1. _____ [*Set forth probative facts from declarant's personal knowledge showing good cause for granting the motion*].

2. _____ [*Continue paragraphs setting out facts as necessary*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Attach memorandum of points and authorities.*]

PROOF OF SERVICE

I, _____ [*name*], declare that:

I am at least 18 years of age and not a party to the above-entitled action. My _____ [residence *or* business] address is _____, California; I am _____ [a resident *or* employed in] _____ County, California [*county where mailing occurs*].

I served the foregoing motion on _____ [*date*], by depositing _____ [a copy *or* copies] thereof in the United States mail in _____, California, enclosed in [a] sealed envelope[s], with postage fully prepaid, addressed to _____ [*state name and full address of each party served*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[b] Use of Form

The form set out in [a], *above*, is for use by an attorney for a party on appeal seeking permission to withdraw as counsel. It should be used only if counsel is unable to obtain a stipulation substituting new counsel or substituting the party *in propria persona*. It must be accompanied by a memorandum of points and authorities and one or more declarations explaining the need for withdrawal if the need is not demonstrated in the record on appeal [*Cal. Rules of Ct., Rule 8.54*].

Unless otherwise ordered by the court, service of the motion need be made only on the party and the attorneys directly affected [*Cal. Rules of Ct., Rule 8.36(c)(1)*]. Notification of any withdrawal or substitution shall be given by the clerk of the reviewing court to the clerk of the superior court [*Cal. Rules of Ct., Rule 8.36(c)(3)*]. If the motion is filed in any proceeding pending in the Supreme Court after grant of review, the Supreme Court clerk must also notify the court of appeal of any ruling on the motion [*Cal. Rules of Ct., Rule 8.36(c)(4)*].

For discussion of substitution and withdrawal of counsel on appeal, see *§ 40.14[2]*. For further discussion and forms relating to substitution and withdrawal of attorneys generally, see *Ch. 72, Attorney Practice and Ethics, § 72.350* et seq., "Terminating the Attorney-Client Relationship." For discussion concerning service, format, and other general procedural requirements, see *Ch. 45, Appeal: Motion Procedure, § 45.13*.

Counsel should check local rules or practice to determine whether a proposed order should be submitted with the motion. Some courts prefer to draft their own orders. Others encourage or require proposed orders. In the Second Appellate District, for example, failure to submit a proposed order with an appellate motion or application may be grounds for denial of the motion [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 4].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureCounselWithdrawalsCivil ProcedureCounselSubstitutions

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Chapter 40 APPEAL: AN OVERVIEW
PART V. FORMS

5-40 California Forms of Pleading and Practice--Annotated § 40.72

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

§ 40.72 Information on Appeal Procedure for Unlimited Civil Cases--Judicial Council Form APP-001

[1] FORM Information on Appeal Procedure for Unlimited Civil Cases--Judicial Council Form APP-001

Click here to view image.

[2] Use of Form

The form set out in [1], *above*, is adopted by the Judicial Council for optional use [*Cal. Rules of Ct., Rule 1.35*]. It provides a general overview of the procedures for appealing unlimited civil cases, i.e., cases in which the amount in controversy exceeds $25,000.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsDismissals of AppealsVoluntary DismissalsCivil ProcedureAppealsDismissals of AppealsInvoluntary DismissalsCivil ProcedureAppealsBriefsCivil ProcedureAppealsRecords on Appeal

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Volume 5: Appeal-Chs. 40-55
Chapter 40 APPEAL: AN OVERVIEW
PART V. FORMS

1-40 California Forms of Pleading and Practice--Annotated § 40.73

AUTHOR: Hon. Patti S. Kitching, Elizabeth J. Buckley Editorial Consultants

§ 40.73 Proof of Service (Court of Appeal)--Judicial Council Form APP-009

[1] FORM 40.73.1 Proof of Service (Court of Appeal)--Judicial Council Form APP-009

Click here to view image.

[2] Use of Form

The form in [1], *above*, may be used to provide proof that a document has been served in the court of appeal. This form was approved for optional use by the Judicial Council of California effective January 1, 2009.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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Volume 5: Appeal-Chs. 40-55
Chapter 41 APPEAL: REVIEW STANDARDS AND APPELLATE RULES OF LAW

5-41 California Forms of Pleading and Practice--Annotated 41.syn

AUTHOR: Jeffery A. Hogge Author Hon. Patti S. Kitching, Victoria J. DeGoff Editorial Consultants

§ 41.syn Synopsis to Chapter 41: APPEAL: REVIEW STANDARDS AND APPELLATE RULES OF LAW

§ 41.01 Scope of Chapter

§ 41.02 Cross References

[1] Related Chapters in This Volume

[2] Other Related Chapters

§§ 41.03-41.09 [Reserved]

§ 41.10 General Rules Governing All Standards of Review

[1] Prejudicial Error Required for Reversal

[2] Appellant Bears Burden of Showing Prejudicial Error in the Record

[3] Review Limited to Errors of Law

[a] Review Generally Limited to Errors of Law

[b] Invited Error

[c] Waiver of Error

[4] Review of Issues Not Raised at Trial

[a] New Issues Generally Will Not Be Considered

[b] Exception for New Issues Involving Undisputed Facts

[5] Court Need Not Review Issues Not Raised in Appellant's Brief

[6] Review Based on Respondent's Request Under Code Civ. Proc. § 906

[7] Mootness

[8] Review Limited to Final and Appealable Judgment or Order

[9] Ripeness

[10] Political Question

[11] Resolution of Constitutional Issues

§ 41.11 General Standards of Review of Judgment on Appeal

§ 41.12 Review Based on Claim of Abuse of Discretion by Trial Court

[1] General Standard and Applicability

[2] When "Abuse of Discretion" Occurs

[3] Particular Applications of Abuse of Discretion Standard

[a] Admission and Exclusion of Evidence Under Evidence Code Section 352

[b] Motion for New Trial

[c] Relief From Judgment or Order

[d] Award of Attorney's Fees

[e] Award of Expert Witness Fees Under Code Civ. Proc. § 998

[f] Award of Sanctions

[g] Discovery Orders

[h] Motion for Continuance

[i] Dismissal for Delay in Prosecution

[j] Motion to Disqualify Counsel

[k] Proceedings for Forum Non Conveniens

[l] Motion or Action for Injunction

[m] Judicial Notice

[n] Additional Examples

§ 41.13 Review Based on Claim of Insufficient Evidence

[1] "Substantial Evidence" Standard

[a] Applicability to Questions of Fact

[b] Factual Determination Upheld if Supported by "Substantial" Evidence

[c] Review of Evidence Is Made in Light Favoring Trial Court Ruling

[d] When Evidence Is Not "Substantial"

[e] Facts Determined by Affidavit

[2] "Substantial Evidence" Standard Applies Regardless of Burden of Proof Used at Trial

[3] No Challenge to Evidence on Limited Record

[4] Waiver of Issue on Appeal for Failure to State Facts Appropriately

[5] Particular Applications of Substantial Evidence Standard

[a] General Verdict

[b] Directed Verdict

[c] Judgment Notwithstanding the Verdict

[d] Nonsuit

[e] Jury Instructions

[f] Enforcement of Settlement

[g] Award of Damages

[h] Issues in Contractual Arbitration Proceeding

[i] Laches

[j] Additional Examples

§ 41.14 Independent Review of Trial Court's Rulings

[1] Applicability to Questions of Law

[2] Purpose and Scope of Independent Review

[3] Affirmance of "Right Ruling for Wrong Reason"

[4] Particular Applications of Independent Review Standard

[a] Contract Interpretation on Undisputed Facts

[b] Statutory Interpretation on Undisputed Facts

[c] Summary Judgment

[d] Demurrer Sustained

[e] Judgment on the Pleadings

[f] Duty of Care in Negligence Action

[g] Strategic Lawsuit Against Public Participation (SLAPP)

[h] Additional Examples

§ 41.15 Review of Mixed Questions of Law and Fact

§ 41.16 Review of Judicial Bias on Part of Trial Court Judge

§§ 41.17-41.29 [Reserved]

§ 41.30 Law of the Case

[1] General Rule

[2] Prior Appellate Determination Required

[3] Statement of Law Necessary

[4] Prior Ruling That Evidence Was Insufficient

[5] Exceptions

§ 41.31 The Doctrine of Stare Decisis and Controlling Decisional Authority

[1] General Rule

[2] Dicta Not Controlling

[3] Splits of Authority

[4] Plurality Opinions

[5] Persuasive Authority

§ 41.32 Retroactive Application of Law

[1] Retroactive Application of Statutes

[2] Retroactive Application of Case Law

§§ 41.33-41.49 [Reserved]

§ 41.50 Publication and Citability of Appellate Opinions

[1] All Supreme Court Opinions Are Published

[2] Court of Appeal Opinions Published Selectively

[3] Citability of Opinions as Decisional Authority

[a] Generally Only Published Opinions Are Citable

[b] When Unpublished Opinions May Be Cited

§ 41.51 Procedure for Publication of Opinions of Court of Appeal or Appellate Department of Superior Court

[1] Initial Certification for Publication by Court of Appeal

[2] Criteria for Publication

[a] General Criteria

[b] Partial Publication

[3] Request by Interested Party for Publication of Unpublished Opinion

§ 41.52 Procedure for Depublication of Court of Appeal Opinion Previously Certified for Publication

[1] Automatic Depublication Upon Grant of Review or Rehearing

[2] Depublication by Supreme Court Order

[a] Depublication on Request by Interested Person

[b] Response by Other Interested Persons

[c] Disposition of Request by Supreme Court

[3] Supreme Court May Order Depublication Sua Sponte

[4] Effect of Depublication

§§ 41.53-41.59 [Reserved]

§ 41.60 California Constitution

§ 41.61 State Statutes

§ 41.62 California Rules of Court

§ 41.63 Decisions

[1] General Rules Governing All Standards of Review

[a] Prejudice Required for Reversal

[b] Appellant Bears Burden of Showing Error

[c] Review Limited to Errors of Law

[i] Errors of Law the Province of Appellate Courts

[ii] Invited Error

[d] Review Based on Theory of Law Not Raised at Trial

[e] Court Need Not Consider Errors of Law Not Argued in Briefs

[f] Mootness

[2] General Standards of Review of Judgment on Appeal

[a] Overview and Comparison of Standards of Review

[b] Review Based on Claim of Abuse of Discretion by Trial Court

[c] Review Based on Claim of Insufficient Evidence

[i] Substantial Evidence Review

[ii] Presumptions in Favor of Judgment

[iii] Waiver of Contention for Failure to State Facts Appropriately

[iv] Sufficiency of Evidence Judged Against Jury Instructions Given

[v] General Verdict Rule

[vi] Same Appellate Standard Applies Regardless of Trial Court Standard

[vii] Appeal on Judgment Roll or Clerk's Transcript

[viii] Modified Sufficiency Review for Exclusion of Evidence and Instructions

[ix] Mixed Questions of Law and Fact

[d] Independent Review of Trial Court's Rulings

[3] Standards of Review of Particular Judgments and Orders

[a] Admission and Exclusion of Evidence under Evidence Code Section 352

[b] Arbitration

[c] Attorney Fee Awards

[d] Class Action

[e] Continuance

[f] Contract Interpretation

[g] Damages

[h] Demurrer

[i] Directed Verdict

[j] Discovery

[k] Dismissal for Delay in Prosecution

[l] Disqualification of Counsel

[m] Duty of Care

[n] Enforcement of Settlement

[o] Expert Witness Fees

[p] Forum Non Conveniens

[q] Injunction

[r] Judgment Notwithstanding the Verdict

[s] Judgment on the Pleadings

[t] Judicial Notice

[u] Laches

[v] New Trial

[w] Nonsuit

[x] Relief From Judgment or Order

[y] Review of Administrative Decisions

[z] Sanctions

[aa] Statutory Interpretation on Undisputed Facts

[bb] Summary Judgment

[4] Law of the Case

[5] The Doctrine of Stare Decisis and Controlling Decisional Authority

[a] General Rule

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[1] FORM

[2] Use of Form

§ 41.91 Request for Depublication of Published Opinion

[1] FORM

[2] Use of Form

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FOOTNOTES:
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California Forms of Pleading and Practice--Annotated

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Volume 5: Appeal-Chs. 40-55
Chapter 41 APPEAL: REVIEW STANDARDS AND APPELLATE RULES OF LAW
PART I. SCOPE

5-41 California Forms of Pleading and Practice--Annotated § 41.01

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§ 41.01 Scope of Chapter

This chapter discusses the following topics relating to appellate review:

- The standards of review used by the appellate courts to determine whether there is reversible error in a given case [*see § 41.10* et seq.]. This includes discussion of rules applicable in all cases, such as the prejudicial error doctrine or invited error doctrine [*see § 41.10*], the three major review standards, commonly denominated the "abuse of discretion," the "insufficient evidence," and the "independent review" standards, and the application of these standards to specific types of judgments or orders, such as a summary judgment or a judgment of dismissal following demurrer [*see §§ 41.11 -41.15*].

- General rules used to determine which substantive laws govern the review of any given appeal [*see § 41.30* et seq.]. This includes discussion of law of the case [*see § 41.30*], the doctrine of *stare decisis* and rules for determining what constitutes precedential or controlling case law [*see § 41.31*], and rules governing retroactivity, used to determine when new statutory or case law applies in a given case [*see § 41.32*].

- The rules and procedures governing the publication and depublication of California appellate decisions [*see § 41.50* et seq.], discussed here because publication determines whether a case may be cited as precedential or controlling authority, as discussed in *§ 41.50* et seq.

The chapter includes the following forms, for use in proceedings to request an order directing the publication or depublication of a court of appeal opinion:

- Request for Publication of Unpublished Opinion [*see § 41.90*].

- Request for Depublication of Published Opinion [*see § 41.91*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsStandards of ReviewAbuse of DiscretionCivil ProcedureAppealsStandards of ReviewSubstantial EvidenceSufficiency of EvidenceCivil ProcedureAppealsStandards of ReviewReversible ErrorsCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsPrejudicial ErrorsCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsHarmless Error Rule

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PART I. SCOPE

5-41 California Forms of Pleading and Practice--Annotated § 41.02

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§ 41.02 Cross References

[1] Related Chapters in This Volume

- For discussion relating to the civil appeals generally, including discussion of appellate jurisdiction generally, who may appeal, and factors in considering whether to take an appeal (including consideration of the applicable standard of review and applicable substantive law and their effect on the probable outcome of the appeal), see Ch. 40, *Appeal: An Overview* .

- For discussion relating to what constitutes an appealable judgment or order, as well as discussion and forms relating to notice of appeal and consolidation of appeals, see Ch. 42, *Appeal: Notice of Appeal* .

- For discussion and forms pertaining to the record on appeal, the form of which may be critical in disclosing reversible error, see Ch. 44, *Appeal: Preparing and Filing the Record* .

- For discussion and forms pertaining to appellate papers and motion procedure generally, which apply to requests for publication or depublication of a court of appeal opinion as well as to other appellate papers, see Ch. 45, *Appeal: Motion Procedure* .

- For discussion and forms pertaining to proceedings to extend or shorten time requirements or to obtain relief from default, see respectively Ch. 46, *Appeal: Extending or Shortening Time* and Ch. 47, *Appeal: Relief From Default* .

- For discussion of the appellate doctrine of mootness in the context of proceedings to dismiss an appeal, as well as general discussion and forms relating to dismissal, abandonment, and stipulated reversal, see Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* .

- For discussion and forms pertaining to the imposition of sanctions when an appeal has been taken in

frivolous disregard of its merits, see Ch. 49, *Appeal: Sanctions* .

- For discussion and forms pertaining to appellate briefs generally, including discussion of drafting argument so as to focus on the applicable standard of review and governing substantive law, see Ch. 50, *Appeal: Briefs* .

- For discussion and forms of appellate proceedings after the time the record and briefs are completed, up through oral argument, and including final issuance of the court's decision, see Ch. 51, *Appeal: Hearing and Decision* .

- For discussion and forms pertaining to proceedings for rehearing after issuance of the court of appeal decision, see Ch. 52, *Appeal: Rehearing* .

- For discussion and forms pertaining to proceedings for issuance of remittitur after the appellate court's decision has become final, and subsequent proceedings in the trial court including the recovery of costs on appeal, see Ch. 53, *Appeal: Remittitur and Costs on Appeal* .

- For discussion and forms pertaining to review proceedings in the Supreme Court, see Ch. 54, *Appeal: California Supreme Court Review* .

[2] Other Related Chapters

- For discussion of judicial review of an award rendered after contractual arbitration, see Ch. 34, *Contractual Arbitration: Judicial Review* .

- For reliance on authority or other matters subject to mandatory or permissive judicial notice, including a request for judicial notice that may be adapted for use in an appellate court, Ch. 321, *Judicial Notice*.

- For discussion of prejudicial error doctrine in the context of an appeal of a limited civil case to the appellate division of the superior court, and discussion and forms relating to those types of appeals generally, see Ch. 345A, *Limited Civil Cases* .

- For discussion of the standard of judicial review of public agency decisions generally, see Ch. 474B, *Standards in Reviewing Agency Decisions* .

- For discussion of the doctrines of res judicata and collateral estoppel and their application in the context of an appeal as well as in other procedural contexts, see Ch. 491, *Res Judicata* .

- For further discussion of the rules governing retroactivity in the application of statutory law, as well as discussion of the general rules of statutory interpretation, see Ch. 531, *Statutes and Ordinances* .

Further discussion of judicial review standards used in specific actions and proceedings not listed above may also usually be found in the chapter covering the particular action or proceeding.

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PART I. SCOPE

5-41 California Forms of Pleading and Practice--Annotated §§ 41.03-41.09

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[Reserved]

§§ 41.03[Reserved]

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Volume 5: Appeal-Chs. 40-55
Chapter 41 APPEAL: REVIEW STANDARDS AND APPELLATE RULES OF LAW
PART II. LEGAL BACKGROUND
A. Standards of Review

5-41 California Forms of Pleading and Practice--Annotated § 41.10

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§ 41.10 General Rules Governing All Standards of Review

[1] Prejudicial Error Required for Reversal

Cal. Const., art. VI, § 13, provides that "[n]o judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

This constitutional requirement is codified or reflected in several statutory provisions. For example, *Code Civ. Proc. § 475* provides that errors that do not affect the substantial rights of the parties are to be disregarded. No judgment or decision will be reversed because of any error, improper instruction, ruling, or defect in the pleadings or procedures unless it appears from the record that the error was prejudicial, and also that the party complaining or appealing sustained substantial injury, and that a different result would have been probable had the error not occurred. There is no presumption that error is prejudicial or that injury has been sustained if error is shown [*Code Civ. Proc. § 475*; *see also Code Civ. Proc. § 906*, discussed in [6], *below* (respondent may request that appellate court determine whether errors complained of by appellant are prejudicial)].

Similarly, *Evid. Code § 354* provides that a judgment or decision based on a verdict of finding will not be reversed because of erroneous exclusion of evidence, unless the court is of the opinion that the error resulted in a miscarriage of justice, and further, that it appears from the record either that the substance, purpose, and relevance of the excluded evidence was made known to the trial court by questions asked, an offer of proof, or other means, or that the trial court's rulings made it futile to apprise the court of the evidence, or the evidence was sought by questions asked during cross or recross examination [*Evid. Code § 354*; for discussion of waived and "invited" error, *e.g.*, for failure to bring excluded evidence to the court's attention, *see* [2][b] and [c], *below*].

These constitutional and statutory provisions express the most fundamental rule of appellate review: error must be"prejudicial" or result in a miscarriage of justice in order to constitute "reversible" error [*see, e.g.,* *Pool v. City of Oakland (1986) 42 Cal. 3d 1051, 1069, 232 Cal. Rptr. 528, 728 P.2d 1163* ; *Searle v. Allstate Life Ins. Co. (1985) 38 Cal. 3d 425, 439, 212 Cal. Rptr. 466, 696 P.2d 1308* ; *In re Marriage of Falcone & Fyke (2008) 164 Cal. App. 4th 814, 823, 79 Cal. Rptr. 3d 588* ; *Zhou v. Unisource Worldwide, Inc. (2007) 157 Cal. App. 4th 1471, 1480, 69 Cal. Rptr. 3d 273* ; *Weaver v. Chavez (2005) 133 Cal. App. 4th 1350, 35 Cal. Rptr. 3d 514* ; Boeken v. Philip Morris Incorporated (2005) 127 Cal. App. 4th 1640, 1678, 26 Cal. Rptr. 3d 638 (no prejudicial error when trial court refused to give instructions that were not reasonably brief, concise, and understandable)].

Prejudice is not presumed on a showing of error. Error must be shown to be prejudicial and therefore reversible, unless that error is "structural" in that it discloses, in itself, a fundamental denial of the orderly procedure required by constitutional due process. Otherwise, to show that an error is prejudicial or resulted in a miscarriage of justice, an appellant must demonstrate a reasonable probability that, in the absence of the error, a more favorable result for the appellant would have been reached [*see* *Elsner v. Uveges (2004) 34 Cal. 4th 915, 939, 22 Cal. Rptr. 3d 530, 102 P.3d 915* (erroneous application of law prejudiced appellant); *Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 574, 34 Cal. Rptr. 2d 607, 882 P.2d 298]* . Error is prejudicial if it is reasonably probable that a result more favorable to the appellant would have been reached absent the error. A "probability" in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility [*Cellphone Termination Fee Cases (2009) 180 Cal. App. 4th 1110, 1125-1126, 104 Cal. Rptr. 3d 275* ; *Red Mountain, LLC v. Fallbrook Public Utility District (2006) 143 Cal. App. 4th 333, 348, 48 Cal. Rptr. 3d 875]* .

A few cases have held that prejudice is not required when the error calls into question the very fairness of the trial or hearing itself. Courts have held these errors to be reversible per se [*see* *Biscaro v. Stern (2010) 181 Cal. App. 4th 702, 709-710, 104 Cal. Rptr. 3d 817* (failing to rule on continuance as accommodation under *Cal. Rules of Ct., Rule 1.100*, was structural reversible error); *In re Marriage of James & Christine C. (2008) 158 Cal. App. 4th 1261, 1265, 1273, 70 Cal. Rptr. 3d 715* (denying continuance as accommodation under *Cal. Rules of Ct., Rule 1.100*, was reversible error per se)].

PRACTICE TIP:

Assessing Prejudicial Error. Before deciding whether to pursue an appeal, it is important for counsel to become familiar with all of the evidence and trial proceedings. At the outset, counsel should review not only their own papers or those of their client's trial counsel, but also the trial briefs and post-trial papers filed by counsel for the opposing party. Appellate counsel should not rely solely on what their client's trial counsel says about the trial proceedings, and trial counsel, if acting on the appeal, should also take care to review the trial proceedings. Trial counsel, as actual witnesses to, and participants in, the events at trial, have a natural tendency to believe in the accuracy of their recollection of trial events, but all too often their recollection may be imperfect due to preoccupations and distractions at the time of the trial, as well as the subsequent effect of those unconscious mental revisions sometimes termed as "wishful thinking."

[2] Appellant Bears Burden of Showing Prejudicial Error in the Record

The rule requiring prejudicial error for reversal, discussed in [1], *above*, is based on the policy favoring the finality of judgments and an end to litigation. Thus, a corollary of the rule is that a judgment or order is presumed correct and all intendments and presumptions are indulged in favor of its correctness [*Veguez v. Governing Board of Long Beach Unified School District (2005) 127 Cal. App. 4th 406, 421, 25 Cal. Rptr. 3d 526* (because neither party obtained statement of decision, all intendments favor ruling below); *In re Marriage of Gray (2002) 103 Cal. App. 4th 974, 977-978, 127 Cal. Rptr. 2d 271* (request for statement of decision was untimely)].

Consequently, as noted in [1], *above*, the burden is on appellant to overcome this presumption and affirmatively show

prejudicial error, regardless of the standard of review to be applied [*see Maria P. v. Riles (1987) 43 Cal. 3d 1281, 1295, 240 Cal. Rptr. 872, 743 P.2d 932* ; *Searle v. Allstate Life Ins. Co. (1985) 38 Cal. 3d 425, 439, 212 Cal. Rptr. 466, 696 P.2d 1308* ; for discussion of standards of review, *see §§ 41.11 -41.15*].

The appellant's burden to show prejudicial error has two components:

- Presenting a record that adequately shows the error complained of [*see Maria P. v. Riles (1987) 43 Cal. 3d 1281, 1295, 240 Cal. Rptr. 872, 743 P.2d 932* ; *Bullock v. Phillip Morris USA, Inc. (2008) 159 Cal. App. 4th 655, 678-679, 71 Cal. Rptr. 3d 775* (appellant failed to identify in record where instruction requested and rejected); *Kashmiri v. Regents of the University of California (2007) 156 Cal. App. 4th 809, 849, 67 Cal. Rptr. 3d 635]* . An appellant must refer the court to the specific places in the record where any claimed error occurred [Boeken v. Philip Morris Incorporated (2005) 127 Cal. App. 4th 1640, 1671-1672, 26 Cal. Rptr. 3d 638 (appellant failed to identify in record where instruction requested and rejected)].

- Presenting argument and authorities concerning the error disclosed in the record, that shows how or in what manner the error is prejudicial to appellant [*see* Boeken v. Philip Morris Incorporated (2005) 127 Cal. App. 4th 1640, 1671-1672, 26 Cal. Rptr. 3d 638 (appellant failed to identify in record where instruction requested and rejected); *Kurinij v. Hanna & Morton (1997) 55 Cal. App. 4th 853, 865, 64 Cal. Rptr. 2d 324]* . That is, argument demonstrating a reasonable probability that, in the absence of the error, a more favorable result to the appellant would have been reached [*see Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 574, 34 Cal. Rptr. 2d 607, 882 P.2d 298]* .

With respect to the first component, i.e., an adequate record showing error, *Cal. Rules of Ct., Rule 8.163* provides that the reviewing court will presume that the record in an appeal includes all matters material to deciding the issues raised. If the appeal proceeds without a reporter's transcript, this presumption applies only if the claimed error appears on the face of the record [*Cal. Rules of Ct., Rule 8.163*].

Thus, once appellant and the other parties have designated the contents of the record and have had an opportunity to augment the record, and the record has subsequently been certified and transferred to the appellate court, a presumption arises that the record is sufficient for purposes of *Cal. Const., art. VI, § 13*, that is, it is sufficient for the court to determine, upon "an examination of the entire cause, including the evidence," whether or not any error has resulted in a miscarriage of justice [*see Skoglie v. Crumley (1972) 26 Cal. App. 3d 294, 297-298, 103 Cal. Rptr. 205]* .

While the appellate court may augment the record on its own motion [*see Cal. Rules of Ct., Rule 8.155(a)*], it is not required to do so [for detailed discussion and forms relating to designation, augmentation, and certification of the record on appeal, *see* Ch. 44, *Appeal: Preparing and Filing the Record*; for discussion concerning citation to the record in briefs, *see Ch. 50, Appeal: Briefs, § 50.12[1][c]*].

With respect to the second component, that is, argument demonstrating prejudicial error, it is axiomatic that the appellate court need not consider errors that are not raised in the briefs [*see* discussion in [6], *below*]. It is also necessary, not only to raise error in the briefs, but to demonstrate clearly that the error is prejudicial under the standard that governs review of that particular type of error [for detailed discussion of the standards of appellate review, *see §§ 41.11 -41.15*; for further discussion relating to argument in briefs generally, *see Ch. 50, Appeal: Briefs, § 50.13*].

PRACTICE TIP:

Arguing Prejudicial Error. There are two approaches to arguing that error was prejudicial. One is to focus on a single error that goes to the heart of a case, while the other is to focus on the cumulative effect of a number of small errors.

In arguing that error is prejudicial, it helps if the case, overall, favors appellant. In other words, if the overall evidence substantially favors the appellant, appellant may argue this as a factor showing that he or she would have gotten a more favorable result in the absence of the error. This weighing of the evidence for purposes of arguing prejudicial error must be distinguished from the application of the substantial evidence standard of review. In an appeal challenging the sufficiency of the evidence, the latter standard applies to require affirmance of a challenged verdict if there is any evidence to support it. An appellant will not succeed under this standard simply by pointing to contrary evidence, even if it far outweighs the evidence supporting the verdict [*see* discussion of the sufficiency of the evidence standard of review in § 41.13].

On the other hand, the appellate court may take into account the fact that the evidence overall favors appellant when it is deciding whether error was prejudicial in that appellant would have enjoyed a more favorable outcome if the error had not occurred. Thus, in arguing that error was prejudicial, the appellant should summarize the evidence for this purpose. An effective way to do this is to divide the statement of facts in appellant's opening brief into the appellant's case and the respondent's case, rather than employing the common method of drafting a statement of facts by lumping all the facts together in one chronological story [*see* further discussion of the Statement of Facts in Ch. 50, *Appeal: Briefs*, § 50.13[2][b]]. In this way, the appellant can demonstrate the unfairness of the outcome on the facts.

Although appellant bears the burden of showing prejudicial error, a respondent should nevertheless always argue why the error claimed by appellant, assuming it is in fact error, was nevertheless harmless.

[3] Review Limited to Errors of Law

[a] Review Generally Limited to Errors of Law

Only errors of law are reviewable by an appellate court in an ordinary civil appeal [*Merrill v. Department of Motor Vehicles (1969) 71 Cal. 2d 907, 915, 80 Cal. Rptr. 89, 458 P.2d 33]* . The sole province of a court on appeal is to review the action of the trial court, correct its errors, and thus pass on questions of law only. This rule is founded in the essential distinction between the trial and the appellate court, and grows out of considerations of jurisdiction. It is the province of the trier of fact in the trial court to decide questions of fact and of the appellate court to decide questions of law [*Tupman v. Haberkern (1929) 208 Cal. 256, 262, 263, 280 P. 970]* .

Three basic standards of appellate review have evolved to deal with the different types of legal error:

- A pure error of law, that is, the trial court's misapplication or misinterpretation of the law, may be reversed after a review "de novo," or a review that is entirely independent of the trial court's reasoning [*see* discussion in *§ 41.14*].

- When a trial court is given discretion in its ruling or decision, typically in the routine application of a law in disparate fact situations, the ruling will be reversed only if the review shows an "abuse of discretion" in that no reasonable person (as a judge) would have made the ruling [*see* discussion in *§ 41.12*].

- When a factual finding is challenged, it rises to the level of an error of law that may justify reversal only when review shows there is no "substantial evidence" to support the factual determination [*see* discussion in *§ 41.13*].

[b] Invited Error

Under the doctrine of invited error, if a party by his or her own conduct induces the commission of legal error, that party may not claim on appeal that the judgment should be reversed because of that error [*Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 212-213, 285 Cal. Rptr. 99, 814 P.2d 1341* ; *Saxena v. Goffney (2008) 159 Cal. App. 4th 316, 328-329, 71 Cal. Rptr. 3d 469* ; *Munoz v. City of Union City (2007) 148 Cal. App. 4th 173, 178, 55 Cal. Rptr. 3d 393* ; *see, e.g., In re Marriage of Broderick (1989) 209 Cal. App. 3d 489, 501, 257 Cal. Rptr. 397* (husband estopped from raising error that trial court adjudicated community interest under wrong standard, when at trial he conceded that the interest should be determined under that standard)].

Examples of the doctrine include the following:

- If an appellant offers inadmissible matters into evidence, he or she cannot complain of their admission on appeal [*Gjurich v. Fieg (1913) 164 Cal. 429, 433, 129 P. 464* ; *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn. (1992) 4 Cal. App. 4th 1538, 1557, 6 Cal. Rptr. 2d 698]* .

- An appellant cannot complain of an erroneous jury instruction when the appellant requested the instruction given or one substantially similar to it [*Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn. (1992) 4 Cal. App. 4th 1538, 1555, 6 Cal. Rptr. 2d 698]* . If, however, the appellant requested an instruction, but the trial court modified the requested instruction, the doctrine of invited error does not apply [*Lundy v. Ford Motor Co. (2001) 87 Cal. App. 4th 472, 477-478, 104 Cal. Rptr. 2d 545]* .

- An appellant cannot submit a matter for determination by the lower court and then contend on appeal that the matter was beyond the scope of the issues [*Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn. (1992) 4 Cal. App. 4th 1538, 1555, 6 Cal. Rptr. 2d 698* ; *Estate of Armstrong (1966) 241 Cal. App. 2d 1, 7, 50 Cal. Rptr. 339]* .

The doctrine of invited error does not apply, however, if a party makes the appropriate objections, but then acquiesces in a judicial determination to the contrary [*Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 212-213, 285 Cal. Rptr. 99, 814 P.2d 1341* (defendant not estopped from claiming on appeal that trial court erroneously instructed jury on application of respondeat superior when defendant took opposite position throughout case, including at jury instruction conference)]. This is because a litigant, in the course of trial, has a duty to submit to the rulings of the court. After the litigant has done so, he or she may on appeal demonstrate the error of the ruling to which the litigant made timely objection [*Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn. (1992) 4 Cal. App. 4th 1538, 1555, 6 Cal. Rptr. 2d 698]* .

Likewise, there is no estoppel based on invited error if the appellant's acts in the trial court are defensive or precautionary. For example, if an appellant offers jury instructions on irrelevant matter only after an unsuccessful objection to remove that matter from the case, he or she may later challenge that matter's relevancy on appeal [*Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn. (1992) 4 Cal. App. 4th 1538, 1555, 6 Cal. Rptr. 2d 698]* .

A doctrine related to invited error is the doctrine of theory of trial. This means that if the parties try the case based on a certain cause of action, raise certain issues, and assume that a particular issue is controlling, the parties may not change this theory for purposes of review on appeal [*Expansion Pointe Properties Limited Partnership v. Procopio, Cory, Hargreaves & Savitch, LLP (2007) 152 Cal. App. 4th 42, 54, 61 Cal. Rptr. 3d 166* (theories not fully developed to trial court cannot create triable issue on appeal); *Saville v. Sierra College (2005) 133 Cal. App. 4th 857, 873, 36 Cal. Rptr. 3d 515* (plaintiff not permitted to argue college's liability as event sponsor for first time on appeal); *County of Los Angeles v. S. Cal. Edison Co. (2003) 112 Cal. App. 4th 1108, 1118-1119, 5 Cal. Rptr. 3d 575* (after stipulating that consideration paid is not proper basis for tax, requesting determination of property value, and actively litigating issue, party cannot argue that it is entitled to judgment based on total consideration paid)].

[c] Waiver of Error

Although a party may not have invited or induced error, a waiver of error may be found upon express or implied agreement or acquiescense, at trial, to the ruling or procedure objected to on appeal [*In re S.C. (2006) 138 Cal. App. 4th 396, 406, 41 Cal. Rptr. 3d 453* (party waived objection when she failed to tender objection in juvenile court); *Padilla v. Greater El Monte Community Hospital (2005) 129 Cal. App. 4th 667, 670, 28 Cal. Rptr.3d 636* (failure to object to jury's damages calculation waived issue on appeal); *In re Marriage of Broderick (1989) 209 Cal. App. 3d 489, 501, 257 Cal. Rptr. 397]* . For example, if a party makes an evidentiary objection at trial, but fails to obtain a ruling on that objection for the record, on appeal the party is deemed to have waived any claim of error on this ground [*Gallant v. City of Carson (2005) 128 Cal. App. 4th 705, 710, 27 Cal. Rptr. 3d 318* (because defendants did not seek or obtain rulings on objections to plaintiff's declaration, defendants waived objections); *Dodge, Warren & Peters Insurance Services, Inc. v. Riley (2003) 105 Cal. App. 4th 1414, 1421, 130 Cal. Rptr. 2d 385* (parties that failed to obtain rulings on evidentiary objections, but cited to trial court's statement that it disregarded evidence in dispute, waived evidentiary challenges on appeal); *Rosenbluth International, Inc. v. Superior Court (2002) 101 Cal. App. 4th 1073, 1076, n.2, 124 Cal. Rptr. 2d 844* (evidentiary objections to declaration waived because party did not obtain rulings on them)]. However, the rule of waiver does not apply to an instruction which is prejudicially erroneous as given, i.e., which is an incorrect statement of law [*Marich v. MGM/UA Telecommunications, Inc. (2003) 113 Cal. App. 4th 415, 427, 7 Cal. Rptr. 3d 60* (right to appeal erroneous jury instruction defining "intent" not waived)].

There is no waiver of a claim of error based on judicial bias if a party chooses not to make an objection or otherwise raise the issue of bias at trial. The risk of offending the court and the doubt whether the problem could be cured by objection might discourage the assertion of even meritorious claims of judicial bias. Therefore, requiring the issue to be raised at trial would have the unjust effect of insulating judges from accountability for bias [*see* *Catchpole v. Brannon (1995) 36 Cal. App. 4th 237, 244, 42 Cal. Rptr. 2d 440* ; *see also* discussion in [4][b], *below*, and § 41.16].

[4] Review of Issues Not Raised at Trial

[a] New Issues Generally Will Not Be Considered

Appellate courts generally will not consider new issues or theories of law that a party raises for the first time on appeal, particularly a new theory of recovery or relief [*Johnson v. Greenelsh (2009) 47 Cal. 4th 598, 603, 100 Cal. Rptr. 3d 622, 217 P.3d 1194* (court refuses to hear issue regarding no contest clause not raised in lower court); *Gavaldon v. DaimlerChrysler Corp. (2004) 32 Cal. 4th 1246, 1264, 13 Cal. Rptr. 3d 793, 90 P.3d 752* (court refused to hear theory briefly argued during reply portion of closing argument at trial, but not discussed in pleadings); *Western Oil & Gas Ass'n. v. Monterey Bay Unified Air Pollution Control Dist. (1989) 49 Cal. 3d 408, 427 n.20, 261 Cal. Rptr. 384, 777 P.2d 157* ; *Bogacki v. Board of Supervisors (1971) 5 Cal. 3d 771, 780, 97 Cal. Rptr. 657, 489 P.2d 537* ; *Dietz v. Meisenheimer & Herron (2009) 177 Cal. App. 4th 771, 799-800, 99 Cal. Rptr. 3d 464* ; *Kashmiri v. Regents of the University of California (2007) 156 Cal. App. 4th 809, 830, 67 Cal. Rptr. 3d 635* ; *Baugh v. Garl (2006) 137 Cal. App. 4th 737, 746, 40 Cal. Rptr. 3d 539* ; County of Los Angeles v. S. Cal. *Edison Co. (2003) 112 Cal. App. 4th 1108, 1118-1119, 5 Cal. Rptr. 3d 575* (after stipulating that consideration paid is not proper basis for tax, requesting determination of property value, and actively litigating issue, party cannot argue that it is entitled to judgment based on total consideration paid)]. To do so would unfairly deprive the trial court and the opposing parties of their opportunity to decide the issue [*see* *Mattco Forge, Inc. v. Arthur Young & Co. (1997) 52 Cal. App. 4th 820, 847, 60 Cal. Rptr. 2d 780]* . Similarly, the Supreme Court generally does not consider issues not raised in the Court of Appeal [*Flannery v. Prentice (2001) 26 Cal. 4th 572, 590-591, 110 Cal. Rptr. 2d 809, 28 P.3d 860]* .

This rule is stringently applied if a new theory depends on controverted factual questions that were not determined at trial in the context of that theory [*Bogacki v. Board of Supervisors (1971) 5 Cal. 3d 771, 780, 97 Cal. Rptr. 657, 489 P.2d 537* ; *Honig v. San Francisco Planning Department (2005) 127 Cal. App. 4th 520, 530, 25 Cal. Rptr. 3d 649* (rule applies especially to doctrine of estoppel, which includes factual elements that must be established in trial court); *cf.*

discussion in [b], *below*]. When a case is on appeal the parties are bound to the evidence produced in the trial court, and parties opposing or responding to the appeal cannot fairly be expected to disprove factual contentions that were not presented at trial [*Tiernan v. Trustees of Cal. State University & Colleges (1982) 33 Cal. 3d 211, 221-222 n.15, 188 Cal. Rptr. 115, 655 P.2d 317* ; *Strasberg v. Odyssey Group, Inc. (1996) 51 Cal. App. 4th 906, 920, 59 Cal. Rptr. 2d 474]* .

Stipulations either as to legal issues or facts, entered into in the trial court, are binding on appeal [*Carmichael v. Reitz (1971) 17 Cal. App.3d 958, 969, 95 Cal. Rptr. 381]* .

Similarly, if the parties assume the applicability of a particular statute during trial court proceedings, a party may be barred from arguing for the first time on appeal that a different statute applies [*see* *Planned Protective Services, Inc. v. Gorton (1988) 200 Cal. App. 3d 1, 13, 245 Cal. Rptr. 790]* .

The rule extends to theories that were raised at trial but abandoned. Counsel may not abandon a theory of recovery during trial and then seek to revive it on appeal [*Carmichael v. Reitz (1971) 17 Cal. App.3d 958, 969, 95 Cal. Rptr. 381]* . The rule does not, however, preclude a party from raising issues or theories on appeal that were squarely raised at trial, even if the trial court did not base any decision on the issue or theory so raised [*Perez v. 222 Sutter St. Partners (1990) 222 Cal. App. 3d 938, 943 n.4, 272 Cal. Rptr. 119]* .

For discussion of an exception that applies to a new theory that does not require the consideration of facts not decided at trial, but rests wholly on undisputed facts, see [b], *below*.

[b] Exception for New Issues Involving Undisputed Facts

The general rule precluding a party from raising a new issue or theory for the first time on appeal, discussed in [a], *above*, does not apply to pure questions of law [*Carman v. Alvord (1982) 31 Cal. 3d 318, 324, 182 Cal. Rptr. 506, 644 P.2d 192]* . Thus, a party may raise a new theory of recovery for the first time on appeal, so long as it is a question of law that is only applied to undisputed facts in the record [*see* *Larner v. Los Angeles Doctors Hospital Associates, LP (2008) 168 Cal. App. 4th 1291, 1297 n.2, 86 Cal. Rptr. 3d 324* (to determine appeal of summary judgment, appellate court may consider issues not raised in trial court); *RN Solution, Inc. v. Catholic Healthcare West (2008) 165 Cal. App. 4th 1511, 1518, 81 Cal. Rptr. 3d 892* ; *Sheller v. Superior Court of Los Angeles County (2008) 158 Cal. App. 4th 1697, 1709, 71 Cal. Rptr. 3d 207* ; *In re Conservatorship of Whitley (2007) 155 Cal. App. 4th 1447, 1458, 66 Cal. Rptr. 3d 808* ; *Rowe v. Exline (2007) 153 Cal. App. 4th 1276, 1287-1288, 63 Cal. Rptr. 3d 787* ; *Petropoulos v. Department of Real Estate (2006) 142 Cal. App. 4th 554, 561, 47 Cal. Rptr. 3d 812* (*Bus. & Prof. Code § 490* as basis for disciplinary action presented pure question of statutory interpretation that could be resolved without considering disputed facts); *Dieckmeyer v. Redevelopment Agency of the City of Huntington Beach (2005) 127 Cal. App. 4th 248, 259, 24 Cal. Rptr. 3d 895* (court may determine for first time on appeal whether city required to reconvey property upon prepayment of loan); *Allied Fire Protection v. Diede Construction, Inc. (2005) 127 Cal. App. 4th 150, 154, 25 Cal. Rptr. 3d 195* (court may determine for first time on appeal whether res judicata bars action where plaintiff unaware of facts)]. For example, it is well settled that a party may raise the issue of standing for the first time on appeal [*see* *Steadman v. Osborne (2009) 178 Cal. App. 4th 950, 954-955, 100 Cal. Rptr. 3d 724*].

Although the appellate courts *may* consider a new theory on undisputed facts, they are not *required* to do so [*see* *Souza v. Westlands Water Dist. (2006) 135 Cal. App. 4th 879, 897-899, 38 Cal. Rptr. 3d 78* (appellate court declines to consider legal issue not raised in trial court); *In re Marriage of Moschetta (1994) 25 Cal. App. 4th 1218, 1227, 30 Cal. Rptr. 2d 893* (application of exception to rule against raising issue for first time on appeal is subject to the appellate court's discretion)]. Usually, an appellate court will consider a new issue on appeal in one of two situations.

The first situation involves a new development in the law that occurs while the appeal is pending. The new law may be considered if it can be applied to undisputed facts and if the appeal is a case that may properly be decided by application

of law that was not in effect or articulated before the appeal [*Fisher v. City of Berkeley (1984) 37 Cal. 3d 644, 654, n.3, 209 Cal. Rptr. 682, 693 P.2d 261]* . This occurs most frequently with respect to newly decided case law, when it validates a new theory that would have previously been rejected if raised at trial [*see Hattersley v. American Nucleonics Corp. (1992) 3 Cal. App. 4th 397, 402, 4 Cal. Rptr. 2d 331* ; *Bunch v. Coachella Valley Water Dist. (1989) 214 Cal. App. 3d 203, 210, 262 Cal. Rptr. 513* ; *Marsango v. Automobile Club of So. Cal. (1969) 1 Cal. App. 3d 688, 694, 82 Cal. Rptr. 92]* .

On the other hand, a reviewing court may decline retroactive application of new law if it raises substantial concerns about the effects of the new rule on the general administration of justice, or unfairly undermines the parties' reasonable reliance on previously existing law [*Newman v. Emerson Radio Corp. (1989) 48 Cal. 3d 973, 978, 258 Cal. Rptr. 592, 772 P.2d 1059]* . For discussion of retroactive application of law generally, see *§ 41.32*.

The second situation involves an issue of public importance or public interest, or an issue relating to the due administration of justice [*Rental Housing Association of Northern Alameda County v. City of Oakland (2009) 171 Cal. App. 4th 741, 755, 90 Cal. Rptr. 3d 181* ; *Preserve Shorecliff Homeowners v. City of San Clemente (2008) 158 Cal. App. 4th 1427, 1433, 71 Cal. Rptr. 3d 332* ; *Raphael v. Bloomfield (2003) 113 Cal. App. 4th 617, 621, 6 Cal. Rptr. 3d 583* (appellate court considered wife's new argument that workers' compensation benefits were separate property because it was question of law involving issue of public policy not previously addressed in California)]. For example, appellate courts have considered claims of reversible error based on the trial court judge's bias, although these were raised initially on appeal. The courts have held that this type of claim involves both a matter of public interest and the due administration of justice. Furthermore, although a party may raise the issue at trial, it would be unfair to require a party to raise it and risk offending the trial court judge [*see Catchpole v. Brannon (1995) 36 Cal. App. 4th 237, 244, 42 Cal. Rptr. 2d 440* (claim of gender bias); *see also* discussion in *§ 41.16*].

In addition, if an action seeks injunctive relief, an appellate court may take into account events occurring after the trial court judgment [*Dowhal v. Smithkline Beecham Consumer Healthcare (2004) 32 Cal. 4th 910, 922 n.4, 12 Cal. Rptr. 3d 262, 88 P.3d 1]* . Also, questions of subject matter jurisdiction are never waived and may be raised for the first time on appeal [*see* Miranda v. 21st *Century Ins. Co. (2004) 117 Cal. App. 4th 913, 920, 12 Cal. Rptr. 3d 159* (court considered appellant's argument that trial court did not have subject matter jurisdiction to enter discovery orders and to dismiss arbitration proceeding)].

Appellate courts' discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue [*In re S.B. (2004) 32 Cal. 4th 1287, 1293-1294, 13 Cal. Rptr. 3d 786, 90 P.3d 746* (court of appeal did not abuse discretion in determining important child custody issue that has divided courts of appeal, even though mother failed to raise it in lower court)].

The Supreme Court, in particular, will usually consider a new theory for the first time on appeal only if the issue is one of public importance, in addition to its being an issue that does not turn on the facts of the case [*see Cedars-Sinai v. Superior Court (1998) 18 Cal. 4th 1, 5-8 n.2, 74 Cal. Rptr. 2d 248, 954 P.2d 511* (deciding issue raised for first time in Supreme Court although it did not turn on facts, was fully argued by parties and *amici curiae*, involved an important issue that should be resolved in the public interest without further delay, and the issue would likely have been rejected below because it would have required reversal of controlling court of appeal decisions); *see also Gavaldon v. DaimlerChrysler Corp. (2004) 32 Cal. 4th 1246, 1265, 13 Cal. Rptr. 3d 793, 90 P.3d 752* (Supreme Court refused to hear theory briefly raised at trial, but not in Court of Appeal, and requiring extensive evidentiary record); *Adams v. Murakami (1991) 54 Cal. 3d 105, 115 n.5, 284 Cal. Rptr. 318, 813 P.2d 1348* (stating "[w]e cannot allow the public interest to be thwarted by a defendant's oversight or trial tactics"); *Fisher v. City of Berkeley (1984) 37 Cal. 3d 644, 654, n.3, 209 Cal. Rptr. 682, 693 P.2d 261* ; Sea & Sage Audubon Society, Inc. v. Planning Com. (1983) 34 Cal, 3d 421, 417, *194 Cal. Rptr. 357, 668 P.2d 664]* .

An appellate court is more likely to consider an issue not raised in the trial court if the issue involves a fundamental

error, such as one involving illegality, unclean hands, failure to state a cause of action, or some other variance so fundamental that it constitutes a departure or failure of proof [*Watson v. Department of Transportation (1998) 68 Cal. App. 4th 885, 890, 80 Cal. Rptr. 2d 594* ; *County of Orange v. Ivansco (1998) 67 Cal. App. 4th 328, 331, 78 Cal. Rptr. 2d 886* (constitutional issue raised for first time on appeal)].

[5] Court Need Not Review Issues Not Raised in Appellant's Brief

If an appellant has neglected to present a point in the opening brief or has presented the point only superficially, that point is deemed waived or abandoned, and the appellant may not insist that the reviewing court consider it when deciding the case [*Fidelity National Title Insurance Co. v. Schroeder (2009) 179 Cal. App. 4th 834, 847 n.11, 101 Cal. Rptr. 3d 854* ; *Wall Street Network, Ltd. v. New York Times Company (2008) 164 Cal. App. 4th 1171, 1177, 80 Cal. Rptr. 3d 6* (failure to address summary adjudication of claim on appeal constitutes abandonment of claim); *Ocean Harbor House Homeowners Association v. California Coastal Commission (2008) 163 Cal. App. 4th 215, 242 n.9, 77 Cal. Rptr. 3d 432* ; *In re Groundwater Cases (2007) 154 Cal. App. 4th 659, 693, 64 Cal. Rptr. 3d 827* (declining to entertain arguments that party withheld until filing its reply brief); *Medill v. Westport Insurance Corp. (2006) 143 Cal. App. 4th 819, 836 n.3, 49 Cal. Rptr. 3d 570* ; *American International Specialty Lines Insurance Company v. Continental Casualty Insurance Company (2006) 142 Cal. App. 4th 1342, 1359, 49 Cal. Rptr. 3d 1* ; *Baugh v. Garl (2006) 137 Cal. App. 4th 737, 746, 40 Cal. Rptr. 3d 539* ; *Feitelberg v. Credit Suisse First Boston, LLC (2005) 134 Cal. App. 4th 997, 1022, 36 Cal. Rptr. 3d 592* (appellate court refuses to consider points raised in reply brief for first time); *Singh v. Lipworth (2005) 132 Cal. App. 4th 40, 42 n.2, 33 Cal. Rptr. 3d 178* (points raised for first time in reply brief, other than those strictly responsive to arguments in respondent's brief, are waived, unless good cause shown); *Dieckmeyer v. Redevelopment Agency of the City of Huntington Beach (2005) 127 Cal. App. 4th 248, 260, 24 Cal. Rptr. 3d 895* ; *In re Estate of DeLoreto (2004) 118 Cal. App. 4th 1048, 1053, 13 Cal. Rptr. 3d 513* (court need not decide issue raised for first time in reply brief); *Stoll v. Shuff (1994) 22 Cal. App. 4th 22, 25, 27 Cal. Rptr. 2d 249* ; *see also Tan v. California Fed. Sav. & Loan Assn. (1983) 140 Cal. App. 3d 800, 811, 189 Cal. Rptr. 775* (the general rule is that points not raised by appellant in briefs are deemed waived or abandoned)].

Similarly, the appellate court may treat as waived any issue or contention raised in a brief in which the appellant (or respondent) has failed to provide citation to authority [*Woods v. Horton (2008) 167 Cal. App. 4th 658, 677, 84 Cal. Rptr. 3d 332* ; *City of Arcadia v. State Water Resources Control Bd. (2006) 135 Cal. App. 4th 1392, 1428-1429, 38 Cal. Rptr. 3d 373* (party waived issue by failing to develop argument); *City of Merced v. American Motorists Insurance Company (2005) 126 Cal. App. 4th 1316, 1328-1329, 24 Cal. Rptr. 3d 788* (court refused to hear challenge to admission of certain evidence); *Jones v. Superior Court (1994) 26 Cal. App. 4th 92, 99, 31 Cal. Rptr. 2d 264* ; *Amato v. Mercury Casualty Co. (1993) 18 Cal. App. 4th 1784, 1794, 23 Cal. Rptr. 2d 73* ; for discussion of rules for use in determining what constitutes citable authority, and further discussion of citation to authority in briefs, *see respectively § 41.30 et seq. and Ch. 50, Appeal: Briefs, §§ 50.13[1][i], [2][c][iv], 50.14[6]*].

This rule, however, is largely for the convenience of the appellate courts. A reviewing court is empowered to decide a case on any proper point or theory, whether urged by counsel or not. Thus, in an appropriate case, an appellate court may decide an appeal on issues not raised in the briefs [*Tan v. California Fed. Sav. & Loan Assn. (1983) 140 Cal. App. 3d 800, 811, 189 Cal. Rptr. 775* ; *see Code Civ. Proc. § 187* (if jurisdiction is conferred by state constitution or statute, a court has all the means necessary to carry that jurisdiction into effect); *see also Code Civ. Proc. § 182* (provisions of *Code Civ. Proc. § 182 et seq.*, including *Code Civ. Proc. § 187*, are not limited in scope or meaning to former justice courts as implied by the chapter heading to these provisions)].

If, however, the issue was not raised at trial, in addition to its being omitted from appellant's briefs, it must otherwise come within the exception to the general rule that precludes consideration of a theory for the first time on appeal [*see, e.g.,* *Schubert v. Lowe (1924) 193 Cal. 291, 294, 223 P. 550* (issue raised for the first time at oral argument involved important legal principle necessary to proper resolution of appeal); *Tan v. California Fed. Sav. & Loan Assn. (1983) 140 Cal. App. 3d 800, 811, 189 Cal. Rptr. 775* (issue arose due to newly decided case law); *see also* discussion

regarding consideration of new theories on appeal in [4], *above*].

If an appellate court decides to resolve an issue not previously briefed or argued, and the issue is dispositive of the appeal, the court must ensure that the parties are given an adequate opportunity to brief the issue, by supplemental briefing or otherwise [*see Gov. Code § 68081* (court of appeal is required to grant a rehearing if it decided the appeal on the basis of a new issue without allowing the parties an opportunity to address that issue in supplemental briefing); *Schubert v. Lowe (1924) 193 Cal. 291, 294, 223 P. 550* (issue raised for the first time at oral argument in Supreme Court was afterwards fully briefed so that resolution of issue did not prejudice parties)].

PRACTICE TIP:

Raising Issues Omitted From the Opening Brief. If counsel for appellant realizes that he or she omitted an argument from the opening brief, the better practice is to include the point in the reply brief and simultaneously file an application for leave to file that portion of the reply brief as a supplemental brief. The application should explain why the argument was omitted and the importance of the issue to the case, and should suggest that respondent's counsel be allowed to reply in a letter or other supplemental brief. Although the appellant will not get the last word on the issue, the court is more likely to allow the issue to be raised when it is accompanied by such an application.

Respondent's counsel, on the other hand, should read the appellant's reply brief soon after receiving it to see whether appellant's counsel has raised any new issue without seeking leave of court. If so, counsel has to make a judgment call: wait and address the issue at oral argument, seek leave to file a letter brief in response, or move to strike that portion of appellant's reply brief or have the reply brief refiled without argument on the new issue. The better course depends on the significance of the issue, whether the respondent has a good answer, and whether the respondent believes that the appellate court is likely to consider the issue.

For discussion regarding the procedures by which the parties or the appellate court may request supplemental briefing of issues not previously raised, see *Ch. 50, Appeal: Briefs, § 50.18*.

[6] Review Based on Respondent's Request Under Code Civ. Proc. § 906

A respondent, without appealing from the judgment, may request that the appellate court review any appealable ruling or order to determine whether or not the appellant was prejudiced by the error or errors on which the appellant relies for reversal or modification [*Code Civ. Proc. § 906*; *see Redevelopment Agency of San Diego v. Attisha (2005) 128 Cal. App. 4th 357, 374* (respondent could argue evidence was excludable for purpose of determining whether appellant was prejudiced by error upon which appellant relied for reversal)]. The purpose of *Code Civ. Proc. § 906* is to allow a respondent to assert a legal theory that may result in affirmance of the judgment notwithstanding the errors complained of by appellant.

In other words, this statutory provision permits a respondent to argue, without cross appealing, that error other than that complained of by appellant occurred, which, if corrected, would eliminate any justification or need to reverse or modify the judgment due to the other errors raised by appellant [*see California State Employees' Assn. v. State Personnel Bd. (1986) 178 Cal. App. 3d 372, 382 n.7, 223 Cal. Rptr. 826* ; *see, e.g., Citizens for Uniform Laws v. County of Contra Costa (1991) 233 Cal. App. 3d 1468, 1472, 285 Cal. Rptr. 456* (issue of appellant's standing to sue was cognizable on appeal for purpose of determining whether trial court's denial of relief to appellant should nevertheless be affirmed on a legal theory other than that on which the trial court relied, despite respondent's failure to cross appeal)].

Code Civ. Proc. § 906 is ordinarily invoked to argue for affirmance notwithstanding the errors complained of by appellant. It refers more broadly, however, to a review of the prejudice suffered by appellant. Thus, for example, when an appellant claims error in the jury instructions and argues for reversal with directions for entry of a directed verdict, it

is appropriate for respondent to argue under *Code Civ. Proc. § 906* that the appellant has overstated the prejudice, if any, suffered from the claimed error, and that if reversal is warranted the appellant would be entitled to a new trial but not a directed verdict [*Selger v. Steven Brothers, Inc. (1990) 222 Cal. App. 3d 1585, 1594, 272 Cal. Rptr. 544]* .

PRACTICE TIP:

Distinguishing Section 906 Argument From Arguing "Wrong Reason But Right Ruling." *Code Civ. Proc. § 906* provides for a review of claims by a respondent that reasons exist for affirming a judgment despite the errors raised on appeal by appellant. This argument, essentially that the claimed error is harmless because of other factors, or is at least not as prejudicial as claimed by appellant, should be distinguished from the argument that there was in fact no error.

Counsel for respondent should consider the latter argument, and research whether there is any legal theory that renders the trial court action correct, even if the trial court did not rely on that theory and trial counsel did not argue for it.

If a trial court's ruling is right on any applicable theory of law, it is not error at all, notwithstanding the fact that the trial court may have made the ruling for the wrong reason or due to erroneous reasoning [*see D'Amico v. Board of Medical Examiners (1974) 11 Cal. 3d 1, 19, 112 Cal. Rptr. 786, 520 P.2d 10* , and discussion in *§ 41.14[3]*].

[7] Mootness

Generally, an appellate court will not give opinions on moot questions or abstract propositions or declare principles or rules of law that cannot affect the matter in issue [*Consol. etc. Air Corp. v. United A. etc. Workers (1946) 27 Cal. 2d 859, 863, 167 P.2d 725* ; *Watkins v. Wachovia Corporation (2009) 172 Cal. App. 4th 1576, 1588, 92 Cal. Rptr. 409* (settlement agreement may not preserve parties' right to appeal)]. A case is moot when the reviewing court's decision "can have no practical impact or provide the parties effectual relief" [*MHC Operating Limited Partnership v. City of San Jose (2003) 106 Cal. App. 4th 204, 214, 130 Cal. Rptr. 2d 564* (citing *Woodward Park Homeowners Assn. v. Garreks, Inc. (2000) 77 Cal. App. 4th 880, 888* , by complying with writ, city rendered appeal moot)]. A moot appeal is normally dismissed. When, however, the action itself is rendered moot, and the judgment at trial was therefore improperly rendered, dismissal of the appeal operates as an affirmance of that judgment, which is the exact opposite of the appellate court's intention. In such an appeal the correct disposition is to reverse the judgment with directions to the lower court to dismiss the action [*San Bernardino Valley Audubon Soc. v. Metropolitan Water Dist. (1999) 71 Cal. App. 4th 382, 404, 83 Cal. Rptr. 2d 836* (reversal with directions to dismiss when action was rendered moot by subsequent legislation that required a result contrary to the trial court's judgment)].

An appellate court will sometimes decide issues in a case rendered moot, exercising an inherent power to resolve the issues if they are matters of continuing public interest and likely to recur [*see Konig v. Fair Employment and Housing Commission (2002) 28 Cal. 4th 743, 746 n.3, 123 Cal. Rptr. 2d 1, 50 P.3d 718 (Supreme Court decided case even though party died before oral argument because case involved issue of great public interest)* ; *Baluyut v. Superior Court (1996) 12 Cal. 4th 826, 829-830 n.4, 50 Cal. Rptr. 2d 101, 911 P.2d 1* ; *In re Anna S. (2010) 180 Cal. App. 4th 1489, 1497, 103 Cal. Rptr. 3d 889* ; *City of San Jose v. International Assn. of Firefighters, Local 230 (2009) 178 Cal. App. 4th 408, 417-418, 100 Cal. Rptr. 3d 396* ; *Carson Citizens for Reform v. Kawagoe (2009) 178 Cal. App. 4th 357, 364-365, 100 Cal. Rptr. 3d 358* ; *Hollister v. Monterey Insurance Company (2008) 165 Cal. App. 4th 455, 480, 81 Cal. Rptr. 3d 72* (court "loath" to dismiss appeal where result would be further expenditure of resources and further delay in achieving final resolution); *Gonzalez v. Munoz (2007) 156 Cal. App. 4th 413, 419-420, 67 Cal. Rptr. 3d 317* (agreeing to hear domestic violence case that rarely reaches appeal stage)]. A court will likely decline to exercise its discretion when the issues presented are essentially factual in nature and therefore require resolution on a case-by-case basis [*MHC Operating Limited Partnership v. City of San Jose (2003) 106 Cal. App. 4th 204, 215, 130 Cal. Rptr. 2d 564* (whether specific party is indispensable is fact-specific question)]. In addition, a court will decide an appeal if only part

but not all of the controversy has been rendered moot [*Mercury Interactive Corporation v. Klein (2007) 158 Cal. App. 4th 60, 78, 70 Cal. Rptr. 3d 88*].

For further discussion of mootness and exceptions to the general rule, which usually arise in the context of a motion to dismiss the appeal, see *Ch. 48, Appeal: Abandonment, Dismissal, and Stipulated Reversal, § 48.13[2][h]*.

[8] Review Limited to Final and Appealable Judgment or Order

Appeal is limited to the review of judgments and orders expressly appealable by statutory provision, judgments that are, generally, a final disposition of all causes pending between the parties [*see Code Civ. Proc. § 904.1*].

For discussion of the one final judgment rule and the statutory provisions delineating those judgments and orders that are appealable, see *Ch. 42, Appeal: Notice of Appeal, § 42.12*.

[9] Ripeness

The doctrine of "ripeness" focuses on whether the issues in a particular case are ready for judicial review. Although the federal doctrine of ripeness is rooted in the constitutional case or controversy requirement [U.S. Const., art. III], California cases have drawn on analogous concepts developed as part of the common law of judicial review, including the admonition against issuing purely advisory opinions [*see People ex rel. Lynch v. Superior Court of Los Angeles County (1970) 1 Cal. 3d 910, 912, 83 Cal. Rptr. 670, 464 P.2d 126; Teachers' Retirement Board v. Genest (2007) 154 Cal. App. 4th 1012, 1040, 65 Cal. Rptr. 3d 326; In re S.C. (2006) 138 Cal. App. 4th 396, 414, 41 Cal. Rptr. 3d 453 (court rejects argument regarding how dependency proceedings are conducted in Sacramento County Superior Court when counsel made no effort to show that purported practice occurred in specific case)]* . The leading California case, *Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal. 3d 158, 188 Cal. Rptr. 104, 655 P.2d 306* , involved a general, facial challenge to guidelines adopted by the California Coastal Commission interpreting the Coastal Act's public access provisions. In ruling that the action was unripe, the Court applied the federal test for ripeness enunciated by the *United States Supreme Court in Abbott Laboratories v. Gardner (1967) 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681* .

The test articulated in *Abbott* involves a two part inquiry [*Abbott Laboratories v. Gardner (1967) 387 U.S. 136, 148-149, 87 S. Ct. 1507, 18 L. Ed. 2d 681* ; *see also Gardner v. Toilet Goods Assoc. (1967) 387 U.S. 167, 87 S. Ct. 1526, 18 L. Ed. 2d 704* (companion case to *Abbott Laboratories* in which claims held unripe)]:

- The fitness of the issues for judicial decision.
- The hardship to the parties of withholding court consideration.

In *Pacific Legal Foundation v. California Coastal Commission (1982) 33 Cal. 3d 158, 188 Cal. Rptr. 104, 655 P.2d 306* , the California Supreme Court held that the case was not ripe for judicial review because the plaintiffs were challenging the guidelines in the abstract without application to particular developments. The Court noted that the plaintiffs were "in essence inviting [the Court] to speculate as to the types of developments for which the access conditions might be imposed, and then to express an opinion on the validity and proper scope of such hypothetical exactions" [*Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal. 3d 158, 172, 188 Cal. Rptr. 104, 655 P.2d 306]* .

In *San Mateo County Coastal Landowners' Association v. County of San Mateo (1995) 38 Cal. App. 4th 523, 545, 45 Cal. Rptr. 2d 117* , the court reviewed the distinction between constitutional challenges to an ordinance "as applied" (*i.e.,* ripeness) and "facial." The court held that the measure's requirement that landowners dedicate easements was not ripe for challenge as applied because the plaintiffs had not submitted a subdivision plan or applied for a permit or

variance from the local authority which had been conclusively denied or in this instance subjected to the easement requirement [*San Mateo County Coastal Landowners' Assn. v. County of San Mateo (1995) 38 Cal. App. 4th 523, 547, 45 Cal. Rptr. 2d 117* (also holding that the policy was not facially unconstitutional because the plaintiffs had not shown that unconstitutional application was unavoidable)]. Although the court of appeal did not consider the hardship test of *Abbott*, the case is clearly unripe under that standard because the plaintiffs were not immediately facing the dilemma of either complying with the guidelines or risking penalties for violating them. The landowners could wait until they applied for a development permit and then challenge any invalid imposition of dedication conditions. Although the possibility that they would have to comply with access conditions might tend to inhibit property owners from planning improvements on their land, the hardship was not imminent or significant enough to compel immediate resolution of the controversy [*see* *Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal. 3d 158, 172-173, 188 Cal. Rptr. 104, 655 P.2d 306]* .

In determining the ripeness of a controversy under the *Pacific Legal Foundation* and *Abbott* standard, courts may consider the existence and importance of any public interest in the controversy. The fact of "widespread public interest" may tip the balance in a doubtful case, and cause the court to find that adjudication of the controversy is not premature [*see* *Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal. 3d 158, 170, 188 Cal. Rptr. 104, 655 P.2d 306* ; *Farm Sanctuary, Inc. v. Department of Food & Agriculture (1998) 63 Cal. App. 4th 495, 504, 74 Cal. Rptr. 2d 75* ; *see also* *Hunt v. Superior Court (1999) 21 Cal. 4th 984, 998-999, 90 Cal. Rptr. 2d 236, 987 P.2d 705* (noting that ripeness requirement does not prevent court from deciding "concrete dispute" if deferred decision will result in uncertainty in the law, particularly when there is widespread public interest in the answer to a particular legal question); *but see* *Sherwyn v. Department of Social Services (1985) 173 Cal. App. 3d 52, 58, 218 Cal. Rptr. 778* (case was not ripe despite "widespread public interest")].

[10] Political Question

In deference to the doctrine of separation of powers, a court will exclude from review those controversies grounded in policy choices and value determinations committed to the legislative and executive branches. Nevertheless, the judicial function includes authority to interpret the law and declare whether the legislative or the executive branch has acted beyond its authority [*Schabarum v. Legislature (1998) 60 Cal. App. 4th 1205, 1213-1215, 70 Cal. Rptr. 2d 745]* . Broadly, the political question concept requires the courts to defer in its substantive decision making to the legislative and executive branches in matters such as the initial presumption of constitutionality or the wisdom of legislation. Specifically, however, the political question concept can require dismissal of an action without reaching the merits, when complete deference to the legislative or executive branch is required and there is nothing upon which the court can adjudicate without impermissibly intruding on the authority of the other branch [*Schabarum v. Legislature (1998) 60 Cal. App. 4th 1205, 1214, 70 Cal. Rptr. 2d 745]* .

[11] Resolution of Constitutional Issues

If the appellate court can avoid resolving a constitutional issue by deciding a statutory issue, it will do so. The court will resolve constitutional issues only if absolutely necessary [*Souza v. Westlands Water Dist. (2006) 135 Cal. App. 4th 879, 899, 38 Cal. Rptr. 3d 78* (appellate court has obligation to avoid deciding constitutional questions unless absolutely necessary); *Gatto v. County of Sonoma (2002) 98 Cal. App. 4th 744, 753, 120 Cal. Rptr. 2d 550* (declining to reach constitutional issue if appeal resolved by statutory issue)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityMootnessGeneral OverviewCivil ProcedureJusticiabilityPolitical QuestionsGeneral OverviewCivil ProcedureJusticiabilityRipenessGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsPrejudicial Errors

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Volume 5: Appeal-Chs. 40-55
Chapter 41 APPEAL: REVIEW STANDARDS AND APPELLATE RULES OF LAW
PART II. LEGAL BACKGROUND
A. Standards of Review

5-41 California Forms of Pleading and Practice--Annotated § 41.11

AUTHOR: Jeffery A. Hogge Author Hon. Patti S. Kitching, Victoria J. DeGoff Editorial Consultants

§ 41.11 General Standards of Review of Judgment on Appeal

The standard of review governs the manner in which the appellate court will examine the record on a given issue or with regard to a particular judgment or order. Different standards of review may be applied to different issues on appeal.

The three basic standards of review are summarized as follows and discussed further in §§ 41.12-41.15. The following summary focuses on how much, or how little, deference is given by the reviewing court to the trial court's ruling [*see* Marer, *Demystifying Appellate Review Standards*, 7(2) Cal. Litig. 33, 34 (1994)]:

- The appellate court accords a great degree of deference to the trial court's ruling, under the "abuse of discretion" standard, which requires affirmance of the ruling absent a showing in the record of abuse of discretion by the lower court or tribunal. Under this standard a high degree of deference is given to the ruling or judgment [*see Denham v. Superior Court (1970) 2 Cal. 3d 557, 564, 86 Cal. Rptr. 65, 468 P.2d 193]* . For further discussion of the "abuse of discretion" standard of review and when it applies, see *§ 41.12*.

- The second standard, in which, again, great deference is given either to the trial court or to the jury, as trier of fact, is the standard that is applied in reviewing factual determinations. It is usually termed the "substantial evidence" standard. Under this standard the appellate court will generally affirm a factual conclusion made by the trial court or jury so long as it is supported by substantial evidence in the record [*Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 101 Cal. Rptr. 568, 496 P.2d 480]* . For further discussion of the "substantial evidence" standard of review and when it applies, see *§ 41.13*.

- The third standard, usually termed the "independent" or "de novo" review standard, is the standard under which the appellate court conducts an independent review of the record, giving no deference to the ruling or judgment of the trial court, and conducting essentially the same inquiry as that conducted by the trial court [*Estate of Coate (1979) 98 Cal. App. 3d 982, 986, 159 Cal. Rptr. 794]* . For further

discussion of the "independent" standard of review and when it applies, see *§ 41.14*.

PRACTICE TIP:

Determine and Provide Applicable Standards of Review for Every Contention on Appeal. The initial determination to be made by appellate counsel in researching whether to take an appeal, or in drafting argument on appeal, is the determination of the standard of review that applies, or arguably applies, to every contention of the appeal. As discussed below, the applicable standard determines not only the focus in arguing error, but may also have significant impact on the deference accorded to the trial court ruling by the appellate court, and hence the likelihood of any finding of reversible error.

Although the deadlines for filing a notice of appeal often make this a difficult task, it is critical to research sufficiently the standards applicable to every potential claim, and to do this *before* deciding whether to pursue an appeal. Counsel should not wait until writing the brief. Many futile appeals are prosecuted because appellants' counsel are ignorant of the applicable standard of review until they are already far into the appeal process.

The applicable standard should be determined and stated for each contention, because several standards may apply to the appeal as a whole. There may be separate issues involving separate standards, or a single issue may combine more than one standard. For example, some mixed questions of law and fact require application of both the "substantial evidence" test and the "independent review" test [*see* discussion in *§ 41.15*]. Similarly, a challenged ruling may be subject to the "abuse of discretion" test, whereas the validity of fact findings relating to that ruling will be subject to the "substantial evidence" test.

Although there is no requirement in California that the appellant state the standard of review for each contention in the opening brief, it is, in practice, an extremely useful practice to state the appropriate standard of review at the outset of the brief, or, if different standards apply to different issues, at the beginning of the argument relating to each issue [*compare* Ninth Cir. R., Rule 28-2.5 (requiring appellant to identify proper standard of review at outset of each contention)]. Doing so helps frame the issue for argument and focuses on the appropriate burden for showing error. Moreover, it provides the appellate court with appropriate argument when the applicable standard of review is itself in dispute.

For further discussion regarding inclusion of discussion of applicable standards of review in the appellate briefs, see *Ch. 50, Appeal: Briefs, § 50.13[2][c][ii]*.

For discussion of the applicable standard of review in a particular proceeding, consult the General Index of this publication, which provides references to the general coverage of that proceeding in the trial court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsStandards of ReviewDe Novo ReviewCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionCivil ProcedureAppealsStandards of ReviewSubstantial EvidenceSufficiency of Evidence

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§ 41.12 Review Based on Claim of Abuse of Discretion by Trial Court

[1] General Standard and Applicability

Under the "abuse of discretion" standard of review, an appellate court will not reverse a ruling of the trial court unless it appears a miscarriage of justice has occurred because the trial court exceeded the bounds of reason, all circumstances considered; the appellate court will not substitute its opinion for that of the trial court and divest the trial court of its discretionary power [*Denham v. Superior Court (1970) 2 Cal. 3d 557, 564, 86 Cal. Rptr. 65, 468 P.2d 193* ; *Yield Dynamics, Inc. v. Tea Systems Corporation (2007) 154 Cal. App. 4th 547, 556-560, 66 Cal. Rptr. 3d 1* ; *In re of Marriage Heiner (2006) 136 Cal. App. 4th 1514, 1519-1520, 39 Cal. Rptr. 3d 730* ; *Hernandez v. Superior Court (2004) 115 Cal. App. 4th 1242, 1246-1247, 9 Cal. Rptr. 3d 821* (court had discretion to continue discovery deadlines due to death of party's counsel)].

The standard applies in the review of a wide variety of orders and judgments. Most typically, it applies in situations in which the appellate court's ruling will not aid uniformity of decision making in the lower courts; that is, to review trial court rulings that are rendered in a proceeding that is common and recurring, that involves consideration of a myriad factors, that results in an equitable determination dependent on conflicting facts that vary widely from case to case, or that involves a combination of these or other similar characteristics [*see* Marer, *Demystifying Appellate Review Standards*, 7(2) Cal. Litig. 33, 34 (1994)]. In such proceedings, because the trial court is required to exercise "discretion," "wide discretion," or "broad discretion," the appellate court affords great deference to its ruling [*see also § 41.11*].

"Discretion," in the abuse of discretion standard, refers to the relationship between trial and appellate courts, denoting essentially the amount of deference the appellate court is willing to give to the trial court. As such, it cannot be defined further without regard to the particular subject of discretion.

PRACTICE TIP:

Researching and Arguing Application of the Abuse of Discretion Standard. The "abuse of

discretion" standard applies to a wide variety of particular orders or judgments. Many rulings that fall within the trial court's discretion are not intuitively obvious; consequently, it is necessary to do sufficient research to determine whether the order or judgment will be governed by the abuse of discretion standard before deciding whether to pursue an appeal. If counsel for appellant are not aware that this standard will govern review of the trial court's ruling, they are likely to pursue an appeal that is virtually hopeless.

Because the abuse of discretion standard applies in many different situations, appellant's counsel should always try to read all of the decisions involving the type of ruling being challenged. The goal is to find a decision or decisions that reversed a trial court's exercise of discretion on similar or analogous facts. The appellant's opening brief should construct an argument that discusses the facts in these helpful decisions and compares with the facts of the appeal. If there are no such precedents, appellant's consider should reconsider whether the appeal is worth pursuing.

The goal of respondent's counsel is similar and usually easier: to find decisions that have upheld a trial court's exercise of discretion on a similar fact pattern. Respondent's counsel should always argue that the appellate court should not substitute its judgment for that of the trial court, even if it would have ruled differently in the first instance.

It can sometimes be difficult for appellant's counsel to explain the abuse of discretion standard to the client. It may help to discuss the facts in similar cases in which the trial court's ruling was affirmed. In some opinions, the appellate court will even go so far as to state that it would have decided the case differently if it were sitting as a trial court, but it nevertheless cannot say that the trial court abused its discretion.

For discussion of the some of the particular orders, judgments, or rulings to which the abuse of discretion standards applies (or usually applies), see [3], *below*.

[2] When "Abuse of Discretion" Occurs

The "discretion" of the trial court is subject to the limitations of legal principles governing the subject of its action. The scope of discretion always depends on the particular law being applied. That scope may vary greatly according to the context [*City of Sacramento v. Drew (1989) 207 Cal. App. 3d 1287, 1297-1298, 255 Cal. Rptr. 704]* .

The appellate court cannot reverse merely because it disagrees with the ruling or order being challenged [*Rappleyea v. Campbell (1994) 8 Cal. 4th 975, 987, 35 Cal. Rptr. 2d 669, 884 P.2d 126* ; *Ajaxo Inc. v. E*TRADE Group, Inc. (2005) 135 Cal. App. 4th 21*]. The discretion of a trial court cannot be whimsical and uncontrolled, however. "Abuse" of discretion, justifying a reversal of the trial court ruling, may be found by the appellate court to occur when, all relevant circumstances considered, the trial court "exceeded the bounds of reason," or when no judge would reasonably make the same order under the same circumstances [*Rappleyea v. Campbell (1994) 8 Cal. 4th 975, 987, 35 Cal. Rptr. 2d 669, 884 P.2d 126* (reversal when ruling or order exceeds the bounds of "allowable discretion" under the circumstances); *Denham v. Superior Court (1970) 2 Cal. 3d 557, 564, 86 Cal. Rptr. 65, 468 P.2d 193* (reversal when court "exceeds the bounds of reasons" considering all the circumstances); *Miyamoto v. DMV (2009) 176 Cal. App. 4th 1210, 1217-1219, 98 Cal. Rptr. 3d 459* (court abused discretion in refusing to admit blood alcohol report); *see also Westside Community for Independent Living, Inc. v. Obledo (1983) 33 Cal. 3d 348, 355, 188 Cal. Rptr. 873, 657 P.2d 365* ; *In re Marriage of Smith (1990) 225 Cal. App. 3d 469, 480, 274 Cal. Rptr. 911]* . The appellant has the burden, however, of showing a clear case of abuse, absent which the appellate court will not reverse and substitute its opinion for that of the trial court, and thus divest the trial court of its discretionary power [*Denham v. Superior Court (1970) 2 Cal. 3d 557, 564, 86 Cal. Rptr. 65, 468 P.2d 193]* .

Because discretion in a given context is determined by the particular laws being applied, it may also be argued that any

action by the trial court that transgresses the confines of the applicable principles of law is outside the scope of discretion and is thus an abuse of that discretion [*see Law Offices of Dixon R. Howell v. Valley (2005) 129 Cal. App. 4th 1076, 1090, 29 Cal. Rptr. 3d 499* (court's refusal to acknowledge and exercise discretion was abuse of discretion); Marer, *Demystifying Appellate Review Standards*, 7(2) Cal. Litig. 33, 34 (1994) (citing *City of Sacramento v. Drew (1989) 207 Cal. App. 3d 1287, 1297-1298, 255 Cal. Rptr. 704*)].

Even if an abuse of discretion is shown, this error must also be shown to be prejudicial to justify reversal [*see Cal. Const., art. VI, § 13*, and discussion of prejudicial error in § 41.10[1]; *see also Denham v. Superior Court (1970) 2 Cal. 3d 557, 564, 86 Cal. Rptr. 65, 468 P.2d 193* (trial court ruling will not be disturbed for abuse of discretion unless it appears that there has been a miscarriage of justice as a result)].

PRACTICE TIP:

Arguing Lack of Exercise as Abuse. In some instances the trial court may not have realized that it had discretion, but thought it was legally required to rule the way it did. In these cases appellant's counsel may argue that the trial court abused its discretion because the record shows that it failed to exercise any discretion at all.

[3] Particular Applications of Abuse of Discretion Standard

[a] Admission and Exclusion of Evidence Under Evidence Code Section 352

Evid. Code § 352 gives the trial court discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. A trial court's ruling under *Evid. Code § 352* will be upset only if there is a clear showing of an abuse of discretion [*Ajaxo Inc. v. E*TRADE Group, Inc. (2005) 135 Cal. App. 4th 21* ; *Aguayo v. Crompton & Knowles Corp. (1986) 183 Cal. App. 3d 1032, 1038, 228 Cal. Rptr. 768]* .

An appellate court is neither authorized nor warranted to substitute its judgment for that of the trial judge in a Section 352 ruling, but may reverse only if an alleged abuse of discretion clearly constitutes a miscarriage of justice [*Cain v. State Farm Mut. Auto Ins. Co. (1975) 47 Cal. App. 3d 783, 798, 121 Cal. Rptr. 200]* .

For further discussion concerning exclusion of evidence under *Evid. Code § 352*, see Ch. 373, *Motions in Limine* .

[b] Motion for New Trial

A trial court's determination of a motion for new trial is usually reviewed under the abuse of discretion standard [*see Romero v. Riggs (1994) 24 Cal. App. 4th 117, 121-122, 29 Cal. Rptr. 2d 219]* .

Orders granting or denying a new trial are treated somewhat differently. Moreover, other review standards may apply depending on the grounds for the order. For example, an order for a new trial granted on the ground that the verdict was against the law, is reviewed under a version of the substantial evidence standard: the order will be reversed unless the verdict is unsupported by substantial evidence to an extent that would justify a directed verdict *against* the party in whose favor the verdict was returned [*see Berge v. International Harvester Co. (1983) 142 Cal. App. 3d 152, 160, 190 Cal. Rptr. 815* ; *see also Lane v. Hughes Aircraft Co. (2000) 22 Cal. 4th 405, 412, 93 Cal. Rptr. 2d 60, 993 P.2d 388* (order granting a new trial based on insufficiency of evidence or excessive or inadequate damages is reversed only if there is no substantial evidence in the record to support the trial court's reasons and must be sustained unless no reasonable trier of fact could have found for the party moving for a new trial; normal presumption in favor of correctness of the verdict is replaced by a presumption in favor of the new trial order)]. In other instances the order may involve an error of law subject to independent review [*see, e.g., The Oakland Raiders v. National Football League (2005) 126 Cal. App. 4th 1497, 1506, 25 Cal. Rptr. 3d 141* (trial court's order granting new trial failed to specify court's reason for granting new trial and, therefore, appellate court required to independently review motion); *City of San*

Diego v. D.R. Horton San Diego Holding Co. (2005) 126 Cal. App. 4th 668, 678, 24 Cal. Rptr. 3d 338 (order granting new trial based on determination that two of jury's special verdict findings were inconsistent analyzed as matter of law)].

When an appellate court concludes the trial court abused its discretion in denying a motion for new trial, the appellate court must review the entire record, including the evidence, to independently determine whether the denial of the motion was prejudicial [*Piscitelli v. Friedenberg (2001) 87 Cal. App. 4th 953, 9, 105 Cal. Rptr. 2d 88]* . For further discussion of prejudicial error, see*§ 41.10*.

For further discussion concerning motions for new trial and review of such motions, see Ch. 371, *Motions After Trial*, § 357.60 et seq.

[c] Relief From Judgment or Order

The disposition of a motion for relief under *Code Civ. Proc. § 473* is subject to the discretion of the trial court. On appeal, the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason when the case is viewed in its entirety [*In re Marriage of Connolly (1979) 23 Cal. 3d 590, 597-598, 153 Cal. Rptr. 423, 591 P.2d 911]* .

While the general standard of review for grant or denial of relief under *Code Civ. Proc. § 473* is abuse of discretion, an exception occurs when the applicant for relief qualifies under *Code Civ. Proc. § 473(b)* for mandatory relief from a dismissal entered as a result of an attorney's mistake, inadvertence, surprise, or neglect. In such cases, the application of the mandatory provision that does not turn on disputed facts is subject to independent review [*Leader v. Health Industries of America, Inc. (2001) 89 Cal. App. 4th 603, 612, 107 Cal. Rptr. 2d 489]* .

For further discussion concerning relief from judgments and orders under *Code Civ. Proc. § 473* and review of such proceedings, see Ch. 489, *Relief from Judgments and Orders* .

[d] Award of Attorney's Fees

The trial court has the initial responsibility of determining the appropriateness and amount of an award of attorney's fees. The court's determination will be reviewed for abuse of discretion [*Bartling v. Glendale Adventist Medical Center (1986) 184 Cal. App. 3d 97, 103, 228 Cal. Rptr. 847]* . For further discussion concerning awards of attorney's fees, see Ch. 174, *Costs and Attorney Fees* .

[e] Award of Expert Witness Fees Under Code Civ. Proc. § 998

Determination of a reasonable expert witness fee to be awarded to a prevailing party is subject to the discretion of the trial court under *Code Civ. Proc. § 998* [*see* *Peterson v. John Crane, Inc. (2007) 154 Cal. App. 4th 498, 513, 65 Cal. Rptr. 3d 185]* . The trial court is in a far better position, having heard the entire case and observed the demeanor of witnesses, to exercise this discretion and determine what was a reasonable amount and what was reasonably necessary. The determination will not be reversed absent a clear abuse of discretion [*Huber, Hunt & Nichols, Inc. v. Moore (1977) 67 Cal. App. 3d 278, 315, 136 Cal. Rptr. 603]* . For discussion concerning expert witness fees under *Code Civ. Proc. § 998*, see Ch. 520, *Settlement and Release* .

[f] Award of Sanctions

Review of a trial court's order of sanctions is for abuse of discretion only [*Luke v. Baldwin-United Corp. (1985) 167 Cal. App. 3d 664, 668, 213 Cal. Rptr. 654* ; *see* *Decker v. The U.D. Registry, Inc. (2003) 105 Cal. App. 4th 1382, 1392* (court reversed sanctions order when order did not recite in detail the conduct or circumstances justifying it)]. For further discussion concerning sanctions in the trial court, see Ch. 510, *Sanctions* .

[g] Discovery Orders

Determinations on matters of discovery are normally subject to the trial court's discretion and will be reversed only for abuse of discretion [*Toshiba America Electronics Components v. Superior Court (2004) 124 Cal. App. 4th 762, 767-768, 21 Cal. Rptr. 3d 532]* . For further discussion concerning review of discovery proceedings generally (which, if crucial, may be reviewed immediately on petition for extraordinary writ rather than by appeal from a final judgment), see Ch. 200, *Discovery: Review of Discovery Orders* .

[h] Motion for Continuance

A trial court's determination with respect to a motion for continuance is reviewed only for abuse of discretion [*In re Marriage of Falcone & Fyke (2008) 164 Cal. App. 4th 814, 822-823, 79 Cal. Rptr. 3d 588* ; *Mahoney v. Southland Mental Health Associates Medical Group (1990) 223 Cal. App. 3d 167, 171-172, 272 Cal. Rptr. 602]* . For discussion and forms concerning continuance proceedings generally, see Ch. 136, *Continuances* .

[i] Dismissal for Delay in Prosecution

A trial court's ruling on a motion to dismiss for delay in prosecution will not be reversed unless a clear case of abuse is shown and unless there has been a miscarriage of justice. The appellate court must not substitute its opinion for the trial court's and thereby divest the trial court of its discretionary power [*Blank v. Kirwan (1985) 39 Cal. 3d 311, 331, 216 Cal. Rptr. 718, 703 P.2d 58]* . For further discussion concerning dismissal for delay in prosecution, see *Ch. 212, Dismissal, § 212.60* et seq.

[j] Motion to Disqualify Counsel

When reviewing an order granting or denying a motion to disqualify an attorney, the reviewing court defers to the trial court's decision, absent an abuse of discretion, unless only legal matters are at issue [*Sharp v. Next Entertainment, Inc. (2008) 163 Cal. App. 4th 410, 425, 78 Cal. Rptr. 3d 37*]. Discretion is deemed abused when there is a failure to exercise discretion in a situation in which the exercise of discretion is required [*Truck Insurance Exchange v. Fireman's Fund Insurance Co. (1992) 6 Cal. App. 4th 1050, 1055, 8 Cal. Rptr. 2d 228]* . For discussion concerning disqualification of counsel, see Ch. 72, *Attorney Practice and Ethics* , § 72.430 et seq.

[k] Proceedings for Forum Non Conveniens

Under most circumstances, the abuse of discretion standard applies to review a determination regarding forum non conveniens. However, if the forum selection is subject to a contractual agreement, most courts will uphold the contractual forum selection unless there is substantial evidence of the requirements for invalidating a contract [*Cal-State Business Products & Services, Inc. v. Ricoh (1993) 12 Cal. App. 4th 1666, 1680-1681, 16 Cal. Rptr. 2d 417* ; *but see Bancomer, S.A. v. Superior Court (1996) 44 Cal. App. 4th 1450, 1457, n.7, 52 Cal. Rptr. 2d 435* (declining to apply substantial evidence test even though contractual forum selection clause at issue)]. For discussion concerning forum non conveniens, see Ch. 323, *Jurisdiction: Personal* .

[l] Motion or Action for Injunction

The abuse of discretion standard usually applies to review a ruling on a motion or action for an injunction, since review involves evaluating interrelated factors of the plaintiff's likelihood of success and the magnitude of interim harm to the plaintiff if the preliminary injunction is denied [*Cinquegrani v. Department of Motor Vehicles (2008) 163 Cal. App. 4th 741, 745-746, 77 Cal. Rptr. 3d 816*]. If, however, the likelihood of prevailing depends upon a question of law, the appellate court reviews that question of law under the independent review standard [*Strategix, Ltd v. Infocrossing West, Inc. (2006) 142 Cal. App. 4th 1068, 1072, 48 Cal. Rptr. 3d 614* ; *Sahlolbei v. Providence Healthcare, Inc. (2003) 112 Cal. App. 4th 1137, 1155, 5 Cal. Rptr. 3d 598* (denial of preliminary injunction reversed because of failure to grant

plaintiff pre-termination hearing); *People ex rel. Department of Alcoholic Beverage Control v. Miller Brewing Company (2002) 104 Cal. App. 4th 1189, 1194, 128 Cal. Rptr. 2d 861* (court used de novo standard of review because appellant claimed trial court erred in relying on case law construing statutory definition at issue prior to time of pertinent change in statute as applied to instant case); *Efstratis v. First Northern Bank of Dixon (1997) 59 Cal. App. 4th 667, 671, 69 Cal. Rptr. 2d 445]* . Similarly, the substantial evidence standard may apply in some instances to review evidence that was presented to the trial court [*see American Academy of Pediatrics v. Van de Kamp (1989) 214 Cal. App. 3d 831, 838, 263 Cal. Rptr. 46]* . For further discussion and forms concerning injunctions and review of proceedings for injunctive relief, see Ch. 303, *Injunctions* .

[m] Judicial Notice

A decision of a trial court not to take judicial notice will be upheld unless the reviewing court determines no reasonable judge would have refused to take judicial notice [*Leibert v. Transworld Systems, Inc. (1995) 32 Cal. App. 4th 1693, 1700, 39 Cal. Rptr. 2d 65]* . This is, in essence, an application of the "abuse of discretion" standard. For further discussion concerning judicial notice, see Ch. 321, *Judicial Notice* .

[n] Additional Examples

For additional examples of application of the abuse of discretion standard, see *§ 41.14[4][c]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsStandards of ReviewAbuse of Discretion

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§ 41.13 Review Based on Claim of Insufficient Evidence

[1] "Substantial Evidence" Standard

[a] Applicability to Questions of Fact

The "sufficiency of evidence" standard of review applies to determine the validity of factual determinations that are challenged on appeal as being unsupported by the evidence [*see 20th Century Ins. Co. v. Garamendi (1994) 8 Cal. 4th 216, 271, 32 Cal. Rptr. 2d 807, 878 P.2d 566]* . If a question involves the establishment of historical or physical facts, it is a question of fact to which the "substantial evidence" standard applies [*Crocker National Bank v. City and County of San Francisco (1989) 49 Cal. 3d 881, 888, 264 Cal. Rptr. 139, 782 P.2d 278]* .

A major rationale for the "substantial evidence" test is that the trier of fact, not the appellate court, is in the better position to weigh evidence through such factors as the demeanor and credibility of witnesses. Note however, that the standard has been applied to fact determinations in which this underlying rationale arguably does not apply. For example, the test applies even if the record on appeal includes a videotape of trial testimony [*see Moustakas v. Dashevsky (1994) 25 Cal. App. 4th 752, 754-755, 30 Cal. Rptr. 2d 753* (stating also that any change in the review standard based on technological changes in the record should be initiated by the Legislature)], and to the sufficiency of declarations or affidavits [*see McGlothen v. Superior Court (1981) 121 Cal. App. 3d 106, 109, 175 Cal. Rptr. 129* (review of facts based on controverted declarations subject to same review applicable to oral testimony; trial court is in better position to weigh effect of contrary facts in opposing declaration)].

The substantial evidence standard applies in cases in which a party could have but did not request a statement of decision [*In re Marriage of Arceneaux (1990) 51 Cal. 3d 1130, 1133-1134, 275 Cal. Rptr. 797]* .

PRACTICE TIP:

Preserving Factual Determinations of Trial Court for Appeal. In certain proceedings before the trial court, a litigant is entitled to request a statement of decision. Upon the proper request of a party, the court

must issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial [*see Code Civ. Proc. § 632*]. When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was properly brought to the attention of the trial court, it will not be inferred on appeal that the trial court decided in favor of the prevailingparty as to those facts or on that issue [*Code Civ. Proc. § 634*]. Accordingly, to preserve the record and avoid adverse inferences on appeal, a party contemplating an appeal should request from the trial court a statement of decision, identifying the principal controverted issues. For further discussion concerning a statement of decision and preservation of factual and legal issues for appeal, see Ch. 529, *Statement of Decision* .

[b] Factual Determination Upheld if Supported by "Substantial" Evidence

Under the substantial evidence standard, the factual findings of the trial court are presumed correct and a party challenging a judgment has the burden of showing reversible error by an adequate record. In the absence of a contrary showing in the record, all presumptions in favor of the trial court's action will be made by the appellate court [*In re Marriage of Bonds (2000) 24 Cal. 4th 1, 31, 99 Cal. Rptr. 2d 252, 5 P.3d 815* ; *Schmidlin v. City of Palo Alto (2007) 157 Cal. App. 4th 728, 737, 69 Cal. Rptr. 3d 365* ; *Huong Que, Inc. v. Luu (2007) 150 Cal. App. 4th 400, 409, 58 Cal. Rptr. 3d 527* ; *Construction Financial v. Perlite Plastering Co. (1997) 53 Cal. App. 4th 170, 179, 61 Cal Rtpr. 2d 574*].

A claim of insufficient evidence to support a judgment is a challenge to the fact-finding function of the trial court, and that function is entitled to great deference from the courts of appeal [*see People v. Louis (1986) 42 Cal. 3d 969, 984-987, 232 Cal. Rptr. 110, 728 P.2d 180]* .

Under this standard, the appellant must demonstrate that no reasonable inference supporting the challenged ruling can be drawn from the evidence presented [*McRae v. Department of Corrections and Rehabilitation (2006) 142 Cal. App. 4th 377, 389, 48 Cal. Rptr. 3d 313* ; *Reichardt v. Hoffman (1997) 52 Cal. App. 4th 754, 766, 60 Cal. Rptr. 2d 770]* . The appellant has the burden to identify and establish deficiencies in the evidence. The appellate court is not required to independently search the evidentiary record to determine its sufficiency [*Huong Que, Inc. v. Luu (2007) 150 Cal. App. 4th 400, 409, 58 Cal. Rptr. 3d 527]* .

Thus, the scope of the review under this standard begins and ends with thedetermination whether there is any substantial evidence that will support the factual conclusions reached by the jury or trial court [*Foreman & Clark Corp. v. Fallon (1971) 3 Cal. 3d 875, 881, 92 Cal. Rptr. 162, 479 P.2d 362]* .

A recitation of only appellant's evidence does not satisfy this requirement. The appellant's brief must fairly and fully set forth both sides' evidence on the issue with appropriate citations to the record on appeal [*Doe v. Roman Catholic Archbishop of Cashel & Emly (2009) 177 Cal. App. 4th 209, 218, 99 Cal. Rptr. 3d 158* ; *Schmidlin v. City of Palo Alto (2007) 157 Cal. App. 4th 728, 737, 69 Cal. Rptr. 3d 365* ; Boeken v. Philip Morris Incorporated (2005) 127 Cal. App. 4th 1640, 1658, 26 Cal. Rptr. 3d 638 (recitation of only appellant's evidence was not adequate for determining whether any of jury's inferences were reasonable and supported by substantial evidence); *Maggio, Inc. v. United Farm Workers (1991) 227 Cal. App. 3d 847, 878, 278 Cal. Rptr. 250]* . If appellant does not address all of the material evidence on the point, the error, if any, is deemed waived [*In re Marriage of Fink (1979) 25 Cal. 3d 877, 887-888, 160 Cal. Rptr. 516, 603 P. 2d 881* ; Road Sprinkler Fitters Local Union No. 669 v. *G & G Fire Sprinklers, Inc. (2002) 102 Cal. App. 4th 765, 782, 125 Cal. Rptr. 2d 804* (because appellant set forth only its own evidence, and ignored trial court's findings and evidence in support of those findings, court held it waived its substantial evidence claim)].

An appellant challenging a judgment on the basis of insufficient evidence must be aware of the importance of presenting a complete record when designating the record on appeal. If the record provided does not reflect all of the conflicting evidence admitted, the reviewing court may conclusively presume the evidence was ample to sustain the trial court's factual findings and limit its review to the question whether the findings support the judgment [

Construction Financial v. Perlite Plastering Co. (1997) 53 Cal. App. 4th 170, 179, 61 Cal. Rptr. 2d 574] . For discussion and forms relating to designating the record, see Ch. 44, *Appeal: Preparing and Filing the Record* .

PRACTICE TIP:

Claims Based on Insufficiency of the Evidence. Appellate courts rarely reverse for lack of substantial evidence. These appeals are the hardest to argue and the hardest to win. Counsel should therefore be very selective about when and whether to raise this issue. If there is any other strong ground for an appeal, it is often wise not to challenge the sufficiency of the evidence. Raising this issue can undermine the appellant's overall credibility.

By definition, the appellant must show that after reviewing the entire record, there is no substantial evidence to support what happened in the trial court. Whether the brief argues that there is no substantial evidence or that the evidence doesn't support the legal conclusions underlying the judgment, the statement of facts must include all of the evidence that there is, without trying to hide the evidence from the court. In arguing under this standard of review, as with all others, be honest with the record, and discuss the unfavorable evidence, but argue why that evidence cannot support the judgment.

The principles of the "substantial evidence" standard of review are fairly uniform in their application to review factual determinations by the trial court. Appellate counsel should, nevertheless, always research and argue application of the standard from the viewpoint of precedent applying the standard in the same or similar cases as the one being reviewed. Note in particular that some factual determinations have been held to be outside the application of this standard [*see, e.g.,* *McCoy v. Hearst Corporation (1986) 42 Cal.3d 835, 846, 231 Cal. Rptr. 518, 727 P.2d 711* (independent review of determination of actual malice in *First Amendment* libel case)].

The substantial evidence or sufficiency of the evidence rule applies only to a trial court's resolution of factual conflicts: it does not apply when the question involves the legal consequences that flow from the facts [*see* *Crocker National Bank v. City and County of San Francisco (1989) 49 Cal. 3d 881, 888, 264 Cal. Rptr. 139, 782 P.2d 278]* .

For discussion of some of the particular orders, judgments, or rulings to which the substantial evidence standard applies (or usually applies), see [5], *below*. For discussion of review when the issue involves both questions of law and fact, see *§ 41.15*.

[c] Review of Evidence Is Made in Light Favoring Trial Court Ruling

If there is substantial evidence in the record, that is sufficient to affirm the factual conclusions under review.

Because of the fundamental presumption that a judgment or verdict is correct [*see § 43.10[2]*], a reviewing court applying the substantial evidence test begins with the presumption that the record contains evidence to sustain every finding of fact [*Foreman & Clark Corp. v. Fallon (1971) 3 Cal. 3d 875, 881, 92 Cal. Rptr. 162, 479 P.2d 362]* . It then considers the evidence disclosed by the record in the light most favorable to the party prevailing below (*i.e.*, the respondent) and takes into account every reasonable inference supporting the trial court's decision or the jury's verdict [*McRae v. Department of Corrections and Rehabilitation (2006) 142 Cal. App. 4th 377, 389, 48 Cal. Rptr. 3d 313* ; *In re Complex Asbestos Litigation (1991) 232 Cal. App. 3d 572, 597, 283 Cal. Rptr. 732]* . Finally, the appellate court ignores contrary evidence, resolving every conflict in favor of the ruling under review [*see* *Pool v. City of Oakland (1986) 42 Cal. 3d 1051, 1056 n.1, 1061, 232 Cal. Rptr. 528, 728 P.2d 1163* ; *see also* Marer, *Demystifying Appellate Review Standards*, 7(2) Cal. Litig. 33, 35 (1994)]. In sum, the appellate court draws all reasonable inferences permitted by the evidence that favor the respondent.

[d] When Evidence Is Not "Substantial"

"Any substantial" evidence is not synonymous with "any" evidence. Toconstitute sufficient substantiality to support the verdict, the evidence must be reasonable in nature, credible, and of solid value; it must actually be substantial proof of the essentials that the law requires in a particular case [*Bridgeman v. McPherson, (2006) 141 Cal. App. 4th 277, 286, 45 Cal. Rptr. 3d 813* (unsworn memoranda and hearsay do not constitute substantial evidence); *Kruse v. Bank of America (1988) 202 Cal. App. 3d 38, 51, 248 Cal. Rptr. 217]* . The judgment or verdict must be a product of logic and comport with physical laws and human experience [*Louis & Diederich v. Cambridge European Imports, Inc. (1987) 189 Cal. App. 3d 1574, 234 Cal. Rptr. 889]* . When an expert's opinion is premised upon facts contradicted by the only evidence of record, the expert's opinion does not constitute substantial evidence in support of the judgment [People ex *Rel. Edmund G. Brown, Jr. v. Tri-Union Seafoods, LLC (2009) 171 Cal. App. 4th 1549, 1567, 90 Cal. Rptr. 3d 644* ; *Maples v. Kern County Assessment Appeals Board (2002) 103 Cal. App. 4th 172, 198, 126 Cal. Rptr. 2d 585* (expert's testimony and written report contradicted his claimed use of certain valuation standard and therefore did not constitute substantial evidence in support of the judgment)].

A reviewing court will not uphold a judgment or verdict based on evidence that is inherently improbable. [*Schaffield v. Abboud (1993) 15 Cal. App. 4th 1133, 1142, 19 Cal. Rptr. 2d 205]* . However, evidence which merely discloses unusual circumstances does not come within that category; there must exist either aphysical impossibility that the evidence is true, or the falsity of the evidence must be apparent without resort to inferences or deductions [*Schaffield v. Abboud (1993) 15 Cal. App. 4th 1133, 1142, 19 Cal. Rptr. 2d 205]* .

PRACTICE TIP:

Reversal Is Rare Under Substantial Evidence Standard. There are relatively few cases in which the appellate courts have considered the evidence as a whole and found that the respondent's evidence was not of ponderable legal significance. "Substantial" evidence is a term of art, and its meaning in practical results can be very different from what one would expect based on the ordinary use of language. Ordinarily, one would think of substantial evidence as evidence that is heavy or solid. In fact, the test is often deemed satisfied by little more than a shred, for example, by the testimony of a single witness, even that of an interested party alone.

The appellate court does, however, sometimes reverse because the result is overwhelmingly unfair. Such an opinion may describe the respondent's evidence as being not of "ponderable legal significance" or as "inherently incredible." If counsel decides to seek this result, indicate that you are not asking the court to reweigh the evidence or challenge the credibility of the evidence. Argue rather that the evidence is insufficient as a matter of law. In some cases, the evidence may be inherently incredible because it is self-contradictory or physically impossible, for example, when an expert witness's opinion was not based on a foundation in the evidence introduced at trial. In other cases, it may be arguable that no evidence was presented on one of the necessary elements of the cause of action.

[e] Facts Determined by Affidavit

When the trial court decides a question of fact based on the presentation of affidavits rather than on oral testimony, the same substantial evidence standard applies on review. Those affidavits favoring the contention of the prevailing party establish all facts stated therein as well as any facts that can reasonably be inferred therefrom. The determination of controverted facts by the trial court, even on the basis of affidavits, will not be disturbed on appeal [*Bolkiah v. Superior Court (1999) 74 Cal. App. 4th 984, 1000, 88 Cal. Rptr. 2d 540]* .

[2] "Substantial Evidence" Standard Applies Regardless of Burden of Proof Used at Trial

On review of a factual determination, the sufficiency of evidence standard applies regardless of the standard used by the trial court's trier of fact to weigh evidence [*Crail v. Blakely (1973) 8 Cal. 3d 744, 750, 106 Cal. Rptr. 187, 505 P.2d*

1027 ("clear and convincing" showing required at trial)].

[3] No Challenge to Evidence on Limited Record

In an appeal on a limited record, such as one including only the clerk's transcript or the judgment roll, every presumption is in favor of the validity of the judgment and any condition of facts consistent with its validity will be presumed to have existed rather than one that will defeat it [*Wheelright v. County of Marin (1970) 2 Cal. 3d 448, 454, 85 Cal. Rptr. 809, 467 P.2d 537* ; *Nielsen v. Gibson (2009) 178 Cal. App. 4th 318, 324-325, 100 Cal. Rptr. 3d 335]* . If no evidence or only a portion of the evidence is designated as part of the record on appeal, the appellant may not challenge the sufficiency of the evidence [*Sui v. Landi (1985) 163 Cal. App. 3d 383, 385-386*]. The only fact-related questions presented do not really involve the sufficiency of the evidence, but rather the sufficiency of the pleadings and whether the findings support the judgment [*see Kass v. Weber (1968) 261 Cal. App. 2d 417, 418, 67 Cal. Rptr. 876]* .

For further discussion of appeal on a limited record, such as on the clerk's transcript or the judgment roll only, see Ch. 44, *Appeal: Preparing and Filing the Record* .

[4] Waiver of Issue on Appeal for Failure to State Facts Appropriately

An appellant contending on appeal that the evidence does not support particular findings by the trial court or jury must demonstrate that there is no substantial evidence to support the challenged findings. A recitation of evidence favorable to the appellant is not the demonstration contemplated under this rule. In arguing that the evidence does not adequately support a particular finding of fact, appellantmust set forth in the brief all the material evidence on the point and not merely appellant's evidence. Unless this is done, the error is deemed waived [*Foreman & Clark Corp. v. Fallon (1971) 3 Cal. 3d 875, 881, 92 Cal. Rptr. 162, 479 P.2d 362; In re S.C. (2006) 138 Cal. App. 4th 396, 414-415, 41 Cal. Rptr. 3d 453]* . Failure to acknowledge the proper standard of review may be considered by the appellate court a concession of lack of merit [*James B. v. Superior Court (1995) 35 Cal. App. 4th 1014, 1021, 41 Cal. Rptr. 2d 762, 767]* .

PRACTICE TIP:

Appellant's Failure to State Facts in the Light Most Favorable to the Judgment. It can be psychologically difficult for appellant's counsel to state "negative" facts, that is, all the evidence in favor of the judgment that appellant is challenging. Nevertheless, it is vital. Otherwise the appellant will lose credibility. Failure to state the evidence in the manner required by the substantial evidence test dooms not only that legal argument, but probably everything else that the appellant is trying to persuade the appellate court.

If an appellant makes a sufficiency of evidence argument but fails to state the facts in the light most favorable to the judgment, the respondent should point out this defect in its brief for three reasons. First, it alerts the appellate court that it may not be possible to take the appellant's statement of facts at face value. Second, the appellate court may find the issue waived for failure to present it properly [*Foreman & Clark Corp. v. Fallon (1971) 3 Cal. 3d 875, 881, 92 Cal. Rptr. 162, 479 P.2d 362]* . Lastly, in rare cases, the appellate court may strike the appellant's brief [*Cal. Rules of Ct., Rule 8.204(e)*; *see Ch. 50, Appeal: Briefs, § 50.19*]. Respondent's counsel should, however, avoid any temptation to request that appellant's brief be stricken on this ground. It is almost always better simply to point out the appellant's short-comings in respondent's brief, or at most, request that appellant be given an opportunity to correct the statement of facts, a correction that will only help rather than harm respondent.

[5] Particular Applications of Substantial Evidence Standard

[a] General Verdict

When several counts or issues are tried, a general verdict will not be disturbed by an appellate court if any one of the counts or issues is supported by substantial evidence and is unaffected by error. This rule requires that the reviewing court assume that the jury found on the cause of action that it is supported by substantial evidence and is free of error [*Liberty Transport, Inc. v. Harry W. Gorst Co. (1991) 229 Cal. App. 3d 417, 427, 280 Cal. Rptr. 159* , disapproved on other grounds in *Adams v. Murakami (1991) 54 Cal. 3d 105, 116, 284 Cal. Rptr. 318, 813 P.2d 1348]* .

The general verdict rule provides that where several counts are tried, a general verdict will be sustained if any one count is supported by substantial evidence and is unaffected by error, despite possible insufficiency of evidence as to the remaining counts [*Tavaglione v. Billings (1993) 4 Cal. 4th 1150, 1157, 17 Cal. Rptr. 2d 608, 847 P.2d 574]* . The general verdict rule does not apply, however, when the jury has, along with a general verdict, rendered special findings assigning specific damage amounts to specific counts [*Tavaglione v. Billings (1993) 4 Cal. 4th 1150, 1158, 17 Cal. Rptr. 2d 608, 847 P.2d 574]* .

When reviewing a verdict based in part on excludable evidence, the reviewing court first strips away the inadmissible evidence and asks whether enough admissible evidence remains to sustain the verdict [*see* *In re Dorinda A. (1992) 10 Cal. App. 4th 1657, 1663, 13 Cal. Rptr. 2d 653]* . This, of course, presupposes finding an error by the trial court in admitting the evidence, over a proper objection by the appellant; any other circumstance involving inadmissible evidence may be categorized as invited or waived error [*see* discussion regarding invited error in § 41.10[3][b]; *see also* discussion regarding evidentiary rulings in [1][a], *above*].

[b] Directed Verdict

On review after a directed verdict, the appellate court views the evidence in the light most favorable to the losing party and resolves all conflicts and inferences in that party's favor [*Fariba v. Dealer Services Corporation (2009) 178 Cal. App. 4th 156, 174, 100 Cal. Rptr. 3d 219*]. The judgment must be reversed if a hypothetical judgment for appellant can be supported under the "substantial evidence" standard [*see* *Colbough v. Hartline (1994) 29 Cal. App. 4th 1516, 1521, 35 Cal. Rptr. 2d 213]* . For discussion concerning directed verdicts generally, see Ch. 326A, *Jury Verdicts* .

[c] Judgment Notwithstanding the Verdict

On an appeal from a judgment notwithstanding the verdict, the appellate court must read the record in the light most advantageous to the party in whose favor the verdict was rendered, resolve all conflicts in that party's favor, and give that party the benefit of all reasonable inferences in support of the original verdict [*Mason v. Lake Dolores Group, LLC (2004) 117 Cal. App. 4th 822, 829-830, 840, 11 Cal. Rptr. 3d 914* (reversing JNOV based on whether employee's injury arose out of course of employment); *Borba v. Thomas (1977) 70 Cal. App. 3d 144, 151-152, 138 Cal. Rptr. 565]* . This is, in essence, an application of the "substantial evidence" standard. For further discussion concerning proceedings for judgment notwithstanding the verdict, see *Ch. 371, Motions After Trial, § 357.30* et seq.

[d] Nonsuit

With respect to review of a motion for nonsuit, the appellate court must accept all facts asserted in the plaintiff's opening statement as true and must indulge every legitimate inference which may be drawn from those facts. A grant of a nonsuit can only be upheld on appeal if, after accepting all the asserted facts as true and indulging every legitimate inference in favor of plaintiff, it can be said those facts and inferences lead inexorably to the conclusion plaintiff cannot establish an essential element of its cause of action or has inadvertently established uncontrovertible proof of an affirmative defense [*Cooper v. State Farm Mutual Automobile Insurance Co. (2009) 177 Cal. App. 4th 876, 891-892, 99 Cal. Rptr. 3d 870* ; *Abeyta v. Superior Court (1993) 17 Cal. App. 4th 1037, 1041, 21 Cal. Rptr. 2d 680]* . This is, in essence, a variation of the "substantial evidence" standard of review. The reviewing court will not consider any ground for the nonsuit not raised in the trial court unless it identifies an incurable defect [*Lombardo v. Huysentruyt (2001) 91 Cal. App. 4th 656, 664, 110 Cal. Rptr. 2d 691]* . For discussion concerning judgment on the pleadings, see Ch. 206,

Demurrers and Motions for Judgment on the Pleadings .

[e] Jury Instructions

When an appellant contends the trial court erred by not giving requested jury instructions or instructions the trial court was required to give *sua sponte*, the appellate court will review the record to determine whether there was sufficient evidence to justify the instruction, viewing the evidence in the light most favorable to the appellant, before determining whether the failure to give the instruction was error and, if it was, whether the error was prejudicial. The appellate court assumes the jury might have believed the appellant's evidence and,if properly instructed, might have decided in the appellant's favor [*Sills v. Los Angeles Transit Lines (1953) 40 Cal. 2d 630, 633, 255 P.2d 795* ; *Huffman v. Interstate Brands Corp. (2004) 121 Cal. App. 4th 679, 691-692, 17 Cal. Rptr. 3d 397* (court assumes jury might have believed appellant's evidence and might have decided in appellant's favor); *Shell Oil Co. v. Winterthur Swiss Ins. Co. (1993) 12 Cal. App. 4th 715, 773, 15 Cal. Rptr. 2d 815* ; *but see Mendoza v. Club Car, Inc. (2000) 81 Cal. App. 4th 287, 306, 96 Cal. Rptr. 2d 605* (instructional error harmless unless it results in miscarriage of justice)].

The substantial evidence test also applies when challenging a jury instruction that was given on the ground that there was insufficient evidence to justify having given it. However, an appellant who requested an instruction that was in fact given by the trial court is generally bound by the jury's determination based on that instruction, and may not argue on appeal that the evidence was insufficient to submit to the jury on that issue [*Williams v. Volkswagenwerk Aktiengesellschaft (1986) 180 Cal. App. 3d 1244, 1264, 226 Cal. Rptr. 306]* . This variation of the "invited error" doctrine presupposes a record disclosing that the objecting party failed to make proper objections or take other defensive action before submitting the jury instruction that was in fact given [*see* discussion in *§ 41.10[3][b]*]. Thus, if the appellant objected to *any* instruction being given on an issue because there was insufficient evidence on that issue, the objection was overruled, and appellant thereafter submitted an instruction on the issue as an alternative to one proposed by the opposing party, the appellant may then be in a position to argue later that there was not sufficient evidence to give that instruction.

Factors the appellate courts consider, when determining whether instructional error was prejudicial, include the following [*Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 570-571, 34 Cal. Rptr. 2d 607, 882 P.2d 298* ; *Weaver v. Chavez (2005) 133 Cal. App. 4th 1350, 35 Cal. Rptr. 3d 514]* :

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

[f] Enforcement of Settlement

Substantial evidence review is the proper standard for a trial court's factual determination on a motion to enforce settlement pursuant to *Code Civ. Proc. § 664.6* [*In re Marriage of Assemi (1994) 7 Cal. 4th 896, 911, 30 Cal. Rptr. 2d 265, 872 P.2d 1190* ; *Conservatorship of McElroy v. Kravagna (2002) 104 Cal. App. 4th 536, 544-546, 128 Cal. Rptr. 2d 485* (substantial evidence standard applied even though appellate court could watch videotape of proceedings at issue)]. For discussion concerning enforcement of settlements under *Code Civ. Proc. § 664.6*, see Ch. 520, *Settlement and Release* .

[g] Award of Damages

The amount of damages is a factual question, first committed to the discretion of the jury or trial court sitting as trier of fact, and next to the discretion of the trial judge on a motion for new trial. On review, the appellate court indulges all presumptions in favor of the decision of the trial court and can interfere only on the ground that the verdict is so large that, at first blush, it shocks the conscience and suggests passion, prejudice or corruption on the part of the jury [*Fagerquist v. Western Sun Aviation, Inc. (1987) 191 Cal. App. 3d 709, 727-728, 236 Cal. Rptr. 633]* . For further discussion and forms concerning damages generally, see Ch. 177, *Damages* .

[h] Issues in Contractual Arbitration Proceeding

Whether a party has waived the right to compel arbitration is ordinarily a question of fact which is binding on the appellate court if it is supported by substantial evidence [*Davis v. Continental Airlines, Inc. (1997) 59 Cal. App. 4th 205, 211, 69 Cal. Rptr. 2d 79]* .

Similarly, whether the parties formed a valid agreement to arbitrate is determined under general California contract law, and the trial court's determination concerning whether an enforceable agreement exists is reviewed under the substantial evidence test [*City of Vista v. Sutro & Co. (1997) 52 Cal. App. 4th 401, 407, 60 Cal. Rptr. 2d 488]* . If, however, the determination of whether an agreement to arbitrate exists is simply a matter of contract or statutory interpretation, with no accompanying factual issues to be resolved, it is a question of law subject to the appellate court's independent review [*County of Contra Costa v. Kaiser Foundation Health Plan, Inc. (1996) 47 Cal. App. 4th 237, 241, 54 Cal. Rptr. 2d 628]* .

For further discussion concerning judicial review of contractual arbitration, see Ch. 34, *Contractual Arbitration: Judicial Review* .

[i] Laches

Case law is split regarding the correct standard of review of a ruling allowing or disallowing laches as an affirmative defense. One line holds that the correct standard of review is substantial evidence [*see Marshall v. Marshall (1965) 232 Cal. App. 2d 232, 252, 42 Cal. Rptr. 686]* . Another regards the abuse of discretion standard to be applicable [*see In re Marriage of Fogarty & Rasbeary (2000) 78 Cal. App. 4th 1353, 1364-1365, 93 Cal. Rptr. 2d 653]* . A third line of cases applies a standard under which the appellate court will not interfere with the trial court's ruling unless the trial court's conclusions do not find substantial support in the evidence or it is obvious that a manifest injustice has been done [*Chang v. City of Palos Verdes Estates (1979) 98 Cal. App. 3d 557, 563, 159 Cal. Rptr. 630* ; *see In re Marriage of Fogarty & Rasbeary (2000) 78 Cal. App. 4th 1353, 1364, 93 Cal. Rptr. 2d 653* (describing this as a "mixed" standard)].

For further discussion concerning laches, see its application as a defense in the chapter covering the particular type of lawsuit in which the defense is raised.

[j] Additional Examples

For additional examples of when the substantial evidence standard applies, see*§§ 41.12[3][b],[k],* and*[l],* and *41.13[4][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on AppealCivil ProcedureAppealsStandards of ReviewSubstantial EvidenceSufficiency of Evidence

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A. Standards of Review

5-41 California Forms of Pleading and Practice--Annotated § 41.14

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§ 41.14 Independent Review of Trial Court's Rulings

[1] Applicability to Questions of Law

The reviewing court conducts an independent or "de novo" review of questions of law [*see Professional Engineers in California Government v. Kempton (2007) 40 Cal. 4th 1016, 1032, 56 Cal. Rptr. 3d 814, 155 P.3d 226* ; *20th Century Ins. Co. v. Garamendi (1994) 8 Cal. 4th 216, 271, 32 Cal. Rptr. 2d 807, 878 P.2d 566* ; *In re Groundwater Cases (2007) 154 Cal. App. 4th 659, 674, 64 Cal. Rptr. 3d 827* (interpretation of legal opinion subject to de novo review)]. If a question relates to the selection of a rule of law, or requires critical consideration, in a factual context, of legal principles and their underlying values, it is a question of law [*Crocker National Bank v. City and County of San Francisco (1989) 49 Cal. 3d 881, 888, 264 Cal. Rptr. 139, 782 P.2d 278]* .

[2] Purpose and Scope of Independent Review

Pure questions of law are reviewed independently or "de novo" to ensure uniformity of application of the law in the trial courts [*see Mancuso v. Southern Cal. Edison Co. (1991) 232 Cal. App. 3d 88, 95, 283 Cal. Rptr. 300* ; *Rudd v. California (1990) 219 Cal. App. 3d 948, 951-952, 268 Cal. Rptr. 624* ; *see also* Marer, *Demystifying Appellate Review Standards*, 7(2) California Litigation 33, 34 (1994)].

In conducting an independent review, the appellate court is not bound by the interpretation or construction that the trial court gave to the law in question [*see 20th Century Ins. Co. v. Garamendi (1994) 8 Cal. 4th 216, 271, 32 Cal. Rptr. 2d 807, 878 P.2d 566]* .

PRACTICE TIP:

Appellants Should Argue for Application of This Standard if Possible. Appellate counsel should research and argue the application of the independent standard of review with reference to precedent applying the standard in cases identical or similar to that being reviewed. An independent review, however, favors an appellant more than the other standards, to the extent that, unlike the other standards,

> it does *not* favor the trial court ruling and hence the respondent. Therefore counsel for appellant should always try to argue that this standard applies, if the applicable standard is arguably in doubt. For example, appellant's counsel may argue that an issue involving mixed questions of law and fact is predominantly legal and should be decided "de novo" as a question of law [*see* discussion in [5], *below*], or that an issue is factually undisputed and therefore is a question of pure law subject to "de novo" review [*see* Marer, *Demystifying Appellate Review Standards*, 7(2) California Litigation 33, 34 (1994)].

Note that, as with other types of trial court error, the appellant has the burden of showing that an error of pure law is prejudicial to a point justifying reversal [*see Cal. Const., art. VI, § 13* and discussion in *§ 41.30[1]*].

For discussion of the some of the particular orders, judgments, or rulings to which the independent review standard applies (or usually applies), see [4], *below*. For discussion of review when the issue involves both questions of law and fact, see*§ 41.15*.

[3] Affirmance of "Right Ruling for Wrong Reason"

As discussed in [2], *above*, an appellate court conducting an independent review of a question of law is free to interpret a rule of law without regard or deference to the trial court's interpretation. Conversely, however, the reviewing court examines the validity of that ruling without regard to the lower court's underlying reasons for the ruling. Because of the fundamental presumption that the trial court ruling is correct [*see § 41.10[2]*], the reviewing court will affirm a "right ruling for the wrong reason." That is, it will uphold a ruling if it is correct on any theory of law applicable to the case, despite the fact that the trial court made that ruling on the basis of erroneous reasoning or for other improper considerations [*D'Amico v. Board of Medical Examiners (1974) 11 Cal. 3d 1, 19, 112 Cal. Rptr. 786, 520 P.2d 10* ; *Hiser v. Bell Helicopter Textron Inc. (2003) 111 Cal. App. 4th 640, 647-648, 4 Cal. Rptr. 3d 249* (court reviews judgment for reversible error, to determine not merely whether trial court's interpretation of statute was correct, but whether judgment is correct on any theory); *see also* *Carnes v. Superior Court (2005) 126 Cal. App. 4th 688, 694, 23 Cal. Rptr. 3d 915* (on review of summary judgment, appellate court reviews ruling, not rationale); *Heller v. Franchise Tax Bd. (1994) 21 Cal. App. 4th 1730, 1735, 27 Cal. Rptr. 2d 88* (review of summary judgment proceedings although no facts disputed); *Brown v. State of California (1993) 21 Cal. App. 4th 1500, 1506, 26 Cal. Rptr. 2d 687* (review of dismissal after sustained demurrer)].

[4] Particular Applications of Independent Review Standard

[a] Contract Interpretation on Undisputed Facts

The appellate court reviews independently the interpretation of a contract if no extrinsic evidence was admitted to aid in the interpretation of the contract or if extrinsic evidence was admitted but was not in dispute [*Parsons v. Bristol Development Co. (1965) 62 Cal. 2d 861, 865-866, 44 Cal. Rptr. 767, 402 P.2d 839* ; *Warburton/Buttner v. Superior Court (2002) 103 Cal. App. 4th 1170, 1180, 127 Cal. Rptr. 2d 706* (court independently reviewed contract regarding Indian tribe's waiver of sovereign immunity)]. Whether a contract is clear and unambiguous and therefore not in need of extrinsic evidence to aid in its interpretation is a question of law for the court. The appellate court makes this determination independently as well [*Sanchez v. Bally's Total Fitness Corp. (1998) 68 Cal. App. 4th 62, 69, 79 Cal. Rptr. 2d 902]* .

When, however, extrinsic evidence has been properly admitted to aid in interpreting a contract, the appellate court will uphold a reasonable construction of the contract by the trier of fact if it is supported by substantial evidence [*In re Marriage of Fonstein (1976) 17 Cal. 3d 738, 746-747, 131 Cal. Rptr. 873, 552 P.2d 1169* ; *Apple Computer, Inc. v. County of Santa Clara Assessment Appeals Board (2003) 105 Cal. App. 4th 1355, 1365, 130 Cal. Rptr. 2d 335* (reviewing stipulation between tax board and taxpayer)]. For detailed discussion concerning contracts generally, see Ch. 140, *Contracts* .

[b] Statutory Interpretation on Undisputed Facts

When the facts are undisputed and the only issue on appeal is the proper interpretation of a statute, the appellate court independently reviews it [*Connerly v. State Personnel Bd. (2006) 37 Cal. 4th 1169, 1175, 39 Cal. Rptr. 3d 788, 129 P.3d 1* (de novo review of whether California Business Council can be assessed attorney fees under *Code Civ. Proc. § 1021.5*); *Law Offices of Dixon R. Howell v. Valley (2005) 129 Cal. App. 4th 1076, 1088, 29 Cal. Rptr. 3d 499* (whether statute requires dismissal of action is question of statutory interpretation independently reviewed by appellate court); *Librers v. Black (2005) 129 Cal. App. 4th 114, 124, 28 Cal. Rptr. 3d 188* (application of statute is question of law if relevant facts not in dispute); *Upland Police Officers Assn. v. City of Upland (2003) 111 Cal. App. 4th 1294, 1301, 4 Cal. Rptr. 3d 629* (court applied de novo standard of review to interpret Public Safety Officers Procedural *Bill of Rights Act*); *Nguyen v. Calhoun (2003) 105 Cal. App. 4th 428, 437-438, 129 Cal. Rptr. 2d 436* (case submitted on stipulated facts subject to independent review); *Simpson v. Unemployment Ins. Comp. Appeals Bd. (1986) 187 Cal. App. 3d 342, 350, 231 Cal. Rptr. 690]* . In the public interest, the court may reject a concession by the parties concerning a statute's interpretation and determine the meaning itself [*R.J. Land & Associates Const. Co. v. Kiewit-Shea (1999) 69 Cal. App. 4th 416, 427 n.4, 81 Cal. Rptr. 2d 615]* . For discussion concerning statutory interpretation, see Ch. 531, *Statutes and Ordinances* .

[c] Summary Judgment

On appeal from a judgment after the granting of summary judgment, the appellate court independently reviews the motion, following the procedure established in *Code Civ. Proc. § 437c,* to determine whether it was properly granted or denied [*Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56, 64, 74 Cal. Rptr. 3d 108* ; *Lyle v. Warner Brothers Television Productions (2006) 38 Cal. 4th 264, 274, 42 Cal. Rptr. 3d 2, 132 P.3d 211* ; *County of San Diego v. Ace Property & Cas. Ins. Co. (2005) 37 Cal. 4th 406, 414, 33 Cal. Rptr. 3d 583* ; *Wiener v. Southcoast Childcare Centers, Inc. (2004) 32 Cal. 4th 1138, 1142, 12 Cal. Rptr. 3d 615, 88 P.3d 517* (reviewing summary judgment on negligence claim based on foreseeability of criminal act); *Colmenares v. Braemar Country Club, Inc. (2003) 29 Cal. 4th 1019, 1031-1032, 130 Cal. Rptr. 2d 662, 63 P.3d 220* (remanding case to trial court to determine whether summary judgment was proper on any ground advanced by defendant in light of revised definition of "disability" under *FEHA); Regents of Univ. of Cal. v. Superior Court (1999) 20 Cal. 4th 509, 531, 85 Cal. Rptr. 2d 257, 976 P.2d 808]* .

The only exceptions to the rule of independent review of a summary judgment are rulings concerning additional time for discovery under *Code Civ. Proc. § 437c(h)* and on the sole witness and mental state provisions of *Code Civ. Proc. § 437c(e),* which are subject to the abuse of discretion standard [*see Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 212 n.3, 285 Cal. Rptr. 717* ; *Saldana v. Globe-Weis Systems Co. (1991) 233 Cal. App. 3d 1505, 1512 n.3, 285 Cal. Rptr. 385* ; *see also Scott v. CIBA Vision Corp. (1995) 38 Cal. App. 4th 307, 313-314, 326, 44 Cal. Rptr. 2d 902* (when continuance not mandatory because conditions of *Code Civ. Proc. § 437c(h)* were not met, appellate court reviews trial court's denial of continuance under abuse of discretion standard); *Angell v. Peterson Tractor, Inc. (1994) 21 Cal. App. 4th 981, 985-986, 26 Cal. Rptr. 2d 541* (rulings under *Code Civ. Proc. § 437c(e)* are discretionary)].

For further discussion of standards of review on appeal after summary judgment, see Ch. 537, *Summary Judgment* .

[d] Demurrer Sustained

On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the reviewing court applies an independent review standard, giving the complaint a reasonable interpretation and treating the demurrer as admitting all material facts properly pleaded [*Farm Raised Salmon Cases (2008) 42 Cal. 4th 1077, 1089 n.10, 72 Cal. Rptr. 3d 112, 175 P.3d 1170* ; *Shirk v. Vista Unified School District (2007) 42 Cal. 4th 201, 205, 64 Cal. Rptr. 3d 210, 164 P.3d 630* ; *City of Dinuba v. County of Tulare (2007) 41 Cal. 4th 859, 865, 62 Cal. Rptr. 3d 614, 161 P.3d 1168* ; *Kearney v. Salomon Smith Barney, Inc. (2006) 39 Cal. 4th 95, 101, 45 Cal. Rptr. 3d 730, 137 P.3d 914* ;

Barratt American, Inc. v. City of Rancho Cucamonga (2005) 37 Cal. 4th 685, 692, 37 Cal. Rptr. 3d 149, 124 P.3d 719 ; *Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal. 4th 797, 810, 27 Cal. Rptr. 3d 661* ; *Blank v. Kirwan (1985) 39 Cal. 3d 311, 318, 216 Cal. Rptr. 718, 703 P.2d 58* ; *Aubry v. Tri-City Hospital Dist. (1992) 2 Cal. 4th 962, 966-967, 9 Cal. Rptr. 2d 92, 831 P.2d 317* (noting also that the appellate court does not assume the truth of contentions, deductions or conclusions of law); *Swift v. Department of Corrections (2004) 116 Cal. App. 4th 1365, 1370* (upholding demurrer based on defendant's immunity from plaintiff's suit); *see also Miklosy v. Regents of the University of California (2008) 44 Cal. 4th 876, 883, 80 Cal. Rptr. 3d 690, 188 P.3d 629* (when case comes before appellate court from judgment sustaining demurrer, court assumes truth of facts alleged in complaint and reasonable inferences that may be drawn from those facts)]. This is because a demurrer tests only the legal sufficiency of the pleadings; it does not test the truth of the complaint's allegations or their accuracy, but admits the truth of all material factual allegations and the plaintiff's ability to prove them [*Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 47, 77 Cal. Rptr. 2d 709, 960 P.2d 513]* .

The judgment must be affirmed if any ground for the demurrer is well taken [*Campbell v. Regents of the University of California (2005) 35 Cal. 4th 311, 320, 25 Cal. Rptr. 3d 320* (sustaining demurrer based on plaintiff's failure to exhaust administrative remedies); *Total Call International, Inc. v. Peerless Ins. Co. (2010) 181 Cal. App. 4th 161, 169, 104 Cal. Rptr. 3d 319* (demurrer affirmed on any properly supported ground, regardless of trial court's basis for ruling); *Schuster v. Gardner (2005) 127 Cal. App. 4th 305, 315, 25 Cal. Rptr. 3d 468* (sustaining demurrer on ground that action was derivative and therefore plaintiff lacked standing); *Coast Plaza Doctors Hospital v. UHP Healthcare (2002) 105 Cal. App. 4th 693, 704-705, 129 Cal. Rptr. 2d 650* (demurrer sustained regarding whether health care provider may seek reimbursement directly from health care insurer for services rendered to enrollees of health care plan)]. It must be reversed, however, if the plaintiff stated a cause of action under any possible legal theory, regardless of the label attached to the cause of action [*Aubry v. Tri-City Hospital Dist. (1992) 2 Cal. 4th 962, 966-967, 9 Cal. Rptr. 2d 92, 831 P.2d 317* ; *Saunders v. Cariss (1990) 224 Cal. App. 3d 905, 908, 274 Cal. Rptr. 186* ; *Platt v. Coldwell Banker Residential Real Estate Services (1990) 217 Cal. App. 3d 1439, 1444, 266 Cal. Rptr. 601* (reversible error is committed if the facts alleged show entitlement to relief under any possible legal theory)].

It is also reversible error, in sustaining a demurrer without leave to amend, if the plaintiff shows, either in the trial court or on appeal, that there is a reasonable possibility any defect identified by the defendant can be cured by amendment [*City of Dinuba v. County of Tulare (2007) 41 Cal. 4th 859, 865, 62 Cal. Rptr. 3d 614, 161 P.3d 1168* ; *Schifando v. City of Los Angeles (2003) 31 Cal. 4th 1074, 1081, 6 Cal. Rptr. 3d 457, 79 P.3d 569* (reversing demurrer granted on ground city employees must exhaust city charter internal remedies before filing FEHA suit); *Aubry v. Tri-City Hospital Dist. (1992) 2 Cal. 4th 962, 966-967, 9 Cal. Rptr. 2d 92, 831 P.2d 317* ; *Herzberg v. County of Plumas (2005) 133 Cal. App. 4th 1, 12, 34 Cal. Rptr. 3d 588* ; *Murphy v. BDO Seidman (2003) 113 Cal. App. 4th 687, 691-692* (overruling demurrer in part); *Richelle L. v. Roman Catholic Archbishop of San Francisco (2003) 106 Cal. App. 4th 257, 266, 130 Cal. Rptr. 2d 601* (if reasonable possibility defect can be cured by amendment, demurrer must be reversed)]. The burden is on the appellant to show how the amendment will change the legal effect of the complaint [*Swift v. Department of Corrections (2004) 116 Cal. App. 4th 1365, 1373* (upholding demurrer based on defendant's immunity from plaintiff's suit)]. If the demurrer was sustained with leave to amend and the plaintiff elected not to amend before entry of judgment of dismissal, the appellate court presumes the plaintiff stated as strong a case as possible and resolves all ambiguities and uncertainties raised by the demurrer against the plaintiff [*Casella v. City of Morgan Hill (1991) 230 Cal. App. 3d 43, 48, 280 Cal. Rptr. 876* ; *but see Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal. App. 3d 1371, 1386, 272 Cal. Rptr. 387* (plaintiff need not show it can amend at trial level so long as it can so demonstrate to the appellate court)].

PRACTICE TIP:

Specify Additional Facts in Opening Brief. The appellant's opening brief may be able to offer additional facts that would state a cause of action, but were not presented to the trial court. Appellant's counsel should request that the appellate court reverse with direction to the trial court to grant appellant leave to amend the complaint to add such facts.

For further discussion and forms concerning demurrers generally, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[e] Judgment on the Pleadings

Review of a judgment on the pleadings is governed by the same standards governing a judgment following a successful demurrer, discussed in [d], *above*. A defendant is entitled to judgment on the pleadings if the plaintiff's complaint does not state a cause of action. In considering whether a defendant is entitled to judgment on the pleadings, the trial court looks only to the face of the pleading under attack; all facts alleged in the complaint are admitted for purposes of the motion, and the court determines whether those facts constitute a cause of action. The court of appeal reviews an order granting judgment on the pleadings independently [*Camacho v. Automobile Club of Southern California (2006) 139 Cal. App. 4th 63, 66 n.4, 42 Cal. Rptr. 3d 488* ; *Harris v. Grimes (2002) 104 Cal. App. 4th 180, 185-186, 127 Cal. Rptr. 2d 791* (trial court erroneously granted judgment on pleadings in legal malpractice action based on misapprehension that negligence claim could not have been litigated in earlier trial)].

If the trial court does not grant leave to amend, the court of appeal determines whether the defect can reasonably be cured by amendment. The judgment is to be affirmed if it is proper on any lawful ground raised in the motion, even if the trial court did not rely on those grounds. The appellate court reviews the trial court's denial of leave to amend for abuse of discretion [*DiPirro v. American Isuzu Motors Inc. (2004) 119 Cal. App. 4th 966, 972, 14 Cal. Rptr. 3d 787* (affirming judgment on pleadings, holding that private enforcer of Prop. 65 may not curefailure to timely provide certificate of merit by serving it months after the litigation commenced)].

For discussion concerning judgment on the pleadings, see Ch. 206, *Demurrers, and Motions for Judgment on the Pleadings* .

[f] Duty of Care in Negligence Action

The question of duty of care is one of law for the court and is subject to independent review by an appellate court [*Crocker National Bank v. City and County of San Francisco (1989) 49 Cal. 3d 881, 888, 264 Cal. Rptr. 139, 782 P.2d 278]* .

For discussion concerning duty of care in negligence actions generally, see *Ch. 380, Negligence, § 380.30* et seq. For discussion of the duty of care as it applies in specific negligence actions, see the chapter covering that action [*see, e.g.,* Ch. 421, *Premises Liability*].

[g] Strategic Lawsuit Against Public Participation (SLAPP)

On appeal after a denial of a motion to strike a SLAPP suit under *Code Civ. Proc. § 425.16*, the appellate court conducts an independent review of the motion [*Contemporary Services Corp. v. Staff Pro, Inc. (2007) 152 Cal. App. 4th 1043, 1052, 61 Cal. Rptr. 3d 434* ; *Thomas v. Quintero (2005) 126 Cal. App. 4th 635, 645, 24 Cal. Rptr. 3d 619* (petition for injunctive relief under civil harassment statute is subject to special motion to strike under anti-SLAPP statute); *Foothills Townhome Assn. v. Christiansen (1998) 65 Cal. App. 4th 688, 695, 76 Cal. Rptr. 2d 516]* . For further discussion and forms relating to SLAPP suits, see Ch. 376, *Motions to Strike: Anti-SLAPP* .

[h] Additional Examples

For additional examples of when independent review is conducted, see*§§ 41.12[3][l]* and 41.13[5][h].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsStandards of ReviewDe Novo Review

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Chapter 41 APPEAL: REVIEW STANDARDS AND APPELLATE RULES OF LAW
PART II. LEGAL BACKGROUND
A. Standards of Review

5-41 California Forms of Pleading and Practice--Annotated § 41.15

AUTHOR: Jeffery A. Hogge Author Hon. Patti S. Kitching, Victoria J. DeGoff Editorial Consultants

§ 41.15 Review of Mixed Questions of Law and Fact

The "substantial evidence" standard [*see § 41.13*] applies to questions of fact, that is, to the *establishment of historical or physical facts*. The "independent review" standard [*see § 41.14*] applies to questions of law, that is, questions *relating to the selection of a rule*. Mixed questions of law and fact concern the application of the *rule* to the *facts* and the consequent determination whether the *rule* is satisfied [*Crocker National Bank v. City and County of San Francisco (1989) 49 Cal. 3d 881, 888, 264 Cal. Rptr. 139, 782 P.2d 278* (emphasis added)].

When a question is mixed, involving both factual and legal issues, the appellate court first analyzes whether it is predominantly factual or legal. If inquiry into the question requires the application of experience with human affairs, the question is predominantly factual and the substantial evidence test applies. On the other hand, if the inquiry requires criticial consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and is reviewed independently [*20th Century Ins. Co. v. Garamendi (1994) 8 Cal. 4th 216, 271, 32 Cal. Rptr. 2d 807, 878 P.2d 566* ; *Crocker National Bank v. City and County of San Francisco (1989) 49 Cal. 3d 881, 888, 264 Cal. Rptr. 139, 782 P.2d 278* ; *McKesson HBOC, Inc. v. Superior Court (2004) 115 Cal. App. 4th 1229, 1235-1236, 9 Cal. Rptr. 3d 812* (waiver of attorney-client privilege held to be predominantly legal so appellate court would independently review trial court's decision)].

In some situations the courts have found mixed questions not to be predominantly legal or factual, and have applied both standards sequentially. In this situation a court will determine whether the facts found by the trial court are supported by substantial evidence, then select the applicable rule of law, and finally apply the rule of law to the facts to determine whether the law has been violated on the established facts [*Ghirardo v. Antonioli (1994) 8 Cal. 4th 791, 800, 35 Cal. Rptr. 2d 418, 883 P.2d 960* ; *Green v. Par Pools, Inc. (2003) 111 Cal. App. 4th 620, 627, 3 Cal. Rptr. 3d 844* (court defers to trial court's factual decisions and reviews questions of law under nondeferential standard)].

PRACTICE TIP:

Appellants Should Argue That Mixed Question Is Predominantly Legal. Many issues on appeal

involve mixed issues of law and fact. As demonstrated by the facts and holding in *Crocker National Bank v. City and County of San Francisco (1989) 49 Cal. 3d 881, 888, 264 Cal. Rptr. 139, 782 P.2d 278* , it is not always well established whether a particular mixed question is predominantly legal or factual. Because legal issues are reviewed independently, as discussed in *§ 41.14*, it is always preferable to argue, whenever possible, that a mixed question is predominantly legal because it requires a critical examination, in a factual context, of a legal principle and its underlying policies or values, and because the issue is one in which uniform application of the law is necessary, requiring independent review of its application in various factual contexts [*see* *Crocker National Bank v. City and County of San Francisco (1989) 49 Cal. 3d 881, 888, 264 Cal. Rptr. 139, 782 P.2d 278* (tax law must be uniformly applied and classification of property for this purpose by trial court must be reviewed independently to secure this uniformity; classification of property as either "fixture" or "personal property" for purposes of tax law is not a factual description but a statement of legal conclusion)].

Legal Topics:

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A. Standards of Review

5-41 California Forms of Pleading and Practice--Annotated § 41.16

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§ 41.16 Review of Judicial Bias on Part of Trial Court Judge

One of the grounds for reversing a verdict and granting a new trial is an irregularity in the proceedings of the trial court by which a party was prevented from having a fair trial [*Code Civ. Proc. § 657(1)*; *see also* Ch. 371, *Motions After Trial*, § 357.60 et seq.]. If the court's "irregularity" takes the form of a judge's bias against one of the parties based on preconceived stereotypes, the aggrieved party has sometimes raised the issue of bias directly on appeal, without objecting during trial or moving subsequently for a new trial [*see Hall v. Harker (1999) 69 Cal. App. 4th 836, 841, 82 Cal. Rptr. 2d 44* (claim of bias against attorneys by defendant attorney sued for malicious prosecution); *Catchpole v. Brannon (1995) 36 Cal. App. 4th 237, 244, 42 Cal. Rptr. 2d 440* (claim of gender bias); *see also In re Marriage of Iverson (1992) 11 Cal. App. 4th 1495, 15 Cal. Rptr. 2d 70* (claim of gender bias)].

Appellate courts have allowed such claims to be made for the first time on appeal [*see* discussion in *§ 41.10[4][b]*]. The standard of review in these cases is unique in that it is not a "review" of trial court rulings, but an initial evaluation of the trial court judge's conduct as shown in the record on appeal. In this evaluation, the appellate court determines objectively whether a reasonable person would entertain doubts concerning the judge's impartiality because the judge has revealed preconceived ideas about one of the parties based on stereotypes [*Hall v. Harker (1999) 69 Cal. App. 4th 836, 841, 82 Cal. Rptr. 2d 44* (reversing and dismissing on alternative ground); *see also Catchpole v. Brannon (1995) 36 Cal. App. 4th 237, 245-247, 42 Cal. Rptr. 2d 440* (reversing and remanding for new trial before different judge)]. For detailed discussion of the standards for disqualification for bias, from which this test is derived, see Ch. 317, *Judges* .

Legal Topics:

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

§§ 41.17[Reserved]

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B. Rules to Determine Applicable Law on Appeal

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§ 41.30 Law of the Case

[1] General Rule

The doctrine of law of the case provides that the decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case [*Nally v. Grace Community Church (1988) 47 Cal. 3d 278, 301, 253 Cal. Rptr. 97, 763 P.2d 948* ; *Santa Clarita Organization for Planning the Environment v. County of Los Angeles (2007) 157 Cal. App. 4th 149, 68 Cal. Rptr. 3d 449, 455* ; *Daar & Newman v. VRL International (2005) 129 Cal. App. 4th 482, 488-489, 28 Cal. Rptr. 3d 566* (prior trial court ruling in separate case governed by res judicata, not law of the case); *Joyce v. Simi Valley Unified Sch. Dist. (2003) 110 Cal. App. 4th 292, 304, 1 Cal. Rptr. 3d 712* (law of the case barred appellant from challenging jury instruction on second appeal); *see Quackenbush v. Superior Court (2000) 79 Cal. App. 4th 867, 874, 94 Cal. Rptr. 2d 282* (noting that dictum is not law of the case)].

The doctrine is not inflexible. The appellate court may disregard it if necessary to avoid an unjust decision arising from a misapplication of law, especially if the case must be reversed for a different reason [*Searle v. Allstate Ins. Co. (1985) 38 Cal. 3d 425, 434-435, 212 Cal. Rptr. 466, 696 P.2d 1308]* .

For discussion of the related doctrines of res judicata and collateral estoppel and their application in the context of an appeal as well as in other procedural contexts, see Ch. 491, *Res Judicata* .

[2] Prior Appellate Determination Required

Generally, the doctrine of law of the case applies only to issues that were both presented and determined in a prior appeal [*Roden v. Amerisourcebergen Corporation (2007) 155 Cal. App. 4th 1548, 1576, 67 Cal. Rptr. 3d 26* ; *Bovard v. American Horse Enterprises, Inc. (1988) 201 Cal. App. 3d 832, 841, 247 Cal. Rptr. 340* ; *see also Pigeon Point Ranch, Inc. v. Perot (1963) 59 Cal. 2d 227, 231, 28 Cal. Rptr. 865, 379 P.2d 321* (noting, in addition, that application must not result in unjust decision)]; *but see PG&E Corp. v. Public Utilities Commission (2004) 118 Cal.*

App. 4th 1174, 1193, 13 Cal. Rptr. 3d 630 (summary denial of petition for writ of review from PUC order acts as law of the case)]. For example, a trial court's denial of a motion for nonsuit based on the statute of limitations, as opposed to an appellate determination of the issue, does not conclusively establish the statute of limitations in the case, but is merely an interim ruling subject to correction at any time up to final judgment [*Abreu v. Svenhard's Swedish Bakery (1989) 208 Cal. App. 3d 1446, 1456, 257 Cal. Rptr. 26]* . The doctrine does not apply to points of law that might have been determined but not decided in the prior appeal [*see, e.g.,* *ABF Capital Corp. v. Grove Properties Co. (2005) 126 Cal. App. 4th 204, 212, 23 Cal. Rptr. 3d 803* (prior ruling dismissing appeal of order sustaining demurrer without leave to amend did not establish as law of the case that documentation supporting appealability of order did not exist)]. However, it does extend to questions that were implicitly determined because they were essential to the prior decision [*Yu v. Signet Bank/Virginia (2002) 103 Cal. App. 4th 298, 309, 126 Cal. Rptr. 2d 516* (prior appellate decision reversing summary judgment necessarily determined that cause of action had been stated)].

The doctrine also applies to certain pretrial writ proceedings. A holding resulting from an alternative writ establishes law of the case on a later appeal from the final judgment because the matter is a determination of the cause [*see* *Kowis v. Howard (1992) 3 Cal. 4th 888, 894, 12 Cal. Rptr. 2d 728, 838 P.2d 250]* . In such proceedings, the matter is fully briefed, there is opportunity for oral argument, and the cause is decided by written opinion [*see* *Kowis v. Howard (1992) 3 Cal. 4th 888, 894, 12 Cal. Rptr. 2d 728, 838 P.2d 250*]. However, absent a written opinion following issuance of the alternative writ, the appellate court's reasoning in issuing the alternative writ is not the law of the case binding on appeal [*Cerna v. City of Oakland (2008) 161 Cal. App. 4th 1340, 1354-1355, 75 Cal. Rptr. 3d 168* ; *Carretti v. Italpast (2002) 101 Cal. App. 4th 1236, 1241-1242, 125 Cal. Rptr. 2d 126* (unless written opinion follows issuance of alternative writ, denial of writ petition does not have issue preclusive effect)].

The doctrine does not apply, however, if a writ petition is summarily denied [*Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal. 4th 180, 200-201, 25 Cal. Rptr. 3d 298* (rejecting argument that court of appeal's summary denial of defendants' earlier petition for writ of supersedeas seeking stay pending appeal was law of the case); *Kowis v. Howard (1992) 3 Cal. 4th 888, 894, 12 Cal. Rptr. 2d 728, 838 P.2d 250* (short statement or citation explaining basis for summary denial does not transform denial into decision of cause entitled to law of case effect)]. Prior to the Supreme Court's decision in *Kowis v. Howard*, one case held, and a number of cases allowed in dicta, that a summary denial of a writ petition may establish the law of the case if there is an implication that the denial is on the merits, either because there is no other possible ground or because it affirmatively appears that the denial was intended to be on the merits. *Kowis* disapproved of this "sole possible ground" exception, however, for judicial economy reasons [*see* *Kowis v. Howard (1992) 3 Cal. 4th 888, 898-899, 12 Cal. Rptr. 2d 728, 838 P.2d 250* , overruling *Richer v. Superior Court (1976) 63 Cal. App. 3d 748, 757-758, 134 Cal. Rptr. 52]* .

Further, an appellate ruling will not become the law of the case in a pending appeal unless it reflects a decision on the merits considered by a panel of three justices, ultimately acquiesced in by a majority [*In re Salvador M. (2005) 133 Cal. App. 4th 1415, 1420 n.3, 35 Cal. Rptr. 3d 577* ; *Delmonico v. Laidlaw Waste Systems, Inc. (1992) 5 Cal. App. 4th 81, 83, 6 Cal. Rptr. 2d 599]* .

[3] Statement of Law Necessary

The very idea of the doctrine refers to an appellate court's statement in an opinion of a necessary rule of law *In re Christopher A. (1991) 226 Cal. App. 3d 1154, 1160* , *277 Cal. Rptr. 302]* . A prior appellate decision establishes law of the case, nevertheless, on a point not raised by counsel or expressly mentioned if it was essential to the prior decision because it could not have been rendered without the appellate court's determination of that point [*see* *Adams v. Pacific Bell Directory (2003) 111 Cal. App. 4th 93, 97, 3 Cal. Rptr. 3d 365* (federal court decision after removal was law of case after remand to state court); *Bovard v. American Horse Enterprises, Inc. (1988) 201 Cal. App. 3d 832, 841, 247 Cal. Rptr. 340]* .

As a general rule, the doctrine does not apply to points of law that might have been, but were not determined on the

prior appeal [*Brookhouser v. State of California (1992) 10 Cal. App. 4th 1665, 1681, 13 Cal. Rptr. 2d 658]* .

[4] Prior Ruling That Evidence Was Insufficient

The effect of an appellate decision that the trial court judgment was not supported by sufficient evidence is conclusive in further litigation unless evidence is produced at a subsequent trial that is "materially," "essentially," or "substantially" different from that passed on in the first appeal. Evidence merely cumulative to that previously presented is not sufficient to avoid the law of the case [*Adams v. Pacific Bell Directory (2003) 111 Cal. App. 4th 93, 98, 3 Cal. Rptr. 3d 365* (rule that law-of-the-case doctrine limited to instances in which "evidence is the same" applies only if sufficiency of evidence as a matter of law is at issue); *Bank of America v. Superior Court (1990) 220 Cal. App. 3d 613, 621 n.3, 269 Cal. Rptr. 596]* .

[5] Exceptions

The doctrine, exclusively concerned with issues of law, is not inflexibly applied [*Searle v. Allstate Life Ins. Co. (1985) 38 Cal. 3d 425, 434-435, 212 Cal. Rptr. 466, 696 P.2d 1308]* . Courts have recognized that, as a procedural rule, the law of the case may operate harshly and have fashioned a number of exceptions to the doctrine. A court is permitted to decide a case without regard to what has gone before if (1) there has been an intervening change in the law, (2) the disputed issue was not presented or considered in the proceedings below, or (3) application of the doctrine would result in manifest injustice [*George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd. (1989) 49 Cal. 3d 1279, 1291, 265 Cal. Rptr. 162, 783 P.2d 749* ; *Searle v. Allstate Life Ins. Co. (1985) 38 Cal. 3d 425, 434-435, 212 Cal. Rptr. 466, 696 P.2d 1308* (doctrine disregarded under exceptional circumstances of hardship or injustice)].

Not all changes in the law, however, justify disregarding the established law of the case. The change must be in the controlling rules of law [*George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd. (1989) 49 Cal. 3d 1279, 1291 n.9, 265 Cal. Rptr. 162, 783 P.2d 749]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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5-41 California Forms of Pleading and Practice--Annotated § 41.31

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§ 41.31 The Doctrine of *Stare Decisis* and Controlling Decisional Authority

[1] General Rule

The principle of *stare decisis* requires a court of inferior jurisdiction to follow the decisions of a court exercising superior jurisdiction. Thus, decisions by the California Supreme Court are binding on all of the courts of California [*Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 455-456, 20 Cal. Rptr. 321, 369 P.2d 937* ; *Cuccia v. Superior Court (2007) 153 Cal. App. 4th 347, 353-354, 62 Cal. Rptr. 3d 796* (precedent binding even if judge disagrees)].

Stare decisis is also a fundamental jurisprudential policy that prior applicable precedent must be followed by the same court, even if the principle of law is considered anew by that court. It is based on the assumption that certainty, predictability, and stability in the law are major objectives of the legal system. However, *stare decisis* allows flexibility and departure from precedent in an appropriate case [*People v. Birks (1998) 19 Cal. 4th 108, 116-117, 77 Cal. Rptr. 2d 848, 960 P.2d 1073* (noting also that the force of *stare decisis* is not as great in cases involving interpretation of the state constitution as it is in cases involving statutory construction)]. *Stare decisis* has added force for adhering to, rather than departing from, a court's own precedent if there is evidence that the Legislature and the public have relied on the precedent. To overrule the prior decision would thus dislodge settled rights and expectations or require a legislative response [*Sierra Club v. San Joaquin Local Agency Formation Com. (1999) 21 Cal. 4th 489, 504, 87 Cal. Rptr. 2d 702, 981 P.2d 543]* . The principle also has special force when applied to statutory interpretation, in that the Legislature is free to alter what the courts have done [*Hunt v. Superior Court (1999) 21 Cal. 4th 984, 1005, 90 Cal. Rptr. 2d 236, 987 P.2d 705]* .

The decision, or binding portion of a reviewing court's opinion, is the court's rationale for the judgment rendered, that is, the consideration and application of principles of law leading to the court's ultimate disposition of the cause. It includes statements of law that are responsive to the issues on appeal and that are intended to guide the parties and the trial court in resolving the matter on remand [*see* *Garfield Medical Center v. Belshe (1998) 68 Cal. App. 4th 798, 806, 80 Cal.*

Rptr. 2d 527] . Conversely, statements in an opinion that are dicta and unnecessary to the decision are not binding authority under *stare decisis* [*see* [2], *below*]. Nor is an opinion binding authority for propositions not actually considered in its decision [*Colmenares v. Braemar Country Club, Inc. (2003) 29 Cal. 4th 1019, 1029, 130 Cal. Rptr. 2d 662, 63 P.3d 220* (determining whether prior case interpreting FEHA definition of "disability" controls); *People v. Martinez (2000) 22 Cal. 4th 106, 118, 91 Cal. Rptr. 2d 687, 990 P.2d 563* ; *New Albertsons, Inc. v. Superior Court (2008) 168 Cal. App. 4th 1403, 1430-1431, 86 Cal. Rptr. 3d 457*]. The positive authority of any decision, including opinions of a higher court, is coextensive only with the facts of that case [*Lolley v. Campbell (2002) 28 Cal. 4th 367, 377, 121 Cal. Rptr. 2d 571, 48 P.3d 1128* (refusing to apply statement in prior opinion because it was not meant to resolve same issue)].

Although the decisions of the California Supreme Court, rendered after grant of review and oral argument, are binding precedent on the lower courts of California [*Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 455, 20 Cal. Rptr. 321, 369 P.2d 937]* , Supreme Court minute orders are not binding precedent [*California Ass'n of Psychology Providers v. Rank (1990) 51 Cal. 3d 1, 9, 270 Cal. Rptr. 796, 793 P.2d 2]* . Such minute orders, however, may be considered by lower courts if doing so would assist them in rendering a decision [*Thompson v. Department of Corrections (2001) 25 Cal. 4th 117, 125, 105 Cal. Rptr. 2d 46, 18 P.3d 1198]* .

The various districts and divisions of the court of appeal have equivalent jurisdiction with respect to each other. To promote the interests of stability in the law and predictability of decision, court of appeal panels ordinarily follow the decisions of other panels without good reason to disagree [*Wolfe v. Dublin Unified School Dist. (1997) 56 Cal. App. 4th 126, 65 Cal. Rptr. 2d 280]* . However, a panel in one appellate district or division is not compelled to reach the same conclusions when faced with an issue previously decided in one of the other districts or divisions [*McCallum v. McCallum (1987) 190 Cal. App. 3d 308, 315, 235 Cal. Rptr. 396* ; *Greyhound Lines, Inc. v. County of Santa Clara (1986) 187 Cal. App. 3d 480, 485, 231 Cal. Rptr. 702]* . In effect, the decision of one district or division is persuasive but not controlling authority in another district or division [*see* [5], *below*]. As a result, it is best to rely on authority decided by the same district or division in which an appeal is pending, especially if there is a conflict among the districts or divisions on the point in issue. For discussion of the various districts and divisions of the court of appeal, see *Ch. 40, Appeal: An Overview, § 40.11[3][b]*.

Decisions of the United States Supreme Court are binding on state courts considering federal questions. If United States Supreme Court precedent directly applies to a case involving a federal question, the state court should follow that case, even if it appears that the reasons for the precedent-setting decision have been rejected in some other line of decisions [*Scheiding v. General Motors Corp. (2000) 22 Cal. 4th 471, 478, 93 Cal. Rptr. 2d 342, 993 P.2d 996]* . Decisions of the United States Supreme Court on state law matters are, however, not binding on California courts. They are entitled to respectful consideration [*Lagatree v. Luce, Forward, Hamilton & Scripps (1999) 74 Cal. App. 4th 1105, 1134 n.27, 88 Cal. Rptr. 2d 664]* , and may therefore be persuasive, but not controlling, authority [*see* [5], *below*].

Decisions of the federal court of appeals and district courts are not binding, even on federal questions [*Etcheverry v. Tri-Ag Service, Inc. (2000) 22 Cal. 4th 316, 320, 93 Cal. Rptr. 2d 36, 993 P.2d 366 , overruled in part by Bates v. Dow Agrosciences L.L.C. (2005) 544 U.S. 431, 125 S. Ct. 1788, 161 L. Ed. 2d 687* ; *Hood v. Santa Barbara Bank & Trust (2006) 143 Cal. App. 4th 526, 547, 49 Cal. Rptr. 3d 369* ; *Metalclad Corp. v. Ventana Envtl Organizational Partnership (2003) 109 Cal. App. 4th 1705, 1714-1715, 1 Cal. Rptr. 3d 328* (in absence of U.S. Supreme Court ruling on equitable estoppel's application under Federal Arbitration Act to questions of arbitrability, court makes independent determination)], although they, too, may be cited as persuasive if not controlling authority [*Flynt v. California Gambling Control Commission (2002) 104 Cal. App. 4th 1125, 1132, 129 Cal. Rptr. 2d 167* (appellate court persuaded by reasoning of district court opinion filed after briefs filed)]. As persuasive authority, lower federal court decisions carry little weight when they are divided or sparse: a state court should make its determination independently of such authority. Conversely, a state court should hesitate before rejecting the precedent of lower federal courts when it is supported by consistent and numerous decisions [*see Etcheverry v. Tri-Ag Service, Inc. (2000) 22 Cal. 4th 316, 321, 93 Cal. Rptr. 2d 36, 993 P.2d 366* , overruled in party by *Bates v. Dow Agrosciences L.L.C. (2005) 544 U.S. 431, 125*

S. Ct. 1788, 161 L. Ed. 687] . Opinions of the Ninth Circuit Court of Appeals are no more significant than opinions of other circuits [*People ex rel. Renne v. Servantes (2001) 86 Cal. App. 4th 1081, 1090, 103 Cal. Rptr. 2d 870]* .

PRACTICE TIP:

Be Judicious in Citing Noncontrolling Authority. As discussed above, decisions of other states and lower federal courts are not binding authority and should be avoided unless there is no California case on point and the noncontrolling authority sets out persuasive reasoning. In the latter situation, a noncontrolling authority should not simply be cited or buried in a string citation, but analyzed thoroughly to demonstrate its persuasiveness. Decisions of districts or divisions of the court of appeal other than those in which the appeal is pending are usually good authority, although it is best to be able to cite to a case on point decided by the same district or division. If there is a conflict among the different districts, or divisions within a district, is it essential to use authority within the same district or division if such authority exists; if it does not, the persuasiveness of authority cited should be argued in the same manner as out-of-state or lower federal court decisions.

For discussion of the procedures for publishing and depublishing California appellate decisions, which in turn affects their citability and their status as controlling (or persuasive) decisional authority, see*§ 41.50* et seq. For additional considerations in citing persuasive authority, see *Ch. 50, Appeal: Briefs, § 50.15[1][i]*.

[2] Dicta Not Controlling

The statement of a principle not necessary to the decision is not precedent that is required by the rule of *stare decisis* to be followed [*Redevelopment Agency of San Diego v. Attisha (2005) 128 Cal. App. 4th 357, 372* (refusing to apply case containing broad language and significantly different facts); *Western Landscape Const. v. Bank of America (1997) 58 Cal. App. 4th 57, 61, 67 Cal. Rptr. 2d 868]* . A statement of law is not dictum, however, when it is responsive to the issues on appeal and is intended to guide the parties and the trial court in resolving the matter on remand [*Garfield Medical Center v. Belshe (1998) 68 Cal. App. 4th 798, 806, 80 Cal. Rptr. 2d 527]* . In differentiating controlling authority from dictum, the language of an opinion must be construed with reference to the facts presented by the case. The positive authority of a decision is coextensive only with its facts [*PLCM Group, Inc. v. Drexler (2000) 22 Cal. 4th 1084, 1097, 95 Cal. Rptr. 2d 198, 997 P.2d 511]* .

Although dictum is not controlling authority, this does not mean it must be ignored. Dicta are often followed as persuasive authority [*see* *Howard Jarvis Taxpayers Association v. City of Fresno (2005) 127 Cal. App. 4th 914, 925, 26 Cal. Rptr. 3d 153* (refusing to reject Supreme Court dicta without compelling reason); *California Apartment Assn. v. City of Stockton (2000) 80 Cal. App. 4th 699, 710, 95 Cal. Rptr. 2d 605* ; *see also* [5], *below*].

[3] Splits of Authority

Decisions by courts of equal dignity are not binding under the principles of *stare decisis*, but they are often considered as persuasive authority [*see* *In re Benjamin D. (1991) 227 Cal. App. 3d 1464, 1471, 278 Cal. Rptr. 468]* .

[4] Plurality Opinions

When the decision of a higher court is fragmented, in that there is no single rationale for the judgment to which a majority of the justices subscribe, the binding effect of that decision on lower courts is properly limited to a holding that is no broader than the position taken by those justices who concurred in the judgment on the narrowest grounds [*Marks v. United States (1977) 430 U.S. 188, 193, 97 S. Ct. 990, 993, 51 L. Ed. 2d 260* ; *Tily B., Inc. v. City of Newport Beach (1998) 69 Cal. App. 4th 1, 16, 81 Cal. Rptr. 2d 6]* . Thus, the reasoning of a plurality opinion in such a decision, signed by less than a majority of the justices on the panel that is deciding the appeal, lacks authority as precedent and need not be given deference under *stare decisis* [*Board of Supervisors v. Local Agency Formation Com. (1992) 3 Cal. 4th 903, 918, 13 Cal. Rptr. 2d 245, 838 P.2d 1198]* .

[5] Persuasive Authority

Even though they are not controlling, the decisions of other courts may be persuasive, especially if there is no controlling authority or a changeof law is sought. In such instances, decisions of other divisions and districts, lower federal courts, and out-of-state courts, as well as treatises, may be of value to the reviewing court [*see, e.g.,* *Weil v. Federal Kemper Life Assurance Co., (1994) 7 Cal. 4th 125, 138, 27 Cal. Rptr. 2d 316, 866 P.2d 774* ; *Baptiste v. Superior Court (1980) 106 Cal. App. 3d 87, 93, 164 Cal. Rptr. 789]* . When a California law is modeled on federal laws, decisions of the federal courts interpreting substantially identical statutes are unusually strong persuasive authority on the interpretation of the California law [*Kamen v. Lindly (2001) 94 Cal. App. 4th 197, 203, 114 Cal. Rptr. 2d 127* (looking to federal decisions concerning civil liability for securities fraud to interpret state securities fraud statute)].

Similarly, while an opinion of the Attorney General also is not binding precedent, it may be entitled to great weight as persuasive authority when there is no other authority on the issue [*Fischer v. Los Angeles Unified School Dist. (1999) 70 Cal. App. 4th 87, 101, 82 Cal. Rptr. 2d 452* (opinion construing state statute)].

Administrative adjudications have similar force as persuasive authority. For example, cases published in California Compensation Cases in which writs of review were denied are citable [*Tenet/Centinela Hospital Medical Center v. Workers' Comp. Appeals Bd. (2000) 80 Cal. App. 4th 1041, 1047, n.4, 95 Cal. Rptr. 2d 858* ; *see also* *Bowen v. Workers' Comp. Appeals Bd. (1999) 73 Cal. App. 4th 15, 21 n.10, 86 Cal. Rptr. 2d 95* (cases published in California Compensation Cases as denials of writs of review have no *stare decisis* effect on appellate courts, but are citable authority as to the holding of the WCAB)], and a WCAB panel decision published in the California Workers' Compensation Reporter is citable, particularly on the issue of contemporaneous administrative construction of a statute [*Tenet/Centinela Hospital Medical Center v. Workers' Comp. Appeals Bd. (2000) 80 Cal. App. 4th 1041, 1047 n.4, 95 Cal. Rptr. 2d 858]* .

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§ 41.32 Retroactive Application of Law

[1] Retroactive Application of Statutes

Statutes do not operate retrospectively unless the Legislature plainly intended them to do so [*Evangelatos v. Superior Court (1988) 44 Cal. 3d 1188, 1207-1208, 246 Cal. Rptr. 629, 753 P.2d 585]* . If the Legislature clearly intended retrospective effect, the courts will carry out that intent unless to do so violates due process rights [*In re Marriage of Bouquet (1976) 16 Cal. 3d 583, 587, 592, 128 Cal. Rptr. 427, 546 P.2d 1371]* . A statute has retrospective effect when it substantially changes the legal consequences of past events [*Kizer v. Hanna (1989) 48 Cal. 3d 1, 7, 255 Cal. Rptr. 412, 767 P.2d 679]* . If the statute merely clarifies, rather than changes, existing law, it does not operate retrospectively even if applied to circumstances predating its enactment [*Martin v. California Mut. B. & L. Assn. (1941) 18 Cal. 2d 478, 484, 116 P.2d 71]* .

When a statute does not expressly declare the Legislature's intent to apply it retroactively, a court must determine the Legislature's intent from other factors, such as the following [*Santangelo v. Allstate Ins. Co. (1998) 65 Cal. App. 4th 804, 814, 76 Cal. Rptr. 2d 735]* :

- The context of the legislation.
- The objective of the litigation.
- The evils sought to be remedied.
- Similar legislation.
- The history of the times.

- Public policy.
- Contemporaneous statutory construction.

When the court finds the Legislature intended a new procedural statute to apply to pending cases, it will only be applied if a reasonable time remains for the party to comply. This construction avoids constitutional problems [*Santangelo v. Allstate Ins. Co. (1998) 65 Cal. App. 4th 804, 814-815, 76 Cal. Rptr. 2d 735]* .

When the Legislature exercises its power to change appellate procedure, the change may apply to all cases pending as of the effective date of the statute [Save our *Forest and Ranchlands v. County of San Diego (1996) 50 Cal. App. 4th 1757, 1764, 58 Cal. Rptr. 2d 708]* .

For further discussion concerning retroactive application of statutes, see Ch. 531, *Statutes and Ordinances* .

[2] Retroactive Application of Case Law

Judicial decisions, particularly those in tort cases, are generally applied retroactively. Considerations of fairness and public policy may require that a decision be given only prospective application [*Newman v. Emerson Radio Corp. (1989) 48 Cal. 3d 973, 978, 981-984, 258 Cal. Rptr. 592, 772 P.2d 1059* ; *see In re Retirement Cases (2003) 110 Cal. App. 4th 426, 443, 1 Cal. Rptr. 3d 790* (reviewing trial court's ruling that neither fairness nor public policy warranted exception to retroactivity rule under abuse of discretion standard)]. Considerations relevant to the retroactivity determination include the reasonableness of the parties' reliance on the former rule, the nature of the change as substantive or procedural, retroactivity's effect on the administration of justice, and the purposes to be served by the new rule [*Newman v. Emerson Radio Corp. (1989) 48 Cal. 3d 973, 978, 983-992, 258 Cal. Rptr. 592, 772 P.2d 1059]* . When a new Supreme Court decision is not inconsistent with a prior Supreme Court decision, the new decision will be given full retroactive application [*Planning and Conservation League v. Department of Water Resources (1998) 17 Cal. 4th 264, 274, 70 Cal. Rptr. 2d 635* (also suggesting that a jurisdictional ruling may never be made prospective only)].

At times, a court may expressly overrule a case precedent and, while applying the new rule to the case in which it is announced, return to the old rule in all other cases arising on facts predating the pronouncement of the new rule [*Schmier v. Supreme Court (2000) 78 Cal. App. 4th 703, 710, 93 Cal. Rptr. 2d 580]* . This practice, called "selective prospectivity," can violate due process and equal protection guarantees [*Schmier v. Supreme Court (2002) 96 Cal. App. 4th 873, 880 n. 4, 117 Cal. Rptr. 2d 497* (finding prior appeal in same case did not establish new rule of law)].

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[Reserved]

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§ 41.50 Publication and Citability of Appellate Opinions

[1] All Supreme Court Opinions Are Published

All opinions of the California Supreme Court are published in the Official Reports (California Reports) [*see Cal. Const. art. VI, § 14*; Cal. Rules of Ct., Rule 8.1150(a)]. As such, all Supreme Court opinions become citable precedential case law authority.

[2] Court of Appeal Opinions Published Selectively

Court of appeal opinions, and opinions of the appellate department of the Superior Court, are published by selection only, pursuant to the criteria set out in Cal. Rules of Ct., Rule 8.1150(c), discussed in *§ 41.51[2]*.

This initial selective publication of court of appeal opinions (and opinions of the appellate department of the Superior Court), and the other rules regarding the publication or "depublication" of these opinions, derive from the California Supreme Court's unlimited discretion, under the state constitution, to control which opinions of the lower appellate courts are to be published and which are not to be published [*see Cal. Const. art. VI, § 14* (providing for publication of court of appeal opinions "as the Supreme Court deems appropriate"); *see also* Cal. Rules of Ct., Rule 8.1150(b)]. This power, of course, determines which court of appeal opinions and which opinions of the appellate department of the Superior Court may ultimately be cited as either controlling or persuasive decisional authority as a result of their publication [*see* discussion in *§ 41.31* and in [3], *below*].

[3] Citability of Opinions as Decisional Authority

[a] Generally Only Published Opinions Are Citable

All final California Supreme Court opinions are published in the Official Reports [*see* [1], *above*], and all consequently are citable decisional authority.

Opinions of the court of appeal and the appellate department of the Superior Court are published only selectively [*see* [2], *above*, and discussion in *§ 41.51*]. With certain exceptions, discussed in [b], *below*, any opinion that is not published in the Official Reports may *not* be cited or relied on by a court or a party in any other action or proceeding [*Cal. Rules of Ct., Rule 8.1115(a)*; *see also Nelson v. Justice Court (1978) 86 Cal. App. 3d 64, 66, 150 Cal. Rptr. 39* (unpublished decision not available as a precedent); for discussion regarding the effect of such cases upon subsequent proceedings in the same action, see*§ 41.30*]. The availability of unpublished opinions on the Internet does not change the rule that an opinion not certified for publication in the official reports may not be cited in a brief[*Schmier v. Supreme Court (2002) 96 Cal. App. 4th 873, 881, 117 Cal. Rptr. 2d 497]* .

Unpublished, and therefore uncitable, opinions of the court of appeal and the appellate department of the Superior Court include the following:

- Opinions not certified for publication by the deciding court and not later ordered published by the deciding court or the Supreme Court [*see § 41.51*].

- Opinions initially certified for publication by the court of appeal or appellate department of the Superior Court that have been specifically ordered not published (commonly termed depublication or decertification) by subsequent order of the Supreme Court [*see § 41.52[2]*].

- Opinions initially certified for publication by the court of appeal or appellate department of the Superior Court that have been superseded by an order granting review, rehearing, or other action, unless the Supreme Court has expressly ordered publication of the opinion pending the disposition of such orders [*see § 41.52[1]*].

For discussion of the general effect of citable case law under the doctrine of *stare decisis*, *see § 41.31*.

[b] When Unpublished Opinions May Be Cited

An opinion that is not published may be cited in the following limited circumstances [Cal. Rules of Ct., Rule 8.115(b)]:

- When the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel [*see County of Riverside v. Superior Court (2003) 30 Cal. 4th 278, 132 Cal. Rptr. 2d 713, 66 P.3d 718, 726* (for collateral estoppel to apply, issue decided in unpublished decision must be identical to that in current action); for discussion of law of the case principles, see*§ 41.30*; for discussion of res judicata or collateral estoppel principles, see Ch. 491, *Res Judicata*].

- When the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.

A copy of any unpublished opinion citable under these circumstances must be furnished to the court and all parties by attaching it to the document in which it is cited or, if the citation will be made orally, by letter, within a reasonable time in advance of citation [*Cal. Rules of Ct., Rule 8.1115(c)*]. Note that this citation procedure applies not only to unpublished opinions, but also to opinions that have been certified for publication but which do not yet have any official or other print-based citation. That is, copies must be provided in the same way for a cited opinion of any court that is available only in a computer-based source of decisional law [*Cal. Rules of Ct., Rule 8.1115(c)*; *see* Ch. 50, *Appeal: Briefs* , for further discussion of rules governing the manner of citation].

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§ 41.51 Procedure for Publication of Opinions of Court of Appeal or Appellate Department of Superior Court

[1] Initial Certification for Publication by Court of Appeal

The initial process of publication is decided by a majority of the court of appeal panel deciding a particular case, considering the Supreme Court's criteria for publication set out in *Cal. Rules of Ct., Rule 8.1105(c)* (discussed in [2], *below*). That majority may certify the opinion for publication pursuant to these criteria at any time prior to its becoming final [*Cal. Rules of Ct., Rule 8.1105(b)*; for discussion of when court of appeal decisions become final, see *Ch. 51, Appeal: Hearing and Decision, § 51.19*].

Either on its own motion or the motion of any person, whether a party or not, the court of appeal may reconsider its initial decision *not* to publish up until the time the opinion becomes final in that court [*see Cal. Rules of Ct., Rule 8.1120* and discussion in [3], *below*.].

[2] Criteria for Publication

[a] General Criteria

An opinion of a court of appeal or appellate department of the superior court, whether it affirms or reverses a trial court order or judgment, should be certified for publication if it does one or more of the following [*Cal. Rules of Ct., Rule 8.1105(c)*]]:

- Establishes a new rule of law.
- Applies an existing rule of law to a set of facts significantly different from those stated in published opinions.
- Modifies, explains, or criticizes with reasons given, an existing rule of law.

- Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule.

- Addresses or creates an apparent conflict in the law.

- Involves a legal issue of continuing public interest.

- Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

- Invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision.

- Is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law.

When deciding whether to publish an opinion, courts may not consider the workload of the court, or the potential embarrassment of a litigant, lawyer, judge, or other person [*Cal. Rules of Ct., Rule 8.1105(d)*].

[b] Partial Publication

Any part of an opinion by a court of appeal or appellate department of the superior court may be certified for publication when that part meets the criteria for publication under *Cal. Rules of Ct., Rule 8.1105(c)* [discussed in [a], *above*]. The part that is published must indicate which part of the opinion is unpublished; all material, factual and legal, including the disposition, that aids in the application or interpretation of the published part must be included in the published part [*Cal. Rules of Ct., Rule 8.1110(a)*].

For purposes of the general rules set out in *Cal. Rules of Ct., Rules 8.1105-8.1120*, the published part is deemed a published opinion and the unpublished part is deemed an unpublished opinion [*Cal. Rules of Ct., Rules 8.1110(c)*].

[3] Request by Interested Party for Publication of Unpublished Opinion

Any person may request publication of an opinion that has not already been certified for publication by the court rendering that opinion as discussed in [1], *above*. The request may be made only to the court that rendered the opinion [*Cal. Rules of Ct., Rule 8.1120(a)*]. The request must be delivered to the rendering court within 20 days after the opinion is filed [*Cal. Rules of Ct., Rule 8.1120(a)(3)*]. The request must be made by a letter that states the following [*Cal. Rules of Ct., Rule 8.1120(a)*]:

- The nature of the person's interest.

- Why, concisely, the opinion meets one or more of the publication standards [*see* [2], *above*, for discussion of publication standards].

PRACTICE TIP:

Requesting Publication. Whether to request publication of an unpublished decision requires an exercise of judgment and the balancing of a variety of factors. Before requesting publication, counsel should be sure to discuss these issues with the client. For example, an attorney who represented the successful party may have reasons for desiring publication that conflict with the client's best interests. The attorney may believe the opinion makes an important contribution to the law, or that it will help other clients, or both,

or he or she may simply want the publicity of a published decision. Similarly, the client may want the opinion published because it vindicates his or her position and is therefore important for business or personal reasons. On the other hand, publication may increase the possibility that the Supreme Court will grant a review resulting in a reversal. Accordingly, it is often in the client's interest for the opinion not to be published.

Requesting publication does not raise as many potential conflicts for the losing party, but there may still be conflicting considerations. For example, if the client does not intend to seek review in the California Supreme Court, the attorney may want the opinion published for some of the reasons discussed above, whereas the losing client may prefer not to have the subject matter of the opinion become a matter of public knowledge.

When requesting publication of an unpublished decision, be concise, but also be sure to explain clearly to the court why you think an opinion meets one or more of the criteria for publication: why it clarifies the law, why it answers an important legal question, etc. It is also usually helpful to obtain letters of support from others who have an interest in the legal issue, but were not involved in the particular case. As discussed, *above*, it is not necessary to be a party to make a request or provide a letter in support of a request. These letters can explain consequences that the opinion might have whichthe litigants might not have discussed and the court might not have considered. A request for publication or letter of support from a nonparty may be accorded more weight than one by a prevailing or other party because it suggests that the issue is in fact one of continuing public interest with applicability to a problem that frequently arises.

The request must be accompanied by proof of its service on each party to the action or proceeding in the court of appeal [*Cal. Rules of Ct., Rule 8.1120(a)*; for discussion and forms relating to proof of service generally, see Ch. 518, *Service of Summons and Papers*].

For a form of request for publication of a court of appeal opinion that has not already been certified for publication by that court, see*§ 41.90*.

If the court that rendered the opinion does not grant the request, or cannot grant it by reason of the decision's finality as to that court, that court must transmit the request for publication and a copy of the opinion to the Supreme Court with its recommendation for disposition and a brief statement of its reasons. The rendering court must forward these materials within 15 days after the decision is final in that court. The transmitting court must also send a copy of its recommendation and reasons to each party and to any person who has requested publication [*Cal. Rules of Ct., Rule 8.1120(b)*].

When the Supreme Court receives a request for publication under *Cal. Rules of Ct., Rule 8.1120(b)*, it must either order the opinion published or deny the request, and send notice of its action to the transmitting court, each party, and any person who has requested publication [*Cal. Rules of Ct., Rule 8.1120(c)*]. Note that, in addition to the procedure in *Cal. Rules of Ct., Rule 8.1120* for publication on the request by an interested person, the Supreme Court retains the power to order such publication on its own motion [*see Cal. Const. art. VI, § 14*; *Cal. Rules of Ct., Rule 8.1105(d)(2)* and discussion in *§ 41.50[2]*].

When the Supreme Court orders the publication of an opinion of the court of appeal or the appellate department of the Superior Court, the order is not to be deemed an expression of opinion by the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion [*Cal. Rules of Ct., Rule 8.1120(d)*].

A request for depublication, as distinguished from a request for publication, is addressed to the Supreme Court rather that to the court that rendered the opinion. For further discussion of depublication procedures, see*§ 41.52*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsPublication of Opinions

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PART II. LEGAL BACKGROUND
C. Publication and Citability of California Case Law

5-41 California Forms of Pleading and Practice--Annotated § 41.52

AUTHOR: Jeffery A. Hogge Author Hon. Patti S. Kitching, Victoria J. DeGoff Editorial Consultants

§ 41.52 Procedure for Depublication of Court of Appeal Opinion Previously Certified for Publication

[1] Automatic Depublication Upon Grant of Review or Rehearing

Opinions initially certified for publication by the court of appeal or appellate department of the Superior Court may *not* be published if they are superseded by an order granting review, rehearing, or other action, unless the Supreme Court has expressly ordered publication of the opinion pending the disposition of such orders [*Cal. Rules of Ct., Rule 8.1105(e)*; *see also Cal. Rules of Ct., Rules 8.264* (finality), 8.268 (rehearing), 8.500 (review)]. For discussion respectively of finality, rehearing, and review, see Ch. 51, *Appeal: Hearing and Decision* , Ch. 52, *Appeal: Rehearing* , and Ch. 54, *Appeal: California Supreme Court Review* .

After granting review, after decision, or after dismissal of review and remand as improvidently granted, the Supreme Court may order the opinion of the court of appeal published in whole or in part [*Cal. Rules of Ct., Rule 8.1105(d)*].

[2] Depublication by Supreme Court Order

[a] Depublication on Request by Interested Person

A request by any person for the depublication of a court of appeal opinion certified for publication must be made by letter to the Supreme Court within 30 days after the decision becomes final as to the court of appeal that rendered the opinion [*Cal. Rules of Ct., Rule 8.1125(a)*; for discussion of the initial certification process, see*§ 41.51[1]* and*[2]*]. The request must be made promptly by a letter that states the following [*Cal. Rules of Ct., Rule 8.1125(a)*]:

- The nature of the person's interest.
- Concisely, the reasons why the opinion should not remain published.

The request may not exceed 10 pages, and must be accompanied by proof of its mailing to the court of appeal and proof

of service on each party to the action or proceeding [*Cal. Rules of Ct., Rule 8.1125(a)*; for discussion and forms relating to proof of service generally, see Ch. 518, *Service of Summons and Papers*].

PRACTICE TIP:

Requesting Depublication. The Supreme Court grants review in only a very small percentage of the civil cases in which a party seeks its review. Requests for depublication were often included in a petition for review, as an alternative to a grant of review. However, effective January 1, 2005, *Cal. Rules of Ct., Rule 8.1125(a)(2)* specifically prohibits that practice and requires that the request for depublication be in a separate letter to the Supreme Court not exceeding 10 pages [*Cal. Rules of Ct., Rule 8.1125(a)(2)*].

Similarly, a party opposing the petition may argue for denial in the answer to the petition, but include, as an alternative, a separate letter request for depublication. A party opposing review, but not opposed to depublication, may argue, for example, that the published court of appeal decision reached the proper result, even though it may arguably contain a misstatement of law on some points, or an inappropriate discussion of issues or facts, and that in such a case it is unnecessary for the Supreme Court to use its limited resources to write an opinion that will reach the same result. Alternatively, the case may present a legal issue that might eventually be worthy of the Supreme Court's review, but the case otherwise is not an appropriate vehicle for reaching the issue, for example, because review will have no effect on the ultimate outcome. In these situations it is arguable that depublication is preferable to making the litigants wait even longer for the decision in their case to become final.

Parties requesting depublication are likely to improve their chances of having the request granted if they seek and obtain letters from *amici curiae* or other nonparties that support the request and explain why depublication is important. A nonparty, as an interested person, is also free to make his or her own request, which may be done separately or as part of a letter supporting (or opposing) a petition for review as *amicus curiae* [*see Cal. Rules of Ct., Rule 8.500(g)* and Ch. 22, *Amicus Curiae*].

For a form of request to the Supreme Court for an order directing depublication of a court of appeal opinion, see*§ 41.91*. For forms of petition for review and an answer to a petition for review, see *Ch. 54, Appeal: California Supreme Court Review, § 54.100* et seq.

[b] Response by Other Interested Persons

Within 10 days after the Supreme Court receives a request for depublication, any person may submit a response, either joining in the request or concisely stating reasons why the opinion should remain published. A response submitted by anyone other than the court of appeal must state the nature of the submitting person's interest. The response must not exceed 10 pages and must be accompanied by proof of mailing to the court of appeal, and proof of service to each party to the action or proceeding and to any person who has submitted a request for depublication [*Cal. Rules of Ct., Rule 8.1125(b)*].

[c] Disposition of Request by Supreme Court

When the Supreme Court receives a request under *Cal. Rules of Ct., Rule 8.1125(a)*, it is required either to order the opinion depublished or to deny the request. The Court must send notice of its action to the court of appeal, each party, and any person who has requested depublication [*Cal. Rules of Ct., Rule 8.1125(c)*].

[3] Supreme Court May Order Depublication Sua Sponte

In addition to the automatic depublication discussed in [1], *above*, and the procedure in *Cal. Rules of Ct., Rule 8.1125* for depublication on the request by an interested person discussed in [2], *above*, the Supreme Court retains the power to order such depublication on its own motion [*see Cal. Const. art. VI, § 14*; *Cal. Rules of Ct., Rule 8.1105(d)(2)* and

discussion in *§ 41.50[2]*].

[4] Effect of Depublication

Depublication renders an opinion uncitable as precedential decisional law [*Cal. Rules of Ct., Rule 8.1115(a)*; *see also* discussion concerning citability in § 41.51[3]]. An order of the Supreme Court directing depublication of an opinion is not to be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion [*Cal. Rules of Ct., Rule 8.1125(d)*].

While some commentators and court of appeal opinions have suggested that depublication orders have inevitable significance and indicate a tacit disapproval, notwithstanding the language of *Cal. Rules of Ct., Rule 8.1125(d)* [*see People v. Dee (1990) 222 Cal. App. 3d 760, 763-765, 272 Cal. Rptr. 208* , disapproved by *People v. Saunders (1993) 5 Cal. 4th 580, 20 Cal. Rptr. 2d 638, 853 P.2d 1093]* , the Supreme Court itself has maintained that, consistent with *Cal. Rules of Ct., Rule 8.1125(d)*, it is improper to argue or to infer any disapproval implicit in a depublication order [*see, e.g., People v. Saunders (1993) 5 Cal. 4th 580, 592 n.8, 20 Cal. Rptr. 2d 638, 853 P.2d 1093]* .

Similarly, some have criticized depublication as a practice by which the Supreme Court may shape common law in California without issuing reasoned opinions [*see* Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court, 26 Loyola L.A. L. Rev. 1033 (1993)*], while others have defended it [*see* Grodin, *The Depublication Practice of the California Supreme Court, 72 Cal. L. Rev. 514 (1984)*]. Ultimately, however, the fact remains that the Supreme Court has a constitutional discretion to determine which appellate decisions are to be published [*see Cal. Const. art. VI, § 14* and discussion in *§ 41.50[2]*].

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[Reserved]

§§ 41.53[Reserved]

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5-41 California Forms of Pleading and Practice--Annotated § 41.60

AUTHOR: Jeffery A. Hogge Author Hon. Patti S. Kitching, Victoria J. DeGoff Editorial Consultants

§ 41.60 California Constitution

Reversal based on error justified only when error resulted in a miscarriage of justice. *Cal. Const., art. VI, § 13*

Publication of opinions. *Cal. Const., art. VI, § 14*

Legal Topics:

For related research and practice materials, see the following legal topics:
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5-41 California Forms of Pleading and Practice--Annotated § 41.61

AUTHOR: Jeffery A. Hogge Author Hon. Patti S. Kitching, Victoria J. DeGoff Editorial Consultants

§ 41.61 State Statutes

Respondent, without appealing, may request reviewing court to review ruling or order to determine if appellant prejudiced by error. *Code Civ. Proc. § 906*

When appellant shows error, it is also necessary to show prejudice to justify reversal. *Cal. Const., art. VI, § 13*; *Evid. Code § 354*

Legal Topics:

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AUTHOR: Jeffery A. Hogge Author Hon. Patti S. Kitching, Victoria J. DeGoff Editorial Consultants

§ 41.62 California Rules of Court

All opinions of California Supreme Court published in official reports. *Cal. Rules of Ct., Rule 8.1105(a)*

Certification for publication by court of appeal or appellate department of Superior Court. *Cal. Rules of Ct., Rules 8.1105(b),(c),* 8.1110

Supreme Court's general power to order publication or depublication of opinion of lower appellate court. *Cal. Rules of Ct., Rule 8.1105(e)(2)*

Automatic depublication of opinion superseded by order granting review, rehearing, or other action. *Cal. Rules of Ct., Rule 8.1105(e)*

Citability of published and unpublished opinions. Cal. Rules of Ct., Rule 8.115

Publication on order of court rendering decision, or on order of Supreme Court, upon request by interested party, of opinion not previously certified for publication. *Cal. Rules of Ct., Rule 8.1120*

Depublication by order of Supreme Court, on request by interested person, of opinion of court of appeal. *Cal. Rules of Ct., Rules 8.1125*

Legal Topics:

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AUTHOR: Jeffery A. Hogge Author Hon. Patti S. Kitching, Victoria J. DeGoff Editorial Consultants

§ 41.63 Decisions

[1] General Rules Governing All Standards of Review

[a] Prejudice Required for Reversal

Court will not reverse judgment unless, after examination of entire cause, it appears error caused miscarriage of justice, i.e., reasonable probability that, in absence of error, result more favorable to appealing party would have been reached. *Elsner v. Uveges (2004) 34 Cal. 4th 915, 939, 22 Cal. Rptr. 3d 530, 102 P.3d 915*

For reversal due to state law error, appellant must show reasonable probability of more favorable result absent error. *Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 574, 34 Cal. Rptr. 2d 607, 882 P.2d 298*

The miscarriage of justice standard for reversal requires a showing that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. A probability does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility. *Cellphone Termination Fee Cases (2009) 180 Cal. App. 4th 1110, 1125-1126, 104 Cal. Rptr. 3d 275*

Prejudicial error not required when the error calls into question the very fairness of the trial or hearing itself. *Biscaro v. Stern (2010) 181 Cal. App. 4th 702, 709-710, 104 Cal. Rptr. 3d 817*

Error is prejudicial if it is reasonably probable that a result more favorable to the appellant would have been reached absent the error. A "probability" means a reasonable chance, more than an abstract possibility. *Red Mountain, LLC v. Fallbrook Public Utility District (2006) 143 Cal. App. 4th 333, 348, 48 Cal. Rptr. 3d 875*

"Miscarriage of justice" exists when it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error. *Weaver v. Chavez (2005) 133 Cal. App. 4th 1350, 1356, 35 Cal. Rptr. 3d 514*

When jury receives improper instruction, prejudice generally found only where it seems probable that jury's verdict may have been based on erroneous instruction. *Raghavan v. Boeing Co. (2005) 35 Cal. Rptr. 3d 397, 410, 35 Cal. Rptr. 3d 397*

[b] Appellant Bears Burden of Showing Error

Appellant bears burden of showing prejudicial error, regardless of standard of review to be applied. *Searle v. Allstate Life Ins. Co. (1985) 38 Cal. 3d 425, 439, 212 Cal. Rptr. 466, 696 P.2d 1308*

Appellant has burden to show that error has resulted in a miscarriage of justice. Boeken v. Philip Morris Incorporated (2005) 127 Cal. App. 4th 1640, 1678, 26 Cal. Rptr. 3d 638

[c] Review Limited to Errors of Law

[i] Errors of Law the Province of Appellate Courts

Sole province of court on appeal is to review action of trial court, correct its errors, and pass on questions of law only. *Tupman v. Haberkern (1929) 208 Cal. 256, 262, 263, 280 P. 970*

[ii] Invited Error

Under doctrine of invited error, party may not claim error on appeal if that party induced error. *Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 212-213, 285 Cal. Rptr. 99, 814 P.2d 1341*

Doctrine of invited error does not apply when party, while making appropriate objections, acquiesces in judicial determination. *Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 212-213, 285 Cal. Rptr. 99, 814 P.2d 1341*

Under the doctrine of invited error, when a party by its own conduct induces the commission of error, it may not claim on appeal that the judgment should be reversed because of that error. *Ruiz v. Podolsky (2009) 175 Cal. App. 4th 227, 247, 95 Cal. Rptr. 3d 828*

Invited error doctrine does not extend to situations where a party induces the commission of the error, but does not in fact mislead the trial court in any way, as where a party endeavors to make the best of a bad situation for which it was not responsible. *Saxena v. Goffney (2008) 159 Cal. App. 4th 316, 329, 71 Cal. Rptr. 3d 469*

If a party induces the commission of error, the party is estopped from asserting it as a ground for reversal on appeal. *Munoz v. City of Union City (2007) 148 Cal. App. 4th 173, 178, 55 Cal. Rptr. 3d 393*

[d] Review Based on Theory of Law Not Raised at Trial

Issues not raised in trial court cannot be raised for first time on appeal; party may not, for the first time on appeal, change the theory of the cause of action. *Johnson v. Greenelsh (2009) 47 Cal. 4th 598, 603, 100 Cal. Rptr. 3d 622, 217 P.3d 1194*

Appellate courts' discretion to excuse forfeiture should be exercised rarely and only in cases presenting important legal issue. *In re S.B. (2004) 32 Cal. 4th 1287, 1293-1294, 13 Cal. Rptr. 3d 786, 90 P.3d 746*

Appellate court will not consider issues raised for first time on appeal. *Gavaldon v. DaimlerChrysler Corp. (2004) 32 Cal. 4th 1246, 1265, 13 Cal. Rptr. 3d 793, 90 P.3d 752*

Exception to rule that appellate court will not consider facts occurring after trial court judgment when action seeks injunctive relief. *Dowhal v. Smithkline Beecham Consumer Healthcare (2004) 32 Cal. 4th 910, 922 n.4, 12 Cal. Rptr. 3d 262, 88 P.3d 1*

Exception to rule that appellate court will not consider issues raised for first time on appeal when new point of law is decided after trial. Fisher v. City of *Berkeley (1984) 37 Cal. 3d 644, 654, n.3, 209 Cal. Rptr. 682, 693 P.2d 261*

Appellate court need not consider new theory that contemplates factual situation the consequences of which are open to controversy and were not put in issue or presented at trial. *See Tiernan v. Trustees of Cal. State University & Colleges (1982) 33 Cal. 3d 211, 221-222 n.15, 188 Cal. Rptr. 115, 655 P.2d 317*

To preserve an issue for appeal, a party must raise the objection in the trial court. This rule is founded on considerations of fairness to the court and opposing party, and on the practical need for an orderly and efficient administration of the law. *Dietz v. Meisenheimer & Herron (2009) 177 Cal. App. 4th 771, 799, 99 Cal. Rptr. 3d 464*

Appellate court may consider new argument on appeal if it was question of law involving issue of public concern. *Rental Housing Association of Northern Alameda County v. City of Oakland (2009) 171 Cal. App. 4th 741, 755, 90 Cal. Rptr. 3d 181*

To preserve an issue for appeal, a party ordinarily must raise the objection in the trial court. *K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc. (2009) 171 Cal. App. 4th 939, 948-949, 90 Cal. Rptr. 3d 247*

To determine the appeal of a summary judgment motion, the appellate court may consider issues not raised in trial court. *Larner v. Los Angeles Doctors Hospital Associates, LP (2008) 168 Cal. App. 4th 1291, 1297 n.2, 86 Cal. Rptr. 3d 324*

Appellate courts may consider new theories raised for the first time on appeal when the new theory presents a question of law to be applied to undisputed facts in the record. *RN Solution, Inc. v. Catholic Healthcare West (2008) 165 Cal. App. 4th 1511, 1518, 81 Cal. Rptr. 3d 892*

Parties may raise new issues on appeal where the issue is purely a question of law on undisputed facts. *Sheller v. Superior Court of Los Angeles County (2008) 158 Cal. App. 4th 1697, 1709, 71 Cal. Rptr. 3d 207*

Appellate courts typically have engaged in the discretionary review of otherwise forfeited arguments when the claim involves an important issue of constitutional law or a substantial right. *Preserve Shorecliff Homeowners v. City of San Clemente (2008) 158 Cal. App. 4th 1427, 1433, 71 Cal. Rptr. 3d 332*

Reviewing court ordinarily will not consider claims made for the first time on appeal that could have been but were not presented to the trial court. *Kashmiri v. Regents of the University of California (2007) 156 Cal. App. 4th 809, 830, 67 Cal. Rptr. 3d 635*

Appellate court may consider a new issue on appeal for the first time when the issue posed is purely a question of law based on undisputed facts and involves important questions of public policy. *In re Conservatorship of Whitley (2007) 155 Cal. App. 4th 1447, 1458, 66 Cal. Rptr. 3d 808*

Exception to rule that appellate court will not consider issue not raised in trial court when it is a pure question of law. *Petropoulos v. Department of Real Estate (2006) 142 Cal. App. 4th 554, 561, 47 Cal. Rptr. 3d 812*

Points not raised in the trial court may not be raised for the first time on appeal. *Baugh v. Garl (2006) 137 Cal. App. 4th 737, 746, 40 Cal. Rptr. 3d 539*

Appellate court will not consider issues raised for first time on appeal. *Lackner v. North (2006) 135 Cal. App. 4th 1188, 1201 n.5, 37 Cal. Rptr. 3d 863*

Appellate court not required to consider purely legal issue raised for first time on appeal. *Souza v. Westlands Water Dist. (2006) 135 Cal. App. 4th 879, 898-899, 38 Cal. Rptr. 3d 78*

Rule that issues not raised in trial court cannot be raised for first time on appeal especially applicable to doctrine of estoppel, which includes factual elements which must be established in trial court. *Honig v. San Francisco Planning Department (2005) 127 Cal. App. 4th 520, 530, 25 Cal. Rptr. 3d 649*

Party may raise new theory on appeal where it involves purely legal question. *Dieckmeyer v. Redevelopment Agency of the City of Huntington Beach (2005) 127 Cal. App. 4th 248, 259, 24 Cal. Rptr. 3d 895*

Appellate court may consider question of law based on undisputed facts, even if first raised on appeal. *Allied Fire Protection v. Diede Construction, Inc. (2005) 127 Cal. App. 4th 150, 154, 25 Cal. Rptr. 3d 195*

Exception to rule that appellate court will not consider issues raised for first time on appeal when subject matter jurisdiction is raised. Miranda v. 21st *Century Ins. Co. (2004) 117 Cal. App. 4th 913, 920, 12 Cal. Rptr. 3d 159*

Appellate court may consider new argument on appeal if it was question of law involving issue of public policy not previously addressed in *California. Raphael v. Bloomfield (2003) 113 Cal. App. 4th 617, 621, 6 Cal. Rptr. 3d 583*

Issue raised only in motion for nonsuit after trial not sufficient; defendant's failure to object to evidence during trial waived appeal. *Henley v. Philip Morris Inc. (2003) 112 Cal. App. 4th 198, 212-213, 5 Cal. Rptr. 3d 42*

Exception to rule that appellate court will not consider issues raised for first time on appeal when issue bears upon public interest or due administration of justice. *Catchpole v. Brannon (1995) 36 Cal. App. 4th 237, 244, 42 Cal. Rptr. 2d 440*

[e] Court Need Not Consider Errors of Law Not Argued in Briefs

Issues not properly raised in opening brief are deemed forfeited or abandoned. *Fidelity National Title Insurance Co. v. Schroeder (2009) 179 Cal. App. 4th 834, 847 n.11, 101 Cal. Rptr. 3d 854*

Court need not consider issue where reasoned, substantial argument and citation to supporting authorities are lacking; mere assertion of statutory or constitutional violation, followed by simple citation to statute or constitutional provision, does not merit judicial response. *Woods v. Horton (2008) 167 Cal. App. 4th 658, 677, 84 Cal. Rptr. 3d 332*

Absent good cause, failure to raise a claim in an opening brief waives it. *Ocean Harbor House Homeowners Association v. California Coastal Commission (2008) 163 Cal. App. 4th 215, 242 n.9, 77 Cal. Rptr. 3d 432*

Appellant court need not determine any issue appellant failed to raise in opening brief. *Wall Street Network, Ltd. v. New York Times Company (2008) 164 Cal. App. 4th 1171, 1177, 80 Cal. Rptr. 3d 6*

Appellant's failure to support argument with proper legal citations triggers a waiver, thereby undermining an appeal.

American International Specialty Lines Insurance Company v. Continental Casualty Insurance Company (2006) 142 Cal. App. 4th 1342, 1359, 49 Cal. Rptr. 3d 1

Appellate court may treat as waived any argument for which brief does not provide citation to authority. *City of Arcadia v. State Water Resources Control Bd. (2006) 135 Cal. App. 4th 1392, 1428-1429, 38 Cal. Rptr. 3d 373*

Appellant's failure to raise argument in opening brief waives issue on appeal. *Dieckmeyer v. Redevelopment Agency of the City of Huntington Beach (2005) 127 Cal. App. 4th 248, 260, 24 Cal. Rptr. 3d 895*

If appellant has neglected to present point in opening brief or has presented point only superficially, party may not insist that court consider the point. *Stoll v. Shuff (1994) 22 Cal. App. 4th 22, 25, 27 Cal. Rptr. 2d 249*

Appellate court may treat as waived any contention for which brief does not provide citation to authority. *Jones v. Superior Court (1994) 26 Cal. App. 4th 92, 99, 31 Cal. Rptr. 2d 264* ; *Amato v. Mercury Casualty Co. (1993) 18 Cal. App. 4th 1784, 1794, 23 Cal. Rptr. 2d 73*

[f] Mootness

Court has discretion to resolve appeal based on issue of great public interest, despite events, such as death of party, which may render the matter moot. *Konig v. Fair Employment and Housing Commission (2002) 28 Cal. 4th 743, 746, n.3, 123 Cal. Rptr. 2d 1, 50 P.3d 718*

Appellate court may exercise inherent power to resolve issue in appeal rendered moot by subsequent events, when that issue is one of continuing public interest and likely to recur. *Baluyut v. Superior Court (1996) 12 Cal. 4th 826, 829-830 n.4, 50 Cal. Rptr. 2d 101, 911 P.2d 1*

Appellate court will not give opinions on moot questions or abstract propositions or declare principles or rules of law that cannot affect matter in issue. *Consol. etc. Air Corp. v. United A. etc. Workers (1946) 27 Cal. 2d 859, 863, 167 P.2d 725*

A reviewing court may exercise its inherent discretion to resolve an issue rendered moot by subsequent events if the question to be decided is of continuing public importance and is a question capable of repetition, yet evading review. *In re Anna S. (2010) 180 Cal. App. 4th 1489, 1497, 103 Cal. Rptr. 3d 889*

Appellate court has inherent power to decide issues in a case rendered moot if they are important and of continuing interest. *City of San Jose v. International Assn. of Firefighters, Local 230 (2009) 178 Cal. App. 4th 408, 417-418, 100 Cal. Rptr. 3d 396*

Settlement agreement may not preserve parties' right to appeal. *Watkins v. Wachovia Corporation (2009) 172 Cal. App. 4th 1576, 1588, 92 Cal. Rptr. 409*

Parties cannot by agreement make moot issue appealable. *Larner v. Los Angeles Doctors Hospital Associates, LP (2008) 168 Cal. App. 4th 1291, 1297-1298, 86 Cal. Rptr. 3d 324*

If appeal is technically moot, but same controversy between parties may reoccur, and parties have fully litigated issues, reviewing court may reach merits of appeal. *Hollister v. Monterey Insurance Company (2008) 165 Cal. App. 4th 455, 480, 81 Cal. Rptr. 3d 72*

A court will decide an appeal if only part but not all of the controversy has been rendered moot. *Mercury Interactive*

Corporation v. Klein (2007) 158 Cal. App. 4th 60, 78, 70 Cal. Rptr. 3d 88

If a pending case poses an issue of broad public interest that is likely to recur, the court may exercise an inherent discretion to resolve that issue even though an event occurring during its pendency would normally render the matter moot. *Gonzalez v. Munoz (2007) 156 Cal. App. 4th 413, 419-420, 67 Cal. Rptr. 3d 317*

Although an appeal is technically moot, the appellate court may exercise its inherent discretion to consider the issue presented if it is of broad public interest and likely to recur. *City of Riverside v. Stansbury (2007) 155 Cal. App. 4th 1582, 1588, 66 Cal. Rptr. 3d 862*

Appeal was not rendered moot by subsequent federal law condemning memorial site by eminent domain; condemnation law was itself subject of challenges, and local issue was part of continuing controversy that existed for 17 years. Paulson v. Abdelnour (2006) 145 Cal. App. 4th 400, 415-416, 51 Cal. Rptr. 3d 575

Appeal moot when parties settled underlying case. *Ebensteiner Co. v. Chadmar Group (2006) 143 Cal. App. 4th 1174, 1178-1180, 49 Cal. Rptr. 3d 825*

Purity of elections and full disclosure of contributions and expenditures are matters of public interest for purposes of determining whether matter is moot. *Californians for Fair Representation--No on 77 v. Superior Court (2006) 138 Cal. App. 4th 15, 22-23, 41 Cal. Rptr. 3d 148*

Appeal not moot when case raised important issues of public policy that were likely to recur, yet would evade review because of the cyclical nature of the pesticide renewal process. *Californians for Alternatives to Toxics v. Department of Pesticide Regulation (2006) 136 Cal. App. 4th 1049, 1069, 39 Cal. Rptr. 3d 393*

Court hears issue of conflicts of interest that may arise between putative class members and counsel despite withdrawal of counsel. *Apple Computer, Inc. v. Superior Court (2005) 126 Cal. App. 4th 1253, 1264, 24 Cal. Rptr. 3d 818*

If issues on appeal affect the general public interest and will likely be litigated and appealed again, an appellate court may, although the appeal is subject to dismissal as moot, adjudicate the issues involved. *Marshall v. Pasadena Unified School District (2004) 119 Cal. App. 4th 1241, 1250, 15 Cal. Rptr. 3d 344*

Despite settlement of case, issue of disclosure of confidential reports not moot when it may arise in future in same case or in other cases. *Tracy A. v. Superior Court (2004) 117 Cal. App. 4th 1309, 1313-1314, 12 Cal. Rptr. 3d 684*

Court determined case not moot, despite defendant's death, in light of public interest in lawful enforcement of drunk driving laws. *Hernandez v. Gutierrez (2003) 114 Cal. App. 4th 168, 176, n.3, 7 Cal. Rptr. 3d 307*

Appeal is moot when the decision of the reviewing court can have no practical impact or provide the parties effectual relief; city's compliance with writ rendered appeal moot. *MHC Operating Limited Partnership v. City of San Jose (2003) 106 Cal.App. 4th 204, 214, 130 Cal. Rptr. 2d 564*

A court will decline to exercise its discretion when the issues presented are essentially factual in nature and therefore require resolution on a case-by-case basis; whether specific party is indispensable is fact-specific question. *MHC Operating Limited Partnership v. City of San Jose (2003) 106 Cal. App. 4th 204, 215, 130 Cal. Rptr. 2d 564*

Appeal considered moot when contracts at issue had already been performed and had expired. *Giles v. Horn (2002) 100 Cal. App. 4th 206, 226-228, 123 Cal. Rptr. 2d 735*

Appeal based on a challenge to an emergency regulation that has expired is not moot when the emergency regulation

has been replaced by an identical permanent regulation. *Californians for Political Reform Foundation v. Fair Political Practices Com. (1998) 61 Cal. App. 4th 472, 71 Cal. Rptr. 2d 606*

[2] General Standards of Review of Judgment on Appeal

[a] Overview and Comparison of Standards of Review

Standard of review determines how much deference is given to ruling or judgment. *Hurtado v. Statewide Home Loan Co. (1985) 167 Cal. App. 3d 1019, 1022-1023, 213 Cal. Rptr. 712, 714* , disapproved on other grounds in *Shamblin v. Brattain (1988) 44 Cal. 3d 474, 479 n.4, 243 Cal. Rptr. 902, 749 P.2d 339*

[b] Review Based on Claim of Abuse of Discretion by Trial Court

Appellate court will not reverse under abuse of discretion standard if it merely disagrees with ruling or order. *Rappleyea v. Campbell (1994) 8 Cal. 4th 975, 987, 35 Cal. Rptr. 2d 669, 884 P.2d 126*

Appellate court will not reverse for abuse of discretion unless it appears a miscarriage of justice has occurred because the trial court exceeded the bounds of reason, all circumstances considered; appellant has the burden of showing a clear case of abuse, or appellate court will not substitute its opinion for that of trial court and divest trial court of its discretionary power. *Denham v. Superior Court (1970) 2 Cal. 3d 557, 564, 86 Cal. Rptr. 65, 468 P.2d 193*

Trial court's discretion is not a whimsical, uncontrolled power, but a legal discretion, subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal if no reasonable basis for the action is shown. *Miyamoto v. DMV (2009) 176 Cal. App. 4th 1210, 1217-1219, 98 Cal. Rptr. 3d 459*

Court's refusal to acknowledge and exercise discretion vested in it was abuse of discretion. *Law Offices of Dixon R. Howell v. Valley (2005) 129 Cal. App. 4th 1076, 1090, 29 Cal. Rptr. 3d 499*

A reviewing court will reverse a trial court's exercise of discretion only when there has been a miscarriage of justice. *Bancomer, S.A. v. Superior Court (1996) 44 Cal. App. 4th 1450, 1457, 52 Cal. Rptr. 2d 435*

Discretion of trial court subject to limitations of legal principles governing subject of its action. *City of Sacramento v. Drew (1989) 207 Cal. App. 3d 1287, 1297-1298, 255 Cal. Rptr. 704*

"Discretion" cannot be defined without regard to the particular subject of discretion. *Hurtado v. Statewide Home Loan Co. (1985) 167 Cal. App. 3d 1019, 1022-1023, 213 Cal. Rptr. 712, 714* , disapproved on other grounds in *Shamblin v. Brattain (1988) 44 Cal. 3d 474, 479 n.4, 243 Cal. Rptr. 902, 749 P.2d 339*

[c] Review Based on Claim of Insufficient Evidence

[i] Substantial Evidence Review

Substantial evidence test applies to questions of fact, that is, when the inquiry requires the application of experience with human affairs. *20th Century Ins. Co. v. Garamendi (1994) 8 Cal. 4th 216, 271, 32 Cal. Rptr. 2d 807, 878 P.2d 566*

Scope of review of sufficiency of evidence begins and ends with determination whether there is substantial evidence that will support conclusions reached by jury or trial court. *Foreman & Clark Corp. v. Fallon (1971) 3 Cal. 3d 875,*

881, 92 Cal. Rptr. 162, 479 P.2d 362

Appellant has burden to identify and establish deficiencies in evidence. The appellate court is not required to independently search the evidentiary record to determine its sufficiency. *Huong Que, Inc. v. Luu (2007) 150 Cal. App. 4th 400, 409, 58 Cal. Rptr. 3d 527*

Questions of fact are reviewed under the substantial evidence rule. *Gifford v. J & A Holdings (1997) 54 Cal. App. 4th 996, 1002, 63 Cal. Rptr. 2d 253*

[ii] Presumptions in Favor of Judgment

An inference may constitute substantial evidence, but the inference must be a reasonable conclusion from the evidence and cannot be based upon suspicion, imagination, speculation, surmise, conjecture or guesswork. *McRae v. Department of Corrections and Rehabilitation (2006) 142 Cal. App. 4th 377, 389, 48 Cal. Rptr. 3d 313*

If more than one reasonable inference may be drawn from facts, the substantial evidence rule requires indulging the inferences favorable to the trial court's judgment. *Davis v. Continental Airlines, Inc. (1997) 59 Cal. App. 4th 205, 211, 69 Cal. Rptr. 2d 79*

Presumption that record contains evidence sufficient to sustain every finding of fact. *Foreman & Clark Corp. v. Fallon (1971) 3 Cal. 3d 875, 881, 92 Cal. Rptr. 162, 479 P.2d 362*

Court must consider evidence in light most favorable to prevailing party. *In re Complex Asbestos Litigation (1991) 232 Cal. App. 3d 572, 597, 283 Cal. Rptr. 732*

[iii] Waiver of Contention for Failure to State Facts Appropriately

Appellant risks waiver of issue if facts not stated with appropriate standard in mind, e.g., in light most favorable to judgment. *Foreman & Clark Corp. v. Fallon (1971) 3 Cal. 3d 875, 881, 92 Cal. Rptr. 162, 479 P.2d 362*

[iv] Sufficiency of Evidence Judged Against Jury Instructions Given

Party who requested jury instructions is bound by jury's determination on those instructions. *Williams v. Volkswagenwerk Aktiengesellschaft (1986) 180 Cal. App. 3d 1244, 1264, 226 Cal. Rptr. 306*

[v] General Verdict Rule

General verdict not be disturbed by appellate court if any one of counts or issues is supported by substantial evidence and is unaffected by error. *Liberty Transport, Inc. v. Harry W. Gorst Co. (1991) 229 Cal. App. 3d 417, 427, 280 Cal. Rptr. 159* , disapproved on other grounds in *Adams v. Murakami (1991) 54 Cal. 3d 105, 116, 284 Cal. Rptr. 318, 813 P.2d 1348*

[vi] Same Appellate Standard Applies Regardless of Trial Court Standard

On review of factual determination, same sufficiency of evidence standard applies regardless of standard applied in trial court. *Crail v. Blakely (1973) 8 Cal. 3d 744, 750, 106 Cal. Rptr. 187, 505 P.2d 1027*

[vii] Appeal on Judgment Roll or Clerk's Transcript

When appeal based on judgment roll, court must conclusively presume that the evidence is ample to sustain the trial court's findings; review is limited to determining whether any error appears on the face of the record. *Nielsen v. Gibson (2009) 178 Cal. App. 4th 318, 324-325, 100 Cal. Rptr. 3d 335*

If no evidence or only portion of evidence designated as part of record on appeal, appellant may not challenge sufficiency of evidence. *Sui v. Landi (1985) 163 Cal. App. 3d 383, 385-386 , 209 Cal. Rptr. 449*

[viii] Modified Sufficiency Review for Exclusion of Evidence and Instructions

When appellant contends trial court erred by not giving requested instructions or instructions which must be given on court's own motion, appellate court will review record to determine whether there was sufficient evidence to justify instruction, viewing evidence in light most favorable to appellant. *Sills v. Los Angeles Transit Lines (1953) 40 Cal. 2d 630, 633, 255 P.2d 795*

[ix] Mixed Questions of Law and Fact

Substantial evidence test applies to questions of fact and independent review test applies to questions of law; for mixed questions, if the inquiry requires the application of experience with human affairs, the question is predominantly factual and the substantial evidence test applies, whereas if the inquiry, by contrast, requires critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and is reviewed independently. *20th Century Ins. Co. v. Garamendi (1994) 8 Cal. 4th 216, 271, 32 Cal. Rptr. 2d 807, 878 P.2d 566*

Mixed questions of law and fact are determined in three steps: the reviewing court determines whether the facts found by the trial court are supported by substantial evidence, selects the applicable law, and finally applies the law to the facts to determine whether the law has been violated on the established facts. *Ghirardo v. Antonioli (1994) 8 Cal. 4th 791, 800, 35 Cal. Rptr. 2d 418, 883 P. 2d 960*

Appellate court defers to trial court's factual decisions and reviews questions of law under nondeferential standard. *Green v. Par Pools, Inc. (2003) 111 Cal. App. 4th 620, 627, 3 Cal. Rptr. 3d 844*

[d] Independent Review of Trial Court's Rulings

In resolving questions of law on appeal from a denial of a writ of mandate, an appellate court exercises its independent judgment. *Professional Engineers in California Government v. Kempton (2007) 40 Cal. 4th 1016, 1032, 56 Cal. Rptr. 3d 814, 155 P.3d 226*

If material facts are largely undisputed, appellate court applies de novo standard of application of statute. *Connerly v. State Personnel Bd. (2006) 37 Cal. 4th 1169, 1175, 39 Cal. Rptr. 3d 788, 129 P.3d 1*

Independent review test applies to questions of law, that is, when the inquiry requires critical consideration of legal principles and their underlying values. *20th Century Ins. Co. v. Garamendi (1994) 8 Cal. 4th 216, 271, 32 Cal. Rptr. 2d 807, 878 P.2d 566*

De novo review applied to determine whether trial court correctly determined that exhibits were subject to sealed records rules. *Mercury Interactive Corporation v. Klein (2007) 158 Cal. App. 4th 60, 80-81, 70 Cal. Rptr. 3d 88*

Application of statute is question of law and independent review standard applies if relevant facts are not in dispute. *Librers v. Black (2005) 129 Cal. App. 4th 114, 124, 28 Cal. Rptr. 3d 188*

Questions of law are reviewed de novo. *McGhan Medical Corp. v. Superior Court (1992) 11 Cal. App. 4th 804, 811, 14 Cal. Rptr. 2d 264* ; *Mancuso v. Southern Cal. Edison Co. (1991) 232 Cal. App. 3d 88, 95, 283 Cal. Rptr. 300*

[3] Standards of Review of Particular Judgments and Orders

[a] Admission and Exclusion of Evidence under Evidence Code Section 352

Abuse of discretion review. *Aguayo v. Crompton & Knowles Corp. (1986) 183 Cal. App. 3d 1032, 1038, 228 Cal. Rptr. 768*

[b] Arbitration

Whether an arbitration agreement applies to a controversy is a question of law to which the appellate court applies its independent judgment if there is absence of conflicting extrinsic evidence in aid of interpretation introduced in the trial court. *Alan v. Superior Court (2003) 111 Cal. App. 4th 217, 223-224, 3 Cal. Rptr. 3d 377*

A determination that the right to compel arbitration has been waived is ordinarily a question of fact, and the trial court's finding is binding on the appellate court if supported by substantial evidence. *Davis v. Continental Airlines, Inc. (1997) 59 Cal. App. 4th 205, 211, 69 Cal. Rptr. 2d 79*

Substantial evidence review. *City of Vista v. Sutro & Co. (1997) 52 Cal. App. 4th 401, 407, 60 Cal. Rptr. 2d 488*

If determination of whether agreement to arbitrate exists is simply matter of contract or statutory interpretation, with no accompanying factual issues to be resolved, it is question of law subject to appellate court's independent review. *County of Contra Costa v. Kaiser Foundation Health Plan, Inc. (1996) 47 Cal. App. 4th 237, 241, 54 Cal. Rptr. 2d 628*

Court should not substitute its own judgment for the arbitrator's when determining the scope of the agreement to arbitrate. *Advanced Micro Devices, Inc. v. Intel Corp. (1994) 9 Cal. 4th 362, 372, 36 Cal. Rptr. 2d 581, 885 P.2d 994*

[c] Attorney Fee Awards

Abuse of discretion review. *Bartling v. Glendale Adventist Medical Center (1986) 184 Cal. App. 3d 97, 103, 228 Cal. Rptr. 847*

[d] Class Action

Appellate court will not disturb trial court ruling on class certification if supported by substantial evidence unless (1) improper criteria were used or (2) erroneous legal assumptions were made. *Richmond v. Dart Industries, Inc. (1981) 29 Cal. 3d 462, 470, 174 Cal. Rptr. 515, 629 P.2d 23*

[e] Continuance

Abuse of discretion review. *Mahoney v. Southland Mental Health Associates Medical Group (1990) 223 Cal. App. 3d*

167, 171-172, 272 Cal. Rptr. 602

[f] Contract Interpretation

When extrinsic evidence properly admitted to aid in interpreting contract, the appellate court will uphold reasonable construction of contract by trier of fact if supported by substantial evidence. *In re Marriage of Fonstein (1976) 17 Cal. 3d 738, 746-747, 131 Cal. Rptr. 873, 552 P.2d 1169*

Abuse of discretion review. *In re Marriage of Falcone & Fyke (2008) 164 Cal. App. 4th 814, 822-823, 79 Cal. Rptr. 3d 588*

Trial court's threshold finding of ambiguity is a question of law subject to appellate court's independent review; trial court's ultimate construction of ambiguous language is subject to independent review if the extrinsic evidence is not in conflict, even when the parties draw different inferences from the evidence. *Bill Signs Trucking, LLC v. Signs Family Limited Partnership (2007) 157 Cal. App. 4th 1515, 1521, 69 Cal. Rptr. 3d 589*

Appellate court reviews independently interpretation of contract when no extrinsic evidence is admitted to aid in interpretation of contract. *Parsons v. Bristol Development Co. (1965) 62 Cal. 2d 861, 865-866, 44 Cal. Rptr. 767, 402 P.2d 839* ; *Alex Robertson Co. v. Imperial Casualty & Indemnity Co. (1992) 8 Cal. App. 4th 338, 343, 10 Cal. Rptr. 2d 165*

Appellate court required to analyze contract de novo if (a) trial court's contractual interpretation based solely on written instrument without extrinsic evidence; (b) no conflict in properly admitted extrinsic evidence; or (c) trial court's determination based on improperly admitted incompetent evidence. *City of Hope Nat. Medical Center v. Genentech, Inc. (2004) 123 Cal. App. 4th 306, 324*

If interpretation of ambiguous contract provision turns on credibility of conflicting extrinsic evidence, appellate court must determine whether trial court's interpretation is supported by substantial evidence and uphold interpretation if reasonable. *City of Hope Nat. Medical Center v. Genentech, Inc. (2004) 123 Cal. App. 4th 306, 324*

When proper interpretation of a contract depends upon extrinsic evidence, a question of fact is presented. *Powers v. Dickson, Carlson & Campillo (1997) 54 Cal. App. 4th 1102, 1111, 63 Cal. Rptr. 2d 261*

Where no extrinsic evidence is presented, the proper interpretation of a contract is a question of law which is reviewed de novo. *Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1527, 60 Cal. Rptr. 2d 138*

[g] Damages

On review of factual question of amount of damages, appellate court indulges all presumptions in favor of decision of trial court and interferes only on ground that verdict is so large that, at first blush, it shocks conscience and suggests passion, prejudice or corruption on the part of jury. *Fagerquist v. Western Sun Aviation, Inc. (1987) 191 Cal. App. 3d 709, 727-728, 236 Cal. Rptr. 633*

[h] Demurrer

When case comes before appellate court from judgment sustaining demurrer, court assumes truth of facts alleged in complaint and reasonable inferences that may be drawn from those facts. *Miklosy v. Regents of the University of California (2008) 44 Cal. 4th 876, 883, 80 Cal. Rptr. 3d 690, 188 P.3d 629*

Court of appeal applies de novo standard of review to case resolved on demurrer. *Farm Raised Salmon Cases (2008) 42 Cal. 4th 1077, 1089 n.10, 72 Cal. Rptr. 3d 112, 175 P.3d 1170*

When an appeal arises from a ruling on a demurrer, the appellate court treats the demurrer as admitting all properly pleaded material facts. *Shirk v. Vista Unified School District (2007) 42 Cal. 4th 201, 205, 64 Cal. Rptr. 3d 210, 164 P.3d 630*

On appeal from judgment dismissing action after sustaining demurrer without leave to amend, appellate court gives complaint reasonable interpretation, reading it as a whole and its parts in their context. It treats the demurrer as admitting all material facts properly pleaded, but does not assume truth of contentions, deductions or conclusions of law. When demurrer is sustained, appellate court determines whether complaint states facts sufficient to constitute cause of action. When demurrer is sustained without leave to amend, appellate court decides whether there is reasonable possibility that defect can be cured by amendment: if it can be, trial court has abused its discretion and appellate court reverses. *City of Dinuba v. County of Tulare (2007) 41 Cal. 4th 859, 865, 62 Cal. Rptr. 3d 614, 161 P.3d 1168*

When case comes to review court on demurrer for failure to state cause of action, court accepts as true facts alleged in plaintiff's complaint. *Barratt American, Inc. v. City of Rancho Cucamonga (2005) 37 Cal. 4th 685, 692, 37 Cal. Rptr. 3d 149, 124 P.3d 719*

On appeal from judgment dismissing action after sustaining demurrer without leave to amend, reviewing court gives complaint reasonable interpretation, and treats demurrer as admitting all material facts properly pleaded. *Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal. 4th 797, 810, 27 Cal. Rptr. 3d 661*

Trial court abused discretion in denying leave to amend after granting demurrer if appellate court sees reasonable possibility that plaintiff could cure defect by amendment. *Campbell v. Regents of the University of California (2005) 35 Cal. 4th 311, 320, 25 Cal. Rptr. 3d 320*

On appeal from judgment dismissing action after sustaining demurrer without leave to amend, reviewing court applies an independent review. *Aubry v. Tri-City Hospital Dist. (1992) 2 Cal. 4th 962, 966-967, 9 Cal. Rptr. 2d 92, 831 P.2d 317*

Demurrer affirmed on any properly supported ground, regardless of trial court's basis for ruling. *Total Call International, Inc. v. Peerless Ins. Co. (2010) 181 Cal. App. 4th 161, 169, 104 Cal. Rptr. 3d 319*

Error for trial court to sustain demurrer when plaintiff stated cause of action under any possible legal theory; abuse of discretion to sustain demurrer without leave to amend if plaintiff shows reasonable possibility any defect can be cured by amendment. *Schuster v. Gardner (2005) 127 Cal. App. 4th 305, 311, 25 Cal. Rptr. 3d 468*

If demurrer was sustained without leave to amend, appellate court must decide whether there is reasonable possibility defect can be cured by amendment; if so, demurrer must be reversed. Demurrer granted without leave to amend must be reversed for abuse of discretion if reasonable possibility defects could be cured by amendment. *Schifando v. City of Los Angeles (2003) 31 Cal. 4th 1074, 1081, 6 Cal. Rptr. 3d 457, 79 P.3d 569* ; *Richelle L. v. Roman Catholic Archbishop of San Francisco (2003) 106 Cal. App. 4th 257, 266, 130 Cal. Rptr. 2d 601*

Appellate court's only task in reviewing a ruling on demurrer is to determine whether complaint states cause of action. Court assumes that complaint's properly pleaded material allegations are true and gives complaint a reasonable interpretation by reading it as a whole and all its parts in their context. *Stoops v. Abbassi (2002) 100 Cal. App. 4th 644, 650, 122 Cal. Rptr. 2d 747*

When the demurrer is sustained with leave to amend and plaintiff elects not to amend before entry of judgment of dismissal, appellate court resolves all ambiguities and uncertainties raised by demurrer against plaintiff. *Casella v. City of Morgan Hill (1991) 230 Cal. App. 3d 43, 48, 280 Cal. Rptr. 876*

[i] Directed Verdict

On review after directed verdict, appellate court views evidence in light most favorable to losing party and resolves all conflicts and inferences in that party's favor. *Colbough v. Hartline (1994) 29 Cal. App. 4th 1516, 1521, 35 Cal. Rptr. 2d 213*

[j] Discovery

Abuse of discretion review. *Perkins v. Superior Court (1981) 118 Cal. App. 3d 761, 765, 173 Cal. Rptr. 596*

[k] Dismissal for Delay in Prosecution

Abuse of discretion review. *Blank v. Kirwan (1985) 39 Cal. 3d 311, 331, 216 Cal. Rptr. 718, 703 P.2d 58*

[l] Disqualification of Counsel

Abuse of discretion review. *Truck Insurance Exchange v. Fireman's Fund Insurance Co. (1992) 6 Cal. App. 4th 1050, 1055, 8 Cal. Rptr. 2d 228*

[m] Duty of Care

Independent review. Crocker National Bank v. City and County of San Francisco *(1989) 49 Cal. 3d 881, 888, 264 Cal. Rptr. 139, 782 P.2d 278*

[n] Enforcement of Settlement

Substantial evidence review. *In re Marriage of Assemi (1994) 7 Cal. 4th 896, 911, 30 Cal. Rptr. 2d 265, 872 P.2d 1190*

[o] Expert Witness Fees

Award of expert witness fees under *Code of Civ. Proc. § 998* reviewed under abuse of discretion standard. *Peterson v. John Crane, Inc. (2007) 154 Cal. App. 4th 498, 513, 65 Cal. Rptr. 3d 185*

Abuse of discretion review. *Huber, Hunt & Nichols, Inc. v. Moore (1977) 67 Cal. App. 3d 278, 315, 136 Cal. Rptr. 603*

[p] Forum Non Conveniens

Abuse of discretion review. *Cal-State Business Products & Services, Inc. v. Ricoh (1993) 12 Cal. App. 4th 1666, 1680-1681, 16 Cal. Rptr. 2d 417* ; *but see Bancomer, S.A. v. Superior Court (1996) 44 Cal. App. 4th 1450, 1457, n.7,*

52 Cal. Rptr. 2d 435

[q] Injunction

To the extent that the grant or denial of a preliminary injunction requires statutory construction, the matter presents a question of law. Once the legal question is resolved the trial court's decision to grant a preliminary injunction is reviewed for an abuse of discretion. *Cinquegrani v. Department of Motor Vehicles (2008) 163 Cal. App. 4th 741, 745-746, 77 Cal. Rptr. 3d 816*

Standard of review for denial of preliminary injunction is abuse of discretion; however, likelihood of prevailing on merits may be determined as matter of law, and de novo review for that factor is proper. *Strategix, Ltd v. Infocrossing West, Inc. (2006) 142 Cal. App. 4th 1068, 1072, 48 Cal. Rptr. 3d 614*

Standard of review for denial of preliminary injunction is abuse of discretion; however, likelihood of prevailing on merits may be determined as matter of law, and de novo review for that factor is proper. *Sahlolbei v. Providence Healthcare, Inc. (2003) 112 Cal. App. 4th 1137, 1145-1146, 5 Cal. Rptr. 3d 598*

Court used de novo standard of review because appellant claimed trial court erred in relying on case law construing statutory definition at issue prior to time of pertinent change in statute as applied to instant case. *People ex rel. Department of Alcoholic Beverage Control v. Miller Brewing Company (2002) 104 Cal. App. 4th 1189, 1194, 128 Cal. Rptr. 2d 861*

Normal standard of review of ruling concerning injunction is abuse of discretion unless likelihood of prevailing depends upon question of law. *Efstratis v. First Northern Bank of Dixon (1997) 59 Cal. App. 4th 667, 671, 69 Cal. Rptr. 2d 445*

[r] Judgment Notwithstanding the Verdict

On appeal from judgment notwithstanding verdict, appellate court independently determines whether record, viewed most favorably to verdict, contains any substantial evidence to support verdict. If so, trial court erred in granting JNOV. If issue deals solely with application of statute to facts supporting jury verdict, appellate court review is de novo. *Mason v. Lake Dolores Group, LLC (2004) 117 Cal. App. 4th 822, 829-830, 840, 11 Cal. Rptr. 3d 914*

On appeal from judgment notwithstanding verdict, appellate court must read record in light most advantageous to party in favor of whom verdict was rendered, resolve all conflicts in that party's favor, and give that party benefit of all reasonable inferences in support of original verdict. *Borba v. Thomas (1977) 70 Cal. App. 3d 144, 151-152, 138 Cal. Rptr. 565*

[s] Judgment on the Pleadings

Review of judgment on pleadings governed by standards governing judgment following successful demurrer. *Ramirez v. USAA Casualty Ins. Co. (1991) 234 Cal. App. 3d 391, 397, 285 Cal. Rptr. 757*

[t] Judicial Notice

Decision of trial court not to take judicial notice upheld unless no reasonable judge would have refused to take judicial notice. *Leibert v. Transworld Systems, Inc. (1995) 32 Cal. App. 4th 1693, 1700, 39 Cal. Rptr. 2d 65*

[u] Laches

Substantial evidence review. *Chang v. City of Palos Verdes Estates (1979) 98 Cal. App. 3d 557, 563, 159 Cal. Rptr. 630*

[v] New Trial

Trial court's order granting new trial was deficient in that it failed to specify court's reasoning; therefore, appellate court required to independently review motion. *The Oakland Raiders v. National Football League (2005) 126 Cal. App. 4th 1497, 1506, 25 Cal. Rptr. 3d 141*

Order granting new trial based on determination that two of jury's special verdict findings were inconsistent analyzed as matter of law. *City of San Diego v. D.R. Horton San Diego Holding Co., Inc. (2005) 126 Cal. App. 4th 668, 678, 24 Cal. Rptr. 3d 338*

Abuse of discretion review. *Romero v. Riggs (1994) 24 Cal. App. 4th 117, 121-122, 29 Cal. Rptr. 2d 219*

[w] Nonsuit

After conclusion of an opening statement, an appellate court reviewing a nonsuit must accept all facts asserted in the opening statement as true and must indulge every legitimate inference that may be drawn from those facts. A court will uphold a nonsuit only if the facts and inferences lead inexorably to the conclusion that the plaintiff cannot establish an essential element of its cause of action. *Cooper v. State Farm Mutual Automobile Insurance Co. (2009) 177 Cal. App. 4th 876, 891-892, 99 Cal. Rptr. 3d 870*

With respect to motion for nonsuit, appellate court must accept all facts asserted in opening statement as true and must indulge every legitimate inference which may be drawn from those facts. *Abeyta v. Superior Court (1993) 17 Cal. App. 4th 1037, 1041, 21 Cal. Rptr. 2d 680*

[x] Relief From Judgment or Order

The disposition of a motion for relief under *Code Civ. Proc. § 473* is subject to the discretion of the trial court. On appeal, the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason when the case is viewed in its entirety. *In re Marriage of Connolly (1979) 23 Cal. 3d 590, 597-598, 153 Cal. Rptr. 423, 591 P.2d 911*

[y] Review of Administrative Decisions

Appellate court reviews findings of trial court on issues upon which court properly exercised its independent judgment to determine whether they are supported by substantial evidence on whole record. *Schmitt v. City of Rialto (1985) 164 Cal. App. 3d 494, 501, 210 Cal. Rptr. 788*

As to administrative determinations properly reviewed in superior court under substantial evidence or abuse of discretion standard, scope of review is same in appellate court as it was in superior court. *Schmitt v. City of Rialto (1985) 164 Cal. App. 3d 494, 501, 210 Cal. Rptr. 788*

The decision of an administrative agency is reviewed under the substantial evidence rule if it does not involve a

constitutional right. *Contra Costa County v. Social Welfare Bd. (1962) 199 Cal. App. 2d 468, 472-473, 18 Cal. Rptr. 573*

[z] Sanctions

Abuse of discretion review. *Luke v. Baldwin-United Corp. (1985) 167 Cal. App. 3d 664, 668, 213 Cal. Rptr. 654*

[aa] Statutory Interpretation on Undisputed Facts

Independent review. *Simpson v. Unemployment Ins. Comp. Appeals Bd. (1986) 187 Cal. App. 3d 342, 350, 231 Cal. Rptr. 690*

[bb] Summary Judgment

Following entry of a defense summary judgment, appellate court views evidence in light most favorable to plaintiffs as the losing parties and liberally construes plaintiffs' evidentiary submissions and strictly scrutinize defendant's evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiffs' favor. *McDonald v. Antelope Valley Community College District (2008) 45 Cal. 4th 88, 96-97, 84 Cal. Rptr. 3d 734, 194 P.3d 1026*

If a plaintiff appeals from a trial court's order granting a defendant summary judgment, the court of appeal independently examines the record in order to determine whether triable issues of fact exist to reinstate the action. *Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56, 64, 74 Cal. Rptr. 3d 108*

Appellate court reviews the trial court's summary judgment decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained; court liberally construes the evidence in support of the party opposing summary judgment and resolves doubts concerning the evidence in favor of that party. Wilson v. 21st *Century Ins. Co. (2007) 42 Cal. 4th 713, 716-717, 68 Cal. Rptr. 3d 746, 171 P.3d 1082*

Court applies de novo standard of review to order granting summary judgment based on interpretation or application of insurance policy terms. *County of San Diego v. Ace Property & Cas. Ins. Co. (2005) 37 Cal. 4th 406, 414, 33 Cal. Rptr. 3d 583*

When plaintiff appeals trial court's order granting defendants summary judgment, appellate court independently examines record to determine whether triable issues of fact exist to reinstate action. *Wiener v. Southcoast Childcare Centers, Inc. (2004) 32 Cal. 4th 1138, 1142, 12 Cal. Rptr. 3d 615, 88 P.3d 517*

Remand to trial court appropriate to determine if summary judgment was proper on any ground advanced by defendant in light of revised definition of "disability" under *FEHA. Colmenares v. Braemar Country Club, Inc. (2003) 29 Cal. 4th 1019, 1031-1032, 130 Cal. Rptr. 2d 662, 63 P.3d 220*

Federal court decision after removal was law of the case after remand to state court. *Adams v. Pacific Bell Directory (2003) 111 Cal. App. 4th 93, 97, 3 Cal. Rptr. 3d 365*

Only exceptions to rule of independent review of summary judgment granting are rulings concerning additional time for discovery under *Code Civ. Proc. § 437c(h)* and on sole witness and mental state provisions of *Code Civ. Proc. § 437c(e).* *Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 212 n.3, 285 Cal. Rptr. 717* ; *Saldana v. Globe-Weis Systems Co. (1991) 233 Cal. App. 3d 1505, 1512 n.3, 285 Cal. Rptr. 385*

[4] Law of the Case

Decision of appellate court, stating rule of law necessary to decision of case, conclusively establishes that rule and makes it determinative of rights of same parties in subsequent retrial or appeal in same case. *Nally v. Grace Community Church (1988) 47 Cal. 3d 278, 301, 253 Cal. Rptr. 97, 763 P.2d 948*

Appellate court may disregard law of the case when necessary to avoid unjust decision arising from misapplication of law. *Searle v. Allstate Ins. Co. (1985) 38 Cal. 3d 425, 434-435, 212 Cal. Rptr. 466, 696 P.2d 1308*

Absent a written opinion following issuance of the alternative writ, the appellate court's reasoning in issuing the alternative writ is not the law of the case binding on appeal. *Cerna v. City of Oakland (2008) 161 Cal. App. 4th 1340, 1354-1355, 75 Cal. Rptr. 3d 168*

When an appellate court states in its opinion a principle or rule of law necessary to its decision, that principle or rule becomes the law of the case. *Santa Clarita Organization for Planning the Environment v. County of Los Angeles (2007) 157 Cal. App. 4th 149, 68 Cal. Rptr. 3d 449, 455*

Prior trial court ruling in separate case governed by res judicata, not law of the case. *Daar & Newman v. VRL International (2005) 129 Cal. App. 4th 482, 488-489, 28 Cal. Rptr. 3d 566*

Summary denial of petition for writ of review from PUC order acts as law of the case. *PG&E Corp. v. Public Utilities Commission (2004) 118 Cal. App. 4th 1174, 1193, 13 Cal. Rptr. 3d 630*

Law of the case barred appellant on second appeal from challenging jury instruction determined in first appeal. *Joyce v. Simi Valley Unified Sch. Dist. (2003) 110 Cal. App. 4th 292, 304, 1 Cal. Rptr. 3d 712*

Appellate court may affirm summary judgment on any correct legal theory, as long as parties had adequate opportunity to address theory in trial court. *California School of Culinary Arts v. Lujan (2003) 112 Cal. App. 4th 16, 22, 4 Cal. Rptr. 3d 785*

Law of the case applies only to issues that were both presented and determined in prior appeal. *Bovard v. American Horse Enterprises, Inc. (1988) 201 Cal. App. 3d 832, 841, 247 Cal. Rptr. 340*

Effect of appellate decision that trial court judgment was not supported by sufficient evidence is conclusive in further litigation unless evidence is produced at subsequent trial that is different from that passed on in firstappeal. *Bank of America v. Superior Court (1990) 220 Cal. App. 3d 613, 621 n.3, 269 Cal. Rptr. 596*

[5] The Doctrine of *Stare Decisis* and Controlling Decisional Authority

[a] General Rule

Stare decisis requires court of inferior jurisdiction to follow decisions of court exercising superior jurisdiction. *Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 456, 20 Cal. Rptr. 321, 369 P.2d 937*

Under *stare decisis*, precedent binding even if judge disagrees. *Cuccia v. Superior Court (2007) 153 Cal. App. 4th 347, 353-354, 62 Cal. Rptr. 3d 796*

Decisions of federal court of appeals and district courts not binding, even on federal questions. *Metalclad Corporation v. Ventana Envtl. Organizational Partnership (2003) 109 Cal. App. 4th 1705, 1714-1715, 1 Cal. Rptr. 3d*

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[b] Dicta Not Controlling

While dicta not controlling, court of appeal follows Supreme Court dicta without compelling reason to the contrary. *Howard Jarvis Taxpayers Association v. City of Fresno (2005) 127 Cal. App. 4th 914, 925, 26 Cal. Rptr. 3d 153*

Statement of principle not necessary to decision not precedent that is required by rule of *stare decisis* to be followed. *Western Landscape Const. v. Bank of America (1997) 58 Cal. App. 4th 57, 61, 67 Cal. Rptr. 2d 868*

[c] Splits of Authority

Decisions by courts of equal dignity are not binding under principles of *stare decisis*. *In re Benjamin D. (1991) 227 Cal. App. 3d 1464, 1471, 278 Cal. Rptr. 468*

[d] Plurality Opinions

Plurality opinion not binding precedent. *Board of Supervisors v. Local Agency Formation Com. (1992) 3 Cal. 4th 903, 918, 13 Cal. Rptr. 2d 245, 838 P.2d 1198*

[e] Persuasive Authority

Even if they are not controlling, decisions of other courts may be persuasive. *Weil v. Federal Kemper Life Assurance Co. (1994) 7 Cal. 4th 125, 138, 27 Cal. Rptr. 2d 316, 866 P.2d 774* ; *Baptiste v. Superior Court (1980) 106 Cal. App. 3d 87, 93, 164 Cal. Rptr. 789*

[6] Retroactive Application of Law

[a] Statutory Law

If Legislature clearly intended retrospective effect, courts will carry out that intent unless to do so violates due process rights. *In re Marriage of Bouquet (1976) 16 Cal. 3d 583, 587, 592, 128 Cal. Rptr. 427, 546 P.2d 1371*

Statute has retrospective effect when it substantially changes legal consequences of past events. *Kizer v. Hanna (1989) 48 Cal. 3d 1, 7, 255 Cal. Rptr. 412, 767 P.2d 679*

[b] Case Law

Judicial decisions generally applied retroactively. *Newman v. Emerson Radio Corp. (1989) 48 Cal. 3d 973, 978, 981-984, 258 Cal. Rptr. 592, 772 P.2d 1059*

Considerations of fairness and public policy may require that decision be given only prospective application. *Newman v. Emerson Radio Corp. (1989) 48 Cal. 3d 973, 978, 981-984, 258 Cal. Rptr. 592, 772 P.2d 1059*

Considerations relevant to retroactivity determination include reasonableness of parties' reliance on former rule, nature of change as substantive or procedural, retroactivity's effect on administration of justice, and purposes to be served by

new rule. *Newman v. Emerson Radio Corp. (1989) 48 Cal. 3d 973, 978, 983-992, 258 Cal. Rptr. 592, 772 P.2d 1059*

Appellate court reviews trial court's ruling that neither fairness nor public policy warranted exception to retroactivity rule under abuse of discretion standard. *In re Retirement Cases (2003) 110 Cal. App. 4th 426, 443, 1 Cal. Rptr. 3d 790*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsLaw of the CaseGovernmentsCourtsJudicial PrecedentsCivil ProcedureAppealsStandards of ReviewGeneral OverviewCivil ProcedureAppealsStandards of ReviewFact & Law IssuesGovernmentsLegislationEffect & OperationRetrospective Operation

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AUTHOR: Jeffery A. Hogge Author Hon. Patti S. Kitching, Victoria J. DeGoff Editorial Consultants

§ 41.64 Law Reviews

Jonakait, *The Standard of Appellate Review for Scientific Evidence: Beyond Joiner and Scheffer*, *32 U.C. Davis L. Rev. 289 (1999)*

Faigman, *Appellate Review of Scientific Evidence Under Daubert and Joiner*, *48 Hastings L.J. 959 (1997)*

Barnett, *Depublication Deflating: The California Supreme Court's Wonderful Law-Making Machine Begins to Self-Destruct*, *45 Hastings L.J. 519 (1994)*

Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?* *46 Stan. L. Rev. 817 (1994)*

Fischer and Yockelson, *Standards of Review on Appeal from Post-Trial Motions: Deference Given Where Deference Due*, 7(2) Cal. Litig. 37 (1994)

Kelso, *Report on the California Appellate System*, *45 Hastings L.J. 433 (1994)*

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Barnett, *Making Decisions Disappear: Depublication and Stipulated Reversal in the California Supreme Court*, *26 Loy. L.A. L. Rev. 1033 (1993)*

Grodin, *The Depublication Practice of the California Supreme Court*, *72 Cal. L. Rev. 514 (1984)*

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§ 41.65 Text References

California Civil Appellate Practice, vol. 1, ch. 5, *What Are the Prospects for Reversal?* (Cal. CEB 3rd ed. 2000)

Witkin, California Procedure, vol. 9, *Appeal*, § 316 et seq. (4th ed. 1997)

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§ 41.66 Internet References

California Courts. This site includes: general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most court of appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

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AUTHOR: Jeffery A. Hogge Author Hon. Patti S. Kitching, Victoria J. DeGoff Editorial Consultants

§ 41.90 Request for Publication of Unpublished Opinion

[1] FORM Request for Publication of Unpublished Opinion

_____ [*date*]

California Court of Appeal
_____ Appellate District [, Division _____]
[*Court's address*]

Re: _____ [*case name*]
No. _____ [*case number*]
Request for Publication

To the Honorable Presiding Justice and Associate Justices of the Court of Appeal:

Pursuant to *California Rules of Court, Rule 8.1120,* I respectfully request that the opinion issued by this court in the case referenced above be certified for publication in the Official Reports.

The nature of my interest in this proceeding is _____ [as a party to the action *or* _____ (*specify interest of nonparty, e.g.,* the effect of the opinion on the requesting person's business interests or on other pending litigation to which the person is a party, etc.)].

_____ [*Describe concisely the reasons why the opinion meets the criteria for selection of published opinions in Cal. Rules of Ct., Rule 8.1105(c), e.g.:* The opinion applies the assumption of risk doctrine to circumstances which are novel since the enunciation of the rule of primary assumption of risk in *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* and *Ford v. Gouin (1992) 3 Cal. 4th 339, 11 Cal. Rptr. 2d 30, 834 P.2d 724* in that _____ (*explain*)].

It is respectfully submitted that, for this/these reason[s], the above referenced opinion meets the standards for publication under *California Rules of Court, Rule 8.1105(c)* and merits certification for publication in the Official Reports.

_____ [*signature*]
_____ [*typed name and status,*
if appropriate, e.g., attorney for amicus curiae]
_____ [*California Bar number*
if requesting person is attorney]

[2] Use of Form

This form is for use by a person seeking publication of an opinion of the court of appeal which was not certified for publication. The request must be made to the court of appeal regardless of whether the opinion is final in that court, must include a statement of the nature of the interest of the requesting person and a concise statement of reasons why the opinion meets one or more of the criteria for publication, and must be accompanied by proof of its service on each party to the action. The request must be delivered to the rendering court within 20 days after the opinion is filed [*Cal. Rules of Ct., Rule 8.1120(a)*; for discussion concerning proof of service, *see* Ch. 518, *Service of Summons and Papers*].

For further discussion of the requirements applicable to this request, see*§ 41.51[3]*. For discussion of format requirements applicable to papers filed in appellate courts generally, see Ch. 45, *Appeal: Motion Procedure* .

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AUTHOR: Jeffery A. Hogge Author Hon. Patti S. Kitching, Victoria J. DeGoff Editorial Consultants

§ 41.91 Request for Depublication of Published Opinion

[1] FORM Request for Depublication of Published Opinion

_____ [*date*]

California Supreme Court
[*Court's address*]

Re: _____ [*case name*]
NO. _____ [*case number*]
Request for Depublication

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

Pursuant to *California Rules of Court, Rule 8.1125*, I respectfully request that the above referenced opinion issued by the Court Appeal be ordered not published in the Official Reports. [No petition for review has been filed in this case.] For the Court's convenience, a copy of the opinion, as published, is attached.

The nature of my interest in this proceeding is _____ [as a party to the action *or* _____ (*specify interest of nonparty, e.g., the effect of the opinion on the requesting person's business interests or on other pending litigation to which the person is a party, etc.*)].

_____ [*Describe concisely the reasons why the opinion should not remain published, e.g.:* The opinion of the Court of Appeal misapplies the assumption of risk doctrine enunciated in *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* and *Ford v. Gouin (1992) 3 Cal. 4th 339, 11 Cal. Rptr. 2d 30, 834 P.2d 724* in that _____ (*explain*)].

It is respectfully submitted that, for this/these reason[s], the above-referenced opinion should not remain published.

_____ [*signature*]
_____ [*typed name as status, if appropriate, e.g., attorney for amicus curiae*]
_____ [*California Bar number if requesting person is attorney*]

[2] Use of Form

This form is for use by a person seeking an order from the Supreme Court directing that a court of appeal opinion, certified for publication by the court of appeal, not be published in the Official Reports. The request must be made to the Supreme Court within 30 days after the decision becomes final as to the court of appeal, must include a statement of the nature of the interest of the requesting person and a concise statement of reasons why the opinion should not remain published, must not exceed 10 pages, and must be accompanied by proof of its mailing to the court of appeal and proof of service on each party to the action [*Cal. Rules of Ct., Rule 8.1125(a)*; for discussion concerning proof of service, *see* Ch. 518, *Service of Summons and Papers*]. The concise statement of reasons is sometimes drafted to provide a very brief statement of pertinent facts and procedural history followed by a discussion of the requesting person's reasoning.

For further discussion of the requirements applicable to this request, see*§ 41.52[2]*. For discussion of format requirements applicable to papers filed in appellate courts generally, see Ch. 45, *Appeal: Motion Procedure* . For further discussion of proceedings in the Supreme Court generally, see Ch. 54, *Appeal: California Supreme Court Review* .

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FOOTNOTES:
(n12)Footnote *.
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Volume 5: Appeal-Chs. 40-55
Chapter 42 APPEAL: NOTICE OF APPEAL
PART I. SCOPE

5-42 California Forms of Pleading and Practice--Annotated § 42.01

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§ 42.01 Scope of Chapter

This chapter discusses the procedure for filing and serving notice of appeal in the superior court, which initiates the appeal in the appropriate district of the court of appeal [*see §§ 42.11*, *42.13* et seq.], as well as related proceedings to file docketing statements, when required, and to consolidate related appeals [*see §§ 42.22*, *42.23*].

This chapter also discusses in detail the judgments and orders that are appealable, from which a notice of appeal may properly be taken [*see § 42.12*].

The chapter includes a Research Guide [*see § 42.30* et seq.], Procedural Checklists [*see § 42.50* et seq.], and the following forms:

- Notice of appeal [*see §§ 42.70*, *42.73*].
- Notice of cross appeal [*see § 42.71*].
- Civil Case Information Statement [*see § 42.72*].
- Notices of appeal from particular types of judgments or orders [*see § 42.80* et seq.].
- Notice of appeal combined with other notices regarding record [*see § 42.90*].
- Stipulation and motion for consolidation of appeals [*see § 42.100*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsAppellate JurisdictionState Court Review

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§ 42.02 Cross References

[1] Related Chapters in This Volume

- For discussion relating to the overall procedures for civil appeal, see Ch. 40, *Appeal: An Overview* .

- For discussion in determining the legal likelihood of success in taking an appeal (generally applicable rules of appellate review, standards of review, rules governing application of substantive law, and rules governing publication and citability of appellate opinions), see Ch. 41, *Appeal: Review Standards and Appellate Rules of Law* .

- For discussion and forms concerning proceedings to stay the enforcement or execution of a judgment or order pending its review on appeal, see Ch. 43, *Appeal: Stay of Proceedings* .

[2] Other Related Chapters

- For discussion and a form of complaint against an attorney for malpractice based on failure to perfect an appeal, see Ch. 76, *Attorney Professional Liability* .

- For discussion and forms relating to review of nonappealable judgments and orders, see Ch. 358, *Mandate and Prohibition* .

- For discussion and forms relating to notices of appeals taken in limited civil cases to the appellate division of the superior court (as distinguished from notices of appeal taken from the superior courts to the court of appeal), see Ch. 345A, *Limited Civil Cases* .

- For discussion and forms relating to appeals from judgments rendered in the Small Claims division of the superior court, see Ch. 526, *Small Claims* .

See additional cross references to topics relating to appeal generally in Ch. 40, *Appeal: An Overview*, § 40.02.

California Forms of Pleading and Practice--Annotated

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5-42 California Forms of Pleading and Practice--Annotated §§ 42.03-42.09

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[Reserved]

§§ 42.03[Reserved]

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Chapter 42 APPEAL: NOTICE OF APPEAL
PART II. LEGAL BACKGROUND

5-42 California Forms of Pleading and Practice--Annotated § 42.10

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§ 42.10 Governing Law

The filing of a notice of appeal from a judgment or order of the superior court is governed by *Cal. Rules of Ct., Rules 8.100-8.108*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of Appeal

California Forms of Pleading and Practice--Annotated

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PART II. LEGAL BACKGROUND

5-42 California Forms of Pleading and Practice--Annotated § 42.11

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§ 42.11 Appeal From Superior Court Is Taken By Filing Notice of Appeal

[1] General Requirements

An appeal from a judgment, or a particular part of a judgment, of the superior court in an unlimited civil case is taken by filing with the superior court clerk a notice of appeal from that judgment [*Cal. Rules of Ct., Rule 8.100(a)(1)*; for coverage of appeals taken from judgments or orders in limited civil cases, *see* Ch. 345A, *Limited Civil Cases*]. The following requirements or considerations also apply:

- The notice is essentially a statement that a party appeals from a specified judgment or order, signed by the party or the party's attorney; for discussion of the requirements for preparing a notice of appeal, see [2], *below*. For forms of notice of appeal, see*§§ 42.70*, *42.73*, and *42.80* et seq.

- The notice must specify a judgment or order that is expressly appealable by statute. This requirement is jurisdictional; a notice of appeal from a ruling that is not appealable will be dismissed. For discussion of appealable judgments and orders, see *§ 42.12*.

- The notice must be served on other parties as well as filed; for discussion of the requirements for preparing, serving, and filing a notice of appeal, see [2] and [3], *below*.

- The time deadlines for filing are mandatory and jurisdictional and may not be extended [*see* [4], *below*, and § 42.17]; for discussion of time deadlines generally, see *§§ 42.13 -42.18*.

- A cross appeal is generally taken in the same way as an appeal, although different time deadlines apply [*see Cal. Rules of Ct., Rules 8.100(e), 8.108(e)*]; for further discussion, see [2][a][iii], *below*, and §

42.16. For a form of notice of cross appeal, see*§ 42.71*.

- The appealing or cross appealing party usually must pay a filing fee and deposit when filing the notice [*Cal. Rules of Ct., Rule 8.100(b)*]; for further discussion of filing fees, the deposit for clerk's transcript, and waiver of these costs, see*§ 42.19*.

- The notice may be combined with a notice designating the reporter's transcript, a notice designating the clerk's transcript, or both [*Cal. Rules of Ct., Rule 8.121(a)*], but if combined, an additional deposit may be required at the time of filing; for further discussion, see*§ 42.20*. For forms of combined notice, see *§ 42.90*.

- Some districts or divisions of the court of appeal require a docketing statement or other similar statement to be filed in that court soon after the notice of appeal is filed in the superior court; for further discussion, see*§ 42.22*.

[2] Form and Content of Notice of Appeal

[a] Notice Consists of Statement That Appellant Appeals From Specific Appealable Judgment or Order

[i] General Rule

The notice of appeal "shall be sufficient" if it states in substance that the appellant appeals from a specified judgment or a particular part of it [*Cal. Rules of Ct., Rule 8.100(a)(2)*]. Effective January 1, 2004, the appellant or cross-appellant may use Judicial Council form APP-002, Notice of Appeal/Cross-Appeal (Unlimited Civil Case), to file a notice of appeal in an unlimited civil case, i.e., a case in which the amount in controversy exceeds $25,000. For a form Notice of Appeal/Cross-Appeal (Unlimited Civil Case), see*§ 42.73*.

Although the notice is construed liberally in favor of its sufficiency [*see* [d], *below*], failure to specify an appealable judgment or order is a jurisdictional defect that may result in dismissal of the appeal [*see* [4], *below*]. For discussion of what constitutes an appealable judgment or order of the superior court, see*§ 42.12*.

[ii] Review Limited to Judgment, Portion of Judgment, or Order Specified in Notice of Appeal

Specification of the judgment or order appealed from should be done with care not only to ensure that the appeal is taken from an appealable judgment or order [*see* [i], *above*, and § 42.12], but also to ensure review of all issues the party wishes to raise in the appellate court.

The rule that notices of appeal are to be construed liberally with a view to hearing causes on their merits [*see* [d], *below*], does not apply if the description of the portion of the judgment appealed from is so clear and unmistakable as to preclude a description of another portion [*see* *Bosetti v. U.S. Life Insurance Company (2009) 175 Cal. App. 4th 1208, 1223-1225, 96 Cal. Rptr. 3d 744* (notice of appeal identifying summary judgment did not constitute notice of appeal of demurrer as to different defendant); *Conservatorship of Edde (2009) 173 Cal. App. 4th 883, 889, 93 Cal. Rptr. 3d 266* (notice of appeal referring to only one judgment not applicable to other judgment); *Morton v. Wagner (2007) 156 Cal. App. 4th 963, 967, 67 Cal. Rptr. 3d 818* (even construing notice of appeal liberally did not allow it to include specifically excluded judgment); *Glassco v. El Sereno Country Club, Inc. (1932) 217 Cal. 90, 92, 17 P.2d 703* ; *Sole Energy Company v. Petrominerals Corporation (2005) 128 Cal. App. 4th 212, 239, 26 Cal. Rptr. 3d 798* (court refuses to liberally construe notice of appeal that did not specify new trial order or makes it reasonably clear plaintiffs were trying to appeal from it); *Calhoun v. Vallejo City Unified School Dist. (1993) 20 Cal. App. 4th 39, 42, 24 Cal. Rptr. 2d 337* (clear specification of one order precluded review of another order not interdependent with specified order); *Unilogic, Inc. v. Burroughs Corp. (1992) 10 Cal.App. 4th 612, 624-625, 12 Cal. Rptr. 2d 741* (clear specification of judgment as to one cause of action precluded review of judgment as to another cause of action)].

An appeal may be taken only by an aggrieved party [*see Code Civ. Proc. § 902*], and a party therefore cannot appeal from a *favorable* ruling. When a ruling is partially, but not completely, favorable, the party may appeal only from the unfavorable part of the judgment [*Soldate v. Fidelity National Financial, Inc. (1998) 62 Cal. App. 4th 1069, 1073, 72 Cal. Rptr. 2d 404]* . In this situation the notice of appeal should specify the unfavorable portion of the judgment from which the appeal is being taken, in order to give the opposing party proper notice of the what is being challenged by the appeal.

In addition, if an appeal is taken from a judgment, the general rule is that the court will review the correctness of the judgment at the time it is rendered; later matters are not included in the review. Therefore, it may be necessary to specify in a separate notice of appeal a later and separately appealable post-judgment order. For example, in one case a plaintiff filed a notice of appeal from a final judgment, and the court of appeal held that this notice did not include a subsequent order fixing the amount of attorney's fees that were awarded to the plaintiff in the judgment. The judgment itself was *favorable* to the plaintiff, because it awarded plaintiff fees in an amount to be determined later. A notice of appeal specifying only that judgment was not sufficient to put the opposing party on notice that plaintiff was seeking to challenge the amount of the fees as fixed by the subsequent, and separately appealable, order [*see Soldate v. Fidelity National Financial, Inc. (1998) 62 Cal. App. 4th 1069, 1073-1075, 72 Cal. Rptr. 2d 404]* . The rule is not inflexible, however. For example, if a party appeals from a judgment awarding fees to the *opposing* party, that notice of appeal should be sufficient to review also any subsequent order fixing the amount of fees, because it puts the opposing party on notice that appellant is challenging the entitlement to fees awarded by the judgment, and this necessarily includes a challenge to the amount of fees fixed in a later order [*see Soldate v. Fidelity National Financial, Inc. (1998) 62 Cal. App. 4th 1069, 1073-1075, 72 Cal. Rptr. 2d 404* (distinguishing the appeal in *Grant v. List & Lathrop (1992) 2 Cal. App. 4th 993, 996, 3 Cal. Rptr. 2d 654*)]. On the other hand, if an award of attorney's fees is subject to the discretion of the court, a later order awarding attorney's fees is not subsumed in the earlier judgment; therefore, a notice of appeal from the judgment does not preserve a challenge to the award of attorney's fees [*Colony Hill v. Ghamaty, (2006) 142 Cal. App. 4th 1408, 1413-1415, 48 Cal. Rptr. 3d 798* ; *Gouskos v. Aptos Village Garage, Inc. (2001) 94 Cal. App. 4th 754, 764, 114 Cal. Rptr. 2d 558* ("shall be awarded" language makes fees incidental to judgment)].

[iii] Specification of Additional Matters in Notice of Cross Appeal

A cross appeal may specify the same judgment or order, but it may, and usually does, specify additional judgments, parts of judgments, or orders in the same action or proceedings. For example, most typically, when one party appeals the part of a judgment dealing with a complaint, the opposing party may cross appeal as to that part of the judgment dealing with a cross complaint [*see Unilogic, Inc. v. Burroughs Corp. (1992) 10 Cal. App. 4th 612, 616, 12 Cal. Rptr. 2d 741]* .

A similar situation arises when a losing party is successful in obtaining a postjudgment order granting a motion for new trial or a motion to vacate the judgment. If the party prevailing on the original judgment appeals from this order, the losing party (as to the original judgment) will usually wish to take what is commonly termed a "protective" or "precautionary" cross appeal from the original judgment. In this way, if the postjudgment order granting a new trial or vacating the judgment is reversed on appeal, the losing party (as to the original judgment) will still be able to challenge the underlying judgment in the cross appeal. Ordinarily, a notice of cross appeal from the original judgment would be untimely under *Cal. Rules of Ct., Rule 8.104* [discussed in *§ 42.13*], if it is made after an appeal is taken from an order entered after the original judgment. *Cal. Rules of Ct., Rule 8.108(d)*, however, specifically deals with this problem by allowing such cross appeals, so long as they are filed within 20 days after the superior court clerk mails notification of the initial notice of appeal. Such a cross appeal may then present any question that might have been presented on appeal from the original judgment (or, similarly, on appeal from an order denying a motion for JNOV) [*see Cal. Rules of Ct., Rule 8.108(f)* and further discussion in *§§ 42.12[4A], 42.16*].

[b] Notice Must Be Signed by Appellant or Appellant's Attorney

The notice must be signed by the appellant or appellant's attorney [*Cal. Rules of Ct., Rule 8.100(a)(1)*; *see Toal v. Tardif (2009) 178 Cal. App. 4th 1208, 1216-1217, 101 Cal. Rptr. 3d 97* (notice signed by husband and not listing name of appealing party deemed to apply to wife, too); *Cal. Rules of Ct., Rule 8.10(1)* (the party appealing is the "appellant")].

If signed by an attorney, the client's authorization is nevertheless required. A notice signed and filed by an attorney without the client's consent is subject to dismissal [*Guardianship of Gilman (1944) 23 Cal.2d 862, 864, 147 P.2d 530* ; *In re Alma B. (1994) 21 Cal. App. 4th 1037, 1043, 26 Cal. Rptr. 2d 592]* .

For discussion of who may be an appealing party, see *Ch. 40, Appeal: An Overview, § 40.13[1]*.

[c] Notice Need Not Specify Appellate Court

The notice need not specify the court to which the appeal is taken and is deemed to be an appeal to the court of appeal for the district in which the superior court is located [*Cal. Rules of Ct., Rule 8.100(a)(2)*], that is, to the appellate district of the court of appeal within which the particular superior court is located [*see Gov. Code § 69100 et seq.* and discussion in *Ch. 40, Appeal: An Overview, § 40.11[3][b]*; *First American Title Company v. Mirzaian (2003) 108 Cal. App. 4th 956, 959, 134 Cal. Rptr. 2d 206* (notice of appeal that stated wrong appellate court did not deprive appellate court of jurisdiction)].

If for any reason the appeal is ultimately taken to the wrong appellate court, that court will not dismiss the appeal solely for this reason, but will transfer the cause to the proper court on such terms as to costs or otherwise as may be just [*Gov. Code § 68915*].

For further discussion of the structure of the court of appeal, the manner in which appeals are assigned to particular divisions or panels within each appellate district, and proceedings to transfer a cause taken to the wrong appellate court, see *Ch. 51, Appeal: Hearing and Decision, § 51.11*.

For discussion of waiver of the filing fee when proceeding in forma pauperis, see [c], *below*.

[d] Notice of Appeal Is Construed Liberally in Favor of Its Sufficiency

The notice of appeal is liberally construed in favor of its sufficiency [*Cal. Rules of Ct., Rule 8.100(a)(2)*; *Walker v. Los Angeles County Metropolitan Transportation Authority (2005) 35 Cal. 4th 15, 18, 23 Cal. Rptr. 3d 490, 104 P.3d 844* (treating notice of appeal from unappealable order denying new trial as appeal from underlying judgment because it was clear appellant intended to appeal from judgment and respondent would not be prejudiced); *Etheridge v. Reins International California, Inc. (2009) 172 Cal. App. 4th 908, 913 n.7, 91 Cal. Rptr. 3d 816* ; *Jones v. The Lodge at Torrey Pines Partnership (2007) 147 Cal. App. 4th 475, 54 Cal. Rptr. 3d 379* ; *Johnston v. Corrigan (2005) 127 Cal. App. 4th 553, 555-556, 25 Cal. Rptr. 3d 657* (determining that notice of appeal from motion for reconsideration of attorneys' fees ruling was notice of appeal of attorneys' fees ruling)]. When it is clear, defects in form, or misdirections such as addressing the document to the court instead of to the clerk of the court, are properly disregarded [*First American Title Company v. Mirzaian (2003) 108 Cal. App. 4th 956, 959, 134 Cal. Rptr. 2d 206* (notice of appeal that stated wrong appellate court did not deprive appellate court of jurisdiction); *In re Issac J. (1992) 4 Cal. App. 4th 525, 535, 6 Cal. Rptr. 2d 65]* ; *see Toal v. Tardif (2009) 178 Cal. App. 4th 1208, 1216-1217, 101 Cal. Rptr. 3d 97* (notice signed by husband and not listing name of appealing party deemed to apply to wife, too).

The underlying policy of this rule of construction is to preserve the appellant's right of review unless it appears the respondent has been misled by any inaccurate description or ambiguity in the notice. In determining whether the notice complies with legal requirements, a court will consider the absence of prejudice to other parties and the efficacy of

appellant's efforts to notify other parties that an appeal has been taken [*Kellett v. Marvel (1936) 6 Cal. 2d 464, 471, 472-473, 58 P.2d 649* ; *Bosetti v. U.S. Life Insurance Company (2009) 175 Cal. App. 4th 1208, 1223-1225, 96 Cal. Rptr. 3d 744* (notice of appeal identifying summary judgment did not constitute notice of appeal of demurrer as to different defendant); *Morton v. Wagner (2007) 156 Cal. App. 4th 963, 967, 67 Cal. Rptr. 3d 818* (even construing notice of appeal liberally did not allow it to include specifically excluded judgment to prejudice of opposing party)].

Appellate courts have sometimes used this rule of construction to remedy a notice of appeal from a nonappealable judgment or order, a defect that otherwise would result in dismissal of the appeal [*see* [a][i], *above*, and [4], *below*]. For example, if a notice of appeal specifies that an appeal is taken from a nonappealable order, such as an order denying a new trial, an appellate court should construe the notice of appeal to be an appeal from the underlying judgment, provided that it is reasonably clear the appellant intended to appeal from the judgment and the respondent would not be misled or prejudiced [*Walker v. Los Angeles County Metropolitan Transportation Authority (2005) 35 Cal. 4th 15, 22, 23 Cal. Rptr. 3d 490, 104 P.3d 844* ; *see also* Miranda v. 21st *Century Ins. Co. (2004) 117 Cal. App. 4th 913, 919, 12 Cal. Rptr. 3d 159* (because plaintiff filed premature notice of appeal from nonappealable minute order, and signed judgment of dismissal was entered four weeks later, appellate court treated notice of appeal as having been filed immediately after entry of judgment)].

PRACTICE TIP:

Don't Depend on Liberal Construction. Several districts and divisions of the court of appeal have expressed disagreement with the "liberal" notion of treating notices of appeal from nonappealable orders or judgments as being one from an appealable order or judgment. For example, an order sustaining a demurrer is not appealable, whereas the subsequent judgment of dismissal based on that order *is* appealable. Formerly, appellate courts would construe a notice of appeal from the nonappealable order liberally, treating it as an appeal from the subsequent judgment of dismissal, to further the policy of disposing on the issue on the merits. The current trend, however, is to dismiss an appeal based on a notice defective in this manner. Counsel must be careful therefore both to ensure that a proper, appealable judgment or order is entered, even if it is the opposing party's responsibility to submit a proposed judgment or order, and also to designate carefully an appealable judgment in the notice of appeal. For more detailed discussion of appellate courts' willingness, and unwillingness, to remedy this type of defect in a notice of appeal, see *§ 42.12[2][c]*.

If a notice of appeal is clear and unambiguous in its specification of an appeal only from a particular order or part of a judgment, the reviewing court will not construe the notice to allow review of any other order or any other portion of the judgment not specified in the notice [*see* discussion in [a][ii], *above*].

[3] Service and Filing of Notice of Appeal

The requirement that the notice be served and filed means that the appellant must properly serve one copy of the notice on each adverse party represented by separate counsel, and then file the original notice, together with proof of the prior service, with the clerk of the superior court [*see Cal. Rules of Ct., Rule 8.25* (defining "serve and file" for purposes of appellate rules)].

Any failure to serve the notice will not prevent its filing and will not affect the validity of the appeal. On reasonable notice, however, the appellant may be required to remedy the failure [*Cal. Rules of Ct., Rule 8.100(a)(3)*; *Chapman v. Enos (2004) 116 Cal. App. 4th 920, 926, 10 Cal. Rptr. 3d 852* (appellant remedied failure by obtaining agreement from appellee to waive service defects)].

For discussion and forms relating to service and proof of service generally, see Ch. 518, *Service and Summons of Papers* .

[4] Timely Filing of Sufficient Notice of Appeal Is Jurisdictional

Filing the notice of appeal is not merely a procedural step, but vests jurisdiction in the appellate court and for most purposes terminates the jurisdiction of the trial court [*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc. (1997) 15 Cal. 4th 51, 56, 61 Cal. Rptr. 2d 166, 931 P.2d 344* ; *Estate of Hanley (1943) 23 Cal. 2d 120, 123, 142 P.2d 423* ; *see also Silverbrand v. County of Los Angeles (2009) 46 Cal. 4th 106, 120-121, 92 Cal. Rptr. 3d 595, 205 P.3d 1037* (under prison-delivery rule, notice of appeal still must be filed within jurisdictional time period, but filing constructively occurs when prisoner delivers notice to prison authorities for forwarding to court clerk); *Code Civ. Proc. § 916 et seq.* (perfecting of appeal from certain judgments automatically stays trial court proceedings on those judgments)]. Thus, an appellate court will dismiss an appeal, for lack of jurisdiction, when the notice of appeal is untimely [*see Hollister Convalescent Hospital, Inc. v. Rico (1975) 15 Cal. 3d 660, 670, 125 Cal. Rptr. 757, 542 P.2d 1349* ; *Guillemin v. Stein (2002) 104 Cal. App. 4th 156, 161, 128 Cal. Rptr. 2d 65* (immaterial that trial court later confirmed sanctions award in postjudgment order from which there was timely appeal); *see* discussion in *§ 42.15[2]*], or if it fails to specify an *appealable* judgment or order [*Jennings v. Marralle (1994) 8 Cal. 4th 121, 126, 32 Cal. Rptr. 2d 275, 876 P.2d 1074* ; *Degnan v. Morrow (1969) 2 Cal. App. 3d 358, 362, 82 Cal. Rptr. 557* ; *see § 42.12*].

PRACTICE TIP:

Appellant Should Ensure Notice Is Correct and Timely, and Respondent Should Move to Dismiss if Notice Is Defective. Because an untimely or defective notice of appeal does not vest jurisdiction in the appellate court, it is crucial for appellant's counsel to ensure that the notice is filed in time, and that all necessary steps have been taken to ensure that the notice is taken from an appealable judgment or order. Thus, for example, when the trial court sustains a demurrer without leave to amend, a party wishing to appeal that ruling must ensure that the subsequent judgment of dismissal based on that ruling is properly prepared and entered [*see § 42.12*].

Conversely, counsel for respondent should act early in the appeal process to seek dismissal of an appeal based on an untimely or defective notice. See *Ch. 48, Appeal: Abandonment, Dismissal, and Stipulated Reversal, §§ 48.13[1], [2][a], [b], 48.42*-48.43.

Although the filing of a notice of appeal generally divests the trial court of jurisdiction pending the appeal, the trial court does retain jurisdiction over proceedings that are embraced by the action but are not affected by the judgment or order [*Code Civ. Proc. § 916(a)*]. Thus, for example, the trial court has jurisdiction, even after the filing of a notice of appeal, to rule on a motion for new trial [*see Weisenburg v. Molina (1976) 58 Cal. App. 3d 478, 485-486, 129 Cal. Rptr. 813]* . For further discussion of matters over which the trial court retains jurisdiction, and for discussion and forms for an order staying trial court proceedings not otherwise stayed by the notice of appeal, see Ch. 43, *Appeal: Stay of Proceedings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsReviewabilityTime LimitationsCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsRecords on Appeal

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Chapter 42 APPEAL: NOTICE OF APPEAL
PART II. LEGAL BACKGROUND

5-42 California Forms of Pleading and Practice--Annotated § 42.12

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§ 42.12 Appealable Judgments and Orders

[1] One Final Judgment Rule

[a] The "One Final Judgment Rule" Is Essentially Codified in Statutes Specifying Appealable Judgments and Orders

The "one final judgment" rule prohibits the taking of an appeal from a judgment that disposes of fewer than all the causes of action pending between the parties. The rule applies even though the causes of action disposed of by the judgment were tried separately or may be characterized as "separate and independent" from those remaining [*Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 743, 29 Cal. Rptr. 2d 804, 872 P.2d 143]* ; *Canandaigua Wine Co., Inc. v. County of Madera (2009) 177 Cal. App. 4th 298, 99 Cal. Rptr. 3d 264* . The underlying theory of the rule is that the interests of judicial economy are best served by allowing a single review from the final judgment rather than piecemeal review as the case progresses [*Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 741 n.9, 29 Cal. Rptr. 2d 804, 872 P.2d 143]* . It prevents costly and oppressive review of intermediate rulings [*Griset v. Fair Political Practices Commission (2001) 25 Cal. 4th 688, 697, 107 Cal. Rptr. 2d 149, 23 P.3d 43* (order denying petition for writ of administrative mandate not appealable when order does not dispose of other causes of action)].

In determining whether an order disposes of all causes of action and is therefore a judgment for the purpose of applying the one final judgment rule, the substance and effect of the adjudication, not the form of the decree, is determinative. If no issue is left for future consideration, except for compliance with the adjudication, the decree is a final judgment. However, the decree is not final if anything further in the nature of judicial action is essential to a final determination of the rights of the parties [*Griset v. Fair Political Practices Commission (2001) 25 Cal. 4th 688, 698, 107 Cal. Rptr. 2d 149, 23 P.3d 43* ; *San Joaquin County Department of Child Support Services v. Winn (2008) 163 Cal. App. 4th 296, 299-300, 77 Cal. Rptr. 3d 470* ; *Montegani v. Johnson (2008) 162 Cal. App. 4th 1231, 1237, 76 Cal. Rptr. 3d 621* (probate case); *Breslin v. City and County of San Francisco (2007) 146 Cal. App. 4th 1064, 1073-1074, 55 Cal. Rptr.*

3d 14] . If it appears the trial court inadvertently failed to dispose of all causes of action and the intent of the trial court to do so is manifest from the record, the appellate court may amend the judgment to reflect the manifest intent of the trial court and thereby satisfy the one final judgment rule [*Prichard v. Liberty Mut. Ins. Co. (2000) 84 Cal. App. 4th 890, 901, 101 Cal. Rptr. 2d 298]* . If a complaint and cross-complaint involving the same parties have been filed, there is no final appealable judgment until both have been resolved [*ECC Construction, Inc. v. Oak Park Calabasas Homeowners Assn. (2004) 122 Cal. App. 4th 994, 1002, 19 Cal. Rptr. 3d 340* (notice of appeal not untimely as to cross-complaint if complaint not yet resolved)].

This one final judgment rule is essentially codified in the statutes that specify which judgments and orders are appealable [*Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 740, 29 Cal. Rptr. 2d 804, 872 P.2d 143* ; for discussion of the main statutory provisions specifying appealable judgments and orders made by the superior court, *see* [2], *below*]. Some judgments and orders, however, that lack the requisite finality under this rule have nevertheless been made expressly appealable [*see In re Conservatorship of Rich (1966) 46 Cal. App. 4th 1233, 1235, 54 Cal. Rptr. 2d 459* , and discussion in [2], *below*]. Others may be reviewed by writ if the special requirements for issuance of the writ are met [*Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 743, 29 Cal. Rptr. 2d 804, 872 P.2d 143* ; *see § 40.12[2][c]*].

When a case involves separate plaintiffs and judgment is entered against some of the plaintiffs but not against others, the judgment is immediately appealable by the plaintiffs against whom judgment has been entered. Those plaintiffs cannot wait until judgment is entered with respect to the remaining plaintiffs because, in most cases, the appeal will be untimely as to the plaintiffs against whom judgment was previously entered [*Justus v. Atchison (1977) 19 Cal. 3d 564, 568, 139 Cal. Rptr. 97, 565 P.2d 122* ; *Panico v. Truck Ins. Exchange (2001) 90 Cal. App. 4th 1294, 1300-1301, 109 Cal. Rptr. 2d 638]* . Similarly, if a party brings an action in multiple capacities, a judgment finally determining the party's rights in one capacity but not another is final and may be appealed. The absence of a final determination in the action with respect to one capacity in which the party appears does not violate the one final judgment rule as to the final determination with respect to another capacity in which the party appears [*First Security Bank of California, N.A. v. Paquet (2002) 98 Cal. App. 4th 468, 474, 119 Cal. Rptr. 2d 787]* . For example, if a party appears as both an executrix of a decedent's estate and as guardian ad litem for the decedent's minor children, a final determination of the action with respect to the party's capacity as executrix is a final judgment and immediately appealable regardless of whether there has been a final determination of the action with respect to the party's capacity as guardian ad litem [*First Security Bank of California, N.A. v. Paquet (2002) 98 Cal. App. 4th 468, 474-475, 119 Cal. Rptr. 2d 787]* .

In addition, when a plaintiff sues multiple defendants, the judgment against any single defendant is considered final and appealable even if it is not final with respect to other defendants [*Nguyen v. Calhoun (2003) 105 Cal. App. 4th 428, 437, 129 Cal. Rptr. 2d 436* (judgment final against certain defendants even though plaintiffs' claims against other defendants and cross-action were still pending); *see Entertainment, Inc. v. Arthur J.Gallagher & Co. (2005) 125 Cal. App. 4th 1022, 1025, 23 Cal. Rptr. 3d 258* (judgment in favor of insurance agent is dependent on non-final ruling against insurer, and not appealable until judgment against insurer is final)].

An exception to the one final judgment rule arises when the trial court's ruling on a collateral issue is substantially the same as a final judgment in an independent proceeding [*Mercury Interactive Corporation v. Klein (2007) 158 Cal. App. 4th 60, 76-77, 70 Cal. Rptr. 3d 88*]. In determining whether an order is collateral, the test is whether an order is important and essential to the correct determination of the main issue in the case. If the order is necessary to that determination, it is not collateral. Some courts hold that the collateral order must also direct payment of money or performance of an act [*see Serrano v. Stefan Merli Plastering Company, Inc. (2008) 162 Cal. App. 4th 1014, 1026-1027, 76 Cal. Rptr. 3d 559* ; *Drum v. Superior Court (2006) 139 Cal. App. 4th 845, 850, 43 Cal. Rptr. 3d 279*]. Other courts hold that the test is whether the order is collateral and final as to the collateral matter, not whether the order has the effect of requiring payment of money or the performance of an act [*see Muller v. Fresno Community Hospital and Medical Center (2009) 172 Cal. App. 4th 887, 898-905, 91 Cal. Rptr. 3d 617*].

When an appeal is taken from a ruling that is nonappealable under the one final judgment rule, the court of appeal may treat it as a petition for an extraordinary writ when the briefs and record contain in substance all of the elements prescribed by the rules of court for an original mandate proceeding and there are extraordinary circumstances justifying the exercise of the court's discretionary power [*see San Joaquin County Department of Child Support Services v. Winn (2008) 163 Cal. App. 4th 296, 300-301, 77 Cal. Rptr. 3d 470* (refusing to do so); *Drum v. Superior Court (2006) 139 Cal. App. 4th 845, 852-853, 43 Cal. Rptr. 3d 279* ; *Angell v. Superior Court (1999) 73 Cal. App. 4th 691, 697-698, 86 Cal. Rptr. 2d 657]* . Thus, when an appeal from a summary judgment was deemed nonappealable because it did not dispose of respondent's cross complaint, one court of appeal deemed it to be a writ petition because otherwise respondent could defeat immediate review simply by refusing to dismiss the cross complaint and undermine judicial economy by requiring further trial court proceedings on the cross complaint [*Angell v. Superior Court (1999) 73 Cal. App. 4th 691, 698, 86 Cal. Rptr. 2d 657]* . For discussion and forms relating to review by extraordinary writ generally, see Ch. 358, *Mandate and Prohibition* , and Ch. 492, *Review (Certiorari), Writ of.*

[b] Nonappealable Rulings Generally Reviewable on Appeal From Final Judgment

A natural corollary to the one final judgment rule set out in [a], *above*, is that any order or ruling made in a proceeding leading to a final, appealable judgment is generally reviewable upon appeal from that judgment [*Code Civ. Proc. § 906*; *Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 825 n.1, 69 Cal. Rptr. 321, 442 P.2d 377* ; *Hill v. Long Beach (1995) 33 Cal. App. 4th 1684, 1695, 40 Cal. Rptr. 2d 125* ; *Gudel v. Ellis (1962) 200 Cal. App. 2d 849, 859, 19 Cal. Rptr. 751]* . Any such order or ruling that might properly be challenged on appeal may also be raised in a timely cross appeal [Fundamental Inv. Growth Shelter Realty Fund I-1973 v. *Gradow (1994) 28 Cal. App. 4th 966, 977-979, 33 Cal. Rptr. 2d 812]* .

The application of this corollary assumes, however, that the appellant has not lost the right to challenge such an order or ruling by failing to raise the issue in the lower court or by inviting the erroneous order or ruling [*Mission Housing Development Co. v. City and County of San Francisco (1997) 59 Cal. App. 4th 55, 78, 69 Cal. Rptr. 2d 185]* . Similarly, an appellant seeking review of such an order or ruling must be prepared to provide the appellate court with an adequate record to review any claim of error [*Kurinij v. Hanna and Morton (1997) 55 Cal. App. 4th 853, 865, 64 Cal. Rptr. 2d 324]* . For discussion of such waiver, see *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.10* [*see also* discussion in *Ch. 40, Appeal: An Overview, § 40.12[2][b]*].

[c] Appealable Orders Not Reviewable on Appeal From Final Judgment

While nonappealable orders may be reviewed on appeal from the final judgment [*see* [b], *above*], the same does not apply to any interlocutory order that is expressly appealable by statute. In the latter case an appeal must be taken directly from the appealable order, and, failing that, any error in such an order cannot be raised on appeal from the final judgment [*Code Civ. Proc. § 906*; *Alfaro v. Community Housing Improvement System & Planning Assn., Inc. (2009) 171 Cal. App. 4th 263, 277, 89 Cal. Rptr. 3d 659* (on appeal from appealable order or judgment reviewing court may review any intermediate ruling, proceeding, order or decision but it may not review earlier appealable ruling); *Sole Energy Company v. Petrominerals Corporation (2005) 128 Cal. App. 4th 212, 239, 26 Cal. Rptr. 3d 798* (notice of appeal specifying judgment to be appealed did not include other appealable order); *In re Marriage of Weiss (1996) 42 Cal. App. 4th 106, 119, 49 Cal. Rptr. 2d 339* ; *see also Soldate v. Fidelity National Financial, Inc. (1998) 62 Cal. App. 4th 1069, 1073-1075, 72 Cal. Rptr. 2d 404* (appeal from *favorable* judgment awarding costs to appellant did not include appeal from subsequent, separately appealable order fixing the amount of the costs)]. The same rule applies when an appeal could have been taken from a severable portion of the judgment [*Hansen v. Hansen (1965) 233 Cal. App. 2d 575, 580, 43 Cal. Rptr. 729]* . A judgment entered after the entry of an appealable order does not revive or extend the time for appealing the appealable order [*Laraway v. Pasadena Unified School Dist. (2002) 98 Cal. App. 4th 579, 583, 120 Cal. Rptr. 2d 213* (judgment entered at request of parties did not revive for appeal earlier appealable order which decided the issue between the parties)].

[d] Parties May Not by Stipulation Create a Final Judgment

A trial court sometimes disposes of some, but not all, issues in an action, usually by grant of summary judgment or adjudication as to some but not all issues. In some cases, the parties in these actions have sought to dismiss, by stipulation, the issues not resolved, in order to obtain entry of a "final judgment" from which they may appeal those issues upon which the trial court rendered a dispositive ruling. Their procedural error has been an attempt, in the stipulated dismissal, to pursue an appeal of issues on which the trial court ruled, while expressing an intent "that the ... appeal ... shall not prejudice either party's future right to prosecute ... [the] claims ... which a re being voluntarily dismissed" once the appeal of the other issues has been concluded [*see Four Point Entertainment, Inc. v. New World Entertainment, Ltd. (1997) 60 Cal. App. 4th 79, 81-82, 70 Cal. Rptr. 2d 82* ; *see also Hoveida v. Scripps Health (2005) 125 Cal. App. 4th 1466, 1468-1469, 23 Cal. Rptr. 3d 667* (court lacked jurisdiction to hear appeal when one cause of action dismissed without prejudice)].

The courts of appeal have held, in such cases, that the parties, by stipulation, may not create appellate jurisdiction where it would not otherwise exist, in an attempt to create an artificial "final judgment." The parties may not, by stipulated agreement, separate causes of action for separate appellate treatment at different points in time, in violation of the "one final judgment" rule [*Four Point Entertainment, Inc. v. New World Entertainment, Ltd. (1997) 60 Cal. App. 4th 79, 82-83, 70 Cal. Rptr. 2d 82* ; *see also Hill v. City of Clovis (1998) 63 Cal. App. 4th 434, 443-446, 73 Cal. Rptr. 2d 638* ; *Jackson v. Wells Fargo Bank (1997) 54 Cal. App. 4th 240, 242-243, 62 Cal. Rptr. 2d 679* ; *Don Jose's Restaurant, Inc. v. Truck Ins. Exchange (1997) 53 Cal. App. 4th 115, 118-119, 61 Cal. Rptr. 2d 370]* . Unless circumstances are present that would permit interlocutory review by petition for an extraordinary writ, the parties must "get in line" for ordinary appellate review from the final judgment as to all causes of action [*Four Point Entertainment, Inc. v. New World Entertainment, Ltd. (1997) 60 Cal. App. 4th 79, 83, 70 Cal. Rptr. 2d 82]* .

On the other hand, a party is not precluded from stipulating to an adverse judgment *with prejudice* as to *all* claims, in order to appeal from that judgment [*McMahon v. Craig (2009) 176 Cal. App. 4th 222, 228 n. 1, 97 Cal. Rptr. 3d 555* ; *City of South San Francisco v. Mayer (1998) 67 Cal. App. 4th 1350, 1354, n.2, 79 Cal. Rptr. 2d 704]* .

[2] Appealability Determined by Statute

[a] No Appeal From Judgment or Order Unless Expressly Authorized by Statute

Since the right of appeal is wholly statutory [*see § 40.12[2][a]*], no judgment or order is appealable unless it is expressly made so by statute, meaning that a judgment or order must come within one of the classes described in the main statutes or be made appealable by a special statute [*Doe v. Luster (2006) 145 Cal. App. 4th 139, 147-148, 51 Cal. Rptr. 3d 403* (no statutory authorization of immediate appeal from award or denial of attorney's fees to prevailing party or from denial of attorney's fees to prevailing party opposing special motion to strike); *Draus v. Alfred M. Lewis, Inc. (1968) 261 Cal. App. 2d 485, 489, 68 Cal. Rptr. 154* ; *see also Leone v. Medical Bd. (2000) 22 Cal. 4th 660, 666, 668, 94 Cal. Rptr. 2d 61, 995 P.2d 191* (affirming constitutionality of statute specifying writ petition as sole means of appellate review of ruling on physician licensing; constitution's grant of appellate jurisdiction may be exercised in the procedural context of either appeal or writ petition, and statute may properly specify which must be used in a particular case)].

The main provisions for appealable judgments and orders made by the superior court are set out in *Code Civ. Proc. § 904.1*, discussed in [3], *below*.

[b] Appellate Court Lacks Appellate Jurisdiction to Review Nonappealable Judgment or Order

An appealable judgment is a jurisdictional prerequisite to an appeal [*Vivid Video, Inc. v. Playboy Entertainment Group, Inc. (2007) 147 Cal. App. 4th 434, 440-443, 2007 Cal. App. LEXIS 132* (ruling as to who decides arbitrability is

not appealable final order); *Garau v. Torrance Unified School District (2006) 137 Cal. App. 4th 192, 198, 40 Cal. Rptr. 3d 108]* . If the appellate court doubts whether the trial court has entered a final judgment or appealable order, it must raise the issue of appealability on its own initiative [*Jennings v. Marralle (1994) 8 Cal. 4th 121, 126, 32 Cal. Rptr. 2d 275, 876 P.2d 1074* ; *Garau v. Torrance Unified School District (2006) 137 Cal. App. 4th 192, 198, 40 Cal. Rptr. 3d 108* (order reclassifying and transferring case to limited jurisdiction department not appealable order)]. The general rule is that, due to the jurisdictional defect, the court must dismiss an appeal from a nonappealable order, even if the parties want the appeal to be decided on the merits [*see Four Point Entertainment, Inc. v. New World Entertainment, Ltd. (1997) 60 Cal. App. 4th 79, 81-83, 70 Cal. Rptr. 2d 82* ; *Degnan v. Morrow (1969) 2 Cal. App. 3d 358, 362, 82 Cal. Rptr. 557]* .

PRACTICE TIP:

Appellant Should Ensure Judgment or Order Is Appealable; Respondent Should Make Early Motion to Dismiss Appeal From Nonappealable Judgment or Order. In many instances a ruling may be nonappealable simply because the proper steps have not yet been taken to secure an appealable judgment or order. One example is when a party seeks to appeal an order sustaining a demurrer without leave to amend, without first securing the entry of a judgment of dismissal that disposes of the action on the basis of that order [*see Cal. Rules of Ct., Rule 8.104(e)* and discussion in [4], *below*, and in § 40.15[1]]. Although, as discussed in [c], *below*, an appellate court may sometimes be willing to treat a nonappealable order as appealable, it is ultimately the responsibility of appellant's counsel to perfect the appeal. Thus, even when the opposing party is the one whom the trial court has directed to prepare, serve, and submit the judgment, that party's failure to do so does not relieve an appellant from the jurisdictional requirement of appealing only from an appealable judgment or order. In such a case appellant's counsel should request that the trial court compel the other party to prepare the judgment as ordered, or request permission to assume responsibility for preparing and submitting the judgment [*see Jordan v. Malone (1992) 5 Cal. App. 4th 18, 21, 6 Cal. Rptr. 2d 454]* . As noted in *Jordan*, it is helpful when the trial court puts a specific time limit on the preparation of the proposed judgment; if the court does not do so, counsel for a potential appellant should suggest that such a deadline be added to the court's directions for preparation of the judgment.

Even when a notice of appeal has already been filed based on a non-appealable order that effectively terminates the case (*e.g.*, an order sustaining a demurrer without leave to amend or granting a summary judgment), there may still be time to remedy this defect by having a proper, appealable judgment entered on the basis of this order, and then filing a new notice of appeal. While filing a second notice may be costly and embarrassing, it is safer than hoping that the court of appeal will exercise discretion to treat a premature notice of appeal as one taken from a subsequently entered judgment [*see* further discussion of premature appeals in § 42.17; *see also* discussion in [c], *below*].

Conversely, counsel for respondent should act early in the appeal process to seek dismissal of an appeal taken from a nonappealable judgment or order. See *Ch. 48, Appeal: Abandonment, Dismissal, and Stipulated Reversal, §§ 48.13[2][b]*, 48.43.

[c] Purported Appeal From Nonappealable Judgment or Order Sometimes Treated as Appealable

The courts of appeal are increasingly disinclined to "save" an appeal from a nonappealable judgment or order [*see In re the Marriage of Lafkas (2007) 153 Cal. App. 4th 1429, 1434, 64 Cal. Rptr. 3d 100* (refusing to cure imperfect appeal); *Gu v. BMW of North America, LLC (2005) 132 Cal. App. 4th 195, 202-203, 33 Cal. Rptr. 3d 617* ; *Hill v. City of Long Beach (1995) 33 Cal. App. 4th 1684, 1695-1696, 40 Cal. Rptr. 2d 125* ; *Stolz v. Wong Communications Limited Partnership (1994) 25 Cal. App. 4th 1811, 1816, 31 Cal. Rptr. 2d 229* ; *Shpiller v. Harry C's Redlands (1993) 13 Cal. App. 4th 1177, 1180, 16 Cal. Rptr. 2d 814* (refusing to "save" appeal from a notice of ruling); *Jordan v. Malone (1992) 5 Cal. App. 4th 18, 20-23, 6 Cal. Rptr. 2d 454* (refusing to consider appeal from tentative decision);

Munoz v. Florentine Gardens (1991) 235 Cal. App. 3d 1730, 1731-1732, 1 Cal. Rptr. 2d 609 (refusing to consider appeal from minute order dismissing action); *Modica v. Merin (1991) 234 Cal. App. 3d 1072, 1074-1075, 285 Cal. Rptr. 673* (refusing to hear appeal from order granting summary judgment or to allow correction of the defect by nunc pro tunc entry of a judgment); *see also Cohen v. Equitable Life Assurance Society (1987) 196 Cal. App. 3d 669, 671, 242 Cal. Rptr. 84* ("saving" unperfected appeal from order sustaining demurrer, but serving notice that it would not "bail out" careless attorneys in the future)].

PRACTICE TIP:

Do NOT Count on Being Saved From a Defective Appeal. Because an appeal from a nonappealable judgment or order is a jurisdictional defect, the courts of appeal essentially have no discretion to "save" an appeal from such a judgment or order. The court is required to dismiss such an appeal for lack of jurisdiction [*see Hollister Convalescent Hospital, Inc. v. Rico (1975) 15 Cal. 3d 660, 670, 125 Cal. Rptr. 757]* . If, however, the appeal is timely taken from a judgment which has been rendered but not entered, the reviewing court must deem the notice of appeal to be filed immediately after entry of judgment. [*Cal. Rules of Ct., Rule 8.104(e)*; *Demyer v. Costa Mesa Mobile Home Estates (1995) 36 Cal. App. 4th 393, 399, n.14, 42 Cal. Rptr. 2d 260* ; *see § 42.18*]. Thus, even though such a judgment is technically unappealable, courts will reach the merits of the appeal because it is a matter of mere formality to obtain a final appealable judgment [*see, e.g., County of Santa Clara v. Redevelopment Agency (1993) 18 Cal. App. 4th 1008, 1016, 22 Cal. Rptr. 2d 868* ; *Francis v. Dun & Bradstreet (1992) 3 Cal. App. 4th 535, 538-539, 4 Cal. Rptr. 2d 361*]. Many, but not all, reviewing courts also will choose to reach the merits when the notice of appeal is premature only because the trial court inadvertently failed to render final judgment [*Hines v. Lukes (2008) 167 Cal. App. 4th 1174, 1182, 84 Cal. Rptr. 3d 689* ; *Belio v. Panorama Optics, Inc. (1995) 33 Cal. App. 4th 1096, 1101-1102, 39 Cal. Rptr. 2d 737*].

Many courts of appeal, however, as discussed above, will no longer give appellants opportunity to obtain a final judgment or appealable order after the first notice of appeal is filed [*see* Fourth App. Dist., Div. Two, Pol. Mem., April 3, 1992 (also providing that an appellant whose appeal is dismissed may contest ruling by motion to vacate dismissal and reinstate appeal); *see* further discussion regarding premature appeals in § 42.18].

In rare instances a court of appeal may treat an appeal from a nonappealable judgment or order as a petition for an extraordinary writ, thus reaching the merits of the appeal in this way [*cf.* discussion in *§ 42.17[3][b]* of special cases in which an untimely notice of appeal is treated as a writ petition]. This may occur when (1) the briefs and record contain in substance all of the elements prescribed by the rules of court for an original mandate proceeding and (2) there are extraordinary circumstances justifying the exercise of the court's discretionary power [*Drum v. Superior Court (2006) 139 Cal. App. 4th 845, 852-853, 43 Cal. Rptr. 3d 279* ; *Big Valley Band of Pomo Indians v. Superior Court (2005) 133 Cal. App. 4th 1185, 35 Cal. Rptr. 3d 357* (interlocutory writ review of demurrer appropriate where tribal sovereign immunity at issue); *Black Diamond Asphalt, Inc. v. Superior Court (2003) 114 Cal. App. 4th 109, 114-115, 7 Cal. Rptr. 3d 466* (court treated appeal as petition for writ of mandate given that pure question of law at issue which trial court decided incorrectly and which greatly prejudiced appellant's rights); *Angell v. Superior Court (1999) 73 Cal. App. 4th 691, 697-698, 86 Cal. Rptr. 2d 657* ; *see also Sheller v. Superior Court of Los Angeles County (2008) 158 Cal. App. 4th 1697, 1709, 71 Cal. Rptr. 3d 207* ; *In re Molz (2005) 127 Cal. App. 4th 836, 843, 26 Cal. Rptr. 3d 131* (even if order not appealable, court would treat appeal as petition for writ relief because record contained all required elements and question presented significant public policy issues)]. For example, when an appeal from a summary judgment was deemed nonappealable because it did not dispose of respondent's cross complaint, and was thus not an appeal from a final judgment disposing of the entire action [*see* [1][a], *above*], one court of appeal deemed this to be a writ petition because otherwise respondent could defeat immediate review simply by refusing to dismiss the cross complaint and would undermine judicial economy by requiring further trial court proceedings on the cross complaint [*Angell v. Superior Court (1999) 73 Cal. App. 4th 691, 698, 86 Cal. Rptr. 2d 657]* . For discussion and forms relating to review by extraordinary writ generally, see Ch. 358, *Mandate and Prohibition* and Ch. 492, *Review (Certiorari), Writ*

of.

[3] Superior Court Judgments and Orders Appealable Under Code Civ. Proc. § 904.1

[a] Final Judgment

An appeal may be taken to the court of appeal from a final superior court judgment [*see Code Civ. Proc. § 904.1(a)(1)*]. Certain exceptions, however, preclude an appeal from the following types of judgments [*Code Civ. Proc. § 904.1(a)(1)*]:

- An interlocutory judgment not otherwise made appealable by *Code Civ. Proc. § 904.1(a)(8),(9),* and*(11)* (discussed respectively in [h], [i], and [k], *below*) [*Code Civ. Proc. § 904.1(a)(1)(A)*].

- A judgment of contempt that is made final and conclusive by *Code Civ. Proc. § 1222* [*Code Civ. Proc. § 904.1(a)(1)(B)*]. Note that judgments or orders of contempt may be reviewable by petition for writ of habeas corpus [*see* Ch. 292, *Habeas Corpus*].

- A judgment (or order) by a superior court judge or other judicial officer in a limited civil case [*Code Civ. Proc. § 904.2* (in limited civil case, appeal is taken to appellate division of superior court); *see also § 40.11[4]* (appellate jurisdiction of superior court)]. For detailed discussion and forms relating to limited civil cases and appeals to the appellate division of the superior court, see Ch. 345A, *Limited Civil Cases* .

- A judgment of the appellate division of a superior court granting or denying a petition for issuance of a writ of mandamus or prohibition directed to the superior court, or a judge thereof, in a limited civil case or a misdemeanor or infraction case [*Code Civ. Proc. § 904.1(a)(1)(c)*; *California Cas. Ins. Co. v. Municipal Court (1998) 66 Cal. App. 4th 1410, 1413, 78 Cal. Rptr. 2d 657]* .

The exception set out in *Code Civ. Proc. § 904.1*, relating to a judgment granting or denying a petition for a writ of mandate or prohibition is strictly limited to judgments involving those types of writs. *Code Civ. Proc. § 904.1* provides further that an appellate court may review any judgment granting ordenying a petition for a writ of mandate or prohibition, if review is sought by petition for an extraordinary writ rather than by appeal [*see also Baluyut v. Superior Court (1996) 12 Cal. 4th 826, 829 n.3, 50 Cal. Rptr. 2d 101, 911 P.2d 1* (order denying petition for writ of mandate directed to municipal court, not appealable under predecessor to *Code Civ. Proc. § 904.3*, may be reviewed on petition for writ of mandate); *In re Marriage of Ellis (2002) 101 Cal. App. 4th 400, 404, 124 Cal. Rptr. 2d 719* (court construed appeal as writ petition in order to resolve issue), *and see §§ 40.11[2][a]* and *40.12[3]*]. For general discussion and forms relating to review by writ of mandate or prohibition, see Ch. 358, *Mandate and Prohibition* .

[b] Order Made After Final Judgment

An appeal may be taken from a superior court order made after a judgment that is appealable under *Code Civ. Proc. § 904.1(a)(1)* (discussed in [a], *above*) [*Code Civ. Proc. § 904.1(a)(2)*].

For an order after judgment to be appealable, the judgment that precedes the order must be "final" in the trial court, the appeal from the order may not present the same issues as an appeal from the judgment itself, and the order must either affect the judgment or relate to it either by enforcing it or staying its execution [*Lakin v. Watkins Associated Industries (1993) 6 Cal. 4th 644, 651-652, 25 Cal. Rptr. 2d 109, 863 P.2d 179* ; *Bates v. Rubio's Rests. (2009) 179 Cal. App. 4th 1125, 1130-1132, 102 Cal. Rptr. 3d 206* (order regarding late-identified class members separately appealable from final judgment); *Doppes v. Bentley Motors, Inc. (2009) 174 Cal. App. 4th 1004, 1008, 94 Cal. Rptr. 3d 797* ; *Day v. Collingwood (2006) 144 Cal. App. 4th 1116, 1123, 50 Cal. Rptr. 3d 903* (postjudgment order denying sanctions

pursuant to *Code Civ. Proc. § 128.7* is appealable order); *In re Marriage of Wilcox (2004) 124 Cal. App. 4th 492, 497, 21 Cal. Rptr. 3d 315* (order denying motion to vacate renewal of judgment is appealable post-judgment order)]. It is the substance and effect of an adjudication, not its form, which determines whether it is final and appealable. As a general test, if no issue is left for future consideration--except the fact of compliance or noncompliance with the terms of the first decree--that decree is final. However, if anything further on the court's part is essential to a final determination of the parties' rights, the decree is not appealable [*Warmington Old Town Associates, L.P. v. Tustin Unified School District (2002) 101 Cal. App. 4th 840, 847-848, 124 Cal. Rptr. 2d 744* (although no formal judgment entered, court held order appealable)]. Some postjudgment orders are not appealable because, although they follow an earlier judgment, they are considered preliminary to a later judgment, at which time they will become ripe for appeal. These postjudgment orders lack finality because they are preparatory to later proceedings [*Yeboah v. Progeny Ventures, Inc. (2005) 128 Cal. App. 4th 443, 448, 27 Cal. Rptr. 3d 150* (when court refers matter to master or referee after ordering accounting, initial order directing accounting is interlocutory); *In re Marriage of Ellis (2002) 101 Cal. App. 4th 400, 403, 124 Cal. Rptr. 2d 719* (order in bifurcated trial that property was divisible community property not appealable until second issue regarding value resolved)]. With regard to a motion to vacate a judgment, generally only denial of a *statutory* motion may be appealed [*Forman v. Knapp Press (1985) 173 Cal. App. 3d 200, 202, 218 Cal. Rptr. 815* ; *see City of Los Angeles v. Glair (2007) 153 Cal. App. 4th 813, 820-823, 63 Cal. Rptr. 3d 280* ; *In re Marriage of Brockman (1987) 194 Cal. App. 3d 1035, 1040-1045, 240 Cal. Rptr. 96]* .

An order vacating default and default judgment pursuant to *Code Civ. Proc. § 473* is appealable as an order after final judgment. In addition, an order denying relief under *Code Civ. Proc. § 473* is appealable [*Doppes v. Bentley Motors, Inc. (2009) 174 Cal. App. 4th 1004, 1008-1009, 94 Cal. Rptr. 3d 797* ; *Huh v. Wang (2007) 158 Cal. App. 4th 1406, 1413, 71 Cal. Rptr. 3d 65* ; *Moghaddam v. Bone (2006) 142 Cal. App. 4th 283, 287, 47 Cal. Rptr. 3d 602]* .

When a trial court determines in its judgment that a party is entitled to attorney's fees but the court does not set the amount of fees, the determination of entitlement is merely interlocutory. Consequently, a party may challenge the entitlement to attorney's fees as well as the determination of the amount of fees to be paid after entry of the order after judgment setting the amount of attorney's fees [*P R Burke Corp. v. Victor Valley Wastewater Reclamation Authority (2002) 98 Cal. App. 4th 1047, 1055, 120 Cal. Rptr. 2d 98* (order establishing right to fees, although part of appealable order, is interlocutory if it does not establish the amount of fees)].

Whenever a post-judgment order is expressly appealable, an appeal from that order must specify that order in the notice of appeal, instead of or in addition to specifying the judgment [*Soldate v. Fidelity National Financial, Inc. (1998) 62 Cal. App. 4th 1069, 1074-1075, 72 Cal. Rptr. 2d 404* ; *see* [1][c], *above*].

[c] Order Granting Motion Based on Lack of Personal Jurisdiction or Inconvenient Forum

An appeal may be taken from an order granting a motion to quash service of summons or granting a motion to stay the action on the ground of inconvenient forum, or from a written order of dismissal under *Code Civ. Proc. § 581d* following an order granting a motion to dismiss the action on the ground of inconvenient forum [*Code Civ. Proc. § 904.1(a)(3)*]. The appeal may be taken even if the order is not signed by the court [*Quest Int'l, Inc. v. Icode Corp. (2004) 122 Cal. App. 4th 745, 754-760, 19 Cal. Rptr. 3d 173* (time for appeal began to run upon entry of unsigned minute order on trial court's sua sponte motion for reconsideration)]. For discussion and forms relating to such motions generally, see Ch. 323, *Jurisdiction: Personal* .

[d] Order Granting New Trial or Denying JNOV

An appeal may be taken from a superior court order granting a new trial or denying a motion for judgment notwithstanding the verdict [*Code Civ. Proc. § 904.1(a)(4)*; *Saxena v. Goffney (2008) 159 Cal. App. 4th 316, 323-324, 71 Cal. Rptr. 3d 469* ; *Gober v. Ralphs Grocery Co. (2006) 137 Cal. App. 4th 204, 211, 40 Cal. Rptr. 3d 92]* . For discussion and forms relating to such motions generally, see Ch. 371, *Motions After Trial* .

[e] Order Granting Right to Attach or Granting or Denying Discharge of Attachment

An appeal may be taken from a superior court order discharging or refusing to discharge an attachment or granting a right to attach order [*Code Civ. Proc. § 904.1(a)(5)*]. For discussion and forms relating to attachment and attach orders generally, see Ch. 62, *Attachment* .

[f] Order Granting or Denying Injunction or Dissolution of Injunction

An appeal may be taken from a superior court order granting or dissolving an injunction or refusing to grant or dissolve an injunction [*Code Civ. Proc. § 904.1(a)(6)*; *Cabrini Villas Homeowners Association v. Haghverdian (2003) 111 Cal. App. 4th 683, 688, 4 Cal. Rptr. 3d 192* (order granting injunction is appealable as final judgment on merits)]. An interlocutory order denying a permanent injunction is not immediately appealable, however, and is reviewed after final judgment [*Bishop Creek Lodge v. Scira (2000) 82 Cal. App. 4th 631, 633-634, 98 Cal. Rptr. 2d 398]* . For discussion and forms relating to orders granting, denying, or dissolving injunctions generally, see Ch. 303, *Injunctions* .

[g] Order Appointing Receiver

An appeal may be taken from a superior court order appointing a receiver [*Code Civ. Proc. § 904.1(a)(7)*]. For discussion and forms relating to orders appointing receivers generally, see Ch. 486, *Receivers* .

[h] Judgment or Order Determining Right to Redeem Property Subject to Mortgage or Lien

An appeal may be taken from a superior court interlocutory judgment, order, or decree that was made or entered in an action to redeem real or personal property from a mortgage or lien, when the judgment, order, or decree determines the right to redeem and directs an accounting [*Code Civ. Proc. § 904.1(a)(8)*]. For discussion and forms relating to orders determining redemption rights generally, see Ch. 42, *Liens and Wage Preferences* , and Ch. 555, *Trust Deeds and Real Property Mortgages* .

[i] Judgment Directing Partition

An appeal may be taken from a superior court interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made [*Code Civ. Proc. § 904.1(a)(9)*; *see also Solis v. Vallar (1999) 76 Cal. App. 4th 710, 713, 90 Cal. Rptr. 2d 677* (order confirming a partition sale under *Code Civ. Proc. § 873.750* may be appealable under *Code Civ. Proc. § 904.1(a)(2)* if it is made after appealable interlocutory judgment directing partition and sale; disagreeing with contrary ruling on this point in *Hummel v. First National Bank (1987) 191 Cal. App. 3d 489, 493, 236 Cal. Rptr. 449*)]. For discussion and forms relating to partition proceedings generally, see Ch. 397, *Partition* .

[j] Order Appealable Under Probate or Family Law Codes

An appeal may be taken from a superior court order made appealable by the provisions of the Probate Code or the Family Code [*Code Civ. Proc. § 904.1(a)(10)*; *see Fam. Code § 2341*; *Prob. Code § 7240*]. For discussion and forms relating to probate orders generally, see Ch. 440, *Probate: Is Probate Necessary?* For discussion and forms relating to family law orders, see the various chapters covering Family Law Code proceedings listed by specific topic in the *General Index* of this publication.

[k] Judgment or Order Imposing Monetary Sanctions Exceeding $5000

An appeal may be taken from a superior court order or an interlocutory judgment directing payment of monetary sanctions by a party or an attorney for a party only if the amount exceeds $5,000 [*Code Civ. Proc. § 904.1(a)(11),(12)*; *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants (2007) 148 Cal. App. 4th 390, 401, 55 Cal. Rptr.*

3d 751] . Contemporaneous, separate sanction awards are not aggregated for purposes of this rule if the conduct giving rise to the awards was separate and distinct [*see Champion/L.B.S. Associates Development Co. v. E-Z Serve Petroleum Marketing, Inc. (1993) 15 Cal. App. 4th 56, 57-60, 18 Cal. Rptr. 2d 726]* .

Sanctions judgments that do not exceed $5,000 may be reviewed on an appeal by that party after entry of final judgment in the main action. Alternatively, the appellate court has discretion to review such judgment on petition for writ of mandate or prohibition [*see Code Civ. Proc. § 904.1(b)*; *see also Code Civ. Proc. § 904.1(a)(1)* (discussed in [a], *above*); *County of Monterey v. Mahabir (1991) 231 Cal. App. 3d 1650, 1653, 282 Cal. Rptr. 924]* .

For discussion and forms relating to monetary sanctions generally, see Ch. 510, *Sanctions* .

[l] Order Granting or Denying Motion to Strike SLAPP Suit

An appeal may be taken from an order granting or denying a special motion to strike under *Code Civ. Proc. § 425.16* [*Code Civ. Proc. § 904.1(a)(13)*; *see also Code Civ. Proc. § 425.16(i)*; Century *21 Chamberlain & Associates v. Haberman (2009) 173 Cal. App. 4th 1, 6, 92 Cal. Rptr. 3d 249* ; *Doe v. Luster (2006) 145 Cal. App. 4th 139, 147-148, 51 Cal. Rptr. 3d 403* ; *Contemporary Services Corp. v. Staff Pro, Inc. (2007) 152 Cal. App. 4th 1043, 1052, 61 Cal. Rptr. 3d 434* ; *Barak v. The Quisenberry Law Firm (2006) 135 Cal. App. 4th 654, 658, 37 Cal. Rptr. 3d 688* ; *Soukup v. Stock (2004) 118 Cal. App. 4th 1490, 1494-1497, 15 Cal. Rptr. 3d 303]* . *Code Civ. Proc. § 425.16* provides the special motion procedure for striking SLAPP suits ("Strategic Litigation Against Public Participation"), that is, actions brought primarily to chill constitutionally protecte d speech. For discussion and forms relating to this procedure, see Ch. 376, *Motions to Strike: Anti-SLAPP* .

[m] Order Disqualifying Attorney

An order disqualifying an attorney is appealable as an order granting an injunction [*Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc. (1999) 69 Cal. App. 4th 1399, 1402, n.1, 82 Cal. Rptr. 2d 326* ; *see also* discussion in [f], *above*].

[4] Appealable Judgments and Orders Under Other Statutes

[a] In General

Most judgments and orders from which an appeal may be taken to the court of appeal are set out in *Code Civ. Proc. § 904.1*, discussed in [3], *above*. Counsel should be aware, however, that there are additional statutes providing a right of appeal from other judgments and orders, and they should conduct research accordingly [*see, e.g., Welf. & Inst. Code § 395*].

[b] Judgments and Order in Contractual Arbitration Proceedings

A common instance of judgments and orders made appealable by statutory provisions other than *Code Civ. Proc. § 904.1*, are the following judgments and orders in contractual arbitration proceedings [*Code Civ. Proc. § 1294*]:

- An order dismissing or denying a petition to compel arbitration.
- An order dismissing a petition to confirm, correct, or vacate an award.
- An order vacating an award unless a rehearing in arbitration is ordered.
- A judgment entered pursuant to the provisions for contractual arbitration [*see Code Civ. Proc. § 1280 et seq.*].

- A special order after final judgment.

For more detailed discussion and forms relating to judgments and orders appealable under the contractual arbitration law, see Ch. 34, *Contractual Arbitration: Judicial Review* .

[4A] Judgments Subject to Protective or Precautionary Cross Appeal

In an appeal from a postjudgment order granting a new trial or vacating the judgment, the respondent is the winning party as to the postjudgment order that is the subject of the appeal, but also the losing party as to the original judgment. If a postjudgment order of this type is reversed on appeal, this original judgment will be reinstated. The respondent in such an appeal, therefore, will commonly file a "protective" or "precautionary" cross appeal. If the postjudgment order is reversed by reason of the direct appeal, the respondent will then be able to challenge, in the cross appeal, the original judgment that would otherwise be reinstated. *Cal. Rules of Ct., Rule 8.108(f)(2)*, expressly provides for such protective cross appeals by specifying the time within which they must be filed [*see also* discussion in *§ 42.16*].

An original judgment, once vacated by a postjudgment order granting a new trial or vacating the judgment, is no longer an appealable judgment in the sense that it is not subject to a direct appeal. If the postjudgment order is never appealed, this original judgment is forever vacated and a direct appeal would serve no purpose. Once, however, an appeal is taken from the postjudgment order, the vacating effect of that order is suspended, and the original judgment remains effective for the purpose of an appeal from that judgment [*see Spencer v. Nelson (1947) 30 Cal. 2d 162, 164, 180 P.2d 886]* . In other words, when an appeal is taken from a postjudgment order granting a new trial or vacating a judgment, the original judgment remains an appealable judgment for the limited purpose of pursuing a protective or precautionary cross appeal from that judgment.

As provided by *Cal. Rules of Ct., Rule 8.108(f)(2)*, any appeal from the original judgment in this situation *must* be pursued by means of a protective or precautionary cross appeal. The respondent to an appeal taken from the postjudgment order may not simply wait for the outcome of that appeal and then, if the order is reversed, appeal directly from the reinstated judgment. To do so would subject the adverse party to unjust and unwarranted delay.

Before amendment and renumbering resulting in *Cal. Rules of Ct., Rule 8.108(f)(2)* one court of appeal held, in an appeal from a postjudgment order granting a JNOV, that the rule did not permit a precautionary cross appeal that challenges the original judgment because the rule did not expressly allow appeal by the respondent after an order granting a JNOV [*Lippert v. AVCO Community Developers, Inc. (1976) 60 Cal. App. 3d 775, 777-778, 778 n.3, 131 Cal. Rptr. 730* (also noting that it did not imply that permitting such a cross appeal would be unwise, but that this could be accomplished only by amending the rule)]. The holding in *Lippert* was abrogated by express provision for a cross appeal after the appeal of an order granting a JNOV [*Cal. Rules of Ct., Rule 8.108(f)(2)*; *see also* accompanying Advisory Committee Comment].

[5] Examples of Nonappealable Judgments and Orders

Nonappealable judgments and orders are those not expressly appealable by statute [*see* discussion in [2] and [3], *above*; *see also* discussion in [1][b], *above*, regarding the review of nonappealable orders or rulings encompassed within a final, appealable judgment]. Nonappealable orders include, but are not necessarily limited to, the following:

- An order overruling a demurrer [*San Diego Gas and Elec. Co. v. Superior Court (1996) 13 Cal. 4th 893, 912-913, 55 Cal. Rptr. 2d 724, 920 P.2d 669* (order may be reviewed after final judgment)].

- An order sustaining a demurrer [*City of Morgan Hill v. Bay Area Air Quality Management District (2004) 118 Cal. App. 4th 861, 867 n.3, 13 Cal. Rptr. 3d 420* (appeal may be taken from order dismissing

complaint with prejudice)].

- An order granting or denying a motion to strike a pleading [*Barrett v. Stanislaus County Employees Retirement Assn. (1987) 189 Cal. App. 3d 1593, 1601 n.4, 234 Cal. Rptr. 900]* .

- Discovery orders [*Dodge, Warren & Peters Insurance Services, Inc. v. Riley (2003) 105 Cal. App. 4th 1414, 1421, 130 Cal. Rptr. 2d 385* (denial of protective order not appealable); *Marsh v. Mountain Zephyr, Inc. (1996) 43 Cal. App. 4th 289, 298 n.6, 50 Cal. Rptr. 2d 493]* .

- An order denying a motion for a new trial [*Walker v. Los Angeles County Metropolitan Transportation Authority (2005) 35 Cal. 4th 15, 19, 23 Cal. Rptr. 3d 490, 104 P.3d 844]* .

- An order granting mistrial due to hung jury [*Sullivan v. Delta Air Lines, Inc. (1997) 15 Cal. 4th 288, 307 n.11, 63 Cal. Rptr. 2d 74, 935 P.2d 781]* .

- An order granting a motion for partial judgment notwithstanding the verdict [*Beavers v. Allstate Ins. Co. (1990) 225 Cal. App. 3d 310, 329, 274 Cal. Rptr. 766]* .

- An order denying a pretrial motion for dismissal [*Samuel v. Stevedoring Services of America (1994) 24 Cal. App. 4th 414, 417, 29 Cal. Rptr. 2d 420]* .

- An order directing a verdict [*Hilliard v. A.H. Robins Co. (1983) 148 Cal. App. 3d 374, 384, 196 Cal. Rptr. 117* (ordinary appeal from final judgment may include review of order granting directed verdict)].

- An order reopening a case for further proceedings under *Code Civ. Proc. § 662* [*Concerned Citizens Coalition of Stockton v. City of Stockton (2005) 128 Cal. App. 4th 70, 77-79, 26 Cal. Rptr. 3d 735]* .

- An order granting or denying a motion for summary judgment (as distinguished from a judgment entered after the grant of summary judgment) [*Sullivan v. Delta Air Lines, Inc. (1997) 15 Cal. 4th 288, 307, n.10, 63 Cal. Rptr. 2d 74, 935 P.2d 781; Mukthar v. Latin American Security Service (2006) 139 Cal. App. 4th 284, 288, 42 Cal. Rptr. 3d 563]* .

- An order reopening a case for further proceedings under *Code Civ. Proc. § 662* [*Concerned Citizens Coalition of Stockton v. City of Stockton (2005) 128 Cal. App. 4th 70, 77-79, 26 Cal. Rptr. 3d 735]* .

- Denial of motion for reconsideration [*Branner v. Regents of University of California (2009) 175 Cal. App. 4th 1043, 1050, 96 Cal. Rptr. 3d 690* ; *Huh v. Wang (2007) 158 Cal. App. 4th 1406, 1413, 71 Cal. Rptr. 3d 65* ; *Ramon v. Aerospace Corp. (1996) 50 Cal. App. 4th 1233, 1237, 58 Cal. Rptr. 2d 217]* .

- An order compelling arbitration [*Branham v. State Farm Mut. Auto. Ins. Co. (1975) 48 Cal. App. 3d 27, 32, 121 Cal. Rptr. 304* ; *see Code Civ. Proc. § 1294*].

- Entry of judgment under *Code Civ. Proc. § 998* after settlement [*Pazderka v. Caballeros Dimas Alang, Inc. (1998) 62 Cal. App. 4th 658, 667-668, 73 Cal. Rptr. 2d 242* (also stating that denial of motion for relief from default under *Code Civ. Proc. § 473* is appealable); *see also Bias v. Wright (2002) 103 Cal. App. 4th 811, 817, 127 Cal. Rptr. 2d 137* (judgment appealable when entered after parties informed

trial court that dispute had arisen over whether agreement under *Code Civ. Proc. § 998* existed)].

- An order remanding a matter to an administrative board for a new hearing [*Board of Dental Examiners v. Superior Court (1998) 66 Cal. App. 4th 1424, 1430, 78 Cal. Rptr. 2d 653]* .

- An order fixing the amount of a preliminary injunction bond [*County of Los Angeles v. City of Los Angeles (1999) 76 Cal. App. 4th 1025, 1028, 90 Cal. Rptr. 2d 799]* .

- An order denying a motion for entry of judgment pursuant to *Code Civ. Proc. § 664.6* [*Doran v. Magan (1999) 76 Cal. App. 4th 1287, 1293-1294, 91 Cal. Rptr. 2d 60]* .

- A tentative decision [*In re Marriage of Hafferkamp (1998) 61 Cal. App. 4th 789, 793-794, 71 Cal. Rptr. 2d 761]* .

- A clerk's entry of default [*First American Title Co. v. Mirzaian (2003) 108 Cal. App. 4th 956, 961, 134 Cal. Rptr. 2d 206]* .

- An order reclassifying and transferring a case to a limited jurisdiction department [*Garau v. Torrance Unified School District (2006) 137 Cal. App. 4th 192, 198, 40 Cal. Rptr. 3d 108]* .

- A ruling as to who decides arbitrability [*Vivid Video, Inc. v. Playboy Entertainment Group, Inc. (2007) 147 Cal. App. 4th 434, 440-443, 54 Cal. Rptr. 3d 232]* .

- Courts are split as to whether an order denying a motion for reconsideration is separately appealable, with most recent cases holding that they are not [*see, e.g.,* *Morton v. Wagner (2007) 156 Cal. App. 4th 963, 968-969, 67 Cal. Rptr. 3d 818]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionFinal Judgment Rule

California Forms of Pleading and Practice--Annotated

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Volume 5: Appeal-Chs. 40-55
Chapter 42 APPEAL: NOTICE OF APPEAL
PART II. LEGAL BACKGROUND

5-42 California Forms of Pleading and Practice--Annotated § 42.13

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§ 42.13 Time Requirements for Filing Notice of Appeal

[1] General Filing Deadlines

A notice of appeal generally must be filed on or before the *earliest* of the following three dates [*Cal. Rules of Ct., Rule 8.104(a)*]:

- 60 days after the date of serving by the clerk of the court of a document entitled "notice of entry" of judgment or a file-stamped copy of the judgment, showing the date either was served [*Cal. Rules of Ct., Rule 8.104(a)(1)*; *see* [2][a], *below*].

- 60 days after the date of service of a document entitled "notice of entry" of judgment or a file-stamped copy of the judgment, accompanied by proof of service, by any party on the party filing the notice of appeal or by the party filing the notice of appeal [*Cal. Rules of Ct., Rule 8.104(a)(2)*; *see* [2][a], *below*].

- 180 days after the date of entry of the judgment [*Cal. Rules of Ct., Rule 8.104(a)(3)*; *see* [2][b], *below*].

One court of appeal has held that noncompliance with the statutory notice requirements for entry of judgment does not render the judgment void [*see Kimball Avenue v. Franco (2008) 162 Cal. App. 4th 1224, 1228-1229, 76 Cal. Rptr. 3d 628* (when court clerk and party fail to serve notice of entry of judgment, sole consequence is that longer statutory period for filing notice of appeal applies)].

For purposes of this rule, "judgment" includes "appealable order" if the appeal is from an appealable order [*Cal. Rules*

of Ct., Rule 8.104(f); *see* *Russell v. Foglio (2008) 160 Cal. App. 4th 653, 660 n.3, 73 Cal. Rptr. 3d 87]* .

Different time deadlines for filing an appeal, other than the general deadlines set out in *Cal. Rules of Ct., Rule 8.104(a), above*, apply in the following situations:

- When there is postjudgment motion for new trial, motion for reconsideration, motion to vacate, or motion for JNOV [*Cal. Rules of Ct., Rule 8.108*, discussed in *§ 42.14*].

- An action involving liability by a public entity under *Gov. Code § 984* [*Cal. Rules of Ct., Rule 8.104*, discussed in *§ 42.15[1]*].

- Validation actions under *Code Civ. Proc. § 870* [*Cal. Rules of Ct., Rule 8.104(a)*, discussed in *§ 42.15[2]*].

- Cross appeals [*Cal. Rules of Ct., Rule 8.108(f)*, discussed in *§ 42.16*].

A different deadline may also apply when there is postjudgment modification of the judgment in the trial court, to the extent that time deadlines under *Cal. Rules of Ct., Rule 8.104(a)* may begin to run anew from the modified judgment [*see* discussion § 42.14[5]]. However, filing a bankruptcy petition and the imposition of an automatic stay does not stay the time to file a notice of appeal [*ECC Construction, Inc. v. Oak Park Calabasas Homeowners Assn. (2004) 122 Cal. App. 4th 994, 999, 19 Cal. Rptr. 3d 340]* .

In any event, the applicable time deadline may not be extended, and timely filing is a mandatory and jurisdictional requirement. Failure to file in time results in dismissal. For further discussion, see *§ 42.15*.

[2] Calculation of General Filing Deadlines

[a] 60-Day Deadline

The general 60-day filing deadline for filing a notice of appeal begins to run in either of the following situations [*Cal. Rules of Ct., Rule 8.104(a)(1), (2)*]:

- The clerk of the superior court serves a notice of entry of the judgment or order from which the appeal is to be taken.

- One of the parties to the action, including appellant, serves notice of entry of the judgment or order from which the appeal is to be taken.

A file-stamped copy of the judgment may be used in place of a document entitled "notice of entry," and service of a file-stamped copy of the judgment therefore starts the 60-day deadline [*Cal. Rules of Ct., Rule 8.104(a)(1),(2)*; *Russell v. Foglio (2008) 160 Cal. App. 4th 653, 659-660, 73 Cal. Rptr. 3d 87* ; *Hughes v. City of Pomona (1998) 63 Cal. App. 4th 772, 777, 74 Cal. Rptr. 2d 344* ; *see also* *Filipescu v. California Housing Finance Agency (1996) 41 Cal. App. 4th 738, 741-742, 48 Cal. Rptr. 2d 736* ; *Imuta v. Nakano (1991) 233 Cal. App. 3d 1570, 1579 n.10, 285 Cal. Rptr. 681]* . If a file-stamped copy is used, it must bear the judge's signature or signature stamp; otherwise, it does not give sufficient notice to start the 60-day deadline [*People v. One Parcel of Land (1991) 235 Cal. App. 3d 579, 582 n.2, 286 Cal. Rptr. 739]* . One court has held that the document must literally be entitled "Notice of Entry" in order to start the appeal clock running [*Sunset Millennium Associates, LLC v. Le Songe, LLC (2006) 138 Cal. App. 4th 256, 259-260, 41 Cal. Rptr. 3d 273* (14-page minute order with notice of entry language on page 13 did not comply with requirement that document providing notice of entry be so entitled)]. Notice of an appealable judgment or order mailed to an incorrect address is not sufficient to constitute legal notice [*Moghaddam v. Bone (2006) 142 Cal. App. 4th 283, 288, 47 Cal.*

Rptr. 3d 602] . However, a notice sent to only one of a party's two attorneys does constitute legal notice [*Adaimy v. Ruhl (2008) 160 Cal. App. 4th 583, 586-587, 72 Cal. Rptr. 3d 926*].

Documents served by the clerk do not trigger the 60-day period for filing a notice of appeal unless the documents strictly comply with *California Rules of Ct., Rule 8.104(a)* [*Alan v. American Honda Motor Co., Inc. (2007) 40 Cal. 4th 894, 902-903, 55 Cal. Rptr. 3d 534, 152 P.3d 1109* ; *Citizens for Civic Accountability v. Town of Danville (2008) 167 Cal. App. 4th 1158, 1162-1165, 84 Cal. Rptr. 3d 684* (clerk's e-mailing judgment failed to trigger appeal deadline; U.S. mail required)]. Rule 8.104(a)(1) requires a single document, either a "Notice of Entry" or a file-stamped copy of the judgment or appealable order, that is sufficient in itself to satisfy all of Rule 8.104(a)'s conditions, including the requirement that the document itself show the date on which it was served. The clerk may satisfy the single-document requirement by attaching a certificate of mailing to the file-stamped judgment or appealable order, or to a document entitled "Notice of Entry" [*Alan v. American Honda Motor Co., Inc. (2007) 40 Cal. 4th 894, 905, 55 Cal. Rptr. 3d 534, 152 P.3d 1109*]. To commence the 60-day period for filing a notice of appeal, the notice of entry must include an actual proof of service [*Thiara v. Pacific Coast Khalsa Diwan Society (2010) 182 Cal. App. 4th 51, 56-58, 105 Cal. Rptr. 3d 333]* .

Service under *Cal. Rules of Ct., Rule 8.104(a)(1)* and *(a)(2)* may be by any method permitted by the Code of Civil Procedure, including electronic service when permitted under *Code Civ. Proc. § 1010.6* and *Cal. Rules of Ct., Rules 2.250-2.261* [*Cal. Rules of Ct., Rule 8.104(a)(4)*].

One court of appeal has held that noncompliance with the statutory notice requirements for entry of judgment does not render the judgment void [*see* *Kimball Avenue v. Franco (2008) 162 Cal. App. 4th 1224, 1228-1229, 76 Cal. Rptr. 3d 628* (when court clerk and party fail to serve notice of entry of judgment, sole consequence is that longer statutory period for filing notice of appeal applies)].

[b] 180-Day Deadline

The general 180-day filing deadline for filing a notice of appeal applies when neither the superior court clerk nor one of the parties to an action has properly served a "notice of entry" of judgment sufficient to start the 60-day deadline within 120 days after entry of judgment [*Cal. Rules of Ct., Rule 8.104(a)(3)*; *see* [a], *above*].

In this situation, the deadline for filing the notice of appeal is 180 days after entry of the judgment or order. "Entry" of the judgment or order is one of the following [*Cal. Rules of Ct., Rule 8.104(d)*]:

- The date that a judgment is entered in the judgment book (or the date of filing with the clerk when a county follows the procedures in lieu of a judgment book under *Code Civ. Proc. § 668.5*) [*Cal. Rules of Ct., Rule 8.104(d)(1)*; *see also* *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc. (1997) 15 Cal. 4th 51, 57, n.2, 61 Cal. Rptr. 2d 166* (noting use of this procedure when county fails to keep judgment book)].

- If the appeal is from an appealable order that is entered in the minutes, the date that it is entered in the permanent minutes, unless the minute order expressly directs that a written order is to be prepared, signed, and filed, in which case it is the date the signed order is filed [*Cal. Rules of Ct., Rule 8.104(d)(2)*]. *Cal. Rules of Ct., Rule 3.1312* (requiring prevailing party in trial court motion to prepare order, deliver it to opposing party for approval, and transmit it to court for signature and filing), or any similar local court rule, does *not* constitute an express direction by the court to prepare and file an order within the meaning of *Cal. Rules of Ct., Rule 8.104(d)(2)* [*Cal. Rules of Ct., Rule 8.104(d)(2)*; *Hughey v. City of Hayward (1994) 24 Cal. App. 4th 206, 209-210, 30 Cal. Rptr. 2d 678]* .

- When the appeal is from an appealable order that has not been entered in the minutes, the date that

the order signed by the court is filed [*Cal. Rules of Ct., Rule 8.104(d)(3)*].

- In a probate proceeding, the date of entry of a decree of distribution is the date of entry of that decree at length in the judgment book or other permanent record of the court [*Cal. Rules of Ct., Rule 8.104(d)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsReviewabilityTime Limitations

California Forms of Pleading and Practice--Annotated

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Chapter 42 APPEAL: NOTICE OF APPEAL
PART II. LEGAL BACKGROUND

5-42 California Forms of Pleading and Practice--Annotated § 42.14

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§ 42.14 Time Requirements for Filing Notice of Appeal After Post-Judgment Proceedings

[1] Motion for New Trial

If any party serves and files a valid notice of intention to move for a new trial and the motion is denied, the time to appeal from the judgment is extended for all parties until the earliest of [*Cal. Rules of Ct., Rule 8.108(b)*]:

- 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order [*Cal. Rules of Ct., Rule 8.108(b)(1)(A)*]; *see also Code Civ. Proc. § 660*, discussed below].

- 30 days after denial of the motion by operation of law [*Cal. Rules of Ct., Rule 8.108(b)(1)(B)*; *see also Code Civ. Proc. § 660*, discussed *below*].

- 180 days after entry of judgment [*Cal. Rules of Ct., Rule 8.108(b)(1)(C)*].

If any party serves an acceptance of a conditionally ordered additur or remittitur of damages pursuant to a trial court finding of excessive or inadequate damages, the time to appeal from the judgment is extended for all parties until 30 days after the date the party serves the acceptance [*Cal. Rules of Ct., Rule 8.108(b)(2)*].

An order or notice mailed by the clerk under *Cal. Rules of Ct., Rule 8.108(b)* must show the date it was mailed, and an order or notice served by a party must be accompanied by proof of service [*Cal. Rules of Ct., Rule 8.108(g)*].

Under *Code Civ. Proc. § 660*, the trial court must rule on a motion for new trial within 60 days after either the superior court clerk or a party mails notice of entry of judgment, or 60 days after the filing of the first notice of intention to move

for a new trial. If the court fails to rule on the motion within this 60-day period, the motion is deemed denied without further order of the court [*Code Civ. Proc. § 660*]. Note, however, that in some instances, the applicable 60-day period in which to decide a motion for new trial may be extended [*see Freiberg v. City of Mission Viejo (1995) 33 Cal. App. 4th 1484, 1487-1489, 39 Cal. Rptr. 2d 802* (time to rule on new trial motion may sometimes be extended for performance of conditions precedent to denial of a new trial, such as additur, for circumstances beyond a party's control, or the time limit may be tolled due to a stay, such as a bankruptcy stay)]. In addition, one court held that *11 U.S.C. § 108(c)(2)* provides a 30-day extension of the time in which a trial court may rule on a motion for new trial if the deadline contained in *Code Civ. Proc. § 660* passed while an automatic stay was in effect [*ECC Construction, Inc. v. Oak Park Calabasas Homeowners Association (2004) 118 Cal. App. 4th 1031, 1037, 13 Cal. Rptr. 3d 580* (notice of appeal filed within 30 days of notice of ruling on motion for new trial was timely)]. For further discussion and forms relating to motions for a new trial, see Ch. 371, *Motions After Trial* .

If a party files a valid motion for new trial, and the trial court issues a timely order denying that motion, but no one serves the order or notice of entry of that order, then the applicable deadline for filing the notice of appeal from the judgment is 180 days after entry of judgment, pursuant to *Cal. Rules of Ct., Rule 8.108(b)(1)(C)* [*Anderson v. Chikovani (2010) 181 Cal. App. 4th 1397, 1400-1401, 105 Cal. Rptr. 3d 553]* .

[2] Motion to Vacate Judgment

The time for filing a notice of appeal is extended when both of the following occur [*Cal. Rules of Ct., Rule 8.108(c)*]:

- Any party serves and files a valid notice of intention to move to vacate a judgment or to vacate a judgment and enter another different judgment, on any ground.

- The notice of intention is served and filed within the time for filing a notice of appeal under *Cal. Rules of Ct., Rule 8.104*, or within any shorter time that may apply by statute.

In this event, the time for filing the notice of appeal from the judgment is extended for all parties until the earliest of the following dates [*Cal. Rules of Ct., Rule 8.108(c)*]:

- 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order [*Cal. Rules of Ct., Rule 8.108(c)(1)*].

- 90 days after the first notice of intention to move or motion is filed [*Cal. Rules of Ct., Rule 8.108(c)(2)*].

- 180 days after entry of judgment [*Cal. Rules of Ct., Rule 8.108(c)(3)*].

An order or notice mailed by the clerk under *Cal. Rules of Ct., Rule 8.108(c)* must show the date it was mailed, and an order or notice served by a party must be accompanied by proof of service [*Cal. Rules of Ct., Rule 8.108(g)*].

Motions to vacate a judgment are typically those made under *Code Civ. Proc. § 663 et seq.*, on grounds that the judgment by the court or by special verdict is based on incorrect or erroneous law or is not supported by or is inconsistent with the facts [*see Payne v. Rader (2008) 167 Cal. App. 4th 1569, 1574, 85 Cal. Rptr. 3d 174* (motion to vacate judgment extended time to appeal only if motion was valid)]. For discussion and forms relating to these motions, see Ch. 371, *Motions After Trial* .

The provision under *Cal. Rules of Ct., Rule 8.108(c)*, for filing a notice of appeal after filing a motion to vacate judgment, may be applied only to lengthen the time for filing a notice of appeal under *Cal. Rules of Ct., Rule 8.104(a)*. It may not be applied to shorten the time allowed under *Cal. Rules of Ct., Rule 8.104(a)* [*Maides v. Ralphs Grocery*

Co. (2000) 77 Cal. App. 4th 1363, 1370, 92 Cal. Rptr. 2d 542] .

A motion to set aside a judgment under *Code Civ. Proc. § 473*, on grounds of mistake, inadvertence, surprise, or excusable neglect, also operates to extend the time for filing of notice of appeal under *Cal. Rules of Ct., Rule 8.108(c)* [*Matera v. McLeod (2006) 145 Cal. App. 4th 44, 56-57, 51 Cal. Rptr. 3d 331* ; *In re Marriage of Eben-King & King (2000) 80 Cal. App. 4th 92, 108, 95 Cal. Rptr. 2d 113* ; *Duncan v. Sunset Agricultural Minerals (1969) 273 Cal. App. 2d 489, 491-492, 78 Cal. Rptr. 339* (rejecting contention that motion did not extend time because it was not made under *Code Civ. Proc. § 663 et seq.*); *see also Cal. Rules of Ct., Rule 8.108(c)*, Advisory Committee Comment]. In order for the motion to set aside a judgment to function to extend the time within which to appeal, the motion to set aside judgment must have been filed in a timely manner. That is, it must have been served and filed within either the normal time period for filing a notice of appeal under *Cal. Rules of Ct., Rule 8.104* or any shorter time period prescribed by statute for filing such a motion [*In re Marriage of Eben-King & King (2000) 80 Cal. App. 4th 92, 108-109, 95 Cal. Rptr. 2d 113]* . For discussion and forms relating to motions under *Code Civ. Proc. § 473*, see Ch. 489, *Relief from Judgments and Orders* .

A motion pursuant to *Fam. Code § 2122(e)*, which allows a motion to set aside a stipulated or uncontested judgment on the basis of mistake within one year after the date of entry of judgment, is not a motion to vacate which serves to extend the time for filing a notice of appeal [*In re Marriage of Eben-King & King (2000) 80 Cal. App. 4th 92, 112-113, 95 Cal. Rptr. 2d 113]* .

[3] Motion to Reconsider Appealable Order

If any party serves and files a valid motion to reconsider an appealable order under *Code Civ. Proc. § 1008(a)*, the time to appeal from that order is extended for all parties until the earliest of the following dates [*Cal. Rules of Ct., Rule 8.108(e)*]:

- 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order [*Cal. Rules of Ct., Rule 8.108(e)(1)*].
- 90 days after the first motion to reconsider is filed [*Cal. Rules of Ct., Rule 8.108(e)(2)*].
- 180 days after entry of the appealable order [*Cal. Rules of Ct., Rule 8.108(e)(3)*].

An order or notice mailed by the clerk under *Cal. Rules of Ct., Rule 8.108(e)* must show the date it was mailed, and an order or notice served by a party must be accompanied by proof of service [*Cal. Rules of Ct., Rule 8.108(g)*].

The extension provisions of *Cal. Rules of Ct., Rule 8.108(e)* do not apply to motions to reconsider a nonappealable order. For example, in one case, appellants filed a motion for reconsideration of a minute order granting a motion for summary judgment. The trial court later entered judgment based on the minute order, and the parties were served with notice of entry of the judgment. Still later, the trial court heard and denied the motion for reconsideration. Appellants filed their notices within 30 days of the denial of the motion for reconsideration, but more than 60 days after the notice of entry of judgment. The court of appeal held that the appeals were barred because of the untimely notices. The motion for reconsideration did not seek reconsideration of an appealable order, and therefore did not trigger the extension provisions of *Cal. Rules of Ct., Rule 8.108* [*Kasper v. Cedars-Sinai Medical Center (1998) 62 Cal. App. 4th 780, 782, 72 Cal. Rptr. 2d 835* (distinguishing contrary language in *Stratton v. First Nat. Life Ins. Co. (1989) 210 Cal. App. 3d 1071, 1082, 258 Cal. Rptr. 721* as dicta)]. In addition, to extend the time to file a notice of appeal, a motion for reconsideration must comply with all procedural requirements [*see Branner v. Regents of University of California (2009) 175 Cal. App. 4th 1043, 1047-1048, 96 Cal. Rptr. 3d 690* (motion to reconsider invalid because it did not include declaration)].

The extension provisions of *Cal. Rules of Ct., Rule 8.108*, also apply only to timely motions to reconsider that are made before entry of judgment. After entry of judgment, a trial court has no authority to change the judgment except through the statutory provisions governing motions for new trial or to vacate the judgment [*Nave v. Taggart (1995) 34 Cal. App. 4th 1173, 1177, 40 Cal. Rptr. 2d 714* ; *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1606, 275 Cal. Rptr. 887]* . When the motion for reconsideration is untimely and the trial court therefore has no power to rule on it, the motion has no effect on the period within which to file a notice of appeal [*Ramon v. Aerospace Corp. (1996) 50 Cal. App. 4th 1233, 1238, 58 Cal. Rptr. 2d 217* ; *see also Betz v. Pankow (1993) 16 Cal. App. 4th 931, 937-938, 20 Cal. Rptr. 2d 841* ; *Ten Eyck v. Industrial Forklifts Co. (1989) 216 Cal. App. 3d 540, 545, 265 Cal. Rptr. 29* ; *Eddy v. Sharp (1988) 199 Cal. App. 3d 858, 863 n.3, 245 Cal. Rptr. 211* ; *Magallanes v. Superior Court (1985) 167 Cal. App. 3d 878, 882, 213 Cal. Rptr. 547]* . If the motion for reconsideration is made before the entry of judgment, but is not actually heard until after the entry of judgment, the entry of judgment operates as an implied denial of the motion, and the entry of judgment, rather than any subsequent formal hearing and denial of the motion, triggers the running of the 30-day period under *Cal. Rules of Ct., Rule 8.108* [*Kasper v. Cedars-Sinai Medical Center (1998) 62 Cal. App. 4th 780, 782, 72 Cal. Rptr. 2d 835]* .

For discussion and forms relating to motions to reconsider generally, see Ch. 374, *Motions to Reconsider and Renewed Motions* .

[4] JNOV Motion

If any party serves and files a valid JNOV motion and the motion is denied, the time to appeal from the judgment is extended for all parties until the earliest of [*Cal. Rules of Ct., Rule 8.108(d)(1)*]:

- 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order [*Cal. Rules of Ct., Rule 8.108(d)(1)(A)*].

- 30 days after denial of the motion by operation of law [*Cal. Rules of Ct., Rule 8.108(d)(1)(B)*].

- 180 days after entry of judgment [*Cal. Rules of Ct., Rule 8.108(d)(1)(C)*].

The time to appeal from an order denying a JNOV motion is governed by *Cal. Rules of Ct., Rule 8.104*, unless extended by *Cal. Rules of Ct., Rule 8.108(f)(2)* [*Cal. Rules of Ct., Rule 8.108(d)(2)*].

An order or notice mailed by the clerk under *Cal. Rules of Ct., Rule 8.108(d)(1)* must show the date it was mailed, and an order or notice served by a party must be accompanied by proof of service [*Cal. Rules of Ct., Rule 8.108(g)*].

[5] Effect of Modification of Judgment by Trial Court

If the trial court substantially modifies a judgment, for example, on a motion for new trial, the amended judgment becomes the final judgment from which a new filing deadline begins to run [*Neff v. Ernst (1957) 48 Cal. 2d 628, 634, 311 P.2d 849* (trial court's substantial modification of original judgment made original judgment ineffective, and the appeal from the amended judgment was properly before the court of appeal); *Stone v. Regents of University of California (1999) 77 Cal. App. 4th 736, 744* (appeal is timely if taken from a modified judgment if modification is material and substantial) *but see* discussion in [1], *above* (time requirements applicable on denial of motion for new trial)].

When, however, an amendment merely corrects a clerical error and does not involve the exercise of judicial discretion, the original judgment remains effective and unimpaired and the amendment does not operate as a new judgment from which a new appeal may be taken [*Mulder v. Mendo Wood Products, Inc. (1964) 225 Cal. App. 2d 619, 635, 37 Cal. Rptr. 479* (original judgment modified to eliminate inadvertent inclusion of matter remained the appealable judgment in

that modification corrected only a clerical error)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureAppealsReviewabilityTime LimitationsCivil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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5-42 California Forms of Pleading and Practice--Annotated § 42.15

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§ 42.15 Time Requirements for Filing Notice of Appeal in Specific Actions

[1] Action Involving Periodic Payment of Judgment by Public Entity

Notwithstanding *Cal. Rules of Ct., Rule 8.104(a)* (discussed in *§ 42.13, above*), or any other rule, in actions in which a public entity has been held liable and has elected to pay a judgment in periodic payments under *Gov. Code § 984*, the time for filing a notice of appeal is governed by *Cal. Rules of Ct., Rule 8.104(c)*. In these cases, the time for filing the notice of appeal is the earliest of the following, unless *Cal. Rules of Ct., Rule 8.108*, applies to further extend the date [*Cal. Rules of Ct., Rule 8.104(c)*; *see § 42.14* (post-judgment motions) and § 42.16 (cross appeal) for discussion of *Cal. Rules of Ct., Rule 8.108*]:

- 90 days after the superior court clerk mails the notice of entry of judgment.
- 90 days after the date of service of written notice of entry of judgment.
- 180 days after the date of entry of the judgment.

For a discussion and forms relating to periodic payments of judgments by public entities generally, see Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities* .

[2] Validation Action

The time requirements of *Cal. Rules of Ct., Rule 8.104* (discussed in *§ 42.13*), do not apply in proceedings subject to *Code Civ. Proc. § 870* [*Cal. Rules of Ct., Rule 8.104(a)*].

Code Civ. Proc. § 870, which applies to validation actions under *Code Civ. Proc. §§ 860-870*, provides that,

notwithstanding any other provision of law or any rule of court, no appeal will be allowed from a judgment entered in a validation action unless a notice of appeal is filed within 30 days after notice of entry of judgment, or within 30 days after entry of judgment if there is no answering party [*Code Civ. Proc. § 870(b)*; *see Hollywood Park Land Co., LLC v. Golden State Transportation Financing Corp. (2009) 178 Cal. App. 4th 924, 938-948, 100 Cal. Rptr. 3d 752* (casino compact unconstitutional because it bypasses court of appeal and mandates direct review by California Supreme Court); *California Commerce Casino, Inc. v. Schwarzenegger, 146 Cal. App. 4th 1406, 1418-1419, 53 Cal. Rptr. 3d 626]* . If there is no answering party, only issues related to the jurisdiction of the court to enter a judgment in the action under *Code Civ. Proc. §§ 860-870* may be raised on the appeal [*Code Civ. Proc. § 870(b)*].

The shortened time requirements of *Code Civ. Proc. § 870(b)* apply to appealable *orders* in validation proceedings as well as to judgments [*Planning & Conservation League v. Department of Water Resources (1998) 17 Cal. 4th 264, 267, 70 Cal. Rptr. 2d 635, 949 P.2d 488]* .

[3] Proceedings to Determine Validity of Public Bonds and Other Undertakings

Gov. Code § 53511 and *Gov. Code § 17700* allow a state or local agency to bring an action to determine the validity of its bonds, warrants, contracts, obligations, or evidences of indebtedness. *Code Civ. Proc. § 863 et seq.* provide for an action by an "interested person" to challenge the validity of these agency undertakings. The time for filing a notice of appeal from a judgment in one of these actions is within 30 days after notice of entry of judgment or 30 days after entry of judgment if there is no answering party [*Code Civ. Proc. § 870*]. This shortened period supersedes the longer period for filing a notice of appeal found in *Cal. Rules of Ct., Rule 8.104(a)*. In the case of an appeal from an order in such a proceeding, which is not a final judgment, the same shorter time limits of *Code Civ. Proc. § 870* also apply [*Planning and Conservation League v. Department of Water Resources (1998) 17 Cal. 4th 264, 70 Cal. Rptr. 2d 635]* .

[4] Other Special Proceedings

Counsel should be aware that other particular proceedings may have their own statutory deadlines for filing an appeal. For example, an action challenging the validity of a special assessment against real property for a public improvement not only has an extremely short limitation period for bringing the action, but any appeal from a final judgment in such an action must be perfected within 30 days after entry of judgment [*Code Civ. Proc. § 329.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityTime LimitationsGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsLocal GovernmentsFinanceGovernmentsState & Territorial GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsFinance

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5-42 California Forms of Pleading and Practice--Annotated § 42.16

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§ 42.16 Time Requirements for Filing Notice of Appeal in Cross Appeal

When a timely notice of appeal is filed under *Cal. Rules of Ct., Rule 8.104* (discussed in *§ 42.13*), or under *Cal. Rules of Ct., Rule 8.108* (discussed in *§ 42.14*), any other party may file a notice of cross appeal within 20 days after the superior court clerk mails notification of the first appeal or within the time otherwise prescribed by the applicable rule, whichever period expires later [*Cal. Rules of Ct., Rule 8.108(f)(1)*].

Note that *Cal. Rules of Ct., Rule 8.108(f)(1)*, does not require that the first notice of appeal be valid for purposes of determining the timeliness of the cross appeal. Hence, an invalid but timely filed appeal operates to extend the time required for the filing of the notice of cross appeal [*Life v. County of Los Angeles (1990) 218 Cal. App. 3d 1287, 1298, 267 Cal. Rptr. 557]* . In addition, the rule applies to any appeal filed after the first appeal, whether protective or independent [*The Termo Company v. Luther (2008) 169 Cal. App. 4th 394, 402-403, 86 Cal. Rptr. 3d 687*]. However, a notice of appeal that is not filed timely does not extend the time for filing a cross-appeal [*Branner v. Regents of University of California (2009) 175 Cal. App. 4th 1043, 1050, 96 Cal. Rptr. 3d 690*].

If an appellant timely appeals from an order granting a motion for new trial, an order granting--within 150 days after entry of judgment--a motion to vacate the judgment, or a JNOV, the time for any other party to appeal from the original judgment or from an order denying a JNOV motion is extended until 20 days after the clerk mails notification of the first appeal [*Cal. Rules of Ct., Rule 8.108(f)(2)*; *see Richter v. Aetna Life Ins. & Annuity Co. (2002) 96 Cal. App. 4th 1143, 1145, 117 Cal. Rptr. 2d 737* (applying rule effective January 1, 2002); *Montgomery Ward & Company, Inc. v. Imperial Cas. & Indem. Co. (2000) 81 Cal. App. 4th 356, 371, 97 Cal. Rptr. 2d 44* ; for additional discussion relating to protective cross appeals, *see §§ 42.11[2][a][iii]* and *42.12[4A]*].

For discussion of the application of *Cal. Rules of Ct., Rule 8.108(f)(2)* to protective cross appeals in an appeal from a JNOV, as well as to protective cross appeals in an appeal from an order granting a new trial or vacating a judgment, see

§ 42.12[4A].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityTime Limitations

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§ 42.16A Calculation of Time Requirements in Doubtful Case to Be Resolved in Favor of Right to Appeal

Most commonly the applicable deadline for filing a notice of appeal is one of two or more periods, the longer of which typically applies in the absence of some event that triggers the shorter period. For example, the general deadline is a shorter period, of 60 days following service of notice of entry of judgment, or, in the event that such service does not occur (at least within 120 days after entry of judgment), a longer period of 180 days following entry of judgment [*see Cal. Rules of Ct., Rule 8.104*, discussed in *§ 42.13*; *see also Cal. Rules of Ct., Rule 8.108* and discussion in *§§ 42.14 -42.16*].

When a notice of appeal is not timely filed under the shorter of two or more periods, but is timely filed under the longer period, an appellant may successfully argue that the appeal is timely when the records suggests, but does not definitively establish, that the shorter period applies. In such cases, when it is doubtful the appellant has met the applicable time requirement, but evidence on the matter is not definitive, courts will adhere to the policy of according the right to appeal when this can be done without doing violence to the applicable rules [*Montgomery Ward & Company, Inc. v. Imperial Cas. & Indem. Co. (2000) 81 Cal. App. 4th 356, 372-373, 97 Cal. Rptr. 2d 44]* . Thus for example, one court of appeal held a cross appeal was timely pursuant to *Cal. Rules of Ct., Rule 8.104* when it was filed within 180 days after entry of judgment, and when, although it appeared "more likely than not" that the shorter period applied, there was no "definitive evidence in the record" that the shorter rather than the longer period governed [*Montgomery Ward & Company, Inc. v. Imperial Cas. & Indem. Co. (2000) 81 Cal. App. 4th 356, 372-373, 97 Cal. Rptr. 2d 44]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityGeneral OverviewCivil ProcedureAppealsReviewabilityTime Limitations

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§ 42.17 Filing Deadlines Are Jurisdictional and May Not Be Extended

[1] Time for Filing Notice of Appeal Mandatory and Jurisdictional

The time requirements are mandatory and appellate courts are without jurisdiction to consider late appeals [*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc. (1997) 15 Cal. 4th 51, 56, 61 Cal. Rptr. 2d 166, 931 P.2d 344* (once filing deadline expires, appellate court has no power to entertain appeal); *Estate of Hanley (1943) 23 Cal. 2d 120, 122, 142 P.2d 423]* . The deadlines may not be extended by application of estoppel principles [*see Hollister Convalescent Hospital, Inc. v. Rico (1975) 15 Cal. 3d 660, 668, 125 Cal. Rptr. 757, 542 P.2d 1349* ; *see also Stuart Whitman, Inc. v. Cataldo (1986) 180 Cal. App. 3d 1109, 1114, 226 Cal. Rptr. 42]* .

Thus, an appeal is subject to dismissal when the notice of appeal has not been timely filed [*see Silverbrand v. County of Los Angeles (2009) 46 Cal. 4th 106, 120-121, 92 Cal. Rptr. 3d 595, 205 P.3d 1037* (under prison-delivery rule, notice of appeal still must be filed within jurisdictional time period, but filing constructively occurs when prisoner delivers notice to prison authorities for forwarding to court clerk); *Hollister Convalescent Hospital, Inc. v. Rico (1975) 15 Cal. 3d 660, 670, 125 Cal. Rptr. 757, 542 P.2d 1349* ; *Guillemin v. Stein (2002) 104 Cal. App. 4th 156, 161, 128 Cal. Rptr. 2d 65* (immaterial that trial court later confirmed sanctions award in postjudgment order from which there was timely appeal)]. For discussion and forms relating to a motion in the court of appeal to dismiss an appeal, see Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* .

PRACTICE TIP:

Timely Filing Rendered Untimely by Improper Failure to File Notice of Appeal. In the event a notice of appeal is tendered to the clerk before the time for filing notice of appeal expires, but the clerk improperly fails to file or rejects the notice, the notice, though tendered to the clerk again after the deadline for filing notice of appeal has expired, will be deemed filed when it was first tendered [*Rapp v. Golden Eagle Insurance Co. (1994) 24 Cal. App. 4th 1167, 30 Cal. Rptr. 2d 126]* . The court's opinion

in *Rapp* involved an appellant who tendered to the clerk of the court a notice of appeal but did not include an adequate filing fee, so the clerk rejected the notice. Since the clerk was required to accept the notice of appeal regardless of whether the proper fee was paid, the appellate court concluded the notice of appeal was constructively filed on the date it was initially tendered to the clerk [*Rapp v. Golden Eagle Insurance Co. (1994) 24 Cal. App. 4th 1167, 1172-1173, 30 Cal. Rptr. 2d 126]* . Similarly, in another case, the appellant timely submitted the notice of appeal to the court clerk, but the clerk erroneously believed that she could not file the notice of appeal until the accompanying fee waiver was reviewed and approved by the court. Because the notice of appeal was presented to the trial court for filing within the time prescribed by Rule 8.104, and because there was no lawful basis to refuse to file the notice, the court deemed the notice of appeal timely filed [*Lezama-Carino v. Miller (2007) 149 Cal. App. 4th 55, 57-59, 56 Cal. Rptr. 3d 671]* .

[2] Time Deadlines May Not Be Extended

The time for filing a notice of appeal may not be extended [*Cal. Rules of Ct., Rule 8.308*; *see Silverbrand v. County of Los Angeles (2009) 46 Cal. 4th 106, 124-125, 92 Cal. Rptr. 3d 595, 205 P.3d 1037* (court may not extend time for filing notice of appeal)]. The reviewing court may not, even for good cause, relieve a party from a default occasioned by failure to give timely notice of appeal [*Cal. Rules of Ct., Rule 8.60(d)*].

This is an exception to general rules providing for time extensions in certain situations and allowing relief from default for good cause [*see Cal. Rules of Ct., Rule 8.60(b),(d)*; *see Code Civ. Proc. §§ 12-13b* (computation of time generally)]. Thus, for example, the five-day extension of time provided under *Code Civ. Proc. § 1013*, for "any act" when a notice in a civil action is served by mail, Express Mail or other overnight delivery method, or facsimile, does not extend the time in which a notice of appeal must be filed [*Casado v. Sedgwick, Detert, Moran & Arnold (1994) 22 Cal. App. 4th 1284, 1286, 27 Cal. Rptr. 2d 719, 720]* .

[3] Relief From Untimely Filing in Limited Cases

[a] Relief Based on Fraud of Another Party or Unavoidable Circumstances

Although the timely filing of a notice of appeal is a jurisdictional requirement [*see* [1], *above*], courts have permitted relief under certain limited circumstances. For example, when, after a judgment has been rendered against a person, that person is entitled to institute proceedings looking to its reversal or modification and is prevented from doing so by the fraud or duress of the other party until it is too late, or when the person has been prevented from taking an appeal because of circumstances over which he or she has no control, that person is entitled to relief from the judgment. Such relief may be invoked in the unusual case of fraud or hardship without interfering with the rules governing jurisdiction of an appeal [*Hollister Convalescent Hosp., Inc. v. Rico (1975) 15 Cal. 3d 660, 675, 125 Cal. Rptr. 757, 542 P.2d 1349]* .

[b] Review by Writ Petition in Special Circumstances

Although it is well settled that a party is not entitled to obtain review of an appealable judgment or order by means of a petition for an extraordinary writ when he or she failed to file an appeal from the ruling in a timely manner, such relief has been allowed in very narrow situations, when special circumstances exist constituting an excuse for the failure to employ the remedy of appeal [*see Drum v. Superior Court (2006) 139 Cal. App. 4th 845, 852-853, 43 Cal. Rptr. 3d 279* ; *Mauro B. v. Superior Court (1991) 230 Cal. App. 3d 949, 954, 281 Cal. Rptr. 507]* . Thus, review by writ may be available when the lower court acted in excess of its jurisdiction or when fundamental constitutional rights were violated. The Supreme Court has also permitted a writ to be heard on its merits when uncertainty had previously existed regarding the appealability of the order in question, and several earlier decisions, thereafter overruled, had held that an appeal was not an adequate remedy in that type of case [*see Mauro B. v. Superior Court (1991) 230 Cal. App. 3d 949, 954, 281 Cal. Rptr. 507* (citing cases)].

For additional discussion of limited circumstances under which an appellate courts sometimes treat a defective notice of appeal as a petition for extraordinary relief, see *Ch. 40, Appeal: An Overview, § 40.12[3]*. For discussion and forms relating to the more common types of extraordinary relief, see Ch. 358, *Mandate and Prohibition* .

[c] Earthquake, Fire, or Other Public Emergency

In the event of earthquake, fire, or other public emergency, the chairperson of the Judicial Council may, notwithstanding the other appellate rules, make any of the following orders [*Cal. Rules of Ct., Rule 8.66*]:

- An order extending by no more than 14 additional days the time to do any act required or permitted under the California Rules of Court [*Cal. Rules of Ct., Rule 8.66(a)(1)*].

- An order authorizing specified courts to extend by no more than 30 additional days the time to do any act required or permitted under the California Rules of Court [*Cal. Rules of Ct., Rule 8.66(a)(2)*].

Any such order must specify whether it applies statewide, only to specified courts, only to courts or attorneys within a specified area, or any other specific applicability [*Cal. Rules of Ct., Rule 8.66(b)*]. If the emergency makes it necessary, the chairperson may extend or renew any such order an additional period of up to 14 days in the case of an order under *Cal. Rules of Ct., Rule 8.66(a)(1)*, or an additional period of up to 30 days for an order under *Cal. Rules of Ct., Rule 8.66(a)(2)* [*Cal. Rules of Ct., Rule 8.66(c)*]. The Chief Justice of California is the Chair of the Judicial Council [Advisory Committee Comment to *Cal. Rules of Ct., Rule 8.66*].

Legal Topics:

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

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5-42 California Forms of Pleading and Practice--Annotated § 42.18

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§ 42.18 Effect of Filing Premature Notice of Appeal

A notice of appeal filed before entry of the judgment, but after its rendition, is valid and is deemed to have been filed immediately after entry [*Cal. Rules of Ct., Rule 8.104(e)*; *see* *Wenzoski v. Central Banking System, Inc. (1987) 43 Cal. 3d 539, 541 n.2, 237 Cal. Rptr. 167, 736 P.2d 753* ; *see also* *Mukthar v. Latin American Security Service (2006) 139 Cal. App. 4th 284, 288, 42 Cal. Rptr. 3d 563* ; *Eckhart v. Genuine Parts Distributors (1997) 53 Cal. App.4th 1340, 1344, 62 Cal. Rptr. 2d 487]* .

A notice of appeal filed before rendition of the judgment, but after the judge has announced his or her intended ruling, may, in the discretion of the reviewing court for good cause, be treated as filed immediately after entry of the judgment [*Cal. Rules of Ct., Rule 8.104(e)*]. Generally, a reviewing court will liberally construe a premature notice if the respondent is not misled or prejudiced [*Boyer v. Jensen (2005) 129 Cal. App. 4th 62, 69, 28 Cal. Rptr. 3d 124* (court reviewed premature appeal when judgment actually entered, it was clear which ruling appellant sought to have reviewed, and respondents were not prejudiced); *In re Roderick U. (1993) 14 Cal. App. 4th 1543, 1547-1548, 18 Cal. Rptr. 2d 555* ; *but see* the Practice Tips in § 42.11[2][d] and [4]; *see also* Practice Tip in § 42.12[2][b]]. However, a notice of appeal filed before the judge has announced his or her intended ruling is ineffective and the appeal must be dismissed [*First American Title Company v. Mirzaian (2003) 108 Cal. App. 4th 956, 961, 134 Cal. Rptr. 2d 206* (dismissing appeal filed after clerk entered default but before default judgment was entered)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsReviewabilityTime Limitations

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§ 42.19 Fees Required at Time of Filing Notice of Appeal

[1] Filing Fee

[a] Filing Fee Generally Required at Time of Filing

A party filing a notice of appeal must simultaneously deliver to the superior court clerk the aggregate $655 filing fee specified by *Gov. Code § 68926* (requires $485) and *Gov. Code § 68926.1(b)* (requires additional $170 for deposit in appellate court trust fund) [*Gov. Code §§ 68926, 68926.1(b)*; *Cal. Rules of Ct., Rule 8.100(b)(1)*]. The fee payment must be accompanied by the deposit required under *Gov. Code § 68926.1* [*Cal. Rules of Ct., Rule 8.100(c)*; *see* [2], *below*].

The fee should be paid in the form of a check or money order payable to the clerk of the court of appeal. If the fee is delivered in cash, the clerk of the superior court is required to provide a receipt [*Cal. Rules of Ct., Rule 8.100(c)*].

[b] Dismissal for Nonpayment of Filing Fees

If the filing fee is not paid simultaneously with filing the notice of appeal, the notice of appeal will be accepted for filing, but the acceptance will be subject to *Cal. Rules of Ct., Rule 8.100(c)* [*Cal. Rules of Ct., Rule 8.100(b)(3)*]. Under *Cal. Rules of Ct., Rule 8.100(c)(2)*, if the reviewing court receives a notification of a filing of a notice of appeal (discussed in *§ 42.21*), and the notification is not accompanied by the filing fee, by the superior court clerk's certificate that the fee has been paid, or by a copy of an order excusing payment of the fee, or if a check given in payment of the filing fee is returned dishonored, the clerk of the reviewing court promptly notifies the appellant in writing that the appeal will be dismissed unless, within 15 days after mailing of the notice, appellant either tenders the fee or shows good cause why the fee should be excused [*Cal. Rules of Ct., Rule 8.100(c)*; *see Rapp v. Golden Eagle Ins. Co. (1994) 24 Cal. App. 4th 1167, 1172-1173, 30 Cal. Rptr. 2d 126* (denied motion to dismiss appeal as untimely because appellant, after paying an insufficient filing fee, tendered proper fee amount within the designated time period)].

If adequate excuse for nonpayment is not shown within that time, the appeal may be dismissed, but the court may vacate the dismissal for good cause [*Cal. Rules of Ct., Rule 8.100(c)(3)*]. For further discussion of dismissal generally, see Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* .

In the First Appellate District, the clerk is directed by local rule not to accept a notice of appeal in civil cases if it is not accompanied by the statutory fee, by an in forma pauperis order excusing the payment, or by an application for in forma pauperis order, unless the notice is tendered on the last day for timely filing. If the notice is tendered on the last day, *Cal. Rules of Ct., Rule 8.100(c)(3)* applies, discussed *above* [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 1].

For discussion of waiver of the filing fee when proceeding in forma pauperis, see [c], *below*.

[c] Waiver of Fees

If the appellant is indigent, payment of the filing fee may be excused on the same basis as payment of a filing fee in the trial court is excused [*Gov. Code § 68634.5*; *Cal. Rules of Ct., Rule 8.26*; *see In re Adrian O. (1984) 155 Cal. App. 3d 631, 634, 202 Cal. Rptr. 287* (recovery of filing fee, paid by appellant in propria persona, as permitted on later showing of indigence under court's inherent power to waive payment for good cause)]. For additional discussion of relief from this and other fees on appeal, when seeking a fee waiver, see *Ch. 40, Appeal: An Overview, § 40.13[1][d]*. For discussion and forms for seeking a fee waiver generally, under *Gov. Code §§ 68630-68641* and *Cal. Rules of Ct., Rule 8.26*, see *Ch. 174, Costs and Attorney's Fees, § 174.110* et seq.

[2] Deposit for Preparation of Clerk's Transcript

On filing the notice of appeal, counsel must also deposit the $100 amount required by *Gov. Code § 68926.1* [*Cal. Rules of Ct., Rule 8.100(b)(2)*]. This deposit is to be credited against the amount chargeable for the preparation of the clerk's transcript, or for any other appeal processing or notification, and is forfeited if the appeal is abandoned or dismissed prior to the filing of the record in the appellate court [*Gov. Code § 68926.1*]. The clerk's transcript fee must be paid even if the appellant elects to proceed with an appendix in lieu of the clerk's transcript, and is nonrefundable even if the appellant later elects to proceed without a clerk's transcript [*see Gov. Code § 68926.1*; *Cal. Rules of Ct., Rule 8.100(b)(2)*].

The balance of the estimated cost of the clerk's transcript is due, subsequently, within 10 days of receipt of the clerk's estimate of charges [*Cal. Rules of Ct., Rule 8.122(c)(3)*].

These fees, like the filing fee, may be waived [*see Cal. Rules of Ct., Rules 8.100(b)(1), 8.26*, and discussion in [1][c], *above*].

For a further discussion of the fees required for preparation of clerk's transcript, see *Ch. 44, Appeal: Preparing and Filing the Record, § 44.32*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsDismissals of AppealsInvoluntary DismissalsCivil ProcedureAppealsRecords on Appeal

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§ 42.20 Combining Notice of Appeal With Other Documents

Appellant may choose to combine a notice of appeal in a single document with one or more notices designating matters to be prepared for the record on appeal, including a notice designating the reporter's transcript under *Cal. Rules of Ct., Rule 8.130(a)*, a notice designating the clerk's transcript under *Cal. Rules of Ct., Rule 8.122(a)*, or a notice of election to proceed with an appendix in lieu of clerk's transcript under *Cal. Rules of Ct., Rule 8.124(a)* [*see Cal. Rules of Ct., Rule 8.121(a)(2)*].

Combining a notice of appeal with notices concerning preparation and designation of the record offers the obvious advantage of avoiding multiple filings in the superior court. Some forethought, however, must be given to the notices concerning the record, since counsel must determine what items to request for inclusion in the reporter's and clerk's transcripts. This may be difficult to do when there is insufficient time for preparation of the designations due to an impending and unchangeable deadline for filing the notice of appeal [*see § 42.17*]. In addition, if the notice of appeal is combined with the notice designating reporter's transcript, an additional deposit of estimated fees for that transcript must be filed at that time [*see Cal. Rules of Ct., Rule 8.130(b)*; *see also* discussion in *Ch. 40, Appeal: An Overview, § 40.13[1][d]* (regarding nonwaiver of this fee even when proceeding in forma pauperis)].

For further discussion of the notices to designate clerk's and reporter's transcripts, considerations in preparing such designations, and separate forms of designation, see generally Ch. 44, *Preparing and Filing the Record* . For forms combining a notice of appeal with designation notices, see *§ 42.90*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 42.21 Notification by Superior Court Clerk After Filing of Notice of Appeal

After appellant files the notice of appeal, the superior court clerk mails a notification of the filing of the notice of appeal to the attorney of record for each party other than the appellant, to any unrepresented party, and to the reviewing court [*Cal. Rules of Ct., Rule 8.100(e)(1)*]. The notification shows the date it was mailed and states the number and title of the case and the date the notice of appeal was filed. If the information is available, the notification also includes [*Cal. Rules of Ct., Rule 8.100(e)(1)*]:

> (1) the name, address, telephone number, and California State Bar number of each attorney of record in the case;
>
> (2) the name of the party each attorney represented in the superior court; and
>
> (3) the name, address, and telephone number of any unrepresented party.

This mailing is a sufficient performance of the clerk's duty, notwithstanding the death of a party or the death, discharge, suspension, disbarment, or disqualification of a party's attorney before the giving of the notification [*Cal. Rules of Ct., Rule 8.100(e)(4)*]. The clerk's failure to give such notification does not affect the validity of the appeal [*Cal. Rules of Ct., Rule 8.100(d)(6)*].

With the notification of appeal, the superior court clerk sends to the reviewing court the filing fee or an application for, or order granting, a waiver of that fee [*Cal. Rules of Ct., Rule 8.100(e)(5)*].

The notifications given to the parties and the appellate court clerk may take the form of a copy of the notice of appeal, so long as the required information appears on the copy or is added by the clerk of the superior court [*Cal. Rules of Ct.,*

Rule 8.100(e)(3)].

Legal Topics:

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§ 42.21A Civil Case Information Statement

After receiving notice of the filing of a notice of appeal under *Cal. Rules of Ct., Rule 8.100(e)(1)*, the reviewing court clerk must promptly mail the appellant a copy of the Civil Case Information Statement (form APP-004) together with a notice that the statement must be filed within 10 days [*Cal. Rules of Ct., Rule 8.100(g)(1)*; for a form, *see § 42.72*].

The appellant must serve and file a completed Civil Case Information Statement, attaching a copy of the judgment or appealed order which shows the date it was entered [*Cal. Rules of Ct., Rule 8.100(g)(2)*]. If the appellant fails to file the Civil Case Information Statement within 10 days, the reviewing court clerk must send the appellant notice that the appellant must file it within 15 days after the clerk's notice is mailed and that if the appellant fails to comply the court may either impose monetary sanctions or dismiss the appeal [*Cal. Rules of Ct., Rule 8.100(g)(3)*].

Legal Topics:

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§ 42.22 Docketing Statements Required by Some Courts of Appeal

Some districts of the court of appeal require, by local rule, that the appellant file a docketing statement in the court of appeal within 10 days after the filing of the notice of appeal with the superior court clerk [*see* Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 2(a); Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 4th App. Dist., Rule 9(b) (also requiring that statement be accompanied with proof of service on all parties to the appeal)]. However, effective January 1, 2003, the Judicial Council adopted a single form for statewide use to simplify and make more uniform the practice of filing civil appeals and facilitate an early determination of appealability [*see Cal. Rules of Ct., Rule 8.100(g)*; § 42.72].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 42.23 Consolidation of Multiple Appeals

Appeals are frequently consolidated when they consist of appeals by several parties from the same judgment or parts of the same judgment, or when there is one or more cross appeal under *Cal. Rules of Ct., Rule 8.108(f)* [*see § 42.16*].

When several parties appeal from the same judgment or order or some part of that judgment (or when there is a cross appeal), the superior court clerk prepares and files a single record [*Cal. Rules of Ct., Rule 8.147(a)*].

Cross appeals are routinely consolidated [*see Ch. 44, Appeal: Preparing and Filing the Record, § 44.70* et seq.]. Cases consolidated for trial are also commonly consolidated for appeal [*Safeway Stores, Inc. v. City of Burlingame (1959) 170 Cal. App. 2d 637, 639, 339 P.2d 933]* . The parties should always check with the appellate clerk to verify that routine consolidations are accomplished.

In other circumstances, a party may move or the parties may stipulate to consolidate appeals although even a stipulation is subject to approval by the appellate court. The appellate court may consolidate appeals on its own motion even if there is no motion or stipulation [*see California for Population Stabilitization v. Hewlett-Packard (1997) 58 Cal. App. 4th 273, 279, 279 n.1, 67 Cal. Rptr. 2d 621* ; *Sharick v. Galloway (1936) 12 Cal. App. 2d 733, 738, 55 P.2d 1196]* .

PRACTICE TIP:

Transfer for Purposes of Consolidation. The appellate court is without authority to consolidate cases unless both appeals are pending in the same appellate district and division [*see Davis v. Kittle Mfg. Co. (1933) 133 Cal. App. 599, 601, 24 P.2d 550]* .

If appeals arising from the same trial court proceedings are pending within the same district, the administrative presiding justice may transfer them all to the same division for this purpose [*see Cal.*

Rules of Ct., Rules 10.1000(b), and discussion in *Ch. 51, Appeal: Hearing and Decision, § 51.11[4]*]. If such transfer is not made early in the appeal, a party should inform the presiding justice by letter or stipulation of related cases, so that he or she may transfer them to the same division for consolidation.

If proceedings are in different districts, the Supreme Court, on petition, may transfer causes to the same district and division for purposes of consolidation [*see Cal. Rules of Ct., Rules 10.1000(a)*, and discussion in *Ch. 54, Appeal: California Supreme Court Review, § 54.11[3]*]. A party may sometimes avoid this petition process by informing the court of appeal justices, by letter or stipulation, of related cases in another district, and the justices may themselves request that the Chief Justice transfer all the related causes to the same division.

Any showing in opposition to a motion to consolidate appeals must be served and filed within 10 days after service of the motion [*Cal. Rules of Ct., Rules 8.10, 8.54(a)*].

The grant or denial of a motion to consolidate is entirely within the discretion of the reviewing court [*Sampson v. Sapoznik (1953) 117 Cal. App. 2d 607, 609, 256 P.2d 346* ; *Silver v. Bank of America (1941) 43 Cal. App. 2d 835, 838, 111 P.2d 666]* . Consolidation of separate appeals in the same action is proper when no prejudice will result [*General Elec. Co. v. Fed. etc. Distrib. Co. (1954) 122 Cal. App. 2d 509, 511, 265 P.2d 19]* . A motion to consolidate appeals involves factual questions as to whether questions presented by the appeals are related and whether the appeals will be expedited by consolidation; therefore, each motion is disposed of on its own merits [*Sampson v. Sapoznik (1953) 117 Cal. App. 2d 607, 609, 256 P.2d 346]* . Motions may be disposed of after opposition or other response has been filed or the time for filing opposition has expired [*Cal. Rules of Ct., Rule 8.54*].

For forms of stipulation and motion for consolidation of appeals, see*§ 42.100*.

For a stipulation that actions be consolidated for trial, see Ch. 125, *Consolidation, Severance and Coordination of Actions* . For forms of stipulations generally, see Ch. 533, *Stipulations* .

For further discussion and forms relating to preparation of the record in a consolidated appeal, see *Ch. 44, Appeal: Preparing and Filing the Record, §§ 44.70, 44.270*. For discussion and forms relating to motions to consolidate appeals, see *Ch. 45, Appeal: Motion Procedure, §§ 45.21*, 45.71.

Legal Topics:

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§ 42.24 Special Notice Requirements in Some Appeals

Appellant's counsel should be aware that in some special proceedings there are special notice requirements in addition to those relating to the notice of appeal. Counsel should research and comply with such requirements when appealing from a statutory cause of action that may carry such additional notice requirements. For example, in a proceeding in an appellate court involving the violation or construction of *Bus. & Prof. Code § 17200 et seq.*, each person filing any brief or petition with the court must serve a copy of that brief or petition on the Attorney General and on the district attorney of the county in which the proceeding was originally filed. The brief must be served within three days after filing the brief with the court, subject to extension for good cause by the presiding justice or Chief Justice [*Bus. & Prof. Code § 17209*; *see also Soldate v. Fidelity Nat'l Fin., Inc. (1998) 62 Cal. App. 4th 1069, 1075-1076, 72 Cal. Rptr. 2d 404* (cautioning that failure to comply with *Bus. & Prof. Code § 17209*, if it applies, will preclude appellate relief in the appropriate case)]. For further discussion and forms relating to causes of action under *Bus. & Prof. Code § 17200 et seq.*, see Ch. 565, *Unfair Competition*].

Legal Topics:

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

§§ 42.25[Reserved]

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5-42 California Forms of Pleading and Practice--Annotated § 42.30

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§ 42.30 Related Matthew Bender Publications

For discussion and forms relating to civil appellate practice in the federal courts, see Moore's, Federal Practice, Ch. 201 et seq. (3d ed., Matthew Bender)

For discussion and forms relating to California criminal, as distinguished from civil, appeals, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 101, *Appeal* (Matthew Bender)

California Forms of Pleading and Practice--Annotated

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Volume 5: Appeal-Chs. 40-55
Chapter 42 APPEAL: NOTICE OF APPEAL
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5-42 California Forms of Pleading and Practice--Annotated § 42.31

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§ 42.31 California Constitution

Composition of court of appeal and function of court in three-judge panels. *Cal. Const., art. VI, § 3*

Appellate jurisdiction of Supreme Court, court of appeal, and superior courts; power of appellate courts to take evidence. *Cal. Const., art. VI, § 11*

Power of Supreme Court to transfer causes pending in court of appeal or to review decisions of court of appeal. *Cal. Const., art. VI, § 12*

Error resulting in miscarriage of justice is required to set aside judgment or grant a new trial on the ground of misdirection of the jury, improper admission or rejection of evidence, or errors in pleading or procedure. *Cal. Const., art. VI, § 13*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionGeneral OverviewGovernmentsCourtsCreation & OrganizationGovernmentsCourtsAuthority to AdjudicateCivil ProcedureAppealsCase TransfersCivil ProcedureAppealsStandards of ReviewPlain ErrorMiscarriages of Justice

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5-42 California Forms of Pleading and Practice--Annotated § 42.32

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§ 42.32 State Statutes

Time to file notice of appeal in validation proceedings under *Code Civ. Proc. §§ 860-870*. *Code Civ. Proc. § 870(b)*

Parties to appeal. *Code Civ. Proc. § 902*

Filing appeal on behalf of deceased party. *Code Civ. Proc. § 903*

Appealable judgments and orders of superior court in civil actions. *Code Civ. Proc. § 904.1*

Appeal taken to wrong court will not be dismissed but transferred to proper court. *Gov. Code § 68915*

Fees for filing notice of appeal and for miscellaneous services. *Gov. Code § 68926 et seq.*

Court of appeal districts. *Gov. Code § 69100 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsReviewabilityTime LimitationsCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedurePartiesCapacity of PartiesExecutors

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§ 42.33 California Rules of Court

Appeal taken by filing and serving notice of appeal. *Cal. Rules of Ct., Rule 8.100(a)(1)*

Contents of notice of appeal. *Cal. Rules of Ct., Rule 8.100(a)(2)*

Notice of appeal liberally construed in favor of sufficiency. *Cal. Rules of Ct., Rule 8.100(a)(2)*

Notice of appeal is not required to specify court to which appeal is taken; appeal is deemed taken to court of appeal within district. *Cal. Rules of Ct., Rule 8.100(a)(2)*

Filing of Civil Case Information Statement. *Cal. Rules of Ct., Rule 8.100(f)*

Time to serve and file notice of appeal. *Cal. Rules of Ct., Rules 8.104-8.108*

Time to serve and file notice of cross appeal. *Cal. Rules of Ct., Rule 8.108(f)*

Notice of appeal may be combined with notice designating documents of record on appeal and with notice to prepare transcript. *Cal. Rules of Ct., Rule 8.121(a)(2)*

Notice of dismissal, and dismissal, by appellate court clerk when filing fee or waiver of fee is not received. *Cal. Rules of Ct., Rule 8.100(c)*

Notice of dismissal, and dismissal, by appellate court when deposit is not received. *Cal. Rules of Ct., Rule 8.100(d)*

Appellant's duty to notify appellate court of any settlement that occurs after notice of appeal has been filed. *Cal. Rules of Ct., Rule 8.244(a)*

Transfer of appeal taken to wrong court. *Cal. Rules of Ct., Rule 10.1000(b)*

Extension of time to file notice of appeal not permitted. *Cal. Rules of Ct., Rule 8.308(a)*

No relief for failure to file timely notice of appeal. *Cal. Rules of Ct., Rule 8.60(d)*

Chairperson of Judicial Council authorized to issue orders extending time for doing acts under appellate rules in the event of earthquake, fire, or other public emergency. *Cal. Rules of Ct., Rule 8.66*

Format of papers filed with trial court generally. *Cal. Rules of Ct., Rules 2.100-2.119*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsReviewabilityTime LimitationsGovernmentsCourtsRule Application & InterpretationCivil ProcedureAppealsRecords on AppealCivil ProcedureAppealsCase Transfers

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§ 42.34 Local Rules of Courts of Appeal

Requirement that notice of appeal be accompanied by statutory fee, order excusing payment of fee, or application for order excusing payment, unless notice of appeal is filed on last day for timely filing. Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 1

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of AppealGovernmentsCourtsRule Application & InterpretationCivil ProcedureAppealsAppellate JurisdictionState Court Review

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§ 42.35 Decisions

[1] Notice of Appeal Construed Liberally in Favor of Sufficiency

Court treated notice of appeal from unappealable order denying new trial as appeal from underlying judgment because it was clear appellant intended to appeal from judgment and respondent would not be prejudiced. *Walker v. Los Angeles County Metropolitan Transportation Authority (2005) 35 Cal. 4th 15, 18, 23 Cal. Rptr. 3d 490, 104 P.3d 844*

Notice of appeal contained in request for transcript held to be sufficient and effective. *Magruder v. City of Redwood (1928) 203 Cal. 665, 675, 265 P. 806* (decided under former *Code Civ. Proc. § 953a*; *now see Cal. Rules of Ct., Rule 8.121(a)(2)* (permitting notice of appeal and notice designating record to be combined))

Notice of appeal is to be construed liberally to preserve appellant's right of review unless it appears that respondent has been misled by any misdescription or ambiguity in notice. *Kellett v. Marvel (1936) 6 Cal. 2d 464, 471, 58 P.2d 649* (decided under former *Code Civ. Proc. § 940*; *now see Cal. Rules of Ct., Rule 8.100(a)(2)*); *Haydel v. Morton (1934) 3 Cal. App. 2d 364, 365, 39 P.2d 454*

Absence of prejudice, and efficacy of any acts done to give notice to adverse parties that appeal has been taken, are permitted to be considered in determining whether notice of appeal is sufficient. *Kellett v. Marvel (1936) 6 Cal. 2d 464, 472-473, 58 P.2d 649* (decided under former *Code Civ. Proc. § 940*; *now see Cal. Rules of Ct., Rule 8.100(a)(2)*)

Notices of appeal are to be liberally construed so as to protect the right of appeal if it is reasonably clear what appellant was trying to appeal from, and where the respondent could not possibly have been misled or prejudiced. *Etheridge v. Reins International California, Inc. (2009) 172 Cal. App. 4th 908, 913 n.7, 91 Cal. Rptr. 3d 816*

Court held that notice of appeal from motion for reconsideration of attorneys' fees ruling was notice of appeal of attorneys' fees ruling. *Johnston v. Corrigan (2005) 127 Cal. App. 4th 553, 555-556, 25 Cal. Rptr. 3d 657*

Notice of appeal is liberally construed to permit review on the merits. *Collins v. Hemet Valley Hospital Dist. (1986) 186 Cal. App. 3d 922, 927, 231 Cal. Rptr. 92*

Notice of appeal sufficient when intent to appeal may be ascertained from notice designating record. *Margott v. Gem Properties, Inc. (1973) 34 Cal. App. 3d 849, 852-853 n.1, 111 Cal. Rptr. 1* (*see also Cal. Rules of Ct., Rule 8.121(a)(2)* (permitting notice of appeal and notice designating record to be combined))

[2] Notice of Appeal Sufficient Despite Minor Defect When It Is Clear That Appeal Is Sought From Particular Judgment or Order

Notices of appeal are to be liberally construed so as to protect the right of appeal only if it is reasonably clear what appellant was trying to appeal from. *Russell v. Foglio (2008) 160 Cal. App. 4th 653, 660-661, 73 Cal. Rptr. 3d 87*

Notice of appeal sufficient even though it stated wrong appellate court. *First American Title Company v. Mirzaian (2003) 108 Cal. App. 4th 956, 959, 134 Cal. Rptr. 2d 206*

Notice of appeal is sufficient, even though case number is incorrect, when it is clear what order the appeal is from. *D'Avola v. Anderson (1996) 47 Cal. App. 4th 358, 361-362, 54 Cal. Rptr. 2d 689*

Reviewing court is permitted to construe notice of appeal to refer to proper order when, despite minor technical deficiencies, notice in fact gave timely and adequate notice of matter referred for appellate review. *Conservatorship of Starr (1989) 215 Cal. App. 3d 1390, 1393-1394, 264 Cal. Rptr. 80* ; *see Herrscher v. Herrscher (1953) 41 Cal. 2d 300, 304, 259 P.2d 901*

[3] Notice of Appeal Not Sufficient When It Specifies Nonappealable Judgment or Order or Clearly Seeks Remedy Other Than Appeal

Notice of appeal identifying summary judgment did not constitute notice of appeal of demurrer as to different defendant. *Bosetti v. U.S. Life Insurance Company (2009) 175 Cal. App. 4th 1208, 1223-1225, 96 Cal. Rptr. 3d 744*

Even construing notice of appeal liberally did not allow court to consider specifically excluded judgment. *Morton v. Wagner (2007) 156 Cal. App. 4th 963, 967, 67 Cal. Rptr. 3d 818*

If an award of attorney's fees is subject to court discretion, a later order awarding attorney's fees is not subsumed in the earlier judgment; therefore, a notice of appeal from the judgment does not preserve a challenge to the award of attorney's fees. *Colony Hill v. Ghamaty (2006) 142 Cal. App. 4th 1408, 1413-1415, 48 Cal. Rptr. 3d 798*

Notice of appeal is defective when it seeks to appeal court clerk's entry of default, rather than default judgment. *First American Title Company v. Mirzaian (2003) 108 Cal. App. 4th 956, 960, 134 Cal. Rptr. 2d 206*

Although liberal construction of notice of appeal is required under former Cal. Rules of Ct., Rule 1(a)(2) (now see *Cal. Rules of Ct., Rule 8.100(a)(2)*), when party seeks new trial and unequivocally requests that error in judgment be corrected by trial court, such motion for new trial may not be treated as notice of appeal even though remedy of appeal is thereby lost. *In re Issac J. (1992) 4 Cal. App. 4th 525, 535, 6 Cal. Rptr. 2d 65*

Notice of appeal is defective when it specifies only findings and conclusions of trial court rather than appealable

judgment. *Gosney v. State of California (1970) 10 Cal. App. 3d 921, 927-928, 89 Cal. Rptr. 390*

[4] Specification of Nonappealable Judgment Treated as Specification of Appealable Order

If notice of appeal specifies that an appeal is taken from order denying new trial, which is not appealable order, an appellate court should construe notice to be appeal from underlying judgment if it is reasonably clear appellant intended to appeal from judgment and respondent would not be misled or prejudiced. *Walker v. Los Angeles County Metro. Transp. Auth. (2005) 35 Cal. 4th 15, 22, 23 Cal. Rptr. 3d 490, 104 P.3d 844*

Because plaintiff filed premature notice of appeal from nonappealable minute order and signed judgment of dismissal was entered four weeks later, appellate court treated notice of appeal as having been filed immediately after entry of judgment. *Miranda v. 21st Century Ins. Co. (2004) 117 Cal. App. 4th 913, 919, 12 Cal. Rptr. 3d 159*

Incorrectly framed notice of appeal construed to refer to correct appealable order when intent of appellant was clear and it was manifest that respondent suffered no prejudice. *Baldwin Park Redevelopment Agency v. Irving (1984) 156 Cal. App. 3d 428, 433, 202 Cal. Rptr. 792*

Courts of appeal exercising discretion to treat notice of appeal that specified nonappealable minute order is sufficient under *Cal. Rules of Ct., Rule 1(a)*, when appealable order was prepared and signed by court subsequent to minute order. *Estate of Coburn (1971) 20 Cal. App. 3d 368, 371, 97 Cal. Rptr. 597* ; *Hopper v. Allen (1968) 266 Cal. App. 2d 797, 798, 72 Cal. Rptr. 435* ; *but see Modica v. Merin (1991) 234 Cal. App. 3d 1072, 1074, 285 Cal. Rptr. 673*

[5] Effect of Specification of Portion of Judgment

Appeal from portion of judgment brings only that portion up for review which has been specified in the notice of appeal. *Glassco v. El Sereno Country Club, Inc. (1932) 217 Cal. 90, 92, 17 P.2d 703* ; *Calhoun v. Vallejo City Unified School Dist. (1993) 20 Cal. App. 4th 39, 42, 24 Cal. Rptr. 2d 337*

[6] Notice of Appeal Signed by Attorney

Notice of appeal signed by attorney and filed without the client's authorization is ineffectual because attorney cannot appeal without client's consent. *Guardianship of Gilman (1944) 23 Cal. 2d 862, 864, 147 P.2d 530* ; *In re Alma B. (1994) 21 Cal. App. 4th 1037, 1043, 26 Cal. Rptr. 2d 592*

Notice of appeal signed by appellant's attorney need not be signed by attorney of record. *Bell v. Hummel (1982) 136 Cal. App. 3d 1009, 1014, 186 Cal. Rptr. 688*

[7] Filing Fees and Deposit Accompanying Notice of Appeal

Clerk must file timely notice of appeal and thereafter issue default notice when notice not accompanied by proper filing fees and deposits. *Rapp v. Golden Eagle Ins. Co. (1994) 24 Cal. App. 4th 1167, 1172-1173, 30 Cal. Rptr. 2d 126* (*see Cal. Rules of Ct., Rule 8.100(c)*)

Tender of proper filing fee within designated statutory time period, after having failed to do so initially when filing of notice of appeal, is sufficient grounds to accept notice of appeal. *Rapp v. Golden Eagle Ins. Co. (1994) 24 Cal. App.4th 1167, 1172-1173, 30 Cal. Rptr. 2d 126*

[8] Time to File Notice of Appeal

[a] General Time Deadlines Mandatory

Timely filing of notice of appeal is mandatory and jurisdictional. *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc. (1997) 15 Cal. 4th 51, 56, 61 Cal. Rptr. 2d 166, 931 P.2d 344* ; *Estate of Hanley (1943) 23 Cal. 2d 120, 122, 142 P.2d 423* ; *Thompson, Curtis, Lawson & Parrish v. Thorne (1971) 21 Cal. App. 3d 797, 803, 98 Cal. Rptr. 753* ; *Nu-Way Associates, Inc. v. Keefe (1971) 15 Cal. App. 3d 926, 928, 93 Cal. Rptr. 614* ; *Kapelus v. United Title Guaranty Co. (1971) 15 Cal. App. 3d 648, 651, 93 Cal. Rptr. 278* (notice of cross appeal)

Notice of appeal is untimely when filed 61 days after date notice of entry of judgment served. *Casado v. Sedgwick, Detert, Moran & Arnold (1994) 22 Cal. App. 4th 1284, 1286, 27 Cal. Rptr. 2d 719*

Time limits under former Cal. Rules of Ct., Rule 63(d) (now see *Cal. Rules of Ct., Rule 8.1005(d)*) (certification to court of appeal by superior court for transfer of appeal from appellate department of superior court to court of appeal), former Cal. Rules of Ct., Rule 107 (now see *Cal. Rules of Ct., Rule 8.708*) (finality of superior court appellate division judgment), are jurisdictional. *Gersten Companies v. Deloney (1989) 212 Cal. App. 3d 1119, 1125 n.5, 261 Cal. Rptr. 431* (*see* generally Ch. 345A, *Limited Civil Cases*)

Notice of appeal is untimely if it was not filed within 60 days after notice of entry of judgment; extensions of time periods if service is made by mail do not apply to time deadlines for filing notice of appeal. *Chase v. Glynn (1973) 35 Cal. App. 3d 29, 31, 110 Cal. Rptr. 566* ; *Casado v. Sedgwick, Detert, Moran & Arnold (1994) 22 Cal. App. 4th 1284, 1286, 27 Cal. Rptr. 2d 719, 720*

[b] Calculation and Running of General Deadlines

Documents mailed by the clerk do not trigger the 60-day period for filing a notice of appeal unless the documents strictly comply with *California Rules of Ct., Rule 8.104(a).* *Alan v. American Honda Motor Co., Inc. (2007) 40 Cal. 4th 894, 902-903, 55 Cal. Rptr. 3d 534, 152 P.3d 1109*

Minute order not entitled "Notice of Entry" of judgment or order does not trigger 60-day period to appeal. *Bi-Coastal Payroll Services, Inc. v. California Insurance Guarantee Association (2009) 174 Cal. App. 4th 579, 585-588, 94 Cal. Rptr. 3d 562*

The clerk must mail the notice of entry to trigger the time to appeal under *Cal. Rules of Ct., Rule 8.104(a)(1),* whereas a party may e-mail the notice of entry to trigger the time to appeal under *Cal. Rules of Ct., Rule 8.104(a)(2).* *Insyst, Ltd. v. Applied Materials, Inc. (2009) 170 Cal. App. 4th 1129, 1135-1140, 88 Cal. Rptr. 3d 808*

Noncompliance with the statutory notice requirements for entry of judgment does not render the judgment void; when court clerk and party fail to serve notice of entry of judgment, sole consequence is that 180-day period for filing notice of appeal applies. *Kimball Avenue v. Franco (2008) 162 Cal. App. 4th 1224, 1228-1229, 76 Cal. Rptr. 3d 628*

Time for filing notice of appeal runs from the clerk's mailing of either a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, showing the date either was mailed. *Russell v. Foglio (2008) 160 Cal. App. 4th 653, 659-660, 73 Cal. Rptr. 3d 87*

Notice of entry of judgment sent to only one of a party's two attorneys constitutes legal notice and starts the time running to file a notice of appeal. *Adaimy v. Ruhl (2008)160 Cal. App. 4th 583, 586-587, 72 Cal. Rptr. 3d 926*

A document must literally be entitled "Notice of Entry" in order to start the appeal clock running. *Sunset Millennium*

Associates, LLC v. Le Songe, LLC (2006) 138 Cal. App. 4th 256, 259-260, 41 Cal. Rptr. 3d 273

File-stamped copy of the judgment may be used in place of the document entitled "notice of entry" to start the time running for appeal under former Cal. Rules of Ct., Rule 2(a) (now see *Cal. Rules of Ct., Rule 8.104(a)*). *Imuta v. Nakano (1991) 233 Cal. App. 3d 1570, 1579 n.10, 285 Cal. Rptr. 681* (any notice in writing that conveys to losing party that judgment has been entered is sufficient in California to start time running for appeal); *see also Filipescu v. California Housing Finance Agency (1996) 41 Cal. App. 4th 738, 741-742, 48 Cal. Rptr. 2d 736*

"Notice of entry" of judgment need not give notice of when an appealable judgment or order was entered, but only of when it was filed. *Estate of Crabtree (1992) 4 Cal. App. 4th 1119, 1123, 6 Cal. Rptr. 2d 224* ; *see also Filipescu v. California Housing Finance Agency (1996) 41 Cal. App. 4th 738, 741, 48 Cal. Rptr. 2d 736*

Service to attorney's office during normal business hours of endorsed filed copy of judgment, the second page of which noted entry of judgment, though not in accordance with procedure of *Code Civ. Proc. § 664.5*, is sufficient to trigger 60-day period for filing notice of appeal. *National Advertising Co. v. City of Rohnert Park (1984) 160 Cal. App. 3d 614, 618-619, 206 Cal. Rptr. 696*

Under former Cal. Rules of Ct., Rule 2(a) (now see *Cal. Rules of Ct., Rule 8.104(a)*), notice of appeal filed within 180 days of entry of judgment is timely if record indicated that neither clerk nor opposing party served notice of entry of judgment. *Baldwin Park Redevelopment Agency v. Irving (1984) 156 Cal. App. 3d 428, 433, 202 Cal. Rptr. 792*

Sixty-day period of former Cal. Rules of Ct., Rule 2(a) (now see *Cal. Rules of Ct., Rule 8.104(a)*), commences when clerk entered judgment in minutes and mailed notice of entry of judgment to parties to submitted action, rather than later date when party served notice of entry of final order on opposing party. *Pacific City Bank v. Los Caballeros Racquet & Sports Club, Ltd. (1983) 148 Cal. App. 3d 223, 227, 195 Cal. Rptr. 776*

Notice of appeal is timely filed when presented to and received by any deputy clerk of the office of the clerk of superior court for purposes of filing. *Pacific Southwest Airlines v. Dowty-Rotol, Ltd. (1983) 144 Cal. App. 3d 491, 493, 193 Cal. Rptr. 25*

If clerk mails notice of entry of judgment in improperly addressed envelope, the notice is considered to have not been mailed. *Triumph Precision Products, Inc. v. Insurance Co. of North America (1979) 91 Cal. App. 3d 362, 364-365, 154 Cal. Rptr. 120* (notice of appeal in municipal court held to be timely under former Cal. Rules of Ct., Rule 122(a) (now see *Cal. Rules of Ct., Rule 8.751(a)*), if first notice of entry of new trial order was sent in envelope without designation of law firm name and was not received; reported here for arguable application to former Cal. Rules of Ct., Rule 2(a) (now see *Cal. Rules of Ct., Rule 8.104(a)*) by analogy; *see* Ch. 345A, *Limited Civil Cases* , for discussion of appeals in limited civil cases to the appellate division of the superior court)

[c] Extension for Post-Judgment Orders

If a party files a valid motion for new trial, and the trial court issues a timely order denying that motion, but no one serves the order or notice of entry of that order, then the applicable deadline for filing the notice of appeal from the judgment is 180 days after entry of judgment, pursuant to *Cal. Rules of Ct., Rule 8.108(b)(1)(C)*. *Anderson v. Chikovani (2010) 181 Cal. App. 4th 1397, 1400-1401, 105 Cal. Rptr. 3d 553*

Time for appealing order granting a new trial is not extended for an order granting a new trial following an order granting summary judgment. *Ricketts v. McCormack (2009) 177 Cal. App. 4th 1324, 1337, 99 Cal. Rptr. 3d 817*

To extend the time to file a notice of appeal, a motion for reconsideration must comply with all procedural

requirements. *Branner v. Regents of University of California (2009) 175 Cal. App. 4th 1043, 1047-1048, 96 Cal. Rptr. 3d 690*

Motion to vacate judgment under *Code Civ. Proc. § 663* extended time to appeal only if motion was valid. *Payne v. Rader (2008) 167 Cal. App. 4th 1569, 1574, 85 Cal. Rptr. 3d 174*

Extension of time to appeal a judgment when party serves and files a timely motion for relief from judgment under *Code Civ. Proc. § 473(b)*. *Matera v. McLeod (2006) 145 Cal. App. 4th 44, 56-57, 51 Cal. Rptr. 3d 331*

Notice of appeal filed within 30 days of notice of ruling on motion for new trial was timely insofar as *11 U.S.C. § 108(c)(2)* provided 30-day extension of time for trial court to rule on motion for new trial if deadline contained in *Code Civ. Proc. § 660* passed while automatic stay was in effect. *ECC Construction, Inc. v. Oak Park Calabasas Homeowners Association (2004) 118 Cal. App. 4th 1031, 1037, 13 Cal. Rptr. 3d 580*

Postjudgment motion for reconsideration does not have effect on filing deadline for notice of appeal, since the trial court, after entry of judgment, has no power to rule on a reconsideration motion. *Ramon v. Aerospace Corp. (1996) 50 Cal. App. 4th 1233, 1238, 58 Cal. Rptr. 2d 217* ; *see also Betz v. Pankow (1993) 16 Cal. App. 4th 931, 937-938, 20 Cal. Rptr. 2d 841* ; *Ten Eyck v. Industrial Forklifts Co. (1989) 216 Cal. App. 3d 540, 545, 265 Cal. Rptr. 29* ; *Eddy v. Sharp (1988) 199 Cal. App. 3d 858, 863 n.3, 245 Cal. Rptr. 211* ; *Magallanes v. Superior Court (1985) 167 Cal. App. 3d 878, 882, 213 Cal. Rptr. 547*

Notice of appeal is timely filed within 180-day period, and former Cal. Rules of Ct., Rule 3 (now see *Cal. Rules of Ct., Rule 8.108*), did not require appellant to file notice of appeal within 30 days of denial of motion for new trial and judgment, notwithstanding verdict, if, under former Cal. Rules of Ct., Rule 2 (now see *Cal. Rules of Ct., Rule 8.104*), there was no evidence that entry of judgment was mailed by clerk or served on appellant. *Carpiaux v. Peralta Community College Dist. (1989) 215 Cal. App. 3d 1220, 1223, 264 Cal. Rptr. 208*

Code Civ. Proc. § 660, governing denial of motion for new trial by operation of law and limiting extension of time within which to file notice of appeal, is also applicable to extension resulting from motion for reconsideration. *Miller v. United Services Automobile Assn. (1989) 213 Cal. App. 3d 222, 226, 261 Cal. Rptr. 515*

Notice of appeal filed later than 30 days after denial of motion for new trial was untimely, even though trial court erroneously heard and denied second motion for new trial and notice of appeal was filed within 30 days of second denial. *Wenzoski v. Central Banking System, Inc. (1987) 43 Cal. 3d 539, 542, 237 Cal. Rptr. 167, 736 P.2d 753*

Motion for reconsideration has same effect as motion for new trial or motion to vacate for purposes of former Cal. Rules of Ct., Rule 3 (now see *Cal. Rules of Ct., Rule 8.108*); timely filing of motion to reconsider operates to extend time for filing of notice of appeal from original ruling until 30 days after entry of order denying reconsideration. *Tunis v. Barrow (1986) 184 Cal. App. 3d 1069, 1075, 229 Cal. Rptr. 389*

Notice of intention to file motion for new trial that is filed after 15-day period provided by *Code Civ. Proc. § 659* is invalid and does not extend time for filing notice of appeal from judgment pursuant to former Cal. Rules of Ct., Rule 3(a) (now see *Cal. Rules of Ct., Rule 8.108(b)*). *In re Marriage of Patscheck (1986) 180 Cal. App. 3d 800, 802, 225 Cal. Rptr. 787*

Extension of time for filing notice of appeal under former Cal. Rules of Ct., Rule 3(a),*(b)* (now see *Cal. Rules of Ct., Rule 8.108(b),(c)*), runs from date of entry of order denying motion for new trial or motion to vacate, and not from date of service of notice of entry of that order. *City of Long Beach v. Crocker National Bank (1986) 179 Cal. App. 3d 1114, 1118, 225 Cal. Rptr. 227*

Defendant's appeal dismissed because notice of appeal was filed too late, when plaintiff served notice of motion to vacate judgment and later withdrew it, since withdrawal constituted denial of motion for purposes of former Cal. Rules of Ct., Rule 3(b) (now see *Cal. Rules of Ct., Rule 8.108(c)*), which provides that, after denial of motion to vacate, party has 30 days to file notice of appeal. *Rolen v. Rhine (1981) 117 Cal. App. 3d 23, 26, 172 Cal. Rptr. 456* ; *see also O'Donnell v. Municipal Court (1989) 207 Cal. App. 3d 714, 717, 255 Cal. Rptr. 31* (withdrawal of motions for new trial and to vacate judgment is equivalent to denial of motions for purposes of timeliness of notice of appeal from municipal court judgment under *Cal. Rules of Ct., Rule 8.752(a),(b)*; reported here for arguable application to *Cal. Rules of Ct., Rule 8.108(b),(c)* by analogy; *see* Ch. 345A, *Limited Civil Cases* , for further discussion of appeals of limited civil cases to the appellate division of the superior court)

Motion to vacate judgment on merits under *Code Civ. Proc. § 473* extends time within which to file notice of appeal until 30 days after entry of order denying motion under former *Cal. Rules of Ct., Rule 3(b)* (now see *Cal. Rules of Ct., Rule 8.108(c)*). *Duncan v. Sunset Agricultural Minerals (1969) 273 Cal. App. 2d 489, 491-492, 78 Cal. Rptr. 339* (rejecting contention that *Code Civ. Proc. § 473* applies only to default judgments and that motion was invalid for not having been made under *Code Civ. Proc. § 663*)

Motion for reconsideration treated as motion for new trial, so that time to file notice of appeal was extended for 30 days under former *Cal. Rules of Ct., Rule 3* (now see *Cal. Rules of Ct., Rule 8.108*), on denial of motion. *Dockter v. City of Santa Ana (1968) 261 Cal. App. 2d 69, 74-75, 67 Cal. Rptr. 686*

[d] Effect of Modification of Judgment

Amended judgment that merely corrects clerical error and does not involve the exercise of judicial discretion does not supersede original judgment to operate as a new judgment from which a new appeal may be taken. *Mulder v. Mendo Wood Products, Inc. (1964) 225 Cal. App. 2d 619, 635, 37 Cal. Rptr. 479*

Judgment that has been substantially modified by trial court supersedes original judgment, causing new filing deadline to begin to run. *Neff v. Ernst (1957) 48 Cal. 2d 628, 634, 311 P.2d 849*

[e] Effect of Premature Filing of Notice of Appeal

Notice of appeal filed before entry of judgment, but after its rendition, was valid and deemed to have been filed immediately after entry. *Wenzoski v Central Banking System, Inc. (1987) 43 Cal. 3d 539, 541 n.2, 237 Cal. Rptr. 167, 736 P.2d 753* ; *see also Eckhart v. Genuine Parts Distributors (1997) 53 Cal. App. 4th 1340, 1344, 62 Cal. Rptr. 2d 487*

Court reviewed premature appeal when judgment actually entered, it was clear which ruling appellant sought to have reviewed, and respondents were not prejudiced. *Boyer v. Jensen (2005) 129 Cal. App. 4th 62, 69, 28 Cal. Rptr. 3d 124*

Because plaintiff filed premature notice of appeal from nonappealable minute order and signed judgment of dismissal was entered four weeks later, appellate court treated notice of appeal as having been filed immediately after entry of judgment. *Miranda v. 21st Century Ins. Co. (2004) 117 Cal. App. 4th 919, 920*

Appellate court treated notice of appeal from minute order as being from judgment subsequently ordered, pursuant to former Cal. Rules of Ct., Rule 2(d) (now *Cal. Rules of Ct., Rule 8.104(c)*) when there was no claim or indication that adverse party was misled or prejudiced and respondent did not raise problem by making a motion to dismiss during the time that the defect could have been cured by the filing of a second and timely notice of appeal from the judgment. *American Motorists Ins. Co. v. Cowan (1982) 127 Cal. App. 3d 875, 883, 179 Cal. Rptr. 747*

Notice of appeal filed after filing of memorandum decision but before entry of appealable court order, is premature but is to be treated as taken from an appealable order under former Cal. Rules of Ct., Rule 2(d) (now *Cal. Rules of Ct., Rule 8.104(c)*). *Webb v. Webb (1970) 12 Cal. App. 3d 259, 262 n.1, 90 Cal. Rptr. 565*

[9] Appealable Judgments and Orders

[a] One Final Judgment Rule

Violation of one final judgment rule curable when the trial court's failure to dispose of all causes of action results from inadvertence or mistake rather than an intention to retain the remaining causes of action for trial and the error can be cured by amendment of the judgment. *Sullivan v. Delta Air Lines, Inc. (1997) 15 Cal. 4th 288, 307-308, 63 Cal. Rptr. 2d 74, 935 P.2d 781*

Most orders made in the proceedings leading to final judgment are reviewable on appeal from that judgment. *Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 825, n.1, 69 Cal. Rptr. 321, 442 P.2d 377* ; *Hill v. Long Beach (1995) 33 Cal. App. 4th 1684, 1695, 40 Cal. Rptr. 2d 125* ; *Gudel v. Ellis (1962) 200 Cal. App. 2d 849, 859*

Collateral order is appealable if it is actually collateral and final as to the collateral matter, not if it has the effect of requiring payment of money or the performance of an act. *Muller v. Fresno Community Hospital and Medical Center (2009) 172 Cal. App. 4th 887, 898-905, 91 Cal. Rptr. 3d 617*

Issue of genetic testing was not severable from the general subject matter of the litigation, i.e., to establish whether party was father of children and to obtain an order that he pay child support and furnish health insurance; instead, it was integral to the subject matter and was, accordingly, not appealable as a collateral order. *San Joaquin County Department of Child Support Services v. Winn (2008) 163 Cal. App. 4th 296, 300, 77 Cal. Rptr. 3d 470*

An appeal is allowed if an order is a final judgment against a party in a collateral proceeding growing out of the action. It is not sufficient that the order determine finally for the purposes of further proceedings in the trial court some distinct issue in the case. *Mercury Interactive Corporation v. Klein (2007) 158 Cal. App. 4th 60, 76-77, 70 Cal. Rptr. 3d 88*

Ruling as to who decides arbitrability is not appealable final order. *Vivid Video, Inc. v. Playboy Entertainment Group, Inc. (2007) 147 Cal. App. 4th 434, 440-443, 54 Cal. Rptr. 3d 232*

Court lacked jurisdiction to hear appeal when, in stipulated dismissal, parties dismissed one cause of action without prejudice. *Hoveida v. Scripps Health (2005) 125 Cal. App. 4th 1466, 1468-1469, 23 Cal. Rptr. 3d 667*

If liability of one defendant is intertwined with and dependent on earlier non-final judgment against another defendant, entry of judgment in first defendant's favor is premature and judgment cannot be appealed without violating one-final-judgment rule. C3 *Entertainment, Inc. v. Arthur J. Gallagher & Co. (2005) 125 Cal. App. 4th 1022, 1025, 23 Cal. Rptr. 3d 258*

If complaint and cross-complaint involving same parties have been filed, there is no final appealable judgment until both are resolved. *ECC Construction, Inc. v. Oak Park Calabasas Homeowners Assn. (2004) 122 Cal. App. 4th 994, 1002, 19 Cal. Rptr. 3d 340*

One final judgment rule prevents piecemeal appeals and achieves optimal appellate review allowing appeals only after the entire action is resolved in the trial court. *Art Movers, Inc. v. Ni West, Inc. (1992) 3 Cal. App. 4th 640, 645, 4 Cal. Rptr. 2d 689*

An appeal lies only from a judgment that terminates the proceeding in the lower court by completely disposing of the matter in controversy, unless the judgment in question is made appealable by statute. *Garat v. City of Riverside (1991) 2 Cal. App. 4th 259, 275, 3 Cal. Rptr. 2d 504*

A party who is granted a new trial on only one of several issues has a right to appeal from the order when he or she is aggrieved by the limitation of the new trial to a single issue and it is not severable from the other issues. *Stegmann v. Holder (1963) 223 Cal. App. 2d 531, 537, 36 Cal. Rptr. 1*

[b] Appealable Judgments and Orders

Order regarding late-identified class members was separately appealable from final judgment pursuant to *Code Civ. Proc. § 904.1(a)(2)*. *Bates v. Rubio's Rests. (2009) 179 Cal. App. 4th 1125, 1130-1132, 102 Cal. Rptr. 3d 206*

Issues raised by an appeal from a post-judgment order must be different from those arising from an appeal from the judgment. *Doppes v. Bentley Motors, Inc. (2009) 174 Cal. App. 4th 1004, 1008, 94 Cal. Rptr. 3d 797*

Under the death knell doctrine, an order denying class certification is appealable. *Farwell v. Sunset Mesa Property Owners Association, Inc. (2008) 163 Cal. App. 4th 1545, 1547, 78 Cal. Rptr. 3d 666*

Although an informal opinion or decision is not normally an appealable judgment or order, a memorandum of decision may be appealed when signed and filed, and constitutes the trial judge's final judicial determination on the merits. *County of San Diego v. Arzaga (2007) 152 Cal. App. 4th 1336, 1344, 62 Cal. Rptr. 3d 329*

Postjudgment order denying sanctions pursuant to *Code Civ. Proc. § 128.7* is appealable order. *Day v. Collingwood (2006) 144 Cal. App. 4th 1116, 1123, 50 Cal. Rptr. 3d 903*

Order denying motion to vacate renewal of judgment is appealable post-judgment order, but renewal of judgment is not. *Jonathan Neil & Associates, Inc. v. Jones (2006) 138 Cal. App. 4th 1481, 1487, 42 Cal. Rptr. 3d 350*

Order denying motion to vacate renewal of judgment is appealable post-judgment order. *In re Marriage of Wilcox (2004) 124 Cal. App. 4th 492, 497, 21 Cal. Rptr. 3d 315*

Order denying class certification is appealable; however, trial court ruling supported by substantial evidence will not be disturbed unless trial court used improper criteria or made erroneous legal assumptions. *Frieman v. San Rafael Rock Quarry, Inc. (2004) 116 Cal. App. 4th 29, 34, 10 Cal. Rptr. 3d 82*

Because it leaves no issue for future consideration and terminates the litigation between the parties on the merits of the case, a judgment entered after the sustaining of demurrers without leave to amend is appealable. *Richelle L. v. Roman Catholic Archbishop of San Francisco (2003) 106 Cal. App. 4th 257, 266, 130 Cal. Rptr. 2d 601*

Post-judgment order granting or denying judgment debtor's claim of exemption is appealable under *Code Civ. Proc. § 703.600*. *Schwartzman v. Wilshinsky (1996) 50 Cal. App. 4th 619, 626, 57 Cal. Rptr. 2d 790*

Judgment of sanctions against counsel who has been substituted out is appealable. *Rail-Transport Employees Ass'n v. Union Pacific Motor Freight (1996) 46 Cal. App. 4th 469, 475, 54 Cal. Rptr. 2d 713*

Post-judgment orders are appealable when they raise issues different from judgment and affect or relate to judgment by staying or enforcing it. *Lakin v. Watkins Associated Industries (1993) 6 Cal. 4th 644, 651, 25 Cal. Rptr. 2d 109, 863 P.2d 179*

Order denying a motion to disqualify counsel is appealable. *Gregori v. Bank of America (1989) 207 Cal. App. 3d 291, 300, 254 Cal. Rptr. 853*

Order granting partial new trial is appealable. *Liodas v. Sahadi (1977) 19 Cal. 3d 278, 285, 137 Cal. Rptr. 635, 562 P.2d 316*

Judgment of dismissal as to one defendant in a multiple defendant case is appealable. *In re Estate of Gonzalez (1990) 219 Cal. App. 3d 1598, 1601, 269 Cal. Rptr. 68*

[c] Nonappealable Judgments and Orders

Statement of decision not treated as appealable when a formal order or judgment follows. *Alan v. American Honda Motor Co., Inc. (2007) 40 Cal. 4th 894, 901, 55 Cal. Rptr. 3d 534, 152 P.3d 1109*

An order granting or denying motion for summary judgment is not appealable, but the grant of the motion may be appealed from judgment entered thereon. *Sullivan v. Delta Air Lines, Inc. (1997) 15 Cal. 4th 288, 307, n.10, 63 Cal. Rptr. 2d 74, 935 P.2d 781*

An order granting a mistrial due to a hung jury is not appealable. *Sullivan v. Delta Air Lines, Inc. (1997) 15 Cal. 4th 288, 307, n.11, 63 Cal. Rptr. 2d 74, 935 P.2d 781*

An order overruling a demurrer is not appealable; appeal must be taken from the judgment entered upon such order. *San Diego Gas and Elec. Co. v. Superior Court (1996) 13 Cal. 4th 893, 912-913, 55 Cal. Rptr. 2d 724, 920 P.2d 669*

On appeal from appealable order or judgment, reviewing court may review any intermediate ruling, proceeding, order or decision, but it may not review earlier appealable ruling. *Alfaro v. Community Housing Improvement System & Planning Assn., Inc. (2009) 171 Cal. App. 4th 263, 277, 89 Cal. Rptr. 3d 659*

Courts are split as to whether an order denying a motion for reconsideration is separately appealable, with most recent cases holding that they are not. *Morton v. Wagner (2007) 156 Cal. App. 4th 963, 968-969, 67 Cal. Rptr. 3d 818*

Order on bifurcated issue is not separately appealable. *In re the Marriage of Lafkas (2007) 153 Cal. App. 4th 1429, 1434, 64 Cal. Rptr. 3d 100*

An order sustaining demurrer to class action allegations is appealable to the extent that it prevents further proceedings as a class action. *Berry v. American Express Publishing, Inc. (2007) 147 Cal. App. 4th 224, 228, 54 Cal. Rptr. 3d 91*

On an untimely notice of appeal, the appellate court has discretion to treat the appeal as a petition for an extraordinary writ within the appellate court's jurisdiction. *Drum v. Superior Court (2006) 139 Cal. App. 4th 845, 852-853, 43 Cal. Rptr. 3d 279*

Order granting summary judgment is not appealable order; however, when the order is followed by a judgment, the appellate court may deem the premature notice of appeal to have been filed after the entry of judgment. *Mukthar v. Latin American Security Service (2006) 139 Cal. App. 4th 284, 288, 42 Cal. Rptr. 3d 563*

Renewal of judgment is not appealable order. *Jonathan Neil & Associates, Inc. v. Jones (2006) 138 Cal. App. 4th 1481, 1487, 42 Cal. Rptr. 3d 350*

Appeal from trial court's denial of motion for new trial not directly appealable, but reviewable on appeal from underlying judgment. *Toscano v. Greene Music (2004) 124 Cal. App. 4th 685, 689 n.1, 21 Cal. Rptr. 3d 732*

Order sustaining demurrer ordinarily not appealable; exception applies in class action if order is tantamount to dismissal of action as to all class members other than plaintiff and if order virtually demolishes action as class action. *Alch v. Superior Court (2004) 122 Cal. App. 4th 339, 359-360, 19 Cal. Rptr. 3d 29*

Denial of certification to entire class is appealable order, but in absence of other error, a trial court ruling supported by substantial evidence generally will not be disturbed. Any valid pertinent reason stated will be sufficient to uphold order. *Lebrilla v. Farmers Group, Inc. (2004) 119 Cal. App. 4th 1070, 1075, 16 Cal. Rptr. 3d. 25*

Order that denies class certification disposes of that action and is appealable final judgment. *Prince v. CLS Transportation, Inc. (2004) 118 Cal. App. 4th 1320, 1322 n.2, 13 Cal. Rptr. 3d 725*

Order sustaining demurrer not appealable, but order dismissing complaint with prejudice is appealable. *City of Morgan Hill v. Bay Area Air Quality Management District (2004) 118 Cal. App. 4th 861, 867 n.3, 13 Cal. Rptr. 3d 420*

On a purported appeal from a nonappealable order, the appellate court has discretion to treat the appeal as a petition for an extraordinary writ within the appellate court's original jurisdiction. *In re Marriage of Ellis (2002) 101 Cal. App. 4th 400, 404, 124 Cal. Rptr. 2d 719*

An order sustaining a demurrer to one of several causes of action is nonappealable. *North American Chemical Co. v. Superior Court (1997) 59 Cal. App. 4th 764, 773, 69 Cal. Rptr. 2d 466*

An order denying a new trial is not appealable. *Zavala v. Arce (1997) 58 Cal. App. 4th 915, 924, n.7, 68 Cal. Rptr. 2d 571*

An order sustaining a demurrer is not appealable. *Forsyth v. Jones (1997) 57 Cal. App. 4th 776, 780, 67 Cal. Rptr. 2d 357*

An order appointing guardian ad litem is not appealable. *In re Marriage of Lloyd (1997) 55 Cal. App. 4th 216, 219, 64 Cal. Rptr. 2d 37*

An order denying a motion for reconsideration is not appealable. *Ramon v. Aerospace Corp. (1996) 50 Cal. App. 4th 1233, 1237, 58 Cal. Rptr. 2d 217* ; *Rojes v. Riverside General Hosp. (1988) 203 Cal. App. 3d 1151, 1160, 250 Cal. Rptr. 435*

Discovery orders are not appealable, but may be reviewed upon appeal from the final judgment. *Marsh v. Mountain Zephyr, Inc. (1996) 43 Cal. App. 4th 289, 299, n.6, 50 Cal. Rptr. 2d 493*

An order denying class certification is not appealable unless it effectively terminates the action. *Kennedy v. Baxter Healthcare Corp. (1996) 43 Cal. App. 4th 799, 807, 50 Cal. Rptr. 2d 736*

An order denying a pretrial motion for dismissal is not appealable. *Samuel v. Stevedoring Services of America (1994) 24 Cal. App. 4th 414, 417, 29 Cal. Rptr. 2d 420*

An order granting motion for partial judgment notwithstanding the verdict is not appealable. *Beavers v. Allstate Ins. Co. (1990) 225 Cal. App. 3d 310, 329, 274 Cal. Rptr. 766*

An order granting or denying a motion to strike a pleading is not appealable. *Barrett v. Stanislaus County Employees*

Retirement Assn. (1987) 189 Cal. App. 3d 1593, 1601 n.4, 234 Cal. Rptr. 900

An order directing a verdict is not appealable. *Hilliard v. A.H. Robins Co. (1983) 148 Cal. App. 3d 374, 384, 196 Cal. Rptr. 117*

An order to arbitrate is not appealable. *Branham v. State Farm Mut. Auto. Ins. Co. (1975) 48 Cal. App. 3d 27, 32, 121 Cal. Rptr. 304*

[10] Consolidation of Appeals

Reviewing court may consolidate appeals on its own motion. *California for Population Stabilitization v. Hewlett-Packard (1997) 58 Cal. App. 4th 273, 279, 279 n.1, 67 Cal. Rptr. 2d 621* ; *Sharick v. Galloway (1936) 12 Cal. App. 2d 733, 738, 55 P.2d 1196*

Reviewing court without authority to consolidate cases unless both appeals pending in same court. *Davis v. Kittle Mfg. Co. (1933) 133 Cal. App. 599, 601, 24 P.2d 550*

Cases consolidated for trial commonly consolidated for appeal. *Safeway Stores, Inc. v. City of Burlingame (1959) 170 Cal. App. 2d 637, 639, 339 P.2d 933*

Grant or denial of motion to consolidate entirely within discretion of reviewing court. *Sampson v. Sapoznik (1953) 117 Cal. App. 2d 607, 609, 256 P.2d 346*

Consolidation of separate appeals in same action proper when no prejudice will result. *General Elec. Co. v. Fed. etc. Distrib. Co. (1954) 122 Cal. App. 2d 509, 511, 265 P.2d 19*

Motion to consolidate appeals involves factual questions as to whether questions presented by appeals are related and whether appeals will be expedited by consolidation; therefore, each motion disposed of on its own merits. *Sampson v. Sapoznik (1953) 117 Cal. App. 2d 607, 609, 256 P.2d 346*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsReviewabilityTime LimitationsCivil ProcedureAppealsAppellate JurisdictionState Court Review

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Volume 5: Appeal-Chs. 40-55
Chapter 42 APPEAL: NOTICE OF APPEAL
PART III. RESEARCH GUIDE

5-42 California Forms of Pleading and Practice--Annotated § 42.36

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§ 42.36 Law Reviews

Graber, *Timeline and Deadlines for Civil Appeals in California*, 7(2) California Litigation 43 (1994)

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§ 42.37 Text References

Witkin, California Procedure, vol. 9, *Appeal*, § 453 et seq. (4th ed. 1997)

California Civil Appellate Practice, ch. 7, *Filing the Notice of Appeal*, § 7.1 et seq. (Cal. CEB 3rd ed. 2000)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsReviewabilityGeneral Overview

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§ 42.38 Internet References

California Courts. This site includes: general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of court of appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to sites of local trial courts; links to state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Appellate Courts Case Information. This site includes information on pending appellate cases including calendar listings and requests for e-mail notificiations. http://appellatecases.courtinfo.ca.gov

California Legislative Information. This site includes: text of constitution, codes, and statutes; and information concerning pending legislation. http://www.leginfo.ca.gov

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5-42 California Forms of Pleading and Practice--Annotated §§ 42.39-42.49

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[Reserved]

§§ 42.39[Reserved]

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Chapter 42 APPEAL: NOTICE OF APPEAL
PART IV. PROCEDURAL CHECKLISTS

5-42 California Forms of Pleading and Practice--Annotated § 42.50

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§ 42.50 Appellant's Checklist

[1] Preliminary Steps

☐ If considering appeal, determine [*see § 42.12, Ch. 40, Appeal: An Overview, §§ 40.12, 40.15*, and *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.11* et seq.]:

☐ Appealability of judgment or order.

☐ Likelihood of success under the applicable standard of review and other applicable law.

☐ Practical advisability of taking the appeal.

☐ If necessary, request temporary stay of trial court proceedings immediately after pronouncement of the judgment or order [*see Code Civ. Proc. § 918*; *see also Ch. 40, Appeal: An Overview, § 40.14[2]*, and Ch. 43, *Appeal: Stay of Proceedings*].

[2] Prepare and Serve Notice of Appeal

[a] Preparation of Notice

☐ Address notice to superior court clerk [*see § 42.11[1]*].

☐ State in notice that an appeal is being taken from a specified *appealable judgment or order* [*see § 42.11[2][a]*].

☐ You need not specify particular district or division of the court of appeal to which appeal is taken; appeal is deemed taken to the proper district court of appeal [*see § 42.11[2][c]*].

☐ Have appellant sign the notice or sign it yourself [*see § 42.11[2][b]*].

☐ If you sign the notice, ensure your client's authorization to take appeal [*see § 42.11[2][b]*].

☐ For forms of notice of appeal, see forms in *§ 42.70* et seq.

[b] Service of Notice and Proof of Service

☐ Prepare the following copies of the notice of appeal:

☐ One original for filing with superior court clerk;

☐ Prepare also proof of service of copy on each adverse party [*see below*].

☐ One copy for each adverse party.

☐ One copy for endorsement by clerk and filing in office.

☐ Serve a copy of the notice on each adverse party represented by separate counsel [*see Cal. Rules of Ct., Rules 8.100(a), 8.25*; *see § 42.11[3]*; for discussion and forms relating to service of papers generally, *see* Ch. 518, *Service and Summons of Papers*].

☐ Attach proof of service to notice on filing [*see § 42.11[3]*; for discussion and forms relating to proof of service generally, *see* Ch. 518, *Service and Summons of Papers*].

☐ If time deadline for filing notice of appeal is imminent, file before serving, and serve the notice on adverse parties as soon as possible [*Cal. Rules of Ct., Rule 8.100(a)*].

[3] File Notice of Appeal

[a] File Notice With Clerk of Superior Court

☐ File notice with clerk of superior court that rendered judgment or order from which appeal is being taken [*Cal. Rules of Ct., Rule 8.100(a)*; *see § 42.11[1]*].

[b] General Deadlines for Filing

☐ Meet filing deadline; filing deadlines for notice of appeal are mandatory and jurisdictional and may not be extended [§ 42.17].

☐ Serve and file notice by the earliest of the following dates [*see Cal. Rules of Ct., Rule 8.104(a),(b)*; *see §§ 42.13, 42.17*; *see also § 42.18*]:

☐ 60 days after the date of mailing by the clerk of a document entitled "notice of entry" of judgment [*Cal. Rules of Ct., Rule 8.104(a)(1)*].

☐ 60 days after the date of service of a document entitled "notice of entry" of judgment by any party on the party filing the notice of appeal, or by the party filing the notice of appeal [*Cal. Rules of Ct., Rule 8.104(a)(2)*].

☐ 180 days after the date of entry of the judgment [*Cal. Rules of Ct., Rule 8.104(a)(3)*].

☐ See also [4] and [5], *below*, for special deadlines for specific actions or proceedings.

[c] Filing of Notice With Fee and Deposit

☐ Accompany notice with filing fee of $655, and deposit of $100 for clerk's transcript when filing [*see Cal. Rules of Ct., Rule 8.100(b)*; *see § 42.19*].

☐ Alternatively, apply for an order granting appellant waiver of fee and deposit [*see Cal. Rules of Ct., Rule 8.100(b)(1)*, § 42.19].

☐ Submit filing fee in the form of a check or money order made payable to the clerk of the court of appeal [*Gov. Code § 68926*; *Cal. Rules of Ct., Rule 8.100(b)(1)*].

☐ Submit deposit for clerk's transcript in the form of a check or money order made payable to the clerk of the superior court [*Gov. Code § 68926.1*].

☐ Ensure that you receive a receipt from the superior court clerk for the fee (or deposit) if delivered in cash [*Cal. Rules of Ct., Rule 8.100(b)(1)*].

☐ If you cannot submit the fee and/or deposit with the notice for filing, have the superior court clerk accept the notice for filing without accompanying fee or deposit, subject to later action, including possible dismissal, by the clerk of appellate court under *Cal. Rules of Ct., Rule 8.100(b)(3)* [*see § 42.19*].

☐ If you are filing in the First Appellate District, submit notice for filing without the filing fee and deposit or order excusing payment or application for such order *only* on the last day for timely filing and be sure to comply with the normal provisions of *Cal. Rules*

of Ct., Rule 8.100(b)(3) [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 1; *see § 42.19*].

[4] Filing Deadline in Special Actions

☐ In an action involving an election of periodic payment of judgment by public entity under *Gov. Code § 984*, file notice of appeal within 90 days after the mailing of notice of entry of judgment by the clerk or after the date of service of written notice of entry of judgment or 180 days after the date of entry of the judgment, whichever is earliest [*Cal. Rules of Ct., Rule 8.104(c)*; § 42.15[1]].

☐ In a validation action under *Code Civ. Proc. § 860 et seq.*, file notice of appeal within 30 days after the notice of entry of the judgment or within 30 days after the entry of the judgment if there is no answering party. [*Code Civ. Proc. § 870(b)*; *Cal. Rules of Ct., Rules 8.104(a)*; § 42.15[2]].

☐ In an action to determine the validity of public bonds and other undertakings, file notice of appeal within 30 days after notice of entry of judgment or 30 days after entry of judgment if there is no answering party [*Code Civ. Proc. § 870*; 42.15[3]].

[5] Filing Deadline in Specific Post-Judgment Proceedings

[a] Motion for New Trial

☐ File notice of appeal within 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order [*Cal. Rules of Ct., Rule 8.108(b)(1)(A)*; *see Code Civ. Proc. § 660* and discussion in *§ 42.14[1]*].

☐ If motion is not denied by formal order, file notice of appeal within 30 days after denial of motion by operation of law [*Cal. Rules of Ct., Rule 8.108(b)(1)(B)*; *see Code Civ. Proc. § 660*, and discussion in *§ 42.14[1]*].

☐ In any event, file notice of appeal within 180 days after the date of entry of the judgment, whether or not the motion for new trial has been determined [*Cal. Rules of Ct., Rule 8.108(b)(1)(C)*, and discussion in *§ 42.14[1]*].

[b] Motion to Vacate

☐ File notice of appeal within the earliest of the following [*Cal. Rules of Ct., Rule 8.108(c)*; § 42.14[2]]:

☐ 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order [*Cal. Rules of Ct., Rule 8.108(c)(1)*].

☐ 90 days after the first notice of intention to move--or motion--is filed [*Cal. Rules of Ct., Rule 8.108(c)(2)*].

☐ 180 days after entry of judgment [*Cal. Rules of Ct., Rule 8.108(c)(3)*].

[c] Motion for JNOV

☐ File a notice of appeal within the earliest of the following [*Cal. Rules of Ct., Rule 8.108(d)*; *see* discussion in *§ 42.14[4]*]:

☐ 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order [*Cal. Rules of Ct., Rule 8.108(d)(1)(A)*].

☐ 30 days after denial of the motion by operation of law [*Cal. Rules of Ct., Rule 8.108(d)(1)(B)*].

☐ 180 days after entry of judgment [*Cal. Rules of Ct., Rule 8.108(d)(1)(C)*].

[d] Motion for Reconsideration

☐ File a notice of appeal within the earliest of the following [*Cal. Rules of Ct., Rule 8.108(e)*; *see* discussion in *§ 42.14[3]*]:

☐ 30 days after the superior court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order [*Cal. Rules of Ct., Rule 8.108(e)(1)*].

☐ 90 days after the first motion to reconsider is filed [*Cal. Rules of Ct., Rule 8.108(e)(2)*].

☐ 180 days after entry of the appealable order [*Cal. Rules of Ct., Rule 8.108(e)(3)*].

[6] Filing Deadline in Cross Appeal

☐ Once timely notice of appeal has been filed, file notice of cross appeal within the later of the following [*Cal. Rules of Ct., Rule 8.108(f)(1)*; § 42.16]:

☐ 20 days after the superior court clerk mails notification of the filing of the notice of appeal.

☐ The time otherwise prescribed by the applicable extension provisions.

☐ If an appellant timely appeals from an order granting a motion for new trial, an order granting--within 150 days after entry of judgment--a motion to vacate the judgment, or a JNOV, file a notice of appeal from the original judgment or from an order denying a JNOV motion within 20 days after the clerk mails notification of the first appeal [*Cal. Rules of Ct., Rule 8.108(f)(2)*].

[7] Combining Notice With Notices Designating Record

☐ Combine notice of appeal with notice designating clerk's transcript, reporter's transcript, or both [*see Cal. Rules of Ct., Rule 8.121(a)(2)*, § 42.20; *see also* Ch. 44, *Appeal: Preparing and Filing the Record*].

☐ If you have not combined the notice of appeal with the notices designating record, file them within 10 days of filing notice of appeal [*see Cal. Rules of Ct., Rules 8.121(a)*].

☐ Accompany designation notice with deposit of estimated cost of reporter's transcript [*see Cal. Rules of Ct., Rule 8.130(b)*].

☐ Submit deposit of estimated cost of clerk's transcript, over and above the $100 deposit required at the time of filing the notice of appeal [*see Cal. Rules of Ct., Rule 8.100(b)(2)*], within 10 days after notification of clerk's estimate [*see Cal. Rules of Ct., Rules 8.122(c), 8.128(b)*].

[8] File Civil Case Information Sheet

☐ File Civil Case Information Sheet within 10 days after clerk mails required form [*see Cal. Rules of Ct., Rule 8.100(g)(2)*; *see* discussion in *§ 42.21A*].

☐ Attach copy of judgment or appealed order showing date [*see Cal. Rules of Ct., Rule 8.100(g)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsReviewabilityTime LimitationsCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsRecords on Appeal

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PART IV. PROCEDURAL CHECKLISTS

5-42 California Forms of Pleading and Practice--Annotated § 42.51

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§ 42.51 Respondent's Checklist

[1] Check for Defects

☐ Consider moving for dismissal for defects in the notice of appeal that are jurisdictional [*see* Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal*].

☐ Check notice to determine if it is untimely or specifies an unappealable judgment or order [§§ 42.11[4], 42.17].

[2] Move to Dismiss Appeal Based on Defective Notice

☐ Make prompt motion to dismiss appeal based on notice that is untimely filed or specifies unappealable judgment or order [§§ 42.11[4], 42.17; for discussion and forms of motion to dismiss on these grounds, see *Ch. 48, Appeal: Abandonment, Dismissal, and Stipulated Reversal, §§ 48.13[2][a],[b], 48.42*, 48.43].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsDismissals of AppealsInvoluntary Dismissals

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5-42 California Forms of Pleading and Practice--Annotated §§ 42.52-42.69

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[Reserved]

§§ 42.52[Reserved]

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5-42 California Forms of Pleading and Practice--Annotated § 42.70

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§ 42.70 Notice of Appeal

[1] FORM Notice of Appeal

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF APPEAL
Defendant.	)	
	)	
	)	

_____

[To the clerk of the above entitled court:]

NOTICE IS GIVEN that _____ [*e.g.*, defendant] _____ [*name*] hereby appeals from _____ [*specify judgment, appealable order, or portion of judgment*] entered on _____ [*date*].

_____ [*date*].

By: _____ [*signature*]

_____ [*typed name*]
[Attorney for _____ (*party's status, e.g.*, Defendant
and Appellant) _____ (*party's name*)]

[2] Use of Form

The form set out in [1], *above*, is a general form of notice of appeal, for use in taking an appeal from a judgment or order, or part of a judgment or order, of the superior court. The notice is served on the other parties, then filed, with proof of service and with the necessary fees (or fee waivers), with the clerk of the superior court that rendered the judgment or order from which the appeal is being taken [*see Cal. Rules of Ct., Rule 8.100(a),(b)*, and discussion in *§§ 42.11[3], 42.19*]. It must be filed within the applicable time limits, generally those set out in *Cal. Rules of Ct., Rule 8.104* [*see* discussion in *§§ 42.13 -42.15, 42.17*].

The notice is sufficient so long as it states that appellant appeals from a specified judgment, appealable order, or portion of a judgment. It need not specify the court to which the appeal is taken and will be deemed taken to the appropriate district of the court of appeal. The notice must be signed by the appealing party or by his or her attorney [*see Cal. Rules of Ct., Rule 8.100(a)(1)*, and discussion in *§ 42.11[2]*].

The form includes an optional address to the clerk of the superior court with whom the notice is being filed; if desired, counsel may alternatively address the notice to the superior court. No particular address is required, however, and most notices of appeal simply omit the address.

The notice of appeal may be combined with a notice designating the clerk's transcript, the reporter's transcript, or both [*see Cal. Rules of Ct., Rule 8.121(a)* and discussion in *§ 42.20*]. For forms of combined notices, see*§ 42.90*.

For alternative forms of notice of appeal, for use in particular actions or proceedings or specifying particular types of judgments, see*§ 42.80* et seq. For a form of notice of cross appeal, see*§ 42.71*. For a Judicial Council form Notice of Appeal, see*§ 42.73*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsAppellate JurisdictionState Court Review

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5-42 California Forms of Pleading and Practice--Annotated § 42.71

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§ 42.71 Notice of Cross Appeal

[1] FORM Notice of Cross Appeal

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF CROSS APPEAL
Defendant.	)	
	)	
	)	

_____

[To the clerk of the above entitled court:]

NOTICE IS GIVEN that, whereas an appeal has been taken by _____ [*opposing or other party, e.g.*, defendant] _____ [*name*] from the _____ [*describe judgment or order specified in initial notice of appeal*] entered on _____ [*date*], as described in the notice of appeal filed by that party, _____ [*party cross appealing, e.g.*, plaintiff] _____ [*name*] hereby cross appeals from _____ [*specify the judgment or order from which the cross appeal is taken, e.g.*, the same judgment or order previously appealed, a different portion of the judgment previously appealed, and/or a judgment or order separate than that previously appealed but in the same action or proceeding], which was entered on

_____, [*date*].

_____ [*date*].
By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*cross appellant's status, e.g.,*
Defendant and Cross Appellant) _____
(*cross appellant's name*)]

[2] Use of Form

The form set out in [1], *above*, is a form of notice of cross appeal, for use in taking an appeal from a judgment or order of the superior court when an appeal has previously been filed by the opposing party or another party in the same action or proceeding. For a Judicial Council form Notice of Cross-Appeal, see*§ 42.73*.

For discussion of judgment and orders that may be specified in a cross appeal, as distinguished from the initial appeal, see*§ 42.11[2][a][iii]*.

Preparation, service, and filing is the same as with an initial notice of appeal, except for the time for filing [*see Cal. Rules of Ct., Rule 8.100(f)*, and discussion in *§§ 42.11[2][a][i],[3], 42.19*]. See*§ 42.70[2]* for comments concerning these generally applicable requirements.

The time deadlines for filing a cross appeal are set out in *Cal. Rules of Ct., Rule 8.108(f)* and discussed in *§ 42.16* [*see also* discussion in *§ 42.17*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsAppellate JurisdictionState Court Review

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5-42 California Forms of Pleading and Practice--Annotated § 42.72

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§ 42.72 Civil Case Information Sheet--Judicial Council Form APP-004

[1] FORM Civil Case Information Sheet

Click here to view image.

[2] Use of Form

The form set out in [1], *above*, is adopted for mandatory use [*Cal. Rules of Ct., Rule 1.31*], and is required by *California Rules of Court, Rule 8.100(g)*. It is intended to simplify and make more uniform the practice of filing civil appeals and to facilitate an early determination of appealability. It is a composite of the forms used by various districts of the Court of Appeal.

On receiving a notice of appeal, the court clerk is required to mail the appellant a copy of the form [*Cal. Rules of Ct., Rule 8.100(g)(2)*]. Within 10 days after the clerk mails the notice, the appellant must serve and file in the reviewing court the completed form, attaching a copy of the judgment or appealed order that shows the date it was entered [*Cal. Rules of Ct., Rule 8.100(g)(2)*].

If the appellant fails to file the Civil Case Information Statement within 10 days, the reviewing court clerk must send the appellant notice that the appellant must file it within 15 days after the clerk's notice is mailed and that if the appellant fails to comply the court may either impose monetary sanctions or dismiss the appeal [*Cal. Rules of Ct., Rule 8.100(g)(3)*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionState Court Review

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5-42 California Forms of Pleading and Practice--Annotated § 42.73

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§ 42.73 Notice of Appeal/Cross-Appeal (Unlimited Civil Case)--Judicial Council Form APP-002

[1] FORM Notice of Appeal/Cross-Appeal (Unlimited Civil Case)

Click here to view image.

[2] Use of Form

The form set out in [1], above, is adopted for optional use [*Cal. Rules of Ct., Rule 1.35*]. An appellant or a cross-appellant may use this form to file a notice of appeal in an unlimited civil case, i.e., a case in which the amount in controversy exceeds $25,000. In the alternative, an appellant or cross-appellant may use a form such as that *set forth in § 42.70*. See*§ 42.70[2]* discussing requirements applicable to notices of appeal generally.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of Appeal

California Forms of Pleading and Practice--Annotated

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5-42 California Forms of Pleading and Practice--Annotated §§ 42.74-42.79

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[Reserved]

§§ 42.74[Reserved]

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5-42 California Forms of Pleading and Practice--Annotated § 42.80

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§ 42.80 Notice of Appeal From Particular Type of Judgment or Order

[1] Minute Order

[a] FORM Notice of Appeal From Particular Type of Judgment or Order--Minute Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF APPEAL
Defendant.	)	
	)	
	)	

_____

[To the clerk of the above entitled court:]

NOTICE IS GIVEN that _____ [*party appealing, e.g.*, defendant _____ [*name*] appeals from that certain order made and entered by the court in this action on _____ [*date*]. Such order reads as follows: _____ [*recite minute order*].

_____ [*date*].
By: _____ [*signature*]

_____ [*typed name*]
[Attorney for _____ (*party's status, e.g.,* Defendant
and Appellant) _____ (*party's name*)]

[b] Use of Form

The form set out in [a], *above*, is for use in taking an appeal from an order entered in the permanent minutes of the superior court. Such a minute order must be a final, appealable order to be specified properly in a notice of appeal. For discussion of appealable orders generally, see*§ 42.12*.

See*§ 42.70[2]* concerning requirements applicable to notices of appeal generally.

[2] Part of Judgment

[a] FORM Prohibition by Owner or Act of Law Against Return of Bailed Art Work [Civ. Code § 1825]--Part of Judgment

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF APPEAL
Defendant.	)	
	)	
	)	

_____

[To the clerk of the above entitled court:]

NOTICE IS GIVEN that _____ [*e.g.*, defendant] _____ [*name*] hereby appeals from that portion of the judgment entered on _____ [*date*] in favor of _____ [*specify, e.g.*, plaintiff] _____ [*name*] and against _____ [*specify, e.g.*, defendant] _____ [*name*], and which provides as follows: _____ [*quote particular part of judgment appealed from or state substance of that portion*].

_____ [*date*].
By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*party's status, e.g.,* Defendant
and Appellant) _____ (*party's name*)]

[b] Use of Form

The form set out in [a], *above*, is for use in taking an appeal only from a portion of a judgment [*see Cal. Rules of Ct., Rule 8.100(a)(1)*]. For discussion concerning the effect of specifying only a portion of a judgment, and concerning the specification of additional portions on cross appeal, see discussion in *§ 42.11[2][a][ii]* and*[iii]*, respectively.

See*§ 42.70[2]* concerning requirements applicable to notices of appeal generally.

[3] Order or Judgment on Cross Complaint

[a] FORM Prohibition by Owner or Act of Law Against Return of Bailed Art Work [Civ. Code § 1825]--Order or Judgment on Cross Complaint

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF APPEAL
Defendant.	)	
	)	
	)	

_____

[To the clerk of the above entitled court:]

NOTICE IS GIVEN that _____ [*e.g.*, defendant and cross complainant] _____ [*name*] hereby appeals from _____ [*describe order or judgment or portion of judgment appealed from*] of the above entitled court entered on _____ [*date*], in favor of _____ [*e.g.*, plaintiff and cross defendant] _____ [*name*] and against _____ [*e.g.*, defendant and cross complainant] _____ [*name*].

_____ [*date*].
By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*party's status, e.g.*, Defendant,
Cross Complainant and Appellant) _____
(*party's name*)]

[b] Use of Form

The form set out in [a], *above*, is for use in taking an appeal only from an order, judgment, or portion of a judgment involving a cross complaint.

For discussion concerning cross appeals when a cross complaint is involved, see*§ 42.11[2][a][iii]*. For a notice of cross appeal, see*§ 42.71*.

For discussion and forms relating to cross complaints generally, see Ch. 123, *Complaints and Cross Complaints* .

See*§ 42.70[2]* concerning requirements applicable to notices of appeal generally.

[4] Order Denying Intervention

[a] FORM Prohibition by Owner or Act of Law Against Return of Bailed Art Work [Civ. Code § 1825]--Order Denying Intervention

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],)

Plaintiff,	)	
vs.	)	
_____ [*name*],	)	NO. _____
Defendant,	)	NOTICE OF APPEAL
_____ [*name*],	)	
Intervenor.	)	
	)	
	)	

[To the clerk of the above entitled court:]

NOTICE IS GIVEN that _____ [*name of intervenor*] appeals from the order entered on _____ [*date*] by this court denying his/her/its motion for leave to intervene in the above entitled action.

_____ [*date*].
By: _____ [*signature*]
_____ [*typed name*]
[Attorney for Intervenor and Appellant _____ (*name*)]

[b] Use of Form

The form set out in [a], *above*, is for use by a proposed third-party intervenor to take an appeal from an order denying leave to intervene in an action or proceeding [*see Braun v. Brown (1939) 13 Cal. 2d 130, 133, 87 P.2d 1009* ; *Noya v. A.W. Coulter Trucking (2006) 143 Cal. App. 4th 838, 841, 49 Cal. Rptr. 3d 584* ; *Ryerson v. Riverside Cement Co. (1968) 266 Cal. App. 2d 789, 793, 72 Cal. Rptr. 595* (order denying intervention is appealable)].

For discussion and forms relating to intervention, see Ch. 395, *Parties* .

See*§ 42.70[2]* concerning requirements applicable to notices of appeal generally.

[5] Dismissal or Nonsuit

[a] FORM Prohibition by Owner or Act of Law Against Return of Bailed Art Work [Civ. Code § 1825]--Dismissal or Nonsuit
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF APPEAL
Defendant.	)	
	)	
	)	

[To the clerk of the above entitled court:]

NOTICE IS GIVEN that plaintiff _____ [*name*] hereby appeals from the judgment of _____ [*either* dismissal *or* nonsuit] entered in this action on _____ [*date*], [in Book _____, Page _____, of the Book of Judgments, in favor of defendant and against plaintiff].

_____ [*date*].
By: _____ [*signature*]
_____ [*typed name*]
[Attorney for Plaintiff and Appellant _____ (*name*)]

[b] Use of Form

The form set out in [a], *above*, is for use to take an appeal from a judgment of dismissal or nonsuit.

For discussion and forms relating to dismissal and nonsuit generally, see respectively Ch. 212, *Dismissal* , Ch. 389, *Nonsuit and Motions for Judgment* and Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

See*§ 42.70[2]* concerning requirements applicable to notices of appeal generally.

[6] Judgment Denying Third-Party Claim

[a] FORM Prohibition by Owner or Act of Law Against Return of Bailed Art Work [Civ. Code § 1825]--Judgment Denying Third-Party Claim

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF APPEAL
Defendant.	)	
	)	
	)	

[To the clerk of the above entitled court:]

NOTICE IS GIVEN that the third party claimant _____ [*name*] appeals from the judgment of the court entered in the above cause on _____ [*date*], against the third party claimant.

_____ [*date*].
By: _____ [*signature*]
_____ [*typed name*]
[Attorney for Third Party Claimant _____ (*name*)]

[b] Use of Form

The form set out in [a], *above*, is for use by a third party claimant to take an appeal from a judgment adversely determining title to personal property levied on [*see Code Civ. Proc. § 720.420*] or adversely determining title to personal property that was subject of a claim and delivery action [*see Code Civ. Proc. § 514.050*]. See generally Ch. 119, *Claim and Delivery* , and Ch. 254, *Execution and Enforcement of Judgments* , § 254.310 et seq.

See*§ 42.70[2]* concerning requirements applicable to notices of appeal generally.

[7] Judgment or Order in Consolidated Cases

[a] FORM Prohibition by Owner or Act of Law Against Return of Bailed Art Work [Civ. Code § 1825]--Judgment or Order in Consolidated Cases

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF APPEAL
Defendant.	)	
	)	
	)	

_____

[To the clerk of the above entitled court:]

NOTICE IS GIVEN that _____ [*party appealing, e.g.*, defendant, _____ (*name*)], appeals from the _____ [*describe judgment or order, or portion thereof, appealed from*] in the above-captioned consolidated cases entered by the court on _____ [*date*], in favor of _____ [*e.g.*, plaintiff(s) _____ (*name*[*s*]) and against _____ [*e.g.*, defendant _____ (*name of party appealing*)].

_____ [*date*].
By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*specify, e.g.*, Defendant and Appellant) _____ (*name*)]
[Case No. _____]

[b] Use of Form

The form set out in [a], *above*, is for use to take an appeal from a judgment in consolidated cases [*see Code Civ. Proc. § 1048* (consolidation of causes)].

Consolidation of cases at trial does not necessarily require consolidation of these cases on appeal. When, for example, cases are consolidated only for the purpose of trial of related issues but not for all purposes, separate findings and judgments must be made in each case in disposition of independently submitted issues, and separate appeals are taken from each judgment [*see Harmon v. San Francisco & S. R. R. Co. (1890) 86 Cal. 617, 618, 25 P. 124* ; *Walker v. Walker (1960) 177 Cal. App. 2d 89, 91, 1 Cal. Rptr. 871]* . To consolidate the appeals, a special motion to consolidate is made in the reviewing court, although that court may consolidate on its own motion when separate and related appeals are pending in the same district of the court of appeal. For discussion and forms concerning consolidation of cases on

appeal, see Ch 45, *Appellate Motions Generally* .

See generally Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

See*§ 42.70[2]* concerning requirements applicable to notices of appeal generally.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of AppealContracts LawTypes of ContractsBailmentsCivil ProcedureAppealsAppellate JurisdictionState Court Review

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Volume 5: Appeal-Chs. 40-55
Chapter 42 APPEAL: NOTICE OF APPEAL
PART V. FORMS

5-42 California Forms of Pleading and Practice--Annotated § 42.81

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§ 42.81 Notice of Appeal in Probate Proceedings

[1] General Form

[a] FORM Notice of Appeal in Probate Proceedings--General Form

[*Caption. As on papers previously filed in case.*]

[To the clerk of the above entitled court:]

NOTICE IS GIVEN that _____ [*name*] hereby appeals from [that portion of] the _____ [*either* judgment *or* order] by the court entered on _____ [*date*], in Page _____, Volume _____ of the Judgment Book, which provides as follows: _____ [*set forth judgment or order, or portion thereof, appealed from*].

_____ [*date*].
By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*name*)]

[b] Use of Form

The form set out in [a], *above*, is for use in taking an appeal from an order or judgment in probate proceedings [*see Prob. Code § 1300 et seq.* (appealable probate orders and judgments)].

See generally Ch. 440, *Probate: Is Probate Necessary ?*

See*§ 42.70[2]* concerning requirements applicable to notices of appeal generally.

[2] Order Settling Final Account

[a] FORM Notice of Appeal in Probate Proceedings--Order Settling Final Account

[*Caption. As on papers previously filed in case.*]

[To the clerk of the above entitled court:]

NOTICE IS GIVEN that _____ [*name*] appeals from [that portion of] the order of the court settling the _____ [*e.g.*, first] and final account and report of the executor of the will, and the order of distribution entered in these proceedings on _____ [*date*], which provides as follows: _____ [*set forth order, or portion thereof, appealed from*].

_____ [*date*].
By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*name*)]

[b] Use of Form

The form set out in [a], *above*, is for use to take an appeal from an order in a probate proceeding settling the final account and report of the executor of the will and decreeing distribution [*see Prob. Code §§ 1300(b), 1303(h)* (appealable orders in probate proceedings); *see also Prob. Code § 17200(b)(5)* (settling accounts of trustee), *Prob. Code § 1304* (appealable orders regarding trusts)].

See generally Ch. 440, *Probate: Is Probate Necessary ?*

See*§ 42.70[2]* concerning requirements applicable to notices of appeal generally.

[3] Order Determining Heirship or Persons Entitled to Distribution

[a] FORM Notice of Appeal in Probate Proceedings--Order Determining Heirship or Persons Entitled to Distribution

[*Caption. As on papers previously filed in case.*]

[To the clerk of the above entitled court:]

NOTICE IS GIVEN that _____ [*name*], the _____ [*relationship to decedent, e.g.*, brother] of decedent and one of his/her heirs, who has appeared and filed a written statement in this proceeding setting forth his/her interest in the estate, appeals from the order entitled "Decree Determining Interest in Estate," entered on _____ [*date*], in Volume _____, at Page _____, of the Judgment Book [partially in favor of petitioner _____ (*name*) and partially in favor of _____ (*name*)] [, and from the whole of such order].

_____ [*date*].
By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*name*)]

[b] Use of Form

The form set out in [a], *above*, is for use in taking an appeal from an order determining heirship or persons to whom distribution should be made [*Prob. Code § 1303(g)* (order determining heirship, succession, entitlement, or persons to whom distribution of estate should be made is appealable)].

See generally Ch. 440, *Probate: Is Probate Necessary ?*

See*§ 42.70[2]* concerning requirements applicable to notices of appeal generally.

[4] Decree Determining Interests in Estate and Denying Preliminary Distribution

[a] FORM Notice of Appeal in Probate Proceedings--Decree Determining Interests in Estate and Denying Preliminary Distribution

[*Caption. As on papers previously filed in case.*]

[To the clerk of the above entitled court:]

NOTICE IS GIVEN that _____ [*name*], hereby appeals from the whole order of the above entitled court entitled "Decree Determining Interests in Estate and Order Denying Petitions for Preliminary Distribution" entered on _____ [*date*], in Book _____, Page _____ of the Book of Judgments, denying the petition of _____ [*name*] for preliminary distribution, and granting the petition of _____ [*name*] for a decree determining interests in the estate.

_____ [*date*].
By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*name*)]

[b] Use of Form

The form set out in [a], *above*, is for use in taking an appeal from orders in probate proceedings determining interests in a decedent's estate and denying a petition for preliminary distribution [*see Prob. Code § 1303(g),(h)*].

See generally Ch. 440, *Probate: Is Probate Necessary ?*

See*§ 42.70[2]* concerning requirements applicable to notices of appeal generally.

[5] Judgment in Will Contest

[a] FORM Notice of Appeal in Probate Proceedings--Judgment in Will Contest

[*Caption. As on papers previously filed in case.*]

[To the clerk of the above entitled court:]

NOTICE IS GIVEN that _____ [*name*], _____ [*either* proponent *or* contestant] of the will of _____ [*name*], deceased, appeals from the judgment entered herein by the court on _____ [*date*], _____ [*either* rejecting and denying probate of such will *or* admitting such will to probate].

_____ [*date*].
By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*name*)]

[b] Use of Form

The form set out in [a], *above*, is for use in taking an appeal from a judgment denying or admitting a will to probate [*see Prob. Code § 1303(b)*].

See generally Ch. 440, *Probate: Is Probate Necessary ?*

See*§ 42.70[2]* concerning requirements applicable to notices of appeal generally.

[6] Judgment Denying Probate of Will by Executor

[a] FORM Notice of Appeal in Probate Proceedings--Judgment Denying Probate of Will by Executor

[*Caption. As on papers previously filed in case.*]

[To the clerk of the above entitled court:]

NOTICE IS GIVEN that _____ [*name*], individually and as executor of the last will of _____ [*name*], hereby appeals from the judgment entered in the above matter on _____ [*date*], in favor of contestant and against proponent, and from the whole thereof, denying probate of such will.

_____ [*date*].
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*name of proponent*], Executor
of Last Will of _____
[*name*], Deceased

[b] Use of Form

The form set out in [a], *above*, is for use by the executor of the will to appeal from a judgment rejecting and denying probate of the will [*see Prob. Code § 1303(b)*].

See generally Ch. 440, *Probate: Is Probate Necessary ?*

See*§ 42.70[2]* concerning requirements applicable to notices of appeal generally.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of AppealEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionState Court Review

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5-42 California Forms of Pleading and Practice--Annotated § 42.82

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§ 42.82 Notice of Appeal in Guardianship Proceedings

[1] FORM Notice of Appeal in Guardianship Proceedings

[*Caption. As on papers previously filed in case.*]

[To the clerk of the above entitled court:]

NOTICE IS GIVEN that _____ [*name of appellant*] appeals from the order of the above entitled court _____ [*nature of order, e.g.*, granting Letters of Guardianship in the above entitled matter to petitioner _____ (*name*)].

_____ [*date*].
By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*name*)]

[2] Use of Form

The form set out in [a], *above*, is a general form of notice of appeal for use in taking an appeal from appealable orders in guardianship proceedings [*see Prob. Code § 1301* (appealable orders in guardianship proceedings)].

See generally Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , through Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships* .

See*§ 42.70[2]* concerning requirements applicable to notices of appeal generally.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of AppealEstate, Gift & Trust LawConservators & GuardiansGeneral Overview

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5-42 California Forms of Pleading and Practice--Annotated § 42.83

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§ 42.83 Notice of Appeal in Conservatorship Proceedings

[1] FORM Notice of Appeal in Conservatorship Proceedings

[*Caption. As on papers previously filed in case.*]

[To the clerk of the above entitled court:]

NOTICE IS GIVEN that _____ [*name*] appeals from the order of the court entered on _____ [*date*], ordering that _____ [*specify, e.g.*, Letters of Conservatorship be issued to _____ (*name or conservator*)].

_____ [*date*].
By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*name*)]

[2] Use of Form

The form set out in [a], *above*, is a general form of notice of appeal for use in taking an appeal from appealable orders in conservatorship proceedings [*see Prob. Code § 1301* (appealable orders in conservatorship proceedings)].

See generally Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , through Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships* .

See*§ 42.70[2]* concerning requirements applicable to notices of appeal generally.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of AppealEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral Overview

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5-42 California Forms of Pleading and Practice--Annotated §§ 42.84-42.89

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[Reserved]

§§ 42.84[Reserved]

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5-42 California Forms of Pleading and Practice--Annotated § 42.90

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§ 42.90 Notice of Appeal Combined With Notice Regarding Record

[1] Notice of Appeal Combined With Notice Designating Clerk's Transcript

[a] FORM Notice of Appeal Combined With Notice Regarding Record--Notice of Appeal Combined With Notice Designating Clerk's Transcript

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF APPEAL AND NOTICE DESIGNAT-
Defendant.	)	ING CLERK'S TRANSCRIPT FOR RECORD ON
	)	APPEAL
	)	

_____

[To the clerk of the above entitled court:]

NOTICE IS GIVEN that _____ [*specify party, e.g.*, defendant] _____ [*name*] hereby appeals from [that portion of] the judgment entered on _____ [*date*], in favor of _____ [*specify party, e.g.*, plaintiff] _____ [*name*] and against _____ [*specify party, e.g.*, defendant] _____ [*name*], which adjudges as follows:

_____ [*set forth judgment, or portion thereof, appealed from*].

NOTICE IS FURTHER GIVEN that _____ [*specify party, e.g.*, defendant] designates the following papers or records on file or lodged with the clerk of the above entitled court which _____ [*specify party, e.g.*, defendant] desires incorporated in the record on appeal: _____ [*specify*].

_____ [*date*].
By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*party's status, e.g.*, Defendant and Appellant) _____ (*party's name*)]

[b] Use of Form

The form set out in [a], *above*, combines a notice of appeal with a notice designating documents to be incorporated in the clerk's transcript under *Cal. Rules of Ct., Rule 8.120(a)*. The latter notice is ordinarily required to be served on the respondent and filed with the trial court within 10 days after the filing of a notice of appeal, but may be combined and filed with the notice of appeal [*Cal. Rules of Ct., Rule 8.120(a)(2)*].

For discussion regarding combining the notice of appeal with notices designating the record, see*§ 42.20*. See also more detailed discussion and additional, more detailed forms relating to designation of the clerk's transcript in Ch. 44, *Appeal: Preparing and Filing the Record*.

See*§ 42.70[2]* concerning requirements applicable to notices of appeal generally.

[2] Notice of Appeal Combined With Notices Designating Both Clerk's and Reporter's Transcript

[a] FORM Notice of Appeal Combined With Notice Regarding Record--Notice of Appeal Combined With Notices Designating Both Clerk's and Reporter's Transcript

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF APPEAL AND NOTICES DESIG-
Defendant.	)	NATING CLERK'S TRANSCRIPT AND REPORT-
	)	ER'S TRANSCRIPT FOR RECORD ON APPEAL
	)	

_____

[To the clerk of the above entitled court:]

NOTICE IS GIVEN that _____ [*specify party, e.g.*, defendant] _____ [*name*] hereby appeals from [that portion of] the _____ [*either* judgment *or* order] of the above entitled court entered herein on _____ [*date*], in favor of _____ [*specify party, e.g.*, plaintiff] _____ [*name*] and against _____ [*specify party, e.g.*, defendant] _____ [*name*], providing as follows: _____ [*set forth judgment or order, or portion thereof, appealed from*].

NOTICE IS FURTHER GIVEN that _____ [*specify, e.g.*, defendant] designates the following papers or records on file or lodged with the clerk of the above entitled court which _____ [*specify, e.g.*, defendant] desires incorporated in the record on appeal: _____ [*specify*].

NOTICE IS FURTHER GIVEN that _____ [*specify, e.g.*, defendant] requests the preparation of a reporter's transcript of the oral proceedings in this action [including the following instructions given or refused by the court _____ (*list and describe*)].

_____ [*date*].
By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*party's status, e.g.*, Defendant and Appellant) _____ (*party's name*)]

[b] Use of Form

The form set out in [a], *above*, combines a notice of appeal with a notice designating documents to be incorporated in the clerk's transcript under *Cal. Rules of Ct., Rule 8.122(a)*, and a notice designating items to be prepared by the reporter or reporters in the proceeding as the reporter's transcript under *Cal. Rules of Ct., Rule 8.130(a)*. The notices designating clerk's and reporter's transcripts are normally required to be served on respondent and filed within 10 days after the filing of the notice of appeal [*Cal. Rules of Ct., Rules 8.121(a)*], but may be combined and filed with the notice of appeal [*Cal. Rules of Ct., Rule 8.121(a)*].

For discussion regarding combining the notice of appeal with notices designating the record, see*§ 42.20*. See also detailed discussion and more detailed forms relating to designating the clerk's and reporter's transcripts in Ch. 44, *Appeal: Preparing and Filing the Record*.

See*§ 42.70[2]* concerning requirements applicable to notices of appeal generally.

[3] Notice of Appeal Combined With Notice of Election to Prepare Appendix and Notice Designating Reporter's Transcript

[a] FORM Notice of Appeal Combined With Notice Regarding Record--Notice of Appeal Combined With Notice of Election to Prepare Appendix in Lieu of Clerk's Transcript and Notice Designating Reporter's Transcript

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF APPEAL, NOTICE DESIGNATING
Defendant.	)	REPORTER'S TRANSCRIPT FOR RECORD ON
	)	APPEAL, AND NOTICE OF ELECTION TO PRE-
	)	PARE APPENDIX FOR RECORD ON APPEAL

_____

[To the clerk of the above entitled court:]

NOTICE IS GIVEN that _____ [*specify party, e.g.*, defendant] _____ [*name*] hereby appeals from [that portion of] the _____ [*either* judgment *or* order] of the above entitled court entered

herein on _____ [*date*], in favor of _____ [*specify, e.g.,* plaintiff] _____ [*name*] and against _____ [*specify, e.g.,* defendant] _____ [*name*], providing as follows: _____ [*set forth judgment or order, or portion thereof, appealed from*].

NOTICE IS FURTHER GIVEN that _____ [*specify party, e.g.,* defendant] requests that a reporter's transcript on appeal herein be prepared and include: _____ [*specify, e.g.,* all oral proceedings, including testimony of all witnesses, the voir dire examination of jurors, the opening statement of counsel, objections made by counsel, rulings of the trial court, the arguments of counsel to the jury, the proceedings on a motion for a new trial, and such portions of depositions as have been either received in evidence or offered and rejected].

NOTICE IS FURTHER GIVEN that _____ [*specify party, e.g.,* defendant] elects to prepare an appellant's or joint appendix pursuant to *Rule 8.124 of the California Rules of Court*.

_____ [*date*].
By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*party's status, e.g.,* Defendant and Appellant) _____ (*party's name*)]

[b] Use of Form

The form set out in [a], *above*, combines a notice of appeal with a notice to prepare a reporter's transcript under *Cal. Rules of Ct., Rule 8.130(a)* and a notice that the appellant has elected to prepare an appendix under *Cal. Rules of Ct., Rule 8.124(a)*. The notices designating the reporter's transcripts and electing to proceed by appendix are usually required to be served on respondent and filed within 10 days after the filing of the notice of appeal [*Cal. Rules of Ct., Rules 8.121(a)*], but they may be combined and filed with the notice of appeal [*Cal. Rules of Ct., Rule 8.121(a)*].

A copy of the notice of election and a copy of any notice to prepare a reporter's transcript in a case in which a notice of election is in effect must also be served on the clerk of the court of appeal [*Cal. Rules of Ct., Rule 8.121(c)*].

For discussion regarding combining the notice of appeal with notices designating the record, see*§ 42.21*. See also detailed discussion and more detailed relating to designating the reporter's transcript and notice of election to proceed by appendix in Ch. 44, *Appeal: Preparing and Filing the Record*.

See*§ 42.70[2]* concerning requirements applicable to notices of appeal generally.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsRecords on Appeal

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5-42 California Forms of Pleading and Practice--Annotated §§ 42.91-42.99

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[Reserved]

§§ 42.91[Reserved]

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5-42 California Forms of Pleading and Practice--Annotated § 42.100

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§ 42.100 Consolidation of Appeals

[1] Stipulation to Consolidate Appeals

[a] FORM Consolidation of Appeals--Stipulation to Consolidate Appeals

_____ [*name of attorney*]
_____ [*California State Bar No.*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone number*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, _____ APPELLATE DISTRICT [, DIVISION _____]

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	Superior Court No. _____
Defendant and Respondent/Appellant.	)	
	)	
	)	

_____

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	Superior Court No. _____
Defendant and Respondent/Appellant.	)	
	)	
	)	

_____

STIPULATION TO CONSOLIDATE APPEALS

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above entitled matters, by their respective counsel, that the following appeals, pending before this court, be consolidated and considered as one appeal in all respects, including the preparation and filing a single record on appeal, subject to approval and order by this court:

Appeal number _____, filed on _____ [*date*], by appellant _____ [*name*],

and

Appeal number _____, filed on _____ [*date*], by appellant _____ [*name*],
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[b] Use of Form

The form set out in [a], *above*, is for use by the parties to consolidate two appeals and use the same record and briefs on both appeals. For discussion concerning consolidation of appeals, see*§ 45.21*.

For detailed discussion and additional forms relating to stipulations generally, see Ch. 533, *Stipulations* .

[2] Motion to Consolidate Appeals

[a] FORM Consolidation of Appeals--Motion to Consolidate Appeals

_____ [*name of attorney*]
_____ [*California State Bar No.*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone number*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, _____ APPELLATE DISTRICT[, DIVISION _____]

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	Superior Court No. _____
Defendant and Respondent/Appellant.	)	
	)	
	)	

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	Superior Court No. _____
Defendant and Respondent/Appellant.	)	
	)	
	)	

MOTION TO CONSOLIDATE APPEALS, SUPPORTING DECLARATION, AND MEMORANDUM OF POINTS AND AUTHORITIES

_____ [*Name*], _____ [*e.g.*, plaintiff and appellant] in _____ [*specify number*] moves this court for an order consolidating the appeals in the above entitled matters pending before this court and filed on _____ [*date*], and _____ [*date*], by _____ [*name(s)*], respectively.

This motion is made on the ground that the questions presented by such appeals are so related as to make it advisable to consolidate them and that considerations of the appeals will be expedited by the consolidation in that _____ [*specify*].

This motion is based on the declaration(s) of _____ [*name(s)*], [and] the memorandum of points and

authorities, [and the certificate of the Clerk of the Superior Court of California, County of _____,] accompanying this motion [, and on the record on file herein].

_____ [*date*]
_____ [*signature*]
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION

I, _____ [*name*], declare:

I am the [attorney for the] _____ [*specify moving part, e.g.,* appellant] in this appeal. This declaration is submitted in support of the motion to consolidate the appeals in this matter.

The questions involved in the appeals are so related as to make it advisable to consolidate them, in the following respects: _____ [*identify issues of each appeal and indicate how they are related*].

Consideration of the appeals will be expedited by consolidating them in that _____ [*specify, e.g.,* consolidation will avoid wasteful duplication and will require that only one record on appeal be prepared and filed, that only one brief be filed by each of the parties, that only one hearing be set for oral argument, and that one judgment dispositive of the issues of each appeal be rendered by the court].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Attach supporting memorandum of points and authorities.*]

PROOF OF SERVICE

I, _____ [*name*], declare that:

I am at least 18 years of age and not a party to the above-entitled action. My _____ [residence *or* business] address is _____, California; I am _____ [a resident *or* employed in] _____ County, California [*county where mailing occurs*].

I served the foregoing motion on _____ [*date*], by depositing _____ [a copy *or* copies] thereof in the United States mail in _____, California, enclosed in [a] sealed envelope[s], with

postage fully prepaid, addressed to _____ [*state name and full address of each party served*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[b] Use of Form

The form set out in [a], *above*, is for use to seek consolidation of two or more appeals pending before the same court of appeal. The format of this motion is used when the appeals to be consolidated are from judgments or orders in separate superior court proceedings, and the title and number of each proceeding is represented in the caption. If the appeals are from separate orders in the same proceeding, the form will be modified to set forth the title of the one proceeding.

The motion must be accompanied by proof of service on all other parties, include a supporting memorandum of points and authorities, and a supporting declaration or other evidence when referring to matters not appearing the record [*see Cal. Rules of Ct., Rule 8.54*, and discussion in *§§ 45.13, 45.14*].

For discussion and additional forms relating to proof of service of papers generally, see Ch. 518, *Service of Summons and Papers* . For discussion and additional forms of declaration and affidavits, see Ch. 15, *Affidavits, Certificates, and Declarations* .

Counsel should check local practice to determine whether a proposed order should be submitted with the motion. Some courts prefer to draft their own orders. Others encourage or require proposed orders. In the Second Appellate District, for example, failure to submit a proposed order with an appellate motion or application may be grounds for denial of the motion [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 4].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsAppellate JurisdictionState Court Review

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Volume 5: Appeal-Chs. 40-55
Chapter 43 APPEAL: STAY OF PROCEEDINGS

5-43 California Forms of Pleading and Practice--Annotated 43.syn

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FOOTNOTES:
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Chapter 43 APPEAL: STAY OF PROCEEDINGS
PART I. SCOPE

5-43 California Forms of Pleading and Practice--Annotated § 43.01

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§ 43.01 Scope of Chapter

This chapter discusses staying the enforcement of a superior court judgment or order pending its appeal. It includes coverage of undertakings that are in many cases required in order to stay a judgment or order pending appeal.

This chapter includes the following forms for use in the superior court:

- A waiver of an undertaking [*see § 43.70*].

- A stipulation regarding alternative security in lieu of an undertaking [*see § 43.71*].

- Motions with supporting declarations and an order for use in fixing the amount of undertaking where the undertaking is required by statute to be fixed by the trial court [*see § 43.72*].

- A motion and supporting declaration and an order for use in limiting or dispensing with the requirement of an undertaking [*see § 43.73*].

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- A motion and supporting declaration and an order for use in increasing an appellate undertaking to account for additional expenses incurred or anticipated to be incurred due to a protracted appeal [*see § 43.75*].

- Forms of undertaking, a declaration of qualification by a personal surety which must accompany an

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- A motion, declaration, and order designating an officer as custodian of personal property and fixing the amount of an undertaking [*see § 43.77*].

- A motion, declaration, and order involving stay of enforcement of a judgment or order re child custody or exclusion from a dwelling [*see § 43.78*].

- A motion, declaration, and order to stay enforcement of a judgment or order re public office, inspection of corporate records, or nuisance [*see § 43.79*].

It includes the following forms for use in the court of appeal:

- A petition for writ of supersedeas, and order granting the petition, and a writ of supersedeas [*see § 43.90*].

Further discussion and forms relating to proceedings in the trial court to stay the execution or enforcement of judgments generally are set out in Ch. 254, *Executions and Enforcement of Judgments* , and that chapter should also be also consulted in connection with all trial court proceedings relating to stays. Similarly, more detailed discussion and forms relating to undertakings in general are set out in Ch. 538, *Suretyship, Bonds, and Undertakings* , and that chapter should also be consulted in connection with all proceedings relating to undertakings.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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PART I. SCOPE

5-43 California Forms of Pleading and Practice--Annotated § 43.02

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§ 43.02 Cross References

[1] Related Chapters in This Volume

For discussion of stay of enforcement in the context of the overall procedures for initiating and prosecuting a civil appeals generally, see Ch. 40, *Appeal: An Overview* .

For discussion relating to the trial court's resumption of jurisdiction after remittitur following conclusion of an appeal, including restitution when there was no stay pending appeal, see Ch. 53, *Appeal: Remittitur and Costs on Appeal* .

[2] Other Related Chapters

For discussion relating to the stay of a judgment in a limited civil case pending appeal in the Appellate Division of the Superior Court, see *Ch. 345A, Limited Civil Cases, § 345A.41*

For alternative forms of petition for writ of supersedeas to stay execution of judgment and levy, see Ch. 254, *Executions and Enforcement of Judgments* .

For discussion relating to the stay pending appeal of a judgment of the small claims court, pursuant to *Code Civ. Proc. § 116.810*, see Ch. 526, *Small Claims* .

For general discussion and forms relating to bonds and undertakings, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

For general discussion and forms relating to the automatic stay of related actions by creditors, including appeals in those actions, brought about by the commencement of bankruptcy proceedings, see Ch. 94, *Bankruptcy* .

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Volume 5: Appeal-Chs. 40-55
Chapter 43 APPEAL: STAY OF PROCEEDINGS
PART I. SCOPE

5-43 California Forms of Pleading and Practice--Annotated §§ 43.03-43.09

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[Reserved]

§§ 43.03[Reserved]

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Volume 5: Appeal-Chs. 40-55
Chapter 43 APPEAL: STAY OF PROCEEDINGS
PART II. LEGAL BACKGROUND

5-43 California Forms of Pleading and Practice--Annotated § 43.10

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§ 43.10 Governing Law

The law governing the stay of enforcement of orders and judgments pending appeal is primarily set out in *Code Civ. Proc. §§ 916-923*. *Code Civ. Proc. § 995.010 et seq.* govern bonds and undertakings generally. Deposits in lieu of an undertaking are governed by *Code Civ. Proc. § 995.710 et seq.* The extension of an undertaking on attachment pending appeal is governed by *Code Civ. Proc. § 489.410* as well as by *Code Civ. Proc. § 921*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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Chapter 43 APPEAL: STAY OF PROCEEDINGS
PART II. LEGAL BACKGROUND

5-43 California Forms of Pleading and Practice--Annotated § 43.11

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§ 43.11 Purpose and Effect of Stay Pending Appeal

[1] Stay Maintains Status Quo Pending Appeal

The purpose of staying of a judgment or order pending appeal is to protect the reviewing court's jurisdiction until the appeal is decided [*Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal. 4th 180, 196-197, 25 Cal. Rptr. 3d 298* (stay divests trial court of jurisdiction); *Elsea v. Saberi (1992) 4 Cal. App. 4th 625, 629, 5 Cal. Rptr. 2d 742]* . A stay prevents the trial court from rendering an appeal futile by conducting other proceedings that may affect it [*Betz v. Pankow (1993) 16 Cal. App. 4th 931, 938, 20 Cal. Rptr. 2d 841]* . The effect of a stay is to suspend the trial court's power to enforce, vacate, or modify a judgment or order while an appeal from that judgment or order is pending [*Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc. (1996) 43 Cal. App. 4th 630, 641, 50 Cal. Rptr. 2d 824* ; *Gold v. Superior Court (1970) 3 Cal. 3d 275, 280, 90 Cal. Rptr. 161, 475 P.2d 193]* .

A stay also protects the interests of both parties to the appeal. Appellants are protected from the immediate enforcement of a challenged judgment or order, and from the seizure of assets and property. Respondents, through undertakings and other conditions that may be imposed as a condition for a court-ordered stay, are protected from potential losses caused by a delay in enforcement of the judgment while the appeal is pending.

PRACTICE TIP:

Stay vs. Restitution. Under *Code Civ. Proc. § 908*, an appellant who has conferred a benefit on respondent (*e.g.*, a money payment) in compliance with a judgment, is generally entitled to restitution if the judgment is reversed, set aside, or modified on appeal. Thus, if an appellant, rather than obtaining a stay, satisfies a judgment in whole or part, and afterwards obtains favorable decision on appeal, he or she may be able to recoup money payments or other benefits through restitution, usually in the trial court after remittitur [*see* discussion in *Ch. 53, Appeal: Remittitur and Costs on Appeal, § 53.15[3]*].

It is generally preferable to obtain a stay, however, rather than rely on the right of restitution. The right to

restitution could be a hollow one in some cases, such as when several years go by before resolution of the appeal and respondent has squandered the proceeds of the judgment. On the other hand, if the respondent is "good for the judgment," there may be some advantages in reserving the right to appeal while paying off the judgment, for example, to forestall the running of postjudgment interest and save on the cost of the bond, and then seek restitution later if the judgment is reversed.

[2] Trial Court Actions Not Affected by Stay Pending Appeal

[a] Trial Court May Proceed With Matters Not Embraced by Stay

The trial court retains some powers over the parties and the incidental aspects of a case subject to a stay pending appeal [*see Wisely v. Superior Court (1985) 175 Cal. App. 3d 267, 269, 220 Cal. Rptr. 893* (discussing scope of reviewing court's exclusive jurisdiction)]. The trial court may proceed with any matter embraced by the action that is not affected by a judgment or order from which the appeal has been taken [*Code Civ. Proc. § 916(a)*].

Whether a matter is "embraced" by the action or "affected" by the judgment depends on the impact of the particular proceeding on the effectiveness of the appeal [*City of Santa Monica v. Stewart (2005) 126 Cal. App. 4th 43* (determining whether issues raised in summary judgment motion were embraced or affected by order denying anti-SLAPP motion); *Betz v. Pankow (1993) 16 Cal. App. 4th 919, 938, 20 Cal. Rptr. 2d 834*]. Postjudgment proceedings are permitted when they do not render an appeal futile, or do not impinge on the "effectiveness" of the appeal [*Whittier Redevelopment Agency v. Oceanic Arts (1995) 33 Cal. App. 4th 1052, 1059-1060, 39 Cal. Rptr. 2d 396* ; *Elsea v. Saberi (1992) 4 Cal. App. 4th 625, 629, 5 Cal. Rptr. 2d 742]* . The trial court proceeding may not directly or indirectly seek to enforce, vacate, or modify the appealed judgment or order [*Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal. 4th 180, 189-190, 25 Cal. Rptr. 3d 298* (trial court proceedings on merits following appeal from denial of anti-SLAPP motion are embraced in or affected by appeal); *see, e.g., Gridley v. Gridley (2008) 166 Cal. App. 4th 1562, 1587-1588, 83 Cal. Rptr. 3d 715* (issues regarding judge's authority were ancillary and collateral to judgment)]. However, by contrast, an appeal does not stay proceedings on ancillary or collateral matters which do not affect the judgment or order on appeal even though the proceedings may render the appeal moot [*Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal. 4th 180, 190-191, 25 Cal. Rptr. 3d 298]* . For example, an award of attorney's fees as costs is a collateral matter which, although "embraced" by the action, is not "affected" by the judgment [*Bankes v. Lucas (1992) 9 Cal. App. 4th 365, 369, 11 Cal. Rptr. 2d 723* ; *see Hollaway v. Scripps Memorial Hospital (1980) 111 Cal. App. 3d 719, 723, 168 Cal. Rptr. 782* (order disallowing certain costs within trial court's jurisdiction after appeal)]. Similarly, when an appeal from a judgment in a marital dissolution proceeding is pending, which challenges the trial court's division of community property and award of spousal support, the trial retains jurisdiction to modify spousal support based on changed circumstances. Such a modification does not affect the appeal, which reviews only the circumstances in the record at trial. The trial court lacks jurisdiction, however, to terminate its jurisdiction over spousal support while an appeal from a judgment awarding spousal support or dividing community property is pending; if the judgment is reversed on appeal and calls for a reallocationof assets on remand, this would constitute a change in circumstances that might justify a further modification of spousal support, something the trial court could no longer do if it had terminated its jurisdiction to do in the meantime [*In re Marriage of Varner (1998) 68 Cal. App. 4th 932, 936-937, 80 Cal. Rptr. 2d 628]* .

When there is a stay of proceedings other than the enforcement of the judgment, the trial court has jurisdiction of proceedings relating to the enforcement of the judgment as well as any matter embraced in the action and not affected by the judgment or order appealed from [*Code Civ. Proc. § 916(b)*].

PRACTICE TIP:

Stay of Further Proceedings When Appeal Taken Before Trial. When an appeal is taken from an interim order at the outset of a case or shortly before trial, the trial court may be anxious to proceed with discovery or trial in spite of the pending appeal. If further proceedings will impact the appeal, counsel

should raise the issue of a stay directly with the trial court and if unsuccessful, by way of an appropriate writ.

[b] Trial Court Retains Power to Set Aside Void Judgment or Order

The perfecting of an appeal does not stay proceedings in the trial court relating to a void judgment or order [*see Code Civ. Proc. § 916(a)*; *Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal. 4th 180, 200, 25 Cal. Rptr. 3d 298* (because trial court lacked subject matter jurisdiction over matters on trial, judgment was void, and reviewing court's jurisdiction was limited to reversing trial court's void acts); *Andrisani v. Saugus Colony Ltd. (1992) 8 Cal. App. 4th 517, 523-524, 10 Cal. Rptr. 2d 444]* . A court may set aside a void order at any time [*Lovret v. Seyfarth (1972) 22 Cal. App. 3d 841, 854, 101 Cal. Rptr. 143* ; *Macmillan Petroleum Corp. v. Griffin (1950) 99 Cal. App. 2d 523, 533, 222 P.2d 69]* . The trial court does not retain jurisdiction, however, to set aside an order that is merely voidable, rather than void [*People v. Malveaux (1996) 50 Cal. App. 4th 1425, 1434-1435, 59 Cal.Rptr. 2d 371* ; *Betz v. Pankow (1993) 16 Cal. App. 4th 931, 20 Cal. Rptr. 2d 841]* . For discussion and forms relating to setting aside void judgments and orders, see Ch. 489, *Relief From Judgments and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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PART II. LEGAL BACKGROUND

5-43 California Forms of Pleading and Practice--Annotated § 43.12

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§ 43.12 General Procedures for Obtaining Stay

[1] Planning and Implementing Stay

If an unsuccessful litigant is considering taking an appeal from a judgment or order, he or she should, immediately following notice of entry of the judgment or order, file a request with the trial court to stay its enforcement [*see* discussion in *§ 43.19*]. If the judgment or order is not one automatically stayed when the appeal is perfected [*see* discussion in *§ 43.13*], the appellant must follow the procedures for obtaining a court-ordered stay for the particular judgment or order [*see* discussion in *§ 43.15*]. The appellant may petition for a writ of supersedeas in the appellate court if the trial court refuses to order a stay of enforcement [*see* discussion in *§ 43.21*]. For a more detailed summary of procedures, see *§ 43.60* et seq.

As a practical matter, money judgments and most other judgments and orders are not stayed pending appeal, and are immediately enforceable upon entry of judgment. There are various courses of action that counsel for a prospective appellant may take to obtain a stay pending appeal and preserve the status quo. Because most judgments are immediately enforceable, litigants should begin thinking about the need for obtaining a stay, and taking the preliminary steps for securing a stay, *before* the entry of judgment. Absent timely action by a prospective appellant, the respondent may be able to enforce the judgment and seize the appellant's assets before the appellant has had an opportunity to get a stay in place. If this happens, then the appeal is effectively lost before the appellant has had an opportunity to begin prosecuting the appeal.

A prospective appellant should therefore request a stay immediately after rendition of a judgment or order and before its entry. In some cases, the subsequent filing of a notice of appeal will operate to continue this stay in effect during any subsequent appeal. In most cases, however, this initial stay is temporary only. When an undertaking is required, an initial stay lasts no longer than 10 days after the last day for filing a notice of appeal. It is intended to provide only a brief period to prospective appellants to prepare an undertaking or take other action necessary to keep the stay in place

pending the appeal [*see Code Civ. Proc. § 918(b), (c)*, and further discussion in *§ 43.19*].

Thus, if the judgment or order is not one automatically stayed when the appeal is perfected [*see § 43.13*], then the appellant must follow the initial stay request with an adequate bond, a deposit in lieu of a bond, or an appropriate stay order from the trial court or the court of appeal [*see §§ 43.15, 43.19, 43.21*].

PRACTICE TIP:

Educating the Client, the Possibility of a Stipulated Stay, and Other Preliminary Considerations. Obtaining a stay of enforcement pending appeal requires considerable thought and attention at the very outset, when the judgment or order is rendered. Many clients are unfamiliar with bonding procedures and, perhaps more fundamentally, the cost of posting security. Appellants' counsel should be sure to provide his or her client with information on the time for posting security, the amount of security needed, and the manner of obtaining it. In addition, the security must be in proper form, and this can take time. Counsel should plan ahead to allow sufficient time, and provide guidance on where and how to obtain a bond or other form of adequate security.

Posting a statutorily and monetarily sufficient bond can be difficult and costly, and the likelihood of obtaining a court-ordered stay for the duration of the appeal is usually slim. One alternative to consider is the possibility of a stipulated stay pending appeal. If, for example, appellant is a large company with easily located and seizable assets, and the relationship among trial counsel has not deteriorated, respondent may well be amenable to a stipulated stay. From the respondent's perspective, the costs of posting security are recoverable from respondent as part of the costs awarded on appeal, in the event the judgment is reversed and costs are awarded to appellant. This can be a significant amount. So, if the appellant is otherwise "good for the judgment," a waiver of the posting of security could make good economic sense. A stipulated stay can thus save both sides the expense of bonding proceedings or judicial proceedings associated with a court-ordered stay. For discussion of consensual waiver or reduction of the amount of an undertaking, see *§ 43.20[1]*.

[2] Notice by Party of Stay or Vacation of Stay

The appellant, as the party that requested or caused the stay, must file a notice of the stay in the superior court [*see Cal. Rules of Ct., Rule 3.650(c)*]. A copy of the order or other document staying the proceedings must be attached to the notice. When a stay is vacated, is no longer in effect, or is modified, the party who filed the notice of the stay must immediately serve and file a notice of termination or modification of stay. If that party fails to do so, any other party in the action who has knowledge of the termination or modification must serve and file a notice of termination or modification of stay. Once one party has served and filed a notice of termination or modification of stay, the other parties are not required to do so.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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Volume 5: Appeal-Chs. 40-55
Chapter 43 APPEAL: STAY OF PROCEEDINGS
PART II. LEGAL BACKGROUND

5-43 California Forms of Pleading and Practice--Annotated § 43.13

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§ 43.13 Automatic Stay Pending Appeal Under Code Civ. Proc. § 916

[1] Automatic Stay Applies to Judgments and Orders Not Excepted by Code Civ. Proc. §§ 917.1-917.9 or by Code Civ. Proc. § 116.810

The general rule is that the perfecting of an appeal stays any proceedings in the trial court concerning the judgment or order appealed from, and concerning matters, including enforcement proceedings, which are embraced or affected by the judgment or order, *except* as provided in *Code Civ. Proc. §§ 917.1-917.9* and *Code Civ. Proc. § 116.810* [*Code Civ. Proc. § 916(a)* (emphasis added); *Travis v. County of Santa Cruz (2002) 100 Cal. App. 4th 609, 618-619, 122 Cal. Rptr. 2d 713* (trial court lacked jurisdiction to amend order denying motion to vacate judgment on day after appeal perfected)].

As a practical matter, the *exceptions* swallow the general rule. The judgments and orders that are *not* automatically stayed pursuant to *Code Civ. Proc. § 917.1 et seq.* are far more extensive than those which *are* automatically stayed under *Code Civ. Proc. § 916*. The primary reason for this is that the automatic stay requires no undertaking or other protection of the respondent's interests that may be adversely affected by a delay in enforcement [*see* discussion in *§ 43.11[1]*]. By contrast, a nonautomatic or court-ordered stay is usually conditioned on an undertaking or other such protection.

Examples of judgments and orders that are automatically stayed under *Code Civ. Proc. § 916* are set out in [2], *below*. Examples of judgments and orders that are not automatically stayed are discussed in *§§ 43.14* and *43.15*.

For discussion of the stay of judgments of the Small Claims Court pursuant to *Code Civ. Proc. § 116.810*, which are also expressly excepted from the automatic stay of *Code Civ. Proc. § 916*, see Ch. 526, *Small Claims* .

For discussion of matters over which trial courts retain jurisdiction despite a stay pending appeal, see *§ 43.11[2]*.

[2] Examples of Judgments and Orders Automatically Stayed

As discussed in [1], *above*, the automatic stay of *Code Civ. Proc. § 916* actually operates in relatively few cases. The judgments and orders that are *not* excepted, and which are therefore subject to the automatic stay of *Code Civ. Proc. § 916*, include the following:

- A judgment or order solely awarding costs [*see* discussion in *§ 43.15[1][b][ii]* and *[c]*].

- Orders and decrees in probate proceedings, with certain exceptions set out in the Probate Code [*see* discussion in *§ 43.16*].

- A mandatory injunction [*see* discussion in *§ 43.17*].

- An order directing issuance of writ of mandate [*Johnston v. Jones (1925) 239 P. 862* (decided under predecessor statute)].

- All further proceedings on the merits during the pendency of an appeal from the denial of an anti-SLAPP motion [*Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal. 4th 180, 191-196, 25 Cal. Rptr. 3d 298]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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5-43 California Forms of Pleading and Practice--Annotated § 43.14

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§ 43.14 Judgment or Order Not Automatically Stayed May Generally Be Stayed on Court Order Conditioned by Undertaking or Other Act

The automatic stay under *Code Civ. Proc. § 916*, discussed in *§ 43.13*, does not apply to judgments and orders covered by the provisions of *Code Civ. Proc. §§ 917.1-917.9* and *Code Civ. Proc. § 116.810*.

The provisions of *Code Civ. Proc. §§ 917.1-917.9* include procedures for obtaining a court-ordered stay for most of those judgments and orders that are not automatically stayed by operation of *Code Civ. Proc. § 916*. As discussed further in *§ 43.15*, these procedures usually require that the appellant post an undertaking or bond as a condition to a stay [*see, e.g., Code Civ. Proc. § 917.1* (undertaking required to stay money judgment; discussed in *§ 43.15[1]*)]. The procedures relating to undertakings are generally governed by the Bond and Undertaking Law (*Code Civ. Proc. § 995.010 et seq.*), except to the extent another statute prescribes a different rule or is inconsistent [*see Code Civ. Proc. § 995.020(a)*, discussed in *§ 43.20*]. The terms of an undertaking are thus controlled by statute, and any condition in a bond inconsistent with the governing statutes is disregarded as surplusage [*Lewin v. Anselmo (1997) 56 Cal. App. 4th 694, 696-700, 65 Cal. Rptr. 2d 682]* . For detailed discussion and forms relating to the Bond and Undertaking Law, see generally *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.40* et seq.

Action other than the giving of an undertaking or bond may also be required as a condition for a stay of enforcement, depending on the type of judgment or order sought to be stayed. For example, the execution of an instrument and its deposit in the trial court may be required as a condition for a stay, when the judgment appealed from directs such execution [*see, e.g., Code Civ. Proc. § 917.3*, discussed in *§ 43.15[3]*].

For discussion of proceedings for the stay of a small claims judgment pursuant to *Code Civ. Proc. § 116.810*, which are also excepted from the automatic stay of *Code Civ. Proc. § 916*, see Ch. 526, *Small Claims* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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§ 43.15 Judgments and Orders Excepted From Automatic Stay of Code Civ. Proc. § 916 Under Code Civ. Proc. §§ 917.1-917.9

[1] Money Judgment

[a] Undertaking Generally Required

Unless an undertaking is given, the perfecting of an appeal does not stay enforcement of a judgment or order for money or directing the payment of money, whether or not the money consists of a special fund and whether or not it is payable by the appellant or by another party to the action [*Code Civ. Proc. § 917.1(a)*].

The undertaking must be given on condition that if the judgment or order, or part of it, is affirmed or if the appeal is withdrawn or dismissed, the party ordered to pay must pay the amount of the judgment or order, or the part of it as to which the judgment or order is affirmed, as entered after the receipt of the remittitur, together with any interest which may have accrued pending the appeal and entry of the remittitur, and costs that may have been awarded against the appellant on appeal [*Code Civ. Proc. § 917.1(b)*].

The liability on the undertaking may be enforced if the party ordered to pay does not make the payment within 30 days after the filing of the remittitur from the reviewing court [*Code Civ. Proc. § 917.1(b)*; *see also* discussion in *§ 43.20[7]*; for discussion relating to remittitur to the trial court following decision by the appellate court, see *Ch. 53, Appeal: Remittitur and Costs on Appeal, § 53.10* et seq.].

Code Civ. Proc. § 917.1 does not apply when the money to be paid is in the actual or constructive custody of the court; in this event *Code Civ. Proc. § 917.2* (discussed in [2], *below*) governs [*Code Civ. Proc. § 917.1(b)*].

The undertaking required by *Code Civ. Proc. § 917.1* is designed to protect the judgment won in the trial court from becoming uncollectible while the judgment is subjected to appellate review [*Lewin v. Anselmo (1997) 56 Cal. App.*

4th 694, 700, 65 Cal. Rptr. 2d 682 ; *Whelan v. Rallo(1997) 52 Cal. App. 4th 989, 995-996, 60 Cal. Rptr. 2d 876]* . The undertaking provides assurance to the respondent, as the successful litigant in trial court, that there will be a source of funds to satisfy the amount of the money judgment, costs, and postjudgment interest [*Grant v. Superior Court (1990) 225 Cal. App. 3d 929, 934, 275 Cal. Rptr. 564]* .

For a form of undertaking to stay enforcement of a judgment or order for the payment of money, see *§ 43.76[2]*.

[b] Amount of Undertaking

[i] General Calculation of Amount

The undertaking is for double the amount of the judgment or order unless given by an admitted surety insurer (as defined in *Code Civ. Proc. § 995.120*), in which case it is for one and one half times the amount of the judgment or order [*Code Civ. Proc. § 917.1(b)*; *see also Leung v. Verdugo Hills Hospital (2008) 168 Cal. App. 4th 205, 211-212, 85 Cal. Rptr. 3d 203* (lump sum present value of judgment was judgment amount for purpose of calculating undertaking required for stay)].

This means that an appellant seeking to stay enforcement of a money judgment must be prepared to provide collateral as security for the bond of value in excess of the judgment. Finding such collateral can be difficult on short notice. In addition, an appellant must be prepared to pay the considerable annual premiums often required by bonding companies.

For discussion of proceedings to increase the amount, see *§ 43.20*[6].

[ii] Inclusion of Costs Award in Judgment or Order

An undertaking is not required for a judgment or order that is *solely* for costs awarded under *Code Civ. Proc. §§ 1021-1038* [*Code Civ. Proc. § 917.1(d)*]. When, however, a judgment or order for the payment of money does not consist solely of an award for costs, any costs that are awarded by the trial court under *Code Civ. Proc. §§ 1021-1038* are added to the amount of the judgment or order for the purpose of determining the amount of the undertaking [*Code Civ. Proc. § 917.1(d)*].

Code Civ. Proc. § 917.1(d) requires the bonding of an entire judgment, including some otherwise nonbondable aspects (*i.e.*, an award of costs that is by itself nonbondable), so long as some part of the judgment is bondable [*Banks v. Manos (1991) 232 Cal. App. 3d 123, 129, 283 Cal. Rptr. 318* (including award of attorney's fees pursuant to contract in amount of money judgment for purpose of determining amount of undertaking to stay execution of that judgment pending appeal)]. For example, contractual attorney's fees awarded by the trial court as an item of costs under *Civ. Code § 1717* can be added to the judgment for this purpose [*see Chamberlin v. Dale's R.V. Rentals, Inc. (1986) 188 Cal. App. 3d 356, 362, 232 Cal. Rptr. 785* ; *see also Code Civ. Proc. § 1033.5(a)(10)(A)* (attorney's fees authorized by contract are among items allowable in award of costs pursuant to *Code Civ. Proc. § 1032*)].

When an appeal is solely from an order awarding costs and attorney's fees after entry of judgment, an undertaking is not required, even though an appeal from the judgment would have required an undertaking. *Code Civ. Proc. § 917.1(d)* eliminates the need for an undertaking in this situation [*Ziello v. Superior Court (1999) 75 Cal. App. 4th 651, 655, 89 Cal. Rptr. 2d 398]* .

For detailed discussion and forms relating to costs awards under *Code Civ. Proc. §§ 1021-1038*, including attorney's fees when authorized as an item of costs, see Ch. 174, *Costs and Attorney's Fees* .

[c] Judgment or Order Solely for Costs

A judgment that awards no monetary recovery other than "routine" costs under *Code Civ. Proc. § 1033.5* is subject to

the automatic stay of *Code Civ. Proc. § 916* (discussed in *§ 43.11*[1]). The limitation is based on the practical concern that, if a judgment for costs were a money judgment within the meaning of *Code Civ. Proc. § 917.1*, virtually every judgment would be within the scope of that section and an undertaking would be required to stay every judgment pending appeal [*see Bank of San Pedro v. Superior Court (1992) 3 Cal. 4th 797, 801, 12 Cal. Rptr. 2d 696, 838 P. 2d 218* ; *McCallion v. Hibernia etc. Society (1893) 98 Cal. 442, 445, 33 P. 329* (construing predecessor to § 917.1)].

If, however, the only monetary recovery is an award of costs *other* than those listed in *Code Civ. Proc. § 1033.5*, then the judgment "directs the payment of money" under *Code Civ. Proc. § 917.1*, and an undertaking is required to stay enforcement [*see Bank of San Pedro v. Superior Court (1992) 12 Cal. Rptr. 2d 696, 838 P.2d 218* ; *Pecsok v. Black (1992) 7 Cal. App. 4th 456, 9 Cal. Rptr. 2d 12]* . Courts sometimes refer to these costs as "non-routine." A judgment may be considered to be one for non-routine costs if those costs are not ordinarily a part of costs awarded at trial, or if the costs are not the type included in virtually every case and were an issue that was directly litigated by the parties [*Bank of San Pedro v. Superior Court (1992) 12 Cal. Rptr. 2d 696, 838 P.2d 218]* .

For example, an award of expert witness fees payable under *Code Civ. Proc. § 998*, that is, an award of such fees payable to a defendant when a plaintiff has rejected that defendant's written offer to compromise but subsequently failed to obtain a more favorable judgment, requires a bond in order to stay enforcement [*see Bank of San Pedro v. Superior Court (1992) 3 Cal. 4th 797, 802-803, 12 Cal. Rptr. 2d 696, 838 P. 2d 218* ; *Fish v. Guevara (1993) 12 Cal. App. 4th 142, 148, 15 Cal. Rptr. 2d 329* ; for discussion and forms relating to the recovery of costs and expenses pursuant to *Code Civ. Proc. § 998, see* Ch. 520, *Settlement and Release*]. These fees are "non-routine" costs in the sense that, under *Code Civ. Proc. § 1033.5*, fees for experts whose testimony was not court ordered are not recoverable as costs, "except when expressly authorized by law" [*Code Civ. Proc. § 1033.5(b)(1)*; *see* further discussion in Ch. 174, *Costs and Attorney's Fees*].

An award of attorney's fees as an element of costs, unless accompanied by a money judgment, does not require a bond to stay enforcement [*Bank of San Pedro v. Superior Court (1992) 3 Cal. 4th 797, 801, 12 Cal. Rptr. 2d 696, 838 P. 2d 218* ; *see* discussion in [1][b][ii], *above*]. An award of attorneys' fees pursuant to a sanctions statute, however, is not a "routine" cost awarded under *Code Civ. Proc. § 1033.5*, and must be bonded to stay enforcement [*Banks v. Manos (1991) 232 Cal. App. 3d 123, 127-129, 283 Cal. Rptr. 318]* . Under *Code Civ. Proc. § 1033.5*, attorney's fees are recoverable as an item of costs when an award of such fees is authorized by contract, statute, or law [*Code Civ. Proc. § 1033.5(a)(10), (b)(5)*]. The distinction in these cases would be that an award of sanctions, although authorized by statute and including compensation for the expense of attorney's fees incurred, is nevertheless an award to punish misconduct, and not an award of attorney's fees authorized by statute within the meaning of *Code Civ. Proc. § 1033.5* [*see* further discussion of attorney's fees recoverable as costs in Ch. 174, *Costs and Attorney's Fees* , and further discussion of sanction awards in Ch. 510, *Sanctions*].

One court has rejected the distinction between routine and non-routine costs, and applied a "bright line" rule that all costs that are expressly authorized to be awarded under the provisions of *Code Civ. Proc. § 1033.5* are to be treated alike for purposes of applying *Code Civ. Proc. § 916 et seq.* [*Pecsok v. Black (1992) 7 Cal. App. 4th 456, 9 Cal. Rptr. 2d 12]* .

PRACTICE TIP:

Always Check Your Costs Award. The law regarding costs is a waiting trap for the unwary. The "routine" versus "non-routine" distinction has been fleshed out in several cases, as discussed *above*, and these can provide some help. For any significant award of costs, however, counsel should never assume that an undertaking will not be required, but research the issue and make sure his or her client's interests are protected.

For detailed discussion of the items recoverable as costs under *Code Civ. Proc. § 1033.5*, see Ch. 174, *Costs and Attorney's Fees* .

[2] Judgment for Delivery of Personal Property

[a] Undertaking Required

Unless an undertaking is given, the perfecting of an appeal does not stay enforcement of a judgment or order that directs the assignment or delivery of personal property, including documents, whether by the appellant or another party to the action, or the sale of personal property on the foreclosure of a mortgage or other lien [*Code Civ. Proc. § 917.2*].

For a form of undertaking to stay enforcement of a judgment or order generally, see *§ 43.76[1]*. For an alternative form of motion and declaration for use in fixing the amount of an undertaking under *Code Civ. Proc. § 917.2* after deposit of the personal property with an officer appointed for that purpose (discussed in [c], *below*), see *§ 43.77*.

[b] Amount and Conditions of Undertaking

The amount and conditions of the undertaking are fixed by the trial court and governed by statute. The undertaking must provide that the appellant or party ordered to assign or deliver the property will obey and satisfy the order of the appellate court and will not commit or permit any damage to the property. The undertaking must also provide that, if the judgment or order is affirmed or the appeal is withdrawn or dismissed, then the appellant will pay the damage suffered to such property and the value of the use of such property for the period of the delay caused by the appeal [*Code Civ. Proc. § 917.2*].

[c] Placement of Property With Designated Custodian

The appellant may cause the property to be placed in the custody of an officer designated by the court to abide the order of the appellate court, and the trial court must consider this fact in fixing the amount of the undertaking [*Code Civ. Proc. § 917.2*]. The appellant may, by noticed motion, request the court to designate an officer as custodian of the property. The language of the statute is not absolute, and the trial court has discretion to deny the motion. [*Mason v. Superior Court (1972) 23 Cal. App. 3d 913, 914-916, 100 Cal. Rptr. 557]* .

An officer designated by the court to be the custodian of personal property has duties and responsibilities similar to those of a receiver. *Code Civ. Proc. § 546(b)(4)* specifically authorizes the appointment of a receiver after judgment to preserve property during the pendency of an appeal. In certain instances the provision for appointment of a receiver pending appeal may overlap the provision for appointment of a custodian of personal property pending appeal under *Code Civ. Proc. § 917.2* [*see Code Civ. Proc. § 564(b)(4)*]. One such instance is when the custodian is appointed to take possession and control of share certificates representing a controlling interest in a corporation, which is substantively similar to appointment of a receiver under *Code Civ. Proc. § 564(b)(4)* to take charge of the business. In these cases, the safeguards attached to appointment of receivers apply by analogy when a custodian is appointed. For example, the prohibition under *Code Civ. Proc. § 566* against the appointment as a receiver of a party, an attorney for a party, an interested person, or certain relatives of a judge applies by analogy to insure the appointment of a disinterested person to act as custodian pending appeal [*Davis v. CustomComponent Switches, Inc. (1970) 13 Cal. App. 3d 21, 29-30, 91 Cal. Rptr. 181]* .

For detailed discussion and forms relating to appointment of receivers and receivership generally, see Ch. 486, *Receivers* . For a form of motion and declaration for a an order designating an officer as custodian of personal property, see *§ 43.77*.

[d] Sale of Perishable Property

If the judgment or order appealed from directs the sale of perishable property, the trial court may order the property to be sold and the proceeds to be deposited with the clerk of the trial court to abide the order of the appellate court. The trial court must also consider this fact in fixing the amount of the undertaking [*Code Civ. Proc. § 917.2*].

[3] Judgment Directing Execution of Instruments

The perfecting of an appeal does not stay enforcement of the judgment or order directing the execution of one or more instruments, unless the instrument or instruments are executed and deposited in the office of the clerk of the court in which the original judgment or order was entered. The disposition of the deposited instrument or instruments is subject to order of the appellate court upon determination of the appeal [*Code Civ. Proc. § 917.3*].

[4] Judgment Directing Sale of Real Property

Unless an undertaking is given, the perfecting of an appeal does not stay enforcement of the judgment or order that directs the sale, conveyance, or delivery of possession of real property that is in the possession or control of the appellant or the party ordered to sell, convey, or deliver possession of the property [*Code Civ. Proc. § 917.4*]. For a form of undertaking to stay enforcement of a judgment or order generally, see *§ 43.76[1]*.

Stays of enforcement pending appeal in unlawful detainer proceedings are governed by *Code Civ. Proc. § 1178(a)*, not *Code Civ. Proc. § 917.4* [*Selma Auto Mall II v. Superior Court (1996) 44 Cal. App. 4th 1672, 1681, 52 Cal. Rptr. 2d 599]* . For detailed discussion and forms relating to unlawful detainer proceedings, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

The undertaking is in an amount fixed by the trial court and must provide that the appellant or party ordered to sell, convey, or deliver possession of the property will not commit or permit any waste on the property. The undertaking must also provide that, if the judgment or order appealed from is affirmed or the appeal is withdrawn or dismissed, the appellant will pay the damage suffered by the waste and the value of the use and occupancy of the property, or the part of it as to which the judgment or order is affirmed, from the time of the taking of the appeal until the delivery of the possession of the property. If the judgment or order directs the sale of mortgaged real property and the payment of any deficiency, the undertaking must also provide for the payment of any deficiency [*Code Civ. Proc. § 917.4*].

[5] Order Appointing Receiver

Unless an undertaking is given, the perfecting of an appeal does not stay enforcement of the judgment or order that appoints a receiver [*Code Civ. Proc. § 917.5*]. For a form of undertaking to stay enforcement of a judgment or order generally, see *§ 43.76[1]*.

The undertaking is in a sum fixed by the trial court and must be given on condition that, if the judgment or order is affirmed or the appeal is withdrawn or dismissed, the appellant will pay all damages that the respondent may sustain by reason of the stay in the enforcement of the judgment [*Code Civ. Proc. § 917.5*].

[6] Judgment or Order Directing Two or More Acts Covered Under Code Civ. Proc. §§ 917.1-917.5

The perfecting of an appeal does not stay enforcement of the judgment or order that directs the performance of two or more of the acts specified under *Code Civ. Proc. §§ 917.1-917.5* (discussed in [1] through [5], *above*), unless the appellant complies with the requirements of each applicable section [*Code Civ. Proc. § 917.6*].

[7] Right to Attach Order

Unless an undertaking is given, the perfecting of an appeal does not stay the enforcement of a right to attach order [*Code Civ. Proc. § 917.65*]. For a form of undertaking to stay enforcement of a judgment or order generally, see *§ 43.76[1]*.

The undertaking must be in an amount specified in the right to attach order as the amount to be secured by the attachment. The undertaking must be on the condition that if the right to attach order is not reversed, and plaintiff

recovers judgment in the action in which the right to attach order was issued, the appellant must pay the amount of the judgment, together with any interest that may have accrued. The liability on the undertaking may be enforced if the judgment is not paid within 30 days after it becomes final. If a surety on the undertaking pays the judgment, either with or without action, the surety is substituted to the rights of the creditor and is entitled to control, enforce, and satisfy the judgment in all respects as if the surety had recovered the judgment [*Code Civ. Proc. § 917.65*].

For discussion of an undertaking to continue, pending appeal, a preexisting levy of attachment (as distinguished from an undertaking as a condition to a stay of enforcement of a right to attach order), see *§ 43.18*.

For detailed discussion and forms relating to attachment proceedings in the trial court generally, including right to attach orders, see Ch. 62, *Attachment* .

[8] Judgment or Order Relating to Child Custody or Exclusion From Dwelling

[a] Child Custody Matters

The perfecting of an appeal does not stay proceedings as to those provisions of a judgment or order that award, change, or otherwise affect the custody, including the right of visitation, of a minor child in any civil action, in an action or special proceeding filed under the Juvenile Court Law (*Welf. & Inst. Code § 245 et seq.*) [*Code Civ. Proc. § 917.7*; *see In re Anna S. (2010) 180 Cal. App. 4th 1489, 1499, 103 Cal. Rptr. 3d 889* ; *In re Natasha A. (1996) 42 Cal. App. 4th 28, 39]* .

The trial court may in its discretion stay execution of provisions pending review on appeal or pending such other periods that it may deem appropriate. Further, in the absence of a writ or order of a reviewing court providing otherwise, the provisions of the judgment or order allowing, or eliminating restrictions against, removal of the minor child from the state are stayed by operation of law for a period of seven calendar days from the entry of judgment or order by a juvenile court in a dependency hearing, or for a period of 30 days from the entry of judgment or order by any other trial court. The periods during which these provisions allowing, or eliminating restrictions against, removal of the minor child from the state are stayed, are subject to further stays as ordered by the trial court or by the juvenile court pursuant to *Code Civ. Proc. § 917.7*. An order directing the return of a child to a sister state or country, including any order effectuating that return, made in a proceeding brought pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act or the Hague Convention on the Civil Aspects of International Child Abduction is not a judgment or order which awards, changes, or otherwise affects the custody of a minor child within the meaning of *Code. Civ. Proc. § 917.7*; therefore it is not subject to the automatic stay provisions of *Code. Civ. Proc. § 917.7* [*Code Civ. Proc. § 917.7*].

In many proceedings involving the custody of a minor, an appeal may be regarded as an inadequate means of reviewing trial court error, even if a stay is granted, due to quickly changing circumstances and the minor's best interests. Review by extraordinary writ is favored, and in some instances the court of appeal will treat a motion for a stay as a petition for a writ of mandate, in order to resolve the matter more quickly [*see Zenide v. Superior Court (1994) 22 Cal. App. 4th 1287, 1293, 27 Cal. Rptr. 2d 703* ; *Speelman v. Superior Court (1983) 152 Cal. App. 3d 124, 128, 199 Cal. Rptr. 784]* .

It is best to determine the practice prevalent in the particular type of custody proceeding in which review is sought. For detailed discussion and forms relating to the various proceedings involving the custody of minors, see Ch. 223, *Dissolution of Marriage: Child Custody* . See also discussion and forms in Ch. 12E, *Adoptions: Attack on Decree* ; Ch. 328, *Juvenile Courts: Dependency Proceedings* ; Ch. 329, *Juvenile Courts: Delinquency Proceedings* ; Ch. 394, *Parent and Child* ; and Ch. 412, *Paternity* .

For a form of motion to stay a judgment or order relating to the custody of a minor under *Code Civ. Proc. § 917.7, §*

43.78.

[b] Proceedings for Temporary Exclusion From Dwelling

The perfecting of an appeal does not stay the provisions of a judgment or order for the temporary exclusion of a party from a dwelling as provided in the Family Code. The trial court may in its discretion stay execution of such provisions pending review on appeal or for such other period or periods that it may deem appropriate [*Code Civ. Proc. § 917.7*].

For a form of motion to stay such a provision in a judgment or order under the Family Code, see *§ 43.78*. For detailed discussion and forms of proceedings relating to proceedings for the exclusion from a dwelling pursuant to the Family Law Code, see Ch. 293, *Harassment and Domestic Violence* .

[9] Judgment or Order Relating to Unlawfully Held Public Office

Absent an order of the trial court or a writ of supersedeas providing otherwise, the perfecting of an appeal does not stay proceedings in which a party to the proceeding has been adjudged guilty of usurping, or intruding into, or unlawfully holding, a public office, civil or military, within California [*Code Civ. Proc. § 917.8*; for discussion and forms for use in proceedings to adjudge a party guilty of usurping, intruding into, or unlawfully holding a public office, *see* Ch. 483, *Quo Warranto*].

For a form of motion for an order to stay enforcement of a judgment or order relating to an unlawfully held public office, see *§ 43.79*. For a form of petition for issuance of a writ of supersedeas by the appellate court, see *§ 43.90*.

[10] Judgment or Order Directing Inspection of Corporate Records

Absent an order of the trial court or a writ of supersedeas providing otherwise, the perfecting of an appeal does not stay proceedings in which a judgment or order directs a corporation or its officers or agents to give to a director, stockholder, or member of such corporation a reasonable opportunity to inspect or make copies of books, papers, or documents of the corporation as the trial court finds that the director, stockholder, or member is entitled by law to inspect or copy [*Code Civ. Proc. § 917.8*; for discussion and forms for use in proceedings to compel inspection of corporate records, *see* Ch. 165, *Corporations: Corporate Records and Reports* .].

For a form of motion for an order to stay enforcement of a judgment or order relating to inspection of corporate records, see *§ 43.79*. For a form of petition for issuance of a writ of supersedeas by the appellate court, see *§ 43.90*.

[11] Judgment or Order Adjudging That Building Is Nuisance

Absent an order of the trial court or a writ of supersedeas providing otherwise, the perfecting of an appeal does not stay proceedings in which a judgment or order adjudges a building or place to be a nuisance, nor any part of such judgment or order directing the closing or discontinuance of any specific use of a building or place for any period of time [*Code Civ. Proc. § 917.8*; *see also Civ. Code § 3479 et seq.*, governing nuisance generally, and discussion and forms in Ch. 391, *Nuisance*].

For a form of motion for an order to stay enforcement of a judgment or order relating to the adjudication of a building or place as a nuisance, see *§ 43.79*. For a form of petition for issuance of a writ of supersedeas by the appellate court, see *§ 43.90*.

[12] Judgment or Order Relating to Hazardous Waste

The perfecting of an appeal does not stay enforcement of the judgment or order, or its underlying administrative order, under either of the following [*Code Civ. Proc. § 917.15*]:

- *Health & Safety Code § 25358.3(a)*, ordering a responsible party to take appropriate removal or other remedial actions in response to a release or threatened release of a hazardous substances.

- *Health & Safety Code § 25181*, ordering the party to comply with *Health & Safety Code § 25100 et seq.* (hazardous waste control) or any rule, regulation, permit, covenant, standard, requirement, or order issued, adopted, or executed pursuant to these sections.

Code Civ. Proc. § 917.15 does not, in itself, provide any procedures for obtaining a stay of enforcement pending appeal. For discussion of the trial court's and reviewing court's general powers to order the stay of any judgment or order, see respectively *§§ 43.19* and *43.21*.

For further discussion and forms relating to orders issued under these provisions of the Heath & Safety Code, see Ch. 418, *Pollution and Environmental Matters* .

[13] Judgment or Order in Which Trial Court Has Discretion to Require Undertaking

The perfecting of an appeal does not stay enforcement of a judgment or order in cases not otherwise provided for in *Code Civ. Proc. §§ 917.1-917.8* (discussed in [1] through [12], *above*) when the trial court, in its discretion, requires an undertaking and the undertaking is not given, in any of the following cases [*Code Civ. Proc. § 917.9(a)*]:

- The appellant is found to possess money or other property of the respondent [*Code Civ. Proc. § 917.9(a)(1)*].

- The appellant is required to perform an act for the respondent's benefit [*Code Civ. Proc. § 917.9(a)(2)*].

- The judgment against the appellant is solely for costs awarded under *Code Civ Proc. § 1021 et seq.* [*Code Civ. Proc. § 917.9(a)(3)*; *see also* discussion in [1][b][ii] and [1][c], *above*].

The undertaking in any such case is required to be in a sum fixed by the court and conditioned on the performance of the judgment or order appealed from in the event that the judgment or order is affirmed or the appeal is withdrawn or dismissed. The undertaking must also require that if the judgment or order appealed from or any part of it is affirmed, or the appeal is withdrawn or dismissed, the appellant will pay all damages which the respondent may sustain by reason of the stay in the enforcement of the judgment [*Code Civ. Proc. § 917.9(b), (c)*]. "Damages" means reasonable compensaton for the loss of use of the money or property, or payment of costs under *Code Civ. Proc. § 1021 et seq.* if the judgment against appellant is solely for costs [*Code Civ. Proc. § 917.9(d)*].

For a form of undertaking to stay enforcement of a judgment or order generally, see *§ 43.76[1]*.

[14] Judgment or Order Sought by Government to Abate Illegal Activities

Absent an order of the trial court or a writ of supersedeas providing otherwise, the perfecting of an appeal does not stay proceedings in which a judgment or order, including, but not limited to, a temporary restraining order or preliminary injunction, grants relief in an action brought by a governmental agency under either of the following [*Code Civ. Proc. § 917.8*]:

- *Penal Code § 11225 et seq.*, relating to buildings where illegal gambling, lewdness, assignation, or prostitution occurs.

- *Health and Safety Code § 11570 et seq.*, relating to buildings where selling, serving, storing, keeping, manufacturing, or giving away controlled substances occurs.

For a form of petition for issuance of a writ of supersedeas by the appellate court, see *§ 43.90*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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5-43 California Forms of Pleading and Practice--Annotated § 43.16

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§ 43.16 Proceedings Under Probate Code

[1] Appeal Generally Stays Judgment or Order

Judgments and orders in probate proceedings are not expressly excluded from the automatic stay of *Code Civ. Proc. § 916* pursuant to any of the provisions of *Code Civ. Proc. §§ 917.1-917.9*. Thus, under prior law they were generally held to be stayed automatically under *Code Civ. Proc. § 916* [*see Estate of Dabney (1951) 37 Cal. 2d 402, 407, 232 P.2d 481* (decree of distribution; decided under predecessor statute); *Estate of Hultin (1947) 29 Cal. 2d 825, 833, 178 P.2d 756* (order appointing executor; decided under predecessor statute); *Estate of Sam Lee (1945) 26 Cal. 2d 295, 296, 158 P.2d 193* (order appointing public administrator; decided under predecessor statute); *Estate of Neilson (1960) 181 Cal. App. 2d 769, 772, 5 Cal. Rptr. 542* (decree determining heirship; decided under predecessor statute); *Estate of Schwartz (1948) 87 Cal. App. 2d 569, 573, 197 P.2d 223* (order appointing executor; decided under predecessor statute); *see also* discussion in *§ 43.13[2]*].

Such judgments and orders are still generally stayed, but with certain limits set out in the Probate Code. Specifically, an appeal from a judgment or order under *Prob. Code § 1300 et seq.* (appeals in proceedings governed by Probate Code) stays the operation and effect of that judgment or order pending appeal, unless certain exceptions, discussed in [2], *below*, are satisfied [*Prob. Code § 1310(a)*].

For detailed discussion and forms relating to proceedings under the Probate Code, including provisions governing appeals (*Prob. Code § 1300 et seq.*), see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , through Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships* , and Ch. 440, *Probate: Is Probate Necessary ?*

[2] Exceptions to General Stay in Probate Proceedings

[a] Trial Court Retains Power to Order Exercise of Fiduciary Powers to Prevent Loss or Injury

Notwithstanding that an appeal is taken from a judgment or order in a probate proceeding, the trial court may do the following for the purpose of preventing injury or loss to a person or property [*Prob. Code § 1310(b)*]:

- Direct the exercise of the powers of the fiduciary, from time to time as if no appeal were pending.

- Appoint a temporary guardian or conservator of the person or estate, or both, or a special administrator, to exercise such powers, from time to time, as if no appeal were pending.

All acts of the fiduciary pursuant to the directions of the court made under *Prob. Code § 1310(b)* are valid, irrespective of the result of the appeal. An appeal of the directions made by the court under *Prob. Code § 1310(b)* does not operate to stay these directions [*Prob. Code § 1310(b)*].

[b] Judgment or Order in Proceedings for Guardianship of the Person Not Automatically Stayed

In proceedings for guardianship of the person, *Code Civ. Proc. § 917.7* applies [*Prob. Code § 1310(c)*]. For discussion of *Code Civ. Proc. § 917.7*, see *§ 43.15[8]*.

[c] Other Judgments and Orders Not Automatically Stayed When Trial Court Exercises Discretion to Require Undertaking

An appeal does not stay the operation and effect of a judgment or order in probate proceedings if the trial court requires an undertaking as provided in *Code Civ. Proc. § 917.9*, and that undertaking is not given [*Prob. Code § 1310(d)*]. For discussion of *Code Civ. Proc. § 917.9*, see *§ 43.15[13]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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5-43 California Forms of Pleading and Practice--Annotated § 43.17

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§ 43.17 Proceedings for Injunctive Relief

A prohibitory injunction is self executing and its operation is not stayed by an appeal. A mandatory injunction, however, is automatically stayedby an appeal. As a general rule, an injunction is prohibitory if it requires a person to refrain from a particular act, and an injunction is mandatory if it compels performance of an affirmative act that changes the position of the parties [*Davenport v. Blue Cross of California (1997) 52 Cal. App. 4th 435, 446, 60 Cal. Rptr. 2d 641]* . Thus, an injunction that requires a party to perform a physical act or surrender property is likewise mandatory [*Kettenhofen v. Superior Court (1961) 55 Cal. 2d 189, 191, 10 Cal. Rptr. 356, 358 P.2d 684]* .

Resolving whether an injunction is prohibitory or mandatory can be a difficult, because an injunction that is entirely negative or prohibitory in form may prove on analysis to be mandatory and affirmative in essence or effect. An injunction that has incidental mandatory aspects may still be prohibitory [*Youngblood v. Wilcox (1989) 207 Cal. App. 3d 1368, 1372 n.1, 255 Cal. Rptr. 527]* . An injunction may also include both prohibitory and mandatory components, in which event an appeal will stay operation of the mandatory features but not those that are prohibitory. [*Kettenhofen v. Superior Court (1961) 55 Cal. 2d 189, 191, 10 Cal. Rptr. 356, 358 P.2d 684* ; *Food & Grocery Bureau v. Garfield (1941) 18 Cal. 2d 174, 176 177, 114 P.2d 579]* . The substance of the injunction, not the form, determines whether it is mandatory or prohibitory [*Davenport v. Blue Cross of California (1997) 52 Cal. App. 4th 435, 447, 60 Cal. Rptr. 2d 641]* .

An injunction restraining the further continuance of an existing condition does not take on the character of a mandatory injunction merely because it enjoins the defendants from continuing to do the forbidden acts. An injunction that restrains the continuance of an act or series of acts may be just as much of a preventive or prohibitory injunction as one that restrains the commission of an act [*Dry Cleaners & Dyers Institute v. Reiss (1936) 5 Cal. 2d 306, 309, 54 P.2d 470]* .

If the trial court mistakenly attempts to enforce a mandatory injunction after an appeal has been taken, the appellant is

entitled to issuance of a writ of supersedeas by the appellate court. Even in the case of a purely prohibitory injunction, where there is no automatic stay and the appellant is not entitled to a writ of supersedeas as a matter of right, the appellate court has inherent power to issue the writ if it is necessary or proper to the complete exercise of its appellate jurisdiction. [*Food & Grocery Bureau v. Garfield (1941) 18 Cal. 2d 174, 176 177, 114 P.2d 579* ; *see also Wind v. Hite (1962) 58 Cal. 2d 415, 416, 24 Cal. Rptr. 683, 374 P.2d 643* , and discussion in *§ 43.21*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsMandatory InjunctionsCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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5-43 California Forms of Pleading and Practice--Annotated § 43.18

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§ 43.18 Proceedings Involving Levy of Attachment

When a party has levied an attachment in the trial court proceeding, an appeal by that party does not automatically continue that attachment. Tocontinue the attachment, the appellant must execute and file an undertaking to the effect that appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in the event that the order of the court below is sustained in favor of the respondent [*Code Civ. Proc. § 921*]. The appellant must also perfect the appeal within five days after written notice of the entry of the order from which the appeal is taken [*Code Civ. Proc. § 921*; for discussion and forms relating to the perfecting of an appeal, *see* Ch. 42, *Appeal: Notice of Appeal*].

The amount of the undertaking required under *Code Civ. Proc. § 921* is the amount fixed by the trial court on a motion by the respondent as provided in *Code Civ. Proc. § 489.410* [*Code Civ. Proc. § 921*; *see Code Civ. Proc. § 489.410(a)* (defendant may move for an increase in the original undertaking on attachment, after entry of judgment and before perfection of appeal, and the trial court may order an increase in an amount, if any, that is justified by the detriment reasonably to be anticipated by continuing the attachment)]. If no order has been made under *Code Civ. Proc. § 489.410*, the undertaking required under *Code Civ. Proc. § 921* is double the amount of the debt claimed by the appellant [*Code Civ. Proc. § 921*].

If the respondent is not satisfied with the undertaking as determined under *Code Civ. Proc. § 921* or *Code Civ. Proc. § 489.410*, the trial court, on motion of the respondent made within 60 days after perfecting the appeal, may order an increase in the amount of the undertaking in such amount as is justified by the detriment reasonably to be anticipated by continuing the attachment [*Code Civ. Proc. § 921*]. If an order increasing the amount of the undertaking is made under *Code Civ. Proc. § 921* or *Code Civ. Proc. § 489.410*, and the appellant fails to execute and file the undertaking within 10 days after the order is made, the attachment is discharged and the attached property is released [*Code Civ. Proc. § 921*; *see also Code Civ. Proc. § 489.410(a)*].

For a form of motion to increase an undertaking in order to continue an existing levy of attachment pending appeal, see *§ 43.74*. For a form of increased undertaking *§ 43.76[3]*. For detailed discussion and forms relating to attachment proceedings in the trial court generally, including proceedings under *Code Civ. Proc. § 489.410*, see Ch. 62, *Attachment* .

For discussion of an undertaking as a condition to a stay of enforcement of a right to attach order (as distinguished from an undertaking to continue in effect a preexisting levy of attachment), see *§ 43.15*[7].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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5-43 California Forms of Pleading and Practice--Annotated § 43.19

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§ 43.19 Trial Court's General Power to Order Stay

The trial court may stay the enforcement of any judgment or order, subject to the provisions of *Code Civ. Proc. § 918(b)* [*Code Civ. Proc. § 918(a)*].

Code Civ. Proc. § 918(b), in turn, provides that, if the enforcement of a judgment or order is one that may be stayed only the giving of an undertaking, the trial court does not have power to stay enforcement, without the consent of the adverse party, except for a limited period up to but not beyond 10 days beyond the last date on which a notice of appeal may be filed [*Code Civ. Proc. § 918(b)*; for discussion of the applicable deadlines for filing a notice of appeal, *see* Ch. 42, *Appeal: Notice of Appeal*].

The court's power under *Code Civ. Proc. § 918* applies whether or not an appeal will be taken from the judgment or order and whether or not a notice of appeal has been filed [*Code Civ. Proc. § 918(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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5-43 California Forms of Pleading and Practice--Annotated § 43.20

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§ 43.20 Provisions Relating to Undertaking Required as Condition for Stay

[1] Waiver of Undertaking or Consent to Reduction

The beneficiary of an undertaking given in an action or proceeding may, in writing, consent to an undertaking in an amount less than the amount required by statute or may waive the undertaking altogether [*Code Civ. Proc. § 995.230*; *see also Merritt v. J. A. Stafford Co. (1968) 68 Cal. 2d 619, 625, 68 Cal. Rptr. 447, 440 P.2d 927* (decided under prior law)].

Although a consent to reduction or waiver is based on the particular circumstances in any given case, one common consideration is the eventual award of costs on appeal. Subject to certain exceptions, the prevailing party is entitled to costs on appeal [*see Cal. Rules of Ct., Rules 8.278(a)*], and recoverable costs on appeal include the cost to procure a surety bond, including the premium and the cost to obtain a letter of credit as collateral, unless the trial court determines the bond was unnecessary [*Cal. Rules of Ct., Rule 8.278(d)(1)(F)*; *see also Code Civ. Proc. § 995.250*; *Stockton Theatres, Inc. v. Palermo (1958) 51 Cal. 2d 346, 347-352, 333 P.2d 10* (inadequacy of appellant's assets to satisfy judgment makes bond necessary as a matter of law)].

For further discussion relating to the recovery of costs on appeal in Ch. 53, *Appeal: Remittitur and Costs on Appeal*, § 53.30 et seq.

For a form of waiver of undertaking, see *§ 43.70*.

[2] Deposit in Lieu of Undertaking

A deposit may be given by the principal in lieu of a bond or undertaking, and has the same force and effect, is treated the same, and is subject tothe same conditions, liability, and statutory provisions as a bond or undertaking [*see Code Civ. Proc. §§ 995.710, 995.730*].

Deposit in the trial court of the amount of the undertaking provided for by *Code Civ. Proc. §§ 916-923*, in the amount fixed by the court, is the equivalent to filing the undertaking [*Code Civ. Proc. § 995.710 et seq.*]. The deposit must be in an amount or have a face value, or in the case of bearer bonds or bearer notes, have a market value, equal to or in excess of the amount required to be secured by the bond or undertaking if the bond were given by an admitted surety insurer [*Code Civ. Proc. § 995.710(b)*].

The deposit in lieu of an undertaking may be any of the following [*Code Civ. Proc. § 995.710(a)(1)-(6)*]:

- Lawful money of the United States.
- Bearer bonds or bearer notes of the United States or California.
- Certificates of deposit.
- Savings accounts.
- Investment certificates or share accounts issued by savings associations.
- Certificates for funds or share accounts issued by a credit union.

The deposit must be accompanied by an agreement executed by the principal authorizing the officer to collect, sell, or otherwise apply to deposit to enforce the liability of the principal on the deposit. The agreement must include the address for service on the principal [*Code Civ. Proc. § 995.710(c)*; *see Code Civ. Proc. § 995.160* (defining "officer")].

Unless agreed by stipulation of the principal and beneficiary, the market value of bearer bonds or notes is determined by the court in the manner prescribed in *Code Civ. Proc. § 995.720(b)* and *(c)* [*Code Civ. Proc. § 995.720(a)*]. A certified copy of the stipulation or court order must be delivered to the officer at the time of the deposit of the bonds or notes [*Code Civ. Proc. § 995.720(a)*].

The party who wishes to deposit bearer bonds or notes in lieu of an undertaking may file a written application with the court to determine the market value of the bonds or notes. The application must be served on the beneficiary and proof of service must be filed with the application. The application must contain all of the following [*Code Civ. Proc. § 995.720(b)*]:

- A specific description of the bonds or notes.
- A statement of the current market value of the bonds or notes as of the date of the filing of the application.
- A statement of the amount of the bonds or notes that the principal believes equal the required amount of the deposit.

The trial court must hear the application not less than five days or more than 10 days after service of the application. If at the time of the hearing there is no objection to the current market value of the bonds or notesalleged in the application, the court will fix the amount of the bonds or notes on the basis of the market value alleged in the application. If the beneficiary contends that the current market value of the bonds or notes is less than alleged in the application, then the principal must offer evidence in support of the application, and the beneficiary may offer evidence in opposition. At the conclusion of the hearing, the court makes an order determining the market value of the bonds or notes and fixes and determines the amount of the bonds or notes to be deposited by the principal [*Code Civ. Proc. §*

995.720(c)].

Because a respondent may waive any undertaking required by *Code Civ. Proc. §§ 916-923*, or may stipulate to limiting the amount of an undertaking [*see Code Civ. Proc. § 995.230*, and discussion of consent and waiver in [1], *above*], the beneficiary of the deposit may stipulate to a security device not specifically provided for by statute. Generally, corporate sureties require substantial collateral before issuing an undertaking to stay enforcement pending appeal, perhaps even the equivalent of the amount of the bond itself. Deposit of the same assets with a third party mutually agreed upon may provide a respondent with security equivalent to an undertaking and at the same time eliminate the premium on a surety bond which might otherwise be taxed as a cost on appeal [Cal. Rules of Ct., Rule 8.27d(d)(1)(F); for further discussion and forms relating to the recovery of costs on appeal, see Ch. 53, *Appeal: Remittitur and Costs on Appeal*].

For a form of stipulation or consent to reduce to alter the form of undertaking, see *§ 43.71*. For more detailed discussion and forms relating to deposits in lieu of a bond or undertaking, see Ch. 538, *Suretyship, Bonds, and Undertakings* . For discussion and forms relating to stipulations generally, see Ch. 533, *Stipulations* .

[3] Limitation of Undertaking or Other Security When Appellant Is Personal Representative

The trial court may, in its discretion, dispense with or limit the security (*i.e.*, undertaking or other condition) required by any of the provisions of *Code Civ. Proc. §§ 916-923*, if the appellant is an executor, administrator, trustee, guardian, conservator, or other person acting in another's right [*Code Civ. Proc. § 919*].

[4] Sufficiency of Sureties Executing Undertaking

[a] Execution of Undertaking by Sureties

An undertaking must be executed by two or more sufficient personal sureties or by one sufficient admitted surety insurer or by any combination of sufficient personal sureties and admitted surety insurers [*Code Civ. Proc. § 995.310*; *see also Code Civ. Proc. § 995.120* (defining admitted surety insurer), *Code Civ. Proc. § 995.185* (defining surety)].

The undertaking must be in writing signed by the sureties under oath, and the sureties are jointly and severally liable on the obligations of the undertaking [*Code Civ. Proc. § 995.320*].

[b] Sufficiency of Personal Surety

A personal surety is sufficient if all of the following are satisfied [*Code Civ. Proc. § 995.510(a)*; *see also Code Civ. Proc. § 995.185* (defining surety)]:

- He or she is a person other than the principal.
- He or she is not a member of the State Bar or an officer of the court.
- He or she is a resident, and either an owner of real property or householder, in California.
- He or she is worth the amount of the bond or undertaking in real or personal property, or both, situated in California, over and above all debts and liabilities, exclusive of property exempt from enforcement of a money judgment.

An undertaking executed by personal securities must be accompanied by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of the qualifications of each personal surety [*Code Civ. Proc. § 995.520(a)*].

The affidavit or declaration of qualification must contain all the following [*Code Civ. Proc. § 995.520(b)*]:

- The name, occupation, residence address, and business address (if any), of the surety.

- A statement that the surety is a resident and either an owner of real property or householder within California.

- A statement that the surety is worth the sum specified in the undertaking in real or personal property, or both, situated in California, over and above all debts and liabilities, exclusive of property exempt from enforcement of a money judgment.

If the amount of the undertaking exceeds $5,000, the affidavit (or declaration) must also contain, in addition to the foregoing information required by *Code Civ. Proc. § 995.520(b)*, all of the following [*Code Civ. Proc. § 995.520(c)*]:

- A description sufficient for identification of property, real or personal, belonging to the surety and situated in California and the nature of his or her interest in that property that qualifies the surety.

- The surety's best estimate of the fair market value of each item of property.

- A statement of any charge or lien and its amount, known to the surety, whether of public record or not, against any item of property.

- Any other impediment or cloud known to the surety on the free right of possession, use, benefit, or enjoyment of any of the property.

When the amount specified in the undertaking or bond exceeds $10,000 and there are more than two sureties, they may state in their affidavits or (declarations) that they are severally worth amounts less than the amount specified in the undertaking or bond, and it may be stipulated in the undertaking that the liability of the surety is limited to the worth of the surety stated in the declaration, provided that the aggregate worth of all sureties executing the undertaking is twice the amount of the bond [*Code Civ. Proc. § 995.520(d)*].

PRACTICE TIP:

Don't Count on Personal Sureties. As a practical matter, the requirements for posting a personal surety are cumbersome and usually difficult to satisfy, particularly on short notice. Some individuals who originally may be willing to serve as personal sureties for a prospective appellant may reconsider when they learn that their personal financial statements may become public documents, and that they may be subject to questioning about their finances [*see* discussion in *§ 43.20[5],[6]*]. For these reasons, most appellants do not obtain undertakings executed by personal sureties.

For a general form of undertaking subscribed by sureties, see *§ 43.76[1]*. For a form of declaration of qualification of a personal surety, see *§ 43.76[4]*. For more detailed discussion and forms relating to the qualifications of sureties, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[c] Sufficiency of Admitted Surety Insurer

Two or more admitted surety insurers may be sureties on an undertaking by executing the same or separate undertakings for amounts aggregating the required amount of the undertaking, and each insurer is jointly and severally liable to the extent of the amount of the liability assumed by it [*Code Civ. Proc. § 995.620*; *see also Code Civ. Proc. § 995.120* (defining admitted surety insurer), *Code Civ. Proc. § 995.185* (defining surety)].

An admitted surety insurer will be accepted or approved by the court or officer as surety on a bond without further

acknowledgment if the bond is executed in the name of the surety insurer under penalty of perjury or the fact of execution of the bond is duly acknowledged before an officer authorized to take and certify acknowledgments, and either one of the following conditions, at the surety insurer's option, is satisfied [*Code Civ. Proc. § 995.630*]:

- A copy of the transcript or record of the unrevoked appointment, power of attorney, bylaws, or other instrument, duly certified by the proper authority and attested by the seal of the insurer entitling or authorizing the person who executed the bond to do so for and on behalf of the insurer, is filed in the office of the clerk of the county in which the court or officer is located.

- A copy of a power of attorney is attached to the bond.

For a general form of undertaking subscribed by sureties, see *§ 43.76[1]*. For more detailed discussion and forms relating to the qualifications of sureties, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[5] Objections to Sureties or Undertaking

The beneficiary may object to the undertaking on the ground that the sureties are insufficient, or that the amount of the undertaking is insufficient, or that the undertaking is insufficient [*Code Civ. Proc. § 995.920*; *see also Code Civ. Proc. §§ 995.930-995.960* (manner of objecting to and determining sufficiency of undertakings in general); *Conservatorship of O'Connor (1996) 48 Cal. App. 4th 1076, 1103, 56 Cal. Rptr. 2d 386* (no objection necessary for technical defects not related to amount or recoverability)]. For detailed discussion and forms relating to objections to sureties undertakings generally, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

If the respondent objects to an undertaking required or permitted by *Code Civ. Proc. § 901 et seq.*, and the court determines the undertaking is insufficient, and a sufficient undertaking is not given within the time provided by statute (*see Code Civ. Proc. §§ 995.910-995.960*), then enforcement of the judgment or order appealed from is no longer stayed and property that has been levied on under execution issued on such judgment will not be released from levy [*Code Civ. Proc. § 922*].

[6] Proceeding to Increase Amount of Undertaking

Under *Code Civ. Proc. § 996.010*, a respondent may ask the trial court to increase an undertaking that has become insufficient, especially when postjudgment interest and costs have mounted because the appellate process has become unduly prolonged [*see Grant v. Superior Court (1990) 225 Cal. App. 3d 929, 938, 940, 275 Cal. Rptr. 564]* . To challenge an undertaking as insufficient, the moving party must demonstrate a real, substantial possibility, not just speculation, that the current undertaking is or has become insufficient, either because the sureties are insufficient or because the amount of the undertaking is insufficient [*Code Civ. Proc. § 996.010(a)*; *Grant v. Superior Court (1990) 225 Cal. App. 3d 929, 938, 275 Cal. Rptr. 564* (undertaking to stay money judgment under *Code Civ. Proc. § 917.1*); *see Code Civ. Proc. § 995.020* (provisions of *Code Civ. Proc.§ 995.010 et seq.* apply to undertaking given as security under any statute of this state, except to extent statute is inconsistent), *Code Civ. Proc. § 995.210* (unless provision or context otherwise requires, terms "bond" and "undertaking" in statutes are interchangeable)].

The amounts of accumulated appellate costs and postjudgment interest are proper factors for the trial court to consider in ruling on a motion under *Code Civ. Proc. § 996.010* [*Grant v. Superior Court (1990) 225 Cal. App. 3d 929, 938, 275 Cal. Rptr. 564]* . There appears to be no statutory basis, however, for increasing an undertaking based on dilatory tactics [*Grant v. Superior Court (1990) 225 Cal. App. 3d 929, 939, 275 Cal. Rptr. 564]* .

For forms of notice of motion and order to increase the amount of an undertaking to stay enforcement of judgment or order pending appeal, see *§ 43.75*.

[7] Enforcement of Undertaking Against Principal and Sureties

The successful respondent may enforce the liability on the undertaking against both the appellant and the sureties [*Code Civ. Proc. § 996.410*]. A surety on an undertaking given in an action or proceeding, other than the bond of a public officer or fiduciary, submits itself to the jurisdiction of the court in all matters affecting its liability on the undertaking [*Code Civ. Proc. § 996.420*]. The liability of a surety may be enforced on motion filed in the trial court without the necessity of bringing an independent action [*Code Civ. Proc. § 996.440(a)*].

A surety may not defend an action brought on an undertaking by relying on terms or conditions in the bond that are inconsistent with the statutes governing undertakings [*Lewin v. Anselmo (1997) 56 Cal. App. 4th 694, 696-700, 65 Cal. Rptr. 2d 682]* . A judgment of liability on the undertaking obligates each of the principals and sureties jointly and severally, and may be enforced by the beneficiary directly against the surety [*Code Civ. Proc. § 996.460*].

The aggregate liability of a surety to all persons for all breaches of the condition of an undertaking is limited, except as provided under Code Civ. Proc. § 966.480, to the amount of that undertaking [*Code Civ. Proc. § 996.470(a)*; *see, e.g.*, Code Civ. Proc. § 966.480(a)(2) (if surety fails to make payment when beneficiary makes claim after liability has been established, surety may be liable for additional amounts comprising costs incurred in obtaining a judgment against the surety)]. If the undertaking given is in an amount greater than the amount required by statute or by order of the court, the liability of the surety is limited to the amount required by statute or court order, unless the undertaking has been increased voluntarily or by agreement of the parties to satisfy an objection to the sufficiency of the bond [*Code Civ. Proc. § 996.470(b)*].

If the judgment is affirmed, then the surety may make payment on the undertaking without awaiting enforcement, and the amount of the undertaking will be reduced to the extent of any good faith payment made by the surety [*Code Civ. Proc. § 996.480(a)(1)*]. If the surety pays the judgment either with or without an enforcement action after the judgment is affirmed, the surety is substituted to the rights of the creditor and is entitled to control, enforce, and satisfy the judgment, in all respects as if the surety had recovered the judgment [*Code Civ. Proc. § 917.1(c)*; *see Code Civ. Proc. § 996.460(d)*].

If the judgment is reversed, then the cash deposit or bond must be returned to the principal (that is, the appellant) because the purpose for which the bond or deposit was given has been satisfied and no longer exists [*Code Civ. Proc. §§ 995.360, 995.430, 995.770*]. The appellant is entitled to return of a bond or deposit even if the appellate court reverses the judgment only for a new trial on the issue of damages [*see McCallion v. The Hibernia Savings & Loan Soc'y (1890) 83 Cal. 571, 572-573, 23 P. 798* ; *see Love v. Wolf (1967) 249 Cal. App. 2d 822, 840, 58 Cal. Rptr. 42* ; *King v. Goldberg (1958) 159 Cal. App. 2d 543, 545-546, 323 P.2d 1035]* .

For further, more detailed discussion and forms relating generally to sureties and the enforcement of bonds or undertakings, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[8] Stay When Undertaking Is Posted After Levy

When enforcement of a judgment is stayed on appeal by the giving of a sufficient undertaking, existing liens created under the enforcement-of-money-judgments statutes (*Code Civ. Proc. § 695.010 et seq.*) are extinguished, including an execution lien created on property by levy [*Code Civ. Proc. §§ 697.040(a)(1), 697.710*]. In such a case, property held subject to the lien must be released unless certain exceptions (described *below*) apply [*see Code Civ. Proc. § 697.050*; *California Commerce Bank v. Superior Court (1992) 8 Cal. App. 4th 582, 587, 10 Cal. Rptr. 2d 418]* .

In *California Commerce Bank*, the judgment debtor bank filed a stay bond one week after funds were seized by levy and three weeks after it filed a notice of appeal. The bank afterwards filed an ex parte application for an order staying execution of the money judgment pending appeal and directing the levying officer to return the funds levied under the

writ of execution. The trial court denied the application, but the court of appeal issued a peremptory writ directing the trial court to vacate its order. The appellate court held that in the case of a perfected appeal, under the enforcement of judgment statutes, the posting of a sufficient bond after the levying officer has taken possession of money pursuant to a writ of execution stayed enforcement of judgment and required the return of funds held in levy tothe judgment debtor [*see California Commerce Bank v. Superior Court (1992) 8 Cal. App. 4th 582, 583, 10 Cal. Rptr. 2d 418]* .

Costs and attorney's fees may be available when there is a long delay by the judgment debtor in obtaining the bond. Although the court in *California Commerce Bank* deferred to the lower court's sound discretion in denying the judgment creditor's request for such an award, it did not expressly rule out that an award may be available in an appropriate case [*see California Commerce Bank v. Superior Court (1992) 8 Cal. App. 4th 582, 588, 10 Cal. Rptr. 2d 418]* .

Exceptions to the rule requiring release of property held subject to the lien apply when the property is to be held under another lien or the property is ordered by the court to be held pending resolution of a dispute concerning its proper disposition [*Code Civ. Proc. §§ 697.050, 699.060*]. In addition, the stay may be terminated by the judgment creditor objecting to the sufficiency of the bond and the court determining the bond is insufficient [*Code Civ. Proc. § 922*].

For detailed discussion and forms relating to the execution liens and the enforcement of judgments and orders generally, see Ch. 254, *Executions and Enforcement of Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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§ 43.21 Appellate Court's Power to Issue Writ of Supersedeas or Make Other Orders to Preserve Status Quo

The provisions of *Code Civ. Proc. §§ 916-923* do not limit the power of an appellate court or justice to stay proceedings during the pendency of an appeal, to issue a writ of supersedeas, to suspend or modify an injunction during the pendency of an appeal, or to make any order appropriate to preserve the status quo, or the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction [*Code Civ. Proc. § 923*]. Supersedeas is a nonstatutory writ, although referred to in *Code Civ. Proc. § 923* and governed by *Cal. Rules of Ct., Rule 8.112*.

The writ of supersedeas has long been recognized to be an attribute of the inherent power of the courts to preserve their own jurisdiction [*People ex rel. S. F. Bay etc. Com. v. Town of Emeryville (1968) 69 Cal. 2d 533, 538, 72 Cal. Rptr. 790, 446 P.2d 790]* . The power to issue the writ is implied from the power to hear appeals. When jurisdiction is conferred by the California Constitution, the Code of Civil Procedure, or by any other statute, a court or judicial officer has all the means necessary to carry that jurisdiction into effect [*see Code Civ. Proc. § 187*; *see also Code Civ. Proc. § 182* (provisions of *Code Civ. Proc. § 182 et seq.* are not limited in scope or meaning to former justice courts as implied by the chapter heading to these provisions)]. The purpose of the writ of supersedeas is to maintain the subject of the action in status quo until final determination of the appeal [*Dry Cleaners & Dyers Institute v. Reiss (1936) 5 Cal. 2d 306, 310, 54 P.2d 470* ; *cf.* discussion in *§ 43.11*[1]].

An appellate court may in its discretion issue a writ of supersedeas to stay, pending appeal, the operation of an order or judgment not otherwise stayed, if necessary or proper to the complete exercise of its appellate jurisdiction [*Food & Grocery Bureau v. Garfield (1941) 18 Cal. 2d 174, 176-177, 114 P.2d 579]* . An appellate court may grant a writ of supersedeas when a denial of a stay of enforcement would deprive the appellant of the benefit of a reversal of the judgment against him or her, provided, of course, that a proper showing is made [*Deepwell Homeowners' Protective Asso. v. City Council of Palm Springs (1965) 239 Cal. App. 2d 63, 65-66, 48 Cal. Rptr. 321* (quoted with approval in *People ex rel. S. F. Bay etc. Com. v. Town of Emeryville (1968) 69 Cal. 2d 533, 537, 72 Cal. Rptr. 790, 446 P.2d 790*)].

The determination of whether or not a writ of supersedeas is proper is based on a consideration of the respective rights of the litigants, which contemplates the possibility of an affirmance of the order or judgment as well as of a reversal [*Food & Grocery Bureau v. Garfield (1941) 18 Cal. 2d 174, 177, 114 P.2d 579* ; *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors (1967) 255 Cal. App. 2d 51, 53, 62 Cal. Rptr. 819]* .

PRACTICE TIP:

Issuance of Supersedeas Rare. As a practical matter, it is very difficult to obtain a writ of supersedeas. They are rarely granted. At a minimum, counsel must be able to demonstrate that his or her client cannot afford a bond, that the issues in the appeal are significant, and that there is a strong likelihood of obtaining a reversal.

An appellate court may issue a writ of supersedeas on any conditions that that court deems just or appropriate under the circumstances [*Kane v. Superior Court (1995) 37 Cal. App. 4th 1577, 1587 n.6, 44 Cal. Rptr. 2d 578]* . The most common condition imposed on granting a writ of supersedeas is that an undertaking be filed, and the practice is to require approval of the sufficiency of the bond by the presiding judge of the lower court [*see* *Sandell, Inc. v. Bailey (1961) 193 Cal. App. 2d 518, 520, 14 Cal. Rptr. 347]* .

PRACTICE TIP:

Other Grounds for Stay. In *People ex rel. S. F. Bay etc. Com. v. Town of Emeryville (1968) 69 Cal. 2d 533, 72 Cal. Rptr. 790, 446 P.2d 790* , the Supreme Court indicated that *Code Civ. Proc. § 923* could be relied on to broaden an appellate court's power to grant a stay beyond the traditional confines of supersedeas. The opinion can be read to give the appellate courtthe authority to enter an appropriate stay with respect to any order to protect its jurisdiction. Counsel seeking to stay trial court proceedings pending appeal should consider *Town of Emeryville* and *Section 923* as authority for obtaining a stay in those circumstances that do not technically fit within the confines of a writ of supersedeas.

A request for a temporary stay pending the granting or denial of the writ may be included in the petition or may be made separately. It must be served on the respondent. For good cause, the Chief Justice or presiding justice may excuse advance service [*Cal. Rules of Ct., Rule 8.112*].

PRACTICE TIP:

Consider Including Proposed Briefing Schedule in Petition. The appellate court may order an accelerated briefing schedule as a condition to granting a stay, to minimize the length of the appeal and hence the stay. Appellants seeking a writ of supersedeas may want to propose an expedited briefing schedule in their petition, in order to increase the likelihood that the court will grant the petition.

The writ will not issue until respondent has had an opportunity to file a memorandum and a statement of any material facts in opposition. Unless otherwise ordered, any opposition must be filed within 15 days after the petition and supporting points and authorities are filed [*Cal. Rules of Ct., Rule 8.112*].

For forms for use in an appellate court to obtain issuance of a writ of supersedeas, see *§ 43.90*. For a form of petition and a form of writ of supersedeas to stay execution and levy, see Ch. 254, *Executions and Enforcement of Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsAuthority to AdjudicateCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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§ 43.22 Automatic Stay of Appellate Proceedings Due to Bankruptcy Proceedings

The commencement of a proceeding in bankruptcy by a debtor will operate to stay automatically most actions by creditors, including appeals in such actions [*see 11 U.S.C. § 362(a)*]. This is one situation in which an appeal may itself be stayed pending the outcome of another proceeding, as distinguished from the stay of lower court proceedings pending an appeal. However, the automatic stay does not preclude an appellate court from imposing sanctions on a party and/or the party's attorney for abuse of the appellate process, such as filing a frivolous appeal [*Keitel v. Heubel (2002) 103 Cal. App. 4th 324, 333-336, 126 Cal. Rptr. 2d 763* (sanctions considered government regulatory exception to stay)].

The First Appellate District, by local appellate rule, requires that any party to an appeal or writ proceeding pending in that court, who acquires knowledge of a bankruptcy proceeding that may cause or impose a stay of the appellate proceedings, must promptly give notice of the bankruptcy proceedings [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 11(a); *see Keitel v. Heubel (2002) 103 Cal. App. 4th 324, 340-342, 126 Cal. Rptr. 2d 763* (failure to provide notice supported sanctions)]. The notice must be filed with the court and served on all parties and must include a copy of the most recent order of the bankrupty court, a copy of any stay order issued by that court, and an explanation of whether a stay order or an automatic stay is in effect and why the stay applies to the pending appeal or writ proceeding [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 11(b)]. Thereafter, the debtor or other party for whose benefit the stay is taken must periodically serve and file reports on the status of the bankruptcy proceedings [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 11(c)]. In addition, any party, at any time, may thereafter serve and file notice of any circumstances or orders permitting the appeal or writ proceeding to proceed, including evidence that the bankruptcy stay has been lifted, the bankruptcy proceeding has been dismissed, or the party has obtained relief from the stay [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 11(d)].

It is recommended that this rule be used as a guideline to provide similar notice in appellate proceedings pending before

courts other than the First District.

For further discussion and forms relating to bankruptcy stays and relief from the automatic stay provision, see Ch. 94, *Bankruptcy* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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[Reserved]

§§ 43.23[Reserved]

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§ 43.40 State Statutes

[1] General Powers of Trial and Appellate Courts to Stay Enforcement of Judgments and Orders Pending Appeal

Trial court's general power to order stay of enforcement subject to time limits when undertaking would otherwise be required. *Code Civ. Proc. § 918*

Appellate court's general power to stay judgment or order pending appeal by issuance of writ or supersedeas or other order. *Code Civ. Proc. § 923*

[2] Stay of Enforcement of Judgment or Order Pending Appeal

Stay of enforcement of judgment or order not otherwise excepted under *Code Civ. Proc. §§ 917.1-917.9* upon perfection of appeal from that judgment or order. *Code Civ. Proc. § 916(a)*

Stay of enforcement of judgment or order for payment of money upon filing of undertaking. *Code Civ. Proc. § 917.1*

Stay of enforcement of judgment or order regarding hazardous substances. *Code Civ. Proc. § 917.15*

Stay of enforcement of judgment or order directing assignment or delivery of personal property upon filing of undertaking or upon filing undertaking together with delivery of property to court designated custodian. *Code Civ. Proc. § 917.2*

Stay of enforcement of judgment or order directing sale of perishable property upon sale and deposit of proceeds and

filing of undertaking. *Code Civ. Proc. § 917.2*

Stay of enforcement of judgment or order directing execution of instrument upon execution of instrument and deposit of instrument with clerk of trial court. *Code Civ. Proc. § 917.3*

Stay of enforcement of judgment or order directing sale or conveyance of real property upon filing of undertaking. *Code Civ. Proc. § 917.4*

Stay of enforcement of judgment or order appointing receiver upon filing of undertaking. *Code Civ. Proc. § 917.5*

Stay of enforcement of judgment or order directing performance of two or more acts specified in *Code Civ. Proc. §§ 917.1-917.5* upon compliance with requirements of each applicable section. *Code Civ. Proc. § 917.6*

Stay of enforcement of judgment or order affecting custody of minor or relating to exclusion from dwelling upon court order or writ of supersedeas. *Code Civ. Proc. § 917.7*

Stay of judgment or order in which party adjudged guilty of usurping public office upon court order or writ of supersedeas. *Code Civ. Proc. § 917.8*

Stay of judgment or order directing corporation to produce records for inspection by director or stockholder upon court order or writ of supersedeas. *Code Civ. Proc. § 917.8*

Stay of judgment or order adjudging building to be nuisance upon court order or writ of supersedeas. *Code Civ. Proc. § 917.8*

Stay of judgment or order sought by governmental agency under *Penal Code § 11225 et seq.* (relating to buildings where illegal gambling, lewdness, assignation, or prostitution occurs) or *Health and Safety Code § 11570 et seq.* (relating to buildings where selling, serving, storing, keeping, manufacturing, or giving away controlled substances occurs). *Code Civ. Proc. § 917.8*

Stay of enforcement of judgment or order not otherwise provided for by *Code Civ. Proc. §§ 917.1-917.8* upon filing of undertaking as required in discretion of trial court. *Code Civ. Proc. § 917.9*

[3] Stay of Enforcement in Writ Proceedings

Provisions for stay of enforcement of order or decision of agency on appeal from denial or granting of writ of mandate as applicable to appeal from granting or denying writ of prohibition. *Code Civ. Proc. § 1105*

Stay of order or judgment directing issuance of writ of mandate commanding party to deliver water for irrigation purposes. *Code Civ. Proc. § 1110a*

Enforcement of writ of mandate as not stayed where court granting writ or appellate court so orders on showing by petitioner of irreparable damage to his or her business or profession if execution is stayed. *Code Civ. Proc. § 1110b*

Stay of order or decision of administrative agency, when writ is issued by court for purpose of inquiring into validity of such order or decision under *Code Civ. Proc. § 1094.5* (administrative mandate); stay pending appeal of order or judgment in mandate proceeding. *Code Civ. Proc. § 1094.5(g)*

Stay of proceedings in or before inferior tribunal, board, or officer, exercising judicial functions on issuance of writ of

review. *Code Civ. Proc. §§ 1071, 1072*

[4] Stay of Enforcement of Judgment or Order in Miscellaneous Proceedings

Judgment on submitted controversy as subject to appeal in same manner as if it had been rendered in court action. *Code Civ. Proc. § 1140*

Appeal as not staying proceedings on judgment in forcible entry or detainer proceeding unless judge so directs. *Code Civ. Proc. § 1176*

Proceedings by plaintiff to obtain possession of property pending appeal in eminent domain proceeding. *Code Civ. Proc. §§ 1268.210-1268.230*

Appeal in contractual arbitration proceeding taken in same manner as appeal in civil action. *Code Civ. Proc. § 1294.2*

Stay of decree or order in dissolution of marriage proceeding. *Fam. Code § 2341*

Stay of judgment or order under Probate Code. *Prob. Code § 1310*

[5] Provisions Relating to Undertaking Generally as Condition for Stay

Deposit of amount of undertaking with trial court in lieu of filing undertaking. *Code Civ. Proc. § 995.710*

Undertaking required to continue attachment levy pending appeal. *Code Civ. Proc. § 921*

Objection to sufficiency of undertaking given during pendency of appeal. *Code Civ. Proc. §§ 922, 995.910-996.030*

Bond and Undertaking Law. *Code Civ. Proc. § 995.010 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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§ 43.41 California Rules of Court

Recoverable costs on appeal include the cost to procure a surety bond, including the premium and the cost to obtain a letter of credit as collateral, unless the trial court determines the bond was unnecessary [*Cal. Rules of Ct., Rule 8.278(d)(1)(F)*].

Format of petition for writ of supersedeas or request for stay filed in appellate courts. *Cal. Rules of Ct., Rules 8.112, 8.116*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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§ 43.42 Decisions

[1] Appealability of Stay Order

Order of trial court staying enforcement of judgment pending appeal is appealable. *Merritt v. J. A. Stafford Co. (1968) 68 Cal. 2d 619, 622, 68 Cal. Rptr. 447, 440 P.2d 927*

[2] Appellate Court's Power

Court of appeal has inherent power to issue process necessary to protect its appellate jurisdiction and to ensure that rights of appellant will not be destroyed by mere passage of time necessary to prosecute appeal. *Adoption of Pierce (1970) 5 Cal. App. 3d 316, 320, 85 Cal. Rptr. 104*

[3] Automatic Stay in Particular Proceedings

[a] Judgment for Costs

Attorney's fees recovered pursuant to contract provision and costs included in calculating amount of undertaking when some part of judgment is bondable. *Banks v. Manos (1991) 232 Cal. App. 3d 123, 129, 283 Cal. Rptr. 318*

Attorney's fees recovered pursuant to contract provision are element of costs when party has not recovered money damages and filing of notice of appeal stays execution without posting of undertaking. *Nielsen v. Stumbos (1990) 226 Cal. App. 3d 301, 303-304, 276 Cal. Rptr. 272*

Judgment for costs alone automatically stayed without bond pending appeal. *Vadas v. Sosnowski (1989) 210 Cal.*

App. 3d 471, 475, 258 Cal. Rptr. 374

Judgment for costs stayed automatically on perfecting appeal. *Estate of Neilson (1960) 181 Cal. App. 2d 769, 772, 5 Cal. Rptr. 542*

[b] Mandatory Injunction

Mandatory injunction automatically stayed on perfecting appeal. *Kettenhofen v. Superior Court (1961) 55 Cal. 2d 189, 191, 10 Cal. Rptr. 356, 358 P.2d 684* ; *Agricultural Labor Relations Bd. v. Superior Court (1983) 149 Cal. App. 3d 709, 713, 196 Cal. Rptr. 920*

[c] Partition Proceeding

Interlocutory order in partition action automatically stayed on perfecting appeal. *Williams v. Wells Fargo Bank (1941) 17 Cal. 2d 104, 107, 109 P.2d 649*

[d] Proceeding to Compel Arbitration

Appeal from order compelling arbitration affects entire case; further trial court proceedings are therefore stayed under *Code Civ. Proc. § 916*. *Prudential-Bache Securities, Inc. v. Superior Court (1988) 201 Cal. App. 3d 924, 925, 247 Cal. Rptr. 477*

[e] Writ of Mandate

Order directing issuance of writ of mandate automatically stayed on appeal. *Hayworth v. City of Oakland (1982) 129 Cal. App. 3d 723, 727-728, 181 Cal. Rptr. 214* (citing *Code Civ. Proc. § 1110b*); *Johnston v. Jones (1925) 74 Cal. App. 272, 273, 239 P. 862*

[f] Anti-SLAPP Motion

All further proceedings on merits are stayed during pendency of appeal from denial of anti-SLAPP motion. *Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal. 4th 180, 191-196, 25 Cal. Rptr. 3d 298*

[4] Deposit of Personal Property

Denial of motion under *Code Civ. Proc. § 917.2* for appointment of custodian with whom property that is subject of litigation is to be deposited pending appeal. *Mason v. Superior Court (1972) 23 Cal. App. 3d 913, 914-916, 100 Cal. Rptr. 557*

Deposit of stock which is subject of litigation with clerk of trial court to stay enforcement pending appeal. *Sherwood v. Wallin (1905) 1 Cal. App. 532, 537, 82 P. 566*

[5] Injunction

Supersedeas is proper remedy to stay enforcement of preliminary prohibitory injunction pending appeal. *Wind v. Hite (1962) 58 Cal. 2d 415, 416-417, 24 Cal. Rptr. 683, 374 P.2d 643* ; *Sun-Maid Raisin Growers v. Paul (1964) 229*

Cal. App. 2d 368, 373, 40 Cal. Rptr. 352

Prohibitory injunction is self executing and not stayed by appeal; injunction which ismandatory in character is automatically stayed by appeal. *Kettenhofen v. Superior Court (1961) 55 Cal. 2d 189, 191, 10 Cal. Rptr. 356, 358 P.2d 684* ; *Food & Grocery Bureau v. Garfield (1941) 18 Cal. 2d 174, 176-177, 114 P.2d 579*

Injunction which is prohibitory in part and mandatory in part is automatically stayed on appeal to extent it is mandatory. *Kettenhofen v. Superior Court (1961) 55 Cal. 2d 189, 191, 10 Cal. Rptr. 356, 358 P.2d 684* ; *Food & Grocery Bureau v. Garfield (1941) 18 Cal. 2d 174, 176-177, 114 P.2d 579*

Appellate court has inherent power to issue writ of supersedeas to stay execution of injunction where such stay is necessary or proper to complete exercise of its appellate jurisdiction, even where injunction is purely prohibitory. *Food & Grocery Bureau v. Garfield (1941) 18 Cal. 2d 174, 177, 114 P.2d 579* ; *see also* *Wind v. Hite (1962) 58 Cal. 2d 415, 416, 24 Cal. Rptr. 683, 374 P.2d 643*

Determination of whether injunction is mandatory or prohibitory. *Dry Cleaners & Dyers Institute v. Reiss (1936) 5 Cal. 2d 306, 309, 54 P.2d 470*

[6] Judgment Directing Sale of Real Property

Code Civ. Proc. § 917.4 applies only to specific class of persons, appellants who have been ordered to sell or convey real property. *Barnes v. Chamberlain (1983) 147 Cal. App. 3d 762, 767, 195 Cal. Rptr. 417*

[7] Payment of Judgment

Voluntary payment of judgment does not deprive party of right to appeal unless payment was compromise or consideration for agreement not to prosecute appeal. *Warner Bros. Co. v. Freud (1901) 131 Cal. 639, 644, 63 P. 1017* ; *Vaughn v. De Kreek (1969) 2 Cal. App. 3d 671, 680, 83 Cal. Rptr. 144*

[8] Sanctions

Attorney's fees award under *Code Civ. Proc. § 128.5* is essentially judgment for money damages that must be bonded. *Banks v. Manos (1991) 232 Cal. App. 3d 123, 129, 283 Cal. Rptr. 318*

[9] Stipulation for Undertaking

Stipulation between appellant and respondent is appropriate procedure for fixing security on appeal. *Merritt v. J. A. Stafford Co. (1968) 68 Cal. 2d 619, 625, 68 Cal. Rptr. 447, 440 P.2d 927*

[10] Sureties

Legal insufficiency of supersedeas or appeal bond to stay proceedings does not exonerate sureties when as matter of fact there is a stay, no execution is issued nor any attempt is made to collect execution if issued, or to enforce judgment. *Merritt v. J. A. Stafford Co. (1968) 68 Cal. 2d 619, 624, 68 Cal. Rptr. 447, 440 P.2d 927*

[11] Trial Court's Jurisdiction

Trial court has no jurisdiction to hear proceedings on merits following appeal from denial of anti-SLAPP motion. *Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal. 4th 180, 189-190, 25 Cal. Rptr. 3d 298*

Trial court retains jurisdiction to set amount of bond required to stay enforcement of order setting aside default. *Conrad v. Superior Court (1988) 201 Cal. App. 3d 1362, 1365, 247 Cal. Rptr. 712*

Stay of proceedings under *Code Civ. Proc. § 916* pending appeal does not prohibit trial court from proceeding on any other matter embraced in action and is not affected by judgment or order, including discovery proceedings. *Wisely v. Superior Court (1985) 175 Cal. App. 3d 267, 269-270, 220 Cal. Rptr. 893*

Stay of proceedings under *Code Civ. Proc. § 916* during perfecting of appeal does not divest trial court of subject matter jurisdiction over matters unrelated to appeal such as motion of new defendant for summary judgment. *Beckstead v. International Industries, Inc. (1982) 127 Cal. App. 3d 927, 933-934, 179 Cal. Rptr. 767*

Trial court has inherent power to set aside void orders or judgments at any time whether appeal perfected or not. *Lovret v. Seyfarth (1972) 22 Cal. App. 3d 841, 854, 101 Cal. Rptr. 143* ; *Macmillan Petroleum Corp. v. Griffin (1950) 99 Cal. App. 2d 523, 533, 222 P.2d 69*

Trial court has jurisdiction to preserve subject of litigation until final determination on appeal. *San Diego v. Southern California Tel. Corp. (1954) 42 Cal. 2d 110, 120* ; *Hayes v. Risk (1967) 255 Cal. App. 2d 613, 628, 64 Cal. Rptr. 36*

Filing of notice of appeal divests trial court of all jurisdiction in matters embraced by judgment or affected thereby. *Olson v. Superior Court (1969) 274 Cal. App. 2d 311, 314, 79 Cal. Rptr. 136* ; *see also Estate of Hanley (1943) 23 Cal. 2d 120, 123, 142 P.2d 423*

Trial court is authorized to impose undertaking as condition to stay enforcement when not otherwise provided by statute. *Estate of Murphy (1971) 16 Cal. App. 3d 564, 568, 94 Cal. Rptr. 141*

[12] Writ of Supersedeas

Proper procedure for obtaining stay pending appeal is by petition to court in which appeal is pending for writ of supersedeas rather than for writ of mandate. *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 Cal. 3d 1157, 1160, 232 Cal. Rptr. 567, 728 P.2d 1202*

No explicit constitutional grant is necessary to authorize issuance of such auxiliary writs as supersedeas, which have long been recognized to be an attribute of inherent power of courts to preserve their own jurisdiction. *People ex rel. S. F. Bay etc. Com. v. Town of Emeryville (1968) 69 Cal. 2d 533, 538, 72 Cal. Rptr. 790, 446 P.2d 790*

Appellate courts may grant supersedeas when the denial of a stay would deprive appellant of benefit of a reversal of judgment. *People ex rel. S. F. Bay etc. Com. v. Town of Emeryville (1968) 69 Cal. 2d 533, 537, 72 Cal. Rptr. 790, 446 P.2d 790* ; *Deepwell Homeowners' Protective Asso. v. City Council of Palm Springs (1965) 239 Cal. App. 2d 63, 65-66, 48 Cal. Rptr. 321*

Issuance by appellate court of stay order, injunctive in nature, serves function similar to that of supersedeas, and is authorized under *Code Civ. Proc. § 923*; that section is legislative affirmation of inherent power of appellate courts in California to issue injunctive stay orders in aid of their jurisdiction. *People ex rel. S. F. Bay etc. Com. v. Town of Emeryville (1968) 69 Cal. 2d 533, 538-539, 72 Cal. Rptr. 790, 446 P.2d 790*

Power of reviewing court to issue writ of supersedeas. *Food & Grocery Bureau v. Garfield (1941) 18 Cal. 2d 174, 177, 114 P.2d 579* ; *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors (1967) 255 Cal. App. 2d 51, 53, 62 Cal. Rptr. 819*

Determination of whether or not writ of supersedeas is proper as based on consideration of respective rights of litigants. *Food & Grocery Bureau v. Garfield (1941) 18 Cal. 2d 174, 177, 114 P.2d 579* ; *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors (1967) 255 Cal. App. 2d 51, 53, 62 Cal. Rptr. 819*

Purpose of writ of supersedeas is to maintain status quo. *Dry Cleaners & Dyers Institute v. Reiss (1936) 5 Cal. 2d 306, 310, 54 P.2d 470* ; *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors (1967) 255 Cal. App. 2d 51, 53, 62 Cal. Rptr. 819*

Supersedeas is appropriate remedy when it appears that party is refusing to acknowledge applicability of statutory provisions "automatically" staying judgment while appeal is being pursued. *Nielsen v. Stumbos (1990) 226 Cal. App. 3d 301, 303, 276 Cal. Rptr. 272*

Issuance of writ of supersedeas is precluded if appeal no longer pending and judgment has become final. *In re Christy L. (1986) 187 Cal. App. 3d 753, 758-759, 232 Cal. Rptr. 184*

Unusual circumstances warrant exercise of court of appeal's discretion to issue writ of supersedeas with bond, with conditions to insure diligent prosecution of appeal, even though appellant may have statutory remedy of stay pending appeal on filing an undertaking. *Estate of Murphy (1971) 16 Cal. App. 3d 564, 567-570, 94 Cal. Rptr. 141*

Propriety of writs of prohibition and supersedeas to suspend effect of judgment of dismissal to preserve superior court's jurisdiction to make orders re custody, support, and visitation rights re minor child pending appeal. *In re Marriage of Dover (1971) 15 Cal. App. 3d 675, 680-681, 93 Cal. Rptr. 384*

Supersedeas is extraordinary writ issued by appellate court to lower court or officer thereof, directing that enforcement of judgment be stayed pending appeal in court issuing writ, when relief is necessary to protect appellant from serious injury in case of reversal, and will not cause respondent disproportionate injury in case of affirmance. *California Table Grape Com. v. Dispoto (1971) 14 Cal. App. 3d 314, 316, 92 Cal. Rptr. 268*

Appellate court has inherent power to issue process necessary to protect its appellate jurisdiction and to insure that rights of appellant will not be destroyed by mere passage of time necessary to prosecute appeal. *Adoption of Pierce (1970) 5 Cal. App. 3d 316, 320, 85 Cal. Rptr. 104*

Supersedeas does not issue to stay executed order. *Superior Court v. Dist. Court of Appeal (1966) 65 Cal. 2d 293, 295, 54 Cal. Rptr. 119, 419 P.2d 183*

Issuance by court of order to show cause why writ of supersedeas should not issue. *Donen v. Donen (1964) 228 Cal. App. 2d 441, 450-451, 39 Cal. Rptr. 547*

Supersedeas properly issues when statutory stay is not provided for or, if provided, sufficient reason appears why stay is not perfected in accordance therewith. *Sandell, Inc. v. Bailey (1961) 193 Cal. App. 2d 518, 520, 14 Cal. Rptr. 347*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil

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§ 43.43 Law Reviews

Graber, *Timeline and Deadlines for Civil Appeals in California*, 7(2) California Litigation 43 (1994)

Comment, *Fee Simple? Indeterminable: Inconsistent Procedures Regarding Attorney Fees and Posting Appeal Bonds, 24 Pac. L.J. 141 (1992)*

Comment, *Supersedeas and Child Custody: A Reappraisal, 7 Santa Clara Lawyer 224 (1967)*

Comment, *California Stay Law--Supersedeas and Statutory, 40 Calif. L. Rev. 249 (1952)*

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§ 43.44 Text References

Witkin, California Procedure, vol. 9, *Appeal*, § 227 et seq. (4th ed. 1997)

California Civil Appellate Practice, ch. 6, *Staying Enforcement During Appeal* (Cal. CEB 3rd ed. 2000)

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§ 43.45 Internet References

California Courts. This site includes: general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most court of appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes: text of constitution, codes, and statutes; and information concerning pending legislation. http://www.leginfo.ca.gov

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5-43 California Forms of Pleading and Practice--Annotated §§ 43.46-43.59

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[Reserved]

§§ 43.46[Reserved]

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5-43 California Forms of Pleading and Practice--Annotated § 43.60

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§ 43.60 Appellant's Checklist

[1] Preliminary Steps

☐ Determine need to obtain stay of enforcement of judgment or order from which appeal is to be taken.

☐ Determine whether judgment or order is automatically stayed on filing of notice of appeal [*Code Civ. Proc. § 916*; *see* discussion in *§ 43.13*].

☐ If judgment or order will not be stayed automatically by filing notice of appeal, determine whether it may be stayed by undertaking or alternative procedure [*Code Civ. Proc. § 917.1 et seq.*; *see* discussion in *§§ 43.14, 43.15*].

☐ The time limits and potential difficulties of obtaining the necessary bond, producing sufficient collateral for a bond, or arranging other appropriate measures to stay enforcment pending appeal may require attention of the most immediate and highest priority if an appeal is being considered.

☐ Request immediate, temporary stay after entry of judgment pending decision to file notice of appeal [*Code Civ. Proc. § 918*; *see* discussion in *§ 43.19*].

[2] Prepare and File Undertaking for Stay of Judgment Directing Payment of Money

☐ Consider negotiating stipulation or consent from opposing party to reduce or waive undertaking or

accept security deposit in lieu of undertaking [*see § 43.20[1]* and forms of waiver and stipulation *set out in §§ 43.70, 43.71*].

☐ Absent waiver or consent to substitute security, arrange for sufficient undertaking to stay judgment [*Code Civ. Proc. § 917.1*; *see* discussion in *§ 43.15[1]* and forms of undertaking *set out in § 43.76[2], [4], [5]*].

☐ Amount of undertaking to stay enforcement of a judgment or order for the payment of money is double the amount of the judgment or order unless given by an admitted surety insurer, in which event it is 11/2 times the amount of the judgment or order.

☐ Costs awarded by the trial court under *Code Civ. Proc. § 1021 et seq.* are included in the amount of the judgment or order for the purpose of determining the amount of the undertaking; no undertaking is required, however, solely for costs [*Code Civ. Proc. § 917.1*].

☐ The liability of the undertaking may be enforced if the party ordered to pay does not make the payment within 30 days after the filing of the remittitur from the reviewing court.

[3] Prepare and Make Motion Requesting That Court Fix Sufficient Undertaking for Stay of Nonmoney Judgment

☐ If appeal is to be taken from the following types of nonmoney judgment or order, in which the undertaking must be fixed by court, prepare a motion requesting order to fix sufficient undertaking for stay [*Code Civ. Proc. § 917.2 et seq.*; *see* discussion in *§ 43.15[2]* et seq., and forms of motion *set out in § 43.72[1]*]:

☐ Judgment or order directing the assignment or delivery of personal property [*Code Civ. Proc. § 917.2*; *see* discussion in *§ 43.15[2]*, and form of motion *set out in § 43.72[1]*]:

☐ Appellant may place the property in the custody of an officer designated by the court and this fact will be considered by the court in fixing the amount of the undertaking.

☐ If court directs that perishable property be sold, it may further order that the proceeds of the sale be deposited with the clerk of the trial court pending disposition of the appeal [*Code Civ. Proc. § 917.2*].

☐ Judgment or order directing sale, conveyance, or delivery of possession of real property [*Code Civ. Proc. § 917.4*; *see* discussion in *§ 43.15[4]*, and form of motion *set out in § 43.72[1]*].

☐ Judgment or order appointing receiver [*Code Civ. Proc. § 917.5*; *see* form of undertaking to stay enforcement of a judgment or order generally *set out in § 43.76[1]*].

☐ The undertaking is in a sum fixed by the trial court and must be given on condition

that, if the judgment or order is affirmed or the appeal is withdrawn or dismissed, the appellant will pay all damages that the respondent may sustain by reason of the stay in the enforcement of the judgment [*Code Civ. Proc. § 917.5*].

☐ Judgment or order effecting discharge of attachment on appeal by party who levied attachment.

☐ Attachment does not continue in force on appeal absent the filing of an undertaking fixed by the trial court under *Code Civ. Proc. § 921* [*see* discussion in *§ 43.18* and form *set out in § 43.74*].

☐ Judgment or order, the stay of execution of which is conditioned on a court order requiring the giving of an undertaking.

☐ Even when the execution of an order or judgment is otherwise stayed by perfection of the appeal, the trial court has discretion to require an undertaking under *Code Civ. Proc. § 917.9* in specified cases. If the court exercises this discretion, it fixes the sum of the undertaking and provides that if the judgment or order appealed from or any part of it is affirmed, or the appeal is withdrawn or dismissed, the appellant will pay all damages which the respondent may sustain by reason of the stay in enforcement of the judgment or order [*see* discussion in *§§ 43.15[13]* and *43.61[2]*].

☐ File undertaking or bond fixed by court. The execution, format, and filing of bonds and undertakings are governed by *Code Civ. Proc. § 995.310 et seq.* [*see* Ch. 538, *Suretyship, Bonds, and Undertakings*].

[4] Prepare and Make Motion to Reduce or Dispense With Undertaking When Appellant Is Fiduciary

☐ The trial court may dispense with or limit the security required when the appellant is an executor, administrator, trustee, guardian, conservator, or other person acting in another's right [*Code Civ. Proc. § 919*; *see* discussion in *§ 43.20[3]* and form of motion to dispense with or limit security *set out in § 43.73*].

[5] Make Deposit in Lieu of Undertaking

☐ In cases in which an undertaking is required or permitted, a deposit in the trial court of the amount of the undertaking is the equivalent to the filing of the undertaking [*Code Civ. Proc. § 995.710*; *see* discussion in *§ 43.20[2]*].

[6] Make Deposit of Executed Instrument

☐ In the case of a judgment or order directing execution of instrument, perfecting the appeal does not stay enforcement of the judgment or order unless the instrument is executed and deposited in the office of the clerk of the trial court [*Code Civ. Proc. § 917.3*; *see* discussion in *§ 43.15[3]*].

[7] Prepare and Make Motion for Stay of Judgment or Order Not Involving Undertaking

☐ The execution of a judgment or order affecting the custody of a minor or excluding a party from a

family dwelling or dwelling of another may be stayed by order of the trial court on noticed motion (or by petition for writ of supersedeas, discussed in *§ 43.62*) [*Code Civ. Proc. § 917.7*; *see* discussion in *§ 43.15[8]* and form of motion *set out in § 43.78*].

☐ The trial court may in its discretion stay execution of such order or judgment pending review on appeal, or for such other period it may deem proper except that, absent a writ or order of the appellate court providing otherwise, any provisions allowing or eliminating restrictions against removal of a minor child from the state are stayed by operation of law for a period of seven calendar days from the entry of judgment or order by a juvenile court in a dependency hearing, or for a period of 30 days from the entry of judgment or order by any other trial court. The periods during which these provisions allowing, or eliminating, restrictions against removal of the minor child from the state are stayed, are subject to further stays as ordered by the trial court or by the juvenile court pursuant to *Code Civ. Proc. § 917.7*. An order directing the return of a child to a sister state or country, including any order effectuating that return, made in a proceeding brought pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act or the Hague Convention on the Civil Aspects of International Child Abduction is not a judgment or order which awards, changes, or otherwise affects the custody of a minor child within the meaning of *Code. Civ. Proc. § 917.7*; therefore it is not subject to the automatic stay provisions of *Code. Civ. Proc. § 917.7* [*Code Civ. Proc. § 917.7*].

☐ The execution of the following judgments and orders may be stayed by order of the trial court on noticed motion, usually by an appellant who was an unsuccessful defendant in the trial court proceeding [*Code Civ. Proc. § 917.8*; *see* discussion in *§ 43.15[9]-[12]* and forms of motion set out in *§ 43.79*]:

☐ Judgment that a party is guilty of usurping, or intruding into, or unlawfully holding a public office, civil or military, within this state.

☐ Judgment or order directing a corporation or its officers or agents, or any of them, to give to a person adjudged to be a director, stockholder, or member of the corporation a reasonable opportunity to inspect or make copies of such books, papers, or documents of the corporation as the trial court finds that the director, stockholder, or member is entitled by law to inspect or copy.

☐ Judgment or order adjudging a building or place to be a nuisance and directing the closing or discontinuance of any specific use of the building or place for any period of time.

☐ Judgment or order, including, but not limited to, a temporary restraining order or preliminary injunction, that grants reliefin an action brought by a governmental agency under *Penal Code § 11225 et seq.* (relating to buildings where illegal gambling, lewdness, assignation, or prostitution occurs) or *Health and Safety Code § 11570 et seq.* (relating to buildings where selling, serving, storing, keeping, manufacturing, or giving away controlled substances occurs)

[8] Alternative Petition for Writ in Appellate Court

☐ See *§ 43.62*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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§ 43.61 Respondent's Checklist

[1] Waiver of Undertaking or Consent to Reduction

☐ In some instances respondent may waive an otherwise required undertaking, or consent to a reduction or other security in lieu of an undertaking [*see* discussion in *§ 43.20[1]* and forms of waiver and stipulation set out in *§§ 43.70, 43.71*].

[2] Prepare and Make Motion to Require Undertaking Not Otherwise Required

☐ Respondent may in some cases request that the trial court exercise its discretion to fix an undertaking not otherwise requred [*see* discussion in *§ 43.15[13]* and form of motion to fix undertaking in court's discretion *set out in § 43.72[2]*].

[3] Prepare and Make Objection to Undertaking and Request Increase in Undertaking or Other Additional Conditions

☐ Within 10 days after service of a copy of the bond or undertaking, respondent may object to the bond by noticed motion on the ground that the sureties are insufficient or the amount of the bond is insufficient [*see Code Civ. Proc. §§ 995.370, 995.920, 995.930*]. If no objection is made to the sufficiency of the bond within 10 days, the respondent is deemed to have waived all objections except on a showing of good cause for failure to make the objection within the time required by statute or of changed circumstances [*Code Civ. Proc. § 995.930(c)*]. Subsequent objections to the sufficiency or excessiveness of the bond are governed by *Code Civ. Proc. § 996.010 et seq.* [*see* discussion in *§ 43.20[5], [6]* and forms of motions set out in *§§ 43.74, 43.75*].

☐ Unless the parties otherwise agree, the hearing on the motion must be held not less than two or more than five days after service of the notice of motion [*Code Civ. Proc. § 995.950*]. On the hearing, the court must make an order determining the sufficiency or insufficiency of the bond, and if the bond is insufficient,a sufficient bond must be given within five days or the court will order on ex parte motion that all rights determined by giving the bond immediately cease [*Code Civ. Proc. § 995.960*].

[4] Oppostion to Petition for Writ of Supersedeas

☐ See *§ 43.62[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 43.62 Petition for Writ of Supersedeas Filed in Court of Appeal

[1] Petition for Writ as Alternative to Trial Court Motion

☐ The provisions of *Code Civ. Proc. § 916 et seq.* do not limit the power of an appellate court or justice thereof to stay proceedings during the pendency of an appeal or to issue a writ of supersedeas or to suspend or modify an injunction during the pendency of an appeal or to make any order proper to preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction [*Code Civ. Proc. § 923*]. *Code Civ. Proc. § 917.7*, discussed in *§ 43.60*[7], also expressly provides that the orders and judgments covered in that section may alternatively be writ of supersedeas.

☐ Issuance of the writ is a matter within the inherent power of the appellate court in aid of its appellate jurisdiction [*People ex rel. S.F. Bay etc. Com. v. Town of Emeryville (1968) 69 Cal. 2d 533, 538, 72 Cal. Rptr. 790, 446 P.2d 790]* . The appellate court may issue the writ when a stay of proceedings is not provided by statute or, if a stay is so provided, there is nevertheless sufficient reason why the appellant has not perfected a stay of proceedings in the trial court [*Sandell, Inc. v. Bailey (1961) 193 Cal. App. 2d 518, 520, 14 Cal. Rptr. 347]* .

[2] Prepare and Serve Petition for Writ

☐ Appellant prepares, serves, and files a verified petition for writ of supersedeas with the court of appeal in which the appeal is pending [*Cal. Rules of Ct., Rule 8.112*; *see* discussion in *§ 43.21* and form of petition in § 43.90]. For requirements applicable generally to papers prepared, served, and filed in the court of appeal, see *Cal. Rules of Ct., Rule 8.40*, and discussion in Ch. 45, *Appeal: Motion Procedure* .

☐ The petition bears the same title as the appeal and contains a statement of the necessity for the writ and supporting memorandum [*Cal. Rules of Ct., Rule 8.112*]. If a petition or other request for a stay or writ of supersedeas is bound with or included in the text of a petition for another writ, a petition for a hearing, or any other document, the cover must bear the conspicuous notation "STAY REQUESTED," and identify the nature and date of the proceeding or act sought to be stayed [*Cal. Rules of Ct., Rules 8.40(c), 8.116*].

☐ If the record on appeal has not yet been filed in the court of appeal, the petition must contain a copy of the judgment, the date of its entry, the fact and date of filing of the notice of appeal, and a statement of the subject matter of the appeal sufficient to advise the reviewing court of the question involved [*Cal. Rules of Ct., Rules 8.40(c), 8.112*].

☐ A request for a temporary stay pending the granting or denial of the writ may be included in the petition or may be made separately. Except when the custody of a minor is involved, this request for a temporary stay may be made without service on the respondent [*Cal. Rules of Ct., Rule 8.112*].

[3] Opposition to Petition

☐ Unless otherwise ordered, respondent may file a memorandum and a statement of any material facts in opposition within 15 days after filing of the petition and memorandum supporting it [*Cal. Rules of Ct., Rule 8.112*].

[4] Disposition of Petition

☐ The writ may be issued on any conditions that the court of appeal deems just, but the writ will not issue until respondent has had an opportunity to file points and authorities and a statement of any material facts in opposition. A writ staying an order awarding or changing the custody of a minor is not granted without a hearing [*Cal. Rules of Ct., Rule 8.112*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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Volume 5: Appeal-Chs. 40-55
Chapter 43 APPEAL: STAY OF PROCEEDINGS
PART IV. PROCEDURAL CHECKLISTS

5-43 California Forms of Pleading and Practice--Annotated §§ 43.63-43.69

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[Reserved]

§§ 43.63[Reserved]

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Volume 5: Appeal-Chs. 40-55
Chapter 43 APPEAL: STAY OF PROCEEDINGS
PART V. FORMS

5-43 California Forms of Pleading and Practice--Annotated § 43.70

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§ 43.70 Waiver of Undertaking

[1] FORM Waiver of Undertaking

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	WAIVER OF UNDERTAKING
Defendant.	)	
	)	
	)	

_____

Plaintiff and Respondent _____ [*name*] waives any requirement of *Sections 916 through 923 of the Code of Civil Procedure*, that an undertaking, or bond, or security deposit be given by Defendant and Appellant _____ [*name*] to stay enforcement pending appeal of the _____ [*either* judgment entered *or* order made] on _____ [*date*]. This waiver is made pursuant to *Code of Civil Procedure Section 995.230*.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]
Plaintiff

APPROVED AS TO FORM

_____ [*law firm*]	_____ [*law firm*]
By: _____[*signature*]	By: _____ [*signature*]
_____ [*typed name*]	_____ [*typed name*]
Attorney for Defendant	Attorney for Plaintiff

[2] Use of Form

The form set out in [1], *above*, is a waiver for use when the perfecting of an appeal by defendant does not automatically stay proceedings in the trial court unless an undertaking is given [*see, e.g., Code Civ. Proc. §§ 917.1, 917.2, 917.4, 917.5, 917.9* (situations when undertaking is required)], and the plaintiff wishes to waive the right to the protection of such undertaking [see *Code Civ. Proc. § 995.230*]. For discussion of waiver by a plaintiff of the right to an undertaking, see *§ 43.20[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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Chapter 43 APPEAL: STAY OF PROCEEDINGS
PART V. FORMS

5-43 California Forms of Pleading and Practice--Annotated § 43.71

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§ 43.71 Stipulation Regarding Security in Lieu of Undertaking

[1] FORM Stipulation Regarding Security in Lieu of Undertaking

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	STIPULATION IN LIEU OF UNDERTAKING ON
Defendant.	)	APPEAL
	)	
	)	

The undersigned parties and their respective counsel stipulate that, for the purpose of staying enforcement of the _____ [*either* judgment entered *or* order made] on _____ [*date*], they agree to the following in lieu of an undertaking otherwise required under Code of Civil Procedure Section _____ [*specify*]:

Defendant and appellant _____ [*name*] will, no later than _____ [*time and date*], deposit a security consisting of _____ [*describe*], having a cash value, at that time and date of $ _____, as calulated by _____ [*specify*]. The deposit will be made to _____ [*specify*], to be held on the following conditions: _____ [*specify*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The form set out in [1], *above*, is for use to stipulate that a security deposit may be substituted in lieu of an undertaking, when an undertaking is required by statute to stay enforcement of an order or judgment pending appeal [*see Code Civ. Proc. § 283(1)* (authority of attorney to bind client), *Code Civ. Proc. § 995.230* (written consent to lesser amount of undertaking or waiver of undertaking); *see also Code Civ. Proc. §§ 917.1, 917.2, 917.4, 917.5* (situations in which undertakings are required to stay enforcement of judgment or order on appeal); *Merritt v. J. A. Stafford Co. (1968) 68 Cal. 2d 619, 625, 68 Cal. Rptr. 447, 440 P.2d 927* (no statutory prohibition against stipulations re undertaking on appeal; decided under predecessor statute)].

For discussion of a stipulation for substitution of deposit in lieu of an undertaking, see *§ 43.20[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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Chapter 43 APPEAL: STAY OF PROCEEDINGS
PART V. FORMS

5-43 California Forms of Pleading and Practice--Annotated § 43.72

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§ 43.72 Motion for Undertaking Fixed by Court

[1] Motion and Declaration to Fix Undertaking Required Under Code. Civ. Proc. § 917.2, 917.4, or 917.5

[a] FORM Motion for Undertaking Fixed by Court--Motion and Declaration to Fix Undertaking Required Under Code. Civ. Proc. § 917.2, 917.4, or 917.5

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER FIXING AMOUNT OF UNDERTAKING TO STAY ENFORCEMENT ON APPEAL, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM OF POINTS AND AUTHORITIES
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff _____ (*name*)] and to _____ [*name*] his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] _____ [*name*] will, and does, move for an order under Code of Civil Procedure Section _____ [917.2 *or* 917.4 *or* 917.5], fixing the amount [and conditions] of the undertaking to be given by defendant to stay enforcement pending appeal of the _____ [*either* the judgment *or* order] entered on _____ [*date*].

The motion will be made on the grounds that _____ [*specify*]. The motion will be based on this notice of motion, on the declaration of _____ [*name*], and the memorandum of points and authorities served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. On _____ [*date*], _____ [*either* judgment was entered *or* an order was made] in favor of plaintiff _____ [*name*] and against defendant _____ [*name*]. It _____ [*describe, e.g.,* directs the delivery of _____ (*personal property*) by _____ (*name*) to _____ (*name*)].

3. On _____ [*date*], a notice of appeal was filed by defendant _____ [*name*]. Under the provisions of Section _____ [917.2 *or* 917.4 *or* 917.5] of the Code of Civil Procedure, enforcement of such _____ [*either* judgment *or* order] will not be stayed pending the appeal unless defendant _____ [*name*] gives an undertaking in a sum [and on conditions] fixed by this court.

4. Defendant desires to stay enforcement of the judgment pending appeal and intends to cause an undertaking to be entered into and filed according to Section _____ [917.2 *or* 917.4 *or* 917.5] of the Code of Civil Procedure in such amount [and on such conditions] as [*either* is *or* are] fixed by order of the court.

5. _____ [*State evidentiary facts in as many paragraphs as appropriate that will aid the court in fixing the amount and conditions of the undertaking*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion*]

[b] Use of Form

The form set out in [a], *above*, is a notice of motion and declaration for use to obtain an order fixing the amount of the undertaking necessary to stay enforcement of an order or judgment pending appeal, when the amount of the undertaking must be fixed by order of the trial court when the appeal is taken from the following judgments or orders that include the following directions:

- The assignment or delivery of personal property, including documents [*Code Civ. Proc. § 917.2*; *see* discussion *§ 43.15[2]*]. For an alternative form of motion and declaration for use in fixing the amount of an undertaking under *Code Civ. Proc. § 917.2* after deposit of the personal property with an officer appointed for that purpose, see *§ 43.77*.

- The sale, conveyance, or delivery of possession of real property [*Code Civ. Proc. § 917.4*; *see* discussion *§ 43.15[4]*].

- The appointment of a receiver [*Code Civ. Proc. § 917.5*; *see* discussion *§ 43.15[5]*].

The provisions of *Code Civ. Proc. § 916 et seq.* do not require that a noticed motion be used to obtain an order fixing the amount of a required undertaking. Such an order may apparently be obtained by ex parte application [*see McClintock v. Powley (1930) 210 Cal. 333, 337-338, 291 P. 833]* . However, the noticed motion procedure is the preferred practice [*see Hubbard v. University Bank (1898) 120 Cal. 632, 633, 52 P. 1070]* and may be required by local rule. Current requirements for ex parte applications are also strict, designed to limit such proceedings to relatively extraordinary situations involving urgency and inability to communicate with opposing counsel [*see Cal. Rules of Ct., Rule 3.1200 to 3.1207* and further discussion and forms in Ch. 372, *Motions and Orders*].

The supporting declaration should state facts that will aid the court in ascertaining the damage, if any, that may occur pending appeal under *Code Civ. Proc. §§ 917.2*, *917.4*, or *917.5*.

[2] Motion and Declaration to Fix Undertaking in Court's Discretion Under Code. Civ. Proc. § 917.9

[a] FORM Motion for Undertaking Fixed by Court--Motion and Declaration to Fix Undertaking in Court's Discretion Under Code. Civ. Proc. § 917.9
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER REQUIRING AND FIXING AMOUNT OF

vs.	)	DISCRETIONARY UNDERTAKING TO STAY
_____ [*name*],	)	ENFORCEMENT ON APPEAL, SUPPORTING DE-
Defendant.	)	CLARATION OF _____ [*name*],
	)	AND MEMORANDUM OF POINTS AND AU-
	)	THORITIES
	)	[Telephone Appearance]
	)	Date: _____
		Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff _____ (*name*)] and to _____ [*name*] his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] _____ [*name*] will, and does, move for an order under *Section 917.9 of the Code of Civil Procedure*, to require an undertaking and to fix its amount, to be given by _____ [*specify party e.g.,* defendant] to stay enforcement pending appeal of the _____ [judgment entered *or* order made] on _____ [*date*].

The motion will be made on the grounds that the _____ [judgment *or* order] _____ [*either* found the defendant to possess money or other property belonging to the plaintiff *or* required the defendant to perform an act for plaintiff's benefit *or* is solely for costs awarded under Code of Civil Procedure, Title 14, Chapter 6 (commencing with Section 1021)], and is not a [judgment *or* order] included in those specified in *Sections 917.1 through 917.8 of the Code of Civil Procedure* that are otherwise stayed on the perfecting of the appeal]. An undertaking is necessary because _____ [*specify facts*].

The motion will be based on this notice of motion, on the declaration of _____ [*name*], and the attached memorandum of points and authorities, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated:

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. On _____ [*date*], _____ [judgment was entered *or* an order was made] in favor of _____ [*specify party e.g.*, plaintiff] _____ [*name*] and against _____ [*specify party e.g.*, defendant] _____ [*name*]. It _____ [found the defendant to possess money or other property belonging to the plaintiff *or* required the defendant to perform an act for plaintiff's benefit *or* awarded _____ (*specify party e.g.*, defendant) costs under Code of Civil Procedure, Title 14, Chapter 6 (commencing with Section 1021)], and is not included in _____ [judgments *or* orders] specified in *Code of Civil Procedure Sections 917.1 through 917.8*. On _____ [*date*], a notice of appeal was filed by _____ [*specify party e.g.*, defendant] _____ [*name*]. Under *Code of Civil Procedure Section 916*, the perfecting of the appeal stays enforcement of the _____ [judgment *or* order] appealed from. _____ [*Specify party e.g.*, Plaintiff] and respondent will sustain damages, specifically, _____ [reasonable compensation for loss of use *or* payment of costs awarded to the respondent], by reason of the stay of the enforcement during the period of the appeal as follows: _____ [*specify*]. [The known assets of _____ (*specify party e.g.*, defendant) and appellant _____ (*name*) are insufficient to provide respondent with protection from the is of loss in that _____ (*specify*)]. [*State additional facts, if any*]. _____ [*Specify party e.g.*, Plaintiff] requests that this court exercise its discretion under *Code of Civil Procedure Section 917.9*, and order that the enforcement of the _____ [judgment *or* order] be stayed pending appeal only on the giving of an undertaking in the amount of $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion*]

[b] Use of Form

The form set out in [a], *above*, is a notice of motion and supporting declaration for use to request that the trial court exercise its discretion to require and undertaking and to fix the amount of that undertaking under *Code Civ. Proc. § 917.9*. When an appeal is taken from a judgment or order not otherwise specified in *Code Civ. Proc. §§ 917.1 through 917.8*, the perfecting of the appeal stays enforcement of the order or judgment pending the appeal unless the court exercises its discretion to condition the stay upon an undertaking under the conditions set out in *Code Civ. Proc. § 917.9*. For further discussion of the conditions and requirements for obtaining an undertaking under *Code Civ. Proc. § 917.9*, *see* discussion in *§ 43.15[13]*.

For discussion of the use of a noticed motion in this proceeding, as distinguished from an ex parte application, see [1][b], *above*.

The supporting declaration should state facts that will aid the court in ascertaining the damage, if any, that may occur

pending appeal under *Code Civ. Proc. § 917.9, see* discussion in *§ 43.15[13]*.

[3] Order Fixing Undertaking Under Code. Civ. Proc. § 917.2, 917.4, 917.5, or 917.9

[a] FORM Motion for Undertaking Fixed by Court--Order Fixing Undertaking Under Code. Civ. Proc. § 917.2, 917.4, 917.5, or 917.9

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

The motion of _____ [*identify party, e.g.,* defendant]] for an order fixing the amount of the undertaking on appeal from the _____ [judgment entered *or* order made] by this court on _____ [*date*], came on regularly for hearing before this court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and the amount of the undertaking to be given to stay enforcement of the _____ [judgment *or* order] pending appeal is $ _____, if executed by an admitted surety insurer and $ _____, if executed by individuals. [In addition to those conditions required by Code of Civil Procedure Section _____ (*specify*), the undertaking shall include the following conditions: _____ (*specify*)].

IT IS FURTHER ORDERED that enforcement of the _____ [judgment *or* order] is hereby stayed, provided that an undertaking complying with this order is filed with the clerk of the court on or before _____ [*date*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[b] Use of Form

The form set out in [a], *above*, is for optional use in submitting a proposed order with the motions set out in [1] and [2], *above*, to fix the amount of the undertaking required to stay enforcement of a judgment or order on appeal under *Code Civ. Proc. § 917.2, 917.4, 917.5,* or *917.9*.

It may be prepared in advance of the hearing, with the actual dollar value left blank. The optional bracketed provision concerning additional conditions need not be included where none are anticipated. For further discussion of undertakings under *Code Civ. Proc. § 917.2*, *917.4*, *917.5*, or *917.9* and additional conditions that might be required under these provisions, see *§ 43.15[2],[3],[4],[13]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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5-43 California Forms of Pleading and Practice--Annotated § 43.73

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§ 43.73 Proceedings for Order to Limit or Dispense With Undertaking Under Code Civ. Proc. § 919

[1] Motion and Declaration

[a] FORM Proceedings for Order to Limit or Dispense With Undertaking Under Code Civ. Proc. § 919--Motion and Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER _____ [LIMITING *or* DIS-
vs.	)	PENSING WITH] UNDERTAKING, SUPPORTING
_____ [*name*],	)	DECLARATION OF _____
Defendant.	)	[*name*], AND MEMORANDUM OF POINTS AND
	)	AUTHORITIES
	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff _____ (*name*)] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] _____ [*name*] will, and does, move for an order under *Code of Civil Procedure Section 919* to [limit *or* dispense] with an undertaking in order to stay enforcement pending appeal of the _____ [judgment entered *or* order made] on _____ [*date*].

The motion will be made on the ground that defendant is sued herein in his/her representative capacity as the _____ [executor of the will *or* administrator with the will annexed of the estate *or* administrator of the estate *or* trustee of the trust *or* guardian *or* conservator *or, if other specify the capacity in which acting in another's right*] of _____ [*name*] and _____ [*specify facts justifying the limiting of or dispensing with the undertaking*].

The motion will be based on this notice of motion, on the declaration of _____ [*name*], and the attached memorandum of points and authorities, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. On _____ [*date*], a notice of appeal from the _____ [*either* judgment entered *or* order made] on _____, [*date*] was filed by defendant _____ [*name*]. As shown by the pleadings, this action is being defended by defendant in his/her representative capacity as _____ [executor of the will *or* administrator with the will annexed of the estate *or* administrator of the estate *or* trustee of the trust *or* guardian *or* conservator *or, if other, specify the capacity in which appellant acts in another's right*] of _____ [*name*].

3. [*Specify other facts within declarant's personal knowledge in as many additional paragraphs as appropriate that would justify court's limiting or dispensing with undertaking.*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion*]

[b] Use of Form

The form set out in [a], *above*, is a notice of motion, motion, and supporting declaration for use by the defendant and appellant to move the trial court for an order limiting or dispensing with a required undertaking under *Code Civ. Proc. § 919. Code Civ. Proc. § 919* provides that the trial court may, in its discretion, dispense with or limit the security required by *Code Civ. Proc. § 916 et seq.*, when the appellant is an executor, administrator, trustee, guardian, conservator, or other person acting in another's right.

The supporting declaration in the form sets out facts showing appellant's representative capacity and states whether an undertaking in that capacity has been posted or waived by court order [*see Code Civ. Proc. § 919*].

For further discussion, see *§ 43.20[3]*.

[2] Order

[a] FORM Proceedings for Order to Limit or Dispense With Undertaking Under Code Civ. Proc. § 919--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER _____ [*either* LIMITING
Defendant.	)	*or* DISPENSING WITH] UNDERTAKING ON AP-
	)	PEAL
	)	

The motion of defendant _____ [*name*] for an order _____ [*either* limiting *or* dispensing with] the undertaking required to stay the enforcement of the _____ [*either* judgment entered *or* order made] on _____ [*date*] came on regularly for hearing before this court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*], and defendant appeared by counsel _____ [*name*]. On proof being made to the satisfaction of the court and good cause appearing therefor,

IT IS ORDERED that the motion be and it hereby is granted and the undertaking required by law is _____ [*either* dispensed with *or* limited as follows: _____ (*specify*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[b] Use of Form

The form set out in [a], *above*, is for submission as a proposed order granting a motion by an appellant who is an executor, administrator, trustee, guardian, conservator, or other person acting in another's right, as provided in *Code Civ. Proc. § 919*, to limit or dispense with the security required [*see* form and discussion in [1], *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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5-43 California Forms of Pleading and Practice--Annotated § 43.74

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§ 43.74 Proceedings for Order Increasing Amount of Undertaking on Attachment After Judgment

[1] Motion and Declaration

[a] FORM Proceedings for Order Increasing Amount of Undertaking on Attachment After Judgment--Motion and Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER INCREASING UNDERTAKING ON AT-
vs.	)	TACHMENT, SUPPORTING DECLARATION OF
_____ [*name*],	)	_____ [*name*], AND MEMOR-
Defendant.	)	ANDUM OF POINTS AND AUTHORITIES
	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff _____ (*name*)] and to _____ [*name*] his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] _____ [*name*] will, and hereby does, move for an order increasing the amount of the undertaking on attachment from $ _____ to $ _____.

The motion will be made on the ground that defendant will sustain damages in excess of the amount of the undertaking on file herein by continuing the attachment _____ [*either* after entry of judgment *or* during the pendency of the appeal].

The motion will be based on this notice of motion, on the declaration of _____ [*name*], and the attached memorandum of points and authorities, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. On _____ [*date*], _____ [*either* judgment was entered *or* an order was made] in favor of declarant and against plaintiff [and appellant] _____ [*name*].

3. [On _____ [*date*], a notice of appeal was filed by appellant.] The [original] undertaking on attachment is in the amount of $ _____.

4. The detriment of defendant [and respondent] reasonably to be anticipated by continuing the attachment [during the pendency of the appeal] is as follows: _____ [*specify*].

5. For the foregoing reasons defendant [and respondent] requests this court to fix the amount of additional undertaking necessary to continue the attachment [on appeal] in the amount of $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion*]

[b] Use of Form

The form set out in [a], *above*, is a notice of motion, motion, and supporting declaration for use when an attachment of defendant's property has been obtained prior to judgment, and the plaintiff and appellant seeks to obtain an order to continue the attachment in force after entry of judgment or pending appeal by increasing the existing undertaking [*see Code Civ. Proc. § 921*; *see also Code Civ. Proc. § 489.410*]. The supporting declaration sets out evidentiary facts in support of the motion.

For further discussion, see *§ 43.18*.

[2] Order

[a] FORM Proceedings for Order Increasing Amount of Undertaking on Attachment After Judgment--Order
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER INCREASING AMOUNT OF UNDER-
Defendant.	)	TAKING
	)	
	)	

The motion of defendant [and respondent] _____ [*name*] for an order increasing the amount of the undertaking on attachment pursuant to the provisions of Section _____ [*Code Civ. Proc. § 489.410 or Code Civ. Proc. § 921*] of the Code of Civil Procedure came on regularly for hearing before this court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*], and defendant appeared by counsel _____ [*name*]. On proof being made to the satisfaction of the court and good cause appearing therefor,

IT IS ORDERED that the motion be and it hereby is granted, and the amount of the additional undertaking to be given [pending appeal] is $ _____ if executed by an admitted surety insurer, and $ _____ if executed by individuals.

IT IS FURTHER ORDERED that the attachment shall be discharged and the property released therefrom, unless the undertaking herein required shall be executed and filed on or before _____ [*date within 10 days after date order made*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[b] Use of Form

The form set out in [a], *above*, is for submission as a proposed order granting a motion to increase the amount of the undertaking on attachment under the provisions of *Code Civ. Proc. § 489.410* or *921*. See form and discussion in [1], *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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Volume 5: Appeal-Chs. 40-55
Chapter 43 APPEAL: STAY OF PROCEEDINGS
PART V. FORMS

5-43 California Forms of Pleading and Practice--Annotated § 43.75

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§ 43.75 Proceedings for Order Increasing Amount of Undertaking Because of Protracted Appeal

[1] Motion and Declaration

[a] FORM Proceedings for Order Increasing Amount of Undertaking Because of Protracted Appeal--Motion and Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER INCREASING AMOUNT OF APPELLATE UNDERTAKING, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM OF POINTS AND AUTHORITIES
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff _____ (*name*)] and to _____ [*name*] his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] _____ [*name*] will, and does, move for an order increasing the amount of the undertaking on stay of enforcement pending appeal from $ _____ to $ _____, a net increase of $ _____.

The motion will be made on the ground that the amount of the undertaking has become insufficient due to mounting postjudgment interest and appellate costs over the prolonged period of time the appeal has remained unresolved. It is estimated that the amount requested would be sufficient for the undertaking.

The motion will be based on this notice of motion, on the declaration of _____ [*name*], and the attached memorandum of points and authorities, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. On _____ [*date*], _____ [judgment was entered *or* an order was made] in favor of moving party and against _____ [*identify party, e.g.,* defendant and appellant _____ (*name*)].

3. On _____ [*date*], _____, a notice of appeal was filed by _____ [*identify party, e.g.,* defendant and appellant _____ (*name*)].

4. On _____ [*date*], an undertaking to stay enforcement pending the appeal was given in the amount of $ _____, which is _____ [double the amount of the judgment/order *or* one and one half times the amount of judgment/order].

5. From the date the notice of appeal was filed until present, the appeal has remained unresolved for a period of _____ [*specify, e.g.,* two years]. _____ [*Set forth further facts showing the protracted state of the appeal, e.g.,* Furthermore, as of the present date, _____ (*identify opposing party, e.g.,* defendant and appellant) has not filed his/her/its opening brief).]

6. From the date of entry of the judgment/order, to the present, postjudgment interest has accrued in the amount of $ _____.

[7. Costs on appeal have accrued in the amount of $ _____, consisting of the following items: _____ (*specify*).]

8. As a consequence of the foregoing facts, should _____ [*identify moving party*, *e.g.*, plaintiff and respondent] be successful on the appeal, there is a substantial possibility that the original undertaking would be insufficient to allow the moving party to have an assured source of funds to meet the amount of the judgment/order, costs, and postjudgment interest after postponing enjoyment of the trial court victory.

9. A sufficient amount for the undertaking would be $ _____. [This amount is arrived at as follows: _____ (*set forth calculations, e.g.,*

$ .....2,000,000.	Judgment and costs
+ .....438,000.	Accrued postjudgment interest to date
2,438,000.	
- .....140,000.	Settlement with _____ (*name of party*)
2,298,000.	New amount
x.....1.5	
3,578,000.	New suggested undertaking amount
- .....3,131,000.	Amount of current undertaking
$.....447,000.	Needed increase].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion*]

[b] Use of Form

The form set out in [a], *above*, is a notice of motion, motion, and supporting declaration for use when the amount of the original undertaking given to stay enforcement of a judgment or order pending appeal has become insufficient as a consequence of the appeal remaining unresolved for a prolonged period of time. The fact pattern provided in the form was adapted from *Grant v. Superior Court (1990) 225 Cal. App. 3d 929, 275 Cal. Rptr. 564* . For further discussion, see *§ 43.20[6]*.

The determination is to be made on motion supported by affidavit or on the court's motion, and the motion is to be heard and notice of motion is to be given in the same manner as an objection to a bond [*Code Civ. Proc. §§ 995.040, 996.010(b)*]. That is, the notice of motion must be in writing and must specify the precise grounds for the motion. Since the ground is that the amount of the undertaking is insufficient, the notice of motion must also state the reason for the insufficiency and *must* include an estimate of the amount that would be sufficient [*see Code Civ. Proc. § 995.930*]. Service of the notice of motion and other documents is made in the same manner as service of process in civil actions generally [*see Code Civ. Proc. § 995.030*; *see* generally discussion and forms relating to service in Ch. 518, *Service and Summons of Papers*].

[2] Order

[a] FORM Proceedings for Order Increasing Amount of Undertaking Because of Protracted Appeal--Order
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER INCREASING AMOUNT OF APPEL-
Defendant.	)	LATE UNDERTAKING
	)	
	)	

The motion of _____ [*identify party, e.g.,* defendant and respondent] for an order increasing the amount of the undertaking to stay enforcement pending appellate review came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and the amount of the undertaking on stay of enforcement pending appeal shall, within _____ days, increase by a net of $ _____, to the total

amount of $ _____ [, unless the undertaking is given by an admitted surety insurer, in which case it shall increase by a net of $ _____, to the total amount of $ _____].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[b] Use of Form

The form set out in [a], *above*, is for submission as a proposed order granting a motion to increase the amount of the undertaking to stay enforcement of a judgment or order pending appeal. It includes optional language for use when the court grants the order allowing for execution of the undertaking either by an individual, or in the alternative, by an admitted surety insurer [*see Code Civ. Proc. § 917.1(b)*]. See form and discussion in [1], *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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California Forms of Pleading and Practice--Annotated

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Volume 5: Appeal-Chs. 40-55
Chapter 43 APPEAL: STAY OF PROCEEDINGS
PART V. FORMS

5-43 California Forms of Pleading and Practice--Annotated § 43.76

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§ 43.76 Undertaking to Stay Enforcement of Judgment or Order Pending Appeal

[1] General Form of Undertaking

[a] FORM Undertaking to Stay Enforcement of Judgment or Order Pending Appeal--General Form of Undertaking

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	UNDERTAKING ON APPEAL
Defendant.	)	
	)	
	)	

Defendant and Appellant _____ [*name*] desires to give an undertaking to stay enforcement pending appeal of the _____ [*either* judgment made *or* order entered] by the court in this cause on _____ [*date*], as provided by Code of Civil Procedure Section _____ [*specify*].

Therefore the undersigned sureties do hereby obligate ourselves, jointly and severally, to Plaintiff and Respondent

_____ [*name*], under said statutory obligations, in the sum of $ _____, which is _____ [*either* double the amount of the judgment *or* the amount fixed by the court].

The address at which each appellant and each surety may be served with notices and papers as provided by *Section 995.320(a)(2) of the Code of Civil Procedure* is as follows:

_____ [*name*], _____ [*address for service*]
_____ [*name*], _____ [*address for service*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature of surety*]
_____ [*typed name*]

_____ [*date*]

_____ [*signature of surety*]
_____ [*typed name*]

[b] Use of Form

The form set out in [a], *above*, is an undertaking substantially in the form set out in *Code Civ. Proc. §§ 995.320* and *995.330*, for use to stay the enforcement of a judgment or order pending appeal [*see Code Civ. Proc. §§ 995.320, 995.330*]. This form may be used when, for example, when an undertaking is required under *Code Civ. Proc. § 917.2, 917.4, 917.5*, or *917.9* [*see* discussion in *§ 43.15[2],[4], [5]*, and *[13]*, and forms for fixing the amount of undertaking in these situations in *§ 43.72*.

For a form of undertaking specifically for use in staying the enforcement of a money judgment or order under *Code Civ. Proc. § 917.1*, see [2], *below* [*see also* discussion in *§ 43.15[1]*]. For a form of undertaking specifically for use in continuing a preexisting attachment pending appeal, see [3], *below* [*see also* discussion in *§ 43.18*].

Some courts provide a general form of undertaking that may be used for undertakings on appeal. Other courts require the attorney to draft his or her own form. If in doubt as to the practice in a given court, counsel should check with the court clerk.

If the undertaking is executed by personal sureties, it must be accompanied by an affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) of qualifications of each such surety stating the matters set forth in *Code Civ. Proc. § 995.520* [*see* [4], *below*]. If the surety is an admitted surety insurer [*see Code Civ. Proc. § 995.120*], for the surety insurer to be accepted or approved without further acknowledgment, the bond must be executed in the surety insurer's name under penalty of perjury or the fact of execution must be duly acknowledged before an officer authorized to take and certify acknowledgments. In addition, either (1) a copy of the transcript or record of the unrevoked, duly certified instrument authorizing the person who executed the bond to do so on the insurer's behalf must be filed in the appropriate county clerk's office, or (2) a copy of a power of attorney must be attached to the bond [*see Code Civ. Proc. § 995.630*].

If the amount of the undertaking is based on the value of property or an interest in property, a description and an estimate of the value of the property or interest must be included in this form [*see Code Civ. Proc. § 995.320(a)(3)*].

For further discussion regarding the qualifications of, and objections to, sureties, see *respectively, § 43.20[4]* and *[5]*.

For related discussion and forms concerning waiver of undertaking or deposits in lieu of undertakings, see *§§ 43.20[1], [2], 43.70*, and *43.71*.

For a form of declaration for use in qualifying a personal or individual surety, see [4], *below*. For a form for use in service of the undertaking, see [5], *below*.

[2] Undertaking to Stay Money Judgment Under Code Civ. Proc. § 917.1

[a] FORM Undertaking to Stay Enforcement of Judgment or Order Pending Appeal--Undertaking to Stay Money Judgment Under Code Civ. Proc. § 917.1

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	UNDERTAKING ON APPEAL
Defendant.	)	
	)	
	)	

In an action in the Superior Court of California, County of _____, judgment was entered on _____ [*date*], rendered by the Honorable _____ [*name*], Judge of the Court, in favor of _____ [*name*] plaintiff, against _____ [*name*], defendant, for the sum of $ _____ with interest in the amount of $ _____.

Defendant _____ [*name*], is dissatisfied with the judgment, has appealed from this judgment to the Court of Appeal of the State of California, and desires a stay of enforcement of this judgment.

Consequently, we, the undersigned, _____ [*name*] of _____ County, and _____ [*name*] of _____ County, do hereby acknowledge ourselves, jointly and severally, bound in the sum of $ _____, to guarantee that, in the event that this judgment so appealed, or any part, is affirmed, or if the appeal from this judgment is withdrawn or dismissed, defendant will pay the amount directed to be paid by such judgment, or the part of such amount as to which the judgment is affirmed if affirmed only in part. If defendant does not make such payment within thirty (30) days after the remittitur from the Court of Appeal is filed in the Superior Court, then, on motion of plaintiff, judgment may be forthwith entered in favor of plaintiff and against ourselves as sureties for such amount, together with interest that may be due thereon and all costs that may be awarded against defendant on the appeal.

The address at which each appellant and each surety may be served with notices and papers as provided by *Section 995.320(a)(2) of the Code of Civil Procedure* is as follows:

_____ [*name*], _____ [*address for service*]
_____ [*name*], _____ [*address for service*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].

_____ [*signature of surety*]
_____ [*typed name*]

_____ [*date*]

_____ [*signature of surety*]
_____ [*typed name*]

[b] Use of Form

The form set out in [a], *above*, is an undertaking for use to stay enforcement, pending appeal, of a judgment or order against defendant under *Code Civ. Proc. § 917.1*, for money or which directs the payment of money, and whether consisting of a special fund or not, and whether payable by the appellant or another party to the action [*Code Civ. Proc. §§ 917.1*; *see Code Civ. Proc. §§ 995.320, 995.330*]. For a more general form of undertaking, see [1], *above*.

The surety submits himself or herself to the jurisdiction of the trial court in all matters affecting his or her liability on the bond or undertaking [*Code Civ. Proc. § 996.420(a)*]. If the judgment is affirmed and the surety pays the judgment, with or without action, then the surety is substituted to the rights of the creditor and is entitled to control, enforce, and satisfy the judgment as if the surety had recovered the judgment [*Code Civ. Proc. § 917.1(c)*]. For further discussion of the amount, conditions, and requirements for an undertaking under *Code Civ. Proc. § 917.1*, see *§ 43.15[1]*. See also discussion regarding undertakings and sureties generally in [1][b], *above*, and § 43.20.

For a form of declaration for use in qualifying a personal or individual surety, see [4], *below*. For a form for use in service of the undertaking, see [5], *below*.

[3] Undertaking to Continue Prejudgment Attachment

[a] FORM Undertaking to Stay Enforcement of Judgment or Order Pending Appeal--Undertaking to Continue Prejudgment Attachment
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	UNDERTAKING ON APPEAL
Defendant.	)	
	)	
	)	

Plaintiff [and appellant] _____ [*name*] desires to give an [additional] undertaking in the amount of $ _____ to continue in force the attachment levied in the above-entitled cause, as provided by Section _____ [*either* 489.410 *or* 921] of the Code of Civil Procedure.

Therefore, we, the undersigned sureties, do hereby obligate ourselves, jointly and severally, to defendant and respondent _____ [*name*], under said statutory obligations, in the sum of $ _____.

The address at which each appellant and each surety may be served with notices and papers as provided by *Section 995.320(a)(2) of the Code of Civil Procedure* is as follows:

_____ [*name*], _____ [*address for service*]
_____ [*name*], _____ [*address for service*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].

_____ [*signature of surety*]
_____ [*typed name*]

_____ [*date*]

_____ [*signature of surety*]
_____ [*typed name*]

[b] Use of Form

The form set out in [a], *above*, is an undertaking for use when the court orders that an undertaking filed in the underlying action for an attachment levy be increased in order to continue that attachment in force pending appeal [*Code Civ. Proc. § 921*; *see also Code Civ. Proc. § 489.410*]. For discussion of proceedings to increase an existing undertaking for this purpose, see *§ 43.18*. For a form of motion for use in having the court fix the amount of increased undertaking for this purpose, see *§ 43.74*.

For a general form of undertaking, and a form of undertaking for use specifically to stay enforcement of a money judgment, see respectively [1] and [2], *above*. See also discussion regarding undertakings and sureties generally in [1][b], *above*, and *§ 43.20*.

For a form of declaration for use in qualifying a personal or individual surety, see [4], *below*. For a form for use in service of the undertaking, see [5], *below*.

[4] Declaration of Qualification by Personal Surety in Support of Undertaking

[a] FORM Undertaking to Stay Enforcement of Judgment or Order Pending Appeal--Declaration of Qualification by Personal Surety in Support of Undertaking

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DECLARATION OF QUALIFICATION BY INDI-
Defendant.	)	VIDUAL SURETY
	)	
	)	

_____

I, _____ [*name*], declare:

1. I am one of the sureties who executed the undertaking _____ [*either* to continue in force the attachment *or* to stay enforcement of the _____ (*either* judgment entered *or* order made)] by the court on _____ [*date*], in the above-entitled matter [pending appeal] and am making this declaration in support of the undertaking.

2. I am a resident and _____ [*either* an owner of real property *or* householder] in California. My occupation is _____ [*specify occupation*]. My residence address is _____ [*street address and city*]; my business address is _____ [*street address and city*].

3. I am worth $ _____, the amount of the undertaking, in _____ [real *and/or* personal] property that is situated in California, over and above all my debts and liabilities, exclusive of property exempt from enforcement of a money judgment. [*Note: If the undertaking exceeds $10, 000 and is executed by more than two sureties, each surety may declare that he or she is worth less than the amount of the undertaking, and it may be stipulated in the undertaking that the liability of the surety is limited to the worth of the surety stated in the declaration, provided that the aggregate worth of all sureties executing the undertaking is twice the amount of the undertaking (Code Civ. Proc. § 995.520(d)).*]

[*When the undertaking exceeds $5,000, add:*]

4. The property belonging to me and relied on by me as qualifying me on the undertaking, and my best estimate of the fair market value of each such property, is as follows: _____ [*set forth description sufficient for identification of property and estimate of fair market value*].

5. The nature of my interest in the property is _____ [*specify, e.g.*, owner in fee *or* sole owner].

[*EITHER*]

6. The property is subject to no charge or liens, of public record or otherwise, known to me. Nor is the property subject to any impediment or cloud known to me on the free right of possession, use, benefit, or enjoyment.

[*OR*]

6. The property is subject to the following charges and liens: _____ [*specify, giving amounts*]. Other than the foregoing charges and liens, the property is not subject to any other impediment or cloud known to me on the free right of possession, use, benefit, or enjoyment.

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].

_____ [*signature of surety*]
_____ [*typed name*]

[b] Use of Form

The form set out in [a], *above*, is a declaration for use to support an undertaking by a personal surety to continue in force an attachment or to stay enforcement of a judgment or order pending appeal [*see Code Civ. Proc. § 995.520*; *see also* forms of undertaking set out in [1]-[3], *above*, and *Code Civ. Proc. § 2015.5* (general requirements for declarations under penalty of perjury)]. A declaration of the qualification of each personal surety must accompany any undertaking executed by one or more such sureties [*Code Civ. Proc. § 995.520(a)*].

For discussion regarding the sufficiency of personal sureties and the evidentiary facts required to be included in a declaration of qualification of a personal surety, see *§ 43.20[4][b]*.

[5] Proof of Service of Undertaking

[a] FORM Undertaking to Stay Enforcement of Judgment or Order Pending Appeal--Proof of Service of Undertaking

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DECLARATION OF SERVICE BY MAIL
Defendant.	)	
	)	
	)	

_____

I, _____ [*name*], declare:

I am, and was at the time of the service hereinafter mentioned, over the age of 18 years and not a party to the above-entitled cause. My _____ [residence *or* business] address is _____ [*specify address*], and I am _____ [a resident of *or* employed in] _____ County, California [*county where mailing occurred*].

I served the Undertaking to Stay Enforcement of Judgment or Order Pending Appeal on _____ [*date*], by depositing a copy of the above-mentioned document in the United States mail [at _____ (*location*)] in _____ [*city*], _____ County, California in a sealed envelope, with postage fully prepaid, addressed to _____ [*state full name(s) and address(es) of addressee(s) as they appeared on envelope*], who _____ [is *or* are] the [attorney(s) of record for the] respondent(s) in the above-entitled cause.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].
_____ [*signature*]
_____ [*typed name*]

[b] Use of Form

The form set out in [a], *above*, is for use in proving service by mail of a copy of the undertaking to stay enforcement of judgment or order pending appeal on the respondent or the respondent's attorney of record. A copy of the undertaking must be served on the respondent at the time the undertaking is given, and an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of service must be given and filed with the undertaking [*Code Civ. Proc. § 995.370*; *see Code Civ. Proc. §§ 1013a(1), 2009*].

For discussion and forms relating to proof of service generally, see Ch. 518, *Service of Summons and Papers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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Volume 5: Appeal-Chs. 40-55
Chapter 43 APPEAL: STAY OF PROCEEDINGS
PART V. FORMS

5-43 California Forms of Pleading and Practice--Annotated § 43.77

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§ 43.77 Motion for Order Designating Custodian of Personal Property and Fixing Amount of Undertaking

[1] Motion and Supporting Declaration

[a] FORM Motion for Order Designating Custodian of Personal Property and Fixing Amount of Undertaking--Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER DESIGNATING OFFICER AS CUSTODIAN OF PERSONAL PROPERTY AND FIXING AMOUNT OF UNDERTAKING, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM OF POINTS AND AUTHORITIES
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff _____ (*name*)] and to _____ [*name*] his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] _____ [*name*] will, and does, move for an order designating _____ [*name*] as the officer in whose custody the personal property which is the subject of this litigation is to be placed pending appeal, to abide the order of the reviewing court and, in consideration of such deposit, fixing the amount of the undertaking required to stay enforcement pending appeal at $ _____.

The motion will be made on the ground that appointment of such custodian is authorized by the provisions of *Section 917.2 of the Code of Civil Procedure* and _____ [*specify facts justifying appointment*].

The motion will be based on this notice of motion, on the declaration of _____ [*name*], and the attached memorandum of points and authorities, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [the defendant herein *or* the attorney of record for defendant herein].

2. On _____ [*date*], _____ [*either* judgment was entered *or* an order was made] in favor of plaintiff _____ [*name*] and against defendant _____ [*name*]. It directs _____ [*name*] to _____ [assign *or* deliver *or* sell] the following personal property: _____ [*specify*].

3. On _____ [*date*], a notice of appeal was filed by defendant _____ [*name*]. Enforcement of the _____ [*either* judgment *or* order] is not stayed unless an undertaking in a sum and on conditions fixed by the trial court is given. However, defendant _____ [*name*] desires to place the property in the custody of an officer designated by the court as authorized by *Section 917.2 of the Code of Civil Procedure*, and requests that the court consider such fact in fixing the amount of the undertaking.

4. _____ [*Specify evidentiary facts justifying the appointment of a custodian and which will aid the court in fixing the amount of the undertaking*].

[5. _____ (*Name*) is a person qualified to serve as custodian of the property to abide the order of the reviewing court in that _____ (*specify*). He/She has agreed to so act if designated by the court.]

[6. _____ (*Name*) is not a party to this action, nor an attorney for such a party, nor a person interested in this action, nor is he/she related to any judge of this court by consanguinity or affinity within the third degree.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion*]

[b] Use of Form

The form set out in [a], *above*, is a notice of motion, motion, and supporting declaration for use by appellant under *Code Civ. Proc. § 917.2*, to request that the trial court designate an officer in whose custody the personal property which is the subject of the litigation is to be placed pending appeal, to abide the order of the reviewing court, and to request that the trial court consider this fact in fixing the amount of undertaking. The supporting declaration states evidentiary facts justifying the appointment and, optionally, suggesting a qualified and disinterested person for appointment as custodian [*see* discussion in *§ 43.15[2][c]*].

For a form of motion and declaration for use in seeking an order from the trial court to fix the amount of an undertaking pursuant to *Code Civ. Proc. § 917.2* without such a deposit of personal property, see *§ 43.76[1]*.

For discussion of conditions and requirments for an undertaking under *Code Civ. Proc. § 917.2*, including appointment of a custodian, see *§ 43.15[2]*.

[2] Order

[a] FORM Motion for Order Designating Custodian of Personal Property and Fixing Amount of Undertaking--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER DESIGNATING OFFICER AS CUSTODI-
Defendant.	)	AN OF PERSONAL PROPERTY AND FIXING
	)	AMOUNT OF UNDERTAKING ON APPEAL
	)	

The motion of _____ [*either* plaintiff *or* defendant] _____ [*name*] for an order designating an officer in whose custody the personal property which is the subject of the within litigation is to be deposited, to abide the order of the reviewing court, and in consideration of such deposit, fixing the amount of

undertaking required to stay enforcement pending appeal of the _____ [*either* judgment entered *or* order made] by this court in this cause on _____ [*date*] came on regularly for hearing on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*]. On proof being made to the satisfaction of the court and good cause appearing,

IT IS ORDERED that the motion be and hereby is granted; that _____ [*name*] is hereby designated as the officer in whose custody _____ [*name*] is to put the following described property to abide the order of the reviewing court: _____ [*specify*]

IT IS FURTHER ORDERED that, in consideration of the deposit of such property with _____ [*name of the officer*], the court fixes the amount of the undertaking to be given to stay enforcement pending appeal of the _____ [*either* judgment entered *or* order made] by the court in this cause on _____ [*date*] at $ _____, if executed by a corporate surety, and $ _____ if executed by individuals. [In addition to those conditions required by *Section 917.2 of the Code of Civil Procedure*, the undertaking shall include the following conditions _____ (*specify*).] Enforcement of the _____ [*either* judgment *or* order] is hereby stayed, provided that an undertaking complying with this order is filed with the clerk of this court on or before _____ [*date*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[b] Use of Form

The form set out in [a], *above*, is for submission as a proposed order granting a motion under *Code Civ. Proc. § 917.2* to designate an officer to take custody, pending appeal, of personal property that is the subject of litigation, and to abide the order of the reviewing court, and, in addition to fix the amount of the undertaking required for the stay of enforcement of the judgment or order after taking into consideration this deposit with a custodian. The optional, bracketed material is for use when conditions in addition to those specified in *Code Civ. Proc. § 917.2* are to be included.

See also discussion in *§ 43.15[2][c]* and [1][b], *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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Volume 5: Appeal-Chs. 40-55
Chapter 43 APPEAL: STAY OF PROCEEDINGS
PART V. FORMS

5-43 California Forms of Pleading and Practice--Annotated § 43.78

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§ 43.78 Motion for Order Staying Enforcement of Order Affecting Child Custody or Exclusion of Party From Dwelling

[1] Motion and Supporting Declaration

[a] FORM Motion for Order Staying Enforcement of Order Affecting Child Custody or Exclusion of Party From Dwelling--Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER STAYING ENFORCEMENT PENDING APPEAL OF _____ [*either* JUDGMENT *or* ORDER] _____ [*either* AFFECTING CUSTODY OF MINOR *or* OF EXCLUSION OF PARTY FROM DWELLING], SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM OF POINTS AND AUTHORITIES
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	
	)	
	)	
	)	
	)	
	)	[Telephone Appearance]
		Date: _____
		Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.*, plaintiff _____ (*name*)] and to _____ [*name*] his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.*, defendant] _____ [*name*] will, and does, move for an order staying enforcement pending appeal of the _____ [*either* judgment entered *or* order made] by the court in this matter on _____ [*date*].

[*EITHER*]

The _____ [*either* judgment *or* order] affects the _____ [*either* custody of *or* right to visit] _____ [*name*], a minor child, in that _____ [*specify*].

[*OR*]

The _____ [*either* judgment *or* order] temporarily excludes _____ [*name*] from the _____ [*either* family dwelling *or* dwelling of _____ (*name of other party*)].

[*CONTINUE*]

The motion will be made on the ground that staying enforcement of the _____ [*either* order *or* judgment] will _____ [*specify, e.g.*, be in the best interests of the minor].

The motion will be based on this notice of motion, on the declaration of _____ [*name*], and the attached memorandum of points and authorities, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

[*EITHER, in support of motion involving custody of minor*]

1. I am the _____ [*state relationship*] of the minor, _____ [*name*], who is the subject of this proceeding.

2. _____ [*Set forth evidentiary facts showing that a stay of enforcement of the judgment or order is necessary; for example, that it will be in the best interests of the child*].

[*OR, in support of motion involving exclusion from dwelling*]

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. Enforcement of the order temporarily excluding _____[*name*] from the _____ [*either* family dwelling *or* the dwelling of _____ (*name or other party*)] located at _____ [*street address*] should be stayed pending appeal for the following reasons: _____[*specify*].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion*]

[b] Use of Form

The form set out in [a], *above*, is a notice of motion, motion, and supporting declaration for use to obtain an order staying enforcement of any of the following judgments or orders under *Code Civ. Proc. § 917.7*:

- One that affects the custody of a minor child, in any civil action, in an action filed under the Juvenile Court Law, or in a special proceeding.

- One that includes a provision for the temporary exclusion of a party from a dwelling as provided in the Family Code.

For discussion of proceedings under *Code Civ. Proc. § 917.7*, see *§ 43.15[8]*.

[2] Order

[a] FORM Motion for Order Staying Enforcement of Order Affecting Child Custody or Exclusion of Party From

Dwelling--Order
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER STAYING ENFORCEMENT OF
Defendant.	)	_____ [*either* JUDGMENT *or* OR-
	)	DER] AFFECTING [*either* CUSTODY OF MINOR
	)	*or* EXCLUSION OF PARTY FROM DWELLING]

_____

The motion of _____[*name of moving party*] for an order staying enforcement pending appeal of the _____ [*either* judgment entered *or* order made] by this court in the above entitled cause on _____ [*date*], came on regularly for hearing on this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel_____ [*name*].

On proof being made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be and it hereby is granted and the _____ [*either* judgment *or* order] re _____[*either* custody *or* exclusion from dwelling] _____[*either* entered *or* made] on _____ [*date*], is hereby stayed [on the following conditions: _____(*specify as ordered*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[b] Use of Form

The form set out in [a], *above*, is for submission as a proposed order to grant a motion under *Code Civ. Proc. § 917.7* to stay the enforcement of the judgment or order affecting the custody of a minor or for temporary exclusion of a party from a dwelling pending appeal. See discussion in *§ 43.15[8]* and [1][b], *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsProperty RightsGeneral OverviewFamily LawChild SupportProceduresCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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Volume 5: Appeal-Chs. 40-55
Chapter 43 APPEAL: STAY OF PROCEEDINGS
PART V. FORMS

5-43 California Forms of Pleading and Practice--Annotated § 43.79

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§ 43.79 Motion for Order Staying Enforcement of Judgment or Order Regarding Public Office, Inspection of Corporate Records, or Nuisance

[1] Motion and Supporting Declaration

[a] FORM Motion for Order Staying Enforcement of Judgment or Order Regarding Public Office, Inspection of Corporate Records, or Nuisance--Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER STAYING ENFORCEMENT OF _____ [*either* JUDGMENT *or* ORDER] PENDING APPEAL, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM OF POINTS AND AUTHORITIES
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff _____ (*name*)] and to _____ [*name*] his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] _____ [*name*] will, and does, move for an order staying the enforcement pending appeal of the _____ [*either* judgment entered *or* order made] by this court in the above entitled cause on _____ [*date*].

[*EITHER*]

The _____ [*either* judgment *or* order] appealed from adjudges that defendant _____ [*name*] is guilty of _____ [usurping *or* intruding into *or* unlawfully holding] the public office of _____ [*specify*].

[*OR*]

The _____ [*either* judgment *or* order] appealed from directs defendant _____ [*name*], a corporation, and its officers and agents, and each of them, to give to plaintiff _____ [*name*], who has been adjudged to be a _____ [director *or* stockholder *or* member] of such corporation a reasonable opportunity to _____ [inspect *or* make *or* inspect and make] copies of the following described _____ [books *or* papers *or* documents *or combination of these*] of such corporation which the court found plaintiff is entitled to _____ [inspect *or* copy *or* inspect and copy] by law: _____ [*describe*].

[*OR*]

The _____ [*either* judgment *or* order] appealed from adjudges _____ [*name of building and street address*], in _____ [city], California, a nuisance and directs _____ [*either* its closing *or* discontinuance as _____ (*specify*)].

[*OR*]

The _____ [*either* judgment *or* order] appealed from grants relief in an action brought by a governmental agency under _____ [*either Penal Code § 11225 et seq. or Health and Safety Code § 11570 et seq.*].

[*CONTINUE*]

The motion will be made on the ground that _____ [*specify*].

The motion will be based on this notice of motion, on the declaration of _____ [*name*], and the attached memorandum of points and authorities, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated:

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am the defendant and appellant in the above entitled action.

2. On _____ [*date*], _____ [*either* a judgment was entered *or* an order was made] in the above entitled cause in favor of plaintiff and respondent _____ [*name*] and against declarant.

3. On _____ [*date*], a notice of appeal was filed by declarant. Enforcement of such _____ [*either* judgment *or* order] is not stayed by the perfecting of the appeal.

4. The following issues will be raised on appeal: _____ [*specify*].

5. Enforcement of the _____ [*either* judgment *or* order] should be stayed for the following reasons: _____ [*specify*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion*]

[b] Use of Form

The form set out in [a], *above*, is a notice of motion, motion, and supporting declaration for use by an appellant to move the trial court for an order staying enforcement of one of the following types of judgments or orders as provided under *Code Civ. Proc. § 917.8*:

- If a party to the proceeding has been adjudged guilty of usurping, or intruding into, or unlawfully holding a public office, civil or military, within California.

- If a judgment or order directs a corporation, or any of its officers or agents, to give to a person adjudged to be a director, stockholder, or member of that corporation a reasonable opportunity to inspect or make copies of the books, papers, or documents of the corporation as the trial court finds that the director, stockholder, or member is entitled by law to inspect or copy.

- If a judgment or order adjudges a building or place to be a nuisance and, as part of that judgment or order, directs the closing or discontinuance of any specific use of the building or place for any period of time.

- If a judgment or order, including, but not limited to, a temporary restraining order or preliminary injunction, grants relief in an action brought by a governmental agency under *Penal Code § 11225 et seq.* (relating to buildings where illegal gambling, lewdness, assignation, or prostitution occurs) or *Health and Safety Code § 11570 et seq.* (relating to buildings where selling, serving, storing, keeping, manufacturing, or giving away controlled substances occurs).

For discussion of the provisions for a stay under *Code Civ. Proc. § 917.8*, see *§ 43.15[10]-[12]*.

[2] Order

[a] FORM Motion for Order Staying Enforcement of Judgment or Order Regarding Public Office, Inspection of Corporate Records, or Nuisance--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER STAYING ENFORCEMENT PENDING
Defendant.	)	APPEAL OF _____ [*either* JUDG-
	)	MENT *or* ORDER] RE _____
	)	[PUBLIC OFFICE *or* INSPECTION OF CORPOR-
		ATE RECORDS *or* NUISANCE]

_____

The motion of _____ [*name of moving party*] for an order staying enforcement pending appeal of the _____ [*either* judgment entered *or* order made] by this court in the above entitled cause on _____ [*date*] came on regularly for hearing on this date. Plaintiff appeared by counsel _____ [*name*]. Defendant appeared by counsel _____ [*name*].

On proof being made to the satisfaction of the court and good cause appearing therefor,

IT IS ORDERED that the motion be and it hereby is granted and the above described _____ [*either* judgment *or* order] _____ [*describe, e.g.,* adjudging defendant _____ (*name*) guilty of usurping the public office of _____ (*specify*) *or* directing _____ (*name*), a corporation, and its officers and agents, to give to plaintiff _____ (*name*) a reasonable opportunity to inspect and make copies of the records of such corporation *or* adjudging _____ (*name of building and street address*) a nuisance and directing its closure/discontinuance], is stayed pending final determination of the appeal [on the following conditions: _____ (*specify as ordered*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[b] Use of Form

The form set out in [a], *above*, is for submission as a proposed order granting a motion to stay enforcement of a judgment or order pending appeal under *Code Civ. Proc. § 917.8*. See discussion in *§ 43.15[10]-[12]* and [1][b], *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsEmployees & OfficialsReal Property LawTortsNuisanceTypesGeneral OverviewBusiness & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsInspection RightsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

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Volume 5: Appeal-Chs. 40-55
Chapter 43 APPEAL: STAY OF PROCEEDINGS
PART V. FORMS

5-43 California Forms of Pleading and Practice--Annotated §§ 43.80-43.89

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[Reserved]

§§ 43.80[Reserved]

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Volume 5: Appeal-Chs. 40-55
Chapter 43 APPEAL: STAY OF PROCEEDINGS
PART V. FORMS

5-43 California Forms of Pleading and Practice--Annotated § 43.90

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§ 43.90 Proceeding for Writ of Supersedeas to Stay Judgment or Order

[1] Petition

[a] FORM Proceeding for Writ of Supersedeas to Stay Judgment or Order--Petition

[*EITHER*]

[IN THE] SUPREME COURT OF CALIFORNIA

[*OR*]

[IN THE] COURT OF APPEAL OF CALIFORNIA
_____ APPELLATE DISTRICT [, DIVISION _____]

_____ [*name*],	)	
Plaintiff and Respondent/Appellant,	)	NO. _____
vs.	)	PETITION FOR WRIT OF SUPERSEDEAS
_____ [*name*], Defendant and	)	
Appellant/Respondent.	)	
	)	

_____

Petitioner and appellant petitions this court for a writ of supersedeas to stay enforcement of the _____ [*either* judgment *or* order] of the Superior Court of California, County of _____, _____ [*describe judgment or order*] and all further proceedings thereon, until final determination [*either* judgment *or* order], and alleges:

1. The judgment appealed from was entered on _____ [*date*], in Volume _____ [*number*], page _____ [*number*] of the Judgment Book. A copy of the judgment is attached as part of this petition as Exhibit "A.".

2. Petitioner and appellant filed his/her/its notice of appeal from the judgment on _____ [*date*].

3. The nature of the action is _____ [*state*].

4. The appeal is based on _____ [*summarize alleged errors of the trial court sufficiently to advise the reviewing court of the question, or questions, involved*].

5. Issuance of the writ is necessary for the following reason[s]: _____ [*specify*].

WHEREFORE, petitioner and appellant prays that this court issue a writ of supersedeas staying enforcement of the judgment, and all proceedings thereon, pending determination of the appeal herein.

[Petitioner and appellant further prays that this court grant a temporary stay of execution of the judgment, and all proceedings thereon, pending determination of this petition.]
Dated: _____.

_____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner and Appellant

VERIFICATION

I, _____ [*name*], am _____ [the appellant *or* the attorney of record for the appellant] in the above-entitled appeal. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge [, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting petition*]

[b] Use of Form

The form set out in [a], *above*, is a petition is for use in requesting that the court of appeal issue a writ of supersedeas staying further proceedings in the trial court during the pendency of an appeal [*see Code Civ. Proc. § 923*; *Cal. Rules of Ct., Rules 8.112, 8.116*]. For further discussion of the writ of supersedeas and the requirements of *Cal. Rules of Ct., Rules 8.112, 8.116*, see *§ 43.21* and [c], *below*.

[c] Format and Contents of Petition

A petition for a writ of supersedeas must bear the same title as the appeal, and be served and filed in the appellate court in which the appeal is pending. It must be verified, contain a statement of the necessity for the writ, and include a supporting memorandum [*Cal. Rules of Ct., Rule 8.112*]. If the record on appeal has not been filed with the reviewing court, the petition must contain a copy of the judgment, the date of its entry, the fact and date of filing of the notice of appeal, and a statement of the subject matter of the appeal sufficient to advise the reviewing court of the question involved [*Cal. Rules of Ct., Rule 8.112*].

If the petition is bound with or included in the text of a petition for another writ, a petition for a hearing, or any other document, the cover must state "STAY REQUESTED," and identify the nature and date of the proceeding or act sought to be stayed [*Cal. Rules of Ct., Rule 8.116*].

The form and covers of petitions filed in appellate courts are governed generally by *Cal. Rules of Ct., Rules 8.40, 8.204*. For detailed discussion of these and other general format, content, service and filing requirements governing petitions and other papers filed in appellate courts, see Ch. 45, *Appeal: Motion Procedure* .

[2] Order Granting Petition

[a] FORM Proceeding for Writ of Supersedeas to Stay Judgment or Order--Order Granting Petition

[*Caption. See [1][a], above.*]

Appellant's verified petition for a writ of supersedeas came on regularly this day for hearing. Appellant _____ [*name*] appeared through his/her/its counsel, _____ [*name*]; respondent _____ [*name*] appeared through his/her/its counsel _____ [*name*].

On proof being made to the satisfaction of the court, and good cause appearing therefor,

IT IS ORDERED that a writ of supersedeas be issued by the clerk of this court staying enforcement of the judgment on appeal herein, and all proceedings thereunder, until further order of the court [, provided that petitioner file with the clerk of this court within _____ days from the date hereof an undertaking in the sum of $ _____. The undertaking is to be conditioned on performance of the judgment appealed from if affirmed in whole or in part or if the appeal is dismissed].

[The clerk shall not issue the writ unless the undertaking is first approved by the Presiding Judge of the Superior Court of California, County of _____.]

[The temporary stay hereinbefore granted shall remain in effect until _____ (*date undertaking is required to be filed*).]

Dated: _____.

_____ [*signature*]
[Presiding] Justice

[b] Use of Form

The form set out in [a], *above*, is for submission, when appropriate, of a proposed order granting a petition for issuance of a writ of supersedeas. Appellate courts often draft and issue their own orders in such proceedings, rather than requesting submission of proposed orders by counsel. Counsel should consult local practice before preparing a proposed order in this type of proceeding.

[3] Writ of Supersedeas

[a] FORM Proceeding for Writ of Supersedeas to Stay Judgment or Order--Writ of Supersedeas

[*Caption. See [1][a], above.*]

THE PEOPLE OF THE STATE OF CALIFORNIA:
TO THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____:

WHEREAS, _____ [*name*], appellant in the above entitled action, has taken an appeal to this court from the _____ [*either* order *or* judgment] rendered by the Honorable _____ [*name*], Judge presiding in [Department _____ of] the Superior Court of California, County of _____, and entered against appellant on _____ [*date*], decreeing that _____ [*state*], [and]

[WHEREAS, appellant has, under an order of this court heretofore made and entered, filed an undertaking in the sum of $ _____, conditioned on performance of the _____ *either* order *or* judgment) appealed from if it be affirmed in whole or in part, or if the appeal is dismissed;]

IT IS HEREBY ORDERED that the _____ [*either* judgment *or* order] not be enforced pending the appeal herein, and we command and enjoin you to suspend enforcement of the _____ [*either* judgment *or* order] and all proceedings thereon, until final determination of this cause on appeal.

WITNESS, the Honorable _____ [*name*], Presiding Justice of the California Court of Appeal, _____ [*number*] District, Division _____ [*number*], and the seal of this court.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]
Clerk of the Court

[b] Use of Form

The form set out in [a], *above*, is for submission as a proposed writ of supersedeas to be issued by the court of appeal to direct the trial court to stay proceedings pending appeal. Most appellate courts draft their own writs, and counsel should consult the practice of the appellate court before drafting and submitting a proposed writ.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD

5-44 California Forms of Pleading and Practice--Annotated 44.syn

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§ 44.syn Synopsis to Chapter 44: APPEAL: PREPARING AND FILING THE RECORD

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§ 44.02 Cross References

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[2] Other Related Chapters

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[2] Summary of Traditional Elements of the Record

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[4] Presumption When Elements of Record Are Incomplete

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[3] Reviewing Court Need Not Consider Matters Not Included in Record

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[1] Appellant's Notice Designating Clerk's Transcript

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§ 44.52 Preparation of Reporter's Transcript

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[2] When Settled Statement May Be Used

[3] Preparation and Filing of a Settled Statement

[a] Appellant's Motion to Use Settled Statement

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[c] Respondent's Proposed Amendments

[d] Settlement by Trial Judge of Proposed Statement and Amendments

[e] Appellant's Preparation and Filing of Statement

[f] Respondent's Objections to Engrossed Statement

[4] Certification of or Stipulation Regarding Engrossed Statement

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[1] Available In Lieu of All or Part of Record

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[3] Procedure for Preparation and Filing of Agreed Statement

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[b] Settled Statement

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[b] Use of Form

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[2] Use of Form

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§ 44.254 Order Settling Statement

[1] FORM

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[b] Use of Form

[2] Order

[a] FORM

[b] Use of Form

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§ 44.293 Opposition to Motion for Order to Augment, Correct or Certify Record on Appeal

[1] FORM

[2] Use of Form

§§ 44.294-44.299 [Reserved]

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[1] FORM

[2] Use of Form

§ 44.301 Cover Sheet for Lodging Records

[1] FORM

[2] Use of Form

§ 44.302 Order Sealing Records

[1] FORM

[2] Use of Form

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FOOTNOTES:
(n16)Footnote *.
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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART I. SCOPE

5-44 California Forms of Pleading and Practice--Annotated § 44.01

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§ 44.01 Scope of Chapter

This chapter discusses the procedures for preparing, augmenting, certifying, and transmitting the record in a civil appeal.

The chapter includes the following:

- Part II, Subpart A [*see § 44.10* et seq.], discusses the elements of the record on appeal, and considerations in selecting the record in particular appeals, and Part V, Subpart A, includes the following related forms:

  - A notice of settlement, before the record is completed, directed to the superior court [*see § 44.200*].

  - A request or stipulation for an abandonment or voluntary dismissal of the appeal before the completed record has been filed in the court of appeal [*see § 44.201*].

- Part II, Subpart B [*see § 44.30* et seq.], discussing the clerk's transcript, the procedures for its designation and preparation, and its alternatives, and Part V, Subpart B, includes the following related forms:

  - Notices to prepare a clerk's transcript with various typical designations of its contents [*see § 44.210* et seq.].

  - Notices of election to prepare an appendix in lieu of a clerk's transcript, and an

objection to that election [*see § 44.220* et seq.].

- A stipulation to use the superior court file in lieu of a clerk's appendix [*see § 44.230*].

- Part II, Subpart C [*see § 44.50* et seq.], discussing the reporter's transcript, the procedures for its designation and preparation, and its alternatives, and Part V, Subpart C, includes the following related forms:

  - Notices to prepare a reporter's transcript with various typical designations of its contents, including a stipulation for a partial transcript [*see § 44.240* et seq.].

  - A reporter's waiver of fee deposit [*see § 44.245*].

  - Motions and notices relating to the use of a settled statement in lieu of a reporter's transcript [*see § 44.250* et seq.].

- Part II, Subpart D [*see § 44.70* et seq.], discussing procedures in completing the record when there are multiple consolidated appeals or cross appeals, and Part V, Subpart D, includes the following related forms:

  - Notice and request relating to the preparation of a record involving consolidated appeals [*see § 44.270*].

- Part II, Subpart E [*see § 44.80* et seq.], discussing procedures for transmission and filing of the completed record on appeal, and Part V, Subpart E, includes the following related forms:

  - A request for transmittal of exhibits [*see § 44.280*].

- Part II, Subpart F [*see § 44.90* et seq.], discussing procedures for augmentation and correction of the completed record, and Part V, Subpart F, includes the following related forms:

  - Applications, motions, stipulations relating to the augmentation, correction, or certification of the record [*see § 44.290* et seq.].

- Part II, Subpart G [*see § 44.100* et seq.], discussing procedures for sealing and unsealing otherwise public records on appeal, and Part V, Subpart G, includes the following related forms:

  - Motions to seal or unseal records, order sealing records, and cover sheet for lodging records under seal [*see § 44.300* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

California Forms of Pleading and Practice--Annotated

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART I. SCOPE

5-44 California Forms of Pleading and Practice--Annotated § 44.02

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§ 44.02 Cross References

[1] Related Chapters in This Volume

- For discussion relating to the overall procedures for civil appeal, including practical considerations in determining whether to take an appeal, see Ch. 40, *Appeal: An Overview* .

- For discussion and forms concerning generally applicable rules of appellate review, specifically, the prejudicial error doctrine, the common standards of review in civil cases, the rules governing the application of substantive law (law of the case, *stare decisis*, retroactivity, etc.), and the rules governing the publication and consequent citability of appellate opinions, see Ch. 41, *Appeal: Review Standards and Appellate Rules of Law* .

- For discussion and forms relating to the initiation of a civil appeal by filing the notice of appeal, including detailed discussion of the judgments and orders from which an appeal may be taken from the superior court to the court of appeal, and forms of notice of appeal combined with notices designating the record, see Ch. 42, *Appeal: Notice of Appeal* .

- For discussion and forms relating to appellate papers and motion procedure generally, see Ch. 45, *Appeal: Motion Procedure* .

- For discussion and forms pertaining to the more significant appellate motions, see respectively Ch. 46, *Appeal: Extending or Shortening Time Requirements* , Ch. 47, *Appeal: Relief From Default* , Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* , and Ch. 49, *Appeal: Sanctions* .

- For discussion and forms pertaining to the drafting and filing of appellate briefs, see Ch. 50, *Appeal: Briefs* .

- For discussion and forms concerning those appellate proceedings generally occurring after the record and briefs are filed, including calendar and conference proceedings, oral argument, and issuance of the court of appeal decision, see Ch. 51, *Appeal: Hearing and Decision* .

- For discussion and forms pertaining to rehearing proceedings after issuance of the court of appeal decision, see Ch. 52, *Appeal: Rehearing* .

- For discussion and forms pertaining to remittitur and the recovery of costs, see Ch. 53, *Appeal: Remittitur and Costs on Appeal* .

- For discussion and forms pertaining to subsequent proceedings in a state civil appeal, that is, proceedings for discretionary review by California Supreme Court, see Ch. 54, *Appeal: California Supreme Court Review* .

[2] Other Related Chapters

See the following chapters for coverage of topics closely related to civil appeals:

- For reliance on authority or other matters subject to mandatory or permissive judicial notice, including a request for judicial notice that may be adapted for use in an appellate court, see Ch. 321, *Judicial Notice* .

- For discussion and forms relating to civil appeals taken in limited civil cases to the appellate division of the superior court (as distinguished from civil appeals taken from the superior court to the court of appeal, which are the main focus of this volume), see Ch. 345A, *Limited Civil Cases* .

- For discussion and forms relating to appeals from judgments rendered in the Small Claims Court, see Ch. 526, *Small Claims* .

- For discussion and forms relating to sealing and unsealing records in the trial court, see Ch. 551, *Trial* .

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Volume 5: Appeal-Chs. 40-55
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PART I. SCOPE

5-44 California Forms of Pleading and Practice--Annotated §§ 44.03-44.09

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[Reserved]

§§ 44.03[Reserved]

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART II. LEGAL BACKGROUND
A. Overview of the Record on Appeal

5-44 California Forms of Pleading and Practice--Annotated § 44.10

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§ 44.10 Governing Law

Designation, preparation, and transmission of the record on appeal from a final judgment or appealable order of the superior court in a civil case generally are governed by *Cal. Rules of Ct., Rules 8.120-8.130, 8.144-8.155* [*see also, Cal. Rules of Ct., Rules 8.60(b), (c), 8.23, 8.163, 8.4; Code Civ. Proc. §§ 269, 670*].

Local rules of the courts of appeal and their established internal operating procedures may also affect the process of preparing the record, and these should be consulted as well [*see* Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st. App. Dist., Rules 4-6, 9; Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rules 1-3; Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 3d App. Dist., Rule 22; Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 4th App. Dist., Rule 10; Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 5th App. Dist., Rules 2, 3; *see also* Cal. Cts. of Appeal, 1st App. Dist. Internal Operating Practices and Procedures, §§ 24, 25(c); Cal. Cts. of Appeal, 3rd App. Dist. Internal Operating Practices and Procedures, A-1, A-2].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsRule Application & InterpretationCivil ProcedureAppealsRecords on Appeal

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART II. LEGAL BACKGROUND
A. Overview of the Record on Appeal

5-44 California Forms of Pleading and Practice--Annotated § 44.11

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§ 44.11 Elements of the Record on Appeal

[1] Purpose of the Record

The purpose of the record on appeal is to permit the appellate court to review trial court proceedings for asserted errors of law. Error is not presumed; prejudicial error must be affirmatively shown *by the record* to have occurred [*Denham v. Superior Court (1970) 2 Cal. 3d 557, 564, 86 Cal. Rptr. 65, 468 P.2d 193* ; *Erickson v. R.E.M. Concepts, Inc. (2005) 126 Cal. App. 4th 1073, 1086-1087, 25 Cal. Rptr. 3d 39* (by not including reporter's transcript of testimony and other evidence introduced at trial, appellant failed to present evidentiary record sufficient to show trial court abused its discretion); *Protect Our Water v. County of Merced (2003) 110 Cal. App. 4th 362, 364, 1 Cal. Rptr. 3d 726* (stressing importance of clear and complete record and denying appeal based on inability to find things in record); *Null v. City of Los Angeles (1988) 206 Cal. App. 3d 1528, 1532, 254 Cal. Rptr. 492]* .

For more detailed discussion of the prejudicial error rule and its implications, see *§ 44.12* [*see also Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.10[1], [2]*].

[2] Summary of Traditional Elements of the Record

The record is traditionally comprised of two, or, more accurately, three basic elements:

- A clerk's transcript, or other cognizable compilation of copied or original documents in the trial court's file [*see Cal. Rules of Ct., Rules 4.5*, 8.120, 8.122, and discussion in *§§ 44.31, 44.32*].

- The trial exhibits, although these are regarded as a part of the clerk's transcript [*see Cal. Rules of Ct., Rules 8.120(a), (d), (e),* and discussion in *§ 44.81[3]*].

- A reporter's transcript of relevant oral proceedings conducted in the trial court [*see Cal. Rules of Ct., Rule 8.130*, and discussion in *§§ 44.51, 44.52*].

In any given appeal, one or more of these elements may be unavailable or unnecessary. The appeal may, for example, neither involve nor require any reporter's transcription of or oral proceedings conducted in the trial court.

[3] Summary of Alternative Elements of the Record

The alternatives to the clerk's and reporter's transcripts, specifically, are the following:

- By far the most common alternative is the appendix, whether prepared as a joint and single appendix or as separate appendices of the parties [*see Cal. Rules of Ct., Rule 8.124*, and discussion in [4], *below*, and *§ 44.33*]. It may be used as a clerk's transcript in combination with a reporter's transcript.

- Another increasingly common alternative is the stipulated use of the superior court file in lieu of the clerk's transcript, when such stipulation is permitted by local appellate rule [*see Cal. Rules of Ct., Rule 8.128*, and discussion in *§ 44.34*]. The use of this alternative is less common than that of an appendix, and, while more economical than both, has less flexibility than either in terms of ensuring the inclusion of all necessary items for review. This file, like an appendix, may be used like a clerk's transcript in conjunction with a reporter's transcript.

- Much more rarely utilized alternatives are the agreed or settled statements in lieu of clerk's transcript, the reporter's transcript, or both [*Cal. Rules of Ct., Rules 8.134, 8.137*, and discussion in *§§ 44.34, 44.53, 44.54*].

- The most antique and rarely used alternative, still on the books, is an appeal on the "judgment roll." This is a record comprised exclusively of an abbreviated clerk's transcript, the contents of which are prescribed by statute. Although economical, the issues that may be raised on such a record are so limited that the risk of not being able to raise reversible error will almost certainly outweigh any benefit of using this type of record [*see Cal. Rules of Ct., Rule 8.163*; *Code Civ. Proc. § 670*; *Nielsen v. Gibson (2009) 178 Cal. App. 4th 318, 324-325, 100 Cal. Rptr. 3d 335* (review limited to determining whether any error appears on face of record); *Bond v. Pulsar Video Productions (1996) 50 Cal. App. 4th 918, 924, 57 Cal. Rptr. 2d 917* (trial court's findings of fact and conclusions of law are presumed to be supported by substantial evidence and are binding unless reversible error appears in the record); *Ducray v. Ducray (1967) 257 Cal. App. 2d 480, 482, 64 Cal. Rptr. 825* (issues confined to whether the complaint stated a cause of action, whether the findings are within the issues, and whether the judgment is supported by the findings)].

NOTE:

Status of Electronic Transcripts as Alterative Form of Record. The Judicial Council adopted procedures permitting the use of electronic recordings of trial court proceedings in lieu of a traditional reporter's transcript [*see Cal. Rules of Ct., Rules 2.952*; *see also* former Cal. Rules of Ct., Rule 980.3 (repealed effective January 31, 1997)]. Case law decisions have superseded the usefulness of these rules [*see California Court Reporters Assn., Inc. v. Judicial Council of California (1997) 59 Cal. App. 4th 959, 69 Cal. Rptr. 2d 529* ("CCRA II") (affirming trial court's judgment on remand from "CCRA I" (*below*) prohibiting the use of electronic recording to create the official record of superior court proceedings); *California Court Reporters Assn., Inc. v. Judicial Council of California (1995) 39 Cal. App. 4th 15, 33, 46 Cal. Rptr. 2d 44* ("CCRA I") (holding Cal. Rules of Ct., Rule 980.3 invalid under *Code Civ. Proc. § 269*); *Moustakas v. Dashevsky (1994) 25 Cal. App. 4th 752, 754, 30 Cal. Rptr. 2d*

753 (denying parties' request to use uncertified copy of videotape in place of a written reporter's transcript)].

[4] Presumption When Elements of Record Are Incomplete

The reviewing court will presume that the record in an appeal includes all matters material to deciding the issues raised. If the appeal proceeds without a reporter's transcript, this presumption applies only if the claimed error appears on the face of the record [*Cal. Rules of Ct., Rule 8.163*]. This presumption may in some instances aid an appellant appealing by choice or necessity on a partial record [*see Dumas v. Stark (1961) 56 Cal. 2d 673, 674, 16 Cal. Rptr. 368, 365 P. 2d 424* (appeal on partial clerk's transcript)]. For further discussion, see *§ 44.13[2][e]*.

[5] Choosing the Elements of a Particular Record

Many appellants' counsel choose what they consider to be the safer course, at least in terms of presenting the record most likely to disclose reversible error. That is, they designate the traditional preparation of both a clerk's and reporter's transcript [*Cal. Rules of Ct., Rules 8.130, 8.122*], together with a request for transmission of all relevant exhibits [*Cal. Rules of Ct., Rule 8.224*]. The preparation of such a record may be expensive, and may cause significant delaysin large cases, but is often perceived to be the record that will provide the greatest opportunity for disclosing error, as well as requiring the least effort in terms of analysis and evaluation to determine the most effective and least costly record.

PRACTICE TIP:

Evaluate Carefully the Elements Best Suited for Your Case. One of most complex and critical initial decisions to be made by counsel for appellant, and one which must be done quickly given the time limits for designating the record, is what the record presented on appeal should be. Weighing the demands of the case against the options in preparing the record, to find a balance that will best serve the client in terms both of cost and presenting the record most likely to yield successful results, is often a difficult decision even for counsel specializing in appellate practice. Trial counsel who choose to pursue an appeal are encouraged to associate experienced appellate practitioners for this purpose, if they have not already done so, for an evaluation of the fundamental merits of the appeal [*see* discussion in *Ch. 40, Appeal: An Overview, § 40.15*, and *Ch. 41, Review Standards and Appellate Rules of Law, § 41.10* et seq.]. In many cases a decision will require negotiation with respondent's counsel on the issue of presenting a joint appendix, which in some cases will give both parties more flexibility in presenting the best record at the least expense.

In some cases a traditionally composed record will, in fact, best serve the client, especially if appellant's counsel has carefully reviewed the court's file and analyzed the potential issues on appeal beforehand, so as to minimize costs by designating only the essential items needed in both the clerk's and reporter's transcripts.

On the other hand, preliminary evaluation and selective designation of traditional clerk's and reporter's transcripts entails a risk of omitting items whose relevance may only become apparent later, for example, during the briefing process. Appellant's counsel on appeal are sometimes hamstrung by an incomplete clerk's transcript designated by appellant's trial counsel.

These considerations lead many appellate practitioners to prefer the use of an appendix or appendices in lieu of clerk's transcript, which provides greater flexibility in that it allows counsel more time to determine, and include, the documents to be presented in lieu of clerk's transcript. Because appellant and respondent prepare the appendix or appendices themselves, and do so while they are actually writing their briefs, this method can save a substantial amount of time, money, and paper. In this way, for example, counsel may include the trial court briefs, the relevance of which may not have become

> apparent by the deadline for designating all the elements of the clerk's transcript, without going to the expense and trouble of augmentation proceedings.
>
> Notwithstanding the current invalidity of electronic transcripts in lieu of print transcripts [*see* [3], *above*], it is nevertheless possible to obtain an additional copy of the original, paper reporter's transcript in "computer-readable form," that is, on diskette, pursuant to *Code Civ. Proc. § 271*, at a nominal cost [*Gov. Code § 69954(a)*]. Assuming counsel's office is computerized, it is almost always a good idea to get this disk. There is simply no better way than running a computer search for a key word, name, or phrase, in order to track down that bit of testimony or colloquy that you feel certain is there, but which somehow did not make it into your index or summary of the record.

In designating and preparing the record, counsel should remember to consult local appellate rules. These may not only affect matters such as designation or augmentation, but may also affect a party's choice of the record. In particular, use of the superior court file in lieu of a clerk's transcript is dependent on whether the practice is permitted by local rule, and both the Second and Sixth Appellate Districts have not yet adopted local rules permitting this option [*see Cal. Rules of Ct., Rule 8.128*, and discussion in *§ 44.34*].

For more detailed discussion of factors to be considered in designating the elements of the record in a particular case, see *§ 44.13*.

For detailed discussion of procedures for designation and preparation of clerk's and reporter's transcripts, and their alternatives, see respectively *§§ 44.30 et seq.* and *44.50 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsStandards of ReviewClearly Erroneous ReviewCivil ProcedureAppealsRecords on Appeal

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART II. LEGAL BACKGROUND
A. Overview of the Record on Appeal

5-44 California Forms of Pleading and Practice--Annotated § 44.12

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§ 44.12 Burden to Produce Record Showing Error

[1] Appellant Has Primary Burden to Produce Record Showing Error

It is perhaps the most fundamental principle of appellate law that a trial court's orders and judgment are presumed to be correct. Therefore, unless the record demonstrates otherwise, the reviewing court will make all presumptions and "indulge all intendments" in favor of the lower court's action [*Veguez v. Governing Board of Long Beach Unified School District (2005) 127 Cal. App. 4th 406, 421, 25 Cal. Rptr. 3d 526* (because neither party obtained statement of decision, all intendments favor ruling below); *In re Marriage of Gray (2002) 103 Cal. App. 4th 974, 977-978, 127 Cal. Rptr. 2d 271* (trial court's express finding presumed correct because party failed to furnish record to impeach trial court's finding)]. When the record is silent, the appellate court will presume that the evidence below supported the findings and judgment [*Border Business Park, Inc. v. City of San Diego (2006) 142 Cal. App. 4th 1538, 1550, 49 Cal. Rptr. 3d 259]* . It may thus presume that a matter that could have been presented, or an argument that might have been made, was so presented or made, or even that the parties consented to, or waived objection to, the trial court's action [*see, e.g., Construction Financial v. Perlite Plastering Co. (1997) 53 Cal. App. 4th 170, 179* ; *Bennett v. McCall (1993) 19 Cal. App. 4th 122, 127, 23 Cal. Rptr. 2d 268* ; *County of Santa Clara v. Redevelopment Agency (1993) 18 Cal. App. 4th 1008, 1016, 22 Cal. Rptr. 2d 868* ; *Buckhart v. San Francisco Residential Rent etc. Bd. (1988) 197 Cal. App. 3d 1032, 1036, 243 Cal. Rptr. 298]* .

Further, unless the appellant provides a record disclosing error that is *prejudicial* in that it resulted in a miscarriage of justice, the appellate court can do nothing other than affirm the trial court's action [*see Cal. Const., art. VI, § 13*; *Code Civ. Proc. § 475*; *see also Evid. Code §§ 353, 354*; *Pool v. City of Oakland (1986) 42 Cal. 3d 1051, 1069, 232 Cal. Rptr. 528, 728 P.2d 1163* ; *see, e.g., Waller v. TJD, Inc. (1993) 12 Cal. App. 4th 830, 832, 16 Cal. Rptr. 2d 38.]* . In fact, an abject failure to present an adequate record may serve as evidence, on a motion for sanctions, that an appeal was

taken frivolously [*Cosenza v. Kramer (1984) 152 Cal. App. 3d 1100, 1102, 200 Cal. Rptr. 18]* .

A cross appellant bears the same burden as an appellant of presenting an adequate record [*Amato v. Mercury Casualty Co. (1993) 18 Cal. App. 4th 1784, 1794, 23 Cal. Rptr. 2d 73* ; *see also* [2], *below*]. Consequently, if a cross appellant fails to augment or otherwise provide a record that adequately supports the issues raised in a cross appeal, the appellate court will not consider the merits of those issues [*Ballard v. Uribe (1986) 41 Cal. 3d 564, 574-575, 224 Cal. Rptr. 664, 715 P. 2d 624* ; *Hodges v. Mark (1996) 49 Cal. App. 4th 651, 657, 56 Cal. Rptr. 2d 700]* .

It is up to the appellant, therefore, as the party who is challenging the trial court's action, to overcome the presumption of validity that attaches to that court's judgments or orders by providing an "adequate" record that discloses the asserted error and enables the appellate court to review and correct it [*Aguilar v. Avis Rent A Car System, Inc. (1999) 21 Cal. 4th 121, 132, 87 Cal. Rptr. 2d 132, 980 P.2d 846* ; *Wagner v. Wagner (2008) 162 Cal. App. 4th 249, 259, 75 Cal. Rptr. 3d 511* ; *Barak v. The Quisenberry Law Firm (2006) 135 Cal. App. 4th 654, 658-659, 37 Cal. Rptr. 3d 688* ; *Weiss v. Brentwood Sav. & Loan Asso. (1970) 4 Cal. App. 3d 738, 746, 84 Cal. Rptr. 736]* .

For more detailed discussion of the prejudicial error rule, see *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.10[1], [2]*. See also discussion in [4], *below*, regarding the appellate court's power to augment the record or order up the trial court's file on its own motion.

[2] Respondent's Burden

[a] On Appeal From Post-Trial Order

Although appellant bears the primary burden of providing an adequate record, there are some circumstances in which the burden ultimately rests on the respondent. For example, in granting a new trial, the trial court is required to specify the reasons for doing so [*Code Civ. Proc. § 657*]. If a party appeals from an order granting a new trial on the ground that the order fails adequately to specify reasons for granting the new trial, the appellate court will reverse the order unless the *respondent*, as the party who prevailed in the post-trial proceedings, presents a record that discloses such errors as would justify the court's grant of a new trial [*see Gaskill v. Pacific Hosp. of Long Beach (1969) 272 Cal. App. 2d 128, 133, 77 Cal. Rptr. 373* ; *Tagney v. Hoy (1968) 260 Cal. App. 2d 372, 377, 67 Cal. Rptr. 261]* .

PRACTICE TIP:

Respondent's Record in a Protective Cross Appeal. In an appeal from a postjudgment order *granting* a new trial or *vacating* the judgment, the respondent is in essence a losing party as to the original judgment as well as the winning party as to the postjudgment order being appealed. The respondent will thus commonly file a "protective" cross appeal, so that, in the event that the postjudgment order is reversed on appeal, the respondent will still be able to the challenge the original judgment in the cross appeal [*see also Ch. 42, Appeal: Notice of Appeal, §§ 42.11[2][a][iii], 42.12[4A]*]. In this situation, the respondent's/cross appellant's task in designating the record is essentially that of an appellant challenging the original judgment. He or she should therefore designate complete trial transcripts and all relevant trial proceedings, such as will present an adequate record to challenge the judgment as well as support the postjudgment order.

Similarly, a postjudgment order *denying* a new trial, if challenged on appeal, will be reversed if the respondent (as the party prevailing on both the original judgment and the postjudgment motion proceeding) fails to rebut the presumption of prejudice that arises on a showing by appellant of juror misconduct [*see Lankster v. Alpha Beta Co. (1993) 15 Cal. App. 4th 678, 683-684, 18 Cal. Rptr. 2d 923]* . Thus, when a special rule of law creates a presumption that a certain type of error is prejudicial, and the appellant has demonstrated the error occurred, the burden shifts to respondent to present a record demonstrating that no prejudice actually resulted.

For further discussion of postjudgment proceedings and the special rules that apply in those proceedings, see Ch. 371, *Motions After Trial* .

[b] To Ensure Affirmance Generally

It is possible to defend an appeal successfully on the ground that appellant failed to meet his or her burden of producing an adequate record [*see, e.g.,* *Arruda v. Arruda (1963) 218 Cal. App. 2d 410, 414, 32 Cal. Rptr. 257]* . Sometimes, however, this tactic can backfire [*see, e.g.,* *Hillman v. Leland E. Burns, Inc. (1989) 209 Cal. App. 3d 860, 864, 257 Cal. Rptr. 535* (court relies on *Cal. Rules of Ct., Rule 8.163*, in appeal on appellant's appendix where respondent did not seek to augment record, to presume that trial court's interpretation of contract did not turn upon extrinsic evidence and apply de novo standard of review); *see also* discussion re presumption of completeness of partial record in § 44.16].

PRACTICE TIP:

Respondent Should Carefully Ensure Adequate Record in Any Case. Even where the burden of producing an adequate record falls squarely on the appellant, it is in respondent's best interest to review carefully the appellant's designation of the record in light of the issues identified or likely to be raised on appeal and, of course, in light of any defenses.

The respondent should also insure that the record includes support for affirming the judgment or order on *any* ground. The respondent may be able to rely on the "right ruling for wrong reason" rule, under which the appellate court will affirm a ruling that is correct on any applicable theory, regardless of the reasoning of the trial court used in making the ruling [*see Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.14[3]*].

Respondent should not hesitate to counterdesignate additional matters or, if necessary, move to augment the record at a later date [Cal. Rules of Ct., Rules 8.136(a), *8.122(a)(2)*, 8.155; *Mountain Lion Coalition v. Fish & Game Com. (1989) 214 Cal. App. 3d 1043, 1051 n.9, 263 Cal. Rptr. 104* (respondents have same obligation as appellants to insure that the record contains matter on which they rely); *but see Cal. Rules of Ct., Rule 8.130(a)(4)* (respondent may not counterdesignate oral proceedings when appellant has not designated reporter's transcript in the first instance)].

For discussion of counterdesignation and augmentation proceedings, see respectively *§§ 44.32[2], 44.90* et seq.

[3] Reviewing Court Need Not Consider Matters Not Included in Record

Appellate courts need not, and almost always will not, consider an issue not presented by the record on appeal [*In re Salazar (1962) 205 Cal. App. 2d 102, 105, 22 Cal. Rptr. 770* ; *see also* *Wagner v. Wagner (2008) 162 Cal. App. 4th 249, 259, 75 Cal. Rptr. 3d 511* ; *Ritschel v. City of Fountain Valley (2006) 137 Cal. App. 4th 107, 122-123, 40 Cal. Rptr. 3d 48* (court's summary analysis of issues based only on documents properly included in incomplete appellate record)]. This principle applies to matters the parties intentionally or inadvertently omitted from the record, as discussed in [1], *above*. It also applies to issues based on facts that were never presented to or determined by the trial court (although the appellate court has discretion in some instances to review an issue not raised below if it in no way turns on factual issues, whether present in the record or not) [*see* *Doers v. Golden Gate Bridge etc. Dist. (1979) 23 Cal. 3d 180, 184 n.1, 151 Cal. Rptr. 837, 588 P.2d 1261* ; *Westlye v. Look Sports, Inc. (1993) 17 Cal. App. 4th 1715, 1727-1728, 22 Cal. Rptr. 2d 781* ; *Pulver v. Avco Financial Services (1986) 182 Cal. App. 3d 622, 632, 227 Cal. Rptr. 491]* . However, although factual assertions contained in the appeal briefs, not presented to the trial court, may not be the basis for a reviewing court's decision, it may be appropriate for the reviewing court to consider such assertions or presentations in order to assess the likely future course of the case if an order is reversed. This is especially true if evidence has been effectively excluded by the trial court [*Rhaburn v. Superior Court (2006) 140 Cal. App. 4th 1566, 1573, 45 Cal. Rptr. 3d 464]* .

The policy against deciding issues not of record also applies to matters occurring after the judgment was entered [*Reserve Ins. Co. v. Pisciotta (1982) 30 Cal. 3d 800, 813, 180 Cal. Rptr. 628, 640 P. 2d 764]* . For further discussion of these principles, see *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.10*.

For discussion of limited exceptions to the application of these principles, see [4], *below*.

[4] Appellate Court's Power to Augment Record or Consider Matters Outside the Record

[a] Augmenting the Record on the Appellate Court's Own Motion

The failure to provide an adequate record is almost always fatal to an appeal, regardless of its apparent merit. In effect, the appellant defaults on his or her burden to make an affirmative showing of error, requiring the appellate court to affirm [*Mountain Lion Coalition v. Fish & Game Com. (1989) 214 Cal. App. 3d 1043, 1051 n.9, 263 Cal. Rptr. 104* ; *see, e.g.,* *Calhoun v. Hildebrandt (1964) 230 Cal. App. 2d 70, 72, 40 Cal. Rptr. 690* (appellant who fails to provide relevant transcript cannot prevail on claim that opposing counsel made prejudicial, racial argument to jury); *Altman v. Poole (1957) 151 Cal. App. 2d 589, 593, 312 P.2d 6* (motion to dismiss granted for failure to provide record)].

The appellate court does possess the power to order up the original superior court file, or to order that portions of the oral proceedings be transcribed or an agreed or settled statement prepared, on its own motion, but this power has only been exercised in a few, exceptional cases. [*Cal. Rules of Ct., Rule 8.155(a)*; *Mountain Lion Coalition v. Fish & Game Com. (1989) 214 Cal. App. 3d 1043, 1051 n.9, 263 Cal. Rptr. 104* (because of intense public interest in litigation, reviewing court ordered up original superior court file, but stated "there is no reasonable basis" to assume this procedure would be used in the future); *see also* *Scala v. Jerry Witt & Sons, Inc. (1970) 3 Cal. 3d 359, 367 n.4, 90 Cal. Rptr. 592, 475 P.2d 864* (need to resolve important conflict among courts of appeal outweighs failure to present adequate record, but reviewing court averts added expense and delay of ordering transcription of oral proceedings or preparation of agreed or settled statement by relying on recitation of evidence in motion for new trial)]. Unless the court orders otherwise, the appellant is responsible for the cost of any reporter's transcript the court may order [*Cal. Rules of Ct., Rule 8.130(a)(4)*].

No party, however, should ever rely on the appellate court to exercise its power to complete the record to save an appeal. For detailed discussion of augmentation and correction of the record, see *§ 44.90* et seq.

[b] Appellate Proceedings for Additional Evidence or Findings

Appellate courts have discretion, rarely exercised, to take additional evidence and issue findings of fact in appropriate cases [*Cal. Const., art. VI, § 11*; *Code Civ. Proc. § 909*; *Cal. Rules of Ct., Rule 8.252*; *Golden West Baseball Co. v. City of Anaheim (1994) 25 Cal. App. 4th 11, 41-42, 31 Cal. Rptr. 2d 378]* (discretionary power to make additional findings in cases where jury trial is not a matter of right should be invoked sparingly); *Philippine Export & Foreign Loan Guar. Corp. v. Chuidian (1990) 218 Cal. App. 3d 1058, 1090, 267 Cal. Rptr. 457* (additional evidence must enable reviewing court to affirm, not reverse; power never used where there is conflicting evidence in the record and substantial evidence supports trial court's findings).

For more detailed discussion of these procedures and their uses, see *Ch. 50, Appeal: Briefs, § 50.21*.

[c] Judicial Notice

An appellate court may, like trial courts, take judicial notice of matters, including those not in the record on appeal [*see Evid. C. § 459*; *Doers v. Golden Gate Bridge, Highway & Transp. Dist. (1979) 23 Cal. 3d 180, 184 n.1, 151 Cal. Rptr. 837, 588 P.2d 1261* ; *Giles v. Horn (2002) 100 Cal. App. 4th 206, 228, 123 Cal. Rptr. 2d 735* (court granted request for judicial notice when opposing party failed to file any opposition); *Ehrler v. Ehrler (1981) 126 Cal. App. 3d*

147, 153, 178 Cal. Rptr. 642 (judicial notice of trial court's calendar)]. Appellate courts will often refuse to do even this, however, if it requires consideration of matters not before the trial court [*see Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 444 n.3, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* ; *Brosterhous v. State Bar of California (1995) 12 Cal. 4th 315, 325, 48 Cal. Rptr. 2d 87, 906 P.2d 1242* , and discussion in *Ch. 50, Appeal: Briefs, § 50.12[3]*].

For discussion relating to judicial notice and a form of request that may be adapted for use in an appellate court, see Ch. 321, *Judicial Notice* .

[d] Evidence Relevant to Appellate Motions

An appellate court may obviously consider declarations and other cognizable evidence presented in support of appellate motions. These include motions that may ultimately be dispositive of the appeal on its merits, such as a motion to dismiss an appeal because of the occurrence of events that have rendered the matter moot [*see Reserve Ins. Co. v. Pisciotta (1982) 30 Cal. 3d 800, 813, 180 Cal. Rptr. 628, 640 P.2d 764* (insurer went bankrupt); *Daly v. Superior Court (1977) 19 Cal. 3d 132, 141, 137 Cal. Rptr. 14, 560 P.2d 1193* (partial settlement reached); Evans Products Co. v. Millmen's Union No. 550 *(1984) 159 Cal. App. 3d 815, 820 n.5, 205 Cal. Rptr. 731* (minor reached the age of 18); *but see Building Industry Ass'n v. City of Oxnard (1985) 40 Cal. 3d 1, 3, 218 Cal. Rptr. 672, 706 P.2d 285* (ordinance modified)].

For detailed discussion of dismissal for mootness and other prehearing dispositions on the merits, see Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsStandards of ReviewClearly Erroneous ReviewEvidenceJudicial NoticeGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsMotions on AppealCivil ProcedureAppealsRecords on Appeal

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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART II. LEGAL BACKGROUND
A. Overview of the Record on Appeal

5-44 California Forms of Pleading and Practice--Annotated § 44.13

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§ 44.13 Determining the Type of Record Needed

[1] In General

As discussed in *§ 44.11[2]*, the record on appeal typically is comprised of both a reporter's and a clerk's transcript. Whether both these elements are needed, and to what extent, and whether one or more of the alternatives summarized in *§ 44.11[3]* may suffice (*e.g.*, appendix or superior court file in lieu of clerk's transcript), will depend on the issues presented by the appeal and a variety of other factors. The determination of the record must always be analyzed on a case-by-case basis.

The more significant factors to be weighed when determining the type of record needed on appeal are the following:

- The nature of the issues to be raised on appeal, and the standard of review that applies to each issue [*see* [2][a], *below*].

- The procedural context of the appeal [*see* [2][b], *below*].

- The expense involved in preparing the various elements [*see* [2][c], *below*].

- The degree of cooperation to be expected from respondent or respondent's counsel [*see* [2][d], *below*].

- The presumption of correctness applicable to an incomplete record [*see* [2][e], *below*].

The determination of the elements needed for the record is intertwined with the analysis of the issues on appeal. In order to accomplish both tasks, appellant's counsel must examine, or reexamine, all the information pertaining to the case that is readily available either through trial counsel's case file or the court: the pleadings; discovery proceedings and their results; notes concerning the results of "informal discovery," that is, interviews and investigations; pretrial motions and orders; in limine motions and orders; voir dire notes or juror interviews orquestionnaires; trial notes; trial briefs; the text, if available, of opening and closing arguments; jury instructions, correspondence with the client; correspondence or negotiations with opposing counsel; final orders or judgments; post-trial proceedings and orders; court minutes, docket sheets, or exhibits lists. All may prove useful in developing an overall sense of "what happened." Do not overly depend on the personal recollection of trial counsel, even if such recollection is your own.

After such review, list all potential issues, determine the standard of review applicable to each, and assess which, if any, are worth pursuing on appeal [*see* [2][a], *below*].

Once you have identified the potentially meritorious issues, the question is: what elements are needed in the record in order for the appellate court to find, in that record, the existence of the prejudicial error or errors on which you intend to focus your case? At this point a little further research will help you to identify readily the record you're going to need. As discussed further in [3], *below*, the most fundamental consideration is whether a reporter's transcript, or some other record of the oral proceedings in the trial court, is necessary. A reexamination of the court's minutes, docket sheets, and exhibit lists, with your short list of issues in hand, will help you to develop a list of the dates and times of critical proceedings, with the name of the reporters present at those proceedings, all of which may readily be incorporated into a notice to prepare a reporter's transcript.

With regard to the documentary record, another trip to the courthouse is worthwhile, again with your short list of issues in hand. A review of the clerk's file will be essential not only to develop a final list of the items needed but to determine which form of record will best enable you to present the appellate court with all those items, whether clerk's transcript, appendix, or other. Sadly, there is no substitute for appellate counsel doing this in person, since others just do not have the necessary grasp of the relevance of each item in the file to the issues involved. If you cannot go to the court yourself, just have your proxy list everything that is in the file and review the documents yourself later.

Note that many superior courts manage their dockets by computer and will, for a fee, print for you a copy of their computer-generated docket sheet. This can be a speedy way of finding out what is in the trial court file. It can also, however, be a trap for the unwary, since some courts only include what they call "dispositive" pleadings. These may provide a very underinclusive view of the file, or even result in your remaining unaware of a *truly* dispositive pleading. So be sure to ask the clerk if the "docket sheet" has everything on it. In courts that generate only "dispositive" pleadings, it is usually best to go ahead and leaf through the court file.

Note finally, with regard to the documentary record, that, regardless of the other items designated, counsel should ensure that the record includes the judgment or appealable order from which the appeal is taken, the notice of appeal, and the notice or notices designating the record. Never assume anything will be included by the trial court clerk just because it is routinely to be included [*Cal. Rules of Ct., Rule 8.122(6); but see, e.g., In re Salazar (1962) 205 Cal. App. 2d 102, 104, 22 Cal. Rptr. 770* ; *Barry v. Rodgers (1962) 199 Cal. App. 2d 298, 301-302, 18 Cal. Rptr. 723]* .

PRACTICE TIP:

Consider Associating Appellate Counsel *Before* Designating the Record. If trial counsel is considering using appellate counsel, and there are significant advantages both for trial counsel and the client in doing so, it is important to consult with appellate counsel very early in the process, not only to evaluate initially the overall merit of the appeal, but to take full responsibility for designating the record. They are the ones who will be making use of the record, and they usually have strong ideas of what they want to have included. Moreover, their greater familiarity with such appellate concerns as the standard of review and waiver may help them to designate a complete record, thus avoiding a later need for augmentation.

[2] The Significant Factors in Determining the Record

[a] The Issues and Their Applicable Review Standards

While the issues to be raised on appeal is perhaps the most obvious factor in determining the contents of the record, once the decision whether a reporter's transcript is necessary has been made [*see also* discussion in [3], *below*], its further ramifications are not always so obvious. If the claim on appeal were that a jury instruction was erroneous, for example, it is fairly obvious that all written instructions proffered by the parties, whether given or refused, must be included in the clerk's transcript or appellant's appendix, as well as the verbal instructions actually read by the judge to the jury in the reporter's transcript.

It may be less obvious that a transcript of any conferences, objections, and rulings concerning the instructions should be included to demonstrate the absence of waiver or invited error. If it is claimed that the rejection of a proffered instruction was erroneous, then the testimony, exhibits, or other evidence justifying the requested instruction would have to be added. In any appeal claiming instructional error, moreover, counsel should consider including the clerk's minutes showing whether the verdict was close, how long the jury deliberated, and whether they asked the court for a rereading of instructions or evidence, in the clerk's transcript. Appellant, to prevail, must demonstrate not only error, but prejudice, *i.e.*, that the jury probably was misled and the verdict affected by the error [*Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 580-581, 34 Cal. Rptr. 2d 607, 882 P.2d 298* ; *Krotin v. Porsche Cars North America, Inc. (1995) 38 Cal. App. 4th 294, 303-306, 45 Cal. Rptr. 2d 10]* .

The standard of review is probably the single most important factor of all in determining the outcome of any appeal; it is the first question a reviewing court wants answered when it opens an appellant's brief. Consequently, once the issues are identified, counsel's next concern must be determining the standard of review applicable to each, for they in turn will establish the minimum requirements for an adequate record. For example, where the claim is that there was insufficient evidence to support the judgment or verdict, the appellate court must be able to review *all* of the material evidence presented at trial in order to determine whether the judgment or verdict was supported by substantial evidence. Accordingly, an appeal on a clerk's transcript alone is out of the question, but so is an appeal based on a reporter's transcript that includes only those portions of the testimony that were favorable to appellant's case [*see* *Bowers v. Bernards (1984) 150 Cal. App. 3d 870, 872-874, 197 Cal. Rptr. 925]* .

For more detailed discussion of the initial process of determining whether to pursue an appeal and analyzing its potential issues, see *Ch. 40, Appeal: An Overview, § 40.15*, and the Practice Tips set out in *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, §§ 41.10[1]* and *41.11*. For detailed discussion of the standards of review and their applicability in specific cases, see *Ch. 41, Review Standards and Appellate Rules of Law, § 41.10* et seq.

[b] The Procedural Posture of the Case Below

The procedural posture of the case in the court below is one of the clearer indicators of the type of record that will be needed. For example, in an appeal from a summary judgment, the bulk of the record necessarily will be documentary; there may have been no hearing at all, and even if there was a hearing, it may have been perfunctory, with little or nothing of importance having been said. In such a case, appellant may reasonably elect to forego a reporter's transcript altogether, or explore the possibility of proceeding on an agreed statement. The important decision from a practical standpoint will be whether to have the clerk prepare a transcript or instead proceed under *Cal. Rules of Ct., Rule 8.124* or *8.128*. That decision may in turn depend on a variety of other factors, such as delay, expense, and the relationship between opposing counsel.

In the vast majority of appeals, which are brought after a jury trial and based on a variety of claimed errors, the reporter's transcript will be as vital as the clerk's transcript, if not more so. In these cases the more important issue is whether a complete reporter's transcript is required, or whether a partial one will suffice [*see* discussion in [3], *below*].

These fundamental differences in the postures of cases on appeal demonstrate the reason for, and the importance of, the flexibility afforded by the Rules of Court with regard to the record.

[c] The Expense Involved With Various Elements of the Record

[i] The Clerk's Transcript or Its Alternative

The cost of mounting an appeal is a factor over which the parties have relatively little control. Preparing an appendix clearly costs less up front than designating a clerk's transcript, but also demands far more time and effort on counsel's part, particularly in big cases. Even assuming appellant can do much of the work, however, copying and production costs can still add up, and mistakes can be costly [*see Warfield v. Peninsula Golf & Country Club (1989) 214 Cal. App. 3d 646, 652 n.3, 262 Cal. Rptr. 890* ($500.00 sanction imposed for failure to comply with *Cal. Rules of Ct., Rule 8.124*)].

Similarly, relying on the trial court's original file under *Cal. Rules of Ct., Rule 8.128*, in those districts in which it is permitted by local rule, is less expensive than having the clerk put a transcript together, but the product may also be less useful. Since the clerk provides the parties with only a chronological index to the contents of the court's file indicating the beginning page of each document, it may be difficult, if not impossible, to create a working copy from the case file that precisely follows the court's file. This can lead to problems in providing adequate references to the record in briefs, as required under *Cal. Rules of Ct., Rule 8.204(a)(1)(C)* [*see Bernard v. Hartford Fire Ins. Co. (1991) 226 Cal. App. 3d 1203, 1204-1205, 277 Cal. Rptr. 401]* .

In large cases particularly, the designation of a clerk's transcript, if done carefully so as to designate only truly necessary items, may sometimes be ultimately more "economical" than the use of an appendix or superior court file.

A small economy may also be achieved in many instances simply by relying on *Cal. Rules of Ct., Rule 8.224(a)*, for the transmission of exhibits, rather than requesting that they be copied into the clerk's transcript when that copying is permitted under *Cal. Rules of Ct., Rule 8.122(a)(3)* [*see § 44.81[3]*].

[ii] The Reporter's Transcript or Its Alternative

Controlling the cost of the record of the oral proceedings is more difficult. In small cases, it may not be much of an issue, as the transcript may be relatively short and inexpensive.

The best course, as discussed in [1], *above*, is simply to research the issues carefully beforehand and take additional care in designating only those portions of the reporter's transcript that are needed.

The only alternative is to proceed on an agreed or settled statement in lieu of a reporter's transcript, but while this may be less expensive, it is available in limited circumstances and is rarely used [*see generally Cal. Rules of Ct., Rules 6, 7*, and discussion in *§§ 44.53, 44.54*].

As discussed in [3], *below*, it is a very rare case in which an appellant may opt simply to forego a reporter's transcript entirely.

[d] The Degree of Cooperation to Be Expected From Opposing Counsel

All too often, an appellant's ability to take advantage of the alternatives permitted by the Rules of Court will depend not on common sense, but on human nature; cooperation is an essential component. Thus, if respondent or his or her attorney will cooperate, it should be possible to prepare a joint appendix under *Cal. Rules of Ct., Rule 8.124*; if not, appellant should plan on filing an appellant's appendix. Similarly, without cooperation, an agreed statement under *Cal. Rules of Ct., Rule 8.134*, is not possible. While this may not be a major factor in the overall decision how to proceed in

most cases, it may be a factor in some.

[e] When a Partial Record Will Be Presumed Complete

Any appellant considering proceeding on a partial record must first consider the effect of *Cal. Rules of Ct., Rule 8.163*. It creates a presumption that the record in an appeal includes all matters material to deciding the issues raised.

Stated differently, when *Cal. Rules of Ct., Rule 8.163*, is satisfied the reviewing court will *not* presume that the judgment or order on appeal is supported by matters as to which the record is silent [*Kovacik v. Reed (1957) 49 Cal. 2d 166, 170, 315 P.2d 314* (settled statement); *Hillman v. Leland E. Burns, Inc. (1989) 209 Cal. App. 3d 860, 864, 257 Cal. Rptr. 535* (appellant's appendix); *County of Yolo v. Francis (1986) 179 Cal. App. 3d 647, 650 n.2, 224 Cal. Rptr. 585* (agreed statement); *Skoglie v. Crumley (1972) 26 Cal. App. 3d 294, 297-298, 103 Cal. Rptr. 205* (partial reporter's transcript)]. Thus, the presumption of completeness provided by *Cal. Rules of Ct., Rule 8.163*, runs counter to the general rule--the presumption of correctness--discussed in *§ 44.12*.

There is a limitation on appellant's entitlement to the benefit of the presumption afforded by *Cal. Rules of Ct., Rule 8.163*, however. In appeals brought exclusively on the judgment roll or a full or partial clerk's transcript, the presumption that the record contains all matters necessary to a determination of the appeal will not apply *unless* the asserted error appears "on the face of the record." Therefore, if the asserted error appears on the face of the transcript or judgment roll, then the presumption of completeness discussed in the preceding paragraph will apply; if it does not, then the reviewing court instead will presume that the asserted error was cured by matters omitted from the record. Simply stated, the general presumption of correctness, discussed in *§ 44.12*, applies, *even under Cal. Rules of Ct., Rule 8.163* , absent an affirmative showing of error [*Dumas v. Stark (1961) 56 Cal. 2d 673, 674, 16 Cal. Rptr. 368, 365 P.2d 424* (partial clerk's transcript; error appears on face of record, but so does absence of prejudice, requiring affirmance); *Ehrler v. Ehrler (1981) 126 Cal. App. 3d 147, 154, 178 Cal. Rptr. 642* (clerk's transcript); *Utz v. Aureguy (1952) 109 Cal. App. 2d 803, 806-807, 241 P.2d 639* (judgment roll)].

For discussion relating to respondent's counterdesignation of matters when appellant's designations of the record are patently inadequate, see *§ 44.32[2]*. For discussion of augmentation proceedings when the inadequacy of the record becomes apparent only later, see *§ 44.90* et seq.

[3] Determining Whether to Proceed Without a Reporter's Transcript

Perhaps the single most important decision appellant must make concerning the record is whether to notice the preparation of a reporter's transcript. When an appeal is submitted *exclusively* on a full or partial clerk's transcript or on one of its alternatives, the appellant's options on appeal are significantly narrowed. Specifically, without a reporter's transcript, an appellant may not challenge the sufficiency of the evidence, the admission or exclusion of evidence, or any other trial court action that is dependent on fact-finding.

The only issues that generally will be decided on such a record are the sufficiency of the pleadings and whether the findings support the judgment. Moreover, the error must appear *on the face* of the record [*Construction Financial v. Perlite Plastering Co. (1997) 53 Cal. App. 4th 170, 179, 61 Cal. Rptr. 2d 574* (appellate court conclusively presumes evidence was ample to sustain trial court's findings; only question is whether findings support judgment); *Bond v. Pulsar Video Productions (1996) 50 Cal. App. 4th 918, 924, 57 Cal. Rptr. 2d 917* (trial court's findings and conclusions are binding unless reversible error appears on the record); *Kennedy v. Taylor (1984) 155 Cal. App. 3d 126, 128, 201 Cal. Rptr. 779* (same); *Ducray v. Ducray (1967) 257 Cal. App. 2d 480, 482, 64 Cal. Rptr. 825* (sufficiency of evidence is not open to question; reviewing court is confined to determination whether complaint states cause of action, findings are within issues, and judgment is supported by findings)].

For more detailed discussion of review involving evidence and factual determinations, see *Ch. 41, Appeal: Review*

Standards and Appellate Rules of Law, § 41.13.

An appeal not including any reporter's transcript will also be adversely affected by the presumption set out in *Cal. Rules of Ct., Rule 8.163*, discussed in *§ 44.11[4]*.

Thus, as a practical matter, appropriate cases for review based only on a clerk's transcript, or one of its substitutes, are rare. Unless the issue on appeal is one of pure law, it is safest to assume, at least to begin with, that some record of the oral proceedings in the court below will be necessary [*see, e.g.*, *Hodges v. Mark (1996) 49 Cal. App. 4th 651, 657, 56 Cal. Rptr. 2d 700* (omission of reporter's transcript precludes review of nonsuit); *County of Santa Clara v. Redevelopment Agency (1993) 18 Cal. App. 4th 1008, 1016, 22 Cal. Rptr. 2d 868* (lack of reporter's transcript of hearing on severance precludes review of sufficiency of evidence to support trial court's implied ruling on that issue); *McKay v. Longsworth (1989) 211 Cal. App. 3d 1592, 1594, 260 Cal. Rptr. 250* (in absence of settled statement, appellate court must assume facts in statement of decision were fully supported); *Rubin v. Los Angeles Fed. Sav. & Loan Ass'n. (1984) 159 Cal. App. 3d 292, 296, 205 Cal. Rptr. 455* (court cannot review finding of waiver of due-on-sale clause on record consisting of appendices and documentary exhibits); *Cosenza v. Kramer (1984) 152 Cal. App. 3d 1100, 1102, 200 Cal. Rptr. 18* (claim that the evidence entitled appellant to judgment as a matter of law not cognizable in appeal taken on partial clerk's transcript)].

Regardless of the circumstances, the decision to forego entirely a reporter's transcript or equivalent record should never be made except on the advice of experienced appellate counsel.

Even if appellant elects to proceed under *Cal. Rules of Ct., Rule 8.124* or *8.128*, in lieu of a complete or partial clerk's transcript, he or she may still designate a full or partial reporter's transcript in conjunction with that election [*Cal. Rules of Ct., Rule 8.130(a)(4)*]. While a reporter's transcript is required in practically every appeal, it is a rare appeal in which everything that transpired in the courtroom must be included. For example, in cases where jury misconduct is not an issue, there is generally no reason to have the voir dire transcribed. When an appellant does not intend to challenge the jury instructions, he or she can omit their reading from the transcript. In short, counsel can and should exercise common sense when designating a reporter's transcript, and in this way, the interests of economy and justice both may be served.

If there is any uncertainty about what to include, it is safer to designate too much rather than to forfeit the right to present legitimate arguments for reversal [*but see*, [4], *below*]. When economy is the foremost concern, however, the possibility of proceeding on an agreed or a settled statement in lieu of both a clerk's and a reporter's transcript should be explored.

For more detailed discussion of determining and designating matters to be included in a reporter's transcript, see *§ 44.51*.

[4] Excessive Designation

Although the parties' overarching concern must be the designation of an adequate record, they must also exercise caution not to include items that clearly are "not reasonably material" to the issues on appeal. Including such matter may be a ground for the appellate court to impose sanctions [*Cal. Rules of Ct., Rule 8.276(a)(2)*; *Haskett v. Villas at Desert Falls (2001) 90 Cal. App. 4th 864, 885-886, 108 Cal. Rptr. 2d 888* ; *Garcia v. Lucido (1961) 191 Cal. App. 2d 303, 308, 12 Cal. Rptr. 601* (disapproved on other grounds in *Nichols v. Hast (1965) 62 Cal. 2d 598, 601, 43 Cal. Rptr. 641, 400 P.2d 753*); *compare* *In re Marriage of Green (1989) 213 Cal. App. 3d 14, 26, 261 Cal. Rptr. 294* (sanctions inappropriate when respondent could not foresee appellant's abandonment of issues when filing counterdesignation)]. Excessive designation would include, for example the designation of items that are clearly unrelated to the issues raised on appeal or fairly embraced by them.

For discussion and forms relating to sanctions generally, see Ch. 49, *Appeal: Sanctions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
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A. Overview of the Record on Appeal

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§ 44.14 Proceedings Concerning Completion of the Record

[1] Superior Court Retains Jurisdiction Over Preparation of Record

With the filing of the notice of appeal, the superior court loses jurisdiction over the case in virtually every respect. Nevertheless, it remains the duty of the superior court to aid in the perfection of the record [*Sullivan v. Superior Court (1954) 128 Cal. App. 2d 476, 479, 275 P.2d 595* (issuing writ of mandate to compel preparation of clerk's and reporter's transcripts); *but see* [2], *below*].

PRACTICE TIP:

"Appeals Supervising Judge." In the First Appellate District, a superior court judge is designated in each county to act as an "appeals supervising judge" to oversee record preparation in the appeals departments [*see* Cal. Rules of Ct., Supp., Internal Operating Practices and Procedures of the Cts. of Appeal, First App. Dist., § 24]. The appeals supervising judge can be an invaluable resource for attorneys encountering difficulty in getting a record completed.

[2] Proceedings by or in Reviewing Court

[a] Proceedings to Extend or Shorten Time Requirements in Completing Record

Notwithstanding that it is generally the superior court's duty to oversee the preparation of the record, only the court of appeal has the power to extend the time for doing any act in connection with the preparation of the record [*Cal. Rules of Ct., Rule 8.60(d)*].

PRACTICE TIP:

Extending Time for Designating Record. Extending the time to designate the record can be an important tool for managing the record preparation process when trial counsel anticipates that appellate counsel will come into the case. A motion to extend the time to designate the record, or the reporter's transcript if an appendix is to be used in lieu of a clerk's transcript, can give trialcounsel or appellant time to consult with appellate counsel and get his or her views on what should be included in the designation. It can also be a tool for "buying time" for appellate counsel to review the case and advise whether there should be an appeal at all. If the appellate counsel's advice is not to proceed, and that advice is taken, the cost of beginning preparation of the record, particularly the reporter's transcript, can be avoided altogether. While it is true that the reporter must refund any unused portion of the deposit if the appeal is dismissed, the pressure on reporters to complete transcripts quickly can mean that most of the deposit is used up while appellate counsel reviews the case and reaches an opinion whether the appeal should proceed. For discussion and forms of applications to extend or shorten time generally, see Ch. 46, *Appeal: Extending or Shortening Time* .

[b] Consequences of Appellant's Default

Appellant's failure to perform any act necessary to procure the filing of the record within the time allowed, including any valid extension of that time, may result in the dismissal of the appeal on the motion of respondent or the appellate court itself. The appeal will not be dismissed, however, before the trial court has issued a 15-day warning, during which time appellant may still cure the default [*Cal. Rules of Ct., Rule 8.140(a)*; *see* [c], *below*]. If the superior court clerk fails to give a 15-day notice after appellant's default, respondent may serve and file in the reviewing court a motion for dismissal; however, the motion must be denied if appellant cures the default within 15 days after the motion is served [*Cal. Rules of Ct., Rule 8.140(c)*].

PRACTICE TIP:

Buying Time With The Grace Period. While a little hard on counsel's nerves, the 15-day "grace period" notice can provide yet another tool for "buying time" in the record preparation process, whether for the purpose of pursuing settlement negotiations, of obtaining appellate counsel's evaluation of whether to go forward with the appeal, or of acquiring the frequently considerable funds needed to pay for a reporters transcript. Letting the initial ten-day period lapse, without designating the record, will prompt the superior court to give notice, with 15 additional days to cure the default. As a practical matter, this grace period results in providing appellant's counsel with 25 days to designate the record.

[c] Proceedings for Relief From Default

If appellant is unable to cure a default with regard to the preparation of the record within the 15-day grace period afforded by *Cal. Rules of Ct., Rule 8.140(a)*, discussed in [b], *above*, then he or she may still seek relief from default in accordance with *Cal. Rules of Ct., Rule 8.60(d)*, to save the appeal. For a full discussion and forms relating to relief from default, see Ch. 47, *Appeal: Relief from Default* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 44.15 Appellant's Duty to Provide Notice of Settlement Before Completion of Record

If a civil case is settled after the notice of appeal has been filed, but before the record has been completed and transmitted to the reviewing court, it is the appellant's duty to give notice to the superior court, as well as to the reviewing court, *immediately*. If the parties have designated a clerk's or a reporter's transcript and the record has not been filed in the reviewing court, the appellant must also immediately serve a copy of the notice on the superior court clerk [*Cal. Rules of Ct., Rule 8.244(a)*; *see Huschke v. Slater (2008) 168 Cal. App. 4th 1153, 1160, 86 Cal. Rptr. 3d 187* (appellant, not respondent, has duty to file notice of settlement)]. For a form of notice to be provided to the superior court, see *§ 44.200*.

Within 45 days after filing a notice of settlement, the appellant who filed the notice of settlement must file either an abandonment under *Cal. Rules of Ct., Rule 8.244(b)* [*see § 44.16*], if the record has not yet been filed in the court of appeal, or a request to dismiss under *Cal. Rules of Ct., Rule 8.244(c)* [*see § 44.16*], if the record has already been filed in the court of appeal [*Cal. Rules of Ct., Rule 8.244(a)(3)*].

In addition, if the appeal is abandoned or dismissed before the clerk has completed preparation of the transcript, the clerk must refund any portion of the deposit under *Cal. Rules of Ct., Rule 8.122(c)* exceeding the preparation cost actually incurred [*Cal. Rules of Ct., Rule 8.122(d)(2)*].

PRACTICE TIP:

Notice of Settlement. Note that a notice of settlement under *Cal. Rules of Ct., Rule 8.244(a)* does not in itself operate to divest the appellate court of jurisdiction in the appeal. The parties must seek a final determination of the cause by a voluntary dismissal, or in some instances by a motion for stipulated reversal. Although the parties may stipulate for an immediate issuance of remittitur once a final

determination has been made, the determination itself is a prerequisite to remittitur [*see Cal. Rules of Ct., Rule 8.272(c)*, and discussion in *Ch. 53, Appeal: Remittitur and Costs on Appeal, § 53.13*]. For further discussion of voluntary dismissal and stipulated reversal, see *Ch. 48, Appeal: Abandonment, Dismissal, and Stipulated Reversal, §§ 48.11, 48.12*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 44.16 Voluntary Abandonment of Appeal Before Record Is Filed

At any time prior to the filing of the record in the reviewing court, appellant may file a written notice of abandonment of the appeal in the superior court. Alternatively, the parties may file a stipulation to abandon the appeal, for example as a condition of a settlement agreement. In either case, the filing will operate to dismiss the appeal and return jurisdiction to the superior court [*Cal. Rules of Ct., Rule 8.244(b)*]. After abandoning the appeal, appellant is entitled to a refund ofany portion of the deposit for preparation of the record exceeding the preparation cost actually incurred [*Cal. Rules of Ct., Rule 8.122(d)(2)*]. For forms of voluntary dismissal to be filed with the superior court before the record has been completed or transmitted, see *§ 44.201*.

In contrast, after the record has been filed in the reviewing court, the abandonment or stipulation to dismiss the appeal must instead be filed in the reviewing court, which *may* order dismissal and issuance of the remittitur [*Cal. Rules of Ct., Rule 8.244(c)*]. For detailed discussion and forms relating to dismissal and stipulated reversals, see, Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* .

An appeal will be dismissed with prejudice to the right to file another appeal unless the dismissal is expressly made without prejudice. [*Code Civ. Proc. § 913*; *Lyons v. Security Pac. Nat'l Bank (1995) 40 Cal. App. 4th 1001, 1017, 48 Cal. Rptr. 2d 174* (as modified on denial of rehearing, review denied)]. If appellant later regrets the decision to abandon, and the dismissal was not expressly made without prejudice to the filing of another appeal, the appellant must file a motion to vacate the dismissal in the superior court to gain relief, as the appellate court no longer has jurisdiction over the case [*Conservatorship of Oliver (1961) 192 Cal. App. 2d 832, 836, 13 Cal. Rptr. 695* ; *Whitehead v. Dickey (1965) 232 Cal. App. 2d 740, 741, 43 Cal. Rptr. 183* ; *see also*, *Liberty Mut. Ins. Co. v. Fales (1973) 8 Cal. 3d 712, 716, 106 Cal. Rptr. 21* , and *Okuda v. Superior Court (1983) 144 Cal. App. 3d 135, 137 n.1, 192 Cal. Rptr. 388* (both discussing abandonment in context of issue of mootness)]. For a form of motion to vacate a dismissal, see Ch. 48,

Appeal: Abandonment, Dismissal, and Stipulated Reversal .

Legal Topics:

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

§§ 44.17[Reserved]

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B. The Clerk's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.30

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§ 44.30 Governing Law

Designation, preparation, and transmission of the clerk's transcript and its alternatives are governed by *Cal. Rules of Ct., Rules 4.5*, *8.120*, 8.122, *8.124*, *8.128*, *8.144*, and *8.147* [*see also Code Civ. Proc. § 670*; Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rules 5, 6, 9; Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rules 2, 3; Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 3d App. Dist., Rule 22; Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 4th App. Dist., Rule 10; Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 5th App. Dist., Rules 2, 3].

Legal Topics:

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART II. LEGAL BACKGROUND
B. The Clerk's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.31

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§ 44.31 The Contents of the Clerk's Transcript

[1] In General

The notice designating a clerk's transcript identifies each designated document by its title and filing date. If the filing date is not available, it is identified by the date it was signed [*Cal. Rules of Ct., Rule 8.122(a)(1)*]. The notice may specify portions of designated documents that are not to be included in the transcript [*Cal. Rules of Ct., Rule 8.122(a)(1)*]. For minute orders or instructions, it is sufficient to collectively designate all minute orders or all minute orders entered between specified dates, or all written instructions given, refused or withdrawn [*Cal. Rules of Ct., Rule 8.122(a)(1)*].

Except for copies of depositions [*see Cal. Rules of Ct., Rule 8.122(b)(4)*], all exhibits admitted in evidence, refused, or lodged are deemed part of the record, but a party wanting a copy of an exhibit included in the transcript must specify that exhibit by number or letter in its notice of designation [*Cal. Rules of Ct., Rule 8.122(a)(3)*]. If the superior court has returned a designated exhibit to a party, the party in possession of the exhibit must deliver it to the superior court clerk within 10 days after the notice designating the exhibit is served [*Cal. Rules of Ct., Rule 8.122(a)(3)*]. When directed to prepare a clerk's transcript, the superior court clerk must include the following items, whether or not these items have been designated in the notice to prepare the record [*Cal. Rules of Ct., Rule 8.122(b)(1)*]:

- The notice of appeal.
- Any judgment appealed from and any notice of its entry.
- Any order appealed from and any notice of its entry.

- Any notice of intention to move for a new trial, or motion to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration of an appealed order, with supporting and opposing memoranda and attachments, and any order on such motion and any notice of its entry.

- Any notices or stipulations to prepare clerk's or reporter's transcripts or to proceed by agreed or settled statement.

- The register of actions.

Each of these documents that the clerk must include in the clerk's transcript must show the date necessary to determine the timeliness of the appeal [*Cal. Rules of Ct., Rule 8.122(b)(4)*].

The clerk must also include the following under *Cal. Rules of Ct., Rule 8.122(b)(3),* if they have been designated by any of the parties:

- Any other document filed or lodged in the case in the superior court.

- Any exhibit admitted in evidence, refused, or lodged [*see also Cal. Rules of Ct., Rule 8.224(a),* discussed *below*].

- Any jury instruction that any party submitted in writing and the cover page required by *Cal. Rules of Ct., Rule 2.1055(b)(2)* indicating the party requesting it, and any written jury instructions given by the court.

Note that neither the mandatory nor the optional list under *Cal. Rules of Ct., Rule 8.122(b),* includes deposition transcripts. Only on the stipulation of the parties, or with the express permission of the reviewing court, may the clerk copy into the transcript or otherwise transmit to the reviewing court the original of any deposition [*Cal. Rules of Ct., Rule 8.122(b)(4)(A)*].

Counsel should also bear in mind that *Cal. Rules of Ct., Rule 8.224(a),* provides for the transmission of any or all of the original exhibits on the motion of a party filed within 10 days after the last respondent's brief is filed or could be filed under *Cal. Rules of Ct., Rule 8.224(a)(1).* For discussion of the procedures for transmission of exhibits under *Cal. Rules of Ct., Rule 8.224(a),* see *§ 44.81[3].*

[2] The Judgment Roll

An appeal on the "judgment roll" is procedurally distinguishable from other appeals, including those prosecuted exclusively on a full or partial clerk's transcript.

First, the contents of the record in a judgment roll appeal in most civil matters are prescribed by *Code Civ. Proc. § 670,* rather than by appellant's selection of documents from the clerk's record [*but see* Code Civ. Pro. §§ 1134, 1139 (judgment by confession and judgment on submitted controversy, respectively); *Prob. Code § 1050* (probate proceedings)].

Further, the specific documents to be included pursuant to that statute are dictated by the procedural posture of the case. Consequently, the record in a judgment roll appeal from a default judgment consists of the following [*Code Civ. Proc. § 670(a)*]:

- The summons, with affidavit or proof of service; also, if service was by publication, the affidavit for

publication and order directing publication.

- The complaint.
- The request for entry of default with indorsed memorandum of default.
- The default judgment.

If defendant appeared by demurrer and the demurrer was overruled, the clerk will add:

- Notice of overruling of demurrer with proof of service on defendant's attorney.

In all other cases, *i.e.*, all contested matters, the judgment roll consists of [*Code Civ. Proc. § 670(b)*]:

- The pleadings.
- Any orders striking out all or part of a pleading.
- The jury's verdict, the trial court's statement of decision, or the referee's finding.
- Any order made on demurrer or relating to a change of parties.
- The judgment.

If there was more than one defendant, however, and a default judgment was entered against one of them, the clerk will add:

- The summons, proof of service, and, if service was by publication, the affidavit and order as to that defendant.

Second, by definition as well as historical usage, the record in a judgment roll appeal cannot include a reporter's transcript or other record of the oral proceedings. The courts will reject any attempt to circumvent this limitation [*see, e.g. Estate of Bernard (1962) 206 Cal. App. 2d 375, 380, 383, 23 Cal. Rptr. 828* ; *Estate of Larson (1949) 92 Cal. App. 2d 267, 268-269, 206 P.2d 852]* .

If appellant elects to proceed on the judgment roll, respondent is bound by that decision. The appellant may require neither the preparation of a reporter's transcript nor the addition of documents from the clerk's record. The judgment roll and pretrial order, if any, "shall constitute" the record on appeal. By way of comparison, when appellant notices only the preparation of a full or partial clerk's transcript, respondent may at least add to the contents of the clerk's transcript. In either case, however, the reviewing court may order the augmentation of the record to prevent a miscarriage of justice on respondent's or its own motion [*Cal. Rules of Ct., Rule 8.130(a)(4)*]. Unless the court orders otherwise, the appellant is responsible for the cost of any reporter's transcript the court may order under this subdivision [*Cal. Rules of Ct., Rule 8.130(a)(4)*].

Third, in a judgment roll appeal, the pretrial order, if any, will only be considered to the extent it affects the definition or joinder of issues, and when only portions of the oral proceedings are transcribed. Evidentiary material and the pretrial order are not considered unless specifically designated by one of the parties for inclusion in the clerk's transcript [*Cal. Rules of Ct., Rule 8.754(d)*; for discussion of partial designation of reporter's transcript, *see § 44.52[2]*].

Finally, there is little substantive difference today between a judgment roll appeal and an appeal brought exclusively on

a full or partial clerk's transcript. Indeed, the cases routinely characterize any appeal brought without the benefit of a reporter's transcript or other record of the oral proceedings in the trial court as a "judgment roll" appeal regardless of whether the contents of the record are confined to those listed in *Code Civ. Proc. § 670* [*see, e.g. Nielsen v. Gibson (2009) 178 Cal. App. 4th 318, 324-325, 100 Cal. Rptr. 3d 335* ; *Waller v. TJD, Inc. (1993) 12 Cal. App. 4th 830, 832, 16 Cal. Rptr. 2d 38* (appeal on clerk's transcript is judgment roll appeal); *Rubin v. Los Angeles Fed. Sav. & Loan Ass'n. (1984) 159 Cal. App. 3d 292, 296, 205 Cal. Rptr. 455* (appeal on appendices in lieu of clerk's transcript is judgment roll appeal)]. This treatment may stem from the fact that there is little difference, as a practical matter, between the issues that may be raised and the presumptions that will apply in a judgment roll appeal as opposed to any other appeal limited to a full or partial clerk's transcript or other documentary record, however denominated [*see, e.g. Construction Financial v. Perlite Plastering Co. (1997) 53 Cal. App. 4th 170, 179, 61 Cal. Rptr. 2d 574* (joint appendix); *National Secretarial Service, Inc. v. Froehlich (1989) 210 Cal. App. 3d 510, 521-522, 258 Cal. Rptr. 506* (clerk's transcript); *Kennedy v. Taylor (1984) 155 Cal. App. 3d 126, 128, 201 Cal. Rptr. 779* (judgment roll); *Cosenza v. Kramer (1984) 152 Cal. App. 3d 1100, 1102, 200 Cal. Rptr. 18* (partial clerk's transcript)].

For a discussion of factors in determining whether to proceed on a partial record comprised of a clerk's transcript, one of the alternatives to a clerk's transcript, or the judgment roll, see *§§ 44.11, 44.13*. For the procedure to be followed by the parties in securing preparation of the clerk's transcript, see *§ 44.32* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on AppealGovernmentsCourtsClerks of Court

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§ 44.32 Procedure for Preparation of Clerk's Transcript

[1] Appellant's Notice Designating Clerk's Transcript

[a] Notice Must Be Served and Filed With Superior Court Clerk Within 10 Days After Filing of Notice of Appeal

Within 10 days after filing the notice of appeal, the appellant must serve on the respondent and file with the superior court clerk, a notice designating the documents to be incorporated in the clerk's transcript [*see Cal. Rules of Ct., Rule 8.121(a), 8.122(a)*]. The requirement that it be served and filed means that the notice must be accompanied by proof of prior service in a manner permitted by law [*see Cal. Rules of Ct., Rule 8.121(a)*; for discussion and forms relating generally to service and proof of service, see Ch. 518, *Service and Summons of Papers*].

For discussion of the 15-day "grace period" under *Cal. Rules of Ct., Rule 8.140(a)*, and proceedings in the appellate court to extend the time for filing the notice or obtain relief from default, see *§ 44.14[2]*.

[b] Form of Notice

The notice to prepare a clerk's transcript must designate the documents the appellant wants incorporated into the clerk's transcript [*see Cal. Rules of Ct., Rule 8.122(a)(1)*].

Specifically, the appellant must designate the documents on file or lodged with the clerk that are to be included in the clerk's transcript. The designation must describe each document with particularity, including the title of the document and the date it was filed, or, if the filing date is not readily available, the date it was signed. Appellant's designation of all minute orders, all minute orders entered between specified dates, or all written jury instructions prepared by the court

or tendered by a party, whether given, refused, or withdrawn, is sufficient designation of those documents [*Cal. Rules of Ct., Rule 8.122(a)(1)*].

The specificity requirements of *Cal. Rules of Ct., Rule 8.122(a)(1)*, are analogous in some respects to designation requirements already in effect in the Second Appellate District, in which a notice of designation must state, for each paper or record to be included, the title and date of filing. Further, each exhibit designated for inclusion in the clerk's transcript must include the exhibit number, a brief description, and the admission status [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, Second App. Dist., Rule 3(a)(2)]. The Second District has also adopted a printed form, entitled "Designation of the Record on Appeal," which complies with Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, Second App. Dist., Rule 3(a), and which "may" be used to designate the record in that court [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, Second App. Dist., Rule 3(b)].

For a form of notice of designation of clerk's transcript that conforms substantially to the requirements of both *Cal. Rules of Ct., Rule 8.122(a)(1)*, and Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, Second App. Dist., Rules 3(a)(2) and (b), see *§ 44.210* [*see also § 44.211* for an alternate form for use in probate proceedings]. For Judicial Council form AP-003, Notice Designating Record on Appeal (Unlimited Civil Case), see *§ 44.213*.

PRACTICE TIP:

Designation That Is Required vs. Designation That Is Recommended. Note that under *Cal. Rules of Ct., Rule 8.122(b)(1)*, the clerk is required to include some items in the clerk's transcript whether or not designated, while other items must be designated to included. The safer practice, whenever possible, is to designate all items needed with the greatest possible specificity. For discussion of items that need, or technically need not be, designated in the notice, by reference to *Cal. Rules of Ct., Rule 8.122(b)(1)*, see *§ 44.31[1]*.

[c] Notice May Be Combined With Notice of Appeal, Notice Designating Reporter's Transcript, or Both

Appellant may combine the notice to prepare the clerk's transcript with a notice to prepare a reporter's transcript. In addition, if an appellant is ready to designate the record at the time the notice of appeal is filed, appellant may combine a notice to prepare the clerk's transcript with a notice to prepare the reporter's transcript,the notice of appeal, or both [*Cal. Rules of Ct., Rule 8.121(a)*]. For forms of notice of appeal combined with one or more notices to prepare the record, see *Ch. 42, Appeal: Notice of Appeal, § 42.90*].

[d] Selecting Discretionary Items to Be Included

As discussed in *§ 44.31[1]*, certain documents and records in the trial court's file will be included automatically when appellant files notice to prepare a clerk's transcript, while others, significantly, the exhibits, the jury instructions, the trial court's opinion, and the minutes, must be requested specifically. In making the decision what to include, it is always helpful to consider what the appellate court might want to see when trying to decide whether an error occurred and whether it prejudiced the outcome of the trial.

For example, the need to designate the instructions in an appeal when instructional error is claimed is obvious, but it may also exist when misconduct on the part of judge, jury, or counsel is claimed, or when special verdicts appear inconsistent.

Unless appellant (or respondent) identifies the exhibits he or she wants copied into the transcript, none will be included [*Cal. Rules of Ct., Rule 8.122(a)(3)*]. When the admission or exclusion of certain evidence is in issue, and a witness's testimony would otherwise be unclear, or "one picture is worth a thousand words," then viewing the exhibit, be it a document, photograph, or physical evidence, may be critical to the appellate court's ability to understand the proceedings, and counsel should direct the clerk to copy it.

PRACTICE TIP:

Bringing Exhibits Before the Appellate Court. If issues of economy predominate, a party will prefer to rely on the procedure established in *Cal. Rules of Ct., Rule 8.224(a)*, under which any or all of the exhibits will be transmitted to the appellate court on request once the court has issued its notice of oral argument. Counsel should also bear in mind that the same provision authorizes the reviewing court to request the transfer of some or all of the original exhibits whenever it wishes to see them [*see § 44.81[3]*].

As a practical matter, any exhibit worth reviewing is one the appellant or respondent will want to bring before the court of appeal as a part of the record, since by the time oral argument is noticed the court has usually all but decided the case. Thus, in any case in which the issues rely significantly on the exhibits, they should be requested to be copied into the clerk's transcript. Alternatively, an appellant's or joint appendix is a great tool to get exhibits before the court for review before it has reached its tentative decision in the case.

While the trial court's written opinion is a discretionary item, it is seldom omitted from the clerk's transcript. lt can offer important insight into the reasoning underlying the court's decision, and often is included in the clerk's transcript as a springboard for discussion in the briefs. Although the opinion may actually be a critical element of the record in a few types of cases in which the decisional process itself bears scrutiny [*see, e.g. Clothesrigger, Inc. v. GTE Corp. (1987) 191 Cal. App. 3d 605, 611, 236 Cal. Rptr. 605* (certification of class action)], in the vast majority, it is the result, and not the reasoning, that must survive scrutiny on appeal. Consequently, in most cases, the trial court's opinion may not be used to impeach its findings or judgment [*Estate of Bernard (1962) 206 Cal. App. 2d 375, 380-383, 23 Cal. Rptr. 828* ; *see also* discussion in *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.14[3]*].

The clerk's minutes may sometimes provide valuable insight into trial court proceedings that are not otherwise accessible. For example, they may make it possible to demonstrate approximately how long the court recessed or the jury deliberated, or that unreported side-bar discussions in fact occurred. Even if not helpful to the reviewing court in a particular case, they can be enormously useful to counsel, especially newly-associated appellate counsel, when trying to reconstruct events at trial. In sum, they are usually well worth the cost of copying into the transcript.

[2] Respondent's Notice Designating Additions to Transcript

[a] Notice Must Be Served and Filed With Superior Court Clerk Within 10 Days After Service of Appellant's Notice

Within 10 days after service of the appellant's notice to prepare a clerk's transcript, the respondent may serve on the appellant and file with the superior court clerk a notice designating additional papers or records to be included in the record on appeal [*Cal. Rules of Ct., Rule 8.122(a)(2)*]. The requirement that it be served and filed means that the notice must be accompanied by proof of prior service in a manner permitted by law [*see Cal. Rules of Ct., Rule 8.25*; for discussion and forms relating generally to service and proof of service, see Ch. 518, *Service and Summons of Papers*].

PRACTICE TIP:

Make Sure Your Notice Is Timely. When the appellant misses the deadline for designating the record, he or she is essentially given a 15-day "grace period" under *Cal. Rules of Ct., Rule 8.140(a)* to file the notice [*see § 44.14[2][b]*]. The appellate rules do not, however, include an analogous grace period for respondent in filing his or her "counter designation." Respondent's counsel should therefore inspect appellant's notice carefully as soon as it is served, and analyze whether further designations will be needed to provide a record adequate to protect respondent's interests [*see* [b] and [c], *below*].

If necessary, a respondent may apply, *in the appellate court*, for an extension of the time to file this

notice [*see Cal. Rules of Ct., Rules 8.60(b), 8.63*], or may, *in theappellate court*, seek relief from default in the event that the notice is filed late without having obtained a prior extension of time for filing [*see Cal. Rules of Ct., Rule 8.60(e)*; *see also* discussion in *§ 44.14[2]*]. As a general rule, respondent should seek an extension if necessary before the deadline for filing passes. Adding necessary items to the record is too critical to the outcome of the appeal to rely on the appellate court's discretion in granting relief from default. For discussion and forms relating to extensions of time for doing an act, and relating to relief from default, see respectively Ch. 46, *Appeal: Extending or Shortening Time* , and Ch. 47, *Appeal: Relief From Default* .

For a form of motion to dismiss an appeal because appellant has failed to file a timely initial notice designating the record, see *Ch. 48, Appeal: Abandonment, Dismissal, and Stipulated Reversal, § 48.62*.

[b] Form of Respondent's Notice

The respondent may, in his or her notice for additional matters to be included in the clerk's transcript, designate additional papers or records that may include the clerk's minutes, the opinion of the superior court, affidavits, written instructions given or refused, and exhibits specifically requested to be copied into the clerk's transcript [*see Cal. Rules of Ct., Rule 8.122(a)(1), (b)(3)*].

The respondent has two options if he or she wants exhibits included in the record [*Cal. Rules of Ct., Rule 8.122(a)*]:

- Respondent may elect to furnish the clerk with copies of the exhibits desired instead of having them copied by the clerk. If so, he or she must, within 10 days after filing his or her notice, furnish the superior court clerk with two copies of each exhibit, in the form required by *Cal. Rules of Ct., Rule 8.144(a)* [for discussion of the requirements of *Cal. Rules of Ct., Rule 8.144(a)*, in the context of preparing an appendix in lieu of clerk's transcript, *see § 44.33[4][b]*]. Otherwise, they will not be included.

- Respondent may, alternatively, elect to have the clerk copy the exhibits, in which case he or she must, within 10 days of after notice from the clerk of the estimated cost of doing so, deposit with the clerk an amount equal to that estimate. Otherwise the exhibits will not be copied.

For further discussion regarding the designation and copying of exhibits, see [1][d], *above*.

If the appellant has designated only a clerk's transcript consisting of part or all the items specified in *Cal. Rules of Ct., Rule 8.122(b)* [*see § 44.31[1]*], the respondent may counter designate any additional papers, records, or affidavits, *other than* instructions or exhibits [*Cal. Rules of Ct., Rule 8.122(a)(2)*]. For further discussion regarding augmentation proceeding generally, see *§ 44.90* et seq.

PRACTICE TIP:

Determining the Additional Items to Designate. Respondent's counsel should immediately and carefully check appellant's designation of the record, to insure that it is as complete as necessary to permit review. All too often, appellant's counsel may designate items, such as a motion by appellant, without also designating respondent's opposition to that motion. Respondent's counsel has a responsibility in some instances equal to or greater than appellant's counsel, to ensure that the court has all necessary matters in the record for review [*see § 44.12[2]*]. Respondent's counsel must accordingly research the potential issues to be raised by appellant, consider the issues, if any, in respondent's cross appeal, compare the conclusions of these analyses with the items designated by appellant for the inclusion in the record, and designate whatever additional items may be necessary to refute appellant's argument of prejudicial error or support issues to be raised in a cross appeal.

> In rare instances, appellant may fail so completely to satisfy his or her initial burden to provide an adequate record that respondent may consider electing *not* to counterdesignate, and instead take the position that in the absence of an adequate record, the appellate court must affirm. This tactic is safely used, though, only when an appellant has failed to provide even the record necessary to make out his or her own case on appeal, let alone respondent's. Usually, when an appellant has simply neglected to include portions of the record that support respondent's position, the better course for respondent is to counterdesignate whatever is needed to give the appellate court the complete picture.

For a form that may be used by respondent to designate additional items for inclusion in the clerk's transcript, see *§ 44.212*.

[3] Payment of Cost of Transcript

Appellant must deposit the estimated cost of preparing the transcript, less the amount, if any, of items designated by the respondent, within 10 days of receiving the clerk's estimate. If the appellant fails to make this deposit, his or her prior notice designating the clerk's transcript is not effective "for any purpose" [*Cal. Rules of Ct., Rule 8.122(c)*].

Appellant should receive the clerk's cost estimate within 30 days after the date respondent filed a counter notice, or the time for doing so has lapsed [*see* [2][a], *above*], whichever is earlier [*Cal. Rules of Ct., Rule 8.122(c)*]. For further discussion of the procedures employed by the clerk's office, see [5], *below*.

[4] Clerk's Preparation and Certification of Transcript

Within 30 days after the appellant has deposited the estimated cost of preparing the transcript, the clerk will prepare an original and one copy in the format required by *Cal. Rules of Ct., Rule 8.144*, and certify the original [*Cal. Rules of Ct., Rule 8.122(d)*]. For further discussion of the contents to be prepared by the clerk under *Cal. Rules of Ct., Rule 8.122(d)*, either as a matter of course or by express designation by the parties, see *§ 44.31[1]*.

The formatting requirements with which the clerk must comply in preparing the record are set out in detail in *Cal. Rules of Ct., Rule 8.144*. That rule covers the weight, size, and type of paper, as well as pagination, binding, and indexing, among other matters. It is of little relevance to the parties, unless they have elected to prepare an appendix or appendices under *Cal. Rules of Ct., Rule 8.124*, in which case, many of the same formatting requirements will apply to them in their own preparation of their appendices [*see Cal. Rules of Ct., Rule 8.124(d)(1)*, and discussion in *§ 44.33*].

The clerk will not copy any exhibit unless directed to do so by one of the parties. Otherwise, the procedure set forth in *Cal. Rules of Ct., Rule 8.224(a)*, will be followed [*see Cal. Rules of Ct., Rule 8.122(a)(3)*, and discussion in *§§ 44.31[1], 44.32[1][d], [2][b], 44.33[2]*, and *44.81[3]*].

When the record on appeal is completed, the clerk of the superior court will transmit the original transcripts to the reviewing court. After they have been received and filed in the reviewing court, the clerk of that court will mail a notice to the parties advising them of the date on which filing occurred [*Cal. Rules of Ct., Rule 8.150*]. This filing date is *critical* because the periods for completing briefs begin to run from this date [*see Cal. Rules of Ct., Rule 8.212(a)(1)*, and detailed discussion in *Ch. 50, Appeal: Briefs, § 50.16*].

[5] Subsequent Augmentation or Correction of Clerk's Transcript

If it later appears that the clerk's transcript is either inadequate or incorrect, either party may move that the reviewing court order augmentation or correction as provided in *Cal. Rules of Ct., Rule 8.155*. For detailed discussion of augmentation and correction procedures, see *§ 44.90* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 44.33 Joint Appendix or Appellant's and Respondent's Separate Appendices

[1] Appendices as Common Alternative to Clerk's Transcript

Within 10 days after the notice of appeal is filed, that is, within the same period for filing a notice to designate the clerk's transcript [*see § 44.32[1]*], *any* party may serve and file with the clerk of the superior court a notice to proceed under the provisions of *Cal. Rules of Ct., Rule 8.124*, as an alternative to proceeding under the provisions of *Cal. Rules of Ct., Rule 8.122*, for the preparation of a clerk's transcript [*Cal. Rules of Ct., Rule 8.121(a)*; for general discussion of proceeding under *Cal. Rules of Ct., Rule 8.122, see § 44.32*].

Proceeding under *Cal. Rules of Ct., Rule 8.124*, allows the parties to file a joint appendix, or separate appendices, in lieu of designating and counter designating a clerk's transcript.

The use of a joint appendix or separate appendices, instead of a clerk's transcript, has become quite common in appellate practice, and, as anticipated, has greatly reduced the time and, sometimes, the cost, of providing the documentary record on appeal. In addition, the use of an appendix permits greater selectivity and flexibility in preparation of the documentary record. Unlike proceedings for a clerk's transcript under *Cal. Rules of Ct., Rule 8.122*, the 10-day deadline under *Cal. Rules of Ct., Rule 8.121(a)*, is for filing a notice of election only, as distinguished from a notice under *Cal. Rules of Ct., Rule 8.122*, under which an appellant must not only elect to proceed by clerk's transcript but also designate all the items to be included in that transcript. Parties using appendices therefore need not designate the contents of the documentary record before briefing, when the issues are still uncertain, but may select the documents needed to support their arguments concurrent with the briefing process [*see* former *Cal. Rules of Ct., Rule 5.1*, Judicial Council Drafter's Note (1981); *see also § 44.13* (considerations in choosing the form of record)].

PRACTICE TIP:

Using Appendices to Strategic Advantage. The distinctive timing and time-saving features associated with *Cal. Rules of Ct., Rule 8.124*, may be of strategic advantage to an appellant. For example, when an appellant's counsel faces some urgency in filing a notice designating the record, but is still evaluating whether to proceed with the appeal (in some instances still seeking or awaiting the advice of an appellate law specialist), counsel may file a notice of election to proceed under *Cal. Rules of Ct., Rule 8.124*, together with an application to extend the time to file a notice to prepare the reporter's transcript. In this way, appellant can buy the time to make a reasoned decision [*see also* Practice Tip in § 44.14[2][a]]. On the other hand, electing to use a traditional clerk's transcript can buy appellant's counsel time in another sense; the delays associated with this proceeding, especially when a large record is involved, may give more time to pursue settlement negotiations.

[2] Contents of Appendix

An appendix prepared by the appellant or jointly by the parties must include [*Cal. Rules of Ct., Rule 8.124(b)*]:

- Those documents listed in *Cal. Rules of Ct., Rule 8.122(b)(1)*, that is, the items that a clerk is required to include in the record whether or not they are designated by a party [*see § 44.31[1]*].

- Such other documents listed in *Cal. Rules of Ct., Rule 8.122(b)(3)* as are "necessary for proper consideration of the issues," including documents that appellant should reasonably assume that respondent will rely upon in meeting the issues raised on appeal [*see § 44.31[1]*].

- The appellant's notice of election to proceed under the provisions of *Cal. Rules of Ct., Rule 8.124*.

- In the case of a joint appendix, the stipulation designating its contents.

- Required indices [*see Cal. Rules of Ct., Rule 8.144(b)*, discussed in [4][b], *below*].

All exhibits admitted into evidence or rejected by the court are deemed a part of the appendix, whether or not they are actually reproduced in it [*Cal. Rules of Ct., Rule 8.124(b)(3)*].

An appendix may incorporate by reference all or part of the record on appeal in another case pending in the reviewing court or in a prior appeal in the same case [*Cal. Rules of Ct., Rule 8.122(b)(2)*].

PRACTICE TIP:

Use of Appendix When Exhibits Are Critical to Review. Proceeding by appendix in lieu of clerk's transcript can be exceptionally helpful in cases in which the exhibits were important to the result below, and are important on appeal as well. Although appellant's counsel is not required to include copies of the exhibits in the appendix, she or he may do so, and *should do so* when the it is important to bring the exhibits to court's attention *before* the court has already reached its tentative decision, which it has usually done by the time exhibits are otherwise transferred to the court of appeal under *Cal. Rules of Ct., Rule 8.224(a)* [*see § 44.81[3]*]. Such exhibits are best brought before the court in an appendix; many courts of appeal will strike or refuse to file a brief that includes a key exhibit attached but not yet included in the record [*see also* discussion in *Ch. 50, Appeal: Briefs, § 50.12[3]*].

[3] Procedure for Electing Use of Appendices

[a] Initial Notice of Election

[i] Service and Filing

As noted in [1], *above*, *any* party may elect to proceed under *Cal. Rules of Ct., Rule 8.124(a)(1)* by filing notice within 10 days of the filing of the notice of appeal. As a practical matter, this election is usually made by appellant, who serves and files a notice of election to proceed under *Cal. Rules of Ct., Rule 8.124*, instead of serving and filing a notice to prepare a clerk's transcript under 8.122. However, either party may elect to have the appeal proceed by way of an appendix. A respondent's timely election to use an appendix will govern unless the superior court orders otherwise and no waiver of the fee for a clerk's transcript is granted to the appellant. This election procedure differs from all other appellate rules governing designation of a record on appeal. In those rules, the appellant's designation, or the stipulation of the parties, determines the type of record on appeal [*Cal. Rules of Ct., Rule 8.124(a)*, Advisory Committee Comment].

The requirement that it be served and filed means that the notice must be accompanied by proof of prior service, in a manner permitted by law, of one copy of the notice on counsel on each adverse party represented by separate counsel [*see Cal. Rules of Ct., Rule 8.25*; for discussion and forms relating generally to service and proof of service, see Ch. 518, *Service and Summons of Papers*].

[ii] Form of Notice of Election

As discussed in [1], *above*, the form of notice of election is simple: a notice that the party chooses to proceed by use of an appendix under *Cal. Rules of Ct., Rule 8.124(a)(1)*. For a form of notice of election, see *§ 44.220*.

Like the notice to prepare a clerk's transcript, the notice of election may be combined in the same document with a notice to prepare the reporter's transcript, and both of these notices may be included in the document containing the notice of appeal [*Cal. Rules of Ct., Rule 8.121(a)*].

PRACTICE TIP:

Combining Notices May Save a Little Money. If appellant intends to rely on an appendix rather than a clerk's transcript, combining the notice of election with the notice of appeal will save a little in expense. On filing a combined notice of appeal and notice of election to proceed by appendix, some courts will waive the additional $100 deposit that is required in addition to the notice of appeal filing fee, and which is credited to the amount chargeable for preparation of the clerk's transcript "or any other appeal processing or notification" [*see Gov. Code § 68926.1*]. This amount is usually used to defray the cost of indexing the file in the course of preparing the clerk's transcript. With no need to prepare the index, some courts will not require the fee.

[b] Opposition to Election

Once appellant (or another party) has served notice of election to proceed under *Cal. Rules of Ct., Rule 8.124(a)(1)*, respondent (or another opposing party) has 10 days to file a noticed motion stating any objections. The provisions of *Cal. Rules of Ct., Rule 8.124*, will govern preparation of the documentary record unless the court orders otherwise for good cause shown in such a motion [*Cal. Rules of Ct., Rule 8.124(a)(1)*]. For a form of motion objecting to the use of an appendix in lieu of a clerk's transcript, see *§ 44.222*.

[c] Stipulation Regarding Preparation of Joint Appendix

Once an election to proceed under *Cal. Rules of Ct., Rule 8.124*, the parties are encouraged to stipulate to a joint appendix [*Cal. Rules of Ct., Rule 8.124(a)(3)*]. If they are successful in reaching an agreement concerning the joint appendix, they must prepare a written stipulation designating the contents of the joint appendix. A copy of the stipulation must be included in the appendix itself when it is filed with the court of appeal [*see Cal. Rules of Ct., Rule 8.124(b)(1)(D)*, and discussion in [2], *above*]. For a form of stipulation, see *§ 44.221*.

PRACTICE TIP:

Preparing Joint Appendix. In practice, preparing a joint appendix frequently entails minor controversies and delays that can complicate counsel's life. A joint appendix is not due until the respondent's brief is filed, but appellant has to cite to it in his or her opening brief, meaning that the determination of its contents must be resolved before the opening brief is filed. Moreover, if the process of settling the contents is done by exchanging proposed indices, respondent's counsel may find that the pagination to his or her version of the same document is different from appellant's, perhaps, for example, because one party is including proofs of service and the other is not. In a large, multi-volume appendix, this can produce significant differences in pagination that are too time consuming to correct. It may be disconcerting enough for some even to imagine the process of two representatives of opposing parties "walking" through a joint appendix over the telephone, comparing the pages and trying to identify, much less resolve, all the discrepancies. In short, in some cases counsel may in good faith conclude that a joint appendix is not feasible. Appellant may then file the proposed or attempted joint appendix and his or her own separate appendix.

[4] Preparation of Joint Appendix or Separate Appendices

[a] Appendix Must Be Prepared by Parties But Conform to Rules

Unlike a clerk's transcript, the parties themselves must prepare an appendix or appendices under *Cal. Rules of Ct., Rule 8.124*. Moreover, they must include the same documents as would be required in a clerk's transcript, and present them in largely the same format [*Cal. Rules of Ct., Rules 8.124(b)(1), (d), 8.144(a), (d), (e)*; *see* [2], *above*, regarding required documents; *see also* [b], *below*, regarding formatting requirements].

PRACTICE TIP:

Options in Conforming Copies. If opposing counsel is uncooperative, the attorney (or staff member) assigned the task of preparing documents for inclusion in an appendix may have to make a trip to the courthouse, with a copy of the index to the office's pleading file, to review the clerk's file. Depending on personal preference and, perhaps, budgetary and time constraints, counsel may either arrange to have the clerk make a copy of the first page of any documents for which the office does not have a filed-stamped copy, or may simply make a notation of the dates of filing in the index for later notation by hand in the upper right-hand corner of the copy to be included in the appendix. Conformed copies are preferred, but not required, for documents included in an appendix [*Doppes v. Bentley Motors, Inc. (2009) 174 Cal. App. 4th 1004, 94 Cal. Rptr. 3d 797*].

It is important that all documents necessary to review be provided to the reviewing court [*Cal. Rules of Ct., Rule 8.124(b)(1)(B)*]. If the parties cannot agree to prepare a joint appendix pursuant to *Cal. Rules of Ct., Rule 8.124(a)(3)*, then appellant proceeds by filing appellant's appendix, which still must include any documents upon which the respondent is likely to rely [*see Cal. Rules of Ct., Rule 8.124(b)(1)(B)* and discussion in [2], *above*]. If any document respondent needs to meet the issues raised on appeal is not included in the appellant's appendix, then respondent may file a respondent's separate appendix, providing any such additional document to the court. If appellant's omissions are substantial, then sanctions may be imposed [*see Cal. Rules of Ct., Rule 8.124(g)*; *see also* discussion in [5], *below*, regarding the deadlines for filing the various appendices].

[b] Format Requirements

The format requirements of an appendix are set out in *Cal. Rules of Ct., Rule 8.124(d)*:

- The appendix must not be bound with a brief [*Cal. Rules of Ct., Rule 8.124(d)(3)*].

- The cover of an appendix must include the same information as the cover of a brief, but must be prominently entitled "JOINT APPENDIX" or, alternatively, "APPELLANT'S APPENDIX" and, if

applicable, "RESPONDENT'S APPENDIX" and "APPELLANT'S REPLY APPENDIX" [*Cal. Rules of Ct., Rule 8.124(d)(2)*; for discussion of the contents otherwise required to be included on the cover of a brief, and a form of cover of a brief that may be modified for use as the cover of an appendix, *see Ch. 50, Appeal: Briefs, §§ 50.14[5], 50.70*]. For a form of cover for a joint appendix, see *§ 44.223*. For additional requirements applicable to preparation of the cover, pursuant to *Cal. Rules of Ct., Rules 8.124(d)(1)* and *8.144(e)*, see *below*.

As discussed in [2], *above*, all exhibits admitted into evidence or rejected by the court are deemed a part of the appendix, whether or not they are actually reproduced in it (although, again as discussed in [2], *above*, it is usually a good idea to reproduce important exhibits in the appendix). An appendix may incorporate by reference all or part of the record on appeal in another case pending in the reviewing court or in a prior appeal in the same case [*Cal. Rules of Ct., Rules 8.122(b)(2), 8.147(b)*].

Otherwise, an appendix must conform to the following requirements of *Cal. Rules of Ct., Rules 8.144(a)-(c)* [*Cal. Rules of Ct., Rule 8.124(d)(1)*].

Under *Cal. Rules of Ct., Rule 8.144(a)(1)*, the appendix must be prepared on *recycled* paper, either white or unbleached, of not less than 20-pound weight, 81/2 by 11 inches in size. The photocopying process must produce clear and permanent copies that are equally legible to printing. Only one side of the paper may be used, and each margin must be no less than 11/4 inches. The pages must be numbered consecutively and bound on the left margin [*Cal. Rules of Ct., Rule 8.144(c)(1)*].

Under *Cal. Rules of Ct., Rule 8.144(b)*, the appendix, at the beginning of the first (or only) volume, must provide both an alphabetical and a chronological index to each document, indicating the volume and page at which it first appears [*see Canal Insurance Company v. Tackett (2004) 117 Cal. App. 4th 239, 242, 11 Cal. Rptr. 3d 626* (party waived right to move to strike appendix that lacked chronological index)]. The index must identify each exhibit by number or letter and a brief description of the exhibit [*Cal. Rules of Ct., Rule 8.144(b)(3)*]. The contents of the appendix must be arranged chronologically. All pages must be renumbered consecutively [*Cal. Rules of Ct., Rule 8.144(a)(1)(D)*].

Note that one court of appeal has held that, under the facts of that case, not following *Cal. Rules of Ct., Rule 8.144* did not warrant sanctions because it did not cause prejudice, confusion, or additional work for the court clerk's office [*Doppes v. Bentley Motors, Inc. (2009) 174 Cal. App. 4th 967, 989, 94 Cal. Rptr. 3d 797*].

PRACTICE TIP:
Pagination. A once common tool for paginating an appendix, a "Bates stamp," rarely produces page numbers that are distinct and legible after copying. A copy service or legal document service can provide computer-generated page number labels that are very legible, and have the additional advantage of showing up clearly even when superimposed on text, as is sometimes necessary. The Rules of Court do not require that page numbers appear in any particular place, and often the upper right-hand corner of the document is better than the lower right-hand corner, where predecessor page numbers or text sometimes appear.

Under *Cal. Rules of Ct., Rule 8.144(c)(1)*, no individual volume of an appendix should be more than 300 pages long. The cover should be the same size as its pages (*see above*). The cover must be endorsed with the title and trial court number of the case, the name of the each trial judge who participated in the

case, the name of the trial court, and the names and addresses of the attorneys representing the parties on appeal. The cover must also contain the volume number and inclusive page numbers of that volume [*Cal. Rules of Ct., Rule 8.144(c)(2)*; *see above* for additional requirements applicable to the cover under *Cal. Rules of Ct., Rule 8.124(d)(2)*].

PRACTICE TIP:

Color of Appendix Cover. Effective January 1, 2005, the appellate rules recommend colors for the covers of appendices. Conforming to the usual practice, the rules recommend that the cover of an appendix be the same color as the brief with which it is filed [*see Cal. Rules of Ct., Rule 8.40*, and discussion in *Ch. 50, Appeal: Briefs, § 50.14[5]*].

[c] Document or Exhibit Held by Other Party

If a party preparing an appendix wants it to contain a copy of a document or exhibit in the possession of another party, the party must take the following steps [*Cal. Rules of Ct., Rule 8.124(c)*]:

1. The party must first ask the party possessing the document or exhibit to provide a copy or lend it for copying. All parties should reasonably cooperate with such requests [*Cal. Rules of Ct., Rule 8.124(c)(1)*].

2. If this attempt is unsuccessful, the party may serve and file in the reviewing court a notice identifying the document or specifying the exhibit's trial court designation and requesting the party possessing the document or exhibit to deliver it to the requesting party or, if the possessing party prefers, to the reviewing court. The possessing party must comply with the request within 10 days after the notice is served [*Cal. Rules of Ct., Rule 8.124(c)(2)*].

3. If the possessing party sends the document or exhibit to the requesting party, the requesting party must copy and return it to the possessing party within 10 days after receiving it [*Cal. Rules of Ct., Rule 8.124(c)(3)*].

4. If the possessing party sends it to the reviewing court, that party must accompany the document or exhibit with a copy of the notice served by the requesting party, and immediately notify the requesting party that it has sent the document or exhibit to the reviewing court [*Cal. Rules of Ct., Rule 8.124(c)(4)*].

5. On request, the reviewing court may return the document or exhibit to the party that sent it. When the remittitur issues, the reviewing court must return all documents or exhibits to the party that sent them [*Cal. Rules of Ct., Rule 8.124(c)(5)*].

For a form of notice to request an exhibit held by another party, see *§ 44.224*.

[5] Service and Filing Requirements

Appendices must be filed in the reviewing court [*Cal. Rules of Ct., Rule 8.124(e)(1)(B)*].

A joint appendix must be filed no later than the apellant's brief [*Cal. Rules of Ct., Rule 8.124(e)(2)*].

An appellant's separate appendix must be served and filed no later than the appellant's opening brief [*Cal. Rules of Ct., Rule 8.124(e)(2)*]. A respondent's appendix, containing any document that could have been, but was not, included in the appellant's appendix, may be served and filed no later than the respondent's brief [*Cal. Rules of Ct., Rule 8.124(e)(3)*].

If necessary, the appellant may serve and file a reply appendix no later than the time when a reply brief is due [*Cal.*

Rules of Ct., Rule 8.124(e)(4); *see Cal. Rules of Ct., Rule 8.212(a)(3)* (reply brief due 20 days after filing of respondent's brief); *see also* discussion in *Ch. 50, Appeal: Briefs, § 50.16[3][b]*].

The requirement that these separate appendices be "served and filed" means that, when filed, they must be accompanied by proof of prior service, in a manner permitted by law, of one copy on counsel for each adverse party who is represented by separate counsel [*see Cal. Rules of Ct., Rule 8.25*; for discussion and forms relating generally to service and proof of service, see Ch. 518, *Service and Summons of Papers*].

The act of filing an appendix constitutes a representation by counsel that it consists of true and correct copies of the papers in the superior court's file [*Cal. Rules of Ct., Rule 8.124(g)*; *Hillman v. Leland E. Burns, Inc. (1989) 209 Cal. App. 3d 860, 864, 257 Cal. Rptr. 535* ; *see also* discussion in [7], *below*, regarding sanctions for failing to file conforming copies or including necessary documents].

[6] Costs

When the parties are unable to agree to file a joint appendix, initially each must bear the cost of preparing a separate appendix. When a joint appendix is to be filed, initially the appellant must bear the cost of its preparation, although when several parties are appealing from all or part of the same judgment, or when there is a cross appeal, the initial expense of preparing a joint appendix must be borne by all of them equally, or as they otherwise may agree. Subject to the provisions of *Cal. Rules of Ct., Rule 8.276(a)(2)* (concerning the inclusion of matter not reasonably material), however, the actual expense of producing two copies of the appendix ultimately is taxable as costs [*Cal. Rules of Ct., Rule 8.124(f)*].

For detailed discussion of *Cal. Rules of Ct., Rule 8.276* and the items chargeable and amounts recoverable as costs on appeal, see *Ch. 53, Appeal: Remittitur and Costs on Appeal, § 53.30* et seq.

[7] Sanctions for Nonconforming Copies or Substantial Underinclusion

Willful or grossly negligent filing of an appendix containing inaccurate copies is an unlawful interference with the proceedings of the reviewing court, and subjects the attorney filing the brief, as well as the party represented, to monetary and other sanctions [*Cal. Rules of Ct., Rule 8.124(g)*]. Conformed copies are preferred, but not required, for documents included in an appendix [*Doppes v. Bentley Motors, Inc. (2009) 174 Cal. App. 4th 967, 988-989, 94 Cal. Rptr. 3d 797*].

Similarly, if the appendix violates *Cal. Rules of Ct., Rule 8.124* in any way, the reviewing court may impose monetary or other sanctions [*Cal. Rules of Ct., Rule 8.124(g)*; *see The Termo Company v. Luther (2008) 169 Cal. App. 4th 394, 404, 86 Cal. Rptr. 3d 687* (striking exhibits that were not before trial court)]; *Warfield v. Peninsula Golf & Country Club (1989) 214 Cal. App. 3d 646, 652 n.4, 262 Cal. Rptr. 890* (sanctions of $500.00 imposed for failing to confer regarding joint appendix and to include necessary documents)]. Failure to submit any record on appeal is grounds for dismissal of the appeal [*see Goehring v. Chapman Univ. (2004) 121 Cal. App. 4th 353, 363 n.7, 17 Cal. Rptr. 3d 39* (despite inconvenience, court chose to consider appeal because opposing party submitted adequate record)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART II. LEGAL BACKGROUND
B. The Clerk's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.34

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§ 44.34 Superior Court File in Lieu of Clerk's Transcript

[1] Use of Original Court File on Stipulation of Parties Where Local Appellate Court Rule Permits

The parties may stipulate to the use of the superior court file, in lieu of a clerk's transcript, when the court of appeal with jurisdiction over the county has approved the procedure by local rule [*Cal. Rules of Ct., Rule 8.128(a)(1)*]. Currently, the First, Third, and Fourth Appellate Districts have adopted local rules allowing the use of this type of documentary record [*see* Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 9; Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 3d App. Dist., Rule 22; Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 4th App. Dist., Rule 10].

The stipulation to proceed under *Cal. Rules of Ct., Rule 8.128*, must be filed with the superior court clerk with the appellant's notice designating the record on appeal under *Cal. Rules of Ct., Rule 8.121*. The parties must serve the reviewing court with a copy of the stipulation [*Cal. Rules of Ct., Rule 8.128(a)(2)*]. For a form of stipulation, see *§ 44.230*.

Once the stipulation is filed, the provisions of *Cal. Rules of Ct., Rule 8.128*, together with any supplemental requirements imposed by local rule of the court of appeal, will govern unless the superior court orders otherwise on reasonable notice to the parties [*Cal. Rules of Ct., Rule 8.128(a)(1)*].

[2] Deposit of Estimated Costs of Preparing Original File

Within 10 days after the stipulation to proceed under *Cal. Rules of Ct., Rule 8.128*, is filed, the clerk of the superior court is required to provide appellant with an estimate of the costs for arranging the entire file in chronological order, numbering all of the pages, and preparing a chronological index and list ofattorneys of record. Within 10 days after the

clerk mails the estimate, appellant is required to deposit the estimated costs with the clerk [*Cal. Rules of Ct., Rule 8.128(b)(1)*].

[3] Clerk's Preparation and Forwarding of Original File

Within 10 days after payment of the estimated costs, the clerk must arrange the entire original superior court file in chronological order, number the pages, and attach a chronological index and a list of attorneys of record indicating the parties they represent and any unrepresented party. The clerk is required to send copies of the index to counsel of record for each party, and to each unrepresented party, for use in paginating their files in accordance with the chronological index [*Cal. Rules of Ct., Rule 8.128(b)*].

The prepared file must be forwarded to the appellate court immediately if no notice to prepare a reporter's transcript has been filed. If a notice to prepare a reporter's transcript has been filed, however, the original court file will be forwarded to the reviewing court along with that transcript when it is complete and certified [*Cal. Rules of Ct., Rule 8.128(b)(4)*].

[4] Parties' Preparation of Working Copies of Original File Based on Clerk's Index

As discussed in *§§ 44.11* and *44.13*, the purpose of permitting the use of the superior court's original file under *Cal. Rules of Ct., Rule 8.128*, is to reduce the time and expense of preparing a clerk's transcript. Accordingly, on receipt of the chronological index prepared by the clerk, which will indicate the beginning page number of each named document, each party must compose his or her own working copy of the court's file using copies of the documents in its file and arranging them in the order set out in the index.

The parties should then paginate their working copies so that they match the original file sent to the reviewing court; otherwise, counsel will not be able to fulfill their obligation to provide exact page citations to the record in their briefs [*Bernard v. Hartford Fire Ins. Co. (1991) 226 Cal. App. 3d 1203, 1205, 277 Cal. Rptr. 401* (court held party's reference to 20 nonsequential pages of deposition testimony in original court file inadequate); *Cal. Rules of Ct., Rule 8.204(a)(1)(C)*; *see Ch. 50, Appeal: Briefs, § 50.12[1][c]*]. Briefs that do not meet this requirement may be stricken [*Cal. Rules of Ct., Rule 8.204(e)*; *see Ch. 50, Appeal: Briefs, § 50.19*].

PRACTICE TIP:

Paginating the Copy of the Court File. Some attorneys who have used *Cal. Rules of Ct., Rule 8.128(b)*, have had difficulty in getting their files to match the court's, particularly in large record cases. If your pleading file is missing so much as a proof of service or a divider sheet between exhibits, it can throw off your pagination from that of the clerk's file. It may be possible to forestall such problems by paying a visit to the clerk's office with a copy of the index to your pleading file *before* you designate the record, comparing it item by item with the contents of the court's file, and ordering a copy of anything that is missing. If that does not work, then you may have no choice but to cart the entire contents of your pleading file down to the courthouse after you receive the clerk's index and compare it, page by page, with the court's paginated file, page by page.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 44.35 Agreed or Settled Statement in Lieu of Clerk's Transcript

As noted in *§§ 44.11* and *44.13*, an agreed or settled statement may be used in lieu of a clerk's as well as a reporter's transcript in appropriate cases under *Cal. Rules of Ct., Rules 8.134, 8.137(b)(3)*. For detailed discussion of these procedures, see *§§ 44.53* and *44.54*.

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[Reserved]

§§ 44.36[Reserved]

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§ 44.50 Governing Law

The designation, preparation, and filing of a reporter's transcript or its alternatives are governed primarily by the appellate rules: *i.e., Cal. Rules of Ct., Rules 8.130, 8.134, 8.137, 8.144* and *8.155*. Local appellate rules may also apply [*see* Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st. App. Dist. Rules 5, 6; Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist. Rules 2, 3; Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 5th App. Dist. Rule 1].

Additional statutory provisions may apply, such as those applicable to court reporters and their fees [*see, e.g., Code Civ. Proc. §§ 269(a), 273(a),* discussed in *§ 44.51*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 44.51 Purpose and Content of Reporter's Transcript

A reporter's transcript is a record of the oral proceedings in the lower court, possibly including the witnesses' testimony, counsels' objections, the court's rulings, the court's and counsels' statements and remarks, and the jury instructions, which were taken down in shorthand by the official court reporter and transcribed at the request of a party or the court [*see Code Civ. Proc. §§ 269(a)* (duties of official court reporter), 273(a) (report of official reporter as prima facie evidence of testimony and proceedings in case); *Cal. Rules of Ct., Rule 8.130(a)*]. The purposes of a notice to prepare a reporter's transcript are to inform the court reporter which portions of the oral proceedings to transcribe, to limit the scope of appellate review to the specified issues, and to enable the respondent to determine whether to request transcription of additional portions of the oral proceedings [*Ermoian v. Desert Hospital (2007) 152 Cal. App. 4th 475, 497, 61 Cal. Rptr. 3d 754* (notice to prepare reporter's transcript insufficient to bring defects in statement of decision to trial court's attention)].

Whenever an appellant wishes to raise a point that requires consideration of oral proceedings, or of instructions that cannot be copied by the clerk, he or she must designate them in a notice to prepare a reporter's transcript [*Cal. Rules of Ct., Rule 8.130(a)*]. As a practical matter, this means providing at least a partial reporter's transcript in virtually every case, since there usually will have been some oral proceedings having a bearing on the appeal, even if they consist only of a short hearing on a motion for summary judgment [*but see Graham v. Kirkwood Meadows Pub. Util. Dist. (1994) 21 Cal. App. 4th 1631, 1638, 26 Cal. Rptr. 2d 793* (when clerk's transcript shows no new evidence was presented in trial court, review of denial of petition for writ of mandate could proceed without reporter's transcript)].

PRACTICE TIP:

Consider Carefully Before Proceeding Without a Reporter's Transcript. As discussed in more detail in Subpart A, *above* [*see § 44.10* et seq.; *see also* in particular discussion in *§§ 44.12, 44.13*], there

is considerable risk of waiving important issues or otherwise failing to present an adequate record when proceeding without any reporter's transcript, except in a very limited number of cases that are truly limited to legal issues presented by the documentary record [*see § 44.31[1]* for discussion of the contents of the documentary record in the form of a traditional clerk's transcript].

Whenever trial counsel is at all uncertain about proceeding without a reporter's transcript, or which parts to designate, it is best to associate appellate counsel for advice. If expense is a primary consideration, it is in many cases possible to proceed on a partial reporter's transcript, concerning which the assistance of appellate counsel may ultimately prove to be cost-beneficial. See *§ 44.52[2]* for further discussion regarding partial transcripts, and *§ 44.52[3][d]* concerning situations in which an appellant may receive some assistance in the cost of a reporter's transcript through the Transcript Reimbursement Fund.

Special considerations in designating matters in the reporter's transcript include the following [*see Cal. Rules of Ct., Rule 8.130(c)*]:

- The reporter will *not* transcribe voir dire examination of jurors, counsels' opening statements and arguments to the jury, and the proceedings on a motion for new trial, unless these are specifically designated by appellant in the notice.

- Although the reporter does not otherwise transcribe or copy documents that may be included in the clerk's transcript under *Cal. Rules of Ct., Rule 8.122* [*see § 44.31[1]*], any instruction given or refused, whether written or oral, may be transcribed at the direction of a party *if* it cannot be copied by the clerk.

- When the appellant designates the transcription of "oral proceedings," these include portions of depositions that were received into evidence, or offered and rejected (with portions and objections clearly indicated).

Currently, the use of video or other electronic means of recording oral proceedings, by means adopted by the Judicial Council, have been disapproved by case law [*see* Practice Tip in *§ 44.11[3]*]. Consequently, appellants must continue to demonstrate any trial court error by means of a reporter's transcript or one of the accepted alternatives, specifically, a settled statement or an agreed statement [*see Cal. Rules of Ct., Rules 8.134, 8.137,* and discussion in *§§ 44.53, 44.54*].

Appellant's failure to perform any act necessary to procure the filing of the record with the reviewing court within the time allowed may result in dismissal[*see Cal. Rules of Ct., Rule 8.140(b),* and further discussion in *§ 44.14*].

For more detailed discussion of the procedures for designating and securing preparation of the reporter's transcript, see *§ 44.52*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on AppealCivil ProcedureJudicial OfficersCourt ReportersGeneral Overview

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART II. LEGAL BACKGROUND
C. The Reporter's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.52

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§ 44.52 Preparation of Reporter's Transcript

[1] Appellant's Notice to Prepare Reporter's Transcript

Within 10 days of filing the notice of appeal, appellant must file a notice toprepare a reporter's transcript with the clerk of the superior court [Cal. Rules of Ct., Rule 8.21(a)]. The appellant must serve a copy of the notice on respondent, and on each reporter whose identity is known to him or her [*Cal. Rules of Ct., Rule 8.130(a)(5)*].

In any case in which a notice of election to prepare an appendix in lieu of a clerk's transcript is in effect, a copy of the notice will be sent by the clerk of the superior court to the clerk of the court of appeal [*Cal. Rules of Ct., Rule 8.121(c)*; *see § 44.33* for discussion of appendix].

The service requirement means that the notice, when filed, must be accompanied by proof of prior service on respondent in a manner permitted by law [*see Cal. Rules of Ct., Rule 8.25*; for discussion and forms relating generally to service and proof of service, see Ch. 518, *Service and Summons of Papers*]. For discussion of the 15-day "grace period" under *Cal. Rules of Ct., Rule 8.140(a)*, and proceedings in the appellate court to obtain an extension of time in filing the notice, or relief from default, see *§ 44.14[2]*.

Appellant's designation should be as specific as possible in indicating the oral proceedings to be transcribed. The designation of "all oral proceedings" or the like should be avoided. Depending on the vagaries of the individual court, clerk, or reporter, appellant may get far more, or far less, than what he or she wanted.

Specificity is required in the Second Appellate District Court of Appeal. In that court the notice must provide the reporter's name, the trial court department, the date, and a brief description of the "nature" of each oral "proceeding" he

or she wants transcribed in the notice to prepare a reporter's transcript [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist. Rule 3(a)(1)]. Failure to comply with this local rule in the Second District is deemed a failure to designate the record properly under *Cal. Rules of Ct., Rules 8.130* and 8.122, and may result in the dismissal of the appeal or the imposition of monetary sanctions [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist. Rule 3(c)].

The Second Appellate District has developed its own printed form that "may" be used in that court [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist. Rule 3(b)]. Counsel may wish to obtain that form form the clerk of that court. For a form of notice that complies substantially with this local rule and form, *see § 44.240*.

PRACTICE TIP:

Designating Reporter's Transcript. As a practical matter, appellant must have all the information that is required in the Second District's local rule in order to come up with a deposit for the reporter's transcript. Before giving you an estimate of the cost of a transcript, the reporter will want to know the date and nature of the proceedings you want transcribed in order to find and review the length of the hearings in question. There may also be a question of just who the reporter was, if the proceedings were in law and motion, or taken down by someone other than the reporter assigned to a particular department. The superior court may have a court officer who supervises all the reporters and can tell you exactly who reported whose proceedings on a specific date. The superior court is a handy place to start in getting the information necessary to file the designation of a reporter's transcript. It is recommended, in any event, that counsel use the Second District's local rule as a useful guideline even when filing a notice in another appellate district. For additional discussion of means by which counsel may research and specify only the portions of oral proceedings actually needed, see *§ 44.13*.

In addition, to help expedite the transcript, counsel should provide the court reporter with an exhibit list, a witness list, and minute orders for each day of proceedings included in the appeal transcript. Moreover, whenever ordering a transcript from a court reporter, be sure to tell the reporter it is being ordered for purposes of appeal, so the reporter will know to prepare the transcript in the required "appeal format" under *Cal. Rules of Ct., Rule 8.144*.

The notice to prepare a reporter's transcript may be incorporated into the same document as the notice to prepare a clerk's transcript or the notice of election to proceed under *Cal. Rules of Ct., Rule 8.124*, and both notices may likewise be included in the document containing the notice of appeal [*Cal. Rules of Ct., Rule 8.121(a)*].

For forms of notice of appeal combined with one or more notices to prepare the record, see *Ch. 42, Appeal: Notice of Appeal, § 42.90*.

[2] Appellant's Notice or Stipulation of Parties Designating Partial Transcript

If the appellant's notice to prepare a reporter's transcript states the points to be raised on appeal, it may designate the portions of the oral proceedings to be transcribed, or direct the omission of portions deemed unnecessary [*Cal. Rules of Ct., Rule 8.130(a)(2)*; for a form of partial designation, *see § 44.241*]. In this event, however, appellant is precluded from later raising any grounds for reversal not embraced by the points stated in such a notice, unless the appellate court, on motion, permits the appellant to present additional errors or grounds of appeal on such terms as it may prescribe [*Cal. Rules of Ct., Rule 8.130(a)(2)*; *see also Rogers v. County of Los Angeles (1974) 39 Cal. App. 3d 857, 861-862, 114 Cal. Rptr. 540* ; *Price v. Tree Topper Timber Co. (1962) 202 Cal. App. 2d 412, 415, 20 Cal. Rptr. 817]* . Any such motion should probably be combined with a request to augment the partial transcript, as necessary, to present an adequate record supporting such additional grounds for reversal [*see Cal. Rules of Ct., Rule 8.155(a)*, and discussion in *§ 44.90* et seq.].

When either a stipulation or a notice to prepare a partial reporter's transcript is filed, only those portions of the oral proceedings, instructions, or both, expressly designated will be transcribed. The sole exception to this rule is that, absent a stipulation to the contrary, all of a witness's testimony will be transcribed if any portion of it has been designated by either party [*Cal. Rules of Ct., Rule 8.130(e)(2)*].

PRACTICE TIP:

Using a Partial Transcript. Reliance on a partial reporter's transcript can significantly limit the scope of the appeal. In addition to the limits of *Cal. Rules of Ct., Rule 8.130(a)(2)*, discussed *above*, when only portions of the oral proceedings are transcribed, and an appeal is brought on the judgment roll, any evidentiary material in the pretrial order of that roll cannot be considered part of the record unless it has been specifically designated by one of the parties for inclusion in the *clerk's* transcript [*see Cal. Rules of Ct., Rule 8.122*; *see also* discussion in *§ 44.31[2]*]. When the record on appeal does not include all of the oral proceedings (or all of the papers and records), the reviewing court presumes that the record includes all matters material to deciding the issues raised [*Cal. Rules of Ct., Rule 8.163*; *see also* discussion in *§ 44.13[2][e]*]. Consequently, the decision to rely on a partial transcript should be an informed one, preferably made on the advice of experienced appellate counsel.

[3] Deposit of Approximate Cost of Transcript or Compliance With Specified Alternative

[a] In General

An additional prerequisite to the preparation of a reporter's transcript is a deposit of the approximate cost of preparation with the clerk of the superior court or compliance with one of the statutory alternatives to a deposit. *Cal. Rules of Ct., Rule 8.130*, provides that the superior court clerk may not file a notice to prepare a reporter's transcript unless it is accompanied by one of the following [*Cal. Rules of Ct., Rule 8.130(b)*]:

- The deposit [*Cal. Rules of Ct., Rule 8.130(b)(1)*; *see* [b], *below*].

- The reporter's written waiver of a deposit [*Cal. Rules of Ct., Rule 8.130(b)(3)*; *see* [c], *below*].

- A copy of a Transcript Reimbursement Fund application [*Cal. Rules of Ct., Rule 8.130(b)(3)*; *see* [d], *below*].

- A certified transcript of the designated proceedings [*Cal. Rules of Ct., Rule 8.130(b)(3)*; *see* [e], *below*].

If the notice is not accompanied by one of the foregoing, the clerk will file the notice and promptly issue a notice of default under *Cal. Rules of Ct., Rule 8.140* [*Cal. Rules of Ct., Rule 8.130(d)(2)*].

The reporter will only begin transcribing his or her notes after he or she has received notice from the clerk that the notice to prepare a reporter's transcript has been "filed" along with the deposit or permitted substitute [*Cal. Rules of Ct., Rule 8.130(d)(1)*]. When the transcript is completed, the reporter will bill the appellant at the statutory rate and send a copy of the bill to the clerk. The clerk will then pay the reporter from the funds deposited and promptly refund any excess deposit to the appellant or give notice to the appellant if additional funds are needed [*Cal. Rules of Ct., Rule 8.130(f)(2)*]. If more than one reporter is producing the transcript, the clerk must promptly pay each reporter who certifies that all of his or her portion of the transcript has been completed [*Cal. Rules of Ct., Rule 8.130(f)(2)*]. On request, the reporter must provide any party with a copy of the reporter's transcript in computer-readable format, unless the superior court orders otherwise [*Cal. Rules of Ct., Rule 8.130(f)(4)*]. Each computer-readable copy must comply with the format, labeling, content, and numbering requirements of *Code Civ. Proc. § 271(b)* [*Cal. Rules of Ct., Rule 8.130(f)(4)*].

[b] Deposit of Approximate Cost of Transcript

The notice to prepare a reporter's transcript generally must be accompanied by a deposit of the approximate cost of the transcript, which is either (1) based on a written estimate secured from the reporter in advance, or (2) computed at $325 per fraction of a day's proceedings that appellant or counsel states did not exceed three hours, or $650 per day or fraction of a day that is greater than three hours [*Cal. Rules of Ct., Rule 8.130(b)(1)*].

PRACTICE TIP:

Getting a Preliminary Estimate. If the transcript is of a law and motion hearing, it is worth the time to get an estimate from the reporter of the cost rather than depositing the statutory minimum. The minimum for a proceeding of less that half a day is $325, whereas an estimate for a law and motion hearing may be much less, around $100.

Immediately after filing the notice to prepare the transcript, the clerk must notify the reporter of its terms and the amount deposited. If the amount of the deposit appears inadequate, the reporter has 15 days after the clerk mails the notice to file with the clerk and mail to appellant an estimate or revised estimate of the total cost of the transcript and notice of the additional amount to be deposited. The appellant must deposit the additional sum with the clerk within 10 days after the mailing of the reporter's notice [*Cal. Rules of Ct., Rule 8.130(b)(2)*].

[c] Reporter's Waiver in Lieu of Deposit

One alternative to depositing the estimated cost of preparing the transcript with the clerk is to make separate arrangements with the reporter, in which case he or she will provide a written waiver of the deposit for filing with the clerk in lieu of the deposit [*Cal. Rules of Ct., Rule 8.130(b)(3)*].

Appellant should proceed with caution in using this procedure, however, since he or she will bear the risk if the reporter defaults on the obligation to prepare the transcript [*see Bitters v. Networks Electronic Corp. (1997) 54 Cal. App. 4th 246, 249-250, 62 Cal. Rptr. 2d 675* (when appellant did not deposit reporter's fee in court, and reporter filed a waiver but absconded with fee without preparing transcript, court would not bear the cost of engaging a substitute reporter)].

For a form for use in obtaining a waiver of the deposit, see *§ 44.245*.

PRACTICE TIP:

Waiver of Deposit Usually Obtained in Connection With Deposit Arranged With Reporter. If appellant deposits a preestimated fee for the transcript with the *reporter*, and obtains from that reporter both a receipt and waiver of deposit for filing with the clerk, that reporter can begin preparation sooner than if the reporter waits for the clerk's office to notify him or her that the transcript fees are posted with the court. This procedure will usually result in a faster delivery of the verbatim record. If the reporter's transcript is less than a hundred pages, the fee deposited with the reporter directly will usually be less than that required to be collected by the court [*see also* Practice Tip in [b], *above*].

[d] Proceeding for Order Allowing Filing Without Deposit

Another alternative to depositing the cost of preparing a reporter's transcript is to file a copy of an application to the Transcript Reimbursement Fund under *Cal. Rules of Court, Rule 8.130(c)*.

The Transcript Reimbursement Fund is a state fund whose monies come from the Certified Shorthand Reporters in California through assessment to their licensing fees by the Court Reporters Board of California. It is designed to provide reporting services to low-income litigants otherwise unable to afford them [*Bus. & Prof. Code § 8030.2(a), (d)*]. Disbursements from the Fund for preparation of reporter's transcripts are generally made to qualified legal services projects that provide free legal services to indigent persons, and to pro bono attorneys who represent indigent persons

referred by these qualified legal services projects in cases not considered "fee-generating" [*see Bus. & Prof. Code § 8030.4(a), (d), (f), (g)*; *see also Bus. & Prof. Code § 8030.6*]. Payments may also be made directly to the certified reporter who prepared the transcript [*see Bus. & Prof. Code § 8030.6(d)* and discussion in [c], *above*]. If an applicant who has received money from the Fund is later awarded court costs or attorney's fees in a judgment or settlement, the applicant must reimburse the Fund [*see Bus. & Prof. Code § 8030.2(e)*].

Applications for payments from the Transcript Reimbursement Fund are processed by the Court Reporters Board of the state Department of Consumer Affairs [*see Bus. & Prof. Code §§ 8000, 8030.6*]. Application procedures and eligibility requirements for payment from the Fund are set out in *Bus. & Prof. Code §§ 8030.4* and *8030.8*.

This procedure is sometimes used in conjunction with an appellant seeking a waiver of court fees, since the relief from costs and expenses afforded to an appellant seeking a waiver of court fees does not include relief from expenses for a reporter's transcript [*see Cal. Rules of Ct., Rule 8.26(e)*; *Mehdi v. Superior Court (1989) 213 Cal. App. 3d 1198, 1202-1203, 261 Cal. Rptr. 919* (reporter's transcript costs are not expressly provided for under *Cal. Rules of Ct., Rule 3.50 et seq.* (now see *Cal. Rules of Court, Rule 8.26(e)*); *see also* further discussion of waiving court fees in Ch. 40, *Appeal: An Overview*, § 40.13[3]].

Under the former rule, the appellant was required to file a motion in the superior court for permission to file a Transcript Reimbursement Fund application. That procedure, however, is superseded by *Cal. Rules of Ct., Rule 8.130(b)(3)*, which allows the appellant simply to file a copy of a Transcript Reimbursement Fund application in lieu of a deposit. If the Court Reporters Board approves the application for payment or reimbursement, the reporter's time to prepare the transcript begins when the reporter receives notice of the approval [*Cal. Rules of Ct., Rule 8.130(c)(2)*]. If the Court Reporters Board denies the application for payment or reimbursement, the appellant's time to deposit the reporter's fee or substitute under *Cal. Rules of Ct., Rule 8.130(b)(3)*, or to file an agreed or settled statement under *Cal. Rules of Ct., Rule 8.134* or *8.137*, is extended until 30 days after the board mails notice of the denial [*Cal. Rules of Ct., Rule 8.130(c)(3)*].

PRACTICE TIP:

Utilizing the Transcript Reimbursement Fund (TRF). When an appellant seeks to utilize the TRF, the court reporter may require the appellant to post the estimated fees for preparation of the transcript with the reporter. To receive reimbursement from the TRF, the appellant must then include a copy of the reporter's invoice when submitting the request for payment to the Court Reporters Board of California. The court reporter may forgo payment in advance and instead wait for payment from the TRF upon delivery or filing of the transcript. Under such circumstances the court reporter's invoice must be included with the documentation submitted by the appellant to the Court Reporters Board of California, with the appropriate notation on the forms being submitted, that thecourt reporter has not yet received the fees for preparation of the verbatim transcript.

There are various limits on payments available from the TRF: *i.e*, $35.00 for exhibits, $20,000 per case per year, reasonable fees for postage, and no payment for handling charges.

[e] Substitution of Original Transcript

The final alternative to depositing the estimated cost of preparing the transcript with the clerk is to substitute a certified transcript of the proceedings specified in the designation [*Cal. Rules of Ct., Rule 8.130(b)(3)*]. In effect, when trial (or appellate) counsel has already paid to have one or more daily transcripts prepared, the deposit is superfluous.

PRACTICE TIP:

Option of Attaching Certified Copy of Transcript Specified. A certified copy of a transcript specifically designated, in lieu of a deposit, need not be a "daily" transcript. If the matter involved is just

a short hearing on a motion, for example, lasting much less than full day, trial counsel may order a transcript of that proceeding at the conclusion of that proceeding, before leaving the courtroom.

Customarily, a copy may be filed in lieu of the original so long as it is certified with the reporter's original signature.

Counsel should note that when daily transcripts are used, the reporter must still renumber the pages consecutively, and add covers and indexes, to conform with *Cal. Rules of Ct., Rule 8.144(d)*, before the record may be filed in the court of appeal. For a form that may be used to advise the court when appellant intends to provide and rely on daily transcripts or other original transcripts, see *§ 44.240*.

[4] Respondent's Notice Designating Additions

Respondent bears the same burden as appellant to provide the court with an adequate record, particularly as to matters necessary to support the judgment or review a cross appeal [*see, e.g., Lankster v. Alpha Beta Co. (1993) 15 Cal. App. 4th 678, 683-684, 18 Cal. Rptr. 2d 923* ; *see also* discussion in *§ 44.12[2]*].

Accordingly, respondent may serve and file a notice designating any additional oral proceedings, or any additional instructions that cannot be copied by the clerk, that he or she wishes to be included in the record on appeal, within ten days after service of appellant's notice to prepare a reporter's transcript [*Cal. Rules of Ct., Rule 8.130(a)(3)*]. For discussion regarding items to be designated generally, see *§ 44.51* and *[1]* and *[2], above*.

At the time of filing the notice, respondent must deposit the estimated cost of preparing the additional portions of the transcript as computed under *Cal. Rules of Ct., Rule 8.130(b)* [*see* discussion in [3], *above*].

Only those proceedings and instructions designated in the notices of the parties will be transcribed, except when a portion of the testimony of a witness has been designated, in which case the entire testimony of that witness will be transcribed regardless of the specification. The parties may, however, stipulate that they wish to proceed on only a portion of that witness's testimony, in which case only the designated portion will be transcribed [*Cal. Rules of Ct., Rule 8.130(e)(2)*; *see* [2], *below*, discussing stipulation to proceed on partial transcript].

Counsel should be aware that if appellant has not designated the preparation of any reporter's transcript at all, respondent may not do so either [*Cal. Rules of Ct., Rule 8.130(a)(4)*; *see* discussion in *§ 44.30* et seq.]. The reviewing court may issue an order to augment the record, however, either on its own motion or on the motion of a party, based on the finding that a reporter's transcript is necessary to prevent a miscarriage of justice [*see Cal. Rules of Ct., Rule 8.155*, and discussion in *§ 44.90* et seq.]. Unless the court orders otherwise, the appellant is responsible for the cost of any reporter's transcript the court may order [*Cal. Rules of Ct., Rule 8.130(a)(4)*].

[5] Preparation and Certification of Reporter's Transcript

Within 30 days after the reporter receives notice under *Cal. Rules of Ct., Rule 8.130(c)(2)* or the clerk mails notice under *Cal. Rules of Ct., Rule 8.130(d)(1)*, the reporter must complete and file with the clerk of the superior court, an original and one copy of the certified reporter's transcript [*Cal. Rules of Ct., Rule 8.130(d)*]. Under *Cal. Rules of Ct., Rule 8.60(b)* and *(e)*, only the reviewing court may extend the time in which to prepare the reporter's transcript [*see also* Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist. Rule 5 (regarding form of reporter's requests for extensions of time, and imposition of sanctions for default)]. When the time has been extended, the clerk will mail copies of the order to the parties [*Cal. Rules of Ct., Rule 8.130(d)*].

PRACTICE TIP:

Extensions for Reporters. To avoid the time and trouble associated with filing for extensions of time,

some courts of appeal have established automatic extensions of time for filing of the court reporter's verbatim transcript. For example, in the Second Appellate District, reporters are given an automatic 60-day extension (aggregate of 90 days) within which to file civil transcripts. Usually any extension must be coordinated with the court of appeal through the superior court's "appeals supervising judge" [*see, e.g.*, Cal. Rules of Ct., Supp., Internal Operating Practices and Procedures of the Cts. of Appeal, First App. Dist., § 24, and discussion in *§ 44.14[1]*].

The reporter also must note in the transcript any places where oral proceedings were omitted, as well as the nature of the omitted matter. Similarly, the reporter must indicate where and when in the proceedings exhibits were received in evidence, or were offered and marked for identification, and identify each exhibit so received or offered [*Cal. Rules of Ct., Rule 8.130(e)(1)*].

The reporter is prohibited from transcribing or copying in the reporter's transcript any document that, under the provisions of *Cal. Rules of Ct., Rule 8.122*, may be included in the clerk's transcript [*Cal. Rules of Ct., Rule 8.130(d)*; *see also* discussion of contents of clerk's transcript in *§ 44.31[1]*].

The general format requirements for a reporter's transcript, including the type of paper, fonts and margins, indexes, binding and covers, and system of pagination to be used, are set forth in *Cal. Rules of Ct., Rule 8.144*.

[6] Remedies When Reporter Fails to Complete Transcript

If a party complains to an appellate court that a reporter has not filed a trial transcript in a timely fashion, that court may issue an order to show cause why the reporter should not be declared incompetent to act as an official reporter. Under *Gov. Code § 69944*, an official reporter or reporter pro tempore is not deemed competent to continue to act as an official reporter unless he or she has completed and filed all transcriptions of his or her notes in any case on appeal that he or she is required by law to transcribe. Therefore, unless an authorized extension has been obtained pursuant to *Cal. Rules of Ct., Rule 8.60*, the appellate court may issue an order providing that the reporter is incompetent to serve as the official reporter in any courtroom until he or she presents written certification, under penalty of perjury, that all outstanding transcriptions have been filed [*Malick v. Contra Costa County Flood Control etc. Dist. (1982) 131 Cal. App. 3d 50, 51-53, 182 Cal. Rptr. 386* ; *see also* Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist. Rule 5(c) (procedures for extension of time to prepare reporter's transcript); Cal. Cts. of Appeal, 1st App. Dist. Internal Operating Practices and Procedures § 24(a) (regarding appointed, county "appeals supervising" judges)]. In addition, sanctions may be imposed on the reporter [*Cal. Rules of Ct., Rule 8.23*].

If the reporter refuses, becomes unable, or otherwise fails to transcribe all or any portion of the oral proceedings designated by the parties, the superior court clerk will mail a notice to the parties specifying the portions affected. Within 10 days of the mailing of the clerk's notice, the appellant may move for leave to file a settled statement in place of those portions. If the motion is granted, the superior court's order will also specify the time in which the settled statement must be served and filed. This remedy is available in addition to any other remedies provided by law [*see Cal. Rules of Ct., Rule 8.130(e)*; for further discussion of settled statements, *see § 44.53*].

The superior court, superior court judge, or appellate court has power to set aside a judgment from which appeal is taken, and to order new trial, when loss, destruction, or other circumstances preclude the preparation of reporter's transcript [*Code of Civ. Proc. § 914*; *see also Code Civ. Proc. § 657.1*, and discussion in Ch. 371, *Motions After Trial*].

[7] Subsequent Augmentation or Correction

If it should later appear that the parties' designations were inadequate to permit review of the appeal or cross appeal, if any, a party, or the court on its own motion, may request that the record be augmented [*Cal. Rules of Ct., Rule 8.155*]. For detailed discussion of augmentation, see *§ 44.90* et seq.

Legal Topics:

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Civil ProcedureAppealsRecords on AppealCivil ProcedureJudicial OfficersCourt ReportersFees

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5-44 California Forms of Pleading and Practice--Annotated § 44.53

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§ 44.53 Settled Statement in Lieu of Reporter's Transcript

[1] Purpose and Definition of "Settled Statement"

A settled statement is a condensed, narrative statement of the relevant proceedings at trial that is drafted by appellant, reviewed and, if necessary, amended by respondent, and then "settled" by the trial court for certification to the court of appeal.

The only reason an appellant might choose this procedure is to avoid reporter's fees, which may be prohibitive. As a practical matter, the procedure is cumbersome and seldom used. Generally, it is not recommended for this purpose, but only when there is no other alternative to preparing a record; *i.e.*, when providing a reporter's transcript is impossible, and any attempt to prepare an agreed statement has failed [*see* further discussion in [2], *below*, and discussion of agreed statements in *§ 44.54*].

For one thing, a trial judge may be none too pleased with the prospect of an appeal from the decision to begin with, and the judge's memory of the proceedings may differ sharply from appellant's. Appellant's remedies in altering the version that is eventually "settled" by such a judge are virtually nonexistent (*e.g.*, such virtually nonexistent remedies might include a compelling motion for reconsideration, a creative motion for relief to correct errors in the court's statement, or even a persuasive writ petition seeking aid from the appellate court in settling the statement).

[2] When Settled Statement May Be Used

An appellant may use a settled statement in lieu of a reporter's transcript in the following situations [*Cal. Rules of Ct., Rule 8.137(a)(2)*]:

- A substantial cost saving will result and the statement can be settled without significantly burdening opposing parties or the court [*Cal. Rules of Ct., Rule 8.137(a)(2)(A)*].

- The designated oral proceedings were not reported or cannot be transcribed [*Cal. Rules of Ct., Rule 8.137(a)(2)(B)*].

- The appellant is unable to pay for a reporter's transcript and funds are not available from the Transcript Reimbursement Fund [*Cal. Rules of Ct., Rule 8.137(a)(2)(C)*; *see also Cal. Rules of Ct., Rule 8.130(c)*; discussion of Transcript Reimbursement Fund in *§ 44.52[3][d]*].

A party who proceeded in forma pauperis in the trial court is deemed to be without adequate funds [*Cal. Rules of Ct., Rule 8.137(a)(2)(C)*]. Other parties may establish that they are without adequate funds on motion for leave to use a settled statement [*see also* discussion of litigants on appeal proceeding in forma pauperis in Ch. 40, *Appeal: An Overview, § 40.13[3]*].

When an appellant is qualified or permitted to use a settled statement under *Cal. Rules of Ct., Rule 8.137(a)*, he or she may elect to use the statement instead of only the reporter's transcript, or in place of both the reporter's and the clerk's transcripts [*Cal. Rules of Ct., Rule 8.137(a)(1)*].

[3] Preparation and Filing of a Settled Statement

[a] Appellant's Motion to Use Settled Statement

If appellant elects to rely on a settled statement in lieu of a reporter's transcript only or both reporter's and clerk's transcripts, he or she must serve and file in the superior court a motion to do so with its notice designating the record on appeal under *Cal. Rules of Ct., Rule 8.121* [*Cal. Rules of Ct., Rule 8.137(a)(1)*; for a form of motion to use settled statement in lieu of reporter's and clerk's transcripts, *see § 44.251*].

If the court denies the motion, the appellant must file a new notice designating the record on appeal under *Cal. Rules of Ct., Rule 8.121* within 10 days after the superior court mails, or a party serves, the order of denial [*Cal. Rules of Ct., Rule 8.137(a)(3)*].

[b] Appellant's Proposed Statement

Within 30 days after the superior court clerk mails, or a party serves, an order granting a motion to use a settled statement, the appellant must serve and file in the superior court a condensed narrative of the oral proceedings that the appellant believes necessary for the appeal [*Cal. Rules of Ct., Rule 8.137(b)(1)*]. Subject to the court's approval in settling the statement, the appellant may present some or all of the evidence by question and answer [*Cal. Rules of Ct., Rule 8.137(b)(1)*]. Counsel should be aware, however, that an inadequate statement can lead to dismissal [Committee to Defend Reproductive Rights v. a *Free Pregnancy Center (1991) 229 Cal. App. 3d 633, 637-639, 280 Cal. Rptr. 329]* . Moreover, if the condensed statement covers only a portion of the oral proceedings, the appellant must state the points to be raised, and will be precluded from presenting any other grounds for reversal unless permitted to do so on motion to the reviewing court [*Cal. Rules of Ct., Rule 8.137(b)(2)*; *In re Marriage of Kelley (1976) 64 Cal. App. 3d 82, 89, 134 Cal. Rptr. 259]* .

When appellant intends to rely solely on a settled statement for the record on appeal, he or she must provide copies of documents listed in *Cal. Rules of Ct., Rule 8.122(b)(1)*, showing the dates required in *Cal. Rules of Ct., Rule 8.122(b)(2)*, in addition to the condensed statement of the oral proceedings (that is, the documentary record to be used in lieu of a clerk's transcript). Specifically, appellant must provide the following [*Cal. Rules of Ct., Rule 8.137(b)(3)*]:

- The notice of appeal.
- Any judgment appealed from and any notice of its entry.
- Any order appealed from and any notice of its entry.
- Any notice of intention to move for a new trial, or motion to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration of an appealed order, and any order on such motion and any notice of its entry.
- Any notices or stipulations to prepare clerk's or reporter's transcripts or to proceed by agreed or settled statement.
- The register of actions, if any.

Appellant may also include any other papers or records that could have been incorporated into a clerk's transcript under *Cal. Rules of Ct., Rule 8.122(b)(3)* and *(4)* [*Cal. Rules of Ct., Rule 8.137(b)(5)*].

For discussion of format requirements in preparing the statement, see [4], *below*.

[c] Respondent's Proposed Amendments

Within 20 days after service of appellant's proposed narrative statement, respondent may file and serve proposed amendments [*Cal. Rules of Ct., Rule 8.137(b)(4)*].

[d] Settlement by Trial Judge of Proposed Statement and Amendments

Ultimately, the judge who tried the case must "settle" the statement, that is, must resolve any differences between appellant's and respondent's versions of the proceedings, and, if necessary, augment them, so that a single statement may be prepared to assist the reviewing court. Accordingly, once respondent has filed his or her proposed amendments, or the time allotted to do so has expired (whichever occurs first), the clerk will set a time for settlement of the statement. Rule 8.137(c) is very specific about the timing of this proceeding: it must be held within ten days of the filing of respondent's proposed amendments, but the parties must receive no less than five days' notice of the hearing. At the time originally set, or as continued, the judge will meet with the parties to settle the statement [*Cal. Rules of Ct., Rule 8.137(c)(1)*].

The trial judge has full and plenary power to settle the statement, subject only to the limitation that he not act arbitrarily. He or she may rely on the suggestions of the respondent on appeal, his or her own memory of the proceedings, and his or her trial notes, in amending and settling the proposed statement. If necessary, the judge may recall witnesses or have the reporter reread his or her shorthand notes, to refresh the court's memory. As a last resort, if the judge believes that he or she cannot fairly or properly pass on the sufficiency or accuracy of appellant's statement or respondent's amendments, the appellant may be required to furnish a reporter's transcript. Before appellant may be compelled to do so, however, the trial judge must specify precisely how the proposed statement is deficient and why he or she is convinced that it cannot otherwise be settled, so that only necessary proceedings will be transcribed and the cost contained [*Ace Beverage Co. v. Municipal Court (1993) 16 Cal. App. 4th 703, 710, 20 Cal. Rptr. 2d 153* ; *Keller v. Superior Court (1950) 100 Cal App 2d 231, 234-236, 223 P.2d 309]* .

[e] Appellant's Preparation and Filing of Statement

Besides settling the statement, the trial judge also fixes the time within which the appellant must prepare, serve, and file

it [*Cal. Rules of Ct., Rule 8.137(c)(2)*; *Williams v. Goldberg (1944) 66 Cal. App. 2d 40, 46, 151 P.2d 853]* .

If appellant fails to serve and file the settled statement in accordance with the trial court's order to incorporate respondent's amendments, the reviewing court will resolve all differences in favor of the respondent [*Williams v. Goldberg (1944) 66 Cal. App. 2d 40, 46, 151 P.2d 853]* .

On appeal, the presumption of completeness in *Cal. Rules of Ct., Rule 8.163*, will apply to a settled statement [*Kovacik v. Reed (1957) 49 Cal. 2d 166, 170, 315 P.2d 314* ; *see* discussion of presumption in *§ 44.13*]. Consequently, the reviewing court is bound to assume that enough appears in the settled statement to decide whether reversible error was committed [*People ex rel. Dept. Pub. Works v. Bond (1964) 231 Cal. App. 2d 435, 437, 41 Cal. Rptr. 900]* .

Moreover, notwithstanding *Cal. Rules of Ct., Rule 8.155*, which authorizes augmentation or correction of the record on appeal, the reviewing court is not authorized to usurp the prerogative of the trial court to determine whether a proposed statement accurately and fairly reflects the proceedings below.

Thus, if appellant fails to convince the trial judge that his or her statement accurately reflects the proceedings in question, and cannot or will not provide a reporter's transcript, then the decision of the trial judge, who heard and tried the case, will be regarded as final [*Burns v. Brown (1946)27 Cal. 2d 631, 636, 166 P.2d 1* ; *Cross v. Tustin (1951) 37 Cal. 2d 821, 825-826, 236 P.2d 142]* .

Therefore, the only truly effective way for appellant to resolve the deadlock that may ensue from the differing views of the court and one or both of the parties, may, finally, be to seek additional time to have a reporter's transcript prepared.

When improper procedures were followed by the trial court in settling the statement, however, appellant may consider seeking writ review [*see* *Quail v. Municipal Court (1985) 171 Cal. App. 3d 572, 575-576, 217 Cal. Rptr. 361]* .

[f] Respondent's Objections to Engrossed Statement

Once appellant has filed and served the statement, the respondent has five days to serve and file any objections to it. If the respondent does not do so, then it will be presumed that the statement has been engrossed in accordance with the order of the judge [*Cal. Rules of Ct., Rule 8.137(c)(3)*].

[4] Certification of or Stipulation Regarding Engrossed Statement

When the time has passed for respondent to file objections to the statement without him or her having done so, the clerk of the court will present the statement to the judge for certification. Alternatively, the parties may stipulate that the statement as originally served, or as prepared, is correct, in which case the stipulation will have the same effect as if the statement were certified by the judge [*Cal. Rules of Ct., Rule 8.137(c)(3), (4)*; *see also* discussion in *§ 44.13[2][e]*].

[5] Format Requirements

The settled statement must conform to the formatting requirements of *Cal. Rules of Ct., Rule 8.144* as far as practicable [*Cal. Rules of Ct., Rule 8.144(f)*].

The paper and formatting requirements are as follows:

- The paper must be white or unbleached, recycled, 81/2 inches by 11 inches, and of at least 20-pound weight [*Cal. Rules of Ct., Rule 8.144(a)(1)(A)*].

- The text must be reproduced as legibly as printed matter [*Cal. Rules of Ct., Rule 8.144(a)(1)(B)*].

- The contents must be arranged chronologically [*Cal. Rules of Ct., Rule 8.144(a)(1)(C)*].

- The pages must be consecutively numbered [*Cal. Rules of Ct., Rule 8.144(a)(1)(D)*].

- The margin must be at least 11/4 inches on the bound edge of the page [*Cal. Rules of Ct., Rule 8.144(a)(1)(E)*].

For each document, the party preparing the settled statement must include at the beginning of the first volume both alphabetical and chronological indexes listing the document and the volume and page where it first appears [*Cal. Rules of Ct., Rule 8.144(b)*]. The index must identify each exhibit by number or letter and a brief description of the exhibit [*Cal. Rules of Ct., Rule 8.144(b)(3)*]. The volumes must be bound on the left margin and may not contain any more than 300 sheets each [*Cal. Rules of Ct., Rule 8.144(c)(1)*]. The cover of each volume should be of recycled stock and must state the title and trial court number of the case, the names of the trial court and each participating trial judge, the names and addresses of appellate counsel for each party, the volume number, and the inclusive page numbers of that volume [*Cal. Rules of Ct., Rule 8.144(c)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART II. LEGAL BACKGROUND
C. The Reporter's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.54

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§ 44.54 Agreed Statement

[1] Available In Lieu of All or Part of Record

An appeal may be presented on a record consisting in whole or in part of an agreed statement [*Cal. Rules of Ct., Rule 8.134(a)(1)*]. It may be used, for example, when the trial court proceedings were limited, the parties are in agreement regarding the facts, and the issue to be reviewed is a narrow one of law. The benefit of the presumption of completeness, under *Cal. Rules of Ct., Rule 8.163*, is applied to agreed statements [*County of Yolo v. Francis (1986) 179 Cal. App. 3d 647, 650 n.2, 224 Cal. Rptr. 585* ; *see § 44.13[2][e]*].

As with settled statements, discussed in *§ 44.53*, agreed statements are *very* rarely used in current appellate practice. Like the settled statement, the agreed statement is a summary of the oral proceedings that serves as an economical substitute for a reporter's transcript. And, like a settled statement, an agreed statement may be used in lieu of a clerk's transcript as well. Unlike the settled statement, however, the circumstances in which an agreed statement may be used, and the manner in which the information may be presented, are not dictated so stringently by the appellate rules. Rather, so long as the necessary information is provided, the parties can present it in any manner that suits them. Moreover, unlike a settled statement, which generally is the result of an adversarial process, an agreed statement is, in effect, a stipulation, and therefore not subject to trial court review and approval [*cf. Cal. Rules of Ct., Rule 8.137* (settled statement procedures, discussed in *§ 44.53*)].

For forms relating to agreed statements, see *§§ 44.260, 44.261*.

[2] Contents of Agreed Statement

The Rule governing agreed statements provides guidance regarding the content. The statement must show (1) the nature

of the action, (2) the basis of the reviewing court's jurisdiction, and (3) how the questions arose in and were decided by the superior court. It should include only those facts necessary to a determination of the questions on appeal [*Cal. Rules of Ct., Rule 8.134(a)(1)*].

In addition, if the agreed statement replaces a clerk's transcript, the statement must contain a copy of the following documents [*Cal. Rules of Ct., Rule 8.122(b)(1), 8.134(a)(2)*]:

- The notice of appeal.
- Any judgment appealed from and any notice of its entry.
- Any notice of intention to move for a new trial, or motion to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration of an appealed order, and any order on such motion and any notice of its entry.
- Any notices or stipulations to prepare clerk's or reporter's transcripts or to proceed by agreed or settled statement.
- The register of actions, if any.

The requirement that certain documents be included in the agreed statement, apparently regardless of whether the parties intend to rely on it in lieu of both a reporter's and a clerk's transcript or simply in lieu of a reporter's transcript, suggests that the procedure is designed to supply the entire record on appeal. In addition to the required documents, the statement may include copies of any document includable in the clerk's transcript under *Cal. Rules of Ct., Rule 8.122(b)(3)* [*Cal. Rules of Ct., Rule 8.134(a)(3)*; *see generally* discussion of the clerk's transcript and its alternatives in *§ 44.30 et seq.*].

[3] Procedure for Preparation and Filing of Agreed Statement

[a] Stipulation Regarding Attempt to Prepare Agreed Statement

Within 10 days of filing the notice of appeal, the parties may file a preliminary stipulation with the clerk of the superior court stating that they are attempting to prepare an agreed statement. In the event the parties are unable to agree on a statement, filing the stipulation will have the effect of extending the time by 50 days in which appellant may file notices designating the record under *Cal. Rules of Ct., Rule 8.121* [*Cal. Rules of Ct., Rule 8.134(b)(3)*].

For a form of stipulation relating to an agreed statement, see *§ 44.260*.

[b] Format of Agreed Statement

Like a settled statement, the agreed statement must conform, as far as practicable, to the formatting requirements in *Cal. Rules of Ct., Rule 8.144* [*Cal. Rules of Ct., Rule 8.144(f)*]. For a more thorough discussion of formatting applicable to agreed or settled statements, see *§ 44.53[4]*.

For a form of agreed statements, see *§ 44.261*.

[c] Appellant's Filing of Agreed Statement

Within 40 days after filing the notice of appeal, the appellant must file, with theclerk of the superior court, the agreed statement [*Cal. Rules of Ct., Rule 8.134(b)(2)*].

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[Reserved]

§§ 44.55[Reserved]

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§ 44.70 Governing Law

The completion of the record in cases involving multiple appeals is governed by *Cal. Rules of Ct., Rule 8.147*.

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§ 44.71 Completion of Record When There Are Multiple Appeals or Cross Appeals From Same Judgment

When several parties are appealing from the same judgment or related order, or when there is a cross appeal pursuant to *Cal. Rules of Ct., Rule 8.108(f)*, a single record on appeal must be prepared and filed within the time prescribed for filing the record in the *latest* appeal [*Cal. Rules of Ct., Rule 8.147(a)(1)*; *Cal. Rules of Ct., Rule 8.406*].

If there is more than one separately represented appellant, all of them must equally share the cost of preparing the record, unless otherwise agreed by them or ordered by the superior court. Appellants sharing the cost of the record preparation are each entitled to a copy of the record [*Cal. Rules of Ct., Rule 8.147(a)(2)*].

PRACTICE TIP:

Motion for Apportionment of Costs. If the appeal is from a judgment after a lengthy trial, and likely to raise several issues, but the cross appeal is from a single ruling or on a single point, or there are similar factors indicating that one party should bear a less than equal share of the costs, counsel should consider seeking an agreement concerning sharing the cost or noticing a motion in the superior court so that the court may order a more equitable apportionment of the costs of preparing the record.

For a notice to prepare the record as provided under *Cal. Rules of Ct., Rule 8.147*, see *§ 44.270*.

Legal Topics:

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§ 44.72 Incorporation by Reference of Record in Prior Appeal

In an appeal in which the parties are using either a clerk's transcript under *Cal. Rules of Ct., Rule 8.122*, or a reporter's transcript under *Cal. Rules of Ct., Rule 8.130*, a party wanting to incorporate by reference all or parts of a record in a prior appeal in the same case must specify those parts in its designation of the record. The prior appeal must be identified by its case name and number. If only part of a record is being incorporated by reference, that part must be identified by citation to the volume and page numbers of the record where it appears and either the title of the document or documents or the date of the oral proceedings to be incorporated. The parts of any record incorporated by reference must be identified in a separate section at the end of the designation of the record [*Cal. Rules of Ct., Rule 8.147(b)(1)*].

If the transcript incorporates by reference any such record, the cover of the transcript must prominently display the notice "Record in case number: ___ incorporated by reference," identifying the number of the case from which the record is incorporated [*Cal. Rules of Ct., Rule 8.147(b)(1)*].

On request of the reviewing court or any party, the designating party must provide a copy of the materials incorporated by reference to the reviewing court or another party or lend them as provided in *Cal. Rules of Ct., Rule 8.153* [*Cal. Rules of Ct., Rule 8.147(b)(1)*].

A party wanting any parts of a clerk's transcript or other record of the written documents from a prior appeal in the same case to be copied into the clerk's transcript in a later appeal must specify those parts in its designation of the record. The estimated cost of copying these materials must be included in the clerk's estimate of the cost of preparing the transcript under *Cal. Rules of Ct., Rule 8.122(c)(1)*. On request of the trial court clerk, the designating party must provide a copy of or lend the materials to be copied to the clerk. The parts of any record from a prior appeal that are copied into a clerk's transcript must be placed in a separate section at the end of the transcript and identified in a separate section at

the end of the indexes [*Cal. Rules of Ct., Rule 8.147(b)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

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[Reserved]

§§ 44.73[Reserved]

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§ 44.80 Governing Law

The transmission of the record from the trial court to and filing of the record in the reviewing court is governed by *Cal. Rules of Ct., Rule 8.150*. The imposition of sanctions for the clerk's failure to perform any duty that results in the delay of the filing of the record is governed by *Cal. Rules of Ct., Rule 8.23*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

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§ 44.81 Transmission and Filing of Completed Record

[1] Transmission of Record by Clerk

When the record on appeal has been completed in accordance with *Cal. Rules of Ct., Rules 8.130-8.150*, the clerk must promptly transmit any original transcripts, or any agreed or settled statement, to the reviewing court [*Cal. Rules of Ct., Rule 8.150(a)(1)*].

[2] Filing of Record on Receipt by Reviewing Court

Assuming it conforms to the requirements of the appellate rules, the original record must be filed when the clerk of the reviewing court receives it. The clerk then must mail a notice to the parties, stating the date the record was filed, without delay [*Cal. Rules of Ct., Rule 8.150(b)*; *compare Cal. Rules of Ct., Rule 8.18* (except as California Rules of Court provide otherwise, no nonconforming record may be filed)]. The date the record is filed is important because it triggers the start of briefing [*see Ch. 50, Appeal: Briefs, § 50.16[3][a]*].

A certified record is presumed to be complete [*see* discussion in *§§ 44.11[4], 44.13[2][e]*]. For discussion of the availability of augmentation or correction proceedings when it is not, in fact, complete, see *§ 44.90* et seq.

[3] Transmission of Exhibits

Although the clerk of the trial court sends the original transcripts or the agreed or settled statements to the reviewing court as soon as they are complete [*see Cal. Rules of Ct., Rule 8.150(a)*], the exhibits, which are deemed a part of the clerk's transcript, remain in the clerk's custody, or in the custody of a party if they were returned to the party by the trial court, unless and until one of the parties (1) designates that some or all of them be copied into the clerk's transcript

under *Cal. Rules of Ct., Rule 8.122* or *8.124* or *(2)* notices their transmission under *Cal. Rules of Ct., Rule 8.224(a),* as discussed *below.* Alternatively, the reviewing courtitself may request on its own motion that some or all of the original exhibits be transferred to it at any time [*Cal. Rules of Ct., Rule 8.224(d)*].

Within 10 days after the last respondent's brief is filed or could be filed under *Cal. Rules of Ct., Rule 8.220,* a party wishing the reviewing court to consider any original exhibits that were admitted in evidence, refused, or lodged, but that were not copied in the clerk's transcript under *Cal. Rules of Ct. Rule 8.122* or the appendix under *Cal. Rules of Ct. Rule 8.124*, must serve and file a notice in superior court designating the exhibits [*Cal. Rules of Ct., Rule 8.224(a)(1)*].

Within 10 days after a notice designating exhibits is served, any other party wishing the reviewing court to consider additional exhibits must serve and file a notice in superior court designating such exhibits [*Cal. Rules of Ct., Rule 8.224(a)(2)*].

A party filing a notice designating exhibits must serve a copy on the reviewing court [*Cal. Rules of Ct., Rule 8.224(a)(3)*].

Unless the reviewing court orders otherwise, within 20 days after the first notice designating exhibits is filed, the superior court clerk must put any designated exhibits in the clerk's possession into numerical or alphabetical order and send them to the reviewing court with two copies of a list of the exhibits sent. If the reviewing court clerk finds the list correct, the clerk must sign and return one copy to the superior court clerk [*Cal. Rules of Ct., Rule 8.224(b)(1)*].

Any party in possession of designated exhibits returned by the superior court must put them into numerical or alphabetical order and send them to the reviewing court with two copies of a list of the exhibits sent. If the reviewing court clerk finds the list correct, the clerk must sign and return one copy to the party [*Cal. Rules of Ct., Rule 8.224(b)(2)*].

After the period for designating exhibits has expired, a party may apply to the reviewing court for permission to send an exhibit to that court [*Cal. Rules of Ct., Rule 8.224(c)*].

The First Appellate District, by local appellate rule, requires that a party must, within 10 days after the filing of the last respondent's or cross respondent's brief, serve and file in the superior court a notice designating the original exhibits offered or admitted in evidence that the party wants the reviewing court to consider. Within 10 days after this notice is served, any other party may serve and file in the superior court a notice designating additional exhibits that party wants the reviewing court to consider. These parties must promptly send copies of the notices to the reviewing court [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 12(a); *see also* Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 12(b) (procedure for superior court to follow in sending exhibits to reviewing court); Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 12(c) (procedure for parties when exhibits have been returned to them under *Code Civ. Proc. § 1952*); Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 12(d) (reviewing court may request lower court to send exhibits at any time; return of exhibits to superior court on request or on remittitur)].

For forms to request the transfer of exhibits to the reviewing court, see *§ 44.280*.

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§ 44.82 Parties' Use of Additional Copy of Record

On completion of the record, the additional copy that must be prepared under *Cal. Rules of Ct., Rules 8.130(f)(1)* (reporter's transcript) or 8.122(d)(1) (clerk's transcript), is transmitted immediately by the clerk to appellant [*Cal. Rules of Ct., Rule 8.150(a)*].

Although respondent may procure yet another copy of the record for his or her own use, he or she may instead use the same copy as appellant and save the expense. To take advantage of this option, respondent must notify appellant, within 20 days of the filing of the record in the Court of Appeal, that he or she has not procured a copy of the record. Appellant is then obliged to deliver the additional copy to respondent when the opening brief is filed. Respondent must, however, return it to appellant when filing the respondent's brief, or, if no respondent's brief is filed, at the time when that brief is due [*Cal. Rules of Ct., Rule 8.153*].

The party borrowing the record must bear the cost of sending the copy of the record to and from the borrowing party [*Cal. Rules of Ct., Rule 8.224(b)(3)*].

PRACTICE TIP:

Sharing Record May Disadvantage Respondent. Although in some cases respondent may have no choice but to borrow appellant's copy of the record, there is a strategic detriment to proceeding in this manner that may outweigh the financial benefit in many others. Specifically, respondent will not be able to review and index or summarize the record before the time to prepare respondent's brief has begun to run. Particularly in large record cases, respondent may find him- or herself without adequate time to write a thorough brief with the citations to the record that the Rules require unless an extension can be secured. Counsel should therefore exercise caution before relying on *Cal. Rules of Ct., Rule 8.153*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

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Volume 5: Appeal-Chs. 40-55
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PART II. LEGAL BACKGROUND
E. Transmission and Filing of Completed Record

5-44 California Forms of Pleading and Practice--Annotated §§ 44.83-44.89

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[Reserved]

§§ 44.83[Reserved]

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5-44 California Forms of Pleading and Practice--Annotated § 44.90

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§ 44.90 Governing Law

Proceedings to augment or correct the record on appeal generally are governed by *Cal. Rules of Ct., Rule 8.155*. Local appellate rules add additional requirements in some courts of appeal [*see* Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist. Rule 6; Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist. Rule 2; Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 5th App. Dist. Rule 1].

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5-44 California Forms of Pleading and Practice--Annotated § 44.91

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§ 44.91 Purpose of Augmentation or Correction

One of the primary objectives of the current appellate rules was to shorten appellate records [*Alkus v. Johnson-Pacific Co. (1947) 80 Cal. App. 2d 1, 11-12, 181 P.2d 72]* . The successful operation of all the rules dealing with short records depends on the free and permissive use of augmentation so that those who make a good faith effort to eliminate nonessential matter will not be penalized by inadvertent omissions. Consequently, when it appears that additional proceedings or evidence should be considered on appeal, the interests of justice generally militate in favor of augmentation [*In re S.M. (2004) 118 Cal. App. 4th 1108, 1117 n.5, 13 Cal. Rptr. 3d 606* (court allowed parties to augment record with post-judgment evidence to avoid further appellate intervention following remand)]. Moreover, it is the duty of the appellate court, if it desires to learn more about any point, to augment the record on its own motion before proceeding with its decision [*In re Marco A. (1996) 50 Cal. App. 4th 1516, 58 Cal. Rptr. 2d 540* ; *Webman v. Little Co. of Mary Hospital (1995) 39 Cal. App. 4th 592, 46 Cal. Rptr. 2d 90* ; *McCarthy v. Mobile Cranes, Inc. (1962) 199 Cal. App. 2d 500, 502, 18 Cal. Rptr. 750* ; *Kalmus v. Kalmus (1950) 97 Cal. App.2d 74, 77, 217 P.2d 64]* .

A motion to augment must be made in good faith, and not for the purpose of delay [*see, e.g.,* Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 6(e); Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 2(f); Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 5th App. Dist., Rule 1(f)].

Appellate counsel has a duty to see to it that any defect in the record is corrected [*People v. Barton (1978) 21 Cal. 3d 513, 146 Cal. Rptr. 727, 579 P.2d 1043]* . The purpose of augmentation or correction is to ensure that the record accurately reflects the proceedings below and conforms to the truth. It cannot be used to create a record or litigate issues that were not before the trial court, but only to supplement the existing record [*People v. Tuilaepa (1992) 4 Cal. 4th 569* ; *In re Marriage of Forrest & Eaddy (2006) 144 Cal. App. 4th 1202, 1209, 51 Cal. Rptr. 3d 172* ; *Electronic Funds Solutions, LLC v. Murphy (2005) 134 Cal. App. 4th 1161, 1172 n.4, 36 Cal. Rptr. 3d 663* ; *De Young v. Del Mar*

Thoroughbred Club (1984) 159 Cal. App. 3d 858, 206 Cal. Rptr. 28 ; *People v. Brooks (1980) 26 Cal. 3d 471, 162 Cal. Rptr. 177, 605 P.2d 1306* ; *Wagner v. Chambers (1965) 232 Cal. App. 2d 14, 42 Cal. Rptr. 334* ; *Lipka v. Lipka (1963) 60 Cal. 2d 472, 35 Cal. Rptr. 71, 386 P.2d 671]* .

Legal Topics:

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§ 44.92 Augmentation or Correction Is Within Court's Discretion

As discussed in *§ 44.91*, augmentation or correction is generally permitted whenever it appears necessary to present an adequate record for review [*see also Cal. Rules of Ct., Rule 8.155(a)* (request will ordinarily be granted absent opposition); *see also* discussion in *§ 44.93[1]*, regarding effect of stipulated augmentation].

However, even when the matter sought to be added is proper, or the proposed correction is warranted, neither augmentation nor correction is a matter of right. Either, or both, may be denied for inexcusable neglect in preparing the record, for delay in presenting the application, or for other reasons, such as the manifest injustice that would be suffered by the opposing party if the appellate court were to grant relief [*Russi v. Bank of America (1945) 69 Cal. App. 2d 100, 102, 158 P.2d 252* ; *see* *Frisk v. Merrihew (1974) 42 Cal. App. 3d 319, 116 Cal. Rptr. 781* ; *Courtell v. McEachen (1956) 147 Cal. App. 2d 219, 221, 305 P.2d 115]* .

Legal Topics:

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§ 44.93 Augmentation of Record

[1] Augmentation May Be Requested by Party or by Appellate Court

On the motion of any party, or on the judge's own motion, a judge of the reviewing court may, on such terms as are deemed proper, order any of the following [*Cal. Rules of Ct., Rule 8.155(a)*]:

- That any part of the original superior court file, including any paper or record on file or lodged with the superior court, be deemed filed or be transmitted to the reviewing court.

- That portions of the oral proceedings be transcribed, certified, and transmitted to the reviewing court.

Unless the court orders otherwise, the appellant is responsible for the cost of any additional transcript the court may order [*Cal. Rules of Ct., Rule 8.155(a)(1)(B)*].

PRACTICE TIP:

Stipulation or Request for Augmentation. Although there is no express provision in the rules, it appears that augmentation may be most economically and speedily accomplished if all parties stipulate to augmentation, that is, present an "agreed" motion for augmentation under *Cal. Rules of Ct., Rule8.155(a)*. For a form of stipulated request, see *§ 44.292*.

A request for augmentation, whether stipulated or not, can be critical in those instances when the record is complete as designated, but during briefing it becomes clear to appellate counsel that additional documents, the importance of which were not previously apparent, need to be included.

On the other hand, *Cal. Rules of Ct., Rule 8.155(b)*, and some local appellate rules require that counsel use an alternative procedure, at least initially, to include any items that *were* designated but which nevertheless do not appear in the record as transmitted. This may occur, for example, when designated items were lodged in the courtroom during trial but never made their way down to the central clerk's office for inclusion in the file, such as a party's request for jury instructions or a trial brief. The alternative procedure requires notifying the trial court clerk or reporter of the omission, and giving him or her a chance to transmit the omitted items, before making a request for augmentation in the court of appeal [*see* discussion in *§ 44.94*].

For forms of request for augmentation or correction of the record, see *§§ 44.290*, *44.291*.

[2] Request Made by Party to Appellate Court

[a] Timing of Request

Cal. Rules of Ct., Rule 8.155, does not specify time limits for filing a request for augmentation, but it is always best to make such a request as soon as it becomes apparent that additional material is needed to raise important issues or demonstrate reversible error. Otherwise, it may be necessary to make a strong showing of unusual or unavoidable circumstances excusing the delay [*People v. Preslie (1977) 70 Cal. App. 3d 486, 138 Cal. Rptr. 828]* .

Several appellate districts have adopted local rules or policies that establish time requirements for requesting augmentation. The First Appellate District requires appellant to file requests to augment in one motion made within 30 days after the date the record is filed. Respondent, in turn, should file his or her requests in one motion made within 30 days of the filing of the appellant's opening brief. Thereafter, motions to augment will only be entertained upon a showing of good cause [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 6(b)].

In the Second and Fifth Appellate districts, an appellant should file his or her requests to augment in one motion made within 40 days after the record has been filed, and a respondent must still file any motion to augment within 30 days of the filing of the appellant's opening brief. As in the First Appellate District, any later filed motions will be granted only on a showing of good cause for the delay [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 2(b); Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 5th App. Dist., Rule 1(b)].

The Third Appellate District's internal operating practices and procedures suggest that an appellant's motion to augment should be filed within 15 days of the filing of the record in civil cases, while respondent's motion should be made no later than 15 days after the filing of appellant's opening brief. The Third District, like the others, does not favor repeated or successive motions, and requires if more than one motion is made it must be supported by a competent showing of good cause for the delay. Exhibits should not be included in a motion to augment, since they may be transmitted to the court under *Cal. Rules of Ct., Rule 8.224(a)* [Cal. Rules of Ct., Supp., Internal Operating Practices and Procedures, 3d App. Dist. IOPP App. A-2; *see* discussion of exhibit transmittal and its alternatives in § 44.81[3]].

PRACTICE TIP:

Effect of Motion on Other Deadlines. *Cal. Rules of Ct., Rule 8.155*, does not specify the effect the filing of a motion to augment will have on the other time periods specified in the appellate rules. In the Second and Fifth Appellate districts, however, the time to perform any act required or permitted by the appellate rules is *not* automatically extended by the filing of, or ruling on, a motion to augment. If additional time is required, for example, to prepare and file briefs, the motion requesting augmentation should include an application for whatever extension of time is need [*see* Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 2(e); Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 5th App. Dist., Rule 1(e)].

It is recommended that this practice be used whenever a motion for augmentation is made, regardless of the district court of appeal to which it is directed. For further discussion and a form of application for extension of time generally, see Ch. 46, *Appeal: Extending and Shortening Time* . For discussion and a form of application for extension of time to file a brief, see *Ch. 50, Appeal: Briefs, §§ 50.16[4], 50.75*.

[b] Service and Filing of Request With Copies of Items to Be Added

The appellate court may order augmentation on the motion of a party [*Cal. Rules of Ct., Rule 8.150(a)*]. This motion must be filed with copies of any papers to be added to the record, if they are available to the requesting party [*Cal. Rules of Ct., Rule 8.150(a)(2)*]. The requesting party must "serve" such copies, if there are any [*Cal. Rules of Ct., Rule 8.150(a)*].

The reviewing court clerk must send all parties notice of the receipt and filing of any matter concerning augmentation or correction of the record [*Cal. Rules of Ct., Rule 8.150(d)*].

The First and Fifth Appellate Districts make service of the request an explicit requirement [*see* Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 6(c); Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 5th App. Dist., Rule 1(c) (requiring that request or motion and the accompanying copies be served "simultaneously" on opposing counsel)]. It is recommended that this pracitce be followed in other appellate districts as well.

In other words, the request, when filed, should be accompanied not only by copies of papers to be included, if available, but also by proof of prior service, in a manner permitted by law, of one copy of the request and accompanying papers, if any, on counsel for each adverse party represented by separate counsel [*see Cal. Rules of Ct., Rule 8.25* (defining "serve and file" under the appellate rules)]. For discussion and forms relating generally to service and proof of service, see Ch. 518, *Service and Summons of Papers* .

[c] Local Appellate Rule Requirements Governing Content of Request for Augmentation

[i] Local Appellate Rules Regarding Augmentation of Clerk's Transcript

In the Second and Fifth Appellate Districts, consistent with *Cal. Rules of Ct., Rule 8.155*, a motion to augment the clerk's transcript "shall" be accompanied by copies of the documents requested [*see* discussion in [b], *above*]. In the Fifth District the copies must also be "certified." If the motion is not accompanied by copies of the documents to be added, the motion must identify the documents with specificity and include an explanation for their omission [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 2(c); Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 5th App. Dist., Rule 1(c)]. In the Second Appellate District, the motion must be accompanied by a declaration stating that the requested materials to be augmented were filed or lodged with the trial court [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 2(c)].

In the Second Appellate District, when more than one document or transcript is attached to or submitted with a motion to augment the record, the pages of the documents and transcripts must be consecutively numbered [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 2(h)].

In the First Appellate District, a motion to augment the clerk's transcript "should" be accompanied by copies of the documents requested [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 6(c)], although whenever the documents are available to the party, this "should" becomes mandatory under *Cal. Rules of Ct., Rule 8.155* [*see* discussion in [b], *above*]. If the motion is not accompanied by copies of the documents to be added, the motion must identify the documents with specificity [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 6(c)]. The motion must be accompanied by a declaration stating that the requested materials to be augmented were filed or lodged with the trial court [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule

6(c)].

For a form of request to augment the clerk's transcript, see *§ 44.291*.

[ii] Local Appellate Rules Regarding Augmentation of Reporter's Transcript

In the First, Second, and Fifth Appellate districts, local appellate rules impose the following requirements regarding a request or motion to augment the reporter's transcript:

- The motion must identify the portion of the record to be added with specificity, including the reporter's name and the date of the hearing. It must also identify with some certainty how the requested materials may be useful on appeal [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 6(d); Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 2(d); Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 5th App. Dist., Rule 1(d)].

- In the First Appellate District, requests for jury voir dire should specify the exact questioning by which counsel of which juror, together with the reason justifying the request [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 6(d)].

For a form of request to augment the reporter's transcript, see *§ 44.291[1]*.

[iii] Local Appellate Rules Requiring Proposed Order

In the Second Appellate District, a motion to augment must be accompanied by a proposed order. A form printed by the court, entitled "Order Re: Augmentation" may be used for this purpose [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 2(g)].

For a form of order granting an augmentation request, see *§ 44.291[2]*.

[3] Opposition to Request and Disposition by Court

The opposing party may file any opposition to an augmentation request within 15 days after the motion is filed [*Cal. Rules of Ct., Rule 8.54*]. Opposition is usually filed only in unusual cases in which the delay in augmentation or other factors render the augmentation prejudicial in some way to the opposing party, or when the material to be added is essentially not necessary and the motion has been filed solely for the purpose of delay. For a form of opposition, see *§ 44.293*. For discussion and forms relating to the imposition of sanctions for actions taken solely for the purpose of delay, see Ch. 49, *Appeal: Sanctions* .

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§ 44.94 Request to Include Items Designated But Omitted From the Record

If the clerk or reporter has omitted material that was actually designated by a party, that party may serve and file in the trial court a notice to the clerk of the trial court requesting that the clerk or reporter prepare and certify the missing material and transmit it to the reviewing court. The party must also serve a copy of the notice on the reviewing court [*Cal. Rules of Ct., Rule 8.155(b)(1)*; *see also Cal. Rules of Ct., Rule 8.25* (under general definition of "serve and file," the notice should include proof of prior service in a manner permitted by law of one copy of the notice on counsel for each adverse party represented by separate counsel; for discussion and forms relating generally to service and proof of service, see Ch. 518, *Service and Summons of Papers*).

The notice must identify the omitted material with specificity. The clerk or reporter must comply with the notice within 10 days from the date it is filed, without the necessity of a court order. If the clerk or reporter fails to comply, a copy of the notice must be filed with a party's subsequent request for augmentation [*Cal. Rules of Ct., Rule 8.155(b)(2)*].

In the First and Second Appellate Districts, a party *must* follow this procedure before making any motion in the court of appeal for augmentation [*see* Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 6(a); Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 2(b); *cf.* Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 5th App. Dist., Rule 1(b) (requiring initial use of alternative procedure only in criminal appeals)].

For a form of notice to include designated but omitted items, see *§ 44.290*.

Legal Topics:

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Civil ProcedureAppealsRecords on AppealGovernmentsCourtsClerks of Court

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§ 44.95 Correction or Certification of Record

[1] Correction or Certification by Reviewing Court

If any material part of the record, or of any transcript or appendix, is incorrect or lacks proper certification, the reviewing court may, on the motion of any party or on its own motion, direct that it be corrected or certified [*Cal. Rules of Ct., Rule 8.155(b)(1)*]. For a form of request for correction, see *§ 44.291*.

[2] Submission to Superior Court for Settlement of Disputed Errors or Omissions

The reviewing court may issue an order directing the lower court to resolve any differences of the parties with respect to alleged omissions or errors in the record [*Cal. Rules of Ct., Rule 8.155(c)(2)*; *see also Prescott v. Ralphs Grocery Co. (1953) 115 Cal. App. 2d 466, 467, 252 P.2d 61* (correcting reporter's transcript in accordance with superior court judge's certificate); *Prescott v. Ralphs Grocery Co. (1952) 114 Cal. App. 2d 655, 657, 250 P.2d 690* (directing superior court judge to certify to appellate court a true copy of a certain instruction as he actually gave it)].

If the superior court makes the record conform to the truth, pursuant to *Cal. Rules of Ct., Rule 8.155(c)*, the appellate court cannot and should not disturb the resulting order if it is supported by any substantial evidence or by reasonable inferences derived from that evidence [*Freitas v. Peerless Stages, Inc. (1952) 108 Cal. App. 2d 749, 763-764, 239 P.2d 671]* .

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§ 44.96 Reviewing Court's Notice of Receipt and Filing of Items Transmitted on Order for Augmentation, Correction, or Settlement

The clerk of the reviewing court is required to mail notice to the parties of the reviewing court's receipt and filing of any matter that has been transmitted to it pursuant to an order for augmentation or correction, or an order directing the trial court to resolve disputed questions [*Cal. Rules of Ct., Rule 8.155(d)*].

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§§ 44.97[Reserved]

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§ 44.100 Governing Law

Cal. Rules of Ct., Rule 8.46 sets out the requirements and procedure for sealing or unsealing records on appeal that would otherwise be accessible to the public.

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5-44 California Forms of Pleading and Practice--Annotated § 44.101

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§ 44.101 Definitions

The following definitions apply for purposes of the procedure for sealing or unsealing otherwise public records on appeal under *Cal. Rules of Ct., Rule 8.46*:

- "Record" means all or a portion of any document, paper, exhibit, transcript, or other thing filed or lodged with the court, unless the context indicates otherwise [*Cal. Rules of Ct., Rule 8.46(b)(1)*].

- "Sealed" records are those that, by court order, are not open to inspection by the public [*Cal. Rules of Ct., Rule 8.46(b)(2)*].

- "Lodged" records are those that are temporarily placed or deposited with the court but not filed [*Cal. Rules of Ct., Rule 8.46(b)(3)*].

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§ 44.102 Purpose and Applicability of Procedures for Sealed Records

Pursuant to the "open court" policy codified in *Code Civ. Proc. § 124*, as well as constitutional protections under the *First Amendment*, substantive courtroom proceedings in ordinary civil cases are "presumptively open" to the public [*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 Cal. 4th 1178, 1212, 1217-1218, 86 Cal. Rptr. 2d 778, 980 P.2d 337*]. This right of public access extends to documents or records used at trial or as a basis of adjudication [*see* Advisory Committee Comment to *Cal. Rules of Ct., Rule 8.46*]. For further discussion of this right of access, see Ch. 551, *Trial* . The rules for sealing records are mandatory, furthering the presumption and constitutional interest in open records. Records may not be filed under seal without a court order and the prerequisite motion and findings [*Savaglio v. Wal-Mart Stores, Inc. (2007) 149 Cal. App. 4th 588, 600, 57 Cal. Rptr. 3d 215*].

Cal. Rules of Ct., Rule 8.46, recognizing this right of public access, sets out a procedure that must be followed for sealing records on appeal, following the standards articulated in NBC Subsidiary [*see* Advisory Committee Comment to *Cal. Rules of Ct., Rule 8.46*].

Cal. Rules of Ct., Rule 8.46 applies to records on appeal, or records in original writ proceedings at the appellate level, that are otherwise subject to the right of public access but are proposed to be sealed [*see Cal. Rules of Ct., Rule 8.46(a)*; *see also § 44.101* (defining "record")]. The rule does not apply to records already required to be kept confidential by law [*Cal. Rules of Ct., Rule 8.46(a)*]. Examples of the latter type of records are records of the family conciliation court and applications to proceed in forma pauperis [*see* Advisory Committee Comment to *Cal. Rules of Ct., Rule 8.46*].

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§ 44.103 Procedure for Records Previously Sealed by Trial Court

[1] Records Sealed by Trial Court Must Be Filed Under Seal in Reviewing Court

The provisions of *Cal. Rules of Ct., Rules 2.550* and *2.580* set out procedures comparable to those in *Cal. Rules of Ct., Rule 8.46* for sealing otherwise public records in trial court proceedings. For detailed discussion and forms relating to *Cal. Rules of Ct., Rule 2.551 et seq.*, see Ch. 551, *Trial* .

A record that has been sealed by the trial court and is part of the record before the reviewing court on appeal or in an original writ proceeding must be filed under seal in the reviewing court. It must remain sealed unless the reviewing court orders otherwise [*Cal. Rules of Ct., Rule 8.46(c)(1)*; *see § 44.107* for discussion of proceedings in the reviewing court to unseal records].

[2] Inclusion in Record on Appeal of Items Relating to Trial Court Proceedings to Seal Records

Whenever the record on appeal or otherwise before the reviewing court was sealed, all or in part, by the trial court, a party must include in that record the following [*Cal. Rules of Ct., Rule 8.46(c)(2)*]:

- The trial court order directing that records be sealed;
- The motion or application to seal records; and
- All documents filed in the trial court in support of, or in opposition to, the motion or application to seal records.

The "party" who must include these items in the record is presumably the appellant or petitioner who has the burden of producing the record [*see § 44.12* regarding burden to produce; *see also § 44.32[1]* regarding appellant's designation of items to be included in clerk's transcript].

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§ 44.104 Procedure for Sealing Records

[1] Motion to Seal Records

A record filed or lodged publically in the trial court, which was not ordered sealed by that court, is not to be filed under seal in the reviewing court [*Cal. Rules of Ct., Rule 8.46(d)*]. A record not previously sealed by the trial court may not be filed under seal based solely on the agreement or stipulation of the parties [Cal. Rules of Ct., Rule 8.460(e)(1)], but may only be filed under seal pursuant to an order by the reviewing court [*Cal. Rules of Ct., Rule 8.46(e)(1)*].

A party seeking to file records under seal if there is no previous trial court order to seal them must file a motion or application in the reviewing court for an order directing that records be filed under seal; it should be accompanied by a declaration containing facts sufficient to justify the sealing [Cal. Rules of Ct., Rule 8.460(e)(2); *see H.B. Fuller Co. v. Doe (2007) 151 Cal. App. 4th 879, 889-891, 60 Cal. Rptr. 3d 501*].

If necessary to prevent disclosure, any motion or application and any supporting or opposing papers must be filed in a public redacted version and lodged in a complete version that is conditionally under seal. Unless the court orders otherwise, a party that already possesses copies of the records to be placed under seal must be served with a complete, unredacted version of all papers, as well as a redacted version [*Cal. Rules of Ct., Rule 8.46(e)(4)*; *see § 44.101* (definitions distinguishing filed and lodged materials)]. For discussion of the prohibition of disclosing material in a record subject to a motion to seal, see *§ 44.106*.

The court may order a record filed under seal only if it makes the express findings required by *Cal. Rules of Ct., Rule 2.550(d)-(e)* [*Cal. Rules of Ct., Rule 8.46(e)(6)*]. The motion, therefore, must be made on the grounds that the court may properly make such findings, and its supporting documents must establish these grounds [*H.B. Fuller Co. v. Doe*

(2007) 151 Cal. App. 4th 879, 894-899, 60 Cal. Rptr. 3d 501 ; *Universal City Studios, Inc. v. Superior Court (2003) 110 Cal. App. 4th 1273, 1282, 2 Cal. Rptr. 3d 484* (court denied motion to seal records based solely on parties' agreement without any serious injury)]. For detailed discussion of the findings under *Cal. Rules of Ct., Rule 2.550(d)-(e)* on which a trial court must base an order sealing records, see Ch. 551, *Trial* [*see also § 44.302* (form of order by reviewing court)].

Otherwise, the motion must conform to the requirements of *Cal. Rules of Ct., Rule 8.54* [Advisory Committee Comment to *Cal. Rules of Ct., Rule 8.46*]. For detailed discussion of the motion procedure under Rule 8.54, see Ch. 45, *Appeal: Motion Procedure* .

For a form of motion for an order directing records to be filed under seal, and a form of order granting the motion, see *respectively § 44.300* and *§ 44.302*. For discussion of the procedure for lodging the records that a party is requesting to be filed under seal, see [2], *below*.

[2] Lodging Record Items Proposed to Be Sealed

A party moving for an order directing that records be filed under seal must lodge those records with the court pursuant to *Cal. Rules of Ct., Rule 8.46(e)(3)* at the time the motion is made, unless good cause exists for not lodging them. Records so lodged are conditionally under seal pending determination of the motion [*Cal. Rules of Ct., Rule 8.46(e)(5)*; *see also Cal. Rules of Ct., Rule 8.46(b)(3)* ("lodged" record is one temporarily placed or deposited with court but not filed)].

Pursuant to *Cal. Rules of Ct., Rule 8.46(e)(3)*, records proposed to be sealed are lodged in the following manner:

- The moving party must put the records in an envelope or other appropriate container, and seal the envelope or container [*Cal. Rules of Ct., Rule 8.46(e)(3)*].

- The moving party must label the envelope or container "CONDITIONALLY UNDER SEAL" [*Cal. Rules of Ct., Rule 8.46(e)(3)*].

- The moving party must affix to the envelope or container a cover sheet that contains all the information required on a caption page under *Cal. Rules of Ct., Rule 8.40* and that states that the enclosed record is subject to a motion to file the record under seal [*Cal. Rules of Ct., Rule 8.46(e)(3)*; *see Cal. Rules of Ct., Rule 8.40(c)* (attorney information to be included on cover or first page of paper); for a form of cover sheet, *see § 44.301*].

- The moving party then lodges the records with the reviewing court [*Cal. Rules of Ct., Rule 8.46(e)(2)*].

On receipt of records lodged in this manner, the clerk is required to endorse the cover sheet with date of receipt. The clerk is also required to retain the records but not file them unless the court orders them filed [*Cal. Rules of Ct., Rule 8.46(e)(5)*]. If the reviewing court denies the motion or application, the clerk is required to return the lodged records to the submitting party, unless that party notifies the clerk in writing within 10 days after the order denying the motion or application that the record is to be filed [*Cal. Rules of Ct., Rule 8.46(e)(7)*].

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§ 44.105 Access to Sealed Records on Appeal

The reviewing court may examine a sealed record [*Cal. Rules of Ct., Rule 8.46(c)(3)*]. Absent an order by the reviewing court that unseals the record [*see § 44.107*], no one else may examine records filed under seal, aside from the trial court and persons, if any, who were expressly given authorization to inspect the records in the trial court's order sealing the records [*see Cal. Rules of Ct., Rule 2.551(e)(3)*].

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§ 44.106 No Public Disclosure of Records Sealed or Proposed to Be Sealed

A record filed publically in the reviewing court must not disclose material contained in a sealed record or material contained in a record that is conditionally under seal or subject to a pending motion to seal [*Cal. Rules of Ct., Rule 8.46(g)*]. "Records" filed publically in the reviewing court include not only unsealed portions of the record on appeal, but also any other brief, paper, document, or other thing filed with the court [*see Cal. Rules of Ct., Rule 8.46(b)(1)*].

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§ 44.107 Unsealing Previously Sealed Records

A sealed record must not be unsealed except on order of the reviewing court [*Cal. Rules of Ct., Rule 8.46(f)(1)*]. A party or member of the public may serve and file a motion, application, or petition in the reviewing court to unseal a record filed under seal. If necessary to preserve confidentiality, the motion, application, or petition, any opposition, and any supporting documents must be filed in both a public redacted version and a sealed complete version [*Cal. Rules of Ct., Rule 8.46(f)(2)*; *see § 44.106* for discussion of the prohibition of disclosing material in a sealed record].

The reviewing court may also unseal the record on its own motion, but must give notice of the proposed unsealing to the parties, and allow any party to file opposition to the proposed unsealing for a period of 10 days after the court's notice is mailed or as the court specifies. Any other party may file a response within five days after an opposition is filed [*Cal. Rules of Ct., Rule 8.46(f)(3)*].

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5-44 California Forms of Pleading and Practice--Annotated §§ 44.108-44.129

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[Reserved]

§§ 44.108[Reserved]

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§ 44.130 California Constitution

Power of appellate courts to take evidence. *Cal. Const., art. VI, § 11*

Error resulting in miscarriage of justice apparent "after an examination of the entire cause, including the evidence" is required to set aside judgment or grant a new trial on the ground of misdirection of the jury, improper admission or rejection of evidence, or errors in pleading or procedure. *Cal. Const., art. VI, § 13*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on AppealCivil ProcedureAppealsStandards of ReviewPlain ErrorMiscarriages of Justice

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§ 44.131 State Statutes

Additional factual determination by reviewing court when there is no right to jury trial or jury trial is waived. *Code Civ. Proc. § 909*

Trial court, trial court judge, or reviewing court has power to set aside judgment from which appeal is taken, and to order new trial, when loss, destruction, or other circumstances preclude the preparation of reporter's transcript. *Code Civ. Proc. § 914*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on AppealCivil ProcedureTrialsJury TrialsRight to Jury Trial

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§ 44.132 California Rules of Court

Reporter's transcript. *Cal. Rules of Ct., Rule 8.130*

Clerk's transcripts. *Cal. Rules of Ct., Rule 8.122*

Appendix. *Cal. Rules of Ct., Rule 8.124*

Superior court file in lieu of clerk's transcript. *Cal. Rules of Ct., Rule 8.128*

Agreed statement. *Cal. Rules of Ct., Rule 8.134*

Settled statement. *Cal. Rules of Ct., Rule 8.137*

Format requirements for record. *Cal. Rules of Ct., Rule 8.144*

Dismissal for failure to do act necessary to procure record. *Cal. Rules of Ct., Rule 8.140(b)*

Transmission and filing of completed record. *Cal. Rules of Ct., Rule 8.150(a)*

Transmission of exhibits. *Cal. Rules of Ct., Rule 8.224(a)*

Preparation of record on multiple appeals. *Cal. Rules of Ct., Rule 8.147*

Augmentation and correction of record. *Cal. Rules of Ct., Rule 8.155*

Procedure for filing records sealed by trial court and for sealing or unsealing records on appeal. *Cal. Rules of Ct., Rule 8.46*; *see Cal. Rules of Ct., Rule 2.550 et seq.*

Presumption when record is not complete. *Cal. Rules of Ct., Rule 8.163*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsRule Application & InterpretationGovernmentsCourtsClerks of CourtCivil ProcedureAppealsRecords on Appeal

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§ 44.133 Local Appellate Rules of Court

Designation of record. Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 3

Stipulation for use of superior court filed in lieu of clerk's transcript. Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 9; Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 3d App. Dist., Rule 22; Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 4th App. Dist., Rule 10; Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 5th App. Dist., Rule 1

Completion of record. Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 5

Augmentation or correction of record. Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 6; Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 2; Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 5th App. Dist., Rule 10

Procedure for designating, sending, and returning exhibits offered or admitted in evidence which a party wants the reviewing court to consider as part of record on appeal. Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 12

Legal Topics:

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§ 44.134 Decisions

Error is not presumed; prejudicial error must be affirmatively shown *by the record* presented by appellant. *Denham v. Superior Court (1970) 2 Cal. 3d 557, 564, 86 Cal. Rptr. 65, 468 P.2d 193*

The absence of a record concerning what actually occurred at a hearing precludes a determination that the court abused its discretion; appellants have an affirmative obligation to provide an adequate record so that appellate court can assess whether the court abused its discretion. *Wagner v. Wagner (2008) 162 Cal. App. 4th 249, 259, 75 Cal. Rptr. 3d 511*

Court may order record sealed only if it expressly finds facts that establish: (1) there exists an overriding interest that overcomes the right of public access to the record; (2) the overriding interest supports sealing the record; (3) a substantial probability exists that the overriding interest will be prejudiced if the record is not sealed; (4) the proposed sealing is narrowly tailored; and (5) no less restrictive means exist to achieve the overriding interest. *H.B. Fuller Co. v. Doe (2007) 151 Cal. App. 4th 879, 888-889, 60 Cal. Rptr. 3d 501*

It is axiomatic that it is the appellant's responsibility to provide an adequate record on appeal. *Lincoln Fountain Villas Homeowners Assn. v. State Farm Fire & Casualty Insurance Co. (2006) 136 Cal. App. 4th 999, 1003, n.1, 39 Cal. Rptr. 3d 345*

Failure to provide an adequate record on an issue requires that the issue be resolved against the appellant. *Barak v. The Quisenberry Law Firm (2006) 135 Cal. App. 4th 654, 659-660, 37 Cal. Rptr. 3d 688*

By not including reporter's transcript of testimony and other evidence introduced at trial, appellant failed to present evidentiary record sufficient to show trial court abused its discretion. *Erickson v. R.E.M. Concepts, Inc. (2005) 126*

Cal. App. 4th 1073, 1086-1087, 25 Cal. Rptr. 3d 39

Failure to submit any record on appeal is grounds for dismissal of appeal. *Goehring v. Chapman University (2004) 17 Cal. Rptr. 3d 39*

Cross appellant bears the same burden as an appellant of presenting an adequate record. *Amato v. Mercury Casualty Co. (1993) 18 Cal. App. 4th 1784, 1794, 23 Cal. Rptr. 2d 73*

Abject failure to present an adequate record may serve as evidence, on a motion for sanctions, that an appeal was taken frivolously. *Cosenza v. Kramer (1984) 152 Cal. App. 3d 1100, 1102, 200 Cal. Rptr. 18*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsDismissals of AppealsInvoluntary DismissalsCivil ProcedureAppealsRecords on Appeal

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§ 44.135 Law Reviews

Graber, *Timeline and Deadlines for Civil Appeals in California*, 7(2) California Litigation 43 (1994)

Witkin, *New California Rules on Appeal, 17 So. Cal. L. Rev. 80 (1944)*

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§ 44.136 Text References

Witkin, California Procedure, vol. 9, *Appeal*, § 517 et seq. (4th ed. 1997)

California Civil Appellate Practice, vol. 1, ch. 9, *Designating the Record* (Cal. CEB 3d ed. 2000)

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§ 44.137 Internet References

California Courts. This site includes: general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of court of appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to sites of local trial courts; links to sites of state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes: text of constitution, codes, and statutes; and information concerning pending legislation. http://www.leginfo.ca.gov

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[Reserved]

§§ 44.138[Reserved]

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§ 44.150 Preliminary Considerations for Appellant

[1] Initial Deadline for Designating Record Is 10 Days After Notice of Appeal

☐ File notice(s) or stipulation(s) regarding preparation of the record within 10 days after filing of the notice of appeal [*see Cal. Rules of Ct., Rule 8.121(a)*].

☐ Include any of the following that apply:

☐ Appellant's notice to prepare a clerk's transcript [*see Cal. Rules of Ct., Rule 8.122(a)*, discussion in *§ 44.32[1][a]*].

☐ Appellant's notice to prepare a reporter's transcript [*see Cal. Rules of Ct., Rule 8.130(a)*, discussion in *§ 44.52[1]*].

☐ Appellant's notice to prepare an appendix [*see Cal. Rules of Ct., Rule 8.124(a)*, discussion in *§ 44.33[3][a][i]*].

☐ The parties' stipulation to use the superior court file in lieu of a clerk's transcript, etc. [*see Cal. Rules of Ct., Rules 8.128(a)*, discussion in *§ 44.34[1]*].

☐ The parties' agreed statement [*see Cal. Rules of Ct., Rule 8.134(a)*, discussion in *§*

44.54[3][a]].

☐ The appellant's settled statement [*see Cal. Rules of Ct., Rule 8.137(a)*, discussion in *§ 44.53[3][a]*].

[2] Determine Form of Record Desired

☐ Determine the type of record to be designated within the deadline set out in [1] *above* [*see § 44.11* et seq.].

[3] When Reporter's Transcript Needed

☐ Review court files, if necessary, to determine date, nature and length of all oral proceedings, as well as the names of reporters.

☐ If oral proceedings are computerized, determine whether client can afford the additional expense of having them transcribed.

☐ Obtain either the estimated reporter's fee or a waiver of the fee from the reporter beforehand to accompany the notice to prepare reporter's transcript [*see Cal. Rules of Ct., Rule 8.130(b)*, anddiscussion in *§ 44.52[3]*], unless:

☐ Client qualifies for financial aid from the Transcript Reimbursement Fund [*see Cal. Rules of Ct., Rule 8.130(b)(3)*].

☐ Oral proceedings have already been transcribed [*see Cal. Rules of Ct., Rule 8.130(b)(3)*].

[4] Factors in Selecting Clerk's Transcript or a Substitute

☐ Consider factors including the following in preparing to designate the clerk's transcript or an alternative [*see Cal. Rules of Ct., Rule 8.122* and *§ 44.30* et seq.].

☐ Time considerations:

☐ If time is of the essence, use an appendix.

☐ If time is needed for settlement negotiations, etc., use a clerk's transcript.

☐ If time to designate is short, and a considered decision concerning the documents needed is not possible, elect to proceed under one of the alternatives to a clerk's transcript.

☐ Cost considerations:

☐ When filing the notice of appeal, appellant must pay the filing fee and a deposit of $100 credited against amount chargeable for preparation of the clerk's transcript, or any other appeal processing or notification [*Gov. Code § 68926.1*; *Cal. Rules of Ct., Rule 8.100(b)(2)*].

☐ If normal clerk's transcript is to used, advise client of need for additional payment of clerk's estimated fee for the transcript when it is received.

☐ If you wish to proceed on the original clerk's file, determine if that option is available in the court of appeal to which the appeal is taken, and advise client of need for a fee [*see Cal. Rules of Ct., Rule 8.128*].

☐ Other considerations:

☐ If appendix is to be used, determine if opposing counsel will cooperate in the use of a joint appendix [*see Cal. Rules of Ct., Rule 8.124(a)(3)*].

☐ If you select clerk's transcript or appendix procedure is selected, avoid overinclusion of documents not needed and underinclusion of documents needed, for resolution of the issues to be raised [*see Cal. Rules of Ct., Rule 8.276(a)(2), 8.163*].

Legal Topics:

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Civil ProcedureAppealsRecords on Appeal

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART IV. PROCEDURAL CHECKLISTS

5-44 California Forms of Pleading and Practice--Annotated § 44.151

AUTHOR: Stefanie Y. Gandolfi Author E. Elizabeth Summers and Gary Cramer Editorial Consultants Ms. Gandolfi is a solo appellate practitioner in Oakland, California. Ms. Summers is a principal partner with Bien & Summers, Oakland, California, an appellate specialty firm. Mr. Cramer, who contributed comments and practice tips concerning reporter's transcripts, is a court reporter with the Los Angeles County Superior Court.

§ 44.151 Procedure for Obtaining Clerk's Transcript or Alternative

[1] Appellant's Duties and Options

[a] When Clerk's Transcript Is Designated

☐ Consider the following in selecting and designating the clerk's transcript [*see Cal. Rules of Ct., Rule 8.122* and *§ 44.30 et seq*.].

☐ Review office files, trial notes, etc., to narrow issues to be raised.

☐ Serve and file notice of designation within 10 days of filing notice of appeal, if not already designated with notice of appeal [*see Cal. Rules of Ct., Rule 8.121(a)*].

☐ Determine if there is need for discretionary items in the clerk's files [*see Cal. Rules of Ct., Rule 8.122(b)(3)*]:

☐ If so, specify those affirmatively.

☐ Always include the court's minutes.

☐ Determine the need for other items depending on the issues to be raised on appeal.

☐ Determine whether to have the exhibits available to the reviewing court before notice of the hearing [*see Cal. Rules of Ct., Rule 8.122(a)(3)*].

☐ If so, include them in the designation.

☐ You may also attach a copy of a critical exhibit as an appendix to the opening brief.

☐ File estimated fee of clerk within 10 days after clerk sends estimate [*see Cal. Rules of Ct., Rule 8.122(2)(3)*].

☐ On receipt of record from clerk, review it carefully to ensure that all matters designated were included.

☐ If there are omissions, file a notice of the omissions with the clerk immediately to correct record by adding them [*see Cal. Rules of Ct., Rule 8.155(b)(1)*].

[b] Appendices or Joint Appendix

☐ Consider the following in electing to proceed with appendix or joint appendix *see Cal. Rules of Ct., Rule 8.124* and *§ 44.33*].

☐ Serve and file notice of election within 10 days of filing notice of appeal, if not already done with the notice of appeal [*see Cal. Rules of Ct., Rules 8.121(a)*].

☐ Seek stipulation from opposing counsel regarding the documents and/or exhibits to be included [*see Cal. Rules of Ct., Rule 8.124(a)(3)*].

☐ Ask opposing counsel for filing dates of the office copies of respondent's documents which are not endorsed-filed [*see Cal. Rules of Ct., Rule 8.124(b)(1)*].

☐ If necessary, review the court's files to determine all needed filing dates.

☐ Assemble the documents to be included [*see Cal. Rules of Ct., Rule 8.124(b)*].

☐ Put pleadings, etc., in chronological order [*see Cal. Rules of Ct., Rules 8.124(b)(1)*].

☐ If exhibits are included, assemble them in numerical and/or alphabetical order following the pleadings [*see Cal. Rules of Ct., Rule 8.124(b)(4)*].

☐ Paginate assembled documents with both alphabetical and chronological indices [*see Cal. Rules of Ct., Rules 8.124(d)(1), 8.144(a)*].

☐ Comply with all format requirements [*see Cal. Rules of Ct., Rules 8.124(d), 8.144(a)*].

☐ Bind appellant's or joint appendix [*see Cal. Rules of Ct., Rules 8.124(d)(3), 8.144(c)*]:

☐ Bind separately from the brief.

☐ Bind on the left margin.

☐ Separate into more than one volume, if more than 300 pages per volume.

☐ Do not split individual documents between volumes.

☐ File appendix with reviewing court [*see Cal. Rules of Ct., Rule 8.124(e)*].

☐ Serve and file appellant's or joint appendix with appellant's opening brief [*see Cal. Rules of Ct., Rule 8.124(e)(3)*].

[c] Use of Clerk's Original File

☐ Consider the following in choosing and preparing a clerk's original file in lieu of a clerk's transcript [*see Cal. Rules of Ct., Rule 8.128* and *§ 44.34*].

☐ Determine if option is available under local rules of reviewing court.

☐ Determine whether opposing counsel will stipulate to this option [*see Cal. Rules of Ct., Rule 8.128(a)(1)*].

☐ If so, file stipulation within 10 days of filing the notice of appeal, if not already done with the notice of appeal [*see Cal. Rules of Ct., Rule 8.128(a)(1)*].

☐ Serve a copy of the stipulation on the clerk of the reviewing court [*see Cal. Rules of Ct., Rule 8.128(a)(2)*].

☐ Within 10 days of receipt of estimate of cost from the clerk, deposit requested fee, file an application for, or an order granting, a waiver of the cost [*see Cal. Rules of Ct., Rule 8.128(b)(1)*].

☐ On receipt of index showing pagination of original files, assemble office copies in same order and paginate them to correspond with the clerk's index.

☐ For documents listed in the index but not in the office files, ignore gaps in pagination unless missing documents are important for the appeal, e.g., minutes of the

court.

☐ If missing documents are important for appeal, obtain copies from the clerk's office.

☐ If it is not possible to coordinate the pagination with the office file, examine the court's files.

☐ In either case, advise the clerk of the need to examine the original files immediately if no reporter's transcript was designated [*see Cal. Rules of Ct., Rule 8.128(b)(4)*].

[d] Use of Settled Statement

☐ Use settled statement as substitute for clerk's transcript rarely; consider more recently adopted procedures for use joint or separate appendices [*see Cal. Rules of Ct., Rules 8.124, 8.137* and discussion in *§ 44.35* and in [b], *above*].

[e] Use of Agreed Statement

☐ Consider the following in choosing and preparing an agreed statement inlieu of a clerk's transcript and reporter's transcript [*see Cal. Rules of Ct., Rule 8.134* and *§ 44.35*].

☐ Incorporate specified documents [*see Cal. Rules of Ct., Rule 8.134(a)(2), (3)*].

☐ In light of current option to prepare appendices (*see* [b], *above*), check with the clerk of appellate court to determine if appendix procedure can be used with agreed statement used solely as a substitute for a reporter's transcript.

☐ Comply with content requirements as relevant [*see Cal. Rules of Ct., Rule 8.134(a)(2), (3)*].

[f] When Appeal Is Abandoned or Settled

☐ Notify the superior and appellate courts if appeal is abandoned or settled [*see Cal. Rules of Ct., Rule 8.244* and discussion in *§ 44.15*].

☐ Seek refund of portion of deposit exceeding the preparation cost actually incurred [*Cal. Rules of Ct., Rule 122(d)(2)*].

[2] Respondent's Duties and Options

[a] When Appellant Designates a Clerk's Transcript

☐ On receipt of appellant's designation, calendar the date for filing counter designation (10 days after

service) [*see Cal. Rules of Ct., Rule 122(a)(2)*].

☐ Review appellant's designation carefully in light of likely issues to determine whether all necessary documents have been designated [*see Cal. Rules of Ct., Rule 122(b)* and discussion in *§ 44.32[2]*].

☐ Determine whether, for any likely issues, respondent has the burden to provide an adequate record, e.g., to establish a defense, demonstrate waiver, refute prejudice, etc., and designate any omitted matters needed.

☐ If exhibits are designated, deposit the clerk's estimated cost within 10 days of notice [*see Cal. Rules of Ct., Rule 8.122(c)(3)*].

☐ Avoid overdesignation [*see Cal. Rules of Ct., Rule 8.276(a)(2)*].

☐ Arrange with clerk for payment of copy of the transcript, or notify appellant's counsel that respondent will not obtain a separate copy [*see Cal. Rules of Ct., Rule 8.153*].

☐ On receipt of record from clerk, review it carefully to ensure that all matters designated were included.

☐ If there are omissions, file a notice of the omissions with the clerk of the superior court immediately to correct record by adding them [*see Cal. Rules of Ct., Rule 8.155(b)(1)* and discussion in *§ 44.32[6]*].

☐ Consider moving for dismissal of appeal if record is not timely filed [*see Cal. Rules of Ct., Rule 8.140*; *see generally* Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal*].

[b] When Appellant Elects Use of Appendix Procedure

☐ Determine whether an agreement can be reached with the other party or parties concerning a joint appendix [*Cal. Rules of Ct., Rule 8.124(a)(3)*].

☐ If agreement as to the content of a joint appendix proves impossible, review appellant's appendix when served and determine what documents should be included in preparing respondent's appendix:

☐ Request filing dates of any of appellant's documents to be added which are not endorsed filed [*see Cal. Rules of Ct., Rule 8.124(b)(1)(A)*].

☐ If necessary, review the court's files to determine the filing dates of all documents to be included.

☐ Assemble the additional documents to be included.

☐ Comply with all format requirements [*see Cal. Rules of Ct., Rules 8.124(d), 8.144(a)-(c)*].

☐ Put pleadings, etc., in chronological order [*see Cal. Rules of Ct., Rules 8.124(d)(a), 8.144(a)* and discussion in *§ 44.33[4]*].

☐ If a copy of a document or exhibit is in the possession of another party, request the document or exhibit or file a request in the appellate court pursuant to *Cal. Rules of Ct., Rule 8.124(c)* [*see* discussion in *§ 44.33[4][c]*].

☐ If exhibits are included, assemble them in numerical and/or alphabetical order following the pleadings [*see Cal. Rules of Ct., Rule 8.124(d)*].

☐ Once assembled, paginate the documents and prepare both an alphabetical and chronological index [*see Cal. Rules of Ct., Rules 8.124(d)(1), 8.144(a)*].

☐ Bind respondent's appendix [*see Cal. Rules of Ct., Rules 8.124(d)(3), 8.144(e)* and discussion in *§ 44.33[4][b]*]:

☐ Bind appendix separately from the brief.

☐ Bind on the left margin.

☐ Bind in more than one volumes with no more than 300 pages per volume.

☐ Do not split individual documents between volumes.

☐ Serve and file respondent's appendix with respondent's brief [*see Cal. Rules of Ct., Rule 8.124(e)(3)*].

[c] When Appellant Desires to Use Court's Original Files

☐ Consider whether to stipulate to this substitute for a clerk's transcript [*see Cal. Rules of Ct., Rule 8.128(a)(1)* and *§ 44.34*].

☐ If acceptable, execute stipulation for filing within 10 days of filing the notice of appeal, if not already done with the notice of appeal [*see Cal. Rules of Ct., Rule 8.128(a)(1)*].

☐ On receipt of index showing pagination of original files, assemble office copies in same order and paginate them to correspond with clerk's index.

☐ For documents listed in the index not in the office files, ignore gaps in pagination

unless missing documents are important for appeal, e.g., the minutes of the court.

☐ If documents are important for appeal, obtain copies from the clerk's office.

☐ If it is not possible to coordinate pagination with the office file, examine court's files.

☐ In either case, advise the clerk of the need to examine the original files immediately if no reporter's transcript was designated [*see Cal. Rules of Ct., Rule 8.128(b)(4)*].

Legal Topics:

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PART IV. PROCEDURAL CHECKLISTS

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§ 44.152 Reporter's Transcript or Alternative

[1] Appellant's Duties and Options

[a] Reporter's Transcript

☐ Determine if funds from Transcript Reimbursement Fund are available if client is without sufficient funds [*see Cal. Rules of Ct., Rule 8.130(c)* and discussion in *§ 44.52[3][d]*].

☐ Determine if partial transcript will be sufficient for the issues on appeal [*see Cal. Rules of Ct., Rule 8.130(a)(1), (2)* and discussion in *§ 44.52[2]*].

☐ Review court's files, if necessary, to determine date, nature and length of all oral proceedings, as well as the name(s) of the reporter(s) [*see Cal. Rules of Ct., Rule 8.130(a)(5)* and discussion in *§ 44.52[1]*].

☐ If the oral proceedings were computerized, consider purchasing the disks covering what is to be included.

☐ Serve and file notice of designation, or file stipulation, within 10 days of filing notice of appeal, if not already designated with notice of appeal [*see Cal. Rules of Ct., Rules 8.121(a)* and discussion in *§ 44.52[1], [2]*].

☐ Serve copy of designation or stipulation on all known reporters who transcribed any portion of the oral proceedings designated [*see Cal. Rules of Ct., Rule 8.130(a)(5)*].

☐ Serve designation or stipulation on clerk of reviewing court if using appendix or original court files for clerk's transcript [*see Cal. Rules of Ct., Rules 8.121(c)*].

☐ Simultaneously deposit estimated cost, reporter's waiver, or copy of application for payment by the Transcript Reimbursement Fund, unless designated proceedings have already been transcribed [*see Cal. Rules of Ct., Rule 8.130(b)* and discussion in *§ 44.52[3]*].

☐ Calendar and monitor preparation of transcript to be completed within 30 days of the notice of designation, absent an extension from the reviewing court [*see Cal. Rules of Ct., Rules 8.130(f)* and *8.60(b)* and discussion in *§ 44.52[5]*].

☐ On receipt of transcript from clerk, review it carefully to ensure that all proceedings designated were included.

☐ If there are omissions, file a notice of the omissions with the clerk immediately to correct record by adding them [*see Cal. Rules of Ct., Rule 8.155(b)(1)* and discussion in *§ 44.52[7]*].

[b] Settled Statement

☐ Determine if it is possible to avoid the use of this procedure [*see Cal. Rules of Ct., Rule 8.137* and *§ 44.34*].

☐ Procedure must or may be used under the following circumstances:

☐ A substantial cost saving will result and the statement can be settled without significantly burdening opposing parties or the court [*Cal. Rules of Ct., Rule 8.137(a)(2)(A)*].

☐ The designated oral proceedings were not reported or cannotbe transcribed [*Cal. Rules of Ct., Rule 8.137(a)(2)(B)*].

☐ The appellant is unable to pay for a reporter's transcript and funds are not available from the Transcript Reimbursement Fund [*Cal. Rules of Ct., Rule 8.137(a)(2)(C)*].

☐ Consider moving for new trial instead [*see Code Civ. Proc. §§ 657.1* and *914*].

☐ Serve and file motion to prepare settled statement within 10 days of filing notice of appeal [*see Cal. Rules of Ct., Rule 8.121(a)* and discussion in *§ 44.53[3][a]*].

☐ Serve and file proposed statement within 30 days thereafter [*see Cal. Rules of Ct., Rule 8.137(b)(1)*] and

discussion in *§ 44.53[3][b]*.

☐ If statement does not cover all oral proceedings, include a statement of the issues to be raised on appeal [*see Cal. Rules of Ct., Rule 8.137(b)(2)*].

☐ Calendar hearing date set by clerk after respondent's proposed amendments have been served and filed, or time for amendments (20 days) has expired [*see Cal. Rules of Ct., Rule 8.137(b)(4)*].

☐ Prepare for and attend hearing to settle the statement [*see Cal. Rules of Ct., Rule 8.137(c)*].

☐ Prepare statement pursuant to the trial court's rulings, and serve and file it within the time ordered by the court [*see Cal. Rules of Ct., Rule 8.137(c)(2)* and discussion in *§ 44.53[3][e]*].

☐ Comply with all format requirements [*see Cal. Rules of Ct., Rule 8.137(b)* and discussion in *§ 44.53[5]*].

☐ If the differences about what happened are crucial to appeal, consider moving for additional time to designate reporter's transcript, if possible.

☐ If respondent makes no objections within five days of the filing of the statement, be sure clerk presents statement for certification by the court [*see Cal. Rules of Ct., Rule 8.137(c)(3)* and discussion in *§ 44.53[4]*].

☐ Alternatively, parties may stipulate that engrossed statement is correct [*see Cal. Rules of Ct., Rule 8.137(c)(4)*].

[c] Agreed Statement

☐ If facts are undisputed and opposing counsel is receptive to stipulating to facts, consider using agreed statement [*see Cal. Rules of Ct., Rule 8.134* and *§ 44.34*].

☐ Within 10 days of filing the notice of appeal, file stipulation with opposing counsel that you are attempting to prepare agreed statement [*see Cal. Rules of Ct., Rules 8.121(a), 8.134(b)(1)* and discussion in *§ 44.54[3][a]*], extending time to designate the record under the other rules governing the preparation of the record [*see Cal. Rules of Ct., Rule 8.134(b)*].

☐ If an agreed statement is prepared, file it in the superior court within 40 days of the filing of the notice of appeal [*see Cal. Rules of Ct., Rule 8.134(b)(2)* and discussion in *§ 44.54[3][c]*].

☐ Comply with content requirements [*see Cal. Rules of Ct., Rule 8.134(a)(2), (3)*].

☐ Comply with all format requirements [*see Cal. Rules of Ct., Rule 8.134(a)*].

☐ If an agreed statement satisfactory to the parties is not possible, designate the record under *Cal.*

Rules of Ct., Rule 8.121, within 50 days of the filing of notice of appeal [*see Cal. Rules of Ct., Rule 8.134(b)(3)*].

[d] When Appeal Is Abandoned or Settled

☐ Notify the superior and reviewing courts if appeal is abandoned or settled [*see Cal. Rules of Ct., Rule 8.244*, and *§ 44.15*].

☐ Within 45 days after filing a notice of settlement, the appellant who filed the notice of settlement must file either an abandonment under *Cal. Rules of Ct., Rule 8.244(b)*, if the record has not yet been filed in the court of appeal, or a request to dismiss under *Cal. Rules of Ct., Rule 8.244(c)*, if the record has already been filed in the court of appeal [*Cal. Rules of Ct., Rule 8.244(a)(3)*].

☐ Request return of any unused portion of fee deposits, if applicable.

[2] Respondent's Duties and Options

[a] When Appellant Designates a Reporter's Transcript

☐ If oral proceedings were computerized, consider purchasing the disks covering what is to be included.

☐ Review appellant's designation in light of expected issues to be raised and determine if additional proceedings need to be designated [*see Cal. Rules of Ct., Rule 8.130(a)(3)*].

☐ Particularly ensure that all proceedings needed to support all issueson which respondent has the burden of producing the record are included.

☐ Serve and file respondent's designation of additions within 10 days of service of appellant's notice [*see Cal. Rules of Ct., Rule 8.130(a)(3)* and discussion in *§ 44.52[4]*].

☐ Simultaneously deposit required fee for estimated cost of the transcription of the portions of the oral proceedings to be added [*see Cal. Rules of Ct., Rule 8.130(b)*].

☐ Serve copy of the designation on all reporters who transcribed any portion of the oral proceedings designated [*see Cal. Rules of Ct., Rule 8.130(a)(5)*].

☐ Serve copy of the designation on the clerk of the reviewing court if an appendix or the original court's files are used for a clerk's transcript [*see Cal. Rules of Ct., Rule 8.121(c)*].

☐ Arrange with reporter(s) for payment of copy of the transcript, or notify appellant's counsel that respondent will not obtain a separate copy [*see* Cal. Rules of Ct., Rule 8.152(b)].

☐ Calendar and monitor reporter's preparation of transcript to ensure that it is completed within 30 days of the notice of designation, absent an extension from the reviewing court [*see Cal. Rules of Ct., Rules 8.122(d), 8.130(f)* and discussion in *§ 44.52[5]*].

☐ Consider moving for dismissal of appeal if record is not timely filed [*see Cal. Rules of Ct., Rule 8.140(a)*; *see generally* Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal*].

☐ On receipt of transcript from clerk, review it carefully to ensure that all proceedings designated were included.

☐ If there are omissions, serve a notice of the omissions with the clerk immediately to correct record by adding them [*see Cal. Rules of Ct., Rule 8.155(b)(1)* and discussion in *§ 44.52[7]*].

[b] When Appellant Does Not Designate a Reporter's Transcript

☐ Since respondent may not designate a reporter's transcript [*see Cal. Rules of Ct., Rule 8.130(a)(4)*], seek relief from the reviewing court to avoid a miscarriage of justice [*see Cal. Rules of Ct., Rules 8.130(c), 8.124(j), 8.128(c)*].

[c] When Appellant Desires or Must Use a Settled Statement in Lieu of a Reporter's Transcript

☐ Consider opposing use of this procedure [*see* discussion in *§ 44.53*].

☐ If unopposed, review carefully appellant's proposed statement when served, and serve and file proposed amendments to protect respondent's interests within 20 days [*see Cal. Rules of Ct., Rule 8.137(b)(4)* and discussion in *§ 44.53[3][c]*].

☐ Calendar and attend hearing to settle differences between proposed statement and amendments [*see Cal. Rules of Ct., Rule 8.137(c)(2)*].

☐ Review statement prepared by appellant to ensure it complies with court's order settling the statement [*see Cal. Rules of Ct., Rule 8.137(c)(3)*].

☐ Serve and file any objections within five days of service of the engrossed statement [*see Cal. Rules of Ct., Rule 8.137(c)(3)* and discussion in *§ 44.53[3][f]*].

☐ If appellant's engrossed statement accurately follows court's order settling the statement, consider stipulating that it is correct [*see Cal. Rules of Ct., Rule 8.137(c)(4)* and discussion in *§ 44.53[4]*].

[d] When Appellant Desires to Use Agreed Statement in Lieu of Reporter's Transcript

☐ Consider whether it is reasonable to expect that relevant facts may be fully and accurately stated

without dispute [*see* discussion in *§ 44.54*].

☐ If so, execute stipulation for filing within 10 days of filing notice of appeal [*see Cal. Rules of Ct., Rule 8.121(a)* and discussion in *§ 44.54[3][a]*].

☐ Make good faith effort to agree on contents of the statement.

Legal Topics:

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§ 44.153 Record Involving Multiple Appeals

[1] Appellant and Cross Appellant's Checklist

☐ Consult with other parties who appeal or cross appeal to determine whether the contents of record can be designated by stipulation, if record prepared other than under *Cal. Rules of Ct., Rules 8.130* and 8.122 is desired [*see Cal. Rules of Ct., Rule 8.147(a)*].

☐ Consult with clerk of appellate court to determine if parties may stipulate to proceed under *Cal. Rules of Ct., Rule 8.124* or *8.128*, if that is desired.

☐ Designate portions of record in any prior appeal to be incorporated by reference [*see Cal. Rules of Ct., Rules 8.124(b)(2), 8.147(b)* and discussion in *§ 44.72*].

☐ Pay share of fees to clerk and reporter(s) when notices are received [*see Cal. Rules of Ct., Rule 8.147(a)(2)*].

[2] Respondent's Checklist

☐ Consider if contents of record can be designated by stipulation and whether to agree to prepare the record other than under *Cal. Rules of Ct., Rules 8.130* and 8.122 [*see* Cal. Rules of Ct., Rule 8.47(a)(1)].

☐ Review appellants' designations carefully to determine if counterdesignations are required [*see Cal.*

Rules of Ct., Rules 8.130, 8.122, *8.147*].

☐ If portions of record in prior appeal are designated by appellant(s), determine if other portions should be designated.

☐ Pay fees for cost of additions for the record in the present appeal, and from any prior appeal, within 10 days of mailing of notice by clerk [*see Cal. Rules of Ct., Rules 8.130(b), 8.122(b)*].

☐ Request clerk of appellate court to obtain the record in the prior appeal, if needed.

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§ 44.154 Transmission and Filing of Completed Record

☐ Preserve and retain exhibits for later transmission to the appellate court, if they were returned by the trial court after trial.

☐ Request clerk to forward all exhibits needed to the appellate court, on receipt of notice from appellate court of the date set for argument [*see Cal. Rules of Ct., Rule 8.224(a)* and discussion in *§ 44.81[3]*].

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§ 44.155 Augmentation or Correction Record

[1] In Trial Court When Designated Matters Omitted

☐ On receipt of record, determine if it contains everything designated.

☐ If not, serve and file notice to the clerk to certify the omitted material and forward it to the appellate court [*see Cal. Rules of Ct., Rule 8.155(b)(1)* and discussion in *§ 44.94*].

☐ Serve copy of notice on the clerk of the appellate court [*see Cal. Rules of Ct., Rule 8.155(b)(1)*].

☐ Check local appellate rules; this procedure is required in some districts, and is the easiest method to solve inadvertent omissions in the record.

[2] In Appellate Court When Additional Matters Needed

[a] When Seeking to Augment

☐ Serve and file request to augment as soon as need is discovered [*see Cal. Rules of Ct., Rule 8.155(a)(1)* and discussion in *§ 44.93[2]*].

☐ Check local appellate rules for any applicable time limits, absent a showing of good

cause.

☐ Attach copies of any documents lodged or filed in the case which are to be added to the record [*see Cal. Rules of Ct., Rule 8.155(a)(2)*].

☐ Attach copies of any documents lodged or filed in the case which are to be added to the record [*see Cal. Rules of Ct., Rule 8.155(a)(2)*].

☐ Consecutively number the pages of the attachments, beginning with the number one [*see Cal. Rules of Ct., Rule 8.155(a)(2)*].

☐ Order transcript of oral proceedings needed and attach it to the motion, as above, or identify the proceedings with specificity [*see Cal. Rules of Ct., Rule 8.155(a)(2), (3)*].

☐ Order transcript of oral proceedings needed and attach it to the motion, as above, or identify the proceedings with specificity [*see Cal. Rules of Ct., Rule 8.155(a)(2)*].

☐ Check local appellate rules for additional requirements.

[B] When Opposing Augmentation

☐ Serve and file opposition within 15 days after the motion requesting augmentation is filed [*see Cal. Rules of Ct., Rule 8.54(a)* and discussion in *§ 44.93[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on AppealCivil ProcedureAppealsAppellate JurisdictionLower Court Jurisdiction

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART IV. PROCEDURAL CHECKLISTS

5-44 California Forms of Pleading and Practice--Annotated § 44.156

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§ 44.156 Correction of Record

☐ Seek to stipulate to the correction of any error in the record [*see Cal. Rules of Ct., Rule 8.155(c)(1)* and discussion in *§ 44.95*].

☐ Otherwise, move in appellate court for the correction of the record [*see Cal. Rules of Ct., Rule 8.155(c)(1)*].

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§ 44.157 Filing Records Under Seal

[1] Filing Records Sealed by Trial Court

☐ If all or part of record on appeal (or record in original writ proceeding) was sealed by trial court order, file this portion of the record under seal in reviewing court.

☐ Include in the record on appeal all of the following:

☐ The trial court order sealing the records.

☐ The motion or application to seal the record and all supporting and opposing papers.

[2] Sealing Records Not Previously Sealed

☐ When seeking to file all or portion of record on appeal under seal, and records sought be filed under seal were not previously sealed by trial court order, prepare and file motion in reviewing court requesting orderdirecting records to be filed under seal, as follows:

☐ Determine whether the reviewing court may properly order the records sealed under the required standards set out in *Cal. Rules of Ct., Rule 2.550* [*Cal. Rules of Ct., Rule*

8.46(e)(6); *see § 44.104[1]*; for detailed discussion of these standards, *see* Ch. 551, *Trial*].

☐ Prepare and file motion or application to file records under seal, together with proposed order and supporting papers [*see Cal. Rules of Ct., Rule 8.46(e)* and § 44.104[1]; for forms of motion and proposed order, *see §§ 44.300*, *44.302*]. If necessary to prevent disclosure of material proposed to be filed under seal, prepare both redacted version of papers for filing, and complete version for lodging conditionally under seal [*Cal. Rules of Ct., Rule 8.46(e)(4)*].

☐ Prepare those records proposed to be filed under seal for lodging with the reviewing court, and lodge such records with reviewing court at the time the motion or application is made, unless good cause exists for not lodging the records [*Cal. Rules of Ct., Rule 8.46(e)(2)*]:

☐ Place records in envelope or container labeled "CONDITIONALLY UNDER SEAL" and affix cover sheet [*Cal. Rules of Ct., Rule 8.46(e)(3)*; for form of cover sheet, *see § 44.301*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCourt RecordsCivil ProcedureAppealsRecords on Appeal

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5-44 California Forms of Pleading and Practice--Annotated §§ 44.158-44.199

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[Reserved]

§§ 44.158[Reserved]

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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
A. Overview of the Record on Appeal

5-44 California Forms of Pleading and Practice--Annotated § 44.200

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§ 44.200 Notice to Superior Court of Settlement Prior to Filing of Record

[1] FORM Notice to Superior Court of Settlement Prior to Filing of Record

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF SETTLEMENT OF APPEAL
Defendant and Respondent/Appellant.	)	
	)	
	)	

_____

To the clerk of the court:

NOTICE IS HEREBY GIVEN that the parties to the appeal taken in this action on _____ [*date*], by _____ [*identify, e.g.*, appellant and plaintiff _____ (*name*)], have settled the case.

[*If applicable, add the following*]

On _____ [*date*], _____ [*identify party, e.g.*, appellant and plaintiff/defendant _____ (*name*)] deposited the sum of $_____ with this court for the preparation of the reporter's transcript. It is requested that a sum be returned by delivery to the undersigned, attorney of record for [*identify party, e.g.*, appellant and plaintiff _____ (*name*)] equal to that portion of the deposit in excess of the actual cost of preparation of the record on appeal up to the date of this notice.]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*specify, e.g.*, Plaintiff and Appellant _____
(*name*)]

[2] Use of Form

The form set out in [1], *above*, is a notice of settlement required to be given in writing by the appellant to the clerk of the superior court when a case has settled before the record on appeal has been completed and transmitted to the court ofappeal. Proof of this filing of this notice must be included with the additional written notice of settlement that must be filed with the court of appeal [*see Cal. Rules of Ct., Rule 8.244(a)*; *see Huschke v. Slater (2008) 168 Cal. App. 4th 1153, 1160, 86 Cal. Rptr. 3d 187* (appellant, not respondent, has duty to file notice of settlement)]. For further discussion, see *§ 44.15*.

For a form of notice of settlement to be filed with the court of appeal, and further discussion of notice of settlement under *Cal. Rules of Ct., Rule 8.244(a)*, see *Ch. 51, Appeal: Hearing and Decision, §§ 51.12[d][1]* and *51.50*.

Note that a notice of settlement is a procedural device to assist the trial and appellate courts to halt, as soon as possible, further dedication of judicial resources in an appeal that has been settled. The appellant or the parties, however, must still move for a voluntary or stipulated dismissal to obtain a final disposition of the appeal. The superior court may dismiss an appeal only if the record has not yet been completed and filed with the court of appeal [*see Cal. Rules of Ct., Rule 8.244(c)*]. For a form of dismissal before the record has been completed and filed, see *§ 44.201*. For further discussion of dismissal generally and forms for use after the record has been completed and filed, see Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureAppealsRecords on Appeal

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PART V. FORMS
A. Overview of the Record on Appeal

5-44 California Forms of Pleading and Practice--Annotated § 44.201

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§ 44.201 Voluntary Dismissal of Appeal Before Record Is Filed

[1] Abandonment of Appeal by Appellant

[a] FORM Voluntary Dismissal of Appeal Before Record Is Filed--Abandonment of Appeal by Appellant

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	NO. _____
_____ [*name*],	)	VOLUNTARY DISMISSAL OF APPEAL
Defendant and Respondent/Appellant.	)	
	)	
	)	

To the clerk of the court:

Appellant and plaintiff/defendant _____ [*name*] hereby requests that the appeal herein, taken by her/him/it from the _____ [*either* judgment *or* order] of this court, _____ [*either* entered *or* made] on _____ [*date*], be dismissed with/without prejudice to another appeal pursuant to *Rule 8.244(c) of the California Rules of Court*.

[*If applicable, add the following:*]

On _____ [*date*], _____ [*identify party, e.g.*, appellant and plaintiff/defendant _____ (*name*)] deposited the sum of $_____ with this court for the preparation of the reporter's transcript. It is requested that a sum be returned by delivery to the undersigned, attorney of record for [*identify party, e.g.*, plaintiff and appellant _____ (*name*)] equal to that portion of the deposit in excess of the actual cost of preparation of the record on appeal up to the date of this notice.]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Appellant and Plaintiff/Defendant
_____ [*name*]

[b] Use of Form

The form set out in [a], *above*, is for use by an appellant to request the superior court to dismiss an appeal pursuant to appellant's voluntary request under *Cal. Rules of Ct., Rule 8.244(c)*, before the record on appeal has been completed and filed with the court of appeal. For further discussion, see *§ 44.16*.

For discussion and forms relating to voluntary dismissal after the record has been completed and filed, see Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* . See also that chapter for a form of motion to vacate a voluntary dismissal directed to the court of appeal.

[2] Stipulated Dismissal

[a] FORM Voluntary Dismissal of Appeal Before Record Is Filed--Stipulated Dismissal

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	NO. _____
_____ [*name*],	)	STIPULATION TO DISMISS APPEAL
Defendant and Respondent/Appellant.	)	
	)	
	)	

To the clerk of the court:

THE PARTIES HEREBY STIPULATE, by and through their respective counsel, that the appeal taken in this action by _____ [plaintiff/defendant] on _____ [*date*], from the _____ [order made *or* judgment entered] on _____ [*date*], be dismissed _____ [with/without] prejudice.

[*If applicable, add the following:*]

On _____ [*date*], _____ [*identify party, e.g.,* appellant and plaintiff/defendant _____ (*name*)] deposited the sum of $_____ with this court for the preparation of the reporter's transcript. It is requested that a sum be returned by delivery to the undersigned, attorney of record for [*identify party, e.g.,* plaintiff and appellant _____ (*name*)] equal to that portion of the deposit in excess of the actual cost of preparation of the record on appeal up to the date of this notice.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Appellant _____ [*name*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[b] Use of Form

The form set out in [a], *above*, is for use as a stipulation to obtain dismissal of an appeal, to be filed with the superior court clerk, before the record on appeal had been completed and filed with the court of appeal, pursuant to *Cal. Rules of Ct., Rule 8.244(c)*. For further discussion, see *§ 44.16*.

For discussion and forms relating to voluntary dismissal after the record has been completed and filed, see Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* . See also that chapter for a form of motion to vacate a voluntary dismissal directed to the court of appeal.

[3] Abandonment of Appeal (Unlimited Civil Case)--Judicial Council Form APP-005

[a] FORM Voluntary Dismissal of Appeal Before Record Is Filed--Abandonment of Appeal (Unlimited Civil Case)

Click here to view image.

[b] Use of Form

The form set out in [a], *above*, was adopted by the Judicial Council effective, January 1, 2007. If the appellant decides not to proceed with the appeal and therecord has not yet been filed in the court of appeal, the appellant must file an abandonment of appeal in the superior court. The appellant may use this form or the voluntary dismissal of appeal *form in § 44.201[1]*. The form must be accompanied by a proof of service on all parties to the appeal.

See Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* , for discussion and forms relating to voluntary dismissal after the record has been completed and filed, and for a form of motion to vacate a voluntary dismissal directed to the court of appeal.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsDismissals of AppealsVoluntary DismissalsCivil ProcedureAppealsRecords on Appeal

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A. Overview of the Record on Appeal

5-44 California Forms of Pleading and Practice--Annotated §§ 44.202-44.209

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[Reserved]

§§ 44.202[Reserved]

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PART V. FORMS
B. The Clerk's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.210

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§ 44.210 Appellant's Notice to Prepare Clerk's Transcript and Designation of Contents

[1] FORM Appellant's Notice to Prepare Clerk's Transcript and Designation of Contents

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	NOTICE TO PREPARE CLERK'S TRANSCRIPT
Defendant and Appellant/Respondent.	)	
	)	
	)	

To the clerk of the court:

NOTICE IS HEREBY GIVEN that _____ [*identify designating party, e.g.,* Plaintiff/Defendant and Appellant _____ (*name*)] requests that a clerk's transcript be prepared. The notice of appeal in this action was filed on _____ [*date*].

Plaintiff/Defendant and Appellant specifically designates the following papers and records on file or lodged with you to be incorporated together with the items otherwise required to be included in the record on appeal:

1. _____ [*List as consecutively numbered items all papers or records on file or lodged with the superior court clerk that need to be included in the clerk's transcript in order to review all the issues raised on appeal, including the clerk's minutes, any written opinion of the superior court, affidavits or declarations, and written instructions given and refused. Describe each document with particularity, including the title of the document and the date it was filed, or, if the filing date is not readily available, the date it was signed. Appellant's designation of all minute orders, all minute orders entered between specified dates, or all written jury instructions prepared by the court or tendered by a party, whether given, refused, or withdrawn, is sufficient designation of those documents (Cal. Rules of Ct., Rule 8.122(a)(1)). If requesting that EXHIBITS be copied into the clerk's transcript, rather than transmitted later, specifically request that the clerk copy and include such exhibits, providing the exhibit number, a brief description, and the admission status of the exhibit (see Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, Second App. Dist., Rule 3(a)(2))*].

2. _____ [*Continue listing each item separately, as needed, providingproper identification for the items as described above. It is recommended that ALL items be specified, including those listed in Cal. Rules of Ct., Rule 8.122(b) (the notice of appeal, the judgment appealed from, etc.) as being required to be included by the clerk even if not specifically designated*].

[*ADD the following to incorporate prior record(s) by reference*]

Plaintiff/Defendant and Appellant also requests that _____ [all *or* the following specified portions] of the record on appeal from the _____ [judgment *or* order] entered in this action on _____ [*date*], to the Court of Appeal of the State of California, _____ [*specify, e.g.*, First Appellate District, Division Three], Civil Number _____, be incorporated by reference in the record on this appeal without being copied in the clerk's transcript:

1. _____ [*If incorporating only portions by reference, list and specify as appropriate*].

2. _____ [*Continue listing items to be incorporated by reference as necessary*].

[*CONTINUE*]

_____ [*date*]

By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*party's status, e.g.*, Defendant and Appellant)
_____ (*party's name*)]

[2] Use of Form

The form set out in [1], *above*, is a general form of notice for use by appellant in requesting that the superior court clerk prepare a clerk's transcript. It includes instructions for specifying and identifying particular papers or records to be included required under *Cal. Rules of Ct., Rule 8.122(a)* or Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, Second App. Dist., Rule 3(b) (the latter of which are recommended for use in other districts), and additional, recommended instructions for specifying and identifying items under *Cal. Rules of Ct., Rule 8.122(b)(3)* (even though these items are required to be included even if not specifically designated). For further discussion of the items that may be designated for inclusion in a clerk's transcript, including those that *must* be specified in order to be included in the record, see *§§ 44.31, 44.32[1][b], [d]*. In the alternative, the appellant may use Judicial Council Form APP-003, Notice

Designating Record on Appeal, to designate the record on appeal. For this form, see *§ 44.213*.

The notice requesting preparation of a clerk's transcript may be combined with a notice requesting preparation of the reporter's transcript, the notice of appeal, or both. For further discussion, see *§ 44.32[1][c]*.

This form must be served and filed with the superior court clerk within 10 days after the date of filing of the notice of appeal. For further discussion regarding this deadline, the 15-day "grace period," and service and filing requirements, see *§ 44.32[1][a]*. See also *§ 44.14[2]* for discussion of proceedings in the appellate court for an extension of time or relief from default.

The Second District has also adopted a printed form, entitled "Designation of the Record on Appeal," which complies with Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, Second App. Dist., Rule 3(a), and which "may" be used to designate the record in that court [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, Second App. Dist., Rule 3(b)]. Parties designating a clerk's transcript for an appeal in that district may use the printed form in lieu of the form set out in [1], *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on AppealGovernmentsCourtsClerks of Court

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B. The Clerk's Transcript and Its Alternatives

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§ 44.211 Notice to Prepare Clerk's Transcript in Probate Proceedings

[1] FORM Notice to Prepare Clerk's Transcript in Probate Proceedings

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Estate of _____ [*name*]	)	
Deceased.	)	
_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	CASE NO. _____
vs.	)	NOTICE TO PREPARE CLERK'S TRANSCRIPT
_____ [*name*],	)	
Defendant and Appellant/Respondent.	)	
	)	
	)	

To the clerk of the court:

NOTICE IS HEREBY GIVEN that _____ [*name*] has filed an appeal from the order _____ [*specify an appealable order under Prob. Code § 1300 et seq.; e.g.,* under *Probate Code Section 1303*, entered on _____ (*date*), revoking the will admitted to probate on _____ (*date*)].

Appellant requests the preparation of the clerk's transcript and designates the following papers and records on file or lodged with you to be incorporated in the record on appeal:

[*List as consecutively numbered items all papers or records on file or lodged with the superior court clerk that need to be included in the clerk's transcript in order to review all the issues raised on appeal, e.g., the items listed below. Describe each document with particularity, including the title of the document and the date it was filed, or, if the filing date is not readily available, the date it was signed.*]

1. Last Will and Testament, filed _____ [*date*].

2. Codicil to Last Will and Testament, filed _____ [*date*].

3. Decree of Settlement of First and Final Account and Report of Administrator, and of Final Distribution, filed and entered on _____ [*date*].

4. Findings of Fact and Conclusions of Law signed on _____ [*date*] and filed and entered on _____ [*date*].

5. _____ [*Continue as necessary*].

_____ [*date*].
By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*party's status, e.g.,* Defendant and Appellant)
_____ (*party's name*)]

[2] Use of Form

The form set out in [1], *above*, is an alternative notice to a superior clerk to prepare a clerk's transcript in an appeal from an order entered under the Probate Code. For further discussion, see the comments to the general form of notice *set out in § 44.210[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewCivil ProcedureAppealsRecords on Appeal

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PART V. FORMS
B. The Clerk's Transcript and Its Alternatives

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§ 44.212 Respondent's Notice Designating Additions to the Clerk's Transcript

[1] FORM Respondent's Notice Designating Additions to the Clerk's Transcript

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	RESPONDENT'S NOTICE DESIGNATING ADDI-
Defendant and Appellant/Respondent.	)	TIONS TO CLERK'S TRANSCRIPT
	)	
	)	

_____

To the clerk of the court:

NOTICE IS HEREBY GIVEN that _____ [*identify designating party, e.g.,* Plaintiff/Defendant and Respondent _____ (*name*)] requests that the following papers and records be included in the clerk's transcript to be prepared for the appeal in this action, in addition to the items designated in notice of Appellant _____ [*name*] filed on _____ [*date*]:

1. _____ [*List as consecutively numbered items all ADDITIONAL papers or records on file or lodged*

with the superior court clerk that need to be included in the clerk's transcript in order for respondent to oppose the appeal adequately or to enable the court of appeal to review issues raised by respondent as cross appellant, etc., including the clerk's minutes, any written opinion of the superior court, affidavits or declarations, and written instructions given and refused not already designated by appellant. Describe each document with particularity, including the title of the document and the date it was filed, or, if the filing date is not readily available, the date it was signed. Designation of all minute orders, all minute orders entered between specified dates, or all written jury instructions prepared by the court or tendered by a party, whether given, refused, or withdrawn, is sufficient designation of those documents (Cal. Rules of Ct., Rule 8.122(a)(1)). If requesting that EXHIBITS be copied into the clerk's transcript, rather than transmitted later, specifically request that the clerk copy and include such exhibits, providing the exhibit number, a brief description, and the admission status of the exhibit (see Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, Second App. Dist., Rule 3(a)(2))].

2. _____ [*Continue listing each item separately, as needed, providing proper identification for the items as described above*].

[*ADD the following to incorporate prior record(s) by reference*]

Plaintiff/Defendant and Respondent also requests that _____ [all *or* the following specified portions] of the record on appeal from the _____ [judgment *or* order] entered in this action on _____ [*date*], to the Court of Appeal of the State of California, _____ [*specify, e.g.*, First Appellate District, Division Three], Civil Number _____, be incorporated by reference in the record on this appeal without being copied in the clerk's transcript:

1. _____ [*If incorporating only portions by reference, list and specify as appropriate*].

2. _____ [*Continue listing items to be incorporated by reference as necessary*].

[*CONTINUE*]

_____ [*date*]

By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____
(*party's status, e.g.*, Defendant and Respondent)
_____ (*party's name*)]

[2] Use of Form

The form set out in [1], *above*, is a general form of notice for use by respondent in designating additional papers or records to be included in the clerk's transcript, not already designated for inclusion by appellant. It includes instructions for specifying and identifying particular papers or records to be included as required under *Cal. Rules of Ct., Rule 8.122(a)(1)*, or Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, Second App. Dist., Rule 3(b). For further discussion of the items that may be designated for inclusion in a clerk's transcript, including those that *must* be specified in order to be included in the record, see *§§ 44.31, 44.32[2][b]*.

This form must be served and filed with the superior court clerk within 10 days after the date of filing of appellant's notice to prepare the clerk's transcript. For further discussion regarding this deadline and service and filing requirements, see *§ 44.32[2][a]*. See also *§ 44.14[2]* for discussion of proceedings in the appellate court for an

extension of time or relief from default.

The Second District has also adopted a printed form, entitled "Designation of the Record on Appeal," which complies with Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, Second App. Dist., Rule 3(a), and which "may" be used to designate the record in that court [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, Second App. Dist., Rule 3(b)]. Parties designating a clerk's transcript for an appeal in that district may use the printed form in lieu of the form set out in [1], *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

California Forms of Pleading and Practice--Annotated

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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
B. The Clerk's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.213

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§ 44.213 Appellant's Notice Designating Record on Appeal (Unlimited Civil Case)--Judicial Council Form APP-003

[1] FORM Notice Designating Record on Appeal (Unlimited Civil Case)

Click here to view image.

[2] Use of Form

The form set out in [1], *above*, is adopted for optional use [*Cal. Rules of Ct., Rule 1.35*]. An appellant may use this form to designate the record on appeal. See *§ 44.210[2]* concerning requirements applicable to designating the record on appeal, generally.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

California Forms of Pleading and Practice--Annotated

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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
B. The Clerk's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.214

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§ 44.214 Respondent's Notice Designating Record on Appeal (Unlimited Civil Case)--Judicial Council Form APP-010

[1] FORM Respondent's Notice Designating Record on Appeal (Unlimited Civil Case)--Judicial Council Form APP-010

Click here to view image.

[2] Use of Form

The form set out in [1], *above*, is adopted for optional use [*Cal. Rules of Ct., Rule 1.35*]. A respondent may use this form to designate the record on appeal. See *§ 44.210[2]* concerning requirements applicable to designating the record on appeal, generally.

This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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B. The Clerk's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated §§ 44.215-44.219

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[Reserved]

§§ 44.215[Reserved]

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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
B. The Clerk's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.220

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§ 44.220 Notice of Election to Prepare Appendix

[1] FORM Notice of Election to Prepare Appendix in Lieu of Clerk's Transcript

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	NOTICE OF ELECTION TO PREPARE AP-
Defendant and Appellant/Respondent.	)	PENDIX
	)	
	)	

_____

To the clerk of the court:

NOTICE IS HEREBY GIVEN that _____ [*specify, e.g.,* Plaintiff/Defendant and Appellant _____ (*name*)] elects, pursuant to *California Rules of Court, Rule 8.124*, that an appendix or appendices be used in lieu of a clerk's transcript. The notice of appeal in this action was filed on _____ [*date*].

_____ [*date*]

By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*party's status, e.g.,* Defendant and Appellant)
_____ (*party's name*)]

[2] Use of Form

The form set out in [1], *above*, is for use in providing notice to the superior court clerk, by "any party," of an election to use an appendix under *Cal. Rules of Ct., Rule 8.124* in lieu of a clerk's transcript under *Cal. Rules of Ct., Rule 8.122* [*Cal. Rules of Ct., Rule 8.124(a)(1)*, and discussion in *§ 44.33[3][a]*]. In the alternative, the appellant may use Judicial Council Form APP-003, Notice Designating Record on Appeal, to provide notice to the superior court clerk of an election to use an appendix. For this form, see *§ 44.213*.

This notice of election may be combined with a notice to prepare a reporter's transcript, or both may be combined with the notice of appeal [*Cal. Rules of Ct., Rule 8.121(a)*]. For a form of such combined notice, see *Ch. 42, Appeal: Notice of Appeal, § 42.90[3]*.

For service and filing requirements, see *§ 44.33[3][a][i]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

California Forms of Pleading and Practice--Annotated

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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
B. The Clerk's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.221

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§ 44.221 Stipulation re Contents of Joint Appendix

[1] FORM Stipulation re Contents of Joint Appendix

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	STIPULATION RE CONTENTS OF JOINT AP-
Defendant and Appellant/Respondent.	)	PENDIX
	)	
	)	

To the clerk of the court:

THE PARTIES HEREBY STIPULATE, through their respective counsel, that copies of the following documents and papers constitute the joint appendix to be used in lieu of a clerk's transcript, pursuant to *California Rules of Court, Rule 8.124*:

1. _____ [*List and number the documents and papers agreed to be included in the joint appendix, listing them in chronological order, including also the filing date for each paper or record. Include all documents*

required under Cal. Rules of Ct., Rules 8.122(b)(1) and 8.124(b)(1)(B), as applicable. If exhibits are included, list them in the order of their date of admission or rejection in evidence. Documents listed in this stipulation must be conformed to show the date of filing, if the clerk's date-stamp does not appear on them. The last document listed in this stipulation should be this stipulation itself. When arranged in chronological order, the list can be readily adapted as a chronological index at the front of the appendix. This stipulation is not filed with the superior court, but must be filed as part of the appendix (Cal. Rules of Ct., Rule 8.124(b)(1)(D)].

2. _____ [*Continue separately numbered items, with date of filing, in chronological order, as necessary*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff/Defendant and Appellant _____ [*name*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant/Plaintiff and Respondent _____ [*name*]

[2] Use of Form

The form set out in [1], *above*, is for use by both parties preparing a joint appendix; the appendix must include their stipulation as to its contents [*Cal. Rules of Ct., Rule 8.124(b)(1)(D)*; *see* discussion in *§ 44.33[3][c]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

California Forms of Pleading and Practice--Annotated

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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
B. The Clerk's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.222

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§ 44.222 Motion Opposing Use of Appendix

[1] FORM Motion Opposing Use of Appendix

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	CASE NO. _____
Plaintiff and Appellant/Respondent,	)	NOTICE OF MOTION AND MOTION OPPOSING
vs.	)	ELECTION TO USE APPENDIX SUPPORTING
_____ [*name*],	)	DECLARATION OF _____ [*name*],
Defendant and Appellant/Respondent.	)	AND SUPPORTING MEMORANDUM
	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.*, plaintiff and respondent _____ (*name*)] and to _____ [*name*] his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant and appellant] _____ [*name*] will, and does, move for an order under *Rule 8.124(a)(1) of the California Rules of Court* for an order that the provisions of *Rule 8.124 of the California Rules of Court*, regarding use of an appendix in lieu of clerk's transcript, shall not govern in the preparation of the record in the appeal of _____ [*specify, e.g.*, Defendant and Appellant _____ (*name*)], taken from the judgment/order of this court entered on _____ [*date*]. The motion will be made on the grounds that _____ [*specify good cause for granting order*].

The motion will be based on this notice of motion, on the declaration of _____ [*name*], and the supporting memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*Specify other relevant facts showing good cause why the provisions for an appendix in lieu of a clerk's transcript, under Rule 8.124 of the California Rules of Court, should not apply in the preparation of the record on appeal in this particular case*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion*]

[2] Use of Form

The form set out in [1], *above*, is for use by a party who opposes the use of an appendix in lieu of a clerk's transcript. It must be served and filed within 10 days after the service of the notice of election by another party to proceed by way of

appendix [*Cal. Rules of Ct., Rule 8.124(a)(1)*; *see* discussion in *§ 44.33[3][b]*].

The notice of motion and motion set out in [1], *above*, should include a proposed order granting the motion and, more importantly, specifying the means by which the record should be prepared, if, for good cause shown, the appendix is for some reason not appropriate under the circumstances.

For discussion and forms relating to noticed motions and proposed orders generally, including service and proof of service requirements, see Ch. 372, *Motions and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsMotions on AppealCivil ProcedureAppealsRecords on Appeal

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PART V. FORMS
B. The Clerk's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.223

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§ 44.223 Cover for Joint Appendix

[1] FORM Cover for Joint Appendix

IN THE COURT OF APPEAL OF CALIFORNIA
_____ [*number, e.g.,* SECOND] APPELLATE DISTRICT
[DIVISION _____ (*number, e.g.,* SEVEN)]

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____ [*appellate court case number*]
_____ [*name*],	)	Superior Court No. _____ [*superior court case num-*
Defendant and Appellant/Respondent.	)	*ber from which appeal was taken*]
	)	
	)	

_____

_____

JOINT APPENDIX IN LIEU OF CLERK'S TRANSCRIPT
[*If more than one volume, add, e.g.:*]
VOLUME I (Pages 1-_____)

Appeal from the Superior Court of the County of _____ [*name*], No. _____ [*trial court case number*].
The Honorable _____ [*name*], Judge.

_____ [*Firm name, if any*]	_____ [*Firm name, if any*]
_____ [*Typed name and State Bar Number*]	_____ [*Typed name and State Bar Number*]
_____ [*Mailing address, telephone number, fax number, etc.*]	_____ [*Mailing address, telephone number, fax number, etc.*]
Attorney for _____ [*specify, e.g.,* Plaintiff/Defendant and Appellant _____ (*name*)]	Attorney for _____ [*specify, e.g.,* Defendant/Plaintiff and Respondent _____ (*name*)]

[2] Use of Form

The form set out in [1], *above*, illustrates the cover that may be used in a joint (or separate) appendix in lieu of clerk's transcript, which is compiled and submitted by the parties rather than the clerk. For further discussion, see *§ 44.34[4][b]*.

If the parties are unable to stipulate to a joint appendix, then the title on the cover may be modified to state "APPELLANT'S APPENDIX IN LIEU OF CLERK'S TRANSCRIPT," with only the appellant's attorney's name, etc.. Similarly, the cover of respondent's appendix would be entitled "RESPONDENT'S APPENDIX, and the cover of appellant's reply appendix, if any, would be entitled "APPELLANT'S REPLY APPENDIX."

The color of the cover of the appendix should match the color of the brief which it accompanies. Thus, a joint appendix or appellant's appendix would be green; a respondent's appendix, yellow; and an appellant's reply appendix, tan [*see Cal. Rules of Ct., Rule 8.40(b)]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

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PART V. FORMS
B. The Clerk's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.224

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§ 44.224 Notice of Request for Document or Exhibit Held by Other Party

[1] FORM Notice of Request for Exhibit Held by Other Party

IN THE COURT OF APPEAL OF CALIFORNIA
_____ [*number, e.g.,* SECOND] APPELLATE DISTRICT
[DIVISION _____ (*number, e.g.,* SEVEN)]

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	CASE NO. _____ [*appellate court case number*]
vs.	)	Superior Court No. _____ [*superior court case number from which appeal was taken*]
_____ [*name*],	)	
Defendant and Appellant/Respondent.	)	On Appeal From the Judgment of the Superior Court of California, County of _____
	)	
	)	The Honorable _____ [*name*], Judge

_____

NOTICE OF REQUEST FOR DOCUMENT OR EXHIBIT HELD BY OTHER PARTY

To the Honorable Court of Appeal of the State of California [,_____[*specify district and division, if district has more than one division, e.g.,:* First Appellate District, Division Three:

NOTICE IS HEREBY GIVEN pursuant to *Cal. Rules of Ct., Rule 8.124(c)*, _____[*identify requesting party, e.g.,* defendant and appellant] _____[*name*] requests that _____[*identify possessing party, e.g.,* plaintiff and respondent] _____[*name*] deliver the document or exhibit designated by the trial court as exhibit number _____[*trial exhibit number*] to _____[*identify requesting party, e.g.,* defendant and appellant] _____[*name*] within 10 days after this notice is served. In the alternative, if_____[*identify possessing party, e.g.,* plaintiff and respondent] _____[*name*] prefers, _____[*identify possessing party, e.g.,* plaintiff and respondent] _____[*name*] may deliver the document or exhibit to this Court within that time.

By: _____ [*signature*]
_____ [*typed name*]
_____ [*firm name, if any*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form set out in [1], *above*, is for use by a party preparing an appendix who wants it to include a copy of a document or exhibit in the possession of another party [*see Cal. Rules of Ct., Rule 8.124(c)*]. Before filing this notice, the requesting party must first ask the party possessing the document or exhibit to provide a copy or lend it for copying [*Cal. Rules of Ct., Rule 8.124(c)(1)*]. If this attempt is unsuccessful, the requesting party may serve and file in the reviewing court the above notice, specifying the document or exhibit's trial court designation and requesting that the party possessing the document or exhibit deliver it to the requesting party or, if the possessing party prefers, deliver it to the reviewing court. The possessing party must comply with the request within 10 days after the notice is served [*Cal. Rules of Ct., Rule 8.124(c)(2)*].

If the possessing party sends the document or exhibit to the requesting party, the requesting party must copy and return it to the possessing party within 10 days after receiving it [*Cal. Rules of Ct., Rule 8.124(c)(3)*]. If the possessing party sends it to the reviewing court, that party must accompany the document or exhibit with a copy of the notice served by the requesting party, and immediately notify the requesting party that it has sent the document or exhibit to the reviewing court [*Cal. Rules of Ct., Rule 8.124(c)(4)*]. For further discussion, see *§ 44.33[4][c]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

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PART V. FORMS
B. The Clerk's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.225

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§ 44.225 Respondent's Notice Electing to Use an Appendix (Unlimited Civil Case)--Judicial Council Form APP-011

[1] FORM Respondent's Notice Electing to Use an Appendix (Unlimited Civil Case)--Judicial Council Form APP-011

Click here to view image.

[2] Use of Form

The form set out in [1], *above*, is for use in providing notice to the superior court clerk, by a respondent of an election to use an appendix under *Cal. Rules of Ct., Rule 8.124* in lieu of a clerk's transcript under *Cal. Rules of Ct., Rule 8.122* [*Cal. Rules of Ct., Rule 8.124(a)(1)*, and discussion in *§ 44.33[3][a]*].

This notice of election may be combined with a notice to prepare a reporter's transcript, or both may be combined with the notice of appeal [*Cal. Rules of Ct., Rule 8.121(a)*]. For a form of such combined notice, see *Ch. 42, Appeal: Notice of Appeal, § 42.90[3]*.

For service and filing requirements, see *§ 44.33[3][a][i]*.

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B. The Clerk's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated §§ 44.226-44.229

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[Reserved]

§§ 44.226[Reserved]

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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
B. The Clerk's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.230

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§ 44.230 Stipulation for the Use of the Superior Court File in Lieu of Clerk's Transcript

[1] FORM Stipulation for the Use of the Superior Court File in Lieu of Clerk's Transcript

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	STIPULATION FOR USE OF COURT FILE IN
Defendant and Appellant/Respondent.	)	LIEU OF CLERK'S TRANSCRIPT
	)	
	)	

_____

To the clerk of the court:

THE PARTIES HEREBY STIPULATE, through their respective counsel, that in the appeal pending in this action, the parties shall proceed under the provisions of *Rule 8.128 of the California Rules of Court* and _____ [*specify local rule of court of appeal authorizing use of superior court file; see references in § 44.34[1]*], and that, pursuant to these provisions the superior court file shall be used in lieu of a clerk's transcript.

[*The First Appellate District, which provides a form for this purpose, contains the following additional language, which*

is recommened generally.]

It is further agreed between the parties that in the event the Supreme Court would grant review at a later date and demand that a Clerk's Transcript be prepared rather that the original file of the Superior Court being used in lieu thereof, that Appellant will pay for the costs of producing the transcript for the Supreme Court. In the event a transcript has to be prepared, the costs thereof will be considered as appropriate costs on appeal.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff/Defendant and Appellant _____ [*name*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant/Plaintiff and Respondent _____ [*name*]

[2] Use of Form

The form set out in [1], *above*, is for use in stipulating to the use of the superior court file in lieu of a clerk's transcript, pursuant to *Cal. Rules of Ct., Rule 8.128*, when the procedure in that rule has been approved by local appellate rule in which the appeal is pending.

For further discussion, including service and filing requirements, see *§ 44.34*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

California Forms of Pleading and Practice--Annotated

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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
B. The Clerk's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated §§ 44.231-44.239

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[Reserved]

§§ 44.231[Reserved]

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PART V. FORMS
C. The Reporter's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.240

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§ 44.240 Appellant's Notice to Prepare Reporter's Transcript

[1] FORM Appellant's Notice to Prepare Reporter's Transcript

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and _____ [*e.g.*, Appellant],	)	NO. _____
vs.	)	APPELLANT'S NOTICE TO PREPARE REPORTER'S TRANSCRIPT
_____ [*name*],	)	
Defendant and _____ [*e.g.*, Respondent].	)	

To the clerk of the court:

NOTICE IS HEREBY GIVEN that _____ [*identify designating party, e.g.*, Plaintiff/Defendant and Appellant _____ (*name*)] requests that a reporter's transcript be prepared. The notice of appeal was filed on _____ [*date*].

Plaintiff/Defendant and Appellant requests that the transcript be prepared to consist of a transcription of the following oral proceedings and testimony in the above-entitled matter:

1. _____ [*Specify as separately numbered items each oral proceeding to be included in the transcript, including for each item the date, the department number, the name of the reporter (or electronic recording monitor), and the nature of the proceeding. This degree of specificity in listing each oral proceeding to be transcribed is REQUIRED in the Second Appellate District (see Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 3(a)(1)), and, while not expressly required under Cal. Rules of Ct., Rule 8.130(a), is nevertheless recommended in all appeals, since the appellant will usually have the necessary information in any event, to provide the clerk with the information necessary to notify the appropriate reporters to begin preparing the transcript. At the very least, it is recommended for appeals in districts other than the Second Appellate District that transcription of any extraordinary proceeding be specifically requested, especially proceedings outside the courtroom such as in camera proceedings conducted in the judge's chambers, etc.*].

2. _____ [*Continue as necessary, e.g.,* All testimony given on _____ (*date(s)*), in department _____ (*specify*) of this court, in the proceeding _____ (*describe nature of proceeding*), recorded by _____ (*identify reporter(s)*)].

3. _____ [*Etc.*].

[*ADD, if requesting transcription of jury instructions*]

Plaintiff/Defendant and Appellant also requests that the transcript include the following instructions given in this matter, which cannot be copied by you:

1. _____ [*Specify as separately numbered items all instructions that cannot be copied into the clerk's transcript, providing their number and whether they were given or refused*].

2. _____ [*Continue as necessary*].

[*ADD, if requesting inclusion of "daily" transcripts previously ordered during trial*]

PLEASE ALSO TAKE NOTICE that Plaintiff/Defendant and Appellant designates the following reporter's transcript(s) of the proceeding(s) held on _____ [*date(s)*]. Plaintiff/Defendant and Appellant has previously ordered and obtained [a] certified transcript(s) of this/these proceeding(s) from _____ [*names of reporter(s)*], and includes herewith the certified transcript to be transmitted to the Court of Appeal as part of the record on appeal.

[*CONTINUE*]

Dated: _____.

By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*party's status, e.g.,* Defendant and Appellant) _____ (*party's name*)]

[2] Use of Form

The form set out in [1], *above*, is a general form of notice for use by appellant in requesting the superior court clerk to

notify the appropriate reporters to prepare a reporter's transcript. It includes instructions for specifying and identifying particular proceedings that must be specified in order to be included [*Cal. Rules of Ct., Rule 8.130(a)*]. It also includes instructions for providing specific information required in the Second Appellate District for identifying all oral proceedings to be transcribed [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 3(a)(1)], information which appellant should provide, whenever possible, regardless of the district court of appeal in which the appeal is pending. For further discussion of the notice and considerations in designating particular proceedings, see *§ 44.52[1]*. In the alternative, the appellant may use Judicial Council Form APP-003, Notice Designating Record on Appeal, to provide notice regarding a reporter's transcript. For this form, see *§ 44.213*.

The notice requesting preparation of a reporter's transcript may be combined with a notice requesting preparation of the clerk's transcript (or appendix in lieu of clerk's transcript), the notice of appeal, or both. For further discussion, see *§§ 44.32[1][c], 44.52[1]*.

This form must be served and filed with the superior court clerk within 10 days after the date of filing of the notice of appeal. For further discussion regarding service and filing requirements, see *§ 44.52[1]*. See also *§§ 44.14[2]* for discussion of proceedings in the appellate court for an extension of time or relief from default.

The notice must be accompanied by a deposit of the approximate cost of preparing the transcript, or by one of the alternatives to this deposit set out in *Cal. Rules of Ct., Rule 8.130(b)*. For further discussion, see *§ 44.52[3]*.

The Second District has also adopted a printed form, entitled "Designation of the Record on Appeal," which "may" be used to designate the record in that court, including the reporter's transcript [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, Second App. Dist., Rule 3(b)]. Parties designating a reporter's transcript for an appeal in that district may use the printed form in lieu of the form set out in [1], *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

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California Forms of Pleading and Practice--Annotated

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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
C. The Reporter's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.241

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§ 44.241 Appellant's Notice Designating Partial Transcript

[1] FORM Appellant's Notice Designating Partial Transcript

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and _____ [*e.g.*,	)	
Appellant],	)	
vs.	)	NO. _____
_____ [*name*],	)	APPELLANT'S NOTICE TO PREPARE PARTIAL
Defendant and _____ [*e.g.*,	)	REPORTER'S TRANSCRIPT
Respondent].	)	
	)	
	)	

To the clerk of the court:

NOTICE IS HEREBY GIVEN that Plaintiff/Defendant and Appellant _____ [*name*] requests that a reporter's transcript of the following proceedings be prepared:

1. _____ [Specify as separately numbered items each oral proceeding, or portions of oral proceedings,

to be included in the transcript, including for each item the date, the department number, the name of the reporter (or electronic recording monitor), and the nature of the proceeding. This degree of specificity in listing each oral proceeding to be transcribed is REQUIRED in any event in the Second Appellate District (*see* Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 3(a)(1)), and is necessary, by implication, in order to identify adequately the proceedings to be transcribed when only portions of the oral proceedings are being requested under *Cal. Rules of Ct., Rule 8.130(a)(1)*].

2. _____ [*Continue as necessary, e.g.,* All testimony of _____ (*name*), which was given on _____ (*date*), in department _____ (*specify*) of this court, in the proceeding _____ (*describe nature of proceeding*) recorded by _____ (*identify reporter*)].

3. _____ [*E.g.,* All testimony from the deposition of _____ (*name*), which was read into evidence on _____ (*date*), in department _____ (*specify*) of this court, in the proceeding _____ (*describe nature of proceeding*) recorded by _____ (*identify reporter*)].

4. _____ [*Etc.*].

[*ADD, if requesting transcription of jury instructions*]

Plaintiff/Defendant and Appellant also requests that the transcript include thefollowing instructions given in this matter, which cannot be copied by you:

1. _____ [*Specify as separately numbered items all instructions that cannot be copied into the clerk's transcript, providing their number and whether they were given or refused*].

2. _____ [*Continue as necessary*].

[*ADD, if requesting inclusion of "daily" transcripts previously ordered during trial*]

PLEASE ALSO TAKE NOTICE that Plaintiff/Defendant and Appellant designates the following reporter's transcript(s) of the proceeding(s) held on _____ [*date(s)*]. Plaintiff/Defendant and Appellant has previously ordered and obtained [a] transcript(s) of this/these proceeding(s) from _____ [*names of reporter(s)*], but requests that the original of this/these transcript(s) be certified and transmitted to the Court of Appeal as part of the record on appeal.

[*CONTINUE*]

Plaintiff/Defendant and Appellant requests the above-listed portions of the oral proceedings because of the following points which he/she/it intends to raise on appeal: _____ [*state points to be raised, as required when requesting partial transcript under Cal. Rules of Ct., Rule 8.130(a)(1)*].

No other portion of the reporter's record of oral proceedings of any nature is requested. The notice of appeal in this action was filed on _____ [*date*].
Dated: _____.

By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*party's status, e.g.,* Defendant and Appellant) _____ (*party's name*)]

[2] Use of Form

The form set out in [1], *above*, is for use when requesting only a partial reporter's transcript under *Cal. Rules of Ct., Rule 8.130(a)(2)* [*see § 44.240* for a general form of designation under *Cal. Rules of Ct., Rule 8.130(a)*]. It includes instructions for providing specific information required in the Second Appellate District for identifying all oral proceedings to be transcribed [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 3(a)(1)], information which appellant will need to provide in order to identify adequately only portions of oral proceedings. For an alternative form for use by both or all parties to stipulate to partial transcript, see *§ 44.242*.

Under *Cal. Rules of Ct., Rule 8.130(a)(1)*, a party may designate the portions of the oral proceedings to be included in a partial transcript. [*Cal. Rules of Ct., Rule 8.130(a)(1)*]. For further discussion of the notice and considerations in designating a partial transcript, see *§ 44.52[2]*.

The notice requesting preparation of a reporter's transcript may be combined with a notice requesting preparation of the clerk's transcript (or appendix in lieu of clerk's transcript), the notice of appeal, or both. For further discussion, see *§§ 44.32[1][c], 44.52[1]*.

This form must be served and filed with the superior court clerk within 10 days after the date of filing of the notice of appeal. For further discussion regarding service and filing requirements, see *§ 44.52[1]*. See also *§ 44.14[2]* for discussion of proceedings in the appellate court for an extension of time or relief from default.

The notice must be accompanied by a deposit of the approximate cost of preparing the transcript, or by one of the alternatives to this deposit set out in *Cal. Rules of Ct., Rule 8.130(b)*. For further discussion, see *§ 44.52[3]*.

The Second District has also adopted a printed form, entitled "Designation of the Record on Appeal," which "may" be used to designate the record in that court, including the reporter's transcript [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, Second App. Dist., Rule 3(b)]. Parties designating a reporter's transcript for an appeal in that district may use the printed form in lieu of the form set out in [1], *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
C. The Reporter's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.242

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§ 44.242 Respondent's Notice Designating Additions to the Reporter's Transcript

[1] FORM Respondent's Notice Designating Additions to the Reporter's Transcript

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and _____ [*e.g.*,	)	
Appellant],	)	
vs.	)	NO. _____
_____ [*name*],	)	RESPONDENT'S NOTICE DESIGNATING ADDI-
Defendant and _____ [*e.g.*,	)	TIONS TO THE REPORTER'S TRANSCRIPT
Respondent].	)	
	)	
	)	

To the clerk of the court:

NOTICE IS HEREBY GIVEN that _____ [*identify designating party, e.g.,* Plaintiff/Defendant and Respondent _____ (*name*)] designates the following to be added to the reporter's transcript on appeal:

1. _____ [*Specify as separately numbered items each oral proceeding to be added to the reporter's*

transcript, including for each item the date, the department number, the name of the reporter (or electronic recording monitor), and the nature of the proceeding. This degree of specificity in listing each oral proceeding to be transcribed is REQUIRED in the Second Appellate District (see Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 3(a)(1)), and, while not expressly required under Cal. Rules of Ct., Rule 8.130(a) (governing additions requested by respondent), is nevertheless recommended in all appeals, since this information will be needed in any event to provide the clerk with the information necessary to notify the appropriate reporters to begin preparing the transcript.]

2. _____ [*Continue as necessary, e.g.,* All testimony given on _____ (*date(s)*), in department _____ (*specify*) of this court, in the proceeding _____ (*describe nature of proceeding*) recorded by _____ (*identify reporter(s)*)].

3. _____ [*Etc.*].

[*ADD, if requesting transcription of jury instructions*]

Plaintiff/Defendant and Respondent also requests that the transcript include the following additional instructions given in this matter, which cannot be copied by you:

1. _____ [*Specify as separately numbered items all instructions that respondent desires to be added to the reporter's transcript that cannot be copied into the clerk's transcript, providing their number and whether they were given or refused*].

2. _____ [*Continue as necessary*].

[*ADD, if requesting inclusion of "daily" transcripts previously ordered during trial*]

PLEASE ALSO TAKE NOTICE that Plaintiff/Defendant and Respondent designates the following reporter's transcript(s) of the proceeding(s) held on _____ [*date(s)*]. Plaintiff/Defendant and Respondent has previously ordered and obtained [a] certified transcript(s) of this/these proceedings from _____ [*names of reporter(s)*], and includes herewith the certified transcript to be transmitted to the Court of Appeal as part of the record on appeal.

[*CONTINUE*]

Dated: _____.

By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*party's status, e.g.,* Defendant and Respondent) _____ (*party's name*)]

[2] Use of Form

The form set out in [1], *above*, is for use by respondent when requesting additions to the reporter's transcript, which were not initially designated by appellant [*Cal. Rules of Ct., Rule 8.130(a)(3)*; *see § 44.240* for a general form of appellant's designation under *Cal. Rules of Ct., Rule 8.130(a)*]. It includes instructions for providing specific information required in the Second Appellate District for identifying all oral proceedings to be transcribed [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 3(a)(1)], information which respondent will need to

provide in any event to identify adequately additional, specific portions of oral proceedings. For further discussion of respondent's notice and designation of additional items, see *§ 44.52[4]*.

This form must be served and filed with the superior court clerk within 10 days after the date of filing of the appellant's notice to prepare reporter's transcript [*Cal. Rules of Ct., Rule 8.130(a)(3)*]. For further discussion regarding service and filing requirements, see *§ 44.52[4]*. See also *§ 44.14[2]* for discussion of proceedings in the appellate court for an extension of time or relief from default.

The notice must be accompanied by a deposit of the approximate cost of preparing the additional material, or by one of the alternatives to this deposit set out in *Cal. Rules of Ct., Rule 8.130(b)* [for further discussion of computing these costs and of the alternatives, *see § 44.52[3]*].

The Second District has also adopted a printed form, entitled "Designation of the Record on Appeal," which "may" be used to designate the record in that court, including the reporter's transcript [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, Second App. Dist., Rule 3(b)]. Parties designating a reporter's transcript for an appeal in that district may use the printed form in lieu of the form set out in [1], *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
C. The Reporter's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated §§ 44.243-44.244

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[Reserved]

§§ 44.243[Reserved]

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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
C. The Reporter's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.245

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§ 44.245 Notice of Reporter's Waiver of Fee Deposit

[1] FORM Notice of Reporter's Waiver of Fee Deposit

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and _____ [*e.g.*,	)	
Appellant],	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF WAIVER OF DEPOSIT
Defendant and _____ [*e.g.*,	)	
Respondent].	)	
	)	
	)	

To the clerk of the court:

NOTICE IS HEREBY GIVEN that satisfactory arrangements have been made between Plaintiff/Defendant and Appellant _____ [*name*] and _____ [*name*], the official reporter in this action. _____ [*Name of reporter*], Court Reporter, therefore waives the deposit of any fees or undertaking for the preparation of the reporter's transcript on appeal in the above entitled action.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]
_____Official Court Reporter
_____ [*court reporter license number*]

[2] Use of Form

The form set out in [1], *above*, is for use by an appellant who has made an arrangement with the court reporter to waive the deposit for preparation of a reporter's transcript under *Cal. Rules of Ct., Rule 8.130(b)(3)*. The form is signed by the court reporter. For further discussion, see *§ 44.52[3][c]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on AppealCivil ProcedureJudicial OfficersCourt ReportersFees

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
C. The Reporter's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated §§ 44.246-44.249

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[Reserved]

§§ 44.246[Reserved]

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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
C. The Reporter's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.250

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§ 44.250 Motion for Leave to Prepare Settled Statement in Lieu of Reporter's Transcript

[1] FORM Motion for Leave to Prepare Settled Statement in Lieu of Reporter's Transcript

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff and Appellant/Respondent, vs. _____ [*name*], Defendant and Appellant/Respondent.	))))))))))	CASE NO. _____ NOTICE OF MOTION AND MOTION FOR ORDER PERMITTING APPEAL ON SETTLED STATEMENT, SUPPORTING DECLARATION OF _____ [*name*], MEMORANDUM OF POINTS AND AUTHORITIES, AND PROPOSED ORDER [Telephone Appearance] Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date:_____

_____

To _____ [*identify party, e.g.,* Plaintiff and Respondent _____ (*name*)] and to _____ [*name*] his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* Defendant and Appellant] _____ [*name*] will, and does, move for an order that Appellant be allowed to set forth the oral proceedings by a settled statement in lieu of a reporter's transcript under *Rule 8.137 of the California Rules of Court*. The motion is made on the ground that _____ [(1) a substantial cost saving will result and the statement can be settled without significantly burdening opposing parties or the court, (2) the designated oral proceedings were not reported or cannot be transcribed, or (3) the appellant is unable to pay for a reporter's transcript and funds are not available from the Transcript Reimbursement Fund].

The motion will be based on this notice of motion, on the declaration of _____ [*name*], and the memorandum of points and authorities served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*specify; e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record for _____ [*specify, e.g.,* Defendant and Appellant in this action]. I have personal knowledge of the facts stated below and if called as a witness could competently testify to those facts.

2. _____ [*State here and in following paragraphs, as necessary, facts indicating Appellant's eligibility to use the settled statement procedure under Cal. Rules of Ct., Rule 8.137, e.g.,* a transcript is unavailable _____ (*explain, e.g.,* because of the unavailability/loss/illegibility of the reporter's notes *or* I have taken the case of Defendant and Appellant on a pro bono basis because of his/her/its inability to pay for my services, and he/she/it is without adequate funds to order and pay for a reporter's transcript, and reimbursement for the transcript is unavailable under the Transcript Reimbursement Fund in that _____ (*explain*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion*]

ORDER

[*Attach as separate document with caption if necessary under local court practice*]

The motion of _____ [*identify party; e.g.,* Defendant and Appellant] _____ [*name*] for an order that he/she be allowed to set forth the oral proceedings by a settled statement in lieu of a reporter's transcript came on regularly for hearing on _____ [*date*]. _____ [*Identify party; e.g.,* Defendant and Appellant was represented by _____ [*name*], and _____ [*identify party, e.g.,* Plaintiff and Respondent _____ [*name*] was represented by _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion of _____ [*specify, e.g.,* Defendant and Appellant] _____ [*name*] be granted and that he/she be allowed to set forth the oral proceedings by a settled statement in lieu of a reporter's transcript.
_____ [*date*]

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form set out in [1], *above*, is for use by an appellant to move for an order allowing use of a settled statement under *Cal. Rules of Ct., Rule 8.137*, in lieu of a reporter's transcript. Under *Cal. Rules of Ct., Rule 8.137*, all that is technically required is a notice of intent to proceed, as *set out in § 44.251*. However, as this form of record is rarely used and is likely to be contested, the motion may be used to establish its use from the outset. For further discussion, see *§ 44.53*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsMotions on AppealCivil ProcedureAppealsRecords on Appeal

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C. The Reporter's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.251

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[Reserved]

§ 44.251[Reserved]

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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
C. The Reporter's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.252

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§ 44.252 Appellant's Proposed Settled Statement in Lieu of Reporter's Transcript

[1] FORM Appellant's Proposed Settled Statement in Lieu of Reporter's Transcript

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	APPELLANT'S PROPOSED SETTLED STATE-
Defendant and Appellant/Respondent.	)	MENT IN LIEU OF REPORTER'S TRANSCRIPT
	)	
	)	

_____

To the clerk of the court:

Plaintiff /Defendant and Appellant _____ [*name*] submits the following condensed statement of [the portions of] the oral proceedings [that are deemed material to the determination of the points on appeal]. This condensed statement is in lieu of a reporter's transcript and is submitted pursuant to the provisions of *Rule 8.137(b)(1) of the California Rules of Court*.

_____ [*Set forth condensed statement, in narrative form, of the oral proceedings material to the*

appeal. If necessary for accuracy, clarity, or convenience, portions of the evidence may be set out in question and answer form. If the condensed statement is of only part of the oral proceedings, then state the points to be raised by appellant on appeal. Incorporate any instructions given or refused which appellant deems material].
Dated: _____.

By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*party's status, e.g.*, Defendant and Appellant) _____ (*party's name*)]

[2] Use of Form

The form set out in [1], *above*, is for use by appellant in providing the proposed settled statement pursuant to *Cal. Rules of Ct., Rule 8.137(b)(1)*, in lieu of a reporter's transcript. For further discussion, see *§ 44.53*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

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C. The Reporter's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.253

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§ 44.253 Respondent's Proposed Amendments to Appellant's Proposed Settled Statement

[1] FORM Respondent's Proposed Amendments to Appellant's Proposed Settled Statement

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	RESPONDENT'S PROPOSED AMENDMENTS TO
Defendant and Appellant/Respondent.	)	APPELLANT'S PROPOSED SETTLED STATE-
	)	MENT IN LIEU OF REPORTER'S TRANSCRIPT
	)	

_____

To the clerk of the court:

Plaintiff/Defendant and Respondent _____ [*name*] submits the following proposed amendments to Appellant's proposed settled statement of the oral proceedings herein: _____ [*Set out amendments proposed; incorporate any instructions given or refused that Respondent deems material*].
Dated: _____.

By: _____ [*signature*]

_____ [*typed name*]
[Attorney for _____ (*party's status, e.g.*, Plaintiff and Respondent) _____ (*party's name*)]

[2] Use of Form

The form set out in [1], *above*, is for use by respondent in providing proposed amendments to appellant's settled statement pursuant to *Cal. Rules of Ct., Rule 8.137(b)(1)*, in lieu of a reporter's transcript. For further discussion, see *§ 44.53*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

California Forms of Pleading and Practice--Annotated

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
C. The Reporter's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.254

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§ 44.254 Order Settling Statement

[1] FORM Order Settling Statement

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	ORDER SETTLING STATEMENT AND FIXING
Defendant and Appellant/Respondent.	)	TIME WITHIN WHICH APPELLANT SHALL
	)	PREPARE IT AS SETTLED
	)	

_____

The hearing for settlement of the statement on appeal in this action was held on _____ [*date*]. Plaintiff/Defendant and Appellant _____ [*name*] was represented by _____ [*name of counsel*], and _____ Defendant/Plaintiff and Respondent _____ [*name*] was represented by _____ [*name of counsel*].

Appellant's proposed settled statement in lieu of the reporter's transcript was before the court [as well as Respondent's proposed amendments]. The court being fully advised, and good cause appearing therefore,

IT IS ORDERED that the proposed settled statement on appeal, in lieu of the reporter's transcript, is settled as follows:

_____ [*List any corrections, additions, or deletions and refer to the parts of statement not changed*].

IT IS FURTHER ORDERED that Appellant has until _____ [*date*], within which to prepare the statement in accordance with this order and serve and file the prepared statement.
_____ [*date*]

_____
Judge of the Superior Court

[2] Use of Form

The form set out in [1], *above*, is for use by appellant to provide a proposed order to settle a statement in lieu of a reporter's transcript under *Cal. Rules of Ct., Rule 8.137(c)(2)*. For further discussion, see *§ 44.53*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
C. The Reporter's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.255

AUTHOR: Stefanie Y. Gandolfi Author E. Elizabeth Summers and Gary Cramer Editorial Consultants Ms. Gandolfi is a solo appellate practitioner in Oakland, California. Ms. Summers is a principal partner with Bien & Summers, Oakland, California, an appellate specialty firm. Mr. Cramer, who contributed comments and practice tips concerning reporter's transcripts, is a court reporter with the Los Angeles County Superior Court.

§ 44.255 Settled Statement

[1] FORM Settled Statement

[*cover*]

IN THE COURT OF APPEAL OF CALIFORNIA
_____ [*number, e.g.,* SECOND] APPELLATE DISTRICT
[DIVISION _____ (*number, e.g.,* SEVEN)]

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____ [*appellate court case number*]
_____ [*name*],	)	Superior Court No. _____ [*superior court case num-*
Defendant and	)	*ber from which appeal was taken*]
Appellant/Respondent.	)	
	)	
	)	

_____

_____

SETTLED STATEMENT IN LIEU OF REPORTER'S TRANSCRIPT

Appeal from the Superior Court of the County of _____ [*name*], No. _____ [*trial court case number*].
The Honorable _____ [*name*], Judge.

_____ [*typed name of attorney filing brief*]
_____ [*California State Bar No.*]
_____ [*law firm, if any*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone*]
Attorney for Appellant

[*Start new page*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	SETTLED STATEMENT
Defendant and Appellant/Respondent.	)	
	)	
	)	

The following settled statement is in lieu of the reporter's transcript and is submitted pursuant to the provisions of *Rule 8.137(c)(2) of the California Rules of Court*:

_____ [*Set out settled statement as ordered by the court*].

By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*party's status, e.g.,* Plaintiff and Appellant) _____ (*party's name*)]

[*EITHER, if settled statement is certified by judge*]

CERTIFICATION OF ENGROSSED SETTLED STATEMENT

I, _____ [*name*], Judge of the Superior Court of California, County of _____, Department No. _____, presided at the trial of this action and rendered the _____ [judgment/order] from which an appeal has been taken. I hereby certify that the statement on appeal, in lieu of the reporter's transcript, was duly prepared, served, and filed, and was duly engrossed, pursuant to the order of this court entered on _____ [*date*], and that, as engrossed, it is correct and is hereby settled and allowed as part of the record on appeal pursuant to *Rule 8.137 of the California Rules of Court*.
_____ [*date*]

_____ [*signature*]
Judge of the Superior Court

[*OR, if settled statement is certified by stipulation of the parties*]

THE PARTIES HEREBY STIPULATE, through their respective counsel, that the _____ [attached/foregoing] settled statement, consisting of pages _____ to _____, inclusive, is correct, conforms to the truth, and contains all of the material facts and proceedings had which are necessary and relevant to the resolution of the issues on appeal, that the same be allowed without notice as the settled statement on appeal, in lieu of the reporter's transcript, and that this stipulation shall have the same effect as though this settled statement were certified by the judge who tried the case.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Appellant _____ [*name*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Use of Form

The form set out in [1], *above*, is an example of a settled statement certified by the trial court judge or by stipulation of the parties, for use in lieu of the reporter's transcript, pursuant to *Cal. Rules of Ct., Rule 8.137(c)(3), (4)*. For further discussion, see *§ 44.53*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

California Forms of Pleading and Practice--Annotated

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
C. The Reporter's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated §§ 44.256-44.259

AUTHOR: Stefanie Y. Gandolfi Author E. Elizabeth Summers and Gary Cramer Editorial Consultants Ms. Gandolfi is a solo appellate practitioner in Oakland, California. Ms. Summers is a principal partner with Bien & Summers, Oakland, California, an appellate specialty firm. Mr. Cramer, who contributed comments and practice tips concerning reporter's transcripts, is a court reporter with the Los Angeles County Superior Court.

[Reserved]

§§ 44.256[Reserved]

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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
C. The Reporter's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.260

AUTHOR: Stefanie Y. Gandolfi Author E. Elizabeth Summers and Gary Cramer Editorial Consultants Ms. Gandolfi is a solo appellate practitioner in Oakland, California. Ms. Summers is a principal partner with Bien & Summers, Oakland, California, an appellate specialty firm. Mr. Cramer, who contributed comments and practice tips concerning reporter's transcripts, is a court reporter with the Los Angeles County Superior Court.

§ 44.260 Preliminary Stipulation re Attempt to Prepare Agreed Statement

[1] FORM Preliminary Stipulation re Attempt to Prepare Agreed Statement

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	PRELIMINARY STIPULATION RE ATTEMPT
Defendant and Appellant/Respondent.	)	TO PREPARE AGREED STATEMENT
	)	
	)	

_____

To the clerk of the court:

THE PARIES HEREBY STIPULATE, through their respective counsel, that they are attempting to prepare an agreed statement, pursuant to *Rule 8.134(a) of the California Rules of Court*.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Appellant _____ [*name*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Use of Form

The form set out in [1], *above*, is for use by the parties to stipulate to the use of an agreed statement in lieu of a reporter's transcript under *Cal. Rules of Ct., Rule 8.134*. For further discussion, see *§ 44.54*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
C. The Reporter's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated § 44.261

AUTHOR: Stefanie Y. Gandolfi Author E. Elizabeth Summers and Gary Cramer Editorial Consultants Ms. Gandolfi is a solo appellate practitioner in Oakland, California. Ms. Summers is a principal partner with Bien & Summers, Oakland, California, an appellate specialty firm. Mr. Cramer, who contributed comments and practice tips concerning reporter's transcripts, is a court reporter with the Los Angeles County Superior Court.

§ 44.261 Agreed Statement

[1] FORM Agreed Statement

[*cover*]

IN THE COURT OF APPEAL OF CALIFORNIA
_____ [*number, e.g.,* SECOND] APPELLATE DISTRICT
[DIVISION _____ (*number, e.g.,* SEVEN)]

_____ [*name*],	)	
Plaintiff and	)	
Appellant/Respondent,	)	
vs.	)	CASE NO. _____ [*appellate court case number*]
_____ [*name*],	)	Superior Court No. _____ [*superior court case num-*
Defendant and	)	*ber from which appeal was taken*]
Appellant/Respondent.	)	
	)	
	)	

_____

_____

AGREED STATEMENT IN LIEU OF [CLERK'S AND] REPORTER'S TRANSCRIPT

Appeal from the Superior Court of the County of _____ [*name*], No. _____ [*trial court case number*].
The Honorable _____ [*name*], Judge.

_____ [*typed name of attorney filing brief*]
_____ [*California State Bar No.*]
_____ [*law firm, if any*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone*]
Attorney for Appellant

[*Start new page*]

Table of Documents Attached

[*Chronological index referring to page at which each paper or record appears.*]

[*Start new page*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and	)	
Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	AGREED STATEMENT
Defendant and	)	
Appellant/Respondent.	)	
	)	
	)	

To the clerk of the court:

Plaintiff/Defendant and Appellant _____ [*name*] submits the following agreed statement on appeal in this action, by stipulation entered into by Appellant and Defendant/Plaintiff and Respondent _____ [

name]. These parties stipulate that this agreed statement contained in these copies may constitute the record on appeal pursuant to the provisions of *Rule 8.134 of the California Rules of Court*:

_____ [*Set out agreed statement, complying with the requirements of Cal. Rules of Ct., Rule 8.134, and containing the following, attached together: (1) statement of the nature of the controversy; (2) statement of the basis on which is it claimed the reviewing court has jurisdiction; and (3) summary of how the questions arose in and were decided by the superior court.*]
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Appellant _____ [*name*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Use of Form

The form set out in [1], *above*, is for use by the parties to present an agreed statement in lieu of a reporter's transcript under *Cal. Rules of Ct., Rule 8.134*. For further discussion, see *§ 44.54*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

California Forms of Pleading and Practice--Annotated

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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
C. The Reporter's Transcript and Its Alternatives

5-44 California Forms of Pleading and Practice--Annotated §§ 44.262-44.269

AUTHOR: Stefanie Y. Gandolfi Author E. Elizabeth Summers and Gary Cramer Editorial Consultants Ms. Gandolfi is a solo appellate practitioner in Oakland, California. Ms. Summers is a principal partner with Bien & Summers, Oakland, California, an appellate specialty firm. Mr. Cramer, who contributed comments and practice tips concerning reporter's transcripts, is a court reporter with the Los Angeles County Superior Court.

[Reserved]

§§ 44.262[Reserved]

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
D. Completing the Record in Multiple Appeals

5-44 California Forms of Pleading and Practice--Annotated § 44.270

AUTHOR: Stefanie Y. Gandolfi Author E. Elizabeth Summers and Gary Cramer Editorial Consultants Ms. Gandolfi is a solo appellate practitioner in Oakland, California. Ms. Summers is a principal partner with Bien & Summers, Oakland, California, an appellate specialty firm. Mr. Cramer, who contributed comments and practice tips concerning reporter's transcripts, is a court reporter with the Los Angeles County Superior Court.

§ 44.270 Appellants' Notice to Prepare Record in Consolidated Actions

[1] FORM Appellants' Notice to Prepare Record in Consolidated Actions

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and _____ [*e.g.*,	)	
Appellant],	)	
vs.	)	
_____ [*name*],	)	
Defendant and _____ [*e.g.*,	)	NO. _____
Respondent].	)	and
_____	)	NO. _____
_____ [*name*],	)	(Consolidated)
Plaintiff and _____ [*e.g.*,	)	APPELLANTS' NOTICE TO PREPARE CLERK'S
Appellant],	)	AND REPORTER'S TRANSCRIPTS AND DESIG-
vs.	)	NATION OF CONTENTS
_____ [*name*],	)	
Defendant and _____ [*e.g.*,	)	
Respondent].	)	
	)	
	)	

_____

To the clerk of the court:

NOTICE IS HEREBY GIVEN that _____ [*identify designating parties, e.g.,* Plaintiffs/Defendants and Appellants _____ (*names*)] have _____ [*explain nature of actions justifying consolidated record, e.g.,* filed notices of appeal from the single judgment in these actions consolidated for trial in this court], and request that a clerk's transcript be prepared, including the following items:

I. In _____ [*state title and case number of first case*]:

1. _____ [*Specify papers and records to be transcribed; see § 44.210[1]* and *§ 44.213*].

2. _____ [*Etc.*].

II. In _____ [*state title and case number of second case*]:

1. _____ [*List items for second case as above*].

2. _____ [*Etc.*].

[*ADD if appropriate*]

_____ [*Identify designating parties, e.g.,* Plaintiffs/Defendants and Appellants _____ (*names*)] further request inclusion in the clerk's transcript of the following items filed after the consolidation of the actions:

1. _____ [*List items as above*].

2. _____ [*Etc.*].

NOTICE IS FURTHER GIVEN that _____ [*identify designating parties, e.g.,* Plaintiffs/Defendants and Appellants _____ (*names*)] also request that a reporter's transcript be prepared of these proceedings held in the consolidated trial:

1. _____ [*Specify oral proceedings to be transcribed; see § 44.240[1]*].

2. _____ [*Etc.*].

They also request that the reporter's transcript include the following proceedings held before consolidation:

I. In _____ [*state title and case number of first case*]:

1. _____ [*Specify papers and records to be transcribed; see § 44.240[1]*].

2. _____ [*Etc.*].

II. In _____ [*state title and case number of second case*]:

1. _____ [*List items for second case as above*].

2. _____ [*Etc.*].

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Appellant _____ [*name*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Appellant _____ [*name*]

[2] Use of Form

The form set out in [1], *above*, is for use by multiple appellants in designating a record for consolidated appeals, usually because their actions were consolidated at trial. By reference to the general forms of notice designating clerk's and reporter's transcripts, this form may be modified to included requests to incorporate portions of another prior record by reference, etc. For discussion, see *§ 44.71* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsRecords on Appeal

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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
D. Completing the Record in Multiple Appeals

5-44 California Forms of Pleading and Practice--Annotated §§ 44.271-44.279

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[Reserved]

§§ 44.271[Reserved]

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
E. Transmission and Filing of Completed Record

5-44 California Forms of Pleading and Practice--Annotated § 44.280

AUTHOR: Stefanie Y. Gandolfi Author E. Elizabeth Summers and Gary Cramer Editorial Consultants Ms. Gandolfi is a solo appellate practitioner in Oakland, California. Ms. Summers is a principal partner with Bien & Summers, Oakland, California, an appellate specialty firm. Mr. Cramer, who contributed comments and practice tips concerning reporter's transcripts, is a court reporter with the Los Angeles County Superior Court.

§ 44.280 Notice Specifying Original Exhibits to Be Transmitted to the Reviewing Court

[1] FORM Notice Specifying Original Exhibits to Be Transmitted to the Reviewing Court

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and _____ [*e.g.*,	)	
Appellant],	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE SPECIFYING ORIGINAL EXHIBITS TO
Defendant and _____ [*e.g.*,	)	BE TRANSMITTED TO REVIEWING COURT
Respondent].	)	
	)	
	)	

To the clerk of the court:

NOTICE IS HEREBY GIVEN that Plaintiff/Defendant and Appellant _____ [*name*] requests, pursuant to *Rule 8.224(a) of the California Rules of Court*, that you transmit to the Court of Appeal of California, _____ [*specify, e.g.,* First] Appellate District[, Division _____ (*specify, e.g.,* Three)], in the appeal pending in this action, No. _____ [*court of appeal case number*], the following

listed original exhibits:

1. _____ [*List exhibits separately by number and/or letter, specifying first those admitted in evidence and then those rejected*].

2. _____ [*Etc.*].
Dated: _____.

By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*party's status, e.g.*, Plaintiff and Appellant) _____ (*party's name*)]

[2] Use of Form

The form set out in [1], *above*, is for use in requesting the transmittal of original exhibits to the court of appeal pursuant to *Cal. Rules of Ct., Rule 8.224(a)*. For discussion, see *§ 44.80* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

California Forms of Pleading and Practice--Annotated

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
E. Transmission and Filing of Completed Record

5-44 California Forms of Pleading and Practice--Annotated §§ 44.281-44.289

AUTHOR: Stefanie Y. Gandolfi Author E. Elizabeth Summers and Gary Cramer Editorial Consultants Ms. Gandolfi is a solo appellate practitioner in Oakland, California. Ms. Summers is a principal partner with Bien & Summers, Oakland, California, an appellate specialty firm. Mr. Cramer, who contributed comments and practice tips concerning reporter's transcripts, is a court reporter with the Los Angeles County Superior Court.

[Reserved]

§§ 44.281[Reserved]

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
F. Augmentation or Correction of Record

5-44 California Forms of Pleading and Practice--Annotated § 44.290

AUTHOR: Stefanie Y. Gandolfi Author E. Elizabeth Summers and Gary Cramer Editorial Consultants Ms. Gandolfi is a solo appellate practitioner in Oakland, California. Ms. Summers is a principal partner with Bien & Summers, Oakland, California, an appellate specialty firm. Mr. Cramer, who contributed comments and practice tips concerning reporter's transcripts, is a court reporter with the Los Angeles County Superior Court.

§ 44.290 Notice to Clerk to Add Matters Designated But Omitted From Record

[1] FORM Notice to Clerk to Add Matters Designated But Omitted From Record

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	NOTICE TO PREPARE CLERK'S/REPORTER'S
Defendant and Appellant/Respondent.	)	TRANSCRIPT
	)	
	)	

_____

To the clerk of the court:

NOTICE IS HEREBY GIVEN that _____ [*identify designating party, e.g.,* Plaintiff/Defendant and Appellant _____ (*name*)] requests that the following items, which were designated for inclusion in the _____ [clerk's transcript *and/or* reporter's transcript] but were omitted from that/those transcript(s), be prepared and certified if necessary and transmitted within to the Court of Appeal within ten days of the filing of this notice, pursuant to *Rule 8.155(b) of the California Rules of Court*:

1. _____ [*List as consecutively numbered items all designated but omitted material, describing each with specificity; see §§ 44.210[1], 44.240[1], and § 44.213,*].

2. _____ [*Etc.*].
_____ [*date*]

By: _____ [*signature*]
_____ [*typed name*]
[Attorney for _____ (*party's status, e.g.*, Defendant and Appellant) _____ (*party's name*)]

[2] Use of Form

The form set out in [1], *above*, is a form of notice to the superior court clerk, requesting the transmittal of items that were designated by one or more parties for inclusion in either the clerk's or reporter's transcript, or both. A copy of this notice is to be served on the court of appeal. If the material is transmitted within ten days of the filing of the notice, the party may make a motion for correction of the record in the court of appeal, attaching a copy of this notice [*Cal. Rules of Ct., Rule 8.155(b)(1)*].

In the First and Second Appellate Districts, a party *must* follow this procedure before making any motion in the court of appeal for augmentation [*see* Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 6(a); Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 2(b)]. For an appellate motion for augmentation or correction, see *§ 44.291*.

For further discussion, see *§ 44.94*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsRecords on Appeal

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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
F. Augmentation or Correction of Record

5-44 California Forms of Pleading and Practice--Annotated § 44.291

AUTHOR: Stefanie Y. Gandolfi Author E. Elizabeth Summers and Gary Cramer Editorial Consultants Ms. Gandolfi is a solo appellate practitioner in Oakland, California. Ms. Summers is a principal partner with Bien & Summers, Oakland, California, an appellate specialty firm. Mr. Cramer, who contributed comments and practice tips concerning reporter's transcripts, is a court reporter with the Los Angeles County Superior Court.

§ 44.291 Motion to Augment, Correct or Certify Record on Appeal

[1] Motion and Declaration

[a] FORM Motion to Augment, Correct or Certify Record on Appeal--Motion and Declaration

_____ [*name of attorney*]
_____ [*California State Bar No.*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone number*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	MOTION TO _____ [AUGMENT
Defendant and Appellant/Respondent.	)	*and/or* CORRECT *and/or* CERTIFY] RECORD ON
	)	APPEAL, SUPPORTING DECLARATION, AND
	)	SUPPORTING MEMORANDUM

_____

_____ [*Specify moving party, e.g.*, Plaintiff and Appellant _____ (*name*)] moves this court for an order directing that the record on appeal be _____ [augmented *and/or* corrected *and/or* certified] as follows:

_____ [*Set forth, as appropriate, additional parts of the record desired for augmenting the record on appeal and their relevancy, or those parts which need to be corrected, pointing out the manner of correction, or those parts which lack proper certification. Additional parts should be described with as specificity as possible; some courts of appeal have adopted local rules providing requirements*].

[A copy of _____ (*specify paper(s)*), which is/are to be added to the record, is/are attached to and filed with this application, pursuant to *Rule 8.155(a)(2) of the California Rules of Court*.]

[It is requested that the court extend the date for filing of appellant's opening brief to 30 days from the receipt of the augmentation.]

This motion is made on the grounds that _____ [*specify*].

This motion is based on the accompanying supporting memorandum and declaration of _____ [*name*] [, and on _____ (*specify, e.g.*, the record on appeal)].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*specify moving party, e.g.*, Appellant _____ (*name*)]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am the _____ [*identify declarant, e.g.*, attorney for the Appellant herein]. I have personal knowledge of the facts stated below and if called as a witness could competently testify to those facts.

2. _____ [*Set forth in and following paragraphs, as necessary, probative facts from declarant's personal knowledge establishing the grounds for the motion*].

[3. _____ (*If appropriate or required by local appellate rule, include the following:* All the materials sought to be added by this motion were filed or lodged with the trial court.)]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

SUPPORTING MEMORANDUM

[*Attach supporting memorandum*.]

[b] Use of Form

The form set out in [a], *above*, is a form of appellate motion to augment, correct, or certify the record on appeal pursuant to *Cal. Rules of Ct., Rule 8.155(a)*. If, as discussed *below*, copies of items to be added are not attached to the motion, any material to be added must be described with specificity [*Cal. Rules of Ct., Rule 8.155(a)(2)*]. Consecutively number the pages of the attachments, beginning with the number one [*see Cal. Rules of Ct., Rule 8.155(a)(2)*]. For further discussion regarding the requisite specificity needed under certain local appellate rules adopted by the First, Second, and Fifth Appellate Districts, see *§ 44.93[2][c]*.

Although *Cal. Rules of Ct., Rule 8.155(a)*, does not set a time limit for the motion, local appellate rules may impose time limits, and too much delay may result in denial of the motion in any event. For further discussion, see *§§ 44.92, 44.93[2][a], [3]*.

Note that, in the First and Second Appellate Districts, a party may *not* make this motion for the purpose of including material that was in fact designated to be included in the record but omitted until first requesting the trial court clerk to transmit the omitted material [*see* Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 6(a); Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 2(b)]. Submitting such a notice to the trial court clerk in the case of designated but omitted matter is permitted under *Cal. Rules of Ct., Rule 8.155(b)(1)*, but not required in other districts. If such a notice has been made initially, but the trial court clerk for some reason did not comply, a copy of that notice should be attached to this motion [*Cal. Rules of Ct., Rule 8.155(b)(2)*; for a form of notice to the trial court clerk, *see § 44.290*; *see also* discussion in *§ 44.94*].

If copies of the material to be augmented are available to the moving party, they must be served and filed with the motion [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 6(c); *Cal. Rules of Ct., Rule 8.155*; *see also* Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 2(c); *cf.* Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 5th App. Dist., Rule 1(c) (requiring also that copies be "certified")]. For further discussion, including discussion of service and filing requirements generally, see *§ 44.93[2][b]*.

In the First and Second Appellate Districts, the motion must be accompanied by a declaration stating that the requested materials to be augmented were filed or lodged with the trial court [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 6(c); Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 2(c)]. This language appears in the declaration portion of this form. See also discussion in *§ 44.93[2][c]*.

In the Second Appellate District, a motion to augment must be accompanied by a proposed order. A form printed by the court, entitled "Order Re: Augmentation" may be used [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 2(g)]. For a form of order granting an augmentation request, see [2], *below* [*see also* discussion in *§ 44.93[2][c][iii]*].

For discussion of correction and certification, as distinguished from augmentation, see *§ 44.96*.

[2] Order

[a] FORM Motion to Augment, Correct or Certify Record on Appeal--Order

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	ORDER
Defendant and Appellant/Respondent.	)	
	)	
	)	

_____

[*EITHER*]

IT IS ORDERED that the request for _____ [augmentation *and/or* correction] and certification is granted and that _____ [*specify papers of which copies were served and filed with request*] _____ (is/are) deemed to be part of the record on appeal.

[*AND/OR*]

IT IS [FURTHER] ORDERED that the record on appeal be _____ [augmented to include _____ (*specify*) *and/or* corrected as follows _____ (*specify*) *and/or* properly certified as follows _____ (*specify*)].

[*CONTINUE*]

IT IS FURTHER ORDERED that _____ [*set out other provisions as necessary, such as directions allocating responsibility and manner of payment for added parts of the record, limiting the time for augmentation, extending time to file briefs, etc., e.g.:* Time for filing Appellant _____ (*name*)'s Opening Brief is extended to 30 days after filing of the augmentation of the record in this court].
Dated: _____

_____
Presiding Justice

[b] Use of Form

The form set out in [a], *above*, is a form of proposed order granting a motion to augment, correct, or certify the record on appeal pursuant to *Cal. Rules of Ct., Rule 8.155* [*see* [1], *above*, for a form of motion].

In the Second Appellate District, a motion to augment must be accompanied by a proposed order. A form printed by the court, entitled "Order Re: Augmentation" may be used [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App.

Dist., Rule 2(g); *see also* discussion in *§ 44.93[2][c][iii]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsMotions on AppealCivil ProcedureAppealsRecords on Appeal

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
F. Augmentation or Correction of Record

5-44 California Forms of Pleading and Practice--Annotated § 44.292

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§ 44.292 Stipulation to Correct Record and Order

[1] FORM Stipulation to Correct Record and Order

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	STIPULATION TO CORRECT RECORD ON AP-
Defendant and Appellant/Respondent.	)	PEAL
	)	
	)	

THE PARTIES HEREBY STIPULATE, through their respective counsel, that the _____ [*specify, e.g.,* clerk's transcript] on file in this appeal is _____ [in error/incomplete] in the following respects:

_____ [*Set forth, as appropriate, matters to be corrected or added pursuant to stipulation, describing each item with as much specificity as possible*].

[A copy of _____ (*specify paper(s)*), which is/are to be added to the record, is/are attached to and filed with this stipulation.]

[It is requested that the court extend the date for filing of Appellant's opening brief to _____ (*specify*).]
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff/Defendant and Appellant
_____ [*name*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant/Plaintiff and Respondent
_____ [*name*]

ORDER

On reading the stipulation of the parties, and good cause appearing therefor,

IT IS ORDERED that the record on appeal be corrected as so stipulated.
Dated: _____.

_____
Presiding Justice

[2] Use of Form

The form set out in [1], *above*, is a stipulation by the parties to correct or augment the record on appeal. For discussion of the use of this procedure, see *§ 44.93[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
F. Augmentation or Correction of Record

5-44 California Forms of Pleading and Practice--Annotated § 44.293

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§ 44.293 Opposition to Motion for Order to Augment, Correct or Certify Record on Appeal

[1] FORM Opposition to Motion for Order to Augment, Correct or Certify Record on Appeal

_____ [*name of attorney*]
_____ [*California State Bar No.*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone number*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	OPPOSITION TO _____ [*specify, e.g.,* APPELLANT'S] MOTION TO _____ [AUGMENT *and/or* CORRECT *and/or* CERTIFY] THE RECORD ON APPEAL AND SUPPORTING DECLARATION
Defendant and Appellant/Respondent.	)	
	)	
	)	

_____

_____ [*Specify opposing party, e.g.,* Defendant and Respondent _____ (*name*)] opposes the motion filed on _____ [*date*] by _____ [*specify moving party, e.g.,* Plaintiff and Appellant _____ (*name*)] for an order directing that the record on appeal be _____ [augmented *and/or* corrected *and/or* certified]. Opposition is submitted on the ground that _____ [*explain, e.g.,* the motion is untimely, filed for the purpose of delay, etc.].

This opposition is based on the accompanying memorandum of points and authorities and declaration of _____ [*name*] [, and on _____ (*specify, e.g.,* the record on appeal)].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*specify opposing party, e.g.,* Respondent _____ (*name*)]

DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am the _____ [*identify declarant, e.g.,* attorney for the Respondent herein]. I have personal knowledge of the facts stated below and if called as a witness could competently testify to those facts.

2. _____ [*Set forth in this and following paragraphs, as necessary, probative facts from declarant's personal knowledge establishing the grounds for the motion*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Attach points and authorities*.]

[2] Use of Form

The form set out in [1], *above*, is a form of opposition to a motion for augmentation or correction of the record. It must be served and filed within 15 days after the motion is filed [*Cal. Rules of Ct., Rule 8.54*]. For further discussion, see *§ 44.93[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsMotions on AppealCivil ProcedureAppealsRecords on Appeal

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Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
F. Augmentation or Correction of Record

5-44 California Forms of Pleading and Practice--Annotated §§ 44.294-44.299

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[Reserved]

§§ 44.294[Reserved]

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
G. Sealing or Unsealing Records on Appeal

5-44 California Forms of Pleading and Practice--Annotated § 44.300

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§ 44.300 Motion to Seal Records

[1] FORM Motion to Seal Records

_____ [*name of attorney*]
_____ [*California State Bar No.*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone number*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	MOTION TO FILE RECORDS ON APPEAL UN-
Defendant and Appellant/Respondent.	)	DER SEAL, SUPPORTING DECLARATION, AND
	)	POINTS AND AUTHORITIES
	)	

_____

_____ [*Specify moving party, e.g.,* Plaintiff and Appellant _____ (*name*)] moves this court for an order directing that the records on appeal be filed under seal.

The records proposed to be seal are _____ [*specify*]. _____ [These records have been lodged with this court conditionally under seal *or* Good cause exists for not lodging these records with this court in that _____ (*explain good cause for not lodging records with reviewing court*)].

This motion is made on the grounds that an order directing that these records be filed under seal is justified under *California Rules of Court, Rule 8.46*. This motion is based on the accompanying memorandum of points and authorities and declaration of _____ [*name*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*specify moving party, e.g.,* Appellant (*name*)]_____

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for plaintiff in the above-described action].

2. This motion to seal records pertains to the following records[, which have been lodged with the court in connection with this motion on _____ (*date*)]: _____ [*specify documents, papers, exhibits, transcripts, or other things, or portions of these, filed or lodged with the court*].

3. The sealing of these records is necessary to an overriding interest that overcomes the right of public access to these records. This overriding interest is _____ [*specifiy overriding interest, which may consist of but is not necessarily limited to statutory privileges, trade secrets, privacy rights, contractual obligation of nondisclosure, and right of civil litigant to fair trial*].

4. There is a substantial probability that this overriding interest will be prejudiced if these records are not sealed, in that _____ [*explain probable prejudice to overriding interest in the event that the records are not sealed*].

5. The following measures have been taken to ensure that the proposed sealing is narrowly tailored and no less restrictive means exist to protect the overriding interest: _____ [*specify measures taken, e.g., documents proposed for sealing were specified only after selective analysis leaving other documents subject to public access*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum supporting motion.*]

Respectfully submitted,
_____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

[2] Use of Form

The form of motion set out in [1], *above*, is for use by a party seeking an order from a reviewing court directing that specified records on appeal be filed under seal pursuant to *Cal. Rules of Ct., Rule 8.46*. Court records that are not confidential by law are deemed open to the public and may not be sealed from public access by stipulation of the parties, but only by a court order on motion by a party [*see Cal. Rules of Ct., Rule 8.46(d)*].

The motion must be accompanied by a supporting memorandum of points and authorities [*Cal. Rules of Ct., Rule 8.54*; *see also* Advisory Committee Comment to *Cal. Rules of Ct., Rule 8.46* (other than requirements under Rule 8.46, motion to seal records must conform to Rule 8.54)]. In addition, the reviewing court must make express findings in its order, setting out the justification for sealing the records [*see Cal. Rules of Ct., Rule 8.46(e)(6)*]. Thus, the motion will typically require a supporting declaration, such as the one in this form, that establishes the circumstances justifying the order [*see Cal. Rules of Ct., Rule 8.54(a)* (motion based on matters not appearing in record on appeal must be supported by affidavits or other evidence)]. The supporting declaration in this form outlines the facts necessary to support the required findings under *Cal. Rules of Ct., Rule 2.550(d), (e)* [*Cal. Rules of Ct., Rule 8.46(e)(6)*].

The records sought to filed under seal must be lodged with the court pursuant to *Cal. Rules of Ct., Rule 8.46(e)(2)*, absent a showing of good cause for not lodging the records. Pending resolution of the motion or application, records so lodged are conditionally under seal [*Cal. Rules of Ct., Rules 8.46(e)(4)*].

If necessary to prevent disclosure, the motion or application and accompanying papers are to be filed in a redacted version, with the complete version lodged conditionally under seal [*Cal. Rules of Ct., Rules 8.46(e)(4)* (requirement also applicable to opposing papers)].

For further discussion of the procedures for sealing records, including the procedures for lodging materials proposed to be filed under seal, see *§ 44.104*.

For further discussion of findings necessary to support an order directing that records be filed under seal, see Ch. 551, *Trial* . For discussion and a form relating to appellate motions generally, see Ch. 45, *Appeal: Motion Procedure* . For discussion and forms relating generally to declarations under penalty or perjury or affidavits, see Ch. 15, *Affidavits, Certificates, and Declarations* .

Legal Topics:

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

GovernmentsCourtsCourt RecordsCivil ProcedureAppealsMotions on AppealCivil ProcedureAppealsRecords on Appeal

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
G. Sealing or Unsealing Records on Appeal

5-44 California Forms of Pleading and Practice--Annotated § 44.301

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§ 44.301 Cover Sheet for Lodging Records

[1] FORM Cover Sheet for Lodging Records

_____ [*name of attorney*]
_____ [*California State Bar No.*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone number*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	COVER SHEET FOR RECORDS LODGED CON-
Defendant and Appellant/Respondent.	)	DITIONALLY UNDER SEAL
	)	
	)	

_____

THE ENCLOSED RECORD[S] IS/ARE LODGED WITH THE COURT CONDITIONALLY UNDER SEAL AND IS/ARE SUBJECT TO A MOTION FOR AN ORDER DIRECTING THAT THE ENCLOSED RECORD[S] BE FILED UNDER SEAL

[2] Use of Form

The form set out in [1], *above*, is for use by a party when lodging records with the reviewing court in connection with a motion for an order directing that the records be filed under seal. Such records are to be enclosed in an envelope or other container that is labeled "CONDITIONALLY UNDER SEAL" [*Cal. Rules of Ct., Rule 8.46(e)(3)*]. This form, a cover sheet, is then required to be affixed to the envelope or container; it is required both to set out the information required on a caption page under Rule 8.40 [*see Cal. Rules of Ct., Rule 8.40(c)* (attorney information)], as well as a statement that the enclosed records are subject to a motion to file the records under seal [*Cal. Rules of Ct., Rule 8.46(e)(3)*].

For further discussion of the procedures for lodging records under *Cal. Rules of Ct., Rule 8.46(e)(3)*, see *§ 44.104[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on Appeal

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Volume 5: Appeal-Chs. 40-55
Chapter 44 APPEAL: PREPARING AND FILING THE RECORD
PART V. FORMS
G. Sealing or Unsealing Records on Appeal

5-44 California Forms of Pleading and Practice--Annotated § 44.302

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§ 44.302 Order Sealing Records

[1] FORM Order Sealing Records

_____ [*name of attorney*]
_____ [*California State Bar No.*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone number*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	ORDER
Defendant and Appellant/Respondent.	)	
	)	
	)	

_____

The Court has considered the motion _____ [*identify party, e.g.*, plaintiff and appellant] _____ [*name*] for an order directing that records be filed under seal pursuant to *California Rules of Court, Rule 8.46*, and finds facts that establish:

1. There exists an overriding interest that overcomes the right of public access to the records specified below, in that _____ [*specify overriding interest*].

2. This overriding interest supports sealing the records specified below.

3. A substantial probability exists that this overriding interest will be prejudiced if the records specified below are not sealed, in that _____ [*specify overriding interest*].

4. The records specified below have been tailored to limit narrowly the overall records to be sealed.

5. No less restrictive means exist to achieve the overriding interest than to seal the records specified below.

IT IS, THEREFORE, ORDERED that the motion be, and hereby is, granted and that the following records be filed under seal: _____ [*specify records and/or portions of records to be sealed*].
Dated: _____.

_____ [*signature*]
Presiding Justice

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use in granting a motion under *Cal. Rules of Ct., Rule 8.46*, for an order directing that all or a portion of the record on appeal be filed under seal. Local practice should be consulted to determine whether a proposed order is expected or required [*see Ch. 45, Appeal: Motion Procedure, § 45.14[1][f]*].

The form of order specifically sets out the findings necessary to support the order, as required under *Cal. Rules of Ct., Rule 2.550(d)* and *(e)* [*Cal. Rules of Ct., Rule 8.46(e)(6)*]. By specifying the sealing of particular records only, it also directs the sealing of only those records, or portions or records, that contain material that needs to be placed under seal [*see Cal. Rules of Ct., Rule 2.550(e)(1)(ii)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCourt RecordsCivil ProcedureAppealsRecords on Appeal

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Volume 5: Appeal-Chs. 40-55
Chapter 45 APPEAL: MOTION PROCEDURE

5-45 California Forms of Pleading and Practice--Annotated 45.syn

AUTHOR: Jeffery A. Hogge Author Hon. Miriam A. Vogel, Barbara L. Sorem Editorial Consultants Mr. Hogge is a staff attorney with the Third Appellate District Court of Appeal. Justice Vogel is an Associate Justice in Division One of the Second Appellate District Court of Appeal, while Ms. Sorem is a senior staff attorney with Division Four of that Court.

§ 45.syn Synopsis to Chapter 45: APPEAL: MOTION PROCEDURE

§ 45.01 Scope of Chapter

§ 45.02 Cross References

[1] Related Chapters in This Volume

[2] Other Related Chapters

§§ 45.03-45.09 [Reserved]

§ 45.10 Governing Law

§ 45.11 General Construction of Appellate Rules

§ 45.12 Motions or Papers Violating Appellate Rules

[1] Clerk Will Not File Defective Motions or Papers

[2] Sanctions for Unreasonable Infractions

§ 45.13 General Format of Appellate Motions and Other Papers Filed in Appellate Courts

[1] Papers Must Be Legible, Typewritten or Proportionally Spaced

[a] Generally

[b] Typewritten Paper

[c] All Other Papers

[2] Recycled Paper

[3] Number of Filing Copies

[a] Papers Filed in the Court of Appeal

[b] Papers Filed in the Supreme Court

[4] Attorney or Pro Per Party Information

[5] Recommended Style and Content of Caption

[a] Caption for Briefs and Petitions Recommended for All Motions

[b] Court in Which Matter Is Pending

[c] Name or Title of the Case

[d] Number of the Case

[e] Designation of the Paper

[f] Name of the Trial Judge and County

[g] Address to Receiving Court

[6] Date of Execution of Paper

[7] Reference to Sealed or Conditionally Sealed Materials

§ 45.14 General Motion Procedure

[1] Content, Filing, and Service of Motion

[a] Grounds of the Motion and Relief Requested

[b] Points and Authorities

[c] Affidavits and Other Evidence

[d] Proof of Service on All Parties

[e] Typewritten Motion Requirement

[f] Proposed Order

[2] Opposition to Motion

[a] General Format of Opposition

[b] Time for Service and Filing

[c] Failure to Oppose Motion

[3] Disposition of Motion

[a] Time for Disposition of Motion

[b] Hearing on Motion

[c] Order

§ 45.15 Procedure for Applications on Routine Matters

[1] Contents of Application

[2] Advance Service and Filing

[3] Opposition to Application

[4] Disposition of Application

§ 45.16 E-Filing Pilot Project in Second Appellate District

[1] In General

[2] Electronic Filing Service Providers

[3] Format of Documents to Be Filed Electronically

[4] Signatures on Electronically Filed Documents

[5] Payment of Filing Fees

[6] Electronic Service of Documents

[a] In General

[b] Change of Electronic Notification Address

[c] When Electronic Service Is Complete

[d] Proof of Service

§§ 45.17-45.19 [Reserved]

§ 45.20 Appellate Motions Generally

§ 45.21 Motion or Stipulation to Consolidate Appeals

§ 45.22 Motions Relating to Record

§ 45.23 Motions Relating to Briefs

§ 45.24 Motions or Stipulations to Substitute a Party or Counsel

§ 45.25 Request for Approval of Compromise

§ 45.26 Notice of Settlement

§ 45.27 Notice of Change of Address

§ 45.28 Motion for Calendar Preference

§ 45.29 Motion Seeking Factual Determination or Production of Additional Evidence

§ 45.30 Proceedings to Transfer Cause Pending Appeal

§ 45.31 Motion to Extend or Shorten Time

§ 45.32 Motion for Relief From Default

§ 45.33 Motion, Application, or Stipulation for Abandonment or Dismissal of Appeal

§ 45.34 Motion for Sanctions Based on Frivolous Appeal

§ 45.35 Request for Publication or Depublication of Court of Appeal Opinion

§ 45.36 Motion for Stipulated Reversal

§ 45.37 Request for Judicial Notice

§§ 45.38-45.49 [Reserved]

§ 45.50 State Statutes

[1] General Format of Motions and Other Papers

[2] Motion Seeking Factual Determination or Production of Additional Evidence

[3] Stipulated Reversal

§ 45.51 California Rules of Court

[1] General Construction of Appellate Rules

[2] Clerk Will Not File Motions or Papers Violating Appellate Rules

[3] General Format of Motions and Other Papers

[4] General Motion Procedure

[5] Motion or Stipulation to Consolidate Appeals

[6] Motions Relating to Record

[7] Motions Relating to Briefs

[8] Proceedings Relating to Parties or Counsel

[9] Request for Approval of Compromise

[10] Notice of Settlement

[11] Notice of Change of Address

[12] Motion for Calendar Preference

[13] Motion Seeking Factual Determination or Production of Additional Evidence

[14] Proceedings to Transfer Cause Pending Appeal

[15] Motion to Extend or Shorten Time

[16] Motion for Relief From Default

[17] Motions, Application, or Stipulation for Abandonment or Dismissal of Appeal

[18] Motion for Sanctions Based on Frivolous Appeal

[19] Motion Requesting Judicial Notice

§ 45.52 Local Rules of Courts of Appeal

§ 45.53 Decisions

[1] General Construction of Appellate Rules

[2] General Motion Procedure

§ 45.54 Law Reviews

§ 45.55 Text References

§ 45.56 Internet References

§§ 45.57-45.59 [Reserved]

§ 45.60 Moving Party's Checklist

[1] Preliminary Determinations

[2] General Appellate Motion Procedure

[3] Procedure for Routine Application

[4] Procedure for Other Appellate Papers

§ 45.61 Opposing Party's Checklist

§§ 45.62-45.69 [Reserved]

§ 45.70 General Form of Appellate Motion

[1] FORM

[2] Use of Form

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FOOTNOTES:
(n18)Footnote *.
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Volume 5: Appeal-Chs. 40-55
Chapter 45 APPEAL: MOTION PROCEDURE
PART I. SCOPE

5-45 California Forms of Pleading and Practice--Annotated § 45.01

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§ 45.01 Scope of Chapter

This chapter discusses the procedures and requirements governing civil appellate motions generally. This chapter also discusses briefly the more common civil appellate motions, with cross references to related chapters that cover these particular motions in more detail.

The chapter includes the following form:

- General Form of Appellate Motion [*see § 45.70*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsMotions on Appeal

California Forms of Pleading and Practice--Annotated

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§ 45.02 Cross References

[1] Related Chapters in This Volume

- For discussion relating to the civil appeals generally, including discussion of appellate jurisdiction generally, who may appeal, and factors in considering whether to take an appeal (including consideration of the applicable standard of review and applicable substantive law and their effect on the probable outcome of the appeal), see Ch. 40, *Appeal: An Overview* .

- For discussion of unpublished opinions and the limited circumstances under which they may be cited and attached at exhibits to appellate motions, see Ch. 41, *Appeal: Review Standards and Appellate Rules of Law* .

- For discussion relating to what constitutes an appealable judgment or order and discussion and forms relating to notice of appeal proceedings to consolidate related appeals, see Ch. 42, *Appeal: Notice of Appeal* .

- For discussion and forms of motions filed in the trial court, to stay the enforcement or execution of a judgment or order pending its review on appeal, see Ch. 43, *Appeal: Stay of Proceedings* .

- For discussion and forms pertaining to the preparation and transmittal of the record on appeal, including motions filed in the trial court and motions for augmentation that may be filed in the appellate court, see Ch. 44, *Appeal: Preparing and Filing the Record* .

- For detailed discussion and forms pertaining to motions to extend or shorten time requirements for

appellate motions generally, see Ch. 46, *Appeal: Extending or Shortening Time* .

- For detailed discussion and forms pertaining to motions for relief from default, see Ch. 47, *Appeal: Relief From Default* .

- For detailed discussion and forms pertaining to proceedings for abandonment or dismissal of appeal or for stipulated reversal of the trial court judgment, see Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* .

- For detailed discussion and forms pertaining to sanctions for frivolous appeal, see Ch. 49, *Appeal: Sanctions* .

- For discussion and forms pertaining to appellate briefs, including forms of motions relating to briefs (e.g., a form of motion to extend time for filing a brief, a form of motion to file a supplemental brief, and a form of motion to strike or order correction of a defective brief, see Ch. 50, *Appeal: Briefs* .

- For discussion and forms pertaining to the hearing and decision on appeal, including motions for calendar preference and requests or stipulations regarding oral argument, see Ch. 51, *Appeal: Hearing and Decision* .

- For discussion and forms pertaining to rehearing, see Ch. 52, *Appeal: Rehearing* .

- For discussion and forms relating to proceedings after the appellate decision, including remittitur and trial court motions to recover costs on appeal, see Ch. 53, *Appeal: Remittitur, and Costs on Appeal* .

- For discussion and forms pertaining to proceedings in the Supreme Court, including petitions for transfer, see Ch. 54, *Appeal: California Supreme Court Review* .

[2] Other Related Chapters

- For discussion relating to declarations, certificates, and affidavits generally, and forms used to provide evidentiary support for trial court motions which may be adapted for appellate proceedings, see Ch. 15, *Affidavits, Certificates, and Declarations* .

- For discussion and forms relating to proceedings to appear as *amicus curiae*, see Ch. 22, *Amicus Curiae* .

- For discussion relating to judicial notice and a form of request that judicial notice be taken, see Ch. 321, *Judicial Notice* .

- For discussion and forms relating to service and proof of service generally, see Ch. 518, *Service and Summons of Papers* .

- For discussion and forms relating to stipulations generally, see Ch. 533, *Stipulations* .

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[Reserved]

§§ 45.03[Reserved]

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Volume 5: Appeal-Chs. 40-55
Chapter 45 APPEAL: MOTION PROCEDURE
PART II. LEGAL BACKGROUND
A. General Appellate Motion Requirements

5-45 California Forms of Pleading and Practice--Annotated § 45.10

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§ 45.10 Governing Law

The procedure and requirements governing civil appellate motions generally are set out in *Cal. Rules of Ct., Rules 8.40-8.57*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsMotions on Appeal

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PART II. LEGAL BACKGROUND
A. General Appellate Motion Requirements

5-45 California Forms of Pleading and Practice--Annotated § 45.11

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§ 45.11 General Construction of Appellate Rules

Division 8 of the Cal. Rules of Ct. (*Cal. Rules of Ct., Rules 8.100 et seq.*) applies to appeals from superior courts and original proceedings in the Court of Appeal and the Supreme Court. These rules are to be liberally construed to secure the just and speedy determination of appeals, transfers, and original proceedings [*Cal. Rules of Ct., Rule 1.5*; *Jones v. Superior Court (1994) 26 Cal. App. 4th 92, 96-97, 31 Cal. Rptr. 2d 264* ; *Burns v. Brown (1944) 66 Cal. App. 2d 142, 145, 151 P.2d 899]* . A reference to a statute in the appellate rules includes any subsequent amendments to the statute [*Cal. Rules of Ct., Rule 8.16*].

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Volume 5: Appeal-Chs. 40-55
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5-45 California Forms of Pleading and Practice--Annotated § 45.12

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§ 45.12 Motions or Papers Violating Appellate Rules

[1] Clerk Will Not File Defective Motions or Papers

Except as the California Rules of Court provide otherwise, the clerk of the reviewing court is required to refuse for filing any record or other paper or document that does not conform to the Rules of Court [*Cal. Rules of Ct., Rule 8.18*].

PRACTICE TIP:

Rejection by the Clerk. Some clerks are pickier than others, and all exercise some discretion as a practical matter, depending on the nature of the defect. Errors that commonly result in rejection include format errors or errors in the caption or cover, although in many cases the clerks will allow or ask that such errors be corrected on the spot, if possible. Another common error that may result in rejection is defective proof of service.

If a clerk does reject a paper for rule violations, he or she will almost always explain why it is being rejected and how it can be corrected. If a rule violation can be easily corrected, a clerk will often point out the error and ask simply that it be corrected on the spot by writing in missing or correct matter, and will then file the paper.

Local appellate rules must also be consulted for additional requirements relating to general or specific motions filed in a particular district or division of the court of appeal. For example, the Fourth Appellate District of the Court of Appeal will not accept for filing any document that has a plastic or acetate cover or that does not conform strictly to *Cal. Rules of Ct., Rules 8.144* and *8.204* [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 4th App. Dist., Rule 2].

For discussion concerning relief from default for failure to comply with the California Rules of Court, see Ch. 47,

Appeal: Relief from Default .

[2] Sanctions for Unreasonable Infractions

The appellate court may impose sanctions, including the award or denial of costs, upon offending attorneys or parties for committing any unreasonable violations of the rules governing appeal [*Cal. Rules of Ct., Rule 8.276(a)*]. "Unreasonable violations" usually arise in the context of preparing and submitting briefs [*see Ch. 50, Appeal: Briefs, § 50.19*[2][c]], but egregious violations of the rules in preparing appellate motions and papers may also generate or at least contribute to the imposition of sanctions under *Cal. Rules of Ct., Rule 8.276(a)*, see Ch. 49, *Appeal: Sanctions* .

PRACTICE TIP:

Sanctions for Rule Violations. Appellate courts have rarely, if ever, exercised their power under *Cal. Rules of Ct., Rule 8.276(a)* to impose sanctions for "unreasonable violations" of the appellate rules. A motion that is significantly defective under the appellate rules is much more likely simply to be rejected [*see* discussion in [1], *above*], or worse, to be unsuccessful and fail in its objective. Appellate rule violations, as with other errors committed by appellate counsel, may also draw public criticism of counsel's deficiencies in the court's written opinion. While sanctions for rule violations are unlikely, appellate justices are aware of their power to impose sanctions on this ground. Rule violations that are sufficiently egregious and involve a waste of judicial resources, or that prejudice an opposing party, may well result in sanctions payable to the court, the opposing party, or both.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsGeneral OverviewCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsMotions on Appeal

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Volume 5: Appeal-Chs. 40-55
Chapter 45 APPEAL: MOTION PROCEDURE
PART II. LEGAL BACKGROUND
A. General Appellate Motion Requirements

5-45 California Forms of Pleading and Practice--Annotated § 45.13

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§ 45.13 General Format of Appellate Motions and Other Papers Filed in Appellate Courts

[1] Papers Must Be Legible, Typewritten or Proportionally Spaced

[a] Generally

Except as otherwise provided in the appellate rules, all papers filed in a reviewing court may be either produced on a computer or typewritten [*Cal. Rules of Ct., Rule 8.40(a)*].

They must conform to the requirements of *Cal. Rules of Ct., Rule 8.204(b)* [*Cal. Rules of Ct., Rule 8.40(a)*]. For detailed discussion of the requirements of *Cal. Rules of Ct., Rule 8.204(b)*, which apply more specifically to appellate briefs, see *Ch. 50, Appeal: Briefs, § 50.14*.

[b] Typewritten Paper

A typewritten original and carbon copies may be filed only with the presiding justice's permission, which will ordinarily be given only to unrepresented parties proceeding in forma pauperis. All other typewritten briefs must be filed as photocopies [*Cal. Rules of Ct., Rule 8.204(b)(11)(A)*]. Both sides of the paper may be used if a photocopy is filed; only one side may be used if a typewritten original and carbon copies are filed [*Cal. Rules of Ct., Rule 8.204(b)(11)(B)*]. The type size, including footnotes, must not be smaller than standard pica, 10 characters per inch. Unrepresented incarcerated litigants may use elite type, 12 characters per inch if they lack access to a typewriter with larger characters [*Cal. Rules of Ct., Rule 8.204(b)(11)(C)*]. In all other respects, the typewritten motion must conform to the requirements for all other papers [*Cal. Rules of Ct., Rule 8.204(b)*; *see* [c], *below*].

See also Practice Tip concerning type size in [c], *below*.

[c] All Other Papers

A motion may be reproduced by any process that produces a clear, black image of letter quality. The paper must be white or unbleached, recycled, 81/2 by 11 inches, and of at least 20-pound weight [*Cal. Rules of Ct., Rule 8.204(b)(1)*]. Any conventional typeface may be used. The typeface may be either proportionally spaced or monospaced [*Cal. Rules of Ct., Rule 8.204(b)(2)*]. The type style must be roman; but for emphasis, italics or boldface may be used, or the text may be underscored. Case names must be italicized or underscored. Headings may be in uppercase letters [*Cal. Rules of Ct., Rule 8.204(b)(3)*]. The type size, including footnotes, must not be smaller than 13-point, and both sides of the paper may be used [*Cal. Rules of Ct., Rule 8.204(b)(4)*]. The lines of text must be unnumbered and at least one-and-a-half spaced. Headings and footnotes may be single-spaced. Quotations may be block-indented and single-spaced. Single-spaced means six lines to a vertical inch [*Cal. Rules of Ct., Rule 8.204(b)(5)*]. The margins must be at least 11/2 inches on the left and right and 1 inch on the top and bottom [*Cal. Rules of Ct., Rule 8.204(b)(6)*]. The pages must be consecutively numbered [*Cal. Rules of Ct., Rule 8.204(b)(7)*].

PRACTICE TIP:

Type Size Usually Checked by Clerk Before Filing. The clerk's office in most if not all courts of appeal use a plastic overlay displaying various type sizes, to determine whether type size requirements of the appellaterules have been satisfied. A similar overlay may be obtained from some printers specializing in the printing of appellate briefs.

For further discussion concerning format of briefs, see Ch. 50, *Appeal: Briefs* .

[2] Recycled Paper

All papers must be prepared on recycled paper, and the use of recycled paper is encouraged in preparing the cover of briefs [*Cal. Rules of Ct., Rule 8.204(b)*].

[3] Number of Filing Copies

[a] Papers Filed in the Court of Appeal

When filing papers in the Court of Appeal, the following number of copies are required [*Cal. Rules of Ct., Rule 8.44(b)*]:

- An original and four copies of a brief, an amicus curiae brief, or an answer to an amicus curiae brief, and, in civil appeals, proof of delivery of four copies to the Supreme Court.

- An original and four copies of a petition, an answer, opposition or other response to a petition, or a reply.

- An original and three copies of a motion or an opposition or other response to a motion.

- Unless the court orders otherwise by local rule or in the specific case, one set of any separately bound supporting documents accompanying any brief or answer.

- An original and one copy of any application, other than an application to extend time, or any other document.

- An original and one copy of an application to extend time. In addition, one copy for each separately represented or unrepresented party must be provided to the court.

[b] Papers Filed in the Supreme Court

When filing papers in the Supreme Court, the following number of copies are required [*Cal. Rules of Ct., Rule 8.44(a)*]:

- An original and 13 copies of a petition for review, an answer, or a reply.
- An original and 13 copies of a brief in a cause pending in that court.
- Unless the court orders otherwise, an original and 10 copies of a petition for a writ within the court's original jurisdiction or an opposition or other response to the petition.
- An original and eight copies of a notice of motion, motion, or opposition or other response to a motion.
- An original and eight copies of a federal exhaustion petition for review, an answer, or a reply.
- An original and one copy of any other document or paper.

[4] Attorney or *Pro Per* Party Information

The cover, or first page if there is no cover, of every document filed by an attorney in a reviewing court must comply with *Cal. Rules of Ct., Rule8.204(b)(10)(D)* (must include name, address, telephone number, California State Bar number of each attorney filing brief) [*Cal. Rules of Ct., Rule 8.40(c)*].

If the party is appearing *in propria persona*, that is, on his or her own behalf without counsel, he or she should, in place of the above information, include his or her name, address, and telephone number.

[5] Recommended Style and Content of Caption

[a] Caption for Briefs and Petitions Recommended for All Motions

The information set out in [b]-[g], *below*, is required for the cover of a brief or petition for rehearing or review, and is recommended for the cover of all appellate motions.

[b] Court in Which Matter Is Pending

Examination of papers filed in the Supreme Court and in the Court of Appeal indicates that various styles are used in designating the title of the respective courts.

The following are common examples of titles used in the Supreme Court:

- "SUPREME COURT OF THE STATE OF CALIFORNIA"
- "SUPREME COURT OF CALIFORNIA"
- "IN THE SUPREME COURT OF THE STATE OF CALIFORNIA"

In designating the title of the court of appeal, the proper appellate district is given, and, if known, the division, if any, to which the case has been assigned. The following are examples of those used in the court of appeal:

- "COURT OF APPEAL OF CALIFORNIA, _____ APPELLATE DISTRICT[,]

[DIVISION _____]"

- "COURT OF APPEAL OF THE STATE OF CALIFORNIA _____ APPELLATE DISTRICT [DIVISION _____]"

- "IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA _____ APPELLATE DISTRICT [DIVISION _____]"

For a general form of motion in an appellate court that includes a general caption, see *§ 45.70*.

[c] Name or Title of the Case

The title of the case on appeal is the same as it was in the trial court and the names of the parties are not reversed.

Cal. Rules of Ct., Rule 2.100 et seq., provides that on papers filed in a superior court, the title of the case is to be placed below the title of the court in the space to the left of the center of the page.

Code Civ. Proc. § 422.40 provides that in complaints the title of the action must include the names of all the parties, but, except as otherwise provided by statute or rule of the Judicial Council, in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties, such as "et al."

As to papers filed on appeal, it is appropriate to add appellate designations, such as "Appellant" and "Respondent," to distinguish the parties to the appeal [*see Code Civ. Proc. § 902*; *Cal. Rules of Ct., Rule 8.10* (parties to an appeal designated as appellant and respondent)].

[d] Number of the Case

If no number has been assigned when the paper is prepared, a blank must be left for insertion of the number. The preferred placement of the case number is in the top left corner of the cover. An examination of papers filed in the Court of Appeal indicates that it can also be placed to the right of the title of the case as is done with papers filed in the trial court. The superior court's number of the case is customarily provided also, in parentheses, under the appellate court case number.

[e] Designation of the Paper

This item is customarily blocked in capital letters beneath the title of the case, for example: "MOTION TO DISMISS."

[f] Name of the Trial Judge and County

This item usually appears below the designation of the paper, and is frequently blocked in the following manner:

- "On Appeal From the Judgment of the Superior Court of California, County of _____, The Honorable _____, Judge."

[g] Address to Receiving Court

Although it is not required by the California Rules of Court or statute, some attorneys include on the first page of the body of the paper, immediately preceding the body of the paper, an address to the court such as the following:

- "TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA"

- "TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR _____ [*specify district and/or division of court of appeal*]"

[6] Date of Execution of Paper

Generally, it is not required that papers filed in the reviewing court reflect the date on which they are signed, since in most cases the paper does notbecome effective until the date it is filed [*see e.g., Cal. Rules of Ct., Rule 8.100* (appeal as "taken" on *filing* of notice of appeal)].

Nevertheless, stipulations should be dated as they essentially comprise binding agreements that should be certain as to the date that they were executed [*see generally* Ch. 140, *Contracts* , and Ch. 533, *Stipulations*]. It is also generally a good practice to date all papers that are signed in order to record the date of execution on office file copies in the event that originals become lost or destroyed.

[7] Reference to Sealed or Conditionally Sealed Materials

A "record" filed publically in a reviewing court, including an appellate motion and any supporting or opposing papers or evidence [*see Cal. Rules of Ct., Rule 8.46* (defining "record" for purposes of Rule 8.46)], must not disclose material contained in a record that is sealed, conditionally under seal, or subject to a pending motion to seal [*Cal. Rules of Ct., Rule 8.46*]. Thus, for example, even a motion to seal or unseal records on appeal, together with any supporting or opposing papers, may need to be filed in a redacted version, with a complete version lodged conditionally under seal, in order to avoid disclosure of sealed materials [*see Cal. Rules of Ct., Rule 8.46*]. For further discussion, see *Ch. 44, Appeal: Preparing and Filing the Record, § 44.100* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureSanctionsGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsMotions on Appeal

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Volume 5: Appeal-Chs. 40-55
Chapter 45 APPEAL: MOTION PROCEDURE
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A. General Appellate Motion Requirements

5-45 California Forms of Pleading and Practice--Annotated § 45.14

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§ 45.14 General Motion Procedure

[1] Content, Filing, and Service of Motion

[a] Grounds of the Motion and Relief Requested

An appellate motion must state the grounds of the motion and the relief requested [*Cal. Rules of Ct., Rule 8.54*].

[b] Points and Authorities

Each appellate motion must be accompanied by a memorandum in support of the motion [*Cal. Rules of Ct., Rule 8.54*].

For a general form of memorandum of points and authorities, which may be adapted for use in appellate motion proceedings, see Ch. 417, *Points and Authorities* . For forms of points and authorities on specific issues, which may be used in civil appellate memoranda, see California Points and Authorities (Matthew Bender).

[c] Affidavits and Other Evidence

If the motion is based on matters not appearing in the record, the motion must be accompanied by appropriate declarations, affidavits, or other evidence [*Cal. Rules of Ct., Rule 8.54*]. Such evidentiary support may berequired for any motion filed before the filing of the record on appeal [*see Cal. Rules of Ct., Rule 8.57(b)* (motion filed before record is filed must be accompanied by declarations or other evidence as necessary and proper to support motion)]. Failure to include such evidence may, and probably will, result in denial of the motion [*see Ray v. Farmers Ins. Exchange (1988) 200 Cal. App. 3d 1411, 1415, 246 Cal. Rptr. 593]* .

PRACTICE TIP:

Motion Attachments Encouraged. Attachments to briefs are not encouraged. It is rarely helpful, for example, to attach a document as an exhibit (one of the rare exceptions would be when the brief makes repeated references to a document such as a map or chart). Generally, the appellate court has the time to review the record carefully and to extract those portions necessary to its review without recourse to attachments [*see* discussion in *Ch. 50, Appeal: Briefs, § 50.12*[3]].

On the other hand, attachments to the declarations that accompany motions (or petitions for extraordinary relief) are both common and helpful, so long as care is taken to assure their evidentiary sufficiency. Thus, any exhibit should be authenticated in the declaration or certified as part of the record [*see, e.g.,* discussion of *Cal. Rules of Ct., Rule 8.57(a), below*]. Similarly, if judicial notice is being sought in connection with the motion, it is advisable to include a separate application that judicial notice be taken of the matter [*see, e.g.*, Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 5; Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 4th App. Dist., Rule 8(g) (local rules requiring separate motion for request for judicial notice as distinguished from including request in appellate brief)]. For discussion relating to declarations and affidavits generally, and forms that may be adapted for use in appellate proceedings, see Ch. 15, *Affidavits, Certificates, and Declarations* . For discussion relating to judicial notice and a form of request that may be adapted for use in an appellate court, see Ch. 321, *Judicial Notice* .

Note that nonevidentiary attachments may sometimes be necessary or desirable, particularly copies of authority cited in supporting points and authorities that are not readily available to the appellate court. When a party cites to an unpublished opinion or to an opinion available only in a computer-based source of decisional law, that party is expressly required to furnish a copy of the opinion to the court and all parties by attaching it to the document in which it is cited [*Cal. Rules of Ct., Rule 8.1115(c)*; for discussion of unpublished opinions and the limited circumstances under which they may be cited, see *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.50*[3][b]].

For discussion concerning particular evidence submitted in support of motions, see Ch. 47, *Appeal: Relief From Default* ; Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* ; Ch. 49, *Appeal: Sanctions* .

If a motion to dismiss the appeal is filed prior to the filing of the record on appeal, the motion must be accompanied by a certificate of the clerkof the superior court, or a declaration, setting forth certain information specified in *Cal. Rules of Ct., Rule 8.57(a)*. For further discussion of the certificate or declaration in a dismissal proceeding under *Cal. Rules of Ct., Rule 8.57(a)*, see *Ch. 48, Appeal: Abandonment, Dismissal, and Stipulated Reversal, § 48.13*[3][a].

[d] Proof of Service on All Parties

A motion presented for filing in the reviewing court must be accompanied by proof of service on all other parties in a manner permitted by law [*Cal. Rules of Ct., Rule 8.54*; *see Cal. Rules of Ct., Rule 8.25*]. For discussion relating to service and proof of service generally, and forms that may be adapted for use in appellate proceedings, see Ch. 518, *Service and Summons of Papers* .

For discussion of a variation of proof of service requirement for applications on routine matters, see *§ 45.15*[2].

[e] Typewritten Motion Requirement

Cal. Rules of Ct., Rule 8.40(a), requires that the motion be typewritten. "Typewritten" includes other methods of duplication equivalent in legibility to typewriting.

[f] Proposed Order

Counsel should check local practice to determine whether a proposed order should be submitted with the motion. Some courts prefer to draft their own orders. Others encourage or require proposed orders. In the Second Appellate District, for example, failure to submit a proposed order with an appellate motion or application may be grounds for denial of the motion [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 4].

[2] Opposition to Motion

[a] General Format of Opposition

Generally, an opposition to a motion should consist of an opposing memorandum of points and authorities, and any affidavits or other evidence as necessary [*see Cal. Rules of Ct., Rule 8.54*, and discussion in [1][b], [c], *above*]. If desired, it may include a counter-motion with a request for a different or alternative relief than that requested in the motion [*see Cal. Rules of Ct., Rule 8.54*, and discussion in [1][a], *above*].

The opposition should conform to the same format requirements as the motion [*see Cal. Rules of Ct., Rule 8.54*, and discussion in [1][e], *above*; *see also* discussion of general format requirements in § 45.13].

[b] Time for Service and Filing

Any opposition to a motion must be served and filed within 15 days after the motion is filed [*Cal. Rules of Ct., Rule 8.54*; *see also Code Civ. Proc. § 1013* (extension of time when service is by mail, etc.)].

The opposing papers, when filed, must include proof of service in a manner permitted by law [*Cal. Rules of Ct., Rule 8.25*]. For discussion relating to service and proof of service generally, and forms that may be adapted for use in appellate proceedings, see Ch. 518, *Service and Summons of Papers* .

[c] Failure to Oppose Motion

Failure to serve and file a written opposition or other response may be deemed by the appellate court to be consent to the granting of the motion [*Cal. Rules of Ct., Rule 8.54*; *see Sharp v. Union Pacific R. Co. (1992) 8 Cal. App. 4th 357, 361, 9 Cal. Rptr. 2d 925* (no opposition to motion to augment record deemed consent to grant of motion)].

[3] Disposition of Motion

[a] Time for Disposition of Motion

The appellate court may dispose of a motion any time after opposition or other response has been filed or the time for filing opposition has expired [*Cal. Rules of Ct., Rule 8.54*].

PRACTICE TIP:
Denial at Any Time After Filing. The court may, and sometimes will, *deny* a motion before any opposition is received and before the time for filing opposition has lapsed.

[b] Hearing on Motion

Motions are ordinarily decided without argument, but may be placed on the calendar for any session by order of the court or the Presiding Justice (or the Chief Justice in Supreme Court proceedings [*Cal. Rules of Ct., Rule 8.54*]. Thus, upon request of a party or upon its own motion, the appellate court may place a motion on calendar for hearing. A hearing is discretionary. The court may dispose of the motion after scheduling such a hearing, or it may dispose of the

motion regardless of a request for hearing [*Cal. Rules of Ct., Rule 8.54*].

When a motion is placed on calendar, the clerk must mail to each party notice of the hearing, showing the date and time designated for the hearing [*Cal. Rules of Ct., Rule 8.54*; *see UAP-Columbus JV 326132 v. Nesbitt (1991) 234 Cal. App. 3d 1028, 1030* (placement ofmotion on calendar because motion was potentially dispositive of appeal and raised different interpretations of precedent that could be argued by the parties)].

PRACTICE TIP:

Hearing on Motion Is Rare and May Be Deferred. Most appellate courts schedule a hearing on a motion only in very unusual cases. If a motion will be dispositive of the entire appeal, hearing and decision of the motion is often deferred until oral argument, or later. One exception would be a motion that raises the issue of the court's jurisdiction to hear the appeal on the merits, for example, a motion to dismiss due to an untimely or defective notice of appeal; while these motions are dispositive, they are usually decided promptly, with or without a hearing [*see Ch. 48, Appeal: Abandonment, Dismissal, and Stipulated Reversal, § 48.13*[3][d]].

[c] Order

Some courts of appeal and the Supreme Court prefer to prepare their own orders and counsel is not expected to submit a draft of the proposed order. Other courts of appeal, however, expect or *require* counsel to submit a draft of the order. Counsel are advised to consult local practice as to the requirements for, and contents of, an order [*see* [1][f], *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsMotions on Appeal

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A. General Appellate Motion Requirements

5-45 California Forms of Pleading and Practice--Annotated § 45.15

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§ 45.15 Procedure for Applications on Routine Matters

[1] Contents of Application

A routine application must set out facts showing the following [*Cal. Rules of Ct., Rule 8.50*]:

- Good cause for granting the application.
- Any previous applications granted or denied to any party after filing of the notice of appeal.

If the application is for an extension of time, additional requirements apply [*see Cal. Rules of Ct., Rule 8.63(b)* (declaration stating specific facts, not conclusions, showing good cause, stating when document is due, how long an extension is needed, whether prior extensions were granted and if so, their length and whether they were stipulations or grants of applications); for further discussion and a form of application to extend time, *see Ch. 46, Appeal: Extending or Shortening Time, §§ 46.12, 46.40*].

In the case of routine applications, it is customary to submit a proposed order as part of the application. Such orders are commonly included in printed forms of application to extend time that are provided by some courts. In the Second Appellate District, a proposed order must, by local rule, accompany any application, and failure to do so may be grounds fordenying the application [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 4].

[2] Advance Service and Filing

Except as otherwise provided in the appellate rules, applications to extend time for filing records and briefs, applications to shorten time, and applications for other routine matters must be served and filed, but the presiding justice

(or Chief Justice in Supreme Court proceedings) may for good cause excuse advance service [*Cal. Rules of Ct., Rule 8.50*]. Thus, any routine application made without advance service must include a request for excuse of the service requirement, and show good cause for granting this request.

PRACTICE TIP:

Avoid Filing an Application Without Advance Notice. The presiding justice (or Chief Justice) is very unlikely to find "good cause" to excuse advance notice, as it should almost always be possible to provide such notice in the context of a routine applications. Counsel should avoid, as much as possible, filing without advance notice.

If the application is for an extension of time, Cal. Rules of Ct., Rule 8.43(b), requires service on all parties to the appellate proceeding. For other routine applications, each adverse party represented by counsel must be served [*see Cal. Rules of Ct., Rule 8.25* (discussed in [1][d], *above*, defining "serve and file" generally)]. An application to extend time to accomplish a step in the preparation of the record or to file a brief must also include not only proof of service on all other parties, but also proof of prior delivery of a copy of the application, by mail or otherwise, to the client of counsel submitting the application. Delivery of copy to one client is sufficient when representing a class, and the proof of delivery need not give the client's address [*Cal. Rules of Ct., Rule 8.60(f)*]. For further discussion, see *Ch. 46, Appeal: Extending or Shortening Time, § 46.12*.

On filing, a routine application must be accompanied by an addressed, postage prepaid envelopes for mailing the order granting or denying the motion to all parties [*Cal. Rules of Ct., Rule 8.50*].

[3] Opposition to Application

Cal. Rules of Ct., Rule 8.50, does not expressly provide for opposition, but opposing parties may wish to submit opposition nevertheless, especially when the application is for an extension of time. Parties wishing to file opposition should follow the procedures set out in *Cal. Rules of Ct., Rule 8.54*, as much as possible [*see § 45.14*[2]].

[4] Disposition of Application

A routine application may be granted or denied by the presiding justice (or the Chief Justice in Supreme Court proceedings), unless the court determines otherwise [*Cal. Rules of Ct., Rule 8.50*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsMotions on Appeal

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§ 45.16 E-Filing Pilot Project in Second Appellate District

[1] In General

Effective July 1, 2010, the Second Appellate District is testing a pilot program to electronically file and serve documents. A "document" is [*Cal. Rules of Ct., Rule 8.71(2)*]:

- Any filing submitted to the reviewing court, including a brief, a petition, an appendix, or a motion.
- Any document transmitted by a trial court to the reviewing court, including a notice or a clerk's or reporter's transcript.
- Any writing prepared by the reviewing court, including an opinion, an order, or a notice.

A document that the court, a party, or a trial court files electronically has the same legal effect as a document in paper form. Filing a document electronically does not alter any filing deadline [*Cal. Rules of Ct., Rule 8.72(d)*].

When the court permits electronic filing it will publish, in both electronic and print formats, the court's electronic filing requirements [*Cal. Rules of Ct., Rule 8.74(a)*]. If the court is aware of a problem that impedes or precludes electronic filing, it must promptly take reasonable steps to provide notice of the problem [*Cal. Rules of Ct., Rule 8.74(b)*].

[2] Electronic Filing Service Providers

The court may contract with one or more electronic filing service providers to furnish and maintain an electronic filing system for the court. If the court contracts with an electronic filing service provider, the court may require electronic

filers to transmit the documents to the provider. If there is a single provider or an in-house system, the court must accept filing from other electronic filing service providers to the extent it is compatible with them [*Cal. Rules of Ct., Rule 8.75(a)*].

An electronic filing service provider must promptly transmit any electronic filing and the applicable filing fee to the court [*Cal. Rules of Ct., Rule 8.75(c)*]. An electronic filing service provider must promptly send to an electronic filer its confirmation of the receipt of any document that the filer has transmitted to the provider for filing with the court [*Cal. Rules of Ct., Rule 8.75(d)(1)*]. After reviewing the documents, the court must promptly transmit to the electronic filing service provider and the electronic filer the court's confirmation of filing or notice of rejection of filing [*Cal. Rules of Ct., Rule 8.75(d)(3)*].

[3] Format of Documents to Be Filed Electronically

A document that is filed electronically with the court must be in a format specified by the court unless it cannot be created in that format [*Cal. Rules of Ct., Rule 8.76(b)*]. The format adopted by a court must meet the following requirements [*Cal. Rules of Ct., Rule 8.76(b)*]:

- The software for creating and reading documents must be in the public domain or generally available at a reasonable cost.

- The printing of documents must not result in the loss of document text, format, or appearance.

If a document is filed electronically and cannot be formatted to be consistent with a formatting rule elsewhere in the California Rules of Court, these rules prevail [*Cal. Rules of Ct., Rule 8.76(b)*].

[4] Signatures on Electronically Filed Documents

If a document to be filed must be signed under penalty of perjury, the document may be filed electronically provided that the original, signed verification page or pages are filed with the court within five calendar days [*Cal. Rules of Ct., Rule 8.77(a)*]. If a document does not require a signature under penalty of perjury, the document is deemed signed by the party if the document is filed electronically [*Cal. Rules of Ct., Rule 8.77(b)*].

When a document to be filed electronically, such as a stipulation, requires the signatures of opposing parties, the party filing the document must obtain the signatures of all parties on a printed form of the document. By electronically filing the document, the electronic filer indicates that all parties have signed the document and that the filer has the signed original in his or her possession [*Cal. Rules of Ct., Rule 8.77(c)(1)*]. The party filing the document must maintain the original, signed document and must make it available for inspection and copying at the request of the court or any other party [*Cal. Rules of Ct., Rule 8.77(c)(2)*]. Any time after the document is filed, any other party may serve a demand for production of the original signed document. The demand must be served on all other parties but need not be filed with the court [*Cal. Rules of Ct., Rule 8.77(c)(3)*]. Within five days of service of the demand, the party on whom the demand is made must make the original signed document available for inspection and copying by all other parties [*Cal. Rules of Ct., Rule 8.77(c)(4)*].

A party is not required to use a digital signature on an electronically filed document [*Cal. Rules of Ct., Rule 8.77(d)*]. If a document requires a signature by a court or a judicial officer, the document may be electronically signed in any manner permitted by law [*Cal. Rules of Ct., Rule 8.77(e)*].

[5] Payment of Filing Fees

The court may permit the use of credit cards, debit cards, electronic fund transfers, or debit accounts for the payment of

filing fees associated with electronic filing, as provided in *Gov. Code § 6159* and other applicable law. The court may also authorize other methods of payment [*Cal. Rules of Ct., Rule 8.78(a)*].

[6] Electronic Service of Documents

[a] In General

When a notice may be served by mail, express mail, overnight delivery, or fax transmission, electronic service of the notice is permitted when authorized [*Cal. Rules of Ct., Rule 8.80(a)(1)*]. A party indicates that the party agrees to accept electronic service by [*Cal. Rules of Ct., Rule 8.80(a)(2)*]:

- Filing and serving a notice that the party accepts electronic service. The notice must include the electronic notification address at which the party agrees to accept service.

- Electronically filing any document with the court. The act of electronic filing is evidence that the party agrees to accept service at the electronic notification address that the party has furnished to the court under *Cal. Rules of Ct., Rule 8.76(a)(4)*.

When the court permits electronic filing in a case, it must maintain and make available electronically to the parties an electronic service list that contains the parties' current electronic notification addresses, as provided by the parties that have filed electronically in the case [*Cal. Rules of Ct., Rule 8.80(b)*].

Parties are responsible for electronic service on all other parties in the case. A party may serve documents electronically directly, by an agent, or through a designated electronic filing service provider [*Cal. Rules of Ct., Rule 8.80(c)(1)*]. A document may not be electronically served on a nonparty unless otherwise provided by law or court order [*Cal. Rules of Ct., Rule 8.80(c)(2)*].

[b] Change of Electronic Notification Address

A party whose electronic notification address changes while the appeal or original proceeding is pending must promptly file a notice of change of address electronically with the court and must serve this notice electronically on all other parties [*Cal. Rules of Ct., Rule 8.80(d)*].

[c] When Electronic Service Is Complete

Electronic service is complete at the time of transmission [*Cal. Rules of Ct., Rule 8.80(e)(1)*]. Service that occurs after 11:59 p.m. is deemed to have occurred on the next court day [*Cal. Rules of Ct., Rule 8.80(e)(2)*].

[d] Proof of Service

Proof of electronic service may be by any of the methods provided in *Code of Civil Procedure § 1013a*, except that the proof of service must state [*Cal. Rules of Ct., Rule 8.80(f)(1)*]:

- The electronic notification address of the person making the service, in addition to that person's residence or business address.

- The date and time of the electronic service, instead of the date and place of deposit in the mail.

- The name and electronic notification address of the person served, in place of that person's name and address as shown on the envelope.

- That the document was served electronically, in place of the statement that the envelope was sealed and deposited in the mail with postage fully prepaid.

Proof of electronic service may be in electronic form and may be filed electronically with the court [*Cal. Rules of Ct., Rule 8.80(f)(2)*].

The party filing the proof of electronic service must maintain the printed form of the document bearing the declarant's original signature and must make the document available for inspection and copying on the request of the court or any party to the action or proceeding in which it is filed, in the manner provided in *Cal. Rules of Ct., Rule 8.77(c)* [*Cal. Rules of Ct., Rule 8.80(f)(3)*].

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45.17-45 California Forms of Pleading and Practice--Annotated §§ 45.17-45.19

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[Reserved]

§§ 45.17[Reserved]

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§ 45.20 Appellate Motions Generally

All appellate motions are governed generally by *Rules of Ct., Rules 8.25-8.44,* discussed in *§ 45.10* et seq. Some of the more common motions, applications, and notices made in civil appellate proceedings are described in *§ 45.21* et seq., in most cases with references to more detailed discussion and forms in this or related chapters.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsMotions on Appeal

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§ 45.21 Motion or Stipulation to Consolidate Appeals

When several parties appeal from the same judgment or order or some part of that judgment (or when there is a cross appeal), the superior court clerk prepares and files a single record [*Cal. Rules of Ct., Rule 8.147(a)*]. In some instances, even when related appeals are not consolidated by the court on its own motion, a party may move or the parties may stipulate to consolidate appeals. For further discussion and forms, see Ch. 42, *Appeal: Notice of Appeal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 45.22 Motions Relating to Record

The record on appeal is prepared by the trial court clerk and reporter, and transmitted by the trial court clerk. Most motions relating to preparation or completion and transmission of the record are filed in the trial court [*see* Ch. 44, *Appeal: Preparing and Filing the Record*]. In proceedings to augment the record, however, an application or motion may be addressed to the appellate court as well as, or in lieu of, a notice to the trial court clerk or reporter to prepare, certify, and transmit the omitted material [*Cal. Rules of Ct., Rule 8.155(a)*].

Motions for an order directing that all or part of the record on appeal be filed under seal, or for an order unsealing records, must also be directed to the reviewing court [*see Cal. Rules of Ct., Rule 8.46(e), (f)*].

For further discussion and forms relating to proceedings to augment the record on appeal, see *Ch. 44, Appeal: Preparing and Filing the Record, § 44.90* et seq. For discussion and forms relating to motions to seal or unseal records on appeal, see *Ch. 44, Appeal: Preparing and Filing Record on Appeal, § 44.100* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 45.23 Motions Relating to Briefs

Briefs and the various motions relating to briefs are discussed in Ch. 50, *Appeal: Briefs* , including discussion and forms of the following types of motions or applications:

- Application to extend time for filing brief [*Cal. Rules of Ct., Rule 8.63(a)*; *see Ch. 50, Appeal: Briefs, §§ 50.16*[4][b], *50.75*[2], *50.75*[3]; for discussion and forms concerning extension of time to file papers generally, *see* Ch. 46, *Appeal: Extending or Shortening Time*].

- Application to file supplemental brief (in addition to appellant's opening and reply briefs and respondent's brief) [*Cal. Rules of Ct., Rule 8.200(a)(4)*; *see Ch. 50, Appeal: Briefs, §§ 50.11*[3], *50.76*].

- Application to file brief exceeding word limits [*Cal. Rules of Ct., Rule 8.204(c)(5)*; *see Ch. 50, Appeal: Briefs, §§ 50.15, 50.74*].

- Motion to strike or correct all or part of a brief that does not comply with the rules of court [*Cal. Rules of Ct., Rule 8.204(e)*; *see Ch. 50, Appeal: Briefs, §§ 50.19, 50.77*].

- An application, usually by a party proceeding without counsel *in forma pauperis*, to file typewritten ribbon-original and carbon copies of brief [*Cal. Rules of Ct., Rule 8.204(b)(11)(A)*; *see Ch. 50, Appeal: Briefs, §§ 50.14*[2][a], *50.73*].

For discussion and forms relating to an application or request by a non-party to appear and file a brief as *amicus curiae*, see Ch. 22, *Amicus Curiae* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsMotions on Appeal

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§ 45.24 Motions or Stipulations to Substitute a Party or Counsel

Substitution of parties in an appeal or original proceeding must be made by serving and filing a motion in the reviewing court. The clerk of that court must notify the superior court of any ruling on the motion [*Cal. Rules of Ct., Rule 8.36(a)*].

A party may substitute attorneys by serving and filing in the reviewing court a substitution signed by the party represented and the new attorney. In all appeals and in original proceedings related to a superior court proceeding, the party must also serve the superior court [*Cal. Rules of Ct., Rule 8.36(b)*]. An attorney may request withdrawal by filing a motion to withdraw [*Cal. Rules of Ct., Rule 8.36(c)*].

For further discussion and forms relating to substitution of a party and substitution or withdrawal of counsel, as well as discussion of an application for out-of-state counsel to appear *pro hac vice*, see *Ch. 40, Appeal: An Overview, § 40.14*[3] [*see also Cal. Rules of Ct., Rule 9.40(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsMotions on AppealCivil ProcedurePartiesSubstitutionsMotions for SubstitutionCivil ProcedurePartiesCapacity of PartiesGuardians

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§ 45.25 Request for Approval of Compromise

Whenever the guardian of a minor, an insane person, or an incompetent person seeks approval of a proposed compromise of a case pending onappeal, the reviewing court may, by order, refer the matter to the trial court with instructions to hear the request and determine whether the proposed compromise is for the best interests of the ward, and to report its findings. On receipt of the report, the reviewing court makes its order approving or disapproving the compromise [*Cal. Rules of Ct., Rule 8.244(d)*].

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§ 45.26 Notice of Settlement

If a civil case is settled after a notice of appeal is filed, the appellant is required to provide the reviewing court with immediate written notice, as well as immediate telephone or other expeditious notice if a hearing or conference is scheduled. If the record on appeal has not been completed and transmitted to the reviewing court at the time of the settlement, the appellant must also provide written notice to the clerk of the superior court, and include proof of that notice with the notice given to the court of appeal [*Cal. Rules of Ct., Rule 8.244(a)*; *see Huschke v. Slater (2008) 168 Cal. App. 4th 1153, 1160, 86 Cal. Rptr. 3d 187* (appellant, not respondent, has duty to file notice of settlement)].

Within 45 days after filing a notice of settlement, the appellant who filed the notice of settlement must file either an abandonment under *Cal. Rules of Ct., Rule 8.244(b)*, if the record has not yet been filed in the court of appeal, or a request to dismiss under *Cal. Rules of Ct., Rule 8.244(c)*, if the record has already been filed in the court of appeal [*Cal. Rules of Ct., Rule 8.244(a)(3)*].

PRACTICE TIP:

Notice of Settlement. Note that a notice of settlement under *Cal. Rules of Ct., Rule 8.244(a)*, does not in itself operate to divest the appellate court of jurisdiction in the appeal. The parties must seek a final determination of the cause by a voluntary dismissal, or in some instances by a motion for stipulated reversal. Although the parties may stipulate for an immediate issuance of remittitur once a final determination has been made, the determination itself is a necessary prerequisite to remittitur [*see Cal. Rules of Ct., Rule 8.272*, and discussion in *Ch. 53, Appeal: Remittitur and Costs on Appeal, § 53.13*]. For further discussion of voluntary dismissal and stipulated reversal, see *§§ 45.33, 45.36* and *Ch. 48, Appeal: Abandonment, Dismissal, and Stipulated Reversal, §§ 48.11, 48.12*.

For discussion of prehearing or settlement conference procedure under *Cal. Rules of Ct., Rule 8.244*, and a form of notice of settlement under *Cal. Rules of Ct., Rule 8.244(a)*, see *Ch. 51, Appeal: Hearing and Decision, §§ 51.12*[1][d] and *51.50*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 45.27 Notice of Change of Address

An attorney or unrepresented party whose address or telephone number changes while a case is pending must promptly serve and file a written notice of the change in the court in which the case is pending [*Cal. Rules of Ct., Rule 8.32(a)(1)*]. The notice must specify the title and number of the case or cases to which it applies. If an attorney gives the notice, the notice must include the attorney's California State Bar number [*Cal. Rules of Ct., Rule 8.32(a)(2)*].

If the notice does not identify the case or cases in which the new address or telephone number applies, the clerk may use the new address or telephone number as the person's address and telephone number of record in all pending and concluded cases [*Cal. Rules of Ct., Rule 8.32(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsMotions on Appeal

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5-45 California Forms of Pleading and Practice--Annotated § 45.28

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§ 45.28 Motion for Calendar Preference

A motion for preference on the calendar, supported by points and authorities may be made pursuant to *Cal. Rules of Ct., Rule 8.240*.

For discussion of prehearing conference procedure, calendar setting procedure, and further discussion and a form of motion relating to requests for calendar preference, see *Ch. 51, Appeal: Hearing and Decision, § 51.12* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsMotions on Appeal

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5-45 California Forms of Pleading and Practice--Annotated § 45.29

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§ 45.29 Motion Seeking Factual Determination or Production of Additional Evidence

A party may move that the appellate court make proposed findings of fact [*Cal. Rules of Ct., Rule 8.252(b)*], or that it grant leave for the production of additional evidence on appeal [*Cal. Rules of Ct., Rule 8.252(c)*; *see also Cal. Const. art. VI, § 11*; *Code Civ. Proc. § 909*].

For discussion and forms relating to these motions, see *Ch. 50, Appeal: Briefs, §§ 50.21, 50.80* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsMotions on AppealCivil ProcedureAppealsRecords on Appeal

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§ 45.30 Proceedings to Transfer Cause Pending Appeal

Causes may be transferred from the Supreme Court to a Court of Appeal, or from a Court of Appeal to the Supreme Court, or from one Court of Appeal to another, or from one division to another, only on order of the Supreme Court [*Cal. Rules of Ct., Rule 10.1000*]. For further discussion relating to transfer proceedings by the Supreme Court and a motion or petition for transfer, see *Ch. 54, Appeal: California Supreme Court Review, § 54.11*[3].

Legal Topics:

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

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5-45 California Forms of Pleading and Practice--Annotated § 45.31

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§ 45.31 Motion to Extend or Shorten Time

A party may move to extend or shorten time pursuant to the requirements in *Cal. Rules of Ct., Rules 8.50, 8.60, 8.63*. For more detailed discussion and forms relating to a motion to extend or shorten time, see Ch. 46, *Appeal: Extending or Shortening Time* [*see also* discussion in *§ 45.15*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsMotions on AppealCivil ProceduresPleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProceduresPleading & PracticePleadingsTime LimitationsExtensions

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5-45 California Forms of Pleading and Practice--Annotated § 45.32

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§ 45.32 Motion for Relief From Default

A party may move for relief from default following the requirements in *Cal. Rules of Ct., Rule 8.60(d)*. For forms and discussion concerning a motion to dismiss, see Ch. 47, *Appeal: Relief from Default* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsMotions on AppealCivil ProcedureAppealsDismissals of AppealsInvoluntary Dismissals

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5-45 California Forms of Pleading and Practice--Annotated § 45.33

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§ 45.33 Motion, Application, or Stipulation for Abandonment or Dismissal of Appeal

A respondent may move to dismiss the appeal involuntarily by following the requirements for filing motions generally [*Cal. Rules of Ct., Rules 8.40-8.60*].

An appellant, or all parties by stipulation, may obtain an abandonment or voluntary dismissal of the appeal by request or stipulation, in the court of appeal after the record on appeal has already been filed in that court or in the superior court if it has not [*Cal. Rules of Ct., Rule 8.244*].

For forms and discussion concerning a motion for involuntary dismissal, and a request or stipulation for voluntary abandonment or dismissal, see Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsDismissals of AppealsVoluntary DismissalsCivil ProcedureAppealsMotions on Appeal

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5-45 California Forms of Pleading and Practice--Annotated § 45.34

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§ 45.34 Motion for Sanctions Based on Frivolous Appeal

A respondent may move for sanctions for a frivolous appeal [*Cal. Rules of Ct., Rule 8.276(a)(1)*]. For detailed discussion and forms relating to motions for imposing sanctions for frivolous appeals, see Ch. 49, *Appeal: Sanctions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsFrivolous AppealsCivil ProcedureAppealsMotions on Appeal

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5-45 California Forms of Pleading and Practice--Annotated § 45.35

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§ 45.35 Request for Publication or Depublication of Court of Appeal Opinion

A party or any other interested person may request that an opinion of the court of appeal not already certified for publication be ordered published [*Cal. Rules of Ct., Rule 8.1120*], or that a court of appeal opinion that has been certified for publication be ordered not published [*Cal. Rules of Ct., Rule 8.1125*]. For detailed discussion and forms relating to requests for publication made in the court of appeal, and requests for depublication made in the Supreme Court, see *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, §§ 41.51, 41.52, 41.90*, and *41.91*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsMotions on Appeal

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§ 45.36 Motion for Stipulated Reversal

The parties, on reaching a settlement, may move for a stipulated reversal of the trial court judgment, as distinguished from the more usual procedure following settlement of a stipulated or voluntary dismissal [*see § 45.33*]. An appellate court, however, will grant a stipulated reversal only after making certain findings that the reversal will not adversely affect nonparties, the public, public trust in the judicial process, or the incentivefor pretrial settlement [*see Code Civ. Proc. § 128(a)(8)*]. For detailed discussion and a form of motion for stipulated reversal, see *Ch. 48, Appeal: Abandonment, Dismissal, and Stipulated Reversal, §§ 48.12, 48.52*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsMotions on AppealCivil ProcedureAppealsStipulated Reversals

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§ 45.37 Request for Judicial Notice

Generally, a reviewing court must take judicial notice of matters that the trial court properly noticed or that it was required to notice, and it has the same discretionary power to take judicial notice as that possessed by the trial court [*see Evid. Code § 459*]. Thus a party may request that the appellate court take judicial notice of certain matters, although as a general rule appellate courts will decline to take notice of matters that were not before the trial court [*see, e.g., Brosterhous v. State Bar of California (1995) 12 Cal. 4th 315, 325, 48 Cal. Rptr. 2d 87, 906 P.2d 1242* ; *Violante v. Communities Southwest Development and Construction Company (2006) 138 Cal. App. 4th 972, 978, 41 Cal. Rptr. 3d 673* ; *but see Giles v. Horn (2002) 100 Cal. App. 4th 206, 228, 123 Cal. Rptr. 2d 735* (court granted request for judicial notice when opposing party failed to file any opposition)]. Former Cal. Rules of Ct., Rule 41.5, which required that a request for judicial notice be made under a motion separate from the appeal brief, has been repealed effective July 1, 2003. For further discussion and a form of request for judicial notice, see *Ch. 50, Appeal: Briefs, §§ 50.22, 50.82*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsMotions on AppealEvidenceJudicial NoticeGeneral Overview

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[Reserved]

§§ 45.38[Reserved]

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§ 45.50 State Statutes

[1] General Format of Motions and Other Papers

Party appealing known as appellant, adverse party as respondent. *Code Civ. Proc. § 902*

[2] Motion Seeking Factual Determination or Production of Additional Evidence

Authority of appellate courts to take evidence and make findings of fact. *Cal. Const. art. VI, § 11*; *Code Civ. Proc. § 909*

[3] Stipulated Reversal

Authority of appellate courts to grant stipulated request for reversal. *Code Civ. Proc. § 128(a)(8)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 45.51 California Rules of Court

[1] General Construction of Appellate Rules

Rules of construction stated in *Cal. Rules of Ct., Rule 1.5* apply to appellate rules; headings of divisions, chapters, articles, rules, and subdivisions are substantive. *Cal. Rules of Ct., Rule 8.7*

[2] Clerk Will Not File Motions or Papers Violating Appellate Rules

Except as California Rules of Court provide otherwise, reviewing court clerk to refuse to file any record or other paper or document that does not conform to the Rules of Court. *Cal. Rules of Ct., Rule 8.18*

[3] General Format of Motions and Other Papers

Use of recycled paper required. *Cal. Rules of Ct., Rule 8.204(b)*

Every paper filed must list name, address, and telephone number of attorney filing paper and bar number of filing attorney and other attorneys joining in paper. *Cal. Rules of Ct., Rule 8.204(b)(10)(D)*

Number of copies required for court of appeal or Supreme Court filings. *Cal. Rules of Ct., Rule 8.44*

[4] General Motion Procedure

Motion must state grounds for relief and be accompanied by memorandum; if necessary to establish grounds for motion, affidavit or other evidence must accompany motion. *Cal. Rules of Ct., Rule 8.54(a)*

Motion must be accompanied by proof of service on all parties. *Cal. Rules of Ct., Rule 8.54(a)*

Motion to dismiss before filing of record must be accompanied by certificate of clerk of superior court or declaration. *Cal. Rules of Ct., Rule 8.57*

Opposition to motion must be filed within 15 days after motion is filed; failure to oppose motion may be deemed consent to the granting of the motion. *Cal. Rules of Ct., Rule 8.54(a), (c)*

Court may dispose of motion any time after opposition or other response filed or time for filing opposition expires; hearing on motion subject to discretion of court. *Cal. Rules of Ct., Rule 8.54(b)*

Procedures on applications to extend time, shorten time, or other routine matters. *Cal. Rules of Ct., Rule 8.50*

Motion must be "typewritten" (which means typewritten or duplication equivalent in legibility to typewriting). *Cal. Rules of Ct., Rule 8.40(a)*

E-filing pilot project in Second Appellate District. *Cal. Rules of Ct., Rules 8.71 et seq.*

[5] Motion or Stipulation to Consolidate Appeals

When more than one appeal taken from same judgment or order, superior court clerk files only one record. *Cal. Rules of Ct., Rule 8.147(a)*

[6] Motions Relating to Record

Motion to appellate court to augment record. *Cal. Rules of Ct., Rule 8.155(a)*

Motions to seal or unseal records on appeal. *Cal. Rules of Ct., Rule 8.46(e), (f)*

No paper or document filed publiclly in reviewing court, including motion and supporting or opposing papers, permitted to disclose material contained in sealed record on appeal, or record conditionally under seal. *Cal. Rules of Ct., Rule 8.46(f)*

[7] Motions Relating to Briefs

Briefs other than appellant's opening and reply and respondent's briefs filed only with permission of Chief Justice or Presiding Justice. *Cal. Rules of Ct., Rule 8.200(a)(4)*

If brief defective, court may order return and correction, strike brief, or disregard defects. *Cal. Rules of Ct., Rule 8.204(e)*

For good cause, court may extend time to file brief. *Cal. Rules of Ct., Rule 8.63(a)*

[8] Proceedings Relating to Parties or Counsel

Substitution of parties by serving and filing a motion in the reviewing court. Clerk of that court must notify superior court of any ruling on motion. *Cal. Rules of Ct., Rule 8.36(a)*

Substitution of attorneys affected by serving and filing substitution. *Cal. Rules of Ct., Rule 8.36(b)*

In absence of substitution, withdrawal can be effected only by court order. *Cal. Rules of Ct., Rule 8.36(c)*

Appearance by out-of-state counsel *pro hac vice*. *Cal. Rules of Ct., Rule 9.40*

[9] Request for Approval of Compromise

When guardian seeks approval of proposed compromise, appellate court may refer to trial court to determine whether the compromise is in the minor's or the conservatee's best interests and to report its findings. *Cal. Rules of Ct., Rule 8.244(d)*

[10] Notice of Settlement

Appellant must give court notice in event of settlement and, if record not filed, must also give notice to superior court clerk. *Cal. Rules of Ct., Rule 8.244(a)*

Within 45 days after filing notice of settlement, appellant must file either abandonment under *Cal. Rules of Ct., Rule 8.244(b)*, if record has not yet been filed in court of appeal, or request to dismiss under *Cal. Rules of Ct., Rule 8.244(c)*, if record has already been filed. *Cal. Rules of Ct., Rule 8.244(a)(3)*

[11] Notice of Change of Address

Written notice of change of address or telephone number of attorney or unrepresented party must be served and filed. *Cal. Rules of Ct., Rule 8.32*

[12] Motion for Calendar Preference

Motion for calendar preference must be promptly filed in the reviewing court. *Cal. Rules of Ct., Rule 8.240*

[13] Motion Seeking Factual Determination or Production of Additional Evidence

Motion for findings of fact must contain draft of proposed findings. *Cal. Rules of Ct., Rule 8.252(b)*

If court grants motion, it may take evidence or appoint a referee. *Cal. Rules of Ct., Rule 8.252(c)*

[14] Proceedings to Transfer Cause Pending Appeal

Only Supreme Court may order transfer from Supreme Court to Court of Appeal, from Court of Appeal to Supreme Court, for from one Court of Appeal to another. *Cal. Rules of Ct., Rule 10.1000*

[15] Motion to Extend or Shorten Time

Party may move to extend or shorten time to file paper. *Cal. Rules of Ct., Rules 8.50, 8.60, 8.63, 8.68*

[16] Motion for Relief From Default

Party may move for relief from default. *Cal. Rules of Ct., Rule 8.60(d)*

[17] Motions, Application, or Stipulation for Abandonment or Dismissal of Appeal

Before filing of record, appellant may obtain dismissal by motion or stipulation filed in superior court. *Cal. Rules of Ct., Rule 8.244(b)*

After filing of record, appellant may obtain dismissal, subject to discretion of appellate court, by motion or stipulation in appellate court. *Cal. Rules of Ct., Rule 8.244(c)*

Respondent may move for dismissal. *Cal. Rules of Ct., Rules 8.40-8.60*

[18] Motion for Sanctions Based on Frivolous Appeal

Respondent may move for sanctions for frivolous appeal. *Cal. Rules of Ct., Rule 8.276(a)(1)*

[19] Motion Requesting Judicial Notice

In cause pending before Supreme Court or court of appeal, request that court take judicial notice under *Evid. Code § 459* (judicial notice by reviewing court) must be made by motion. *Cal. Rules of Ct., Rule 8.54*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 45.52 Local Rules of Courts of Appeal

Proposed order must accompany any motion or application filed in Second Appellate District, and failure to do so may be grounds for denial of motion or application. Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 4

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsMotions on AppealGovernmentsCourtsRule Application & Interpretation

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§ 45.53 Decisions

[1] General Construction of Appellate Rules

Rules of Court liberally construed to secure just and speedy determination of appeal. *Jones v. Superior Court (1994) 26 Cal. App. 4th 92, 96-97, 31 Cal. Rptr. 2d 264* ; *Burns v. Brown (1944) 66 Cal. App. 2d 142, 145, 151 P.2d 899*

[2] General Motion Procedure

Failure to include evidence in motion necessary to establish grounds for motion results in denial. *Sharp v. Union Pacific R. Co. (1992) 8 Cal. App. 4th 357, 360, 9 Cal. Rptr. 2d 925* ; *Burns v. Brown (1944) 66 Cal. App. 2d 142, 145, 151 P.2d 899*

Legal Topics:

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§ 45.54 Law Reviews

Graber, *Timeline and Deadlines for Civil Appeals in California*, 7(2) California Litigation 43 (1994)

Witkin, *New California Rules on Appeal, 17 So. Cal. L. Rev. 80, (1944)*

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§ 45.55 Text References

Witkin, California Procedure, vol. 9, *Appeal*, § 620 et seq. (4th ed. 1997)

California Civil Appellate Practice, ch. 11, Applications and Motions (Cal. CEB 3rd ed. 2000)

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§ 45.56 Internet References

California Courts. This site includes: general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most Court of Appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes: text of constitution, codes, and statutes; and information concerning pending legislation. http://www.leginfo.ca.gov

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5-45 California Forms of Pleading and Practice--Annotated §§ 45.57-45.59

AUTHOR: Jeffery A. Hogge Author Hon. Miriam A. Vogel, Barbara L. Sorem Editorial Consultants Mr. Hogge is a staff attorney with the Third Appellate District Court of Appeal. Justice Vogel is an Associate Justice in Division One of the Second Appellate District Court of Appeal, while Ms. Sorem is a senior staff attorney with Division Four of that Court.

[Reserved]

§§ 45.57[Reserved]

California Forms of Pleading and Practice--Annotated

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Volume 5: Appeal-Chs. 40-55
Chapter 45 APPEAL: MOTION PROCEDURE
PART IV. PROCEDURAL CHECKLISTS

5-45 California Forms of Pleading and Practice--Annotated § 45.60

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§ 45.60 Moving Party's Checklist

[1] Preliminary Determinations

☐ Determine whether grounds exist for the motion. For discussion of particular motions, *see § 45.20* et seq. [*see also § 45.70*[1] (form of general motion)]. For more detailed discussion, more detailed procedural checklists, and forms relating to particular *appellate* motions, see the following:

☐ Motion to substitute counsel on appeal: Ch. 40, *Appeal: An Overview* .

☐ Motion or stipulation to consolidate related appeals: Ch. 42, *Appeal: Notice of Appeal* .

☐ Application to extend or shorten time requirements: Ch. 46, *Appeal: Extending or Shortening Time* .

☐ Motion for relief from default: Ch. 47, *Appeal: Relief From Default* .

☐ Motion, request, or stipulation to dismiss appeal or motion for stipulated reversal: Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* .

☐ Motion for sanctions: Ch. 49, *Appeal: Sanctions* .

☐ Motion relating to briefs, e.g., to extend time for filing, to file lengthy brief, to file supplemental brief, to strike or correct defective brief: Ch. 50, *Appeal: Briefs* .

☐ Motion relating to hearing and decisions, e.g., for calendar preference, for additional factual findings, to vacate submission, for stipulated reversal: Ch. 51, *Appeal: Hearing and Decision* .

☐ Motion to recall remittitur: Ch. 53, *Appeal: Remittitur and Costs on Appeal* .

☐ For discussion and forms relating to motions made in trial court, see, e.g., Ch. 40, *Appeal: An Overview* (trial court motion to substitute party), Ch. 43, *Appeal: Stay of Proceedings* (trial court motions to stay trial court proceedings), Ch. 44, *Appeal: Preparing and Filing the Record* (trial court motions relating to preparation of record), Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* (request or stipulation for voluntary dismissal madein trial court when record on appeal has not yet been filed), and Ch. 53, *Appeal: Remittitur and Costs on Appeal* (trial court memorandum to recover costs on appeal and motion to recover attorney's fees on appeal).

[2] General Appellate Motion Procedure

☐ Prepare motion stating the following: grounds of motion; papers, if any, on which motion is based; order or other relief requested [*Cal. Rules of Ct., Rule 8.54(a)*; *see § 45.14*[1]; *see also §§ 45.13* (general format requirements for appellate papers); 45.70[1] (form of general appellate motion)].

☐ Prepare and attach supporting memorandum [*Cal. Rules of Ct., Rule 8.54(a)*].

☐ If the motion is based on facts not appearing in the record on appeal, prepare and attach supporting affidavits or other evidentiary papers [*Cal. Rules of Ct., Rule 8.54(a)*].

☐ Prepare and attach proof of service [*Cal. Rules of Ct., Rule 8.54(a)*; *see § 45.14*[1][d]].

☐ Prepare and include proposed order if local rule or practice so dictates [*see § 45.14*[1][f]].

☐ Serve motion on all parties [*Cal. Rules of Ct., Rule 8.54(a)*; *see § 45.14*[1][d]].

☐ File original and three copies in court of appeal (or original and eight copies in Supreme Court) [*Cal. Rules of Ct., Rule 8.44(a)(5), (b)(4)*; *see § 45.13*[3][b]].

☐ If a hearing is desired, serve and file a request for a hearing [*Cal. Rules of Ct., Rule 8.54(b)*; *see § 45.14*[3]].

☐ If the court orders a hearing on request of party or *sua sponte*, prepare for and appear at hearing. Absent such order the motion will be decided without a hearing.

[3] Procedure for Routine Application

☐ Determine whether application involves routine matter [*Cal. Rules of Ct., Rule 8.50*; *see § 45.15*[1]]. For further discussion and forms relating to routine applications to extend or shorten time, see Ch. 46, *Appeal: Extending or Shortening Time* .

☐ Prepare application setting forth: (1) facts showing good cause for granting the application, and (2) any previous applications granted or denied to any party after filing of the notice of appeal [*Cal. Rules of Ct., Rule 8.50*; *see § 45.15*[1]]. For form of application conforming to requirements *Cal. Rules of Ct., Rule 8.50*, see *Ch. 46, Appeal: Extending or Shortening Time, § 46.40*.

☐ If application is for extension of time, prepare in the form of a declaration containing specific facts, not mere conclusions, which also states when document is due, how long an extension is needed, whether any prior extensions have been granted and, if so, how long, and whether they were granted by stipulation or application [*Cal. Rules of Ct., Rule 8.60(c)*; *see Ch. 46, Appeal: Extending or Shortening Time Requirements, § 46.12*[1][b]].

☐ Prepare and attach proof of service (and evidence of delivery to client if applicable; see directions regarding service, *below*) [*Cal. Rules of Ct., Rules 8.10, 8.50*; *see § 45.15*[2]].

☐ If seeking to file without advance service, prepare application to include request for excuse from advance service requirement, showing good cause for excuse [*see Cal. Rules of Ct., Rule 8.50*; *but see § 45.15*[2]].

☐ Prepare and include proposed order if local rule or practice so dictates [*see § 45.15*[1]].

☐ Serve one copy of application on each adverse party represented by counsel [*Cal. Rules of Ct., Rules 8.10(f), 8.50*; *see § 45.15*[2]].

☐ If application is for extension of time, serve all parties [*Cal. Rules of Ct., Rule 8.60(c)*; *see Ch. 46, Appeal: Extending or Shortening Time, § 46.12*[1][c]].

☐ If application is for extension of time to accomplish a step in the preparation of the record or to file a brief, deliver copy by mail or otherwise to client [*Cal. Rules of Ct., Rule 8.60(f)*; *see Ch. 46, Appeal: Extending or Shortening Time, § 46.12*[1][c]].

☐ File original and three copies in court of appeal (or original and eight copies in Supreme Court) [*Cal. Rules of Ct., Rule 8.44(a)(5), (b)(4)*; *see § 45.13*[3][b]].

☐ Provide the clerk of the court with addressed, postage prepaid envelopes for mailing the order granting or denying the application to all parties [*Cal. Rules of Ct., Rule 8.50*; *see § 45.15*[2]].

☐ Unless the court determines and orders otherwise, the application will bedecided without further papers (e.g., by opposing party) or a hearing, by the presiding justice (or Chief Justice in Supreme Court proceedings) [*Cal. Rules of Ct., Rule 8.50*; *see § 45.15*[4]].

[4] Procedure for Other Appellate Papers

☐ For notices or other papers other than a notice of motion, motion, or application (e.g., notice of settlement or change of address, discussed in *§§ 45.26, 45.27*), prepare notice or other paper and file original and one copy [*Cal. Rules of Ct., Rule 8.44(a)(6), (b)(6)*; *see § 45.13*[3][b]].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsFrivolous AppealsCivil ProcedureAppealsBriefsCivil ProcedureAppealsMotions on AppealCivil ProcedureAppealsRecords on Appeal

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Volume 5: Appeal-Chs. 40-55
Chapter 45 APPEAL: MOTION PROCEDURE
PART IV. PROCEDURAL CHECKLISTS

5-45 California Forms of Pleading and Practice--Annotated § 45.61

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§ 45.61 Opposing Party's Checklist

☐ Determine whether to oppose appellate motion.

CAUTION:
Effect of Failure to File Opposition. Failure to file opposition toa motion may be deemed a consent to the granting of the motion [*Cal. Rules of Ct., Rule 8.54(c)*].

☐ Prepare opposition as opposing memorandum of points and authorities and any affidavits or other evidentiary papers as necessary [*see § 45.14*[2][a]; *see also §§ 45.14*[1][b], [c] (memorandum and affidavits generally), *45.13* (general format requirements for appellate papers)].

☐ Prepare and attach proof of service [*Cal. Rules of Ct., Rule 8.54(a)*; *see § 45.14*[1][d]].

☐ Serve opposing papers on all parties served with moving papers [*see Cal. Rules of Ct., Rule 8.54(a)* and discussion in *§ 45.14*[2][b]].

☐ File opposing papers and proof of service in the reviewing court within 15 days after the motion is filed [*Cal. Rules of Ct., Rule 8.54(a)*; *see § 45.14*[2][b]].

☐ File original and three copies in court of appeal (or original and eight copies in

Supreme Court [*Cal. Rules of Ct., Rule 8.44(a)(5), (b)(4)*; *see § 45.13*[3][b]].

☐ If a hearing is desired, serve and file a request for a hearing [*Cal. Rules of Ct., Rule 8.54(b)*; *see § 45.14*[3]].

☐ If the court orders a hearing on request of party or *sua sponte*, prepare for and appear at hearing. Absent such order the motion will be decided without a hearing.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsMotions on Appeal

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Volume 5: Appeal-Chs. 40-55
Chapter 45 APPEAL: MOTION PROCEDURE
PART IV. PROCEDURAL CHECKLISTS

5-45 California Forms of Pleading and Practice--Annotated §§ 45.62-45.69

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[Reserved]

§§ 45.62[Reserved]

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Volume 5: Appeal-Chs. 40-55
Chapter 45 APPEAL: MOTION PROCEDURE
PART V. FORMS

5-45 California Forms of Pleading and Practice--Annotated § 45.70

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§ 45.70 General Form of Appellate Motion

[1] FORM General Form of Appellate Motion

[*Attorney identification: the following information customarily appears at the top left corner of the first page of the motion or, if a cover is used, at the bottom right corner:*]

_____ [*name of attorney*]
_____ [*California State Bar No.*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone number*]
Attorney for Appellant/Respondent _____ [*name*]

[*The name of the court is customarily blocked in capital letters, e.g.:*]

[IN THE] SUPREME COURT OF [THE STATE OF] CALIFORNIA

[*OR*]

[IN THE] COURT OF APPEAL OF [THE STATE OF] CALIFORNIA, _____ [*specify district and division if district has more than one division, e.g.,* FIRST APPELLATE DISTRICT, DIVISION THREE *or* SIXTH

APPELLATE DISTRICT]

[*The title of the case on appeal is the same as it was in the trial court and the names of the parties are not reversed. It is appropriate to add the designation "Appellant" and "Respondent" to distinguish the parties to the appeal, e.g.:*]

_____[*name*],	)	
Plaintiff and _____	)	
[*Appellant/Respondent*],	)	
vs.	)	CASE NO. _____ [*appellate court case number*]
_____ [*name*],	)	Superior Court No. _____ [*superior court case number from which appeal was taken*]
Defendant and _____	)	
[*Appellant/Respondent*].	)	
	)	
	)	

[*A description of the procedural posture of the underlying case usually appearsbelow the designation of the paper, and is frequently blocked in the following manner:*]

On Appeal From the Judgment of the Superior Court of California,
County of _____
The Honorable _____ [*name*], Judge

[*The title of the motion is customarily blocked in capital letters beneath the title of the case, for example:*]

MOTION FOR SANCTIONS

[*Although not required by the California Rules of Court or statute, an introductory address is frequently included on the first page of the body of the paper, phrased, e.g., as follows:*]

To the Honorable Chief Justice of California and Associate Justices of the Supreme Court of [the State of] California:

[*OR*]

To the Honorable Supreme Court of [the State of] California:

[*OR*]

To the Honorable Presiding Justice and Associate Justices of the Court of Appeal of [the State of] California [, _____ (*specify district and division, if district has more than one division, e.g.,:* First Appellate District, Division Three)]:

[*OR*]

To the Honorable Court of Appeal of [the State of] California, _____ [*specify district and division, if district has more than one division, e.g.,:* First Appellate District, Division Three]:

_____ [*Specify relief requested and grounds for motion, e.g.,* Defendant and Respondent _____ (*name*) hereby moves for an order awarding sanctions against Plaintiff and Appellant _____ (*name*) pursuant to *Section 907 of the Code of Civil Procedure* and *California Rules of Court, Rule 8.276*. The motion is made on the grounds that the appeal is frivolous and taken solely for the purpose of delay.]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[*If the motion is based on matters not appearing in the record on appeal, include declaration or other evidence as necessary to establish grounds for motion, e.g,:*]

SUPPORTING DECLARATION

I, _____ [*name*], declare:

I am the [attorney of record for] _____ [*party, e.g.,* plaintiff and appellant] herein.

1. _____ [*Set forth probative facts from declarant's personal knowledge showing good cause for granting the motion.*]

2. _____ [*Continue paragraphs setting out facts as necessary.*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

SUPPORTING MEMORANDUM

[*Attach supporting memorandum.*]

PROOF OF SERVICE

I, _____ [*name*], declare that:

I am at least 18 years of age and not a party to the above-entitled action. My _____ [residence *or* business] address is _____, California; I am _____ [a resident *or* employed in] _____ County, California [*county where mailing occurs*].

I served the foregoing motion on _____ [*date*], by depositing _____ [a copy *or* copies] thereof in the United States mail in _____, California, enclosed in [a] sealed envelope[s], with postage fully prepaid, addressed to _____ [*state name and full address of each party served*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form set out in [1], *above*, is for adaptation in filing any motion in theappellate court in a civil appeal. Unless otherwise provided, an appellate motion must conform with *Cal. Rules of Ct., Rule 8.54*, which requires that the motion be accompanied by proof of service on all other parties, a memorandum of points and authorities, and, if the motion is based on matters not appearing in the record on appeal, by declarations, affidavits, or other supporting evidence [*Cal. Rules of Ct., Rule 8.54(a)*]. Other evidence may include documentary evidence and other exhibits if properly authenticated by declaration [*see* discussion in *§ 45.14*[1][c]]. A proposed order may be expected or required to accompany the motion [*see* discussion in *§ 45.14*[1][f]].

For discussion and additional forms relating to proof of service of papers generally, see Ch. 518, *Service of Summons and Papers* . For discussion and additional forms of declaration and affidavits, see Ch. 15, *Affidavits, Certificates, and Declarations* .

For more detailed discussion concerning the general format, content, and required elements of appellate motions, see *§§ 45.13, 45.14*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsMotions on Appeal

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Volume 5: Appeal-Chs. 40-55
Chapter 46 APPEAL: EXTENDING OR SHORTENING TIME

5-46 California Forms of Pleading and Practice--Annotated 46.syn

AUTHOR: Jeffery A. Hogge Author Hon. Miriam A. Vogel, Barbara L. Sorem Editorial Consultants

§ 46.syn Synopsis to Chapter 46: APPEAL: EXTENDING OR SHORTENING TIME

§ 46.01 Scope of Chapter

§ 46.02 Cross References

[1] Related Chapters in This Volume

[2] Other Related Chapters

§§ 46.03-46.09 [Reserved]

§ 46.10 Governing Law

§ 46.11 Application to Shorten Time Requirement

§ 46.12 Application to Extend Time Requirement

[1] Availability and Procedure

[a] Extension of Time Not Available in All Proceedings

[b] Contents of Application to Extend Time

[c] Service and Filing of Application

[2] Extensions for Preparing the Record or Filing Briefs

[3] Standards for Showing Good Cause for Extension

[4] Disposition of Application

§ 46.13 Rules for Computing Time and Extensions of Time

§ 46.14 Extension of Time Ordered by Judicial Council Due to Earthquake, Fire, or Other Public Emergency

§§ 46.15-46.19 [Reserved]

§ 46.20 State Statutes

§ 46.21 California Rules of Court

[1] Application to Shorten Time Requirement

[2] Application to Extend Time Requirement

[3] Computation of Time

[4] Extension of Time Due to Earthquake, Fire, or Other Public Eemergency

§ 46.22 Local Rules of Courts of Appeal

§ 46.23 Decisions

§ 46.24 Law Reviews

§ 46.25 Text References

§ 46.26 Internet References

§§ 46.27-46.29 [Reserved]

§ 46.30 Party Seeking Order Shortening Time

§ 46.31 Party Seeking Order Extending Time

[1] Preliminary Determinations

[2] Prepare and Serve Application

§§ 46.32-46.39 [Reserved]

§ 46.40 Application to Reviewing Court to Extend Time for Doing Act Involved in Preparation of Record or to Shorten Time for Serving or Filing Paper Incident to Appeal

[1] FORM

[2] Use of Form

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FOOTNOTES:
(n20)Footnote *. Mr. Hogge is a staff attorney with the Third Appellate District Court of Appeal. Justice Vogel is an Associate Justice in Division One of the Second Appellate District Court of Appeal, while Ms. Sorem is a senior staff attorney with Division Four of that Court.

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Volume 5: Appeal-Chs. 40-55
Chapter 46 APPEAL: EXTENDING OR SHORTENING TIME
PART I. SCOPE

5-46 California Forms of Pleading and Practice--Annotated § 46.01

AUTHOR: Jeffery A. Hogge Author Hon. Miriam A. Vogel, Barbara L. Sorem Editorial Consultants

§ 46.01 Scope of Chapter

This chapter discusses applications for extension or shortening of time in connection with the filing of an appellate motion or other appellate document or paper. It includes a general form of appellate motion to extend or shorten time for filing [*see § 46.40*].

NOTE:

Stipulation in Lieu of Application. Stipulations may used in lieu of the application procedure discussed in this chapter, particularly for an extension to file a brief. For discussion and a form relating to stipulations to extend time for filing a brief, see *Ch. 50, Appeal: Briefs, §§ 50.16[4][a], 50.75[1]*. For discussion and forms relating to stipulations generally, see Ch. 533, *Stipulations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsMotions on AppealCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions

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PART I. SCOPE

5-46 California Forms of Pleading and Practice--Annotated § 46.02

AUTHOR: Jeffery A. Hogge Author Hon. Miriam A. Vogel, Barbara L. Sorem Editorial Consultants

§ 46.02 Cross References

[1] Related Chapters in This Volume

- For discussion relating to the civil appeals generally, including discussion of appellate jurisdiction generally, what constitutes an appealable judgment or order, who may appeal, and factors in considering whether to take an appeal (including consideration of the applicable standard of review and applicable substantive law and their effect on the probable outcome of the appeal), see Ch. 40, *Appeal: An Overview* .

- For discussion and forms relating to the preparation and transmittal of the record on appeal, see Ch. 44, *Appeal: Preparing and Filing the Record* .

- For discussion relating to procedures governing appellate motions and applications generally, including a general form of appellate motion, see Ch. 45, *Appeal: Motion Procedure* .

- For detailed discussion and forms pertaining to motions for relief from default, see Ch. 47, *Appeal: Relief From Default* .

- For detailed discussion and forms pertaining to proceedings for abandonment or dismissal of appeal, see Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* .

- For detailed discussion and forms pertaining to sanctions for frivolous appeal, see Ch. 49, *Appeal: Sanctions* .

- For discussion and forms pertaining to appellate briefs, including a form of motion for an extension of time for filing a brief, see Ch. 50, *Appeal: Briefs* .

- For discussion and forms pertaining to the hearing and decision on appeal, including motions for calendar preference and requests or stipulations regarding oral argument, see Ch. 51, *Appeal: Hearing and Decision* .

- For discussion and forms pertaining to rehearing proceedings after the appellate court has rendered a decision, see Ch. 52, *Appeal: Rehearing* .

- For discussion and forms pertaining to remittitur and trial court motions to recover costs on appeal, see Ch. 53, *Appeal: Remittitur and Costs on Appeal* .

- For discussion and forms pertaining to proceedings in the Supreme Court, including petitions for transfer, see Ch. 54, *Appeal: California Supreme Court Review* .

[2] Other Related Chapters

- For discussion relating to declarations, certificates, and affidavits generally, and forms used to provide evidentiary support for trial court motions which may be adapted for appellate proceedings, see Ch. 15, *Affidavits, Certificates, and Declarations* .

- For discussion relating to judicial notice and a form of request that judicial notice be taken, see Ch. 321, *Judicial Notice* .

- For discussion and forms relating to service and proof of service generally, see Ch. 518, *Service and Summons of Papers* .

- For discussion and forms relating to stipulations generally, see Ch. 533, *Stipulations* .

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5-46 California Forms of Pleading and Practice--Annotated §§ 46.03-46.09

AUTHOR: Jeffery A. Hogge Author Hon. Miriam A. Vogel, Barbara L. Sorem Editorial Consultants

[Reserved]

§§ 46.03[Reserved]

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Chapter 46 APPEAL: EXTENDING OR SHORTENING TIME
PART II. LEGAL BACKGROUND

5-46 California Forms of Pleading and Practice--Annotated § 46.10

AUTHOR: Jeffery A. Hogge Author Hon. Miriam A. Vogel, Barbara L. Sorem Editorial Consultants

§ 46.10 Governing Law

The availability and procedure for extending or shortening time to file motions and other papers on appeal is governed by *Cal. Rules of Ct., Rules 8.60, 8.68,* and *8.63*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureAppealsMotions on AppealCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions

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PART II. LEGAL BACKGROUND

5-46 California Forms of Pleading and Practice--Annotated § 46.11

AUTHOR: Jeffery A. Hogge Author Hon. Miriam A. Vogel, Barbara L. Sorem Editorial Consultants

§ 46.11 Application to Shorten Time Requirement

The presiding justice (or Chief Justice in Supreme Court proceedings), for good cause shown, may shorten the time for serving or filing a notice of motion or other paper incident to an appeal or to an original proceeding in the reviewing court. An application to shorten time must be made as provided in *Cal. Rules of Ct., Rule 8.50* [*Cal. Rules of Ct., Rule 8.68*].

Under *Cal. Rules of Ct., Rule 8.50*, except as otherwise provided in the appellate rules, applications must set out facts showing the following [*Cal. Rules of Ct., Rule 8.50*]:

- Good cause for granting the application.
- Any previous applications granted or denied to any party after filing of the notice of appeal.

Applications to shorten time must be served and filed, which means each adverse party represented by counsel must be served and the application must be filed with proof of such prior service in a manner permitted by law [*see Cal. Rules of Ct., Rule 8.10(f)*]. The presiding justice (or Chief Justice in Supreme Court proceedings) may for good cause excuse advance service [*Cal. Rules of Ct., Rule 8.50*]. Thus, any routine application made without advance service must include a request for excuse of the service requirement, and show good cause for granting this request [*but see* discussion in *Ch. 45, Appeal: Motion Procedure, § 45.15[2]*].

In the case of routine applications, it is customary to submit a proposed order as part of the application. Such orders are commonly included in printed forms of application to extend time that are provided by some courts. In the Second Appellate District, a proposed order must, by local rule, accompany any application, and failure to do so may be grounds for denying the application [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 4].

A routine application must be accompanied by addressed, postage prepaid envelopes for mailing the order granting or denying the motion to all parties [*Cal. Rules of Ct., Rule 8.50*].

The application is granted or denied by the presiding justice (or the Chief Justice in Supreme Court proceedings) at his or her discretion, unless thecourt determines that another method of disposition is appropriate [*Cal. Rules of Ct., Rule 8.50*].

For a form of application to shorten time, see *§ 46.40*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureAppealsMotions on AppealCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions

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PART II. LEGAL BACKGROUND

5-46 California Forms of Pleading and Practice--Annotated § 46.12

AUTHOR: Jeffery A. Hogge Author Hon. Miriam A. Vogel, Barbara L. Sorem Editorial Consultants

§ 46.12 Application to Extend Time Requirement

[1] Availability and Procedure

[a] Extension of Time Not Available in All Proceedings

The California Rules of Court provide the following limitations on extensions of time by the reviewing court:

- Time is not extended for [*Cal. Rules of Ct., Rules 8.104(b), 8.268(f), 8.500(e)(2), 8.308(a)*; *see also Silverbrand v. County of Los Angeles (2009) 46 Cal. 4th 106, 125-126, 92 Cal. Rptr. 3d 595, 205 P.3d 1047* (court may not extend time for filing notice of appeal); *Freiberg v. City of Mission Viejo (1995) 33 Cal. App. 4th 1484, 1488, 39 Cal. Rptr. 2d 802* (time for appeal absolutely jurisdictional)]:
  - Filing a notice of appeal;
  - Filing a petition for Supreme Court review of a court of appeal decision; or
  - Granting or denying a rehearing in the court of appeal.
- The time for granting or denying Supreme Court review of a decision of a court of appeal may be extended only as provided under *Cal. Rules of Ct., Rule 8.512(b)*.
- The time for granting or denying a rehearing in the Supreme Court may be extended only as provided under *Cal. Rules of Ct., Rule 8.536(c)*.
- The time for ordering a case transferred from the appellate department of the superior court to the court of appeal as provided under *Cal. Rules of Ct., Rule 8.1008* is not extended, and the time for the superior court to certify the transfer of a case to the court of appeal may not be extended except as provided under *Cal. Rules of Ct., Rule 8.1005(d)*.

Aside from these exceptions, the Chief Justice or presiding justice may, for good cause shown, extend the time for doing any act required or permitted under the rules on appeal (*Cal. Rules of Ct., Rules 8.1-8.276*) [*Cal. Rules of Ct., Rule 8.60(b)*].

PRACTICE TIP:

Try Stipulating Before Applying for Extension. Before applying for an extension, try first to obtain a stipulation from opposing counsel, particularly if the extension is for filing a brief. In this situation, stipulations are expressly authorized under *Cal. Rules of Ct., Rule 8.212(b)(1)*, and the appellate courts naturally prefer that this alternative be exhausted before making any application that must be disposed of by the presiding justice [*see, e.g.*, Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Rule 7(a)]. For further discussion relating to stipulations for anextension of time to file a brief, and a form of stipulation, see *Ch. 50, Appeal: Briefs, §§ 50.16[4][a], 50.75[1]*.

[b] Contents of Application to Extend Time

An application to extend time must be made by a declaration containing specific facts, not mere conclusions. The application is required to state when the brief is due, how long an extension is requested, whether any prior extensions of time have been granted and, if so, their length, and whether granted by stipulation or by the court [*Cal. Rules of Ct., Rule 8.60(c)*]. The application must also demonstrate good cause pursuant to the standards stated in *Cal. Rules of Ct., Rule 8.63(b)* [*Cal. Rules of Ct., Rule 8.63(a)*]. These standards are set out in *Cal. Rules of Court, Rule 8.63(c)*, discussed in [3], *below*.

The provisions of *Cal. Rules of Ct., Rule 8.63(a)* and *(b)*, if satisfied, also satisfy the content requirements of *Cal. Rules of Ct., Rule 8.50*, which govern routine applications generally [*see Ch. 45, Appeal: Motion Procedure, § 45.15[1]*].

In the case of routine applications, it is customary to submit a proposed order as part of the application. Such orders are commonly included in printed forms of application to extend time that are provided by some courts. In the Second Appellate District, a proposed order must, by local rule, accompany any application, and failure to do so may be grounds for denying the application [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 4].

[c] Service and Filing of Application

An application to extend time must be served on all parties to the appellate proceeding [*Cal. Rules of Ct., Rule 8.60(c)*; *see also Cal. Rules of Ct., Rule 8.25* (proof of such service must accompany application when filed)]. For discussion and forms relating to proof of service of papers generally, see Ch. 518, *Service of Summons and Papers*]. See also discussion in [2], *below*, regarding proof of delivery of a copy of the application to the client.

In addition, counsel must mail or otherwise deliver to his or her client a copy of each stipulation or application for additional time for a step in preparation of the record or for filing a brief, and must affix evidence of doing so to the application or stipulation presented for filing. In class actions, delivery of a copy to one represented party is adequate. The evidence of delivery need not state the client's address [*Cal. Rules of Ct., Rule 8.10(f)*].

In other respects, the service and filing requirements of *Cal. Rules of Ct., Rule 8.50* apply. However, under *Cal. Rules of Ct., Rule 8.60* an applicationto extend time for filing records and briefs must be served and filed, but the presiding justice (or Chief Justice in Supreme Court proceedings) may, for good cause, excuse advance service [*Cal. Rules of Ct., Rules 8.60(c)*]. Thus, any application made without advance service must include a request for excuse of the service requirement, and show good cause for granting this request. It would appear, however, in light of the superseding requirement of *Cal. Rules of Ct., Rule 8.60(c)*, of service on all parties, that excuse of advance service will rarely be granted in the case of applications to extend time [*see also* discussion in *Ch. 45, Appeal: Motion Procedure, § 45.15[2]*

].

A routine application must be accompanied by addressed, postage prepaid envelopes for mailing the order granting or denying the motion to all parties [*Cal. Rules of Ct., Rule 8.50*].

[2] Extensions for Preparing the Record or Filing Briefs

Certain additional provisions apply to specifically to applications to extend the time for preparing the record on appeal, or for filing a brief:

- While preparation of the record on appeal is done in the superior court, and superior court judges may make a number of orders respecting its preparation, they may *not* extend the time for doing any act involved in the preparation of the record on appeal. Those times may be extended only by the court of appeal as provided under *Cal. Rules of Ct., Rule 8.60(b)* [*Cal. Rules of Ct., Rule 8.60(e)*].

- Additional requirements or provisions apply to stipulations or applications for additional time for filing a brief, both under the appellate rules [*see, e.g., Cal. Rules of Ct., Rules 8.216(b)*] and local appellate rules. For further discussion of these requirements, see *Ch. 50, Appeal: Briefs, §§ 50.16[4]* and *50.17* [*see also Ch. 50, Appeal: Briefs, § 50.75*, for forms of stipulation and application for additional time to file a brief].

[3] Standards for Showing Good Cause for Extension

As discussed in [1], *above*, an application to extend time must demonstrate good cause under the standards stated in *Cal. Rules of Ct., Rule 8.63(b)* [*Cal. Rules of Ct., Rule 8.63(a)*], as shown in a declaration containing specific facts, not mere conclusions [*Cal. Rules of Ct., Rule 8.63(b)*].

The standards under *Cal. Rules of Ct., Rule 8.63(b)*, for determining good cause, which the court will consider if applicable, are as follows [*Cal. Rules of Ct., Rule 8.60(b)*]:

- The degree of prejudice, if any, to any party from a grant or denial of the extension. A party claiming prejudice must support the claim in detail [*Cal. Rules of Ct., Rule 8.63(b)(1)*].

- The positions of the client and any opponent with regard to the extension [*Cal. Rules of Ct., Rule 8.63(b)(2)*].

- The length of the record, including the number of relevant trial exhibits. A party relying on this factor must specify the length of the record. A record containing one volume of clerk's transcript or appendix and two volumes of reporter's transcript is considered an average-length record [*Cal. Rules of Ct., Rule 8.63(b)(3)*].

- The number and complexity of the issues raised. A party relying on this factor must specify the issues [*Cal. Rules of Ct., Rule 8.63(b)(4)*].

- Whether there are settlement negotiations and, if so, how far they have progressed and when they might be completed [*Cal. Rules of Ct., Rule 8.63(b)(5)*].

- Whether the case is entitled to priority [*Cal. Rules of Ct., Rule 8.63(b)(6)*].

- Whether counsel responsible for preparing the document is new to the case [*Cal. Rules of Ct., Rule*

8.63(b)(7)].

- Whether other counsel or the client needs additional time to review the document [*Cal. Rules of Ct., Rule 8.63(b)(8)*].

- Whether counsel responsible for preparing the document has other time-limited commitments that prevent timely filing of the document. Mere conclusory statements that more time is needed because of other pressing business will not suffice. Good cause requires a specific showing of other obligations of counsel that: (i) involve deadlines that as a practical matter preclude filing the document by the due date without impairing its quality, or (ii) arise from cases entitled to priority [*Cal. Rules of Ct., Rule 8.63(b)(9)*].

- Illness of counsel, a personal emergency, or a planned vacation that counsel did not reasonably expect to conflict with the due date and cannot reasonably rearrange [*Cal. Rules of Ct., Rule 8.63(b)(10)*].

- Any other factor that constitutes good cause in the context of the case [*Cal. Rules of Ct., Rule 8.63(b)(11)*].

[4] Disposition of Application

Cal. Rules of Ct., Rule 8.50 does not expressly provide for opposition, but opposing parties may wish to submit opposition nevertheless, especially when the application is for an extension of time. Parties wishing to file opposition should follow the procedures set out in *Cal. Rules of Ct., Rule 8.54* as much as possible [*see Ch. 45, Appeal: Motion Procedure, § 45.15[3]*].

An application to extend time may be granted or denied by the presiding justice (or Chief Justice in Supreme Court Proceedings), unless the court otherwise determines [*Cal. Rules of Ct., Rule 8.50*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsMotions on AppealCivil ProcedureAppealsRecords on AppealCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions

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PART II. LEGAL BACKGROUND

5-46 California Forms of Pleading and Practice--Annotated § 46.13

AUTHOR: Jeffery A. Hogge Author Hon. Miriam A. Vogel, Barbara L. Sorem Editorial Consultants

§ 46.13 Rules for Computing Time and Extensions of Time

The time for doing any act required or permitted under *Cal. Rules of Ct., Rules 8.1-* 8.277 (rules on appeal) is computed and extended in the manner provided by the Code of Civil Procedure [*Cal. Rules of Ct., Rule 8.60(a)*].

The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded [*Code Civ. Proc. § 12*].

If the last day for the performance of any act provided or required by law to be performed within a specified period of time falls on a holiday, that period is extended to and includes the next day that is not a holiday. The term "holiday" includes all Saturdays, all holidays specified in *Code of Civ. Proc. §§ 135, 659, 659a*, and *921*, and all days required to be considered as holidays under *Code Civ. Proc. § 12b* (discussed *below*) [*Code Civ. Proc. § 12a*]. *Code Civ. Proc. § 12a* applies to all provisions requiring performance on a particular day or within a specified period of time, whether set out in statute, code section, rule, regulation, or ordinance [*Code Civ. Proc. § 12a*]. *Code Civ. Proc. § 12a* applies to all provisions requiring performance on a particular day or within a specified period of time, whether set out in statute, code section, rule, regulation, or ordinance [*Code Civ. Proc. § 12a*].

If any city, county, state, or public office, other than a branch office, is closed for business the whole of any day, that day is considered a holiday for the purposes of computing time under *Code Civ. Proc. §§ 12* and *12a* [*Code Civ. Proc. § 12b*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureAppealsMotions on AppealCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedurePleading & PracticePleadingsTime LimitationsComputation

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5-46 California Forms of Pleading and Practice--Annotated § 46.14

AUTHOR: Jeffery A. Hogge Author Hon. Miriam A. Vogel, Barbara L. Sorem Editorial Consultants

§ 46.14 Extension of Time Ordered by Judicial Council Due to Earthquake, Fire, or Other Public Emergency

When necessary due to earthquake, fire, or other public emergency, or due to the danger from any such event, or the destruction of or danger to the building housing an appellate court, the Chairperson of the Judicial Council may make one or more of the following orders, notwithstanding any provision of the appellate rules (*i.e., Cal. Rules of Ct., Rules 8.100 et seq.*) [*Cal. Rules of Ct., Rule 8.66*]:

- An order extending by no more than 14 additional days the time to do any act required or permitted under the California Rules of Court [*Cal. Rules of Ct., Rule 8.66(a)(1)*].

- An order authorizing specified courts to extend by no more than 30 additional days the time to do any act required or permitted under the California Rules of Court [*Cal. Rules of Ct., Rule 8.66(a)(2)*].

If the nature and extent of the public calamity make it necessary, the Chairperson of the Judicial Council may extend or renew an order issued for an additional period of not more than 14 days for an order under Rule 8.66(a)(1), or an additional period of not more than 30 days for an order under Rule 8.66(a)(2) [*Cal. Rules of Ct., Rule 8.66(c)*]. The Chief Justice of California is the Chair of the Judicial Council [Advisory Committee Comment to *Cal. Rules of Ct., Rule 8.66*].

An order issued by the Chairperson of the Judicial Council under this rule must specify whether it applies throughout the state, applies only to specified courts, applies to courts within specified geographic areas, applies to attorneys within specified geographic areas, or applies in some other respect [*Cal. Rules of Ct., Rule 8.66*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsMotions on AppealCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions

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5-46 California Forms of Pleading and Practice--Annotated §§ 46.15-46.19

AUTHOR: Jeffery A. Hogge Author Hon. Miriam A. Vogel, Barbara L. Sorem Editorial Consultants

[Reserved]

§§ 46.15[Reserved]

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5-46 California Forms of Pleading and Practice--Annotated § 46.20

AUTHOR: Jeffery A. Hogge Author Hon. Miriam A. Vogel, Barbara L. Sorem Editorial Consultants

§ 46.20 State Statutes

Time computed excluding first day and including last day, unless last day a holiday, then it is also excluded. *Code Civ. Proc. § 12*

If last day to do act is holiday, time extended to next day not a holiday. *Code Civ. Proc. § 12a*

If public office closed for whole day, that day considered a holiday for purposes of computing time. *Code Civ. Proc. § 12b*

Legal Topics:

For related research and practice materials, see the following legal topics:
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5-46 California Forms of Pleading and Practice--Annotated § 46.21

AUTHOR: Jeffery A. Hogge Author Hon. Miriam A. Vogel, Barbara L. Sorem Editorial Consultants

§ 46.21 California Rules of Court

[1] Application to Shorten Time Requirement

Power of Chief Justice or Presiding Justice to shorten time for serving or filing paper. *Cal. Rules of Ct., Rule 8.68*

[2] Application to Extend Time Requirement

Superior court judge may not extend time for preparation of record. *Cal. Rules of Ct., Rule 8.60(e)*

Limitations on extensions of time in the reviewing courts. *Cal. Rules of Ct., Rule 8.268(c), 8.500(e)(2)*

When extension of time to file brief requested or subject of stipulation, counsel must mail or otherwise deliver copy of request or stipulation to party and affix evidence of doing so to application or stipulation. *Cal. Rules of Ct., Rule 8.60(f)*

Extension of time must demonstrate good cause. *Cal. Rules of Ct., Rule 8.63(a)*

Application for extension of time to file brief must include specific facts establishing good cause for extension and statement of when document is due, how long an extension is requested, and whether any prior extensions have been granted and, if so, their length, and whether granted by stipulation or by the court. *Cal. Rules of Ct., Rule 8.60(c)*

Application to extend time must be served on all parties. *Cal. Rules of Ct., Rule 8.60(c)*

List of factors considered in determining good cause. *Cal. Rules of Ct., Rule 8.63(b)*

[3] Computation of Time

Time for doing any act computed and extended in manner provided in Code of Civil Procedure. *Cal. Rules of Ct., Rule 8.60(a)*

[4] Extension of Time Due to Earthquake, Fire, or Other Public Eemergency

Effect on time requirements in case of public emergency. *Cal. Rules of Ct., Rule 8.66*

Legal Topics:

For related research and practice materials, see the following legal topics:
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5-46 California Forms of Pleading and Practice--Annotated § 46.22

AUTHOR: Jeffery A. Hogge Author Hon. Miriam A. Vogel, Barbara L. Sorem Editorial Consultants

§ 46.22 Local Rules of Courts of Appeal

Proposed order must accompany any motion or application filed in Second Appellate District, and failure to do so may be grounds for denial of motion or application. Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 2d App. Dist., Rule 4

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Jeffery A. Hogge Author Hon. Miriam A. Vogel, Barbara L. Sorem Editorial Consultants

§ 46.23 Decisions

Time to file notice of appeal absolutely jurisdictional. *Freiberg v. City of Mission Viejo (1995) 33 Cal. App. 4th 1484, 1488, 39 Cal. Rptr. 2d 802*

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Jeffery A. Hogge Author Hon. Miriam A. Vogel, Barbara L. Sorem Editorial Consultants

§ 46.24 Law Reviews

Graber, *Timeline and Deadlines for Civil Appeals in California*, 7(2) California Litigation 43 (1994)

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§ 46.25 Text References

Witkin, California Procedure, vol. 9, *Appeal*, §§ 606-608, 620 et seq. (4th ed. 1997)

California Civil Appellate Practice, ch. 11, *Applications and Motions* (Cal. CEB 3rd ed. 2000)

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5-46 California Forms of Pleading and Practice--Annotated § 46.26

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§ 46.26 Internet References

First Appellate District. This site includes: local rules; internal operating procedures; forms, including form of application for extension of time to file brief. http://www.courtinfo.ca.gov/courtsofappeal/1stDistrict

California Courts. This site includes: general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most Court of Appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

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[Reserved]

§§ 46.27[Reserved]

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5-46 California Forms of Pleading and Practice--Annotated § 46.30

AUTHOR: Jeffery A. Hogge Author Hon. Miriam A. Vogel, Barbara L. Sorem Editorial Consultants

§ 46.30 Party Seeking Order Shortening Time

☐ Prepare application setting forth: (1) facts showing good cause for granting the application, and (2) any previous applications granted or denied to any party after filing of the notice of appeal [*Cal. Rules of Ct., Rule 8.50*; *see § 46.11*, and *Ch. 45, Appeal: Motion Procedure, §§ 45.13* (general format requirements), *45.15* (general procedures for routine applications under *Cal. Rules of Ct., Rule 8.50*)]. For a form of application to shorten time, see *§ 46.40*.

☐ Prepare and attach proof of service [*Cal. Rules of Ct., Rules 8.10(f), 8.50*; *see Ch. 45, Appeal: Motion Procedure, § 45.15[2]*].

☐ If seeking to file without advance service, prepare application to include request for excuse from advance service requirement, showing good cause for excuse [*see Cal. Rules of Ct., Rule 8.50*; *but see Ch. 45, Appeal: Motion Procedure, § 45.15[2]*].

☐ Prepare and include proposed order if local rule or practice so dictates [*see § 46.11*, and *Ch. 45, Appeal: Motion Procedure, § 45.15[1]*].

☐ Serve one copy of application on each adverse party represented by counsel [*Cal. Rules of Ct., Rules 8.10(f), 8.50*; *see § 46.11* and *Ch. 45, Appeal: Motion Procedure, § 45.15[2]*].

☐ File original and three copies in court of appeal (or original and eight copies in Supreme Court) [*Cal. Rules of Ct., Rule 8.44(a)(5), (b)(4)*].

☐ Provide the clerk of the court with addressed, postage prepaid envelopes for mailing the order

granting or denying the application to all parties [*Cal. Rules of Ct., Rule 8.50*; *see § 46.11* and *Ch. 45, Appeal: Motion Procedure, § 45.15[2]*].

☐ Unless the court determines and orders otherwise, the application will be decided without further papers (*e.g.*, by opposing party) or a hearing, by the presiding justice (or Chief Justice in Supreme Court proceedings) [*Cal. Rules of Ct., Rule 8.50*; *see § 46.11* and *Ch. 45, Appeal: Motion Procedure, § 45.15[3], [4]*].

Legal Topics:

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5-46 California Forms of Pleading and Practice--Annotated § 46.31

AUTHOR: Jeffery A. Hogge Author Hon. Miriam A. Vogel, Barbara L. Sorem Editorial Consultants

§ 46.31 Party Seeking Order Extending Time

[1] Preliminary Determinations

☐ Determine whether time extension is necessary and whether good cause exists, using the following factors [*Cal. Rules of Ct., Rule 8.63*; *see § 46.12[3]*]:

☐ The degree of prejudice, if any, to any party from a grant or denial of the extension. Support this claim in detail.

☐ The positions of the client and any opponent with regard to the extension.

☐ The length of the record, including the number of relevant trial exhibits. Specify the length of the record. A record containing one volume of clerk's transcript or appendix and two volumes of reporter's transcript is considered an average-length record.

☐ The number and complexity of the issues raised. Specify the issues.

☐ Whether there are settlement negotiations and, if so, how far they have progressed and when they might be completed.

☐ Whether the case is entitled to priority.

☐ Whether counsel responsible for preparing the document is new to the case.

☐ Whether other counsel or the client needs additional time to review the document.

☐ Whether counsel responsible for preparing the document has other time-limited commitments that prevent timely filing of the document. Mere conclusory statements that more time is needed because of other pressing business will not suffice. Good cause requires a specific showing of other obligations of counsel that: (i) involve deadlines that as a practical matter preclude filing the document by the due date without impairing its quality, or (ii) arise from cases entitled to priority.

☐ Illness of counsel, a personal emergency, or a planned vacation that counsel did not reasonably expect to conflict with the due date and cannot reasonably rearrange.

☐ Any other factor that constitutes good cause in the context of the case.

[2] Prepare and Serve Application

☐ Prepare application in the form of a declaration containing specific facts, not mere conclusions, showing good cause for granting the application under the standards stated in *Cal. Rules of Ct., Rule 8.63(b)* [*see* [1], *above*], and also stating when document is due, how long an extension is needed, whether any prior extensions have been granted and if so, how long, and whether they were granted by stipulation or application [*Cal. Rules of Ct., Rule 8.60(c)*; *see § 46.12[1][b]*]. For general format requirments, see *Ch. 45, Appeal: Motion Procedure, § 45.13*. For a form of application to shorten time, see *§ 46.40*.

☐ Prepare and attach proof of service [*Cal. Rules of Ct., Rules 8.25, 8.50*; *see § 46.12[1][c]*].

☐ Prepare and include proposed order if local rule or practice so dictates [*see § 46.12[1][b]*, and *Ch. 45, Appeal: Motion Procedure, § 45.15[1]*].

☐ Serve all parties [*Cal. Rules of Ct., Rule 8.60(c)*; *see § 46.12[1][c]*].

☐ File original and one copy in court of appeal (or original and eight copies in Supreme Court) [*Cal. Rules of Ct., Rule 8.44(a)(5), (b)(6)*].

☐ Provide the clerk of the court with addressed, postage prepaid envelopes for mailing the order granting or denying the application to all parties [*Cal. Rules of Ct., Rule 8.50*; *see § 46.12[1][c]*].

☐ Unless the court determines and orders otherwise, the application will be decided without further papers (*e.g.*, by opposing party) or a hearing, by the presiding justice (or Chief Justice in Supreme Court proceedings) [*Cal. Rules of Ct., Rule 8.50*; *see § 46.12[4]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Jeffery A. Hogge Author Hon. Miriam A. Vogel, Barbara L. Sorem Editorial Consultants

[Reserved]

§§ 46.32[Reserved]

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5-46 California Forms of Pleading and Practice--Annotated § 46.40

AUTHOR: Jeffery A. Hogge Author Hon. Miriam A. Vogel, Barbara L. Sorem Editorial Consultants

§ 46.40 Application to Reviewing Court to Extend Time for Doing Act Involved in Preparation of Record or to Shorten Time for Serving or Filing Paper Incident to Appeal

[1] FORM Application to Reviewing Court to Extend Time for Doing Act Involved in Preparation of Record or to Shorten Time for Serving or Filing Paper Incident to Appeal

_____ [*name of attorney*]
_____ [*California State Bar No.*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone number*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, _____ APPELLATE DISTRICT[, DIVISION _____]

_____ [*name*],	)	
Plaintiff and _____ [*Appellant/*	)	
Respondent],	)	CASE NO. _____
vs.	)	(Superior Court No. _____)
_____ [*name*],	)	
Defendant and _____ [*Appel-*	)	
lant/Respondent].	)	
_____		

On Appeal from the Superior Court of the County of _____ [*name*], No. _____ [*number*].
The Honorable _____ [*name*], Judge.

APPLICATION AND DECLARATION TO _____ [EXTEND *or* SHORTEN] TIME TO _____ [*specify act to be done*]

I, _____ [*name*], declare:

1. I am an attorney at law duly admitted to practice before all the courts of California and the attorney of record herein for _____ [*party, e.g.,* Plaintiff and Appellant].

2. I hereby apply for an order _____ [extending *or* shortening] the time for _____ [*specify act*]. The time for doing this act will ordinarily expire on _____ [*date*]. I request that the order _____ [extend *or* shorten] this time period from _____ days to _____ days, so that the time for doing this act will expire instead on _____ [*date*].

3. _____ [*State any previous applications granted or denied to any party after notice of appeal was filed; if application is to extend time, statewhether any prior extensions have been granted and, if so, their length, and whether granted by stipulation or by the court*].

4. _____ [*State here and in succeeding paragraphs, as necessary, facts within declarant's knowledge showing good cause why application should be granted; if application is to extend time, state specific facts, not mere conclusions, showing good cause pursuant to standards set out in Cal. Rules of Ct., Rule 8.63(c)*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]
Attorney for _____ [*e.g.,* Plaintiff and Appellant]

ORDER

The request for _____ [extension *or* shortening] of time is _____ granted to _____.

_____ denied.
_____
Presiding Justice/Chief Justice

PROOF OF SERVICE

I, _____ [*name*], declare that:

I am at least 18 years of age and not a party to the above-entitled action. My _____ [residence *or*

business] address is _____, California; I am _____ [a resident *or* employed in] _____ County, California [*county where mailing occurs*].

I served the foregoing motion on _____ [*date*], by depositing _____ [a copy *or* copies] thereof in the United States mail in _____, California, enclosed in [a] sealed envelope[s], with postage fully prepaid, addressed to _____ [*state name and full address of each party served*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form is for use by a party seeking an extension of time for doing any act involved in the preparation of the record or filing a paper incident to an appeal pursuant to *Cal. Rules of Ct., Rules 8.100 et seq.* (rules on appeal) [*see Cal. Rules of Ct., Rules 8.50, 8.63, 8.68*] or a shortening of time for serving or filing a paper incident to an appeal [*see Cal. Rules of Ct., Rules 8.50, 8.60, 8.63*]. For discussion of applications to shorten or extend time, see respectively *§§ 46.11* and *46.12*.

Note that several districts of the court of appeal have printed forms of application to extend time; the First Appellate District has a printed form for use specifically to extend time to file a brief. Counsel should check the district clerk's office to determine whether a printed form should be used in lieu of this form [*see also Ch. 50, Appeal: Briefs, § 50.75[2]*, setting out a form of application for extension of time to file a brief, based on the First Appellate District's printed form and *§ 50.75[3]*, setting out Judicial Council Form APP-006, *Application for Extension of Time to File Brief (Civil Case)*].

The application must be accompanied by a proof of prior service in a manner permitted by law, either on all parties (application for extension), or on each adverse party separately represented by counsel (application to shorten time), unless the presiding justice has excused advance service [*see Cal. Rules of Ct., Rules 8.50, 8.60, 8.63(b)*, and discussion in *§§ 46.11, 46.12[1]*]. For discussion concerning proof of service, see Ch. 518, *Service of Summons and Papers* .

A routine application, by custom and in some courts by requirement, is accompanied by a proposed order [*see § 46.12[1][b]*, and *Ch. 45, Appeal: Motion Procedure, § 45.15[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureAppealsMotions on AppealCivil ProcedureAppealsRecords on Appeal

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Volume 5: Appeal-Chs. 40-55
Chapter 53 APPEAL: REMITTITUR AND COSTS ON APPEAL

5-53 California Forms of Pleading and Practice--Annotated 53.syn

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§ 53.syn Synopsis to Chapter 53: APPEAL: REMITTITUR AND COSTS ON APPEAL

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§ 53.02 Cross References

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[2] Other Related Chapters

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[1] FORM

[2] Use of Form

§ 53.61 Motion for Stay of Issuance

[1] FORM

[2] Use of Form

§ 53.62 Proceedings to Recall Remittitur

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[2] Stipulation for Recall of Remittitur

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§ 53.71 Motion for Attorney's Fees on Appeal

[1] FORM

[2] Use of Form

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FOOTNOTES:
(n34)Footnote *.
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5-53 California Forms of Pleading and Practice--Annotated § 53.01

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§ 53.01 Scope of Chapter

This chapter covers the following proceedings that occur after a decision has been filed in a civil appeal:

- Remittitur proceedings, or the return of the case to the jurisdiction of the superior court, including proceedings to expedite or recall remittitur [*see § 53.10* et seq.].

- Proceedings after remittitur, in the superior court, to recover costs and fees on appeal [*see § 53.30* et seq.].

Although this chapter focuses on rehearing and remittitur by the court of appeal, these proceedings apply also to review proceedings before the Supreme Court, and are identical, with a few noted exceptions [*see also* Ch. 54, *Appeal: California Supreme Court Review*].

This chapter includes the following forms relating to remittitur and the recovery of costs on appeal:

- A stipulation to expedite remittitur, a stipulation and motion to stay remittitur, and a stipulation and motion to recall remittitur [*see §§ 53.60 -53.62*].

- Memoranda for costs on appeal and a motion to recovery attorney's fees on appeal [*see §§ 53.70, 53.71*].

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5-53 California Forms of Pleading and Practice--Annotated § 53.02

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§ 53.02 Cross References

[1] Related Chapters in This Volume

- For discussion relating to the overall procedures for civil appeal, see Ch. 40, *Appeal: An Overview* .

- For discussion and forms relating to requests by a party or other interested person for the publication or "depublication" of a court of appeal opinion, see Ch. 41, *Appeal: Review Standards and Appellate Rules of Law* .

- For discussion and forms relating to proceedings to stay trial court proceedings pending appeal and remittitur, see Ch. 43, *Appeal: Stay of Proceedings* .

- For discussion and forms relating to appellate papers and appellate motion procedure generally, see Ch. 45, *Appeal: Motion Procedure* .

- For discussion and forms relating to extension of time for filing, and relief from default for late filing generally, see respectively Ch. 46, *Appeal: Extending or Shortening Time* , Ch. 47, *Appeal: Relief From Default* .

- For discussion and forms relating to proceedings for the imposition of sanctions on appeal, see Ch. 49, *Appeal: Sanctions* .

- For discussion and forms relating to briefs, including detailed discussion of the requirements governing briefs that also apply to petitions for rehearing, see Ch. 50, *Appeal: Briefs* .

- For discussion and forms concerning postbriefing proceedings leading up the filing of the decision on appeal, including discussion concerning the timing and form of a decision, the time when a decision becomes final, and a consent to modification of a money judgment, see Ch. 51, *Appeal: Hearing and Decision* .

- For discussion and forms relating to rehearing proceedings in the court of appeal and the Supreme Court, see Ch. 52, *Appeal: Rehearing* .

- For discussion and forms relating to Supreme Court proceedings generally, see Ch. 54, *Appeal: California Supreme Court Review* .

[2] Other Related Chapters

- For discussion and forms relating the recovery of costs and attorney's fees in a trial court proceeding, see Ch. 174, *Costs and Attorney's Fees*, §§ 174.40 *et seq.*, *174.140* et seq.

- For discussion and forms relating to remittitur and recovery of costs in an appeal in a limited civil case to the appellate division of a superior court, see *Ch. 345A, Limited Civil Cases, §§ 345A.66 -345A.70*.

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5-53 California Forms of Pleading and Practice--Annotated §§ 53.03-53.09

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[Reserved]

§§ 53.03[Reserved]

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5-53 California Forms of Pleading and Practice--Annotated § 53.10

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§ 53.10 Governing Law

Remittitur in the court of appeal and the Supreme Court is governed by *Code Civ. Proc. § 912* and *Cal. Rules of Ct., Rules 8.272, 8.540*.

Legal Topics:

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

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5-53 California Forms of Pleading and Practice--Annotated § 53.11

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§ 53.11 Remittitur Defined

The remittitur is essentially the document by which the final judgment of the appellate court is communicated to the trial court. The appellate court, in issuing the remittitur, notifies the trial court that the appellate court's judgment is final, authenticates its judgment to the trial court, and thereby transfers the case back to the trial court, reinvesting it with jurisdiction over the case. The clerk of the appellate court attaches a copy of the court's opinion or decision to the remittitur [*see Code Civ. Proc. § 912*; *Cal. Rules of Ct., Rule 8.272(b)*; *In re Anna S. (2010) 180 Cal. App. 4th 1489, 1500, 103 Cal. Rptr. 3d 889* ; *Bellows v. Aliquot Associates, Inc. (1994) 25 Cal. App. 4th 426, 30 Cal. Rptr. 2d 723* ; *Schwartz v. Schwartz (1969) 268 Cal. App. 2d 685, 690, 74 Cal. Rptr. 192* ; *Noel v. Smith (1905) 2 Cal. App. 158, 162, 83 P. 167* ; *see also Isenberg v. Sherman (1932) 214 Cal. 722, 725-726, 7 P.2d 1006*].

Legal Topics:

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

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5-53 California Forms of Pleading and Practice--Annotated § 53.12

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§ 53.12 Procedure for Issuance of Remittitur

[1] Issuance by Clerk After Lapse of Time for Obtaining Further Review

On final determination of an appeal by the reviewing court, the clerk of the court remits to the trial court a certified copy of the judgment or order of the reviewing court and of its opinion, if any [*Code Civ. Proc. § 912*; *see Cal. Rules of Ct., Rule 8.272(b)*].

PRACTICE TIP:

Form of Remittitur and "Judgment." The remittitur issued by an appellate court is typically a one-page printed form, which, as discussed in *§ 53.11*, essentially advises the lower court that a copy of the opinion or decision is attached and that the decision has now become final. It may also specify that a party is entitled to an award of costs.

The "judgment or order" of the appellate court, referred to in *Code Civ. Proc. § 912*, is typically the final paragraph of the court's opinion, stating that the trial court judgment is affirmed or reversed, or otherwise providing the disposition and directions for the trial court to follow after remittitur. It may provide for the award of costs or sanctions, or both, in addition to its other disposition of the cause [*see § 53.30* et seq.].

Unless otherwise ordered, the clerk of the Supreme Court issues the remittitur when a judgment of that court becomes final, and the clerk of the court of appeal issues the remittitur on the expiration of the period during which a hearing in the Supreme Court may be determined, including any extension of such period granted in the particular cause. The remittitur is deemed issued on the date the clerk enters a remittitur in the record of the case. It is transmitted immediately to the lower court, with a certified copy of the opinion or order, to the lower court [*Cal. Rules of Ct., Rule 8.540(b)*].

When the remittitur is from the Supreme Court's review of a court of appeal decision, it is addressed to the court of appeal unless otherwise ordered by the Supreme Court, and is accompanied by a second certified copy of the remittitur and by two certified copies of the opinion or order. In this situation, the court of appeal must issue its own remittitur immediately afterwards, after an unqualified affirmance or reversal of its judgment by the Supreme Court, or after the finality of such further proceedings in the court of appeal that may have been mandated by the Supreme Court's decision [*Cal. Rules of Ct., Rule 8.272(b)(2)*].

The clerk of the trial court, or the judge if there is no clerk, files this certified copy of the judgment and opinion of the appellate court, and attaches that copy to the judgment roll if the appeal was from a judgment. The clerk then enters a note of the judgment of the reviewing court, stating whether the judgment or order appealed from has been affirmed, reversed, or modified, both in the margin of the original entry of the judgment or order and also in the register of actions [*Code Civ. Proc. § 912*].

PRACTICE TIP:

Delay in Issuance of Remittitur. In some instances, such as when the parties settle and dismiss, they may wish to stipulate to an immediate issuance of remittitur [*see* [3], *below*]. Unless you have some reason for doing so, however, do not worry about a certain amount of time delay in its issuance. When it has been transmitted, you should receive a notice by mail. Sometimes it will be issued immediately and sometimes a few weeks, or more, may pass before it actually issues. The only effect of the delay is that transfer of jurisdiction to the trial court is postponed. Jurisdiction is not lost. If there is inordinate delay, call or write the clerk's office to check on its issuance, since it is possible that it was issued, but your name was inadvertently omitted from the service list.

CAUTION: Be Aware of Time Requirements. Note that the time periods for doing certain important acts begin to run either from the date of the mailing by the appellate court of notice of issuance of the remittitur [*see, e.g., Cal. Rules of Ct., Rule 8.278(c)* (40-day period for filing memorandum of costs), and discussion in *§ 53.33*] or from the date of the filing of the remittitur in the trial court [*see, e.g., Code Civ. Proc. § 583.320(a)(3)* (mandatory three-year period for bringing case to trial following appeal and remand for trial or new trial), and discussion in *Ch. 212, Dismissal, § 212.60* et seq.].

[2] Immediate Issuance on Stipulation of Parties

The court of appeal may direct the immediate issuance of a remittitur on a stipulation of the parties [*Cal. Rules of Court, Rule 8.268(c)(1)*]. The Supreme Court may order an immediate remittitur either on the parties' stipulation or on a motion showing good cause [*Cal. Rules of Court, Rule 8.540(c)*].

PRACTICE TIP:

Expedited Issuance of Remittitur. If you reach settlement while your appeal is pending, consider, to save time, submitting a stipulation for immediate issuance of the remittitur along with your request to dismiss the appeal. This way, the trial court will immediately be reinvested with jurisdiction and will be able to enforce your settlement agreement.

For a form of stipulation for immediate issuance of remittitur, see *§ 53.60*.

[3] Notice of Issuance

The clerk of the appellate court is required to mail a notice to the parties that it has issued the remittitur promptly after having done so [*Cal. Rules of Ct., Rule 8.272(d)*].

Legal Topics:

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

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5-53 California Forms of Pleading and Practice--Annotated § 53.13

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§ 53.13 Stay of Issuance

An appellate court, for good cause, may stay the issuance of a remittitur for a reasonable period [*Cal. Rules of Ct., Rule 8.272(c)(2)*].

For example, when a party files a petition for writ of certiorari with the United States Supreme Court, a stay of issuance of the California Supreme Court's remittitur, pending the determination of that petition, is proper [*see Severns Drilling Co. v. Superior Court (1936) 16 Cal. App. 2d 435, 437, 60 P.2d 530* ; *Reynolds v. E. Clemens Horst Co. (1918) 36 Cal. App. 529, 529-530, 172 P. 623*].

Issuance of remittitur also may be stayed when the appellate court issues an order to show cause why its judgment should not be vacated due to mistaken assumption of fact [*Krug v. Meehan (1951) 108 Cal. App. 2d 416, 239 P.2d 46*].

For form of a motion for stay of issuance of remittitur, see *§ 53.61*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRemandsCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral Overview

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5-53 California Forms of Pleading and Practice--Annotated § 53.14

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§ 53.14 Recall of Remittitur

[1] Grounds for Recall

As a general rule, the appellate court cannot exercise any jursidiction over a case once it has issued a remittitur that has been filed in the lower court. This rule rests on the assumption that all of the proceedings have been regular. Thus, if it appears that this has not been the case, and that, for example, one party has practiced fraud on the appellate court or the opposing party, the appellate court will assert its jurisdiction and recall the case. This is not done on the principal of resumption of jurisdiction, but on the ground that the jurisdiction of the court cannot be divested by an irregular or improvident order [*Isenberg v. Sherman (1932) 214 Cal. 722, 725-726, 7 P.2d 1006*]. Absent fraud, inadvertence, or mistake, however, the appellate court does not have the power to recall a remittitur once it has been issued and filed [*Chin Ott Wong v. Title Ins. & Trust Co. (1949) 91 Cal.App.2d 1, 2, 204 P.2d 387*].

A remittitur may not be recalled, for example, simply to correct judicial error. The remedies of petition for rehearing or modification of the judgment are available if a party is dissatisfied with the appellate court's decision for this reason [*Bank of America v. Superior Court (1990) 220 Cal. App. 3d 613, 625, 269 Cal. Rptr. 596* ; *Davis v. Basalt Rock Co. (1952) 114 Cal. App. 2d 300, 301-311, 250 P.2d 254* ; *Chin Ott Wong v. Title Ins. & Trust Co. (1949) 91 Cal.App.2d 1, 2-3, 204 P.2d 387* ; *see Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal. 3d 158, 165, 188 Cal. Rptr. 104, 655 P.2d 306*]. On the other hand, an appellate court may recall remittitur for the purpose of correcting a clerical error [*Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal. 3d 158, 166, 188 Cal. Rptr. 104, 655 P.2d 306*]. For example, if the clerk of the reviewing court fails to enter on the record and insert in the remittitur a judgment for costs as provided in *Cal. Rules of Ct., Rule 8.278(b)(1)*, the reviewing court may recall the remittitur for correction [*Cal. Rules of Ct., Rule 8.278(b)(2)*].

A misstatement of material facts also may justify recall of the remittitur if it constitutes a misstatement of facts presented in evidence, not a mere faulty conclusion as to the legal effect of those facts [*Davis v. Basalt Rock Co. (1952) 114 Cal. App. 2d 300, 303, 250 P.2d 254*].

[2] Motion or Stipulation for Recall

In a proper case, the remittitur may be recalled by order of the reviewing court on its own motion, on a motion of a party, or on a stipulation, for good cause [*Cal. Rules of Ct., Rule 8.272(c)(2)*].

Any motion must be made promptly by the moving party, as soon as that party has learned of the facts on which the motion is based [*Talbot v. Fire etc. Pension Bd. (1942) 51 Cal. App. 2d 193, 194, 124 P.2d 352*].

For forms of motion and stipulation for recall of remittitur, see *§ 53.62*.

PRACTICE TIP:

Recall vs. Stay. Both stay of issuance of remittitur and recall of remittitur are rarely utilized or granted by the court. A party is more likely, however, to be able to show good cause for a stay of issuance of the remittitur [*see § 53.13*], than to establish the very narrow and limited grounds on which the court may recall remittitur [*see* [1], *above*]. A recall is exceedingly rare.

Deadline for Recall. While there is no specific deadline for a stipulation or motion to recall remittitur in general, a recall motion for the purpose of correcting errors regarding the award of costs on appeal must be filed within 30 days of the issuance of the remittitur [*see Cal Rules of Ct., Rule 8.272(c)(2)*, and discussion in *§ 53.31*].

Legal Topics:

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

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5-53 California Forms of Pleading and Practice--Annotated § 53.15

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§ 53.15 Action by Trial Court on Receipt of Remittitur

[1] Court Is Reinvested With Jurisdiction Only to Carry Out Remittitur

After final decision on appeal, the trial court is reinvested with jurisdiction of the cause, but only as defined by the terms of the remittitur. The trial court is empowered to act only in accordance with the direction of the reviewing court. Action which does not conform to that direction is void. The order of the appellate court as stated in the remittitur is decisive of the character of the judgment to which the appellant is entitled. When entry of a specific judgment is directed [*see Code Civ. Proc. § 906* (power of appellate court to direct entry of proper judgment)], the trial court has no discretion but to enter the judgment called for [*Hampton v. Superior Court (1952) 38 Cal. 2d 652, 655-656, 242 P.2d 1* ; *Bell v. Farmers Ins. Exchange (2006) 135 Cal. App. 4th 1138, 1143-1144, 38 Cal. Rptr. 3d 306]* . The lower court cannot reopen the case on the facts, allow the filing of amended or supplemental pleadings, or retry the case. If it does so, any subsequent judgment is rendered void [*Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi (2006) 141 Cal. App. 4th 15, 23, 45 Cal. Rptr. 3d 633* ; *Bach v. County of Butte (1989) 215 Cal. App. 3d 294, 301, 263 Cal. Rptr. 565*]. If the appellate court inadvertently omits to include in its instructions to the trial court, on the reversal of a judgment, essential elements within the issues necessarily determined on the appeal, a party's proper remedy is to petition for rehearing [*Hampton v. Superior Court (1952) 38 Cal. 2d 652, 655-656, 242 P.2d 1* ; for discussion of rehearing proceedings, *see Ch. 52, Appeal: Rehearing, § 52.10* et seq.]. The trial court may not exceed the specific directions of the appellate court, including the addition of conditions that the trial court has merely assumed the appellate court should have included [*Hampton v. Superior Court (1952) 38 Cal. 2d 652, 656, 242 P.2d 1*]. An unqualified affirmance ordinarily sustains the judgment and ends the litigation [*Griset v. Fair Political Practices Commission (2001) 25 Cal. 4th 688, 701, 107 Cal. Rptr. 2d 149, 23 P.3d 43*].

[2] Remittitur to Be Interpreted by Reference to Opinion

A remittitur must be interpreted by reference to the reviewing court's opinion. Especially when there is any ambiguity, the remittitur must be interpreted so as to harmonize with the appellate court's ruling [*In re Justin S. (2007) 150 Cal. App. 4th 1426, 1434-1435, 59 Cal. Rptr. 3d 376* ; *Schwartz v. Schwartz (1969) 268 Cal. App. 2d 685, 690, 74 Cal. Rptr. 192*].

[3] Restitution on Reversal

[a] Restitution May Be Ordered to Conform With Terms of Remittitur

When a judgment or order is reversed or modified, the appellate court may direct that the parties be returned so far as possible to the positions they occupied before the enforcement of or execution on the judgment or order. In doing so, the appellate court may order restitution on reasonable terms and conditions of all property and rights lost by the erroneous judgment or order of the trial court, to the extent that the restitution is consistent with rights of third parties. The appellate court may direct the entry of a money judgment sufficient to compensate for property or rights not restored. The court may take evidence and make findings concerning restitution, or it may, by order, refer such matters to the trial court for determination [*Code Civ. Proc. § 908*].

Under *Code Civ. Proc. § 908*, a person who has conferred a benefit on another in compliance with a judgment, or whose property has been taken pursuant to a judgment, is entitled to restitution if the judgment is reversed or set aside, unless restitution would be inequitable or the parties contract that payment is to be final. If the judgment is modified, there is a right to restitution of the excess. A party's voluntary compliance with an erroneous judgment or order does not preclude restitution, because satisfaction of a judgment, when not forced or done only pursuant to execution, is not deemed to be such a voluntary or gratuitous act that would preclude restitution after reversal [*Schubert v. Bates (1947) 30 Cal. 2d 785, 791-792, 185 P.2d 793* (vacation of premises by defendant-appellant pursuant to judgment in unlawful detainer action did not preclude restitution when judgment was later reversed)].

Although *Code Civ. Proc. § 908* provides that the appellate court may order restitution when the judgment or order appealed from is reversed or modified, this is rarely done. More often, restitution is sought in the trial court after remittitur. The trial court has inherent, discretionary power to order restitution [*see Schubert v. Bates (1947) 30 Cal. 2d 785, 789, 185 P.2d 793* ; *see also Loeb v. Record (2008) 162 Cal. App. 4th 431, 451-452, 75 Cal. Rptr. 3d 551* ; *Rogers v. Bill & Vince's, Inc. (1963) 219 Cal. App. 2d 322, 324, 33 Cal. Rptr. 129*]. The existence of this power stems from the rule that, on reversal, the action is as though it had never been tried, and the court will, when justice requires it, place the parties as nearly as maybe in the condition in which they stood previously [*Schubert v. Bates (1947) 30 Cal. 2d 785, 789-791, 185 P.2d 793*].

For a discussion of proceedings by the appellate court to determine and order restitution, see *Ch. 51, Appeal: Hearing and Decision, § 51.17[4][e]*.

[b] Motion or Action for Restitution

Restitution may be sought by way of motion made in the main action in either the appellate or trial court. Due to the summary nature of this procedure, there is no right of setoff [Bank of America, etc. v. *McLaughlin (1940) 37 Cal. App. 2d 415, 417-418, 99 P.2d 548*]. Restitution may also be sought in an independent action, such as one for money had and received, and in that instance the claim for restitution is subject to a setoff claim [*Buckman v. Tucker (1937) 9 Cal. 2d 403, 406, 71 P.2d 69* ; *see Code Civ. Proc. § 431.70* (right to setoff cross demands for money)].

PRACTICE TIP:

Restitution vs. Stay of Enforcement. As a general rule, it is far more preferable to obtain a stay of enforcement of the judgment at the outset of the appeal, than it is to rely on restitution proceedings after remittitur. For further discussion, including detailed discussion and forms relating to stay proceedings, see *Ch. 43, Appeal: Stay of Proceedings, § 43.11[1]*.

Legal Topics:

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

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A. Remittitur

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§ 53.16 Relief by Petition for Extraordinary Writ When Trial Court Fails to Carry Out Remittitur Properly

If the trial court enters a judgment that does not conform with the remittitur, an aggrieved party may petition the appellate court for writ of mandate to compel the trial court to vacate the improper judgment and enter one properly conforming to the remittitur [*Lamb v. Owen (1929) 98 Cal. App.106, 108, 276 P. 628*].

Similarly, a party make seek a writ of prohibition to prevent the trial court from proceeding to a trial in violation of the terms of the appellate court's remittitur. Although appeal from the judgment after further trial of the action would also be an available remedy, it is not an adequate remedy when the vicissitudes and expenses of an unnecessary trial would result [*Hampton v. Superior Court (1952) 38 Cal. 2d 652, 656-657, 242 P.2d 1*].

For detailed discussion and form relating to petitions for writ of mandate generally, see Ch. 358, *Mandate and Prohibition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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5-53 California Forms of Pleading and Practice--Annotated § 53.17

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§ 53.17 Trial Court Proceedings After Remittitur

Following remittitur, after the trial court resumes jurisdiction of the cause, further proceedings depend upon the disposition by the appellate court. The following are some of the questions that arise after remittitur:

- The recovery of costs on appeal and attorney's fees, when recovery is permitted. For detailed discussion of these proceedings, see *§ 53.30* et seq.

- The trial court's interpretation and implementation of the appellate court's disposition. For discussion of the doctrine of the "law of the case," see *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.30*.

- Time deadlines for prosecuting a new trial.

  - For discussion of the three-year time period that begins running from the date that the trial clerk files the remittitur, within which a plaintiff must bring an action to trial after a judgment has been reversed and remanded for a new trial [*Code Civ. Proc. § 583.320(a)(3)*], see *Ch. 212, Dismissal, § 212.60* et seq.

  - For discussion of the one-year period within which a plaintiff must recommence an action if a judgment for plaintiff is reversed on appeal other than on the merits [*Code Civ. Proc. § 355*], see Ch. 345, *Limitation of Actions* .

- The conduct of a new trial itself, particularly, whether the case will be assigned to the same judge

who presided over the initial trial. Assignment of trials on remand vary from court to court, and counsel should check with clerk of the particular court or its local rules to ascertain its assignment practices. A peremptory challenge may be made in the event that the trial court judge in the prior proceeding is assigned to conduct a new trial on the matter after reversal on appeal; the motion to challenge the assignment must be made within 60 days after the party or the party's attorney has been notified of the assignment [*see Code Civ. Proc. § 170.6(2)*; for further discussion and forms, *see* Ch. 317, *Judges*].

Legal Topics:

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

§§ 53.18[Reserved]

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§ 53.30 Governing Law

Costs on appeal are governed by *Code Civ. Proc. § 1034(b)* and *Cal. Rules of Ct., Rule 8.278*. Attorney's fees on appeal are governed by *Cal. Rules of Ct., Rule 3.1702(c), (d)*, and by decisional law [*see, e.g., Harbour Landing-Dolfann, Ltd. v. Anderson (1996) 48 Cal. App. 4th 260, 263, 55 Cal. Rptr. 2d 640*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 53.31 Recovering Costs on Appeal

With certain qualifications and exceptions, the party prevailing on appeal is entitled to recover costs on appeal [*Cal. Rules of Ct., Rule 8.278(a)(1)*].The appellate court may, and in some cases is required to, specify an award, apportionment, or denial of costs [*Cal. Rules of Ct., Rule 8.278(a)(3)*]. The appellate court has discretion to award costs to the losing party [*see Quest Int'l, Inc. v. Icode Corp. (2004) 122 Cal. App. 4th 745, 778, 19 Cal. Rptr. 3d 173* (court awarded costs to losing appellant because appeal issue was very complex and respondent's actions added to complexity)].The appellate court clerk enters in the record, and inserts into the remittitur, either the court's directions as to an award or denial of costs, or, in the absence of directions, a "judgment awarding costs" pursuant to *Cal. Rules of Ct., Rule 8.278(a)* [*Cal. Rules of Ct., Rule 8.278(b)*].

For further discussion of who is a "prevailing party" under *Cal. Rules of Ct., Rule 8.278(a)*, and the entry of a cost award under *Cal. Rules of Ct., Rule 8.278(b)*, see *Ch. 51, Appeal: Hearing and Decision, § 51.18*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 53.32 Items Recoverable as Costs

The party to whom costs are awarded on appeal may recover only the following costs, if reasonable [*Cal. Rules of Ct., Rule 8.278(d)*]:

- Filing fees;
- The amount the party paid for any portion of the record, whether an original or a copy or both;
- The cost to produce additional evidence on appeal;
- The costs to notarize, serve, mail, and file the record, briefs, and other papers;
- The cost to print and reproduce any brief, including any petition for rehearing or review, answer, or reply; and
- The cost to procure a surety bond, including the premium and the cost to obtain a letter of credit as collateral, unless the trial court determines the bond was unnecessary.

PRACTICE TIP:

When a Bond May Be Deemed Unnecessary. In most instances the trial court approves or even sets the requirement for a bond as a condition for a court-ordered stay. Nevertheless, there are some situations in which a trial court may determine that a bond was unnecessary for the purpose of fixing costs on appeal. For example, it may find the bond unnecessary if it appears that respondent was willing to

consent to a stay without security, but appellant posted the bond anyway.

Courts have consistently held that items of expense *not* listed in *Cal. Rules of Ct., Rule 8.278(d)* are *not* a recoverable item of costs on appeal, even though it may otherwise be a reasonable item of expense [*see, e.g., Golf West of Kentucky, Inc. v. Life Investors, Inc. (1986) 178 Cal. App. 3d 313, 316-317, 223 Cal. Rptr. 539* (holding that the expense of obtaining letters of credit in securing surety bonds was not listed and not recoverable; note that *Cal. Rules of Ct., Rule 8.278(d)*, as set out *above*, was subsequently amended to allow this item of expense)]. This is consistent with the language of *Cal. Rules of Ct., Rule 8.278(d)*, providing that a party may recover "only" the items listed, "if reasonable" [*see also Code Civ. Proc. § 1034(b)* (directing that Judicial Council establish by rule the costs allowable on appeal and procedure for claiming costs on appeal)].

Costs previously incurred in connection with another appeal are not recoverable under *Cal. Rules of Court, Rule 8.278(d)*, even though the cost benefitted the current appeal. For example, the cost of preparing a reporter's transcript incurred in a prior appeal is not recoverable in a second appeal, even though the reporter's transcript is used in the second appeal [*Acree v. General Motors Acceptance Corp. (2001) 92 Cal. App. 4th 385, 405-410, 112 Cal. Rptr. 2d 99*].

Cal. Rules of Ct., Rule 8.276(d)(4) provides that attorney's fees are not an item of costs and therefore costs on appeal do not normally include attorney's fees. Nevertheless, when attorney's fees are authorized to be awarded under a statute or contract provision, attorney's fees are available when incurred on appeal as well as when incurred at trial [*Butler-Rupp v. Lourdeaux (2007) 154 Cal. App. 4th 918, 925, 65 Cal. Rptr. 3d 242* (rule does not create substantive basis for recovering fees); *Harbour Landing-Dolfann, Ltd. v. Anderson (1996) 48 Cal. App. 4th 260, 263, 55 Cal. Rptr. 2d 640* ; *see Cal. Rules of Ct., Rule 8.276(d)(4)*]. For further discussion of the recovery and the procedure for recovery of attorney's fees on appeal, see *§ 53.34*.

PRACTICE TIP:

The Cost of Getting Costs. Because the items of allowable costs are so limited, there may be some small appeals in which it is not necessarily time- or cost-effective to seek to recover costs. Therefore, before you actually go to the trouble of preparing the memorandum of costs, make a quick outline of allowable items to verify whether the potential amount recoverable justifies the time and expense.

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§ 53.33 Procedure for Claiming Costs

[1] Memorandum of Costs After Notice of Remittitur

After remittitur, the party to whom costs have been awarded on appeal may recover such costs in the trial court, by serving and filing in that court amemorandum of costs [*Cal. Rules of Ct., Rule 8.278(c)*; for discussion of the manner in which costs are awarded by the appellate court, *see § 53.31*]. For a form of memorandum of costs, see *§ 53.70*.

The memorandum must be filed within 40 days after the clerk of the appellate court mails that party notice of the issuance of the remittitur [*Cal. Rules of Ct., Rule 8.278(c)(1)*; for discussion of notice of remittitur, *see § 53.12[3*]]. The memorandum must also be verified as prescribed in *Cal. Rules of Ct., Rule 3.1700(a)(1)* [*Cal. Rules of Ct., Rule 8.278(c)(1)*], that is, by a statement of the party, attorney, or agent, that to the best of his or her knowledge the item of costs are correct and necessarily incurred in the case [*Cal. Rules of Ct., Rule 3.1700(a)(1)*; *see also Cal. Rules of Ct., Rule 8.278(d)(1)* (allowable costs are recoverable only "if reasonable")].

The time for filing a memorandum of prejudgment costs may be extended for certain periods by stipulation or by the court [*see Cal. Rules of Ct., Rule 3.1700(b)(3)*]. There is, however, no corresponding provision allowing for extensions of time to file a memorandum of costs on appeal under *Cal. Rules of Ct., Rule 8.278(c)*. Courts, in construing the prior time requirement for filing a memorandum of costs on appeal (former *Code Civ. Proc. § 1034*), have held that a trial court may not consider a memorandum that is filed after the deadline [*Johnson v. Schimpf (1928) 91 Cal. App. 26, 36-37, 266 P. 597*], unless the party seeking costs has also filed a motion for relief under *Code Civ. Proc. § 473* (relief from default due to mistake, inadvertence, surprise, or excusable neglect) that provides a sufficient showing of good cause for the court to grant relief from the failure to file on time [*see Soda v. Marriott (1933) 130 Cal. App. 589, 594, 20 P.2d 758* ; for discussion and forms relating to relief from default under *Code Civ. Proc. § 473* generally, *see* Ch.

489, *Relief from Judgments and Orders*].

PRACTICE TIP:

Awarded Costs May Be Waived by Delay in Filing Memorandum. Costs which have been awarded by the appellate court will be waived unless a cost memorandum is timely filed and served, or an extension is granted. Therefore, begin preparing a draft costs memorandum as soon as you receive the decision, or at least as soon as you receive notice of the issuance of the remittitur.

[2] Motion to Tax Costs

After the service of a copy of the memorandum of costs on appeal, an opposing party may move to have the claimed costs taxed in the same manner, and within a like time, as is prescribed in *Cal. Rules of Ct., Rule 3.1700(b)* [*Cal. Rules of Ct., Rule 8.278(c)(2)*].

Cal. Rules of Ct., Rule 3.1700(b), provides as follows:

- A notice of motion to tax costs must be served and filed within 15 days after service of the cost memorandum (discussed in [1], *above*); this time is extended pursuant to *Code Civ. Proc. § 1013* when the cost memorandum was served by mail [*Cal. Rules of Ct., Rule 3.1700(b)(1)*].

- Unless objection is made to the entire memorandum, the motion to tax must refer to each item objected to by the same number, and inthe same order, as the items appear in the memorandum, and must state why each item is objectionable [*Cal. Rules of Ct., Rule 3.1700(b)(2)*].

The burden is on the moving party to establish the illegality of the challenged items; otherwise the amount demanded in the verified cost bill is controlling [*Wilson v. Nichols (1942) 55 Cal. App. 2d 678, 682-683, 131 P.2d 596*].

For further discussion relating to a motion to tax following the filing of a costs memorandum under *Cal. Rules of Ct., Rule 3.1700(b)*, and forms of a motion to tax that may be adapted for use in moving to tax a memorandum of costs on appeal, *see Ch. 174, Costs and Attorney's Fees, § 174.10* et seq.

PRACTICE TIP:

Motion to Tax Costs Is Not the Correct Method for Disputing Appellate Court's Award. If you want to attack the appellate court's award of costs, you must do so in the appellate court, for example, by a petition for rehearing, request for modification, or even a petition for review. The sole function of the motion to tax costs is to challenge the allowableness or amount of specific items claimed in the memorandum of costs.

[3] Enforcement of Award

After the costs have been taxed or the time for taxing costs has expired, the award of costs may be enforced in the same manner as a money judgment [*Cal. Rules of Ct., Rule 8.278(c)(3)*]. For discussion and forms relating to the enforcement of money judgments generally, see Ch. 254, *Executions and Enforcement of Judgments* .

Legal Topics:

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§ 53.34 Attorney Fees on Appeal

Attorney's fees incurred on appeal are normally not recoverable [*Cal. Rules of Ct., Rule 8.278(d)(2)*]. When, however, attorney's fees are available pursuant to a statute or a contract provision, attorney's fees are available on appeal as well as at trial [*Butler-Rupp v. Lourdeaux (2007) 154 Cal. App. 4th 918, 923-924, 65 Cal. Rptr. 3d 242* ; *Harbour Landing-Dolfann, Ltd. v. Anderson (1996) 48 Cal. App. 4th 260, 263, 55 Cal. Rptr. 2d 640* ; *see, e.g., Morcos v. Board of Retirement (1990) 51 Cal. 3d 924, 930, 275 Cal. Rptr. 187, 800 P.2d 543* (attorney's fees under *Gov. Code § 31536*); *Wilson v. Wilson (1960) 54 Cal. 2d 264, 272, 5 Cal. Rptr. 317, 352 P.2d 725* (attorney's fees pursuant to contract); *Buescher v. Lastar (1976) 61 Cal. App.3d 73, 76, 132 Cal. Rptr. 124* (promissory note); *Union Bank v. Ross (1976) 54 Cal. App. 3d 290, 299, 126 Cal. Rptr. 646* (contract); *Roberts v. Brian (1973) 30 Cal. App. 3d 427, 430-431, 106 Cal. Rptr. 360* (attorney's fees under *Welf. & Inst. Code § 10962*)].

Attorney's fees on appeal may be claimed in either the appellate court, while the appeal is pending, or in the trial court [*Harbour Landing-Dolfann, Ltd. v. Anderson (1996) 48 Cal. App. 4th 260, 263-265, 55 Cal. Rptr. 2d 640*].

At the appellate court level, the court may determine a party's entitlement to attorney's fees as provided by contract or statute [*Walsh v. New West Federal Savings & Loan Assn. (1991) 234 Cal. App. 3d 1539, 1548, 1 Cal. Rptr. 2d 35*]. Although the court of appeal has the power to appraise and fix attorney's fees on appeal, the better practice is to leave it to the trial court to determine the amount of an award of attorney's fees at the time that it determines the costs on appeal [*Security Pacific National Bank v. Adamo (1983) 142 Cal. App. 3d 492, 498, 191 Cal. Rptr. 134* ; *see also Milman v. Shukhat (1994) 22 Cal. App. 4th 538, 546, 27 Cal. Rptr. 2d 526* ; *Mackinder v. OSCA Development Co. (1984) 151 Cal. App. 3d 728, 739, 198 Cal. Rptr. 864*].

Unless otherwise ordered by the reviewing court, an order or judgment regarding costs on appeal does not include

attorney's fees on appeal, but neither does it preclude any party from seeking attorney fees on appeal in the trial court after remittitur. In the latter situation, the issue of entitlement to attorney fees on appeal is determined by a motion in the trial court under *Cal. Rules of Ct., Rule 3.1702* [*Cal. Rules of Ct., Rule 8.278(d)(2)*; *see also Butler-Rupp v. Lourdeaux (2007) 154 Cal. App. 4th 918, 925, 65 Cal. Rptr. 3d 242* (rule does not create substantive basis for recovering fees); *Harbour Landing-Dolfann, Ltd. v. Anderson (1996) 55 Cal. Rptr. 2d 640*].

PRACTICE TIP:

Requests for Attorney Fees on Appeal. If entitlement to attorney's fees is a disputed issue that may be properly decided by appellate court on the record before it, a party may wish to raise this issue on appeal, and request that the appellate court determine entitlement to an award of fees, and then direct the trial court to determine the amount after remittitur [*see, e.g., Security Pacific National Bank v. Adamo (1983) 142 Cal. App. 3d 492, 498, 191 Cal. Rptr. 134* (awarding fees with direction to trial court to determine amount); *see also* discussion of award of costs and fees by appellate court in *Ch. 51, Appeal: Hearing and Decision, § 51.18*]. In many cases it will be as effective, and more efficient, simply to request, after remittitur, that the trial court determine both entitlement to fees and their amount.

An award of attorney's fees on appeal to the prevailing party should, however, be distinguished from the recovery of attorney fee expenses as part of an award of sanctions for a frivolous or bad-faith appeal. In the latter situation, the motion must be made to the appellate court [*see* discussion and forms in Ch. 49, *Appeal: Sanctions*].

The procedure for obtaining attorney's fees after remittitur, as set out in *Cal. Rules of Ct., Rule 3.1702*, is as follows:

- If a party is seeking to recover attorney's fees on appeal pursuant to a contract or statute that requires the court to determine entitlement to the fees, the amount of fees, or both, that party must serve and file a notice of motion requesting that the trial court make these determinations. This motion must be served and filed within 40 days after the clerk of the appellate court has mailed to that party notice of the issuance of remittitur, that is, within the time for filing the memorandum of costs [*Cal. Rules of Ct., Rule 3.1702(c)*; *see* discussion of time for filing cost memorandum in *§ 53.32*]. For a form of motion for the recovery of attorney's fees under *Cal. Rules of Ct., Rule 3.1702(c)*, see *§ 53.71*.

- If a party is entitled to attorney's fees under a statute or contract in which the fees are fixed without the necessity of a court determination, the attorney's fees may be claimed as an item of costs in the memorandum of costs [*Cal. Rules of Ct., Rule 3.1702(e)*; *see* discussion of memorandum of costs and a form of memorandum of costs in *§§ 53.31, 53.32[1], 53.70*, respectively].

For good cause, the trial judge may extend the time for filing a motion for attorney's fees, either in the absence of a stipulation or for a longer period than allowed by stipulation [*Cal. Rules of Ct., Rule 3.1702(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsFrivolous AppealsCivil ProcedureAppealsRemandsCivil ProcedureAppealsCosts & Attorney Fees

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Chapter 53 APPEAL: REMITTITUR AND COSTS ON APPEAL
PART II. LEGAL BACKGROUND
B. Claiming Costs and Fees After Remittitur

5-53 California Forms of Pleading and Practice--Annotated §§ 53.35-53.39

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[Reserved]

§§ 53.35[Reserved]

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5-53 California Forms of Pleading and Practice--Annotated § 53.40

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§ 53.40 State Statutes

Power of appellate court to direct entry of proper judgment. *Code Civ. Proc. § 906*

Appellate court may take evidence and make findings concerning restitution, or it may, by order, refer such matters to the trial court for determination upon reversal of trial court's judgment. *Code Civ. Proc. § 908*

Remittitur upon final determination of appeal by appellate court; filing in trial court and entry in judgment on receipt of remittitur. *Code Civ. Proc. § 912*

Allowable costs on appeal and procedure for claiming these costs are to be established by Judicial Council rule. *Code Civ. Proc. § 1034(b)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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5-53 California Forms of Pleading and Practice--Annotated § 53.41

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§ 53.41 California Rules of Court

When decisions of appellate court become final. *Cal. Rules of Ct., Rule 8.264(b)*

Remittitur; expedited issuance or stay of remittitur; recall of remittitur. *Cal. Rules of Ct., Rule 8.272*

Award and entry by appellate court of costs on appeal; procedure for recovery in trial court of costs on appeal. *Cal. Rules of Ct., Rule 8.278*

Recovery of attorney's fees on appeal. *Cal. Rules of Ct., Rules 8.278(d)(2), 3.1702(c)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsCosts & Attorney FeesCivil ProcedureAppealsRemands

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5-53 California Forms of Pleading and Practice--Annotated § 53.42

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§ 53.42 Decisions

[1] Remittitur

[a] Generally

The issuance of remittitur is the act by which the reviewing court transfers jurisdiction to the court reviewed. When the remittitur issues, the jurisdiction of the reviewing court terminates and the jurisdiction of the trial court reattaches. *In re Anna S. (2010) 180 Cal. App. 4th 1489, 1500, 103 Cal. Rptr. 3d 889*

Jurisdiction revests in the trial court upon the appellate court's issuance of the remittitur. *Bellows v. Aliquot Associates, Inc. (1994) 25 Cal. App. 4th 426*

Remittitur designates and authenticates the judgment of the appellate court to the trial court from which appeal was taken; it corresponds with "mandate" procedure used by United States Supreme Court. *Schwartz v. Schwartz (1969) 268 Cal. App. 2d 685, 690, 74 Cal. Rptr. 192*

Trial court must interpret remittitur by consulting appellate court's opinion and giving to it the meaning that best harmonizes with the appellate court's ruling. *Schwartz v. Schwartz (1969) 268 Cal. App. 2d 685, 690, 74 Cal. Rptr. 192*

Inherent power of trial court to direct *nunc pro tunc* filing of certified copy of remittitur when original had previously been filed but had disappeared from court's files. *Wilson v. Nichols (1942) 55 Cal. App. 2d 678, 681, 131 P.2d 596*

Waiver of irregularities underlying issuance of remittitur. *Muller v. Union Traction Co. (1924) 68 Cal. App. 239,*

242-243, 228 P. 731

[b] Recall of Remittitur

Example of order on stipulation directing recall and setting aside of remittitur, and directing that stipulated findings of fact and judgment be entered. *Estate of Davis (1936) 8 Cal. 2d 11, 11-12, 63 P.2d 827*

Appellate court is ordinarily without jurisdiction of cause for purpose of recall when remittitur is sent to and filed by trial court. *Isenberg v. Sherman (1932) 214 Cal. 722, 725, 7 P.2d 1006*

Appellate court does not lose jurisdiction of cause after remittitur is sent to trial court, when judgment and remittitur were secured by fraud or imposition, or when court is led astray so as to decide case under misapprehension as to true facts; in these circumstances, the appellate court is entitled to recall remittitur. *Isenberg v. Sherman (1932) 214 Cal. 722, 725-726, 7 P.2d 1006*

Faulty conclusion as to legal effect of facts does not constitute misstatement of material facts justifying recall of remittitur. *Davis v. Basalt Rock Co. (1952) 114 Cal. App. 2d 300, 303, 250 P.2d 254*

Remittitur is not to be recalled to correct judicial error; remedies of petition for rehearing or modification of judgment are available when party is dissatisfied with judgment rendered in appellate court. *Davis v. Basalt Rock Co. (1952) 114 Cal. App. 2d 300, 301, 311, 250 P.2d 254* ; *Chin Ott Wong v. Title Ins. & Trust Co. (1949) 91 Cal. App. 2d 1, 2, 3, 204 P.2d 387*

Motion to recall remittitur must be promptly made. *Talbot v. Fire etc. Pension Bd. (1942) 51 Cal. App. 2d 193, 194, 124 P.2d 352*

[c] Jurisdiction of Trial Court After Remittitur

Trial court has no discretion but to enter judgment directed by appellate court and is not permitted to exceed specific directions of the appellate court; action by trial court not conforming to directions of appellate court in remittitur is void. *Hampton v. Superior Court (1952) 38 Cal. 2d 652, 655-656, 242 P.2d 1*

Writ of prohibition is the proper remedy to restrain the trial court from proceeding in violation of terms of final judgment of reviewing court. *Hampton v. Superior Court (1952) 38 Cal. 2d 652, 656-657, 242 P.2d 1*

If directions to trial court are ambiguous, they are interpreted in accordance with views, reasoning, and holdings expressed in opinion as a whole. *In re Justin S. (2007) 150 Cal. App. 4th 1426, 1434-1435, 59 Cal. Rptr. 3d 376*

When there has been a decision on appeal, the trial court is reinvested with jurisdiction of the case, but only such jurisdiction as is defined by the terms of the remittitur. The trial court is empowered to act only in accordance with the direction of the reviewing court; action which does not conform to those directions is void. *Bell v. Farmers Ins. Exchange (2006) 135 Cal. App. 4th 1138, 1143-1144, 38 Cal. Rptr. 3d 306*

Writ of mandate is the proper remedy to require the superior court to enter judgment in conformity to remittitur. *Lamb v. Owen (1929) 98 Cal. App. 106, 108, 276 P. 628*

[d] Restitution After Remittitur

Trial court has inherent power to restore benefits lost pursuant to a judgment that is later reversed on appeal; exercise of this power is discretionary. *Schubert v. Bates(1947) 30 Cal. 2d 785, 789-791, 185 P.2d 793* ; *Rogers v. Bill & Vince's, Inc. (1963) 219 Cal. App. 2d 322, 324, 33 Cal. Rptr. 129* ; *Bank of America Nat'l Trust & Sav. Asso. v. McLaughlin (1940) 37 Cal. App. 2d 415, 417-418, 99 P.2d 548*

Right of appellant to restitution as to any benefit conferred or property taken under judgment which is later reversed on appeal. *Schubert v. Bates (1947) 30 Cal. 2d 785, 791, 185 P.2d 793*

Claim for restitution after reversal of judgment is subject to setoff claim when restitution is sought in independent action for money had and received. *Buckman v. Tucker (1937) 9 Cal. 2d 403, 406, 71 P.2d 69*

Respondent who collects money pursuant to judgment later reversed on appeal becomes trustee for appellant with respect to the amount collected. *Rogers v. Bill & Vince's, Inc. (1963) 219 Cal. App. 2d 322, 325, 33 Cal. Rptr. 129*

Trial court order requiring restitution of proceeds from execution on a judgment later reversed on appeal, is proper even though the cause is remanded for a new trial. *Rogers v. Bill & Vince's, Inc. (1963) 219 Cal. App. 2d 322, 326, 33 Cal. Rptr. 129*

Claim for restitution is not subject to setoff by opposing party when restitution is sought in summary proceeding by way of motion made in main action in either appellate or trial court. Bank of America, etc. v. *McLaughlin (1940) 37 Cal. App. 2d 415, 417-418, 99 P.2d 548*

Motion for restitution is to be denied when it would be inequitable to opposing party. Bank of America, etc. v. *McLaughlin (1940) 37 Cal. App. 2d 415, 418, 99 P.2d 548*

[2] Costs on Appeal

[a] Generally

Recall of remittitur, on motion, is the proper remedy to strike an improper allowance of costs. *Estate of Steehler (1925) 197 Cal. 67, 68-69, 239 P. 718* ; *Schwartz v. Schwartz (1969) 268 Cal. App. 2d 685, 690, 74 Cal. Rptr. 192* ; *Paine v. Bank of Ceres (1943) 60 Cal. App. 2d 621, 621-622, 141 P.2d 219*

Trial court has discretionary power to stay retrial proceedings until costs on appeal have been paid, when judgment was reversed on appeal and there is a showing of hardship by virtue of failure to pay costs on appeal. *Weile v. Sturtevant (1917) 176 Cal. 767, 770, 169 P. 685*

Cal. Rules of Court, Rule 8.27(d)(2) (formerly Rule 8.276(c)(2)), does not provide a substantive basis for an appellate court to award or to disallow attorney's fees to the prevailing party. When a party claims the right to an award of attorney's fees on appeal pursuant to a contract or a statute, the party may request that award from the appellate court in the first instance, and the appellate court may make that award. *Butler-Rupp v. Lourdeaux (2007) 154 Cal. App. 4th 918, 925, 65 Cal. Rptr. 3d 242*

Court of appeal may award costs to losing appellant if appeal issue was very complex and respondent's actions added to complexity. *Quest Int'l, Inc. v. Icode Corp. (2004) 122 Cal. App. 4th 745, 778, 19 Cal. Rptr. 3d 173*

Trial court is without jurisdiction to apportion or amend award of costs made by appellate court in appellate judgment; only recourse is to the appellate court. *Ramirez v. St. Paul Fire & Marine Ins. Co. (1995) 35 Cal. App. 4th 473, 478-479, 41 Cal. Rptr. 2d 416*

Absent cost award by court, clerk has no discretion but to award costs as provided under former Cal. Rules of Ct., Rule 26(b); (now *Cal. Rules of Ct., Rule 8.272(b)*) plaintiff and defendant both obtaining partial reversal of judgment of appeal are entitled to recover costs on their appeals apportioned on basis of portions of transcripts and briefs devoted to each appeal. *People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater (1985) 165 Cal. App. 3d 378, 384-385, 211 Cal. Rptr. 501*

Court may apportion costs among multiple parties when justified by circumstances surrounding appeal; costs on appeal from judgment in consolidated actions involving different parties are properly apportioned on basis of portions of transcripts and briefs devoted to each case when appellants prevailed in one case and respondents prevailed in other. *Schwartz v. Schwartz (1969) 268 Cal. App. 2d 685, 691, 74 Cal. Rptr. 192*

Entry in remittitur by appellate court clerk that "prevailing party to recover costs" does not comply with former Cal. Rules of Ct., Rule 26(b) (now *Cal. Rules of Ct., Rule 8.272(b)*), which requires clerk to insert judgment for costs for "respondent" or "appellant," depending on whether lower court judgment is affirmed, modified, or reversed or appeal dismissed. *Schwartz v. Schwartz (1969) 268 Cal. App. 2d 685, 689, 74 Cal. Rptr. 192*

Appellate court alone is entitled under former Cal. Rules of Ct., Rule 26(a) (now *Cal. Rules of Ct., Rule 8.272(a)*), to award or apportion costs based on "interests of justice." *Schwartz v. Schwartz (1969) 268 Cal. App. 2d 685, 689-690, 74 Cal. Rptr. 192*

Bankruptcy discharge does not affect liability under judgment for costs on appeal. *Supera v. Moreland Sales Corp. (1938) 28 Cal. App. 2d 517, 522, 82 P.2d 963*

[b] Items Recoverable as Costs

Reimbursement for cost of entire clerk's transcript on prior appeal is proper despite appellant's abandonment of portion of appeal, when it is reasonable to infer respondent did not receive notice of abandonment until after obtaining transcript. *Lubetzky v. Friedman (1991) 228 Cal. App. 3d 35, 42, 278 Cal. Rptr. 706* .

Reasonable costs associated with producing briefs by any process of duplication (except typewriter ribbon and carbon copies) are recoverable under former Cal. Rules of Ct., Rule 26(c) (now *Cal. Rules of Ct., Rule 8.272(c)*); recoverable costs include cost of typing final draft of brief from which copies are then made by photocopying, as well as cost of preparing brief on a word processor. *Lubetzky v. Friedman (1991) 199 Cal. App. 3d 1350, 1357, 245 Cal. Rptr. 589* .

Necessarily incurred travel expenses in transmitting appellate briefs are recoverable costs under former Cal. Rules of Ct., Rule 26(c) (now *Cal. Rules of Ct., Rule 8.272(c)*). *Lubetzky v. Friedman (1991) 199 Cal. App. 3d 1350, 1357-1358, 245 Cal. Rptr. 589* .

After remand to state court of appeal after United States Supreme Court ruling concerning federal Constitution, costs of printing Supreme Court petition are not recoverable because in actions in federal courts, federal statute that covers subject controls and may not be regulated by state statutes that result in penalizing free access to federal courts in proper cases. *People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater (1985) 165 Cal. App. 3d 378, 390, 211 Cal. Rptr. 501* .

Pursuant to former Cal. Rules of Ct., Rule 26(c) (now *Cal. Rules of Ct., Rule 8.272(c)*), prevailing respondent on appeal is entitled to cost of preparation ofonecopy of reporter's transcript. *Santa Barbara County Fire Fighters v. County of Santa Barbara (1981) 121 Cal. App. 3d 521, 522-523, 175 Cal. Rptr. 389*

[c] Memorandum of Costs on Appeal

Trial court has power to grant relief under *Code Civ. Proc. § 473* (relief from proceedings taken through mistake, inadvertence, surprise, or excusable neglect) for failure to file and serve cost bill within statutory time provided in former Cal. Rules of Ct., Rule 26(d) (now *Cal. Rules of Ct., Rule 8.272(d)*). *Soda v. Marriott (1933) 130 Cal. App. 589, 594, 20 P.2d 758* ; *but see Johnson v. Schimpf (1928) 91 Cal. App. 26, 36-37, 266 P. 597* (trial court unable to consider untimely memorandum of costs not accompanied by request for relief from default)

Absence of, or defect in, verification as proper grounds for motion to strike memorandum of costs. *Snodgrass v. Snodgrass (1930) 103 Cal. App. 412, 414, 284 P. 696*

Failure to complete verification of memorandum of costs on appeal is an insufficient basis for relief under *Code Civ. Proc. § 473*, permitting amendment of proceedings, when the relief sought is not to amend the memorandum but rather to add proper verification. *Snodgrass v. Snodgrass (1930) 103 Cal. App. 412, 414, 284 P. 696*

[d] Motion to Tax Costs on Appeal

Party moving to tax costs has burden of proving illegality of challenged items; otherwise amount demanded in verified cost bill is controlling. *Wilson v. Nichols (1942) 55 Cal. App. 2d 678, 682-683, 131 P.2d 596*

[e] Attorney's Fees on Appeal

Civ. Code § 1717 does not support an award of attorney's fees to the prevailing party on appeal, but only to the prevailing party in the lawsuit. *Wood v. Santa Monica Escrow Co. (2009) 176 Cal. App. 4th 802, 805-808, 97 Cal. Rptr. 3d 909*

Attorney's fees incurred on appeal recoverable if recovery of fees is authorized by statute or contract; they may be claimed in appellate court while appeal is pending, or in trial court after remittitur; trial court has jurisdiction to award fees under statute or contract even if remittitur includes no directions concerning attorney's fees. *Harbour Landing-Dolfann, Ltd. v. Anderson (1996) 48 Cal. App. 4th 260, 264-265, 55 Cal. Rptr. 2d 640*

Attorney's fees authorized by contract are to be claimed only by noticed motion, not by filing a memorandum of costs. *Russell v. Trans Pacific Group (1993) 19 Cal. App. 4th 1717, 1725, 24 Cal. Rptr. 2d 274* ; *see also Allstate Insurance Company v. Loo (1996) 46 Cal. App. 4th 1794, 1797-1798, 54 Cal. Rptr. 2d 541* (when entitlement to attorney's fees is provided by contract to the prevailing party, they are to be awarded by noticed motion)

Attorney's fees authorized by statute are recoverable on appeal as well as in trial court. *People ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater (1985) 165 Cal. App. 3d 378, 387, 211 Cal. Rptr. 501*

Provision in contract for attorney's fees encompasses fees on appeal; although the court of appeal has the power to fix attorney's fees on appeal, the better practice is to remand cause to trial court for determination of such fees. *Mackinder v. OSCA Development Co. (1984) 151 Cal. App. 3d 728, 739, 198 Cal. Rptr. 864*

Attorney's fees on appeal recoverable under parties' agreement are recoverable as "costs," but costs awarded on appeal do not normally include attorney's fees, and an order that each party shall bear its own costs on appeal therefore does not preclude recovery of attorney's fees on appeal under contract provision. *De La Cuesta v. Superior Court (1984) 152 Cal. App. 3d 945, 950, 200 Cal. Rptr. 1* .

A party who prevails on appeal is not entitled under a contract provision to fees incurred on appeal, when the appellate decision does not decide who wins the lawsuit but instead contemplates further proceedings in the trial court. *Presley of Southern California v. Whelan (1983) 146 Cal. App. 3d 959, 961, 196 Cal. Rptr. 1*

Legal Topics:

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5-53 California Forms of Pleading and Practice--Annotated § 53.43

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§ 53.43 Law Reviews

Graber, *Timeline and Deadlines for Civil Appeals in California*, 7(2) California Litigation 43 (1994)

Comment, *Fee Simple? Indeterminable: Inconsistent Procedures Regarding Attorney Fees and Posting Appeal Bonds, 24 Pac. L.J. 141 (1992)*

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§ 53.44 Text References

Witkin, California Procedure, vol. 9, *Appeal*, § 731 et seq. (remittitur), § 785 et seq. (restitution), § 802 et seq. (costs and fees on appeal) (4th ed. 1997)

California Civil Appellate Practice, ch. 18, *Remittitur*, ch. 20, *Costs, Attorney Fees, and Sanctions* (Cal. CEB 3rd ed. 2000)

Legal Topics:

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§ 53.45 Internet References

California Courts. This site includes: general information about state court organization and specific courts; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most court of appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

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[Reserved]

§§ 53.46[Reserved]

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§ 53.50 Remittitur Proceedings

[1] Expedited Issuance of Remittitur

☐ Consider stipulation for immediate or expedited issuance of remittitur [*see Cal. Rules of Ct., Rule 8.272(c)(1)*, and discussion in *§ 53.12[2]*; for form of stipulation for immediate issuance, *see § 53.60*].

☐ For a general appellate motion that may be adapted for use as a motion for immediate issuance of remittitur in the Supreme Court, see *Ch. 45, Appeal: Motion Procedure, § 45.70*.

[2] Stay of Issuance of Remittitur

☐ Determine whether to apply on showing of good cause for a stay of issuance of the remittitur for a reasonable period of time [*see Cal. Rules of Ct., Rule 8.272(c)(2)*, and discussion in *§ 53.13*; for form of motion to stay issuance of remittitur, *see § 53.61*].

☐ For a checklist of the general appellate motion procedure to be followed in a motion for stay of issuance of remittitur, see *Ch. 45, Appeal Motion Procedure, § 45.60[2]*.

[3] Recall of Remittitur

☐ Determine whether to move or petition for recall of remittitur on a showing of good cause [*see Cal. Rules of Ct., Rule 8.272(c)(3)*, and discussion in *§ 53.14*; for form of motion for recall, *see § 53.62*].

☐ Give notice of motion or petition.

☐ Support motion or petition with affidavits (or declarations under *Code Civ. Proc. § 2015.5*).

☐ Consider whether to seek a stipulation that sets forth facts that would justify granting a motion or petition for recall [*see Cal. Rules of Ct., Rule 8.272(c)(3)*, and discussion in *§ 53.14*; for form of stipulation for recall, *see § 53.62*].

☐ For a checklist of the general appellate motion procedure to be followed in a motion for recall of issuance of remittitur, see *Ch. 45, Appeal: Motion Procedure, § 45.60[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 53.51 Trial Court Proceedings to Recover Costs and Fees on Appeal

[1] Checklist for Party Entitled to Costs and Fees

[a] Memorandum of Costs

☐ To determine whether to seek an award of costs on appeal under *Cal. Rules of Ct., Rule 8.278(a)*, see *Ch. 51, Appeal: Hearing and Decision, § 51.18* [*see also* discussion in *§ 53.31*].

☐ To determine items recoverable as costs on appeal as limited to items expressly allowed under *Cal. Rules of Ct., Rule 8.278(d)*, see *§ 53.32*.

☐ Serve and file in the superior court a memorandum of costs on appeal [*Cal. Rules of Ct., Rule 8.278(c)*; *see* discussion in *§ 53.33[1]*; for a form of memorandum, *see § 53.70*].

☐ File memorandum within 40 days after the clerk of the appellate court mails notice of issuance of remittitur [*Cal. Rules of Ct., Rule 8.278(c)(1)*; for discussion of notice of remittitur, *see § 53.12[3*]].

☐ Specify applicable items of allowable costs [*Cal. Rules of Ct., Rule 8.278(d)(1)*; *see Cal. Rules of Ct., Rule 3.1700(a)(1)*].

☐ Verify applicable items by a declaration of the party, attorney, or agent, to the

effect that all claimed costs are correct and were necessarily incurred.

[b] Motion for Attorney's Fees

☐ To determine whether to apply for award of attorney's fees, see discussion in *§ 53.34*.

☐ If the appellate court awards fees, request that the trial court fix the amount of the award.

☐ If the appellate court makes no award, request that the trial court determine entitlement to an award under contract or statute and fix the amount [*see* discussion in *§ 53.34*].

☐ If determination by trial court is required, make a noticed motion requesting determination [*see Cal. Rules of Ct., Rule 3.1702(c)*, and discussion in *§ 53.34*; for a form of motion *see § 53.71*]:

☐ Serve and file motion within the same time as the memorandum of costs on appeal. For detailed discussion relating to procedures for noticed motions in the trial court generally, see *Ch. 372, Motions and Orders, § 327.21*.

☐ If no determination by the trial court of entitlement to award or the amount is necessary, because entitlement was established and the amount is fixed by the authorizing statute orcontract, claim amount as part of memorandum of costs on appeal [*see Cal. Rules of Ct., Rule 3.1702(d)*, and discussion in *§ 53.34*; *see also* checklist for and form for memorandum of costs on appeal in [a], *above*, and *§ 53.70*, respectively].

[2] Opposing Party's Checklist

☐ File motion to tax costs [*Cal. Rules of Ct., Rules 8.278(c)(2), 3.1700(b)(1)*; *see* discussion in *§ 53.33[2]*]:

☐ File motion within 15 days after service of the cost memorandum (extended pursuant to *Code Civ. Proc. § 1013* when the cost memorandum was served by mail).

☐ Unless you are objecting to the entire memorandum, specify the items to which you object in the motion to tax [*Cal. Rules of Ct., Rules 8.278(c)(2), 3.1700(b)(2)*; *see* discussion in *§ 53.33[2]*]:

☐ Refer to each item to which you object to by the same number, and in the same order, as it appears in the memorandum.

☐ State why each item is objectionable.

☐ Serve and file an opposing memorandum of points and authorities [*see* discussion in *§ 53.34*; for discussion relating to procedures for opposing a noticed motion in the trial court generally, *see Ch. 372, Motions and Orders, § 327.21[9]*].

☐ Attach proof of service.

☐ Attach declarations or other evidence, if appropriate, in the same manner as any other opposition to a motion in the trial court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRemandsCivil ProcedureAppealsCosts & Attorney Fees

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Volume 5: Appeal-Chs. 40-55
Chapter 53 APPEAL: REMITTITUR AND COSTS ON APPEAL
PART IV. PROCEDURAL CHECKLIST

5-53 California Forms of Pleading and Practice--Annotated §§ 53.52-53.59

AUTHOR: Dorothy K. Gustafson Author Gail E. Chesney Editorial Consultant Ms. Gustafson is currently of counsel to the appellate firm of Bien & Summers, Oakland, California. Ms. Chesney is a solo practitioner in San Francisco, California, specializing in appeals and appellate motions. This chapter includes additional comment from Mr. James Martin and Ms. Elizabeth Buckley.

[Reserved]

§§ 53.52[Reserved]

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Volume 5: Appeal-Chs. 40-55
Chapter 53 APPEAL: REMITTITUR AND COSTS ON APPEAL
PART V. FORMS

5-53 California Forms of Pleading and Practice--Annotated § 53.60

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§ 53.60 Stipulation for Immediate Issuance of Remittitur

[1] FORM Stipulation for Immediate Issuance of Remittitur

_____ [*name of attorney*]
_____ [*California State Bar No.*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone number*]
Attorney for Appellant/Respondent _____ [*name*]

[*EITHER, if stipulation is to be filed in the court of appeal*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
_____ [*number, e.g.,* SECOND] APPELLATE DISTRICT
[DIVISION _____ (*number, e.g.,* SEVEN)]

[*OR, if stipulation is to be filled in the Supreme Court*]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	(Superior Court No. _____)
Defendant and Appellant/Respondent.	)	
	)	
	)	

_____

Appeal from the Superior Court of the County of _____ [*name*], No. _____ [*case number*].
The Honorable _____ [*name*], Judge.

STIPULATION FOR IMMEDIATE ISSUANCE OF REMITTITUR

IT IS HEREBY STIPULATED by the parties to this appeal, through their respective counsel, that the _____ [*either* Supreme Court *or* the Court of Appeal, _____ Appellate District(, Division _____)] direct the immediate issuance of a remittitur on its judgment in the above appeal, pursuant to *California Rules of Court, Rule 8.272(c)(1)*.
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Appellant
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent

[2] Use of Form

The form set out in [1], *above*, is for use when the parties to an appeal wish to stipulate to an immediate issuance of remittitur [*Cal. Rules of Ct., Rule 8.272(c)(1)*; *see* discussion in *§ 53.12[2]*].

The Supreme Court may also issue immediate remittitur on a request and showing of good cause [*Cal. Rules of Court, Rule 8.540(c)(1)*]. For a form of motion that may be adapted for use in this situation, see *§ 53.61*.

Legal Topics:

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

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PART V. FORMS

5-53 California Forms of Pleading and Practice--Annotated § 53.61

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§ 53.61 Motion for Stay of Issuance

[1] FORM Motion for Stay of Issuance

_____ [*name of attorney*]
_____ [*California State Bar No.*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone number*]
Attorney for Appellant/Respondent _____ [*name*]

[*EITHER, if stipulation is to be filed in the court of appeal*]

IN THE COURT OF APPEAL OF CALIFORNIA, _____ [*specify district and division if district has more than one, e.g.,* SECOND APPELLATE DISTRICT, DIVISION SEVEN]

[*OR, if stipulation is to be filed in the Supreme Court*]

IN THE SUPREME COURT OF CALIFORNIA

_____ [*name*],)

Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	(Superior Court No. _____)
Defendant and Appellant/Respondent.	)	
	)	
	)	

Appeal from the Superior Court of the County of _____ [*name*], No. _____ [*case number*].
The Honorable _____ [*name*], Judge.

MOTION FOR STAY OF ISSUANCE OF REMITTITUR

[*EITHER, if motion is filed in the court of appeal*]

To the Honorable Presiding Justice and the Honorable Associate Justices of the Court of Appeal of the State of California, _____ [*specify, e.g.,* Second Appellate District, Division Seven]:

[*OR, if motion is filed in the Supreme Court*]

To the Honorable Chief Justice of California and to the Honorable Associate Justices of the Supreme Court of the State of California:

_____ [*Identify moving party, e.g.,* Defendant and Respondent _____(*name*) hereby moves for a stay of the remittitur on the judgment filed in this appeal on _____ [*date*], for a period of_____ [*specify reasonable period*], to and including _____ [*date*].

This motion is made on the grounds that _____ [*specify good cause for stay*].

This motion is based on the declaration[s] of _____ [*name(s)*] and the memorandum of points and authorities accompanying this motion.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION

I, _____ [*name*], declare:

I am the [attorney of record for] _____ [*party, e.g.,* Plaintiff and Appellant] herein.

[*Set forth probative facts from declarant's personal knowledge showing good cause for granting stay of issuance of remittitur.*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM

[*Attach memorandum.*]

PROOF OF SERVICE

I, _____ [*name*], declare that:

I am at least 18 years of age and not a party to the above-entitled action. My _____ [residence *or* business] address is _____, California; I am _____ [a resident *or* employed in] _____ County, California [*county in which mailing occurs*].

I served the foregoing motion on _____ [*date*], by depositing _____ [a copy *or* copies] thereof in the United States mail in _____, California, enclosed in [a] sealed envelope[s], with postage fully prepaid, addressed to _____ [*state name and full address of each party served*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form set out in [a], *above*, is for use to move for an order staying, for a reasonable period of time, the appellate court's issuance of remittitur [*Cal. Rules of Ct., Rule 8.272(c)(2)*; *see* discussion in *§ 53.13*]. It must be accompanied by proof of service on all other parties, by a memorandum, and by a declaration or other evidence if based on matters not appearing in the record [*Cal. Rules of Ct., Rule 8.54(a)*; for discussion of general format, service, and procedural requirements for appellate motions, see *Ch. 45, Appeal: Motion Procedure, §§ 45.13, 45.14*]. Some courts expect or require a proposed order to accompany an appellate motion [*see Ch. 45, Appeal: Motion Procedure, § 45.14[1][f]*].

It may also be possible for the parties to stipulate to a stay, for good cause and for a reasonable time [*see Cal. Rules of Court, Rule 8.272(c)(2)*]. For a form of stipulation that may be adapted for use in this situation, so long as it shows good cause and stipulates to a reasonable period of time, see *§ 53.60*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRemandsCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral Overview

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Volume 5: Appeal-Chs. 40-55
Chapter 53 APPEAL: REMITTITUR AND COSTS ON APPEAL
PART V. FORMS

5-53 California Forms of Pleading and Practice--Annotated § 53.62

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§ 53.62 Proceedings to Recall Remittitur

[1] Motion for Recall of Remittitur

[a] FORM Proceedings to Recall Remittitur--Motion for Recall of Remittitur

_____ [*name of attorney*]
_____ [*California State Bar No.*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone number*]
Attorney for Appellant/Respondent _____ [*name*]

[*EITHER, if stipulation is to be filed in the court of appeal*]

IN THE COURT OF APPEAL OF OF CALIFORNIA, _____ [*specify district and division if district has more than one, e.g.,* SECOND APPELLATE DISTRICT, DIVISION SEVEN]

[*OR, if stipulation is to be filed in the Supreme Court*]

IN THE SUPREME COURT OF CALIFORNIA

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	(Superior Court No. _____)
Defendant and Appellant/Respondent.	)	
	)	
	)	

Appeal from the Superior Court of the County of _____ [*name*], No. _____ [*case number*].
The Honorable _____ [*name*], Judge.

NOTICE AND MOTION TO RECALL REMITTITUR

[*EITHER, if motion is filed in the court of appeal*]

To the Honorable Presiding Justice and the Honorable Associate Justices of the Court of Appeal of the State of California, _____ [*specify, e.g.,* Second] Appellate District[, Division _____ (*specify, e.g.,* Two)]:

[*OR, if motion is filed in the Supreme Court*]

To the Honorable Chief Justice of California and to the Honorable Associate Justices of the Supreme Court of the State of California:

NOTICE IS HEREBY GIVEN that Appellant/Respondent _____ [*name*], moves this court to recall the remittitur issued on _____ [*date*], for the purpose of _____ [*specify reason for recall of remittitur*].

This motion is made on the ground that the judgment was improvidently made in that _____ [*specify grounds for recall, e.g.,* acts of fraud by one party imposed on the court and other parties].

This motion is based on the declaration[s] of _____ [*name(s)*] and the memorandum accompanying this motion.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION

I, _____ [*name*], declare:

I am the [attorney of record for] _____ [*party, e.g.,* Plaintiff and Appellant] herein.

[*Set forth probative facts from declarant's personal knowledge setting forth facts justifying grant of motion. See discussion of grounds in § 53.14[1].*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM

[*Attach memorandum.*]

PROOF OF SERVICE

I, _____ [*name*], declare that:

I am at least 18 years of age and not a party to the above-entitled action. My _____ [residence *or* business] address is _____, California; I am _____ [a resident *or* employed in] _____ County, California [*county in which mailing occurs*].

I served the foregoing motion on _____ [*date*], by depositing _____ [a copy *or* copies] thereof in the United States mail in _____, California, enclosed in [a] sealed envelope[s], with postage fully prepaid, addressed to _____ [*state name and full address of each party served*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[b] Use of Form

The form set out in [a], *above*, is for use to move for an order recalling an appellate court's issuance of remittitur [*Cal. Rules of Ct., 8.272(c)(2)*]. For discussion of format, service, and procedural requirements otherwise applicable to appellate motions generally, see *Ch. 45, Appeal: Motion Procedure, §§ 45.13, 45.14*.

[2] Stipulation for Recall of Remittitur

[a] FORM Proceedings to Recall Remittitur--Stipulation for Recall of Remittitur

_____ [*name of attorney*]
_____ [*California State Bar No.*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone number*]
Attorney for Appellant/Respondent _____ [*name*]

[*EITHER, if stipulation is to be filed in the court of appeal*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
_____ [*number, e.g.,* SECOND] APPELLATE DISTRICT
[DIVISION _____ (*number, e.g.,* SEVEN)]

[*OR, if stipulation is to be filled in the Supreme Court*]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

_____ [*name*],	)	
Plaintiff and Appellant/Respondent,	)	
vs.	)	CASE NO. _____
_____ [*name*],	)	(Superior Court No. _____)
Defendant and Appellant/Respondent.	)	
	)	
	)	

Appeal from the Superior Court of the County of _____ [*name*], No. _____ [*case number*].
The Honorable _____ [*name*], Judge.

STIPULATION FOR RECALL OF REMITTITUR

It is hereby stipulated by the parties to this appeal, through their respective counsel, that the _____ [*either* Supreme Court *or* Court of Appeal of the State of California, _____ Appellate District (, Division _____)] direct that the remittitur issued herein on _____ [*date*], be recalled for the purpose of_____ [*specify reason for recall*], for the following reasons: _____ [*set forth facts which would justify granting of a motion to recall the remittitur*].

_____ [*date*].
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Appellant
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent

[b] Use of Form

The form set out in [a], *above*, is for use by the parties to an appeal to request recall of the appellate court's issuance of remittitur [*Cal. Rules of Ct., Rule 8.272(c)(2)*; *see* discussion in *§ 53.14*].

Legal Topics:

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

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5-53 California Forms of Pleading and Practice--Annotated §§ 53.63-53.69

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[Reserved]

§§ 53.63[Reserved]

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Chapter 53 APPEAL: REMITTITUR AND COSTS ON APPEAL
PART V. FORMS

5-53 California Forms of Pleading and Practice--Annotated § 53.70

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§ 53.70 Memorandum of Costs on Appeal--Judicial Council Form MC-013

[1] FORM Memorandum of Costs on Appeal

Click here to view image.

[2] Use of Form

The form set out in [1], *above*, is a reproduction of the form of Memorandum of Costs on Appeal approved by the Judicial Council for mandatory use [*Cal. Rules of Ct., Rule 1.35*]. The memorandum of costs must be served and then filed in the superior court within 40 days after the appellate clerk mails to the party claiming costs the notice of issuance of remittitur [*Cal. Rules of Ct., Rule 8.278(c)(1)*]. It lists only those items that are expressly allowable as costs on appeal under *Cal. Rules of Ct., Rule 8.278(d)*. For further discussion of allowable costs on appeal, see *§ 53.32*.

The form contains one item labeled "Other," which may be used for attorney's fees on appeal. When attorney's fees on appeal are claimed from the opposing party pursuant to statute or contractual provision authorizing such fees, and the fees are fixed by statute or contract so that the trial court need not make any determination with regard to either entitlement to fees or their amount, these fees should be included in the memorandum of costs on appeal [*see Cal. Rules of Ct., Rule 3.1702(a)*, and discussion in *§ 53.34*]. The "Other" item in this form should be used for attorney's fees only in this situation. When it is necessary for the trial court to determine entitlement to fees, or their amount, or both, the party claiming attorney's fees on appeal must make a motion requesting that these determinations be made, and must serve and file the motion within the same time as the memorandum of costs on appeal [*see Cal. Rules of Ct., Rule 3.1702(c)*, and discussion in *§ 53.34*]. For a form of such motion, see *§ 53.71*.

For discussion and additional forms relating to prior service requirements in trial court proceedings, and proof of service generally, see Ch. 518, *Service of Summons and Papers* .

This form is available in an interactive, electronic format in *LexisNexis[(R)] Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRemandsCivil ProcedureAppealsCosts & Attorney Fees

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Volume 5: Appeal-Chs. 40-55
Chapter 53 APPEAL: REMITTITUR AND COSTS ON APPEAL
PART V. FORMS

5-53 California Forms of Pleading and Practice--Annotated § 53.71

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§ 53.71 Motion for Attorney's Fees on Appeal

[1] FORM Motion for Attorney's Fees on Appeal

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER [DETERMINING ENTITLEMENT TO AND]
vs.	)	FIXING AMOUNT OF AWARD OF ATTORNEY'S
_____ [*name*],	)	FEES ON APPEAL
Defendant.	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.*, plaintiff _____ (*name*)] and to _____ [*name*] his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.*, defendant] _____ [*name*] will, and does, move for an order under *Rule 3.1702(c) of the California Rules of Court*, [determining his/her/its right to, and] fixing the amount of attorney's fees on appeal that he/she/it is entitled to recover from _____ [*identify party, e.g.*, plaintiff] _____ [*name*].

The motion will be made on the grounds that _____ [*specify contract provision or statute authorizing court to determine and fix attorney fee award, e.g.*, a provision of the contract between the parties authorizes the court to award and fix attorney's fees on appeal to be recovery by _____ (*identify party, e.g.*, defendant) _____ (*name*) as prevailing party in this action].

The motion will be based on this notice of motion, on the declaration of _____ [*name*], and the memorandum served and filed herewith, on the papers and records on file herein, and on suchoral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*Set out here and in subsequent numbered paragraphs facts within the personal knowledge of declarant that show moving party is entitled to award of attorney's fees on appeal, e.g., declarant's authentication of an attached copy of a contract between the parties that includes provision for the recovery of fees, and/or facts showing the amount of attorney's fees on appeal incurred*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM

[*Add memorandum supporting motion*]

[*Attach proof of service*]

[2] Use of Form

The form set out in [1], *above*, is a notice of motion and motion requesting that trial court determine entitlement of the moving party to an award of attorney's fees on appeal, to determine the amount of the award, or both.

In some instances the appellate court may award attorney's fees on appeal, and leave to the trial court the determination of the amount. In this case the motion need seek only the latter determination. If the appellate court has not awarded fees, the trial court may nevertheless determine both entitlement and amount. The fees are allowable only when authorized by statute or contract [*see Cal. Rules of Ct., Rule 3.1702(c)*, and discussion in *§ 53.34*].

Declarations and other evidence, such as authenticated copies of the contract, should be attached to the motion to provide sufficient facts to enable the court to determine entitlement to the award, the amount, or both. If fees are claimed under a contract, counsel should check to see if there is a local rule that establishes a fee schedule for contract actions. Generally, any claim for fees that is not based on the court's established schedule of fees for actions on a contract bears the burden of proof [*Code Civ. Proc. § 1033.5(c)(5)*], and therefore must be supported by evidence of time expended, special difficulty, or of a protracted contest. It appears that this burden of proof applies in any action in which fees may be awarded by statute, and not just in actions on a contract [*see, e.g.*, Los Angeles Super. Ct. Rules, Rule 3.2 (applying contract schedule to other types of actions based on statute authorizing recovery of attorney's fees)]. For further discussion of the recovery of attorney's fees under *Code Civ. Proc. § 1033.5*, as an item of costs at the conclusion of trial, see *Ch. 174, Costs and Attorney's Fees, § 174.140* et seq.

A memorandum is required to accompany notices of motion in law and motion proceedings as defined in *Cal. Rules of Ct., Rule 3.1103(a)* [*Cal. Rules of Ct., Rule 3.1113(a)*]. Although the definition in Rule 3.1103(a) does not extend to the post-remittitur motion noticed in this form, the better practice is to support the motion with a memorandum.

A notice of motion and motion for attorney's fees on appeal must be served and filed within the same time as the memorandum of costs on appeal, that is, within 40 days after the appellate clerk mails to the moving party the notice of issuance of remittitur [*Cal. Rules of Ct., Rule 3.1702(c)*; *see Cal. Rules of Ct., Rule 8.278(d)(2)*, and discussion in *§§ 53.34*, *53.60[2*]]. For discussion and additional forms relating to prior service requirements in trial court proceedings, and proof of service generally, see Ch. 518, *Service of Summons and Papers* .

When the trial court need not determine either entitlement or amount, for example, because the appellate court has determined entitlement and the statute or contract provides a formula or otherwise fixes the amount, the party claiming fees is required to include the claim for fees with memorandum of costs on appeal [*see Cal. Rules of Ct., Rule 3.1702(d)*, and discussion in *§ 53.34*]. For a form of memorandum for use in this situation, see *§ 53.70*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRemandsCivil ProcedureAppealsCosts & Attorney Fees

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Volume 5: Appeal-Chs. 40-55
Chapter 54 APPEAL: CALIFORNIA SUPREME COURT REVIEW

5-54 California Forms of Pleading and Practice--Annotated 54.syn

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.syn Synopsis to Chapter 54: APPEAL: CALIFORNIA SUPREME COURT REVIEW

§ 54.01 Scope of Chapter

§ 54.02 Cross References

[1] Related Chapters in This Volume

[2] Other Related Chapters

[3] Other Related Coverage

§§ 54.03-54.09 [Reserved]

§ 54.10 Governing Law

§ 54.11 Civil Proceedings in the Supreme Court

[1] Summary of Civil Proceedings in the Supreme Court

[2] Review Proceedings

[3] Transfer Proceedings

[a] Constitutional Authority

[b] Transfer From the Court of Appeal to the Supreme Court

[i] Transfer May Be Ordered Any Time Before Court of Appeal Decision Is Final

[ii] Transfer May Be Made on Motion or Petition of Party or on Court's Own Motion

[iii] Grounds for Transfer

[iv] Petition for Transfer and Answer to Petition

[v] Order Granting Transfer

[vi] Proceedings After Transfer

[c] Transfer From the Supreme Court to the Court of Appeal

[d] Transfer Within Courts of Appeal

[4] "Original" Proceedings for Relief by Petition for Extraordinary Writ

[5] Proceedings for "Depublication" or Publication of Court of Appeal Opinion

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Volume 5: Appeal-Chs. 40-55
Chapter 54 APPEAL: CALIFORNIA SUPREME COURT REVIEW
PART I. SCOPE

5-54 California Forms of Pleading and Practice--Annotated § 54.01

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§ 54.01 Scope of Chapter

Part II, Subpart A, of this chapter summarizes civil proceedings in the Supreme Court, with cross references to more detailed coverage when appropriate [*see § 54.10* et seq.]. Proceedings summarized in this subpart but covered in more detail elsewhere include the following:

- Writ proceedings within the Court's original jurisdiction [*see § 54.11[4]*].
- Requests for depublication of a court of appeal opinion [*see § 54.11[5]*].

Proceedings summarized and discussed at length, and not covered elsewhere, include the following:

- Transfer proceedings [*see § 54.11[3]*].
- Proceedings to interpret a question of state law in response to a certified request by federal appellate courts or by courts of last resort of another state [*see § 54.11[6]*].

The primary focus of this chapter is Supreme Court review of civil cases, discussed at length in Part II, Subpart B [*see § 54.20* et seq.]. Forms in Part V relating to the Court's review proceedings include the following:

- Petition for review [*see § 54.100*].
- Answer to a petition for review [*see § 54.101*].
- Reply to an answer to a petition for review [*see § 54.102*].
- Skeletal forms of briefs in review proceedings, including an opening brief on the merits, a responding brief on the merits, and a reply brief [*see §§ 54.110 -54.112*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureRemediesWritsGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsCase TransfersCivil ProcedureAppealsPublication of Opinions

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Chapter 54 APPEAL: CALIFORNIA SUPREME COURT REVIEW
PART I. SCOPE

5-54 California Forms of Pleading and Practice--Annotated § 54.02

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§ 54.02 Cross References

[1] Related Chapters in This Volume

- For discussion relating to civil appeals generally, including discussion of appellate jurisdiction generally, who may appeal, factors in considering whether to take an appeal, a summary of the appeal process leading up to review proceedings in the Supreme Court, and additional cross references to Supreme Court review in specific proceedings, see Ch. 40, *Appeal: An Overview* .

- For discussion concerning generally applicable rules of appellate review, specifically, the prejudicial error doctrine, the common standards of review in civil cases, the rules governing the application of substantive law (law of the case, *stare decisis*, retroactivity, etc.), discussion concerning the publication and citability of appellate opinions, and discussion and forms of request to publish or "depublish" a court of appeal opinion, see Ch. 41, *Appeal: Review Standards and Appellate Rules of Law* .

- For discussion relating to what constitutes an appealable judgment or order as well as discussion and forms of notice of appeal and consolidation of appeals, see Ch. 42, *Appeal: Notice of Appeal* .

- For discussion and forms concerning proceedings to stay the enforcement or execution of a judgment or order pending its review on appeal, see Ch. 43, *Appeal: Stay of Proceedings* .

- For discussion and forms pertaining to the preparation, augmentation, and transmittal of the record on appeal, see Ch. 44, *Appeal: Preparing and Filing the Record* .

- For discussion and forms relating to appellate papers and motion procedure generally, see Ch. 45, *Appeal: Motion Procedure* .

- For discussion and forms pertaining to the more significant appellate motions, see respectively Ch.

46, *Appeal: Extending or Shortening Time* , Ch. 47, *Appeal: Relief From Default* , Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* , and Ch. 49, *Appeal: Sanctions* .

- For detailed discussion and forms pertaining to the drafting and filing of appellate briefs generally, see Ch. 50, *Appeal: Briefs* .

- For discussion and forms concerning proceedings in a California appellate court generally occurring after the record and briefs are filed, including calendar and conference proceedings, oral argument, and issuance of the decision, see Ch. 51, *Appeal: Hearing and Decision* .

- For discussion and forms pertaining to rehearing in the Supreme Court as well as in the court of appeal, see Ch. 52, *Appeal: Rehearing* .

- For discussion and forms pertaining generally to remittitur and the recovery of costs on appeal in the trial court after remittitur, see Ch. 53, *Appeal: Remittitur, and Costs on Appeal* .

[2] Other Related Chapters

- For discussion and forms relating to proceedings by a nonparty to submit letters or briefs as *amicus curiae* in a civil appeal or in review proceedings before the Supreme Court, see Ch. 22, *Amicus Curiae* .

- For discussion of original proceedings for judicial review through petition for extraordinary writ of mandate or prohibition, see Ch. 358, *Mandate and Prohibition* .

- For discussion of original proceedings for judicial review by extraordinary writ of review, see Ch. 492, *Review (Certiorari), Writ of* .

- For discussion and forms relating to petitions for writ of review by the Supreme Court and the court of appeal of decisions by the Public Utilities Commission, see Ch. 480, *Public Utilities* .

[3] Other Related Coverage

For discussion and forms relating to review by the United States Supreme Court on petition for writ of certiorari from a decision by a state court of last resort, see Moore's Federal Practice, Ch. 406, *Certiorari Jurisdiction Over State Courts* , and Ch. 408, *Procedural Framework of Supreme Court Practice* (3d ed., Matthew Bender).

For discussion and forms relating to California criminal, as distinguished from civil, appeals, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 101, *Appeal* (Matthew Bender).

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Chapter 54 APPEAL: CALIFORNIA SUPREME COURT REVIEW
PART I. SCOPE

5-54 California Forms of Pleading and Practice--Annotated §§ 54.03-54.09

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[Reserved]

§§ 54.03[Reserved]

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Volume 5: Appeal-Chs. 40-55
Chapter 54 APPEAL: CALIFORNIA SUPREME COURT REVIEW
PART II. LEGAL BACKGROUND
A. Overview of Proceedings in the Supreme Court

5-54 California Forms of Pleading and Practice--Annotated § 54.10

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§ 54.10 Governing Law

Civil proceedings in the California Supreme Court are governed primarily by *Cal. Const., art. VI, §§ 1, 2, 10-14*, and *Cal. Rules of Ct., Rules 8.500-8.552* (review proceedings), *Cal. Rules of Ct., Rules 8.485-8.499* (original or writ proceedings).

Other statutes apply in specific actions or proceedings, for example, Supreme Court review of proceedings before the Public Utilities Commission under *Pub. Util. Code §§ 1756, 1758*.

Other statutes and rules applicable to all state appellate courts include *Code Civ. Proc. §§ 41-45, 901-914, 923, 936.1*, and *Cal. Rules of Ct., Rules 8.200-8.276, 8.10, 3.1702(c)* and *8.1105-8.1125*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewGovernmentsCourtsAuthority to Adjudicate

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Chapter 54 APPEAL: CALIFORNIA SUPREME COURT REVIEW
PART II. LEGAL BACKGROUND
A. Overview of Proceedings in the Supreme Court

5-54 California Forms of Pleading and Practice--Annotated § 54.11

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§ 54.11 Civil Proceedings in the Supreme Court

[1] Summary of Civil Proceedings in the Supreme Court

The California Supreme Court consists of the Chief Justice and six associate justices. The concurrence of four justices at argument is necessary for a judgment by the Supreme Court [*Cal. Const., art. VI, § 2*].

The Court holds regular sessions in San Francisco, Sacramento, and Los Angeles, at times specified by the court, and it may hold special sessions elsewhere [*Cal. Rules of Ct., Rule 8.256(a)*; *see also* discussion of the Supreme Court's jurisdiction and structure in Ch. 40, *Appeal: An Overview*, § 40.11[2]].

Civil proceedings and miscellaneous proceedings conducted in the Supreme Court consist primarily of the following:

- Review of decisions of the court of appeal under the Court's "review jurisdiction," upon grant of a petition for review [*see Cal. Const., art. VI, § 12(b)*; *Cal. Rules of Ct., Rule 8.500 et seq.*, and discussion in [2], *below*, and *§ 54.20* et seq.].

- Proceedings to transfer a cause, either from the court of appeal to the Supreme Court, from the Supreme Court to the court of appeal, or from one court of appeal district to another [*see Cal. Const., art. VI, § 12(a), (c)*; *Cal. Rules of Ct., Rule 10.1000*, and discussion in [3], *below*].

- Original proceedings for an extraordinary writ of mandate, prohibition, review, or habeas corpus [*see Cal. Const., art. VI, § 10*, and discussion in [4], *below*].

- Proceedings, upon the request of a party, interested third person, or on the Court's own motion, to "depublish" an opinion that was previously certified for publication by the court of appeal. Also, frequently, proceedings to publish a court of appeal opinion upon the request of a party or interested third

person, in instances when that request has been forwarded by the court of appeal [*see Cal. Const., art. VI, § 14*; *Cal. Rules of Ct., Rules 8.1105-8.1125*, and discussion in [5], *below*].

- Proceedings to answer a question concerning California law, when the question has been requested and "certified" by the United States Supreme Court, the United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth [*see Cal. Rules of Ct., Rule 8.548*, and discussion in [6], *below*].

[2] Review Proceedings

The Supreme Court does not have appellate jurisdiction in civil causes. This means a party aggrieved by a judgment or order in a civil action or proceeding may not appeal directly to the Supreme Court [*see Cal. Const., art. VI, § 11* (Supreme Court has appellate jurisdiction only in criminal cases involving a judgment of death); *Hollywood Park Land Co., LLC v. Golden State Transportation Financing Corp. (2009) 178 Cal. App. 4th 924, 938-948, 100 Cal. Rptr. 3d 752* (casino compact statute unconstitutional because it bypasses court of appeal and mandates direct review by California Supreme Court)].

While the Supreme Court does not have civil appellate jurisdiction, it does have "review" power or jurisdiction, which describes the Court's power to review, in its discretion, any decision rendered by the court of appeal in a civil appeal [*Cal. Const., art. VI, § 12(b)*; *see Cal. Rules of Ct., Rule 8.500 et seq.* (procedures and grounds for Supreme Court review)]. When the Supreme Court has exercised its discretion to grant review of a court of appeal decision, its review jurisdiction or power of review under *Cal. Const., art. VI, § 12(b)*, extends to any or all issues in the case [*see Cedars-Sinai v. Superior Court (1998) 18 Cal. 4th 1, 5-7, 7-8 n.2, 74 Cal. Rptr. 2d 248, 954 P.2d 511* (as a matter of policy, the Court ordinarily exercises review power only with respect to issues raised in the court of appeal, but it may exercise this power to decide any other issue in the case, even though not raised in the court of appeal, if it deems it appropriate to do so)].

Review proceedings, the primary focus of this chapter, are discussed in detail in *§ 54.20* et seq.

[3] Transfer Proceedings

[a] Constitutional Authority

The Supreme Court may transfer to itself a cause pending in the court of appeal, before decision, and may likewise transfer a decision from itself to the court of appeal, before decision. The court to which the cause is transferred has jurisdiction [*Cal. Const., art. VI, § 12(a)*]. The Judicial Council is authorized to establish rules of procedure for transfer [*Cal. Const., art. VI, § 12(c)*].

[b] Transfer From the Court of Appeal to the Supreme Court

[i] Transfer May Be Ordered Any Time Before Court of Appeal Decision Is Final

The phrase in *Cal. Const., art. VI, § 12(a)*, that a transfer to or from the Supreme Court is to be made "before decision," suggests that a transfer must be made before a decision is rendered by the court in which the cause is pending. In practice, this is always likely to be the case.

When, however, the Supreme Court orders a transfer *from* the court of appeal to itself, the appellate rules, adopted under the constitutional authority of *Cal. Const., art. VI, § 12(c)* (discussed in [a], *above*), provide that the Court may order the transfer at any time before the court of appeal decision becomes final as to that court [*Cal. Rules of Ct., Rule 8.552(b)* (transfer may be made while cause is "pending" in court of appeal and cause is deemed pending until it is final as to court of appeal)]. Nevertheless, considering that a transfer will, in any case, be granted only under the most

compelling circumstances [*see* discussion in [iii], *below*], and considering also the availability of review proceedings once a decision has been rendered by the court of appeal [*see § 54.20* et seq.], the Supreme Court is not likely to exercise its power to order a transfer to itself, except in the most extraordinary circumstance, when the court of appeal has rendered a decision but that decision has not yet become final.

A cause decided by the appellate division of the superior court is not pending in the court of appeal, for purpose of a transfer to the Supreme Court under *Cal. Rules of Ct., Rule 8.552*, until the cause has been ordered transferred from the superior court appellate division to the court of appeal under *Cal. Rules of Ct., Rule 8.1008* [*Cal. Rules of Ct., Rule 8.552(b)*; for discussion of transfer from the superior court appellate division to the court of appeal, *see Ch. 345A, Limited Civil Cases, § 345A.71*].

[ii] Transfer May Be Made on Motion or Petition of Party or on Court's Own Motion

The Supreme Court may order a cause pending in the court of appeal to be transferred to itself on its own motion, or on the motion or petition of a party [*Cal. Rules of Ct., Rule 8.552(a)*].

[iii] Grounds for Transfer

Transfer to the Supreme Court is an extraordinary procedure that is infrequently exercised by the Supreme Court. The Supreme Court will not order a transfer from the court of appeal to itself before decision by the court of appeal, unless the cause "presents an issue of great public importance that the Supreme Court must promptly resolve" [*Cal. Rules of Ct., Rule 8.552(c)*; *see Brosnahan v. Brown (1982) 32 Cal. 3d 236, 241, 186 Cal. Rptr. 30, 651 P.2d 274 , 651 P.2d 274]* . The language of *Cal. Rules of Ct., Rule 8.552(c)*, is drawn from *U.S. Sup. Ct. Rules, Rule 18*, the procedure under which the United States Supreme Court will transfer to itself a cause pending in but not yet decided by a lower federal court. [For discussion of the procedure under *U.S. Supreme Court Rules, Rule 18, see* Moore's Federal Practice, Ch. 518, *Appeal From a United States District Court* (3d ed., Matthew Bender)].

[iv] Petition for Transfer and Answer to Petition

A party seeking transfer must promptly serve and file in the Supreme Court a petition explaining how the cause satisfies the requirements of *Cal. Rules of Ct., Rule 8.552(c)* [*Cal. Rules of Ct., Rule 8.552(d)*].

An answer to the petition may be served and filed within 20 days after service of the petition [*Cal. Rules of Ct., Rule 8.552(d)*].

The format of both the petition and answer must conform as nearly as practicable to the requirements of *Cal. Rules of Ct., Rules 8.204* and *8.504* [*Cal. Rules of Ct., Rule 8.552(d)*]. For further discussion of these requirements, see *§ 54.25*.

[v] Order Granting Transfer

Transfer is granted by an order signed by at least four justices [*Cal. Rules of Ct., Rule 8.552(e)*; Supreme Court of California, Practices and Procedures, Part V, Internal Operating Practices and Procedures of the California Supreme Court, § II].

[vi] Proceedings After Transfer

The clerk of the Supreme Court must promptly send each party a copy of the order of transfer showing the new case number [*Cal. Rules of Ct., Rule 10.1000(a)(2)*]. Once a transfer is accomplished, the Supreme Court may conduct review to the same extent as in review proceedings [*see Cal. Const., art. VI, § 12(a)*; *see also* discussion of review proceedings in § 54.20 et seq.].

[c] Transfer From the Supreme Court to the Court of Appeal

The Supreme Court may order that a cause pending before it be transferred, before it has rendered a decision in the cause, from itself to the court of appeal [*Cal. Const., art. VI, § 12(a)*; *Cal. Rules of Ct., Rule 10.1000(a)(1)(A)*].

In most instances the Supreme Court will order such a transfer as part or all of its disposition of a cause once it has granted review of a court of appeal decision. It may order transfer to the court of appeal, for example, in the following situations:

- When it decides some issues and transfers the cause to the court of appeal for decision of the remaining issues [*Cal. Rules of Ct., Rule 8.528(c)*, discussed in *§ 54.38[2]*].

- When it decides that a transfer to itself [discussed in [b], *above*], was improvidently ordered [*Cal. Rules of Ct., Rule 8.528(e)*, discussed in *§ 54.38[2]*].

- When it grants review of a decision of the court of appeal, but decides thereafter to transfer the cause to the court of appeal with instructions to conduct further proceedings as the Supreme Court deems necessary (*e.g.*, in light of an opinion recently decided by the Supreme Court) [*Cal. Rules of Ct., Rule 8.528(d)*, discussed in *§ 54.38[2]*].

Any supplemental briefing in the court of appeal after transfer from the Supreme Court is governed by *Cal. Rules of Ct., Rule 8.200(b)* [*Cal. Rules of Ct., Rule 8.528(f)*]. For detailed discussion and forms relating to appellate briefs generally, and for further discussion relating to supplemental briefing, see Ch. 50, *Appeal: Briefs* .

[d] Transfer Within Courts of Appeal

Cal. Const., art. VI, § 12(a) mentions only transfer to and from the Supreme Court. Under *Cal. Const., art. VI, § 12(c)* (discussed in [a], *above*), however, the Judicial Council is authorized to establish rules of procedure for transfer, and, under *Cal. Rules of Ct., Rule 10.1000*, has provided that the Supreme Court may also order the transfer of causes from one district or division of the court of appeal to another [*Cal. Rules of Ct., Rule 10.1000(a)(1)(D)*; *see, e.g., PG&E Corp. v. Public Utils. Comm. (2004) 118 Cal. App. 4th 1174, 1192 n.16, 13 Cal. Rptr. 3d 630* (related actions filed in separate districts where defendants had principal places of business all transferred to single district for decision)].

PRACTICE TIP:

Transfer Between Districts Rarely Ordered by Supreme Court. The procedure by which the Supreme Court may order transfer from one district or division to another is almost never utilized. In most instances a transfer between divisions may be accomplished by the administrative presiding justice of a district [*see Cal. Rules of Ct., Rule 10.1000(b)* and discussion in *Ch. 51, Appeal: Hearing and Decision, § 51.11[4]*]. In rare cases when a transfer between districts is necessary, for example, for consolidation, parties should consider applying to the court of appeal panel, or to the administrative presiding justice, requesting transfer. The panel justices or presiding justice may thereafter informally request a transfer order from the Supreme Court for this purpose [*see Ch. 45, Appeal: Motion Procedure, § 45.21*].

In situations in which the Supreme Court orders a transfer from one court of appeal district or division to another, the clerk of the court from which the cause is being transferred must immediately transmit to the other court the original record, briefs, and all original papers and exhibits on file in the cause. The clerk of the court to which the cause is transferred must promptly send to each party a copy of the order of transfer showing the new case number [*Cal. Rules of Ct., Rule 10.1000(a)(2)*].

[4] "Original" Proceedings for Relief by Petition for Extraordinary Writ

The Supreme Court, together with the courts of appeal and the superior courts and their judges, have original jurisdiction in proceedings for extraordinary relief by writ of mandate, prohibition, review (certiorari), or habeas corpus [*Cal. Const., art. VI, § 10*]. As a general rule, original writ proceedings are undertaken by the Supreme Court (that is, proceedings other than summary denial of a writ petition) only in extraordinary circumstances involving issues of public interest with statewide and urgent implications. Thus, unless otherwise ordered by the Chief Justice, a petition for a writ of mandate or prohibition that has not previously been filed with the proper court of appeal is transferred to that court [Supreme Court of California, Practices and Procedures, Part V, Internal Operating Practices and Procedures of the California Supreme Court, § II].

In some instances, review by writ in the Supreme Court is authorized by statute, for example, the review of decisions by the Public Utilities Commission [*see Pub. Util. Code §§ 1756, 1758*; *Cal. Rules of Ct., Rule 8.496*; Supreme Court of California, Practices and Procedures, Part V, Internal Operating Practices and Procedures of the California Supreme Court, § II; *see also* discussion in Ch. 480, *Public Utilities*].

Generally, the Supreme Court as well as the court of appeal has power to review a grant or denial of a writ petition by a lower court on a petition for an extraordinary writ [*see Code Civ. Proc. § 904.1(a)(1)*]. This review is discretionary, however, and rarely granted by the Supreme Court absent extraordinary circumstances [*see* discussion in *Ch. 40, Appeal: An Overview, § 40.13[3][a]*]. The normal method of review of a court of appeal order summarily denying a writ petition within the original jurisdiction of the Supreme Court is by petition for review [*see* Rule 8.500, and discussion in *§ 54.21[2][c]*].

For discussion and forms relating to original proceedings for relief by writ of mandate or prohibition, see Ch. 358, *Mandate and Prohibition* . For discussion and forms relating to original proceedings for relief by writ of review or certiorari, see Ch. 492, *Review (Certiorari), Writ of* . For discussion and forms relating to original proceedings for relief by writ of habeas corpus in civil proceedings (such as review of contempt orders), see Ch. 292, *Habeas Corpus* .

[5] Proceedings for "Depublication" or Publication of Court of Appeal Opinion

[a] Request for "Depublication" of Court of Appeal Opinion

Any person may request, by letter to the Supreme Court, an order directing that an opinion certified for publication by the court of appeal not be published. The letter must be filed with the Supreme Court within 30 days after the decision becomes final as to the court of appeal that rendered the opinion [*Cal. Rules of Ct., Rule 8.1125(a)*]. The letter must state the following [*Cal. Rules of Ct., Rule 8.1125(a)*]:

- The nature of the person's interest.
- A concise statement of the reasons why the opinion should not remain published.

The request may not exceed 10 pages, and must be accompanied by proof of its mailing to the court of appeal and proof of service on each party to the action or proceeding [*Cal. Rules of Ct., Rule 8.1125(a)*; for discussion and forms relating to proof of service generally, see Ch. 518, *Service of Summons and Papers*].

For more detailed discussion of this procedure, including responses by other interested persons, and a form of request to the Supreme Court for an order directing depublication of a court of appeal opinion, see *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, §§ 41.52, 41.91*.

Note that the Supreme Court may order that a court of appeal opinion not be published on its own motion, as well as on

the request of an interested person [*see Cal. Const. art. VI, § 14*; *Cal. Rules of Ct., Rule 8.1105(d)(2)*, and discussion in *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, §§ 41.50[2], 41.52*].

[b] Forwarded Request for Publication of Court of Appeal Opinion

Any person may request publication of a court of appeal opinion that has not already been certified for publication by the court rendering that opinion. The request must be made to the court that rendered the opinion. The request must be delivered to the rendering court within 20 days after the opinion is filed [*Cal. Rules of Ct., Rule 8.1120(a)*]. If, however, the court of appeal that rendered the opinion does not grant the request, or cannot grant it by reason of the decision's finality as to that court, that court must transmit the request for publication and a copy of the opinion to the Supreme Court with its recommendation for disposition and a brief statement of its reasons. The transmitting court must also send a copy of its recommendation and reasons to each party and to any person who has requested publication. The rendering court must forward these materials within 15 days after the decision is final in that court [*Cal. Rules of Ct., Rule 8.1120(b)*].

When the Supreme Court receives a request for publication under *Cal. Rules of Ct., Rule 8.1120(b)*, it must either order the opinion published or deny the request, and send notice of its action to the transmitting court, each party, and any person who has requested publication [*Cal. Rules of Ct., Rule 8.1120(c)*]. Note that, in addition to the procedure in *Cal. Rules of Ct., Rule 8.1120*, for publication on the request by an interested person, the Supreme Court retains the power to order publication on its own motion [*see Cal. Const. art. VI, § 14*; *Cal. Rules of Ct., Rule 8.1105(d)(2)*].

For more detailed discussion of this procedure and a form of request for publication of a court of appeal opinion that has not already been certified for publication by that court, see *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, §§ 41.50[2], 41.51, 41.90*.

[6] Proceedings to Answer Question on California Law Certified by Another Jurisdiction

[a] Authority to Review Certified Questions

The Supreme Court has authority to answer questions of California law by the Supreme Court of the United States, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth [*Cal. Rules of Ct., Rule 8.548(a)*)]. The Court may answer such questions so long as the certifying court requests the answer, the question is one that may be determinative of a cause pending in the certifying court, and there is no California appellate court decision that otherwise provides a controlling precedent for the certified question [*Cal. Rules of Ct., Rule 8.548(a)*; *see International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles (2010) 48 Cal. 4th 446, 455, 2010 Cal. LEXIS 2063]* .

The Supreme Court noted, in its first opinion relating to a certified question, the following benefits of state law certification procedures generally [*Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal. 4th 352, 360-361, 93 Cal. Rptr. 2d 1, 993 P.2d 334]* :

- The procedure allows federal courts to avoid mischaracterizing state law, thereby avoiding a misstatement that might produce an injustice in the particular case and potentially mislead other federal and state courts until the state supreme court finally, in other litigation, corrects the error.

- The procedure strengthens the primacy of the state supreme court in interpreting state law by giving it the first opportunity to decide an issue conclusively.

- The procedure avoids conflicts between federal and state courts, and forestalls needless litigation.

- The procedure protects the sovereignty of state courts, especially in that a federal court's erroneous construction of state law results in application of law contrary to the law of the state, in derogation of the state's right to prescribe a rule of decision.

The Court in *Los Angeles Alliance* also noted, in dictum, that other state supreme courts with similar certification procedures have uniformly determined that the constitutional scope of their jurisdiction properly includes the power to entertain and decide certified questions, and that the issuance of an opinion on a certified question is not an improper advisory opinion so long as the court addresses only issues that are truly contested by the parties and that are presented on a factual record, and the court's opinion on the certified question will be dispositive of the issue and res judicate between the parties [*Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal. 4th 352, 361-362, 93 Cal. Rptr. 2d 1, 993 P.2d 334* ; *but see Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal. 4th 352, 379, 93 Cal. Rptr. 2d 1, 993 P.2d 334* , conc. opn. of Werdegar, J. (writing separate concurrence to stress the majority opinion on this point is dictum only; the majority opinion does not decide the issue of the constitutionality of the certification procedure adopted by the Court under former Cal. Rules of Ct., Rule 29.5 (*now see Cal. Rules of Ct., Rule 8.548*), because that rule's validity was not questioned by the parties)].

[b] Content of Request to Answer Certified Question

The request must be made by a court specified in *Cal. Rules of Ct., Rule 8.548(a)* (discussed in [a], *above*), in an order that sets out the following [*Cal. Rules of Ct., Rule 8.548(b)*; *see, e.g., Los Angeles Alliance for Survival v. City of Los Angeles (9th Cir. 1998) 157 F.3d 1162* (certifying a question concerning California constitution to California Supreme Court from Ninth Circuit Court of Appeals)]:

- The title and number of the case, including names and addresses of counsel and of parties appearing pro se, and a designation of the party to be deemed the petitioner on the certified question if the request to answer is granted [*Cal. Rules of Ct., Rule 8.548(b)(1)*].

- The question of law to be answered with a statement that the requesting court will accept the decision [*Cal. Rules of Ct. Rule 8.548(b)(2)*].

- A statement, by stipulation of the parties subject to approval by the certifying court, or by the court itself, of all facts relevant to the certified question [*Cal. Rules of Ct. Rule 8.548(b)(3)*].

- Statements demonstrating the question presented is contested and that there is no controlling precedent in California case law, explaining how the answer may be determinative of a cause pending before the certifying court, and indicating that the answer provided by the Supreme Court will be followed by the certifying court [*Cal. Rules of Ct., Rule 8.548(b)(4)*].

The certifying court must supply copies of all relevant briefs and any portions of the record the Supreme Court may request [*Cal. Rules of Ct., Rule 8.548(c)*].

[c] Procedure for Making Request

The requesting court clerk must file an original and 10 copies of the request in the Supreme Court with a certificate of service on the parties [*Cal. Rules of Ct. Rule 8.548(d)*].

[d] Briefs and Letters Supporting or Opposing the Request

[i] Briefs of Parties

When another court files a request with the Supreme Court for an answer to a certified question, it will have given

notice of the request to the parties to the action or proceeding to which the request pertains [*see Cal. Rules of Ct., Rule 8.548(d)* and discussion in [c], *above*]. Such parties may, within 20 days after the filing of the request, file a letter that supports or opposes the request [*Cal. Rules of Ct., Rule 8.548(e)(1)*].

When a party has filed a letter with the Supreme Court supporting or opposing the request, any other party may reply to that letter. The reply must be filed within 10 days of the filing of the initial supporting or opposing brief [*Cal. Rules of Ct., Rule 8.548(e)(2)*].

A letter or reply filed with the Supreme Court must be served on the other parties to the action or proceeding and on the requesting court [*Cal. Rules of Ct., Rule 8.548(e)(2)*].

A letter supporting or opposing a request may include a request that the Supreme Court restate the certified question pursuant to *Cal. Rules of Ct., Rule 8.548(f)(5)* (discussed in [e], *below*). If a letter includes such a request, it must provide a proposed restatement of the question [*Cal. Rules of Ct., Rule 8.548(e)(3)*].

[ii] Letters of Amici Curiae

When another court has filed with the Supreme Court a request for an answer to a certified question under *Cal. Rules of Ct., Rule 8.548*, any non-party individual or entity, acting as amicus curiae, may lodge with the Supreme Court a letter that supports or opposes the Court's acceptance of the request. Such a letter, like that supporting or opposing a petition for review, is in lieu of filing an amicus curiae brief [*Cal. Rules of Ct., Rule 8.548(e)(1)*]. For further discussion of the requirements applicable to such letters and their disposition by the Supreme Court, see Ch. 22, *Amicus Curiae* .

[e] Disposition of Request

The Supreme Court has discretion to accept or deny the request for an answer to the certified question [*Cal. Rules of Ct., Rule 8.548(f)(1)*]. There is no stated time limit for the Court to act on a request. In deciding whether to accept or deny the request, the Court may consider any factors it deems appropriate, including, whether resolution of the question is necessary to secure uniformity of decision or to settle an important question of law [*Cal. Rules of Ct., Rule 8.548(f)(1)*].

Thus, it is not necessary for the request to meet the standards for granting a petition for review. At any time, the Supreme Court may restate the certified question or ask the certifying court to restate or clarify the question [*Cal. Rules of Ct., Rule 8.548(f)(5)*].

If the legal issues raised are of continuing public interest and likely to recur, the Supreme Court has discretion to answer a certified question, even if the parties have settled the underlying litigation, thereby making the case moot [*Cadence Design Systems, Inc. v. Avant! Corporation (2002) 29 Cal. 4th 215, 218, n.2, 127 Cal. Rptr. 2d 169, 57 P.3d 647* (trade secret issues likely to recur)].

After the Supreme Court accepts a request, the California Rules of Court governing briefing, argument, and the conduct of appeals apply [*Cal. Rules of Ct., Rule 8.548(f)(3)*]. Thus, the rules governing certified questions contemplate full briefing and oral argument by the parties once a request has been granted [*Cal. Rules of Ct., Rule 8.548(f)(3)*].

[f] Notice to Attorney General

If, after granting a request, the Supreme Court determines that a decision on the question may require an interpretation of the California Constitution or a decision on the validity or meaning of a California law affecting the public interest, the Supreme Court must direct the clerk to send to the Attorney General a copy of the request and the order granting it. The only exception to this rule is if the Attorney General is representing a party to the litigation [*Cal. Rules of Ct., Rule*

8.548(f)(4)].

[g] Publication and Effect of Answer to Certified Question

The clerk of the Supreme Court is required to forward the Supreme Court's opinion on the certified question to the certifying court, and to counsel of record [*Cal. Rules of Ct., Rule 8.548(f)(6)*]. An opinion in answer to a certified question has the same authority and precedential effect as any other decision of the Supreme Court, and is published in the Official Reports [*Cal. Rules of Ct., Rule 8.548(f)(7)*].

[h] Fees And Costs in Connection With Request

The Supreme Court imposes no fees in cases involving a certified question. Costs are dealt with in accordance with *Cal. Rules of Ct., Rule 8.544* [*Cal. Rules of Ct., Rule 8.548,* Advisory Committee Comment (2003); *see also Cal. Rules of Ct., Rule 8.548(f)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

[Reserved]

§§ 54.12[Reserved]

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5-54 California Forms of Pleading and Practice--Annotated § 54.20

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§ 54.20 Governing Law

Civil review proceedings in the Supreme Court are governed primarily by *Cal. Const., art. VI, § 12(b)*, and *Cal. Rules of Ct., Rules 8.500-8.552*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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5-54 California Forms of Pleading and Practice--Annotated § 54.21

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§ 54.21 Review Jurisdiction of the Supreme Court

[1] Power to Review Decisions of Court of Appeal

Before 1984, the Supreme Court's grant of a hearing in a civil appeal operated to vacate the decision of the court of appeal automatically. The Supreme Court then reviewed the trial court's judgment independently, without regard to the court of appeal decision.

This procedure was altered fundamentally by the enactment of Proposition 32. By this enactment, *Cal. Const., art. VI, § 12*, now provides for a grant of "review" rather than a grant of "hearing," in all cases other than criminal cases involving the death penalty, and the "review" so granted is a review of the court of appeal decision rather than the decision of the trial court [*see Cal. Const., art. VI, § 12(b)*].

The Supreme Court may now review trial court decisions *only* if it exercises its power to transfer to itself an appeal pending in and not yet decided by the court of appeal [*see Cal. Const., art. VI, § 12(a)*, and discussion in *§ 54.11[3]*]. The Judicial Council was given authority, by the same enactment, to provide rules of procedure for both transfer and review, as well as for remand of a cause in which the Court determines that its grant of review was improvident [*Cal. Const., art. VI, § 12(c)*], and on this authority the Judicial Council adopted *Cal. Rules of Ct., Rules 8.500-8.552*.

Thus, in determining whether to grant review in a civil appeal, the Supreme Court now focuses on the decision of the court of appeal rather than on the decision of the trial court; the Court very rarely exercises its power to transfer an appeal from the trial court before it has been first been reviewed by the court of appeal. The Supreme Court's current method of review is more analogous to that used by the United States Supreme Court in reviewing decisions from the state supreme courts [*see Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc. (1987) 43 Cal. 3d 696, 709 n.12, 238 Cal. Rptr. 780, 739 P.2d 140]* .

Note also that before 1984, the Supreme Court reviewed the entire judgment of the trial court, whereas now it may

review specific issues in the court of appeal decision (or issues embraced by the case but not previously raised) [*see* discussion in [2][b], *below*, and in *§ 54.22*].

[2] Scope of Review Power

[a] Review Is Discretionary

The Supreme Court's review of civil appeals is wholly discretionary [*see Cal. Const., art. VI, §§ 11, 12* (also providing that the only instance of the Supreme Court's "appellate," as distinguished from review, jurisdiction, in which a party is entitled by right to direct review, is a criminal case involving imposition of the death penalty); *People v. Davis (1905) 147 Cal. 346, 348, 81 P. 718* ; *see also* discussion in *§ 54.11[1]* and *Ch. 40, Appeal: An Overview, § 40.11[2][a]*].

[b] Review of Court of Appeal Decision

The Supreme Court's review power under *Cal. Const., art. VI, § 12(b)*, once it has exercised its discretion to grant review, extends to any or all issues in the case [*see Cal. Rules of Ct., Rule 8.516(b)*]. Ordinarily, as a matter of policy, the Court exercises its review power only with respect to issues raised in the court of appeal, and, as discussed in *§ 54.23*, will ordinarily decline review of issues that could have been raised in the court of appeal but were not. The Court may nevertheless exercise its review power to decide any issue in a case, even though not raised in the court of appeal, if it deems it appropriate to do so. Thus, for example, it may address an issue not raised below, when that issue is one of continuing importance, and when review is granted expressly to consider the issue and the issue is fully briefed and argued before the Supreme Court [*see Cedars-Sinai v. Superior Court (1998) 18 Cal. 4th 1, 5-7, 7-8 n.2, 74 Cal. Rptr. 2d 248, 954 P.2d 511* (addressing spoliation of evidence issue raised for the first time on appeal because "[t]he petition for review ... squarely raised the issue [and] ... the issue has been extensively briefed not only by the parties but also by numerous amici curiae ... [i]t is an issue of law that does not turn on the facts of this case, it is a significant issue of widespread importance, and it is in the public interest to decide the issue at this time")].

The Supreme Court usually grants review only to address issues of public policy or institutional importance, or to articulate uniform rules of law in areas in which there there may be confusion or a conflict of authority [*see Cal. Rules of Ct., Rule 8.500(b)*, and discussion in *§ 54.22*; *see also People v. Davis (1905) 147 Cal. 346, 348, 81 P. 718]* . It will not usually grant review merely to correct errors in the judgments of the trial court or court of appeal. The error-correcting function is deemed to be fulfilled by the court of appeal, in which a civil litigant is afforded his or her only *right* to an appeal [*see People v. Davis (1905) 147 Cal. 346, 347-350, 81 P. 718]* .

[c] Review of Interlocutory Court of Appeal Orders and Court of Appeal Judgments in Original Proceedings

The Supreme Court's review power extends not only to review of court of appeal decisions, but also to interlocutory orders issued by the court of appeal in civil appeal proceedings, and orders of the court of appeal summarily denying writs within the original jurisdiction of the Court [*Cal. Rules of Ct., Rule 8.500(a)(1)*; for discussion of original proceedings in the Supreme Court, *see also* discussion in *§ 54.11[4]*].

Note that summary denials of writ petitions are final immediately [*Cal. Rules of Ct., Rule 8.264(b)(2)*], and a petition for review of such an order must therefore be filed within 10 days of the filing of the order [*Cal. Rules of Ct., Rule 8.500(e)(1)*]. Interlocutory orders of the court of appeal may also be deemed final immediately to enable a party to petition the Supreme Court for review within 10 days of the filing of the order [*Cal. Rules of Ct., Rule 8.500(a)(1)*].

[3] Review on Transfer From Court of Appeal Distinguished

In rare instances, the Supreme Court may, either on petition or on its own motion, transfer to itself a cause pending in the court of appeal. Once transferred to itself, the Court has jurisdiction over the cause [*Cal. Const., art. VI, § 12(a)*;

Cal. Rules of Ct., Rule 8.552(a)]. Once the cause is transferred, the Court has jurisdiction [*Cal. Const., art. VI, § 12(a)*], but it is to be distinguished from the Court's jurisdiction to review court of appeal decisions. Because a transfer must be accomplished before decision by the court of appeal [*Cal. Const., art. VI, § 12(a*); *Cal. Rules of Ct., Rule 8.552(a)*], the Supreme Court necessarily reviews the judgment of the trial court rather than the decision of the court of appeal. For further discussion of transfer proceedings and the limited grounds for transfer, see *§ 54.11[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 54.22 Grounds For Review

The Supreme Court will order review of a court of appeal decision in the following circumstances:

- When it appears necessary to secure uniformity of decision or the settlement of important questions of law [*Cal. Rules of Ct., Rule 8.500(b)(1)*].

- When the court of appeal was without jurisdiction of the cause [*Cal. Rules of Ct., Rule 8.500(b)(2)*].

- When, because of disqualification or other reason, the decision of the court of appeal lacks the concurrence of the required majority of qualified judges [*Cal. Rules of Ct., Rule 8.500(b)(3)*; *see Amwest Surety Ins. Co. v. Wilson (1995) 11 Cal. 4th 1243, 1266, 48 Cal. Rptr. 2d 12, 906 P.2d 1112]* .

- For the purpose of transferring the matter to the court of appeal for proceedings that the Supreme Court may order [*Cal. Rules of Ct., Rule 8.500(b)(4)*].

PRACTICE TIP:

Grant of Review Is Very Selective. As a practical matter, review is granted in those cases that meet the first of these three criteria, that is, when it appears necessary to the Supreme Court in order to secure uniform application of state law or to settle an important question of state law [*Cal. Rules of Ct., Rule 8.500(b)(1)*]. Moreover, review is more likely to be granted when the opinion of the court of appeal was certified for publication [*see* discussion regarding publication in *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.51*].

Litigants should be realistic about the chances of the Supreme Court granting a petition for review. Statistics prepared in 1997 indicate that the Supreme Court granted only 5% of 4,657 petitions for review filed in a one year period [1997 Judicial Council Report On Court Statistics, p. 10].

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§ 54.23 Issues Not Regarded as Proper Grounds for Review

As a matter of policy, on petition for review the Supreme Court normally will not consider:

- Any issue that could have been but was not timely raised in the briefs filed in the court of appeal [*Cal. Rules of Ct., Rule 8.500(c)(1)*].

- Any issue or any material fact that was omitted from or misstated in the opinion of the court of appeal, unless the omission or misstatement was called to the attention of the court of appeal in a petition for rehearing [*Cal. Rules of Ct., Rule 8.500(c)(2)*; *see also* discussion in Ch. 52, *Appeal: Rehearing* for detailed discussion of rehearing proceedings].

All other issues and facts may be presented in the petition for review without the necessity of filing a petition for rehearing [*Cal. Rules of Ct., Rule 8.500(c)(2)*].

Certain types of issues are appropriately raised for the first time in the Supreme Court [*see, e.g., Code Civ. Proc. § 430.80(a)* (issue regarding lack of subject matter jurisdiction or failure to state facts constituting cause of action are not waived by failure to object in pleadings); *Common Cause v. Board of Supervisors (1989) 49 Cal. 3d 432, 438-439, 261 Cal. Rptr. 574, 777 P.2d 610* (addressing standing issue first raised before Supreme Court); *see also* discussion in *§ 54.21[2][b]*].

PRACTICE TIP:

Don't Wait to Raise Issues in Supreme Court. *Cal. Rules of Ct., Rule 8.500(c)(1)*, is a statement of policy rather than a jurisdictional limitation. Nonetheless, it is an important policy that the Supreme Court follows in all but the most exceptional cases. A party considering review proceedings in the Supreme Court should *always* present to the court of appeal an issue it intends to present later to the Supreme Court, even if prevailing on the issue appears hopeless in the court of appeal, and should

always consider whether a petition for rehearing in the court of appeal is a necessary precursor to the petition for review. In rare instances strategic considerations may dictate otherwise. For example, it may appear unwise to raise an issue in the court of appeal when the party intends to argue against a position squarely taken by the division of the court of appeal that is to decide the appeal. Even in these situations, however, the most prudent course is to raise the issue in the court of appeal, rather than rely on the Supreme Court to exercise its discretion to review an issue not raised below. For an informative discussion of the Supreme Court's exercise of its discretionary power to review an issue that counsel did not raise below for strategic reasons, but afterwards presented squarely in the petition for review, see *Cedars-Sinai Med. Ctr. v. Superior Court (1998) 18 Cal. 4th 1, 5-7, 7-8 n.2, 74 Cal. Rptr. 2d 248, 954 P.2d 511* , discussed in *§ 54.21[2][b]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 54.24 Methods and Deadlines for Exercising Review Power

[1] On Court's Own Motion After Court of Appeal Decision Becomes Final

If no petition for review is filed, the Supreme Court, on its own motion, may order review of a court of appeal decision within 30 days after the court of appeal decision becomes final as to that court [*Cal. Rules of Ct., Rule 8.500(b)*; *see Cal. Rules of Ct., Rules 8.264, 8.60(c)*].

The Supreme Court rarely grants review on its own motion [*see, e.g., American Motorcycle Assn. v. Superior Court (1978) 20 Cal. 3d 578, 586, 146 Cal. Rptr. 182, 578 P.2d 899* ; *Skaff v. Small Claims Court for Los Angeles Judicial Dist. (1968) 68 Cal. 2d 76, 77-78, 65 Cal. Rptr. 65, 435 P.2d 825]* .

[2] On Petition by a Party

The Supreme Court may order review of a court of appeal decision within 60 days after the filing by a party of the last timely petition for review [*Cal. Rules of Ct., Rule 8.512(b)(1)*]. The Court may, within this original 60-day period and for good cause, extend this time by one or more periods of not more than 30 days in the aggregate. The total time to grant review on petition, including extensions, cannot exceed 90 days after filing of the last timely petition [*Cal. Rules of Ct., Rule 8.512(b)(4)*].

Legal Topics:

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5-54 California Forms of Pleading and Practice--Annotated § 54.25

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§ 54.25 Petition for Review

[1] Deadline for Filing Petition for Review

[a] Petition Must Be Filed Within 10 Days After Finality of Court of Appeal Decision

A party seeking review in the Supreme Court must serve and file a petition for review within 10 days after the decision of the court of appeal becomes final as to that court [*Cal. Rules of Ct., Rule 8.500(e)(1)*; *see also* service requirements discussed in [4], *below*]. Every party seeking review must file a timely petition or join in the petition of another party [*see Woods v. Young (1991) 53 Cal. 3d 315, 333, 279 Cal. Rptr. 613, 807 P.2d 455* (concurring opinion of Justice Baxter)].

A decision of the court of appeal generally becomes final 30 days after filing [*Cal. Rules of Ct., Rule 8.264(b)*]. However, for the purpose of determining the time within which a petition for review must be filed, the time when the decision of the court of appeal becomes final is not extended if the 30th day falls on a weekend, holiday, or other day the clerk's office is closed [*Cal. Rules of Ct., Rule 8.500(e)(1)*; *see also Code Civ. Proc. §§ 10-13b* (calculation of time periods generally)]. For detailed discussion relating to the finality of court of appeal decisions, see *Ch. 51, Appeal: Hearing and Decision, § 51.19*.

[b] Special Rule For Summary Denial of Writs

The summary denial of a writ petition by the court of appeal is final immediately, and a petition for review from such an order is therefore due within 10 days after the order of summary denial is filed [*Cal. Rules of Ct., Rules 8.264(b)(2), 8.500(e)*; *see* discussion in *§ 54.21[2][c]*].

[c] "Date of Filing" Defined

The "date of filing" of a petition for review, or an answer to a petition for review, is the date of delivery to the clerk's

office during normal business hours [*Cal. Rules of Ct., Rule 8.25*]. The document is timely, however, if the time for its filing has not expired on the date of its mailing by certified or express mail as shown on the postal receipt or postmark, or on the date of delivery to a common carrier promising overnight delivery as shown on the carrier's receipt [*Cal. Rules of Ct., Rule 8.25*].

[d] Premature Petition Is Received But Not Filed

If a petition for review is submitted for filing before the court of appeal decision becomes final, the clerk of the Supreme Court will receive the petition but not file it. The petition will be deemed to have been filed on the day after the decision becomes final as to the court of appeal [*Cal. Rules of Ct., Rule 8.500(b)*].

PRACTICE TIP:

Avoid Premature Petitions. Litigants should generally avoid submitting a premature petition. The court of appeal might modify an opinion or change its publication status any time before the opinion becomes final as to that court, thus making the premature petition inaccurate or unnecessary.

[e] Generally No Extension for Filing Petition Absent Grant of Relief From Default

The time for filing a petition for Supreme Court review of a court of appeal decision cannot be extended [*Cal. Rules of Ct., Rule 8.512(b)*]. The Chief Justice may, however, relieve a party from a default for failure to file a timely petition for review if the time within which the Court could order review on its own motion has not expired [*Cal. Rules of Ct., Rule 8.60(d)* (relief from default); *see also* discussion in *§ 54.24[1*] (time for granting review by Supreme Court *sua sponte*), and *Ch. 47, Appeal: Relief from Default, § 47.11 et seq.*].

[2] Contents of Petition

[a] Beginning Statement of Issues

The body of the petition for review must begin with a "concise, nonargumentative statement of the issues presented for review, framing them in terms of the facts of the case but without unnecessary detail" [*Cal. Rules of Ct., Rule 8.504(b)(1)*].

The Supreme Court need consider only the issues set forth in the petition for review and the answer to the petition [*Cal. Rules of Ct., Rule 8.516(b)(1)*]. The statement of issues is therefore not only a means of summarizing the issues before the court: it *defines* the scope of the issues to be considered, unless the Supreme Court decides on its own to consider other issues embraced by the cause [*see Cal. Rules of Ct., Rule 8.516(b)(2)* (the Court "may decide an issue that is neither raised nor fairly included in the petition or answer if the case presents the issue")]. *Cal. Rules of Ct., Rule 8.516(b)(1)*, is adapted from an analogous United States Supreme Court rule, and, like other provisions of *Cal. Rules of Ct., Rule 8.516*, is intended to conform California Supreme Court practice to practice before the United States Supreme Court. Thus, the California Supreme Court is not limited to issues presented in the petition or answer, but ordinarily will limit itself to the issues thus presented as a matter of policy [*see Cal. Rules of Ct., Rule 8.516(b)*; *see also ABC Internat. Traders, Inc. v. Matsushita Electric Corp. (1997) 14 Cal. 4th 1247, 1268 n.10, 61 Cal. Rptr. 2d 112, 931 P.2d 290* ; *In re Marriage of Heikes (1994) 10 Cal. 4th 1211, 1215 n.5, 44 Cal. Rptr. 2d 155, 899 P.2d 1349* (the Court need not reach issues not raised in petition for review)].

PRACTICE TIP:

Drafting the Statement of Issues. The statement of issues presented is the single most important vehicle for attracting the interest of the Supreme Court. Counsel for both petitioner and respondent should be selective and concise in drafting their statements, focusing on why the issues presented have the significance that warrants the devotion of the Supreme Court's limited resources.

Counsel should therefore take great care in drafting the statement of issues. The best petition for review usually presents a single, compelling issue. It is a rare case that truly has several issues worthy of review; listing several issues tends to convey the message there is no single and sufficiently important issue that the Court should address. Do *not* attempt to restate the same issue several ways; a shotgun approach will not impress the Supreme Court. The issue should be stated objectively, simply, but as interestingly and as compellingly as possible. The Supreme Court is the court of last resort in California, and as such has both great responsibility and great discretion in how best to satisfy that responsibility. The court is interested only in issues of general or public importance, not those of interest only to the parties in a particular cause; counsel should present their issues for review accordingly.

Because, under *Cal. Rules of Ct., Rule 8.512(d)*, the Supreme Court may grant review and then defer action pending disposition of another case before the court (the "grant and hold" procedure discussed in *§ 54.31[3]*), it is important for petitioners (and respondents) to advise the court in the statement of issues of any related cases pending before the court. A "grant and hold" will give the litigants, if not the benefit of direct review by the Supreme Court, at least the benefit, on remand, of having their cause decided in light of the Supreme Court's decision in similar pending cases.

[b] Argument Why the Cause Is Appropriate for Review

The petition must address, in particular, why the cause is appropriate for review, focusing as concisely as possible on why the case satisfies the criteria for review set out in *Cal. Rules of Ct., Rule 8.500(b)* [*Cal. Rules of Ct., Rule 8.504(b)*; for discussion of grounds for review under *Cal. Rules of Ct., Rule 8.500(b), see §§ 54.22, 54.23*].

[c] Generally No Incorporation of Materials by Reference

No authorities or argument may be incorporated into the petition by reference, with the following exceptions [*Cal. Rules of Ct., Rule 8.504(e)*]:

- Portions of a petition for review, answer or reply filed by another party in the same case.

- Portions of a petition for review, answer or reply filed in a connected case in which a petition for review is pending or has been granted.

[d] Copy of Court of Appeal Opinion Must Be Attached or Included

The petition, and each copy of the petition filed in the Supreme Court, must contain or be accompanied by a copy of the court of appeal opinion, showing the date that opinion was filed [*Cal. Rules of Ct., Rule 8.504(b)(4)*].

[e] Petition Must Conform in Other Respects to Requirements for Appellate Briefs

Except as superseded by the requirements of *Cal. Rules of Ct., Rule 8.504*, discussed in [a]-[d], *above*, the contents of a petition for review, its answer, and the reply, must comply with the relevant provisions of *Cal. Rules of Ct., Rule 8.204*. For detailed discussion of the requirements of *Cal. Rules of Ct., Rule 8.204*, that are not superseded by the requirements that are specifically applicable to petitions for review, such as descriptive headings, references to the record, and tables of contents and authorities, see *Ch. 50, Appeal: Briefs, § 50.12[1]*.

[3] Form of Petition

[a] Generally

It is advisable to include the following in the body of a petition for review:

- An introduction that briefly provides an overview of the case and explains why review should be granted in a way that sets the stage for the remainder of the petition. The introduction should be as persuasive as possible, summarizing in one or two pages the most compelling reasons for granting review.

- A statement of the necessary and pertinent facts.

- A brief legal argument that focuses on the institutional or policy implications of the issues presented.

For a form of petition, see *§ 54.100*.

[b] Length and Attachments

The petition should be as concise as possible [*Cal. Rules of Ct., Rule 8.504(b)(1)*]. If produced on a computer, it may not exceed 8,400 words, including footnotes. The petition must include a certificate by appellate counsel or an unrepresented party stating the number of words in the document. The person certifying may rely on the word count of the computer program used to prepare the document [*Cal. Rules of Ct., Rule 8.504(d)(1)*]. If typewritten, the petition may not exceed 30 pages [*Cal. Rules of Ct., Rule 8.504(d)(2)*]. These limits do not include any tables, the court of appeal opinion, a certificate under *Cal. Rules of Ct., Rule 8.504(e)(1)*, and any permitted attachments [*Cal. Rules of Ct., Rule 8.504(d)(3)*].

There may be no exhibits or appendices, however named, attached, annexed, or filed with the petition, other than the following [*Cal. Rules of Ct., Rule 8.504(e)(1)*]:

- An opinion or order from which the party seeks relief.

- Exhibits or orders of a trial court or court of appeal that the party considers unusually significant.

- Copies of relevant local, state, or federal regulations or rules, out-of-state statutes, or other similar citable materials that are not readily accessible.

- An opinion required to be attached under *Cal. Rules of Ct., Rule 8.1115(c)*.

These attachments may not exceed a combined total of 10 pages [*Cal. Rules of Ct., Rule 8.504(e)(2)*].

Upon a written application, the Chief Justice may permit petitions, answers, or replies of greater length, or the inclusion of additional annexed material [*Cal. Rules of Ct., Rule 8.504(e)(4)*]. For discussion relating to an analogous procedure for filing a lengthy appellate brief, and a form of application which may be adapted for this purpose, see *Ch. 50, Appeal: Briefs, §§ 50.15* and *50.74*.

PRACTICE TIP:

Keep the Petition Short and Concise. There are rarely circumstances that would justify a petition in excess of 30 pages, particularly since a new brief on the merits can be filed in the event review is granted [*see Cal. Rules of Ct., Rule 8.516*].

The petition should rarely even approach the page limit. Conciseness is of great value. An effective petition is sometimes only a few pages long, although obviously some have to be longer. If the importance of a case or issue is not obvious and requires many pages to explain, this is often an indication that it is not important after all. If the first draft of the petition has over ten pages of text,

counsel should ask whether the length is really necessary. The petition should stress legal issues of general application, not fact-specific issues relevant only to the specific case. Counsel should always bear in mind the sole purpose of the petition: to convince the court to consider the issue on the merits. The goal of the petition is not to win the case but to get it reviewed. Arguing that the court of appeal opinion was erroneous might be a useful means to this end, but it is not an end in itself. After the petition has succeeded, and the court grants review, then counsel can brief the merits more thoroughly.

[c] Cover

The cover of the petition should be white [*Cal. Rules of Ct., Rule 8.40(b)*].

[d] Petition Must Conform in Other Respects to Requirements for Appellate Briefs

Except as superseded by the requirements of *Cal. Rules of Ct., Rule 8.504*, discussed in [a]-[c], *above*, the form of a petition for review, the answer to the petition, and the reply to the answer must conform to the relevant provisions of *Cal. Rules of Ct., Rule 8.204* [*Cal. Rules of Ct., Rule 8.504(a)*]. For detailed discussion of the format requirements of *Cal. Rules of Ct., Rule 8.204*, that are not superseded by those specifically applicable to petitions for review, see *Ch. 50, Appeal: Briefs, § 50.14*. For additional discussion of drafting considerations applicable to briefs that may also be useful to consider when drafting a petition for review, see *Ch. 50, Appeal: Briefs, § 50.13*.

PRACTICE TIP:

Further Your Cause by Adhering to Formal Requirements. The procedural rules for the form of the petition are relatively simple. Following them rigorously will contribute to the Court's impression that counsel knows what he or she is doing. The importance of such an impression can hardly be understated, since counsel for petitioner is attempting to persuade a busy Supreme Court that his or her case is one of the small percentage of civil appeals that merits further review.

[4] Service and Filing of Petition

A petition for review must be "served and filed" [*Cal. Rules of Ct., Rule 8.500(e)(1)*]. This means that the petition, at the time of filing, must be accompanied by proof of prior service, in a manner permitted by law, of one copy on each party represented by separate counsel [*Cal. Rules of Ct., Rule 8.25*].

A petition must also be served on the superior court clerk and the court of appeal clerk [*Cal. Rules of Ct., Rule 8.500(f)(1)*].

A petition for review accompanied by a defective proof of service will be filed, but if proper proof of service is not thereafter filed within five days, after the clerk gives notice of the defect, the Court may strike the petition or impose a lesser sanction [*Cal. Rules of Ct., Rule 8.500(f)(3)*].

At the time of filing, counsel for petitioner must file an original and 13 copies of the petition [*Cal. Rules of Ct., Rule 8.44(a)(1)*]. The filing fee that must accompany a petition for review of a civil appeal is currently an aggregate amount of $590 [*Gov. Code § 68927* (requires $420); *Gov. Code § 68926.1(b)* (requires additional $170 for deposit in appellate court trust fund)].

Petitions for review (and other papers) may be filed with the Supreme Court clerks' offices in San Francisco, Los Angeles, or Sacramento, or, alternatively, may be filed with the clerk of the court of appeal for the Fourth District in its San Diego office or with the clerk of the court of appeal for the Fifth Appellate District at its office in Fresno [*see* Supreme Court of California, Practices and Procedures, Part I, Functions and Structure of the California Supreme Court].

For discussion of the deadline for filing the petition, see [1], *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 54 APPEAL: CALIFORNIA SUPREME COURT REVIEW
PART II. LEGAL BACKGROUND
B. Review Proceedings

5-54 California Forms of Pleading and Practice--Annotated § 54.26

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§ 54.26 Answer to Petition for Review

[1] Deadline for Filing Answer

If an answer to a petition for review is contemplated, it must be served and filed within 20 days after the filing of the petition for review [*Cal. Rules of Ct., Rule 8.500(e)(4)*]. For discussion of the deadline for filing the petition, see *§ 54.25[1]*; for discussion of the definition of "date of filing," see *§ 54.25[1][c]*.

The Chief Justice may, for good cause shown, extend the time for doing any act other than the filing of a petition for review, including the filing of an answer to the petition [*see Cal. Rules of Ct., Rules 8.500(e)(2), 8.60(d)*].

PRACTICE TIP:

Extension to File Answer to Petition or Reply to Answer. The Chief Justice's authority to extend time under *Cal. Rules of Ct., Rule 8.60(b)*, includes extensions of time for filing an answer to a petition for review or a reply to the answer. However, any such extension should be avoided if possible, since it will only decrease the time available to the Court to consider the merits of the petition, answer, and reply. This is because the Court's time to act on the petition is itself limited, and may not be extended except as provided under *Cal. Rules of Ct., Rule 8.532(b)*; for discussion of the time for grant or denial of the petition under *Cal. Rules of Ct., Rule 8.500(a), see § 54.24*].

An application for an extension of time must be made as provided in *Cal. Rules of Ct., Rule 8.50*, and must demonstrate good cause under *Cal. Rules of Ct., Rule 8.63* [*Cal. Rules of Ct., Rule 8.63(a)*]. For further discussion and a form of application for an extension of time, see Ch. 46, *Appeal: Extending or Shortening Time* .

[2] Answer Is Permitted But Is Not Required

An answer to a petition for review "may" be filed; it is not required [*see Cal. Rules of Ct., Rule 8.500(e)(4)*].

PRACTICE TIP:

Deciding Whether to Answer. An answer is technically not required, and the vast majority of petitions are denied. Most practitioners, nevertheless, feel it is prudent to file an answer to any petition for review, so that the Court has the opposing party's view of why the petition should not be granted.

Counsel should note, however, that within the Supreme Court, an answer to a petition is seldom regarded as a determinative factor, either in denying or granting a petition, if the Court is disposed otherwise to do one or the other. The Court knows the applicable standards and rules and generally can determine from the petition and court of appeal opinion whether a case is worthy of review. If the case is important enough to warrant review, an answer will not obscure or defeat the fact of that importance. Sometimes an answer might even work against opposing counsel by highlighting the importance of the case and suggesting counsel is worried about the court of appeal opinion.

Counsel should not therefore consider an answer to be a routine matter, but should consider carefully whether it will be helpful, by supplying the Court with information and argument not readily apparent. Counsel should also consider whether an answer might even prove to be harmful, by giving the impression that counsel has serious concerns over the court of appeal decision and fears it will likely be reversed if the Court grants review.

Although an answer is rarely determinative in preventing a grant of review, it may nevertheless serve other useful purposes. For example, the Supreme Court will sometimes exercise its discretion to order that a court of appeal opinion not be published, even when it decides not to grant review. If a petition for review requests that the court of appeal opinion be ordered not published, opposing counsel should use the answer to the petition to argue why the court of appeal opinion should remain published, in the same manner as a response to a request for depublication [*see* discussion in *Ch. 41, Standards of Review and Appellate Rules of Law, § 41.52[2][b]*].

The answer to a petition may also be useful if the responding party wishes to raise additional issues for review [*see* discussion in the Practice Tip set out in [3], *below*].

For a form of answer to a petition for review, see *§ 54.101*.

[3] Content of Answer

[a] Answer May Present Additional Issues For Review

The answer may present additional issues for review in the event the petition for review is granted [*Cal. Rules of Ct., Rule 8.500(a)(2)*; *see* *In re Manuel G. (1997) 16 Cal. 4th 805, 814 n.3, 66 Cal. Rptr. 2d 701, 941 P.2d 880* (respondent must raise additional issues in answer to petition for review in order to raise those issues in briefs on the merits);

PRACTICE TIP:

An Answer May Be Useful in Presenting Additional Issues. The answer is generally underutilized for the purpose of suggesting additional issues for review. Often, the prevailing party in the court of appeal loses on some issues. The prevailing party might not want the case reviewed but, if review *is* granted, would want such issues to be considered by the Supreme Court. The answer may be more effective in taking such an approach than by simply arguing against a grant of review, and making it clear that the court of appeal opinion was not entirely one-sided as to the parties. The Court understands that, by presenting additional issues for review, the opposing party does not thereby seek or consent to a grant of review.

If additional issues are presented, the answer must contain a concise, nonargumentative statement of those issues, framing them in terms of the facts of the case, but without unnecessary detail [*Cal. Rules of Ct., Rule 8.504(c)*]. For discussion of the statement of issues required to appear at the beginning of the body of a petition for review, see *§ 54.25[2][a]*.

As discussed further in *§ 54.25[2][a]*, the Court need only consider issues presented in either the petition or the answer [*Cal. Rules of Ct., Rule 8.516(b)*].

[b] Answer Must Conform in Other Respects to Requirements for Appellate Briefs

Except as superseded by the requirements of *Cal. Rules of Ct., Rule 8.504(a)*, discussed in [a], *above*, the contents of an answer must comply with the relevant provisions of *Cal. Rules of Ct., Rule 8.204* [*Cal. Rules of Ct., Rule 8.504(a)*]. For detailed discussion of the requirements of *Cal. Rules of Ct., Rule 8.204*, that are not superseded by those specifically applicable to an answer to a petition for review, such as descriptive headings, references to the record, and tables of contents and authorities, see *Ch. 50, Appeal: Briefs, § 50.12[1]*.

[4] Form of Answer

The answer is subject to the same page limits and the same limits on attachments, exhibits, and the incorporation of matter by reference that apply to petitions for review [*see Cal. Rules of Ct., Rule 8.504(e), (f)*]. For discussion of these limits and requirements and their exceptions, see *§ 54.25[2][c], [3][b]*.

The cover of the answer should be blue [*Cal. Rules of Ct., Rule 8.40(b)*].

Again, like the petition for review, the answer to the petition must comply with the relevant requirements for appellate briefs under *Cal. Rules of Ct., Rule 8.204* [*see Cal. Rules of Ct., Rule 8.504(a)*]. For detailed discussion of the format requirements of *Cal. Rules of Ct., Rule 8.204*, that are not superseded by those specifically applicable to an answer to a petition for review, see *Ch. 50, Appeal: Briefs, § 50.14*. For additional discussion of drafting considerations applicable to briefs that may be useful when drafting an answer to a petition for review, see *Ch. 50, Appeal: Briefs, § 50.13*.

For a form of answer, see *§ 54.101*.

[5] Service and Filing of Answer

An answer to a petition for review must be "served and filed" within 20 days after the petition is filed [*Cal. Rules of Ct., Rule 8.500(e)(4)*]. This means that the answer, at the time of filing, must be accompanied by proof of prior service, in a manner permitted by law, of one copy on each party represented by separate counsel [*Cal. Rules of Ct., Rules 8.25* ("serve and file" as applied to briefs), 8.10(7) ("briefs" defined to include answer to petition for review)].

An answer must also include proof of deposit with the clerk of the superior court [*see Cal. Rules of Ct., Rules 8.212(c)* (requiring proof of deposit of one copy of brief with superior court clerk for delivery to trial court judge), 8.10(7) (*i*) (defining "briefs" in appellate rules to include answer to petition for review)].

PRACTICE TIP:

Deliver Copy to Court of Appeal. A petition filed in the Supreme Court must have proof of delivery or mailing of a copy to the clerk of the court of appeal that rendered the decision [*Cal. Rules of Ct., Rule 8.500(f)(1)*]. This delivery is designed primarily to trigger the transmittal of the record by the court of appeal to the Supreme Court. Nevertheless, it is recommended as a courtesy that the responding party also deliver to the court of appeal a copy of any answer to the petition.

At the time of filing, counsel for petitioner must file an original and 13 copies of the answer [*Cal. Rules of Ct., Rule 8.44(a)(1)*].

For discussion of the deadline for filing an answer, see [1], *above*. For discussion of the locations at which papers may be filed with the Supreme Court, see *§ 54.25[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions

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5-54 California Forms of Pleading and Practice--Annotated § 54.27

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§ 54.27 Reply to Answer to Petition for Review

[1] Deadline for Filing Reply

A reply, if justified [*see* [2], *below*], must be served and filed within 10 days after the filing of the answer to a petition for review [*Cal. Rules of Ct., Rule 8.500(e)(5)*]. For discussion of the deadline for filing the answer, see *§ 54.26[1]*; for discussion of the definition of "date of filing," see *§ 54.25[1][c]*.

The Chief Justice may, for good cause shown, extend the time for filing a reply to an answer to a petition for review [*see Cal. Rules of Ct., Rule 8.60(b)*]. For further discussion of the requirements and practical considerations when seeking an extension for filing a reply, see *§ 54.26[1]*.

[2] Reply Limited to Addressing Additional Issues Presented in Answer

A petitioner may file a reply to the answer [*Cal. Rules of Ct., Rule 8.500(a)(3)*]. Prior to January 1, 2004, a petitioner could file a reply only if the answer to his or her petition for review presented additional issues for review [*see* former Cal. Rules of Ct., Rule 28(a)(3)].

For a form of reply, see *§ 54.102*.

[3] Content and Form of Reply

A reply must not exceed 4200 words or 15 pages, not including tables of contents and authorities [*Cal. Rules of Court, Rule 8.504(d)(1)*; *but see § 54.25[3][b*] for discussion of procedures for leave to file a longer reply].

Otherwise, a reply is subject to the same restrictions in *Cal. Rules of Court, Rule 8.504(e),* that apply to petitions for review and answers, regarding the incorporation of material by reference and the attachment of exhibits or appendices. For discussion of these restrictions and their exceptions, see *§ 54.25[2][c], [3][b]*.

The cover of a reply should be white [*Cal. Rules of Ct., Rule 8.40(b)*].

Again, like the petition for review and the answer, a reply must comply with the relevant requirements for appellate briefs under *Cal. Rules of Ct., Rule 8.204* [*see Cal. Rules of Ct., Rule 8.504(a)*]. For detailed discussion of the requirements of *Cal. Rules of Ct., Rule 8.204*, that are not superseded by those specifically applicable to a reply to an answer to a petition for review, see *Ch. 50, Appeal: Briefs, §§ 50.12[1]* and *50.14*. For additional discussion of drafting considerations applicable to briefs that may be useful when drafting a reply, see *Ch. 50, Appeal: Briefs, § 50.13*.

[4] Service and Filing of Reply

A reply must be "served and filed" [*Cal. Rules of Ct., Rule 8.500(e)(5)*]. This means that the reply, at the time of filing, must be accompanied by proof of prior service, in a manner permitted by law, of one copy on counsel for each adverse party represented by separate counsel [*Cal. Rules of Ct., Rules 8.10(f)*].

PRACTICE TIP:

Deliver Copy to Court of Appeal and Superior Court. A petition filed in the Supreme Court must have proof of delivery or mailing of a copy to the clerk of the court of appeal that rendered the decision [*Cal. Rules of Ct., Rule 8.500(f)(1)*]. This delivery is designed primarily to trigger the transmittal of the record by the court of appeal to the Supreme Court. Nevertheless, it is recommended as a courtesy that the petitioner also deliver to the court of appeal a copy of any reply to an answer to the petition. The petitioner may also, as a courtesy, deposit a copy of any reply with the clerk of the superior court for delivery to the trial court judge; this is required in the case of a petition and answer, but not in the case of a reply [*see Cal. Rules of Ct., Rule 8.212(c)* (requiring proof of deposit of one copy of brief with superior court clerk for delivery to trial court judge)].

At the time of filing, counsel for petitioner should file an original and 13 copies of the reply [*see Cal. Rules of Ct., Rule 8.44(a)(1)*].

For discussion of the deadline for filing a reply, see [1], *above*.

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5-54 California Forms of Pleading and Practice--Annotated § 54.28

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§ 54.28 Letter of Amicus Curiae Supporting or Opposing Petition

An individual or entity that desires to support or oppose a petition for review or petition for original writ in the Supreme Court may lodge with that Court a letter (in lieu of a brief of *amicus curiae*) [*Cal. Rules of Ct., Rule 8.500(g)*]. For detailed discussion and forms relating to letters of *amicus curiae* filed in civil proceedings before the Supreme Court, see Ch. 22, *Amicus Curiae* .

PRACTICE TIP:

Seek Out *Amici Curiae*. Letters by *amici curiae* can provide important background information that enhances the Court's understanding of the issues and their importance.

Legal Topics:

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

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5-54 California Forms of Pleading and Practice--Annotated § 54.29

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.29 Transmission of Record, Briefs, Papers, Exhibits

When a copy of the petition for review is delivered to the clerk of the court of appeal, or on request by the clerk of the Supreme Court, whichever is earlier, the clerk of the court of appeal must "promptly" send the record to the Supreme Court. If the petition is denied, the Supreme Court clerk must promptly return the record to the court of appeal [*Cal. Rules of Ct., Rule 8.512(a)*].

Legal Topics:

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5-54 California Forms of Pleading and Practice--Annotated § 54.30

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.30 Disposition of Petition for Review

[1] Denial of Petition

[a] Denial by Order or Lapse of Time

Denial of review of a court of appeal decision may be evidenced by an order signed by the Chief Justice and filed with the clerk [*Cal. Rules of Ct., Rule 8.512(b)(2)*]. If no order, either granting or denying the petition, is made within the time specified in *Cal. Rules of Ct., Rule 8.512(b)(1)* [*see* discussion in *§ 54.24*], the petition is deemed denied, and the clerk enters a notation in the register to that effect [*Cal. Rules of Ct., Rule 8.512(b)(3)*].

[b] Finality and Remittitur After Denial of Petition

An order of the Supreme Court denying a petition for review of a decision of a court of appeal (or, by implication, the notation of the clerk indicating denial due to lapse of time, discussed in [2], *above*) becomes final when it is filed [*Cal. Rules of Ct., Rule 8.532(b)(2)*]. The clerk of the court of appeal then issues its remittitur transmitting a certified copy of the court of appeal's opinion to the superior court [*Cal. Rules of Ct., Rule 8.272(b)*]. For further discussion of remittitur proceedings and subsequent proceedings in the trial court after remittitur, see Ch. 53, *Remittitur and Costs on Appeal* .

[c] Effect of Denial of Petition

Denial of a petition for review by the Supreme Court is not an expression of an opinion by the Supreme Court on whether the opinion or judgment of the court of appeal is correct and is not to be construed as such [*see Cal. Rules of Ct., Rule 8.500,* Advisory Committee Comment (1985); *Trope v. Katz (1995) 11 Cal. 4th 274, 287 n.1, 45 Cal. Rptr. 2d 241, 902 P.2d 259* ; *see also* discussion in *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.52[4*] (discussing effect of order that court of appeal opinion not be published, sometimes issued in connection with order denying petition for review)].

[2] Grant of Petition

[a] Grant by Order Signed by at Least Four Justices

Review in the Supreme Court of a court of appeal decision may be granted by an order, signed by at least four justices, and filed with the clerk [*Cal. Rules of Ct., Rule 8.512(b)*; *see Cothran v. San Jose Water Works (1962) 58 Cal. 2d 608, 612, 25 Cal. Rptr. 569, 375 P.2d 449* (order granting hearing in Supreme Court signed by justice who was thereafter absent from state when concurring three justices signed was effective); *cf. Giometti v. Etienne (1934) 219 Cal. 687, 688-689, 28 P.2d 913* (order granting hearing in Supreme Court was void where one of four justices who signed order was legally disqualified from participating in order)].

[b] Effect of Order Granting Petition

A grant of review supersedes the court of appeal's opinion, at least pending disposition of the Court's review [*Quintano v. Mercury Casualty Co. (1995) 11 Cal. 4th 1049, 1067 n.6, 48 Cal. Rptr. 2d 1, 906 P.2d 1057]* .

No court of appeal decision superseded by a grant of review is to be published, or remain published, unless the Supreme Court expressly orders otherwise. After granting review, the Court may order that the opinion of the court of appeal be, or remain, published in whole or in part [*Cal. Rules of Ct., Rule 8.1105(e)*]. For further discussion regarding the citability of opinions, see *Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.50[3][a]*.

Legal Topics:

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Chapter 54 APPEAL: CALIFORNIA SUPREME COURT REVIEW
PART II. LEGAL BACKGROUND
B. Review Proceedings

5-54 California Forms of Pleading and Practice--Annotated § 54.31

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§ 54.31 Issues to Be Decided on Grant of Review

[1] Court May Decide Any Issue for Review

On review of a court of appeal decision, the Supreme Court may review and decide any or all issues in the cause [*Cal. Rules of Ct., Rule 8.516(b)(2)*]. As a matter of policy, however, the Court need only consider, and usually will only consider, those issues presented in the petition for review and answer or fairly included in them [*Cal. Rules of Ct., Rule 8.516(b)(1)*]. For more detailed discussion of the Court's power of review, that is, to limit its review to issues presented by the litigants, or to select for review, in special circumstances, other issues fairly embraced by the cause in which review has been granted, see *§ 54.21[2][b]*.

[2] Specification of Selected Issues

[a] Court May Specify Issues After Granting Review

After granting review of a court of appeal decision, the Supreme Court may specify the issues to be argued. The Court will give the parties reasonable notice of any specification of the issues to be argued [*Cal. Rules of Ct., Rule 8.516(a)(1)*].

Notwithstanding its specification of issues, the Court may order argument on fewer or additional issues, or on the entire cause [*Cal. Rules of Ct., Rule 8.516(a)(2)*]. The Court will give the parties reasonable notice of any change in its specification of issues [*Cal. Rules of Ct., Rule 8.516(a)(2)*].

Hence, the Court is expressly authorized to specify the issues that may be argued on appeal and is not required to address all the issues addressed by the court of appeal [*Southern Cal. Ch. of Associated Builders etc. Com. v. California Apprenticeship Council (1992) 4 Cal. 4th 422, 431 n.3, 14 Cal. Rptr. 2d 491, 841 P.2d 1011]* . It may also specify for review issues not addressed by the court of appeal [*see Cedars-Sinai v. Superior Court (1998) 18 Cal. 4th 1, 5-7, 7-8 n.2, 74 Cal. Rptr. 2d 248, 954 P.2d 511* and discussion in *§ 54.21[2][b]*].

[b] Briefs Must Be Confined To Specified Issues

Unless otherwise ordered, the parties are to confine their briefs on the merits and their arguments to the issues specified by the Supreme Court, and to any other issues fairly included in those that the Court has specified [*Cal. Rules of Ct., Rule 8.516(a)(1)*].

[3] "Grant and Hold" of Issues

After granting review of a court of appeal decision, the Supreme Court may order action on the cause deferred until disposition of another cause pending before the Court [*Cal. Rules of Ct., Rule 8.512(d)(2)*]. This is commonly referred to as a "grant and hold" [*see also* Practice Tip in *§ 54.25[2][a]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral OverviewGovernmentsCourtsAuthority to AdjudicateCivil ProcedureAppealsBriefs

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5-54 California Forms of Pleading and Practice--Annotated § 54.32

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.32 Petitioner's Opening Brief on Grant of Review

[1] Deadline for Filing Opening Brief on Merits

Within 30 days after the Supreme Court files the order of review, the petitioner must serve and file in that court either an opening brief on the merits or the brief it filed in the court of appeal [*Cal. Rules of Ct., Rule 8.520(a)(1)*].

The time for service and filing may not be extended by stipulation [*Cal. Rules of Ct., Rule 8.520(a)(5)*]. The Chief Justice may, for good cause, extend the time for doing any act other than the filing of a petition for review, including the filing of an opening brief on the merits [*see Cal. Rules of Ct., Rules 8.520(a)(5), 8.60(b)*]. An application for an extension of time must be made as provided in *Cal. Rules of Ct., Rule 8.50*, and must demonstrate good cause under *Cal. Rules of Ct., Rule 8.63* [*Cal. Rules of Ct., Rule 8.63(a)*]. For further discussion and a form of application for an extension of time, see Ch. 46, *Appeal: Extending or Shortening Time* .

[2] Contents of Opening Brief

The opening brief must be either of the following [*Cal. Rules of Ct., Rule 8.520(a)(1)*]:

- The brief filed in the court of appeal together with a notice of intention to rely on that brief.
- A new brief on the merits [*Cal. Rules of Ct., Rule 8.520(a)(1)*].

PRACTICE TIP:

A Grant of Review Usually Deserves a New Brief on the Merits. Generally, it is advisable to file a new brief on the merits rather than rely upon the court of appeal brief. Filing a new brief enables the petitioner to take advantage of new authority, and make new arguments focusing on the court of appeal's opinion and on the issues that the Supreme Court has expressly specified for review or that are otherwise obviously of more public or institutional concern.

A new petitioner's brief on the merits must quote any order of the Supreme Court specifying the issues upon grant of review, or, in the absence of an order specifying the issues, quote the statement of issues included in the petition for review and any additional issues stated in the answer to the petition [*Cal. Rules of Ct., Rule 8.520(b)(2)*]. Unless otherwise ordered, briefs on the merits must be confined to those issues and issues fairly included in them [*Cal. Rules of Ct., Rule 8.520(b)(3)*].

PRACTICE TIP:

Limit Briefing to the Issues Under Review. Counsel should be careful to brief only those issues that are actually before the Court. Obviously, the issues that are fairly embraced by the grant of review are often open to interpretation, and counsel may take an expansive view if helpful to the client. If appropriate, the brief on the merits should explain how a particular issue is included in the issue presented. Counsel should not, however, brief entirely unrelated issues unless the Court so requests. The Court typically grants review on specific issues and expects the parties to confine briefing and argument to the issues it has framed.

Otherwise, the opening brief must comply with the requirements applicable to appellate briefs set out in *Cal. Rules of Ct., Rule 8.204* [*Cal. Rules of Ct., Rule 8.520(b)(1)*]. For detailed discussion of the content requirements of *Cal. Rules of Ct., Rule 8.204*, that are not superseded by the requirements specifically applicable to an opening brief on the merits, such as descriptive headings, references to the record, and tables of contents and authorities, see *Ch. 50, Appeal: Briefs, § 50.12[1]*.

For a form of new opening brief on the merits, see *§ 54.110*.

[3] Form of Opening Brief

If produced on a computer, the opening brief on the merits must not exceed 14,000 words. The brief must include a certificate by counsel stating the number of words in the brief. The person certifying may rely on the word count of the computer program used to prepare the brief [*Cal. Rules of Ct., Rule 8.520(c)(1)*]. If typewritten, the brief must not exceed 50 pages [*Cal. Rules of Ct., Rule 8.520(c)(2)*]. The tables, certificate, and quotation of issues are excluded from these limits [*Cal. Rules of Ct., Rule 8.520(c)(3)*].

Otherwise, the opening brief must comply with the requirements applicable to appellate briefs set out in *Cal. Rules of Ct., Rule 8.204* [*Cal. Rules of Ct., Rule 8.520(b)(1)*]. For detailed discussion of the format requirements of *Cal. Rules of Ct., Rule 8.204*, that are not superseded by those specifically applicable to an opening brief on the merits, see *Ch. 50, Appeal: Briefs, § 50.14*. For additional discussion of drafting considerations applicable to briefs that may be useful when drafting an opening brief on the merits, see *Ch. 50, Appeal: Briefs, § 50.13*.

[4] Service and Filing of Opening Brief

A petitioner must "serve and file" his or her opening brief on the merits in the Supreme Court [*Cal. Rules of Ct., Rule 8.520(a)(1)*]. This means that the brief, at the time of filing, must be accompanied by proof of prior service, in a manner permitted by law, of one copy on each party represented by separate counsel [*Cal. Rules of Ct., Rule 8.25(a)* ("serve and file" as applied to briefs)].

The brief must also include proof of deposit of one copy of the brief with the clerk of the superior court [*see Cal. Rules of Ct., Rule 8.212(c)* (requiring proof of deposit of one copy of brief with superior court clerk for delivery to trial court judge)]. It is not required, but many practitioners also deposit a copy of the brief with the clerk of the court of appeal as a courtesy to the justices who decided the appeal.

At the time of filing, counsel for petitioner must file an original and 13 copies of the brief [*Cal. Rules of Ct., Rule 8.44(a)(1)*].

For discussion of the deadline for filing the brief, see [1], *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsBriefs

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5-54 California Forms of Pleading and Practice--Annotated § 54.33

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§ 54.33 Opposing Party's Answering Brief

[1] Deadline for Filing Answering Brief

The opposing party must serve and file any new answering brief on the merits within 30 days after the petitioner has filed either a notice of intention to rely on the brief filed in the court of appeal or a new opening brief on the merits, or after the expiration of time for the time for petitioner to do either [*Cal. Rules of Ct., Rule 8.520(a)(2)*; for discussion of petitioner's deadlines, *see § 54.32[1]*].

The opposing party may alternatively elect to rely on the brief filed in the court of appeal, by serving and filing that brief within 15 days after the petitioner has filed his or her brief (or notice of intention to rely on petitioner's court of appeal brief), or the time for doing so has elapsed [*Cal. Rules of Ct., Rule 8.520(a)(2)*].

For discussion of the "date of filing," as defined by the appellate rules, see *§ 54.25[1][c]*.

The time for service and filing may not be extended by stipulation [*Cal. Rules of Ct., Rule 8.520(a)(5)*]. The Chief Justice may, for good cause, extend the time for doing any act other than the filing of a petition for review, including the filing of an answering brief on the merits [*see Cal. Rules of Ct., Rules 8.520(a)(5), 8.60(b)*]. An application for an extension of time must be made as provided in *Cal. Rules of Ct., Rule 8.50*, and must demonstrate good cause under *Cal. Rules of Ct., Rule 8.63* [*Cal. Rules of Ct., Rule 8.63(a)*]. For further discussion and a form of application for an extension of time, see Ch. 46, *Appeal: Extending or Shortening Time* .

[2] Contents of Answering Brief

The opposing party must file either of the following [*Cal. Rules of Ct., Rule 8.520(a)(2)*]:

- The brief filed in the court of appeal together with a notice of intention to rely on that brief.

- A new answering brief on the merits [*Cal. Rules of Ct., Rule 8.520(a)(2)*].

PRACTICE TIP:

Supreme Court Review Usually Merits a New Brief. As with the petitioner [*see § 54.32[2]*], it is usually in the opposing party's best interest to take the trouble to file a new answering brief on the merits, to address the issues as they have been narrowed by the grant of review.

Unless otherwise ordered by the Court, the answering brief should confine itself to the issues specified by the Court upon granting review, or in the absence of such order, upon the issues presented in the petition for review and the answer, and those issues that are fairly included [*Cal. Rules of Ct., Rule 8.520(b)(3)*].

Otherwise, the answering brief must comply with the requirements applicable to appellate briefs set out in *Cal. Rules of Ct., Rule 8.204* [*Cal. Rules of Ct., Rule 8.520(b)(1)*]. For detailed discussion of the content requirements of *Cal. Rules of Ct., Rule 8.204*, that are not superseded by those specifically applicable to an answering brief on the merits, such as descriptive headings, references to the record, and tables of contents and authorities, see *Ch. 50, Appeal: Briefs, § 50.12[1]*.

For a form of new answering brief on the merits, see *§ 54.111*.

[3] Form of Answering Brief

If produced on a computer, the opposing party's answering brief on the merits must not exceed 14,000 words. The brief must include a certificate by counsel stating the number of words in the brief. The person certifying may rely on the word count of the computer program used to prepare the brief [*Cal. Rules of Ct., Rule 8.520(c)(1)*]. If typewritten, the brief must not exceed 50 pages [*Cal. Rules of Ct., Rule 8.520(c)(2)*]. The tables, certificate, and quotation of issues are excluded from these limits [*Cal. Rules of Ct., Rule 8.520(c)(3)*].

Otherwise, the opening brief must comply with requirements applicable to appellate briefs set out in *Cal. Rules of Ct., Rule 8.204* [*Cal. Rules of Ct., Rule 8.520(b)(1)*]. For detailed discussion of the format requirements of *Cal. Rules of Ct., Rule 8.204*, that are not superseded by those specifically applicable to an opening brief on the merits, see *Ch. 50, Appeal: Briefs, § 50.14*. For additional discussion of drafting considerations applicable to briefs that may be useful when drafting an opening brief on the merits, see *Ch. 50, Appeal: Briefs, § 50.13*.

[4] Service and Filing of Answering Brief

The answering brief should be served and filed in the same manner as the opening brief on the merits [*see § 54.32[4]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedureAppealsReviewabilityGeneral Overview

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5-54 California Forms of Pleading and Practice--Annotated § 54.34

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§ 54.34 Petitioner's Reply Brief

Within 20 days after the opposing party files an opening brief, the petitioner may file a reply brief [*Cal. Rules of Ct., Rule 8.520(a)(3)*; *see also* discussion in *§ 54.32[1*] regarding extension of time to file].

The cover of a petitioner's reply brief on the merits should be white [*see Cal. Rules of Ct., Rule 8.40(b)*]. If produced on a computer, the reply brief must not exceed 8,400 words. The brief must include a certificate by counsel stating the number of words in the brief. The person certifying may rely on the word count of the computer program used to prepare the brief [*Cal. Rules of Ct., Rule 8.520(c)(1)*]. If typewritten, the reply brief on the merits must not exceed 30 pages [*Cal. Rules of Ct., Rule 8.520(c)(2)*]. The tables and certificate are excluded from these limits [*Cal. Rules of Ct., Rule 8.520(c)(3)*]. In other respects, a reply brief is subject to the same form and content requirements as a petitioner's opening brief, except that the quotation of the issues is not required [*Cal. Rules of Ct., Rule 8.520(d)*; *see § 54.32[2]* and *[3]*].

The reply brief should be filed and served in the same manner as the opening brief [*see § 54.32[4]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsBriefsCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral Overview

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5-54 California Forms of Pleading and Practice--Annotated § 54.35

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.35 Supplemental and Additional Briefs

If any party wishes to present new authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in that party's briefs on the merits, the party may serve and file a supplemental brief no later than 10 days before oral argument [*Cal. Rules of Ct., Rule 8.520(d)*]. A supplemental brief must be limited to the new matter and must not exceed 2,800 words if produced on a computer or ten pages if typewritten [*Cal. Rules of Ct., Rule 8.520(d)*; *see Waller v. Truck Ins. Exchange, Inc. (1995) 11 Cal. 4th 1, 23-24, 44 Cal. Rptr. 2d 370, 900 P.2d 619]* . The service and filing requirements are the same as for briefs on the merits [*see § 54.31[4]*].

The Supreme Court may also request additional briefs on all or any issues, whether or not the parties have filed new briefs [*Cal. Rules of Ct., Rule 8.520(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsBriefs

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AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.36 Amicus Curiae Briefs

Once review is granted, a nonparty acting as *amicus curiae* may file a brief on the merits after obtaining prior permission of the Chief Justice [*Cal. Rules of Ct., Rule 8.520(f)*]. For detailed discussion and forms relating to letters and briefs of *amicus curiae* filed in civil proceedings before the Supreme Court, see Ch. 22, *Amicus Curiae* .

PRACTICE TIP:

Seek Out *Amici Curiae*. Briefs by *amici curiae* can provide important background information that enhances the court's understanding of the issues and their importance. Counsel in cases accepted for review by the Supreme Court should seek out *amicus* briefing from individuals or entities that can provide the court with pertinent information and argument that may not be available to the parties concerning the institutional or policy aspects of the issues raised in the case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsBriefsCivil ProcedureAppealsAmici Curiae

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5-54 California Forms of Pleading and Practice--Annotated § 54.37

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.37 Oral Argument on Review

[1] Scheduling Oral Argument

The Supreme Court clerk sends notice of the time and place of oral argument to all parties at least 20 days before the argument date. The Chief Justice may shorten that period for good cause [*Cal. Rules of Ct., Rule 8.524(c)*].

Cases are set for argument on days and at times set by the Court, according to the following schedule [Supreme Court of California, Practices and Procedures, Part V, Internal Operating Practices and Procedures of the California Supreme Court, § V]:

- Argument scheduled during January, April, June, and October is heard in Los Angeles.
- Argument scheduled during February, May, September, and December is heard in San Francisco.
- Argument scheduled during March and November is heard in Sacramento.

[2] Duration and Order of Oral Argument

Unless otherwise ordered, counsel for each party is allowed 30 minutes for oral argument in a civil case [*Cal. Rules of Ct., Rule 8.524(e)*]. The petitioner or appellant has the right to open and close the argument [*Cal. Rules of Ct., Rule 8.524(d)*].

In civil cases, only one counsel may be heard on each side of a case, even if there is more than one party on a side, unless the Supreme Court orders otherwise [*Cal. Rules of Ct., Rule 8.524(f)(1)*]. If counsel wish to divide oral argument with other counsel, a request must be filed not later than 10 days after the date of the order setting the case for argument [*Cal. Rules of Ct., Rule 8.524(f)(2)*]. In no event may oral argument be divided into segments of less than 10 minutes, except that one counsel for the opening side (unless additional counsel are so authorized) may reserve a portion of his or

her allotted time for rebuttal [Supreme Court of California, Practices and Procedures, Part V, Internal Operating Practices and Procedures of the California Supreme Court, § V].

PRACTICE TIP:

Oral Argument. As in any appellate court oral argument, counsel should be thoroughly prepared to discuss all aspects of the case. However, oral argument in the Supreme Court gives counsel an opportunity to go beyond the briefs and focus the Court's attention on the institutional concerns or policy issues raised by a case.

It is usually more effective if argument on each side of the case is presented by a single counsel. Argument should not be divided among several counsel unless there is a compelling reason for doing so.

For further discussion of practical considerations in presenting oral argument, see the discussion of oral argument in the court of appeal in Ch. 51, *Appeal: Hearing and Decision*, § 51.15.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewGovernmentsCourtsCreation & Organization

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5-54 California Forms of Pleading and Practice--Annotated § 54.38

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.38 Disposition Of Causes Accepted For Review

[1] Submission of the Cause and Filing of the Opinion

A cause is submitted either after oral argument or, if the Court has approved a waiver of oral argument, after the time has passed for filing all briefs and papers, including supplementary briefs. Submission may be vacated only by an order which both states in detail the reasons for doing so and provides for prompt resubmission [*Cal. Rules of Ct., Rule 8.524(h)*]. Absent good cause to vacate the submission, the Court will file its opinion or opinions in the cause on or before the 90th day after submission [Supreme Court of California, Practices and Procedures, Part V, Internal Operating Practices and Procedures of the California Supreme Court, § X].

Opinions are normally filed on Mondays and Thursdays at 10 a.m. and are posted immediately on the State of California Judicial Branch website at http://www.courtinfo.ca.gov [Supreme Court of California, Practices and Procedures, Part IV, Description of California Supreme Court Operations].

[2] Types Of Dispositions

The Supreme Court may dispose of causes in the following manner [*Cal. Rules of Ct., Rule 8.528*]:

- On review of a court of appeal decision, unless otherwise ordered, the judgment of the court of appeal will be affirmed, reversed, or modified [*Cal. Rules of Ct., Rule 8.528(a)*].

- In any cause, the Supreme Court may decide one or more issues and transfer the cause to a court of appeal for a decision on any remaining issues in the cause [*Cal. Rules of Ct., Rule 8.532(c)*].

- The Supreme Court may dismiss review. The Supreme Court clerk must promptly send an order dismissing review to all parties and the court of appeal [*Cal. Rules of Ct., Rule 8.528(b)(1)*]. When the court of appeal receives an order dismissing review, the decision of the court is final and its clerk must

promptly issue a remittitur or take other appropriate action [*Cal. Rules of Ct., Rule 8.528(b)(2)*]. The decision of the court of appeal in this instance remains unpublished, however, unless the Supreme Court expressly orders otherwise [*Cal. Rules of Ct., Rule 8.528(b)*; *see Morgan Hill Unified School Dist. v. Amoroso (1988) 204 Cal. App. 3d 1083, 1085, 252 Cal. Rptr. 1* ; *see also Ch. 41, Appeal: Review Standards and Appellate Rules of Law, § 41.50* et seq. for discussion of citability and other issues relating to publication or nonpublication of court of appeal opinions, and Ch. 53, *Appeal: Remittitur and Costs on Appeal* , for discussion of remittitur and post-remittitur proceedings].

- After transferring to itself, before decision, a cause pending in a court of appeal, the Supreme Court may retransfer the cause to a court of appeal without decision [*Cal. Rules of Ct., Rule 8.528(e)*; for discussion of transfer proceedings, *see § 54.11[3]*].

- After granting review of a court of appeal decision, the Supreme Court may transfer the cause to a court of appeal with instructions to conduct such further proceedings as the Supreme Court deems necessary [*Cal. Rules of Ct., Rule 8.528(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsPublication of Opinions

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5-54 California Forms of Pleading and Practice--Annotated § 54.39

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.39 Supplemental Briefing of Transferred Causes

If a cause is transferred from the Supreme Court to the court of appeal for further proceedings, a party may, within 30 days after the Supreme Court's order, serve and file in the court of appeal a supplemental brief [*Cal. Rules of Ct., Rules 8.528(f), 8.200(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsBriefsCivil ProcedureAppealsCase Transfers

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5-54 California Forms of Pleading and Practice--Annotated § 54.40

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.40 Rehearing

A rehearing in the Supreme Court may be sought in the same manner and on any of the grounds that would support a rehearing in the court of appeal (e.g., omission or misstatement of issue or material fact in the Court's written opinion) [*Cal. Rules of Ct., Rule 8.500(c)(2)*]. A Supreme Court order granting rehearing must be signed by at least four assenting justices [*Cal. Rules of Ct., Rule 8.536(d)*].

PRACTICE TIP:

Rehearings in the Supreme Court. As a practical matter, rehearings in the Supreme Court are rarely granted. The Supreme Court will more frequently modify its opinion. Counsel should always request a modification in the alternative to a grant of rehearing, providing specific directions for a requested modification together with the underlying reasons. The rehearing procedure applies only to *decisions* of the Supreme Court. Rehearing may not be sought of an order denying review because that order becomes final immediately upon being filed [*Cal. Rules of Ct., Rule 8.532(b)(2)(A)*].

For detailed discussion and forms relating to rehearing proceedings, see Ch. 52, *Appeal: Rehearing* .

Legal Topics:

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

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5-54 California Forms of Pleading and Practice--Annotated § 54.41

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.41 Remittitur and Subsequent Lower Court Proceedings

After the Supreme Court has made a final determination in a proceeding to review a decision of the court of appeal, the clerk of the Supreme Court is required to issue the remittitur once that determination has become final [*Cal. Rules of Ct., Rule 8.540(b)*]. A decision of the Supreme Court becomes final 30 days after it is filed, unless the Court orders a shorter time or, before the date of finality, orders one or more extensions not exceeding a total of 60 days [*Cal. Rules of Ct., Rule 8.532(b)*]. The Court may order immediate issuance of remittitur for good cause or on stipulation of the parties [*Cal. Rules of Ct., Rule 8.540(c)(1)*].

After review of a court of appeal decision, the Supreme Court clerk addresses the remittitur to the court of appeal and sends that court two copies of the remittitur and two file-stamped copies of the Supreme Court opinion or order [*Cal. Rules of Ct., Rule 8.540(b)(2)*]. The court of appeal then issues its own remittitur immediately, if there will be no further proceedings in the court of appeal. The clerk of the court of appeal then sends the court of appeal remittitur to the lower court, together with a copy of the Supreme Court remittitur, and a file-stamped copy of the Supreme Court opinion or order [*Cal. Rules of Ct., Rule 8.272(b)(2)*].

For further discussion of remittitur proceedings, including proceedings to stay or vacate the remittitur, and for discussion of further proceedings in the trial court after issuance of the remittitur, particularly the recovery of costs on appeal, see Ch. 53, *Appeal: Remittitur and Costs on Appeal* .

Legal Topics:

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

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AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.42 Subsequent Review by the United States Supreme Court

Under limited circumstances, a party may seek discretionary review by the United States Supreme Court of a decision of the California Supreme Court, or of a decision of a California court of appeal after the California Supreme Court has denied review [*see 28 U.S.C. § 1257*]. Counsel filing a petition for writ of certiorari seeking such discretionary review must be a member of the Bar of the United States Supreme Court, and generally must file the petition in accordance with all applicable requirements of the United States Supreme Court Rules within 90 days after entry of the California Supreme Court's decision or its order denying a petition for review [*see 28 U.S.C. § 2101*; *U.S. Sup. Ct. Rules, Rules 13.1-13.3*].

For detailed discussion and forms relating to review by the United States Supreme Court on petition for writ of certiorari from a decision by a state court of last resort, see Moore's Federal Practice, Ch. 406, *Certiorari Jurisdiction Over State Courts* , and Ch. 408, *Procedural Framework of Supreme Court Practice* (3d ed., Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureU.S. Supreme Court ReviewState Court Decisions

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Chapter 54 APPEAL: CALIFORNIA SUPREME COURT REVIEW
PART II. LEGAL BACKGROUND
B. Review Proceedings

5-54 California Forms of Pleading and Practice--Annotated §§ 54.43-54.59

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

[Reserved]

§§ 54.43[Reserved]

California Forms of Pleading and Practice--Annotated

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Chapter 54 APPEAL: CALIFORNIA SUPREME COURT REVIEW
PART III. RESEARCH GUIDE

5-54 California Forms of Pleading and Practice--Annotated § 54.60

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.60 California Constitution

Composition of Supreme Court. *Cal. Const., art. VI, § 2*

Original jurisdiction of Supreme Court, courts of appeal, and superior courts. *Cal. Const., art. VI, § 10*

Appellate jurisdiction of Supreme Court, courts of appeal, and superior courts; power of appellate courts to take evidence. *Cal. Const., art. VI, § 11*

Power of Supreme Court to transfer causes pending in court of appeal or to review decisions of court of appeal. *Cal. Const., art. VI, § 12*

Publication of appellate opinions; appellate decisions are required to be written with reasons stated. *Cal. Const., art. VI, § 14*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionGeneral OverviewGovernmentsCourtsAuthority to AdjudicateCivil ProcedureJurisdictionJurisdictional SourcesConstitutional SourcesCivil ProcedureAppealsPublication of Opinions

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5-54 California Forms of Pleading and Practice--Annotated § 54.61

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.61 State Statutes

Appellate courts; transaction of business and adjournments. *Code of Civ. Proc. §§ 41, 42*

Affirming, reversing, modifying judgments by appellate courts. *Code of Civ. Proc. § 43*

Power of Judicial Council to prescribe rules for practice and procedure on appeal. *Code Civ. Proc. § 901*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionGeneral OverviewGovernmentsCourtsAuthority to AdjudicateCivil ProcedureJurisdictionJurisdictional SourcesStatutory Sources

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5-54 California Forms of Pleading and Practice--Annotated § 54.62

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.62 California Rules of Court

Amicus curiae letters and briefs in the Supreme Court. *Cal. Rules of Ct., Rule 8.520(f)*

Appellate brief requirements also applicable to petitions in Supreme Court. *Cal. Rules of Ct., Rule 8.204*

Transfer by Supreme Court, before decision, of cause pending in court of appeal. *Cal. Rules of Ct., Rules 8.552, 10.1000*

Oral argument. *Cal. Rules of Ct., Rule 8.256*

Decision of reviewing court; finality; modification; consent to modification. *Cal. Rules of Ct., Rule 8.264*

Remittitur. *Cal. Rules of Ct., Rule 8.272*

Costs and fees on appeal. *Cal. Rules of Ct., Rules 8.278, 3.1702(c)*

Sanctions. *Cal. Rules of Ct., Rule 8.276*

Rehearing. *Cal. Rules of Ct., Rule 8.268*

Review by Supreme Court. *Cal. Rules of Ct., Rules 8.500-8.552*

Definition of terms used in appellate rules. *Cal. Rules of Ct., Rule 8.10*

Notice of change of address. *Cal. Rules of Ct., Rule 8.32*

Appellate motions generally. *Cal. Rules of Ct., Rules 8.54*

Applications to extend time or for other routine matters. *Cal. Rules of Ct., Rule 8.50*

Form and filing of appellate papers. *Cal. Rules of Ct., Rule 8.40*

Provisions applicable to motions to extend or shorten time; relief from default occasioned by failure to comply with appellate rules. *Cal. Rules of Ct., Rules 8.60-8.66*

Except as California Rules of Court provide otherwise, appellate clerk is not to file records or other papers not complying with appellate rules. *Cal. Rules of Ct., Rule 8.18*

Publication and depublication of appellate decisions; citability of unpublished appellate decisions. *Cal. Rules of Ct., Rules 8.1105-8.1125*

Appearance by out-of-state counsel *pro hac vice*. *Cal. Rules of Ct., Rule 9.40*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsAuthority to AdjudicateCivil ProcedureAppealsBriefsCivil ProcedureAppealsCosts & Attorney FeesCivil ProcedureAppealsRehearingsCivil ProcedureAppealsRemands

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5-54 California Forms of Pleading and Practice--Annotated § 54.63

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.63 Local Appellate Rules of Court

Supreme Court operations and internal practices and procedures. Supreme Court of California, Practices and Procedures, Part IV, Description of California Supreme Court Operations, and Part V, Internal Operating Practices and Procedures of the California Supreme Court

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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5-54 California Forms of Pleading and Practice--Annotated § 54.64

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.64 Decisions

State constitution establishes the judicial branch of the government, including the Supreme Court and courts of appeal, and defines the jurisdiction of each; it does not guarantee a right to appeal in civil cases. *Powers v. City of Richmond (1995) 10 Cal. 4th 85, 115, 40 Cal. Rptr 2d 839, 893 P. 2d 1160*

Legal Topics:

For related research and practice materials, see the following legal topics:
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5-54 California Forms of Pleading and Practice--Annotated § 54.65

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.65 Law Reviews

Goldberg, *The Shadow Court*, California Lawyer, 43 (July 1997)

Comment, *Center Stage: A Special Report on Ronald George's First Year as Chief Justice*, California Lawyer, 34 (July 1997)

Horvitz and Axelrad, *Supreme Court Review: Improving Your Chances for Success*, 7(2) California Litigation 9 (1994)

Lascher, *Oral Argument*, 7(2) California Litigation 16 (1994)

Margolin, *Amicus Curiae and Briefing Limitations*, 7(2) California Litigation 3 (1994)

Miller, *Effective Brief Writing; A Court of Appeal Staff Attorney's Perspective*, 7(2) California Litigation 27 (1994)

Graber, *Timeline and Deadlines for Civil Appeals in California*, 7(2) California Litigation 43 (1994)

Kelso, *Report on the California Appellate System, 45 Hastings L.J. 433, 492*-496 (1994)

Barnett, *Depublication Deflating: The California Supreme Court's Wonderful Law-Making Machine Begins to Self-Destruct, 45 Hastings L.J. 519 (1994)*

Comment, *Fee Simple? Indeterminable: Inconsistent Procedures Regarding Attorney Fees and Posting Appeal Bonds, 24 Pac. L.J. 141 (1992)*

Grodin, *The Depublication Practice of the California Supreme Court, 72 Cal. L. Rev. 514 (1984)*

Witkin, *New California Rules on Appeal, 17 So. Cal. L. Rev. 80, (1944)*

Davis, *The Argument of an Appeal*, 26 ABA L.J. 895 (1940).

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5-54 California Forms of Pleading and Practice--Annotated § 54.66

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.66 Text References

Witkin, California Procedure, vol. 9, *Appeal,* § 860 et seq. (4th ed. 1997)

California Civil Appellate Practice, vol. 2, Ch. 22, *Review by the California Supreme Court* (Cal. CEB 3d ed. 2000)

Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* (rev. ed. 1996 NITA)

California Courts and Judges (James Publishing)

Stern, *Appellate Practice in the United States* (2d ed. 1988 BNA)

Formichi, *California Style Manual, A Handbook of Legal Style for California Courts and Lawyers* (3d ed.1986)

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5-54 California Forms of Pleading and Practice--Annotated § 54.67

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.67 Internet References

California Courts. This site includes: general information about state court organization and specific courts, including Supreme Court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; internal operating procedures of Supreme Court; links to other sites maintained by local trial courts, courts of appeal, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes: text of constitution, codes, and statutes; and information concerning pending legislation. http://www.leginfo.ca.gov

Matthew Bender. This site includes: links to Matthew Bender publications and Shepard's citation service. http://www.bender.com

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5-54 California Forms of Pleading and Practice--Annotated §§ 54.68-54.79

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

[Reserved]

§§ 54.68[Reserved]

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PART IV. PROCEDURAL CHECKLISTS

5-54 California Forms of Pleading and Practice--Annotated § 54.80

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.80 Petitioner's Checklist

[1] Preliminary Considerations

☐ Determine if there are sufficient grounds for a grant of review [*see Cal. Rules of Ct., Rule 8.500(b)*, and discussion in *§§ 54.22, 54.23*].

☐ Seek *amicus* letters of support for petition, as appropriate [*Cal. Rules of Ct., Rule 8.500(g)*].

☐ A ground based on the court of appeal's omission or misstatement, in its opinion, of a material fact or issue must have been raised on a petition for rehearing before it may be raised as a ground in a petition for review in the Supreme Court [*Cal. Rules of Ct., Rule 8.500(c)(2)*, and discussion in *Ch. 52, Appeal: Rehearing, § 52.12*].

☐ Determine deadlines for filing petition for review.

☐ Petition must be served and filed in Supreme Court within 10 days after the decision of the court of appeal becomes final as to that court [*Cal. Rules of Ct., Rule 8.500(e)(1)*; *see Cal. Rules of Ct., Rule 8.25* (requiring proof of service showing prior service, as defined, and what constitutes date of filing); *see also* discussion *§ 54.26[5]*].

[2] Prepare Petition for Review

☐ Petition must include beginning statement of issues and argument why cause is appropriate for

grant of review [*Cal. Rules of Ct., Rule 8.504(b)(1), (2)*; *see § 54.25[2][a], [b]*].

☐ Petition and copies must have copy of court of appeal opinion attached, and generally not incorporate material by reference [*Cal. Rules of Ct., Rule 8.504(b)(4), (f)*; *see § 54.25[2][c], [d], [3][a], [b]*].

☐ Petition must not exceed 8400 words or 30 pages excluding appendices, attached opinion, and tables and generally may not include exhibits [*Cal. Rules of Ct., Rule 8.504(e)*; *see § 54.25[3][b]*].

☐ Petition must otherwise conform as much as possible to *Cal. Rules of Ct., Rule 8.204* (content and format of briefs) [*see Cal. Rules of Ct., Rules 8.504(a)*, and discussion in *§ 54.25[3][d]*], including the following [*see generally* discussion in *Ch. 50, Appeal: Briefs, §§ 50.12 -50.15*]:

☐ Paper must be recycled, either white or unbleached, not less than 20-pound weight, and 81/2 x 11 inches in size [*Cal. Rules of Ct., Rule 8.204(b)(1)*].

☐ Conform to general format specifications unless brief is typewritten [*Cal. Rules of Ct., Rule 8.204(b)(1)-(7)*, and discussion in *§ 50.14*]:

☐ Reproduce by any process that produces a clear, black image of letter quality [*Cal. Rules of Ct., Rule 8.204(b)(1)*].

☐ Use any conventional typeface, either proportionally spaced or monospaced [*Cal. Rules of Ct., Rule 8.204(b)(2)*].

☐ Use roman type style; but for emphasis, italics or boldface may be used, or the text may be underscored. Case names must be italicized or underscored. Headings may be in uppercase letters [*Cal. Rules of Ct., Rule 8.204(b)(3)*].

☐ Use type size, including footnotes, no smaller than 13-point [*Cal. Rules of Ct., Rule 8.204(b)(4)*].

☐ Use both sides of the paper [*Cal. Rules of Ct., Rule 8.204(b)(4)*].

☐ Do not number lines [*Cal. Rules of Ct., Rule 8.204(b)(5)*].

☐ Use at least one-and-a-half spacing, except that headings and footnotes may be single-spaced. Quotations may be block-indented and single-spaced [*Cal. Rules of Ct., Rule 8.204(b)(5)*].

☐ Make margins at least 11/2 inches on the left and right and 1 inch on the top and bottom [*Cal. Rules of Ct., Rule 8.204(b)(6)*].

☐ Number pages consecutively [*Cal. Rules of Ct., Rule 8.204(b)(7)*].

☐ The brief need not be signed [*Cal. Rules of Ct., Rule 8.204(b)(9)*].

☐ If brief is typewritten, conform to specific format specifications [*Cal. Rules of Ct., Rule 8.204(b)(11)*; and discussion in § 50.41]:

☐ Obtain presiding justice's permission if using carbon copies [*Cal. Rules of Ct., Rule 8.204(b)(11)(A)*].

☐ If using carbon copies, use only one side of paper [*Cal. Rules of Ct., Rule 8.204(b)(11)(B)*].

☐ Use type size, including footnotes, no smaller than standard pica, 10 characters per inch [*Cal. Rules of Ct., Rule 8.204(b)(11)(C)*].

☐ Petition must be bound in book or pamphlet form; if stapled, the bound edge and staples must be covered with tape [*see Cal. Rules of Ct., Rule 8.204(b)(8)*].

☐ Covers of recycled paper are encouraged; petition should have white cover [*see Cal. Rules of Ct., Rules 8.204(b), 8.40(b)*].

☐ Every petition must be prefaced with a table of contents and a table of authorities listing separately cases, statutes, court rules, constitutional provisions, and other authorities; it must organize argument in distinct points appearing separately under appropriate headings, and subheadings, if desired, which are generally descriptive of the subject matter covered; and, it must support each statement of any matter in the record with an appropriate reference to the record [*see Cal. Rules of Ct., Rule 8.204(a)(1)*; *see* form of petition set out in *§ 54.100*].

☐ Prepare the following copies [*see Cal. Rules of Ct., Rules 8.25, 8.44*]:

☐ One original and 13 copies for filing in the Supreme Court.

☐ One copy each for all other parties represented by separate counsel.

☐ One office copy and other copies as desired.

[3] Service and Filing of Petition for Review

☐ Serve, prior to filing, one copy of petition on each counsel for all other parties represented by separate counsel, in any manner of service provided by law [*see Cal. Rules of Ct., 8.25*; *see also Cal. Rules of Ct., Rules 8.212(e)(2), 8.500(f)(2)* (special service on Attorney General and county district

attorney in unfair competition cases)].

☐ Deliver or mail one copy to clerk of court of appeal and deposit one copy with clerk of trial court [*see Cal. Rules of Ct., Rules 8.212(c), 8.500(f)(2), 8.25*].

☐ Prepare proof of service to be filed with petition [*see Cal. Rules of Ct., Rule 8.500(f), 8.25*].

☐ File original and required number of filing copies, with proof of prior service, by required deadline [*see* [1], *above*; *see also* discussion in *§ 54.25[1]*].

☐ File petition with Supreme Court clerk's office in San Francisco, Los Angeles, or Sacramento, or in the court of appeal clerk's office in San Diego or Fresno [*see § 54.25[1]*].

☐ File with fee of $590 to clerk of the Supreme Court at time of filing petition for review [*Gov. Code § 68927* (requires $420); *Gov. Code § 68926.1(b)* (requires additional $170 for deposit in appellate court trust fund)].

[4] Reply to Answer to Petition for Review

☐ Reply, if necessary, to respond to additional issues raised in answer [*see § 54.81[1]*], must be filed within 10 days after filing of answer to petition for review [*see Cal. Rules of Ct., Rule 8.500(e)(5)*].

☐ Reply is otherwise subject to same requirements as petition, except that it must not exceed 4200 words or 15 pages exclusive of tables [*see Cal. Rules of Ct., Rule 8.504(e)(1)*] and need not conform to requirements that apply to elements necessary only in petition or answer [*see Cal. Rules of Ct., Rule 8.504(d)*].

☐ For checklist for preparation, service, and filing, see *§ 54.80[2], [3]*; *see also* generally discussion in *§ 54.27*.

[5] Subsequent Proceedings

☐ If review is granted, prepare opening and reply briefs, prepare for oral argument, and conduct motion and other proceedings generally as with briefing, motion, argument, and other proceedings applicable in court of appeal. Certain exceptions to procedure in court of appeal apply; for example, time limits and other aspects of oral argument and procedures for remittitur. For briefing and subsequent proceedings, see *§§ 54.32, 54.34, 54.37, 54.41*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsAmici CuriaeCivil ProcedureAppealsBriefs

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PART IV. PROCEDURAL CHECKLISTS

5-54 California Forms of Pleading and Practice--Annotated § 54.81

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.81 Opposition to Petition for Review

[1] Preliminary Considerations

☐ Determine if there are sufficient reasons to prepare and file opposition, for example, to present additional issues for review [*see generally § 54.26[2],[3][a*]].

[2] Prepare, Serve, and File Answer to Petition

☐ Preparation, service, and filing of answer must conform generally to requirements for petition [*see Cal. Rules of Ct., Rules 8.504(c)* and preparation checklist in *§ 54.80[2*]; *see also § 54.26*].

☐ Exceptions: cover should be blue, copy of opinion need not be attached, requirements re issues presented apply only if new issues are presented in answer, and no filing fee is required.

☐ Exception re filing date: answer must be filed within 20 days of filing of petition [*Cal. Rules of Ct., Rule 8.500(e)(4)*; *see § 54.26[5]*].

[3] Subsequent Proceedings

☐ If review is granted, prepare answer brief on merits, and prepare for oral argument, and conduct motion and other proceedings, generally as with briefing, motion, argument, and other proceedings applicable in court of appeal. Certain exceptions to court of appeal requirements apply, for example, time limits and other aspects of oral argument and procedures for remittitur. For briefing and subsequent proceedings, see *§§ 54.33, 54.37, 54.41*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 54 APPEAL: CALIFORNIA SUPREME COURT REVIEW
PART IV. PROCEDURAL CHECKLISTS

5-54 California Forms of Pleading and Practice--Annotated §§ 54.82-54.99

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

[Reserved]

§§ 54.82[Reserved]

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Volume 5: Appeal-Chs. 40-55
Chapter 54 APPEAL: CALIFORNIA SUPREME COURT REVIEW
PART V. FORMS

5-54 California Forms of Pleading and Practice--Annotated § 54.100

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.100 Petition for Review

[1] FORM Petition for Review

[Cover. *The cover of a petition for review must contain the information required under Cal. Rules of Ct., Rule 8.204(b)(10); there is no required order for this information but form of cover below illustrates one way in which the information is customarily placed in current practice. The cover should be of recycled paper, and white, if practicable, under Cal. Rules of Ct., Rules 8.204(b), 8.40(b).*]

CASE NO. _____

IN THE
SUPREME COURT OF CALIFORNIA

_____ [*name*],
Plaintiff and Appellant/Respondent,
vs.
_____ [*name*],
Defendant and Appellant/Respondent.

After a Decision by the Court of Appeal
_____ [*Specify, e.g.,* Second] Appellate District[, Division _____ (*specify, e.g.,* Five)]
Case No. _____

On Appeal from the Superior Court of the County of _____ [*name*],
The Honorable _____ [*name*], Judge.
Case No. _____

PETITION FOR REVIEW

_____ [*Law firm, if any*]
_____ [*typed name of attorney filing brief*]
_____ [*California State Bar No.*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone and FAX number*]
Attorney for Petitioner and Appellant/Respondent _____ [*name*]

[*Start new page.*]

[Table of Contents and Table of Authorities. *The petition must be prefaced by a topical index of its contents and a table of authorities (Cal. Rules of Ct., Rule 8.204(a)(1)(A). These items ordinarily follow the cover page and are arranged on separate pages as follows:*]

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES..... ii
ISSUE[S] PRESENTED..... 1
INTRODUCTION..... _____
WHY REVIEW SHOULD BE GRANTED..... _____
FACTUAL AND PROCEDURAL HISTORY..... _____
A. The Facts..... _____
B. Procedural History..... _____
C. The Court of Appeal's Decision..... _____
LEGAL DISCUSSION..... _____
_____ [*State primary issue presented for review, e.g.,* THE COURT OF APPEAL ERRONEOUSLY RULED THAT etc.]..... _____
A. _____ [*State subsidiary issue*]..... _____
B. _____ [*Continue as necessary*]..... _____
CONCLUSION..... _____

[*Start new page.*]

TABLE OF AUTHORITIES

Cases: Page No.
[*Indent and list each citation used in brief*] _____
Statutes:
[*Indent and list*] _____
Court Rules:
[*Indent and list*] _____
Constitutions:
[*Indent and list*] _____
Miscellaneous:
[*Indent and list*] _____

[*Start new page.*]

CASE NO. _____

IN THE
SUPREME COURT OF CALIFORNIA

_____ [*name*],
Plaintiff and Appellant/Respondent,
vs.
_____ [*name*],
Defendant and Appellant/Respondent.

PETITION FOR REVIEW

ISSUE(S) PRESENTED

_____[*Specify briefly the issue or issues presented for review; see §§ 54.22, 54.25[2][a]*].

INTRODUCTION

_____[*Summarize concisely, usually in about two pages, the issues presented and argument in support of review given in the context of the facts and procedural history of the case*].

WHY REVIEW SHOULD BE GRANTED

_____[*Summarize concisely, usually in about one to two pages, the reasons why the issues presented meet the criteria for selective review by the Supreme Court; see § 54.22*].

FACTUAL AND PROCEDURAL HISTORY

A. The Facts

_____[*Summarize concisely, with citations to the record, the relevant facts of the case*].

B. Procedural History

_____[*Summarize concisely, the underlying procedural history*].

C. The Court of Appeal Opinion

_____[*Summarize concisely the action and reasoning of the court of appeal, with references to the attached opinion of that court*].

LEGAL DISCUSSION

[*In a centered heading emphasized with boldface type in all-capital letters or other graphic means, state succinctly in argumentative style the overall issue or issues presented and the error of the court of appeal. This main heading is similar to those used in appellate briefs and legal memoranda. For a general example and specific forms including such headings as part of forms of legal memoranda, see respectively Ch. 417, Points and Authorities, and California Points And Authorities (Matthew Bender)*].

I. _____ [*State subsidiary point heading, usually centered and emphasized with boldface type in all-capital letters, which summarizes the legal argument to follow the subsidiary point heading, and which, together with all subsequent subsidiary point headings, supports the main heading above and logically leads to the conclusion stated below*].

_____[*Support subsidiary point heading with legal argument, as necessary*].

II. _____ [*Continue subsidiary point headings in this and subsequent headings, as necessary*].

_____[*Support subsidiary point heading with legal argument, as necessary*].

CONCLUSION

For the foregoing reasons, review should be granted in order that _____[*specify action desired of the Supreme Court, whether to reverse the court of appeal decision, or, in the alternative, if desired, to depublish its opinion if review is denied*].
_____ [*date*].

Respectfully submitted,
_____ [*firm name, if any*]
_____ [*typed name of counsel*]
[Attorney for Petitioner and Appellant/Respondent _____ (*party's name*)]

PROOF OF SERVICE

[*Add proof of service and delivery to other parties, the court of appeal, and the superior court; see § 54.25[4]*].

[2] Use of Form

The form set out in [1], *above*, illustrates the format of a petition for review by the Supreme Court of a court of appeal decision. The petition is, as far as practicable, in the same form and style as a brief but for the requirements specific to the petition for review[*see generally Cal. Rules of Ct., Rule 8.500*]. For further discussion of content and format, see *§ 54.25*; for discussion of service and filing requirements, see *§ 52.25[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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PART V. FORMS

5-54 California Forms of Pleading and Practice--Annotated § 54.101

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.101 Answer to Petition for Review

[1] FORM Answer to Petition for Review

[Cover. *The cover of an answer to a petition for review must contain the information required under Cal. Rules of Ct., Rule 8.204(b)(10); there is no required order for this information but form of cover below illustrates one way in which the information is customarily placed in current practice. The cover should be of recycled paper, and blue, if practicable, under Cal. Rules of Ct., Rules 8.204(b), 8.40(b).*]

CASE NO. _____

IN THE
SUPREME COURT OF CALIFORNIA

_____ [*name*],
Plaintiff and Appellant/Respondent,
vs.
_____ [*name*],
Defendant and Appellant/Respondent.

After a Decision by the Court of Appeal
_____ [*Specify, e.g.,* Second] Appellate District[, Division _____ (*specify, e.g.,* Five)]
Case No. _____

On Appeal from the Superior Court of the County of _____ [*name*],
The Honorable _____ [*name*], Judge.
Case No. _____

ANSWER TO A PETITION FOR REVIEW

_____ [*Law firm, if any*]
_____ [*typed name of attorney filing brief*]
_____ [*California State Bar No.*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone and FAX number*]
Attorney for Appellant/Respondent _____ [*name*]

[*Start new page.*]

[Table of Contents and Table of Authorities. *The petition must be prefaced by a topical index of its contents and a table of authorities (Cal. Rules of Ct., Rule 8.204(a)(1)(A). These items ordinarily follow the cover page and are arranged on separate pages as follows:*]

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Constitutions:	
[*Indent and list*]	_____
Miscellaneous:	

[*Indent and list*] _____

[*Start new page.*]

CASE NO. _____

IN THE
SUPREME COURT OF CALIFORNIA

_____ [*name*],
Plaintiff and Appellant/Respondent,
vs.
_____ [*name*],
Defendant and Appellant/Respondent.

ANSWER TO PETITION FOR REVIEW

ADDITIONAL ISSUE(S) PRESENTED

_____ [*Specify briefly any additional issue or issues to be considered if review is granted, which were not already raised in the petition for review; see § 54.26[3][a]*].

INTRODUCTION

_____[*Summarize concisely, usually in about two pages, the additional issues presented and any argument against granting the petition, or against any alternative relief sought in the petition, such as depublication of the court of appeal decision*].

DISCUSSION

[*In a centered heading emphasized with boldface type in all-capital letters or other graphic means, state succinctly in argumentative style the overall additional issue or issues presented and the essential correctness of the court of appeal decision. This main heading is similar to those used in appellate briefs and legal memoranda. For a general example and specific forms including such headings as part of forms of legal memoranda, see respectively Ch. 417, Points and Authorities, and California Points and Authorities (Matthew Bender)*].

I. _____ [*State subsidiary point heading, again, usually centered and emphasized with boldface type in all-capital letters, which summarizes the legal argument to follow the subsidiary point heading, and which, together with all subsequent subsidiary point headings, supports the main heading above and logically leads to the conclusion stated below*].

_____[*Support subsidiary point heading with legal argument, as necessary*].

II. _____ [*Continue subsidiary point headings in this and subsequent headings, as necessary*].

_____[*Support subsidiary point heading with legal argument, as necessary*].

CONCLUSION

For the foregoing reasons, the petition for review should be denied. [Alternatively, if the petition is granted, the additional issues presented for issue require to the Court to _____[*specify action desired of the Supreme Court, whether to remand or order other further proceedings, or in the alternative, if desired, to affirm the court of appeal decision and order that it remain published*].
_____ [*date*].

Respectfully submitted,
_____ [*firm name, if any*]
_____ [*typed name of counsel*]
[Attorney for Appellant/Respondent _____ (*party's name*)]

PROOF OF SERVICE

[*Add proof of service and delivery to other parties, the court of appeal, and the superior court; see § 54.26[5]* .]

[2] Use of Form

The form set out in [1], *above*, illustrates the format of an answer to a petition for review by the Supreme Court of a court of appeal decision. The answer is, as far as practicable, in the same form and style as a brief but for the requirements specific to the answer [*see generally Cal. Rules of Ct., Rule 8.504*]. For further discussion of content and format, see *§ 54.26*; for discussion of service and filing requirements, see § 52.26[5].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsBriefs

California Forms of Pleading and Practice--Annotated

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Volume 5: Appeal-Chs. 40-55
Chapter 54 APPEAL: CALIFORNIA SUPREME COURT REVIEW
PART V. FORMS

5-54 California Forms of Pleading and Practice--Annotated § 54.102

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.102 Reply to Answer to Petition for Review

[1] FORM Reply to Answer to Petition for Review

[Cover. *The cover of an reply to an answer to a petition for review must contain the information required under Cal. Rules of Ct., Rule 8.204(b)(10); there is no required order for this information but form of cover below illustrates one way in which the information is customarily placed in current practice. The cover should be of recycled paper, and white, if practicable, under Cal. Rules of Ct., Rules 8.204(b), 8.40(b).*]

CASE NO. _____

IN THE
SUPREME COURT OF CALIFORNIA

_____ [*name*],
Plaintiff and Appellant/Respondent,
vs.
_____ [*name*],
Defendant and Appellant/Respondent.

After a Decision by the Court of Appeal
_____ [*Specify, e.g.,* Second] Appellate District[, Division _____ (*specify, e.g.,* Five)]
Case No. _____

On Appeal from the Superior Court of the County of _____ [*name*],
The Honorable _____ [*name*], Judge.
Case No. _____

REPLY TO ADDITIONAL ISSUES RAISED IN ANSWER TO PETITION FOR REVIEW

_____ [*Law firm, if any*]
_____ [*typed name of attorney filing brief*]
_____ [*California State Bar No.*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone and FAX number*]
Attorney for Petitioner and Appellant/Respondent _____ [*name*]

[*Start new page.*]

[Table of Contents and Table of Authorities. *The petition must be prefaced by a topical index of its contents and a table of authorities (Cal. Rules of Ct., Rule 8.204(a)(1)(A). These items ordinarily follow the cover page and are arranged on separate pages as follows:*]

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TABLE OF AUTHORITIES

Cases:	Page No.
[*Indent and list each citation used in brief*]	_____
Statutes:	
[*Indent and list*]	_____
Court Rules:	
[*Indent and list*]	_____
Constitutions:	
[*Indent and list*]	_____
Miscellaneous:	
[*Indent and list*]	_____

[*Start new page.*]

CASE NO. _____

IN THE
SUPREME COURT OF CALIFORNIA

_____ [*name*],
Plaintiff and Appellant/Respondent,
vs.
_____ [*name*],
Defendant and Appellant/Respondent.

REPLY TO ANSWER TO PETITION FOR REVIEW

REPLY TO ANSWER

_____[*Summarize briefly the response to the answer to petition; see 54.27[2].*]

DISCUSSION

[*In a centered heading emphasized with boldface type in all-capital letters or other graphic means, state succinctly in argumentative style the overall response to the answer and, if appropriate, why the petition for review should nevertheless be granted. This main heading is similar to those used in appellate briefs and legal memoranda. For a general example and specific forms including such headings as part of forms of legal memoranda, see respectively Ch. 417, Points and Authorities, and California Points and Authorities (Matthew Bender)*].

I. _____[*State subsidiary point heading, again, usually centered and emphasized with boldface type in all-capital letters, which summarizes the legal argument to follow the subsidiary point heading, and which, together with all subsequent subsidiary point headings, supports the main heading above and logically leads to the conclusion stated below*].

_____[*Support subsidiary point heading with legal argument, as necessary*].

II. _____[*Continue subsidiary point headings in this and subsequent headings, as necessary*].

_____[*Support subsidiary point heading with legal argument, as necessary*].

CONCLUSION

For the foregoing reasons, the petition for review should be granted.

_____ [*date*]

Respectfully submitted,
_____ [*firm name, if any*]
_____ [*typed name of counsel*]
[Attorney for Petitioner and Appellant/Respondent _____ (*party's name*)]

PROOF OF SERVICE

[*Add proof of service; see § 54.27[4]* .]

[2] Use of Form

The form set out in [1], *above*, illustrates the format of a reply to an answer to a petition for review by the Supreme Court of a court of appeal decision. The reply is, as far as practicable, in the same form and style as a brief but for the requirements specific to the reply [*see generally Cal. Rules of Ct., Rule 8.504*]. For further discussion of content and format, see *§ 54.27*; for discussion of service and filing requirements, see § 52.26[4].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureAppealsBriefs

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Volume 5: Appeal-Chs. 40-55
Chapter 54 APPEAL: CALIFORNIA SUPREME COURT REVIEW
PART V. FORMS

5-54 California Forms of Pleading and Practice--Annotated §§ 54.103-54.109

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

[Reserved]

§§ 54.103[Reserved]

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Volume 5: Appeal-Chs. 40-55
Chapter 54 APPEAL: CALIFORNIA SUPREME COURT REVIEW
PART V. FORMS

5-54 California Forms of Pleading and Practice--Annotated § 54.110

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.110 Opening Brief on the Merits

[1] FORM Opening Brief on the Merits

[Cover. *The cover of a petitioner's opening brief on the merits must contain the information required under Cal. Rules of Ct., Rule 8.204(b)(10); there is no required order for this information but form of cover below illustrates one way in which the information is customarily placed in current practice. The cover should be of recycled paper, and white, if practicable, under Cal. Rules of Ct., Rules 8.204(b), 8.40(b).*]

CASE NO. _____

IN THE
SUPREME COURT OF CALIFORNIA

_____ [*name*],
Plaintiff and Appellant/Respondent,
vs.
_____ [*name*],
Defendant and Appellant/Respondent.

After a Decision by the Court of Appeal
_____ [*Specify, e.g.,* Second] Appellate District[, Division _____ (*specify, e.g.,* Five)]
Case No. _____

On Appeal from the Superior Court of the County of _____ [*name*],
The Honorable _____ [*name*], Judge.
Case No. _____

OPENING BRIEF ON THE MERITS

_____ [*Law firm, if any*]
_____ [*typed name of attorney filing brief*]
_____ [*California State Bar No.*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone and FAX number*]
Attorney for Petitioner and Appellant/Respondent _____ [*name*]

[*Start new page.*]

[*The remainder of the opening brief on the merits will conform essentially to the structure, format, and style of the appellant's opening brief filed in the court of appeal; see Ch. 50, Appeal: Briefs, § 50.70.*]

[2] Use of Form

The form set out in [1], *above*, illustrates the cover of a petitioner's opening brief on the merits in the Supreme Court review of a decision rendered by the court of appeal in a civil appeal. The brief itself is essentially the same as an appellant's opening brief [*see generally Cal. Rules of Ct., Rule 8.520*]. For further discussion of content and format, see *§ 54.32*; for discussion of service and filing requirements, see § 52.32[4].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 5: Appeal-Chs. 40-55
Chapter 54 APPEAL: CALIFORNIA SUPREME COURT REVIEW
PART V. FORMS

5-54 California Forms of Pleading and Practice--Annotated § 54.111

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.111 Answer Brief on the Merits

[1] FORM Answer Brief on the Merits

[Cover. *The cover of an answer brief on the merits must contain the information required under Cal. Rules of Ct., Rule 8.204(b)(10); there is no required order for this information but form of cover below illustrates one way in which the information is customarily placed in current practice. The cover should be of recycled paper, and blue, if practicable, under Cal. Rules of Ct., Rules 8.204(b), 8.40(b).*]

CASE NO. _____

IN THE
SUPREME COURT OF CALIFORNIA

_____ [*name*],
Plaintiff and Appellant/Respondent,
vs.
_____ [*name*],
Defendant and Appellant/Respondent.

After a Decision by the Court of Appeal
_____ [*Specify, e.g.,* Second] Appellate District[, Division _____ (*specify, e.g.,* Five)]
Case No. _____

On Appeal from the Superior Court of the County of _____ [*name*],
The Honorable _____ [*name*], Judge.
Case No. _____

ANSWER BRIEF ON THE MERITS

_____ [*Law firm, if any*]
_____ [*typed name of attorney filing brief*]
_____ [*California State Bar No.*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone and FAX number*]
Attorney for Appellant/Respondent _____ [*name*]

[*Start new page.*]

[*The remainder of the answer brief on the merits will conform essentially to the structure, format, and style of the respondent's brief filed in the court of appeal; see Ch. 50, Appeal: Briefs, § 50.71.*]

[2] Use of Form

The form set out in [1], *above*, illustrates the cover of a brief filed in answer to a petitioner's opening brief on the merits [*see § 54.110*]. The answer brief itself is essentially the same as a respondent's brief [*see generally Cal. Rules of Ct., Rule 8.520*]. For further discussion of content and format, see *§ 54.33*; for discussion of service and filing requirements, see § 52.33[4].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 5: Appeal-Chs. 40-55
Chapter 54 APPEAL: CALIFORNIA SUPREME COURT REVIEW
PART V. FORMS

5-54 California Forms of Pleading and Practice--Annotated § 54.112

AUTHOR: David M. Axelrad Author Blair Hoffman Editorial Consultant

§ 54.112 Reply Brief on the Merits

[1] FORM Reply Brief on the Merits

[Cover. *The cover of a reply to an answer brief on the merits must contain the information required under Cal. Rules of Ct., Rule 8.204(b)(10); there is no required order for this information but form of cover below illustrates one way in which the information is customarily placed in current practice. The cover should be of recycled paper, and white, if practicable, under Cal. Rules of Ct., Rules 8.204(b), 8.40(b)* .]

CASE NO. _____

IN THE
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vs.
_____ [*name*],
Defendant and Appellant/Respondent.

After a Decision by the Court of Appeal
_____ [*Specify, e.g.,* Second] Appellate District[, Division _____ (*specify, e.g.,* Five)]
Case No. _____

On Appeal from the Superior Court of the County of
_____ [*name*],
The Honorable _____ [*name*], Judge.
Case No. _____

REPLY BRIEF ON THE MERITS

_____ [*law firm, if any*]
_____ [*typed name of attorney filing brief*]
_____ [*California State Bar No.*]
_____ [*street address*]
_____ [*city and state*]
_____ [*telephone and FAX number*]
Attorney for Appellant/Respondent _____ [*name*]

[*Start new page.*]

[*The remainder of the answer brief on the merits will conform essentially to the structure, format, and style of the appellant's reply brief filed in the court of appeal; see Ch. 50, Appeal: Briefs, § 50.72.*]

[2] Use of Form

The form set out in [1], *above*, illustrates the cover of a brief filed in reply to an answer brief on the merits [*see § 54.111*]. The reply brief itself is essentially the same as an appellant's reply brief [*see generally Cal. Rules of Ct., Rule 8.520*]. For further discussion of content and format, and service and filing, see *§ 54.34*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsBriefs

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Volume 5: Appeal-Chs. 40-55
Chapter 55 RESERVED

5-55 California Forms of Pleading and Practice--Annotated Chapter 55

RESERVED

NOTE: Ch. 55, ***Arbitration***, has been completely revised. For the topics formerly found in Chapter 55, see the following new chapters:
Ch. 32, ***Contractual Arbitration: Agreements and Compelling Arbitration***
Ch. 33, ***Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding***
Ch. 34, ***Contractual Arbitration: Judicial Review***
Ch. 35, ***Arbitration and Conciliation of International Commercial Disputes***
Ch. 36, ***Judicial Arbitration***
These chapters are in Volume 4, which covers these and other forms of alternative dispute resolution.

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 56 ARCHITECTS

6-56 California Forms of Pleading and Practice--Annotated 56.syn

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§ 56.02 Cross References

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§ 56.11 Practice of Architecture

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[2] When License Is Required

[3] Discipline

§ 56.12 When Written Contract Is Required

§ 56.13 Architectural Corporations

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§ 56.21 Damages

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[2] Late Payment Penalty in Lieu of Interest (Private Works Contracts)

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§ 56.22 Lack of Architectural License

§ 56.23 Mechanics' Liens, Design Professionals' Liens, and Stop Notices

§§ 56.24-56.29 [Reserved]

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[3] Liability for Signed Plans, Specifications, or Other Documents

[4] Liability for Defective Construction in New Residences Sold on or After January 1, 2003

§ 56.31 Cost Estimates

§ 56.32 Statutes of Limitations

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[2] Improvements to Real Property (Patent Deficiency)

[3] Improvements to Real Property (Latent Deficiency)

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§ 56.34 Certificate of Merit

§ 56.35 Penalty for Late Payments Due Subconsultant Design Professionals Under Public Works Contracts

§§ 56.36-56.39 [Reserved]

§ 56.40 Related Matthew Bender Publications

§ 56.41 State Statutes

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[2] Design

[3] Government Contracts

[4] Practice of Architecture

[5] Liability

[6] Damages

[7] Statutes of Limitations

[8] Undertaking

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[3] Mechanics' Lien

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[8] Negligent Design and Supervision

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[10] Relationship to Contractor

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[3] Damages

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Damages

[5] Cross References

§ 56.53 Affirmative Defense--Lack of Architect's License [Bus. & Prof. Code § 5536(a)]

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§ 56.67 Proceedings to Verify Noncompliance With Code Civ. Proc. § 411.35 and for Payment of Reasonable Expenses [Code Civ. Proc. § 411.35(h)]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

§ 56.68 Proceedings to Verify Noncompliance With Code Civ. Proc. § 411.35 and for Payment of Reasonable Expenses [Code Civ. Proc. § 411.35(h)]--Order Granting Motion

[1] FORM

[2] Use of Form

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 56 ARCHITECTS
PART I. SCOPE

6-56 California Forms of Pleading and Practice--Annotated § 56.01

§ 56.01 Scope of Chapter

This chapter discusses actions by architects to recover contract fees or the reasonable value of architectural services and actions against architects for breach of contract or negligence.

Part II, Subpt. A [*see § 56.10* et seq.] provides a general overview and discussion of the law governing the practice of architecture, including when an architect's license and written contract are required. Also included is a discussion of the law governing the operation of architectural corporations.

Part II, Subpt. B [*see § 56.20* et seq.] discusses actions by architects. Part IV, Subpt. A contains related forms for use in actions by architects to recover fees provided for by contract [*see §§ 56.50, 56.52*] and to recover the reasonable value of their services [*see § 56.51*]. Also included is an affirmative defense to an action by an architect for fees or the reasonable value of services if the architect is not licensed to practice architecture in California [*see § 56.53*].

Part II, Subpt. C [*see § 56.30* et seq.] discusses actions against architects. Part IV, Subpt. B includes related forms of complaints to recover damages for injury caused by an architect's breach of contract or negligence [*see §§ 56.60 -56.65*]. Also included is a form of specific denial by an architect, denying negligence in the preparation of plans and specifications [*see § 56.66*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityProfessional ServicesContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawDesign ProfessionalsContracts LawRemediesEquitable ReliefQuantum Meruit

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Chapter 56 ARCHITECTS
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6-56 California Forms of Pleading and Practice--Annotated § 56.02

§ 56.02 Cross References

For forms involving the licensing of occupations, see Ch. 471B, *Licensing by Public Agency*

For discussion and forms relating to causes of action based on contract, see Ch. 140, *Contracts*

For alternative forms of complaints of common counts, see Ch. 121, *Common Counts*

For forms involving mechanics' liens, see Ch. 361, *Mechanics' Liens*

For forms alleging entitlement to treble damages when defendant is not licensed, see *Ch. 177, Damages, § 177.40* et seq.

For discussion and forms relating to causes of action based on fraud and deceit, see Ch. 269, *Fraud and Deceit*

For discussion and forms relating to causes of action against architects based on negligence, see Ch. 380, *Negligence*

See generally, Ch. 26, *Answers*

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 56 ARCHITECTS
PART I. SCOPE

6-56 California Forms of Pleading and Practice--Annotated §§ 56.03-56.09

[Reserved]

§§ 56.03[Reserved]

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 56 ARCHITECTS
PART II. LEGAL BACKGROUND
A. Overview

6-56 California Forms of Pleading and Practice--Annotated § 56.10

§ 56.10 Governing Law

Architects and the practice of architecture are governed by *Bus. & Prof. Code § 5500 et seq.*

Actions for breach of contract and actions on common counts by architects to recover fees or the reasonable value of their services are governed by the law governing contractual obligations generally [*see Havens v. Donahue (1896) 111 Cal. 297, 299, 43 P. 962* ; *Miller v. San Francisco Church Exten. Soc. (1932) 125 Cal. App. 85, 92, 13 P.2d 824*]. See generally Ch. 140, *Contracts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityProfessional ServicesContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawDesign ProfessionalsContracts LawRemediesEquitable ReliefQuantum Meruit

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 56 ARCHITECTS
PART II. LEGAL BACKGROUND
A. Overview

6-56 California Forms of Pleading and Practice--Annotated § 56.11

§ 56.11 Practice of Architecture

[1] Definition

The practice of architecture within the meaning and intent of *Bus. & Prof. Code § 5500 et seq.* is defined as offering, performing, or being in responsible control of, professional services that require the skills of an architect in the planning of sites and the design, in whole or in part, of buildings or groups of buildings and structures [*Bus. & Prof. Code § 5500.1(a)*]. "Responsible control" means that amount of control over the content of all architectural instruments of service during their preparation that is ordinarily exercised by architects applying the required professional standard of care [*Bus. & Prof. Code § 5535.1*].

Architects' professional services may include any or all of the following [*Bus. & Prof. Code § 5500.1(b)*]:

- Investigation, evaluation, consultation, and advice.
- Planning schematic and preliminary studies, designs, working drawings, and specifications.
- Coordination of the work of technical and special consultants.
- Compliance with generally applicable codes and regulations, and assistance in the governmental review process.
- Technical assistance in the preparation of bid documents and agreements between clients and contractors.
- Contract administration.
- Construction observation.

[2] When License Is Required

It is a misdemeanor, punishable by a fine of not less than $100 or more than$5,000, or by imprisonment in the county jail not exceeding one year, or by both, for any person who is not licensed to practice architecture under *Bus. & Prof. Code § 5500 et seq.* to practice architecture in California, to use any term confusingly similar to the word architect, to use the stamp of a licensed architect, as provided in *Bus. & Prof. Code § 5536.1*, or to advertise or put out any sign, card, or other device that might indicate to the public that he or she is either an architect, qualified to practice architecture, or an architectural designer [*Bus. & Prof. Code § 5536(a)*]. In addition, it is a misdemeanor for any person who is not licensed to practice architecture in California to affix a stamp or seal that bears the legend "State of California" or words or symbols that represent or imply that the person is so licensed by the state to prepare plans, specifications, or instruments of service [*see Bus. & Prof. Code § 5536(b)*]. It is also a misdemeanor for any person to advertise or represent that he or she is a "registered building designer" or is registered or otherwise licensed by the state as a building designer [*Bus. & Prof. Code § 5536(c)*].

Exemptions from the requirement of an architect's license are given to certain categories of professional persons, and also to any person carrying on certain types of work. Insofar as they are authorized, registered, or licensed under another section of the Business and Professions Code, the following need not have an architect's certificate to practice their professions: structural engineers [*Bus. & Prof. Code § 5537.1*]; contractors [*Bus. & Prof. Code § 5537.2*]; professional engineers [*Bus. & Prof. Code § 5537.4*]; civil engineers [*Bus. & Prof. Code § 5537.5*]; landscape architects [*Bus. & Prof. Code § 5537.6*]; and land surveyors [*Bus. & Prof. Code § 5537.7*].

Further, it is not prohibited for any person to prepare plans, drawings, or specifications for the following types of structures [*Bus. & Prof. Code § 5537(a)*]:

- Single family dwellings of woodframe construction not more than two stories and basement in height.

- Multiple dwellings containing no more than four dwelling units of woodframe construction not more than two stories and basement in height, excluding multiple clusters of up to four dwelling units each to form apartment or condominium complexes when the total exceeds four units on any lawfully divided lot.

- Garages or other structures appurtenant to single family dwellings of woodframe construction not more than two stories and a basement in height.

- Agricultural and ranch buildings of woodframe construction, unless the building official having jurisdiction deems that an undue risk to the public health, safety, or welfare is involved.

Nor is it prohibited for any person to furnish, either alone or with contractors, if required by *Bus. & Prof. Code § 7000 et seq.*, labor and materials, with or without plans, drawings, specifications, instruments of service, or other data covering such labor and materials to be used for any of the following [*Bus. & Prof. Code § 5538*]:

- Nonstructural or nonseismic storefronts, interior alterations or additions, fixtures, cabinetwork, furniture, or other appliances or equipment;

- Any nonstructural or nonseismic work necessary to provide for their installation; and

- Any nonstructural or nonseismic alterations or additions to any building necessary to or attendant on the installation of those storefronts, interior alterations or additions, fixtures, cabinetwork, furniture, appliances, or equipment, provided those alterations do not change or affect the structural system or safety of the building.

[3] Discipline

Article 5 [*Bus. & Prof. Code §§ 5560-5590*] of the Architects Practice Act [*Bus. & Prof. Code § 5500 et seq.*] provides for investigation and discipline of architects, and sets forth particular acts or omissions constituting grounds for disciplinary action [*Hughes v. Board of Architectural Examiners (1998) 17 Cal. 4th 763, 773-774, 72 Cal. Rptr. 2d 624, 952 P.2d 641*]. *Bus. & Prof. Code §§ 5583, 5584* provide that fraud or deceit or negligence or willful misconduct by a license holder in the practice of architecture are grounds for disciplinary action.

An architect may be disciplined under *Bus. & Prof. Code §§ 5583, 5584* for wrongful conduct occurring after his or her license has been issued [*Hughes v. Board of Architectural Examiners (1998) 17 Cal. 4th 763, 767-768, 72 Cal. Rptr. 2d 624, 952 P.2d 641*]. Although *Bus. & Prof. Code §§ 5583, 5584* do not explicitly authorize the Board to impose discipline for acts occurring before licensure, the more reasonable estimation of legislative intent is that the Board may discipline an architect under those sections for conduct that occurred before the license was issued, even if the license was not obtained by fraud or misrepresentation [*Hughes v. Board of Architectural Examiners (1998) 17 Cal. 4th 763, 768, 774-793, 72 Cal. Rptr. 2d 624, 952 P.2d 641* (upholding revocation of license based on prelicensure acts)]. For discussion and forms related to discipline of holders of licenses issued by public agencies generally, *see* Ch. 471B, *Licensing by Public Agencies* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicensesContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawDesign Professionals

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§ 56.12 When Written Contract Is Required

With certain exceptions noted below, an architect must use a written contract when providing professional services to a client. The contractmust be executed by the architect and the client, or the client's representative, before the architectbegins work unless the client knowingly states in writing that work may begin before the contract is executed [*Bus. & Prof. Code § 5536.22(a)*]. At a minimum, the contract must include the following [*Bus. & Prof. Code § 5536.22(a)*]:

- A description of the services the architect will provide.
- A description of any basis for compensation under the contract and the payment method to which the parties agree.
- The names and addresses of both the architect and the client, and the architect's license number.
- A description of the procedure to be used to accommodate additional services under the contract.
- A description of the procedure to be used by either party to terminate the contract.

A written contract is not required when the following apply [*Bus. & Prof. Code § 5536.22(b)*]:

- The architect will not be compensated for providing the client with professional services.
- The architect and the client have an arrangement as to the basis for compensation and manner of providing professional services, which is implied by the fact that the services are of the same general kind that the architect has previously rendered to and received payment from the same client.
- The client knowingly states in writing, after full disclosure of the right to use a written contract, that a written contract is not required.

- The architect is rendering services to a registered professional engineer or a licensed land surveyor.

There is no authority indicating that failure to comply with the written contract requirement will, absent other circumstances, bar an architect's right to receive compensation for professional services performed, whether based on a contract theory or quantum meruit.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicensesContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawDesign ProfessionalsContracts LawStatutes of FraudsRequirementsWritings

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§ 56.13 Architectural Corporations

Subject to all applicable statutes, rules, and regulations, a professional architectural corporation (that is, one that is licensed with the California Architects Board and has a currently effective license from the board pursuant to the Moscone-Knox Professional Corporation Act [*Corp. Code § 13400 et seq.*] and *Bus. & Prof. Code § 5610 et seq.*) is entitled to practice architecture [*Bus. & Prof. Code § 5610*]. The Architects Practice Act [*Bus. & Prof. Code § 5500 et seq.*] does not prevent other corporations from furnishing or supplying by contract architectural services, as long as any architects' professional services are offered and provided under the responsible control of a licensed architect or architects [*Bus. & Prof. Code § 5535.3*].

Except as provided in *Corp. Code § 13403*, each director, shareholder, and officer of a professional architectural corporation is required to be a licensed person as defined in the Moscone-Knox Professional Corporation Act [*Bus. & Prof. Code § 5610.4*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicensesContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawDesign ProfessionalsContracts LawStatutes of FraudsRequirementsWritingsBusiness & Corporate LawProfessional Associations & Corporations

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[Reserved]

§§ 56.14[Reserved]

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6-56 California Forms of Pleading and Practice--Annotated § 56.20

§ 56.20 Governing Law

Actions for breach of contract and actions on common counts by architects to recover fees or the reasonable value of their services are governed by the law governing contractual obligations generally [*see Havens v. Donahue (1896) 111 Cal. 297, 298-299, 43 P. 962* ; *Miller v. San Francisco Church Exten. Soc. (1932) 125 Cal. App. 85, 92, 13 P.2d 824*].

See generally Ch. 140, *Contracts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawDesign ProfessionalsContracts LawRemediesEquitable ReliefQuantum MeruitContracts LawStatutes of FraudsRequirementsWritings

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6-56 California Forms of Pleading and Practice--Annotated § 56.21

§ 56.21 Damages

[1] Breach of Contractual Obligation

For the breach of an obligation arising from contract, the measure of damages, except when otherwise expressly provided by the Civil Code, is the amount that will compensate the party aggrieved for all the detriment proximately caused thereby, or that in the ordinary course of things, would be likely to result therefrom [*Civ. Code § 3300*]. No damages can be recovered for a breach of a contract that are not clearly ascertainable in both their nature and origin [*Civ. Code § 3301*]. The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon [*Civ. Code § 3302*].

[2] Late Payment Penalty in Lieu of Interest (Private Works Contracts)

In any contract for a private work of improvement entered into on or after January 1, 1996, the contracting party and the architect (or other design professional) may agree to include a clause providing for the assessment of a late payment penalty in lieu of any interest otherwise due for delayed payments underthe contract. The contract must specify the terms of the penalty [*Civ. Code § 3319(a)*].

Any late payment penalty provided for will be separate from, and in addition to, the architect's rights to a design professionals' lien or stop notice [*Civ. Code § 3319(b)*; *see § 56.23*]. None of the rights or obligations created or permitted by *Civ. Code § 3319* between an architect (or other design professional) and the contracting party will apply to construction loan funds held by a lender pursuant to a construction loan agreement [*Civ. Code § 3319(c)*].

[3] Penalty for Late Progress or Final Retention Payments (Public Works Contracts)

A statutory deadline applies to progress payments and final retention payments made under any contract for a public work of improvement entered into on or after January 1, 1996. Specifically, the public agency must pay the prime design professional (hereafter referred to as "the architect") any progress payment within 30 days of receipt of the architect's written demand for payment under the contract. The final retention payment must be made within 45 days of receipt of written demand for payment. If the public agency disputes in good faith any portion of the amount due, it may

withhold from the payment an amount not to exceed 150 percent of the disputed amount. The disputed amount withheld will not be subject to any penalties authorized by *Civ. Code § 3320* [*Civ. Code § 3320(a)*].

If a progress or retention payment is wrongfully withheld or not timely paid, the architect will be entitled to a penalty of one and one-half percent of the amount due per month for every month that payment is not made. This penalty is in lieu of any interest that would otherwise be due. In any collection action for wrongfully withheld amounts, the prevailing party is entitled to attorney's fees and costs [*Civ. Code § 3320(b)*].

Any penalty assessed is separate from, and in addition to, the architect's rights to a design professionals' lien or stop notice [*Civ. Code § 3320(c)*; *see § 56.23*].

These penalty provisions do not apply to construction loan funds held by a lender pursuant to a construction loan agreement [*Civ. Code § 3320(e)*]. Nor do they apply in situations involving either (1) certain contracts between the state and small businesses, or (2) certain state contracts that are subject to other statutory payment deadlines [*Civ. Code § 3320(d)*; *see Gov. Code § 927 et seq.* (California Prompt Payment Act)].

[4] Quantum Meruit

If no basis for compensation is stated, or the architect chooses to treat the contract as rescinded by the client, the reasonable value of architectural services rather than a contract price may be sought [*Havens v. Donahue (1896) 111 Cal. 297, 298-299, 43 P. 962* ; *Miller v. San Francisco Church Exten. Soc. (1932) 125 Cal. App. 85, 92, 13 P.2d 824* ; *see also White v. Kanrich (1962) 201 Cal. App. 2d 356, 358, 20 Cal. Rptr. 37* ; *Parker v. Maier Brewing Co. (1960) 180 Cal. App. 2d 630, 634, 4 Cal. Rptr. 825*].

[5] Where Fee Is Based on Construction Cost

If an architect has agreed to prepare plans and specifications and the fee is to be a fixed percentage of the cost of construction of the structureplanned, the recovery is not barred by the failure of the client to complete construction. If the architect has completed his or her work, an estimate of the cost of completing the structure will usually be made and the architect's fee computed accordingly [*see Havens v. Donahue (1896) 111 Cal. 297, 299-301, 43 P. 962* ; *Stacy-Judd v. Stone (1932) 124 Cal. App. 165, 168, 12 P.2d 143*].

If the architect has been prevented from completing performance of the contractual obligation, he or she may recover as the fee an amount based on the cost of completing construction, or an estimate thereof if construction is not completed, less any actual expenses that were saved by not performing the obligation [*see Oliver v. Campbell (1954) 43 Cal. 2d 298, 302, 273 P.2d 15* (general rule regarding employment contracts); *Miller v. San Francisco Church Exten. Soc. (1932) 125 Cal. App. 85, 92, 13 P.2d 824* (contract with architect as treated as employment contract); *see also Kingsbury v. Arcadia Unified School Dist. (1954) 43 Cal. 2d 33, 41-42, 271 P.2d 40*]. If, however, construction has not started, an estimated price may not be ascertainable; the architect will then be limited to recovering the reasonable value of his or her services [*see Miller v. San Francisco Church Exten. Soc. (1932) 125 Cal. App. 85, 92-96, 13 P.2d 824*]. It has been held that an architect's contract to design and supervise construction of a building and receive as his or her fee a percentage of the construction costs that fails to specify a maximum construction cost is incomplete on its face, and parol evidence may be introduced to show the existence of an oral agreement that limits the cost of the building [*Crawford v. France (1933) 219 Cal. 439, 442-444, 27 P.2d 645* ; *Spurgeon v. Buchter (1961) 192 Cal. App. 2d 198, 204-205, 13 Cal. Rptr. 354* (rule in *Crawford* case particularly applicable if plans are not let out for competitive bidding)].

An architect who agrees to prepare plans for a structure not to cost more than a specified sum and whose plans do not comply with that provision, cannot recover his or her contractual fee or the reasonable value of his or her services on quantum meruit if the plans are not used by the client [*Spurgeon v. Buchter (1961) 192 Cal. App. 2d 198, 206-207, 13*

Cal. Rptr. 354 ; *Rowell v. Crow (1949) 93 Cal. App. 2d 500, 503, 209 P.2d 149*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesLiquidated DamagesContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawDesign ProfessionalsContracts LawRemediesEquitable ReliefQuantum MeruitPublic Contracts LawContract ProvisionsPayment Schedules

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6-56 California Forms of Pleading and Practice--Annotated § 56.22

§ 56.22 Lack of Architectural License

A contract with an unlicensed architect for services not exempt from the licenserequirements of *Bus. & Prof. Code § 5500 et seq.* [*see § 56.11*] is against public policy [*see Bus. & Prof. Code § 5536(a)* (misdemeanor to practice architecture without license)] and the architect cannot recover for services rendered under the contract [*Civ. Code §§ 1596, 1667(2)*; *Force v. Hart (1930) 209 Cal. 600, 605, 289 P. 828* ; *Payne v. De Vaughn (1926) 77 Cal. App. 399, 404, 246 P. 1069*]. A client who knowingly contracts with an unlicensed architect cannot recover monies paid under the contract, at least if the client receives an adequate quid pro quo for the monies and there is no unjust enrichment. A client who is justifiably ignorant of the lack of license is not barred from recovering consideration paid under the contract [*Medak v. Cox (1970) 12 Cal. App. 3d 70, 78, 90 Cal. Rptr. 452*].

An architect is not prevented by the Architects Practice Act [*see Bus. & Prof. Code § 5500 et seq.*] from forming a business entity or collaborating with persons who are not architects, provided that any architects' professional services that are provided through the entity or collaboration are offered and provided under the responsible control of an architect, or architects, and in accordance with the Act [*Bus. & Prof. Code § 5535.2*]. "Business entity" and "collaboration" include employer-employee relationships, joint ventures, partnerships, general corporations, and consulting relationship formed by written agreement in which the architect provides immediate and responsible direction of architectural services [*Bus. & Prof. Code § 5535.25*; *see 16 Cal. Code Reg. § 151* ("immediate and responsible direction" defined)]. The entity or collaboration is not required to affirmatively advise the client that non-architects may be involved [*see Joseph v. Drew (1950) 36 Cal. 2d 575, 580, 225 P.2d 504* (construing predecessor to *Bus. & Prof. Code § 5535.2*)], although work done by a person who is not an architect must be done under an architect's direction and supervision [*Palmer v. Brown (1954) 127 Cal. App. 2d 44, 54, 273 P.2d 306*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-56 California Forms of Pleading and Practice--Annotated § 56.23

§ 56.23 Mechanics' Liens, Design Professionals' Liens, and Stop Notices

NOTE:

SB 189, which was introduced in February 2009 as a two-year bill, would comprehensively revise the law governing mechanics' liens and associated construction remedies. If enacted, the legislation will be operative January 1, 2011. For further information see the Special Alert preceding Ch. 361, *Mechanics' Liens*.

Architects contributing to a work of improvement other than a public work [*see Civ. Code § 3109*] have a mechanics' lien on the property on which they have bestowed labor or furnished materials or appliances or leased equipment, for the value of such labor done or materials furnished and for the value of the use of such appliances, equipment, teams, or power whether done or furnished at the instance of the owner or of any person acting by his or her authority or under him or her as contractor or otherwise. For the purposes of *Civ. Code § 3109 et seq.* (mechanics' liens), every architect is held to be the agent of the owner [*Civ. Code § 3110*]. Architects may also obtain stop notices for public works [*Civ. Code § 3181*].

An architect must be licensed, or must be eligible for an exemption under *Bus. & Prof. Code § 5537*, in order to use the mechanics' lien as security for recovery [*see Cash v. Blackett (1948) 87 Cal. App. 2d 233, 237, 196 P.2d 585*].

A design professional, including a certificated architect, may obtain a lien on real property for which a work of improvement is planned, even if actual construction has not yet commenced, for the amount of his or her fee for any services rendered prior to commencement of the work of improvement [*see Civ. Code § 3081.2*; *see also Civ. Code § 3081.1 et seq.*]. The design professional lien is not applicable to a work of improvement relating to a single-family owner-occupied residence when the construction costs are less than $100,000 [*Civ. Code § 3081.10*].

For the procedure to obtain a mechanics' lien and related forms, see Ch. 361, *Mechanics' Liens* .

Legal Topics:

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

Real Property LawNonmortgage LiensMechanics' LiensContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawDesign ProfessionalsContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' Liens

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[Reserved]

§§ 56.24[Reserved]

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6-56 California Forms of Pleading and Practice--Annotated § 56.30

§ 56.30 Liability

[1] Generally

The same act may be both a tort and a breach of contract. A cause of action in tort may sometimes arise out of the negligent manner in which the contractual duty is performed, or out of a failure to perform such duty. If the cause of action arises from a breach of a promise set forth in the contract, the action is ex contractu, but if it arises from a breach of duty growing out of the contract, it is ex delicto [*Eads v. Marks (1952) 39 Cal. 2d 807, 810, 811, 249 P.2d 257* ; *see also Zurich Ins. Co. v. Kings Industries, Inc. (1967) 255 Cal. App. 2d 919, 923, 63 Cal. Rptr. 585*]. Implicit in the architect's contract are the possession of architectural skills and abilities and a promise to exercise them reasonably [*see Benenato v. McDougall (1913) 166 Cal. 405, 408, 137 P. 8*]. Indeed, architects are members of a professional class subject to a duty to conform to the existing standards of their profession [*Huber, Hunt & Nichols, Inc. v. Moore (1977) 67 Cal. App. 3d 278, 313, 136 Cal. Rptr. 603*].

Architects may be liable for failure as excavators to carry out a duty imposed by statute in favor of the right of a landowner to lateral support for his or her soil from adjoining land [*Peak v. Richmond Elementary Sch. Dist. (1958) 161 Cal. App. 2d 366, 368-369, 326 P.2d 860* ; *see also Civ. Code § 832*; for forms, see Ch. 11, *Adjoining Landowners*].

When an architect acts under a contract as the official interpreter of its conditions and the judge of its performance, he or she should favor neither side, but exercise impartial judgment [*Macomber v. State of California (1967) 250 Cal. App. 2d 391, 398, 58 Cal. Rptr. 393* (affirming court judgment in favor of contractor on claim rejected through gross error by defendant's architect)].

[2] Negligence

A duty of reasonable care is owed persons other than those in privity of contract with the architect [*Cooper v. Jevne (1976) 56 Cal. App. 3d 860, 868, 128 Cal. Rptr. 724*]. For example, an architect who plans and supervises construction work, as an independent contractor, is under a duty to exercise ordinary care in the course thereof for the protection of any person who foreseeably and with reasonable certainty may be injured by his or her failure to do so, even though

such injury may occur after the architect's work has been accepted by the person engaging his or her services [*Montijo v. Swift (1963) 219 Cal. App. 2d 351, 353, 33 Cal. Rptr. 133*]. The duty to third persons not in privity with the architect may be limited, however, by the California Supreme Court's decision in *Bily v. Arthur Young & Co.* [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 11 Cal. Rptr. 2d 51, 834 P.2d 745*]. Although *Bily* involved an accountant's duty to third parties during an audit, the decision may indicate the duty of care applied generally to information-supplying professionals [*see* *Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 410-413, 11 Cal. Rptr. 2d 51, 834 P.2d 745* (Court recognized that other professionals, including architects, supply information and evaluations for use and benefit of others, and also may face suits by third persons claiming reliance on their information)]. Thus, an architect, in his or her function as a supplier of information or evaluations relied on by third parties, may be insulated from general negligence claims [*see* *Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 406, 11 Cal. Rptr. 2d 51, 834 P.2d 745*]. However, the Court also held that intended beneficiaries of audit reports who are known to the auditor and for whose benefit the auditor renders the report may recover on a theory of negligent misrepresentation [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 406-407, 11 Cal. Rptr. 2d 51, 834 P.2d 745*]. Thus, under the reasoning in *Bily,* an architect may be liable for negligent misrepresentation to these beneficiaries.

Mere deviation from "customary practice" in the community does not necessarily prove that a resulting architectural condition was dangerous or defective, when the deviation was reasonably safe [*Paxton v. County of Alameda (1953) 119 Cal. App. 2d 393, 406, 259 P.2d 934*].

The negligent act of an architect may involve either design or supervision [*see* *Pieri v. Rosebrook (1954) 128 Cal. App. 2d 250, 257, 275 P.2d 67* ; *Goldberg v. Underhill (1950) 95 Cal. App. 2d 700, 702, 213 P.2d 516*]. Thus, liability may result from the architect's failure to exercise ordinary care regarding a stairway for which he or she drew up the plans and supervised construction [*Montijo v. Swift (1963) 219 Cal. App. 2d 351, 352, 353, 33 Cal. Rptr. 133*], the inaction of a supervising architect with authority to remedy the substitution of inferior sheathing on a roof [*Paxton v. County of Alameda (1953) 119 Cal. App. 2d 393, 408-412, 259 P.2d 934*], or failure to mention in the plans an underground high voltage line the architect knew about, which failure caused the operator of a jackhammer to strike the line [*Mallow v. Tucker, Sadler & Bennett, Architects etc., Inc. (1966) 245 Cal. App. 2d 700, 702-703, 54 Cal. Rptr. 174*].

An architect who negligently prepares plans and supervises construction is not a joint tortfeasor with a negligent contractor in the case [*Alexander v. Hammarberg (1951) 103 Cal. App. 2d 872, 879-880, 230 P.2d 399* (property damage)]. Concurrent negligence of a contractor is not a superseding cause of an accident that will relieve a negligent architect from liability [*Paxton v. County of Alameda (1953) 119 Cal. App. 2d 393, 411-412, 259 P.2d 934*].

A tort duty runs, not only to the original owner for whom architectural services are provided, but also to subsequent owners of the same property [*Krusi v. S. J. Amoroso Construction Co. (2000) 81 Cal. App. 4th 995, 1005-1006* ; *see Biakanja v. Irving (1958) 49 Cal.2d 647, 650, 320 P.2d 16* ; *Huang v. Garner (1984) 157 Cal. App. 3d 404, 419-425, 203 Cal. Rptr. 800*]. This does not mean, however, that in a case involving damage to the property, once a cause of action in favor of a prior owner accrues, another cause of action against the same defendant or defendants can accrue to a subsequent owner, unless the damaged suffered by that subsequent owner is fundamentally different from the earlier type. Thus, if owner number one has an obviously leaky roof and suffers damage to its building as a result, a cause of action accrues to it against the defendant whose deficient architectural plans cause the defect. But, if that condition goes essentially unremedied over a period of years, owners two and three of the same building have no such right of action against the defendant (unless the right was explicitly transferred to them by owner number one). But owners two and three could well have a cause of action against the defendant architect for damage caused by, for example, an earthquake if it could be shown that the architectural plans included inadequate seismic safeguards. This is a new and different cause of action [*see* *Krusi v. S. J. Amoroso Construction Co. (2000) 81 Cal. App. 4th 995, 1005-1006*].

The duty to third persons not in privity with the architect may be affected by a California Supreme Court decision that has limited an accountant's duty to third parties during an audit [*see* *Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370,*

406-407, 11 Cal. Rptr. 2d 51, 834 P.2d 745]. In dictum, the Court recognized that other professionals, including architects, supply information and evaluations for use and benefit of others, and also may face suits by third persons claiming reliance on their information [*see Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 410-413, 11 Cal. Rptr. 2d 51, 834 P.2d 745*]. Thus, an architect, in his or her function as a supplier of this information, may be insulated from general negligence claims [*see Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 406, 11 Cal. Rptr. 2d 51, 834 P.2d 745*]. However, an architect may be liable on a theory of negligent misrepresentation to intended beneficiaries of the information who are known to the architect and for whose benefit the architect renders the information [*see Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 406-407, 11 Cal. Rptr. 2d 51, 834 P.2d 745*].

[3] Liability for Signed Plans, Specifications, or Other Documents

A person who prepares or is in responsible control of plans, specifications, or instruments of service for others must sign those documents, and if that person is a licensed architect, must affix a stamp to the documents as evidence of that person's responsibility for them [*Bus. & Prof. Code § 5536.1(a)*]. This stamp must bear, at a minimum, the architect's name,license number, the legend "licensed architect," and the legend "State of California" [*Bus. & Prof. Code § 5536.1(b)*]. The stamp also must provide a means for indicating the renewal date of the license [*Bus. & Prof. Code § 5536.1(b)*].

A licensed architect who signs and stamps plans, specifications, reports, or documents is not liable for damage caused by subsequent changes to or uses of those documents, including those made by state or local governmental agencies, if the architect did not authorize or approve in writing the subsequent changes or uses, provided that the architect did not unreasonably withhold the written authorization or approval and the architectural service rendered by the licensed architect was not also a cause of the damage [*Bus. & Prof. Code § 5536.25(a)*]. Moreover, the signing and stamping of plans, specifications, reports, or documents that relate to the design of fixed works does not impose a legal duty or responsibility on the signer to observe the construction of the fixed works that are the subject of the plans, specifications, reports, or documents [*Bus. & Prof. Code § 5536.25(b)*]. *Bus. & Prof. Code § 5536.25* does not, however, preclude an architect from agreeing to provide construction observation services, nor does it modify the liability of an architect for construction observation services that he or she has undertaken to render, contractually or otherwise [*Bus. & Prof. Code § 5536.25(b)*; *see also Bus. & Prof. Code §§ 6735.1, 8761.2* (similar provisions applicable to licensed civil engineers or land surveyors)].

A licensed architect's use of the words "certify" and "certification" merely constitutes an expression of professional opinion regarding those facts or findings that are the subject of the certification. It does not constitute an express or implied warranty or guarantee [*Bus. & Prof. Code § 5536.26*].

[4] Liability for Defective Construction in New Residences Sold on or After January 1, 2003

In accordance with Division 2, Part 2, Title 7 of the Civil Code, "Requirements for Actions for Construction Defects" [*Civ. Code § 895 et seq.*], any action against a design professional, seeking recovery of damages arising out of, or related to deficiencies in, residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction when the property involved is a new residential unit (excluding a condominium conversion) when the purchase agreement with the buyer was signed by the seller on or after January 1, 2003, is governed by detailed statutory standards related to the various functions and components of the building [*see Civ. Code §§ 896, 938*].

Design professionals may also be liable under Title 7 for damages to the extent that they cause, in whole or in part, a violation of a particular statutory construction standard as the result of a negligent act or omission or a breach of contract. All actions by a claimant or builder to enforce an express contract, or any provision of an express contract, against a design professional is preserved. Design professionals may be held joint and severally liable to the extent that they contribute to any specific violation of the statutory construction standards. This does not apply, however, to any design professional to which strict liability applies [*Civ. Code § 936*]. For complete discussion of Title 7 to Part 2 of

Division 2 of the Civil Code, see Ch. 104, *Building Contracts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 56.31 Cost Estimates

Unless cost estimates are expressly warranted, it is sufficient that they be reasonably made. An architect sometimes makes a mistaken estimate of the cost of certain construction. But the client may have sufficient notice to apprise a prudent person [*see Civ. Code § 19*] of the fact that he or she cannot complete the work for the sum of money the client intends to invest. In that case, the architect's mistake is not the proximate cause of the loss sustained by the client from the client's lacking the financial ability to complete the work. One to whom an architect gives an estimate of cost may not recklessly proceed to make contracts that may and probably would make the cost of construction far above that estimated and then hold the architect responsible for the surplus expenditure [*Benenato v. McDougall (1913) 166 Cal. 405, 407, 408, 137 P. 8*].

Gross knowing misrepresentation of a building's maximum cost, whether expressed as an opinion or a fact, gives rise to an action against the architect for deceit [*Barron Estate Co. v. Woodruff Co. (1912) 163 Cal. 561, 572, 574, 126 P. 351* ; *see generally* Ch. 269, *Fraud and Deceit*]. In such a case, when the client discovers the misrepresentation in mid-construction, the client has a right to abandon the unfinished building or to complete it at reasonable cost, without waiving his or her right of an action to recover damages for fraud and deceit [*Barron Estate Co. v. Woodruff Co. (1912) 163 Cal. 561, 577, 579, 126 P. 351*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawDesign Professionals

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§ 56.32 Statutes of Limitations

[1] General Provisions

The statute of limitations of an action on any contract, obligation, or liability founded on an instrument in writing is four years, with exceptions set forth in *Code Civ. Proc. §§ 336a, 337(1)* [*Code Civ. Proc. § 337(1)*]. If the contract, obligation, or liability is not founded on an instrument of writing, the limitations period is two years [*Code Civ. Proc. § 339(1)*].

The statute of limitations on an action for relief on the ground of fraud or mistake is three years; the cause of action in such a case is deemed not to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake [*Code Civ. Proc. § 338(d)*].

An action for injury to or for the death of one caused by the wrongful act or neglect of another is required to be brought within two years after the cause of action has accrued [*Code Civ. Proc. § 335.1*].

Actions for relief not otherwise provided for in *Code Civ. Proc. § 335 et seq.* (periods of limitation for actions other than for recovery of real property) must be commenced within four years after the cause of action has accrued [*Code Civ. Proc. § 343*].

With certain limited exceptions, any action related to construction defects in new residential units (excluding condominium conversions) when the purchase agreement with the buyer was signed by the seller on or after January 1, 2003, must be filed within 10 years after substantial completion of the residence, but not later than 10 years after the date a valid notice of completion was recorded [*see Civ. Code §§ 938, 941*]. For further discussion, see Ch. 104, *Building Contracts* .

[2] Improvements to Real Property (Patent Deficiency)

Except as otherwise provided below, no action shall be brought to recover damages from any person performing or furnishing the design, specifications, surveying, planning, supervision, or observation of construction or construction of

an improvement to real property more than four years after the substantial completion of the improvement for any of the following [*Code Civ. Proc. § 337.1*]:

- Any patent deficiency (deficiency apparent by reasonable inspection [*Code Civ. Proc. § 337.1(e)*]) in the design, specifications, surveying, planning, supervision, observation of construction, or construction of an improvement to, or survey of, real property [*Code Civ. Proc. § 337.1(a)(1)*];

- Injury to property, real or personal, arising out of the patent deficiency [*Code Civ. Proc. § 337.1(a)(2)*]; or

- Injury to the person or for wrongful death arising out of the patent deficiency [*Code Civ. Proc. § 337.1(a)(3)*].

If, by reason of the patent deficiency, an injury to property or the person or an injury causing wrongful death occurs during the fourth year after the substantial completion, an action in tort to recover damages for such an injury or wrongful death may be brought within one year after the date on which the injury occurred, irrespective of the date of death, but in no event may such an action be brought more than five years after the substantial completion of construction of the improvement [*Code Civ. Proc. § 337.1(b)*].

Nothing in the foregoing rule is to be construed as extending the period prescribed by the laws of California for the bringing of any action [*Code Civ. Proc. § 337.1(c)*]. The limitation period prescribed above is not to be asserted by way of defense by any person in actual possession or the control, as owner, tenant, or otherwise, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action [*Code Civ. Proc. § 337.1(d)*]. *Code Civ. Proc. § 337.1(a), (b),* discussed *above,* does not apply to any owner-occupied single unit residence [*Code Civ. Proc. § 337.1(f)*].

The four-year statute of limitations for patent defects specified by *Code Civ. Proc. § 337.1* does not apply to an action seeking damages for construction defects in new residential construction sold on or after January 1, 2003 [*Civ. Code § 941(d)*; *see* [1], *above*; *see also* Ch. 104, *Building Contracts*].

[3] Improvements to Real Property (Latent Deficiency)

No action [*see Code Civ. Proc. § 337.15(c)*] may be brought to recover damages from any person or the surety of a person who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement for any of the following [*Code Civ. Proc. § 337.15(a)*]:

- Any latent deficiency (deficiency that is not apparent by reasonable inspection) [*Code Civ. Proc. § 337.15(b)*] in the design, specification, surveying, planning, supervision, observation of construction, or construction of an improvement to, or survey of, real property [*Code Civ. Proc. § 337.15(a)(1)*].

- Injury to property, real or personal, arising out of the latent deficiency [*Code Civ. Proc. § 337.15(a)(2)*].

An action for indemnity arising out of any act within the scope of *Code Civ. Proc. § 337.15* is also barred. However, a cross complaint for indemnity arising from the same transaction or occurrence as that sued on in the complaint may be filed if the principal action is timely [*Code Civ. Proc. § 337.15(c)*; *see Code Civ. Proc. § 428.10(b)*]. For further discussion, see Ch. 300, *Indemnity and Contribution* .

An action for personal injury based on latent defects is not barred after 10 years [*Martinez v. Traubner (1982) 32 Cal.*

3d 755, 760, 187 Cal. Rptr. 251, 653 P.2d 1046].

Nothing in *Code Civ. Proc. § 337.15* is to be construed as extending the period prescribed by the laws of California for bringing any action [*Code Civ. Proc. § 337.15(d)*]. The limitation prescribed by the above rule is not to be asserted by way of defense by any person in actual possession or the control, as owner, tenant, or otherwise, of such an improvement at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to bring an action [*Code Civ. Proc. § 337.15(e)*]. Thisrule refers to the person in possession or control at the time that the deficiency becomes the proximate cause of the damages and not to the person in possession or control at the time of construction, that is, when the defective latent condition was designed, installed, or built into theimprovement [*Eden v. Van Tine (1978) 83 Cal. App. 3d 879, 886, 148 Cal. Rptr. 215*].

The 10-year limitation period does not apply to actions based on willful misconduct or fraudulent concealment [*Code Civ. Proc. § 337.15(f)*]. Willful misconduct encompasses not only intentional wrongdoing, but negligence of such a character as to constitute reckless disregard for the rights of others [*Felburg v. Don Wilson Builders (1983) 142 Cal. App. 3d 383, 391, 191 Cal. Rptr. 92*].

The 10-year period commences on substantial completion of the improvement, but not later than the earliest of the following [*Code Civ. Proc. § 337.15(g)*]:

- The date of final inspection by the applicable public agency.
- The date a valid notice of completion is recorded.
- The date of use or occupation of the improvement.
- One year after termination or cessation of work on the improvement.

The date of substantial completion relates specifically to the performance or furnishing of design, specifications, surveying, planning, supervision, testing, observation of construction, or construction services by each profession or trade rendering services to the improvement [*Code Civ. Proc. § 337.15(g)*; *see also* *Eden v. Van Tine (1978) 83 Cal. App. 3d 879, 883-885, 148 Cal. Rptr. 215*].

The statute may be tolled during any period when the contractor, who has breached a warranty, claims that the defect can be repaired and attempts to make repairs [*Cascade Gardens Homeowners Assn. v. McKellar & Associates (1987) 194 Cal. App. 3d 1252, 1255-1257, 240 Cal. Rptr. 113*]. Tolling is justified on the basis that the plaintiff is relying on the words or actions of the contractor who originally caused the problem. If the plaintiff obtains repairs by a third party, the statute is not tolled because the plaintiff is not relying on the defendant to remedy the problem; thus, there is no basis for tolling the statute [*A & B Painting & Drywall, Inc. v. Superior Court (1994) 25 Cal. App. 4th 349, 354-355, 30 Cal. Rptr. 2d 418* (court refused to extend rule of *Cascade Gardens* to situations where repairs were made by third parties)].

Legal Topics:

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

If a complaint for damages is filed against any architect, landscape architect, engineer, building designer, or land surveyor, duly licensed as such under the laws of California, in an action for error, omission, or professional negligence in the creation and preparation of plans, specifications, designs, reports, or surveys that are the basis for work performed or agreed to be performed on real property, any such defendant may, within 30 days after service of summons, move the court for an order, on notice and hearing, requiring the plaintiff to furnish an undertaking, in a sum not to exceed $500 as security for the costs of defense as provided in *Code Civ. Proc. § 1029.5(d)*, discussed *below*, which may be awarded against the plaintiff. The motion is to be supported by affidavit (declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) showing that the claim against the defendant is frivolous [*Code Civ. Proc. § 1029.5(a)*].

At the hearing on the motion, the court orders the plaintiff to file security if the defendant shows to the satisfaction of the court that (1) the plaintiff would not suffer undue economic hardship in filing the undertaking, and (2) there is no reasonable possibility that the plaintiff has a cause of action against each named defendant with respect to whom the plaintiff would otherwise be required to file the undertaking. No appeal is to be taken from any order made pursuant to *Code Civ. Proc. § 1029.5(a)* to file or not to file security [*Code Civ. Proc. § 1029.5(a)*].

The undertaking must be in writing and signed by the sureties under oath [*Code Civ. Proc. § 995.320(a)*]. It must be executed by two or more sufficient personal sureties, by one admitted surety insurer, or by any combination of sufficient personal sureties and admitted surety insurers [*Code Civ. Proc. § 995.310*]. For further discussion, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

A determination by the court that security either is or is not to be furnished or is to be furnished as to one or more defendants and not as to others, is not to be deemed a determination of any one or more issues in the action or of the merits. If the court, on any such motion, makes a determination that an undertaking be furnished by the plaintiff as to any one or more defendants, the action is to be dismissed as to those defendant or defendants, unless the security required by the court has been furnished within a reasonable time as may be fixed by the court [*Code Civ. Proc. § 1029.5(a)*].

Code Civ. Proc. § 1029.5 does not apply to a complaint for bodily injury or for wrongful death, nor to an action commenced in a small claims court [*Code Civ. Proc. § 1029.5(b)*].

If more than one defendant is named, the undertaking is to be increased in an amount not to exceed $500 for each additional defendant in whose favor the undertaking is ordered, not to exceed the total of $3,000 [*Code Civ. Proc. § 1029.5(c)*].

In any action requiring an undertaking as provided in *Code Civ. Proc. § 1029.5* (certain actions against architects and others), on the dismissal of the action or the award of judgment to the defendant, the court requires the plaintiff to pay the defendant's costs of defense authorized by law. Any sureties are to be liable for these costs in an amount not to exceed the sum of $500 or the amount of the undertaking, whichever is less, for each defendant with respect to whom these sureties have executed an undertaking [*Code Civ. Proc. § 1029.5(d)*; *see Code Civ. Proc. § 995.320*]. If the plaintiff prevails in the action against any defendant with respect to whomthe security has been filed, that defendant is required to pay the cost to plaintiff of obtaining the undertaking [*see Code Civ. Proc. § 995.250*].

The 10-year statute of limitations for latent defects specified by *Code Civ. Proc. § 337.15* does not apply to an action seeking damages for construction defects in new residential construction sold on or after January 1, 2003 [*Civ. Code § 941(d)*; *see § 56.32[1]*; *see also* Ch. 104, *Building Contracts*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-56 California Forms of Pleading and Practice--Annotated § 56.34

§ 56.34 Certificate of Merit

In any action for damages arising out of the professional negligence of a person holding a valid architect's license issued pursuant to *Bus. & Prof. Code § 5500 et seq.*, on or before the date of service of the complaint on any defendant, the plaintiff's attorney must file a certificate as prescribed in *Code Civ. Proc. § 411.35* [*see § 56.61*]. Failure to comply with the requirements of *Code Civ. Proc. § 411.35* is a ground for demurrer [*Code Civ. Proc. § 411.35(g)*; *see Code Civ. Proc. § 430.10(h)*; *but see Code Civ. Proc. § 92(c)* (prohibiting special demurrers in limited civil cases)] or a motion to strike [*Code Civ. Proc. § 411.35(g)*; *see Code Civ. Proc. § 435*; *but see Code Civ. Proc. § 92(d)* (prohibiting motions to strike in limited civil cases except on the ground that the damages or relief sought are not supported by the allegations of the complaint)], and may subject plaintiff's counsel to discipline [*Code Civ. Proc. § 411.35(f)*].

In addition, on the favorable conclusion of the litigation with respect to any party for whom a certificate of merit was filed or should have been filed pursuant to *Code Civ. Proc. § 411.35*, the trial court may, on a finding of noncompliance with *Code Civ. Proc. § 411.35(b)*, order the noncomplying party or the party's attorney to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of the failure to comply [*see Code Civ. Proc. § 411.35(h)*; *see also §§ 56.67, 56.68* (notice of motion and order, respectively)].

The requirement to furnish a certificate of merit is not eliminated or abrogated in an action against a design professional, for claims and damages that are not covered by the statutory scheme governing construction defect litigation for new residences sold on or after January 1, 2003 [*Civ. Code § 937*; *see Civ. Code § 895 et seq.*; *see also* Ch. 104, *Building Contracts*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 56.35 Penalty for Late Payments Due Subconsultant Design Professionals Under Public Works Contracts

The prime design professional (hereafter referred to as "the architect") under a contract for a public work of improvement must pay to each subconsultant design professional, within 15 days after receipt of each progress payment or final retention payment, the amount due the subconsultant [*Civ. Code § 3321(a)*]. If a progress or retention payment is wrongfully withheld or not timely paid, the subconsultant design professional will be entitled to a penalty of one and one-half percent of the amount due per month for every month that payment is not made. This penalty is in lieu of any interest that would otherwise be due. The prevailing party is entitled to attorneys' fees in any action involving a delay in making progress or retention payments [*Civ. Code § 3321(b)*].

Any penalty assessed is separate from, and in addition to, the architect's rights to a design professionals' lien or stop notice [*Civ. Code § 3321(c)*; *see § 56.23*]. These penalty provisions do not apply to situations involving construction loan funds held by a lender pursuant to a construction loan agreement [*Civ. Code § 3321(d)*].

Legal Topics:

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

§§ 56.36[Reserved]

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§ 56.40 Related Matthew Bender Publications

For memoranda relating to forms in this chapter, see California Points and Authorities, Ch. 43, *Common Counts and Bills of Particulars* , Ch. 50, *Contracts* , Ch. 65, *Damages* , Ch. 105, *Fraud and Deceit* , and Ch. 165, *Negligence* (Matthew Bender)

For legal forms relating to contracts between owners, architects, and engineers, see California Legal Forms, Ch. 30C, *Agreements With Architects, Engineers, and Other Design Professionals* (Matthew Bender)

For forms of interrogatories for use in actions for the recovery of fees by architects, see Bender's Forms of Discovery, *Architects* (Matthew Bender)

For forms of interrogatories for use in actions brought against architects regarding damages, see Bender's Forms of Discovery, *Architects* (Matthew Bender)

For forms of interrogatories for use in actions involving common counts, see Bender's Forms of Discovery, *Common Counts* (Matthew Bender)

For forms of interrogatories for use in actions regarding the creation, existence, and termination of contracts, see Bender's Forms of Discovery, *Contracts* (Matthew Bender)

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§ 56.41 State Statutes

[1] Generally

Misdemeanor to practice architecture without license. *Bus. & Prof. Code § 5536(a)*

Business entity or collaboration that includes architects and non-architects. *Bus. & Prof. Code §§ 5535.2, 5535.25*

Immunity from liability for licensed architects retained to provide independent quality review of plans and specifications in connection with residential construction. *Civ. Code § 43.99*

Requirements for actions for construction defects in new residential units sold on or after January 1, 2003. *Civ. Code §§ 895-945.5*

Subject of contract is required to be lawful. *Civ. Code § 1596*

Unlawful contracts. *Civ. Code § 1667*

Design professionals' lien. *Civ. Code § 3081.1 et seq.*

Mechanics' lien for architect. *Civ. Code § 3110*

Stop notice for public works available to persons designated in *Civ. Code § 3110*. *Civ. Code § 3181*

Penalty in lieu of interest for late payment due to design professional under contract for private work of improvement. *Civ. Code § 3319*

Time periods for public agency to make progress and final retention payments to design professional under contract for public works of improvement. *Civ. Code § 3320*

Time periods for prime design professional to make payments to subconsultant design professionals. *Civ. Code § 3321*

Damages for breach of contract. *Civ. Code §§ 3300-3321*

[2] Design

Proprietorship in design. *Civ. Code § 980*

[3] Government Contracts

Contract provision purporting to indemnify public agency by design professional against liability for claims against public agency is unenforceable except for claims arising from design professional's negligence, recklessness, or willful misconduct. *Civ. Code § 2782.8*

Government contracts with architects and engineers to be awarded after selection on basis of demonstrated competence, professional qualifications, and fair and reasonable prices. *Gov. Code §§ 4525-4529.5*

[4] Practice of Architecture

General provisions. *Bus. & Prof. Code §§ 5500-5502*

Administration. *Bus. & Prof. Code §§ 5510-5528*

Persons subject to provisions. *Bus. & Prof. Code §§ 5535-5539*

Issuance of licenses. *Bus. & Prof. Code §§ 5550-5557*

Disciplinary proceedings. *Bus. & Prof. Code §§ 5560-5590*

Revenue. *Bus. & Prof. Code §§ 5600-5604*

Professional architectural corporations. *Bus. & Prof. Code §§ 5610-5610.7*

[5] Liability

Licensed architect is not liable for damage caused by change to or use of plans, specifications, reports, or documents prepared by architect, provided change was not authorized in writing by architect, written authorization or approval of change was not unreasonably withheld by architect, and services rendered by architect did not also proximately cause damage. *Bus. & Prof. Code § 5536.25(a)*

Liability of licensed architects for supervision of construction. *Bus. & Prof. Code § 5536.25(b)*

Construction observation services defined. *Bus. & Prof. Code § 5536.25(c)*

Licensed architect's use of "certify" or "certification" does not constitute warranty or guarantee. *Bus. & Prof. Code § 5536.26*

Penalty assessed against prime design professional for wrongfully withholding or failing to timely pay subconsultant design professional's share of progresspayment or final retention payment. *Civ. Code § 3321(b)*

[6] Damages

Recovery of treble damages, and costs and attorney's fees in court's discretion, when unlicensed person causes injury or damage to another while providing goods or performing services for which specified licenses are required. *Code Civ. Proc. § 1029.8*

[7] Statutes of Limitations

Written contract. *Code Civ. Proc. § 337*

Patent defect in plans or construction. *Code Civ. Proc. § 337.1*

Latent defect in plans or construction. *Code Civ. Proc. § 337.15*

Fraud. *Code Civ. Proc. § 338(d)*

Contractual obligation not founded on writing. *Code Civ. Proc. § 339(1)*

Personal injury or death. *Code Civ. Proc. § 335.1*

Periods not otherwise provided for. *Code Civ. Proc. § 343*

[8] Undertaking

Procedures regarding bonds and undertakings generally. *Code Civ. Proc. §§ 995.010-996.560*

When required in action against architect. *Code Civ. Proc. § 1029.5*

Legal Topics:

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

[1] Generally

Bus. & Prof. Code § 5537, excluding from architect licensing requirements persons preparing plans for single family dwellings of wood frame construction not more than two stories high, does not restrict number of houses that person may design without architect's license. *Medak v. Cox (1970) 12 Cal. App. 3d 70, 77, 90 Cal. Rptr. 452*

Suspension of architect for dishonest practice must be supported by record making dishonesty apparent to all. *Coffman v. Board of Architectural Exam. (1933) 130 Cal. App. 343, 348, 19 P.2d 1002*

[2] License to Practice Architecture

Claim to fee by architect without certificate was denied because it was contrary to public policy of architectural certification statute. Force v. v *Hart (1930) 209 Cal. 600, 605, 289 P. 828* ; *Medak v. Cox (1970) 12 Cal. App. 3d 70, 77-79, 90 Cal. Rptr. 452* ; *Payne v. De Vaughn (1926) 77 Cal. App. 399, 404, 246 P. 1069*

In action by registered designer to recover fees on alternative breach of contract theories, designer's failure to sign contract and affix registration number to it as required by *Bus. & Prof. Code § 5536.1(b)* was at most technical violation not barring recovery. *Felix v. Zlotoff (1979) 90 Cal. App. 3d 155, 163, 153 Cal. Rptr. 301*

Architect's fees paid for work done by uncertificated designer is not recoverable by client, despite fact that payment of such fees would be against public policy, when both designer and client know designer to lack certificate. *Medak v. Cox (1970) 12 Cal. App. 3d 70, 78-79, 90 Cal. Rptr. 452*

Supervision of actual construction was within scope of architect's certificate and agency of builder; architect was not required to secure a contractor's license. *Wallich v. Salkin (1963) 219 Cal. App. 2d 157, 160-163, 33 Cal. Rptr. 125*

In partnership, uncertificated partner was required to be under supervision of certificated partner. *Palmer v. Brown*

(1954) 127 Cal. App. 2d 44, 54, 273 P.2d 306

Partnership was not required to advise client one partner was uncertificated. *Joseph v. Drew (1950) 36 Cal. 2d 575, 580, 225 P.2d 504*

[3] Mechanics' Lien

Mechanic's lien denied to architect when real property on which building to be designed by architect will be located is not physically benefited by architect's "pre-preliminary" plans to be used for a stock offering. *Design Associates, Inc. v. Welch (1964) 224 Cal. App. 2d 165, 173-174, 36 Cal. Rptr. 341*

Action by unlicensed architect to foreclose mechanic's lien was denied, based on his lack of a contractor's license. *Cash v. Blackett (1948) 87 Cal. App. 2d 233, 237, 196 P.2d 585*

[4] Recovery of Fees

Recovery of reasonable value of architectural services. *Havens v. Donahue (1896) 111 Cal. 297, 298-299, 43 P. 962* ; *Miller v. San Francisco Church Exten. Soc. (1932) 125 Cal. App. 85, 92, 13 P.2d 824* ; *see also White v. Kanrich (1962) 201 Cal. App. 2d 356, 357, 20 Cal. Rptr. 37* ; *Parker v. Maier Brewing Co. (1960) 180 Cal. App. 2d 630, 632-633, 4 Cal. Rptr. 825*

Damages measured using the estimated full cost of building, not partial cost of incomplete structure, when construction not completed and architect's fee was to be measured as percentage of construction costs. *Havens v. Donahue (1896) 111 Cal. 297, 298-299, 43 P. 962* ; *Stacy-Judd v. Stone (1932) 124 Cal. App. 165, 168, 12 P.2d 143*

Architect was entitled to recover percentage of construction cost provided by contract less actual expenses saved in not performing when performance of contract was prohibited. *Oliver v. Campbell (1954) 43 Cal. 2d 298, 302, 273 P.2d 15* ; *Miller v. San Francisco Church Extension Soc. of Methodist Episcopal Church (1932) 125 Cal. App. 85, 92, 13 P.2d 824* ; *cf. Kingsbury v. Arcadia Unified School Dist. (1954) 43 Cal. 2d 33, 43-44, 271 P.2d 40*

Recovery of reasonable value of services was barred, as well as recovery on the contract, when architect's design violated cost condition of contract and was of no use to client. *Spurgeon v. Buchter (1961) 192 Cal. App. 2d 198, 206-207, 13 Cal. Rptr. 354* ; *Rowell v. Crow (1949) 93 Cal. App. 2d 500, 503, 209 P.2d 149*

When parol evidence may be introduced to show existence of cost condition. *Crawford v. France (1933) 219 Cal. 439, 442-444, 27 P.2d 645* ; *Spurgeon v. Buchter (1961) 192 Cal. App. 2d 198, 204-205, 13 Cal. Rptr. 354* ; *Hudson v. Barneson (1919) 41 Cal. App. 633, 636-637, 183 P. 274*

[5] Duty

In determinations under construction contract, architect occupies position of trust and confidence, and must not favor client or contractor but must exercise impartial judgment. *Macomber v. State of California (1967) 250 Cal. App. 2d 391, 397-398, 58 Cal. Rptr. 393*

Architect who plans and supervises construction work as independent contractor is under duty to exercise ordinary care in course thereof forprotection of any person who foreseeably and with reasonable certainty may be injured by his or her failure to do so, even though such injury may occur after his or her work has been accepted by person engaging his or her services. *Cooper v. Jevne (1976) 56 Cal. App. 3d 860, 868, 128 Cal. Rptr. 724* ; see also *Montijo v. Swift (1963)*

219 Cal. App. 2d 351, 353, 33 Cal. Rptr. 133

Duty based on statute giving adjacent landowner right to lateral support of his or her soil, which architect must respect when plans call for architect's supervision of excavation. *Peak v. Richmond Elementary Sch. Dist. (1958) 161 Cal. App. 2d 366, 368-369, 326 P.2d 860*

[6] Fraud

Fraud is basis for liability against architect claiming to have unique skill or experience that he or she does not have, or giving opinion that building of certain type can be built for specified sum when he or she does not in fact believe so. *Barron Estate Co. v. Woodruff Co. (1912) 163 Cal. 561, 572, 126 P. 351*

Liability based on fraud when architects issued certificates to contractors showing satisfactory completion of work without ascertaining whether premises free from liens chargeable to contractors. *Palmer v. Brown (1954) 127 Cal. App. 2d 44, 47, 58-59, 273 P.2d 306*

Fraud and misrepresentation in respect to cost of proposed building by contractor-architect. *Goldberg v. Underhill (1950) 95 Cal. App. 2d 700, 701-702, 213 P.2d 516*

[7] Liability

A duty of reasonable care is owed persons other than those in privity of contract with the architect, and failure to do so may result in liability to any person who foreseeably and with reasonable certainty may be injured thereby. *Cooper v. Jevne (1976) 56 Cal. App. 3d 860, 868, 128 Cal. Rptr. 724*

Architect may be liable to lender with security interest in underlying real property. *U.S. Financial v. Sullivan (1974) 37 Cal. App. 3d 5, 12-14, 112 Cal. Rptr. 18*

Negligent execution of contract duty possibly gives rise to both cause of action in tort and in contract. *Eads v. Marks (1952) 39 Cal. 2d 807, 810-811, 249 P.2d 257* ; *Zurich Ins. Co. v. Kings Industries, Inc. (1967) 255 Cal. App. 2d 919, 923, 63 Cal. Rptr. 585*

Architect, by every contract, implies his or her possession of skill and ability and promise to exercise them reasonably and without neglect. *Benenato v. McDougall (1913) 166 Cal. 405, 408, 137 P. 8*

Architect who negligently supervises construction has liability separate and distinct from liability of the party who negligently performs actual building process. *Alexander v. Hammarberg (1951) 103 Cal. App. 2d 872, 879-880, 884, 230 P.2d 399*

[8] Negligent Design and Supervision

Negligence in failure to safeguard and make apparent stairway to bottom of steps. *Montijo v. Swift (1963) 219 Cal. App. 2d 351, 352-353, 33 Cal. Rptr. 133*

Negligence found in specification of supports, fastening, and weight of concrete sundeck. *Pieri v. Rosebrook (1954) 128 Cal. App. 2d 250, 258, 275 P.2d 67*

Public entity was principal of architect-agent liable when lumber of lower grade used to construct roof that workman

fell through, and when architect had authority to remedy condition, had notice of condition, and failed to remedy in reasonable time. *Paxton v. County of Alameda (1953) 119 Cal. App. 2d 393, 408-410, 259 P.2d 934*

Negligence was proximate cause of wrongful death of jackhammer operator who struck buried high-voltage wire that should have been located and identified by architect. *Mallow v. Tucker, Sadler & Bennett, Architects etc, Inc. (1966) 245 Cal. App. 2d 700, 702-703, 54 Cal. Rptr. 174*

Liability of architect-contractor for negligent design and execution of design. *Goldberg v. Underhill (1950) 95 Cal. App. 2d 700, 702, 213 P.2d 516*

Liability as based on breach of duty in issuing payment certificates to contractors without requiring proof that premises were free from subcontractor liens chargeable to the contractors and without carefully examining the work to see that it had been properly done. *Palmer v. Brown (1954) 127 Cal. App. 2d 44, 47, 58-59, 273 P.2d 306*

Expert testimony useful but not necessary for trier of fact to conclude that proper architectural supervision and design had not been employed when sun deck sagged and leaked. *Pieri v. Rosebrook (1954) 128 Cal. App. 2d 250, 258, 275 P.2d 67*

[9] Proximate Cause

When client knew [*Civ. Code § 19*] before letting contracts to build that cost would exceed architect's estimate, and proceeded to build, architect was not proximate cause of detriment. *Benenato v. McDougall (1913) 166 Cal. 405, 407, 137 P. 8*

[10] Relationship to Contractor

When contracting for plans and supervision, architect acts as independent contractor; but in supervising the contractor, architect acts as agent and representative of the owner. *Trane Co. v. Gilbert (1968) 267 Cal. App. 2d 720, 726, 73 Cal. Rptr. 279*

Negligent supervision and misrepresentation by architect that caused expense to contractor was recoverable from architect despite lack of privity. *United States v. Rogers & Rogers (S.D. Cal. 1958) 161 F. Supp. 132, 135-136*

[11] Standard of Care

Professional standard of care must be established by qualified expert testimony unless standard is a matter of common knowledge, but when standardof care is within knowledge of experts only, expert evidence is conclusive and cannot be disregarded. *Huber, Hunt & Nichols, Inc. v. Moore (1977) 67 Cal. App. 3d 278, 313, 136 Cal. Rptr. 603*

Breach of standard of care by architect must be proven by showing not only that architect deviated from customary architectural practices of locality but also that in deviating architect acted unreasonably. *Paxton v. County of Alameda (1953) 119 Cal. App. 2d 393, 399, 406, 259 P.2d 934*

Standard of care is standard of architectural practice that can only be established by having jury hear architects testify as to those practices. *Paxton v. County of Alameda (1953) 119 Cal. App. 2d 393, 399, 259 P.2d 934*

[12] Statute of Limitations

If plaintiff obtains repairs by third party, 10-year period of *Code Civ. Proc. § 337.15* is not tolled because plaintiff is not relying on defendant to remedy problem; thus, there is no basis for tolling statute. *A & B Painting & Drywall, Inc. v. Superior Court (1994) 25 Cal. App. 4th 349, 354-355, 30 Cal. Rptr. 2d 418*

Ten-year statute of limitations of *Code Civ. Proc. § 337.15* for latent defects is tolled during any period when contractor, who has breached warranty, claims that defect can be repaired and attempts to make repairs. *Cascade Gardens Homeowners Assn. v. McKellar & Associates (1987) 194 Cal. App. 3d 1252, 1255-1257, 240 Cal. Rptr. 113*

Ten-year limitation on actions alleging latent deficiency in property design is inapplicable to action for personal injuries caused by deficiency. *Martinez v. Traubner (1982) 32 Cal. 3d 755, 759, 760, 187 Cal. Rptr. 251, 653 P.2d 1046*

Ten-year statute of limitations of *Code Civ. Proc. § 337.15* for actions for latent defects is not applicable to actions for personal injuries; thus, action for indemnity for damages for personal injuries is not barred by *Code Civ. Proc. § 337.15*. *Grimmer v. Harbor Towers (1982) 133 Cal. App. 3d 88, 92-94, 183 Cal. Rptr. 634* ; *but see Ernest W. Hahn, Inc. v. Superior Court (1980) 108 Cal. App. 3d 567, 570-571, 166 Cal. Rptr. 644* (holding such indemnity action barred by *Code Civ. Proc. § 337.15*)

Code Civ. Proc. § 337.15 is constitutional when applied to person who did not learn of defect until after 10-year statute had run. *Barnhouse v. City of Pinole (1982) 133 Cal. App. 3d 171, 183-187, 183 Cal. Rptr. 881*

[13] Certificate of Merit

Building owner who consulted with structural engineer instead of architect complied with *Code Civ. Proc. § 411.35*, requiring the filing of a certificate of merit as a prerequisite to action for professional negligence against architect *Ponderosa Center Partners v. McClellan/Cruz/Gaylord & Associates (1996) 45 Cal. App. 4th 913, 53 Cal. Rptr. 2d 64*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawNonmortgage LiensMechanics' LiensTortsMalpractice & Professional LiabilityProfessional ServicesGovernmentsState & Territorial GovernmentsLicensesGovernmentsLegislationStatutes of LimitationsReal Property LawConstruction LawDesign Professionals

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§ 56.43 Attorney General Opinions

State Architect as not authorized to adopt standards for making privately funded facilities accessible to and usable by physically handicapped persons, but authorized to adopt such standards for publicly funded facilities regarding physically handicapped persons, including those with visual or auditory handicaps. *59 Ops. Cal. Att'y Gen. 324 (1976)*

Building design registration as expiring after one year, but renewal may be made at any future time; Board of Architectural Examiners as not requiring to give renewal notice, but may refer failure-to-renew matter for criminal prosecution. *58 Ops. Cal. Att'y Gen. 474 (1975)*

Construction manager or master builder as not required to be licensed as architect. *57 Ops. Cal. Att'y Gen. 421 (1974)*

Persons registered as building designer who subsequently becomes licensed architect as not capable of renewing building designer registration [*Bus. & Prof. Code § 5536.1*]. *55 Ops. Cal. Att'y Gen. 322 (1972)*

Practice of architecture in corporate form. *28 Ops. Cal. Att'y Gen. 373 (1956)*

What constitutes practice of architecture. *7 Ops. Cal. Att'y Gen. 45 (1946)*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityProfessional ServicesGovernmentsState & Territorial GovernmentsLicensesContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawDesign Professionals

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§ 56.44 Law Reviews

Polelle, *Who's on First, and What's a Professional? 33 U.S.F.L. Rev. 205 (1999)*

Comment, *"Show Me the Money!": A Comment on the Enforceability of "Pay-if-Paid" Clauses in Contracts for Professional Services, 33 U.S.F.L. Rev. 99 (1998)*

Unruh and Worden, *Liquidated Damages for Delay in Completion of Commercial Construction Projects: Are They Recoverable by the Owner When the Owner Contributes to the Delay? 34 Santa Clara L. Rev. 1 (1993)*

Note, *Architectural Malpractice: A Contract-Based Approach, 92 Harv. L. Rev. 1075 (1979)*

Note, *Design Professionals--Recognizing a Duty to Inform, 30 Hastings L.J. 729 (1979)*

Comment, *The Protection of Architectural Plans as Intellectual Property, 6 Loy. L. Rev. 97 (1973)*

Comment, *Copyright Protection for the Architect: Leaks in a Legal Lean-To, 8 Cal. W.L. Rev. 458 (1972)*

Comment, *Copyright Protection for Architectural Structures, 2 U.S.F. L. Rev. 320 (1968)*

Sweet and Sweet, *Architectural Cost Predictions: A Legal and Institutional Analysis, 56 Cal. L. Rev. 996 (1968)*

Comment, *Architect Tort Liability in Preparation of Plans and Specifications, 55 Cal. L. Rev. 1361 (1967)*

Sweet, *Owner-Architect-Contractor: Another Eternal Triangle, 47 Cal. L. Rev. 645 (1959)*

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6-56 California Forms of Pleading and Practice--Annotated § 56.45

§ 56.45 Text References

Witkin, California Procedure, vol. 4, *Pleading*, §§ 476-498, 514-531 (4th ed. 1997)

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 820-822, 861-866, 1032; vol. 2, *Insurance §§ 20-24*, 243; vol. 5-6, *Torts*, §§ 767-1373, 1545-1697 (10th ed. 2005)

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 674-728; vol. 6, *Torts*, §§ 729-1113, 1316-1430 (9th ed. 1988)

Attorney's Guide to California Construction Contracts and Disputes, § 7.3 (Cal. C.E.B. 2d ed. 1990)

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[Reserved]

§§ 56.46[Reserved]

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§ 56.50 Complaint for Architectural Services [Bus. & Prof. Code § 5500.1]--Agreed Fee (Indebitatus Assumpsit)

[1] FORM Complaint for Architectural Services [Bus. & Prof. Code § 5500.1]--Agreed Fee (Indebitatus Assumpsit)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONEY
_____ [*name(s)*],	)	(Common Count)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. At all times herein mentioned, plaintiff was licensed to practice architecture in California.

2. _____ [*Allege capacity and residence of defendant, e.g.,* Defendant _____ (*name*) is, and at all times herein mentioned was, a corporation organized and existing under the laws of California with its principal place of business in this state in _____ County [*if applicable*:, _____ Judicial District].

3. [Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-IV, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously

named defendants is indebted to plaintiff as hereinafter alleged, and that plaintiff's rights against such fictitiously named defendants arise from such indebtedness.)]

4. _____ [Within the last _____ (two *or* four) years *or* On or about _____ (*date*)], at _____ [*city*,], California, defendant became indebted to plaintiff in the agreed sum of $_____ for architectural services rendered by plaintiff to defendant at the special request of defendant.

5. Neither the whole nor any part of the above sum has been paid [except the sum of $_____], although demand has been made therefor, and thereis due and unpaid the sum of $_____ together with interest thereon at the rate of _____ percent per annum from _____ [*date*].

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____.

2. For interest at _____ percent per annum from _____ [*date*].

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form of complaint is for use to recover money under a common count on *indebitatus assumpsit*, which should not be confused with a common count for quantum meruit (the reasonable value of services) [for an allegation for use in a

common count on quantum meruit, *see § 56.51*]. This form should be used when the services were rendered for a fixed and agreed price.

[3] Allegations

The complaint alleges:

- The time within which the indebtedness arose (Paragraph 4) [*see Code Civ. Proc. §§ 337, 339*];
- The indebtedness (Paragraph 4);
- The consideration (Paragraph 4);
- Nonpayment after a demand for payment (Paragraph 5) [*Philpott v. Superior Court (1934) 1 Cal. 2d 512, 518-523, 36 P.2d 635* ; *Pike v. Zadig (1915) 171 Cal. 273, 276-277, 152 P. 923*];
- The capacity of defendant (Paragraph 2);
- Defendant's residence for venue purposes (Paragraph 2) [*see Code Civ. Proc. § 395(a)*]; and
- An optional allegation as to fictitiously named defendants (Paragraph 3) [*see Code Civ. Proc. § 474*].

The fact that plaintiff is an architect and licensed to practice in California may be alleged (Paragraph 1), although denial is properly a matter for defendant's answer [*Harris v. Bucher (1914) 25 Cal. App. 380, 382, 143 P. 796* ; for a form of affirmative defense, *see § 56.53*].

[4] Verification

Verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified)]. However, if the complaint is verified, the defendant is required to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446*] and is precluded from making a general denial in superior court actions and in some limited civil cases [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Allegations or Affidavit Showing Proper Venue

If the action is commenced as a limited civil case and is subject to *Code Civ. Proc. § 395(b)* (venue for action arising from offer or provision of goods, services, loans, or extensions of credit intended primarily for personal, family, or household use), facts showing that the action has been commenced in the proper court must be set forth in the complaint, verified by the oath of the plaintiff or of his or her attorney, or in an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) of the plaintiff or of his or her attorney filed with the complaint. If such an affidavit or declaration is filed with the complaint, a copy of it must be served with the summons. If the complaint or affidavit or declaration be not so filed, unless the court on such terms as may be just permits a later filing of the affidavit or declaration, no further proceedings shall be had in the action or proceeding, except to dismiss the same without prejudice [*Code Civ. Proc. § 396a(a)*; *see also* Ch. 20, *Allegations Commonly Used*].

[6] Interest

Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt [*Civ. Code §*

3287(a)]. Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed [*Civ. Code § 3287(b)*]. If the action is to recover the reasonable value of services, as opposed to the agreed price, the amount, character, or value of which can only be established by evidence in court, the plaintiff is not entitled to interest prior to verdict or judgment [*see Kingsbury v. Arcadia Unified School Dist. (1954) 43 Cal. 2d 33, 43-44, 271 P.2d 40* ; *Parker v. Maier Brewing Co. (1960) 180 Cal. App. 2d 630, 634-636, 4 Cal. Rptr. 825*].

[7] Common Counts

Common counts are appropriate where the contract on which the count is based is implied in fact or implied in law [*Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 793, 256 P.2d 947*] or, in an express contract where plaintiff has executed his or her obligations and nothing remains to be done thereunder except the payment of money by the defendant [*Ferro v. Citizens Nat. Trust & Sav. Bank (1955) 44 Cal. 2d 401, 409, 282 P.2d 849*], except that plaintiff may recover on a common count on an express contract partially unexecuted on his or her part if defendant prevented complete performance by plaintiff [*Rains v. Arnett (1961) 189 Cal. App. 2d 337, 342-343, 11 Cal. Rptr. 299*].

For further discussion, see Ch. 121, *Common Counts* .

[8] Cross References

For alternative fictitious name allegations and allegations of capacity and residence, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms of complaints of common counts, see Ch. 121, *Common Counts*

For forms involving mechanics' liens, see Ch. 361, *Mechanics' Liens*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively

For memoranda of points and authorities in support of and in opposition to a complaint of common count, see California Points and Authorities, ch. 43, *Common Counts and Bills of Particulars* (Matthew Bender)

Witkin, California Procedure, vol. 4, *Pleading*, §§ 514-531 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawDesign Professionals

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6-56 California Forms of Pleading and Practice--Annotated § 56.51

§ 56.51 Allegations--For Reasonable Value of Services (Quantum Meruit)

[1] FORM Allegations--For Reasonable Value of Services (Quantum Meruit)

1. _____ [Within the last _____ (two *or* four) years *or* On or about _____ (*date*)] at _____ [*city*], _____ County, California plaintiff rendered architectural services to defendant to wit: _____ [*specify, e.g.*, conferred with and advised defendant concerning the proposed building, prepared preliminary studies, prepared plans and working drawings, let bids, supervised construction, *etc.*].

2. At all times herein mentioned the above services were and are of the reasonable value of $_____, neither any part nor the whole of which has been paid [except $_____].

[2] Use of Form

The allegations in [1], *above*, are for use in an action in which the architect seeks to recover the reasonable value of his or her services. The allegations may be inserted in a complaint, such as the one in § 56.50[1] in place of the allegations in Paragraphs 4 and 5 of that form.

[3] Damages

Damages may be measured by the reasonable value of an architect's services if the client terminates the contract without just cause [*Hart v. Buckley (1912) 164 Cal. 160, 163, 128 P. 29*].

The reasonable value of services is recoverable when the architect has chosen to treat the contract as rescinded or no basis of compensation is stated [*Havens v. Donahue (1896) 111 Cal. 297, 298-299, 43 P. 962* ; *Miller v. San Francisco Church Exten. Soc. (1932) 125 Cal. App. 85, 92, 13 P.2d 824* ; *Kimes v. Davidson Inv. Co. (1929) 101 Cal. App. 382, 385-386, 281 P. 639*].

A schedule of fees published by an architect's association is competent evidence of the value of services recoverable in

quantum meruit [*Laver v. Hotaling (1897) 115 Cal. 613, 616, 47 P. 593*].

[4] Interest

Interest before judgment [*Civ. Code § 3287*] is not available in an action in quantum meruit where there is no express contract or where there is a contract but the value of the services can only be established by evidence rather than from face of the contract or reference to established market values [*Parker v. Maier Brewing Co. (1960) 4 Cal. Rptr. 825*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawDesign ProfessionalsContracts LawRemediesEquitable ReliefQuantum Meruit

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6-56 California Forms of Pleading and Practice--Annotated § 56.52

§ 56.52 Complaint for Damages for Breach of Contract for Architectural Services--Anticipatory Breach [Civ. Code § 1440]

[1] FORM Complaint for Damages for Breach of Contract for Architectural Services--Anticipatory Breach [Civ. Code § 1440]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Breach of Contract)
_____ [*name(s)*],	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. At all times herein mentioned, plaintiff was certificated to practice architecture in California.

2. [*Capacity and residence of defendant. See § 56.50, Paragraph 2.*]

3. On or about _____ [*date*], plaintiff and defendant entered into _____ [a written *or* an oral] agreement whereby defendant employed plaintiff as an architect for the construction of _____ [*type of structure*] to be erected in _____ County, California. _____ [*If contract is oral, specify pertinent provisions. If contract is written, plead accordingly to its legal effect or set forth its exact words or attach a copy as an exhibit.*]

4. On or about _____ [*date*], plaintiff received a _____ [*specify, e.g.*, letter from defendant] dated _____ [*date*], giving notice that defendant would not perform the contract and totally repudiated it. [A copy of defendant's _____ (*specify, e.g.*, letter) is attached hereto as Exhibit "A" and made a part hereof]. Defendant's repudiation was not retracted before the time at which defendant's performance was due.

5. At the time plaintiff received defendant's repudiation, plaintiff had performed all conditions, covenants, and promises under the contract which were then to be performed by him [except _____ (*describe condition*), the performance of which was excused on the ground that _____ (*specify*)], and plaintiff was ready, able, and willing to complete performance.

6. As a result of defendant's breach of the contract, plaintiff has lost the profit to be realized therefrom in the sum of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For compensatory damages in the sum of $_____.

2. For interest on the sum of $_____ from and after _____ [*date*] at the rate of _____ percent per year.

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 56.50.*]

[2] Use of Form

The form of complaint in [1], *above*, is for use to obtain damages for breach of a contract for architectural services where the defendant gives notice prior to the time for his or her performance that he or she will not perform [*see Civ. Code § 1440*]. Although neither the conditions in the contract nor time specified for defendant's performance have occurred, an immediate right of action accrues to the architect when the client communicates a definite and unconditional repudiation [*Daum v. Superior Court (1964) 228 Cal. App. 2d 283, 287, 39 Cal. Rptr. 443*].

[3] Allegations

The complaint in [1], *above*, alleges:

- The existence of the contract and its nature as written or oral [*Code Civ. Proc. § 430.10(g)*];
- Its terms or legal effect (Paragraph 3);
- Anticipatory breach (Paragraph 4) [*see Jeppi v. Brockman Holding Co. (1949) 34 Cal. 2d 11, 18, 206 P.2d 847* ; *Daum v. Superior Court (1964) 228 Cal. App. 2d 283, 287-288, 39 Cal. Rptr. 443*].

If a party to an obligation gives notice to another, before the latter is in default, that he or she will not perform the same on his or her part, and does not retract such notice before the time at which performance on his or her part is due, such other party is entitled to enforce the obligation without previously performing or offering to perform any conditions on his or her part in favor of the former party [*Civ. Code § 1440*]. Anticipatory breach thus creates a cause of action for damages, a right of rescission, or right to stand on contract until after failure to perform on stated date [*Jeschke v. Lamarr (1965) 234 Cal. App. 2d 506, 511, 44 Cal. Rptr. 416]* . For this reason, the pleading of performance or excuse appears optional, although it is customary (Paragraph 5). In addition, plaintiff need not allege that he or she is an architect, although it is customary (Paragraph 1) [*Harris v. Bucher (1914) 25 Cal. App. 380, 382, 143 P. 796*].

Finally, in case of anticipatory breach, venue is found in the county from which letter repudiating the contract was posted rather than the county of receipt [*Karson Industries, Inc. v. Superior Court (1969) 273 Cal. App. 2d 7, 9-10, 77 Cal. Rptr. 714*].

[4] Damages

For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by the Civil Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom [*Civ. Code § 3300*]. The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon [*Civ. Code § 3302*]. No damages can be recovered for a breach of a contract which are not clearly ascertainable in both their nature and origin [*Civ. Code § 3301*].

[5] Cross References

For additional discussion and references relating to complaints generally, see *§ 56.50[4]* et seq.

See generally Ch. 140, *Contracts*

For related memoranda of points and authorities, see 5 California Points and Authorities, ch. 50, *Contracts* (Matthew Bender)

Witkin, California Procedure, vol. 4, *Pleading*, §§ 368, 479-498 (4th ed. 1997)

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 820-822, 861-869; vol. 2, *Insurance*, § 73 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachAnticipatory RepudiationGeneral OverviewContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawDesign Professionals

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 56 ARCHITECTS
PART IV. FORMS
A. Actions by Architects

6-56 California Forms of Pleading and Practice--Annotated § 56.53

§ 56.53 Affirmative Defense--Lack of Architect's License [Bus. & Prof. Code § 5536(a)]

[1] FORM Affirmative Defense--Lack of Architect's License [Bus. & Prof. Code § 5536(a)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. The services allegedly performed by plaintiff pursuant to the contract alleged in plaintiff's complaint are architectural services within the meaning of *Section 5500.1 of the Business and Professions Code*. [*If insufficiently pleaded in complaint, set out the contract in exact words, set out its legal effect, or incorporate it and attach a copy.*]

2. Plaintiff _____ [is not, and never has been, *or* at the time of his/her performance under the contract was not] licensed as an architect in the State of California. Plaintiff's alleged performance of the services required under the contract is thereby illegal and in violation of *Section 5536 of the Business and Professions Code*. The contract alleged in plaintiff's complaint is against the public policy of *Section 5536 of the Business and Professions Code* and the State of California and is unenforceable.

[2] Use of Form

The affirmative defense in [1], *above*, is for use in an answer to a complaint by an architect to recover for his or her services. A contract for architectural services, where the architect is not licensed [*see § 56.11*] is unenforceable [*Civ. Code §§ 1596, 1667(2)*; *Force v. Hart (1930) 209 Cal. 600, 605, 289 P. 828* ; *Medak v. Cox (1970) 12 Cal. App. 3d 70, 77-79, 90 Cal. Rptr. 452*] and this defect is properly raised in the answer [*Palmer v. Brown (1954) 127 Cal. App. 2d 44, 55, 273 P.2d 306*].

[3] Practice of Architecture

The practice of architecture within the meaning and intent of *Bus. & Prof. Code § 5500 et seq.* is defined as offering, performing, or being in responsible control of, professional services that require the skills of an architect in the planning

of sites, and the design, in whole or in part, of buildings, or groups of buildings and structures [*Bus. & Prof. Code § 5500.1(a)*]. "Responsible control" means that amount of control over the content of all architectural instruments of service during their preparation that is ordinarily exercised by architects applying the required professional standard of care [*Bus. & Prof. Code § 5535.1*].

Architects' professional services may include any or all of several specified services [*Bus. & Prof. Code § 5500.1(b)*; *see § 56.11[1*]].

A plaintiff suing on an express contract need not plead compliance with licensing requirements, but the issue is properly raised by defendant in order to defeat recovery [*Harris v. Bucher (1914) 25 Cal. App. 380, 382, 143 P. 796*].

[4] Cross References

Witkin, California Procedure, vol. 5, *Pleading*, §§ 1000, 1008-1014, 1023-1025 (4th ed. 1997)

Witkin, Summary of California Law, vol. 1, *Contracts*, § 487 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawDesign Professionals

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6-56 California Forms of Pleading and Practice--Annotated §§ 56.54-56.59

[Reserved]

§§ 56.54[Reserved]

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Chapter 56 ARCHITECTS
PART IV. FORMS
B. Actions Against Architects

6-56 California Forms of Pleading and Practice--Annotated § 56.60

§ 56.60 Complaint for Damages for Personal Injuries Based on Negligence--Against Architect--Collapse of Building Platform

[1] FORM Complaint for Damages for Personal Injuries Based on Negligence--Against Architect--Collapse of Building Platform

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Negligence)
_____ [*name(s)*],	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. _____ [*Allege capacity and residence of defendant, e.g.*, Defendant is, and at all times herein mentioned was, a resident of _____ County [*if applicable*:, _____ Judicial District].

2. At all times herein mentioned defendant was and is an architect duly certified to practice as such in California.

[3. The true names and capacities of defendants sued herein as DOES I-IV are unknown to plaintiff who therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to show their true names and capacities when the same have been ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously

named defendants is responsible in some manner for the occurrences herein alleged and that plaintiff's injuries as herein alleged were proximately caused thereby.)]

4. Prior to _____ [*date*], defendant drew and prepared certain plans and specifications for and supervised the construction of a building located at _____, in _____ County, California. The building, its appurtenances, and particularly _____ [*specify appurtenance on which plaintiff was injured, e.g.,* a loading platform] attached thereto, were constructed in accordance with the plans and specifications prepared and drawn up by defendant, and under defendant's supervision.

5. At all times herein mentioned, and particularly at the time he/she drew the plans and specifications and supervised the construction, defendant knew, or in the exercise of reasonable care should have known, that_____ [*specify knowledge with which charged, e.g.,* objects and people aggregating substantial weight would be placed on the _____ (*e.g.,* loading platform) and that the materials or the design specified by defendant for the construction thereof were inadequate or improper for the support of such weight].

6. Defendant so negligently, carelessly, and unlawfully prepared and drew the plans and specifications, and supervised the construction of the _____ [*e.g.,* loading platform] that on or about _____ [*date*], while plaintiff was on the premises and on the _____ [*e.g.,* platform], it was caused to and did _____ [*specify particular occurrence causing injury, e.g.,* collapse], causing plaintiff to fall violently to the ground.

7. As the proximate result of the negligence of defendant, and of the _____ [*e.g.,* collapse of the loading platform], plaintiff was injured in his/her health, strength, and activity, sustaining bodily injuries and shock and injury to his/her nervous system, which have caused and will cause him great mental and physical pain and suffering, all to his/her general damage [in the sum of $_____]. [Plaintiff is informed and believes, and on such information and belief alleges, that said injuries will result in some permanent disability to him.]

8. As a further proximate result of the negligence of defendants, and each of them, plaintiff has incurred [and will continue to incur] medical and related expenses [in the sum of $_____].

9. At the time of the injuries, plaintiff was _____ [employed *or* employable] in his/her usual occupation [as a _____ (*specify*)], and as a further proximate result of the negligence of defendant and by reason of the injuries suffered by him, plaintiff was prevented from attending to such occupation from _____ [*date*], through _____ [*e.g.,* the present] and thereby lost earnings. Plaintiff is informed and believes and thereon alleges that he/she will continue to be prevented from attending to _____ [his/her *or* any] occupation for a period in the future, and will thereby lose future earnings. [The full amount of the loss of earnings, past and future, is _____ ($_____ *or* unknown to plaintiff at this time, and plaintiff will seek leave to amend this complaint to state such amount when the same becomes known to him, or on proof thereof).]

WHEREFORE, plaintiff prays for judgment against defendant as follows:

1. For general damages [in the sum of $_____].

2. For medical and related expenses [_____ (in the sum of $_____ *or* according to proof)].

3. For lost earnings, past and future[, _____ (in the sum of $_____ *or* according to proof)].

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 56.50.*]

[*Add if appropriate (see below)*]

ATTORNEY'S CERTIFICATE [*Code Civ. Proc. § 411.35(d)*]

I certify that in this action I am relying solely on the doctrine[s] of _____ [res ipsa loquitur as defined by *Section 646 of the Evidence Code and/or* failure to inform of the consequences of a procedure], for which reason a certificate required by subdivision (a) of *Section 411.35 of the Code of Civil Procedure* will not be filed.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

This complaint is for use by a person injured by the collapse of a building platform to bring an action against the architect who drew the plans and specifications and supervised the construction to recover damages for personal injuries based on negligence.

[3] Allegations

The complaint alleges [*see Dillon v. Legg (1968) 68 Cal. 2d 728, 733-734, 69 Cal. Rptr. 72, 441 P.2d 912* ; *Montijo v. Swift (1963) 219 Cal. App. 2d 351, 353, 33 Cal. Rptr. 133*]:

- Defendant's duty (Paragraphs 2, 4, 5);
- Breach of duty (Paragraph 6); and
- Injury and damages as a proximate result thereof (Paragraphs 7-9).

[4] Specification of Damages

In a superior court action that is not a limited civil case, brought to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*]. Therefore, if using this form in that type of case, do not use the optional clauses in brackets that give the amounts of damages.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

Otherwise, the amounts claimed as damages must be alleged [*Code Civ. Proc. § 425.10(a)(2)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[5] Attorney's Certificate

If the theory of relief is res ipsa loquitur [*see Evid. Code § 646* (definition)] or failure to inform of the consequences of a procedure, a certificate to that effect executed by plaintiff's counsel should be appended to the complaint [*see Code Civ. Proc. § 411.35(d)*]. In that event, a certificate of merit [*see § 56.61*] need not be filed. Otherwise, however, the complaint is subject to a motion to strike or demurrable, and plaintiff's counsel may be subjected to discipline, if a certificate of merit is not filed in compliance with *Code Civ. Proc. § 411.35(a),(b)* [*see Code Civ. Proc. §§ 430.10(h), 411.35(f),(g)*; *but see Code Civ. Proc. § 92(c), (d)* (respectively prohibiting special demurrers in limited civil cases and allowing motions to strike in such actions only on the ground that the damages or relief sought are not supported by the allegations of the complaint)].

[6] Cross References

For a general discussion of architect liability, see *§ 56.30*.

For additional discussion and references relating to complaints generally, see *§ 56.50[4]* et seq.

See generally Ch. 380, *Negligence*

For forms of alternative allegations as to capacity and residence of parties, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms of prayers and verification, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively

For memoranda of points and authorities in support of and in opposition to a general demurrer to a complaint to recover damages based on negligence,see 16 California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender)

5 PIADD, *Negligence*, §§ 1-4 (Matthew Bender)

Witkin, Summary of California Law, vol. 2, *Insurance*, *§§ 9-10*, *14-16*, *36*, 85, *115*, 139-139, *152*, 159, 162-215, 233-237, 241, 246, *252-276*, *282-311*, 315, 316, 318, 322, 324, 325, *330*; vol. 6, *Torts*, §§ 831-1402, 1545-1697 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityProfessional ServicesContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawDesign Professionals

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6-56 California Forms of Pleading and Practice--Annotated § 56.61

§ 56.61 Attorney's Certificate [of Merit] [Code Civ. Proc. § 411.35]

[1] FORM Attorney's Certificate [of Merit] [Code Civ. Proc. § 411.35]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ATTORNEY'S CERTIFICATE [OF MERIT]
Defendant.	)	
	)	
	)	

_____

[*EITHER*]

I, _____ [*name of attorney*], hereby certify that I have reviewed the facts of this case, I have consulted with and received an opinion as to _____ [defendant's *or* cross defendant's] professional negligence from at least one architect who is licensed to practice and _____ [practices in _____

(California *or specify other state*) *or* teaches at a[n] _____ (accredited college *or* university)], who is in the same discipline as _____ [defendant *or* cross defendant] and who is not a party to this litigation, and whom I reasonably believe to be knowledgeable in the relevant issues involved in this case, and I have concluded on the basis of this review and consultation that there is reasonable and meritorious cause for commencing this action.

[*OR*]

I, _____ [*name of attorney*], hereby certify that I have made three separate good-faith attempts to consult with three separate architects, each of whom is licensed to practice and practices in California or another state or teaches at an accredited college or university and each of whom I reasonably believe to be knowledgeable in the relevant issues involved in this case, but none of those contacted would agree to the consultation.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The form of certificate in [1], *above*, is for use by plaintiff's counsel in any action, including any cross complaint, for damages or indemnity arising out of the professional negligence of a person holding a valid architect's license issued pursuant to *Bus. & Prof. Code § 5500 et seq.*, in compliance with the requirements of *Code Civ. Proc. § 411.35* discussed in the following subsections.

[3] Requirement of Attorney's Certificate

In any action for damages arising out of the professional negligence of a person holding a valid architect's certificate issued pursuant to *Bus. & Prof. Code § 5500 et seq.*, plaintiff's counsel is required to file a certificate as follows:

- If counsel intends to rely solely on the doctrine of res ipsa loquitur as defined by *Evid. Code § 646*, or exclusively on a failure to inform of the consequences of a procedure, or both, counsel must file a certificate to that effect, when the complaint is filed; and in that event, a certificate in the form illustrated above need not be filed [*Code Civ. Proc. § 411.35(d)*]. Such a certificate, when counsel relies on one or the other or both of those doctrines, may conveniently be appended to the complaint [*see* Form 5].

- Otherwise, counsel must, on or before the date of service of the complaint on any defendant, file and serve a certificate in the form illustrated above [*see Code Civ. Proc. § 411.35(a)*].

The term "action" includes a complaint or cross complaint for equitable indemnity arising out of the rendition of professional services, whether or not the complaint or cross complaint specifically asserts or utilizes the terms "professional negligence" or "negligence" [*Code Civ. Proc. § 411.35(i)*].

[4] Contents of Certificate

The certificate will be one or the other of the following forms:

- An "Attorney's Certificate of Merit" declaring that counsel has reviewed the facts of the case, that counsel has consulted with and received an opinion as to the defendant's or cross defendant's professional negligence from at least one architect who is licensed to practice and practices in California or another state or teaches at an accredited college or university, who is in the same discipline as the defendant or cross defendant, who is not a party to the litigation, and whom counsel reasonably believes to be knowledgeable in the relevant issues involved in the case, and that counsel has concluded on the basis of this review and consultation that there is reasonable and meritorious cause for commencing the action [*Code Civ. Proc. § 411.35(b)(1)*]; or

- An "Attorney's Certificate" declaring that counsel was unable to obtain the consultation referred to in Paragraph (1) because, although counsel made three separate good-faith attempts with three separate (and appropriately credentialed) architects to obtain the consultation, none of those contacted would agree to the consultation [*Code Civ. Proc. § 411.35(b)(3)*].

The governing statute also provides for a third alternative, a certificate declaring that counsel "was unable to obtain the consultation required by [P]aragraph (1) because a statute of limitations would impair the action and that the certificate required by [P]aragraph (1) could not be obtained before the impairment of the action" [*Code Civ. Proc. § 411.35(b)(2)*]. However, such a certificate would serve no purpose. The action may be commenced to avoid the bar of limitation, without the filing of any certificate (except when counsel relies on res ipsa loquitur or failure to inform; *see § 56.60*). The statute requires the filing and service of a certificate, in the form illustrated above, on or before the date of *service* of the complaint on any defendant [*Code Civ. Proc. § 411.35(a)*], not on the date of filing the complaint.

[5] Multiple Defendants

Only one certificate need be filed, notwithstanding that two or more defendants may be named in the complaint or may be named at a later time [*Code Civ. Proc. § 411.35(c)*]. The certificate must be filed and served on or before the date of first service on any of the defendants [*Code Civ. Proc. § 411.35(a)*].

[6] Disclosing Consultants' Identities or Statements

Subject to *Evid. Code § 912* (waiver of privilege against disclosure), an attorney who submits a certificate of merit pursuant to *Code Civ. Proc. § 411.35(b)(1)* has a privilege to refuse to disclose the identity of the consultant or the substance of the consultation, and the consultant has the same privilege [*Code Civ. Proc. § 411.35(e)*].

If counsel submits a certificate pursuant to *Code Civ. Proc. § 411.35(b)(3)*, to the effect that attempts to obtain consultation were unavailing, the court may require counsel to divulge the names of those who were contacted and refused to give consultation [*Code Civ. Proc. § 411.35(e)*].

[7] Consequences of Noncompliance With Statute

Failure to file a required certificate is a ground for demurrer to the complaint [*Code Civ. Proc. § 411.35(g)*; *see Code Civ. Proc. § 430.10(h)* (grounds for demurrer); *but see Code Civ. Proc. § 92(c)* (prohibiting special demurrers in limited civil cases)] or a motion to strike [*Code Civ. Proc. § 411.35(g)*; *see Code Civ. Proc. § 435*; *but see Code Civ. Proc. § 92(d)* (prohibiting motions to strike in limited civil cases except on the groundthat the damages or relief sought are not supported by the allegations of the complaint)], and may subject plaintiff's counsel to discipline [*Code Civ. Proc. § 411.35(f)*].

In addition, on the favorable conclusion of the litigation with respect to any party for whom a certificate of merit was filed or should have been filed pursuant to *Code Civ. Proc. § 411.35*, on the motion of a party or on the court's own

motion, the trial court may verify compliance with the statute by requiring the attorney for the plaintiff or cross complainant who was required to execute the certificate to reveal the name, address, and telephone number of the person or persons consulted pursuant to *Code Civ. Proc. § 411.35(b)*. If the trial judge finds there has been a failure to comply with the statute, the court may order a party, a party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of the failure to comply [*Code Civ. Proc. § 411.35(h)*]. For forms of motion and order under *Code Civ. Proc. § 411.35(h)*, see *§§ 56.67* and *56.68*, respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityProfessional ServicesContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawDesign ProfessionalsCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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B. Actions Against Architects

6-56 California Forms of Pleading and Practice--Annotated § 56.62

§ 56.62 Complaint for Damages--Against Architect--Negligent and Substandard Preparation of Material Specifications for Hotel

[1] FORM Complaint for Damages--Against Architect--Negligent and Substandard Preparation of Material Specifications for Hotel

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Negligence; Breach of Contract)
_____ [*name(s)*],	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 56.60, Paragraph 1.*]

2. At all times herein mentioned defendant was, and still is, an architect duly certified to practice as such in California.

3. [*Fictitious name allegation, if appropriate. See § 56.60, Paragraph 3.*]

4. At all times herein mentioned, plaintiff was, and still is, the owner of certain real property and a hotel building thereon, located at _____ [*address*], _____ [*city*], California.

5. On or about _____ [*date*], plaintiff and defendant entered into _____ [a written *or* an oral] agreement whereby plaintiff employed defendant as architect for _____ [*describe particular improvement, e.g.*, designing and installing heating equipment in plaintiff's hotel] to be carried on in _____ County, California. _____ [*If contract is oral, specify pertinent portions. If contract is written, plead according to its legal effect, set forth its exact words, or attach a copy as an exhibit*].

6. Thereafter, in accordance with the agreement, defendant prepared plans and specifications, blueprints, and other data for the construction [and installation], and, as provided in the agreement, rendered opinions and recommendations in connection with the foregoing.

7. Plaintiff has performed all conditions, covenants, and promises under the agreement, on his/her part to be performed [including the payment in the sum of $_____ as the fee specified in the agreement].

8. Defendant, in preparing the plans and specifications and in rendering the opinions and recommendations, negligently and wrongfullyrecommended and specified _____ [*e.g.*, that sheet metal hot air ducts and warm air distributing piping be installed, lagged, and covered with a substance known as _____ (*specify*), further represented that _____ (*specify*) was suitable and proper for use as a covering for the hot air ducts and warm air distributing piping, and further represented that _____ (*specify*) was noninflammable and was, in fact, fireproof and adequate protection as an insulator for the ducts and piping].

9. In fact and in truth _____ [*specify why plans and specifications were negligently drawn, e.g.*, _____ (*specify substance*) was flammable and inadequate, dangerous, and unsafe for such use], all of which defendant knew, or in the exercise of ordinary care should have known, at the time he/she prepared the plans and specifications and rendered the opinions and recommendations.

10. Plaintiff, relying on the plans, specifications, blueprints, drawings, opinions, and recommendations, had the construction [and installation] done and made in accordance with the foregoing.

11. The injury and damage described below was proximately caused by the defect in the _____ [*e.g.*, heating equipment], and by the defendant's negligent, improper, and unskilled preparation of the plans and specifications, blueprints, drawings, opinions, and recommendations, in recommending _____ [*e.g.*, use of _____ (*specify*) as a covering for the hot air ducts]. Because of the negligently prepared plans and specifications, and as a proximate result of them, the entire _____ [*e.g.*, heating plant] was so designed as to be unsafe and highly dangerous when used normally, all of which defendant knew or should have known.

12. Thereafter, or about _____ [*date*], _____ [*specify injury caused by negligently drawn plans and specifications, e.g.*, fires occurred on the hotel premises,] by reason of which plaintiff's hotel building was damaged in the amount of $_____ and contents in the building were damaged or destroyed in the further amount of $_____.

13. [*Allege other relief, such as recovery of payments made to defendant or damages for loss of use of premises.*]

WHEREFORE, plaintiff prays judgment as follows:

1. For damage to plaintiff's property in the sum of $_____.

2. _____ [*Specify other relief.*]

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 56.50.*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action against an architect for damages resulting from his or her deficient design and specification of a hotel heating system. It characterizes the architect's errors as both a breach of his or her professional duty of adequate performance under the contract and a breach of the general duty to plaintiff to practice architecture with the same standard of care of architects in that locality [*see Eads v. Marks (1952) 39 Cal. 2d 807, 810-811, 249 P.2d 257* ; *Zurich Ins. Co. v. Kings Industries, Inc. (1967) 255 Cal. App. 2d 919, 923, 63 Cal. Rptr. 585* (tortious breach of contract)].

This cause of action might be joined with one based on strict liability against the manufacturer and supplier of defective building material [*see* Ch. 460, *Products Liability*].

[3] Cross References

For additional discussion and references relating to complaints against architects for professional negligence generally, see *§ 56.60[5]* et seq.

See generally, Ch. 140, *Contracts* ; Ch. 380, *Negligence*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityProfessional ServicesContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawDesign ProfessionalsCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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Chapter 56 ARCHITECTS
PART IV. FORMS
B. Actions Against Architects

6-56 California Forms of Pleading and Practice--Annotated § 56.63

§ 56.63 Complaint for Damages--Against Architect--Negligent Supervision of Construction

[1] FORM Complaint for Damages--Against Architect--Negligent Supervision of Construction

[*Caption. See § 56.62.*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 56.60, Paragraph 1.*]

2. At all times herein mentioned, defendant was, and still is, an architect duly certified to practice as such in California.

3. [*Fictitious name allegation, if appropriate. See § 56.60, Paragraph 3.*]

4. On or about _____ [*date*], plaintiff purchased from _____ [*name*] certain lands and premises in _____ County, California, commonly known as _____ [*street address or other identification*]. The contract of purchase for the premises provided that the vendor would complete the construction of a partly completed building standing thereon.

5. On or about _____ [*date*], plaintiff employed defendant as architect to superintend and supervise the remainder of the work to be done under the contract of purchase by the vendor.

6. Defendant accepted the employment and undertook for a consideration to be paid him by plaintiff to properly superintend and supervise the remainder of the work so to be performed and to see that such work was done in a good and workmanlike manner and in accordance with the contract of purchase, so that the building when finally constructed would be suitable for the purposes of plaintiff, and would be substantially and solidly built and capable of sustaining the weight to be placed thereon.

7. Defendant carelessly and negligently superintended and supervised the remainder of the work thereafter performed in the building under the contract of purchase and failed to see that such work was done in a good and workmanlike manner. Defendant carelessly and negligently permitted said work to be done in an improper and unsafe manner.

8. As a proximate result of the negligence of defendant, _____ [*specify detriment*], making necessary frequent and extensive repairs for which plaintiff was obliged to and did pay substantial sums of money, all to plaintiff's damage in the sum of $_____.

9. _____ [*Allege other damages sought.*]

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____ for repairs.

2. _____ [*Specify other damages.*]

3. For the costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 56.50.*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action against an architect for damages resulting from the architect's negligent supervision of construction of a building [*see Goldberg v. Underhill (1950) 95 Cal. App. 2d 700, 701-702, 213 P.2d 516* (liability of contractor-architect for damage resulting from defective plans he negligently prepared and defective construction he supervised)].

[3] Cross References

For additional discussion and references relating to complaints against architects for professional negligence generally, see *§ 56.60[5]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityProfessional ServicesContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawDesign ProfessionalsCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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6-56 California Forms of Pleading and Practice--Annotated § 56.64

§ 56.64 Complaint for Compensatory Damages--Against Architect--Inadequate Foundation Design--Loss of Anticipated Business Profits

[1] FORM Complaint for Compensatory Damages--Against Architect--Inadequate Foundation Design--Loss of Anticipated Business Profits

[*Caption. See § 56.52.*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 56.60, Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 56.60, Paragraph 3.*]

3. At all times herein mentioned, plaintiff was, and now is, the owner of that certain real property in _____ County, California, described as _____ [*street address or other description*].

4. At all times herein mentioned, defendant was, and now is, an architect duly certified by the State of California, and held, and now holds, himself out to be skilled in his/her profession in designing and in supervising construction of hotel structures.

5. On or about _____ and _____ [*date*], plaintiff discussed with defendant plaintiff's intention and plans for a hotel structure, with dining and banquet facilities, on the above described real property. He/She informed defendant that he/she would have a limited budget for the project, and specifically required and requested a design for a hotel, including dining and banquet facilities, which would be built for approximately $_____ and within plaintiff's budget. In addition, he/she advised that plaintiff required the structure to be complete and ready for occupancy on or before _____ [*date*]. Defendant represented and agreed to perform pursuant to plaintiff's requirements and requests as aforesaid.

6. Plaintiff, relying on the representations and on the alleged skills of defendant, and his/her agents, servants, and employees, entered into _____ [a written *or* an oral] contract on or about _____ [*date*], at _____ [*city*], _____ County, California with defendant _____ [a copy of which is attached hereto as Exhibit "A" and made part hereof *or set forth the contract in exact words or plead according to its legal effect, e.g.,* that defendant draw the plans and specifications for, and superintend the construction of, a hotel building and appurtenances thereto, to be known as the _____ Hotel to be built on the herein described real property]. Defendant then drew and prepared the plans and specifications for the project and assisted plaintiff in entering into a construction contract for $_____ with _____ [*name*] providing for the construction to be completed prior to _____ [*date*].

7. Plaintiff performed all conditions, covenants, and promises of the agreement, including the payment of $_____ for fees.

8. In reliance on defendant's representations and the contract executed for the construction, plaintiff prepared to open for business on or about_____ [*date*], and to that end contracted for the services of _____ [*number*] employees and leased adjacent vacant property as a parking lot.

9. Defendant, in preparing the plans and specifications, and in rendering opinions and recommendations, negligently and carelessly designed, recommended, and specified foundations and a building which were beyond the safe load-bearing value of the soil, making the building as designed and planned inadequate, dangerous, and unsafe for use and not in conformity with standards set and required by the Building Department and Chief Building Inspector of the City of _____, California, and below the generally accepted architectural standards of the area, all of which defendant knew, or in the exercise of ordinary care by a person of his/her profession should have known, at the time he/she prepared the plans and specifications and rendered his/her opinions and recommendations.

10. _____ [*Name*] began work under the construction contract, leveled the land, built forms, and commenced pouring concrete footings pursuant to the plans and specifications prepared by defendant, when construction was halted on or about _____ [*date*], by the Chief Building Inspector of the City of _____, California, for the reason that the building designed by defendant was beyond the safe load-bearing value of the soil. Defendant thereon amended the plans and specifications and obtained consent of said Chief Building Inspector for construction to proceed pursuant to the plans and specifications as amended.

11. As a proximate result of defendant's negligence and carelessness as aforesaid, completion of the building was delayed for a period of _____ months, causing plaintiff to be damaged in the sum of $_____.

12. In addition to general damages hereinabove alleged, as a proximate result of defendant's negligence and carelessness as aforesaid, and the resultant delay in the opening of the hotel and dining and banquet facilities, from _____ [*date*], the date defendant promised and agreed the facilities could open, to _____ [*date*], the date on which they did open, plaintiff sustained damages as follows:

a. The sum of $_____, which is the amount of the reasonable and fair rental value of the structure and facilities for the _____ month period from _____ [*date*], to _____ [*date*];

b. The sums of $_____ for parking lot rental and $_____ for salaries, all of which were incurred pursuant to commitments made by plaintiff in reliance upon defendant's representations that the hotel could open for business on _____ [*date*];

c. The sum of $_____ for loss of earnings from the restaurant and banquet business during the period from _____ [*date*], to _____ [*date*].

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages in the sum of $_____.

2. For special damages in the sums of $_____ for fair rental value, $_____ for parking lot rental, $_____for salaries, and $_____ for lost earnings.

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 56.50.*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action where the breach of duty arises from failure of architectural plans to conform to the local ordinance setting permissible building support limits, resulting in redesign of the structure and delay in its availability to plaintiff.

[3] Profits From Unestablished Business

Anticipated profits from an unestablished business may not be recoverable on the ground that they are too uncertain, unless an operating history of the business (or of a comparable one in the vicinity) can be produced [*Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists (1971) 14 Cal. App. 3d 209, 221-222, 92 Cal. Rptr. 111* ; *see also Macmorris Sales Corp. v. Kozak (1968) 263 Cal. App. 2d 430, 442, 69 Cal. Rptr. 719* (recovery denied where business established only a few days)]. Evidence of the later rate of profitability would support a finding of certain damages of loss of profits [*see Edwards v. Container Kraft Carton etc. Co. (1958) 161 Cal. App. 2d 752, 758-759, 327 P.2d 622* ; *see also Civ. Code § 3301* (contract damages are required to be clearly ascertainable)].

[4] Cross References

For additional discussion and references relating to complaints against architects for professional negligence generally, see *§ 56.60[5]* et seq.

Witkin, Summary of California Procedure, vol. 3, *Actions*, §§ 139-162 (4th ed. 1996), vol. 5, *Pleading*, §§ 890, 897 (4th ed. 1997)

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 879-882 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityProfessional ServicesContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawDesign ProfessionalsContracts LawRemediesForeseeable DamagesLost ProfitsCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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6-56 California Forms of Pleading and Practice--Annotated § 56.65

§ 56.65 Complaint for Damages--Against Architect--Inaccurate Cost Estimates

[1] FORM Complaint for Damages--Against Architect--Inaccurate Cost Estimates

[*Caption. See § 56.52.*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 56.60, Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 56.60, Paragraph 3.*]

3. Defendant is, and at all times herein mentioned was, an architect, duly certificated to practice his/her profession under the laws of the State of California.

4. On or about _____ [*date*], in _____ County, California, _____ County, California, plaintiff and defendant entered into _____ [*either* a written *or* an oral] contract [*if contract in writing, add:* a copy of which is attached hereto, as Exhibit "A" and made a part hereof] where defendant agreed to prepare plans and specifications for a residence to be built by plaintiff on _____ [*street*] in _____, California, it being understood and agreed by the parties that the cost of the house would not exceed $_____, or thereabouts, and that defendant would exercise his/her skill and his/her professional knowledge in planning and designing the residence; plaintiff agreed to pay defendant $_____ for preparing the plans and specifications.

5. Plaintiff has fully performed all the terms and conditions on his/her part to be performed, having paid defendant $_____.

6. Defendant has failed to perform the contract in the following respects: _____ [*specify, e.g.,*

defendant failed to prepare plans and specifications for a residence to cost not exceeding $_____ or thereabouts, as agreed, but prepared plans and specifications for a residence to cost $_____, or thereabouts], all to plaintiff's damage in the sum of $_____.

[*Prayer. See § 56.52.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 56.50.*]

[2] Use of Form

The form of complaint in [1], *above*, is for use where the architect has undertaken to draw plans and specifications to cost a certain price, but on letting bids the client discovers that the building designed cannot be built for the price specified [*but see Benenato v. McDougall (1913) 166 Cal.405, 407, 137 P. 8* (no proximate cause of client's detriment on cost overrun when client discovers building cannot be constructed for desired price but proceeds to let contract)].

[3] Allegations

The complaint in [1], *above*, alleges [*see Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377* (elements of action for breach of contract)]:

- The existence of the contract (Paragraph 4);
- The performance of all conditions, covenants, or promises on plaintiff's part (payment of fee) (Paragraph 5);
- Breach by defendant architect (Paragraph 6); and
- The damages sustained (Paragraph 6).

[4] Cross References

For additional discussion and references relating to complaints generally, see *§ 56.50[4]* et seq.

Attorney's Guide to California Construction Contracts and Disputes (2d ed. Cal CEB 1990) §§ 3.54, 7.5

Legal Topics:

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

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6-56 California Forms of Pleading and Practice--Annotated § 56.66

§ 56.66 Specific Denial by Architect--Denying Negligence in Preparation of Plans and Specifications

[1] FORM Specific Denial by Architect--Denying Negligence in Preparation of Plans and Specifications

1. Further answering Paragraph _____, defendant specifically denies that an unsafe and dangerous condition resulted from the plans and specifications that were drawn and further specifically denies that the plans and specifications were negligently and carelessly drawn.

2. Further answering Paragraph _____, defendant denies _____ [*e.g.*, that the material that was specified and used for the sheathing thereon was of insufficient strength to support workmen who would go thereon].

[2] Use of Form

The specific denials set out in [1], *above*, are for use in an answer to a complaint for damage resulting from the negligent preparation of plans and specifications by an architect.

[3] Cross References

For additional discussion and references relating to complaints against architects for professional negligence generally, see *§ 56.60[5]* et seq.

See generally Ch. 26, *Answers*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDenialsTortsMalpractice & Professional LiabilityProfessional ServicesContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction

LawDesign Professionals

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6-56 California Forms of Pleading and Practice--Annotated § 56.67

§ 56.67 Proceedings to Verify Noncompliance With Code Civ. Proc. § 411.35 and for Payment of Reasonable Expenses [Code Civ. Proc. § 411.35(h)]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Verify Noncompliance With Code Civ. Proc. § 411.35 and for Payment of Reasonable Expenses [Code Civ. Proc. § 411.35(h)]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

	)	
	)	NO. _____
_____ [*name(s)*],	)	NOTICE OF MOTION FOR ORDER VERIFYING
Plaintiff(s),	)	NONCOMPLIANCE WITH
vs.	)	CODE CIV. PROC. § 411.35
_____ [*name(s)*],	)	AND FOR PAYMENT OF REASONABLE EX-
Defendant(s).	)	PENSES, SUPPORTING DECLARATION OF
	)	_____ [*name*], AND MEMOR-
	)	ANDUM OF POINTS AND AUTHORITIES
	)	Date: _____
		Time: _____
		Location: _____
		[Trial Date: _____]

_____

To _____ [Plaintiff(s) *or* Cross Complainant(s)] _____ [*name(s)*] and to his/her/their attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [defendant(s) *or* cross defendant(s)] _____ [*name(s)*] will move for an order determining that _____ [plaintiff(s) *or* cross complainant(s)] have failed to comply with *Code of Civil Procedure Section 411.35*, by requiring the attorney for _____ [plaintiff(s) *or* cross complainant(s)] to reveal to the trial judge in an in camera hearing the name, address, and telephone number of the person or persons consulted with that were relied on by the attorney in preparation of the certificate of merit. The motion will be made on the grounds that this litigation has been favorably concluded with respect to _____ [*name(s)*], _____ [defendant(s) *or* cross defendant(s)], and he/she/they has/have incurred expenses,including attorney's fees, as a result of the failure of _____ [plaintiff(s) *or* cross complainant(s)] to comply with *Code of Civil Procedure Section 411.35*.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. On _____ [*date*], this action was favorably concluded with respect to _____ [*name*], moving party herein, in that _____ [*specify facts, e.g.*, moving party's motion for summary judgment was granted and judgment was entered in favor of moving party, and against _____ (*name(s)*), _____(plaintiff(s) *or* cross complainant(s)). This judgment became final on _____ (*date*)].

3. Moving party has incurred the following reasonable expenses, including attorney's fees, as a result of the failure of _____ [*name(s)*], _____ [plaintiff(s) *or* cross complainant(s)], to comply with *Code of Civil Procedure Section 411.35*: _____ [*set forth expenses, including attorney's fees, incurred by moving party*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

MEMORANDUM

[*Add memorandum supporting motion*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The notice of motion in [1], *above*, is for use by a defendant or cross defendant to compel the court to verify that the plaintiff or cross complainant has complied with the requirements of *Code Civ. Proc. § 411.35* regarding certificates of merit. On the favorable conclusion of the litigation with respect to any party for whom a certificate of merit was or should have been filed, the trial court may, on its own motion or on motion of a party, verify compliance by requiring the attorney for the plaintiff or cross complainant to reveal to the judge, in an in camera hearing without the moving party present, the name, address, and telephone number of the person or persons consulted that were relied on in preparing the certificate [*see Code Civ. Proc. § 411.35(h)*; for further discussion, *see § 56.34*].

A supporting memorandum is required to be served and filed with the notice of motion [*see Code Civ. Proc. §§ 1005(b), (c)* 1010; *Cal. Rules of Ct., Rules 3.1100, 3.1103*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewTortsMalpractice & Professional LiabilityProfessional ServicesContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawDesign ProfessionalsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral Overview

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6-56 California Forms of Pleading and Practice--Annotated § 56.68

§ 56.68 Proceedings to Verify Noncompliance With Code Civ. Proc. § 411.35 and for Payment of Reasonable Expenses [Code Civ. Proc. § 411.35(h)]--Order Granting Motion

[1] FORM Proceedings to Verify Noncompliance With Code Civ. Proc. § 411.35 and for Payment of Reasonable Expenses [Code Civ. Proc. § 411.35(h)]--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Trial Date: _____]
	)	

The motion of _____ [defendant *or* cross defendant] _____ [*name*] for an order verifying compliance with *Code of Civil Procedure Section 411.35* came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by

counsel _____ [*name*].

After conducting an in camera hearing without the moving party present, and after considering the evidence presented therein, the court finds that _____ [*name*], _____ [plaintiff *or* cross complainant], has failed to comply with the provisions of *Code of Civil Procedure Section 411.35*. Accordingly, the court determines that this motion ought to be granted.

IT IS ORDERED that the motion be, and it hereby is, granted and that _____ [*name*], _____ [plaintiff *or* cross complainant], is ordered to pay the reasonable expenses (including attorney's fees) of _____ [*name*], _____ [defendant *or* cross defendant], that were incurred as a result of the failure to comply, in the sum of $_____.
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, is for use when the court grants a motion for verification of noncompliance with *Code Civ. Proc. § 411.35* regarding the filing of a certificate of merit [*see § 56.67*].

If the trial judge finds there has been a failure to comply with *Code Civ. Proc. § 411.35*, the court may order a party, a party's attorney, or both, to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of the failure to comply [*Code Civ. Proc. § 411.35(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewTortsMalpractice & Professional LiabilityProfessional ServicesContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawDesign ProfessionalsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral Overview

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Chapter 57 ART

6-57 California Forms of Pleading and Practice--Annotated 57.syn

§ 57.syn Synopsis to Chapter 57: ART

§ 57.01 Scope

§ 57.02 Cross References

§ 57.03 Governing Law

§§ 57.04-57.09 [Reserved]

§ 57.10 California Arts Act

[1] Enactment

[2] Arts Council

[3] Duties of Council

[4] Accepting and Awarding of Grants and Other Gifts

§ 57.11 Government Involvement With Art

[1] County Art Museums

[2] County Art Institutes

[3] County Historical Monuments

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[5] City Art Galleries

§ 57.12 Charitable Solicitations

§ 57.13 Property Taxation

§§ 57.14-57.19 [Reserved]

§ 57.20 Definitions of Fine Art

§ 57.21 Authentication and Valuation of Art Works

§ 57.22 Sale of Fine Art Multiples

[1] In General

[2] Sales Subject to Regulation

[3] Disclosure by Art Dealer

[4] Disclosure in Written Materials

[5] Public Posting of Disclosure Requirement

[6] Information Required

[7] Exemption for Charitable Organizations

[8] Art Dealer's Disclaimer of Knowledge

[9] Information Disclosed as Express Warranty

[10] Liability of Consignors and Agents

[11] Action to Enforce Liability of Art Dealer

[a] Recovery of Consideration Paid

[b] Willful Violation

[c] Defense of Disclaimer

[d] Limitation of Action

[e] Recovery of Costs

[f] Remedies Not Exclusive

[g] Injunctive Relief and Civil Penalties

[h] Additional Remedies in Case of Merchants of Fine Art Multiples

§ 57.23 Right of Reproduction After Assignment and Transfer of Fine Art

§ 57.24 Reservation of Ownership After Conveyance of Right to Reproduce or Display

§ 57.25 Consignment of Fine Art

[1] Delivery as Consignment

[2] Effect of Consignment

[3] Waivers Void

§ 57.26 Royalty Rights of Artist

[1] Royalty Due on Sale

[2] Action for Damages by Artist

[3] Proceeds Exempt From Enforcement of Money Judgment

[4] Rights of Artist's Heirs

[5] Exempt Transactions

§§ 57.27-57.39 [Reserved]

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[5] Cross References

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Limitation Period for Rescission

[5] Cross References

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[1] FORM

[2] Use of Form

[3] Allegations

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[6] Cross References

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[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Allegations

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[1] FORM

[2] Use of Form

[3] Allegations

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Statute of Limitations

[5] Cross References

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[2] Use of Form

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[b] Use of Form

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[a] FORM

[b] Use of Form

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[a] FORM

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[a] FORM

[b] Use of Form

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[a] FORM

[b] Use of Form

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[1] FORM

[2] Use of Form

[3] Allegations

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 57.165 Complaint for Recovery of Personal Property (Bailed Work of Art)--By Bailor Against Bailee

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[2] Use of Form

[3] Allegations

[4] Cross References

§ 57.166 Bailee's Defenses to Complaint for Failure to Return Bailed Work of Art

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[b] Use of Form

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[a] FORM

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[a] FORM

[b] Use of Form

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[2] Use of Form

[3] Contents of Form

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[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 57.191 Complaint for Recovery of Holocaust-Era Artwork From Museum or Gallery [Code Civ. Proc. § 354.3]

[1] FORM

[2] Use of Form

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§ 57.01 Scope

This chapter discusses and provides forms for use in a variety of actions and proceedings involving art. Works of art are products of the fine arts rather than industrial or mechanical arts or literary arts (including musical composition). This chapter does not relate to machinery, tools, vehicles, musical instruments, or other items of the kind that can be patented, nor does it relate to architecture. The works of art dealt with in this chapter include examples of creative endeavor that a museum or gallery of art is likely to display, even if they are products of industrial or mechanical arts (for example, armor, antiques, oriental rugs, ancient vases, and other relics). For the statutory defintions of "art" relevant to this chapter, see *§ 57.20*.

The chapter contains the following discussions and forms:

- Discussion of the involvement of California public entities in art [*see §§ 57.10 -57.13*].

- Discussion of sales of fine art multiples, pursuant to the provisions of *Civ. Code § 1740 et seq.* [*see § 57.22*], a form of complaint for use in an action for restitution by an aggrieved purchaser [*see § 57.130*], and forms of affirmative defenses to such an action [*see § 57.131*].

- Discussion of the assignment, transfer, and reservation of royalty rights in fine art [*see §§ 57.23 -57.26*], and a form for use by an artist to recover royalty payments from the resale of a work of art pursuant to *Civ. Code § 986*. [*see § 57.132*].

- Discussion of general contract principles as they apply to art works and artists [*see §§ 57.40 -57.41*], and related forms of complaint [*see §§ 57.133 -57.136*], including one based on the negligent authentication of an art work [*see § 57.136*].

- Discussion of the protection of the artist's moral rights under both federal and California law [*see §§ 57.50 -57.53*], and forms of complaint for use by an artist to vindicate those rights [*see §§ 57.150 -57.152*].

- Discussion of various aspects of the bailment of art works [*see §§ 57.60 -57.63*], and forms for complaints and defenses relating to bailed art works [*see §§ 57.160 -57.166*].

- Discussion of the loan of art to a museum [*see §§ 57.70 -57.79*], a form of notice for use when property is loaned to a museum [*see § 57.180*], and a form of affirmative defense for use by a museum that damaged or destroyed a work of art as, or in the process of, necessary conservation measures [*see § 57.181*].

- A form of complaint for recovery after loss or theft of an art work [*see § 57.190*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailmentsCopyright LawOwner RightsMoral RightsEducation LawMuseumsCopyright LawSubject MatterPictorial, Graphic & Sculptural WorksWorks of Art

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§ 57.02 Cross References

For discussions and forms covering subjects related to contracts involving artists and art works, see Ch. 6, *Accord and Satisfaction* ; Ch. 121, *Common Counts* ; Ch. 140, *Contracts* ; Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* ; Ch. 365, *Minors: Contract Actions* ; Ch. 488, *Reformation of Instruments* ; Ch. 528, *Specific Performance* ; and Ch. 530, *Statute of Frauds*

For discussions and forms covering transportation and storage of personal property, see Ch. 16, *Airplanes and Airports* ; Ch. 109, *Carriers* ; Ch. 485, *Railroads* ; Ch. 522, *Ships and Shipping* ; and Ch. 553, *Trucks*

For discussions and forms covering subjects related to transactions involving artists and art works, see Ch. 93, *Bailments* ; Ch. 119, *Claim and Delivery* ; Ch. 150, *Conversion* ; Ch. 252, *Escheat (Unclaimed Property)*; Ch. 278, *Gifts*; and Ch. 355, *Lost and Unclaimed Property*

For discussions and forms covering subjects related to security interests in art works, see Ch. 270, *Fraudulent Conveyances* ; Ch. 342 *Liens and Wage Preferences* ; and Ch. 503, *Sales: Secured Transactions*

For a discussion and additional forms for use in an action for restitution, see Ch. 490, *Rescission and Restitution*

For discussions and forms relating to actions based on sales of personal property generally, see Ch. 500, *Sales: Sales Under the Commercial Code* (sale of goods regulated by the Commercial Code) and Ch. 140, *Contracts* (contract actions)

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§ 57.03 Governing Law

Sales of fine art multiples, as defined in *Civ. Code § 1740*, are governed by *Civ. Code § 1740 et.seq.* The sale and transfer of fine art, as defined in *Civ. Code §§ 982(d)(1)* and *997*, is governed by *Civ. Code § 982(c)*. The royalty rights of an artist from the sale of fine art is governed by *Civ. Code § 986*. The reservation of ownership after conveyance of the right to reproduce or display a work of art is governed by *Civ. Code § 988*. The consignment of fine art, as defined in *Civ. Code §§ 1738(b)* and *997*, is governed by *Civ. Code § 1738 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal PropertyCopyright LawOwner RightsState RegulationBusiness & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsPropertyContracts LawPerformanceAssignmentGeneral Overview

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[Reserved]

§§ 57.04[Reserved]

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§ 57.10 California Arts Act

[1] Enactment

The Dixon-Zenovich-Maddy California Arts Act of 1975 (*Gov. Code §§ 8750-8756*) was enacted to give effect to the express intention of the Legislature that life in California is enriched by art, that the source of art is in the natural flow of the human mind and that, hence, the people of the state desire to encourage and nourish the demanding realization of craft and beauty wherever it occurs to the benefit of all [*Gov. Code § 8750*].

[2] Arts Council

The Arts Council was created as part of the California Arts Act and is governed by *Gov. Code §§ 8750-8756*. It is composed of nine members appointed by the Governor with the advice and consent of the Senate, one member appointed by the Speaker of the Assembly, and one member appointed by the Senate Rules Committee. The council meets on 8-day public notice no more than 8 times each calendar year in various places throughout the state so as to encourage broad and diverse attendance [*Gov. Code § 8752*].

[3] Duties of Council

Generally the council's duties are [*Gov. Code § 8753*]:

(a) Encouraging of artistic awareness, participation and expression;

(b) Helping independent local groups develop their own art programs;

(c) Promoting the employment of artists and those skilled in crafts in both the public and private sector;

(d) Providing for the exhibition of art works in public buildings throughout California; and

(e) Enlisting the aid of all state agencies in the task of ensuring the fullest expression of our artistic potential.

In addition, the council is to hold hearings, execute agreements, and perform any acts necessary and proper to carry out the purposes of the California Arts Act [*Gov. Code § 8753(k)*].

Provisions relating to the administration of the council, including the adoption of regulations, the appointment of advisory committees, and the appointment of a director and two deputies for the council by the Governor are set forth in *Gov. Code §§ 8751*, *8753(f)-(j)*, and *8754*.

[4] Accepting and Awarding of Grants and Other Gifts

The council accepts for any of the purposes of the California Arts Act federal gifts, and only unrestricted gifts, donations, bequests, or grants of funds from private sources and public agencies giving careful consideration to any donor requests concerning specific dispositions [*Gov. Code § 8753(l), (m)*]. The council is also directed to establish grant application criteria and procedure and award prizes or direct grants to individuals or organizations in accordance with regulations the council may prescribe [*Gov. Code § 8753(n), (o)*]. Any grants or the funding of any program which has not been established by *Gov. Code §§ 8750-8756* (California Arts Act) is prohibited [*Gov. Code § 8753.5*].

If any member of the council is an employee, member, director, or officer of any arts organization that has applied to the council for a grant, that member is prohibited from communicating with any other member of the council or any member of an advisory panel regarding such grant application and being present when the grant application is considered by the council or panel [*Gov. Code § 8751.5*.]

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsEmployees & OfficialsEstate, Gift & Trust LawPersonal GiftsGeneral Overview

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§ 57.11 Government Involvement With Art

[1] County Art Museums

A county may acquire and manage real and personal property necessary properly to house and care for exhibits and materials comprising an art museum [*see Pub. Res. Code §§ 5120, 5121*]. The board of supervisors may purchase, collect, trade, exchange, or otherwise acquire exhibitions or study material proper or necessary for the use of the museum, and may sell, lend, or exchange material, according to the established custom of museums [*see Pub. Res. Code § 5123*]. The board may also carry on various activities related to operation of the museum, which are specified in *Pub. Res. Code §§ 5124-5132* but generally include any power necessary and proper to promote the objects and purposes of a museum devoted to acquisition, exhibition, and utilization of artistic material [*see Pub. Res. Code § 5120*].

A county may also accept the donation of an art gallery in the same manner as a city may [*Pub. Res. Code §§ 5135-5138*; *see* [5], *below*].

A local agency is authorized by *Gov. Code § 50331* to acquire and hold land within its boundaries for (among other purposes) erecting, rebuilding, or furnishing an art gallery. The land may be acquired by purchase or otherwise, or may be leased for a term not to exceed 50 years [*see Gov. Code § 50331*]. The term "local agency" as used here means city, county, or city and county [*see Gov. Code § 50001*].

[2] County Art Institutes

A county may construct, lease, build, rebuild, furnish, refurnish, or repair buildings for an art institute [*see Gov. Code § 25351*]. In the operation of a county art institute, the board of supervisors may charge fees necessary to defray the cost of instruction and may issue certificates evidencing the completion of courses of instruction to the satisfaction of the board [*see Gov. Code § 25351.2*].

[3] County Historical Monuments

The board of supervisors of a county may appropriate money from the general fund of the county to erect monuments to

commemorate historic spots or places within the limits of the county [*see Pub. Res. Code § 5109*].

[4] California Pioneer Monuments

A county or a city may receive devises, bequests, donations, and gifts for the purpose of erecting within the county or city a monument in memory of California pioneers [*see Pub. Res. Code § 5101*], or may submit a tax initiative to the voters for that purpose [*see Pub. Res. Code § 5103*]. When sufficient funds are available, the monument may be erected [*see Pub. Res. Code §§ 5102, 5108*].

[5] City Art Galleries

Every city may accept title to real property for art gallery purposes, or permit the erection of buildings and improvements for such purposes on lands owned by the city [*see Pub. Res. Code § 5135*]. The governing body of the city has the same powers with respect to a city art gallery as the board of supervisors has with respect to a county art museum under *Pub. Res. Code § 5120 et seq.* [*see Pub. Res. Code § 5138*]. In addition, the city may delegate the management, operation, maintenance, and regulation of the art gallery to the donor or the donor's successors, or to boards of trustees or directors nominated by the donor and appointed by the governing body of the city on such terms and conditions as it may prescribe [*see Pub. Res. Code § 5136*]. In that case, certain requirements specified in *Pub. Res. Code § 5137* must be met. The governing body of the city may also appropriate and expend funds for the improvement, operation, expansion, and support of the art gallery [*see Pub. Res. Code § 5138*].

A city art gallery is also authorized by *Gov. Code § 50331*, relating to local agencies (i.e., cities [*Gov. Code § 50001*]) [*see* [1], *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsAdministrative BoardsEducation LawMuseumsGovernmentsLocal GovernmentsProperty

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§ 57.12 Charitable Solicitations

The solicitation of salvageable personal property for charitable purposes is regulated by *Welf. & Inst. Code §§ 148-148.9*. The property in question is any type of corporeal personalty, new or used, except money and evidences of debt [*see Welf. & Inst. Code § 148(b)*].

Solicitation and sale by fraternal, social, political, or service organizations, when they do not constitute a major part of the organization's activities and are not conducted as a permanent or continuous operation, are not subject to *Welf. & Inst. Code §§ 148-148.9* [*see Welf. & Inst. Code § 148.1*]. An association exempt from taxation under *Rev. & Tax Code § 23701d* (religious, charitable, etc., corporations) is also partially exempt from regulation under *Welf. & Inst. Code §§ 148-148.9* [*see Welf. & Inst. Code § 148.3*]. Violation of the provisions of *Welf. & Inst. Code §§ 148-148.9* and soliciting by use of a device falsely purporting to be an identification card are misdemeanors [*see Welf. & Inst. Code § 148.8*].

Charitable solicitations of donations of money or property [*see Bus. & Prof. Code § 17510.2(a), (c), (d)*] and charitable solicitations to buy goods or services [*see Bus. & Prof. Code § 17510.2(b)-(d)*] are regulated by *Bus. & Prof. Code § 17510 et seq.*

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§ 57.13 Property Taxation

All property located in California, not exempt under the laws of the United States or of California, is subject to the property tax [*Rev. & Tax. Code § 201*]. All property subject to general property taxation is assessed according to its value on the lien date [*Rev. & Tax. Code § 401.3*]. The lien on personal property attaches on the first day of January of each year [*Rev. & Tax. Code § 11492*]. The assessment of all property subject to general property taxation is made at its full value [*Rev. & Tax. Code § 401*]. The taxable value of personal property is its market value on the lien date or the price for which the property could be sold on the lien date [*18 Cal.Code Reg. § 10*].

For tax purposes, the full value of a work of art, still owned by the artist who created it and which has never been sold or exhibited for profit, is the full value of the materials which constitute the work of art [*Rev. & Tax. Code § 986*]. Works of art used for "free museums" are exempt from taxation [*Cal. Const., art. XIII, § 3(d)*; *Rev. & Tax. Code § 202*]. Household furnishings and personal effects not held or used in connection with a trade, profession, or business are exempt [*Cal. Const., art. XIII, § 3(m)*; *see Rev. & Tax. Code § 224*].

A work of art which is brought into California exclusively for purposes of public exhibition, which is used only for these purposes while in California, which is intended to be removed from California following its exhibition, which is subject to taxation in another state or a foreign country while in California, and on which all taxes due in the other state or foreign county have been paid, is exempt [*Rev. & Tax. Code § 213*]. For procedure in claiming the exemption, see *Rev. & Tax. Code §§ 251, 252.1, 254, 259, 260*.

For further discussion of property tax procedures, see Ch. 540, *Taxes and Assessments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesPersonal Property TaxTangible PropertyGeneral Overview

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[Reserved]

§§ 57.14[Reserved]

California Forms of Pleading and Practice--Annotated

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6-57 California Forms of Pleading and Practice--Annotated § 57.20

§ 57.20 Definitions of Fine Art

Civil Code sections governing creative works of the mind define the term "fine art" variously with respect to the purposes of the particular statute involved. For example, *Civ. Code § 982(d)(1)* defines fine art for purposes of the assignment or transfer of an artist's right (including right of reproduction) in a work as any work of visual art, including, but not limited to the following:

- A drawing, painting, sculpture, mosaic, or photograph.
- A work of calligraphy.
- A work of graphic art (including an etching, lithograph, offset print, silk screen, or a work of graphic art of like nature).
- Crafts (including crafts in clay, textile, fiber, wood, metal, plastic, and like materials).
- Mixed media (including a collage, assemblage, or any combination of the art media listed above).

This *Civ. Code § 982(d)(1)* definition also applies to the statutory provisions respecting art in public buildings [*Gov. Code § 15813.1(b)*].

Other definitions are provided in the following contexts:

- Definitions concerning the royalty rights of an artist from the sale of fine art are contained in *Civ. Code § 986(c)*.
- The definition of fine art for purposes of preservation is contained in *Civ. Code § 987(b)(2)*.
- For purposes of reservation of ownership rights when fine art is reproduced or displayed, the

definition of fine art *Civ. Code § 988(a)(2)* applies.

- The definition of fine art contained in *Civ. Code § 989(b)(1)* governs injunctive relief to preserve or restore integrity of fine art.

- Definitions concerning the consignment of fine art are contained in *Civ. Code § 1738(b)*.

- Definitions relating to the sale of fine prints and other fine art multiples are contained in *Civ. Code § 1740*.

In addition, *Civ. Code § 997* provides that, in California, for any purpose, porcelain painting and stained glass artistry are to be considered a fine art.

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6-57 California Forms of Pleading and Practice--Annotated § 57.21

§ 57.21 Authentication and Valuation of Art Works

There are many noncommercial art galleries and art museums in California, in addition to countless dealers' galleries, where a work of art may be authenticated or an appraisal of its value might be had. Fifty noncommercial galleries and museums are listed below by the cities where they are located. Others may be found by consulting reference books at any public library. A comprehensive listing of museums and galleries is published under the title of "The Official Museum Directory (United States and Canada)," which is available in many library reference departments. Commercial dealers and local authorities may be found by consulting the telephone directory.

Noncommercial art galleries and museums in California include:

Berkeley

Berkeley Art Center
University Art Museum and Pacific Film Archive

Cherry Valley

Edward-Dean Museum of Decorative Art

Claremont

Ruth Chandler Williamson Gallery (Scripps College)
Pomona College Art Gallery

Davis

Memorial Union Art Gallery (University of California)

Downey

Downey Museum of Art (Long Beach State College)

Fresno

Fresno Arts Museum

Glendale

Brand Library and Art Galleries

Laguna

Laguna Art Museum

Long Beach

Long Beach Museum of Art

Los Angeles

Fowler Museum of Cultural History (University of California)

Los Angeles Art Association and Galleries

Los Angeles County Museum of Art

Southwest Museum

University of Southern California Fisher Gallery

University of California at Los Angeles Art Galleries

Malibu

Getty Museum

Monterey

Monterey Peninsula Museum of Art

Oakland

Mills College Art Gallery
Oakland Museum

Palm Springs

Palm Springs Desert Museum

Pasadena

Norton Simon Museum of Art

Richmond

Richmond Art Center

Riverside

Riverside Art Museum

Sacramento

Crocker Art Gallery

San Diego

San Diego Museum of Art
Timken Art Gallery

San Francisco

M.H. de Young Memorial Museum and California Palace of the Legion of Honor

San Francisco Museum of Modern Art

San Jose

Egyptian Museum and Planetarium

San Marino

Huntington Library and Art Gallery

Santa Ana

Bowers Museum of Cultural Art

Santa Barbara

Santa Barbara Museum of Art

Santa Clara

de Saisset Museum (University of Santa Clara)
Triton Museum of Art

Santa Cruz

Santa Cruz Art League, Inc.

Saratoga

Montalvo Center for the Arts

Stanford

Stanford University Museum and Art Gallery

Walnut Creek

Bedford Gallery at the Regional Center for the Arts

Legal Topics:

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

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6-57 California Forms of Pleading and Practice--Annotated § 57.22

§ 57.22 Sale of Fine Art Multiples

[1] In General

The law governing the sale of fine art prints was significantly expanded in 1982 to include not only prints, but also photographs, sculpture casts, collages, or similar art objects produced in more than one copy. These objects are now referred to as "fine art multiples" or "multiples" [*see Civ. Code § 1740(a)*; *see also Civ. Code § 1740(b)* (definition of "fine print")]. The Legislature determined that the sale of fine art multiples affected large segments of the public, and that the marketing, in both volume and monetary value, of these objects, had substantially increased during the past two decades. The Legislature further determined that among the main questions to be answered, and about which information was necessary, in determining the value of fine art multiples in relation to their sale, were [*see* Stats. 1982, Ch 1320, § 10]:

- Whether the fine art multiple is properly attributed to the named artist;
- Whether the fine art multiple was signed by the artist after it was produced;
- Whether the fine art multiple is a reproduction of a work formerly created by the artist in a different medium;
- Whether the purported number of fine art multiples in a "limited edition" is the actual number; and
- Whether there are other editions of the same or virtually the same image.

[2] Sales Subject to Regulation

The provisions governing sales of fine art multiples [*Civ. Code §§ 1740-1745.5*] apply to the sale of any fine art multiple when offered for sale or sold at wholesale or retail for $100 or more, exclusive of any frame [*Civ. Code § 1741*].

[3] Disclosure by Art Dealer

Before sale or consignment of a fine art multiple into or from California, an art dealer [*see Civ. Code § 1740(g)* (art dealer defined)] must furnish to a purchaser or consignee a written certificate of authenticity containing all specific and relevant details and descriptive information required by *Civ. Code § 1744* [*see* [6], *below*]. The information must be clearly, specifically, and distinctly addressed to each of the items required by *Civ. Code § 1744* unless the required data is not applicable. The information must be in writing and be given to the purchaser or consignee at his or her request, or in any event prior to a sale or consignment. If a prospective purchaser so requests, the information must be transmitted to him or her prior to the payment or placing of an order for a multiple. If payment is made by a purchaser prior to delivery of a multiple, this information must be supplied at the time of or prior to delivery [*Civ. Code § 1742(a)*].

With respect to auctions, the required information may be furnished in catalogs or other written materials which are made readily available for consultation and purchase before the sale. However, a bill of sale, receipt, or invoice describing the transaction must then be provided which refers to the catalogs and lot number in which the information was supplied [*Civ. Code § 1742(a)*].

If an artist sells or consigns a fine art multiple of his or her own creation or conception, the artist is also bound to disclose the information required by *Civ. Code § 1744* [*Civ. Code § 1742(e)*].

[4] Disclosure in Written Materials

An art dealer who solicits a direct sale, by inviting transmittal of payment for a specific multiple, in a catalog, prospectus, or flyer, or other written material or advertisement to be distributed in, into, or from California, must clearly set forth, in close proximity to the place in the material in which the fine art multiple is being described, the descriptive information required by *Civ. Code § 1744* [*Civ. Code § 1742(b)*].

The art dealer may, in lieu of setting forth the information required by *Civ. Code § 1744*, supply the information contained in the quoted passage in *Civ. Code § 1742(b)* concerning disclosure requirements to the buyer before or with the delivery of the fine art multiple [*Civ. Code § 1742(b)*].

[5] Public Posting of Disclosure Requirement

In each place of business in California in which an art dealer is regularly engaged in sale of fine art multiples, the art dealer must post in a conspicuous place a sign which in legible format contains information informing the general public that California law provides for the disclosure in writing of certain information concerning prints, photographs, and sculpture casts, and that the information is available to the public and may be requested by a prospective buyer before purchase of a fine art multiple [*Civ. Code § 1742(c)*].

[6] Information Required

Except as provided below, the informational details required to be supplied in a written certificate of authenticity in all transactions for the sale or consignment of fine art multiples are contained in *Civ. Code § 1744(a)*. The required information includes [*see Civ. Code § 1744(a)*]:

(1) The artist's name;

(2) If the artist's name appears on the multiple, a statement whether or not the multiple was signed by the artist;

(3) A description of the medium or process;

(4) A statement concerning certain types of reproduction of an image produced in a different medium for a purpose other than the creation of the multiple;

(5) If the previous paragraph applies and the multiple is not signed, a statement whether or not the artist authorized or approved in writing the multiple or edition;

(6) If the purported artist was deceased at the time the master was made that produced the multiple;

(7) If the multiple is a "posthumous" multiple;

(8) A statement concerning whether or not the multiple was made from a master that produced a prior limited edition;

(9) The year or approximate year the multiple was produced as to multiples produced after 1949;

(10) A statement concerning whether or not the edition is being offered as a limited edition; and

(11) Whether or not the master has been destroyed, effaced, altered, defaced, or canceled after the current edition.

Refer to *Civ. Code § 1744(a)* for the express informational requirements.

In addition to the above information, every certificate of authenticity must contain the following statement: "This is to certify that all information and the statements contained herein are true and correct" [*Civ. Code § 1740(j)*].

More limited informational details are required for multiples produced from 1950 to January 1, 1983 [*see Civ. Code § 1744(c)*], from 1900 to 1949 [*see Civ. Code § 1744(d)*], and before 1900 [*see Civ. Code § 1744(e)*].

[7] Exemption for Charitable Organizations

A charitable organization which conducts a sale or auction of fine art multiples is exempt from the disclosure requirements of *Civ. Code § 1744* if it posts in a conspicuous place, at the site of the sale or auction, a disclaimer of any knowledge of the information specified in that section, and includes this disclaimer in any catalog distributed by the organization with respect to the sale or auction of fine art multiples. However, an art dealer used or employed by a charitable organization to conduct the sale or auction of fine art multiples is subject to all disclosure requirements regulating the sale of fine art multiples [*Civ. Code § 1742.6*].

[8] Art Dealer's Disclaimer of Knowledge

An art dealer offering fine art multiples by means of a catalog, prospectus, flyer or other written material or advertisement distributed in, into, or from California, may disclaim knowledge as to any relevant detail referred to in *Civ. Code § 1744*. However, he or she must so state specifically and categorically with regard to each detail disclaimed to the end that the purchaser will be able to judge the degree of uniqueness or scarcity of each fine art multiple contained in the edition offered [*Civ. Code §§ 1742(d), 1744.7*]. For discussion of this disclaimer as a defense to an action by a purchaser, see [11][c], *below*.

Describing the edition as an edition of "reproductions" eliminates the need to furnish further informational details unless the edition was allegedly published in a signed, numbered, or limited edition, or any combination thereof, in which case all of the informational details are required to be furnished [*Civ. Code § 1742(d)*].

[9] Information Disclosed as Express Warranty

Whenever an art dealer furnishes the name of an artist pursuant to *Civ. Code § 1744* for any time period after 1949, and otherwise furnishes information required under that statute for any time period relating to offers, sales, or consignments made to purchasers other than art dealers, the information conveyed forms a part of the basis of the bargain and creates an express warranty as to the information provided [*Civ. Code § 1744.7*; *see also Civ. Code § 1744(b)*]. The warranty is not negated or limited by the art dealer's failure to use the words "warrant" or "guarantee," or because he or she did not have specific intention or authority to make a warranty, or because any of the required statements represented only the dealer's opinion [*Civ. Code § 1744.7*].

The existence of a basis in fact for information warranted by virtue of *Civ. Code § 1744.7* will not give rise to a defense in an action to enforce a given warranty. However, with respect to photographs and sculptures, produced before 1950, and other fine art multiples produced before 1900, the required information given relating to the description of the medium or process of production of the multiple [*Civ. Code § 1744(a)(3)*], reproduction of an image produced in a different medium [*Civ. Code § 1744(a)(4)*], whether the reproduction of the image from a different medium was authorized or approved by the artist [*Civ. Code § 1744(a)(5)*], or whether the purported artist was deceased at the time the master was made that produced the multiple [*Civ. Code § 1744(a)(6)*] will be sufficient if a reasonable basis in fact existed for the information provided. When information is not supplied as to any subdivision or paragraph of *Civ. Code § 1744* because not applicable, this constitutes an express warranty that the paragraph is not applicable [*Civ. Code § 1744.7*].

[10] Liability of Consignors and Agents

An artist or art dealer who consigns a multiple to an art dealer for the purpose of effecting a sale of the multiple does not incur any liability to a purchaser if the consignor, as to the consignee, has complied with *Civ. Code §§ 1740-1745.5* [*Civ. Code § 1744.9(a)*].

When an art dealer has agreed to sell a multiple on behalf of a consignor, who is not an art dealer, or an artist has not consigned a multiple to an art dealer but the art dealer has agreed to act as the agent for an artist for the purpose of supplying the information required, the art dealer incurs the liabilities of other art dealers as prescribed by *Civ. Code §§ 1740-1745.5*, as to a purchaser [*Civ. Code § 1744.9(b)*].

[11] Action to Enforce Liability of Art Dealer

[a] Recovery of Consideration Paid

An art dealer, including a dealer consignee, who offers or sells a fine art multiple in, into, or from California without providing the certificate of authenticity required in *Civ. Code §§ 1742* and *1744* [*see* [1]-[10], *above*], is liable to the purchaser of the multiple. Liability also occurs if the information provided is mistaken, erroneous, or untrue, except for harmless errors. The purchaser may sue to recover the consideration paid by him or her for the multiple, together with interest at the legal rate, on return of the fine art multiple in the condition in which it was received [*Civ. Code § 1745(a)*]. It is apparent that an offer which does not ripen into a sale will not give rise to liability since recovery is based on the consideration paid for the fine art multiple.

For a form of complaint to recover consideration paid, see *§ 57.130*.

[b] Willful Violation

If an art dealer, including a dealer consignee, willfully offered or sold a fine art multiple in violation of *Civ. Code §§ 1740-1745.5*, the purchaser of the multiple may recover from the art dealer an amount equal to three times the amount required under *Civ. Code § 1745(a)*, that is the consideration paid plus interest [*Civ. Code § 1745(b)*].

For a form of complaint, see *§ 57.130*.

[c] Defense of Disclaimer

In any proceeding an art dealer may rely on a disclaimer of knowledge as to any relevant information set forth in *Civ. Code § 1744* for any time period. The disclaimer is effective unless the claimant is able to establish that the art dealer failed to make reasonable inquiries, according to the custom and usage of the trade, to ascertain the relevant information or that such relevant information would have been ascertained as a result of such reasonable inquiries [*Civ. Code § 1745(f)*].

For a form raising this affirmative defense, see *§ 57.131[1]*.

[d] Limitation of Action

No action shall be maintained to enforce any liability under *Civ. Code § 1745* unless it is brought within one year after discovery of the violation on which it is based, and in no event more than three years after the print was sold [*Civ. Code § 1745(c)*].

[e] Recovery of Costs

In any action to enforce any provision of *Civ. Code §§ 1740-1745.5*, the court may allow the prevailing purchaser the costs of the action together with reasonable attorney's and expert witness's fees. In the event, however, that the court determines that an action to enforce was brought in bad faith, it may allow such expenses to the seller as it deems appropriate [*Civ. Code § 1745(d)*].

[f] Remedies Not Exclusive

The remedies provided by *Civ. Code §§ 1745* and *1745.5* (injunctive relief) are not a bar to, nor can they be deemed inconsistent with, a claim for damages or with the exercise of additional remedies otherwise available to the purchaser [*Civ. Code § 1745(e)*].

[g] Injunctive Relief and Civil Penalties

Any person performing or proposing to perform an action in violation of *Civ. Code § 1740 et seq.* may be enjoined in any court of competent jurisdiction in California [*Civ. Code § 1745.5(a)*]. Injunctive relief may be sought by the Attorney General, any district or city attorney or prosecutor, or any person acting in his or her own interests or in the interests of the members of a corporation, association, or in the interests of the general public [*Civ. Code § 1745.5(b)*]. In addition, any person who violates any provision of *Civ. Code § 1740 et seq.* may also be liable for a civil penalty up to $1,000 for each violation assessed and recovered in a civil action brought in the name of the People of the State of California [*Civ. Code § 1745.5(c)*]. Moreover, a violator of any the above sections may be liable for a civil penalty surcharge of up to $1,000 for each violation, to be applied to the costs of enforcement [*Civ. Code § 1745.5(d)*]. For further discussion and forms relating to provisional and permanent relief, see Ch. 303, *Injunctions* .

[h] Additional Remedies in Case of Merchants of Fine Art Multiples

If a defendant is a merchant [*see Com. Code § 2104* (merchant defined)] with respect to fine art multiples, or if both parties are merchants, then a plaintiff may have additional remedies under the Commercial Code, which governs sales of goods [*see Com. Code § 2102*; *see also Com. Code § 2105* (goods defined)]. For discussion and forms relating to these remedies, see Ch. 500, *Sales: Sales Under the Commercial Code* .

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)WarrantiesExpress WarrantiesGovernmentsLegislationStatutes of LimitationsTime LimitationsCivil ProcedureRemediesInjunctionsGeneral OverviewContracts LawTypes of ContractsPersonal PropertyBusiness & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsProperty

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6-57 California Forms of Pleading and Practice--Annotated § 57.23

§ 57.23 Right of Reproduction After Assignment and Transfer of Fine Art

Whenever a work of fine art is transferred, whether by sale or on commission, or otherwise, by or on behalf of the artist who created it, or by that artist's heir, legatee, or personal representative, the right of reproduction thereof is reserved to the artist or his or her heir, legatee, or personal representative until it passes into the public domain by act or operation of law, unless that right is expressly transferred by a document in writing in which reference is made to the specific right of reproduction, signed by the owner of the rights conveyed or that person's duly authorized agent. If the transfer is pursuant to an employment relationship, the right of reproduction is transferred to the employer, unless it is expressly reserved in writing. If the transfer is pursuant to a legacy or inheritance, the right of reproduction is transferred to the legatee or heir, unless it is expressly reserved by will or codicil [*Civ. Code § 982(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawConveyancesState RegulationContracts LawTypes of ContractsPersonal PropertyCopyright LawOwner RightsState Regulation

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6-57 California Forms of Pleading and Practice--Annotated § 57.24

§ 57.24 Reservation of Ownership After Conveyance of Right to Reproduce or Display

Whenever an exclusive or nonexclusive conveyance of any right to reproduce, prepare derivative works based on, distribute copies of, publicly perform, or publicly display a work of art is made by or on behalf of the artist who created it or the owner at the time of the conveyance, ownership of the physical work of art remains with and is reserved to the artist or owner, as the case may be. However, the right of ownership may be expressly transferred by an instrument, note, memorandum, or other writing, signed by the artist, owner, or their duly authorized agent [*Civ. Code § 988(b)*; *see Civ. Code § 988(a)* (artist and work of art defined)]. Any ambiguity with respect to the nature or extent of the rights conveyed are resolved in favor of the reservation of rights by the artist or owner, unless in any given case the federal copyright law provides to the contrary [*Civ. Code § 988(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawConveyancesState RegulationContracts LawTypes of ContractsPersonal PropertyCopyright LawOwner RightsState Regulation

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6-57 California Forms of Pleading and Practice--Annotated § 57.25

§ 57.25 Consignment of Fine Art

[1] Delivery as Consignment

Notwithstanding any custom, practice, or usage of the trade to the contrary, whenever an artist delivers or causes to be delivered a work of fine art of the artist's own creation to an art dealer in California for the purpose of exhibition or sale on a commission, fee, or other basis of compensation, the delivery to and acceptance of the work of fine art by the art dealer constitutes a consignment [*see Civ. Code § 1738(e)* (consignment defined)], unless the delivery to the art dealer is pursuant to an outright sale for which the artist receives or has received full compensation for the work of fine art on delivery [*Civ. Code § 1738.5*].

[2] Effect of Consignment

A consignment of a work of fine art results in the following [*Civ. Code § 1738.6*]:

- The art dealer, after delivery of the work of fine art, is an agent of the artist for the purpose of sale or exhibition of the consigned work of fine art within California;

- The work of fine art constitutes property held in trust by the consignee for the benefit of the consignor, and is not subject to claims by a creditor of the consignee;

- The consignee is responsible for the loss of, or damage to, the work of fine art; and

- The proceeds from the sale of the work of fine art constitute funds held in trust by the consignee for the benefit of the consignor. The proceeds must first be applied to pay any balance due the consignor, unless the consignor expressly agrees otherwise in writing.

In addition, a work of fine art received as a consignment remains trust property, notwithstanding the subsequent purchase thereof by the consignee directly or indirectly for the consignee's own account until the price is paid in full to the consignor. If the work is thereafter resold to a bona fide purchaser before the consignor has been paid in full, the

proceeds of the resale received by the consignee constitute funds held in trust for the benefit of the consignor to the extent necessary to pay any balance still due to the consignor, and the trusteeship continues until the fiduciary obligation of the consignee with respect to the transaction is discharged in full [*Civ. Code § 1738.7*].

[3] Waivers Void

Any provision of a contract or agreement whereby the consignor waives any part of the rights specified by *Civ. Code §§ 1738-1738.9* is void [*Civ. Code § 1738.8*]. These statutes do not apply to a written contract executed prior to January 1, 1976, unless either party agrees by mutual written consent that the statutory provisions apply or the contract is extended or renewed after that date. *Civ. Code §§ 1738-1738.9* prevail over any conflicting or inconsistent provisions of the Commercial Code affecting the subject matter of these statutes [*Civ. Code § 1738.9*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawConveyancesState RegulationCommercial Law (UCC)Sales (Article 2)Contract TermsSales on Approval or ReturnContracts LawTypes of ContractsPersonal PropertyContracts LawContract Conditions & ProvisionsWaiversGeneral OverviewCopyright LawOwner RightsState Regulation

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6-57 California Forms of Pleading and Practice--Annotated § 57.26

§ 57.26 Royalty Rights of Artist

[1] Royalty Due on Sale

Except as otherwise provided by law (see below), whenever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller or the seller's agent must pay to the artist or the artist's agent five percent of the sale price. The right of the artist to receive this "royalty" is not transferable and may be waived only by a written contract providing for payment of a sum exceeding five percent of the sale price. An artist may assign the right to collect the royalty payment to another individual or entity. However, the assignment must not have the effect of creating a waiver [*Civ. Code § 986(a)*].

When a work of art is sold at an auction or by a gallery, dealer, broker, museum, or any other person acting as the agent of the seller, that agent must withhold five percent of the sale price, locate the artist, and pay the withheld sum to the artist [*Civ. Code § 986(a)(1)*]. If the seller or his or her agent cannot locate and pay the artist the sum due, within 90 days after the sale, the sum due must be transferred to the California Arts Council [*Civ. Code § 986(a)(2)*]. The council will deposit the sum in the Special Deposit Fund in the State Treasury and will attempt to locate the artist to whom it is due. If he or she is not located within seven years and does not file a written claim for the sum due within that period, his or her right to it terminates and the money is transferable to the council for use in acquiring fine art pursuant to the Art in Public Buildings program set forth in *Gov. Code §§ 15813-15813.8* [*Civ. Code § 986(a)(4), (5)*].

[2] Action for Damages by Artist

If the seller or the seller's agent fails to pay an artist the five percent residual required by *Civ. Code § 986(a)* or fails to transfer the money to the California Arts Council as required, the artist may sue for damages [*Civ. Code § 986(a)(3)*].

The period of limitation is three years after the sale or one year after the artist discovers that the sale was made, whichever is longer court [*Civ. Code § 986(a)(3)*].

The prevailing party in the action is entitled to reasonable attorney's fees, in an amount as determined by the court [*Civ. Code § 986(a)(3)*].

For a form of complaint for use by an artist to recover the royalty, see *§ 57.132*.

[3] Proceeds Exempt From Enforcement of Money Judgment

Any sum held by a seller or his or her agent for payment to an artist pursuant to *Civ. Code § 986(a)* is exempt from enforcement of a money judgment by the creditors of the seller or agent [*Civ. Code § 986(a)(6)*].

[4] Rights of Artist's Heirs

On the death of an artist, the rights and duties created under *Civ. Code § 986* inure to his or her heirs, legatees, or personal representative, until the twentieth anniversary of the death of the artist [*Civ. Code § 986(a)(7)* (applicable only with respect to an artist who dies after January 1, 1983)].

[5] Exempt Transactions

The provisions of *Civ. Code § 986(a)* [*see* [1]-[4], *above*] do not apply to any of the following [*Civ. Code § 986(b)*]:

(1) The initial sale of a work of fine art when legal title is vested in the artist;

(2) The resale of a work of fine art for a gross sales price of less than $1,000;

(3) Resale after the artist's death, except that, pursuant to *Civ. Code § 986(a)(7)*, the right to the five percent royalty payment inures to the artist's heirs, legatees, or personal representative for 20 years after the death of an artist who dies after January 1, 1983;

(4) The resale of the work of fine art for a gross price less than the purchase price paid by the seller;

(5) A transfer of a work of fine art which is exchanged for one or more works of fine art or for a combination of cash, other property, and one or more works of fine art when the fair market value of the property exchanged is less than $1,000;

(6) The resale of a work of fine art by an art dealer to a purchaser within 10 years of the initial sale of the work by the artist to an art dealer, provided all intervening resales are between art dealers; and

(7) A sale of a work of stained glass artistry when it has been permanently attached to real property and is sold as part of the sale of the real property. The provisions of *Civ. Code § 986* (operative January 1, 1977) apply to works of fine art created before the section's operative date as well as to works created thereafter [*Civ. Code § 986(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawConveyancesState RegulationGovernmentsLegislationStatutes of LimitationsTime LimitationsContracts LawTypes of ContractsPersonal PropertyCopyright LawOwner RightsState RegulationBankruptcy LawExemptionsState LawSpecific Exemptions

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6-57 California Forms of Pleading and Practice--Annotated §§ 57.27-57.39

[Reserved]

§§ 57.27[Reserved]

California Forms of Pleading and Practice--Annotated

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C. Applicable Contract Principles

6-57 California Forms of Pleading and Practice--Annotated § 57.40

§ 57.40 Artists' Contracts for Works

An artist's agreement to make a work of art is a contract for the performance of personal services [*see Mackay v. Clark RigBldg. Co. (1935) 5 Cal. App. 2d 44, 58-59, 42 P.2d 341]* . Such a contract is not specifically enforceable against the artist [*see Civ. Code § 3390*].

As a general rule, an injunction cannot be granted to prevent the breach of an agreement that cannot be specifically enforced [*see Adams v. Williams Resorts, Inc. (1962) 210 Cal. App. 2d 456, 463, 26 Cal. Rptr. 656* ; *see also Civ. Code § 3423*; *Code Civ. Proc. § 526(b)*]. However, an injunction may be available to prevent a breach of a contract to make a work of art, provided that the contract is in writing and provides for compensation of not less than $6,000 per year for contracts entered into on or before December 31, 1993, and at higher rates in successive years for contracts entered into on or after January 1, 1994, and that the promised service is of a special, unique, unusual, extraordinary, or intellectual character that gives it a peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law [*see Civ. Code § 3423*; *Code Civ. Proc. § 526*; *see also Foxx v. Williams (1966) 244 Cal. App. 2d 223, 235-236, 52 Cal. Rptr. 896* (construing former *Civ. Code § 3423(e)* prior to 1992 and 1993 amendments to the minimum annual compensation)]. For further discussion, see Ch. 528, *Specific Performance* .

The death or disability of the artist discharges his or her obligation [*see Mackay v. Clark Rig Bldg. Co. (1935) 5 Cal. App. 2d 44, 56-57, 42 P.2d 341]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesEquitable ReliefInjunctive ReliefContracts LawTypes of ContractsPersonal Service AgreementsContracts LawRemediesSpecific Performance

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6-57 California Forms of Pleading and Practice--Annotated § 57.41

§ 57.41 Ascertainment of Damages

In an action based on breach of contract, no damages can be recovered that are not clearly ascertainable both in their nature and origin [*Civ. Code § 3301*]. This condition refers to the fact, not the extent or monetary value, of the plaintiff's injury [*see Stott v. Johnston (1951) 36 Cal. 2d 864, 875, 229 P.2d 348]* .

It appears to be the rule in California that if an item is so unusual in character that a market value cannot be determined, its value (that is, the plaintiff's damages), must be ascertained in some other rational way from elements that are attainable, such as the difficulty and expense to which plaintiff was put in acquiring the property, the nature and character of the use to which it was put by him or her, and the like [*Zvolanek v. Bodger Seeds, Ltd. (1935) 5 Cal. App. 2d 106, 109, 42 P.2d 92* (negligence); *see also Willard v. Valley Gas & Fuel Co. (1915) 171 Cal. 9, 15-16, 151 P. 286* (negligence)].

A person is competent to testify regarding the value of property that he or she owns, even though he or she is not an expert [*Willard v. Valley Gas & Fuel Co. (1915) 171 Cal. 9, 14-16, 151 P. 286* ; *see also Evid. Code § 800* (opinions of nonexperts)]. When certain property has a peculiar value to a person recovering damages for deprivation thereof or injury thereto, the peculiar value may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer [*Civ. Code § 3355*], when the property also has a market value; but this rule does not apply to property having no market value [*Willard v. Valley Gas & Fuel Co. (1915) 171 Cal. 9, 15, 151 P. 286]* .

For further discussion of damages, see Ch. 177, *Damages* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal PropertyTortsDamagesGeneral OverviewContracts LawTypes of ContractsPersonal Service AgreementsContracts LawRemediesCompensatory DamagesGeneral OverviewCivil ProcedureRemediesDamagesCompensatory Damages

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6-57 California Forms of Pleading and Practice--Annotated §§ 57.42-57.49

[Reserved]

§§ 57.42[Reserved]

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6-57 California Forms of Pleading and Practice--Annotated § 57.50

§ 57.50 Nature of Rights Protected

Some European and other nations have long recognized rights that are personal to artists and that are separate and distinct from the economic or proprietary rights of copyright. These personal rights are known as moral rights. Two species of moral rights are protected, in limited contexts, by both federal and California law, which are discussed in this subpart. The protected moral rights are the right of attribution and the right of integrity. For further discussion of moral rights generally, and of the rights of attribution and integrity specifically, see M. Nimmer on Copyright, *Moral Rights*, Ch. 8D.

The right of attribution includes the right of an artist to be known as the author of his or her work, to prevent others from being named as the author of his or her work, and to prevent others from falsely attributing to that artist authorship of work that he or she has not created. The right of integrity includes an artist's right to prevent others from making deforming changes to the artist's work [M. *Nimmer on Copyright, § 8D.03*]. At the federal level and in the context of narrowly defined "works of visual art," these rights are set forth in *17 U.S.C. § 106A(a)* [*see § 57.52[3*], *below*]. In California, and in the context of narrowly defined works of "fine art," these rights are set forth in *Civ. Code § 987(c)* and *(d)* [*see § 57.53[1*], *below*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawOwner RightsGeneral OverviewContracts LawTypes of ContractsPersonal PropertyCopyright LawOwner RightsMoral RightsCopyright LawSubject MatterPictorial, Graphic & Sculptural WorksWorks of Art

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6-57 California Forms of Pleading and Practice--Annotated § 57.51

§ 57.51 Preemption of State Statutory and Common Law by Federal Law

[1] In General

On or after June 1, 1991, all legal or equitable rights that are equivalent to any of the rights conferred by *17 U.S.C. § 106A* relative to works of visual art to which the rights conferred by *17 U.S.C. § 106A* apply are governed exclusively by *17 U.S.C. §§ 106A* and *113(d)* and by the provisions of the Copyright Act of 1976 relating to those sections. Thereafter, no person is entitled to any such right or equivalent right in any work of visual art under the common law or statutes of any state [*17 U.S.C. § 301(f)(1)*]. Thus, federal statutes protecting and providing a cause of action for violation of the rights of attribution and integrity preempt California law protecting and providing a cause of action for violation of the same rights [*see 17 U.S.C. § 301(f)*].

If a state attempts to grant an artist the rights of attribution or integrity for works of visual art as defined in the federal moral rights law, those state laws are preempted. For example, the federal moral rights law preempts *Civ. Code § 987* as it applies during an artist's lifetime, at least to the artist's right of integrity in a work of fine art [*see Civ. Code § 987(b)(2)*] created on or after June 1, 1991. The California statute is preempted in this respect even though *Civ. Code § 987* is broader than the federal law, inasmuch as the California statute provides a right of integrity with respect to covered works without regard to injury to the author's honor or reputation [*see* H.R. Rep. No. 514, 101st Cong., 2d Sess. 21 (1990); *compare 17 U.S.C. §§ 101, 106A with Civ. Code § 987*, discussed in *§ 57.53*].

[2] Exceptions

Nothing in the federal preemption statute, however, annuls or limits any rights or remedies under the common law or statutes of any state with respect to the following [*17 U.S.C. § 301(f)(2)*]:

- Any cause of action from undertakings commenced before June 1, 1991;

- Activities violating legal or equitable rights that are not equivalent to any of the rights conferred by *17 U.S.C. § 106A* relative to works of visual art; or

- Activities violating legal or equitable rights that extend beyond the life of the author.

Consistent with current law on preemption for economic (copyright) rights, federal moral rights law will not preempt state causes of action relating to works that are not covered by federal moral rights law, such as audiovisual works and photographs produced for nonexhibition purposes [H.R. Rep. No. 514, 101st Cong., 2d Sess. 21 (1990); *see 17 U.S.C. § 101* ("work of visual art" defined), *discussed under § 57.52[2], below*]. Similarly, state laws governing artists' rights that grant rights not equivalent to those accorded under the federal law are not preempted, even when they relate to works covered by the federal moral rights law. For example, the federal law will not preempt a cause of action for a misattribution of a reproduction of a work of visual art [H.R. Rep. No. 514, 101st Cong., 2d Sess. 21 (1990)]. Nor will it preempt a cause of action for violation of a right to a resale royalty under *Civ. Code § 986* [H.R. Rep. No. 514, 101st Cong., 2d Sess. 21 (1990); *see Civ. Code § 986*, discussed in *§ 57.26, above*].

With respect to activities violating legal or equitable rights that extend beyond the life of the author (subparagraph (3), *above*), federal moral rights law will not preempt a cause of action under *Civ. Code § 987(e)* for violation of an attribution or integrity right when the work is otherwise covered by the federal moral rights law but the violation occurred within 50 years after the artist's death [*see 17 U.S.C. § 301(f)(2)(C)*; *Civ. Code § 987(g)(1)*; *see also discussion under § 57.53[3*], *below*].

Finally, state law causes of action such as those for misappropriation, unfair competition, breach of contract, and deceptive trade practices are not preempted by the federal moral rights law [H.R. Rep. No. 514, 101st Cong., 2d Sess. 21 (1990)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawOwner RightsGeneral OverviewCopyright LawConstitutional ProtectionsApplication of FederalismFederal PreemptionCivil ProcedureFederal & State InterrelationshipsFederal Common LawInterstitial LawConstitutional LawSupremacy ClauseFederal PreemptionCopyright LawSubject MatterPictorial, Graphic & Sculptural WorksWorks of Art

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6-57 California Forms of Pleading and Practice--Annotated § 57.52

§ 57.52 Visual Artists Rights Act of 1990

[1] Federal Protection of Artist's Rights of Attribution and Integrity

The Visual Artists Rights Act of 1990 is a set of amendments to various provisions of the Copyright Act of 1976 (*17 U.S.C. § 101 et seq.*) that protects both the reputations of certain visual artists and the works of art they create. It provides these artists with the rights of attribution and integrity. The right of attribution ensures that artists are correctly identified with the works of art they create and that they are not identified with works created by others. The right of integrity allows artists to protect their works against modifications and destructions that are prejudicial to their honor or reputations. Together, these rights enable visual artists to protect the integrity of their works and the fact of their authorship [H.R. Rep. No. 514, 101st Cong., 2d Sess. 5 (1990)].

[2] Protected Works of Visual Art

A "work of visual art" is any of the following [*17 U.S.C. § 101*]:

- A painting, drawing, or print, existing in a single copy or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author;

- A sculpture existing in a single copy or in multiple cast, or carved or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

- A still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

The general protective principle operative in these definitions is that protection is limited to originals, that is, to works created in single copies or limited editions. Reproductions are not protected [*see* H.R. Rep. No. 514, 101st Cong., 2d Sess. 9 (1990)].

In an action for infringement of attribution or integrity rights, the author ordinarily has the burden of showing that the particular work falls within the definition set forth in *17 U.S.C. § 101* [H.R. Rep. No. 514, 101st Cong., 2d Sess. 13 (1990)].

[3] Works Not Protected

A work of visual art excludes a host of articles and art forms, in whole or in part, specified in *17 U.S.C. § 101*, and including applied art and motion pictures or other audiovisual works. Reproductions are not protected [*see* H.R. Rep. No. 514, 101st Cong., 2d Sess. 9 (1990)]. Protected visual art also does not include merchandising, advertising, promotional, or packaging material. Finally, protected visual art does not include any work made for hire [*17 U.S.C. § 101*; *see 17 U.S.C. § 101* ("work made for hire" defined)] and any work not subject to copyright protection under the Copyright Act of 1976 [*17 U.S.C. § 101*]. The following 13 factors are to be considered in determining whether a work was produced for hire (by an employee) or by an independent contractor [*Community for Creative Non-Violence v. Reid (1989) 490 U.S. 730, 751-752, 109 S. Ct. 2166, 104 L. Ed. 2d 811* ; *Carter v. Helmsley-Spear, Inc. (2d Cir. 1995) 71 F.3d 77, 85]* :

- The hiring party's right to control the manner and means by which the product is accomplished.
- The skill required.
- The source of the instrumentalities and tools.
- The location of the work.
- The duration of the relationship of the parties.
- Whether the hiring party has the right to assign additional projects to the hired party.
- The extent of the hired party's discretion over when and how long to work.
- The method of payment.
- The hired party's role in hiring and paying assistants.
- Whether the work is part of the regular business or the hiring party.
- Whether the hiring party is in business.
- The provision of employee benefits.
- The tax treatment of the hired party.

A sculpture made in the lobby of defendants' building was found to be a work for hire, and thus excluded from the protection of the act on the basis of the following criteria [*Carter v. Helmsley-Spear, Inc. (2d Cir. 1995) 71 F.3d 77, 86-88]* :

- The contract gave the hiring party the right to require the artists to perform other related projects.
- The artists were assigned and did complete projects in other places in the building.

- The hiring party paid payroll and social security taxes.
- The hiring party provided life, health, and liability insurance and paid vacations.
- The hiring party contributed to unemployment insurance and workers' compensation funds on the artists' behalf.
- Two of the three artists filed for unemployment benefits after their positions were terminated.
- Each artist was paid a weekly salary for the two years it took to complete the work.
- The artists agreed to work principally for the defendants for the duration of the agreement on a 40-hour per week basis.
- Most of the supplies used to create the sculpture were provided by defendants.
- Artists could not hire paid assistants without defendants' approval.

[4] Right of Attribution

[a] To Claim Authorship

The author of a work of visual art has the right of attribution to claim authorship of that work [*17 U.S.C. § 106A(a)(1)(A)*].

[b] To Prevent Attribution of Authorship to Work Not Created by Author

Additionally, the author of a work of visual art has the attribution right to prevent the use of his or her name as the author of any work of visual art that he or she did not create [*17 U.S.C. § 106A(a)(1)(B)*].

[c] To Prevent Attribution of Authorship to Modified Work

Finally, the author of a work of visual art has the combined right of attribution and integrity to prevent the use of his or her name as the author of the work in the event of a distortion, mutilation, or other modification of the work that would be prejudicial to the author's honor or reputation [*see 17 U.S.C. § 106A(a)(2)*].

It is not clear whether this right applies when the modification is the result of the passage of time or the inherent nature of the materials of which the work is made [*see 17 U.S.C. § 106A(c)(1)*]. It is also not clear whether this right applies when the modification is made without gross negligence as the result of either conservation or the public presentation of the work [*see 17 U.S.C. § 106A(c)(2)*; *see also* H.R. Rep. No. 514, 101st Cong., 2d Sess. 17 (1990)]. On the other hand, the rights of integrity (discussed under [5], *below*) clearly do not apply when modification of the work is the result of these factors [*see 17 U.S.C. § 106A(c)(1), (2)*; *see also* H.R. Rep. No. 514, 101st Cong., 2d Sess. 17 (1990)].

[d] Limitations on Right and Effect of Copyright

All of the rights of attribution are subject to the fair use limitations of the Copyright Act of 1976 [*see 17 U.S.C. § 107*] and independent of the exclusive rights of copyright afforded the owner of the copyright in the work [*see 17 U.S.C. § 106*]. For discussion of fair use and exclusive rights of copyright, see Ch. 349, *Literary Property and Copyright* .

[e] Attribution Right Inapplicable to Specified Depictions

These attribution rights do not apply to any use of a work in connection either with a work made for hire or with any of the art forms and articles excluded by statute from the definition of a work of visual art. Furthermore, any such use of the work is not a prejudicial modification of the work giving rise to the author's right to prevent the use of his or her name in connection with the work [*see 17 U.S.C. § 106A(c)(3)*; *see also 17 U.S.C. § 101* ("work of visual art" defined), discussed under [2], *above*]. This exception operates, for example, when a magazine includes a photograph of a work, such as a painting or a piece of sculpture, that meets the definition of a "work of visual art." The depiction of that work in the photograph is not a violation of the painter's or sculptor's right of attribution [*see* H.R. Rep. No. 514, 101st Cong., 2d Sess. 17 (1990)].

[5] Right of Integrity

[a] To Prevent Modification of Work

The author of a work of visual art has the integrity right to prevent any intentional distortion, mutilation, or other modification of the work that would be prejudicial to the author's honor or reputation. Any intentional distortion, mutilation, or modification of that work is a violation of this right [*17 U.S.C. § 106A(a)(3)(A)*].

This right is subject to both the fair use and building incorporation limitations of the Copyright Act of 1976 [*17 U.S.C. § 106A(a)(3)*; *see 17 U.S.C. §§ 107* (fair use, discussed in Ch. 349, *Literary Property and Copyright*), 113(d) (artwork incorporated in buildings, discussed under [d], *below*)]. The right is also independent of the exclusive rights of copyright afforded the owner of the copyright in the work [*17 U.S.C. § 106A(a)(3)*; *see 17 U.S.C. § 106*, discussed in Ch. 349, *Literary Property and Copyright*].

A modification that is a result of the passage of time or the inherent nature of the materials is not a distortion, mutilation, or other modification [*17 U.S.C. § 106A(c)(1)*]. Additionally, a modification that is the result of conservation or of the public presentation of the work (including lighting and placement) is not a destruction, distortion, mutilation, or other modification as described, unless the modification is caused by gross negligence [*17 U.S.C. § 106A(c)(2)*]. Generally, the removal of a work from a specific location comes within the presentation exclusion because location is a matter of presentation, unless the work cannot be removed without causing the kinds of actionable modifications discussed, *above*. Therefore, despite the statutory grant of the right of integrity, galleries and museums continue to have normal discretion to light, frame, and place works of art. Nevertheless, conduct that goes beyond presentation of a work to physical modification of it is actionable [*see* H.R. Rep. No. 514, 101st Cong., 2d Sess. 17 (1990)].

[b] To Prevent Destruction of Work of Recognized Stature

Furthermore, the author of a work of visual art has an integrity right that prevents any destruction of a work of recognized stature. Any intentional or grossly negligent destruction of that work is a violation of that right [*17 U.S.C. § 106A(a)(3)(B)*]. This right is also subject to the fair use and building incorporation limitations and independent of the rights of copyright of the Copyright Act of 1976 [*17 U.S.C. § 106A(a)(3)*; *see 17 U.S.C. §§ 106, 107, 113(d)*].

A modification of the work, however, that is the result of conservation or of the public presentation of the work, including lighting and placement, is not a destruction of the work as described above, unless the modification is caused by gross negligence [*17 U.S.C. § 106A(c)(2)*]. Presentation issues are discussed under [a], *above*.

It is not clear exactly what a work "of recognized stature" is. The legislative history surrounding enactment of the Visual Artists Rights Act of 1990 seems to indicate that such a work presupposes the artist has a preexisting standing in the artistic community, and that the artist would be required to prove that standing in any action to enforce the integrity right related to such a work. There is also an indication that this proof would entail expert witness testimony to provide evidence of the work's "recognized" stature [*see* H.R. Rep. No. 514, 101st Cong., 2d Sess. 15 (1990)]. Persuasive

assistance in the proof of recognized stature may perhaps be found in the California moral rights law. Under the applicable statute, in determining whether a work of fine art is of "recognized quality" for purposes of enforcement of moral rights, the trier of fact is instructed to rely on the opinions of artists, art dealers, fine art collectors, art museum curators, and other persons involved with the creation or marketing of fine art [*see Civ. Code § 987(f)*; *see also Civ. Code § 987(b)(2)* (defining "fine art" as being of "recognized quality")].

[c] Integrity Right Inapplicable to Specified Depictions

Any reproduction, depiction, portrayal, or other use of a work in connection either with a work made for hire or with any of the art forms specified by statute as not constituting a work of visual art is not a modification of the work giving rise to the author's integrity rights [*17 U.S.C. § 106A(c)(3)*; *see 17 U.S.C. § 101* ("work of visual art" defined), discussed under [2], *above*]. For example, this exception applies when a motion picture includes a scene set in an art gallery. The showing in the motion picture of a painting on display in the gallery, when the painting qualifies as a "work of visual art," does not violate the painter's integrity rights [*see* H.R. Rep. No. 514, 101st Cong., 2d Sess. 17 (1990)].

[d] Inapplicable to Work Incorporated in Building

If a work of visual art has been incorporated in or made part of a building in such a way that the work cannot be removed from the building without causing modification or destruction of the work in a way that would be prejudicial to the author's honor or reputation, none of the author's integrity rights of *17 U.S.C. § 106A(a)(2)* and *(3)* apply. Similarly, none of the integrity rights apply if the author consented to installation of the work in the building either before June 1, 1991, or in a written instrument, signed by both the building owner and the author, executed on or after June 1, 1991, that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification because of its removal [*17 U.S.C. § 113(d)(1)*].

If, however, a work of visual art has been incorporated in or made part of a building in such a way that the work can be removed from the building without any modification of the work that would be prejudicial to the artist's honor or reputation, the artist's integrity rights under *17 U.S.C. § 106A(a)(2)* and *(3)* apply, subject to the occurrence of either of the following conditions [*17 U.S.C. § 113(d)(2)*]:

- The building owner desiring to remove the work has made a diligent, good faith, but unsuccessful, attempt to notify the author of the owner's intended action affecting the work. An owner is presumed to have made a diligent, good faith attempt to send notice if the owner sent the notice by registered mail to the author at the author's most recent address as recorded with the Register of Copyrights pursuant to *17 U.S.C. § 113(d)(3)*. If the work is removed at the author's expense, title to that copy of the work is deemed to be in the author; or

- The owner did provide written notice but the person so notified failed, within 90 days after receiving the notice, either to remove the work or to pay for its removal.

The Register of Copyrights is required by law to establish a recording system to make this notice scheme work [*see 17 U.S.C. § 113(d)(3)*].

[6] Ownership of Rights

Only the author of a work of visual art has the rights of attribution and integrity in that work, whether or not the author is the copyright owner. The authors of a joint work of visual art are coowners of these rights [*17 U.S.C. § 106A(b)*].

[7] Duration of Rights

With respect to works of visual art created on or after June 1, 1991, the rights of attribution and integrity endure for the

life of the author [*17 U.S.C. § 106A(d)(1)*].

With respect to works of visual art created before June 1, 1991, but to which title has not been transferred from the author as of June 1, 1991, the rights of attribution and integrity are coextensive with, and expire at the same time as, the exclusive rights conferred on a copyright owner by *17 U.S.C. § 106* [*17 U.S.C. § 106A(d)(2)*]. The duration of copyright, and therefore of the attribution and integrity rights, depends on when the work was created or published or when it first acquired a copyright [*see 17 U.S.C. §§ 302-304*; for further discussion of the duration of copyright, *see* Ch. 349, *Literary Property and Copyright*]. It is important to note, however, that, in some instances, the attribution and integrity rights of these works will be of longer duration than those of works created on or after June 1, 1991, and in some cases may even extend beyond the life of the author [*see, e.g., 17 U.S.C. § 302(a)* (copyright in work created on or after January 1, 1978, endures generally for term consisting of life of author plus 70 years)]. It appears from the language of *17 U.S.C. § 106A(d)(2)* that, when the moral rights in the work subsist beyond the life of the author, they may be devised to the author's beneficiaries or inherited by the author's heirs [*see 17 U.S.C. § 106A(d)(2)*; *see also 17 U.S.C. § 201(d)(1)* (transfer of ownership of copyright by will or intestate succession)]. It also appears, however, that this language is at odds with the statutory prohibition against the transfer of moral rights [*see 17 U.S.C. § 106A(e)(1)*, discussed under [8], *below*].

In the case of a joint work prepared by two or more authors, the rights of attribution and integrity endure for the life of the last surviving author [*17 U.S.C. § 106A(d)(3)*].

All terms of the rights of attribution and integrity run to the end of the calendar year in which they expire [*17 U.S.C. § 106A(d)(4)*].

[8] Assignment, Transfer, and Waiver of Rights

The rights of attribution and integrity cannot be assigned or otherwise transferred [*17 U.S.C. § 106A(e)(1)*]. An assignment or transfer to third parties is contrary both to the personal nature of the rights and to the legislative purpose of strictly controlling the circumstances under which the author chooses to exercise these rights [H.R. Rep. No. 514, 101st Cong., 2d Sess. 19 (1990)]. Because the rights also die with the author when the work is created on or after June 1, 1991, the rights in works created on or after that date cannot be devised to the author's beneficiaries or inherited by the author's heirs, in contradistinction to the operation of the California moral rights statute [*see Civ. Code § 987(g)(1)*].

The rights may, however, be waived if the author expressly agrees to a waiver in a writing signed by the author. The writing must specifically identify the work, and the uses of that work, to which the waiver applies. The waiver can apply only to the work and uses so identified. Blanket waivers are prohibited [*17 U.S.C. § 106A(e)(1)*; H.R. Rep. No. 514, 101st Cong., 2d Sess. 19 (1990)]. Furthermore, according to legislative history, the waiver applies only to the specific person to whom the waiver is made, and that person cannot subsequently transfer that waiver to a third party. Any third party must obtain a waiver directly from the author [*see* H.R. Rep. No. 514, 101st Cong., 2d Sess. 18-19 (1990)].

In the case of a joint work prepared by two or more authors, a waiver of rights made by one joint author waives the same rights for all joint authors [*17 U.S.C. § 106A(e)(1)*].

Ownership of the rights of attribution and integrity with respect to a work of visual art is distinct from ownership of any copy of that work or of a copyright or any exclusive right under a copyright in that work. Transfer of ownership of any copy of a work of visual art, or of a copyright or any exclusive right under a copyright, does not constitute a waiver of the rights of attribution and integrity. Except as may otherwise be agreed by the author in a writing signed by the author, a waiver of the rights of attribution and integrity with respect to a work of visual art does not constitute a transfer of ownership of any copy of that work, or ownership of a copyright or of any exclusive right under a copyright in that work [*17 U.S.C. § 106A(e)(2)*].

[9] Civil Action for Enforcement of Rights

[a] Availability

The author of the work is entitled to institute an action for any infringement of the rights of attribution or integrity committed while he or she is the holder of those rights [*see 17 U.S.C. §§ 106A(e), 501(b)*; for a form of complaint for infringement of attribution and integrity rights, *see § 57.150[1]*]. An infringement is any violation of the attribution or integrity rights as provided in *17 U.S.C. § 106A* [*see 17 U.S.C. § 501(a)*; *see also 17 U.S.C. § 106A(a)*]. An infringement action is only available for any cause of action from undertakings commenced on or after June 1, 1991 [*see 17 U.S.C. § 301(f)(1), (2)(A)*]. Note that the author retains this right of action as long as he or she is the holder of the rights, even if he or she does not own the work or the copyright in the work [*see 17 U.S.C. § 106A(a), (e)*].

An infringer of the rights is anyone who violates those rights. "Anyone" includes any State, any instrumentality of a state, and any officer or employee of a state or instrumentality of a state acting in an official capacity. Any state, and any instrumentality, officer, or employee, is subject to the provisions of the Copyright Act of 1976 in the same manner and to the same extent as any nongovernmental entity [*17 U.S.C. § 501(a)*].

[b] Period of Limitation

An artist's action to enforce the rights of attribution and integrity must be commenced within three years after the claim has accrued [*17 U.S.C. § 507(b)*].

[c] Remedies

With the exception of the imposition of criminal penalties [*see 17 U.S.C. § 506(f)*], any remedy that is applicable under the Copyright Act of 1976 for infringement of copyright is applicable to the owner of attribution and integrity rights in an action to enforce and prevent the violation of those rights [*see 17 U.S.C. § 501(b)*]. These remedies are money damages [*17 U.S.C. § 504(b)*], profits [*17 U.S.C. § 504(b)*], special damages in certain cases [see *17 U.S.C. § 504(d)*], temporary and final injunctive relief [*17 U.S.C. § 502(a)*], and the equitable relief of seizure [*17 U.S.C. § 509*], impoundment [*17 U.S.C. § 503(a)*], destruction [*17 U.S.C. § 503(b)*], and forfeiture [*17 U.S.C. § 509*]. These remedies are discussed in Ch. 349, *Literary Property and Copyright*].

To the degree that costs, attorney's fees, and interest are applicable in an action for infringement of copyright under the Copyright Act of 1976 [*see 17 U.S.C. § 505*], they are applicable in an action under the Act for the enforcement of attribution and integrity rights [*see 17 U.S.C. § 501(a)*]. The recovery of items is discussed in Ch. 349, *Literary Property and Copyright* .

[d] Defenses

The defenses of fair use and waiver of rights are specifically applicable in an action for infringement of moral rights, in addition to any other available defenses [*see 17 U.S.C. § 106A(a), (e)*; *see generally Cort v. St. Paul Fire & Marine Ins. Cos. (9th Cir. 2002) 311 F.3d 979* (when building owner obliterated mural that had been painted on side of building as public-art project, and artists sued under VARA, building owner's property insurer had no duty to defend because artists' claims could not be construed as alleging any cause of action within personal injury or advertising injury coverage of insurance policy)]. For a discussion of fair use, see Ch. 349, *Literary Property and Copyright* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawConveyancesState RegulationCopyright LawOwner RightsMoral RightsCopyright LawDuration & RenewalDurationGeneral OverviewCopyright LawOwner RightsState RegulationCopyright LawSubject

MatterPictorial, Graphic & Sculptural WorksWorks of Art

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Chapter 57 ART
PART II. LEGAL BACKGROUND
D. Protection of Artist's Moral Rights Under Federal and State Law

6-57 California Forms of Pleading and Practice--Annotated § 57.53

§ 57.53 California Art Preservation Act

[1] Prohibition Against Alteration or Destruction of Fine Art

Works of fine art are an expression of an artist's personality. The physical alteration or destruction of a work of fine art is detrimental to the artist's reputation, and therefore artists have an interest in protecting their works against alteration or destruction. There is also a public interest in preserving the integrity of cultural and artistic creations [*Civ. Code § 987(a)*]. To protect these interests, the Legislature enacted the California Art Preservation Act (*Civ. Code § 987*). Organizations seeking to preserve the integrity of cultural and artistic creations may seek injunctive relief pursuant to *Civ. Code § 989* [*see* [5][d], *below*].

The act provides that no person, except an artist (defined in *Civ. Code § 987(b)(1)*) who owns and possesses a work of fine art that he or she has created, may intentionally commit or authorize the intentional commission of any physical defacement, mutilation, alteration, or destruction of a work of fine art [*Civ. Code § 987(c)(1)*]. Additionally, no person who frames, conserves, or restores a work of fine art may personally commit, or authorize the commission of, any physical defacement, mutilation, alteration, or destruction of a work of fine art by an act of gross negligence. The term "gross negligence" means the exercise of so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art [*Civ. Code § 987(c)(2)*].

There is no implied remedy for destruction due to simple negligence [*Lubner v. City of Los Angeles (1996) 45 Cal. App. 4th 525, 530, 53 Cal. Rptr. 2d 24* (truck crashed into artists' home; no recovery under section 987, common law, or *17 U.S.C. § 106A*)]. Similarly, the artist cannot recover damages for emotional distress in a case involving destruction of art works due to simple negligence [*Lubner v. City of Los Angeles (1996) 45 Cal. App. 4th 525, 533-534, 53 Cal. Rptr. 2d 24]* .

It appears that *Civ. Code § 987* has been preempted by the Visual Artists Rights Act of 1990 [*17 U.S.C. § 301(f)*; *Lubner v. City of Los Angeles (1996) 45 Cal. App. 4th 525, 531, 53 Cal. Rptr. 2d 24* ; *accord, Cort v. St. Paul Fire & Marine Ins. Cos. (9th Cir. 2002) 11 F.3d 973 n.1*]. For discussion of the extent of preemption, *see § 57.51*.

[2] Artist's Right of Attribution

The artist retains at all times the right to claim authorship or, for just and valid reason, to disclaim authorship of his or her work of fine art [*Civ. Code § 987(d)*].

For discussion of the extent of preemption of state law by the Visual Artists Rights Act of 1990 [*see 17 U.S.C. § 301(f)*], see *§ 57.51*.

[3] Action by Artist to Enforce Rights Under Act

To effectuate the rights created by *Civ. Code § 987*, the artist may commence an action to recover or obtain (1) injunctive relief, (2) actual damages, (3) punitive damages, (4) reasonable attorney's and expert witness's fees, and (5) any other relief the court deems proper. In the event that punitive damages are awarded, the court must, in its discretion, select an organization or organizations engaged in charitable or educational activities involving the fine arts in California to receive those damages [*Civ. Code § 987(e)*]. This action is available only for intentional damage or destruction of the work of art [*see Civ. Code § 987(c)(1)* set forth at [1], *above*]. For a form of complaint, see *§ 57.151*.

No action may be maintained to enforce any liability under *Civ. Code § 987* unless brought within three years of the act complained of or one year after discovery of the act, whichever is longer [*Civ. Code § 987(i)*].

A work of fine art for purposes of *Civ. Code § 987* must be of recognized quality [*see Civ. Code § 987(b)(2)* ("fine" art defined)]. In determining whether a work of fine art is of recognized quality, the trier of fact must rely on the opinions of artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art [*Civ. Code § 987(f)*].

For discussion of the extent of preemption of state law by the Visual Artists Rights Act of 1990 [*see 17 U.S.C. § 301(f)*], see *§ 57.51*.

[4] Scope of Waiver of Rights

The rights and duties created under *Civ. Code § 987* exist, with respect to the artist or, if any artist is deceased, to his or her heir, beneficiary, devisee, or personal representative, until the 50th anniversary of the artist's death [*Civ. Code § 987(g)(1)*]. The rights and duties also exist in addition to any other rights and duties that may now or in the future be applicable [*Civ. Code § 987(g)(2)*]. Additionally, except as provided for works of art permanently attached to a building, these rights and duties may not be waived except by a written instrument expressly so providing which is signed by the artist [*Civ. Code § 987(g)(3)*].

For discussion of the extent of preemption of state law by the Visual Artists Rights Act of 1990 [*see 17 U.S.C. § 301(f)*], see *§ 57.51*.

[5] Work of Art Attached to Building

[a] In General

The California Art Preservation Act protects works of fine art that are attached to buildings. Murals come within the statutory definition of "fine art," but graffiti is not protected [*Botello v. Shell Oil Co. (1991) 229 Cal. App. 3d 1130, 1134, 1134 n.2, 280 Cal. Rptr. 535]* .

The rights and duties created under the Act are deemed waived when a work of fine art cannot be removed from a building without substantial physical defacement, mutilation, alteration, or destruction, unless expressly reserved in a written instrument that is signed by the owner of the building, contains a legal description of the property, and is properly recorded. If properly recorded, the written reservation is binding on subsequent owners of the building

involved [*Civ. Code § 987(h)(1)*].

For discussion of the extent of preemption of state law by the Visual Artists Rights Act of 1990 [*see 17 U.S.C. § 301(f)*], see *§ 57.51*.

[b] Notice to Artist of Removal

In cases in which the work of fine art can be removed from a building without substantial harm to the work, the rights and duties created under the act apply if the owner of the building, in the course of or after removal, intends to cause or allow the work to suffer physical defacement, mutilation, alteration, or destruction. The rights and duties do not apply if the owner (1) has diligently attempted without success to notify the artist or, if the artist is deceased, the artist's heir, beneficiary, devisee, or personal representative in writing of his or her intention affecting the work, or (2) provided notice and the artist or other person notified failed within 90 days either to remove the work or to pay for its removal. If the work is removed at the expense of the artist or his or her heir, beneficiary, devisee, or personal representative, title to the fine art passes to that person [*Civ. Code § 987(h)(2)*].

If the work of fine art can be removed from a building scheduled for demolition without substantial physical defacement, mutilation, alteration, or destruction of the work, and the owner of the building either owns the work or has notified the owner of the work of the scheduled demolition, and the owner of the work elects not to remove the work, the rights and duties created under the act apply. The rights and duties do not apply, however, if the owner of the building (1) has diligently attempted without success to notify the artist or, if the artist is deceased, his or her heir, beneficiary, devisee, or personal representative in writing of the intended action affecting the work, or (2) did provide notice and that person failed within 90 days either to remove the work or to pay for its removal. If the work is removed at the expense of the artist or his or her heir, beneficiary, devisee, or personal representative, title to the fine art passes to that person [*Civ. Code § 987(h)(3)*].

[c] Public Notice of Removal

An owner of real property who wishes to remove a work of fine art of recognized quality and of substantial public interest [*see Civ. Code § 989(b)(1)* ("fine art" defined)] that is part of the real property, and that can be removed without substantial harm, but that the owner intends to allow to suffer physical defacement, mutilation, alteration, or destruction, may be required to give public notice of the removal [*see Civ. Code § 989(e)(2)*]. Either concurrently or after the 90-day notice required by *Civ. Code § 987(h)(2)* of an owner's intent to remove a work of fine art that will cause substantial harm to that work [*see* [b], *above*], to which the artist or his or her heir, beneficiary, devisee, or personal representative has not responded, the owner is required to provide 30 days' notice of his or her intended action. The written notice must be a display advertisement in a newspaper of general circulation in the area where the fine art is located [*Civ. Code § 989(e)(2)(A)*]. An organization acting in the public interest [*see Civ. Code § 989(b)(2)* ("organization" defined)] may respond within the 30-day period by agreeing to remove the work and paying the cost of removal [*see Civ. Code § 989(b)(3)* ("cost of removal" defined)]. Payment and removal must occur within 90 days of the first day of the 30-day notice. In this event, title to the fine art work passes to that organization [*Civ. Code § 989(e)(2)(A)(i), (ii)*]. If an organization does not agree to remove the work or fails to remove and pay the cost of removal within the applicable periods, the owner may take the intended action affecting the work [*Civ. Code § 989(e)(2)(B)*].

[d] Action for Injunctive Relief by Organization

An organization acting in the public interest may commence an action for injunctive relief to preserve or restore the integrity of a work of fine art from acts prohibited by *Civ. Code § 987(c)* [*Civ. Code § 989(c)*; *see* [1], *above*]. If it appears that a work of fine art cannot be removed from real property without substantial physical harm to the work, an organization, nonetheless, may offer some evidence as to the likelihood that the work can be removed from the property without substantial harm. If the organization can present that evidence and is prepared to pay the cost of the removal, it

may bring a legal action for a determination of this issue. The organization is entitled to injunctive relief to preserve the integrity of the work of fine art, but has the burden of proof in the action. The action must commence within 30 days after filing. The action is unavailable if the organization's interest is in conflict with a written reservation of rights binding against the building owner under *Civ. Code § 987(h)(1)* [*Civ. Code 989(e)(1)*; *see* discussion under [5][a], *above*].

The court may award reasonable attorney's and expert witness's fees to the prevailing party, and require the organization to post a bond in a reasonable amount [*Civ. Code § 989(f)*]. The action for injunctive relief must be brought within three years of the act complained of, or one year after discovery of the act, whichever is longer [*Civ. Code § 989(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawConveyancesState RegulationCivil ProcedureRemediesInjunctionsGeneral OverviewCopyright LawOwner RightsMoral RightsCopyright LawOwner RightsState RegulationCopyright LawSubject MatterPictorial, Graphic & Sculptural WorksWorks of Art

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[Reserved]

§§ 57.54[Reserved]

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6-57 California Forms of Pleading and Practice--Annotated § 57.60

§ 57.60 Elements of Bailment Agreement

[1] In General

A bailment is the delivery of personal property to a person for some special object or purpose, on a contract, express or implied, to conform to the objects or purposes of delivery, which may be as various as the transactions of men [*Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 850, 88 Cal. Rptr. 39]* .

In order to constitute a bailment, possession of the bailed article must be given or delivered to the bailee [*Garcia v. Halsett (1970) 3 Cal. App. 3d 319, 324, 82 Cal. Rptr. 420]* . A bailee cannot be responsible for redelivering that which has not been delivered to him [*Porter v. Los Angeles T. Club (1940) 40 Cal. App. 2d Supp. 840, 842 , 105 P.2d 956]* .

[2] Storage or Depositary for Hire

A bailment for storage otherwise than gratuitously is termed a depositary for hire [*Civ. Code § 1851*]. A depositary for hire, including an artisan in the position of a depositary for hire [*see* [3], *below*], has a lien for the following [*Civ. Code § 1856*]:

- Storage charges.
- Advances and insurance incurred at the request of the bailor.
- Money necessarily expended in and about the care, preservation, and keeping of the property stored.
- Money advanced at the request of the bailor, to discharge a prior lien.
- Expenses of sale to satisfy a valid lien.

The bailee of a stored work of art may not use it or permit it to be used, for any purpose, without the bailor's consent [*see Civ. Code § 1835*]. If the bailee does use the stored work wrongfully, then he or she is liable for any damage

happening to it during the wrongful use, except damage that must have inevitably happened even though the bailee had not so used it [*see Civ. Code § 1836*]. For a form of complaint for damages based on wrongful use of an art work by a bailee for storage, see *§ 57.163*.

[3] Bailment for Repair, Alteration, or Improvement

[a] Bailment Implied

When bailee has possession of a work of art for the purpose of repair, alteration, or improvement, the bailment is a mere incident to the conduct of the business from which the bailee derives profits (i.e., repairing, altering, or improving works of art). The bailment is for the mutual benefit of the parties, even though the bailee may receive no compensation for the bailment as such [*see Civ. Code §§ 1858-1858.3*]. One who becomes a bailee for the purpose of repair, alteration, or improvement is a depositary for hire [*see Greenberg Bros., Inc. v. Ernest W. Hahn, Inc. (1966) 246 Cal. App. 2d 529, 532, 54 Cal. Rptr. 770]* . Even though a bailment was not expressly created by the parties' agreement, if a bailment is an incidental service to the principal transaction, the law will deem it included in the agreement [*see Franklin v. Southern Pacific Co. (1928) 203 Cal. 680, 683, 265 P. 936]* .

An artisan who is entrusted with a work of art for the purpose of applying skilled labor to it and who gives it to another person for this purpose does not thereby breach the bailment agreement unless he or she was expressly or impliedly required to perform the labor personally [*see Travelers Fire Ins. Co. v. Brock & Co. (1938) 30 Cal. App. 2d 112, 114, 85 P.2d 905]* .

[b] Liens

An artisan in the position of a depositary for hire has the lien described in *Civ. Code § 1856* [*see* [2], *above*]. An artisan also has a special possessory lien as provided in *Civ. Code § 3051* on property with respect to which he or she has rendered a service, for any compensation due him or her [*see Civ. Code § 3051*].

[c] Notification of Lack of Insurance

A person who in the ordinary course of business regularly receives property from customers for the purpose of repair or alteration is required, on accepting property from a customer, to present the customer with a written receipt that includes the statement, if that is the case, that the deposited property is not insured or protected to the amount of its actual cash value by the depositary against loss occasioned by theft, fire, and vandalism while the property remains with the depositary [*Civ. Code §§ 1858(b), 1858.1*]. Failure to furnish the receipt or statement, or the making of any misrepresentation in the receipt, makes the depositary strictly liable to the customer for any loss occasioned by theft, fire, or vandalism while the property remains with the depositary [*see Civ. Code § 1858.2*]. A depositary who is insured or self-insured to protect property deposited by customers for loss or damage occasioned by theft, fire, or vandalism while property remains in his or her possession is not required to make or deliver the statement to the customer [*see Civ. Code § 1858.3*].

As a further consequence, a depositary who becomes liable under *Civ. Code § 1858.2*, forfeits any lien or other right to hold the property arising from services rendered in holding, repairing, altering, or selling the property [*see Civ. Code § 1858.2*]. Liability imposed on a depositary under *Civ. Code § 1858.2*, is deemed to have been imposed for the commission of a willful act for the purposes of *Ins. Code § 533*, which provides that an insurer is not liable for a loss caused by the willful act of the insured [*see Civ. Code § 1858.2*].

For a form alleging that the purpose of a bailment was for the repair, alteration, or improvement of an art work, see *§ 57.161[1]*.

[4] Loan for Use

The loan of a work of art solely for the borrower's use is a contract by which the lender gives to the borrower the temporary possession and use of the work, and the borrower agrees to return it at a future time, without reward for its use [*see Civ. Code § 1884*]. Title is not transferred to the borrower [*Civ. Code § 1885*].

The borrower may use a borrowed work of art only for purposes that the lender might reasonably anticipate at the time of lending [*see Civ. Code § 1890*] and must not part with it to a third person without the lender's consent [*see Civ. Code § 1891*].

For a form alleging that the purpose of a bailment was for the use of an art work, see *§ 57.161[2]*.

[5] Rental or Lease

The rental or lease of a work of art (called "hiring" in the Civil Code) is a contract by which the lessor gives the lessee temporary possession of the work, for reward, and the lessee agrees to return it at a future time [*see Civ. Code § 1925*].

If a work of art is rented for a particular purpose, the lessee must not use it for any other purpose; and if the lessee does, then he or she is liable to the lessor for all damages resulting from the unauthorized use, or the lessor may elect to treat the contract as rescinded [*see Civ. Code § 1930*; *Constantian v. Mercedes-Benz Co. (1936) 5 Cal. 2d 631, 633, 55 P.2d 841* (art objects rented by defendant and destroyed by fire while being used in place not contemplated by agreement; defendant held liable for loss, although not negligent)].

For a form alleging that the purpose of a bailment was the rental or lease of an art work, see *§ 57.161[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailments

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6-57 California Forms of Pleading and Practice--Annotated § 57.61

§ 57.61 Bailee's Duty of Care

[1] Gratuitous Bailee

A gratuitous bailee is liable only for failure to use slight care [*see Civ. Code § 1846(a)*; *Roselip v. Raisch (1946) 73 Cal. App. 2d 125, 133, 166 P.2d 340]* .

[2] Depositary for Hire

A depositary for hire (storage) is chargeable with "at least ordinary care" in safeguarding the bailor's property, and thus, is liable only if he or she has been guilty of some negligence [*see Civ. Code § 1852*]. For discussion of the standard of care, see Ch. 93, *Bailments* .

[3] Borrower's Duty Towards Property Loaned for Use

A borrower of a work of art must use great care for its preservation in safety and good condition [*see Civ. Code § 1886*]; and if he or she caused the lender to believe that he or she possesses skill in the care of the work, then he or she is bound to have and to exercise that skill in caring for it [*see Civ. Code § 1888*]. A borrower must repair all deteriorations of or injuries to the work that are occasioned by his or her negligence, however slight [*see Civ. Code § 1889*]. For a discussion of a museum's duty of care in applying conservation measures to or disposing of property on loan without a lender's permission under *Civ. Code § 1899.6*, see *§ 57.75[1]*.

[4] Lessee's Duty of Care

The lessee of a work of art must use ordinary care for its preservation in safety and good condition [*see Civ. Code § 1928*] and must repair all deteriorations or injuries occasioned by his or her want of ordinary care [*see Civ. Code § 1929*]. The lessee must bear all expenses concerning the rented work as might naturally be foreseen to attend it during its use by him or her [*Civ. Code § 1956*].

[5] Presumption Regarding Loss of or Injury to Stored Property

If a stored work of art is lost or injured during storage, and the bailee refuses to inform the bailor of the circumstances under which the loss or injury occurred (insofar as he or she has information concerning them) or willfully misrepresents the circumstances, then the bailee is presumed to have permitted the loss or injury to occur willfully or by gross negligence [*see Civ. Code § 1838*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailmentsTortsVicarious LiabilityBaileesTortsNegligenceProofViolations of LawStandards of Care

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6-57 California Forms of Pleading and Practice--Annotated § 57.62

§ 57.62 Damages Recoverable for Loss of or Injury to Bailed Property

[1] Monetary Value of Property

The liability of a depositary for negligence cannot exceed the amount which he or she is informed by the depositor, or has reason to suppose, the thing deposited to be worth [*Civ. Code § 1840*]. If the bailor does not disclose the value of the deposited property, and the bailee has no reason to suppose that it has a special value, this limitation does not apply, and the measure of damages is the actual value of the deposited property [*see Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 855, 88 Cal. Rptr. 39* ; *see also Homan v. Burkhart (1930) 108 Cal. App. 363, 368-369, 291 P. 624* (warehouseman's liability as limited to value of lost containers because bailor stated no special value for property other than to say that it was valuable, and warehouseman had no reason to know that property had any particular value)].

[2] Personal Injuries

A bailee is liable for the bailor's emotional distress if it is by negligent loss of the bailed property and the property has sentimental value, which was known to the bailee [*Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 851-852, 88 Cal. Rptr. 39]* . The court in *Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 88 Cal. Rptr. 39* upheld an award for headaches and distress to plaintiff/bailor's nervous system that proximately resulted from a bailee's losing some rings which, as plaintiff had told the bailee, had great sentimental value to plaintiff.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsVicarious LiabilityBaileesContracts LawRemediesCompensatory DamagesGeneral Overview

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6-57 California Forms of Pleading and Practice--Annotated § 57.63

§ 57.63 Duty to Return

[1] Stored Art Work

The bailee of a stored work of art must deliver it on demand to the person for whose benefit it was stored, whether or not there is a fixed period of storage, unless he or she has a lien on it or has been prevented or forbidden from making the delivery by the owner or by operation of law [*Civ. Code § 1822*]. In order to assert the excuse of prevention or prohibition by the owner or operation of law, the bailee must give prompt notice, to the person for whose benefit the work is stored, of the proceeding taken adversely to his or her interest which may tend to excuse nondelivery [*Civ. Code § 1825*]. Delivery is not required until demanded, even if there is a fixed period of storage [*Civ. Code § 1823*], and delivery must be made at the bailee's residence or place of business, whichever is more convenient for him or her [*Civ. Code § 1824*].

If the bailee believes that the stored work is being wrongfully detained from the owner by the bailor, the bailee may notify the owner of the bailment. If the owner does not claim the work, sufficiently establish his or her right to it, and indemnify the bailee against the claim of the bailor within a reasonable time after notification, the bailee is exonerated from liability to the owner, on returning the work to the bailor, or on assuming in good faith a new obligation changing his or her position with respect to the work, to his or her prejudice [*Civ. Code § 1826*].

For a form of complaint based on failure to return an art work, see *§ 57.165*.

[2] Borrowed Art Work

A work of art that is borrowed for a specified period or purpose must be returned to the lender, without demand, as soon as the period has expired or the purpose has been accomplished, but in other cases it need not be returned until demanded [*Civ. Code § 1895*]. Even though the lender may have lent the work for a specified period or purpose, he or she may require its return at any time; but if, on the faith of an agreement for a specified period or purpose, the borrower has made such arrangements that a premature return of the work would cause him or her loss, in excess of the benefit derived by the borrower from the loan, then the lender must indemnify the borrower for that loss if the lender compels return and provided the borrower has not in any manner violated his or her duty [*Civ. Code § 1894*]. The borrower must

return the work to the lender at the place contemplated by the parties at the time of lending or, if no particular place was contemplated, at the place where the work was located at the time of lending [*Civ. Code § 1896*].

For a form of complaint based on failure to return an art work, see *§ 57.165*.

[3] Rented Art Work

At the expiration of the term for which the work was rented, the lessee must return it to the lessor at the place contemplated by the parties at the time of renting or, if no particular place was contemplated, at the place where the work was located at the time of renting [*Civ. Code § 1958*].

The lessor may terminate the rental and reclaim the rented work before the end of the term agreed on when [*Civ. Code § 1931*]:

- The lessee uses the work or permits a use of it in a manner contrary to the agreement of the parties; or

- The lessee does not, within a reasonable time after request, make any repairs he or she is bound to make.

Termination may also come about as a result of any of the following events:

- Expiration of the rental term agreed on [*Civ. Code § 1933*].

- Mutual consent of the parties [*Civ. Code § 1933*].

- Acquisition by the lessee of a title superior to the lessor's [*Civ. Code § 1933*].

- Destruction of the rented work [*Civ. Code § 1933*].

- If the rental is terminable at the pleasure of one of the parties, by notice of that party's death or incapacity to contract [*Civ. Code § 1934*].

[4] Failure to Return Work as Conversion

Failure to return the deposited work of art when the bailment has been terminated and its return has been properly demanded may constitute prima facie evidence of conversion [*see Wolfe v. Willard H. George, Inc. (1930) 110 Cal. App. 532, 535, 294 P. 436* ; *Civ. Code § 3336* (measure of damages for conversion)]. However, failure to return the deposited property because it was negligently destroyed does not constitute conversion [*see George v. Bekins Van & Storage Co. (1949) 33 Cal. 2d 834, 838, 205 P.2d 1037]* . Exemplary and punitive damages may be claimed in an action for conversion, given the requisite malice, fraud, or oppression [*Civ. Code § 3294*; *Haigler v. Donnelly (1941) 18 Cal. 2d 674, 681, 117 P.2d 331]* . For forms and discussion, see Ch. 150, *Conversion* .

For a fact situation in which defendant was held liable for conversion after appropriating two granite statues sculpted by plaintiff and left in defendant's custody, see *Bufano v. City & County of San Francisco (1965) 233 Cal. App. 2d 61, 63-68, 43 Cal. Rptr. 223* .

Legal Topics:

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

Contracts LawTypes of ContractsBailmentsTortsVicarious LiabilityBaileesTortsIntentional TortsConversionRemediesTortsIntentional TortsConversionGeneral Overview

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E. Applicable Bailment Principles

6-57 California Forms of Pleading and Practice--Annotated §§ 57.64-57.69

[Reserved]

§§ 57.64[Reserved]

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6-57 California Forms of Pleading and Practice--Annotated § 57.70

§ 57.70 Governing Statutes

Because of the unique circumstances and problems surrounding property loaned to museums for indefinite or long terms, a uniform procedure provides for the preservation of the lender's interest in property loaned for indefinite and long terms, and allows title to unclaimed loaned property to vest in the museum [*see Civ. Code § 1899*]. The procedure is set forth in *Civ. Code § 1899 et seq.*

Legal Topics:

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

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6-57 California Forms of Pleading and Practice--Annotated § 57.71

§ 57.71 General Notice Requirements

When a museum is required to give a lender any notice pursuant to *Civ. Code § 1899 et seq.*, notice is deemed to have been given if the museum mails the notice to the lender at the lender's address and proof of receipt is received by the museum within 30 days from the date the notice was mailed. If the museum does not have an address for the lender, or if proof of receipt is not received by the museum, notice shall be deemed given if the museum publishes notice at least once a week for three successive weeks in a newspaper of general circulation in both the county in which the museum is located and the county of the lender's address, if any [*Civ. Code § 1899.2(a)*]. For purposes of notice, a museum is "located" in the county of the branch of the museum to which the loan is made. In all other instances, a museum is located in the county in which it has its principal place of business [*Civ. Code § 1899.2(c)*].

In addition to any other information required to be included pursuant to *Civ. Code § 1899 et seq.*, all notices given pursuant to these sections must contain the lender's name; the lender's address if known; the date of the loan; and, if the notice is being given by the museum, the name, address, and telephone number of the appropriate office or official to be contacted at the museum for information regarding the loan [*Civ. Code § 1899.2(b)*].

Legal Topics:

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

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6-57 California Forms of Pleading and Practice--Annotated § 57.72

§ 57.72 Notice Required by Museum

[1] Notice of Lender's Rights

If a museum [*see Civ. Code § 1899.1(a)* ("museum" defined)] accepts a loan of property [*see Civ. Code § 1899.1(d)* ("property" defined)] for an indefinite term, or for a term in excess of seven years, the museum must inform the lender in writing at the time of the loan of the provisions of *Civ. Code § 1899 et seq.* The form notice set forth in *Civ. Code § 1899.5* or a citation to the code sections is sufficient [*Civ. Code § 1899.3(a)* (governing loans of property accepted on or after January 1, 1984); for a form of notice, *see § 57.180[1]*]. Unless the loaned property is returned to the claimant, the museum must retain for a period of not less than 25 years the original or an accurate copy of each notice filed by a claimant pursuant to *Civ. Code § 1899.4* [*Civ. Code § 1899.3(b)*; *see § 57.73*].

[2] Receipt for Notice of Intent to Preserve Interest

The museum must also furnish anyone who files a notice of interest in loaned property proof of receipt of the notice by mailing an original receipt or a copy of the receipt portion of the form notice prescribed in *Civ. Code § 1899.5* to the lender or other claimant at the address given on the notice within 30 days of receiving the notice [*Civ. Code § 1899.3(c)*; for a form of notice of intent to preserve interest in property, *see § 57.180*].

[3] Notice of Injury to Loaned Property

In addition, a museum must give a lender prompt notice of any known injury to or loss of property on loan [*Civ. Code § 1899.3(d)*; *see § 57.76[1]*].

Legal Topics:

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

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6-57 California Forms of Pleading and Practice--Annotated § 57.73

§ 57.73 Notice Required by Lender

It is the responsibility of the owner of property on loan to a museum to notify the museum promptly in writing of any change of address or change in the ownership of the property. Failure to notify the museum of these changes may result in the owner's loss of rights in the property [*Civ. Code § 1899.4(a)*].

The owner of property on loan to a museum may choose to file with the museum a notice of intent to preserve an interest in the property as provided for in *Civ. Code § 1899.5* [for a form of notice of intent to preserve interest, *see § 57.180*; *see also § 57.74*]. However, the filing of a notice of intent does not validate or make enforceable any claim that would be extinguished under the terms of a written loan agreement or that would otherwise be invalid or unenforceable [*Civ. Code § 1899.4(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal PropertyEducation LawMuseums

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6-57 California Forms of Pleading and Practice--Annotated § 57.74

§ 57.74 Notice of Intent to Preserve Interest

A notice of intent to preserve an interest in property on loan to a museum must comply with the following requirements [*Civ. Code § 1899.5(a)*]:

- Be in writing;
- Contain a description of the property adequate to enable the museum to identify it;
- Be accompanied by documentation sufficient to establish the claimant as owner of the property; and
- Be signed under penalty of perjury by the claimant or a person authorized to act on behalf of the claimant.

The museum need not retain a notice that does not meet the above requirements. However, if the museum does not intend to keep a notice for this reason, it must promptly notify the claimant at the address given on the notice that the notice is ineffective and the reasons why it is ineffective. The fact that a museum retains a notice cannot be construed to mean that the museum accepts the sufficiency or accuracy of the notice or that the notice is effective to preserve an interest in property on loan [*Civ. Code § 1899.5(b)*].

A notice of intent to preserve an interest in loaned property that is in substantially the form set forth in *Civ. Code § 1899.5(c)* and that contains the information and attachments described in that section satisfies the requirements noted above [*Civ. Code § 1899.5(c)*; for a form of notice of intent to preserve interest, *see § 57.180*].

A notice of intent filed pursuant to *Civ. Code § 1899 et seq.* is exempt from the disclosure requirements of the California Public Records Act (*Gov. Code § 6250 et seq.*) [*Civ. Code § 1899.5(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-57 California Forms of Pleading and Practice--Annotated § 57.75

§ 57.75 Conservation or Disposal of Property

[1] When Allowed

Absent a written loan agreement to the contrary, a museum may apply conservation measures to or dispose of property on loan to the museum without the lender's permission in the following two situations.

First, the museum may take action if immediate action is required to protect the property or to protect other property in the custody of the museum or if the property has become a hazard to the health and safety of the public or the museum's staff and either (1) the museum is unable to reach the lender at the lender's last address of record in order to agree on a resolution or (2) the lender will not agree to the protective measures recommended by the museum, but is unwilling or unable to terminate the loan and retrieve the property [*Civ. Code § 1899.6(a)(1)*].

Second, the museum may take action if a lender cannot be contacted in person, the museum publishes a notice containing the information set forth in *Civ. Code § 1899.7(a)*, and there is no response for 120 days [*Civ. Code § 1899.6(a)(2)*; *see* discussion of *Civ. Code § 1899.7(a)* under § 57.76[1]].

[2] Lien on Property

If a museum applies conservation measures to or disposes of property pursuant to *Civ. Code § 1899.6(a)*, it has a lien on the property and the proceeds from any disposition for the costs incurred [*Civ. Code § 1899.6(b)(1)*].

[3] Liability for Injury or Loss

A museum is not liable for injury to or loss of property resulting from conservation measures or disposal of property if the museum had a reasonable belief at the time the action was taken that the action was necessary to protect the loaned property or other property in its custody or that the property on loan constituted a hazard to the health and safety of the public or the museum's staff. In the case of conservation measures, the museum is not liable if it exercised reasonable care in the choice and application of the measures [*Civ. Code § 1899.6(b)(2)*].

For a form raising this affirmative defense, see *§ 57.181*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiensContracts LawTypes of ContractsPersonal PropertyEducation LawMuseums

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6-57 California Forms of Pleading and Practice--Annotated § 57.76

§ 57.76 Injury or Loss to Property

[1] Notice Requirements

A museum must give a lender prompt notice of any known injury to or loss of property on loan [*Civ. Code § 1899.3(d)*]. Except as provided by *Civ. Code § 1899.7(b)*, if a museum is unable to give this notice by mail, notice by publication will be deemed sufficient if two requirements are met [*Civ. Code § 1899.7(a)*]. The published notice must contain the information required by *Civ. Code § 1899.2(b)* [*see § 57.71*], and it must include a statement containing substantially the following information [*Civ. Code § 1899.7(a)*]:

> "The records of _____ (*name of museum*) indicate that you have property on loan to it. Your failure to notify it in writing of a change of address or ownership of property on loan or to contact it in writing regarding the loan may result in the loss of rights in the loaned property. See *California Civil Code Sections 1899 et seq*."

If, within three years of giving a proper notice by publication, the museum receives a notice from a claimant pursuant to *Civ. Code § 1899.4*, the museum must promptly advise the claimant in writing of the nature of the injury to or the fact of the loss of property and the approximate date thereof. For the purposes of the limitation period prescribed by *Civ. Code § 1899.8* [*see* [2], *below*], if the museum mails the information to the claimant within 30 days of receipt of the claimant's notice, the museum is deemed to have given the claimant notice of the injury or loss on the date notice by publication pursuant to *Civ. Code § 1899.7(a)* was completed [*Civ. Code § 1899.7(b)*].

[2] Limitation Period for Damage Action

The limitation period for actions against a museum for damages for injury to or loss of property loaned to the museum is the earlier of the following [*Civ. Code § 1899.8* (effective January 1, 1985)]:

- Three years from the date the museum gives the lender notice of the injury or loss, or
- Ten years from the date of the injury or loss.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsEducation LawMuseums

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6-57 California Forms of Pleading and Practice--Annotated § 57.77

§ 57.77 Termination of Loan by Museum

A museum may give a lender notice of the museum's intent to terminate a loan for an indefinite term, or one made on or after January 1, 1984, for a term in excess of seven years. The notice must include a statement containing substantially the following information [*Civ. Code § 1899.9(a)*]:

> "The records of _____ (*name of museum*) indicate that you have property on loan to it. The institution wishes to terminate the loan. You must contact the institution, establish your ownership of the property, and make arrangements to collect the property. If you fail to do so promptly, you will be deemed to have donated the property to the institution. See *California Civil Code Sections 1899 et seq.*"

For the purposes of *Civ. Code § 1899 et seq.*, a loan for a specified term becomes a loan for an indefinite term if the property remains in the custody of the museum when the specified term expires [*Civ. Code § 1899.9(b)*].

Legal Topics:

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

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6-57 California Forms of Pleading and Practice--Annotated § 57.78

§ 57.78 Recovery of Property Loaned to Museum

[1] Limitation Period

The limitation period for actions for the recovery of personal property loaned to a museum is the three-year period prescribed by *Code Civ. Proc. § 338(c)* [*see Civ. Code § 1899.10(a)* (note section refers to nonexistent Code Civ. Proc. § 338.3)]. The three-year limitation period runs from the date the museum gives the lender notice of intent to terminate the loan pursuant to *Civ. Code § 1899.9* [*Civ. Code § 1899.10(a)*; *see § 57.77*]. Except as provided in *Civ. Code § 1899.10(e)* [*see* [2], *below*], no action may be brought against a museum for the recovery of property on loan if more than 25 years have passed from the date of the last written contact between the lender and the museum, as evidenced by the museum's records [*Civ. Code § 1899.10(b)* (effective January 1, 1985)].

A lender is deemed to have donated loaned property to the museum if the lender fails to file an action to recover the property within the limitation periods specified above [*Civ. Code § 1899.10(c)*]. A person who thereafter purchases property from a museum acquires good title if the museum represents that it has acquired title by donation pursuant to *Civ. Code § 1899.10(c)* [*Civ. Code § 1899.10(d)*].

[2] Recovery If No Notice Given

Notwithstanding *Civ. Code § 1899.10(b)* and *(c)*, a lender may be entitled to recover the property if the lender was not given notice of the museum's intent to terminate the loan, and the lender proves that the museum received a notice of intent to preserve an interest in loaned property within the 25 years immediately preceding the date on which the lender's right to recover the property otherwise expired under *Civ. Code § 1899.10(b)*. If the property has been disposed of, the lender may recover the reasonable value of the property at the time of its disposal plus interest at the rate allowed on judgments pursuant to *Cal. Const., art. XV, § 1* [*Civ. Code § 1899.10(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsEducation LawMuseums

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6-57 California Forms of Pleading and Practice--Annotated § 57.79

§ 57.79 Unclaimed Property Law

The provisions of *Civ. Code § 1899 et seq.* supersede the Unclaimed Property Law (*Code Civ. Proc. § 1500 et seq.*, which is discussed in Ch. 252, *Escheat (Unclaimed Property)*). However, the museum may, at its option, dispose of loaned property pursuant to the Unclaimed Property Law, provided the property has been unclaimed for more than seven years [*Civ. Code § 1899.11(a)*]. If a museum elects to proceed under the Unclaimed Property Law, it must mail notice to the lender of its intent not less than six months or more than 12 months before reporting the property to the controller pursuant to the Unclaimed Property Law. The notice must be mailed to the lender at the lender's address, if known, and must include a statement containing substantially the following information [*Civ. Code § 1899.11(b)*]:

> "The records of _____ (*name of museum*) indicate that you have property on loan to the institution. The institution wishes to terminate the loan. You must contact the institution, establish your ownership of the property and make arrangements to collect the property before _____ (*fill in date*) or the property will be disposed of in accordance with the provisions of the Unclaimed Property Law (commencing with *Section 1500 of the Code of Civil Procedure*)."

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawIntestacyEscheatEducation LawMuseums

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6-57 California Forms of Pleading and Practice--Annotated §§ 57.80-57.89

[Reserved]

§§ 57.80[Reserved]

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6-57 California Forms of Pleading and Practice--Annotated § 57.90

§ 57.90 Deposit of Art With Pawnbroker

[1] Pawnbroker Distinguished From Other Lenders

When a work of fine art is deposited as security for a loan, *Fin. Code § 21000 et seq.*, governing pawnbrokers, may apply. A pawnbroker is a person engaged in the business of receiving goods as security for a loan [*Fin. Code § 21000*]. A pawnbroker should be distinguished from other types of lenders who may obtain a security interest in an item of personal property, including a work of art, but do not retain possession of the property. Those lenders are known as "finance lenders" under California law [*see Fin. Code § 22009*] and are governed by *Fin. Code § 22000 et seq.*

For a more detailed discussion of licensing and other legal requirements governing pawnbrokers, see California Legal Forms, Ch. 102B, *Pawnbrokers, Finance Lenders, and Secondhand Goods Dealers* (Matthew Bender).

[2] Pawnbroker's Rights and Duties After Loan Is Due

A pawnbroker who has taken possession of art (or any other item of personal property) as security for a loan must retain possession of it for four months after the date when the loan is due. The borrower may redeem the pledged work of art during this four-month period by paying the applicable charges. If the borrower and the pawnbroker agree in writing that the pledged work of art may be stored off-premises, then following the request for redemption of the loan, the pawnbroker must return the pledged work of art to the borrower the next calendar day when both the pawnbroker's store and the storage facility are open, not to exceed two business days [*Fin. Code § 21201*].

If the pledged work of art is not redeemed during the four-month period, and the borrower and the pawnbroker do not mutually agree in writing to extend the loan period, the pawnbroker must notify the borrower within 30 days after the loan period expires. If the pawnbroker fails to notify the borrower within that period, the pawnbroker may not charge interest from the day after the expiration of the 30-day period. The pawnbroker must notify the borrower, at his or her last known address, of the termination of the loan period, by a means for which verification of mailing or delivery of the notification can be provided by the pawnbroker, and must extend the right of redemption for a period of 10 days from the date of mailing the notice. The 10-day notice must include this statement: "If the tenth day falls on a day when the pawnshop is closed, the time period is extended to the next day that the pawnshop is open." If any pledged property is

not redeemed within the 10-day period, the pawnbroker becomes vested with all right, title, and interest of the pledgor, or his or her assignees, to the pledged, to hold and dispose of as his or her own property [*Fin. Code § 21201*].

A pawnbroker who sells any pledged property before he or she has become vested with the title to that property is guilty of a misdemeanor under *Fin. Code § 21209* [*Fin. Code § 21201*].

The posted schedule of charges required by *Fin. Code § 21200.5* must contain a notice informing the borrower that, if he or she desires, the notice of termination of the loan period shall be sent by registered or certified mail with return receipt requested, on prepayment of costs [*Fin. Code § 21201*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsDefaultForeclosure & RepossessionRedemptionBanking LawGeneral OverviewGovernmentsState & Territorial GovernmentsLicenses

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6-57 California Forms of Pleading and Practice--Annotated § 57.91

§ 57.91 Junk Dealers and Secondhand Dealers

Junk dealers, who are regulated by *Bus. & Prof. Code §§ 21600 et seq.* and *21650-21653*, and secondhand dealers, who are regulated by *Bus. & Prof. Code §§ 21625 et seq.* and *21650-21653*, may become involved in dealings with art works. A work of art might accidentally come into the hands of a junk dealer or secondhand dealer; and the property with which they deal could include works of art, antiques, and collector's items of varying descriptions [*see Bus. & Prof. Code §§ 21600, 21627* (definitions of junk and secondhand goods)].

Every junk dealer or secondhand dealer, before accepting for resale from any person any goods or materials in a state or condition that they are neither abandoned nor scrapped, must require that the person selling the property present adequate evidence of authority to sell. Violation of this provision is a misdemeanor [*see Bus. & Prof. Code § 21652*]. Resale of an item acquired in violation of *Bus. & Prof. Code § 21652* is an offense [*see Bus. & Prof. Code § 21653*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsConversionGeneral OverviewGovernmentsState & Territorial GovernmentsLicenses

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6-57 California Forms of Pleading and Practice--Annotated § 57.92

§ 57.92 Lost or Stolen Property

[1] Finder's Rights and Duties

One who finds lost property is a depositary for the owner, with the rights and obligations of a depositary for hire [*see Civ. Code § 2080*]. He or she may acquire title to it only by following the statutory procedure [*Civ. Code §§ 2080.1-2080.3*] which involves delivering it to the police or sheriff, if its value is $100 or more [*Civ. Code § 2080.1*], who will try to find the owner, and waiting a period of time for the owner to claim it. If the owner does not claim it, title will vest in the finder [*see Civ. Code § 2080.3*].

If owner is entitled to possession, the finder is entitled to a reasonable sum for saving and taking care of the property [*see Civ. Code § 2080*].

For a form for a complaint to recover lost or stolen art from a junk dealer or secondhand dealer, see *§ 57.190*.

[2] Penal Provisions

Every swap meet vendor [*see Bus. & Prof. Code § 21661* (definition)] and every person whose principal business is dealing in, or collecting, merchandise or personal property, and every agent, employee, or representative of that person, who buys or receives any property of any value that has been stolen or obtained in any manner constituting theft or extortion, under circumstances that should cause the person, agent, employee, or representative to make reasonable inquiry to ascertain that the person from whom the property was bought or received had the legal right to sell or deliver it, without making a reasonable inquiry, is guilty of an offense [*Penal Code § 496(b)*; *see Penal Code § 496(a)* (offense of knowingly receiving stolen property)].

One who finds lost property under circumstances that give him or her knowledge of or means of inquiry as to the true owner, and who appropriates that property to his or her own use or to the use of another person not entitled to the property without first making reasonable and just efforts to find the owner and to restore the property to that person, is guilty of theft [*Penal Code § 485*].

If the defendant is guilty of the crime of receiving stolen property, then the owner, or any other person who has been injured by the crime, may bring an action for three times the amount of actual damages, if any, plus costs and reasonable attorney's fees [*see Penal Code § 496(c)*; *see, e.g.,* *Citizens of Humanity, LLC v. Costco Wholesale Corp. (2009) 171 Cal. App. 4th 1, 17-20, 89 Cal. Rptr. 3d 455*]. For example, the manufacturer of high end apparel could sue the operator of a discount warehouse store where some of manufacturer's current-season products were being sold, on the theory that the store operator acquired those products as stolen property, even though they were not stolen from the manufacturer. The harm to the manufacturer's goodwill could constitute the "actual damages" that must be sought under the statute [*Citizens of Humanity, LLC v. Costco Wholesale Corp. (2009) 171 Cal. App. 4th 1, 17-20, 89 Cal. Rptr. 3d 455*].

[3] Purchaser's Lack of Title

A good faith purchaser from a thief acquires no title, because the thief's title is void rather than merely voidable. Therefore, the thief possesses no power to transfer property. Voidable title under *Com. Code § 2403(1)* only arises from a voluntary transfer or delivery by a true owner [*Suburban Motors, Inc. v. State Farm Mut. Auto. Ins. Co. (1990) 218 Cal. App. 3d 1354, 1359-1361, 268 Cal. Rptr. 16]* .

A purchaser who paid an unreasonably low price, or otherwise should have been suspicious that property that he or she bought was stolen, is not a good faith purchaser from a thief and cannot prevail against the owner [*see* *Kelley Kar Co. v. Maryland Cas. Co. (1956) 142 Cal. App. 2d 263, 264-265, 298 P.2d 590* ; *see also Com. Code § 2403*].

[4] Limitation Period for Action Regarding Stolen Property

An action involving the taking, detaining, or injuring of chattels, including actions for the specific recovery of personal property, must be commenced within three years [*Code Civ. Proc. § 338(c)*].

Effective January 1, 1983, the three-year statute was amended to include a discovery rule. Under this amendment, the cause of action for theft [*see* Pen. Co § 484] of any article of historical, interpretive, scientific, or artistic significance is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his orher agent, or the law enforcement agency that originally investigated the theft [*Code Civ. Proc. § 338(c)*]. This rule applies to cases in which the limitations period had not yet expired as of January 1, 1983 [*Society of Cal. Pioneers v. Baker (1996) 43 Cal. App. 4th 774, 783-784, 50 Cal. Rptr. 2d 865* (post-1983 rule governed when statute had not expired by January 1 of that year)]. The language "in the case of theft" in *Code Civ. Proc. § 338(c)* does not limit the application of the discovery rule to actions against thieves [*Society of Cal. Pioneers v. Baker (1996) 43 Cal. App. 4th 774, 783-784 n.11, 50 Cal. Rptr. 2d 865]* .

The time at which a cause of action accrued prior to January 1, 1983, is less clear [*see* *Orkin v. Taylor (9th Cir. 2007) 487 F.3d 734* ("[t]he California Supreme Court has never confronted the question of what rule governs accrual of pre-1983 causes of action for theft and conversion")]. In one case involving the pre-1983 statute, the court held that in a case of theft, the cause of action based on wrongful taking did not accrue until the aggrieved person discovers the identity of the person in possession of the stolen property--in other words, a discovery rule implicitly existed even prior to the 1983 amendment [*Naftzger v. American Numismatic Soc'y (1996) 42 Cal. App. 4th 421, 433, 49 Cal. Rptr. 2d 784]* . Another court expressly disagreed, holding that under pre-1983 case law the three-year statute began to run when the defendant acquired property from a wrongful possessor [*Society of Cal. Pioneers v. Baker (1996) 43 Cal. App. 4th 774, 781-782, 783 n.10* , *50 Cal. Rptr. 2d 865* ; *see* *San Francisco Credit C. House v. Wells (1925) 196 Cal. 701, 239 P. 319* ; *Harpending v. Meyer (1880) 55 Cal. 555*]. However, the latter court also held that the statute of limitations in an action concerning stolen property began to run anew against a subsequent purchaser. Thus, for example, when an object was stolen in 1978 and sold to a third party in 1980, the statute began to run anew on the latter date; it therefore had not expired when the discovery rule took effect on January 1, 1983, and became subject to the 1983 rule at that time [*Society of Cal. Pioneers v. Baker (1996) 43 Cal. App. 4th 774, 782-783, 50 Cal. Rptr. 2d 865* ; *see* *First Nat'l Bk. v.*

Thompson (1943) 60 Cal. App. 2d 79, 82, 140 P.2d 75 ; *Culp v. Signal Van & Storage (1956) 142 Cal. App. 2d Supp. 859, 861, 298 P.2d 162]* .

The California discovery rule incorporates the general principle of constructive notice, under which a plaintiff is held to his or her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to the plaintiff [*Orkin v. Taylor (9th Cir. 2007) 487 F.3d.734* ; *see* *Jolly v. Eli Lilly & Co. (1988) 44 Cal.3d 1103, 1109-1111, 245 Cal. Rptr. 658, 751 P.2d 923]* . In other words, under the discovery rule, a cause of action accrues when the plaintiff discovered *or reasonably could have discovered* his or her claim to and the whereabouts of the property [*Orkin v. Taylor (9th Cir. 2007) 487 F.3d.734]* . In the context of a Van Gogh painting that allegedly was sold under duress due to economic coercion by the Nazis during the Holocaust, this meant that the plaintiff "most probably" could have discovered its whereabouts in 1963 when it was acquired by a celebrity in a highly publicized international auction, and "certainly" when the celebrity unsuccessfully offered the painting for sale at another international auction in 1990. Under this analysis, the statute of limitations expired, at the absolute latest, in 1993, and had already expired by the time plaintiff subsequently read an Internet rumor regarding ownership of the painting in 2002 [*Orkin v. Taylor (9th Cir. 2007) 487 F.3d 734* ; *see § 57.97*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsState & Territorial GovernmentsPropertyCriminal Law & ProcedureCriminal OffensesProperty CrimesReceiving Stolen PropertyGeneral Overview

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6-57 California Forms of Pleading and Practice--Annotated § 57.93

§ 57.93 Bankruptcy

An individual debtor in bankruptcy may exempt from the assets that are subject to creditors' claims any property that he or she may exempt from levy and execution under the law of the state where his or her domicile was located for 730 days (two years) immediately preceding the filing of the petition in bankruptcy (or where his or her domicile was located for the longest portion of the 180 days immediately preceding that two-year period, if the debtor's domicile was not in one state for that two-year period) [*11 U.S.C. § 522(b)(3)(A)*]. Works of art generally are not exempt under California law [*see Code Civ. Proc. § 704.040*; *but see § 57.94* for exception].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawExemptionsGeneral OverviewBankruptcy LawExemptionsState LawSpecific Exemptions

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§ 57.94 Execution

Works of art are exempt from execution to the extent that the aggregate equity in jewelry, heirlooms, and works of art does not exceed $6,075 [*Code Civ. Proc. § 704.040*].

For forms for use in connection with executions, see Ch. 254, *Executions and Enforcement of Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsBankruptcy LawExemptionsState LawSpecific Exemptions

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6-57 California Forms of Pleading and Practice--Annotated § 57.95

§ 57.95 Political Campaign Artifacts

The Civil Code provides a cause of action for damages to the purchaser of a copy or reproduction of a political campaign artifact that the seller misrepresented as genuine [*Civ. Code § 1739 et seq.*].

A campaign artifact is a button, ribbon, poster, or sticker, or advertising or literature, concerning a candidate or ballot proposition [*Civ. Code § 1739.1*]. Genuine political campaign artifacts are those produced during a campaign for use in supporting or opposing a candidate or ballotproposition [*Civ. Code § 1739.2*]. There is no misrepresentation if an item is labeled as a copy or reproduction [*Civ. Code § 1739.3*].

A defrauded purchaser can recover the consideration paid or given, with interest at the legal rate, on tender of the item [*Civ. Code § 1739.4(a)*]. The recovery may be tripled if the seller knew that the item was not a genuine political campaign artifact [*Civ. Code § 1739.4(b)*].

A purchaser's action must be commenced within one year after discovery of the fraud and three years after the sale [*Civ. Code § 1739.4(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Labeling & PackagingState RegulationGovernmentsLegislationStatutes of LimitationsTime Limitations

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6-57 California Forms of Pleading and Practice--Annotated § 57.96

§ 57.96 Malicious and Willful Injury to Art

Any person who maliciously cuts, tears, defaces, breaks, or injures any book, map, chart, picture, engraving, statue, coin, model, apparatus, or other work of literature, art, mechanics, or object of curiosity deposited in any public library, gallery, museum collection, fair, or exhibition is guilty of a misdemeanor. The parent or guardian of a minor who willfully and maliciously commits any of these acts is liable for all damages so caused by the minor [*Educ. Code § 19910*; for liability of parents for torts of minors generally, *see Civ. Code § 1714.1*; *see also* Ch. 367A, *Minors: Tort Actions*].

Any person, other than an owner, who willfully injures, disfigures, or destroys any monument, work of art, or ornamental improvement within the limits of any village, town, or city, whether situated on private ground or on any street, sidewalk, or public park or place, is guilty of a misdemeanor [*Penal Code § 622*; *see also Penal Code § 622*1/2 (willful injury of any archaeological or historical object is misdemeanor)].

The Native American Historic Resource Protection Act [*Pub. Res. Code § 5097.993 et seq.*] provides (among other purposes) for the protection of certain Native American art objects. In general, any person who unlawfully and maliciously excavates on, removes, destroys, injures, or defaces a Native American historic, cultural, or sacred site that is listed or may be listed in the California Register of Historic Resources, including any historic or prehistoric ruins, burial ground, any archaeological or historical site, any inscriptions made by Native Americans at the site, any archaeological or historic Native American rock art, or any archaeological or historic feature, is guilty of a misdemeanor if the act was committed with the specific intent to vandalize, deface, destroy, steal, convert, possess, collect, or sell a Native American art object, inscription, or feature, or site, and the act occurs on public land or, if on private land, is committed by a person other than the landowner [*see Pub. Res. Code § 5097.993(a)*; *see also Pub. Res. Code § 5097.994* (liability for civil penalty); *but see Pub. Res. Code § 5097.993(b)* (exceptions)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Relationships & TortsTort LiabilityChild TortsTortsVicarious LiabilityFamily MembersChildren &

ParentsCriminal Law & ProcedureCriminal OffensesProperty CrimesDestruction of PropertyGeneral OverviewGovernmentsNative AmericansProperty RightsTortsIntentional TortsConversionGeneral Overview

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6-57 California Forms of Pleading and Practice--Annotated § 57.97

§ 57.97 Recovery of Holocaust-Era Artwork From Museum or Gallery

Holocaust-era artwork is any article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945. Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork may bring an action to recover the Holocaust-era artwork from any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance [*Code Civ. Proc. § 354.3(a), (b)*]. For a complaint to recover such an article, see *§ 57.191*. The action cannot be dismissed for failure to comply with the applicable statute of limitations, if the action is commenced on or before December 31, 2010 [*Code Civ. Proc. § 354.3(c)*].

Normally, an individual has three years, after discovering the whereabouts of missing artwork, to commence an action in court [*see Code Civ. Proc. § 338(c)*]. The statement of legislative intent behind enactment of *Code Civ. Proc. § 354.3*, however, notes that because of the unique circumstances surrounding the theft of Holocaust-era artwork, commencement of an action requires detailed investigation in several countries, involving numerous historical documents and the input of experts. In order to obtain all necessary data, investigating a prospective action may take several years. Thus, the legislature has decided that the normal three-year period of limitation, after discovery of the whereabouts of the artwork, is an insufficient amount of time to finance, investigate, and commence an action. To the extent that the enactment of *Code Civ. Proc. § 354.3* extends the statute of limitation, that extension of the limitation period is intended to be applied retroactively, irrespective of whether the claims were barred by any applicable statute of limitation under any other provision of law prior to the enactment of *Code Civ. Proc. § 354.*3 [Stats. 2002, ch. 332, § 1]. For additional discussion, see *§ 57.92[4]*.

WARNING:

Federal Preemption. In August 2009, a Ninth Circuit panel held that the extension of the limitations period of *Code Civ. Proc. § 354.3(c)* is invalid under the field-preemption doctrine because it "intrudes on the power to make and resolve war, a power reserved exclusively to the federal government by the Constitution" [*Saher v. Norton Simon Museum of Art at Pasadena (9th Cir. 2009) 578 F.3d 1016*]. However, the Ninth Circuit's opinion does recognize that legislative amendments may avoid a preemption problem. In addition, the opinion may be subject to en banc review.

Courts have now invalidated, on preemption grounds, four of the six code sections embodying, in *Code Civ. Proc. §§ 354.3-354.7*, the legislature's scheme to provide remedies for the victims, and survivors of victims, of torts and crimes that occurred many years ago in other countries. The statutes so far invalidated, along with *Code Civ. Proc. § 354.3*, are *Code Civ. Proc. § 354.4* [*Movsesian v. Victoria Versicherung AG (9th Cir. 2009) 578 F.3d 1052*], *Code Civ. Proc. § 354.5* [*Steinberg v. International Comm'n on Holocaust Era Ins. Claims (2005) 133 Cal. App. 4th 689, 34 Cal. Rptr. 3d 944*], and *Code Civ. Proc. § 354.6* [*Deustch v. Turner (9th Cir. 2003) 324 F.3d 692*]. In addition, the United States Supreme Court has invalidated, on preemption grounds, a similar effort under *Ins. Code § 13800 et seq.* [*American Ins. Ass'n v. Garamendi (2003) 539 U.S. 396, 123 S. Ct. 2374, 156 L. Ed. 2d 376*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsEducation LawMuseums

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1-57 California Forms of Pleading and Practice--Annotated § 57.98

§ 57.98 Artist's Sale of Original Work as Protected Speech

An artist's sale of his or her original artwork constitutes speech protected under the *First Amendment*. A painting, for instance, expresses the painter's perspective and therefore, while in the hands of the painter, is self-expression protected by the *First Amendment*. The painter's sale of a painting does not remove it from the ambit of protected expression (while it is yet in the painter's hands), nor is the painting to be considered as commercial speech merely because it is offered for sale or sold [*White v. City of Sparks (9th Cir. 2007) 500 F.3d 953, 956-957* (city could not prevent artist from selling his paintings in public areas where limited selling of other merchandise was permitted, on ground asserted by city, that his paintings did not patently express religious, ideological, political, or philosophical message and therefore did not constitute protected speech)].

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[Reserved]

§§ 57.99[Reserved]

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6-57 California Forms of Pleading and Practice--Annotated § 57.110

§ 57.110 Related Matthew Bender Publications

For interrogatories for use in an action based on fraud, see Bender's Forms of Discovery, *Fraud* (Matthew Bender)

For interrogatories for use in actions based on negligence, see Bender's Forms of Discovery, *Negligence* (Matthew Bender)

For forms for use in seeking remedies for sales governed by the Commercial Code, see Hart & Willier, Forms and Procedures Under the Uniform Commercial Code (5-5C Bender's Uniform Commercial Code Service), Pt. 4, *Rights and Remedies*, § 24.51

For other forms involving sales of art, see Betsos, Modern UCC Litigation Forms (Bender's Uniform Commercial Code Service), Art. 2, *Sales*, § 2-716-1

For discussion of related infringement issues, see Nimmer on Copyright, Chs. 12-14 (Matthew Bender)

For general discussion of remedies under the Commercial Code, see Duesenberg & King, Sales and Bulk Transfers Under the Uniform Commercial Code (Bender's Uniform Commercial Code Service), Ch. 2, *Statute of Frauds;* Ch. 14, *Remedies of the Buyer and Matters Related to Remedies Generally*, §§ 14.02, 14.03

Legal Topics:

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

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6-57 California Forms of Pleading and Practice--Annotated § 57.111

§ 57.111 State Constitution

Exemption from taxation for property of free museum. *Cal. Const., art. XIII, § 3(d)*

Exemption from taxation for property of householder. *Cal. Const., art. XIII, § 3(m)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesPersonal Property TaxExempt PropertyGeneral Overview

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6-57 California Forms of Pleading and Practice--Annotated § 57.112

§ 57.112 Federal Statutes

[1] Bankruptcy

Property exempt from creditors' claims in bankruptcy proceedings. *11 U.S.C. § 522*

[2] Visual Artists Rights Act of 1990

Visual Artists Rights Act of 1990. *17 U.S.C. §§ 101, 106A, 107, 113(d), 301(f), 411(a), 412* (*see* Pub. L. No. 101-650, § 601 et seq.)

Action for infringement of moral rights. *17 U.S.C. § 501*

Remedies for infringement. *17 U.S.C. §§ 502-505, 509, 511*

[3] Protection of Art Owners' Rights

Holocaust Victims Redress Act. Pub. L. No. 105-158 (Feb. 13, 1998) Nazi War Crimes Disclosure Act. Pub. L. No. 105-246 (Oct. 8, 1998) U.S. Holocaust Assets Commission Act of 1998. Pub. L. No. 195-186 (June 23, 1998)

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawExemptionsBankruptcy CodeCopyright LawOwner RightsMoral RightsCopyright LawSubject MatterPictorial, Graphic & Sculptural WorksWorks of Art

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6-57 California Forms of Pleading and Practice--Annotated § 57.113

§ 57.113 State Statutes

[1] Ascertainment of Damages

Damages must be clearly ascertainable. *Civ. Code § 3301*

Damages when property has peculiar value. *Civ. Code § 3355*

Opinions of nonexperts. *Evid. Code § 800*

[2] Assignment, Transfer of Fine Art

Definitions. *Civ. Code §§ 982(d), 997*

Rights retained or transferred. *Civ. Code § 982(c)*

[3] Bailments

Nature and creation of deposit. *Civ. Code §§ 1813-1818*

Obligations of depositary. *Civ. Code §§ 1822-1828*

Deposit for keeping, generally. *Civ. Code §§ 1833-1840*

Duties and liabilities of bailee for services other than storage. *Civ. Code § 1839*; *Lab. Code § 2700 et seq.*

Gratuitous deposit. *Civ. Code §§ 1844-1847*

Storage. *Civ. Code §§ 1851-1857*

Deposits for repair, alteration, or sale. *Civ. Code §§ 1858-1858.3*

Loan for use or bailment. *Civ. Code §§ 1884-1896*

Property loaned to museum. *Civ. Code §§ 1899-1899.11*

Notices and procedures required when property loaned to museum. *Civ. Code § 1899 et seq.*

Statute of limitations for injury to or loss of property loaned to museum. *Civ. Code §§ 1899.7, 1899.8*

Hiring in general. *Civ. Code §§ 1925-1935*

Bailment of personality. *Civ. Code §§ 1955-1959*

Warehouse receipts (documents of title). *Com. Code § 7101 et seq.*

Fraudulent conversion or secretion of bailed property by bailee is misdemeanor. *Penal Code § 507*

Fraudulent disposition by bailee of property held under unfulfilled contract of purchase is embezzlement. *Penal Code § 504a*

[4] California Art Preservation Act

General provisions. *Civ. Code § 987*

Injunctive relief to restore or preserve fine art work. *Civ. Code § 989(c)*

[5] California Arts Act

Legislative purpose of realizing craft and beauty. *Gov. Code § 8750*

Membership of Arts Council. *Gov. Code § 8751*

Meeting of Arts Council. *Gov. Code § 8752*

Powers and duties of Arts Council. *Gov. Code § 8753*

Limitation on grants and funding of programs. *Gov. Code § 8753.5*

Appointment of director and deputies for Arts Council. *Gov. Code § 8754*

Recognition of any citizen with exceptional talent making unique contribution to cultural or artistic heritage of *California. Gov. Code § 8755*

[6] Charitable Solicitations

Charitable solicitations generally. *Bus. & Prof. Code § 17510 et seq.*

Activities regulated by Bus. & Prof. Code *§ 17510 et seq. Bus. & Prof. Code* § 17510.2

Persons and organizations to whom *Bus. & Prof. Code § 17510 et seq.* apply. *Bus. & Prof. Code § 17510.2*

Solicitation of salvageable personal property for charitable purposes generally. *Welf. & Inst. Code §§ 148-148.9*

"Salvageable personal property" defined. *Welf. & Inst. Code § 148(b)*

Certain fraternal, social, political, and service organizations as exempt. *Welf. & Inst. Code § 148.1*

Certain tax exempt organizations are partially exempt. *Welf. & Inst. Code § 148.3*

Violations of *Welf. & Inst. Code §§ 148-148.9* are misdemeanors. *Welf. & Inst. Code § 148.8*

[7] Consignment of Fine Art

Definitions. *Civ. Code §§ 997, 1738*

General provisions. *Civ. Code §§ 1738.5-1738.9*

[8] Contracts for Personal Services

Contracts not specifically enforceable. *Civ. Code § 3390*

Proceedings that may not be enjoined. *Civ. Code § 3423*; *Code Civ. Proc. § 526*

[9] Conveyance of Right to Reproduce or Display

Definitions. *Civ. Code § 988(a)*

Ownership of work of art is reserved in artist or owner after conveyance of right to reproduce or display work. *Civ. Code § 988(b)*

Ambiguities are resolved in favor of artist or owner. *Civ. Code § 988(c)*

[10] Execution

Partial exemption of art work from execution. *Code Civ. Proc. § 704.040*

[11] Government Involvement With Art

Art in public buildings: selection, purchase, or other acquisition, and display. *Gov. Code § 15813 et seq.*

County authorized to establish and maintain art institute. *Gov. Code § 25351*

County supervisors authorized to charge fees and issue certificates in connection with operating county art institute. *Gov. Code § 25351.2*

Local agency [*see Gov. Code § 50001*] authorized to acquire land for erecting, rebuilding, or furnishing art gallery. *Gov. Code § 50331*

County or city authorized to receive gifts or raise tax money to erect monument in memory of California pioneers. *Pub. Res. Code §§ 5101-5108*

County supervisors authorized to appropriate money for and to erect monuments commemorating county historic spots. *Pub. Res. Code § 5109*

County supervisors authorized to establish and maintain museum of art, and to acquire and manage real and personal property therefor. *Pub. Res. Code §§ 5120, 5121*

County supervisors authorized to acquire and dispose of exhibition and study material for art museum. *Pub. Res. Code § 5123*

Authorized activities of county supervisors regarding operation of art museum. *Pub. Res. Code §§ 5124-5132*

County or city authorized to accept gifts of real or personal property for art museum or gallery. *Pub. Res. Code § 5135*

Authority of county or city regarding operation of art museum or gallery when real or personal property for it was gift. *Pub. Res. Code §§ 5136-5138*

[12] Loans of Property to Museums

Legislative declaration of need for uniform procedures regulating long-term loans of property to museums. *Civ. Code § 1899*

Governing procedures. *Civ. Code § 1899.1 et seq.*

[13] Lost and Stolen Property

Disposition of lost (found) property. *Civ. Code § 2080 et seq.*

Disposition of unclaimed property in hands of bailee. *Civ. Code § 2081 et seq.*

Disposition of unclaimed property where state is entitled to possession. *Code Civ. Proc. § 1300 et seq.*

Person with voidable title as enabled to pass good title to good faith purchaser for value. *Com. Code § 2403*

California Native American Graves Protection and Repatriation Act of 2001. *Health & Safety Code § 8010 et seq.*

Appropriation of found property as theft. *Penal Code § 485*

Receiving stolen property as crime. *Penal Code § 496*

[14] Malicious and Willful Injury to Art

Liability of parent and guardian for minor's torts. *Civ. Code § 1714.1*

Liability of parent or guardian for minor's malicious injury to art work in public gallery. *Educ. Code § 19910*

Malicious injury to art work in public gallery as misdemeanor. *Educ. Code § 19910*

Willful injury to public art as misdemeanor. *Penal Code § 622*

Willful injury to archaeological or historical object as misdemeanor. *Penal Code § 622*1/2

Native American Historic Resource Protection Act. *Pub. Res. Code § 5097.995 et seq.*

[15] Pawnbrokers

Pawnbroker defined. *Fin. Code § 21000*

Duty of pawnbroker regarding pledged goods. *Fin. Code § 21201*

[16] Political Campaign Artifacts

Damages to purchaser for copy or reproduction of political campaign artifacts that seller misrepresented as genuine. *Civ. Code § 1739 et seq.*

[17] Property Taxation

Exemption from taxation of art works used for free museums. *Rev. & Tax. Code § 202(a)(2)*

Art work brought into California for exhibition purposes only on which taxes are payable and paid in other state or country as exempt from taxation. *Rev. & Tax. Code § 213*

Exemption of household furnishings and personal effects, except personalty used in trade, profession, or business from taxation. *Rev. & Tax. Code § 224*

Procedure for claiming exemption under *Rev. & Tax. Code § 213*. *Rev. & Tax. Code §§ 251, 252.1, 254, 255, 259, 260*

Assessment of property subject to taxation as made at full value. *Rev. & Tax. Code § 401*

All property subject to property tax as assessed at value on lien date. *Rev. & Tax. Code § 401.3*

Full value of art work, for tax purposes, if in hands of artist and never sold or exhibited for profit, as full value of materials. *Rev. & Tax. Code § 986*

Lien on personal property attaches annually on January 1. *Rev. & Tax. Code § 11492*

[18] Royalty Rights of Artist

Artist's right to collect five percent royalty payment from seller or seller's agent on resale of fine art. *Civ. Code § 986(a)(1)*

Payment by seller or agent to Arts Council when unable to locate artist. *Civ. Code § 986(a)(2)*

Artist's right to bring action for damages within three years after sale or one year after discovery of sale, whichever is longer; right to attorney's fees. *Civ. Code § 986(a)(3)*

Sales and transfers of fine art exempt from royalty payment requirement. *Civ. Code § 986(b)*

Definitions. *Civ. Code §§ 986(c)(2), 997*

[19] Sale of Fine Art

[a] In General

Royalty rights of artist from resale of fine art; waiver and assignment of rights. *Civ. Code § 986(a)*

Artist's right after sale at auction, or by gallery, dealer, broker, museum, or other agent. *Civ. Code § 986(a)(1)*

Payment by seller or agent to Arts Council if unable to locate artist. *Civ. Code § 986(a)(2)*

Deposit of moneys held by Arts Council in Special Deposit Fund. *Civ. Code § 986(a)(4)*

Termination of artist's right to moneys after seven years. *Civ. Code § 986(a)(5)*

Moneys held by seller or agent as exempt from enforcement of money judgment. *Civ. Code § 986(a)(6)*

Rights held by heirs, legatees, or personal representative of artist until 20th anniversary of artist's death. *Civ. Code § 986(a)(7)*

Sales and transfers of fine art exempt from artist's rights. *Civ. Code § 986(b)*

Provisions applicable to fine art created before or after operative date. *Civ. Code § 986(d)*

Severability of § 986 provisions. *Civ. Code § 986(e)*

Applicability of 1982 amendments to transfers on or after January 1, 1983. *Civ. Code § 986(f)*

[b] Action to Enforce Artist's Rights

Action for damages by artist within three years after sale or one year after discovery of sale, whichever longer; recovery of attorney's fees. *Civ. Code § 986(a)(3)*

[c] Definitions

Artist. *Civ. Code § 986(c)(1)*

Fine art. *Civ. Code § 986(c)(2)*

Art dealer. *Civ. Code § 986(c)(3)*

[20] Sale of Fine Art Multiples

[a] Applicability

Applicability of Civ. Code *§ 1740 et seq. Civ. Code* § 1741

[b] Definitions

Fine art multiple. *Civ. Code § 1740(a)*

Fine print. *Civ. Code § 1740(b)*

Master. *Civ. Code § 1740(c)*

Artist. *Civ. Code § 1740(d)*

Signed or unsigned. *Civ. Code § 1740(e)*

Impression. *Civ. Code § 1740(f)*

Art dealer. *Civ. Code § 1740(g)*

Limited edition. *Civ. Code § 1740(h)*

Proofs. *Civ. Code § 1740(i)*

Certificate of authenticity. *Civ. Code § 1740(j)*

Person. *Civ. Code § 1740(k)*

[c] Disclosure of Information Details

Art dealer is required to furnish informational details in written certificate of authenticity to purchaser of consignee. *Civ. Code § 1742(a)*

Catalog, prospectus, or flyer as required to contain information details or substitute statement of disclosure. *Civ. Code § 1742(b)*

Art dealer is required to post disclosure statement in place of business. *Civ. Code § 1742(c)*

Disclaimer by art dealer in catalog, prospectus, or flyer. *Civ. Code § 1742(d)*

Artist selling own multiple is required to disclose informational details. *Civ. Code § 1742(e)*

Charitable organizations exempt from disclosure requirements. *Civ. Code § 1742.6*

Informational details required for all transactions involving fine art multiples. *Civ. Code § 1744*

Furnishing information creats express warranties as to information provided. *Civ. Code § 1744.7*

[d] Liabilities and Remedies

Liability of consignors and agents. *Civ. Code § 1744.9*

Liability of art dealer for failure to provide required informational details in certificate of authenticity, and amounts recoverable. *Civ. Code § 1745(a)*

Liability for willful failure to provide informational details. *Civ. Code § 1745(b)*

Limitation of action to enforce liability. *Civ. Code § 1745(c)*

Civil penalty and civil penalty surcharge for violation of disclosure requirements. *Civ. Code § 1745.5(c), (d)*

Recovery of costs and attorney's fees. *Civ. Code § 1745(d)*

Remedies not exclusive. *Civ. Code § 1745(e)*

Effectiveness of disclaimer as defense. *Civ. Code § 1745(f)*

Availability of injunctive relief against art dealer or other seller violating disclosure requirements. *Civ. Code § 1745.5*

[21] Sales Tax Exemption

Exemption from sales tax for transfer of original drawings, sketches, illustrations, or paintings by artist or designer at social gathering for entertainment purposes. *Rev. & Tax. Code § 6010.30*

Exemption from sales tax for amount charged for intangible personal property (such as copyright) transferred with tangible personal property (such as work of art) in any technology transfer agreement, which includes any agreement under which person who holds copyright interest assigns or licenses right to another person to make and sell product that is subject to that copyright interest (such as agreement granting right to reproduce work of art). *Rev. & Tax. Code §§ 6011(c)(10), 6012(c)(10)*; *see Preston v. State Bd. of Equalization (2001) 25 Cal. 4th 197, 214, 105 Cal. Rptr. 2d 407, 19 P.3d 1148* (construction and application of those code sections in case involving works of art)

[22] Statute of Limitations

Statute of limitations in civil and criminal actions for stealing, taking, or fraudulently appropriating art or artifacts. *Code Civ. Proc. § 338(c)*; *Penal Code § 484* (theft defined)

Suspension of statute of limitations in case of action to recover Holocaust-era artwork, if action is commenced before 2011. *Code Civ. Proc. § 354.3*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal Service AgreementsBankruptcy LawExemptionsGeneral OverviewCopyright LawOwner RightsState RegulationContracts LawPerformanceAssignmentGeneral Overview

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6-57 California Forms of Pleading and Practice--Annotated § 57.114

§ 57.114 Decisions

[1] Artists' Contracts for Works

Artist's contract for services not enforceable by injunction unless meeting requirements of *Civ. Code § 3423* (including compensation of at least $6,000 per year for contracts entered into on or before December 31, 1993, and at higher rates in successive years for contracts entered into on or after January 1, 1994). *Foxx v. Williams (1966) 244 Cal. App. 2d 223, 235-236, 52 Cal. Rptr. 896* (construing former *Civ. Code § 3423(e)* prior to 1992 and 1993 amendments to the minimum annual compensation)

Injunction is generally unavailable to prevent breach of agreement that is not specifically enforceable. *Adams v. Williams Resorts, Inc. (1962) 210 Cal. App. 2d 456, 463, 26 Cal. Rptr. 656*

Artist's agreement for services is contract for purely personal services. *Mackay v. Clark Rig Bldg. Co. (1935) 5 Cal. App. 2d 44, 58-59, 42 P.2d 341* (dictum)

Death or disability of artist discharges contractual obligation for services. *Mackay v. Clark Rig Bldg. Co. (1935) 5 Cal. App. 2d 44, 58-59, 42 P.2d 341* (dictum)

[2] Ascertainment of Damages

Certainty-of-damages requirement refers to fact of damage, not extent or value. *Stott v. Johnston (1951) 36 Cal. 2d 864, 875, 229 P.2d 348*

Criteria for establishing value of unusual item having no market value. *Willard v. Valley Gas & Fuel Co. (1915) 171 Cal. 9, 14-15, 151 P. 286* ; *Zvolanek v. Bodger Seeds, Ltd. (1935) 5 Cal. App. 2d 106, 109, 42 P.2d 92*

Owner is competent to testify as to value of property, even though not expert. *Willard v. Valley Gas & Fuel Co. (1915) 171 Cal. 9, 14-16, 151 P. 286*

Rule of *Civ. Code § 3355* (damages for loss of property with peculiar value) is not applicable if property has no market value. *Willard v. Valley Gas & Fuel Co. (1915) 171 Cal. 9, 15, 151 P. 286*

[3] Bankruptcy

Property exempt from execution under state law is exempt from bankrupt's creditors' claims. *Smalley v. Laugenour (1905) 196 U.S. 93, 97, 25 S. Ct. 216, 49 L. Ed. 400*

[4] Fine Art Defined

Architectural drawings made pursuant to contract for commercial purpose do not constitute fine art. *Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc. (1984) 159 Cal. App. 3d 637, 644, 205 Cal. Rptr. 620*

[5] Transfer of Fine Art

Holocaust Victims Redress Act, Pub. L. No. 105-158 (Feb. 13, 1998), does not create private right of action for rightful owner's recovery of Nazi-confiscated work of art; rather, legislative intent was to encourage state and foreign governments to enforce existing rights for protection of Holocaust victims. *Orkin v. Taylor (9th Cir. 2007) 487 F.3d 734*

District court finding that *Civ. Code § 988* created statute of frauds requirement for transfers of art objects was erroneous; *Civ. Code § 988* provides instead that written agreement is required before transfer of property rights may accompany transfer of copyright rights. *Chamberlain v. Cocola Associates (9th Cir. 1992) 958 F.2d 282, 282-285* (remanding case to determine whether transaction at issue is loan or sale)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal PropertyContracts LawTypes of ContractsPersonal Service AgreementsCopyright LawOwner RightsState RegulationBankruptcy LawExemptionsState LawSpecific Exemptions

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6-57 California Forms of Pleading and Practice--Annotated § 57.115

§ 57.115 Law Reviews

Zuber, *The Visual Artists Rights Act of 1990--What it Does, and What it Preempts, 23 Pac. L.J. 445 (1992)*

Comment, *Moral Rights for Muralists: Expanding Artists' Rights Under California Civil Code Section 987* , 24 U.C. Davis L. Rev. 531 (1990)

Comment, *"Tilted" Justice: Site Specific Art and Moral Rights After U.S. Adherence to the Berne Convention, 77 Cal. L. Rev. 1431 (1989)*

Karlen, *Artists' Rights Today*, 4(3) Cal. Lawyer 23 (1984)

McInerney, *California Resale Royalties Act: Private Sector Enforcement, 19 U.S.F. L. Rev. 1 (1984)*

Note, *Copyright, Free Speech, and the Visual Arts, 93 Yale L.J. 1565 (1984)*

Bator, *An Essay on the International Trade in Art, 34 Stan. L. Rev. 275 (1982)*

Francione, *The California Art Preservation Act and Federal Preemption by the 1976 Copyright Act--Equivalence and Actual Conflict, 18 Cal. W.L. Rev. 189 (1982)*

Note, *Works of Applied Art: An Expansion of Copyright Protection, 56 S. Cal. L. Rev. 241 (1982)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawOwner RightsMoral Rights

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§ 57.116 Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 285-308; vol. 2, *Insurance*, 68, 224, 225, 243; vol. 4, *Sales*, §§ 193, 209, 355; vol. 5, *Torts*, §§ 767-769, 771-779, 821, 822, 826; vol. 6, *Torts*, §§ 831 et seq., 1551; vol. 13, *Personal Property*, §§ 117-120; vol. 13, *Equity*, §§ 244-66 (10th ed. 2005)

Vol. 1, *Contracts*, §§ 392-415

Vol. 3, *Sales*, §§ 186, 202, 290-292

Vol. 4, *Personal Property*, §§ 93-96

Vol. 5, *Torts*, §§ 674-683

Vol. 6, *Torts*, §§ 729 et seq., 1325

Vol. 12, *Equity*, §§ 21-77

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[Reserved]

§§ 57.117[Reserved]

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6-57 California Forms of Pleading and Practice--Annotated § 57.130

§ 57.130 Complaint for Recovery of Consideration Paid--Unlawful Sale of Fine Art Multiples [Civ. Code § 1745]

[1] FORM Complaint for Recovery of Consideration Paid--Unlawful Sale of Fine Art Multiples [Civ. Code § 1745]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RECOVERY OF CONSIDERA-
_____ [*name(s*)],	)	TION
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Defendant, _____ [*name*], is, and at all times mentioned herein was, _____ [*state capacity and residence of defendant or other basis for venue, e.g.,* a resident of *or* a corporation organized and existing under the laws of the state of _____ with its principal place of business in] _____ County, California.

[2. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged,

and that plaintiff's damages as herein alleged were proximately caused by those defendants.)]

[3. (Plaintiff is informed and believes and thereon alleges that) (A)t all times herein mentioned, each of the defendants sued herein as DOES I-_____, inclusive, was the agent and employee of each of the remaining defendants and was at all times acting within the course and scope of that agency and employment.]

4. On or about _____ [*date*], in _____, California, defendant knowingly sold to plaintiff a certain fine art multiple, to wit: _____ [*describe, including production date, e.g.,* a framed black-and-white lithograph entitled "A Summer's Day" bearing, on the reverse side, the number 27 and the date August, 1996], for a price of $_____, of which plaintiff has paid _____ [the full amount *or state portion paid, e.g.,* one third *or a dollar amount*].

5. _____ [*Allege defendant's violation of Civ. Code § 1742, e.g.,* Defendant solicited a direct sale of the fine art print by distributing in California a written _____ (catalog *or* prospectus *or* flyer *or other written material or advertisement*), a copy of which is attached as Exhibit A and incorporated by reference. The _____ (catalog *or* prospectus *or* flyer *or other written material or advertisement*) fails to _____ (*specify what information listed in Civ. Code § 1744 is missing*)].

[6. *When the action is not commenced within one year of sale add:* On or about _____ (*date*), plaintiff discovered that_____ (*specify circumstances of discovery of violation, including reasons for failure to discover violation earlier*).]

[7. *If defendant gave disclaimer, allege facts showing defendant knew or should have known that the sale was in violation of provisions of Civ. Code § 1740 et seq.*]

8. Plaintiff _____ [has tendered the work of art in question to defendant on the condition that defendant return plaintiff's money but defendant refused to accept it and to return the money *or* hereby tenders the work of art to defendant].

[9. *If treble damages are sought, allege additional facts showing violation was willful.*]

WHEREFORE, plaintiff prays judgment [against defendants and each of them] as follows:

1. For recovery of the consideration paid in the sum of $_____.

2. For interest thereon from and after _____ [*insert the date when the print was tendered to defendant or, if tender was not made before filing*, the date of filing of this action].

[3. *If the violation is willful* : That the above amounts be trebled for a willful violation, pursuant to *Civil Code Section 1745(b)*.]

4. For costs of suit herein incurred, together with reasonable attorney's [and expert witness's] fees.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The complaint in [1], *above*, may be used to plead a cause of action for recovery of the consideration paid (and for a penalty, in appropriate cases) when a fine art multiple has been sold without accompanying disclosures, in violation of *Civ. Code § 1740 et seq.* [*see § 57.22[11]*].

[3] Allegations

This complaint alleges:

- The sale of an art work that is a multiple subject to *Civ. Code § 1740 et seq.* (Paragraph 4) [*see Civ. Code §§ 1740-1742, 1744*; for discussion *see § 57.22[1], [2]*].

- The art dealer's failure to make the required disclosures (Paragraph 5) [*see Civ. Code §§ 1742, 1744*; for discussion, *see § 57.22[3*]-[6]].

- Plaintiff's return or tender of the work (Paragraph 8) [*see Civ. Code § 1745(a)*].

There are also optional allegations for use in the following situations:

- If the action is commenced more than one year, but within three years, after the sale of the work (Paragraph 6) [*Civ. Code § 1745(c)*; *see § 57.22[11][d]*].

- If the art dealer gave a disclaimer but had not made appropriate investigations (Paragraph 7) [*Civ. Code § 1745(f)*; *see § 57.22[11][c]*].

- If the violation was willful (Paragraph 9) [*Civ. Code § 1745(b)*; *see § 57.22[11][b]*].

[4] Verification

Verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], but verification of the complaint requires the defendant to file a verified answer in a superior court action other than a limited civil case [*see* Code *Civ. Proc. §§*

92(b), 446(a)]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, § 177.140* et seq.

For discussion and forms relating to Fax service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For allegations for use when a nonprofit corporation, such as a museum, is a party, see Ch. 388, *Nonprofit Corporations*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue* , Pt. I

For alternative forms of verification, see Ch. 572, *Verification*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsContracts LawTypes of ContractsPersonal Property

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6-57 California Forms of Pleading and Practice--Annotated § 57.131

§ 57.131 Affirmative Defenses to Complaint Arising From Unlawful Sale of Fine Art Multiple [Civ. Code § 1742(d)]

[1] Disclaimer by Seller

[a] FORM Affirmative Defenses to Complaint Arising From Unlawful Sale of Fine Art Multiple [Civ. Code § 1742(d)]--Disclaimer by Seller

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. At the time of the sale referred to in the complaint, defendant had no knowledge of any of the [following] informational details about the fine art multiple described in the complaint [: _____ (*describe specifically what details are claimed to be unknown, if fewer than all details referred to in Civ. Code § 1744 are disclaimed*)].

2. In connection with the sale, defendant informed plaintiff _____ [orally *or* in writing], specifically and categorically with regard to each detail, that defendant disclaimed knowledge thereof, and defendant advised plaintiff that defendant could not state an opinion as to the degree of uniqueness or scarcity of the fine art multiple in question.

[b] Use of Form

The affirmative defense in [1], *above*, may be used in answer to the complaint set out at § 57.130[1], when the seller disclaimed knowledge of relevant details as provided in *Civ. Code § 1742(d), (f)* [*see § 57.22[8], [11][c]*].

The disclaimer must have been specific and categorical as to each informational detail of which the seller disclaimed knowledge [*see Civ. Code § 1744* (required informational details listed)], to the end that the purchaser was able to judge the degree of uniqueness and scarcity of the fine art multiple in question [*see Civ. Code § 1742(d)*]. There is no express

requirement that the disclaimer be written.

[2] Sale of Reproduction Not in Signed, Numbered, or Limited Edition

[a] FORM Affirmative Defenses to Complaint Arising From Unlawful Sale of Fine Art Multiple [Civ. Code § 1742(d)]--Sale of Reproduction Not in Signed, Numbered, or Limited Edition

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the fine art multiple described in the complaint was not published in a signed, numbered, or limited edition, or any combination thereof, and defendant so informed plaintiff and described the fine art multiple in question as an edition of reproductions in connection with the sale.

[b] Use of Form

The affirmative defense in [1] *above*, may be used in answer to the complaint set out at § 57.130[1], when the seller described the fine art multiple in question as an edition of reproductions [*Civ. Code § 1742(d)*; *see § 57.22[8]*]. Describing the edition as a reproduction eliminates the need for further informational details unless the fine art multiple was allegedly published in a signed, numbered, or limited edition, or any combination thereof, in which case all of the informational details are required to be furnished [*see Civ. Code § 1742(d)*]. There is no express requirement that the description of the multiple as a reproduction be written.

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-57 California Forms of Pleading and Practice--Annotated § 57.132

§ 57.132 Complaint for Damages for Recovery of Artist's Royalty Fee for Sale of Fine Art [Civ. Code § 986]

[1] FORM Complaint for Damages for Recovery of Artist's Royalty Fee for Sale of Fine Art [Civ. Code § 986]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR RECOVERY
_____ [*name*],	)	OF ROYALTY FEE
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 57.130[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 57.130[1], Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 57.130[1], Paragraph 3.*]

4. On or about _____ [*date*], in _____, California, defendant sold a certain work of fine art created by plaintiff, to wit: _____ [*describe work of fine art, e.g.,* a painting *or* a sculpture *or* a stained glass window] which is known as _____ [*title or number*], for a price of $_____.

[*EITHER, if defendant knew where to locate plaintiff*]

5. In connection with the sale, defendant failed and refused to pay to plaintiff, artist and creator of the work of fine art, five percent (5%) of the amount of the sale, in an amount totaling $_____, as required by *Section 986(a) of the Civil Code*.

[*OR, if defendant may not have known plaintiff's address*]

5. In connection with the sale of the work of fine art sold _____ [*describe how work sold, e.g.,* at an auction *or* by a gallery *or* by a dealer *or* by a broker *or* by a museum], defendant failed and refused to withhold five percent (5%) of the amount of the sale, in an amount totaling $_____, and to locate and pay plaintiff within 90 days of the sale or to transfer the amount due to plaintiff to the California Arts Council, as required by Section 986(a)(1) and (2) of the Civil Code.

6. Plaintiff has not received the amount due from _____ [either defendant seller or defendant seller's agent *or* the California Arts Council].

WHEREFORE, plaintiff prays judgment as follows:

1. For recovery of the royalty fee for sale of the fine art work in the amount of $_____.

2. For costs of suit, including reasonable attorney's fees, herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 57.130[1]; for discussion, see § 57.130[4].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for damages for recovery of a royalty fee by an artist against a seller or the seller's agent resulting from the resale of a work of fine art [*see Civ. Code § 986(a)*, discussed at *§ 57.26*]. Not all

resales of works of fine art require payment of the five percent royalty fee to the artist or his or her assignee [*see Civ. Code § 986(b)*]. For discussion of when payment of the residual fee is not required, see *§ 57.26[5]*.

For cross references relating to complaints generally, see *§ 57.130[5]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-57 California Forms of Pleading and Practice--Annotated § 57.133

§ 57.133 Complaint for Restitution Based on Rescission of Sale of Art Work

[1] FORM Complaint for Restitution Based on Rescission of Sale of Art Work

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RESTITUTION
_____ [*name*],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 57.130[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 57.130[1], Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 57.130[1], Paragraph 3.*]

4. On or about _____ [*date*], at _____, California, plaintiff, as _____ [*either* buyer *or* seller], and defendant, as _____ [seller *or* buyer], made _____ [a written *or* an oral] agreement for the sale of a certain work of art, to wit: _____ [*describe*]. The terms of the agreement were _____ [as stated in the agreement, a copy of which is attached hereto as Exhibit "A" and made a part hereof *or state terms*].

5. Pursuant to the agreement, plaintiff, on or about _____ [*date*], _____ [*describe plaintiff's performance or excuse for nonperformance*].

[*EITHER, if defendant has fully performed*]

6. Pursuant to the agreement, defendant, on or about _____ [*date*], _____ [*describe defendant's performance*].

[*OR, if defendant has partially performed*]

6. Prior to plaintiff's rescission of the agreement as hereinafter described, defendant had partially performed as follows: _____ [*describe defendant's partial performance*].

[*OR, if defendant has not performed at all*]

6. Prior to plaintiff's rescission of the agreement as described in Paragraph 7, defendant had not performed any of the obligations on his/her/its part provided for in the agreement or given any consideration to plaintiff.

[*CONTINUE with EITHER, if plaintiff gave notice of rescission and defendant has performed*]

7. On or about _____ [*date*], plaintiff notified defendant in writing that plaintiff thereby rescinded the agreement on the ground that _____ [*describe ground for rescission*]. Plaintiff offered in that written notice to restore to defendant all consideration which defendant had given, to wit: _____ [*describe*], on condition that defendant restore to plaintiff the _____ [*describe plaintiff's consideration*] which plaintiff gave in consideration.

[*OR, if plaintiff gave notice of rescission and defendant has not performed*]

7. On or about _____ [*date*], plaintiff notified defendant in writing that plaintiff thereby rescinded the agreement on the ground that _____ [*describe ground for rescission*]. Plaintiff requested in that written notice that defendant restore to plaintiff the _____ which plaintiff gave in consideration.

[*OR, if plaintiff intends service of the complaint to serve as notice of rescission and defendant has performed*]

7. By service of this complaint, plaintiff notifies defendant that plaintiff hereby rescinds the agreement on the ground

that _____ [*describe the ground for rescission*]. Plaintiff hereby offers to restore to defendant all consideration which defendant has given, to wit: _____ [*describe*], on condition that defendant restore to plaintiff the _____ [*describe plaintiff's consideration*] which plaintiff gave in consideration.

[*OR, if plaintiff intends service of the complaint to serve as notice of rescission and defendant has not performed*]

7. By service of this complaint, plaintiff notifies defendant that plaintiff hereby rescinds the agreement on the ground that _____ [*describe the ground for rescission*]. Plaintiff hereby requests that defendant restore to plaintiff _____ [*specify consideration*] which plaintiff gave in consideration.

[*CONTINUE*]

8. Plaintiff did not know, until _____ [*date*], that _____ [*state facts constituting ground for rescission*], and on that date _____ [*describe circumstances under which plaintiff discovered facts constituting ground for rescission*].

WHEREFORE, plaintiff prays for judgment as follows:

1. For a determination by the court that the agreement described in this complaint has been rescinded.

2. For restitution of the consideration given by plaintiff, to wit: _____ [*describe*].

[3. *If plaintiff's consideration was money or its equivalent:* For interest thereon at the legal rate from and after _____ (*date*).]

4. For costs of suit.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 57.130[1]; for discussion, see § 57.130[4].*]

[2] Use of Form

The complaint in [1], *above*, is for use to obtain restitution based on plaintiff's rescission of an agreement for the sale of an art work. The grounds for rescission are set out in *Civ. Code § 1689*.

When a contract has been rescinded in whole or in part, any party to the contract may seek relief based on the rescission by bringing an action to recover any money or thing owing to him or her by any other party to the contract as a consequence of the rescission [*see Com. Code § 2711(1)* (buyer's remedy as recovery of purchase price paid)] or for any

other relief to which he or she may be entitled under the circumstances [*Civ. Code § 1692*].

[3] Allegations

This complaint alleges:

- The agreement for the sale of the art work (Paragraph 4).
- Plaintiff's performance in accordance with that agreement (Paragraph 5).
- Defendant's performance, or lack thereof (alternative Paragraphs 6).
- Plaintiff's rescission, demand for return of consideration given by plaintiff, and offer to restore any consideration paid by defendant (alternative Paragraphs 7).
- The date and circumstances of plaintiff's discovery of the grounds for rescission (Paragraph 8).

[4] Limitation Period for Rescission

The period of limitation for action on rescission of a written contract is four years [*Code Civ. Proc. § 337(3)*]. The limitation period action on rescission of an oral contract is two years [*Code Civ. Proc. § 339(3)*].

[5] Cross References

For discussion of the grounds for rescission and for other forms related to an action for restitution based on rescission, see Ch. 490, *Rescission and Restitution*

For discussion and forms relating to buyer's remedies generally, see Ch. 500, *Sales: Sales Under the Commercial Code*

For additional cross references relating to complaints generally, see *§ 57.130[5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsContracts LawTypes of ContractsPersonal PropertyContracts LawRemediesRescission & RedhibitionGeneral Overview

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Chapter 57 ART
PART IV. FORMS
A. Authentication, Sale, and Consignment of Fine Art and Fine Art Multiples

6-57 California Forms of Pleading and Practice--Annotated § 57.134

§ 57.134 Complaint for Specific Performance by Buyer of Art Work Against Seller

[1] FORM Complaint for Specific Performance by Buyer of Art Work Against Seller

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR SPECIFIC PERFORMANCE
[and DOES I through _____,]	)	
Defendant(s).	)	
	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 57.130[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 57.130[1], Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 57.130[1], Paragraph 3.*]

4. On or about _____ [*date*], at _____, California, plaintiff, as buyer, and defendant, as seller, made _____ [a written *or* an oral] agreement for the sale of a certain work of art, to wit: _____ [*describe, e.g.,* a Ming dynasty figurine in jade and gold of the Chinese philosopher Confucius]. The terms of the agreement were _____ [as stated in the agreement, a copy of which is

attached as Exhibit "A" and incorporated by reference *or state terms*].

5. The consideration set forth in the agreement is the fair and reasonable value of the _____ [*e.g.,* figurine], and the agreement is, as to the defendant, just and reasonable.

6. On or about _____ [*date*], pursuant to the agreement, plaintiff tendered, and defendant accepted, _____ [*dollar amount or other consideration*] as full consideration for defendant's sale of the _____ [*e.g.,* figurine].

7. Contrary to the terms of the agreement, defendant did not deliver the _____ [*e.g.,* figurine] to plaintiff on _____ [*date*], the date that delivery was due under the aforementioned agreement, nor has defendant yet delivered it, although defendant was able to deliver it on _____ [*date*], and remains able to deliver it.

8. The _____ [*e.g.,* figurine] is unique _____ [*explain unique character of art work, e.g.,* in that it is the only known surviving figurine of its type], and damages cannot be properly ascertained and will be inadequate to compensate plaintiff for the detriment caused by defendant's failure and neglect to deliver the _____ [*e.g.,* figurine].

WHEREFORE, plaintiff prays for judgment as follows:

1. That defendant be specifically compelled to deliver the _____ [*e.g.,* figurine] to plaintiff forthwith.

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 57.130[1]; for discussion, see § 57.130[4].*]

[2] Use of Form

The complaint in [1], *above*, is for use to obtain specific performance of a seller's obligation to deliver a work of art which plaintiff bought [*see Civ. Code § 3384*]. Specific performance is available to the buyer under a contract for the sale of goods if the goods are unique or in other proper circumstances [*see Com. Code § 2716(1)*].

[3] Allegations

This complaint alleges:

- The agreement for the sale of the art work (Paragraph 4).

- The consideration for the art work, and that it was fair and reasonable as to defendant (Paragraph 5) [*Civ. Code § 3369*].

- Plaintiff's performance in accordance with that agreement (Paragraph 6) [*Civ. Code § 3392*].

- Defendant's failure and ability to perform (Paragraph 7).

- That the subject of the contract is unique so that money damages cannot adequately compensate plaintiff for its nondelivery (Paragraph 8) [*see Civ. Code § 3367*; *Com. Code §§ 2711(2)(b), 2716*].

[4] Requirement of Writing

Except as otherwise provided in *Com. Code § 2201*, a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his or her authorized agent or broker [*Com. Code § 2201(1)*]. A writing is not insufficient because it omits or incorrectly states a term agreed on, but the contract is not enforceable beyond the quantity of goods shown in that writing [*Com. Code § 2201(1)*].

Between merchants, if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, then it satisfies the above requirements against that party, unless written notice of objection to its contents is given within 10 days after it is received [*Com. Code § 2201(2)*].

A contract that does not satisfy the requirements of *Com. Code § 2201(1), above*, but that is valid in other respects is enforceable in the following circumstances [*Com. Code § 2201(3)*]:

- If the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement.

- If the party against whom enforcement is sought admits in his or her pleading, testimony, or otherwise in court that a contract for sale was made, in which case the contract is enforceable with respect to the quantity of goods admitted.

- With respect to goods for which payment has been made and accepted or which have been received and accepted (as specified in *Com. Code § 2606*).

[5] Limitation Period for Specific Performance

The limitation period for action on a written contract is four years [*Code Civ. Proc. § 337(1)*], while the limitation period for action on an oral contract is two years [*Code Civ. Proc. § 339(1)*].

[6] Cross References

For discussion and forms related to contracts generally, see Ch. 140, *Contracts*

For discussion and related forms for use in an action for specific performance of an agreement for the sale of goods, see Ch. 500, *Sales: Sales Under the Commercial Code*

For discussion of the requirements for specific performance and related forms for use in an action for specific performance, see Ch. 528, *Specific Performance*

For additional cross references relating to complaints generally, see *§ 57.130[5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsContracts LawTypes of ContractsPersonal PropertyContracts LawRemediesSpecific Performance

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Chapter 57 ART
PART IV. FORMS
A. Authentication, Sale, and Consignment of Fine Art and Fine Art Multiples

6-57 California Forms of Pleading and Practice--Annotated § 57.135

§ 57.135 Complaint for Damages Based on Fraud by Buyer of Art Work Against Seller

[1] FORM Complaint for Damages Based on Fraud by Buyer of Art Work Against Seller

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 57.130[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 57.130[1], Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 57.130[1], Paragraph 3.*]

4. On or about _____ [*date*], defendant sold to plaintiff, for a price of $_____, of which plaintiff has paid _____ [*state portion paid*], and duly delivered a certain work of art, to wit: _____ [*describe*].

5. In connection with the sale, defendant represented to plaintiff _____ [orally *or* in writing] that _____ [*state fraudulent misrepresentation*].

6. That representation was false, the true facts being that _____ [*state true facts*].

7. Plaintiff believed the representation to be true and relied on it in giving his/her assent to the purchase of the _____ [*e.g.*, painting]. Plaintiff discovered on or about _____ [*date*], that the representation was false.

8. Plaintiff is informed and believes and thereon alleges that defendant knew at the time of making the representation that it was false, and that defendant made the representation with the intent fraudulently to induce plaintiff to buy the _____ [*e.g.*, painting].

9. The value of the _____ [*e.g.*, painting] which plaintiff received is $_____.

[10. *If plaintiff has additional damages under Civ. Code § 3343, allege facts showing those damages.*]

[11. In committing the acts described in this complaint, defendant(s)(, and each of them,) acted in conscious disregard of the rights of plaintiff and others and were guilty of _____ (malice *and/or* oppression *and/or* fraud) in that _____ (*specify facts constituting malice, oppression, or fraud*). The conduct of defendant(s) warrants an assessment of punitive damages in an amount appropriate to punish defendant(s) and deter others from engaging in similar wrongful conduct.]

WHEREFORE, plaintiff prays for judgment as follows:

1. For general damages in the sum of $_____.

[2. *Additional damages, if any.*]

[3. For exemplary and punitive damages in the sum of $_____.]

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 57.130[1]; for discussion, see § 57.130[4].*]

[2] Use of Form

The complaint in [1], *above*, is for use to obtain damages by a plaintiff who has been defrauded in the purchase of a work of art worth less than what he or she paid for it [*see Civ. Code § 1709* (liability for deceit)]. A cause of action for

fraud may be an alternative to seeking restitution based on rescission [*see § 57.133*] if plaintiff wants to keep the work.

[3] Allegations

The complaint alleges [*see Civ. Code § 1710* (elements of actionable fraud)]:

- The sale of the art work, the date of the sale, and the price plaintiff paid for the work (Paragraph 4).
- The representations made by defendant to induce the sale (Paragraph 5).
- That the representations were false (Paragraph 6).
- The true facts (Paragraph 6).
- Plaintiff's reliance on the misrepresentations (Paragraph 7).
- The date and fact of plaintiff's discovery that the representations were false (Paragraph 7).
- On information and belief, that defendant knew the representations were false and made them with intent to defraud plaintiff (Paragraph 8).

There are also a reminder to allege any additional damages pursuant to *Civ. Code § 3343(a)*, discussed at [4][a], *below* (Paragraph 10) and an allegation for use to recover punitive damages (Paragraph 11) [*Civ. Code § 3294*].

[4] Damages for Fraud

[a] Civil Code Measure

Civ. Code § 3343 is a special relief statute setting out the measure of damages recoverable by any person (buyer or seller) defrauded in the purchase, sale, or exchange of property. The measure of damages specified in *Com. Code § 2714(2)* for breach of warranty is different from the measure of damages provided in *Civ. Code § 3343*, which expressly states that it may not be invoked to permit the defrauded person to recover any amount measured by the difference between the value of the property as represented and the actual value [*Civ. Code § 3343(b)(1)*]. The basic measure of damages provided in *Civ. Code § 3343* is the difference between the actual value of that with which the defrauded person parted and the actual value of that which he or she received [*Civ. Code § 3343(a)*]. In other words, the plaintiff in a fraud action will always have parted with something more valuable than what he or she received, and is entitled to have the defendant make up the difference.

The defrauded person may also have additional damages to compensate for (1) expenses actually and reasonably incurred in reliance on the fraud [*see Civ. Code § 3343(a)(1)*], (2) proximately caused loss of the use and enjoyment of the property, if the defrauded party parted with it [*see Civ. Code § 3343(a)(2)*], (3) lost profits or other gains which might reasonably have been earned by use of the property, if the defrauded party parted with it [*see Civ. Code § 3343(a)(3)*], and (4) loss of profits or other gains which were reasonably anticipated to be earned from use or sale of the property, if the defrauded party bought it for the purpose of using or reselling it for a profit [*see Civ. Code § 3343(a)(4)*].

For forms of allegations pleading damages under *Civ. Code § 3343*, see the Ch. 177, *Damages*, § 177.40 et seq., and Ch. 269, *Fraud and Deceit*).

[b] Remedies Under Commercial Code

Com. Code § 2721 provides that remedies for material misrepresentation or fraud include all remedies available under *Com. Code §§ 2101-2725* for nonfraudulent breach; and neither rescission or a claim for rescission of the contract for sale, nor rejection or return of the goods, shall bar or be deemed inconsistent with a claim for damages or other remedy.

[5] Limitation Period

The limitation period for an action based on fraud is three years [*Code Civ. Proc. § 338(d)*].

[6] Cross References

For cross references relating to complaints generally, see *§ 57.130[5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsContracts LawTypes of ContractsPersonal Property

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PART IV. FORMS
A. Authentication, Sale, and Consignment of Fine Art and Fine Art Multiples

6-57 California Forms of Pleading and Practice--Annotated § 57.136

§ 57.136 Complaint for Damages Based on Negligent Authentication of Copy or Reproduction as Genuine Work of Art

[1] FORM Complaint for Damages Based on Negligent Authentication of Copy or Reproduction as Genuine Work of Art

[*Caption. See § 57.135[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 57.130[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 57.130[1], Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 57.130[1], Paragraph 3.*]

4. [At all times herein mentioned, and particularly] [O]n or about _____ [*date*], defendant [was engaged in the business of, and] held himself/herself out to [the public in general, and to] plaintiff [in particular,] as being skilled in the authentication of certain kinds of art works, to wit: _____ [*describe kinds of works on which defendant purported to be an authority*], by reason of his/her superior knowledge and experience.

5. On or about that date, defendant undertook to examine a certain work of art, to wit: _____ [*describe*], for the purpose of determining whether it was a genuine work. Defendant's undertaking was the result of _____ [*state circumstances in which defendant undertook to authenticate work, e.g.*, an oral agreement by which plaintiff promised to pay defendant the sum of $_____ as a fee in compensation for defendant's examining the work of art and determining whether it was genuine].

6. Defendant knew at the time of the examination that plaintiff intended to buy the work of art if it was genuine, and

that plaintiff intended to rely on defendant's judgment as to whether it was genuine.

7. Following the examination, defendant told plaintiff that the work of art was genuine. In reliance on defendant's determination of authenticity, plaintiff bought the work of art for a price of $_____.

8. On or about _____ [*date*], plaintiff discovered that the work of art is not genuine but is a _____ [copy *or* reproduction] having a value of $_____.

9. In the exercise of reasonable care commensurate with the skill, superior knowledge, and experience which defendant represented himself/herself to have, defendant should have recognized that the work of art is a _____ [copy *or* reproduction] because _____ [*state characteristics that mark the work as a copy or reproduction*].

10. As a proximate result of defendant's negligence, plaintiff has been damaged in the sum of $_____ [*difference between purchase price and actual value*].

[11. *If plaintiff has additional damages, allege facts showing those damages.*]

WHEREFORE, plaintiff prays for judgment as follows:

1. For general damages in the sum of $_____.

[2. For additional damages in the sum of $_____.]

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 57.130[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use to obtain damages based on defendant's negligent determination that a copy or reproduction was a genuine work [*see Civ. Code § 1714(a)* (negligence); *Civ. Code § 3333* (damages for breach of noncontractual injury)]. It is not a complaint for negligent misrepresentation, even though defendant's negligence consists in misrepresenting the quality of the work as genuine, or perhaps in misrepresenting his skill and ability to distinguish copies from genuine works. The gist of the cause of action is defendant's negligent performance of a contractual obligation to use professed skill and experience in authenticating a work of art.

[3] Allegations

The complaint alleges:

- Defendant's expertise and the fact that defendant held himself or herself out to the public as having that expertise (Paragraph 4).

- The agreement between plaintiff and defendant (Paragraph 5).

- The fact that defendant knew plaintiff would be relying on defendant's authentication in deciding whether to purchase the object (Paragraph 6).

- Defendant's pronouncement that the work was genuine (Paragraph 7).

- Plaintiff's purchase of the work in reliance on defendant's assertion that it was genuine (Paragraph 7).

- [Plaintiff's discovery, and the date of that discovery, that the work was not genuine (Paragraph 8).

- The fact that and reasons why a person with the degree of skill and experience defendant purported to have would have know the work was not genuine (Paragraph 9).

- Plaintiff's damage as measured between the price plaintiff paid for the work or art and its actual value (Paragraph 10).

There is also a reminder to allege any other damages (Paragraph 11).

[4] Negligent Performance of Contractual Obligation

Accompanying every contract is a common law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done. A negligent failure to observe any of these conditions is a tort, as well as a breach of contract. The rule which imposes this duty is of universally applied to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill, and knowledge. The obligation is implied by law and need not be stated in the agreement [*see Roscoe Moss Co. v. Jenkins (1942) 55 Cal. App. 2d 369, 376, 130 P.2d 477* ; *Perry v. D. J. & T. Sullivan, Inc. (1933) 219 Cal. 384, 390, 26 P.2d 485* (gratuitous undertaking as creating duty to use reasonable care)].

The same act may be both a tort and a breach of contract [*Eads v. Marks (1952) 39 Cal. 2d 807, 810, 249 P.2d 257]* . Even when there is a contractual relationship between the parties, a cause of action in tort may sometimes arise out of the negligent manner in which the contractual duty is performed, or out of a failure to perform that duty. The contract is of significance only in creating the legal duty, and the negligence of the defendant should not be considered as a breach of contract, but as a tort governed by tort rules. If the cause of action arises from a breach of a promise set forth in a contract, the action is ex contractu; but if it arises from a breach of duty growing out of the contract, it is ex delicto. If the cause of action arises from the breach of a contractual duty, the action is delictual notwithstanding that it also involves a breach of contract. Contractual negligence ordinarily gives rise to an action either on contract or in tort. The injured party may elect to waive the contract and sue in tort. In general, it has been held that actions based on negligent failure to perform contractual duties, although containing elements of both contract and tort, are regarded as delictual actions, because negligence is considered the gravamen of the action [*see Eads v. Marks (1952) 39 Cal. 2d 807, 810-812, 249 P.2d 257]* .

[5] Limitation Period

The limitation period for an action for negligent performance of an implied obligation based on contract is the four-year

period prescribed by *Code Civ. Proc. § 337(1)* [*Bruckman v. Parliament Escrow Corp. (1987) 190 Cal. App. 3d 1051, 1057-1058, 235 Cal. Rptr. 813]* .

[6] Cross References

For discussion and forms relating to negligence actions generally, see Ch. 380, *Negligence*

For additional cross references relating to complaints generally, see *§ 57.130[5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsContracts LawTypes of ContractsPersonal Service Agreements

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[Reserved]

§§ 57.137[Reserved]

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Chapter 57 ART
PART IV. FORMS
B. Protection of Artist's Moral Rights Under Federal and State Law

6-57 California Forms of Pleading and Practice--Annotated § 57.150

§ 57.150 Complaint in United States District Court for Damages, Profits, and Accounting, and for Injunctive and Impounding Relief, for Infringement of Moral Rights [17 U.S.C. § 501]

[1] FORM Complaint in United States District Court for Damages, Profits, and Accounting, and for Injunctive and Impounding Relief, for Infringement of Moral Rights [17 U.S.C. § 501]

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF
CALIFORNIA, _____ DIVISION

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	Civil Action, File No. _____
_____ [*name*],	)	COMPLAINT [AND DEMAND FOR JURY TRI-
Defendant(s).	)	AL]
	)	
	)	

Plaintiff alleges:

COUNT ONE
(Intentional Infringement of Right of Integrity)

1. This action arises under the Copyright Act of 1976, *17 U.S.C. § 101 et seq.* Jurisdiction is vested in this Court pursuant to *28 U.S.C. § 1338*.

2. Plaintiff is the author of a work of visual art, which he/she created on _____ [*date*]. On that date, plaintiff then was and ever since has been a citizen of the United States. The work is _____ [*describe work, e.g.,* an original lithograph, entitled "_____"]. It consists of _____ [*allege number of copies of work, e.g.,* a limited edition of 50 original prints produced from an original plate]. [*If work exists in limited edition, allege numbering and signing or marking of copies, e.g.,* Each print is signed and consecutively numbered by plaintiff.]

3. On or about _____ [*date on or after June 1, 1991*], defendant willfully and intentionally distorted, mutilated, and otherwise modified the work, in violation of plaintiff's right of integrity therein, as set forth in *Title 17, Section 106A(a)(3)(A), of the United States Code*. Defendant did so by _____ [*describe defendant's acts, e.g.,* treating three prints from the limited edition of "_____" in his/her possession with a blue watercolor wash so that each print, which consisted of black figures on a white ground when created by plaintiff, now consists of black figures on a blue ground].

4. Defendant's willful and intentional distortion, mutilation, and other modification of plaintiff's work is the proximate cause of prejudice to plaintiff's honor or reputation, to plaintiff's damage [in the amount of $_____].

5. Plaintiff has notified defendant that defendant has violated one of plaintiff's integrity rights in the work. Despite this notification, [plaintiff is informed and believes and thereon alleges that] defendant is preparing and intends to distort, mutilate, and otherwise modify plaintiff's work in future _____ [*describe impending modification, e.g.,* by treating the remaining two prints of "_____" in defendant's possession with a blue watercolor wash].

6. Any such willful and intentional distortion, mutilation, or other modification to the work will cause prejudice to plaintiff's honor or reputation, to plaintiff's damage [in the amount of $_____].

7. Unless restrained and enjoined by this court, any such continued willful and intentional distortion, mutilation, or other modification of the work will cause irreparable injury to plaintiff's honor or reputation, in that _____ [*allege facts showing irreparable injury, e.g.,* pecuniary compensation will not afford plaintiff adequate relief for the damage thereto].

8. Plaintiff has not waived any of his/her integrity rights under Title *17 of the United States Code, Section 106A(a)*.

COUNT TWO
(Infringement of Right of Attribution)

9. Plaintiff refers to Paragraphs One through Eight of Count One, and incorporates them by reference herein.

10. Despite defendant's willful and intentional distortion, mutilation, or other modification of plaintiff's work as alleged above, the distorted, mutilated, and otherwise modified work continues to bear plaintiff's signature.

11. Plaintiff has notified defendant that the continued presence of plaintiff's name on the work as distorted, mutilated, and otherwise modified by defendant, and defendant's continued attribution to plaintiff of the work as distorted, mutilated, and otherwise modified by defendant, is a violation of plaintiff's rights under *Title 17, Section 106A(a)(2), of the United States Code*. Despite this notification, [plaintiff is informed and believes and thereon alleges that] defendant is preparing and intends to permit plaintiff's name to remain on any work that, in future, defendant distorts, mutilates, or

otherwise modifies to the prejudice of plaintiff's honor or reputation.

12. Unless restrained and enjoined by this Court, defendant will continue to permit the work, as distorted, mutilated, and otherwise modified to the prejudice of plaintiff's honor or reputation, to bear plaintiff's name. Any such continued attribution of plaintiff's name to the work as distorted, mutilated, and otherwise modified by defendant, will cause irreparable injury to plaintiff and to his/her honor or reputation, in that _____ [*allege grounds for injunctive relief, e.g.,* pecuniary compensation will not afford plaintiff adequate relief for the damage thereto].

13. Plaintiff has not waived any of his/her attribution rights under *Title 17, Section 106A(a), of the United States Code*.

WHEREFORE, plaintiff requests judgment as follows:

1. That defendant be restrained and enjoined during the pendency of this action, and permanently thereafter, from infringing plaintiff's right of integrity in the work by distorting, mutilating, or otherwise modifying the work to the prejudice of plaintiff's honor or reputation;

2. That defendant be restrained and enjoined during the pendency of this action, and permanently thereafter, from infringing plaintiff's right of attribution in the work by permitting plaintiff's name to remain on work that defendant has distorted, mutilated, and otherwise modified to the prejudice of plaintiff's honor or reputation;

3. That defendant be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendant's infringement of plaintiff's integrity and attribution rights in plaintiff's work;

4. That defendant be required to account to plaintiff for all gains, profits, and advantages derived by defendant by his/her infringement of plaintiff's integrity and attribution rights in plaintiff's work;

5. That defendant, as a willful infringer, be required to pay to plaintiff such statutory damages as the court shall deem within the provisions of the copyright statutes, but not less than $500.00 for each infringement of each of plaintiff's integrity and attribution rights in plaintiff's work;

6. That defendant be required to deliver up to be impounded during the pendency of this action _____ [*specify items, e.g.,* all prints of plaintiff's work] in defendant's possession or under defendant's control for removal of _____ [*specify attributing information, e.g.,* plaintiff's name and print number];

7. That defendant be required to pay to plaintiff the costs of this action and reasonable attorney's fees to be allowed to plaintiff by the court; and

8. That plaintiff be granted such other and further relief as the Court deems necessary, proper, and just.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

Office and Mailing Address

_____

_____

[*ADD if plaintiff seeks jury trial*]

DEMAND FOR JURY TRIAL

The plaintiff in the above-entitled action requests a trial by jury as provided by the *United States Constitution, Amendment VII*, and by the *Federal Rules of Civil Procedure, Rule 38*.

_____ [*signature*]

Attorney for Plaintiff

VERIFICATION

State of California,
[City and] County of _____ss.

_____ [*Name*], being duly sworn, deposes, and says:

He/She is the plaintiff in the above-entitled action. He/She has read the foregoing complaint and knows the contents thereof. The same is true of his/her own knowledge[, except as to matters therein stated on information and belief, and as to those matters he/she believes it to be true].

_____ [*signature of plaintiff*]

Subscribed and sworn to before me this _____ day of _____ [*month and year*].

_____ [*signature*]

Notary Public--California

[City and] County of _____

My commission expires _____ [*date*].

[*Notary seal*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by the author of a work of visual art to enforce his or her rights of integrity and attribution in the work under the Copyright Act of 1976, specifically, that portion of the Act known as the

Visual Artists Rights Act of 1990, discussed at *§ 57.52*.

The specific integrity right sought to be enforced in the form is the right to prevent any intentional distortion, mutilation, or other modification of the work that would be prejudicial to the artist's honor or reputation (Count One) [*see 17 U.S.C. § 106A(a)(3)(A)*; *see § 57.52[5]*].

The specific attribution right sought to be enforced in the form is the right to prevent the use of the artist's name as the author of a work in the event of a distortion, mutilation, or other modification of the work that would be prejudicial to the artist's honor or reputation (Count Two) [*see 17 U.S.C. § 106A(a)(2)*; *see § 57.52[5]*].

[3] Allegations

[a] Jurisdiction

A complaint filed in federal court must include an allegation of the court's jurisdiction over the subject matter of the action (Paragraph 1) [*Fed. R. Civ. P., Rule 8(a)(1)*]. Local court rule may govern the allegation of federal jurisdiction [*see, e.g.,* U.S. Dist. Ct., Cen. Dist. of Cal., Rules 3.7.1, 3.7.2 (jurisdictional allegation required to be first paragraph of complaint); U.S. Dist Ct., No. Dist. of Cal., Rule 200-5 (required to be separate paragraph entitled "Jurisdiction")]. Jurisdiction is discussed further in [6], *below*.

[b] Prima Facie Case

To state a prima facie case of infringement of these rights, plaintiff must allege and prove (1) that the work at issue is a "work of visual art" within the meaning of *17 U.S.C. § 101* (Paragraph 2); (2) that plaintiff is the holder of the rights (Paragraphs 2, 8, and 13); (3) that the rights have been or will be intentionally infringed (Paragraphs 3, 5, 10, and 11); and (4) that the infringement will prejudice plaintiff's honor or reputation (Paragraphs 4, 6, 10, and 11) [*see 17 U.S.C. §§ 101, 106A(a)(2), (3), (d), (e)*; *see § 57.52[9]*].

[c] Injunction

To enjoin a defendant preliminarily from continued or future infringement of these rights, it appears that, analogizing to copyright law, plaintiff must show either a likelihood of success on the merits and a possibility of irreparable injury or that serious questions going to the merits of the action are raised and that the balance of hardships tips in plaintiff's favor (Paragraphs 7 and 12) [*see Johnson Controls v. Phoenix Control Systems (9th Cir. 1989) 886 F.2d 1173, 1174* (copyright infringement action); *17 U.S.C. 501(a)* (for purposes of remedies section of federal Copyright Act, any reference to copyright is deemed to include rights of attribution and integrity); *Fed. R. Civ. P., Rule 65*; *see also* H.R. Rep. No. 514, 101st Cong., 2d Sess. 22 (1990) (Visual Artists Rights Act of 1990 makes all copyright infringement remedies, except criminal penalties, available to moral rights infringement plaintiffs); *see also § 57.52[9][c]*].

Local federal rules also govern the procedure for obtaining temporary restraining orders and preliminary injunctions [*see, e.g.,* U.S. Dist. Ct., Cen. Dist. of Cal., Rule 7.17; U.S. Dist. Ct., East. Dist. of Cal., Rule 231; U.S. Dist. Ct., No. Dist. of Cal., Rules 220-7, 220-8; *see also* U.S. Dist. Ct., Cen. Dist. of Cal., Rule 19 (seizure of property)].

[d] Willful Infringement

In the Ninth Circuit, to sustain a finding of willful infringement of a moral right, it appears that, analogizing to copyright law [*see 17 U.S.C. § 504(c)(2)* (statutory damages for willful infringement)], the court must find that a defendant knew that its conduct constituted an act of infringement (Paragraphs 5 and 11) [*see 17 U.S.C. § 501(a)* (for purposes of remedies section of federal Copyright Act, any reference to copyright is deemed to include rights of attribution and integrity); *Peer Intern. Corp. v. Pausa Records, Inc. (9th Cir. 1990) 909 F.2d 1332, 1335, 1335 n.3, 1336 , cert. denied, 498 U.S. 1109, 111 S. Ct. 1019, 112 L. Ed. 2d 1100 (1991)* (copyright infringement action); *see*

also H.R. Rep. No. 514, 101st Cong., 2d Sess. 22 (1990) (Visual Artists Rights Act of 1990 makes all copyright infringement remedies, except criminal penalties, available to moral rights infringement plaintiffs)]. For further discussion of statutory damages in copyright infringement actions, see Ch. 349, *Literary Property and Copyright* .

[4] Standard of Harm to Honor or Reputation

The legislative history indicates that the best approach to construing the term "honor or reputation" is to focus on the artistic or professional honor or reputation of the individual as embodied in the work that is protected. The standard used is not analogous to that of a defamation case, in which the general character of the plaintiff is at issue. In a suit for violation of moral rights, any evidence with regard to the latter is irrelevant [H.R. Rep. No. 514, 101st Cong., 2d Sess. 15 (1990)].

The formulation for determining whether harm to honor or reputation exists must of necessity be flexible. The trier of fact must examine the way in which a work has been modified and the professional reputation of the author of the work. *Fed. R. Evid., Rules 701-706* permit expert testimony on the issue of whether the modification affects the artist's honor or reputation. Although no per se rule exists, modification of a work of recognized stature will generally establish harm to honor or reputation [H.R. Rep. No. 514, 101st Cong., 2d Sess. 15-16 (1990)].

[5] Verification

Pleadings in federal court need not be verified or accompanied by affidavit unless specifically provided by rule or statute [*Fed. R. Civ. P., Rule 11*]. Thus, a verified pleading does not thereby automatically require an opposing party to verify subsequent or responsive pleadings unless specifically required by rule or statute.

Nevertheless, an application for an ex parte temporary restraining order must proceed by either verified complaint or affidavit. In such an action, the applicant must present verified facts, by either complaint or separate supporting affidavit(s), showing that immediate and irreparable injury, loss, or damage to the applicant will result before the adverse party or its attorney can be heard in opposition to the application. Additionally, the applicant must certify to the court, in writing, both the applicant's efforts, if any, to give notice to the opposing party, and reasons supporting the applicant's claim that notice should not be required [*Fed. R. Civ. P., Rule 65(b)*].

Rule 65(b) does not expressly require a verified complaint when accompanied by supporting affidavits [*see Fed. R. Civ. P., Rule 65(b)*]. An unverified complaint, coupled with a supporting affidavit stating the affiant's source of information for the complaint and the fact that the affiant prepared the complaint, has been held sufficient to meet the requirements of the rule [*Brown v. Bernstein (M.D. Pa. 1943) 49 F. Supp. 497, 499]* .

[6] Signature of Pleadings

Every pleading of a party represented by an attorney in federal court must be signed by at least one attorney of record in the attorney's individual name. Additionally, the attorney must state his or her address in the pleading. The attorney's signature constitutes a certificate by the attorney that he or she has read the pleading; that to the best of his or her knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law; and that the pleading is not interposed for any improper purpose. If a pleading is not signed, it must be stricken unless it is signed promptly after the omission is called to the pleader's attention. If a pleading is signed in violation of *Fed. R. Civ. P., Rule 11*, the court will impose an appropriate sanction on the person who signed the pleading, a represented party, or both [*see Fed. R. Civ. P., Rule 11*].

[7] Jurisdiction and Venue

The United States District Court has exclusive, original subject matter jurisdiction in any civil action arising under any

act of Congress relating to copyrights [*28 U.S.C. § 1338(a)*]. Therefore, neither diversity of citizenship nor a specific amount in controversy is required.

Venue is laid in the judicial district where (1) any defendant resides, if all defendants reside in the same state; (2) a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated; or (3) any defendant may be found, if there is no district in which the action can otherwise be brought [*28 U.S.C. § 1391(b)* (venue in federal question jurisdiction cases); *see 28 U.S.C. § 1392* (venue when defendants reside or property is located in different districts of the same state)].

[8] Cross References

For jurisdictional allegations for use in federal district courts, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For a form of complaint for copyright infringement, see Ch. 349, *Literary Property and Copyright*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCopyright LawOwner RightsMoral RightsCopyright LawSubject MatterPictorial, Graphic & Sculptural WorksWorks of Art

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 57 ART
PART IV. FORMS
B. Protection of Artist's Moral Rights Under Federal and State Law

6-57 California Forms of Pleading and Practice--Annotated § 57.151

§ 57.151 Complaint for Damages for Intentional Destruction of Fine Art [Civ. Code § 987(c)(1), (e)]

[1] FORM Complaint for Damages for Intentional Destruction of Fine Art [Civ. Code § 987(c)(1), (e)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR INTENTION-
_____ [*name*],	)	AL DESTRUCTION OF FINE ART
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 57.130[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 57.130[1], Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 57.130[1], Paragraph 3.*]

4. _____ [*Allege facts establishing existence and location of work of fine art and plaintiff's creation of the work or other status allowing plaintiff to enforce the rights created under Section 987 of the Civil Code, e.g.,* On or about _____ (*date*), in _____, California, _____ (*name*), plaintiff's father (hereinafter referred to as "the artist") created a work of fine art, to wit, a painting entitled "_____" (*name of work*). The artist died in _____ (*date*). Plaintiff, as the artist's daughter, personal representative, and beneficiary of his last will and testament, is entitled to enforce the rights sought to be enforced by this complaint. On or about _____ (*date*), at the time of the acts complained of, the work was on exhibit in _____, California, at _____ (*describe location, e.g., the specific museum where the work was on exhibit*)].

5. _____ [*Allege defendant's violation of Civ. Code § 987(c)(1), e.g.,* Defendant, as a member of the public invited to view various works of fine art, including the painting entitled "_____," intentionally inflicted physical mutilation on the work of art by slashing the canvas surface on which the painting was depicted, and which intentional act was in violation of *Section 987(c)(1) of the Civil Code*].

6. As a proximate result of defendant's acts, _____ [the artist *or* plaintiff] has been damaged [in the amount of $_____].

[7. In committing the acts described in this complaint, defendant(s)(, and each of them,) acted in conscious disregard of the rights of _____ (the artist's *or* plaintiff) and others and were guilty of _____ (malice *and/or* oppression *and/or* fraud) in that _____ (*specify facts constituting malice, oppression, or fraud*). The conduct of defendant(s) warrants an assessment of punitive damages in an amount appropriate to punish defendant(s) and deter others from engaging in similar wrongful conduct.]

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages [in the amount of $_____].

[2. For punitive damages.]

3. For costs of suit, including attorney's [and expert witness's] fees, herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 57.130[1]; for discussion, see § 57.130[4].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for damages for the intentional physical defacement, mutilation, alteration, or destruction of a work of fine art pursuant to the California Art Preservation Act [*Civ. Code § 987(c)(1)* and *(e)*; *see* discussion in *§ 57.53[1], [3]*].

To a great extent, the California Art Preservation Act has been preempted by the Visual Artists Rights Act of 1990 [*17 U.S.C. §§ 106A, 113(d)*], effective June 1, 1991 [*see 17 U.S.C. § 301(f)*, discussed in *§ 57.51*]. However, California courts have not yet determined the extent of the preemption [*see, e.g., Lubner v. City of Los Angeles (1996) 45 Cal. App. 4th 525, 531, 53 Cal. Rptr. 2d 24]* , so this form is included, using as an example, a situation that may not be preempted, namely, the enforcement of the rights created by *Civ. Code § 987* after, but within 50 years of the artist's death, by the artist's heir, devisee, beneficiary, or personal representative [*see* 17 U.S.C. *§ 301(f)(2)(C), Civ. Code* § 987(g)(1), discussed at *§ 57.51[2]* and *§ 57.53[4]*, respectively].

For discussion of the effect of this statute with respect to works of fine art which are part of a building, see *§ 57.53[5]*.

[3] Allegations

The complaint alleges:

- The creation of the work of art (Paragraph 4).

- Plaintiff's status as the artist or a person entitled to enforce the rights for 50 years after the artist's death (Paragraph 4) [*Civ. Code § 987(g)(1)*].

- The description of the work of art, and the time and place of the wrongful act (Paragraph 4).

- Defendant's wrongful act (Paragraph 5).

- Damages [*see Civ. Code § 987(a)* (statement of legislative intent; damage presumed to flow from alteration or destruction of work of fine art)]. There is also an optional allegation that the defendant's act was malicious, oppressive, or fraudulent enough to warrant an award of punitive damages [*see Civ. Code § 987(e)(3)*, discussed under [4], *below*].

[4] Statute of Limitations

The action must be brought within three years of the act complained of or one year after discovery of the act, whichever is longer [*Civ. Code § 987(i)*].

[5] Punitive Damages

An artist bringing an action to enforce his or her rights under *Civ. Code § 987* may seek punitive damages. However, the court must, in its discretion, select an organization or organizations engaged in charitable or educational activities involving the fine art in California to receive the damages when awarded [*Civ. Code § 987(e)(3)*]. For further discussion of punitive damages generally, see Ch. 177, *Damages* , §ensp;177.40 et seq.

[6] Cross References

For cross references relating to complaints generally, see *§ 57.130[5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsIntentional TortsConversionGeneral Overview

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Chapter 57 ART
PART IV. FORMS
B. Protection of Artist's Moral Rights Under Federal and State Law

6-57 California Forms of Pleading and Practice--Annotated § 57.152

§ 57.152 Complaint for Damages for Negligent Destruction of Fine Art [Civ. Code § 987(c)(2), (e)]

[1] FORM Complaint for Damages for Negligent Destruction of Fine Art [Civ. Code § 987(c)(2), (e)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR NEGLIGENT
_____ [*name*],	)	DESTRUCTION OF FINE ART
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff allege(s):

1. Plaintiff is _____ [the creator *and/or* owner] of a certain work of fine art, to wit: _____ [*describe, e.g.,* a painting entitled "_____"]. [_____If plaintiff is not the creator of the work, continue to allege status that entitles plaintiff to maintain suit, e.g., The work was

created by _____ (*name*), plaintiff's mother (hereinafter referred to as "the artist"). The artist died on _____ (*date*). Plaintiff, as the artist's son, personal representative, and beneficiary of her last will and testament, is entitled to enforce the rights sought to be enforced by this complaint.]

2. [*Capacity and residence of defendant. See § 57.130[1], Paragraph 1.*]

[3. *Fictitious name allegation, if appropriate. See § 57.130[1], Paragraph 2.*]

[4. *Agency allegation, if appropriate. See § 57.130[1], Paragraph 3.*]

5. On or about _____ [*date*], plaintiff delivered to defendant at _____ [*place*], in _____, California, and defendant accepted, the _____ [*describe, e.g.,* a painting], pursuant to _____ [a written *or* an oral] agreement for the purpose of _____ [framing *and/or* conserving *and/or* restoring] the work of art.

6. _____ [*Allege defendant's violation of Civ. Code § 987(c)(2), e.g.,* While in defendant's possession, the work of art was physically _____ (defaced *or* mutilated *or* altered *or* destroyed) by an act constituting gross negligence, to wit: _____ (*describe, e.g.,* allowing foreign substances to permanently mar the surface of the canvas of the painting)].

7. As a proximate result of defendant's failure to use due care in _____ [framing *and/or* conserving *and/or* restoring] the work of art, _____ [plaintiff *or* the artist] has been damaged [in the amount of $_____].

[8. *Allege conduct by defendant that forms basis for award of punitive damages, e.g.,* The conduct of defendant in _____ (*specify conduct, e.g.,* allowing a foreign substance to remain on the painting, despite his/her knowledge of the danger to the painting and of the likelihood of permanent damage to the painting,) was carried on by defendant in conscious disregard of _____ (the artist's *or* plaintiff's) and others rights. The conduct of defendant(s) was so _____ (malicious *and/or* oppressive *and/or* fraudulent) as to warrant an assessment of punitive damages in an amount appropriate to punish defendant(s) and deter others from engaging in similar wrongful conduct.]

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages [in the amount of $_____].

[2. For punitive damages.]

3. For costs of suit, including attorney's [and expert witness's] fees, herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 57.130[1]; for discussion, see § 57.130[4].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for damages for the negligent commission of any physical defacement, mutilation, alteration, or destruction of a work of fine art when the work is being framed, conserved, or restored. The act that causes the destruction to the work of art must constitute gross negligence, which means the exercise of so slight a degree of care as to justify the belief that there was an indifference to the particular work of fine art. The action may be brought against the person who committed, or authorized the commission of, any destructive act [*see Civ. Code § 987(c)(2), (e)*, discussed in *§ 57.53[1], [3]*].

As discussed in *§ 57.151[2], Civ. Code § 987*, has been preempted to a great extent by *17 U.S.C. §§ 106A, 113(d)* [*see 17 U.S.C. § 301(f)*, discussed in *§ 57.51*]. Nevertheless, this form is included, using as an example a situation that does not appear to be preempted, namely, vindication of rights created by *Civ. Code § 987* after the artist's death, by the artist's heir beneficiary, or personal representative [*see* 17 U.S.C. *§ 301(f)(2)(C), Civ. Code* § 987(g)(1), discussed at *§ 57.51[2]* and *§ 57.53[4]*, respectively].

For discussion of *Civ. Code § 987* as applied to works of fine art which are part of a building, see *§ 57.53[5]*.

[3] Allegations

This complaint alleges:

- Plaintiff's status as the artist or a person entitled to enforce the rights for 50 years after the artist's death (Paragraph 1) [*Civ. Code § 987(g)(1)*].
- The description of the work of art (Paragraph 1).
- Delivery of the work to defendant for a purpose specified in *Civ. Code § 987(c)(2)* (Paragraph 5).
- Defendant's wrongful act (Paragraph 6).
- Damages [*see Civ. Code § 987(a)* (statement of legislative intent; damage presumed to flow from alteration or destruction of work of fine art)].

The form also includes an optional allegation regarding punitive damages [*see Civ. Code § 987(e)(3)*, discussed at *§ 57.151[5]*].

[4] Statute of Limitations

The action must be brought within three years of the act complained of or one year after discovery of the act, whichever is longer [*Civ. Code § 987(i)*].

[5] Cross References

For cross references relating to complaints generally, see *§ 57.130[5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsNegligenceActionsGeneral Overview

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[Reserved]

§§ 57.153[Reserved]

California Forms of Pleading and Practice--Annotated

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Chapter 57 ART
PART IV. FORMS
C. Bailment of Work of Art

6-57 California Forms of Pleading and Practice--Annotated § 57.160

§ 57.160 Complaint for Damages for Breach of Bailment Agreement to Store Work of Art--Damage Arising From Negligence of Bailee [Civ. Code § 1852]

[1] FORM Complaint for Damages for Breach of Bailment Agreement to Store Work of Art--Damage Arising From Negligence of Bailee [Civ. Code § 1852]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 57.130[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 57.130[1], Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 57.130[1], Paragraph 3.*]

4. On or about _____ [*date*], plaintiff delivered to defendant at _____ [*place*], and defendant accepted, a certain work of art, to wit: _____ [*describe*], pursuant to

_____ [a written *or* an oral] agreement for the purpose of storing the work of art. The terms of the agreement were _____ [as stated in the agreement, a copy of which is attached as Exhibit A and incorporated by reference *or state terms*].

5. At the time of delivery, the _____ [*work of art*] had a value of $_____. _____ [Plaintiff informed defendant, at the time of delivery, that the _____ (*work of art*) had that value *or if defendant was not informed of the value but had reason to know the value*, Defendant had reason to know that the work of art had that value because _____ (*specify reason*).]

6. While the _____ [*work of art*] was in defendant's possession, defendant failed to use due care for its preservation, in that _____ [*specify defendant's default*].

7. As a proximate result of defendant's failure to use due care for the preservation of the _____ [*work of art*], _____ [*specify consequences, e.g.*, it was damaged by fire, smoke, and water in the following respects: _____ (*specify*)] and in its damaged condition has a value of $_____ [*or allege costs of repair*].

8. As a proximate result of defendant's negligence, plaintiff has been damaged in the sum of $_____ [*amount of general damages*].

WHEREFORE, plaintiff prays for judgment as follows:

1. For general damages in the amount of $_____.

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 57.130[1]; for discussion, see § 57.130[4].*]

[2] Use of Form

The complaint in [1], *above*, is for use to obtain damages for injury to a work of art in the possession of a bailee for storage, based on the bailee's breach of the bailment agreement. If the bailee's breach consists in negligent performance of his or her duty to care for the property, plaintiff may alternatively have a cause of action in tort [*see § 57.136[4*]. The bailor is entitled to recover damages for injury to or destruction of bailed goods even if the bailor is not the owner of those goods [*Sperisen v. Heynemann (1957) 149 Cal. App. 2d 228, 230, 308 P.2d 436]* .

For alternative forms for allegations as to the nature of the bailment, which may be substituted in place of Paragraph 4 of this form, see *§ 57.161*.

For special notices and procedures required under *Civ. Code § 1899 et seq.* when property is loaned to a museum, see *§§ 57.70 -57.79*.

[3] Allegations

The complaint alleges (1) the making of the agreement for a bailment for storage (Paragraph 4) and (2) delivery of the art work to the bailee in accordance with that agreement (Paragraph 4). If the right of recovery rests on the existence of the bailment relationship and the fact of bailment is in issue, the burden of establishing a bailment rests on the plaintiff and includes the burden of proving the making of a valid contract of bailment between the parties, the delivery to the bailee under the contract, and acceptance by the bailee [*H.S. Crocker Co., Inc. v. McFaddin (1957) 148 Cal. App. 2d 639, 647, 307 P.2d 429* ; see *§ 57.60[1]*].

The complaint continues with allegations of the value of the art work including, if it has a special value, the fact that plaintiff informed defendant of that value or the facts from which defendant should have known the special value (Paragraph 5). The liability of a depositary for negligence cannot exceed the amount which the depositary is informed by the depositor, or has reason to suppose, the thing deposited to be worth [*Civ. Code § 1840*]. If the bailor does not disclose the value of the deposited property, and the bailee has no reason to suppose that it has a special value, this limitation does not apply, and the measure of damages is the actual value of the deposited property [*see Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 855, 88 Cal. Rptr. 39* ; *see also § 57.62[1]*].

Finally, the complaint alleges defendant's lack of care (Paragraph 6) and the consequences of that lack of care in terms of the specific damage to the work of art (Paragraph 7) and the financial loss to plaintiff (Paragraph 8). For optional allegations regarding special damaged, see *§ 57.162*.

[4] Limitation Period

The limitation period for an action for negligent performance of an implied obligation based on contract is the four-year period prescribed by *Code Civ. Proc. § 337(1)* [*Bruckman v. Parliament Escrow Corp. (1987) 190 Cal. App. 3d 1051, 1057-1058, 235 Cal. Rptr. 813]* .

[5] Cross References

For discussion and forms relating to bailments generally, see Ch. 93, *Bailments*

For discussion and forms relating to negligence actions generally, see Ch. 380, *Negligence*

For additional cross references relating to complaints generally, see *§ 57.130[5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailmentsCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsNegligenceActionsGeneral Overview

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C. Bailment of Work of Art

6-57 California Forms of Pleading and Practice--Annotated § 57.161

§ 57.161 Allegations Regarding Type or Purpose of Bailment

[1] Bailment for Purpose of Repair, Alteration, or Improvement [Civ. Code §§ 1858-1858.3]

[a] FORM Allegations Regarding Type or Purpose of Bailment--Bailment for Purpose of Repair, Alteration, or Improvement [Civ. Code §§ 1858-1858.3]

On or about _____ [*date*], plaintiff delivered to defendant at _____ [*place*], and defendant accepted, a certain work of art, to wit: _____ [*describe*], pursuant to _____ [a written *or* an oral] agreement for the purpose of _____ [repairing *or* altering *or* improving] the work of art. The terms of the agreement were _____ [*state terms or insert* as stated in the writing, a copy of which is attached as Exhibit A and incorporated by reference].

[b] Use of Form

The allegation in [a], *above*, may be used in place of Paragraph 4 of § 57.160[1] if the bailee had possession of the work of art for the purpose of repair, alteration, or improvement. For discussion of the elements and attributes of a bailment for repair, see *§ 57.60[3]*.

[2] Loan of Art Work for Use [Civ. Code § 1884]

[a] FORM Allegations Regarding Type or Purpose of Bailment--Loan of Art Work for Use [Civ. Code § 1884]

On or about _____ [*date*], plaintiff delivered to defendant at _____ [*place*], and defendant accepted, a certain work of art, to wit: _____ [*describe*], pursuant to _____ [a written *or* an oral] agreement by which plaintiff gave defendant the temporary possession and use of the _____ [*work of art*], and defendant agreed to return the _____ [*work of art*] to plaintiff at a future time, without reward for its use. The terms of the agreement were _____ [as stated in the writing, a copy of which is attached as Exhibit A and incorporated by reference *or state terms*].

[b] Use of Form

The allegation in [a], *above*, may be used in place of Paragraph 4 of § 57.160[1] if a work of art was lent to defendant and was damaged or lost while in defendant's possession. This allegation may also be used in an action against a museum for injury to or loss of property loaned to a museum pursuant to *Civ. Code §§ 1899-1899.11* [*see* discussion in *§§ 57.70 -57.79*].

For discussion of the attributes and duty of care associated with a loan for use see *§ 57.60[4]* and *§ 57.61[3]*, respectively.

[3] Rental or Lease of Work of Art [Civ. Code § 1925]

[a] FORM Allegations Regarding Type or Purpose of Bailment--Rental or Lease of Work of Art [Civ. Code § 1925]

On or about _____ [*date*], plaintiff delivered to defendant at _____ [*place*], and defendant accepted, a certain work of art, to wit: _____ [*describe*], pursuant to _____ [a written *or* an oral] agreement by which plaintiff gave defendant the temporary possession and use of the _____ [*work of art*], for reward, and defendant agreed to return the _____ [*work of art*] to plaintiff at a future time. The terms of the agreement were _____ [as stated in the writing, a copy of which is attached as Exhibit A and incorporated by reference *or state terms*].

[b] Use of Form

The allegation in [a], *above*, may be used in place of Paragraph 4 of § 57.160[1] if a work of art was rented or leased to defendant and was damaged or lost while in defendant's possession.

For discussion of the attributes and duty of care associated with the rental or lease of a work or art § 57.60[5] and § 57.61[4], respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailmentsCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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6-57 California Forms of Pleading and Practice--Annotated § 57.162

§ 57.162 Allegations Regarding Value of Bailed Art Work

[1] Sentimental Value of Bailed Art Work and Personal Injury Arising From Loss

[a] FORM Allegations Regarding Value of Bailed Art Work--Sentimental Value of Bailed Art Work and Personal Injury Arising From Loss

1. The _____ [*work of art*] had great sentimental value to plaintiff because _____ [*state reasons for sentimental value*]. At the time of delivery, plaintiff told defendant of the great sentimental value which plaintiff placed on the _____ [*work of art*].

2. As a consequence of the loss of the _____ [*work of art*], plaintiff has suffered _____ [*specify physical suffering*], to plaintiff's damage in the sum of $_____.

[b] Use of Form

The form of allegations in [a], *above*, may be added to a complaint involving breach of bailment agreement if a work of art was lost or damaged through the bailee's negligence and the bailee knew that the work had great sentimental value to the plaintiff [*see Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 851-852, 88 Cal. Rptr. 39* (the court upheld an award for personal injuries, headaches and distress to the nervous system, that proximately resulted from a bailee's losing some rings which, as plaintiff had told the bailee, had great sentimental value to plaintiff)].

[2] Special Damages for Loss of or Injury to Bailed Work of Art

[a] FORM Allegations Regarding Value of Bailed Art Work--Special Damages for Loss of or Injury to Bailed Work of Art

As a proximate result of defendant's negligence, plaintiff _____ [*specify special circumstances*] and has thereby sustained special damages in the sum of $_____.

[b] Use of Form

The form of allegation in [a], *above*, may be added to a complaint involving breach of a bailment agreement where the injury to the work of art has caused some special damage, for example, if one of a pair of matching objects is damaged and the value of the remaining object is thereby decreased. The special circumstances should be pleaded, and a special finding by the court should be made [*see Sperisen v. Heynemann (1957) 149 Cal App2d 228, 234-235, 308 P.2d 436]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailmentsCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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6-57 California Forms of Pleading and Practice--Annotated § 57.163

§ 57.163 Complaint for Damages for Breach of Bailment Agreement for Storage of Art Work--Wrongful Use of Work by Bailee

[1] FORM Complaint for Damages for Breach of Bailment Agreement for Storage of Art Work--Wrongful Use of Work by Bailee

[*Caption. See § 57.160[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 57.130[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 57.130[1], Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 57.130[1], Paragraph 3.*]

4. On or about _____ [*date*], plaintiff delivered to defendant at _____ [*place*], and defendant accepted, a certain work of art, to wit: _____ [*describe*], pursuant to _____ [a written *or* an oral] agreement for the purpose of storing the _____ [*work of art*]. The terms of the agreement were _____ [as stated in the writing, a copy of which is attached hereto as Exhibit "A" and made a part hereof *or state terms*].

5. The value of the _____ [*work of art*] is $_____.

6. While the _____ [*work of art*] was in defendant's possession, and contrary to the terms of the agreement, defendant _____ [*state the facts of defendant's wrongful use*].

7. As a proximate result of defendant's wrongful use of the _____ [*work of art*], it was

_____ [destroyed *or* lost], to plaintiff's damage in the sum of $_____.

WHEREFORE, plaintiff prays for judgment as follows:

1. For general damages in the amount of $_____.

2. For costs of suit.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 57.130[1]; for discussion, see § 57.130[4].*]

[2] Use of Form

The form of complaint in [1], *above*, may be used to obtain damages, based on the bailee's wrongful use of the bailed property, if a work of art was lost or destroyed while the bailee had it in his or her custody and used it, or permitted it to be used, contrary to the terms of the bailment agreement [*see Constantian v. Mercedes-Benz Co. (1936) 5 Cal. 2d 631, 633, 55 P.2d 841* (art objects rented by defendant and destroyed by fire while being used in place not contemplated by agreement; defendant not negligent); *Sperisen v. Heynemann (1957) 149 Cal. App. 2d 228, 230-231, 308 P.2d 436* (art objects damaged while in possession of bailee for purpose of showing to prospective buyer; bailee showed publicly in Los Angeles rather than privately in Dallas as agreed)]. For discussion of the limitations on bailee's, borrower's, or renter's right to use the bailed, rented, or borrowed object, see *§ 57.60[2] -[5]*.

The form may be modified for use when the work of art is damaged, rather than lost or destroyed [*see § 57.160[1*], Paragraph 7]. This complaint assumes a bailment for storage. For alternative forms of allegations of other types of bailments, which can be used in place of Paragraph 4 in this complaint, see *§ 57.161[1]* (repair, alteration, or improvement), [2] (loan), and [3] (rental).

[3] Allegations

The complaint alleges (1) the bailment for storage (Paragraph 4); (2) the value of the work at the time of the bailment (Paragraph 5); (3) the bailee's wrongful use of the art work (Paragraph 6) [*see Civ. Code §§ 1835, 1836, 1890, 1891, 1930*]; the destruction or lost of the work as a consequence of the wrongful use (Paragraph 7); and the resulting damage (Paragraph 7).

[4] Cross References

For cross references relating to complaints generally, see *§ 57.130[5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailmentsCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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6-57 California Forms of Pleading and Practice--Annotated § 57.164

§ 57.164 Complaint for Damages Based on Strict Liability of Artisan for Failure to Give Notice of No Insurance Covering Art Work Held for Repair or Alteration [Civ. Code § 1858.2]

[1] FORM Complaint for Damages Based on Strict Liability of Artisan for Failure to Give Notice of No Insurance Covering Art Work Held for Repair or Alteration [Civ. Code § 1858.2]

[*Caption. See § 57.160[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 57.130[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 57.130[1], Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 57.130[1], Paragraph 3.*]

4. On or about _____ [*date*], plaintiff delivered to defendant at _____ [*place*], and defendant accepted, a certain work of art, to wit: _____ [*describe*], pursuant to _____ [a written *or* an oral] agreement for the purpose of _____ [repairing *or* altering *or* improving] the _____ [*work of art*]. The terms of the agreement were _____ as stated in the writing, a copy of which is attached hereto as Exhibit "A" and made a part hereof [*or state terms*].

[*EITHER, if artisan gave receipt that did not mention lack of insurance*]

5. On accepting the _____ [*work of art*], defendant presented plaintiff with a written receipt which contained no statement that it was not insured or protected to the amount of the actual cash value thereof by defendant

against loss occasioned by theft, fire, or vandalism while it remained with defendant.

[*OR, if artisan failed to give receipt of any kind*]

5. On accepting the _____ [*work of art*], defendant failed to present plaintiff with a written receipt of any kind.

[*OR, if artisan gave receipt falsely claiming insurance coverage*]

5. On accepting the _____ [*work of art*], defendant presented plaintiff with a written receipt which stated and misrepresented that _____ [*specify misrepresentation respecting defendant's insurance or self-insurance*].

[*CONTINUE*]

6. Defendant did not, while the _____ [*work of art*] remained with him, protect it, by insurance or self-insurance, against loss or damage occasioned by theft, fire, or vandalism.

7. While the _____ [*work of art*] remained with defendant, it was _____ [destroyed *or* damaged *or lost*] through _____ [fire *or* vandalism *or* theft].

8. At the time of _____ [destruction *or* damage *or* loss], the work of art had an actual cash value of $_____. [*If the work was damaged rather than destroyed or lost, add* The present actual cash value of the work of art is $_____.] Plaintiff has therefore been damaged in the sum of $_____.

WHEREFORE, plaintiff prays for judgment as follows:

1. For general damages in the amount of $_____.

2. For costs of suit.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 57.130[1]; for discussion, see § 57.130[4].*]

[2] Use of Form

The form of complaint in [1], *above*, may be used to obtain damages for injury to or loss or destruction of a work of art, through fire, vandalism, or theft, when the work was left with an artisan for repair or alteration, and the artisan was uninsured against those risks and failed to warn plaintiff of that fact [*see Civ. Code §§ 1858-1858.3*, discussed in *§ 57.60[3][c]*].

[3] Allegations

The complaint alleges:

- The creation of a bailment and delivery of an art work to an artisan for repair or alteration (Paragraph 4).
- The artisan's delivery, or failure to deliver, a receipt for the art work and whether or not the receipt contained a statement of lack of insurance (alternative Paragraphs 5).
- The fact that defendant had no insurance covering the work of art (Paragraph 6).
- Loss of or damage to the work while in defendant's possession (Paragraph 7).
- The amount of plaintiff's damage (Paragraph 8).

[4] Cross References

For cross references relating to complaints generally, see *§ 57.130[5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsRequirementsInsurance LawProperty InsuranceGeneral OverviewTortsStrict LiabilityGeneral Overview

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6-57 California Forms of Pleading and Practice--Annotated § 57.165

§ 57.165 Complaint for Recovery of Personal Property (Bailed Work of Art)--By Bailor Against Bailee

[1] FORM Complaint for Recovery of Personal Property (Bailed Work of Art)--By Bailor Against Bailee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RECOVERY OF PERSONAL
_____ [*name*],	)	PROPERTY
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 57.130[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 57.130[1], Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 57.130[1], Paragraph 3.*]

4. At all times herein mentioned, plaintiff was, and still is, the owner of a certain work of art, to wit: _____ [*describe*].

5. On or about _____ [*date*], plaintiff delivered to defendant at _____ [*place*], and defendant accepted, the _____ [*work of art*], pursuant to _____ [a written *or* an oral] agreement for the purpose of storing the _____ [*work of art*]. The terms of the agreement were _____ [as stated in the writing, a copy of which is attached hereto as Exhibit "A" and made a part hereof *or state terms*].

6. On or about _____ [*date*], plaintiff demanded the return of the _____ [*work of art*] _____ [orally *or* in writing].

7. Defendant has not returned the work of art to plaintiff.

[8. *If there is a condition precedent to plaintiff's right to the return of the work, allege the fulfillment of the condition, e.g.,* Plaintiff has tendered payment to defendant of all that would become due to defendant in case of the deposit continuing for the length of time provided in the agreement.]

9. The value of the work of art is $_____.

[10. *If plaintiff has sustained damage because of the detention of the work, allege:* By reason of defendant's failure to make due return of the work of art, plaintiff _____ (*specify in what respect plaintiff has been damaged*) and has sustained damage thereby in the sum of $_____.]

WHEREFORE, plaintiff prays for judgment as follows:

1. For recovery of the work of art described in this complaint or, if a delivery thereof cannot be had, then in the alternative, the value thereof.

[2. *If damages are claimed:* For general damages on account of the detention of the work of art in the sum of $_____.]

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 57.130[1]; for discussion, see § 57.130[4].*]

[2] Use of Form

The complaint in [1], *above*, may be used to obtain recovery of a work of art that plaintiff put into the hands of defendant, as bailee, for storage and defendant has failed to return according to the terms of the bailment agreement [*see Civ. Code §§ 3379, 3380* (recovery of personal property)]. For discussion of the duty to return a bailed object, see *§ 57.63*

This complaint may also be used in an action for the recovery of property loaned to a museum pursuant to *Civ. Code § 1899 et seq.*, in which case the allegation regarding loan for use at § 57.161[2] should be used in place of the allegation regarding storage. For special notices and procedures required when property is loaned to a museum, see discussion in *§§ 57.70 -57.79*.

For alternative forms of allegations as to the type of bailment, which may be used in place of Paragraph 5 in the foregoing complaint, see *§ 57.161[1]* (repair, alteration, or improvement), [2] (loan), [3] (rental).

For various defenses to a bailee's duty to return the bailed object, see *§ 57.166*.

[3] Allegations

The complaint alleges (1) plaintiff's ownership of the work of art (Paragraph 4); (2) the bailment and delivery of the work of art to the defendant (Paragraph 5); plaintiff's demand for return of the work (Paragraph 6) [*see Downey v. Martin Aircraft Service, Inc. (1950) 96 Cal. App. 2d 94, 100* (demand for return as not necessary if property is destroyed or lost)]; (4)defendant's failure and refusal to return the work (Paragraph 7); and (5) the value of the work of art (Paragraph 9) [*see Code Civ. Proc. § 627* (jury as required to find value of property in action for recovery of personal property)].

There is also an optional allegation for use to set forth plaintiff's performance of any condition precedent to the return of the work, such as payment of any storage fees or fees for repair (Paragraph 8) [*see § 57.60[3][b]*].

The value of the property and damages for detention (Paragraph 10) are alleged because in an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for detention [*Code Civ. Proc. § 667*].

If this form of complaint is being used against a museum to recover a work of art loaned to the museum, add either an allegation that the museum gave no notice of intent to terminate the loan, or an allegation that plaintiff received the museum's notice of intent to terminate the loan within three years prior to the filing of the [*see Civ. Code § 1899.10(c)*; § 57.78[2]].

[4] Cross References

For discussion of the limitation period governing an action for stealing, taking, or fraudulently appropriating art [*Code Civ. Proc. § 338(c)*], see *§ 57.92[4]*

For discussion and forms related to an action for the recovery of personal property, see Ch. 119, *Claim and Delivery*

For additional cross references relating to complaints generally, see *§ 57.130[5]*

Legal Topics:

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

Contracts LawTypes of ContractsBailmentsCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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6-57 California Forms of Pleading and Practice--Annotated § 57.166

§ 57.166 Bailee's Defenses to Complaint for Failure to Return Bailed Work of Art

[1] Notification to Owner That Art Work Is Wrongfully Detained by Bailor [Civ. Code §§ 1822, 1826]

[a] FORM Bailee's Defenses to Complaint for Failure to Return Bailed Work of Art--Notification to Owner That Art Work Is Wrongfully Detained by Bailor [Civ. Code §§ 1822, 1826]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that on or about _____ [*date*], defendant notified plaintiff that the work of art appeared to be wrongfully detained from plaintiff by _____ [*name of bailor*], who deposited it with defendant. Plaintiff did not thereafter within a reasonable time claim the work, sufficiently establish his/her right to it, and indemnify defendant against the claim of _____ [*name of bailor*]. On or about _____ [*date*], defendant returned the work of art to _____ [*name of bailor*].

[b] Use of Form

The form of affirmative defense in [a], *above*, may be used to plead the defense of nonliability to the owner, when the owner is not the bailor and has sued the bailee for recovery of the bailed work of art, and the owner failed to claim the work after notification by the bailee pursuant to *Civ. Code § 1826* [*see* discussion in *§ 57.63[1]*].

[2] Lien on Art Work by Bailee

[a] FORM Notification to Owner That Art Work Is Wrongfully Detained by Bailor [Civ. Code §§ 1822, 1826]--Lien on Art Work by Bailee

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that he/she has a lien on the _____ [*work of art*], pursuant to _____ [*statute authorizing lien*], for certain sums due and unpaid to defendant, to wit:

_____ [*specify what is due and why*], on account of which defendant is entitled to retain the work of art until said sums have been paid.

[b] Use of Form

The form of affirmative defense in [a], *above*, may be used to plead the defense of a lien in response to a plaintiff who seek recovery of a deposited work of art, but has not satisfied a lien on the work or art in favor of the bailee. it [*see Civ. Code § 1822* (bailee must deliver thing, on demand, unless he or she has a lien on it)]. For discussion of various liens that may arise in favor of the bailee, see *§ 57.60[2], [3]*.

[3] Prohibition by Owner or Act of Law Against Return of Bailed Art Work [Civ. Code § 1825]

[a] FORM Bailee's Defenses to Complaint for Failure to Return Bailed Work of Art--Prohibition by Owner or Act of Law Against Return of Bailed Art Work [Civ. Code § 1825]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that on or about _____ [*date*], defendant notified plaintiff that a certain proceeding had been taken adversely to plaintiff's interest in the _____ [*work of art*], to wit: _____ [*describe proceeding taken*], and that defendant was thereby prevented by _____ [the owner *or* act of law] from delivering the _____ [*work of art*] to plaintiff, and defendant remains unable to deliver it because of the adverse proceeding.

[b] Use of Form

The form of affirmative defense in [a], *above*, may be used to plead the defense of excuse for nondelivery when the bailee is forbidden by the owner or operation of law from delivering the work of art deposited [*see Civ. Code § 1825*, discussed in *§ 57.63[1]*].

An example of an adverse proceeding within the meaning of *Civ. Code § 1825* is attachment, and the bailee may be liable for damages for conversion if he negligently failed to exercise diligence in notifying the bailor (or other person for whose benefit the work of art was deposited) of the adverse proceeding [*see Branch v. Bekins Van & Storage Co. (1930) 106 Cal. App. 623, 629-630, 290 P. 146]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailmentsCivil ProceduresPleading & PracticePleadingsAnswers

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6-57 California Forms of Pleading and Practice--Annotated §§ 57.167-57.179

[Reserved]

§§ 57.167[Reserved]

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D. Loan of Art to Museums for Indefinite or Long Terms

6-57 California Forms of Pleading and Practice--Annotated § 57.180

§ 57.180 Notice of Intent to Preserve Interest in Property on Loan to Museum [Civ. Code § 1899.5(c)]

[1] FORM Notice of Intent to Preserve Interest in Property on Loan to Museum [Civ. Code § 1899.5(c)]

NOTICE OF INTENT TO PRESERVE AN INTEREST IN PROPERTY ON LOAN TO A MUSEUM

TO THE LENDER: *Section 1899.4 of the California Civil Code* requires that you notify the museum promptly in writing of any change of address or ownership of the property. If the museum is unable to contact you regarding your loan, you may lose rights in the loaned property. If you choose to file this form with the museum to preserve your interest in the property, the museum is required to maintain it, or a copy of it, for 25 years. For full details, see *Section 1899 et seq. of the California Civil Code*.

TO THE MUSEUM: You are hereby notified that the undersigned claims an interest in the property described herein.

Claimant

Name: _____
Address: _____
Telephone: _____
Social Security Number (optional): _____

Museum Name: _____

Date Property Loaned: _____

Interest in Property:

If you are not the original lender, describe the origin of your interest in the property and attach a copy of any document

creating your interest: _____ [*Insert description*].

Description of Property:

Unless an accurate, legible copy of the original loan receipt is attached, give a detailed description of the claimed property, including its nature and general characteristics and the museum registration number assigned to the property, if known, and attach any documentary evidence you have establishing the loan:

Registration No. _____
Description: _____
(Attach additional sheets if necessary.)

I understand that I must promptly notify the museum in writing of any change of address or change in ownership of the loaned property.

I declare under penalty of perjury that to the best of my knowledge the information contained in this notice is true.

Signed: _____ .....Date: _____

(claimant)

OR

I declare under penalty of perjury that I am authorized to act on behalf of the claimant and am informed and believe that the information contained in this notice is true.

Signed: _____ .....Date: _____

(claimant's representative)

RECEIPT FOR NOTICE OF INTENT TO PRESERVE AN INTEREST IN PROPERTY
(For use by the museum.)

Notice received by: _____

Date of receipt: _____

Copy of receipt returned to claimant:

By _____
Date: _____.

[2] Use of Form

The form in [1], *above*, is identical to the form contained in *Civ. Code § 1899.5(c)*; [*see § 57.74*].

This form may be used by the owner of property on loan to a museum to give notice to the museum of his or her intent

to preserve an interest in the property [*see Civ. Code § 1899.4(b)*; see *§§ 57.73 -57.74*].

A museum may also use a copy of this form to give the required written notice to a lender of the terms of *Civ. Code §§ 1899-1899.11*. A museum must give that notice if, on or after January 1, 1984, it accepts a loan of property for an indefinite term or for a term in excess of seven years. The notice must be given at the time of the loan. A copy of this form, or a citation to *Civ. Code §§ 1899-1899.11*, constitutes adequate notice [*Civ. Code § 1899.3(a)*; *see § 57.72[1]*].

[3] Contents of Form

A notice of intent to preserve an interest in property must [*Civ. Code § 1899.5(a)*; *see § 57.74*]:

- Be in writing;
- Contain a description of the property adequate to enable the museum to identify it;
- Be accompanied by documentation sufficient to establish the claimant as owner of the property; and
- Be signed under penalty of perjury by the claimant or a person authorized to act on behalf of the claimant.

A museum need not retain a notice which does not meet the above requirements. However, if a museum does not intend to keep a notice for this reason, it must promptly notify the claimant at the address given on the notice that the notice is ineffective and the reasons why it is ineffective. The fact that a museum retains a notice may not be construed to mean that the museum accepts the sufficiency or accuracy of the notice, or that the notice is effective to preserve an interest in property on loan [*Civ. Code § 1899.5(b)*].

[4] Receipt by Museum

A museum must furnish proof of receipt of a notice of intent to preserve an interest in property. The museum must either mail an original receipt or a copy of the receipt portion of the form notice to the lender or other claimant at the address given on the notice within 30 days of receiving the notice [*Civ. Code § 1899.3(c)*]. A museum must also retain for a period of not less than 25 years the original or an accurate copy of each notice filed by a claimant pursuant to *Civ. Code § 1899.4*, unless the loaned property is returned to the claimant [*Civ. Code § 1899.3(b)*].

[5] Prerequisite to Some Actions for Recovery of Loaned Work

Effective January 1, 1985, no action can be brought against a museum to recover loaned property more than 25 years after the date of the last written contact between the lender and the museum, as evidenced by the museum's records [*Civ. Code § 1899.10(b)*; *see § 57.78[1*] (limitation period for action against museum)]. However, if the lender was not given notice of the museum's intent to terminate the loan [*see Civ. Code § 1899.9*, discussed in *§ 57.77*], and if the lender proves that a notice of intent to preserve an interest in the property was received by the museum within the 25 years immediately preceding the date on which the lender's right to recover the property otherwise expired under *Civ. Code § 1899.10(b)*, the lender may be entitled to recover the property, or the reasonable value of it at the time of the disposal plus interest at the legal rate [*Civ. Code § 1899.10(e)*].

If a lender fails to file an action to recover property loaned to a museum within three years of receiving the museum's notice of intent to terminate the loan, or within the 25-year period noted above, the lender will be deemed to have donated the property to the museum [*see Civ. Code § 1899.10(c)*; § 57.78[2]].

Legal Topics:

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

California Forms of Pleading and Practice--Annotated

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 57 ART
PART IV. FORMS
D. Loan of Art to Museums for Indefinite or Long Terms

6-57 California Forms of Pleading and Practice--Annotated § 57.181

§ 57.181 Museum's Defense to Complaint for Failure to Return Loaned Work of Art--Necessary Conservation Measures [Civ. Code § 1899.6]

[1] FORM Museum's Defense to Complaint for Failure to Return Loaned Work of Art--Necessary Conservation Measures [Civ. Code § 1899.6]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the subject property was injured or disposed of in the course of defendant's _____ [application of conservation measures *or* disposal of the property] pursuant to *Section 1899.6 of the Civil Code*. At the time of defendant's action, defendant had a reasonable belief that the action was necessary _____ [*specify one or all of the following:* to protect the subject property *and/or* to protect other property in the custody of defendant *and/or* because the subject property constituted a hazard to the health and safety of the public or defendant's staff] in that _____ [*specify facts supporting allegation, e.g.,* the property was an organic material and it had become infected with life-threatening bacteria]. [*If defendant's action involved conservation measures, add:* Defendant exercised reasonable care in the choice and application of the conservation measures in that _____ [*specify facts supporting allegation, e.g.,* defendant employed a reliable and competent person to perform the task, and used the most modern and thoroughly tested procedures.]

[2] Use of Form

The form of affirmative defense in [1], *above*, may be used in answer to a complaint for injury to or loss of property on loan to a museum, as *set out in §§ 57.160, 57.161[2],* if defendant museum applied conservation measures or disposed of the property pursuant to *Civ. Code § 1899.6(a)* [*Civ. Code § 1899.6(b)(2)* (discussed in *§ 57.75[3*]; museum's reasonable belief that action was necessary as sufficient to protect it from liability)]. In general, *Civ. Code § 1899.6(a)* provides that, absent a written loan agreement to the contrary, a museum may apply conservation measures to or dispose of loaned property without the lender's consent if immediate action is required, and the lender cannot be reached or does not agree to the proposed measures but will not retrieve the property [*see Civ. Code § 1899.6(a)*]. See further discussion in *§ 57.75[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawMuseumsTortsIntentional TortsConversionGeneral Overview

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Chapter 57 ART
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6-57 California Forms of Pleading and Practice--Annotated §§ 57.182-57.189

[Reserved]

§§ 57.182[Reserved]

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Chapter 57 ART
PART IV. FORMS
E. Other Transactional and Litigation Aspects

6-57 California Forms of Pleading and Practice--Annotated § 57.190

§ 57.190 Complaint for Recovery of Lost or Stolen Work of Art by Owner Against Junk Dealer or Secondhand Dealer

[1] FORM Complaint for Recovery of Lost or Stolen Work of Art by Owner Against Junk Dealer or Secondhand Dealer

[*Caption. See § 57.165[1].*]

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, a resident of _____ County, California, and engaged in that county in business as a _____ [junk *or* secondhand] dealer.

[2. *Fictitious name allegation, if appropriate. See § 57.130[1], Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 57.130[1], Paragraph 3.*]

4. On or about _____ [*date*], plaintiff was the owner of a certain work of art, to wit: _____ [*describe*]. At that time, the work of art was _____ [lost *or* stolen] from plaintiff's possession under the following circumstances: _____ [*briefly describe*].

5. The value of the work of art is $_____.

6. On or about _____ [*date*], plaintiff discovered that the work of art was in defendant's possession. Plaintiff immediately notified defendant of the circumstances under which the work of art was _____ [lost *or* stolen] and demanded return of it after making reasonable proof that plaintiff was the owner and tendering the sum of $_____ for defendant's expenses and charges and a reasonable compensation and reward for saving, preserving, and caring for the work of art. The sum of $_____ is a reasonable sum for those

expenses, charges, and compensation. Defendant refused to return the work of art and continues to refuse. Plaintiff remains ready to pay said sum to defendant on return of the work of art.

WHEREFORE, plaintiff prays for judgment as follows:

1. For delivery of the work of art to plaintiff.

2. If delivery cannot be had, then in the alternative, for recovery of the value thereof.

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 57.130[1]; for discussion, see § 57.130[4].*]

[2] Use of Form

The form of complaint in [1], *above*, may be used to obtain recovery of a work of art that was lost or stolen, where a junk dealer or secondhand dealer has acquired it, either by finding it or by receiving it from the thief [*see Civ. Code §§ 3379, 3380* (recovery of personal property); *see also* Ch. 119, *Claim and Delivery*].

For discussion of lost and stolen property generally, including the applicable limitation period for an action to recover the property, see *§ 57.92*.

[3] Allegations

This complaint alleges:

- Defendant's status as a junk dealer regulated by *Bus. & Prof. Code §§ 21600 et seq.* and *21650-21653*, or a secondhand dealer regulated by *Bus. & Prof. Code §§ 21625 et seq.* and *21650-21653* (Paragraph 1) [*see* discussion in *§ 57.91*].

- Plaintiff's ownership of the work of art (Paragraph 4).

- The fact and circumstances of the loss or theft of the work (Paragraph 4).

- The value of the work of art (Paragraph 5).

- The date of plaintiff's discovery of the work in the possession of defendant (Paragraph 6).

- Plaintiff's notification to defendant that plaintiff was the owner of the work (Paragraph 6).

- Plaintiff's demand for the return of the work and offer to compensate defendant for his or her reasonable expenses in caring for and preserving the work (Paragraph 6).

[4] Cross References

For discussion and forms related to actions involving lost or unclaimed property, see Ch. 355, *Lost and Unclaimed Property*

For additional cross references relating to complaints generally, see *§ 57.130[5]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsIntentional TortsConversionGeneral Overview

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
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E. Other Transactional and Litigation Aspects

6-57 California Forms of Pleading and Practice--Annotated § 57.191

§ 57.191 Complaint for Recovery of Holocaust-Era Artwork From Museum or Gallery [Code Civ. Proc. § 354.3]

[1] FORM Complaint for Recovery of Holocaust-Era Artwork From Museum or Gallery [Code Civ. Proc. § 354.3]

[*Caption. See § 57.165[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 57.130[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 57.130[1], Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 57.130[1], Paragraph 3.*]

4. Defendant operates _____ [*name of museum or gallery*], which is a _____ [museum *or* gallery] that _____ [displays *or* exhibits *or* sells *or appropriate combination of those words*] articles of _____ [historical *or* interpretive *or* scientific *or* artistic *or appropriate combination of those words*] significance.

5. Defendant has possession and control of _____ [*specifically describe item of artwork, using conventional terms and descriptive norms such as dimensions, medium in which it was executed, style, and so forth, including attribution to artist if known*]. This is hereafter referred to as the artwork. Defendant keeps, or has kept, the artwork at defendant's _____ [museum *or* gallery].

6. The artwork was in the _____ [plaintiff's possession *or* possession of _____ (*name*)], as the owner of the artwork, and was kept in _____ [*specify location, such as private house, and geographical site such as city and country*] until _____ [*date, or approximate date, when artwork*

was stolen under Nazi persecution, within period 1929 to 1945], when it was stolen as a result of Nazi persecution.

7. Plaintiff has and asserts a claim of right to the artwork as the _____ [owner *or* owner's heir *or* owner's beneficiary under _____ (*specify instrument such as owner's will*)].

8. Plaintiff has demanded that defendant relinquish the artwork to plaintiff, but defendant has refused and continues to refuse to relinquish it.

9. The artwork is unique.

WHEREFORE, plaintiff prays for judgement as follows:

1. For recovery of the artwork.

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 57.130[1]; for discussion, see § 57.130[4].*]

[2] Use of Form

The complaint in [1], *above*, may be used to obtain recovery of an item of Holocaust-era artwork, after provenance research has authenticated the plaintiff's claim to the item. Holocaust-era artwork is any article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945. Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover Holocaust-era artwork from any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance [*Code Civ. Proc. § 354.3(a),(b)*]. For discussion, see *§ 57.97*.

Subject to *Code Civ. Proc. § 410.10* (providing that a California court may exercise jurisdiction on any basis not inconsistent with the constitutions of California and of the United States), the action may be brought in a superior court, which will have jurisdiction over the action until its completion or resolution [*Code Civ. Proc. § 354.3(b)*].

Code Civ. Proc. § 361 does not apply [*Code Civ. Proc. § 354.3(b)*]. That section provides that when a cause of action has arisen in another state, or in a foreign country, and by the laws of that state or country an action cannot be maintained there against a person by reason of the lapse of time, an action cannot be maintained against the person in California, except in favor of one who has been a citizen of California, and who has held the cause of action from the time it accrued.

An action brought under *Code Civ. Proc. § 354.3* cannot be dismissed for failure to comply with the applicable statute of limitations, if the action is commenced on or before December 31, 2010 [*Code Civ. Proc. § 354.3(c)*].

WARNING: Federal Preemption.

In August 2009, a Ninth Circuit panel held that the extension of the limitations period of *Code Civ. Proc. § 354.3(c)* is invalid under the field-preemption doctrine because it "intrudes on the power to make and resolve war, a power reserved exclusively to the federal government by the Constitution" [*Saher v. Norton Simon Museum of Art at Pasadena (9th Cir. 2009) 578 F.3d 1016*]. However, the Ninth Circuit's opinion does recognize that legislative amendments may avoid a preemption problem. In addition, the opinion may be subject to en banc review.

Courts have now invalidated, on preemption grounds, four of the six code sections embodying, in *Code Civ. Proc. §§ 354.3-354.7*, the legislature's scheme to provide remedies for the victims, and survivors of victims, of torts and crimes that occurred many years ago in other countries. The statutes so far invalidated, along with *Code Civ. Proc. § 354.3*, are *Code Civ. Proc. § 354.4* [*Movsesian v. Victoria Versicherung AG (9th Cir. 2009) 578 F.3d 1052*], *Code Civ. Proc. § 354.5* [*Steinberg v. International Comm'n on Holocaust Era Ins. Claims (2005) 133 Cal. App. 4th 689, 34 Cal. Rptr. 3d 944*], and *Code Civ. Proc. § 354.6* [*Deustch v. Turner (9th Cir. 2003) 324 F.3d 692*]. In addition, the United States Supreme Court has invalidated, on preemption grounds, a similar effort under *Ins. Code § 13800 et seq.* [*Am. Ins. Ass'n v. Garamendi (2003) 539 U.S. 396, 123 S. Ct. 2374, 156 L. Ed. 2d 376*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsIntentional TortsConversionGeneral Overview

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Chapter 58 ASSAULT AND BATTERY

6-58 California Forms of Pleading and Practice--Annotated 58.syn

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[2] Use of Form

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Chapter 58 ASSAULT AND BATTERY
PART I. SCOPE

6-58 California Forms of Pleading and Practice--Annotated § 58.01

§ 58.01 Scope of Chapter

This chapter discusses civil actions for assault and battery. The chapter contains the following forms:

- A general complaint for assault and battery [*see § 58.50*].
- Allegations of common facts that constitute assault and battery [*see §§ 58.51 -58.60*].
- Complaints against a public entity employer of a law enforcement officer for a battery committed by the officer in the scope of employment [*see §§ 58.61, 58.62*].
- Common affirmative defenses, including those involving defense of self, others, and property [*see §§ 58.70 -58.76*].
- Demurrers based on the constitutional right of privacy and consent [*see §§ 58.90, 58.91*].
- Demurrer to a complaint for battery against a peace officer based on plaintiff's failure to state sufficient facts showing unreasonable force [*see § 58.92*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAssault & BatteryDefensesTortsIntentional TortsAssault & BatteryElements of AssaultTortsIntentional TortsAssault & BatteryElements of BatteryTortsIntentional TortsAssault & BatteryRemedies

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6-58 California Forms of Pleading and Practice--Annotated § 58.02

§ 58.02 Cross References

[1] Procedure for Civil Actions

- For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions*

[2] Physical Abuse

- For discussion regarding civil actions for damages based on childhood sexual abuse under *Code Civ. Proc. § 340.1*, see *Ch. 5, Abuse of Minors and Elderly, § 5.10* et seq., and for related forms, see *§ 5.60* et seq.

- For a form for use in an action by a child against its parent for assault and battery, see Ch. 394, *Parent and Child*

- For discussion regarding civil actions for damages based on physical abuse of elderly persons and dependent adults under *Welf. & Inst. Code § 15657*, see *Ch. 5, Abuse of Minors and Elderly, § 5.30* et seq., and for a related form of complaint, see *§ 5.70*

[3] Third Party Liability

- For a form for use in an action against an intoxicated bar patron for assault and battery and against the bar owner for negligence, see Ch. 19, *Alcoholic Beverages: Civil Liability*

- For a form for use in an action by a club member against an association for assault and battery by other club members, see Ch. 61, *Associations and Clubs*

- For a form for use in an action by a passenger on a carrier against the carrier and its agent for assault and battery, see Ch. 109, *Carriers*

- For a form for use in an action in which a hotel guest is assaulted by another guest, see Ch. 297, *Hotels and Motels*

[4] Public Entity Liability

- For a form for use in an action against a public entity for damages resulting from assault and battery committed by its employee while within scope of his employment, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

[5] Unauthorized Medical Treatment

- For a form for use in an action by a patient against a physician for a technical battery committed through unauthorized medical treatment, see Ch. 415, *Physicians: Medical Malpractice*

- For a form for use in an action against a dentist for personal injury based on a technical battery arising from administering unauthorized treatment, see Ch. 209, *Dentists*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersDoctors & Physicians

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6-58 California Forms of Pleading and Practice--Annotated §§ 58.03-58.09

[Reserved]

§§ 58.03[Reserved]

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6-58 California Forms of Pleading and Practice--Annotated § 58.10

§ 58.10 Governing Statutes

[1] Statutory Right of Protection

Many of the common law tort rules were included in the 1872 codification of the common law in the Civil Code. The right of protection from bodily harm is set forth in *Civ. Code § 43*. The right to protect one's person, property, relative, family, ward, servant, master, or guest from wrongful injury is found in *Civ. Code § 50*. The maxim of jurisprudence that one who consents to an act is not wronged by it is found in *Civ. Code § 3515*.

[2] Minor and Incompetent Liability

The scope of liability of incompetents for their civil wrongs is stated in *Civ. Code § 41*.

The scope of minors' liability for their civil wrongs is governed by *Fam. Code § 6600*, and the liability of parents or guardians for the willful acts of their minor children is governed by *Civ. Code § 1714.1*. For discussion and forms regarding liability of a parent or guardian for a battery committed by a child or ward, see Ch. 394, *Parent and Child* .

[3] Employer and Employee Liability

Liability is governed by the following:

- The liability of principals for the acts of their agents is governed by *Civ. Code §§ 2338, 2339*.
- The liability of public employees is governed by *Gov. Code §§ 820, 820.2*.
- The liability of public employers is governed by *Gov. Code § 815.2*.

For further discussion of employer and employee liability, see Ch. 248, *Employer Liability for Employee's Torts* , Ch. 427, *Principal and Agent* , and Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[4] Statute of Limitations

Limitations periods are prescribed as follows:

- The statute of limitations for actions for personal injuries is set forth in *Code Civ. Proc. § 335.1*.

- The statute of limitations for actions against certain medical personnel is set forth in *Code Civ. Proc. § 340.5*.

- The statute of limitations for actions for personal injuries by a minor sustained prior to or in the course of birth is set forth in Civ. Code Proc. § 340.4.

Periods of disability not included in time limitations for the commencement of actions are provided for in *Code Civ. Proc. § 352*.

For further discussion of limitations of actions, see Ch. 345, *Limitation of Actions* .

[5] Damages

Compensatory damages are governed by *Civ. Code § 3333*; punitive damages by *Civ. Code § 3294*.

For further discussion of compensatory damages, see *§ 58.17*. For further discussion of punitive damages, see *§ 58.18*.

[6] Crimes of Assault and Battery

The crimes of assault and battery are set forth in *Penal Code §§ 240-247.5*.

The Penal Code also sets forth certain duties with regard to arrest and resistance. The duty of a person to refrain from resisting arrest is stated in *Penal Code § 834a*. The right of a peace officer to arrest and to use reasonable force to effect an arrest is stated in *Penal Code §§ 835a, 836*. Rights of lawful resistance to criminal acts are stated in *Penal Code §§ 692-694*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Relationships & TortsTort LiabilityChild TortsTortsIntentional TortsAssault & BatteryDefensesTortsIntentional TortsAssault & BatteryElements of AssaultTortsIntentional TortsAssault & BatteryRemediesTortsPublic Entity LiabilityLiabilityVicarious Liability

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§ 58.11 Distinction Between Assault and Battery

Although the terms "assault" and "battery" are frequently used interchangeably or in conjunction with one another in both pleadings and appellate court opinions, the terms refer to two distinct torts [*see Vaughn v. Jonas (1948) 31 Cal. 2d 586, 603, 191 P.2d 432]* . Battery is an unconsented invasion of a person's right to be free from intentional, unlawful, and harmful or offensive contact [*Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 375, 193 Cal. Rptr. 422* (emphasis added)]. An assault is an invasion of a person's right to live without being put in fear of personal harm [*Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 7, 146 P.2d 57* (emphasis added)]. Simply stated, a battery is a completed act of tortious contact, while an assault is the creation of the apprehension of tortious contact [*see Vaughn v. Jonas (1948) 31 Cal. 2d 586, 603, 191 P.2d 432]* .

Thus, although both an assault and a battery may be present in many cases, one may exist without the other. For example, an offensive contact inflicted on another while he or she is asleep or unconscious, but not discovered until afterward, would constitute a battery but not an assault since the victim had no apprehension of the contact [*see Zanotto v. Marogna (1954) 124 Cal. App. 2d 329, 331-332, 268 P.2d 826]* . On the other hand, the act of pointing a gun at another person for the purpose of frightening him or her would constitute an assault but not a battery [*seee.g., Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 6-7, 146 P.2d 57]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAssault & BatteryElements of AssaultTortsIntentional TortsAssault & BatteryElements of Battery

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6-58 California Forms of Pleading and Practice--Annotated § 58.12

§ 58.12 Applicability of Penal Code Definitions

[1] Definitions under the Penal Code

Assault and battery are crimes as well as torts in California. Criminal battery is any willful and unlawful use of force or violence on the person of another [*Penal Code § 242*]. Criminal assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another [*Penal Code § 240*]. The least touching is sufficient force to constitute criminal battery [*People v. Rocha (1971) 3 Cal. 3d 893, 899 n.12, 92 Cal. Rptr. 172, 479 P.2d 372* (force need not be violent or severe, need not cause bodily harm or pain, and need not leave any mark)]. Also, "violent injury," as used in the definition of assault, has been broadly construed to include any wrongful act committed by means of physical force against another [*People v. Herrera (1970) 6 Cal. App. 3d 846, 851, 86 Cal. Rptr. 165]* . Therefore, it has been said that, under criminal law, an assault is essentially an attempted battery [*People v. Rocha (1971) 3 Cal. 3d 893, 899, 92 Cal. Rptr. 172, 479 P.2d 372]* .

[2] Criminal Assault and Battery Compared to Civil Assault and Battery

The criminal definitions of assault and battery vary significantly from the corresponding civil torts. An act that intentionally places another in fear of a battery may be a civil assault even if no actual battery is intended or possible [*see* *Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 7, 146 P.2d 57* ; *see § 58.15*]. Criminal assault, in contrast, must be based on an actual intent to commit a battery, not just on an attempt to frighten, and must be accompanied by a present ability to complete the act [*People v. Wolcott (1983) 34 Cal. 3d 92, 99, 192 Cal. Rptr. 748, 665 P.2d 520]* .

Also, there may be some harmful and offensive contacts that are civilly actionable as battery, but that do not constitute the use of force or violence within the criminal meaning [*see* Comment to *BAJI, No. 7.51* (7th ed.) (adopting definition of civil battery from Restatement (Second) of Torts § 18 and expressly rejecting definition of battery in *Penal Code § 242*)]. For example, it is difficult to conceptualize unauthorized medical treatment as a criminal battery [*see § 58.14[1]*], although it may be civilly actionable as an unprivileged touching.

Numerous older cases may be found that endorse civil jury instructions based on the Penal Code definitions of assault or battery [*see, e.g.,* *Bartosh v. Banning (1967) 251 Cal. App. 2d 378, 386, 59 Cal. Rptr. 382* ; *McChristian v. Popkin (1946) 75 Cal. App. 2d 249, 260, 171 P.2d 85* ; *Fraguglia v. Sala, (1936) 17 Cal. App. 2d 738, 742, 62 P.2d 783]* .

None of these cases expressly considers the differences in the civil and criminal standards, nor does any expressly reject the broader civil definitions in favor of applying the narrower criminal definitions in a civil action. These cases all deal with alleged conduct that, if true, would be both tortious and criminal in the absence of an affirmative defense, and for which it was unnecessary to carefully distinguish between civil and criminal standards. More recent opinions have abandoned the Penal Code definitions in favor of the broader civil standards [*see, e.g.*, *Rains v. Superior Court (1984) 150 Cal. App. 3d 933, 938, 198 Cal. Rptr. 249* ; *Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 375, 193 Cal. Rptr. 422* ; *Delia S. v. Torres (1982) 134 Cal. App. 3d 471, 480, 184 Cal. Rptr. 787* (overruled on other grounds in *Christensen v. Superior Court (1991) 54 Cal. 3d 868, 905, 2 Cal. Rptr. 2d 79*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsAssault & BatteryGeneral OverviewTortsIntentional TortsAssault & BatteryElements of AssaultTortsIntentional TortsAssault & BatteryElements of Battery

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§ 58.13 Cause of Action for Battery

[1] Battery Defined

The tort of battery has been defined as any intentional, unlawful, and harmful or offensive contact by one person with the person of the other [*Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 375, 193 Cal. Rptr. 422* ; *Delia S. v. Torres (1982) 134 Cal. App. 3d 471, 480, 184 Cal. Rptr. 787* (overruled on other grounds in *Christensen v. Superior Court (1991) 54 Cal. 3d 868, 905, 2 Cal. Rptr. 2d 79*)]. This definition, which is set out in the standard California jury instructions [*see BAJI, No. 7.51* (7th ed.)], is essentially in accordance with the definition of the tort of battery of the Restatement (Second) of Torts [*see* Comment to *BAJI No. 7.51*; Restatement (Second) of Torts §§ 13(1), 18(1)].

*BAJI No. 7.51*as it existed before a 1992 amendment, although correct in the abstract, required clarification in some cases. By defining battery as "any intentional, unlawful and harmful contact," it was not clear that lack of consent was sufficient to make contact unlawful for purposes of the definition [*Barouh v. Haberman (1994) 26 Cal. App. 4th 40, 45 47, 31 Cal. Rptr. 2d 259* (use of instruction, and refusal to give clarifying instruction, required reversal of defense judgment)]. The instruction now uses the word "unconsented" instead of "unlawful."

[2] Elements of Battery

The applicable Restatement sections provide that a person is subject to liability to another for battery if:

- He or she acts intending to cause harmful or offensive contact with the person of the other or a third person, or to cause an imminent apprehension of such a contact; and

- A harmful or offensive contact with the person of the other directly or indirectly results [*see* Restatement (Second) of Torts §§ 13(a), 18(1)].

[3] Element of Intent

[a] General Intent Required

The general rule is that every person is presumed to intend the natural and probable consequences of his or her acts. One is liable for the consequences that directly and naturally result from conduct, even if the particular injury that results is not intended [*see* *Lopez v. Surchia (1952) 112 Cal. App. 2d 314, 318, 246 P.2d 111* (liability for gunshot wounds even if there is no intent to injure by firing gun)]. Therefore, it has been said that the intent necessary to constitute battery is an intent to do the act that causes the harm, not the intent to cause the harm [*Singer v. Marx (1956) 144 Cal. App. 2d 637, 641, 301 P.2d 440]* .

This statement, however, it is not a complete statement of the element of intent. In *Lopez*, the court stated that a specific intent to injure is immaterial only if the act causing the injury is itself unlawful or wrongful [*Lopez v. Surchia (1952) 112 Cal. App. 2d 314, 318, 246 P.2d 111]* . The reasonable conclusion of the court's language is that if the act itself is an innocent one, the mere intent to do the act is insufficient if it has the unintended consequence of leading to a harmful or offensive contact.

For example, in *Singer*, the rule that the only intent required is that of doing the particular act was applied to a nine-year-old who threw a rock at another child. However, the act was considered to be throwing a rock at a person. The court noted that throwing rocks is an innocent and lawful pastime if thrown at trees or into the street, and becomes wrongful only if thrown at another person [*Singer v. Marx (1956) 144 Cal. App. 2d 637, 641-642, 301 P.2d 440]* . Thus, if the act itself is not always wrongful, it is not strictly the intent to do the act that causes the harm (for example, throwing a rock) that is required, but rather an intent that the act have, as a consequence, contact with the person of another (for example, throwing a rock at a person), even if there is no specific intent to injure [*see* *Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 315, 253 P.2d 675]* .

In another case, a special education teacher was not liable for battery when his touching of autistic students was reasonable under the circumstances and the plaintiffs failed to prove that the defendant intended to harm the students. The court stressed that the school teacher stood in loco parentis to the students and the teacher's contact with the students was necessary to control and guide the students [*Austin B. v. Escondido Union School Dist. (2007) 149 Cal. App. 4th 860, 872-876, 57 Cal. Rptr. 3d 454]* .

[b] Intent to Harm One's Self

One court of appeal has upheld a trial court's implicit finding that the attempt to harm one's self is not unlawful or wrongful conduct because the law imposes no criminal liability for intentional acts of self-destruction [*Fluharty v. Fluharty (1997) 59 Cal. App. 4th 484, 497, 69 Cal. Rptr. 2d 244]* . In that case, the plaintiff's wife was slightly injured when plaintiff successfully intervened in the defendant's suicide attempt. Plaintiff initiated the contact and defendant had sought to avoid it. The court reasoned that defendant had no intent to harm anyone other than himself and therefore plaintiff's assault and battery claim was properly rejected by the trial court [*Fluharty v. Fluharty (1997) 59 Cal. App. 4th 484, 497, 69 Cal. Rptr. 2d 244]* .

[c] Doctrine of Transferred Intent

If a person acts with the intent to make a wrongful contact with one person and instead accidentally makes contact with another, the actor may be liable for any injury suffered by the person struck. This rule is frequently referred to as the doctrine of "transferred intent" [*Singer v. Marx (1956) 144 Cal. App. 2d 637, 642, 301 P.2d 440* ; *Lopez v. Surchia (1952) 112 Cal. App. 2d 314, 318, 246 P.2d 111]* .

It is sufficient intent if the actor intended only to put the victim in apprehension of the contact and not to make contact, if the result is that a harmful or offensive bodily contact is actually made. In other words, the intent to commit an assault is sufficient intent to support a battery. Thus, firing a weapon in the general direction of another with the intent solely to scare that person is sufficient intent to constitute a battery if the result is that the person is struck and injured by the act [*Weisbart v. Flohr (1968) 260 Cal. App. 2d 281, 284-285, 67 Cal. Rptr. 114]* .

[4] Element of Offensive Contact

[a] Offensive Contact Defined

A person is liable for a battery if his or her act results in a harmful or offensive contact with another [*Delia S. v. Torres (1982) 134 Cal. App. 3d 471, 480, 184 Cal. Rptr. 787* (emphasis added; overruled on other grounds in *Christensen v. Superior Court (1991) 54 Cal. 3d 868, 905, 2 Cal. Rptr. 2d 79*); *see CACI No. 1300*]. California courts have not been called on to set the parameters of what is offensive contact. However, the Restatement (Second) defines offensive contact as contact that offends a reasonable sense of personal dignity [Restatement (Second) Torts § 19]. The contact must be one that would offend the ordinary person, who is not unduly sensitive as to his or her personal dignity. Therefore, it must be unwarranted by the social usages prevalent at the time when and the place where the contact occurs [*see* Restatement (Second) Torts § 19, Comment a]. However, the least touching of another may constitute a battery if it involves an element of personal indignity or insult, or if done in a rude and insolent manner [Prosser and Keeton on Torts, Ch. 2, § 9 (West 5th ed. 1984); *see People v. Martinez (1970) 3 Cal. App. 3d 886, 889, 83 Cal. Rptr. 914* (criminal case involving kick by barefoot person to shin of police officer wearing boots)].

[b] Awareness of Contact Not Necessary

A victim need not have been aware of the contact to recover damages for battery. For example, if A is attacked first by B, and rendered unconscious, and then attacked by C, A may recover from C as well as from B even though A was unaware of C's acts when they occurred [*see Zanotto v. Marogna (1954) 124 Cal. App. 2d 329, 331-332, 268 P.2d 826]* . Thus,unauthorized medical treatment performed on an unconscious person may constitute a battery [*see Valdez v. Percy (1939) 35 Cal. App. 2d 485, 491, 96 P.2d 142* ; *see also § 58.14[1]*].

[5] Element of Absence of Consent

[a] Consent Defined

A person may consent to an act that otherwise would be a battery. Consent may be express or by voluntary participation in a lawful activity within which the contact occurs [*Delia S. v. Torres (1982) 134 Cal. App. 3d 471, 480, 184 Cal. Rptr. 787* ; *see BAJI No. 7.52*]. Thus, it has been stated that consent is a complete legal defense to a battery [*Carr v. Dickey (1958) 163 Cal. App. 2d 416, 423, 329 P.2d 539* ; *see* Restatement (Second) Torts §§ 892-892D (discussing consent in chapter on Justification and Excuse in Division entitled "Defenses Applicable to All Tort Claims")].

Despite this statement, consent is not an affirmative defense to battery, but, rather, lack of consent to the alleged contact is an essential element of the tort [*Rains v. Superior Court (1984) 150 Cal. App. 3d 933, 938, 198 Cal. Rptr. 249* ; *Kritzer v. Citron (1950) 101 Cal. App. 2d 33, 39-40, 224 P.2d 808* ; *see Civ. Code § 3515* (maxim that one who consents to act is not wronged by it); *see also* Prosser and Keeton on Torts, ch. 4, § 18 (West 5th ed. 1984) (consent is not, strictly speaking, a defense, but prevents the existence of any tort in the first instance by negating the wrongful element of the defendant's act); *but see* Restatement (Second) Torts §§ 892-892D (discussing consent in Division on defenses to any tort action without considering burdens of pleading and proof)].

[b] Plaintiff Required to Plead Absence of Consent

The plaintiff must plead facts sufficient to show that there was an absence of informed consent to the particular offensive contact alleged [*see Rains v. Superior Court (1984) 150 Cal. App. 3d 933, 938, 198 Cal. Rptr. 249]* . The defendant need not plead consent affirmatively, but its lack may be shown under a general denial. The burden of proving lack of consent is on the plaintiff [*Kritzer v. Citron (1950) 101 Cal. App. 2d 33, 39-40, 224 P.2d 808]* . For a form of complaint that contains sample allegations showing a lack of informed consent, *see § 58.50*. For a form of a demurrer based on the plaintiff's failure to properly plead lack of consent, see *§ 58.91*.

[c] Exceeding Scope of Consent

An act that exceeds the scope of the consent given may constitute a battery [*Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 375, 193 Cal. Rptr.422]* . For consideration of this rule in the context of medical treatment, see *§ 58.14[1]*, and Ch. 415, *Physicians: Medical Malpractice* .

[d] Consent to Illegal Conduct

A person who consents to and participates in an illegal act that otherwise constitutes a battery cannot recover for the consequences of the act from another participant [*Sayadoff v. Warda (1954) 125 Cal. App. 2d 626, 630-632, 271 P.2d 140* (illegal abortion)]. There is an exception in the case of an act made illegal for the purpose of protecting a particular class of persons from their inability to appreciate the consequences of the act. In such a case, the consent of a member of the protected class does not negate liability [*Hudson v. Craft (1949) 33 Cal. 2d 654, 657, 204 P.2d 1* (unlicensed promoter of boxing exhibition liable for injuries suffered by willing participant)].

As to voluntary mutual combat, there is a division of authority that has not been resolved in California. Some courts in other jurisdictions have allowed each combatant to hold the other liable for any injury received even though both consented to the contest [*see* Comment to *BAJI No. 7.52* (noting that such is the majority rule, although not resolved in California)]. Because it is perceived that this rule encourages rather than deters mutual combat, other courts and commentators have taken the contrary position, that by consenting, each negates any claim of tortious conduct against the other [*see* generally *Hudson v. Craft (1949) 33 Cal. 2d 654, 656, 204 P.2d 1* (discussing cases from other jurisdictions in dictum)].

[e] Consent Fraudulently Induced

[i] Misrepresentation

Misrepresentation may vitiate consent to contact that otherwise would constitute a battery. Misrepresentation as to the identity of the person making the contact would vitiate consent if the offensive nature of the contact is altered according to the identity or capacity of the actor in relation to the person subjected to the contact (for example, impersonating a physician). Also, misrepresentation as to the necessity of the contact vitiates consent (for example, representing that a given contact, otherwise offensive, is required for medical treatment, when, in fact, it is not) [*Rains v. Superior Court (1984) 150 Cal. App. 3d 933, 939-940, 198 Cal. Rptr. 249]* .

[ii] Misrepresentation Compared to Collateral Inducement

It has been stated that the misrepresentation must extend to the essential character of the act itself, that is, to that which makes it harmful or offensive, rather than to a collateral matter that merely operates as an inducement. For example, consent to sexual intercourse obtained by misrepresentation that it will improve one's singing voice goes to the essential character of the act and is vitiated; consent obtained by a false promise to marry is collateral inducement and does not vitiate consent[*Rains v. Superior Court (1984) 150 Cal. App. 3d 933, 939-940, 198 Cal. Rptr. 249* ; (citing Prosser on Torts, ch. 4, § 18 (West 4th Ed. 1971), and Fleming on Torts § 78 (4th ed. 1971))].

However, it is not clear whether or not this distinction is still viable under California law. One court has held that a battery was well pleaded by an allegation that consent to sexual intercourse was vitiated by the man's misrepresentation of his infertility [*Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 375, 193 Cal. Rptr. 422* (woman suffered sterility because of tubal pregnancy)]. Another court appears to have allowed an action for battery to proceed based on vitiation of consent to sexual intercourse by the fraudulent concealment of the risk of transmission of disease [*Kathleen K. v. Robert B. (1984) 150 Cal. App. 3d 992, 994-997, 198 Cal. Rptr. 273* (plaintiff pleaded multiple tort theories, including battery; court found action not to be barred by constitutional right of privacy without specific consideration of facts as applied to battery)]. The misrepresentations in these cases seem more like collateral

inducement, such as a fraudulent promise to marry, than to fraud regarding the essential character of the act, such as a promise of vocal enhancement. Other courts, without addressing the essential-character/collateral-inducement distinction, have found tort actions based on misrepresentations in the area of procreative decisions to be barred by the constitutional right of privacy [*see Perry v. Atkinson (1987) 195 Cal. App. 3d 14, 16-17, 240 Cal. Rptr. 402* (abortion induced by misrepresentation); *Stephen K. v. Roni L. (1980) 105 Cal. App. 3d 640, 642-645, 164 Cal. Rptr. 618* (woman's misrepresentation as to birth control)].

For further discussion, see *§ 58.26*. For a form for allegations of battery arising from sexual intercourse fraudulently induced, see *§ 58.57*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAssault & BatteryElements of Battery

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§ 58.14 Battery in Medical Context

[1] Informed Consent to Medical Treatment

Providing medical treatment to a person without his or her consent may constitute a battery [*Rainer v. Community Memorial Hospital (1971) 18 Cal. App. 3d 240, 255, 95 Cal. Rptr. 901* ; *see BAJI No. 6.10.5*], a situation sometimes referred to as "technical battery"[*see Weinstock v. Eissler (1964) 224 Cal. App. 2d 212, 233, 36 Cal. Rptr. 537]* . If a medical professional obtains the patient's consent to perform one type of treatment and subsequently performs a substantially different treatment for which consent has not been obtained, a battery may also have been committed [*Cobbs v. Grant (1972) 8 Cal. 3d 229, 239, 104 Cal. Rptr. 505, 502 P.2d 1* ; *see BAJI No. 6.10.5*].

Consent to medical care, including surgery, may be express or implied from the circumstances, and may be oral or written [*Clemens v. Regents of University of California (1970) 8 Cal. App. 3d 1, 8-9, 87 Cal. Rptr. 108* ; *see BAJI No. 6.10*]. It may be manifested by acts or conduct, in addition to words [*Kritzer v. Citron (1950) 101 Cal. App. 2d 33, 39, 224 P.2d 808]* .

[2] Scope of Consent to Medical Care

Consent to a particular procedure implies consent to do all those things that are a normal incident of the procedure [*Bradford v. Winter (1963) 215 Cal. App. 2d 448, 454, 30 Cal. Rptr. 243* (consent to bronchoscopy carries with it consent to remove tissue and perform biopsy)]. However, consent to a particular medical procedure or treatment does not constitute a general consent to other procedures or treatment that the treating medical professional may deem to be appropriate [*see Valdez v. Percy (1939) 35 Cal. App. 2d 485, 491, 96 P.2d 142* ; *see also Hundley v. St. Francis Hospital (1958) 161 Cal. App. 2d 800, 803, 806, 327 P.2d 131* (consent to surgery does not imply consent to remove other parts of body that are not normally excised during the operation consented to)].

[3] Duty to Disclose

A medical professional has a duty to disclose the nature of any medical procedures that may be performed on a patient along with the risks involved so that the patient may give his or her informed consent to the treatment. However, the occurrence of injury from an undisclosed risk, alone, is not a battery. If the patient consents to a particular treatment and

the medical professional performs that treatment, but an undisclosed inherent complication with a low probability occurs, there is no intentional deviation from the consent obtained. Rather, the medical professional may have failed to meet the duty to disclose pertinent information. In such a situation, the action should be pleaded as negligence rather than as a battery [*Cobbs v. Grant (1972) 8 Cal. 3d 229, 239-241, 104 Cal. Rptr. 505, 502 P.2d 1]* . A battery theory, however, may still apply to some situations involving a lack of disclosure of inherent risks [*see Nelson v. Gaunt (1981) 125 Cal. App. 3d 623, 634-635, 178 Cal. Rptr. 167]* .

The facts of *Nelson* were extreme in that the medical professional made false and misleading statements and knowingly concealed both the nature of the proposed procedure and its inherent risks. On these facts, the court held that the patient had consented to a procedure that was substantially different from the one that was performed, and that, therefore, a battery was well pleaded [*Nelson v. Gaunt (1981) 125 Cal. App. 3d 623, 634-635, 178 Cal. Rptr. 167* (construing Cobbs as implying that failure to discuss nature of treatment sounds in battery)].

For further discussion of a medical professional's duty to disclose information on which informed consent may be based, see Ch. 415, *Physicians: Medical Malpractice* .

[4] Implied Consent in Emergency Situations

[a] Scope of Emergency Situation

Consent may be implied from an emergency situation [*Cobbs v. Grant (1972) 8 Cal. 3d 229, 243, 104 Cal. Rptr. 505, 502 P.2d 1* ; *cf. Kritzer v. Citron (1950) 101 Cal. App. 2d 33, 39, 224 P.2d 808* (medical emergency is a not an instance of implied consent, but rather a separate and distinct defense)]. An emergency is an unforeseen combination of circumstances that calls for immediate action [*Wheeler v. Barker (1949) 92 Cal. App. 2d 776, 785, 208 P.2d 68* ; *see BAJI No. 6.15*]. It is the general rule that if there is an emergency or unanticipated condition for which some immediate action is necessary for the preservation of the life or health of a patient and it is impracticable to first obtain consent, the medical professional is justified in rendering the necessary treatment without the express consent of the patient. In the case of surgery being performed on a patient under anesthesia, the surgeon must respond to emergency conditions as required by usual and customary practice without waiting to obtain the consent of the patient [*Preston v. Hubbell (1948) 87 Cal. App. 2d 53, 57-59, 196 P.2d 113* ; *see BAJI No. 6.13*].

A true emergency situation is required in order to invoke implied consent. There is no implied consent to treatment that is merely deemed advisable by the medical professional on discovering unexpected conditions [*Preston v. Hubbell (1948) 87 Cal. App. 2d 53, 59-60, 196 P.2d 113]* . If the evidence is in conflict, whether an emergency situation exists is a question of fact [*Valdez v. Percy (1939) 35 Cal. App. 2d 485, 491, 96 P.2d 142]* .

[b] Scope of Written General Consent

It is not entirely clear whether the scope of a patient's consent may be broadened to extend to treatment that is only advisable by the use of a written general consent form that often must be signed by a patient on admission to a hospital. In one case, such a writing was narrowly construed to extend only to a situation of necessity even though the writing stated that the patient was giving consent to treatment that may "be deemed advisable or necessary"[*Valdez v. Percy (1939) 35 Cal. App. 2d 485, 491, 96 P.2d 142]* . In two other cases, the same wording was relied on, in part, to find valid consent. In each, the facts involved a true emergency and not merely advisable treatment. Thus, implied consent for emergency treatment could have been found without considering the writing at all under the rule of implied consent to emergency treatment, suggesting that the courts might have enforced the writing even in the absence of a true emergency [*Danielson v. Roche (1952) 109 Cal. App. 2d 832, 835, 241 P.2d 1028* ; *Wheeler v. Barker (1949) 92 Cal. App. 2d 776, 783-786, 208 P.2d 68]* . In a fourth case, not involving an emergency, the same language was not treated as conclusive, but noted as evidence supporting the jury's inference of consent from conduct [*see Kritzer v. Citron (1950) 101 Cal. App. 2d 33, 37 39, 224 P.2d 808]* .

[5] Conditional Consent or Legal Disabilities of Patient

Consent may be conditioned on the existence or nonexistence of a given fact. If the medical professional proceeds without regard to the condition on which consent is given, there may be a battery based on a deviation from that consent [*Grieves v. Superior Court (1984) 157 Cal. App. 3d 159, 164-166, 203 Cal. Rptr. 556* (consent given to tubal ligation after birth only if child born without abnormalities; surgeon proceeded with ligation, and child subsequently died from abnormality)]. To be liable for performing a medical procedure while failing to abide by a known condition imposed by the patient, the doctor must have intended to perform the procedure without abiding by the condition. Negligent failure to abide by the condition is an insufficient basis for liability for battery [*Dennis v. Southard (2009) 174 Cal. App. 4th 540, 544, 94 Cal. Rptr. 3d 559* (approving intent requirement imposed in CACI No. 530B)].

If a patient is under no legal disability, his or her consent, alone, is sufficient [*Kritzer v. Citron (1950) 101 Cal. App. 2d 33, 38, 224 P.2d 808* (consent of patient's spouse not required)]. If the patient is a minor or incompetent, the authority to consent is transferred to the patient's legal representative or closest available relative [*Cobbs v. Grant (1972) 8 Cal. 3d 229, 244, 104 Cal. Rptr. 505, 502 P.2d 1* ; *see BAJI No. 6.10*; *see also Civ. Code § 25.8* (person with legal custody may authorize medical treatment of minor)]. A minor may consent to his or her own medical treatment if married or a member of the armed services [*Civ. Code §§ 25.6*, *25.7*], or for certain needs that are specified by statute [*see Civ. Code §§ 34.5-34.10*, discussed in Ch. 366, *Minors: Court Consent for Medical Care or Enlistment*]. For discussion of medical treatment of a minor or incompetent having a guardian or conservator appointed under the Probate Code, see *Ch. 285, Guardianship and Conservatorship: Care of Ward or Conservatee, §§ 285.40 -285.47*. For discussion of the involuntary commitment and treatment of mentally disabled persons under the Lanterman Petris Short Act (*Welf. & Inst. Code § 5000 et seq.*), see Ch. 304, *Insane and Other Incompetent Persons* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentPatient ConsentGeneral OverviewHealthcare LawTreatmentPatient ConsentInformed ConsentTortsIntentional TortsAssault & BatteryElements of Battery

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Chapter 58 ASSAULT AND BATTERY
PART II. LEGAL BACKGROUND

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§ 58.15 Cause of Action for Assault

[1] Assault Defined

[a] Elements of Civil Assault

The civil tort of assault requires no intent to actually make any contact with the victim, nor any actual ability to inflict injury. Rather, it is sufficient that the actor intends only to put another in apprehension of such a contact, if the apprehension is actually created [*see* Restatement (Second) Torts § 21(1); Prosser and Keaton on Torts, ch. 4, § 10 (West 5th ed. 1984)].

[b] Civil Use of Criminal Assault Definition

The parameters of the tort of assault in California are somewhat unclear. This uncertainty has been created primarily by the use of the Penal Code definition of assault in civil cases [*see, e.g., Bartosh v. Banning (1967) 251Cal. App. 2d 378, 386 , 59 Cal. Rptr. 382]* , which is significantly different than the generally accepted civil tort [*see People v. Wolcott (1983) 34 Cal. 3d 92, 99, 192 Cal. Rptr. 748, 665 P.2d 520* ; *see also § 58.12*].

Under the Penal Code, an assault is an attempt to commit a violent injury on another, accompanied by the actual ability to inflict the injury [*Penal Code § 240*]. This differs from the civil definition which does not require an actual ability to inflict injury. Thus, it is not a crime in California to scare another person [*People v. Wolcott (1983) 34 Cal. 3d 92, 99, 192 Cal. Rptr. 748, 665 P.2d 520]* , but it may be civilly actionable. These distinctions have been recognized by the California Supreme Court in the criminal context [*see People v. Wolcott (1983) 34 Cal. 3d 92, 99, 192 Cal. Rptr. 748, 665 P.2d 520]* , but have not been expressly adopted in civil cases.

Unlike battery, assault has not often been litigated, and standard jury instructions on assault have not been adopted [*see* Use Note to *BAJI No. 7.50* (instructions for battery do not apply to assault, defined as the apprehension of harmful or offensive contact)]. A single California opinion has departed from the criminal definition of assault in a civil case and applied the common civil definition instead. In 1944, it was held that the act of pointing a gun at another in a menacing manner for the purpose of scaring that person was an assault, regardless of whether or not the gun was loaded and regardless of whether or not the actor intended to shoot the victim, as long as the victim was unaware that the gun was

not loaded and feared personal injury [*Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 7, 146 P.2d 57]* . However, since 1944 courts have continued to use the Penal Code definition of assault in civil actions [*see, e.g., Bartosh v. Banning (1967) 251 Cal. App. 2d 378, 386, 59 Cal. Rptr. 382]* .

[2] Element of Intent

Under either the Penal Code or the civil definition, assault is an intentional act. Under the civil definition, the actor must intend either to cause a harmful or offensive contact or to put one in apprehension of such a contact. An unintentional act does not constitute an assault regardless of how much apprehension the act causes [Restatement (Second) Torts § 21; *see Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 6-7, 146 P.2d 57* (assault is demonstration of unlawful intent by one person to inflict immediate injury on another)].

It has been said that the crime of assault is an intentional tort [*Bartosh v. Banning (1967) 251 Cal. App. 2d 378, 385, 59 Cal. Rptr. 382]* . However, if civil assault is the same as criminal assault, the intent must be to actually commit a violent injury [*see Penal Code § 240*]. An intent to frighten alone is not sufficient [*People v. Wolcott (1983) 34 Cal. 3d 92, 99, 192 Cal. Rptr. 748, 665 P.2d 520]* .

[3] Element of Harmful or Offensive Contact

Under the definition of civil assault, the assaulter must either intend to cause harmful or offensive contact or intend to put the victim in imminent apprehension of such a contact [*see* Restatement (Second) Torts § 21(1); *see also Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 6-7, 146 P.2d 57]* . Therefore, the element of harmful or offensive contact must be present, either in the mind of the actor or in the mind of the victim. For further discussion, see *§ 58.13[4]*.

If civil assault is the same as criminal assault, an attempted violent injury is required [*see Penal Code § 240*]. However, "violent injury" has been broadly construed to include any wrongful act committed by means of physical force against another [*People v. Herrera (1970) 6 Cal. App. 3d 846, 851, 86 Cal. Rptr. 165]* .

[4] Element of Absence of Consent

Lack of consent to tortious conduct is an essential element of any tort [*see Civ. Code § 3515* (maxim that one who consents to an act is not wronged by it); *see also Rains v. Superior Court (1984) 150 Cal. App. 3d 933, 938, 198 Cal. Rptr. 249* ; *Kritzer v. Citron (1950) 101 Cal. App. 2d 33, 39-40, 224 P.2d 808* (lack of consent to harmful or offensive contact is essential element of battery)]. Therefore, consent to conduct that otherwise might constitute an assault would vitiate the tort [*see § 58.13[5]*].

[5] Element of Apprehension of Harm

Under the civil definition of assault, the victim must actually be put in imminent apprehension of a harmful or offensive contact [*see* Restatement (Second) Torts § 21(1)(b); *see also Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 7, 146 P.2d 57* (essence of civil assault is invasion of one's right to live without fear of personal harm)]. An attempt to inflict a harmful or offensive contact is not an assault if the intended victim is not aware of the attempt before it is terminated [*see* Restatement (Second) Torts § 22].

Mere words, however threatening or profane, do not amount to an assault [*Tomblinson v. Nobile (1951) 103 Cal. App. 2d 266, 269, 229 P.2d 97]* . The Restatement sets forth numerous additional rules as to what constitutes sufficient apprehension [*see* e.g., Restatement (Second) Torts §§ 25 (source of danger other than actor is sufficient), 26 (threat to third person is insufficient)]. None of these rules appears to have ever been applied in California.

If civil assault is the same as criminal assault, the subjective state of the victim's mind is irrelevant to the tort [*People v. Mosqueda (1970) 5 Cal. App. 3d 540, 544, 85 Cal. Rptr. 346* (in criminal cases, subjective belief of victim is not

determinative)].

[6] Element of Ability to Cause Immediate Harm

Under the civil definition of assault, the ability or lack of ability of the actor to actually carry out a battery is irrelevant as long as the intended victim believes the act can be carried out and has imminent apprehension of the act [*Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 7, 146 P.2d 57* (pointing of gun at another is sufficient unless target knows that gun in fact is unloaded)]. If civil assault is the same as criminal assault, the actor must have the present ability to commit a violent injury on the person of another [*Penal Code § 240*; *see People v. Wolcott (1983) 34 Cal. 3d 92, 99, 192 Cal. Rptr. 748, 665 P.2d 520]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAssault & BatteryElements of Assault

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§ 58.16 Persons Liable for Torts of Assault and Battery

[1] Liability of Aiders and Abettors

A party who is injured by an assault or battery may recover damages not only from the actual assailant, but from any other person who aids, abets, counsels, or encourages the attack [*Ayer v. Robinson (1958) 163 Cal. App. 2d 424, 428, 329 P.2d 546]* . This rule appears to be merely another way of saying that nonassailants may be held liable for conspiracy to commit an assault or battery [*see Michael R. v. Jeffrey B. (1984) 158 Cal. App. 3d 1059, 1069, 205 Cal. Rptr. 312* (words, "Hey shoot him; go for it" sufficient to make speaker liable as co-conspirator); *see Sayadoff v. Warda (1954) 125 Cal. App. 2d 626, 629, 271 P.2d 140]* .

For a form adding a count for conspiracy to a complaint for assault and battery, see *§ 58.57*. For further discussion of civil conspiracy, see Ch. 126, *Conspiracy* .

[2] Liability of Minor or Incompetent

In general, a minor or incompetent person of any degree is civilly liable for his or her torts, but is not liable in punitive damages unless at the time of the act he or she was capable of knowing that it was wrongful [*Civ. Code § 41*]. Therefore, it is not necessary that a minor or incompetent appreciate the wrongfulness of conduct in order to be liable in compensatory damages for the results [*Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 314-315, 253 P.2d 675]* .

This rule is qualified by the limitation that the minor or incompetent must have the state of mind necessary to formulate any intent that is an element of the tort [*Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 314-315, 253 P.2d 675]* . With regard to battery, the minor or incompetent must have the capacity to intend the violent contact that is essential to the commission of the tort [*Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 315, 253 P.2d 675* ; *see §§ 58.13[3], 58.15[2]*]. A specific intent to cause injury is not required [*Singer v. Marx (1956) 144 Cal. App. 2d 637, 301 P.2d 440]* . Whether a minor or incompetent had the requisite intent is a question of fact [*Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 317, 253 P.2d 675* (four-year-old may be liable for attack on baby sitter); *see Weisbart v. Flohr (1968) 260 Cal. App. 2d 281, 287-291, 67 Cal. Rptr. 114* (seven-year-old may be liable for shooting arrow at playmate); *Singer v. Marx (1956) 144 Cal. App. 2d 637, 641-642, 301 P.2d 440* (nine-year-old may be liable for throwing rock at playmate)].

[3] Liability of Parent or Guardians

A minor's willful conduct is imputed by statute to a parent or guardian who has custody or control of the minor, subject to dollar limitations on liability [*see Civ. Code § 1714.1*; *see also Civ. Code § 1714.3* (parent's liability for minor's discharge of firearm); *Educ. Code § 48904* (parent's liability for willful misconduct of pupil)].

In addition to this limited statutory imputed liability, a parent may be liable for a child's torts if the parent's negligence made it possible for the child to cause the injury and probable that the child would do so [*Weisbart v. Flohr (1968) 260 Cal. App. 2d 281, 291, 67 Cal. Rptr. 114]* . The parent will incur liability for the child's intentional acts of violence if, knowing of the child's vicious or destructive tendencies or acts, the parent fails to exercise reasonable measures to restrain or discipline the child, and thus encourages or acquiesces in the misconduct [*Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 318, 253 P.2d 675* ; *see Civ. Code § 1714.1(a)* (statutory imputed liability is in addition to any other liability imposed by law)]. For further discussion of a parent's liability for the torts of a child and for forms imputing liability to a parent for the acts of a child, see Ch. 394, *Parent and Child* .

[4] Liability of Employer

[a] Liability under Doctrine of Respondeat Superior

An employer is liable for the willful and malicious torts of an employee committed in the scope of employment [*Carr v. Wm. C. Crowell Co. (1946) 28 Cal. 2d 652, 654, 171 P.2d 5* ; *see Civ. Code § 2338*]. This rule of respondeat superior applies to both private and public employers [*Alma W. v. Oakland Unified School Dist. (1981) 123 Cal. App. 3d 133, 138-139, 176 Cal. Rptr. 287* ; *see Gov. Code § 815.2*].

[b] "Incident to Duties" Standard

[i] "Incident to Duties" Standard Defined

Vicarious employer liability does not require that the employee's act further the employer's interest. It is sufficient if the act is incident to a dispute arising out of the employment relationship [*Carr v. Wm C. CrowellCo. (1946) 28 Cal. 2d 652, 654, 171 P.2d 5]* . Thus, an employer is liable for an employee's battery on a customer resulting from a dispute over an order or account [*see Stansell v. Safeway Stores, Inc. (1941) 44 Cal. App. 2d 822, 824, 113 P.2d 264* ; *Hiroshima v. Pacific Gas & Elec. Co. (1936) 18 Cal. App. 2d 24, 28, 63 P.2d 340]* , and an employer-contractor is liable for a battery by its employees on the employees of another contractor at the same job site arising from a dispute over work-related matters [*Carr v. Wm C. Crowell Co. (1946) 28 Cal. 2d 652, 653-657, 171 P.2d 5* ; *Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 617 624, 124 Cal. Rptr. 143]* .

[ii] Employee's Personal Malice

An employee is not acting incident to his or her duties if the act committed arises from personal malice unconnected with the employment relationship [*Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 621, 124 Cal. Rptr. 143]* . This rule applies even if the battery is committed on the employer's premises during the employee's work hours [*see Monty v. Orlandi (1959) 169 Cal. App. 2d 620, 624, 337 P.2d 861]* . Nor is nonliability negated by factors such as the employee's being on assignment for the employer, with an expense account, company car, and living quarters, if the motive is unconnected to the employment [*Golden West Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 955-958, 171 Cal. Rptr. 95]* .

[iii] "Incident to Duties" Standard Applied to Sexual Assault

The "incident-to-duties" standard has been applied in cases of sexual assault committed by the employee while on duty with differing results. In one case, the court held that an employer school district was not liable for an employee janitor's

assault on a student because the assault was in no way incident to any duties of a janitor [*Alma W. v. Oakland Unified School Dist. (1981) 123 Cal. App. 3d 133, 139-144, 176 Cal. Rptr. 287]* . In another, the court held that a sexual assault committed by a police officer after making a traffic stop was incident to the officer's duties. The court considered that a police officer, unlike a janitor, was cloaked with the authority of the law, and that the employer-government should be liable for acts done during the exercise of this authority [*White v. County of Orange (1985) 166 Cal. App. 3d 566, 571-572, 212 Cal. Rptr. 493]* .

In comparison to the case involving a police officer, the court of appeal has held that the private employer of an on-duty security guard was not liable for a sexual assault committed by the uniformed and armed guard after he pulled over the victim while she was driving down the highway. In that case, although the assault may not have occurred but for the employment, the guard's decision to assault the victim was strictly personal and did not arise out of the guard's duties [*Maria D. v. Westec Residential Security, Inc. (2000) 85 Cal. App. 4th 125, 146-147, 102 Cal.Rptr. 2d 326]* . The assault did not arise from the misuse of authority uniquely conferred on a public law enforcement officer, and the guard was not acting as an official representative of the state at the time of the assault [*Maria D. v. Westec Residential Security, Inc. (2000) 85 Cal. App. 4th 125, 146, 102 Cal. Rptr. 2d 326]* .

[c] "Foreseeability of Act" Standard

In recent cases, it has been stated that, as an alternative to the "incident-to-duties" standard, the determination as to whether an employee committed a tort during the course of employment may turn on whether the employee's misconduct could be reasonably foreseen by the employer [*White v. County of Orange (1985) 166 Cal. App. 3d 566, 570-571, 212 Cal. Rptr. 493* ; *Alma W. v. Oakland Unified School Dist. (1981) 123 Cal. App. 3d 133, 139, 176 Cal. Rptr. 287]* . Foreseeability in this context is distinct from foreseeability as a test for negligence. It means only that, in the context of the particular enterprise, an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business [*Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 618-619, 124 Cal. Rptr. 143]* .

To date, the foreseeability test has not been applied to find an employer liable for an employee's battery [*see* *Alma W. v. Oakland Unified School Dist. (1981) 123 Cal. App. 3d 133, 139-144, 176 Cal. Rptr. 287* (sexual assault by employee janitor on student is not reasonably foreseeable to employer school district)]. The test seems more appropriate for analysis of respondeat superior on the basis of an employee's negligence.

[d] Punitive Damages

If the plaintiff seeks punitive damages from an employer based on an employee's conduct, plaintiff must also establish the facts specified in *Civ. Code § 3294(b)*. For discussion, see *§ 58.18*.

For a form for an allegation of agency between an employer and employee, see *§ 58.59*. For a further discussion of respondeat superior liability, see Ch. 427, *Principal and Agent* , and Ch. 380, *Negligence* .

[e] Reference to Workers' Compensation Law

It has been said that the test for determining whether a given act arose out of or in the course of employment for the purpose of respondeat superior is closely related to the test applied in workers' compensation cases for determining whether an injury to an employee is compensable [*Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 619, 124 Cal. Rptr. 143* ; *see* discussion of compensability of injuries in Ch. 577, *Worker's Compensation*]. However, it has also been said that there is a marked conceptual difference in the rationale for workers' compensation and respondeat superior, and that workers' compensation law is not controlling under thedoctrine of respondeat superior [*Golden West Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 958, 171 Cal. Rptr. 95]* .

[f] Actions Brought by Co-Employee

The rules discussed above apply only when an action is being brought by a third party; they do not apply when the plaintiff is a co-employee of the person committing the assault. The Labor Code specifically provides that, while an injured co-employee may bring an action for assault against a co-employee, an action against the employer for the co-employee's assault is prohibited by the exclusive remedy doctrine of workers' compensation law [*Lab. Code § 3601(a)(1)*]. The respondeat superior doctrine may not be used to avoid the exclusive remedy doctrine and extend civil liabilityfor such assaults vicariously to the employer [*Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1486-1487, 82 Cal. Rptr. 2d 359]* . However, since an employer may be civilly liable for an assault committed by the employer [*see Lab. Code § 3602(b)(1)*], an employer might be directly liable if participating in or ratifying the assault [*See Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1489-1491, 82 Cal. Rptr. 2d 359* (no evidence employer ratified assault of employee)]. For further discussion of the effect of workers' compensation coverage on actions brought by employees, see Chapter 577, *Workers' Compensation* .

[5] Liability of Public Employees and Public Employers

[a] Public Employee Liability

A public employee, including a law enforcement officer, is liable for injury caused by his or her act or omission to the same extent as a private person, subject to the same defenses that would be available to the public employee if he or she were a private person [*Gov. Code § 820*]. The governmental entity that employs the officer is liable for injury proximately caused by an act or omission of the officer committed within the scope of the employee's employment if the act or omission would, apart from this rule, have given rise to a cause of action against that employee or his or her personal representative [*see Gov. Code § 815.2(a)*; *see also § 58.16[4]*].

A law enforcement officer who commits an assault and battery on an individual in the course of an arrest without warrant or probable cause is liable for the injuries inflicted [*Boyes v. Evans (1936) 14 Cal. App. 2d 472, 479, 58 P.2d 922* ; *see Dawkins v. City of Los Angeles (1978) 22 Cal. 3d 126, 148 Cal. Rptr. 857, 583 P.2d 711]* . Similarly, a law enforcement officer is liable to a person arrested for using unreasonable force in making an otherwise lawful arrest [*Scruggs v. Haynes (1967) 252 Cal. App. 2d 256, 264, 60 Cal. Rptr. 355* ; *see BAJI No. 7.54*].

For discussion of defenses available to a law enforcement officer to civil assault and battery, see *§ 58.22*.

For discussion of sovereign immunity of public employees, see *§ 58.23*.

For forms for a complaint and allegations against a public entity and its law enforcement officer employee for battery committed in the course of the officer's duties, see *§§ 58.61* and *58.62*.

For more detailed discussion of public entity and officer liabilities and immunities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[b] Public Employer Liability

In addition to employer liability under respondeat superior, a public entity may also incur liability for willfully continuing to employ a law enforcement officer of known violent propensities. The public entity may also be liable for the negligent failure to adequately supervise its law enforcement officers [*City of Los Angeles v. Superior Court (1973) 33 Cal. App. 3d 778, 782-783, 109 Cal. Rptr. 365]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAssault & BatteryGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil

Aiding & Abetting

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§ 58.17 Compensatory Damages

Plaintiff may recover all damages necessary to compensate him or her for injuries or detriment proximately resulting from the assault or battery [*see Civ. Code § 3333*; *McChristian v. Popkin (1946) 75 Cal. App. 2d 249, 262-263, 171 P.2d 85]* . Recoverable damages for an assault and battery include damages for pain, discomfort, fear, anxiety, and other mental and emotional distress [*see Delia S. v. Torres (1982) 134 Cal. App. 3d 471, 482, 184 Cal. Rptr. 787]* , as well as damages for lost wages, medical expenses, and lost earning capacity [*McChristian v. Popkin (1946) 75 Cal. App. 2d 249, 263, 171 P.2d 85* (dictum); *Ward v. De Martini (1930) 108 Cal. App. 745, 749, 292 P. 192]* .

For full discussion of compensatory damages recoverable in tort actions generally, see *Ch. 177, Damages, § 177.40* et seq. For further discussion of damages for mental suffering, see Ch. 362, *Mental Suffering and Emotional Distress* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsAssault & BatteryRemedies

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§ 58.18 Punitive Damages

[1] Requirement for Punitive Damage Award

Punitive damages may be awarded in an action for assault or battery if plaintiff shows that defendant acted with the requisite malice, oppression, or fraud [*see Civ. Code § 3294(a),(c)*; *see, e.g., Scruggs v. Haynes (1967) 252 Cal. App. 2d 256, 269, 60 Cal. Rptr. 355* ; *Thomas v. Doorley (1959) 175 Cal. App. 2d 545, 549, 346 P.2d 491* ; *Ayer v. Robinson (1958) 163 Cal. App. 2d 424, 428-429, 329 P.2d 546]* . Punitive damages are not recoverable if the defendant, acting in good faith, committed the assault or battery under a mistake of fact [*Ebaugh v. Rabkin (1972) 22 Cal. App. 3d 891, 895, 99 Cal. Rptr. 706* (technical battery for performing surgery on wrong patient)]. Also, a showing that the defendant acted in the heat of anger after provocation serves to eliminate or reduce punitive damages [*see Badostain v. Grazide (1896) 115 Cal. 425, 429, 47 P. 118]* . For a form for an affirmative defense to punitive damages based on provocation, see *§ 58.76*.

[2] Employer Liability for Punitive Damages

An employer is not liable for punitive damages based on the acts of an employee [*see § 58.16[4][a]*] unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others, or authorized or ratified the wrongful conduct for which the damages are awarded, or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer,the particular conduct giving rise to a claim for punitive damages against the employer must be on the part of an officer, director, or managing agent of the corporation [*Civ. Code § 3294(b)*].

For forms to allege punitive damages against an employer for the acts of the employee, see Ch. 427, *Principal and Agent* . For further discussion of the recovery of punitive damages in tort actions, see *Ch. 177, Damages, § 177.40* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesPunitive DamagesGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral

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6-58 California Forms of Pleading and Practice--Annotated § 58.19

§ 58.19 Self Defense

[1] Scope of Privilege of Self Defense

Any necessary force may be used to protect oneself from wrongful injury [*Civ. Code § 50*]. Self-defense is an affirmative defense, and the defendant has the burden of proving that the assault or battery was justified [*Boyer v. Waples (1962) 206 Cal. App. 2d 725, 727, 24 Cal. Rptr. 192* ; *see Marriott v. Williams (1908) 152 Cal. 705, 711, 93 P. 875]* .

For a form to allege self-defense as an affirmative defense, see *§ 58.70*.

[2] Necessity of Using Force

The justification of self-defense is viewed subjectively from the position of the defendant. If the circumstances as they appeared to the defendant were such that a reasonable person in the position of the defendant would be justified in believing that the plaintiff had the present ability to inflict serious injury and that the plaintiff intended to do so, the defendant is justified in using force in self-defense. The plaintiff's actual lack of intent to inflict injury is not a limitation of the right of self-defense [*Vaughn v. Jonas (1948) 31 Cal. 2d 586, 599-600, 191 P.2d 432* ; *see Fraguglia v. Sala (1936) 17 Cal. App. 2d 738, 743, 745, 62 P.2d 783* ; *see also BAJI No. 7.55*].

Force, however, may be resorted to only to prevent or repel the threatened use of force. It may not be used to punish for past acts [*Villines v. Tomerlin (1962) 206 Cal. App. 2d 448, 457, 23 Cal. Rptr. 617]* .

The defendant's state of mind at the time of his or her use of force is material and an important factor in determining justification in his or her belief of an impending attack. However, the defendant must first establish a prima facie case that the assault and battery was in self-defense [*Villines v. Tomerlin (1962) 206 Cal. App. 2d 448, 452, 23 Cal. Rptr. 617]* . A prima facie case of self defense requires some evidence of imminent danger from the plaintiff reasonably contemporaneous with the acts of the defendant. Absent this prima facie showing, evidence of the plaintiff's prior specific acts of violence or prior threats of violence is inadmissible to show defendant's belief that the plaintiff is a violent and dangerous person [*Villines v. Tomerlin (1962) 206 Cal. App. 2d 448, 456, 23 Cal. Rptr. 617* ; *see Evid. Code § 1101(b)*].

[3] Reasonableness of Force Used

[a] Force in Excess of Privilege

If defendant uses force in excess of that which is privileged, he or she may be held liable for damages resulting from the excessive force [*see Fraguglia v. Sala (1936) 17 Cal. App. 2d 738, 745, 62 P.2d 783]* . However, the amount of force that one may use in self-defense is viewed subjectively from the position of the defendant. The defendant is justified in using the amount of force that reasonably appears necessary to the defendant, in view of all the circumstances of the case, to prevent the impending injury. The amount of force that was actually necessary to repel the attack is not a limitation of the scope of self-defense [*Vaughn v. Jonas (1948) 31 Cal. 2d 586, 599-600, 191 P.2d 432* ; *see BAJI No. 7.55*].

The burden of proof that the force used was not excessive is on the defendant [*Boyer v. Waples (1962) 206 Cal. App. 2d 725, 727, 24 Cal. Rptr. 192]* . The question of excessive force is for the trier of fact [*Boyer v. Waples (1962) 206 Cal. App. 2d 725, 730, 24 Cal. Rptr. 192]* .

[b] Use of Deadly Force

Although no civil assault or battery case in California explicitly discusses the point, the Restatement and other authorities indicate that the use of force intended or likely to cause death or great bodily injury is not privileged unless the defendant reasonably believes that (1) the other is about to inflict an intentional contact that places defendant in peril of death or serious bodily harm, and (2) the peril can only safely be prevented by the immediate use of that force [*see* Restatement (Second) Torts § 65(1); Prosser and Keeton on Torts, ch. 4, § 19 (West 5th ed. 1984)]. This rule appears to be consistent with the Penal Code provisions pertaining to justifiable homicide in criminal cases [*see Penal Code §§ 197, 198*].

Also, no reported civil case in California has directly addressed the issue of whether one is privileged to use deadly force in self-defense if he or she can safely avoid the necessity of doing so by retreating. In one case, the use of deadly force was approved to stop the commission of a felony against property that involved a reasonable fear of great bodily harm. The question of a duty to retreat was not discussed, although it appeared from the facts that retreat, or at least avoidance of a confrontation with the felons, was possible [*Nakashima v. Takase (1935) 8 Cal. App. 2d 35, 39, 46 P.2d 1020* (defendant store owner hid on premises to prevent impending burglary, then fired at them in dark)].

In criminal cases, California courts have held that a person need not retreat under these circumstances, but may stand his or her ground and use deadly force in self-defense, if necessary [*see People v. Hughes (1951) 107 Cal. App. 2d 487, 493-494* ; *People v. Zuckerman (1942) 56 Cal. App. 2d 366, 372-374, 132 P.2d 545]* . Other authorities areapparently split as to whether a civil defendant is required to retreat, if possible, before using deadly force [*see* Prosser and Keeton on Torts, ch. 4, § 19 (West 5th ed. 1984)]. The Restatement requires retreat before use of deadly force, but not before use of nondeadly force [*see* Restatement (Second) Torts §§ 63(2)(a), 65(3)(a)]. Retreat is not necessary, however, if one is attacked in one's dwelling [*see* Prosser and Keeton on Torts, ch. 4, § 19 (West 5th ed. 1971); Restatement (Second) Torts § 65(2)(a)].

[4] Liability to Innocent Bystanders

If the defendant injures an innocent bystander while acting in the lawful exercise of his or her right of self-defense, the defendant's liability to the third person depends on whether or not the defendant acted with reasonable care so as not to injure the bystander. Under these circumstances, the comparative negligence of the third person is available as a defense to the person exercising a right of self-defense, although comparative negligence is not a defense as to the person whose conduct required the act of self-defense [*Bartosh v. Banning (1967) 251 Cal. App. 2d 378, 385-386, 59 Cal. Rptr. 382* ; *see § 58.25*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsAssault & BatteryDefenses

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§ 58.20 Defense of Third Persons

[1] Scope of Privilege to Defend Third Persons

The statutory privilege to use necessary force to protect against wrongful injury extends to the defense of a spouse, child, parent, or other relative, or member of one's family, or of a ward, servant, master, or guest [*Civ. Code § 50*]. The commentaries extend the privilege to the defense of any third person [*see* Restatement (Second) Torts § 76; Prosser and Keeton on Torts, ch. 4, § 20 (West 5th ed. 1984); *see also Ward v. De Martini (1930) 108 Cal. App. 745, 748, 292 P. 192* (plaintiff went to defense of coemployee and was subsequently injured by attacker)]. For a form to allege defense of third persons as an affirmative defense, see *§ 58.71*.

No California case has directly addressed the issue of whether a defendant may be held liable for a battery committed in defense of a third person who was, in fact, not justified in forcibly defending himself or herself. In cases involving acts that were alleged to be both self-defense and defense of others, the general rule that the reasonableness of the defendant's acts must be viewed subjectively from defendant's position has been applied [*see Vaughn v. Jonas (1948) 31 Cal. 2d 586, 600, 191 P.2d 432* (defense of defendant and wife); *Boyer v. Waples (1962) 206 Cal. App.2d 725, 727 728, 24 Cal. Rptr. 192* (defense of defendant, family, and home); *see § 58.19*]. This result is in accord with the Restatement, which takes the position that the defendant is relieved from liability if he or she reasonably believed that the third person was justified in defending himself or herself by force, even if the defendant's belief was mistaken [*see* Restatement (Second) Torts § 76].

[2] Reasonableness of Force Used

As in the case of self-defense, the reasonableness of the degree of force used is to be judged from the subjective viewpoint of the defendant [*see § 58.19[3]*]. The force must not be greater than that which would appear reasonably necessary as judged by the situation as it reasonably appeared to the defendant at the time of the assault or battery [*see Lopez v. Surchia (1952) 112 Cal. App. 2d 314, 317-319, 246 P.2d 111* (defendant alleged that he fired gun to break up fight between his son and another boy, and one bullet struck plaintiff; court held that force used to defend son was excessive)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 58.21 Defense of Property

[1] Scope of Privilege to Defend Property

A person may use any necessary force to protect from wrongful injury his or her property or the property of a spouse, child, parent, or other relative, or member of one's family, or of a ward, servant, master, or guest [*Civ. Code § 50*]. Thus, a possessor of land may eject a trespasser from the premises without incurring liability, as long as unnecessary force is not employed [*Livesey v. Stock (1929) 208 Cal. 315, 317-318, 281 P. 70* ; *see Townsend v. Briggs (1893) 99 Cal. 481, 483, 34 P. 116* ; *Phelps v. Arnold (1931) 112 Cal. App. 518, 522-523, 297 P. 31]* . A person in rightful possession may also use reasonable force to prevent a forcible and unlawful entry [*see Lorenz v. Hunt (1928) 89 Cal. App. 6, 12, 264 P. 336]* . Likewise, the proprietor of a tavern may use reasonable force to eject a patron who is engaging in conduct that is dangerous to other invitees or that is morally offensive [*see Coorough v. DeLay (1959) 171 Cal. App. 2d 41, 44-46, 339 P.2d 963]* . For a form to allege defense of property by ejection of a trespasser as an affirmative defense, see *§ 58.72*.

[2] Reasonableness of Force Used

[a] Scope of Reasonable Force

In cases in which the court determined that both defense of persons and of property was involved, it has been stated that a person has a right to use all such force as is reasonably necessary to protect person or property [*Nakashima v. Takase (1935) 8 Cal. App. 2d 35, 39, 46 P.2d 1020* (emphasis added; property owner was justified in shooting at burglar because of reasonable belief that burglar was armed, was attempting to commit felony on premises, and would use force or violence to consummate felony or to facilitate escape); *see Boyer v. Waples (1962) 206 Cal. App.2d 725, 727, 24 Cal. Rptr. 192]* .

[b] Use of Deadly Force

Cases holding that a person has a right to use such force as is reasonably necessary to protect property suggest that deadly force may be justified solely in the defense of property if no lesser degree of force will suffice to protect the property. However, it is unlikely that this is the correct statement of the law.

In the criminal context, the use of deadly force to protect property has been limited to situations that also involved a threat to life or of great bodily injury [*see People v. Ceballos (1974) 12 Cal. 3d 470, 478-482, 116 Cal. Rptr. 233, 526 P.2d 241* (construing language in *Penal Code § 197(2)* that might otherwise allow use of deadly force solely in defense of property); *see also CALJIC 5.10, 5.16, 5.43*]. However, there is a presumption that a person who uses deadly force on an intruder into his or her residence has a reasonable fear of imminent peril of death or great bodily injury [*Penal Code § 198.5*].

The California criminal law is in accord with generally accepted common-law principles, which indicate that force intended or likely to cause death or serious bodily injury may not be used solely to defend one's property. The use of deadly force is not privileged unless the plaintiff's conduct also threatens, or reasonably appears to threaten, death or serious bodily injury to the defendant or to a third person who the defendant is entitled to defend [*see* generally Witkin, Summary of California Law, vol. 5, *Torts*, § 420 (10th ed. 2005); Restatement (Second) Torts § 81; Prosser & Keeton on Torts, ch. 4, § 20 (West 5th ed. 1984)].

[c] Force Used in Excess of Privilege

If a lesser degree of force would be sufficient to defend property, one is liable for injuries inflicted by excessive force [*Rogers v. Kabakoff (1947) 81 Cal. App. 2d 487, 491, 184 P.2d 312]* . The same applies to the amount of force that is justified in the removal of a trespasser or one whose presence represents a danger to property [*Tomblinson v. Nobile (1951) 103 Cal. App. 2d 266, 270, 229 P.2d 97* (use of blackjack by security guard to eject trespasser not justified); *Haworth v. Elliott (1944) 67 Cal. App. 2d 77, 82-83, 153 P.2d 804]* .

[3] Necessity of Warning

The use of force in defense of property against a trespasser is generally not privileged unless the intruder has first been requested to desist from the intrusion [*Chapell v. Schmidt (1894) 104 Cal. 511, 514, 38 P. 892* (defendant not justified in using force against old man who was picking flowers on defendant's property without first warning him to desist and leave premises); *see* Restatement (Second) Torts §§ 77(c), 87, 104]. The warning need not, however, be couched in polite language so long as it is sufficient to inform the other that he or she is being told to leave the premises [*see Townsend v. Briggs (1893) 99 Cal. 481, 484, 34 P. 116]* . The trespasser need not be given more than one warning to stay off the premises, and if he or she returns after being told to stay away, he or she may be removed forcibly without a second warning [*see Phelps v. Arnold (1931) 112 Cal. App. 518, 524, 297 P. 31]* .

No warning is necessary if the actor reasonably believes that it will be useless or that substantial harm will be done before the warning can be given. In the case of a burglary in progress, the defendant has a right to assume that giving warning would have the effect of placing him or her in danger [*Nakashima v. Takase (1935) 8 Cal. App. 2d 35, 38-39, 46 P.2d 1020* ; *see* Restatement (Second) Torts § 77(c)].

[4] Recapture of Property

[a] No Privilege to Forcibly Recover Land Peaceably Possessed

A person who claims title or the right to possession of land may not use force to recover possession of the land from one who is in peaceable possession of it. The person in possession may recover in tort for damages for injuries to his or her person or property that are proximately caused by the other's forcible entry, regardless of whether the entering party has title or right to possession [*see Daluiso v. Boone (1969) 71 Cal. 2d 484, 499 500, 78 Cal. Rptr. 707, 455 P.2d 811* (disapproving earlier cases holding to the contrary)]. The rationale behind this rule is that a person claiming the right to possession of land should resort to judicial proceedings rather than resorting to self-help [*see Daluiso v. Boone (1969) 71 Cal. 2d 484, 500, 78 Cal. Rptr. 707, 455 P.2d 811]* . In the case of a tenant holding over or otherwise in breach under a lease, the landlord must result to unlawful detainer proceedings and may not forcibly eject the tenant [*Jordan v.*

Talbot (1961) 55 Cal. 2d 597, 604-605, 12 Cal. Rptr. 488, 361 P.2d 20 ; *see Code Civ. Proc. §§ 1161-1179a*].

[b] No Privilege to Forcibly Recover Chattel Wrongfully Retained

The use of force to recapture a chattel from one whose original possession of it was lawfully acquired but who subsequently wrongfully retains possession is not privileged even if possession is being lawfully withheld [*Deevy v. Tassi (1942) 21 Cal. 2d 109, 130 P.2d 389* (alleged default under chattel mortgage); *Rogers v. Kabakoff (1947) 81 Cal. App. 2d 487, 490, 184 P.2d 312* (alleged overcharge under bailment)]. However, a person who has the right to immediate possession of a chattel may use force to recover possession from one who has wrongfully taken possession of the property, if he or she acts promptly after the dispossession or timely discovery of the dispossession [*see* Restatement (Second) Torts §§ 100-106; *see also McLean v. Colf (1918) 179 Cal. 237, 238, 176 P. 169* ; *Riffel v. Letts (1916) 31 Cal. App. 426, 428, 160 P. 845]* . The amount of force that maybe used in recapturing a chattel must not exceed that which is reasonably adequate and necessary [*see McLean v. Colf (1918) 179 Cal. 237, 238-239, 176 P. 169* ; *see also Riffel v. Letts (1916) 31 Cal. App. 426, 428, 160 P. 845* ; Restatement (Second) Torts § 106 (force used may not be intended or likely to cause death or serious bodily injury)]. For a form to allege recapture of personal property as an affirmative defense, see *§ 58.73*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 58.22 Law Enforcement Defense: Reasonable Force to Effect Arrest

[1] Privilege of Reasonable Force to Effect Arrest

A person arrested may be subjected to such restraint as is reasonable for his or her arrest and detention [*see Penal Code § 835*]. Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape, or to overcome resistance [*Penal Code § 835a*]. Thus, a law enforcement officer is privileged to use reasonable force to effect an arrest as long as the arrest is otherwise lawful [*see Boyes v. Evans (1936) 14 Cal. App. 2d 472, 479, 58 P.2d 922* (law enforcement officer may be liable for battery committed in course of making unlawful arrest)]. For discussion of when an arrest is lawful, see Ch. 257, *False Imprisonment* .

A peace officer who makes or attempts to make an arrest need not retreat or desist from his or her efforts because of the resistance or threatened resistance of the person being arrested [*Penal Code § 835a*]. Furthermore, the officer may not be deemed an aggressor or lose his or her right to self-defense by the use of reasonable force to effect the arrest, prevent escape, or overcome resistance [*Penal Code § 836.5(b)*]. Similarly, if an arrest is made by an officer under the authority of a warrant, the officer may use all necessary means to effect the arrest if, after information of the intention to make the arrest, the person to be arrested either flees or forcibly resists [*Penal Code § 843*]. However, an officer may be liable for battery if the officer's use of deadly force in effecting an arrest is unreasonable under the circumstances [*Munoz v. City of Union City (2004) 120 Cal. App. 4th 1077, 1106, 16 Cal. Rptr. 3d 521]* .

If the battery claim stems from an inadvertent injury to a bystander caused by the use of force against an arrestee, it appears that if the force used against the arrestee is reasonable under the totality of the circumstances, then the police officer is also free from liability to the bystander. In one case, for example, the court held that police acted reasonably as a matter of law in shooting at a murder suspect who, while attempting to flee in a vehicle being driven on a curb at a strip mall, was headed straight for another police officer. As the suspect, who was shot and killed, could not have sued for battery, police also had a defense from liability for battery to a bystander in one of the mall offices who was hit by a deflected bullet fragment [*Brown v. Ransweiler (2009) 171 Cal. App. 4th 516, 526-533, 89 Cal. Rptr. 3d 801*].

[2] Plaintiff's Burden to Show Force Unreasonable

Although the plaintiff bears the burden of proving the use of unreasonable force in a battery action against a peace officer [*Edson v. City of Anaheim (1998) 63 Cal. App. 4th 1269, 1272, 74 Cal. Rptr. 2d 614]* , the defendant peace officer should affirmatively answer a complaint by alleging facts showing that the force used to effect the arrest was reasonable. For a form to allege that a plaintiff has failed to plead facts that demonstrate that the force used to effect a lawful arrest was unreasonable, see § 58.93.

A plaintiff may not pursue state law tort claims against a police officer based on the conduct of the officer in effecting the plaintiff's arrest, including claims for assault and battery or false imprisonment, if, based on the same events, the plaintiff was convicted of resisting or obstructing a police officer and the plaintiff has not previously been granted postconviction relief that invalidates that conviction [*Susag v. City of Lake Forest (2002) 94 Cal. App. 4th 1401, 1413, 115 Cal. Rptr. 2d 269]* .

However, although an admission by a convicted criminal defendant that he or she resisted officers in the performance of their duties, and that those officers had the right to respond with reasonable force, may bar a civil action based on the use of reasonable force, an action for battery alleging the *unreasonable* use of deadly force is not barred if that civil action would not call into question the validity of the arrest and conviction. In one case, for example, a drunk driver who had strenuously resisted arrest was pinned to the ground by multiple police officers, one of whom shot the driver in the buttock by accident under the belief that he had pulled out his taser rather than his pistol. The driver was convicted after entering a plea admitting that he had resisted arrest. While agreeing that police had the right to use reasonable force to subdue him when he was resisting arrest, the driver argued that a subsequent civil claim for battery was not barred because it was based on a use of deadly force that was unreasonable under the circumstances. The California Supreme Court agreed, concluding that while a battery claim based on the use of *any* force would be barred, a battery claim based on the unreasonable use of excessive force was not barred under the circumstances, as such a claim would not call into question plaintiff's arrest and conviction for resisting arrest [*Yount v. City of Sacramento (2008) 43 Cal. 4th 885, 898-900, 902, 76 Cal. Rptr. 3d 787, 183 P.3d 471*].

[3] Use of Force to Resist Arrest

A person who has knowledge, or who by the exercise of reasonable care should have knowledge, that he or she is being arrested by a peace officer has the duty to refrain from using force or any weapon to resist the arrest [*Penal Code § 834a*]. In criminal law, this statute has been construed as making a person who resists an unlawful arrest guilty of misdemeanor battery, but not of any crime for which an element is that a police officer is engaged in performance of his or her duties [*see People v. Henderson (1976) 58 Cal. App. 3d 349, 356, 129 Cal. Rptr. 844]* . The same distinction applies to the resistance of excessive force in effecting a lawful arrest [*People v. White (1980) 101 Cal. App. 3d 161, 167, 161 Cal. Rptr. 541]* . If the person making the arrest is not a peace officer, the arrestee may forcibly resist an unjustified arrest [*see Griswold v. Hollywood Turf Club (1951) 106 Cal. App. 2d 578, 584, 235 P.2d 656]* .

A similar rule applies to detentions by peace officers; because a detention is a lesser infringement than an arrest, there is no right to resist the lesser infringement if there is no right to resist the greater [*Evans v. City of Bakersfield (1994) 22 Cal. App. 4th 321, 330]* . Thus, as with an unlawful arrest, if the detention is unlawful, the resistance can constitute assault or battery, unless excessive force is used or threatened, in whichcase the individual has the right of self-defense [*Evans v. City of Bakersfield (1994) 22 Cal. App. 4th 321, 331]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawSection 1983 ActionsLaw Enforcement OfficialsExcessive ForceCriminal Law & ProcedureArrestsReasonable ForceGovernmentsLocal GovernmentsEmployees & OfficialsTortsIntentional TortsAssault & BatteryGeneral OverviewTortsPublic Entity LiabilityExcessive Force

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§ 58.23 Public Employee Defense: Sovereign Immunity

A public employee is not liable for an injury resulting from his or her act or omission if the act or omission was the result of the exercise of the discretion vested in him or her, whether or not that discretion was abused [*Gov. Code § 820.2*]. However, this immunity for discretionary acts does not apply to the use of excessive force in effecting an arrest [*Scruggs v. Haynes (1967) 252 Cal. App. 2d 256, 263-268]* . For discussion of liabilities and immunities of public entities and employees generally, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawSection 1983 ActionsLaw Enforcement OfficialsExcessive ForceCriminal Law & ProcedureArrestsReasonable ForceTortsIntentional TortsAssault & BatteryGeneral OverviewTortsPublic Entity LiabilityExcessive ForceTortsPublic Entity LiabilityImmunitySovereign Immunity

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§ 58.24 Private Privilege to Detain and Search Suspected Thief

[1] Merchant's Privilege Defined

A merchant may detain a person for a reasonable time for the purpose of conducting an investigation in a reasonable manner if the merchant has probable cause to believe that the person to be detained is attempting to unlawfully take or has unlawfully taken merchandise from the merchant's premises [*Penal Code § 490.5(f)(1)*; *see also Penal Code § 490.5(g)(1), (2)* (definitions of "merchandise" and "merchant")].

Likewise, a person employed by a library facility may detain a person for a reasonable time for the purpose of conducting an investigation in a reasonable manner whenever the person employed by the library facility has probable cause to believe that the person to be detained is attempting to unlawfully remove or has unlawfully removed books or library materials for the premises of the library [*Penal Code § 490.5(f)(1)*; *see also Penal Code § 490.5(g)(4), (5)* (definitions of "book or other library materials" and "library facility")].

Also, a theater owner may detain a person for a reasonable time for the purpose of conducting an investigation in a reasonable manner whenever the theater owner has probable cause to believe the person to be detained is attempting to operate a video recording device within the premises of a motion picture theater without the authority of the theater's owner [*Penal Code § 490.5(f)(1)*; *see also Penal Code § 490.5(g)(3)* (definition of "theater owner")].

[2] Reasonableness of Force Used

In making such a detention, the merchant, theater owner, or library employee may use a reasonable amount of nondeadly force necessary to protect himself or herself and to prevent the escape of the person detained or tangible or intangible loss of the property [*Penal Code § 490.5(f)(2)*]. If the person detained refuses on request to voluntarily surrender any item that the merchant, theater owner, or library employee has probable cause to believe was unlawfully taken, or a recording that the person made within the premises of a motion picture theater without the authority of the theater's owner, the merchant, theater owner, or library employee may also make a limited and reasonable search of any packages, shopping bags, handbags, or other property in the immediate possession of the person detained to recover the item, but may not search the clothing worn by that person [*see Penal Code § 490.5(f)(4)*].

[3] Use of Privilege as Defense

In any civil action brought by any person resulting from a detention or arrest by a merchant, theater owner, or person employed by a library facility, the merchant, theater owner, or library employee may assert as a defense that he or she had probable cause to believe that the person detained had stolen or attempted to steal merchandise, books, or library materials or was attempting to operate a video recording device within the premises of a motion picture theater without the authority of the theater's owner, and that he or she acted reasonably under all the circumstances [*see Penal Code § 490.5(f)(7)*].

For a form to allege the merchant's privilege as an affirmative defense, see *§ 58.75*. For further discussion of the merchant or librarian's privilege to detain and search, see Ch. 257, *False Imprisonment* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsDefensesDefense of Property

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§ 58.25 Negligence of Plaintiff Not a Defense

Traditionally, contributory negligence has not been recognized as a defense to assault, battery, or intentional torts generally [*see Bartosh v. Banning (1967) 251 Cal. App. 2d 378, 385, 59 Cal. Rptr. 382* ; *Villines v. Tomerlin (1962) 206 Cal. App. 2d 448, 458, 23 Cal. Rptr. 617* ; *Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 5-6, 146 P.2d 57]* . For example, courts have held that the plaintiff's voluntary intoxication at the time of the injury does not relieve defendant from liability for intentionally shoving or pushing the plaintiff [*see Villines v. Tomerlin (1962) 206 Cal. App. 2d 448, 458, 23 Cal. Rptr. 617]* . Likewise, a court has held that if an innocent bystander is injured as a proximate result of a battery committed by the defendant on a third person, the defendant may not assert the defense of contributory negligence against the bystander on the grounds that the latter failed to retreat from a place lawfully occupied by him or her to an area outside the range of the defendant's wrongful conduct [*Bartosh v. Banning (1967) 251 Cal. App. 2d 378, 385, 59 Cal. Rptr. 382]* .

The cases referred to above were decided prior to adoption in California of the rule of comparative fault by the California Supreme Court [*see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226* ; for discussion, *see* Ch. 380, *Negligence*]. Whether or not a plaintiff's recovery should be diminished in proportion to his or her own negligence if defendant is guilty of an intentional tort, rather than mere negligence, was left open by the Court in *Li*. However, the nonapplicability of comparative fault principles to intentional torts has subsequently been reaffirmed by the court of appeal, including one opinion that involved a plaintiff's claim of battery [*see Heiner v. Kmart Corp. (2000) 84 Cal. App. 4th 335, 348-350, 100 Cal. Rptr. 2d 854* (although defendant waived argument, comparative fault was inapplicable to battery claim); *see also Allen v. Sundean (1982) 137 Cal. App. 3d 216, 226-227, 186 Cal. Rptr. 863* (comparative fault inapplicable to fraudulent concealment claim)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 58.26 Right of Privacy as Bar to Action

[1] Relationship between Right of Privacy and Tort Actions

Four cases have looked at the interrelationship between the constitutional right of privacy [*see Cal. Const., art. I, § 1*] and traditional tort actions arising from acts of consensual sexual intercourse. Two courts have found the right of privacy to bar such an action [*see Perry v. Atkinson (1987) 195 Cal. App. 3d 14, 16-17, 240 Cal. Rptr. 402* ; *Stephen K. v. Roni L. (1980) 105 Cal. App. 3d 640, 643, 164 Cal. Rptr. 618]* , and two have allowed the action to proceed [*see Kathleen K. v. Robert B. (1984) 150 Cal. App. 3d 992, 994-995, 198 Cal. Rptr. 273* ; *Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 374-375, 193 Cal. Rptr. 422]* . Neither of the two cases finding a privacy bar involved causes of action for assault or battery, but rather sounded in fraud. By contrast, both cases that were allowed to proceed included causes of action for battery. However, this result may be more related to questions of pleading rather than any particular relationship between battery and the right of privacy.

[2] Cases Barring Tort Action Arising from Consensual Sexual Intercourse

In a case involving misrepresentation of birth control practices, one court refused to attach tortious liability to the results of consensual sexualintercourse, finding the cause of action to be barred by the right of privacy. The court stated that to allow the action to proceed would encourage unwarranted governmental intrusion into matters affecting the individual's right to privacy. The court rejected any role in defining standards of conduct in the highly intimate and private relationship [*Stephen K. v. Roni L. (1980) 105 Cal. App. 3d 640, 643, 645, 164 Cal. Rptr. 618]* .

Another court followed *Stephen K.* and rejected the distinction and reasoning of *Barbara A., below*. The facts involved a termination of pregnancy by abortion. The plaintiff woman alleged that she had agreed to have an abortion because of the defendant man's intentional misrepresentation that he would impregnate her at a later date. The court refused to intervene in the area of procreative decisions, citing *Stephen K.* for its holding concerning unwarranted governmental intrusion into matters affecting the individual's right to privacy [*Perry v. Atkinson (1987) 195 Cal. App. 3d 14, 16-20, 240 Cal. Rptr. 402]* .

Nevertheless, the court in *Perry* found a reasonable distinction between a cause of action involving pregnancy or termination of pregnancy and one involving the transmission of disease. While holding that no cause of action could be

stated for fraudulently inducing a person to have an abortion, the court stated that the transmission of a contagious disease implicates policy considerations beyond the sexual conduct and procreative decisions of two consenting adults, and that the state's interest in the prevention and control of contagious and dangerous diseases is sufficient to allow a cause of action for fraudulent concealment of the risk of infection with venereal disease [*Perry v. Atkinson (1987) 195 Cal. App. 3d 14, 20-21, 240 Cal. Rptr. 402]* .

[3] Cases Permitting Tort Action Arising from Consensual Sexual Intercourse

A court reached a different result in a subsequent case involving a man's alleged fraudulent misrepresentation of infertility before engaging in intercourse. The court analyzed the complaint under traditional tort principles and found causes of action to be stated for both battery and deceit [*Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 374-375, 193 Cal. Rptr. 422* (plaintiff developed tubal pregnancy, which, according to allegations, endangered her life, required major corrective surgery, and caused sterility and emotional and financial injury; *see § 58.13[5][e]*]. In reaching its decision, the court considered whether its finding on the facts before it would constitute unwarranted governmental intrusion into matters affecting the individual's right to privacy. The court found that the right of privacy was not absolute and does not insulate a person from all judicial inquiry into his or her sexual relationships, noting examples of illegal consensual intercourse, spousal rape, and paternity. Thus, the right of privacy does not insulate from liability one sexual partner who, by intentionally tortious conduct, causes physical injury to the other [*Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 380-381, 193 Cal. Rptr. 422]* .

In a case involving the transmission of genital herpes through an act of sexual intercourse, the court allowed the plaintiff to proceed under theories of negligence, battery, intentional infliction of emotional distress, and fraudulent misrepresentation. The court found that the constitutional right to privacy was subordinate to the state's fundamental right to protect the health and welfare of its citizens [*Kathleen K. v. Robert B. (1984) 150 Cal. App. 3d 992, 994, 198 Cal. Rptr. 273]* .

For a form of allegations of battery arising from fraudulently induced sexual intercourse, see *§ 58.57*. For a form of demurrer based on the constitutional right of privacy, see *§ 58.90*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawSubstantive Due ProcessPrivacyGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsAssault & BatteryDefensesTortsIntentional TortsDefensesGeneral Overview

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§ 58.27 Cause of Action for Sexual Battery

[1] Elements of Sexual Battery

A person commits a sexual battery who does any of the following [*Civ. Code § 1708.5(a)*]:

> Acts with the intent to cause a harmful or offensive contact with an intimate part of another, and a sexually offensive contact with that person directly or indirectly results.
>
> Acts with the intent to cause a harmful or offensive contact with another by use of his or her intimate part, and a sexually offensive contact with that person directly or indirectly results.
>
> Acts to cause an imminent apprehension of the conduct described in *Civ. Code § 1708.5(a)(1)*or *(2)*, and a sexually offensive contact with that person directly or indirectly results.

[2] Intimate Part and Offensive Contact Defined

"Intimate part" means the sexual organ, anus, groin, or buttocks of any person, or the breast of a female [*Civ. Code § 1708.5(d)*]. "Offensive contact" means contact that offends a reasonable sense of personal dignity [*Civ. Code § 1708.5(f)*].

[3] Remedies for Sexual Battery

A person who commits a sexual battery on another is liable to that person for damages, including but not limited to general damages, special damages, and punitive damages [*Civ. Code § 1708.5(b)*]. The court in an action pursuant to *Civ. Code § 1708.5* may award equitable relief, including but not limited to an injunction, costs, and any other relief the court deems proper [*Civ. Code § 1708.5(c)*]. The rights and remedies provided in *Civ. Code § 1708.5* are in addition to any other rights and remedies providedby law [*Civ. Code § 1708.5(e)*]. For a form of complaint alleging sexual battery under *Civ. Code § 1708.5*, *see § 58.55*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 58.28 Cause of Action for Stalking

[1] Elements of Tort of Stalking

A person is liable for the tort of stalking when the plaintiff proves all of the following elements:

- The defendant engaged in a pattern of conduct the intent of which was to follow, alarm, or harass the plaintiff. In order to establish this element, the plaintiff shall be required to support his or her allegations with independent corroborating evidence [*Civ. Code § 1708.7(a)(1)*].

- As a result of that pattern of conduct, the plaintiff reasonably feared for his or her safety, or the safety of an immediate family member [*Civ. Code § 1708.7(a)(2)*].

- One of the following [*Civ. Code § 1708.7(a)(3)*]:

  - The defendant made a credible threat with the intent to place the plaintiff in reasonable fear for his or her safety, or the safety of an immediate family member and, on at least one occasion, the plaintiff clearly and definitively demanded that the defendant cease and abate his or her pattern of conduct and the defendant persisted in his or her pattern of conduct [*see Civ. Code § 1708.7(b)(2)* ("credible threat" means a verbal or written threat, including that communicated by means of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent and apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family member); *see also Civ. Code § 1708.7(b)(1), (4)* (defining "pattern of conduct" and "harass," respectively)].

  - The defendant violated a restraining order, including, but not limited to, any order issued pursuant to *Code Civ. Proc. § 527.6*, prohibiting any act described in *Civ. Code §*

1708.7(a).

[2] Immediate Family Defined

"Immediate family" means a spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any person who regularly resides, or, within the six months preceding any portion of the pattern of conduct, regularly resided, in the plaintiff's household [*see Civ. Code § 1708.7(a)(2)*].

[3] Remedies for Tort of Stalking

A person who commits the tort of stalking on another is liable to that person for damages, including, but not limited to, general damages, special damages, and punitive damages [*Civ. Code § 1708.7(c)*]. The court in an action pursuant to *Civ. Code § 1708.7* may grant equitable relief, including, but not limited to, an injunction [*Civ. Code § 1708.7(d)*]. The rights and remedies provided in *Civ. Code § 1708.7* are cumulative and in addition to any other rights and remedies provided by law [*Civ. Code § 1708.7(e)*]. *Civ. Code § 1708.7* shall not be construed to impair any constitutionally protected activity, including, but not limited to, speech, protest, and assembly [*Civ. Code § 1708.7(f)*].

For a form of a complaint alleging the tort of stalking under *Civ. Code § 1708.7*, see *§ 58.60*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 58.29 Statute of Limitations

[1] Two Year Statute of Limitations

The usual limitation period for actions for assault or battery is two years after accrual of the cause of action (prior to January 1, 2003, one year after accrual of cause of action) [*Code Civ. Proc. §§ 312, 335.1*; *see* former *Code Civ. Proc. § 340(3)*; Ch. 345, *Limitation of Actions*, § 345.14; *see, e.g., Trube v. Katz (1923) 60 Cal. App. 474, 476, 213 P. 264]* .

For general discussion of statutes of limitations, including discussion of provisions for tolling the statute of limitations, see Ch. 345, *Limitation of Actions* .

For discussion of the statute of limitations for civil actions for damages based on childhood sexual abuse under *Code Civ. Proc. § 340.1 see* Ch. 5, *Abuse of Minors and Elderly* , Pt. I.

For discussion of the limitation period applicable to actions for medical malpractice, see Ch. 415, *Physicians: Medical Malpractice* , and Ch. 295, *Hospitals* .

For discussion of the special limitation periods and claims requirements applicable to actions against public entities and employees under the Tort Claims Act (*Gov. Code § 810 et seq.*), see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[2] Accrual of Cause of Action

Ordinarily, a cause of action for assault accrues at the time that plaintiff anticipates the harm, and a cause of action for battery accrues at the time of the physical contact, even though no observable damage occurs at that time [*see Sonbergh v. MacQuarrie (1952) 112 Cal. App. 2d 771, 774, 247 P.2d 133]* . The statute of limitations begins to run at that time in theabsence of fraud, concealment, or duress on the part of the defendant that prevented the plaintiff from ascertaining the extent of his or her injury [*see Sonbergh v. MacQuarrie (1952) 112 Cal. App. 2d 771, 774, 247 P.2d 133* ; *see also Collins v. County of Los Angeles (1966) 241 Cal. App. 2d 451, 455, 457 459, 50 Cal. Rptr. 586* (applying similar rule to accrual of cause of action for false imprisonment)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsTortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsAssault & BatteryDefenses

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§ 58.30 Cause of Action for Domestic Violence

[1] Definition and Elements

Domestic violence means abuse committed against an adult or a fully emancipated minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the defendant has had a child or is having or has had a dating or engagement relationship. "Cohabitant" means one of two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) the parties' holding themselves out as husband and wife, (5) the continuity of the relationship, and (6) the length of the relationship [*Penal Code § 13700(b)*].

A person is liable for the tort of domestic violence if the plaintiff proves both of the following elements [*Civ. Code 1708.6(a)*]:

- The plaintiff suffered injury resulting from abuse, which is defined as intentionally or recklessly causing or attempting to cause bodily injury or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself or to another [*Penal Code § 13700(a)*].

- The abuse was committed by the defendant, a person having a relationship with the plaintiff as defined in *Penal Code § 13700(b)*.

[2] Remedies

A person who commits an act of domestic violence against another person is liable to that other person for damages including, but not limited to, general damages, special damages, and punitive damages [*Civ. Code 1708.6(b)*]. The court may grant a prevailing plaintiff equitable relief, an injunction, costs, and any other relief that the court deems proper, including reasonable attorney's fees [*Civ. Code 1708.6(c)*].

[3] Statute of Limitations

The plaintiff must bring a domestic violence action either (1) within three years after the date of the last act of domestic violence by the defendant against the plaintiff, or (2) within three years after the date that the plaintiff discovers or reasonably should have discovered that an injury or illness resulted from an act of domestic violence by the defendant against the plaintiff [*Civ. Code § 1708.6(e)*; *Code Civ. Proc. § 340.15*].

Although the three-year statute of limitations uses the "last act" of domestic violence as a trigger, a plaintiff may recover for domestic violence occurring more than three years before suit is brought if plaintiff proves a continuing course of abusive conduct and files suit within three years of the last act [*Pugliese v. Superior Court (2007) 146 Cal. App. 4th 1444, 1451, 53 Cal. Rptr. 3d 681]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsTortsIntentional TortsAssault & BatteryElements of BatteryTortsIntentional TortsAssault & BatteryRemedies

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§ 58.31 Judicial Immunity Not Defense

Judicial immunity, which provides absolute immunity from suit for a judge and all other persons who act in a judicial capacity, including court commissioners and court-appointed referees, does not extend to nonjudicial actions. As such, it would not ordinarily protect judges and other judicial actors from liability for assault and battery if the judge abandons the traditional role of the judge and uses brute force against a litigant. An exception could exist, however, if the litigant has initiated a physical assault on court personnel and the judge intervenes to protect staff because court security personnel are absent or unable to do so [*Regan v. Price (2005) 131 Cal. App. 4th 1491, 1497, 33 Cal. Rptr. 3d 130]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsAssault & BatteryDefensesTortsPublic Entity LiabilityImmunityJudicial Immunity

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[Reserved]

§§ 58.32[Reserved]

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§ 58.40 Related Texts From LexisNexis

For memoranda of points and authorities relating to forms in this chapter, see California Points and Authorities, Ch. 21, *Assault and Battery* (Matthew Bender)

For discussion of actions for assault and battery, see Levy, Golden & Sacks, California Torts, Ch. 41, *Assault and Battery* (Matthew Bender)

Personal Injury Actions, Defenses, Damages, *Assault and Battery* (Matthew Bender)

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§ 58.41 State Constitution

Constitutional right of privacy. *Cal. Const., art. I, § 1*

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§ 58.42 State Statutes

[1] Definitions

Crime of assault. *Penal Code § 240*

Crime of battery. *Penal Code § 242*

Sexual battery. *Civ. Code § 1708.5*

Stalking. *Civ. Code § 1708.7*

[2] General Provisions of Liability

[a] Minor Liability

Scope of civil liability of minors and incompetents. *Civ. Code § 41*; *Fam. Code § 6600*

[b] Parental Liability

Liability of parent or guardian for willful acts of minor. *Civ. Code § 1714.1*

Liability of parent for minor's discharge of firearm. *Civ. Code § 1714.3*

Liability of parent or guardian for willful misconduct of pupil. *Educ. Code § 48904*

[c] Public Employer Liability

Liability of public employer for injury caused by acts or omissions of employee. *Gov. Code § 815.2*

[d] Public Employee Liability

Liability of public employee for injury caused by his or her own acts or omissions. *Gov. Code § 820*

Public employee's immunity from liability for discretionary acts. *Gov. Code § 820.2*

[e] Principal Liability

Liability of principal for acts of agent. *Civ. Code §§ 2338, 2339*

[f] Consent

One who consents to an act as not wronged by it. *Civ. Code § 3515*

Authority of minor to consent to own medical treatment if married or member of armed services. *Fam. Code §§ 7002(a), (b), 7050(e)(1)*

[g] Defenses

Right of protection from bodily restraint or harm. *Civ. Code § 43*

Right to defend oneself, protect others, and defend one's property. *Civ. Code § 50*

[3] Penal Provisions

[a] Rights of Lawful Resistance

Rights of lawful resistance to criminal acts. *Penal Code §§ 692-694*

[b] Arrest

Duty to refrain from resisting arrest. *Penal Code § 834a*

Right of peace officer to arrest and to use reasonable force to effect arrest. *Penal Code §§ 835, 835a, 836*

Public officer or employee as not losing right to self-defense by use of reasonable force to effect arrest, prevent escape, or overcome resistance. *Penal Code § 836.5(b)*

For arrest made under authority of warrant, officer as allowed to use necessary means to effect arrest if, after information of intention to make arrest, person to be arrested flees or forcibly resists. *Penal Code § 843*

[c] Private Privilege

Privilege of merchants and library employees to detain and search persons reasonably suspected of theft or attempted

theft of merchandise or library property. *Penal Code § 490.5(f)*

[4] Damages

Exemplary and punitive damages. *Civ. Code § 3294*

Measure of compensatory damages. *Civ. Code § 3333*

Damages recoverable in action for sexual battery. *Civ. Code § 1708.5(b), (c), (e)*

[5] Statutes of Limitations

General provision for action for personal injuries. *Code Civ. Proc. § 335.1*

Action for personal injuries to minor sustained prior to or at birth. *Code Civ. Proc. § 340.4*

Actions against certain medical personnel. *Code Civ. Proc. § 340.5*

Periods of disability. *Code Civ. Proc. § 352*

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§ 58.43 Decisions

[1] Allegations Generally

Allegation by plaintiff court bailiff that defendant's act of "slumping or going limp" when plaintiff was taking defendant into custody caused plaintiff's knee to be injured as generally sufficient to state cause of action for assault and battery. *Gibb v. Stetson (1988) 199 Cal. App. 3d 1008, 1012, 245 Cal. Rptr. 283*

[2] Definitions and Elements

Criminal assault as essentially attempted battery. *People v. Rocha (1971) 3 Cal. 3d 893, 899, 92 Cal. Rptr. 172, 479 P.2d 372*

Distinction between torts of assault and battery: battery as completed act of tortious contact, assault as creation of apprehension of tortious contact. *Vaughn v. Jonas (1948) 31 Cal. 2d 586, 603, 191 P.2d 432*

Tort of battery defined as any intentional, unlawful, and harmful or offensive contact by one person with person of another. *Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 375, 193 Cal. Rptr. 422* ; *see Mesecher v. County of San Diego (1992) 9 Cal. App. 4th 1677, 1681 n.3, 12 Cal. Rptr. 2d 279* (jury instructed with this definition)

Intent necessary to constitute battery as intent to do act that causes harm, not intent to cause harm. *Singer v. Marx (1956) 144 Cal. App. 2d 637, 641, 301 P.2d 440* ; *see Mesecher v. County of San Diego (1992) 9 Cal. App. 4th 1677, 1681 n.3, 12 Cal. Rptr. 2d 279* (jury instructed with this definition)

Battery as well pleaded against employer for acts of sexual harassment or rape by employer's agent against employee. *Meyer v. Graphic Arts International Union (1979) 88 Cal. App. 3d 176, 178, 151 Cal. Rptr. 597*

Criminal rape as constituting civil battery. *Delia S. v. Torres (1982) 134 Cal. App. 3d 471, 480, 184 Cal. Rptr. 787*

Sexual intercourse as constituting battery despite apparent consent if consent is induced by misrepresentation of freedom from disease. *Kathleen K. v. Robert B. (1984) 150 Cal. App. 3d 992, 994, 198 Cal. Rptr. 273*

Sexual intercourse as constituting battery despite apparent consent if consent is induced by misrepresentation of infertility. *Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 374-375, 193 Cal. Rptr. 422*

[3] Persons Liable

Party injured by assault or battery as entitled to recover damages not only from actual assailant, but from any other person who aids, abets, counsels, or encourages attack. *Ayer v. Robinson (1958) 163 Cal. App. 2d 424, 428, 329 P. 2d 546*

[4] Employees in General

Sexual molestation of student by Sunday school teacher as not within course and scope of employment. *Jeffrey E. v. Central Baptist Church (1988) 197 Cal. App. 3d 718, 722, 243 Cal. Rptr. 128*

Determination whether employee committed tort during course of employment as turning on whether or not (1) act performed was either required by or incident to employee's duties, or (2) employee's misconduct could reasonably be foreseen by employer. *White v. County of Orange (1985) 166 Cal. App. 3d 566, 570-571, 212 Cal. Rptr. 493* ; *Alma W. v. Oakland Unified School Dist. (1981) 123 Cal. App. 3d 133, 139, 176 Cal. Rptr. 287*

Employer as not liable for employee's battery resulting from personal malice unconnected with employment relationship. *Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 621, 124 Cal. Rptr. 143*

[5] Medical Personnel

Provision of medical treatment without patient's consent as possible battery. *Rainer v. Community Memorial Hospital (1971) 18 Cal. App. 3d 240, 255, 95 Cal. Rptr. 901*

[6] Public Employees

Civ. Code § 1714.9, relating to conditions of liability for injuries to peace officers, firefighters, or emergency medical personnel employed by public entity, as creating exception to fireman's rule whenever injurious conduct, whether intentional or negligent, occurs after person inflicting injury is aware of presence of peace officer. *Gibb v. Stetson (1988) 199 Cal. App. 3d 1008, 1014-1016, 245 Cal. Rptr. 283*

Civil plaintiff as under some circumstances collaterally estopped from relitigating issues involved in arrest determined adversely in criminal trial. *Leader v. State of California (1986) 182 Cal. App. 3d 1079, 1083, 226 Cal. Rptr. 207*

Public entity as potentially liable for willfully continuing to employ law enforcement officer of known violent propensities and for negligent failure to adequately supervise its law enforcement officers. *City of Los Angeles v. Superior Court (1973) 33 Cal. App. 3d 778, 782-783, 109 Cal. Rptr. 365*

Law enforcement officer as liable for battery in using unreasonable force in making otherwise lawful arrest. *Scruggs v. Haynes (1967) 252 Cal. App. 2d 256, 264, 60 Cal. Rptr. 355*

[7] Defenses

Self-defense as affirmative defense to assault or battery claim. *Boyer v. Waples (1962) 206 Cal. App. 2d 725, 727, 24 Cal. Rptr. 192*

Consent as complete legal defense to battery. *Carr v. Dickey (1958) 163 Cal. App. 2d 416, 423, 329 P.2d 539*

[8] Damages

Mental suffering as frequently constituting principal element of damages in actions for assault and battery. *State Rubbish etc. Assn. v. Siliznoff (1952) 38 Cal. 2d 330, 338, 240 P.2d 282*

Defamation of defendant by plaintiff as appropriate consideration in determining provocation and appropriateness and amount of punitive damages. *Marriott v. Williams (1908) 152 Cal. 705, 710, 93 P. 875*

Provocation as defense to claim for exemplary and punitive damages. *Badostain v. Grazide (1896) 115 Cal. 425, 429, 47 P. 118*

Punitive damages as not recoverable if defendant, acting in good faith, committed battery under mistake of fact. *Ebaugh v. Rabkin (1972) 22 Cal. App. 3d 891, 895, 99 Cal. Rptr. 706*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsEmployees & OfficialsHealthcare LawTreatmentPatient ConsentInformed ConsentTortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsAssault & BatteryDefensesTortsIntentional TortsAssault & BatteryRemedies

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6-58 California Forms of Pleading and Practice--Annotated § 58.44

§ 58.44 Law Reviews

[1] Attempted Assault

Comment, *A Final Assault on Attempted Assaults, 14 Santa Clara Law. 83 (1973)*

[2] Incestuous Abuse

Comment, *Tort Remedies for Incestuous Abuse, 13 Golden Gate U.L. Rev. 609 (1983)*

[3] Self Defense

Comment, *Self-Defense: Battered Woman Syndrome on Trial, 20 Cal. W.L. Rev. 485 (1984)*

[4] Informed Consent

Note, *Informed Consent to Medical Treatment, 61 Cal. L. Rev. 634 (1973)*

Comment, *Unauthorized Rendition of Lifesaving Medical Treatment, 53 Cal. L. Rev. 860 (1965)*

Comment, Surgery Without the Patient's Consent A New Test for Liability, *4 UCLA L. Rev. 627 (1957)*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAssault & BatteryElements of Assault

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6-58 California Forms of Pleading and Practice--Annotated § 58.45

§ 58.45 Text References

[1] Procedure: Assault and Battery

Witkin, California Procedure, vol. 5, Pleading, §§ 722, 723 (4th ed. 1997)

[2] Content: Assault and Battery

Witkin, Summary of California Law, vol. 5, Torts, §§ 381-424 (10th ed. 2005)

Restatement (Second) of Torts, §§ 13-34

Prosser and Keeton on Torts, ch. 2, §§ 9, 10 (West 5th ed. 1984)

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[Reserved]

§§ 58.46[Reserved]

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6-58 California Forms of Pleading and Practice--Annotated § 58.50

§ 58.50 Complaint for Compensatory [Civ. Code § 3333] and Punitive Damages [Civ. Code § 3294] for Assault and Battery

[1] FORM Complaint for Compensatory [Civ. Code § 3333] and Punitive Damages [Civ. Code § 3294] for Assault and Battery

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DAMAGES
[and DOES I through _____,]	)	(Assault and Battery)
Defendant(s).	)	
	)	
	)	

Plaintiff alleges:

1. Defendant _____ [*name*] is an individual, and at all times herein mentioned was a resident of _____ County, California.

2. Defendants Doe 1 through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants. Each reference in this complaint to "defendant," "defendants," or a specifically named defendant refers also to all defendants sued under fictitious names.

3. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned each of the defendants, including all defendants sued under fictitious names, was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of this agency and employment.

FIRST CAUSE OF ACTION
(Assault)

4. On or about _____ [*date*] at _____ [*location*] in _____ [*city*], California, defendant _____ [*name*] _____ [*state all acts of defendant that placed plaintiff in fear of a harmful or offensive contact, e.g.,* drew a knife from his coat pocket and threatened to kill plaintiff].

5. In doing the acts as alleged above, defendant intended to cause or to place plaintiff in apprehension of _____ [a harmful *or* an offensive] contact with plaintiff's person.

6. As a result of defendant's acts as alleged above, plaintiff, in fact, was placed in great apprehension of _____ [a harmful *or* an offensive] contact with plaintiff's person.

SECOND CAUSE OF ACTION
(Battery)

7. Immediately thereafter, defendant _____ [*name*] _____ [*state all acts of defendant that constituted a harmful or offensive contact with plaintiff, e.g.,* placed the tip of the knife under plaintiff's chin and cut plaintiff across the neck with the blade of the knife].

8. In doing the acts as alleged above, defendant acted with the intent to make a contact with plaintiff's person.

FIRST AND SECOND CAUSES OF ACTION
(Continued)

9. At no time did plaintiff consent to any of the acts of defendant alleged in the first and second causes of action, above.

[10. _____ [*Allege any specific physical injuries suffered by plaintiff, e.g.,* As a proximate result of the acts of defendant as alleged in the first and second causes of action, plaintiff's vocal chords were severed, and plaintiff has permanently lost his capacity of speech.]]

11. As a proximate result of the acts of defendant as alleged in the first and second causes of action, plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervous system and person, all of which have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that these injuries will result in some permanent disability to him/her.] As a result of these injuries, plaintiff has suffered general damages.

[*EITHER*]

12. As a further proximate result of defendant's acts, plaintiff has been damaged in that he/she has been required to expend money and incur obligations for medical services, x-rays, drugs, and sundries reasonably required in the

treatment and relief of the injuries herein alleged.

[*OR*]

12. As a further proximate result of the acts of defendant, plaintiff has incurred, and will continue to incur, medical and related expenses. The full amount of these expenses is not known to plaintiff at this time.

[*EITHER*]

13. As a further proximate result of the acts of defendant, plaintiff was prevented from attending to his/her usual occupation as a _____ [*state occupation*] for a period of _____ [*specify, e.g.,* 2 months] and thereby lost earnings to his/her damage.

[*OR*]

13. As a further proximate result of the acts of defendant, plaintiff was prevented from attending to his/her usual occupation as a _____ [*state occupation*] for a period of _____ [*specify, e.g.,* 2 months] as of the date of this complaint and continuing for an as yet undetermined period. Plaintiff thereby has lost and will lose earnings. [As a further proximate result of the acts of defendant, plaintiff's present and future earning capacity has been greatly impaired.]

[*CONTINUE*]

14. The aforementioned conduct of defendant was willful and malicious and was intended to oppress and cause injury to plaintiff. Plaintiff is therefore entitled to an award of punitive damages.

WHEREFORE, plaintiff prays judgment on both causes of action against defendant(s) as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For lost earnings, past and future, according to proof;

4. For punitive damages;

5. For interest as allowed by law;

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____

[*party's status and name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a complaint to allege causes of action for both an assault and battery from relatively contemporaneous acts by the defendant, for example, threatening with a knife and immediately thereafter cutting plaintiff with the knife. It may be modified to allege only an assault by deleting the second cause of action. It may also be modified to allege only a battery by deleting the first cause of action.

An assault without a battery might involve the use of a weapon to frighten without any intent to actually use it [*see, e.g., Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 6-7, 146 P.2d 57]* ; a battery without an assault might occur in the case of an offensive contact with someone who is asleep or unconscious [*see Zanotto v. Marogna (1954) 124 Cal. App. 2d 329, 331-332, 268 P.2d 826]* . For further discussion of the distinction between the causes of action for assault and battery, see [3], *below*.

[3] Allegations

[a] General Allegations

In addition to the allegations commonly used for capacity, fictitiously named defendants, and agency (Paragraphs 1 and 3), the complaint alleges the following:

- The defendant's acts that constituted an assault, that is, the acts that placed plaintiff in apprehension of a harmful or offensive contact (Paragraph 4).
- The defendant's acts that constituted a battery, that is, the acts of harmful or offensive contact (Paragraph 7).
- The defendant's intent to cause the apprehension (Paragraph 5).
- The defendant's intent to actually make the contact (Paragraph 8).
- The plaintiff's actually feeling apprehension (Paragraph 6).
- The plaintiff's lack of consent to the defendant's act (Paragraph 9).

Paragraphs 4, 5, and 6 are essential elements of assault [*see Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 6-7, 146 P.2d 57* ; *see also § 58.15*]. Paragraphs 7 and 8 are essential elements of battery [*see Barbara A. v. John G. (1983)*

145 Cal. App. 3d 369, 375, 193 Cal. Rptr. 422 ; *see also § 58.13*]. Lack of consent is an element of any intentional tort [*see Rains v. Superior Court (1984) 150 Cal. App. 3d 933, 938, 198 Cal. Rptr. 249]* .

[b] Assault Allegations

The allegations of assault contained in this form of complaint are those of the commonly understood civil tort [*see Lowry v. Standard Oil Co. (1944)63 Cal. App. 2d 1, 6-7, 146 P.2d 57]* and not those of the crime of assault as defined in the Penal Code [*see Penal Code § 240*]. Despite the common use of criminal assault as a civil jury instruction [*see, e.g., Bartosh v. Banning (1967) 251 Cal. App. 2d 378, 386, 59 Cal. Rptr. 382]* , there are significant dissimilarities between the civil and criminal standards [*see People v. Wolcott (1983) 34 Cal. 3d 92, 99, 192 Cal. Rptr. 748, 665 P.2d 520* ; *see also §§ 58.12* and *58.15[1]*].

[c] Damage Allegations

The complaint also contains allegations of:

- Specific physical injury (Optional Paragraph 10).
- General damages (Paragraph 11).
- Special damages for medical expenses (Alternative Paragraph 12).
- Special damages for lost earnings (Alternative Paragraph 13).
- Punitive damages (Paragraph 14).

[d] Battery Allegations

This form alleges the defendant's intent to make contact with plaintiff's person (Paragraph 8). Intent to make contact is the requisite intent for battery [*see Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 315, 253 P.2d 675* ; *see also § 58.13[3]*]. Battery may also be committed in the case of unintended contact if the defendant acted with the intent to place plaintiff in fear of great bodily harm [*Weisbart v. Flohr (1968) 260 Cal. App. 2d 281, 284-285, 67 Cal. Rptr. 114]* . In such a situation, Paragraphs 7 and 8 should be modified to alleged an inadvertent contact from an intent to assault. Paragraphs 7 and 8 may also be modified to allege a battery committed with transferred intent, that is, the defendant intended an offensive contact with one person but actually made contact with another [*see Singer v. Marx (1956) 144 Cal. App. 2d 637, 642, 301 P.2d 440]* .

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the actionis a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[5] Venue

Venue of the action may be based on the residence of defendant (Paragraph 1) or the location of the assault (Paragraph 4) [*see Code Civ. Proc. § 395(a)*]. For further discussion, see Ch. 571, *Venue* .

[6] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281*, *3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see *Ch. 177, Damages, § 177.40* et seq., and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11*, *425.115*].

[7] Cross References

[a] General Format

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue* , Pt. I

For alternative forms of verification, see Ch. 572, *Verification*

[b] Damages

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, § 177.40* et seq.

[c] Intentional Infliction of Emotional Distress

For forms of complaint to recover damages for intentional infliction of emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsDamagesPunitive DamagesGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral Overview

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6-58 California Forms of Pleading and Practice--Annotated § 58.51

§ 58.51 Judicial Council Trial Court Pleading Forms [Code Civ. Proc. § 425.12; Cal. Judicial Council Form PLD-PI-001(3)]--Causes of Action for Assault and Battery

[1] FORMS Judicial Council Trial Court Pleading Forms [Code Civ. Proc. § 425.12; Cal. Judicial Council Form PLD-PI-001(3)]--Causes of Action for Assault and Battery

Click here to view image.

[2] Use of Form

[a] Intentional Tort Forms

These forms are illustrations of the Judicial Council approved forms for use to allege a cause of action for an intentional tort [*see Code Civ. Proc. § 425.12*; Cal. Judicial Council Form PLD-PI-001(3)]. The first form is an example of allegations that state a cause of action for assault. The second form is an example of a cause of action for battery. For further discussion, see *§ 58.51*. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[b] Separate Causes of Action

A separate cause-of-action form must be filled out for each cause of action to be pleaded. For greater clarity if multiple causes of action are pleaded, it is recommended that a title of the cause of action be included somewhere on the form. These forms are illustrated with a title under the reference to "Intentional Tort." Also, the identifying paragraph number of additional causes of action should be changed to match the cause of action number (note change of IT-1 to IT-2 in second cause of action).

[c] Complaint Must be Attached

A cause-of-action form may not be used alone, but must be attached to the Judicial Council form of complaint or cross complaint for personal injury, property damage, or wrongful death [*see Cal. Rules of Ct., Rule 1.45*]. Use of the Judicial

Council pleading forms is optional [*see Code Civ. Proc. § 425.12*].

[d] Completing Judicial Council Form of Complaint

In filling out the approved complaint form for use with these attachments, the box labeled "OTHER" in the caption to the complaint should be checked, and the cause of action should be specified, for example, by inserting "INTENTIONAL TORTS ASSAULT AND BATTERY." The appropriate injuries should be noted in Paragraph 8 and the appropriate prayer for compensatory damages should be checked in Paragraph 10. Additionally, the box labeled "Intentional Tort" in Paragraph 11 of the approved complaint form must be checked.

For a filled-out example of the Judicial Council complaint for personal injury, property damage, and wrongful death, see Ch. 380, *Negligence* . For general information relating to the use of Judicial Council complaint forms, see Ch. 123, *Complaints and Cross Complaints* .

[e] Completing Judicial Council Form Attachments

The short title of the case, as taken from the caption of the complaint in the box at the top left corner of the form, should be entered at the top of the attachment. The number of the cause of action must be entered in the space provided below the title. The appropriate box labeled "Complaint" or "Cross-Complaint" must be checked to indicate the document to which the form is attached.

The page number that the attachment represents as to the entire form of complaint must be inserted. The complaint form is three pages long; thus, the first cause-of-action attachment will be page 4.

This form provides a box that, when checked, alleges that the Doe defendants specified along with specifically named defendants "was the legal (proximate) cause of damages to plaintiff." This language may be sufficient to meet the requirement that the complaint set forth a cause of action against fictitiously named defendants [*see Code Civ. Proc. § 474*; *Marasco v. Wadsworth (1978) 21 Cal. 3d 82, 87-88, 145 Cal. Rptr. 843, 578 P.2d 90]* . This box should always be checked and all Does named in the caption should be included. In line 4, the word "was" should be changed to "were" and the word "defendant" should be changed to "defendants." As a precautionary measure, an allegation tying all fictitiously named defendants to the allegations of the cause of action is also included (Paragraph a). For further discussion, see Ch. 20, *Allegations Commonly Used* .

[f] Exemplary Damages Attachment

If exemplary damages are sought under *Civ. Code § 3294*, the approved Judicial Council form of attachment for exemplary damages should be used [*see* Cal. Judicial Council Form PLD-PI-001(6); *see also* Judicial Council *form in Ch. 177, Damages, § 177.40* et seq.].

[3] Cross References

For general cross references relating to complaints for assault and battery, see *§ 58.50[7]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-58 California Forms of Pleading and Practice--Annotated § 58.52

§ 58.52 Allegations--Assault and Battery Committed With Gun

[1] FORM Allegations: Assault and Battery Committed With Gun

FIRST CAUSE OF ACTION
(Assault)

1. On or about _____ [*date*] at _____ [*location*] in _____ [*city*], California, defendant _____ [*name*] produced a gun that had been concealed on his/her person, pointed the barrel of the gun at plaintiff's head, and threatened to kill plaintiff.

2. In doing the acts as alleged above, defendant intended to place plaintiff in apprehension of great bodily harm.

3. As a result of defendant's acts as alleged above, plaintiff, in fact, was placed in great apprehension of great bodily harm.

SECOND CAUSE OF ACTION
(Battery)

4. Immediately thereafter, defendant _____ [*name*] pulled the trigger of the gun, firing a bullet that struck plaintiff in the neck, causing plaintiff great bodily injury.

5. In doing the acts as alleged above, defendant further acted with the intent to make a contact with plaintiff's person.

[2] Use of Form

The form in [1], *above*, is an example of allegations for use in a complaint for assault and battery if the acts that constitute the assault and battery were committed with a gun. These allegations may be substituted for Paragraphs 4-8 in Form, § 58.50[1]. They may also be used as the charging allegations on the Judicial Council intentional tort

cause-of-action attachments to a complaint for personal injury [for an illustration of that form, *see § 58.51[1]*].

Only the first cause of action (assault) may be pleaded if there was no actual contact of a bullet with plaintiff's person, for example, shooting and missing, or brandishing the gun at plaintiff in a menacing manner without actually firing it. Only the second cause of action (battery) may be pleaded in the case of injury by gunshot under circumstances in which plaintiff was unaware that he or she was the target of a bullet.

[3] Cross References

For general discussion and cross references relating to complaints for assault and battery, see *§ 58.50[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsRequirementsTortsIntentional TortsAssault & BatteryGeneral Overview

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6-58 California Forms of Pleading and Practice--Annotated § 58.53

§ 58.53 Allegations--Assault and Battery Committed by Beating With Hands and Feet

[1] FORM Allegations--Assault and Battery Committed by Beating With Hands and Feet

FIRST CAUSE OF ACTION
(Assault)

1. On or about _____ [*date*] at _____ [*location*] in _____ [*city*], California, defendant _____ [*name*] approached plaintiff in a menacing manner, with closed fists, and stated his/her intention of striking plaintiff with his/her hands and feet.

2. In doing the acts as alleged above, defendant intended to place plaintiff in apprehension of great bodily harm.

3. As a result of defendant's acts as alleged above, plaintiff, in fact, was placed in great apprehension of great bodily harm.

SECOND CAUSE OF ACTION
(Battery)

4. Immediately thereafter, defendant _____ [*name*] struck plaintiff in the face with his/her fists, knocking plaintiff to the ground, whereupon defendant proceeded to kick plaintiff numerous times, directing the blows to plaintiff's head and body. Thereafter, defendant jumped on top of plaintiff while plaintiff remained prone on the ground and proceeded to strike plaintiff with his/her closed fist numerous times in the face.

5. In doing the acts as alleged above, defendant acted with the intent to make a contact with plaintiff's person.

[2] Use of Form

The form in [1], *above,* is an example of allegations for use in a complaint for assault and battery if the acts that

constitute the assault and battery were committed by the defendant with his or her hands and feet. These allegations may be substituted for Paragraphs 4-8 in § 58.50[1]. They may also be used as the charging allegations on the Judicial Council intentional tort cause-of-action attachments to a complaint for personal injury [*see § 58.51[1]*].

Only the first cause of action (assault) may be pleaded if the defendant did not make actual contact with plaintiff's person, for example, if defendant only shook his or her fist in plaintiff's face and threatened to hit plaintiff. Only the second cause of action (battery) may be pleaded in the case of injury by beating under circumstances in which plaintiff was unaware that he or she was about to be attacked, such as if plaintiff was attacked from the rear and without warning [*see Zanotto v. Marogna (1954) 124 Cal. App. 2d 329, 331-332, 268 P.2d 826* ; Prosser and Keeton on Torts, ch. 2, § 10 (West 5th ed. 1984)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-58 California Forms of Pleading and Practice--Annotated § 58.54

§ 58.54 Allegations--Assault and Battery Committed by Offensive Touching; Sexual Harassment

[1] FORM Allegations--Assault and Battery Committed by Offensive Touching; Sexual Harassment

FIRST CAUSE OF ACTION
(Assault)

1. On or about _____ [*date*] at _____ [*location*] in _____ [*city*], California, defendant _____ [*name*] approached plaintiff, made lewd and vulgar comments about certain parts of plaintiff's anatomy, and stated his/her intention to touch plaintiff on those parts. Defendant then maneuvered himself/herself so that plaintiff could not walk in any direction without passing by defendant.

2. In doing the acts as alleged above, defendant intended to place plaintiff in apprehension of an offensive contact with his/her person.

3. As a result of defendant's acts as alleged above, plaintiff, in fact, was placed in great apprehension of an offensive contact with his/her person.

SECOND CAUSE OF ACTION
(Battery)

4. Immediately thereafter, defendant _____ [*name*] did touch plaintiff's _____ [*specify parts or locations on plaintiff's body that were touched*].

5. In doing the acts as alleged above, defendant acted with the intent to make a contact with plaintiff's person.

6. At all times herein mentioned, plaintiff in fact found the contact made with his/her person by defendant to be offensive to his/her person and dignity.

[2] Use of Form

The form in [1], *above*, is an example of allegations for use in a complaint for assault and battery if the acts that constitute the assault and battery involve offensive touching and sexual harassment. These allegations may be substituted for Paragraphs 4-8 in § 58.50[1]. They may also be used as the charging allegations on the Judicial Council intentional tort cause-of-action attachments to a complaint for personal injury [*see § 58.51[1]*].

Only the first cause of action (assault) may be pleaded if the defendant did not make actual contact with plaintiff's person, for example, if defendant only made vulgar comments and threatened to touch plaintiff. Only the second cause of action (battery) may be pleaded in the case of offensive contact under circumstances in which plaintiff was unaware that he or she was about to be touched, such as if plaintiff was grabbed from the rear and without warning [*see Zanotto v. Marogna (1954) 124 Cal. App. 2d 329,331-332, 124 Cal. App. 2d 329, 332, 268 P.2d 826* ; Prosser and Keeton on Torts, ch. 2, § 10 (West 5th ed. 1984)].

[3] Cross References

For allegations involving sexual battery or rape, see *§§ 58.55* and *58.56*, respectively

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsIntentional TortsAssault & BatteryGeneral Overview

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Chapter 58 ASSAULT AND BATTERY
PART IV. FORMS

6-58 California Forms of Pleading and Practice--Annotated § 58.55

§ 58.55 Allegations--Sexual Battery

[1] FORM Allegations--Sexual Battery

[*EITHER*]

1. On or about _____ [*date*], at _____ [*location*] in _____ [*city*], California, defendant _____ [*name*] acted with the intent to cause a _____ [harmful *and/or* offensive] contact with plaintiff's _____ [*specify intimate part, e.g.,* groin], in that _____ [*describe defendant's conduct*], and a sexually offensive contact with plaintiff _____ [directly *or* indirectly] resulted in that _____ [*describe events resulting from defendant's conduct*].

[*AND/OR*]

2. On or about _____ [*date*], at _____ [*location*] in _____ [*city*], California, defendant _____ [*name*] acted with the intent to cause a _____ [harmful *and/or* offensive] contact with plaintiff by use of his/her _____ [*specify intimate part, e.g.,* sexual organ], in that _____ [*describe defendant's conduct*], and a sexually offensive contact with plaintiff _____ [directly *or* indirectly] resulted in that _____ [*describe events resulting from defendant's conduct*].

[*AND/OR*]

3. On or about _____ [*date*], at _____ [*location*] in _____ [*city*], California, defendant _____ [*name*] acted to cause an imminent apprehension of _____ [*describe harmful or offensive conduct of Paragraphs 1 and/or 2, above*] to plaintiff, and a

sexually offensive contact with plaintiff _____ [directly *or* indirectly] resulted in that _____ [*describe events resulting from defendant's conduct*].

[2] Use of Form

The form of allegation in [1], *above*, is for use in a complaint for assault and battery if the defendant's acts constituted statutory sexual battery [*see Civ. Code § 1708.5*]. For further discussion, see *§ 58.27*.

[3] Cross References

For allegation offensive touching or rape, see *§§ 58.54* or *58.56*, respectively

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsIntentional TortsAssault & BatteryElements of Battery

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6-58 California Forms of Pleading and Practice--Annotated § 58.56

§ 58.56 Allegations--Assault and Battery Committed by Forcible Rape

[1] FORM Allegations--Assault and Battery Committed by Forcible Rape

FIRST CAUSE OF ACTION
(Assault)

1. On or about _____ [*date*], at _____ [*location*] in _____ [*city*], California, defendant _____ [*name*] approached plaintiff, brandished a weapon at her, and threatened to do her great bodily harm unless she engaged in sexual intercourse with defendant.

2. In doing the acts as alleged above, defendant intended to place plaintiff in apprehension of great bodily harm and of offensive contact with her person.

3. As a result of defendant's acts as alleged above, plaintiff, in fact, was placed in great apprehension of great bodily harm and of offensive contact with her person.

SECOND CAUSE OF ACTION
(Battery)

4. Immediately thereafter, defendant _____ [*name*] seized plaintiff, threw her to the ground, and engaged in an act of forcible and unconsented sexual intercourse with her.

5. In order to accomplish his unlawful purpose and act, defendant struck and beat plaintiff and used force to restrain plaintiff's movement.

6. In doing the acts as alleged above, defendant acted with the intent to make a contact with plaintiff's person.

[2] Use of Form

The form in [1], *above*, is an example of allegations for use in a complaint for assault and battery if the acts that constitute the assault and battery involve rape. These allegations may be substituted for Paragraphs 4-8 in § 58.50[1]. They may also be used as the charging allegations on the Judicial Council intentional tort cause-of-action attachments to a complaint for personal injury [*see § 58.51[1]*].

Only the first cause of action (assault) may be pleaded if the defendant did not actually rape plaintiff but only threatened to do so. Only the second cause of action (battery) may be pleaded in the case of unconsented sexual intercourse with a woman who was unconscious at the time [*see Zanotto v. Marogna (1954) 124 Cal. App. 2d 329, 331-332, 268 P.2d 826* ; Prosser and Keeton on Torts, ch. 2, § 10 (West 5th ed. 1984)].

[3] Cross References

For allegations relating to offensive touching and sexual battery, see *§§ 58.54* and *58.55*, respectively

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsIntentional TortsAssault & BatteryElements of AssaultTortsIntentional TortsAssault & BatteryElements of Battery

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Chapter 58 ASSAULT AND BATTERY
PART IV. FORMS

6-58 California Forms of Pleading and Practice--Annotated § 58.57

§ 58.57 Allegations--Battery Committed by Consensual Sexual Intercourse Fraudulently Induced Transmission of AIDS

[1] FORM Allegations--Battery Committed by Consensual Sexual Intercourse Fraudulently Induced Transmission of AIDS

_____ CAUSE OF ACTION
(Battery)

1. On or about _____ [*date*] at _____ [*location*] in _____ [*city*], California, defendant _____ [*name*] asked plaintiff to engage in an act of sexual intercourse with him/her.

2. Before agreeing to participate in the act, plaintiff inquired of defendant whether he/she was then or ever had been infected with any sexually transmitted disease, including Acquired Immunity Deficiency Syndrome (AIDS), or had ever tested positive for the AIDS antibody.

3. Defendant replied in the negative and denied that he/she had AIDS or any other sexually transmitted disease or had tested positive for the AIDS antibody.

4. In reliance on these representations of defendant, plaintiff then engaged in an act of sexual intercourse with defendant.

5. The representations of defendant were false, in that at that time, defendant was in fact infected with the AIDS virus and knew that he/she was so infected.

6. Had plaintiff known the true facts, he/she would not have consented to engage in sexual intercourse with defendant. Plaintiff's apparent consent to this act, therefore, was vitiated by the misrepresentation, and plaintiff did not consent to the act.

7. In doing the acts as alleged above, defendant acted with the intent to make a contact with plaintiff's person.

8. On learning the true facts, plaintiff found the contact made with his/her person by defendant to be harmful and offensive to his/her person and dignity.

9. As a proximate result of the acts of defendant, plaintiff has tested positive for the AIDS antibody.

[2] Use of Form

The form of allegations in [1], *above,* is for use in a complaint for battery if the acts that constitute the battery involve sexual intercourse for which consent was fraudulently induced by representations of freedom from disease, when in fact the defendant was infected with the virus for Acquired Immunity Deficiency Syndrome (AIDS). These allegations may be substituted for Paragraphs 4-10 in § 58.50[1]. They may also be used as the charging allegations on the Judicial Council intentional tort cause-of-action attachments to a complaint for personal injury [*see § 58.51[1]*]. This cause of action would generally be included in a complaint that also includes a cause of action for fraud or misrepresentation [*see* Ch. 269, *Fraud and Deceit*].

[3] Allegations

[a] Vitiation of Consent

The plaintiff has the burden of pleading and proving lack of consent to acts that otherwise would constitute a battery [*Rains v. Superior Court (1984) 150 Cal. App. 3d 933, 938, 198 Cal. Rptr. 249* ; *Kritzer v. Citron (1950) 101 Cal. App. 2d 33, 39-40, 224 P.2d 808]* . Absence of consent may be shown by proof that apparent consent was fraudulently induced [*Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 375, 193 Cal. Rptr. 422* ; *see § 58.13[5][e]*]. Therefore, this form includes allegations of the defendant's misrepresentations as to his or her freedom from disease (Paragraphs 1-5) in order to establish the vitiation of consent as alleged in Paragraph 6.

[b] Intent

The intent necessary to constitute a battery is not an intent to cause harm but an intent to do the act that causes the harm [*Singer v. Marx (1956) 144 Cal. App. 2d 637, 641, 301 P.2d 440]* . Under this standard, the only intent necessary with regard to the transmission of AIDS to a sexual partner is the intent to engage in sexual intercourse, not an intent to infect the other with the disease. For further discussion on the intent required for battery, see *§ 58.13[3]*.

[c] Right of Privacy

The interaction of traditional tort causes of action, including battery, with the constitutional right of privacy as applied to acts of consensual sexual intercourse is currently an unresolved area of California law. Causes of action for battery have been held to be well pleaded despite the right of privacy in cases involving transmission of herpes [*see Kathleen K. v. Robert B. (1984) 150 Cal. App. 3d 992, 994, 198 Cal. Rptr. 273]* and misrepresentation of infertility [*Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 374-375, 193 Cal. Rptr. 422]* . However, a cause of action for fraud has been found barred by the right of privacy in a case involving misrepresentation as to birth control use [*see Stephen K. v. Roni L. (1980) 105 Cal. App. 3d 640, 164 Cal. Rptr. 618]* . For further discussion, see *§ 58.26*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsIntentional TortsAssault & BatteryElements of Battery

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6-58 California Forms of Pleading and Practice--Annotated § 58.58

§ 58.58 Allegations--Count for Conspiracy

[1] FORM Allegations--Count for Conspiracy

COUNT FOR CONSPIRACY

1. On or about _____ [*date*], defendants _____ [*specify all defendants alleged to have conspired*] knowingly and willfully conspired and agreed among themselves to assault and batter plaintiff [in that _____ (*state facts that show how defendants who did not actually commit assault or battery entered into agreement that acts be committed, e.g.,* when plaintiff entered the bar, defendant John Jones stated to defendant Robert Smith, "There's the guy who I saw with your girl friend. Why don't you go teach him a lesson?")].

2. Thereafter and in furtherance of this conspiracy, defendant _____ [*name of defendant who actually committed the assault and battery*] did, in fact, assault and batter plaintiff as alleged in the first and second causes of action.

3. Defendants _____ [*names of all defendants who did not actually commit assault and battery but are alleged to have conspired as subsequent aiders and abettors*] furthered the conspiracy by lending aid and encouragement to defendant _____ [*name of defendant who committed assault and battery*] [in that _____ (*state facts that show how defendants encouraged acts, e.g.,* as defendant Robert Smith was assaulting and battering plaintiff, defendant Joe Brown urged defendant Robert Smith to continue the attack, stating, "Come on, give it to him good. Show him what happens to guys who mess with us!")].

4. As a proximate result of this conspiracy, plaintiff suffered injury and damages as hereinafter alleged.

[2] Use of Form

The form of allegations in [1], *above,* is for use to allege a count for conspiracy to commit assault and battery. It may be added to the allegations in § 58.50[1], after the first and second causes of action and before the allegations of damages.

Paragraphs 1 and 3 include optional provisions to specify facts that show initial formation of the conspiracy or subsequent encouragement of it. If these facts are known, they should be pleaded. However, it is not required, and formation and participation may be pleaded in general language [*see Greenwood v. Mooradian (1955) 137 Cal. App. 2d 532, 537-538, 290 P.2d 955]* . For further discussion, see Ch. 126, *Conspiracy* .

[3] Allegations

[a] Civil Conspiracy

This form alleges the elements of a civil conspiracy, which are as follows [*see Unruh v. Truck Insurance Exchange (1972) 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815, 498 P.2d 1063]* :

- Formation of the conspiracy through agreement of initial conspirators (Paragraph 1).

- Tortious acts done in furtherance of the conspiracy (Paragraph 2, referring to charging causes of action).

- Acts of cooperation, aid, encouragement, or ratification of conspirators who participated after formation (Paragraph 3) [*see Orser v. George (1967) 252 Cal. App. 2d 660, 667, 60 Cal. Rptr. 708]* .

- Damages resulting from the acts done pursuant to the conspiracy (Paragraph 4, referring to subsequent allegations of damages).

For further discussion, see *§ 58.16[1]*, and Ch. 126, *Conspiracy* .

[b] Conspiracy to Assault and Batter

Nonassailants may be held liable for conspiracy to commit an assault or battery if they agree with the perpetrator before the fact that the acts be committed [*see Michael R. v. Jeffrey B. (1984) 158 Cal. App. 3d 1059, 1069, 205 Cal. Rptr. 312]* . If a conspiracy is in progress, those who subsequently cooperate, aid, encourage, or ratify the acts are also liable as coconspirators for all the acts of the conspiracy [*Orser v. George (1967) 252 Cal. App. 2d 660, 667, 60 Cal. Rptr. 708]* . For further discussion, see *§ 58.16[1]*, and Ch. 126, *Conspiracy* .

[c] Counts and Causes of Action

Generally, if recovery is sought for invasion of the same primary right, it is sought under the same cause of action, even if sought on a different legal ground or theory [*see Mattson v. City of Costa Mesa (1980) 106 Cal. App. 3d 441, 448-449, 164 Cal. Rptr. 913]* . Different legal grounds or theories for recovery for invasion of the same right are commonly denominated as "counts."

An agreement of persons, alone, is not a tort, and conspiracy brings liability only if a wrongful act is done pursuant to the agreement [*see Unruh v. Truck Insurance Exchange (1972) 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815, 498 P.2d 1063]* . Thus, conspiracy is a count whose function is to bring liability to persons who, absent the conspiracy, would not be liable to plaintiff for the injuries incurred [*see Unruh v. Truck Insurance Exchange (1972) 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815, 498 P.2d 1063]* . For further discussion, see Ch. 126, *Conspiracy* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsIntentional TortsAssault & BatteryElements of AssaultTortsIntentional TortsAssault & BatteryElements of BatteryTortsProcedureMultiple DefendantsConcerted

ActionCivil ConspiracyGeneral Overview

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6-58 California Forms of Pleading and Practice--Annotated § 58.59

§ 58.59 Allegations--Agency--Act Committed Within Scope of Employment

[1] FORM Allegations--Agency--Act Committed Within Scope of Employment

1. [Plaintiff is informed and believes and thereon alleges that] [A]t all times herein mentioned, defendant _____ [*name of employee*] was the employee and agent of defendant _____ [*name of employer*], and in doing the things hereinafter alleged, was acting within the course and scope of that agency.

[2] Use of Form

The form of allegation in [1], *above,* is for use to allege the liability of an employer under the doctrine of respondeat superior for an assault and battery committed by an employee [*see Civ. Code §§ 2338, 2339*; *see also § 58.16[4]*]. This allegation may be inserted into the complaint in § 58.50[1] after Paragraph 3 as an additional allegation of agency. It should not be used instead of the universal agency allegation set forth in Paragraph 3 because of the need to allege agency involving fictitiously named defendants. Alternatively, this form may be used as a numbered count for liability under the doctrine of respondeat superior [*see* discussion in *§ 58.58[3][c]*]. Under appropriate facts, it may be used in conjunction with a separate count for the negligence of the employer in hiring or supervising the employee who committed the assault and battery [*see City of Los Angeles v. Superior Court (1973) 33 Cal. App. 3d 778, 782-783, 109 Cal. Rptr. 365* ; *see also* Ch. 427, *Principal and Agent*].

[3] Cross References

For additional forms of allegations of agency, see Ch. 20, *Allegations Commonly Used*

For a general form of complaint by a third party against an employer for the torts of an employee, see Ch. 248, *Employer's Liability for Employee's Torts*

For general discussion of employer liability for acts of employees under the doctrine of respondeat superior and for forms of punitive damages allegations against an employer, see Ch. 427, *Principal and Agent*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsIntentional TortsAssault & BatteryGeneral OverviewTortsVicarious LiabilityEmployersScope of EmploymentGeneral Overview

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6-58 California Forms of Pleading and Practice--Annotated § 58.60

§ 58.60 Allegations--Tort of Stalking

[1] FORM Allegations--Tort of Stalking

1. On or about _____ [*date*], at _____ [*location*] in _____ [*city*], California, defendant _____ [*name*] engaged in a pattern of conduct with the intent to follow, alarm, or harass plaintiff. Such pattern of conduct is corroborated by _____ [*set forth independent corroborating evidence*].

2. As a result of defendant's pattern of conduct alleged above, plaintiff reasonably feared for his/her safety [, or the safety of an immediate family member].

[*EITHER*]

3. In doing the acts as alleged above, defendant made a credible threat with the intent to place plaintiff in reasonable fear for his/her safety, [or the safety of an immediate family member,] in that _____ [*describe credible threat, e.g.,* defendant made a verbal threat to harm plaintiff with the intent and apparent ability to carry out that threat]. On or about _____ [*date(s)*], plaintiff clearly and definitively demanded that defendant cease and abate his/her pattern of conduct and defendant persisted in his/her pattern of conduct.

[*AND/OR*]

4. In doing the acts as alleged above, defendant violated a restraining order issued on _____ [*date*], by _____ [*identify court and judge that issued restraining order*], [*add if appropriate:* pursuant to *Code of Civil Procedure Section 527.6,*] prohibiting the acts alleged above. [A copy of the restraining order is attached hereto as Exhibit A and incorporated herein as if fully copied and set forth at length.]

[2] Use of Form

The form of allegation in [1], *above*, is for use in a complaint for the tort of stalking if the defendant's pattern of conduct constituted stalking under the statute [*see Civ. Code § 1708.7*]. These allegations may be substituted for Paragraphs 4-8 in § 58.50[1]. They may also be used as the charging allegations on the Judicial Council intentional tort cause-of-action attachments to a complaint for personal injury [*see § 58.51[1]*].

In order for the defendant to be liable for the tort of stalking, the plaintiff must prove all of the elements listed in the statute [*see Civ. Code § 1708.7(a)* and § 58.28, Elements of Tort of Stalking, *above*] and must support allegations of the defendant's pattern of conduct, the intent of which was to follow, alarm, or harass the plaintiff, with independent corroborating evidence [*see Civ. Code § 1708.7(a)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsIntentional TortsAssault & BatteryElements of Assault

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6-58 California Forms of Pleading and Practice--Annotated § 58.61

§ 58.61 Complaint for Damages for Battery Against City and Employee Law Enforcement Officer: Unreasonable Force in Effecting Arrest

[1] FORM Complaint for Damages for Battery Against City and Employee Law Enforcement Officer: Unreasonable Force in Effecting Arrest

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name of city*],	)	COMPLAINT FOR DAMAGES
_____ [*name of law enforcement officer*],	)	[Amount demanded _____ (exceeds or does not exceed) $10,000]
[and DOES I through _____,]	)	[LIMITED CIVIL CASE]
Defendants.	)	
	)	

_____

Plaintiff alleges:

1. Defendant City of _____ is, and at all times herein mentioned was, a municipal corporation, duly organized under the laws of the State of California and situated in the County of _____.

2. Defendant _____ [*name of law enforcement officer*] is an individual, who at all times herein mentioned was an employee of defendant City of _____ as a _____ [*specify, e.g.,* police officer], and in doing the acts hereinafter described, acted within the course and scope of his/her employment.

3. [*Fictitious name allegation. See § 58.50[1], Paragraph 2.*]

4. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned each of the defendants sued under fictitious names was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of this agency and employment.

5. On or about _____ [*date*], plaintiff _____ [*allege where plaintiff was and what he/she was doing at time of injury, e.g.*, was standing at the corner of Main Street and First Avenue in defendant City of _____ waiting for a bus].

6. At that time and place, defendant _____ [*name of law enforcement officer*] approached plaintiff and stated that plaintiff was under arrest [for _____ (*specify if pertinent*)].

7. Plaintiff [protested his/her innocence of the charge, but otherwise] did not attempt to flee or physically resist arrest in any manner whatsoever.

8. Despite plaintiff's willingness to submit to arrest, defendant _____ [*name of law enforcement officer*] _____ [*specify acts of unreasonable force, e.g.*, struck plaintiff in the back of his head with a billy club, knocking plaintiff to the ground, and kicked plaintiff numerous times on and about the head, shoulders, back, rib cage, and legs, before finally grabbing plaintiff by the hair and ordering him to enter a police car].

9. In doing the acts as alleged above, defendant acted with the intent to make a contact with plaintiff's person.

10. At no time did plaintiff consent to any of the acts of defendant alleged above.

[11. _____ (*Allege any specific physical injuries suffered by plaintiff, e.g.*, As a proximate result of the acts of defendants, plaintiff suffered numerous cuts and bruises over his/her entire body, two cracked ribs, and a cerebral concussion).]

12. [*General damages allegation. See § 58.50[1], Paragraph 11.*]

13. [*Medical expenses allegation. See § 58.50[1], Alternative Paragraphs 12.*]

14. [*Lost earnings allegation. See § 58.50[1], Alternative Paragraphs 13.*]

15. On or about _____ [*date*], plaintiff _____ [delivered *or* mailed] a claim to defendant City of _____ through its _____ [*position of city employee to whom claim was presented*] for the injuries, disability, losses, and damages suffered and incurred by him/her by reason of the above-described occurrence, all in compliance with the requirements of *Section 905 of the Government Code*. A copy of the claim is attached hereto as Exhibit A and made a part hereof.

[*EITHER*]

16. On or about _____ [*date*], defendant City of _____ [rejected the claim in its entirety *or* allowed the claim in the amount of $_____ and rejected it as to the remainder].

[*OR*]

16. Defendant City of _____ failed to act on the claim within a period of 45 days after its presentation,

and the claim was thus deeded rejected under the provisions of *Section 912.4 of the Government Code*at the expiration of the 45-day period on _____ [*date 45 days after date on which claim was presented*].

[*CONTINUE*]

WHEREFORE, plaintiff prays judgment defendants as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For lost earnings, past and future, according to proof;

4. For costs of suit incurred herein; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*party's status and name*]

[*Verification, if desired. See § 58.50[1].*]

[2] Use of Form

The form in [1], *above,* is for use as a complaint to allege a battery against a city and its employee law enforcement officer for the use of excessive force in effecting an arrest. It may be modified for use against any other public entity that engages in law enforcement functions, such as the state, a county, or a special district, by selecting appropriate allegations of capacity from forms in Ch. 464, *Public Entities and Officers: California Tort Claims Act* . It may be expanded to also allege an assault in addition to a battery by adapting the allegations in the first cause of action in § 58.50[1].

[3] Allegations

This form alleges the capacity of the city (Paragraph 1), the specific employment-agency relationship between the city and the officer (Paragraph 2), and the existence of fictitiously named defendants and their universal agency (Paragraphs 3, 4).

Paragraphs 5 through 10 set forth the facts establishing the use of the excessive force and the elements of a cause of action for battery. Paragraphs 11-14 allege injury and damages. For discussion, see *§ 58.13*, Cause of Action for Battery, *above*, and § 58.50[2]-[7].

Paragraph 15 alleges the filing of a claim for compensation with the defendant city, which is a condition precedent to an action against the city for damages [*see Gov. Code § 905*]. Paragraph 16 alleges the resolution of the claim that removes the condition precedent and allows a civil action to proceed, either the rejection of the claim in whole or in part (first alternative), or the passing of 45 days without any action being taken on the claim (second alternative) [*Gov. Code § 912.4*].

[4] Verification

A public entity need not verify its answer even though the complaint is verified [*see Code Civ. Proc. § 446*]. The verification of a complaint against a public entity does, however, preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*].

[5] Venue

In an action against a local public entity for personal injuries, the proper venue is the county in which the public entity is situated [*Code Civ. Proc. § 394*].

[6] Cross References

For additonal discussion and cross references relating to complaints for assault and battery in general, see *§§ 58.50[2] -[7]*

For discussion of actions against public entities and public employees, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsIntentional TortsAssault & BatteryElements of BatteryTortsPublic Entity LiabilityExcessive Force

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6-58 California Forms of Pleading and Practice--Annotated § 58.62

§ 58.62 Allegations Against City and Employee Law Enforcement Officer--Battery Committed by Unlawful Arrest

[1] FORM Allegations Against City and Employee Law Enforcement Officer--Battery Committed by Unlawful Arrest

1. On or about _____ [*date*], plaintiff _____ [*allege where plaintiff was and what he/she was doing at time of injury, e.g.*, was standing at the corner of Main Street and First Avenue in defendant City of _____ waiting for a bus.

2. At that time and place, defendant _____ [*name of law enforcement officer*] approached plaintiff and stated that plaintiff was under arrest [for _____ (*specify if pertinent*)].

3. _____ [*Allege all facts constituting battery that occurred during course of arrest and detention, e.g.*, defendant _____ (*name of law enforcement officer*) then ordered plaintiff to stand against defendants' vehicle with his arms extended touching the hood and his feet spread wide apart. Defendant then performed a full-body search of plaintiff's person].

4. Plaintiff is informed and believes and thereon alleges that at the time of the above-described events, and at all other pertinent times, defendants had no warrant for the arrest of plaintiff or other facts or information that constituted probable cause that plaintiff had ever committed or was about to commit a crime, so as to provide grounds for a lawful arrest; nor did defendants have any facts or information that constituted a reasonable suspicion that defendant was involved in any unlawful activity so as to provide grounds for any detention or restraint whatsoever on plaintiff's freedom of movement, and that plaintiff's detention and arrest was, therefore, unlawful.

5. In doing the acts as alleged above, defendant acted with the intent to make a contact with plaintiff's person.

6. At all times stated herein, plaintiff found the contact made with his/her person by defendant to be harmful and offensive to his/her person and dignity.

7. At no time did plaintiff consent to any of the acts of defendant alleged above.

[2] Use of Form

The form of allegations in [1], *above,* is for use in a complaint against a city and its employee law enforcement officer for battery committed by offensive touching in the course of an unlawful arrest. It is designed to be substituted for the charging allegations in § 58.61[1] (Paragraphs 5-10). It may be expanded to allege assault also by adapting the allegations in the first cause of action in § 58.50[1]. The allegations in this form should be combined with allegations of a cause of action for false imprisonment. For the appropriate form, see Ch. 257, *False Imprisonment* .

[3] Cross References

For further discussion of the legality or illegality of a detention or arrest, see Ch. 257, *False Imprisonment*

For discussion of the law of search and seizure, including legality of detention and arrest, see Erwin et al., California Criminal Defense Practice, chs. 10, 11 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsIntentional TortsAssault & BatteryElements of BatteryTortsIntentional TortsFalse ArrestGeneral Overview

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Chapter 58 ASSAULT AND BATTERY
PART IV. FORMS

6-58 California Forms of Pleading and Practice--Annotated § 58.63

§ 58.63 Allegations--Tort of Domestic Violence

[1] FORM Allegations--Tort of Domestic Violence

[*EITHER*]

1. On or about _____ [*date*], at _____ [*location*] in_____ [*city*], California, defendant _____ [*name*] acted with the intent to cause a bodily injury, in that _____ [*describe defendant's conduct*].

[*AND/OR*]

2. On or about _____ [*date*], at _____ [*location*] in_____ [*city*], California, defendant _____ [*name*] acted recklessly to cause a bodily injury, in that _____ [*describe defendant's conduct*].

[*AND/OR*]

3. On or about _____ [*date*], at _____ [*location*] in_____ [*city*], California, defendant _____ [*name*] acted to cause an imminent apprehension of serious bodily injury, in that _____ [*describe defendant's conduct*].

[*AND*]

4. Plaintiff is _____ [an adult *or* a fully emancipated minor] and is defendant's _____ [spouse, former spouse, cohabitant, former cohabitant, *or* person with whom defendant _____ (has had

a child *or* is having a dating or engagement relationship *or* has had a dating or engagement relationship)].

[2] Use of Form

The form of allegations in [1], *above,* is for use in a complaint for assault and battery if the defendant's acts constituted domestic violence [*see Civ. Code § 1708.6*]. For further discussion, see *§ 58.30*.

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[Reserved]

§§ 58.64[Reserved]

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6-58 California Forms of Pleading and Practice--Annotated § 58.70

§ 58.70 Affirmatives Defense--Self-Defense

[1] FORM Affirmatives Defense--Self-Defense

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE TO THE _____ [*specify, e.g.,* FIRST AND SECOND] CAUSE(S) OF ACTION, defendant alleges:

1. At the time and place mentioned in the complaint, plaintiff willfully and wrongfully and without just cause or provocation assaulted [and battered] defendant by _____ [*specify acts that placed defendant in reasonable fear of bodily injury, e.g.,* running at defendant with clenched fists and threatening to strike defendant], placing defendant in reasonable fear of his/her personal safety and life.

2. Defendant responded to this assault by doing only those acts that were reasonably necessary for his/her self-defense and safety and was justified in doing those acts. These acts of defendant are the same acts of which plaintiff complains.

[2] Use of Form

The form in [1], *above,* is for use as an affirmative defense in an answer to a complaint for damages for assault and battery if defendant's acts that form the basis of the complaint were done in self defense. This form may be inserted into a general form of answer, to be found in Ch. 26, *Answers* . For discussion of self-defense, see *§ 58.19.*

[3] Separate Statement of Defense

Defenses set forth in an answer must be separately stated. Each defense must refer to the causes of action that it is intended to answer in a manner by which it may be intelligibly distinguished [*Code Civ. Proc. § 431.30(g)*]. For further discussion, see Ch. 26, *Answers* .

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsAssault & BatteryDefensesTortsIntentional TortsDefensesDefense of Self & Others

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6-58 California Forms of Pleading and Practice--Annotated § 58.71

§ 58.71 Affirmative Defenses--Defense of Third Person

[1] FORM Affirmative Defenses--Defense of Third Person

AS A [_____ (*if more than one, specify number, e.g., FIRST*)] SEPARATE AND AFFIRMATIVE DEFENSE TO THE _____ [*specify, e.g.,* FIRST AND SECOND] CAUSE(S) OF ACTION, defendant alleges:

1. At the time and place mentioned in the complaint, plaintiff willfully and wrongfully and without just cause or provocation assaulted [and battered] _____ [*name of third person and relationship to defendant, e.g.,* Mary Jones, who is defendant's wife], by _____ [*specify acts that placed defendant in reasonable fear of bodily injury to third person, e.g.,* grabbing her by the hair and throwing her to the ground], which, according to defendant's observations, placed _____ [*name of third person*] in fear of his/her personal safety and life.

2. Defendant responded to this assault by doing only those acts that were reasonably necessary for the defense and safety of _____ [*name of person defended*], and was justified in doing those acts. These acts of defendant are the same acts of which plaintiff complains.

[2] Use of Form

The form in [1], *above,* is for use as an affirmative defense in an answer to a complaint for damages for assault and battery if defendant's acts that form the basis of the complaint were done in defense of another person. This form may be inserted into a general form of answer, to be found in Ch. 26, *Answers* . For discussion of defense of others, see *§ 58.20*.

[3] Separate Statement of Defense

Defenses set forth in an answer must be separately stated. Each defense must refer to the causes of action that it is intended to answer in a manner by which it may be intelligibly distinguished [*Code Civ. Proc. § 431.30(g)*]. For further discussion, see Ch. 26, *Answers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsAssault & BatteryDefensesTortsIntentional TortsDefensesDefense of Self & Others

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6-58 California Forms of Pleading and Practice--Annotated § 58.72

§ 58.72 Affirmative Defense--Defense of Real Property by Ejecting Trespasser

[1] FORM Affirmative Defense--Defense of Real Property by Ejecting Trespasser

AS A [_____ (*if more than one, specify number, e.g., FIRST*)] SEPARATE AND AFFIRMATIVE DEFENSE TO THE _____ [*specify, e.g.,* FIRST AND SECOND] CAUSE(S) OF ACTION, defendant alleges:

1. At the time and place mentioned in the complaint, defendant was the owner of certain real property located in _____ County, California, more particularly described as _____ [*description*].

2. At the time and place mentioned in the complaint, plaintiff attempted to enter on defendant's property without permission and against the will of defendant.

3. The acts complained of by plaintiff were committed to prevent plaintiff from accomplishing his/her wrongful purpose in entering on the land of defendant, and the force employed by defendant was only that force necessary to prevent the wrongful entry by plaintiff and was not unreasonable or unwarranted.

[2] Use of Form

The form in [1], *above,* is for use as an affirmative defense in an answer to a complaint for damages for assault and battery if defendant's acts that form the basis of the complaint were done in defense of his or her real property by physically ejecting plaintiff who was trespassing on the property. This form may be inserted into a general form of answer, to be found in Ch. 26, *Answers* . For discussion of defense of property, see *§ 58.21*.

[3] Separate Statement of Defense

Defenses set forth in an answer must be separately stated. Each defense must refer to the causes of action that it is intended to answer in a manner by which it may be intelligibly distinguished [*Code Civ. Proc. § 431.30(g)*]. For further discussion, see Ch. 26, *Answers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsAssault & BatteryDefensesTortsIntentional TortsDefensesDefense of Property

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6-58 California Forms of Pleading and Practice--Annotated § 58.73

§ 58.73 Affirmative Defense--Recapture of Personal Property

[1] FORM Affirmative Defense--Recapture of Personal Property

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE TO THE _____ [*specify, e.g.,* FIRST AND SECOND] CAUSE(S) OF ACTION, defendant alleges:

1. At the time and place mentioned in the complaint, defendant was the owner of certain personal property consisting of _____ [*describe*], and had the right to immediate possession of this property.

2. Immediately prior to the alleged acts of defendant complained of, plaintiff had wrongfully and unlawfully seized the above-described property from defendant's possession, was withholding possession of this property from defendant, and was removing it from defendant' premises.

3. Plaintiff's seizure, withholding, and removal of defendant's property was without any original right of possession or claim of title whatsoever.

4. The acts complained of by plaintiff were committed immediately after plaintiff's acts of dispossession of defendant's property and were done solely to prevent plaintiff from accomplishing his/her unlawful purpose in seizing and withholding defendant's property. The force employed by defendant was only that force necessary to recapture the property from plaintiff.

[2] Use of Form

The form in [1], *above,* is for use as an affirmative defense in an answer to a complaint for damages for assault and battery if defendant's acts that form the basis of the complaint were done in defense of his or her personal property by recapturing the property after it had been taken by the plaintiff. This form may be inserted into a general form of answer, to be found in Ch. 26, *Answers* . For discussion of defense of property, see *§ 58.21[4]*.

[3] Separate Statement of Defense

Defenses set forth in an answer must be separately stated. Each defense must refer to the causes of action that it is intended to answer in a manner by which it may be intelligibly distinguished [*Code Civ. Proc. § 431.30(g)*]. For further discussion, see Ch. 26, *Answers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsAssault & BatteryDefensesTortsIntentional TortsDefensesDefense of Property

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[Reserved]

§ 58.74[Reserved]

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6-58 California Forms of Pleading and Practice--Annotated § 58.75

§ 58.75 Affirmative Defense--Merchant's Privilege to Detain Suspected Shoplifter

[1] FORM Affirmative Defense--Merchant's Privilege to Detain Suspected Shoplifter

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE TO THE _____ [*specify, e.g.,* FIRST AND SECOND] CAUSE(S) OF ACTION, defendant alleges:

1. At the time and place mentioned in the complaint, defendant _____ [*name*] was _____ [*specify facts bringing defendant within definition of "merchant" in Penal Code § 490.5(g)(2), e.g.,* the owner of _____ (*name of business*), a premises used for the retail sale of personal property capable of manual delivery].

2. At the time of the acts complained of in the complaint, defendant had probable cause to believe that plaintiff had stolen or attempted to steal merchandise, in that immediately prior to the acts complained of in the complaint, _____ [*specify facts establishing probable cause, e.g.,* defendant observed plaintiff remove a gold chain from a display case and place it in her purse].

3. Defendant responded to plaintiff's [attempted] theft by doing only those acts that were reasonably necessary in order to detain plaintiff for purposes of investigation and transfer to an appropriate law enforcement officer, and was justified in doing those acts as provided in *Penal Code Section 490.5(f)(7)*. These acts of defendant are the same acts of which plaintiff complains.

[2] Use of Form

The form in [1], *above,* is for use as an affirmative defense in an answer to a complaint for damages for assault and battery arising from the detention of a suspected shoplifter [*see Penal Code § 490.5(f)*]. The form alleges that defendant had reasonable cause to detain plaintiff and used only the force necessary to effect the detention [*see Penal Code § 490.5(f)(7)*]. This form may be inserted into a general form of answer, to be found in Ch. 26, *Answers* . It may be adapted for use by a librarian defendant involved in a detention of one suspected of unlawfully removing books or other materials from a library, or for use by a theater owner involved in a detention of one suspected of attempting to operate

a video recording device within the premises of a motion picture theater without the authority of the owner of the theater [*see Penal Code § 490.5(f)(1)*]. For further discussion, see *§ 58.24*.

[3] Separate Statement of Defense

Defenses set forth in an answer must be separately stated. Each defense must refer to the causes of action that it is intended to answer in a manner by which it may be intelligibly distinguished [*Code Civ. Proc. § 431.30(g)*]. For further discussion, see Ch. 26, *Answers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsAssault & BatteryDefensesTortsIntentional TortsDefensesDefense of Property

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6-58 California Forms of Pleading and Practice--Annotated § 58.76

§ 58.76 Affirmative Defense--Opposing Demand for Punitive Damages--Plaintiff Provoked Altercation

[1] FORM Affirmative Defense--Opposing Demand for Punitive Damages--Plaintiff Provoked Altercation

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE TO THE _____ [*specify, e.g.,* FIRST AND SECOND] CAUSE(S) OF ACTION, defendant alleges:

1. The acts complained of by plaintiff were provoked by plaintiff's unlawful and wrongful conduct in that plaintiff willfully and maliciously _____ [*specify acts of provocation, e.g.,* directed vile and obscene language toward defendant and defendant's wife]. Plaintiff is, therefore, not entitled to an award of punitive damages.

[2] Use of Form

The form of affirmative defense in [1], *above,* is for use in an answer to a complaint for assault and battery that includes a prayer for punitive damages [*Civ. Code § 3294*] in which defendant alleges that the acts forming the basis of the complaint were done by defendant only after being provoked by plaintiff.

An act of provocation that might defeat an award of punitive damages must be distinguished from an act that would justify defendant's conduct as an affirmative defense such as self-defense [*see Vaughn v. Jonas (1948) 31 Cal. 2d 586, 599-600, 191 P.2d 432]* . In the case of provocation, plaintiff's behavior does not give the defendant any reasonable belief of imminent danger to self or others so as to justify a response by force. Rather, if plaintiff has been provoked, the response is viewed as the product of sudden anger rather than the malice required to support an award of punitive damages [*Badostain v. Grazide (1896) 115 Cal. 425, 429, 47 P. 118]* .

[3] Separate Statement of Defense

Defenses set forth in an answer must be separately stated. Each defense must refer to the causes of action that it is intended to answer in a manner by which it may be intelligibly distinguished [*Code Civ. Proc. § 431.30(g)*]. For further discussion, see Ch. 26, *Answers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewTortsDamagesPunitive DamagesGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsAssault & BatteryDefenses

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6-58 California Forms of Pleading and Practice--Annotated §§ 58.77-58.89

[Reserved]

§§ 58.77[Reserved]

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6-58 California Forms of Pleading and Practice--Annotated § 58.90

§ 58.90 Demurrer to Complaint for Failure to State Cause of Action on Ground that Action Barred by Constitutional Right of Privacy

[1] FORM Demurrer to Complaint for Failure to State Cause of Action on Ground that Action Barred by Constitutional Right of Privacy

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], [and DOES I through _____,] Defendant(s).	)))))))))))	NO. _____ DEMURRER OF DEFENDANT _____ [*name*] TO COMPLAINT OF _____ [*name*], MEMORANDUM OF POINTS AND AUTHORITIES, AND NOTICE OF HEARING [Amount demanded _____ (exceeds or does not exceed) $10,000] [LIMITED CIVIL CASE] Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ [Trial Date: _____]

_____

Defendant _____ [*name*] demurs to the complaint herein on the following ground:

The complaint fails to state facts sufficient to constitute a cause of action in that it appears on the face of the complaint,

in Paragraphs _____ through _____ on pages _____ through _____ that plaintiff is attempting to recover for battery arising from _____ [*specify, e.g.*, defendant's alleged act of offensive contact pursuant to an act of sexual intercourse for which consent was allegedly fraudulently induced by misrepresentations as to birth control practices]. Such an action is barred by public policy in that it involves unwarranted governmental intrusion into matters affecting the individual's right to privacy.

[WHEREFORE, defendant prays that this demurrer be sustained without leave to amend, that plaintiff take nothing by his/her complaint, that defendant have judgment for his/her costs, and for all other proper relief.]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*party's status and name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting demurrer*]

NOTICE IS HEREBY GIVEN that this demurrer has been set for hearing on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] the above-entitled court, located at _____ [*address*], _____ [*city*], California.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant

[2] Use of Form

[a] Demurrer

This form is for use to object by demurrer to a complaint for battery in which the alleged acts of defendant are within the sphere of activities protected from tort liability by the constitutional right of privacy [*see Stephen K. v. Roni L. (1980) 105 Cal. App. 3d 640, 642-645, 164 Cal. Rptr. 618]* . A notice of hearing is also included.

A demurrer must be accompanied by a notice of hearing [*Cal. Rules of Ct., Rule 3.1320(c)*]. It must also be accompanied by a memorandum of points and authorities in support of each ground [*Cal. Rules of Ct., Rule 3.1113(a)*]. This form contains an optional prayer; a prayer to a demurrer is not required but is frequently included. For further discussion of demurrer procedures and sample forms, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* ; for discussion and forms relating to points and authorities generally, see Ch. 417, *Points and Authorities* .

[b] Objection by Demurrer

If any ground for objection to a complaint appears on the face of the complaint, or from any matter of which the court is required to or may take judicial notice, objection to the complaint on that ground may be taken by demurrer [*Code Civ.*

Proc. § 430.30(a)]. Objection may also be taken by answer if the ground does not appear on the face of the complaint, or by both demurrer and answer [*Code Civ. Proc. § 430.30(b),(c)*]. Objection maybe made on the ground that the complaint does not state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*].

The cases that have found tort actions involving sexual acts and procreative decisions to be barred by public policy and the constitutional right of privacy have held that the allegations did not state a cause of action [*see Perry v. Atkinson (1987) 195 Cal. App. 3d 14, 21, 240 Cal. Rptr. 402* ; *Stephen K. v. Roni L. (1980) 105 Cal. App. 3d 640, 642-645, 164 Cal. Rptr. 618]* . Therefore, if on review of the complaint, it appears that the allegations fall into the sphere of activities so protected, a demurrer is the appropriate response. For further discussion of the effect of the right of privacy on a tort action for battery, *see § 58.26*.

[3] Cross References

For further discussion, see *§ 58.57[2] -[4]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersConstitutional LawSubstantive Due ProcessPrivacyGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsAssault & BatteryDefenses

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6-58 California Forms of Pleading and Practice--Annotated § 58.91

§ 58.91 Demurrer to Complaint for Failure to State Cause of Action on Ground that Plaintiff Consented to Defendant's Conduct

[1] FORM Demurrer to Complaint for Failure to State Cause of Action on Ground that Plaintiff Consented to Defendant's Conduct

[*Caption. See § 58.90[1].*]

Defendant _____ [*name*] demurs to the complaint herein on the following ground:

The complaint fails to state facts sufficient to constitute a cause of action in that nowhere does it appear on the face of the complaint that plaintiff did not consent to the acts of defendant therein alleged, and therefore, an essential element of a battery has not been alleged.

[*Optional prayer for relief, memorandum of points and authorities, and notice of hearing. See § 58.90[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant

[2] Use of Form

The form in [1], *above,* is for use to object by demurrer to a complaint for battery to which the defendant wishes to place at issue the question of whether plaintiff consented to the alleged contact, and the complaint fails to include an allegation of nonconsent. A notice of hearing is also included.

[3] Allegations

Lack of consent is an essential element of battery on which plaintiff bears the burdens of pleading and proof. Defendant does not have to plead consent affirmatively, but its lack may be shown under a general denial [*Kritzer v. Citron (1950) 101 Cal. App. 2d 33, 39, 224 P.2d 808* ; *see Rains v. Superior Court (1984) 150 Cal. App. 3d 933, 938, 198 Cal. Rptr. 249]* . Therefore, consent should not be pleaded as an affirmative defense; pleading it as such suggests that defendant bears the burden of proof on an issue for which the burden correctly lies with the plaintiff. The standard California jury instruction does not refer to the burden of proof [*see BAJI No. 7.52*], and thus cannot be relied on to correct any error of allocation of burden derived from the pleadings.

A complaint may expressly allege a lack of consent [*see, e.g., § 58.50[1]*], or allege that apparent consent was vitiated by the defendant's misrepresentations [*see, e.g., Rains v. Superior Court (1984) 150 Cal. App. 3d 933, 936-938, 198 Cal. Rptr. 249* ; *see also § 58.57[1]*]. In that case, consent is placed at issue by the defendant's denial of these allegations in the answer [*see Kritzer v. Citron (1950) 101 Cal. App. 2d 33, 39-40, 224 P.2d 808]* . To emphasize that consent is at issue, the defendant may wish to deny the allegations with specific language in the answer, for example, "defendant denies the allegations of paragraph _____ in that at all times mentioned in the complaint, plaintiff consented to each and every act of defendant as alleged in the complaint."

If the complaint is silent as to consent or lack of consent, an essential element of the cause of action is missing [*Rains v. Superior Court (1984) 150 Cal. App. 3d 933, 938, 198 Cal. Rptr. 249]* . In that case, the defendant may raise the issue by demurrer for failure to state facts sufficient to constitute a cause of action [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*].

[4] Cross References

For discussion and cross references relating to demurrers generally, see *§ 58.90[2] -[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsAssault & BatteryDefensesTortsIntentional TortsDefensesConsent

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6-58 California Forms of Pleading and Practice--Annotated § 58.92

§ 58.92 Demurrer to Complaint for Failure to State Cause of Action on Ground that Reasonable Force Used to Effect Arrest

[1] FORM Demurrer to Complaint for Failure to State Cause of Action on Ground that Reasonable Force Used to Effect Arrest

[*Caption. See § 58.90[1].*]

Defendant _____ [*name of peace officer*] demurs to the complaint on the following ground:

The complaint fails to state facts sufficient to constitute a cause of action for battery in that the complaint fails to allege facts sufficient to prove that defendant _____ [name of peace officer] used unreasonable force to effect the arrest of plaintiff _____ [*name*].

[*Optional prayer for relief, memorandum of points and authorities, and notice of hearing. See § 58.90[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant

[2] Use of Form

The form in [1], *above,* is for use to object by demurrer to a complaint for battery brought against a peace officer arising from the alleged use of excessive force in effecting an arrest [*see § 58.61*]. A plaintiff in a battery action against a peace officer has the burden of pleading and proving as an element of the cause of action that the force used in effecting the arrest was unreasonable [*Edson v. City of Anaheim (1998) 63 Cal. App. 4th 1269, 1272, 74 Cal. Rptr. 2d 614]* .

For discussion of the liability of a police officer for the use of unreasonable force in effecting an otherwise lawful arrest,

see *§ 58.22*.

[3] Cross References

For discussion and cross references relating to demurrers generally, see *§ 58.90[2] -[3]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsAssault & BatteryDefensesTortsPublic Entity LiabilityExcessive Force

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Chapter 59 ASSEMBLIES, MEETINGS, AND DEMONSTRATIONS

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§ 59.syn Synopsis to Chapter 59: ASSEMBLIES, MEETINGS, AND DEMONSTRATIONS

§ 59.01 Scope of Chapter

§ 59.02 Cross References

§§ 59.03through 59.09 [Reserved]

§ 59.10 Governing Law

[1] Constitutional Provisions

[a] Federal

[b] California

[c] Protection of Speech, Assembly, and Petition Rights by Due Process Clause

[2] Comparison of Protection for Free Expression Under Federal and State Constitutions

[3] Combined Protection for Freedom of Expression

[4] California Statutes

§ 59.11 General Types of Conduct and Activities Protected by Freedom of Expression

[1] Purpose of Protection

[2] Protected Speech

[3] Methods of Disseminating Protected Speech

[4] Nonverbal Activity

§ 59.12 Governmental Limitations on Freedom of Expression

[1] General Principles

[2] Permissible Time, Place, and Manner Regulations

[a] General Test for Constitutionality

[b] Requirement of Content-Neutrality

[c] Requirement of Narrow-Tailoring

[d] Requirement of Alternative Forum for Expression

[e] Discretion of Decision Maker

[f] Captive Audiences

[3] Content Restrictions

[a] General Strict Scrutiny Standard of Review

[b] "Unprotected" Content Categories

[c] "Clear and Present Danger" Test

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[3] Allegations

[4] Verification

[5] Jurisdiction and Venue

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§ 59.01 Scope of Chapter

This chapter provides a general overview of the federal and California constitutional rights of free speech, assembly, and petitioning the government for redress, as applied to assemblies, meetings, demonstrations, and distribution of materials on public and private property, and limitations on those rights.

The chapter contains the following forms:

- A complaint for declaratory and injunctive relief challenging a governmental entity's refusal to permit use of a public forum for free speech activities [*see § 59.50*].

- A petition for a writ of mandate under *Code Civ. Proc. § 1094.8* for expedited judicial review of the denial by a public agency of a permit involving expressive conduct protected by the *First Amendment* [*see § 59.50A*].

- A complaint for declaratory and injunctive relief challenging a private shopping center owner's refusal to allow access to the shopping center for free speech activities [*see § 59.51*].

- A petition for writ of habeas corpus for release from custody when the underlying criminal prosecution is based on a statute or ordinance that violates the petitioner's right to free expression [*see § 59.52*].

- A complaint by a private property owner for damages for trespass and for injunctive relief against constitutionally unprotected activities on the owner's property [*see § 59.53*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechExpressive ConductConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechForumsConstitutional LawBill of RightsFundamental

FreedomsFreedom of SpeechScope of FreedomConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechGeneral Overview

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§ 59.02 Cross References

For discussion and forms pertaining to free speech and assembly rights of public school students, see Ch. 513, *Schools: Student Rights and Responsibilities* .

For discussion and forms pertaining to civil rights generally, see Ch. 113, *Civil Rights: Post Civil-War Civil Rights Statutes* , Ch. 117A, *Civil Rights: Interference with Civil Rights by Threats, Intimidation, Coercion, or Violence* .

For discussion and forms pertaining to injunctions generally, see Ch. 303, *Injunctions* .

For discussion pertaining to labor picketing and demonstrations generally, see NLRA Law and Practice, Chs. 14-14B (Matthew Bender).

For discussion of picketing involving public sector labor disputes in California, see California Public Sector Labor Relations, Ch. 25, pt. B (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawCollective Bargaining & Labor RelationsStrikes & Work StoppagesEducation LawStudentsSpeechGeneral Overview

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[Reserved]

§§ 59.03[Reserved]

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§ 59.10 Governing Law

[1] Constitutional Provisions

[a] Federal

The *First Amendment of the United States Constitution* declares that Congress shall make no law abridging the freedom of speech or press [*U.S. Const., amend. I*]. The *First Amendment* also provides that Congress may make no law abridging the right of the people to assemble peaceably and to petition the government for redress of grievances [*U.S. Const., amend. I*].

[b] California

The California Constitution provides that the people have the right to instruct their representatives, petition the government for redress of grievances, and assemble freely to consult for the common good [*Cal. Const., art. I, § 3*]. The California Constitution also provides that every person may freely speak, write, and publish sentiments on all subjects, being responsible for the abuse of this right; a law may not restrain or abridge liberty of speech or press [*Cal. Const., art. I, § 2(a)*].

[c] Protection of Speech, Assembly, and Petition Rights by Due Process Clause

The exercise of speech protected by the *First Amendment* is a fundamental right in both state and federal constitutions. Thus, this right is protected from state action or infringement by any government entity under the *due process clause of the Fourteenth Amendment of the United States Constitution* [*New York Times Co. v. Sullivan (1964) 376 U.S. 254, 265, 84 S. Ct. 710, 11 L. Ed. 2d 686* ; *Loza v. Panish (1980) 102 Cal. App. 3d 821, 824-825, 162 Cal. Rptr. 596]* .

The state and federal constitutional rights of assembly and petition are also protected by the *Fourteenth Amendment due process clause* against government intrusion [*Wolfgram v. Wells Fargo Bank (1997) 53 Cal. App. 4th 43, 52, 61 Cal. Rptr. 2d 694* ; *Sun Co. of San Bernardino v. Superior Court (1973) 29 Cal. App. 3d 815, 821-822, 105 Cal. Rptr. 873]* .

[2] Comparison of Protection for Free Expression Under Federal and State Constitutions

California Constitution's "liberty of speech" clause [*Cal. Const., art. I, § 2*] is broader and more protective than the free speech clause of the *federal Constitution's First Amendment* [*Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal. 4th 352, 365-366, 93 Cal. Rptr. 2d 1, 993 P.2d 334]* . The free speech provisions of the California Constitution provide more definitive and inclusive protection, and greater restrictions from governmental interference, than comparable federal provisions [*see, e.g.,* *Blatty v. New York Times Co. (1986) 42 Cal. 3d 1033, 1041, 232 Cal. Rptr. 542, 728 P.2d 1177 , cert. denied, 485 U.S. 934 (1987)* ; *Robins v. Pruneyard Shopping Center (1979) 23 Cal. 3d 899, 908-910, 153 Cal. Rptr. 854, 592 P.2d 341 , aff'd, 447 U.S. 74 (1980)]* . The expanded rights of every citizen set forth in *Cal. Const., art. I, § 2* include the following [*Pines v. Tomson (1984) 160 Cal. App. 3d 370, 393, 206 Cal. Rptr. 866]* :

- An affirmation that all persons may freely speak, and may write and publish their sentiments;
- A provision allowing for liability if the right is abused; and
- A prohibition against laws that infringe on freedom of speech or the press.

However, merely because the California Constitution's provision is worded more broadly and has been interpreted as more protective than the *First Amendment* does not mean it is broader than the *First Amendment* in all its applications [*Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal. 4th 352, 367, 93 Cal. Rptr. 2d 1, 993 P.2d 334]* . Protection may at times be coterminous [*Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal. 4th 352, 367 n.12, 93 Cal. Rptr. 2d 1, 993 P.2d 334]* .

[3] Combined Protection for Freedom of Expression

The *First Amendment* rights to speech and to assemble and petition for the redress of grievances are related and inseparable freedoms and are often collectively described in the cases as "freedom of expression" [*see, e.g.,* *Thomas v. Collins (1945) 323 U.S. 516, 530, 65 S. Ct. 315, 89 L. Ed. 430* ; *De Jonge v. Oregon (1937) 299 U.S. 353, 364, 57 S. Ct. 255, 81 L. Ed. 278]* .

[4] California Statutes

Code Civ. Proc. § 1094.8 provides an expedited procedure for judicial review of local public agency decisions regarding issuance, revocation, suspension, or denial of a permit that involves expressive conduct protected by *U.S. Const., amend. I*. For a detailed discussion of Section 1094.8, see *§ 59.12[5][b][iv]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechExpressive ConductConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of FreedomConstitutional LawBill of RightsFundamental FreedomsFreedom to PetitionConstitutional LawBill of RightsFundamental FreedomsFreedom of Assembly

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§ 59.11 General Types of Conduct and Activities Protected by Freedom of Expression

[1] Purpose of Protection

The purpose of constitutional provisions that guarantee right to expression is to ensure that ideas, views, and information may be widely disseminated to the public without restriction on content, subject, or manner. Free expression is essential to maintaining a democratic system of self-government that respects individual dignity [*see, e.g., Guglielmi v. Spelling-Goldberg Productions (1979) 25 Cal. 3d 860, 866, 160 Cal. Rptr. 352, 603 P.2d 454* ; *Weaver v. Jordan (1966) 64 Cal. 2d 235, 241, 49 Cal. Rptr. 537, 411 P.2d 289* , *cert. denied, 385 U.S. 844]* .

The *First Amendment* safeguards a freedom that is the indispensable condition of nearly every other form of freedom. When the ultimate effect of sustaining a claim of a waiver of *First Amendment* rights might be an imposition on that freedom, courts are unwilling to find waiver in circumstances that fall short of being clear and compelling [*Ferlauto v. Hamsher (1999) 74 Cal. App. 4th 1394, 1399-1400, 88 Cal. Rptr. 2d 843* , citing *Curtis Publishing Co. v. Butts (1967) 388 U.S. 130, 145, 87 S. Ct. 1975, 18 L. Ed. 2d 1094]* . Courts closely scrutinize waivers of constitutional rights and indulge every reasonable presumption against a waiver [*Ferlauto v. Hamsher (1999) 74 Cal. App. 4th 1394, 1399-1400, 88 Cal. Rptr. 2d 843* ; *City of Glendale v. George (1989) 208 Cal. App. 3d 1394, 1398, 256 Cal. Rptr. 742]* . However, courts will find a waiver if it appears that *First Amendment* rights have been knowingly and voluntarily waived [*see United States v. Berke (9th Cir. 1999) 170 F.3d 882* (criminal defendant accused of violations of federal obscenity laws and operation of criminal enterprise knowingly and voluntarily waived *First Amendment* rights by agreeing to permanent injunction from involvement with production, sale, or distribution of sexually explicit materials)].

[2] Protected Speech

Federal and California decisions have broadly defined the types of speech that are protected by the *First Amendment* [*see, e.g., Ward v. Rock Against Racism (1989) 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661]* . Protected speech includes all of the following:

- Most methods and modes of speech [*see, e.g., Aaron v. Municipal Court of San Jose-Milpitas Judicial Dist. (1977) 73 Cal. App. 3d 596, 602, 140 Cal. Rptr. 849]* , including (1) artistic and literary

expression [*see, e.g., Miller v. California (1973) 413 U.S. 15, 23, 93 S. Ct. 2607, 37 L. Ed. 2d 419* ; *but see National Endowment for the Arts v. Finley (1998) 524 U.S. 569, 577-585, 118 S. Ct. 2168, 141 L. Ed. 2d 500* (federal statute requiring National Endowment for the Arts (NEA) to consider general standards of "decency" in judging grantapplications does not inherently interfere with *First Amendment* rights of free expression)], (2) commercial advertising [*see Metromedia, Inc. v. San Diego (1981) 453 U.S. 490, 500, 101 S. Ct. 2882, 69 L. Ed. 2d 800* ; *but see Keimer v. Buena Vista Books, Inc. (1999) 75 Cal. App. 4th 1220, 89 Cal. Rptr. 2d 781* (commercial speech is not stripped of all free speech protections, but protections are limited by rational and carefully crafted restrictions, including California's Unfair Trade Practices Act)], (3) peaceful picketing [*United Food & Commercial Workers Union v. Superior Court (2000) 83 Cal. App. 4th 566, 574, 99 Cal. Rptr. 2d 849]* , and (4) symbolic speech [*see Texas v. Johnson (1989) 491 U.S. 397, 403-406, 109 S. Ct. 2533, 105 L. Ed. 2d 342]* ;

- Speech of a political nature [*Browne v. Russell (1994) 27 Cal. App. 4th 1116, 1122, 33 Cal. Rptr. 2d 29]* , including contributions to political campaigns [*Austin v. Michigan Chamber of Commerce (1990) 494 U.S. 652, 657, 110 S. Ct. 1391, 108 L. Ed. 2d 652* ; *VanNatta v. Keisling (9th Cir. 1998) 151 F.3d 1215, 1219* , *cert. denied sub nom. Miller v. VanNatta (1999) 525 U.S. 1104* (state constitutional amendment by ballot measure prohibiting state candidates from using or directing contributions from out-of-district residents violates *First Amendment*)];

- Speech that conveys religious social beliefs, opinions, and messages [*see, e.g., Capitol Square Review & Advisory Bd. v. Pinette (1995) 515 U.S. 753, 115 S. Ct. 2440, 132 L. Ed. 2d 650; see also Good News Club v. Milford Central School (2001) 533 U.S. 98, 111, 121 S. Ct. 2093, 150 L. Ed. 2d 151 (activities quintessentially religious in nature such as religious instruction, prayer, and discussion and recitation of Bible, are protected speech); Lamb's Chapel v. Center Moriches Union Free School Dist. (1993) 508 U.S. 384, 393-394, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (presentation of cultural and educational subject matter from religious perspective is speech protected by First Amendment); Widmar v. Vincent (1981) 454 U.S. 263, 269, 102 S. Ct. 269, 70 L. Ed. 2d 440 (religious worship and discussion are forms of speech and association protected by First Amendment); Faith Center Church Evangelistic Ministries v. Glover (9th Cir. 2006) 462 F.3d 1194, 1202 (church engaged in protected speech when its participants met in county public library for prayer, praise, and worship)]* ;

- Speech in the context of a privileged relationship such as physician-patient [*Conant v. Walters (9th Cir. 2002) 309 F.3d 629, 636]* or psychotherapist-patient [*Nat'l Ass'n for the Advancement of Psychoanalysis v. California Bd. of Psychology (9th Cir. 2000) 228 F.3d 1043, 1054]* ;

- Verbal criticism, challenges, and profanity directed at police officers, unless the speech is likely to produce a clear and present danger of a serious substantive evil rising far above public inconvenience, annoyance, or unrest [*City of Houston v. Hill (1987) 482 U.S. 451, 461, 107 S. Ct. 2502, 96 L. Ed. 2d 398* ; *United States v. Poocha (9th Cir. 2001) 259 F.3d 1077, 1080]* ;

- Employee speech on matters of public concern, but not complaints over internal office affairs [*Connick v. Myers (1983) 461 U.S. 138, 147, 103 S. Ct. 1684, 75 L. Ed. 2d 708* ; *Weisbuch v. County of Los Angeles (9th Cir. 1997) 119 F.3d 778, 784]* ;

- Artistic depictions of celebrities that would otherwise be protected by the right of publicity (*Civ. Code § 3344.1*), which contain significant transformative elements or creative contributions [*Comedy III Productions, Inc. v. Gary Saderup, Inc. (2001) 25 Cal. 4th 387, 405-406, 106 Cal. Rptr. 2d 126, 21 P.3d 797* (transformative elements or creative contributions not confined to parody and can take manyforms, from factual reporting to fictionalized portrayal, from heavy-handed lampooning to subtle social criticism); *see also Winter v. DC Comics (2003) 30 Cal. 4th 881, 887-892, 134 Cal. Rptr. 2d*

634, 69 P.3d 473 (transformative elements test applied to comic book depiction of well-known performers); *Kirby v. Sega of America, Inc. (2006) 144 Cal. App. 4th 47, 57-62, 50 Cal. Rptr. 3d 607* (transformative elements test applied to videogame depiction of rock performer)];

- An artist's sale of the artist's own original artwork [*White v. City of Sparks (9th Cir. 2007) 500 F.3d 953, 955-957]* .

- Vote swapping and vote exchange mechanisms provided by Internet websites [*Porter v. Bowen (9th Cir. 2007) 496 F.3d 1009, 1018-1026]* .

- Speech that can reasonably be characterized as political rhetoric or hyperbole, particularly speech not directed at specific individuals [*Fogel v. Collins (9th Cir. 2008) 531 F.3d 824, 830*].

- Anonymous speech on the Internet [*Krinsky v. Doe 6 (2008) 159 Cal. App. 4th 1154, 1162-1164, 72 Cal. Rptr. 3d 231*].

The right of free speech also includes a speaker's right to tailor speech by deciding "what not to say," i.e., to be free from being compelled to present a viewpoint with which the speaker disagrees. In one case, for example, the United States Supreme Court held that private parade organizers in Boston could not be required to include among marchers a group imparting a message that the organizers do not wish to convey [*Hurley v. Irish-American Gay Group (1995) 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487, 495, 503-508]* . The right to be free from being compelled to speak is also protected by the California Constitution [*see* *ARP Pharmacy Svcs., Inc. v Gallagher Bassett Svcs., Inc. (2006) 138 Cal. App. 4th 1307, 1314-1316, 42 Cal. Rptr. 3d 256]* . However, the right to exclude does not extend to the exclusion of a speaker in a public forum seeking only to be heard, not to have his or her speech included or possibly confused with another's, and the speaker has not violated a valid statute or ordinance [*Gathright v. City of Portland (9th Cir. 2006) 439 F.3d 573, 576-579]* .

The *First Amendment* affords the right of free speech to the communication, its source, and its recipients [*Virginia Pharmacy Bd. v. Virginia Consumer Council (1976) 425 U.S. 748, 756, 96 S. Ct. 1817, 48 L. Ed. 2d 346* ; *National Association for the Advancement of Colored People v. Jones (9th Cir. 1997) 131 F.3d 1317, 1322]* . However, the listener's rights are no greater than those of the speaker [*National Association for the Advancement of Colored People v. Jones (9th Cir. 1997) 131 F.3d 1317, 1322* (voters, as recipients of campaign speech, have no greater rights than candidates to have candidates publish statements in sample ballot or to have candidates' campaigns publicly funded)].

Commercial speech receives a lesser degree of constitutional protection than many other forms of expression, and governments may entirely prohibit commercial speech that is false or misleading [*Kasky v. Nike (2002) 27 Cal. 4th 939, 946, 119 Cal. Rptr. 2d 296, 45 P.3d 243* ; for discussion of commercial speech generally, see Ch. 14, *Advertising*].

Threats are generally not protected by the *First Amendment*. The objective test for determining whether a threat is a "true" threat that falls outside the protection of the *First Amendment* is whether a reasonable person would foresee that the statement would be interpreted by those to whom the person making the speech communicates it as a serious expression of intent to harm or assault [*Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of LifeActivists (9th Cir. 2002) 290 F.3d 1058, 1088* ("wanted"-type posters showing physicians providing reproductive services constituted true threat even though posters on their face contained no explicitly threatening language); *Bauer v. Sampson (9th Cir. 2001) 261 F.3d 775, 782* ; *Lovell v. Poway Unified School Dist. (9th Cir. 1996) 90 F.3d 367, 371-372]* .

The display of a permanent monument in a public park is government speech, which is not subject to scrutiny under the Free Speech Clause [*Pleasant Grove City, Utah v. Summum (2009) -- U.S. --, 129 S. Ct. 1125, 1131-1138, 172 L. Ed. 2d 853*].

[3] Methods of Disseminating Protected Speech

Federal and California decisions have uniformly recognized that *First Amendment* protection extends to most means of assembly employed to communicate and disseminate ideas and information [*see, e.g., Organization for a Better Austin v. Keefe (1971) 402 U.S. 415, 419, 91 S. Ct. 1575, 29 L. Ed. 2d 1]* , including all of the following:

- Acts of picketing [*see, e.g., Planned Parenthood Shasta-Diablo, Inc. v. Williams (1995) 10 Cal. 4th 1009, 1019, 43 Cal. Rptr. 2d 88, 898 P.2d 402 , cert. denied, 520 U.S. 1133 (1997)* ; *see also* discussion in *§ 59.13[6]*];

- Distribution of handbills, leaflets, and pamphlets [*see, e.g., McIntyre v. Ohio Elections Comm'n (1995) 514 U.S. 334, 345-346, 115 S. Ct. 1511, 131 L. Ed. 2d 426* (state prohibition of anonymous campaign literature unconstitutional); *Talley v. California (1960) 362 U.S. 60, 80 S. Ct. 536, 4 L. Ed. 2d 559* (municipal ban on anonymous leafleting unconstitutional); *American Civil Liberties Union of Nevada v. Heller (9th Cir. 2004) 378 F.3d 979, 987-1002* (statute requiring groups or entities publishing material or information relating to election, candidate, or question on ballot to reveal names and addresses of publications' financial sponsors unconstitutional); *Rancho Publications v. Superior Court of Orange County (1999) 68 Cal. App. 4th 1538, 81 Cal. Rptr. 2d 274* (subpoena seeking identities of members of group that published newspaper advertorials in controversy surrounding public hospital unenforceable because of qualified immunity in *First Amendment* protection of speech); *Paradise Hills Associates v. Procel (1991) 235 Cal. App. 3d 1528, 1539, 1 Cal. Rptr. 2d 514]* ;

- Marching and demonstrating in streets [*see, e.g., Dillon v. Municipal Court (1971) 4 Cal. 3d 860, 867, 94 Cal. Rptr. 777, 484 P.2d 945]* ;

- Charitable appeals for funds on streets [*see, e.g., Village of Schaumburg v. Citizens for Better Environment (1980) 444 U.S. 620, 633, 100 S. Ct. 826, 63 L. Ed. 2d 73]* ;

- Demonstrating and leafletting in parks [*see, e.g., United States v. Baugh (9th Cir. 1999) 187 F.3d 1037, 1042* (march and protest activities on national park land); *Grossman v. City of Portland (9th Cir. 1994) 33 F.3d 1200, 1204]* ;

- Parading [*see, e.g., Hurley v. Irish-American Gay Group (1995) 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487, 500-501]* ; and

- Acts of disclosing and publishing information, even if the information was obtained from a source that obtained it unlawfully [*Bartnicki v. Vopper (2001) 532 U.S. 514, 528-535, 121 S. Ct. 1753, 149 L. Ed. 2d 787]* .

Nonverbal conduct implicates the *First Amendment* when it is intended to convey a "particularized message" and the likelihood is great that the message would be so understood [*Texas v. Johnson (1989) 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L. Ed. 2d 342* ; *Nunez v. Davis (9th Cir. 1999) 169 F.3d 1222, 1226* ; *see* discussion of nonverbal activity in § 59.11[4]].

Courts have recognized that the rights of free speech and free press are worthless without effective means of expression [*Wollam v. City of Palm Springs (1963) 59 Cal. 2d 276, 284, 29 Cal. Rptr. 1, 379 P.2d 481* ; *In re Englebrecht (1998) 67 Cal. App. 4th 486, 496-497, 79 Cal. Rptr. 2d 89]* . Thus, *First Amendment* protections extend to tools for disseminating speech like cellular telephones, pagers, and beepers, which are important communication devices, analogous to the telephone. Regulation of these modes of communication must be narrowly tailored so that they do not proscribe a substantial amount of protected speech [*In re Englebrecht (1998) 67 Cal. App. 4th 486, 496-497, 79 Cal.*

Rptr. 2d 89 (provision of preliminary injunction prohibiting all uses and possession of pagers and beepers by gang members within specified target area is overbroad and infirm)].

Even if information has been obtained in a manner which is itself lawful, but from a source that obtained it unlawfully, the government may not punish the ensuing publication of the information based on the fact that it was unlawfully obtained [*Bartnicki v. Vopper (2001) 532 U.S. 514, 528-535, 121 S. Ct. 1753, 149 L. Ed. 2d 787* (application of *18 U.S.C. § 2511(1)(c)*, punishing willful disclosure or attempt to disclose contents of unlawfully obtained wire or oral communication if publisher knows or has reason to know it was unlawfully intercepted, to radio commentator who played tape of unlawfully intercepted telephone conversation violated commentator's *First Amendment* rights)].

[4] Nonverbal Activity

Protected expression is not limited to verbal expression, such as written or spoken words. The federal and California constitutions protect nonverbal, symbolic speech as an effective way of communicating ideas [*see, e.g.,* *Hurley v. Irish-American Gay Group (1995) 515 U.S. 557, 569-570, 115 S. Ct. 2338, 132 L. Ed. 2d 487* (parade)].Conduct is expressive when two factors are present: (1) intent to convey a particularized message, and (2) a substantial likelihood that the message will be understood by those receiving it [*Spence v. Washington (1974) 418 U.S. 405, 410-411, 94 S. Ct. 2727, 41 L. Ed. 2d 842* ; *Colacurcio v. City of Kent (9th Cir. 1998) 163 F.3d 545, 549 n.1*]. Cases have recognized that the *First Amendment* shields such symbolic acts as a Ku Klux Klan display of a cross in a town square [*see Capitol Square Review & Advisory Bd. v. Pinette (1995) 515 U.S. 753, 115 S. Ct. 2440, 132 L. Ed. 2d 650]* , wearing an arm band to protest a war [*Tinker v. Des Moines Community School Dist. (1969) 393 U.S. 503, 505-506, 89 S. Ct. 733, 21 L. Ed. 2d 731]* , and dancing [*4805 Convoy, Inc. v. City of San Diego (9th Cir. 1999) 183 F.3d 1108, 1111 n.2* (nude dancing is form of expression entitled to *First Amendment* protection and subject only to reasonable time, place, and manner restrictions); *Colacurcio v. City of Kent (9th Cir. 1998) 163 F.3d 545, 549* (nude dancing); *see* *City of Erie v. Pap's A. M. (2000) 529 U.S. 277, 120 S. Ct. 1382, 1391, 146 L. Ed. 2d 265* (plurality opinion that nude dancing is expressive conduct falling only within outer ambit of *First Amendment*); *Barnes v. Glen Theatre, Inc. (1991) 501 U.S. 560, 565-566, 111 S. Ct. 2456, 115 L. Ed. 2d 504* (same)].

Religious activity typically involves expressive speech and, although protected by the *First Amendment*, as a matter of law it is subordinate to *establishment clause* concerns [*DiLoreto v. Board of Educ. of Downey Unif. Sch. Dist. (1999) 74 Cal. App. 4th 267, 280, 87 Cal. Rptr. 2d 791* (school district properly refused to post sign containing Ten Commandments at high school baseball field)]. For discussion of the federal and state constitutional protections for religion, see Ch. 110, *Churches and Religious Organizations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechCommercial SpeechGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechPolitical SpeechConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of FreedomConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechExpressive ConductConstitutional LawBill of RightsFundamental FreedomsFreedom of Assembly

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Chapter 59 ASSEMBLIES, MEETINGS, AND DEMONSTRATIONS
PART II. LEGAL BACKGROUND

6-59 California Forms of Pleading and Practice--Annotated § 59.12

§ 59.12 Governmental Limitations on Freedom of Expression

[1] General Principles

Although free speech, assembly, and petition are fundamental rights guaranteed by federal and state constitutions, they are not absolute [*see Near v. Minnesota (1931) 283 U.S. 697, 708, 51 S. Ct. 625, 75 L. Ed. 1357* ; *Aguilar v. Avis Rent A Car System (1999) 21 Cal. 4th 121, 134, 87 Cal. Rptr. 2d 132, 980 P.2d 846]* . In many instances, important governmental interests such as public safety may outweigh an individual's liberty interests in free expression [*see, e.g., People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1110-1112, 60 Cal. Rptr. 2d 277, 929 P.2d 596* (upholding preliminary injunction against gang members "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view" with another gang member within four block area, which was directed at ending gang members' trafficking in illegal drugs and securing control of community through systematic acts of intimidation and violence, is not invalid on associational grounds); *Wolfgram v. Wells Fargo Bank (1997) 53 Cal. App. 4th 43, 55-59, 61 Cal. Rptr. 2d 694* (upholding *Code Civ. Proc. § 391 et seq.*, vexatious litigant statute, as not impermissibly chilling right to petition government for redress); *In re Juan C. (1994) 28 Cal. App. 4th 1093, 1100-1101, 33 Cal. Rptr. 2d 919* (upholding riot curfew against *First Amendment* challenge)].

An otherwise valid statute, which is not aimed at protected expression, does not conflict with the *First Amendment* simply because the statute can be violated by the use of spoken words or other expressive activity [*Roberts v. United States Jaycees (1984) 468 U.S. 609, 628, 104 S. Ct. 3244, 82 L. Ed. 2d 462* ; *Aguilar v. Avis Rent A Car System (1999) 21 Cal. 4th 121, 134, 87 Cal. Rptr. 2d 132, 980 P.2d 846* (also true when spoken words, alone or with conduct, violate statutes relating to employment discrimination, and use of racial epithets constitute discrimination)]. On the other hand, a city has no legitimate interest in protecting its "image" qua image as against the free speech rights of its citizens [*Gammoh v. City of Anaheim (1999) 73 Cal. App. 4th 186, 192, 86 Cal. Rptr. 2d 194* ("visual blight" can be prevented by lesser intrusive means than complete preclusion of adult business from any major roadway)].

In determining the constitutionality of governmental limitations on free expression, the cases frequently distinguish between restrictions based on the content of speech and content-neutral limitations on the time, place, and manner of expression. A more stringent standard of scrutiny applies to the former [*see, e.g., Capitol Square Review & Advisory Bd. v. Pinette (1995) 515 U.S. 753, 115 S. Ct. 2440, 132 L. Ed. 2d 650* ; *Perry Ed. Ass'n v. Perry Local Ed. Ass'n*

(1983) 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 ; *Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal. 4th 352, 364-378, 93 Cal. Rptr. 2d 1, 993 P.2d 334]* . The level of scrutiny applied to content-neutral time, place, and manner regulations is an "intermediate" scrutiny [*Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal. 4th 352, 364, 93 Cal. Rptr. 2d 1, 993 P.2d 334]* . For discussion of time, place, and manner restrictions, see [2], *below.* For discussion of content-based restrictions, see [3], *below.* The courts also strictly scrutinize any prior restraints on expression [*see Organization for a Better Austin v. Keefe (1971) 402 U.S. 415, 419* ; *Grossman v. City of Portland (9th Cir. 1994) 33 F.3d 1200, 1204]* , as discussed in [5], *below.*

In addition, cases involving demonstrations and marches frequently raise issues regarding the right of access to public property to engage in such activities. When the government seeks to limit expressive activity on public property, the standard for judging the constitutionality of the limitation depends on the nature of the public property involved and whether it has the status of a "public forum" [*see, e.g., Cornelius v. NAACP Legal Defense & Ed. Fund (1985) 473 U.S. 788, 799-800, 105 S. Ct. 3439, 87 L. Ed. 2d 567* ; *Perry Ed. Ass'n v. Perry Local Ed. Ass'n (1983) 460 U.S. 37, 45-46, 103 S. Ct. 948, 74 L. Ed. 2d 794]* . For discussion, see *§ 59.13.*

A court may have to decide if speech is the government speaking for itself (or adopting private speech as its own), which the government is free to regulate without constraint [*see Rosenberger v. Rector and Visitors of Univ. of Va. (1995) 515 U.S. 819, 833, 115 S. Ct. 2510, 132 L. Ed. 2d 700* (when government speaks for itself, it may take legitimate and appropriate steps to ensure its message is neither garbled nor distorted)], or if speech is private, which the government may only regulate within the constraints for the *First Amendment* [*Ariz. Life Coalition, Inc. v. Stanton (9th Cir. 2008) 515 F.3d 956, 963*]. The Ninth Circuit has adopted a four-part test to differentiate between government speech and private speech [*Ariz. Life Coalition, Inc. v. Stanton (9th Cir. 2008) 515 F.3d 956, 963-965* ; *see also Johanns v. Livestock Marketing Ass'n (2005) 544 U.S. 550, 125 S. Ct. 2055, 161 L. Ed. 2d 896* (when government sets overall message to be communicated and approves every word that is disseminated, it is government speech); *Downs v. Los Angeles Unified School District (9th Cir. 2000) 228 F.3d 1003* (addressing whether messages conveyed through school bulletin boards constituted government speech)]:

- The central purpose of the program in which the speech in question occurs.

- The degree of editorial control exercised by the government or private entities over the content of the speech.

- The identity of the literal speaker.

- Whether the government or the private entity bears the ultimate responsibility for the content of the speech, in analyzing circumstances in which both government and a private entity are claimed to be speaking.

[2] Permissible Time, Place, and Manner Regulations

[a] General Test for Constitutionality

Many federal and California decisions have held that governmental restriction of free expression is permissible when the regulation is reasonably limited only to the time, place, and manner of exercise of the *First Amendment* activity, provided that the regulation complies with all of the following [*see, e.g., Perry Ed. Ass'n v. Perry Local Ed. Ass'n (1983) 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794* ; *Grossman v. City of Portland (9th Cir. 1994) 33 F.3d 1200, 1205* ; *Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal. 4th 352, 364, 93 Cal. Rptr. 2d 1, 993 P.2d 334* ; *Savage v. Trammell Crow Co. (1990) 223 Cal. App. 3d 1562, 1571-1573, 273 Cal. Rptr. 302* ; *Bodenheimer v. Superior Court (1980) 108 Cal. App. 3d 885, 891, 167 Cal. Rptr. 26]* :

- It does not refer to the content of regulated speech (i.e., is "content-neutral") [*see* discussion in [b], *below*];

- It is narrowly tailored to serve a significant government interest [*see* discussion in [c], *below*]; and

- It leaves open adequate alternative avenues of communication to express views [*see* discussion in [d], *below*].

The relevant standards under the federal and state constitutions are the same. California's formulation of the time, place, and manner test was fashioned from a long line of United States Supreme Court cases, and analysis of speech regulation under the California Constitution's Liberty of Speech Clause employs time, place, and manner restrictions measured by federal constitutional standards [*Klein v. City of San Clemente (9th Cir. 2009) 584 F.3d 1196, 1200* ; *Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal. 4th 352, 363 n.7, 93 Cal. Rptr. 2d 1, 993 P.2d 334]* .

[b] Requirement of Content-Neutrality

To qualify as a constitutionally permissible "time, place, and manner" restriction, a regulation or injunctive provision must be "content-neutral" [*see, e.g.,* *Ward v. Rock Against Racism (1989) 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661* ; *Colacurcio v. City of Kent (9th Cir. 1998) 163 F.3d 545, 551* ; *Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal. 4th 352, 364-365, 93 Cal. Rptr. 2d 1, 993 P.2d 334* ; *Savage v. Trammell Crow Co. (1990) 223 Cal. App. 3d 1562, 1573, 273 Cal. Rptr. 302]* . Any regulation of content is presumptively invalid and is subject to a different and stricter level of constitutional scrutiny [*see, e.g.,* *CapitolSquare Review & Advisory Bd. v. Pinette (1995) 515 U.S. 753, 115 S. Ct. 2440, 132 L. Ed. 2d 650* ; *Perry Ed. Ass'n v. Perry Local Ed. Ass'n (1983) 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794]* , as discussed in [3], *below*.

The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech without reference to the content of the regulated speech [*Madsen v. Women's Health Center, Inc. (1994) 512 U.S. 753, 763, 114 S. Ct. 2516, 129 L. Ed. 2d 593* ; *Ward v. Rock Against Racism (1989) 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661* ; *Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal. 4th 352, 367-368, 93 Cal. Rptr. 2d 1, 993 P.2d 334]* . This does not require literal or absolute content neutrality, only that the regulation be "justified" by legitimate concerns unrelated to a disagreement with the message conveyed by the speech [*Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal. 4th 352, 368, 93 Cal. Rptr. 2d 1, 993 P.2d 334]* . Thus, courts look to the government's purpose as the threshold consideration [*Madsen v. Women's Health Center, Inc. (1994) 512 U.S. 753, 763, 114 S. Ct. 2516, 129 L. Ed. 2d 593]* . A regulation that serves purposes unrelated to the content of expression is deemed neutral even if it has an incidental effect on some speakers or messages, but not others [*see, e.g.,* *Ward v. Rock Against Racism (1989) 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661* ; *Boos v. Barry (1988) 485 U.S. 312, 320-321, 108 S. Ct. 1157, 99 L. Ed. 2d 333* ; *Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal. 4th 352, 368, 93 Cal. Rptr. 2d 1, 993 P.2d 334* ; *Savage v. Trammell Crow Co. (1990) 223 Cal. App. 3d 1562, 1573, 273 Cal. Rptr. 302]* .

For example, the United States Supreme Court found that a municipal ordinance requiring a permit to conduct an event involving more than 50 individuals in public parks is a content-neutral time, place, and manner regulation of the use of a public forum since (1) the ordinance is not directed to communicative activity, but to all activity in a public park, and (2) the object of the ordinance and permit system is not to exclude communication of a particular content [*Thomas v. Chicago Park Dist. (2002) 534 U.S. 316, 122 S. Ct. 775, 779-780, 151 L. Ed. 2d 783]* . The Supreme Court has also found that an ordinance prohibiting knowingly or intentionally appearing in public in a state of nudity is to be evaluated as a content-neutral restriction on symbolic speech [*City of Erie v. Pap's A. M. (2000) 529 U.S. 277, 120 S. Ct. 1382, 1391, 146 L. Ed. 2d 265* (plurality opinion)]. The Court also found a federal injunction that imposed place restrictions against abortion protesters to be content-neutral since it focused exclusively on location and manner of the protest activities. The protesters' claim that the restriction was against a particular ideology was rejected since the injunction

was issued in response to their harassing conduct, not their viewpoint [*Madsen v. Women's Health Center, Inc. (1994) 512 U.S. 753, 763, 114 S. Ct. 2516, 129 L. Ed. 2d 593* ; *accord, Planned Parenthood Shasta-Diablo, Inc. v. Williams (1995) 10 Cal. 4th 1009, 1019-1020, 43 Cal. Rptr. 2d 88, 898 P.2d 402 , cert. denied, 520 U.S. 1133 (1997)]* . Similarly, the Ninth Circuit Court of Appeals found content-neutral a city ordinance regulating all demonstration activity within 100 feet of an abortion clinic, in which demonstration activity was defined as including but not limited to "protesting, picketing, distributing literature, attempting to impede access, or engaging in oral protest, education or counseling activities," so that the ordinance did not refer to the content of the speech it regulated [*Sabelko v. City of Phoenix (9th Cir. 1997) 120 F.3d 161, 164* (invalidating ordinance because not narrowly drawn)].

The United States and California Supreme Courts have found regulation of the solicitation of money to be content-neutral, thus requiring intermediate rather than strict scrutiny, even though the regulations distinguish between speech soliciting the immediate payment or donation of money and other protected speech, and thus are not totally unconcerned with the literal content of spoken or written words so long as the regulation predominantly is addressed to the inherently intrusive and potentially coercive nature of that *kind* of speech and not to the content [*see Int'l Soc. for Krishna Consciousness v. Lee (1992) 505 U.S. 672, 112 S. Ct. 2701, 120 L. Ed. 2d 541* ; *United States v. Kokinda (1990) 497 U.S. 720, 110 S. Ct. 3115, 111 L. Ed. 2d 571* ; *Heffron v. Int'l Soc. for Krishna Consciousness (1981) 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed. 2d 298* ; *Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal. 4th 352, 368-379, 93 Cal. Rptr. 2d 1, 993 P.2d 334]* .

A restriction may be content-based, and therefore subject to strict scrutiny, even though it is not "viewpoint based." In one case, for example, the United States Supreme Court considered the constitutionality of an ordinance that banned the display of any sign within 500 feet of a foreign embassy if the sign tended to bring the foreign government into "public odium" or "public disrepute." The Court rejected the government's contention that the restriction was not content-based. The Court agreed that the restriction was not viewpoint-based because the government was not selecting permissible expression on the basis of the views expressed in the signs; the permissible message was essentially determined by the policies of the foreign governments. Nevertheless, the expression was content-based because the permissibility of picket signs was determined by whether or not the sign criticized the foreign government [*Boos v. Barry (1988) 485 U.S. 312, 319, 108 S. Ct. 1157, 99 L. Ed. 2d 333]* . Furthermore, the justification for the ordinance was based on its potential primary impact on the target of the speech, i.e., the foreign governments [*Boos v. Barry (1988) 485 U.S. 312, 320-321, 108 S. Ct. 1157, 99 L. Ed. 2d 333]* .

Generally, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based [*Turner Broad. Sys. v. F.C.C. (1994) 512 U.S. 622, 643, 114 S. Ct. 2445, 129 L. Ed. 2d 497* ; *Foti v. City of Menlo Park (9th Cir. 1998) 146F.3d 629, 636*]. Thus, when exceptions to restrictions on noncommercial speech are based on content, the restriction itself is based on content [*Foti v. City of Menlo Park (9th Cir. 1998) 146 F.3d 629, 636* ; *National Advertising Co. v. City of Orange (9th Cir. 1988) 861 F.2d 246, 249]* . For example, a municipal ordinance banning all signs on all public property that created exemptions for real estate and safety, traffic, and public informational signs is unconstitutional, since enforcement of the ordinance requires that a law enforcement officer examine the content of signs to determine whether the exemptions apply [*Foti v. City of Menlo Park (9th Cir. 1998) 146 F.3d 629, 636* , citing *Desert Outdoor Advertising v. City of Moreno Valley (9th Cir. 1996) 103 F.3d 814, 820]* .

[c] Requirement of Narrow-Tailoring

A narrowly tailored time, place, or manner restriction on speech is one that does not burden substantially more speech than is necessary to achieve a substantial government interest [*Ward v. Rock Against Racism (1989) 491 U.S. 781, 799, 109 S. Ct. 2746, 105 L. Ed. 2d 661* ; *Berger v. City of Seattle (9th Cir. 2009) 569 F.3d 1029, 1041*]. It must target and eliminate no more than the exact source of the evil it seeks to remedy [*Frisby v. Schultz (1988) 487 U.S. 474, 485, 108 S. Ct. 2495, 101 L. Ed. 2d 420* ; *Berger v. City of Seattle (9th Cir. 2009) 569 F.3d 1029, 1041*].

Because it is content-neutral, a time, place, or manner restriction passes constitutional muster if it is narrowly tailored to serve a significant government interest and leaves open ample alternative channels of communication [*Frisby v. Schultz (1988) 487 U.S. 474, 482, 108 S. Ct. 2495, 101 L. Ed. 2d 420* ; *Edwards v. City of Santa Barbara (9th Cir. 1998) 150 F.3d 1213, 1215* ; for discussion of alternative channels of communication, see [d], *below*]. Though the regulation must be narrowly tailored to serve the government's legitimate, content-neutral interests, it need not be the least restrictive or least intrusive means of doing so [*Ward v. Rock Against Racism (1989) 491 U.S. 781, 798-799, 109 S. Ct. 2746, 105 L. Ed. 2d 661* ; *Klein v. City of San Clemente (9th Cir. 2009) 584 F.3d 1196, 1201* ; *Edwards v. City of Santa Barbara (9th Cir. 1998) 150 F.3d 1213, 1215-1216]* . However, the existence of obvious, less burdensome alternatives is a relevant consideration in determining whether the fit between ends and means is reasonable [*City of Cincinnati v. Discovery Network, Inc. (1993) 507 U.S. 410, 417 n.13, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993)* ; *Berger v. City of Seattle (9th Cir. 2009) 569 F.3d 1029, 1041* ; *see also Santa Monica Food Not Bombs v. City of Santa Monica (9th Cir. 2006) 450 F.3d 1022, 1041*].

The narrow tailoring requirement has been refined in three ways since it was first announced [*Galvin v. Hay (9th Cir. 2004) 374 F.3d 739, 753]* :

- As long as the government's interest in a regulation of speech in a public forum is substantial, the regulation need not be the least restrictive or least intrusive alternative [*One World One Family Now v. City and County of Honolulu (9th Cir. 1996) 76 F.3d 1009, 1014]* . So long as the governmental interests would be achieved less effectively absent the regulation and the regulation achieves its ends without significantly restricting a substantial quantity of speech that does not create the same evils, the regulation is sufficiently narrowly tailored [*Ward v. Rock against Racism (1989) 491 U.S. 781, 799 & n.7*].

- Although the regulation need not be minimally restrictive, the availability of several obvious less-restrictive alternatives is pertinent in deciding whether the regulation burdens substantially more speech than necessary to achieve its purposes [*Galvin v. Hay (9th Cir. 2004) 374 F.3d 739, 755* ; *see Klein v. City of San Clemente (9th Cir. 2009) 584 F.3d 1196, 1201* (existence of numerous and obvious less-burdensome alternatives is relevant to assessing whether restriction on speech reasonably fits interest asserted); *Project 80's, Inc. v. City of Pocatello (9th Cir. 1991) 942 F.2d 635, 638*].

- When there is a generic regulation, its validity need not be judged solely by reference to the demonstration at hand, but can also take into account the need for the regulation as applied to other speakers.

A state's interest in protecting the safety and convenience of persons using a public forum is a valid government objective [*Heffron v. Intl. Soc. of Krishna Consciousness, Inc. (1981) 452 U.S. 640, 650, 101 S. Ct. 2559, 69 L. Ed. 2d 298* ; *Berger v. City of Seattle (9th Cir. 2009) 569 F.3d 1029, 1041-1043* (while city's asserted reasons for enacting permitting regulations were substantial governmental interests of protecting safety and convenience of persons using public park, permitting requirements did not promote interests in any significant way); *see also Thomas v. Chicago Park Dist. (2002) 534 U.S. 316, 323, 122 S. Ct. 775, 151 L. Ed. 2d 783* ; *Cox v. State of New Hampshire (1941) 312 U.S. 569, 574, 61 S. Ct. 762, 85 L. Ed. 1049*].

For example, in one case, a California court of appeal held that an ordinance establishing a 300-foot buffer zone around residences, within which "targeted picketing" was prohibited, was constitutionally valid, even though some lesser zone might conceivably have accomplished the purpose of protecting residential privacy. The court noted that an ordinance is valid under the "narrow tailoring" test for time, place, and manner restrictions if it reasonably supports the government purpose in such a way that any less restrictive ordinance would do an inferior job [*City of San Jose v. Superior Court (Thompson) (1995) 32 Cal. App. 4th 330, 340-341, 38 Cal. Rptr. 2d 205 , cert. denied sub nom., Thompson v. City of San Jose, 516 U.S. 932]* .

In contrast, the Ninth Circuit found that a city ordinance banning sales and solicitation of donations along a city boardwalk, but containing an exception for nonprofit organizations, was invalid as not narrowly tailored to serve a governmental interests of protecting local merchants and aiding free traffic flow. The Ninth Circuit held that there was no evidence that those without nonprofit status were any more cumbersome on fair competition or free traffic flow than those with nonprofit status. Nor was there a justification for allowing those with membership in a nonprofit organization to sell items and solicit donations, while disallowing those with no nonprofit membership from the same activities [*Perry v. Los Angeles Police Dep't (9th Cir. 1997) 121 F.3d 1365, 1369-1370]* . In another case, the Ninth Circuit held that dispersing a prayer service held on public land to protest the destruction of former military housing rather than its conversion to housing for the homeless to a " *First Amendment*" zone was not narrowly tailored to serve the important governmental interests of ensuring that the prayer service was conducted so as not to impede access to the visitor center on the land or use of the roadways running through the land. In this case, the location was an essential part of the message sought to be conveyed, so that the requirement that the protesters use the *First Amendment* area burdened the speech to a substantially greater degree than was needed to achieve the government's purposes [*Galvin v. Hay (9th Cir. 2004) 374 F.3d 739, 753-755]* .

The "narrow tailoring" test discussed above applies when testing the constitutionality of generally applicable rules such as statutes or ordinances. A more stringent standard applies when testing the constitutionality of an injunction against expressive activities [*see Madsen v. Women's Health Center, Inc. (1994) 512 U.S. 753, 763, 114 S. Ct. 2516, 129 L. Ed. 2d 593* ; *City of San Jose v. Superior Court (Thompson) (1995) 32 Cal. App. 4th 330, 335, 337-341, 38 Cal. Rptr. 2d 205 , cert. denied sub nom., Thompson v. City of San Jose, 516 U.S. 932]* . For discussion of constitutional restrictions on such injunctions, see [6], *below*.

[d] Requirement of Alternative Forum for Expression

A time, place, and manner restriction imposed on protected expression must leave open adequate alternative channels of expression that allowsthe message to reach its audience, i.e., the speaker's target audience must not be altogether insulated from the speaker's message [*Frisby v. Schultz (1988) 487 U.S. 474, 480, 108 S. Ct. 2495, 101 L. Ed. 2d 420]* . In one case, for example, a "buffer zone" limiting protesters to anti-abortion activity across the street from a clinic was held to be an adequate alternative avenue to convey their message since the protesters were in plain view and within hearing distance of their target audience, the clinic's patients, and staff [*Planned Parenthood Shasta-Diablo, Inc. v. Williams (1995) 10 Cal. 4th 1009, 1020-1022, 43 Cal. Rptr. 2d 88, 898 P.2d 402 , cert. denied, 520 U.S. 1133 (1997)* ; *see also Madsen v. Women's Health Center, Inc. (1994) 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593* (striking down floating buffer zone imposed as part of injunctive relief as not narrowly drawn on basis of record in case); *see also § 59.13[6]*].

[e] Discretion of Decision Maker

To be valid under the *First Amendment*, a regulation of speech, such as a statute or an ordinance, must not delegate overly broad discretion to a government official to decide whether to restrict speech [*Seattle Affiliate of the October 22nd Coalition to Stop Police Brutality, Repression and the Criminalization of a Generation v. City of Seattle (9th Cir. 2008) 550 F.3d 788, 798-803* ; *Long Beach Area Peace Network v. City of Long Beach, 522 F.3d 1010, 1022 (9th Cir. 2008)* ; Santa Monica Food Not Bombs v. City of Santa Monica (9th Cir. 2006) *450 F.3d 1022, 1037 (9th Cir. 2006)]* . To determine whether a regulation impermissibly grants the official unduly broad discretion, courts consider whether the language of the regulation contains adequate standards to guide the official's decision and render it subject to effective judicial review [*Seattle Affiliate of the October 22nd Coalition to Stop Police Brutality, Repression and the Criminalization of a Generation v. City of Seattle (9th Cir. 2008) 550 F.3d 788, 798* ; *see also Thomas v. Chicago Park Dist. (2002) 534 U.S. 316, 323, 122 S. Ct. 775, 151 L. Ed. 2d 783]* . These guidelines mitigate the risk that the official will favor or disfavor speech based on its content [*Seattle Affiliate of the October 22nd Coalition to Stop Police Brutality, Repression and the Criminalization of a Generation v. City of Seattle (9th Cir. 2008) 550 F.3d 788, 798* ; *see also Thomas v. Chicago Park Dist. (2002) 534 U.S. 316, 323, 122 S. Ct. 775, 151 L. Ed. 2d 783]* . Among

the factors courts consider is whether the regulation contains narrowly drawn, reasonable, and definite standards guiding the hand of the official [*Seattle Affiliate of the October 22nd Coalition to Stop Police Brutality, Repression and the Criminalization of a Generation v. City of Seattle (9th Cir. 2008) 550 F.3d 788, 798* ; *see also Forsyth County v. Nationalist Movement (1992) 505 U.S. 123, 133, 112 S. Ct. 2395, 120 L. Ed. 2d 101]* . There is particular concern about statutes that do not require the official to provide any explanation for the decision, and that decision is unreviewable [*Seattle Affiliate of the October 22nd Coalition to Stop Police Brutality, Repression and the Criminalization of a Generation v. City of Seattle (9th Cir. 2008) 550 F.3d 788, 798-799* ; *see also Thomas v. Chicago Park Dist. (2002) 534 U.S. 316, 324, 122 S. Ct. 775, 151 L. Ed. 2d 783* (ordinance did not confer excess discretion where licensor had to clearly explain its reasons for denial, and statute's standards were enforceable on review by appeal to administrative board and then to state courts); *Forsyth County v. Nationalist Movement (1992) 505 U.S. 123, 133, 112 S. Ct. 2395, 120 L. Ed. 2d 101]* . None of these factors is itself necessarily determinative of whether a statute confers excess discretion. Instead, courts look to the totality of the factors to assess whether a regulation contains adequate safeguards to protect against official abuse [*Seattle Affiliate of the October 22nd Coalition to Stop Police Brutality, Repression and the Criminalization of a Generation v. City of Seattle (9th Cir. 2008) 550 F.3d 788, 799]* .

For example, the open-ended standard in a city's parade ordinance, combined with the absence of a requirement that officials articulate their reasons or an administrative-judicial review process, vested the chief of police with sweeping authority to determine whether a parade could utilize the forum of the streets to broadcast its message. This unduly broad discretion was prohibited by the *First Amendment* as placing unfettered discretion in the hands of the licensing officials and rendered the parade ordinance constitutionally defective on its face [*Seattle Affiliate of the October 22nd Coalition to Stop Police Brutality, Repression and the Criminalization of a Generation v. City of Seattle (9th Cir. 2008) 550 F.3d 788, 798-803]* .

[f] Captive Audiences

The government may only restrain speech to captive audiences in public fora under narrow circumstances [*Erznoznik v. City of Jacksonville (1975) 422 U.S. 205, 210-211, 95 S. Ct. 2268, 45 L. Ed. 2d 125* ; *Berger v. City of Seattle (9th Cir. 2009) 569 F.3d 1029, 1054*]. The government must show that substantial privacy interests are being invaded in an essentially intolerable manner [*Cohen v. California (1971) 403 U.S. 15, 21, 91 S. Ct. 1780, 29 L. Ed. 2d 284* ; *Berger v. City of Seattle (9th Cir. 2009) 569 F.3d 1029, 1054*]. Substantial privacy interests include the following:

- The psychological and physical well-being of a hospital patient held captive by medical circumstance [*Madsen v. Women's Health Ctr. (1994) 512 U.S. 753, 768-771, 114 S. Ct. 2516, 129 L. Ed. 2d 593* (validating injunction creating 36-foot buffer zone around entrances of abortion clinic in which picketing and demonstrating, among other activities, were barred); *see also Hill v. Colorado (2000) 530 U.S. 703, 728-730, 120 S. Ct. 2480, 147 L. Ed. 2d 597* (upholding eight-foot regulatory buffer around clinic entrances due to unique concerns surrounding health care facilities, where those using facilities are often in particularly vulnerable physical and emotional conditions)].

- The quiet enjoyment of one's home [*Frisby v. Schultz (1988) 487 U.S. 474, 483, 108 S. Ct. 2495, 101 L. Ed. 2d 420* (upholding ban on focused picketing taking place solely in front of particular residence)].

Under the captive audience rule, the Ninth Circuit found a city's rule prohibiting speech activities in a park within 30 feet of any person or group waiting in line to obtain tickets, food, or other goods or services; attending or being the audience in a park event; or seated and eating or drinking, to be an unconstitutional "captive audience" regulation [*Berger v. City of Seattle (9th Cir. 2009) 569 F.3d 1029, 1053-1057* ; *see Lehman v. City of Shaker Heights (1974) 418 U.S. 298, 302-304, 94 S. Ct. 2714, 41 L. Ed. 2d 770* (recognizing that public streetcar is not *First Amendment* forum like park, where *First Amendment* values inalterably prevail); *Kuba v. A Agric. Ass'n (9th Cir. 2004) 387 F.3d 850, 861 n.10* (patrons of place of public entertainment were not captive audience similar to intended audiences in *Madsen* and

its progeny, because they were obviously not particularly vulnerable, as were patients and doctors in those cases)]. Even if the city could have justified a prohibition on unwelcome speech, the "captive audience" regulation was too broad because it prohibited all "speech activities," not just those that continued after the recipient of the speech signaled a preference to be left alone [*Berger v. City of Seattle (9th Cir. 2009) 569 F.3d 1029, 1055* ; *see Board of Airport Comm'rs v. Jews for Jesus, Inc. (1987) 482 U.S. 569, 574-575, 107 S. Ct. 2568, 96 L. Ed. 2d 500* (regulation was constitutionally overbroad where it prohibited all *First Amendment* activities and no conceivable governmental interest justified such absolute prohibition of speech); *see also Schenck v. Pro-Choice Network of Western New York (1997) 519 U.S. 357, 383-384, 117 S. Ct. 855, 137 L. Ed. 2d 1 (1997)* (injunction provision requiring abortion protestors to move away from abortion clinic patients who asked to be left alone did not violate *First Amendment*)]. Moreover, even if the city's purported interest in protecting certain park-goers from communications by others were substantial, the rule was not narrowly tailored to meet that interest [*Berger v. City of Seattle (9th Cir. 2009) 569 F.3d 1029, 1055-1057*].

[3] Content Restrictions

[a] General Strict Scrutiny Standard of Review

As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based [*Baba v. Board of Supervisors (2004) 124 Cal. App. 4th 504, 513, 21 Cal. Rptr. 3d 428]* . The *First Amendment* does not permit government to restrict the content of speech because of its disapproval of the ideas expressed. Such content-based regulations are presumptively invalid [*R.A.V. v. St. Paul (1992) 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305* ; *Free Speech Coalition v. Reno (9th Cir. 1999) 198 F.3d 1083, 1091]* .

Most purported regulation of speech content is subject to a strict-scrutiny standard to determine its constitutional validity. In particular, content-based restrictions on expression in a public forum must be necessary to serve a compelling state interest and narrowly drawn to achieve that end [*U.S. v. Playboy Entertainment Group, Inc. (2000) 529 U.S. 803, 813-814, 120 S. Ct. 1878, 146 L. Ed. 2d 865* ; *Capitol Square Review & Advisory Bd. v. Pinette (1995) 515 U.S. 753, 761, 115 S. Ct. 2440, 132 L. Ed. 2d 650* ; *Boos v. Barry (1988) 485 U.S. 312, 321, 108 S. Ct. 1157, 99 L. Ed. 2d 333* ; *Perry Ed. Ass'n v. Perry Local Ed. Ass'n (1983) 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794* ; *see § 59.13[3], [6][a]*]. However, there may be content restriction in a nonpublic forum, such as a school, so long as the restriction is reasonably related to legitimate governmental concerns *[80 Ops. Cal. Atty. Gen. 155, 169 (1997)* (school district that permits commercial motion picture studios to film on school property may deny permission based solely on content of movie so long as reasonably related to legitimate pedagogical concerns)]. Further, regulation of solicitation of the immediate payment or donation of money has been found to be content-neutral and subject to a lower level of scrutiny [*see Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal. 4th 352, 93 Cal. Rptr. 2d 1, 993 P.2d 334* , and discussion in [2][b], *above*].

In determining whether a regulation is content based, the focus should be on determining the following [*Reed v. Town of Gilbert (9th Cir. 2009) 587 F.3d 966, 976]* :

- Whether the regulation targets certain content.

- Whether the regulation or an exemption is based on identification of a speaker or event instead of on content.

- Whether an enforcement officer would need to distinguish content to determine applicability of the regulation.

[b] "Unprotected" Content Categories

In addition to the general standard set forth in [a], *above*, the following limited categories of speech have been held to

be subject to content regulation because their social value is deemed to be "slight" when compared with society's interest in order and morality [*R.A.V. v. St. Paul (1992) 505 U.S. 377, 383, 112 S. Ct. 2538, 120 L. Ed. 2d 305]* :

- Obscenity;
- Defamation; and
- "Fighting words."

The California Supreme Court has also found knowingly false statements of fact to be unprotected speech [*see People v. Stanistreet (2002) 29 Cal. 4th 497, 501-512, 127 Cal. Rptr. 2d 633, 58 P.3d 465* (*Pen. Code § 148.6*, making filing of allegation of misconduct against peace officer knowing allegation to be false a misdemeanor, is constitutional on its face)]. The United States Supreme Court held that a state may punish words that by their very utterance inflict injury or tend to incite an immediate breach of the peace [*Virginia v. Black (2003) 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535* ; *Chaplinsky v. New Hampshire (1942) 315 U.S. 568, 572, 62 S. Ct. 766, 86 L. Ed. 1031]* .

Even in the above areas, however, the Supreme Court has indicated that there are *First Amendment* limits on the extent of permissible governmental regulation [*R.A.V. v. St. Paul (1992) 505 U.S. 377, 383-384, 112 S. Ct. 2538, 120 L. Ed. 2d 305]* . For speech to be actionable fighting words, the government must show there was a likelihood the person addressed would make an immediate violent response [*Gooding v. Wilson (1972) 405 U.S. 518, 528, 92 S. Ct. 1103, 31 L. Ed. 2d 408* ; *United States v. Poocha (9th Cir. 2001) 259 F.3d 1077, 1080-1081* (fighting words exception requires narrower application when words addressed to police officer because properly trained officer may reasonably be expected to exercise higher degree of restraint than average citizen and be less likely to respond)]. Further, the Supreme Court struck down as unconstitutional a state law prohibiting the placement of symbols or objects on private or public property that "one knows or has reason to know arouses anger, alarm or resentment on the basis of race, color, creed, religion or gender." Although the state had justified the regulation as a prohibition of "fighting words," the Court held that the statute was unconstitutional because it discriminated based on viewpoint; those using fighting words that communicate messages of ethnic or gender intolerance are punished, while those expressing other viewpoints are free to use fighting words [*R.A.V. v. St. Paul (1992) 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305* ; *see Department of Corrections v. State Personnel Bd. (Wallace) (1997) 59 Cal. App. 4th 131, 144-145, 69 Cal. Rptr. 2d 34* (white male correctional officer's expression of frustration and anger regarding affirmative action policy of California Department of Corrections to Hispanic female officer was not within "fighting words" exception to *First Amendment* protection)].

The *First Amendment* also permits a state to ban a "true threat." True threats encompass statements in which the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals [*Virginia v. Black (2003) 538 U.S. 343, 123 S. Ct. 1536, 1547-1548, 155 L. Ed. 2d 535* ; *Watts v. United States (1969) 394 U.S. 705, 708, 89 S. Ct. 1399, 22 L. Ed. 2d 664]* . The speaker need not actually intend to carry out the threat. Intimidation in the constitutionally proscribable sense is a type of true threat, in which a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death [*Virginia v. Black (2003) 538 U.S. 343, 123 S. Ct. 1536, 1547-1548, 155 L. Ed. 2d 535* (some cross-burnings fit within this meaning of intimidating speech)].

[c] "Clear and Present Danger" Test

In a number of earlier decisions, the United States Supreme Court held that the restriction of otherwise protected speech may be justified if the words pose a "clear and present danger" to an undeniable public interest or to the administration of justice. Generally, the "clear and present danger" test required the government to demonstrate that the speech involved a "serious substantive evil" and a high degree of imminence to justify the restriction [*see, e.g.,* *Dennis v. United States (1951) 341 U.S. 494, 510, 71 S. Ct. 857, 95 L. Ed. 1137* ; *Terminiello v. Chicago (1949) 337 U.S. 1, 4, 69 S. Ct. 894, 93 L. Ed. 1131* ; *Bridges v. California (1941) 314 U.S. 252, 263, 62 S. Ct. 190, 86 L. Ed. 192]* . In a

later case, the Court struck down a statute that punished mere advocacy of unlawful violence without citing the "clear and present danger" test, and two justices expressed the view, in concurring opinions, that the test should not be applied in interpreting the *First Amendment* [*see Brandenburg v. Ohio (1969) 395 U.S. 444, 447-455, 89 S. Ct. 1827, 23 L. Ed. 2d 430]* . The Court in that case held that the state cannot ban advocacy of unlawful conduct unless the expression is directed to inciting or producing imminent lawless action and is likely to incite or produce such action [*Brandenburg v. Ohio (1969) 395 U.S. 444, 447-448, 89 S. Ct. 1827, 23 L. Ed. 2d 430* ; *see Texas v. Johnson (1989) 491 U.S. 397, 409, 109 S. Ct. 2533, 105 L. Ed. 2d 342]* .

Although the Supreme Court apparently no longer relies on the "clear and present danger" test, some later California decisions have continued to refer to it when testing the constitutionality of various restrictions on free expression [*see, e.g., In re Juan C. (1994) 28 Cal. App. 4th 1093, 1100, 33 Cal. Rptr. 2d 919* (upholding riot curfew); *DiBona v. Matthews (1990) 220 Cal. App. 3d 1329, 1342-1343, 269 Cal. Rptr. 882* (striking down censorship of play by community college officials); *Sun Co. of San Bernardino v. Superior Court (1973) 29 Cal. App. 3d 815, 826-829, 105 Cal. Rptr. 873* (striking down restraining order against news media pertaining to publication of information about pending criminal case)]. One California court of appeal has indicated that the following factors should be balanced to determine the constitutionality of restrictions on speech under the clear and present danger test [*Sun Co. of San Bernardino v. Superior Court (1973) 29 Cal. App. 3d 815, 826, 105 Cal. Rptr. 873]* :

- The seriousness of the danger relative to the value of the occasion for speech;
- The availability of more moderate controls than those the state has imposed; and
- The specific intent with which the speech is delivered.

In one case, a court of appeal held that a play containing racial slurs and profanity whose community college production was canceled due to "community opposition" was a "classic illustration" of speech not satisfying the clear and present danger test. The appellate court reversed a summary judgment granting the college declaratory and injunctive relief, and ordered college officials to allow the play's production. The court found that by cancelling the production, the government was censoring protected speech based on undifferentiated fear of dissension, with no showing of evil. The court concluded that the play was intended to provoke public thought, not violence [*DiBona v. Matthews (1990) 220 Cal. App. 3d 1329, 1342-1344, 269 Cal. Rptr. 882]* . On the other hand, a speaker's "serious" offer to reward killing or maiming a Nazi Party member made at a rally was held to be evil and dangerous and did present a clear and present danger of producing imminent lawless conduct--killing for a reward. Therefore, the rally speech was not protected by the *First Amendment*, and the speaker could be prosecuted [*People v. Rubin (1979) 96 Cal. App. 3d 968, 976-980, 158 Cal. Rptr. 488 , cert. denied, 449 U.S. 821 (1980)]* .

Speech that merely advocates violation of the law or creates undifferentiated fear of provoking dissension does not satisfy the clear and present danger test [*see DiBona v. Matthews (1990) 220 Cal. App. 3d 1329, 1342-1343, 269 Cal. Rptr. 882* ; *Long v. Valentino (1989) 216 Cal. App. 3d 1287, 1294, 265 Cal. Rptr. 96]* . For example, a rock singer's lyrics that were claimed to have incited teenage suicide did not present a clear and present danger since the words did not command immediate suicide and the music was not intended toward the goal of inciting imminent suicide of rock music listeners [*McCollum v. CBS, Inc. (1988) 202 Cal. App. 3d 989, 1000-1002, 249 Cal. Rptr. 187]* .

[4] "Incidental" Limitations on Expression

[a] Examples of Limitations

In some instances, the government may indirectly or incidentally infringe on *First Amendment* rights as a result of a statute or injunction aimed, on its face, at prohibiting or restricting unprotected speech [*Times Mirror Co. v. City of Los Angeles (1987) 192 Cal. App. 3d 170, 237 Cal. Rptr. 346 , appeal dismissed, 484 U.S. 1022 (1988)]* . Often,

incidental interferencewith *First Amendment* activity results from an overbroad injunction or an ordinance that condemns protected speech along with unprotected conduct, as demonstrated by the following examples [*Spiritual Psychic Science Church v. City of Azusa (1985) 39 Cal. 3d 501, 516-517, 217 Cal. Rptr. 225, 703 P.2d 1119]* :

- An ordinance regulating distribution of newspapers at an airport that granted sole authority to the distributor to decide what newspapers would be sold [*People v. Singer (1975) 50 Cal. App. 3d Supp. 9*].

- An injunctive order prohibiting former residents of a mobilehome park from contacting current residents [*Smith v. Silvey (1983) 149 Cal. App. 3d 400, 197 Cal. Rptr. 15]* .

- An ordinance prohibiting fortunetelling for profit [*Spiritual Psychic Science Church v. City of Azusa (1985) 39 Cal. 3d 501, 516, 217 Cal. Rptr. 225, 703 P.2d 1119]* .

For discussion of the overbreadth doctrine, see *§ 59.15[2]*. For discussion of constitutional limitations on injunctive relief, see [6], *below.*

[b] Test for Constitutionality of Incidental Limitation

An incidental limitation on free speech is subject to constitutional scrutiny and is justified if it meets both of the following criteria [*United States v. O'Brien (1968) 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672]* :

- It furthers an important governmental interest unrelated to the suppression of free expression; and

- The incidental restriction is no greater than necessary to further that interest.

A finding that a city has the restriction of *First Amendment* speech as a "motivating factor" in enacting an ordinance is not of itself sufficient to hold the regulation presumptively invalid [*Renton v. Playtime Theatres, Inc. (1986) 475 U.S. 41, 46-49, 106 S. Ct. 925, 89 L. Ed. 2d 29* ; *Colacurcio v. City of Kent (9th Cir. 1998) 163 F.3d 545, 552]* .

For example, a city could reasonably rely on a 1977 study it conducted before enacting an ordinance prohibiting the establishment or maintenance of more than one adult entertainment business in the same building, since the study revealed that areas with high concentrations of adult establishments are associated with high crime rates. Thus, it was reasonable for the city to suppose that a concentration of adult establishments is correlated with high crime rates because a concentration of operations in one locale draws a greater concentration of adult consumers to the neighborhood, and a high density of adult consumers either attracts or generates criminal activity [*City of Los Angeles v. Alameda Books, Inc. (2002) 535 U.S. 425, 436, 122 S. Ct. 1728, 152 L. Ed. 2d 670]* .

As another example, a city regulation imposing a night curfew in the wake of a major riot was justified, despite its incidental limit on speech, since the compelling interest in controlling widespread rioting and preventing imminent destruction of life and property was promoted, and the restriction was limited to certain hours of the night [*In re Juan C. (1994) 28 Cal. App. 4th 1093, 1100, 33 Cal. Rptr. 2d 919]* . Similarly, an ordinance requiring cabarets to close between the hours of 2 and 6 a.m. did not constitute excessive infringement on free expression in that the infringement was minimal relative to potential public harm from excess noise and disorderly patrons [*Sundance Saloon, Inc. v. City of San Diego (1989) 213 Cal. App. 3d 807, 814-822, 261 Cal. Rptr. 841]* .

By contrast, a conviction under an ordinance forbidding flag-burning was found not consistent with the *First Amendment* because the government's interest in preserving the flag as a symbol of nationhood did not justify the incidental limitation on *First Amendment* political speech [*Texas v. Johnson (1989) 491 U.S. 397, 410-420, 109 S. Ct. 2533, 105 L. Ed. 2d 342]* .

[5] Prior Restraint on Expression

[a] General Prohibition

A prior restraint exists when the enjoyment of protected expression is contingent on the approval of government officials [*Near v. Minnesota (1931) 283 U.S. 697, 713, 51 S. Ct. 625, 75 L. Ed. 1357* ; *Clark v. City of Lakewood (9th Cir. 2001) 259 F.3d 996, 1005* (licensing scheme regulating nude dancing is prior restraint because enjoyment of protected expression is contingent on approval of government officials); *Baby Tam & Co., Inc. v. City of Las Vegas (9th Cir. 1998) 154 F.3d 1097, 1100]* . Prior restraint on protected expression is the most serious and the least tolerable infringement on *First Amendment* rights. Any governmental action that seeks prior restraint of exercise of protected speech or assembly in public forums is presumptively invalid under the *First Amendment* [*see* *Organization for a Better Austin v. Keefe (1971) 402 U.S. 415, 419, 91 S. Ct. 1575, 29 L. Ed. 2d 1* ; *Grossman v. City of Portland (9th Cir. 1994) 33 F.3d 1200, 1204* ; *Hurvitz v. Hoefflin (2000) 84 Cal. App. 4th 1232, 1241, 101 Cal. Rptr. 2d 558* ; *Pines v. Tomson (1984) 160 Cal. App. 3d 370, 395, 206 Cal. Rptr. 866]* . Publication of lawfully obtained, truthful information about a matter of public significance may not be restrained unless it is necessary to protect a state interest of the highest order [*The Florida Star v. B. J. F. (1989) 491 U.S. 524, 533, 109 S. Ct. 2603, 105 L. Ed. 2d 443* ; *South Coast Newspapers, Inc. v. Superior Court (2000) 85 Cal. App. 4th 866, 870, 102 Cal. Rptr. 2d 487]* . Therefore, although prior restraints are not unconstitutional per se, any system of prior restraint bears a heavy presumption against its constitutional validity [*FW/PBS, Inc. v. City of Dallas (1990) 493 U.S. 215, 225, 110 S. Ct. 596, 107 L. Ed. 2d 603* ; *Southeastern Promotions,Ltd. v. Conrad (1975) 420 U.S. 546, 558, 95 S. Ct. 1239, 1246, 43 L. Ed. 2d 448* ; *Clark v. City of Lakewood (9th Cir. 2001) 259 F.3d 996, 1005* ; *Baby Tam & Co., Inc. v. City of Las Vegas (9th Cir. 1998) 154 F.3d 1097, 1100* ; *Tily B., Inc. v. City of Newport Beach (1998) 69 Cal. App. 4th 1, 10, 81 Cal Rptr 2d. 6* (nude dancing comes within rule because is marginally within outer perimeters of *First Amendment*)].

For a claim of prior restraint to lie, the government's action constituting the basis for the claim must involve content discrimination [*see* *Wolfgram v. Wells Fargo Bank (1997) 53 Cal. App. 4th 43, 59-60, 61 Cal. Rptr. 2d 694]* . Thus, a prefiling order prohibiting a vexatious litigant from filing new litigation absent leave from the presiding judge of the court in which the litigation is proposed to be filed [*Code Civ. Proc. § 391.7*] does not constitute a prior restraint on the constitutionally protected right to petition the government for redress. The prefiling order is more akin to a license or permit "administered to narrowly drawn, reasonable and definite standards," representing the only practical means for the government to manage competing uses of a public facility, the court, than to a prior restraint [*Wolfgram v. Wells Fargo Bank (1997) 53 Cal. App. 4th 43, 59-60, 61 Cal. Rptr. 2d 694]* . The following are further examples of situations in which prior restraints are allowed:

- Pure commercial speech, to the extent it is fraudulent [*Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n (1980) 447 U.S. 557, 563-564, 100 S. Ct. 2343, 65 L. Ed. 2d 341* ; for regulation of commercial speech generally, *see* Ch. 14, *Advertising*].

- Speech that will incite imminent lawlessness [*Brandenburg v. Ohio (1969) 395 U.S. 444, 447, 89 S. Ct. 1827, 23 L. Ed. 2d 430* ; for discussion of the "clear and present danger" test, *see* [3][c], *above*].

- Speech that aids or abets criminal activity [*Illinois ex rel. Madigan v. Telemarketing Assocs. (2003) 538 U.S. 600, 612-613, 123 S. Ct. 1829, 155 L. Ed. 2d 793]* .

The California Supreme Court has also held that an injunction issued banning racial epithets at the workplace is not a constitutionally invalid prior restraint on expression, since in the case at issue, the injunction was issued only after the jury had determined at trial that the defendants engaged in unlawful employment discrimination and the order simply precluded the defendants from continuing their unlawful activity [*Aguilar v. Avis Rent A Car System (1999) 21 Cal. 4th 121, 138-145, 87 Cal. Rptr. 2d 132, 980 P.2d 846* (determination under *U.S. Const., amend. I* and *Cal. Const., art. I, § 2*].

[b] Administrative Permit Requirements

[i] General Rule

An ordinance or regulation that requires a speaker to secure a permit in advance to conduct expressive activity in a public forum is a form of prior restraint [*Forsyth County, Ga. v. Nationalist Movement (1992) 505 U.S. 123, 130, 112 S. Ct. 2395, 120 L. Ed. 2d 101* ; *Berger v. City of Seattle (9th Cir. 2009) 569 F.3d 1029, 1037* (permitting requirement is prior restraint on speech and therefore bears heavy presumption against its constitutionality); *United States v. Baugh (9th Cir. 1999) 187 F.3d 1037* (arrest of demonstrators after Park Service refused to issue permit because leader of demonstrators would not promise not to enter certain areas violated *First Amendment* rights); *Grossman v. City of Portland (9th Cir. 1994) 33 F.3d 1200, 1204* (advance permit for demonstrating in public park; held invalid); *Rosen v. Port of Portland (9th Cir. 1981) 641 F.2d 1243, 1247* (one-day advance notice for demonstrating; held invalid)]. However, as discussed below, such permit requirements may be constitutional if they meet the requirements for a valid, content-neutral time, place, and manner restriction [*see, e.g.,* *Long Beach Lesbian & Gay Pride, Inc. v. City of Long Beach (1993) 14 Cal. App. 4th 312, 324-325, 17 Cal. Rptr. 2d 861]* .

As a result of the significant burden registration requirements place on speakers, the Supreme Court has consistently struck down permitting systems that apply to individual speakers, as opposed to large groups, in the context of solicitation of private homes [*Berger v. City of Seattle (9th Cir. 2009) 569 F.3d 1029, 1038* ; *see* *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton (2002) 536 U.S. 150, 166-167, 122 S. Ct. 2080, 153 L. Ed. 2d 205* ; *Village of Schaumburg v. Citizens for a Better Envt. (1980) 444 U.S. 620, 638-639, 100 S. Ct. 826, 63 L. Ed. 2d 73* (striking down solicitation permit requirement); *Cantwell v. State of Conn. (1940) 310 U.S. 296, 301, 306-307, 60 S. Ct. 900, 84 L. Ed. 1213* (striking down license requirement as applied to Jehovah's Witnesses going singly from house to house for purpose of religious solicitation); *Schneider v. State of N.J. (1939) 308 U.S. 147, 163-164, 60 S. Ct. 146, 84 L. Ed. 155* (striking down permitting scheme covering all forms of solicitation)]. The Court has concluded that single-speaker permitting requirements are not a constitutionally valid means of advancing valid governmental interests of the prevention of crime and fraud and the protection of residential privacy because of the following reasons [*Berger v. City of Seattle (9th Cir. 2009) 569 F.3d 1029, 1038*]:

- They sweep too broadly [*see* *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton (2002) 536 U.S. 150, 165-166, 122 S. Ct. 2080, 153 L. Ed. 2d 205* ; *Village of Schaumburg v. Citizens for a Better Envt. (1980) 444 U.S. 620, 636-637, 100 S. Ct. 826, 63 L. Ed. 2d 73*].

- They only marginally advance the government's asserted interests [*see* *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton (2002) 536 U.S. 150, 168-169, 122 S. Ct. 2080, 153 L. Ed. 2d 205*].

- The government's interests can be achieved by less intrusive means [*see* *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton (2002) 536 U.S. 150, 168-169, 122 S. Ct. 2080, 153 L. Ed. 2d 205* ; *Village of Schaumburg v. Citizens for a Better Envt. (1980) 444 U.S. 620, 637, 100 S. Ct. 826, 63 L. Ed. 2d 73*].

The Supreme Court has not addressed the validity of single-speaker permitting requirements for speech in a public forum. The Ninth Circuit has refused to uphold registration requirements that apply to individual speakers or small groups in a public forum [*see* *Santa Monica Food Not Bombs v. City of Santa Monica (9th Cir. 2006) 450 F.3d 1022, 1039* ; *Grossman v. City of Portland (9th Cir. 1994) 33 F.3d 1200, 1204-1205* ; *Rosen v. Port of Portland (9th Cir. 19981) 641 F.2d 1243, 1247-1248*], including single-speaker permitting requirements for speech in a public park [*see* Berger v. City of Seattle (9th Cir. 2009) 1029, 1039-1048 (permitting requirements had impermissibly broad scope; did not meaningfully promote city's asserted interests; and addressed interests that could have been achieved through means far less intrusive than individual speaker registration requirement)].

To regulate competing uses of public forums such as streets and parks, the government may impose a permit requirement on those wishing to hold a march, parade, or rally. However, a regulatory scheme delegating an official unfettered discretion to grant or deny a permit is facially invalid as an impermissible prior restraint [*see Forsyth County, Ga. v. Nationalist Movement (1992) 505 U.S. 123, 130, 112 S. Ct. 2395, 120 L. Ed. 2d 101* ; *see also In re Juan C. (1994) 33 Cal. Rptr. 2d 919]* . Instead, a permit scheme must be limited to restriction of time, place, manner, and duration of the march or parade and be narrowly drawn to serve a significant government interest, such as safety and convenience of the public. Official discretion must be exercised with content-neutrality, reasonableness, and uniformity based on the facts of each permit application [*Dillon v. Municipal Court (1971) 4 Cal. 3d 860, 869-871, 94 Cal. Rptr. 777, 484 P.2d 945]* .

In one case, the United States Supreme Court found a municipal practice of allowing demonstrations or parades only when prior approval has been obtained from city officials to be unconstitutional since it vested arbitrary control in public officials to issue or withhold the permit, depending on their approval or disapproval of the paraders' purpose [*Cox v. Louisiana (1965) 379 U.S. 536, 555-558 & n.15*]. Likewise, a federal appellate court found improper a transit authority requirement for a permit to participate in any "organized exercise of rights which deal with political, religious, and social matters" as sweeping too broadly in regulating protected speech [*Community for Creative Non-Violence v. Turner (D.C. Cir. 1990) 893 F.2d 1387, 1389-1390* ; *see also Rosen v. Port of Portland (9th Cir. 1990) 641 F.2d 1242, 1247-1250* ; *cf. Welton v. City of Los Angeles (1976) 18 Cal. 3d 497, 134 Cal. Rptr. 668, 556 P.2d 1119* (restriction regarding sale of merchandise on streets constitutional)].

For a form of complaint against a public entity for injunctive and declaratory relief based on an unconstitutional denial of a permit to use a public facility for free speech activities, see *§ 59.50*.

For discussion of expedited judicial review procedures of public agency decisions regarding the issuance, revocation, suspension, or denial of a permit involving expressive conduct protected by *U.S. Const., amend. I*,see [iv], *below*. For a form of petition for writ of mandate for expedited judicial review of a public agency decision related to a permit or other entitlement regarding expressive conduct protected by the *First Amendment*, including a denial of a permit to use a public facility for free speech activities, see *§ 59.50A*.

[ii] Advance Notice Requirements

Some permit schemes impose advance notice provisions, such as application submission requirements and waiting periods, that must be fulfilled before a permit is granted. These procedural hurdles potentially pose "drastic" burdens on protected speech since potential speakers may be discouraged [*see N.A.A.C.P., Western Region v. City of Richmond (9th Cir. 1984) 743 F.2d 1346, 1355-1357]* . Therefore, courts apply strict scrutiny in evaluating the justification for these notice requirements [*Grossman v. City of Portland (9th Cir. 1994) 33 F.3d 1200, 1204]* . For example, theNinth Circuit found a city's requirement of 20 days' advance notice to receive a parade permit as violative of the *First Amendment* because it was not the least restrictive means of protecting its interest in regulating traffic [*N.A.A.C.P., Western Region v. City of Richmond (9th Cir. 1984) 743 F.2d 1346, 1355-1357]* .

Moreover, delays caused by complying with procedures may have a chilling effect on spontaneous speech responding to immediate events, often the most effective type of expression. For instance, a federal court found no justification for a "built-in delay mechanism" inherent in a challenged permit requirement since it only served to deter and even preclude expression necessary to provide an "immediate response to late-breaking events" [*Community for Creative Non-Violence v. Turner (D.C. Cir. 1990) 893 F.2d 1387, 1389-1390]* .

Some types of advance notice provisions may be justified in the case of large groups, where the burden placed on park facilities and the possibility of interference with other park users is substantial. However, in one case, the Ninth Circuit found that even if a 24-hour advance notice requirement was justified for large groups, it swept too broadly in

regulating small groups [*Rosen v. Port of Portland (9th Cir. 1990) 641 F.2d 1242, 1247-1250]* .

[iii] Permit Fee

The government may require payment of a fee as a condition of granting a permit to cover the cost for police protection and traffic control necessary to maintain public order. A fee that is neither arbitrary nor excessive, but that reflects the added public cost, is constitutional [*Cox v. New Hampshire (1941) 312 U.S. 569, 576-577, 61 S. Ct. 762, 85 L. Ed. 1049]* . However, a fee that is arbitrarily applied to tax the content of the speaker's message is invalid [*Forsyth County, Ga. v. Nationalist Movement (1992) 505 U.S. 123, 112 S. Ct. 2395, 120 L. Ed. 2d 101]* .

[iv] Expedited Judicial Review of Agency Decisions Regarding Permits Involving Expressive Conduct

Effective July 1, 1999, an action or proceeding for judicial review of the issuance, revocation, suspension, or denial of a permit or other entitlement for expressive conduct protected by *U.S. Const., amend. I*, must be conducted in accordance with *Code Civ. Proc. § 1094.8(d)* [*Code Civ. Proc. § 1094.8(a)*]. This procedure is designed to provide a judicial hearing and decision on the issuance, revocation, suspension or denial of a permit for expressive conduct protected by *U.S. Const., amend. I*, in an expeditious manner consistent with constitutional requirements, in view of the holding of the Ninth Circuit Court of Appeals in *Baby Tam & Co. v. City of Las Vegas (9th Cir. 1998) 154 F.3d 1097* [Stats. 1999, ch. 49, § 2].

Within five court days after receiving written notification from a permit applicant that the permit applicant will seek judicial review of a publicagency's action on the permit, the public agency must prepare, certify, and make available the administrative record to the permit applicant [*Code Civ. Proc. § 1094.8(d)(1)*]. "Permit applicant" within the meaning of *Code Civ. Proc. § 1094.8* includes both the applicant for a permit and a permit holder [*Code Civ. Proc. § 1094.8(b)(2)*]; "public agency" includes a city, county, city and county, joint powers authority or similar public entity formed pursuant to *Gov. Code § 65850.4*, or any other public entity authorized by law to issue permits for expressive conduct protected by *U.S. Const., amend. I* [*Code Civ. Proc. § 1094.8(b)(3)*].

Either the public agency that took action on the permit or the permit applicant may bring an action for judicial review in accordance with *Code Civ. Proc. § 1094.8* [*Code Civ. Proc. § 1094.8(d)(2)*]. If the permit applicant brings the action, it must be in the form of a petition for writ of mandate pursuant to *Code Civ. Proc. §§ 1085* or *1094.5*, as appropriate [*Code Civ. Proc. § 1094.8(d)(2)*]. For discussion of petitions for writ of mandate generally, see Ch. 358, *Mandate and Prohibition* ; for discussion of petitions for writ of administrative mandate to review administrative decisions pursuant to *Code Civ. Proc. § 1094.5*, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

The party bringing the action for judicial review must file and serve the petition on the respondent no later than 21 calendar days following the public agency's final decision on the permit. The title page of the petition must contain the following language in 18-point type [*Code Civ. Proc. § 1094.8(d)(3)*]:

ATTENTION: THIS MATTER IS ENTITLED TO PRIORITY AND SUBJECT TO THE EXPEDITED HEARING AND REVIEW PROCEDURES CONTAINED IN SECTION 1094.8 OF THE CODE OF CIVIL PROCEDURE.

For a form petition for writ of mandate under *Code Civ. Proc. § 1094.8*, see *§ 59.50A[1]*.

The clerk of the court must set a hearing for review of the petition not later than 25 calendar days from the date the petition is filed. Moving, opposition, and reply papers are to be filed as provided in the California Rules of Court. The petitioner must lodge the administrative record with the court no later than 10 calendar days in advance of the hearing date [*Code Civ. Proc. § 1094.8(d)(4)*]. The court must render its decision in an expeditious manner consistent with constitutional requirements, in view of the particular facts and circumstances. However, in no event may the court

render the decision later than 20 calendar days after the matter is submitted, or 50 calendar days after the date the petition is filed, whichever is earlier [*Code Civ. Proc. § 1094.8(d)(5)*].

The parties to the action may jointly waive the time limits provided in *Code Civ. Proc. § 1094.8* [*Code Civ. Proc. § 1094.8(f)*]. If the presiding judge determines that as a result of either the press of other court business or other factors, the court will be unable to meet any one or more the deadlines provided in *Code Civ. Proc. § 1094.8*, the presiding judge must request the temporary assignment of a judicial officer to hear the petition and render a decision within the stated time limits, pursuant to *Gov. Code § 68543.8*. Given the short time period involved, that request is entitled to priority [*Code Civ. Proc. § 1094.8(e)*].

[c] Gag Orders

Gag orders on litigants and trial participants are unconstitutional unless each of the following is true [*Hurvitz v. Hoefflin (2000) 84 Cal. App. 4th 1232, 1241, 101 Cal. Rptr. 2d 558]* :

- The speech sought to be restrained poses a clear and present danger or serious and imminent threat to a protected competing interest;
- The order is narrowly tailored to protect that interest; and
- No less restrictive alternatives are available.

The trial court must make express findings showing it applied this standard and considered and weighed the competing interests. The appellate court makes an independent examination of the entire record to determine the constitutionality of the trial court order in light of the standard. The fact that information is protected by the physician-patient privilege, that dissemination might prejudice potential jurors, and that information is protected by a patient's right of privacy, while important considerations, may not be sufficient to justify a prior restraint on litigants' speech [*see Hurvitz v. Hoefflin (2000) 84 Cal. App. 4th 1232, 1242-1246, 101 Cal. Rptr. 2d 558]* .

[6] Injunction Restricting Expression

Although some cases have indicated that any injunction prohibiting or restricting *First Amendment* activity is a form of prior restraint subject to strict scrutiny [*see, e.g., Paradise Hills Associates v. Procel (1991) 235 Cal. App. 3d 1528, 1538, 1 Cal. Rptr. 2d 514* ; *Chico Feminist Women's Health Center v. Scully (1989) 208 Cal. App. 3d 230, 240, 256 Cal. Rptr. 194]* , the United States Supreme Court has more recently stated that not every injunction that incidentally limits expression constitutes a prior restraint that is subject to the heavy presumption of invalidity, particularly whenthe injunction is content-neutral and leaves the defendant with alternative means of expressing his or her message [*Madsen v. Women's Health Center, Inc. (1994) 512 U.S. 753, 763-764 n.2, 114 S. Ct. 2516, 129 L. Ed. 2d 593]* .

Nevertheless, because of the risk of censorship and discriminatory application posed by injunctions, the Court has indicated that even content-neutral injunctions imposing restrictions on expressive activity must meet a higher level of scrutiny than time, place, and manner restrictions imposed under a generally applicable statute or ordinance. Rather than merely being "narrowly tailored to serve a significant governmental interest," injunctive provisions must "burden no more speech than necessary" to serve that interest [*Madsen v. Women's Health Center, Inc. (1994) 512 U.S. 753, 764-765, 114 S. Ct. 2516, 129 L. Ed. 2d 593* ; *San Diego Unified Port Dist. v. U.S. Citizens Patrol (1998) 63 Cal. App. 4th 964, 971, 74 Cal. Rptr. 2d 364]* . In addition, such an injunction must leave open ample alternative channels of communication [*Chico Feminist Women's Health Center v. Scully (1989) 208 Cal. App. 3d 230, 246-247, 256 Cal. Rptr. 194]* .

Thus, for example, the United States Supreme Court declared provisions in a preliminary injunction establishing a

floating buffer zone requiring abortion protestors to stay 15 feet from people entering and leaving abortion clinics unconstitutional. In holding that the floating buffer zone burdened more speech than necessary to serve relevant governmental interests, the Court noted that the floating zones required protestors to move with various people entering and leaving clinics to communicate their messages, resulting in a lack of certainty as to how to comply with the injunction, leading in turn to substantial risk that much more speech would be burdened than that prohibited by the terms of the injunction [*Schenck v. Pro-Choice Network Of Western New York (1997) 519 U.S. 357, 375-380, 117 S. Ct. 855, 137 L. Ed. 2d 1]* . However, in light of the protestors' purposeful blocking of clinic entrances and parking lots and their harassment of local police before and after issuance of the temporary restraining order, the Court upheld the portion of the injunction imposing a fixed buffer zone requiring protestors to remain 15 feet from clinic doorways, driveways, and driveway entrances as necessary to ensure that people and vehicles attempting to enter or exit abortion clinic property or parking lots could do so [*Schenck v. Pro-Choice Network Of Western New York (1997) 519 U.S. 357, 372-376, 117 S. Ct. 855, 137 L. Ed. 2d 1]* .

The California Supreme Court, relying on *Madsen*, upheld an injunction thatcreated a 60-foot "buffer zone" around the front of a medical clinic by ordering anti-abortion protesters to remain on the sidewalk on the opposite side of the street from the clinic. The Court found that the injunction, which was granted in response to the protesters' previous harassment of clinic patients and staff and interference with access to the clinic, did not unduly burden any more of the protesters' expression than was necessary to serve the government's significant interests in promotingsafety and order around the clinic, protecting the safety and well-being of patients, and assuring unfettered access to and egress from the clinic. Furthermore, the injunction allowed the protesters to communicate their viewpoint from across the street in plain view of persons entering and leaving the clinic, without subjecting patients to physical intimidation [*Planned Parenthood Shasta-Diablo, Inc. v. Williams (1995) 10 Cal. 4th 1009, 1019-1025, 43 Cal. Rptr. 2d 88, 898 P.2d 402 , cert. denied, 520 U.S. 1133 (1997)]* .

Efforts to enjoin the publication of lawfully obtained information about pending court proceedings are consistently struck down [*South Coast Newspapers, Inc. v. Superior Court (2000) 85 Cal. App. 4th 866, 870, 102 Cal. Rptr. 2d 487* ; *see, e.g.,* *Nebraska Press Ass'n v. Stuart (1976) 427 U.S. 539, 562, 96 S. Ct. 2791, 49 L. Ed. 2d 683* (trial court's enjoining of publication of lawfully obtained, publicly available information relating to defendant's confessions or other strongly implicative information based on dangers to defendant's *Sixth Amendment* rights struck down); *KGTV Channel 10 v. Superior Court (1994) 26 Cal. App. 4th 1673* (trial court order prohibiting media from publishing likeness of minor charged with murder for whom court was holding detention hearing was unconstitutional prior restraint); *San Bernardino County Dept. of Public Social Services v. Superior Court (1991) 232 Cal. App. 3d 188, 283 Cal. Rptr. 332* (trial court order restricting media reporting on dependency proceeding, including ban on publishing photos of minor, reversed)].

An order prohibiting a party from making or publishing false statements is a classic type of an unconstitutional prior restraint [*Evans v. Evans (2008) 162 Cal. App. 4th 1157, 1167-1168, 76 Cal. Rptr. 3d 859* ; *see* *Gilbert v. National Enquirer, Inc. (1996) 43 Cal. App. 4th 1135, 1145, 51 Cal. Rptr. 2d 91* (while party may be held responsible for abusing right to speak freely in subsequent tort action, party has initial right to speak freely without censorship)]. The rule does not apply to an order issued after a trial prohibiting the defendant from repeating specific statements found at trial to be defamatory [*Balboa Island Village Inn, Inc. v. Lemen (2007) 40 Cal. 4th 1141, 1155-1156, 57 Cal. Rptr. 3d 320, 156 P.3d 339*]. Thus, an injunction following a trial that determined that defendant defamed plaintiff, which does no more than prohibit the defendant from repeating the defamation, is not a prior restraint and does not offend the *First Amendment* [*Balboa Island Village Inn, Inc. v. Lemen (2007) 40 Cal. 4th 1141, 1148, 57 Cal. Rptr. 3d 320, 156 P.3d 339*]. However, in determining whether an injunction restraining defamation may be issued, a court must consider constitutional prohibitions against prior restraints on free speech and press [*Balboa Island Village Inn, Inc. v. Lemen (2007) 40 Cal. 4th 1141, 1158, 57 Cal. Rptr. 3d 320, 156 P.3d 339*].

A prohibition against disclosing confidential information constitutes a prior restraint [*Evans v. Evans (2008) 162 Cal. App. 4th 1157, 1169, 76 Cal. Rptr. 3d 859* ; *see* *Hurvitz v. Hoefflin (2000) 84 Cal. App. 4th 1232, 1244, 101 Cal. Rptr.*

2d 558]. However, because it also potentially concerns the countervailing right of privacy protected under the California Constitution [*Cal. Const., art. I, § 1*], a prohibition may be proper under compelling or extraordinary circumstances [*Evans v. Evans (2008) 162 Cal. App. 4th 1157, 1170, 76 Cal. Rptr. 3d 859* ; *see Wilson v. Superior Court (1975) 13 Cal.3d 652, 661-662, 119 Cal. Rptr. 468, 532 P.2d 116* ; *Gilbert v. National Enquirer, Inc. (1996) 43 Cal. App. 4th 1135, 1145, 51 Cal. Rptr. 2d 91* ; *see also Shulman v. Group W Productions, Inc. (1998) 18 Cal. 4th 200, 245, 74 Cal. Rptr. 2d 843, 955 P.2d 469* (conc. opn. of Kennard, J.); *In re Marriage of Burkle (2006) 135 Cal. App. 4th 1045, 1059-1060, 1063, 37 Cal. Rptr. 3d 805*]. In determining whether such circumstances exist, courts generally apply a balancing test, weighing the competing privacy and free speech constitutional rights [*Evans v. Evans (2008) 162 Cal. App. 4th 1157, 1170, 76 Cal. Rptr. 3d 859* ; *see Gilbert v. National Enquirer (1996) 43 Cal. App. 4th 1135, 1148, 61 Cal. Rptr. 2d 91*]. Relevant factors include the following [*Evans v. Evans (2008) 162 Cal. App. 4th 1157, 1170, 76 Cal. Rptr. 3d 859*]:

- Whether the person is a public or private figure.
- The scope of the prior restraint.
- The nature of the private information.
- Whether the information is of legitimate public concern.
- The extent of the potential harm if the information is disclosed.
- The strength of the private and governmental interest in preventing publication of the information.

A city's seeking a preliminary injunction and a stay in violation of the *First Amendment* will not provide the basis for liability under *42 U.S.C. § 1983* even if the ordinance on which the injunction and stay are based is found unconstitutional and even if those acts cause injury to the party against whom the preliminary injunction and stay are sought, in the absence of evidence that the city materially misled or pressured the judge who issued the injunction and/or the stay. The exercise of independent judgment by the judges in granting the injunction and stay breaks the chain of causation for purposes of § 1983 liability [*Manta Management Corp. v. City of San Bernardino (2008) 43 Cal. 4th 400, 406-413, 75 Cal. Rptr. 3d 353, 181 P.3d 159*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechFighting WordsConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechObscenityConstitutional LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsPrior RestraintConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechAdvocacy of Illegal Action

California Forms of Pleading and Practice--Annotated

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Chapter 59 ASSEMBLIES, MEETINGS, AND DEMONSTRATIONS
PART II. LEGAL BACKGROUND

6-59 California Forms of Pleading and Practice--Annotated § 59.13

§ 59.13 Right to Free Expression in Public Forums

[1] Public Forum Analysis of Restrictions on Free Expression

Even on public property, the government may impose certain reasonable limitations on the *First Amendment* right to engage in expressive activities. The United States Supreme Court has observed that the government, "no less than a private owner of property, has power to preserve the property under its control for the use to which it was lawfully dedicated" [*Cornelius v. NAACP Legal Defense & Ed. Fund (1985) 473 U.S. 788, 799-800, 105 S. Ct. 3439, 87 L. Ed. 2d 567]* . Recognizing this power, the Court has adopted a "public forum analysis" as a means to determine when the government's interest in limiting the use of its property to its intended purposeoutweighs the interests of those who wish to use the property for other purposes [*see* *Cornelius v. NAACP Legal Defense & Ed. Fund (1985) 473 U.S. 788, 800, 105 S. Ct. 3439, 87 L. Ed. 2d 567* ; *see also* *Clark v. Burleigh (1992) 4 Cal. 4th 474, 482, 14 Cal. Rptr. 2d 455, 841 P.2d 975]* .

The application of public forum analysis to a challenged regulation of expression on governmental property involves the following analytical steps [*Clark v. Burleigh (1992) 4 Cal. 4th 474, 484, 14 Cal. Rptr. 2d 455, 841 P.2d 975]* :

- The court first defines the "forum" by deciding whether the forum is the entire property to which access is sought, or only a portion of that property.

- The court determines whether the forum, as defined in step one, is traditional, designated, or nonpublic [*see* [2], *below*].

- If the court decides the forum is traditional or designated, the court determines whether the challenged regulation restricts content of speech or only its time, place, and manner.

- The court then tests the challenged law by the standard that governs the class of forum it has selected in step one, and, if relevant, the type of speech restriction it has identified in step two.

A forum need not be a physical place [*Pocatello Educ. Ass'n v. Heideman (9th Cir. 2007) 504 F.3d 1053, 1061-1062* ;

see *Rosenberger v. Rector & Visitors of Univ. of Va. (1995) 515 U.S. 819, 830, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)* (endorsing use of forum analysis in considering fora defined more in metaphysical than in spatial or geographic sense). The following are examples of things found to be fora even though they are not physical places:

- A charity drive within federal workplaces constituted a forum [*Cornelius v. NAACP Legal Def. & Educ. Fund, Inc. (1985) 473 U.S. 788, 801-802, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985)* (relevant forum should be determined on basis of type of access sought by speaker to relevant property; relevant forum was charity drive itself rather than federal workplace)].

- A university's student fund responsible for monetary reimbursements to student groups [*Rosenberger v. Rector & Visitors of Univ. of Va. (1995) 515 U.S. 819, 830, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)*].

- Public school mail facilities and delivery system [*Perry Educ. Ass'n v. Perry Local Educators' Ass'n (1983) 460 U.S. 37, 46, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983)*].

- Student government election [*Flint v. Dennison (9th Cir. 2007) 488 F.3d 816, 831*].

- A school's policy of waiving fees for the after-hours use of school facilities [Child Evangelism Fellowship v. Anderson Sch. Dist. Five (4th Cir. 2006)].

The mere possession of legal authority to regulate an entity, without more, is an insufficient level of control over that property to claim the forum in the name of thestate [*Pocatello Educ. Ass'n v. Heideman (9th Cir. 2007) 504 F.3d 1053, 1063* ; *see also* *Consolidated Edison Co. v. Pub. Service Comm'n (1980) 447 U.S. 530, 532-533, 534 n.1, 100 S. Ct. 2326, 65 L. Ed. 2d 319* (rejecting attempt by state, acting through its public service commission, to regulate utility's monthly bill inserts and noting that utility, although privately owned, was government-regulated monopoly)]. Thus, for example, in a challenge by labor unions to the application of a state law prohibiting payroll deductions for political activities for local government employers, the state failed to establish that it was the proprietor of the local workplaces or of local government payroll systems. The state's relationship with the local governments instead resembled that of a regulator possessing broad powers over them [*Pocatello Educ. Ass'n v. Heideman (9th Cir. 2007) 504 F.3d 1053, 1063-1065*].

Although a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which the forum analysis applies [*Pleasant Grove City, Utah v. Summum (2009) -- U.S. --, 129 S. Ct. 1125, 1131-1138, 172 L. Ed. 2d 853* (placement of permanent monument in public park is best viewed as form of government speech and is therefore not subject to scrutiny under Free Speech Clause)].

[2] Classification of Forums

For purposes of forum analysis, the courts have divided all public property into three categories [*Arkansas Educ. TV Comm'n v. Forbes (1998) 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875, 886* ; *Clark v. Burleigh (1992) 4 Cal. 4th 474, 482-483, 14 Cal. Rptr. 2d 455, 841 P.2d 975]* :

- "Traditional" public forums, such as public streets, sidewalks, and parks [*see* [3], *below*].

- "Designated" or limited public forums, nontraditional in nature, which the state has opened up for expressive activity [*see* [4], *below*].

- Nonpublic forums (i.e., all remaining property) [*see* [5], *below*].

Traditional public fora are open for expressive activity regardless of the government's intent. The objective characteristics of these properties require the government to accommodate private speakers. The government is free to open additional properties for expressive use by the general public or by a particular class of speakers, thereby creating designated public fora. Where the property is not a traditional public forum and the government has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all [*Arkansas Educ. Television Com'n v. Forbes (1998) 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875, 886-887* ; *see Hopper v. City of Pasco (9th Cir. 2001) 241 F.3d 1067, 1074* (two main categories of fora: public, where strict scrutiny applies, and nonpublic, where more lenient "reasonableness" standard governs, with government property divided into public fora, designated public fora, and nonpublic fora)].

[3] Traditional Forums

No clear-cut test has emerged for determining when a "traditional" public forum exists. In the absence of widespread agreement among the courts on how to determine the nature of a forum, courts consider a jumble of overlapping factors, frequently deeming a factor dispositive or ignoring it without reasoned explanation. Consequently, courts do not always agree on the goals and proper application of forum analysis. However, the factors the courts emphasize consistently reflect the following two underlying considerations [*ACLU of Nevada v. City of Las Vegas (9th Cir. 2003) 333 F.3d 1092, 1100]* :

- Most significantly, a common concern for the compatibility of the uses of the forum with expressive activity; and

- A commitment to guarding speakers' reasonable expectations that their speech will be protected.

The Ninth Circuit emphasizes the following factors in considering whether an area constitutes a traditional public forum [*ACLU of Nevada v. City of Las Vegas (9th Cir. 2003) 333 F.3d 1092, 1100]* :

- The actual use and purposes of the property, particularly status as a public thoroughfare and availability of free public access to the area [*see, e.g., Venetian Casino v. Local Executive Bd., Las Vegas (9th Cir. 2001) 257 F.3d 937, 944-945, 948* ; *Hale v. Dept. of Energy (9th Cir. 1986) 806 F.2d 910, 916]* ;

- The area's physical characteristics, including its location and the existence of clear boundaries delimiting the area [*see, e.g., Gerritsen v. City of Los Angeles (9th Cir. 1993) 994 F.2d 570, 576]* ; and

- Traditional or historic use of both the property and other similar properties [*see, e.g., Venetian Casino v. Local Executive Bd., Las Vegas (9th Cir. 2001) 257 F.3d 937, 944* ; *Jacobsen v. Bonine (9th Cir. 1997) 123 F.3d 1272, 1274]* .

"Traditional" public fora are defined by the objective characteristics of the property, which include whether, by long tradition or by government fiat, the property has been devoted to assembly and debate [*Arkansas Educ. Television Com'n v. Forbes (1998) 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875, 886* ; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n (1983) 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794]* . The government can exclude a speaker only when necessary to serve a compelling state interest, and the exclusion is narrowly drawn to achieve the interest [*Arkansas Educ. TV Comm'n v. Forbes (1998) 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875, 886]* . Thus, traditional public forums are state properties that historically have been used by the public for exchange of ideas [*see Ward v. Rock Against Racism (1989) 491 U.S. 781, 790-791, 109 S. Ct. 2746, 105 L. Ed. 2d 661]* , such as:

- Public streets and sidewalks [*see, e.g., Frisby v. Schultz (1988) 487 U.S. 474, 480-481, 108 S. Ct.*

2495, 101 L. Ed. 2d 420 ; *Boos v. Barry (1988) 485 U.S. 312, 318, 108 S. Ct. 1157, 99 L. Ed. 2d 333]* .

- Parks [*see, e.g., Berger v. City of Seattle (9th Cir. 2009) 569 F.3d 1029, 1035-1036* ; *United States v. Baugh (9th Cir. 1999) 187 F.3d 1037, 1042* ; *Grossman v. City of Portland (9th Cir. 1994) 33 F.3d 1200, 1204]* .

- Public squares [*see, e.g., Capitol Square Review & Advisory Bd. v. Pinette(1995) 515 U.S. 753, 761, 115 S. Ct. 2440, 132 L. Ed. 2d 650* (statehouse square)].

However, the United States Supreme Court declined to extend the public forum doctrine mechanically to public television broadcasting, since broad rights of access for outside speakers would be antithetical as a general rule to the discretion stations and editorial staff must exercise to fulfill their journalistic purpose and statutoryobligations [*Arkansas Educ. TV Comm'n v. Forbes (1998) 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875, 883-886* (upholding exclusion of third party candidate from televised debate as reasonable exercise of journalistic discretion consistent with *First Amendment*)].

Expression conducted in a traditional forum receives special protection under the *First Amendment*. The government may not restrict all expression in a traditional public forum, but may impose reasonable, content-neutral restrictions on the time, place, and manner of expression that are narrowly tailored to serve a significant government interest and that leave open ample alternative channels of communication [*Frisby v. Schultz (1988) 487 U.S. 474, 480, 108 S. Ct. 2495, 101 L. Ed. 2d 420]* . Any restrictions based on the content of such expression are invalid unless the regulation is necessary and narrowly tailored to achieve a compelling state interest [*Capitol Square Review & Advisory Bd. v. Pinette (1995) 515 U.S. 753, 761, 115 S. Ct. 2440, 132 L. Ed. 2d 650* ; *Boos v. Barry (1988) 485 U.S. 312, 321, 108 S. Ct. 1157, 99 L. Ed. 2d 333* ; *Clark v. Burleigh (1992) 4 Cal. 4th 474, 482-483, 14 Cal. Rptr. 2d 455, 841 P.2d 975* ; *see also* discussion of content restriction in § 59.12[3]].

For example, the government failed to meet its burden against an anti-nuclear protester arrested for violating an ordinance requiring an advancepermit "to conduct any organized" demonstration in a public park. The appellate court found that rather than being tailored to the city's asserted interest in maintaining safety of park users, the ordinance was directed at prohibiting speech activities. The court noted that a group of 100 noisy picnickers would not be impeded by the law, but quiet protesters with anti-nuclear signs could be subject to arrest [*Grossman v. City of Portland (1994) 33 F.3d 1200, 1205-1207]* .

[4] Designated Public Forums

The government can create a "designated" public forum by opening for use by part or all of the public a public place that has not traditionally been used as a public forum for expressive activity [*see International Soc. for Krishna Consciousness, Inc. v. Lee (1992) 505 U.S. 672, 678, 112 S. Ct. 2701, 120 L. Ed. 2d 541* (recognizing category of designated public forum as property state opens for expressive activity by all or part of public); *Clark v. Burleigh (1992) 4 Cal. 4th 474, 483, 14 Cal. Rptr. 2d 455, 841 P.2d 975]* . Designated public forums are created by purposeful governmental action. The court looks to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum [*Arkansas Educ. TV Comm'n v. Forbes (1998) 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875, 886-887* ; *Children of The Rosary v. City of Phoenix (9th Cir. 1998) 154 F.3d 972, 976]* .

Access to a designated forum may be restricted in a manner consistent with the purposes for which the forum is normally used [*see Leeb v. DeLong (1988) 198 Cal. App. 3d 47, 56, 243 Cal. Rptr. 494]* . When the state establishes a limited public forum, it is not required to and does not allow persons to engage in every type of speech, and the state may be justified in reserving the forum for certain groups or for the discussion of certain topics [*Good News Club v. Milford Central School (2001) 533 U.S. 98, 121 S. Ct. 2093, 2100, 150 L. Ed. 2d 151]* . However, any content-based

regulation of speech in such a forum is subject to the same strict scrutiny applied to restriction of speech in a traditional forum, as described in [3], *above* [*Good News Club v. Milford Central School (2001) 533 U.S. 98, 121 S. Ct. 2093, 2100, 150 L. Ed. 2d 151* ; *Arkansas Educ. TV Comm'n v. Forbes (1998) 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875, 887* ; *International Soc. for Krishna Consciousness, Inc. v. Lee (1992) 505 U.S. 672, 678, 112 S. Ct. 2701, 120 L. Ed. 2d 541* ; *Clark v. Burleigh (1992) 4 Cal. 4th 474, 483, 14 Cal. Rptr. 2d 455, 841 P.2d 975]* .

Although the United States Supreme Court has recognized the concept of designated public forums in its decisions, there are very few examples of public places the Supreme Court has placed in this category [*see* *Good News Club v. Milford Central School (2001) 533 U.S. 98, 121 S. Ct. 2093, 2100, 150 L. Ed. 2d 151* (because parties agreed that school created limited public forum when it opened its facilities to public use for specified purposes, Court need not resolve issue); *Culbertson v. Oakridge School. Dist. No. 76 (9th Cir. 2001) 258 F.3d 1061, 1064* (school district providing that school buildings should function as community centers to be available for nonprofit community activities, including educational activities, created public forum); *Clark v. Burleigh (1992) 4 Cal. 4th 474, 483 & n.8* and cases discussed therein].

Although some courts use the terms "designated public forum" and "limited public forum" interchangeably, in the Ninth Circuit, they are not the same. A limited public forum is a subcategory of a designated public forum; the term refers to a type of nonpublic forum the government intentionally opens to certain groups or certain topics. In a limited public forum, restrictions that are viewpoint neutral and reasonable in light of the purpose served by the forum are permissible [*Hopper v. City of Pasco (9th Cir. 2001) 241 F.3d 1067, 1074-1075* ; *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ. (9th Cir. 1999) 196 F.3d 958, 964* , *cert. denied, 529 U.S. 1067]* . The fact that the government has opened a nonpublic forum to expressive activity means that the court must examine the terms on which the forum operates to determine whether it is a designated public forum, to which the strict scrutiny standard applies, or a limited public forum, to which a more lenient reasonableness standard applies [*Hopper v. City of Pasco (9th Cir. 2001) 241 F.3d 1067, 1075]* . Government intent is the essential question in determining whether a designated public forum has been established [*Hopper v. City of Pasco (9th Cir. 2001) 241 F.3d 1067, 1075]* . Courts examine all of the following factors [*Hopper v. City of Pasco (9th Cir. 2001) 241 F.3d 1067, 1075-1078]* :

- Consistency in application of the policy designed to preserve the nonpublic status of a forum;

- Whether the policy is based on subjective or overly general criteria, or whether the standards for inclusion and exclusion are unambiguous and definite;

- The selectivity with which the forum is open to particular forms of expression; the more restrictive the criteria for admission and the more administrative control over access, the less likely a forum will be deemed public; and

- Whether the expressive activity is consistent with the principal function of the forum, focusing on the specific space in which the would-be speaker seeksaccess, but also taking into account the context of the property as a whole.

[5] Nonpublic Forums

Publicly owned property that is neither a traditional public forum [*see* [3], *above*] nor a designated public forum [*see* [4], *above*] is referred to in the case law as a "nonpublic" forum [*see, e.g.,* *Arkansas Educ. TV Comm'n v. Forbes (1998) 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875, 887* (property that is not traditional public forum and as to which government has not chosen to create designated public forum is either nonpublic forum or not forum at all); *International Soc. for Krishna Consciousness, Inc. v. Lee (1992) 505 U.S. 672, 678, 112 S. Ct. 2701, 120 L. Ed. 2d 541* ; *Cornelius v. NAACP Legal Defense & Ed. Fund (1985) 473 U.S. 788, 800, 105 S. Ct. 3439, 87 L. Ed. 2d 567* ; *Clark v. Burleigh (1992) 4 Cal. 4th 474, 483* & n.9, *14 Cal. Rptr. 2d 455, 841 P.2d 975]* . The following are examples of

publicly-owned places that have been held to be nonpublic forums:

- Federal workplaces [*see* *Cornelius v. NAACP Legal Defense & Ed. Fund (1985) 473 U.S. 788, 805-806, 105 S. Ct. 3439, 87 L. Ed. 2d 567]* .

- The sidewalks in front of a post office [*see* *U.S. v. Kokinda (1990) 497 U.S. 720, 730, 110 S. Ct. 3115, 111 L. Ed. 2d 571]* .

- Airport terminals operated by a public agency [*see* *International Soc. for Krishna Consciousness, Inc. v. Lee (1992) 505 U.S. 672, 112 S. Ct. 2701, 120 L. Ed. 2d 541]* .

- Perimeter walkways bordering the parking area and facilities of an interstate rest area [*Jacobsen v. Bonine (9th Cir. 1997) 123 F.3d 1272]* .

- Schools [*DiLoreto v. Board of Educ. of Downey Unif. Sch. Dist. (1999) 74 Cal. App. 4th 267, 280, 87 Cal. Rptr. 2d 791* (high schools); *see* *80 Ops. Cal. Atty. Gen. 155, 159* (school district may restrict use of school property to educational activities, including exclusion of filming movies by motion picture studios; rental of facilities for movie filming would be solely to enhance revenues and not for purpose of providing public forum for expressive activity, and district could deny permission to film specific movies based solely on content so long as actions were reasonably related to legitimate pedagogical concerns)].

- Advertising panels on buses [*see* *Children of the Rosary v. City of Phoenix (9th Cir. 1998) 154 F.3d 972, 976-978* (Arizona case)].

- A city's fund to encourage civic events and provide a budgetary mechanism for accounting for the costs of in-kind services provided by the city for selected civic events [*Gentala v. City of Tucson (9th Cir. 2000) 213 F.3d 1055, 1062-1063]* .

- Airspace protected by a city and county ordinance prohibiting aerial advertising, for purposes of determining the scope of *First Amendment* protection of banner towing in airspace [*Center for Bio-Ethical Reform, Inc. v. City & County of Honolulu (9th Cir. 2006) 448 F.3d 1101, 1108-1110]* .

In addition, the United States Supreme Court held that a televised debate involving candidates for political office sponsored by a public broadcaster is a nonpublic forum rather than a designated public forum. Thus, the broadcaster could constitutionally exercise its reasonable, viewpoint-neutral journalistic discretion to exclude from the debate an independent candidate with little popular support [*Arkansas Educ. Television Comm'n v. Forbes (1998) 523 U.S. 666, 679-681, 118 S. Ct. 1633, 140 L. Ed. 2d 875]* . The debate in *Forbes* did not have an open-microphone format. Instead, the broadcaster reserved eligibility for participation to candidates for a particular congressional district seat, and made candidate-by-candidate determinations as to which of the eligible candidates wouldparticipate in the debate [*Arkansas Educ. Television Comm'n v. Forbes (1998) 523 U.S. 666, 679-681, 118 S. Ct. 1633, 140 L. Ed. 2d 875]* . Such selective access, unsupported by evidence of a purposeful designation for public use, does not create a public forum [*Arkansas Educ. Television Comm'n v. Forbes (1998) 523 U.S. 666, 680, 118 S. Ct. 1633, 140 L. Ed. 2d 875]* .

A government restriction on use of a nonpublic forum for expressive activities is subject to limited review, and is valid so long as it is reasonable and not designed to suppress the speaker's activity due to public officials' disagreement with the speaker's viewpoint or message [*Arkansas Educ. Television Comm'n v. Forbes (1998) 523 U.S. 666, 677-678, 118 S. Ct. 1633, 140 L. Ed. 2d 875* ; *International Soc. for Krishna Consciousness, Inc. v. Lee (1992) 505 U.S. 672, 112 S. Ct. 2701, 120 L. Ed. 2d 541* ; *Cornelius v. NAACP Legal Defense & Ed. Fund (1985) 473 U.S. 788, 800, 105 S. Ct. 3439, 87 L. Ed. 2d 567* ; *Clark v. Burleigh (1992) 4 Cal. 4th 474, 483, 491, 14 Cal. Rptr. 2d 455, 841 P.2d 975]* . For example, a regulation forbidding the solicitation of funds or distribution of literature inside publicly owned airport

terminals was held not to violate the *First Amendment* rights of members of the International Society for Krishna Consciousness who sought to solicit funds inside the terminals, because the regulation was a reasonable means of promoting the free flow of traffic through the terminals and protecting members of the public from undue interference and delay [*see International Soc. for Krishna Consciousness, Inc. v. Lee (1992) 505 U.S. 672, 112 S. Ct. 2701, 120 L. Ed. 2d 541]* .

A speaker may be excluded from a nonpublic forum if he or she wishes to address a topic not encompassed within the forum's purpose, or if he or she is not a member of the class of speakers for whose special benefit the forum was created [*Cornelius v. NAACP Legal Defense & Ed. Fund (1985) 473 U.S. 788, 806, 105 S. Ct. 3439, 87 L. Ed. 2d 567* ; *Clark v. Burleigh (1992) 4 Cal. 4th 474, 491, 14 Cal. Rptr. 2d 455, 841 P.2d 975* ; *see U.C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory (1984) 154 Cal. App. 3d 1157, 1165, 201 Cal. Rptr. 837]* . Moreover, public institutions that do not perform speech-related functions at all, such as hospitals, jails, or military bases, can exclude speech and assembly that would otherwise be protected by the *First Amendment* when it interferes, or is fundamentally incompatible, with normal activity at the particular institution [*Prisoners Union v. Department of Corrections (1982) 135 Cal. App. 3d 930, 935, 185 Cal. Rptr. 634]* .

[6] Application of Public Forum Analysis to Picketing and Similar Activities

[a] General Rules

Peaceful picketing in a public forum such as a public sidewalk is a time-honored method of protest protected by the *First Amendment*. Any governmental restrictions on such activity are subject to strict scrutiny, as discussed in [3], *above* [*see, e.g., Boos v. Barry (1988) 485 U.S. 312, 318, 108 S. Ct. 1157, 99 L. Ed. 2d 333]* . Furthermore, any injunction against such picketing must satisfy the even more rigorous standards discussed in *§ 59.12[6]* [*see, e.g., Madsen v. Women's Health Center, Inc. (1994) 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593]* .

[b] Residential Picketing

A public street or sidewalk does not lose its status as a traditional public forum merely because it runs through a residential neighborhood. Thus, restrictions on picketing and other expressive activities conducted on streets or sidewalks in a residential area are subject to the same strict scrutiny as restrictions on such activities in any other traditional public forum [*Frisby v. Schultz (1988) 487 U.S. 474, 480-481, 108 S. Ct. 2495, 101 L. Ed. 2d 420* ; *see* discussion in [3], *above*].

Nevertheless, the courts have recognized that the state has an important interest in protecting privacy in the home, and that individuals should not be required to hear unwelcome speech in their households [*Frisby v. Schultz (1988) 487 U.S. 474, 484-485, 108 S. Ct. 2495, 101 L. Ed. 2d 420* ; *see City of San Jose v. Superior Court (Thompson) (1995) 32 Cal. App. 4th 330, 341, 38 Cal. Rptr. 2d 205* , *cert. denied sub nom., Thompson v. City of San Jose, 516 U.S. 932]* . Thus, courts will uphold a regulation of picketing in a residential area if it is narrowly tailored to serve the government's compelling interest in protecting the privacy of home, does not unduly burden the picketers' message, and leaves open ample alternative channels of communication [*see Frisby v. Schultz (1988) 487 U.S. 474, 488, 108 S. Ct. 2495, 101 L. Ed. 2d 420* ; *Carey v. Brown (1980) 447 U.S. 455, 465, 100 S. Ct. 2286, 65 L. Ed. 2d 263]* .

The United States Supreme Court has described picketing targeted specifically at residents of households as "especially offensive" conduct that intrudes on the privacy of residents and leaves them "captive" with no means of avoiding the unwanted speech [*Frisby v. Schultz (1988) 487 U.S. 474, 487, 108 S. Ct. 2495, 101 L. Ed. 2d 420]* . In that case, the Court upheld an ordinance imposing a complete ban on residential picketing "before or about" the residence of any individual, which the Court construed to refer only to picketing targeted at a specific house. The Court ruled that the ordinance was narrowly directed to protect the important household privacy interest, and left open an alternative channel of communication, marching through the neighborhood streets, that reached its audience, the residents, without

intruding on the resident's privacy [*Frisby v. Schultz (1988) 487 U.S. 474, 482-487, 108 S. Ct. 2495, 101 L. Ed. 2d 420]* .

In another case, a California court of appeal upheld a city ordinance prohibiting targeted picketing within 300 feet of a residence as a reasonable time, place, and manner restriction. The court ruled that the ordinance was appropriate to preserve a resident's constitutional right to privacy. The court further noted that the "more precise" 300-foot zone was a less onerous burden on speech than the "on or about" standard upheld in *Frisby*, so that there was a lesser chance of discriminatory application by the police [*see City of San Jose v. Superior Court (Thompson) (1995) 32 Cal. App. 4th 330, 337-341, 38 Cal. Rptr. 2d 205 , cert. denied sub nom., Thompson v. City of San Jose, 516 U.S. 932]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechForumsConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of FreedomConstitutional LawBill of RightsFundamental FreedomsFreedom of Assembly

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PART II. LEGAL BACKGROUND

6-59 California Forms of Pleading and Practice--Annotated § 59.14

§ 59.14 Private Property Owners' Power to Restrict Expression

[1] General Rule: First Amendment Not Applicable

The *First* and *Fourteenth Amendments of the United States Constitution* limit only governmental action and do not apply to actions by owners of private property used for purely private purposes [*Lloyd Corp. v. Tanner (1972) 407 U.S. 551, 567, 92 S. Ct. 2219, 33 L. Ed. 2d 131]* . Thus, the *First Amendment* does not compel a private property owner to permit free speech activities on his or her property against his or her wishes; the owner may expel such persons as trespassers [*Lloyd Corp. v. Tanner (1972) 407 U.S. 551, 567-568, 92 S. Ct. 2219, 33 L. Ed. 2d 131* ; *Trader Joe's Co. v. Progressive Campaigns (1999) 73 Cal. App. 4th 425, 430, 86 Cal. Rptr. 2d 442* ; *Savage v. Trammell Crow Co. (1990) 223 Cal. App. 3d 1562, 1578-1580, 273 Cal. Rptr. 302* ; *see Allred v. Harris (1993) 14 Cal. App. 4th 1386, 1390, 18 Cal. Rptr. 2d 530]* . Under the *First Amendment*, the mere fact that the property is "open to the public" does not transform private property into public property so as to require the owner to permit expressive activities on the premises [*Lloyd Corp. v. Tanner (1972) 407 U.S. 551, 568-570, 92 S. Ct. 2219, 33 L. Ed. 2d 131]* . However, even if title is held privately, property on which a servitude is imposed for public use, such as a sidewalk, is a public forum [*Venetian Casino v. Local Executive Bd., Las Vegas (9th Cir. 2001) 257 F.3d 937]* .

For a form of complaint by a private property owner against protesters or picketers for damages for trespass and for injunctive relief, see *§ 59.53*.

[2] Shopping Centers and Other Private Property Functioning as Traditional Public Forum

[a] Free Speech Rights Under California Constitution

Although the *First Amendment* does not limit the power of private property owners to restrict free speech activities on their property [*see* [1], *above*], the right to free speech under the California Constitution [*Cal. Const., art. I, § 2(a)*] is more "definitive and inclusive" than that afforded by the *First Amendment* [*Robins v. Pruneyard Shopping Center (1979) 23 Cal. 3d 899, 908, 153 Cal. Rptr. 854, 592 P.2d 341 , aff'd, 447 U.S. 74* (1980)]. Thus, in *Robins*, the California Supreme Court held that large retail shopping centers act as an invaluable public forum for free expression and that the California Constitution protects speech and petitioning, when reasonably exercised, in shopping centers, even if privately owned [*Robins v. Pruneyard Shopping Center (1979) 23 Cal. 3d 899, 910, 153 Cal. Rptr. 854, 592*

P.2d 341 , aff'd, 447 U.S. 74 (1980)] .

Later cases have restated the *Robins* holding as establishing that the California Constitution protects the reasonable exercise of free speech rights on private property when that property is generally open to the public and functions as the equivalent of a traditional public forum [*Fashion Valley Mall, LLC v. National Labor Relations Board (2007) 42 Cal. 4th 850, 858-863, 69 Cal. Rptr. 3d 288, 172 P.3d 742* ; *Allred v. Harris (1993) 14 Cal. App. 4th 1386, 1390, 18 Cal. Rptr. 2d 530]* , thus implying that the holding is not strictly limited to shopping centers. However, the court also held that the property involved in *Allred*, a medical center parking lot and interior corridors, lacked the attributes of a public forum, and thus the owner was not required to allow picketing on the premises [*Allred v. Harris (1993) 14 Cal. App. 4th 1386, 1391-1393, 18 Cal. Rptr. 2d 530*]. Further, a privately owned shopping center may prohibit free speech activity that is unrelated to the operation of the shopping center [*Fashion Valley Mall, LLC v. National Labor Relations Board (2007) 42 Cal. 4th 850, 862, 69 Cal. Rptr. 3d 288, 172 P.3d 742*].

The California Supreme Court has clarified at least one aspect left unaddressed in *Robins*, that is, whether the California free speech protection requires state action. In a plurality opinion, the Court held that *Cal. Const. art. I, § 2(a)* only protects against state action, and the actions of a private property owner constitute state action for these purposes only if the property is freely and openly accessible to the public [*Golden Gateway Center v. Golden Gateway Tenants Assn. (2001) 26 Cal. 4th 1013, 111 Cal. Rptr. 2d 336, 29 P.3d 797* (plurality opinion)]. In *Golden Gateway*, the Court found that a tenants association had no state constitutional right to distribute a newsletter in a privately owned apartment complex, and that judicial enforcement of injunctive relief against the tenants association did not constitute the requisite state action [*Golden Gateway Center v. Golden Gateway Tenants Assn. (2001) 26 Cal. 4th 1013, 1033-1034, 111 Cal. Rptr. 2d 336, 29 P.3d 797]* .

The California Supreme Court in *Robins* developed a balancing test to apply in other situations, i.e., to balance the competing interests of the property owner and of the society with respect to the particular property or type of property at issue to determine whether there is a state constitutional right to engage in the challenged activity [*Trader Joe's Co. v. Progressive Campaigns (1999) 73 Cal. App. 4th 425, 433, 86 Cal. Rptr. 2d 442]* . In *Trader Joe's*, the court found that although a free-standing, single-structure, single-use retail food store and parking lot voluntarily opens its doors to the public, its invitation to the public is more limited than a shopping center's since it invites the public only to shop for food and food-related items, so that the owner's interest in maintaining exclusive control over its private property is stronger than the interest of a shopping mall owner and the public's interest in using the store as a forum for free speech and petitioning activity is not as strong as its interest in engaging in those activities at a large shopping center [*Trader Joe's Co. v. Progressive Campaigns (1999) 73 Cal. App. 4th 425, 433, 86 Cal. Rptr. 2d 442* ; *see also Albertson's, Inc. v. Young (2003) 107 Cal. App. 4th 106, 115, 118, 131 Cal. Rptr. 2d 721* (taken as whole, *Pruneyard* implies that smaller privately owned commercial establishments that do not assume societal role of a town center may prohibit expressive activity unrelated to business enterprise, and nothing in *Golden Gateway* can be interpreted to support conclusion that any large business establishment is public forum for expressive activity simply because it is freely and openly accessible to public)].

Although *Pruneyard* held that the California Constitution protects expressive activity in the common areas of a large, privately owned shopping center, that holding does not apply to the area immediately surrounding the entrance of an individual retail store that does not itself possess the characteristics of a public forum, even when that store is part of a larger shopping center [*Van v. Target Corp. (2007) 155 Cal. App. 4th 1375, 1382-1391, 66 Cal. Rptr. 3d 497* (apron and perimeter areas at entrances and exits of stores located in shopping centers did not serve as public fora in view of undisputed evidence that those particular areas lacked any public forum attributes); *see also Albertson's, Inc. v. Young (2003) 107 Cal. App. 4th 106, 118, 131 Cal. Rptr. 2d 721* (grocery store located in shopping center was akin to stand-alone store and lacked characteristics of traditional public forum)].

Decisions applying *Pruneyard* focus on whether the property owner has so opened up his or her property for public use as to make it the functional equivalent of a traditional public forum [*see, e.g., Albertson's, Inc. v. Young (2003) 107*

Cal. App. 4th 106, 118-119, 131 Cal. Rptr. 2d 721 ; *Trader Joe's Co. v. Progressive Campaigns, Inc. (1999) 73 Cal. App. 4th 425, 433-434, 86 Cal. Rptr. 2d 442* ; *Bank of Stockton v. Church of Soldiers (1996) 44 Cal. App. 4th 1623, 1630, 52 Cal. Rptr. 2d 429* ; *Allred v. Harris (1993) 14 Cal. App. 4th 1386, 1390-1391, 18 Cal. Rptr. 2d 530* ; *Planned Parenthood v. Wilson (1991) 234 Cal. App. 3d 1662, 1671-1672, 286 Cal. Rptr. 427* ; *Allred v. Shawley (1991) 232 Cal. App. 3d 1489, 1501-1502, 284 Cal. Rptr. 140]* . The less an owner has opened up the property for use by the general public, the less the owner's rights are circumscribed by the statutory and constitutional rights of those who use it. Whether private property is considered quasi-public property subject to the exercise of constitutional rights of free speech and assembly depends in part on the nature, purpose, and primary use of the property; the extent and nature of the public invitation to use the property; and the relationship between the ideas sought to be presented and the purpose of the property's occupants [*Albertson's, Inc. v. Young (2003) 107 Cal. App. 4th 106, 119, 131 Cal. Rptr. 2d 721]* .

The United States Supreme Court, in affirming the California Supreme Court's decision in *Robins*, held that California law requiring private shopping center owners to permit the exercise of free speech rights on shopping center property infringes on neither the owner's federally recognized property rights nor its *First Amendment* rights [*Pruneyard Shopping Center v. Robins (1980) 447 U.S. 74, 82-88, 100 S. Ct. 2035, 64 L. Ed. 2d 741]* .

Protection under the liberty of speech clause of the California Constitution includes the following expressive activities conducted at shopping centers:

- Speech and leafletting [*see Westside Sane/Freeze v. Ernest W. Hahn, Inc. (1990) 224 Cal. App. 3d 546, 554-556, 274 Cal. Rptr. 51]* ;

- Distribution of religious literature [*see Savage v. Trammell Crow Co. (1990) 223 Cal. App. 3d 1562*]; and

- Gathering of signatures for a petition [*see Robins v. Pruneyard ShoppingCenter (1979) 23 Cal. 3d 899, 908-910, 153 Cal. Rptr. 854, 592 P.2d 341 , aff'd, 447 U.S. 74 (1980)]* .

For a form of complaint against a shopping center owner for injunctive and declaratory relief for refusal to permit free speech activities on the premises, see *§ 59.51*.

[b] Time, Place, and Manner Regulations

Like the government, private shopping center owners may impose reasonable time, place, and manner restrictions on protected speech and petitioning, provided they are content-neutral, narrowly tailored, and leave ample alternative means of communication [*Fashion Valley Mall, LLC v. National Labor Relations Board (2007) 42 Cal. 4th 850, 865-870, 69 Cal. Rptr. 3d 288, 172 P.3d 742* ; *Savage v. Trammell Crow Co. (1990) 223 Cal. App. 3d 1562, 1572-1573, 273 Cal. Rptr. 302* ; *see Robins v. Pruneyard Shopping Center (1979) 23 Cal. 3d 899, 910, 153 Cal. Rptr. 854, 592 P.2d 341 , aff'd, 447 U.S. 74 (1980)]* . However, a mall's prohibition of speech advocating a boycott of a store in the mall was not a time, place, or manner restriction because it was not content neutral. It could not withstand strict scrutiny because the mall's purpose to maximize the profits of its merchants was not compelling compared with a union's right to free expression, and urging customers to boycott a store lies at the core of the right to free speech [*Fashion Valley Mall, LLC v. National Labor Relations Board (2007) 42 Cal. 4th 850, 869-870, 69 Cal. Rptr. 3d 288, 172 P.3d 742*]. In promulgating time, place, and manner rules governing when, where, and how a group may exercise expressive rights, a shopping center is constitutionally permitted to protect important rights of substance such as freedom from disruption of normal business operations and freedom from interference with customer convenience [*Union of Needletrades, Indus. & Textile Employees, AFL-CIO v. Superior Court (Taubman Co.) (1997) 56 Cal. App. 4th 996, 1009-1010, 65 Cal. Rptr. 2d 838]* . This is because a shopping center exists as a center of commerce. Its function is to facilitate the ease of commerce and to promote the business of its merchant tenants. Consequently, a

center can impose reasonable, objective limitations on the number of persons who can be present, and those persons can be required to be in a certain area to limit disruption. They can be prohibited from areas normally subject to congestion, and can be excluded entirely from areas such as doorways and loading areas where their presence would threaten personal danger or block the flow of traffic [*Union of Needletrades, Indus. & Textile Employees, AFL-CIO v. Superior Court (Taubman Co.) (1997) 56 Cal. App. 4th 996, 1010, 65 Cal. Rptr. 2d 838]* .

In one case, for example, a court of appeal held that a shopping center's ban on all leafletting in the center's parking lot was constitutional because it was narrowly tailored to prevent litter and traffic problems, was content-neutral, and allowed leafletters to use the center's sidewalks as an alternative channel of communication [*Savage v. Trammell Crow Co. (1990) 223 Cal. App. 3d 1562, 1573-1576, 273 Cal. Rptr. 302]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechForumsConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of FreedomConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechCommercial SpeechBoycotts & Picketing

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PART II. LEGAL BACKGROUND

6-59 California Forms of Pleading and Practice--Annotated § 59.15

§ 59.15 Uncertainty and Overbreadth

[1] Void-for-Vagueness Doctrine

[a] General Rule

The void-for-vagueness doctrine requires that a criminal statute define the criminal offense with sufficient certainty so that ordinary people can understand what conduct is prohibited, and in a manner that does not encourage arbitrary and discriminatory enforcement [*see Free Speech Coalition v. Reno (9th Cir. 1999) 198 F.3d 1083, 1095* ; *Nunez v. City of San Diego (9th Cir. 1997) 114 F.3d 935, 940* ; *People v. Ewing (1999) 76 Cal. App. 4th 199, 90 Cal. Rptr. 2d 177* (*Pen. Code § 646.9(a)*, prohibiting stalking, not void for vagueness); *People v. Custodio (1999) 73 Cal. App. 4th 807, 811, 87 Cal. Rptr. 2d 18]* . An enactment may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. [*City of Chicago v. Morales (1999) 527 U.S. 41, 78, 119 S. Ct. 1849, 144 L. Ed. 2d 67* ; *Kolender v. Lawson (1983) 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903]* . A statute imposing criminal liability may be declared invalid in its entirety if piecemeal adjudication of the legality of the statute would entail the vague or uncertain future application of the statute [*People v. Custodio (1999) 73 Cal. App. 4th 807, 811, 87 Cal. Rptr. 2d 18]* . In analyzing whether a statute is sufficiently definite to pass constitutional muster, courts look not only at the language of the statute, but also to legislative history and California decisions construing the statute [*People v. Custodio (1999) 73 Cal. App. 4th 807, 811, 87 Cal. Rptr. 2d 18]* .

The doctrine affects statutes limiting free expression: If the statute fails to give fair notice of what acts will be punished so that *First Amendment* rights are chilled, an accused's rights under due process and freedom of speech are violated [*see Kolender v. Lawson (1983) 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903* ; *Connally v. General Constr. Co. (1926) 269 U.S. 385, 391 46 S. Ct. 126, 70 L. Ed. 322* ; *People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1115, 60 Cal. Rptr. 2d 277, 929 P.2d 596* ; *Manning v. Municipal Court (1982) 132 Cal. App. 3d 825, 829, 183 Cal. Rptr. 458]* . A claim of void for vagueness can only succeed when the litigant demonsrates that the law is vague as to the litigant or impermissibly vague in all of its applications [*People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1115, 60 Cal. Rptr. 2d 277, 929 P.2d 596* , citing *Hoffman Estates v. Flipside, Hoffman Estates (1982) 455 U.S. 489, 497-498, 102 S. Ct. 1186, 71 L. Ed. 2d 362* ; *Parker v. Levy (1974) 417 U.S. 733, 755-757, 94 S. Ct. 2547, 41 L. Ed. 2d 439* ; *see also City of Chicago v. Morales (1999) 527 U.S. 41, 78, 119 S. Ct. 1849, 144 L. Ed. 2d 67* (ordinance

prohibiting loitering in public place by two or more people, one of whom is member of criminal street gang, unconstitutionally vague); *but see Nunez v. City of San Diego (9th Cir. 1997) 114 F.3d 935, 940* (in facial vagueness challenge, ordinance need not be vague in all applications if it reaches substantial amount of constitutionally protected conduct)].

There are two guiding principles endorsed by the United States Supreme Court for applying the void-for-vagueness doctrine:

- Abstract legal commands must be applied in a specific context, and acontextual application of otherwise unqualified legal language may give facially standardless language a constitutionally sufficient concreteness [*People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1116-1117, 60 Cal. Rptr. 2d 277, 929 P.2d 596* , citing *American Communications Ass'n v. Douds (1950) 339 U.S. 382, 412, 70 S. Ct. 674, 94 L. Ed. 925]* ; and

- Only a reasonable degree of certainty or specificity can be demanded. We cannot expect mathematical certainty from language [*People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1116-1117, 60 Cal. Rptr. 2d 277, 929 P.2d 596* , citing *Coates v. City of Cincinnati (1971) 402 U.S. 611, 614, 91 S. Ct. 1686, 29 L. Ed. 2d 214]* .

[b] Application of Doctrine

A statute prohibiting individuals from wandering "without apparent business" and refusing to identify themselves to police was void for vagueness because it failed to sufficiently describe the guilty conduct and vested excessive discretion in the police to decide guilt [*Kolender v. Lawson (1983) 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903]* .

By contrast, a curfew that specifies that no person may be on the streets at specific times is not void for vagueness because it applies, on its face, to all persons, clearly informs the public and police of the proscribed illegal conduct, and does not allow the police to stop people on a "whim" [*In re Juan C. (1994) 28 Cal. App. 4th 1093, 1102-1103, 33 Cal. Rptr. 2d 919]* . However, a juvenile curfew ordinance that makes it unlawful for any minor to "loiter, idle, wander, stroll or play in or upon the public streets, highways, roads, alleys, parks, playgrounds, wharves, docks, or other public grounds, public places and public buildings, places of amusement and entertainment, vacant lots or other unsupervised places, between the hours of ten o'clock P.M. and daylight immediately following" except in four specific situations, is unconstitutionally void for vagueness and allows the police excessive discretion to decide whether to stop and arrest juveniles after curfew hours [*Nunez v. City of San Diego (9th Cir. 1997) 114 F.3d 935, 940-944]* .

The portion of a preliminary injunction enjoining specified gang members from "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view" with any other gang member within a specified four-block area was not void for vagueness. The application of the injunction language within the context gave the language a constitutionally sufficient concreteness. The fact that the City would have to prove that a defendant knew that the person with whom he engaged in the activities was a gang member was fairly implied in the injunction or would be imposed by the trial court in any attempt to enforce the injunction [*People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1117-1118, 60 Cal. Rptr. 2d 277, 929 P.2d 596* ; *see also In re Englebrecht (1998) 67 Cal. App. 4th 486, 492-496, 79 Cal. Rptr. 2d 89* (neither fact that target area of injunction prohibiting gang activity similar to injunction in *Acuna* is significantly greater nor fact that some gang members live in or have relatives living in target area did not make injunction unconstitutionally void for vagueness, since injunction does not prohibit presence in target area, only association with other gang members in area, and living in or having relatives in area does not transform gang activities into intimate or intrinsic associational activities)]. The portion of the injunction enjoining the defendants from "confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons, or visitors to [the specified area] ... known to have complained about gang activities" was also not impermissibly vague. The required element that defendants know that the person complained of gang activities could be

fairly implied in the injunction imposed by a trial court in an action to enforce the injunction. Further, similar words were upheld against claims of vagueness by the United States Supreme Court [*Madsen v. Women's Health Center, Inc. (1994) 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593]* . The words were also not impermissibly vague when the objectives of the injunction were considered and the words read in context, and declarations filed in support of preliminary relief left little doubt as to the kind of conduct the injunction sought to enjoin [*People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1118, 60 Cal. Rptr. 2d 277, 929 P.2d 596* ; *see also In re Englebrecht (1998) 67 Cal. App. 4th 486, 492-496, 79 Cal. Rptr. 2d 89* (neither fact that target area of injunctionprohibiting gang activity similar to injunction in *Acuna* is significantly greater nor fact that some gang members live in or have relatives living in target area did not make injunction unconstitutionally void for vagueness, since injunction does not prohibit presence in target area, only association with other gang members in area, and living in or having relatives in area does not transform gang activities into intimate or intrinsic associational activities)].

On the other hand, an ordinance forbidding loitering in any public place by two or more persons, one of whom is a member of a criminal street gang, is impermissibly vague. Although the ordinance does not prohibit speech or any form of conduct apparently intended to convey a message so that by its terms, the ordinance is inapplicable to assemblies designed to demonstrate a group's support of or opposition to a particular point of view, the freedom to loiter for innocent purposes is part of the "liberty" protected by the *Due Process Clause of the Fourteenth Amendment* [*City of Chicago v. Morales (1999) 527 U.S. 41, 78, 119 S. Ct. 1849, 144 L. Ed. 2d 67]* .

[2] Overbreadth Doctrine

A statute that prohibits protected speech along with unprotected speech so that it has a chilling effect on free expression is facially invalid [*see People v. Hsu (2000) 82 Cal. App. 4th 976, 99 Cal. Rptr. 2d 184* (statute restricting speech as invalid in any respect is invalid in all respects); *People v. Tisbert (1992) 11 Cal. App. 4th Supp. 1* ; *see also Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal. 3d 294, 303, 138 Cal. Rptr. 53, 562 P.2d 1302]* . A governmental purpose to control or prevent activities constitutionally subject to state regulation cannot be achieved by means that sweep unnecessarily broadly and thereby invade areas of protected freedoms [*In re Englebrecht (1998) 67 Cal. App. 4th 486, 497, 79 Cal. Rptr. 2d 89* , quoting *Williams v. Garcetti (1993) 5 Cal. 4th 561, 577, 20 Cal. Rptr. 2d 341, 853 P.2d 507]* .

The *First Amendment* doctrine of overbreadth is an exception to the normal rule regarding the standards for facial challenges. Showing that a law punishes a substantial amount of protected free speech, judged in relation to the law's legitimate sweep,suffices to invalidate all enforcement of the law until a limiting construction or partial invalidation narrows it to remove the seeming threat or deterrence to constitutionally protected expression [*Virginia v. Hicks (2003) 539 U.S. 113, 123 S. Ct. 2191, 2196, 156 L. Ed. 2d 148]* . The doctrine's concern with "chilling" protected speech attenuates as the otherwise unprotected behavior it forbids the state to sanction moves from pure speech toward conduct. Rarely, if ever, will an overbreadth challenge succeed against a law or regulation not specifically addressed to speech or to conduct necessarily associated with speech, such as picketing or demonstrating [*Virginia v. Hicks (2003) 539 U.S. 113, 123 S. Ct. 2191, 2199, 156 L. Ed. 2d 148]* . The court's first task is to determine whether an enactment reaches a substantial amount of constitutionally protected conduct; if not, the overbreadth challenge fails [*Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc. (1982) 455 U.S. 489, 494-495, 102 S. Ct. 1186, 71 L. Ed. 2d 362* ; *Bauer v. Sampson (9th Cir. 2001) 261 F.3d 775, 782]* .

A broadly written statute or injunction that has a deterrent effect on protected free expression may be challenged by a party whose own conduct is unprotected [*City Council v. Taxpayers for Vincent (1984) 466 U.S. 789, 798-799, 104 S. Ct. 2118, 80 L. Ed. 2d 772* ; *People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1113, 60 Cal. Rptr. 2d 277, 929 P.2d 596* ; *see 4805 Convoy, Inc. v. City of San Diego (9th Cir. 1999) 183 F.3d 1108, 1112]* . A party may challenge a statute or injunction as overbroad because its very existence may cause others not before the court to refrain from constitutionally protected speech, and, if the overbreadth is "substantial," the law may not be enforced against anyone until it is narrowed to reach only unprotected activity [*In re Englebrecht (1998) 67 Cal. App. 4th 486, 497, 79 Cal.*

Rptr. 2d 89 citing *Broadrick v. Oklahoma (1973) 413 U.S. 601, 612, 93 S. Ct. 2908, 37 L. Ed. 2d 830]* . However, a claim of overbreadth will not lie if no one other than those before the court are affected [*People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1113, 60 Cal. Rptr. 2d 277, 929 P.2d 596]* .

In one case, the court ordered dismissal of a misdemeanor complaint against a defendant who had set up a table in a county courthouse to collect signatures for a ballot initiative and to collect donations. The defendant was charged with violating a county ordinance that broadly banned all solicitation on county property. The court held that the ordinance was unconstitutionally overbroad since it did not attempt to exempt acts of solicitation protected by the *First Amendment* [*People v. Tisbert (1992) 11 Cal. App. 4th Supp. 1, 6*].

When the overbreadth challenge involves both conduct and speech, the overbreadth must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep [*In re Juan C. (1994) 28 Cal. App. 4th 1093, 1099, 33 Cal. Rptr. 2d 919]* .

There is a constitutionally significant difference between injunctions and statutes in the context of protected speech. "The narrow and particularized focus inherent in the nature of the injunction as an equitable remedy" is significant in evaluating a contention of overbreadth [*People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1114, 60 Cal. Rptr. 2d 277, 929 P.2d 596* , citing *Madsen v. Women's Health Center, Inc. (1994) 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593]* . Thus, a preliminary injunction enjoining specified gang members from "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view" with any other gang member within a specified four-block area was not overbroad in the context of being a product of a "concrete judicial proceeding prompted by particular events" that were inimical to the residents of the area, which led to a specific request for preventive relief [*People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1114, 60 Cal. Rptr. 2d 277, 929 P.2d 596]* . However, a provision of an injunction that proscribes all uses of pagers or beepers by gang members within a specified area is overbroad and infirm because pagers and beepers have lawful, legitimate, and everyday uses so that constitutionally protected communications are swept within the ambit of the injunction [*In re Englebrecht (1998) 67 Cal. App. 4th 486, 496-498, 79 Cal. Rptr. 2d 89]* .

[3] Construing Statute or Ordinance to Avoid Vagueness or Overbreadth

Sometimes an uncertain or overbroad statute or ordinance can be "saved" by construing it so as to avoid conflict with the state or federal constitution. A statute can be given such a limiting construction if [*Spiritual Psychic Science Church v. City of Azusa (1985) 39 Cal. 3d 501, 519, 217 Cal. Rptr. 225, 703 P.2d 1119]* :

- The statute's effect and operation can be limited to matters that may be constitutionally regulated;
- The terms are reasonably susceptible to an interpretation consistent with the constitution; and
- Judicial construction does not create uncertainty or overbreadth inhibiting the exercise of protected expression.

In one case, for example, the California Supreme Court held that an ordinance principally aimed at the sale of "goods, wares, and merchandise" on the streets also incidentally affected the sale of printed matter, but could be judicially construed to sever reference to printed matter to save the constitutionality of the ordinance. Construing the ordinance to refer only to unprotected conduct did not substantially alter its focus and limited the regulation to conduct that was constitutionally subject to regulation [*see* *Welton v. City of Los Angeles (1976) 18 Cal. 3d 497, 134 Cal. Rptr. 668, 556 P.2d 1119]* .

In another case, by contrast, the Court held that a statute prohibiting fortunetelling for profit was unconstitutionally overbroad and invalid "in its essence." The Court held that the ordinance could not be saved without rewriting it and that such a revision would be an abuse of the Court's power [*Spiritual Psychic Science Church v. City of Azusa*

(1985) 39 Cal. 3d 501, 520, 217 Cal. Rptr. 225, 703 P.2d 1119] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsOverbreadth & Vagueness

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Chapter 59 ASSEMBLIES, MEETINGS, AND DEMONSTRATIONS
PART II. LEGAL BACKGROUND

6-59 California Forms of Pleading and Practice--Annotated § 59.16

§ 59.16 Remedies for Violation of Freedom of Expression

[1] Federal Remedies

[a] Civil Action Against Person Acting Under Color of State Law

Any person who, under color of a state statute or ordinance, deprives a United States citizen of a federal constitutional right or privilege (such as the right to free speech), is liable to the injured party in an action at law or suit in equity [*see 42 U.S.C. § 1983*;*see also 42 U.S.C. § 1985(3)* (damages for conspiracies to deprive persons of specified rights); *Mitchum v. Foster (1972) 407 U.S. 225, 226, 243, 92 S. Ct. 2151, 32 L. Ed. 2d 705* (in action under *42 U.S.C. § 1983*, federal court may enjoin state court proceedings based on unconstitutional state statute, notwithstanding "anti-injunction" statute, *28 U.S.C. § 2283*)]. The federal district courts have original jurisdiction of such actions [*28 U.S.C. § 1343(a)*; *see generally* Ch. 265, *Federal Courts: Jurisdiction and Removal* , Pt. I]. State courts also have concurrent jurisdiction over civil rights actions under *42 U.S.C. § 1983* [*Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 173* & n.10, *216 Cal. Rptr. 661, 703 P.2d 1]* .

For full discussion of actions under *42 U.S.C. § 1983* and forms for use in such actions, see Ch. 112, *Civil Rights: Government-Funded Programs and Activities* , as well as Cook & Sobieski, Civil Rights Actions (Matthew Bender).

[b] Other Potential Civil Remedies

Other potential federal civil remedies for infringement of the *First Amendment* right of free expression include both of the following:

- Actions for declaratory relief [*see 28 U.S.C. §§ 2201, 2202*; *Fed. R. Civ. P., Rule 57*; *see also Golden v. Zwickler (1969) 394 U.S. 103, 108-110, 89 S. Ct. 956, 22 L. Ed. 2d 113* (requisite controversy did not exist; case involving distribution of handbills); *see generally* Moore's Federal Practice, Ch. 57 (3d ed. Matthew Bender); *but see* *Samuels v. Mackell (1971) 401 U.S. 66, 73, 91 S. Ct. 764, 27 L. Ed. 2d 688* (federal declaratory relief ordinarily denied if injunctive relief is unavailable under *28 U.S.C. § 2283*, barring federal injunction of state court proceedings in absence of statute specifically authorizing such injunction)]; and

- Federal mandamus proceedings, if the case involves constitutional violations by an agency, officer, or employee of the United States [*see 28 U.S.C. § 1361*].

[c] Federal Review of State Criminal Proceedings

[i] Review of Conviction That Infringes on Right to Freedom of Expression

A final judgment rendered by the highest court of a state may be reviewed by the United States Supreme Court by writ of certiorari [*28 U.S.C. § 1257*]. Thus, a person convicted under a state statute that he or she claims infringes on his or her right to free expression, and whose conviction is affirmed by state appellate courts, may petition the United States Supreme Court for review of the conviction and consideration of the constitutional issues [*see, e.g., Texas v. Johnson (1989) 491 U.S. 397, 400-402, 109 S. Ct. 2533, 105 L. Ed. 2d 342* ; *Cohen v. California (1971) 403 U.S. 15, 16-18, 91 S. Ct. 1780, 29 L. Ed. 2d 284]* .

For discussion of certiorari procedures before the United States Supreme Court, see Moore's Federal Practice, Chs. 405 and 406 (3d ed. Matthew Bender).

[ii] Habeas Corpus Review of Custody That Violates Constitution

The United States Supreme Court or the appropriate United States court of appeals or district court may hear an application for a writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment. The ground for federal habeas corpus review is that the applicant's custody violates the Constitution or laws of the United States [*see 28 U.S.C. § 2254(a)*].

A habeas corpus writ will be granted only if the applicant has exhausted remedies of the state courts, or if there is no state corrective process available to the prisoner [*28 U.S.C. § 2254(b)*]. An applicant has not exhausted remedies if he or she has the right under state law to raise the issues presented by a procedure available in state courts [*28 U.S.C. § 2254(c)*].

For discussion of review of state court criminal judgments by federal habeas, see Erwin, Millman, Monroe, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 102 (Matthew Bender).

[d] Standing

The following special standing principles apply in *First Amendment* cases in which someone makes facial constitutional challenges to a law related to expressive activity:

- First, a plaintiff seeking to vindicate his or her own constitutional rights may argue that a law is unconstitutional on its face if it is unconstitutionally vague or impermissibly restricts a protected activity [*Santa Monica Foods Not Bombs v. City of Santa Monica (9th Cir. 2006) 450 F.3d 1022, 1033* ; *Foti v. City of Menlo Park (9th Cir. 1998) 146 F.3d 629, 635* ; *see Nunez v. City of San Diego (9th Cir. 1997) 114 F.3d 935, 949* (plaintiffs could seek directly on their own behalf facial invalidation of overly broad statutes creating unacceptable risk of suppression of ideas), *quoting Sec'y of Md. v. Joseph H. Munson Co. (1984) 467 U.S. 947, 965 n.13, 104 S. Ct. 2839, 81 L. Ed. 2d 786]* .

- Second, a plaintiff whose own speech or expressive conduct may validly be prohibited or sanctioned may challenge a statute on its face because it threatens others not before the court [*Santa Monica Foods Not Bombs v. City of Santa Monica (9th Cir. 2006) 450 F.3d 1022, 1033* ; *Brockett v. Spokane Arcades, Inc. (1985) 472 U.S. 491, 503, 105 S. Ct. 2794, 86 L. Ed. 2d 394* ; *see NAACP v. City of Richmond (9th Cir. 1984) 743 F.2d 1346, 1352]* .

The first kind of challenge may be paired with the more common as-applied challenge, when a plaintiff argues that a law is unconstitutional as applied to his or her own speech or expressive conduct [*Santa Monica Foods Not Bombs v. City of Santa Monica (9th Cir. 2006) 450 F.3d 1022, 1033* ; *see Foti v. City of Menlo Park (9th Cir. 1998) 146 F.3d 629, 635* ; *see also NAACP v. City of Richmond (9th Cir. 1984) 743 F.2d 1346, 1352]* .

[2] State Remedies

[a] Civil Remedies

[i] Potential Remedies Listed

Potential remedies available under state law to redress a violation of constitutional free expression rights include all of the following:

- Declaratory relief [*see Code Civ. Proc. § 1060*; *see, e.g., Weaver v. Jordan (1966) 64 Cal. 2d 235, 240, 49 Cal. Rptr. 537, 411 P.2d 289* , *cert. denied, 385 U.S. 844 (1967)* (affirming judgments for plaintiff in declaratory relief action involving statute violating constitutional free speech guarantees); *see generally* Ch. 182, *Declaratory Relief*];

- Injunctive relief [*see Civ. Code §§ 3422, 3423* (final injunctions); *Code Civ. Proc. §§ 526, 527* (temporary injunctions); *see, e.g., Ketchens v. Reiner (1987) 194 Cal. App. 3d 470, 480, 239 Cal. Rptr. 549* ; *see generally* Ch. 303, *Injunctions* ; *but see* discussion in [b], *below*];

- A writ of mandate to compel an inferior tribunal or board to allow a petitioner to engage in free expression activities from which he or she has been unlawfully precluded [*see Code Civ. Proc. §§ 1084, 1085*; *see, e.g., American Civil Liberties Union v. Board of Education (1961) 55 Cal. 2d 167, 182, 10 Cal. Rptr. 647, 359 P.2d 45* (political group precluded from using junior high school auditorium for series of monthly meetings on current topics); *see generally* Ch. 358, *Mandate and Prohibition*];

- A writ of prohibition to restrain criminal proceedings when the court lacks jurisdiction because the ordinance on which the proceedings arebased is facially invalid under the *First* and *Fourteenth Amendments* [*see Code Civ. Proc. § 1102*; *see, e.g., Dillon v. Municipal Court (1971) 4 Cal. 3d 860, 872, 94 Cal. Rptr. 777, 484 P.2d 945* ; *see generally* Ch. 358, *Mandate and Prohibition*]; and

- A writ of review to restrain a lower court from proceedings in excess of jurisdiction [*see Code Civ. Proc. §§ 1067, 1068*; *see generally* Ch. 492, *Review (Certiorari), Writ of*], such as a contempt order arising from a violation of a temporary restraining order that violates the contemnor's free speech rights [*see, e.g., Fortenbury v. Superior Court (1940) 16 Cal. 2d 405, 406-410, 106 P.2d 411]* .

An individual may not bring an action for money damages on the basis of an alleged violation of *Cal. Const., art. I, § 2(a)* in the absence of a statutory provision or an established common law tort authorizing such a damage remedy for the constitutional violation [*Degrassi v. Cook (2002) 29 Cal. 4th 333, 335-344, 127 Cal. Rptr. 2d 508, 58 P.3d 360]* .

[ii] Limitation on Injunctive Relief Against Enforcement of Statute or Ordinance

Generally, injunctions may not be granted to restrain a public officer from executing a statute for the public benefit [*Civ. Code § 3423(d)*; *Code Civ. Proc. § 526(b)(4)*; *McCarthy v. Superior Court (1987) 191 Cal. App. 3d 1023, 1031-1032, 236 Cal. Rptr. 833]* . Nevertheless, courts have recognized an exception to this rule and have permitted injunctive relief to enjoin prosecution under laws or ordinances that infringe on a plaintiff's constitutional rights, including the right to free expression [*see, e.g., Abbott v. City of Los Angeles (1960) 53 Cal. 2d 674, 678* (criminal

registration ordinance); *Sundance Saloon, Inc. v. City of San Diego (1989) 213 Cal. App. 3d 807, 812, 261 Cal. Rptr. 841* (ordinance restricting cabaret license); *see also Leach v. City of San Marcos (1989) 213 Cal. App. 3d 648, 660-661, 261 Cal. Rptr. 805* (injunction may be issued if statute or ordinance is invalid and showing of irreparable injury is made)].

In deciding whether to issue a preliminary injunction against enforcement of an unconstitutional statute or ordinance, the courts will weigh the following factors [*see Sundance Saloon, Inc. v. City of San Diego (1989) 213 Cal. App. 3d 807, 811, 261 Cal. Rptr. 841* ; *Leach v. City of San Marcos (1989) 213 Cal. App. 3d 648, 657, 261 Cal. Rptr. 805*]:

- The likelihood that plaintiff will prevail on the merits at trial; and

- The interim harm that plaintiff is likely to suffer if the injunction is denied, as compared with the harm that defendant will suffer if the injunction is granted pending trial.

Thus, when a preliminary injunction challenges a statute or ordinance as infringing on free expression guarantees, the court weighs the competing burdens on the individual and the government to determine if aninjunction should be granted [*see, e.g., Elrod v. Burns (1976) 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547]* . While the loss of *First Amendment* freedoms for even minimal periods of time may constitute irreparable injury [*see, e.g., Ketchens v. Reiner (1987) 194 Cal. App. 3d 470, 480, 239 Cal. Rptr. 549]* , when the burden imposed by the statute on the individual's *First Amendment* rights is minimal compared to the potential burden on the public if the injunction is granted, a preliminary injunction will not be granted [*see Sundance Saloon, Inc. v. City of San Diego (1989) 213 Cal. App. 3d 807, 814-818, 261 Cal. Rptr. 841]* .

[iii] Bane Act

The Bane Act provides for a cause of action for damages, injunctive and other equitable relief, and attorney's fees against a person who interferes or attempts to interfere, by threats, intimidation, or coercion, with the exercise or enjoyment by another of rights under the constitution or laws of the United States or of California [*see Civ. Code § 52.1(a), (b), (h)*]. The action may be brought by the individual whose rights have been violated in his or her own name [*see Civ. Code § 52.1(b)*] or by the Attorney General, a district attorney, or a city attorney, in the name of the people of the State of California [*see Civ. Code § 52.1(a)*].

An action under the Bane Act may not be based on speech alone unless the plaintiff shows that [*Civ. Code § 52.1(j)*]:

- The speech itself threatens violence against a specific person or group of persons; and

- The person or group of persons against whom the threat is directed reasonably fears that, because of the speech, violence will be directed against the person or group or his, her, or their property, and the person threatening violence has the apparent ability to carry out the threat.

Furthermore, no injunction issued in a Bane Act case can restrict the content of speech. Orders restricting time, place, or manner of any person's speech are permissible only to the extent reasonably necessary to protect the peaceable exercise or enjoyment of constitutional or statutory rights, consistent with the constitutional rights of the person sought to be enjoined [*Civ. Code § 52.1(k)*]. For discussion of the constitutionality of time, place, and manner restrictions, see *§ 59.12[2]*.

For further discussion of the Bane Act, including a complaint for damages and temporary restraining order, preliminary injunction, and permanent injunction for interference with the exercise of civil rights under the Act, see Ch. 117A, *Civil Rights: Interference with Civil Rights by Threats, Intimidation, Coercion, or Violence* .

[iv] Limitation Period for Civil Actions

A claim for violation of speech rights under *Cal. Const., art. I, § 2* is subject to the one-year statute of limitations in *Code Civ. Proc. § 340*, which covers infringements of personal rights. Note that effective January 1, 2003, *Code Civ. Proc. § 340* was amended to no longer govern actions for personal injuries and *Code Civ. Proc. § 335.1* was added to provide that an action for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another must be brought within two years. Actions for certain infringements of personal rights, such as libel, slander, and false imprisonment, are governed by *Code Civ. Proc. § 340(c)*, which provides a one-year statute of limitations.

Before the amendment of *Code Civ. Proc. § 340*, one court had held that claims for wrongful firing of a tenured professor for disapproval of political views, as well as a claim of wrongful denial of a tenured professorship based on speech discrimination, were governed by former *Code Civ. Proc. § 340(3)* [*Acuna v. Regents of University of California (1997) 56 Cal. App. 4th 639, 645-646, 65 Cal. Rptr. 2d 388* (claim of wrongful denial of application for tenured professorship filed 15 months after denial was time barred)]. However, it is now unclear whether a one-year or two-year statute of limitations governs causes of action for wrongful firing of a tenured professor for disapproval of political views or wrongful denial of a tenured professorship based on speech discrimination. It is clear, however, that *Code Civ. Proc. § 339(1)*, prescribing a two-year limitations period for claims involving property rights, does not apply, since there is no property right to a tenured teaching position [*Acuna v. Regents of University of California (1997) 56 Cal. App. 4th 639, 646-647, 65 Cal. Rptr. 2d 388]* .

The cause of action for violation of state constitutional rights accrues on the date of the action which allegedly constitutes the violation [*see, e.g.,* *Acuna v. Regents of University of California (1997) 56 Cal. App. 4th 639, 646, 65 Cal. Rptr. 2d 388* (no equitable tolling for exhaustion of other legal or administrative remedies where evidence showed no administrative remedies to exhaust; equitable tolling did not apply to letter-writing campaign)].

[b] Review of Criminal Proceedings

[i] Habeas Corpus

The legality of any imprisonment or confinement may be challenged by a writ of habeas corpus [*see Penal Code § 1473(a)*]. A person may be discharged from custody if the confinement is based on a judgment or order that exceeds the court's jurisdiction [*see Penal Code § 1487(1)*]. For example, habeas corpus is available to obtain release from custody when the petitioner has been criminally convicted for conduct protected by the *First Amendment* [*see, e.g.,* *In re Brown (1973) 9 Cal. 3d 612, 624-625,108 Cal. Rptr. 465, 510 P.2d 1017* (convictions for unlawful assembly)]. Habeas corpus may also be used to obtain release from custody before trial when the prosecution is based on an unconstitutional statute or ordinance or when the defendant has been charged with contempt for violation of an unconstitutional court order, even when the defendant has been released on bail [*see, e.g.,* *In re Berry (1968) 68 Cal. 2d 137, 145-146, 157, 65 Cal. Rptr. 273, 436 P.2d 273* (involving *First Amendment* challenge to injunction against labor picketing)].

For general discussion of habeas corpus procedure and forms for use in habeas corpus proceedings, see Ch. 292, *Habeas Corpus* . For specific discussion of habeas corpus in state criminal proceedings, see Erwin, Millman, Monroe, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 102 (Matthew Bender).

[ii] Appeal of Criminal Conviction

An individual convicted of violating a statute or ordinance that allegedly violates his or her right of free speech may also challenge its constitutionality on appeal from his or her conviction [*see, e.g.,* *People v. Davis (1968) 68 Cal. 2d 481, 482, 67 Cal. Rptr. 547, 439 P.2d 651* (appeal from municipal court conviction under anti-riot statute; conviction upheld)]. For discussion of appellate procedure in criminal proceedings, see Erwin, Millman, Monroe, Sevilla &

Tarlow, California Criminal Defense Practice, Ch. 101 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsGeneral OverviewConstitutional LawThe JudiciaryCase or ControversyStandingGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsCivil Rights LawSection 1983 ActionsGeneral Overview

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§ 59.17 Right of Association

The *First Amendment* recognizes and shields from government intrusion a limited right of association. There is no generalized right of social association [*People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1110, 60 Cal. Rptr. 2d 277, 929 P.2d 596* , citing *Dallas v. Stanglin (1989) 490 U.S. 19, 25, 109 S. Ct. 1591, 104 L. Ed. 2d 18]* .

There are two kinds of associations entitled to *First Amendment* protection. The first are those with "intrinsic" or "intimate" value, exemplified by "personal affiliations ... [attending] the creation and sustenance of a family--marriage ... the raising and education of children; and cohabitation with one's relatives. ... [T]hey are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship" [*People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1110, 60 Cal. Rptr. 2d 277, 929 P.2d 596* , citing *Roberts v. United States Jaycees (1984) 468 U.S. 609, 619-620, 104 S. Ct. 3244, 82 L. Ed. 2d 462]* . Parents and children have a well-elaborated constitutional right to live together without governmental interference, which is an essential liberty interest protected by the *Fourteenth Amendment's* guarantee that parents and children will not be separated by the state without due process of law except in an emergency. Officials may remove a child from the custody of its parent without prior judicial authorization only if the information they possess at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury [*Burke v. County of Alameda (9th Cir. 2009) 586 F.3d 725, 731* ; *Wallis v. Spencer (9th Cir. 2000) 202 F.3d 1126, 1136-1138]* . Although non-custodial parents have a reduced liberty interest in the companionship, care, custody, and management of their children, parents with legal custody, regardless of whether they also possess physical custody of their children, have a constitutionally protected right of familial association [*Burke v. County of Alameda (9th Cir. 2009) 586 F.3d 725, 733]* , preliminary injunction enjoining defendants, as members of a street gang, from "standing, sitting, walking, driving, gathering or appearing anywhere in public view with any other defendant or any other member of the gang" within a specified four-block area was not invalid on *First Amendment* associational grounds. The gang's activities within the area failed to qualify as either of the two protected forms of association. The gang was not an association of individuals formed "for the purpose of engaging in protected speech or religious activities" [*People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1111, 60 Cal. Rptr. 2d 277, 929 P.2d 596* , quoting *Bd. of Dirs. of Rotary Int'l v. Rotary Club (1987) 481 U.S. 537, 544, 107 S. Ct. 1940, 95 L. Ed. 2d 474]* , nor did it fit within a constitutionally protected "intrinsic" or "intimate" association [*People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1112, 60 Cal.*

Rptr. 2d 277, 929 P.2d 596] . The constitutionally protected right of association does not extend to associating for the "purpose of depriving third parties of their lawful rights" [*People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1112, 60 Cal. Rptr. 2d 277, 929 P.2d 596* , citing *Madsen v. Women's Health Center, Inc. (1994) 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593]* .

The second type of association entitled to *First Amendment* protection is pursuit of "a wide variety of political, social, economic, educational, religious, and cultural ends." This is directly related to the freedom to speak, worship, and petition the government for redress of grievances because without the right to associate, the others could not exist [*People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1110-1111, 60 Cal. Rptr. 2d 277, 929 P.2d 596* , quoting *Roberts v. United States Jaycees (1984) 468 U.S. 609, 622, 104 S. Ct. 3244, 82 L. Ed. 2d 462]* . This right includes partisan political organization [*Tashjian v. Republican Party of Connecticut (1986) 479 U.S. 208, 214, 107 S. Ct. 544, 93 L. Ed. 2d 514]* . The *First Amendment* protects the freedom to join together in furtherance of common political beliefs, which presupposes the freedom to identify the people constituting the association and limit the association to those people only, so that a corollary of the right to associate is the right not to associate [*California Democratic Party v. Jones (2000) 530 U.S. 567, 120 S. Ct. 2402, 2408, 147 L. Ed. 2d 502]* .

The government may abridge the freedom to associate directly, or abridgement of associational rights, even though unintended, may inevitably follow from varied forms of governmental action [*NAACP v. Alabama (1958) 357 U.S. 449, 461, 78 S. Ct. 1163, 2 L. Ed. 2d 1488* ; *Perry v. Schwarzenegger (9th Cir. 2010) 591 F.3d 1147, 1159]* . The government must justify its actions when it imposes direct limitations on associational rights, and when governmental action would have the practical effect of discouraging the exercise of constitutionally protected political rights [*NAACP v. Alabama (1958) 357 U.S. 449, 461, 78 S. Ct. 1163, 2 L. Ed. 2d 1488* ; *Perry v. Schwarzenegger (9th Cir. 2010) 591 F.3d 1147, 1159-1160]* . Those actions have a chilling effect on, and therefore infringe, the exercise of fundamental rights, and they must survive exacting scrutiny [*Buckley v. Valeo, 424 U.S. 1, 15, 64, 96 S. Ct. 612, 46 L. Ed. 2d 659* ; *Perry v. Schwarzenegger (9th Cir. 2010) 591 F.3d 1147, 1159-1160]* .

The compelled disclosure of political associations can have a chilling effect [*Buckley v. Valeo, 424 U.S. 1, 15, 64, 96 S. Ct. 612, 46 L. Ed. 2d 659* ; *Perry v. Schwarzenegger (9th Cir. 2010) 591 F.3d 1147, 1160]* . Disclosures of political affiliations and activities that have a deterrent effect on the exercise of *First Amendment* rights are therefore subject to exacting scrutiny [*Buckley v. Valeo, 424 U.S. 1, 15, 64-65, 96 S. Ct. 612, 46 L. Ed. 2d 659* ; *Perry v. Schwarzenegger (9th Cir. 2010) 591 F.3d 1147, 1160]* . A party who objects to a discovery request as an infringement of the party's *First Amendment* rights is in essence asserting a *First Amendment* privilege [*Perry v. Schwarzenegger (9th Cir. 2010) 591 F.3d 1147, 1160]* . In the Ninth Circuit, a claim of *First Amendment* privilege is subject to a two-part framework. The party asserting the privilege must demonstrate a prima facie showing of arguable *First Amendment* infringement [*Perry v. Schwarzenegger (9th Cir. 2010) 591 F.3d 1147, 1160* ; *Brock v. Local 375, Plumbers Int'l Union (9th Cir. 1988) 860 F.2d 346, 349-350]* . The prima facie showing requires the party to demonstrate that enforcement of the discovery requests will result in harassment, membership withdrawal, or discouragement of new members, or other consequences that objectively suggest an impact on, or chilling of, the members' associational rights [*Perry v. Schwarzenegger (9th Cir. 2010) 591 F.3d 1147, 1160* ; *Brock v. Local 375, Plumbers Int'l Union (9th Cir. 1988) 860 F.2d 346, 350]* . If party opposing discovery can make the necessary prima facie showing, the evidentiary burden then shifts to the proponent to demonstrate that the information sought through the discovery is rationally related to a compelling governmental interest and the least restrictive means of obtaining the desired information [*Perry v. Schwarzenegger (9th Cir. 2010) 591 F.3d 1147, 1161* ; *Brock v. Local 375, Plumbers Int'l Union (9th Cir. 1988) 860 F.2d 346, 350* ; *see also Dole v. Serv. Employees Union, AFL-CIO, Local 280 (9th Cir. 1991) 950 F.2d 1456, 1459-1461]* . The second step is meant to make discovery that has an impact on *First Amendment* associational rights available only after careful consideration of the need for the discovery, but not necessarily to preclude it. The question is whether the party seeking the discovery has demonstrated an interest in obtaining the disclosures it seeks, which is sufficient to justify the deterrent effect on the free exercise of the constitutionally protected right of association [*NAACP v. Alabama (1958) 357 U.S. 449, 461, 78 S. Ct. 1163, 2 L. Ed. 2d 1488* ; *Perry v. Schwarzenegger (9th Cir. 2010) 591 F.3d 1147, 1161]* . The court balances the burdens imposed on individuals and associations against the

significance of the interest in disclosure to determine whether the interest in disclosure outweighs the harm [*Buckley v. Valeo, 424 U.S. 1, 15, 72, 96 S. Ct. 612, 46 L. Ed. 2d 659* ; *Perry v. Schwarzenegger (9th Cir. 2010) 591 F.3d 1147, 1161]* . This balancing may take into account the following [*Perry v. Schwarzenegger (9th Cir. 2010) 591 F.3d 1147, 1161]* :

- The importance of the litigation [*see Dole v. Serv. Employees Union, AFL-CIO, Local 280 (9th Cir. 1991) 950 F.2d 1456, 1461* (purpose of investigating possible criminal violations serves compelling governmental interest)].

- The centrality of the information sought to the issues in the case [*see NAACP v. Alabama (1958) 357 U.S. 449, 464-465, 78 S. Ct. 1163, 2 L. Ed. 2d 1488* ; *Grandbouche v. Clancy (10th Cir. 1987) 825 F.2d 1463, 1466* ; *Black Panther Party v. Smith (D.C. Cir. 1981) 661 F.2d 1243, 1268, 213 U.S. App. D.C. 67]* .

- The existence of less intrusive means of obtaining the information [*see Grandbouche v. Clancy (10th Cir. 1987) 825 F.2d 1463, 1466* ; *Black Panther Party v. Smith (D.C. Cir. 1981) 661 F.2d 1243, 1268, 213 U.S. App. D.C. 67]* .

- The substantiality of the *First Amendment* interests at stake [*see Buckley v. Valeo, 424 U.S. 1, 15, 71, 96 S. Ct. 612, 46 L. Ed. 2d 659* (weighing seriousness of threat to exercise of *First Amendment* rights against substantiality of state's interest); *Black Panther Party v. Smith (D.C. Cir. 1981) 661 F.2d 1243, 1267, 213 U.S. App. D.C. 67* (argument in favor of upholding claim of privilege will ordinarily grow stronger as danger to rights of expression and association increases)].

The party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation. The request must be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable [*Perry v. Schwarzenegger (9th Cir. 2010) 591 F.3d 1147, 1161]* .

Disclosure of internal campaign communications can have a deterrent effect on the exercise of protected activities. The disclosure of this information can have a deterrent effect on participation in campaigns, which is a protected activity [*Perry v. Schwarzenegger (9th Cir. 2010) 591 F.3d 1147, 1162* ; *see San Francisco County Democratic Cent. Comm. v. Eu (9th Cir. 1987) 826 F.2d 814, 827* (right of individuals to associate for advancement of political beliefs is fundamental)]. Disclosure of internal campaign information can also have a deterrent effect on the free flow of information within campaigns [*Perry v. Schwarzenegger (9th Cir. 2010) 591 F.3d 1147, 1162-1163* (implicit in right to associate with others to advance shared political beliefs is right to exchange ideas and formulate strategy and messages in private)]. Disclosure of internal campaign information could chill protected activities in other ways as well [*Perry v. Schwarzenegger (9th Cir. 2010) 591 F.3d 1147, 1163]* .

Political parties' government, structure, and activities enjoy constitutional protection [*Timmons v. Twin Cities Area New Party (1997) 520 U.S. 351, 357, 117 S. Ct. 1364, 137 L. Ed. 2d 589* ; *see California Democratic Party v. Jones (2000) 530 U.S. 567, 120 S. Ct. 2402, 2408, 147 L. Ed. 2d 502* (state's blanket open primary violates *First Amendment* right of association; in no area is political associations' right to exclude more important than in process of selecting its nominee)]. When deciding whether a state election law violates *First* and *Fourteenth Amendment* associational rights, courts weigh the character and magnitude of the burden the state's rule imposes on those rights against the interests the state contends justify that burden, and consider the extent to which the state's concerns make the burden necessary. Regulations imposing severe burdens on associational rights must be narrowly tailored and advance a compelling state interest; lesser burdens trigger less-exacting review, and a state's "important regulatory interests" will usually be enough to justify reasonable nondiscriminatory restrictions. No bright line separates permissible election-related regulation from unconstitutional infringements on *First Amendment* freedoms [*Timmons v. Twin Cities Area New Party (1997) 520 U.S. 351, 358, 117 S. Ct. 1364, 137 L. Ed. 2d 589]* .

The *First Amendment* right of association also guarantees that liability will not be imposed on an individual by reason of association with a particular group alone, unless it can be established that the group with which the individual associates possesses unlawful goals and the individual holds a specific intent to further those illegal aims [*N.A.A.C.P. v. Claiborne Hardware Co. (1982) 458 U.S. 886, 918-920, 102 S. Ct. 3409, 73 L. Ed. 2d 1215* ; *Humanitarian Law Project v. Reno (9th Cir. 2000) 205 F.3d 1130, 1133]* .

Freedom of association does not trump a parent's right to direct and control the activities of a minor child, including with whom the child may associate. Parents' liberty interest in the care, custody, and control of their children gives them broad authority over their minor children, and their fundamental right to make child rearing decisions includes deciding who may spend time with a minor child [*Brekke v. Wills (2005) 125 Cal. App. 4th 1400, 1410, 23 Cal. Rptr. 3d 609]* .

For a complete discussion of the right of association as applied to unincorporated associations and clubs, see Ch. 61, *Associations and Clubs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of Association

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§ 59.18 Right to Petition Government for Redress of Grievances

The federal and state constitutional right to petition for redress of grievances is the right to complain about the government to the government. It encompasses the right to sue [*Wolfgram v. Wells Fargo Bank (1997) 53 Cal. App. 4th 43, 50-52, 61 Cal. Rptr. 2d 694* ; *see also* *Pacific Gas & Electric Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 270 Cal. Rptr. 1, 791 P.2d 587* ; *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 Cal. 3d 1157, 232 Cal. Rptr. 567, 728 P.2d 1202* ; *Smith v. Silvey (1983) 149 Cal. App. 3d 400, 197 Cal. Rptr. 15]* . A suit against the government has preferred status over a suit invoking judicial power against a nongovernmental subject [*City of Long Beach v. Bozek (1982) 31 Cal. 3d 527, 530 , vacated and remanded (1983) 459 U.S. 1095 , reiterated (1983) 33 Cal. 3d 727, 728, 190 Cal. Rptr. 918, 661 P. 2d 1072]* . "The *First Amendment* attains its highest potency in cases ... which manifest *political* expression" [*Wolfgram v. Wells Fargo Bank (1997) 53 Cal. App. 4th 43, 56, 61 Cal. Rptr. 2d 694* (emphasis in original), citing *44 Liquormart, Inc. v. Rhode Island (1996) 517 U.S. 484, 517-518, 116 S. Ct. 1495, 134 L. Ed. 2d 711* (conc. opn. of Scalia, J.); *Garrison v. Louisiana (1964) 379 U.S. 64, 77-78, 85 S. Ct. 209, 13 L. Ed. 2d 125]* . An application for a use permit is not the equivalent of a petition to the government forredress of grievances [*WMX Technologies v. Miller (9th Cir. 1999) 197 F.3d 367]* .

The right to petition for redress of grievances is not absolute [*Wolfgram v. Wells Fargo Bank (1997) 53 Cal. App. 4th 43, 56, 61 Cal. Rptr. 2d 694]* . Any impairment to the right, however, must be narrowly drawn [*Wolfgram v. Wells Fargo Bank (1997) 53 Cal. App. 4th 43, 57, 61 Cal. Rptr. 2d 694]* . For example, enforcement of California's vexatious litigant statute, *Code Civ. Proc. § 391 et seq.*, against a litigant who had previously lost five cases against the government in seven years did not impermissibly chill the litigant's right to petition. The statute would only create a "chill" by causing one who had lost several suits against the government to fear being branded a vexatious litigant only if the last suit lacked merit, and baseless litigation is not protected by the right to petition [*Wolfgram v. Wells Fargo Bank (1997) 53 Cal. App. 4th 43, 57-58, 61 Cal. Rptr. 2d 694]* .

For discussion and forms relating to the requirement that vexatious litigants furnish security for costs, see *Ch. 174, Costs and Attorney's Fees, § 174.90* et seq. For discussion and forms relating to the requirement that vexatious litigants obtain permission from the court before filing additional lawsuits, see Ch. 573, *Vexatious Litigants* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom to Petition

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§ 59.19 First Amendment Right of Access

The Ninth Circuit recognizes a qualified *First Amendment* right of access in the public to certain types of documents, especially those involved with criminal prosecutions [*see United States v. Higuera-Guerrero (9th Cir. 2008) 518 F.3d 1022, 1026* (*First Amendment* right of access to cooperation addendum to plea agreement, government's motion and memoranda filed in support of it to seal plea agreement, and district court's orders granting government's motion); *Oregonian Publ'ng Co. v. U.S. Dist. Court (9th Cir. 1990) 920 F.2d 1462, 1464*]. When there is a qualified right of access, the question is whether the right to access is overcome by a compelling governmental interest.

To decide whether the public has a *First Amendment* right to access to a certain type of document, the court considers historical experience and logic [*United States v. Higuera-Guerrero (9th Cir. 2008) 518 F.3d 1022, 1026* ; *Times Mirror Co. v. United States (9th Cir. 1989) 873 F.2d 1210, 1213*] although logic alone, even without experience, may be enough to establish the right [*United States v. Higuera-Guerrero (9th Cir. 2008) 518 F.3d 1022, 1026* ; *see Seattle Times Co. v. U.S. Dist. Court (9th Cir. 1988) 845 F.2d 1513, 1516, 1517* (even without unbroken history of public access, *First Amendment* right exists if public scrutiny would benefit proceedings); *see also Phoenix Newspapers, Inc. v. U.S. Dist. Court (9th Cir. 1998) 156 F.3d 940, 948* (even if historic right of access were not dispositive, logic prong of test would be)]. Thus, for example, the public has a qualified *First Amendment* right to access a plea colloquy transcript, because logic favors access [*United States v. Higuera-Guerrero (9th Cir. 2008) 518 F.3d 1022, 1026-1027*]. There is also a qualified right of access to transcripts of hearings on a motion to seal by the government. Although there is no historical experience of public access to the hearings or their transcripts because the hearings did not exist until quite recently, logic requires that at least part of the hearings be open to the public, because one of their purposes is to give the public an opportunity to be heard. If the public has a right to attend the hearings, it necessarily follows that it is entitled to read the transcript of those parts of the proceeding that were public [*United States v. Higuera-Guerrero (9th Cir. 2008) 518 F.3d 1022, 1027*]. However the public does not have the right to attend such hearings in their entirety. The court may close portions of the hearings to hear in private, for example, the government's explanation of how unsealing a plea would endanger the defendant and others. It would be illogical to give the public a right to read the transcripts of these portions of the hearings [*United States v. Higuera-Guerrero (9th Cir. 2008) 518 F.3d 1022, 1027-1028*]. There is no historical experience of access and logic militates against granting access to declarations and documentation appended to the government's motion to seal and to memoranda supporting that motion [*United States v. Higuera-Guerrero (9th Cir. 2008) 518 F.3d 1022, 1027*].

The qualified right of access can be overcome if each of the following is true [*United States v. Higuera-Guerrero (9th Cir. 2008) 518 F.3d 1022, 1028* ; *Oregonian Publ'ng Co. v. U.S. Dist. Court (9th Cir. 1990) 920 F.2d 1462, 1466*]:

- Closure serves a compelling interest.

- There is a substantial probability that, in the absence of closure, the compelling interest would be harmed.

- There are no alternatives to closure that would adequately protect the compelling interest.

Governmental interests that can be compelling include keeping criminal defendants or informants or others safe [*United States v. Higuera-Guerrero (9th Cir. 2008) 518 F.3d 1022, 1028*].

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[Reserved]

§§ 59.20-[Reserved]

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§ 59.30 Federal Constitution

Congress prohibited from abridging freedom of speech, press, and assembly. *U.S. Const., amend. I*

States prohibited from making or enforcing any law that abridges privileges or immunities of United States citizens, from depriving any person of life, liberty, or property without due process of law, and from denying any person within their jurisdiction equal protection of laws. *U.S. Const., amend. XIV*(1)

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of Freedom

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 59 ASSEMBLIES, MEETINGS, AND DEMONSTRATIONS
PART III. RESEARCH GUIDE

6-59 California Forms of Pleading and Practice--Annotated § 59.31

§ 59.31 State Constitution

Every citizen allowed to freely speak, write, and publish sentiments on all subjects, being responsible for abuse of that right; no law may be passed to restrain or abridge liberty of speech or of press. *Cal. Const., art. I, § 2(a)*

Right of people to freely assemble together to consult for common good, to instruct their representatives, and to petition Legislature for redress of grievances. *Cal. Const., art. I, § 3*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of Freedom

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6-59 California Forms of Pleading and Practice--Annotated § 59.32

§ 59.32 Federal Statutes

[1] Jurisdiction

District court jurisdiction of civil actions arising under United States Constitution, laws, or treaties. *28 U.S.C. § 1331(a)*

District court jurisdiction of any civil action authorized by law commenced by any person on account of certain deprivations of his or her rights or privileges. *28 U.S.C. § 1343*

[2] Remedies for Civil Rights Violations

U.S. Supreme Court review of state court decisions by writ of certiorari. *28 U.S.C. § 1257*

Action in nature of mandamus to compel officer or employee of United States or any agency to perform duty owed to plaintiff. *28 U.S.C. § 1361*

Declaratory relief is available in federal district courts. *28 U.S.C. § 2201*

Federal courts may hear application for writ of habeas corpus on behalf of person in custody pursuant to a state court judgment on ground that custody violates United States Constitution or laws. *28 U.S.C. § 2254(a)*

Federal court is not permitted to grant injunction to stay state court proceedings except when expressly authorized by act of Congress, or to protect or effectuate its judgments, or when necessary in aid of its jurisdiction. *28 U.S.C. § 2283*

One who, under color of state statute, ordinance, regulation, custom, or usage subjects person to deprivation of rights, privileges, or immunities secured by United States Constitution or laws is liable to injured party in action at law or equity. *42 U.S.C. § 1983*

Party injured by conspiracy to deprive him or her of certain rights is entitled to bring action for recovery of damages.

42 U.S.C. § 1985(3)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil Rights LawSection 1983 ActionsGeneral OverviewCivil Rights LawConspiracyGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral Overview

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§ 59.33 State Statutes

Action for damages, injunctive or other equitable relief, and attorney's fees against person who, by threats, intimidation, or coercion, interferes or attempts to interfere with another's exercise or enjoyment of constitutional rights. *Civ. Code § 52.1*

Preliminary injunctive relief. *Code Civ. Proc. §§ 525-526*

Action or cross complaint in pending action seeking declaration of parties' rights and duties. *Code Civ. Proc. § 1060*

Writ of review is available when inferior tribunal, board, or officer, exercising judicial functions, has exceeded its or his or her jurisdiction, and there is no appeal or plain, speedy, adequate remedy. *Code Civ. Proc. §§ 1067, 1068*

Writ of mandate is available to compel performance of act that law specially enjoins or to compel admission of party to use and enjoyment of rights to which he or she is entitled. *Code Civ. Proc. §§ 1084, 1085*

Expedited judicial review procedure of local public agency decisions related to permit involving expressive conduct protected by *U.S. Const., amend. I. Code Civ. Proc. § 1094.8*

Writ of prohibition is available to stop proceedings of tribunal, corporation, board, or person exercising judicial functions, when acting in excess of jurisdiction. *Code Civ. Proc. § 1102*

Availability of writ of habeas corpus. *Penal Code § 1473 et seq.*

Legal Topics:

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Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil Rights LawSection 1983 ActionsGeneral OverviewCivil Rights LawConspiracyGeneral OverviewCivil ProcedureRemediesWritsCommon

Law WritsProhibitionCivil ProcedureRemediesWritsCommon Law WritsMandamus

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§ 59.34 Decisions

[1] Applicability of Free Expression Rights

[a] To State Action

First Amendment rights to assemble and petition are liberties guaranteed by *due process clause of Fourteenth Amendment* and thus are protected against state action. *Sun Co. of San Bernardino v. Superior Court (1973) 29 Cal. App. 3d 815, 105 Cal. Rptr. 873*

[b] To Private Property Owners

First and *Fourteenth Amendments* limit only governmental action and do not apply to actions by owners of private property used for purely private purposes; mere fact that the property is "open to the public" does not transform private property into public property so as to require the owner to permit expressive activities on the premises. *Lloyd Corp. v. Tanner (1972) 407 U.S. 551, 567-570, 92 S. Ct. 2219, 33 L. Ed. 2d 131*

Under *Cal. Const., art. I, § 2*, shopping mall could not enforce rule prohibiting persons from urging customers to boycott store in mall; shopping mall was public forum in which persons could reasonably exercise their right to free speech guaranteed by *Cal. Const., art. I, § 2*. Although mall could enact and enforce reasonable regulations of time, place and manner of free expression to assure these activities did not interfere with normal business operations of mall, it could not prohibit certain types of speech based upon content, such as prohibiting speech urging boycott of one or more of stores in mall. *Fashion Valley Mall, LLC v. National Labor Relations Board (2007) 42 Cal. 4th 850, 857-870, 69 Cal. Rptr. 3d 288, 172 P.3d 742*

Tenants association had no state constitutional right to distribute its newsletter in privately-owned apartment complex, when complex owner had restricted public's access to complex by carefully limiting access to residential tenants and their invitees, so that complex is not functional equivalent oftraditional public forum and complex owner's actions did not constitute state action for purposes of state constitutional free speech protection; further, owner's action in seeking

and enforcing injunctive relief was not state action. *Golden Gateway Center v. Golden Gateway Tenants Assn. (2001) 26 Cal. 4th 1013, 111 Cal. Rptr. 2d 336, 29 P.3d 797*

Right to free speech under *Cal. Const., art. I, § 2(a)* is more "definitive and inclusive" than that afforded by *First Amendment*; California Constitution protects speech and petitioning, when reasonably exercised, in privately owned shopping centers. *Robins v. Pruneyard Shopping Center (1979) 23 Cal. 3d 899, 908, 910, 153 Cal. Rptr. 854, 592 P.2d 341 , aff'd, 447 U.S. 74 (1980)*

Trial court properly granted mall owners injunction against and denied anti-SLAPP motion to strike by protestors at shopping mall protesting adult entertainment club, when mall, although shopping center contained many stores, was small property with limited access, and owners could restrict speech on mall property, but because mall had more than one store, protestors could not be completely barred; when original stipulated injunction entered into by leader of protesters and property owners was admirable accommodation by giving protestors sufficient access to mall given its multi-store layout yet taking into account mall's small size and limited purposes, mainly shopping, but leader and other protestors abused generous access they were given by yelling on bullhorns in admittedly residential area at 12:30 in morning, accosting and harassing patrons and defacing property, and leader directed protestors, kept list of many of their names, and negotiated original injunction, purportedly on their behalf, and there was ample evidence of wrongful conduct on his part, for example, use of bullhorn; and when evidence on preliminary injunction supported denial of motion to strike. *Slauson Partnership v. Ochoa (2003) 112 Cal. App. 4th 1005, 1028-1029, 5 Cal. Rptr. 3d 668*

Although free-standing, single-structure, single-use retail food store and parking lot voluntarily opens its doors to the public, its invitation to public is more limited than shopping center's since it invites public only to shop for food and food-related items, so that trial court properly granted preliminary injunction against organization and individuals attempting to obtain signatures for initiative petitions from individuals patronizing store, where owner's interest in maintaining exclusive control over its private property is stronger than interest of shopping mall owner and public's interest in using store as forum for free speech and petitioning activity is not as strong as its interest in engaging in those activities at large shopping center. *Trader Joe's Co. v. Progressive Campaigns (1999) 73 Cal. App. 4th 425, 433, 86 Cal. Rptr. 2d 442*

California Constitution protects reasonable exercise of free speech rights on private property when that property is generally open to the public and functions as the equivalent of a traditional public forum. *Allred v. Harris (1993) 14 Cal. App. 4th 1386, 1390, 18 Cal. Rptr. 2d 530*

[c] Differentiating Government and Private Speech

In action by nonprofit coalition of pro-life organizations alleging violation of *First Amendment* rights by state license plate commission's denial of application for special organization license plate that would portray its message, trial court erred in granting summary judgment to license plate commission on grounds that it was state-adopted speech which state was free to regulate without *First Amendment* constraint, where, by allowing organizations to obtain speciality license plates with their logo and motto, state provided forum in which philanthropic organizations could exercise their *First Amendment* rights in hopes of raising money to support their cause, supporting finding of private speech; license plate commission's de minimis editorial control over plate design and color did not support finding that messages conveyed by organization constituted government speech; factor of ownership of means of communication had characteristics of both private and government speech, but fact that coalition's logo would also be displayed on license plate supporting its message weighed in favor of its being primarily private speech; and fact that coalition had to take affirmative step of submitting application suggested that coalition, rather than state, bore ultimate responsibility for content of speech. *Ariz. Life Coalition, Inc. v. Stanton (9th Cir. 2008) 515 F.3d 956, 963-968*

[2] Protected Expression

City's decision to accept certain privately donated monuments while rejecting religious organization's was best viewed as form of government speech, which was not subject to scrutiny under *Free Speech Clause. Pleasant Grove City, Utah v. Summum (2009) -- U.S. --, 129 S. Ct. 1125, 1131-1138, 172 L. Ed. 2d 853*

Although *First Amendment* protected school's right to publish truthful information about school and its athletic programs and school's right to try to persuade prospective students and their parents that its excellence in sports was reason for enrolling, enforcement by not-for-profit membership corporation that regulated interscholastic sports among its members, which school chose to join, and which was athletic league and state actor invested with threefold obligation to prevent exploitation of children, ensure high school athletics remained secondary to academics, and promote fair competition among its members, of rule prohibiting coaches from trying to recruit impressionable middle school athletes, was not protected by *First Amendment*, where anti-recruiting rule struck nowhere near heart of *First Amendment* because league did not ban dissemination of truthful information relating to sports or claim that it could, and where, even accepting questionable holding that league's closed-door deliberations relating to school's recruiting violations were unconstitutional, any due process violation was harmless beyond reasonable doubt. *Tenn. Secondary Sch. Ath. Ass'n. v. Brentwood Academy (2007) 551 U.S. 291, 127 S. Ct. 2489, 168 L. Ed. 2d 166, 170-176*

Court of Appeals was correct to affirm district court ruling that enforcement of Child Online Protection Act (COPA) [*47 U.S.C. § 231*], which imposescriminal penalties of $50,000 fine and six months in prison for knowingly posting, for "commercial purposes," of World Wide Web content "harmful to minors," should be enjoined because COPA likely violates *First Amendment*, when statute was likely to burden some speech that is protected for adults and there were plausible, less restrictive alternatives to COPA, including blocking and filtering software, which were likely more effective as means of restricting children's access to materials harmful to them than COPA, and when potential harms from reversing injunction outweighed those of leaving it in place by mistake. *Ashcroft v. American Civil Liberties Union (2004) 542 U.S. 656, 124 S. Ct. 2783, 2790-2795, 159 L. Ed. 2d 690*

Virginia statute banning cross-burning with intent to intimidate does not run afoul of *First Amendment*, because statute does not single out for opprobrium only speech directed toward specified disfavored topics; burning cross is particularly virulent form of intimidation, and state chose to prohibit only forms of intimidation most likely to inspire fear of bodily harm. However, provision that cross-burning is prima facie evidence of intent to intimidate, as interpreted by jury instruction that burning of cross, by itself, is sufficient evidence from which jury could infer required intent, renders statute unconstitutional because it permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on defense, or when defendant presents defense, makes it more likely jury will find intent to intimidate regardless of particular facts of case, creating unacceptable risk of suppression of ideas. *Virginia v. Black (2003) 538 U.S. 343, 123 S. Ct. 1536, 1547-1552, 155 L. Ed. 2d 535*

Municipal ordinance requiring one to obtain permit before engaging in door-to-door advocacy of political cause and to display on demand permit, which contains one's name, violates *First Amendment* protection accorded to anonymous pamphleteering ordiscourse. *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton (2002) 536 U.S. 150, 122 S. Ct. 2080, 2087-2091, 153 L. Ed. 2d 205*

Punishing radio commentator for playing tape of unlawfully intercepted telephone conversation under *18 U.S.C. § 2511(1)(c)*, which punishes willful disclosure or attempt to disclose contents of unlawfully obtained wire or oral communication if publisher knows or has reason to know it was unlawfully intercepted, violated commentator's *First Amendment* rights. *Bartnicki v. Vopper (2001) 532 U.S. 514, 121 S. Ct. 1753, 149 L. Ed. 2d 787*

Condition imposed by Congress on use of Legal Services Corporation (LSC) funds, prohibiting legal representation funded by recipients of LSC moneys if representation involves effort to amend or otherwise challenge existing welfare law, which prevents attorney from arguing to court that state statute conflicts with federal statute or that either state or federal statute by its terms or in its application violates federal Constitution, violates *First Amendment* rights of LSC

grantees and their clients, when, although viewpoint-based funding decisions can be sustained when government is itself speaker or government uses private speakers to transmit information pertaining to its own program, LSC program was designed to facilitate private speech, i.e., to provide attorneys to represent interests of indigent clients, not to promote governmental message and in context of suits for welfare benefits, LSC-funded attorney speaks on behalf of client and attorney defending decision to deny benefits delivers government's message; when government sought to use an existing medium of expression to control it, in class of cases, in ways that distort its usual functioning; and when restriction threatened severe impairment of judicial function of interpretation of law and constitution. *Legal Services Corp. v. Velazquez (2001) 531 U.S. 533, 121 S. Ct. 1043, 149 L. Ed. 2d 63*

Section 505 of Telecommunications Act of 1996, requiring cable television operators providing channels primarily dedicated to sexually-oriented programming either to fully scramble or otherwise fully block channels or limit transmission to hours when children are unlikely to be viewing, with purpose of shielding children from hearing or seeing images resulting with signal bleed, is content-based restriction on speech violating *First Amendment*, when government failed to show it is least restrictive means for addressing problem. *U.S. v. Playboy Entertainment Group, Inc. (2000) 529 U.S. 803, 120 S. Ct. 1878, 146 L. Ed. 2d 865*

Communications Decency Act of 1996, prohibiting knowingly transmission of obscene or indecent messages to recipient under 18 years of age and knowing sending or displaying of patently offensive messages in manner available to person under 18 years of age, is unconstitutional as abridging free speech protected by federal constitution. *Reno v. ACLU (1997) 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874*

Protected speech under *First Amendment* includes speech that conveys religious social beliefs. *Capitol Sq. Review Bd. v. Pinette (1995) 515 U.S. 753, 115 S. Ct. 2440, 132 L. Ed. 2d 650, 659* (private group's unattended display of cross in state-owned square)

Parading is form of expression protected by *First Amendment*. *Hurley v. Irish-American Gay Group (1995) 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487, 500-501*

Under *First Amendment*, parade organizers may not be compelled to affirm belief with which they disagree by being required to include among parade marchers a group imparting a message that organizers do not wish to convey. *Hurley v. Irish-American Gay Group (1995) 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487, 495, 503-508*

Nude dancing is expressive conduct marginally within outer perimeters of *First Amendment*; however, ordinance making knowingly or intentionally appearing in public place in state of nudity, defined as showing of human male or female genitals, pubic area, or buttocks with less than fully opaque covering, showing of female breast with less than fully opaque covering or any part of nipple, or showing of covered male genitals in discernibly turgid state misdemeanor is constitutional. *Barnes v. Glen Theatre, Inc. (1991) 501 U.S. 560, 565-566, 111 S. Ct. 2456, 115 L. Ed. 2d 504* (plurality opinion)

Conduct is expressive and thus protected by *First Amendment* when two factors are present: (1) intent to convey a particularized message, and (2) a substantial likelihood that the message will be understood by those receiving it. *Spence v. Washington (1974) 418 U.S. 405, 410-411, 94 S. Ct. 2727, 41 L. Ed. 2d 842* ; *Colacurcio v. City of Kent (9th Cir. 1998) 163 F.3d 545, 549 n.1* (nude dancing)

"Heckler's veto" is impermissible content-based speech restriction under which speaker is silenced due to anticipated disorderly or violent reaction of audience. *Brown v. Louisiana (1966) 383 U.S. 131, 133 n.1, 86 S. Ct. 719, 15 L. Ed. 2d 637*

Demonstrators failed to plead actionable viewpoint discrimination in their relocation by Secret Service agents, where bald allegations of impermissible motive on agents' part and that, in ordering relocation of their demonstration agents

acted in conformity with officially authorized sub rosa Secret Service policy of suppressing speech critical of President, standing alone, were conclusory and therefore not entitled to assumption of truth, and where court could not reasonably infer *First Amendment* violation from non-conclusory factual allegations that agents ordered relocation of their anti-President demonstration but left similarly situated pro-President demonstration undisturbed and that diners and guests inside inn where President was dining were not subjected to security screening or asked to leave premises, despite their close proximity to President as argument for presuming agents' discriminatory intent by way of evidence of disparate impact, because agents' instruction to state and local police to move demonstrators to location situated comparable distance from inn as other demonstrators, establishing consistent perimeter around President, was not plausible allegation of disparate treatment. *Moss v. United States Secret Service (9th Cir. 2009) 572 F.3d 962, 969-972*

Restrictions on lobbying, soliciting clients, participating in class actions, and seeking attorney's fees Congress imposed on legal aid organizations receiving federal grants through Legal Services Corporation (LSC) were not facially violative of *First Amendment*, where they did not discriminate against particular viewpoint; LSC did not apply program integrity rule, permitting grantees to channel restricted speech, paid for with non-federal dollars, through unrestricted affiliates, to plaintiffs in manner that violated *First Amendment*, where plaintiffs did not demonstrate as factual matter that PIR had not left them adequate alternative channels for protected expression. *Legal Aid Servs. of Or. v. Legal Servs. Corp. (9th Cir. 2009) 587 F.3d 1006, 1015-1021*

Removal of political activist from public street for which one defendant had obtained permit to state private event constituted constitutional violation of activist's *First Amendment* rights, where *First Amendment* plainly protected activities of gathering signatures for political petition and registering voters, and where defendants' conduct resulting in complete exclusion of plaintiff for no reason other than asserted right of permittees to exclude anyone expressing political message, violated *First Amendment*. *Dietrich v. John Ascuagua's Nugget (9th Cir. 2008) 548 F.3d 892, 896-899*

Police officers violated plaintiff's *First Amendment* rights by arresting him for political messages painted on his van, impounding his van, and forcing him to remove the messages, where reasonable person would expect that observer of van would have seen old Volkswagen van covered with artwork, American flag, and obviously satiric or hyperbolic political message, and actions of officers who actually saw van and its message made clear that reasonable people would not have understood and did not understand speech as true threat; and where there was virtually no evidence plaintiff subjectively intended speech as true threat of serious harm. *Fogel v. Collins (9th Cir. 2008) 531 F.3d 824, 829-833*

City ordinance contained provisions that violated *First Amendment* and provisions that did not, where provisions permissibly distinguished between expressive activity, as defined in ordinance, and city manager did not have unbridled discretion to impose conditions on permits to hold special events because provision allowed city manager to impose conditions on permits only to achieve specified purposes that were objective and relatively precise and had no discernable connection to content of any particular message; where provision allowing city manager to require documentation of indigent status to avoid imposition of service charges defined indigency in content-neutral and objective manner and limited city to relevant information reasonably necessary, which adequately ensured that choice of means of proof was not left to whim of city manager; where insurance requirement was content-neutral because city could authorize permit applicant to provide, indemnification as alternative to insurance at applicant's option; and where, to degree ordinance was otherwise constitutional, misdemeanor penalty forintentional violation of its provisions did not violate *First Amendment*. However, provisions governing special events were unconstitutional because they were not narrowly tailored to serve substantial governmental interest, provisions governing spontaneous events were unconstitutional because they were not narrowly tailored and did not provide sufficient alternative means of communication, hold-harmless and indemnification provisions were unconstitutional because they were not narrowly tailored to serve significant governmental interest, and funding and waiver provision was unconstitutional because it allowed exercise of unbridled discretion. *Long Beach Area Peace Network v. City of Long Beach (9th Cir. 2008) 522 F.3d 1010, 1025-1043*

State license plate commission violated *First Amendment* rights of nonprofit coalition of pro-life organizations by denying coalition's application for special organization license plate that would portray its message, where state's speciality license plate program was limited public forum, and where, because abortion-related speech fell within boundaries of limited public forum and because commission denied application based on nature of message, commission's actions were viewpoint discriminatory. *Ariz. Life Coalition, Inc. v. Stanton (9th Cir. 2008) 515 F.3d 956, 968-973*

State statute prohibiting payroll deductions for political activities was constitutional as applied to state government itself, but violated *First Amendment* as applied to local government employers, where it was content-based law for which there was no compelling justification, and where state officials failed to demonstrate statute should be reviewed under more relaxed standard applicable to speech restrictions in nonpublicfora, because they failed to show that state could properly assert proprietary interest in controlling access to payroll systems that constituted fora, caselaw suggested authority over local governments state possessed by operation of law was not enough to associate local workplaces or payroll deduction programs with state, and state officials adduced no specific evidence state owned, administered, or controlled payroll deduction programs. *Pocatello Educ. Ass'n v. Heideman (9th Cir. 2007) 504 F.3d 1053, 1057-1068*

First Amendment protects artist's sale of the artist's original artwork, and city applied wrong *First Amendment* standard in its *First Amendment* exception to its vendor-permitting policy, only allowing exception for sale of merchandise carrying or constituting political, religious, philosophical or ideological message. *White v. City of Sparks (9th Cir. 2007) 500 F.3d 953, 955-957*

Threatened criminal prosecution of owners of websites offering voters mechanisms for vote swapping and vote exchange violated their *First Amendment* rights, where owners had *First Amendment* interest vote-swapping mechanisms and communication and vote swaps that mechanisms enabled, and where state's legitimate interests of preventing corruption, preventing fraud and preventing subversion of Electoral College did not support threatened criminal prosecution. *Porter v. Bowen (9th Cir. 2007) 496 F.3d 1009, 1018-1026*

District properly denied claim of Christian evangelists that city officials implemented "heckler's veto" that was impermissible viewpoint discrimination by responding to complaints by citizens who were hostile to Christian message, where there was no evidence police officers who responded to incidents involving evangelists knew about, agreed with or adopted any views of complainants, and evidence showed city was concerned about unacceptable noise levels, not content of Christian message. City did not exercise viewpoint discrimination by exercising unbridled discretion over volume, where police commissioner's discretion to issue permits was guided by statutory criteria, and decisions to deny evangelists permits were based on fact that proposed use of amplified sound was unsuitable for area covered by requested permit under statutory criteria. Finally, city did not engage in impermissible viewpoint discrimination by making no legitimate showing of probable cause when citing evangelists under *Pen. Code § 415* for maliciously and willfully disturbing others, where both incidents of citation were legitimately based on probable cause, and where, even if probable cause were lacking, two isolated incidents did not amount to pattern or policy of abusive citation under § 415, given that two unrelated individuals prompted complaints and two different officers responded. *Rosenbaum v. City & County of San Francisco (9th Cir. 2007) 484 F.3d 1142, 1157-1163*

City ordinance prohibiting soliciting in specified area as part of city's effort to revitalize downtown area was unconstitutional on its face as violating *First Amendment*, where ordinance was content-based and did not represent least restrictive means of achieving city's stated goals of protecting potential visitors from aggressive or intrusive solicitation, eliminating obstructions to free movement of pedestrians, and protecting local merchant economy. Further, city ordinance prohibiting use of portables in same area for distribution of literature was limitation on expressive activity protected by Constitution to extent tables facilitated dissemination of *First Amendment* speech. *American Civil Liberties Union of Nevada v. City of Las Vegas (9th Cir. 2006) 466 F.3d 784, 791-799*

Church engaged in protected speech when its participants met in county public library for prayer, praise, and worship. *Faith Center Church Evangelistic Ministries v. Glover (9th Cir. 2006) 462 F.3d 1194, 1202*

Defendants contributing to organization designated as terrorist organization by State Department could be prosecuted under *8 U.S.C. § 1189*, assigning criminal penalties to one who knowingly provides material support orresources to foreign terrorist organization or attempts or conspires to do so, because what defendants proposed to do was not to engage in speech, but rather to provide material assistance. *United States v. Afshari (9th Cir. 2005) 426 F.3d 1150, 1159-1162*

Criminal statutory scheme barring giving of material support to foreign organizations designated as terrorist by State Department [8 U.S.C. § 2339B] does not violate *First Amendment* right of association by denying accused opportunity to challenge foreign terrorist organization designation and depriving them of *First Amendment* right to make contributions, when giving money to perfectly legitimate political expression within United States can be restricted by Congress consistent with Constitution, so that *a fortiori*, contribution of money to organizations engaging in terrorism, as well as expressing political agenda with speech, can be restricted by Congress. *United States v. Afshari (9th Cir. 2004) 392 F.3d 1031, 1037-1040*

First Amendment prohibition of compelled speech does not apply when excise tax is used to produce message indisputably coming from government itself. Thus, state excise tax imposed on cigarette sales, part of which was used for media campaign designed to raise public awareness of deleterious effects of smoking and to effect reduction in tobacco use, was not unconstitutional as compelled subsidization of speech. *R.J. Reynolds Tobacco Co. v. Shewry (9th Cir. 2004) 384 F.3d 1126, 1131-1141*

Operating restrictions in county ordinance prohibiting provision of services by adult entertainment businesses between 1:00 a.m. and 8:00 a.m. on Monday through Saturday or 1:00 a.m. and noon on Sunday were constitutional under secondary effects test, when predominate concerns motivating ordinance were secondary effects of adult speech because ordinance was designed to combat secondary effects of adult entertainment establishments on surrounding community, including effects on crime rates, property values, and quality of city's neighborhoods. Further, requiring managers to obtain work permits was reasonable time, place, and manner restriction because adult businesses are associated with variety of secondary effects, such as presence of organized crime and money laundering, which directly involve employees in management positions. Ban on "specific sexual activity" was not reasonable time, place, and manner restriction because there was no way for adult entertainment business to comply with ordinance, unless it simply ceased to engage in protected expression entirely and ban was not necessary to serve county's unquestioned significant interest in ameliorating secondary effects. *Dream Palace v. County of Maricopa (9th Cir. 2004) 384 F.3d 990, 1012-1021*

University student failed to state claim for violation of *First Amendment* rights either by administrators and university law enforcement officers placing lock on door of university newspaper office after student informed them he had box of confidential student records and by removing handbills advertising press conference that were posted in area not approved for posting, when even if *First Amendment* or state's exceptionally strong shield law entitled student to reporter's privilege protecting his news-gathering work, privilege did not avail because he voluntarily returned box of confidential student records to university administrators and officers and administrators and officers complied with *Fourth Amendment* and did not interfere with publication of news since student remained free to write about university's handling or mishandling of confidential student records and he remained in possession of summary of records he compiled and placed on hard drive of his computer; and when unapproved areas were not public for a or designated public fora because university did not intend to open them for expression as manifested by university's bulletin board posting policy, andregulation of students speech in nonpublic fora was not viewpoint-based, since all fliers were removed in one place and with regard to selectively removed fliers elsewhere on campus, no allegation connected any defendants to their removal, and regulation of speech in nonpublic forum was reasonable in light of purpose served by fora because hallways, doorways, and columns of campus were designated off-limits to fliers primarily for aesthetic

reasons. *Desyllas v. Bernstine (9th Cir. 2003) 351 F.3d 934, 941-944*

City's prohibitions of leafleting, vending, solicitation, and use of tables in pedestrian mall were unconstitutional, because mall was traditional public forum. Although ban on leafleting was content-neutral, it was clearly not narrowly tailored, nor did it leave open ample alternative channels for communication. By placing decision to authorize vending wholly within discretion of company official operating mall, ordinance created situation ripe for abuse in violation of *First Amendment*. Because solicitation and use of tables are expressive activities protected under *First Amendment*, district court would need to determine on remand whether City was able to show restrictions were narrowly tailored to serve significant government interest without burdening substantially more speech than necessary to further government's legitimate interests. *ACLU of Nevada v. City of Las Vegas (9th Cir. 2003) 333 F.3d 1092, 1106-1109*

Enjoining federal government from revoking physician's license to prescribe controlled substances or conducting investigation of physician that might lead to revocation when basis for government's action is solely physician's professional "recommendation" of use of medical marijuana was proper to protect physicians' *First Amendment* rights, when injunction was not intended to limit government's ability to investigate doctors who aid and abet actual distribution and possession of marijuana, and government did not provide any empirical evidence to demonstrate that injunction interfered with or threatened to interfere with any legitimate law enforcement activities. *Conant v. Walters (9th Cir. 2002) 309 F.3d 629, 632*

Night club owners stated actionable claim for violation of *First Amendment* by offering undisputed evidence that city withdrew its offer to settle nuisance abatement action because of owners' choice of music format, because city learned they were still playing rap music occasionally and intended to doso at party on New Year's Eve, and city agreed to continue postponing abatement hearing, which was critical for owners to pursue negotiations to sell club, only after owners agreed never to play rap music again. *RK Ventures, Inc. v. City of Seattle (9th Cir. 2002) 307 F.3d 1045, 1063*

Municipal charitable solicitation ordinance requirement of information card endorsement was form of compelled speech that should have been subject to exacting *First Amendment* scrutiny requiring municipality to show compelling need to force disclosure and whether ordinance was precisely tailored. *Gospel Missions of America v. City of Los Angeles (9th Cir. 2002) 298 F.3d 1099, 1106*

In action under federal Freedom of Access to Clinics Entrances Act (FACE) [*18 U.S.C. § 248*], which gives aggrieved persons right of action against whoever by "threat of force" intentionally intimidates person because person is or has been providing reproductive health services, defendant's conduct amounted to true threat and was not protected speech, where defendant was aware that "wanted"-type poster would likely be interpreted as serious threat of death or bodily harm by plaintiffs, who were doctors in reproductive health services community identified on one, given previous pattern of "WANTED" posters identifying specific physician followed by that physician's murder, and same was true of posting about plaintiffs on part of "Nuremberg Files" website where lines were drawn through names of doctors who provided abortion services and who had been killed or wounded. *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists (9th Cir. 2002) 290 F.3d 1058, 1077-1088*

Conviction under state statute of participating in criminal street gang, based on former gang member discussing organization of his former gang with members of another street gang, unconstitutionally violated defendant's *First Amendment* rights, when advice defendant gave to gang was nothing more than abstract advocacy of overarching gang philosophy lacking specific intent to further or promote criminal acts, when circumstances of speech at barbeque and social party made it unlikely anyone would act on it immediately, and when advice was very general and abstract as it was not aimed at any particular person or particular time. *McCoy v. Stewart (9th Cir. 2002) 282 F.3d 626*

While community college's prohibition of verbal threats interfering with employee's safety in workplace as workplace violence is facially constitutional, policy was unconstitutionally applied, when professor's statements regarding president were not true threats, but were hyperbole of sort found in non-mainstream political invective, and when

college's rights were not impermissibly burdened by professor's expression. *Bauer v. Sampson (9th Cir. 2001) 261 F.3d 775*

Profanity expressing disapproval of National Park Service rangers' conduct in making arrest, which was not likely to provoke violent response from trained officer, was not fighting words, but fell within protection of *First Amendment* and did not provide lawful basis for conviction of disorderly conduct. *United States v. Poocha (9th Cir. 2001) 259 F.3d 1077, 1079-1082*

Court administrator's conduct in sending two court clerks to attend training seminar despite two supervising judge's instruction to limit attendees at training seminars to court employees who had worked in his reelection campaign and these clerks had not, was protected speech under *First Amendment*, where administrator testified that she intended by her conduct to convey message to court clerks and co-workers that judge should not condition court clerks's benefits on working in his reelection campaign, and court clerks and coemployees testified that they understood that message, so that administrator's expressive conduct possessed sufficient communicative elements to bring *First Amendment* into play. *Nunez v. Davis (9th Cir. 1999) 169 F.3d 1222, 1226*

Contributions to political campaigns are protected speech under the *First Amendment*. *Austin v. Michigan Chamber of Commerce (1990) 494 U.S. 652, 657, 110 S. Ct. 1391, 108 L. Ed. 2d 652* ; *VanNatta v. Keisling (9th Cir. 1998) 151 F.3d 1215, 1219 , cert. denied sub nom., Miller v. VanNatta 525 U.S. 1104 (1999)*

Employee speech on matters of public concern, but not complaints over internal office affairs, is protected under the *First Amendment*. *Connick v. Myers (1983) 461 U.S. 138, 147, 103 S. Ct. 1684, 75 L. Ed. 2d 708* ; *Weisbuch v. County of Los Angeles (9th Cir. 1997) 119 F.3d 778, 784*

City ordinance regulating distribution of food in public parks was not subject to facial challenge as violating *First Amendment* because food distribution generally is notexpressive activity protected by *First Amendment*. Whether food distribution could be expressive activity protected by *First Amendment* under particular circumstances was question to be decided in as-applied challenge. *Santa Monica Foods Not Bombs v. City of Santa Monica (9th Cir. 2006) 450 F.3d 1022, 1032*

City ordinance requiring person who wishes to sit or lie on city sidewalk at specified times for specific kinds of events to obtain permit does not violate *First Amendment* on its face, when ordinance does not regulate speech or patently expressive conduct. *Amster v. City of Tempe (9th Cir. 2001) 248 F.3d 1198*

State university professor's removal of handbills publicizing appearance of former colleague at conference to be held on campus constituted *First Amendment* violation, when handbills were speech in that they were posted for purpose of conveying information, and when removal of handbills denied former colleague access to public forum and removal of handbills constituted viewpoint discrimination in that professor sought to silence speech only by former colleague rather than speech by all non-university speakers or all speakers promoting conference and its participants. *Giebel v. Sylvester (9th Cir. 2001) 244 F.3d 1182*

City violated *First Amendment* rights of two artists by creating public forum in exhibition of work of local artists in new city hall under contract with private organization to manage program, and then excluding their works without compelling governmental interest, when although children might pass through hallways, city conceded that artworks were not obscene, it was beyond peradventure that works had serious artistic value and city offered no evidence that children would be harmed by or even saw artworks, when mere fact that works caused controversy was patently insufficient to justify their suppression, and when city's standard for disapproval of works in exhibition failed narrow tailoring requirement because it did not adequately limit discretion of city in approving or disapproving artwork to be exhibited. *Hopper v. City of Pasco (9th Cir. 2001) 241 F.3d 1067*

Provisions of Food and Drug Administration Modernization Act of 1997 prohibiting drug providers from promoting or advertising particular compounded drugs violated *First Amendment* free speech protections afforded to group of pharmacists, when prohibited speech, although commercial, neither was inherently misleading nor concerned unlawful activity, when although two of three of government's stated interests served by speechrestriction were substantial, government failed to show how speech restriction directly advanced government interests of protecting public, and when speech restrictions were more extensive than necessary to achieve asserted government interests, since there were clear alternatives to advance government's asserted interests in manner far less intrusive to pharmacist's free speech rights. *Western States Medical Center v. Shalala (9th Cir. 2001) 238 F.3d 1090 , aff'd sub nom. Thompson v. Western States Med. Ctr. (2002) 535 U.S. 357, 122 S. Ct. 1497, 152 L. Ed. 2d 563*

Rejection of application for coverage of cost of city services for local observance of National Day of Prayer as part of annual observance, under civic events fund established to encourage civic events, on ground of fund's explicit policy of not funding events held in direct support of religious organizations violated free speech rights of event organizers, when local observance was protected expressive conduct; when, although fund was nontraditional public form from which speakers could be excluded if inconsistent with fund's purpose to encourage and support civic events, observance had civic character fitting comfortably within general subject matter of events for which fund was created so that decision to exclude event was content-based discrimination was not consistent with fund's purposes; when reimbursement of costs of observance would not be direct support of religion in constitutional sense, since minimal and diffuse benefits to members of Jewish and Christian religious organizations more than members of other faith traditions or nonreligious members of public at large did not amount to constitutionally impermissible support of religion; and when even if exclusion were reasonable, city could not reject coverage based on viewpoint that most relevant manner to address important social concerns for which local observance was established in part, was through expressive acts of worship, singing, and prayer. *Gentala v. City of Tucson (9th Cir. 2000) 213 F.3d 1055*

Portion of Child Pornography Prevention Act of 1996 proscribing computer images not involving use of real children in production or dissemination, thus criminalizing generation of images of fictitious children engaged in imaginary but explicit sexual conduct, violates free speech protections of *First Amendment* and government's articulated compelling state interest cannot justify criminal proscriptionwhen no actual children are involved. *Free Speech Coalition v. Reno (9th Cir. 1999) 198 F.3d 1083*

Neither *First Amendment* nor Religious Freedom Restoration Act, *42 U.S.C. § 2000bb-1*, required city to retain as member of its Human Rights Commission a minister who made public statements explicitly condemning homosexuality as a sin and implicitly endorsing violence against homosexuals, which were antithetical to Commission's official charge to eliminate prejudice and discrimination because of, among other things, sexual orientation and to officially encourage private persons and groups to promote and provide equal oportunity for and good will toward all people; although *First Amendment* strictly protects freedom of expression, government, as employer, has latitude to protect its operations and policies from subversion by its own personnel, and city's interest in eliminating prejudice and discrimination prevailed over minister's *First Amendment* interest in condemning homosexuality while serving as a voting member of city's Human *Rights Commission. Lumpkin v. Brown (9th Cir. 1997) 109 F.3d 1498, 1500-1501*

Although public employee speech on matters of public concern merits highest degree of *First Amendment* protection if it helps citizens make informed decisions about operation of their government, private transmission of case citations from police officer who chose to remain anonymous to prosecutor to advise prosecutors on search and seizure issues should similar situations arise in the future, which allegedly resulted in officer's transfer to another jurisdiction, did not constitute a matter of public concern sufficient to meet threshold requirement for *First Amendment* retaliation lawsuit. *Roe v. City and County of San Francisco (9th Cir. 1997) 109 F.3d 578, 585-586*

First Amendment protection extends to political demonstration in city park. *Grossman v. City of Portland (9th Cir. 1994) 33 F.3d 1200, 1204*

Sections of Communications Decency Act of 1996, *47 U.S.C. § 223(a)(1)(A)(ii)* and *223(a)(2)*, can be construed so as to render them constitutionally valid, where in light of prior case law and statutory history, it is possible to read them as applying only to "obscene" communications. *Apollomedia Corp. v. Reno (N.D. Cal. 1998) 19 F. Supp. 2d 1081 , aff'd, 526 U.S. 1061, 119 S. Ct. 1450, 143 L. Ed. 2d 538 (1999)*

Comic book depictions of well-known performers were entitled to *First Amendment* protection in action by performers for appropriation of likeness, where comic book characters were not just conventional depictions of plaintiffs, but contained significant expressive content other than plaintiffs' mere likenesses. *Winter v. DC Comics (2003) 30 Cal. 4th 881, 887-892, 134 Cal. Rptr. 2d 634, 69 P.3d 473*

Although artist's lithographs with likenesses of Three Stooges did not lose *First Amendment* protections by being sold and being used to create T-shirts that were sold, enforcement of judgment against him for violation of *Civ. Code § 3344.1* (former *Civ. Code § 990*), which prohibits use of likeness of deceased personality without prior consent from deceased's heirs and assignees, did not violate *First Amendment*, whenartistic expression took form of literal depiction or imitation of celebrity for commercial gain, thus directly trespassing on right of publicity without adding significant expression beyond trespass, so that state law interest in protecting fruits of artistic labor outweighed expressive interests of artist; had work contained significant transformative elements, it would be especially worthy of *First Amendment* protection and less likely to interfere with economic interest protected by right of publicity, so that *First Amendment* protection would outweigh whatever interest state may have in enforcing right of publicity. *Comedy III Productions, Inc. v. Gary Saderup, Inc. (2001) 25 Cal. 4th 387, 106 Cal. Rptr. 2d 126, 21 P.3d 797*

California plum marketing program issued by state Secretary of Food and Agriculture, which is funded by plum producers and compels them to fund generic advertising about plums, does not implicate individual producer's *First Amendment* right to freedom of speech, but does implicate producer's right to freedom of speech under free speech clause of Cal. Const., art. I. *Gerawan Farming, Inc. v. Lyons (2000) 24 Cal. 4th 468, 101 Cal. Rptr. 2d 470, 12 P.3d 720*

In action for defamation based on anonymous postings on financial bulletin board on Internet, plaintiff's ability to discover identity of anonymous poster through subpoena to message board host had to be weighed against poster's long-recognized *First Amendment* right to speak anonymously; plaintiff was required to make prima facie showing of elements of libel to overcome poster's motion to quash subpoena, and language of Internet posts, together with surrounding circumstances compelled conclusion that statements of which plaintiff complained were not actionable. Applicability of *First Amendment* to speech on message board also foreclosed cause of action for interference with business relationships. *Krinsky v. Doe 6 (2008) 159 Cal. App. 4th 1154, 1162-1179, 72 Cal. Rptr. 3d 231*

Civil Code § 1785.11.2, known as "security freeze" law, which allows California consumers to prevent dissemination of their credit reports, was unconstitutional as applied to credit reporting agency providing consumer credit reports to landowners who rent and lease apartments and property managers, whether or not it was considered commercial speech, where agency's consumer credit reports neither related to unlawful activity nor were misleading, and where, although asserted government interest in protecting consumers from identity theft was substantial and compelling state interest, there was no evidence that § 1785.11.2 directly and materially advanced government's asserted interest in protecting consumers from identity theft. Also, the court held that restriction was excessive because it swept more broadly than necessary to serve government interest in protecting consumers from identity theft. However, in terms of facial challenge, there was no total and fatal conflict between § 1785.11.2 and *First Amendment*, where there were logically conceivable circumstances under which consumer could forestall release of credit information federal and state constitutions did not protect, such as a false credit report. *U.D. Registry, Inc. v. State of California (2006) 144 Cal. App. 4th 405, 417-430, 50 Cal. Rptr. 3d 647*

In action for appropriation of likeness by celebrity who was former member of rock group against manufacturers of videogame, trial court properly held that videogame was protected by *First Amendment*, where, notwithstanding

similarities, videogame character was more than mere likeness or literal depiction of plaintiff and contained sufficient expressive content to constitute transformative work; where videogame character was not literal depiction of plaintiff and defendants added creative elements to create new expression; and where transformative test specifically did not require videogame character to say something factual, critical or comedic about plaintiff to receive *First Amendment* protection. *Kirby v. Sega of America, Inc. (2006) 144 Cal. App. 4th 47, 57-62, 50 Cal. Rptr. 3d 607* [rejecting "predominant use" test adopted by *Missouri Supreme Court in Doe v. TCI Cablevision (Mo. 2003) 110 S.W.3d 363 , cert. denied, (2004) 540 U.S. 1106]*

Civ. Code § 2527(c), (d) (requiring every prescription drug claims processor in California to conduct or obtain results of studies identifying fees, separate from ingredient costs, of all or statistically significant sample of California pharmacies, for pharmaceutical dispensing services to private consumers no less often than every 24 months, and to transmit the studies by certified mail to chief executive officer or designee of each client for whom it performs claims processing services no less often than every 24 months) and *Civ. Code § 2528* (providing statutory damages plus reasonable attorney's fees and costs, declaratory and injunctive relief, and other relief deemed proper for violation of § 2527(c), (d)) were unconstitutional as compelled speech. Statutes required transmission of specific content so as to be content-based regulation of speech implicating drug claims processors' right to freedom of speech. Further, speech was not commercial speech, thus requiring strict scrutiny, and requiring drug claims processors to provide cost studies to insurers was not narrowly tailored means of achieving compelling state interest nor did it have least restrictive impact on processors' right to free speech. *ARP Pharmacy Svcs., Inc. v. Gallagher Bassett Svcs., Inc. (2006) 138 Cal. App. 4th 1307, 1314-1322, 42 Cal. Rptr. 3d 256*

Administrator of 4-H program was entitled to qualified immunity in action for violation of *First Amendment* free speech rights brought by club members and adult leader who had been suspended while administrator investigated whether members, who participated in making film depicting violent behavior, posed risk of violent behavior, when there was no federal constitutional violation. Adult leader had no part in filmmaking project, so that if administrator punished adult leader at all, punishment was unrelated to any speechor other expressive act by adult leader so that *42 U.S.C. § 1983* claim did not allege violation of adult leader's constitutional right to free speech. As to members who had participated in film, administrator was shown expressive work of art raising concerns about possibility of future violence, and suspended plaintiffs for short period of time while she conducted investigation to determine whether they and other participants in project were threat to others, and temporary suspension did not violate plaintiffs' *First Amendment* rights. *Robbins v. Regents of University of California (2005) 127 Cal. App. 4th 653, 661-664, 25 Cal. Rptr. 3d 851*

Injunction requiring 15-year-old boy to stay away from 16-year-old former girlfriend based on letters he wrote to harass girl's mother did not violate boy's *First Amendment* free speech rights, when speech was between purely private parties, about purely private parties, on matters of purely private interest. Trial court did not err in considering as evidence of harassment song lyrics boy quoted in one letter, when by including lyric in letter, boy was not singing or otherwise attempting to entertain, but used lyric to ridicule and annoy mother. *Brekke v. Wills (2005) 125 Cal. App. 4th 1400, 1409-1410, 23 Cal. Rptr. 3d 609*

Rev. & Tax. Code § 19714, allowing State Board of Equalization to impose penalty on taxpayer who institutes or maintains proceedings primarily for delay or if it appears taxpayer's position in proceedings was frivolous or groundless or that taxpayer unreasonably failed to pursue available administrative remedies, does not violate *First Amendment* free speech rights, because it is content-neutral in penalizing conduct outside *First Amendment* protection, not expression of views. *Neufeld v. State Bd. of Equalization (2004) 124 Cal. App. 4th 1471, 1476-1479, 22 Cal. Rptr. 3d 423*

Rent control ordinance prohibiting landlords from making bad faith threats of eviction and providing that tenant's waiver of rights was void unless tenant was represented by independent counsel was unconstitutional content-based regulation of speech understate and federal speech protections. Regulation was not permissible because it addressed false commercial speech, since regulation penalized certain types of speech regardless of whether speech was motivated

by economic considerations, so both commercial and noncommercial speech were regulated. In addition, provision regulated speech that was neither false nor inherently misleading, and it was not narrowly tailored to serve governmental interest. *Baba v. Board of Supervisors (2004) 124 Cal. App. 4th 504, 512-521, 21 Cal. Rptr. 3d 428*

Civ. Code § 47.5, allowing peace officers to bring defamation claims against those filing complaints against them for "misconduct, criminal conduct, or incompetence" with their employers if complaint is knowingly false and made with "spite, hatred, or ill will," does not violate *First Amendment*, because § 47.5 makes actionable only formal complaints against peace officers based on knowingly false statements of fact, which is speech that is constitutionally unprotected, and there is no realistic possibility that § 47.5 results in official suppression of ideas. *Loshonkohl v. Kinder (2003) 109 Cal. App. 4th 510, 514-519, 135 Cal. Rptr. 2d 114*

Actions of California Highway Patrol in directing anti-abortion protesters to desist from standing on sidewalks of freeway overpasses during rush hours and holding signs, visible to motorists below on freeways, communicatingtheir views concerning abortion, in response to reports of freeway congestion caused by those activities did not violate protesters' free speech rights. Highway Patrol's actions were not based on content of message, served significant governmental interest of allowing traffic to flow freely on freeways, and left open ample alternatives for protesters to communicate their message in other forums. *Sanctity of Human Life Network v. Cal. Highway Patrol (2003) 105 Cal. App. 4th 858, 869-872, 129 Cal. Rptr. 2d 708*

Conduct of dumping gallons of garbage on floor of schoolroom during school board meeting was sufficient to support arrest for disturbing public meeting under *Pen. Code § 403* and was not speech protected by *First Amendment*. *McMahon v. Albany Unif. Schl. Dist. (2003) 104 Cal. App. 4th 1275, 1283-1291, 129 Cal. Rptr. 2d 184*

Civ. Code § 47.5, allowing defamation action by peace officer against individual who files complaint against officer if complaint is false, made with knowledge it was false, and made with spite, hatred, or ill will, is unconstitutional content-based regulation, when (1) it restricts defamatory speech against peace officers while leaving intact privilege under *Civ. Code § 47* for defamatory speech against all other public officials so that whether speech is actionable depends solely on its content and statute discriminates based on viewpoint since it makes actionable only defamatory complaint against police officer and defamatory statement by officer or other witness about complainant or anyone else is not actionable; (2) it does not single out especially egregious defamatory speech as basis for civil liability because it does not make actionable only more injurious defamatory speech, such as that accusing officer of committing crime, but includes allegations of ordinary misconduct or incompetence; (3) there was no basis for concluding § 47.5 was justified based on secondary effects associated with kind of speech it regulates; (4) there was no basis for concluding that there is no realistic possibility of official suppression of ideas because § 47.5 makes speech actionable or not depending solely on target of speech; and (5) § 47.5 is supported by governmental interest of deterring false complaints against law enforcement officers which might inhibit them in vigorous performance of their duties, which is important, but not so compelling to justify engaging in content-based speech discrimination, and is not narrowly tailored to promote that interest, since there are ways other than content-based discrimination to insure peace officers' careers are not unduly jeopardized by unfounded citizen complaints, which Legislature has already taken. *Walker v. Kiousis (2001) 93 Cal. App. 4th 1432, 114 Cal. Rptr. 2d 69*

Pub. Util. Code § 453(d), which prohibits inclusion of specified political literature by public utility with any bill for services or commodities furnished to customer or subscriber, violates *First Amendment* protection of speech on its face, when public utilities have right to freedom of speech, and newsletters discussing political matters included by utilities with their bills include discussion of matters of public concern that *First Amendment* both fully protects and implicitly encourages; when § 453(d) is content-related, as utility would be free to include newsletter with billing so long as newsletter does not contain discussion of restricted political issues, so that § 453(d) cannot be upheld as content-neutral time, place, or manner restriction; when § 453(d) is impermissible subject-matter regulation since it attempts to restrict public utilities' discussion of entire topics; and when § 453(d) cannot be justified as narrowly tailored means of serving compelling state interest. *Pacific Gas & Electric Co. v. Public Utilities Commission (2000) 85 Cal. App. 4th 86, 102*

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Peaceful picketing is constitutionally protected as incident of free speech; to justify limitation or restriction of union's right of free speech by limitation or restriction on picketing, employer must demonstrate "compelling public interest." *United Food & Commercial Workers Union v. Superior Court (2000) 83 Cal. App. 4th 566, 574, 99 Cal. Rptr. 2d 849*

Pen. Code § 288.2(b), prohibiting distribution or exhibition of lewd matter to minor by Internet, does not violate *First Amendment* prohibition of restriction of speech, even though it is content-based restriction on speech, since purpose of § 288.2(b) (i.e., to prevent particular of message from reaching minors in order to provoke in them arousal of sexual desire) cannot be served without referring to speech it seeks to restrict (i.e., cannot be justified without reference to content of Internet transmission) where § 288.2(b) serves compelling interest of protecting children from material harmful to them even if not obscene by adult standards; and where § 288.2(b) is not unconstitutionally overbroad or vague. *People v. Hsu (2000) 82 Cal. App. 4th 976, 99 Cal. Rptr. 2d 184*

First Amendment does not protect advertising statements made on book and videotape covers that reiterate verifiably false factual statements contained in books and videotape themselves since this advertising is commercial speech not protected by *First Amendment*, and regulated under California's Unfair Trade Practices Act, *Bus. & Prof. Code §§ 17200 et seq., 17500 et seq. Keimer v. Buena Vista Books, Inc. (1999) 75 Cal. App. 4th 1220, 89 Cal. Rptr. 2d 781*

School district properly refused to post sign proffered by private party containing Ten Commandments at high school baseball field in response to district's fund raising campaign, where, although religious activity typically involves expressive speech and is protected by *First Amendment*, as matter of law, it is subordinate to *establishment clause* concerns. *DiLoreto v. Board of Educ. of Downey Unif. Sch. Dist. (1999) 74 Cal. App. 4th 267, 280, 87 Cal. Rptr. 2d 791*

City's refusal to approve application for permit to operate adult business contravened *First Amendment*, where city required that adult businesses be at least 400 feet from residences and barred adult business from industrial area because of wedge-shaped sliver of undeveloped land that was zoned for any use, and while reasonable location limits to keep adult businesses apart from residential zones are constitutional, principle cannot be twisted into per se rule that any time adult business might be located within given distance of any land zoned residential location limit is always constitutional as applied; where city's retroactive preclusionary zoning of area in which property on which adult business was to be opened was located, after owner first filed application, functioned as discretionary refusal to grant permit, so that by changing rules of game while it was being played, effect was to confer on city arbitrary power to censorspeech; and where city could not advance its "image" as basis for denying permit, since city has no legitimate interest in protecting its "image" qua image as against free speech rights of its citizens. *Gammoh v. City of Anaheim (1999) 73 Cal. App. 4th 186, 191-192, 86 Cal. Rptr. 2d 194*

City ordinance prohibiting total nudity in adult-oriented business by prohibiting owners or other persons with managerial control from permitting any person on premises to engage in live showing of human male or female genitals, pubic area, or buttocks with less than fully opaque covering, and/or female breasts with less than fully opaque covering over any part of nipple or areola and/or covered male genitals in discernibly turgid state is constitutional. *Tily B. v. City of Newport Beach (1998) 69 Cal. App. 4th 1, 15-19, 81 Cal. Rptr. 2d 6*

Popular entertainment is entitled to same constitutional protection as exposition of political ideas; film, whether exhibited in theaters or on television, is protected by constitutional guarantees of free expression, which is not diminished when film makers advertise and sell work as mass public entertainment. Thus, private individual was not entitled to recover under commercial appropriation of name or likeness theory merely because maker of film that was fanciful work of fiction and imagination used name that sounded like individual's name or employed actor who resembled individual as a child. *Polydoros v. Twentieth Century Fox Film Corp. (1997) 67 Cal. App. 4th 318, 323-325, 79 Cal. Rptr. 2d 207*

Speech protected by *First Amendment* includes political speech. *Browne v. Russell (1994) 27 Cal. App. 4th 1116, 33 Cal. Rptr. 2d 29* (circulation of petition for referendum on ordinance)

[3] Time, Place, and Manner Regulations

Municipal ordinance requiring permit to conduct event in public park involving more than 50 individuals is content-neutral time, place, and manner regulation of use of a public forum, when ordinance is not directed to communicative activity, but to all activity in public park, and object of ordinance and permit system is not to exclude communication of particular content, but to coordinate multiple uses of limited space, assure preservation of park facilities, prevent dangerous, unlawful, or impermissible uses, and assure financial accountability for damage caused by event. Further, ordinance does not vest unduly broad discretion in licensing official to grant or deny permit, when park district can only deny permit for reason set forth in ordinance and must explain reasons for denial, providing narrowly drawn, reasonable, and definite standards. *Thomas v. Chicago Park Dist. (2002) 534 U.S. 316, 122 S. Ct. 775, 779-781, 151 L. Ed. 2d 783*

City ordinance prohibiting knowingly or intentionally appearing in public in state of nudity was content-neutral regulation that did not violate *First Amendment*, when city's efforts to protect public health and safety were within city's police powers; ordinance furthered important governmental interests, unrelated to suppression of expression, of regulating conduct through public nudity ban and combating harmful secondary effects associated with nude dancing; and restriction was no greater than essential to furtherance of governmental interest. *City of Erie v. Pap's A. M. (2000) 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265*

State statute making it unlawful for any person within 100 feet of health care facility's entrance to knowingly approach within eight feet of another without person's consent, to pass leaflet or handbill to, display sign to, or engage in oral protest, education, or counseling with that person is permissible time, place, and manner restriction on speech-related conduct, when statute is regulation not of speech but of places where some speech may occur; when statute was not adopted because of disagreement with message speech conveys as it makes no reference to content of speech; when state's interests in protecting access to health care facilities and privacy and providing police with clear guidelines are unrelated to content of speech; and when statute is narrowly tailored to serve significant and legitimate governmental interests, leaving open ample alternative channels for communication. *Hill v. Colorado (2000) 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597*

Federal injunction imposing 36-foot buffer zone against abortion protesters around front of abortion clinic and requiring protesters to remain on the sidewalk across the street was valid time, place, and manner regulation since government's combined interests in protecting privacy and safety of patients, medical staff, and residents, and ensuring access to clinic were sufficient to justify injunction tailored to protect these interests, and injunction burdened no more speech than necessary to protect these interests; limited noise reduction provision was also justifiable; however, injunctive provisions that created buffer zone on side and rear of clinic, that banned "all images" observable within the clinic, that restrained protesters from making uninvited physical approaches to any person within 300 feet of the clinic, and that created wide "buffer zone" around clinic owners' residences were unnecessarily broad restrictions on speech. *Madsen v. Women's Health Center, Inc. (1994) 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593, 610-614*

Regulation of activity involving public solicitation for immediate donation or payment of funds implicates liberty of speech clause of California Constitution [*Cal. Const., art. I, § 2*] and free speech protection of federal Constitution, but should not be considered content based or constitutionally suspect under California or federal Constitutions. *Int'l Soc. for Krishna Consciousness v. Lee (1992) 505 U.S. 672* ; *United States v. Kokinda (1990) 497 U.S. 720, 110 S. Ct. 3115, 111 L. Ed. 2d 571* ; *Heffron v. Int'l Soc. for Krishna Consciousness (1981) 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed. 2d 298* ; *Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal. 4th 352, 93 Cal. Rptr. 2d 1, 993*

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Regulation of time, place, or manner of protected speech must be narrowly tailored to serve government's legitimate content-neutral interests, but is not required to be least-restrictive or least-intrusive means of doing so; requirement of narrow tailoring is satisfied so long as regulation promotes substantial government interest that would be achieved less effectively absent regulation. *Ward v. Rock Against Racism (1989) 491 U.S. 781, 798-799, 109 S. Ct. 2746, 105 L. Ed. 2d 661* ; *City of San Jose v. Superior Court (1995) 32 Cal. App. 4th 330, 340-341, 38 Cal. Rptr. 2d 205*

Municipalities may impose reasonable restrictions on time, place, or manner of protected speech, provided restrictions are content-neutral, are narrowly tailored to serve significant government interest, and leave open ample alternative channels for communication of information; in determining whether ordinance is content-neutral, principal inquiry is whether government has adopted regulation of speech because of disagreement with message it conveys. *Ward v. Rock Against Racism (1989) 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661* ; *Colacurcio v. City of Kent (9th Cir. 1998) 163 F.3d 545, 551*

Rule requiring street performers at public park and entertainment complex to obtain permits before performing and to wear badge displaying permit while performing was not valid time, place, and manner regulation, where permitting requirements had impermissibly broad scope, did not meaningfully promote city's asserted interests, and addressed interests that could have been achieved through means far less intrusive than individual speaker registration requirement. There was genuine issue of material fact as to whether city met its burden of justifying rule setting out specified locations for street performances and establishing first-come, first-served rule for using locations, where city's evidence that, before introduction of location restriction, it received weekly complaints from park tenants about street performers blocking entranceways and egresses and that street performers regularly engaged in disruptive and volatile territorial disputes met its burden of establishing that significant problem existed, and there was conflicting evidence concerning whether dedicated locations provided street performers with adequate access to intended audience. Rule allowing only passive solicitation of funds by street performers was content-based regulation that did not satisfy exacting standard for valid content-based regulation. Rule prohibiting any communication, by street performers or anyone else, within 30 feet of visitors to complex who were waiting in line, attending event, or sitting in spot available for eating or drinking was unconstitutional "captive audience" regulation, where even if city could have justified a prohibition on unwelcome speech, regulation was too broad because it prohibited all "speech activities," not just those that continued after recipient signaled preference to be left alone, and even if city's purported interest in protecting certain park-goers from communications by others were substantial, rule was not narrowly tailored to meet that interest. *Berger v. City of Seattle (9th Cir. 2009) 569 F.3d 1029, 1035-1057*

Provision of town's sign ordinance prohibiting all signs without permit, subject to 19 enumerated exemptions ranging from directional signs to ideological and political signs, did not violate *First Amendment* rights of church by regulating its deployment of temporary directional signs, where portion of ordinance regulated physical characteristics, such as size, number, and construction of signs, location of placement, and timing of display, none of which implicated content of speech, where portion of ordinance defining "qualifying event signs" to which it applied as any assembly, gathering, activity, or meeting sponsored, arranged or promoted by religious, charitable, community service, educational or other similar non-profit organization" did not mention any idea or viewpoint or single one out for differential treatment; where ordinance was narrowly tailored, as it did not sweep in more speech than necessary to achieve town's aesthetic and traffic control objectives, and church had ample alternative channels of communicating its invitation to church services; and where ordinance did not favor commercial speech over non-commercial speech. However, although ideological signs, political signs, and qualifying event signs were all exempted from permit requirement and treated favorably in that respect, each category faced different restrictions and requirements, and district court did not address whether church was likely to succeed on merits of its claim that ordinance impermissibly discriminated among certain forms of noncommercial speech, requiring remand. *Reed v. Town of Gilbert (9th Cir. 2009) 587 F.3d 966, 973-981*

City ordinance prohibiting leafleting of unoccupied vehicles parked on city streets violated *First Amendment* as not

narrowly tailored to serve significant government interests, where, assuming prevention of litter could constitute sufficiently significant government interest to justify interference with free speech, city failed to provide any evidence that placing leaflets on parked cars resulted in any litter, much less more-than-minimal amount of additional litter; and where protection of private property was not sufficiently substantial government interest to justify across-the-board ban on placing leaflets on windshields of empty vehicles parked on public streets. Under California law, vehicle-leafleting ban could not be justified by interest in protecting private property rights of recipients of leaflets. *Klein v. City of San Clemente (9th Cir. 2009) 584 F.3d 1196, 1201-1207*

Open-ended standard in city's parade ordinance, combined with absence of requirement that officials articulate their reasons or administrative-judicial review process, vested chief of police with sweeping authority to determine whether parade could utilize forum of streets to broadcast its message, and unduly broad discretion was prohibited by *First Amendment* as placing unfettered discretion in hands of licensing officials and rendered parade ordinance constitutionally defective on its face. *Seattle Affiliate of the October 22nd Coalition to Stop Police Brutality, Repression and the Criminalization of a Generation v. City of Seattle (9th Cir. 2008) 550 F.3d 788, 798-803*

To extent protestors' blockade in protest of high speed ferry constituted symbolic speech, Coast Guard's rule establishing security zone around harbor to allow ferry to dock was reasonable time, place, and manner restriction. *Wong v. Bush (9th Cir. 2008) 542 F.3d 732, 736*

Application of *Cal. Pen. Code § 626.8*, prohibiting disruptive entry onto school grounds, was not a reasonable time, place, or manner regulation of plaintiff's activities in driving around middle school in truck displaying large, graphic photographs of first-term aborted fetuses on sides of truck, where, although language of § 626.8 did not indicate intent to suppress speech of certain content, lack of purpose did not render application of statute to plaintiffs' speech content-neutral, and disruptions caused by plaintiffs' conduct were all result of students' reactions to plaintiffs' message, and where there is no precedent for "minors" exception to prohibition on banning speech because of listeners' reaction to its content. *Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dept. (9th Cir. 2008) 533 F.3d 780, 786-793*

Comprehensive zoning ordinance governing operation of adult entertainment businesses within county's jurisdiction, restricting hours in which businesses could operate, requiring removal of doors on peep show booths, and limiting adult entertainment establishment to areas of county zoned for industrial use, stated rationale of which was to combat negative secondary effects including crime, disorderly conduct, blight, noise, traffic, property value depreciation, and unsanitary behavior concentrating in and around adult businesses did not violate either *First Amendment* or California Constitution, where hours-of-operation restriction survived intermediate scrutiny under California Constitution, and where county's requirement of open booths at peep shows did not violate *First Amendment* as it was supported by evidence of nexus between closed booths and adverse secondary effects such as prostitution and pandering, which county had substantial interest in regulating; ordinance was narrowly tailored because content, number, and availability of peep shows were untouched as ordinance dealt only with doors. *Fantasyland Video, Inc. v. County of San Diego (9th Cir. 2007) 505 F.3d 996, 1001-1005*

County ordinance prohibiting residential picketing activity targeted at and within 300 feet of residential dwelling in unincorporated areas of county was valid time, place, and manner regulation, when ordinance was content neutral on its face and narrowly tailored to serve significant governmental interest of protecting residential tranquillity. In addition, despite problematic aspects, court could not say ordinance was unconstitutional in every application, primarily because ordinance did not have unconstitutional effect in test case leading to instant suit. Ordinance left open adequate alternatives to communicate to targeted resident and resident's neighbors by leaving open opportunity for general dissemination of picketer's message, including picketing in other neighborhoods, direct mail and telephone contact with those in neighborhood, and picketing more than 300 feet from targeted residence. *Klein v. San Diego County (9th Cir. 2006) 463 F.3d 1029, 1033-1037*

City ordinance establishing permitting process for community events held in public spaces was permissible time, place, and manner regulation, when ordinance had to be viewed as content-neutral time, place, and manner permitting scheme, not as scheme imposing subject matter censorship through prior restraint since no grounds for denying permit had anything to do with what speaker might say, ordinance was not directed to communicative activity as such, but rather to all activity conducted in public places, and object of permitting scheme was to coordinate multiple uses of limited space, assure preservation of facilities, prevent dangerous or unlawful uses or impermissible uses under rules, and assure financial accountability for damage caused by event rather than exclude expression based on particular content; and when challenged provisions of ordinance were narrowly tailored and left open ample alternatives for communication. *Santa Monica Foods Not Bombs v. City of Santa Monica (9th Cir. 2006) 450 F.3d 1022, 1035-1049*

Ordinance prohibiting aerial advertising was reasonable and viewpoint neutral restriction on speech in nonpublic forum given importance of preserving area's coastal and scenic visual beauty; banner towing prohibited by ordinance, although form of speech protected under *First Amendment*, was neither historically important form of communication nor speech with unique identifying attributes for which there was no practical substitute. *Center for Bio-Ethical Reform, Inc. v. City & County of Honolulu (9th Cir. 2006) 448 F.3d 1101, 1108-1114*

City's ordinance and policy of allowing private permittees of public property for events open to public to exclude speakers from events of whose speech permittees did not approve was not valid time, place, or manner regulation of public property allowing exclusion of speakers whose speech was form of expression protected by *First Amendment*, including preaching. Being required to allow expression by one of whose message permittee disapproved did not make speaker part of organizer's message for *First Amendment* purposes. Further, policy of allowing permittees unfettered discretion to exclude private citizens on any or no basis was not narrowly tailored to city's legitimate interest in protecting permittees' right not to be forced to include message of which permittees disapproved. *Gathright v. City of Portland (9th Cir. 2006) 439 F.3d 573, 576-579*

Ordinance restricting pole signs as carriers of communication within city's general commercial zones did not violate owners' *First Amendment* rights by impermissibly banning protected medium of expression. Pole sign restriction was not content based, government had significant interests in regulating pole signs, including preservation of city's aesthetic quality and protection of travel safety, ordinance permissibly and in narrowly tailored way limited prominence of plaintiffs' advertising sign by restricting its length and position, and although ordinance restricted availability of pole signs in city, and code said nothing about other non-sign-based forms of communication such as handbills, radio, television, newspaper or telemarketing. Further, even with regard to signage, code authorized wall signs, monument signs, awning and canopy signs, blade signs and overhanging signs, allowing plaintiffs reasonable opportunity to communicate their message. Additionally, sign code as whole was not facially unconstitutional and was reasonable time, place, and manner restriction. *G.K. Ltd. Travel v. City of Lake Oswego (9th Cir. 2006) 436 F.3d 1064, 1071-1081*

Emergency order prohibiting access to portions of downtown Seattle, Washington, during 1999 World Trade Organization conference was constitutional time, place, and mannerrestriction on speech on its face, when order was content-neutral and motivating factor in adopting order was city's observation that level of civil disturbances and danger to persons and property had been highest in areas in which there were protests in vicinity of meetings and need to ensure safety of delegates as well as downtown residents and workers; when order was narrowly tailored to serve significant governmental interest; and when order left protestors ample channels of communication. Further, order did not improperly give unfettered discretion to officers charged with enforcing it. However, statements of assistant police chief and others created genuine issue of material fact as to whether it was city policy to apply order in manner excluding only anti-WTO protestors, requiring reversal of district court's grant of summary judgment to city on constitutionality of order as applied. *Menotti v. City of Seattle (9th Cir. 2005) 409 F.3d 1113, 1128-1148*

City ordinance requiring adult cabaret dancers to remain two feet away from patrons during performances did not violate plaintiffs' *First Amendment* rights, when ordinance was not complete ban on expression. Intermediate scrutiny

applied because ordinance was regulation of sexual or pornographic speech and reducing secondary effects of adult establishments was ordinance's primary purpose. Ordinance passed intermediate scrutiny, because reducing negative secondary effects of adult businesses was substantial governmental interest, two-foot rule was narrowly tailored to address problem of secondary effects from adult entertainment, and ordinance left alternate channels of communication open by allowing dancers to perform at two-foot distance. *Gammoh v. City of La Habra (9th Cir. 2005) 395 F.3d 1114, 1121-1128*

Forest Service regulations that make it illegal to use or occupy National Forest System land or facilities without special-use authorization for non-commercial group uses, which is activity conducted on National Forest System lands involving group of 75 or more people, is constitutional time, place, and manner restriction for public forum, because scheme is content-neutral, narrowly tailored to serve significant government interest, and leaves open ample alternatives for communication. *United States v. Adams (9th Cir. 2004) 388 F.3d 708, 710-711* ; *Black v. Arthur (9th Cir. 2000) 201 F.3d 1120, 1123* ; *United States v. Linick (9th Cir. 1999) 195 F.3d 538, 540*

Agricultural association's *First Amendment* expression policy prohibiting individuals from demonstrating except in designated "free expression zones," none of which was near entrance to building, was not permissible time, place, and manner regulation, when association provided no evidence that protest activity was threat to financial success of its facility or in any other regard more than mere annoyance to patrons, when association failed to meet burden of proving that demonstrators handing out leaflets and carrying signs on parking lots and walkways outside facility would implicate significant governmental interest in preventing traffic congestion and ensuring safety of pedestrians and drivers alike by causing congestion and danger to safety, and when policy restricted substantially more speech than necessary to address congestion and traffic problems. *Kuba v. 1-A Agricultural Ass'n (9th Cir. 2004) 387 F.3d 850, 856-863*

Dispersing prayer service on public land to protest destruction of former military housing rather than its conversion to housing for homeless to " *First Amendment*" zone was not narrowly tailored to serve important governmental interests of ensuring that service was conducted so as not to impede access to visitor center or use of roadways running through land, when location was essential part of message sought to be conveyed, so that requirement that protesters use *First Amendment* area burdened speech to substantially greater degree than needed to achieve government's purposes, and protestors, had they asked, would have been allowed to use much closer parking lot just across street, directly in front of visitor center, which would have distorted witnessing considerably less, as connection between visitor center and protest activity would have been maintained. *Galvin v. Hay (9th Cir. 2004) 374 F.3d 739, 753-755*

State's Mass Gathering Act, which regulates gatherings of large numbers of people overnight in open spaces, bore sufficiently close nexus to conduct commonly associated with expression that it was subject to facial *First Amendment* challenge, but was not unconstitutional time, place, and manner regulation, when although Act lacked deadline for local governing body to act on permit applications or for prompt judicial review of permit application denials, because it was content-neutral, Act did not need procedural safeguards required of content-based regulations, because overnight mass gatherings state sought to regulate raised special health and safety issues because of their size and duration and state had eminently valid interest in ensuring health and safety of its residents and visitors at large, lengthy events, so that local governing bodies needed time to evaluate applications and conduct inspections, making strict deadline for permit action impracticable; and when discretion conferred on governing body to set permit application fees reasonably calculated to reimburse county for reasonable and necessary costs in receiving, processing, and reviewing applications for permits to hold outdoor mass gatherings was not unconstitutional because there no was actual evidence of pattern of abuse, statutory limits objectively constrained governing body's discretion and allowed effective judicial review, and statutory standard did not allow governing body to gauge reaction applicant's message would generate and set fee according to projected costs of policing hostile listeners. *South Oregon Barter Fair v. Jackson County (9th Cir. 2004) 372 F.3d 1128, 1136-1141*

City's ordinances regulating location of adult-oriented retail businesses were constitutional, when city's purpose in

enacting ordinances as "place" restriction was to regulate harmful secondary effects associated with sexually oriented businesses so that ordinances were subject to intermediate scrutiny, when ordinances were narrowly tailored to serve city's substantial interest in reducing undesirable secondary effects of adult stores because ordinances left open sufficient relocation sites and thus were likely to reduce secondary effects by moving stores from sensitive areas without substantially reducing speech by forcing stores to close, when city satisfied initial burden of producing evidence that fairly supported ordinances but store owner failed to provide sufficient contrary evidence to shift burden back to city by failing to cast direct doubt on rationale behind ordinances, either by showing that city's evidence did not support it or by supplying its own contrary actual and convincing evidence, and when ordinances were narrowly tailored because through testimonial evidence, city showed that retail-only stores generated secondary effects and therefore its interests in enacting ordinances would be achieved less effectively absent regulation. *World Wide Video of Wash., Inc. v. City of Spokane (9th Cir. 2004) 368 F.3d 1186, 1191-1198*

Although Park Service police officers' decision to relegate protesters' prayer service to designated " *First Amendment* area" rather than allowing them to remain at site they chose because of its significance was content-neutral, dispersal of prayer service because of protesters' refusal to retreat to designated *First Amendment* area was not narrowly tailored enough to serve significant governmental interest. Because location restriction on prayer service was unconstitutional, court would not reach more difficult application of ample alternative channels for communication of message prong of time, place, and manner test. *Galvin v. Hay (9th Cir. 2004) 361 F.3d 1134, 1146-1150*

State's highway billboard regulation prohibiting outdoor advertising signs except those existing as of June 12, 1975, exempting on-premises signs attracting attention to activities conducted on premises, temporary signs on private property and signs of a governmental unit, and allowing applications for variances from prohibition, was content-neutral, time, place, and manner restriction that did not violate *First Amendment* rights of person wishing to display political sign on his residence, whenstatutes specifically prohibit consideration of content in deciding whether to allow variance and although commercial billboards could prevail under legislative scheme, neutrality was maintained because regulation allowed noncommercial messages on either onsite or offsite signs. *Lombardo v. Warner (9th Cir. 2003) 353 F.3d 774, 776-779*

Neither of two different versions of county ordinance regulating erection and maintenance of signs and billboards within county limits violated *First Amendment* by imposing impermissible restrictions on speech, favoring commercial over noncommercial speech, and conferring unbridled discretion on county officials to grant or deny sign permits. Although neither ordinance was model of statutory clarity, content-neutral zoning, size, and height provisions in both ordinances were constitutional, severable, and independently enforceable regardless of other constitutional issues in either ordinance. "Grandfather" provision in more recent version of ordinance was not specifically targeted at billboard companies' billboards or constitute attempt by county to single them out for retribution. *Valley Outdoor, Inc. v. County of Riverside (9th Cir. 2003) 337 F.3d 1111, 1114-1115*

Even though city ordinance prohibiting carrying or possession of rectangular wooden pieces more than 1/4 inch thick and 2 inches wide, or non-rectangular pieces thicker than 3/4 inch arguably constrained "communicative conduct" of demonstrators, it was not facially unconstitutional as applied to protestor arrested at entrance to circus for having bull hook that exceeded allowable dimensions, where city has constitutional authority to control use of its public streets for parades or processions by imposing time, place, and manner restrictions and substantial interest in safeguarding its citizens and police against violence, which is not related to free expression; and where ordinance imposed no greater burden than necessary to protect safety of circus-goers, police, and demonstrators. Although non-wooden replicas and pictures of bull hook may not have had same impact, potential hazards of wielding it in crowd during demonstrations justified relatively small burden imposed by ordinance. Further, fact that protestor and her husband brought leaflets, pictures, signs, videotapes, and press releases to demonstration showed that other, less hazardous but still effective ways of communicating their message were available. *Vlasak v. Superior Court (9th Cir. 2003) 329 F.3d 683, 690-691*

City ordinance regulating newsracks and setting up system segregating publications into two classes based on whether

or not publisher charges its readers, not on content of publications, was content-neutral on its face, and there was no evidence ordinance had been applied in anything but content-neutral manner; ordinance was narrowly tailored to serve significant government interests to protect health, safety, and welfare of pedestrians and to preserve aesthetics, and was not substantially broader than necessary. *Honolulu Weekly, Inc. v. Harris (9th Cir. 2002) 298 F.3d 1037, 1045-1046*

Imposing conditions that pro-life demonstrators on public college campus not create public disturbance and not interfere with campus activities or access to school buildings were content-neutral regulations that did not violate demonstrators *First Amendment* rights, when regulations did not distinguish among speakers based on content of message and were narrowly tailored to achieve college's pedagogical purpose; however, having permitted demonstrators to conduct demonstration on campus, dean could not, consistent with *First Amendment's* free speech and *free exercise clauses*, limit demonstration to secular content and impose condition that demonstrators refrain from religious worship or instruction. *Orin v. Barclay (9th Cir. 2001) 272 F.3d 1207, 1214-1216*

Ordinance prohibiting carrying of signs attached to wooden or plastic handles during parades and public assemblies, which clearly regulated expressive activity protected by *First Amendment*, is not valid time, place, and manner restriction on protected speech, when, although ordinance is content-neutral since there is no evidence it is designed to favor some viewpoints or ideas at expense of others and it was enacted to combat evil unrelated to speech, ordinance was not narrowly tailored to advance significant governmental interest of safeguarding its citizens against violence and fails to leave open ample alternative means of communication. *Edwards v. City of Coeur D'Alene (9th Cir. 2001) 262 F.3d 856*

Trial court erroneously found zoning ordinance restricting locations in which adult businesses can locate constitutional; ordinance that does not ban adult businesses outright, but limits areas of city in which they may operate is content-neutral time, place, and manner restriction, which is constitutional so long as it is designed to serve substantial governmental interests and allows for alternative avenues of communication; although parties did not dispute that curbing secondary effects of adult businesses is substantial governmental interest, city had burden of proving alternative avenues of communication by showing reasonable opportunity to open and operate within city, and city did make good faith attempt to prove it was providing adult businesses with reasonable opportunity; burden then rested with adult businesses to show that particular sites shown by city to be available would not reasonably become available, and trial court denied businesses' request to submit additional evidence to satisfy their burden. *Lim v. City of Long Beach (9th Cir. 2000) 217 F.3d 1050*

City ordinance requiring nude dancers to perform at least 10 feet from patrons, effectively barring "table dancing," is content-neutral, and 10-foot distance requirement is narrowly tailored and leaves open ample alternative avenues for communication of protected expression; 10-foot distance requirement not shown to bar market entry; whether table dancing is unique form of expression entitled to separate *First Amendment* analysis is not outcome determinative since uniquenessalone is insufficient to trigger special protection. *Colacurcio v. City of Kent (9th Cir. 1998) 163 F.3d 545, 551-557*

Whether or not Los Angeles International Airport is public forum for free expression under California Constitution, ordinance prohibiting solicitation of funds at Los Angeles International Airport is valid as reasonable time, place, and manner restriction of expressive rights to extent it prohibits soliciting immediate receipt of funds. *Intl. Society for Krishna Consciousness of Cal. v. City of Los Angeles (2010) 48 Cal. 4th 446, 454-460*

City ordinance that bans all mobile billboard advertising of any content, at any time, on any street was content-neutral reasonable time, place and manner restriction, where ordinance regulated manner of speech, not its content; declared purpose of ordinance to eliminate mobile billboard advertising within city to promote safe movement of vehicular traffic, reduce air pollution, and improve aesthetic appearance of city was legitimate governmental interest; and ordinance was narrowly tailored to achieving city's legitimate interests even though it exempted buses and taxicabs that also carried billboards, and ban on mobile billboard advertising left plaintiff with numerous alternative channels for

effectively communicating its message, such as the *Internet. Showing Animals Respect and Kindness v. City of West Hollywood (2008) 166 Cal. App. 4th 815, 820-825, 83 Cal. Rptr. 3d 134*

Suspension of police permit to operate nude entertainment establishment as sanction for numerous and on-going violations of regulations was proper time, place, and manner regulation even though nude or semi-nude entertainment is expressive activity falling within ambit of *First Amendment*. Regulation was content neutral on its face and applied to any business required to have police permit. In addition, ordinance authorizing permit suspension was within city's constitutional police power and could further governmental interest of gaining compliance with regulations. Further, governmental interest of obtaining compliance with laws and regulations relating to permitted business was unrelated to suppression of speech because regulation applied to all businesses requiring permit to any violation, not just those related to expressive activity. Lastly, restriction was no greater than necessary to further governmentalinterest. *Krontz v. City of San Diego (2006) 136 Cal. App. 4th 1126, 1136-1139, 39 Cal. Rptr. 3d 535*

State regulation prohibiting touching, caressing, or fondling of the breast, buttocks, anus, or genitals or exposure of breast or buttock unless dancer is on raised stage at least six feet from patrons in business establishments selling alcohol did not violate *First Amendment* rights, when adoption of regulation was supported by ample evidence of deleterious effects inherent in combination of alcoholic beverages and explicitly erotic performances, governmental interest was not related to suppression of any particular expression or expression in general, and any incidental impact on expressive element of dancing was *de minimis*. *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board of California (2002) 99 Cal. App. 4th 880, 890-891, 121 Cal. Rptr. 2d 729*

Restrictions by owner of chain of retail warehouse stores at locations where it shared parking lot with other retail businesses, prohibiting all expressive activity on 34 days on which historically it has experienced high volume of customer traffic, preventing any individual or organization from using its property for expressive activity on more than five days within any 30-day period, not permitting any individual or group to useits facilities on consecutive weekends, restricting expressive activities to designated areas in front of its stores, only allowing three participants to engage in expressive activity at any one time and requiring that they identify themselves, requiring that individuals or groups complete application at least three days in advance of any expressive activity, and prohibiting all expressive activity at its stand-alone facilities, are valid; owner presented evidence that expressive activity at its stores has imposed on it considerable expenses, administrative burdens, and risks which directly impaired commercial purposes of stores, and regulations were narrowly tailored to protect owner's substantial interests in smooth operation of its stores. *Costco Companies, Inc. v. Gallant (2002) 96 Cal. App. 4th 740, 743, 748-753, 117 Cal. Rptr. 2d 344*

Policy of private, stand-alone warehouse-type retail store, allowing signature gatherers and others with free speech interests to stand only in designated areas near its stores in accordance with written guidelines requiring each store to have at least one designated area for noncommercial speech activity and prohibiting noncommercial speech activity outside the designated area to ensure that no person or property is injured in the course of the activity was reasonable time, place, and manner regulation which complied with any duty store had to provide public access and did not violate free speech rights of signature gatherer who was arrested after leaving designated area several times; further, placing designated area a few feet from entrance was not unreasonable when persons with political messages could set up table and/or sign so that anyone interested could step forward for further information. *Lushbaugh v. Home Depot U.S.A., Inc. (2001) 93 Cal. App. 4th 1159, 1166-1170, 113 Cal. Rptr. 2d 700*

Under California Constitution, reasonable time, place, and manner restrictions on protected speech and petitioning may be imposed by private shopping center owner provided they are content-neutral, narrowly tailored, and leave open ample alternative means of communication. *Westside Sane/Freeze v. Ernest W. Hahn, Inc. (1990) 224 Cal. App. 3d 546, 558, 274 Cal. Rptr. 51* ; *Savage v. Trammell Crow Co. (1990) 223 Cal. App. 3d 1562, 1572-1576, 273 Cal. Rptr. 302*

Restriction on leafletting in shopping center parking lot is valid time, place, and manner restriction since it is

content-neutral and narrowly tailored to prevent litter and traffic problems, and leafletters are allowed to use sidewalks as alternative channel of communication. *Savage v. Trammell Crow Co. (1990) 223 Cal. App. 3d 1562, 1573-1576, 273 Cal. Rptr. 302*

[4] Administrative Permits to March or Parade

Federal Park Service employees were entitled to qualified immunity in *Bivens* action based on denial of march permit to protestors without concomitant promise on their part not to engage in civil disobedience and dispersal of prayer service that began as alternative to march, when before opinion of Ninth Circuit in *United States v. Baugh*, involving same parties and same facts, contours of constitutional right violated by defendants' denial of permit were not sufficiently clear that reasonable official would have understood that what he was doing violated that right; and when as to dispersal of prayer service, although location restriction was unconstitutional because dispersal of service due to refusal to retreat to designated *First Amendment* area was not sufficiently narrowly tailored, law at time of events in question was not sufficiently clear that reasonable official would understand that what he was doing violated that right because although defendants were wrong in their assumption that terminating prayer service was narrowly tailored response to threatened governmental interests, their error was not unreasonable given law as clearly established at time. *Galvin v. Hay (9th Cir. 2004) 374 F.3d 739, 745*

United States Park Service's application of permit regulation to group demonstrating on national park property against Park Service's plan to demolish housing instead of providing housing for homeless violated demonstrator's *First Amendment* rights, where national park as public park constituted quintessential public forum, and where Park Service engaged in informal process of negotiating terms for permit and demonstrators expressed desire for permit for their march and initiated prayer service as direct consequence of Park Service's refusal to issue permit for the march. *United States v. Baugh (9th Cir. 1999) 187 F.3d 1037*

Transit Authority requirement for permit to participate in any "organized exercise of rights which deal with political, religious, and social matters" swept too broadly in regulating protected speech. *Rosen v. Port of Portland (9th Cir. 1990) 641 F.2d 1242, 1247-1250*

Government may impose a permit requirement on those wishing to hold a march, parade, or rally; however, permit scheme must be limited to restriction of time, place, manner, and duration of the march or parade and must be narrowly drawn to serve a significant government interest, such as safety and convenience of the public. *Dillon v. Municipal Court (1971) 4 Cal. 3d 860, 869-871, 94 Cal. Rptr. 777, 484 P.2d 945*

[4A] Prior Restraint

Permanent injunction prohibiting picketing, displaying signs, placards, or other written or printed material, and orally uttering statements about famous attorney and about attorney's law firm in any public forum became overly broad prior restraint on speech, lacking plausible justification on death of attorney, since picketing attorney and his law offices while engaging in injunction-forbidden speech could no longer achieve objectives trial court had in mind, *i.e.*, coercing attorney to pay "tribute" for desisting in activity and grounds for injunction were much diminished, if they had not disappeared altogether. *Tory v. Cochran (2005) 544 U.S. 734, 125 S. Ct. 2108, 2111-2112, 161 L. Ed. 2d 1042*

"Adult business" ordinance requiring adult bookstore, novelty store, or video store to have adult business license met *First Amendment's* requirement that licensing scheme assure prompt judicial review of administrative decision denying license, when although *First Amendment* requires assurance of prompt judicial determination of applicant's legal claim, ordinance satisfied any prompt judicial determination requirement because ordinary court procedural rules and practices in state of city enacting ordinance provide reviewing courts with judicial tools sufficient to avoid delay-related *First Amendment* harm, there was no reason to doubt willingness of state's judges to exercise powers wisely so as to avoid

serious threats of delay-induced *First Amendment* harm, ordinance did not seek to censor material and its licensing scheme applied reasonably objective, nondiscretionary criteria unrelated to content of expressive materials that adult business may sell or display and objective criteria were simple enough to apply and their application simple enough to review that their use was unlikely in practice to suppress total presence of any specific item of adult material in community, and nothing in earlier case law required city or state to place judicial review safeguards all in city ordinance setting forth licensing scheme. *City of Littleton v. Z. J. Gifts D-4, L.L.C. (2004) 541 U.S. 774*

With regard to licensing of sexually-oriented businesses, licensing scheme placing unbridled discretion in hands of government official or agency constitutes a prior restraint and may result in censorship; prior restraint that fails to place limits on time within which decision maker must issue license is also impermissible; licensing scheme regulating adult entertainment must contain, at minimum, two procedural safeguards: (1) licensor must make decision whether to issue license within specified and reasonable time period during which status quo is maintained, and (2) there must be possibility of prompt judicial review in event license is erroneously denied. *FW/PBS, Inc. Dallas (1990) 493 U.S. 215, 225-228, 110 S. Ct. 596, 107 L. Ed. 2d 603*

Any system of prior restraint comes with heavy presumption against its constitutional validity. *Southeastern Promotions, Ltd. v. Conrad (1975) 420 U.S. 546, 558, 95 S. Ct. 1239, 43 L. Ed. 2d 448*

City did not engage in unconstitutional prior restraint in rejecting amplified sound permit applications by Christian evangelists based on their noncompliance with conditions for permits issued in past, where city's hearing officer's reference to past violations did not show absolute prohibition based on past violation, but rather that hearing officer sought to balance, within constitutional bounds, competing interests at proposed permit location, and receipt by evangelists received of permits at different city locations reinforced hearing officer's finding that it was proposed location, not content of message, that was unsuitable. *Rosenbaum v. City & County of San Francisco (9th Cir. 2007) 484 F.3d 1142, 1163-1167*

Permitting requirement for signs was not unconstitutional prior restraint. Sign code was content neutral so that procedural requirements of prior restraint doctrine need not have been satisfied. Further, officials did not have unbridled discretion because city could deny permits only when sign did not comport with reasonably specific size and type criteria or was not compatible with surrounding environment. *G.K. Ltd. Travel v. City of Lake Oswego (9th Cir. 2006) 436 F.3d 1064, 1081-1084*

County ordinance requiring adult entertainment business to obtain license before conducting business in county was not unconstitutional prior restraint, when, although requiring businesses to apply for and obtain license before engaging in business was prior restraint, ordinance was not invalid because it placed burden of proof in administrative appeals process on applicant and provided constitutionally sufficient judicial review. However, requirement that managers and dancers obtain work permits before beginning work at adult entertainment businesses was invalid prior restraint, when, although placing burden of proof on managers and dancers in administrative proceedings did not violate their *First Amendment* rights and requiring managers and dancers to exhaust their administrative remedies before seeking judicial review did not constitute prior restraint, public disclosure requirements with regard to work permit applications resulting from interplay of county ordinance and state law violated *First Amendment* because *First Amendment* would not permit county to put employees of adult entertainment establishments to choice of whether to apply for permit to engage in protected expression in circumstances in which they exposed themselves to unwelcome harassment from aggressive suitors and overzealous opponents of such activity. *Dream Palace v. County of Maricopa (9th Cir. 2004) 384 F.3d 990, 1001-1012*

Trial court properly enjoined publication of book purporting to teach reader how to "legally" stop paying federal income taxes as making fraudulent claims, when book was integral part of program to market various products for taxpayers to utilize forms and techniques to avoid paying income tax, and expressive and political portions of book were not inextricably entwined with its commercial elements. *United States v. Schiff (9th Cir. 2004) 379 F.3d 621,*

626-630

In action under under federal Freedom of Access to Clinics Entrances Act (FACE) [*18 U.S.C. § 248*], which gives aggrieved persons right of action against whoever by "threat of force" intentionally intimidates person because person is or has been providing reproductive health services, injunction prohibiting dissemination of "wanted"-type posters about plaintiffs, who were doctors in reproductive health services community identified on posters, and dissemination of information about plaintiffs on part of "Nuremberg Files" website when lines were drawn through names of doctors who provided abortion services and who had been killed or wounded, was not improper prior restraint on speech, when terms of injunction were finely tuned and exceedingly narrow, so that only threats or use of posters or their equivalent with specific intent to threaten plaintiffs were prohibited, and only personal information about plaintiffs could not be used in Nuremberg Files with specific intent to threaten them, which left huge room for defendant to express its views. *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists (9th Cir. 2002) 290 F.3d 1058, 1077-1088*

Refusal of United States Park Service to authorize any expressive activity in Presidio in San Francisco absent demonstrators' promise to keep out of certain areasconstitutes prior restraint preventing expressive activity from occurring, where promise sought by Park Service that no trespassing would occur before Park Service would issue permit was illusory and meaningless at best. *United States v. Baugh (9th Cir. 1999) 187 F.3d 1037, 1042*

City's statutory scheme for suspension and revocation of licenses for adult-oriented businesses is unconstitutional prior restraint, where, although city's ordinance fails to impose specified and reasonable time limits for decision on suspension/revocation, it provides for automatic stay on enforcement of suspension/revocation so that status quo is maintained, but where neither city's ordinance nor California's statutory scheme provide express time limits or guarantee prompt hearing or decision for judicial review and do not guarantee stay of enforcement pending judicial review. *4805 Convoy, Inc. v. City of San Diego (9th Cir. 1999) 183 F.3d 1108, 1113-1116*

Injunction issued following trial that determined defendant defamed plaintiff, which did no more than prohibit defendant from repeating defamation, was not prior restraint and did not offend *First Amendment*. *Balboa Island Village Inn v. Lemen (2007) 40 Cal. 4th 1141, 1148-1160, 57 Cal. Rptr. 3d 320, 156 P.3d 339*

Remedial injunction prohibiting continued use of racial epithets in the workplace does not violate right to freedom of speech if there has been judicial determination that use of epithets will contribute to continuation of hostile or abusive work environment and therefore will constitute employment discrimination. *Aguilar v. Avis Rent A Car System (1999) 21 Cal. 4th 121, 87 Cal. Rptr. 2d 132, 980 P.2d 846*

Order enjoining newspaper from reporting on trial testimony in wage-and-hour class action brought by persons who deliver copies of paper to homes and businesses each morning, in which newspaper was defendant, contained within broader order barring all nonexpert witnesses from courtroom except during their own testimony, forbidding witnesses from discussing their testimony with other witnesses, and forbidding parties and witnesses from disclosing to nonexpert witness testimony of another witness in order to prevent witnesses from being influenced by testimony of others, was unconstitutional prior restraint violating press freedoms of state and federal constitutions, where order was presumptively invalid because risk that witnesses in civil trial might be influenced by reading news reports of testimony of other witnesses could not possibly justify censorship imposed, and where less restrictive alternatives were available to protect plaintiffs' fair trial rights without infringing on newspaper's *First Amendment* rights, including trial court's admonishment of witnesses not to read press accounts of trial. *Freedom Communications, Inc. v. Superior Court (2008) 167 Cal. App. 4th 150, 153-154, 83 Cal. Rptr. 3d 861*

Trial court's preliminary injunction prohibiting ex-wife from publishing any "false and defamatory" statements about ex-husband on Internet was constitutionally invalid prior restraint, where there had been no trial and no determination on merits that any statement made by her was defamatory. Court of Appeal could not determine whether trial court

properly applied balancing test in prohibiting ex-wife from publishing"confidential personal information" about ex-husband on Internet, where order was ambiguous as to meaning of "confidential personal information" and, without definition, injunction was not sufficiently clear to determine whether ex-husband's privacy rights to information substantially outweighed ex-wife's free speech rights; and where reference to "confidential personal information" did not provide ex-wife with reasonable basis to understand what she was prohibited from placing on Internet. To extent ex-husband, who was law enforcement officer, sought injunction preventing ex-wife from placing his telephone number, address, and Social Security number on Internet, supported by evidence, trial court would be justified in immediately ordering that information be kept private because restriction would not involve information with any public value and would serve significant public interest of protecting safety of law enforcement officer; however, information about divorce proceedings, including information in family court file, would not be protected unless it would harm best interests of children if publicly disclosed, was information obtained through discovery, or information that would compromise person's financial security or personal safety, and order enjoining disclosure was narrowly tailored to protect only specific interests and did not unnecessarily interfere with person's free speech rights. *Evans v. Evans (2008) 162 Cal. App. 4th 1157, 1167-1171, 76 Cal. Rptr. 3d 859*

Suspension of police permit to operate nude entertainment establishment as sanction for numerous and on-going violations of regulations was not improper prior restraint even though nude or semi-nude entertainment is expressive activity falling within ambit of *First Amendment*. Nude dancing in establishment in which owner allowed violations of valid regulations did not confer *First Amendment* coverage to defeat regulation, which was aimed at penalizing and terminating illegal conduct, not expressive activity, on premises. *Krontz v. City of San Diego (2006) 136 Cal. App. 4th 1126, 1132-1136, 39 Cal. Rptr. 3d 535*

Admonition to grand jury witness after testifying not to reveal to any person, except as directed by court, what questions were asked and what responses were given or any other matters concerning nature or subject of grand jury's investigation which witness learned during appearance before grand jury until transcript of proceeding was made public and that violation of admonition was punishable as contempt of court was not unjustifiable prior restraint on newspaper's speech in violation of *First Amendment*. Admonition did not prevent newspaper from publishing anything and restraint on source of news was not required to survive strict scrutiny of prior restraint analysis when media, and not source, was challenger. Further, information impeded was not type generally available to public. *San Jose Mercury News, Inc. v. Criminal Grand Jury (2004) 122 Cal. App. 4th 410, 415-418, 18 Cal. Rptr. 3d 645*

Trial court's order in response to possible disclosure of confidential information, restraining plaintiffs' counsel from discussing lawsuit or related lawsuits with third parties who were current or former investors in any partnership in which defendants were general partners without first applying for and receiving court's permission, requiring any such application for court's permission to be served on defendants' counsel, restraining plaintiffs' counsel from accepting representation of any new plaintiffs in any lawsuits against any defendants, any corporate general partners of partnerships in which defendants held partnership interests, or any partnerships themselves, and plaintiffs to immediately notify defendants and court if any investors contacted them or their counsel, and requiring presence of court-appointed discovery referee when plaintiffs' counsel spoke with investors who had contacted counsel and parties had to agree on areas of questioning court would then approve during subsequent hearing, violated plaintiffs' and plaintiffs' counsel's freedom of speech as prior restraint. Restrained speech did not implicate protected competing interest, which during trial was constitutional right to fair trial and interest at issue was trial court's ability to govern discovery process and sanction violations of discovery orders and party's right to be free from abusive discovery designed to disrupt and interfere with relationships with investors, which were not constitutionally protected competing interests analogous to right to fair trial. Further, gag order was not appropriate method to protect confidential information from disclosure, no matter how damaging or private that information and was not appropriate sanction after confidential information had already been disclosed. Lastly, other forms of sanctions could address abuses of discovery process and violations of court orders, such as monetary sanctions or limiting depositions of third-party investors to topics relevant to case. *Maggi v. Superior Court (2004) 119 Cal. App. 4th 1218, 1224-1226, 15 Cal. Rptr. 3d 161*

Trial court order prohibiting news media from publishing images of defendant in pending criminal proceedings, which were not tilized, i.e., did not obscure facial features on individual depicted, regardless of source from which media obtained images, was unconstitutional prior restraint, when, although defendant's due process right to fair trial is substantial or overriding interest competing with media's free speech rights and order was narrowly tailored, and order was entered to preserve integrity of witnesses' in-court testimony concerning identity of perpetrators, which was at issue, record did not support substantial probability that, absent prior restraint, witnesses' in-court identifications of defendants would be based on photographs in newspapers rather than their observations of perpetrators at crime scene, since record was devoid of evidence that publishing photographs created substantial probability that victims' identifications of perpetrators were either tentative or in danger of being altered by published photographs, and when there were less restrictive means of achieving competing interest, i.e., by in limine motion or trial objection to exclude testimony and require court to take evidence out of jury's presence to determine whether proposed in-court identification was admissible as witness' independent recollection or inadmissible as tainted by unduly suggestive pretrial events. *South Coast Newspapers, Inc. v. Superior Court (2000) 85 Cal. App. 4th 866, 102 Cal. Rptr. 2d 487*

Trial court order barring disclosure of information relating to patients of cosmetic surgeons involved in litigation against each other, whether obtained through discovery or otherwise, was unconstitutional prior restraint on speech, despite competing interests of protecting information protected by physician-patient privilege, possible prejudice of potential jurors and protecting patients' right of privacy, when mere possibility of prejudicing potential jurors, without finding of actual risk of prejudice, was not enough to support prior restraint; when, although physician-patient privilege protects patient from forced disclosure of protected information in course of litigation, it may not be extended to cover dissemination of information already made known outside litigation; and when sparing citizens from embarrassment, shame, or even intrusions into their privacy has never been held to outweigh constitutional guarantees of free speech. *Hurvitz v. Hoefflin (2000) 84 Cal. App. 4th 1232, 101 Cal. Rptr. 2d 558*

City's licensing scheme for restaurants as applied to adult business seeking to serve food as well as provide adult entertainment was unconstitutional prior restraint, where, by defining restaurant as any place serving food or beverages yet applying additional primary use test to adult business, licensing scheme gave city impermissible unbridled discretion so that city was free to add that gloss or not, depending on applicant, and thus discourage disfavored expression in form of nude dancing; however, city's licensing scheme for businesses offering live entertainment is not unconstitutional prior restraint, where there is nothing impermissible in authorizing city manager to conduct investigations to determine if proposed business complies with municipal requirements, and scheme satisfies requirement that license for *First Amendment*-protected business must be issued within reasonable period of time. *Tily B., Inc. v. City of Newport Beach (1998) 69 Cal. App. 4th 1, 13-15, 81 Cal. Rptr. 2d 6*

City's ordinance scheme for revocation or nonrenewal for entertainment and adult business permits is not unconstitutional prior restraint, where scheme does not give city manager unbridled discretion to revoke or refuse to renew permit. *Tily B., Inc. v. City of Newport Beach (1998) 69 Cal. App. 4th 1, 25, 81 Cal. Rptr. 2d 6*

[5] Incidental Limitations on Expression

City could reasonably rely on 1977 study it conducted before enacting ordinance prohibiting establishment or maintenance of more than one adult entertainment business in same building, when study revealed that areas with high concentrations of adult establishments are associated with high crime rates so that it is reasonable for city to suppose that concentration of adult establishments is correlated with high crime rates because concentration of operations in one locale draws greater concentration of adult consumers to neighborhood, and high density of adult consumers either attracts or generates criminal activity. *City of Los Angeles v. Alameda Books, Inc. (2002) 535 U.S. 425, 122 S. Ct. 1728, 1735, 152 L. Ed. 2d 670*

First Amendment analysis of state public records statute as applied to public release of documents showing names and

contact information of individuals who signed petitions in support of ballot referendum required intermediate scrutiny, not strict scrutiny, where signing referendum petition had speech element such that petition signing qualified as expressive conduct, and public access provision of public records access statute had incidental effect on referendum petition signers' speech by deterring some would-be signers from signing petitions. Statute as applied to referendum decisions did not violate *First Amendment*, where state interests in preserving integrity of election by promoting government transparency and accountability and in providing voters with information about who supported placing referendum on ballot were sufficiently important to justify incidental limitations on referendum petition signers' *First Amendment* freedoms, incidental effect on speech was no greater than necessary, and there was no claim that state's interests were at all related to the suppression or regulation of expression. *Doe v. Reed (9th Cir. 2009) 586 F.3d 671, 676-680*

Order for sale of federal inmate's personal writings under federal restitution lien statute [*18 U.S.C. § 3613*] did not violate inmate's *First Amendment* rights as generally applicable law with incidental effect on *First Amendment* issues, where inmate's right to communicate information contained in papers would not be impaired because inmate could still communicate any ideas contained in documents without originals because originals were simply worth more; where government's ability to redact from originals names of victims and their families, names of other intended victims, and recognizable descriptions of victims and their injuries at request of named victims did not hinder his right of expression and result in suppression of information that could have been of value to public, because any diminution in originals' value was justified because of importance of excising information to protect privacy interests of victims and intended victims; and because district court would review materials *in camera* and approve redactions to ensure they corresponded to and did not exceed approved descriptions. *United States v. Kaczynski (9th Cir. 2009) 551 F.3d 1120, 1126-1128*

State statute requiring all sexually oriented businesses to close between 1:00 a.m. and 8:00 a.m. on Monday through Saturday and between 1:00 a.m. and 12:00 noon on Sunday did not violate *First Amendment*, when, under *Renton* three-part test for evaluating constitutionality of sexually oriented business regulations, statute did not amount to complete ban on protected expressive activity, but was classic time, place, or manner restriction; when, although statute is content based on its face because whether establishment falls within its parameters and is subject to sanction for violating prohibition against operating during nighttime hours can only be determined by reference to content of expression inside establishment, United States Supreme Court has clearly carved out sexual and pornographic speech as type of speech than can be subject to reasonable restriction and examination of record as a whole indicated that in enacting hours of operation restriction, state Legislature was concerned with curbing negative secondary effects associated with such businesses so that intermediate scrutiny applies; and when state's specific interest in reducing secondary effects associated with late-night operations of sexually oriented businesses, including noise, traffic, unlawful public sexual activity, prostitution, and drug trafficking, is substantial, Legislature relied on evidence reasonably believed to be relevant in demonstrating connection between its stated rationale and protected speech, it appeared self-evident that state's asserted interest, *i.e.*, amelioration of secondary effects associated with late-night operation of sexually oriented businesses would be achieved less effectively in statute's absence, and statute left open ample alternative channels for communication. *Center for Fair Public Policy v. Maricopa County (9th Cir. 2003) 336 F.3d 1153, 1159-1170*

Fam. Code § 7640, allowing court in actions under Uniform Parentage Act to order party to pay reasonable fees of counsel, experts, and child's guardian ad litem, and other costs of action and pretrial proceedings, including blood tests, does not unconstitutionally burden speech, because orders to pay opposing party's attorney's fees do not constitute interference with free speech or compelled subsidization of opponent's speech and purpose of fee award is to ensure that child's best interests are represented. Assuming § 7640 imposes significant encroachment on fundamental constitutional rights, such infringement is permissible because law is narrowly tailored and justified by compelling state interest, which is interest in promoting the best interests of children involved in custody proceedings, and requirement that father pay attorney's fees, even when he prevails on legal issue, is necessary to ensure that welfare of child he fathered is protected by presentation of all evidence bearing on various issues arising in custody dispute, and employment of

attorney is essential to allow lay persons, such as mother, to present evidence bearing on child's best interests. *Banning v. Newdow (2004) 119 Cal. App. 4th 438, 448-450, 14 Cal. Rptr. 3d 447*

City regulation imposing a night curfew was justified, despite incidental limit on speech, since the compelling interest in controlling widespread rioting and preventing imminent destruction of life and property was promoted and the restriction was limited to certain hours of the night. *In re Juan C. (1994) 28 Cal. App. 4th 1093, 1100, 33 Cal. Rptr. 2d 919*

[6] Public Versus Nonpublic Forums

Children's Internet Protection Act, under which public library may not receive federal assistance to provide Internet access unless it installs software to block images that constitute obscenity or child pornography and to prevent minors from obtaining access to material that is harmful to them, is not facially invalid for inducing public libraries to violate patrons' *First Amendment* rights. Forum analysis and heightened judicial scrutiny are incompatible with the discretion that public libraries must have to fulfill their traditional missions. A library provides Internet access, not to encourage a diversity of views from private speakers, but to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality. *United States v. American Library Ass'n (2003) 539 U.S. 194, 123 S. Ct. 2297, 2301-2305, 156 L. Ed. 2d 221*

Having created limited public forum by opening school for public use for specified purposes, school's exclusion of organization because of its religious nature constituted viewpoint discrimination in violation of *First Amendment*, when school opened its limited public forum to events pertaining to welfare of community and to groups promoting moral and character development of children, which organization teaches, and there is no logical difference in kind between invocation of Christianity by organization and invocation of teamwork, loyalty, or patriotism by other associations; school's interest in not violating *Establishment Clause* did not outweigh organization's interest in gaining equal access to school's facilities, since school had no valid *Establishment Clause* interest. *Good News Club v. Milford Central School (2001) 533 U.S. 98, 121 S. Ct. 2093, 150 L. Ed. 2d 151*

Traditional public forums are open for expressive activity regardless of government's intent; government is also free to open additional properties for expressive use by general public or particular class of speakers, thereby creating designated public fora. Government's exclusion of speaker from traditional or designated public forum is subject to strict scrutiny; exclusion must be necessary to serve compelling state interest and exclusion must be narrowly drawn to achieve that interest. Where property is not traditional or designated public forum, it is either nonpublic forum or not forum at all,as to which government can restrict access as long as restrictions are reasonable and not effort to suppress expression merely because officials oppose speaker's view. *Arkansas Educ. TV Comm'n v. Forbes (1998) 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875, 886-887*

Public forum doctrine holds that restrictions on speech should be subject to higher scrutiny when speech occurs in areas playing vital role in communication, such as those places historically associated with *First Amendment* activities, including streets, sidewalks, and parks; in these quintessential public forums, government cannot prohibit all communicative activity, but can enforce reasonable regulations of time, place, and manner of expression. *Capitol Sq. Review Bd. v. Pinette (1995) 515 U.S. 753, 115 S. Ct. 2440, 132 L. Ed. 2d 650, 660* ; *Clark v. Burleigh (1992) 4 Cal. 4th 474, 482, 14 Cal. Rptr. 2d 455, 841 P.2d 975*

Unlike public forum, speaker may be excluded from nonpublic forum if he wishes to address topic not encompassed within the forum's purpose, or he is not member of the class of speakers for whose special benefit the forum was created; airport terminal was nonpublic forum; airport authority's policy of excluding all solicitors from inside airport terminal did not violate *First Amendment* rights of Krishna Consciousness members since it was justified by government's interest in protecting free flow of traffic in terminal and protecting travellers from undue interference and

delay. *Krishna Society v. Lee (1992) 505 U.S. 672, 112 S. Ct. 2701, 120 L. Ed. 2d 541, 550*

School district's refusal to recognize and sponsor student club that discriminated on religious grounds in its membership criteria, which recognition would have allowed club access to student association funds, additional access to school property and facilities, and special rights to post materials around school, based on district's non-discrimination policy, was not restriction on limited public forum, where, although access to recognition qualified as limited public forum, district's policy of restricting access to forum based on compliance with its non-discrimination policy was viewpoint neutral and reasonable in light of purposes of forum. However, there was evidence that other groups were granted recognition despite violating district's non-discrimination policy, so that to extent club argued it was denied exemption from non-discrimination policy based on content of its speech, it raised triable issue of fact. *Truth v. Kent School District (9th Cir. 2008) 542 F.3d 634, 648-650*

State university could impose dollar limit on what student could spend on campaign for student office because, unlike exercise of state-wide political self-determination at national level at issue in *Buckley v. Valeo*, student election occurred in limited public forum, opened by university to serve viewpoint neutral educational interests but closed to all save enrolled students who carried minimum course load and maintained minimum grade-point average, and educational interests outweigh free speech interests of students who campaigned within limited public forum. *Flint v. Dennison (9th Cir. 2007) 488 F.3d 816, 826-836*

Airspace protected by city and county ordinance prohibiting aerial advertising was nonpublic forum for purposes of determining whether prohibition of banner towing violated *First Amendment*. Airspace did not fit public forum category because (1) it was not among places immemorially held in trust for use of public and used for purposes of assembly, communicating thoughts between citizens, and discussing public questions and use of airspace for banner towing was relatively modern creation; (2) airspace had access historically restricted by FAA regulations governing airspace and 25 years of regulating aerial advertising; (3) airspace was not extension of beaches below because airspace was physically separate from ground or beaches, required special equipment and authorization for access, and was never typically locus of expressive activity; (4) airspace was not designated public forum, because local ordinance explicitly prohibited using airspace as forum for expressive conduct and airspace was not naturally compatible with expressive activity. *Center for Bio-Ethical Reform, Inc. v. City & County of Honolulu (9th Cir. 2006) 448 F.3d 1101, 1108-1110*

By making public library meeting rooms publicly available during operating hours, county library created limited public forum rather than traditional public forum. County's policy and practices made clear county did not intend for meeting rooms to be open for indiscriminate use and forum was not intended to undermine library's primary function as avenue for reading, writing, and quiet contemplation. Further, county consistently applied its policy restrictions to, inter alia, exclude religious worship as a permissible use, and enforcement of policy to exclude religious worship services from meeting room was reasonable in light of forum's purpose. Exclusion of religious organization's worship services from library meeting room was permissible limitation on subject matter that could be discussed in meeting room, and was not suppression of prohibited perspective from otherwise permissible topic. *Faith Center Church Evangelistic Ministries v. Glover (9th Cir. 2006) 462 F.3d 1194, 1203-1215*

Pedestrian mall created by city of Las Vegas from city street was traditional forum, when property remained public thoroughfare despite recreation as pedestrian mall and addition of entertainment to uses did not alter fact it remained public thoroughfare and shopping and gambling district, when, although there was no doubt decorative pavement, barriers to cars, and canopy indicated to public that mall was not simply another street, its openness to public and smooth integration into downtown preserved its public forum status, and when there was no dispute it was historically public forum and case law indicated that courts regard public pedestrian malls and commercial zones as type of property traditionally used as public forum, and city failed to show public forum status was destroyed by transformation from street to pedestrian mall. *ACLU of Nevada v. City of Las Vegas (9th Cir. 2003) 333 F.3d 1092, 1099-1106*

California state highway overpass fences are not public fora, because they have not traditionally been available for

public expression. Overpasses are not designated public fora, because CalTrans has not intentionally made them available for public discourse and they are not compatible with expressive activity because messages displayed invariably distract drivers, posing safety risks. Thus, highway overpasses are nonpublic fora, and restrictions on free expression are constitutional only if distinctions drawn are (1) reasonable in light of purpose served by forum, and (2) viewpoint neutral. CalTrans policy of allowing flags on highway over-pass fences but no other banners is not reasonable because flags are no less distracting than other types of banners. Further, policy amounts to impermissible viewpoint discrimination because flag expresses viewpoint and policy supports one viewpoint to exclusion of another. *Brown v. Cal. Dept. of Transportation (9th Cir. 2003) 321 F.3d 1217, 1221-1226*

Military Honor and Decency Act, which prohibits sale or rental of sexually explicit material on Department of Defense property including military exchanges, does not violate *First Amendment* speech rights as unconstitutionally vague and restricting protected speech, when Act is not government speech so traditional public forum analysis applies, when government has not created designated public forum and military exchanges fall into category of nonpublic fora, and when restrictions imposed by Act are viewpoint-neutral since Act targets only sexually-oriented materials deemed sexually explicit and reasonable in light of Supreme Court's long-standing deference to military regulations in *First Amendment* context and because Act seeks to restrict sale of materials at odds with military's image of honor, professionalism, and proper decorum. *PMG Int'l Div., L.L.C. v. Rumsfeld (9th Cir. 2002) 303 F.3d 1163, 1167-1172*

Government building, which was judicial and municipal complex and to which individualswere denied entrance after refusing to remove clothing bearing symbols of motorcycle organizations, was nonpublic forum. Individuals showed high probability of success on claim that rules barring them from entering wearing such clothing violated *First Amendment*, when although complex has legitimate need to preserve orderly and safe place to conduct public's business, review of record revealed almost no evidentiary support for argument that need is reasonably served by rules, and when rules do not comply with *First Amendment's* requirement that regulation of speech in nonpublic forum be viewpoint neutral. *Sammartano v. First Judicial District Court (9th Cir. 2002) 303 F.3d 959, 966-973*

School district that had policy that buildings be considered community centers to beavailable for nonprofit community activities including education, could not deny access to group providing home Bible class for children, when district created limited public forum by its policy and then denied group access because education provided by group was religious. *Culbertson v. Oakridge School Dist. No. 76 (9th Cir. 2001) 258 F.3d 1061*

Sidewalk owned privately by casino, but on which there was recorded servitude imposed for unobstructed public use, was public forum, when casino had agreed with county to construct sidewalk with unobstructed pedestrian traffic on its property to replace public sidewalk lost by widening traffic lanes, and function of replacement sidewalk was to be same as former public sidewalk and sidewalks connecting on either end of property; when, although particular parcel of land used for replacement sidewalk had not been public forum historically, sidewalk in front of casino had been historically public forum and newly constructed sidewalk still performed same role as thoroughfare for pedestrian traffic that it performed before construction of casino; when provisions of agreement constituted dedication of sidewalk to public use and agreement operated as servitude because it specified it was to be recorded and bind heirs, successors, and assigns of parties; and when mere retention of some property interest in parcel did not affect public nature of dedicated use of sidewalk. *Venetian Casino v. Local Executive Bd., Las Vegas (9th Cir. 2001) 257 F.3d 937*

City created designated public forum, to which strict scrutiny standard applied, rather than limited public forum, to which more lenient reasonableness standard would apply, by opening display space to expressive activity by retaining organization to manage gallery with exhibitions by local artists, when city's policy of non-controversy, by which it purported to limit to display only noncontroversial art, became no policy at all because it was not consistently enforced and lacked definite standards, given lack of prescreening or previous lack of exercise to right to exclude works so that city retained no substantive control over content of arts program. *Hopper v. City of Pasco (9th Cir. 2001) 241 F.3d 1067, 1078-1081*

Fund established by city to encourage and provide support for civic events celebrating and commemorating historical, cultural, and ethnic heritage of city and nation or increasing community's knowledge and understanding of critical issues, which provides budgetary mechanism for accounting for costs of in-kind services for funded events, is limited public forum opened to support expressive activities of certain groups speaking about certain topics, when fund, although not forum for speech in physical sense, is government-created source of funding to cover costs associated with engaging in behavior protected by *First Amendment*; when fund is not traditional public forum, since it is not source of funding for expressive activities held in trust since time immemorial; and when city has not designated fund as forum open to general expressive activity so as to be designated public forum, since fund is limited to certain topics and speakers and has been managed in selective manner. *Gentala v. City of Tucson (9th Cir. 2000) 213 F.3d 1055, 1062-1063*

Ordinance requiring advance permit "to conduct any organized" demonstration in public park not tailored to city's interest in maintaining safety of park users, but was directed at prohibiting speech activities. *Grossman v. City of Portland (1994) 33 F.3d 1200, 1205-1207*

California Constitution did not protect expressive conduct in area immediately surrounding entrance of individual retail store that, although located in shopping center, did not itself possess characteristics of public forum. *Van v. Target Corp. (2007) 155 Cal. App. 4th 1375, 1382-1391, 66 Cal. Rptr. 3d 497*

Single structure, single-use supermarket with no plazas, walkways, or courtyards for patrons to congregate and spend time together did not become functional equivalent of traditional public forum. In view of physical layout of center in which supermarket was located, restrictions on types of businesses that could open in center, and absence of any common areas that would invite public to meet, congregate, or engage in other activities typical of public forum, supermarket's location in center did not impress walkways of supermarket with character of traditional public forum. That supermarket established content-neutral and nondiscriminatory rules and procedures by which expressive activity may be permitted on the store's premises did not impress it with the character of traditional public forum. Therefore, solicitors did not have constitutional right to use supermarket to solicit signatures on initiative petitions. *Albertson's, Inc. v. Young (2003) 107 Cal. App. 4th 106, 113-129, 131 Cal. Rptr. 2d 721*

[7] Residential Areas

Picketing targeted at residence of individual may be prohibited since it is fundamentally different from other means of communication that may not be banned in residential areas; targeted picketing does not seek dissemination of a message to the general public, but intrudes on the targeted resident in an especially offensive way. *Frisby v. Schultz (1988) 487 U.S. 474, 486-487, 108 S. Ct. 2495, 101 L. Ed. 2d 420*

Preliminary injunction enjoining gang members from "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view" with another gang member within specified four-block residential area did not violate *First Amendment* right of association, since gang affiliation does not fall within either of two kinds of associations entitled to *First Amendment* protection, "intimate" or "intrinsic" associations, such as familial associations, or joining together for political, social, economic, educational, religious and cultural ends. *People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1110-1112, 60 Cal. Rptr. 2d 277, 929 P.2d 596*

When *First Amendment* activity impinges on peaceful enjoyment by others of their home in residential neighborhood, state is able to impose reasonable time, place, and manner restrictions to advance compelling interest of preserving integrity of neighborhood; ordinance restricting decoration of residence and time during which certain decorations may be displayed as valid. *City of Glendale v. George (1989) 208 Cal. App. 3d 1394, 1399-1401, 256 Cal. Rptr. 742* (property had been decorated with numerous Christmas ornaments, thereby attracting crowds of people)

[8] Void-for-Vagueness Doctrine

11 U.S.C. § 526(a)(4), prohibiting debt relief agency from advising client to incur more debt in contemplation of filing for bankruptcy, was not unconstitutionally vague, where § 526(a)(4) prohibits debt relief agency only from advising debtor to incur more debt because debtor is filing for bankruptcy, rather than for valid purpose, to prevent prefiling abusive conduct, and where scope of prohibition was adequately defined, both on its own terms and by reference to Bankruptcy Code's other provisions. *Milavetz, Gallop & Milavetz, P.A. v. United States (2010) -- U.S. --, 130 S. Ct. 1324, 1334-1339, 176 L. Ed. 2d 79*

18 U.S.C. § 2252A(a)(3)(B), which criminalizes in specified circumstances pandering or solicitation of child pornography, is not impermissibly vague, where statute requires defendant to hold and make statement reflecting belief material is child pornography or that defendant communicate in manner intended to cause another so to believe, which are clear questions of fact and does not give law enforcement officials virtually unfettered discretion. *United States v. Williams (2008) 553 U.S. 285, 128 S. Ct. 1830, 1845-1846, 170 L. Ed. 2d 650*

Partial-Birth Abortion Ban Act of 2003 [*18 U.S.C. § 1531*], allowing criminal prosecutions of doctors performing specified abortions occurring in second trimester of pregnancy involving intact extraction of fetus, was not void for vagueness, where Act set forth relatively clear guidelines as to prohibited conduct and provided objective criteria to evaluate whether doctor performed prohibited procedure by defining line between potentially criminal conduct and lawful abortion and by requiring intent to be proved to impose liability. Further, Act did not encourage arbitrary or discriminatory enforcement, because Act's anatomical landmarks established minimal guidelines to govern law enforcement, and scienter requirements narrowed scope of Act's prohibition and limited prosecutorial discretion. *Gonzales v. Carhart (2007) 550 U.S. 124, 127 S. Ct. 1610, 1628-1629, 167 L. Ed. 2d 480*

Provisions of Communications Decency Act of 1996 (CDA) prohibiting knowing transmission of obscene or "indecent" messages to recipient under 18 years of age and knowingly sending or displaying of "patently offensive" messages in manner available to person under 18 years of age, are void for vagueness; CDA lacks precision *First Amendment* requires when statute regulates content of speech. *Reno v. ACLU (1997) 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874*

Ban imposed by Executive Order issued by President in wake of attack of September 11, 2001, on "services to or in support of" "Specially Designated Global Terrorists" (SDGTs) was not unconstitutionally vague facially or as applied, where, even if term "services" standing alone would have been ambiguous, regulations clarified term by offering examples of what was contemplated, alerting person of ordinary intelligence to services that should not be provided to or for benefit of SDGTs. *Humanitarian Law Project v. United States Dept. of Treasury (9th Cir. 2009) 578 F.3d 1133, 1146-1147*

Definition of in-kind expenditures and contributions in state's election law as furnishing of services, property, or rights without charge or at charge less than fair market value to person, candidate, or political committee for purpose of supporting or opposing any person, candidate, ballot issue or political committee, was void for vagueness as applied to church's placing petitions in church's foyer and pastor's exhortation to sign petition during regularly scheduled sermon, where conduct neither caused economic detriment to church nor carried ascertainable market value. However, regulation was not impermissibly void as applied to church's acquiescence with member's use of its copy machine to photocopy petition, where church incurred some, albeit de minimis, expense in wear and tear of its equipment and member would have been charged if she had secured same photocopying services on open market. *Canyon Ferry Rd. Baptist Church of East Helena, Inc. v. Unsworth (9th Cir. 2009) 556 F.3d 1021, 1028-1030*

18 U.S.C. § 1466A(a)(1), proscribing transfer of certain obscene visual representations of sexual abuse of children, was not unconstitutionally void for vagueness, where it was limited to prohibition of obscene material and employed same

requirements Supreme Court already deemed valid. *United States v. Schales (9th Cir. 2008) 546 F.3d 965, 972-973*

Parts of section 303(a) of Antiterrorism and Effective Death Penalty Act (AEDPA) and 2004 amendment, Intelligence Reform and Terrorism Prevention Act (IRTPA), codified at *18 U.S.C. § 2339B(a)*, making crime to knowingly provide "material support or resources" to support to even nonviolent activities of designated organization, were impermissibly vague, where definitions of "training" remained impermissibly vague even after amendment; portion of definition of "expert advice or assistance" referring to "scientific" and "technical" knowledge was not vague because meaning of "technical" and "scientific" was reasonably understandable to person of ordinary intelligence, but "other specialized knowledge" was vague; "service" was impermissibly vague because statute defined "service" to include "training" or "expert advice or assistance," and it was easy to imagine protected expression falling within bounds of "service"; and, because IRTPA's definition of "personnel" provided fair notice of prohibited conduct to person of ordinary intelligence and did not punish protected speech, "personnel" as defined in IRTPA was not vague. *Humanitarian Law Project v. Mukasey (9th Cir. 2007) 509 F.3d 1122, 1133-1136*

County ordinance prohibiting residential picketing activity targeted at and within 300 feet of residential dwelling in unincorporated areas of county was not unconstitutionally void for vagueness. Language of ordinance was not ambiguous and, although no public record contained setback distance so that would-be picketers could precisely measure 300-foot boundary, assessor's maps available from county tax assessor's office showed lot sizes. While maps did not indicate exactly where residence sat on lot, would-be picketer, with lot map in hand, should have been able to estimate boundary with some level of precision. *Klein v. San Diego County (9th Cir. 2006) 463 F.3d 1029, 1038-1039*

City's sign code regulating advertising signage was not void for vagueness. Codeappeared quite clearly to describe what conduct was permitted by providing explicit sign size and type requirements, stating which signs were exempt from permitting, offering thorough and precise list of definitions for various types of signs, and requiring most parties to obtain permit before erecting sign, thereby preventing unexpected citations. Further, in addition to providing notice of what conduct was punishable, clarity of code's proscriptions avoided fear of arbitrary and discriminatory enforcement. Lastly, although with regard to code's permitting process, there was element of subjectivity to determination of compatibility, this subjectivity, alone, did not render code unconstitutionally vague and impreciseness of compatibility and was mitigated by clarity of rest of design review section directing officials to determine compatibility with reference to form, color, shape, size, etc. *G.K. Ltd. Travel v. City of Lake Oswego (9th Cir. 2006) 436 F.3d 1064, 1084-1085*

Definition of "charitable" in city ordinance regulating solicitations by charitable organizations, as well as term "charitable purpose" in definition of "solicitation," were not unconstitutionally vague both facially and as applied to activities of non-profit corporation, where "charitable" was word of common understanding generally understood to describe both religious and non-religious charity, and when nonprofit's fundraising activities for evangelical and missionary purposes clearly constituted solicitations for charitable purpose. *Gospel Missions of Am. v. City of Los Angeles (9th Cir. 2005) 419 F.3d 1042, 1047-1049*

City ordinance requiring adult cabaret dancers to remain two feet away from patrons during performances and defining "adult cabaret dancer" was not void for vagueness as containing subject terms, when subjective terms in ordinance were used in combination with other terms and combined terms outlined performer, place of performance, and type of performance, giving notice to performers and ample guidance to law enforcement officers as to who was and was not adult cabaret dancer, and when subjective terms did not define prohibited conduct and prohibited conduct was defined objectively. *Gammoh v. City of La Habra (9th Cir. 2005) 395 F.3d 1114, 1119-1121*

State statute prohibiting sexual intercourse with person incapable of consent by reason of mental defect was not unconstitutionally void for vagueness, when mistaken evaluation of other person's ability to consent to sexual intercourse had no bearing on whether statute was vague and thus unconstitutional and statute was clear on what it prohibited, *i.e.*, sexual intercourse with person incapable of consent by reason of mental defect; and when statute was

not vague because it did not provide explicit standards to those who apply them so as to avoid arbitrary and discriminatory enforcement, because statute gave law enforcement officials clear standards on conduct that must be prosecuted, and fact that state might have arbitrarily chosen to prosecute one person who had sex with alleged victim but none of her other sexual partners sounded in selective prosecution rather than arbitrary enforcement. United States Supreme Court's holding in *Lawrence v. Texas (2003) 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508* had no impact on vagueness claim, because holding that *Due Process Clause of Fourteenth Amendment* protects right of two individuals to engage in fully and mutually consensual private sexual conduct did not affect state's legitimate interest andduty to interpose when consent was in doubt, and Supreme Court did place certain kinds of primary, private individual conduct beyond power of criminal law-making authority to proscribe, but not conduct in this case. *Anderson v. Morrow (9th Cir. 2004) 371 F.3d 1027, 1031-1033*

Federal statute prohibiting using Internet to solicit sexual activity from minor [*18 U.S.C. § 2422(b)*] is not facially unconstitutional as vague by regulating content of speech, when statute does not chill legitimate speech because scienter and intent requirements sufficiently limit criminal culpability to reach only conduct outside protection of *First Amendment*; and when statutory terms "persuade," "induce," "entice," and "coerce" have plain and ordinary meaning that do not need further technical explanation, and lack of statutory definitions for terms posed no danger of chilling legitimate speech because statute's intent provision, coupled with requirement that purpose of conduct be for criminal sexual activity, sufficiently excluded legitimate activity, including speech, from its scope. *United States v. Dhingra (9th Cir. 2004) 371 F.3d 557, 561-563*

Hobbs Act [*18 U.S.C. § 1951*], prohibiting conspiracy to interfere with commerce by robbery, is not unconstitutionally void for vagueness as vague and ambiguous with regard to use of term "commerce," because definition of commerce in § 1951 is well-established given Supreme Court's interpretation of jurisdiction under Hobbs Act to be coextensive with Commerce Clause so that notice of scope of conduct proscribed by § 1951 is supplied by common understanding of reach of Commerce Clause. *United States v. Rodriguez (9th Cir. 2004) 360 F.3d 949, 953-954*

City ordinance prohibiting carrying or possession of rectangular wooden pieces more than 1/4 inch thick and 2 inches wide, or non-rectangular pieces thicker than 3/4 inch is not facially unconstitutional as vague for failing to define "public assembly" or "demonstration." Terms are not oblique or ambiguous, particularly in specific context of ordinance. *Vlasak v. Superior Court (9th Cir. 2003) 329 F.3d 683, 689*

Educ. Code § 320, allowing parents to sue and hold personally liable teacher, administrator, or official who willfully and repeatedly refuses to implement requirement that instruction be in English only is sufficiently clear so as not to violate *First* and *Fourteenth Amendments* by being void for vagueness. *California Teachers Ass'n v. State Board of Education (9th Cir. 2001) 263 F.3d 888*

Provision of Child Pornography Prevention Act of 1996 criminalizing material that "appears to be a minor" and "convey[s] the impression" of minor engaged in explicit sexual activity is void for vagueness. *Free Speech Coalition v. Reno (9th Cir. 1999) 198 F.3d 1083, 1095*

Asportation element of simple kidnapping under *Cal. Pen. Code § 207*, requiring movement of "substantial distance," was not impermissibly vague under statutory construction existing at time of criminal defendant's offense and trial, where, in context of simple kidnapping statute, "substantial" meant "significant amount" as contrasted with distance that was "trivial," so that "substantial distance" met constitutional requirement of reasonable certainty; and where case law in effect at time of offense provided adequate guidance as to what distances would be considered "substantial" under simple kidnapping statute. *People v. Morgan (2007) 42 Cal. 4th 593, 604-607, 67 Cal. Rptr. 3d 753, 170 P.3d 129*

Juvenile court's imposition of condition of probation that juvenile "not associate with anyone disapproved of by probation" was unconstitutionally vague in absence of express requirement of knowledge, when condition did not notify juvenile in advance with whom she might not associate. However, modification by Court of Appeal inserting

qualification that juvenile have knowledge of who was disapproved of by her probation officer, secured constitutional validity of condition. *In re Sheena K. (2007) 40 Cal. 4th 875, 889-892, 55 Cal. Rptr. 3d 716, 153 P.3d 282*

Preliminary injunction enjoining specified gang members from "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view" with another gang member within specified four-block residential area was not void for vagueness, since injunction enjoined acts within specific context, and, to extent defendant could violate injunction only if defendant knew that other person with whom he engaged in prohibited activity was another gang member, element of knowledge was fairly implied in injunction or would be imposed by trial court in any attempt to enforce injunction; section of injunction enjoining specified gang members from "confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering any residents or patrons, or visitors to [the residential area] known to have complained about gang activities" was also not void for vagueness, since requirement that gang member know that person had complained of gang activities was fairly implied or would be imposed by trial court in any attempt to enforce injunction, and words "confront, annoy, provoke, challenge or harrass" were sufficiently definite in this context. *People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1115-1119, 60 Cal. Rptr. 2d 277, 929 P.2d 596*

Definition of "residence" in *Penal Code § 290.011(g)*, relating to registration as sex offender, was not unconstitutionally vague as applied to defendant, where definition of "residence" in § 290.011(g) was consistent with common meaning of residence and reasonably certain to provide offenders and law enforcement with notice of statutory registration requirements, when considered in context with other terms, and adequate in view of legislative purpose of allowing local law enforcement agencies to keep known sex offenders under surveillance; and where there was substantial evidence defendant was aware of need to register residence because he spent considerable amount of time there and defendant was told by law enforcement officers and his parole officer that he was required to register any place where he regularly resided, regardless of number of days or nights spent there. *People v. Gonzales (2010) 183 Cal. App. 4th 24, 37-39*

Prob. Code § 1516.5, providing that if guardianship is in place, proceeding to terminate parental rights may be brought if three requirements are met: one or both parents do not have legal custody of child, child has been in physical custody of guardian for period of not less than two years, and child will benefit from being adopted by guardian, is not void for vagueness, where while "physical custody" requirement is not more specifically defined or elucidated, "physical custody" grants adequate notice of its meaning and is rendered reasonably certain by reference to other statutory provisions and judicial decisions defining joint and sole physical custody. *In re Noreen G. (2010) 181 Cal. App. 4th 1359, 1373-1377, 105 Cal. Rptr. 3d 521*

Probation condition prohibiting defendant from associating with gang members was unconstitutionally vague, where it lacked explicit knowledge requirement, and, absent that qualification, renders him vulnerable to criminal punishment for associating with persons not known to him to be gang members. Condition prohibiting him from possessing gang paraphernalia was unconstitutionally vague because it lacked explicit knowledge requirement and rendered defendant vulnerable to criminal punishment for possessing paraphernalia he did not know was associated with gangs. Condition prohibiting him from frequenting areas of gang-related activity was unconstitutionally vague absent knowledge requirement, because he could be criminally punished for gang involvement of which he was unaware, and because "frequent" was both obscure and had multiple meanings. *People v. Leon (2010) 181 Cal. App. 4th 943, 949-952, 104 Cal. Rptr. 3d 410*

Probation condition prohibiting minor from possessing any "dangerous or deadly weapon" was not unconstitutionally vague, where condition was sufficiently precise for probationer to know what was required of him, and where condition did not create inherent danger law enforcement officers could construe term instead as strict liability prohibition and punish completely innocent conduct because legal definition of "dangerous or deadly weapon" included user's unlawful intent in possessing object. *In re R.P. (2007) 176 Cal. App. 4th 562, 566-569, 97 Cal. Rptr. 3d 822*

Probation condition imposed on minor that he "not associate with any known probationer, parolee, or gang member" was void for vagueness, where it was unlikely minor would know that person was probationer or a parolee, because that kind of detail is province of law enforcement officers, and would be modified to state that minor not "associate with any person known to you to be on probation, on parole or a member of a criminal street gang." Condition that he not "frequent any areas of gang related activity and not participate in any gang activity" was void for vagueness, where "frequenting" areas of gang-related activity was obscure and area with "gang-related activity" could be entire district or town, and condition should be revised to say that minor not visit any area known to him to be place of gang-related activity. *In re H.C. (2009) 175 Cal. App. 4th 1067, 1071-1072, 96 Cal. Rptr. 3d 793*

Probation condition that defendant not own, possess, or have custody or control of any firearms or ammunition was void for vagueness, where, although defendant, as felon, had no constitutional right to bear arms, and it was unnecessary to state expressly knowledge requirement as to guns or ammunition because status of those items as guns or ammunition was patent, requirement that defendant not knowingly possess those items was required because law had no legitimate interest in punishing innocent citizen who had no knowledge of presence of firearm or ammunition. *People v. Freitas (2009) 179 Cal. App. 4th 747, 751-752, 102 Cal. Rptr. 3d 51*

State law intended to resolve problems with widespread sale of seller assisted marketing plans in state for purchasers was not void for vagueness, and, read in context of state legislature's articulated purpose, meaning of terms "will earn, is likely to earn, or can earn" was plain. *People ex re.l Brown v. iMergent, Inc. (2009) 170 Cal. App. 4th 333, 339-341, 87 Cal. Rptr. 3d 844*

Investigative Consumer Reporting Agencies Act [*Civ. Code § 1786 et seq.*], governing reports containing information on consumer's character, was unconstitutionally vague as applied to impose requirements on tenant screening reports containing information regarding unlawful detainer actions that may have been filed against prospective tenant, where reasonable persons could not readily determine whether unlawful detainer information constituted "character" information governed by ICRAA or "creditworthiness" information governed by Consumer Credit Reporting Agencies Act [*Civ. Code § 1785.1 et seq.*], which governed reports containing information on a consumer's creditworthiness. *Ortiz v. Lyon Management Group, Inc. (2007) 157 Cal. App. 4th 604, 612-619, 69 Cal. Rptr. 3d 66*

Curfew provision enjoining criminal street gang members from being outside in safety zone between hours of 10:00 p.m. on any day and sunrise following day, unless going to or from legitimate meeting or entertainment activity, specifically excluding activities at which other gang members were present; actively engaged in business, trade, profession or occupation requiring presence, including directly driving to or from work; or involved in legitimate emergency situation requiring immediate attention, was unconstitutionally void, where provision did not define "outside" or "legitimate meeting or entertainment activity" exception; however, description of enjoined parties as gang and its active members, as well as persons participating with or acting in concert with gang in more than nominal, passive, inactive or purely technical way, as defined by applicable law, was not unconstitutionally void. *People ex rel. Totten v. Colonia Chiques (2007) 156 Cal. App. 4th 31, 46-50, 67 Cal. Rptr. 3d 70*

City ordinance imposing on owners 10 percent transient occupancy tax upon stays of 30 days or less at hotels, motels, and like accommodations within city was not unconstitutionally void for vagueness, where ordinance clearly described circumstances in which it applied. *City of Santa Cruz v. Patel (2007) 155 Cal. App. 4th 234, 243-247, 65 Cal. Rptr. 3d 824*

Reference to "mitigating circumstances" in *Veh. Code § 14602.6(b)* did not renderstatutory provision unconstitutionally vague on its face, when mitigating circumstances standard was reasonably specific and certain when viewed in context. Section 14602.6 itself set forth mitigating circumstances requiring release of impounded vehicle prior to expiration of 30-day period, and case law was constitutional application of "mitigating circumstances" standard set forth in § 14602.6(b), precluding finding that statute was unconstitutional on its face. *Samples v. Brown (2007) 146 Cal. App. 4th 787, 800-804, 53 Cal. Rptr. 3d 216*

Penal Code § 211 was not impermissibly vague due to failure to provide adequate definition of bank robbery, for which defendant was convicted, where defendant was not charged with robbery of banks, but rather with robbery of persons who happened to be bank employees, and language of statute was sufficiently clear and settled to provide notice of proscribed conduct and enable those charged with its violation to properly prepare defense. *People v. Sullivan (2007) 151 Cal. App. 4th 524, 542-544, 59 Cal. Rptr. 3d 876*

Former *Pen. Code § 290(a)(1)(A)*, requiring sex offender to re-register on change of address, was not void for vagueness as applied to defendant. It was only when transient offender moved from location to location that concept of change of residence did not apply and concept of change of location was sole governing criterion, which was held unconstitutionally vague unless change of location was to another jurisdiction. Further, it was not relevant whether defendant had moved to address where law enforcement found him or was merely transient temporarily there, since it still could be said he changed his residence so as to trigger the re-registration requirement. In addition, record demonstrated he had moved out of residence, making his residence different, and he was given adequate notice to comply with re-registration requirements by having signed registration notification statement informing him that on coming into, or when changing address or transient location within, any city, county, or city and county in which he resided or was located, he was required to register with law enforcement agency having jurisdiction over his residence or location within five working days. *People v. Musovich (2006) 138 Cal. App. 4th 983, 989-992, 42 Cal. Rptr. 3d 62*

Welf. & Inst. Code § 213.5(a), allowing issuance of temporary restraining order against grandmother after petition was filed to declare grandchildren dependent children, enjoining her from, inter alia, stalking children, was not unconstitutionally void for vagueness for failure to define stalking, when reasonable person would necessarily be on notice that if she surreptitiously concealed herself for purpose of making unauthorized contact with specific children, hired investigators to spy on them, videotaped their home, tracked their movements, and went to their schools unannounced to see them and spread defamatory information about their caretakers, all resulting in emotional distress to children and their caretakers, she would have been engaged in stalking and subject to restraining order under § 213.5. *In re Brittany K. (2005) 127 Cal. App. 4th 1497, 1508-1512, 26 Cal. Rptr. 3d 487*

Provisions in former *Pen. Code § 290(a)(1)(A), (f)(1)*, requiring sex offenders to register in jurisdiction in which they are "located" within five working days of changing "location," and give authorities written notice of new "location," were unconstitutionally vague because they do not give transient sex offenders fair notice of what they must do to conform with registration requirements governing changes of "location" and fail to provide even minimal guidelines for registering authorities encouraging arbitrary enforcement. However, basic registration requirements for transient sex offenders that they register in each jurisdiction in which they are regularly "located" and update their registration every 60 days [former *Pen. Code § 290(a)(1)(A)-(C)*] may be reasonably and practically understood by offenders and law enforcement as mandating registration in any jurisdiction in which offender is present on five consecutive working days and are valid. *People v. North (2003) 112 Cal. App. 4th 621, 627-636, 5 Cal. Rptr. 3d 337*

County fair dress code prohibiting apparel or accessories intended to provoke, offend, or intimidate others, including offensive slogans, insignia, or "gang colors" was void for vagueness because operative criteria were so highly subjective as to provide enforcement authorities almost unfettered license to decide what dress code permits and prohibits. *Gatto v. County of Sonoma (2002) 98 Cal. App. 4th 744, 769-776, 120 Cal. Rptr. 2d 550*

Use of "seducing" and "harmful matter" in *Pen. Code § 288.2(b)*, prohibiting distribution or exhibition of lewd matter to minor by Internet with intent to seduce minor, is not unconstitutionally void for vagueness, when in context of § 288.2(b), with references to gratifying lust, passion, and sexual desire, people of ordinary intelligence would readily understand "seducing" as used in § 288.2(b) to mean "persuading into partnership in sexual discourse" as defined in Webster's Third New International Dictionary; and when "harmful matter" incorporates definition from *Pen. Code § 313(a)*, which essentially tracks three-prong test for obscenity articulated by United States Supreme Court; lack of definition of "sexual conduct" does not make § 288.2(b) impermissibly vague, where given that term "prurient interest"

in § 313 is used in conjunction with intent elements of arousing, appealing to, or gratifying lust or passions or sexual desires of and seducing in § 288.2(b), meaning of sexual conduct can be objectively ascertained by reference to common experiences for purposes of acts proscribed by § 288.2(b), and where meaning of sexual conduct can easily be made certain by reference to other statutes in companion chapters of Penal Code dealing with related subject of obscenity. *People v. Hsu (2000) 82 Cal. App. 4th 976, 99 Cal. Rptr. 2d 184*

Pen. Code § 646.9(a), prohibiting stalking by, *inter alia*, harassing, is not void for vagueness where § 646.9(a), in conjunction with definition of term "harasses" contained in *Pen. Code § 646.9(e)* provides person of ordinary intelligence reasonable opportunity to know what is prohibited, so that he or she may act accordingly. *People v. Ewing (1999) 76 Cal. App. 4th 199, 90 Cal. Rptr. 2d 177*

Pen. Code § 4502(a), prohibiting possession of sharp instrument while confined in penal institution, is not unconstitutionally vague on its face, where viewing § 4502(a) according to fair import of its terms person of ordinary intelligence would know what is and what is not prohibited by statute; § 4502(a) also is not unconstitutionally vague as applied to inmate who possessed sharp instrument in his cell that was capable of being used to inflict injury as stabbing device and was not necessary for inmate to have in his possession. *People v. Custodio (1999) 73 Cal. App. 4th 807, 811-813, 87 Cal. Rptr. 2d 18*

In prosecution of jury nullification advocate under state jury tampering statute, statute as interpreted by Alaska state Supreme Court as prohibiting knowingly communicating with juror, directly or indirectly, with intent to influence outcome of specific case, unless such communication was permitted by rules of proceeding, did not violate *First Amendment* as overbroad. *Turney v. Pugh (9th Cir. 2005) 400 F.3d 1197, 1200-1205*

City ordinances prohibiting in general terms "physical contact" between entertainers and patrons is not void for vagueness, where ordinary people can understand what conduct is prohibited and in manner that does not encourage arbitrary and discriminatory enforcement; ordinances prohibiting owners and persons with managerial control over place of entertainment from allowing specific sexual acts and specific acts of touching, caressing, fondling and stimulation are also not void for vagueness, where what is meant is easily understood by person of ordinary intelligence and where use of wordsin context are clear to anyone; similarly, stage height and distance requirements requiring that stage be six feet from nearest area occupied by patrons, and prohibition against patron directly tipping entertainer are not void for vagueness. *Tily B., Inc. v. City of Newport Beach (1998) 69 Cal. App. 4th 1, 22, 81 Cal. Rptr. 2d 6*

Void-for-vagueness doctrine requires that penal statute define criminal offense with sufficient certainty that ordinary people can understand what conduct is prohibited, and in manner that does not encourage arbitrary and discriminatory enforcement; curfew that specifies "no person" shall be on streets at specific times is not void for vagueness because it applies, on its face, to all persons, clearly informs the public and police of the proscribed illegal conduct, and does not allow the police to stop people on a "whim." *In re Juan C. (1994) 28 Cal. App. 4th 1093, 1102-1103, 33 Cal. Rptr. 2d 919*

[9] Overbreadth Doctrine

18 U.S.C. § 2252A(a)(3)(B), which criminalizes in specified circumstances pandering or solicitation of child pornography, is not overbroad, where statute's definition of material or purported material that may not be pandered or solicited precisely tracks material held constitutionally proscribable in earlier cases, and where statute does not criminalize substantial amount of protected expressive activity because offers to provide or requests to obtain child pornography are categorically excluded from *First Amendment*. *United States v. Williams (2008) 553 U.S. 285, 128 S. Ct. 1830, 1838-1845, 170 L. Ed. 2d 650*

Nonresident arrested for trespassing after notice not to return to housing development failed to show that housing

authority policy was overbroad in violation of *First Amendment*, even assuming unlawfulness of unwritten rule that demonstrating and leafleting at development required permission from manager. Nonresident failed to show no-return notice served on nonresidents with no "legitimate business or social purpose" to be in development would be given to anyone engaged in constitutionally protected speech by failing to show that any *First Amendment* activity fell outside "legitimate business or social purpose" permitting entry. Provision authorizing police to arrest nonresidents returning to development after receiving barment notice did no t violate *First Amendment* as applied to persons whose postnotice entry was not for purpose of engaging in constitutionally protected speech. Even assuming the streets of development, which had become private, were public forum, notice-barment rule subjected to arrest those reentering after trespassing and being warned not to return regardless of whether, on their return, they sought to engage in speech. Finally, notice-barment and "legitimate business or social purpose" rules applied to all persons, not just to those seeking to engage in expression. *Virginia v. Hicks (2003) 539 U.S. 113, 123 S. Ct. 2191, 2199, 156 L. Ed. 2d 148*

Child Online Protection Act's (COPA) reliance in part on community standards to identify material harmful to minors does not violate *First Amendment* by rendering statute facially unconstitutional as overbroad, even though Internet publishers are unable to control geographic scope of recipients of their communications, since COPA is additionally restricted to material displayed on World Wide Web for commercial purposes, and defines the harmful-to-minors material restricted in manner parallel to *Miller* definition of obscenity. *Ashcroft v. American Civil Liberties Union (2002) 535 U.S. 564, 122 S. Ct. 1700, 1709, 152 L. Ed. 2d 771*

Child Pornography Prevention Act of 1996 (CPPA), *18 U.S.C. § 2251 et seq.*, extending federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using real children, is overbroad and unconstitutional, when it proscribes significant universe of speech that is neither obscene under *Miller* nor child pornography under *New York v. Ferber*. *Ashcroft v. Free Speech Coalition (2002) 535 U.S. 234*

Gov. Code § 6254(f)(3), requiring that person requesting arrestee's address declare that request is made for one of five prescribed purposes and that address will not be used directly or indirectly to sell product or service, is not constitutionally overbroad where § 6254(f)(3) is not abridgment of anyone's right to engage in speech, but simply law regulating access to information in government's hands. *Los Angeles Police Dept. v. United Reporting Publishing Corp. (1999) 528 U.S. 32, 120 S. Ct. 483, 145 L. Ed. 2d 451*

Provisions of Communications Decency Act of 1996 (CDA) prohibiting knowing transmission of obscene or "indecent" messages to recipient under 18 years of age and knowing sending or displaying of "patently offensive" messages in manner available to person under 18 years of age, are overbroad; CDA effectively suppresses large amount of speech adults have constitutional right to receive and to address to one another, and burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving legitimate purpose of protecting children from harmful materials that CDA was enacted to serve. *Reno v. ACLU (1997) 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874*

In addressing overbreadth challenge to statutory enactment, court's first task is ascertaining whether enactment reaches substantial amount of constitutionally protected conduct; in that assessment, court considers actual text of statute as well as limiting constructions that have been developed. *Boos v. Barry (1988) 485 U.S. 312, 329, 108 S. Ct. 1157, 99 L. Ed. 2d 333*

Statute that prohibits protected speech along with unprotected speech so that it has chilling effect on free expression is facially invalid; broadly written statute that has deterrent effect on free expression may be challenged by party whose own conduct is unprotected. *City Council v. Taxpayers for Vincent (1984) 466 U.S. 789, 798-799, 104 S. Ct. 2118, 80 L. Ed. 2d 772*

Organization's challenge to executive order issued by President in wake of attack of September 11, 2001, blocking property of 27 designated terrorists and authorizing Secretary of Treasury to designate others whom Secretary

determines to be acting for, providing support or services to, or are otherwise associated with, designated persons, as unconstitutionally overbroad failed, where organization could not suggest how designation of U.S. groups or individuals under executive order could be unconstitutional if groups or individuals were aiding or supporting terrorists, and where there was no reason to think that "infinite regression of designations" implicated due process if each designation was in turn based on impermissible dealings with "Specially Designated Global Terrorists" (SDGTs). Further, as the executive order was not aimed at speech and did not cover substantial amount of it, ban on "services" to SDGTs was not facially overbroad. *Humanitarian Law Project v. United States Treasury Dep't (9th Cir. 2009) 578 F.3d 1133, 1145, 1148*

Federal restitution lien statute [*18 U.S.C. § 3613*], which assisted government in collecting unpaid restitution orders imposed on those convicted of federal crimes, and which provided that lien arose automatically upon entry of judgment against these individuals and could be enforced against all property and property rights regardless of nature of property, was not subject to facial challenge as overbroad, where statute was generally applied to all individuals subject to restitution orders, was not dependent upon discretion of any government officials, and did not vary according to type of property owned by these individuals. *United States v. Kaczynski (9th Cir. 2009) 551 F.3d 1120, 1124-1126*

18 U.S.C. § 1466A(a)(1), proscribing transfer of certain obscene visual representations of sexual abuse of children, was not unconstitutionally overbroad because it encompassed material not produced with actual minors, where statute required that material be obscene and statutes proscribing conduct only with respect to material that is obscene under *Miller* test are not overbroad. *United States v. Schales (9th Cir. 2008) 546 F.3d 965, 971-972*

City's requirement that street performers have permit within city's arts center was not overbroad, where requirement affected only specific form of activity that had generated documented concerns for patrons and center staff; where, although permit requirement affected all street performers, not only those proven to be disruptive, city was not required to wait for problems to arise or to speculate as to which performers would pose greater threats; where attempts to discriminate among performers in granting permits could have destroyed content neutrality of permit scheme; and where permit requirement for all street performances did not exceed scope warranted by city'sinterests in order and accountability. Rule limiting street performers to specific locations was not overbroad, where street performers could still perform in numerous well-located sites. *Berger v. City of Seattle (9th Cir. 2008) 512 F.3d 582, 593-594, 601-603*

Because section 303(a) of Antiterrorism and Effective Death Penalty Act (AEDPA) and 2004 amendment, Intelligence Reform and Terrorism Prevention Act (IRTPA), codified at *18 U.S.C. § 2339B(a)*, making crime to knowingly provide "material support or resources" to support to even nonviolent activities of designated organization, was not aimed at expressive conduct and did not cover substantial amount of protected speech, prohibition against providing "material support or resources" to foreign terrorist organization was not facially overbroad. *Humanitarian Law Project v. Mukasey (9th Cir. 2007) 509 F.3d 1122, 1136-1137*

County ordinance prohibiting residential picketing activity targeted at and within 300 feet of residential dwelling in unincorporated areas of county was not unconstitutionally overbroad. Ordinance prohibited only picketing targeted at single residential dwelling and was not intended to preclude right to picket in residential area generally and in manner that did not target or focus on particular residence or household. Further, ordinance was unlikely to have substantial effect on truly welcome picketing. *Klein v. San Diego County (9th Cir. 2006) 463 F.3d 1029, 1037-1038*

Definitions of "charitable" and "solicitation" in city ordinance governing solicitations by charitable organizations were not unconstitutionally overbroad because they indirectly burdened solicitation activities by religious organizations in violation of Establishment and *Free Exercise Clauses of First Amendment*, when overbreadth challenges cannot be based on constitutional provisions other than the protection for speech and other specified settings, not including Establishment and *Free Exercise Clauses*. *Gospel Missions of Am. v. City of Los Angeles (9th Cir. 2005) 419 F.3d 1042, 1049-1051*

City ordinance requiring adult cabaret dancers to remain two feet away from patrons during performances and defining

"adult cabaret dancer" was not unconstitutionally overbroad because it could apply to mainstream or avant-garde performances as well as adult entertainment, when potentially overbroad applications of ordinance were minimal since performances occurring outside adult cabaret were unaffected by ordinance, and performances occurring in adult cabaret and containing sexual emphasis defining adult cabaret dancer were within ordinance's legitimate sweep. *Gammoh v. City of La Habra (9th Cir. 2005) 395 F.3d 1114, 1121-1122*

Federal statute prohibiting using Internet to solicit sexual activity from minor [*18 U.S.C. § 2422(b)*] is not facially unconstitutional as overbroad for incorporating local criminal laws in determining whether sexual activity solicited from minortriggers culpability, when statute national in scope may rely on community standards for determining what is harmful to minors without being substantially overbroad for purposes of *First Amendment*, and when any concern with not knowing identity or whereabouts of person at other end of e-mail, instant messaging, or website was addressed by statute's intent requirement, both with regard to minor and illegal sexual activity. *United States v. Dhingra (9th Cir. 2004) 371 F.3d 557, 563-564*

City ordinance regulating location of adult retail establishments and defining regulated establishments as enclosed building or any portion thereof which, for money or any other form of consideration, devotes significant or substantial portion of its stock in trade to sale, exchange, rental, loan, trade, transfer, or viewing of adult-oriented merchandise was not overbroad, when cases directly addressing phrase "significant or substantial" in this context have upheld its validity and phrase is readily susceptible to narrowing construction, and when "any portion thereof" clause plainly meant ordinance was intended to cover stores occupying only portion of enclosed building, such as one store in shopping mall, as distinct from entire building, and language had nothing to do with determination whether adult material constituted significant or substantial portion of store's stock. *World Wide Video of Wash., Inc. v. City of Spokane (9th Cir. 2004) 368 F.3d 1186, 1198-1199*

City ordinance prohibiting carrying or possession of rectangular wooden pieces more than 1/4 inch thick and 2 inches wide, or non-rectangular pieces thicker than 3/4 inch is not facially unconstitutional as overbroad, where ordinance applies to all demonstrators, regardless of persuasion, viewpoint, or cause, and its self-avowed purpose is to protect police and demonstrators alike, so it is justified without reference to content of regulated speech; where ordinance is narrowly tailored to meet city's substantial interest in safeguarding its citizens and police against violence; and where ordinance does not deprive demonstrators of alternative means of communication. *Vlasak v. Superior Court (9th Cir. 2003) 329 F.3d 683, 689-690*

Community college's workplace violence definition as including, but not being limited to, making written, physical, or visual contact with verbal threats or violent behavior overtones violates *First Amendment*, when some expression with violent "overtones" would not offend standard defining unprotected threat as whether reasonable person would foresee that statement would be interpreted by those to statement made as serious expression of intent to harm or assault. *Bauer v. Sampson (9th Cir. 2001) 261 F.3d 775, 782*

Provision of Child Pornography Prevention Act of 1996 criminalizing material that "appears to be a minor" and "convey[s] the impression" of a minor engaged in explicit sexual activity is constitutionally infirm as overbroad, since nonobscene sexual expression not involving actual children is protected under *First Amendment*. *Free Speech Coalition v. Reno (9th Cir. 1999) 198 F.3d 1083, 1095*

Injunction against neighbor of restaurant from initiating contact with employees of restaurant at any time or place and requiring neighbor to contact restaurant management to communicate any problems related to restaurant's operation, and from making specified defamatory statements about restaurant to third persons, was impermissibly broad and violated neighbor's right to free speech under federal and California Constitutions, but properly limited injunction prohibiting neighbor from repeating to third persons statements about restaurant that were determined at trial to be defamatory would not violate right to free speech. *Balboa Island Village Inn v. Lemen (2007) 40 Cal. 4th 1141, 1147-1161, 57 Cal. Rptr. 3d 320, 156 P.3d 339*

Probation condition imposed on juvenile forbidding her association with "anyone disapproved of by probation" was, in absence of express requirement of knowledge, unconstitutionally vague, where, as orally pronounced by juvenile court and as set forth in minute order, condition did not notify juvenile in advance with whom she might not associate through any reference to persons whom defendant knew to be disapproved of by her probation officer. *In re Sheena K. (2007) 40 Cal. 4th 875, 889-892, 55 Cal. Rptr. 3d 716, 153 P.3d 282*

Injunction barring racial epithets directed at or descriptive of Hispanic/Latino employees, even outside hearing of Hispanic/Latino employees, was not constitutionally infirm as overbroad where it certainly is possible that use of racial epithets even outside hearing of Hispanic/Latino employees would contribute to atmosphere of racial hostility perpetuating hostile work environment created by employer, and where nothing in limited record presented to California Supreme Court suggested that injunction was more burdensome than necessary to prevent future violations of *California Fair Employment and Housing Act. Aguilar v. Avis Rent A Car System (1999) 21 Cal. 4th 121, 145-146, 87 Cal. Rptr. 2d 132, 980 P.2d 846*

Preliminary injunction enjoining gang members from "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view" with another gang member within specified four-block residential area was not overbroad; foundation of overbreadth doctrine is inhibitory effect of contested statute on freedom of those, although possibly subject to its reach, who are not before court, and injunction presented no danger of violating rights of parties not before court, and injunction did not embody broad and abstract commands of statute, but was product of concrete judicial proceeding prompted by particular events inimical to well-being of residents of area that led to specific request for preventive relief. *People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1112-1115, 60 Cal. Rptr. 2d 277, 929 P.2d 596*

Probation condition that defendant not attend any court hearing or be within 500 feet of any court in which he is neither defendant nor under subpoena was overbroad, where condition was not limited to protecting specific witnesses or parties or confined to trials involving gang members, it was so broad that it restricted defendant from engaging in activities unrelated to future criminality, and Attorney General had not shown why narrower condition restricting attendance at trials of gang members and prohibiting contact with witnesses would not have sufficed. *People v. Perez (2009) 176 Cal. App. 4th 380, 383-386, 97 Cal. Rptr. 3d 632*

Probation condition prohibiting defendant from possessing gang paraphernalia was not unconstitutionally overbroad because it tailored restrictions to articles that were evidence of defendant's gang of choice, but purportedly required defendant to avoid colors, symbols, and paraphernalia from all criminal gangs, where defendant's need for rehabilitation was due to his association with criminal street gang, and condition could be aimed squarely at that without inserting name of his gang. However, condition prohibiting defendant from appearing at any court proceeding unless defendant is party, defendant in criminal action, or subpoenaed as witness, or with permission of probation officer was overbroad restriction of defendant's *First Amendment* right of access to court proceedings, where condition was neither limited to protecting specific witnesses or parties nor confined to trials involving gang members and prevented activities unrelated to future criminality; condition was not saved because it allowed defendant to attend court proceedings with probation officer's permission, because condition in effect delegated unfettered discretion to probation officer to determine its scope. *People v. Leon (2010) 181 Cal. App. 4th 943, 951, 952-954, 104 Cal. Rptr. 3d 410*

Probation condition imposed after plea of no contest to grand theft that defendant possess no stolen property was overbroad, where defendant had constitutional right to possess property, "stolen" nature of property would not always be apparent, express requirement of knowledge had to appear in probation condition; to extent it was overbroad, it was not reasonably related to compelling state interest in reformation and rehabilitation and was unconstitutional restriction on exercise of fundamental constitutional rights, and was modified to prohibit defendant from being in possession of stolen property he knew was stolen. *People v. Freitas (2009) 179 Cal. App. 4th 747, 750-751, 102 Cal. Rptr. 3d 51*

Probation condition forbidding defendant from associating with persons designated by his probation officer was unconstitutionally overbroad, where requirement that defendant not be present with persons designated by probation officer was not limited to those who defendant knew to have been so designated, and where there were no limits on persons whom probation officer could prohibit defendant from associating with, which would allow probation officer to banish defendant by forbidding contact with his family and close friends, even though prohibition might have no relationship to state's interest in reforming and rehabilitating defendant. *People v. O'Neil (2008) 165 Cal. App. 4th 1351, 1355-1358, 81 Cal. Rptr. 3d 878*

Preliminary injunction prohibiting ex-wife from contacting ex-husband's employer, which was sheriff's department, concerning ex-husband, except to call "911 to report criminal conduct." was unconstitutionally overbroad, where, balanced against substantial burden on ex-wife's constitutional petitioning rights resulting from court's restrictions on her communications with sheriff's department, and there was minimal evidence in record supporting need for pretrial injunction on communications; where record did not support conclusion ex-husband would prevail on his causes of action challenging ex-wife's complaints to sheriff's department; and where there were less intrusive means to limit ex-wife's filing false complaints with sheriff's department. *Evans v. Evans (2008) 162 Cal. App. 4th 1157, 1171-1173, 76 Cal. Rptr. 3d 859*

Pen. Code § 288.2(b), prohibiting knowing transmission of harmful matter to minor with intent of seducing minor, is not unconstitutionally overbroad, where statute is sufficiently tailored to serve a compelling state interest of protecting children from harmful material by proscribing only transmission of harmful matter to known minor with intent to sexually arouse and seduce minor. *People v. Garelick (2008) 161 Cal. App. 4th 1107, 1122-1124, 74 Cal. Rptr. 3d 815*

Provision enjoining criminal street gang members from possessing open containers of alcoholic beverages in public or knowingly being in presence of someone possessing or of open container of alcohol in public was not overbroad in violation of right to privacy, where possessing open container of alcoholic beverage in public view or in place accessible to public was not freedom protected by constitutional right to privacy. *People ex rel. Totten v. Colonia Chiques (2007) 156 Cal. App. 4th 31, 51, 67 Cal. Rptr. 3d 70*

Probation conditions prohibiting defendant who pled no contest to felony indecent exposure from associating with persons under 18 and possessing sexually stimulating materials or patronizing places where materials were available were unconstitutionally vague, where conditions did not provide fair notice of prohibited activities; conditions modified to prohibit association with persons defendant knows or reasonably should know to be under age of 18 unless accompanied by responsible adult unrelated to defendant, and to prohibit possession of sexually stimulating/oriented material having been informed by probation officer that material is inappropriate and/or patronize places where such material or entertainment in style of said material were known to be available. *People v. Turner (2007) 155 Cal. App. 4th 1432, 1435-1437, 66 Cal. Rptr. 3d 803*

Probation condition that minor who was ward of court by reason of her having committed misdemeanor battery that she not associate with anyone disapproved of by probation officer was unconstitutionally vague and overbroad; because of breadth of probation officer's power to virtually preclude minor's association with anyone, minor must be advised in advance of those whom minor must avoid. However, conditions that she not use or possess dangerous or deadly weapons, and not remain with any person known to be unlawfully armed were not vague or overbroad and were permissible, because people of common intelligence know what is deadly or dangerous weapon and trial court's judgment was that she could not remain with anyone she knows is unlawfully armed. *In re Sheena K. (2004) 116 Cal. App. 4th 436, 10 Cal. Rptr. 3d 444*

County fair dress code prohibiting apparel or accessories intended to provoke, offend, or intimidate others, including offensive slogans, insignia, or "gang colors" was overbroad because it did not aim specifically at evils within allowable area of governmental control, but swept within its ambit other activities constituting exercise of protected expression

and conduct, since a great deal of the apparel and accessories celebrated in contemporary fashion magazines can fairly be described as provocative and/or intimidating, and conventional dress bearing forms of political speech and religious expression protected under *First Amendment* are clearly offensive to many people, and sometimes even likely to provoke violence. *Gatto v. County of Sonoma (2002) 98 Cal. App. 4th 744, 776-777, 120 Cal. Rptr. 2d 550*

Pen. Code § 288.2, prohibiting transmission of harmful matter to a minor (including over the Internet, *Pen. Code § 288.2(b)*), with intent of seducing minor, is not unconstitutionally overbroad as chilling protected speech, where banned matter is properly defined; § 288.2 only addresses communications in which adult seeks to seduce child, and activity prohibited by § 288.2 is more akin to conduct than communication. *Hatch v. Superior Court (2000) 80 Cal. App. 4th 170, 197-204, 94 Cal. Rptr. 2d 453*

Pen. Code § 288.2(b), prohibiting distribution or exhibition of lewd matter to minor by Internet, is not unconstitutionally overbroad, when it is written in manner thatdoes not impermissibly infringe on rights of adults to transmit and receive constitutionally protected material via Internet, since to violate § 288.2(b), sender must know recipient is minor, know transmitted matter is harmful, intend to arouse minor's sexual desires, and intend to seduce minor, and chilling effect is on those who would use otherwise protected speech to seduce minors; when built-in affirmative defenses limit reach of § 288.2(b) so that it targets only those who prey on minors to seduce them; and when gauges whether published material is harmful to minors on narrow basis of contemporary statewide standards. *People v. Hsu (2000) 82 Cal. App. 4th 976, 99 Cal. Rptr. 2d 184*

City ordinances prohibiting entertainer or nonmanagerial employee from allowing patrons of adult-oriented businesses to engage in specified sexual acts and prohibiting same individuals from allowing any person to touch, caress, or fondle certain anatomical parts of any other person are overbroad, when neither entertainers nor nonmanagerial employees ordinarily have control over conduct between patrons of club nor, presumably, authority to eject them, and city could revoke adult business's permit because entertainer or waiter/waitress failed to stop one patron from fondling another patron, so that restrictions are not narrowly drawn to achieve city's legitimate goals; further, ordinance requiring restroom attendant to be present in restroom duringoperating hours to prevent any persons from engaging in any specified sexual activities within restroom is also overbroad, since ordinance is drawn so as to require attendant to prevent touching of genitals or buttocks, so that attendant is required to prevent patrons from using facilities for intended sanitary purposes; however, stage height and distance requirements further the city's interest in crime and disease prevention and are narrowly tailored to meet that goal, so they are constitutional. *Tily B., Inc. v. City of Newport Beach (1998) 69 Cal. App. 4th 1, 22-23, 81 Cal. Rptr. 2d 6*

Code Civ. Proc. § 391.7, allowing court to enter order prohibiting "vexatious litigant" from filing new state court litigation absent leave of court, is not overbroad for preventing filing of writs of habeas corpus and petitions for dissolution of marriage, resolution of paternity, and adoption, since court presumably will take nature of action into consideration, and, as to all categories of cases, if presiding judge refused to exercise or abused his or her discretion, litigant could file mandamus action in higher court to compel presiding judge to act according to law. *Wolfgram v. Wells Fargo Bank (1997) 53 Cal. App. 4th 43, 60-61, 61 Cal. Rptr. 2d 694*

[9A] Waiver

Individual indicted for violations of federal obscenity laws and operation of criminal enterprise knowingly and voluntarily waived *First Amendment* rights as part of plea agreement, by agreeing to consent decree permanently enjoining him from involvement with production, sale, or distribution of any sexually explicit materials, even though terms of consent decree reach not only obscene materials, but also sweep in nonobscene sexually-explicit materials otherwise protected by *First Amendment*, and even though district court failed to establish explicitly, on the record, voluntary waiver of the *First Amendment* rights potentially implicated by consent decree, when record established that individual had discussed consent decree with his attorneys, that he had read it, and that he understood it, court elicited

from prosecution description of consent decree that clearly indicated that injunction at issue was central feature of decree, and court then asked second time if individual understood terms of agreement, and where individual never contended that he actually did not understand agreement. *United States v. Berke (9th Cir. 1999) 170 F.3d 882*

Confidential settlement agreement in earlier lawsuit between author of book and attorney allegedly defamed in book did not constitute waiver of *First Amendment* protections, where confidentiality clause does not by its terms specifically prohibit characterizations of legal abilities or personality of attorney, where attorney's complaint in defamation action does not assert attorney was party to confidentiality agreement or even mentioned in terms of agreement, and when terminology used in agreement is so imprecise and overbroad as to fall short of being clear and compelling waiver of specific *First Amendment* rights regarding comments about attorney. *Ferlauto v. Hamsher (1999) 74 Cal. App. 4th 1394, 1399-1400, 88 Cal. Rptr. 2d 843*

[9B] Remedies

In action under *42 U.S.C. § 1983* challenging city ordinance prohibiting leafleting of unoccupied vehicles parked on city streets, plaintiff was entitled to preliminary injunction, where plaintiff demonstrated likelihood of success on merits of claim that ordinance violated his right to free speech under the federal and state constitutions as city failed to show that ordinance was narrowly tailored to advance either of its asserted interests, and where plaintiff demonstrated that he was likely to suffer irreparable injury in absence of preliminary injunction and balance of equities and public interest tipped in his favor because loss of *First Amendment* freedoms, for even minimal periods of time, unquestionably constituted irreparable injury, and harm was particularly irreparable as plaintiff sought to engage in political speech. *Klein v. City of San Clemente (9th Cir. 2009) 584 F.3d 1196, 1207-1208*

In action under *42 U.S.C. § 1983*, trial court could deny company lost profits caused by preliminary injunction and stay pending appeal city sought and superior court and court of appeal, respectively, issued on grounds that city's ordinance that was legal basis for preliminary injunction was unconstitutional, where courts' intervening exercise of independent judgment in issuing preliminary injunction and stay, though former was dissolved and latter was lifted after ordinance was declared unconstitutional, broke chain of causation for purposes of § 1983 liability in absence of evidence city materially misled or pressured judges who were expected to exercise independent judgment. Because parties disputed whether material misrepresentations were made to judges who issued preliminary injunction and stay, action remanded for further proceedings on that factual issue. *Manta Management Corp. v. City of San Bernardino (2008) 43 Cal. 4th 400, 406-413, 75 Cal. Rptr. 3d 353, 181 P.3d 159*

Former city council member alleging violation of free speech clause of *Cal. Const., art. I, § 2(a)* based on conduct of various city officials and other individuals that assertedly interfered with performance of her duties, could not bring action for money damages, when no statutory provision or established common law tort authorized a damage remedy for constitutional violation. *Degrassi v. Cook (2002) 29 Cal. 4th 333, 335-344, 127 Cal. Rptr. 2d 508, 58 P.3d 360*

[10] Right of Association

Solomon Amendment [*10 U.S.C. § 983*], specifying that if any part of institution of higher education denied military recruiters access equal to that provided other recruiters, entire institution would lose certain federal funds, did not infringe schools' *First Amendment* freedom of association for purpose of speaking, when recruiters were, by definition, outsiders coming onto campus for limited purpose of trying to hire students, not to become members of school's expressive association, and when students and faculty were free to associate to voice their disapproval of military's message and nothing about statute affected composition of group by making group membership less desirable. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (2006) 547 U.S. 47, 126 S. Ct. 1297, 1311-1313, 164 L. Ed. 2d 156*

California's blanket open primary violates *First Amendment* right of association where open primary forces political parties to associate with, to have their nominees, their positions determined by those who have refused to affiliate with party or have expressly affiliated with rival, and the prospect of having party's nominee determined by adherents of opposing party is clear and present danger; when no compelling state interest was articulated; and when even if state interests were compelling, blanket primary was not narrowly tailored means of furthering them. *California Democratic Party v. Jones (2000) 530 U.S. 567, 120 S. Ct. 2402, 2408, 147 L. Ed. 2d 502*

First Amendment permits public university to require students to pay nonrefundable student activity fee used to fund program to facilitate free and open exchange of extracurricular student speech, where university's mission is served by providingstudents with means to engage in dynamic extracurricular discussions of philosophical, religious, scientific, social, and political subjects, and allocation of funding support to student organizations engaging in such speech is viewpoint neutral; remand was necessary to resolve question of *First Amendment* validity of student referendum mechanism, which appeared to permit exaction of fees in violation of viewpoint neutrality. *Board of Regents of the University of Wisconsin System v. Southworth (2000) 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed. 2d 193*

In action by white merchants against black individuals and organizations seeking racial equality and integration, for losses sustained during 7-year boycott of their businesses, *First Amendment* precluded imposition of liability on boycott participants for all damages resulting from boycott, because boycott was protected by *First Amendment* as nonviolent, politically-motivated, and designed to force governmental and economic change, and liability could not be imposed on individuals who were nonviolent solely by association with individuals who committed nonviolent acts. *N.A.A.C.P. v. Claiborne Hardware Co. (1982) 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215*

Sheriff's officer who removed child from home without warrant and placed her in protective custody based on interview with child after she had returned home after running away was entitled to summary judgment on claim that he violated mother's and stepfather's familial association rights, where officer's reliance on child's statements was reasonable and, under totality of circumstances, officer had reasonable cause to believe child was in imminent danger of physical harm, and there was no delay here between interview with child and decision to remove her, and where, as to mother, removing child from her because she lived with allegedly abusive stepfather was reasonable. However, as to non-custodial father, who was never personally accused of violence, scope of officer's intrusion on his associational rights was for jury to decide, where officers made no attempt to contact him and did not explore possibility of putting child in his care that evening rather than placing her in government custody, and he was not informed of removal for two days. *Burke v. County of Alameda (9th Cir. 2009) 586 F.3d 725, 731-733*

Proponents of successful ballot proposition that was later challenged in court, as to which opponents sought disclosure of internal campaign information, made prima facie showing of arguable *First Amendment* infringement by demonstrating consequences objectively suggesting impact on, or chilling of, associational rights, where they presented declarations from several individuals attesting to impact compelled disclosure would have on participation and formulation of strategy, after which evidentiary burden should have shifted to plaintiffs to demonstrate sufficient need for discovery to counterbalance infringement. District court erred by not applying heightened relevance test, but, rather, having determined *First Amendment* privilege did not apply to disclosure of internal campaign communications except to protect identities of rank-and-file members and volunteers, applied *Fed. R. Civ. Proc. Rule 26* standard of reasonably calculated to lead to discovery of admissible evidence, and plaintiffs' request satisfied Rule 26 standard, because it was reasonably calculated to lead to discovery of admissible evidence on issues of voter intent and existence of legitimate state interest. Applying *First Amendment's* more demanding heightened relevance standard, plaintiffs did not demonstrate interest in obtaining disclosures sufficient to justify deterrent effect on free exercise of constitutionally protected right of association. *Perry v. Schwarzenegger (9th Cir. 2010) 591 F.3d 1147, 1159-1165*

As part of investigation of criminal activity, by disclosing information about North American Man/Boy Love Association members to FBI field offices, government did not violate members' rights to associational privacy, where FBI did not compel disclosure of membership lists, and FBI investigation did not impose any significant hardships on

associational rights of NAMBLA members or lack sufficient connection to legitimate government interest. *United States v. Mayer (9th Cir. 2007) 490 F.3d 1129, 1134-1135*

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which punishes knowingly providing material support or resources to foreign terrorist organization, does not violate *First Amendment* right of association by imposing guilt by association, where AEDPA does not prohibit being member of designated group, vigorously promoting and supporting political goals of group, praising groups for using terrorism as means of achieving ends, or advocating goals of organizations, but only giving material support, and there is no constitutional right to give terrorists support, and where government need not show specific intent to aid organization's illegal activities before attaching liability to donation of funds. *Humanitarian Law Project v. Reno (9th Cir. 2000) 205 F.3d 1130, 1133-1134*

University did not violate students' free speech and associational rights by requiring them, as condition of matriculation, to pay incidental fees that contributed to the support of student public interest research group education fund, where fund's activities are germane to purpose for which mandatory exaction was imposed as matter of law and distribution of funds to fund serves legitimate governmental interest that does not violate *First Amendment*. *Rounds v. Oregon State Bd. of Higher Educ. (9th Cir. 1999) 166 F.3d 1032*

Preliminary injunction enjoining gang members from "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view" with another gang member within specified four-block residential area did not violate *First Amendment* right of association, since gang affiliation does not fall within either of two kinds of associations entitled to *First Amendment* protection, "intimate" or "intrinsic" associations, such as familial associations, or joining together forpolitical, social, economic, educational, religious and cultural ends. *People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1110-1112, 60 Cal. Rptr. 2d 277, 929 P.2d 596*

Injunction prohibiting enjoined persons from knowingly associating with criminal street gang members did not impermissibly burden associational rights of those enjoined, where injunction as issued had limited impact on familial relationships, and any liberalization of injunction to try to allow greater familial contact in target area would have limited effectiveness of injunction. *People ex rel. Totten v. Colonia Chiques (2007) 156 Cal. App. 4th 31, 45-46, 67 Cal. Rptr. 3d 70*

Probation conditions prohibiting defendant who pled no contest to felony indecent exposure from associating with persons under 18 and possessing sexually stimulating materials or patronizing places where materials were available were unconstitutionally overbroad; conditions as modified to prohibit association with persons defendant knows or reasonably should know to be under age of 18 unless accompanied by responsible adult unrelated to defendant, and to prohibit possession of sexually stimulating/oriented material having been informed by probation officer that material is inappropriate and/or patronize places where such material or entertainment in style of said material were known to be available not overbroad, because defendant had two convictions for indecent exposure involving child victims and two federal convictions for possessing child pornography, giving state compelling interest in protecting children from him, and preventing possession of sexually oriented materials by persons such as defendant promoted public safety and his rehabilitation and did not infringe on his *First Amendment* rights. *People v. Turner (2007) 155 Cal. App. 4th 1432, 1435-1437, 66 Cal. Rptr. 3d 803*

Injunction obtained by mother to restrain boy from contacting minor daughter did not violate boy's *First Amendment* right of association, because boy had no right to associate with plaintiff's minor child or to otherwise interfere with her parents' exercise of their right to control her activities. *Brekke v. Wills (2005) 125 Cal. App. 4th 1400, 1410-1411, 23 Cal. Rptr. 3d 609*

[11] Right to Petition Government for Redress of Grievances

Code Civ. Proc. § 391 et seq., "vexatious litigant" statute, did not violate federal or state right to petition government for redress of litigant who previously lost five suits against government in seven years, even though statute did not require that five losing suits be frivolous, since statute required proof that suer had come into court again with suit with no reasonable probability of success in order to be declared vexatious litigant, which, coupled with abysmal history of failure, was sufficient to establish vexatiousness in sense of litigation lacking reasonable or probable cause or excuse. *Wolfgram v. Wells Fargo Bank (1997) 53 Cal. App. 4th 43, 55-59, 61 Cal. Rptr. 2d 694*

[12] Forced Expression

Solomon Amendment [*10 U.S.C. § 983*], specifying that if any part of institution of higher education denied military recruiters access equal to that provided other recruiters, entire institution would lose certain federal funds, did not infringe schools' *First Amendment* freedom of speech as forced speech, when Congress' constitutional authority to provide for common defense included authority to require campus access for military recruiters and Congress' power to regulate military recruiting under Solomon Amendment was arguably greater than *First Amendment* rights because universities were free to decline federal funds. Solomon Amendment neither limited what law schools could say nor required them to say anything, and conduct regulated by Solomon Amendment was not inherently expressive. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (2006) 547 U.S. 47, 126 S. Ct. 1297, 1306-1311, 164 L. Ed. 2d 156*

Provisions in state statute forbidding employers who received state grant or program funds in excess of $10,000 from using funds to assist, promote, or deter union organizing did not violate employers' *First Amendment* rights by compelling employers to take position of neutrality with regard to labor relations. Statutes did not impose any condition on receipt of state grant and program funds, and, because employer retained freedom to raise and spend its own funds however it wished, so long as it did not use state grant and program funds on union-related advocacy, statutes did not infringe employers' *First Amendment* right to express whatever view they wished on organizing. *Chamber of Commerce of the United States v. Lockyer (9th Cir. 2006) 463 F.3d 1076, 1096-1097*

District court's order that copy of preliminary injunction enjoining defendants from engaging in plan or arrangement advising or encouraging taxpayers to attempt to violate internal revenue laws or unlawfully evade assessment or collection of federal tax liabilities on defendants' websites did not violate their *First Amendment* rights by forcing them to promote ideological position with which they did not agree, because defendants sold product that, if used, could expose customers to criminal liability for tax evasion, and government did not offend *First Amendment* by warning potential customers of hazards of product. *United States v. Schiff (9th Cir. 2004) 379 F.3d 621, 630-631*

City could properly condition Sea Scouts' free berth at city marina on group's adoption ofmembership policy that expressly adopted nondiscrimination policy against homosexuals and atheists without violating group's *First Amendment* rights when city did not prohibit or penalize group's exercise of speech or associational rights. To extent Sea Scouts objected to compliance with city's policy, organization was free to terminate its participation in free berth program and avoid requirements of nondiscrimination provision. *Evans v. City of Berkeley (2006) 38 Cal. 4th 1, 10-21, 40 Cal. Rptr. 3d 205, 129 P.3d 394*

[13] Standing

Protestors had standing to maintain claim that Coast Guard's rule establishing security zone around harbor to allow high-speed ferry to dock prevented them from exercising their *First Amendment* right to communicate view that operation of ferry was illegal by blocking its entrance, where several protestors referenced *First Amendment* in their complaint, complaint detailed protests that had already occurred, and many protestors alleged their resolve to reenter water in protest should ferry return, and there was little doubt, based on affidavits in record, that once ferry resumed operations, Coast Guard would enforce security zone, and protestors' asserted *First Amendment* rights would be

implicated. *Wong v. Bush (9th Cir. 2008) 542 F.3d 732, 735-736*

Organization that organized two separate events covered by city ordinance had standing to challenge its facial constitutionality based on showing of injury in fact fairly traceable to ordinance that was likely to be redressed if its *First Amendment* action was successful, where city assessed departmental services charges against organization for second event and brought suit in state court to obtain payment, where organization provided evidence that it modified its behavior as a result of ordinance by declining to hold such events in city in future because of city's enforcement of ordinance, and where organization stated that if district court's permanent injunction against enforcement of ordinance were upheld, it would hold expressive events in city. *Long Beach Area Peace Network v. City of Long Beach (9th Cir. 2008) 522 F.3d 1010, 1018-1019*

Organization that organized marches and demonstrations and obtained permits to do so in other localities had standing to challenge city ordinance establishing permitting process for community events held in public spaces. Organization's apprehension that ordinance would be enforced against it for engaging in activities protected by *First Amendment* without permit was sufficient to establish injury-in-fact and support facial challenge, injury alleged was fairly traceable to ordinance, and injury would likely be redressed by decision in organization's favor. Fact that organization never applied for permit under ordinance did not destroy its standing because organization was subject to law and could challenge it facially without necessity of first applying for and being denied permit, and organization averred that it had modified its behavior by choosing locations other than city because of permit requirements. *Santa Monica Foods Not Bombs v. City of Santa Monica (9th Cir. 2006) 450 F.3d 1022, 1033-1034*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechCommercial SpeechGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechFighting WordsConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechForumsConstitutional LawBill of RightsFundamental FreedomsFreedom to PetitionConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechExpressive Conduct

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PART III. RESEARCH GUIDE

6-59 California Forms of Pleading and Practice--Annotated § 59.35

§ 59.35 Law Reviews

Baker, *Harm, Liberty, and Free Speech, 70 S. Cal. L. Rev. 979 (1997)*

Stevens, *The Freedom of Speech, 102 Yale L.J. 1293 (1993)*

Harel, *Bigotry, Pornography, and the First Amendment: A Theory of Unprotected Speech, 65 S. Cal. L. Rev. 1887 (1992)*

Comment, *Campus Anti-Slur Regulations: Speakers, Victims, and the First Amendment, 79 Cal. L. Rev. 919 (1991)*

Note, *The University of California Hate Speech Policy: A Good Heart in Ill-Fitting Garb, 12 Hastings Comm. & Ent. L.J. 599 (1990)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechObscenityConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechGeneral Overview

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6-59 California Forms of Pleading and Practice--Annotated § 59.36

§ 59.36 Text References

Witkin, Summary of California Law, vol. 7, *Constitutional Law*, §§ 311-504 (10th ed. 2005)

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6-59 California Forms of Pleading and Practice--Annotated §§ 59.37-59.49

[Reserved]

§§ 59.37[Reserved]

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Chapter 59 ASSEMBLIES, MEETINGS, AND DEMONSTRATIONS
PART IV. FORMS

6-59 California Forms of Pleading and Practice--Annotated § 59.50

§ 59.50 Complaint Against Public Entity and Officials for Injunctive and Declaratory Relief for Denial of Right to Freedom of Expression [U.S. Const., amend. I, XIV; Cal. Const., art. I, § 2]--Denial of Application for Access to Public Forum

[1] FORM Complaint Against Public Entity and Officials for Injunctive and Declaratory Relief for Denial of Right to Freedom of Expression [U.S. Const., amend. I, XIV; Cal. Const., art. I, § 2]--Denial of Application for Access to Public Forum

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	COMPLAINT FOR INJUNCTIVE AND DECLAR-
Defendant(s).	)	ATORY RELIEF
	)	
	)	

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Injunctive Relief Against Violation of Constitutional Right to Free Speech and Free Assembly)

1. Plaintiff _____ [*name*] is _____ [*allege facts regarding plaintiff's capacity and standing, e.g.,* a California nonprofit corporation organized for the purpose of (*describe in detail purpose of corporation*). Plaintiff's principal place of business is located at _____ (*city*), _____ County, California].

2. Defendant _____ [*name of government entity*] is, and at all times herein mentioned was, _____ [*state capacity and type of governmental entity*], duly organized under the laws of the State of California, and was empowered and authorized to _____ [*describe duties and operations of entity, e.g.,* enforce all rules and regulations for government operations and management of the public facilities and properties under its jurisdiction]. [*Unless defendant is the county, add:* Defendant _____ (*name of governmental entity*) is located and operates within the County of _____.]

3. Defendant, _____ [*name*], is, and at all times herein mentioned was, _____ [*allege capacities and duties of any individual defendant(s), e.g.,* the chief administrative officer of defendant _____ (*name of governmental entity*), and is and at all times herein mentioned has been responsible for the enforcement of ordinances, rules, and regulations pertaining to facilities and property owned and/or operated by defendant _____ (*name of governmental entity*)].

4. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by the wrongful conduct of these fictitiously named defendants.]

5. [Plaintiff is informed and believes and thereon alleges that] [A]t all times herein mentioned, defendants _____ [*names*], were the agents, servants, and employees of their codefendants and in doing the things hereinafter alleged were acting within the course and scope of their authority as agents, servants, and employees with the permission and consent of their codefendants.

6. [Plaintiff is informed and believes and thereon alleges that] [A]t all times herein mentioned defendant _____ [*name*] was authorized and empowered by defendant _____ [*name of principal*] to act and did act as the agent of defendant _____ [*name of principal*], and each and all of the things herein alleged to have been done by him/her were done in the capacity of and as agent for defendant _____ [*name of principal*].

7. [Plaintiff is informed and believes and thereon alleges that] [A]t all times herein mentioned, each of the defendants sued herein as DOES I-_____, inclusive, was the agent and employee of each of the remaining defendants and was at all times acting within the course and scope of that agency and employment.

8. Defendant _____ [*name of entity*] has promulgated an ordinance that requires certain public facilities and properties under its jurisdiction to be dedicated as forums for members of the public and/or public groups to _____ [*specify nature of use, e.g.,* use to peaceably meet, assemble, and disseminate and convey messages and information to the public]. A copy of this ordinance is attached hereto as Exhibit _____ and made a part of this complaint by reference.

9. Among the facilities and properties covered by the ordinance referred to in Paragraph 8 is _____ [*identify and describe public facility that plaintiff desires to use for speech activities*].

10. On _____ [*date*], defendant _____ [*name of official*], established procedures to implement the ordinance that included specific requirements for administration of the ordinance referred to in Paragraph 9. Any members of the public and/or public groups who wished to use any facilities or properties operated by defendant _____ [*name of entity*] as a public forum for assembly, as described in Paragraph 9, were required to submit an application for a permit to defendant _____ [*name of official*] for approval as to time, place, and manner of use of the forum. A copy of these procedures is attached hereto as Exhibit _____ and made a part of this

complaint by reference.

11. On _____ [*date*], plaintiff _____ [*name(s)*] submitted an application for a permit to use the _____ [*name of public facility referred to in Paragraph 9*] as a public forum by [*specify manner of application, e.g.,* fully and properly completing the application as described in Paragraph 10 and submitting it to defendant _____ (*name of official*)'s office]. The application stated that plaintiff wished to use the _____ [*name of public facility*] to peaceablyassemble for the purpose of _____ [*describe in detail the purpose and nature of plaintiff's proposed use of public facility, alleging any facts necessary to show that plaintiff's activities are constitutionally protected, e.g.,* distributing literature and displaying signs informing the public of plaintiff's position and opinions on the subject of _____ (*specify*)].

12. On _____ [*date*], defendant(s) informed plaintiff [by letter] that his/her/its application for a permit was denied on grounds that _____ [*specify reasons, e.g.,* defendant did not consider use of its facilities and properties to be suitable for the purpose of plaintiff's meeting because of its concern for maintaining public safety and it did not believe the forum to be a suitable place for conveying plaintiff's message].

13. _____ [*Allege subsequent efforts, if any, to obtain reconsideration of permit denial, e.g.,* On _____ (*date*), plaintiff contacted defendant _____ (*name of official*) and requested a meeting to discuss the denial of the application for permit and request reconsideration of the denial. Defendant _____ (*name of official*) declined to attend such a meeting and further indicated that there was no process for appealing defendants' decision].

[14. Plaintiff is informed and believe, and on that basis alleges, that the denial of his/her/its application for use of _____ (*identify public facility or property*) as a public forum was based wholly or in part on defendants' disagreement with the content of the message that plaintiff intended to convey, that is, _____ (*specify nature and content of message to be conveyed by plaintiff*).]

[*EITHER*]

15. _____ [*Identify public facility*] is a public forum that has traditionally been used by members of the public for expressive activities.

[*OR*]

15. By passing an ordinance described in Paragraph 8, defendant _____ [*name of entity*] has designated _____ [*identify public facility*] as a public forum for use by members of the public for expressive activities.

[*CONTINUE*]

16. No compelling state interest justifies defendants' refusal to make _____ [*identify public facility*] available for use by plaintiff to convey his/her/its constitutionally protected speech and message. In fact, defendants articulated no legitimate governmental reason whatsoever for refusing plaintiff use of _____ [*identify public facility*] to convey his/her/its message. Defendants' decision to refuse plaintiff's request for use of _____ [*identify public facility*] was wholly arbitrary.

17. As a proximate result of defendants' policies and actions, plaintiff has been deprived of the right to free speech and assembly as guaranteed by the *First* and *Fourteenth Amendments of the United States Constitution* and by *California Constitution, Article I, Sections 2* and *3*.

18. Unless defendants are restrained by injunction, plaintiff will continue to suffer severe, irreparable harm in that _____ [*describe harm, e.g.,* the message proposed by plaintiff will not be conveyed in a public forum in defendants' jurisdiction and plaintiff's constitutional rights to express its message as described in Paragraph 10 will continue to be violated]. Plaintiff is informed and believes, and on that basis alleges, that unless the court grants injunctive relief, defendants will continue to prohibit plaintiff's exercise of free speech, and plaintiff and the public will continue to suffer injury as described in Paragraph 17.

19. Plaintiff has no adequate remedy at law because monetary damages will not afford adequate relief for the suppression of plaintiff's message and the deprivation of plaintiff's constitutional rights.

SECOND CAUSE OF ACTION
(Declaratory Relief)

20. Plaintiff incorporates by reference the allegations of Paragraphs 1 through 19, inclusive, in the First Cause of Action, above, as though fully set forth here.

21. An actual controversy has arisen and now exists between plaintiff and defendants regarding their respective rights and duties in that plaintiff contends that defendants' rules, policies, and practices concerning the use of its facilities and properties for speech activities, as described in Paragraphs 8 through 14 inclusive, of the First Cause of Action set forth above, violate plaintiff's rights of freedom of speech and freedom of assembly under the *First* and *Fourteenth Amendments of United States Constitution* and under the *California Constitution, Article I, Section 2*, in the following manner: _____ [*specify manner in which policies and actions amount to constitutional violation, e.g.,* Defendants' rules vest total discretion in defendant _____ (*name of official*) to determine and allocate use of defendant _____'s (*name of entity*) property for speech activities and permits arbitrary suppression of messages with which defendant _____ (*name of official*) disagrees]. Defendants dispute these contentions and contend that the rules, policies, and practices described in this complaint are lawful and constitutional.

22. Plaintiff desires a declaration as to the validity of defendant's rules, policies, and practices, as described in this complaint, both on their face and as applied to plaintiff's permit application and proposed free speech activities. Unless the court issues an appropriate declaration of rights, the parties will not know whether defendants' policies and procedures comply with the law, and there will continue to be disputes and controversy surrounding the defendants' current policies for permitting use of and access to its facilties and properties, including _____ [*identify facility*], for public use and dissemination of information and messages.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant(s) and his/her/their/its agents, servants, and employees, and all such persons acting under, in concert with, or for him/her/them/it from denying plaintiff's constitutional right to express his/her/its views and inparticular to require defendants, and each of them, to grant plaintiff's application for a permit to use _____ [*identify facility*] as a public forum for the purposes of distributing literature and other free speech activities, as described in Paragraph 11 of this complaint;

2. For a declaration by the court of the rights and duties of plaintiff herein, and specifically for a declaration that

_____ [*describe declaratory judgment sought, e.g.,* the policies and practices of defendants are unconstitutional as a violation of plaintiff's rights, as described in Paragraph 21];

3. For reasonable attorney's fees according to proof, pursuant to *Code of Civil Procedure Section 1021.5*;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read this complaint and know its contents. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date and place*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above,* is a complaint for use in an action arising from a governmental agency's violation of the plaintiff's constitutional rights of free speech and assembly by denying a permit to use a public forum for constitutionally protected expressive activities. The form combines a complaint for injunctive relief [*see generally Civ. Code §§ 3420-3423*; *Code Civ. Proc. §§ 526, 527*; Ch. 303, *Injunctions*] against the defendants' violations of plaintiff's constitutional rights (First Cause of Action), with a complaint for declaratory relief [*see generally Code Civ. Proc. § 1060*; Ch. 182, *Declaratory Relief*] requesting that the court declare the defendants' rules, policies, and practices to be unconstitutional (Second Cause of Action). For discussion of free speech rights in public forums, see *§ 59.13*.

In an appropriate case, counsel may wish to add to this complaint a cause of action under *42 U.S.C. § 1983* for damages for deprivation of federal constitutional rights under color of state law. For discussion of the general requirements for establishing a cause of action under that statute and a general form of complaint that may be adapted for that purpose, see Ch. 112, *Government-Funded Programs and Activities* .

Plaintiff's counsel may also wish to join a petition for writ of mandate compelling the governmental entity to immediately issue the permit to plaintiff for exercise of free speech [*see generally Code Civ. Proc. §§ 427.10, 1084 et seq.*; *Wrather-Alvarez Inc. v. Hewicker (1957) 147 Cal. App. 2d 509, 511, 305 P.2d 236]* with the causes of action for declaratory and injunctive relief. For discussion of mandate proceedings, see Ch. 358, *Mandate and Prohibition* .

The prayer of the complaint includes a request for attorney fees under the statutory "private attorney general" provision [*see Code Civ. Proc. § 1021.5*]. For discussion of criteria and procedures for an award of attorney's fees under that statute, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

[3] Allegations

[a] Injunctive Relief

The First Cause of Action in [1], *above*, seeks injunctive relief and alleges the following:

- Plaintiff's capacity (Paragraph 1).

- Defendants' capacities as a governmental entity and officials (Paragraphs 2, 3).

- Agency and fictitious name allegations (Paragraphs 4-7).

- Location and description of the public facility or property that plaintiff wishes to use for free speech activities (Paragraph 9) and its status as a traditional or designated public forum (Paragraph 15) [*see, e.g., Clark v. Burleigh (1992) 4 Cal. 4th 474, 482-483, 14 Cal. Rptr. 2d 455, 841 P.2d 975* ; *see generally* discussion in *§ 59.13*].

- Defendants' permit rules and other policies regarding the use of its facilities for such activities (Paragraphs 8, 10).

- Plaintiff's application for a permit to use the public facility for free speech activities and facts showing that the intended use was constitutionally protected under *U.S. Const., amend. I, XIV*, and *Cal. Const., art. I, §§ 2, 3* (Paragraph 11).

- Defendants' refusal to grant the permit and the reasons given for the denial, if any (Paragraph 12).

- Plaintiff's subsequent efforts to obtain reconsideration of the permit denial, if any (Paragraph 13).

- Defendants' lack of a constitutionally sufficient justification for denying plaintiff access to the public forum and the consequent violation of plaintiff's rights of free speech and assembly under *U.S. Const., amend. I, XIV*, and *Cal. Const., art. I, §§ 2, 3* (Paragraphs 16, 17).

- Facts showing how defendants' denial of permit to use the public forum constitutes great and irreparable injury to plaintiff's constitutional rights (Paragraph 18) [*see Code Civ. Proc. § 526(a)(2)*; *E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1]* .

- Facts showing plaintiff lacks an adequate remedy at law (Paragraph 19) [*see Civ. Code § 3422(1)-(3)*; *Code Civ. Proc. § 526(a)(4)-(6)*].

[b] Declaratory Relief

The Second Cause of Action in [1], *above*, seeks declaratory relief. It incorporates by reference the allegations of the First Cause of Action (Paragraph 20) and alleges the following:

- Facts showing the existence of an actual controversy between the parties concerning their respective

rights and duties, including the parties' conflicting contentions regarding the constitutionality of defendants' actions (Paragraph 21) [*see Code Civ. Proc. § 1060*].

- Plaintiff's present need for a declaration of his, her, or its rights (Paragraph 22) [*see Code Civ. Proc. §§ 1060, 1061*].

[4] Verification

Verification [*see Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavits (or declarations under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*; *see generally* Ch. 303, *Injunctions*]. In addition, if a temporary restraining order is sought without notice on the other party, the certification requirements of *Code Civ. Proc. § 527(c)* must be satisfied. For discussion of the procedural requirements for obtaining a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

If no preliminary injunctive relief is sought, the complaint need not be verified [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified); *see also Code Civ. Proc. § 128.7(j)* (§ 128.7 applies to complaint or petition filed on or after January 1, 1995, and any other pleading, written notice of motion, or other similar paper filed in that matter)].

A public entity need not verify its answer even though the complaint is verified [*see Code Civ. Proc. § 446(a)*]. However, the verification of a complaint against a public entity does preclude a general denial in superior court actions that are not limited civil cases [*see Code Civ. Proc. § 431.30(d)*].

[5] Jurisdiction and Venue

The complaint should contain allegations showing that the action has been commenced in the proper county for trial. The proper place for trial of an action against a public officer for an act done by him or her "in virtue of the office" is the county in which the cause of action arose [*see Code Civ. Proc. § 393(b)*]. An action against a city, county, or other local public entity may be tried in the county in which the defendant public entity is located [*see Code Civ. Proc. § 394(a)*]. As a practical matter, an action against a local governmental entity and its officials arising out of challenges to restrictions on speech activities will normally be brought in the county in which the entity is located, which will also normally be the place where the cause of action arose.

For discussion of venue in actions against the State of California, see Ch. 571, *Venue* .

An action seeking permanent injunctive relief is in the jurisdiction of the superior court and is not a limited civil case [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*].

[6] Cross References

For alternative complaints and allegations concerning declaratory relief, see Ch. 182, *Declaratory Relief*

For alternative complaints, allegations, orders, and defenses concerning injunctive relief, see Ch. 303, *Injunctive Relief*

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons and complaint generally, see Ch. 518, *Service of Summons and Papers*

For other forms of allegations showing proper venue, see Ch. 571, *Venue* .

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6-59 California Forms of Pleading and Practice--Annotated § 59.50A

§ 59.50A Petition for Writ of Mandate for Expedited Judicial Review of Denial by Public Agency of Permit Involving Expressive Conduct Protected by U.S. Const., amend. I [Code Civ. Proc. § 1094.8]

[1] FORM Petition for Writ of Mandate for Expedited Judicial Review of Denial by Public Agency of Permit Involving Expressive Conduct Protected by U.S. Const., amend. I

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	PETITION FOR WRIT OF MANDATE FOR RE-
Respondent(s).	)	VIEW OF PUBLIC AGENCY DENIAL OF PERMIT
	)	FOR EXPRESSIVE CONDUCT PROTECTED BY
	)	*FIRST AMENDMENT* TO UNITED STATES CON-
		STITUTION

_____

ATTENTION: THIS MATTER IS ENTITLED TO PRIORITY AND SUBJECT TO THE EXPEDITED HEARING AND REVIEW PROCEDURES CONTAINED IN SECTION 1094.8 OF THE CODE OF CIVIL PROCEDURE.

1. Petitioner _____ [*name*] is _____ [*allege facts regarding plaintiff's capacity and standing, e.g.*, a California nonprofit corporation organized for the purpose of (*describe in detail purpose of corporation*). Plaintiff's principal place of business is located at _____ (*city*), _____ County, California].

2. Respondent _____ [*name of public agency*] is, and at all times herein mentioned was, _____ [*state capacity and type of public agency*], duly organized under the laws of the State of

California, and was empowered and authorized to _____ [*describe duties and operations of agency, e.g.,* issue permits for the use of public facilities and properties under its jurisdiction by the general public]. [*Unless defendant is the county, add:* Respondent _____ (*name of public agency*) is located and operates within the County of _____.]

3. Respondent _____ [*name*], is, and at all times herein mentioned was, _____ [*allege capacities and duties of any individual respondent(s), e.g.,* the chief administrative officer of defendant _____ (*name of public agency*), and is and at all times herein mentioned has been responsible for the issuance, revocation, suspension, or denial of permits for the use of facilities and property owned and/or operated by defendant _____ (*name of public agency*)].

4. Respondent _____ [*name of agency*] has promulgated an ordinance that requires certain public facilities and properties under its jurisdiction to be dedicated as forums for members of the public and/or public groups to _____ [*specify nature of use, e.g.,* use to peaceably meet, assemble, and disseminate and convey messages and information to the public]. A copy of this ordinance is attached hereto as Exhibit _____ and made a part of this complaint by reference.

5. Among the facilities and properties covered by the ordinance referred to in Paragraph 4 is _____ [*identify and describe public facility that petitioner desires to use for speech activities*].

6. On _____ [*date*], respondent _____ [*name of official*], established procedures to implement the ordinance that included specific requirements for administration of the ordinance referred to in Paragraph 4. Any members of the public and/or public groups who wish to use any facilities or properties operated by respondent _____ [*name of agency*] as a public forum for assembly, as described in Paragraph 4, are required to submit an application for a permit to respondent _____ [*name of official*] for approval as to time, place, and manner of use of the forum. A copy of these procedures is attached hereto as Exhibit _____ and made a part of this complaint by reference.

7. On _____ [*date*], petitioner _____ [*name(s)*] submitted an application for a permit to use the _____ [*name of public facility referred to in Paragraph 5*] as a public forum by [*specify manner of application, e.g.,* fully and properly completing the application as described in Paragraph 6 and submitting it to respondent _____ (*name of official*)'s office]. The application stated that petitioner wished to use the _____ [*name of public facility*] to peaceably assemble for the purpose of _____ [*describe in detail the purpose and nature of petitioner's proposed use of public facility, alleging any facts necessary to show that petitioner's activities are constitutionally protected, e.g.,* distributing literature and displaying signs informing the public of petitioner's position and opinions on the subject of _____ (*specify*)].

8. On _____ [*date*], respondent(s) informed petitioner [by letter] that his/her/its application for a permit was denied on grounds that _____ [*specify reasons, e.g.,* respondent did not consider use of its facilities andproperties to be suitable for the purpose of petitioner's meeting because of a concern for maintaining public safety and it did not believe the forum to be a suitable place for conveying petitioner's message].

9. _____ [*Allege subsequent efforts, if any, to obtain reconsideration of permit denial, e.g.,* On _____ (*date*), petitioner contacted respondent _____ (*name of official*) and requested a meeting to discuss the denial of the application for permit and request reconsideration of the denial. Respondent _____ (*name of official*) declined to attend such a meeting and further indicated that there was no process for appealing respondents' decision].

[10. Petitioner is informed and believe, and on that basis alleges, that the denial of his/her/its application for use of

_____ (*identify public facility or property*) as a public forum was based wholly or in part on respondents' disagreement with the content of the message that petitioner intended to convey, that is, _____ (*specify nature and content of message to be conveyed by plaintiff*).]

[*EITHER*]

11. _____ [*Identify public facility*] is a public forum that has traditionally been used by members of the public for expressive activities.

[*OR*]

11. By passing an ordinance described in Paragraph 4, respondent _____ [*name of entity*] has designated _____ [*identify public facility*] as a public forum for use by members of the public for expressive activities.

[*CONTINUE*]

12. No compelling state interest justifies respondents' refusal to make _____ [*identify public facility*] available for use by petitioner to convey his/her/its constitutionally protected speech and message. In fact, respondents articulated no legitimate governmental reason whatsoever for refusing petitioner use of _____ [*identify public facility*] to convey his/her/its message. Respondents' decision to refuse petitioner's request for use of _____ [*identify public facility*] was wholly arbitrary.

13. As a proximate result of respondents' policies and actions, petitioner has been deprived of the right to free speech and assembly as guaranteed by the *First* and *Fourteenth Amendments of the United States Constitution* and by *California Constitution, Article I, Sections 2* and *3*.

14. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition, because monetary damages will not afford adequate relief for the suppression of plaintiff's message and the deprivation of plaintiff's constitutional rights, and _____ [*specify facts showing absence of any other adequate legal remedy such as appeal*].

[15. Respondents' denial of petitioner's application for a permit to _____ (*describe in detail the purpose and nature of petitioner's proposed use of public facility*) has damaged petitioner in the sum of $_____ in that _____ (*describe facts showing petitioner's damages, if any*).]

WHEREFORE, petitioner prays judgment against respondents, and each of them, as follows:

1. That the court issue a peremptory writ in the first instance commanding respondents, and each of the, to grant petitioner's application for a permit to use _____ [*identify facility*] as a public forum for the purposes of _____ [*specify purposes for which petitioner applied for permit, e.g.* distributing literature and other free speech activities, as described in Paragraph 7 of this complaint]; or

2. That the court, alternatively, first issue an alternative writ commanding respondents to _____ grant petitioner's application for a permit to use _____ [*identify facility*] as a public forum for the purposes of _____ [*specify purposes for which petitioner applied for permit, e.g.* distributing literature and other free speech activities, as described in Paragraph 7 of this complaint] or, in the alternative, show cause why it they

should not do so, and thereafter a peremptory writ commanding respondents to grant petitioner's application for a permit to use _____ [*identify facility*] as a public forum for the purposes of _____ [*specify purposes for which petitioner applied for permit, e.g.,* distributing literature and other free speech activities, as described in Paragraph 7 of this complaint];

[3. For damages in the sum of $_____;]

[4. For reasonable attorney's fees according to proof, pursuant to *Code of Civil Procedure Section 1021.5*;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read this petition and know its contents. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form is a petition for writ of mandate for expedited judicial review of a decision by a local public agency to deny a permit involving expressive conduct in a public forum protected by *U.S. Const., amend. I*, pursuant to *Code Civ. Proc. § 1094.8*. An action for expedited review under *Code Civ. Proc. § 1094.8* by the permit applicant must be in the form of a petition for writ of mandate pursuant to *Code Civ. Proc. §§ 1085* or *1094.5*.

For discussion of free speech rights in public forums, see *§ 59.13*; for discussion of mandate proceedings generally, see Ch. 358, *Mandate and Prohibition* ; for discussion of administrative mandate proceedings, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

In an appropriate case, counsel may wish to join a complaint asserting a cause of action under *42 U.S.C. § 1983* for damages for deprivation of federal constitutional rights under color of state law. For discussion of the general

requirements for establishing a cause of action under that statute and a general form of complaint that may be adapted for that purpose, see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

The prayer of the complaint includes a request for attorney fees under the statutory "private attorney general" provision [*see Code Civ. Proc. § 1021.5*]. For discussion of criteria and procedures for an award of attorney's fees under that statute, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

[3] Allegations

The petition alleges the following:

- Petitioner's capacity (Paragraph 1).

- Respondents' capacities as a public agency and as officials (Paragraphs 2, 3).

- Location and description of the public facility or property that petitioner wishes to use for free speech activities (Paragraph 5) and its status as a traditional or designated public forum (Paragraph 11) [*see, e.g., Clark v. Burleigh (1992) 4 Cal. 4th 474, 482-483, 14 Cal. Rptr. 2d 455, 841 P.2d 975* ; *see generally* discussion in *§ 59.13*].

- Respondents' permit rules and other policies regarding the use of the agency's facilities for such activities (Paragraph 4, 6).

- Petitioner's application for a permit to use the public facility for free speech activities and facts showing that the intended use was constitutionally protected under *U.S. Const., amend. I* and *Cal. Const., art. I, §§ 2, 3* (Paragraph 7).

- Respondents' refusal to grant the permit and the reasons given for the denial, if any (Paragraph 8).

- Petitioner's subsequent efforts to obtain reconsideration of the permit denial, if any (Paragraph 9).

- Respondents' lack of a constitutionally sufficient justification for denying petitioner access to the public forum and the consequent violation of petitioner's rights of free speech and assembly under *U.S. Const., amend. I* and *Cal. Const., art. I, §§ 2, 3* (Paragraphs 10, 12).

- That respondents' denial of permit to use the public forum constitutes great and irreparable injury to petitioner's constitutional rights (Paragraph 13).

- Facts showing petitioner lacks an adequate remedy at law (Paragraph 14).

- Damages, if any, suffered by petitioner as a result of respondents' denial of the permit (Paragraph 15).

[4] Notice of Priority and Expedited Hearing and Review

Code Civ. Proc. § 1094.8(d)(3) requires that a petition for expedited judicial review of decisions by local public agencies regarding the issuance, revocation, suspension or denial of a permit involving expressive conduct protected by *U.S. Const., amend. I*, must contain the following language in 18-point type:

ATTENTION: THIS MATTER IS ENTITLED TO PRIORITY AND SUBJECT TO THE EXPEDITED

HEARING AND REVIEW PROCEDURES CONTAINED IN SECTION 1094.8 OF THE CODE OF CIVIL PROCEDURE.

[5] Verification

A petition for writ of mandate must be verified [*Code Civ. Proc. §§ 1086, 1103*]. The verification requirement may be met by affidavit or by declaration under penalty of perjury [*Code Civ. Proc. §§ 446, 1109, 2015.5*]. For discussion of the verification requirements for a petition for writ of mandate, see Ch. 358, *Mandate and Prohibition* .

[6] Jurisdiction and Venue

The petition should contain allegations showing that the action has been commenced in the proper county for trial. The proper place for trial of an action against a public officer for an act done by him or her "in virtue ofthe office" is the county in which the cause of action arose [*see Code Civ. Proc. § 393(b)*]. An action against a city, county, or other local public entity may be tried in the county in which the defendant public entity is located [*see Code Civ. Proc. § 394(a)*]. As a practical matter, an action against a local governmental entity and its officials arising out of challenges to restrictions on speech activities will normally be brought in the county in which the entity is located, which will also normally be the place where the cause of action arose. For discussion of filing a petition for writ of mandate in Los Angeles County, see Ch. 358, *Mandate and Prohibition* , Form 1; for discussion of venue in actions against the State of California, see Ch. 571, *Venue* .

[7] Points and Authorities

Neither the Code of Civil Procedure nor the California Rules of Court require points and authorities when a petition for writ of mandate is filed in superior court. However, points and authorities are required by practice in some local rules. Before filing the petition, counsel should ascertain the local practice and rules. However, even if points and authorities are not required by local rules or practice, it is advisable to include a memorandum. For further discussion, see *Ch. 474C, Procedures in Reviewing Agency Decisions, § 474C.13[9]*.

[8] Cross References

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For discussion and forms relating to the format of a petition for writ of mandate, see Ch. 358, *Mandate and Prohibition*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to administrative mandate generally, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

For discussion and forms relating to service of initial pleadings generally, see Ch. 518, *Service of Summons and Papers*

For other forms of allegations showing proper venue, see Ch. 571, *Venue*

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California Forms of Pleading and Practice--Annotated

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 59 ASSEMBLIES, MEETINGS, AND DEMONSTRATIONS
PART IV. FORMS

6-59 California Forms of Pleading and Practice--Annotated § 59.51

§ 59.51 Complaint Against Action Against Owner and Operator of Shopping Center for Injunctive and Declaratory Relief for Denial of Right to Freedom of Expression [Cal. Const., art. I, § 2]--Denial of Access to Shopping Center for Free Speech Activities

[1] FORM Complaint Against Action Against Owner and Operator of Shopping Center for Injunctive and Declaratory Relief for Denial of Right to Freedom of Expression [Cal. Const., art. I, § 2]--Denial of Access to Shopping Center for Free Speech Activities

[*Caption. See § 59.50[1].*]

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Injunctive Relief Against Violation of State Constitutional Right to Free Speech and Free Assembly)

1. [*Plaintiff's capacity and standing. See § 59.50[1], Paragraph 1.*]

2. Defendant _____ [*name of shopping center owner/operator*] is, and at all times herein mentioned was, _____ [*state defendant's capacity, e.g.,* a corporation organized and existing under the laws of the State of California, with its principal place of business in this state at _____ (*city*), County of _____, California].

3. Defendant _____ [*name of individual defendant*] is, and at all times herein mentioned was, _____ [*allege capacities and duties of any individual defendant(s), e.g.,* an employee of defendant _____ (*name of shopping center owner/operator*), and is and at all times herein mentioned has been responsible for security at retail shopping center facilties operated by defendant _____ (*name of shopping center owner/operator*)].

4. [*Fictitious name allegations. See § 59.50[1], Paragraph 4.*]

5-7. [*Agency allegations. See § 59.50[1], Paragraphs 5-7.*]

8. Defendant _____ [*name of shopping center owner/operator*] _____ [owns *and/or* operates] a retail shopping center known as _____ [*name of shopping center*], which is located at _____ [*address*], in the City of _____, County of _____, California.

9. _____ [*Name of shopping center*] has frequently been used by members of the public for expressive activities, such as picketing and the distribution of political and religious literature, and has served as the functional equivalent of a traditional public forum such as a town square or public sidewalk for the City of _____.

10. On _____ [*date*], plaintiff _____ [*name*] entered the premises of _____ [*name of shopping center*] for the purpose of _____ [*describe in detail the purpose and nature of plaintiff's use of public forum, alleging any facts necessary to show that plaintiff's activities are constitutionally protected, e.g.,* peacefully distributing literature informing the public of plaintiff's position and opinions on the subject of _____ (*specify*)].

11. _____ [*Describe plaintiff's actions and defendant's response, e.g.,* On entering the premises of _____ (*name of shopping center*), plaintiff began peacefully and politely distributing leaflets to customers, as described in Paragraph 10. A copy of the leaflet that plaintiff distributed is attached hereto as Exhibit _____ and incorporated in this complaint by reference. Shortly after plaintiff began distributing his/her leaflets, defendant's employees and agents _____ (*names*) approached plaintiff and told him that he/she could not distribute the leaflets anywhere on the premises of _____ (*name of shopping center*). When plaintiff stated that he/she believed that he/she had a constitutional right to distribute the leaflets and that he/she intended to continue doing so, defendant's employees and agents used abusive language toward plaintiff and threatened to have him/her arrested if he/she did not cease distributing the literature and leave the premises. Upon being threatened with arrest, plaintiff left the premises].

12. _____ [*Allege subsequent efforts, if any, to excercise free speech rights on the premises, e.g.,* On _____ (*date*), plaintiff returned to the premises of _____ (*name of shopping center*) and began peacefully distributing the same leaflets referred to in Paragraph 11. Plaintiff was again approached by an employee and agent of defendant _____ (*name of shopping center owner/operator*) and asked to leave the premises. Plaintiff refused to leave and asked to speak to the manager in charge of (*name of shopping center*). Plaintiff was escorted to the office of defendant _____ (*name of shopping center manager*), who informed plaintiff that his/her leaflets were "too controversial" and "may cause problems" and that some of the tenant-merchants disagreed with plaintiff's views and had complained about the leaflets. Defendant _____ (*name of shopping center manager*) further stated that _____ (*name of shopping center*) was private property and that since plaintiff had not entered the premises to patronize any of the businesses located therein, plaintiff was a trespasser and that defendant _____ (*name of shopping center manager*) would call the police and have plaintiff arrested if he/she did not leave voluntarily. Plaintiff thereupon left the premises].

13. No constitutionally sufficient interest justifies defendants' refusal to make _____ [*name of shopping center*] available for use by plaintiff to convey his/her/its constitutionally protected speech and message. In fact, defendants articulated no legitimate reason whatsoever for refusing plaintiff use of _____ [*name of shopping center*] to convey his/her/its message. Defendants' decision to refuse plaintiff's request for use of _____ [*name of shopping center*] was wholly arbitrary.

14. As a proximate result of defendants' policies and actions, plaintiff has been deprived of the right to free speech and assembly as guaranteed by the *California Constitution, Article I, Sections 2* and *3*.

15. [*Irreparable injury justifying injunctive relief. See § 59.50[1], Paragraph 18.*]

16. [*Lack of adequate remedy at law. See § 59.50[1], Paragraph 19.*]

SECOND CAUSE OF ACTION
(Declaratory Relief)

17. Plaintiff incorporates by reference the allegations of Paragraphs 1 through 16, inclusive, in the First Cause of Action, above, as though fully set forth here.

18. An actual controversy has arisen and now exists between plaintiff and defendants regarding their respective rights and duties in that plaintiff contends that defendants' rules, policies, and practices concerning the use of _____ [*name of shopping center*] for speech activities, as described in Paragraphs 11 and 12, inclusive, of the First Cause of Action set forth above, violate plaintiff's rights of freedom of speech and freedom of assembly under the *California Constitution, Article I, Section 2*, in the following manner: _____ [*specify manner in which policies and actions amount to constitutional violation, e.g.,* Defendants' total refusal to permit plaintiff to distribute his/her leaflets on the premises of _____ (*name of shopping center*) prevents plaintiff's use of an important public forum for the dissemination of his/her message. Plaintiff is informed and believes and thereon alleges that defendants' actions and policies were based in part on defendants' disagreement with plaintiff's message and in part on undifferentiated and unsubstantiated fears of disruption and are not justified by any constitutionally sufficient interest of defendants]. Defendants dispute these contentions and contend that the rules, policies, and practices described in this complaint are lawful and constitutional.

19. Plaintiff desires a declaration as to the validity of defendant's rules, policies, and practices, as described in this complaint, both on their face and as applied to plaintiff's free speech activities. Unless the court issues an appropriate declaration of rights, the parties will not know whether defendants' policies and procedures comply with the law, and there will continue to be disputes and controversy surrounding the defendants' current policies for permitting use of and access to _____ [*name of shopping center*] for public use and dissemination of information and messages.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant(s) and his/her/their/its agents, servants, and employees, and all such persons acting under, in concert with, or for him/her/them/it from denying plaintiff's constitutional right to express his/her/its views and in particular to require defendants, and each of them, to permit plaintiff to use _____ [*name of shopping center*] as a public forum for the purposes of distributing literature and other free speech activities, as described in Paragraph 10 of this complaint;

2. For a declaration by the court of the rights and duties of plaintiff herein, and specifically for a declaration that _____ [*describe declaratory judgment sought, e.g.,* the policies and practices of defendants are unconstitutional as a violation of plaintiff's rights, as described in Paragraph 18];

3. For reasonable attorney's fees according to proof, pursuant to *Code of Civil Procedure Section 1021.5*;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 59.50[1].*]

[2] Use of Form

This form is a complaint for use in an action arising from a shopping center owner's denial of access to a shopping center for free speech activities. The form combines a complaint for injunctive relief [*see generally Civ. Code §§ 3420-3423*; *Code Civ. Proc. §§ 526, 527*; Ch. 303, *Injunctions*] against the defendants' violations of plaintiff's constitutional rights (First Cause of Action), with a complaint for declaratory relief [*see generally Code Civ. Proc. § 1060*; Ch. 182, *Declaratory Relief*] requesting that the court declare the defendants' rules, policies, and practices to be unconstitutional (Second Cause of Action). For discussion of free speech rights in shopping centers and other similar private property, see *§ 59.14[2]*.

The prayer of the complaint includes a request for attorney fees under the statutory "private attorney general'provision [*see Code Civ. Proc. § 1021.5*]. For discussion of criteria and procedures for an award of attorney's fees under that statute, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

[3] Allegations

[a] Injunctive Relief

The First Cause of Action in [1], *above,* seeks injunctive relief and alleges the following:

- Plaintiff's capacity (Paragraph 1).
- Capacities of the defendant shopping center owner and any individual defendants (Paragraphs 2, 3).
- Agency and fictitious name allegations (Paragraphs 4-7).
- Defendant's ownership of a shopping center and location of the property (Paragraph 8).
- The shopping center's status as a public forum (Paragraph 9) [*see, e.g., Robins v. Pruneyard Shopping Center (1979) 23 Cal. 3d 899, 910 , aff'd 447 U.S. 74 (1980)* ; *Savage v. Trammell Crow Co. (1990) 223 Cal. App. 3d 1562, 1576-1581, 273 Cal. Rptr. 302* ; *see generally* discussion in *§ 59.14[2][a]*].
- Plaintiff's attempt to use the shopping center premises for free speech activities protected under *Cal. Const., art. I, §§ 2, 3* (Paragraphs 10, 11).

- Defendants' interference with plaintiff's attempt to exercise his or her free speech rights (Paragraphs 11, 12).

- Defendants' lack of a constitutionally sufficient justification for denying plaintiff access to the public forum and the consequent violation of plaintiff's rights of free speech and assembly under *Cal. Const., art. I, §§ 2, 3* (Paragraphs 13, 14).

- Facts showing how defendants' denial of permit to use the public forum constitutes great and irreparable injury to plaintiff's constitutional rights (Paragraph 15) [*see Code Civ. Proc. § 526(a)(2)*; *E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1]* .

- Facts showing plaintiff lacks an adequate remedy at law (Paragraph 16) [*see Civ. Code § 3422(1)-(3)*; *Code Civ. Proc. § 526(a)(4)-(6)*].

[b] Declaratory Relief

The Second Cause of Action in [1], *above*, seeks declaratory relief. It incorporates by reference the allegations of the First Cause of Action (Paragraph 17) and alleges the following:

- Facts showing the existence of an actual controversy between the parties concerning their respective rights and duties, including the parties' conflicting contentions regarding the constitutionality of defendants' actions (Paragraph 18) [*see Code Civ. Proc. § 1060*].

- Plaintiff's present need for a declaration of his, her, or its rights (Paragraph 19) [*see Code Civ. Proc. §§ 1060, 1061*].

[4] Verification

Verification [*see Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavits (or declarations under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*; *see generally* Ch. 303, *Injunctions*]. In addition, if a temporary restraining order is sought without notice on the other party, the certification requirements of *Code Civ. Proc. § 527(c)* must be satisfied. For discussion of the procedural requirements for obtaining a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

If no preliminary injunctive relief is sought, the complaint need not be verified [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified); *see also Code Civ. Proc. § 128.7(j)* (§ 128.7 applies to complaint or petition filed on or after January 1, 1995, and any other pleading, written notice of motion, or other similar paper filed in that matter)]. However, in superior court actions that are not limited civil cases, if plaintiff does verify the complaint, the defendant must verify the answer [*see Code Civ. Proc. § 446(a)*] and is precluded from making a general denial [*see Code Civ. Proc. § 431.30(d)*].

[5] Jurisdiction and Venue

The complaint should contain allegations showing that the action has been commenced in the proper county for trial. An action against an individual should ordinarily be brought in his or her county of residence [*see Code Civ. Proc. § 395(a)*]. If the defendant is a corporation or association, the action may be brought in the county where the liability arises or in the county where the defendant's principal place of business is located [*see Code Civ. Proc. § 395.5*]. For full discussion of venue rules, see Ch. 571, *Venue* .

An action seeking permanent injunctive relief is in the jurisdiction of the superior court and is not a limited civil case [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*].

[6] Cross References

For a listing of references to general procedural topics contained in other chapters in this set, see *§ 59.50[6]*

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 59 ASSEMBLIES, MEETINGS, AND DEMONSTRATIONS
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6-59 California Forms of Pleading and Practice--Annotated § 59.52

§ 59.52 Petition for Writ of Habeas Corpus for Release From Restraint Under Unconstitutional Statute or Ordinance Abridging Freedom of Expression

[1] FORM Petition for Writ of Habeas Corpus for Release From Restraint Under Unconstitutional Statute or Ordinance Abridging Freedom of Expression

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the matter of the Application of _____ [*name*], Petitioner, for Writ of Habeas Corpus.	)))))))	NO. _____ PETITION FOR WRIT OF HABEAS CORPUS

Petitioner alleges:

1. Petitioner is the party for whose benefit this petition is intended.

2. Petitioner is presently being imprisoned, detained, confined, and otherwise restrained of his/her liberty at _____ [*specify place of confinement, e.g.,* the _____ County Jail, located at _____ (*address*) in the City of _____] by _____ [*name and title of custodian*].

3. _____ [*Allege facts concerning petitioner's arrest and confinement, e.g.,* On _____ (*date*), petitioner and other concerned citizens went to _____ (*place where protected speech activity occurred*) for the purpose of peacefully demonstrating their views concerning

_____ (*specify subject*) by marching on the public sidewalk surrounding _____ (*place where protected speech activity occurred*) and carrying placards stating their opinions on the subject. At that time and place, petitioner was approached by uniformed police officers of the City of _____, who informed petitioner that he/she was under arrest for violation of _____ (*specify statute or ordinance that is basis of arrest*). Thereafter, he/she was taken into custody and transported to the _____ County Jail, where he/she was booked on charges of violating _____ (*specify statute or ordinance that is basis of arrest*)].

4. _____ [*Name and title of custodian*] presently purports to restrain and keep custody of petitioner solely by authority of and pursuant to a criminal complaint issued by the District Attorney of _____ County on _____ [*date*], charging that petitioner violated _____ [*specify statute or ordinance allegedly violated*] by _____ [*describe alleged violation, e.g.,* picketing within 500 feet of the entrance to _____ (*specify facility or property where activity occurred*)].

5. The restraint and confinement of petitioner is unlawful in that _____ [*specify statute or ordinance*], with which petitioner has been charged with violating and which is the sole basis of his/her present confinement, is unconstitutional, both on its face and as applied to petitioner, because it violates petitioner's rights of free speech and free assembly under the *First* and *Fourteenth Amendments to the United States Constitution* and under the *California Constitution, Article I, Sections 2* and *3* as follows: _____ [*specify reason(s) why statute or ordinance is unconstitutional*].

[*EITHER*]

6. Petitioner has made no prior application for a writ of habeas corpus in connection with this matter.

[*OR*]

6. Petitioner previously applied, on or about _____ [*date*], for a writ of habeas corpus in connection with this matter. The following proceedings were had on the prior application: _____ [*set forth brief statement of prior proceedings, including title of petition, date, court in which filed, disposition and date of disposition, and final order(s) on appeal or otherwise*]. _____ [*Allege facts showing why a second application should be granted*].

[*CONTINUE*]

WHEREFORE, petitioner prays for judgment as follows:

1. That a writ of habeas corpus be granted, directed to _____ [*name and title of custodian*], commanding him/her to bring the body of petitioner before this court at a time to be specified in the writ and to show lawful justification for petitioner's continued confinement and, if there is no such justification, directing _____ [*name and title of custodian*] to release petitioner from custody and confinement, or in the alternative that _____ [*name and title of custodian*] be ordered to appear at a specified time and show cause why the relief specified above should not be granted.

2. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read this petition and know its contents. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form is a petition for writ of habeas corpus [*see Penal Code § 1473 et seq.*] for use by a petitioner to obtain release from confinement under a criminal charge. The basis of the petition is that the confinement is unlawful because it is based on a statute or ordinance that violates the petitioner's constitutional right of free expression [*see § 59.16[2*][b][i]].

This form is for use when the petitioner has been arrested and charged, but not yet tried and convicted. Petitions for writs of habeas corpus filed by counsel are governed by *Cal. Rules Ct., Rule 8.384*. If the petitioner is being held under process of the court (i.e., has been convicted), and is not represented by counsel, the petition must generally be submitted on a form adopted by the Judicial Council [*see Cal. Rules of Ct., Rule 8.380(a)*]. For a reproduction of the adopted Judicial Council form of petition for writ of habeas corpus, see Ch. 292, *Habeas Corpus* .

[3] Contents

The petition alleges the following:

- The petitioner is the person on whose behalf the relief is sought (Paragraph 1) [*see Penal Code § 1474*].

- The fact of petitioner's confinement, the name of the person holding petitioner in custody, and the place of confinement (Paragraph 2) [*see Penal Code § 1474(1)*].

- Facts concerning petitioner's arrest and confinement, showing that petitioner was engaged in lawful, constitutionally protected speech activities at the time of his or her arrest (Paragraph 3).

- Facts showing that petitioner's arrest and confinement was based on a statute or ordinance that unconstitutionally infringed on petitioner's right of free expression and is therefore unlawful (Paragraphs 4 and 5) [*see Penal Code § 1474(2)*].

- Whether or not petitioner has made a previous application for habeascorpus in connection with this matter and, if so, a summary of the facts concerning the proceedings held on the previous application (Alternative Paragraphs 6) [*see Penal Code § 1475*].

[4] Verification

The petition must be verified [*Penal Code § 1474(3)*; *see Code Civ. Proc. § 446(a)* (form of verification)].

[5] Service on District Attorney and City Attorney

If the person applying for the writ is held in custody or restraint by any officer of a California court, or by a peace officer of the State of California or any political subdivision of the state, a copy of the petition must be served on the district attorney of the county where the petitioner is being held in custody at least 24 hours before the time when the writ is returnable. The application may not be heard without proof of such service [*Penal Code § 1475*].

In addition, if the person is in custody for violation of a city ordinance and if the city has a city attorney, a copy of the petition must be served on the city attorney at least 24 hours before the time when the writ is returnable. The failure to serve the city attorney does not, however, deprive the court of jurisdiction to hear the application [*Penal Code § 1475*].

[6] Jurisdiction

The California Supreme Court, courts of appeal, and superior courts have original jurisdiction to issue writs of habeas corpus [*Cal. Const., art. VI, § 10*]. Appellate courts have discretion, however, to refuse to issue a writ of habeas corpus if application has not initially been made in a lower court. Thus, in general, habeas corpus proceedings should normally be initially brought in the superior court, at least when there are factual issues to be resolved [*see In re M. (1975) 14 Cal. 3d 783, 789, 122 Cal. Rptr. 531, 537 P.2d 363* ; *In re Hillery (1962) 202 Cal. App. 2d 293, 294, 20 Cal. Rptr. 759]* .

[7] Cross References

For further discussion and forms pertaining to habeas corpus proceedings, see Ch. 292, *Habeas Corpus*

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Chapter 59 ASSEMBLIES, MEETINGS, AND DEMONSTRATIONS
PART IV. FORMS

6-59 California Forms of Pleading and Practice--Annotated § 59.53

§ 59.53 Complaint for Damages for Trespass to Real Property and for Injunctive Relief--Unauthorized Speech Activities Conducted on Private Property

[1] FORM Complaint for Damages for Trespass to Real Property and for Injunctive Relief--Unauthorized Speech Activities Conducted on Private Property

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	COMPLAINT FOR DAMAGES FOR TRESPASS
Defendant(s).	)	TO REAL PROPERTY AND FOR INJUNCTIVE
	)	RELIEF
	)	

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, the _____ [*specify proprietary interest, e.g.,* owner] and in possession of certain real property consisting of land [and _____ (*describe improvements to land, if any, e.g.,* a single-family dwelling *or* a private business)] located at _____ [*address*], City of _____, County of _____, California, and more particularly described as follows _____ [*specify legal description*].

2. Defendant(s) [*name(s)*] is/are _____ [*specify defendants' capacities, e.g.,* an unincorporated organization of persons formed in part for the purpose of publicizing its members views on the subject of _____ (*specify*). Defendants _____ (*names of individuals*), and each of them, are members, officers, agents, and/or employees of that organization].

3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is tortiously responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by these defendants' wrongful conduct.)]

4. At all times herein mentioned, each of the defendants were the agents, servants, and employees of their codefendants, and in doing the things hereinafter alleged were acting within the course and scope of their authority as such agents, servants, and employees, and with the permission and consent of their codefendants.

5. On or about _____ [*date*], without plaintiff's consent, defendants, and each of them, intentionally and willfully entered plaintiff's privateproperty _____ [*further describe trespassory conduct, e.g.,* for the purpose of demonstrating their viewpoint and conveying a message by way of demonstrating, marching, displaying signs, shouting, yelling, and other types of conduct loudly and physically displayed in the direction of plaintiff's home].

6. As a proximate result of defendants' entry onto plaintiff's private property as described in Paragraph 5, plaintiff's property was damaged in that _____ [*specify injury and damages to property, e.g.,* defendants damaged the fence, landscaping, and other improvements on plaintiff's property, requiring repairs and clean-up to restore the land to its prior condition, _____ (in the amount of $_____ *or* according to proof)].

[7. As a further proximate result of defendants' trespassory conduct as described in Paragraph 5, plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervous system and person. All of these injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. As a result of these injuries, plaintiff has suffered general damages in an amount according to proof.]

[8. As a further proximate result of defendants' trespass as described in Paragraph 5, plaintiff has incurred and will continue to incur, medical and related expenses according to proof.]

[9. In committing the acts described in this complaint, defendants, and each of them, acted in conscious disregard of the rights of plaintiff and others and were guilty of _____ (malice *and/or* oppression *and/or* fraud) in that _____ (*specify facts constituting malice, oppression, or fraud*). Defendants' conduct warrants an assessment of punitive damages in an amount appropriate to punish defendants and deter others from engaging in similar wrongful conduct.]

10. Defendant's wrongful conduct as described in Paragraph 5, unless enjoined and restrained by order of this court, will cause great and irreparable injury to plaintiff's private property [and will deprive plaintiff of peace of mind and privacy to which he/she is entitled under the United States Constitution and the California Constitution].

11. Plaintiff has no adequate remedy at law for the injuries currently being suffered and which are threatened in that _____ [*specify additional facts showing grounds for permanent injunctive relief, e.g.,* defendants will continue to participate in conduct as described in Paragraph 5 unless restrained and plaintiff would be required to commence and maintain a multiplicity of judicial proceedings to protect his/her private property and privacy interests].

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For damages for injury to plaintiff's property, in the sum of $_____;

[2. For general damages _____ (in the sum of $_____ *or* according to proof);]

[3. For medical and related expenses _____ (in the sum of $_____ *or* according to proof);]

[4. For punitive damages in an amount appropriate to punish defendants and deter others from engaging in similar wrongful conduct;]

5. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendants, and each of them, and each of their agents, servants, and employees, and all such persons acting under, in concert with, or for them from _____ [*describe acts to be enjoined, e.g.*, entering onto plaintiff's property at any time without plaintiff's consent, from making any loud noises whatsoever that are audible within plaintiff's residence between the hours of 8 p.m. and 9 a.m., from blocking plaintiff's driveway or otherwise impeding access to plaintiff's property in any manner whatsoever, and from using any form of abusive or threatening language toward plaintiff and his/her family, guests, or invitees];

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 59.50[1].*]

[2] Use of Form

This form is a complaint for use by a private property owner or other person entitled to possession to recover damages sustained as a result of persons entering the owner's property without his, her, or its consent for the purpose of demonstrating. This complaint seeks damages for trespass, along with preliminary and permanent injunctive relief to restrain the demonstrators from entering the property [*see Civ. Code §§ 3294, 3333*; *Code Civ. Proc. §§ 526, 527(a)*].

[3] Allegations

The complaint in [1], *above*, alleges the following:

- Facts showing plaintiff's protectible right or interest in the property (Paragraph 1) [*see Lightner Mining Co. v. Lane (1911) 161 Cal. 689, 694-695, 120 P. 771]* .

- Defendants' status and capacity (Paragraph 2).

- Fictitious name and agency allegations (Paragraphs 3, 4).

- Defendants' conduct constituting trespass on plaintiff's property (Paragraph 5) [*see Wilson v. Interlake Steel Co. (1982) 32 Cal. 3d 229, 233, 185 Cal. Rptr. 280, 649 P.2d 922]* .

- Property damages (Paragraph 6) and personal injury damages (Optional Paragraphs 7, 8) proximately caused by the defendant's trespass [*see Civ. Code § 3333*].

- Facts supporting an award of punitive damages (Optional Paragraph 9) [*see Civ. Code § 3294*].

- Facts supporting the request for injunctive relief (Paragraphs 10, 11) [*see Civ. Code § 3422*; *Code Civ. Proc. §§ 526, 527*].

[4] Verification

Verification [*see Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavits (or declarations under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*; *see generally* Ch. 303, *Injunctions*]. In addition, if a temporary restraining order is sought without notice on the other party, the certification requirements of *Code Civ. Proc. § 527(c)* must be satisfied. For discussion of the procedural requirements for obtaining a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

If no preliminary injunctive relief is sought, the complaint need not be verified [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified); *see also Code Civ. Proc. § 128.7(j)* (§ 128.7 applies to complaint or petition filed on or after January 1, 1995, and any other pleading, written notice of motion, or other similar paper filed in that matter)]. However, if the complaint is verified, the defendant must verify the answer [*Code Civ. Proc. § 446(a)*] and is precluded from making a general denial [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, *see* Ch. 26, *Answers* .

[5] Jurisdiction and Venue

Since the action involves injury to real property, the county in which the real property that is the subject of the action is located is the proper county for trial of the action [*see Code Civ. Proc. § 392(a)(1)*].

If the issue of title or right of possession is so involved that it must be decided in order to determine the case, the superior court has original jurisdiction and the action is not a limited civil case, whether or not the involution may be merely incidental [*Morrissey v. Morrissey (1923) 191 Cal. 782, 784]* . Furthermore, municipal courts and superior courts in limited civil cases (amount in controversy, exclusive of interest, is $25,000 or less) have original jurisdiction in limited civil cases to issue only temporary restraining orders and preliminary injunctions. An action seeking permanent injunctive relief is in the jurisdiction of the superior court and is not a limited civil case [*see Code Civ. Proc. §§ 85, 85.1, 86(a)(8), 580(b)(2)*].

[6] Cross References

For discussion of limitations on injunctions against free speech activities, see *§ 59.12[6]*

For additional discussion and forms pertaining to trespass actions, see Ch. 550, *Trespass*

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to compensatory and punitive damages damages in tort actions, see Ch. 177, *Damages*

For discussion, a procedural guide, and forms relating to the procedures for seeking injunctive relief, see Ch. 303, *Injunctions*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For further discussion of venue rules and forms of allegations showing proper venue, see Ch. 571, *Venue*

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Chapter 60 ASSIGNMENTS
PART I. SCOPE

6-60 California Forms of Pleading and Practice--Annotated § 60.01

§ 60.01 Scope of Chapter

This chapter covers actions by assignees on assignments of things in action (also called "choses in action") and obligees' rights in general. It contains complaints for use by assignees [*see §§ 60.60 -60.62, 60.73*], allegations relating to assignment [*see § 60.63 -60.72*], and forms for defenses [*see §§ 60.71 -60.72*].

Actions and claims based on assignments of particular things in action or particular rights may be covered in other chapters. See generally the listing under Cross References in the Research Guide to this chapter. For example, a defendant may assign to a judgment creditor the defendant's claim against the defendant's liability insurer, based on the insurer's bad faith refusal to settle [*see* Ch. 308, *Insurance*]; or a merchant may assign to a commercial lender the merchant's rights under a conditional sale contract for goods or equipment or a lease of goods or equipment [*see* Ch. 503, *Sales: Secured Transactions*].

Regarding actions and claims based on assignments of licenses, privileges, copyrights, trademarks, and the like--that is, assignments of intangible property apart from things in action and obligees' rights--see chapters concerning the kinds of property involved [*see, e.g.,* Ch. 549, *Trademarks and Trade Names*].

Assignments for the benefit of creditors are covered in Ch. 307, *Insolvency* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsChoses in ActionReal Property LawLandlord & TenantLease AgreementsAssignmentsContracts LawSales of GoodsForm, Formation & ReadjustmentFormationAssignment of RightsContracts LawSecured TransactionsInstallment ContractsAssignmentsContracts LawSecured TransactionsThird Party RightsAssignments

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6-60 California Forms of Pleading and Practice--Annotated § 60.02

§ 60.02 Cross References

For discussion of novation generally, see Ch. 6, *Accord and Satisfaction* .

For discussion of the assignment, transfer, and reservation of royalty rights in fine art, and a form for use by an artist for recovery of royalty payments from the resale of a work of art, see Ch. 57, *Art* .

For an assignment for use by a judgment creditor in an action against a real estate broker or salesperson for recovery of an unsatisfied final judgment from the Recovery Account of the Real Estate Fund, see Ch. 103, *Brokers* .

For an allegation that the plaintiff is the assignee of a claim for conversion, see Ch. 150, *Conversion* .

For discussion of, and forms for obtaining, wage assignments for child, spousal, or family support, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* , and Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee* .

For discussion of the enforcement of judgments by assignees and for a declaration for verifying a copy of an assignment or other evidence of succession to judgment debtor's interest, for use in redemption proceedings, see Ch. 254, *Executions and Enforcement of Judgments* .

For a complaint that may be adapted for use to obtain contribution from a co-obligor following payment of the obligation by one joint obligor and assignment of the obligation to that obligor by the creditor, see Ch. 300, *Indemnity and Contribution* .

For discussion of, and forms for use in, actions concerning assignments for the benefit of creditors, see Ch. 307, *Insolvency* .

For a complaint by a judgment creditor on an assigned claim of an insured against the insurer for damages for breach of contract and breach of the implied covenant of good faith and fair dealing, to recover judgment in excess of the policy limit after a wrongful refusal to settle, see Ch. 308, *Insurance* .

For an allegation that an assignee of a casualty insurance policy has an insurable interest in the subject property and is entitled to recover under the policy, see Ch. 308, *Insurance* .

For an affirmative defense by an insurer, that a casualty insurance policy was assigned without the insurer's consent, see Ch. 308, *Insurance* .

For a complaint for use by the maker of a promissory note to interplead the payee, the payee's assignee, and a garnishor, see Ch. 314, *Interpleader* .

For discussion and forms relating to assignments of judgments, see Ch. 318, *Judgments* .

For an allegations of a tenant's breach of a covenant not to assign the lease without the landlord's consent, see Ch. 332, *Landlord and Tenant: The Tenancy* .

For a three-day notice to a tenant under a written lease to quit, based on incurable breach of a covenant against assigning the lease, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

For a complaint by an assignee of rents under a written lease and a complaint against a tenant's assignee, both to recover rent and attorney's fees, see Ch. 334, *Landlord and Tenant: Claims for Damages* .

For a complaint by the assignee of a contractor and holder of a promissory note to impress and foreclose an equitable lien on real property, see Ch. 342, *Liens and Wage Preferences* .

For discussion generally of voluntary wage assignments by employees, see Ch. 250, *Employment Law: Wage and Hour Disputes* .

For discussion and forms regarding assignments of wage claims to the Labor Commissioner, see Ch. 250, *Employment Law: Wage and Hour Disputes* .

For a complaint by an employee's assignee against the employer to recover damages and penalties based on breach of the statutory obligation to pay wages, and an affirmative defense that the wage assignment was defective, see Ch. 250, *Employment Law: Wage and Hour Disputes* .

For an assignment of a mechanics' lien and the secured claim, see Ch. 361, *Mechanics' Liens* .

For discussion of assignments of royalty interests in oil and gas properties, see Ch. 393, *Oil and Gas* .

For discussion of assignments of limited partners' interests, see Ch. 404, *Partnerships: Actions Between Limited Partners and Partnerships* .

For discussion of the effect of assignment of a partnership interest in the context of partnership dissolution, see Ch. 406, *Partnerships: Dissolution* .

For discussion of assignment to an employer of the right of an injured employee to recover damages from a third person under the federal Longshoremen's and Harbor Workers' Compensation Act, see Ch. 522, *Ships and Shipping* .

For discussion of subrogation, and regarding how it differs from assignment, see Ch. 536, *Subrogation* .

For discussion of assignments of trademarks, see Ch. 549, *Trademarks and Trade Names* .

For discussion of, and forms for use in, actions to enforce assignment-of-rents provisions in trust deeds, see *Ch. 555, Trust Deeds and Real Property Mortgages, § 555.80 et seq. and § 555.180* et seq.

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[Reserved]

§§ 60.03[Reserved]

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PART II. LEGAL BACKGROUND

6-60 California Forms of Pleading and Practice--Annotated § 60.10

§ 60.10 Governing Statutes

Transfers of things in action are governed by *Civ. Code §§ 953* and *954*. Transfers of obligees' rights are governed by *Civ. Code §§ 1458* and *1459*. Transfers in general are governed by *Civ. Code § 1039 et seq.* Transfers of personal property are governed generally by *Civ. Code § 1135 et seq.* Perfection of assignments of certain nonnegotiable instruments is governed by *Civ. Code § 955*; perfection of assignments of certain general intangibles is governed by *Civ. Code § 955.1*. Defenses that may be raised in actions by assignees are governed in general by *Code Civ. Proc. § 368*. The delegation of contractual duties is governed by *Civ. Code § 1457*.

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6-60 California Forms of Pleading and Practice--Annotated § 60.11

§ 60.11 Things in Action and Obligees' Rights

[1] Definitions

A "thing in action" is a right to recover money or personal property by a judicial proceeding [*Civ. Code § 953*]. A thing in action arising out of the violation of a right of property or out of an obligation may be transferred by the owner [*Civ. Code § 954*; *see* discussion in *§ 60.15[5]*].

A right arising out of an obligation is the property of the person to whom it is due and may be transferred as such [*Civ. Code § 1458*]. The obligation may arise either from a contract or by operation of law [*Civ. Code § 1428*; *see* discussion in *§ 60.11[2], [3], below*].

[2] Assignments in General

The transfer of a thing in action or an obligee's right commonly is effected by an assignment (from the "assignor" to the "assignee") [*Commercial Discount Co. v. Cowen (1941) 18 Cal. 2d 610, 614, 116 P.2d 599* (ordinarily "*assign* ... [is] used in connection with the transfer of a thing in action"); *see, e.g., Com. Code § 3414(f)* (circumstances in which drawer of check may discharge payment obligation "by assigning to the person entitled to enforce the check the rights of the drawer against the drawee with respect to the funds"); *Woodruff v. California Republic Bank (1977) 75 Cal. App. 3d 108, 110, 141 Cal. Rptr. 915* (bank depositor "assigned his claim [to recover deposited funds that the bank had seized through exercise of the so-called banker's lien] to plaintiff herein who thereupon brought this action")]. References in statutes and opinions to "assignment," however, often do not mean a transfer of a thing in action or an obligee's right. In current usage "assignment" can be applied to almost any kind of transfer of any kind of property [*Commercial Discount Co. v. Cowen (1941) 18 Cal. 2d 610, 614, 116 P.2d 599]* . The term is most usefully restricted to a transfer of intangible property.

Generally, the validity of an assignment is governed by the law of contracts. For example, leaving aside statutory formalities, an assignment of money to become due under a contract of sale is valid if there is a bona fide agreement for a sufficient consideration and without intent to defraud creditors. An antecedent debt may be consideration for an assignment. The fact that an assignment is oral does not defeat it in the absence of a statutory requirement for a writing or recordation [*Northern Counties Bank v. Earl Himovitz & Sons Livestock Co. (1963) 216 Cal. App. 2d 849,*

855-856, 31 Cal. Rptr. 551] . A transfer may be made without a writing in every case in which a writing is not expressly required by statute [*Civ. Code § 1052*; *see, e.g., Union Supply Co. v. Morris (1934) 220 Cal. 331, 338-339, 30 P.2d 394* (oral assignment of mechanics' lien claim as valid)]. For discussion of the law governing contracts generally, see Ch. 140, *Contracts* .

The substance rather than the form of a transaction determines whether an assignment was intended. An effective assignment may be the product of inference and, when the parties to a transaction indicate an intent to transfer a specific claim, the courts will infer an assignment [*Kelley v. British Coml. Ins. Co. (1963) 221 Cal. App. 2d 554, 564, 34 Cal. Rptr. 564* (inadvertent use of one of two insurance policy numbers)]. In determining whether an assignment has been made, a court may go outside the terms of an instrument and may find an assignment from the conduct of the parties [*California Pac. Title Co. v. Moore (1964) 229 Cal. App. 2d 114, 117, 40 Cal. Rptr. 61* (assignment to title insurance company for purpose of prosecuting action to clear title)].

[3] Novation Distinguished

"Novation" refers to a contractual substitution of a new obligation for an existing obligation [*Civ. Code §§ 1530, 1532*]. One of the three means of effecting a novation [*see Civ. Code § 1531*] is a substitution of a new obligee for the existing obligee. When this is done with the obligor's consent, it is a novation; without the obligor's consent, it is merely an assignment by the existing obligee [*Wells Fargo Bank v. Bank of America (1995) 32 Cal. App. 4th 424, 432, 435]* .

A second means of effecting a novation is a substitution of a new obligor for the existing obligor [*see Civ. Code § 1531(2)*], that is, a delegation by the existing obligor. Although an obligee's rights may be transferred (assigned) without the consent of the person bound, the burden of an obligation may not be transferred (delegated) without the consent of the person entitled to the benefit [*Civ. Code § 1457*]. The substitution of a new obligor for the existing obligor is often referred to, confusingly, as an "assignment of the contract" [*see, e.g., Corp. Code § 25234(a)(2)* (investment advisory contract must provide that no assignment of contract may be made by investment advisor without consent of other party); *Baer v. Associated Life Ins. Co. (1988) 202 Cal. App. 3d 117, 123-124, 248 Cal. Rptr. 236]* ; and this confusion may be compounded by Commercial Code rules regardingassignments [*see* discussion in *§ 60.18[3]*]. Older cases stating the rule that a contract is not assignable mean, usually, that the *obligor's burden* cannot be transferred without the obligee's consent [*see, e.g., La Rue v. Groezinger (1890) 84 Cal. 281, 283, 24 P. 42]* . The courts have consistently held that the *obligee's rights* (in particular, or at least, the right to receive payment) can always be transferred without the obligor's consent [*see, e.g., Trubowitch v. Riverbank Canning Co. (1947) 30 Cal. 2d 335, 339, 182 P.2d 182]* . In some cases, assignment of the obligee's rights may be described as assignment of "the contract" [*see, e.g., Drennan v. Security Pac. Nat. Bank (1981) 28 Cal. 3d 764, 767, 170 Cal. Rptr. 904, 621 P.2d 1318 , cert. denied, 454 U.S. 833]* .

The third means of effecting a novation is a substitution of a new obligation between the existing parties, in place of the existing obligation [*see Civ. Code § 1531(1)*].

For further discussion regarding novation, see Ch. 6, *Accord and Satisfaction ; see also* California Legal Forms, Ch. 77, *Discharge of Obligations* (Matthew Bender).

[4] Subrogation Distinguished

"Subrogation" refers to the substitution of a new obligee for the existing obligee after satisfaction (or partial satisfaction) of the obligation by the new obligee. Subrogation may be effected either by operation of law, called legal subrogation, or by contract, called conventional subrogation [*see Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 638-640, 7 Cal. Rptr. 377, 354 P.2d 1073]* . Conventional subrogation is the result of an assignment from the existing obligee to the new obligee [*see, e.g., Krusi v. Bear, Stearns & Co. (1983) 144 Cal. App. 3d 664, 677, 192 Cal. Rptr. 793* (right of subrogation "means only that ... [the subrogee] may bring a cause of action ... as an assignee")]. Legal subrogation sometimes may be described as an assignment by operation of law, or a legal assignment, or an equitable

assignment [*see, e.g., Bank of California v. Connolly (1973) 36 Cal. App. 3d 350, 366-368, 111 Cal. Rptr. 468* (equitable assignment)]. The common example of subrogation is the substitution of an insurer in the place of the insured with respect to a claim against a third person arising from the insured's loss for which the insurer has paid compensation [*see, e.g., Lee v. State Farm Mut. Auto. Ins. Co. (1976) 57 Cal. App. 3d 458, 465-466, 129 Cal. Rptr. 271]* .

For further discussion, see Ch. 536, *Subrogation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsChoses in ActionInsurance LawClaims & ContractsSubrogationGeneral OverviewContracts LawPerformanceNovationContracts LawPerformanceAssignmentConsent

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6-60 California Forms of Pleading and Practice--Annotated § 60.12

§ 60.12 Assignments of General Intangibles

[1] Priority Among Assignees

In general, a transfer (other than one intended to create a security interest [*see generally Com. Code § 9109(a)(1), (3)*]) of any paymentintangible [*see Com. Code § 9102* (definition)] and any transfer of accounts, chattel paper, payment intangibles, or promissory notes excluded from the coverage of Division 9 of the Commercial Code by *Com. Code § 9109(d)(4)* (excluding a sale of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose) is perfected as against third persons on the execution and delivery to the transferee of an assignment in writing [*Civ. Code § 955.1(a)*; *but see Civ. Code §§ 954.5, 955* (transfers of certain judgment rights and nonnegotiable instruments)].

As between bona fide assignees of the same right for value without notice, the assignee first giving notice to the obligor in writing has priority [*Civ. Code § 955.1(b)*; *see City of Los Angeles v. Knapp (1936) 7 Cal. 2d 168, 171, 60 P.2d 127]* .

Such an assignment is not, of itself, notice to the obligor so as to invalidate any payments made by the obligor to the transferor [*Civ. Code § 955.1(c)*].

Transfers or assignments of transition property or recovery property as defined in the Public Utilities Code [*see Pub. Util. Code §§ 840, 848*] are not subject to *Civ. Code § 955.1* [*Civ. Code § 955.1(d)*].

[2] Federal Government as Obligor

Any claim, or part of a claim, against the United States may be assigned, but only after the claim has been allowed, the amount has been decided, and a warrant has been issued. The assignment must meet certain formal requirements. A conforming assignment is valid for any purpose [*31 U.S.C. § 3727(a), (b)*]. In general, nonconforming assignments are void; hence, the governing statute (or the predecessor) is called the Anti-Assignment Act in many cases. The courts, however, have recognized narrow exceptions [*see generally United States v. Shannon (1952) 342 U.S. 288, 291-294, 72 S. Ct. 281, 96 L. Ed. 321]* .

A contractor's right to receive money due or to become due from the United States under a contract for $1,000 or more may be assigned to a financing lender under other rules [*31 U.S.C. § 3727(c)*; *41 U.S.C. § 15*; § 60.15[3]].

[3] Tax Claims of Counties

If the collection procedure authorized by the Revenue and Taxation Code [*see Rev. & Tax. Code § 2951*] will not be used, the board of supervisors of a county, by a four-fifths vote and with the approval of the tax collector, may assign for purposes of collection any or all delinquent unsecured taxes 90 days after the date they are due and delinquent [*Gov. Code § 26220(b)*]. The assignee, through an attorney duly licensed to practice in California, may invoke legal process in the collection of obligations assigned [*Gov. Code § 26222*]. The board of supervisors may assign, for purposes ofsecuring any financing of the same, any obligations arising out of any delinquent assessments or taxes levied on the secured roll by the county or any other political subdivision of the state. However, no assignment to a collection agency may be made of obligations arising out of any delinquent assessments or taxes levied on the secured roll by the county or any other political subdivision of the state [*Gov. Code § 26220(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsChoses in Action

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6-60 California Forms of Pleading and Practice--Annotated § 60.13

§ 60.13 Assignments of Insurance

[1] Automobile Policies to Dealers

It is a misdemeanor for any person engaged in the business of selling motor vehicles at retail (a dealer) to accept, in connection with the sale of a motor vehicle, an assignment of an insurance policy, or rights under an insurance policy, pertaining to any motor vehicle traded in by the buyer, unless all amounts realized on the policy or rights by the dealer are credited by the dealer to the buyer on the next monthly payment due or are refunded to the buyer [*Bus. & Prof. Code § 18450*]. If the dealer accepts assignment of a policy in violation of this provision, the buyer may bring a civil action against the dealer for three times the amount realized on the policy or rights under the policy [*Bus. & Prof. Code § 18451*].

[2] Casualty Insurance; CIGA Assignments

Any insured or claimant entitled to the benefits of the California Insurance Guaranty Association Act (*Ins. Code § 1063 et seq.*) who elects to proceed under that law is deemed to have assigned to the association the insured's or claimant's rights against the estate of the insolvent insurer [*Ins. Code § 1063.4(b)*; *see generally Middleton v. Imperial Ins. Co. (1983) 34 Cal. 3d 134, 137, 193 Cal. Rptr. 144, 666 P.2d 1]* .

A covered claim under the CIGA law does not include a claim asserted by an assignee, except an assignee of a premium finance agreement [*see Ins. Code § 673*] that was entered into before the insurer became insolvent [*Ins. Code § 1063.1(c)(9)*].

[3] Life and Health Insurance and Annuity Contracts; CLHIGA Assignments

Any person receiving benefits under the California Life and Health Insurance Guarantee Association Act (*Ins. Code § 1067 et seq.*) is deemed to have assigned the rights under, and any causes of action relating to, the covered policy or contract [*see Ins. Code § 1067.02(b)*] to the association, to the extent of the benefits received because of the act, whether the benefits are payments of or on account of contractual obligations, continuation of coverage, or provision of substitute or alternative coverages. The association may require an assignment to it of those rights and the cause of action by any payee, policy or contract owner, beneficiary, insured, orannuitant, as a condition precedent to the receipt

of any right or benefits conferred by the act [*Ins. Code § 1067.07(m)(1)*].

[4] Life Insurance Policy Assigned to Secure Military Service Member's Obligation

If any life insurance policy on the life of a service member in military service (as defined below) was assigned before his or her period of military service, to secure his or her payment of any obligation, then any assignee of the policy, except the insurer in connection with a policy loan, must not, during the period of military service of the insured or within one year after that period, exercise any right or option by virtue of that assignment, except on the consent in writing of the insured made during that period or when the premiums on the policy are due and unpaid or on the death of the insured, unless on leave of court granted on an application made by the assignee. (For general discussion of applying for leave of the court to commence an action or go forward, see Ch. 372, *Motions and Orders* .) The court may refuse to grant that leave unless in the opinion of the court the ability of the obligor to comply with the terms of the obligation is not materially affected by reason of his or her military service [*50 U.S.C. App. § 536(c)*; *Mil. & Vet. Code § 409.1(a)*].

A violation of the above proscription is subject to civil and criminal penalties [*see 50 U.S.C. App. § 536(e)(1)*; *Mil. & Vet. Code § 409.1(c)*]. Any disallowed civil action or proceeding, or execution on a judgment obtained, by the assignee could be stayed on an application by, or on behalf of, the service member [*see 50 U.S.C. App. §§ 522, 591*; *Mil. & Vet. Code §§ 403, 409.3*]; or a disallowed default judgment could be opened to enable the mounting of a defense [*see 50 U.S.C. App. § 521(g)*; *Mil. & Vet. Code § 402(d)*]. For further discussion and forms, see Ch. 136, *Continuances* , Ch. 254, *Executions and Enforcement of Judgments* , and Ch. 489, *Relief From Judgments and Orders* .

The protections described above are available under federal law to members of the uniformed services [see *10 U.S.C. § 101(a)(5)* (definition)] in military service [see *50 U.S.C. § 511(1), (2)*] and, under California law, to the following [*Mil. & Vet. Code § 400(a)*; *see generally Mil. & Vet. Code § 409.8* (proof of service member's status and relevant facts)]:

- An officer or enlisted member of the national guard called or ordered into active state service by the governor pursuant to *Mil. & Vet. Code §§ 143* or *146* or into active federal service by the President pursuant to Title 10 or Title 32 of the U.S. Code; or

- A reservist of the U.S. military reserve who has been called to full-time active duty.

"Military service" for purposes of the California requirements means full time active state or federal service of a national guard member or full-time active duty of a reservist, for a period in excess of seven days in any 14-dayperiod. For any service member who has been called to active service or duty since September 11, 2001, to engage in homeland defense against terrorism, his or her days of service before June 21, 2002, are to be credited toward this seven-day period [*Mil. & Vet. Code § 400(b)*; *see generally Mil. & Vet. Code § 409.11* (legislative intent to provide for retroactive qualification for benefits, back to September 11, 2001, but prospective only application of law in creating benefits); *see also 50 U.S.C. App. § 511(3)* (meaning of "period of military service" for purposes of federal requirements)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsChoses in ActionInsurance LawBad Faith & Extracontractual LiabilityAssignment of ClaimsInsurance LawGroup PoliciesAssignments & TransfersInsurance LawLife InsuranceAssignments & Transfers

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§ 60.14 Assignments of Mortgage Debts

The assignment of a debt secured by a mortgage carries with it the security [*Civ. Code § 2936*]. For discussion, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

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§ 60.15 Assignments of Nonnegotiable Instruments

[1] By Endorsement

A nonnegotiable written contract for the payment of money or personal property may be transferred by endorsement, in like manner with negotiable instruments. The endorsement transfers all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the endorsement [*Civ. Code § 1459*; *Royal Bank Export Finance Co. v. Bestways Distributing Co. (1991) 229 Cal. App. 3d 764, 768, 280 Cal. Rptr. 355]* .

[2] Priority Among Assignees

A transfer (other than one intended to create a security interest [*see generally Com. Code § 9109(a)(1), (3)*]) of a nonnegotiable instrument that is otherwise negotiable within Division 3 of the Commercial Code but is not payable to order or to bearer, and a sale of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose [*see generally Com. Code § 9109(d)(4)*], is perfected against third persons when those property rights have been endorsed or assigned in writing and, in the case of such instruments or chattel paper delivered to the transferee, whether or not notice of such transfer or sale has been given to the obligor. However, such an endorsement, assignment, or delivery is not, of itself, notice to the obligor so as to invalidate any payments made by the obligor to the transferor [Com. Code § 955].

As between bona fide assignees of the same right for value, the one who first gives notice to the obligor has priority [*see City of Los Angeles v. Knapp (1936) 7 Cal. 2d 168, 171, 60 P.2d 127]* .

[3] Federal Contract Rights

A bank, trust company, or other financing institution (including any federal lending agency) may be the assignee of a contractor's right to receive money due or to become due from the United States under a contract providing for payments aggregating $1,000 or more, provided the contract does not prohibit the assignment. The assignment must cover all amounts payable and not already paid and must be to one person only. Reassignment is prohibited (however, the single assignee may be an agent or trustee for two or more lenders participating in the financing). Written notice of

the assignment must be filed as specified by the governing law [*see 41 U.S.C. § 15*]. These requirements set up an exception to the general rules governing assignments of claims against the United States [*31 U.S.C. § 3727(c)*; § 60.12[2]]. The purpose of the exception is to facilitate the financing of contractors performing under government contracts [*Peterman Lumber Company v. Adams (W.D. Ark. 1955) 128 F. Supp. 6, 13]* .

[4] Improvement Contracts; Priority of Stop Notices

No assignment of construction loan funds by the owner or contractor under a contract for a private work of improvement, whether made before or after a stop notice or bonded stop notice is given to a construction lender, takes priority over a stop notice or bonded stop notice under the Civil Code provisions governing works of improvement [*see Civ. Code § 3082 et seq.*], and the assignment has no effect insofar as the rights of claimants who give the stop notice or bonded stop notice are concerned [*Civ. Code § 3166*]. For further discussion, see Ch. 104, *Building Contracts* .

No assignment by the original contractor of any of the money due or to become due to the original contractor under a public works improvement contract, or for "extras" in connection with the contract, whether made before or after the service of a stop notice, takes priority over a stop notice under the Civil Code provisions governing stop notices for public works of improvement [*see Civ. Code § 3179 et seq.*], and the assignment has no effect on the rights of the stop notice claimants. Any garnishment of the money by any creditor of the original contractor [*see Code Civ. Proc. § 708.710 et seq.*] and any statutory lien on the money are subordinate to the rights of all stop notice claimants [*Civ. Code § 3193*]. For further discussion, see Ch. 481, *Public Works* .

[5] Local Agency Public Construction Contracts; Priority of Mechanics' and Materialmen's Lien Claims

In the case of a local agency public construction contract, no assignment by the contractor of the whole or any part of the money, assessment, partial assessment, any reassessment, and any bonds that may be issued to represent any assessment or reassessment, due or to become due under the contract, or for "extras" in connection with the contract, whether madebefore or after a verified claim is filed pursuant to the Local Agency Public Construction Act (*Pub. Contract Code § 20100 et seq.*), will take priority over lien claims by mechanics and materialmen [*see Pub. Contract Code §§ 20459, 20460* (filing of claims and claimants' liens)]. The assignment has no binding force insofar as the rights of the claimants and their assignees are concerned. None of the provisions of the Civil Code governing works of improvement [*see Civ. Code § 3082 et seq.*; *see also* discussion § 60.15[4]] will be applied to any assessment, partial assessment, reassessment, bonds, money, or funds payable to the assignee under the Local Public Agency Construction Act [*Pub. Contract Code § 20461*]. For further discussion, see Ch. 481, *Public Works* .

[6] Insurance Premium Finance Agreements

In the case of an insurance premium finance agreement with an industrial loan company [*see Fin. Code § 18560 et seq.*], unless the insured has notice of the assignment of the premium finance agreement, payment under the agreement by the insured to the last known assignee of the agreement is binding on all subsequent assignees. The obligations and rights of the loan company, as a premium finance agency, also are imposed on and belong to the assignee of a premium finance agreement [*Fin. Code § 18588*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawPerformanceAssignment & NovationContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensContracts LawNegotiable InstrumentsTransfersContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & Assignors

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§ 60.16 Assignments of Things in Action

[1] Actions on Bonds

A cause of action on a bond [*see Code Civ. Proc. § 995.140*] may be transferred and assigned as other causes of action [*Code Civ. Proc. § 996.430(c)*; *see generally Code Civ. Proc. § 995.010 et seq.* (Bond and Undertaking Law), and Ch. 538, *Suretyship, Bonds, and Undertakings; see also* discussion in *§ 60.19[5]*].

[2] Antitrust Claims Arising From Public Purchase Contracts

In submitting a bid to a public purchasing body, the bidder offers and agrees that if the bid is accepted, the bidder will assign to the purchasing body all rights, title, and interest in and to all causes of action that the contractor or subcontractor may have under Section 4 of the Clayton Act [*see 15 U.S.C. § 15*] or under the Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*) arising from purchases of goods, materials, or services by the bidder for sale to the purchasing body pursuant to the bid [*Gov. Code § 4552*].

[3] Consumer Warranty Claims

An independent repair or service facility may take an assignment of a buyer's right under the Song-Beverly Consumer Warranty Act (*Civ. Code§ 1790 et seq.*) to recover from a manufacturer of consumer goods the actual and reasonable cost of service and repair, including any cost for parts and any reasonable cost of transporting the goods or parts, plus a reasonable profit [*see Civ. Code § 1793.3(c)*]. For further discussion, see Ch. 502, *Sales: Warranties* .

[4] Lien Claims

Generally a claim that is secured by a lien may be assigned [*see Civ. Code §§ 1428, 1458* (right arising out of contractual or legal obligation is transferrable)], and the lien automatically is assigned along with the claim [*see Civ. Code § 1084* (incidents of thing transferred are transferred along with it); *Union Supply Co. v. Morris (1934) 220 Cal. 331, 338-339, 30 P.2d 394* (mechanics' lien is incident of debt and automatically transferred by assignment of debt, regardless of whether assignment is oral or written); *Champion Home Builders Co. v. Sipes (1990) 219 Cal. App. 3d 1415, 1423-1424, 269 Cal. Rptr. 75]* , unless the assignment expressly excepts the lien [*Civ. Code § 1084*] or a statute

forbids assignment of the lien. Assignment of a debt secured by a mortgage carries with it the security [*Civ. Code § 2936*]. Assignment of a lien does not automatically transfer the secured debt [*see Civ. Code § 1084*].

Numerous lien statutes provide, in various ways (including by implication), that the liens mentioned in the following list are assignable [*see generally* Ch. 342, *Liens and Wage Preferences*]:

- Agricultural chemical and seed lien [*Food & Agric. Code § 57590*].
- Aircraft lien [*Code Civ. Proc. § 1208.63*].
- Boaters lien [*Harb. & Nav. Code § 508*].
- Dairy cattle supply lien [*Food & Agric. Code § 57411*; *see also* Ch. 24, *Animals: Liens*].
- Equipment dealer's lien [*Bus. & Prof. Code § 22921(a)*; *see also* Ch. 515, *Securities and Franchise Regulation*].
- Harvester's lien [*see Civ. Code § 3061.6(a), (c)*].
- Livestock lien (on livestock sold or delivered to a meatpacker) [*see Food & Agric. Code § 55703*].
- Livestock service lien [*see Civ. Code § 3080.22*; *see also* Ch. 24, *Animals: Liens*].
- Logger's lien and lumber millman's lien [*see Civ. Code §§ 3065-3065b*; *see also* Ch. 350, *Logs and Timbers*].
- Oil and gas lien [*Code Civ. Proc. § 1203.64*; *see* Ch. 393, *Oil and Gas*].
- Poultry and fish supply lien [*Food & Agric. Code § 57540*].
- Vehicle lien [*Civ. Code § 3069*; *but see Veh. Code § 22851(a)(1)* (garage keeper's lien for towing and storing parked or abandoned vehicle pursuant to police order is not assignable); *see also* Ch. 274, *Garages and Gas Stations*].

A lien acquired by a local agency pursuant to the Delinquent Assessment Acquisition and Sales Law of 1915 (*Gov. Code § 53860 et seq.*) may be assigned [*Gov. Code §§ 53864, 53865*].

[5] Tort Causes of Action

As a general rule, the only causes or rights of action in tort that are not assignable or transferrable in any sense are those arising from wrongs of a purely personal nature, such as slander, assault and battery, negligence causing personal injuries, malicious prosecution, and others of like nature [*Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 834, 69 Cal. Rptr. 321, 442 P.2d 377* ; *Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 638-639, 7 Cal. Rptr. 377, 354 P.2d 1073* ; *Bush v. Superior Court (1992) 10 Cal. App. 4th 1374, 1381, 13 Cal. Rptr. 2d 382* ; *Peller v. Liberty Mut. Fire Ins. Co. (1963) 220 Cal. App. 2d 610, 611-612, 34 Cal. Rptr. 41]* . In other words, the doctrine of nonassignability of tort causes of actions is confined to wrongs done to the person, the reputation, or the feelings of the injured person [*Webb v. Pillsbury (1943) 23 Cal. 2d 324, 327, 144 P.2d 1]* . A cause of action for legal malpractice is not assignable [*Goodley v. Wank & Wank, Inc. (1976) 62 Cal. App. 3d 389, 398, 133 Cal. Rptr. 83* ; *see* Ch. 76, *Attorney Professional Liability*]. The *Goodley* rule prohibiting assignment of legal malpractice claims applies to any assignment of a claim, whether voluntary or involuntary [*Kracht v. Perrin, Gartland & Doyle (1990) 219 Cal. App. 3d 1019, 1022-1024, 268*

Cal. Rptr. 637] . Thus, a legal malpractice claim belonging to the bankruptcy estate of a corporation may not be assigned by the trustee of that estate to a creditor of the corporation for prosecution in state court [*Baum v. Duckor, Spradling & Metzer (1999) 72 Cal. App. 4th 54, 67-69, 84 Cal. Rptr. 2d 703]* . See Ch. 536, *Subrogation* , for discussion of the equitable rule under which a third person (usually an insurance company) paying compensation may be entitled to prosecute the injured person's cause of action against the tortfeasor, for the purpose of recovering the amount paid.

A joint tortfeasor's right to equitable indemnity [*see American Motorcycle Assn. v. Superior Court (1978) 20 Cal. 3d 578, 598, 146 Cal. Rptr. 182, 578 P.2d 899]* is assignable to the injured person in a settlement, regardless of whether the injured person's cause of action is assignable [*Bush v. Superior Court (1992) 10 Cal. App. 4th 1374, 1380-1383, 13 Cal. Rptr. 2d 382]* . For discussion, see Ch. 300, *Indemnity and Contribution* .

The rules of the Code of Civil Procedure concerning the survival of causes of action [*see Code Civ. Proc. § 377.10 et seq.*] do not affect the assignability of causes of action [*Code Civ. Proc. § 377.22*].

A cause of action for damages based on an insurer's failure to settle is assignable by the insured, whether the action is considered as sounding in tort or sounding in contract [*Johansen v. California State Auto. Assn. Inter-Ins. Bureau (1975) 15 Cal. 3d 9, 14 n.3, 123 Cal. Rptr. 288* ;744; *Comunale v. Traders & General Ins. Co. (1958) 50 Cal. 2d 654, 661, 328 P.2d 198]* . For discussion and forms, see *Ch. 308, Insurance, § 308.10* et seq.

Causes of action arising from torts that affect property rather than the person of an individual are generally held to be assignable. For example, the owner of particular property may assign claims based on conversion of the property, claims based on negligent or intentional injury to the property, and claims based on fraud and deceit arising out of violation of a right of property [*Jackson v. Deauville Holding Co. (1933) 219 Cal. 498, 500-501, 27 P.2d 643* ; *Wikstrom v. Yolo Fliers Club (1929) 206 Cal. 461, 463-464, 274 P. 959]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsChoses in ActionPublic Contracts LawPerformanceAssignment & Novation

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 60 ASSIGNMENTS
PART II. LEGAL BACKGROUND

6-60 California Forms of Pleading and Practice--Annotated § 60.17

§ 60.17 Assignments of Wages

[1] In General

Wage assignments are governed in general by *Lab. Code § 300* and are discussed in Ch. 250, *Employment Law: Wage and Hour Disputes* . Certain wage assignments are treated as loan transactions subject to state regulation, and certain wage assignments are unlawful, as follows.

[2] Treatment as Regulated Loans

The payment of money, credit, goods, or things in action by an industrial loan company or consumer financial lender (including a personal property broker) [*see* Stats. 1994, ch. 1115, § 9; *see also Fin. Code § 22009* ("finance lender" defined)], as consideration for any assignment of wages, salary, commissions, or other compensation for services, whether earned or to be earned, is for purposes of regulation under the Industrial Loan Law [*Fin. Code § 18000 et seq.*] and the Finance Lenders Law [*Fin. Code § 22000 et seq.*], a loan secured by assignment. The amount by which the assigned compensation exceeds the amount of consideration actually paid must be accounted for as interest and charges on or for the loan from the date of payment to the date the compensation is payable. This does not modify or affect existing statutes governing wage assignments, nor does it authorize wage assignments [*Fin. Code §§ 18192, 22335*].

The requirements of the Finance Lenders Law are matters of fundamental public policy that cannot be waived by way of agreement between the parties. For example, the Finance Lenders Law may not be circumvented by a choice-of-law provision by which another state's law is chosen in a loan agreement of the kind that law regulates. In determining whether such a provision should be enforced in California, a court will consider which state, under the circumstances presented, would suffer greater impairment of its policies if the other state's law were applied [*Brack v. Omni Loan Co., Ltd. (2008) 164 Cal. App. 4th 1312, 1326, 1329, 80 Cal. Rptr. 3d 275* (choice of Nevada law, in consumer loan contract of adhesion, was not enforceable)].

[3] Unlawful Wage Assignments

[a] Debt Proraters

A debt prorater [*see Fin. Code § 12002.1*] may not take any wage assignment to secure the prorater's charges [*Fin. Code § 12318(c)*].

[b] Employment Agencies and Counseling Services; Job Listing Services

No employment agency, employment counseling service, or job listing service [*see Civ. Code § 1812.500 et seq.* (Employment Agency, Employment Counseling, and Job Listing Services Act)] may take from a job seeker an assignment of wages to cover its fees [*Civ. Code §§ 1812.505(d), 1812.512(d), 1812.517(c)*].

[c] Mortgage Foreclosure Consultants

It is a violation punishable by fine and imprisonment for a mortgage foreclosure consultant to take any wage assignment to secure the payment of compensation [*Civ. Code §§ 2945.4(c), 2945.7*]. Any such security is void and unenforceable [*Civ. Code § 2945.4(c)*].

[d] Motor Vehicle Conditional Sale Contracts and Leases

No motor vehicle conditional sale contract subject to the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*) nor any lease contract subject to the Vehicle Leasing Act (*Civ. Code § 2985.7 et seq.*) may contain any provision by which an assignment of wages is given; however, this does not prohibit an assignment of wages in a separate instrument executed pursuant to *Lab. Code § 300* (governing wage assignments generally) [*Civ. Code §§ 2983.7(b), 2986.3(a)*]. For further discussion, see Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* , and Ch. 90, *Automobiles: Vehicle Leasing Act* .

[e] Nurses' Registries

No nurses' registry [*see Civ. Code § 1812.524(b)*] may take an assignment of wages from a nurse to cover its fees [*Civ. Code § 1812.530(b)*].

[f] Retail Installment Sale Contracts

No contract or obligation subject to the Unruh Act (*Civ. Code § 1801 et seq.*) may contain any provision by which an assignment of wages is given; however, this does not prohibit an assignment of wages in a separate instrument executed pursuant to *Lab. Code § 300* (governing wage assignments generally) [*Civ. Code § 1804.1(c)*]. For further discussion of retail installment sale contracts, see Ch. 501, *Sales: Retail Installment Sales* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsAssignments, Deductions & GarnishmentsContracts LawSales of GoodsForm, Formation & ReadjustmentFormationAssignment of Rights

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§ 60.18 Assignments Under Commercial Code

[1] Letters of Credit

The right of a beneficiary to draw or otherwise demand performance under a letter of credit [*see Com. Code § 5101 et seq.*] may not be transferred unless the letter of credit provides that it is transferable [*see Com. Code § 5112(a)*; *but see Com. Code § 5113* (rules governing successor of beneficiary)]. Even if a letter of credit provides that it is transferable, the issuer may refuse to recognize or carry out a transfer if (1) the transfer would violate applicable law, or (2) the transferor or transferee has failedto comply with any requirement stated in the letter of credit or any other requirement relating to transfer imposed by the issuer which is within the standard of practice [*see Com. Code § 5108(e)*] or is otherwise reasonable under the circumstances [*Com. Code § 5112(b)*]. For further discussion, see Ch. 503, *Sales: Secured Transactions* .

[2] Negotiable Instruments

A check or other draft does not of itself operate as an assignment of funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until the drawee accepts it [*Com. Code § 3408*].

If a transferor of a negotiable instrument purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under the Commercial Code division on negotiable instruments [*see Com. Code § 3101 et seq.*] and has only the rights of a partial assignee [*Com. Code § 3203(d)*; *see discussion under § 60.19[2]*].

For further discussion, see Ch. 385, *Negotiable Instruments* .

[3] Sales

[a] Availability and Effect of Assignment

For purposes of the Commercial Code division on sales [*see Com. Code § 2101 et seq.*], unless otherwise agreed, generally all rights of either seller or buyer can be assigned except when the assignment would materially change the

duty of the other party, or increase materially the burden or risk imposed on the other party by that party's contract, or impair materially the other party's chance of obtaining return performance. A right to damages for breach of the whole contract or a right arising out of the assignor's due performance of the assignor's entire obligation can be assigned despite agreement otherwise [*Com. Code § 2210(2)*; *but see Com. Code § 9406* (effects of filing statement of assignment after secured party assigns all or part of security interest in all or part of collateral covered by filed Financing statement)].

Unless the circumstances indicate the contrary, a prohibition of assignment of "the contract" is to be construed as barring only the delegation to the assignee of the assignor's performance [*Com. Code § 2210(4)*; *see* discussion in *§ 60.18[3*][b], *below.*].

An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of rights. Unless the language and the circumstances indicate the contrary (as in an assignment for security), it is also a delegation of performance of the duties of the assignor, and its acceptance by the assignee constitutes a promise by the assignee to perform those duties [*see discussion under § 60.18[3][b]*]. This promise is enforceable by either the assignor or the other party to the original contract [*Com. Code § 2210(5)*].

[b] Delegation of Duties

A party's duties under a contract governed by the Commercial Code division on sales [*see Com. Code § 2101 et seq.*] may be performed through a delegate unless otherwise agreed or unless the other party has a substantial interest in having the original promisor perform or control the acts required by the contract. No delegation of performance relieves the party delegating of any duty to perform or any liability for breach [*Com. Code § 2210(1)*].

The other party may treat any assignment that delegates performance as creating reasonable grounds for insecurity and may, without prejudice to that party's rights against the assignor, demand assurances from the assignee [*Com. Code § 2210(6)*]. For discussion of sales under Division 2 generally, see Ch. 500, *Sales: Sales Under the Commercial Code* .

[4] Secured Transactions

[a] Excluded Transfers and Prohibited Terms In General

The Commercial Code division on secured transactions [*see Com. Code § 9101 et seq.*] does not apply to (1) an assignment of accounts or chattel paper that is for the purpose of collection only [*see* discussion in *§ 60.19[4]*]; (2) an assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract [*see* discussion in *§ 60.18[3*][a], *above*]; or (3) an assignment of a single account, payment intangible, or promissory note to an assignee in full or partial satisfaction of a preexisting indebtedness [*Com. Code § 9109(d)(5)-(7)*].

In general (except in the case of a lease agreement; *see* discussion in *§ 60.18[4][b]*), a term in an agreement between an account debtor and an assignor or in a promissory note is ineffective to the extent that it either [*Com. Code § 9406(d)(1), (2)*]:

- Prohibits, restricts, or requires the consent of the account debtor or person obligated on the promissory note to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account, chattel paper, payment intangible, or promissory note; or

- Provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account, chattel paper, payment intangible, or promissory note.

However, this rule does not apply to the sale of a payment intangible or promissory note [*Com. Code § 9406(e)*] and does not apply to an assignment of a health-care insurance receivable [*Com. Code § 9406(i)*; *see* discussion in *§ 60.18[d*], *below*]. The rule also is subject to any other law apart from Division 9 of the Commercial Code which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes [*Com. Code § 9406(h)*].

In general (except in the case of a lease agreement; [*see* discussion in *§ 60.18[4*][b]), a rule of law, statute, or regulation, that prohibits, restricts, or requires the consent of a government, governmental body or official, or account debtor to the assignment or transfer of, or creation of a security interest in, an account or chattel paper is ineffective to the extent that the rule of law, statute, or regulation either [*Com. Code § 9406(f)(1), (2)*]:

- Prohibits, restricts, or requires the consent of the government, governmental body or official, or account debtor to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account or chattel paper; or

- Provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account or chattel paper.

However, this rule does not apply to an assignment of a health care insurance receivable [*Com. Code § 9406(i)*; *see* discussion in *§ 60.18[d*], *below*]. The rule also is subject to any other law apart from Division 9 of the Commercial Code which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes [*Com. Code § 9406(h)*]. In addition, the foregoing rule does not apply to an assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, a claim or right to receive compensation for injuries or sickness as described in *I.R.C. § 104(a)(1)* or *(2)* (allowing a gross-income exclusion for worker's compensation or damages received for bodily injuries or sickness) or a claim or right to receive benefits under a special-needs trust as described in *42 U.S.C. § 1396p(d)(4)* (concerning grants to states for medical assistance programs), to the extent that the rule is inconsistent with those laws [*Com. Code § 9406(j)*].

Another exception to the rule of *Com. Code § 9406(f)* is the prohibition against any assignment of the right to a prize in the California State Lottery [*Gov. Code § 8880.325*]. That prohibition takes precedence over the Commercial Code rule generally invalidating such prohibitions [*Stone St. Capital, LLC v. California State Lottery Comm'n (2008) 165 Cal. App. 4th 109, 119-120, 80 Cal. Rptr. 3d 326*]. Specified assignments of the *payment* of a prize are permitted, however [*see Gov. Code §§ 8880.325, 8880.326*].

For discussion of the assignment of a conditional sale contract for the purpose of creating a security interest in goods or equipment that a merchant has sold, see Ch. 503, *Sales: Secured Transactions* .

[b] Lease Agreements

In general, a term in a lease agreement is ineffective to the extent that it either [*Com. Code § 9407(a)(1), (2)*]:

- Prohibits, restricts, or requires the consent of a party to the lease to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, an interest of a party under the lease contract or in the lessor's residual interest in the goods; or

- Provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the lease.

A term described in the second clause above is effective nonetheless to the extent that there is either (1) a transfer by the lessee of the lessee's right of possession or use of the goods in violation of the term, or (2) a delegation of a material performance of either party to the lease contract in violation of the term [*Com. Code § 9407(b)(1), (2)*]. In a consumer lease, in order to prohibit the transfer of an interest of a party under the lease contract or to make a transfer an event of default, the language must be specific, by a writing, and conspicuous [*Com. Code § 10303(g)*].

The creation, attachment, perfection, or enforcement of a security interest in the lessor's interest under the lease contract or the lessor's residual interest in the goods is not a transfer that materially impairs the lessee's prospect of obtaining return performance or materially changes the duty of or materially increases the burden or risk imposed on the lessee within the purview of *Com. Code § 10303(d)* (prescribing rights and remedies; see discussion, *below*) unless, and then only to the extent that, enforcement actually results in a delegation of material performance of the lessor [*Com. Code § 9407(c)*].

[c] Personal Property Leases

Additionally, in the case of a personal property lease agreement governed by Division 10 of the Commercial Code [for discussion, *see* Ch. 413, *Personal Property Leases*], a provision in the lease agreement might either (1) prohibit the voluntary or involuntary transfer of an interest of a party under the lease contract or of the lessor's residual interest in the goods, including a transfer by sale, sublease, creation or enforcement of a security interest, or attachment, levy, or other judicial process, or (2) make such a transfer an event of default. Such a provision gives rise to specified rights and remedies [*see Com. Code § 10303(d)*], but in general, a transfer that is prohibited or is an event of default under the lease agreement is otherwise effective [*Com. Code § 10303(b)*]. In this context, "creation of a security interest" includes the sale of a lease contract that is subject to Division 9 of the Commercial Code by reason of *Com. Code § 9109(a)(3)* (providing that Division 9 governs a sale of accounts, chattel paper, payment intangibles, or promissory notes) [*Com. Code § 10303(a)*].

A provision in a personal property lease agreement might either (1) prohibit a transfer of a right to damages for default with respect to thewhole lease contract or of a right to payment arising out of the transferor's due performance of the transferor's entire obligation or (2) make such a transfer an event of default. Such a provision is not enforceable, and such a transfer is not a transfer that materially impairs the prospect of obtaining return performance by, or materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract within the purview of *Com. Code § 10303(d)* (prescribing rights and remedies) [*Com. Code § 10303(c)*].

A transfer of "the lease" or of "all my rights under the lease," or a transfer in similar general terms, is a transfer of rights and, unless the language or the circumstances, as in a transfer for security, indicate the contrary, the transfer is a delegation of duties by the transferor to the transferee. Acceptance by the transferee constitutes a promise by the transferee to perform those duties. The promise is enforceable by either the transferor or the other party to the lease contract [*Com. Code § 10303(e)*].

Unless otherwise agreed by the lessor and the lessee, a delegation of performance does not relieve the transferor as against the other party of any duty to perform or of any liability for default [*Com. Code § 10303(f)*].

In a consumer lease, in order to prohibit the transfer of an interest of a party under the lease contract or to make a transfer an event of default, the language must be specific, by a writing, and conspicuous [*Com. Code § 10303(g)*].

[d] Promissory Notes, Health Care Insurance Receivables, and General Intangibles

In general, a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health care insurance receivable or a general intangible, including a contract, permit, license, or franchise, and which term prohibits, restricts, or requires the consent of the person obligated on the promissory note or the account debtor to,

the assignment or transfer of, or the creation, attachment, or perfection of a security interest in, the promissory note, health care insurance receivable, or general intangible, is ineffective to the extent that the term either [*Com. Code § 9408(a)(1), (2)*]:

- Would impair the creation, attachment, or perfection of a security interest; or

- Provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health care insurance receivable, or general intangible.

However, this rule would not apply to a security interest in a payment intangible or promissory note unless the security interest arises out of a sale of the payment intangible or promissory note [*Com. Code § 9408(b)*].

A rule of law, statute, or regulation that prohibits, restricts, or requires the consent of a government, governmental body or official, person obligated on a promissory note, or account debtor to, the assignment or transfer of, or the creation of a security interest in, a promissory note, health-care insurance receivable, or general intangible, including a contract, permit, license, or franchise between an account debtor and a debtor, is ineffective to the extent that the rule of law, statute, or regulation either [*Com. Code § 9408(c)(1), (2)*]:

- Would impair the creation, attachment, or perfection of a security interest; or

- Provides that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health care insurance receivable, or general intangible.

However, the foregoing rule does not apply to an assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, a claim or right to receive compensation for injuries or sickness as described in *I.R.C. § 104(a)(1)* or *(2)* (allowing a gross income exclusion for worker's compensation or damages received for bodily injuries or sickness) or a claim or right to receive benefits under a special needs trust as described in *42 U.S.C. § 1396p(d)(4)* (concerning grants to states for medical assistance programs), to the extent that the rule is inconsistent with those laws [*Com. Code § 9408(e)*].

If, and to the extent that, a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health care insurance receivable or general intangible, or a rule of law, statute, or regulation described above, would be effective under other law apart from Division 9 of the Commercial Code, but it is ineffective under any of the foregoing rules, then all of the following rules apply with respect to the creation, attachment, or perfection of a security interest in the promissory note, health-care insurance receivable, or general intangible [*Com. Code § 9408(d)(1)-(6)*]:

- It is not enforceable against the person obligated on the promissory note or the account debtor.

- It does not impose a duty or obligation on the person obligated on the promissory note or the account debtor.

- It does not require the person obligated on the promissory note or the account debtor to recognize the security interest, pay or render performance to the secured party, or accept payment or performance from the secured party.

- It does not entitle the secured party to use or assign the debtor's rights under the promissory note, health care insurance receivable, or general intangible, including any related information or materialsfurnished to the debtor in the transaction giving rise to the promissory note, health care

insurance receivable, or general intangible.

- It does not entitle the secured party to use, assign, possess, or have access to any trade secrets or confidential information of the person obligated on the promissory note or the account debtor.

- It does not entitle the secured party to enforce the security interest in the promissory note, health care insurance receivable, or general intangible.

[e] Notification and Proof of Assignment

In general, an account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor [*Com. Code § 9406(a)*].

Notification is ineffective if it does not reasonably identify the rights assigned or to the extent that an agreement between an account debtor and a seller of a payment intangible limits the account debtor's duty to pay a person other than the seller and the limitation is effective under other law apart from Division 9 of the Commercial Code [*Com. Code § 9406(b)(1), (2)*]. At the option of an account debtor, notification is ineffective if the notification notifies the account debtor to make less than the full amount of any installment or other periodic payment to the assignee, even if (1) only a portion of the account, chattel paper, or payment intangible has been assigned to that assignee, or (2) a portion has been assigned to another assignee, or (3) the account debtor knows that the assignment to that assignee is limited [*Com. Code § 9406(b)(3)(A)-(C)*]. However, these rules are subject to any other law apart from Division 9 of the Commercial Code which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes [*Com. Code § 9406(h)*].

If requested by the account debtor, an assignee must seasonably furnish reasonable proof that the assignment has been made. Unless the assignee complies, the account debtor may discharge its obligation by paying the assignor, even if the account debtor has received a notification under *Com. Code § 9406(a)* as described above [*Com. Code § 9406(c)*].

In addition, the foregoing rules are subject to *Com. Code § 9406(d)-(g)* and *(i)* [*see Com. Code § 9406(a)*], which are discussed in *§ 60.18[4][a], above.*

[f] Modification or Substitution

In general, a modification of or substitution for an assigned contract is effective against an assignee if made in good faith. The assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that the modification or substitution is a breach of contract by the assignor [*Com. Code § 9405(a)*]. These rules apply to the extent that either (1) the right to payment or a part thereof under an assigned contract has not been fully earned by performance or (2) the right to payment or a part thereof has been fully earned by performance and the account debtor has not received notification of the assignment under *Com. Code § 9406(a)* [*Com. Code § 9405(b)*]. See discussion in *§ 60.18[4][e]*.

However, the above rule is subject to any other law apart from Division 9 of the Commercial Code which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes [*Com. Code § 9405(c)*]. The rules stated above also do not apply to an assignment of a health-care insurance receivable [*Com. Code § 9405(d)*]. See discussion in *§ 60.18[4][d], above.*

[g] Claims and Defenses

Com. Code § 9403 establishes rules regarding agreements not to assert claims and defenses against assignees. In general, an agreement between an account debtor and an assignor not to assert against an assignee any claim or defense that the account debtor may have against the assignor is enforceable by an assignee taking an assignment that satisfies all of the following conditions [*Com. Code § 9403(b)(1)-(4)*]:

- It is taken for value [*see Com. Code §§ 3303(a), 9403(a)*].
- It is taken in good faith.
- It is taken without notice of a claim of a property or possessory right to the property assigned.
- It is taken without notice of a defense or claim in recoupment of the type that may be asserted against a person entitled to enforce a negotiable instrument under *Com. Code § 3305(a).*

However, this does not apply to defenses of a type that may be asserted against a holder in due course of a negotiable instrument under *Com. Code § 3305(b)* [*Com. Code § 9403(c)*]. For discussion of *Com. Code § 3305(a)* and *(b)*, see Ch. 385, *Negotiable Instruments* .

In a consumer transaction, if a record evidences the account debtor's obligation, and other law apart from Division 9 requires that the record include a statement to the effect that the rights of an assignee are subject to claims or defenses that the account debtor could assert against the original obligee, and the record does not include such a statement, then both of the following apply [*Com. Code § 9403(d)(1), (2)*]:

- The record has the same effect as if the record included such a statement.
- The account debtor may assert against an assignee those claims and defenses that would have been available if the record included such a statement.

Except to that extent, *Com. Code § 9403* does not displace other law apart from Division 9 which gives effect to an agreement by an account debtor not to assert a claim or defense against an assignee [*Com. Code § 9403(f)*].

Com. Code § 9403 is subject to other law apart from Division 9 which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes [*Com. Code § 9403(e)*]. For discussion of the contrary statutory rules for buyers or lessees of consumer goods, see *§ 60.21[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsInstallment ContractsAssignmentsContracts LawSecured TransactionsThird Party RightsAssignmentsReal Property LawLandlord & TenantLease AgreementsSubleasesCommercial Law (UCC)Letters of Credit (Article 5)Assignments & TransfersContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & Assignors

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6-60 California Forms of Pleading and Practice--Annotated § 60.19

§ 60.19 Actions by Assignees

[1] Assignment as Security

When an assignment of a thing in action or an obligee's rights is made for the purpose of security, the assignee (secured party) may sue to foreclose the security interest without joining the assignor as a party. The assignor is a proper party but is not a necessary party. The assignor may sue on the assigned thing in action or to enforce the assigned rights if the assignee consents or the assignor joins the assignee as a party. The assignee is a necessary party in that case [*Greco v. Oregon Mut. Fire Ins. Co. (1961) 191 Cal. App. 2d 674, 687, 12 Cal. Rptr. 802* ; *see* discussion in *§ 60.19[4*], *below*].

[2] Assignment of Partial Rights

An assignee of less than the whole of a thing in action or less than all of an obligee's rights--a partial assignee--may sue on the thing in action or sue to enforce the assigned rights, provided the assignor and any other partial assignees are joined as parties [*Martin v. Howe (1922) 190 Cal. 187, 194, 211 P. 453]* . A partial assignee may not sue alone [*Stein v. Cobb (1940) 38 Cal. App. 2d 8, 10-11, 100 P.2d 358]* . The assignor and any other partial assignees are necessary parties [*cf. Greco v. Oregon Mut. Fire Ins. Co. (1961) 191 Cal. App. 2d 674, 687, 12 Cal. Rptr. 802* (assignor is a proper party, but not necessay party)] because of the prohibition against splitting a cause of action [*Martin v. Howe (1922) 190 Cal. 187, 194, 211 P. 453]* . For the same reason, if the assignor retained any interest in the thing in action or rights in question, the assignor may not sue alone but must join all partial assignees [*Cain v. State Farm Mut. Auto. Ins. Co. (1975) 47 Cal. App. 3d 783, 794-795, 121 Cal. Rptr. 200* ; *see* generally Ch. 395, *Parties* , regarding joinder].

[3] Damages

[a] In General

The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest [*Civ. Code § 3302*].

The detriment caused by the wrongful conversion of personal property is presumed to be (1) the value of the property at

the time of the conversion, with interest from that time, or an amount sufficient to indemnify the injured person for the loss that is the natural, reasonable, and proximate result of the wrongful act complained of and that a proper degree of prudence on the part of the injured person would not have averted, plus (2) a fair compensation for the time and money properly expended in pursuit of the property [*Civ. Code § 3336*]. This presumption cannot be defeated, in favor of one whose possession was wrongful from the beginning, by his or her subsequent application of the property to the owner's benefit, without the owner's consent [*Civ. Code § 3337*].

For further discussion, see Ch. 177, *Damages* .

[b] Bounced Checks, Drafts, and Money Orders

A cause of action for actual and treble damages may be brought as a limited civil case by an assignee of the payee of a bounced check, draft, or money order [*see Civ. Code § 1719(f), (i)*; *see generally Civ. Code § 1719* (action for treble damages by payee of dishonored check, draft, or money order is a limited civil case); *see also Code Civ. Proc. §§ 85, 86(a)(1)*; Ch. 324, *Jurisdiction: Subject Matter*]. However, if the assignee is acting on behalf of the payee for a flat fee or a percentage fee--that is, in the case of an assignment for collection--the assignee may not charge the payee a greater flat fee or percentage fee for that portion of the amount collected that represents treble damages than is charged the payee for collecting the face amount of the check, draft, or order [*Civ. Code § 1719(f)*]. For further discussion, see Ch. 385, *Negotiable Instruments* .

[c] Trust Deed Forgeries

In an action for damages by an assignee or a successor in interest against a beneficiary of a trust deed on real property consisting of a single-family residence containing not more than four dwelling units, if it is established that the trust deed was forged in whole or in part by the beneficiary, judgment may be entered for three times the amount at which the actual damages are assessed [*Code Civ. Proc. § 749.5(a)*; *see generally* Ch. 555, *Trust Deeds and Real Property Mortgages*].

[d] Unfair Trade Practices

In an action based on a violation of the Unfair Practices Act (*Bus. & Prof. Code § 17000 et seq.*) or a violation of the statutes governing unfair pharmacy trade practices [*see Bus. & Prof. Code § 4380 et seq.*], the plaintiff may both obtain injunctive relief and also recover three times the amount of the plaintiff's actual damages, if any, as well as three times the actual damages, if any, sustained by any person who assigned to the plaintiff a claim for damages resulting from such a violation [*Bus. & Prof. Code §§ 4381(c), 17082*]. For further discussion, see Ch. 565, *Unfair Competition* .

[4] Debts Assigned for Collection

When a debt is assigned for collection, the assignee usually is in the business of taking assignments of debts for collection. The assignee is a contractor of the creditor for the purpose of collecting the debt and will pay to the creditor whatever amount is collected from the debtor, less a fee [*see generally Hospital Medical Collections, Inc. v. City of Los Angeles (1976) 65 Cal. App. 3d 46, 50, 135 Cal. Rptr. 147* (description of collection agency business)]. The function of the assignment is to give the collector standing to sue on the debt [*see, e.g., Associated Creditors' Agency v. Davis (1975) 13 Cal. 3d 374, 378-379, 118 Cal. Rptr. 772, 530 P.2d 1084* (suit by assignee for collection); *James Talcott, Inc. v. Short (1979) 100 Cal. App. 3d 504, 507, 161 Cal. Rptr. 63 , disapproved on other grounds* in *Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 743 n.11, 29 Cal. Rptr. 2d 804, 872 P.2d 143* (same)]. An assignment for the purpose of collection is not void for lack of consideration. The assignee (collector) may sue on the debt in the assignee's own name even though the assignor retains an equitable interest in the assigned debt [*National R. Co. v. Metropolitan T. Co. (1941) 17 Cal. 2d 827, 831, 112 P.2d 598]* . For a complaint by an assignee for collection, see *§ 60.62*; see also the discussion in *§§ 60.19[3][b], 60.20[2]*.

An assignee for the purpose of security may be considered as an assignee for collection with respect to any part of the assigned claim that exceeds the secured debt. If the assignee sues on the claim for the purpose of foreclosing the security interest, any amount recovered in excess of the secured debt belongs to the assignor, and the assignee is accountable to the assignor for that excess amount [*Ginocchio v. Amador C. & M. Co. (1885) 67 Cal. 493, 496, 8 P. 29* ; *see also* the discussion in *§ 60.18[4][a]*].

An assignee of a legal claim for money owed has standing to pursue that claim in a federal court, even when the assignee has promised to remit the proceeds of the litigation to the assignor. However, in a particular case there could be so-called prudential reasons--for example, the assignment was made in bad faith, or there will be practical impediments in the litigation (such as the defendant's difficulty in pursuing discovery against the assignor)--on which the court could rely in concluding that the complaint should be dismissed for lack of standing [*Sprint Communs. Co. v. APCC Servs. (2008) -- U.S. --, 128 S. Ct. 2531, 171L. Ed. 2d424, 2008 U.S. LEXIS 5034, at *5, *36-*41*].

[5] Oil and Gas Lien Claims; Actions on Bonds

Whenever any lien is claimed or recorded under the Oil and Gas Lien Act (*Code Civ. Proc. § 1203.50 et seq.*), the lessor or owner (or a contractor, in the case of a subcontractor's lien) may record a surety bond to take the place of the property against which the lien is claimed or recorded. Oneaction on the bond does not exhaust the remedies of obligees on the bond. Any assignee of any obligee may, within the period prescribed for enforcement of a lien [*see Code Civ. Proc. § 1203.61*], commence and maintain a separate suit on the bond in any court having jurisdiction [*Code Civ. Proc. § 1203.60*]. For further discussion, see Ch. 393, *Oil and Gas* .

[6] Private School Student Contracts

Any private postsecondary school or vocational institution [*see Educ. Code § 94300 et seq.*] extending credit or lending money to any person for tuition, fees, or any charges whatever for educational services to be rendered or furnished must cause any note, instrument, or other evidence of indebtedness taken in connection with that loan or extension of credit to be conspicuously marked on the face with a notice set forth in *Educ. Code § 94335(c)*. The notice alerts any holder that he or she is subject to specified claims and defenses of the debtor, and describes the recovery available to the debtor. In the event the school or institution fails to insert this notice, it is liable for any damage or loss suffered or incurred by any subsequent assignee, transferee, or holder of that evidence of indebtedness on account of the absence of that notification [*Educ. Code § 94335(c)*].

[7] Recovery of Street Improvement Assessments

At any time after the first of July next after the expiration of nine months following the date of recording of an assessment for street improvements under the Improvement Act of 1911 (*Sts. & Hy. Code § 5000 et seq.*), the contractor's assignee may sue, in the assignee's own name, the owner of the land, lots, or portions of lots assessed on the date of recording of the warrant, assessment, and diagram, to recover the amount of any assessment [*see Sts. & Hy. Code § 5410* (what assessments may be collected by action)] remaining unpaid, together with interest and any penalties allowed under the act. If any state, county, or municipal taxes or any other special assessments are delinquent on the property, the action may be brought at any time after the expiration of 90 days following the recording of the assessment [*Sts. & Hy. Code § 5411*]. The Commercial Code division dealing with secured transactions [*see Com. Code § 9101 et seq.*] does not apply to any security interest created by an assignment of the benefits of any public construction contract under the Improvement Act of 1911 [*Com. Code § 9109(d)(14)*].

In the case of delinquent assessments under the Municipal Improvement Act of 1913 (*Sts. & Hy. Code § 10000 et seq.*), the legislative body of the city may be empowered to authorize collection under the foregoing provision [*see Sts. & Hy. Code § 10600.1*].

[8] Retail Installment Sale Contracts

In any action by an assignee of the seller's rights under a retail installment salecontract subject to the Unruh Act, the buyer's writtenacknowledgment, conforming to statutory requirements, creates a rebuttable presumption of delivery of a legible copy of the contract and any other document signed by the buyer at the seller's request during the contract negotiation, provided the assignee was without knowledge to the contrary at the time of purchasing the contract [*Civ. Code § 1803.7*]. For further discussion, see Ch. 501, *Sales: Retail Installment Sales* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsChoses in ActionContracts LawSecured TransactionsInstallment ContractsAssignmentsTax LawState & Local TaxesAdministration & ProceedingsAssessmentsContracts LawPerformanceAssignmentConsentContracts LawSecured TransactionsThird Party RightsAssignments

California Forms of Pleading and Practice--Annotated

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 60 ASSIGNMENTS
PART II. LEGAL BACKGROUND

6-60 California Forms of Pleading and Practice--Annotated § 60.20

§ 60.20 Bars to Assignees' Actions

[1] Attorneys Disbarred or Suspended

No person who has been an attorney, while a judgment of disbarment or suspension is in force, may appear in his or her own behalf as plaintiff in the prosecution of any action if the subject of the action was assigned to him or her after entry of the judgment of disbarment or suspension and solely for the purpose of collection [*Bus. & Prof. Code § 6130*; *see Wilde v. Superior Court (1942) 53 Cal. App. 2d 168, 177, 127 P.2d 560* (disbarred attorney not precluded from suing as assignee if assignment was not solely for purpose of collection)]. However, an attorney who *resigned* may appear as an assignee for collection [*Gresham v. Superior Court (1941) 44 Cal. App. 2d 664, 665, 112 P.2d 965]* and, therefore, may lawfully operate a collection agency business. See also the discussion in *§ 60.19[4], above.*

[2] Attorney's Fees Assigned for Collection

If an assignee commences an action in any court for the recovery of attorney's fees, the client may stay the action by serving and filing a request for arbitration in accordance with the rules established by the State Bar Board of Governors for the arbitration of fee disputes [*see Bus. & Prof. Code § 6200 et seq.*], unless those rules do not apply to the dispute in question [*Bus. & Prof. § 6201(b)*; *see Bus. & Prof. § 6200(b)* (excepted disputes)]. For further discussion and forms, see Ch. 72, *Attorney Practice and Ethics* .

[3] Commercial Rent Control Ordinance

Any ordinance or other local law establishing a notice requirement relating to termination of a commercial lease because of expiration of the term must contain (or will be deemed to contain) a provision that no right or cause of action accruing to a tenant pursuant to the local law or the enabling state law [*see Civ. Code § 1954.25 et seq.*] may be assigned except to a person who is a lawful assignee of the lease, is in lawful possession of the premises under the lease, and has performed the terms of the lease in such manner as would entitle the tenant to exercise any option the tenant might have under the lease [*Civ. Code § 1954.31(b)(1), (2)*]. For further discussion, see Ch. 335, *Landlord and Tenant: Rent Control* .

[4] Consumer Credit Contracts

No action may be brought, and no security interest may be enforced, by any assignee of a creditor on any consumer credit contract that fails to comply with Civil Code provisions governing consumer credit contracts [*see Civ. Code § 1799.90 et seq.*], against any person, however designated, who is entitled to notice under *Civ. Code § 1799.91* and who does not in fact receive any of the money, property, or services that are the subject matter of the consumer credit contract [*Civ. Code § 1799.95*]. This provision may protect certain accommodation co-signers from being sued on consumer credit contracts. For further discussion, see Ch. 501, *Sales: Retail Installment Sales ;* see also the discussion of consumer credit contracts in Ch. 127, *Consumer Contracts and Loans*.

[5] Contract or Transaction in Fictitious Business Name

No assignee of a person transacting business under a fictitious business name contrary to the applicable provisions of the Business and Professions Code [*see Bus. & Prof. Code § 17900 et seq.*] may maintain any action on, or on account of, any contract made, or transaction had, in the fictitious business name in any California court until a fictitious business name statement has been executed, filed, and published as required by law [*Bus. & Prof. Code § 17918*]. For forms of allegations of compliance with the requirements to execute, file, and publish a fictitious business name statement, see Ch. 20, *Allegations Commonly Used* . A fictitious business name statement may be executed, filed, and published by an assignee of the business at any time after the assignment, if a failure to comply with the applicable provisions of the Business and Professions Code would otherwise preclude the maintenance of an action to recover any sums due to the assignee by reason of the assignment [*Bus. & Prof. Code § 17919(c)*]. For discussion of the execution, filing, and publishing of a fictitious business name statement, see *California Legal Forms, Ch. 1A, Role of Counsel in Starting A New Business, §§ 1A.51, 1A.130, 1A.140* (Matthew Bender). A fictitious business statement form is illustrated in *California Legal Forms, Ch. 1A, Role of Counsel in Starting A New Business, § 1A.205* (Matthew Bender).

[6] Health Care Service Plans

No assignee of a contracting provider under a health care service plan [*see Health & Safety Code § 1340 et seq.*] may maintain any action at law against a subscriber or enrollee to collect sums owed by the plan [*Health & Safety Code § 1379(c)*].

[7] Insurance Adjusters as Assignees

No licensee under the Insurance Adjuster Act (*Ins. Code § 14000 et seq.*) may appear as an assignee party in any proceeding involving claim anddelivery or replevin, or any other possessory action, or any action to foreclose a chattel mortgage, mechanics' lien, materialman's lien, or any other lien [*Ins. Code § 14038(g)*].

[8] Repossessors as Assignees

A repossessor under the Collateral Recovery Act (*Bus. & Prof. Code § 7500 et seq.*) is subject to an administrative fine for appearing as an assignee party in any court proceeding involving claim and delivery or replevin, or any other possessory court action, action to foreclose a chattel mortgage, or action to foreclose a mechanics' lien, materialman's lien, or any other lien. This does not prohibit a repossessor from appearing as a defendant in any of those actions [*Bus. & Prof. Code § 7508.1(d)*].

[9] Small Claims

No claim may be filed or maintained in small claims court by an assignee of the claim [*Code Civ. Proc. § 116.420(a)*]. However, this does not prevent the filing or defense of an action in the small claims court by the holder of a security agreement, retail installment contract, or lien contract subject to the Unruh Act (*Civ. Code § 1801 et seq.*) or the Rees-Levering Automobile Sales and Finance Act (*Civ. Code § 2981 et seq.*) purchased by the holder for the holder's

portfolio of investments, provided the holder is not an assignee for the purpose of collection [*Code Civ. Proc. § 116.420(b)*].

A workers' compensation insurer is an assignee for this purpose and may not sue a third-party tortfeasor in small claims court to recover benefits paid to an injured employee [*Allianz Insurance Co. v. Municipal Court (1981) 126 Cal. App. 3d 1043, 1046, 179 Cal. Rptr. 334]* .

For further discussion of small claims court proceedings, see Ch. 526, *Small Claims* .

[10] Tax Refund Claims

[a] Commercial Fishing Landing Tax

A judgment may not be rendered in favor of the plaintiff in any action brought against the Department of Fish and Game to recover any amount paid as a commercial fishing landing tax [*see Fish & Game Code § 8040 et seq.* (landing taxes imposed on commercial fishermen)] when the action is brought by or in the name of an assignee of the person paying the amount [*Fish & Game Code § 8070*].

[b] Excise Taxes

The Revenue and Taxation Code provides, in various separate excise tax laws, that a judgment may not be rendered in favor of the plaintiff in any action brought to recover any amount paid as tax (sometimes specifyingalso interest and penalties) under the law in question, when the action is brought by or in the name of an assignee of the person paying the tax (or interest or penalties). Such a provision exists with respect to each of the following types of taxes:

- Alcoholic beverage tax [*Rev. & Tax. Code § 32418*].
- Cigarette and tobacco products tax [*Rev. & Tax. Code § 30407*].
- Emergency telephone users surcharge [*Rev. & Tax. Code § 41114*].
- Energy resources surcharge [*Rev. & Tax. Code § 40131*].
- Hazardous substances tax [*Rev. & Tax. Code § 43478*; *but see* discussion following this list].
- Oil spill response, prevention, and administration fees [*Rev. & Tax. Code § 46528 but see* discussion following this list)].
- Private railroad car tax [*Rev. & Tax. Code § 11577*].
- Sales and use taxes [*Rev. & Tax. Code § 6937*].
- Solid waste disposal site cleanup and maintenance fees [*Rev. & Tax. Code § 45708* (*but see* discussion following this list)].
- Timber yield tax [*Rev. & Tax. Code § 38617*].
- Underground storage tank maintenance fees [*Rev. & Tax. Code § 50149(a)* (*but see* discussion following this list)].

- Use fuel tax [*Rev. & Tax. Code § 9175*].
- Vehicle fuel license tax [*Rev. & Tax. Code § 8152*].

In the case of the hazardous substances tax, the oil spill response, prevention, and administration fees, the solid waste disposal site cleanup and maintenance fees, and the underground storage tank maintenance fees, "assignee" does not include a person who has acquired the business of the taxpayer or fee payer that gave rise to the taxes or fees and who is thereby a successor in interest to the taxpayer or fee payer [*Rev. & Tax. Code §§ 43478, 45708, 46528, 50149(b)*].

For further discussion and forms relating to refunds of sales or use taxes, see Ch. 540, *Taxes and Assessments* .

[c] Fees Collectible by Board of Equalization

In the case of fees that are collectible by the Board of Equalization pursuant to the Fee Collection Procedures Law (*Rev. & Tax. Code § 55001 et seq.*), a judgment may not be rendered in favor of the plaintiff in any action brought against the board to recover any fee paid when the action is brought by or in the name of an assignee of the person paying the fee. "Assignee" does not include a person who has acquired the business of the fee payer that gave rise to the fee and who is thereby a successor in interest to the fee payer [*Rev. & Tax. Code § 55248*].

[d] Generation Skipping Transfer Tax

Any person who has paid any tax imposed by the Generation Skipping Transfer Tax Law (*Rev. & Tax. Code § 16700 et seq.*) that later is determined by judgment to have been in excess of the amount legally due, or an heir, the executor of the will, or the administrator of the estate of any such person, but not any such person's assignee, is entitled to a refund in the amount of the excess paid within one year after the judgment becomes final [*Rev. & Tax. Code § 16852*].

[e] Insurance Company Taxes

A judgment may not be rendered in favor of the plaintiff in any action brought to recover any amount paid as tax, interest, or penalties imposed on an insurance company under the Revenue and Taxation Code [*see Rev. & Tax. Code § 12001 et seq.*] when the action is brought by or in the name of an assignee of the insurer paying the tax, interest, or penalties [*Rev. & Tax. Code § 13108*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawIndustry RegulationInsurance Company OperationsRepresentativesAdjusters & InvestigatorsLicensesContracts LawSales of GoodsForm, Formation & ReadjustmentFormationAssignment of RightsLegal EthicsSanctionsDisbarmentsReal Property LawLandlord & TenantLease AgreementsAssignmentsContracts LawSecured TransactionsThird Party RightsAssignments

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Chapter 60 ASSIGNMENTS
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6-60 California Forms of Pleading and Practice--Annotated § 60.21

§ 60.21 Claims and Other Defenses Assertable Against Assignees

[1] In General

Assignees are subject to the general rule that a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all of the obligations arising from it, as far as the facts are known, or ought to be known, to the person accepting [*Civ. Code § 1589*; *see Melchior v. New Line Productions, Inc. (2003) 106 Cal. App. 4th 779, 788-790, 131 Cal. Rptr. 2d 347* (assignee of film production company, which accepted benefits of company's original agreement with author, also accepted obligations of original agreement despite different terms in assignment agreement); *Heppler v. J.M. Peters Company, Inc. (1999) 73 Cal. App. 4th 1265, 1289-1292, 87 Cal. Rptr. 2d 497* (under *Civ. Code § 1589*, plaintiffs assumed rights and obligations associated with attorney fee provisions of subcontracts under settlement agreement); *Hughes v. Nashua Mfg. Co. (1968) 257 Cal. App. 2d 778, 784, 65 Cal. Rptr. 380* ; *see also Recorded Picture Co. v. Nelson Entertainment (1997) 53 Cal. App. 4th 350, 362-363, 61 Cal. Rptr. 2d 742* (subdistributor of motion picture which did not accept benefit of agreement between producer and distributor was not subject to burdens of that agreement under *Civ. Code § 1589*)].

In the case of an assignment of a thing in action, an action by the assignee is without prejudice to any set-off or other defense existing at the time of, or before, notice of the assignment. This provision, however, does not apply in the case of a negotiable promissory note or bill of exchange transferred in good faith and on good consideration, before maturity [*Code Civ. Proc. § 368*].

[2] Account Debts Under Commercial Code

In general, unless an account debtor has made an enforceable agreement not to assert defenses or claims [*see discussion under § 60.18[4][e]*], the rights of an assignee are subject to *Com. Code § 9404(a)(1), (2)*:

- All terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and

- Any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee [

see discussion under § 60.18[4][c]].

In addition, the claim of an account debtor against an assignor may be asserted against an assignee only to reduce the amount the account debtor owes [*Com. Code § 9404(b)*].

In a consumer transaction, if a record evidences the account debtor's obligation, law other than this division requires that the record include a statement to the effect that the account debtor's recovery against an assignee with respect to claims and defenses against the assignor may not exceed amounts paid by the account debtor under the record, and the record does not include such a statement, the extent to which a claim of an account debtor against the assignor may be asserted against an assignee is determined as if the record included such a statement [*Com. Code § 9404(d)*].

However, the foregoing rules are subject to any other law apart from Division 9 of the Commercial Code which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes [*Com. Code § 9404(c)*]. The rules stated above also do not apply to an assignment of a health-care insurance receivable [*Com. Code § 9404(e)*; *see* discussion in *§ 60.18[4][d]*].

[3] Dance and Health Studio Contracts

No right of action or defense arising out of a contract for dance studio lessons and other services [*see Civ. Code § 1812.50 et seq.*] or for health studio services [*see Civ. Code § 1812.80 et seq.*] that the buyer has against the seller, which normally would be cut off by assignment, is cut off by assignment of the contract to any third party whether or not the assignee acquires the contract in good faith and for value, unless the assignee gives notice of the assignment to the buyer and, within 30 days after mailing the notice, receives no written notice of the facts giving rise to the claim or defense of the buyer [*Civ. Code §§ 1812.56* (dance studio), 1812.88 (health studio)].

A notice of assignment must be in writing addressed to the buyer at the address shown on the contract and must identify the contract and informthe buyer that within 30 days after the date of mailing of the notice, the buyer must notify the assignee in writing of any facts giving rise to a claim or defense that he or she may have. The notice of assignment must state the names of the seller and the buyer, a description of the lessons and other services, the contract balance, and the number and amounts of the installments [*Civ. Code §§ 1812.56* (dance studio), 1812.88 (health studio)].

For further discussion, see Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* .

[4] Discount Buying Services

No right of action or defense arising out of a contract for discount buying services [*see Civ. Code § 1812.100 et seq.*] that the buyer has against the discount buying organization is cut off by assignment or transfer of the contract to any third party [*Civ. Code § 1812.114*]. For further discussion, see Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* .

[5] Insurance Premium Finance Agreements

In the case of an insurance premium finance agreement with an industrial loan company [*see Fin. Code § 18560 et seq.*], assignment of the premium finance agreement does not cut off any defenses that the insured would have against the company or an assignee of the agreement arising from obligations imposed by the Industrial Loan Law [*Fin. Code § 18588*; *see Fin. Code § 18000 et seq.* (Industrial Loan Law)].

[6] Invention Development Services Contracts

An assignee of an invention developer's rights under an invention development services contract [*see Bus. & Prof. Code § 22370 et seq.*] is subject to all equities and defenses of the customer against the invention developer existing in favor

of the customer at the time of the assignment [*Bus. & Prof. Code § 22377*]. For further discussion, see Ch. 411, *Patents and Inventions* .

[7] Mobilehome Conditional Sale Contracts

Except as otherwise specifically provided in *Health & Safety Code § 18036.5* (governing conditional sale contracts for manufactured homes and mobilehomes), any civil action for a violation of that section that may be brought against a seller may be maintained against any assignee of the seller only if the violation for which the action or proceeding is brought is apparent on the face of the required disclosure statement. If the assignment was involuntary, however, no civil action may be brought against the assignee for the violation. A violation apparent on the face of the disclosurestatement includes, but is not limited to, (1) a disclosure that can be determined to be incomplete or inaccurate from the face of the disclosure statement or other documents assigned, and (2) a disclosure that does not use the terms required to be used in Regulation Z [*Health & Safety Code § 18036.5(k)*].

Notwithstanding any agreement to the contrary, the assignee of a mobilehome conditional sale contract for which Regulation Z disclosures are required pursuant to *Health & Safety Code § 18036.5* is subject to all equities and defenses of the buyer against the seller, except as provided by that section. However, the assignee's liability may not exceed the amount of the debt owing to the assignee at the time of assignment. The assignee has recourse against the seller to the extent of any liability incurred by the assignee pursuant to this provision, whether the assignment was with or without recourse, except to the extent of any written agreement between the seller and assignee that expressly references this provision and modifies its effect [*Health & Safety Code § 18037*]. For further discussion, see Ch. 369, *Mobilehomes and Mobilehome Parks* .

[8] Motor Vehicle Conditional Sale Contracts

An assignee of the seller's right under a conditional sale contract governed by the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*) is subject to all equities and defenses of the buyer against the seller, notwithstanding an agreement to the contrary, but the assignee's liability may not exceed the amount of the debt owing to the assignee at the time of the assignment [*Civ. Code § 2983.5(a)*]. No conditional sale contract may contain any provision by which the buyer agrees not to assert a claim or defense arising out of the sale against the seller or an assignee [*Civ. Code § 2983.7(a)*]. The assignee has recourse against the seller to the extent of any liability incurred by the assignee pursuant to these provisions, regardless of whether the assignment was with or without recourse [*Civ. Code § 2983.5(b)*]. For further discussion, see Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* .

[9] Motor Vehicle Leases

An assignee of the lessor's rights under a motor vehicle lease governed by the Vehicle Leasing Act (*Civ. Code § 2985.7 et seq.*) is subject to all equities and defenses of the lessee against the lessor, notwithstanding an agreement to the contrary, but the assignee's liability may not exceed the amount of the obligation owing to the assignee at the time of the assignment [*Civ. Code § 2986.10(a)*]. Except as otherwise specifically provided in the Vehicle Leasing Act, any civil action for a violation of the act that may be brought against the original lessor in any lease transaction may be maintained against any subsequent assignee of the original lessor, if the violation from which the alleged liability arose is apparent on the faceof the instrument assigned, unless the assignment was involuntary [*Civ. Code § 2988.5(e)*].

A lease contract may not contain any provision by which the lessee waives any right of action against the lessor or holder of the contract, or other person acting on behalf of the lessor or holder, for any illegal act committed in the collection of payments under the contract or in the repossession of the motor vehicle [*Civ. Code § 2986.3(b)*]. Additionally, a lease contract may not contain any provision by which the lessee relieves the lessor from liability for any legal remedies that the lessee may have against the lessor under the contract or any separate instruments executed in connection with the contract [*Civ. Code § 2986.3(c)*].

The assignee has recourse against the lessor to the extent of any liability incurred by the assignee pursuant to these provisions, regardless of whether the assignment was with or without recourse [*Civ. Code § 2986.10(b)*].

For further discussion, see Ch. 90, *Automobiles: Vehicle Leasing Act* .

[10] Nonnegotiable Instruments

A nonnegotiable written contract for the payment of money or personal property may be transferred by endorsement, in like manner with negotiable instruments. The endorsement transfers all of the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the endorsement [*Civ. Code § 1459*; *Royal Bank Export Finance Co. v. Bestways Distributing Co. (1991) 229 Cal. App. 3d 764, 768, 280 Cal. Rptr. 355]* .

[11] Oil and Gas Lien Claims

An assignee of a cause of action to recover on a lien claim under the Oil and Gas Lien Act (*Code Civ. Proc. § 1203.50 et seq.*) is subject to all defenses that might have been raised if the assignment had not been made [*Code Civ. Proc. § 1203.64*; *see also* the discussion in *§ 60.19[5]*].

[12] Retail Installment Contracts

An assignee of the seller's rights under a retail installment sale contract governed by the Unruh Act (*Civ. Code § 1801 et seq.*) is subject to all equities and defenses of the buyer against the seller arising out of the sale, notwithstanding an agreement to the contrary, but the assignee's liability may not exceed the amount of the debt owing to the assignee at the time of the assignment [*Civ. Code § 1804.2(a)*; *see Fin. Code § 22341(a)(5)* (refinancing of buyer's obligation through consumer finance lender or broker that is seller's assignee)]. No retail installment sale contract may contain a provision by which the buyer agrees not to assert a claim or defense arising out of the sale against an assignee [*Civ. Code § 1804.1(a)*].

Unless the buyer has notice of an actual or intended assignment of a retail installment sale contract or installment account, payment made by the buyer to the last known holder of the contract or installment account discharges the buyer's obligation, to the extent of the payment [*Civ. Code § 1806.1(a)*].

For further discussion, see Ch. 501, *Sales: Retail Installment Sales* .

[13] Seller Assisted Marketing Plans

Any assignee of a seller assisted marketing plan contract [*see Civ. Code § 1812.200 et seq.*] is subject to all equities, rights, and defenses of the purchaser against the seller [*Civ. Code § 1812.211*; *see Civ. Code § 1812.215* (voidability of contract)]. For further discussion, see Ch. 515, *Securities and Franchise Regulation* .

[14] Student Credit Contracts

Notwithstanding the presence or absence of any required notification to the student in a private school student credit contract [*see discussion under § 60.19[6]*] and notwithstanding any agreement in which the student waives the right to assert any claim or defense, the private postsecondary school or vocational institution making a loan or extending credit under the contract and the transferee, assignee, or holder of the evidence of indebtedness are subject to all defenses and claims that could be asserted against the school or institution that was to render or furnish the contracted-for educational services by any party to that evidence of indebtedness or by the person to whom the educational services were to be rendered or furnished, up to the amount remaining to be paid [*Educ. Code § 94335(d)*].

[15] Trust Deed Forgeries

In an action for damages by a homeowner or trustor against a beneficiary of a trust deed on real property consisting of a single family residence containing not more than four dwelling units, or against an assignee or successor in interest of the beneficiary, if it is established that the trust deed was forged in whole or in part by the beneficiary, judgment may be entered for three times the amount at which the actual damages are assessed [*Code Civ. Proc. § 749(a)*]. However, an assignee of a beneficiary or a transferee of a prior assignee is not subject to treble damages unless it is established that the person purchased or obtained the deed of trust with actual knowledge of the forgery of the deed of trust [*Code Civ. Proc. § 749(b)*]. For further discussion, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

[16] Truth in Lending Act

Assignees of consumer retail installment contracts who regularly extend or arrange for the extension of credit to consumers through the assignorsof the contracts may themselves be "creditors" within the meaning of the Truth in Lending Act and subject to liability under the act. A finance company cannot shed the duties and responsibilities of a lender by accepting the assignment of contracts from a seller with which it is intimately connected [*Glaire v. La Lanne-Paris Health Spa, Inc. (1974) 12 Cal. 3d 915, 923-924, 117 Cal. Rptr. 541, 528 P.2d 357]* . For further discussion, see Ch. 501, *Sales: Retail Installment Sales* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingSecondary FinancingAssignees & PriorityContracts LawSecured TransactionsInstallment ContractsAssignmentsCommercial Law (UCC)Secured Transactions (Article 9)Third Party RightsDefensesReal Property LawMobilehomes & Mobilehome ParksPurchase & SaleBanking LawConsumer ProtectionTruth in LendingLiability

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[Reserved]

§§ 60.22[Reserved]

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PART III. RESEARCH GUIDE

6-60 California Forms of Pleading and Practice--Annotated § 60.40

§ 60.40 California Points and Authorities

For forms and discussion of points and authorities regarding novation, in the context of motions for a new trial, see California Points and Authorities, Ch. 50, *Contracts* , (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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6-60 California Forms of Pleading and Practice--Annotated § 60.41

§ 60.41 California Legal Forms

For discussion and transaction forms relating to the assignment and discharge of obligations, see California Legal Forms, Ch. 76, *Assignment of Obligations;* Ch. 77, *Discharge of Obligations* (Matthew Bender)

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6-60 California Forms of Pleading and Practice--Annotated § 60.42

§ 60.42 Federal Statutes

Federal government as obligor of assigned rights. *31 U.S.C. § 3727*

Assignment of federal contract rights. *41 U.S.C. § 15*

Assignment of life insurance policy by military service member prior to commencement of military service--limitation on assignee's rights. *50 U.S.C. § 411*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawLife InsuranceAssignments & TransfersPublic Contracts LawPerformanceAssignment & Novation

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6-60 California Forms of Pleading and Practice--Annotated § 60.43

§ 60.43 State Statutes

[1] Actions by Assignees

Unfair trade practices. *Bus. & Prof. Code §§ 4381, 17082*

Bounced checks, drafts, and money orders. *Civ. Code § 1719(f), (i)*

Retail installment sale contracts. *Civ. Code § 1803.7*

Damages. *Civ. Code §§ 3302, 3336, 3337*

Trust deed forgeries. *Code Civ. Proc. § 749.5(a)*

Oil and gas lien claims: actions on bonds. *Code Civ. Proc. § 1203.60(b)*

Public works contracts: recovery of street improvement assessments. *Sts. & Hy. Code § 5411*

[2] Assignment and Transfer

Transfer of thing in action. *Civ. Code §§ 953, 954*

Transfer in general. *Civ. Code § 1039 et seq.*

Transfer of personal property generally. *Civ. Code § 1135 et seq.*

Transfer of burden of obligation only with consent of party entitled to benefit. *Civ. Code § 1457*

Right arising out of obligation is property of one to whom it is due, and transferable as such. *Civ. Code § 1458*

Fraudulent conveyance law (*Civ. Code § 3440 et seq.*), which as to transferor's creditors voids any transfer not accompanied by change of possession, is not applicable to things in action. *Civ. Code § 3440.1(a)*

Check or draft is not of itself assignment of funds in hands of drawee. *Com. Code § 3408*

[3] Assignments of General Intangibles

Priority among assignees. *Civ. Code § 955.1(b)*

Tax claims of counties. *Gov. Code § 26220*

[4] Assignments of Insurance

Automobile policies assigned to dealers. *Bus. & Prof. Code § 18451*

Casualty insurance assignments to CIGA. *Ins. Code § 1063.4(b)*

Life and health insurance and annuity contract assignments to CLHIGA. *Ins. Code § 1067.07(m)(1)*

Limitation on assignee's exercise of rights under assignment of military service member's life insurance policy to secure payment of his or her obligation. *Mil. & Vet. Code § 409.1(a), (c)*

[5] Assignments of Mortgage Debts

Assignment of debt secured by mortgage. *Civ. Code § 2936*

[6] Assignments of Nonnegotiable Instruments

Priority among assignees. *Civ. Code § 955*

Assignability in general. *Civ. Code § 1459*

Improvement contracts: priority of stop notices. *Civ. Code §§ 3166, 3193*

Insurance premium finance agreements. *Fin. Code § 18588*

Local agency public construction contracts: priority of mechanics' and materialmen's lien claims. *Pub. Contract Code § 20461*

[7] Assignments of Things in Action

Consumer warranty claims. *Civ. Code § 1793.3(c)*

Actions on bonds. *Code Civ. Proc. § 996.430(c)*

Antitrust claims: public works or purchase contracts. *Gov. Code § 4552*

Lien acquired by local agency pursuant to Delinquent Assessment Acquisition and Sales Law of 1915 is assignable. *Gov. Code §§ 53864, 53865*

Garage keeper's lien for towing and storing parked or abandoned vehicle pursuant to police order is not assignable. *Veh. Code § 22851(a)(1)*

[8] Lien Claims

Equipment dealer's lien. *Bus. & Prof. Code § 22921(a)*

Harvester's lien. *Civ. Code § 3061.6(a), (c)*

Logger's lien and lumber millman's lien. *Civ. Code §§ 3065-3065b*

Vehicle lien. *Civ. Code § 3069*

Livestock service lien. *Civ. Code § 3080.22*

Oil and gas lien. *Code Civ. Proc. § 1203.64*

Aircraft lien. *Code Civ. Proc. § 1208.63*

Livestock lien (on livestock sold or delivered to meatpacker). *Food & Agric. Code § 55703*

Dairy cattle supply lien. *Food & Agric. Code § 57411*

Poultry and fish supply lien. *Food & Agric. Code § 57540*

Agricultural chemical and seed lien. *Food & Agric. Code § 57590*

Boaters lien. *Harb. & Nav. Code § 508*

[9] Assignments of Wages

Wage assignments as regulated loans under Industrial Loan Law and Finance Lenders Law. *Fin. Code §§ 18192, 22335*

[10] Unlawful Wage Assignments

Retail installment sale contracts. *Civ. Code § 1804.1(c)*

Employment agencies, counseling services, and job listing services. *Civ. Code §§ 1812.505(d), 1812.512(d), 1812.517(c)*

Nurses' registries. *Civ. Code § 1812.530(b)*

Mortgage foreclosure consultants. *Civ. Code §§ 2945.4(c), 2945.7*

Automobile conditional sale contracts and leases. *Civ. Code §§ 2983.7(b), 2986.3(a)*

Debt proraters. *Fin. Code § 12318(c)*

[11] Assignments Under Commercial Code

Sales. *Com. Code § 2210*

Negotiable instruments. *Com. Code §§ 3203(d), 3408*

Letters of credit. *Com. Code §§ 5112, 5113*

Secured transactions. *Com. Code §§ 9109(d)(3)-(7), (9), (12)-(14), 9309(2), (5), (12), (13), 9406*

[12] Bars to Actions by Assignees

Attorneys disbarred or suspended. *Bus. & Prof. Code § 6130*

Attorney's fees assigned for collection. *Bus. & Prof. § 6201(b)*

Repossessors as assignees. *Bus. & Prof. Code § 7508.1(d)*

Contract or transaction in fictitious business name. *Bus. & Prof. Code § 17918*

Consumer credit contracts. *Civ. Code § 1799.95*

Commercial rent control ordinance. *Civ. Code § 1954.31(b)(1), (2)*

Small claims. *Code Civ. Proc. § 116.420(a)*

Health care service plans. *Health & Safety Code § 1379(c)*

Insurance adjusters as assignees. *Ins. Code § 14038(g)*

[13] Tax Refund Claims

Commercial fishing landing tax. *Fish & Game Code § 8070*

Sales and use taxes. *Rev. & Tax. Code § 6937*

Vehicle fuel license tax. *Rev. & Tax. Code § 8152*

Use fuel tax. *Rev. & Tax. Code § 9175*

Private railroad car tax. *Rev. & Tax. Code § 11577*

Insurance company taxes. *Rev. & Tax. Code § 13108*

Generation skipping transfer tax. *Rev. & Tax. Code § 16852*

Cigarette and tobacco products tax. *Rev. & Tax. Code § 30407*

Alcoholic beverage tax. *Rev. & Tax. Code § 32418*

Timber yield tax. *Rev. & Tax. Code § 38617*

Energy resources surcharge. *Rev. & Tax. Code § 40131*

Emergency telephone users surcharge. *Rev. & Tax. Code § 41114*

Hazardous substances tax. *Rev. & Tax. Code § 43478*

Solid waste disposal site cleanup and maintenance fees. *Rev. & Tax. Code § 45708*

Oil spill response, prevention, and administration fees. *Rev. & Tax. Code § 46528*

Underground storage tank maintenance fees. *Rev. & Tax. Code § 50149(a)*

Fees collectible by board of equalization. *Rev. & Tax. Code § 55248*

[14] Defenses in Actions by Assignees

Invention development services contracts. *Bus. & Prof. Code § 22377*

Retail installment sale contracts. *Civ. Code §§ 1804.1(a), 1804.2(a), 1806.1(a)*

Dance studio contracts and health studio contracts. *Civ. Code §§ 1812.56, 1812.88*

Discount buying services. *Civ. Code § 1812.114*

Seller assisted marketing plans. *Civ. Code § 1812.211*

Automobile conditional sale contracts and leases. *Civ. Code §§ 2983.7(a), 2986.10(a)*

Defenses that may be asserted against assignees; claimant is not deprived of benefit of setoff by assignment. *Code Civ. Proc. § 368*

Oil and gas lien claims. *Code Civ. Proc. § 1203.64*

Agreement not to assert defenses against assignee in secured transaction. *Com. Code § 9403*

Account debts under Commercial Code. *Com. Code § 9404*

Private school student contracts. *Educ. Code § 94335(d)*

Insurance premium finance agreements. *Fin. Code § 18588*

Mobilehome conditional sale contracts. *Health & Safety Code § 18037*

[15] Liabilities of Assignees

Invention development services contracts. *Bus. & Prof. Code § 22377*

In general. *Civ. Code § 1589*

Retail installment sale contracts. *Civ. Code §§ 1804.1(a), 1804.2*

Dance studio contracts and health studio contracts. *Civ. Code §§ 1812.56, 1812.88*

Discount buying services. *Civ. Code § 1812.114*

Seller assisted marketing plans. *Civ. Code § 1812.211*

Automobile conditional sale contracts and leases. *Civ. Code §§ 2983.5, 2983.7(a), 2986.3, 2986.10, 2988.5(e)*

Trust deed forgeries. *Code Civ. Proc. § 749*

Account debts under Commercial Code. *Com. Code § 9404*

Private school student contracts. *Educ. Code § 94335(d)*

Mobilehome conditional sale contracts. *Health & Safety Code §§ 18036.5(k), 18037*

Legal Topics:

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

Labor & Employment LawWage & Hour LawsAssignments, Deductions & GarnishmentsPublic Contracts LawPerformanceAssignment & NovationContracts LawSecured TransactionsInstallment ContractsAssignmentsCommercial Law (UCC)Secured Transactions (Article 9)Third Party RightsAssignmentsCommercial Law (UCC)Letters of Credit (Article 5)Assignments & Transfers

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§ 60.44 Decisions

[1] Contracts

Effect of contract provision prohibiting assignability. *Johnston v. Landucci (1942) 21 Cal. 2d 63, 68-69, 130 P.2d 405*

Contract calling for skill, credit, or other personal quality of promisor not assignable in absence of consent by obligee. *Simmons v. Zimmerman (1904) 144 Cal. 256, 260-261, 79 P. 451* ; *Knipe v. Barkdull (1963) 222 Cal. App. 2d 547, 551, 35 Cal. Rptr. 283*

Deceased dealer's rights under newspaper distribution contract did not survive or pass to decedent's heirs because contract provided that it was not assignable by dealer either voluntarily or involuntarily, by operation of law. *Miller v. San Francisco Newspaper Agency (1985) 164 Cal. App. 3d 315, 317-318, 210 Cal. Rptr. 159*

Clause in group health service agreement for reimbursement in event of recovery was valid. *Block v. Cal. Physicians' Service (1966) 244 Cal. App. 2d 266, 272, 53 Cal. Rptr. 51*

Delegation of contractual duty is prohibited without consent of party entitled to its benefit. *Davis v. Basalt Rock Co. (1951) 107 Cal. App. 2d 436, 444-445, 237 P.2d 338*

Assignment of wages. *Cox v. Hughes (1909) 10 Cal. App. 553, 558, 102 P. 956*

[2] Surety Agreements

Assignability of surety agreement is assumed unless there is plain intent to restrict guarantors' liability to original creditor. *Champion Home Builders Co. v. Sipes (1990) 219 Cal. App. 3d 1415, 1422, 269 Cal. Rptr. 75*

Assignment of personal guaranty not required to be in writing to be enforceable. *Champion Home Builders Co. v. Sipes (1990) 219 Cal. App. 3d 1415, 1422-1423, 269 Cal. Rptr. 75*

[3] Torts

Cause of action for personal injury assignable only when specifically authorized by statute. *Bilyeu v. State Employees' Retirement System (1962) 58 Cal. 2d 618, 624, 25 Cal. Rptr. 562, 375 P.2d 442*

Neither doctor nor doctor's medical corporation had standing to pursue claim for legal malpractice purportedly assigned to doctor by Chapter 7 trusteefor corporation; only trustee had standing to pursue claim. *Curtis v. Andelson (1999) 73 Cal. App. 4th 492, 503-507, 86 Cal. Rptr. 2d 536*

Legal malpractice claim belonging to bankruptcy estate of corporation may not be assigned by trustee of that estate to creditor of corporation for prosecution in state court. *Baum v. Duckor, Spradling & Metzer (1999) 72 Cal. App. 4th 54, 67-69, 84 Cal. Rptr. 2d 703*

Cause of action against attorney for fraud not assignable when gravamen of action is actually legal malpractice. *Jackson v. Rogers & Wells (1989) 210 Cal. App. 3d 336, 348, 258 Cal. Rptr. 454*

Causes of action for fraud and negligent misrepresentation based on false promise of trustors to deed of trust were assignable. *Osuna v. Albertson (1982) 134 Cal. App. 3d 71, 80-84, 184 Cal. Rptr. 338*

[4] Assignee as Plaintiff

Fact that assignment of contract between assignor and supplier was conditioned on supplier's written approval, which had not been obtained at time assignee plaintiff sued supplier for declaratory relief regarding contract, did not deprive assignee of standing to maintain action; plaintiffs required to be provided forum even though decision might not uphold assignment. *Don Rose Oil Co., Inc. v. Lindsley (1984) 160 Cal. App. 3d 752, 759-760, 206 Cal. Rptr. 670*

Premature filing of complaints was cured by proper assignment of obligation one month after action filed. *Donovan v. Wechsler (1970) 11 Cal. App. 3d 210, 214, 89 Cal. Rptr. 669*

Assignment between coplaintiffs did not require substitution of parties. *Union Bank v. County of Los Angeles (1963) 223 Cal. App. 2d 687, 690, 35 Cal. Rptr. 870*

Requirement that assignee plaintiff must allege own right to recover rather than that right exists in assignor. *Credit Bureau of San Diego v. Horeth (1943) 60 Cal. App. 2d 47, 48-49, 139 P.2d 962*

[5] Definition

Definition of word "assign." *Commercial Discount Co. v. Cowen (1941) 18 Cal. 2d 610, 614, 116 P.2d 599*

[6] Notice

Settlement of claim with assignor before notice to obligor of assignment was binding on assignee; assignee's remedy is against assignor. *Hogan v. Black (1884) 66 Cal. 41, 42, 4 P. 943*

Payment by obligor to assignor of note before notice of assignment is defense to action on note. *Bank of Stockton v. Jones (1884) 65 Cal. 437, 438, 4 P. 418*

Debtor is not discharged from obligation by performance rendered to assignor after notice of assignment. *St. Paul Fire & Marine Ins. Co. v. James I. Barnes Constr. Co. (1968) 267 Cal. App. 2d 931, 937-938, 73 Cal. Rptr. 618* (exception to general rule)

[7] Priority

Assignee found to have priority over other assignee was entitled to prejudgment interest on amounts actually received by subordinate assignee. *Continental Bank v. Blethen (1970) 7 Cal. App. 3d 178, 186-187, 86 Cal. Rptr. 485*

[8] Proof of Assignment

Burden of proving assignment is on party seeking to assert rights under assignment. *Cockerell v. Title Ins. & Trust Co. (1954) 42 Cal. 2d 284, 292, 267 P.2d 16* ; *Neptune Society Corp. v. Longanecker (1987) 194 Cal. App. 3d 1233, 1242, 240 Cal. Rptr. 117*

Assignee suing to enforce assigned right is required to prove assignment; measure of sufficiency of evidence to establish assignment was clear and positive. *Cockerell v. Title Ins. & Trust Co. (1954) 42 Cal. 2d 284, 292, 267 P.2d 16* ; *Neptune Society Corp. v. Longanecker (1987) 194 Cal. App. 3d 1233, 1242, 240 Cal. Rptr. 117*

Fact that obligor treated plaintiff as assignee was not sufficient to establish fact of assignment when authority of corporate officer to make assignment was not proved and obligor relied on misrepresentations of plaintiff regarding fact of assignment. *Neptune Society Corp. v. Longanecker (1987) 194 Cal. App. 3d 1233, 1242-1243, 240 Cal. Rptr. 117*

[9] Rights of Assignee

Enforcement of assignor's rights by assignee is dependent on rights of assignor. *Estate of McConnell (1936) 6 Cal. 2d 493, 499, 58 P.2d 639* ; *Johnson v. County of Fresno (2003) 111 Cal. App. 4th 1087, 1096, 4 Cal. Rptr. 3d 475* (employee's assignment of right to pursue indemnification from employer for stipulated judgment); *Teater v. Good Hope Dev. Corp. (1942) 55 Cal. App. 2d 459, 462, 130 P.2d 812*

Defense of illegality of contract is valid against assignee of nonnegotiable note or negotiable note taken with notice of illegality. *Union Collection Co. v. Buckman (1907) 150 Cal. 159, 161-162, 88 P. 708* (note evidencing gambling debt)

Judgment on property owner's claim against construction contractor for breach of warranty, based on defects in building, could not include attorney's fees for successful plaintiff because warranty, which was separate from construction contract and which property owner had acquired by assignment on purchasing property from previous owner that had erected building, did not contain attorney's fees provision, and construction contract, which did contain such provision, had not been assigned by seller. *Vons Cos. v. Lyle Parks Jr., Inc. (2009) 177 Cal. App. 4th 823, 825-826, 835, 99 Cal. Rptr. 3d 562*

Nonnegotiable purchase orders assigned to bank were subject to defenses and claims that purchaser had against manufacturer (obligor) before notice of assignment. *Royal Bank Export Finance Co. v. Bestways Distributing Co. (1991) 229 Cal. App. 3d 764, 767-768, 280 Cal. Rptr. 355*

Assignee of promissory note (bank) is agent of assignor (payee), not holder in due course, and subject to defenses based on contract for which promissory note was given when (1) assignee has right to full recourse and unconditional guarantee of repayment by assignor, (2) assignor agrees to repurchase note in event of default, (3) assignor supervises and finances litigation to collect note, (4) assignor indemnifies assignee in respect of any consequences of attachment, (5) assignee agrees not to settle case without consent of assignor, (6) action was prosecuted by attorneys for assignor, (7) assignee knew of defenses before filing action, and (8) assignee does not proceed inmanner of usual management of its loans. *Michigan Nat'l Bank v. Hardman Aerospace (1973) 36 Cal. App. 3d 196, 203-204 n.4, 111 Cal. Rptr. 514*

Unlicensed contractor's disability in not being able to sue attached to his assignee who is not holder in due course. *Walker v. Nitzberg (1970) 13 Cal. App. 3d 359, 367, 91 Cal. Rptr. 526*

[10] Validity of Assignment

Whether assignment of notes and deeds of trust was intended outright sale or as security for loan is determined from facts and circumstances surrounding transaction; fact that buyers did not take possession not conclusive. *Bear v. Coben (In re Golden Plan of Ca., Inc.), (9th Cir. 1986) 829 F.2d 705, 708-709* (finding sale)

Intent of parties rather than form of assignment determines rights. *Republic Indem. Co. v. Maier Brewing Co. (1967) 249 Cal. App. 2d 495, 498, 57 Cal. Rptr. 670* (involving waiver of assignment)

Validity of oral assignment of promissory note. *Brown v. Patella (1938) 24 Cal. App. 2d 362, 363-364, 75 P.2d 119*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGuaranty ContractsContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesHolders in Due CourseGeneral OverviewInsurance LawGroup PoliciesAssignments & TransfersContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & AssignorsContracts LawNegotiable InstrumentsEnforcementDefensesIllegality

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§ 60.45 Text References

Witkin, California Procedure, vol. 4, *Pleading*, § 108 et seq. (4th ed. 1997)

Witkin, Summary of California Law, vol. 1, *Contracts*, § 707 et seq. (10th ed. 2005)

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[Reserved]

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§ 60.60 Complaint for Damages for Breach of Obligation to Pay Money [Civ. Code § 3302]--By Assignee of Payee Against Maker of Promissory Note [Com. Code §§ 3201, 3203]

[1] FORM Complaint for Damages for Breach of Obligation to Pay Money [Civ. Code § 3302]--By Assignee of Payee Against Maker of Promissory Note [Com. Code §§ 3201, 3203]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Breach of Obligation to Pay Money)
through _____,]	)	[Amount demanded _____ (exceeds
Defendant(s).	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. _____ [*Allege capacity and residence of defendant, e.g.,* Defendant _____ (*name*) is, and at all times mentioned in this complaint was, a corporation organized and existing under the laws of California with its principal place of business in this state in _____ County *or* Defendant _____ (*name*) is, and at all times mentioned in this complaint was, a resident of _____ County, California].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued as Doe I through Doe _____, inclusive, and therefore sues these defendants by those fictitious names. Plaintiff will amend

this complaint to allege their true names and capacities when they are ascertained. Plaintiff is informed and believes that each of these defendants is responsible in some manner for the occurrences alleged in this complaint and that plaintiff's damages as alleged in this complaint were proximately caused by these defendants.]

3. On or about _____ [*date*], at _____ [*city*], in _____ County, California, defendant _____ [*name*], for valuable consideration, made, executed, and delivered to _____ [*name of plaintiff's assignor*] his/her/its promissory note in the principal sum of $_____ with interest at the rate of _____ percent a year, principal and interest due and payable on _____ [*date*]. A copy of the note is attached to and incorporated into this complaint as Exhibit A.

4. On or about _____ [*date*], _____ [*name of assignor*] transferred and assigned the note to plaintiff. The transfer and assignment areevidenced _____ [*describe evidence of assignment, e.g.*, on the reverse side of the note, as shown on the copy that is attached to and incorporated into this complaint as Exhibit A *or, if assignment is by separate document*, by a writing that is attached to and incorporated into this complaint as Exhibit B]. Plaintiff now is, and since the date of the transfer and assignment plaintiff has been, the owner and holder of the note.

5. On or about _____ [*date*], defendant was given notice of the transfer and assignment by _____ [*specify means of notification*].

6. No part of the principal nor any interest has been paid. There is now due from defendant to plaintiff on the note the principal sum of $_____ with interest at the rate of _____ percent a year from _____ [*date*].

[7. The note provides that if a lawsuit is filed to collect any amount due under the note, the maker shall pay attorney's fees incurred by the prevailing party. Plaintiff has employed counsel to prosecute this action and has incurred and will continue to incur attorney's fees in an amount unknown to plaintiff at this time. Plaintiff will seek leave of this court to amend this complaint to insert the amount when it is ascertained.]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For the sum of $_____ together with interest at the rate of _____ percent a year from _____ [*date*];

[2. For attorney's fees according to proof;]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], above, is a complaint for use in an action by an assignee of the payee of a promissory note against the payor.

[3] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. If the cause of action is a claim assigned to a third party for collection and the complaint is verified, the defendant's denial of the allegations must be made positively or according to the information and belief of the defendant, even if the complaint is subject to the statutory provisions for economic litigation in limited civil cases [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For discussion and forms relating to actions on promissory notes generally, see Ch. 385, *Negotiable Instruments*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms for verification, see Ch. 572, *Verification*

[6] California Points and Authorities

For memoranda of points and authorities relating to actions on promissory notes, see California Points and Authorities, Ch. 166, *Negotiable Instruments* (Matthew Bender)

[7] State Statutes

Transfer of right arising out of obligation. *Civ. Code § 1458*

Transfer of nonnegotiable written contract by endorsement. *Civ. Code § 1459*

Attorney's fees in contract actions. *Civ. Code § 1717*

Detriment caused by breach of obligation to pay money as amount due by terms of obligation, with interest. *Civ. Code § 3302*

Venue allegations in complaint if action involves certain retail installment sale contract, automobile sale or lease contract, or certain other consumer contracts. *Code Civ. Proc. § 396a*

Accrual of cause of action against maker of instrument. *Com. Code § 3118*

Transfer of negotiable instruments. *Com. Code § 3201 et seq.*

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6-60 California Forms of Pleading and Practice--Annotated § 60.61

§ 60.61 Complaint for Damages for Breach of Obligation to Pay Money [Civ. Code § 3302]--Account Stated--By Assignee of Payee

[1] FORM Complaint for Damages for Breach of Obligation to Pay Money [Civ. Code § 3302]--Account Stated--By Assignee of Payee

[*Caption. See § 60.60.*]

Plaintiff alleges:

1. [*Allegation of defendant's capacity and residence. See § 60.60, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 60.60, Paragraph 2.*]

3. On or about _____ [*date*], at _____ [*city*], California, an account was stated _____ [orally *or* in writing] between defendant _____ [*name*] and _____ [*name of plaintiff's assignor*], and on the account a balance of $_____ was stated to be due to _____ [*name of plaintiff's assignor*] from defendant _____ [*name*]. Defendant _____ [*name*] agreed to pay _____ [*name of plaintiff's assignor*] that balance. [A copy of the account is attached to and incorporated into this complaint as Exhibit A.]

4. On or about _____ [*date*] and before the commencement of this action, _____ [*name of plaintiff's assignor*] assigned the account and the indebtedness to plaintiff. Plaintiff is now the owner and holder of the account and the debt.

5. On or about _____ [*date*], defendant was given notice of the assignment by _____ [*specify means of notification*].

6. No part of the agreed balance has been paid.

7. There is now due, owing, and unpaid from defendant to plaintiff the sum of $_____ together with interest at the rate of _____ percent a year from and after _____ [*date account was stated*].

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For the sum of $_____ together with interest at the rate of _____ percent a year from _____ [*date account was stated*];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 60.60.*]

[2] Use of Form

The complaint in [1], *above*, is for use by the assignee of an account stated. An action on an account in [1] *above*, stated is often pleaded as an alternative to an action based on the transaction underlying the account since, if the account stated is not proved and an amendment of the pleadings is not allowed, plaintiff may be barred by the statute of limitation from subsequent recovery on the underlying transaction.

[3] Decisions

Party (defendant) is foreclosed from proving underlying transaction after trial of case on theory of account stated. *Trafton v. Youngblood (1968) 69 Cal. 2d 17, 29-30, 69 Cal. Rptr. 568, 442 P.2d 648*

Account stated is acknowledgment of prior debt, agreement that balance is correct, and promise to pay balance. *Block v. D.W. Nicholson Corp. (1947) 77 Cal. App. 2d 739, 746, 176 P.2d 739*

[4] Cross References

For additional forms for complaints on accounts stated, see Ch. 8, *Accounts Stated and Open Accounts*

See also Comments and References to § 60.60

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6-60 California Forms of Pleading and Practice--Annotated § 60.62

§ 60.62 Complaint [Code Civ. Proc. § 425.10] for Damages for Breach of Obligation to Pay Money [Civ. Code § 3302]--By Collection Agency as Assignee--On Common Count

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages for Breach of Obligation to Pay Money [Civ. Code § 3302]--By Collection Agency as Assignee--On Common Count

[*Caption. See § 60.60.*]

Plaintiff alleges:

1. [*Allegation of defendant's capacity and residence. See § 60.60, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 60.60, Paragraph 2.*]

[3. Plaintiff is, and at all times mentioned in this complaint was, a corporation organized and existing under the laws of California.]

4. On or about _____ [*date*], _____ [*name of plaintiff's assignor*] assigned to plaintiff all rights, title, and interest in and to the claim set forth below, for the purpose of collection.

5. On or about _____ [*date*], defendant was given notice of the assignment by _____ [*specify means of notification*].

6. Within the last four years, at _____ [*city*], _____ [*county*], California, defendant became indebted to plaintiff's assignor _____ [*describe, e.g.,* on an open book account for money due in the sum of $_____ for goods, wares, and merchandise sold and delivered by plaintiff's assignor to defendant at his/her special instance and request and for which defendant agreed to pay the above sum].

7. No part of the above sum has been paid, [except for the sum of $_____,] although a demand has

been made, and there is now due, owing, and unpaid the sum of $_____, together with interest at the rate of _____ percent a year from _____ [*date*].

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For the sum of $_____ together with interest at the rate of _____ percent a year from _____ [*date*];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 60.60.*]

[2] Use of Form

The complaint is in [1], *above*, for use in an action by an assignee collection agency based on a common count.

[3] State Statutes

Assignee for collection is precluded from suing in small claims court. *Code Civ. Proc. § 116.420(a)*

[4] Decisions

Assignee for collection is permitted to maintain suit in own name even though assignor retains equitable interest in thing assigned. *National R. Co. v. Metropolitan T. Co. (1941) 17 Cal. 2d 827, 831, 112 P.2d 598*

Assignment for collection without consideration vests legal title in assignee sufficient to allow recovery while assignor retains equitable interest in thing assigned. *Clark v. Andrews (1952) 109 Cal. App. 2d 193, 198, 240 P.2d 330*

[5] Cross References

See also Comments and References to § 60.60

For further discussion of common counts, see Ch. 121, *Common Counts*

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6-60 California Forms of Pleading and Practice--Annotated § 60.63

§ 60.63 Allegation--Written Assignment

[1] FORM Allegation--Written Assignment

On or about _____ [*date*], the _____ [*specify document, e.g.,* contract] referred to in this complaint was duly assigned in writing to plaintiff, and plaintiff since has been and now is the owner and holder of it. [A copy of the assignment is attached to and incorporated into this complaint as Exhibit A.]

[2] Use of Form

The allegation is in [1], *above*, for use in a complaint by an assignee. Such an allegation may be used, for example, as an alternative to Paragraph 4 in § 60.60.

[3] Cross References

See also Comments and References to § 60.60

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6-60 California Forms of Pleading and Practice--Annotated § 60.64

§ 60.64 Allegation--Assignment of Claim

[1] FORM Allegation--Assignment of Claim

Before the commencement of this action and for a valuable consideration, _____ [*name of plaintiff's assignor*] transferred and assigned to plaintiff the claim referred to in this complaint, and the demand represented by it, and plaintiff ever since has been, and now is, the owner and holder of it.

[2] Use of Form

The allegation in [1], *above*, is for use in a complaint by an assignee. Such an allegation may be used, for example, as an alternative to Paragraph 4 of § 60.62.

[3] Cross References

See also Comments and References to Forms 1, 3

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§ 60.65 Allegation--Assignment of Claim for Professional Services Rendered

[1] FORM Allegation--Assignment of Claim for Professional Services Rendered

1. At all times mentioned in this complaint, _____ [*name*] and _____ [*name*] ("plaintiff's assignors") have been, and now are, _____ [*specify profession, e.g.,* attorneys at law, duly admitted to practice law in California and engaged in the practice of law under the name of _____ (*name of firm*)].

2. On or about _____ [*date*], plaintiff's assignors duly assigned to plaintiff the claims, demands, obligations, recoveries, and causes of action alleged against defendant in this complaint.

[2] Use of Form

The allegation in [1], *above*, is for use in a complaint by an assignee. The allegation sets forth the qualifications of the assignor to perform the services on which the claim is based. Such an allegation may be used, for example, in an action based on a common count for services rendered. See *§ 60.62* for a form for a complaint based on a common count.

[3] Cross References

See also Comments and References to § 60.60

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6-60 California Forms of Pleading and Practice--Annotated § 60.66

§ 60.66 Allegation--Assignment of Cause of Action

[1] FORM Allegation--Assignment of Cause of Action

Before the commencement of this action, _____ [*name of assignor*] sold, assigned, and set over to plaintiff all of his/her/its right, title, and interest in and to the cause of action alleged against defendant in this complaint.

[2] Use of Form

The form in [1], *above*, is for use in a complaint by an assignee to allege that the cause of action was assigned to the plaintiff.

[3] Decisions

Cause of action for personal injuries is assignable only when specifically authorized by statute. *Bilyeu v. State Employees' Retirement System (1962) 58 Cal. 2d 618, 624, 25 Cal. Rptr. 562, 375 P.2d 442*

Cause of action for personal injury generally is not assignable. *Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 638-639, 7 Cal. Rptr. 377, 354 P.2d 1073* ; *Peller v. Liberty Mut. Fire Ins. Co. (1963) 220 Cal. App. 2d 610, 611-612, 34 Cal. Rptr. 41*

Assignability of things in action is the rule, nonassignability is the exception. *Webb v. Pillsbury (1943) 23 Cal. 2d 324, 327, 144 P.2d 1*

Assignable causes of action. *Jackson v. Deauville Holding Co. (1933) 219 Cal. 498, 500-501, 27 P.2d 643* ; *Wikstrom v. Yolo Fliers Club (1929) 206 Cal. 461, 463-464, 274 P. 959*

[4] Cross References

See also Comments and References to § 60.60

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6-60 California Forms of Pleading and Practice--Annotated § 60.67

§ 60.67 Allegation--Assignment of Written Contract With Consent of Other Contracting Party

[1] FORM Allegation--Assignment of Written Contract With Consent of Other Contracting Party

1. On or about _____ [*date*], defendant, pursuant to the terms of the contract, duly consented in writing to the assignment of it by _____ [*name of assignor*] to plaintiff. A copy of the consent is attached to and incorporated into this complaint as Exhibit B.

2. On or about _____ [*date*], pursuant to the terms of the contract and the consent of defendant, _____ [*name of assignor*] assigned the contract together with all of his/her/its rights and interests under it to plaintiff. A copy of the assignment is attached to and incorporated into this complaint as Exhibit C.

[2] Use of Form

The form in [1], *above*, is for use in a complaint by an assignee of a written contract that has been alleged in the complaint, a copy of which is attached as Exhibit A. The substitution of a new creditor in place of the existing one with the intent to transfer the rights of the latter to the former is a novation [*Civ. Code § 1531(3)*]. A novation is made by contract and is subject to all of the rules concerning contracts in general [*Civ. Code § 1532*].

[3] Cross References

For a form for an affirmative defense based on novation, see Ch. 140, *Contracts*

See also Comments and References to § 60.60

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6-60 California Forms of Pleading and Practice--Annotated § 60.68

§ 60.68 Allegation--Assignment of Instrument by Endorsement

[1] FORM Allegation--Assignment of Instrument by Endorsement

On or about _____ [*date*], _____ [*name*] assigned _____ [*describe instrument*] to plaintiff by endorsing the words "_____" [*set forth endorsement*] on it. [A copy of the instrument is attached to and incorporated into this complaint as Exhibit A.]

[2] Use of Form

The allegation in [1], *above*, is for use in a complaint by an assignee of an instrument that was assigned by endorsement. Such an allegation may be used, for example, as an alternative to Paragraph 4 of § 60.60.

[3] Cross References

See also Comments and References to § 60.60

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6-60 California Forms of Pleading and Practice--Annotated § 60.69

§ 60.69 Allegation--Written Assignment of Right to Money

[1] FORM Allegation--Written Assignment of Right to Money

On or about _____ [*date*], at _____ [*city*], California, _____ [*name of assignor*] duly assigned in writing to plaintiff all of his/her/its right to money then due or to become due to him/her/it from defendant under the _____ [*describe source of underlying debt, e.g.,* ground lease referred to above].

[2] Use of Form

This allegation is for use in a complaint by an assignee of money due and to become due from the defendant to the plaintiff's assignor.

[3] Cross References

See also Comments and References to § 60.60

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6-60 California Forms of Pleading and Practice--Annotated § 60.70

§ 60.70 Allegation--Notice of Assignment by Assignee to Defendant

[1] FORM Allegation--Notice of Assignment by Assignee to Defendant

On or about _____ [*date*], plaintiff duly gave defendant notice in writing of the assignment. A copy of the notice is attached to and incorporated into this complaint as Exhibit A.

[2] Use of Form

This allegation is for use in a complaint by an assignee to allege notice of the assignment by the assignee to the defendant. A written assignment is not, of itself, notice to the obligor so as to invalidate any payments made to the assignor [*see, e.g., Civ. Code § 955*].

[3] State Statutes

Assignment of nonnegotiable instrument is deemed perfected as against third party by endorsement or assignment and delivery, but payment by obligor is not invalidated by it. *Civ. Code § 955*

Assignee first giving notice of assignment to obligor of accounts or chattel paper has priority as between bona fide assignees. *Civ. Code § 955.1(b)*

Action by assignee of thing in action is without prejudice to defense existing before or at time of assignment. *Code Civ. Proc. § 368*

[4] Decisions

Debtor not discharged from obligation by performance rendered to assignor after notice of assignment. *Jones v. Martin (1953) 41 Cal. 2d 23, 27-28, 256 P.2d 905*

Payment by obligor to assignor of note before notice of assignment is defense to action on note. *Bank of Stockton v. Jones (1884) 65 Cal. 437, 438, 4 P. 418*

[5] Cross References

See also Comments and References to § 60.60

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6-60 California Forms of Pleading and Practice--Annotated § 60.71

§ 60.71 Affirmative Defense--Notice of Prior Assignment of Obligation

[1] FORM Affirmative Defense--Notice of Prior Assignment of Obligation

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant _____ [*name*] alleges that on or about _____ [*date*], a written notice of assignment, signed by _____ [*name*], was given to defendant stating that the obligation referred to in the complaint was assigned to _____ [*name*]. A copy of the notice of assignment is attached to and incorporated into this answer as Exhibit 1.

[2] Use of Form

This affirmative defense is for use in an answer to a complaint by an assignee, to allege notice of a prior assignment. When there are competing assignees, it may be necessary to join the other assignees [*see Code Civ. Proc. § 389* (compulsory joinder of parties); *see also* Ch. 395, *Parties*] to cross complain for declaratory relief [*see Code Civ. Proc. § 1060 et seq.* (declaratory relief); *see also* Ch. 182, *Declaratory Relief*]. For a complaint for declaratory relief by one assignee against another assignee to determine the priority of an assignment, see *§ 60.73*.

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6-60 California Forms of Pleading and Practice--Annotated § 60.72

§ 60.72 Affirmative Defense--Payment to Assignor Before Notice of Assignment

[1] FORM Affirmative Defense--Payment to Assignor Before Notice of Assignment

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant _____ [*name*] alleges that on or about _____ [*date*], defendant paid $_____ to _____ [*name*], plaintiff's alleged assignor, in complete satisfaction of the obligation referred to in the complaint. Defendant had no notice of the assignment alleged in the complaint before the payment.

[2] Use of Form

This affirmative defense is for use in an answer to a complaint by an assignee, to allege payment of the obligation before notice of the assignment. An assignment is not, of itself, notice to the obligor so as to invalidate any payments made to the transferor [*see, e.g., Civ. Code §§ 955, 955.1(c)*; *cf. City of Los Angeles v. Knapp (1936) 7 Cal. 2d 168, 171, 60 P.2d 127]* . In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any setoff or other defense existing at the time of, or before, notice of the assignment [*Code Civ. Proc. § 368*].

[3] Decisions

Payment by obligor to assignor of note before notice of assignment is defense to action on note. *Bank of Stockton v. Jones (1884) 65 Cal. 437, 438, 4 P. 418*

[4] Cross References

For additional allegations of payment, see Ch. 6, *Accord and Satisfaction* , Ch. 140, *Contracts* , and Ch. 385, *Negotiable Instruments*

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6-60 California Forms of Pleading and Practice--Annotated § 60.73

§ 60.73 Complaint for Declaratory Relief [Code Civ. Proc. § 1060] by Assignee Against Another Assignee to Determine Priority of Assignment

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. § 1060] by Assignee Against Another Assignee to Determine Priority of Assignment

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DECLARATORY RELIEF
_____ [*name*], [and DOES I	)	(Priority of Assignment)
through _____,]	)	
Defendants.	)	
	)	

Plaintiff alleges:

1. [*Allegation of defendant's capacity and residence. See § 60.60, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 60.60, Paragraph 2.*]

3. On or about _____ [*date*], at _____ [*city*], California, _____ [*name*] assigned, in writing, _____ [*describe terms of assignment, e.g.,* all of his/her rights, title, and interest in and to a contract dated _____ (*date*), between the assignor and _____ (*name of obligor*)]. Since that date, plaintiff has been, and plaintiff now is, the owner and holder of

_____'s [*name of assignor*] right, title, and interest in and to the _____ [*describe subject of assignment, e.g.,* contract]. A copy of the _____ [*describe subject of assignment, e.g.,* contract] is attached to and incorporated into this complaint as Exhibit A. A copy of the assignment is attached to and incorporated into this complaint as Exhibit B.

4. On or about _____ [*date*], plaintiff gave notice of the assignment to _____ [*name of obligor*]. On or about _____ [*date*], _____ [*name of obligor*] notified plaintiff that he/she/it had received a notice from defendant _____ [*name of other assignee*] that the _____ [*describe subject of assignment, e.g.,* contract] had been assigned to him/her/it. _____ [*Name of obligor*] further notified plaintiff that he/she/it would not _____ [*describe duty, e.g.,* pay] any obligation under the _____ [*describe subject of assignment, e.g.,* contract] to plaintiff alone because of the conflicting notices of assignment.

5. The obligation of _____ [*name of obligor*] is due on _____ [*date*].

6. Plaintiff has demanded that defendant _____ [*name of other assignee*] notify _____ [*name of obligor*] that _____ [*describe duty, e.g.,* payment] of the obligation must be made to plaintiff, but defendant _____ [*name of other assignee*] has failed and refuses to do so.

7. An actual controversy has arisen and now exists between plaintiff and defendant _____ [*name of other assignee*] concerning their respective rights in and to the _____ [*describe subject of assignment, e.g.,* contract] in that _____ [*specify, e.g.,* plaintiff claims priority, and defendant _____ (*name of other assignee*) denies that plaintiff has priority, to receive payment from _____ (*name of obligor*) under the contract].

8. Plaintiff desires a judicial determination of his/her/its rights and a declaration that the obligation owed under the _____ [*describe subject of assignment, e.g.,* contract] is due to plaintiff alone.

9. Such a declaration is necessary and appropriate at this time to enable plaintiff to ascertain his/her/its rights and _____ [*allege facts showing necessity of a determination now rather than when obligation becomes due*].

WHEREFORE, plaintiff prays judgment as follows:

1. For a declaration that plaintiff is the owner and holder of a valid assignment of rights under the _____ [*describe subject of assignment, e.g.,* contract referred to in this complaint] and that defendant _____ [*name of other assignee*] has no rights or interest under it;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 60.60.*]

[2] Use of Form

This complaint is for use by an assignee to obtain a declaratory judgment of priority as the owner and holder of an assignment, when another person has asserted another assignment of the same rights. The plaintiff should consider joining the assignor and the obligor as defendants [*see Code Civ. Proc. § 379* (permissive joinder of defendants)].

[3] Jurisdiction

Actions for declaratory relief are generally in the jurisdiction of the superior court as cases of unlimited jurisdiction. An action for declaratoryrelief is in the jurisdiction of the superior court, as a limited civil case only when brought as a cross complaint for indemnity in an action or proceeding that is otherwise a limited civil case or in cases following nonbinding arbitration between an attorney and client when the amount in controversy is $25,000 or less [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 86(a)(7)(A)*, 580(b)(4), *1060*].

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See also Comments and References to § 60.60

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6-61 California Forms of Pleading and Practice--Annotated § 61.01

§ 61.01 Scope of Chapter

This chapter discusses and contains forms relating to actions and proceedings involving unincorporated associations, including unincorporated clubs. It discusses issues pertaining to relations between associations and their members, including admission to and expulsion from membership, and issues pertaining to litigation between associations and non-members.

This chapter includes forms for use in the following types of litigation:

- Actions and proceedings between an unincorporated association or club and a former member arising from expulsion from membership [*see §§ 61.80, 61.100, 61.101*].

- A representative action brought by a member on behalf of the association against the management of the association [*see § 61.85*].

- Various proceedings by a member to challenge actions taken by the association's management [*see §§ 61.86, 61.87, 61.100*].

- Actions between unincorporated associations and non-members [*see §§ 61.110 -61.120*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated Associations

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6-61 California Forms of Pleading and Practice--Annotated § 61.02

§ 61.02 Cross References

For discussion and forms pertaining to litigation involving religious organizations, see Ch. 110, *Churches and Religious Organizations* .

For discussion and forms pertaining to litigation involving condominium associations, see Ch. 124, *Condominiums and Other Common Interest Developments* .

For discussion of, and forms relating to, corporations, including incorporated associations and clubs, see Ch. 160, *Corporations: Capacity* .

For discussion and forms pertaining to litigation involving partnerships, see Ch. 400, *Partnerships: Governing Law* , through Ch. 406, *Partnerships: Dissolution* .

For discussion and forms relating to the exclusion and expulsion of physicians from hospital staffs and other professional organizations, see Ch. 416, *Physicians: Membership on Hospital Staffs or in Professional Organizations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionBreach of Agreement & ExpulsionReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsGeneral Overview

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6-61 California Forms of Pleading and Practice--Annotated § 61.03

§ 61.03 Governing Law

The constitutional right to freedom of association is governed by *U.S. Const., amends. I, XIV, § 1* and *Cal. Const., art. I, §§ 1, 3*.

The right of an unincorporated association to sue and be sued in the name it has assumed or by which it is known is set forth in Code Civ. Proc. § 369.5(a). The joinder of a member of the association as a party to the action against the association is governed by *Code Civ. Proc. § 369.5(b)*.

Actions in the right of an unincorporated association by a member thereof are governed by *Corp. Code § 800*. Venue in civil actions against unincorporated associations is governed by *Code Civ. Proc. §§ 395.2, 395.5*. Summons and service of summons in actions against unincorporated associations is governed by *Code Civ. Proc. §§ 412.30, 415.20(a), 416.40*.

The property rights of unincorporated associations are governed by *Corp. Code §§ 18000 et seq., 21200* and *Prob. Code § 6102(c)*. Liability of unincorporated associations is governed by *Corp. Code § 18250 et seq.* Liability of members, directors, and officers of a nonprofit association is governed by *Corp. Code § 18605 et seq.* Enforcement of judgments against unincorporated associations is governed by *Corp. Code §§ 18260, 18270*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewBusiness & Corporate LawUnincorporated AssociationsConstitutional LawBill of RightsFundamental FreedomsFreedom of AssociationCivil ProcedureVenueCorporationsCivil ProcedureParties JoinderGeneral Overview

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§ 61.04 Definitions

[1] Association

The usual meaning of the term "association" is an unincorporated organization composed of a body of people partaking in general form and mode of procedure of the characteristics of a corporation [*Estate of Irwin (1925) 196 Cal. 366, 372, 237 P. 1074]* . By its terms, this definition is not inclusive and exclusive [*Law v. Crist (1940) 41 Cal. App. 2d 862, 865, 107 P.2d 953]* , and the formalities of quasi-corporate organization are not required [*Barr v. United Methodist Church (1981) 90 Cal. App. 3d 259, 267, 153 Cal. Rptr. 322]* . Thus, for example, an organization may be found to be an association even if there are no officers, no constitution and no by-laws [*Law v. Crist (1940) 41 Cal. App. 2d 862, 865, 107 P.2d 953* (group working together to advance and disseminate teachings of theosophy constituted association)]. Conversely, the existence of articles of association and by-laws is not dispositive; the membership requirements may be reviewed to determine whether exclusivity is actual or only apparent [*DeMott v. Board of Police Commissioners (1981) 122 Cal. App. 3d 296, 305-306, 175 Cal. Rptr. 879* (picture arcade in bookstore was not association, but place to which public was admitted despite alleged operation as private film club)].

The criteria applied to determine whether an entity is an unincorporated association are no more complicated than [*Barr v. United Methodist Church (1981) 90 Cal. App. 3d 259, 266, 153 Cal. Rptr. 322]* :

- A group whose members share a common purpose, and
- Who function under a common name under circumstances where fairness requires the group be recognized as a legal entity.

"Association" is defined for purposes of *Corp. Code §§ 21300-21310* (insignia) as any lodge; order; beneficial association; fraternal or beneficial society or association; historical, military, or veterans organization; laborunion; foundation; federation; or any other society, organization, or association, or degree, branch, subordinate lodge, or auxiliary thereof [*Corp. Code § 21300(a)*].

[2] Unincorporated Association

"Unincorporated association" is defined as an unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not [*Corp. Code § 18035(a)*]. Joint tenancy, tenancy in common, community property, or other form or property tenure does not by itself establish an unincorporated association, even if co-owners share ownership of the property for a common purpose [*Corp. Code § 18035(b)*]. Marriage or creation of a registered domestic partnership does not by itself establish an unincorporated association [*Corp. Code § 18035(c)*].

[3] Nonprofit Association

"Nonprofit association" is defined as an unincorporated association with a primary common purpose other than to operate a business for profit [*Corp. Code § 18020(a)*]. A nonprofit association may carry on a business for profit and apply any profit that results from the business activity to any activity in which it may lawfully engage [*Corp. Code § 18020(b)*].

[4] Club

"Club" is defined as a voluntary, incorporated or unincorporated association of persons for common purposes of a social, literary, investment, or political nature, or the like [Black's Law Dictionary, p. 256 (6th ed. 1990); *see also Bus. & Prof. Code § 23037* (definition of "club" for purposes of Alcoholic Beverage Control Act)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated Associations

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[Reserved]

§§ 61.05[Reserved]

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A. Issues Involving Membership
1. Admission to and Exclusion From Membership

6-61 California Forms of Pleading and Practice--Annotated § 61.10

§ 61.10 Association's General Right to Establish Membership Qualifications

The general rule is that membership in a voluntary association is a privilege that may be withheld or accorded on such terms and conditions as the association sees fit to impose [*Greenwood v. Building Trades Council (1925) 71 Cal. App. 159, 171, 233 P. 823* (labor union council)]. As further discussed in *§ 61.11*, a private association's power to establish membership membership qualifications is reinforced to some extent by the constitutional right to freedom of association. Absent constitutional protection, however, an association's power to exclude persons from membership may be limited by the Unruh Civil Rights Act [*see* discussion in *§ 61.12*] and by certain common-law principles of fairness when exclusion from membership would cause economic harm to an applicant [*see* discussion in *§ 61.13*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsConstitutional LawBill of RightsFundamental FreedomsFreedom of Association

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A. Issues Involving Membership
1. Admission to and Exclusion From Membership

6-61 California Forms of Pleading and Practice--Annotated § 61.11

§ 61.11 Effect of Constitutional Right of Association

[1] Two Separate Interests Protected

The power of the government to regulate the discretion of an unincorporated association or club to select its own members (for example, by applying antidiscrimination laws to the association's membership decisions) is limited to some extent by the constitutional freedom of association. The constitutional protection of freedom of association protects two separate types of associational interests, intimate and expressive. The intimate associational interest protects the freedom to form and preserve certain kinds of personal relationships or associations as a fundamental element of personal liberty. The expressive associational interest protects the right to associate for the purpose of engaging in those activities protected by *U.S. Const., amend. I*--speech, assembly, petition for redress of grievances, and the exercise of religion. This freedom of association is an indispensable means of preserving other individual liberties [*see Roberts v. United States Jaycees (1984) 468 U.S. 609, 617-618, 104 S. Ct. 3244, 82 L. Ed. 2d 462* ; *Warfield v. Peninsula Golf & Country Club (1995) 10 Cal. 4th 594, 624-626, 42 Cal. Rptr. 2d 50, 896 P.2d 776* ; *Bohemian Club v. Fair Employment & Housing Com. (1986)187 Cal. App. 3d 1, 12, 231 Cal. Rptr. 769 , appeal dismissed, 484 U.S. 805 (1987)* ; *see also People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1111, 60 Cal. Rptr. 2d 277, 929 P.2d 596 , cert. denied sub nom. Gonzalez v. Gallo, 521 U.S. 1121* (street gang's conduct in taking over neighborhood, fighting, and participating in other illegal conduct fails to qualify as either of two protected forms of association)].

[2] Intimate Associational Interest

Certain intimate human relationships must be secured against undue intrusion by the state because of the role of those relationships in safeguarding the individual freedom that is central to our constitutional scheme. The relationships protected are typically distinguished by their relative smallness, high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. Only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty. The factors considered in deciding whether an association possesses the requisite degree of intimacy include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent [*Roberts v. United States Jaycees (1984) 468 U.S. 609, 620, 104 S. Ct. 3244, 82 L. Ed. 2d 462* ;

Bohemian Club v. Fair Employment & Housing Com. (1986) 187 Cal. App. 3d 1, 12-13, 231 Cal. Rptr. 769 , appeal dismissed, 484 U.S. 805 (1987)] .

For example, an organization comprised mostly of former cult members, which was devoted to informing the public about the harmful effects of mind control and the unethical practices employed by cults, was not required to accept Scientologists as members because it was based on sufficiently intimate relationships to warrant constitutional protection that precluded application of the Unruh Civil Rights Act, *Civ. Code § 51* [*see Hart v. Cult Awareness Network (1993) 13 Cal. App. 4th 777, 788-789, 16 Cal. Rptr. 2d 705]* . By contrast, in another case, the California Supreme Court held that the Unruh Civil Rights Act could be constitutionally applied to strike down a country club's policy of excluding women from proprietary membership. In finding untenable the club's claim that application of the Act infringed on club members' freedom of intimate association, the Court relied on several factors, including (1) the size of defendant's membership (about 700 members); (2) the fact that the premises and activities of the defendant club were not narrowly restricted to club members (or their families), but were open to numerous nonmembers, including invited guests, participants in sponsored events, and patrons of the club's golf and tennis pro shops; and (3) the fact that elimination of the men-only requirement for proprietary membership would not fundamentally alter the nature of the club or its specific purposes, since the club's recreational facilities had generally been open to women and women had routinely held nonproprietary classes of membership within the club [*see Warfield v. Peninsula Golf& Country Club (1995) 10 Cal. 4th 594, 629, 42 Cal. Rptr. 2d 50, 896 P.2d 776]* .

For further discussion and forms pertaining to the Unruh Civil Rights Act, see Ch. 116, *Civil Rights: Discrimination in Business Establishments* , Ch. 117, *Civil Rights: Housing Discrimination* .

[3] Expressive Associational Interest

The right to engage in expressive activities protected by *U.S. Const., amend. I* implies a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. Governmental impediments to the exercise of one's right to choose one's associates can violate that protected right [*BSA v. Dale (2000) 530 U.S. 640, 120 S. Ct. 2446, 2451, 147 L. Ed. 2d 554* ; *Bd. of Dirs. of Rotary Int'l v. Rotary Club (1987) 481 U.S. 537, 548, 107 S. Ct. 1940, 95 L. Ed. 2d 474* ; *Roberts v. United States Jaycees (1984) 468 U.S. 609, 622-623, 104 S. Ct. 3244, 82 L. Ed. 2d 462]* .

The right to associate for expressive purposes is not absolute. Infringements on the right of association may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms [*Roberts v. United States Jaycees (1984) 468 U.S. 609, 623, 104 S. Ct. 3244, 82 L. Ed. 2d 462]* .

Furthermore, when state law does not affect in any significant way the existing members' ability to carry out the association's purposes, that state law may be applied to an association. Thus, for example, the United States Supreme Court has held that because application of the Unruh Civil Rights Act (*Civ. Code § 51*), which prohibits discrimination against women, did not require the Rotary Clubs to abandon or alter any of their activities, basic goals, classification system, or admit members who do not reflect a cross section of the community, it could be constitutionally applied to Rotary Clubs, so as to require them to admit women as members [*Bd. of Dirs. of Rotary Int'l v. Rotary Club (1987) 481 U.S. 537, 548-549, 107 S. Ct. 1940, 95 L. Ed. 2d 474* ; *see also Warfield v. Peninsula Golf & Country Club (1995) 10 Cal. 4th 594, 628-629, 42 Cal. Rptr. 2d 50, 896 P.2d 776* (application of Unruh Act to private country club did not violate constitutional freedom of expressive association because club was not organized for and did not regularly engage in expressive activities protected by *U.S. Const., amend. I*); *see generally* Ch. 116, *Discrimination in Business Establishments*]. State law will not be applied to force inclusion of individuals, however, when their presence would interfere with a group's expressive activities. For example, New Jersey's application to the Boy Scouts of its public accommodations law prohibiting discrimination on the basis of, *inter alia*, sexual orientation violated the Boy Scouts' *First Amendment* expressive associational right [*BSA v. Dale (2000) 530 U.S. 640, 120 S. Ct. 2446, 2449, 147*

L. Ed. 2d 554] . As another example, a cult awareness group could notbe forced to accept Scientologists as members [*see Hart v. Cult Awareness Network (1993) 13 Cal. App. 4th 777, 790, 16 Cal. Rptr. 2d 705]* .

[4] Public Organizations Involving Business Relationships

Clubs and associations that are allegedly "private" and based on intimate relationships may not necessarily be constitutionally immune from state intrusion. Thus, an ordinance that prohibited discrimination in private clubs was upheld by the United States Supreme Court in *New York State Club Assn. v. NYC* [*N.Y. State Club Ass'n v. City of New York (1988) 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1]* . The ordinance in *New York State Club Assn.* applied to clubs that were within its definition of "public," that is, clubs with more than 400 members that provide regular meal service and regularly receive payment for dues, fees, use of space, facilities, services, meals, or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business. In upholding the ordinance, the Court did not explicitly focus on the intimate versus nonintimate interests of the members. Instead, it focused on the "commercial" nature of the organizations; they were clubs where business deals were made and personal contacts valuable for business and employment purposes were formed. The Court found that such associations involved business relationships rather than intimate personal relationships. It explained that strangers played a major role in the ordinary existence of such clubs. The provision of regular meal service, the receipt of regular payments from nonmembers for the furtherance of business, and the regular participation of strangers at meetings were all significant in defining the nonprivate nature of the clubs [*N.Y. State Club Ass'n v. City of New York (1988) 487 U.S. 1, 12-15, 108 S. Ct. 2225, 101 L. Ed. 2d 1* ; *see Warfield v. Peninsula Golf & Country Club (1995) 10 Cal. 4th 594, 629, 42 Cal. Rptr. 2d 50, 896 P.2d 776* (holding that Unruh Civil Rights Act could be constitutionally applied to "private" country club; relying in part on club's large size (over 700 members) and on fact that use of club's facilities were not strictly limited to proprietary members)].

[5] Inapplicability to Relations With Association's Employees

Although the membership policies of an association may be entitled to constitutional protection under the right to freedom of association, that right will not necessarily protect the employment policies of that association. In one case, for example, a California court of appeal held that because the Bohemian Club membership policy limiting membership to males who had an appreciation of the arts was extremely selective and created an intimate relationship among the members, the members' association rights were protected. However, because the same selectivity was not applied in the employment process and there was a policy of nonfraternization between members and employees, the members did not have the same associational rights with employees, and the club could not exclude women from employment. In reaching this conclusion, the court of appeal stated that even if the mere presence of women on a regular basis would change the spirit of the organization and destroy the "bohemian feeling" of the club, those feelings are not afforded constitutional protection. The right to freedom of association only protects highly personal relationships, and the club members' relationship with employees could not reasonably be termed intimate within the letter or spirit of the term [*Bohemian Club v. Fair Employment & Housing Com. (1986) 187 Cal. App. 3d 1, 13-14, 231 Cal. Rptr. 769 , appeal dismissed, 484 U.S. 805 (1987)]* . Moreover, even if the members' associational rights would somehow be constricted by the club's forced hiring of women or others typically excluded from membership, that infringement might be justified by the state's compelling interest in eradicating employment discrimination [*Bohemian Club v. Fair Employment & Housing Com. (1986) 187 Cal. App. 3d 1, 14, 231 Cal. Rptr. 769 , appeal dismissed, 484 U.S. 805 (1987)]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechExpressive ConductBusiness & Corporate LawUnincorporated AssociationsCivil Rights LawPublic FacilitiesGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of AssociationCivil Rights LawPrivate Discrimination

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6-61 California Forms of Pleading and Practice--Annotated § 61.12

§ 61.12 Applicability of Unruh Civil Rights Act

The Unruh Civil Rights Act proscribes arbitrary discrimination in all business establishments [*see Civ. Code § 51*]. Except when application of the Act would violate the constitutional freedom of association [*see* discussion in *§ 61.11*], the exclusion of a person from membership in an association or club (or expulsion of a current member) because of the person's sex, race, religion, disability, or other basis specified in *Civ. Code § 51* may constitute a violation of the Unruh Act. The term "business establishment" includes all entities, whether carried on for profit or not, that are open to and serving the general public. Thus, all associations and clubs that are not strictly private (that is, exclusive in their selection of members and not open to the general public) are potentially subject to the application of the Unruh Act [*see Curran v. Mount Diablo Council of the Boy Scouts (1998) 17 Cal. 4th 670, 696-700, 72 Cal. Rptr. 2d 410, 952 P.2d 218* ; *Randall v. Orange County Council, Boy Scouts of America (1998) 17 Cal. 4th 736, 744, 72 Cal. Rptr. 2d 453, 952 P.2d 261* (Boy Scouts are not subject to Unruh Act for membership decisions and may exclude homosexuals and atheists without violating Act, but are subject to Act for business transactions with nonmembers)]. Furthermore, even if an association or club is "private" in the sense that it exercises selectivity in choosing members, that association or club may be deemed a business establishment for purpose of the Act if it regularly engages in business transactions with nonmembers on its premises [*see, e.g., Warfield v. Peninsula Golf & Country Club (1995) 10 Cal. 4th 594, 621-623, 42 Cal. Rptr. 2d 50, 896 P.2d 776* ("private" country club was business establishment subject to Unruh Act)]. An association or club may be subject to the Act for one purpose, e.g., business transactions, but not for another, e.g., its membership decisions [*see Curran v. Mount Diablo Council of the Boy Scouts (1998) 17 Cal. 4th 670, 697, 72 Cal. Rptr. 2d 410, 952 P.2d 218* ; *Randall v. Orange CountyCouncil, Boy Scouts of America (1998) 17 Cal. 4th 736, 744, 72 Cal. Rptr. 2d 453, 952 P.2d 261* (Boy Scouts may exclude homosexuals and atheists from membership without violating Act, but business transactions with nonmembers are subject to Act)].

For full discussion of the Unruh Civil Rights Act and its application to private associations and clubs, see Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPrivate DiscriminationConstitutional LawBill of RightsFundamental FreedomsFreedom of Association

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§ 61.13 Limitations or Exclusions Causing Economic Harm

By showing that exclusion from membership in an association deprives him or her of substantial economic advantages, an applicant can establish a right to judicial intervention with respect to the denial of his or her application for membership [*Pinsker v. Pacific Coast Soc. of Orthodontists (1969) 1 Cal. 3d 160, 164-166, 81 Cal. Rptr. 623, 460 P.2d 495* (incorporated associations); *see James v. Marinship Corp. (1944) 25 Cal. 2d 721, 731, 745, 155 P.2d 329* (labor union); *Kronen v. Pacific Coast Society of Orthodontists (1965) 237 Cal. App. 2d 289, 304-307, 46 Cal. Rptr. 808 , cert. denied, 384 U.S. 905 (1966)* (two professional organizations, one unincorporated; exclusion was reviewed and upheld)]. Judicial intervention into membership decisions is not restricted to organizations possessing monopoly power such as trade unions or professional membership groups, but will be applied to organizations that have the power substantially to affect an important economic interest [*see Warfield v. Peninsula Golf & Country Club (1989) 214 Cal. App. 3d 646, 659, 262 Cal. Rptr. 890]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPrivate DiscriminationAntitrust & Trade LawIndustry RegulationProfessional Associations & Higher EducationProfessional Associations

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§ 61.14 Termination of Membership

Unless otherwise provided by an unincorporated association's governing principles, defined at *Corp. Code § 18010*, membership in the unincorporated association is terminated by any of the following events [*Corp. Code § 18310(a)*]:

- Resignation of the member.
- Expiration of the fixed term of the membership, unless the membership is renewed before its expiration.
- Expulsion of the member [*see §§ 61.30* and *61.31* for discussion of expulsion or suspension from membership].
- Death of the member.
- Termination of the legal existence of a member that is not a natural person.

Termination of membership does not relieve a person from an obligation incurred as a member before termination [*Corp. Code § 18310(b)*]. Termination of membership also does not affect the right of an unincorporated association to enforce an obligation against a person incurred as a member before termination, or to obtain damages for its breach [*Corp. Code § 18310(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated Associations

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[Reserved]

§§ 61.15[Reserved]

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6-61 California Forms of Pleading and Practice--Annotated § 61.20

§ 61.20 Legal Distinction Between Association and Its Members

An association is a legal entity distinct from its members. The association represents the common or group interests of its members, as distinguished from their personal or private interests. Dues and assessments paid by members to an association become the property of the association and any severable or individual interest in them ceases on payment. As association property, they are subject to disbursement and expenditure by the association in pursuit of the lawful object or objects for which they were designated to be expended [*DeMille v. American Fed. of Radio Artists (1947) 31 Cal. 2d 139, 149, 187 P.2d 769 , cert. denied, 333 U.S. 876 (1948)* (labor union)].

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6-61 California Forms of Pleading and Practice--Annotated § 61.21

§ 61.21 Rights and Duties of Members Determined by Association's Constitution, Rules, and Bylaws

The constitution, rules, and bylaws of a voluntary unincorporated association constitute a contract between the association and its members. The rights and duties of the members as between themselves and in their relation to the association, in all matters affecting the association's internal government and the management of its affairs, are measured by the terms of the constitution and bylaws [*Weber v. Marine Cooks' & Stewards' Assn. (1949) 93 Cal. App. 2d 327, 335, 208 P.2d 1009* (labor union)]. Those provisions, rules, and bylaws are regarded in the same light as the terms of any other contract unless they contravene some law of the land [*Lawson v. Hewell (1897) 118 Cal. 613, 619, 50 P. 763]* .

The rights and duties of the members are to be determined by a consideration of the entire body of the rules governing the association, and are not limited to those existing at the time an individual became a member. Unless the rules at that time placed a limitation on the power of the association to make any change or amendment, any amendment or change adopted in accordance with the rules of the association is binding on each of the members [*Lawson v. Hewell (1897) 118 Cal. 613, 621, 50 P. 763* (fraternal organization); *Gear v. Webster (1968) 258 Cal. App. 2d 57, 61-62, 65 Cal. Rptr. 255* (controversy between two members; board of realtors bylaw was involved)], except that the power of amendment may not be used to repudiate obligations of a mutual benefit association that, in equity and justice, it should continue to pay [*Power v. Sheriffs' Relief Asso. (1943) 57 Cal. App. 2d 350, 352, 134 P.2d 827* (sick benefits)].

The practical and reasonable construction of the constitution and bylaws of a voluntary organization by its governing board is binding on the membership and will be recognized by the courts [*DeMille v. American Fed. of Radio Artists (1947) 31 Cal. 2d 139, 147, 187 P.2d 769 , cert. denied, 333 U.S. 876 (1948)* (labor union)]. However, an unreasonable construction is not binding on the membership and will not be recognized by the courts [Mandracio v. Bartenders Union, Local 41 *(1953) 41 Cal. 2d 81, 85, 256 P.2d 927* (labor union)]. The general rule is that when a private voluntary organization plainly contravenes the terms of its bylaws, whether and to what extent judicial relief will be available depends on balancing the rights of the aggrieved party against the infringement on the organization's autonomy and the resulting burdens on the courts [*California Dental Assn. v. American Dental Assn. (1979) 23 Cal. 3d 346, 350, 354-355, 152 Cal. Rptr. 546, 590 P.2d 401* (mandate available to require parent association to recognize

rules of affiliate)].

If the internal dispute of a private voluntary association involves the interpretation and construction of seemingly inconsistent provisions of its bylaws and if the meaning attributed to those provisions by the association's governing board is not unreasonable, arbitrary, or plainly in contravention of those bylaws, a court may not intervene and substitute its judgment for that of the association [*California Trial Lawyers Assn. v. Superior Court (1986) 187 Cal. App. 3d 575, 579-581, 231 Cal. Rptr. 725* (order of trial court directing association to disqualify candidate for office of president-elect and to install opposing candidate improper)].

Interference by the courts in the internal affairs of an association, involving the relations between it and its members, is justifiable under certain circumstances on the basis of public policy [Mooney v. Bartenders Union Local No. 284 *(1957) 48 Cal. 2d 841, 843-844, 313 P.2d 857* (right of labor union member to inspect union financial records without exhausting union remedies)]. Furthermore, if a private organization is "tinged with public stature or purpose" or has attained a "quasi-public significance," the organization must afford its members fair procedure before denying them benefits or otherwise adversely affecting their interests [*see* *Delta Dental Plan v. Banasky (1994) 27 Cal. App. 4th 1598, 1607-1608, 33 Cal. Rptr. 2d 381* (largest private dental plan in state was required to afford its participating dentists fair procedure before modifying participating dentists' list of usual, customary, and reasonable fees)]. Issues regarding fair procedure most often arise in connection with expulsion from membership [*see* discussion in *§ 61.31[1]*], although the right to fair procedure is not limited to matters of expulsion or exclusion [*Delta Dental Plan v. Banasky (1994) 27 Cal. App. 4th 1598, 1607, 33 Cal. Rptr. 2d 381]* .

For a form of complaint by members of an unincorporated association for declaratory relief to challenge the validity of amendments to the association's constitution, bylaws, or other rules, see *§ 61.87*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated Associations

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§ 61.22 Member's Interest in Association's Property

A member's interest in association property is only incidental to his or her membership and will cease on his or her ceasing to be a member when the property was accumulated by reason of the payment of dues [*Lawson v. Hewell (1897) 118 Cal. 613, 621-622, 50 P. 763* (fraternal organization)]. However, courts may interfere for the purpose of protecting property rights of members of unincorporated associations, such as the right to participate in their benefit features [*Otto v. Tailors' P. & B. Union (1888) 75 Cal. 308, 313-314, 17 P. 217* (expulsion from labor union)].

A member's interest in association property will not in itself prevent his or her expulsion [*Lawson v. Hewell (1897) 118 Cal. 613, 621-622, 50 P. 763]* .

Legal Topics:

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6-61 California Forms of Pleading and Practice--Annotated § 61.23

§ 61.23 Member's Right to Inspect Association Records

Analogizing to the rule applicable to corporations, the California Supreme Court has held that members of an unincorporated association are entitled to inspect financial records of the association on written demand, at least to the extent reasonably related to the member's interests in the association [*see* Mooney v. Bartenders Union Local No. 284 *(1957) 48 Cal. 2d 841, 843, 313 P.2d 857* (citing former Corp. Code § 3003; *now see Corp. Code § 1601*)]. Furthermore, the Court held that a member need not exhaust the association's internal remedies before exercising the right of inspection [*see* Mooney v. Bartenders Union Local No. 284 *(1957) 48 Cal. 2d 841, 843-844, 313 P.2d 857]* .

The association involved in the *Mooney* case was a labor union. After that decision, Congress enacted specific statutory provisions pertaining to the inspection by members of union records [*see 29 U.S.C. § 431(c)*]. Nevertheless, the holding in *Mooney* apparently remains applicable to other types of unincorporated associations.

For a form of petition for writ of mandate to require an association to permit inspection of its records, see *§ 61.86*. For discussion of a shareholder's right to inspect corporate records, see Ch. 165, *Corporations: Corporate Records and Reports* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusBusiness & Corporate LawUnincorporated Associations

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6-61 California Forms of Pleading and Practice--Annotated § 61.24

§ 61.24 Member Voting

Except as otherwise provided by statute or by an unincorporated association's governing principles, the following rules govern a member vote conducted pursuant to the provisions of the Corporations Code governing unincorporated associations [*Corp. Code § 18330(a)-(e)*; *see Corp. Code § 18000 et seq.*]:

- A vote may be conducted either (1) at a member meeting at which a quorum is present, or (2) by a written ballot in which the number of votes cast equals or exceeds the number required for a quorum.Approval of a matter voted on requires an affirmative majority of the votes cast.

- Written notice of the vote must be delivered to all members entitled to vote on the date of delivery. The notice must be delivered or mailed or sent electronically to the member addresses shown in the association's records a reasonable time before the vote is to be conducted. The notice may not be delivered electronically, unless the recipient has consented to electronic delivery of the notice. The notice must state the matter to be decided and describe how and when the vote is to be conducted.

- If the vote is to be conducted by written ballot, the notice of the vote will serve as the ballot. It must (1) set forth the proposed action, (2) provide an opportunity to specify approval or disapproval of any proposal, and (3) provide a reasonable time within which to return the ballot to the unincorporated association.

- One-third the voting power of the association constitutes a quorum.

- The voting power of the association is the total number of votes that can be cast by members on a particular issue at the time the member vote is held.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 61.25 Liability of Members for Harm

A member of a nonprofit association is liable for injury, damage, or harm caused by an act or omission of the association or an act or omission of a director, officer, or agent of the association, if any of the following conditions are satisfied [*Corp. Code § 18620(a)*]:

- The member expressly assumes liability for injury, damage, or harm caused by particular conduct and that conduct causes the injury, damage, or harm.
- The member engages in tortious conduct that causes the injury, damage, or harm.
- The member is otherwise liable under any other statute.

Corp. Code § 18620 provides a nonexclusive list of existing grounds for liability, and does not foreclose any common law grounds for liability [*Corp. Code § 18620(b)*].

Legal Topics:

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

§§ 61.26[Reserved]

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6-61 California Forms of Pleading and Practice--Annotated § 61.30

§ 61.30 Grounds for Suspension or Expulsion

The right of an unincorporated association to expel a member may be based and upheld on either of the following two grounds [*Smith v. Kern County Medical Asso. (1942) 19 Cal. 2d 263, 270, 120 P.2d 874* (medical society); *Otto v. Tailors' P. & B. Union (1888) 75 Cal. 308, 314, 17 P. 217* (labor union); *see Anderson v. Los Angeles County Employee Relations Com. (1991) 229 Cal. App. 3d 817, 826, 280 Cal. Rptr. 415* (organization has right of self-preservation and may expel members who are disloyal and join rival organization)]:

- A violation of those established rules of the association that have been subscribed or assented to by the members, if those rules provide expulsion for such violation; or

- Conduct that clearly violates the fundamental objects of the association and that, if persisted in and allowed, would thwart those objects or bring the association into disrepute.

However, an association may not expel a member if the expulsion is substantively unreasonable and rests on a rule that is capricious or contrary to public policy. For example, the expulsion of a Boy Scout based solely on his status as a homosexual was found to be substantively unreasonable [*see Curran v. Mount Diablo Council of the Boy Scouts (1983) 147 Cal. App. 3d 712, 721, 723, 195 Cal. Rptr. 325 , appeal dismissed, 468 U.S. 1205 (1984) , on review after remand, 17 Cal. 4th 670, 72 Cal. Rptr. 2d 410, 952 P.2d 218 (1998)* (Boy Scouts not subject to Unruh Act for purposes of membership decisions)].

At least in situations in which a private organization controls an important economic interest, its decision to expel an individual may not be arbitrary. An expulsion will be deemed arbitrary either because the reason for the exclusion is itself irrational or because, in applying a rule in a particular case, the organization has proceeded in an unfair manner [*Gaenslen v. Board of Directors (1985) 185 Cal. App. 3d 563, 568, 232 Cal. Rptr. 239* ; *see § 61.31[1]*].

For a form of petition for writ of mandate challenging an association's decision to expel a member and for damages for wrongful expulsion, see *§ 61.80*. For a form of affirmative defense alleging that there were sufficient grounds for a

member's expulsion, see *§ 61.101*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusBusiness & Corporate LawUnincorporated Associations

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6-61 California Forms of Pleading and Practice--Annotated § 61.31

§ 61.31 Procedure for Expulsion

[1] General Fair Procedure Requirement

Corp. Code § 18320 codifies the fair procedure requirement for suspension or expulsion from membership in an unincorporated association. It applies only if membership in an unincorporated association includes a property right, or if expulsion or suspension of a member would affect an important, substantial economic interest [*Corp. Code § 18320(a)*]. It does not apply to an unincorporated association that has a religious purpose [*Corp. Code § 18320(a)*]. In addition, § 18320 governs only the procedure for expulsion or suspension and not the substantive grounds for expulsion or suspension [*Corp. Code § 18320(f)*]. An expulsion or suspension basedon substantive grounds that violate contractual or other rights of the member or are otherwise unlawful is not made valid by compliance with § 18320 [*Corp. Code § 18320(f)*].

Expulsion or suspension of a member must be done in good faith and in a fair and reasonable manner. A procedure that satisfies the requirements of *Corp. Code § 18320(c)* is fair and reasonable, but a court may also determine that another procedure is fair and reasonable taking into account the full circumstances of the expulsion or suspension [*Corp. Code § 18320(b)*].

A procedure for expulsion or suspension of a member that satisfies the following requirements is fair and reasonable [*Corp. Code § 18320(c)*]:

- The procedure is included in the unincorporated association's governing documents [*see Corp. Code § 18008* ("governing documents" defined)].

- The member to be expelled or suspended is given notice, including a statement of the reasons for the expulsion or suspension. The notice must be delivered at least 15 days before the effective date of the expulsion or suspension [*Corp. Code § 18320(c)(2)*]. A notice pursuant to *Corp. Code § 18320* may be delivered by any method reasonably calculated to provide actual notice. A notice delivered by mail must

be sent by first-class, certified, or registered mail to the last address of the member shown on the unincorporated association's records [*Corp. Code § 18320(d)*].

- The member to be expelled or suspended is given an opportunity to be heard by the person or body deciding the matter, orally or in writing, not less than five days before the effective date of the expulsion or suspension.

A member may commence a proceeding to challenge his or her expulsion or suspension, including a claim alleging defective notice, within one year after the effective date of the expulsion or suspension [*Corp. Code § 18320(e)*]. The court may order any relief, including reinstatement, it determines is equitable under the circumstances [*Corp. Code § 18320(e)*]. A vote of the members or of the board may not be set aside solely because a person was wrongfully excluded from voting by virtue of the challenged expulsion or suspension, unless the court determines that the wrongful expulsion or suspension was in bad faith and for the purpose, and with the effect, of wrongfully excluding the member from the vote or from the meeting at which the vote took place, so as to affect the vote's outcome [*Corp. Code § 18320(e)*].

California courts recognize a common law right to fair procedure protecting individuals from arbitrary exclusion or expulsion from private organizations that control important economic interests [*Potvin v. Metropolitan Life Ins. Co. (2000) 22 Cal. 4th 1060, 1071-1072, 95 Cal. Rptr. 2d 496, 997 P.2d 1153* ; *Applebaum v. Board of Directors (1980) 104 Cal. App. 3d 648, 163 Cal. Rptr. 831* ; *see Delta Dental Plan v. Banasky (1994) 27 Cal. App. 4th 1598, 1607, 33 Cal. Rptr. 2d 381* ; *Gaenslen v. Board of Directors (1985) 185 Cal. App. 3d 563, 568, 232 Cal. Rptr. 239]* . The purpose of the common law right to fair procedure is to protect against arbitrary decisions by private organizations in certain situations, including the following [*Potvin v. Metropolitan Life Ins. Co. (2000) 22 Cal. 4th 1060, 1066, 95 Cal. Rptr. 2d 496, 997 P.2d 1153]* :

- Membership expulsions adversely affecting rights in specified funds held for the associations' members, so that court intervention is necessary to protect the affected members' property rights against arbitrary deprivation by the association [*Von Arx v. San Francisco G. Verein (1896) 113 Cal. 377, 45 P. 685* ; *Otto v. Tailors' P. & B. Union (1888) 75 Cal. 308, 17 P. 217]* ;

- Exclusion from membership on the basis of race [*James v. Marinship Corp. (1944) 25 Cal. 2d 721, 155 P.2d 329* (union's arbitrary denial of full membership to African-American workers)];

- Exclusion from professional organizations [*Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II); Pinsker v. Pacific Coast Soc. of Orthodontists (1969) 1 Cal. 3d 160, 81 Cal. Rptr. 623, 460 P.2d 495* (*Pinsker I*)];

- Expulsion from a hospital surgical residency program [*Ezekial v. Winkley (1977) 20 Cal. 3d 267, 142 Cal. Rptr. 418, 572 P.2d 32]* ; and

- Removal of a physician from an insurance company's preferred provider lists [*Potvin v. Metropolitan Life Ins. Co. (2000) 22 Cal. 4th 1060, 95 Cal. Rptr. 2d 496, 997 P.2d 1153]* .

The right of fair procedure generally applies when a private organization is "tinged with public stature or purpose" or has attained a "quasi-public significance" [*see Potvin v. Metropolitan Life Ins. Co. (2000) 22 Cal. 4th 1060, 1070, 95 Cal. Rptr. 2d 496, 997 P.2d 1153* (private insurer maintaining list of preferred provider physicians is "private entity affecting public interest"); *Delta Dental Plan v. Banasky (1994) 27 Cal. App. 4th 1598, 1607-1608, 33 Cal. Rptr. 2d 381* (largest California dential plan; citing *Salkin v. California Dental Ass'n (1986) 176 Cal. App. 3d 1118, 1125, 224 Cal. Rptr. 352*)]. However, automatic suspension of a member pursuant to the association's bylaws following his or her failure to pay dues does not contravene the requirements of fair procedure [*DeMille v. American Fed. of Radio Artists*

(1947) 31 Cal. 2d 139, 154, 187 P.2d 769 , cert. denied, 333 U.S. 876 (1948) (labor union)].

What constitutes fair procedure is not fixed or judicially prescribed; however, if the right of fair procedure applies, the association generally may not expel a member without affording him or her notice and a hearing, even though the rules of the association make no provision for these protections [*Youngblood v. Wilcox (1989) 207 Cal. App. 3d 1368, 1375, 255 Cal. Rptr. 527* (expulsion of lifetime members from country club); *see Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 555, 116 Cal. Rptr. 245, 526 P.2d 253* (denial of orthodontist's application for membership in professional society); *see also Delta Dental Plan v. Banasky (1994) 27 Cal. App. 4th 1598, 1608, 33 Cal. Rptr. 2d 381* (dental plan's modification of participating dentist's list of fees)]. Generally, the hearing required by the right of fair procedure includes the right to notice of the charges, to confront and cross examine the accusers, and to examine and refute the evidence [*Cason v. Glass Bottle Blowers Asso. (1951) 37 Cal. 2d 134, 143-144, 231 P.2d 6* ; *Rosenblit v. Superior Court (1991) 231 Cal. App. 3d 1434, 1445, 282 Cal. Rptr. 819]* . Additionally, the right to fair procedure includes the right to impartial adjudicators and a practical method of testing impartiality [*Rosenblit v. Superior Court (1991) 231 Cal. App. 3d 1434, 1448-1449, 282 Cal. Rptr. 819* (in proceeding to determine hospital staff privileges, physician has right to examination of committee members to discover possible bias or conflicts of interest)].

One court has held that public censure is sufficient to invoke judicial protection of fair procedure rights. The court reasoned that public censure may tend to impair a member's opportunity to earn a livelihood through his or her chosen profession because, in the public view, membership in those organizations may appear to be a tangible demonstration of professional competence and skill, professional responsibility, and acceptance by one's professional peers [*Salkin v. California Dental Ass'n (1986) 176 Cal. App. 3d 1118, 1121-1126, 224 Cal. Rptr. 352]* .

For a form of petition for writ of mandate containing allegations that a member was expelled without a fair hearing, see *§ 61.80*. For a form of affirmative defense alleging that the member was afforded a fair expulsion proceeding, see *§ 61.101*.

[2] Judicial Review and Relief

[a] Exhaustion of Internal Remedies

A plaintiff who seeks judicial relief against an organization of which he or she is a member must first invoke and exhaust the remedies provided by that organization applicable to his or her grievance. This makes possible the settlement of the matter by simple, expeditious, and inexpensive procedures by persons who are familiar with those procedures. Pursuit of internal relief is excused only if the organization violates its rules for review or on a showing that it would be futile to invoke the internal procedures [*Holderby v. Internat. Union etc. Engrs. (1955) 45 Cal. 2d 843, 846-847, 291 P.2d 463* (denial of reinstatement into labor union); *DeVaughn Peace, M.D., Inc. v. St. Francis Medical Center (1994) 28 Cal. App. 4th 454, 460, 33 Cal. Rptr. 2d 459]* . The exhaustion of internal remedies is a jurisdictional prerequisite to resort to the courts [*American Society of Composers, Authors & Publishers v. Superior Court (1962) 207 Cal. App. 2d 676, 684, 24 Cal. Rptr. 772* ; *see also DeVaughn Peace, M.D., Inc. v. St. FrancisMedical Center (1994) 28 Cal. App. 4th 454, 459-460, 33 Cal. Rptr. 2d 459* (physician's failure to exhaust intraorganizational remedies and thereafter file petition for writ of mandate pursuant to medical staff bylaws was fatal to his tort action against medical center for damages caused by alleged wrongful deprivation of medical staff privileges); *Ferguson v. Writers Guild of America (1991) 226 Cal. App. 3d 1382, 1390, 277 Cal. Rptr. 450* (exhaustion of internal remedies prevents litigant from pursuing judicial remedy for procedural defects in arbitration without having first asked responsible private organization to correct them)].

Furthermore, when a remedy is resorted to, the member must give the association a reasonable time to act [*Simpson v. The Salvation Army (1942) 49 Cal. App. 2d 371, 376, 121 P.2d 847* (religious and charitable association)].

An incorrect decision by the appellate organs of the association is not a violation of the association's rules on appeal that

justifies the member in refusing to further follow these rules. However, imposition of a penalty nowhere prescribed that constitutes a violation of the association's appellate procedure rules makes it futile to invoke the further appellate rules [*Gonzales v. International Asso. of Machinists (1956) 142 Cal. App. 2d 207, 211-212, 298 P.2d 92* , *affirmed, 356 U.S. 617 (1958)* (labor union)]. An aggrieved association member is also excused from further internal appeal if exhaustion of appeals would create too great a delay [*Mitchell v. International Asso. of Machinists (1961) 196 Cal. App. 2d 796, 808, 16 Cal. Rptr. 813]* .

For a form of demurrer to a complaint or petition based on the plaintiff's or petitioner's failure to exhaust an association's internal remedies, see *§ 61.100*.

[b] General Power of Court in Mandate Proceeding

Mandate is a proper proceeding to compel the reinstatement to membership of one who has been illegally expelled from a duly organized association [*Smetherham v. Laundry Workers' Union (1941) 44 Cal. App. 2d 131, 135, 111 P.2d 948* ; *see generally Code Civ. Proc. § 1084 et seq.*; Ch. 358, *Mandate and Prohibition*]. Furthermore, in cases in which the expulsion decision is subject to the right to fair procedure [*see* discussion in [1], *above*], judicial review of the organization's decision is by administrative mandate under *Code Civ. Proc. § 1094.5* because the right to fair procedure includes the right to a hearing, which contemplates the receiving of evidence and the vesting of discretion in a trier of fact [*Delta Dental Plan v. Banasky (1994) 27 Cal. App. 4th 1598, 1608, 33 Cal. Rptr. 2d 381* ; *see* *Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 813-817, 140 Cal. Rptr. 442, 567 P.2d 1162* (administrative mandate under *Code Civ. Proc. § 1094.5* is not limited to review of decisions by governmental agencies, but applies to adjudicatory decisions by nongovernmental bodies or officers that are result of proceedings in which hearing is required bylaw)]. For general discussion of procedures pertaining to adminstrative mandate, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* .

In cases in which the association's decision affects a fundamental vested right, such as the right to practice one's profession, the trial court must exercise its independent judgment on the evidence presented to the decisionmaking body and determine whether the decision is supported by the weight of the evidence [*see* *Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 820-825, 140 Cal. Rptr. 442, 567 P.2d 1162* ; *Code Civ. Proc. § 1094.5(c)*]. In other cases, the court is limited to determining whether the association's decision and findings are supported by substantial evidence [*see Code Civ. Proc. § 1094.5(c)*; *see also* *Bush v. International Alliance (1942) 55 Cal. App. 2d 357, 363, 130 P.2d 788* (standard is whether association's decision is supported by any evidence whatsoever); *McConville v. Milk W.D. Union (1930) 106 Cal. App. 696, 698, 289 P. 852]* .

Code Civ. Proc. § 1094.5(d) sets forth standards for review of decisions of private hospital boards, boards of directors of hospital districts or governing bodies of municipal hospitals. For further discussion, see Ch. 416, *Physicians: Membership on Hospital Staffs or in Professional Organizations* .

For a form of petition for writ of mandate to review the decision of a private association to expel a member, see *§ 61.80*. For a form of affirmative defense to such a petition, alleging the legality of the expulsion, see *§ 61.101*.

[c] Mandate as Prerequisite to Damages Action

Before an association member may bring an action for damages based on wrongful expulsion, he or she must first seek and obtain a favorable decision on a petition for writ of mandate overturning the expulsion [*Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 483-485, 131 Cal. Rptr. 90, 551 P.2d 410* ; *Holder v. California Paralyzed Veterans Assn. (1980) 114 Cal. App. 3d 155, 160-165, 170 Cal. Rptr. 455* ; *see* *DeVaughn Peace, M.D., Inc. v. St. Francis Medical Center (1994) 28 Cal. App. 4th 454, 459-460, 33 Cal. Rptr. 2d 459]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsCivil ProcedureRemediesWritsCommon Law WritsMandamus

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A. Issues Involving Membership
3. Suspension or Expulsion From Membership

6-61 California Forms of Pleading and Practice--Annotated §§ 61.32through 61.39

[Reserved]

§§ 61.32[Reserved]

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PART II. LEGAL BACKGROUND
B. Property Rights of Associations

6-61 California Forms of Pleading and Practice--Annotated § 61.40

§ 61.40 Association's General Power to Own, Manage, and Transfer Property

An unincorporated association may, in its name, acquire, hold, manage, encumber, or transfer an interest in real or personal property [Corp. Code § 18105; *see Corp. Code § 21200* (property rights of certain unincorporated medical societies)]. Property acquired by or for an unincorporated association is property of the unincorporated association and not of the members individually [*Corp. Code § 18110*]. No limitation on the power of an unincorporated association to acquire, hold, manage, pledge, encumber, or transfer an interest in real or personal property, or the manner of exercise of those powers, can be asserted as between the unincorporated association or a member of the unincorporated association and a third person, except in the following proceedings [*Corp. Code § 18125*]:

- A proceeding to enjoin an unauthorized act, or the continuation of an unauthorized act, when a third person has not yet acquired rights that would be adversely affected by the injunction, or when, at the time of the unauthorized act, the third person had actual knowledge that the act was unauthorized.

- A proceeding to dissolve the unincorporated association.

- A proceeding against a director, officer, or agent of the unincorporated association for violation of that person's authority.

The acquisition of an interest in real property by an unincorporated association must be executed by (1) its president and secretary or other comparable officers; (2) a person specifically designated by a resolution adopted by the association; or (3) a committee or other body or person authorized to act by the governing principles of the association [*Corp. Code § 18115*].

An unincorporated association may record in a county in which it has an interest in real property a verified and acknowledged statement of authority stating the name of the association, and the names, title, or capacity of its officers and other persons who are authorized on its behalf to acquire real property. For these purposes, "statement of authority" includes a certified copy of a statement recorded in another county [*Corp. Code § 18120(a)*]. An unincorporated association may revoke a statement of authority by recording either of the following documents in the county in which

the statement of authority is recorded [*Corp. Code § 18120(b)*]:

- A new statement of authority that satisfies the requirements described above. The new statement supersedes the revoked statement; or

- A verified and acknowledged document that expressly revokes the statement of authority.

It will be conclusively presumed in favor of a bona fide transferor for value of real property of the association located in the county in which a statement of authority has been recorded, that a person designated in the statement is authorized to acquire real property on behalf of the association [*Corp. Code § 18120(c)*]. This presumption does not apply if, before the acquisition, either of the following occurs [*Corp. Code § 18120(d)*]:

- The statement of authority is revoked by the unincorporated association; or

- A person claiming to be a member, director, or officer of the unincorporated association records, in the county in which the property is located, a verified and acknowledged document stating that the statement of authority is erroneous or unauthorized.

A testamentary disposition may be made to unincorporated societies or associations or lodges or branches thereof [*Prob. Code § 6102*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferBusiness & Corporate EntitiesBusiness & Corporate LawUnincorporated Associations

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6-61 California Forms of Pleading and Practice--Annotated § 61.41

§ 61.41 Conveyance of Association's Real Property

The transfer or encumbrance of an interest in real property by an unincorporated association must be executed by (1) its president and secretary or other comparable officers; (2) a person specifically designated by a resolution adopted by the association; or (3) a committee or other body or person authorized to act by the governing principles of the association [*Corp. Code § 18115*].

An unincorporated association may record in a county in which it has an interest in real property a verified and acknowledged statement of authority stating the name of the association, and the names, title, or capacity of its officers and other persons who are authorized on its behalf to transfer or encumber real property. For these purposes, "statement of authority" includes a certified copy of a statement recorded in another county [*Corp. Code § 18120(a)*]. An unincorporated association may revoke a statement of authority by recording either of the following documents in the county in which the statement of authority is recorded [*Corp. Code § 18120(b)*]:

- A new statement of authority that satisfies the requirements described above. The new statement supersedes the revoked statement; or

- A verified and acknowledged document that expressly revokes the statement of authority.

It will be conclusively presumed in favor of a bona fide purchaser or encumbrancer for value of real property of the association located in the county in which a statement of authority has been recorded, that a person designated in the statement is authorized to transfer or encumber real property on behalf of the association [*Corp. Code § 18120(c)*]. This presumption does not apply if, before the transfer or encumbrance, either of the following occurs [*Corp. Code § 18120(d)*]:

- The statement of authority is revoked by the unincorporated association; or

- A person claiming to be a member, director, or officer of the unincorporated association records, in the county in which the property is located, a verified and acknowledged document stating that the

statement of authority is erroneous or unauthorized.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferBusiness & Corporate EntitiesBusiness & Corporate LawUnincorporated Associations

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6-61 California Forms of Pleading and Practice--Annotated § 61.42

§ 61.42 Levying on Association's Real Property

A money judgment against an unincorporated association, whether organized for profit or not, may be enforced only against the association's property [*Corp. Code § 18260*]. A judgment creditor of a member, director, officer, or agent of an unincorporated association may not levy execution against the assets of the member, director, officer, or agent to satisfy a judgment based on a claim against the unincorporated association unless a judgment based on the same claim has been obtained against the unincorporated association and any of the following conditions is satisfied [*Corp. Code § 18270(a)*]:

- A writ of execution on the judgment against the unincorporated association has been returned unsatisfied in whole or in part.

- The unincorporated association is a debtor in bankruptcy.

- The member, director, officer, or agent has agreed that the creditor need not exhaust the assets of the unincorporated association.

- A court grants permission to the judgment creditor to levy execution against the assets of a member, director, officer, or agent based on a finding that the assets of the unincorporated association subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of the assets of the unincorporated association is excessively burdensome, or that the grant of permission is an appropriate exercise of the court's equitable powers.

Nothing in *Corp. Code § 18270* affects the right of a judgment creditor to levy execution against the assets of a member, director, officer, or agent of an unincorporated association if the claim against the member, director, officer, or agent is not based on a claim against the unincorporated association [*Corp. Code § 18270(b)*].

For full discussion of procedures for enforcement of judgments, see Ch. 254, *Executions and Enforcement of Judgments*
.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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6-61 California Forms of Pleading and Practice--Annotated § 61.43

§ 61.43 Use of Association's Name or Insignia

[1] General Rights of Association

An association may enjoin the use of its name by another group, even though neither is incorporated nor engaged in business for material profit. The right to an injunction does not depend on either the actual showing of specific injury or the misleading of any particular person. An injunction is proper when there is a natural and probable tendency to mislead and confuse the public to the hurt and injury of the association having the prior right to the distinctive names and emblems [*Law v. Crist (1940) 41 Cal. App. 2d 862, 865-866, 107 P.2d 953* (lodge of theosophists); *see also Ball v. American Trial Lawyers Assn. (1971) 14 Cal. App. 3d 289, 300-313, 92 Cal. Rptr. 228* (use of name similar to American College of Trial Lawyers)].

The use of the name of an association or organization in a commercial venture may be enjoined under specific statutory provisions [*Bus. & Prof. Code § 14493*; *Corp. Code § 21308(2)*], as may the wearing or use of the insignia of an association [*Corp. Code § 21308(1)*].

For a form of complaint seeking an injunction against the unauthorized use of an association's name and insignia, see *§ 61.120*. For related discussion of remedies for infringement of trademarks and tradenames and similar forms of unfair competition, see Ch. 549, *Trademarks and Trade Names* , and Ch. 565, *Unfair Competition* .

[2] Penal Provisions

Any person who willfully wears the badge, lapel button, rosette, or any part of the garb, robe, habit, or any other recognized and established insignia or apparel of any secret society, or fraternal or religious order or organization, or of any sect, church, or religious denomination, or who uses the same to obtain aid or assistance, with intent to deceive, unless entitled to wear and use the same under the constitution, bylaws, or rules and regulations, or other laws or enactments of that society, order, organization, sect, church, or religious denomination is guilty of a misdemeanor [*Penal Code § 538b*].

Any person who willfully wears, exhibits, or uses for any purpose a name or insignia registered under *Corp. Code §*

21300 et seq. (association names and insignia) in the office of the Secretary of State, unless the person is entitled to use, wear, or exhibit the name or insignia under the constitution, bylaws, or rules of the association that registered it, is guilty of a misdemeanor punishable by fine or by imprisonment in the county jail for a period not to exceed 60 days [*Corp. Code § 21307*; *see also Mil. & Vet. Code §§ 1801*, *1820*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsTrademark LawInfringement ActionsRemediesGeneral OverviewTrademark LawInfringement ActionsRemediesEquitable ReliefGeneral OverviewTrademark LawSpecial MarksTrade NamesInfringement

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6-61 California Forms of Pleading and Practice--Annotated § 61.44

§ 61.44 Dissolution of Association

An unincorporated association may be dissolved by any of the following methods [*Corp. Code § 18410*]:

- If the association's governing documents provide a method for dissolution, by that method.
- If the association's governing documents do not provide a method for dissolution, by the affirmative vote of a majority of the association's voting power.
- If the association's operations have been discontinued for at least three years, by the board or, if the association has no incumbent board, by the members of its last preceding incumbent board.
- If the association's operations have been discontinued, by court order.

Promptly after commencement of dissolution of an unincorporated association, the board or, if there is no board, the members, must (1) promptly wind up the affairs of the association; (2) pay or provide for its known debts or liabilities; (3) collect any amounts due to it; (4) take any other action as is necessary or appropriate for winding up, settling, and liquidating its affairs; and (5) dispose of its assets as provided in *Corp. Code § 18130* [*Corp. Code § 18420*].

Apparently, dissolution of an unincorporated association may be brought about by the action of the association itself as provided for in its articles of association, charter, or bylaws. The propriety of such a method of disslution stems from the principle that the constitution or bylaws of an unincorporated association has the force and effect of a contract between the association and its members concerning which the members are bound and are charged with full knowledge. When no provision is made in the association's constitution or bylaws concerning the method of dissolution, it may be dissolved by the unanimous consent of its members, by the decision of some superior organization, or by a court decree [*Holt v. Santa Clara County Sheriff's Benefits Assn. (1967) 250 Cal. App. 2d 925, 929-930, 59 Cal. Rptr. 180]* .

When the dissolution of an unincorporated association is by court decree, a court of equity has jurisdiction to decree

dissolution and to distribute the association's funds among the several members or contributors when its operations have been discontinued and its objects have been abandoned by common consent of the members. It will not be involuntarily dissolved or dissolved on complaint of some of the members for slight causes, but only when it has apparently ceased to answer the purpose of its existence and no other relief can be had [*Holt v. Santa Clara County Sheriff's Benefits Assn. (1967) 250 Cal. App. 2d 925, 930, 59 Cal. Rptr. 180]* .

Because the courts do not favor dissolution, even when the majority of the members desire it, if the government of the association is fairly administered and its purposes can be carried out by a minority consisting of a sufficient number to constitute the association, the association may not accomplish dissolution by an amendment to its constitution or bylaws providing for the dissolution itself and not for the method or manner by which dissolution could be accomplished by future action of the association [*Holt v. Santa Clara County Sheriff's Benefits Assn. (1967) 250 Cal. App. 2d 925, 930, 931 n.2, 59 Cal. Rptr. 180]* .

Generally, on the dissolution of a voluntary association, its property is distributed pro rata among its members unless otherwise provided by its constitution or bylaws. The constitution or bylaws may provide, for example, that, on dissolution, the distribution of assets is to be limited to those members of the organization who, by virtue of the longevity of their membership, played a substantial part in the acquisition of those assets [*Holt v. Santa Clara County Sheriff's Benefits Assn. (1967) 250 Cal. App. 2d 925, 932, 933, 59 Cal. Rptr. 180]* .

When an unincorporated association is incorporated, the creation of the corporation ipso facto dissolves the association and transfers its propertyand rights to the corporation [*Oliver v. Swiss Club Tell (1963) 222 Cal. App. 2d 528, 544, 35 Cal. Rptr. 324* ; *Security-First Nat. Bk. v. Cooper (1944) 62 Cal. App. 2d 653, 670, 145 P.2d 722* ; *cf. Barber v. Irving (1964) 226 Cal. App. 2d 560, 566-567, 38 Cal. Rptr. 142* (approving reconveyance of property to unincorporated church association that had been taken by corporation formed by minority faction)]. For discussion pertaining to dissolution of a corporation, see Ch. 170, *Corporations: Dissolution and Winding Up*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated Associations

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6-61 California Forms of Pleading and Practice--Annotated §§ 61.45-61.49

[Reserved]

§§ 61.45[Reserved]

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6-61 California Forms of Pleading and Practice--Annotated § 61.50

§ 61.50 Standing Issues

[1] Association as Named Party

[a] General Right to Sue and Be Sued

A partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name it has assumed or by which it is known [*Code Civ. Proc. § 369.5(a)*; *see Tenants Assn. of Park Santa Anita v. Southers (1990) 222 Cal. App. 3d 1293, 1299-1305, 272 Cal. Rptr. 361]* .

For captions and general allegations of status and capacity for use in actions by and against unincorporated associations, see *§§ 61.110 -61.114*.

[b] Standing to Sue on Behalf of Members

An association has standing to sue on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit [*N.Y. State Club Ass'n v. City of New York (1988) 487 U.S. 1, 9, 108 S. Ct. 2225, 101 L. Ed. 2d 1* ; *United Union of Roofers v. Insurance Corp. of Am. (9th Cir. 1990) 919 F.2d 1398, 1400* ; *California Rural Legal Assistance v. Legal Services Co. (9th Cir. 1990) 917 F.2d 1171, 1174]* .

An unincorporated association can sue in a representative capacity when it has been injured itself, or it can bring an action for prospective relief, such as an injunction or a declaration of rights [*Tenants Assn. of Park Santa Anita v. Southers (1990) 222 Cal. App. 3d 1293, 1299-1305, 272 Cal. Rptr. 361]* . Thus, an unincorporated association of residents in a mobilehome park had standing to sue for prospective relief and damages that were generally applicable to the tenants, because there was anascertainable class, there was a community of interest in the questions of law and fact, the members had a common interest, and the members were all alleged victims of the defendants. However, the association did not have standing to bring actions for intangible and inherantly personal injuries, such as the infliction of emotional distress [*Tenants Assn. of Park Santa Anita v. Southers (1990) 222 Cal. App. 3d 1293, 1299-1305, 272 Cal.*

Rptr. 361 (also holding trial court should grant relief to amend complaint to add individual plaintiffs)].

[c] Effect of Fictitious Business Names

No person transacting business under a fictitious business name contrary to the provisions of *Bus. & Prof. Code § 17900 et seq.* (requiring filing of a fictitious business name statement), or his or her assignee, may maintain any action on or on account of any contract made, or transaction had, in the fictitious business name in any court of California until the fictitious business name statement has been executed, filed, and published as required [*Bus. & Prof. Code § 17918*].

In the case of a partnership or other association of persons (other than a limited partnership that has filed a certificate of limited partnership with the Secretary of State under *Corp. Code §§ 15621* or *15902.01*, a foreign limited partnership that has filed an application for registration with the Secretary of State under *Corp. Code §§ 15692* or *15909.02*, a registered limited liability partnership that has filed a registration under *Corp. Code §§ 16953*, or a foreign limited liability partnership that has filed an application for registration under *Corp. Code §§ 16959*), a fictitious business name means a name that does not include the surname of each general partner or a name that suggests the existence of additional owners [*Bus. & Prof. Code § 17900(b)(2)*; *Corp. Code §§ 15621, 15692* (inoperative and repealed on January 1, 2010, unless later enacted statute, effective on or before January 1, 2010, deletes or extends that date; to be replaced by *Corp. Code §§ 15902.01, 15909.02*)]. A name that suggests the existence of additional owners is one that includes such words as "Company," "& Company," "& Son," "& Sons," "& Associates," "Brothers," and the like, but not words that merely describe the business being conducted [*Bus. & Prof. Code § 17900(c)*].

For a further discussion of, and forms related to, the fictitious business name statement, see Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties* .

[2] Standing of Members

[a] Joinder of Member in Action Against Association

A member of the partnership or other unincorporated association may be joined as a party in an action against the unincorporated association. If service of process is made on the member as an individual, whether or not the member is also served as a person on whom service is made on behalf of the unincorporated association, a judgment against the member based on the member's personal liability is joint,joint and several, or several [*Code Civ. Proc. § 369.5(b)*].

[b] Derivative Action Against Association's Management

The provisions of *Corp. Code § 800*, relating to corporate shareholder's derivative actions, are applicable to actions in the right of unincorporated associations [*see Corp. Code § 800(a)*].

No action may be instituted or maintained in right of any unincorporated association by a member of that association unless the following conditions exist [*see Corp. Code § 800(a), (b)*]:

- The plaintiff alleges in the complaint that he or she was a member at the time of the transaction or any part thereof of which he or she complains or that his or her membership thereafter devolved on him or her by operation of law from a person who was a member at the time of the transaction or any part thereof complained of.

- The plaintiff alleges in the complaint with particularity his or her efforts to secure from the managing body of the association the action that he or she desires, or the reasons for not making such effort.

- The plaintiff alleges further that he or she has either informed the association or the managing body in writing of the ultimate facts of each cause of action against each defendant member of the managing

body or delivered to the association or the managing body a true copy of the complaint that he or she proposes to file.

Under certain circumstances, the court has discretion to allow a person who was not a member at the time of the transaction complained of to bring a derivative action [*see Corp. Code § 800(a), (b)(1)*].

For a form of skeletal complaint for use in a derivative action by a member on behalf of an unincorporated association, see *§ 61.85*. For further discussion and forms involving shareholder's derivative actions, see Ch. 168, *Corporations: Derivative Actions* .

[c] Tort Actions Against Association

Unincorporated associations are entitled to general recognition as separate legal entities. As a consequence, a member of an unincorporated association may maintain a tort action against the association [*see White v. Cox (1971) 17 Cal. App. 3d 824, 828, 95 Cal. Rptr. 259* (negligence action against condominium); *see also* Ch. 124, *Condominiums and Other Common Interest Developments*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawThe JudiciaryCase or ControversyStandingThird Party StandingBusiness & Corporate LawUnincorporated AssociationsConstitutional LawThe JudiciaryCase or ControversyStandingParticular PartiesCivil ProcedureJusticiabilityStandingThird Party Standing

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6-61 California Forms of Pleading and Practice--Annotated § 61.51

§ 61.51 Association's Liability to Third Parties

[1] General Rule

Except as otherwise provided by law, an unincorporated association is liable for its act or omission and for the act or omission of its director, officer, agent, or employee, acting within the scope of the office, agency, or employment, to the same extent as if the association were a natural person [*Corp. Code § 18250*; *see also Corp. Code § 18605 et seq.* (liability of directors and officers)].

For general discussion of the liability of a principal for acts of its agent, see Ch. 427, *Principal and Agent* . For general discussion of the liability of an employer for tortious conduct of its employees, see Ch. 248, *Employer's Liability for Employee's Torts* .

[2] Immunities for Professional Societies

[a] Immunity for Operation of Public Service Referral Program

A professional society or a nonprofit corporation authorized by such a society may operate a public service referral program for referring any member of the public to any professional member of the society or service. Neither the society or corporation nor its agents, employees, or members may be held liable for damages for referring a member of the public to a professional member of the organization, or for acts of negligence or conduct constituting unprofessional conduct committed by the professional member to whom the member of the public was referred, if the following conditions are met [*Civ. Code § 43.95(a)*]:

- The organization or persons making the referral acted without malice.
- The referral was made at no cost added to the initial referral fee.

The immunity described above does not apply unless, at the time of making the referral, the organization or other person making the referral disclosed the nature of any disciplinary action, of which the organization or person had

actual knowledge, taken by a state licensing agency against the professional member in question, except (1) a disciplinary proceeding resulting in no disciplinary action being taken against the professional member, or (2) a disciplinary action concerning which the professional has satisfied all terms, conditions, and sanctions imposed, at least three years prior to the referral [*see Civ. Code § 43.95(b)*]. However, if the professional is an attorney, there is no time limit on the duty to disclose [*see Civ. Code § 43.95(b)(2)*].

For purposes of the immunity, "professional society" includes any legal, psychological, architectural, medical, dental, dietetic, accounting, optometric, podiatric, pharmaceutic, chiropractic, veterinary, licensed marriage and family therapy, licensed clinical social work, and engineering organizations having as members at least 25 percent of the eligible persons or licentiates in the geographic area served by the particular society. However, if the professional society has less than 100 members, it must have as members at least a majority of the eligible persons or licentiates in the geographic area served by the particular society. "Professional society" also includes organizations with nonprofit lawyer-referralservices that have been authorized by the State Bar of California and operated in accordance with the Minimum Standards for a Lawyer Referral Service in California, and organizations that have been established to provide free assistance or representation to needy patients or clients [*Civ. Code § 43.95(a)*].

Professional societies are also immune from monetary liability for providing a telephone information library available for use by the general public without charge. This immunity extends to nonprofit corporations authorized by a professional society to provide such a library service [*Civ. Code § 43.95(a)*].

[b] Immunity for Reviewing Professional Standards

A professional society, a member of a committee of a medical specialty society, and a member of a committee of a state or local professional society, is immune from monetary liability is granted to for any act or proceedings performed in the course of maintaining the professional standards of the society as established by its bylaws. To qualify for the immunity, the society or person must act without malice, make a reasonable effort to obtain the facts of the matter involved, and act in reasonable belief that the action taken is warranted by the facts known after such reasonable effort to obtain the facts [*Civ. Code § 43.7(b)*].

For purposes of this immunity, a "professional society" includes legal, medical, psychological, dental, dental hygiene, dietetic, accounting, optometric, acupuncture, podiatric, pharmaceutic, chiropractic, physical therapist, veterinary, licensed marriage and family therapy, licensed clinical social work, and engineering organizations having as members at least 25 percent of the eligible persons or licentiates in the geographic area served by the particular society or, if the society has less than 100 members, having as members at least a majority of the eligible persons or licentiates in the geographic area served by the particular society. "Medical speciality society" means an organization having as members at least 25 percent of the eligible physicians within a given professionally recognized medical specialty in the geographic area served by the particular society [*Civ. Code § 43.7(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsLiability of Principal

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§ 61.52 Liability of Members to Third Parties

A member of a nonprofit association is not liable for a debt, obligation, or liability of the association solely by reason of being a member [*Corp. Code § 18605*]. Mere membership in an unincorporated association does not make a member liable for unlawful acts of other members without participation, knowledge, or approval. Liability may exist, however, based on a member's personal participation in an unlawful activity or the fact that he or she set the unlawful activity in motion. The liability of members cannot extend beyond the principles of agency on which the liability of each copartner for the acts of his or her fellow partners is grounded [*Orser v. George (1967) 252 Cal. App. 2d 660, 670-671, 60 Cal. Rptr. 708* (wrongfuldeath action against members of duck club; defendants were not acting within scope of their activities as members)].

A member of a nonprofit association is not liable for a contractual obligation of the association unless one of the following conditions is satisfied [*Corp. Code § 18610*]:

- The member expressly assumes personal responsibility for the obligation in a signed writing that specifically identifies the obligation assumed.

- The member expressly authorizes or ratifies the specific contract, as evidenced by a writing. This does not apply if the member authorizes or ratifies a contract solely in the member' s capacity as a director, officer, or agent of the association.

- With notice of the contract, the member receives a benefit under the contract, in which case liability is limited to the value of the benefit received.

- The member executes the contract without disclosing that the member is acting on the association's behalf.

- The member executes the contract without authority to execute.

Notwithstanding any other provision governing unincorporated associations in the Corporations Code, a member or person in control of a nonprofit association may be subject to liability for a debt, obligation, or liability of the association under common law principles governing alter ego liability of shareholders of a corporation, taking into account the differences between a nonprofit association and a corporation [*Corp. Code § 18630*]. Further, nothing in those provisions limits application of the Uniform Fraudulent Transfer Act [*Corp. Code § 18640*; *see Civ. Code § 3439 et seq.* (Uniform Fraudulent Transfer Act); *see also* Ch. 270, *Fraudulent Conveyances*].

For discussion of the liability of individual partners for the obligations of a partnership, see Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties* , and Ch. 405, *Partnerships: Actions Between Limited Partners or Partnerships and Third Parties*. For discussion of liability under agency principles, see Ch. 427, *Principal and Agent* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsLiability of PrincipalContracts LawRemediesRatification

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6-61 California Forms of Pleading and Practice--Annotated § 61.53

§ 61.53 Venue in Action Against Association

An association may be sued in one of the following counties [*Code Civ. Proc. § 395.5*]:

- The county where the contract is made or is to be performed.
- The county where the obligation or liability arises, or the breach occurs.
- The county where the principal place of business of the association is situated.

If an unincorporated association has filed a statement with the Secretary of State pursuant to statute [*see Corp. Code § 18200 et seq.*], designating its principal office in California, the proper county for the trial of an action against the unincorporated association is the same as it would be if the unincorporated association were a corporation. For the purpose of determining the proper county, the principal place of business of the unincorporated association is deemed to be the principal office in California listed in the statement [*Code Civ. Proc. § 395.2*].

Venue in an action against an association is subject to the court's power to transfer the action, as in other cases [*see Code Civ. Proc. § 395.5*]. For general discussion of venue rules and of motions to transfer proceedings to another county, see Ch. 571, *Venue* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewBusiness & Corporate LawUnincorporated AssociationsCivil ProcedureVenueCorporations

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[Reserved]

§§ 61.54[Reserved]

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6-61 California Forms of Pleading and Practice--Annotated § 61.60

§ 61.60 Related Matthew Bender Publications

For transactional forms involving nonprofit unincorporated associations, see California Legal Forms, Ch. 13A (Matthew Bender).

For points and authorities pertaining to actions involving membership in unincorporated associations, see California Points and Authorities, Ch. 22, *Associations and Clubs* (Matthew Bender)

For forms of interrogatories for use in actions involving membership in unincorporated associations, see Bender's Forms of Discovery, *Associations and Clubs; Reputation and Character* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesFormBusiness & Corporate LawUnincorporated Associations

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§ 61.61 Federal Constitution

Rights of free speech and assembly. *U.S. Const., amend. I*

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§ 61.62 State Constitution

Rights of free speech and privacy. *Cal. Const., art. I, § 1*

Right of free assembly. *Cal. Const., art. I, § 3*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of Freedom

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§ 61.63 Federal Statutes

Federal agencies and employees are not authorized to direct, supervise, or control membership practices or internal operations of organizations or clubs at institutions of higher education financed from private sources and whose facilities are not owned by institution. *20 U.S.C. § 1144(b)*

Civil Rights Commission is not authorized to inquire into or investigate membership practices or internal operations of fraternal organizations, college or university fraternities and sororities, private clubs, and religious organizations. *42 U.S.C. § 1975a(b)*

42 U.S.C. § 2000a et seq. (civil rights in public accomodations) does not apply to private clubs, with exceptions. *42 U.S.C. § 2000a(e)*

"Employer," for purposes of *42 U.S.C. § 2000e et seq.* (equal employment opportunities) does not include certain bona fide private membership clubs. *42 U.S.C. § 2000e(b)*

Religious organizations and private clubs are exempt from *42 U.S.C. § 3601 et seq.* (fair housing). *42 U.S.C. § 3607(a)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated Associations

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§ 61.64 State Statutes

[1] Definitions

"Board" defined for purposes of general provisions related to unincorporated associations. *Corp. Code § 18003*

"Director" defined for purposes of general provisions related to associations [*Corp. Code § 18000 et seq.*]. *Corp. Code § 18005*

"Governing document" defined for purposes of general provisions related to unincorporated associations. *Corp. Code § 18008*

"Governing principles" defined for general provisions related to associations [*Corp. Code § 18000 et seq.*] as principles stated in governing documents. If association has no governing documents or governing documents do not include provision governingissue, association's governing principles regarding issue may be inferred from its "established practices," defined as practices used by unincorporated association without material change or exception during most recent five years of its existence, or if it has existed for less than five years, during its entire existence. *Corp. Code § 18010*

"Member" defined for general provisions related to unincorporated associations [*Corp. Code § 18000 et seq.*]. *Corp. Code § 18015*

"Nonprofit association" defined for general provisions related to associations [*Corp. Code § 18000 et seq.*]. *Corp. Code § 18020*

"Officer" defined for general provisions related to associations [*Corp. Code § 18000 et seq.*]. *Corp. Code § 18025*

"Person" defined for general provisions related to associations [*Corp. Code § 18000 et seq.*]. *Corp. Code § 18030*

"Unincorporated association" defined. *Corp. Code § 18035*

Termination or suspension of membership. *Corp. Code § 18310 et seq.*

Member voting. *Corp. Code § 18330*

"Association" defined for purposes of *Corp. Code §§ 21300-21310* (insignia). *Corp. Code § 21300(a)*

"Club" defined for purposes of *Bus. & Prof. Code § 23000 et seq.* (Alcoholic Beverage Control Act). *Bus. & Prof. Code § 23037*

[2] Association Members

[a] General Rights and Interests of Members

Interest of member of unincorporated association is personal property. *Corp. Code § 18100*

Member voting. *Corp. Code § 18330*

[b] Liabilities of Members

Liability of member for debt, obligation, or liability of association. *Corp. Code §§ 18605, 18610*; *see also Corp. Code § 21200* (certain unincorporated medical societies)

Liability of members for harm. *Corp. Code § 18620*

[c] Termination or Suspension of Membership

Termination or suspension of membership in unincorporated association. *Corp. Code § 18310*

[3] Actions by and Against Associations

[a] Standing and Parties to Action

Association transacting business under fictitious business name contrary to *Bus. & Prof. Code §§ 17900-17930* (fictitious business name statement) may not maintain certain actions. *Bus. & Prof. Code §§ 17902, 17918*; *see also Bus. & Prof. Code § 17900* (definition of fictitious business name), *Bus. & Prof. Code § 17910* (filing statement), *Bus. & Prof. Code §§ 17911, 17912* (nonprofit association exempt)

Unincorporated association, whether organized for profit or not, is entitled to sue and be sued in name which it has assumed or by which it is known. *Code Civ. Proc. § 369.5(a)*

Joinder of member of unincorporated association is party in action against association; judgment against member based on his or her personal liability. *Code Civ. Proc. § 369.5(b)*

Action instituted or maintained in right of unincorporated association by member of association. *Corp. Code § 800*

[b] Discovery

Any party is entitled to serve on any other party written interrogatories to be answered by any officer or agent, if party served is association. *Code Civ. Proc. § 2030(a), (g)* (*Code Civ. Proc. §§ 2030.010(a), 2030.250*, operative July 1, 2005)

Records and proceedings of certain committees, including those of medical or other professional health societies or associations, that are organized to evaluate or improve quality of health care are not subject to discovery in certain circumstances. *Evid. Code § 1157 et seq.*

[c] Summons and Service of Summons

Notice required on copy of summons served in action against unincorporated association. *Code Civ. Proc. § 412.30*

Service of summons on unincorporated association. *Code Civ. Proc. §§ 415.20(a), 416.40(b), (c)*; *see also Code Civ. Proc. § 416.30* (service of summons on joint stock company or association)

Statement of unincorporated association filed with Secretary of State and designating location and complete address of its principal office in this state and its agent for service of process. *Corp. Code § 18200 et seq.*

[d] Venue

Proper county for trial (venue) of action against unincorporated association. *Code Civ. Proc. §§ 395.2, 395.5*; *see also Corp. Code § 105*

[e] Enforcement of Judgment Against Association

Execution of judgment against association. *Corp. Code §§ 18260, 18270*

[4] Association Liability to Nonmembers and Immunities

Immunity of professional society and members of standards review committee of society for acts or proceedings performed in course of maintaining professional standards. *Civ. Code § 43.7(b), (e)*

Qualified immunity of professional society for liability arising from referring members of public to members of society. *Civ. Code § 43.95*

Liability of unincorporated association to person who is not member of association for acts or omissions of association and of its officer, agent, or employee. *Corp. Code § 18250*

[5] Property of Association

[a] Property Rights in General

Property rights of unincorporated society or association. *Corp. Code § 18100 et seq.*

Unincorporated association may receive property by will. *Prob. Code § 6102(c)*

[b] Real Property

Execution of acquisition, transfer, or encumbrance of interest in real property by unincorporated association. *Corp. Code § 18115*

[c] Name, Insignia, Apparel

Registration and use of name or insignia of association. *Bus. & Prof. Code §§ 14492-14495*; *Corp. Code §§ 21300-21310*

Improper use of name or insignia of association registered under *Corp. Code §§ 21300-21310* is misdemeanor. *Corp. Code § 21307*

Unauthorized use or wearing of insignia or apparel of organization is misdemeanor. *Penal Code § 538b*; *see also Mil. & Vet. Code §§ 1801, 1820*

[6] Estates and Trusts

Appointment of association authorized to conduct business of trust company in California as executor, administrator, guardian, or conservator of estate, or trustee. *Prob. Code §§ 83, 300*

[7] Incorporation of Association

Procedures for and effect of incorporation of previously unincorporated association. *Corp. Code § 5121*

[8] Lawyer-Client Privilege

"Person" for purposes of lawyer-client privilege under *Evid. Code § 954*, includes client that is association, organization, or business trust. *Evid. Code §§ 175, 951, 954*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingThird Party StandingBusiness & Corporate LawUnincorporated AssociationsBusiness & Corporate LawAgency RelationshipsTypesAttorney & ClientCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureVenueCorporations

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§ 61.65 Federal Rules of Civil Procedure

Service of summons and complaint on unincorporated association that is subject to suit under common name. *Fed. R. Civ. P., Rule 4(h)*

Determination of capacity to sue or be sued of unincorporated association. *Fed. R. Civ. P., Rule 17(b)*

Class actions. *Fed. R. Civ. P., Rules 23* (generally), 23.2 (unincorporated associations)

Derivative actions brought by one or more members to enforce right of unincorporated association when association has failed to enforce right that it may properly assert. *Fed. R. Civ. P., Rule 23.1*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated Associations

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§ 61.66 Decisions

[1] Definitions

Usual meaning of term "association" is unincorporated organization composed of body of persons partaking in general form and mode of procedure or characteristics of corporation. *Estate of Irwin (1925) 196 Cal. 366, 372, 237 P. 1074*

Definition of "fraternity." *City of Long Beach v. California Lambda etc. Fraternity (1967) 255 Cal. App. 2d 789, 794, 63 Cal. Rptr. 419*

Term "association" is often used as synonymous with "company" or "society." *Law v. Crist (1940) 41 Cal. App. 2d 862, 865, 107 P.2d 953*

[2] Constitutional Freedom of Association

Application of New Jersey's public accommodations law barring discrimination on the basis of, *inter alia*, sexual orientation to Boy Scouts to force Boy Scouts to include a gay man as assistant scoutmaster violates Boy Scouts' *First Amendment* expressive associational right, where Boy Scouts seek to transmit system of values so that it engages in expressive activity, and where forced inclusion of gay man would significantly affect Boy Scouts' ability to advocate its viewpoints on homosexuality. *BSA v. Dale (2000) 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554*

City ordinance restricting admission to certain dance halls to persons between 14 and 18 years of age is not violative of patrons' associational rights; activity of dance hall patrons--coming together to engage in recreational dancing--not protected by *U.S. Const., amend I*, because that activity qualifies neither as form of intimate association nor expressive association. *Dallas v. Stanglin (1989) 490 U.S. 19, 23-28, 109 S. Ct. 1591, 104 L. Ed. 2d 18*

Freedom of association encompasses political party's decisions about identity of, and process of electing, its leaders. *Eu v. San Francisco Democratic Com. (1989) 489 U.S. 214, 229, 109 S. Ct. 1013, 103 L. Ed. 2d 271*

Application of *Civ. Code § 51* (Unruh Act) to associations is not violative of *First Amendment* rights of members when it does not interfere unduly with members' freedom of private association and does not violate right of expressive association. *Board of Dirs. of Rotary Int'l v. Rotary Club (1987) 481 U.S. 537, 547, 107 S. Ct. 1940, 95 L. Ed. 2d 474*

Constitutional protection of freedom of association protects intimate and expressive associations; intimate associational interest is fundamental element of personal liberty; expressive associational interest protects right to associate for purpose of engaging in activities relating to speech, assembly, petition for redress of grievances, and exercise of religion. *Board of Dirs. of Rotary Int'l v. Rotary Club (1987) 481 U.S. 537, 544-545, 107 S. Ct. 1940, 95 L. Ed. 2d 474* ; *Roberts v. United States Jaycees (1984) 468 U.S. 609, 617-618, 104 S. Ct. 3244, 82 L. Ed. 2d 462* ; *Warfield v. Peninsula Golf & Country Club (1995) 10 Cal. 4th 594, 624-626, 42 Cal. Rptr. 2d 50, 896 P.2d 776* ; *Bohemian Club v. Fair Employment & Housing Com. (1986) 187 Cal. App. 3d 1, 12, 231 Cal. Rptr. 769 , appeal dismissed, 484 U.S. 805 (1987)*

Right to associate for expressive purposes allows individuals to associate with others in pursuit of wide variety of political, social, economic, educational, religious, and cultural ends, but does not extend to association unrelated to those goals, such as sexual conduct constituting statutory rape. *Fleisher v. City of Signal Hill (9th Cir. 1987) 829 F.2d 1491, 1500 , cert. denied, 485 U.S. 961 (1988)*

Preliminary injunction enjoining gang members from "[s]tanding, sitting, walking, driving, gathering or appearing anywhere in public view" with another gang member within a specified four-block residential area did not violate *First Amendment* right of association, because gang affiliation does not fall within either of two kinds of associations entitled to *First Amendment* protection, i.e., "intimate" or "intrinsic" associations, such as familial associations, or joining together for political, social, economic, educational, religious, and cultural ends. *People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1110-1112, 60 Cal. Rptr. 2d 277, 929 P.2d 596*

Constitutional freedom of association does not protect groups of strangers who are not members of any organized association and who are patrons of business establishment; therefore, ordinance that prevented persons between 18 and 20 years from remaining on premises of cabaret between 2 a.m. and 6 a.m. did not infringe on associational rights of patrons. *Burnett v. San Francisco Police Department (1995) 36 Cal. App. 4th 1177, 1189, 42 Cal. Rptr. 2d 879*

Constitutional protection includes members and their right to associate, but does not extend to employment policies of association. *Bohemian Club v. Fair Employment & Housing Com. (1986) 187 Cal. App. 3d 1, 13-14, 231 Cal. Rptr. 769 , appeal dismissed, 484 U.S. 805 (1987)*

[3] Corporations and Associations Compared

Whether association organized under laws of first state should be treated by second state as corporation is determined by powers and faculties conferred on it by first state. *Hill-Davis Co., Ltd. v. Atwell (1932) 215 Cal. 444, 447, 10 P.2d 463*

[4] Dissolution and Reorganization of Association

Methods of dissolution of unincorporated association and distribution of its property on its dissolution. *Holt v. Santa Clara County Sheriff's Benefits Assn. (1967) 250 Cal. App. 2d 925, 929-933, 59 Cal. Rptr. 180* (beneficial association)

Incorporation of unincorporated association ipso facto dissolves association and transfers its property and rights to corporation. *Oliver v. Swiss Club Tell (1963) 222 Cal. App. 2d 528, 544, 35 Cal. Rptr. 324* ; *Security-First Nat. Bk. v. Cooper (1944) 62 Cal. App. 2d 653, 670, 145 P.2d 722* (fraternal order); *but see Maron v. Howard (1968) 258 Cal. App. 2d 473, 485, 66 Cal. Rptr. 70* (sole proprietorship, stating contrary rule)

Member of unincorporated league that lay dormant for some years is not authorized to conduct reorganization meeting without notifying other members. *Dimond Public Utility Dist. v. Shaffer (1960) 185 Cal. App. 2d 482, 485, 8 Cal. Rptr. 372*

Law authorizing organization of voluntary associations into corporations, which law is in existence when voluntary association is formed, is deemed incorporated into association agreement. *Security-First Nat. Bk. v. Cooper (1944) 62 Cal. App. 2d 653, 669, 145 P.2d 722* (fraternal order)

Members in good standing of local lodge are entitled at its involuntary dissolution by parent organization to proportionate share of fund raised for benefit of all lodge's members. *Scott v. Donahue (1928) 93 Cal. App. 126, 132, 269 P. 455* (railway labor union)

[5] Exclusion From Membership

Private club that regularly transacts business on its premises with nonmembers is "business establishment" governed by *Unruh Act. Warfield v. Peninsula Golf & Country Club (1995) 10 Cal. 4th 594, 621-623, 42 Cal. Rptr. 2d 50, 896 P.2d 776* (involving country club)

Boys' club is "business establishment" covered by Unruh Act and its male-only membership policy is proscribed arbitrary form of discrimination; finding of arbitrary discrimination based on nature and function of that particular club. *Isbister v. Boys' Club of Santa Cruz, Inc. (1985) 40 Cal. 3d 72, 86-91, 219 Cal. Rptr. 150, 707 P.2d 212*

Applicant for membership in association, by showing that exclusion from membership deprives him or her of substantial economic advantages, establishes right to judicial intervention with respect to denial of his or her application. *Pinsker v. Pacific Coast Society of Orthodontists (1969) 1 Cal. 3d 160, 164-166, 81 Cal. Rptr. 623, 460 P.2d 495* (associations were incorporated); *see also James v. Marinship Corp. (1944) 25 Cal. 2d 721, 731, 745, 155 P.2d 329* (labor union); *Kronen v. Pacific Coast Society of Orthodontists (1965) 237 Cal. App. 2d 289, 304-307, 305, 46 Cal. Rptr. 808 , cert. denied, 384 U.S. 905 (1966)* (two organizations, one unincorporated; exclusion was upheld)

In action for exclusion from membership, question of whether Academy of Orthopedic Surgeons was *Pinsker*-type organization, affecting significant economic and professional concerns so as to clothe it with public interest and wielding monopoly power, is question for trier of fact. *Bunzel v. American Academy of Orthopaedic Surgeons (1980) 107 Cal. App. 3d 165, 169-170, 165 Cal. Rptr. 433*

[6] Expulsion From Membership

[a] Fair Procedure

In action by physician alleging that insurer removed physician from its preferred provider lists in violation of common law right of fair procedure, trial court erroneously granted summary judgment for insurer, where relationship between insurers and their preferred provider physicians significantly affects public interest, and where insurer has obligation to comply with common law right to fair procedure because it possess power so substantial that removal significantly impairs ability of ordinary, competent physician to practice medicine or medical specialty in particular geographic area, thereby affecting important, substantial economic interest. *Potvin v. Metropolitan Life Ins. Co. (2000) 22 Cal. 4th 1060, 1071-1078, 95 Cal. Rptr. 2d 496, 997 P.2d 1153*

Courts may interfere with decision of association expelling member if association's rules governing expulsion have not been observed or if member has not been afforded certain rudimentary procedural rights. *Cason v. Glass Bottle*

Blowers Asso. (1951) 37 Cal. 2d 134, 143-144, 231 P.2d 6 ; *see also* Taboada v. Sociedad Espanola etc. *(1923) 191 Cal. 187, 191, 215 P. 673* ; *Delta Dental Plan v. Banasky (1994) 27 Cal. App. 4th 1598, 1607, 33 Cal. Rptr. 2d 381* ; *Rosenblit v. Superior Court (1991) 231 Cal. App. 3d 1434, 1444-1449, 282 Cal. Rptr. 819* ; *Hackethal v. California Medical Assn. (1982) 138 Cal. App. 3d 435, 441-443, 187 Cal. Rptr. 811*

Automatic suspension of member by organization pursuant to its bylaws following his failure to pay dues does not contravene requirements of fair procedure. *DeMille v. American Fed. of Radio Artists (1947) 31 Cal. 2d 139, 154, 187 P.2d 769* , *cert. denied, 333 U.S. 876 (1948)* (labor union)

One expelled from society is not allowed to complain that expulsion hearings, of which he had due notice and opportunity to attend, were conducted in his absence. *Smith v. Kern County Medical Asso. (1942) 19 Cal. 2d 263, 268-269, 120 P.2d 874* (medical society)

Medical society disciplinary hearing panel denied member due process and fair procedure when it refused to provide member with right to voir dire hearing panel to test impartiality of panel, denied discovery of documentary evidence made available to panel, held closed sessions that excluded member and his attorney, and made decision based on standard of preponderance of evidence rather than society's required standard of clear and convincing proof. *Rosenblit v. Superior Court (1991) 231 Cal. App. 3d 1434, 1448-1449, 282 Cal. Rptr. 819* ; *Hackethal v. California Medical Assn. (1982) 138 Cal. App. 3d 435, 443-445, 187 Cal. Rptr. 811*

Adequate notice of charges and reasonable opportunity to respond are basic to both due process and fair procedure; member has right to tribunal that meets prevailing standards of impartiality, as well as opportunity to confront and cross examine accusers, examine and refute evidence, and present defense. *Rosenblit v. Superior Court (1991) 231 Cal. App. 3d 1434, 1444-1446, 282 Cal. Rptr. 819* ; *Hackethal v. California Medical Assn. (1982) 138 Cal. App. 3d 435, 442, 187 Cal. Rptr. 811*

Basic notions of fairness dictate that person whose right to practice livelihood at particular hospital is subject to revocation has right to examine members of tribunal for possible bias, even if hospital's bylaws did not specifically provide for voir dire of hearing panel. *Lasko v. Valley Presbyterian Hospital (1986) 180 Cal. App. 3d 519, 530, 225 Cal. Rptr. 603*

Fair procedure requirements do not require fixed format but are assessed on case-by-case basis. *Tiholiz v. Northridge Hospital Foundation (1984) 151 Cal. App. 3d 1197, 1202, 199 Cal. Rptr. 338*

[b] Grounds

Grounds on which unincorporated association may expel member. *Smith v. Kern County Medical Asso. (1942) 19 Cal. 2d 263, 270, 120 P.2d 874* (medical society); *Otto v. Journeyman Tailors' P. & B. Union (1888) 75 Cal. 308, 314, 17 P. 217* (labor union)

Expulsion from Boy Scouts because of homosexuality is denial of common law right to fair procedure; connection between homosexual conduct and any significant danger of harm is required to be shown before homosexual conduct may lawfully be used as basis to expel boy from membership in *Boy Scouts. Curran v. Mount Diablo Council of the Boy Scouts (1983) 147 Cal. App. 3d 712, 723-725, 195 Cal. Rptr. 325* , *appeal dismissed, 468 U.S. 1205 (1984)* , *on review after remand, 17 Cal. 4th 670, 72 Cal. Rptr. 2d 410, 952 P.2d 218 (1998)* (Boy Scouts not subject to Unruh Act for purposes of membership decisions)

[c] Injunction

Preliminary injunction restraining club from interfering with expelled members' full use and enjoyment of club facilities, pending determination of action growing out of expulsion. *Nyman v. The Desert Club (1952) 109 Cal. App. 2d 63, 64, 67, 240 P.2d 37* (incorporated club)

[d] Judicial Review

Trial court's use of independent standard of review as to issue of fairness in considering additional evidence is appropriate; no remand to administrative tribunal required. *Tiholiz v. Northridge Hospital Foundation (1984) 151 Cal. App. 3d 1197, 1204-1205, 199 Cal. Rptr. 338*

Substantial evidence test of *Code Civ. Proc § 1094.5(d)* utilized in reviewing private hospital board's decision suspending physician from medical staff does not violate due process and equal protection. *Anton v. San Antonio Community Hospital (1982) 132 Cal. App. 3d 638, 650-656, 183 Cal. Rptr. 423*

Court, with respect to merits of charges resulting in suspension or expulsion of member by union, is restricted to ascertaining whether there was any evidence whatever to support union's conclusion. *Bush v. International Alliance (1942) 55 Cal. App. 2d 357, 363, 130 P.2d 788* (expulsion from labor union); *McConville v. Milk W.D. Union (1930) 106 Cal. App. 696, 698, 289 P. 852* (suspension from labor union)

[e] Laches

Laches bar action by member of produce exchange to have it adjudged he is member in good standing. *Meherin v. S.F. Produce Exchange (1897) 117 Cal. 215, 216-218, 48 P. 1074* (suspension from membership in incorporated exchange)

Trial court in mandate proceeding has large discretion as to whether relief should be denied on ground of laches. *Hopson v. Nat. Union etc. Cooks, Stewards (1953) 116 Cal. App. 2d 320, 325-326, 253 P.2d 733*

[f] Mandate

Mandate is proper proceeding by means of which to compel reinstatement to membership of one who has been illegally expelled from duly organized association. *Smetherham v. Laundry Workers' Union (1941) 44 Cal. App. 2d 131, 135, 111 P.2d 948* (labor union)

Expelled member of society must prove he or she is member in good standing before being entitled to writ of mandate restoring his or her privileges. Taboada v. Sociedad Espanola etc. *(1923) 191 Cal. 187, 193, 215 P. 673* (fraternal organization)

[7] Exhaustion of Internal Remedies

[a] General Requirement

Plaintiff who seeks judicial relief against organization required to first invoke and exhaust organization's remedies that are applicable to grievance. *Holderby v. Internat. Union etc. Engrs. (1955) 45 Cal. 2d 843, 846, 291 P.2d 463* ; *Petermann v. International Brotherhood of Teamsters (1959) 174 Cal. App. 2d 184, 192, 344 P.2d 25* ; *see also DeVaughn Peace, M.D., Inc. v. St. Francis Medical Center (1994) 28 Cal. App. 4th 454, 460, 33 Cal. Rptr. 2d 459* ; *Zepeda v. Internat. Hodcarriers' etc. Union (1956) 143 Cal. App. 2d 609, 614-615, 300 P.2d 251*

Exhaustion of internal remedies of his organization by aggrieved member is jurisdictional prerequisite to resort to courts over grievance. *American Society of Composers, Authors & Publishers v. Superior Court (1962) 207 Cal. App. 2d 676, 684, 24 Cal. Rptr. 772* ; *but see Wallis v. Farmers Group, Inc. (1990) 220 Cal. App. 3d 718, 735, 269 Cal. Rptr. 299* (exhaustion of administrative remedies is "procedural prerequisite" to judicial review, but does not affect court's subject matter jurisdiction)

Officers or members of parent or affiliated voluntary associations are not to resort to courts to review duly authorized decisions of officers of association, absent exhaustion of remedies provided for by constitution of their organization. *Killeen v. Hotel & R. Emp. etc. League (1948) 84 Cal. App. 2d 87, 91, 190 P.2d 30* ; *Stoica v. International etc. Employees (1947) 78 Cal. App. 2d 533, 536, 540, 178 P.2d 21* (both cases involving labor unions)

Member of association resorting to its remedies are required to give association reasonable time to act. *Simpson v. The Salvation Army (1942) 49 Cal. App. 2d 371, 376, 121 P.2d 847* (religious and charitable association)

[b] When Exhaustion of Remedies Excused

Member denied access to financial records of his labor union not required to exhaust all its internal remedies before seeking court enforcement of his right to inspect such records. Mooney v. Bartenders Union Local No. 284 *(1957) 48 Cal. 2d 841, 844-845, 313 P.2d 857*

Nonmember of order, having dispute with it, not required to resort to its tribunals. *Grimbley v. Harrold (1899) 125 Cal. 24, 30, 57 P. 558* (beneficial society)

Labor union waives requirement of exhaustion of remedies by one aggrieved by union's actions when it sues him in connection with grievance. *Hodcarriers etc. Local Union v. Miller (1966) 243 Cal. App. 2d 391, 394-395, 52 Cal. Rptr. 251*

Aggrieved labor union member excused from further internal appeal if exhaustion of appeals would create excessive delay. Mitchell v. Internat. Assn. ofMachinists *(1961) 196 Cal. App. 2d 796, 808, 16 Cal. Rptr. 813* (14 months); *see also Van Hook v. So. Cal. Waiters Alliance (1958) 158 Cal. App. 2d 556, 566, 323 P.2d 212* (labor union; at least nine months)

Violation by organization of its rules for appellate procedure in handling member's grievances is exception to requirement that member exhaust remedies. *Gonzales v. International Asso. of Machinists (1956) 142 Cal. App. 2d 207, 211-212, 298 P.2d 92* , *affirmed, 356 U.S. 617 (1958)* (labor union)

Controversy within unincorporated association confined to rights to funds and fiscal mismanagement affords good ground for equitable relief in courts notwithstanding charter provision for internal appeal. *DeMonbrun v. Sheet Metal Workers (1956) 140 Cal. App. 2d 546, 564, 295 P.2d 881* (no adequate appeal procedure for dispute in question)

[7A] Fair Procedure Right

Common law right to fair procedure has not been applied to situation other than exclusion or expulsion from membership, and it only applies when challenged exclusion or expulsion adversely affects important, substantial economic interest. Thus, trial court properly dismissed complaint that Boy Scout was denied common law right to fair procedure because of failure to promote him to Eagle Scout, when court did not discern any basis in public policy or sound legal theory to warrant broad extension of current law to include failure to promote within association, and because plaintiff did not allege that failure to promote him to Eagle Scout thwarted or interfered with his pursuit of lawful trade or profession or caused him to suffer substantial financial loss, and court could perceive no reason why

existing law should be expanded to provide relief for speculative type of detriment allegedly caused by absence of prestige and honor associated with specific rank in or award conferred by charitable, expressive, and social organization, such as Boy Scouts, whose formation and activities are unrelated to promotion or advancement of economic or business interests of its members. *Kim v. Southern Sierra Council Boy Scouts of America (2004) 117 Cal. App. 4th 743, 746-748, 11 Cal. Rptr. 3d 911*

[8] Member's Action Against Association

Member of unincorporated labor union entitled to maintain against union action on account of tort committed by its members and officers. Inglis v. Operating Engineers Local Union No. 12 *(1962) 58 Cal. 2d 269, 270, 23 Cal. Rptr. 403, 373 P.2d 467* (intentional torts); *Marshall v. International Longshoremen's & Warehousemen's Union (1962) 57 Cal. 2d 781, 787, 22 Cal. Rptr. 211, 371 P.2d 987* (negligent torts)

Statute of limitations in action against medical association by physician based on curtailment of use of hospital to practice physician's specialties is *Code Civ. Proc. § 339(1)* (two years) since action involves property right rather than personal right. *Edwards v. Fresno Community Hosp. (1974) 38 Cal. App. 3d 702, 703, 113 Cal. Rptr. 579*

Unincorporated associations is recognized as separate legal entities, so that member is entitled to maintain tort action against association. *White v. Cox(1971) 17 Cal. App. 3d 824, 828, 95 Cal. Rptr. 259* (condominium association)

Rules and regulations of professional association applicable to action between association members who had agreed to abide by such rules and regulations. *Corrigan v. Cox (1967) 254 Cal. App. 2d 919, 922-923, 62 Cal. Rptr. 733* (professional association); *see also Gear v. Webster (1968) 258 Cal. App. 2d 57, 61, 65 Cal. Rptr. 255* (rule requiring arbitration of disputes between members of realtor association)

Member of association entitled to maintain action to enjoin association's violation of law, where such violation would result in harmful consequences to association and its members. Herald v. Glendale Lodge No. 1289 *(1920) 46 Cal. App. 325, 333, 189 P. 329* (fraternal organization)

[9] Inspection of Association Records

Neither incorporated nor unincorporated associations allowed to plead unqualified right to conduct affairs in secret. *California Bankers Ass'n v. Shultz (1974) 416 U.S. 21, 65, 94 S. Ct. 1494, 39 L. Ed. 2d 812*

Member of unincorporated labor union entitled to writ of mandate directing that he be permitted to inspect its financial records. Mooney v. Bartenders Union Local No. 284 *(1957) 48 Cal. 2d 841, 842, 843, 845, 313 P.2d 857* (labor union)

Director of condominium association had no absolute right to inspect members' proxy ballots under *Corp. Code § 8334*; members had constitutional privacy right in contents of ballots that was not outweighed by director's interests in inspecting ballots. *Chantiles v. Lake Forest II Master Homeowners Assn. (1995) 37 Cal. App. 4th 914, 923-926, 45 Cal. Rptr. 2d 1*

Proper showing to justify inspection by labor union member of union's books and records required. *Deacon v. Internat. Union of Operating Engineers (1965) 236 Cal. App. 2d 302, 307, 46 Cal. Rptr. 11 , cert. denied, 383 U.S. 103 (1966)*

[10] Property of Association

Dues and assessments paid by members to association are its property subject to disbursement and expenditure by it in pursuit of lawful objects for which funds were designated to be expended. *DeMille v. American Fed. of Radio Artists (1947) 31 Cal. 2d 139, 149, 187 P.2d 769 , cert. denied, 333 U.S. 876 (1948)* (labor union)

When member's interest in association property is only incidental to his membership, such interest ends on his ceasing to be member, and does not prevent his expulsion. *Lawson v. Hewell (1897) 118 Cal. 613, 621-622, 50 P. 763* (fraternal organization)

Secession by subordinate association from parent organization, unless through unanimous action of all of parent's members,causes secesionists to lose all rights in property, including name, of subordinate association. *Most Worshipful Lodge v. Sons etc. Lodge (1953) 118 Cal. App. 2d 78, 85, 88, 257 P.2d 464* (fraternal associations)

[11] Rules of Association

[a] Generally

Contractual relation between association and member exists by virtue of rules of association and is not limited to rules existing at time individual became member. *Lawson v. Hewell (1897) 118 Cal. 613, 621, 50 P. 763* ; *Gear v. Webster (1968) 258 Cal. App. 2d 57, 61-62, 65 Cal. Rptr. 255*

Bylaws of nonprofit agricultural association regarding value of members' interests are binding on expelled members. *Sanchez v. Grain Growers Assn. (1981) 126 Cal. App. 3d 665, 674, 179 Cal. Rptr. 459*

Bylaws and rules of voluntary association which on their face negate assent by member to contractual obligation to other members not held to establish enforceable contract between them. *Scott v. Lee (1962) 208 Cal. App. 2d 12, 15, 24 Cal. Rptr. 824* (incorporated association)

Rights and duties of members are between themselves and in their relation to association are measured by terms of association constitution and bylaws, not including changes in these terms occurring after member's membership terminates. *American Society of Composers, Authors & Publishers v. Superior Court (1962) 207 Cal. App. 2d 676, 689-690, 24 Cal. Rptr. 772* ; *see also Weber v. Marine Cooks' & Stewards' Assn. (1949) 93 Cal. App. 2d 327, 335, 208 P.2d 1009*

Constitution and bylaws of voluntary association are measure of authority conferred on organization to discipline, suspend, or expel its members and constitute contract between organization and its members. *Smetherham v. Laundry Workers' Union (1941) 44 Cal. App. 2d 131, 136-137, 111 P.2d 948* ; *see also DeMille v. American Fed. of Radio Artists (1947) 31 Cal. 2d 139, 146, 187 P.2d 769 , cert. denied, 333 U.S. 876 (1948)* (both cases involving labor unions)

[b] Construction

Unreasonable construction of labor union's constitution by its president is not binding on members and not recognized by courts. Mandracio v. Bartenders Union, Local 41 *(1953) 41 Cal. 2d 81, 85, 256 P.2d 927* ; *see also Gonzales v. International Asso. of Machinists (1956) 142 Cal. App. 2d 207, 216-217, 298 P.2d 92 , affirmed, 356 U.S. 617 (1958)* (labor union)

Practical and reasonable construction of constitution and bylaws of voluntary organization by its governing board binding on membership and recognized by courts. *DeMille v. American Fed. of Radio Artists (1947) 31 Cal. 2d 139, 147, 187 P.2d 769 , cert. denied, 333 U.S. 876 (1948)* (labor union)

Rules and regulations of fraternal beneficial order are not given strict and rigid construction when issue is right to death benefits under insurance certificate issued by order. *Ells v. Order of United etc. Travelers (1942) 20 Cal. 2d 290, 294, 125 P.2d 457*

Bylaws of association required to be given reasonable construction that will sustain their validity. *Sanchez v. Grain Growers Assn. (1981) 126 Cal. App. 3d 665, 672, 179 Cal. Rptr. 459*

[c] Permissible Provisions

Club bylaw provision for payment of attorney's fees by member against whom club is successful in litigation is valid. *Malibou Lake Mountain Club, Ltd. v. Smith (1971) 18 Cal. App. 3d 31, 35-36, 95 Cal. Rptr. 553* (incorporated club)

Power of amendment of bylaws of mutual benefit society not allowed to be used to repudiate obligations of association that in equity and justice it should continue to pay. *Power v. Sheriffs' Relief Asso. (1943) 57 Cal. App. 2d 350, 352, 134 P.2d 827* (provisions on sick benefits)

Individuals who form voluntary association permitted to be governed by rules they see fit to adopt, so long as they are not immoral or contrary to public policy or law of land. Neto v. Conselho Amor etc. *(1912) 18 Cal. App. 234, 236, 122 P. 973*

[d] Repeal and Amendment

Repeal and amendment of constitution and bylaws of voluntary unincorporated association. *Weber v. Marine Cooks' & Stewards' Assn. (1949) 93 Cal. App. 2d 327, 334-335, 338, 208 P.2d 1009* (labor union)

[12] Unfair Competition and Practices

Unfair Practices Act [*Bus. & Prof. Code § 17000 et seq.*] authorizes, in *Bus. & Prof. Code § 17070*, trade association to bring action to restrain violation or recover damages. *Los Angeles Check Sellers Asso. v. United States Nat'l Bank (1969) 275 Cal. App. 2d 570, 572, 80 Cal. Rptr. 321*

Application of unfair competition statutes [*Bus. & Prof. Code § 17200 et seq.* (formerly set out in *Civ. Code § 3369 et seq.*)] not limited to business practices and organizations. *Athens Lodge No. 70 v. Wilson (1953) 117 Cal. App. 2d 322, 325, 255 P.2d 482* (unincorporated fraternal organization as plaintiff)

Scope of court's injunctive powers against unfair competition between fraternal organizations in gaining of members. *Most Worshipful Lodge v. Sons etc. Lodge (1949) 94 Cal. App. 2d 25, 32-35, 210 P.2d 34* (incorporated organizations)

Fact that publication used fraternal organization's name for period of years does not support a finding of organization's consent to publication's exclusive use of its name, but organization not allowed to deny use of its name to publication after such period. *Jewish Publications, Inc. v. Gordon (1949) 91 Cal. App. 2d 376, 378, 205 P.2d 65*

Association, though neither incorporated nor engaged in business for material profit, has right to obtain injunction where another organization uses its name. *Law v. Crist (1940) 41 Cal. App. 2d 862, 865-866, 107 P.2d 953* (theosophists lodge); *see also Ball v. American Trial Lawyers Assn. (1971) 14 Cal. App. 3d 289, 300-305, 92 Cal. Rptr. 228* (use of name similar to American College of Trial Lawyers)

[13] Defamation of Association

Unincorporated association's cause of action for defamation. *Washburn v. Wright (1968) 261 Cal. App. 2d 789, 793-795, 68 Cal. Rptr. 224* (trust); *see also Daniels v. Sanitarium Asso. (1963) 59 Cal. 2d 602, 609, 30 Cal. Rptr. 828, 381 P.2d 652* (labor union); *Mullins v. Brando (1970) 13 Cal. App. 3d 409, 422, 91 Cal. Rptr. 796 , cert. denied, 403 U.S. 923 (1971)* (policemen's association)

[14] Litigation Involving Associations

[a] Federal Court Jurisdiction

Unincorporated association not to be treated as citizen for purposes of federal diversity jurisdiction. *United Steelworkers v. Bouligny (1965) 382 U.S. 145, 147, 153, 86 S. Ct. 272, 15 L. Ed. 2d 217* (labor union); *Chapman v. Barney (1889) 129 U.S. 677, 681, 682, 9 S. Ct. 426, 32 L. Ed. 800* (joint stock company)

Judgment in federal class suit when jurisdiction is based only on diversity of citizenship binds class members whose presence as plaintiffs would have defeated jurisdiction. *Supreme Tribe of Ben-Hur v. Cauble (1921) 255 U.S. 356, 363-367, 41 S. Ct. 338, 65 L. Ed. 673*

[b] Venue

If county in which plaintiff brings action against corporation is its principal place of business, individual defendant resident in different county does not have right to have action changed to county of his residence. *McClung v. Watt (1922) 190 Cal. 155, 158, 211 P. 17* (decided under former *Cal. Const., Art. XII, § 16*; *now see Code Civ. Proc. § 395.5*)

Venue where plaintiff chooses to join as defendants in his action against association individuals whose residence is in different county from county where action is brought. *Nelson v. East SideGrocery Co. (1915) 26 Cal. App. 344, 346-348, 146 P. 1055* (action brought where contract sued on was made and to be performed; decided under former *Cal. Const., Art. XII, § 16*; *now see Code Civ. Proc. § 395.5*)

[15] Member's Liability to Nonmembers

Members of religious association individually liable for negligence of driver of vehicle owned by association, if members, in fact, individually joined in entrusting car to driver. *Steuer v. Phelps (1974) 41 Cal. App. 3d 468, 472-473, 116 Cal. Rptr. 61*

Liability of members of unincorporated association for unlawful acts of other members causing harm to nonmembers. *Orser v. George (1967) 252 Cal. App. 2d 660, 670-671, 60 Cal. Rptr. 708*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityExhaustion of RemediesGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of AssociationCivil Rights LawPrivate DiscriminationCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureJusticiabilityStandingThird Party Standing

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6-61 California Forms of Pleading and Practice--Annotated § 61.67

§ 61.67 Law Reviews

Hofmeister, *Women Need Not Apply; Discrimination and the Supreme Court's Intimate Association Test, 28 USF L. Rev. 1009 (1994)*

Note, *State Power and Discrimination by Private Clubs: First Amendment Protection for Nonexpressive Associations, 104 Harv. L. Rev. 1835 (1991)*

Garcia, *Title VII Does Not Preempt State Regulation of Private Club Employment Practices, 34 Hastings L.J. 1107 (1983)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPrivate Discrimination

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§ 61.68 Text References

Witkin, California Procedure, vol. 2, *Jurisdiction*, §§ 173-174; vol. 3, *Actions*, §§ 303-324, 335-338, 933-934, 926, 971; vol. 4, *Pleading*, §§ 81-85, 855; vol. 8, *Extraordinary Writs*, §§ 96-97 (4th ed. 1997)

Witkin, Summary of California Law, vol. 1, *Contracts*, § 1008; vol. 5, *Torts*, §§ 36-40, 474; vol. 9, *Corporations*, §§ 37-51; vol. 12, *Real Property*, § 267; vol. 14, *Wills and Probate*, § 340 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral Overview

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Chapter 61 ASSOCIATIONS AND CLUBS
PART IV. FORMS
A. Actions Between Associations and Members

6-61 California Forms of Pleading and Practice--Annotated § 61.80

§ 61.80 Petition for Writ of Mandate--By Member Against Association and Its Member-Officers--To Restore Membership and/or Recover Damages for Wrongful Expulsion

[1] FORM Petition for Writ of Mandate--By Member Against Association and Its Member-Officers--To Restore Membership and/or Recover Damages for Wrongful Expulsion
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	
_____ [*name*],	)	NO. _____
an unincorporated association, and	)	PETITION FOR WRIT OF MANDATE
_____ [*names*],	)	
Respondents.	)	
	)	
	)	

Petitioner alleges:

1. At all times herein mentioned, petitioner was, and now is, a member in good standing of respondent _____ [*name of association*] and possessed all qualifications for such membership.

2. At all times herein mentioned, respondent _____ [*name of association*], hereafter called Association, was, and now is, an unincorporated association, composed of approximately _____ [

number] members, and having its principal place of business in _____ [*city*], _____ County, California.

3. At all times pertinent times referred to in this petition, respondents _____ [*names*] were members and officers of Association as follows: _____ [*set office titles and names of respective office holders*].

4. At all pertinent times herein mentioned, each of the respondents _____ [*name(s)*] was an agent of Association and of each of the remaining respondents, and in doing the things hereinafter alleged was acting within the scope of that agency.

5. At all times herein mentioned, Association was, and now is, formed and existing for the following specified purposes: _____ [*specify, e.g.,* To promote the trade of widgetmaking and set voluntary professional standards for persons engaged in widgetmaking].

6. Association controls important economic interests and has attained a quasi-public statute in that _____ [*allege fact(s) showing association's control of important economic interests and quasi-public stature, e.g.,* Association is the largest professional society of widgetmakers in the State of California. Nearly all professional widgetmakers belong to the Association, and membership in Association is, as a practical matter required in order to obtain employment or other work as a widgetmaker].

7. Petitioner has a valuable property right and economic interest in continued membership in Association in that _____ [*allege fact(s) showing plaintiff's economic interest in membership, e.g.,* plaintiff cannot as a practical matter find work as a widgetmaker in California without belonging to Association].

8. At all times herein mentioned, Association has had, and now has, a duly adopted and subsisting constitution and bylaws containing provisions relating to the conditions for maintenance of membership in Association and to the expulsion of members from Association. A copy of the constitution and bylaws is attached hereto as Exhibit _____ and made a part hereof. The constitution and bylaws constitute a contract between Association and each of its members. [Under the Association's constitution and bylaws, discretion is vested in _____ (*identify relevant officials*) to conduct investigations and hold evidentiary hearings for the purpose of determining whether a member should be expelled.]

9. Petitioner has done nothing which, under the constitution and bylaws of Association, would justify his/her being expelled from Association and at all times herein mentioned has met, and now meets, all requirements for membership set forth in the constitution and bylaws or reasonably to be implied therefrom.

10. As a consequence of Association's control of important economic interests and its quasi-public stature, as well as the vital economic interests of its members, including petitioner, that depend upon membership in Association, Association is required by law to afford its members, including petitioner, fair procedure, including prior notice and an evidentiary hearing, before terminating their membership in Association.

11. On or about _____ [*date*] at _____ [*place*], respondents, and each of them, purported to expel petitioner from membership in Association. [A copy of the notice of expulsion is attached to this petition as Exhibit _____ and incorporated into this petition by reference.] Since the date of this purported expulsion, respondents, and each of them, have denied and continue to deny petitioner all of the rights and privileges of membership in Association.

12. Respondents' action in expelling petitioner is in breach of the contract between Association and petitioner in that _____ [*specify, e.g.,* the respondents purported to expel petitioner for _____ (*specify*), which is not a ground for expulsion recognized in the Association's bylaws or constitution. Furthermore, respondents'

failure to afford petitioner prior notice of the expulsion and opportunity to respond to the charges forming the basis of the expulsion was in violation of the Association's bylaws].

13. In expelling petitioner from his/her membership in Association, respondents also acted contrary to law and in excess of their jurisdiction and committed prejudicial abuse of discretion in the following respects:

[*Specify reasons for invalidity of decision that are within scope of review under Code Civ. Proc. § 1094.5(b), such as the following:*]

a. Respondents' action in expelling petitioner is contrary to law and public policy in that _____ [*specify nature of illegality, e.g.,* the purported reason for petitioner's expulsion constitutes an arbitrary discrimination on the basis of petitioner's _____ (*specify protected characteristic or status*) in violation of the Unruh Civil Rights Act, *Civil Code Section 51*].

b. Furthermore, respondents' action in expelling petitioner violated petitioner's common-law right to fair procedure because _____ [*allege facts showing lack of fair procedure, e.g.,* respondents expelled petitioner without without affording petitioner prior notice and opportunity for a hearing to present evidence in response to the charges against him/her]. Thus, respondents failed to proceed in the manner required by law.

14. On or about _____ [*date*], petitioner demanded of respondents _____ [*names*], in their capacity as agents and/or officers of Association, that they restore to petitioner all of the rights and privileges of membership in Association. Petitioner then and there tendered to these respondents his/her dues for _____ [*specify period*]; payment of these dues would, under the constitution and bylaws of Association, entitle petitioner to all of the rights and privileges of membership in Association. However, these respondents refused all of petitioner's demands for restoration of rights and privileges and cessation of the publicizing of the purported expulsion and refused to accept the dues that petitioner tendered them.

15. _____ [*Allege exhaustion of any internal remedies provided by association or facts excusing petitioner from exhausting those remedies, e.g.,* On _____ (*date*), petitioner attempted to appeal the expulsion decision of respondents by filing a written request for reconsideration and for a hearing as provided in Association's bylaws, but respondent _____ (*name*) refused to accept petitioner's request and informed petitioner, on behalf of the Association's board of directors that the decision to expel petitioner was final].

16. _____ [*Allege any damages resulting from wrongful expulsion, e.g.,* Immediately preceding the purported expulsion of petitioner from Association, petitioner was regularly employed as _____ (*specify, e.g.,* a widgetmaker), and was earning and receiving in this employment approximately $ _____ per month. As a proximate result of the wrongful purported expulsion of petitioner from membership in Association, petitioner has been unable to practice his/her trade and has suffered a loss of employment and consequent loss of earnings from the time of the purported expulsion to the present time, in the sum of $_____].

17. The purported expulsion of petitioner from membership in Association, together with the publicity given and being given thereto, has held, and will hold, him up to public contempt and ridicule, thereby causing him to be shunned and avoided by his associates and persons with whom he has been doing business; has impaired, and will impair, his means of earning a livelihood, and his earnings; has caused, and will cause, him to suffer serious physical illness and mental distress, and to incur necessary medical expense therefor; all to his damage in an amount not capable of being calculated or estimated at this time. Therefore, petitioner will seek leave to amend this petition to show the true amount and nature of these damages when they are ascertained.

18. Petitioner does not have a plain, speedy, and adequate remedy in the ordinary course of law in that pecuniary compensation would not afford adequate relief, since petitioner's enjoyment of the rights and privileges appertaining to membership in Association is not fully subject to a monetary valuation. Furthermore, petitioner's injuries as a proximate result of the purported expulsion and the publicity given thereto are continuing injuries.Thus, petitioner would be required to institute successive actions at law for damages, leading to a multiplicity of judicial proceedings.

WHEREFORE, petitioner prays judgment against respondents, and each of them, as follows:

1. That, on the hearing of this application and the return thereto, if any, this court issue its peremptory writ of mandate commanding respondents, and each of them, to restore to petitioner his/her membership in Association and all of the rights and privileges that appertain to that membership.

2. For general damages according to proof.

3. For medical and incidental expenses according to proof.

4. For past lost earnings in the sum of $ _____.

5. For future lost earnings according to proof.

6. For costs of suit herein incurred[, including reasonable attorney's fees, as authorized by *Civil Code Section 1717*].

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner_____ [*name*]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know its contents. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form of petition in [1], *above*, may be used by an expelled member of an unincorporated association to obtain a peremptory writ of mandate to compel the association and its officers to restore petitioner's membership and all rights

and privileges of membership [*see Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 813-817, 140 Cal. Rptr. 442, 567 P.2d 1162* ; *Code Civ. Proc. §§ 1085, 1087, 1094.5*; *see also* discussion in *§ 61.31[2][b]*]. It may also be used to recover damages caused by the wrongful expulsion [*see Code Civ. Proc. § 1095*].

[3] Allegations

The petition alleges the following facts:

- Petitioner's status as a member in good standing of the association (Paragraph 1) [*see* Taboada v. Sociedad Espanola etc. *(1923) 191 Cal. 187, 193, 215 P. 673]* .

- Respondent association's name, status, and purpose (Paragraphs 2, 5) [*see Code Civ. Proc. § 369.5(a)*].

- The status of any other members or officers joined as repsondents (Paragraph 3) [*see Code Civ. Proc. § 369.5(b)*].

- Respondent association's principal place of business, the place where any breach of obligation occurred, or other facts establishing venue (Paragraphs 2, 11) [*see Code Civ. Proc. § 395.5*; *see also* discussion in *§ 61.53*].

- Respondent association's "quasi-public stature" and control of important economic interests, establishing obligation to afford petitioner fair procedure, including an evidentiary hearing, before terminating his or her membership (Paragraphs 6, 10) [*see Potvin v. Metropolitan Life Ins. Co. (2000) 22 Cal. 4th 1060, 1066-1071, 95 Cal. Rptr. 2d 496, 997 P.2d 1153* ; *Salkin v. California Dental Ass'n (1986) 176 Cal. App. 3d 1118, 1125, 224 Cal. Rptr. 352* ; *see also Code Civ. Proc. § 1094.5(a)*].

- Petitioner's property or economic interest in association membership, thereby establishing a beneficial interest in the proceedings (Paragraph 7) [*see Code Civ. Proc. § 1086*; *Funeral Dirs. Assn. v. Bd. of Funeral Dirs. (1944) 67 Cal. App. 2d 311, 312-313, 154 P.2d 39]* .

- Respondents' purported expulsion of petitioner from membership in the association (Paragraph 11).

- The invalidity of the purported expulsion under the constitution, bylaws, or rules of the association, constituting a breach of contract (Paragraphs 8, 9, 12) [*see Smith v. Kern County Medical Asso. (1942) 19 Cal. 2d 263, 270, 120 P.2d 874* ; *see also* discussion in *§§ 61.21, 61.30*].

- The respondents' commission of acts in excess of jurisdiction and any prejudicial abuse of discretion (Paragraph 13) [*see Code Civ. Proc. § 1094.5(b)*]. This form includes, as examples, the following:

  - The illegality of the grounds for expulsion under any provision of law, such as the Unruh Civil Rights Act (Paragraph 13a) [*see, e.g., Civ. Code § 51*; Ch. 116, *Civil Rights: Discrimination in Business Establishments*].

  - Respondents' violation of petitioner's common-law right of fair procedure (Paragraph 13b) [*see, e.g., Youngblood v. Wilcox (1989) 207 Cal. App. 3d 1368, 1375, 255 Cal. Rptr. 527* ; *see also* discussion in *§ 61.31[1]*].

- Petitioner's tender of dues and express demand that respondents to perform the duty sought to be compelled by the writ (Paragraph 14) [*see* Taboada v. Sociedad Espanoala etc. *(1923) 191 Cal. 187,*

193, 215 P. 673 ; *Price v. Riverside L. & I. Co. (1880) 56 Cal. 431, 434-436]* .

- Petitioner's exhaustion of association's internal remedies or reasons why exhaustion of remedies should be excused (Paragraph 15) [*see Holderby v. Internat. Union etc. Engrs. (1955) 45 Cal. 2d 843, 846, 847, 291 P.2d 463* ; *DeVaughn Peace, M.D., Inc. v. St. Francis Medical Center (1994) 28 Cal. App. 4th 454, 460, 33 Cal. Rptr. 2d 459* ; *Mitchell v. International Asso. of Machinists (1961) 196 Cal. App. 2d 796, 808, 16 Cal. Rptr. 813]* .

- Damages suffered by petitioner as a result of the wrongful expulsion (Paragraphs 16, 17) [*see Code Civ. Proc. § 1095*; *see also* discussion in [4], *below*].

- Petitioner's lack of a plain, speedy, and adequate remedy in the ordinary course of law (Paragraph 18) [*see Code Civ. Proc. § 1086*; *Lohr v. Superior Court (1952) 111 Cal. App. 2d 231, 234, 244 P.2d 5]* .

This form assumes, as an example, that the respondent association abused its discretion by failing to afford petitioner any hearing whatsoever (Paragraphs 12, 13b) and thus failed to proceed in the manner required by law [*see Code Civ. Proc. § 1094.5(b)*]. For examples of allegations that an agency abused its disrcretion because its decision is not supported by its findings or because its findings are not supported by the evidence [*see Code Civ. Proc. § 1094.5(b), (c)*], which may be adapted for use in this form, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[4] Recovery of Damages

Before an association member may bring an action for damages based on wrongful expulsion, he or she must first seek and obtain a favorable decision on a petition for writ of mandate overturning the expulsion [*Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 483-485, 131 Cal. Rptr. 90, 551 P.2d 410* ; *Holder v. California Paralyzed Veterans Assn. (1980) 114 Cal. App. 3d 155, 160-165, 170 Cal. Rptr. 455* ; *see DeVaughn Peace, M.D., Inc. v. St. Francis Medical Center (1994)28 Cal. App. 4th 454, 459-460, 33 Cal. Rptr. 2d 459]* . However, in granting a petition for writ of mandate, the court is authorized to award damages that the petitioner has sustained [*Code Civ. Proc. § 1095*]; therefore, this form of petition includes an allegation of damages (Paragraphs 16, 17) and request for an award of damages (Prayer, Paragraphs 2-5). By recovering damages in the mandate proceeding, petitioner can presumably avoid the necessity for bringing a separate civil action for damages.

To support a damages award, the petition should include allegations of fact that provide a substantive basis for the award of damages. This form includes allegations (1) that the expulsion violated the association's constitution, rules, and bylaws and thus constituted a breach of contract (Paragraphs 8-11) [*see Cason v. Glass Bottle Blowers Asso. (1951) 37 Cal. 2d 134, 142, 231 P.2d 6* ; *Smetherham v. Laundry Workers' Union (1941) 44 Cal. App. 2d 131, 136-137, 111 P.2d 948]* ; (2) that the expulsion violated other provisions of law and was contrary to public policy (Paragraph 12); and (3) that the expulsion violated plaintiff's common-law right to fair procedure (Paragraph 13) [*see, e.g., Youngblood v. Wilcox (1989) 207 Cal. App. 3d 1368, 1375, 255 Cal. Rptr. 527* ; *see also* discussion in *§ 61.31[1]*].

A wrongful expulsion may also involve facts giving rise to potential liability under various tort theories, such as defamation, interference with business relationships, or other causes of action. Therefore, counsel should consider including additional causes of action in this petition, if appropriate under the facts of a particular case. For forms of allegations that may be adapted for this purpose, see the chapter in this set pertaining to the particular cause of action.

[5] Recovery of Attorney's Fees

In an action on a contract, when the contract specifically provides that attorney's fees and costs incurred to enforce the contract must be awarded to one of the parties or the prevailing party, the party who is determined to be the prevailing party is entitled to reasonable attorney's fees as an element of the costs of suit [*see Civ. Code § 1717(a)*]. These attorney's fees therefore are not pleaded as an element of damages, but are included as part of the costs in the prayer of a pleading [*see* discussion in *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.]. *Civ. Code § 1717* has been held to apply to special proceedings as well as civil actions [*see San Luis Obispo Bay Properties, Inc. v. Pacific Gas & Elec. Co. (1972) 28 Cal. App. 3d 556, 571, 104 Cal. Rptr. 733* (proceeding to confirm arbitration award)]. The prayer in this form includes optional language requesting an award of fees under Civ.Code § 1717, which should be included if the association's constitution, by-laws, or rules provide for an award of fees to the association or to a prevailing party in litigation between the association and its members.

[6] Verification and Accompanying Documents

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*; *Cal. Rules of Ct., Rule 8.486(a)(4)*; *see Code Civ. Proc. § 446(a)* (form of verification)].

Proof of service of a copy of the petition on each respondent is required to accompany the petition when it is offered for filing (except when, in its discretion and for good cause, the court has granted the application for the writ ex parte) [*Code Civ. Proc. § 1107*]. When a petition that does not seek an alternative writ is filed under *Code Civ. Proc. § 1088.5*, however, the action may be filed and served in the same manner as an ordinary action [*Code Civ. Proc. § 1107*]. In a trial court, proof of service need not accompany such an application at the time of filing, but proof of service of a copy of the filed petition must be lodged with the court before a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

A petition in a reviewing court for the issuance of the writ must be accompanied by a memorandum and by proof of service of both on each respondent, but the court in its discretion may allow the filing of the petition without service [*Cal. Rules of Ct., Rule 8.486(a)(5)*]. Memorandum also customarily accompany a petition filed in a superior court, although they do not appear to be expressly required by statute or court rule [*but see Code Civ. Proc. § 1090* (referring to proceeding as a "motion"); *Cal. Rules of Ct., Rules 3.1103(a)(2), 3.1113(a)* (mandate proceeding is included in definition of "law and motion" proceeding; memorandum must be submitted in support of noticed motion)]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[7] Cross References

For forms for use in actions for breach of contract, see Ch. 140, *Contracts*

For discussion of and additional forms for use in mandate proceedings generally, see Ch. 358, *Mandate and Prohibition*

For discussion of and forms for use in administrative mandate proceedings under *Code Civ. Proc. § 1094.5*, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions*

For points and authorities that may be used in support of and in opposition to a petition for writ of mandate to restore an expelled member of an association to membership, see California Points and Authorities, *Associations and Clubs* (Matthew Bender)

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[Reserved]

§§ 61.81[Reserved]

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6-61 California Forms of Pleading and Practice--Annotated § 61.85

§ 61.85 Complaint by Member Against Association and Certain Members of Its Managing Body--Action Brought in Right of Unincorporated Association [Corp. Code § 800(a),(b)]--Skeletal Form

[1] FORM Complaint by Member Against Association and Certain Members of Its Managing Body--Action Brought in Right of Unincorporated Association [Corp. Code § 800(a),(b)]--Skeletal Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR _____
an unincorporated association, and	)	[*specify, e.g.,*
_____ [*names*],	)	DAMAGES AND INJUNCTIVE RELIEF]
Defendants.	)	
	)	
	)	

Plaintiff alleges:

1. Defendant _____ [*name*], hereinafter referred to as Association, is, and at all times herein mentioned was, an unincorporated association having its principal place of business in _____ County, California. Association has a present membership numbering approximately _____ [*number*] persons.

2. At all times herein mentioned, Association was, and now is, formed and existing for the following specified purposes: _____ [*specify*].

3. At all times herein mentioned, defendants _____ [*names*] were, and now are, members of Association and of its managing body as follows: _____ [*set out office titles and names of respective office holders*].

[4. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by those fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that the harm to plaintiff and to Association as herein alleged was proximately caused by the conduct of defendants.)]

5. At all times herein mentioned, each of the individual defendants named in this complaint was and now is, the agent and employee of each of the remaining individual defendants and of defendant Association, and in doing the things hereinafter alleged, was, and now is, acting within the scope of that agency.

[*EITHER*]

6. Plaintiff is, and at all times herein mentioned was, a member of Association in good standing.

[*OR*]

6. Plaintiff is a member in good standing of Association. Plaintiff's membership devolved on him/her by operation of law from _____ [*name*] who was a member of Association at the time of the transaction complained of herein, in the following manner: _____ [*specify manner*].

[*CONTINUE*]

7. [*Allege facts stating cause of action against defendants, other than Association, which show injury to Association.*]

[*EITHER*]

8. On or about _____ [*date*], plaintiff made the following efforts to secure action from the _____ [*managing body*] of Association with regard to above specified claim against the above-named individual defendants: _____ [*set forth with particularity such efforts*].

[*OR*]

8. Plaintiff did not make any effort to secure action from the _____ [*managing body*] of Association or from Association, since any such effort would have been futile in that _____ [*set forth facts demonstrating futility of demand*].

[*EITHER*]

9. On _____ [*date*], plaintiff informed _____ [Association *and/or* the _____ (*managing body*) of Association] in writing of the ultimate facts of each cause of action alleged against each individual defendant named in this complaint, and demanded that it take such action necessary for Association to prosecute the cause of action against the above-named individual defendants. However, _____ [Association *or and/or* the _____ (*managing body*) of Association] refused, and continue(s) to refuse, to prosecute this action.

[*OR*]

9. On _____ [*date*], plaintiff delivered to _____ [Association *and/or* the _____ (*managing body*) of Association] a true copy of the complaint that plaintiff proposed to file in this action, and demanded that it take such action necessary for Association to prosecute the cause of action against the above-named individual defendants. However, _____ [Association *or and/or* the _____ (*managing body*) of Association] refused, and continue(s) to refuse, to prosecute this action.

[*CONTINUE*]

10. If plaintiff is successful in this action, a substantial benefit will result to defendant Association on whose behalf this action is prosecuted in that _____ [*specify benefit to Association*].

WHEREFORE, plaintiff prays judgment against the defendants _____ [*names*], and each of them, as follows:

1. For _____ [*specify legal and/or equitable relief sought, e.g.*, damages in the sum of $ _____].

WHEREFORE, plaintiff further prays judgment against Association as follows:

1. For costs of suit herein incurred.

2. For reasonable attorney's fees incurred in the prosecution of this action.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

[*If desired, add verification, as follows (see [4], below):*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled proceeding. I have read the foregoing complaint and know its contents. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a "skeletal" complaint is for use by a member of an unincorporated association in an action, commonly known as a "derivative action," instituted or maintained by the member in the right of the association against the association and members of its managing body. The provisions of *Corp. Code § 800* pertaining to corporate shareholder's derivative actions also apply to derivative actions by members of an unincorporated association [*see Corp. Code § 800(a)*; *see also* discussion in *§ 61.50[2][b]*].

[3] Allegations

This form of complaint sets forth the basic allegations necessary to maintain a derivative action against an association and its management [*see Corp. Code § 800(a),(b)*]. It must be combined with allegations setting forth the substance of any causes of action against the individual named members of the association's management (Paragraph 7). Counsel should refer to the chapters in this set pertaining to the relevant substantive causes of action for forms of specific allegations that may be inserted into this complaint.

This form alleges the following facts:

- The status and capacity of the association and the individual named defendants (Paragraphs 1-3).

- The status and capacity of fictitiously named defendants, if any (Optional Paragraph 4).

- Allegations of agency between the individual defendants and the association and among the individual defendants (Paragraph 5).

- Plaintiff's membership in the association at the time of the transaction complained of or any part thereof, or that his membership devolved on him or her by operation of law from a member who was a member at the time of the transaction or any part thereof complained of (Alternative Paragraphs 6) [*see Corp. Code § 800(a),(b)(1)*].

- Details regarding plaintiff's efforts, if any, to secure from the managing body of the association the action that he or she desires, or reasons why plaintiff failed to make any such efforts (Alternative Paragraphs 8) [*see Corp. Code § 800(a),(b)(2)*].

- Plaintiff's giving of written notice informing the association or its managing body of the ultimate facts of each cause ofaction against each individual defendant, or plaintiff's delivery of a copy of the proposed complaint to the association or its managing body (Alternative Paragraphs 9) [*see Corp. Code § 800(a), (b)(2)*].

- Any substantial benefit to the association that will result from plaintiff's success in the action,

thereby justifying an award of attorney's fees to plaintiff from the association (Paragraph 10) [*see Fletcher v. A.J. Industries, Inc. (1968) 266 Cal. App. 2d 313, 323-324, 72 Cal. Rptr. 146* (involving shareholder's derivative suit against corporation); *but see Braude v. Automobile Club of Southern Cal. (1986) 178 Cal. App. 3d 994, 1006-1010, 223 Cal. Rptr. 914* (to justify attorney's fee award under substantial benefit doctrine, the litigation must result in "actual and concrete" benefits to the organization and its members, not merely "conceptual or doctrinal" benefits)].

[4] Jurisdiction

An action under *Corp. Code § 800* is an equitable action [*see Rosenfeld v. Zimmer (1953) 116 Cal. App. 2d 719, 722, 254 P.2d 137* (corporate stockholder's derivative suit)] and is therefore within the residual equity jurisdiction of the superior court [*see Cal. Const., art. VI, § 10*], and is not a limited civil case [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. § 86(b)*].

[5] Verification

Verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings need not be verified)]. However, if the complaint is verified, the defendant is required to file a verified answer [*Code Civ. Proc. § 446(a)*] and is precluded from making a general denial [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[6] Cross References

For further discussion of and forms for use in stockholder's derivative actions, see Ch. 168, *Corporations: Derivative Actions* .

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6-61 California Forms of Pleading and Practice--Annotated § 61.86

§ 61.86 Petition for Writ of Mandate to Enforce Right of Member to Inspect Unincorporated Association's Financial Records--By Member Against Association and Its Secretary-Treasurer

[1] FORM Petition for Writ of Mandate to Enforce Right of Member to Inspect Unincorporated Association's Financial Records--By Member Against Association and Its Secretary-Treasurer

[*Caption. See § 61.80[1].*]

Petitioner alleges:

1. At all times herein mentioned, petitioner was, and now is, a member in good standing of respondent _____ [*name of association*].

2. [*Respondent association's capacity and location of principal place of business. See § 61.80[1], Paragraph 2.*]

3. At all times herein mentioned, respondent _____ [*name*], was, and now is, secretary-treasurer of Association, and Association's agent and employee. In doing the things herein after alleged, respondent _____ [*name*] was, and now is, acting within the scope of such agency.

4. [*Purpose for which association was formed. See § 61.80[1], Paragraph 5.*]

5. At all times herein mentioned, Association has been, and now is, the owner of large sums of money, government bonds, and other assets, which are to be used for the benefit of Association's members, including petitioner.

6. At all times herein mentioned, respondent _____ [*name*], secretary-treasurer of Association, has had, and now has, possession and control of the financial books and records of Association.

7. _____ [*Allege facts known to petitioner justifying petitioner's request to inspect association records,*

e.g., Monthly and quarterly statements (available to the members) of the finances of Association based on the above-described books and records show that for a period from _____ (*date*), to _____ (*date*), the expenditures have exceeded the income of Association, and show certain large outlays of funds, but do not show any detailed explanation therefor. Petitioner is informed and believes and on such information and belief alleges that certain of these expenditures are improper and contrary to the rights and interests of the members of Association, including petitioner].

8. On _____ [*date*], petitioner made and served on Association and respondent _____ [*name*], secretary-treasurer of Association, a written demand for permission to examine allfinancial records of Association covering the period from _____ [*date*], to _____ [*date*], and for necessary facilities and assistance in the course of this examination. A copy of petitioner's demand is attached to this complaint as Exhibit _____ and made a part of this complaint by reference.

9. Petitioner desires to examine the financial records for purposes reasonably related to his rights and interests as a member of Association, as follows: _____ [*describe purposes*].

10. Association and respondent _____ [*name*], secretary-treasurer, have refused, and continue to refuse, to permit petitioner to examine financial records, although they each have the authority to permit this examination.

11. Petitioner does not have a plain, speedy, and adequate remedy in the ordinary course of law in that pecuniary compensation would not afford adequate relief, since it would not give petitioner the right to examine Association's financial records, and the appropriate amount of pecuniary compensation, even if such existed, would be extremely difficult to ascertain.

[12. Petitioner has exhausted his internal administrative remedies within Association by _____ (*describe steps taken to exhaust remedies*). Any attempt by petitioner to pursue any further internal remedy would be futile and involve delay likely to defeat the purpose of petitioner's investigation in that _____ (*describe reasons why further exhaustion of remedies should be excused*).]

WHEREFORE petitioner prays judgment as follows:

1. That, on the hearing of this application and the return thereto, if any, this court issue its peremptory writ of mandate commanding respondent Association and respondent _____ [*name*], its secretary-treasurer, to permit petitioner or his duly authorized representative to examine forthwith all financial records of Association covering the period from _____ [*date*], to _____ [*date*], and to afford such facilities and such assistance in the course of this examination as the court deems proper.

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner_____ [*name*]

[*Verification. See § 61.80[1].*]

[2] Use of Form

The form of petition in [1], *above*, is for use by a member of an unincorporated association to obtain a peremptory writ of mandate compelling the association and its secretary treasurer to permit the member or his duly authorized representative to examine association financial records for a specified period [*see Code Civ. Proc. § 1085*; Mooney v. Bartenders Union Local No. 284 *(1957) 48 Cal. 2d 841, 843, 313 P.2d 857* ; *see also* discussion in *§ 61.23*].

[3] Allegations

This form of petition alleges the following facts:

- Petitioner is a member of the association and hence a beneficially interested party (Paragraph 1) [*see Code Civ. Proc. § 1086*; *Funeral Dirs. Assn. v. Bd. of Funeral Dirs. (1944) 67 Cal. App. 2d 311, 312-313, 154 P.2d 39]* .

- The capacities of the association and its secretary-treasurer and the purposes of the association (Paragraphs 2-4).

- The association's maintenance of financial books and records (Paragraph 6).

- Plaintiff's written request to inspect the association's books and records (Paragraph 8) [*see* Mooney v. Bartenders Union Local No. 284 *(1957) 48 Cal. 2d 841, 843, 313 P.2d 857* ; *see also* discussion in *§ 61.23*; *cf. Corp. Code § 1601(a)*].

- Reasons justifying petitioner's request to inspect the association's records (Paragraphs 5, 7-9) [*see* Mooney v. Bartenders Union Local No. 284 *(1957) 48 Cal. 2d 841, 843, 313 P.2d 857* ; *see also* discussion in *§ 61.23*; *cf. Corp. Code § 1601(a)*].

- Petitioner's distinct and express demand on respondents to perform the duty sought to be compelled by the writ and respondents' refusal to do so (Paragraph 8, 10) [*see Price v. Riverside L. & I. Co. (1880) 56 Cal. 431, 434-436]* .

- Petitioner's lack of a plain, speedy, and adequate remedy in the ordinary course of law (Paragraph 11) [*see Code Civ. Proc. § 1086*; *Lohr v. Superior Court (1952) 111 Cal. App. 2d 231, 234, 244 P.2d 5]* .

- Petitioner's exhaustion of internal administrative remedies, if any (Optional Paragraph 12). However, exhaustion of internal remedies after refusal of the member's demand onthe association to permit inspection is not usually required [*see* Mooney v. Bartenders Union Local No. 284 *(1957) 48 Cal. 2d 841, 843-844, 313 P.2d 857* (involving labor union)].

[4] Cross References

For discussion of the requirement that a petition for writ of mandate be verified and of documents required to accompany the petition when it is filed, see *§ 61.80[6]*

For additional discussion of and forms for use in mandate proceedings, see Ch. 358, *Mandate and Prohibition*

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6-61 California Forms of Pleading and Practice--Annotated § 61.87

§ 61.87 Complaint for Declaratory Relief--Class Action by Certain Members Against Association and Its Member-Officers--Challenging Validity of Amendments to Association's Constitution, Rules, or Bylaws

[1] FORM Complaint for Declaratory Relief--Class Action by Certain Members Against Association and Its Member-Officers--Challenging Validity of Amendments to Association's Constitution, Rules, or Bylaws
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*names*], on behalf of themselves and all others similarly situated, Plaintiffs, vs. _____ [*name of association*], an unincorporated association, and _____ [*names*], Defendants.	)	NO. _____ COMPLAINT FOR DECLARATORY RELIEF

Plaintiffs allege:

1. At all times herein mentioned, plaintiffs were, and now are, members in good standing of defendant _____ [*name of association*], hereinafter called Association.

2. [*Defendant association's capacity and location of principal place of business. See § 61.85[1], Paragraph 1.*]

3. [*Purpose for which association was formed. See § 61.85[1], Paragraph 2.*]

4. [*Names, capacities, and office titles of individual defendants. See § 61.85[1], Paragraph 3.*]

5. [*Fictitious name allegation, if appropriate. See § 61.85[1], Paragraph 4.*]

6. [*Agency allegations. See § 61.85[1], Paragraph 4.*]

7. Plaintiffs bring this action on behalf of themselves and all other members of Association except defendants _____ [*names*]. The members of Association, other than these defendants, are numerous and it is impracticable to bring them all beforethe court. Plaintiffs, together with all the remaining members of the association, except these defendants, constitute a definite, ascertainable class.

8. There is a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented in that the action is to obtain a declaration of the status of the constitution, bylaws, and rules of Association, which govern the rights and obligations of all members of Association.

9. At all times herein mentioned, Association and its members have had, and now have, a valid, subsisting written contract, entitled Constitution of _____ [*name of defendant association*], governing the reciprocal rights and obligations of Association and of the members. A copy of this constitution is attached to this complaint as Exhibit _____ and made a part of the complaint by reference.

10. The procedure for amending the Association's constitution is forth in Article _____ [*number*] of that constitution, which reads in pertinent part: _____ [*set out verbatim*]. As provided in the Association's constitutution, this procedure is the exclusive means of amending that constitution.

11. On or about _____ [*date*], at a regular meeting of Association held in _____ [*place*], the individual defendants named in this complaint undertook to, and did, cause Association to adopt certain purported amendments to the Association's constitution set forth in Exhibit _____. A copy of the constitution as purportedly amended is attached hereto as Exhibit _____ and made a part hereof.

12. These purported amendments were adopted in contravention of the mandatory procedure for amending the Association's constitution prescribed by Article _____ [*number*], and are void, in that _____ [*set out departures from prescribed procedure*].

13. The officer defendants undertook to, and did, cause Association to so adopt the purported amendments to the Association's constitution with the intent and for the purpose of _____ [*e.g.,* giving the officer defendants purported basis for claiming and exercising substantially increased powers over the affairs and property of Association and its members, and of avoiding opposition thereto through the constitutionally prescribed amendment procedure]. The purported amendments would _____ [*e.g.,* take from the members as a whole and vest in defendant officers, without effective control by the members, the control over the policies, affairs, and property of Association and its members as a whole].

14. At all times herein mentioned, Association has been and now is the owner of a large fund of money, government bonds, and other assets of great value, which are to be used for the benefit of its members as a whole.

15. By reason of the existence of the valid constitution of Association, set forth in Exhibit _____, affecting the relations between the respective parties hereto, and the subsequent purported amended constitution, set forth in Exhibit _____ affecting or claimed to affect the relations between the respective parties, a dispute and actual controversy have arisen between plaintiffs and defendants over the valid constitution, and the legal rights and duties of the parties thereunder.

16. More particularly, the dispute and controversy raise the following opposing contentions:

a. Plaintiffs contend the original constitution, set forth in Exhibit _____ is the only valid constitution and ruling authority of Association.

b. Plaintiffs contend the purported amended constitution, set forth in Exhibit _____ illegally and wrongfully _____ [*e.g.,* takes from plaintiffs and the other nonofficer-members and vests in defendant officers the control over the policies, affairs, and property of Association and its members as a whole].

c. Defendants contend the valid constitution was amended and by reason thereof an amended constitution, set forth in Exhibit _____, is the only constitution and ruling authority of Association and that _____ [*e.g.,* defendant officers are validly in possession of and exercising the powers accorded to them by the amended constitution *or other as appropriate*].

17. Plaintiffs have incurred and, during the pendency of this action, will incur, expenses for attorney's fees and costs herein. Such attorney's fees and costs are necessary for the prosecution of this action and will result in a benefit to each of the members of the class in that his contractual rights as originally established under the original constitution, as set forth in Exhibit _____, including his rights in the aforementioned Association fund of assets, will be protected.

18. Plaintiffs have no adequate internal remedy within the Association for challenging the actions of defendants as alleged in this complaint in that _____ [*specify, e.g.,* the Constitution and rules of Association provide no procedure for appealing actions taken by the Association's managing body to amend the constitution, rules, or bylaws of the Association].

WHEREFORE, plaintiffs pray judgment against defendants and each of them, as follows:

1. Declaring the rights and duties of the parties in the premises, including a declaration that the original constitution, set forth in Exhibit _____, is the only valid constitution and ruling authority of Association.

2. Declaring the purported amended constitution, set forth in Exhibit _____, and all acts done thereunder, void.

3. For costs of suit, including a reasonable attorney's fee for maintenance of this action on behalf of all members but the officer defendants.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiffs

[*Add verification, if desired. See § 61.85[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by members of an unincorporated association who seek, in a class action on behalf of themselves and other members of the association, a judicial declaration that the association's present constitution is invalid and that its previous constitution is valid. With appropriate modifications, the form may be used to challenge amendments to bylaws or other rules of the association.

For general discussion of the effect of an association's constitution, bylaws, and rules on the rights and duties of members, see *§ 61.21*.

[3] Allegations

This complaint alleges the following facts:

- The status of plaintiffs as members of the association (Paragraph 1).

- The status and capacity of the association and the individual named defendants (Paragraphs 2-4).

- The status and capacity of fictitiously named defendants, if any (Optional Paragraph 5).

- Allegations of agency between the individual defendants and the association and among the individual defendants (Paragraph 6).

- The existence of an ascertainable class consisting of association members other than the individual named defendants (Paragraph 7) [*see Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 704, 717, 63 Cal. Rptr. 724, 433 P.2d 732]* .

- A well defined community of interest in the questions of law and fact involved affecting the parties to be represented (Paragraph 8) [*see Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 704, 717, 63 Cal. Rptr. 724, 433 P.2d 732* ; *Code Civ. Proc. § 382*].

- Facts showing the existence of an actual controvery relating to the legal rights and duties of the respective parties regarding the validity of the association's constitution (Paragraphs 9-16) [*see Code Civ. Proc. § 1060*; *Cinmark Investment Co. v. Reichard (1966) 246 Cal. App. 2d 498, 501, 54 Cal. Rptr. 810]* .

- The incurring of reasonable attorney's fees in bringing the action (Paragraph 17) [*see Weber v. Marine Cooks' & Stewards' Assn. (1949) 93 Cal. App. 2d 327, 340-341, 208 P.2d 1009]* .

- The lack of internal remedies within the association that can be exhausted (Paragraph XVIII) [*see Holderby v. Internat. Union etc. Engrs. (1955) 45 Cal. 2d 843, 846, 847, 291 P.2d 463* ; *see also* discussion in *§ 61.31[2][a]*].

The complaint requests the adjudication of the rights and duties of the respective parties by the court [*see Code Civ. Proc. § 1060*; *Cinmark Investment Co. v. Reichard (1966) 246 Cal. App. 2d 498, 501, 54 Cal. Rptr. 810]* .

[4] Cross References

For discussion of and additional forms for use in class actions, see Ch. 120, *Class Actions*

For discussion of and additional forms for use in actions for declaratory relief, see Ch. 182, *Declaratory Relief*

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[Reserved]

§§ 61.88[Reserved]

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6-61 California Forms of Pleading and Practice--Annotated § 61.100

§ 61.100 General Demurrer--Failure to Exhaust Association's Internal Remedies

[1] FORM General Demurrer--Failure to Exhaust Association's Internal Remedies
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff/Petitioner,	)	GENERAL DEMURRER
vs.	)	[LIMITED CIVIL CASE]
_____ [*name of association*],	)	Date: _____
an unincorporated association, and	)	Time: _____
_____ [*names*],	)	Location: _____
Defendants/Respondents.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

Defendant/Respondent demurs to the _____ [complaint *or* petition] in the above-entitled _____ [action *or* proceeding] on the following ground:

_____ [*Designate cause of action or count number, if appropriate, e.g.,* The First Cause of Action of] [T]he _____ [complaint *or* petition] does not state facts sufficient to constitute a cause of action in that it does not allege facts sufficient to establish that plaintiff/petitioner exhausted the remedies provided by defendant/respondent that are applicable to plaintiff's/petitioner's grievance or that plaintiff's/petitioner's failure to

exhaust those remedies was excusable under the circumstances.
Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant/

Respondent _____ [*name*]

[2] Use of Form

This form of general demurrer is for use by a defendant or respondent unincorporated association to object to a complaint or petition by a member with a grievance against the association. The ground of the demurrer is that the complaint or petition does not state facts sufficient to constitute a cause of action in that it does not allege that plaintiff or petitioner has exhausted the association's internal remedies that apply to the grievance [*see Holderby v. Internat. Union etc. Engrs. (1955) 45 Cal. 2d 843, 846-847, 291 P.2d 463* ; *DeVaughn Peace, M.D., Inc. v. St. Francis Medical Center (1994) 28 Cal. App. 4th 454, 460, 33 Cal. Rptr. 2d 459* ; *see also* discussion in *§ 61.31[2][a]*].

This form should be used when the defect appears on the face of the complaint or petition, or from any matter of which the court is required to or may take judicial notice [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*]. If the defect does not appear on the face of the complaint, this objection may be raised as an affirmative defense [*see Code Civ. Proc. § 431.30(b)(2)*].

A party filing a demurrer must serve and file with the demurrer a memorandum in support of each ground [*Cal. Rules of Ct., Rules 3.1103(c), 3.1113(a)*] and a notice of hearing [*see Cal. Rules of Ct., Rules 3.1103(c), 3.1320(c)*]. For further discussion of procedures pertaining to demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* . For discussion of procedures and format of points and authorities, see Ch. 417, *Points and Authorities* .

[3] Cross References

For points and authorities pertaining to a member's failure to exhaust an association's internal remedies before resorting to the courts, see California Points and Authorities, Ch. 22, *Associations and Clubs* (Matthew Bender)

For general forms of affirmative defense and a form of answer, see Ch. 26, *Answers*

For general forms of demurrer and verified answer to a petition for a writ of mandate, see Ch. 358, *Mandate and Prohibition*

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6-61 California Forms of Pleading and Practice--Annotated § 61.101

§ 61.101 Affirmative Defense---Sufficiency and Legality of Expulsion Proceedings

[1] FORM Affirmative Defense--Sufficiency and Legality of Expulsion Proceedings

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. The expulsion of plaintiff/petitioner was based on the following conduct: _____ [*specify grounds for expulsion, consisting of a violation of the association's rules or other conduct that clearly violates the fundamental objects of the association*].

2. The procedure followed in expelling plaintiff/petitioner conformed in all respects to those rules of the association governing the procedure for expelling members. A copy of those rules is attached to this answer as Exhibit _____ and made a part of this answer by reference. Specifically, defendant/respondent Association followed the following procedure in terminating plaintiff's/petitioner's membership: _____ [*specify procedure followed in expelling petitioner/plaintiff, including facts sufficient to show that petitioner/plaintiff was afforded fair procedure, e.g.,* Plaintiff/Petitioner was served with a written notice specifying the acts constituting his/her alleged offense and the charges against him/her,including a citation of the rule(s) he/she was charged with violating. The notice informed him/her of the date, time, and place at which a hearing would be held on the charges to determine if he should be expelled. On the specified date, a hearing was held before a fair and impartial committee constituted in accordance with the Association's rules. No person responsible for bringing the charges against plaintiff was a member of this committee. At the hearing, witnesses testified against plaintiff, and he/she was given a full opportunity to confront and cross examine these accusers and to call his/her own witnesses to examine and refute the evidence against him/her. After due consideration of the evidence on both sides, the committee determined that the evidence justified expelling plaintiff from membership in the Association, and he/she was thereon expelled in accordance with the rules of the Association].

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer [*see Code Civ. Proc. § 431.30(b)(2)*]. by an unincorporated association to a complaint or petition for writ of mandate challenging the legality of plaintiff's expulsion from membership in the association [*see § 61.80*]. The form alleges that the plaintiff or petitioner was expelled on lawful grounds [*see* discussion in *§ 61.30*] and that the expulsion was in accordance with the association's rules and complied with common-law requirements for fair procedure [*see* discussion in *§ 61.31[1]*].

If the facts alleged in this form appear on the face of the complaint or petition, the defect should be raised by demurrer for failure to state a cause of action [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*].

[3] Cross References

For points and authorities pertaining to the legality of proceedings to expel a member of an association, see California Points and Authorities, *Associations and Clubs* (Matthew Bender)

For general forms of affirmative defense and a form of answer, see Ch. 26, *Answers*

For a general form of demurrer to a complaint, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

For general forms of demurrer and verified answer to a petition for a writ of mandate, see Ch. 358, *Mandate and Prohibition*

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[Reserved]

§§ 61.102[Reserved]

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6-61 California Forms of Pleading and Practice--Annotated § 61.110

§ 61.110 Caption for Complaint--Action by Unincorporated Association Suing in Its Own Name [Code Civ. Proc. § 369.5(a)]

[1] FORM Caption for Complaint--Action by Unincorporated Association Suing in Its Own Name [Code Civ. Proc. § 369.5(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

	)	
_____ [*name of association*],	)	NO. _____
an unincorporated association, Plaintiff,	)	COMPLAINT FOR _____
vs.	)	[*specify relief sought, e.g.,*
_____ [*name(s)*],	)	DAMAGES]
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

[2] Use of Form

The form in [1], *above*, is a caption for use in a complaint in an action brought by an unincorporated association is plaintiff [*see Code Civ. Proc. § 422.30* (general format of caption)].

Any unincorporated association, whether organized for profit or not, may sue in the name which it has assumed or by which it is known [*Code Civ. Proc. § 369.5(a)*; *see* discussion in *§ 61.50[1][a]*]. However, if the association is transacting business under a fictitious business name contrary to the provisions of *Bus. & Prof. Code § 17900 et seq.* (fictitious business names), the association or its assignee may not maintain any action on or on account of any contract made, or transaction had, in the fictitious business name in any California court until the fictitious business name statement has been executed, filed, and published as required by *Bus. & Prof. Code § 17900 et seq.* [*Bus. & Prof. Code §§ 17902, 17918*]. For further discussion, see *§ 61.50[1][c]*.

[3] Cross References

For alternative forms of captions, see Ch. 108, *Captions and Introductions*

For forms for use to allege a fictiticious business name, see *Ch. 20, Allegations Commonly Used, §§ 20.35* et seq.

For a form of affirmative defense in connection when a partnership has not complied with the fictitious business name statutes, see Ch. 402,*Partnerships: Actions Between General Partners or Partnership and Third Parties,* § 402.40

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6-61 California Forms of Pleading and Practice--Annotated § 61.111

§ 61.111 Caption for Complaint--Action Against Unincorporated Association in Its Own Name [Code Civ. Proc. § 369.5(a)] and Against Its Principal Member-Officers [Code Civ. Proc. § 369.5(b)]

[1] FORM Caption for Complaint--Action Against Unincorporated Association in Its Own Name [Code Civ. Proc. § 369.5(a)] and Against Its Principal Member-Officers [Code Civ. Proc. § 369.5(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR _____
_____ [*name*],	)	[*specify relief sought, e.g.,* DAMAGES]
an unincorporated association, and	)	[Amount demanded _____
_____ [*name(s)*],	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

[2] Use of Form

The form of caption in [1], *above*, is for use in a complaint in an action brought against an unincorporated association and its principal member-officers [*see Code Civ. Proc. § 422.30* (general format of caption)].

Any unincorporated association, whether organized for profit or not, may be sued in the name which it has assumed or by which it is known [*Code Civ. Proc. § 369.5(a)*; *see* discussion in *§ 61.50[1][a]*]. Any member of the unincorporated association may be joined as a party in an action against the unincorporated association [*Code Civ. Proc. § 369.5(b)*; *see* discussion in *§ 61.50[2][a]*].

[3] Cross References

For alternative forms of captions, see Ch. 108, *Captions and Introductions*

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6-61 California Forms of Pleading and Practice--Annotated § 61.112

§ 61.112 Allegation--Association's Unincorporated Status and Principal Place of Business

[1] FORM Allegation--Association's Unincorporated Status and Principal Place of Business

At all times pertinent to this complaint, _____ [*name*], was[, and now is,] an unincorporated association, composed of approximately _____ [*number*] members, with its principal place of business in [_____ (*name*) Municipal Court District,] _____ County, California.

[2] Use of Form

The allegation in [1], *above*, of an association's unincorporated status and principal place of business is for use in a pleading in an action or proceeding by or against an unincorporated association.

The allegation of principal place of business establishes venue in an action against an unincorporated association [*see Code Civ. Proc. §§ 395.2, 395.5*; *see also* discussion in *§ 61.53*].

[3] Cross References

For additional forms of venue allegations, see Ch. 571, *Venue*

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6-61 California Forms of Pleading and Practice--Annotated § 61.113

§ 61.113 Allegation--Status of Pertinent Member-Officer of Unincorporated Association

[1] FORM Allegation--Status of Pertinent Member-Officer of Unincorporated Association

At all times pertinent to this complaint, _____ [*name*] was [, and now is,] a member of _____ [*name of association*] and held the office and title of _____ [*specify*] in _____ [*name of association*].

[2] Use of Form

The form in [1], *above*, may be used in a pleading in an action or proceeding by or against the association to allege the office and title of any pertinent individual members-officers [*see Code Civ. Proc. § 369.5*].

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6-61 California Forms of Pleading and Practice--Annotated § 61.114

§ 61.114 Allegation--Purpose for Which Association Was Formed

[1] FORM Allegation--Purpose for Which Association Was Formed

At all times pertinent to this complaint, _____ [*name of association*] was [, and now is,] formed and existing for the following specified purposes: _____ [*specify*].

[2] Use of Form

The form in [1], *above*, may be used in a pleading in an action or proceeding involving an unincorporated association to allege the purposes for which the association was formed.

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[Reserved]

§§ 61.115[Reserved]

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6-61 California Forms of Pleading and Practice--Annotated § 61.120

§ 61.120 Complaint for Temporary Restraining Order, Preliminary and Permanent Injunction, and Damages--By Unincorporated Association Against Rival Entity and Its Member-Officers--Use of Plaintiff's Name and Insignia [Bus. & Prof. Code § 17203; Corp. Code §§ 21308, 21309]

[1] FORM Complaint for Temporary Restraining Order, Preliminary and Permanent Injunction, and Damages--By Unincorporated Association Against Rival Entity and Its Member-Officers--Use of Plaintiff's Name and Insignia [Bus. & Prof. Code § 17203; Corp. Code §§ 21308, 21309]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name of association*], an unincorporated association, Plaintiff, vs. _____ [*name*], _____ [an unincorporated association *or* a corporation], and _____ [*names*], Defendants.	)	NO. _____ COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTION, AND DAMAGES

Plaintiff alleges:

1. At all times herein mentioned, plaintiff was, and now is, an unincorporated association, composed of approximately _____ [*number*] members, with its principal place of business in _____ [*city*], _____ County, California.

2. Plaintiff was formed on or about _____ [*date*], for the following specified purposes: _____ [*specify*]. Since that date, and for more than _____ [*number*] years, plaintiff has been, and now is, a duly created and existing organization, known and designated by its name of _____ [*name of plaintiff association*]. At all times pertinent to this complaint, plaintiff has had, and now has, duly adopted rules contained in its constitution and bylaws, and an insignia that consists of the following described items: _____ [*describe*].

3. Defendant _____ [*name of rival association or corporation*] (hereafter called "defendant association") is _____ [an unincorporated association *or* a corporation, incorporated under the laws of the State of _____], with its principal place of business in _____ [*city*], _____ County, California. [Plaintiff is informed and believes and thereon alleges that] [D]efendant association was formed on or about _____ [*date*] for the purpose of _____ [*specify*].

4. Defendants _____ [*names*] are members and officers of defendant association, which they and their agents formed. They are hereafter collectively referred to as the "officer defendants".

[5. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that the harm to plaintiff as herein alleged was proximately caused by such conduct of defendants.)]

6. At all times relevant to this complaint, each of the officer defendants was, and now is, the agent and employee of each of the remaining officer defendants and of defendant association, and in doing the things hereinafter alleged, was, and now is, acting within the scope of such agency.

7. At all times relevant to this complaint, and for _____ [*number*] years, plaintiff has conducted its business and affairs, which involve _____ [*specify nature of plaintiff's business*], in such a way that it has acquired, and now enjoys, a widespread reputation and goodwill of great value; has induced its members and members of the general public to rely, and they do rely, on the faithful performance of plaintiff in its business matters; and has commanded, and now commands, extensive support and patronage of its business and affairs by members of the general public.

8. By reason of the existence of plaintiff and the manner in which plaintiff has conducted, advertised, and carried out its business and affairs, the name _____ [*name of plaintiff*], which was first adopted and used and is owned by plaintiff, has been so exclusively identified with plaintiff's business and affairs that it has acquired a secondary meaning in the minds of members of the public in that the name is solely indicative of plaintiff's business and affairs and that of no other organization.

9. _____ [*Allege facts showing misappropriation of plaintiff's name and/or insignia, e.g.,* On or about _____ (*date*), and ever since that date, the officer defendants, and each of them, have been, and now are, conducting business and affairs and advertising and campaigning to recruit members for the defendant association, using plaintiff's identical name, and are about to commence and continue an even more extensive advertising and recruiting campaign thereunder for additional members for defendant association. The business and other affairs conducted by the defendants are similar to those of plaintiff, namely _____ (*specify*), and these affairs are conducted in the same locality, namely, _____ (*specify*). Defendants have also used an insignia in their advertising, a copy of which is attached to this complaint as Exhibit _____, that is confusingly similar to plaintiff's and likely to cause confusion in the minds of the public between plaintiff and the defendant association]. All of the above acts havebeen committed by defendants without plaintiff's permission and without any legal authority.

10. The defendants, and each of them, undertook and did all of the above-described acts, knowing of plaintiff's prior adoption, continued use, and ownership of the name _____ [*name*], with the intent and for the purpose of defrauding and otherwise competing unfairly with plaintiff and appropriating to their own use plaintiff's name, reputation, and goodwill by misleading and deceiving, and they have misled and deceived, members of plaintiff and of the general public into the belief that the business and affairs of plaintiff are the business and affairs of defendants, and that the place where defendants conduct their business and affairs is that of plaintiff, all to the injury of plaintiff and of the public.

11. The defendants, and each of them, threaten to, and will unless enjoined and restrained by order of this court, continue to conduct business and affairs, advertise, and campaign to recruit additional members for defendant association, all with the described intent, for the described purpose, and by the described means, whereby they are likely to, and will, mislead and deceive members of plaintiff and of the general public into the belief the business and affairs of plaintiff are the business and affairs of defendants, and that the place where defendants conduct their business and affairs is that of plaintiff.

12. Unless enjoined by this court, the actions and conduct of defendants, and each of them, as described in this complaint will cause great and irreparable injury to plaintiff and the public, since pecuniary compensation would not afford plaintiff adequate relief for the loss of potential members and supporters it would proximately suffer thereby or the public for the loss of an opportunity to become members and supporters of plaintiff. In view of the continuing nature of defendants' conduct, plaintiff would have to file numerous civil actions for damages, leading to a multiplicity of judicial proceedings.

13. As a further proximate result of defendants' wrongful conduct, plaintiff has suffered the following injuries and damage: _____ [*allege damages to plaintiff's property to the date of the complaint*]. Plaintiff will be further damaged in like manner so long as defendants' conduct continues; the full amount of such damage is not now known to plaintiff and plaintiff will seek leave to amend this complaint to state that amount when it becomes known to plaintiff, or on proof of the amount.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For an order requiring defendants to show cause, if any they have, why they should not be enjoined as hereinafter set forth, during the pendency of this action.

2. For a preliminary injunction and a permanent injunction, both enjoining defendant association and the officer defendants, and each of them, and their agents, servants, and employees, and all persons acting under, in concert with, or for them:

a. From using the name _____ [*name of plaintiff*] or any other name confusingly, misleadingly, or deceptively similar to it, and from doing or conducting any business or affairs of any kind in this name, including the use of this name in the solicitation of advertising in defendant association's newspaper, in advertising for defendant association, and in campaigning to recruit additional members for defendant association; and

b. From using plaintiff's insignia, or any insignia that is confusingly, misleadingly, or deceptively similar to plaintiff's, in any manner whatsoever; and

3. For damages according to proof.

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

[*Verification. See form in § 61.85[1], and discussion in [4], below.*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action for unfair trade name competition by an unincorporated association against a rival association and its officers. The complaint seeks to enjoin defendants from using plaintiff's name or any other name confusingly, misleadingly, or deceptively similar to it, in its business and affairs, and from using plaintiff's insignia in any way [*see Bus. & Prof. Code § 17203*; *Corp. Code § 21308*; *see also* discussion in *§ 61.43[1]*]. The complaint also seeks damages [*see Corp. Code § 21309*].

[3] Allegations

This complaint alleges the following facts:

- Name, capacity, and purpose of the plaintiff association (Paragraphs 1, 2).

- Names and capacities of the defendant association and of the individual defendants (Paragraphs 3, 4).

- Fictitious name allegations, if appropriate (Optional Paragraph 5).

- Agency allegations (Paragraph 6).

- Plaintiff's prior and continuous use of a trade name in such a way that a secondary meaning is acquired (Paragraphs 7, 8).

- Plaintiff's prior adoption and continuous use of an insignia (Paragraph 2).

- Defendants' subsequent unauthorized use of the same or a confusingly similar trade name and/or insignia (Paragraph 9) [*see Corp. Code § 21308*].

- Likelihood of confusion in the minds of the public of the defendant's business with plaintiff's (Paragraphs 10-12) [*see Sunset House Distributing Corp. v. Coffee Dan's, Inc. (1966) 240 Cal. App. 2d 748, 753, 50 Cal. Rptr. 49]* .

- To justify injunctive relief, great and irreparable injury, inadequacy of pecuniary compensation, and a multiplicity of judicial proceedings, unless the injunction is granted (Paragraph 12) [*see Civ. Code § 3422*; *Code Civ. Proc. § 526(a)(2)*].

- Damages caused by defendants' unauthorized use of plaintiff's name and/or insignia (Paragraph 13) [*see Corp. Code § 21309*].

[4] Verification

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ;

Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581] . In a limited civil case, the court may issue temporary restraining orders and preliminary injunctions, but not permanent injunctive relief; thus, when permanent injunctive relief is sought, the action cannot be brought as a limited civil case [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*]. For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

If no preliminary injunctive relief is sought, the complaint need not be verified [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings need not be verified)]. However, if the complaint is verified in a superior court action that is not a limited civil case, the defendant must file a verified answer [*Code Civ. Proc. §§ 92(b), 446(a)*] and is precluded from making a general denial [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Cross References

For additional forms for use in actions involving infringement of trade names, see Ch. 549, *Trademarks and Trade Names*

For additional forms for use in actions involving unfair competition, see Ch. 565, *Unfair Competition*

California Forms of Pleading and Practice--Annotated

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 62 ATTACHMENT

6-62 California Forms of Pleading and Practice--Annotated 62.syn

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[1] FORM

[2] Use of Form

[3] Additional Uses of Form

[4] Filling Out the Form

[a] General Information

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[1] FORM

[2] Use of Form

[3] Additional Use of Form

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[2] Use of Form

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[4] Filling Out the Form

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[c] Order

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[5] Cross Reference

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[2] Use of Form

[3] Effect of Order

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[1] FORM

[2] Use of Form

[3] Additional Use of Form

[4] Filling Out the Form

[a] General Instructions

[b] Supporting Facts

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[1] FORM

[2] Use of Form

[3] Additional Use of Form

[4] Filling Out the Form

[a] General Instructions

[b] Court Order

[5] Cross Reference

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[1] FORM

[2] Use of Form

[3] Additional Uses of Form

[4] Time for Filing

[5] Filling Out the Form

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[1] FORM

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[f] Substitute Undertaking for Property

[g] Order to Increase Plaintiff's Undertaking

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[j] Order to Release Property Levied on Due to Filing Undertaking on Appeal

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[6] Cross References

§ 62.143 Order to Set Aside Right to Attach Order, Release Attached Property, etc. [Code Civ. Proc. §§ 485.240, 488.720, 488.740, 489.220, 489.310, 489.420, 492.050, 995.930]--Judicial Council Form AT-175

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[3] Additional Uses of Form

[4] Filling Out the Form

[a] General Instructions

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[c] Setting Aside Right to Attach Order

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[ii] Nonresident Defendant

[d] Releasing Property in Excess of Amount to be Secured

[e] Substituting Undertaking for Property

[f] Insufficiency of Undertaking

[g] Discharging Attachment and Releasing Property After Judgment

[h] Releasing Property After Undertaking on Appeal

[5] Cross References

§ 62.144 Examination Proceedings--Ex Parte Application and Order for Appearance and Examination of Third Person With Possession or Control of Property [Code Civ. Proc. § 491.110]--Judicial Council Form AT-138

[1] FORM

[2] Use of Form

[3] Ex Parte Application

[4] Filling Out the Form

[a] Order to Appear for Examination

[b] Application for Order to Appear for Examination

[i] Status of Plaintiff and Examinee

[ii] Examinee's Residence

[c] Verification

[d] Page Two of Form

[5] Cross References

§ 62.145 Notice of Opposition to Claim of Exemption [Code Civ. Proc. §§ 482.100, 484.530, 485.610, 703.560]

[1] FORM

[2] Use of Form

[3] Time for Filing and Hearing

[4] Contents of Notice

§ 62.146 Proceedings for Order Determining Claim of Exemption [Code Civ. Proc. §§ 482.100, 484.530, 485.610, 703.550]--Notice of Motion

[1] FORM

[2] Use of Form

[3] Cross References

§ 62.147 Proceedings for Order Determining Claim of Exemption [Code Civ. Proc. §§ 482.100, 484.530, 485.610, 703.550]--Order

[1] FORM

[2] Use of Form

[3] Cross Reference

§ 62.148 Declaration in Support of Application to Vacate or Stay Attachment Against Service Member [Mil. & Vet. Code § 403(c)(2)]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 62.149 Application to Vacate or Stay Attachment Against Service Member [Mil. & Vet. Code § 403(c)(2)]

[1] FORM

[2] Use of Form

[3] State Statutes

§§ 62.150-62.169 [Reserved]

§ 62.170 Writ of Attachment [Code Civ. Proc. § 488.010]--Judicial Council Form AT-135

[1] FORM

[2] Use of Form

[3] Filling Out the Form

[a] General Instructions

[b] Property Information

§ 62.171 Notice of Attachment [Code Civ. Proc. §§ 482.030, 488.060]--Judicial Council Form AT-165

[1] FORM

[2] Use of Form

[3] Contents of Notice

[4] Filling Out the Form

[5] Use by Levying Officer

[6] Information for Person Served

§ 62.172 Notice of Attachment Lien--California Secretary of State Form

[1] FORM

[2] Use of Form

[3] Contents of Notice

[4] Copy for Acknowledgment

[5] Effect of Filing

§ 62.173 Instructions to Levying Officer [Code Civ. Proc. § 488.030]

[1] FORM

[2] Use of Form

[3] Contents of Instructions

[4] Instructions by Registered Process Server

[5] Deposit of Expenses

[6] State Statutes

§ 62.174 Proceedings for Order Appointing Receiver or Directing Levying Officer to Take Action re Attached Perishable Property [Code Civ. Proc. § 488.700]--Notice of Motion

[1] FORM

[2] Use of Form

[3] Cross References

§ 62.175 Proceedings for Order Appointing Receiver or Directing Levying Officer to Take Action re Attached Perishable Property [Code Civ. Proc. § 488.700]--Order Granting Motion

[1] FORM

[2] Use of Form

[3] Cross Reference

§ 62.176 Proceedings to Extend Attachment on Property [Code Civ. Proc. § 488.510]--Notice of Motion

[1] FORM

[2] Use of Form

[3] Length of Extension and Procedure

[4] Cross References

[5] Decisions

§ 62.177 Proceedings to Extend Attachment [Code Civ. Proc. § 488.510]--Order Granting Motion

[1] FORM

[2] Use of Form

[3] Cross Reference

§§ 62.178-62.189 [Reserved]

§ 62.190 [Reserved]

§ 62.191 Proceedings for Order Permitting Creation of Lien in Pending Action or Proceeding [Code Civ. Proc. §§ 491.410(a), 491.415(b)]--Notice of Motion

[1] FORM

[2] Use of Form

[3] Procedure

[a] Motion Concurrent With Application for RTAO

[b] When RTAO Already Obtained

[c] Undertaking

[d] Exemption

[4] Filing Notice of Lien

[5] Cross Reference

§ 62.192 Proceedings for Order Permitting Creation of Lien in Pending Action or Proceeding [Code Civ. Proc. §§ 491.410(a), 491.415(b)]--Order Granting Motion

[1] FORM

[2] Use of Form

[3] Cross Reference

§ 62.193 Notice of Lien in Pending Action to Secure Amount to Be Secured by Plaintiff's Existing Attachment [Code Civ. Proc. §§ 491.410, 491.420]--Judicial Council Form AT-180

[1] FORM

[2] Use of Form

[3] Filling Out the Form

[a] Title and Status of Action

[b] Contents

[4] Service

[5] Cross References

§ 62.194 Procedures in Response to Creation of Lien in Pending Action or Proceeding--Notice of Motion to Claim Exemption of Money or Property and Terminate Lien [Code Civ. Proc. § 491.470(a)]

[1] FORM

[2] Use of Form

[3] Service

[4] Opposition

[5] Hearing on Motion

[6] Waiver

§ 62.195 Procedures in Response to Creation of Lien in Pending Action or Proceeding--Notice of Motion and Supporting Declaration for Order to Allow Enforcement of Judgment or Compromise, Dismissal, Settlement, or Satisfaction [Code Civ. Proc. § 491.440(b)]

[1] FORM

[2] Use of Form

§ 62.196 Procedures in Response to Creation of Lien in Pending Action or Proceeding--Notice of Motion and Supporting Declaration for Order That Judgment Be Attached or Otherwise Applied to Satisfaction of Lien [Code Civ. Proc. § 491.460(a)]

[1] FORM

[2] Use of Form

[3] Available Orders

§ 62.197 Procedures in Response to Creation of Lien in Pending Action or Proceeding--Order Granting Motion to Terminate Lien [Code Civ. Proc. § 491.470(b)] or to Attach Judgment or Satisfy Lien [Code Civ. Proc. § 491.460]

[1] FORM

[2] Use of Form

[3] Order Terminating Lien

[4] Orders Attaching Judgment or Otherwise Satisfying Lien

[5] Cross Reference

§§ 62.198-62.209 [Reserved]

§ 62.210 Complaint for Damages on Attachment Undertaking [Code Civ. Proc. §§ 490.020, 490.060, 996.430]--Against Corporate Surety--Loss of Sale of Real Property

[1] FORM

[2] Use of Form

[3] Verification

[4] Cross References

[5] State Statutes

[6] Decisions

§ 62.211 Complaint for Damages on Attachment Undertaking [Code Civ. Proc. §§ 490.020, 490.060, 996.430]--Against Sureties--Summary Judgment Granted to Attachment Defendant

[1] FORM

[2] Use of Form

[3] Cross Reference

§ 62.212 Allegations--Malicious Prosecution--Attachment Issued Without Valid Claim

[1] FORM

[2] Use of Form

[3] Attachment as Grounds for Action

[4] State Statutes

[5] Decisions

§ 62.213 Allegations--Abuse of Process--Regularly Issued Attachment Used for Improper Purpose

[1] FORM

[2] Use of Form

[3] Abuse of Process

[4] Decisions

[5] Cross Reference

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 62 ATTACHMENT
PART I. SCOPE

6-62 California Forms of Pleading and Practice--Annotated § 62.01

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§ 62.01 Scope of Chapter

This chapter discusses the provisional remedy of attachment, including the following topics:

- What attachment is and when it is generally available [*see § 62.10* et seq.].
- Procedures that may be used by a plaintiff to obtain a writ of attachment, including the following:
  - Procedures for obtaining a writ of attachment or a temporary protective order [*see § 62.30* et seq.].
  - Procedures for levying on property pursuant to a writ of attachment [*see § 62.38* et seq.].
  - Liens to secure the amount to be secured by an attachment [*see § 62.46* et seq.].
  - Examination of third persons concerning the defendant's property [*see § 62.55* et seq.].
  - Creditor suits when a third person has possession or interest in the defendant's property or owes a debt to the defendant [*see § 62.61* et seq.].
  - Release of attached property by the levying officer [*see § 62.64* et seq.].
- Procedures for use by a defendant to oppose attachment proceedings [*see § 62.80* et seq.].

Forms covering attachment generally [*see § 62.130* et seq.], levy procedures [*see § 62.170* et seq.], liens [*see § 62.191* et seq.], and wrongful attachment [*see § 62.210* et seq. are provided.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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PART I. SCOPE

6-62 California Forms of Pleading and Practice--Annotated § 62.02

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§ 62.02 Cross References

For forms involving the continuation of an attachment pending appeal, see Ch. 43, *Appeal: Stay of Proceedings* .

For a discussion and forms relating to consumer's rights, see Ch. 127, *Consumer Contracts and Loans* , Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* , and Ch. 129, *Consumer Credit Reporting* .

For a form of attachment for a defaulter, see Ch. 135, *Contempt* .

For a form of complaint against a sheriff for conversion for allowing attached property to be sold for storage charges, see Ch. 150, *Conversion* .

For discussion and forms relating to the enforcement of money judgments and third-party claims, see Ch. 254, *Executions and Enforcement of Judgments* , General Introduction, Parts I, V.

For a discussion and forms relating to garnishment, see Ch. 276, *Garnishment* .

For forms for use in a proceeding for an order that a warrant of body attachment issue for disobedience of a writ of habeas corpus, and a form of attachment warrant, see Ch. 292, *Habeas Corpus* .

For forms for attachment of logs and products subject to logger's or lumberman's lien, see Ch. 350, *Logs and Timber* .

For a form of notice of motion to enforce liability of a surety on a bond given in an action or proceeding, see *Ch. 538, Suretyship, Bonds, And Undertakings, § 538.40* et seq.

Legal Topics:

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

Banking LawConsumer ProtectionState LawGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureRemediesProvisional RemediesGarnishmentsCivil ProcedureSanctionsContemptCivil ContemptTortsIntentional TortsConversionGeneral Overview

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6-62 California Forms of Pleading and Practice--Annotated §§ 62.03-62.09

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[Reserved]

§§ 62.03[Reserved]

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Chapter 62 ATTACHMENT
PART II. LEGAL BACKGROUND
A. Overview of Attachment

6-62 California Forms of Pleading and Practice--Annotated § 62.10

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§ 62.10 Attachment as Provisional Remedy

[1] Purpose

Attachment is a prejudgment remedy that requires a court to make a preliminary determination of the merits of a dispute involving a debtor and creditor. It allows the creditor, who has followed the statutory requirements and who has established a prima facie claim, to have a lien recorded against real property and/or the debtor's assets seized and held until final adjudication at trial [*see Lorber Industries v. Turbulence, Inc. (1985) 175 Cal. App. 3d 532, 535, 221 Cal. Rptr. 233]* .

PRACTICE TIP:

Attachment Generally Expensive. Generally, an attach ment application involves significant expense for a client and is not cost-effective unless there is property available to attach. If your client has no information about attachable assets (including information regarding values or liens), retention of an investigator for an asset search may be advisable at the outset.

[2] Governing Law and Definitions

Attachment is strictly governed by the statutory Attachment Law as set forth in *Code Civ. Proc. § 481.010 et seq.* [*see Bank of America v. Salinas Nissan, Inc. (1989) 207 Cal. App. 3d 260, 270, 254 Cal. Rptr. 748]* . Unless a provision of the Attachment Law or the context otherwise requires, definitions set forth in the Attachment Law [*see Code Civ. Proc. § 481.020 et seq.*] govern its construction [*Code Civ. Proc. § 481.010*]. The most important definitions are as follows:

- "Personal property" includes both tangible and intangible personal property [*Code Civ. Proc. § 481.175*].

- "Probable validity" refers to a claim when it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim [*Code Civ. Proc. § 481.190*].

NOTE:

Plaintiff's Burden of Proof. The plaintiff has the burden of proof in establishing the right to a right-to-attach-order (RTAO). Since the court must make an affirmative finding of "probable validity," the mere absence of opposition does not cure a plaintiff's deficient showing.

- "Property" includes real and personal property and any interest therein [*Code Civ. Proc. § 481.195*].

- "Real property" includes any right in real property, including, but not limited to, a leasehold interest in real property [*Code Civ. Proc. § 481.203*].

- "Registered process server" means any person registered as a process server under *Bus. & Prof. Code § 22350 et seq.* [*Code Civ. Proc. § 481.205*].

- "Secured party" means a lender, seller, or other person in whose favor a security interest exists, including a person to whom accounts or chattel paper have been sold. If a security interest is in favor of a trustee, indentured trustee, agent, collateral agent, or other representative, the representative is a secured party [*Code Civ. Proc. § 481.207*; *Com. Code § 9102(a)(72)*].

[3] Performance of Judicial Duties

In attachment proceedings, a judge, or a temporary judge appointed under the state constitution [*see Cal. Const., art. VI, § 21*], must perform all judicial duties in the determination of [*Code Civ. Proc. § 482.060(b), (c)*]:

- Contested claims of exemption.

- Contested motions for determination of liability and damages for wrongful attachment.

- Contested third-party claims.

- Contested proceedings to enforce a third person's liability.

All other judicial duties are "subordinate" and may be performed by appointed officers, such as commissioners [*Code Civ. Proc. § 482.060(a)*; *see Cal. Const., art. VI, § 22*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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6-62 California Forms of Pleading and Practice--Annotated § 62.11

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§ 62.11 When Attachment Authorized

[1] Required Elements of Claim

With certain limited exceptions, a court may issue an attachment if the plaintiff's claim meets the following four requirements [*see Code Civ. Proc. § 483.010(a)-(c)*]:

- The claim is a claim for money that is based on an express or implied contract.
- The claim is of a fixed or readily ascertainable amount not less than $500.
- The claim is a commercial claim.
- The claim is not secured by real property.

Unless otherwise provided by statute, an attachment may be issued only in an action on one or more claims for money based on an express orimplied contract. The total amount of the claim or claims must be fixed or readily ascertainable and not less than $500, exclusive of costs, interest, and attorneys' fees [*Code Civ. Proc. § 483.010(a)*; *Kemp Bros. Construction, Inc. v. Titan Electric Corporation (2007) 146 Cal. App. 4th 1474, 1481, n.5, 53 Cal. Rptr. 3d 673]* . The term "contract" includes a lease of real or personal property [*see Stanford Hotel Co. v. M. Schwind Co. (1919) 180 Cal. 348, 352, 181 P. 780* ; *The CIT Group/Equipment Financing, Inc. v. Super DVD, Inc. (2004) 115 Cal. App. 4th 537, 540, 8 Cal. Rptr. 3d 927* (attachment may be issued for breach of lease so long as lease furnishes standard by which amount due may be determined)]. In addition, a claim brought under the Contractors' State License Law against an unlicensed contractor may form the basis for a right to attach order since an agreement for the performance of services lies at the heart of such a claim [*Goldstein v. Barak Construction (2008) 164 Cal. App. 4th 845, 853, 79 Cal. Rptr. 3d 603*].

Attachments are generally unavailable on tort claims due to their unascertainable amounts and because under *Code Civ. Proc. § 483.010(a)* attachment is available only on claims based on a contract, express or implied. Thus, unless perhaps a tort claim were characterized as a claim of implied contract or quasi-contract, attachment would not be available on a tort claim due to the necessity of satisfying the contract element [*Waffer Internat. Corp. v. Khorsandi (1999) 69 Cal. App. 4th 1261, 1277, 1277 n.16, 82 Cal. Rptr. 2d 241]* .

PRACTICE TIP:

Alternative Contract and Tort Claims. Attachment may be available if contract and tort claims are alternatively pled. For example, recission based on fraud, conversion, and embezzlement have been found to be appropriate bases for attachment [*see* *Klein v. Benaron (1967) 247 Cal. App. 2d 607, 609, 56 Cal. Rptr. 5]* . Attachment should always be available to secure liquidated contract claims seeking damages completely separate from those sought under a tort claim even when the claims are based on common facts [*Waffer Internat. Corp. v. Khorsandi (1999) 69 Cal. App. 4th 1261, 1277, 82 Cal. Rptr. 2d 241* (quoting *Baker v. Superior Court (1983) 150 Cal. App. 3d 140, 146-147, 197 Cal. Rptr. 480]* . Counsel should note, however, that an attachment might be found to be an election of remedies barring further recourse on the tort claim [§ 62.11[6]].

PRACTICE TIP: Aggregating Multiple Claims. Claims may be aggregated, but the total amount claimed in the action may not be less than $500. Generally, an expeditious remedy will be available for lesser amounts under the small claims procedure [*see* Ch. 526, *Small Claims*].

Attachment may also be authorized by other miscellaneous statutory provisions [*Code Civ. Proc. § 483.010*; *see, e.g., Civ. Code §§ 3052, 3065a*; *Code Civ. Proc. § 492.010*; *Food & Agric. Code § 281*; *Harb. & Nav. Code § 495.1*; *Health & Safety Code § 11501*; Lab. Code. § 5600; Rev. & Tax. Code. §§ 6713, 7864, 8972, 11473, 12680, 19373, 30302, 32352].

[2] Attachment Generally Unavailable for Claims Secured by Real Property

In general, an attachment may not be issued on a claim that is secured by a real property interest arising from an agreement, statute, or other rule of law. This includes any mortgage or deed of trust of realty and any statutory, common-law, or equitable lien on real property, but excludes any security interest in fixtures subject to *Com. Code § 9101 et seq.* [*Code Civ. Proc. § 483.010(b)*].

An exception to the general rule is applied when the claim was originally secured by an interest in real property but, without any act of the plaintiff or the person to whom the security was given, the security has become valueless or has decreased in value to less than the amount then owing on the claim. In this case, the amount for which an attachment may issue must not exceed the lesser of the amount of the decrease or the difference between the value of the security and the amount then owing on the claim [*Code of Civ. Proc. § 483.010(b)*].

NOTE:

Attachment on Unsecured Guaranty. Attachment may issue on an unsecured guaranty of an obligation secured by real or personal property, if the guaranty contains a waiver of the right to require the creditor to proceed first against the primary obligor or the obligor's security [*see* *American Guaranty Corp. v. Stoody (1964) 230 Cal. App. 2d 390, 394-396, 41 Cal. Rptr. 69]* .

PRACTICE TIP: Plaintiff's Burden of Proof. In seeking attachment on a claim secured by real property, the plaintiff has the burden of showing:

- The security has diminished in value.

- The plaintiff was not responsible for the diminution.

Although it is no longer necessary for such averments to be included in the plaintiff's affidavit, it is prudent to do so since the court need not consider additional evidence at the attachment application hearing without good cause [*Bank of America v. Salinas Nissan, Inc. (1989) 207 Cal. App. 3d 260, 273, 254 Cal. Rptr. 748]* . When Judicial Council attachment forms are used, however, the court does not need to make a specific finding that the plaintiff was not responsible for any diminution in the security's value. That finding is implicit in the language of the court order that "[t]he claim upon which the application is based is one upon which an attachment may be issued" [*Bank of America v. Salinas Nissan, Inc. (1989) 207 Cal. App. 3d 260, 272, 254 Cal. Rptr. 748]* .

In an action to foreclose a mortgage or deed of trust on real property or an estate for years in real property, pursuit of a remedy under the Attachment Law does not constitute an action for recovery of a debt for the purposes of the one action rule of *Code Civ. Proc. § 726(a)* or a failure to comply with any other statutory or judicial requirement to proceed first against security [*Code Civ. Proc. § 483.012*].This provision is subject to the restrictions of *Code Civ. Proc. §§ 580b* and *580d* (antideficiency judgment rules) [*Code Civ. Proc. § 483.012*]. For discussion of the oneaction rule and antideficiency statutes, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

[3] Attachment of Claim Secured by Interest in Personal Property

Attachment is available when the plaintiff's claim is partially secured by personal property.

Effective January 1, 1991, attachment became available on a claim secured by an interest in personal property, including any security interest in fixtures [*Code Civ. Proc. § 483.010(b)*, as amended by Stats. 1990, ch. 943, § 1; *see Com. Code § 9101 et seq.*]. The sunset clause that would have reinstated the prohibition on attachment of claims secured by personal property was repealed in 1997, so that *Code Civ. Proc. § 483.010(b)* will continue to allow attachment of such claims [*see* Stats. 1997, ch. 222, § 1; 26 Cal. L. Revision Comm'n Reports 311, 312]. The amount that may be secured by attachment is reduced by the value of the security interest plaintiff holds to secure the debt [*see Code Civ. Proc. § 483.015(b)(2)*; for further discussion, *see § 62.12[1]*]. The objective behind this provision is to afford an undersecured creditor the same rights as an unsecured creditor [*see* 26 Cal. L. Revision Comm'n Reports 312].

[4] Claim Must Involve Commercial Obligation

If the defendant is a natural person, an attachment may be issued only on a claim that arises out of the defendant's conduct of a trade, business, or profession. Thus, attachment is not available when a claim against a natural person is based on the sale or lease of property, a license to use property, the furnishing of services, or the loan of money, if the property, services, or money was used by the defendant primarily for personal, family, or household purposes [*Code Civ. Proc. § 483.010(c)*]. This reflects the intent of the Legislature that attachment be available only for commercial obligations, and not consumer debts.

ILLUSTRATION:

Claim Not Arising From Business. Plaintiff seeks to attach real property owned by a nonresident defendant, asserting that plaintiff's claim arose out of defendant's business as a real estate broker. Defendant is an 86-year-old woman who is disposing of her real property before moving to Mexico. The real property sought to be attached has been owned by defendant for over 30 years. Will plaintiff prevail in attaching defendant's real property? No. In selling her own real property in contemplation of a move out-of-state, defendant is not engaging in a trade, business, or profession. Even assuming that defendant is a real estate broker, the evidence compels the conclusion that real property held for over 30 years and sold under such circumstances is a personal investment [*Nakasone v. Randall (1982) 129 Cal. App. 3d*

757, 763-765, 181 Cal. Rptr. 324] .

ILLUSTRATION: Claim Arising From Profession. Two individuals execute a note on behalf of a lighting corporation, as the corporation's president and secretary. The creditor brings suit on the note against the corporation and the two individual guarantors and applies for an attachment. The trial court requires the establishment of identity between the defendant guarantors and the primary obligor on the basis of the alter ego doctrine before permitting an attachment to issue against the defendant guarantors. Finding no identity between the corporation and the individual defendants, the court denies the application for attachment as to the two individual defendants, but grants it as against attachable assets of the corporation. Did the trial court apply a correct standard for determining the availability of the attachment remedy? No. The "alter ego" standard is inappropriate. In cases involving guarantees by principal shareholders of closely held corporations, the correct standard should be as follows: if the sum total of the circumstances justifies the conclusion that the guarantor occupied himself or herself to a substantial degree and on a continuing basis in promoting his or her own profit through provision of credit or management to the primary obligor, a guarantee executed in the course of such activity may properly be considered an obligation arising out of the conduct of the guarantor's business [*Advance Transformer Co. v. Superior Court (1974) 44 Cal. App. 3d 127, 144, 118 Cal. Rptr. 350]* .

[5] Demand for Other Relief No Bar to Attachment

An attachment may be issued whether or not other forms of relief are demanded [*Code Civ. Proc. § 483.010(d)*]. However, under certain circumstances the doctrine of election of remedies might prevent a plaintiff from proceeding on a tort cause of action after an attachment is granted, if both the tort and contract causes of action arise from the same set of facts. See discussion § 62.11[6].

[6] Election of Remedies

Broadly speaking, election of remedies is the act of choosing between two or more concurrent but inconsistent remedies based on the same state of facts. Ordinarily, a plaintiff need not elect, and cannot be compelled to elect, between inconsistent remedies during the course of trial prior to judgment [*Baker v. Superior Court (1983) 150 Cal. App. 3d 140, 144, 197 Cal. Rptr. 480]* . There is uncertainty, however, as to whether and to what extent, if any, the doctrine of election of remedies applies in the context of an attachment.

It has been held that an action in tort for fraud in which punitive damages are sought is inconsistent with an action for money had and received. Pleading the two causes of action in the alternative does not, however, constitute a binding election of remedies, because pleading inconsistent counts is permissible. Obtaining an attachment, however, constitutes a positive act in the pursuit of the contractual remedy. By levying under the writ, defendant is deprived of the use of defendant's property and plaintiff obtains an advantage over defendant. Under suchcircumstances, the doctrine of election of remedies has been held to apply [*see* *Steiner v. Rowley (1950) 35 Cal. 2d 713, 720, 221 P.2d 9* ; *Roam v. Koop (1974) 41 Cal. App. 3d 1035, 1040, 116 Cal. Rptr. 539* (doctrine of election of remedies is affirmative defense applicable to tort cause of action, but defense waived by failure to raise it in trial court)].

More recently, it has been said that it is doubtful that the doctrine of election of remedies has any continuing viability in the attachment context, in that the cases which pioneered the application of the doctrine in the attachment context were dealing with a type of attachment law that no longer exists [*Waffer Internat. Corp. v. Khorsandi (1999) 69 Cal. App. 4th 1261, 1268, 82 Cal. Rptr. 2d 241]* . After *Randone v. Appellate Dep't of Superior Court (1971) 5 Cal. 3d 536, 96 Cal. Rptr. 709, 488 P.2d 13* , in which the former attachment law was held unconstitutional, a new attachment law replete with due process protections and procedures was enacted [*Waffer Internat. Corp. v. Khorsandi (1999) 69 Cal. App. 4th 1261, 1273-1274, 82 Cal. Rptr. 2d 241]* . In the post-*Randone* era, the election doctrine is now viewed as harsh and disfavored. It has been held that the doctrine does not apply when differing operative facts are involved in the

contract and tort claims. This is a far reaching limitation on the doctrine, since a claim for fraud (or any other tort) will almost necessarily involve elements differing from a contract claim [*Waffer Internat. Corp. v. Khorsandi (1999) 69 Cal. App. 4th 1261, 1278, 82 Cal. Rptr. 2d 241]* . If all the elements were precisely the same, both claims would normally be the same claim, not different, which was essentially the same situation in *Steiner v. Rowley (1950) 35 Cal. 2d 713, 221 P.2d 9* , in which the claim for punitive damages was found barred by the election of remedies doctrine. *Steiner* predates *Randone* and the comprehensive revision of the attachment statutes, and it is questionable whether it would be decided the same way today [*Waffer Internat. Corp. v. Khorsandi (1999) 69 Cal. App. 4th 1261, 1275 n.15, 1278, 1278 n.17, 82 Cal. Rptr. 2d 241]* . *Roam v. Koop (1974) 41 Cal. App. 3d 1035, 1040* was also decided under pre-*Randone* law [*Waffer Internat. Corp. v. Khorsandi (1999) 69 Cal. App. 4th 1261, 1270, 82 Cal. Rptr. 2d 241]* .

Nor is a tort claim forfeited by election of remedies if the facts material to the contract claim arise at a different time than those material to the tort claim, nor if the contract or tort claims arise out of different rights and duties. These restrictions largely eliminate the application of the doctrine in the attachment context because (with the possible exception of circumstances like those presented in *Steiner v. Rowley, above*) a contractual obligation is different than a tort duty. Moreover, the inapplicability of the doctrine when tort and contract claims arise out of different rights and duties makes the doctrine inapplicable when the plaintiff's tort claims are directed at wholly different defendants than the contract claims. In the instance of wholly different defendants, different operative facts and separately enforceable legal rights and duties are clearly involved. Nor are tort claims barred by the election doctrine if different elements of damages are sought in the contract and tort claims [*Waffer Internat. Corp. v. Khorsandi (1999) 69 Cal. App. 4th 1261, 1278-1279, 82 Cal. Rptr. 2d 241]* .

Adding to these restrictions on the election doctrine is the proviso that the doctrine does not apply to forfeit tort claims unless the defendant has suffered substantial prejudice as a result of the plaintiff's attachment. Given the protections afforded by the current attachment law, it is incongruous to speak of a defendant being substantially prejudiced by enforcement of plaintiff's statutory rights [*Waffer Internat. Corp. v. Khorsandi (1999) 69 Cal. App. 4th 1261, 1279, 82 Cal. Rptr. 2d 241]* . The doctrine of election of remedies is an application of the broader concept of equitable estoppel. Since the current attachment statutes carefully protect a defendant's rights, and allow attachment only on prior court order in limited circumstances, it is doubtful that attachment today can ever be said to result in an inequity justifying estoppel [*Waffer Internat. Corp. v. Khorsandi (1999) 69 Cal. App. 4th 1261, 1265, 1279-1280, 82 Cal. Rptr. 2d 241* (even assuming election doctrine remains available in context of attachment in some situations, this case would not be one of them)].

PRACTICE TIP:

Waiver of Tort Claims. Tort claims are common in cases in which an attachment may be available on a contract or quasi-contract claim. By seeking an attachment there may be certain circumstances under which plaintiff's counsel might waive his or her client's tort claims--including possible punitive damages claims. Before making such an election of remedies, plaintiff's counsel should fully disclose the alternatives and other ramifications to the plaintiff. The disclosure, and the chosen course of conduct, should be confirmed in writing.

PRACTICE TIP: Election of Remedies. According to dicta in one court of appeals case, a defendant may be required to assert an election of remedies as a defense in the first instance. Failure to do so would preclude defendants from asserting the defense in the absence of changed circumstances. In addition, the court states that when the election of remedies defense is applicable, the court should issue the right-to-attach-order (RTAO) conditionally, giving the plaintiff the choice of electing between the writ of attachment and pursuing inconsistent remedies [*Baker v. Superior Court (1983) 150 Cal. App. 3d 140, 147 n.5, 197 Cal. Rptr. 480]* .

ILLUSTRATION: Contract Damages Separate From Tort Claims. Plaintiffs bring suit against defendant contractors, alleging breach of contract, fraudulent inducement, and various tort causes of

action. Plaintiffs obtain a writ of attachment and corresponding temporary restraining order prior to trial. Defendants move for partial summary judgment on the ground that plaintiffs are barred from asserting their tort claims because they elected to proceed on the contract claim by obtaining the attachment order. Are plaintiffs barred from pursuing their tort causes of action? No. Attachment is available to secure liquidated contract claims seeking damages completely separate from those sought under the tort claims, even when the claims are based on some common facts. Here, medical expenses and damages for emotional distress sought under the tort claims are separate and distinct from the liquidated damages requested in the contract cause of action [*Baker v. Superior Court (1983) 150 Cal. App. 3d 140, 144-145, 197 Cal. Rptr. 480]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentContracts LawRemediesElection of Remedies

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 62 ATTACHMENT
PART II. LEGAL BACKGROUND
A. Overview of Attachment

6-62 California Forms of Pleading and Practice--Annotated § 62.12

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.12 Attachable Property

[1] Amount Securable by Attachment

In general, the amount to be secured by an attachment is the sum of the amount of the defendant's indebtedness claimed by the plaintiff together with prejudgment interest, allowable costs, and attorney's fees allowed by the court pursuant to contract or statute [*Code Civ. Proc. § 483.015(a)*; *see Code Civ. Proc. § 482.110*]. Separate provisions govern securable amounts in unlawful detainer actions [*see 62.12[2]*].

PRACTICE TIP:

Inclusion of Anticipated Costs. A declaration from counsel can be used to justify inclusion of anticipated costs that may be out of the ordinary, and to set forth a computation of anticipated prejudgment interest through the date of trial.

The amount determined under the general rule must be reduced by the sum of the following [*Code Civ. Proc. § 483.015(b)*]:

- The amount of any money judgment in favor of the defendant and against the plaintiff that remains unsatisfied and is enforceable.

- The amount of any indebtedness of the plaintiff that the defendant has claimed in a cross complaint filed in the action if the defendant's claim is one on which an attachment could be issued.

- The amount of any claim of the defendant asserted as a defense in the answer [*see Code Civ. Proc. § 431.70*], if the defendant's claim is one on which an attachment could be issued had an action been brought on the claim when it was not barred by the statute of limitation.

- The value of any security interest in the property of the defendant held by the plaintiff to secure the

defendant's indebtedness claimed by the plaintiff, together with the amount by which the value of the security interest has decreased because of the act of the plaintiff a prior holder of the security interest.

PRACTICE TIP:

Attachment as to Multiple Defendants. It is not excessive for a plaintiff to attach property of multiple defendants with value equal to the full amount of the claim as to each defendant.

[2] In Unlawful Detainer Proceedings

In an unlawful detainer proceeding, a writ of attachment may be issued to secure the sum of the following amounts [*Code Civ. Proc. § 483.020*]:

- The amount of rent due and unpaid as of the date the complaint was filed [*Code Civ. Proc. § 483.020(a)(1)*].

- An amount equal to the amount of rent, computed at the rate provided in the lease, for the period from the date the complaint is filed to the estimated date of judgment or the estimated date of plaintiff's recovery of possession, whichever estimated date is earlier. This additional amount may be included, in the court's discretion, only if the plaintiff seeks it in the application for a right-to-attach order (RTAO) and a writ of attachment [*Code Civ. Proc. § 483.020(a)(2), (b), (c)*].

- Any additional amount included by the court under *Code Civ. Proc. § 482.110*, providing for costs and attorney's fees [*Code Civ. Proc. § 483.020(a)(3)*].

From the amount determined above, the following amounts, if applicable, must be subtracted [*Code Civ. Proc. § 483.020(d), (e)*]:

- The amount of any payment or deposit that the plaintiff has received or holds solely to secure the payment of rent. This provision does not apply to payments or deposits that secure both the payment of rent and also the performance of other obligations under the lease or only the performance of other obligations under the lease.

- The amount of all claims that would diminish the amount of the plaintiff's recovery [*see Code Civ. Proc. § 483.015(b)*].

[3] Property Subject to Attachment

[a] Corporate, Partnership, or Association Property

If the defendant is a corporation, partnership, or other unincorporated association, all corporate, partnership, or association property that may be levied upon [*see Code Civ. Proc. § 488.300 et seq.*] is subject to attachment [*Code Civ. Proc. § 487.010(a), (b)*].

[b] Property of Natural Person

If the defendant is a natural person, all of the following property is subject to attachment [*Code Civ. Proc. § 487.010(c)*]:

- Interests in real property, except leasehold estates with unexpired terms of less than one year.

- Accounts receivable, chattel papers, and general intangibles arising out of the conduct by the

defendant of a trade, business, or profession, except any such individual claim with a principal balance of less than $150.

- Equipment.

- Farm products.

- Inventory.

- Final money judgments arising out of the conduct by the defendant of a trade, business, or profession.

- Money on the premises where a trade, business, or profession is conducted by the defendant.

- Except for the first $1,000, money located elsewhere than on the premises where the defendant conducts a trade, business, or profession, and deposit accounts, unless the defendant has more than one deposit account or has at least one deposit account and money located elsewhere. In the latter case, the court, on application of the plaintiff, may order that the writ of attachment be levied so that an aggregate amount of $1,000 in the form of such money and in such accounts remains free of levy.

- Negotiable documents of title.

- Instruments.

- Securities.

- Minerals or the like, including oil and gas, to be extracted.

Community property that otherwise qualifies under the criteria above is subject to attachment, if it would be subject to enforcement of a judgment obtained in the action in which the attachment is sought [*Code Civ. Proc. § 487.010(d)*].

In general, when community property is sought to be attached, any provision of the Attachment Law that applies to property of the defendant also applies to the community property interest of the spouse of the defendant and to community obligations owed to either spouse. Similarly, any provision that applies to property in the possession or under the control of the defendant also applies to community property in the possession or under the control of the spouse of the defendant. These rules do not apply when a provision or the context requires otherwise [*Code Civ. Proc. § 487.010(d)(1), (2)*].

[c] Homestead Property

The recording of a homestead declaration has no effect on the right to record an attachment lien, regardless of when the homestead was recorded [*Code Civ. Proc. § 487.025(a)*]. An attachment lien attaches to a homestead in the amount of any surplus over the total of all liens and encumbrances on the homestead at the time the attachment lien is created plus the statutory homestead exemption [*Code Civ. Proc. § 487.025(b)*; *see Code Civ. Proc. § 704.730*]. Nonetheless, a homestead is exempt from sale (except pursuant to a court order [*see Code Civ. Proc. § 704.740*]) to the extent provided by the Homestead Exemption [*see Code Civ. Proc. § 704.710 et seq.*; *see generally* Ch. 294, *Homesteads*] when it is sought to be sold to enforce the judgment obtained in the action in which the attachment is obtained [*Code Civ. Proc. § 487.025(d)*]. In addition, the defendant may protect a homestead by claiming an exemption for necessities [*Code Civ. Proc. § 487.025(c)*; *see Code Civ. Proc. § 487.020(b)*].

[d] Property Subject to Pending Action or Special Proceeding

The following property may be attached even if it is subject to a pending action or special proceeding [*Code Civ. Proc. § 488.475(a)*; *see Code Civ. Proc. § 488.300 et seq.*]:

- Real property.

- Growing crops, timber to be cut, or minerals or the like, including oil and gas, to be extracted or accounts receivable resulting from sales at the wellhead or minehead.

- Tangible personal property in the possession or control of the defendant or in the custody of a levying officer.

- The interest of a defendant in personal property in the estate of a decedent, whether the interest arises by testate or intestate succession.

Except as to those types of property set forth above, an attachment of property subject to a pending action or special proceeding is not effective [*Code Civ. Proc. § 488.475(b)*]. An action or proceeding is "pending" from the time the action or proceeding is commenced until judgment has been entered and the time for appeal has expired or, if an appeal is filed, until the appeal has been finally determined [*Code Civ. Proc. § 488.475(d)*]. If an attachment is attempted but is ineffective under this provision, a statement to that effect and the title of the court where the action is pending and the number of the pending action or proceeding must be given in any garnishee's memorandum requested by the levying officer [*see Code Civ. Proc. § 488.610*; *see also § 62.42[1]*]. However, if the defendant is a party in the pending action or proceeding, the plaintiff may nonetheless obtain a lien to secure the amount to be secured by attachment [*Code Civ. Proc. § 488.475(e)*; *see Code Civ. Proc. § 491.410 et seq.*, and § 62.46].

[e] Nonresident's Property

A nonresident's property subject to attachment is defined as any property for which a method of levy is provided under the Attachment Law [*Code Civ. Proc. § 492.040*; *see Code Civ. Proc. § 488.300 et seq.*]. The definition expressly excludes reference to the provisions defining property subject to attachment and exempt property with respect to defendants generally [*Code Civ. Proc. § 492.040*; *see Code Civ. Proc. §§ 487.010, 487.020*]. Once the nonresident defendant has filed a general appearance in the action, however, only the nonresident defendant's nonexempt property may be levied on. Any property previously levied on which is exempt under Code*Civ. Proc. § 487.020* must be released on order of the court [*Code Civ. Proc. § 492.040*]. For further discussion, see *§ 62.113[15]*.

[4] Property Exempt From Attachment

Except for certain fraudulent transfers [*see Civ. Code § 3439.07(a)(2)*], the following property is exempt from attachment [*Code Civ. Proc. § 487.020*;§ 62.30[7]]:

- All property exempt from enforcement of a money judgment [*see Code Civ. Proc. § 704.010 et seq.*].

- Property that is necessary for the support of a defendant who is a natural person or the defendant's family supported in whole or in part by the defendant.

- "Earnings" as defined by *Code Civ. Proc. § 706.011*, that is, compensation payable by an employer to an employee for personal services performed by the employee, whether denominated as wages, salary, commission, bonus, or otherwise [*see Code Civ. Proc. § 706.011(a)*].

- All property not subject to attachment pursuant to *Code Civ. Proc. § 487.010* [§ 62.111[2][n]].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesProvisional RemediesAttachmentsReal Property LawHomestead ExemptionsReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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Chapter 62 ATTACHMENT
PART II. LEGAL BACKGROUND
A. Overview of Attachment

6-62 California Forms of Pleading and Practice--Annotated § 62.13

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.13 General Provisions Applicable to Attachment

[1] Injunctive Relief Available

Nothing in the Attachment Law precludes the granting of injunctive relief [*see Code Civ. Proc. § 482.020*]. Injunctive relief, however, may not be granted when to do so will permit a party, in effect, to obtain prejudgment attachment without satisfying the statutory requirements for attachment [*Doyka v. Superior Court (1991) 233 Cal. App. 3d 1134, 1137, 285 Cal. Rptr. 14]* .

For discussion of and forms for obtaining injunctive relief, see Ch. 303, *Injunctions* .

[2] Use of Affidavits, Declarations, and Verified Complaints

Affidavits (or declarations under *Code Civ. Proc. § 2015.5*) filed under the Attachment Law [*see, e.g., Code Civ. Proc. §§ 484.030, 484.350*] must contain facts set forth with particularity. Except when matters are specifically permitted to be shown by information and belief [*see, e.g., Code Civ. Proc. §§ 484.510(b), 485.210(d)*], each affidavit or declaration must show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated. As to matters shown by information and belief, the affidavit or declaration must state the facts on which the affiant's belief is based, showing the nature of his or her information and the reliability of his or her informant. The affiant may be any person, whether or not a party to the action, who has knowledge of the facts [*Code Civ. Proc. § 482.040*].

PRACTICE TIP:

Content of Affidavits and Declarations. In affidavits and declarations, do not use conclusory language or copy ultimate facts from the complaint. Recite in clear language, with a foundation for each fact, each element (e.g., to satisfy the business records exception to the hearsay rule), and the basis for alleging execution of the contractual agreements and existence of default(s). Even if there is no opposition, admissible evidence is required. It is not good practice, therefore, to rely on a complaint for evidentiary purposes.

CAUTION:

Use of Verified Complaint. While a verified complaint that satisfies the statutory requirements generally may be used in lieu of, or in addition to, an affidavit [*Code Civ. Proc. § 482.040*], it will not serve as an affidavit or declaration establishing the facts set forth when the verification is made [*Code Civ. Proc. § 446*; *Lorber Industries v. Turbulence, Inc. (1985) 175 Cal. App. 3d 532, 536, 221 Cal. Rptr. 233]* :

- On behalf of a corporation or public agency by an officer of the corporation or agency.
- By an attorney because the parties are either absent from the county in which the attorney has his or her office or are otherwise unable to verify it.

[3] Availability of Records and Documents for Public Inspection

The plaintiff may request in writing when filing the complaint that the court clerk withhold the records and documents in the action from public access before the earlier of [*Code Civ. Proc. § 482.050(a)*]:

- 30 days after the filing of the complaint.
- The filing of the return of service of the notice of hearing and any temporary protective order, or of the writ of attachment, if issued without notice.

This request may be made in the form of a notation, made by rubber stamp or other suitable means, at the top of the first page of the complaint filed with the clerk [*Code Civ. Proc. § 482.050(c)*].

The clerk of the court, however, must make the entire file in the action available for inspection at any time to any party named in the complaint or to his or her attorney [*Code Civ. Proc. § 482.050(b)*].

In addition to the request in writing, the plaintiff must also file a declaration under oath pursuant to *Cal. Rules of Ct., Rule 2.580*. For a form of declaration, see *§ 62.140*.

[4] Method of Service

Except as otherwise provided in the Attachment Law, a writ, notice, order, or other paper required or permitted to be served may be served personally or by mail. With the exceptions noted below, the provisions regarding service with respect to enforcement of money judgments [*see Code Civ. Proc. §§ 684.010 et seq., 684.110 et seq.*; *see generally Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.] govern service under the Attachment Law, including the provisions extending time when service is made by mail [*Code Civ. Proc. § 482.070(b)*]. However, references in the enforcement of money judgment provisions to "judgment debtor" and to "judgment creditor" are deemed to be to the defendant and the plaintiff, respectively. Similarly, references to "writ" are deemed to be references to writ of attachment and those to "notice of levy" are deemed to be to notice of attachment [*Code Civ. Proc. § 482.070(c)*].

If the defendant has not appeared in the action and the Attachment Law requires that a writ, notice, order, or other paper be personally served, service is to be made in the same manner as a summons [*Code Civ. Proc. § 482.070(d)*; *see Code Civ. Proc. § 413.10 et seq.*; *see generally* Ch. 518, *Service of Summons and Papers*]. If the defendant has an attorney of record in the action, service is to be made on the attorney rather than the defendant. However, service of a subpoena or other process to require the attendance of the defendant or service of a paper to bring the defendant into contempt must be made personally on the defendant [*Code Civ. Proc. § 482.070(e)*].

Proof of service under the Attachment Law is governed by *Code Civ. Proc. § 684.210 et seq.*, which generally applies to enforcement of money judgments [*Code Civ. Proc. § 482.070(f)*].

PRACTICE TIP:

Personal Service. Temporary protective orders must also be served personally on the persons to be bound, in order to ensure the availability of a contempt order should a named person fail to comply [*see generally* Ch. 303, *Injunctions* , regarding enforcement by contempt].

[5] Order to Transfer Property

If a writ of attachment is issued, the court may also issue an order directing the defendant to transfer to the levying officer either or both of the following [*Code Civ. Proc. § 482.080(a)*]:

- Possession of the property to be attached, if the property is sought to be attached by taking it into custody.

- Possession of any documentary evidence of title to the property of, or the debt owed to, the defendant that is sought to be attached.

An order for the transfer of possession of documentary evidence of title may be served by the levying officer when the property is levied on or afterwards [*Code Civ. Proc. § 482.080(a)*]. The order must be personally served and must contain a notice to the defendant that failure to comply with the order may subject the defendant to arrest and punishment for contempt of court [*Code Civ. Proc. § 482.080(b)*]. A turnover order issued without a writ of attachment is not valid [*Pacific Decision Sciences Corp. v. Superior Court (2004) 121 Cal. App. 4th 1100, 1106-1107, 18 Cal. Rptr. 3d 104]* . In addition, a turnover order does not apply to a levy of attachment on an account receivable or a deposit account by taking the account into custody because these types of properties may not be taken into custody [*Pacific Decision Sciences Corp. v. Superior Court (2004) 121 Cal. App. 4th 1100, 1108-1109, 18 Cal. Rptr. 3d 104]* .

[6] Multiple Writs

Several writs in the same form may be issued simultaneously or from time to time on the same undertaking, whether or not any writ previously issued has been returned [*Code Civ. Proc. § 482.090(a)*; *see also* discussion § 62.13[8]].

[7] Alias Writ of Attachment

After the return of a writ of attachment, the plaintiff may demand at any time before judgment that the clerk issue an alias writ in the same form as the original without the requirement of a new undertaking [*Code Civ. Proc. § 482.090(b)*]. An alias writ may also issue on the filing by the plaintiff of an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) setting forth the loss of the writ of attachment [*Code Civ. Proc. § 482.090(b)*].

[8] Date of Issuance

The date of issuance of a writ of attachment is deemed to be the date the writ is first issued [*Code Civ. Proc. § 482.090(c)*]. Thus, additional writs in the same form [§ 62.13[6]] and alias writs [§ 62.13[7]] relate back to this date for purposes of determining the expiration of liens created by the writs [*see* Law Rev. Comm. Comment to *Code Civ. Proc. § 482.090(c)*].

[9] Effect of Bankruptcy Filing on Attachment Lien

An attachment levied within 90 days of a debtor's filing a petition in bankruptcy is voided by *Code Civ. Proc. § 493.030(b)*.

If a temporary protective order was issued more than 90 days before the commencement of the bankruptcy case, however, the attachment is not a voidable preference [*see 11 U.S.C. § 547*] because it is deemed created on the date the temporary protective order was granted [*In re Wind Power Systems, Inc. (9th Cir. 1988) 841 F.2d 288, 291* ; *see* Code Civ. Proc.§ 488.500(e)]. This result is not affected by *Code Civ. Proc. § 493.030(b)*. The latter provision was not amended after the addition of the relation-back provision [*In re Wind Power Systems, Inc. (9th Cir. 1988) 841 F.2d 288, 291]* . For discussion of preferential transfers, see Collier on Bankruptcy, 15th ed. (Matthew Bender).

NOTE:

Priority of Attachment Lien. The 9th Circuit recently interpreted the *Wind Power* case to hold that the priority of an attachment lien relates back to the date on which the writ was issued [*see In re Jenson (9th Cir. 1992) 980 F.2d 1254, 1259]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewCivil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticeService of ProcessGeneral OverviewCivil ProceduresRemediesInjunctionsGeneral OverviewCivil ProceduresRemediesProvisional RemediesAttachments

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[Reserved]

§§ 62.14[Reserved]

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PART II. LEGAL BACKGROUND
B. Procedures to Obtain, Enforce, or Release Attachment
1. Obtaining Attachment or Temporary Protective Order

6-62 California Forms of Pleading and Practice--Annotated § 62.30

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.30 Obtaining Writ Under Noticed Hearing Procedure

[1] Application

[a] Availability

On filing a complaint or at any time after, the plaintiff may apply for a right-to-attach order, referred to hereinafter as an "RTAO," and a writ of attachment by filing an application for the order and writ with the court in which the action is brought [*Code Civ. Proc. § 484.010*]. Use of a separate application for each defendant may be advisable or even required by certain courts. For a form of application, see *§ 62.130*.

PRACTICE TIP:
Forms in Federal Courts. Judicial Council forms may be used in federal court, once the appropriate changes are made to indicate the appropriate forum.

[2] Contents of Application

The application must be executed under oath and must include all of the following [*Code Civ. Proc. § 484.020*]:

- A statement showing that the attachment is sought to secure the recovery on a claim on which an attachment may be issued.

- A statement of the amount to be secured by the attachment.

- A statement that the attachment is not sought for a purpose other than the recovery on the claim on which the attachment is based.

- A statement that the applicant has no information or belief that the claim is discharged in a U.S. Code Title 11 bankruptcy proceeding or that the prosecution of the action is stayed in a Title 11 proceeding.

PRACTICE TIP:

Proceeding Against Bankrupt Codefendant. Plaintiff may proceed against a nonbankrupt codefendant, unless the bankrupt debtor is proceeding under Chapter 13 [*see 11 U.S.C. § 1301(a)*; for further discussion, *see Ch. 94, Bankruptcy § 94.34*, regarding codebtor's stay].

- A description of the property to be attached and a statement that the plaintiff is informed and believes that the property is subject to attachment. Concerning the description:

  - If the defendant is a corporation, a reference to "all corporate property which is subject to attachment pursuant to *Code Civ. Proc. § 487.010(a)*" is sufficient.

  - If the defendant is a partnership, or other unincorporated association, a reference to "all property of the partnership or other unincorporated association which is subject to attachment pursuant to *Code Civ. Proc. § 487.010(b)*" is sufficient.

  - If the defendant is a natural person, however, the description of the property must be reasonably adequate to permit the defendant to identify the specific property sought to be attached.

ILLUSTRATION:

Target All Defendant's Property. A plaintiff's application for an RTAO seeks to attach all of the following types of property owned by individual defendants: real property, personal property, equipment, motor vehicles, chattel paper, negotiable and other instruments, securities, deposit accounts, safe deposit boxes, accounts receivable, general intangibles, property subject to pending actions, final money judgments, and personalty in estates of decedents. Is this description legally sufficient? Yes. The property description requirements for property of individual defendants do not prevent a plaintiff from targeting for attachment everything an individual defendant owns. The purpose of the requirement is to enable the defendant to determine whether he or she desires to make a claim of exemption as to that property [*Bank of America v. Salinas Nissan, Inc. (1989) 207 Cal. App. 3d 260, 264, 267-268, 254 Cal. Rptr. 748]* .

PRACTICE TIP:

Anticipate and Counter Objections. On the initialapplication for an RTAO, counsel should anticipate and counter all possible objections. While the plaintiff may reapply for a writ of attachment, the plaintiff may be limited to presenting only new facts that were unavailable at the time of the first application [*see Film Packages, Inc. v. Brandywine Film Productions, Ltd. (1987) 193 Cal. App. 3d 824, 827-830* & n.3, *238 Cal. Rptr. 623]* .

[3] Supporting Papers

The application must be supported by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) showing that on the facts presented, the plaintiff would be entitled to a judgment on the claim on which the attachment is based [*Code Civ. Proc. § 484.030*; *see 62.13[2]*].

[4] Service on Defendant

The defendant must be served with all of the following [*see Code Civ. Proc. § 484.040*]:

- A copy of the summons and complaint.
- A notice of the application and hearing [§ 62.30[5]].
- A copy of the application and of any affidavit (or declaration under *Code Civ. Proc. § 2015.5*) in support of the application.
- A copy of the temporary protective order, if one has been granted.

If the defendant has not appeared in the action, these documents must be personally served. If the defendant has appeared, these documents must be served in the same manner and at the same time as notices of motions generally [*Code Civ. Proc. § 484.040(b)*; *see Code Civ. Proc. § 1005(a)(1), (b)*; *see generally* Ch. 518, *Service of Summons and Papers*]. Thus, all moving and supporting papers must be served and filed at least 16 court days before the hearing [*Code Civ. Proc. § 1005(b)*; *see also Cal. Rules of Ct., Rule 3.1300*]. The moving and supporting papers served must be a copy of the papers filed or to be filed with the court. If, however, the notice is served by mail, the 16-day notice period must be increased by [*Code Civ. Proc. § 1005(b)*]:

- 5 calendar days, if the place of mailing and the place of address are within the State of California.
- 10 calendar days, if either the place of mailing or the place of address is outside the State of California but within the United States.
- 20 calendar days, if either the place of mailing or the place of address is outside the United States.

If the notice is served by facsimile transmission, Express Mail, or another method of delivery providing for overnight delivery, the required 16-day period of notice before the hearing must be increased by two calendar days [*Code Civ. Proc. § 1005(b)*]. An extension of two court days, as opposed to calendar days, may apply in case of electronic service made pursuant to a local rule adopted under *Code Civ. Proc. § 1010.6* [*see Code Civ. Proc. § 1010.6(a)(6)*; for discussion, *see Ch. 518, Service of Summons and Papers, § 518.41[8]*].

[5] Contents of Notice of Application and Hearing

The notice of application and hearing must inform the defendant of all of the following [*see § 62.131*]:

(1) A hearing will be held at a place and time to be specified in the notice, on plaintiff's application for an RTAO and writ of attachment [*Code Civ. Proc. § 484.050(a)*; *see Code Civ. Proc. § 484.040* (no order or writ of attachment may be issued without a hearing)].

(2) The order will be issued if the court finds that the plaintiff's claim is probably valid and the other requirements for issuing the order are established. The hearing is not for the purpose of determining whether the claim is actually valid. The determination of the actual validity of the claim will be made in subsequent proceedings in the action and will not be affected by the decisions at the hearing on the application for the order [*Code Civ. Proc. § 484.050(b)*].

(3) The amount to be secured by the attachment is determined pursuant to *Code Civ. Proc. §§ 482.110* (amount for costs and attorney's fees), 483.010 (cases where attachment is authorized), 483.015 (amount to be secured by attachment), and 483.020 (amount in unlawful detainer proceeding), which must be summarized in the notice [*Code Civ. Proc. § 484.050(c)*].

(4) If an RTAO is issued, a writ of attachment will be issued to attach the property described in the plaintiff's application unless the court determines that the property is exempt from attachment, or that its value clearly exceeds the amount necessary to satisfy the amount to be secured by the attachment. However, additional writs of attachment may be issued to attach other nonexempt property of the defendant on the basis of the RTAO [*Code Civ. Proc. § 484.050(d)*].

(5) If the defendant desires to oppose the issuance of the order, he or she must file with the court a notice of opposition [§ 62.30[6]] and supporting affidavit (or declaration under *Code Civ. Proc. § 2015.5*) as required by *Code Civ. Proc. § 484.060* not later than five court days prior to the date set for the hearing [*Code Civ. Proc. § 484.050(e)*; *see Code Civ. Proc. §§ 484.060, 2015.5*].

(6) If the defendant claims that all or part of the property described in the application is exempt from attachment, he or she must include the claim in the notice of opposition filed and served [*see Code Civ. Proc. § 484.060* and *discussion under 62.30[6]*], or fileand serve a separate claim of exemption with respect to the property [*see Code Civ. Proc. § 484.070* and *discussion under § 62.30[7]*]. If he or she does not do so, the claim of exemption will be barred in the absence of a showing of a change in circumstances occurring after the expiration of the time for claiming an exemption [*Code Civ. Proc. § 484.050(f)*].

(7) The defendant may obtain a determination at the hearing whether real or personal property not described in the application, or real property described in the application, is exempt from attachment by including the claim in the notice of opposition [*see Code Civ. Proc. § 484.060*] or by filing and serving a separate claim of exemption with respect to the property [*see Code Civ. Proc. § 484.070*]. The failure to claim an exemption for property not described in the application will not, however, preclude the defendant from making a claim of exemption with respect to the property at a later time [*Code Civ. Proc. § 484.050(g)*].

(8) Either the defendant, the defendant's attorney, or both may be present at the hearing [*Code Civ. Proc. § 484.050(h)*].

(9) The defendant may seek the advice of an attorney, in the form of the following mandatory statement: "You may seek the advice of an attorney as to any matter connected with the plaintiff's application. The attorney should be consulted promptly so that the attorney may assist you before the time set for hearing" [*Code Civ. Proc. § 484.050(i)*].

PRACTICE TIP:

Ascertain Local Practice. Local practice must be ascertained and adhered to. Check to see if the particular court requires that the proof of service be filed by a certain date, where it should be filed, that the parties submit a "Separate Statement" (as in Los Angeles County Superior Court Central), or that the parties must meet and confer and file a declaration relating thereto (as in Orange County Superior Court pursuant to Orange Co. Coordinated Trial Ct. Rules, Rule 441).

[6] Notice of Opposition and Reply

If the defendant wishes to oppose an RTAO sought by the plaintiff or objects to the amount sought to be secured by the attachment, he or she must file and serve the plaintiff with a notice of opposition no later than five court days prior to the date set for the hearing [*Code Civ. Proc. § 484.060(a)*].

The notice of opposition must [*Code Civ. Proc. § 484.060(a)*]:

- State the grounds on which the defendant opposes the issuance of the order or objects to the amount sought to be secured by the attachment.

- Be accompanied by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) supporting any factual issues.

- Be accompanied by a memorandum of points and authorities supporting any legal issues raised.

For a form of opposition, see *§ 62.138*.

CAUTION:
Notice of Opposition Filing. If the defendant fails to file a notice of opposition within the time prescribed, he or she is not permitted to oppose the issuance of the order [*Code Civ. Proc. § 484.060(a)*].

The plaintiff may file and serve on the opposing party a reply two court days prior to the date set for the hearing [*Code Civ. Proc. § 484.060(c)*].

[7] Claim of Exemption by Defendant

[a] Exempt Property

The following property is exempt from attachment [*Code Civ. Proc. § 487.020*]:

- Property exempt from enforcement of a money judgment.

- Property necessary for support of defendant or defendant's family.

- Defendant's earnings.

- Property not subject to attachment under *Code Civ. Proc. § 487.010*.

For further discussion of these exemptions, see *§ 62.12[4]*.

[b] Methods for Claiming Exemption

If a defendant filing a notice of opposition wants to claim an exemption, there are two ways in which the exemption may be claimed:

- The defendant may include the claim in the notice of opposition [*Code Civ. Proc. § 484.060(b)*; *see Code Civ. Proc. § 484.070*;§ 62.30[6]].

- Alternatively, when real or personal property has been levied on pursuant to a writ of attachment issued on an ex parte application, a claim of exemption may be made within 30 days after the levying officer serves the defendant with the notice of attachment describing the property [*Code Civ. Proc. § 484.530*; *see Bank of America v. Salinas Nissan, Inc. (1989) 207 Cal. App. 3d 260, 269-270, 254 Cal. Rptr. 748]* .

[c] Procedure for Claiming Exemption for Real or Personal Property

The defendant may claim an exemption as to real or personal property levied on pursuant to the ex parte hearing

procedure [*see* Code Civ. Proc.§ 485.010 et seq.] by following the procedure set forth for claiming exemptions from post-judgment levies [*Code Civ. Proc. § 485.610(a)*; *see Code Civ. Proc. § 703.510 et seq.*; *see generally Ch. 254, Executions and Enforcement of Judgements, § 254.40* et seq., regarding exemptions]. For this purpose, references to the "judgment debtor" are to be deemed references to the defendant and references to the "judgment creditor" are to be deemed references to the plaintiff [*Code Civ. Proc. § 485.610(a)*].

Different time periods for claiming the exemption, however, apply to ex parte attachment proceedings. Thus, the defendant must claim a personal property exemption not later than 30 days after the levying officer serves the defendant with the notice of attachment describing the property. However, the defendant may claim an exemption for real property at any time prior to the entry of judgment [*Code Civ. Proc. §§ 485.610(a), 487.030*].

[d] Procedure for Claiming Exemption for Family Necessities

A defendant who is a natural person may claim an exemption for property necessary for the support of the defendant or his or her family supported in whole or in part by the defendant [*Code Civ. Proc. § 487.020(b)*; *see § 62.12[4]*]. To claim the exemption, the defendant must follow one of two procedures within 30 days of service of the notice of attachment [*Code Civ. Proc. § 485.610(b)*]:

- The procedure for claiming exemptions from post-judgment levies [*see Code Civ. Proc. § 703.510 et seq.*; *see generally Ch. 254, Executions and Enforcement of Judgements, § 254.40* et seq., regarding exemptions].

- The general notice of motion procedure for claiming exemptions under the Attachment Law [*see Code Civ. Proc. § 482.100(c)*; *see also §§ 62.146, 62.147*], except that the requirement of showing changed circumstances does not apply.

[e] Requirements for Claim

A claim of exemption must [*Code Civ. Proc. § 484.070(c)*]:

- Describe the property claimed to be exempt.

- Specify the statute supporting the claim.

The claim of exemption must be accompanied by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) supporting any factual issues and by a memorandum of points and authorities supporting any legal issues raised by the claim [*Code Civ. Proc. § 484.070(d)*]. The claim of exemption, together with any supporting affidavit or declaration and points and authorities, must be filed and served on the plaintiff not less than five court days before the date set for the hearing [*Code Civ. Proc. § 484.070(e)*].

For a form of claim of exemption, see *§ 62.138*. For a form of declaration, see *§ 62.139*.

[f] Loss of Right to Claim Exemption

With respect to personal property described in the plaintiff's application, the defendant will lose the right to claim the exemption if either of the following occur [*Code Civ. Proc. § 484.070(a)*; *see Code Civ. Proc. § 482.100*]:

- The defendant fails to make the claim.

- The defendant fails to prove that the property is exempt, unless the defendant can show a change of

circumstances.

With respect to all real property and to personal property not described in the plaintiff's application, the failure to make the claim does not preclude the defendant from later claiming the exemption. If the defendant fails to prove that the real or personal property is exempt, however, he or she may not later claim an exemption unless a change in circumstances is shown [*Code Civ. Proc. § 484.070(b)*; *see Code Civ. Proc. § 482.100*].

PRACTICE TIP:

Application for Additional Writs. Although a writ of attachment issued after a noticed hearing is limited to the property described in the plaintiff's application, the plaintiff may subsequently apply ex parte for additional writs [*see Code Civ. Proc. § 484.510 et seq.*, and *discussion under § 62.31[1]*]. For protection from such future levies, the defendant should claim as exempt any property not described in the plaintiff's application [*see Code Civ. Proc. § 484.070(b)*].

[g] Plaintiff's Opposition to Claim of Exemption

If the plaintiff wishes to oppose the claim of exemption, he or she must file and serve on the defendant, not less than two calendar days before the date set for the hearing, a notice of opposition, accompanied by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) supporting any factual issues and points and authorities supporting any legal issues raised [*Code Civ. Proc. § 484.070(f)*]. For a form of notice of opposition to a claim of exemption, see *§ 62.145*.

PRACTICE TIP:

Maximize Hearing Date. Plaintiff's counsel may create an impossible, or at least difficult, task for himself or herself by setting an attachment hearing for Monday or Tuesday. Plaintiff's counsel should set the hearing date in order to maximize effective reply time.

If the plaintiff files and serves a proper notice of opposition to the claim, the defendant has the burden of proving that the property is exempt from attachment [*Code Civ. Proc. § 484.070(g)*].

If the plaintiff does not file and serve a notice of opposition [*Code Civ. Proc. § 484.070(f)*; *see Bank of America v. Salinas Nissan, Inc. (1989) 207 Cal. App. 3d 260, 270, 254 Cal. Rptr. 748]* :

- No writ of attachment may be issued as to the property claimed to be exempt.

- If all of the property described in the plaintiff's application is claimed to be exempt, no hearing may be held, no RTAO or writ of attachment may be issued, and any temporary protective orders immediately expire [*see Code Civ. Proc. § 486.010 et seq.*].

[8] Hearing on Application

[a] Readiness of Plaintiff

At the time set for hearing an application for a writ of attachment, the plaintiff must be ready to proceed. If the plaintiff is not ready, or has failed to properly comply with service requirements [*see Code Civ. Proc. § 484.040*; § 62.30[4]], the court may either deny the application for the order or, for good cause shown, grant the plaintiff a continuance for a reasonable period. If a continuance is granted, the effective period of any protective order may be extended by the court for a period ending not more than 10 days after the new hearing date if the plaintiff shows a continuing need for the protective order [*Code Civ. Proc. § 484.080(a)*].

CAUTION:

Denial of Application. If the application is denied, the plaintiff risks losing the opportunity for an

attachment without a showing of new facts or changed circumstances.

[b] Continuance of Hearing at Request of Defendant

The court may, in its discretion and for good cause shown, grant the defendant a continuance for a reasonable period to oppose the RTAO. If a continuance is granted, the court must extend the effective period of any protective order for a period of not more than 10 days after the new hearing date unless the defendant shows that the protective order should be modified or vacated [*Code Civ. Proc. § 484.080(b)*; *see Code Civ. Proc. § 486.100*].

[c] Findings Made by Court at Hearing

At the hearing, the court will issue an RTAO if it finds all of the following [*Code Civ. Proc. § 484.090(a)*; *see § 62.132*]:

- The claim on which the attachment is based is one on which an attachment may be issued.
- The plaintiff has established the probable validity of the claim on which the attachment is based.
- The attachment is not sought for a purpose other than the recovery on the claim on which the attachment is based.
- The amount to be secured by attachment is greater than zero.

In making its findings, the court must consider the showing made by the parties appearing and make its determination based on the pleadings and other papers in the record. On good cause shown, however, the court may receive and consider at the hearing additional evidence, oral or documentary, and additional points and authorities, or it may continue the hearing for the production of additional evidence or points and authorities [*Code Civ. Proc. § 484.090(a), (d)*].

Additional Evidence Consideration Unlikely. Do not rely on the court's willingness to receive and consider additional evidence at the hearing. This is unlikely, especially in the busier courts.

If the order is issued, the court must state the amount to be secured by the attachment [*Code Civ. Proc. § 484.090(a)*]. In addition, if the court finds that the defendant has failed to prove that all of the property sought to be attached is exempt from attachment, it must order a writ of attachment to be issued on the filing of an undertaking [*Code Civ. Proc. § 484.090(b)*; *see Code Civ. Proc. §§ 489.210, 489.220*].

If the court determines that all or part of the defendant's property is exempt from attachment, the RTAO must describe the exempt property and prohibit its attachment [*Code Civ. Proc. § 484.090(c)*]. The defendant may claim an exemption for property other than the property sought to be attached by the plaintiff [*Code Civ. Proc. § 484.070(b)*; § 62.30[7][f]].

[d] Effect of Court's Determinations

No determinations made by the court in a noticed hearing procedure [*see Code Civ. Proc. § 484.010 et seq.*] may be considered in determining any issues in the principal action other than issues relevant to proceedings in the noticed hearing, nor may they be used to affect the rights of the plaintiff or defendant in any other action arising out of the same claim of the plaintiff or defendant. The court's determination in the noticed hearing must not be given in evidence or referred to at the trial of any such action [*Code Civ. Proc. § 484.100*].

[9] Defenses Not Affected

Neither the failure of the defendant to oppose the issuance of an RTAO under the noticed hearing provisions nor the

defendant's failure to rebutany evidence produced by the plaintiff in connection with proceedings under those sections may constitute a waiver of any defense to plaintiff's claim in the principal action or any other action, or have any effect on the right of the defendant to produce or exclude evidence at the trial of any such action [*Code Civ. Proc. § 484.110(a)*].

Similarly, neither the failure of the plaintiff to oppose the issuance of an order reducing the amount to be secured by the attachment under the noticed hearing provisions nor the plaintiff's failure to rebut any evidence produced by the defendant in connection with proceedings under those sections constitute a waiver of any defense to the defendant's claim in the action or any other action, or have any effect on the right of the plaintiff to produce or exclude evidence at the trial of any such action [*Code Civ. Proc. § 484.110(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

California Forms of Pleading and Practice--Annotated

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Chapter 62 ATTACHMENT
PART II. LEGAL BACKGROUND
B. Procedures to Obtain, Enforce, or Release Attachment
1. Obtaining Attachment or Temporary Protective Order

6-62 California Forms of Pleading and Practice--Annotated § 62.31

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§ 62.31 Additional Writs Through Noticed Hearing Procedure

[1] Application

Any time an RTAO has been issued following a noticed hearing [*see Code Civ. Proc. § 484.090*] or the court has found that the plaintiff is entitled to an RTAO on a hearing following the issuance of an ex parte order [*see Code Civ. Proc. § 485.240*], the plaintiff may apply for a writ of attachment by filing an application with the court in which the action is brought [*Code Civ. Proc. § 484.310*].

The purpose of the hearing in this case is to allow the defendant to establish a claim of exemption as to any personal property listed in the RTAO. Both the noticed hearing and ex parte procedure provide for the issuance of additional writs of attachment for property of the defendant if an RTAO has already been issued [*see* Law Rev. Comm. Comment to *Code Civ. Proc. § 484.310*].

PRACTICE TIP:

When Additional Writ Procedures Necessary. The additional writ procedures are necessary only when the defendant is an individual. In an action against a corporation or partnership, the writ of attachment will generally refer to all corporate or all partnership property subject to attachment [*Code Civ. Proc. § 487.010(a), (b)*; *see Code Civ. Proc. § 484.090*]. Hence, in the latter cases, the only "additional" writs necessary will be in the same form.

The application must be executed under oath and must include all of the following [*Code Civ. Proc. § 484.320*; *see § 62.130*]:

- A statement that the plaintiff has been issued an RTAO under the noticed hearing procedure [*see Code Civ. Proc. § 484.010 et seq.*] or that the court has found that the plaintiff is entitled to an RTAO under the ex parte hearing procedure [*see Code Civ. Proc. § 485.240*].

- A statement of the amount to be secured by the attachment.

- A description of the property to be attached under the writ of attachment and a statement that the plaintiff is informed and believes that the property is subject to attachment. The description must be reasonably adequate to permit the defendant to identify the specific property sought to be attached [*Code Civ. Proc. § 484.020(e)*].

- A statement that the applicant has no information or belief that the claim is discharged or prosecution of the action stayed in a bankruptcy proceeding under Title 11 of the United States Code.

[2] Notice of Application for Additional Writ

An additional writ of attachment may be issued only after a hearing. At least 15 days prior to the hearing, the defendant must be served with both of the following [*see Code Civ. Proc. § 484.330*]:

- A notice of application and hearing.

- A copy of the application.

The notice of application and hearing must inform the defendant of all of the following [*Code Civ. Proc. § 484.340*; *see § 62.131*]:

- The plaintiff has applied for a writ of attachment to attach the property described in the application.

- A hearing will be held at a place and at the time specified in the notice to determine whether the plaintiff is entitled to the writ.

- A writ of attachment will be issued to attach the property described in the plaintiff's application unless the court determines that the property is exempt from attachment or that its value clearly exceeds the amount necessary to satisfy the amount to be secured by the attachment.

- If the defendant claims that all or part of the property described in the application is exempt from attachment, the defendant may file with the court and serve on the plaintiff a claim of exemption with respect to the property [*see Code Civ. Proc. § 484.350*] not later than five days prior to the date set for hearing. If the defendant fails to make such a claim with respect to personal property, the defendant may not later claim the exemption in the absence of a showing of a change in circumstances occurring after the expiration of the time for claiming exemptions.

- Either the defendant or the defendant's attorney or both of them may be present at the hearing.

- The notice must also contain the following statement: "You may seek the advice of an attorney as to any matter connected with the plaintiff'sapplication. Such attorney should be consulted promptly so that the attorney may assist you before the time set for hearing."

[3] Claim of Exemption From Additional Writ

[a] Defendant's Claim

If the defendant claims that all or part of the property described in the plaintiff's application for an additional writ is

exempt from attachment, the defendant may claim an exemption [*see Code Civ. Proc. § 484.350*]. If the defendant fails to make the claim with respect to personal property or makes a claim with respect to real or personal property but fails to prove that the property is exempt, he or she may not later claim an exemption except for a change of circumstances [*Code Civ. Proc. § 484.350*; *see Code Civ. Proc. § 482.100*].

The claim of exemption must [*Code Civ. Proc. § 484.350(b)*]:

- Describe the property claimed to be exempt.
- Specify the statutory authority for the claim.

The claim of exemption must be accompanied by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) supporting any factual issues raised by the claim and a memorandum of points and authorities supporting any legal issues raised [*Code Civ. Proc. § 484.350(c)*]. The claim of exemption, together with any supporting affidavits and points and authorities, must be filed and served on the plaintiff not less than five court days before the date set for the hearing [*Code Civ. Proc. § 484.350(d)*].

For a notice of claim of exemption, see *§ 62.138*. For a form of declaration, see *§ 62.139*.

[b] Plaintiff's Challenge to Claim of Exemption From Additional Writ

After the defendant files and serves a claim of exemption and not less than two calendar days before the date set for the hearing, the plaintiff may oppose the claim by filing and serving on the defendant a notice of opposition. The notice of opposition must be accompanied by an affidavit or declaration supporting any factual issues and a memorandum of points and authorities supporting any legal issues raised [*Code Civ. Proc. § 484.360(a)*; *see § 62.145*].

If the plaintiff files and serves a proper notice of opposition to the claim of exemption, the defendant has the burden of proving that the property is exempt from attachment [*Code Civ. Proc. § 484.360(c)*].

If the plaintiff does not file and serve a notice of opposition to a properly filed claim of exemption [*see Code Civ. Proc. § 484.350*], no writ of attachment may be issued as to the property claimed to be exempt [*Code Civ. Proc. § 484.360(b)*]. If all of the property described in the plaintiff's application is claimed to be exempt and the plaintiff does not file and serve a notice of opposition, no hearing may be held and no writ of attachment may be issued [*Code Civ. Proc. § 484.360(b)*].

[4] Hearing and Issuance of Additional Writ

After considering the showing made by the parties [*see Code Civ. Proc. § 484.090, discussed under § 62.30[8][c]*] and the plaintiff's filing of an undertaking [*see Code Civ. Proc. §§ 489.210, 489.220, discussed under § 62.37[1]*], the court must order an additional writ of attachment to be issued if it finds both of the following [*Code Civ. Proc. § 484.370*]:

- An RTAO has been issued after a noticed hearing [*see Code Civ. Proc. § 484.010 et seq.*] or the court has found that the plaintiff is entitled to an RTAO after an ex parte hearing [*see Code Civ. Proc. § 485.240*].
- The defendant has failed to prove that all or part of the property sought to be attached is exempt from attachment.

For a form of RTAO after hearing and order for issuance of writ of attachment, see *§ 62.132*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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6-62 California Forms of Pleading and Practice--Annotated § 62.32

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§ 62.32 Additional Writs Through Ex Parte Procedure

[1] Application

At any time after the court has issued an RTAO under *Code Civ. Proc. § 484.010 et seq.* [*see § 62.30[1]*] or *Code Civ. Proc. § 485.240* [*see § 62.33[1]*], the plaintiff may apply for a writ of attachment by filing an application with the court in which the action is brought [*Code Civ. Proc. § 484.510(a)*; *see Code Civ. Proc. § 484.320*].

The application must be accompanied by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) showing that the property sought to be attached is not exempt from attachment. The affiant may base the affidavit or declaration on information and belief [*Code Civ. Proc. § 485.510(b)*].

For a form of application for an RTAO, see *§ 62.130*.

[2] Findings at Hearing on Ex Parte Application

After examining the application and supporting affidavit or declaration and the plaintiff's filing of an undertaking, the court must order an additional writ of attachment if it finds both of the following [*Code Civ. Proc. § 484.520*]:

- The court has issued an RTAO under *Code Civ. Proc. § 484.010 et seq.* [*see § 62.30[1]*] or found pursuant to *Code Civ. Proc. § 485.240* [*see § 62.33[1]*] that plaintiff is entitled to an RTAO under the ex parte procedure.

- The affidavit accompanying the application shows that all or part of the property sought to be attached is not exempt from attachment.

For a form of ex parte RTAO and order for issuance of writ of attachment, see *§ 62.133*.

[3] Defendant's Claim of Exemption From Additional Writs on Ex Parte Application

The defendant may claim an exemption as to real or personal property levied on pursuant to an additional writ issued under the ex parte procedure [*see Code Civ. Proc. § 484.510 et seq.*] by following the procedure provided for claiming exemptions from post-judgment levies [*Code Civ. Proc. § 484.530(a)*; *see Code Civ. Proc. § 703.510 et seq.*; *see generally Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq., regarding exemptions]. In these provisions, references to "the judgment debtor" are to be deemed references to the defendant, and references to "the judgment creditor" are to be deemed references to the plaintiff. The defendant must claim the exemption as to personal property, however, not later than 30 days after the levying officer serves the defendant with the notice of attachment describing the property [*Code Civ. Proc. § 484.530(a)*].

During the same 30-day period, the defendant may claim an exemption for the support of the defendant or the defendant's family [*see Code Civ. Proc. § 487.020(b)*, and *discussion under § 62.30[7][d]*] by either [*Code Civ. Proc. § 484.530(b)*]:

- Following the procedure for claiming exemptions from post-judgment levies [*see Code Civ. Proc. § 703.510 et seq.*; *see generally Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq., regarding exemptions].

- Following the noticed motion procedures of the Attachment Law [*see Code Civ. Proc. § 482.100(c)*; *see also § 62.146*], except that the requirement of showing changed circumstances [*see Code Civ. Proc. § 482.100(a)*] does not apply.

For a form of notice of claim of exemption, see *§ 62.138*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

California Forms of Pleading and Practice--Annotated

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 62 ATTACHMENT
PART II. LEGAL BACKGROUND
B. Procedures to Obtain, Enforce, or Release Attachment
1. Obtaining Attachment or Temporary Protective Order

6-62 California Forms of Pleading and Practice--Annotated § 62.33

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§ 62.33 Ex Parte Hearing Procedure

[1] Great or Irreparable Injury Requirement

Except as otherwise provided by statute, no RTAO or writ of attachment may be issued ex parte unless the plaintiff shows facts by affidavit (or declaration under *Code Civ. Proc. § 2015.5*) that he or she would suffer great or irreparable injury if the order were delayed until the matter could be heard on notice [*Code Civ. Proc. § 485.010(a)*]. However, some statutes expressly permit an ex parte attachment without such a showing [*see, e.g., Code Civ. Proc. § 492.010 et seq.*; *Harb. & Nav. Code § 495.1*; *Health & Safety Code § 11501*; *Rev. & Tax. Code §§ 6713, 8972, 11473, 12680, 19373, 30302, 32352*].

[2] Grounds for Issuing Writ Ex Parte

[a] Danger That Property May Become Unavailable

The requirement of great or irreparable injury [*see § 62.33[1]*] is satisfied if the plaintiff shows that under the circumstances of the case, it may be inferred that there is a danger that the property sought to be attached would be concealed, substantially impaired in value, or otherwise made unavailable to levy if the order were delayed until the matter could be heard on notice [*Code Civ. Proc. § 485.010(b)(1)*].

[b] Defendant Has Failed to Pay Debts

The requirement of great or irreparable injury also is satisfied if the plaintiff shows that, under the circumstances of the case, it may be inferred that the defendant has failed to pay the debt underlying the requested attachment, and the defendant is insolvent in the sense that the defendant is generally not paying his or her debts as those debts become due, unless the debts are subject to a bona fide dispute [*Code Civ. Proc. § 485.010(b)(2)*].

If the plaintiff bases the writ solely on this ground, the defendant may request a review and the court must conduct a hearing within five court days after the plaintiff is served with notice of the defendant's request [*Code Civ. Proc. § 485.010(c)*].

[c] Bulk Sales Notice Has Been Recorded

The requirement of great or irreparable injury also is satisfied if the plaintiff shows that a bulk sales notice has been recorded and published with respect to a bulk transfer by the defendant [*Code Civ. Proc. § 485.010(b)(3)*; *see Com. Code § 6101 et seq.*; *see generally Ch. 270, Fraudulent Conveyances, § 270.100* et seq.].

Two limitations are provided for writs issued under this provision [*Code Civ. Proc. § 485.010(c)*; *see Code Civ. Proc. § 485.010(b)(3)*]:

- The only property affected is property covered by the bulk sales notice or the proceeds of the sale of the property.

- In addition to any other service required by the Attachment Law, the writ must be served by the levying officer or the transferee or auctioneer identified by the bulk sales notice, not more than five calendar days after the levy of the writ.

[d] Escrow Opened Concerning Sale of Liquor License

The requirement of great or irreparable injury also is satisfied if the plaintiff shows that an escrow has been opened with respect to the sale by the defendant of a liquor license [*Code Civ. Proc. § 485.010(b)(4)*; *see Bus. & Prof. Code § 24074*; *see generally* Ch. 18, *Alcoholic Beverage Licenses*].

A writ issued solely under the liquor license provision must be limited to the plaintiff's pro rata share of the proceeds of the sale in escrow [*Code Civ. Proc. § 485.010(c)*].

[e] Imminent Great or Irreparable Injury

The requirement of great or irreparable injury also is satisfied if the plaintiff shows any circumstance indicating that great or irreparable injury would result to the plaintiff if issuance of the order were delayed until the matter could be heard on notice [*Code Civ. Proc. § 485.010(b)(5)*].

Neither a precarious financial condition nor a refusal to pay a disputed claim warrants an inference that a debtor will abscond with all his or her assets, or otherwise conceal them from the creditor [*Western Steel & Ship Repair, Inc. v. RMI, Inc. (1986) 176 Cal. App. 3d 1108, 1114, 222 Cal. Rptr. 556]* .

ILLUSTRATION:

Insufficient Evidence for Ex Parte Writ. In support of plaintiff's application for an ex parte writ of attachment, plaintiff's president files a declaration stating: "if [defendant] was given any notice at all of this hearing, [defendant] would take whatever steps were necessary to hide its assets so as to prevent attachment of these assets." The declaration also claims that the defendant is currently unable to pay plaintiff's claim. Is this sufficient evidence to warrant a writ of attachment? No. Evidence of defendant's financial condition or refusal to pay a disputed claim is not sufficient. Plaintiff would need to present evidence, for example, of defendant's past dishonesty, failure to meet obligations, or concealment of assets [*Western Steel & Ship Repair, Inc. v. RMI, Inc. (1986) 176 Cal. App. 3d 1108, 1114, 222 Cal. Rptr. 556]* .

[3] Ex Parte Application

[a] Requirements

On or after the filing of the complaint, the plaintiff may apply ex parte for an RTAO and a writ of attachment by filing an application for the order and writ with the court in which the action is brought [*Code Civ. Proc. § 485.210(a)*; *see § 62.130*].

The application must satisfy the requirements of the noticed hearing application [*Code Civ. Proc. § 485.210(b)*; *see Code Civ. Proc. § 484.020*; *see 62.30[1][a]*]. In addition, the plaintiff must include a statement showing great or irreparable injury if the noticed hearing procedure is followed [*Code Civ. Proc. § 485.210(b)*; *see Code Civ. Proc. § 485.010*; *see also § 62.33[1]*].

[b] Papers Supporting Ex Parte Application

The application must be supported by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) showing all of the following [*Code Civ. Proc. § 485.210(c)*]:

- On the facts presented, the plaintiff would be entitled to a judgment on the claim on which the attachment is based.

- The plaintiff would suffer great or irreparable injury if issuance of the order were delayed until the matter could be heard on notice [*see Code Civ. Proc. § 485.010*].

- The property sought to be attached is not exempt from attachment.

When attachment is sought because of the defendant's alleged failure to pay debts [*see Code Civ. Proc. § 485.010(b)(2)*; *see also § 62.33[2][b]*], the plaintiff's affidavit or declaration must state all of the following [*Code Civ. Proc. §§ 485.010(b)(2), 485.530*]:

- The plaintiff would suffer great or irreparable injury [*see Code Civ. Proc. § 485.010*] if the writ were delayed until a noticed hearing could be held.

- The property sought to be attached is not exempt.

- The known undisputed debts of the defendant, that the debts are not subject to bona fide dispute, and the basis for plaintiff's determination that the defendant's debts are undisputed.

The affidavit or declaration supporting the claim that the defendant's property is not exempt [*see Code Civ. Proc. § 485.210(c)(3)*] may be based on the affiant's information and belief [*Code Civ. Proc. § 485.210(d)*].

PRACTICE TIP:

Temporary Protective Order Application. Any ex parte application for a writ of attachment should be accompanied by an application for a temporary protective order. While courts often deny ex parte attachment applications, they usually will issue a temporary protective order that restrains any transfer of the property sought to be attached pending a noticed attachment hearing.

[4] Findings and Order on Ex Parte Application

After examining the application and supporting affidavit or declaration, the court must issue an RTAO if it finds all of the following [*Code Civ. Proc. § 485.220(a)*]:

- The claim on which the attachment is based is one on which an attachment may be issued.

- The plaintiff has established the probable validity of the claim on which the attachment is based.

- The attachment is not sought for a purpose other than recovery on the claim on which the attachment is based.

- The affidavit or declaration accompanying the application shows that all or part of the property sought to be attached in the application is not exempt from attachment.

- The plaintiff will suffer great or irreparable injury if the order is delayed until the matter can be heard on notice [*see Code Civ. Proc. § 485.010*].

- The amount to be secured by attachment is greater than zero.

The RTAO must state the amount to be secured by the attachment and order a writ of attachment to be issued after plaintiff files an undertaking [*Code Civ. Proc. § 485.220(a)*; *see Code Civ. Proc. §§ 489.210, 489.220*]. If the court denies the plaintiff's application, it may issue a temporary protective order [*Code Civ. Proc. § 485.220(a)*; *see Code Civ. Proc. § 486.030*, and *discussion under § 62.35[2]*].

If the court finds that the application and supporting affidavit or declaration do not satisfy the "great or irreparable injury" requirement [*see Code Civ. Proc. § 485.010*; *see also § 62.33[1]*], it must so state and deny the order [*Code Civ. Proc. § 485.220(b)*]. If applicable, the court must also state that the failure to satisfy the great or irreparable injury requirement is the only ground for denial. In that case, the denial does not preclude the plaintiff from applying for an RTAO and writ of attachment under the noticed hearing procedure with the same affidavits and supporting papers [*Code Civ. Proc. § 485.220(b)*; *see Code Civ. Proc. § 484.010 et seq.*].

For a form of ex parte RTAO and order for issuance of writ of attachment, see *§ 62.133*.

[5] Discovery Concerning Defendant's Property

If the court issues a right to attach order, a plaintiff may discover, through any means provided for by and subject to the protections included in the Discovery Act (*Code Civ. Proc. § 2016 et seq.* (*Code Civ. Proc. § 2016.010 et seq.* effective July 1, 2005)), the identity, location, and value of property in which the defendant has an interest [*Code Civ. Proc. § 485.230*]. For discussion and forms relating to discovery methods and protective orders, see Ch. 190, *Discovery: Scope, Regulation, and Timing* .

[6] Reconsideration of Order

A party may bring a subsequent motion for a right to attach order after a previous motion has been denied [*Film Packages, Inc. v. Brandywine Film Productions, Ltd. (1987) 193 Cal. App. 3d 824, 829, 238 Cal. Rptr. 623]* . In the subsequent motion the movant may, for example, present a fuller statement of facts previously furnished, explain the meaning of previously furnished facts, or allege new facts [*see Code Civ. Proc. § 1008*; *FilmPackages, Inc. v. Brandywine Film Productions, Ltd. (1987) 193 Cal. App. 3d 824, 829-830, 238 Cal. Rptr. 623]* . It is not required that the movant state facts materially different from those presented on a previously denied application when subsequent events such as depositions shed new light in the case [*Film Packages, Inc. v. Brandywine Film Productions, Ltd. (1987) 193 Cal. App. 3d 824, 826* and n.3, *238 Cal. Rptr. 623* (no new facts, but new evidence of the meaning of the facts were produced stemming from depositions taken after previous attachment hearing); *see generally* Ch. 374, *Motions to Reconsider and Renewed Motions*].

[7] Defendant's Application to Terminate Ex Parte Order and Writ

[a] By Motion

Any defendant whose property has been attached by a writ issued ex parte may apply for an order [*Code Civ. Proc. § 485.240(a)*]:

- To set aside the RTAO.
- To quash the writ of attachment.
- To release any property levied on.
- To reduce the amount secured by the attachment.

To apply, the defendant must file a notice of motion with the court and serve it on the plaintiff [*Code Civ. Proc. § 485.240(a)*]. The notice of motion must do the following [*Code Civ. Proc. § 485.240(b)*]:

- State the grounds on which the motion is based.
- Be accompanied by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) supporting any factual issues.
- Be accompanied by a memorandum of points and authorities supporting any legal issues raised.

The motion may not be based on the ground that the plaintiff would not have suffered great or irreparable injury if issuance of the order had been delayed until the matter could have been heard on notice [*Code Civ. Proc. § 485.240(b)*; *see Code Civ. Proc. § 485.010*].

For a form of application and a form of order to set aside an RTAO, see *§§ 62.142* and *62.143*.

[b] Hearing on Motion to Terminate

At the hearing on the motion, the court must determine whether the plaintiff is entitled to the RTAO or whether the amount to be secured by the attachment should be reduced. However, no specific findings are called for. The court's determinations must be made on the basis of the pleadings and other papers in the record. However, on good cause shown, the court may receive and consider additional oral or documentary evidence and points and authorities. The court may also continue the hearing for theproduction of additional evidence or points and authorities [*Code Civ. Proc. § 485.240(d)*].

If the court finds that the plaintiff is not entitled to the RTAO, it must order it set aside, the writ of attachment quashed, and any property levied upon under the writ released. If the court finds that the plaintiff is entitled to the RTAO, the plaintiff may apply for additional writs under the noticed hearing procedure or the ex parte procedure [*Code Civ. Proc. § 485.240(c)*; *see Code Civ. Proc. §§ 484.310 et seq., 484.510 et seq.*].

Hearing on a reconsideration motion takes precedence over all other civil matters on the calendar of that day except older matters of the same character [*Code Civ. Proc. § 485.240(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesProvisional RemediesAttachmentsCommercial Law (UCC)Bulk Sales (Article 6)Notice to Claimants

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§ 62.34 Additional Writs After Ex Parte Hearing

[1] Application

At any time after an RTAO and writ of attachment have been issued under the ex parte procedure [*see Code Civ. Proc. § 485.210*;§ 62.33[4]], the plaintiff may:

- Apply for additional writs of attachment by filing an application with the court in which the action is brought [*Code Civ. Proc. § 485.510*; *see § 62.130*].

- Apply for a new order and writ under the noticed hearing procedure [*see Code Civ. Proc. § 484.010 et seq.*; *see also § 62.30[1]*].

When there has been a reconsideration hearing and the plaintiff's right to attach has been upheld [*see Code Civ. Proc. § 485.240*;§ 62.33[6]], the plaintiff may [*Code Civ. Proc. § 485.240(c)*]:

- Apply for an additional writ under the noticed hearing procedure [*see Code Civ. Proc. § 484.310 et seq.*; *see also § 62.31[1]*].

- Apply for an additional writ under the ex parte hearing procedure [*see Code Civ. Proc. § 484.510 et seq.*; *see also § 62.32[1]*].

[2] Contents and Supporting Papers

An application for an additional writ must be executed under oath and must include all of the following [*Code Civ. Proc. § 485.520*]:

- A statement that the plaintiff has been issued an RTAO and writ of attachment [*see Code Civ. Proc. § 485.210 et seq.*].

- A statement of the amount to be secured by the attachment under the right to attach order.

- A description of the property to be attached under the writ of attachment and a statement that the plaintiff is informed and believes that the property is not exempt from attachment. The statement must satisfy the requirements for a description under the noticed hearing procedure [*see Code Civ. Proc. § 484.020*;§ 62.30[2]].

- A statement showing that the "great or irreparable injury requirement" has been satisfied [*see Code Civ. Proc. § 485.010*; *see also § 62.33[1]*].

The application must be supported by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) showing both of the following [*Code Civ. Proc. § 485.530(a)*]:

- The plaintiff would suffer great or irreparable injury [*see Code Civ. Proc. § 485.010*] if the issuance of the writ of attachment were delayed until the matter could be heard on notice.

- The property sought to be attached is not exempt from attachment.

The supporting affidavit or declaration may be based on information and belief [*Code Civ. Proc. § 485.530(b)*].

[3] Court Findings on Application After Ex Parte Hearing

After examining the application and supporting affidavit or declaration, the court must issue a writ of attachment if it finds all of the following [*Code Civ. Proc. § 485.540*]:

- A right to attach order has been issued in the action [*see Code Civ. Proc. § 485.210 et seq.*].

- The affidavit or declaration accompanying the application shows that all or part of the property sought to be attached is not exempt from attachment.

- The plaintiff will suffer great or irreparable injury [*see Code Civ. Proc. § 485.010*; *see also § 62.33[1]*] if the writ of attachment is delayed until the matter can be heard on notice [*Code Civ. Proc. § 485.540*].

Before the writ of attachment may issue, the plaintiff must file an undertaking [*see Code Civ. Proc. §§ 489.210, 489.220*; *see also § 62.37[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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§ 62.35 Temporary Protective Order

[1] Application Under Noticed Hearing Procedure

At the time of applying for an RTAO under the noticed hearing procedure [*see Code Civ. Proc. § 484.010 et seq.*], the plaintiff may apply for a temporary protective order by filing an application for the order with the court in which the action is brought [*Code Civ. Proc. § 486.010(a)*].

The application must specify the relief requested and must be supported by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) showing that the plaintiff would suffer great or irreparable injury if the temporary order were not issued [*Code Civ. Proc. § 486.010(b)*; *see Code Civ. Proc. § 485.010*; *see also § 62.33[1]*]. A supporting affidavit or declaration may be based on information and belief [*Code Civ. Proc. § 486.010(b)*].

An application for a temporary protective order may accompany an application for a right to attach order and writ of attachment under the noticedhearing procedure [*see* Law Rev. Comm. Comment to *Code Civ. Proc. § 486.010*], in which case the court will have both applications from which to make the required findings [*see Code Civ. Proc. § 486.020*]. A temporary protective order may also be issued on the court's own motion in lieu of the ex parte issuance of a writ of attachment [*see Code Civ. Proc. § 486.030*; *see also § 62.111[2][d]*].

For a form of application for temporary protective order and temporary protective order, see *§§ 62.130* and *62.135*.

[2] Temporary Protective Order on Denial of Writ Under Ex Parte Hearing Procedure

After the plaintiff has applied for an RTAO and writ of attachment under the ex parte hearing procedure [*see § 62.33[1]*], the court may in its discretion deny the application for the order if it determines that although the requirements of *Code Civ. Proc. § 485.220* are satisfied [§ 62.33[4]], a temporary protective order would be in the interest of justice and equity to the parties. In making the determination, the court takes into account [*Code Civ. Proc. §*

486.030(a)]:

- The effect on the defendant of issuing a writ of attachment ex parte.
- The effect on the plaintiff of issuing the temporary protective order instead of the writ.
- Other factors that bear on equity and justice under the circumstances of the particular case.

PRACTICE TIP:

TPO Preserves Status Quo. A court will normally preserve the status quo with a temporary restraining order rather than an RTAO. For this reason, alternative orders should be prepared, with the temporary restraining order presented if the court denies the right to attach order.

After examining the application, supporting affidavit or declaration, and other papers on record, the court must issue a temporary protective order if it finds all of the following [*Code Civ. Proc. § 486.020*]:

- The claim on which the application for attachment is based is one on which an attachment may be issued.
- The plaintiff has established the probable validity of the claim on which the application for the attachment is based.
- The order is not sought for a purpose other than the recovery on the claim on which the application for the attachment is based.
- The plaintiff will suffer great or irreparable injury [*see Code Civ. Proc. § 485.010*; *see also § 62.33[1]*] if the temporary protective order is not issued.

For a form of temporary protective order, see *§ 62.135*.

[3] Provisions in Temporary Protective Order

[a] Scope of Order

A temporary protective order must contain provisions that the court determines would be in the interest of justice and equity to the parties, taking into account the effects on both the defendant and the plaintiff under the circumstances of the particular case [*Code Civ. Proc. § 486.040*]. Within this general restriction, a temporary protective order may prohibit the transfer by the defendant of any of the defendant's property in California that is subject to the levy of a writ of attachment. The order must describe the property in a manner adequate to permit the defendant to identify the property subject to the order [*Code Civ. Proc. § 486.050(a)*].

The order may not prohibit the defendant from transferring, in the ordinary course of business, inventory or farm products held for sale. However, the order may impose appropriate restrictions on the disposition of the proceeds from that type of transfer [*Code Civ. Proc. § 486.050(b)*].

The temporary protective order must state the amount sought to be secured by the attachment under the application for the RTAO, and the plaintiff must file a proper undertaking [*Code Civ. Proc. § 486.020*; *see Code Civ. Proc. §§ 489.210, 489.220*; *see also § 62.37[1]*].

[b] Defendant's Right to Issue Certain Checks

A temporary protective order may not prevent the defendant from issuing any number of checks in any amount for the following purposes [*Code Civ. Proc. § 486.060(b)*]:

- Payment of any payroll expense, including fringe benefits, taxes, and premiums for workers' compensation and unemployment insurance, falling due in the ordinary course of business prior to the levy of a writ of attachment.

- Payment for goods delivered to the defendant C.O.D. for use in his or her trade, business, or profession.

- Payment of taxes if necessary to avoid penalties that will accrue if there is any further delay in payment.

- Payment of reasonable legal fees and reasonable costs and expenses required for the representation of the defendant in the action.

In addition, the defendant may issue any number of checks for any purpose as long as the total amount of the checks does not exceed the greater of the following [*Code Civ. Proc. § 486.060(c)*]:

- The amount by which the total amount on deposit exceeds the sum of the amount sought to be secured by the attachment and the amounts of permitted checks [*see Code Civ. Proc. § 486.060(b)*].

- $1,000.

The statutory authorization to issue checks under *Code Civ. Proc. § 486.060* applies to any of the defendant's accounts in a financial institution in California. Furthermore, it applies regardless of any terms to the contrary in the temporary protective order [*Code Civ. Proc. § 486.060(a)*].

[4] Notice of Order and Persons Bound

If the court issues a temporary protective order in lieu of an ex parte RTAO and writ of attachment, the plaintiff's ex parte application must be treated as an application under the noticed hearing procedure [*Code Civ. Proc. § 484.010 et seq.*]. The plaintiff must then comply with the service requirements under the noticed hearing procedure [*Code Civ. Proc. § 486.030(b)*; *see Code Civ. Proc. § 484.040*;§ 62.30[4]].

A temporary protective order must be personally served on the defendant together with certain documents [*Code Civ. Proc. § 486.080*], including the following [*Code Civ. Proc. § 484.040*]:

- A copy of the summons and complaint.

- A notice of application and hearing.

- A copy of the application and of any affidavit or declaration in support of the application.

PRACTICE TIP:

Immediate Service of Order. Have your process server ready to make immediate service when an ex parte RTAO or temporary protective order is issued.

In general, a temporary protective order binds only the defendant whether or not any other person knows of or is served with a copy of it [*Code Civ. Proc. § 486.070*]. However, the lien created by a temporary protective order continues after

transfer or encumbrance of the property, except for the transfer or encumbrance of personal property to certain persons [*see Code Civ. Proc. § 486.110*; *see also § 62.35[5]*].

[5] Creation, Perfection, and Termination of Lien

The service on the defendant of a temporary protective order [*see Code Civ. Proc. § 486.080*] creates a lien on any property, or its proceeds, that is described in the order, owned by the defendant at the time of the service, and subject to attachment. The lien continues notwithstanding the transfer or encumbrance of the property subject to the lien, except when the transfer or encumbrance is made to certain persons, such as a buyer in the ordinary course of business, or a holder in due course of a negotiable instrument [*Code Civ. Proc. § 486.110(a)*; *see Code Civ. Proc. § 697.740*].

The lien terminates on the date of expiration of the order except with respect to property levied on under a writ of attachment while the temporary protective order is in effect [*Code Civ. Proc. § 486.110(b)*].

Liens created by temporary protective order or attachment within 90 days of filing of a bankruptcy petition or an assignment for the benefit of creditors are automatically terminated [*Code Civ. Proc. § 493.030*].

NOTE:

Date of Attachment Lien. If a temporary protective order is served more than 90 days before bankruptcy, and attachment is within 90 days, there is still no preference, because the creation of the attachment lien by levy relates back to the date of the temporary protective order [*In re Wind Power Systems, Inc. (9th Cir. 1988) 841 F.2d 288, 293* ; *see § 62.13[9]*].

[6] Modification or Vacation of Order

The court may modify or vacate a temporary protective order if it determines that the action would be in the interest of justice and equity to the parties. In making its determination, the court takes into account the following [*Code Civ. Proc. § 486.100*]:

- The effect on the defendant of the continuance of the original order.
- The effect on the plaintiff of modifying or vacating the order.
- Any other factors.

The court may modify or vacate a temporary protective order either on an ex parte application of the defendant or, if the court so orders, after a noticed hearing [*Code Civ. Proc. § 486.100*].

For a form of application for an order to modify or vacate a temporary protective order and a form of order, see *§§ 62.136* and *62.137*.

[7] Expiration of Order

Except as otherwise provided in the Attachment Law, the temporary protective order expires at the earlier of the following times [*Code Civ. Proc. § 486.090*]:

- Forty days after the issuance of the order or on an earlier date if prescribed by the court in the order.
- As to specific property described in the order, when a levy of attachment on that property is made by the plaintiff.

If a continuance is granted under the noticed hearing procedure, any temporary order in effect may be extended up to 10 days after the new hearing date [*see Code Civ. Proc. § 484.080*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 62.36 Nonresident Attachment

[1] Availability

An attachment may be issued in any action for the recovery of money brought against any of the following [*Code Civ. Proc. § 492.010*]:

- A natural person who does not reside in California.
- A foreign corporation not qualified to do business in California [*see Corp. Code § 2101 et seq.*].
- A foreign partnership that has not filed a designation of agent [*see Corp. Code § 15800*].

Attachment against nonresidents is broader in scope than that permitted by the general attachment provisions, which limit attachment to actions "on a claim or claims for money, each of which is based upon a contract, express or implied, where the total amount of the claim or claims is a fixed or readily ascertainable amount not less than five hundred dollars..." [*see Code Civ. Proc. § 483.010(a)*]. This means that a resident's property that would be exempt from attachment is attachable in the case of a nonresident until such time as the nonresident has filed a general appearance.

For a discussion of what property of a nonresident may be attached, see *§ 62.12[3][e]*.

PRACTICE TIP:

Arbitration of International Commercial Disputes. An attachment may be an effective tool to encourage arbitration of international commercial disputes. A party to an arbitration agreement regarding international commercial disputes may seek interim protective measures before or during arbitration proceedings [*Code Civ. Proc. § 1297.91*], including an order of attachment [*Code Civ. Proc. § 1297.93(a)*]. For further discussion of arbitration of international commercial disputes, see Ch. 35,

Arbitration and Conciliation of International Commercial Dispute .

[2] Application for Nonresident Attachment

On or after filing a complaint, the plaintiff may apply for an RTAO and a writ of attachment with the court in which the action is brought [*Code Civ. Proc. § 492.020(a)*; *see § 62.130*].

The application must satisfy the requirements for applications under the noticed hearing procedure [*see Code Civ. Proc. § 484.020*; *see also* Obtaining Writ § 62.111[2]], and must be supported by an affidavit or declaration showing all of the following [*Code Civ. Proc. § 492.020(b)*]:

- The action is for the recovery of money and is brought against an appropriate defendant [*see Code Civ. Proc. § 492.010*; *see also § 62.36[1]*].

- The plaintiff on the facts presented would be entitled to a judgment on the claim on which the attachment is based.

- The property sought to be attached is subject to attachment [*Code Civ. Proc. § 492.040*; *see Code Civ. Proc. § 488.300 et seq.*].

Facts in required affidavits or declarations must be set forth with particularity [*Code Civ. Proc. § 482.040*] but may be based on information and belief [*Code Civ. Proc. § 492.020(c)*].

[3] Court Findings on Nonresident Attachment

After examining the application and the supporting affidavit (or declaration under *Code Civ. Proc. § 2015.5*), the court must issue an RTAO and writ of attachment if it finds all of the following [*Code Civ. Proc. § 492.030(a)*]:

- The claim on which the attachment is based is one on which an attachment may be issued.

- The plaintiff has established the probable validity of the claim on which the attachment is based.

- The defendant is a proper defendant [*see Code Civ. Proc. § 492.010*; *see also § 62.36[1]*].

- The attachment is not sought for a purpose other than the recovery on the claim on which the attachment is based.

- The affidavit or declaration accompanying the application shows that all or part of the property sought to be attached is subject to attachment [*see Code Civ. Proc. § 492.040*].

- The amount to be secured by attachment is greater than zero.

The RTAO must state the amount to be secured by the attachment, and the plaintiff must file a proper undertaking [*Code Civ. Proc. § 492.030(a)*; *see Code Civ. Proc. §§ 489.210, 489.220*].

For a form of ex parte RTAO and order for issuance of writ of attachment against a nonresident's property, see *§ 62.134*.

[4] Denial of Order for Nonresident Attachment

If the court finds that the application and supporting affidavit or declaration do not satisfy the requirements for

nonresident attachment [*see Code Civ. Proc. § 492.010 et seq.*], it must so state and deny the order. If denial is solely on the ground that the plaintiff has not established that the defendant is a proper defendant [*see Code Civ. Proc. § 492.010*], the court must so state. In that case, the denial does not preclude the plaintiff from applying for an RTAO and writ of attachment under the noticed hearing procedure for obtaining writs of attachment [*see Code Civ. Proc. § 484.010 et seq.*] using the same affidavits and supporting papers [*Code Civ. Proc. § 492.030(b)*].

[5] Setting Aside RTAO and Quashing Writ for Nonresident Attachment

[a] Application

Any defendant whose property has been attached under the nonresident attachment provisions [*see Code Civ. Proc. § 492.010 et seq.*] may apply to set aside the order, to quash the writ of attachment, and to release any property levied upon under the writ. To apply, the defendant must file with the court, and serve on the plaintiff, a notice of motion [*Code Civ. Proc. § 492.050(a)*] which must [*Code Civ. Proc. § 492.050(b)*]:

- State the grounds on which the motion is based.
- Be accompanied by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) supporting any factual issues.
- Be accompanied by points and authorities supporting any legal issues raised.

If the defendant has filed a general appearance in the action, the RTAO must be set aside unless the plaintiff shows that the right to attach is authorized by a provision other than the basic nonresident attachment provision [*Code Civ. Proc. § 492.050(c)*; *see Code Civ. Proc. § 492.010*].

For a form of application and an order to set aside an RTAO, see *§§ 62.142* and *62.143*.

[b] Hearing and Determination of Motion to Set Aside

The court's determination of the motion to set aside the RTAO must be made on the basis of the pleadings and other papers in the record. On good cause shown, however, the court may receive and consider additional evidence, oral or documentary, and additional points and authorities. The court may also continue the hearing for the production of additional evidence or points and authorities [*Code Civ. Proc. § 492.050(e)*]. The hearing must take precedence over all other civil matters on the calendar of that day except older matters of the same character [*Code Civ. Proc. § 492.050(f)*].

At the hearing, the court must determine whether the plaintiff is entitled to an RTAO. If the court finds that the plaintiff is entitled to an RTAO, the attachment must continue in effect [*Code Civ. Proc. § 492.050(d)*]. If the defendant has filed a general appearance, however, only nonexempt property may be levied on and exempt property previously levied on must be released [*Code Civ. Proc. § 492.050(d)*; *see Code Civ. Proc. § 492.040*].

If the court finds that the plaintiff is entitled to an RTAO, the plaintiff may apply for additional writs under the noticed hearing or the ex parte hearing procedures [*Code Civ. Proc. § 492.050(d)*; *see § 62.32[1] et seq., and § 62.32* et seq.]. If the court finds that the plaintiff is not so entitled, it must order the RTAO set aside, the writ of attachment quashed, and any property levied on under the writ released [*Code Civ. Proc. § 492.050(d)*].

[6] Additional Writs Against Nonresident's Property

[a] Application

At any time after an RTAO and writ of attachment have been issued against a nonresident's property, but before the

hearing on any motion to set aside and quash, the plaintiff may apply for an additional writ of attachment [*Code Civ. Proc. § 492.060*; *see Code Civ. Proc. § 492.050*]. The application must be filed with the court in which the action is brought [*Code Civ. Proc. § 492.060*].

The application must be executed under oath and must include all of the following [*Code Civ. Proc. § 492.070*; *see §§ 62.130, 62.131*]:

- A statement that the plaintiff has been issued an RTAO and writ of attachment [*see Code Civ. Proc. § 492.030*].

- A statement of the amount to be secured by the attachment.

- A description of the property to be attached under the writ of attachment and a statement that the plaintiff is informed and believes that the property is subject to attachment [*see Code Civ. Proc. § 492.040*]. The description must satisfy the requirements for descriptions of property under the noticed hearing procedure [*see Code Civ. Proc. § 484.020*; *see 62.30[1]* et seq.].

[b] Determination Regarding Additional Nonresident Writs

The court must examine the application and supporting affidavit (or declaration under *Code Civ. Proc. § 2015.5*) and order a writ of attachment to be issued if it finds both of the following [*Code Civ. Proc. § 492.090*]:

- An RTAO has been issued in the action [*see Code Civ. Proc. § 492.030*].

- The affidavit or declaration accompanying the application shows that all or a portion of the property sought to be attached is subject to attachment [*see Code Civ. Proc. § 492.040*].

Before the writ is issued, the plaintiff must also file an appropriate undertaking [*see Code Civ. Proc. §§ 489.210, 489.220*; *see also § 62.37[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsChallengesCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsTrue in Rem ActionsCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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1. Obtaining Attachment or Temporary Protective Order

6-62 California Forms of Pleading and Practice--Annotated § 62.37

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§ 62.37 Undertaking Required Before Writ, Temporary Protective Order, or Lien Order Issued

[1] Filed by Plaintiff

Before a writ of attachment, temporary protective order, or order permitting creation of a lien pursuant to *Code Civ. Proc. § 491.415(b)*[*see § 62.47[1]*] is issued, the plaintiff must file an undertaking to pay the defendant any amount the defendant may recover for wrongful attachment [*Code Civ. Proc. § 489.210*; *Vershbow v. Reiner (1991) 231 Cal. App. 3d 879, 882-883, 282 Cal. Rptr. 684]* .

Unless the surety on the undertaking is an admitted surety insurer [*see Code Civ. Proc. § 995.120*], all undertakings must be presented to a proper court for approval. On approval by the court, the undertaking must be filed with the court in which the action is pending [*Code Civ. Proc. § 489.060(a), (b)*].

PRACTICE TIP:

Proper Court For Undertaking. *Code Civ. Proc. § 489.060* implies that a proper court for presenting an undertaking may be different from the court in which the action seeking the attachment is pending. This language predates an amendment to another section [*see* former *Code Civ. Proc. § 489.310*] that permitted a defendant to submit an undertaking in lieu of property being attached to a court in a county separate from the county where the action was pending [*see* Law Rev. Comm. Comment to *Code Civ. Proc. § 489.060*]. The Law Revision Commission Comment for *Code Civ. Proc. § 489.310* (1976) makes it clear that the proper court for submitting an undertaking is, in all cases, the court where the action is pending.

The Bond and Undertaking Law (*Code Civ. Proc. § 995.010 et seq.*) applies to bonds given under the Attachment Law unless the Attachment Law provides a different rule or is inconsistent [*Code Civ. Proc. § 489.010*; *see generally Ch. 538, Suretyship, Bonds, and Undertakings, § 538.40* et seq.].

For a form of undertaking by personal sureties, see *§ 62.141*.

[2] Amount Prescribed by Statute

Unless otherwise ordered, the amount of an undertaking is $10,000 [*Code Civ. Proc. § 489.220(a)*].

If, on objection to the undertaking, the court determines that the probable recovery for wrongful attachment exceeds the amount of the undertaking, it must order the amount of the undertaking increased to the amount it determines to be the probable recovery [*Code Civ. Proc. § 489.220(b)*].

PRACTICE TIP:

Have Undertaking Ready. In order to avoid delay, the plaintiff should have an undertaking ready in the standard amount for submittal to the court whenever an ex parte or noticed hearing is held at which a temporary protective order or writ of attachment is sought.

[3] Undertaking on Appeal of RTAO

A defendant may appeal from an order granting an RTAO [*Code Civ. Proc. §§ 904.1(a)(5)* (appeal other than in limited civil case), 904.2(f) (appeal in limited civil case)]. There is no specific requirement that a defendant post a bond or furnish an undertaking in this regard. However, to secure a release of the property attached, the appealing defendant must furnish an undertaking in accordance with *Code Civ. Proc. § 489.310*.

If a plaintiff desires to continue the effect of an attachment pending its appeal from a judgment in favor of the defendant, *Code Civ. Proc. §§ 921* and *489.410* control the required amount of the undertaking. Pursuant to *Code Civ. Proc. § 921*, the amount of the undertaking on appeal, absent a motion by respondent as provided in *Code Civ. Proc. § 489.410*, must be double the amount of the debt claimed by the appellant. At any time after entry of judgment, but before perfection of an appeal under *Code Civ. Proc. § 921*, the defendant may move for an order increasing the amount of the original undertaking as is justified by the detriment to be anticipated by continuing the attachment [*Code Civ. Proc. § 489.410(a)*]. A defendant would make this motion if the defendant believes a showing can be made that the undertaking provided in *Code Civ. Proc. § 921* would be insufficient. *Code Civ. Proc. § 921* allows a respondent an additional chance to increase the amount of the undertaking on a motion of the trial court made within 60 days after the perfecting of the appeal. For forms of motion to continue an attachment in force after judgment, or to increase an undertaking on attachment after judgment, see Ch. 43, *Appeal: Stay of Proceedings* .

If a defendant appeals a final judgment in favor of a plaintiff, the defendant may file a sufficient undertaking on appeal. The attachment would be released after the respondent's failure to object to the amount of the undertaking in a timely manner [*Code Civ. Proc. § 489.420*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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6-62 California Forms of Pleading and Practice--Annotated § 62.38

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§ 62.38 Levy on Writ of Attachment by Levying Officer

[1] Transmittal of Writ and Instructions to Levying Officer and Contents of Writ

A writ of attachment must be directed to a levying officer in the county in which property of the defendant described in the writ may be located and to any registered process server [*Code Civ. Proc. § 488.020(a)*]. A "levying officer" is a sheriff, or marshal who is directed to execute a writ or order under the Attachment Law [*Code Civ. Proc. § 481.140*]. The levying officer must be located in the county in which the defendant's property is located [*Pacific Decision Sciences Corporation v. Superior Court (2004) 121 Cal. App. 4th 1100, 1108-1109, 18 Cal. Rptr. 3d 104* (writ ofattachment directed to levying officer in Orange County not valid to attach money on deposit in Florida bank and owed by New Jersey entities)].

The writ must include the following information [*Code Civ. Proc. § 488.010*]:

- The date of issuance.
- The title of the court that issued the writ and the cause and number of the action.
- The name and address of the plaintiff and the name and last known address of the defendant.
- The amount to be secured by the attachment.
- A description of the property to be levied on to satisfy the attachment.

For a form of writ of attachment, see *§ 62.170*.

[2] Contents of Instructions

The plaintiff must give the levying officer written instructions containing the information needed or requested by the levying officer to comply with the provisions of the Attachment Law, including but not limited to the following [*Code Civ. Proc. § 488.030(a)*]:

- An adequate description of any property to be levied on.
- A statement as to whether or not the property is a dwelling.
- If the property is a dwelling, whether or not it is real or personal property.

The instructions must be signed by the plaintiff's attorney of record or by the plaintiff, if he or she does not have an attorney of record [*Code Civ. Proc. § 488.030(a)*].

If the levying officer is required under the Attachment Law to serve a writ, order, notice, or other paper on any person, the plaintiff also must include in the instructions to the levying officer the correct name and address of the person. The plaintiff must use reasonable diligence to ascertain the correct name and address. Unless the levying officer has actual knowledge that the name and address included in the instructions is incorrect, he or she must rely on the instructions in serving the writ, order, notice, or other paper on the person [*Code Civ. Proc. § 488.040*].

For a sample form of instructions, see *§ 62.173*.

[3] Copy of Summons and Complaint

If a copy of the summons and complaint has not previously been served on the defendant, the plaintiff or his or her attorney of record must instruct the levying officer to serve the summons and complaint at the same time as the writ of attachment [*Code Civ. Proc. § 488.020(c)*].

[4] Deposit of Costs by Plaintiff

Except as otherwise provided by law [*see, e.g., Lab. Code § 101*], the plaintiff must deposit a sum of money with the levying officer as a prerequisite to the performance of a duty under the Attachment Law [*see Code Civ. Proc. § 481.010 et seq.*]. The amount must be sufficient to pay the costs of performing the duty [*Code Civ. Proc. § 488.050(a)(1)*].

Except as otherwise provided by law, the plaintiff must deposit with the levying officer a sum of money sufficient to pay the costs of taking the property and keeping it safely for a period not to exceed 15 days. This requirement is a prerequisite to taking property into custody by the levying officer [*see Code Civ. Proc. § 488.010 et seq.*], whether by keeper or otherwise. If a longer period of custody is required, the levying officer must, from time to time, demand orally or in writing that the plaintiff deposit additional amounts to cover estimated costs for periods not to exceed 30 days each. A written demand may be mailed or delivered to the plaintiff, and the plaintiff must be given not less than three business days after receipt of the demand within which to comply. If the amount demanded is not paid within the time specified in the oral or written demand, the levying officer must release the property [*Code Civ. Proc. § 488.050(a)(2)*].

The levying officer is not liable for failure to take or hold property unless the plaintiff has fully complied with the advance deposit of costs provisions [*Code Civ. Proc. § 488.050(b)*].

[5] Service of Copy of Writ and Notice

[a] On Defendant

On or promptly after the time of levy, the levying officer must serve a copy of the writ of attachment and notice of

attachment on the defendant [*Code Civ. Proc. § 488.305*]. For a form of notice of attachment, see *§ 62.171*.

A notice of attachment must inform the person who is served with the attachment all of the following [*Code Civ. Proc. § 488.060*]:

- The capacity in which the person is notified.
- The specific property that is sought to be attached.
- The person's rights under attachment, including the right to make a third-party claim [*see Code Civ. Proc. § 720.010 et seq.*; *see also* Third-Party Claims in Attached Property, *below*].
- The person's duties under the attachment.

A notice of attachment must also advise the defendant that the undertaking has been filed and inform the defendant of his or her right to object to the undertaking on the following grounds [*Code Civ. Proc. § 489.230(a)*; *see Code Civ. Proc. § 995.920*]:

- The sureties are insufficient.
- The amount is insufficient.
- The bond is insufficient for any other cause.

A temporary protective order must include a comparable statement [*Code Civ. Proc. § 489.230(b)*].

[b] On Financial Institutions or Insurance Companies

The following organizations must be served a writ and notice of attachment at the office or branch that has actual possession of the levied-on property or deposit account [*Code Civ. Proc. §§ 482.070, 684.110(c)*]:

- A financial institution.
- A title insurance company [*see Ins. Code § 12340.4*].
- An underwritten title company [*see Ins. Code § 12340.5*].
- An industrial loan company [*see Fin. Code § 18003*; *see Fin. Code § 18003.2* (statutory references to an industrial loan company mean an insurance premium finance agency as defined in *Fin. Code § 18560*)].

Service must be made on the officer, manager, or other person in charge of the office or branch at the time of service [*Code Civ. Proc. § 684.110(c)*].

[c] Failure to Serve, Post, or Mail Writ or Notice

In situations in which a copy of a writ of attachment and notice of attachment are required by statute to be posted, served on, or mailed to the defendant or another person [*see, e.g., Code Civ. Proc. §§ 482.070, 488.305*], failure to post, serve, or mail the copy of the writ and the notice does not affect the attachment lien created by the levy [*Code Civ. Proc. § 488.120*].

[6] Levy on Writ

[a] Required Compliance With Written Instructions

On receipt of the written instructions [§ 62.173[3]], the levying officer must levy the writ without delay. The levy must be carried out in the manner provided in the Attachment Law [*see Code Civ. Proc. § 488.010 et seq.*] on the property described in the writ or as much of the property clearly needed to satisfy the amount to be secured by the attachment. The levying officer is not liable for this determination if made in good faith [*Code Civ. Proc. § 488.020(b)*].

In general, the levying officer must act in accordance with the written instructions to the extent the actions are taken in conformance with the Attachment Law [*Code Civ. Proc. § 488.030(b)*]. Thus, the levying officer may rely on any information contained in the written instructions, except to the extent that he or she has actual knowledge that the information is incorrect [*Code Civ. Proc. § 488.030(c)*; *see* Form 32].

[b] Taking Custody of Property

Except as otherwise provided by statute [*see, e.g., Code Civ. Proc. §§ 700.070, 700.080*], when a levying officer is directed to take property into custody, he or she may do so by any of the following methods [*Code Civ. Proc. § 488.090*]:

- Removing the property to a place of safekeeping.
- Installing a keeper.
- Otherwise obtaining possession and control.

[c] Officer's Lien for Costs

The levying officer has a special lien, dependent on possession, on personal property levied on in the amount of the levying officer's costs for which an advance has not been made [*Code Civ. Proc. § 488.100*].

[d] Levy on Particular Types of Property

The Attachment Law provides methods that the levying officer must follow in levying on certain types of property [*see Code Civ. Proc. § 488.315 et seq.*]. These procedures must be followed in levying on the following types of property:

- Real property [*see Code Civ. Proc. § 488.315*].
- Growing crops, timber to be cut, or minerals and the like, including oil and gas, to be extracted, or accounts receivable resulting from their sale at the wellhead or minehead [*see Code Civ. Proc. § 488.325*].
- Tangible personal property in the possession or control of the defendant, unless otherwise provided [*see Code Civ. Proc. § 488.335*; *see also Code Civ. Proc. § 488.300 et seq.*].
- Tangible personal property in the possession or control of a third party, unless otherwise provided [*see Code Civ. Proc. § 488.345*; *see also Code Civ. Proc. § 488.300 et seq.*].
- Personal property in the custody of the levying officer [*see Code Civ. Proc. § 488.355*].
- Goods in the possession of a bailee [*see Code Civ. Proc. § 488.365*].

- Equipment of a going business in the possession or under the control of the defendant [*see Code Civ. Proc. §§ 488.375, 488.385*].

- A vehicle or vessel for which a certificate of ownership has been issued by the Department of Motor Vehicles, or a mobile home or commercial coach for which a certificate of title has been issued by the Department of Housing and Community Development, if either is equipment of a going business in the possession or under the control of the defendant [*see Code Civ. Proc. § 488.385*].

- Farm products or inventory of a going business in the possession or under the control of the defendant [*see Code Civ. Proc. § 488.395* (subject to exception that placement of a keeper in a business for the purpose of attaching tangible personal property consisting solely of money or equivalent proceeds of sales must be conducted in the same manner as provided in Code Civ. Proc. *§ 700.070), Code Civ. Proc.* § 488.405].

- Personal property used as a dwelling [*see Code Civ. Proc. §§ 488.415, 488.425*].

- A vehicle or vessel for which a certificate of ownership has been issued by the Department of Motor Vehicles and is still in effect, or a mobile home or commercial coach for which a certificate of title has been issued by the Department of Housing and Community Development and is still in effect [*see Code Civ. Proc. § 488.425*].

- Chattel paper [*see Code Civ. Proc. § 488.435*].

- An instrument [*see Code Civ. Proc. § 488.440*].

- A negotiable document of title [*see Code Civ. Proc. § 488.445*].

- A security [*see Code Civ. Proc. § 488.450*].

- A deposit account [*see Code Civ. Proc. § 488.455*; *Fin. Code § 6663*].

- Property in a safe-deposit box [*see Code Civ. Proc. § 488.460*].

- A deposit account or property in a safe-deposit box standing in the name of a person other than the defendant, either alone or together with other third persons [*see Code Civ. Proc. § 488.465*].

- An account receivable or general intangible, unless otherwise provided [*see Code Civ. Proc. § 488.470*; *see also Code Civ. Proc. § 488.300 et seq.*].

- A final money judgment [*see Code Civ. Proc. § 488.480*].

- The interest of a defendant in personal property in the estate of a decedent [*see Code Civ. Proc. § 488.485*].

If a writ of attachment has been issued for personal property located in a private place of the defendant, the plaintiff and the levying officer must follow procedures under postjudgment enforcement provisions [*Code Civ. Proc. § 488.070*; *see Code Civ. Proc. § 699.030*]. For discussion and forms relating to these procedures, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.

[e] Return of Writ and Inventory

The levying officer to whom the writ of attachment is delivered must return the writ to the court from which the writ issued, together with a report of the levying officer's actions. The return must be made promptly in accordance with the plaintiff's instructions given to the officer at the time the writ is delivered, but in no event later than 60 days after the officer receives the writ [*Code Civ. Proc. § 488.130(a)*].

The levying officer must make a full inventory of property attached and return the inventory with the writ [*Code Civ. Proc. § 488.130(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentGovernmentsLocal GovernmentsEmployees & Officials

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§ 62.39 Levy on Writ of Attachment by Registered Process Server

[1] Deposit and Levy

A registered process server may levy under a writ of attachment on certain types of property [*see Code Civ. Proc. § 488.080(a)*]. Before such a levy, the registered process server must deposit a copy of the writ with the levying officer and pay a fee [*Code Civ. Proc. § 488.080(b)*; *see Gov. Code § 26721*].

PRACTICE TIP:
Experienced Registered Process Server. If using a registered process server, be sure that person is experienced in the procedures to be followed.

To levy on property, a registered process server must do both of the following [*Code Civ. Proc. § 488.080(c)*]:

- Comply with the applicable levy, posting, and service provisions of the Attachment Law [*see Code Civ. Proc. § 488.300 et seq.*].

- Request any third person served to give a garnishee's memorandum to the levying officer [*see Code Civ. Proc. § 488.610*; *see § 62.42[1]*].

[2] Post-Levy Filing and Procedures

Within five days after a levy by a registered process server, all of the following must be filed with the levying officer [*Code Civ. Proc. § 488.080(d)*]:

- The writ of attachment.

- A proof of service of the registered process server stating the manner of levy performed.

- Proof of service of the copy of the writ and notice of attachment on other persons [*see Code Civ. Proc. § 488.300 et seq.*].

- Instructions in writing [*see Code Civ. Proc. § 488.030*; *see § 62.173*].

If the fee for service of process or notice has been paid [*see Gov. Code § 26721*], the levying officer must perform all other duties under the writ and return the writ to the court. If the registered process server does not comply with*Code Civ. Proc. § 488.080(b)* and *(d)*, the levy is ineffective, and the levying officer is not required to perform any duties under the writ and may issue a release for any property sought to be attached. The levying officer is not liable for actions taken in conformance with the provisions of the Attachment Law [*see Code Civ. Proc. § 481.010 et seq.*] if the action is taken in reliance on information provided to the levying officer [*see Code Civ. Proc. § 488.080(d)*]. This immunity does not apply, however, to the extent that the levying officer has actual knowledge that the informationis incorrect. Nor does this rule limit any liability the plaintiff or registered process server may have if the levying officer acts on the basis of incorrect information [*Code Civ. Proc. § 488.080(e)*; *see also* Limitations on Liability of Levying Officer and Registered Process Server, *below*].

The fee for services of a registered process server must be allowed as a recoverable cost [*Code Civ. Proc. § 488.080(f)*; *see Code Civ. Proc. § 1033.5(a)(4)(B)*; *see generally Ch. 174, Costs and Attorney's Fees, § 174.10* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentGovernmentsLocal GovernmentsEmployees & Officials

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§ 62.40 Limitations on Liability of Levying Officer and Registered Process Server

A levying officer or registered process server is not liable for actions taken in conformance with the provisions of the Attachment Law [*Code Civ. Proc. § 481.010 et seq.*], including actions taken in reliance on information contained in the written instructions of the plaintiff, except to the extent the levying officer or registered process server has actual knowledge that the information is incorrect. This does not limit any liability the plaintiff may have if the levying officer or registered process server acts on the basis of incorrect information given in the written instructions [*Code Civ. Proc. § 488.140(a)*; *see also Code Civ. Proc. § 488.080(e), discussed under § 62.39[2]*].

Unless a levying officer is negligent in the care or handling of the property, the levying officer is not liable to either the plaintiff or the defendant for loss by fire, theft, injury, or damage of any kind to personal property while [*Code Civ. Proc. § 488.140(b)*]:

- In the possession of the levying officer either in a warehouse or other storage place or in the custody of a keeper.
- In transit to or from a warehouse.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentGovernmentsLocal GovernmentsEmployees & OfficialsTortsPublic Entity LiabilityImmunityQualified Immunity

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6-62 California Forms of Pleading and Practice--Annotated § 62.41

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§ 62.41 Third-Party Claims in Attached Property

A third person may claim an interest in property attached by following the postjudgment enforcement procedures for third-party claims [*Code Civ. Proc. § 488.110*; *see Code Civ. Proc. § 720.010 et seq.*]. For discussion and forms relating to these procedures, see *Ch. 254, Executions and Enforcement of Judgments, § 254.310* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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6-62 California Forms of Pleading and Practice--Annotated § 62.42

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§ 62.42 Duties of Third Persons After Levy

[1] Deliver Garnishee's Memorandum to Levying Officer

Unless not required [§ 62.42[2]], the levying officer must request that the third person give the levying officer a garnishee's memorandum at the time a copy of a writ of attachment and a notice of attachment is served on a third person. Within 10 days after the request is made, the third person must mail or deliver the garnishee's memorandum to the levying officer, whether or not the levy is effective [*Code Civ. Proc. § 488.610(a)*].

PRACTICE TIP:
Plaintiff Should Verify Compliance. It is not unusual for a third person to fail to mail or deliver the garnishee's memorandum to the levying officer. It is up to the plaintiff to follow through.

If the garnishee's memorandum is received from a third person, the levying officer must promptly mail or deliver a copy of the memorandum to the plaintiff and attach the original to the writ when it is returned to the court. If the garnishee's memorandum is not received from the third person, the levying officer must so state in the return [*Code Civ. Proc. § 488.610(c)*].

[2] When Memorandum Not Required

The third person need not give a garnishee's memorandum to the levying officer if both of the following conditions are satisfied [*Code Civ. Proc. § 488.610(f)*]:

- The third person has delivered to the levying officer all of the property sought to be attached.

- The third person has paid to the levying officer the amount due at the time of levy on any obligation to the defendant and there is no additional amount that will become payable on the obligation levied on.

When a deposit account or property in a safe deposit box is attached, the financial institution need not give a garnishee's memorandum to the levying officer if the financial institution fully complies with the levy [*Code Civ. Proc. § 488.610(e)*].

[3] Contents of Garnishee's Memorandum

[a] Property Description and Status

A garnishee's memorandum must be executed under oath and contain the following information regarding the defendant's property or obligations sought to be attached [*Code Civ. Proc. § 488.610(b)*]:

- A description of any property that is not delivered to the levying officer and the reason for not delivering the property.

- A statement of the amount and terms of any obligation to the defendant sought to be attached that is due and payable but is not paid to the levying officer and the reason for not paying the obligation.

- A statement of the amount and terms of any obligation to the defendant that is not due and payable at the time of levy.

- A description of claims and rights of other persons to the property or obligation sought to be attached that are known to the third person and the names and addresses of those other persons.

When a deposit account or property in a safe deposit box is attached and a garnishee's memorandum is required, the financial institution must provide only information that is carried on the records available at the office or branch where the levy is made [*Code Civ. Proc. § 488.610(e)*].

[b] When Property Subject to Pending Action or Special Proceeding

If an attachment is ineffective because the property sought to be attached is subject to a pending action or special proceeding [*see § 62.40* et seq.] and a garnishee's memorandum has been requested, the garnishee's memorandum must include the following additional information [*Code Civ. Proc. § 488.475(c)*]:

- A statement that the attachment is not effective because the property is subject to a pending action or special proceeding.

- The title of the court and the cause and number of the pending action or proceeding.

An action or proceeding is pending from the time the action or proceeding is commenced until judgment has been entered and the time for appeal has expired or, if an appeal is filed, until the appeal has been finally determined [*Code Civ. Proc. § 488.475(d)*].

[4] Failure to Supply Memorandum or Complete Information

If a third person does not give the levying officer a required garnishee's memorandum within the time limit [*see Code Civ. Proc. § 488.610(a)*; *see also § 62.42[1]*], or does not provide complete information, the court has the discretion to require the third person to pay the costs and reasonable attorney's fees incurred in any proceedings to obtain the required information [*Code Civ. Proc. § 488.610(d)*].

[5] No Liability for Disclosure in Memorandum

A third person who gives a garnishee's memorandum under the Attachment Law is not liable to any person for the disclosure of any information contained in the garnishee's memorandum [*Code Civ. Proc. § 488.620*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentGovernmentsState & Territorial GovernmentsEmployees & Officials

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6-62 California Forms of Pleading and Practice--Annotated § 62.43

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.43 Lien of Attachment

[1] Creation

A levy on property under a writ of attachment creates an attachment lien on the property from the time of the levy until the attachment expires [*Code Civ. Proc. § 488.500(a)*; *see Code Civ. Proc. § 488.510*;§ 62.43[3]].

NOTE:

Lien on Specific Goods Created. In addition to any other rights created by a levy on chattel paper, the levy creates a lien on the defendant's rights in specific goods subject to the chattel paper [*Code Civ. Proc. § 488.435(b)*].

In general, an attachment lien continues to the same extent as provided for execution liens on subject property that is transferred or encumbered [*Code Civ. Proc. § 488.500(b)*; *see Code Civ. Proc. § 697.720 et seq.*; *see generally Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.].

[2] Priority and Effect of Lien

The priority of an attachment lien may date back to the time an earlier lien was perfected. This is true for property that is subject to the lien of a temporary protective order or a lien created under provisions setting forth a plaintiff's miscellaneous remedies, including the examination of third persons, a creditor suit, and a lien in a pending action or proceeding [*see Code Civ. Proc. § 491.110 et seq.*]. However, the priorities or rights of third persons established while the earlier lien was in effect are determined by the law governing the effect of the earlier lien [*Code Civ. Proc. § 488.500(e)*].

Special rules apply for specific types of property, as follows:

(1) *Equipment, farm products, or inventory for defendant's business* : An attachment lien on equipment of a going business in possession or control of the defendant [*see Code Civ. Proc. § 488.375*], or farm products or inventory of a going business in possession or control of the defendant [*see Code Civ. Proc. § 488.405*], has the same force and effect as a judgment lien on personal property created at the same time [*Code Civ. Proc. § 488.500(c)*; *see Code Civ. Proc. § 697.590 et seq.*; *see generally Ch. 318, Judgments, § 318.90* et seq.].

(2) *Vehicle, vessel, motorhome, or commercial coach* : If equipment consisting of a vehicle, vessel, mobile home, or commercial coach is attached [*see Code Civ. Proc. § 488.385*], the attachment lien does not affect the rights of a person who is a bona fide purchaser or encumbrancer who obtains possession of both the property and its certificate of ownership issued by the Department of Motor Vehicles or its certificate of title or registration card issued by the Department of Housing and Community Development. If the levying officer obtains possession of the certificate of ownership or certificate of title or registration card, the attachment lien has the priority of the lien of a lien creditor under *Com. Code §§ 9317* and *9323* as of the time possession is obtained by the levying officer. In the absence of possession by the levying officer, the attachment lien has the same force and effect as an unperfected security interest that attached at the same time as the notice of attachment was filed [*Code Civ. Proc. § 488.500(d)*; *see generally* Ch. 503, *Sales: Secured Transactions*].

[3] Duration of Attachment

[a] Basic Three-Year Period

Unless released or discharged sooner, an attachment ceases to be of any force or effect, and the property levied on must be released, no later than three years from the date of issuance of the writ of attachment [*Code Civ. Proc. § 488.510(a)*].

NOTE:
Date of Issuance, Not Date of Service. The three-year period runs from the date of issuance, not the date of service.

[b] One-Year Extensions

The court in which the action is pending may order a one-year extension of the time of an attachment [*Code Civ. Proc. § 488.510(b)*]. The plaintiff must present a motion showing good cause for the extension not less than 10 nor more than 60 days before the three-year time limit expires [*see Code Civ. Proc. § 488.510(b)*]. The plaintiff must also give the defendant at least five-days' notice of the motion [*Code Civ. Proc. § 488.510(b)*].

PRACTICE TIP:
When to Calendar Deadline. Calendar the deadline for 60 days before the three-year expiration of the attachment. Be sure to allow sufficient time to give the defendant five days' notice before 10 days before the expiration date.

The levying officer must serve notice of an extension order on any person holding property pursuant to an attachment and must record or file the notice in any office where the writ and notice of attachment are recorded or filed. When real property is subject to an extension order, the plaintiff or his or her attorney, instead of the levying officer, may record or file the notice. The notice must be recorded or filed prior to the expiration of the three-year period or any extension [*Code Civ. Proc. § 488.510(c)*]. A copy of the original notice of attachment that has been served on a third party holding the property sought to be attached, if served on the defendant or any other party, suffices as the notice of attachment to that person [*Code Civ. Proc. § 488.065*].

For a sample form of motion to extend attachment and an order, see *§§ 62.176* and *62.177*.

[c] Eight-Year Maximum Period

An attachment may be extended from time to time for one-year periods, but the maximum period, including extensions, may not exceed eight years from the date the writ of attachment was issued [*Code Civ. Proc. § 488.510(d)*].

According to the California Law Revision Commission, since the duration of the attachment lien is three years [*Code Civ. Proc. § 488.510(a)*], the one-year extensions under *Code Civ. Proc. § 488.510(b)* may not exceed a total of five years. Subject to this limitation, the plaintiff may preserve the effect of the attachment after entry of judgment by levy of execution on the attached property. In this way, the plaintiff may obtain an execution lien that has the same priority as the attachment lien [15 Cal. L. Revision Comm'n Reports 1335-1336 (1979)].

Similarly, if the attached property is real property, the plaintiff may preserve the priority of the attachment lien after entry of judgment by recording an abstract of judgment. The plaintiff will then have a judgment lien that has the same priority as the prior attachment lien [15 Cal. L. Revision Comm'n Reports 1335-1336 (1979)].

[d] Attachment Not Terminated by Defendant's Death

The death of the defendant whose property is attached does not terminate the attachment [*Code Civ. Proc. § 488.510(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentContracts LawSecured TransactionsPerfection & PriorityPriorityLiens

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6-62 California Forms of Pleading and Practice--Annotated § 62.44

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§ 62.44 Preserving Value of Attached Property

[1] Court Ordered Receivership or Other Action

If property has been, or is sought to be, attached, the court may appoint a receiver or order the levying officer to take any action necessary to preserve the value of the property. The court may, for example, order the sale of the property if it determines that the property is perishable or will greatly depreciate in value or that for some other reason the interests of the parties will be best served by the order [*Code Civ. Proc. § 488.700(a)*].

The plaintiff, defendant, or a person who has filed a third-party claim [*see Code Civ. Proc. § 720.010 et seq.*] may apply for such an order. The application may be made ex parte. However, the court, or a local court rule, may require the application to be made on noticed motion [*Code Civ. Proc. § 488.700(a)*].

For a sample form of motion and a form of order, see *§§ 62.174* and *62.175*.

[2] Action by Levying Officer Prior to Court Order

If the levying officer determines that property is extremely perishable or will greatly deteriorate or greatly depreciate in value before a court order can be obtained, the levying officer may take any action necessary to preserve the value of the property or may sell it. The levying officer is notliable for such a determination made in good faith [*Code Civ. Proc. § 488.700(b)*].

[3] Procedure for Sale of Levied-on Property

Except as otherwise provided by court order, a sale of property must be made in the manner provided for sales of levied-on property generally [*see Code Civ. Proc. § 701.510 et seq.*; *see generally Ch. 254, Executions and Enforcement of Judgments, § 254.40*.], and the proceeds must be deposited in the court pending the judgment in the

action. However, notice of sale must be posted and served at a reasonable time before sale, considering the character and condition of the property [*Code Civ. Proc. § 488.700(c)*].

[4] Receiver's Appointment and Fees

Except as otherwise provided by *Code Civ. Proc. § 488.700*, *Code Civ. Proc. § 564 et seq.* govern the appointment, qualifications, powers, rights, and duties of a receiver appointed under *Code Civ. Proc. § 488.700*[*Code Civ. Proc. § 488.700(d)*; *see generally* Ch. 486, *Receivers*].

If a receiver is appointed, the court must fix the daily fee of the receiver. The court may order the plaintiff to pay the receiver's fees and expenses in advance or may direct that all or part of the fees and expenses be paid from the proceeds of any sale of the property [*Code Civ. Proc. § 488.700(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 62.45 Execution of Demand Instrument by Levying Officer

[1] Endorsement and Presentment

If an instrument that is payable to the defendant on demand comes into the possession of a levying officer under a writ of attachment, the officer must promptly endorse and present it for payment [*Code Civ. Proc. § 488.710(b)*]. "Instrument" means a check, draft, money order, or other order for the withdrawal of money from a financial institution, the United States, any state, or any public entity within a state [*Code Civ. Proc. § 488.710(a)*; *see generally Ch. 95 Banks, Deposits, and Checks, § 95.310* et seq.].

The levying officer must endorse the instrument by writing on it [*Code Civ. Proc. § 488.710(c)*]:

- The name of the defendant.
- The name and official title of the levying officer.
- The title of the court and the cause in which the writ was issued.

Such an endorsement is as valid as if the instrument were endorsed by the defendant. No financial institution or public entity on which the instrument is drawn is liable by reason of the endorsement to any person for payment of the instrument to the levying officer rather than to the defendant. No levying officer is liable for endorsing, presenting, and obtaining payment of the instrument. The funds or credit resulting from the payment of the instrument must by held by the levying officer subject to the lien of attachment [*Code Civ. Proc. § 488.710(c)*].

[2] Instrument Tendered in Satisfaction of Claim

If it appears from the face of the instrument that it has been tendered to the defendant in satisfaction of a claim or

demand and that the endorsement of the instrument is considered a release and satisfaction by the defendant of the claim or demand [*see generally* Ch. 6, *Accord and Satisfaction*], the levying officer must not endorse the instrument unless the defendant has first endorsed it to the levying officer. If the defendant does not endorse the instrument to the levying officer, the levying officer must hold the instrument for 30 days and is not liable to the defendant or to any other person for delay in presenting it for payment. At the end of the 30-day holding period, the levying officer must return the instrument to the maker [*Code Civ. Proc. § 488.710(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 62.46 Lien on Defendant's Pending Causes of Action or Rights Under Judgment

If the defendant is a party to a pending action or special proceeding, the plaintiff may obtain an attachment lien on both of the following [*Code Civ. Proc. § 491.410(a)*]:

- Any cause of action of the defendant for money or property if the money or property would be subject to attachment should the defendant prevail.

- The rights of the defendant to money or property under any judgment subsequently obtained in the action or proceeding if the money or property would be subject to attachment.

A contractual arbitration is not an action or proceeding within the meaning of *Code Civ. Proc. § 491.410*. Thus, at least if no petition is filed to compel arbitration or to confirm, correct, or vacate the award, a plaintiff who is not a party to the arbitration cannot create a valid lien in a pending contractual arbitration in which the defendant is a party [*Jordan-Lyon Productions, Ltd. v. Cineplex Odeon Corp. (1994) 29 Cal. App. 4th 1459, 1466-1467, 35 Cal. Rptr. 2d 200* (applying definitions in *Code Civ. Proc. §§ 20-23*)]. Although *Code Civ. Proc. § 1281.8* provides a method for a party to an arbitration agreement to obtain provisional relief, including attachment, in connection with an arbitrable controversy, Section 1281.8 does not authorize a nonparty to obtain Section 491.410 lien in relation to a contractual arbitration [*Jordan-Lyon Productions, Ltd. v. Cineplex Odeon Corp. (1994) 29 Cal. App. 4th 1459, 1470-1471, 35 Cal. Rptr. 2d 200]* .

An action or special proceeding is pending until the time for appeal from the judgment has expired or, if an appeal is filed, until the appeal has finally been determined [*Code Civ. Proc. § 491.410(d)*; *see generally* Ch. 40, *Appeal: An Overview* , et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-62 California Forms of Pleading and Practice--Annotated § 62.47

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.47 Creation of Lien

[1] Application

The plaintiff may apply for an order permitting creation of a lien in a pending action or special proceeding at the time the plaintiff applies for an RTAO [*Code Civ. Proc. § 491.415(b)*; *see §§ 62.191, 62.192*]. For this purpose, the defendant's cause of action in the pending action or special proceeding and his or her rights to money or property under a judgment procured in the action or proceeding are to be treated as property subject to attachment [*Code Civ. Proc. § 491.415(a)*].

If the plaintiff has already obtained an RTAO, an application for an order permitting creation of the lien may be applied for in the same manner as a writ of attachment [*Code Civ. Proc. § 491.415(b)*; *see* § 62.24 et seq.].

[2] Required Filings in Action or Proceeding

To obtain a lien, the plaintiff must file all of the following in the pending action or special proceeding [*Code Civ. Proc. § 491.410(b)*]:

- A notice of lien [*see § 62.48*].
- A copy of the RTAO.
- A copy of an order permitting creation of a lien in the pending action or special proceeding made by the court that issued the RTAO.

The plaintiff must also file an undertaking [*Code Civ. Proc. § 491.415(b)*; *see Code Civ. Proc. §§ 489.210, 489.220*; *see also § 62.37[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-62 California Forms of Pleading and Practice--Annotated § 62.48

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.48 Notice of Lien

[1] Contents

The notice of lien must contain the following [*Code Civ. Proc. § 491.420*; *see § 62.193*]:

- A statement that a lien has been created under *Code Civ. Proc. §§ 491.410-491.470*, and the title of the court and the cause and number of the pending action or proceeding in which the notice of lien is filed.

- The name and last known address of the defendant.

- The name and address of the plaintiff.

- The title of the court where the plaintiff's action against the defendant is pending and the cause and number of the action.

- The amount required to secure the amount to be secured by the attachment at the time the notice of lien is filed in the action or proceeding.

- A statement that the lien attaches to any cause of action of the defendant in the pending action or proceeding and to the defendant's rights to money or property under any judgment procured in the action or proceeding.

- A statement that no compromise, dismissal, settlement, or satisfaction of the pending action or proceeding or any of the defendant's rights to money or property under any judgment procured may be

entered into by or on behalf of the defendant.

- A statement that the defendant may not enforce the defendant's rights to money or property under any judgment procured in the pending action or proceeding by writ or otherwise, unless one of the following requirements is satisfied:

  - The prior approval by order of the court in which the action or proceeding is pending has been obtained.

  - The written consent of plaintiff has been obtained or the plaintiff has released the lien.

[2] Service on All Parties

On or promptly after the filing of the notice of lien and RTAO, the plaintiff must serve on all parties who have made an appearance in the action or special proceeding a copy of the notice of lien and a statement of the date when the notice of lien was filed. Failure to serve all parties as required does not affect the lien created by the filing, but the rights of a party are not affected by the lien until the party has notice [*Code Civ. Proc. § 491.410(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-62 California Forms of Pleading and Practice--Annotated § 62.49

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§ 62.49 Exemption Claim

[1] In Opposition to Creation of Lien

The defendant may claim an exemption [*see § 62.12[4]*] in a proceeding initiated by the plaintiff for an order permitting creation of a lien in a pending action or special proceeding. The exemption may be claimed if the money or property sought by the defendant would be exempt from attachment should the defendant prevail in the other action or proceeding [*Code Civ. Proc. § 491.415(c)*].

The exemption must be claimed and determined in the same manner as an exemption is claimed and determined on application for a writ of attachment [*Code Civ. Proc. § 491.415(c)*; *see § 62.30[7][a], § 62.32[3]*].

[2] After Creation of Lien

[a] By Defendant's Noticed Motion

If a lien has already been created [*see 62.47[1]*], the defendant may claim that all or any portion of the money or property that the defendant may recover in the action or special proceeding is exempt from attachment. The claim must be made by application on noticed motion to the court in which the action or special proceeding is pending. The application must be filed and served on the plaintiff not later than 30 days after the defendant has notice of the creation of lien [*Code Civ. Proc. § 491.470(a)*; *see §§ 62.194, 62.197*].

The defendant must execute an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) in support of the application that includes the following [*Code Civ. Proc. § 484.070(c)*]:

- A description of the property claimed to be exempt.

- A specification of the statute section supporting the claim.

The failure of the defendant to make a claim of exemption constitutes a waiver of the exemption [*Code Civ. Proc. § 491.470(a)*].

[b] Plaintiff's Opposition

The plaintiff may file a notice of opposition not less than two days before the date set for hearing [*Code Civ. Proc. § 484.070(f)*]. However, no notice of opposition to the claim of exemption is required [*Code Civ. Proc. § 491.470(a)*].

[c] Determination of Defendant's Claim

The court may determine the exemption claim at any time prior to the entry of judgment in the action or special proceeding, or may consolidate the exemption hearing with the hearing on a motion to satisfy the lien after judgment [*Code Civ. Proc. § 491.470(b)*; *see Code Civ. Proc. § 491.460*; *see* Satisfaction of Lien After Judgment in Action or Proceeding, *below*].

If the defendant establishes a full or partial exemption to the satisfaction of the court, the court must order the termination of the lien on the exempt portion of the money or property [*Code Civ. Proc. § 491.470(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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6-62 California Forms of Pleading and Practice--Annotated § 62.50

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§ 62.50 Plaintiff as Intervener

The court in which the action or special proceeding subject to the lien is pending may permit a plaintiff who has obtained a lien to intervene [*Code Civ. Proc. § 491.430(a)*; *see Code Civ. Proc. § 387*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 62.51 Court Order or Plaintiff's Consent Required to Enforce Judgment or Terminate Action or Proceeding

Unless the lien is released or the defendant has not received notice [*see Code Civ. Proc. § 491.410(c)*], a court order or the plaintiff's written consent is required before the following [*Code Civ. Proc. § 491.440(a)*]:

- Enforcement of a judgment recovered in the action or special proceeding in favor of the defendant by writ or otherwise.

- Entry by or on behalf of the defendant into a compromise, dismissal, settlement, or satisfaction of the pending action or special proceeding, or the judgment procured therein.

To satisfy this requirement, a defendant may apply for an order in the court in which the action or special proceeding subject to the lien is pending or the judgment is entered. The application must be on noticed motion, a copy of which must be served on plaintiff. After a hearing, the court may in its discretion make the order on any terms and conditions it deems necessary [*Code Civ. Proc. § 491.440(b)*].

For a form of application on noticed motion and supporting declaration, see *§ 62.195*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentContracts LawSecured TransactionsPerfection & PriorityPriorityLiens

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6-62 California Forms of Pleading and Practice--Annotated § 62.52

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.52 Lien Noted on Judgment and Abstract

If a lien is created, the court clerk must endorse the following on the judgment recovered in the action or special proceeding [*Code Civ. Proc. § 491.450(a)*]:

- A statement of the existence of the lien.
- The time the lien was created.

Any abstract issued on the judgment must include a statement of the lien in favor of the plaintiff [*Code Civ. Proc. § 491.450(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-62 California Forms of Pleading and Practice--Annotated § 62.53

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.53 Satisfaction of Lien After Judgment in Action or Proceeding

If the judgment in an action or special proceeding is in favor of the defendant and a lien exists, any party to the action or proceeding may apply for a court order that the defendant's rights to money or property under the judgment be attached or otherwise applied to the satisfaction of the lien. The application must be by noticed motion with a copy served on all parties [*Code Civ. Proc. § 491.460(a)*; *see § 62.196*]. The plaintiff is deemed to be a party in the action or special proceeding even though he or she has not intervened [*Code Civ. Proc. § 491.430(b)*].

If the judgment in the action or special proceeding determines that the defendant has an interest in property, the court may order the party having custody or control not to transfer the property until it can be attached or otherwise applied to the satisfaction of the lien [*Code Civ. Proc. § 491.460(b)*].The court must render judgment against any party who has notice of the lien who transfers property that was subject to the lien or has paid an amount that was subject to the lien to the defendant. The amount of the judgment is equal to the lesser of the following [*Code Civ. Proc. § 491.460(c)*]:

- The value of defendant's interest in the property or the amount paid to defendant.
- The amount of plaintiff's lien.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentContracts LawSecured TransactionsPerfection & PriorityPriorityLiens

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6-62 California Forms of Pleading and Practice--Annotated § 62.54

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.54 Enforcement of Judgment or Order in Action or Proceeding

A judgment or order attaching the defendant's rights in the action or special proceeding may be enforced in the same manner as if it had been obtained by the defendant against the third party. However, prior to entry of judgment in favor of the plaintiff against the defendant, any money or property obtained in enforcing the judgment or order against the third party must be paid or delivered into the court to abide the judgment in the action of the plaintiff against the defendant, or it may be held by the levying officer, or otherwise held, as ordered by the court [*Code Civ. Proc. § 491.460(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentContracts LawSecured TransactionsPerfection & PriorityPriorityLiens

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6-62 California Forms of Pleading and Practice--Annotated § 62.55

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.55 Order for Examination of Third Person

[1] Application and Service

The plaintiff may apply ex parte for a court order directing a third person to appear at a specified time and place to answer concerning the property of the defendant or a debt owed to the defendant. The order may provide for an examination before the court or before a referee appointed by the court [*Code Civ. Proc. § 491.110(a)*; *see § 62.144*].

A plaintiff applying for an examination must prove by affidavit, or otherwise to the satisfaction of the court, both of the following [*Code Civ. Proc. § 491.110(a)*]:

- The third person has possession or control of property in which the defendant has an interest or is indebted to the defendant in an amount exceeding $250.00.
- The plaintiff has an RTAO.

The affidavit (or declaration under *Code Civ. Proc. § 2015.5*) in support of the plaintiff's application may be based on information and belief [*Code Civ. Proc. § 491.110(a)*].

Not less than 10 days prior to the date set for the examination, the plaintiff must serve a copy of the order [*Code Civ. Proc. § 491.110(b)*]:

- Personally on the third person.
- Personally or by mail on the defendant.

[2] Notice of Sanctions in Order

The order must contain the following statement in 14-point boldface type if printed or in capital letters if typed: "NOTICE TO PERSON SERVED. If you fail to appear at the time and place specified in this order, you may be subject to arrest and punishment for contempt of court and the court may make an order requiring you to pay the reasonable attorney's fees incurred by the plaintiff in this proceeding" [*Code Civ. Proc. § 491.110(d)*; *see § 62.144*].

[3] Tender of Mileage Fees

Along with service of the order, the plaintiff must tender to the third person fees for the mileage necessary to travel from the third person's residence to the place of examination. The fees must be in the same amount generally provided for witnesses when legally required to attend civil proceedings in the court where the examination proceeding is to be conducted [*Code Civ. Proc. § 491.110(e)*; for discussion of fees, *see generally* the Ch. 535, *Subpoena*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-62 California Forms of Pleading and Practice--Annotated § 62.56

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.56 Lien on Third Person's Property

[1] Service of Order on Third Person

If the property or the debt is described in a manner reasonably adequate to permit it to be identified, service of the order on the third person creates a lien on the defendant's interest in the property or on the debt owed to the defendant. The description may be made in the application or in the affidavit (or declaration under *Code Civ. Proc. § 2015.5*). The lien continues for a period of one year from the date of the order unless extended or terminated by the court [*Code Civ. Proc. § 491.110(c)*].

[2] Continuation of Lien on Transfer or Encumbrance

A lien created under *Code Civ. Proc. § 491.110 et seq.* continues on property subject to the lien even if the property is transferred or encumbered, unless the transfer or encumbrance is made to certain persons [*Code Civ. Proc. § 491.200*; *see Code Civ. Proc. § 697.740* (termination of execution liens when transfer or encumbrance made to specified persons); *see generally Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-62 California Forms of Pleading and Practice--Annotated § 62.57

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.57 Examination Proceedings

[1] Witnesses

In any proceeding for the examination of a third person, witnesses, including the defendant, may be required to appear and testify before thecourt or referee in the same manner as on trial of the issue [*Code Civ. Proc. § 491.120*; *see generally* Ch. 551, *Trial*].

[2] Appointment of Referee or Temporary Judge

The court may appoint a member of the State Bar of California as a referee to conduct the examination proceedings [*Code Civ. Proc. § 491.130(a), (b)*]. The referee may do the following [*Code Civ. Proc. § 491.130(a)*]:

- Issue, modify, or vacate orders [*see Code Civ. Proc. § 491.190*].
- Make protective orders [*see Code Civ. Proc. § 491.180*].
- Issue warrants [*see Code Civ. Proc. § 491.160*].
- Grant adjournments.
- Preserve order.
- Subpoena witnesses to attend the examination.

The referee, however, may not perform the following functions, which are delegated expressly to the courts [*Code Civ. Proc. § 491.130(a)*]:

- Punish for contempt for disobeying an order of the referee.

- Award attorney's fees on the third person's failure to appear without good cause [*see Code Civ. Proc. § 491.160*].

- Determine a third-party claim when the third party claims an adverse interest or denies the indebtedness [*see Code Civ. Proc. § 491.170*].

The court also has the power to appoint a temporary judge on stipulation of the parties [*see Cal. Const., art. VI, § 21*; *Code Civ. Proc. § 491.130(c)*].

[3] Appearance by Corporation, Partnership, or Other Organization

If the third person is a corporation, partnership, association, trust, or other organization, it must designate one or more of the following to appear and be examined [*Code Civ. Proc. § 491.140(a)*]:

- Officers.

- Directors.

- Managing agents.

- Other persons who are familiar with the entity's property and debts.

If the order to appear names a specified individual, he or she must appear for the examination. The individual, however, may be accompanied by one or more officers, directors, managing agents, or other persons familiar with the property and debts of the corporation, partnership, association, trust, or other organization [*Code Civ. Proc. § 491.140(b)*].

If the order to appear does not require the appearance of a specified individual, the order must advise the corporation, partnership, association, trust, or other organization of its duty to make a designation [*Code Civ. Proc. § 491.140(c)*]. A corporation, partnership, association, trust, or other organization, whether or not a party, may appear at an examination through any authorized officer, director, or employee, whether or not the person is an attorney [*Code Civ. Proc. § 491.140(d)*].

[4] Location of Examination

In general, the proper court for examination of a third person in possession or control of property in which a defendant may have an interest is the court that issued the writ of attachment [*Code Civ. Proc. § 491.140(a)*]. However, a person sought to be examined may not be required to attend an examination before a court located outside the county in which the person resides or has a place of business unless the distance from the person's place of residence or place of business to the place of examination is less than 150 miles [*Code Civ. Proc. § 491.150(b)*].

If the person sought to be examined does not reside or have a place of business in the county where the court that issued the writ is located, the superior court is a proper court for the examination [*Code Civ. Proc. § 491.150(c)*].

If the plaintiff seeks an examination of a person before a court other than the court that issued the writ, the plaintiff must do all of the following [*Code Civ. Proc. § 491.150(d)*]:

- File with the court from which the order is sought a certified copy of the complaint in the pending

action.

- Present to the court an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) in support of the application stating the place of residence or place of business of the person sought to be examined.

- Make any necessary affidavit or showing to prove the RTAO and the third person's possession or control of defendant's property or indebtedness to defendant [*see Code Civ. Proc. § 491.110*].

- Pay the prescribed filing fee [*see Code Civ. Proc. § 491.150(d)*].

[5] Sanctions for Failure to Appear

If the third person fails to appear after being served the order by a sheriff, marshal, a person specially appointed by the court in the order, or a registered process server, the court may, pursuant to a warrant, have the person brought before the court to answer for failure to appear and may punish the person for contempt. In addition, if the person's failure to appear is without good cause, the plaintiff must be awarded reasonable attorney's fees incurred in the examination proceeding [*Code Civ. Proc. § 491.160(a)*; *see generally* Ch. 135, *Contempt*].

NOTE:

Misdemeanor for Willful Improper Service. A person who willfullymakes an improper service of an order for an examination is guilty of a misdemeanor if the third person is arrested and punished for failure to appear [*Code Civ. Proc. § 491.160(b)*].

[6] Protective Orders Available

In any third person examination, the court may, on motion of the person to be examined, or on its own motion, make such protective orders as justice may require [*Code Civ. Proc. § 491.180*]. For a sample motion for a protective order to limit the scope of discovery, which may be adapted for use in third party examinations with appropriate modifications, see Ch. 191, *Discovery: Privileges and Other Discovery Limitations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentCivil ProcedureSanctionsContemptGeneral Overview

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6-62 California Forms of Pleading and Practice--Annotated § 62.58

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.58 Hearing to Determine Third Person's Interest in Property or Existence of Debt

If the third person claims an interest in the property adverse to the defendant or denies the debt, the court may determine the interest in the property or the existence of the debt [*Code Civ. Proc. § 491.170(a)*]. However, the plaintiff must request the determination [*Code Civ. Proc. § 491.170(a)*].

The court may not make a determination of the third person's interest in the property or the existence of the debt if the third person's claim is made in good faith and any of the following conditions is satisfied [*Code Civ. Proc. § 491.170(b)*]:

- The court would not be a proper court for the trial of an independent civil action, including a creditor suit [*see § 62.61[1]*], for the determination of the interests in the property or the existence of the debt and the third person objects to the determination of the matter.

- At the time an order for examination is served on the third person, a civil action, including a creditor suit, is pending with respect to the interests in the property or the existence of the debt.

- The court determines that the interests in the property or the existence of the debt should be determined in a creditor suit.

A determination of the third person's interest is conclusive as to the plaintiff, the defendant, and the third person, but an appeal may be taken in the manner provided for appeals from the court in which the proceeding takes place [*Code Civ. Proc. § 491.170(a)*].

The court may grant a continuance for a reasonable time for discovery proceedings, the production of evidence, or other preparation for the hearing [*Code Civ. Proc. § 491.170(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesPrejudgment RemediesHearingsCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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6-62 California Forms of Pleading and Practice--Annotated § 62.59

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.59 Application for Orders Prior to Creditor Suit or Determination of Interest or Debt

[1] Forbidding Transfer or Payment to Defendant

On the plaintiff's ex parte application, the court may forbid transfer of the property to the defendant or payment of the debt to the defendant until either the interests in the property or the existence of the debt are determined or a creditor suit is commenced and a restraining order or preliminary injunction is obtained [*Code Civ. Proc. § 491.170(c)*; *see Code Civ. Proc. § 491.340*]. The court, in its discretion, may require an undertaking and may modify or vacate the order at any time with or without a hearing on such terms as are just [*Code Civ. Proc. § 491.170(c)*].

[2] Forbidding Transfer or Payment to Any Person

On the plaintiff's application on noticed motion, the court may forbid the transfer or other disposition of the property to any person or forbid payment of the debt until the interests in the property or the existence of the debt are determined or a creditor suit is commenced and a restraining order or preliminary injunction is obtained [*Code Civ. Proc. § 491.170(d)*; *see Code Civ. Proc. § 491.340*].

Before the court can make such an order, it must first determine that the defendant probably owns an interest in the property or that the debt is probably owed to the defendant [*Code Civ. Proc. § 491.170(d)*].

The court must require the plaintiff to furnish an undertaking on the issuance of an injunction [*see Code Civ. Proc. § 529*] and may modify or vacate the order at any time after notice and hearing on such terms as are just [*Code Civ. Proc. § 491.170(d)*].

Legal Topics:

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

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6-62 California Forms of Pleading and Practice--Annotated § 62.60

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.60 Orders Available at Conclusion of Examination or Determination

[1] Attachment of Property or Debt

Unless the third-person claim is not determined [*see Code Civ. Proc. § 491.170(b)*, and discussion under Hearing to Determine Third Person's Interest in Property or Existence of Debt, *above*], the court may order the attachment of the property or debt under conditions provided by the Attachment Law [*Code Civ. Proc. § 491.190(a)(1)*; *see generally* § 62.24 et seq.]. The court may also order the property delivered or the debt paid to the levying officer if the levying officer has a writ of attachment permitting the attachment of the property or debt [*Code Civ. Proc. § 491.190(a)(1)*].

After the property or debt has been attached, the order may be enforced as permitted in creditor suits [*see Code Civ. Proc. § 491.360*; § 62.55 et seq.]. The order creates a lien on the property or debt that continues fora period of one year from the date of the order, unless the court extends or reduces the period [*Code Civ. Proc. § 491.190(a)(1)*].

[2] Determining Third Person's Liability

If the property or debt has previously been attached, the court may make an order determining the third person's liability, and the order may be enforced in the same manner as a judgment in a creditor suit [*Code Civ. Proc. § 491.190(a)(2)*; *see Code Civ. Proc. § 491.360*, and § 62.63].

[3] Forbidding Transfer of Property or Payment of Debt

If the court does not determine the third person's interest [*see Code Civ. Proc. § 491.170(a)*], it may not order an attachment or determine the third person's liability, but it may make an order forbidding transfer or payment [*Code Civ. Proc. § 491.190(b)*; *see Code Civ. Proc. § 491.170(c), (d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-62 California Forms of Pleading and Practice--Annotated § 62.61

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.61 Creditor Suit Against Third Party to Recover Attached Property or Debt

[1] Availability

The plaintiff may bring a creditor suit against a third person in either of the following situations [*Code Civ. Proc. § 491.310*]:

- The third person has possession or control of property in which the defendant has an interest.
- The third person is indebted to the defendant and the property or debt has been subject to an attachment lien.

A creditor action may not be commenced if the attachment lien on the property or debt is not in effect [*Code Civ. Proc. § 491.330(b)*].

[2] Joinder of Defendant

The defendant must be joined in a creditor suit but is not an indispensable party. In determining proper venue, the residence of the defendant may not be considered unless otherwise provided by contract between the defendant and the third person [*Code Civ. Proc. § 491.320*].

[3] Time for Commencement and Prosecution of Action

A creditor suit must be commenced before the expiration of the later of the following times [*Code Civ. Proc. § 491.330(a)*]:

- The time when the defendant may bring an action against the third person concerning the property or

debt.

- If the attachment lien is created at a time when the defendant may bring an action against the third person, one year after the creation of the lien under the Attachment Law.

If an action is commenced within the time permitted, it may be prosecuted to judgment as long as the attachment lien or a judgment lien on the same property [*see Code Civ. Proc. § 680.010 et seq.*] is in effect [*Code Civ. Proc. § 491.330(c)*].

[4] No Right to Jury Trial

There is no right to a jury trial in a creditor suit [*Code Civ. Proc. § 491.350*].

[5] Costs Not Recoverable From Defendant

Costs incurred by or taxed against the plaintiff in a creditor suit may not be recovered from the defendant [*Code Civ. Proc. § 491.370*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderPermissive JoinderCivil ProcedureTrialsJury TrialsRight to Jury TrialCivil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

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6-62 California Forms of Pleading and Practice--Annotated § 62.62

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.62 Restraining Orders Pending Judgment in Creditor Suit

The plaintiff may apply to the court in which the creditor suit is pending for either or both of the following:

- An order restraining the third person from transferring the attached property to the defendant or from paying the attached debt to the defendant. The order must be made on a noticed motion if the court so directs or requires, or, if not, on ex parte application. The order remains in effect until judgment is entered or until the time the court provides in the order. An undertaking may be required in the discretion of the court and the court may modify or vacate the order at any time with or without a hearing on terms that are just [*Code Civ. Proc. § 491.340(a)*].

- A temporary restraining order or a preliminary injunction or both, restraining the third person from transferring to any person or otherwise disposing of the attached property. The court may make, dissolve, and modify the order as provided in the injunction provisions [*Code Civ. Proc. § 491.340(b)*; *see Code Civ. Proc. § 525 et seq.*; *see generally* Ch. 303, *Injunctions*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.63 Enforcement of Judgment in Creditor Suit

If the plaintiff establishes the liability of the third person in a creditor suit, the court must render judgment accordingly. The judgment may be enforced in the same manner as it could be enforced if it had been obtained by the defendant against the third person. Prior to entry of judgment in favor of the plaintiff against the defendant, however, any money or property obtained in enforcing the judgment against the third person must be paidor delivered into the court to abide the judgment in the action of the plaintiff against the defendant. Alternatively, the money or property must be held by a levying officer or as ordered by the court [*Code Civ. Proc. § 491.360*].

Legal Topics:

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AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.64 Release of Attached Property on Plaintiff's Request or Court Order

[1] When Release Required

The levying officer must release attached property when he or she [*Code Civ. Proc. § 488.730(a)*]:

- Receives a written direction to release the property from the plaintiff's attorney of record or, if the plaintiff does not have an attorney of record, from the plaintiff.
- Receives a certified copy of a court order for release.
- Is otherwise required to release the property.

[2] Effect of Release

The release extinguishes any attachment lien in favor of the plaintiff on the property released [*Code Civ. Proc. § 488.730(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-62 California Forms of Pleading and Practice--Annotated § 62.65

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.65 Procedure for Release

[1] Filing or Recording Notice of Release if Writ Was Filed or Recorded

If the property to be released was levied on by recording or filing a copy of the writ and a notice of attachment, the levying officer must record or file a written notice of release in the same office [*Code Civ. Proc. § 488.730(d)*].

If the notice of attachment had been filed with the Secretary of State, any release will have the effect prescribed in *Code Civ. Proc. § 697.650*[*Code Civ. Proc. § 488.730(d)*; *see Code Civ. Proc. § 697.650(c)* (effect of filing statement of release of personal property judgment lien); *see generally Ch. 318, Judgments, § 318.90* et seq.].

[2] Release if Property Was Taken Into Custody

If the property has been taken into custody under the levy, it must be released to the person from whom it was taken unless otherwise ordered by the court [*Code Civ. Proc. § 488.730(b)*].

If the person from whom the property was taken does not claim the property to be released, the levying officer must retain custody of the property and serve on the person a notice of where possession of the property may be obtained. If the person does not claim the property within 30 days after notice is served, the levying officer must sell the property unless it is cash that does not have a value exceeding its face value [*see* [*Code Civ. Proc. § 701.510 et seq.*]. After deducting his or her costs, the levying officer must deposit the proceeds of the sale and any cash with the county treasurer of the county where the property is located. The deposit must be made payable to the order of the person from whom the property was taken. If the amount deposited is not claimed by the person or the legal representative of the person within five years after the deposit is made, it must be paid into the general fund of the county by making application to the treasurer or other official designated in the county [*Code Civ. Proc. § 488.730(b)*].

[3] Release if Property Was Not Taken Into Custody

If the property to be released has not been taken into custody under the levy, the levying officer must release the attachment by issuing a written notice of release. The notice must be served on the same person who was served with a copy of the writ and a notice of attachment to create the lien [*Code Civ. Proc. § 488.730(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentGovernmentsCourtsCourt Records

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§ 62.66 No Liability for Properly Released Attachment

The levying officer is not liable for a properly released attachment [*see Code Civ. Proc. § 488.730*], and no other person is liable for acting in conformity with the release [*Code Civ. Proc. § 488.730(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentTortsPublic Entity LiabilityImmunityGeneral Overview

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6-62 California Forms of Pleading and Practice--Annotated § 62.67

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.67 Release on Judgment for Defendant

In general, if the defendant recovers judgment against the plaintiff and no further proceedings are pending, any undertaking received from the defendant in the action, all the proceeds of sales and money collected by the levying officer, and all the property attached remaining in the officer's hands must be delivered to the person from whom it was collected or taken, unless otherwise ordered by the court. This rule does not apply if a timely motion for vacation of judgment, judgment notwithstanding the verdict, or a new trial is filed and served and is pending, or an appeal is perfected and an undertaking executed and filed [*Code Civ. Proc. § 488.740*; *see Code Civ. Proc. § 921*; *see generally* tCh. 371, *Motions After Trial*, Ch. 42, *Appeal: Notice of Appeal*, and Ch. 43, *Appeal: Stay of Proceedings*].

The court must order the discharge of any attachment made in the action and the release of any property held under it [*Code Civ. Proc. § 488.740*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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6-62 California Forms of Pleading and Practice--Annotated §§ 62.68- 62.79

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

[Reserved]

§§ 62.68[Reserved]

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6-62 California Forms of Pleading and Practice--Annotated § 62.80

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.80 Application to Set Aside Order and Quash Writ

[1] By Noticed Motion

Any defendant whose property has been attached under a writ issued ex parte may apply for an order to set aside the RTAO, to quash the writ of attachment, to release any property levied on, or reduce the amount to be secured by the attachment [*see Code Civ. Proc. § 483.015*]. The application must be made by filing a notice of motion with the court and serving it on the plaintiff [*Code Civ. Proc. § 485.240(a)*].

The notice of motion must include a statement of the grounds on which the motion is based, and be accompanied by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) supporting any factual issues, and points and authorities supporting any legal issues raised [*Code Civ. Proc. § 485.240(b)*]. An assertion that the plaintiff would not have suffered great or irreparable injury [*see Code Civ. Proc. § 485.010*] if issuance of the order had been delayed until the matter could have been heard on notice is not an allowable ground to set aside an order [*Code Civ. Proc. § 485.240(b)*].

For a form of application and order to set aside RTAO and quash writ, see *§§ 62.142* and *62.143*.

[2] Hearing on Defendant's Motion

The hearing must take precedence over all other civil matters on the calendar of that day except older matters of the same character [*Code Civ. Proc. § 485.240(e)*].

At the hearing on the motion, the court must determine whether the plaintiff is entitled to the right to attach order. If the court finds that the plaintiff is not entitled to the right to attach order, it must set aside the right to attach order, quash the writ of attachment, and release any property levied on pursuant to the writ. If the court finds that the plaintiff is entitled to the right to attach order, the plaintiff may apply for additional writs under the noticed hearing procedure or the ex parte procedure [*Code Civ. Proc. § 485.240(c)*; *see Code Civ. Proc. §§ 484.310 et seq., 484.510 et seq.*; *see also § 62.30[1]* and *§ 62.32[1]*].

The court's determinations must be made on the basis of the pleadings and other papers in the record. On good cause shown, however, the court may receive and consider at the hearing additional evidence, oral or documentary, and additional points and authorities, or it may continue the hearing for the production of additional evidence or points and authorities [*Code Civ. Proc. § 485.240(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-62 California Forms of Pleading and Practice--Annotated § 62.81

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.81 Substitution of Undertaking for Attached Property

[1] Application

When a writ of attachment is issued, a defendant who has appeared in the action may apply for an order permitting the defendant to substitute an undertaking for any property in California that has been or is subject to being attached [*Code Civ. Proc. § 489.310(a)*]. The application must be made by noticed motion to the court in which the action is pending [*Code Civ. Proc. § 489.310(a)*].

In two instances, the application must include a statement, executed under oath or declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5*], describing the property to be released or protected from attachment [*Code Civ. Proc. § 489.310(b)*]:

- When the defendant applies for an order to release only a portion of property that has been attached.

- When the defendant applies for an order preventing the attachment of property, and the amount of the undertaking to be given is less than the amount to be secured by the attachment.

The court must issue the substitution order on the condition that a sufficient undertaking be filed [*Code Civ. Proc. § 489.310(c)*].

For a form of application and order to substitute undertaking, see *§§ 62.142* and *62.143*.

[2] Amount of Undertaking

The defendant must file an undertaking to pay the plaintiff the value of the property released not exceeding the amount of any judgment that may be recovered by the plaintiff in the action against the defendant. The amount of the undertaking must be equal to the lesser of [*Code Civ. Proc. § 489.310(c)*]:

- The value of the property attached or prevented from being attached.
- The amount specified by the writ to be secured by the attachment.

[3] Special Rules Concerning Multiple Defendants

When an action is against more than one defendant, any defendant may make the application. The filing of an undertaking by a defendant does not subject him or her to any demand against any other defendant. However, the levying officer is not prevented from attaching, or be obliged to release from attachment, any property of any other defendant [*Code Civ. Proc. § 489.310(d)*].

If less than all the defendants join in the application, the application must contain a statement, executed under oath (or penalty of perjury [Code*Civ. Proc. § 2015.5*]) setting forth the following [*Code Civ. Proc. § 489.310(d)*]:

- The character of the defendant's title to the property.
- The manner in which the defendant acquired title.
- Whether any other non-joining defendant has an interest in the property.

If two or more defendants have an interest in the same property, a joint application and undertaking must be filed to secure the release of the property [*Code Civ. Proc. § 489.310(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-62 California Forms of Pleading and Practice--Annotated § 62.82

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§ 62.82 Application to Terminate Protective Order and File Undertaking

A defendant who has been served with a temporary protective order and who has appeared in the action may apply by noticed motion to the court in which the action is pending for an order terminating the temporary protective order [*Code Civ. Proc. § 489.320(a)*].

The defendant must file an undertaking to pay the plaintiff the maximum amount of any judgment that could be recovered by the plaintiff, that is, an amount equal to the amount sought to be secured by the attachment. The court must issue the order terminating the temporary protective order on condition that a sufficient undertaking be filed [*Code Civ. Proc. § 489.320(b)*].

For a form of application to terminate a temporary protective order and an order, see *§§ 62.136* and *62.137*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesPrejudgment RemediesHearingsCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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6-62 California Forms of Pleading and Practice--Annotated § 62.83

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§ 62.83 Motion to Increase Plaintiff's Undertaking Pending Appeal

When the defendant prevails in the trial court, the court may order an increase in the amount of the plaintiff's original undertaking pending appeal on the defendant's motion, at any time after entry of judgment and before perfection of an appeal [*see Code Civ. Proc. § 921*]. The court may order the undertaking in an amount, if any, justified by the detriment reasonably to be anticipated by continuing the attachment. Unless the plaintiff files the undertaking within 10 days after the order, the attachment must be set aside and the property released [*Code Civ. Proc. § 489.410(a)*].

If an order increasing the original undertaking is made, the amount of the undertaking on appeal required by *Code Civ. Proc. § 921* must be the same as the amount fixed by the trial court in the order [*Code Civ. Proc. § 489.410(b)*].

In addition, a new undertaking is required if the plaintiff applies for a motion notwithstanding the verdict or for new trial and the motion is pending or is granted. The new undertaking must be provided to pay all costs and damages sustained by continuing the attachment because neither motion continues an attachment in force. The undertaking may be included in the undertaking specified in *Code Civ. Proc. § 921*. If not included, the same procedure applies as in case of an undertaking on appeal [*Code Civ. Proc. § 489.410(c)*; *see Code Civ. Proc. § 921*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-62 California Forms of Pleading and Practice--Annotated § 62.84

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.84 Release From Attachment When Defendant Files Undertaking on Appeal

When a defendant appeals and the enforcement of the judgment against him or her is stayed by the filing of a sufficient undertaking on appeal, all property of the defendant that has been attached in the action must be released from the attachment on the failure of the respondent to object to the undertaking within the time prescribed by statute. If an objection is made, the property must be released on a determination that the undertaking is sufficient [*Code Civ. Proc. § 489.420*; *see Code Civ. Proc. § 995.930(b)* (objection to bonds generally)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-62 California Forms of Pleading and Practice--Annotated § 62.85

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.85 Postlevy Procedure for Claiming Property Exemption

[1] Claim Before Entry of Judgment

At any time prior to the entry of judgment, the defendant may claim a property exemption [*see Code Civ. Proc. § 487.020(a)*] for real property by following the procedures for exemptions after levy [*Code Civ. Proc. § 487.030(a)*; *see Code Civ. Proc. § 703.510 et seq.*; *see generally Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.]. A claim of exemption will be denied if it has been denied earlier in the action and there is no change in circumstances affecting the claim [*Code Civ. Proc. § 487.030(a)*].

Prior to entry of judgment, the defendant may also claim an exemption for real property needed for the support of the defendant or his or her family by following either [*Code Civ. Proc. § 487.030(b)*]:

- The procedure for claiming exemptions after a postjudgment levy [*see Code Civ. Proc. § 703.510 et seq.*].

- The procedure for claiming exemptions under the Attachment Law [*see Code Civ. Proc. § 482.100(c)*; *see also* Pt. B, Subpt. 1, § 62.30[7]], except that the defendant does not need to show a change of circumstances [*see Code Civ. Proc. § 482.100(a)*].

When postjudgment levy procedures are used, references to "judgment debtor" and "judgment creditor" are deemed to be references to the defendant and plaintiff, respectively [*Code Civ. Proc. § 487.030(c)*].

Regardless of these provisions, a homestead exemption for real property may be claimed after judgment [*see Code Civ. Proc. § 704.710 et seq.*; *see generally* Ch. 294, *Homesteads*] unless, prior to entry of judgment, thedefendant claimed that the property was exempt from enforcement of a money judgment and the claim was denied [*Code Civ. Proc. § 487.030(d)*].

[2] Family-Support Exemption if Keeper Placed in Charge of Farm Products or Business Inventory

If farm products or the inventory of a going business are levied on by placing a keeper in charge of the property [*see Code Civ. Proc. § 488.395*], a defendant who is a natural person may claim an exemption for the support of the defendant or his or her family [*see Code Civ. Proc. § 487.020(b)*]. The exemption may be claimed by following the procedure for exemptions under the Attachment Law [*see Code Civ. Proc. § 482.100(c)*; *see also* Pt. B, Subpt. 1, § 62.30[7]], except that the requirement of showing changed circumstances does not apply [*Code Civ. Proc. § 488.395(d)*].

On a showing that the property is exempt, the court must order its release and may make any further order as the court deems appropriate to protect the collection of the plaintiff's claim. The order may permit the plaintiff to attach farm products or inventory of a going business, including proceeds or after-acquired property, by filing a notice of attachment with the Secretary of State under *Code Civ. Proc. § 488.405* [*Code Civ. Proc. § 488.395(d)*]. The order may also provide reasonable restrictions on the disposition of the property previously attached [*Code Civ. Proc. § 488.395(d)*].

Code Civ. Proc. § 488.395 does not apply to the placement of a keeper in a business for the purpose of attaching tangible personal property consisting solely of money or equivalent proceeds of sales, which must be conducted in the same manner as provided in *Code Civ. Proc. § 700.070*[*Code Civ. Proc. § 488.395(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesPrejudgment RemediesApplicationsCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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6-62 California Forms of Pleading and Practice--Annotated § 62.86

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.86 Motion for Release of Attachment on Excess Property

[1] By Noticed Motion

The defendant may apply for an order releasing the attachment of property to the extent that the value of the defendant's interest clearly exceeds the amount to be secured by the attachment. The application must be made by noticed motion to the court in which the action is pending or in which the judgment in the action was entered [*Code Civ. Proc. § 488.720(a)*].

The notice of motion must contain a statement of the grounds on which the motion is based, and be accompanied by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) supporting any factual issues, and points and authorities supporting any legal issues raised [*Code Civ. Proc. § 488.720(b)*].

For discussion of the amount to be secured by an attachment, see *§ 62.12*. For a form of application and order to release attached property, see *§§ 62.142* and *62.143*.

[2] Determination of Excess Property Motion

At the hearing on the motion, the court must determine the value of the defendant's interest in the property attached. The court must order the release of the attachment to the extent that the value of the defendant's interest in the property clearly exceeds the amount necessary to satisfy the amount to be secured by the attachment [*Code Civ. Proc. § 488.720(c)*].

If the application is made after judgment, the court must also consider the value of any property not attached in the action in determining whether or not the attachment is clearly excessive. This includes [*Code Civ. Proc. § 488.720(c)*]:

- Property that has been levied on under a writ of execution issued to satisfy the judgment.

- Other property that has been sought to be applied to the satisfaction of the judgment.

The court's determinations must be made on the basis of the pleadings and other papers in the record. On good cause shown, however, the court may receive and consider additional evidence, oral or documentary, and additional points and authorities. The court may also continue the hearing for the production of additional evidence or points and authorities [*Code Civ. Proc. § 488.720(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.87 Vacation or Stay of Attachment Under Servicemembers Civil Relief Act

When the defendant is in the military, the court, on its own motion, has discretion to vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment [*see 50 U.S.C. App. § 501 et seq.*; *see generally* Ch. 489, *Relief From Judgments and Orders* , Pt. I]. The provision applies to actions commenced before, during, or within 90 days after the defendant's military service [*50 U.S.C. App. § 524*].

The court must vacate or stay an attachment or garnishment on the application of the person in military service or of someone on his or her behalf, unless the court is of the opinion that the defendant's ability to comply with the judgment or order entered or sought is not materially affected by reason of his or her military service [*50 U.S.C. App. § 524*; *see also 50 U.S.C. App. §§ 511, 514, 516*]. When an application is made to vacate an attachment, the court may deny the application, as shown by the alternative language of the statute that allows the court to vacate *or* stay the attachment [*Halstead v. Halstead (1946) 72 Cal. App. 2d 832, 834-835, 165 P.2d 513]* .

A stay may be ordered for the period of military service and 90 days after or any part of that period, and subject to any terms as may be just. When the person in military service is a codefendant with others, the plaintiff may proceed against the others by leave of court [*50 U.S.C. App. § 525*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of AttachmentMilitary & Veterans LawServicemembersGeneral Overview

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AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.88 Vacation or Stay of Execution for Service Members

In any action against a service member, before or during the period of the service, or within 60 days thereafter, the court may vacate or stay any attachment [*Mil. & Vet. Code § 403(c)(2)*]. The court may grant the stay in its discretion on its own motion, or it must grant the stay upon application by the service member or some person on his or her behalf [*Mil. & Vet. Code § 403(c)*]. However, the court may deny the motion if in the opinion of the court the defendant's ability to comply with the order entered or sought is not materially affected by reason of his or her military service [*Mil. & Vet. Code § 403(c)*].

A stay of attachment ordered by any court may be ordered for the period of military service and three months thereafter or any part of that period, and subject to those terms as may be just, including terms with respect to payment in installments of those amounts at those times as the court may fix [*Mil. & Vet. Code § 403(d)*]. If the service member is a codefendant with others, the plaintiff may, by leave of court, proceed against the others [*Mil. & Vet. Code § 403(d)*].

"Service members" include officers and enlisted members of the National Guard called or ordered into active state service by the Governor or into active federal service by the President [*Mil. & Vet. Code § 400(a)(1)*]. "Service members" also include reservists of the United States Military Reserve who have been called to full-time active duty [*Mil. & Vet. Code § 400(a)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-62 California Forms of Pleading and Practice--Annotated § 62.89

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.89 Relief for Wrongful Attachment

[1] Wrongful Attachment Defined

A wrongful attachment consists of any of the following [*Code Civ. Proc. § 490.010*]:

- In an action in which attachment is not authorized [*see § 62.11*], the levy under a writ of attachment or the service of a protective order. However, it is not wrongful attachment if both of the following are established:

  - The levy was not authorized solely because the claim did not arise out of the defendant's conduct of trade, business, or profession [*see Code Civ. Proc. § 483.010(c)*; *see also § 62.11[4]*].

  - The person who sold or leased, or licensed for use, the property, furnished the services, or loaned the money reasonably believed that it would not be used primarily for personal, family, or household purposes.

- In an action in which the plaintiff does not recover judgment, the levy under a writ of attachment or the service of a temporary protective order.

- When property is exempt from attachment, the levy under a writ of attachment obtained under the ex parte procedure for obtaining additional writs after the noticed hearing procedure [*see Code Civ. Proc. § 484.510 et seq.* and § 62.32[1]], or under the ex parte hearing procedure for obtaining a writ of attachment [*Code Civ. Proc. § 485.010 et seq.* and § 62.33[1]]. This rule does not apply when the plaintiff shows that he or she reasonably believed the property attached was not exempt from attachment.

[2] Recovery of Damages for Wrongful Attachment

[a] Motion Procedure

A defendant may recover damages for wrongful attachment by a motion to enforce liability on the bond, made in the trial court, without the necessity of an independent action [*Code Civ. Proc. § 996.440(a)*; *see generally Ch. 538, Suretyship, Bonds, And Undertakings, § 538.40* et seq.(including forms of motion for judgment, supporting declaration, and judgment)].

A motion for damages for wrongful attachment may not be filed or notice served on the plaintiff until after [*Code Civ. Proc. § 996.440(c)*]:

- Entry of the final judgment in the action for which damages are sought.
- Either of the following:
  - The time for appeal from the judgment has expired.
  - If an appeal is filed, until the appeal is finally determined.

The motion may not be filed or notice served more than one year after the later of the preceding dates [*Code Civ. Proc. § 996.440(c)*].

The defendant must join the sureties on an undertaking for wrongful attachment liability, and any judgment of liability binds the plaintiff and sureties jointly and severally. However, the liability of a surety is limited to the amount of the undertaking [*Code Civ. Proc. §§ 996.430(a), 996.470*;§ 62.89[2][d]].

[b] Offset of Recovery Amount for Wrongful Attachment

The amount of any recovery for wrongful attachment is offset as far as possible against any unsatisfied amounts owed to the plaintiff by thedefendant under the judgment in the action for which wrongful attachment damages are awarded [*Code Civ. Proc. § 490.040*].

[c] Liability of Plaintiff for Wrongful Attachment

The damages recoverable against the plaintiff for wrongful attachment include [*Code Civ. Proc. § 490.020(a)*]:

- All damages proximately caused to the defendant by the wrongful attachment.
- All costs and expenses, including reasonable attorney's fee, reasonably expended in defeating the attachment.

The damages are, however, limited to the amount of the undertaking [*Code Civ. Proc. § 490.020(b)*].

The proper measure of damages for the wrongful taking or detention of personal property is the reasonable value of the use of the property during the period of detention [*Atlas Dev. Co. v. National Surety Co. (1923) 190 Cal. 329, 332, 212 P. 196]* . The measure of damages for the detention of money is the legal rate of interest [*Stiner v. Travelers Indem. Co. (1964) 226 Cal. App. 2d 128, 130, 37 Cal. Rptr. 813* ; *Gray v. American Surety Co. (1954) 129 Cal. App. 2d 471, 472-475, 277 P.2d 436]* . If real property is attached and the owner has suffered a loss of sale because of the attachment, the measure of damages is the amount of depreciation of the property during the period of the attachment [*Clark v. Andrews (1952) 109 Cal. App. 2d 193, 197, 240 P.2d 330]* .

Although the defendant may recover attorney's fees [*see Code Civ. Proc. § 490.020(a)(2)*], legal expenses incurred in defense of the principal suit are not allowed if the defendant might have rid himself or herself of the attachment without the defense and without incurring the expenses. However, attorney's fees are recoverable in an action for wrongful attachment when [*Reachi v. National Auto. & Cas. Co. (1951) 37 Cal. 2d 808, 811-812, 236 P.2d 151* ; *Mart, Inc. v. National Auto. & Cas. Co. (1967) 250 Cal. App. 2d 772, 774, 58 Cal. Rptr. 877]* :

- All of the proceedings, pleadings, and documents with respect to the levy of attachment are valid and regular on their face.

- A motion to discharge the attachment would have been unsuccessful and an idle and futile act.

- The only manner by which the attachment could have been discharged was to defend and win the principal action on its merits.

[d] Liability of Surety on Undertaking

A defendant may also bring an action for damages against the surety on the attachment undertaking [*see Code Civ. Proc. § 996.410 et seq.*; *see, e.g., §§ 62.210, 62.211*]. The liability of a surety is limited by the amount of the bond [*Code Civ. Proc. § 996.470(a)*], but within that limit, all damages sustained by reason of the attachment are recoverable, without regard to whether or not the damages would be recoverable under the provision defining damages for breach of an obligation [*Klinell v. Shirey (1963) 223 Cal. App. 2d 239, 245, 35 Cal. Rptr. 901* ; *see Civ. Code § 3300*].

The measure of damages against the surety is the actual expense and loss proximately resulting from the levy [*Reachi v. National Auto. & Cas. Co. (1951) 37 Cal. 2d 808, 811, 236 P.2d 151* ; *Ideal Heating Corp. v. Royal Indem. Co. (1951) 107 Cal. App. 2d 662, 664, 237 P.2d 521]* .

NOTE:

Damages Not Recoverable. A surety is not liable on an attachment undertaking for exemplary and punitive damages [*see Code Civ. Proc. § 490.020*]. Damages under the wrongful attachment provisions are limited to actual damages. By definition, exemplary and punitive damages are in addition to actual damages and, therefore, not recoverable against the surety [*Carter v. Agricultural Ins. Co. (1968) 266 Cal. App. 2d 805, 806-807, 72 Cal. Rptr. 462* ; *contra Klinell v. Shirey (1963) 223 Cal. App. 2d 239, 245, 35 Cal. Rptr. 901* (dictum), citing *Barlin v. Barlin (1957) 156 Cal. App. 2d 143, 144, 319 P.2d 87]* .

[e] Duty to Mitigate

The defendant's right to recover damages on an attachment undertaking is not lost by the defendant's failure to mitigate damages by regaining possession of the attached property during the pendency of the action [*Code Civ. Proc. §§ 489.310, 489.320*]. However, under some circumstances a failure to mitigate may be considered in determining recoverable damages [*Gray v. American Surety Co. (1954) 129 Cal. App. 2d 471, 475-476, 277 P.2d 436]* . The owner is under no duty to secure release of his or her attached property if financially unable to do so [*Stiner v. Travelers Indem. Co. (1964) 226 Cal. App. 2d 128, 133, 37 Cal. Rptr. 813* ; *Gray v. American Surety Co. (1954) 129 Cal. App. 2d 471, 476, 277 P.2d 436]* .

[3] Other Remedies Under Common Law Not Precluded

The wrongful attachment provisions [*see Code Civ. Proc. § 490.010 et seq.*] do not limit damages caused by an attachment or protective order on a common-law theory of recovery [*Code Civ. Proc. § 490.060*]. Such actions include malicious prosecution and abuse of process [*see White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 347-350, 66 Cal. Rptr. 697, 438 P.2d 345* ; *see generally* Ch. 357, *Malicious Prosecution and Abuse of Process*].

The proper theory to assert at common law against an attaching plaintiff depends on the type of wrongful conduct involved [*White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 348-349, 66 Cal. Rptr. 697, 438 P.2d 345]* :

- Levying an attachment in an action prosecuted maliciously and without probable cause is malicious prosecution [*see, e.g., § 62.212*].

- Maliciously procuring attachment in a properly instituted action in which the creditor is not entitled to the writ is abuse of process.

- Attaching property which is exempt from attachment or possesses a value greatly in excess of the amount of the legitimate claim is abuse of process.

- Using regularly issued attachment for an improper purpose is abuse of process [*see, e.g., § 62.213*].

In some instances, the person damaged may have a choice of a common law or statutory cause of action, or both, and be able to proceed on motion made in the trial court or by an independent action. An action for abuse of process, unlike one for malicious prosecution or based on statutory grounds, does not depend on a termination in favor of the defendant of the action in which the attachment issued. Thus, the attachment defendant may assert a cause of action for abuse of process by way of cross complaint in the attachment action [*White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 350-351, 66 Cal. Rptr. 697, 438 P.2d 345]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

California Forms of Pleading and Practice--Annotated

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Chapter 62 ATTACHMENT
PART III. RESEARCH GUIDE

6-62 California Forms of Pleading and Practice--Annotated § 62.110

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.110 Federal Statutes

Definitions under Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*]. *50 U.S.C. App. § 511*

Application of act to states. *50 U.S.C. App. § 512*

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Vacation or stay of attachment. *50 U.S.C. App. §§ 524, 525*

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§ 62.111 State Statutes

[1] Appeal

Appeal may be taken from order discharging or refusing to discharge attachment. *Code Civ. Proc. §§ 904.1(a)(5), 904.2(f)*

Requirement of undertaking to continue attachment in force pending appeal. *Code Civ. Proc. § 921*

[2] Attachment Law

[a] Availability

Actions in which attachment may and may not issue. *Code Civ. Proc. § 483.010(a), (d)*

Actions in which attachment may not issue. *Code Civ. Proc. § 483.010(b), (c)*

[b] Creditor's Suit

When available. *Code Civ. Proc. § 491.310*

Joinder of defendant is required; residence of defendant does not affect determination of venue. *Code Civ. Proc. § 491.320*

Time for commencement and prosecution of action. *Code Civ. Proc. § 491.330*

Restraining orders available prior to judgment. *Code Civ. Proc. § 491.340*

No right to jury trial. *Code Civ. Proc. § 491.350*

Enforcement of judgment. *Code Civ. Proc. § 491.360*

Costs incurred by or taxed against plaintiff are not recoverable against defendant. *Code Civ. Proc. § 491.370*

[c] Definitions

"Account debtor." *Code Civ. Proc. § 481.020*; *Com. Code § 9102(a)(3)*

"Account receivable." *Code Civ. Proc. § 481.030*; *Com. Code § 9102(a)(2)*

"Chattel paper." *Code Civ. Proc. § 481.040*; *Com. Code § 9102(a)(11)*

"Deposit account." *Code Civ. Proc. § 481.080*; *Com. Code § 9102(a)(29)*

"Document of title." *Code Civ. Proc. § 481.090*; *Com. Code §§ 7201(b), 9102(a)(30)*

"Equipment." *Code Civ. Proc. § 481.100*

"Farm products." *Code Civ. Proc. § 481.110*

"Financial institution." *Code Civ. Proc. § 481.113*

"General intangibles." *Code Civ. Proc. § 481.115*; *Com. Code § 9102(a)(42)*

"Instrument." *Code Civ. Proc. § 481.117*; *Com. Code § 9102(a)(47)*

"Inventory." *Code Civ. Proc. § 481.120*

"Levying officer." *Code Civ. Proc. § 481.140*

"Person." *Code Civ. Proc. § 481.170*

"Personal property." *Code Civ. Proc. § 481.175*

"Probable validity." *Code Civ. Proc. § 481.190*

"Public entity." *Code Civ. Proc. § 481.200*

"Real property." *Code Civ. Proc. § 481.203*

"Registered process server." *Code Civ. Proc. § 481.205*

"Secured party." *Code Civ. Proc. § 481.207*; *Com. Code § 9102(a)(72)*

"Security." *Code Civ. Proc. § 481.210*; *Com. Code § 8102(a)(15)*

"Security agreement." *Code Civ. Proc. § 481.220*; *Com. Code § 9102(a)(73)*

"Security interest." *Code Civ. Proc. § 481.223*; *Com. Code § 1201(35)*

"Tangible personal property." *Code Civ. Proc. § 481.225*

[d] Ex Parte Hearing Procedure

[i] In General

Great or irreparable injury required. *Code Civ. Proc. § 485.010(a)*

Circumstances constituting great or irreparable injury. *Code Civ. Proc. § 485.010(b)*

Limitations of writ issued ex parte when bulk sales notice recorded and published. *Code Civ. Proc. § 485.010(c)*

Filing application. *Code Civ. Proc. § 485.210(a)*

Contents of application. *Code Civ. Proc. § 485.210(b)*

Supporting affidavit. *Code Civ. Proc. § 485.210(c)*

Findings of court. *Code Civ. Proc. § 485.220(a)*

Denial of application. *Code Civ. Proc. § 485.220(b)*

Application to set aside order and quash writ. *Code Civ. Proc. § 485.240(a)*

Notice of motion. *Code Civ. Proc. § 485.240(b)*

Determinations at hearing. *Code Civ. Proc. § 485.240(c)*

Basis of court's determinations. *Code Civ. Proc. § 485.240(d)*

Precedence of hearing. *Code Civ. Proc. § 485.240(e)*

Procedure and time of claiming exemption. *Code Civ. Proc. § 485.610*

Contents of writ. *Code Civ. Proc. § 488.010*

[ii] Additional Writs After Ex Parte Hearing

Filing application. *Code Civ. Proc. § 485.510*

Contents of application. *Code Civ. Proc. § 485.520*

Supporting affidavit. *Code Civ. Proc. § 485.530(a)*

Findings of court. *Code Civ. Proc. § 485.540*

[e] Examination of Third Persons

Application for order and order. *Code Civ. Proc. § 491.110(a)*

Service of order. *Code Civ. Proc. § 491.110(b)*

Lien created by service of order. *Code Civ. Proc. § 491.110(c)*

Notice of sanctions for failure to appear required in order. *Code Civ. Proc. § 491.110(e)*

Witnesses in examination. *Code Civ. Proc. § 491.120*

Appointment and powers of referee conducting examination. *Code Civ. Proc. § 491.130*

Appearance by corporation, partnership, association, trust, or other organization. *Code Civ. Proc. § 491.140*

Proper court for examination. *Code Civ. Proc. § 491.150*

Sanctions for failure to appear at examination. *Code Civ. Proc. § 491.160*

Determination of interest in property or indebtedness. *Code Civ. Proc. § 491.170(a)*

When determination may not be made. *Code Civ. Proc. § 491.170(b)*

Orders forbidding transfer of property or payment of debt is available prior to determination or plaintiff obtaining pending orders in creditor's suit. *Code Civ. Proc. § 491.170(c), (d)*

Protective orders is available on application of person to be examined. *Code Civ. Proc. § 491.180*

Orders available at conclusion of examination or determination. *Code Civ. Proc. § 491.190*

Lien created pursuant to *Code Civ. Proc. § 491.110 et seq.* continues notwithstanding transfer or encumbrance of property unless made to person listed in *Code Civ.Proc. § 697.740*. *Code Civ. Proc. § 491.200*

[f] General Provisions

Injunctive relief available. *Code Civ. Proc. § 482.020*

Affidavit. *Code Civ. Proc. § 482.040*

Delayed public disclosure. *Code Civ. Proc. § 482.050*

Method of service. *Code Civ. Proc. § 482.070*

Order to transfer property. *Code Civ. Proc. § 482.080*

Multiple writs. *Code Civ. Proc. § 482.090(a)*

Alias writ of attachment. *Code Civ. Proc. § 482.090(b)*

Date of issuance of writ. *Code Civ. Proc. § 482.090(c)*

Amount to be secured by attachment. *Code Civ. Proc. § 483.015*

Amount to be secured by attachment in unlawful detainer proceedings. *Code Civ. Proc. § 483.020*

[g] Levies

[i] In General

Contents of writ of attachment. *Code Civ. Proc. § 488.010*

Execution of writ by levying officer. *Code Civ. Proc. § 488.020*

Instructions to levying officer. *Code Civ. Proc. §§ 488.030, 488.040*

Deposit of costs is prerequisite to performance of duty by levying officer. *Code Civ. Proc. § 488.050*

Contents of notice of attachment. *Code Civ. Proc. § 488.060*

Copy of original notice of attachment served on third party constitutes notice of attachment. *Code Civ. Proc. § 488.065*

Levy on property in private place of defendant. *Code Civ. Proc. § 488.070*

Levy by registered process server. *Code Civ. Proc. § 488.080*

Methods of taking property into custody. *Code Civ. Proc. § 488.090*

Lien on levied property for levying officer's costs. *Code Civ. Proc. § 488.100*

Third-person claims on attached property. *Code Civ. Proc. § 488.110*

Failure to post, serve, or mail copy of writ or notice does not affect attachment lien. *Code Civ. Proc. § 488.120*

Return of writ. *Code Civ. Proc. § 488.130(a)*

Inventory of property. *Code Civ. Proc. § 488.130(b)*

Limitation on liability of levying officer. *Code Civ. Proc. § 488.140*

Service of writ of attachment and notice of attachment on defendant at time of levy. *Code Civ. Proc. § 488.305*

Copy of original notice of levy served on third party constitutes notice of levy when served on judgment debtor or other party. *Code Civ. Proc. § 699.545*

[ii] Levies on Certain Types of Property

Real property. *Code Civ. Proc. § 488.315*

Growing crops, timber, or minerals. *Code Civ. Proc. § 488.325*

Tangible personal property in possession or control of defendant. *Code Civ. Proc. § 488.335*

Tangible personal property in possession or control of third party. *Code Civ. Proc. § 488.345*

Personal property in custody of levying officer. *Code Civ. Proc. § 488.355*

Goods in possession of bailee. *Code Civ. Proc. § 488.365*

Equipment of going business in possession or under control of defendant. *Code Civ. Proc. § 488.375*

Vehicle, vessel, or mobile home constituting equipment of going business. *Code Civ. Proc. § 488.385*

Farm products or inventory of a going business in possession or control of defendant. *Code Civ. Proc. § 488.395*

Personal property used as dwelling. *Code Civ. Proc. §§ 488.415, 488.425*

Vehicle, vessel, mobile home, or commercial coach. *Code Civ. Proc. § 488.425*

Chattel paper. *Code Civ. Proc. § 488.435*

Instruments. *Code Civ. Proc. § 488.440*

Negotiable documents of title. *Code Civ. Proc. § 488.445*

Deposit accounts. *Code Civ. Proc. § 488.455*; *Fin. Code § 6663*

Property in safe-deposit box. *Code Civ. Proc. § 488.460*

Deposit accounts or property in safe-deposit box requiring court order for levy. *Code Civ. Proc. § 488.465*

Account receivables or general intangibles. *Code Civ. Proc. § 488.470*

Certain types of property subject to pending action or special proceeding. *Code Civ. Proc. § 488.475*

Final money judgments. *Code Civ. Proc. § 488.480*

Interests in personal property in decedent's estate. *Code Civ. Proc. § 488.485*

[h] Lien in Pending Action or Proceeding

Creation of lien. *Code Civ. Proc. § 491.410*

Contents of notice of lien. *Code Civ. Proc. § 491.420*

Plaintiff as intervener. *Code Civ. Proc. § 491.430(a)*

Plaintiff is party for purpose of application for attachment of judgment or satisfaction of lien under *Code Civ. Proc. §§ 491.460(a), 491.470*. *Code Civ. Proc. § 491.430(b)*

Court authorization or consent of plaintiff is required for enforcement of judgment in action or proceeding or compromise, dismissal, settlement, or satisfaction by defendant. *Code Civ. Proc. § 491.440*

Lien must be noted on judgment in action or proceeding or in abstract of judgment. *Code Civ. Proc. § 491.450*

Satisfaction of lien on judgment. *Code Civ. Proc. § 491.460*

Procedure for claiming that all or part of money or proceeds that may be recovered in action are exempt from attachment. *Code Civ. Proc. § 491.470*

[i] Lien of Attachment

Levy on chattel paper creates lien on defendant's rights in specific goods subject to chattel paper. *Code Civ. Proc. § 488.435(b)*

Levy on property creates lien of attachment. *Code Civ. Proc. § 488.500(a)*

Priorities of attachment lien on transfer or encumbrance of property. *Code Civ. Proc. § 488.500(b)-(d)*

Priority of attachment lien on property subject to lien of temporary protective order relates back to date of prior lien. *Code Civ. Proc. § 488.500(e)*

Duration of attachment lien is three years from date of issuance of writ unless discharged or released. *Code Civ. Proc. § 488.510(a)*

Extension of attachment on motion. *Code Civ. Proc. § 488.510(b)-(d)*

Death of defendant does not determine attachment. *Code Civ. Proc. § 488.510(e)*

[j] Management and Disposition of Attached Property

Preservation of perishable or depreciating property. *Code Civ. Proc. § 488.700*

Execution of instrument payable to defendant by levying officer. *Code Civ. Proc. § 488.710*

Motion for release of excess attached property. *Code Civ. Proc. § 488.720*

Release of attached property on written direction of plaintiff or court order. *Code Civ. Proc. § 488.730*

Release of attached property on judgment for defendant. *Code Civ. Proc. § 488.740*

[k] Nonresident Attachment

Defendants. *Code Civ. Proc. § 492.010*

Filing application. *Code Civ. Proc. § 492.020*

Findings of court. *Code Civ. Proc. § 492.030(a)*

Denial of order. *Code Civ. Proc. § 492.030(b)*

Property subject to attachment. *Code Civ. Proc. § 492.040*

Setting aside right to attach order and quashing writ. *Code Civ. Proc. § 492.050*

Additional writs. *Code Civ. Proc. § 492.060*

Contents of application. *Code Civ. Proc. § 492.070*

Findings of court. *Code Civ. Proc. § 492.090*

[l] Noticed Hearing Procedure

[i] In General

Time to apply. *Code Civ. Proc. § 484.010*

Contents of application. *Code Civ. Proc. § 484.020*

Affidavit required. *Code Civ. Proc. § 484.030*

Hearing required. *Code Civ. Proc. § 484.040*

Service on defendant. *Code Civ. Proc. § 484.040*

Contents of notice of application. *Code Civ. Proc. § 484.050*

Notice of opposition. *Code Civ. Proc. § 484.060(a)*

Claim of exemption. *Code Civ. Proc. § 484.060(b)*

Plaintiff's reply to notice of opposition. *Code Civ. Proc. § 484.060(c)*

Pre-levy procedure for claiming exemption. *Code Civ. Proc. § 484.070*

Plaintiff is required to be ready at time set for hearing. *Code Civ. Proc. § 484.080(a)*

Continuance for defendant. *Code Civ. Proc. § 484.080(b)*

Findings at hearing on application. *Code Civ. Proc. § 484.090*

Effect of court's determinations. *Code Civ. Proc. § 484.100*

Defendant's defense to plaintiff's claim not affected. *Code Civ. Proc. § 484.110(a)*

[ii] Additional Writs Through Ex Parte Procedure

Findings at hearing. *Code Civ. Proc. § 484.370*

Filing application. *Code Civ. Proc. § 484.510(a)*

Affidavit required. *Code Civ. Proc. § 484.510(b)*

Defendant's right to claim exemption by following procedure in *Code Civ. Proc. § 703.510 et seq.*. *Code Civ. Proc. § 484.530*

[iii] Additional Writs Through Noticed Hearing Procedure

Filing application. *Code Civ. Proc. § 484.310*

Contents of application. *Code Civ. Proc. § 484.320*

Contents of notice of application. *Code Civ. Proc. § 484.340*

Claim of exemption. *Code Civ. Proc. § 484.350*

Plaintiff's notice of opposition to exemption claim; burden of proof. *Code Civ. Proc. § 484.360*

Hearing and issuance of writ. *Code Civ. Proc. § 484.370*

[m] Post-Levy Procedure for Claiming Exemption

Claiming real property exempt from enforcement of money judgment. *Code Civ. Proc. § 487.030(a)*

Claiming real property necessary for support of defendant or family. *Code Civ. Proc. § 487.030(d)*

[n] Property Subject to Attachment

All corporate property for which method of levy provided. *Code Civ. Proc. § 487.010(a)*

All partnership or other unincorporated association property for which method of levy provided. *Code Civ. Proc. § 487.010(b)*

Certain specified property when defendant is natural person engaged in trade, business, or profession. *Code Civ. Proc. § 487.010(c)*

Right to attach declared homestead. *Code Civ. Proc. § 487.025*

[o] Temporary Protective Order

Filing application. *Code Civ. Proc. § 486.010(a)*

Supporting affidavit. *Code Civ. Proc. § 486.010(b)*

Findings of court. *Code Civ. Proc. § 486.020*

Order in lieu of writ. *Code Civ. Proc. § 486.030(a)*

Effect of issuing order. *Code Civ. Proc. § 486.030(b)*

Contents of order. *Code Civ. Proc. § 486.040*

Scope of order. *Code Civ. Proc. § 486.050*

Ability to issue checks. *Code Civ. Proc. § 486.060*

Persons bound by order. *Code Civ. Proc. § 486.070*

Service on defendant. *Code Civ. Proc. § 486.080*

Expiration of order. *Code Civ. Proc. § 486.090*

Modification or vacation of order. *Code Civ. Proc. § 486.100*

Lien created by order. *Code Civ. Proc. § 486.110(a)*

Termination of lien. *Code Civ. Proc. § 486.110(b)*

[p] Third Persons

Duties and liabilities of third person after levy. *Code Civ. Proc. § 488.600*

Garnishee's memorandum. *Code Civ. Proc. § 488.610*

[q] Wrongful Attachment

Unauthorized levy of writ of attachment or service of protective order. *Code Civ. Proc. § 490.010(a)*

Failure of plaintiff to recover judgment is basis for action. *Code Civ. Proc. § 490.010(b)*

Levy on exempt property. *Code Civ. Proc. § 490.010(c)*

Offset of unlawful attachment damages against unsatisfied amounts owed. *Code Civ. Proc. § 490.040*

Action at common law is not affected by statutory motion procedure for recovery of wrongful attachment damages. *Code Civ. Proc. § 490.060*

Enforcement of bond by motion. *Code Civ. Proc. § 996.440*

[3] Damages

Liability of plaintiff for damages proximately caused to defendant. *Code Civ. Proc. § 490.020(a)(1)*

Liability of plaintiff for costs and expenses, including attorney's fees. *Code Civ. Proc. § 490.020(a)(2)*

[4] Exempt Property

Property exempt from enforcement of money judgment. *Code Civ. Proc. §§ 487.020(a), 704.010 et seq.*

Property necessary for support of defendant who is natural person or defendant's family supported in whole or part by defendant. *Code Civ. Proc. § 487.020(b)*

Compensation payable by employer to employee for personal services performed by employee. *Code Civ. Proc. §§ 487.020(c), 706.011(a)*

Property not subject to attachment pursuant to *Code Civ. Proc. § 487.010*. *Code Civ. Proc. § 487.020(d)*

[5] Fees

Levying officer's or registered process server's costs for serving writ are added to and become part of judgment. *Code Civ. Proc. § 685.095*

Fee for serving or executing writ or order when levying officer is required to take immediate possession of property levied on. *Gov. Code § 26722*

Fee for serving or executing writ of attachment on real estate. *Gov. Code § 26725*

Fee for keeping and caring for property under attachment. *Gov. Code § 26726*

Fees charged and collected by marshals. *Gov. Code §§ 71265-71267*

[6] Government Officials

State and federal government or officials acting in official capacity is not required to give bond or undertaking but has same rights as if bond or undertaking were given as required by Code of Civil Procedure. *Code Civ. Proc. § 995.810 et seq.*

Attachment by Director of Agriculture in suit in name of people for recovery of license or fee. *Food & Agric. Code § 281*

Attachment by Worker's Compensation Appeals Board on behalf of injured employee. *Lab. Code § 5600 et seq.*

Attachment available in action by Attorney General to collect taxes. *Rev. & Tax. Code § 6713*

Attachment available in action by Attorney General for recovery of unpaid license tax, interest, penalties, and costs. *Rev. & Tax. Code § 7864*

Attachment available in action by Attorney General to recover use fuel tax. *Rev. & Tax. Code § 8972*

Attachment available in action by Attorney General to recover private railroad car tax. *Rev. & Tax. Code § 11473*

Attachment available in action by Attorney General to recover tax assessed against insurer. *Rev. & Tax. Code § 12680*

Attachment available in action to collect personal income or bank and corporation taxes. *Rev. & Tax. Code § 19371 et seq.*

Attachment available in action by Attorney General to collect cigarette tax. *Rev. & Tax. Code § 30302*

[7] Levying Officer

Duty of officer to release on the record attachment of real property or give written notice of release of attachment of personal property when attachment has been released or discharged. *Code Civ. Proc. §§ 488.730, 699.060*; *Gov. Code § 71265* (marshals)

Sheriff liable to person entitled to money held by sheriff and not paid to that person, plus 25 percent damages. *Gov. Code § 26680*

[8] Miscellaneous Provisions Regarding Attachment

Provisions on mechanics' liens [*Civ. Code § 3082 et seq.*] do not affect right of claimant to writ of attachment. *Civ. Code § 3152*

Attachment of property conveyed in fraud of creditors. *Civ. Code § 3439.07(a)(2), (b)*

Effect of bankruptcy proceedings and assignments for benefit of creditors on lien of attachment. *Code Civ. Proc. § 493.010 et seq.*

Attachment of goods covered by negotiable document. *Com. Code § 7602*

Attachment or levy on certified security. *Code Civ. Proc. § 488.450*; *Com. Code § 8112*

Debtor's rights transferable by attachment notwithstanding provision in security agreement prohibiting transfer. *Com. Code § 9401*

[9] Penal Provisions

Attachment of human remains for any debt or demand, or on any pretended lien or charge, is misdemeanor. *Health & Safety Code § 7053*

Attachment of money and property offered for sale or distribution in violation of *Penal Code § 319 et seq.* (lotteries). *Penal Code § 325*

[10] Records

Duty of county recorder to keep index of attachments. *Gov. Code § 27249*

[11] Sureties

Bonds and undertakings generally. *Code Civ. Proc. § 995.010 et seq.*

Admitted surety insurer is acceptable as sole surety when statute provides for undertaking. *Code Civ. Proc. § 995.610(a)*

Liability of principal and sureties on undertaking. *Code Civ. Proc. § 996.410 et seq.*

Liability on undertaking is enforceable on motion in trial court. *Code Civ. Proc. § 996.440(a)*

[12] Undertakings

[a] In General

Court approval required if undertaking given by personal sureties. *Code Civ. Proc. §§ 489.060(a), 995.410*

No court approval necessary if undertaking given by admitted surety insurer. *Code Civ. Proc. § 489.060(b)*; *see Code Civ. Proc. § 995.410*

Notice of attachment is required to state undertaking was filed and that defendant has right to object thereto. *Code Civ. Proc. § 489.230(a)*

Execution and filing of undertakings generally. *Code Civ. Proc. § 995.310 et seq.*

Sufficiency of personal sureties on undertaking. *Code Civ. Proc. § 995.510 et seq.*

Sufficiency of admitted surety insurer on undertaking. *Code Civ. Proc. § 995.610 et seq.*

Deposits in lieu of undertaking. *Code Civ. Proc. § 995.710 et seq.*

Objections to undertakings. *Code Civ. Proc. § 995.910 et seq.*

Insufficient and excessive undertakings. *Code Civ. Proc. § 996.010 et seq.*

Release and substitution of sureties. *Code Civ. Proc. § 996.110 et seq.*

Liability of principal and sureties. *Code Civ. Proc. § 996.410 et seq.*

[b] Appeal

Increase in original undertaking authorized in amount of detriment to defendant reasonably to be anticipated by postjudgment continuation of attachment. *Code Civ. Proc. § 489.410*

All property released from attachment on failure of respondent to object or on determination of sufficiency of undertaking. *Code Civ. Proc. § 489.420*

[c] To Obtain Writ of Attachment, Protective Order, or Right to Attach Order

Plaintiff required to file undertaking before issuance of writ of attachment, temporary protective order, or right to attack order pursuant to *Code Civ. Proc. § 491.415(b). Code Civ. Proc. § 489.210*

Amount of undertaking is $2,500 in limited civil cases and $7,500 otherwise; court may increase amount to cover probable recovery for wrongful attachment. *Code Civ. Proc. § 489.220*

[d] To Obtain Release of Attachment or Protective Order

Procedure for filing undertaking as substitute for property attached or subject to attachment, or for temporary protective order. *Code Civ. Proc. § 489.310*

[13] Uniform Foreign-Money Claims Act

Procedure for establishing under Uniform Foreign-Money Claims Act (*Code Civ. Proc. § 676 et seq.*) value of foreign money claim in U.S. dollars for purposes of attachment law. *Code Civ. Proc. § 676.11*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesPrejudgment RemediesHearingsCivil ProcedureRemediesPrejudgment RemediesNoticesCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 62 ATTACHMENT
PART III. RESEARCH GUIDE

6-62 California Forms of Pleading and Practice--Annotated § 62.112

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.112 California Rules of Court

Declaration under oath when requesting that filing not be made public under *Code. Civ. Proc. § 482.050. Cal. Rules of Ct., Rule 2.580*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCourt RecordsGovernmentsCourtsRule Application & Interpretation

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§ 62.113 Decisions

[1] Amendment of Complaint or Affidavit

Release of sureties from liability on attachment undertaking by plaintiff's amendment of complaint changing cause of action. *Michelin Tire Co. v. Bentel (1920) 184 Cal. 315, 321-322, 193 P. 770*

Defect in affidavit for attachment in action on promissory note, consisting of failure to allege that dissipation of value of security was not caused by any act of plaintiff, as curable. *Western Bd. of Adjusters, Inc. v. Covina Pub., Inc. (1970) 9 Cal. App. 3d 659, 673, 88 Cal. Rptr. 293*

Affidavit seeking writ of attachment as amendable to same extent as a complaint, so as to defeat motion to discharge attachment. *Rosenberg v. Bullard (1932) 127 Cal. App. 315, 320-321, 15 P.2d 870*

[2] Appeal

Appellate court applies same substantial-evidence standard of review to attachment hearing decided on affidavits and declarations as to case tried on oral testimony; court reviews evidence in favor of prevailing party,resolving conflicts and drawing reasonable inferences in support of judgment; though probative facts are undisputed, appellate court unable to substitute its inferences for trial court's that are reasonably grounded on same evidence. *Bank of America v. Salinas Nissan, Inc. (1989) 207 Cal. App. 3d 260, 271, 273, 254 Cal. Rptr. 748*

Order granting application for writ of attachment as appealable order under former *Code Civ. Proc. § 904.1(e)* (*now see Code Civ. Proc. § 904.1(a)(5)*). *Lorber Industries v. Turbulence, Inc. (1985) 175 Cal. App. 3d 532, 534 n.1, 221 Cal. Rptr. 233*

If appellant's challenge of order granting writ is based on alleged failure of prevailing party to carry burden of proof of probable validity of claim, issue as that of sufficiency of evidence to support order rather than application of statutory standard of probable validity; question of whether prevailing party meets burden of proof is for trier of fact to decide, and is governed on appeal by substantial evidence rule. *Lorber Industries v. Turbulence, Inc. (1985) 175 Cal. App. 3d 532, 535, 221 Cal. Rptr. 233*

Denial of application for writ of attachment as not appealable order pursuant to former *Code Civ. Proc. § 904.1(e)* (*now see Code Civ. Proc. § 904.1(a)(5)*) and *Code Civ. Proc. § 904.2(f).* *International Typographical Union etc. Pension Plan v. Ad Compositors, Inc. (1983) 142 Cal. App. 3d 733, 735, 191 Cal. Rptr. 227*

Order, after stipulated judgment, discharging attachment and exonerating undertaking as appealable. *Urich Oil Co. v. Crown Discount Dep't Stores (1973) 34 Cal. App. 3d 743, 746, 110 Cal. Rptr. 316*

[3] Claims Subject to Prejudgment Attachment

A claim brought under the Contractors' State License Law against an unlicensed contractor may form the basis for a right to attach order since an agreement for the performance of services lies at the heart of such a claim. *Goldstein v. Barak Construction (2008) 164 Cal. App. 4th 845, 853, 79 Cal. Rptr. 3d 603*

The plaintiff has the burden of proving (1) that his or her claim is one upon which an attachment may be issued, and (2) the probable validity of the claim. A claim has probable validity when it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim. *Kemp Bros. Construction, Inc. v. Titan Electric Corporation (2007) 146 Cal. App. 4th 1474, 1481, 53 Cal. Rptr. 3d 673*

Under *Code Civ. Proc. § 483.010(a), (b),* attachments may properly issue only to secure anticipated recoveries on contract claims in fixed and readily ascertainable amounts; by necessary implication, attachments are generally unavailable on tort claims due to their unascertainable amounts and because under *Code Civ. Proc. § 483.010(a)* attachment available only on claims based on contract, express or implied; thus, unless perhaps tort claim were characterized as claim of implied contract or quasi-contract, attachment would not be available on tort claim due to necessity of satisfying contract element. *Waffer Internat. Corp. v. Khorsandi (1999) 69 Cal. App. 4th 1261, 1277, 1277 n.16, 82 Cal. Rptr. 2d 241*

For purposes of attachment, California law as generally treating action to recover statutory liability as brought on implied at law contract. *Pintor v. Ong (1989) 211 Cal. App. 3d 837, 844, 259 Cal. Rptr. 577*

Under *Code Civ. Proc. § 483.010(c),* trust estate as subject to prejudgment attachment by law firm in underlying suit for payment of fees and court costs, because trust is not natural person and law firm was not retained to represent trust in consumer transaction. *Kadison, Pfaelzer, Woodard, Quinn & Rossi v. Wilson (1987) 197 Cal. App. 3d 1, 4-5, 242 Cal. Rptr. 595*

Claim as arising out of individual's trade, business, or profession so as to allow attachment in action against individual on note that individual signed even though individual was nonmanaging, inactive partner in general partnership because loan was for benefit of partnership, was made at request of managing partner, and loan proceeds were immediately loaned to partnership, as loan condition required. *Security Pac. Nat. Bank v. Matek (1985) 175 Cal. App. 3d 1071,*

1074-1077, 223 Cal. Rptr. 288

Requirement that residential tenant deposit back rent into court before cross complaint may be filed or action continued as attachment prohibited by *Code Civ. Proc. § 483.010(c)*. *Medford v. Superior Court (1983) 140 Cal. App. 3d 236, 239-240, 189 Cal. Rptr. 227*

Availability of prejudgment attachment as limited to actions on specific types of claims. *Nakasone v. Randall (1982) 129 Cal. App. 3d 757, 761-762, 181 Cal. Rptr. 324*

Remedy of attachment as available to creditor entitled to recover under a contract with owner of property against which creditor might also have claimed a mechanic's lien but did not. *San Diego Wholesale Credit Men's Assn. v. Superior Court (1973) 35 Cal. App. 3d 458, 461-464, 110 Cal. Rptr. 657*

Applicability of provisional remedy of attachment to contract containing provision requiring arbitration. *Ross v. Blanchard (1967) 251 Cal. App. 2d 739, 742, 746, 59 Cal. Rptr. 783*

[4] Constitutionality

Connecticut statute authorizing prejudgment attachment of real property on filing of affidavit showing probable cause to sustain validity of plaintiff's claim, but without prior notice to defendant, preattachment hearing, showing of extraordinary circumstances, or bond requirement, although providing for postattachment hearing on defendant's motion, as violating due process clause of *U.S. Const., amend. XIV*. *State of Connecticut v. Doehr (1991) 501 U.S. 1, 18-24, 111 S. Ct. 2105, 115 L. Ed. 2d 1*

Prejudgment attachment procedure sanctioned by former *Code Civ. Proc. § 537(1)* relating to attachment against resident defendants as unconstitutional in violation of procedural due process guaranteed by *Cal. Const., art. I, § 13*, and *U.S. Const., amends. V*, VIX. *Randone v. Appellate Department (1971) 5 Cal. 3d 536, cert. denied, 407 U.S. 924, 92 S. Ct. 2452, 32 L. Ed. 2d 811 (1972)*

[5] Construction

Attachment Law, being purely creation of Legislature, as required to be strictly construed. *Vershbow v. Reiner (1991) 231 Cal. App. 3d 879, 882, 282 Cal. Rptr. 684*

Purpose of attachment statutes as confining attachments to commercial situations and prohibiting them in consumer transactions. *Kadison, Pfaelzer, Woodard, Quinn &Rossi v. Wilson (1987) 197 Cal. App. 3d 1, 4, 242 Cal. Rptr. 595*

[6] Court Commissioner

Court commissioner's order in favor of law firm against record company for fees for services rendered as not unconstitutionally exceeding authorized subordinate judicial duties; corporation could not claim individual exemption to bring matter within nonsubordinate judicial duties, requiring hearingbefore a judge, under *Code Civ. Proc. § 482.060(b)*. *Loeb & Loeb v. Beverly Glen Music, Inc. (1985) 166 Cal. App. 3d 1110, 1121, 212 Cal. Rptr. 830*

[7] Death of Debtor

Surety on bond to release attached property as not released from liability by debtor's death. *Turner v. Fidelity & Deposit Co. (1921) 187 Cal. 76, 83-84, 200 P. 959*

[8] Discharge of Attachment

Motion to discharge attachment on ground that complaint does not state cause of action as proper only if complaint shows on its face that pleader has no cause of action and defect cannot be cured by amendment. *Peninsula etc. Co. v. County of Santa Cruz (1950) 34 Cal. 2d 626, 629, 213 P.2d 489*

Attachment as discharged on motion when cause is not one provided in statutes authorizing attachment. *Beltaire v. Rosenberg (1900) 129 Cal. 164, 168, 61 P. 916* (decided under former *Code Civ. Proc. § 537*)

While attachment may be discharged if it is improperly or irregularly issued, it also may be terminated by operation of law. *Peck v. Hagen (1989) 215 Cal. App. 3d 602, 608-609, 263 Cal. Rptr. 198*

Order discharging or refusing to discharge attachment as not only including motions that claim attachment was improperly or irregularly issued, but as also including motions to discharge by operation of law; thus, order denying party's motion to dissolve attachment on theory that debtor's assignment of attached property was general assignment for benefit of creditors as res judicata on issue as to whether assignment was for benefit of creditors. *Peck v. Hagen (1989) 215 Cal. App. 3d 602, 608-610, 263 Cal. Rptr. 198*

Use of writ of mandate to direct court to vacate its order denying motion to discharge writ of attachment. *Samuels v. Superior Court (1969) 276 Cal. App. 2d 264, 266, 81 Cal. Rptr. 216*

On motion to discharge attachment, affidavit as pertinent when issue is factual one as to whether writ has been issued in case not provided by statute, but affidavits not to be used to negate existence of alleged cause of action on which attachment rests. *Rose v. Pearman (1958) 163 Cal. App. 2d 480, 483-484, 329 P.2d 501*

[9] Exemption Claims

Plaintiff's failure to oppose timely exemption claim as conceding its propriety, and absent such opposition, defendant as not required to prove claim; trial court as having no discretion, absent some opposition, to ignore claim. *Bank of America v. Salinas Nissan, Inc. (1989) 207 Cal. App. 3d 260, 270, 254 Cal. Rptr. 748*

[10] Findings for RTAO

Required showing of probable validity of claim on which attachment is based as satisfied by showing that it is more likely than not that plaintiff will obtain judgment against defendant on claim. *Loeb & Loeb v. Beverly Glen Music, Inc. (1985) 166 Cal. App. 3d 1110, 1118-1120, 212 Cal. Rptr. 830*

[11] Levy Methods

Keeper as not ordinarily required when levy is made on real property; but when attachment is levied on movable property, even though it be classed as fixtures, levying officer as entitled to cost of keeper necessary to safely keep property. *Callahan v. Danziger (1916) 172 Cal. 738, 743, 158 P. 760*

Promissory note as personal property capable of manual delivery; attaching officer as required to take it into his or her possession, when it can be found, in order to make levy legal. *Jubelt v. Sketers (1948) 84 Cal. App. 2d 653, 655, 191 P.2d 460*

[12] Levying Officer

Sheriff as bound to respect and carry out court's order releasing attachment when duly authenticated copy is placed in his hands. *Hayward Lumber & Inv. Co. v. Biscailuz (1957) 47 Cal. 2d 716, 724, 306 P.2d 6*

Duty of levying officer to make expense of keeping attached property as light as possible consistent with its safekeeping and to incur no unnecessary expense. *Callahan v. Danziger (1916) 172 Cal. 738, 742, 158 P. 760*

Levying officer as required to set out specifically in return acts performed in executing writ of attachment; return stating in general terms that officer served by attaching described property as insufficient. *Brusie v. Gates (1889) 80 Cal. 462, 466-469, 22 P. 284*

Levying officer must be located in county in which defendant's property is located. *Pacific Decision Sciences Corp. v. Superior Court (2004) 121 Cal. App. 4th 1100, 1108-1109, 18 Cal. Rptr. 3d 104*

[13] Lien

Attachment lien as subject to prior equities against debtor. *Haupt v. Charlie's Kosher Market (1941) 17 Cal. 2d 843, 846, 112 P.2d 627*

Unlike contractual lien under *Civ. Code § 2881(1)*, attachment lien under *Code Civ. Proc. § 491.410* as created only on filing of notice of lien and other papers specified in statute. *Bluxome Street Associates v. Fireman's Fund Ins. Co. (1988) 206 Cal. App. 3d 1149, 1157, 254 Cal. Rptr. 198*

Contractual lien on litigant's interest in tort claim, if equities between lien claimants are equal, as taking precedence over subsequently created attachment lien on same tort claim even though no notice of contractual lien is legally required or was filed in tort action. *Bluxome Street Associates v. Fireman's Fund Ins. Co. (1988) 206 Cal. App. 3d 1149, 1158, 254 Cal. Rptr. 198*

[14] Multiple Defendants

Plaintiff as not required to obtain judgment against all defendants in order to keep attachment in force or to keep alive surety bond given to release attached property. *Golden West C. & A. Co. v. Peardon (1933) 130 Cal. App. 186, 189, 19 P.2d 817*

[15] Nonresident Attachment

Attachment of nonresident's property in California under *Code Civ. Proc. § 492.010* to establish quasi in rem jurisdiction as designed to operate when personal jurisdiction of defendant cannot be obtained; if defendant subsequently files general appearance, right to attach order as required to be set aside under *Code Civ. Proc. § 492.050* unless it can be supported by statutory sections relating ordinary attachment, and burden of showing such support as on plaintiff. *Nakasone v. Randall (1982) 129 Cal. App. 3d 757, 760-761, 181 Cal. Rptr. 324*

[16] Notice

Attachment order based on notice served by mail 21 days prior to attachment hearing, rather than required 25 days prior to hearing (including service by mail) as not improperly issued when no prejudicial error or injury occurred because of defective notice. *Loeb & Loeb v. Beverly Glen Music, Inc. (1985) 166 Cal. App. 3d 1110, 1115, 212 Cal. Rptr. 830*

[17] Precedence of Attachment and Wage Garnishment Laws

Specific provisions of attachment law and wage garnishment law (*Code Civ. Proc. § 706.010 et seq.*) as taking precedence over general provisions of *Gov. Code § 17051* (procedure for payment of warrant drawn against state when validity or amount is in question); hence, state's planned deduction from salaries of state medical facility employees in order to recoup prior alleged overpayments as improper when deductions did not accord with attachment and wage garnishment laws. *California State Employees' Assn. v. State of California (1988) 198 Cal. App. 3d 374, 378, 243 Cal. Rptr. 602*

[18] Priority

Priority of United States tax lien to attachment lien when federal tax lien was recorded subsequent to date of attachment lien but prior to date attaching creditor obtained judgment. *United States v. Acri (1955) 348 U.S. 211, 213, 75 S. Ct. 239, 99 L. Ed. 264*

Bus. & Prof. Code § 24074, governing transfers in escrow of liquor licenses, as representing mandatory and exclusive scheme for payment of creditors of liquor license transferors, giving creditors who comply with section priority over those who employ any form of levy, such as attachment or garnishment, on proceeds. *Grover Escrow Corp. v. Gole (1969) 71 Cal. 2d 61, 62, 77 Cal. Rptr. 21, 453 P.2d 461*

Unrecorded deed as effective as against subsequent attachment of land as property of grantor. *Overton v. Schmitt (1936) 7 Cal. 2d 163, 167, 59 P.2d 1017*

Attack on priority of attaching creditor by subsequent lienholder. *Title Ins. etc. Co. v. California Dev. Co. (1915) 171 Cal. 173, 213-222, 152 P. 542*

Lien of attachment as subject to being set aside if within four months petition initiating bankruptcy is filed [former *11 U.S.C. § 107(a)(1)*]. *Glasband v. Sun State Music Distributors, Inc. (1968) 265 Cal. App. 2d 413, 417, 71 Cal. Rptr. 482*

[19] Property Rights Subject to Attachment

Attachment of homesteaded property as proper as to value of property over homestead exemption. *Marelli v. Keating (1929) 208 Cal. 528, 530, 282 P. 793*

Writ of attachment as required to be quashed if hearing determines no equity subject to attachment in property; homesteaded property as not within provisions of *Code Civ. Proc. § 484.070*. *Martin v. Aboyan (1983) 148 Cal. App. 3d 826, 831, 196 Cal. Rptr. 266*

All wages due employee at time of discharge as exempt from attachment. *Barnhill v. Robert Saunders & Co. (1981) 125 Cal. App. 3d 1, 6, 177 Cal. Rptr. 803*

Former *Code Civ. Proc. § 561*, providing for attachment of interest of debtor in estate, whether interest by that of heir, legatee, or devisee, as permitting attachment or execution on interest of beneficiary of trust created by will of decedent. *Estate of Lawrence (1968) 267 Cal. App. 2d 77, 80, 72 Cal. Rptr. 851*

Plaintiff as not allowed to attach assets for which debtor has no actionable demand and which debtor could not recover in own action. *Hi-Valley Dev. Corp. v. Walters (1963) 223 Cal. App. 2d 778, 783, 36 Cal. Rptr. 140*

[20] Receivership

Receivership of Federal Savings and Loan Insurance Corporation (FSLIC), though instituted after attachment, as taking priority over attachment and over creditor's action by virtue of *12 U.S.C. §§ 1464(d)(6)(C)*, former 1730(k)(1); attachment as required to be discharged, creditor's action as required to be dismissed on application of *FSLIC. Federal Savings & Loan Ins. Corp. v. Superior Court (1986) 180 Cal. App. 3d 336, 342-345, 225 Cal. Rptr. 422 , cert. denied, 479 U.S. 1064 (1987)*

Use of provisional remedy of attachment in lieu of receivership. *Samuels v. Superior Court (1969) 276 Cal. App. 2d 264, 266-270, 81 Cal. Rptr. 216*

[21] Third-Party Claim

Third-party claimant as having sufficient interest to intervene under *Code Civ. Proc. § 387* in action when property claimed by third party as owner is attached. *Berghauser v. Golden State Orchards (1929) 208 Cal. 550, 552-554, 282 P. 950* ; *Hi-Valley Dev. Corp. v. Walters (1963) 223 Cal. App. 2d 778, 784, 36 Cal. Rptr. 140*

[22] Undertaking to Release Attached Property

Sureties on undertaking to release attached property as not able to defeat action by plaintiff against them on undertaking by showing attachment proceedings were voidable; sureties as required to show attachment proceedings were null and void from their inception. *Koehler v. Serr (1932) 216 Cal. 143, 146, 13 P.2d 673*

Premature return of execution, when return is necessary as foundation for action on undertaking to release attachment, as allowed to be cured by proofthat execution debtor in fact had no leviable property. *Passow & Sons v. United States F. & G. Co. (1917) 177 Cal. 31, 34, 170 P. 1124*

Regular issuance and return of execution, unsatisfied, as condition precedent to maintenance of action by plaintiff to recover against sureties on defendant's undertaking to release attached property in prior action. *Passow & Sons v. United States F. & G. Co. (1917) 177 Cal. 31, 34, 170 P. 1124*

Surety as liable for full amount of undertaking and not limited to value of property described in ex parte application or release of attachment order that contained inconsistencies and irregularities; principal and surety estopped from claiming undertaking was not value of property released by court's order because principal was responsible for irregularities and inconsistencies. *First v. Armes (1983) 146 Cal. App. 3d 633, 637-638, 194 Cal. Rptr. 171*

[23] Wrongful Attachment

[a] Damages in Action on Bond

[i] In General

Necessity and reasonableness of all expenses incurred in trial of principal action that was necessary to dispose of attachment as determined only with other issues of fact on trial; recovery of travel expenses and expert witness fees. *Reachi v. National Auto. & Cas. Co. (1951) 37 Cal. 2d 808, 813, 236 P.2d 151*

Fact that attached machinery (oil rig) could not be used further in county in which it was located as not indicating that its adaptability for use elsewhere would not give value to right to use and possess it. *Atlas Dev. Co. v. National Surety Co. (1923) 190 Cal. 329, 333, 212 P. 196*

Recovery of reasonable value of use of personal property as not prevented by fact that owner had other plans for its disposal that involved speculative sale, or even gratuitous loan. *Atlas Dev. Co. v. National Surety Co. (1923) 190 Cal. 329, 333, 212 P. 196* ; *Finn v. Witherbee (1954) 126 Cal. App. 2d 45, 48, 271 P.2d 606*

In action for wrongful attachment against surety, fact that amount of money attached and fees charged seem, comparatively speaking, unreasonable, as not true test of recoverability. *Stiner v. Travelers Indem. Co. (1964) 226 Cal. App. 2d 128, 133, 37 Cal. Rptr. 813*

Plaintiff in action for wrongful attachment against surety as entitled to recover interest on money deposited to release attached property from attachment; recovery as not defeated by fact that money is deposited with attorney of attaching creditor and attachment released pursuant to agreement between parties, rather than by deposit with officer. *Schneider v. Zoeller (1959) 175 Cal. App. 2d 354, 361-364, 346 P.2d 515*

Burden on defendant in wrongful attachment action to prove duty of owner to mitigate damages. *Gray v. American Surety Co. (1954) 129 Cal. App. 2d 471, 476, 277 P.2d 436*

[ii] Attorney's Fees

Attorney's fees incurred in defending principal action as not recoverable in action on attachment bond when defendant might have rid himself of attachment without such defense. *Reachi v. National Auto. & Cas. Co. (1951) 37 Cal. 2d 808, 811-812, 236 P.2d 151*

Attorney's fees as recoverable item of damages when trial of principal action was necessary to dispose of attachment. *Reachi v. National Auto. & Cas. Co. (1951) 37 Cal. 2d 808, 812-813, 236 P.2d 151*

Allegation in complaint for wrongful attachment against surety that alleges attorney's fees were necessarily incurred in defense of principal action as sufficient for recovery; payment of such fees as not condition precedent to their recovery. *Reachi v. National Auto. & Cas. Co. (1951) 37 Cal. 2d 808, 814, 236 P.2d 151*

Legal fees and expenses necessary to obtain discharge are recoverable whether incurred before or after levy of attachment. *Mart, Inc. v. National Auto. & Cas. Co. (1967) 250 Cal. App. 2d 772, 774, 58 Cal. Rptr. 877*

Entitlement of plaintiff in action against surety on attachment undertaking to attorney's fees incurred in defense of principal action when motions to quash and for summary judgment were unsuccessful and remaining recourse was to defend on merts. *White v. Indemnity Ins. Co. (1966) 246 Cal. App. 2d 160, 163, 54 Cal. Rptr. 630*

[b] Liability of Attachment Creditor

Applicability of doctrine of collateral estoppel in action for wrongful attachment when issues of damages resulting from attachment were decided in previous action against surety on bond. *Klinell v. Shirey (1963) 223 Cal. App. 2d 239, 244-246, 35 Cal. Rptr. 901*

Attachment plaintiff as only liable for detriment caused when attachment is levied maliciously and without probable cause. *Finn v. Witherbee (1954) 126 Cal. App. 2d 45, 50, 271 P.2d 606*

Liability of creditor who authorizes collection agency to collect debt owed for him for wrongful attachment by collection agency. *Clark v. Andrews (1952) 109 Cal. App. 2d 193, 199, 240 P.2d 330*

In action for malicious attachment, malice as permitted to be inferred from proof of want of probable cause, but want of probable cause as not to be inferred from malice. *Pacific Nat. Co. v. Southwest Fin. Co. (1935) 4 Cal. App. 2d 326, 330, 40 P.2d 862*

[c] Liability of Levying Officer

Liability of levying officer and sureties on official bond for failure of officer to keep attached property safely when warehouseman with whom officer stored attached property sold property for storage fees. *Aigeltinger v. Whelan (1901) 133 Cal. 110, 112, 65 P. 125*

Sheriff as liable for conversion to owner of attached personal property when warehouseman sold property before main

action was determined. *Reynolds v. Lerman (1956) 138 Cal. App. 2d 586, 592, 292 P.2d 559*

Liability of levying officer for failure to file inventory; complaint alleging that inventory was not filed and as result plaintiff owner was required to expend time and money in search of property as stating cause of action. *Glidden v. Wills (1955) 136 Cal. App. 2d 596, 599, 289 P.2d 55*

[d] Liability of Sureties

Discovery in action for wrongful attachment against surety. *Burke v. Superior Court (1969) 71 Cal. 2d 276, 282-286, 78 Cal. Rptr. 481, 455 P.2d 409*

Surety on undertaking to release attached property as not released from obligations of undertaking by subsequent bankruptcy of debtor. *Higgins v. Brainard (1932) 214 Cal. 647, 655, 8 P.2d 135*

Action against surety on attachment undertaking as insufficient in absence of allegation that demand had been made on plaintiff for payment of damages, or that such damages were unpaid. *Atlas Dev. Co. v. National Surety Co. (1923) 190 Cal. 329, 334, 212 P. 196* (dictum); *Swain v. Los Angeles Morris Plan Co. (1923) 60 Cal. App. 667, 670, 213 P. 703* ; *contra Finn v. Witherbee (1954) 126 Cal. App. 2d 45, 49, 271 P.2d 606* (citing *Civ. Code § 2807*, providing that surety is liable to creditor immediately on default of principal, without demand or notice)

Remedy against sureties as sustained by allegation and proof that writ was wrongfully procured; averment of malice and want of probable cause as not required. *Vesper v. Crane Co. (1913) 165 Cal. 36, 41, 130 P. 876*

Attaching creditor as having no cause of action for fraud against surety on bond to release defendant's property from attachment. *Bezaire v. Fidelity & Deposit Co. (1970) 12 Cal. App. 3d 888, 892, 91 Cal. Rptr. 142*

Cause of action for wrongful attachment against sureties as not accruing until there has been favorable termination of action claimed to constitute malicious prosecution; cause of action does not accrue during pendency of appeal on action in which attachment is issued. *Smith v. Hill (1965) 237 Cal. App. 2d 374, 386, 47 Cal. Rptr. 49* ; *Davis v. Fidelity & Deposit Co. (1949) 93 Cal. App. 2d 13, 15-16, 208 P.2d 414*

Liability of surety on attachment undertaking as arising only by virtue of its contract and statutory provisions under which it is executed and given. *Schneider v. Zoeller (1959) 175 Cal. App. 2d 354, 358, 346 P.2d 515*

[24] Void Writ

Writ issued by court clerk without posting of bond, as required by Attachment Law and court order, even though properly recorded and notice of its existence given to property owners, as in violation of procedural requirements of Attachment Law and void. *Vershbow v. Reiner (1991) 231 Cal. App. 3d 879, 882-883, 282 Cal. Rptr. 684*

[25] Wages

Attachment law as expressly prohibiting prejudgment attachment or levy of execution against wages (*Code Civ. Proc. § 487.020(c)*). *California State Employees' Assn. v. State of California (1988) 198 Cal. App. 3d 374, 377, 243 Cal. Rptr. 602*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesPrejudgment RemediesHearingsCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Attachment

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6-62 California Forms of Pleading and Practice--Annotated § 62.114

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.114 Attorney General Opinions

Provisions of former *Code Civ. Proc. § 542(3)* relating to enforcement of writ of attachment by placing keeper on premises of consenting defendant as applying to defendant retailers of services as well as defendant manufacturers, wholesalers, and retailers of tangible personal property. *50 Ops. Cal. Att'y Gen. 11, 11-14 (1967)*

Fees that may be charged by levying officer for delivery of bond under former *Code Civ. Proc. § 539a* (attachment of bank account, savings and loan share, certain property in safe-deposit box). *43 Ops. Cal. Att'y Gen. 72, 73-74 (1964)*

Legal Topics:

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

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6-62 California Forms of Pleading and Practice--Annotated § 62.115

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.115 Law Reviews

Zakon, *A Proposed Manual for Attachment Practice in the Los Angeles Superior Court,* 17 Bev. Hills B.J. 247 (1983)

Comment, *Abuse of Process and Attachment: Toward a Balance of Power, 30 U.C.L.A. L. Rev. 1218 (1983)*

Review of Selected 1982 California Legislation, *Civil Procedure; Attachments, 14 Pac. L.J. 441 (1983)*

Note, *Attachment Jurisdiction After Shaffer v. Heitner, 32 Stan. L. Rev. 167 (1979)*

Comment, *California's New Attachment Law: Problems in Interpretation, 23 U.C.L.A. L. Rev. 792 (1976)*

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6-62 California Forms of Pleading and Practice--Annotated § 62.116

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.116 Text References

California Civil Actions: Pleading and Practice, ch. 40; ch. 78, Part A (Matthew Bender)

California Points and Authorities, Ch. 23, *Attachment* (Matthew Bender)

Moore's Federal Practice, Ch. 64 (3rd ed. Matthew Bender)

California Civil Procedure Before Trial, § 38.3 (Cal. CEB 3d ed 2000)

Debt Collection Practice in California, chs. 4, 9 (Cal CEB 2d ed 2000)

Witkin, California Procedure, vol. 6, *Provisional Remedies*, § 45 et seq. (4th ed. 1997)

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 523-524 (10th ed. 2005)

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A. Forms Relating to Attachment Generally

6-62 California Forms of Pleading and Practice--Annotated § 62.130

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.130 Application for Right to Attach Order, Temporary Protective Order, etc. [Code Civ. Proc. §§ 482.030, 484.010 et seq.]--Judicial Council Form AT-105

[1] FORM Application for Right to Attach Order, Temporary Protective Order, etc. [Code Civ. Proc. §§ 482.030, 484.010 et seq.]--Judicial Council Form AT-105

Click here to view image.

CAUTION:

When this form is used as an application to obtain an ex parte right to attach order and writ of attachment or to obtain a temporary protective order, it must be supported by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) showing compliance with the notice or excuse of notice requirements of *Cal. Rules of Ct., Rules 3.1203-3.1204*. For discussion of those requirements and a form of declaration, see Ch. 372, *Motions and Orders* .

[2] Use of Form

This form is an illustrative filled-in reproduction of the form approved by the Judicial Council for optional use to obtain a right to attach order (RTAO), a temporary protective order, a writ of attachment, and additional writs of attachment against property of a resident or nonresident of California [*see Code Civ. Proc. § 484.010*; Cal. Judicial Council Form AT-105].

The form may be used for both ex parte and noticed hearing procedures. Various applications of the form are discussed below. This form has been filled in with an example of an application for a right to attach order and a writ of attachment ex parte against a natural person who is a California resident [*Code Civ. Proc. § 485.010 et seq.*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in

PDF format also is available at www.lexisone.com at no charge.

[3] Supporting Papers for Ex Parte RTAO, Nonresident Attachment, or Other Applications

When this form is used as an application to obtain an ex parte right to attach order and writ of attachment, it must include or be supported by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) showing that the plaintiff will suffer great or irreparable injury if the issuance of the order is delayed until the matter can be heard on notice (Paragraph 13) [*Code Civ. Proc. § 485.010(a), 485.210(c)(2)*; *see Code Civ. Proc. § 485.010(b)* (circumstances constituting great and irreparable injury)].

If the application is for an ex parte right to attach order and writ of attachment, the affidavit or declaration must also show that the plaintiff is entitled to a judgment on the claim on which the attachment is based (Paragraph 7), and that the property sought to be attached is not exempt from attachment (Paragraph 10) [*Code Civ. Proc. § 485.210(c)*].

If this form is used as an application for a right to attach order and writ of attachment against a nonresident, it must be supported by an affidavit or declaration showing that the action is one for the recovery of moneyagainst a natural person who does not reside in California or a business entity described in *Code Civ. Proc. § 492.010* (Paragraphs 2a(2), 2b(2), 2d(2)), that plaintiff on the facts presented is entitled to judgment on the claim on which the attachment is based (Paragraph 7), and that the property sought to be attached is subject to attachment pursuant to *Code Civ. Proc. § 492.040* (Paragraphs 8, 9b) [*Code Civ. Proc. §§ 492.020(b), 492.010*].

This form of application is a declaration sufficient to satisfy the requirement of an affidavit if the appropriate paragraphs are completed [*see Code Civ. Proc. § 2015.5*]. The facts showing that plaintiff is entitled to judgment may alternatively be included in an a verified complaint or affidavit [*see* Paragraphs 7a, 7b].

When this form is used as a notice of motion, a memorandum of points and authorities must be served and filed [*Cal. Rules of Ct., Rules 3.1103(a)(2), 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[4] Additional Uses of Form

The foregoing form may also be used to obtain the following orders or writs:

- An RTAO and writ of attachment after noticed hearing against a resident defendant [*Code Civ. Proc. § 484.010 et seq.*].

- An ex parte temporary protective order pending a hearing on an RTAO and writ of attachment against a resident defendant pursuant to *Code Civ. Proc. § 484.010 et seq.* [*Code Civ. Proc. § 486.010 et seq.*].

- An RTAO and writ of attachment ex parte against a nonresident defendant [*Code Civ. Proc. § 492.010 et seq.*].

- A writ of attachment or additional writ ex parte or after noticed hearing after an RTAO has been previously issued under the noticed hearing procedure [*Code Civ. Proc. § 484.010 et seq.*], or after the court has found pursuant to *Code Civ. Proc. § 485.240* that the plaintiff was entitled to a right to attach order following a motion brought by defendant to set aside the ex parte order and quash the writ of attachment [*Code Civ. Proc. § 484.310 et seq.* (noticed hearing), *Code Civ. Proc. § 484.510 et seq.* (ex parte)].

- An additional writ of attachment ex parte after a writ of attachment and RTAO have been previously issued pursuant to the ex parte procedure set forth in *Code Civ. Proc. § 485.210 et seq.* and there has been no hearing on a motion to set aside or quash [Code Civ. Proc. § 485.510et seq.].

- An additional writ of attachment against a nonresident defendant after a hearing on a motion to set aside the ex parte order and quash the writ of attachment [*Code Civ. Proc. § 492.050(d)*].

- An additional writ of attachment ex parte after a writ of attachment and RTAO have been issued against a nonresident defendant but prior to hearing on a motion to quash or set aside [*Code Civ. Proc. § 492.060 et seq.*].

- An order issued with the writ of attachment directing the defendant to transfer to the levying officer possession of the property when the property is sought to be attached by taking the property into custody, or possession of documentary evidence of title to defendant's property or to a debt owed to defendant, or possession of both the property and evidence of title [*Code Civ. Proc. § 482.080*].

[5] Filling Out the Form

[a] Caption and Defendant's Capacity and Resident Status

Plaintiff should mark the appropriate box next to the relief requested in both the caption and Paragraph 1. The defendant's name should be inserted in Paragraph 2 and the appropriate box should be checked designating the capacity and status of the defendant as a resident or nonresident.

The capacity of the defendant is important in determining the property of the defendant subject to attachment, as well as the description of the property sought to be attached, which is contained in Paragraph 9 [*see Code Civ. Proc. § 487.010* (property subject to attachment); *Code Civ. Proc. § 484.020(e)* (description of property)].

The defendant's status as a resident or nonresident bears on the nature of the claim on which an attachment may issue and the property subject to attachment. In addition, an RTAO and writ of attachment may issue ex parte against a nonresident defendant without the showing of great or irreparable injury to the plaintiff that is required when the defendant is a resident [*see Code Civ. Proc. § 492.010 et seq.*].

[b] Amount to Be Secured and Property Description

The amount to be secured by the attachment, which may include an estimate of the amount of allowable costs and attorney fees, should be inserted in Paragraph 8. The appropriate box in Paragraph 7a-c should be checked, and if the defendant is an individual, the information requested in 7c should be provided. When the defendant is an individual, the description of the property should be reasonably adequate to permit the defendant to identify the specific property sought to be attached [*Code Civ. Proc. § 484.020*].

[c] Defendant's Known Debts

If an ex parte attachment is sought under *Code Civ. Proc. § 485.010(b)(2)* (insolvency of debtor), the affidavit must state, in addition to therequirements of *Code Civ. Proc. § 485.530*, the known undisputed debts of the defendant, that the debts are not subject to bona fide dispute, and the basis for plaintiff's determination that the defendant's debts are undisputed [*Code Civ. Proc. § 485.010(b)(2)*]. This information should be supplied in Paragraph 13a(5).

[d] Filing of Undertaking

In Paragraph 15, plaintiff should indicate whether or not an undertaking has been filed. Although an undertaking is not

required to be filed at the time of the application, an undertaking is required to be filed before the issuance of a temporary protective order, a right to attach order pursuant to *Code Civ. Proc. § 491.415*, or a writ of attachment [*Code Civ. Proc. § 489.210*]. Unless objected to, the amount of undertaking required is provided by statute [*see Code Civ. Proc. § 489.220*].

[e] Obtaining Ex Parte Temporary Protective Order

When an ex parte temporary protective order is sought pursuant to *Code Civ. Proc. § 486.010 et seq.*, this form should be completed in the same manner as the example, but with the box in Paragraph 13 pertaining to temporary protective orders checked instead of the box pertaining to an order for a writ of attachment. The same showing of irreparable injury that is required for an ex parte RTAO and writ of attachment is required for a temporary protective order [*see Code Civ. Proc. §§ 486.010(b), 486.020(d)*].

In addition, Paragraph 14 should be checked and counsel should insert the temporary protective order that is requested. The temporary protective order may prohibit a transfer by the defendant of any of the defendant's property in the state subject to the levy of the writ of attachment, and must describe the property in a manner adequate to permit the defendant to identify the property subject to the temporary protective order [*Code Civ. Proc. § 486.050*]. A temporary protective order forbidding the transfer of farm products or inventory held for sale, or covering defendant's accounts in a financial institution, is subject to the restrictions set forth in *Code Civ. Proc. §§ 486.050* and *486.060*. In addition, the temporary protective order binds only the defendant [*Code Civ. Proc. § 486.070*].

[f] Obtaining Right to Attach Order and Writ of Attachment After Noticed Hearing

When an RTAO and writ of attachment is sought after a hearing pursuant to *Code Civ. Proc. § 484.010 et seq.*, the form should be completed in the same manner as the filled-in example, except that the plaintiff need not complete Paragraph 13 because *Code Civ. Proc. § 484.020* does not require a showing of great or irreparable injury.

[g] Obtaining Writ of Attachment After Previous Issuance of Right to Attach Order or Determination of Entitlement to Order

When obtaining a writ of attachment ex parte [*Code Civ. Proc. § 484.510 et seq.*] or on a noticed hearing [*Code Civ. Proc. § 484.310 et seq.*] following a previously issued RTAO or determination that plaintiff was entitled to an RTAO, the form should be completed in the same manner as the filled-in example except for the following differences:

- If the writ sought is an additional writ, that should be indicated in the caption. Plaintiff should complete either Paragraph 11.

- Because the procedure [*Code Civ. Proc. §§ 484.320, 484.510 et seq.*] does not require that the plaintiff show great or irreparable injury, the plaintiff need not complete Paragraph 13.

[h] Obtaining Additional Writ of Attachment Ex Parte on Property of Resident Defendant

To obtain an additional writ of attachment ex parte pursuant to *Code Civ. Proc. § 485.510 et seq.* after an RTAO and writ of attachment has been previously issued pursuant to the ex parte procedure [*Code Civ. Proc. § 485.210 et seq.*], plaintiff should complete the form in the same manner as the filled-in example [*see Code Civ. Proc. § 485.520*].

In addition, the box opposite Paragraph 11 should be checked, the date the RTAO was issued filled in. Paragraph 13, setting forth the circumstances showing great or irreparable injury, must be completed [*see Code Civ. Proc. §§ 485.520*, 485.430].

[i] Obtaining Right to Attach Order and Writ of Attachment Ex Parte on Nonresident Defendant's Property

When obtaining an RTAO and writ of attachment pursuant to *Code Civ. Proc. § 492.010 et seq.* against a nonresident defendant, the attachment may issue in any action for the recovery of money, and the limitation of *Code Civ. Proc. § 483.010(a)* does not apply [*Code Civ. Proc. § 492.010*]. The *Code Civ. Proc. § 483.010(a)* limitation states that an attachment may only issue in an action on a claim for money based on an express or implied contract when the amount is fixed and not less than $500.00 exclusive of costs, interest, and attorney's fees.

Note, however, that after an RTAO and writ of attachment issue, on a motion to set aside and quash brought by a nonresident defendant who has filed a general appearance, the RTAO must be set aside unless plaintiff shows that the order is authorized by a provision other than *Code Civ. Proc. § 492.010* [*Code Civ. Proc. § 492.050(c)*].

If the nonresident defendant has not made a general appearance, all property for which a method of levy is provided by Code Civ. Proc.§ 488.300 et seq. may be subject to a writ of attachment, so the box opposite 9b should be checked. Note, again, that if a general appearance has been filed, only nonexempt property may be levied on, and any property previously levied on that is exempt must be released on court order [*Code Civ. Proc. § 492.040*; *see Code Civ. Proc. § 487.020* (exempt property)]. Because the application must satisfy the requirements of *Code Civ. Proc. § 484.020*, which provides for the description of the property to be levied on, the remainder of Paragraph 9 should be filled out as in the filled-in example [*Code Civ. Proc. § 492.020*].

The box opposite Paragraph 12 should be checked if the nonresident defendant has not made a general appearance. It would appear that if the nonresident defendant has filed a general appearance the defendant is treated as a resident under the Attachment Law [*see Code Civ. Proc. §§ 492.040, 492.050(c)*].

[j] Obtaining Additional Writs Against Nonresident Defendant

[i] After Hearing on Motion to Set Aside Order and Quash Writ of Attachment

If, after an ex parte RTAO and writ of a attachment have been issued, the defendant brings a motion to set aside the order and quash the writ of attachment, and on hearing the court finds the plaintiff entitled to an RTAO, additional writs may be obtained by following the procedures outlined in *Code Civ. Proc. § 484.310 et seq.* (noticed hearing) or *Code Civ. Proc. § 485.510 et seq.* (ex parte) [*Code Civ. Proc. § 492.050(d)*]. Accordingly, the form should be filled in as indicated under § 62.130[5][g].

[ii] Prior to Hearing on Motion to Set Aside and Quash

When obtaining an additional writ against a nonresident defendant prior to a hearing on a motion to set aside the RTAO and quash the writ of attachment but after an RTAO and writ of attachment have been issued pursuant to the nonresident attachment provisions [*Code Civ. Proc. § 492.010 et seq.*], Paragraph 9 should be completed as indicated under § 62.130[5][j]. In addition, the box opposite Paragraph 10 should be checked and the date of the order filled in.

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6-62 California Forms of Pleading and Practice--Annotated § 62.131

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.131 Notice of Application and Hearing for Right to Attach Order and Writ of Attachment [Code Civ. Proc. §§ 482.030, 484.010]--Judicial Council Form AT-115

[1] FORM Notice of Application and Hearing for Right to Attach Order and Writ of Attachment [Code Civ. Proc. §§ 482.030, 484.010]--Judicial Council Form AT-115

Click here to view image.

CAUTION:
A supporting memorandum must be served and filed with this notice of motion [*Cal. Rules of Ct., Rules 3.1103(a)(2), 3.1113(a)* **; *see Code Civ. Proc. §§ 1005(b), 1010***]. **For discussion and forms, see Ch. 417, *Points and Authorities*** .

[2] Use of Form

This form is an illustrative filled-in reproduction of the form approved by the Judicial Council for optional use to give notice of an application and hearing for a right to attach order (RTAO) and order for issuance of a writ of attachment, or for issuance of a writ of attachment or additional writs of attachment when the RTAO has already been issued or plaintiff's entitlement to it has already been determined [*see Code Civ. Proc. §§ 484.040, 484.050*; Cal. Judicial Council Form AT-115]. This form is filled out with an example of how to give notice of an application and hearing for an RTAO and order for issuance of a writ of attachment made pursuant to *Code Civ. Proc. § 484.010 et seq.*

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Additional Uses of Form

This form may also be used to notice the following:

- An application and hearing for an order for the issuance of a writ of attachment or additional writ after an RTAO has been issued pursuant to the notice hearing provisions, or after the court has previously determined that the plaintiff is entitled to an RTAO at a hearing on the defendant's motion to set aside the RTAO and quash the writ of attachment [*see Code Civ. Proc. §§ 484.310 et seq., 485.240(c)*].

- An application and hearing for an order for the issuance of an additional writ of attachment against a nonresident defendant after the court has previously determined that the plaintiff is entitled to an RTAO at a hearing on the defendant's motion to set aside the RTAO and quash the writ of attachment [*see Code Civ. Proc. § 492.050(d)*].

[4] Filling Out the Form

[a] General Information

Plaintiff should mark the appropriate box in both the caption and Paragraph 2 opposite the description of the type of application and hearing for which the notice is being made. Paragraph 3 should be completed showing the date and place of the hearing.

[b] Noticing Application for Writ of Attachment or Additional Writ of Attachment Alone

When noticing an application for a writ of attachment or additional writ of attachment, Paragraphs 6a and 6b should not be checked and Paragraph 6d(2) should be checked instead of Paragraph 6d(1).

[5] Service of Notice

If the application is for a writ of attachment under *Code Civ. Proc. § 484.040*, notice must ordinarily be served in the time prescribed by *Code Civ. Proc. § 1005(b)*, that is, at least 16 court days before the hearing [*Code Civ. Proc. § 484.040(b)*; *see also Code Civ. Proc. § 1005(a)(1)*; *Cal. Rules of Ct., Rule 3.1300*]. If, however, the notice is served by mail, the required 16-day period of notice before the time appointed for the hearing must be increased by five calendar days if the place of mailing and the place of address are within the State of California, 10 calendar days if either the place of mailing or the place of address is outside the State of California but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States [*Code Civ. Proc. § 1005(b)*]. If notice is served by fax, Express Mail or other method of overnight delivery, the period is extended by two calendar days [*Code Civ. Proc. § 1005(b)*]. An extension of two court days, as opposed to calendar days, may apply in case of electronic service made pursuant to a local rule adopted under *Code Civ. Proc. § 1010.6* [*see Code Civ. Proc. § 1010.6(a)(6)*; for discussion, *see Ch. 518, Service of Summons and Papers, § 518.41[8]*]. For further discussion of notice under section 1005, *see* Ch. 372, *Motions and Orders*].

If the application is for an order for the issuance of an additional writ of attachment under *Code Civ. Proc. § 484.310*, notice must be served at least 15 days before the hearing [*Code Civ. Proc. § 484.330*].

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6-62 California Forms of Pleading and Practice--Annotated § 62.132

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.132 Right to Attach Order After Hearing and Order for Issuance of Writ of Attachment After Hearing [Code Civ. Proc. § 484.090]--Judicial Council Form AT-120

[1] FORM Right to Attach Order After Hearing and Order for Issuance of Writ of Attachment After Hearing [Code Civ. Proc. § 484.090]--Judicial Council Form AT-120

Click here to view image.

[2] Use of Form

This form of order is an illustrative filled-in example of the form approved by the Judicial Council for optional use when an RTAO and order for issuance of a writ of attachment is obtained after a hearing [*see Code Civ. Proc. § 484.090*; Cal. Judicial Council Form AT-120].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Additional Use of Form

This form may also be used when the plaintiff obtains an order for issuance of a writ of attachment following a hearing after an RTAO has been previously issued pursuant to *Code Civ. Proc. § 484.010 et seq.*, or after a previous determination has been made under *Code Civ. Proc. § 485.240* that the plaintiff is entitled to an RTAO [*see Code Civ. Proc. § 484.310 et seq.*].

[4] Filling Out the Form

[a] Timing and General Information

This order may either be prepared prior to the hearing in anticipation of the findings to be made by the court or after the hearing. The type of relief sought at the hearing should be designated by counsel in the caption and Paragraph 1. In addition, the information requested in Paragraphs 1a-d should be completed.

[b] Court Findings

Paragraph 2 contains the findings of the court:

- Paragraph 2a should be filled out in every instance in which an RTAO is obtained following a hearing because the findings are necessary to the issuance of an RTAO after a hearing [*see Code Civ. Proc. § 484.090(a)*].

- Paragraph 2f is for use when defendant filed either a notice of opposition or claim of exemption claiming that the property described in the plaintiff's application was exempt from attachment and failed to prove the claim of exemption.

- Paragraph 2g is for use when property described in the plaintiff's application is found to be exempt from attachment.

- Paragraph 2h should be completed when the defendant claims that property not described in the plaintiff's application is exempt from attachment and the court finds that it is or is not exempt.

- In Paragraph 2i counsel should indicate the amount of the undertaking required and whether or not an undertaking has been filed. A writ of attachment may not issue unless the undertaking has been filed, although the filing of an undertaking is not required at the time of an application for the issuance of a writ of attachment [*see Code Civ. Proc. §§ 484.090(b), 484.370*]. The amount of the undertaking, unless objected to, is provided in *Code Civ. Proc. § 489.220*.

[c] Court Orders

Paragraph 3 contains the orders of the court:

- Paragraph 3a should be completed when an RTAO is obtained.

- The box opposite Paragraph 3b should be checked if the court finds that the property claimed by defendant to be exempt is exempt.

- Paragraph 3c contains the order for the issuance of the writ of attachment, and provides for immediate issuance if an undertaking has already been filed or for issuance of the writ when the undertaking is filed. The description of the property subject to the writ of attachment, which is dependent on whether or not the defendant is a natural person, should be provided by completing either Paragraph 3c(1) or 3c(2). Paragraphs 3c(3) (relating to property covered by a bulk sales notice) and 3c(4) (relating to proceeds from an escrow in which a liquor license is sold) should be filled in when relevant.

- Paragraph 3d is for use when the writ of attachment is accompanied by an order that the defendant transfer to the levying officer documentary evidence of title to the defendant's property or of a debt owed to defendant, or possession of the property if the property is sought to be attached by taking it into custody, or possession of the property and the documentary evidence. Note that any order to this effect must be personally served on the defendant [*Code Civ. Proc. § 482.080*].

[d] Order for Issuance of Writ of Attachment After Previously Issued Right to Attach Order or Determination of Entitlement to Order

When the plaintiff obtains an order for issuance of a writ of attachment following a hearing after an RTAO has been previously issued pursuant to *Code Civ. Proc. § 484.010 et seq.*, or after a previous determination has been made under *Code Civ. Proc. § 485.240* that plaintiff was entitled to an RTAO, this form should be completed in the same manner as the filled-in example except that Paragraph 2j or 2k should be completed. The court must make a finding that an RTAO has been issued pursuant to *Code Civ. Proc. § 484.090*, or that a determination has been made pursuant to *Code Civ. Proc. § 485.240* that plaintiff is entitled to an RTAO [*Code Civ. Proc. § 484.370(a)*]. If the finding regarding a prior determination under*Code Civ. Proc. § 485.240* is required, it should be entered under Paragraph 2k.

[5] Cross References

See generally Ch. 372, *Motions and Orders*

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6-62 California Forms of Pleading and Practice--Annotated § 62.133

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.133 Ex Parte Right to Attach Order and Order for Issuance of Writ of Attachment (Resident) [Code Civ. Proc. §§ 485.210, 485.220]--Judicial Council Form AT-125

[1] FORM Ex Parte Right to Attach Order and Order for Issuance of Writ of Attachment (Resident) [Code Civ. Proc. §§ 485.210, 485.220]--Judicial Council Form AT-125

Click here to view image.

[2] Use of Form

This form of order is an illustrative filled-in example of the form approved by the Judicial Council for optional use to obtain an RTAO and order for issuance of a writ of attachment, or to obtain only a writ or an additional writ of attachment, ex parte against a resident defendant [*see Code Civ. Proc. §§ 485.210, 485.220*; Cal. Judicial Form AT-125]. This form has been filled in to illustrate how an RTAO and order for issuance of a writ of attachment is obtained pursuant to *Code Civ. Proc. § 485.210 et seq.*

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Additional Uses of Form

This form may also be used when the plaintiff obtains the following against a resident defendant:

- An order for issuance of a writ of attachment or an additional writ ex parte after an RTAO has been previously issued pursuant to *Code Civ. Proc. § 484.010 et seq.*, or after a previous determination has been made under *Code Civ. Proc. § 485.240* that plaintiff is entitled to an RTAO [*see Code Civ. Proc. §§ 484.510-484.530, 485.240(c)*].

- An additional writ of attachment after an RTAO and writ of attachment have been issued under the ex parte procedure and there has been no hearing on a motion to set aside the order and quash the writ [*see Code Civ. Proc. §§ 485.240(c), 485.510-485.540*].

[4] Filling Out the Form

[a] General Instructions and Findings

This form should be completed in the same manner as § 62.132 (RTAO and order for issuance of writ of attachment after hearing). However, there must be a finding of great or irreparable injury within the meaning of *Code Civ. Proc. § 485.010* when the RTAO and writ of attachment is obtained ex parte pursuant to *Code Civ. Proc. § 485.210 et seq.*, or an additional writ of attachment is obtained after an order and writ have been issued pursuant to the ex parte procedure but before a hearing on a motion to set aside and quash pursuant to *Code Civ. Proc. § 485.510 et seq.* (Paragraph 2i) [*Code Civ. Proc. §§ 485.220(a)(5), 485.540(c)*].

[b] Ex Parte Order for Issuance of Writ After Previous Right to Attach Order or Previous Determination of Entitlement to Order

When an ex parte order for issuance of a writ or additional writ is obtained after a previously issued RTAO or previous determination that the plaintiff is entitled to one, the only required findings are that a right to attach order has been issued pursuant to *Code Civ. Proc. §§ 484.010-484.110* or that the court has found pursuant to *Code Civ. Proc. § 485.240* that the plaintiff is entitled to a right to attach order and that the property to be attached is not exempt from attachment [*see Code Civ. Proc. § 484.520*]. Thus, it appears that Paragraph 2i on great or irreparable injury need not be completed. However, Paragraph 2j, or if the finding regarding a prior determination under *Code Civ. Proc. § 485.240* is required, 2k should be completed, as appropriate.

[c] Ex Parte Additional Writ of Attachment

When an ex parte additional writ of attachment is obtained after the court previously issued an RTAO and writ of attachment pursuant to the ex parte procedure but there has been no hearing on a motion to set aside the order or quash the writ, Paragraph 2j should be completed and the box opposite "*Code Civ. Proc. § 485.220* (ex parte)" should be checked. Note that a finding of great or irreparable injury must be made and thus Paragraph 2i must be completed [*Code Civ. Proc. § 485.540(c)*].

If an ex parte attachment is sought under *Code Civ. Proc. § 485.010(b)(2)* (insolvency of debtor), the affidavit must state, in addition to the requirements of *Code Civ. Proc. § 485.530*, the known undisputed debts of the defendant, that the debts are not subject to bona fide dispute, and the basis for plaintiff's determination that the defendant's debts are undisputed [*Code Civ. Proc. § 485.010(b)(2)*]. This information should be supplied in Paragraph 2i(2) and a supporting affidavit or declaration filed with the application.

[5] Cross References

For discussion of *Cal. Rules of Ct., Rules 3.1203-3.1204* notice requirement for ex parte orders, see Ch. 372, *Motions and Orders*

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6-62 California Forms of Pleading and Practice--Annotated § 62.134

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.134 Ex Parte Right to Attach Order and Order for Issuance of Writ of Attachment (Nonresident) [Code Civ. Proc. §§ 485.210, 485.220, 492.020, 492.030]--Judicial Council Form AT-130

[1] FORM Ex Parte Right to Attach Order and Order for Issuance of Writ of Attachment (Nonresident) [Code Civ. Proc. §§ 485.210, 485.220, 492.020, 492.030]--Judicial Council Form AT-130

Click here to view image.

[2] Use of Form

This form of order is an illustrative filled-in example of a form approved by the Judicial Council for optional use to obtain an RTAO and order for issuance for a writ of attachment, or an additional writ of attachment, ex parte against a nonresident defendant [*see Code Civ. Proc. §§ 485.210, 485.220, 492.020, 492.030*; Cal. Judicial Council Form AT-130]. This form has been filled in to illustrate how an RTAO and order for issuance of a writ of attachment are obtained ex parte against a nonresident defendant pursuant to *Code Civ. Proc. § 485.210 et seq.*

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Additional Use of Form

This form may also be used when an additional ex parte writ of attachment against a nonresident defendant is obtained pursuant to *Code Civ. Proc. §§ 492.070* and *492.090*. An additional writ may only be obtained ex parte when an RTAO and writ of attachment have been issued pursuant to the nonresident provisions and before a hearing on a motion to set aside the order and quash the writ [*Code Civ. Proc. § 492.060*]. After such a hearing, additional writs must be obtained by following the ex parte or notice hearing procedure for resident defendants [*Code Civ. Proc. § 492.050(d)*; *see § 62.130*].

[4] Filling Out the Form

[a] General Instructions

The type of order obtained should be indicated in the caption and Paragraph 1.

Paragraph 2a must be filled out to show defendant's status as a party subject to nonresident attachment [*see Code Civ. Proc. § 492.010, 492.030(a)(3)*].

[b] Undertaking

In Paragraph 2i, the amount of the undertaking inserted, and it should be indicated whether or not an undertaking has been filed. The amount of undertaking, unless objected to, is provided in *Code Civ. Proc. § 489.220*. An undertaking must be filed prior to issuance of a writ of attachment [*Code Civ. Proc. §§ 492.030(a), 492.090*].

[c] Order

The order (Paragraph 3) should be completed in the same manner as the order in §§ 62.132 and 62.133.

[d] Additional Writ of Attachment

When an additional writ of attachment is obtained, the box opposite Paragraph 2h should be checked and the date of the issuance of the RTAO filled in.

[5] Cross Reference

For a related form, *see § 62.133*.

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6-62 California Forms of Pleading and Practice--Annotated § 62.135

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.135 Temporary Protective Order [Code Civ. Proc. §§ 486.020-486.060]--Judicial Council Form AT-140

[1] FORM Temporary Protective Order [Code Civ. Proc. §§ 486.020-486.060]--Judicial Council Form AT-140

Click here to view image.

[2] Use of Form

This form of order is an illustrative filled-in example of the form approved by the Judicial Council for optional use when a temporary protective order is obtained [*see Code Civ. Proc. §§ 486.020-486.060*; Cal. Judicial Council Form AT-140].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Effect of Order

A temporary protective order is issued by the court to preserve the property sought to be attached until an RTAO and writ of attachment are issued. The order binds only the defendant and must be personally served on the defendant [*Code Civ. Proc. §§ 486.070, 486.080*]. Service of the order on the defendant creates a lien on the property, or the proceeds of the property, that is described in the order and is owned by the defendant at the time of the service of the order and is subject to attachment [*Code Civ. Proc. § 486.110*].

[4] Application for Order

The temporary protective order may be issued by the court on an application made by the plaintiff in conjunction with an application for an RTAO and writ of attachment after a noticed hearing [*Code Civ. Proc. §§ 486.010, 486.020*; *see §*

62.130]. It may also be issued by the court on an application for an ex parte RTAO and writ of attachment when the court determines that the requirements for the issuance of these orders are satisfied but in the interest of justice and equity the temporary protective order should issue instead [*Code Civ. Proc. § 486.030(a)*; *see §§ 62.133, 62.134*]. If this is done, the plaintiff's application for an ex parte RTAO and writ of attachment is to be treated as an application for an RTAO and writ of attachment after hearing [*Code Civ. Proc. § 486.030(b)*].

[5] Filling Out the Form

[a] General Instructions

In Paragraph 1 the appropriate box should be checked indicating that the order is issued either on an application for the order and RTAO and writ of attachment after hearing, or on an application for an ex parte RTAO and order for issuance of writ of attachment [*see discussion under§ 62.135[4]*]. Paragraph 2a should be completed indicating the defendant's capacity and 2b stating the amount sought to be secured by the attachment [*Code Civ. Proc. § 486.020*].

[b] Issuance in Conjunction With or Instead of Ex Parte Attachment

If the temporary protective order is issued in conjunction with an ex parte attachment order under *Code Civ. Proc. § 485.010(b)(2)* (insolvency of debtor), Paragraph 2f(2) should be checked [*see Code Civ. Proc. § 485.010(b)(2)*].

If the temporary protective order is being issued instead of the ex parte RTAO and writ of attachment for which plaintiff applied, the box opposite Paragraph 2g is checked. The amount of the undertaking required prior to the issuance of the order should be inserted in Paragraph 2h. The amount, unless objected to, is provided in *Code Civ. Proc. § 489.220*.

[c] Property Subject to Order

The property subject to the temporary protective order must be described in a manner adequate to permit the defendant to identify the property (Paragraph 2i) [*Code Civ. Proc. § 486.050*].

If the property is inventory or farm products held for sale, the description of the property should be inserted in Paragraph 2j and the box opposite Paragraph 2j checked. Property that is inventory or farm products held for sale may be transferred by the defendant notwithstanding the temporary protective order if the transfer is in the ordinary course of business. The temporary protective order, however, may impose restrictions on the disposition of the proceeds from that type of transfer [*Code Civ. Proc. § 486.050(b)*]. Thus, if the property is inventory or farm products held for sale, Paragraph 3b should be checked and any exceptions to the restriction on the defendant prohibiting the disposal of the proceeds set out.

Note that the notice to the defendant contains a list of the types of checks and total amount of checks that may be issued by the defendant from the defendant's deposit account in a financial institution, notwithstanding the temporary protective order [*see Code Civ. Proc. § 486.060*].

[d] Additional Orders and Expiration Date

If there are any additional orders made by the court, the box opposite Paragraph 3c should be checked and the orders set forth there. The date of the expiration of the order is inserted in Paragraph 3d. The temporary protective order expires at the earlier of (1) 40 days or on an earlier date set by the court, or (2) when the levy of attachment on the property described in the order is made by the plaintiff [*Code Civ. Proc. § 486.090*].

[6] Cross Reference

For related forms, *see §§ 62.130* and *62.133*.

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6-62 California Forms of Pleading and Practice--Annotated § 62.136

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.136 Application to Terminate, Modify, or Vacate Temporary Protective Order [Code Civ. Proc. § 489.320]--Judicial Council Form AT-145

[1] FORM Application to Terminate, Modify, or Vacate Temporary Protective Order [Code Civ. Proc. § 489.320]--Judicial Council Form AT-145

Click here to view image.

CAUTION:
A memorandum of points and authorities is required to be served and filed with this notice of motion [*see* Cal. Rules of Ct., Rules 303(a)(2), 313(a)]. **For discussion and forms, see Ch. 417, *Points and Authorities*** .

[2] Use of Form

This form is an illustrative filled-in example of the form approved by the Judicial Council for optional use in making an application and noticing a hearing on an application to terminate, vacate, or modify a temporary protective order [*see Code Civ. Proc. § 489.320*; Cal. Judicial Council Form AT-145]. This form has been filled out to illustrate how to apply for termination of the order pursuant to *Code Civ. Proc. § 489.320*, which allows termination on application by noticed motion when the defendant has filed an undertaking to pay the plaintiff the amount of any judgment recovered. The undertaking must be in an amount equal to the amount sought to be secured by the plaintiff's attachment [*Code Civ. Proc. § 489.320*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Additional Use of Form

This form may also be used to apply to modify or vacate a temporary protective order on the ground that modification or termination would be in the interest of justice and equity to the parties, taking into consideration the effect on the defendant of the continuance of the original order, the effect on the plaintiff of modifying or vacating the order, and any other factors. The order may be modified or vacated on the ex parte application of the defendant or, if the court so orders, on noticed hearing [*Code Civ. Proc. § 486.100*].

[4] Filling Out the Form

[a] General Instructions

Paragraphs 1 and 2 should be completed only when the application is being made on noticed hearing. It would appear that because the application to modify or vacate a temporary protective order under *Code Civ. Proc. § 486.100* need only be made on noticed hearing when the court so orders, counsel would usually make the application ex parte [*see Code Civ. Proc. § 486.100*].

Either Paragraph 2b or 2c should be checked to indicate whether the application is to vacate or to modify the order and the date of the orderto be vacated or modified filled in. If the application is to modify the order, the proposed modification should be inserted in Paragraph 2c. If the application is made ex parte, Paragraph 3 should be completed in this manner instead of Paragraph 2.

[b] Supporting Facts

The facts showing that vacation or modification would be in the interest of justice and equity to the parties should be set out in Paragraph 5b, or Paragraph 5a should be checked and an affidavit or declaration attached setting out those facts [*see Code Civ. Proc. § 486.100*]. Supporting points and authorities may be attached or set out in the form itself (Paragraph 5c or 5d).

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6-62 California Forms of Pleading and Practice--Annotated § 62.137

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.137 Order to Terminate, Modify, or Vacate Temporary Protective Order [Code Civ. Proc. § 489.320]--Judicial Council Form AT-150

[1] FORM Order to Terminate, Modify, or Vacate Temporary Protective Order [Code Civ. Proc. § 489.320]--Judicial Council Form AT-150

Click here to view image.

[2] Use of Form

This form of order is an illustrative filled-in example of the form approved by the Judicial Council for optional use to terminate, vacate, or modify a temporary protective order [*see Code Civ. Proc. § 489.320*; Cal. Judicial Council Form AT-150]. This form has been filled in to illustrate how an order terminating a temporary protective order on the filing of an undertaking by the defendant is obtained pursuant to *Code Civ. Proc. § 489.320*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Additional Use of Form

The form may also be used when an order vacating or modifying a temporary protective order in the interest of justice and equity to the parties is obtained pursuant to *Code Civ. Proc. § 486.100*.

[4] Filling Out the Form

[a] General Instructions

The appropriate box in the caption and in Paragraph 1 should be checked indicating the type of order obtained. It should also be indicated in Paragraph 1a or 1b whether the order is being made after noticed hearing or ex parte. If the order is being made after noticed hearing, the information requested in Paragraphs 1a(1)-(4) should be supplied.

Before a temporary protective order is vacated or modified there must be a determination by the court that a vacation or modification of the order is in the interest of justice and equity to the parties [*Code Civ. Proc. § 486.100*]. Accordingly, the box opposite Paragraph 2b should be checked.

The date of the temporary protective order should be inserted and it should be indicated in Paragraph 2b whether the order is vacated or modified. The factors on which the modification or vacation is based should also be specified in Paragraph 2b.

[b] Court Order

Paragraph 3 contains the order of the court. The date of the temporary protective should be inserted in Paragraph 3a and the box should be checked to indicate whether the order is vacated or modified. If the order is modified the modification should be inserted in Paragraph 3a. Paragraph 3b is for use when any other order is made by the court.

[5] Cross Reference

For a related form, *see § 62.136*.

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6-62 California Forms of Pleading and Practice--Annotated § 62.138

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.138 Notice of Opposition to Application for Right to Attach Order, Claim of Exemption, etc. [Code Civ. Proc. § 484.060]--Judicial Council Form AT-155

[1] FORM Notice of Opposition to Application for Right to Attach Order, Claim of Exemption, etc. [Code Civ. Proc. § 484.060]--Judicial Council Form AT-155

Click here to view image.

CAUTION:

This form must be accompanied by an affidavit or declaration supporting any factual issues raised and points and authorities supporting any legal issues raised [*Code Civ. Proc. §§ 482.100(c), 484.060(a), 484.070(d)*; ***see also*** *Cal. Rules of Ct., Rules 3.1103(a)(2), 3.1113(a)*; for discussion and forms, ***see*** Ch. 417, ***Points and Authorities***].

[2] Use of Form

This form is an illustrative filled-in example of the form approved by the Judicial Council for optional use by the defendant to oppose an application for an RTAO, or to claim that property is exempt from attachment [*see Code Civ. Proc. § 484.060*; Cal. Judicial Council Form AT-155]. This form has been filled in to illustrate how to give notice pursuant to *Code Civ. Proc. § 484.060* that the defendant will oppose the issuance of an RTAO at a hearing set by the plaintiff.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Additional Uses of Form

This form may also be used by the defendant for the following purposes in connection with the hearing on the plaintiff's application for an RTAO:

- To object to the amount sought to be secured by the attachment [*see Code Civ. Proc. § 484.060*].
- To claim an exemption on the property sought to be attached [*Code Civ. Proc. § 484.070(a)*].
- To claim an exemption on any additional property which is not sought to be attached [*Code Civ. Proc. § 484.070(b)*].

The form may also be used to give notice of a motion and to move for a claim of exemption on property levied on which is necessary for the support of the defendant who is a natural person or the defendant's family [*Code Civ. Proc. §§ 482.100, 484.530(b), 485.610(b)*], and to claim an exemption on property levied on [*Code Civ. Proc. §§ 482.100, 484.530, 485.610*].

[4] Time for Filing

If the defendant desires to oppose the issuance of a RTAO or objects to the amount sought to be secured by the attachment, the defendant must file and serve a notice of opposition on the plaintiff no later than five days before the date set for the hearing on the issuance of the RTAO and writ of attachment. If the notice of opposition is not filed within this time, thedefendant will not be permitted to oppose the issuance of the order [*Code Civ. Proc. § 484.060*].

[5] Filling Out the Form

[a] Hearing and Grounds

When opposing the issuance of an RTAO, the opposition is made at the hearing set by the plaintiff, and it appears that there would be no need to give notice of the hearing. However, for the sake of clarity, counsel may wish to insert the date, time, and place of the hearing set by the plaintiff in Paragraph 2.

The grounds for the opposition must be set forth in the notice and must be accompanied by an affidavit or declaration supporting any factual issues raised, and by points and authorities supporting any legal issues raised [*Code Civ. Proc. § 484.060*; for general form of declaration, *see* Ch. 372, *Motions and Orders*]. An RTAO will only be issued if the court finds that (1) the claim is one on which an attachment may be based pursuant to *Code Civ. Proc. § 483.010, (2)* the plaintiff has established the probable validity of the claim, and (3) the attachment is not sought for a purpose other than recovery on a claim on which the attachment is based, and (4) the amount to be secured by the attachment is greater than zer [*see Code Civ. Proc. § 484.090*]. Opposition based on the absence of one or more of these grounds should be set out in Paragraph 4.

[b] Objection to Amount Sought to be Secured by the Attachment

When the amount sought to be secured by the attachment is objected to, the caption should be completed in the same manner as in the example because that is an objection to the RTAO sought by plaintiff. The same time period for filing a notice of objection to an RTAO applies when the objection is to the amount sought to be secured by the attachment [*Code Civ. Proc. § 484.060*; *see discussion under§ 62.138[4]*]. Because this objection, like the objection to the RTAO, will be at the hearing set by the plaintiff, it does not appear that the defendant needs to give notice of the hearing. However, for clarity counsel may wish to complete Paragraph 2.

When objecting to the amount sought to be secured by the attachment, Paragraph 4b should be checked and the grounds of opposition set forth there. The plaintiff must state in the application for the RTAO the amount to be secured by the attachment and may include an estimate of costs and allowable attorney's fees [*Code Civ. Proc. §§ 482.110(a),*

484.020(b); *see § 62.130*]. Except as provided in *Code Civ. Proc. § 483.015(b)* (offsets) and *Code Civ. Proc. § 483.020* (in cases of unlawful detainer), the amount to be secured by the attachment is the sum of the amount of the defendant's indebtedness to the plaintiff, and any additional amount included at the discretion of the court for costs and allowable attorney's fees [*Code Civ. Proc. § 483.015(a)*; *see Code Civ. Proc. § 482.110(b)*]. In unlawful detainer proceedings the amount to be secured is the sum of the amount of unpaid rent as of the filing of the complaint, costs and allowable attorney's fees in the court's discretion, and also in the discretion of the court, an amount equal to the rent for the period from the date the complaint is filed to the estimated date of judgment or such earlier estimated date as possession has been or is likely to be delivered to the plaintiff [*Code Civ. Proc. § 483.020*]. Thus, an objection may be interposed to the inclusion or amount of attorney's fees or of costs. Objection may also be made to the amount of the claimed indebtedness or in the case of an unlawful detainer proceeding, the amount of unpaid rent and/or the estimated amount due from the filing of the complaint to the date of judgment or other earlier time.

In addition, the amount to be secured by the attachment may be reduced by (1) the amount of any money judgment in favor of the defendant against the plaintiff that remains unsatisfied and enforceable, (2) the amount of any indebtedness claimed by the defendant against the plaintiff by way of a cross complaint if the claim in the cross complaint is one on which an attachment could issue, (3) the amount of any claim asserted of the defendant asserted as a defense in the answer pursuant to *Code Civ. Proc. § 431.70*(cross-demand) if that claim is one on which an attachment could be issued had an action been brought on the claim when it was not barred by the statute of limitations, and (4) the value of any security interest in the property of the defendant held by the plaintiff to secure the defendant's indebtedness claimed by the plaintiff, together with the amount by which the value of the security interest has decreased due to the act of the plaintiff or a prior holder of the security interest [*Code Civ. Proc. § 483.015(b)*]. Thus, the entitlement to a reduction might also be asserted in Paragraph 4b as the ground of opposition.

[c] Noticing Claim of Exemption on Property Sought to Be Attached

A claim that all or a portion of the personal property described in the plaintiff's application is exempt from attachment must be made at the hearing. If the claim is not made at the hearing, the defendant may not later claim the exemption except on a showing of a change of circumstances [*Code Civ. Proc. § 484.070(a)*]. If the defendant wishes to claim that real property described in the plaintiff's application is exempt from attachment, the defendant may make the claim at the hearing, but failure to do so will not preclude claiming the exemption later [*Code Civ. Proc. § 484.070(b)*]. The claim must describe the property claimed to be exempt, specify the statute supporting the exemption, and must be accompanied by an affidavit or declaration supporting any factual issues raised and points and authorities supporting any legal issues raised. The claim and accompanying papers must be filed and served on the plaintiff not less than five court days before the date set for the hearing [*Code Civ. Proc. § 484.070(c)-(e)*]. For a form of declaration supporting the claim of exemption, see *§ 62.139*.

When counsel gives notice of a claim of exemption that will be made at the hearing set by the plaintiff for the issuance of an RTAO and writ of attachment, the box before "CLAIM OF EXEMPTION" should be checked. Because the claim will be at the hearing set by the plaintiff, there is no need to give notice of the hearing. For clarity, however, counsel may wish to complete Paragraph 2. The first box in Paragraph 4c should be checked, indicating that the exemption will be claimed at the hearing. Paragraphs 4c(1)-(4) reflects the four categories of property that are exempt from attachment [*see Code Civ. Proc. § 487.020*]. If the property sought to be attached is property described in Paragraph 4c(1)(a) or (b) the requested information should be completed. Note that if the exemption claimed is that the property described in the application is necessary for the support of the defendant who is a natural person or the defendant's family (Paragraph 4c(2)), there is no requirement that a financial statement be filed. The requirement of a financial statement is contained in *Code Civ. Proc. § 703.530*, which applies only when the property has been levied on [*see Code Civ. Proc. §§ 482.100(b)*, 483.530(b), *485.610(b)*]. Counsel might wish to include the information required in the financial statement in the supporting affidavit, however, as they would support the entitlement to an exemption claimed necessary for support. For a form of financial statement, see *Ch. 254, Executions and Enforcement of Judgements, § 254.40* et seq.

[d] Noticing Claim of Exemption on Additional Property Not Sought to Be Attached

At the hearing on the RTAO and writ of attachment, the defendant may claim that property not sought to be attached is exempt. Failure to claim the exemption does not preclude later claiming the exemption [*Code Civ. Proc. § 484.070(b)*]. The claim of exemption on property not sought to be attached is made in the same way as a claim of exemption on property sought to be attached [*Code Civ. Proc. § 484.070(b), (c)*]. Thus, the form should be completed in the manner described at § 138[5][c].

[e] Motion for Claim of Exemption for Family Necessities

A defendant who is a natural person may claim an exemption on property levied on which is necessary for the support of the defendant or the defendant's family in two different ways. The defendant may choose to follow the procedure set forth in the provisions dealing with a claim of exemption on property levied on after judgment pursuant to a writ of execution [*see Code Civ. Proc. § 703.510 et seq.*, and *discussion under § 62.138[5][f]*]. The other method for claiming the exemption that is available to the defendant is the noticed motion procedure set forth in *Code Civ. Proc. § 482.100(c)* [*Code Civ. Proc. §§ 482.100, 484.530, 485.610*].

If the property has been levied on pursuant to an ex parte writ and it is personal property, the exemption must be claimed no later than 30 days after the defendant is served with a notice of attachment by the levying officer [*Code Civ. Proc. §§ 484.530(a), (b), 485.610*]. If this time period passes, or the claim of exemption has been made and previously denied, the exemption may only be claimed if there has been a change of circumstances following the expiration of the time period or the previous denial [*Code Civ. Proc. §§ 482.100(a), 484.530(c)*].

The notice of motion must be filed and served on the plaintiff not less than three days prior to the date set for hearing and the hearing must not be held more than five days after the filing of the notice of motion, unless the court orders otherwise on a showing of good cause. The notice of motion must be accompanied by an affidavit supporting any factual issues raised and points and authorities supporting any legal issues raised [*Code Civ. Proc. § 482.100(c)*].

When the defendant is following the noticed motion procedure for claiming an exemption on property necessary for support, the boxes in the caption before "MOTION (AFTER ISSUANCE OF WRIT) FOR CLAIM OF EXEMPTION" and "AND MOTION FOR CLAIM OF EXEMPTION" should be checked. Paragraphs 1, 2, and 3 should be completed. The second box in Paragraph 4c should be checked and Paragraph 4c(2) should be completed. Note that no financial declaration is required [*see discussion under§ 62.138[5][c]*].

[f] Claim of Exemption on Levied Property

[i] Writ of Execution Procedures Applied

When property is levied on and the defendant wishes to claim an exemption on that property, the defendant must follow the procedures set forth in the provisions dealing with a claim of exemption on property levied on after judgment pursuant to a writ of execution [*see Code Civ. Proc. § 703.510 et seq.*]. If the property is claimed to be necessary for the support of the defendant or the defendant's family, the noticed motion procedure may be followed [*see discussion under§ 62.138[5][e]*].

To claim an exemption on levied property the defendant must file the original claim and a copy with the levying officer [*Code Civ. Proc. § 703.520(a)*]. If the property is levied on pursuant to an ex parte writ and it is personal property, the defendant must claim the exemption not later than 30 days after the levying officer serves the defendant with the notice of attachment describing the property [*Code Civ. Proc. §§ 484.530(a), 485.610(a)*]. If the property is real property, it appears that the exemption may be claimed at any time [*see Code Civ. Proc. §§ 484.530(a), 485.610(a), 703.520*]. If the words "notice of levy" in *Code Civ. Proc. § 703.520* are read to be synonymous with "notice of attachment," however,

the exemption on real property must be claimed within 10 days after the date the notice of attachment is served. Such an interpretation, however, appears to be inconsistent with the recommendation of the Law Revision Commissionand the provisions of *Code Civ. Proc. § 484.030(a)* [*see Recommendation Relating to Attachment*, 16 Cal. L. Rev. Comm. Reports 701, 710 (1981)]. The Judicial Council, however, indicates that the exemption in regard to real property must be taken within 10 days after service of the notice of attachment on the defendant [*see* Item 2 under Information For Defendant in body of Form 21]. If the property levied on is claimed to be exempt because of a change of circumstances following the expiration of the time for claiming the exemption, or following a previous denial of the claim, the exemption may be claimed at any time [*Code Civ. Proc. § 482.100(a), (b)*].

[ii] Completion of Form

When claiming an exemption on levied property, the box before "CLAIM OF EXEMPTION" should be checked and Paragraph 1 should be completed. Paragraph 2 should not be completed as it is incumbent on the plaintiff to oppose the claim of exemption by noticing a motion for an order determining the claim [*Code Civ. Proc. § 703.550*]. Paragraph 3a should be completed by inserting the defendant's name. The claim of exemption is required to contain the address of where service of the notice of opposition to a claim may be made [*Code Civ. Proc. § 703.520(b)(1)*]. Because attachment is a prejudgment remedy, the address will be the attorney's address when the defendant is represented [*see Code Civ. Proc. § 1015*]. This address is already contained in the caption of the form, so in Paragraph 3a counsel may wish to refer to this address and the fact that a notice may be served at that address. Paragraph 3b appears to be directed at a situation when the claimant is not the defendant. However, it should be noted that although an exemption on property levied on after judgment may be claimed by a person other than the judgment debtor [*see Code Civ. Proc. § 703.020*], the relevant provisions of the Attachment Law mention only that the defendant may claim the exemption [*Code Civ. Proc. §§ 482.100, 484.530, 485.610*].

The first box in Paragraph 4c should be checked. However, because technically the defendant is claiming the exemption at the time of the filing of the claim of exemption, the wording should be changed to "claims exemption" [*see Code Civ. Proc. §§ 484.530(a), 485.610(a), 703.520*]. Paragraphs 4c(1)-(4) represent the categories of property exempt from attachment [*Code Civ. Proc. § 487.020*]. The property claimed to be exempt should be described following the appropriate subparagraph, and if the exemption is claimed pursuant to *Code Civ. Proc. § 704.010* (Paragraph 4c(1)(a)), or *Code Civ. Proc. § 704.100* (Paragraph 4c(1)(b)), the requested information must be supplied [*Code Civ. Proc. § 703.520(b)(3)*]. The statutory provision on which the claim of exemption is based must be recited in the claim of exemption and should be supplied if it is not already on the form [*Code Civ. Proc. § 703.520(b)(5)*]. If the property is claimed to be exempt because it is necessary for the support of the judgment debtor who is a natural person or the judgment debtor's family, a financial statement is required to be filed along with the claim [*Code Civ. Proc. §§ 703.520(b)(4), 703.530*]. The financial statement is required to be executed under oath and to contain specified information [*Code Civ. Proc. § 703.530(b), (c)*]. For a illustrative form of financial statement approved by the Judicial Council for use in attachment proceedings and enforcement of judgment proceedings, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.

[iii] Statement of Facts

The claim of exemption must contain a statement of facts necessary to support the claim and must be executed under oath [*Code Civ. Proc. § 703.520(b)(6)*]. Thus, if the statement of facts is contained in an attachment to the claim, it should be executed under oath. If the attachment is a declaration instead of an affidavit [*see Code Civ. Proc. § 2015.5*], the wording of Paragraph 5 should be changed to reflect this. In addition, *Code Civ. Proc. § 703.520* does not require that the claim be accompanied by a memorandum of points and authorities. Thus, the reference in Paragraph 5 to an attached memorandum of points and authorities should be deleted if there is none.

[iv] Verification

Because the claim of exemption is required to be executed under oath [*Code Civ. Proc. § 703.520(b)*], the sentence, "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct," should be inserted above the signature line [*see Code Civ. Proc. § 2015.5*]. In addition, the defendant should sign the claim and the words "attorney for" under the signature line should be crossed out.

[v] Plaintiff's Opposition

Within 10 days after the plaintiff is served with a copy of the claim and a notice of opposition by the levying officer, the plaintiff must file a notice of opposition to the claim of exemption and notice of motion for an order determining the claim of exemption with the court and the levying officer. If this is not done, the property claimed to be exempt will be released from the attachment [*Code Civ. Proc. §§ 703.510(a), 703.550*]. The hearing on the motion must be set no later than 20 days from the date of the filing of the motion [*Code Civ. Proc. § 703.570(a)*]. For further discussion and forms relating to the procedure for claiming an exemption on property levied on pursuant to a writ of execution after judgment, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.

[6] Decisions

Verified cross complaint, without accompanying affidavit, submitted by party opposing application for RTAO as insufficient to support opposition when verification was made by corporate officer on behalf of corporation; thus,opposing party as not making any valid evidentiary showing in opposition to application. *Lorber Industries v. Turbulence, Inc. (1985) 175 Cal. App. 3d 532, 536, 221 Cal. Rptr. 233*

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Chapter 62 ATTACHMENT
PART IV. FORMS
A. Forms Relating to Attachment Generally

6-62 California Forms of Pleading and Practice--Annotated § 62.139

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.139 Declaration in Support of Claim of Exemption [Code Civ. Proc. §§ 484.070(d), 491.470(a)]

[1] FORM Declaration in Support of Claim of Exemption [Code Civ. Proc. §§ 484.070(d), 491.470(a)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF
vs.	)	_____ [*name*] IN
_____ [*name*],	)	SUPPORT OF CLAIM OF EXEMPTION
[and DOES I through _____,]	)	Date: _____
Defendant(s).	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* the (defendant or plaintiff) in the above-entitled _____ (action *or* proceeding)].

[2. $_____ (*specify amount of money*) *or* _____ (*describe property*) is exempt

from attachment.]

[3. The _____ (money *or* property) is exempt from attachment pursuant to _____ (*specify statute section supporting claim, e.g., Code of Civil Procedure Sections 487.020(a)* and *704.140*).]

4. The following facts support the factual issues raised by the claim: _____ [*state facts showing that money or property comes within terms of exemption*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form of declaration is for use by a defendant to support a claim of exemption. The form may be used when the claim of exemption is made at the same time a notice of opposition to an application for a right to attach order is made, or after a lien on a pending action or proceeding has beencreated pursuant to *Code Civ. Proc. §§ 491.410-491.470* [*Code Civ. Proc. §§ 484.070(d), 491.470(a)*].

When the form is used to support a claim of exemption after a lien on a pending action or proceeding has been created, optional Paragraphs 2 and 3 must be included, and the exemption is claimed in the court in which that action or proceeding is pending [*see Code Civ. Proc. § 491.470(a)*; *see also Code Civ. Proc. § 484.070(c)*]. Thus, in that case, the caption should reflect the action or proceeding subject to the lien, and the attachment defendant will be the plaintiff rather than the defendant in the "above-entitled proceedings" for purposes of Paragraph 1.

[3] Cross Reference

For related forms, *see §§ 62.138* and *62.194*.

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6-62 California Forms of Pleading and Practice--Annotated § 62.140

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.140 Declaration in Support of Request That File or Fact of Filing Not Be Made Public [Code Civ. Proc. § 482.050; Cal. Rules of Ct., Rule 243.3]

[1] FORM Declaration in Support of Request That File or Fact of Filing Not Be Made Public [Code Civ. Proc. § 482.050; Cal. Rules of Ct., Rule 243.3]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF
vs.	)	_____ [*name*] IN
_____ [*name*],	)	SUPPORT OF REQUEST THAT
[and DOES I through _____,]	)	_____ [FILE *or* FACT OF FILING]
Defendant(s).	)	NOT BE MADE PUBLIC
	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am the plaintiff in the above-entitled action.

[*EITHER*]

2. This action is on a claim for money based on contract against a defendant who is not a natural person. The claim is not secured within the meaning of *Code of Civil Procedure Section 483.010(b)*.

[*OR*]

2. This action is on a claim for money based on contract against a defendant who is a natural person. The claim arises out of the defendant's conduct of a trade, business, or profession, and the money, property, or services was not used by the defendant primarily for personal, family, or household purposes. The claim is not secured within the meaning of *Code of Civil Procedure Section 483.010(b)*.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form of declaration is for use by a plaintiff who requests in writing at the time of filing a complaint that the file or the fact of filing not be made public, pursuant to *Code Civ. Proc. § 482.050*, before either (1) 30 days after the filing of the complaint, or (2) the filing of the return of service of the notice of hearing and any temporary protective order, or of the writ of attachment if issued without notice, whichever event occurs first [*see Code Civ. Proc. § 482.050(a)*; *Cal. Rules of Ct., Rule 2.580*]. Although *Code Civ. Proc. § 482.050(c)* allows the written request itself to take the form of a mere notation at the top of the first page of the complaint, *Cal. Rules of Ct., Rule 2.580* requires that the plaintiff file a declaration under oath regarding the written request.

[3] Contents of Declaration

This form contains the alternative statements required by *Cal. Rules of Ct., Rule 2.580* for the declaration under oath. The first alternative Paragraph 2 is for use when the defendant is not a natural person, while the second alternative Paragraph 2 is for use when the defendant is a natural person.

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6-62 California Forms of Pleading and Practice--Annotated § 62.141

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.141 Undertaking by Personal Sureties [Code Civ. Proc. § 489.210]--Judicial Council Form AT-160

[1] FORM Undertaking by Personal Sureties [Code Civ. Proc. § 489.210]--Judicial Council Form AT-160

Click here to view image.

[2] Use of Form

This form is an illustrative example of a form of undertaking by personal sureties approved by the Judicial Council for optional use in attachment proceedings [*see* Cal. Judicial Council Form AT-160 (same as CD-140 re claim and delivery)]. This form has been filled out as it would be when used by the plaintiff to give an undertaking to pay to the defendant the amount the defendant may recover for any wrongful attachment pursuant to *Code Civ. Proc. § 489.210*. Such an undertaking is required to be given before a writ of attachment, a right to attach order pursuant to *Code Civ. Proc. § 491.415*, or temporary protective order is issued [*Code Civ. Proc. § 489.210*]. The amount of the undertaking, unless objected to, is provided in *Code Civ. Proc. § 489.220(a)*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Additional Uses of Form

This form of undertaking by personal sureties may also be used by the defendant in attachment proceedings to obtain an order releasing the defendant's property from the attachment on the substitution of an undertaking by the defendant [*Code Civ. Proc. § 489.310*] or to obtain an order terminating a temporary protective order [*Code Civ. Proc. § 489.320*].

This form may also be used in claim and delivery actions by the plaintiff to obtain a writ of possession or temporary protective order [*Code Civ. Proc. § 515.010*] or by the defendant to prevent the plaintiff from taking possession of the

defendant's property, or to regain possession of property already taken by the plaintiff pursuant to a writ of possession [*Code Civ. Proc. § 515.020*].

[4] Admitted Surety Insurers

This form is for use when the undertaking is executed by personal sureties as opposed to admitted surety insurers. An admitted surety insurer is a corporate insurer or a reciprocal interinsurance exchange to which the Insurance Commissioner has issued a certificate of authority to transact surety insurance in the State of California, as defined in *Ins. Code § 105* [*Code Civ. Proc. § 995.120(a)*]. Two or more sufficient personal sureties may be used in place of admitted surety insurers unless the specific statute requiring the undertaking requires execution by admitted surety insurers [*Code Civ. Proc. § 995.310*]. The provisions of the Attachment Law providing for undertakings do not require admitted surety insurers [*see Code Civ. Proc. §§ 489.060, 489.210*]. Nor do the claim anddelivery provisions providing for undertakings require admitted surety insurers [*see Code Civ. Proc. § 489.210 et seq.*]. For a more complete discussion of admitted surety insurers, see *Ch. 538, Suretyship, Bonds, And Undertakings, § 538.40* et seq.

[5] Filling Out the Form

[a] General Instructions

This form combines the bond, which must be executed under oath (Paragraphs 5 and 9), with the affidavit of qualifications that is required to accompany the bond (Paragraphs 6-9) [*see Code Civ. Proc. §§ 995.320-995.330, 995.520*].

In all cases in which the form is used the caption should be completed, indicating the party giving the undertaking and the type of action in which it is given. Paragraphs 1 and 2 should also always be completed by inserting the names of the plaintiff and the defendant. When the sureties are personal sureties there must be at least two of them, and thus both columns of Paragraph 6 will be used. The occupations and the residence and business addresses of the sureties are required to be contained in the affidavit accompanying the bond (Paragraphs 6a-c) [*Code Civ. Proc. § 995.520(b)(1)*]. The address for service of papers on the surety is required to be contained in the bond itself (Paragraph 6d) [*Code Civ. Proc. § 995.320*].

[b] Sufficiency of Personal Sureties and Property Description

Paragraph 7 contains the requirements that a personal surety must meet to be sufficient pursuant to *Code Civ. Proc. § 995.510(a)* and should also be completed in all cases. Note that if the amount of the undertaking exceeds $10,000 and is executed by more than two personal sureties, the worth of a personal surety may be less than the amount of the bond, so long as the aggregate worth of all the sureties executing the bond is twice the amount of the bond [*Code Civ. Proc. § 995.520(d)*]. In addition, in this case, the affidavit of the surety may state that the surety is worth less than the amount of the bond and may stipulate that the liability of the surety is limited to the worth stated in the affidavit [*Code Civ. Proc. § 995.520(d)*]. This form contains no provisions for use in the aforementioned instance and counsel may wish to either modify this form or use the form of declaration of qualification of personal surety contained in Ch. 538, *Suretyship, Bonds, And Undertakings*, § 538.40 et seq.

Paragraphs 8(a) and (b) must be completed when the undertaking is in excess of $5,000 [*Code Civ. Proc. § 995.520(c)*]. The description of the property supplied in Paragraph 8(a) should be sufficient for identification of the property and the nature of the surety's interest which qualifies the surety on the bond.

[c] Verification and Filing

Paragraph 9 should be executed and dated in all cases to satisfy the requirement that the bond be under oath and it be accompanied by the affidavit of qualifications of the personal sureties [*Code Civ. Proc. §§ 995.320(a), 995.520(a),*

2015.5].

When an undertaking in attachment proceedings is given by personal sureties, the undertaking must be presented to the court for approval and must be filed in the court in which the action is pending [*Code Civ. Proc. § 489.060*]. Thus, the portion of the form entitled "COURT APPROVAL" will be completed in all attachment proceedings in which this form is used.

[d] Undertaking by Defendant in Attachment Proceeding to Obtain Property Release

When an undertaking is given by the defendant in order to obtain an order releasing the property attached or subject to attachment pursuant to *Code Civ. Proc. § 489.310*, the amount of the undertaking filed must be the lesser of (1) the value of the property attached or prevented from being attached, or (2) the amount specified by the writ of attachment to be secured by the attachment [*Code Civ. Proc. § 489.310(c)*]. This amount should be inserted in Paragraph 3.

Note that if the amount of the undertaking is based on the value of the property or of an interest in the property, the bond must contain a description of the property or interest and the principal's estimate of the value of the property or interest, or if the estimate is given by the beneficiary or the court, the value so estimated [*Code Civ. Proc. § 995.320(a)(3)*]. Thus, if the amount of the undertaking given pursuant to *Code Civ. Proc. § 489.310* is the value of the property, the bond must contain a description of the property and an estimate of the value. This should also be inserted in Paragraph 3 or elsewhere on the form or in an attachment to the form.

Paragraph 5b should be checked indicating that the undertaking is being given pursuant to *Code Civ. Proc. § 489.310* to pay to the plaintiff the amount of the value of the property released up to the amount of any judgment obtained by the plaintiff.

[e] By Defendant in Attachment Proceeding to Obtain Order Terminating Temporary Protective Order

When an undertaking is given in an attachment proceeding to obtain an order terminating a temporary protective order, the amount of the undertaking must be equal to the amount sought to be secured by the attachment [*Code Civ. Proc. § 489.320(b)*]. This should be inserted in Paragraph 3. Paragraph 5c should be checked indicating that the undertaking is given pursuant to *Code Civ. Proc. § 489.320* to pay the plaintiff the value of the amount of any judgment that may be recovered by the plaintiff in the action.

[f] By Plaintiff in Claim and Delivery When Writ of Possession or Temporary Protective Order Obtained

Before a writ of possession or temporary protective order is issued in a claim and delivery action, an undertaking must be given by the plaintiff for the return of the property and the payment of any amount the defendant recovers from the plaintiff. The undertaking must be not less than twice the value of the defendant's interest in the property [*Code Civ. Proc. § 515.010*; Ch. 119, *Claim and Delivery*]. The amount of the undertaking should be inserted in Paragraph 3. Because the amount of the undertaking is dependent on the value of the property, a description of the property and an estimate of its value must be added [*Code Civ. Proc. § 995.320*].

It does not appear that the address for giving notice of exception to sureties requested in Paragraph 4 is required to be filled in. Prior to the 1982 amendment of *Code Civ. Proc. § 515.020*, the information requested in Paragraph 4 was required to be contained in the defendant's undertaking in claim and delivery actions. However, presently any objection to the undertaking must now be mailed to the levying officer [*Code Civ. Proc. § 515.030(a), (b)*]. There is no requirement that this information be contained in the undertaking [*see Code Civ. Proc. §§ 995.310-995.380*].

There is a requirement in *Code Civ. Proc. § 995.320(a)(2)*, however, that a bond contain the address at which the principal and sureties may be served with notices, papers, and other documents pursuant to the Bonds and Undertakings

Law. The address for service of the sureties is to be inserted in Paragraph 6d. Service on the principal is accomplished by service on the principal's attorney [*Code Civ. Proc. § 1015*] and the address of the attorney is inserted in the caption of the form. Paragraph 5e should be checked indicating that the undertaking is given pursuant to *Code Civ. Proc. § 515.010*.

[g] By Defendant in Claim and Delivery to Prevent Plaintiff From Taking Possession of Property or to Regain Possession

When the defendant gives an undertaking to prevent the plaintiff from taking possession of property pursuant to a writ of possession or to regain possession of property taken pursuant to a writ, the amount of the undertaking must be in an amount equal to the undertaking given by the plaintiff in obtaining the writ or in an amount determined by the court pursuant to *Code Civ. Proc. § 515.010(b)* [*Code Civ. Proc. § 515.020(a)*]. This amount should be inserted in Paragraph 3. It does not appear that Paragraph 4 is required to be completed [*see Code Civ. Proc. §§ 995.310-995.380*; *see discussion under§ 62.141[5][f]*]. Paragraph 5d should be checked indicating that the undertaking is given pursuant to *Code Civ. Proc. § 515.020*.

[6] State Statutes

Applicability of Bond and Undertaking Law (*Code Civ. Proc. § 995.010 et seq.*) to attachment. *Code Civ. Proc. §§ 489.010, 995.020*

[7] California Rules of Court

Corporate sureties. *Cal. Rules of Ct., Rule 3.1130(a)*

Officer of court or attorney as not permitted to act as surety. *Cal. Rules of Ct., Rule 3.1130(b)*

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6-62 California Forms of Pleading and Practice--Annotated § 62.142

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.142 Application and Notice of Hearing for Order to Set Aside Right to Attach Order, Release Attached Property, etc. [Code Civ. Proc. §§ 485.240, 488.720, 489.220, 489.310, 492.050, 995.930]--Ex Parte Application to Discharge Attachment, Release Levied Property, etc. [Code Civ. Proc. §§ 488.740, 489.420]--Judicial Council Form AT-170

[1] FORM Application and Notice of Hearing for Order to Set Aside Right to Attach Order, Release Attached Property, etc. [Code Civ. Proc. §§ 485.240, 488.720, 489.220, 489.310, 492.050, 995.930]--Ex Parte Application to Discharge Attachment, Release Levied Property, etc. [Code Civ. Proc. §§ 488.740, 489.420]--Judicial Council Form AT-170

Click here to view image.

CAUTION:

A memorandum of points and authorities must be served and filed when this form is used as a notice of motion [*Cal. Rules of Ct., Rules 3.1103(a)(2), 3.1113(a)*; ***see*** *Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, ***Points and Authorities*** .

[2] Use of Form

This form is an illustrative filled-in reproduction of the form approved by the Judicial Council as a combined form for optional use by a defendant in seeking various orders affecting the attachment of defendant's property [*see* Cal. Judicial Council Form AT-170]. The form may be used for both ex parte and noticed hearing procedures, depending on the particular order sought by defendant. Various applications of the form are discussed below. This form has been filled in to illustrate a noticed motion to reduce the amount to be secured by the attachment [*Code Civ. Proc. §§ 483.015, 485.240*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in

PDF format also is available at www.lexisone.com at no charge.

[3] Additional Uses of Form

This form may also be used to obtain the following orders:

- An order, on noticed motion, to set aside the right to attach order, quash the writ of attachment, and release the attached property of a defendant who is a either a resident [*Code Civ. Proc. § 485.240*] or a nonresident of California [*Code Civ. Proc. § 492.050*].

- An order, on noticed motion, to release attached property exceeding in value the amount to be secured by the attachment [*Code Civ. Proc. § 488.720*].

- An order, on noticed motion, to substitute an undertaking for property [*Code Civ. Proc. § 489.310*].

- An order, on noticed motion, to increase the plaintiff's undertaking [*Code Civ. Proc. §§ 489.220, 995.920 et seq.*].

- An order, on noticed motion, to determine the sufficiency of plaintiff's sureties [*Code Civ. Proc. § 995.930*].

- An order, on ex parte application, to discharge the attachment and release the property levied on when the defendant recovered judgment in the action [*Code Civ. Proc. § 488.740*].

- An order, on ex parte application, to release property levied on after defendant's filing of an undertaking on appeal [*Code Civ. Proc. § 489.420*].

[4] Filling Out the Form

[a] General Instructions

Defendant should mark the appropriate box next to the relief requested in the caption. The plaintiff's name should be inserted in Paragraph 1 and the date, time, and location of the hearing should be inserted in the box within Paragraph 1. Defendant's status as a resident or nonresident should be checked in the appropriate box of Paragraph 2, and defendant's name should be inserted. The appropriate box in Paragraphs 2a-h should be checked, and the information required in the appropriate box should be filled in.

The information in Paragraphs 3 and 4 is required by *Code Civ. Proc. § 489.310*, when the defendant is seeking to substitute an undertaking for the attached property [§ 62.142[4][f]]. The information required by Paragraph 5 must be provided when defendant is a nonresident of California, seeking to set aside the right to attachment order [§ 62.142[4][d]].

Paragraph 7 should be completed by indicating the number of pages attached as supporting attachments or exhibits.

[b] Affidavits, Declarations, and Points and Authorities

Affidavits (or declarations under *Code Civ. Proc. § 2015.5*) are required to be submitted supporting any factual issues raised when the defendant is seeking to set aside the right to attach order [*Code Civ. Proc. §§ 485.240(b), 492.050(b)*], to substitute the undertaking for property [*Code Civ. Proc. § 489.310(b)*], and for the release of attached property to the extent that the value of defendant's interest in the property exceeds the amount necessary to satisfy the amount to be secured [*Code Civ. Proc. § 488.720(b)*].

In addition, Paragraph 6 should be checked. An affidavit or declaration must accompany the application, supporting the factual issues raised (Paragraph 6a) or the facts may be set out on the form (Paragraph 6b) [*Code Civ. Proc. § 485.240(b)*]. If the facts are set out in the form, the form must be dated and signed under the declaration preceding Paragraph 7. If a separate declaration is attached, box 6a should be checked, the word affidavit struck out, and "declaration" typed in.

Points and authorities in support of any legal issues raised must accompany noticed motions generally (Paragraph 6c or 6d) [*Cal. Rules of Ct., Rules 3.1103(a)(2), 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*; for discussion and forms, *see* Ch. 417, *Points and Authorities*]. In addition, a notice of motion pursuant to *Code Civ. Proc. § 485.240*, *488.720*, or *492.050* is specifically required to be accompanied by points and authorities [*Code Civ. Proc. §§ 485.240(b), 488.720(b), 492.050(b)*].

[c] Resident Defendant Seeking to Set Aside Right to Attachment Order

The defendant who is a California resident and is seeking to set aside the RTAO, quash the writ of attachment, and release the attached property under *Code Civ. Proc. § 485.240* should check box 2a. The dates on which the right to attach order and the writ of attachment were issued must be included in the spaces provided under 2a(1) and 2a(2). In addition, Paragraph 6 should be checked and filled out [*see Code Civ. Proc. § 485.240(b)*; *see discussion under§ 62.142[4][b]*].

[d] Nonresident Defendant Seeking to Set Aside Right to Attach Order

When the RTAO and writ of attachment were issued pursuant to provisions governing nonresident attachment (*Code Civ. Proc. § 492.010 et seq.*), the right to attach order must be set aside when the defendant files a general appearance in the action unless the plaintiff shows that his or her right to attach is authorized by a provision other than *Code Civ. Proc. § 492.010* [*Code Civ. Proc. § 492.050(c)*]. To set aside the right to attach order that was issued pursuant to *Code Civ. Proc. § 492.010*, counsel should check boxes 5 and 5a, and indicate in Paragraph 5b or 5c when defendant made a general appearance or that the general appearance is being made by this application. In addition, Paragraph 6 should be checked and filled out [*see Code Civ. Proc. § 485.240(b)*; *see discussion under§ 62.142[4][b]*].

[e] Order to Release Property Exceeding Amount to be Secured

When defendant is seeking an order releasing the attached property to the extent that defendant's interest in the property exceeds the amount to be secured by the attachment under *Code Civ. Proc. § 488.720*, counsel should check the box corresponding to Paragraph 2c. The value of defendant's interest in the property must be inserted in Paragraph 2c(1), and a description of the attached property must be provided in Paragraph 2c(2). In addition, Paragraph 6 should be checked and filled out [*see Code Civ. Proc. § 488.720(b)*; *see also § 62.142[4][b]*].

[f] Substitute Undertaking for Property

If the defendant is seeking to substitute an undertaking for the attached property, the box corresponding to Paragraph 2b should be checked. The amount of the undertaking should be filled in the space provided, and either box 2b(1) or 2b(2) should be checked. If the undertaking is to substitute for all of defendant's property that is attached, box 2b(1) should be checked. If the undertaking is to substitute for only a portion of defendant's property that is attached or is subject to attachment, box 2b(2) should be checked, and the value of that portion, along with a description of the portion of property, should be filled in the spaces corresponding to 2b(2)(a) and (b), since *Code Civ. Proc. § 489.310* requires that this information be provided.

In any application to substitute an undertaking for property, when the action is against more than one defendant and all the defendants do not join in the application, the applying codefendant must describe the character of the defendant's

title to the property and the manner in which the defendant acquired the property [*Code Civ. Proc. § 489.310(d)*]. Therefore in such a case, the box corresponding to Paragraph 3 should be checked. If box 2b(1) was previously checked, it should be checked in Paragraph 3 also, and if box 2b(2) was checked, it should also be checked in Paragraph 3. The manner of the property's acquisition should either be set forth in the space provided, checking the box labeled "following facts," or, if there is not sufficient room in the space, by a separate affidavit or declaration, and by checking the box labeled "attached affidavit" (strike "affidavit" and type in "declaration" if appropriate).

If there were multiple defendants and the other defendants have not joined in the application, Paragraph 4 must also be completed. The applicant must state whether or not any nonjoining defendant has any interest in the same property. If two or more defendants have an interest in the same property, a joint application and undertaking must be filed to secure the release of the property [*Code Civ. Proc. § 489.310(d)*]. If not, the box corresponding to Paragraph 4 should be checked, as should one of the two boxes labeled 2b(1) and 2b(2), depending on which of the two was checked previously in the form.

Paragraph 6 should be checked and filled out [*see Code Civ. Proc. § 488.720(b)*; *see discussion under§ 62.142[4][b]*].

[g] Order to Increase Plaintiff's Undertaking

If defendant seeks an order increasing plaintiff's undertaking, the box corresponding to Paragraph 2e should be checked. Counsel should specify the grounds showing probable recovery for wrongful attachment in the space provided in Paragraph 2e [*see Code Civ. Proc. §§ 489.220, 995.920 et seq.*].

[h] Order to Determine Sufficiency of Plaintiff's Sureties

Defendant bringing a noticed motion for an order determining the sufficiency of plaintiff's sureties under *Code Civ. Proc. §§ 995.920* and *995.930* should check the box corresponding to Paragraph 2f. The precise grounds for any objection to the sureties must be specified in the space provided in Paragraph 2f [*see Code Civ. Proc. § 995.930*].

[i] Order Discharging Attachment and Releasing Property

To demonstrate the grounds under *Code Civ. Proc. § 488.740* for an order discharging the attachment and releasing defendant's property after a judgment in favor of defendant, counsel should check the box corresponding to Paragraph 2g.

[j] Order to Release Property Levied on Due to Filing Undertaking on Appeal

If seeking an order pursuant to *Code Civ. Proc. § 489.420* to releasedefendant's property from attachment when defendant has appealed and enforcement of judgment is stayed by defendant's filing an undertaking, counsel should check the box corresponding to Paragraph 2h.

[5] Service of Application

Applications to set aside right to attach order, to quash writ of attachment, and to release attached property, and applications to reduce the amount to be secured by the attachment, should be served pursuant to *Code Civ. Proc. § 1005(b)* at least 16 court days before the hearing, plus any extensions based on the manner of service, unless otherwise ordered [*Code Civ. Proc. § 1005(b)*; *see Code Civ. Proc. §§ 485.240, 492.050*; *see also Code Civ. Proc. § 1010.6(a)(6)* (providing for two court day extension period in case of electronic service)].

The same service provisions apply to applications to substitute undertaking for property [*Code Civ. Proc. § 489.310*] and to increase the undertaking pursuant to *Code Civ. Proc. § 489.220*.

In applications to determine the sufficiency of sureties [*Code Civ. Proc. § 995.920 et seq.*], the hearing on this type of objection must be held not less than two nor more than five days after service of notice of motion [*Code Civ. Proc. § 995.950*].

[6] Cross References

For discussion of *Cal. Rules of Ct., Rules 3.1203-3.1204* requirement that ex parte orders be supported by affidavits or declarations relating to giving of or attempt to give notice, or that for specified reasons notice should not be required, see Ch. 372, *Motions and Orders*

California Forms of Pleading and Practice--Annotated

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 62 ATTACHMENT
PART IV. FORMS
A. Forms Relating to Attachment Generally

6-62 California Forms of Pleading and Practice--Annotated § 62.143

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.143 Order to Set Aside Right to Attach Order, Release Attached Property, etc. [Code Civ. Proc. §§ 485.240, 488.720, 488.740, 489.220, 489.310, 489.420, 492.050, 995.930]--Judicial Council Form AT-175

[1] FORM Order to Set Aside Right to Attach Order, Release Attached Property, etc. [Code Civ. Proc. §§ 485.240, 488.720, 488.740, 489.220, 489.310, 489.420, 492.050, 995.930]--Judicial Council Form AT-175

Click here to view image.

[2] Use of Form

This form is an illustrative filled-in reproduction of the form approved by the Judicial Council as a combined form for use in response by the court to defendant's motions for various orders affecting the attachment of defendant's property [*see* Cal. Judicial Council Form AT-175]. The form may be used for both ex parte and noticed hearing procedures, depending on the particular order obtained by defendant. The various types of relief covered by this form of order are discussed in the Comments to § 62.142. This form has been filled in to illustrate an order reducing the amount to be secured by the attachment [*see Code Civ. Proc. §§ 483.015, 485.240*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Additional Uses of Form

See *§ 62.142*, Comments, under Additional Uses of Form for a list of the various types of orders covered by this form.

[4] Filling Out the Form

[a] General Instructions

Counsel should check in the title the box corresponding to the relief requested by defendant's application.

Defendant's name should be filled in the space corresponding to Paragraph 1a. Counsel should check the appropriate box in 1a(1) through 1a(8), to indicate the relief requested. If the order is based on a noticed motion, counsel should check the box corresponding to Paragraph 1b and fill in the information requested about the hearing. If the order is based on an ex parte application, the box for Paragraph 1c should be checked.

[b] Court Findings

One or more of the boxes in Paragraph 2 should be checked, to indicate the court's finding or findings made in response to the application. If findings other than those presented on the printed form are necessary, counsel should check 2k and should specify the findings in the space provided. One or more of the boxes in Paragraph 3 should also be checked to specify the court's order. If orders other than those provided for on the form are required, counsel should check 3i, and should fill in the specific order or orders in the space provided. Counsel should indicate how many boxes were checked in Paragraph 3 by filling in that number in the space provided in 3j.

[c] Setting Aside Right to Attach Order

[i] Resident Defendant

For an order setting aside plaintiff's RTAO, box 2a should be checked and the date of the right to attach order to be set aside should be indicated. In Paragraph 3, boxes 3a-3c should be checked and the date of the RTAO and the writ of attachment should be filled in following boxes 3a and 3b, respectively. The date of issuance of the writ should also be filled in under box 3c, and one of boxes 3c(1)-(3) should be checked to specify what property is being released. If box 3c(2) is checked, the amount of the property must be filled in, and if box 3c(3) is checked, a description of the property must be given.

[ii] Nonresident Defendant

If a nonresident defendant is seeking an order setting aside the RTAO, box 2b should be checked to indicate that the requirements of *Code Civ. Proc. § 492.050* have been met. In addition, boxes 3a-3c should be filled in in the same manner as for a resident defendant.

[d] Releasing Property in Excess of Amount to be Secured

To obtain an order pursuant to *Code Civ. Proc. § 488.720*, box 2c should be checked and the relevant values filled in. In addition, box 3c should be checked and the date of the writ of attachment specified, and box 3c(2) or 3c(3) checked and the information filled in to indicate the portion of property to be released.

[e] Substituting Undertaking for Property

Boxes 2d-f correspond to an order to substitute an undertaking for the property under *Code Civ. Proc. § 489.310*. Box 2d implements the provisions of *Code Civ. Proc. § 489.310(d)*. When an action is against more than one defendant and two or more defendants have an interest in the same property, a joint application and undertaking are required in order to secure their release of that property. When the release of jointly held or co-owned property is sought, a joint application is required also. Therefore, box 2d should be checked. Checking box 2e would preclude the release of attached property under *Code Civ. Proc. § 489.310*. Box 2f should be checked to indicate the court's finding on the amount of the undertaking that may be substituted for the attached property or be subject to attachment under *Code Civ. Proc. § 489.310*. The amount should be filled in, and either box 2f(1) or 2f(2) should be checked, depending on whether the property has been attached or is subject to attachment. A description of the property should be inserted in the space

corresponding to the box checked.

Note that when the defendant applies for an order to release a portion of the property that has been attached or for an order preventing the attachment of property and the amount of the undertaking to be given is less than the amount to be secured by the attachment, a description of the property to be released or to be protected from an attachment must be included [*Code Civ. Proc. § 489.310(b)*].

If the property has been attached, box 3d should be checked, the amount of the undertaking should be specified following 3d(1), and a description of the property should be given following 3d(2). When only a portion of the property attached is to be released, the property should be described with sufficient clarity in 2f so that if identical to the property ordered to be released, defendant can incorporate by reference in 3d the description in 2f. When the entire property attached is to be released, it is sufficient to refer to the description of the property in plaintiff's application or, if appropriate, to the writ of attachment.

If the property is subject to attachment, box 3e should be checked, the amount of the undertaking should be filled in following 3e(1), and the property described following 3e(2). When the amount of the undertaking is less than the amount to be secured by the attachment, the property to be protected from attachment should be described with sufficient clarity in the order. If identical to the description in 2f, that description may be incorporated by reference.

[f] Insufficiency of Undertaking

Box 2g should be checked if defendant seeks an order that the undertaking is insufficient under *Code Civ. Proc. § 995.920 et seq.*, and specific finding as to how the undertaking is sufficient given. In addition, either box 3f or box 3g should be checked. If the order is for an increase in plaintiff's undertaking, box 3f should be checked. The total amount of the increased undertaking, rather than merely the amount of increase, should be specified in the space provided. The date by which the undertaking must be filed should also be specified. The undertaking must be filed within five days of the order [*Code Civ. Proc. § 995.960(b)(1)*]. If the order is for an undertaking with sufficient sureties, box 3g should be checked, and the date by which it must be filed should be indicated.

[g] Discharging Attachment and Releasing Property After Judgment

If the order is to discharge the attachment and release the property under the provisions of *Code Civ. Proc. § 488.740*, box 2h should be checked. Box 3c should also be checked, as should boxes 3c(1), (2), or (3), as described under § 63.143[4][c].

[h] Releasing Property After Undertaking on Appeal

If the order is to release property levied on after defendant's filing of an undertaking on appeal, under *Code Civ. Proc. § 489.420*, box 2i should be checked. One of the three boxes under box 2i must also be checked. Box 3c should also be checked, as should boxes 3c(1), (2), or (3), as described under § 63.143[4][c].

[5] Cross References

See generally Ch. 372, *Motions and Orders*

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PART IV. FORMS
A. Forms Relating to Attachment Generally

6-62 California Forms of Pleading and Practice--Annotated § 62.144

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.144 Examination Proceedings--Ex Parte Application and Order for Appearance and Examination of Third Person With Possession or Control of Property [Code Civ. Proc. § 491.110]--Judicial Council Form AT-138

[1] FORM Examination Proceedings--Ex Parte Application and Order for Appearance and Examination of Third Person With Possession or Control of Property [Code Civ. Proc. § 491.110]--Judicial Council Form AT-138

Click here to view image.

[2] Use of Form

This form of ex parte application and order is an illustrative filled-in reproduction of the Judicial Council form approved for optional use by a plaintiff who has a right to attach order and is applying ex parte for an order directing a third person with possession or control of property in which the defendant has an interest, or who is indebted to the defendant in an amount exceeding $250, to appear for examination with respect to the property or debt [*see Code Civ. Proc. § 491.110(a)*; Cal. Judicial Council Form AT-138 (same as EJ-125 re enforcement of judgment)]. For a discussion of when this remedy is available and the procedure to be followed, see § 62.24 et seq.

This form may also be used in enforcement of judgment proceedings, and some of the information in the form is not relevant in an attachment proceeding [*see Code Civ. Proc. §§ 708.110, 708.120*, and Ch. 254, *Executions and Enforcement of Judgments*, § 254.180 et seq.].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Ex Parte Application

The application for an order of examination is made ex parte [*Code Civ. Proc. § 491.110(a)*].

[4] Filling Out the Form

[a] Order to Appear for Examination

The order to appear for examination includes the name of the third person having possession or control of the property in which the defendant has an interest or who is indebted to the defendant in an amount exceeding $250 (Paragraph 1.). If the order to appear is directed to a corporation, partnership, association, trust, or other organization, it may name the organization or a specified individual [*see Code Civ. Proc. § 491.140*].

Paragraph 2.c. is checked, since Paragraphs 2.a. and 2.b. relate to enforcement of judgment proceedings.

The time and place of the hearing is entered in the box below Paragraph 2. If the court has specially appointed a person to serve the order and application [*see Code Civ. Proc. § 491.160(a)*], his or her name should be typed in Paragraph 3. If no person has been specially appointed, counsel may either leave Paragraph 3 as is, or line out the words "or the following specially appointed person (*name*):"

Although the form provides for signature by either a judge or referee, *Code Civ. Proc. § 491.110(a)* appears to require that the order be signed by a judge as opposed to a referee. *Code Civ. Proc. § 491.110(a)* provides that "the court shall make an order" directing the third person to appear before the court, or before a referee appointed by the court. Consequently, to avoid a possible challenge to an order signed by a referee, counsel may wish to present the order to a judge for signature. A referee once appointed is, however, like a judge or temporary judge, expressly authorized to make specified orders [*see Code Civ. Proc. § 491.130(a)*].

[b] Application for Order to Appear for Examination

[i] Status of Plaintiff and Examinee

The application states that the plaintiff has a right to attach order (Paragraph 1., third box), and names the person or organization to be examined (Paragraph 1., second line).

The status of the person to be examined, as a third person holding property in which the defendant has an interest or owing a debt to the defendant is indicated by checking the second box under Paragraph 2. A separate affidavit (or declaration under *Code Civ. Proc. § 2015.5*) must be attached, showing that the third person has possession or control of property in which the defendant has an interest or is indebted to the defendant in an amount exceeding $250 [*Code Civ. Proc. § 491.110(a)*]. The affidavit or declaration must set forth the facts with particularity [*Code Civ. Proc. § 482.040*]. The facts set forth may be based on information and belief, but if they are, the affidavit or declaration must state the facts on which the belief is based, showing the nature of the information and the reliability of the informant [*Code Civ. Proc. §§ 482.040, 491.110(a)*].

Paragraph 5 is not relevant to an attachment proceeding and is left blank.

[ii] Examinee's Residence

The application states that the person to be examined resides or has a place of business in the county where examination is sought or within 150 miles of the place of examination (Paragraph 3) [*Code Civ. Proc. § 491.150(b)*].

If the place of the examination is in a court other than the one that issued the writ, a separate affidavit or declaration stating the residence or place of business of the person to be examined must be attached and Paragraph 4 checked [*Code Civ. Proc. § 491.150(d)(2)*]. Unlike the affidavit or declaration supporting the application under *Code Civ. Proc. § 491.110*, this affidavit or declaration is not authorized to be made on information and belief. Consequently, it must show affirmatively that the affiant or declarant, if sworn as a witness, can testify competently to the facts stated in it [*see*

Code Civ. Proc. § 482.040].

The examination will take place in a court other than the one that issued the writ when the person to be examined does not reside or have a place of business in the county where the court that issued the writ is located [*see Code Civ. Proc. § 491.150(c)*]. To have the examination in another court, the plaintiff, in addition to presenting the affidavit or declaration under *Code Civ. Proc. § 491.150(d)(2)*, must file with the court from which the order is sought a certified copy of the complaint in the pending action, make any necessary affidavit or declaration or showing for the examination as required by *Code Civ. Proc. § 491.110*, and pay a filing fee with the application [*Code Civ. Proc. § 491.150(d)(1), (3), (4)*].

[c] Verification

Although the application includes a declaration under penalty of perjury, none of the relevant code sections requires that the application (as opposed to the affidavits or declarations mentioned above) be signed under penalty of perjury or otherwise verified [*see Code Civ. Proc. §§ 491.110(a)* (attachment), 708.110(c), 708.120(a) (enforcement of judgment)]. Nor does there appear to be any general provision in The Attachment Law [*Code Civ. Proc. § 481.010 et seq.*] or the Enforcement of Judgments Law [*Code Civ. Proc. § 680.010 et seq.*] so requiring.

[d] Page Two of Form

Page two of the form contains notices required by *Code Civ. Proc. § 491.110(d)*, relating to attachment, as well as those required by *Code Civ. Proc. §§ 708.110(e)* and *708.120(e)*, relating to enforcement of judgments. Nothing needs to be filled in on page two of the form when it is being used to secure examination of a third person in an attachment proceeding.

[5] Cross References

For a general form of declaration under penalty of perjury, see Ch. 372, *Motions and Orders*

For forms drafted by counsel relating to examination of third persons that may be adapted for use in attachment proceedings, see *Ch. 254, Executions and Enforcement of Judgments, § 254.180* et seq.

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6-62 California Forms of Pleading and Practice--Annotated § 62.145

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.145 Notice of Opposition to Claim of Exemption [Code Civ. Proc. §§ 482.100, 484.530, 485.610, 703.560]

[1] FORM Notice of Opposition to Claim of Exemption [Code Civ. Proc. §§ 482.100, 484.530, 485.610, 703.560]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF OPPOSITION TO CLAIM OF EX-
[and DOES I through _____,]	)	EMPTION
Defendant(s).	)	
	)	
	)	

_____

To _____ [*title of levying officer*]:

The property claimed by defendant _____[*name*] to be exempt in the claim of exemption filed on _____ [*date*], is not exempt _____ [under the statutes relied on in the claim of exemption *or* because the equity in the property claimed to be exempt is in excess of the amount provided in the applicable exemption].

The property claimed to be exempt is not exempt because _____ [*state facts in support of opposition to claim of exemption*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The foregoing form is for use by the plaintiff to oppose the defendant's claim of exemption on property levied on pursuant to a writ of attachment. It is used in response to the defendant's claim of exemption when the defendant claims an exemption pursuant to *Code Civ. Proc. § 482.100, 484.530* or *485.610* by following the procedure set forth in *Code Civ. Proc. § 703.510 et seq.* [*see* Form 9].

[3] Time for Filing and Hearing

To oppose the claim of exemption the plaintiff must file a notice of opposition to the claim of exemption and a notice of motion for an order determining the claim of exemption [*see § 62.146*] with the court and the levying officer within 10 days after service of the defendant's claim of exemption [*Code Civ. Proc. § 703.550*]. The hearing on the motion is to be held no later than 20 days from the date the notice of motion was filed with the court. The plaintiff must serve the notice of opposition and notice of motion on the defendant not less than 10 days prior to the hearing [*Code Civ. Proc. § 703.570*].

[4] Contents of Notice

The notice of opposition must allege either that the property is not exempt under the statute relied on or that the equity in the property claimed to be exempt is in excess of the amount provided in the applicable exemption. It must also include a statement of the facts necessary to support the allegation and be executed under oath [*Code Civ. Proc. § 703.560*].

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PART IV. FORMS
A. Forms Relating to Attachment Generally

6-62 California Forms of Pleading and Practice--Annotated § 62.146

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.146 Proceedings for Order Determining Claim of Exemption [Code Civ. Proc. §§ 482.100, 484.530, 485.610, 703.550]--Notice of Motion

[1] FORM Proceedings for Order Determining Claim of Exemption [Code Civ. Proc. §§ 482.100, 484.530, 485.610, 703.550]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR OR-
vs.	)	DER DETERMINING CLAIM OF EXEMPTION
_____ [*name*],	)	Date: _____
[and DOES I through _____,]	)	Time: _____
Defendant(s).	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To defendant and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [Department _____of] the above-entitled court, located at _____[*address*], _____ [*city*], California, plaintiff will, and hereby does, move the court for an order determining defendant's claim of exemption on _____ [*describe property*].

The motion will be made on the ground that defendant has filed a claim to exemption on the property and plaintiff has filed a notice of opposition contesting the claim of exemption.

The motion will be based on this notice of motion, the notice of opposition of _____ [*name*], the points and authorities served and filed herewith, and all the papers and files of this action.
Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

CAUTION:

The foregoing form is required to be accompanied by a memorandum of points and authorities [*Cal. Rules of Ct., Rules 3.1103(a)(2), 3.1113(a)*;***see generally*** Ch. 417, ***Points and Authorities***]. For sample points and authorities relating to claims of exemption, see California Points and Authorities, Ch. 23, ***Attachment*** (Matthew Bender).

[2] Use of Form

The foregoing form is for use by the plaintiff to give notice of a motion for an order determining the defendant's claim of exemption on levied property. It is used in conjunction with a notice of opposition to the claim of exemption [*see § 62.145*]. For a discussion of when to use the forms and the filing and service requirements that apply to both forms, see the Comments to § 62.145.

[3] Cross References

See generally Ch. 372, *Motions and Orders*

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6-62 California Forms of Pleading and Practice--Annotated § 62.147

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.147 Proceedings for Order Determining Claim of Exemption [Code Civ. Proc. §§ 482.100, 484.530, 485.610, 703.550]--Order

[1] FORM Proceedings for Order Determining Claim of Exemption [Code Civ. Proc. §§ 482.100, 484.530, 485.610, 703.550]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
[and DOES I through _____,]	)	
Defendant(s).	)	
	)	
	)	

The motion of _____ [*identify party, e.g.,* plaintiff] for an order determining defendant's claim of exemption came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is granted and it is determined that the following property is _____ [not exempt from attachment *or* exempt from attachment pursuant to Code of Civil Procedure

Section _____ (*specify*) (to the extent indicated)]: _____ [*describe property, and if only partly exempt, extent to which it is exempt*].

IT IS FURTHER ORDERED that the _____ [*title of levying officer*] _____ [release the same to the defendant forthwith *or* continue to hold the same as security for any judgment that may be recovered by plaintiff *or* release the same to the defendant forthwith to the extent it is exempt and continue to hold the same to the extent it is nonexempt as security for any judgment that may be recovered by plaintiff].
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

This form of order is for use on a hearing on plaintiff's motion for an order determining a claim of exemption [*see Code Civ. Proc. §§ 482.100, 484.530, 485.610, 703.580*].

[3] Cross Reference

For related forms, *see §§ 62.145* and *62.146*.

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 62 ATTACHMENT
PART IV. FORMS
A. Forms Relating to Attachment Generally

6-62 California Forms of Pleading and Practice--Annotated § 62.148

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.148 Declaration in Support of Application to Vacate or Stay Attachment Against Service Member [Mil. & Vet. Code § 403(c)(2)]

[1] FORM Declaration in Support of Application to Vacate or Stay Attachment Against Service Member [Mil. & Vet. Code § 403(c)(2)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs. _____ [*name*],	)	IN SUPPORT OF APPLICATION TO VACATE OR
Defendant.	)	STAY ATTACHMENT AGAINST SERVICE MEM-
	)	BER
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* the defendant] in the above-entitled _____ [action *or* proceeding].

2. I am a _____ [*specify rank and branch of service, e.g.,* officer of the National Guard called into active state service by the Governor].

3. I was called into active service on _____ [*date*].

4. This application is made [before *or* during *or* within 60 days after] my period of service.

5. The following facts show that my ability to comply with the attachment was materially affected by my military service: _____ [*state facts showing that the defendant's ability to comply with the order entered or sought was materially affected by reason of his or her military service*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form of declaration is for use by a defendant to support an application to stay or vacate an attachment because the defendant is a service member pursuant to *Military & Veterans Code § 403(c)(2)*. "Service members" include officers and enlisted members of the National Guard called or ordered into active state service by the Governor or into active federal service by the President [*Mil. & Vet. Code § 400(a)(1)*]. "Service members" also include reservists of the United States Military Reserve who have been called to full-time active duty [*Mil. & Vet. Code § 400(a)(2)*].

[3] State Statutes

Stay of Execution for Service Members. *Mil. & Vet. Code § 400 et seq.*

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6-62 California Forms of Pleading and Practice--Annotated § 62.149

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.149 Application to Vacate or Stay Attachment Against Service Member [Mil. & Vet. Code § 403(c)(2)]

[1] FORM Application to Vacate or Stay Attachment Against Service Member [Mil. & Vet. Code § 403(c)(2)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*]	)	APPLICATION TO VACATE OR STAY AT-
Plaintiff,	)	TACHMENT AGAINST SERVICE MEMBER
vs.	)	Date: _____
_____ [*name*]	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

The defendant _____[*name*] in the above-entitled _____[action *or* proceeding] is a _____[*specify rank and branch of service, e.g.,* officer of the National Guard called into active state service by the Governor]. Defendant is a service member as defined by *Mil. & Vet. Code § 400(a)(1).*

Defendant was called into active service on _____ [*date*]. This application is made [before *or* during *or* within 60 days after] defendant's period of service.

Defendant's ability to comply with the attachment was materially affected by [his *or* her] military service because

_____[*state facts showing that the defendant's ability to comply with the order entered or sought was materially affected by reason of his or her military service*].

Therefore, pursuant to *Mil. & Vet. Code § 403(c)(2)*, defendant seeks to vacate or stay the attachment entered on _____ [*date*].

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for

Defendant _____ [*name*]

[2] Use of Form

This form of application is for use by a defendant to stay or vacate an attachment because the defendant is a service member pursuant to *Military & Veterans Code § 403(c)(2)*. "Service members" include officers and enlisted members of the National Guard called or ordered into active state service by the Governor or into active federal service by the President [*Mil. & Vet. Code § 400(a)(1)*]. "Service members" also include reservists of the United States Military Reserve who have been called to full-time active duty [*Mil. & Vet. Code § 400(a)(2)*].

[3] State Statutes

Stay of Execution for Service Members. *Mil. & Vet. Code § 400 et seq.*

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6-62 California Forms of Pleading and Practice--Annotated §§ 62.150-62.169

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

[Reserved]

§§ 62.150[Reserved]

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6-62 California Forms of Pleading and Practice--Annotated § 62.170

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.170 Writ of Attachment [Code Civ. Proc. § 488.010]--Judicial Council Form AT-135

[1] FORM Writ of Attachment [Code Civ. Proc. § 488.010]--Judicial Council Form AT-135

Click here to view image.

[2] Use of Form

This form is the writ of attachment approved by the Judicial Council [*see Code Civ. Proc. § 488.010*; Cal. Judicial Council Form AT-135]. It may also be used for a writ of attachment obtained ex parte.

The writ is issued by the court clerk on order of the court and directs the levying officer and, if applicable, the registered process server, to levy on the property described in the writ [*see Code Civ. Proc. § 488.020(a), (b)*]. It is served, along with the notice of attachment, on the defendant at the time of levy [*Code Civ. Proc. § 488.305*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Filling Out the Form

[a] General Instructions

It should be indicated in the caption by checking the appropriate box if the writ of attachment is one obtained after hearing or ex parte.

The writ is addressed to the levying officer in the county in which the property described in the writ is located (Paragraph 1) and to the registered process server, if one is used to levy the writ (Paragraph 2). Note that a registered

process server may only levy on certain types of property in the manner provided by *Code Civ. Proc. § 488.080*, and within five days after the levy must file the writ with the levying officer, who then performs all other duties under the writ [*Code Civ. Proc. § 488.080(a), (d)*].

The information requested in Paragraphs 3-5 is required to be included on a writ of attachment [*see Code Civ. Proc. § 488.010*].

[b] Property Information

If the property described in Paragraph 5 is real property of the defendant standing on the county records in the name of a person other than the defendant, the box opposite Paragraph 6 should be checked and the requested information supplied. When property of this type is levied on, the county recorder indexes a copy of the writ in the names of both the defendant and the third person in whose name the property stands [*Code Civ. Proc. §§ 488.315, 700.015(a), (b)*].

If the property described in Paragraph 5 is growing crops or timber to be cut located on property standing on the county records in the name of a person other than the defendant, the box opposite Paragraph 7 should be checked and the requested information supplied. When property of thistype is levied on, the county recorder indexes a copy of the writ in the names of both the defendant and the third person in whose name the property stands and a copy of the writ is served on that person [*Code Civ. Proc. §§ 488.325, 700.020(a), (b)(1)*].

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6-62 California Forms of Pleading and Practice--Annotated § 62.171

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.171 Notice of Attachment [Code Civ. Proc. §§ 482.030, 488.060]--Judicial Council Form AT-165

[1] FORM Notice of Attachment [Code Civ. Proc. §§ 482.030, 488.060]--Judicial Council Form AT-165

Click here to view image.

[2] Use of Form

This form is the notice of attachment approved by the Judicial Council [Cal. Judicial Council Form AT-165]. A notice of attachment must be served by the levying officer along with the copy of the writ of attachment at the time of levy or promptly thereafter [*Code Civ. Proc. § 488.305*]. A notice of attachment is also generally required to be served on a third party when the property levied on stands in the name of a third party [*see Code Civ. Proc. § 488.300 et seq.* (methods of levy on specific types of property)].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents of Notice

A notice of attachment is required to inform the person who is served of the following [*Code Civ. Proc. § 488.060*]:

- The capacity in which the person is notified (Paragraph 2).
- The specific property which is sought to be attached (Paragraph 1).
- The person's rights under the attachment, including the right to make a third-party claim.

- The person's duties under the attachment.

[4] Filling Out the Form

The box in the upper left-hand corner in the space provided for the address of the attorney or party should be checked when the notice of attachment is recorded. A notice of attachment is recorded when the property levied on is real property [*Code Civ. Proc. §§ 488.315, 700.015*]. It is also recorded when the property levied on is growing crops, timber to be cut, or minerals and the like [*Code Civ. Proc. §§ 488.325, 700.020*].

The name of the person notified should be inserted in the first line of the notice and the capacity in which they are notified indicated in Paragraph 2.

Paragraph 3a should be checked when the property attached is either:

- Equipment of a going business in the possession or under the control of the defendant and is attached pursuant to *Code Civ. Proc. § 488.375* or

- Inventory or farm products of a going business and the property is attached pursuant to *Code Civ. Proc. § 488.405*.

For an illustration of the Secretary of State's form of Notice of Attachment Lien, see § 62.171A.

Paragraph 3b should be checked when the property attached is a vehicle or vessel for which a certificate of ownership has been issued by the Department of Motor Vehicles, and which is equipment of a going business.

Paragraph 3c is for use when the property attached is a mobile home or commercial coach for which a certificate of title has been issued by the Department of Housing and Community Development, and which is equipment of a going business.

[5] Use by Levying Officer

The bottom of the form is for use by the levying officer or registered process server, depending on who levied on the property. Although *Code Civ. Proc. § 488.305* provides that the levying officer shall serve the notice of attachment at the time of levy, a registered process server may serve the notice if the levy is being made by the registered process server [*see Code Civ. Proc. § 488.080*]. However, a registered process server may levy under a writ of attachment only on certain types of property [*see Code Civ. Proc. § 488.080(a)*].

[6] Information for Person Served

The information supplied on the second page of the form contains the rights and duties of the person on whom the notice is served as required by *Code Civ. Proc. § 488.060(c), (d)*.

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6-62 California Forms of Pleading and Practice--Annotated § 62.172

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.172 Notice of Attachment Lien--California Secretary of State Form

[1] FORM Notice of Attachment Lien--California Secretary of State Form

Click here to view image.

[2] Use of Form

This form is an illustrative filled-in example of the notice of attachment lien approved by the California Secretary of State.

A notice of attachment lien must be filed by the levying officer with the Secretary of State when the property attached is equipment of a going business in the possession or under the control of the defendant, except equipment that is a vehicle or vessel attachment of which is governed by *Code Civ. Proc. § 488.385* [*Code Civ. Proc. § 488.375(a)*].

A notice of attachment lien may be filed by the levying officer as one method of attaching farm products or the inventory of a going business [*see Code Civ. Proc. § 488.405*; *see also Code Civ. Proc. § 488.395* (attachment by placing a keeper in charge of property)].

The form may also be used to give notice that an attachment lien is terminated [*see Code Civ. Proc. § 488.730(a), (d)*] or amended.

A copy of this form may be downloaded from the Secretary of State's website, specifically http://www.ss.ca.gov/business/ucc/ra_9_atl_barcode.pdf. Instructions at the website warn that the barcode patch in the upper left corner is used for processing by the Secretary of State's office and should be printed using a quality laser printer and kept free of damage. Staples should not be placed in the barcode.

[3] Contents of Notice

The notice of attachment must contain all of the following [*Code Civ. Proc. § 488.375(a)*]:

- The name and mailing address of the plaintiff [Item 4].
- The name and last known mailing address of the defendant [Item 3].
- The title of the court where the action is pending [Item 1] and the cause and number of the action [Item 2].
- A description of the specific property attached [Item 6].
- A statement that the plaintiff has acquired an attachment lien on the specified property of the defendant [Item 5].

Instructions for filing the form are on the second page. The original, a duplicate, and the filing fee should be sent to the Secretary of State at the address on the instructions. The filing fee is $10.00 if the original document contains two or fewer pages and $20.00 for an original document containing three or more pages.

[4] Copy for Acknowledgment

To obtain an acknowledgment copy, send a copy with the original and mark it "Acknowledgment Copy."

[5] Effect of Filing

When the notice of attachment lien is filed with the Secretary of State, it is marked and indexed in the same manner as a financing statement [*Code Civ. Proc. § 488.375(b)*].

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6-62 California Forms of Pleading and Practice--Annotated § 62.173

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.173 Instructions to Levying Officer [Code Civ. Proc. § 488.030]

[1] FORM Instructions to Levying Officer [Code Civ. Proc. § 488.030]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	INSTRUCTIONS TO LEVYING OFFICER
[and DOES I through _____,]	)	
Defendant(s).	)	
	)	
	)	

To _____ [*name of levying officer*], _____ [*title of levying officer, e.g.,* Sheriff] of the County of _____:

[*EITHER, if property in possession of defendant*]

You are hereby instructed, pursuant to the accompanying writ of attachment, to levy _____ [*describe method of levy, e.g.,* by removing the property to a place for safekeeping] on the following described property in the possession of and belonging to defendant: _____ [*describe property, e.g.,* a 1994 Cadillac Seville, California license number 4EZN845], located at _____ [*describe location*].

[*OR, if property in possession of third person*]

You are hereby instructed, pursuant to the accompanying writ of attachment, to levy on _____ [*describe property, e.g.,* all moneys, debts, and credits, due or owing defendant] in the possession of _____ [*name*], and located at_____ [*describe location*], up to the amount of $_____ [*specify amount needed to satisfy writ*] by _____ [*describe method of levy, e.g.,* personally serving on _____ (*name of third person*) a copy of the writ of attachment and a notice of attachment].

The described property _____ [is *or* is not] a dwelling [*if dwelling, add* : and is _____ (real *or* personal) property].
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

[2] Use of Form

This form of instructions to the levying officer are to accompany the writ of attachment that is directed to the levying officer in the county in whichthe property of the defendant described in the writ is located [*see Code Civ. Proc. § 488.020(b)*].

[3] Contents of Instructions

The instructions to the levying officer must be in writing and signed by the plaintiff's attorney or, if no attorney, by the plaintiff. They must contain the information needed or requested by the levying officer to comply with the Attachment Law, including the following [*Code Civ. Proc. § 488.030(a)*]:

- An adequate description of the property to be levied on.
- A statement as to whether or not the property is a dwelling.
- If the property is a dwelling, a statement as to whether or not it is real or personal property.

If the levying officer is required to serve any writ, order, notice, or other paper on any person, the plaintiff must include in the instructions the correct name and address of the person and must use reasonable diligence to ascertain the correct name and address [*Code Civ. Proc. § 488.040*].

Counsel should insert in the instructions the method of levy to be made on the property. The methods of levy for specific types of property are contained in *Code Civ. Proc. § 488.315 et seq.* If the method of levy on property requires that the property be taken into custody, the levying officer may do so by (a) removing the property to a place for safekeeping, (b) installing a keeper, or (c) otherwise obtaining possession and control of the property [*Code Civ. Proc. § 488.090*].

[4] Instructions by Registered Process Server

A registered process server may also levy on certain types of property specified in *Code Civ. Proc. § 488.080(a)*. Although nothing in *Code Civ. Proc. § 488.030* requires that written instructions be given to a registered process server, if a registered process server levies on property, the registered process server is required to file written instructions, as required by *Code Civ. Proc. § 488.030*, with the levying officer within five days after levy [*Code Civ. Proc. § 488.080(d)(4)*].

[5] Deposit of Expenses

Except as otherwise provided by law, as a prerequisite to taking property into custody by the levying officer under *Code Civ. Proc. § 488.010 et seq.*, whether by keeper or otherwise, the plaintiff must deposit with the levying officer a sum of money sufficient to pay the costs of taking the property and keeping it safely for a period not to exceed 15 days. If continuation of the custody of the property is required, the levying officer must, from time to time, demand orally or in writing that the plaintiff deposit additional amounts to cover estimated costs for periods not to exceed 30 days each. A written demand may be mailed or delivered to the plaintiff. The plaintiff has not less than three business days after receipt of the demand within which to comply with the demand, and if the amount demanded is not paid within the time specified in the oral or written demand, the levying officer must release the property [*Code Civ. Proc. § 488.050(a)(2)*].

[6] State Statutes

Duty of levying officer on receipt of written instructions. *Code Civ. Proc. § 488.020*

Levy procedure when property located in private place of defendant. *Code Civ. Proc. § 488.070*

Levying officer's possessory lien on levied property for costs not paid by advance deposit. *Code Civ. Proc. § 488.100*

Procedure for third-party claim on attached property. *Code Civ. Proc. § 488.110*

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6-62 California Forms of Pleading and Practice--Annotated § 62.174

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.174 Proceedings for Order Appointing Receiver or Directing Levying Officer to Take Action re Attached Perishable Property [Code Civ. Proc. § 488.700]--Notice of Motion

[1] FORM Proceedings for Order Appointing Receiver or Directing Levying Officer to Take Action re Attached Perishable Property [Code Civ. Proc. § 488.700]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER _____
vs.	)	[APPOINTING RECEIVER *or* DIRECTING LEVYING OFFICER] TO _____
_____ [*name*],	)	[*specify action, e.g.,* SELL PROPERTY]
[and DOES I through _____,]	)	Date: _____
Defendant(s).	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*specify party, e.g.,* defendant] _____ [*name*] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* plaintiff] will, and hereby does, move for an order _____ [appointing a receiver to take charge of and *or* directing the levying officer] to _____[*specify action, e.g.,* harvest and sell] the following property previously attached in this _____ [action *or* proceeding]: _____ [*description and location*].

The motion will be made on the ground that the attached property _____ [is perishable *or* will greatly _____(deteriorate *or* depreciate) in value unless _____(*describe action to be taken by receiver to preserve value of attached property, e.g.,* the property is harvested and sold)].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum of points and authorities served and filed herewith, on the papers, records, and file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

CAUTION:
This notice of motion is required to be accompanied by a memorandum of points and authorities [*Cal. Rules of Ct., Rules 3.1103(a)(2), 3.1113(a)*]. For discussion and forms, see Ch. 417, ***Points and Authorities*** .

[2] Use of Form

This notice of motion is for use by plaintiff to obtain the appointment of a receiver or directions to the levying officer to take any action the court orders that is necessary to preserve the value of the property, including, but not limited to, selling the property. The court may make such an order when it determines that the action is necessary to preserve the value of property when attached property is perishable or will greatly deteriorate or greatly depreciate in value or for some other reason the interests of the parties will be best served by the order [*Code Civ. Proc. § 488.700(a)*].

The plaintiff, defendant, or a person who has filed a third-party claim pursuant to *Code Civ. Proc. § 720.010 et seq.* may apply for the order. The application must be by noticed motion if the court so directs, or if a court rule so requires. Otherwise, the application may be made ex parte [*Code Civ. Proc. § 488.700(a)*].

[3] Cross References

For a general form of declaration supporting a noticed motion, and general form of ex parte application, see Ch. 372, *Motions and Orders*

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6-62 California Forms of Pleading and Practice--Annotated § 62.175

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.175 Proceedings for Order Appointing Receiver or Directing Levying Officer to Take Action re Attached Perishable Property [Code Civ. Proc. § 488.700]--Order Granting Motion

[1] FORM Proceedings for Order Appointing Receiver or Directing Levying Officer to Take Action re Attached Perishable Property [Code Civ. Proc. § 488.700]--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
[and DOES I through _____,]	)	
Defendant(s).	)	
	)	
	)	

The motion of _____ [*identify party, e.g.,* plaintiff] for an order to _____ [appoint a receiver *or* direct the levying officer] to _____ [*specify action, e.g.,* harvest and sell] attached property to preserve its value came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is granted and _____ [_____(

name of receiver), _____ *street address of receiver*), _____ (*city*), California, is appointed receiver and directed to take charge of and *or* _____ (*title of levying officer*) is directed] to _____ [*specify action to be taken, e.g.,* harvest and sell] the following property: _____[*describe property*].

[IT IS FURTHER ORDERED that the receiver shall receive the sum of $_____ per day for his/her services, and that _____ (the fees and expenses of the receiver shall be paid from the proceeds of the sale *or* plaintiff shall pay the sum of $_____ to the receiver in advance(, and that any remaining fees and expenses of the receiver shall be paid from the proceeds of the sale)).]
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

This form of order is for use to appoint a receiver or to direct a levying officer to take action to preserve the value of attached property that is perishable or greatly deteriorating or depreciating in value [*Code Civ. Proc. § 488.700(a)*]. For further discussion of appointment of receivers and sale of the property, see *§ 62.44[1]*.

[3] Cross Reference

For a related form, *see § 62.174*.

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6-62 California Forms of Pleading and Practice--Annotated § 62.176

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.176 Proceedings to Extend Attachment on Property [Code Civ. Proc. § 488.510]--Notice of Motion

[1] FORM Proceedings to Extend Attachment on Property [Code Civ. Proc. § 488.510]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO EXTEND ATTACHMENT ON PROPERTY
vs.	)	
_____ [*name*],	)	Date: _____
[and DOES I through _____,]	)	Time: _____
Defendant(s).	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To defendant _____ [*name*] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], plaintiff will, and hereby does, move for an order to extend the attachment lien levied on _____ [*date*], on _____ [*describe property*] until _____ [*date*].

The motion will be made on the ground that good cause exists for the extension of the attachment lien.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum of points and authorities served and filed herewith, on the papers, records, and file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

CAUTION:
A supporting memorandum is required to be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a);see* *Code Civ. Proc. §§ 1005(b), 1010*; ***see generally*** Ch. 417, ***Points and Authorities***].

[2] Use of Form

This notice of motion form is for use by plaintiff to obtain an order extending an attachment on property [*see Code Civ. Proc. § 488.510(b)*].

[3] Length of Extension and Procedure

An attachment, unless sooner released or discharged, is good for three years from the date the writ under which the levy was made was issued [*Code Civ. Proc. § 488.510(a)*]. But the court may, on plaintiff's motion, extend the time for a good cause for a period not exceeding one year [*Code Civ. Proc. § 488.510(b)*]. The attachment may be extended from time to time, but the maximum period, including the extensions, must not exceed eight years from the date the writ under which the levy was made was issued [*Code Civ. Proc. § 488.510(d)*]. The death of the defendant whose property is attached does not terminate the attachment [*Code Civ. Proc. § 488.510(e)*].

Plaintiff must make the motion not less than 10 or more than 60 days before expiration of the three-year period. A minimum of five days notice must be given to the defendant whose property is attached [*Code Civ. Proc. § 488.510(b)*].

After a hearing on the motion, the levying officer must serve notice of the order on any person holding property pursuant to the attachment. The officer must also record or file the notice in the office where the writ and notice of attachment are recorded or filed before expiration of the three-year period or any extension of it. If the attached property is real property, the plaintiff or plaintiff's attorney may record the required notice [*Code Civ. Proc. § 488.510(c)*].

[4] Cross References

For a general form of declaration supporting a noticed motion, see Ch. 372, *Motions and Orders*

[5] Decisions

Failure to record notice of extension of attachment lien on real property at county recorder's office pursuant to *Code Civ. Proc. § 488.510(c)* as resulting in statutory termination of attachment lien. *Arcata Publications Group v. Beverly Hills Publishing Co. (1984) 154 Cal. App. 3d 276, 279-280, 201 Cal. Rptr. 223*

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Chapter 62 ATTACHMENT
PART IV. FORMS
B. Forms for Use in Levy Procedures

6-62 California Forms of Pleading and Practice--Annotated § 62.177

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.177 Proceedings to Extend Attachment [Code Civ. Proc. § 488.510]--Order Granting Motion

[1] FORM Proceedings to Extend Attachment [Code Civ. Proc. § 488.510]--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
[and DOES I through _____,]	)	
Defendant(s).	)	
	)	
	)	

The motion of plaintiff for an order to extend the attachment lien levied on _____ [*date*], on property described as _____ [*description*], until _____ [*date*], came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted, and good cause appearing therefor,

IT IS ORDERED that the motion be, and it hereby is granted and the attachment lien levied on _____ [*date*], on property described as _____ [*description*], be and hereby is extended until _____ [*date*].

Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

This form of order is for use in granting a motion to extend an attachment lien on property pursuant to *Code Civ. Proc. § 488.510*. The period of extension may not exceed one year from the date the attachment would otherwise expire [*Code Civ. Proc. § 488.510(b)*]. An attachment may be extended more than once, but the maximum period of an attachment, including the extensions, may not exceed eight years from the date of issuance of the writ of attachment under which the levy of attachment was made [*Code Civ. Proc. § 488.510(d)*].

[3] Cross Reference

For a related form, *see § 62.176*.

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6-62 California Forms of Pleading and Practice--Annotated §§ 62.178-62.189

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

[Reserved]

§§ 62.178[Reserved]

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6-62 California Forms of Pleading and Practice--Annotated § 62.190

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

[Reserved]

§ 62.190[Reserved]

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6-62 California Forms of Pleading and Practice--Annotated § 62.191

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.191 Proceedings for Order Permitting Creation of Lien in Pending Action or Proceeding [Code Civ. Proc. §§ 491.410(a), 491.415(b)]--Notice of Motion

[1] FORM Proceedings for Order Permitting Creation of Lien in Pending Action or Proceeding [Code Civ. Proc. §§ 491.410(a), 491.415(b)]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR OR-
vs.	)	DER PERMITTING CREATION OF LIEN
_____ [*name*],	)	Date: _____
[and DOES I through _____,]	)	Time: _____
Defendant(s).	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to _____ his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____

[*specify party, e.g.,* plaintiff] will, and hereby does, move for an order permitting creation of a lien on the defendant's cause of action for money or property that is the subject of, and defendant's rights to any money or property under any judgment procured in, Case No. _____ [*specify*] entitled _____ [*state name of case*] pending in the _____ [*specify court*]. The motion will be made on the ground that the plaintiff is entitled to the lien under *Code of Civil Procedure Sections 491.410-491.470*.

The motion will be based on this notice of motion; on the declaration(s) of _____ [*name(s)*] and the memorandum of points and authorities servedand filed herewith; on the papers, records, and file herein; and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

CAUTION:
A supporting memorandum must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see* *Code Civ. Proc. §§ 1005(b), 1010*; ***see generally*** Ch. 417, ***Points and Authorities***].

[2] Use of Form

This notice of motion form is for use by the plaintiff to obtain a lien on a cause of action and on any subsequently recovered judgment belonging to the defendant that is the subject of a pending action. When the defendant is a party to a pending action or special proceeding, the plaintiff may obtain a lien to the extent necessary to secure the amount to be secured by the attachment on the following [*Code Civ. Proc. § 491.410(a)*]:

- Any cause of action of the defendant for money or property that is the subject of the other action or proceeding if the money or property would be subject to attachment should the defendant prevail in the action or proceedings.

- The rights of the defendant to money and property under any judgment subsequently procured in the other action or proceeding if the money or property would be subject to attachment.

[3] Procedure

[a] Motion Concurrent With Application for RTAO

Plaintiff may apply for an order permitting creation of a lien under *Code Civ. Proc. § 491.410 et seq.* at the time he or she applies for a right to attach order [*see § 62.130*]. When the plaintiff applies for an order permitting creation of a lien at the time of applying for a right to attach order, the defendant must be served with the notice of application. Service of the notice must ordinarily be served in the time prescribed by *Code Civ. Proc. § 1005(b)*, that is, at least 16 court before the hearing [*see Code Civ. Proc. §§ 484.040(b), 491.415(b)*; *see also Code Civ. Proc. § 1005(a)(1), 1005(b)* (increased time for service by mail, or by fax, Express Mail, or other method of overnight delivery); *see also Code Civ. Proc. § 1010.6(a)(6)* (providing for two-court-day extension period in case of electronic service); *see generally* Ch. 372, *Motions and Orders*]. For a discussion of the procedure for obtaining a right to attach order, see *§ 62.131*.

[b] When RTAO Already Obtained

If the plaintiff has already obtained a right to attach order, an application for an order permitting creation of a lien may be applied for in the same manner as a writ of attachment [*Code Civ. Proc. § 491.415*]. For the procedure to be followed in applying for a writ of attachment, see *§ 62.132*.

[c] Undertaking

An undertaking as provided by *Code Civ. Proc. §§ 489.210* and *489.220* must be filed before an order for creation of a lien may be obtained [*Code Civ. Proc. § 491.415*; *see § 62.141*].

[d] Exemption

Defendant may, but is not required to, claim an exemption in a proceeding initiated by the plaintiff for an order permitting creation of a lien. An exemption may be claimed if the money or property sought by the defendant would be exempt from attachment should the defendant prevail in the other action or proceeding. The exemption is claimed and determined in the same manner as an exemption is claimed and determined on application for a writ of attachment [*Code Civ. Proc. § 491.415(c)*; *see §§ 62.138*, *62.146*, 18].

[4] Filing Notice of Lien

After obtaining the order permitting creation of a lien, the lien is created by filing a notice of lien and other papers in the court in which the action or proceeding to be attached is pending [*see § 62.193*].

[5] Cross Reference

For a related form, *see § 62.193*.

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6-62 California Forms of Pleading and Practice--Annotated § 62.192

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.192 Proceedings for Order Permitting Creation of Lien in Pending Action or Proceeding [Code Civ. Proc. §§ 491.410(a), 491.415(b)]--Order Granting Motion

[1] FORM Proceedings for Order Permitting Creation of Lien in Pending Action or Proceeding [Code Civ. Proc. §§ 491.410(a), 491.415(b)]--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
[and DOES I through _____,]	)	Dept: _____
Defendant(s).	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.,* plaintiff] for an order permitting creation of a lien to secure the amount to be secured by plaintiff's existing attachment came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that plaintiff be permitted to create a lien against any cause of action of defendant for money or property that is the subject of the Case No. _____ [*specify*], entitled _____ [*specify title of case*] pending in the _____ [*specify court*] and to defendant's rights to any money or property under any judgment procured in that _____ [action *or* proceeding].
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

This form of order is for use to permit creation of a lien on defendant's cause of action and on any subsequently recovered judgment when the defendant is a party to a pending action or special proceeding [*Code Civ. Proc. §§ 491.410(a), (b)(3), 491.415(b)*].

A copy of the order permitting creation of a lien made by the court that issued the right to attach order must be filed with a notice of lien [*see § 62.193*] and a copy of the right to attach order [*see § 62.132*] in the other pending action or special proceeding in order to obtain the lien [*Code Civ. Proc. § 491.410(b)*].

[3] Cross Reference

For related forms, *see §§ 62.191* and *62.193*.

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6-62 California Forms of Pleading and Practice--Annotated § 62.193

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.193 Notice of Lien in Pending Action to Secure Amount to Be Secured by Plaintiff's Existing Attachment [Code Civ. Proc. §§ 491.410, 491.420]--Judicial Council Form AT-180

[1] FORM Notice of Lien in Pending Action to Secure Amount to Be Secured by Plaintiff's Existing Attachment [Code Civ. Proc. §§ 491.410, 491.420]--Judicial Council Form AT-180

Click here to view image.

[2] Use of Form

This form is an illustrative filled-in reproduction of the form approved by the Judicial Council as a form of notice by the plaintiff or lien claimant to all parties in another pending action to which defendant is a party. The notice informs the parties that the plaintiff has a right to attach order against defendant in the original action, and has obtained a lien in the other action against defendant's cause of action or rights under any judgment subsequently procured [*see Code Civ. Proc. §§ 491.410, 491.420*; Cal. Judicial Council Form AT-180 (same as EJ-185 re enforcement of judgment)].

To obtain the lien, plaintiff is required to file this form of notice in the other pending action, together with a copy of the right to attach order [*see §§ 62.132 -62.134*] and a copy of an order permitting creation of a lien under *Code Civ. Proc. § 491.410 et seq.* made by the court that issued the right to attach order [*Code Civ. Proc. § 491.410*; *see § 62.192*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Filling Out the Form

[a] Title and Status of Action

This form is to be filed in the other pending action, involving the defendant and third party or parties, not the original action involving plaintiff and defendant. Therefore, the name of the plaintiff and defendant in that other action and the case number of the other action should be entered in the caption [*see Code Civ. Proc. §§ 491.410(b), 491.420(a)*].

For the purpose of filing a notice of lien, an action or proceeding is pending until the time for appeal from the judgment has expired or, if an appeal is filed, until the appeal has been finally determined [*Code Civ. Proc. § 491.410(d)*].

[b] Contents

The form includes the following statements and items:

- A statement that the lien is created under *Code Civ. Proc. § 491.410 et seq.* (check box in Paragraph 1a) [*Code Civ. Proc. § 491.420(a)*].

- A statement that the lien is based on a right to attach order and an order permitting the creation of the lien, which papers are attached (check box in Paragraph 2a) [*see Code Civ. Proc. § 491.410(b)*].

- The title of the court in which plaintiff's action against defendant is pending, and the name and number of that case (Paragraph 3a-3c) [*Code Civ. Proc. § 491.420(d)*].

- The names and last known addresses of the plaintiff and defendant (Paragraphs 4, 5) [*Code Civ. Proc. § 491.420(b), (c)*].

- The amount required to secure the amount to be secured by the attachment at the time the notice is filed (Paragraph 6) [*Code Civ. Proc. § 491.420(d)*].

- A statement describing the scope of the lien (Paragraph 7) [*Code Civ. Proc. § 491.420(f)*].

- A statement setting forth restrictions on the compromise, dismissal, settlement, or satisfaction of the action that is the subject of the lien (Paragraph 8) [*Code Civ. Proc. § 491.420(g)*].

[4] Service

At the time of filing the notice of lien or promptly thereafter, plaintiff must serve a copy of the notice on all parties who have made an appearance in the other action or special proceeding prior to the notice being filed. Along with a copy of the notice, plaintiff must serve on any such parties a statement of the date when the notice of lien was filed in the other action or proceeding. Failure to serve all parties as required does not affect the lien created by the filing of the notice, but the rights of any party are not affected by the lien until that party has notice of the lien [*Code Civ. Proc. § 491.410(c)*].

[5] Cross References

See generally *Ch. 342, Liens and Wage Preferences, § 342.10* et seq.

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6-62 California Forms of Pleading and Practice--Annotated § 62.194

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.194 Procedures in Response to Creation of Lien in Pending Action or Proceeding--Notice of Motion to Claim Exemption of Money or Property and Terminate Lien [Code Civ. Proc. § 491.470(a)]

[1] FORM Procedures in Response to Creation of Lien in Pending Action or Proceeding--Notice of Motion to Claim Exemption of Money or Property and Terminate Lien [Code Civ. Proc. § 491.470(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO CLAIM
vs.	)	EXEMPTION AND TERMINATE LIEN
_____ [*name*],	)	Date: _____
[and DOES I through _____,]	)	Time: _____
Defendant(s).	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*name of attachment plaintiff*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], plaintiff, _____ [*name of attachment defendant*], will, and hereby does, move for an order to terminate the lien

created under *Code of Civil Procedure Section 491.415(b)* on (a) his/her cause of action in the above-entitled _____ [action *or* proceeding] and (b) his/her rights to _____ [money *and/or* property] under any judgment in the above-entitled proceeding. The motion will be made on the grounds that the _____ [money *and/or* property] that defendant may recover in the above-entitled _____ [action *or* proceeding] is exempt from attachment.

The motion will be based on this notice of motion*;* on the declaration(s) of _____ [*name(s)*]; on the memorandum of points and authorities served and filed herewith; on the papers, records, and file herein; and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

CAUTION:
A supporting memorandum is required to be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see* *Code Civ. Proc. §§ 1005(b), 1010*; ***see generally*** Ch. 417, ***Points and Authorities***]. In addition, the defendant must execute an affidavit or declaration in support of the motion including the matters set forth in *Code Civ. Proc. § 484.070(c)* [*Code Civ. Proc. § 491.470(a)*; ***see*** *§ 62.139*].

[2] Use of Form

This notice of motion is for use by defendant after a lien has been created under *Code Civ. Proc. § 491.410 et seq.* to claim that the money or property that he or she may recover in the action or special proceeding is exempt from attachment. The motion is made to the court in which the action or special proceeding is pending [*Code Civ. Proc. § 491.470(a)*].

[3] Service

The notice of motion should be filed and served on the plaintiff not later than 30 days after the defendant has notice of the creation of lien [*Code Civ. Proc. § 491.470(a)*].

[4] Opposition

Notice of opposition to the claim of exemption is not required [*Code Civ. Proc. § 491.470(a)*].

[5] Hearing on Motion

The court may determine the exemption claim any time prior to entry of judgment in the action or special proceeding, or may consolidate the exemption hearing with the hearing on a motion pursuant to *Code Civ. Proc. § 491.460* (motion for order that defendant's rights to money or property under judgment recovered in action or special proceeding be attached or otherwise applied to the satisfaction of lien) [*Code Civ. Proc. § 491.470(b)*; *see § 62.196*].

For an order terminating the lien because the money or property defendant will recover is exempt from attachment, see

§ 62.197.

[6] Waiver

Failure of defendant to make a claim of exemption under *Code Civ. Proc. § 491.470* constitutes a waiver of the exemption [*Code Civ. Proc. § 491.470(a)*].

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6-62 California Forms of Pleading and Practice--Annotated § 62.195

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.195 Procedures in Response to Creation of Lien in Pending Action or Proceeding--Notice of Motion and Supporting Declaration for Order to Allow Enforcement of Judgment or Compromise, Dismissal, Settlement, or Satisfaction [Code Civ. Proc. § 491.440(b)]

[1] FORM Procedures in Response to Creation of Lien in Pending Action or Proceeding--Notice of Motion and Supporting Declaration for Order to Allow Enforcement of Judgment or Compromise, Dismissal, Settlement, or Satisfaction [Code Civ. Proc. § 491.440(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER TO ALLOW
vs.	)	_____
_____ [*name*],	)	[ENFORCEMENT OF JUDGMENT *or*
[and DOES I through _____,]	)	_____
Defendant(s).	)	(COMPROMISE *or* DISMISSAL *or* SETTLEMENT *or* SATISFACTION OF JUDGMENT)], SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM OF POINTS AND AUTHORITIES
	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*name of attachment plaintiff*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], plaintiff _____ [*name of attachment defendant*] will, and hereby does, move for an order to _____ [enforce the judgment recovered in *or* allow the _____ (compromise *or* dismissal *or* settlement *or* satisfaction) of (the judgment recovered in)] the above-entitled _____ [action *or* proceeding]. The motion will be made on the ground that _____ [*specify reasons why defendant should be allowed to enforce the judgment or compromise, dismiss, settle, or satisfy the action or proceeding or the judgment*].

The motion will be based on this notice of motion; on the declaration(s) of _____ [*name(s)*]; on the memorandum of points and authorities served and filed herewith; on the papers, records, and file herein; and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*State facts in this and successive paragraphs showing why enforcement of the judgment or compromise, dismissal, settlement, or satisfaction of the judgment should be allowed*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

MEMORANDUM

[*Add memorandum supporting motion.*]

CAUTION:
A memorandum is required to be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see* *Code Civ. Proc. §§ 1005(b), 1010*; ***see generally*** Ch. 417, ***Points and Authorities***].

[2] Use of Form

This form of notice of motion and supporting declaration is for use bydefendant to obtain an order permitting him or her to enforce a judgment that he or she has recovered in an action or proceeding that is subject to a lien under *Code Civ. Proc. § 491.410 et seq.* The form may also be used by defendant to obtain an order permitting him or her to enter into a compromise, dismissal, settlement, or satisfaction of the pending action or special proceeding or resulting judgment [*Code Civ. Proc. § 491.440(a)*].

Notice of the motion must be served on the plaintiff. The motion is made to the court in which the action or special proceeding is pending [*Code Civ. Proc. § 491.440(b)*]. Thus, the caption should reflect the action or proceeding subject to the lien, and the attachment defendant should be referred to as the plaintiff in referring to the parties.

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6-62 California Forms of Pleading and Practice--Annotated § 62.196

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.196 Procedures in Response to Creation of Lien in Pending Action or Proceeding--Notice of Motion and Supporting Declaration for Order That Judgment Be Attached or Otherwise Applied to Satisfaction of Lien [Code Civ. Proc. § 491.460(a)]

[1] FORM Procedures in Response to Creation of Lien in Pending Action or Proceeding--Notice of Motion and Supporting Declaration for Order That Judgment Be Attached or Otherwise Applied to Satisfaction of Lien [Code Civ. Proc. § 491.460(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER TO ATTACH JUDGMENT OR SATISFY LIEN, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM OF POINTS AND AUTHORITIES
vs.	)	
_____ [*name*],	)	
[and DOES I through _____,]	)	
Defendant(s).	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.*, defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.*, plaintiff], _____ [*name*] will, and hereby does, move for an order that plaintiff's rights to money or property under the judgment in the above-entitled _____ [action *or* proceeding] be attached or otherwise applied to the satisfaction of the lien held by _____ [*name of attachment plaintiff*] on the cause of action in this _____ [action *or* proceeding], and on plaintiff's right to _____ [money *and/or* property] under the judgment rendered herein. The motion will be made on the ground that plaintiff is entitled to money or property under the judgment in the above-entitled _____ [action *or* proceeding] that is subject to a lien under *Code of Civil Procedure Sections491.410-491.470*.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum of points and authorities served and filed herewith, on the papers, records, and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*State facts in this and successive paragraphs showing that order attaching judgment or otherwise satisfying lien should be granted, or that a party having notice of the lien transferred property that was subject to the lien or paid money to the defendant that was subject to the lien*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

MEMORANDUM

[*Add memorandum supporting motion.*]

CAUTION:
A memorandum is required to be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see* *Code Civ. Proc. §§ 1005(b), 1010*; ***see generally*** Ch. 417, ***Points and Authorities***].

[2] Use of Form

This form of notice of motion and supporting declaration is for use by any party to the action or special proceeding to apply for an order declaring that defendant's rights to money or property under the judgment be attached or otherwise applied to the satisfaction of the lien created under *Code Civ. Proc. § 491.410 et seq.*

Notice of the motion must be served on all other parties [*Code Civ. Proc. § 491.460(a)*]. It appears that the motion is made to the court in which the action or special proceeding is pending [*see Code Civ. Proc. §§ 491.430(b), 491.460*]. Thus, the caption should reflect the action or proceeding subject to the lien, and the attachment defendant should be referred as the plaintiff in the referring to the parties in the form.

[3] Available Orders

If the court determines that a party other than the defendant has an interest in the property, the court can restrain transfer of the property [*see Code Civ. Proc. § 491.460(b)*]. If a party other than the defendant, having notice of the lien, has transferred property or paid money to the defendant that was subject to the lien, the court enters judgment against that party in an amount equal to the lesser of (1) the value of the defendant's interest in the property or the amount paid to the defendant or (2) the amount of the plaintiff's lien [*Code Civ. Proc. § 491.460(c)*]. For further discussion, see *§ 62.53*. For a form of order, see *§ 62.197*.

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Chapter 62 ATTACHMENT
PART IV. FORMS
C. Forms Relating to Liens

6-62 California Forms of Pleading and Practice--Annotated § 62.197

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.197 Procedures in Response to Creation of Lien in Pending Action or Proceeding--Order Granting Motion to Terminate Lien [Code Civ. Proc. § 491.470(b)] or to Attach Judgment or Satisfy Lien [Code Civ. Proc. § 491.460]

[1] FORM Procedures in Response to Creation of Lien in Pending Action or Proceeding--Order Granting Motion to Terminate Lien [Code Civ. Proc. § 491.470(b)] or to Attach Judgment or Satisfy Lien [Code Civ. Proc. § 491.460]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
[and DOES I through _____,]	)	Dept: _____
Defendant(s).	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

[*EITHER*]

The motion of _____ [*identify party, e.g.,* _____ (*name of attachment plaintiff*)] for an order to attach or otherwise apply plaintiff's rights to money and property under the judgment entered in this

_____ [action *or* proceeding] to the satisfaction of the lien created in the favor of _____ [*name of attachment plaintiff*] under *Code of Civil Procedure Sections 491.410-491.470* came on regularly for hearing by the court on _____ [*date*].

[*AND/OR*]

The motion of _____ [*identify party(s), e.g.,* plaintiff] for an order to terminate the lien created under *Code of Civil Procedure Sections 491.410-491.470* [also] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

[*CONTINUE with EITHER*]

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that the lien be terminated as to _____ [the entire cause of action and all money or property recovered in a judgment herein *or list that part of money or property determined to be exempt*].

[*OR*]

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that _____ [the judgment be attached *or specify other order under Code Civ. Proc. § 491.460(b)-(d), e.g.,* _____ (*name of person having custody or control of property*) not transfer _____ (*describe property covered by judgment or part of property up to amount of lien*) until _____(*name of attachment plaintiff*) can attach it or otherwise apply it to the satisfaction of his/her lien].

[*OR*]

On proof made to the satisfaction of the court that the motion _____ [to claim exemption and terminate the lien *or* to attach the judgment or otherwise satisfy the lien] ought to be denied, and that the motion _____ [to attach the judgment or otherwise satisfy the lien *or* to claim exemption and terminate the lien] ought to be granted,

IT IS ORDERED that the motion _____ [to claim exemption and terminate the lien *or* to attach the judgment or otherwise satisfy the lien] be, and it hereby is, denied; and that the motion _____ [to attach the judgment or otherwise satisfy the lien *or* to claim exemption and terminate the lien] be, and it hereby is, granted and that _____ [the lien be terminated as to _____ (the entire cause of action and all money or property recovered in a judgment *or list that part of money or property determined to be exempt*) *or* the judgment be attached *or specify other order available under Code Civ. Proc. § 491.460(b)-(d)*].
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

This form of order is for use by defendant to determine a claim of exemption and to terminate a lien under *Code Civ. Proc. § 491.470*, or by a plaintiff to attach a judgment recovered by defendant in a pending action or proceeding or to otherwise satisfy the lien pursuant to *Code Civ. Proc. § 491.460*.

The hearing on a claim of exemption may be consolidated with a hearing on a motion pursuant to *Code Civ. Proc. § 491.460* to attach the judgment or otherwise satisfy the lien [*Code Civ. Proc. § 491.470(b)*]. This form may be used when either motion is heard alone or when they are heard together and with one being granted and the other denied. It may be adapted to the situation when motions are heard together and the claim of exemption is only partly granted and the motion to attach the judgment or otherwise satisfy the lien is also granted in part.

[3] Order Terminating Lien

If the court has been requested to determine a claim of exemption, it must order the termination of the lien created under Code Civ. Proc.§ 491.410 et seq. on that portion of the money or property that the defendant may recover in the action or special proceeding that defendant establishes to the satisfaction of the court is exempt from attachment [*Code Civ. Proc. § 491.470(c)*].

[4] Orders Attaching Judgment or Otherwise Satisfying Lien

*Code Civ. Proc. § 491.460(b)-(d)*govern what orders may be made on the motion for an order attaching the judgment or otherwise satisfying the lien and the effect of the order or judgment granted under *Code Civ. Proc. § 491.460(b)-(d)*. For further discussion, see the Comments to § 62.196.

A judgment or order under *Code Civ. Proc. § 491.460* may be enforced in the same manner as it could be enforced if it had been obtained by the defendant against the third party. However, prior to entry of judgment in favor of the plaintiff against the defendant, any money or property obtained in enforcing the judgment or order against the third party must be paid or delivered into court to abide the judgment in the action of the plaintiff against the defendant, or must be held by a levying officer, or otherwise held, as ordered by the court [*Code Civ. Proc. § 491.460(d)*].

[5] Cross Reference

For related forms, *see §§ 62.194* and *62.196*.

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6-62 California Forms of Pleading and Practice--Annotated §§ 62.198-62.209

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

[Reserved]

§§ 62.198[Reserved]

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6-62 California Forms of Pleading and Practice--Annotated § 62.210

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.210 Complaint for Damages on Attachment Undertaking [Code Civ. Proc. §§ 490.020, 490.060, 996.430]--Against Corporate Surety--Loss of Sale of Real Property

[1] FORM Complaint for Damages on Attachment Undertaking [Code Civ. Proc. §§ 490.020, 490.060, 996.430]--Against Corporate Surety--Loss of Sale of Real Property

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES ON BOND
_____ [*name*],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

1. Plaintiff is, and at all of the times mentioned in this complaint was, the owner of certain real property in the County of _____ commonly known as _____ [*street address*] in the City of _____[, and more particularly described as follows: _____ (*legal description*)].

2. Defendant _____ [*name of plaintiff in prior action*] is, and at all times mentioned in this complaint was, _____ [*state capacity and residence of defendant, e.g.,* a resident of _____

County, California, *or* a corporation duly organized and existing under the laws of the State of California with it principal place of business in _____ (*city*), _____ County, California].

3. Defendant _____ [*name*] is, and at all times mentioned in this complaint was, a corporation organized and existing under the laws of _____ [*state*], with its principal place of business in this state in _____ County, California, and doing business in this state as an admitted surety insurer.

4. On or about _____ [*date*], defendant _____ [*name of principal*] caused to be filed in the _____ [*specify*] Court of California, County of _____, an action against the plaintiff in this action for purported claims and demands. That action was entitled _____ vs. _____, No. _____.

5. On _____ [*date*], an attachment undertaking was filed in that action, duly executed by defendant _____ [*name of surety*] in whichdefendant _____ [*name of surety*], as surety, promised to pay all damages that defendant in that cause (plaintiff in this action) might sustain by reason of any wrongful attachment by the plaintiff (defendant _____ [*name of principal*]), pursuant to *Code of Civil Procedure Section 489.210*, not exceeding the sum of $_____.

6. Thereafter, on or about _____[*date*], a writ of attachment issued in the action described in Paragraph 4 above, on the application of the plaintiff in that action (who is defendant _____[*name*] in this action). A copy of the writ is attached to this complaint as Exhibit "A" and made a part hereof.

7. On or about _____ [*date*], attachment was levied by the _____ [*levying officer*] on all of the right, title, and interest of plaintiff in and to the real property described in Paragraph 1 above. Thereafter, on or about _____[*date*], the _____ [*levying officer*] filed in that action his/her return and notice of attachment, copies of which are attached to this complaint as Exhibits "B" and "C," respectively, and made parts hereof.

8. On _____ [*date*], the action was brought to trial and on _____ [*date*], judgment of nonsuit was ordered by the court in favor of defendant (plaintiff in this action), and against the plaintiff in that action. Thereafter, on _____ [*date*], the judgment of nonsuit was duly entered and became final on _____ [*date*]. On _____[*date*], notice of entry of judgment was served on plaintiff in that action, and the time for appeal has now expired.

9. The lien of attachment remained of record against the real property from the time of its levy until the judgment became final on or about _____[*date*].

10. All of the proceedings, pleadings, and documents with respect to the levy of the attachment were valid and regular on their face, and for that reason plaintiff, as defendant in that action, made no motion nor brought any proceeding to discharge or dissolve the attachment, as the motion or proceeding would have been unsuccessful and an idle and futile act; the only manner by which the attachment could be discharged or dissolved was to defend and win the action on its merits.

11. In order to defend the action, to effect dissolution of the attachment, and to clear plaintiff's title to the real property from the lien of attachment, plaintiff was obliged to employ counsel and thereby incurred attorney's fees in the reasonable sum of $_____, neither all nor any part of which has been paid by defendants, although demand has been made for their payment.

12. At the time of the levy of attachment, a valid written agreement existed between plaintiff in this action and _____ [*name*], by which plaintiff agreed to sell and _____ [*name*] agreed to buy the

real property levied on at the agreed price of $_____, which was the fair and reasonable value of the property at the time of the levy. At the time of the attachment an escrow was pending to consummate sale. As a result of the attachment, a cloud was thrown on the legal title to the property standing in the name of plaintiff, and for that reason plaintiff was unable to convey legal title to _____ [*name*] free and clear of the encumbrance and lien of attachment, and was unable to comply with the condition on his/her part to be performed in the contract of sale with _____[*name*], to wit: to transfer and convey the real property to him/her free and clear of all encumbrances. For this reason, the sale was never consummated and was thereby lost to plaintiff.

13. On or about _____ [*date*], when the levy on plaintiff's real property was released, the real property depreciated in value to the sum of $_____, to the damage of plaintiff in the sum of $_____. Demand has been made of the defendants for this sum, but neither all nor any part of it has been paid.

WHEREFORE, plaintiff prays judgment as follows:

1. For loss of value of his/her real property in the sum of $_____;

2. For attorney's fees in the sum of $_____;

3. For costs of suit incurred in this action; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in this action. I have read the complaint above and know its contents. The same is true of my own knowledge, except as to those matters that are stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This complaint may be used to recover damages against the principal and an admitted surety insurer on an attachment

undertaking [*see Code Civ. Proc. §§ 490.020, 490.060, 996.430*]. It may be modified for use against individual sureties. The plaintiff may combine statutory and common law theories of recovery [*Code Civ. Proc. § 490.060*].

The liability of the surety may also be enforced on motion in the trial court where the original attachment was brought without the necessity of an independent action [*Code Civ. Proc. § 996.440*; for a form of notice of motion to enforce liability of a surety on a bond given in an action or proceeding, *see Ch. 538, Suretyship, Bonds and Undertakings, § 538.40* et seq.]. An independent action might be desired, however, if plaintiff will combine an action against the surety with a common law action for abuse of process or malicious prosecution against the attachment creditor.

Both the principal and the sureties are to be joined as parties to the action. The action is to be commenced in the court in which the action or proceeding in which the bond was given was pending [*Code Civ. Proc. § 996.430*].

[3] Verification

While verification of this complaint is not required, verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b)*, 467]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[4] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue* , Pt. I

For alternative forms of verification, see Ch. 572, *Verification*

[5] State Statutes

Wrongful attachment. *Code Civ. Proc. § 490.010*

Liability of surety on attachment undertaking. *Code Civ. Proc. § 996.470*

[6] Decisions

Recovery of attorney's fees. *Reachi v. National Auto. & Cas. Co. (1951) 37 Cal. 2d 808, 811-812, 236 P.2d 151*

Measure of damages for wrongful attachment of real property when owner loses sale because of attachment as depreciation in value of property during attachment. *Clark v. Andrews (1952) 109 Cal. App. 2d 193, 197, 240 P.2d 330*

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6-62 California Forms of Pleading and Practice--Annotated § 62.211

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.211 Complaint for Damages on Attachment Undertaking [Code Civ. Proc. §§ 490.020, 490.060, 996.430]--Against Sureties--Summary Judgment Granted to Attachment Defendant

[1] FORM Complaint for Damages on Attachment Undertaking [Code Civ. Proc. §§ 490.020, 490.060, 996.430]--Against Sureties--Summary Judgment Granted to Attachment Defendant

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES ON UNDERTAK-
_____ [*name*],	)	ING
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Allege filing of previous action. See § 62.210, Paragraph 4.*]

2. On or about _____ [*date*], an attachment undertaking, duly executed by defendants _____[*names*] in this action, was filed in that action, in which defendants _____ [*names*] as sureties promised to pay all costs that might be awarded to defendant in that action (plaintiff in this action), and all damages that he/she might sustain by reason of any wrongful attachment, not exceeding a sum of

$_____. A copy of the undertaking is attached to this complaint as Exhibit "A" and made a part of it.

3. [*Allege issuance of writ of attachment. See § 62.210, Paragraph 6.*]

4. On or about _____ [*date*], the _____ [*levying officer*] under and by virtue of the authority conferred on him/her by the writ attached the following property: _____ [*describe*], situated in the County of _____ and belonging to this plaintiff [and took the property into his/her possession]. The levying officer's return and the notice of attachment are attached to this complaint as Exhibits "C" and "D," respectively, and made parts hereof.

4. [*Allege regularity of levy and need to defend previous action on its merits. See § 62.210, Paragraph 10.*]

5. Thereafter, on or about _____[*date*], the plaintiff in this action, as defendant in the case described in Paragraph 1 above, made a motion for summary judgment in [Division _____ of] that Court; pursuant to the motion, the Honorable _____ [*name*], Judge, granted the motion for summary judgment; on or about _____ [*date*], judgment was entered in that action in favor of the defendant and against the plaintiff. On or about _____[*date*], notice of entry of the judgment was duly served on the attorney for the plaintiff in that action, and the time to file a notice of appeal has now expired.

6. Plaintiff was damaged by reason of the attachment in the following particulars, to wit: the value of the property on the date of the attachment was $_____; since the date of the vacating of the attachment the value of the property was and now is $_____; as a result of the attachment, the plaintiff was damaged in the sum of $_____.

7. It was necessary for this plaintiff to employ counsel to defend the action, whereby plaintiff incurred and did pay for the attorney's services, the sum of $_____, which is a reasonable sum for such services.

8. Plaintiff has demanded of defendants, and each of them, the sum of $_____, being the maximum amount of damages guaranteed by defendants by reason of the undertaking on attachment, but defendants have refused and still refuse to pay the sum or any part of it.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For damages in the sum of $_____;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 62.210.*]

[2] Use of Form

This form of complaint is for use by a defendant whose property was attached in a prior action. It seeks recovery on the attachment undertaking against the principal and personal sureties [*Code Civ. Proc. §§ 995.510, 995.520, 996.410-996.495*].

The complaint may be modified for use against a corporate surety on a bond [*see Code Civ. Proc. § 995.310*; *see § 62.210*]. For forms of allegations of capacity of corporate defendants, see Ch. 20, *Allegations Commonly Used* .

[3] Cross Reference

For a related form, *see § 62.210*.

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6-62 California Forms of Pleading and Practice--Annotated § 62.212

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.212 Allegations--Malicious Prosecution--Attachment Issued Without Valid Claim

[1] FORM Allegations--Malicious Prosecution--Attachment Issued Without Valid Claim

1. On or about _____ [*date*], defendant in this action, in furtherance of his/her intent to harass and maliciously injure plaintiff, filed a declaration for a temporary restraining order and writ of attachment in the prior, above-mentioned case initiated by defendant in this action. A temporary restraining order was issued, and after a hearing, the Honorable _____ [*name*], Judge, directed the clerk of that court to issue a writ of attachment. The writ of attachment was issued on _____ [*date*].

2. On or about _____ [*date*], pursuant to the writ of attachment, the _____ [*title of levying officer*] levied, attached, and _____ [*specify method of attachment and property attached, e.g.,* took into his/her possession the following described property belonging to plaintiff:

(1) Ampex tape machine model 300C.

(2) Arcturus Lathe model "A"].

3. On or about _____ [*date*], in [_____ (Department *or* Division) _____ of] the _____ Court, the Honorable _____ [*name*], Judge, granted to the defendant in that action, plaintiff herein, his/her motion for summary judgment in that action.

4. On or about _____ [*date*], pursuant to an order directed from the plaintiff in that action, defendant herein, the _____ [*title of levying officer*] released the personal property from attachment, and returned it to the plaintiff herein.

5. Plaintiff in this action was at no time indebted, directly or indirectly, to defendant herein or to his/her agent,

employee or anyone connected with him/her. The prior action was filed by defendant and the writ of attachment caused to be issued and the property attached maliciously or without purpose or any probable cause, and for the sole reason of harassing, annoying, and injuring plaintiff, and putting him/her to trouble and expense.

[2] Use of Form

These allegations are for use in a complaint for malicious prosecution. For a general form of complaint for malicious prosecution of a civil action, see *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.10* et seq.. To complete the complaint, allegations of capacity, residence, fictitious name allegations if appropriate, initiation of a civil action by defendant against plaintiff, and damages must be added to the above allegations.

[3] Attachment as Grounds for Action

When an attachment was levied in an action prosecuted maliciously and without probable cause, the remedy is an action for malicious prosecution [*White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 347-350, 66 Cal. Rptr. 697, 438 P.2d 345]* .

[4] State Statutes

Exemplary and punitive damages. *Civ. Code § 3294*

Wrongful attachment. *Code Civ. Proc. § 490.010 et seq.*

Common law theory of recovery permitted. *Code Civ. Proc. § 490.060*

[5] Decisions

Liability for malicious prosecution as requiring that defendant acted maliciously and without probable cause. *Smith v. Hill (1965) 237 Cal. App. 2d 374, 386, 47 Cal. Rptr. 49* (involving irregular appointment of receiver)

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6-62 California Forms of Pleading and Practice--Annotated § 62.213

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors

§ 62.213 Allegations--Abuse of Process--Regularly Issued Attachment Used for Improper Purpose

[1] FORM Allegations--Abuse of Process--Regularly Issued Attachment Used for Improper Purpose

1. [*Issuance of writ of attachment. See § 62.212, Paragraph 1.*]

2. Pursuant to the writ, the _____ [*title of levying officer*] was required to attach and keep sufficient property of plaintiff in this action to satisfy the demand of defendant in the sum of $_____, together with costs and expenses.

3. At all times herein mentioned, plaintiff was the owner of _____ [*specify attached property, e.g.,* a fleet of 30 trucks].

[*EITHER, if writ used for improper purpose*]

4. _____ [*Set forth improper use of writ of attachment, e.g.,* Defendant in this action gave the _____(*title of levying officer*) instructions to levy attachment on the trucks, which were in the possession of _____ (*specify third party*). Plaintiff is informed and believes and thereon alleges that defendant did not instruct the _____ (*title of levying officer*) to attach the property for the purpose of securing his/her claim against plaintiff, but rather for the purpose _____ (*specify, e.g.,* of creating the impression that plaintiff was having financial difficulties). _____ (*Set forth additional facts showing how attachment would accomplish ulterior purpose*)].

[*OR, if writ used to levy on exempt or excessive amount of property*]

4. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned defendant knew _____ [*allege exempt status of property or attachment of property greatly in excess of value of amount to be secured, e.g.,* that plaintiff owned no other trucks, that defendant knew that one truck was exempt from attachment under *Code of Civil Procedure Section 704.060(a) or* that the value of the trucks was $_____, while the debt to be secured was only $_____], but that nonetheless defendant in this action gave the [_____ (*title of levying officer*) instructions to levy attachment on the all of the trucks].

[2] Use of Form

These allegations are for use in a complaint for abuse of process. For a general form of complaint for abuse of process, see *Ch. 357, Malicious Prosecution and Abuse of Process, § 357.50* et seq.

To complete the complaint, allegations of capacity, residence, fictitious name allegations if appropriate, initiation of a civil action by defendant against plaintiff, general damages, and punitive damages must be added to the allegations. In order to allege a cause of action for abuse of process in the case of a writ of attachment, the plaintiff must allege that the writ was maliciously procured in a properly instituted action in which the creditor therein was not entitled to the writ, the attaching property was exempt from attachment or possessed a value greatly in excess of the amount of the legitimate claim, or a regularly issued attachment was used for an improper purpose [*White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 348-349, 66 Cal. Rptr. 697, 438 P.2d 345]* .

[3] Abuse of Process

The essential elements of the tort of abuse of process are an ulterior purpose and a willful act in the use of the process not proper in the regular conduct of the proceeding. Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process is required, and there is no liability when the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions [*Spellens v. Spellens (1957) 49 Cal. 2d 210, 232, 317 P.2d 613]* .

[4] Decisions

Recovery of travel expenses incurred in trial of principal action which was necessary to dispose of attachment. *Reachi v. National Auto. & Cas. Co. (1951) 37 Cal. 2d 808, 813, 236 P.2d 151*

[5] Cross Reference

For a related form, *see § 62.212*.

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Chapter 70 ATTORNEY ADMISSION

6-70 California Forms of Pleading and Practice--Annotated 70.syn

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[1] FORM

[2] Use of Form

[3] California Rules of Court

Editorial Consultant n*

FOOTNOTES:
(n40)Footnote *.
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6-70 California Forms of Pleading and Practice--Annotated § 70.01

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§ 70.01 Scope of Chapter

This chapter discusses admission to practice law and contains forms for use in related proceedings before the State Bar [*see §§ 70.60 -70.62*] and the Supreme Court [*see § 70.63*]. It also briefly discusses the duties of a State Bar member, including the duty to maintain certain information for State Bar records and to report various potentially discipline-related actions to the State Bar.

Legal Topics:

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

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6-70 California Forms of Pleading and Practice--Annotated § 70.02

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§ 70.02 Cross References

For discussion and forms regarding attorney discipline, see Ch. 71, *Attorney Discipline* .

For discussion and forms regarding fee agreements and duties and responsibilities of attorneys, see Ch. 72 *Attorney Practice and Ethics* .

For discussion and forms regarding actions against attorneys, for professional negligence, and other forms of legal malpractice, see Ch. 76, *Attorney Professional Liability* .

For discussion and forms regarding awards of attorney's fees as an element of costs, see Ch. 174, *Costs and Attorney's Fees* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsGeneral OverviewLegal EthicsClient RelationsAttorney FeesFee Agreements

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[Reserved]

§§ 70.03[Reserved]

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6-70 California Forms of Pleading and Practice--Annotated § 70.10

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§ 70.10 Governing Law

Admission to the practice of law in the state of California is governed by *Bus. & Prof. Code §§ 6060-6069* and by administrative regulations adopted by the State Bar of California, which are known as the Rules Regulating Admission to Practice Law in California (hereafter Cal. Rules Regulating Admission) and the Rules of Procedure of the State Bar of California (hereafter Cal. State B. Rules Proc.).

Legal Topics:

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

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6-70 California Forms of Pleading and Practice--Annotated § 70.11

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§ 70.11 Authority of Committee of Bar Examiners

[1] In General

The California Supreme Court has the ultimate constitutional authority to prescribe the requirements for practicing law [*In re Attorney Discipline System; Requests of the Governor and the State Bar of California (1998) 19 Cal. 4th 582, 592-593, 79 Cal. Rptr. 2d 836, 967 P.2d 49* ; *In re Menna (1995) 11 Cal. 4th 975, 984, 47 Cal. Rptr. 2d 2, 905 P.2d 944* ; *Merco Constr. Engineers, Inc. v. Municipal Court (1978) 21 Cal. 3d 724, 727-729, 147 Cal. Rptr. 631, 581 P.2d 636* ; *Brydonjack v. State Bar (1929) 208 Cal. 439, 442-443, 281 P. 1018* ; *see Craig v. State Bar of California (9th Cir. 1998) 141 F.3d 1353, 1354]* . Nevertheless, the Court has recognized the authority of the Committee of Bar Examiners (COBE) to assist the Court in this function [*In re Menna (1995) 11 Cal. 4th 975, 985, 47 Cal. Rptr. 2d 2, 905 P.2d 944* ; *Brydonjack v. State Bar (1929) 208 Cal. 439, 445-446, 281 P. 1018]* .

The COBE is a committee established by the Board of Governors of the State Bar pursuant to the State Bar Act [*Bus. & Prof. Code § 6046*; *see* Cal. Rules Regulating Admission, Rule I, § 1]. Under the Act, the COBE has the power to examine applicants for admission to practice law, to administer the requirements of admission to practice set forth in the State Bar Act and the rules promulgated under the Act, and to certify to the Supreme Court for admission those applicants who fulfill the requirements [*Bus. & Prof. Code § 6046*; Cal. Rules Regulating Admission, Rule I, § 1]. The COBE also has the power to adopt reasonable rules and regulations as may be necessary or advisable for the purpose of making effective the qualifications prescribed in the State Bar Act [*Bus. & Prof. Code § 6047*]. The rules that the COBE has adopted pursuant to the Act, the Rules Regulating Admission, supplement the provisions of the State Bar Act regarding the qualifications for admission and the procedures for gaining admission.

The examining committee is composed of 19 members. Ten of these members must be members of the State Bar or judges of courts of recordin California; at least one of the attorney members must have been admitted to practice law in California within three years of being appointed to the examining committee [*Bus. & Prof. Code § 6046*]. Three

nonattorney members are each selected by the Senate Rules Committee, the Speaker of the Assembly, and the Governor; these members serve four-year terms and have the same rights, powers, and privileges as any attorney member, except that they may not participate in drafting questions for the bar examination [*Bus. & Prof. Code § 6046.5*].

If a full panel of 19 members is appointed and sitting, 10 members will constitute a quorum for the transaction of COBE business. No specific number of members is required to be present for adjournment of a meeting, however [*see* Cal. Rules Regulating Admission, Rule I, § 4 (providing that general quorum consists of one half of members appointed and sitting, plus one)].

[2] Conduct of Investigations and Hearings

In the conduct of investigations and the hearing of all matters, the COBE or any subcommittee having jurisdiction may do all of the following [*Bus. & Prof. Code § 6049*; Cal. Rules Regulating Admission, Rule I, § 6; *see* Cal. Rules Regulating Admission, Rule I, §§ 7, 8]:

- Take and hear relevant evidence.
- Administer oaths and affirmations.
- Compel by subpoena the attendance of witnesses and production of relevant books, papers, and documents.

[3] Review of Subcommittee Determination

If a subcommittee of the COBE acts on the COBE's behalf in a particular matter, the applicant may have the subcommittee's determination reviewed and determined by the entire COBE, provided that the determination was not merely to refer the application for investigation. An application for review must be filed within 10 days after notification to the applicant of the subcommittee's determination [Cal. Rules Regulating Admission, Rule I, § 5]. For a form of application for review, *see § 70.60*.

Legal Topics:

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

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6-70 California Forms of Pleading and Practice--Annotated § 70.12

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§ 70.12 Basic Qualifications for Admission to Practice

To be certified to the Supreme Court for admission and license to practice law, a person who does not meet the requirements of *Bus. & Prof. Code § 6062* (qualifications for certification of out-of-state attorneys), *Cal. Rules of Ct., Rule 9.45* (admission of registered legal services attorneys), or *Cal. Rules of Ct., Rule 9.46* (admission of registered in-house counsel) is required to meet the qualifications set forth in *Bus. & Prof. Code § 6060*, which include, generally, that the applicant:

- Be at least 18 years old.
- Be of good moral character [*see § 70.15*].
- Complete the educational requirements set forth in *Bus. & Prof. Code § 6060(c)-(e)*.
- Pass the examinations specified in *Bus. & Prof. Code § 6060(f)* (final bar examination) and, if applicable, *Bus. & Prof. Code § 6060(g)* (First-Year Law Student's Examination).

The qualifications and the administrative procedures for meeting them are set forth in detail in Cal. Rules Regulating Admission, Rules I--XVI.

Legal Topics:

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

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6-70 California Forms of Pleading and Practice--Annotated § 70.13

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§ 70.13 Registered Legal Services Attorneys

[1] Requirements for Admission

Effective November 15, 2004, an attorney may practice law in California while working, with or without pay, at a qualifying legal services provider under appropriate supervision [*Cal. Rules of Ct., Rule 9.45(b)*]. A "qualifying legal services provider" is one of the following [*Cal. Rules of Ct., Rule 9.45(a)(1)*]:

1. A nonprofit entity incorporated and operated exclusively in California that as its primary purpose and function provides legal services without charge in civil matters to indigent persons, especially underserved client groups, such as the elderly, persons with disabilities, juveniles, and non-English-speaking persons; or

2. A program operated exclusively in California by a nonprofit law school approved by the American Bar Association or accredited by the State Bar of California that has operated for at least two years at a cost of at least $20,000 per year as an identifiable law school unit with a primary purposes and function of providing legal services without charge to indigent persons.

An attorney may practice as a registered legal services attorney for no more than a total of three years [*Cal. Rules of Ct., Rule 9.45(e)*]. The State Bar of California may set initial and annual registration fees and application fees to be paid by registered legal services attorneys [*Cal. Rules of Ct., Rule 9.45(f)*].

To practice law under this rule, an attorney must [*Cal. Rules of Ct., Rule 9.45(c)*]:

> 1. Be an active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency.

2. Register with the State Bar of California and file an Application for Determination of Moral Character [*see § 70.18*].

3. Meet all of the requirements for admission to the State Bar of California, except that the attorney (a) need not take the California bar examination or the Multistate Professional Responsibility Examination; and (b) may practice law while awaiting the result of his or her Application for Determination of Moral Character.

4. Comply with the rules adopted by the Board of Governors relating to the State Bar Registered Legal Services Attorney Program.

5. Practice law exclusively for a single qualifying legal services provider. If qualified, the attorney may also simultaneously practice law as registered in-house counsel [*see § 70.14*].

6. Practice law under the supervision of an attorney who is employed by the qualifying legal services provider and who is a member in good standing of the State Bar of California.

7. Abide by all the laws and rules that govern members of the State Bar of California, including the Minimum Continuing Legal Education requirements.

8. Satisfy in his or her first year of practice all of the MCLE requirements, including ethics education, that members of the State Bar of California must complete every three years.

9. Not have failed the California bar examination within five years immediately preceding the application to register under this rule.

[2] Application

To qualify to practice law as a registered legal services attorney, the attorney must [*Cal. Rules of Ct., Rule 9.45(d)*]:

1. Register as an attorney applicant and file an Application for Determination of Moral Character [*see § 70.18*] with the COBE.

2. Submit to the State Bar of California a declaration signed by the attorney agreeing that he or she will be subject to the disciplinary authority of the Supreme Court of California and the State Bar of California and attesting that he or she will not practice law in California other than under supervision at a qualifying legal services provider during the time he or she practices law as a registered legal services attorney in California, except that, if qualified, the attorney may simultaneously practice law as registered in-house counsel [*see § 70.14*].

3. Submit to the State Bar of California a declaration signed by a qualifying supervisor [*see § 70.13[3]*] on behalf of the qualifying legal services provider in California attesting that the applicant will work, with or without pay, as an attorney for the organization, that the applicant will be supervised, and that the qualifying legal services provider and thesupervising attorney assume professional responsibility for any work performed by the applicant.

[3] Qualifying Supervising Attorney

An attorney supervising a registered legal services attorney [*Cal. Rules of Ct., Rule 9.45(h)*]:

1. Must be an active member in good standing of the State Bar of California.

2. Must have actively practiced law in California and been a member in good standing of the State Bar of California for at least the two years immediately preceding the time of supervision.

3. Must have practiced law as a full-time occupation for at least four years.

4. Must not supervise more than two registered legal services attorneys concurrently.

5. Must assume professional responsibility for any work that the registered legal services attorney performs under the supervising attorney's supervision.

6. Must assist, counsel, and provide direct supervision of the registered legal services attorney in the activities authorized by this rule and review such activities with the supervised attorney, to the extent required for the protection of the client.

7. Must read, approve, and personally sign any pleadings, briefs, or other similar documents prepared by the registered legal services attorney before their filing, and must read and approve any documents prepared by the registered legal services attorney for execution by any person who is not a member of the State Bar of California before their submission for execution.

8. May, in his or her absence, designate another attorney meeting the above requirements to provide the required supervision.

Legal Topics:

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

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§ 70.14 Registered In-House Counsel

[1] In General

Effective November 15, 2004, an attorney who resides in California and who is licensed to practice law in one or more jurisdictions in the United States, other than California, may register to provide legal services as in-house counsel for a single qualifying institution in California without becoming a member of the State Bar of California [*Cal. Rules of Ct., Rule 9.46*].

Registered in-house counsel must renew his or her registration annually [*Cal. Rules of Ct., Rule 9.46(e)*]. If a registered in-house counsel changes employers, he or she must notify the State Bar of California within 30 days [*Cal. Rules of Ct., Rule 9.46(e)*]. If an attorney wishes to practice law as a registered in-house counsel for a new employer, he or she must register as in-house counsel for the new employer [*Cal. Rules of Ct., Rule 9.46(e)*].

[2] Scope of Practice

A registered in-house counsel [*Cal. Rules of Ct., Rule 9.46(b)*]:

1. Is permitted to provide legal services in California only to the qualifying institution that employs him or her.

2. Is not permitted to make court appearances in California state courts or to engage in any other activities for which pro hac vice admission is required if they are performed in California by an attorney who is not a member of the State Bar of California.

3. Is not permitted to provide personal or individual representation to any customers, shareholders, owners, partners, officers, employees, servants, or agents of the qualifying institution.

A "qualifying institution" is a corporation, partnership, association, or other legal entity, including its subsidiaries and organizational affiliates [*Cal. Rules of Ct., Rule 9.46(a)*]. A governmental entity and an entity that provides legal services to others are not qualifying institutions [*Cal. Rules of Ct., Rule 9.46(a)*]. A qualifying institution must [*Cal. Rules of Ct., Rule 9.46(a)*]:

1. Employ at least 10 employees full-time in California; or

2. Employ in California an attorney who is an active member in good standing of the State Bar of California.

[3] Requirements

To practice as a registered in-house counsel, an attorney must [*Cal. Rules of Ct., Rule 9.46(c)*]:

1. Be an active member in good standing of the bar of a United States state, jurisdiction, possession, territory, or dependency.

2. Register with the State Bar of California and file an Application for Determination of Moral Character [*see § 70.18*].

3. Meet all of the requirements for admission to the State Bar of California, except that the attorney (a) need not take the California bar examination or the Multistate Professional Responsibility Examination; and (b) may practice law while awaiting the result of his or her Application forDetermination of Moral Character.

4. Comply with the rules adopted by the Board of Governors relating to the State Bar Registered In-House Counsel Program.

5. Practice law exclusively for a single qualifying institution. If qualified, the attorney may also simultaneously practice law as a registered legal services attorney [*see* discussion under Registered Legal Services Attorney].

6. Abide by all the laws and rules that govern members of the State Bar of California, including the Minimum Continuing Legal Education requirements.

7. Satisfy in his or her first year of practice all of the MCLE requirements, including ethics education, that members of the State Bar of California must complete every three years and, thereafter, satisfy the MCLE requirements applicable to all members of the State Bar.

8. Reside in California.

[4] Application

To qualify to practice law as a registered in-house counsel, the attorney must [*Cal. Rules of Ct., Rule 9.46(d)*]:

1. Register as an attorney applicant and file an Application for Determination of Moral Character [*see § 70.18*] with the COBE.

2. Submit to the State Bar of California a declaration signed by the attorney agreeing that he or she will

be subject to the disciplinary authority of the Supreme Court of California and the State Bar of California and attesting that he or she will not practice law in California other than on behalf of the qualifying institution during the time he or she is registered in-house counsel in California, except that, if qualified, the attorney may simultaneously practice law as a registered legal services attorney [*see § 70.13*].

3. Submit to the State Bar of California a declaration signed by an officer, director, or general counsel of the applicant's employer, on behalf of the applicant's employer, attesting that the applicant is employed as an attorney for the employer, that the nature of the employment conforms to the requirements of *Cal. Rules of Ct., Rule 9.46*, that the employer will notify the State Bar of California within 30 days of the cessation of the applicant's employment in California, and that the person signing the declaration believes, to the best of his or her knowledge after reasonable inquiry, that the applicant qualifies for registration under *Cal. Rules of Ct., Rule 9.46* and is an individual of good moral character.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsPractice QualificationsCivil ProcedureCounselAdmissions Pro Hac Vice

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 70 ATTORNEY ADMISSION
PART II. LEGAL BACKGROUND

6-70 California Forms of Pleading and Practice--Annotated § 70.15

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§ 70.15 Good Moral Character

[1] Requirement for Admission

Every applicant must be of good moral character [*Bus. & Prof. Code §§ 6060, 6062*; Cal. Rules Regulating Admission, Rules II, § 2(b), X, § 1]. The term "good moral character" includes qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, knowledge of the laws of the state and the nation, and the respect for the rights of others and for the judicial process [Cal. Rules Regulating Admission, Rule X, § 1; *In re Gossage (2000) 23 Cal. 4th 1080, 1095, 99 Cal. Rptr. 2d 130, 5 P.3d 186]* . The fundamental question in determining good moral character is whether the applicant is a fit and proper person to practice law, which usually turns on whether he or she has committed or is likely to commit acts of moral turpitude, a concept that embraces a wide range of deceitful and depraved behavior [*see In re Gossage (2000) 23 Cal. 4th 1080, 1095, 99 Cal. Rptr. 2d 130, 5 P.3d 186* ; *In re Menna (1995) 11 Cal. 4th 975, 986, 47 Cal. Rptr. 2d 2, 905 P.2d 944* ; *Hallinan v. Committee of Bar Examiners(1966) 65 Cal. 2d 447, 453, 55 Cal. Rptr. 228, 421 P.2d 76* ; for definition of moral turpitude, *see § 70.15[3][d]*].

The applicant has the burden of establishing that he or she is of good moral character [Cal. Rules Regulating Admission, Rule X, § 1].

[2] Applicant's Duty of Disclosure

Applicants must produce evidence of good moral character in order to be admitted to practice [Cal. Rules Regulating Admission, Rules II, § 2(b), VI, §§ 1(a), 2, 3, X, §§ 1, 2].

Admission may be denied when an applicant fails to disclose fully his or her criminal history, information material to an accurate moral character assessment. Whether it is caused by intentional concealment, reckless disregard for the truth, or an unreasonable refusal to perceive the need for disclosure, such an omission is itself strong evidence that the

applicant lacks the integrity or intellectual discernment required to be an attorney [*In re Gossage (2000) 23 Cal. 4th 1080, 1102, 99 Cal. Rptr. 2d 130, 5 P.3d 186]* . On the other hand, an applicant may be admitted despite omission of less crucial information, when the omission is due to innocent mistake and when the application is otherwise complete [*In re Gossage (2000) 23 Cal. 4th 1080, 1102, 99 Cal. Rptr. 2d 130, 5 P.3d 186* (citing cases of inadvertent omission of civil matters but otherwise complete about criminal matters)].

In addition to the initial duty of disclosure, applicants have a continuing duty to update responses to questions on the application, including the moral character section [*see* Cal. Rules Regulating Admission, Rule VI, § 7; In the Matter of Pasyanos (Rev. Dep't 2005) 2005 Cal. Op. LEXIS 1, *17-*19 (discipline, rather than license cancellation, was appropriate sanction for failing to disclose misdemeanor when failure was innocent and unintentional; *In the Matter of Ike (1996) 3 Cal. State Bar Ct. Rptr. 483* ; *but see In re Gossage (2000) 23 Cal. 4th 1080, 1105, 99 Cal. Rptr. 2d 130, 5 P.3d 186* (adherence to continuing requirement to keep application current and updated did not purge applicant's failure to disclose criminal convictions initially)].

Certain matters pertaining to moral character need not be disclosed. Juvenile adjudications, for example, are not regarded as criminal; once a minor's adjudication records have been sealed, the adjudication is deemed not to have occurred, and an applicant may answer inquiries from the State Bar accordingly [*Welf. & Inst. Code §§ 203, 781(a)*; *see Penal Code § 1203.45(a)* (misdemeanor conviction of minor treated as nonexistent once expunged); *see also Penal Code § 851.7(b)* (sealing record of juvenile arrest for misdemeanor); Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Chs. 93, 103 (Matthew Bender); *but see Welf. & Inst. Code § 781(g)* (certain sealed juvenile records may be inspected and introduced into evidence later for purpose of proving alleged enhancement in criminal prosecution)].

An applicant is likewise not required to disclose convictions of certain offenses relating to the possession of marijuana, or arrests for certain other drug-related offenses if the applicant has successfully completed a drug diversion program [*see Health & Safety Code § 11361.5*; *Penal Code § 1000.5*]. An applicant is not required to reveal criminal acts for which he or she has not been arrested or charged and is not awaiting trial [*In the Matter of Passenheim (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 62]* .

Under *Penal Code § 1203.4*, in certain circumstances, a person who was convicted of a crime may have the conviction set aside. This, however, does not relieve the person of the obligation to disclose the conviction in response to a direct question contained in an application for licensure by a state agency, including the State Bar [*see Penal Code § 1203.4(a)*].

An applicant must disclose convictions based on a plea of nolo contendere. The State Bar may treat the plea as the equivalent of a guilty plea, but it is not required to do so [*see Bus. & Prof. Code § 6101(e)* (disbarment proceedings); *In re Hallinan (1954) 43 Cal. 2d 243, 247, 272 P.2d 768* (no discrimination in instituting disciplinary action against lawyer convicted of tax crime when other lawyers not subject to action were convicted on nolo contendere plea)].

An applicant must disclose whether he or she is awaiting trial for any alleged violation of a law or ordinance, the commission of any felony, misdemeanor, or infraction, no matter how minor the incident. The applicant's duty to disclose calls for a "high degree of frankness and truthfulness" and is an "absolute duty" [*Spears v. The State Bar (1930) 211 Cal. 183, 187, 294 P. 697* ; *In the Matter of Ike (1996) 3 Cal. State Bar Ct. Rptr. 483]* .

[3] Defining Good Moral Character

[a] Decisions and Other Sources of Guidelines on Moral Character Issues

The standard of character to be applied in admissions cases is virtually indistinguishable from that applied in attorney discipline cases [*Hallinan v. Committee of Bar Examiners (1966) 65 Cal. 2d 447, 452-453, 55 Cal. Rptr. 228, 421*

P.2d 76 (rejecting contention by the COBE that higher standard should be applied to applicant)]. Therefore, in considering the kinds of acts that would justify excluding a candidate for admission, the California Supreme Court often looks to acts on which it has relied to sustain decisions to disbar or suspend individuals previously admitted to practice [*In re Gossage (2000) 23 Cal. 4th 1080, 1095, 99 Cal. Rptr. 2d 130, 5 P.3d 186* ; *In re Menna (1995) 11 Cal. 4th 975, 985-986, 47 Cal. Rptr. 2d 2, 905 P.2d 944* ; *Hallinan v. Committee of Bar Examiners (1966) 65 Cal. 2d 447, 453, 55 Cal. Rptr. 228, 421 P.2d 76]* . This expands the available case lawin admissions cases, since the Court has decided only a handful of published bar admissions cases involving moral character issues. Although these cases have been significant in other ways, they do not provide a detailed view of the circumstances under which an applicant's past conduct may prevent admission to practice. Published decisions in attorney discipline cases may provide examples of conduct falling below the applicable standard of character. For general discussion of grounds for discipline, see Ch. 71, *Attorney Discipline* .

An adverse ruling by the COBE must be appealed to the State Bar Court before it will be reviewed by the Supreme Court [*see § 70.18[7]*]. The Review Department of the State Bar Court publishes the majority of its opinions in the California State Bar Court Reporter (hereafter Cal. State Bar Ct. Rptr.).

Other guidelines may prove helpful. The California Supreme Court often acts by minute order or memorandum decision in conviction referrals and other bar matters. These decisions are published in the court minutes. The State Bar General Counsel maintains a list of precedents that assist the bar and the court to determine whether a particular offense involves moral turpitude per se. The published summaries of public and private discipline that appear in the official State Bar newsletter, the *California Bar Journal* and the unofficial State Bar magazine, *California Lawyer*, or in press releases may also prove helpful, although the precedential value of these summaries is dubious.

Bar admission decisions in other states may be looked to as authority, at least in situations that have not been analyzed by the California Supreme Court [*see Hallinan v. Committee of Bar Examiners (1966) 65 Cal. 2d 447, 462-463, 55 Cal. Rptr. 228, 421 P.2d 76* (relying on out-of-state authority)]. The National Conference on Bar Examiners, based in Chicago, publishes a "Litigation Report" summarizing recent decisions and pending actions in admissions cases.

[b] Rehabilitation Following Past Misconduct

An applicant need only demonstrate present good character [*see In re Menna (1995) 11 Cal. 4th 975, 983, 47 Cal. Rptr. 2d 2, 905 P.2d 944* ; *Martin B. v. Committee of Bar Examiners (1983) 33 Cal. 3d 717, 726, 190 Cal. Rptr. 610, 661 P.2d 160]* . If the acts that raise doubt about the applicant's moral character took place in the past, the applicant may be admitted by showing evidence of his or her rehabilitation [*see Martin B. v. Committee of Bar Examiners (1983) 33 Cal. 3d 717, 721-726, 190 Cal. Rptr. 610, 661 P.2d 160* (nine-year, unblemished exemplary record should be sufficient to show rehabilitation after alleged rape)]. In fact, the law looks with favor on rewarding one who has achieved reformation and regeneration with the opportunity to serve [*Hightower v. State Bar (1983) 34 Cal. 3d 150, 157, 193 Cal. Rptr. 153, 666 P.2d 10]* .

To a point, the Supreme Court is normally tolerant of "youthful indiscretions" [*see Martin B. v. Committee of Bar Examiners (1983) 33 Cal. 3d 717, 726, 190 Cal. Rptr. 610, 661 P.2d 160* ; *Hallinan v. Committee of Bar Examiners (1966) 65 Cal. 2d 447, 471, 55 Cal. Rptr. 228, 421 P.2d 76]* . On the other hand, however, admission on the basis of rehabilitation commonly involves a substantial period of exemplary conduct following applicant's past misdeeds, and the more serious the misconduct and bad character evidence, the stronger the showing of rehabilitation must be [*In re Gossage (2000) 23 Cal. 4th 1080, 1096-1097, 99 Cal. Rptr. 2d 130, 5 P.3d 186]* . For example, when past misconduct involved a "brutal and unnecessary" homicide that led to a conviction for voluntary manslaughter, the Supreme Court held that only a "compelling showing of reform" would suffice [*In re Gossage (2000) 23 Cal. 4th 1080, 1096-1097, 99 Cal. Rptr. 2d 130, 5 P.3d 186]* . The Court concluded that this required showing had not been made in light of evidence of other numerous illegal and bad acts by the applicant, which suggested a pattern of antisocial behavior casting doubt on his moral character [*In re Gossage (2000) 23 Cal. 4th 1080, 1098, 99 Cal. Rptr. 2d 130, 5 P.3d 186]*

. The Court noted that, when serious or criminal misconduct is involved, the showing of rehabilitation is affected by the fact that positive inferences become more difficult to draw, while negative inferences become stronger and more reasonable [*In re Gossage (2000) 23 Cal. 4th 1080, 1098, 99 Cal. Rptr. 2d 130, 5 P.3d 186* (denying admission to applicant who claimed reformed moral character following voluntary manslaughter and felony forgery convictions, when these misdeeds were followed by repeated misdemeanor convictions and incomplete disclosure of criminal history on application)].

Repentance or remorse is normally an important factor in determining if an applicant has demonstrated rehabilitation [*see March v. Committee of Bar Examiners (1967) 67 Cal. 2d 718, 731-732, 63 Cal. Rptr. 399, 433 P.2d 191]* . Nevertheless, in cases in which it was never totally clear that the applicant was guilty of moral turpitude, "lack of remorse" may be evidence of good character, in that it demonstrates courageous adherence to one's beliefs [*see Hall v. Committee of Bar Examiners (1979) 25 Cal. 3d 730, 744, 159 Cal. Rptr. 848, 602 P.2d 768]* .

However, "[r]emorse does not demonstrate rehabilitation ... a truer indication of rehabilitation ... is sustained conduct over an extended period of time" [*In re Conflenti (1981) 29 Cal. 3d 120, 124-125, 172 Cal. Rptr. 203, 624 P.2d 253]* . If the applicant's misconduct caused significant harm to others, the sustained conduct must include proof applicant is making amends to the victims [*In re Menna (1995) 11 Cal. 4th 975, 991, 47 Cal. Rptr. 2d 2, 905 P.2d 944]* .

An applicant who cannot demonstrate present good character and is denied admission on this ground may reapply for admission. The rules permit an applicant who was found to lack the requisite moral character to reapply any time following two years after the date of denial, unless theCOBE, for good cause, has set a shorter or longer period [Cal. Rules Regulating Admission, Rule X, § 6].

[c] Relation to Practice of Law

A state may not establish qualifications for admission to the bar unless they have a rational connection with an applicant's fitness or capacity to practice law [*Schware v. Board of Bar Examiners (1957) 353 U.S. 232, 238-239, 77 S. Ct. 752, 1 L. Ed. 2d 796]* . Thus, even if there is an indication of bad moral character, an applicant may be admitted if the bad character trait is not related to the practice of law [*see Hallinan v. Committee of Bar Examiners (1966) 65 Cal. 2d 447, 459-460, 55 Cal. Rptr. 228, 421 P.2d 76* ; *see also Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 238-239, 82 Cal. Rptr. 175, 461 P.2d 375* (restrictions limiting right to practice chosen occupation must be related to fitness to perform that occupation); *In re Rothrock (1940) 16 Cal. 2d 449, 454-459, 106 P.2d 907* (attorney discipline case; assault with deadly weapon not related to moral fitness to practice of law when offense was minor as indicated by lenient punishment)].

[d] Lack of Moral Turpitude

Attorneys must possess good moral character. Good moral character includes traits of "honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the laws of the state and the nation and respect for the rights of others and for the judicial process" [Cal. Rules Regulating Admission, Rule X, § 1; *see In re Gossage (2000) 23 Cal. 4th 1080, 1095, 99 Cal. Rptr. 2d 130, 5 P.3d 186]* . Persons of good character also do not commit acts or crimes involving moral turpitude, a concept that embraces a wide range of deceitful and depraved behavior [*In re Gossage (2000) 23 Cal. 4th 1080, 1095, 99 Cal. Rptr. 2d 130, 5 P.3d 186]* . Good moral character has thus been sometimes defined as the equivalent of a lack of moral turpitude [*In re Menna (1995) 11 Cal. 4th 975, 986, 47 Cal. Rptr. 2d 2, 905 P.2d 944* ; *Kwasnik v. State Bar (1990) 50 Cal. 3d 1061, 1067, 269 Cal. Rptr. 749, 791 P.2d 319* ; *Hallinan v. Committee of Bar Examiners (1966) 65 Cal. 2d 447, 452, 55 Cal. Rptr. 228, 421 P.2d 76]* .

Moral turpitude, in turn, has been broadly defined as "everything done contrary to justice, honesty, modesty, or good morals" and as "an act of baseness, vileness or depravity in the private and social duties" that one owes to others or to society [*Hallinan v. Committee of Bar Examiners (1966) 65 Cal. 2d 447, 452 n.4, 55 Cal. Rptr. 228, 421 P.2d 76]* .

Standing alone, convictions of crimes such as murder, forgery, extortion, bribery, perjury, robbery, embezzlement, and other forms of theft justify a finding of moral turpitude [*see In re Rothrock (1940) 16 Cal. 2d 449, 459, 106 P.2d 907* (but holding that assault with deadly weapon was not related to practice of law; no moral turpitude involved in light of minor punishment imposed)]. On the other hand, an applicant who had a wrongful death judgment against him discharged in bankruptcy established that he had good moral character [*see Kwasnik v. State Bar (1990) 50 Cal. 3d 1061, 1067, 269 Cal. Rptr. 749, 791 P.2d 319]* .

Two of the most prevalent forms of moral turpitude found in admissions cases involve crimes and lying on the application or during the moral fitness investigation [*see § 70.15[3*][e], [f]]. In addition, practicing law without a license may be considered moral turpitude [*Hightower v. State Bar (1983) 34 Cal. 3d 150, 157, 193 Cal. Rptr. 153, 666 P.2d 10]* . General dishonesty may also be grounds for exclusion. The courts have upheld the refusal to certify an applicant for obtaining credit fraudulently and for refusing to account for partnership profits [*see In re Wells (1917) 174 Cal. 467, 475-476, 163 P. 657* ; *In re Stover (1924) 65 Cal. App. 622, 623-624, 224 P. 771]* . When ethical breaches are not serious, however, an applicant may not be refused admission to the bar, at least when the applicant has supplied reasonable explanations for his or her behavior [*see Hall v. Committee of Bar Examiners (1979) 25 Cal. 3d 730, 736-742, 159 Cal. Rptr. 848, 602 P.2d 768]* . Furthermore, isolated instances of dishonesty are not normally grounds for exclusion [*see Martin B. v. Committee of Bar Examiners (1983) 33 Cal. 3d 717, 721, 726, 190 Cal. Rptr. 610, 661 P.2d 160]* .

In determining whether an applicant possesses good moral character, the COBE, the State Bar Court, and the Supreme Court may look to the cumulative effect of several incidents, each of which, if viewed independently, would not be viewed as proof of moral turpitude, as well as to incidents that, in and of themselves, supply proof of moral turpitude [*see Bernstein v. Committee of Bar Examiners (1968) 69 Cal. 2d 90, 107, 70 Cal. Rptr. 106, 443 P.2d 570]* . Each case is evaluated on its own merits [*see Hightower v. State Bar (1983) 34 Cal. 3d 150, 155-156, 193 Cal. Rptr. 153, 666 P.2d 10* ; *March v. Committee of Bar Examiners (1967) 67 Cal. 2d 718, 720, 63 Cal. Rptr. 399, 433 P.2d 191]* .

[e] False Statements or Omissions Made on Application or During Investigation

False statements, omissions, or lack of candor during an investigation may constitute grounds for exclusion of an applicant or may aggravate a negative factor in the applicant's history [*see, e.g., Greene v. Committee of Bar Examiners (1971) 4 Cal. 3d 189, 201, 93 Cal. Rptr. 24, 480 P.2d 976* (omissions in application); *Bernstein v. Committee of Bar Examiners (1968) 69 Cal. 2d 90, 107, 70 Cal. Rptr. 106, 443 P.2d 570* (general lack of truthfulness and candor); *Spears v. The State Bar (1930) 211 Cal. 183, 187, 294 P. 697* (false statements in application); *In the Matter of Ike (1996) 3 Cal. State Bar Ct. Rptr. 483* (failure to disclose)]. Thus, admission may be denied because an applicant fails to disclose fully his or her criminal history, whether that failure is due to intentional concealment, recklessdisregard for the truth, or an unreasonable refusal to perceive the need for disclosure. Such an omission is itself strong evidence that the applicant lacks the integrity or intellectual discernment required to be an attorney [*In re Gossage (2000) 23 Cal. 4th 1080, 1102, 99 Cal. Rptr. 2d 130, 5 P.3d 186* (failure to disclose two felony and six misdemeanor convictions); *see also Hallinan v. Committee of Bar Examiners (1966) 65 Cal. 2d 447, 473, 55 Cal. Rptr. 228, 421 P.2d 76]* .

Conversely, failure to disclose information may be deemed *de minimis* when an applicant failed to disclose relatively unimportant information, at least when the omission is an innocent mistake and the application is otherwise complete in disclosing serious misconduct [*In re Gossage (2000) 23 Cal. 4th 1080, 1102, 99 Cal. Rptr. 2d 130, 5 P.3d 186* (citing cases involving inadvertent omission of civil matters but providing complete disclosure of criminal matters); *see Hallinan v. Committee of Bar Examiners (1966) 65 Cal. 2d 447, 473, 55 Cal. Rptr. 228, 421 P.2d 76* (applicant disclosed numerous arrests but neglected to mention two relatively minor matters)].

In cases in which the applicant is charged with lying in response to questions concerning whether he or she has advocated certain positions (such as violent confrontation with the police), considerations under *U.S. Const., amend. I,*

require that the applicant may be denied admission only if the evidence shows beyond any reasonable doubt that the applicant's version is objectively false and was advanced by him or her with the intent to deceive the COBE [*see Siegel v. Committee of Bar Examiners (1973) 10 Cal. 3d 156, 178-179, 110 Cal. Rptr. 15, 514 P.2d 967]* .

The Supreme Court has held that if an attorney, after admission, is found to have made a deliberate false statement on his or her application, it has the authority not only to discipline him or her, but also to revoke his or her license [*Spears v. The State Bar (1930) 211 Cal. 183, 187, 294 P. 697* ; *State Bar v. Langert (1954) 43 Cal. 2d 636, 639, 276 P.2d 596* ; *Goldstein v. State Bar (1989) 47 Cal. 3d 937, 951, 254 Cal. Rptr. 794, 766 P.2d 560* ; *In the Matter of Ike (1996) 3 Cal. State Bar Ct. Rptr. 483]* .

[f] Crimes in General

Not every intentional violation of the law is, in and of itself, grounds for denying admission due to lack of good moral character. Some crimes, however, such as those involving fraud, perjury, theft, embezzlement, and bribery, moral turpitude is unquestionably involved [*Hallinan v. Committee of Bar Examiners (1966) 65 Cal. 2d 447, 459, 55 Cal. Rptr. 228, 421 P.2d 76]* .

Crimes that are not inherently dishonest or depraved may also indicate moral turpiture in some circumstances. For example, an act of violence resulting in a conviction for voluntary manslaughter may show moral turpitude when the perpetrator continues an assault long after the victim ceases attack or resistance, and subsequently makes no effort to summon medical aid for the victim but instead takes steps to conceal his guilt. Such conduct shows not only deceit in the acts of concealment, but also shows a dangerous volatility combined with a conscious and selfish disregard for the law and the rights of others [*see In re Gossage (2000) 23 Cal. 4th 1080, 1097-1098, 99 Cal. Rptr. 2d 130, 5 P.3d 186]* .

The COBE may initiate an investigation into criminal charges against an applicant even though the applicant ultimately obtained a favorable termination of the charges [*see Martin B. v. Committee of Bar Examiners (1983) 33 Cal. 3d 717, 721, 190 Cal. Rptr. 610, 661 P.2d 160]* . The favorable termination is, however, normally accorded great weight [*see Martin B. v. Committee of Bar Examiners (1983) 33 Cal. 3d 717, 723, 190 Cal. Rptr. 610, 661 P.2d 160]* . When such an investigation is initiated, the COBE must afford the applicant a fair and reasonable opportunity to defend himself or herself [*Martin B. v. Committee of Bar Examiners (1983) 33 Cal. 3d 717, 721, 190 Cal. Rptr. 610, 661 P.2d 160]* . An applicant may not be denied admission on the basis of criminal acts for which he or she obtained an acquittal when the acts took place years ago, memories have faded, witnesses are unavailable, evidence has been destroyed, and a transcript of the proceedings is unavailable [*Martin B. v. Committee of Bar Examiners (1983) 33 Cal. 3d 717, 721-723, 190 Cal. Rptr. 610, 661 P.2d 160]* .

For additional discussion concerning disclosure of criminal convictions, see *§ 70.15[2]*.

[g] Civil Disobedience

Acts of nonviolent civil disobedience are not normally considered acts of moral turpitude, at least when motivated by sincere political beliefs [*Hallinan v. Committee of Bar Examiners (1966) 65 Cal. 2d 447, 462, 55 Cal. Rptr. 228, 421 P.2d 76]* . In one case, for example, the Supreme Court admitted the applicant to practice over the COBE's denial of certification when the applicant had been arrested numerous times for civil disobedience and had testified to the committee that he felt that civil disobedience was proper if alternative methods of dealing with issues involving social justice had been tried first and failed [*Hallinan v. Committee of Bar Examiners (1966) 65 Cal. 2d 447, 455-464, 55 Cal. Rptr. 228, 421 P.2d 76]* .

Advocating violence as a response to social injustice has also been held as an insufficient ground for exclusion from the Bar [*see Siegel v. Committee of Bar Examiners (1973) 10 Cal. 3d 156, 174-175, 110 Cal. Rptr. 15, 514 P.2d 967]* .

[h] Violent or Abrasive Behavior

A quarrelsome disposition or a hasty and ungoverned temper are not necessarily incompatible with the honesty and integrity required ofmembers of the Bar and do not normally disqualify a person for admission [*Hallinan v. Committee of Bar Examiners (1966) 65 Cal. 2d 447, 472, 55 Cal. Rptr. 228, 421 P.2d 76]* . Furthermore, a finding that an applicant has engaged in numerous fistfights does not justify exclusion, at least when most of the incidents occurred during the applicant's adolescence [*Hallinan v. Committee of Bar Examiners (1966) 65 Cal. 2d 447, 464-472, 55 Cal. Rptr. 228, 421 P.2d 76* ; *but see § 70.15[3][f]*].

[i] Advocacy of Overthrow of Government

No person who advocates the overthrow of the United States government or California state government by force, violence, or other unconstitutional means may be certified to the Supreme Court for admission and a license to practice law [*Bus. & Prof. Code § 6064.1*].

The COBE may question an applicant about affiliations with radical political organizations that advocate overthrowing the government and may reject an applicant for refusal to answer questions [*Law Students Research Council v. Wadmond (1971) 401 U.S. 154, 166, 91 S. Ct. 720, 27 L. Ed. 2d 749* ; *Konigsberg v. State Bar (1961) 366 U.S. 36, 43, 81 S. Ct. 997, 6 L. Ed. 2d 105 (Konigsberg II) , aff'g Konigsberg v. State Bar (1959) 52 Cal. 2d 769, 772-774, 344 P.2d 777* ; *see also Konigsberg v. State Bar (1957) 353 U.S. 252, 270-271, 77 S. Ct. 722, 1 L. Ed. 2d. 810* (Konigsberg I; exclusion of applicant violated due process when evidence did not rationally support finding that applicant failed to prove he did not advocate overthrow of government)]. The applicant, however, must first be warned that a refusal to answer may be considered an obstruction of the investigative process [*see Konigsberg v. State Bar of California (1961) 366 U.S. 36, 48-49, 81 S. Ct. 997, 6 L. Ed. 2d 105]* . The State Bar's inquiry must center on whether or not the applicant himself or herself advocates overthrow of the government by unconstitutional means. Membership in an organization that advocates unlawful violence does not automatically establish that the applicant is unfit to practice law [*see Schware v. Board of Bar Examiners (1957) 353 U.S. 232, 245-247, 77 S. Ct. 752, 1 L. Ed. 2d 796* ; *March v. Committee of Bar Examiners (1967) 67 Cal. 2d 718, 730-732, 63 Cal. Rptr. 399, 433 P.2d 191]* . Furthermore, protections under *U.S. Const., amend. I*, normally apply in cases involving "advocacy," and speech that advocates violence or political beliefs may be constitutionally protected in some instances [*see Siegel v. Committee of Bar Examiners (1973) 10 Cal. 3d 156, 174 n.18, 110 Cal. Rptr. 15, 514 P.2d 967]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Forms of Pleading and Practice--Annotated

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 70 ATTORNEY ADMISSION
PART II. LEGAL BACKGROUND

6-70 California Forms of Pleading and Practice--Annotated § 70.16

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§ 70.16 Right to Inspect Examination Papers and Grading

An applicant who has taken and failed the bar examination has the right, within four months/after the results have been declared, to inspect those of his or her examination papers that are in the actual, physical possession of the examining committee at the time the request for inspection is made and the final grades assigned to it at the COBE office located nearest to the place at which the applicant took the examination [*Bus. & Prof. Code § 6065*; Cal. Rules Regulating Admission, Rule I, § 10].

No applicant who passes an examination given by the COBE, other than the First-Year Law Students' Examination, is entitled to inspect his or her examination books, or the grades assigned to them. The COBE may, however, in its discretion, assign grades and disclose them to applicants who pass the First-Year Law Students' Examination [Cal. Rules Regulating Admission, Rule I, § 10].

Legal Topics:

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

California Forms of Pleading and Practice--Annotated

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§ 70.17 Oral Examination Regarding Qualifications

Unless qualified to apply as an "attorney applicant," every person applying to the COBE must present himself or herself before the COBE, any subcommittee, or the State Bar Court at such times and places as may be required, for oral examination concerning his or her moral character or other qualifications and furnish at any time any supplemental information and documentation, and in any form that may be required, relating to his or her moral character or his or her other qualifications [Cal. Rules Regulating Admission, Rule II, § 2(c)].

Legal Topics:

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California Forms of Pleading and Practice--Annotated

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 70 ATTORNEY ADMISSION
PART II. LEGAL BACKGROUND

6-70 California Forms of Pleading and Practice--Annotated § 70.18

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§ 70.18 Proceedings to Determine Moral Character

[1] Screening Procedure

As part of the application process, the applicant must complete and submit a Moral Character Application [*see* Cal. Rules Regulating Admission, Rules VI, §§ 1(a), 2, X, § 2(a), (b)]. The COBE completes an initial screening of each applicant concerning moral character within 180 days following filing of the application and notifies the applicant either that he or she has been found to be of good moral character or that such a determination cannot then be made because (1) information requested from the applicant, from governmental agencies, or from additional sources has not been received, or (2) further inquiry and anlysis is needed [Cal. Rules Regulating Admission, Rule X, § 2(c)].

An applicant who receives such a notice has 90 days to provide any additional information requested by the COBE. Failure to provide the requested information constitutes abandonment of the Moral Character Application and termination of the moral character determination process. Thereafter, if the applicant wishes to proceed with the moral character determination proceess, he or she must file a new Moral Character Application accompanied by a specified fee [Cal. Rules Regulating Admission, Rule X, § 2(d)].

If the COBE determines that further inquiry and analysis is necessary, the further inquiry and analysis must be conducted and a written reportmust be considered by the COBE within 60 days after the notification described above. At that time, the COBE may determine one of the following [Cal. Rules Regulating Admission, Rule X, § 2(f)]:

- That the applicant is of good moral character.
- That the applicant has not met the burden of establishing good moral character.
- That the application be referred for further inquiry and analysis.

- That the applicant be invited to confer informally with the Subcommittee on Moral Character, as provided in Cal. Rules Regulating Admission, Rule X, § 3(a) [*see § 70.18[2]*].

- That the applicant and the COBE enter into an Agreement of Abeyance, as provided in Cal. Rules Regulating Admission, Rule X, § 4 [*see § 70.18[3]*].

The COBE must notify the applicant of its determination [Cal. Rules Regulating Admission, Rule X, § 2(f)].

[2] Informal Conference

[a] By Invitation of COBE

The COBE may invite an applicant to confer informally with the Subcommittee on Moral Character or any two or more of its members at any time during its consideration of the Moral Character Application [Cal. Rules Regulating Admission, Rule X, §§ 2(f)(4), 3(a)]. The purpose of the informal conference is to discuss issues related to moral character considerations. The conference is not mandatory, and no negative inference may be drawn from an applicant's declining to confer [Cal. Rules Regulating Admission, Rule X, § 3(a)].

[b] At Request of Applicant

An applicant may request to confer informally with the Subcommittee on Moral Character only after a determination from the COBE that the applicant has not met the burden of establishing good moral character and only if an informal conference has not been previously held. The request to confer must be in writing and must be received in the COBE's San Francisco office within 30 days of the notification of the adverse determination [Cal. Rules Regulating Admission, Rule X, § 3(b); *see § 70.61*].

On receipt of a timely filed request, the COBE's determination will be considered pending and an informal conference will be scheduled within 60 days, unless the COBE agrees to a later date. The purpose of this informal conference is to discuss the issues related to the determination that the applicant had not met the burden of establishing good moral character. Matters raised by the applicant are limited to those issues that were the basis of the COBE's adverse determination. The COBE's finaldetermination must be forwarded to the applicant within 30 days following consideration of the matter by the COBE. The applicant may appeal the final determination according to the provisions of Cal. Rules Regulating Admission, Rule X, § 5 [Cal. Rules Regulating Admission, Rule X, § 3(b); *see § 70.18[7]*].

[3] Agreement of Abeyance

The COBE and the applicant may enter into an Abeyance Agreement to suspend continued inquiry and analysis regarding moral character under the following circumstances [Cal. Rules Regulating Admission, Rule X, § 4(a)]:

- When an accusatory pleading has been filed against the applicant charging him or her with the commission of a crime and a court has ordered the applicant diverted or referred for education, treatment, or rehabilitation.

- When the applicant has been convicted of a crime and the court has suspended imposition or execution of a sentence and has ordered the applicant placed on probation.

- When the applicant is actively seeking or obtaining treatment for chemical dependency or drug or alcohol addiction.

- In such other situations as the COBE and the applicant may agree

An applicant who has not previously conferred informally with the Subcommittee on Moral Character [*see § 70.18[2]*] may do so before deciding to enter into an Abeyance Agreement [Cal. Rules Regulating Admission, Rule X, § 4(b)].

The Abeyance Agreement must be in writing and must specify the period and conditions of abeyance. A copy of the agreement must be provided to the applicant [Cal. Rules Regulating Admission, Rule X, § 4(c)].

[4] Review by State Bar Court

[a] Application for Hearing

An applicant (Cal. State B. Rules Proc., Rule 2.06) who receives an adverse moral character determination may appeal that determination to the State Bar Court Hearing Department. All proceedings before the State Bar Court regarding moral character are confidential unless confidentiality is waived, in writing, by the applicant [*Bus. & Prof. Code § 6060.2*; *Cal. Rules of Court, Rule 9.15(c)*; Cal. State B. Rules Proc., Rule 21; *In the Matter of Applicant A (1995) 3 Cal. State Bar Ct. Rptr. 318]* .

An applicant may initiate this review by filing an application for hearing,accompanied by the specified filing fee and a copy of the notice of the adverse moral character determination, with the clerk of the State Bar Court [Cal. State B. Rules Proc., Rule 681; Cal. Rules Regulating Admission, Rule X, § 5(a); *see § 70.62*]. The application for hearing must be filedwith the clerk of the State Bar court within 60 days after service of the final determination [Cal. State B. Rules Proc., Rule 681; Cal. Rules Regulating Admission, Rule X, § 5(a)].

A copy of the application for hearing must be served on the San Francisco offices of the COBE and the Office of Chief Trial Counsel [Cal. Rules Regulating Admission, Rule X, § 5(b)]. Proof of such service must be filed with the application [Cal. State B. Rules Proc., Rule 681]. On receipt of the copy, the COBE transmits all files and records of the application inquiry and analysis to the Office of Chief Trial Counsel [Cal. Rules Regulating Admission, Rule X, § 5(b)].

[b] Response

Any response to the application for hearing must be filed within 120 days of service of the application, or within the time period granted by the State Bar Court for good cause. The response must include a statement of the grounds on which the application is opposed [Cal. State B. Rules Proc., Rule 682].

[c] Hearing Procedures

In general, the hearing on the appeal before the State Bar Court Hearing Department is conducted according to the Rules of Procedure of the State Bar Court [Cal. Rules Regulating Admission, Rule X, § 5(b); *see* Cal. State B. Rules Proc., Rules 680-687]. However, the following rules do not apply to a moral character proceeding [Cal. State B. Rules Proc., Rule 687]:

- Rules which by their terms apply only to disciplinary proceedings or to other specific proceedings;
- Rules relating to abatement (Cal. State B. Rules Proc., Rules 116-118);
- Rules relating to default and the obligation to appear at trial (Cal. State B. Rules Proc., Rules 200-210); and
- Rules on the admission of certain evidence (Cal. State B. Rules Proc., Rules 215-217).

For discussion of the State Bar Rules of Procedure in the context of disciplinary proceedings, see Ch. 71, *Attorney*

Discipline .

For discussion of availability of review before the Review Department of the State Bar Court, see *§ 70.18[7]*.

For discussion of the availability of review before the California Supreme Court in matters of attorney admission, see *§ 70.20*.

[d] Abatement of Proceeding

On the motion of any party, or on the State Bar Court's motion after notice to the parties, the Court may order the abatement of the appeal proceedings for such time and on such terms as it deems proper.Abatement stays the proceedings in the State Bar Court and tolls all time limitations in those proceedings except that on motion, and for good cause shown, the Court may order perpetuation of evidence. Abatement does not toll or extend the time limitation set forth in Rule IX of the Rules Regulating Admission to Practice Law in California. Abatement is not intended to be a substitute for the program of abeyance agreements administered by the COBE under the Rules Regulating Admission to Practice Law (*see § 70.18[3]*), nor may a proceeding be abated or continued to allow a party to undertake or pass the California Bar Examination before a determination of the merits of the proceeding. Other forms of relief, such as trial continuances and the withdrawal of an application, are preferred to abatement and must be granted instead of abatement unless the State Bar Court determines that no other remedy is adequate to address the issues raised by the party seeking abatement [Cal. State B. Rules Proc., Rule 683(a)].

In determining a motion for abatement, the State Bar Court may consider any relevant factor, including any of the following [Cal. State B. Rules Proc., Rule 683(b)]:

- Any prejudice to a party that may result if the proceeding is abated.
- Any prejudice to a party that may result if the proceeding is not abated.
- The extent to which the proceeding would probably be delayed by awaiting the outcome of any related proceeding.
- The extent to which the proceeding would probably be expedited or aided in the determination of a material issue by awaiting evidence to be adduced in any related proceeding or by awaiting the outcome of any related proceeding.
- The extent to which evidence may be unavailable in the State Bar Court proceeding because of any delay occasioned by withholding further action.
- The extent to which parties, witnesses, or documents may be unavailable or unable to participate in the State Bar Court proceeding for reasons beyond the parties' control.

A "related proceeding" is any civil, criminal, administrative, or licensing proceeding involving conduct by the applicant that is or is likely to be an issue in the proceeding before the State Bar Court [Cal. State B. Rules Proc., Rule 683(c)].

Review of a hearing judge's ruling on a motion for abatement may be soughtby a petition for interlocutory review [Cal. State B. Rules Proc., Rules 300, 683(d); *see Ch. 71, Attorney Discipline, § 71.121[4]*].

[5] Burden of Proof Regarding Moral Character

In the context of proceedings before the State Bar Court to determine the applicant's moral character, the applicant has

the burden of provingthat he or she has a good moral character [Cal. Rules Regulating Admission, Rule X, § 1]. Pursuant to this rule, the applicant must initially furnish enough evidence of good moral character to establish a prima facie case. The COBE then has the opportunity to rebut that showing with evidence of bad character. If the COBE is unable to rebut the applicant's prima facie case, then the applicant has carried his or her burden of proof. If the COBE presents sufficient evidence to rebut the prima facie case, then the applicant must introduce further evidence of good moral character, or evidence of rehabilitation since the bad character or misconduct which has been established [*In re Menna (1995) 11 Cal. 4th 975, 989-990, 47 Cal. Rptr. 2d 2, 905 P.2d 944]* , or discredit the COBE's evidence [*Lubetzky v. State Bar (1991) 54 Cal. 3d 308, 312, 285 Cal. Rptr. 268, 815 P.2d 341* (applicant certified as qualified for admission on Court's finding that State Bar's evidence failed to rebut applicant's prima facie case)].

[6] Withdrawal of Application During Moral Character Proceeding

An applicant may withdraw his or her Moral Character Application at any time before being notified that a determination cannot be made because of the need for further inquiry and analysis. After receipt of such a notice, an applicant may only withdraw his or her application with the COBE's consent [Cal. Rules Regulating Admission, Rule X, § 7(a)].

An applicant may move to dismiss his or her application for hearing before the State Bar Court to appeal the COBE's adverse determination [Cal. State B. Rules Proc., Rule 262(e)].

[7] Review by Review Department of State Bar Court

If either the applicant or the COBE is dissatisfied with the moral character determination of the Hearing Department of the State Bar Court, the applicant or COBE may request review by the Review Department of the State Bar Court. The procedure for requesting review is the same as that for requesting review of any decision of a hearing judge that fully disposes of an entire proceeding [*see* Cal. State B. Rules Proc., Rule 301 et seq.; *see also Ch. 71, Attorney Discipline, § 71.121[5]*].

[8] Reapplication After Adverse Moral Character Determination

An applicant who has received an adverse moral character determination may file another Moral Character Application after the expiration of two years from the date of the State Bar Court or COBE's final determination, or such shorter or longer period as may have been set by the COBE, for good cause shown, at the time of the denial [Cal. Rules Regulating Admission, Rule X, § 6].

[9] Period of Validity for Positive Moral Character Determination

An initial positive moral character determination is valid for 24 months from the date of the positive determination. If during the validity period,an applicant satisfies all other requirements for admission to practice law, the COBE must then certify the applicant for admission to practice [Cal. Rules Regulating Admission, Rule X, § 9(a)].

If the applicant does not satisfy the other requirements for admission to practice (for example, because he or she fails to pass the bar examination), Cal. Rules Regulating Admission, Rule X, § 9, sets forth a procedure for extending the validity period for the positive moral character determination.

[10] Suspension and Nullification of Positive Moral Character Determination

The COBE may suspend a positive moral character determination if, after having made that determination, it receives information reasonably calling the applicant's character into question. The applicant will be notified by mail addressed to his or her last known address. The notification must specify the grounds for suspension [Cal. Rules Regulating Admission, Rule X, § 8].

Any further inquiry and analysis that is required must be conducted and a written report must be considered by the COBE within 60 days after notice to the applicant that the positive determination has been suspended. If the COBE determines that the positive determination of moral character should be nullified, the applicant must be notified and be accorded the rights of conference appeal discussed above. If the COBE determines to reinstate its previous positive determination, the period of validity commences from the date of the original positive determination [Cal. Rules Regulating Admission, Rule X, § 8].

[11] Effect of Time Limits

Time limits in Cal. Rules Regulating Admission, Rule X, relating to proceedings involving moral character, are solely to expedite the processing of applications, and those time limits are not jurisdictional. The time limits may be extended for good cause by the COBE after notice to the applicant [Cal. Rules Regulating Admission, Rule X, § 10].

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Chapter 70 ATTORNEY ADMISSION
PART II. LEGAL BACKGROUND

6-70 California Forms of Pleading and Practice--Annotated § 70.19

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§ 70.19 Violation of Examination Rules

[1] Procedure for Inadvertent and Nonintentional Violations

If the COBE ascertains that an applicant has inadvertently and nonintentionallyengaged in a violation of COBE examination practices, the COBE may impose reasonable sanctions, which can include the deduction of the applicant's total score on the examination. The sanctions may be imposed only after notice to the applicant. The record of sanctions imposed for inadvertent or nonintentional misconduct may be maintained by theCOBE for statistical purposes, but it will not be construed as adversely reflecting on the applicant's moral character [Cal. Rules Regulating Admission, Rule XII, § 1].

The applicant who has been notified that sanctions will be imposed may request that imposition of sanctions be reconsidered. On such a request, the COBE or a designated subcommittee may remove the sanctions [Cal. Rules Regulating Admission, Rule XII, § 1].

[2] Procedure for Intentional Violations

[a] Notice of Violation

If the COBE suspects that an applicant has intentionally violated the examination rules, it must conduct an inquiry within 45 days of receipt of information regarding an alleged violation. If, from that inquiry, it appears that intentional misconduct did in fact occur, the COBE will, within 30 days of the conclusion of the inquiry, notify the applicant of the results of its inquiry and inform the applicant that it proposes to give the applicant a total score of zero for the examination, that it proposes to include the record of its inquiry in the applicant's file for consideration when determining whether the applicant has the requisite good moral character, and that the applicant may request a hearing to challenge the COBE's determination that an intentional violation did occur [Cal. Rules Regulating Admission, Rule XII, § 2(b)].

The notification must be sent to the applicant by United States mail, postage prepaid, at the address set forth in the application for admission. The notification is deemed to have been received by the applicant within 5 days after deposit in the mail if the applicant's address is within California, within 10 days after deposit if the applicant's address is outside of California but within the United States, or within 20 days after deposit if the applicant's address is outside the United States [Cal. Rules Regulating Admission, Rule XII, § 2(b)].

[b] Request for Hearing

If an applicant wishes a hearing before the COBE on whether an intentional violation did occur, he or she must file a written request with the COBE at its San Francisco office within 30 days after the notification specified above [Cal. Rules Regulating Admission, Rule XII, § 2(c); *see § 70.60*]. For good cause shown by clear and convincing evidence, the COBE may extend the time within which to file a request for hearing if the request is received by the COBE within 90 days after the notification of its determination that an intentional violation occurred. If the applicant fails to make a timely request for hearing, he or she will be deemed to have consented to the COBE's intended action, which will then be implemented [Cal. Rules Regulating Admission, Rule XII, § 2(c)].

If the applicant does make a timely request for a hearing on the charges, the COBE will schedule a hearing within 90 days of receipt of the request (or within 90 days of permitting a late request) and will promptly notify the applicant of the hearing date and location [Cal. Rules Regulating Admission, Rule XII, § 2(d)].

[c] Conduct of Hearing Regarding Intentional Violations

The COBE hearings concerning intentional violations of examination rules are conducted by a panel composed of three members of the COBE. Both the applicant and the COBE may be represented by counsel. The COBE has the burden of proving by clear and convincing evidence that an intentional violation of examination rules did occur [Cal. Rules Regulating Admission, Rule XII, § 2(d)].

The COBE panel must render its findings and decision within 45 days after the conclusion of the hearing. The decision must be promptly served on the applicant and counsel present at the hearing. In response to the COBE panel's decision, the applicant may file a request for review by the full COBE in accordance with Cal. Rules Regulating Admission, Rule I, § 5 [*see § 70.11[3]*] within 10 days after service of the panel's decision. If no request for review is filed within that period, the COBE panel's decision will become the decision of the COBE [Cal. Rules Regulating Admission, Rule XII, § 2(e)].

If, following the hearing, the applicant is found to have committed an intentional violation of the examination rules, the applicant will be given a total score of zero on the examination and any answers submitted by the applicant that may have been assigned scores before the finding of an intentional violation will be voided. If the applicant thereafter takes and passes the bar examination, the record of the COBE's inquiry and the results of any hearing will be included in the applicant's file for consideration when determining whether the applicant is of good moral character [Cal. Rules Regulating Admission, Rule XII, § 2(a), (f)].

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6-70 California Forms of Pleading and Practice--Annotated § 70.20

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§ 70.20 Supreme Court Review

[1] Petition by Applicant

The decision of the Hearing Department of the State Bar Court, or the decision of the Review Department if review was requested, is binding on the applicant and the COBE, unless the Supreme Court grants a petition for review [Cal. State B. Rules of Proc., Rule 686]. The determination of the State Bar Court regarding the establishment of the requisite good moral character is deemed to be conclusive on both the applicant and COBE, unless the case is appealed and review is grantedby the Supreme Court [*Cal. Rules of Ct., Rule 9.18(c)*; *In re Menna (1995) 11 Cal. 4th 975, 984, 47 Cal. Rptr. 2d 2, 905 P.2d 944]* .

An applicant who has been denied admission by the State Bar Court may petition the Supreme Court to review the determination, in accordance with the procedure established by the Court [*Bus. & Prof. Code § 6066*; *Cal. Rules of Ct., Rule 9.13(d)*]. An applicant must exhaust his or her review within the State Bar Court before a petition for review will be granted by the Supreme Court [*Cal. Rules of Ct., Rule 9.13(e)*].

The applicant must file a verified petition for review, which requests that the Supreme Court exercise its direct and plenary authority over attorney admission matters and grant a hearing in the applicant's case [*Cal. Rules of Ct., Rule 9.13(d)*; Cal. Rules Regulating Admission, Rule I, § 11]. For a form of petition, *see § 70.63*. The State Bar, through the Office of General Counsel, may respond to the petition [*see Cal. Rules of Ct., Rule 9.13(d)*].

If the initial petition is granted, the Court will issue a writ of review, and the parties may more fully brief the issues and state the factual basis of the petition [*see Cal. Rules of Ct., Rule 9.13(d)*]. The matter will be set for oral argument, and the Court will make an independent determination of whether or not the applicant should be admitted to practice [*see Siegel v. Committee of Bar Examiners (1973) 10 Cal. 3d 156, 173, 110 Cal. Rptr. 15, 514 P.2d 967* ; *see also § 70.20[4]*].

If the petition is denied, the only other source of review would be the United States Supreme Court. The United States Supreme Court will invariably defer to state courts in matters of attorney admission that do not involve a federal question [*see, e.g., Martin v. Walton (1961) 368 U.S. 25, 26, 82 S. Ct. 1, 7 L. Ed. 2d 5* (association of local counsel rule was not beyond state action); *see also Willner v. Committee on Character (1963) 373 U.S. 96, 102, 104-105, 83 S. Ct. 1175, 10 L. Ed. 2d 224* (violation of procedural due process as grounds for Supreme Court review)]. Except in rare cases, other avenues of review such as federal civil rights actions or state court damage suits typically have been rejected [*see, e.g., Chaney v. State Bar of California (9th Cir. 1967) 386 F.2d 962, 964-967 , cert. denied, 390 U.S. 1011, 88 S. Ct. 1262, 20 L. Ed. 2d 162 (1968)* (civil rights action); *Greene v. Zank (1984) 158 Cal. App. 3d 497, 506-507, 204 Cal. Rptr. 770* (civil rights action); *Engel v. McCloskey (1979) 92 Cal. App. 3d 870, 881, 155 Cal. Rptr. 284* (damage suit)].

[2] Petition by COBE

The COBE also may petition the California Supreme Court for review of a decision by the State Bar Court in moral character proceedings [*see Cal. Rules of Ct., Rule 9.15(a)*]. The procedures for Supreme Court review of State Bar Court decisions on petition by the COBE are set forth in *Cal. Rules of Ct., Rule 9.15*.

[3] Discretion of Court

[a] Review Not Mandatory

Neither the statute authorizing review of denial of certification, *Bus. & Prof. Code § 6066*, nor the rule of court prescribing the procedure, *Cal. Rules of Ct., Rule 9.13(d)*, require the Supreme Court to review the denial of certification. Granting of review is completely within the discretion of the Court. For the past several years, the Supreme Court's practice has been to grant review of few cases [*see In re Menna (1995) 11 Cal. 4th 975, 984, 47 Cal. Rptr. 2d 2, 905 P.2d 944]* .

[b] Denials Based on Moral Character Grounds

The California Supreme Court will generally refuse review of denial based on moral character grounds unless the applicant convincingly demonstrates that the adverse recommendation was not based on sound premises and valid reasoning [*see, e.g., Lubetzky v. State Bar (1991) 54 Cal. 3d 308, 312, 285 Cal. Rptr. 268, 815 P.2d 341* ; *Hightower v. State Bar (1983) 34 Cal. 3d 150, 156-158, 193 Cal. Rptr. 153, 666 P.2d 10* (in both cases applicants met burden of showing good moral character notwithstanding contrary finding by COBE)], that errors in procedure approaching violations of due process were made [*see, e.g., Martin B. v. Committee of Bar Examiners (1983) 33 Cal. 3d 717, 721-723, 190 Cal. Rptr. 610, 661 P.2d 160* (granting review of denial of certification; applicant denied fair and reasonable opportunity to defend against 10-year-old criminal charge because of lack of transcript of prior testimony in criminal proceeding and unavailability of defense witnesses)], or that the weight of the evidence does not support the determination of the Review Department [*see In re Menna (1995) 11 Cal. 4th 975, 984, n.2, 47 Cal. Rptr. 2d 2, 905 P.2d 944]* .

[c] Denials Based on Other Grounds

If the applicant who seeks review of an action of the COBE in a matter not related to moral character can show that he or she was denied passage of the bar examination through fraud, imposition, or coercion, or was prevented from having a fair opportunity to take the examination, the Supreme Court may examine the petition [*Salot v. State Bar (1935) 3 Cal. 2d 615, 617-618, 45 P.2d 203* (no error in grading of essay or use of "yes-no" section of examination); *see Staley v. State Bar (1941) 17 Cal. 2d 119, 121, 109 P.2d 667* (petition alleged COBE reduced grade below passing; Supreme Court refused to regrade examination)]. The Court may also decide to entertain a petition to settle a recurring question that may affect many applicants [*see Bib'le v. Committee of Bar Examiners (1980) 26 Cal. 3d 548, 554-556, 162 Cal.*

Rptr. 426, 606 P.2d 733 , *cert. denied,* *449 U.S. 860, 101 S. Ct. 163, 66 L. Ed. 2d 77* (considering issue of whether the First-Year Law Students' Examination was a valid requirement)].

[4] Scope and Standard of Review

In reviewing the findings of the State Bar Court, the California Supreme Court will accord great weight to those findings, but the Court is not bound by them [*In re Menna (1995) 11 Cal. 4th 975, 985, 47 Cal. Rptr. 2d 2, 905 P.2d 944* ; *Pacheco v. State Bar (1987) 43 Cal. 3d 1041, 1047, 239 Cal. Rptr. 897, 741 P.2d 1138* ; *Siegel v. Committee of Bar Examiners (1973) 10 Cal. 3d 156, 173, 110 Cal. Rptr. 15, 514 P.2d 967]* . Instead, the Court independently examines and weighs the evidence and passes on its sufficiency [*In re Menna (1995) 11 Cal. 4th 975, 985, 47 Cal. Rptr. 2d 2, 905 P.2d 944* ; *Lubetzky v. State Bar (1991) 54 Cal. 3d 308, 312, 285 Cal. Rptr. 268, 815 P.2d 341* ; *Pacheco v. State Bar (1987) 43 Cal. 3d 1041, 1047, 239 Cal. Rptr. 897, 741 P.2d 1138* ; *Hall v. Committee of Bar Examiners (1979) 25 Cal. 3d 730, 734, 159 Cal. Rptr. 848, 602 P.2d 768]* . The Supreme Court, however, will accord special deference to the State Bar Court's decision when it rests primarily on testimonial evidence, particularly when that evidence is in conflict, since the State Bar Court is in a better position to observe the demeanor of the witnesses and the character of their testimony [*In re Menna (1995) 11 Cal. 4th 975, 985, 47 Cal. Rptr. 2d 2, 905 P.2d 944* ; *Siegel v. Committee of Bar Examiners (1973) 10 Cal. 3d 156, 173, 110 Cal. Rptr. 15, 514 P.2d 967]* . If there has been a previous civil or criminal trial, the findings of the trial court are accorded the greatest weight [*Martin B. v. Committee of Bar Examiners (1983) 33 Cal. 3d 717, 723, 190 Cal. Rptr. 610, 661 P.2d 160]* .

In re Menna (1995) 11 Cal. 4th 975, 47 Cal. Rptr. 2d 2, 905 P.2d 944 was the first admissions case to reach the Supreme Court under the new professional State Bar Court system, created in 1988. Although the Supreme Court reaffirmed the majority of its previous positions in admissions cases, it addressed for the first time the standard of proof applicable. The Supreme Court articulated its consideration of the standard of proof necessary to establish the rehabilitation of that applicant, after serious misconduct has been proven, as requiring "clear and convincing" evidence [*In re Menna (1995) 11 Cal. 4th 975, 986, 47 Cal. Rptr. 2d 2, 905 P.2d 944]* . Although the Supreme Court did not explicitly state that the appropriate standard for the prima facie case of the applicant and the rebuttal case of the COBE was the same, the inference can fairly be drawn that the same standard applies.

The party seeking review bears the burden of showing that the State Bar Court's findings are not supported by the evidence or that the decision is erroneous or unlawful; however, all reasonable doubts are normally resolved in favor of the applicant [*Siegel v. Committee of Bar Examiners (1973) 10 Cal. 3d 156, 173, 110 Cal. Rptr. 15, 514 P.2d 967]* .

The sole exception to the rule that all reasonable doubts are resolved in favor of the applicant arises when the applicant has been an attorney in another state and was disbarred, and now seeks admission in California.In the case *In re Menna (1995) 11 Cal. 4th 975, 47 Cal. Rptr. 2d 2, 905 P.2d 944* , the Supreme Court held that such an applicant stands in "essentially identical circumstances" as a disbarred California attorney seeking reinstatement [*In re Menna (1995) 11 Cal. 4th 975, 986, 47 Cal. Rptr. 2d 2, 905 P.2d 944]* . The Court had previously held in *Calaway v. State Bar (1986) 41 Cal. 3d 743, 745-746, 225 Cal. Rptr. 267, 716 P. 2d 371* , that the "person seeking reinstatement after disbarment is required to adduce stronger proof of his present honesty and integrity than one seeking admission for the first time whose character has never been in question. In other words, although an application for reinstatement is treated by this court as a proceeding for admission, the proof presented must be sufficient to overcome our prior adverse judgment ... " In *Menna*, the Supreme Court reaffirmed that position and held that such an applicant is not entitled to the benefit of the doubt if equally reasonable inferences may be drawn from a proven fact [*In re Menna (1995) 11 Cal. 4th 975, 986, 47 Cal. Rptr. 2d 2, 905 P.2d 944]* . In an earlier dissenting opinion, Chief Justice Lucas had observed that the amount of evidence of rehabilitation required to justify admission varies according to the seriousness of the misconduct at issue [*see* *Kwasnik v. State Bar (1990) 50 Cal. 3d 1061, 1086, 269 Cal. Rptr. 749, 791 P. 2d 319]* . In *Menna*, the Court further held that if the previous misconduct was sufficiently egregious, it will require "a truly compelling demonstration of moral rehabilitation" and overwhelming proof of reform [*In re Menna (1995) 11 Cal. 4th 975, 989, 47 Cal. Rptr. 2d 2, 905 P.2d 944]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsPractice QualificationsGovernmentsCourtsAuthority to AdjudicateTortsTransportation TortsGeneral Overview

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6-70 California Forms of Pleading and Practice--Annotated § 70.21

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§ 70.21 Admission to Practice

On certification by the COBE that an applicant has fulfilled the requirements for admission to practice law, the California Supreme Court may admit such applicant as an attorney at law in all California courts and may direct an order to be entered on its records to that effect. A certificate of admission is thereupon given to the applicant by the clerk of the Court [*Bus. & Prof. Code § 6064*].

Legal Topics:

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

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6-70 California Forms of Pleading and Practice--Annotated § 70.22

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§ 70.22 Oath

Every person on admission to practice must take an oath to support the United State Constitution and California Constitution, and faithfully to discharge the duties of any attorney at law to the best of his or her knowledge and ability. A certificate of the oath is endorsed on the license [*Bus. & Prof. Code § 6067*].

Legal Topics:

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

California Forms of Pleading and Practice--Annotated

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6-70 California Forms of Pleading and Practice--Annotated § 70.23

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§ 70.23 General Duties of Attorney

Once admitted to practice, an attorney assumes a number of different legal and ethical responsibilities to his or her clients, to the judicial system,and to society in general. The general duties of an attorney are outlined in *Bus. & Prof. Code § 6068*, which provides that a California attorney must perform as follows:

- Support the Constitution and laws of the United States and California [*Bus. & Prof. Code § 6068(a)*; *see Bus. & Prof. Code §§ 6064.1* (person who advocates overthrow of government by force or violence may not be admitted to practice), 6067 (attorney must take oath to support constitution), 6106.1 (attorney who advocates overthrow of government by force may be suspended or disbarred); *see also §§ 70.15[i], 70.22*];

- Maintain the respect due to courts and judicial officers [*Bus. & Prof. Code § 6068(b)*];

- Counsel or maintain only legal and just actions [*Bus. & Prof. Code § 6068(c)*; *see Cal. Rules Prof. Conduct, Rules 3-200, 3-210, 3-700(B)(1), (C)(1)(a)-(c), 5-110*];

- Use only those means that are consistent with the truth in representing one's clients, and refrain from misleading the judge or any judicial officer by any artifice or false statement of fact or law [*Bus. & Prof. Code § 6068(d)*; *see Cal. Rules Prof. Conduct, Rule 5-200*];

- Maintain inviolate the confidence and, at every peril to the attorney, preserve the secrets of the client [*Bus. & Prof. Code § 6068(e)*];

- Advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged [*Bus. & Prof. Code § 6068(f)*];

- Avoid beginning or continuing an action or proceeding from any corrupt motive of passion or interest [*Bus. & Prof. Code § 6068(g)*];

- Never reject the cause of the defenseless or the oppressed for any personal consideration [*Bus. & Prof. Code § 6068(h)*];

- Cooperate and participate in any State Bar investigation or other State Bar proceeding pending against the attorney (although the attorney may exercise any privilege guaranteed by *U.S. Const., amend. V*, and any other constitutional or statutory privileges); the attorney need not cooperate with a request that requires the attorney to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable amount of time in light of the time constraints of the attorney's practice [*Bus. & Prof. Code § 6068(i)*];

- Maintain information on the membership records of the California bar as required by *Bus. & Prof. Code § 6002.1* [*Bus. & Prof. Code § 6068(j)*; *see § 70.25*];

- Comply with all conditions attached to any disciplinary probation [*Bus. & Prof. Code § 6068(k)*];

- Keep all agreements made in lieu of disciplinary prosecution with the agency charged with attorney discipline [*Bus. & Prof. Code § 6068(l)*];

- Respond promptly to reasonable status inquiries of clients and keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services [*Bus. & Prof. Code § 6068(m)*];

- Provide copies to the client of certain documents under time limits and as prescribed in a rule of professional conduct to be adopted by the State Bar [*Bus. & Prof. Code § 6068(n)*]; and

- Report actions or sanctions taken against the attorney as required by *Bus. & Prof. Code § 6068(o)* [*Bus. & Prof. Code § 6068(o)*; *see § 70.26*].

In addition, attorneys have numerous other duties under specific statutes and rules. Many of these are set forth in the State Bar Act (*Bus. & Prof. Code § 6000 et seq.*) and in the California Rules of Professional Conduct. Among the most important of these duties are the following:

- An attorney must act competently and exercise reasonable skill and diligence in performing legal services [*Cal. Rules Prof. Conduct, Rule 3-110*].

- An attorney must avoid willful breaches of the California Rules of Professional Conduct, and acts of moral turpitude,dishonesty, or corruption, whether criminal or not [*Bus. & Prof. Code §§ 6077, 6101, 6102, 6106*].

- Except when justified in good faith, an attorney must obey court orders connected with the practice of law [*see Bus. & Prof. Code § 6103*]. An attorney's duty to obey a court order is not dependent upon the correctness of that order [*Espinoza v. Classic Pizza, Inc. (2003) 114 Cal. App. 4th 968, 976, 8 Cal. Rptr. 3d 381]* .

- An attorney must not withdraw from representation of a client until the attorney "has taken reasonable steps to avoid foreseeable prejudice to the rights of the client." In some cases, permission of

the court may be required [*see Cal. Rules Prof. Conduct, Rule 3-700*].

- An attorney must observe fiduciary duties of loyalty and fair dealing toward the client [*see, e.g., Cal. Rules Prof. Conduct, Rules 3-300, 3-310, 4-300*].

- An attorney must pay bar dues in a timely manner [*see Bus. & Prof. Code § 6143*; *see also § 70.24*].

For a more detailed discussion of attorney's duties under the State Bar Act andRules of Professional Conduct, see Ch. 72, *Attorney Practice and Ethics* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsPractice QualificationsLegal EthicsClient RelationsConfidentiality of InformationLegal EthicsClient RelationsEffective RepresentationLegal EthicsProfessional ConductIllegal ConductLegal EthicsPublic Service

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§ 70.24 Payment of Bar Dues

Bar dues are fixed by the Board of Governors of the State Bar in accordance with the requirements of the State Bar Act [*see Bus. & Prof. Code § 6140*]. The Board may increase the annual membership fee by an additional amount not exceeding $10, which may be used only for the costs of upgrading the Board's information technology system, including purchasing and maintenance costs and computer hardware and software [*Bus. & Prof. Code § 6140.35(a)*]. The Board also may increase the annual membership fee by an additional amount not exceeding $10 that may be used only for financing, constructing, purchasing, or leasing facilities to house State Bar staff and any major capital improvement projects related to facilities owned by the State Bar [*Bus. & Prof. Code § 6140.3(a)*].

Reduced dues are charged to inactive members [*see Bus. & Prof. Code § 6141*]. A waiver of dues may be requested based on proof of financial hardship [*Bus. & Prof. Code § 6141.1*].

Dues may include costs assessed against a publicly reproved or suspended member [*Bus. & Prof. Code § 6140.7*]. The Board also may charge active members additional assessments for any of the following [*Bus. & Prof. Code §§ 6140.55, 6140.6, 6140.9*]:

- The Client Security Fund.
- The State Bar disciplinary system.
- Discipline augmentation.
- Support of the State Bar Discipline Monitor and State Bar independent expert.

The State Bar is constitutionally prohibited from using the mandatory dues of all members to fund activities of an

ideological nature that fall outside of activities germane to the State Bar's goals of regulating the legal profession and improving the quality of legal services [*Keller v. State Bar of California (1990) 496 U.S. 1, 13-14, 110 S. Ct. 2228, 110 L. Ed. 2d. 1]* . A member may deduct five dollars from the member's annual dues if the member elects not to support lobbying and related activities by the State Bar outside the parameters established by the Supreme Court in *Keller v. State Bar of California* [*Bus. & Prof. Code § 6140.05*].

Dues are assessed annually by a statement sent to the member's last known address of record [*see Bus. & Prof. Code § 6002.1* (member's duty to inform State Bar of current address), discussed in *§ 70.25[1]*]. After two months' written notice of delinquency, the attorney is suspended from State Bar membership [*Bus. & Prof. Code § 6143*]. Practice while suspended, even for nonpayment of dues, may subject the attorney to further discipline or to criminal liability [*Bus. & Prof. Code §§ 6125, 6126*; *see Bus. & Prof. Code § 6103* (violation of court order may constitute grounds for suspension or disbarment)]. Following suspension for nonpayment of dues, an attorney may be reinstated after payment of the accrued dues and a penalty as may be imposed by the Board of Governors not exceeding twice the delinquent amount [*Bus. & Prof. Code § 6143*].

Legal Topics:

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

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6-70 California Forms of Pleading and Practice--Annotated § 70.25

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§ 70.25 Duty to Maintain Information With State Bar

[1] Address and Phone Number

Every member of the State Bar must maintain his or her current office address and telephone number in the official membership records of the State Bar [*Bus. & Prof. Code § 6002.1(a)(1)*]. If the member does not maintain an office, he or she must provide an address to be used by the State Bar for State Bar purposes or for purposes of the agency charged with attorney discipline [*Bus. & Prof. Code § 6002.1(a)(1)*]. Within 30 days after any change of address or telephone number, the member must file a change of address or telephone number with the membership records office of the State Bar [*Bus. & Prof. Code § 6002.1(a)*]. Former members who have been ordered by the California Supreme Court to comply with *Cal. Rules of Ct., Rule 9.20* (setting forth duties of disbarred, resigned, or suspended attorneys) must maintain their current address with the State Bar's membership records office and must report changes of address within 10 days, until the member is no longer subject to the Court's order [*Bus. & Prof. Code § 6002.1(b)*]. For discussion of *Cal. Rules of Ct., Rule 9.20*, see Ch. 71, *Attorney Discipline* .

The addresses on file at the State Bar membership records office are available to the public, and used for the purpose of providing notice by mail of proceedings conducted under the State Bar Act, as well as for sending membership fee bills and other State Bar information [*see Bus. & Prof. Code § 6002.1(c)*]. Attorneys who fail to provide current and accurate address information on State Bar official membership records risk the possibility that disciplinary proceedings against them will take place without their knowledge [*see Bowles v. State Bar (1989) 48 Cal. 3d 100, 107-108, 255 Cal. Rptr. 846, 768 P.2d 65* (rejecting due process claim by attorney that he was improperly denied opportunity to be heard); *see also Evans v. Department of Motor Vehicles (1994) 21 Cal. App. 4th 958, 970, 25 Cal. Rptr. 2d 460* (actual notice not required in attorney disciplinary proceedings even if failure to receive notice is not attorney's fault)]. For discussion of the various notice requirements in State Bar proceedings, see Ch. 71, *Attorney Discipline* .

[2] Specialties

State Bar members must maintain on the official records of the State Bar all specialties in which the member is certified [*Bus. & Prof. Code § 6002.1(a)(2)*]. A member must notify the membership records office of the State Bar of any change in this information on or before the first day of February of each year [*Bus. & Prof. Code § 6002.1(a)*].

[3] Jurisdictions Where Admitted to Practice

All State Bar members must maintain on the State Bar membership records any jurisdictions other than California in which the member is admitted to practice law, and the dates of his or her admission [*Bus. & Prof. Code § 6002.1(a)(3)*]. On or before February 1 of each year, the member must notify the State Bar membership office of any change in this information [*Bus. & Prof. Code § 6002.1(a)*].

[4] Discipline Imposed in Other Jurisdictions

State Bar members must maintain on the official records of the State Bar the jurisdiction, nature, and date of any discipline imposed by another jurisdiction, including the terms and conditions of any probation imposed and, if suspended or disbarred in another jurisdiction, the date of any reinstatement in that jurisdiction [*Bus. & Prof. Code § 6002.1(a)(4)*; *see also Bus. & Prof. Code § 6068(o)(6)* (member's duty to report imposition of discipline by professional disciplinary agency or licensing board in California or elsewhere), *discussed in § 70.26*]. A State Bar member must notify the membership records office of the State Bar of any change in this information within 30 days of the change [*Bus. & Prof. Code § 6002.1(a)*].

[5] Other Information

All State Bar members must maintain on the State Bar membership records any information that may be required by agreement with or conditions of probation imposed by the agency charged with attorney discipline (that is, the State Bar) [*Bus. & Prof. Code § 6002.1(a)(5)*]. The State Bar may not make that information available to the general public unless that information is required to be made so available by a condition of probation. That information is available to the State Bar, the Supreme Court, or the agency charged with attorney discipline [*Bus. & Prof. Code § 6002.1(d)*]. Within 30 days after any change in such information, the member must notify the State Bar membership records office of the change [*Bus. & Prof. Code § 6002.1(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsPractice QualificationsLegal EthicsSanctionsGeneral Overview

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§ 70.26 Duty to Report Actions or Sanctions Taken Against Attorney

Every member of the State Bar must inform the agency charged with attorney discipline (that is, the State Bar) when a client, court, or disciplinary authority has taken certain actions against the member, including the following [*Bus. & Prof. Code § 6068(o)*]:

- The filing of three or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful conduct committed in a professional capacity [*Bus. & Prof. Code § 6068(o)(1)*].

- The entry of judgment against the attorney in any civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity [*Bus. & Prof. Code § 6068(o)(2)*].

- The imposition of any judicial sanctions against the attorney (excluding sanctions for failure to make discovery or monetary sanctions of less than $1,000) [*Bus. & Prof. Code § 6068(o)(3)*].

- The bringing of an indictment or information charging a felony against the attorney [*Bus. & Prof. Code § 6068(o)(4)*].

- The conviction of the attorney (including any verdict of guilty or plea of guilty or no contest) of (1) any felony; (2) any misdemeanor committed in the course of the practice of law; (3) any misdemeanor committed in any manner such that a client of the attorney was the victim; (4) any misdemeanor in which a necessary element (as determined by the statutory or common law definition of the misdemeanor) involvesimproper conduct of an attorney, including dishonesty or other moral turpitude; or (5) any attempt, conspiracy, or solicitation of another to commit a felony or any such misdemeanor [*Bus. & Prof. Code § 6068(o)(5)*].

- The imposition of discipline against the attorney by any professional or occupational disciplinary agency or licensing board, whether in California or elsewhere [*Bus. & Prof. Code § 6068(o)(6)*].

- Reversal of judgment in a proceeding based wholly or partially on misconduct, grossly incompetent representation, or willful misrepresentation by the attorney [*Bus. & Prof. Code § 6068(o)(7)*].

The report must be in writing and must be made within 30 days of the time the attorney has knowledge of the action taken against him or her [*Bus. & Prof. Code § 6068(o)*]. The State Bar is empowered to develop a prescribed form for making the report, and may require usage of that form by rule or regulation [*see Bus. & Prof. Code § 6068(o)(9)*]. An attorney must report any sanction imposed on the attorney that meets the threshold of *Bus. & Prof. Code § 6068(o)(3)*, even if the sanction is under current appeal by the attorney [*In the Matter of Respondent Y (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 862]* .

If the action is against a law firm or corporation, and the attorney was a partner or shareholder in the firm or corporation at the time of the conduct complained of, the attorney has a duty to report the action just as if the action were against the attorney individually [*see Bus. & Prof. Code § 6068(o)(8)*]. If the attorney knows that the matter has already been reported by the law firm or corporation, however, he or she has no reporting duty [*see Bus. & Prof. Code § 6068(o)(8)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 70.27 Uninsured Attorney's Duty to Report Settlement, Judgment, or Arbitration

An attorney who does not have professional liability insurance is required under *Bus. & Prof. Code § 6086.8(c)* to send a complete written report to the State Bar as to any settlement, judgment, or arbitration award on a claim or action against the attorney in any civil action in which fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity was found or admitted [*Bus. & Prof. Code § 6086.8(b), (c)*; *see also Bus. & Prof. Code § 6068(o)(2)*]. The report must be made within 30 days after the written settlement agreement has been reduced to writing and signed by all parties to the agreement, or within 30 days after service of the arbitration award on the parties [*Bus. & Prof. Code § 6086.8(b), (c)*]. If the attorney does have professional liability insurance, the insurer, rather than the attorney, must send the report [*Bus. & Prof. Code § 6086.8(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsPractice QualificationsInsurance LawMalpractice InsuranceAttorneysTortsMalpractice & Professional LiabilityAttorneys

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[Reserved]

§§ 70.28[Reserved]

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§ 70.40 California Constitution

State Bar of California; membership in State Bar. *Cal. Const., art. VI, § 9*

Legal Topics:

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

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6-70 California Forms of Pleading and Practice--Annotated § 70.41

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§ 70.41 State Statutes

Noncompliance with child or family support order is ground for nonissuance or nonrenewal of professional license. *Bus. & Prof. Code §§ 31, 6143.5*; *Welf. & Inst. Code § 11350.6*

State Bar Act. *Bus. & Prof. Code § 6000 et seq.*

Admission to practice law; examination. *Bus. & Prof. Code §§ 6060-6067*

Duties of attorney. *Bus. & Prof. Code § 6068*; *see also Bus. & Prof. Code §§ 6002.1, 6086.8*

Unlawful practice of law. *Bus. & Prof. Code §§ 6125-6133*

Dues, costs and penalties. *Bus. & Prof. Code § 6140 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsPractice QualificationsLegal EthicsUnauthorized Practice of Law

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§ 70.42 Administrative Regulations

Rules of Procedure of the State Bar of California, Rules 680 et seq.

Meetings, sessions, and records of State Bar's board of governors. Rules Governing Open Meetings, Closed Sessions and Records of the Board of Governors of the State Bar of California, Articles 1-6

Rules Regulating Admission. Cal. Rules Regulating Admission, Rules I-XX

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§ 70.43 California Rules of Court

Petition for Supreme Court review of State Bar or COBE decisions. *Cal. Rules of Ct., Rule 9.13*

Petition by COBE for Supreme Court review of State Bar Court decision in moral character proceedings. *Cal. Rules of Ct., Rule 9.15*

Admission of registered legal services attorneys. *Cal. Rules of Ct., Rule 9.45*

Admission of registered in-house counsel. *Cal. Rules of Ct., Rule 9.46*

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§ 70.44 Decisions

[1] Admission to Practice

Supreme Court of California has inherent power to regulate practice of law in California, including power to admit and discipline attorneys. *In re Attorney Discipline System; Requests of the Governor and the State Bar of California (1998) 19 Cal. 4th 582, 592-593, 79 Cal. Rptr. 2d 836, 967 P.2d 49*

Supreme Court may admit applicant as attorney at law who has fulfilled requirementsfor admission to practice law. *In re Menna (1995) 11 Cal. 4th 975, 983, 47 Cal. Rptr. 2d 2, 905 P.2d 944*

Former Cal. Rules of Ct., Rule 983 (now see *Rule 9.40*), by limiting appearances *pro hac vice* to non-resident attorneys, and by thus excluding attorneys who are residents of California and are admitted to practice in foreign jurisdictions but not in California, is not an unconstitutional violation of U.S. *Const., art. IV, § 2* (privileges and immunities clause) or rights protected under *U.S. Const., amend. I* or *XIV*. *Paciulan v. George (9th Cir. 2000) 229 F.3d 1226, 1231*

California Bar Examination does not violate Due Process and *Equal Protection clauses* of *U.S. Const., amend. XIV*, Privilege and Immunities Clause of U.S. *Const., art. IV, § 2*, or Commerce Clause of U.S. *Const., art. I, § 8*. *Giannini v. Real (9th Cir. 1990) 911 F.2d 354, 356-359*

Requirement in California federal district courts that member be active member of California State Bar does not violate Due Process clause of *U.S. Const., amend. V* or Full Faith and Credit Clause of U.S. *Const., art. IV, § 1*. *Giannini v. Real (9th Cir. 1990) 911 F.2d 354, 359-360*

Bus. & Prof. Code § 6060(g), requiring students enrolled at school not accredited by California Committee of Bar Examiners to pass First-Year Law Students' Examination (FYLSE) before receiving credit for further study does not

violate *Equal Protection clause* of *U.S. Const., amend. XIV*; *U.S. Const., amend. XI*, barred action against State Bar's Board of Governors and Committee of Bar Examiners because state did not consent to being sued. *Lupert v. California State Bar (9th Cir. 1985) 761 F.2d 1325, 1327-1328 , cert. denied, 474 U.S. 916* (statute challenged under U.S. *Const., art. I, § 10* (powers prohibited to states) and *U.S. Const., amends. I, V, IX, XIII, XIV*; court treated challenge as on equal protection grounds)

Practice of law is not matter of grace but of right for one who is qualified by learning and moral character. *Raffaelli v. Committee of Bar Examiners (1972) 7 Cal. 3d 288, 300, 101 Cal. Rptr. 896, 496 P.2d 1264*

Admission to practice of law is judicial function within inherent power of court, but is subject to regulation by Legislature by reasonable restrictions that do not materially impair court's functions. *Brydonjack v. State Bar (1929) 208 Cal. 439, 444, 281 P. 1018*

Admission to practice law is attainable on motion to Supreme Court by qualified applicant denied recommendation by *State Bar. Brydonjack v. State Bar (1929) 208 Cal. 439, 447, 281 P. 1018*

Attorney's complaint for damages for delayed admission to practice does not state cause of action against Committee of Bar Examiners, committee staff members, or State Bar on any of asserted theories: failure to discharge statutory duty, breach of contract, negligence, violation of constitutional rights, blackmail, coercion, and intentional infliction of emotional harm. *Engel v. McCloskey (1979) 92 Cal. App. 3d 870, 878-887, 155 Cal. Rptr. 284*

Judgment was not null and void when attacked by losing litigant on ground that counsel for successful litigant was ineligible to practice law. *Gomes v. Roney (1979) 88 Cal. App. 3d 274, 275, 151 Cal. Rptr. 756*

[2] Advocacy of Government Overthrow

Protection under *U.S. Const., amend. XIV*, against arbitrary state action does not forbid state from denying admission to bar applicant so long as he or she refuses to provide unprivileged answers to questions having substantial relevance to qualifications. *Konigsberg v. State Bar (1961) 366 U.S. 36, 44, 81 S. Ct. 997, 6 L. Ed. 2d 105* (refusal of applicant to answer questions concerning Communist Party membership)

Past membership in Communist Party does not provide reasonable basis for belief that bar applicant presently advocates overthrow of government by force. *Konigsberg v. State Bar (1957) 353 U.S. 252, 271, 77 S. Ct. 722, 1 L. Ed. 2d 810*

[3] Bankruptcy

Denial of application for admission to practice solely based on applicant's failure to satisfy obligation discharged in bankruptcy was impermissible, under federal bankruptcy law (*11 U.S.C. § 525(a)*), when debt was not owed as result of professional misconduct, discharged obligation was intended to compensate nonclient for private pecuniary loss, and consideration of applicant's failure to satisfy obligation would serve no rehabilitative purpose. *Kwasnik v. State Bar (1990) 50 Cal. 3d 1061, 1073-1074, 269 Cal. Rptr. 749, 791 P.2d 319*

[4] Burden of Proof

The more serious the misconduct and the bad character evidence, the stronger the showing of rehabilitation must be. *In re Gossage (2000) 23 Cal. 4th 1080, 1096-1097, 99 Cal. Rptr. 2d 130, 5 P.3d 186* ("brutal and unnecessary" homicide resulting in voluntary manslaughter conviction required "compelling showing of reform")

The appropriate level of proof by which an applicant must establish rehabilitation is by clear and convincing evidence. *In re Menna (1995) 11 Cal. 4th 975, 986, 47 Cal. Rptr. 2d 2, 905 P.2d 944*

Applicant who was attorney in another state and was there disbarred is not entitled to have all reasonable inferences resolved in his or her favor. *In re Menna (1995) 11 Cal. 4th 975, 986, 47 Cal. Rptr. 2d 2, 905 P.2d 944*

Court may properly to refuse to admit applicant to practice law on proof that would not justify order of disbarment. *Seide v. Committee of Bar Examiners (1989) 49 Cal. 3d 933, 938, 264 Cal. Rptr. 361, 782 P.2d 602*

Essential distinction between admission proceedings and disciplinary proceedings is that, in former, burden is on applicant to show moral fitness, whereas, in latter, burden is on State Bar to prove attorney is morally unfit. *Hallinan v. Committee of Bar Examiners (1966) 65 Cal. 2d 447, 451, 55 Cal. Rptr. 228, 421 P.2d 76*

[5] Citizenship

Local district court rule (Virgin Islands) requiring that any applicant to Bar be permanent resident of Virgin Islands is violation of privileges and immunities clause of U.S. *Const., art. IV, § 2*. *Barnard v. Thorstenn (1989) 489 U.S. 546, 559, 109 S. Ct. 1294, 103 L. Ed. 2d 559*

State rule (Virginia) requiring that applicant to Bar on motion (without examination) be permanent resident of state is violation of privileges andimmunities clause of U.S. *Const., art. IV, § 2*. *Supreme Court of Virginia v. Friedman (1988) 487 U.S. 59, 70, 108 S. Ct. 2260, 101 L. Ed. 2d 56*

State law (New Hampshire) limiting bar admission to state residents violates privileges and immunities clause of U.S. *Const., art. IV, § 2*. *Supreme Court of New Hampshire v. Piper (1985) 470 U.S. 274, 288, 105 S. Ct. 1272, 84 L. Ed. 2d 205*

State law (Connecticut) requiring citizenship and residence as qualification for admission to practice is unconstitutional denial of equal protection [*U.S. Const., amend. XIV*]. *In re Griffiths (1973) 413 U.S. 717, 718, 93 S. Ct. 2851, 37 L. Ed. 2d 910* ; *Raffaelli v. Committee of Bar Examiners (1972) 7 Cal. 3d 288, 303-304, 101 Cal. Rptr. 896, 496 P.2d 1264* (former *Bus. & Prof. Code § 6060(a)* citizenship requirement as to State Bar applicants unconstitutional)

[6] Due Process

Excluding applicant from admission to practice law without hearing on charges filed against him is denial of procedural due process. *Willner v. Committee on Character (1963) 373 U.S. 96, 106, 83 S. Ct. 1175, 10 L. Ed. 2d 224*

Requirements of procedural due process must be met before state can exclude person from admission to practice law. *Willner v. Committee on Character (1963) 373 U.S. 96, 102, 83 S. Ct. 1175, 10 L. Ed. 2d 224* ; *Schware v. Board of Bar Examiners (1957) 353 U.S. 232, 238, 77 S. Ct. 752, 1 L. Ed. 2d 796*

In applying permissible standards for admission to bar, state is not permitted to exclude applicant when there is no basis for finding that he or she fails to meet such standards or when state action is invidiously discriminatory. *Schware v. Board of Bar Examiners (1957) 353 U.S. 232, 239, 77 S. Ct. 752, 1 L. Ed. 2d 796*

Former Cal. Rules of Ct., Rule 983 (now see Rule *9.40*), by limiting appearances *pro hac vice* to non-resident attorneys, and by thus excluding attorneys who are residents of California and are admitted to practice in foreign jurisdictions but not in California, is not an unconstitutional violation of U.S. *Const., art. IV, § 2* (privileges and

immunities clause) or rights protected under *U.S. Const., amend. I* or *XIV*. *Paciulan v. George (9th Cir. 2000) 229 F.3d 1226, 1231*

Applicant has no basis for claim of deprivation of rights under United States Constitution until review of denial of admission by California Supreme Court is completed. *Giannini v. Committee of Bar Examiners (9th Cir. 1988) 847 F.2d 1434, 1435*

Views and beliefs of State Bar applicant are immune from bar association inquiries designed to lay foundation for barring applicant from practice of law. *Raffaelli v. Committee of Bar Examiners (1972) 7 Cal. 3d 288, 296, 101 Cal. Rptr. 896, 496 P.2d 1264*

[7] Eligibility to Take Bar Exam

Applicant who had been required to pass First-Year Law Students' Examination to be eligible for taking general bar examination was not exempt from requirement of taking general bar examination on grounds of estoppel orequal protection. *Bib'le v. Committee of Bar Examiners (1980) 26 Cal. 3d 548, 553-555, 162 Cal. Rptr. 426, 606 P.2d 733 , cert. denied, 449 U.S. 860*

[8] Federal Court Disbarment

Disbarment by state does not result in automatic disbarment by federal court; state action is entitled to respect but is not conclusively binding on federal court. *In re Ruffalo (1968) 390 U.S. 544, 547, 88 S. Ct. 1222, 20 L. Ed. 2d 117 , modified, 392 U.S. 919, 88 S. Ct. 2257, 20 L. Ed. 2d 1380*

[9] Immunity From Liability of State Bar, Examiners, and Officials

State Bar and Committee of Bar Examiners, as arms of Supreme Court, and their officials, as officers of Supreme Court, are entitled to absolute quasi-judicial immunity for their acts while conducting preadmission investigation. *Greene v. Zank (1984) 158 Cal. App. 3d 497, 513, 204 Cal. Rptr. 770*

[10] Judicial Notice

State Bar's "Instructions for Applicants" are properly subject to judicial notice. *Smith v. State Bar (1989) 212 Cal. App. 3d 971, 975-976, 261 Cal. Rptr. 24*

[11] Misinformation

Intentional nondisclosure by applicant of State Bar's denial of prior application on moral character grounds, enabling applicant to apply prematurely for admission to bar and to be admitted without adequate consideration of his moral character, was ground for cancellation of applicant's right to practice law. *Goldstein v. State Bar (1989) 47 Cal. 3d 937, 943-947, 951, 254 Cal. Rptr. 794, 766 P.2d 560 , cert. denied, 493 U.S. 882*

Duty of applicant to make full disclosure on application is absolute duty, and any significant failure to disclose warrants revocation of license to practice law. *Spears v. The State Bar (1930) 211 Cal. 183, 187, 294 P. 697*

Applicant has affirmative duty to update answers to questions on application. *In the Matter of Ike (1996) 3 Cal. State Bar Ct. Rptr. 483*

[12] Moral Character

State is not permitted to draw unfavorable inferences as to applicant's truthfulness, candor, or moral character in general form refusal to answer questions concerning his Communist Party membership, if refusal is based on belief that inquiries violate U.S. Constitution. *Konigsberg v. State Bar of California (1957) 353 U.S. 252, 270-271, 77 S. Ct. 722, 1 L. Ed. 2d 810*

Editorials by applicant criticizing public officials and policies do not rationally support inference of bad moral character. *Konigsberg v. State Bar (1957) 353 U.S. 252, 268-269, 77 S. Ct. 722, 1 L. Ed. 2d 810*

Applicant convicted of voluntary manslaughter for "brutal and unnecessary" homicide for which applicant attempted to conceal guilt, and convicted of several felony counts of forgery, required to make "compelling showing of reform" for admission to practice. *In re Gossage (2000) 23 Cal. 4th 1080, 1096-1097, 99 Cal. Rptr. 2d 130, 5 P.3d 186* (denying admission)

Applicant who committed serious misconduct as attorney in another state and was there disbarred must establish overwhelming proof of reform to be admitted. *In re Menna (1995) 11 Cal. 4th 975, 989, 47 Cal. Rptr. 2d 2, 905 P.2d 944*

Misconduct unrelated in any way to practice of law is accorded less weight than professional misconduct in evaluating moral fitness for admission to bar. *Kwasnik v. State Bar (1990) 50 Cal. 3d 1061, 1069, 269 Cal. Rptr. 749, 791 P.2d 319*

State Bar applicant's prior history of drug offenses, including cocaine trafficking, demonstrated bad moral character and supported refusal by Supreme Court to admit, in absence of adequate proof of rehabilitation. *Seide v. Committee of Bar Examiners (1989) 49 Cal. 3d 933, 937-943, 264 Cal. Rptr. 361, 782 P.2d 602*

Relatively nonserious misconduct that occurred over 10 years earlier and one recent incident that was technically although not ethically proper were insufficient to support disqualification for admission of applicant who demonstrated his rehabilitation and moral qualification. *Pacheco v. State Bar (1987) 43 Cal. 3d 1041, 1058-1059, 239 Cal. Rptr. 897, 741 P.2d 1138*

[13] Review

[a] In General

Determination of State Bar Court as to moral character of applicant is conclusive, unless Supreme Court grants review. *In re Menna (1995) 11 Cal. 4th 975, 984, 47 Cal. Rptr. 2d 2, 905 P.2d 944*

Judicial challenge to State Bar admission fee policy required to be brought by original petition to California Supreme Court. *Smith v. State Bar (1989) 212 Cal. App. 3d 971, 978, 261 Cal. Rptr. 24*

[b] By Federal Court

Order of California Supreme Court relating to admission of individual may be reviewed only by United States Supreme Court on writ of certiorari to state court, and not by original action in lower federal court. *Craig v. State Bar of California (9th Cir. 1998) 141 F.3d 1353, 1354*

Federal district court lacked subject matter jurisdiction over unsuccessful California State Bar applicant's claim alleging violation of applicant's federal constitutional rights when applicant failed to seek review by California Supreme Court of Committee of Bar Examiners' denial of applicant's petition for admission to *State Bar. Giannini v. Committee of Bar Examiners (9th Cir. 1988) 847 F.2d 1434, 1435*

[c] By U.S. Supreme Court

Claim of present right to admission to bar of state and denial of right is justiciable controversy subject to review on certiorari by United StatesSupreme Court. *Willner v. Committee on Character (1963) 373 U.S. 96, 102, 83 S. Ct. 1175, 10 L. Ed. 2d 224*

[14] Revocation of License

Deliberate concealment of charges of misconduct in another state on verified application for State Bar membership as ground for revocation of license by courts in *California. State Bar v. Langert (1954) 43 Cal. 2d 636, 639, 276 P.2d 596*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawThe JudiciaryCase or ControversyGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewLegal EthicsPractice QualificationsLegal EthicsSanctionsDisbarmentsTortsPublic Entity LiabilityImmunityGeneral Overview

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6-70 California Forms of Pleading and Practice--Annotated § 70.45

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§ 70.45 Attorney General Opinions

Notary public as not obligated to ascertain validity of title "attorney-at-law." *60 Ops. Cal. Atty. Gen. 133 (1977)*

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§ 70.46 Law Reviews

Michelman, *Guiding the Invisible Hand: The Consumer Protection Function of Unauthorized Practice Regulation, 12 Pepperdine L. Rev. 1 (1984)*

Rhode, *Moral Character as a Professional Credential, 94 Yale L.J. 491 (1985)*

Comment, *The Good Moral Character Requirement for Admission to the Bar, 4 San Fernando V.L. Rev. 317 (1975)*

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§ 70.47 Text References

Witkin, California Procedure, vol. 1, *Attorneys*, § 374 et seq., § 526 et seq. (4th ed. 1996)

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6-70 California Forms of Pleading and Practice--Annotated § 70.60

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§ 70.60 Request for Hearing on Determination Regarding Intentional Violation of Examination Rules [Cal. Rules Regulating Admission, Rule XII, § 2(c)]

[1] FORM Request for Hearing on Determination Regarding Intentional Violation of Examination Rules [Cal. Rules Regulating Admission, Rule XII, § 2(c)]

To the Committee of Bar Examiners of the State Bar of California:

I, _____ [*name of applicant*], an applicant for admission to the practice of law, hereby request a hearing on the Committee's initial determination that I intentionally violated the Committee's examination rules and on the Committee's proposal to give me a total score of zero on the bar examination administered _____ [*date*] and to place the Committee's inquiry and findings in my file for purposes of determining moral character.

I received notification of the Committee's determination and proposed action on _____ [*date*].

[I respectfully submit that the Committee's determination is erroneous in that _____ (*specify*).]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

Applicant

CAUTION:

All applications and petitions of whatever nature filed with the Committee of Bar Examiners must be verified or made under penalty of perjury in accordance with *Code Civ. Proc. § 2015.5* [Cal. Rules Regulating Admission, Rule I, § 14].

[2] Use of Form

This form may be used by an applicant for admission to practice law to request a hearing on an initial determination by the Committee of Bar Examiners (COBE) that the applicant has intentionally violated the COBE's examination rules. The request must be filed within 30 days after the COBE has notified the applicant of its determination and of its proposal to give the applicant a total score of zero on the examination and to place the record of its inquiry and findings in the applicant's file for consideration in determining whether he or she has the requiste good moral character [*see* Cal. Rules Regulating Admission, Rule XII, § 2(c)].

The COBE's rules do not specify any format or content requirements for the request. This form presents the request in a form of a letter to the COBE. The applicant may set forth his or her grounds for opposing the COBE's determination, but the rules do not specifically require this.

For further discussion, see *§ 70.19[2]*.

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6-70 California Forms of Pleading and Practice--Annotated § 70.61

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§ 70.61 Request for Informal Conference With Subcommittee on Moral Character Following Adverse Moral Character Determination [Cal. Rules Regulating Admission, Rule X, § 3(b)]

[1] FORM Request for Informal Conference With Subcommittee on Moral Character Following Adverse Moral Character Determination [Cal. Rules Regulating Admission, Rule X, § 3(b)]

To the Committee of Bar Examiners of the State Bar of California:

I, _____ [*name of applicant*], an applicant for admission to the practice of law, hereby request an opportunity to confer informally with the Subcommittee on Moral Character to discuss the Committee's initial determination that I have not met my burden of establishing good moral character.

I received notification of the Committee's determination on _____ [*date*]. No previous informal conference has been held regarding this matter.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

Applicant

CAUTION:

All applications and petitions of whatever nature filed with the Committee of Bar Examiners must be verified or made under penalty of perjury in accordance with *Code Civ. Proc. § 2015.5* [Cal. Rules Regulating Admission, Rule I, § 14].

[2] Use of Form

This form may be used by an applicant for admission to the practice of law to request an informal conference with the Subcommittee on Moral Character to discuss an initial determination by the Committee of Bar Examiners (COBE) that the applicant has not met his or her burden of establishing good moral character [*see* Cal. Rules Regulating Admission, Rule X, § 3(b)]. The request for an informal conference with the Subcommittee may only be made if the COBE has made a determination that applicant lacks good moral character and only if an informal conference has not been previously held [Cal. Rules Regulating Admission, Rule X, § 3(b)]. The request must be made in writing and received in the COBE's San Francisco office within 30 days after the date of notification of the adverse moral character determination [Cal. Rules Regulating Admission, Rule X, §§ 2(f)(2), 3(b)].

The COBE's rules do not specify any format or content requirements for the request. This form presents the request in a form of a letter to the COBE.

For further discussion of informal conferences, see *§ 70.18[2]*.

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6-70 California Forms of Pleading and Practice--Annotated § 70.62

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§ 70.62 Application for Hearing by State Bar Court of Adverse Moral Character Determination by Committee of Bar Examiners [Cal. State B. Rules Proc., Rule 681; Cal. Rules Regulating Admission, Rule X, § 5]

[1] FORM Application for Hearing by State Bar Court of Adverse Moral Character Determination by Committee of Bar Examiners [Cal. State B. Rules Proc., Rule 681; Cal. Rules Regulating Admission, Rule X, § 5]

[*Attorney or applicant information*]

THE STATE BAR COURT OF THE
STATE BAR OF CALIFORNIA
HEARING DEPARTMENT--_____ [LOS ANGELES *or*
SAN FRANCISCO]

	)	
In the Matter of the	)	NO. _____
Application of	)	APPLICATION FOR HEARING TO APPEAL AD-
_____ [*name*],	)	VERSE MORAL
for Admission to Practice Law	)	CHARACTER
	)	DETERMINATION BY COMMITTEE OF BAR EXAMINERS

_____

TO THE STATE BAR COURT OF THE STATE BAR OF CALIFORNIA:

_____ [*name*], an applicant for admission to the practice of law ("applicant"), hereby requests a hearing by the State Bar Court for the purpose of appealing the determination by the Committee of Bar Examiners ("the Committee") that applicant has not met his/her burden of establishing good moral character.

Notice of the Committee's determination was served on applicant on _____ [*date*].

[Applicant respectfully submits that the Committee's determination is erroneous in that _____ (*specify*).]

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[Attorney for] Applicant

[*Attach proof of service on Committee of Bar Examiners and Office of Chief Trial Counsel*]

[2] Use of Form

This form may be used by an applicant for admission to practice law to apply for a hearing before the State Bar Court for the purpose of appealing an adverse moral character determination by the Committee of Bar Examiners (COBE) [Cal. State B. Rules Proc., Rule 681; Cal. Rules Regulating Admission, Rule X, § 5(a)].

For further discussion of review procedures, see *§ 70.18[4]*.

[3] Time Limit for Filing

The application for hearing must be filed with the clerk of the State Bar court within 60 days after service of the final determination [Cal. State B. Rules Proc., Rule 681; Cal. Rules Regulating Admission, Rule X, § 5(a)].

[4] Service and Proof of Service

A copy of the application for hearing must be served on the San Francisco offices of the COBE and of the Office of Chief Trial Counsel [Cal. Rules Regulating Admission, Rule X, § 5(b)]. Proof of service must accompany the application when it is filed [Cal. State B. Rules Proc., Rule 681].

[5] Format and Contents

The form is intended to conform to the general format rule for papers filed with the State Bar Court [*see* Cal. State B. Rules Prac., Rule 1110]. Neither the COBE's rules nor the State Bar Court's Rules of Practice contain any specific format or content requirements for the application for hearing. The applicant may wish to include a statement or reasons why he or she believes that the COBE's determination was erroneous, but no rule specifically requires the applicant to do so. A simple request for a hearing appears to be sufficient. The application must be accompanied by a copy of the notice of adverse moral character determination and the applicable filing fee [Cal. State B. Rules Proc., Rule 681].

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6-70 California Forms of Pleading and Practice--Annotated § 70.63

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§ 70.63 Petition for Review by California Supreme Court of Denial of Applicant's Certification for Admission by Committee of Bar Examiners Based on Adverse Moral Character Determination
[Cal. Rules Regulating Admission, Rule I, § 11;
Cal. Rules of Ct., Rule 9.13(d)]

[1] FORM Petition for Review by California Supreme Court of Denial of Applicant's Certification for Admission by Committee of Bar Examiners Based on Adverse Moral Character Determination
[Cal. Rules Regulating Admission, Rule I, § 11;
Cal. Rules of Ct., Rule 9.13(d)]

[*Cover page.*]

SUPREME COURT OF THE STATE OF CALIFORNIA

_____ [*name*], Petitioner,	)	
vs.	)	NO. _____
THE STATE BAR OF CALIFORNIA, THE STATE	)	PETITION FOR REVIEW OF DECISION BY
BAR COURT OF CALIFORNIA, AND THE COM-	)	STATE BAR COURT AND BY COMMITTEE OF
MITTEE OF BAR EXAMINERS,	)	BAR EXAMINERS OF STATE BAR OF CALIFOR-
Respondents.	)	NIA
_____		

_____ [*name*]

_____ [*address*]

_____ [*phone number*]

Attorney for Petitioner

[*Start new page*]

SUPREME COURT OF THE STATE OF CALIFORNIA

_____ [*name*], Petitioner,	)	
vs.	)	NO. _____
THE STATE BAR OF CALIFORNIA, THE STATE	)	PETITION FOR REVIEW OF DECISION BY
BAR COURT OF CALIFORNIA, and THE COM-	)	STATE
MITTEE OF BAR EXAMINERS,	)	BAR COURT AND BY COMMITTEE OF BAR
Respondents.	)	EXAMINERS OF STATE
		BAR OF CALIFORNIA

_____

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OFTHE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner respectfully requests that this Court issue its writ of review and set aside the action of respondents in refusing to certify him/her for admission to practice law in the State of California, and in support thereof alleges:

1. Petitioner graduated from _____ [*name of law school*], a duly accredited law school located in _____ [*city and state or country*], and was awarded a _____ [J.D. *or* L.L.B.] degree on _____ [*date*].

2. On or about _____ [*date*], petitioner applied to the respondent State Bar of California for admission to practice law in California.

3. Petitioner successfully passed all parts of the general bar examination administered on _____ [*date*], and has otherwise completed all educational and testing requirements for admission to practice.

4. Petitioner was notified by respondent Committee of Bar Examiners on _____ [*date*] that, although he/she had passed the general bar examination, his/her admission to practice would be delayed pending further inquiry and analysis regarding his/her moral character. A true and correct copy of that notice is attached hereto as Appendix _____.

5. On _____ [*date*], petitioner received from the respondent Committee of Bar Examiners a notification that the Committee had determined that petitioner had not met his/her burden of establishing good moral character. A true and correct copy of the Committee's final determination is attached hereto as Appendix _____. In its notification, the Committee set forth the following reasons for its determination: _____ [*specify*].

6. On _____ [*date*], petitioner applied to the respondent State Bar Court of California for a hearing for the purpose of appealing the determination by respondent Committee of Bar Examiners that petitioner had not met his/her burden of establishing good moral character.

7. A hearing on the matter was conducted by a hearing judge of the respondent State Bar Court on _____ [*date*]. True and correct copies of the transcript of the proceedings before the State Bar Court and of all pertinent documents and exhibits submitted to the State Bar Court are attached hereto in Appendices _____ through _____.

8. On _____ [*date*], following the hearing, the hearing judge of the respondent State Bar Court issued its decision _____ [upholding *or* overturning] the determination of the Committee of Bar Examiners. A true and correct copy of the State Bar Court hearing judge's decision is attached hereto in Appendix _____.

9. _____ [*Set forth results of review by Review Department, e.g.*, Following the decision of the hearing judge, on application by the _____ (petitioner *or* respondent Committee of Bar Examiners), the Review Department of the respondent State Bar Court granted review of the hearing judge's decision. After a hearing on _____ (*date*), the Review Department determined that petitioner had not adequately established his/her moral fitness to practice law in California. A true and correct copy of the findings and decision of the Review Department is attached hereto as Appendix _____. The basis of the determination was that _____ (*specify*)].

10. The decision of the respondents to deny petitioner certification is erroneous and contrary to law in that _____ [*specify reasons, e.g.*, the Review Department's findings are not supported by the evidence and are contrary to the findings of the hearing panel, which had a better opportunity to hear the testimony and determine the petitioner's credibility, candor, and contrition].

11. Petitioner is of good moral character and is fully qualified for certification as a member of the State Bar of California.

12. No other adequate, plain, and speedy remedy exists whereby petitioner can seek the relief requested.

CONCLUSION--PRAYER

For the foregoing reasons, it is respectfully requested that this honorable Court issue its Writ of Review, calendar the matter for argument, and order petitioner certified and admitted to practice law in California.

_____ [*date*]

Respectfully submitted,

_____ [*firm name,ifany*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner_____[*name*]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

Petitioner

[*Attach proof of service*]

[2] Use of Form

This form of petition is for use in seeking review by the California Supreme Court of action by the Committee of Bar Examiners (COBE) ofthe State Bar denying certification of an applicant for admission to practice law [*see Cal. Rules of Ct., Rule 9.13(d)*; Cal. Rules Regulating Admission, Rule I, § 11]. It must be filed within 60 days after written notice of the denial of certification is mailed to the petitioner [*see Cal. Rules of Ct., Rule 9.13(d)*].

This form has been drafted for use in reviewing a denial of certification based on an adverse moral character determination, which is the most common situation in which Supreme Court review is sought. However, the form may be modified for use when the denial of certification is based on other grounds, such as an alleged intentional violation of examination rules.

Within 15 days after service of the petition, the State Bar may serve and file an answer and brief. Within five days after service of the answer, the petitioner may serve and file a reply. If a review is ordered by the Supreme Court, the State Bar, within 45 days after filing of the order, may serve and file a supplemental brief. Within 15 days after service of the supplemental brief, the petitioner may file a reply brief [*Cal. Rules of Ct., Rule 9.13(d)*].

For further discussion of Supreme Court review, see *§ 70.20*.

[3] Accompanying Documents

The petitioner must have exhausted his or her right to appeal the COBE's adverse moral character determination within the State Bar Court under Cal. Rules Regulating Admission, Rule X, § 5 [*see* Paragraphs 6-9; *Cal. Rules of Ct., Rule 9.13(e)*; *see also § 70.18[4]*]. The petition must be accompanied by a record adequate to permit review of the ruling of the State Bar Court, including copies of all documents submitted to the State Bar Court supporting and opposing petitioner's position and copies of all other documents submitted to the State Bar Court that are necessary for a complete understanding of the case and the ruling [*Cal. Rules of Ct., Rule 9.13(e)*].

In addition, the petition must be accompanied by a transcript of the proceedings in the State Bar Court leading to the decision, if such a transcript is available. If the transcript is unavailable, the petitioner must include a declaration by counsel in lieu of the transcript. If the petitioner or petitioner's attorney has ordered the transcript, the declaration by

counsel need only state the date the transcript was ordered and the date it is expected to be filed. If no transcript has been ordered, however, the attorney must explain why the transcript is unavailable and fairly summarize the proceedings, including arguments by counsel and the basis of the State Bar Court's decision [*Cal. Rules of Ct., Rule 9.13(e)*].

[4] Service

All petitions, briefs, reply briefs, and other proceedings involving Supreme Court review of moral character issues must be accompanied by proof of service of three copies on the General Counsel of the State Bar at the San Francisco office of the State Bar, and of one copy on the Clerk of the State Bar Court at the Los Angeles office of the State Bar Court [*see Cal. Rules of Ct., Rule 9.13(f)*]. The State Bar will serve the applicant at his or her address furnished to the State Bar, and his or her counsel of record, if any [*see Cal. Rules of Ct., Rule 9.13(f)*].

[5] Copies

The following copies of the foregoing petition should be prepared:

- An original and 13 copies to be filed in the Supreme Court [*Cal. Rules of Ct., Rule 8.44(a)(1)*].
- Three copies to be served on the General Counsel of the State Bar at the San Francisco office of the State Bar [*Cal. Rules of Ct., Rule 9.13(f).*
- One copy to be served on the Clerk of the State Bar Court at the Los Angeles office of the State Bar Court [*Cal. Rules of Ct., Rule 9.13(f)*].
- One copy for the client, if desired.
- One office file copy.
- Other copies as desired.

[6] State Statutes

Right of person denied certification for admission to practice law to have denial reviewed by California Supreme Court. *Bus. & Prof. Code § 6066*

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 70 ATTORNEY ADMISSION
PART IV. FORMS

6-70 California Forms of Pleading and Practice--Annotated § 70.64

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§ 70.64 Declaration of Applicant in Support of Application to Practice Law as Registered Legal Services Attorney [Cal. Rules of Ct., Rule 9.45]

[1] FORM Declaration of Applicant in Support of Application to Practice Law as Registered Legal Services Attorney [Cal. Rules of Ct., Rule 9.45]

To the Committee of Bar Examiners of the State Bar of California:

I, _____ [*name of applicant*], declare as follows:

1. I am an applicant to practice law in California as a registered legal services attorney pursuant to *Cal. Rules of Ct., Rule 9.45*.

2. I am an active member in good standing of the bar of _____ [*name of United States state, jurisdiction, possession, territory, or dependency*].

3. I agree that I will be subject to the disciplinary authority of the Supreme Court of California and the State Bar of California.

4. I will not practice law in California other than under the supervision of _____ [*name of qualified supervising attorney*] at _____ [*name of qualifying legal services provider*], a qualifying legal services provider.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

Applicant

CAUTION:

All applications and petitions of whatever nature filed with the Committee of Bar Examiners must be verified or made under penalty of perjury in accordance with *Code Civ. Proc. § 2015.5* [Cal. Rules Regulating Admission, Rule I, § 14].

[2] Use of Form

This form may be used by an applicant for admission to practice law in California as a registered legal services attorney [*Cal. Rules of Ct., Rule 9.45*. As a registered legal services attorney, an attorney who is admitted to practice law in another jurisdiction may practice law in California without taking the California bar examination for up to three years, so long as the attorney practices law under supervision at a qualifying legal services provider [*Cal. Rules of Ct., Rule 9.45*]. For further discussion, see *§ 70.13[1]*.

[3] California Rules of Court

Application to practice law as registered legal services attorney. *Cal. Rules of Ct., Rule 9.45*

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§ 70.65 Declaration of Qualifying Supervising Attorney in Support of Application to Practice Law as Registered Legal Services Attorney [Cal. Rules of Ct., Rule 9.45(h)]

[1] FORM Declaration of Qualifying Supervising Attorney in Support of Application to Practice Law as Registered Legal Services Attorney [Cal. Rules of Ct., Rule 964(g)]

To the Committee of Bar Examiners of the State Bar of California:

I, _____ [*name*], declare as follows:

1. I make this declaration in support of the application of _____ [*applicant's name*] to practice law in California as a registered legal services attorney pursuant to *Cal. Rules of Ct., Rule 9.45*.

2. _____ [*applicant's name*] has agreed to work as an attorney for _____ [*name of qualified legal services organization*], my current employer.

3. I am an active member in good standing of the State Bar of California.

4. I have actively practiced law in California and been a member in good standing of the State Bar of California for at least the last two years.

5. I have practiced law as a full-time occupation for at least four years.

6. I will not supervise more than two registered legal services attorneys concurrently.

7. I will assume professional responsibility for any work that the registered legal services attorney performs under my

supervision.

8. I will assist, counsel, and provide direct supervision of the registered legal services attorney to the extent required for the protection of the client.

9. I will read, approve, and personally sign any pleadings, briefs, or other similar documents prepared by the registered legal services attorney before their filing. I will read and approve any documents prepared by the registered legal services attorney for execution by any person who is not a member of the State Bar of California before their submission for execution.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

Attorney

CAUTION:

All applications and petitions of whatever nature filed with the Committee of Bar Examiners must be verified or made under penalty of perjury in accordance with *Code Civ. Proc. § 2015.5* [Cal. Rules Regulating Admission, Rule I, § 14].

[2] Use of Form

This form may be used by a qualified supervising attorney in support of an application for admission to practice law in California as a registered legal services attorney [*see Cal. Rules of Ct., Rule 9.45(h)*]. For further discussion, see *§ 70.13[3]*.

[3] California Rules of Court

Application to practice law as registered legal services attorney. *Cal. Rules of Ct., Rule 9.45*

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§ 70.66 Declaration of Applicant in Support of Application to Practice Law as Registered In-House Counsel [Cal. Rules of Ct., Rule 9.46]

[1] FORM Declaration of Applicant in Support of Application to Practice Law as Registered In-House Counsel [Cal. Rules of Ct., Rule 9.46]

To the Committee of Bar Examiners of the State Bar of California:

I, _____ [*name of applicant*], declare as follows:

1. I am an applicant to practice law in California as a registered in-house counsel pursuant to *Cal. Rules of Ct., Rule 9.46*.

2. I am an active member in good standing of the bar of _____ [*name of United States state, jurisdiction, possession, territory, or dependency*].

3. I will meet all of the requirements for admission to the State Bar of California, except that I need not take the California bar examination or the Multistate Professional Responsibility Examination.

4. I will comply with the rules adopted by the Board of Governors relating to the State Bar Registered In-House Counsel Program.

5. I will practice law exclusively for _____ [*name of qualifying institution*], a single qualifying institution.

6. I will abide by all the laws and rules that govern members of the State Bar of California, including the Minimum

Continuing Legal Education requirements.

7. I will satisfy in my first year of practice all of the MCLE requirements, including ethics education, that members of the State Bar of California must complete every three years and, thereafter, I will satisfy the MCLE requirements applicable to all members of the State Bar.

8. I currently reside in California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

Applicant

CAUTION:

All applications and petitions of whatever nature filed with the Committee of Bar Examiners must be verified or made under penalty of perjury in accordance with *Code Civ. Proc. § 2015.5* [Cal. Rules Regulating Admission, Rule I, § 14].

[2] Use of Form

This form may be used by an applicant for admission to practice law in California as registered in-house counsel [*Cal. Rules of Ct., Rule 9.46*]. As a registered in-house counsel, an attorney who is admitted to practice law in another jurisdiction may practice law in California without taking the California bar examination, so long as the attorney practices law a qualifying institution [*Cal. Rules of Ct., Rule 9.46*]. For further discussion, see *§ 70.14[1]*.

[3] California Rules of Court

Application to practice law as registered in-house counsel. *Cal. Rules of Ct., Rule 9.46*

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Chapter 71 ATTORNEY DISCIPLINE

6-71 California Forms of Pleading and Practice--Annotated 71.syn

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[c] Commingling of Client Funds

[d] Conflict of Interest

[e] Failure to Communicate With Client

[f] Failure to Notify Clients of Suspension

[g] Failure to Perform Legal Services

[h] Failure to Provide Accounting

[i] Failure to Support Constitution and Laws

[j] False Personation of State Bar Examinee

[k] Fees

[l] Misappropriation of Client Funds

[m] Misleading Court

[n] Moral Turpitude

[o] Practicing While Suspended

[13] Probation

[14] Rehabilitation

[15] Reinstatement

[16] Review by Supreme Court

[17] Rules of Professional Conduct

[18] Self-Incrimination

[19] State Bar Court

[20] Stipulations Regarding Facts and Discipline

§ 71.145 Law Reviews

§ 71.146 Text References

§ 71.160 Motion to Quash Subpoena [Cal. State B. Rules Proc., Rules 155(c), 156] and Supporting Declaration [Code Civ. Proc. § 2015.5]

[1] FORM

[2] Use of Form

[3] Administrative Regulations

§ 71.161 Motion for Abatement of Proceeding [Cal. State B. Rules Proc., Rule 116]

[1] FORM

[2] Use of Form

[3] Cross References

§ 71.162 Response to Notice of Disciplinary Charges [Cal. State B. Rules Proc., Rule 103]

[1] FORM

[2] Use of Form

[3] Administrative Regulations

[4] Cross References

§ 71.163 Motion for Transfer of Venue [Cal. State B. Rules Proc., Rule 54]

[1] FORM

[2] Use of Form

[3] Cross References

§ 71.164 Motion for Continuance [Cal. State B. Rules Prac., Rule 1131] and Supporting Declaration [Code Civ. Proc. § 2015.5]

[1] FORM

[2] Use of Form

[3] Cross References

§ 71.165 Resignation With Disciplinary Charges Pending [Cal. Rules of Ct., Rule 9.21]

[1] FORM

[2] Use of Form

[3] Cross References

§ 71.166 Motion to Vacate Temporary Suspension Following Criminal Conviction [Bus. & Prof. Code § 6102(a); Cal. State B. Rules of Proc., Rule 320(b)]

[1] FORM

[2] Use of Form

[3] California Rules of Court

[4] Cross References

§ 71.167 Petition to Review Final Order of Discipline by State Bar Court in Conviction Proceeding [Bus. & Prof. Code § 6102; Cal. Rules of Ct., Rule 9.13(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 71.168 Motion for Reconsideration of Decision by State Bar Court [Cal. State B. Rules Proc., Rule 224]

[1] FORM

[2] Use of Form

[3] Cross References

§ 71.169 Motion for New Trial by State Bar Court or to Reopen the Record to Present Additional Evidence [Cal. State B. Rules Proc., Rules 222, 223]

[1] FORM

[2] Use of Form

[3] Cross References

§ 71.170 Request for Review by Review Department of State Bar Court [Cal. State B. Rules Proc., Rule 301]

[1] FORM

[2] Use of Form

[3] Administrative Regulations

[4] Cross References

§ 71.171 Petition for Supreme Court Review of State Bar Court Decision Recommending Disbarment or Suspension [Bus. & Prof. Code §§ 6082, 6083; Cal.Rules of Ct., Rule 9.13(a)]

[1] FORM

[2] Use of Form

[3] Cross References

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FOOTNOTES:
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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 71 ATTORNEY DISCIPLINE
PART I. SCOPE

6-71 California Forms of Pleading and Practice--Annotated § 71.01

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.01 Scope of Chapter

This chapter discusses and contains forms for use in disciplinary proceedings before the State Bar and Supreme Court. It includes discussion of discipline generally, the grounds for and types of discipline, investigation and hearing procedures, related proceedings, and procedures for review. The forms, for use by an attorney in response to a disciplinary proceeding initiated by the State Bar, include:

- A motion to quash a subpoena issued by the State Bar [*see § 71.160*].
- A motion for abatement of a disciplinary proceeding on various grounds [*see § 71.161*].
- A response to a Notice of Disciplinary Charges [*see § 71.162*].
- Motions to transfer venue [*see § 71.163*] or to continue a proceeding [*see § 71.164*].
- A resignation with charges pending [*see § 71.165*].
- A petition to set aside a temporary suspension [*see § 71.166*].
- A petition to review a final order of discipline by the State Bar Court in a conviction proceeding [*see § 71.167*].
- Motions for reconsideration of a decision [*see § 71.168*] and for a new trial or to reopen the record to present new evidence [*see § 71.169*].
- A request for review by the Review Department of the State Bar Court [*see § 71.170*].
- A petition for review by the Supreme Court [*see § 71.171*].

For discussion of a State Bar member's duty to report various civil actions, judgments, and other discipline-related information to the State Bar, see *Ch. 70, Attorney Admission, §§ 70.25 -70.27*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsSanctionsDisciplinary ProceedingsHearingsCivil ProcedureCounselGeneral OverviewLegal EthicsSanctionsDisciplinary ProceedingsAppeals

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6-71 California Forms of Pleading and Practice--Annotated § 71.02

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.02 Cross References

For discussion and forms regarding attorney admission, see Ch. 70, *Attorney Admission* .

For discussion and forms regarding fee agreements and duties and responsibilities of attorneys, see Ch. 72, *Attorney Practice and Ethics* .

For discussion and forms regarding actions against attorneys, for professional negligence, and other forms of legal malpractice, see Ch. 76, *Attorney Professional Liability* .

For discussion and forms regarding awards of attorney's fees as an element of costs, see Ch. 174, *Costs and Attorney's Fees* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsPractice QualificationsTortsMalpractice & Professional LiabilityAttorneysLegal EthicsClient RelationsAttorney FeesFee AgreementsTortsDamagesCosts & Attorney FeesGeneral Overview

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PART I. SCOPE

6-71 California Forms of Pleading and Practice--Annotated §§ 71.03-71.09

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[Reserved]

§§ 71.03[Reserved]

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PART II. LEGAL BACKGROUND
A. The Disciplinary System

6-71 California Forms of Pleading and Practice--Annotated § 71.10

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.10 Governing Law

The disciplinary authority of the State Bar Board of Governors is set forth in *Bus. & Prof. Code § 6075 et seq.* Regulations governing procedural matters in State Bar disciplinary proceedings are contained in the Rules of Procedure of the State Bar of California (cited in this article as "Cal. State B. Rules Proc."), and the Rules of Practice of the State Bar Court (cited in this article as "Cal. State B. Rules Prac."). The Rules of Procedure were revised extensively, effective January 1, 1996. There were many substantive changes, and the Rules of Procedure were reorganized. A Supplement to Rules of Procedure was issued on January 1, 1997. Its new and changed rules were effective on different dates in 1996 and 1997. *Careful checking to determine the current rule in any subject area is advised.* The rules relating to Lawyer Referral Services and Legal Specialists have not yet been revised at this time. They remain in effect until superseding rules are adopted by the Supreme Court [*see* Cal. State B. Rules Proc., State Bar Note preceding Preamble]. Additional rules regarding client security fund claims are contained in the Rules of Procedure, Client Security Fund Matters.

Bus. & Prof. Code §§ 6090-6095.1 set forth additional provisions regarding the "disciplinary agency," which is defined as "the agency charged with the discipline of attorneys for professional misconduct" [*Bus. & Prof. Code § 6090*]. This disciplinary agency is currently composed of the Office of the Chief Trial Counsel and the State Bar Court, which, pursuant to existing law, have sole jurisdiction of their respective areas [*Bus. & Prof. Code § 6086.5* (board of governors must establish State Bar Court to determine disciplinary and reinstatement proceedings); Cal. State B. Rules Proc., Rule 3.08 (State Bar Court as single entire adjudicative tribunal established pursuant to *Bus. & Prof. Code §§ 6079.1, 6086.5*, and *6086.65*); Cal. State B. Rules Proc., Rule 2101 (Board of Governors has delegated to the Office of the Chief Trial Counsel responsibility to receive, investigate and prosecute complaints of alleged attorney misconduct)].

Disciplinary powers of the State Bar Court are set forth in *Cal. Rules of Ct., Rules 9.10* and *9.19*.

The disciplinary authority of the California Supreme Court is contained in *Bus. & Prof. Code § 6100 et seq.*, and procedural rules governing Supreme Court disciplinary proceedings are contained in *Cal. Rules of Ct., Rules 9.10-9.22*.

The conduct of attorneys is governed by the Rules of Professional Conduct. In addition, certain other duties of attorneys are set forth in *Bus. & Prof. Code §§ 6002.1*, *6068*, which are listed in Ch. 70, *Attorney Admission*. For full discussion of attorneys' ethical duties, see Ch. 72, *Attorney Practice and Ethics* .

Grounds for discipline are set forth in *Bus. & Prof. Code §§ 6007*, *6077*, *6077.5*, *6090.5*, *6100-6106.7*, *6131*, *6133*, and *6143*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsSanctionsDisciplinary ProceedingsGeneral OverviewLegal EthicsProfessional ConductGeneral OverviewLegal EthicsGeneral Overview

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A. The Disciplinary System

6-71 California Forms of Pleading and Practice--Annotated § 71.11

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§ 71.11 Disciplinary Powers of Supreme Court, Court of Appeal, and State Bar

[1] Inherent Power of Supreme Court

The California Supreme Court has inherent power over the admission, suspension, and disbarment of attorneys [*Obrien v. Jones (2000) 23 Cal. 4th 40, 48, 96 Cal. Rptr. 2d 205, 999 P.2d 95* ; *In re Menna (1995) 11 Cal. 4th 975, 983, 47 Cal. Rptr. 2d 2, 905 P. 2d 944* ; *In re Hallinan (1954) 43 Cal. 2d 243, 253-254, 272 P.2d 768* ; *see Ramirez v. State Bar (1980) 28 Cal. 3d 402, 411, 169 Cal. Rptr. 206, 619 P.2d 399* ; *Gadda v. Ashcroft, 363 F.3d 861, 864-865 (9th Cir. 2004)* (federal law does not preempt state's authority to regulate attorneys who practice immigration law only in federal courts); *see also Lebbos v. State Bar (1991) 53 Cal. 3d 37, 47-48, 278 Cal. Rptr. 845, 806 P.2d 317* ; *In the Matter of Yagman (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 788, 899]* . The Court has ultimate authority over suspension or disbarment of attorneys, although it may adopt the State Bar's recommendation of suspension or disbarment as its own order, without reviewing the recommendation [*see Bus. & Prof. Code §§ 6077, 6078* (authorizing State Bar to recommend suspension or disbarment to Supreme Court), 6087 (permitting Supreme Court to delegate certain functions to State Bar), 6100 (authorizing Supreme Court to suspend or disbar attorney); *Cal. Rules of Ct., Rule 9.18(b)* (effect of State Bar Court order when no review sought)]. The Court may decline to review a decision of the State Bar Court recommending disbarment or suspension from practice if it determines that none of the five grounds for Supreme Court review apply; denial of review constitutes a final judicial determination on the merits, and the recommendation of the State Bar Court is filed as an order of the Supreme Court [*see Cal. Rules of Ct., Rule 9.16*].

Although a proceeding to suspend or disbar an attorney may also be initiated in the Supreme Court by filing a verified accusation pursuant to *Bus. & Prof. Code § 6108*, the procedure established by the State Bar Board of Governors pursuant to the State Bar Act is the normal procedure for hearing all accusations against members of the State Bar [*see Bus. & Prof. Code § 6075 et seq.*; *Giddens v. State Bar (1981) 28 Cal. 3d 730, 734, 170 Cal. Rptr. 812, 621 P.2d 851* ; *see also Bus. & Prof. Code § 6075* (provisions relating to disciplinary power of State Bar are alternative to court proceedings for hearing and determining accusations against State Bar members)]. The Supreme Court has adopted a policy that it should not exercise its powers unless and until the accuser has invoked the disciplinary powers of the State

Bar [*In re Walker (1948) 32 Cal. 2d 488, 490, 196 P.2d 882]* . The Court will review the State Bar proceedings on petition by the attorney or the Chief Trial Counsel, if grounds for review exist [*see Bus. & Prof. Code§§ 6079.5, 6082*; *Cal. Rules of Ct., Rules 9.13, 9.14, 9.16(a)*]. The Court also may elect to review State Bar proceedings when no petition for review has been filed [*Bus. & Prof. Code § 6084*; *see Cal. Rules of Ct., Rule 9.18(b)*; *see also Cal. Rules of Ct., Rule 9.16* (grounds for review)]. Once the record in an attorney discipline case is transmitted to the Supreme Court, the State Bar no longer has jurisdiction over the matter [In the Matter of Applicant B (Rev. Dep't 2004) 2004 Calif. Op. LEXIS 8, *4]. For discussion of review of disciplinary proceedings by the Supreme Court, see *§ 71.122*.

Final action in disciplinary proceedings can only be taken by the Supreme Court. Nothing in the State Bar Act can be construed as limiting or altering the powers of the Supreme Court to disbar or discipline members of the bar as that power existed prior to the enactment of the State Bar Act [*Bus. & Prof. Code § 6087*; *see Obrien v. Jones (2000) 23 Cal. 4th 40, 48, 96 Cal. Rptr. 2d 205, 999 P.2d 95* ; *Giddens v. State Bar (1981) 28 Cal. 3d 730, 735, 170 Cal. Rptr. 812, 621 P.2d 851]* . Disciplinary action taken by the State Bar on its own authority under *Bus. & Prof. Code § 6078* is reviewable by the Supreme Court under *Bus. & Prof. Code § 6082*, and the Court retains its power to control any such disciplinary proceeding at any step [*Brotsky v. State Bar (1962) 57 Cal. 2d 287, 301, 19 Cal. Rptr. 153, 368 P.2d 697]* .

At any time before the final disposition of a decision of the State Bar Court recommending disbarment or suspension, the Supreme- Court may remand the matter to the State Bar Court with instructions to conduct further proceedings the Supreme Court deems necessary [*Cal. Rules of Ct., Rule 9.17*].

The Supreme Court has authority to delegate certain of its functions to the State Bar. By rule, the Court may authorize the State Bar to take any action otherwise reserved to the Court in any matter arising under *Bus. & Prof. Code § 6000 et seq.* Any action taken by the State Bar must, however, be reviewable by the Supreme Court pursuant to rules the Supreme Court may prescribe [*see Bus. & Prof. Code § 6087*]. In 1990, the Supreme Court adopted a new rule of court delegating a number of matters within its statutory authority to the State Bar Court [*see Cal. Rules of Ct., Rule 9.10*]. For discussion of these matters, see *§ 71.12[1]*.

[2] Review by Court of Appeal

By statute, attorneys complained against or whose reinstatement has been denied by the State Bar may seek review in the courts of appeal, as well as in the California Supreme Court [*see Bus. & Prof. Code § 6082*]. Such review is governed by procedure prescribed by the Supreme Court [*Bus. & Prof. Code § 6082*]. However, the Court has not adopted any procedure for review of attorney disciplinary actions by the courts of appeal. Thus, it appears that appellate review must be sought in the Supreme Court.

[3] State Bar Jurisdiction and Disciplinary Powers

The Board of Governors of the State Bar may discipline a member of the State Bar for a willful breach of any of the California Rules of Professional Conduct. The Rules of Professional Conduct are adopted by the Board and approved by the Supreme Court, and are binding on all members of the State Bar [*Bus. & Prof. Code §§ 6076, 6077*]. The Board may impose discipline by public or private reproval of the member or by recommendation to the Supreme Court that the member be suspended from practice for a period not exceeding three years [*Bus. & Prof. Code § 6077*; *see also Cal. Rules of Ct., Rule 9.18(b)* (recommendation of suspension by State Bar Court has effect of Supreme Court order when no review sought)], or that the attorney be disbarred [*Bus. & Prof. Code section 6078*; *see also Cal. Rules of Ct., Rule 9.18(b)* (recommendation of disbarment)].

For any of the causes set forth in the laws warranting disbarment, suspension, or other discipline, the Board of Governors of the State Bar has the power after a hearing to recommend to the Supreme Court the disbarment or suspension from practice of members, or to discipline them by public or private reproval without such recommendation

[*Bus. & Prof. Code § 6078*; *see also Cal. Rules of Ct., Rule 9.18(b)* (recommendation of disbarment or suspension by State Bar Court has effect of Supreme Court order when no review sought)]. For discussion of the grounds for discipline of attorneys and the various sanctions for discipline, see *§ 71.30* et seq.

The Board of Governors has delegated its disciplinary powers to the State Bar Court [*Bus. & Prof. Code § 6086.5*]. Although some sections of the State Bar Act still contain language referring to "the board" or "the [discipline] committee," these references now pertain to the State Bar Court, or occasionally to the Office of the Chief Trial Counsel, when referring to investigation or prosecution. All newer sections of the State Bar Act, and the applicable sections of the California Rules of Court, speak of the State Bar Court.

[4] Quasi-Judicial Immunity of State Bar Prosecutors

State Bar prosecutors have common--law immunity from lawsuits for monetary damages, in both their individual and their official capacities, since they perform functions similar to criminal prosecutors [*Wu v. State Bar (C.D. Cal. 1997) 953 F. Supp. 315* ; *see Gov. Code § 821.6* (immunity of public employees from liability for malicious prosecution for instituting or prosecuting judicial or administrative proceeding within scope of employment)]. For discussion of prosecutorial immunity in actions under *42 U.S.C. § 1983*, see Ch. 112, *Civil Rights: Government-Funded Programs and Activities* ; for discussion of immunity of public prosecutors from liability for malicious prosecution, see Ch. 357, *Malicious Prosecution and Abuse of Process* ; for discussion of immunity of public prosecutors from general liability under the California Tort Claims Act, see Ch.464, *Public Entities and Officers: California Tort Claims Act* .

[5] Miscellaneous Provisions Applicable to State Bar as "Disciplinary Agency"

[a] Status of State Bar as "Disciplinary Agency"

Bus. & Prof. Code §§ 6090-6095.1 contain special provisions applicable to "the disciplinary agency," which is simply defined as "the agency charged with the discipline of attorneys for professional misconduct" [*Bus. & Prof. Code § 6090*]. Although there is no other identification of the "disciplinary agency" for the purpose of these provisions, it is apparent under existing law that the agency is the State Bar.

[b] Miscellaneous Duties of "Disciplinary Agency"

As a disciplinary agency, the State Bar is required, among other things, to do all of the following:

- Promptly notify the complainant of the disposition of each matter [*Bus. & Prof. Code § 6092.5(a)*].

- Notify certain judges, local bar associations, and disciplinary authorities in other jurisdictions of an attorney's involuntary enrollment as an inactive member and termination of that status, an attorney's disbarment or suspension, or an attorney's reinstatement to active status following suspension or disbarment [*Bus. & Prof. Code § 6092.5(b)*].

- Forward a certified copy of the record of certain criminal convictions involving an attorney to disciplinary agencies in other jurisdictions in which the attorney is admitted to practice [*Bus. & Prof. Code § 6092.5(c)*].

- Maintain and expunge certain records relating to discipline and other matters within the agency's jurisdiction [*see Bus. & Prof. Code § 6092.5(d), (e)*].

- Undertake investigations assigned to the agency pursuant to directions from the California Supreme Court [*Bus. & Prof. Code § 6092.5(f)*].

- Provide general information concerning disciplinary procedures to prospective complainants and the public [*Bus. & Prof. Code § 6092.5(g), (h)*].

- Provide written reports to the Supreme Court and to the Assembly and Senate Judiciary Committees containing specified information concerning disciplinary matters [*Bus. & Prof. Code §§ 6092, 6094.5(a), 6095(b)*].

- Annually hold at least two public hearings to receive proposals concerning disciplinary procedures, attorney competency, and admissions procedures [*Bus. & Prof. Code § 6095(a)*].

- Acknowledge receipt of written complaints within two weeks after receipt [*Bus. & Prof. Code § 6093.5*].

- Notify a complainant or the complainant's designee of the status of his or her complaint, on request [*Bus. & Prof. Code § 6093.5*].

- Provide the complainant with a written summary of any response by an attorney to a complaint if the response was the basis for dismissal of the complaint [*Bus. & Prof. Code §§ 6093.5, 6095.1*].

- Notify the complainant or the complainant's designee in writing of the disposition of his or her complaint and the reasons for that disposition [*Bus. & Prof. Code § 6093.5*].

- Respond within a reasonable time to inquiries about certain pending and completed disciplinary and criminal proceedings involving attorneys [*Bus. & Prof. Code § 6094.5(b)*].

[c] Goal and Policy of "Disciplinary Agency" to Dispose Promptly of Complaints

The goal and policy of the "disciplinary agency" under *Bus. & Prof. Code § 6090 et seq.* is to dismiss a complaint, admonish the attorney, or forward a completed investigation to the Office of Trial Counsel within six months after receipt of a written complaint [*Bus. & Prof. Code § 6094.5(a)*]. (*Bus. & Prof. Code § 6093.5* speaks of "forwarding a completed investigation to the Office of Trial Counsel" because for several years there was a separate Office of Investigations. The investigative function has now been transferred to the Office of the Chief Trial Counsel [Cal. State B. Rules Proc., Rule 2101].) Concerning complaints designated as "complicated matters" by the Chief Trial Counsel, the goal and policy of the "disciplinary agency" is to dismiss, to terminate by admonition, or to complete those investigations within 12 months [*Bus. & Prof. Code § 6094.5(a)*]. The goals and policies concerning timely case disposition do not serve as a bar or defense to any disciplinary investigation or proceeding [*Bus. & Prof. Code § 6094.5(a)*].

[d] "Disciplinary Agency" Required to Respond to Inquiries Within Reasonable Time

The "disciplinary agency" under *Bus. & Prof. Code § 6090 et seq.*, subject to its record retention policy, must respond within a reasonable time to inquiries concerning the following [*Bus. & Prof. Code § 6094.5(b)*]:

- The status of pending disciplinary cases in which a notice of disciplinarycharges has been filed.

- Public discipline that has been imposed on an attorney in California.

- Public discipline that has been imposed on an attorney outside of California, to the extent known by the agency.

In addition, the "disciplinary agency" must respond within a reasonable time to inquiries concerning the following types of criminal cases, to the extent of the agency's information [*Bus. & Prof. Code § 6094.5(b)*]:

- Cases in which an indictment or information has been brought charging a felony against an attorney.
- Cases in which an attorney has been convicted of a felony.
- Cases in which an attorney has been convicted of a misdemeanor committed in the course of the practice of law or in any manner such that a client of the attorney was a victim.
- Cases in which an attorney has been convicted of a misdemeanor or felony, a necessary element of which, as determined by the statutory or common law definition of the crime, involves improper conduct of an attorney.

In responding to inquiries about current felony charges pending against an attorney or those criminal convictions specified above, the State Bar Court, Office of Trial Counsel, Office of Investigation, or other appropriate office of the State Bar may provide the following information [Cal. State B. Rules & Regs., art. XV, § 3]:

- The name of the attorney.
- The date of conviction.
- The crime or crimes that the attorney was convicted of.
- The date when the judgment of conviction has been affirmed on appeal, or has otherwise become final.
- If the felony trial is still pending, the date of the indictment or information and the felony or felonies charged.
- The name of the court, location, and court case number.

[e] Annual Discipline Report

The State Bar must issue an Annual Discipline Report describing the performance and condition of the State Bar discipline system. The report must cover the previous calendar year and include accurate and complete descriptions of the existing backlog of discipline cases, the number of inquiries and complaints and their disposition, the speed of complaint handling and dispositions, the number and types of filed notices of disciplinary charges, the number and types of informal discipline outcomes, and other specified information [*Bus. & Prof. Code § 6086.15(a)*]. The annual report must include statistical information presented in a consistent manner for year-to-year comparison and must compare the required information to similar information for the previous three years. The report must include the general data and tables included in the previous reports of the State Bar Discipline Monitor if feasible [*Bus. & Prof. Code § 6086.15(b)*]. The annual report is presented to the Chief Justice of the Supreme Court, to the Governor, to the Speaker of the Assembly, and to the President pro Tempore of the Senate for their consideration, and is a public document [*Bus. & Prof. Code § 6086.15(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsAuthority to AdjudicateLegal EthicsSanctionsDisciplinary ProceedingsHearingsLegal

EthicsSanctionsDisciplinary ProceedingsAppealsTortsPublic Entity LiabilityImmunityJudicial Immunity

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PART II. LEGAL BACKGROUND
A. The Disciplinary System

6-71 California Forms of Pleading and Practice--Annotated § 71.12

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.12 Administrative Entities Within State Bar

[1] State Bar Court

The Board of Governors has the authority to delegate its disciplinary authority to one or more committees to act in its place in matters of discipline and reinstatement [*Bus. & Prof. Code § 6086.5*]. The single disciplinary and adjudicatory board established by the Board of Governors is known as the State Bar Court [*Bus. & Prof. Code § 6086.5*; Cal. State B. Rules Proc., Rule 3.08]. As the adjudicative division of the State Bar, the State Bar Court is separate and distinct from the prosecutorial division, the Office of Chief Trial Counsel.

The State Bar Court is comprised of judges and judges pro tempore [Cal. State B. Rules Proc., Rule 1000; *see also Cal. Rules of Ct., Rule 9.11*]. It is organized into the following departments [Cal. State B. Rules Proc., Rule 1001]:

- The Hearing Department, consisting of hearing judges and judges pro tempore. The Hearing Department is the trial department of the State Bar Court established pursuant to *Bus. & Prof. Code §§ 6079.1* and *6086.5* [TRP Rule 101].

- The Review Department, consisting of the Presiding Judge and the review judges. The Review Department is the appellate department of the State Bar Court established pursuant to Bus. & Prof. Code § 6086.55(d).

Every member of the State Bar Court and every person appointed to serve in a similar capacity must take an oath of office [Cal. State B. Rules Proc., Rule 1005].

The executive committee of the State Bar Court is composed of no fewer than seven persons appointed by the Presiding Judge of the State Bar Court, including one person who has never been a member of the State Bar or admitted to practicelaw before any court in the United States [*Bus. & Prof. Code § 6086.65(b)*]. The executive committee adopts

Rules of Practice for the State Bar Court and acts in an advisory capacity to the Court [Cal. State B. Rules Proc., Rule 1010].

The Office of the Clerk of the State Bar Court receives and files pleadings, processes documents, assists in court proceedings, maintains files and keeps statistics. The Clerk has offices in both Los Angeles and San Francisco.

In 1990, the California Supreme Court adopted former Cal. Rules of Ct., Rule 951 [*now see Rule 9.10*], setting forth the disciplinary authority of the State Bar Court. This rule expands the power of the State Bar Court, conferring on the State Bar Court authority for a number of ministerial and administrative matters that were formerly the exclusive province of the Supreme Court. Under Rule 9.10, the State Bar Court has authority to do the following:

- Act pursuant to *Bus. & Prof. Code §§ 6101* and *6102* with respect to discipline of attorneys convicted of crimes [*Cal. Rules of Ct., Rule 9.10(a)*].

- Extend the time within which a member of the State Bar must take a professional responsibility examination, suspend a member for failing to take and pass such examination, and vacate a member's suspension for failing to take and pass such an examination [*Cal. Rules of Ct., Rule 9.10(b)*].

- Approve, for good cause, stipulations between a State Bar member and the Chief Trial Counsel for modification of the terms of a member's probation and make corrections and minor modifications to the terms of a member's disciplinary probation [*Cal. Rules of Ct., Rule 9.10(c)*].

- Extend, for good cause, the time within which a member must comply with the provisions of *Cal. Rules of Ct., Rule 9.20*, relating to the duties of disbarred, resigned, or suspended attorneys [*Cal. Rules of Ct., Rule 9.10(d)*].

- Temporarily delay, for good cause, the effective date of, or temporarily stay the effect of, an order for a member's suspension from practice [*Cal. Rules of Ct., Rule 9.10(e)*].

- Hear petitions for readmission or reinstatement in the first instance [*Cal. Rules of Ct., Rule 9.10(f)*].

Nothing in *Cal. Rules of Ct., Rule 9.10* is to be construed as affecting the power of the Supreme Court to exercise its inherent jurisdiction over the lawyer discipline and admissions system [*Cal. Rules of Ct., Rule 9.10(g)*].

[2] Office of Chief Trial Counsel

The Office of the Chief Trial Counsel is the investigative and prosecutorial arm of the State Bar in disciplinary matters. It is headed by a Chief Trial Counsel [*see Bus. & Prof. Code § 6079.5*; Cal. State B. Rules Proc., Rule 2.16]. The Office of the Chief Trial Counsel has been delegated exclusive authority by the Board of Governors to review inquiries and complaints, conduct investigations and determine whether to file notices of disciplinary charges with the State Bar Court [Cal. State B. Rules Proc., Rule 2101].

[3] Alternative Dispute Resolution Discipline Mediation Program

The State Bar Board of Governors is authorized to formulate and adopt rules and regulations necessary to establish an alternative dispute resolution discipline mediation program to resolve complaints against attorneys that do not warrant the institution of formal investigation or prosecution. The program should identify sources of client dissatisfaction and provide a mediation process to resolve those complaints or disputes unless the client objects to mediation. An attorney's refusal to participate in the program or the failure to comply with any agreement reached in the program may subject that attorney to discipline [*Bus. & Prof. Code § 6086.14*]. The board of governors has adopted Transitional Rules of

Procedure under this authority, which have not been completely revised [*see* TRP Rules 840-846 (Alternative Dispute Resolution Client-Attorney Mediation Program (ADRCAMP))].

The authorization of the ADRCAMP may not be construed to limit or alter the powers of the Supreme Court or the State Bar to disbar or discipline members. The records relating to the program may be made available in any subsequent disciplinary action pursuant to any rule, standard, or guideline adopted by the board of governors [*Bus. & Prof. Code § 6086.14(c)*].

The rules adopted by the board of governors may authorize discipline mediation to proceed under programs sponsored by local bar associations, which may charge a reasonable administrative fee to offset the costs of maintaining the discipline mediation programs [*Bus. & Prof. Code § 6086.14(a)*]. The board of governors has adopted California State Bar Rules of Procedure under this authority [Cal. State B. Rules Proc., Rules 4401-4406 (Alternative Dispute Resolution Client-Attorney Mediation Program (ADRCAMP))]. The standards and guidelines adopted by the board to implement discipline mediation programs may encompass any discipline mediation programs sponsored by local bar associations [*Bus. & Prof. Code § 6086.14(b)*].

[4] Discipline Audit Panel

The Discipline Audit Panel, which replaced an earlier Complainants' Grievance Panel in 1996, consists of seven members appointed by the Governor, the Senate Rules Committee, the Speaker of the Assembly, and the Board of Governors. Fourof the members must be non-attorneys (*Bus. & Prof. Code § 6086.11(b)*). The panel does the following:

- Conduct one random audit per year of closures of complaints in lieu of disciplinary prosecution by the office of Chief Trial Counsel; this includes the imposition of admonitions, the issuance of warning letters and directional letters, and agreements in lieu of discipline [*Bus. & Prof. Code § 6086.11(a)(1)*].

- Conduct one audit per year concerning specified matter areas selected by the panel [*Bus. & Prof. Code § 6086.11(a)(2)*].

The scope of an audit is to evaluate the office of Chief Trial Counsel and, specifically, whether it is doing the following [*Bus. & Prof. Code § 6086.11(a)(3)*]:

- Adopting adequate internal policies, procedures, and guidelines and adhering to them.

- Adhering to the Statement of Commitments to Complainants.

- Acting in a consistent manner with respect to its filing of decisions, imposition of informal discipline, and referrals to diversion programs.

- Appropriately utilizing internal procedures and processes concerning complainant dissatisfaction.

- Responding to discipline committee directions, if any, concerning the prior Complainant's Grievance Panel and recommendations of the Discipline Audit Panel.

The Panel prepares an annual written report to the discipline committee of the State Bar Board of Governors, the office of Chief Trial Counsel prepares a response to that report, and the discipline committee, after evaluating these reports, directs the office of Chief Trial Counsel to take whatever action it deems appropriate [*Bus. & Prof. Code § 6086.11(c)*].

[5] Special Deputy Trial Counsel

In the event of a disciplinary complaint against a State Bar employee, a member of the Board of Governors of the State Bar, a judge of the State Bar Court, or a member of the governing board of any entity of the State Bar, the Chief Trial Counsel may appoint one or more Special Deputy Trial Counsel, who shall act in the place of the Office of the Chief Trial Counsel [Cal. State B. Rules Proc., Rule 2201].

Legal Topics:

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

California Forms of Pleading and Practice--Annotated

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 71 ATTORNEY DISCIPLINE
PART II. LEGAL BACKGROUND
A. The Disciplinary System

6-71 California Forms of Pleading and Practice--Annotated § 71.13

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.13 Client Security Fund

[1] In General

The State Bar Act authorizes the State Bar to establish and administer a Client Security Fund to relieve or mitigate pecuniary losses caused by the dishonest conduct of active members of the State Bar, Foreign Legal Consultants registered with the State Bar, and attorneys registered with the State Bar under the Multijurisdictional Practice Program arising from or connected with the practice of law [*Bus. & Prof. Code § 6140.5*; Cal. State B. Rules Proc., Rule 220]. The State Bar has promulgated a separate body of rules, the Rules of Procedure for Client Security Fund Matters, that specifically governs administration of the fund [*see* Rules Proc. Client Sec. Fund, Rule 1 et seq.].

The fund is generally administered by the seven-member Client Security Fund Commission, which acts as the delegate of the Board of Governors [Rules Proc. Client Sec. Fund, Rules 11, 12].

Payments made from the fund are discretionary and are subject to regulation by the Board of Governors [*Bus. & Prof. Code § 6140.5*; Rules Proc. Client Sec. Fund, Rule 2; *see also* Rules Proc. Client Sec. Fund, Rule 4 (limitation on amount of reimbursement)]. The State Bar may collect an amount authorized by statute from each member of the bar for the purpose of funding the Client Security Fund [*Bus. & Prof. Code § 6140.55*; *see State Bar of California v. Statile (2008) 168 Cal. App. 4th 650, 662-669, 86 Cal. Rptr. 3d 72* (Bar's right of recovery is not limited to money due under lawyer's settlement agreements with suing clients)].

[2] General Claim Requirements

To qualify for reimbursement from the Client Security Fund, an applicant must establish loss of money or property that came into the hands of an active member of the State Bar while acting as lawyer, trustee, or fiduciary. The applicant's loss must have been caused by the dishonest conduct of that active member of the State Bar, and the dishonest conduct must have taken place on or after March 4, 1972 [Rules Proc. Client Sec. Fund, Rule 2]. "Dishonest conduct" includes embezzlement, refusal to refund unearned fees, and other specified acts of intentional deceit [*see* Rules Proc. Client Sec.

Fund, Rule 6; *Johnson v. State Bar (1993) 12 Cal. App. 4th 1561, 1566, 16 Cal. Rptr. 2d 6]* .

Certain parties cannot receive reimbursement under the fund, including governmental entities and members of the attorney's immediate family [Rules Proc. Client Sec. Fund, Rule 7(a), (f)]. Coworkers in the attorney's law firm, malpractice insurers, and business entities controlled by the attorney are also generally barred [Rules Proc. Client Sec. Fund, Rule 7(b)-(e)].

If the applicant's loss, or reimbursable portion thereof, was covered by insurance, the applicant generally may not recover from the fund [Rules Proc. Client Sec. Fund, Rule 8].

[3] Reimbursement Procedure

Applications for reimbursement are filed with the Client Security Fund Commission at the San Francisco or Los Angeles office of the State Bar [Rules Proc. Client Sec. Fund, Rule 14(a); *see* Rules Proc. Client Sec. Fund, Rule 13].

PRACTICE TIP:

Applications for Reimbursement. Applications are available from and processed by the Client Security Fund located at the State Bar of California, 1149 S. Hill St., Los Angeles, CA 90015-2299, (213) 765-1140. The applicant should provide a copy all supporting documents. Any questions may be directed to the Client Security Fund. *By Regina E. Brenner*.

The application must be filed within four years after the applicant discovers, or through the use of reasonable diligence should have discovered, the loss [Rules Proc. Client Sec. Fund, Rule 3].

The Commission coordinates the screening of each application and makes a determination on the application [Rules Proc. Client Sec. Fund, Rule 14(b), (c)]. To comport with due process, the State Bar must allow an applicant to be heard and to respond to the State Bar's proposed disposition of the request for funds [*Ainsworth v. State Bar (1988) 46 Cal. 3d 1218, 1232, 252 Cal. Rptr. 267, 762 P.2d 431 , cert. denied, 489 U.S. 1081, 109 S. Ct. 1534, 103 L. Ed. 2d 839 (1989)* ; *Saleeby v. State Bar (1985) 39 Cal. 3d 547, 566, 216 Cal. Rptr. 367, 702 P.2d 525]* . Although a formal hearing is not required, the State Bar has the option of either utilizing the disciplinary proceedings against the attorney as the forum for determining the amount available to the applicant, or providing a separate procedure for Client Security Fund dispositions [*Ainsworth v. State Bar (1988) 46 Cal. 3d 1218, 1232, 252 Cal. Rptr. 267, 762 P.2d 431 , cert. denied, 489 U.S. 1081, 109 S. Ct. 1534, 103 L. Ed. 2d 839 (1989)* ; *Saleeby v. State Bar (1985) 39 Cal. 3d 547, 566, 216 Cal. Rptr. 367, 702 P.2d 525]* . The State Bar's rules allow a party to submit a request for oral hearing before the Commission or a panel of its members [Rules Proc. Client Sec. Fund, Rule 14(c)].

The applicant or the respondent attorney may seek review of the final decision of the Commission or State Bar Court to grant or deny reimbursement in the superior court pursuant to *Code Civ. Proc. § 1094.5* [Rules Proc. Client Sec. Fund, Rule 17.]. The proper standard of review is the substantial evidence test [*Johnson v. State Bar (1993) 12 Cal. App. 4th 1561, 1564, 1567, 16 Cal. Rptr. 2d 6]* . Because an attorney has no vested right or fundamental vested interest that is affected by any decision of reimbursement, independent judgment review of the record in a limited trial de novo is inappropriate [*Johnson v. State Bar (1993) 12 Cal. App. 4th 1561, 1566-1567, 16 Cal. Rptr. 2d 6]* .

If an applicant is reimbursed from the fund, the applicant must give in consideration a pro tanto assignment of his or her rights against the attorney [*see* Rules Proc. Client Sec. Fund, Rule 19].

Payment information from the Client Security Fund is public information [*Bus. & Prof. Code § 6086.1(a)(2)(D)*].

[4] Subrogation Rights of State Bar

On making a payment to an applicant to the Client Security Fund, the State Bar is subrogated, to the extent of that payment, to the rights of the applicant against any person or persons who, or entity that, caused the applicant's pecuniary loss. The State Bar may bring an action to enforce those rights within three years from the date of payment to the applicant [*Bus. & Prof. Code § 6140.5(b)*; *see State Bar of California v. Statile (2008) 168 Cal. App. 4th 650, 662-669,86 Cal. Rptr. 3d 72* (Bar's right of recovery not is limited to money due under lawyer's settlement agreements with suing clients)].

[5] Reimbursement by Attorney

Any attorney whose actions have caused the payment of funds to a claimant from the Client Security Fund must reimburse the fund, with interest, for all moneys paid out as a result of his or her conduct, in addition to payment of the assessment for the procedural costs of processing the claim, as a condition of continued practice. The reimbursed amount, plus applicable interest and costs, must be added to and become a part of the membership fee of a publicly reproved or suspended member for the next calendar year. For a member who resigns with disciplinary charges pending or a member who is suspended or disbarred, the reimbursed amount, plus applicable interest and costs, must be paid as a condition of reinstatement of membership [*Bus. & Prof. Code § 6140.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsClient FundsContracts LawThird PartiesSubrogation

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A. The Disciplinary System

6-71 California Forms of Pleading and Practice--Annotated §§ 71.14-71.29

AUTHOR: Regina E. Brenner Editorial Consultant

[Reserved]

§§ 71.14[Reserved]

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B. Grounds for Discipline, Reporting Attorney Conduct to State Bar, and Disciplinary Sanctions

6-71 California Forms of Pleading and Practice--Annotated § 71.30

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.30 Grounds for Discipline

[1] Statutory Grounds

The California Supreme Court may disbar or suspend an attorney for any of the following causes, arising after an attorney's admission to practice [*Bus. & Prof. Code §§ 6068(o)(10), 6100*]:

- Failing to report to the State Bar, in writing, any event or action against the attorney that is subject to the State Bar's self-reporting requirements [*see Bus. & Prof. Code § 6068(o)(1)-(7), discussed in § 71.30A[3]*], within 30 days of the time the attorney has knowledge of the event [*Bus. & Prof. Code § 6068(o)(10)*].

- Conviction of felony or misdemeanor involving moral turpitude [*Bus. & Prof. Code §§ 6101, 6102*].

- Willful disobedience or violation of a court order requiring the attorney to do or forbear an act connected with or in the cause of the attorney's profession that the attorney ought in good faith to do or forbear [*Bus. & Prof. Code § 6103*].

- Violation of the attorney's professional oath or duties as an attorney [*Bus. & Prof. Code § 6103*; *see Bus. & Prof. Code §§ 6067, 6068* (oath and duties of attorney)].

- Violations of *Prob. Code § 15687* (restrictions on compensation of attorney acting as trustee) or *Prob. Code § 21350 et seq.* (limitations on donative transfers to drafters) [*Bus. & Prof. Code § 6103.6* (applicable to violations occurring on or after January 1, 1994)].

- Corruptly or willfully and without authority appearing as attorney for a partyto an action or proceeding [*Bus. & Prof. Code § 6104*].

- Lending the attorney's name, to be used as an attorney by another person who is not an attorney [*Bus. & Prof. Code § 6105*].

- Committing any act involving dishonesty, moral turpitude, or corruption, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, and regardless of whether or not the act is a felony or misdemeanor [*Bus. & Prof. Code § 6106*]. If the act constitutes a felony or misdemeanor, conviction in a criminal proceeding is not a condition precedent to disbarment or suspension of practice because of the act [*Bus. & Prof. Code § 6106*].

- Advocating the overthrow of the government of the United States or of the State of California by force, violence, or other unconstitutional means [*Bus. & Prof. Code § 6106.1*].

- Engaging in any conduct prohibited by former *Ins. Code § 1871.1* (*now see Penal Code § 550*) (fraud related to insurance claim) or *Ins. Code § 1871.4* (fraud related to claim for workers' compensation) [*Bus. & Prof. Code § 6106.5*].

- Expressly or impliedly conditioning the performance of legal services for a current or prospective client on the client's willingness to engage in sexual relations with the attorney [*Bus. & Prof. Code § 6106.9*; *see Cal. Rules Prof. Conduct, Rule 3-120*].

Attorneys may be subject to discipline for violating *Code Civ. Proc. § 411.35*, which requires the filing and serving of a certificate of merit by the attorney prior to filing an action for damages for the professional negligence of architects, engineers, and land surveyors [*see Code Civ. Proc. § 411.35(f)*]. An attorney may be disciplined by the State Bar for failure to provide advance notice of intention to commence an action for professional negligence against a health care provider, as required by statute [*see Code Civ. Proc. §§ 364, 365*].

The negotiation of a professional sport service contract by an attorney to collect a fee that, in any calendar year, exceeds 10 percent of the athlete's compensation constitutes cause for the imposition of discipline [*Bus. & Prof. Code § 6106.7(a)*]. Likewise, the willful violation of certain Labor Code sections, which regulate athletic contracts and athletic agents, constitutes cause for imposing discipline on an attorney [*Bus. & Prof. Code § 6106.7(b)*; *see Lab. Code §§ 1530.5, 1531(b), (c), 1535.5, 1535.7, 1539*].

An attorney may be subject to discipline for negotiating, arranging, or otherwise offering to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee or other compensation paid by the borrower without certain required notices to the borrower [*see Bus. & Prof. Code § 6106.3*; *Civ. Code § 2944.6*]. In addition, an attorney who negotiates, arranges, or otherwise offers to perform a mortgage loan modification or other form of mortgage loan forbearance for a fee may only claim, demand, charge, collect, or receive any compensation after fully performing each and every service the attorney contracted to perform or represented that he or she would perform [*see Bus. & Prof. Code § 6106.3*; *Civ. Code § 2944.7*].

An attorney also may be disciplined for requiring, as a condition of a settlement of a civil action for professional misconduct brought against him or her, that the plaintiff agree not to file a complaint concerning that conduct with the agency charged with attorney discipline [*Bus. & Prof. Code § 6090.5*]. An attorney also may be subject to discipline for the refusal to participate in the State Bar's alternative dispute resolution discipline mediation program, or the failure to comply with any agreement reached in the program [*Bus. & Prof. Code § 6086.14(a)*; *see § 71.12[3]*].

An attorney's violation of *Bus. & Prof. Code §§ 6158, 6158.1*, or *6158.3* (prohibiting false and misleading advertising) is cause for discipline by the State Bar. The State Bar also may commence an investigation based on a complaint filed by any person claiming a violation of these sections. The State Bar's determination of this complaint is admissible in,

but is not determinative of, any disciplinary proceeding brought against the attorney as a result of the complaint [*Bus. & Prof. Code § 6158.7*].

Causes for discipline listed in the State Bar Act apparently are not exclusive; the Supreme Court retains its inherent power to discipline attorneys, including the power summarily to disbar them [*see Bus. & Prof. Code §§ 6087, 6100*].

[2] Violation of Rules of Professional Conduct

The Board of Governors of the State Bar has the power to discipline members of the Bar for a willful breach of any of the California Rules of Professional Conduct by public or private reproval or to recommend to the Supreme Court the suspension from practice of a member for a period not exceeding three years [*Bus. & Prof. Code § 6077*].

The Rules of Professional Conduct are discussed in Ch. 72, *Attorney Practice and Ethics* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-71 California Forms of Pleading and Practice--Annotated § 71.30A

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.30A Reporting of Attorney Conduct to State Bar for Possible Discipline

[1] Court Reporting Requirements

Courts must notify the State Bar of any of the following [*Bus. & Prof. Code § 6086.7(a)*]:

- A final order of contempt imposed against an attorney that may involve grounds warranting discipline. The court entering the final order must transmit to the State Bar a copy of the relevant minutes, final order, and transcript, if one exists.

- Whenever a modification or reversal of a judgment in a judicial proceeding is based in whole or in part on the misconduct, incompetent representation, or willful misrepresentation of an attorney.

- The imposition of any judicial sanctions against an attorney, except sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000).

- The imposition of any civil penalty upon an attorney pursuant to *Family Code Section 8620*.

If a court notifies the State Bar of any of these events, the court also must notify the attorney involved that the matter has been referred to the State Bar [*Bus. & Prof. Code § 6086.7(b)*]. The State Bar is required to investigate any such matter as to the appropriateness of initiating disciplinary action against the attorney [*Bus. & Prof. Code § 6086.7(c)*].

In addition, within 20 days after a judgment by a court that a member of the State Bar is liable for any damages resulting in a judgment against the attorney in any civilaction for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity, the court which rendered the judgment must report that fact in writing to the State Bar [*Bus. & Prof. Code § 6086.8(a)*].

[2] Business Reporting Requirements

The Legislature has found that overdrafts and misappropriations from attorney trust accounts are serious problems, and determined that it is in the public interest to ensure prompt detection and investigation of instances involving overdrafts and misappropriations from attorney trust accounts. A financial institution (including any branch) which is a depository for attorney trust accounts under *Bus. & Prof. Code § 6211(a)* or *(b)* is required to report to the State Bar in the event any properly payable instrument is presented against an attorney trust account containing insufficient funds, irrespective of whether or not the instrument is honored [*Bus. & Prof. Code § 6091.1(a)*; *see Bus. & Prof. Code § 6091.1(b)* (format of report)].

Every attorney practicing or admitted to practice in California is conclusively deemed to have consented to these reporting and production requirements [*Bus. & Prof. Code § 6091.1(c)*]. A financial institution may charge an attorney or law firm for the reasonable cost of producing the reports and records required by this statute [*Bus. & Prof. Code § 6091.1(d)*].

In addition, every claim or action for damages against a member of the State Bar for fraud, misrepresentation, breach of fiduciary duty, or negligence committed in a professional capacity must be reported to the State Bar within 30 days of receipt by the admitted insurer or licensed surplus brokers providing professional liability insurance to that member of the State Bar [*Bus. & Prof. Code § 6086.8(b)*].

[3] Attorney Self-Reporting Requirements

Attorneys have the duty to report to the State Bar, in writing, within 30 days of the time the attorney has knowledge of any of the following [*Bus. & Prof. Code § 6068(o)*]:

- The filing of three or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful conduct committed in a professional capacity.

- The entry of judgment against the attorney in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity.

- The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than $1,000.

- The bringing of an indictment or information charging a felony against the attorney.

- The conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.

- The imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.

- Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.

"Against the attorney" includes claims and proceedings against any firm of attorneys for the practice of law in which the attorney was a partner at the time of the conduct complained of and any law corporation in which the attorney was a

shareholder at the time of the conduct complained of, unless the matter, to the attorney's knowledge, has already been reported by the law firm or corporation [*Bus. & Prof. Code § 6068(o)(8)*]. An attorney's failure to report as required may serve as a basis of discipline [*Bus. & Prof. Code § 6068(o)(10)*; *see § 71.30[1*]].

In addition, an attorney who does not possess professional liability insurance must send a complete written report to the State Bar as to any settlement, judgment, or arbitration award described in *Bus. & Prof. Code § 6086.8(b)* [*Bus. & Prof. Code § 6086.8(c)*].

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6-71 California Forms of Pleading and Practice--Annotated § 71.31

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.31 Determination of Appropriate Discipline

[1] Adoption of Standards for Attorney Sanctions for Professional Misconduct

The Board of Governors of the State Bar has adopted a set of criteria for the imposition of discipline for professional misconduct known as the Standards for Attorney Sanctions for Professional Misconduct, which comprise Title IV of the Cal. State B. Rules Proc.. These standards became effective on January 1, 1986, and apply to all pending disciplinary matters in which a hearing panel decision or a stipulation as to facts and disposition is filed on or after January 1, 1986. In addition, the standards may be properly considered in assessing the appropriate disciplinary sanction for conduct predating the standards [*Kennedy v. State Bar (1989) 48 Cal. 3d 610, 617 n.3, 257 Cal. Rptr. 324, 770 P.2d 736* ; *Greenbaum v. State Bar (1987) 43 Cal. 3d 543, 550-551, 237 Cal. Rptr. 168 . 736 P.2d 754]* .

The purpose of the standards, as stated in their introduction, is to set up a comprehensive written set of standards to replace the ad hoc method of imposition of discipline. To that end, the issuance of the standards is aimed at achieving the following goals [Cal. State B. Stds. for Att'y Sanctions, Introduction]:

- To better discharge the purposes of attorney discipline as announced by the Supreme Court.
- To achieve greater consistency in disciplinary sanctions for similar offenses.
- To identify for the legal profession, the courts, and the public the factors thatmay appropriately be considered for imposing discipline on an attorney and to set forth an appropriate means by which those factors may lead to the selection of a sanction in a particular case.

Under the Standards, some of the discretion for the imposition of discipline in individual cases has been taken away from the State Bar Court [*see, e.g.,* Cal. State B. Stds. for Atty's Sanctions, Std. 2.5]. Although the Standards are not binding on the California Supreme Court and do not affect the independence of the Court's review, the Court has found

the Standards instructive in making its determinations of discipline [*In re Nadrich (1988) 44 Cal. 3d 271, 277, 747 P.2d 1146* ; *see* *Guzzetta v. State Bar (1987) 43 Cal. 3d 962, 982, 239 Cal. Rptr. 675, 741 P.2d 172]* .

The Standards apply to the fixing of a final disciplinary sanction after a member of the State Bar has been found culpable of or has acknowledged culpability of professional misconduct in a proceeding conducted by the State Bar [Cal. State B. Stds. for Atty's Sanctions, Std. 1.1]. The Standards do not apply to the following [Cal. State B. Stds. For Atty's Sanctions, Std. 1.1]:

- Resignation of an attorney with charges pending pursuant to *Cal. Rules of Ct., Rule 9.21*.
- A transfer to or retransfer from inactive status pursuant to *Bus. & Prof. Code § 6007*.
- An interim suspension following conviction of a crime under *Bus. & Prof. Code §§ 6101, 6102*.

The Standards set forth the purposes for the conduct of disciplinary proceedings and for the imposition of sanctions by the State Bar [Cal. State B. Stds. for Atty's Sanctions, Std. 1.3]. The Standards state that the purposes are [Cal. State B. Stds. For Atty's Sanctions, Std. 1.3]:

- To protect the public, the courts, and the legal profession.
- To maintain high professional standards by attorneys.
- To preserve the public confidence in the legal profession.

Rehabilitation of a member is a permissible object of a sanction, but only if the imposition of rehabilitative sanctions is consistent with the primary purposes of imposing sanctions [Cal. State B. Stds. for Atty's Sanctions, Std. 1.3].

[2] State Bar Recommendation of Discipline

[a] In General

When the State Bar recommends an appropriate sanction for an act of professional misconduct, it selects the sanction set forth in the California State Bar Standards for Attorney Sanctions for the particular act of misconduct found or acknowledged [Cal. State B. Stds. for Atty's Sanctions, Std. 1.6(a)].

PRACTICE TIP:

Standards for Attorney Sanctions for Professional Misconduct. The State Bar Court has utilized the Standards as guidelines in determining the recommended discipline even though the Standards are expressed in mandatory language. The State Bar Court's use of the Standards as guidelines is endorsed by the Supreme Court of California as a method of achieving greater consistency in disciplinary sanctions for similar offenses [*see* *In re Young (1989) 49 Cal. 3d 257, 267, 261 Cal. Rptr. 59, 776 P.2d 1021* ; *Gary v. State Bar (1988) 44 Cal. 3d 820, 828, 244 Cal. Rptr. 482, 749 P.2d 1336* ; *Greenbaum v. State Bar (1987) 43 Cal. 3d 543, 550, 237 Cal. Rptr. 168, 736 P.2d 754]* . *By Regina E. Brenner*.

If two or more acts of professional misconduct are found or acknowledged in a single disciplinary proceeding and different sanctions are prescribed by the Standards for those acts, the sanction imposed is the more or most severe of the different applicable sanctions [Cal. State B. Stds. for Att'y Sanctions, Std. 1.6(a)].

[b] Effect of Aggravating or Mitigating Circumstances Generally

The State Bar recommends imposition of the appropriate sanction prescribed for the particular offense, unless

aggravating or mitigating circumstances are found to surround the particular act of misconduct and the net effect of the aggravating or mitigating circumstances, by themselves and in balance with the opposing mitigating or aggravating circumstances, demonstrates that a greater or lesser degree of sanction should be imposed in order to fulfill the purposes of imposing sanctions, as set forth in the Standards [Cal. State B. Stds. for Att'y Sanctions, Std. 1.6(b)].

In applying the Standards, any limitation on the consideration of mitigatingcircumstances contained in Part B or C of the Standards controls over any standard in Part A [Cal. State B. Stds. for Att'y Sanctions, Std. 1.6(c)]. Standards in Part B specify sanctions in original proceedings for professional misconduct [*see* Cal. State B. Stds. for Att'y Sanctions, Stds. 2.1-2.10]. Standards in Part C set forth sanctions for professional misconduct following conviction of a crime [*see* Cal. State B. Stds. for Att'y Sanctions, Stds. 3.1-3.4]. Standards in Part A are of general applicability [*see* Cal. State B. Stds. for Att'y Sanctions, Stds. 1.1-1.7].

The Supreme Court also considers aggravating and mitigating circumstances in making its decision as to which sanction to impose on an attorney. For discussion of aggravating and mitigating circumstances in the context of Supreme Court imposition of sanctions, see *§ 71.31[5]*.

[3] Aggravating Circumstances

[a] Defined

An aggravating circumstance is defined as an event or factor established clearly and convincingly by the State Bar Court as having surrounded a member's professional misconduct, and as demonstrating that a greater degree of sanction than that set forth in the Standards for the particular act of professional misconduct found or acknowledged is needed to protect the public, the courts, and the legal profession adequately [Cal. State B. Stds. for Atty's Sanctions, Std. 1.2(b)]. The following circumstances are considered aggravating under the Standards [Cal. State B. Stds. for Atty's Sanctions, Std. 1.2(b)(i)-(vi)]:

- The existence of a prior record of discipline and the nature and extent of that record.

- The fact that current misconduct found or acknowledged by the member evidences multiple acts of wrongdoing or demonstrates a pattern of misconduct.

- The fact that the member's misconduct was surrounded by or followed by bad faith, dishonesty, concealment, overreaching, or other violations of the State Bar Act or Rules of Professional Conduct; or, if trust funds or trust property were involved, refusal or inability to account to the client or person who is the object of the misconduct for improper conduct toward those funds or property.

- The fact that the member's misconduct significantly harmed a client, the public, or the administration of justice.

- The member's indifference toward rectification of or atonement for the consequences of his or her misconduct.

- The member's lack of candor to and cooperation with any victims of the member's misconduct or with the State Bar during disciplinary investigation or proceedings.

A member's lack of concern for the disciplinary process and failure to appreciate the seriousness of the charges is a factor in aggravation [*In the Matter of Hunter (1994) 3 Cal. State Bar Ct. Rptr. 63, 77-78* (review department found member's dilatory conduct in repeated attempts to appear in both hearing and review departments without seeking relief from default to be aggravating factor)].

[b] Effect of Prior Discipline

The Standards define a prior record of discipline as a previous imposition or recommendation of discipline of the member as defined by Cal. State B. Rules Proc., Rule 216 [Cal. State B. Stds. for Att'y Sanctions, Std. 1.2(f)]. The Standards also include discipline imposed for a member's violation of probation or willful violation of an order of the Supreme Court requiring compliance with *Cal. Rules of Ct., Rule 9.20*, which allows the Court to impose certain duties on resigned, disbarred, or suspended attorneys [Cal. State. B. Stds. for Att'y Sanctions, Std. 1.2(f)].

If a member is found culpable of professional misconduct and the member has a record of one prior imposition of discipline, the degree of discipline imposed in the current proceeding must be greater than that imposed in the prior proceeding unless the discipline imposed in the prior proceeding was so remote in time to the current proceeding and the offense is so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust [Cal. State B. Stds. for Att'y Sanctions, Std. 1.7(a)]. If the member has a record of two prior impositions ofdiscipline, the degree of discipline in the current proceeding must be disbarment unless the most compelling mitigating circumstances clearly predominate [Cal. State B. Stds. for Att'y Sanctions, Std. 1.7(b); for discussion of mitigating circumstances under the Standards, see *§ 71.31[2][b]*].

A prior record of discipline is not a prerequisite for imposing any appropriate sanction under the Standards, including disbarment, for professional conduct [Cal. State B. Stds. for Att'y Sanctions, Std. 1.7(c)].

[c] Recurring Misconduct

Repeated misconduct and conduct evincing habitual disregard of the client's interests justify severe discipline [*see Trousil v. State Bar (1985) 38 Cal. 3d 337, 342, 211 Cal. Rptr. 525, 695 P.2d 1066* ; *Alberton v. State Bar (1984) 37 Cal. 3d 1, 16, 206 Cal. Rptr. 373, 686 P.2d 1177 , cert. denied, 470 U.S. 1007* ; *see also Levin v. State Bar (1989) 47 Cal. 3d 1140, 1149-1150 n.14, 255 Cal. Rptr. 422, 767 P.2d 689* (for purposes of aggravation of discipline, result is same whether attorney's conduct is characterized as "multiple acts of wrongdoing" or "a pattern of misconduct"); *In the Matter of Doran (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 871, 879* ("pattern of misconduct" amounted to moral turpitude where attorney used client trust account to conduct personal business for period approaching three years and issued 28 NSF (insufficient funds) checks from account); *In the Matter of Hindin (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 685-686* ("pattern of misconduct" amounts to moral turpitude where attorney habitually disregards clients' interests and fails to communicate)]. Thus, each violation committed by an attorney warrants a separate and independent disciplinary response [*Alberton v. State Bar (1984) 37 Cal. 3d 1, 15, 206 Cal. Rptr. 373, 686 P.2d 1177 , cert. denied, 470 U.S. 1007 (1985)]* . The Supreme Court may weigh multiple violations as an aggravating factor notwithstanding Cal. State B. Stds. for Att'y Sanctions, Std. 1.6(a), which discourages separate punishment for each wrongful act [*Levin v. State Bar (1989) 47 Cal. 3d 1140, 1150, 255 Cal. Rptr. 422, 767 P.2d 689]* .

PRACTICE TIP:

Additional Allegations of Misconduct as Aggravating Circumstance. Additional allegations of misconduct may be aggravating circumstances; however, in default matters, an additional allegation of misconduct omitted from the Notice to Show Cause cannot be an aggravating circumstance because the respondent does not have notice of the additional allegation [*see In the Matter of Heiner (1990) 1 Cal. State Bar Ct. Rptr. 301.]* . *By Regina E. Brenner*.

The Supreme Court and the State Bar Court may also consider prior discipline of the attorney as an aggravating factor [*see Alberton v. State Bar (1984) 37 Cal. 3d 1, 16, 206 Cal. Rptr. 373, 686 P.2d 1177 , cert. denied, 470 U.S. 1007 (1985)* ; *In the Matter of Yagman (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 788, 806]* . The Court often uses the Standards For Attorney Sanctions as a guidepost in determining the appropriate discipline for an attorney with prior discipline [*see, e.g., Kapelus v. State Bar (1987) 44 Cal. 3d 179, 198 n.14, 242 Cal. Rptr. 196, 745 P.2d 917* ; *see also* Cal. State B. Stds. for Att'y Sanctions, Stds. 1.7 (effect of prior discipline)].

In determining the extent to which prior discipline is an aggravating factor, the Court and the State Bar Court may consider not only the severity of the prior offenses but also when the prior disciplinary proceedings occurred. For example, in one case, an attorney's prior disciplinary record of three disciplinary proceedings was the basis for the State Bar's recommendation of disbarment. The Supreme Court, however, held that the time frame of the other disciplinary proceedings, which had taken place about 20 years prior to the present proceeding, in addition to the light sentences imposed in the prior proceedings, somewhat lessened the aggravating effect of those proceedings in determining the discipline in the later proceeding. Consequently, the Court imposed discipline of five years' suspension, which would be stayed and the attorney placed on probation, with only one year of actual suspension [*McCray v. State Bar (1985) 38 Cal. 3d 257, 274-275, 211 Cal. Rptr. 691, 696 P.2d 83* ; *see also In the Matter of Yagman (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 788, 806]* .

[d] Misconduct Related to Disciplinary Proceeding in Other Matter

The Court may consider the fact that an attorney's misconduct took place during disciplinary proceedings in another matter. Additionally, a failure by a previously disciplined attorney to comply with probationary conditions set by the State Bar in another matter may be deemed an aggravating factor [*Mepham v. State Bar (1986) 42 Cal. 3d 943, 949, 232 Cal. Rptr. 152, 728 P.2d 222]* .

[e] Attitude About Prior Misconduct and Disciplinary Proceedings

The Supreme Court may consider as an aggravating circumstance an attorney's failure to demonstrate any awareness of the gravity of his or her misconduct [*Trousil v. State Bar (1985) 38 Cal. 3d 337, 343, 211 Cal. Rptr. 525, 695 P.2d 1066* ; *Tarver v. State Bar (1984) 37 Cal. 3d 122, 134-135, 207 Cal. Rptr. 302, 688 P.2d 911]* . The fact that the attorney appears to be unrepentant or appears to take no responsibility for his or her actions is an aggravating consideration [*Kapelus v. State Bar (1987) 44 Cal. 3d 179, 197, 198, 242 Cal. Rptr. 196, 745 P.2d 917* ; *Warner v. State Bar (1983) 34 Cal. 3d 36, 43, 192 Cal. Rptr. 244, 664 P.2d 148]* . An attorney's lack of insight into the wrongfulness of his or her misconduct, however, may not be considered in aggravation of discipline if attorney's attitude is based on honest, though mistaken, belief in his or her innocence [*VanSloten v. State Bar (1989) 48 Cal. 3d 921, 932-933, 258 Cal. Rptr. 235, 771 P.2d 1323]* .

An attorney's contemptuous attitude towards disciplinary proceedings is relevant as a factor in aggravation [*Weber v. State Bar (1988) 47 Cal. 3d 492, 507, 253 Cal. Rptr. 573, 764 P.2d 701 , cert. denied, 490 U.S. 1009 (1989)* ; *Maltaman v. State Bar (1987) 43 Cal. 3d 924, 958, 239 Cal. Rptr. 687, 741 P.2d 185]* . Frivolous lawsuits filed by an attorney against the State Bar may properly be considered in aggravation when the suits are probative of the attorney's contemptuous attitude towards disciplinary proceedings [*see Weber v. State Bar (1988) 47 Cal. 3d 492, 505-507, 253 Cal. Rptr. 573, 764 P.2d 701 , cert. denied, 490 U.S. 1009 (1989)]* .

[f] Noncooperation and Deceit During Disciplinary Proceedings

An attorney's willful failure to cooperate or participate in disciplinary investigations or proceedings is a factor supporting increased discipline, and is a cause for discipline in itself [*see Middleton v. State Bar (1990) 51 Cal. 3d 548, 560, 273 Cal. Rptr. 321, 796 P.2d 1326* ; *see Bus. & Prof. Code § 6068(d)* (attorney has obligation to respond to State Bar's inquiries in manner that is consistent with truth)]. Outright deceit and false testimony during the course of disciplinary proceedings is a strong factor aggravating discipline, and such conduct may even be considered by the Court as being more serious than the underlying offense [*Chang v. State Bar (1989) 49 Cal. 3d 114, 128, 260 Cal. Rptr. 280, 775 P.2d 1049* ; *Warner v. State Bar (1983) 34 Cal. 3d 36, 44, 192 Cal. Rptr. 244, 664 P.2d 148* ; *In re Regan, 2005 Calif. Op. LEXIS 7, 23,--Cal. State Bar Ct. Rptr.*-- (attorney who makes false statement to judge is not exculpated based on belief he is acting in clients' best interest)]. It should be noted, however, that an attorney has no obligation to produce incriminating evidence on his or her own initiative [*Franklin v. State Bar (1986) 41 Cal. 3d*

700, 708, 224 Cal. Rptr. 738, 715 P.2d 699] . Furthermore, an attorney's failure to cooperate during a criminal investigation may not be considered as a factor in aggravation [*In re Severo (1986) 41 Cal. 3d 493, 503, 224 Cal. Rptr. 106, 714 P.2d 1244]* .

[4] Mitigating Circumstances

[a] Defined

A mitigating circumstance is defined as an event or factor that is established clearly and convincingly by the member subject to a disciplinary proceeding as having caused or underlain the member's professional misconduct, and that demonstrates that the public, courts, and legal profession would be adequately protected by a more lenient degree of sanction than that set forth in the Standards for the particular act of professional misconduct found or acknowledged [Cal. State B. Stds. for Att'y Sanctions, Std. 1.2(e)]. The following circumstances are considered mitigating under the Standards [Cal. State B. Stds. for Att'y Sanctions, Std. 1.2(e)(i)-(ix)]:

- The absence of any prior record of discipline over many years of practice coupled with present misconduct that is not deemed serious.

- The member's good faith.

- Lack of harm to the client or person who is the object of the misconduct.

- Extreme emotional difficulties or physical disabilities suffered by the member at the time of the act of professional misconduct that expert testimony establishes was directly responsible for the misconduct, provided that the difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug or substance abuse, and further provided that the member has established through clear and convincing evidence that he or she no longer suffers from the difficulties or disabilities.

- Spontaneous candor and cooperation displayed to the victims of the member's misconduct and the State Bar during disciplinary investigation and proceedings.

- An extraordinary demonstration of the good character of the member attested to by a wide range of references in the legal and general communities who are aware of the full extent of the member's misconduct.

- Objective steps promptly taken by the member that spontaneously demonstrate remorse or recognition of the wrongdoing found or acknowledged and that are designed to atone for any consequences of the member's misconduct in a timely manner.

- Passage of considerable time since the acts of professional misconduct occurred, followed by convincing proof of subsequent rehabilitation.

- Excessive delay in conducting disciplinary proceedings that is not attributable to the member and that prejudiced the member.

The State Bar Court will consider whether the alleged mitigating circumstances outweigh the seriousness of the member's professional misconduct. No one circumstance is determinative of the appropriate degree of discipline. The appropriate degree of discipline rests on a balanced consideration of all relevant factors, with due regard to the purposes of imposing discipline [*In the Matter of Brazil (1994) 2 Cal. State Bar Ct. Rptr. 679, 687-690* (member's lack of prior discipline record during 14 years of practice was entitled to mitigating weight but did not prove disbarment was

excessive for convictions of grand theft and forgery)]. Mitigating circumstances that were considered in a prior disciplinary proceeding involving the member need not be considered in a subsequent disciplinary proceeding [*In the Matter of Stewart (1994) 3 Cal. State Bar Ct. Rptr. 52, 61]* .

[b] Personal Problems

One factor that is properly to be considered in mitigation is that at the time of the misconduct the petitioner experienced personal and financial problems [*Smith v. State Bar (1985) 38 Cal. 3d 525, 540, 213 Cal. Rptr. 236, 698 P.2d 139* ; *see Porter v. State Bar (1990) 52 Cal. 3d 518, 527, 276 Cal. Rptr. 384, 801 P.2d 1135]* .

The Court generally considers drug or alcohol abuse to be mitigating factors in circumstances in which the drug addiction or alcohol dependency developed in response to some significant extrinsic or traumatic event [*Twohy v. State Bar (1989) 48 Cal. 3d 502, 513-514, 256 Cal. Rptr. 794, 769 P.2d 976]* . The Court, however, is hesitant to consider substance abuse as a mitigating factor when caused by stress or psychological disturbance [*Twohy v. State Bar (1989) 48 Cal. 3d 502, 514, 256 Cal. Rptr. 794, 769 P.2d 976]* . In the absence of reliable evidence that a long-standing addiction is permanently under control, or demonstration of a meaningful and sustained period of successful rehabilitation, the Court has not found incomplete or short-term efforts at rehabilitation sufficiently compelling to warrant reducing the severity of disciplinary sanctions recommended by the State Bar Court [*Twohy v. State Bar (1989) 48 Cal. 3d 502, 515, 256 Cal. Rptr. 794, 769 P.2d 976]* . Nevertheless, an attorney's rehabilitation from alcoholism or other substance abuse will be entitled to significant weight in mitigation if the attorney establishes that [*Hawes v. State Bar (1990) 51 Cal. 3d 587, 595, 274 Cal. Rptr. 2, 797 P.2d 1180]* :

- The abuse was addictive in nature.
- The abuse causally contributed to the misconduct.
- The attorney has undergone a meaningful and sustained period of rehabilitation.

Evidence of mental illness is not a mitigating factor that will justify or exonerate an attorney from bearing the responsibility for professional misconduct [*In re Vaughn (1985) 38 Cal. 3d 614, 619, 213 Cal. Rptr. 583, 698 P.2d 651* ; *Ballard v. State Bar (1983) 35 Cal. 3d 274, 289, 197 Cal. Rptr. 556, 673 P.2d 226]* . The Court's duty is to ensure that the public will be protected in the fulfillment of proper professional standards, even if the cause of the problem is emotional [*see Grove v. State Bar (1967) 66 Cal. 2d 680, 685, 58 Cal. Rptr. 564, 427 P.2d 164]* . The problems may explain the misdeeds, but they do not excuse them [*In re Vaughn (1985) 38 Cal. 3d 614, 619, 213 Cal. Rptr. 583, 698 P.2d 651]* . Nonetheless, a mental disorder is entitled to mitigating weight if it causally contributed to the misconduct and if the disorder has since been cured or so controlled that it is unlikely to lead again to misconduct [*Hawes v. State Bar (1990) 51 Cal. 3d 587, 595, 274 Cal. Rptr. 2, 797 P.2d 1180* ; *see McKnight v. State Bar (1991) 53 Cal. 3d 1025, 1038-1039, 281 Cal. Rptr. 766, 810 P.2d 998]* .

[c] Lack of Prior Disciplinary Record

The Court can properly take into consideration the lack of a prior disciplinary record over a substantial period of time in determining discipline [*Schneider v. State Bar (1987) 43 Cal. 3d 784, 798-799, 239 Cal. Rptr. 111, 739 P.2d 1279* (lack of prior record for approximately 13 years); *Chefsky v. State Bar (1984) 36 Cal. 3d 116, 132 n.10, 202 Cal. Rptr. 349, 680 P.2d 82* (lack of prior record for nearly 20 years)].

[d] Attitude of Attorney

An attorney's attitude toward disciplinary proceedings may properly be considered when deciding on the appropriate sanction [*Morales v. State Bar (1988) 44 Cal. 3d 1037, 1048, 245 Cal. Rptr. 398, 751 P.2d 457* ; *Alberton v. State*

Bar (1984) 37 Cal. 3d 1, 16, 206 Cal. Rptr. 373, 686 P.2d 1177 , cert. denied, 470 U.S. 1007 (1985)] . Candor, cooperation, and remorse are factors that can be considered in mitigation in a disciplinary proceeding [*Hipolito v. State Bar (1989) 48 Cal. 3d 621, 627 n.2, 257 Cal. Rptr. 331, 770 P.2d 743* ; *McCray v. State Bar (1985) 38 Cal. 3d 257, 274, 211 Cal. Rptr. 691, 696 P.2d 83* ; *see also In the Matter of Silver (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 902, 906* ; *In the Matter of Doran (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 871, 879* ; *In the Matter of Yagman (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 788, 807]* .

[e] Difficult Clients

The difficulty of dealing with unpleasant, self-serving, disreputable, or dishonest clients has been acknowledged as a mitigating factor [*Chefsky v. State Bar (1984) 36 Cal. 3d 116, 132, 202 Cal. Rptr. 349, 680 P.2d 82* ; *Bernstein v. State Bar (1972) 6 Cal. 3d 909, 918, 101 Cal. Rptr. 369, 495 P.2d 1289]* . However, making disparaging remarks about clients may be considered bad faith tactics [*In re Regan, 2005 Calif. Op. LEXIS 7, 44-45,--Cal. State Bar Ct. Rptr.--* (unsupported claims that clients were mentally ill and senile demonstrated lack of appreciation for attorney's obligations)].

[f] Restitution

The fact that the attorney made restitution to the client prior to the State Bar's involvement in the case may be entitled to some weight in mitigation [*Waysman v. State Bar (1986) 41 Cal. 3d 452, 458, 224 Cal. Rptr. 101, 714 P.2d 1239* ; *see also Lawhorn v. State Bar (1987) 43 Cal. 3d 1357, 1366-1367, 240 Cal. Rptr. 848, 743 P.2d 908* (restitution made after client told attorney that she would file complaint against him, but before attorney received formal notice that complaint had been filed, entitled to some weight as mitigating factor); *but see In re Ford (1988) 44 Cal. 3d 810, 817, 244 Cal. Rptr. 476, 749 P.2d 1331* (partial restitution made after clientthreatened to report attorney to police entitled to little weight in mitigation)]. Restitution made only under the pressure of a forthcoming disciplinary investigation, however, is entitled to no weight as a mitigating circumstance [*Kelly v. State Bar (1988) 45 Cal. 3d 649, 658, 247 Cal. Rptr. 608, 754 P.2d 1104* ; *Murray v. State Bar (1985) 40 Cal. 3d 575, 582, 220 Cal. Rptr. 667, 220 Cal. Rptr. 677, 709 P.2d 480]* .

[g] Delay in Bringing Proceeding

The fact that there has been a substantial delay in the State Bar's initiation of formal proceedings against an attorney, although not a bar to the imposition of discipline, is a factor to consider in deciding what discipline is appropriate [*Chefsky v. State Bar (1984) 36 Cal. 3d 116, 132, 202 Cal. Rptr. 349, 680 P.2d 82* ; *but see In re Ford (1988) 44 Cal. 3d 810, 818, 244 Cal. Rptr. 476, 749 P.2d 1331* (delay in conduct of disciplinary proceedings merits consideration as mitigating factor only if it "caused prejudice in a legal sense")].

[h] Nature of Attorney's Misconduct

In determining discipline, the Supreme Court may take into account whether the attorney's misconduct was negligent, as opposed to being intentionally fraudulent, the former warranting less severe discipline than the latter [*Waysman v. State Bar (1986) 41 Cal. 3d 452, 458, 224 Cal. Rptr. 101, 714 P.2d 1239]* . The fact that the attorney's misconduct did not result in harm to clients may also be considered as mitigation [*Lister v. State Bar (1990) 51 Cal. 3d 1117, 1129, 275 Cal. Rptr. 802, 800 P.2d 1232]* .

If the attorney's misconduct involved an illegal transaction, the Court may consider as a mitigating factor the fact that the attorney was merely a "follower," rather than an instigator, in the transaction. The Court may also consider the fact that the transaction occurred in connection with the attorney's personal affairs, and that the attorney did not stand to benefit personally from the transaction [*see In re Chira (1986) 42 Cal. 3d 904, 909, 231 Cal. Rptr. 560, 727 P.2d 753]* .

Misconduct involving an unsettled area of the law may merit lighter discipline than conduct clearly violating existing statutes, cases, and rules [*see Hawk v. State Bar (1988) 45 Cal. 3d 589, 602, 247 Cal. Rptr. 599, 754 P.2d 1096]* .

[i] Attorney's Youth and Inexperience

Some older cases have held that an attorney's youth and inexperience may be a factor in meting out lighter punishment on the attorney [*see, e.g., Crawford v. State Bar (1960) 54 Cal. 2d 659, 669, 7 Cal. Rptr. 746, 355 P.2d 490* ; *Dudney v. The State Bar (1931) 214 Cal. 238, 240, 4 P.2d 770]* . More recently, however, the Court has stated that an attorney's youth and inexperience alone is not a mitigating factor because thousands of young and inexperienced attorneys begin practice each year without committing professional misconduct [*In re Possino (1984) 37 Cal. 3d 163, 172, 207 Cal. Rptr. 543, 689 P.2d 115* ; *see also Lawhorn v. State Bar (1987) 43 Cal. 3d 1357, 1366, 240 Cal. Rptr. 848, 743 P.2d 908* (inexperience as explaining, though not excusing, misconduct by attorney)].

[j] Passage of Time and Abstention From Practice

The passage of time and abstention from practice are not mitigating factors unless the attorney establishes by substantial evidence that he or she has used the time to rehabilitate himself or herself to regain fitness to practice [*In re Possino (1984) 37 Cal. 3d 163, 172, 207 Cal. Rptr. 543, 689 P.2d 115]* .

[k] Favorable Character Evidence

Favorable character evidence can be a mitigating factor if the attorney has no prior record of discipline. The Court may consider testimony or letters from judges and attorneys indicating that the attorney has a good reputation in the legal community [*see Sternlieb v. State Bar (1990) 52 Cal. 3d 317, 331-332, 276 Cal. Rptr. 346, 801 P.2d 1097* ; *Guzzetta v. State Bar (1987) 43 Cal. 3d 962, 980-981, 239 Cal. Rptr. 675, 741 P.2d 172]* .

[l] Community Service

Service to the community and to the legal profession may constitute a mitigating factor [*Schneider v. State Bar (1987) 43 Cal. 3d 784, 799, 239 Cal. Rptr. 111, 739 P.2d 1279* ; *see Galardi v. State Bar (1987) 43 Cal. 3d 683, 694, 238 Cal. Rptr. 774, 739 P.2d 134* , *cert. denied, 484 U.S. 1062 (1988)]* . If the attorney's misconduct was related to prior emotional problems, the Court may consider community and professional activities in evaluating the attorney's rehabilitation from those problems [*see Porter v. State Bar (1990) 52 Cal. 3d 518, 528, 276 Cal. Rptr. 384, 801 P.2d 1135]* . Substantial pro bono legal work or volunteer work is a mitigating factor [*see In the Matter of Lais (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 926* ; *In the Matter of Bouyer (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 888, 891]* .

[m] Ignominy of Criminal Conviction

The Court recognizes the ignominy of a criminal conviction as a mitigating factor when there has been some period of incarceration [*see In re Mudge (1982) 33 Cal. 3d 152, 156, 187 Cal. Rptr. 779, 654 P.2d 1307* ; *Segretti v. State Bar (1976) 15 Cal. 3d 878, 889, 126 Cal. Rptr. 793, 544 P.2d 929* ; *but see In re Demergian (1989) 48 Cal. 3d 284, 297, 256 Cal. Rptr. 392, 768 P.2d 1069* (rejecting criminal conviction as mitigating factor when conviction was for grand theft from client trust fund and attorney was sentenced to only two days in county jail)]. If, however, the disciplinaryaction is based on a criminal conviction, the fact that the attorney plea-bargained in the underlying criminal action will not be given weight in mitigation [*In re Demergian (1989) 48 Cal. 3d 284, 297, 256 Cal. Rptr. 392, 768 P.2d 1069]* .

[5] Supreme Court Determination of Discipline

As discussed *above*, the State Bar has adopted Standards for Attorney sanctions that relate how the level of discipline

should be determined by the State Bar, setting forth specific sanctions for specific acts of misconduct and the effect of aggravating or mitigating factors in the imposition of discipline. These standards are intended in part to ensure consistency in imposing disciplinary sanctions on members of the State Bar [*see* Cal. State. B. Stds. for Att'y Sanctions, Introduction]. The Standards will be applied by the State Bar in making its recommendation of discipline.

Although the Supreme Court gives the State Bar's recommendation great weight, the Court makes its own independent decision regarding the imposition of discipline [*In re Leardo (1991) 53 Cal. 3d 1, 10, 278 Cal. Rptr. 689, 805 P.2d 948* ; *In re Vaughn (1985) 38 Cal. 3d 614, 618, 213 Cal. Rptr. 583, 698 P.2d 651]* . The Court has found the Standards instructive in making its determinations of discipline [*In re Nadrich (1988) 44 Cal. 3d 271, 277 n.3, 243 Cal. Rptr. 218, 747 P.2d 1146* ; *see Guzzetta v. State Bar (1987) 43 Cal. 3d 962, 982, 239 Cal. Rptr. 675, 741 P.2d 172]* . The Court, however, has rejected State Bar recommendations arising from application of the Standards when it has had serious doubts as to the propriety of the recommended discipline [*see Natali v. State Bar (1988) 45 Cal. 3d 456, 468, 247 Cal. Rptr. 165, 754 P.2d 211* ; *Lawhorn v. State Bar (1987) 43 Cal. 3d 1357, 1366, 240 Cal. Rptr. 848, 743 P.2d 908]* . In some cases, the Court has opted to credit attorneys with time spent on interim suspension, even though the Standards do not explicitly authorize interim suspension to be taken into account in the determination of discipline [*see, e.g., In re Aquino (1989) 49 Cal. 3d 1122, 1134, 264 Cal. Rptr. 833, 783 P.2d 192* ; *In re Young (1989) 49 Cal. 3d 257, 267-268, 261 Cal. Rptr. 59, 776 P.2d 1021]* .

The Supreme Court's imposition of discipline does not issue from a fixed formula, but from a balanced consideration of the relevant factors in mitigation and aggravation [*McCray v. State Bar (1985) 38 Cal. 3d 257, 273, 211 Cal. Rptr. 691, 696 P.2d 83* ; *Chefsky v. State Bar (1984) 36 Cal. 3d 116, 132-133, 202 Cal. Rptr. 349, 680 P.2d 82]* . For discussion of such factors, see *§ 71.31[3], [4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsSanctionsGeneral OverviewLegal EthicsGeneral Overview

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 71 ATTORNEY DISCIPLINE
PART II. LEGAL BACKGROUND
B. Grounds for Discipline, Reporting Attorney Conduct to State Bar, and Disciplinary Sanctions

6-71 California Forms of Pleading and Practice--Annotated § 71.32

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.32 Types of Discipline Available

The following types of discipline are available as sanctions against attorneys for their misconduct:

- Reprovals (private, public, and opinion reprimands) [*see § 71.34[1]*].
- Stayed suspension conditioned on compliance with terms of probation [*see § 71.34[3]*].
- Actual suspension from practice [*see § 71.34[4]*].
- Disbarment [*see § 71.34[5]*].

In addition to the sanctions mentioned above, the following informal, nondisciplinary sanctions are available in the appropriate case:

- Admonition [*see § 71.33[1]*].
- Agreement in lieu of discipline [*see § 71.33[2]*].
- Warning letters.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsSanctionsDisbarmentsLegal EthicsSanctionsSuspensionsLegal EthicsSanctionsReprimands

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6-71 California Forms of Pleading and Practice--Annotated § 71.33

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.33 Informal Discipline

[1] Admonitions

Technically, an admonition is a sanction that does not amount to formal discipline, and is the lowest form of sanction in the disciplinary process [*see* Cal. State B. Rules Proc., Rule 264; Cal. State B. Stds. for Att'y Sanctions, Stds. 1.2(a), 1.4(a)].

Under Cal. State B. Rules Proc., Rule 264, if the subject matter of a disciplinary proceeding pending in the State Bar Court does not involve a matter that is, or probably is, a client security fund matter or a serious offense, the Court may resolve the matter by an admonition to the respondent if the Court concludes that (1) the violation was not intentional or occurred under mitigating circumstances, and (2) no significant harm resulted [Cal. State B. Rules Proc., Rule 264(a)]. The term "serious offense" means conduct involving dishonesty, moral turpitude, or corruption, including conduct or acts constituting bribery, forgery, perjury, extortion, obstruction of justice, burglary or related offenses, intentional fraud, and intentional breach of a fiduciary relationship [Cal. State B. Rules Proc., Rule 264(b)].

Any party may move for the issuance of an admonition, or the parties may make a joint motion which must be accompanied by a stipulation conforming to the requirements of Cal. State B. Rules Proc., Rule 133 [Cal. State B. Rules Proc., Rule 264(e)].

PRACTICE TIP:

Admonitions. As one of the lowest forms of discipline, an admonition as a discipline sanction generally would be offered at an early stage in the discipline process. *By Regina E. Brenner*.

The admonition must be communicated to the complainant (if any) and to the deputy trial counsel, but otherwise may not be actively publicized by the State Bar or the State Bar Court. However, unless otherwise ordered,the file in a public proceeding must remain public even if the proceeding is resolved by the issuance of an admonition [Cal. State B. Rules Proc., Rule 264(c)].

An admonition does not constitute the imposition of discipline on the respondent [Cal. State B. Rules Proc., Rule 264(d)]. If, within two years after the effective date of an admonition to the respondent, another disciplinary hearing is initiated against the respondent based on other alleged misconduct, the proceeding resolved by admonition must be reopened on motion of the Office of the Chief Trial Counsel filed within 30 days after initiation of the second proceeding. All applicable time limitations are tolled during the period between the issuance of the admonition and the filing of the order granting the motion to reopen [Cal. State B. Rules Proc., Rule 264(f)].

[2] Agreements in Lieu of Disciplinary Proceedings

The State Bar Court may make agreements with respondent attorneys in lieu of disciplinary proceedings, regarding conditions of practice, further legal education, or other matters. These agreements may be used by the disciplinary agency in any subsequent proceeding involving the attorney [*Bus. & Prof. Code § 6092.5(i)*].

PRACTICE TIP:

Agreements in Lieu of Disciplinary Proceedings. Like an admonition, an agreement in lieu of disciplinary proceedings is a low form of misconduct resolution, and it is not public discipline. Accordingly, an agreement in lieu of discipline should be sought at an early stage in the discipline process. *By Regina E. Brenner*.

Legal Topics:

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

California Forms of Pleading and Practice--Annotated

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 71 ATTORNEY DISCIPLINE
PART II. LEGAL BACKGROUND
B. Grounds for Discipline, Reporting Attorney Conduct to State Bar, and Disciplinary Sanctions

6-71 California Forms of Pleading and Practice--Annotated § 71.34

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§ 71.34 Formal Discipline

[1] Reprovals

[a] In General

A reproval is a censure or reprimand issued by the California Supreme Court or by the State Bar pursuant to Cal. State B. Rules Proc., Rule 270 [Cal. State B. Stds. for Att'y Sanctions, Std. 1.2(g)]. The State Bar has the authority to discipline its members by the imposition of a reproval, either public or private, without recommendation to the Supreme Court [*Bus. & Prof. Code § 6078*; Cal. State B. Rules Proc., Rule 270(a)]. A reproval is effective when the State Bar Court's decision or order is final [Cal. State B. Rules Proc., Rule 270(a)].

[b] Private Reproval

Private reproval next lowest form of discipline after an admonition, and the lowest form of *formal* discipline, which despite its nomenclature may be available to the public.

A private reproval only remains "private" if it is imposed as the result of a stipulation approved by the State Bar Court *before* the initiation of a State Bar Court proceeding. In this case, the reproval is part of the respondent's official State Bar membership records, but is not disclosed in response to public inquiries and is not reported on the State Bar's web page [Cal. State B. Rules Proc., Rule 270(d)].

However, a "private" reproval may be available to the public in other circumstances. A private reproval imposed on a respondent after the initiation of a State Bar Court proceeding is part of the respondent's official State Bar membership records, is disclosed in response to public inquiries, and is reported as a record of public discipline on the State Bar's web page [Cal. State B. Rules Proc., Rule 270(d)]. A stipulation for a private reproval is not breached by posting a notice of an attorneys' public record of discipline on the State Bar website [*see*, *Mack v. State Bar (2001) 92 Cal. App. 4th 957, 112 Cal. Rptr. 2d 341]* .

If a private reproval is issued after the issuance of a notice of disciplinary charges, then the reproval is available to the public because the disciplinary proceeding at this point is a public proceeding [*see Bus. & Prof. Code § 6086.1*]. Accordingly, a member who feels that "private" reproval is an appropriate discipline, may find it desirable to stipulate to a private reproval before issuance of the notice of disciplinary charges. Otherwise, the member may be disciplined with a "private" reproval, only to lose the benefit of nondisclosure to the public.

In addition, the record of the proceeding in which a private reproval was imposed pursuant to stipulation is available to the public as part of the record of any subsequent proceeding in which it is introduced as evidence of a prior record of discipline [Cal. State B. Rules Proc., Rule 270(d)]. A primary significance of a private reproval is that it constitutes prior discipline for purposes of enhancing a subsequent sanction if the member is disciplined again [*see* Cal. State B. Proc., Rule 216; Cal. State B. Stds. for Att'y Sanctions, Stds. 1.2(f), 1.7].

[c] Public Reproval

A public reproval imposed on a respondent is publicly available as part of the respondent's official State Bar membership records, and may be disclosed in response to public inquiries. The record of the proceeding in which the public reproval was imposed is a public record [Cal. State B. Rules Proc., Rule 270(b)]. The State Bar issues periodic public releases to the press announcing the public discipline of members.

An order imposing a public reproval on a State Bar member must include a direction that the member must pay costs [Bus. & Prof. Code§ 6086.10(a); Cal. State B. Rules Proc., Rule 280]. These costs are added to, and become part of, the membership fee of the member for the next calendar year [*Bus. & Prof. Code § 6140.7*]. For discussion of the costs assessable against the member, see *§ 71.71*.

[d] Reprovals With Conditions

The State Bar may attach conditions, effective for a reasonable period of time, to a public or private reproval [*Cal. Rules of Ct., Rule 9.19*; Cal. State B. Rules Proc., Rule 271; Cal. State B. Stds. for Att'y Sanctions, Std. 1.5]. The conditions attached to a reproval must be based on a finding by the State Bar that protection of the public and the interest of the attorney will be served by them [*Cal. Rules of Ct., Rule 9.19(a)*].

A violation of the conditions issued under a reproval does not trigger a probation revocation proceeding. Rather, it may constitute cause for a separate proceeding for willful breach of *Cal. Rules Prof. Conduct, Rule 1-110* [*see Cal. Rules of Ct., Rule 9.19(b)* (referring to Cal. Rules Prof. Conduct, former Rule 9-101, predecessor to Rule 1-110); *In the Matter of Posthuma (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 813]* . Rule 1-110 states that members of the State Bar must comply with conditions attached to public or private reprovals or other discipline administered by the State Bar. At the time the State Bar administers the reproval, it must give notice to the attorney that failure to comply with the conditions may be punishable [*Cal. Rules of Ct., Rule 9.19(a)*]. A motion to modify any conditions attached to a reproval is governed by Cal. State B. Rules Proc., Rules 550-554, regarding modification or early termination of probation [Cal. State B. Rules Proc., Rule 271].

Cal. State B. Stds. for Att'y Sanctions, Std. 1.5, sets forth examples of conditions and duties that may be attached to reprovals. Conditions and duties may include, but are not limited to, the following [Cal. State B. Stds. for Att'y Sanctions, Std. 1.5]:

- A requirement that specified restitution be made or satisfaction of judgments filed.
- A requirement that the member take and pass the professional responsibility examination.

- A requirement that the member undertake treatment at his or her own expense for medical, psychological, or psychiatric conditions or for problems of alcohol or substance abuse.

- A requirement that the member undertake educational or rehabilitative work at his or her own expense regarding one or more fields of substantive law or law office management.

- A requirement that the member be supervised by a probation monitor referee pursuant to the California State Bar Rules of Procedure and that the member report to the State Bar, as prescribed, compliance with the State Bar Act and Rules of Professional Conduct, the manner in which client funds or trust funds are handled (certified to by an accountant, if required), and other reports as may be reasonable and appropriate in assessing the member's compliance with any duties or conditions imposed.

- Any other duty or condition consistent with the purposes of imposing a sanction for professional misconduct as set forth in Cal. State B. Stds. for Att'y Sanctions, Std. 1.3 [*see § 71.31[1]*].

If a requirement that the member take and pass the professional responsibility examination is imposed as a condition of reproval, the member is given a specific date by which he or she must do so. The member may apply to the Review Department of the State Bar Court for an extension of time to take and pass the exam [*Cal. Rules of Ct., Rule 9.10(b)*; Cal. State B. Rules Proc., Rule 321]. The motion must be:

- Based on good cause [Cal. State B. Rules Proc., Rule 321(c)].

- Filed in the Office of the Clerk of the State Bar Court [Cal. State B. Rules Proc., Rule 61].

- Include proof of service on the Office of Chief Trial Counsel [Cal. State B. Rules Proc., Rule 61].

[2] Opinion Reprimands

Closely related to reprovals are opinion reprimands, that is, opinions by the Supreme Court that are typically used to reduce the recommended discipline and instead to reprimand the member publicly by virtue of publication of the opinion. For example, in a case in which two lawyers were found to have violated former *Cal. Rules Prof. Conduct, Rule 2-101(A)* (predecessor to *Cal. Rules Prof. Conduct, Rule 1-400*), by a mass-mailing advertising campaign to solicit clients, the Court stated that it strongly disapproved of the activity but held that the recommended 30-day suspension was excessive. Because the attorneys had no prior disciplinary records and because they had made good faith efforts to modify the letters to make them truthful, the Court stated that it was satisfied that a public reprimand would constitute sufficient discipline, and that its opinion should serve as such reprimand [*Leoni v. State Bar (1985) 39 Cal. 3d 609, 628, 217 Cal. Rptr. 423, 704 P.2d 183]* . Similarly, in another case, an attorney was charged withconflicts of interest in representing multiple defendants in his role as the provider of public defense services for a county. The Supreme Court held that the attorney's conduct amounted to moral turpitude, but, because the attorney had practiced law for 30 years without any previous record of disciplinary proceedings and because he had abandoned some of his ways that amounted to misconduct, the Court considered that its public reprimand, issued by its opinion, constituted sufficient discipline [*Gendron v. State Bar (1983) 35 Cal. 3d 409, 425, 197 Cal. Rptr. 590, 673 P.2d 260]* .

[3] Probation

[a] In General

The sanction of probation is used when the Supreme Court suspends a member, stays execution of all or part of the period of suspension, and instead places the member on conditional probation [*see* Cal. State B. Stds. for Att'y Sanctions, Stds. 1.2(h), 1.4(c)(i)]. The State Bar may recommend suspension stayed on conditions of probation only if

the stay and conditions of probation are deemed consistent with the purposes of sanctions set forth in Cal. State B. Stds. for Att'y Sanctions, Std. 1.3 [Cal. State B. Stds. for Att'y Sanctions, Std. 1.4(c)(i); *see § 71.31[1]*]. Rehabilitation of a member is a permissible object of a sanction, however, only if the imposition of a rehabilitative sanction is consistent with the primary purpose of protection of the public, the courts, and the legal profession [Cal. State B. Stds. for Att'y Sanctions, Stds. 1.3, 1.4(c)(i)].

An order imposing probation on a State Bar member must include a direction by the Supreme Court that the member must pay costs [*Bus. & Prof. Code § 6086.10(a)*]. For a discussion of the costs assessable against the member, see *§ 71.71*.

[b] Conditions on Probation

If probation is imposed by the State Bar Court or the Office of Chief Trial Counsel with the agreement of the disciplined attorney, any conditions may be imposed that reasonably serve the purposes of the probation [*Bus. & Prof. Code § 6093(a)*].

An example of a condition with which a probationer might be required to comply is participation in a substance abuse program if the attorney's misconduct was caused by a substance abuse problem [*see, e.g., In re Leardo (1991) 53 Cal. 3d 1, 19, 278 Cal. Rptr. 689, 805 P.2d 948]* . Another condition that might be attached to probation, if the attorney's misconduct stemmed from inadequate office procedures, is a requirement that the attorney get outside help in setting up and implementing different office procedures and proving that he or she has done so [*see, e.g., Drociak v. State Bar (1991) 52 Cal. 3d 1085, 1091, 278 Cal. Rptr. 86, 804 P.2d 711]* . If the offense involved a member's trust account, a standard condition is a periodic auditing of the account by the member's accountant and subsequent reports to the State Bar [*see, e.g., Sternlieb v. State Bar (1990) 52 Cal. 3d 317, 334, 276 Cal. Rptr. 346, 801 P.2d 1097]* . When the State Bar Court desires additional monitoring of a probationer, it may require the probationer to submit quarterly reports as a condition of probation [*In the Matter of Sawyer (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 765, 773* ; *In the Matter of Weiner (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 759, 763-764]* . For monitoring of probation generally, see *§ 71.34[3][c]*.

Restitution is routinely required as a condition of probation in cases of misappropriation of client funds [*see, e.g., Waysman v. State Bar (1986)41 Cal. 3d 452, 459, 224 Cal. Rptr. 101, 714, 1239]* . It may also be required when an attorney's misconduct resulted in financial losses to nonclients, regardless of whether the attorney actually profited from the misconduct [*see Coppock v. State Bar (1988) 44 Cal. 3d 665, 685, 244 Cal. Rptr. 462, 749 P.2d 1317]* . For example, if an attorney negligently allows a client to use the client's trust fund to defraud third parties, the attorney may be required to pay restitution to the victims of the fund [*see Coppock v. State Bar (1988) 44 Cal. 3d 665, 685, 244 Cal. Rptr. 462, 749 P.2d 1317]* . Restitution may be imposed as a condition of probation even if the underlying subject of the restitution was previously discharged in bankruptcy and thus cannot be collected as a debt [*see Brookman v. State Bar (1988) 46 Cal. 3d 1004, 1009, 251 Cal. Rptr. 495, 760 P.2d 1023]* .

The State Bar Court has the power, for good cause, to approve stipulations between the disciplined attorney and the Chief Trial Counsel for modification of the terms of the attorney's probation and to make corrections and minor modifications to the terms of the attorney's disciplinary probation [*Cal. Rules of Ct., Rule 9.10(c)*; Cal. State B. Rules Proc., Rule 551].

[c] Monitoring of Probation

A probation monitor referee is responsible for monitoring the conditions of probation received by order of the Supreme Court. The probation monitor referee reviews the probation conditions with the member, and sets up a manner and schedule of compliance and reports to the monitor [Cal. State B. Rules Proc., Rule 2702]. The State Bar Court may impose as a condition of probation that the probationer submit quarterly reports [*In the Matter of Sawyer (Review*

Dept. 1997) 3 Cal. State Bar Ct. Rptr. 765, 773 ; *In the Matter of Weiner (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 759, 763-764]* .

PRACTICE TIP:

Monitoring of Probation. The Probation Unit of the Office of the Chief Trial Counsel will monitor compliance of probation terms and conditions. Any questions concerning compliance should be directed to the Probation Unit of the Office of the Chief Trial Counsel in Los Angeles (213-765-1444). Insome cases, a probation monitor is assigned. A probation monitor is a volunteer from the community and completed a training session through the Probation Unit of the Office of Trials. *By Regina E. Brenner*.

Probation monitor referees must report to the Probation Unit, of the Office of the Chief of Trial Counsel, in Los Angeles within 45 days of receipt of the order regarding the manner and schedule of compliance, and thereafter they must make quarterly progress reports. The referee must determine from time to time, after assessment of the relevant facts, the extent and degree of compliance with the probation conditions and whether that compliance furthers the objective of protection of the public and rehabilitation of the member [Cal. State B. Rules Prac., Rule 2702(a)-(c)].

After assessing the relevant facts and determining that the member has failed to comply with the conditions of probation, the probation monitor referee may report the failure to the Probation Unit which may commence a probation revocation proceeding [*see § 71.94*]. The referee may also recommend that the probationary period be shortened or terminated for good cause [*see* Cal. State B. Rules Proc., Rule 2702(d)-(e)].

[d] Modification or Early Termination of Probation

A party may move for early termination of probation six months or more after the effective date of the order imposing probation. A motion for modification of probation may be made at any time. Either type of motion must state facts showing that the request is consistent with the protection of the public, the respondent's successful rehabilitation (including the degree of compliance with the conditions of probation), and the maintenance of the integrity of the legal profession [Cal. State B. Rules Proc., Rule 550(a)].

Any reponse to the motion must be filed within 30 days after service. Either party may file a request for a hearing [Cal. State B. Rules Proc., Rule 550(d)]. The hearing must be set on an expedited basis [Cal. State B. Rules Proc., Rule 550(f)].

In considering the motion, the State Bar Court must balance the interests of the respondent and the public and determine whether modification or termination of probation serves the objectives of probation [Cal. State B. Rules Proc., Rule 550(a)]. The burden of proof on a motion for modification or early termination of probation is by clear and convincing evidence [Cal. State B. Rules Proc., Rule 552(a)]. The Court must issue a written order on the motion, which is reviewable by a petition for interlocutory review [Cal. State B. Rules Proc., Rules 300, 553; *see § 71.121[4]*].

The parties may also stipulate to a modification or to early termination of probation [Cal. State B. Rules Proc., Rule 551].

[4] Suspension From the Practice of Law

[a] Suspension for Acts of Misconduct

[i] Types of Suspension

The State Bar may recommend to the Supreme Court the suspension from practice of a member for acts of misconduct [*see Bus. & Prof. Code §§ 6077, 6078*]. There are three types of suspension from the practice of law for acts of misconduct:

- Stayed suspension for a period of one to five years with probationary conditions attached [Cal. State B. Stds. for Att'y Sanctions, Std. 1.4(c)(i); *see § 71.144[13]*].

- Actual suspension from practice for a period of not less than 30 days and up to a maximum of three years for a willful breach of the California Rules of Professional Conduct or for longer periods for any of the other causes for suspension set forth in the State Bar Act or other laws [*Bus. & Prof. Code § 6077*; Cal. State B. Stds. for Att'y Sanctions, Std. 1.4(c)(ii); *see Bus. & Prof. Code § 6078* (containing no limitation on length of suspension for causes other than violation of Cal. Rules Prof. Conduct); *see also Bus. & Prof. Code §§ 6100-6106.7* (causes for suspension or disbarment)].

- Stayed suspension that includes an actual suspension as a condition thereof [Cal. State B. Stds. for Att'y Sanctions, Std. 1.4(c)(iii)].

[ii] Nature and Effects of Suspension

Only the California Supreme Court may order that a member be suspended [*Bus. & Prof. Code §§ 6077, 6078, 6100*; *In re Hallinan (1954) 43 Cal. 2d 243, 253-254, 272 P.2d 768]* . The State Bar only has the power to recommend to the Supreme Court that a member be suspended [*see Bus. & Prof. Code §§ 6077, 6078*]. If no review is sought, the Supreme Court may adopt the State Bar Court's recommendation of suspension as its own order, without review of the recommendation [*Cal. Rules of Ct., Rule 9.18(b)*]. Furthermore, the Court may decline to review a decision of the State Bar Court recommending suspension from practice if it determines that none of the five grounds for Supreme Court review apply [*see Cal. Rules of Ct., Rule 9.16(a)*]. In that case, denial of review constitutes a final judicial determination on the merits, and the recommendation of the State Bar Court is filed as an order of the Supreme Court [*see Cal. Rules of Ct., Rule 9.16(b)*].

An attorney who is actually suspended is legally disqualified from practicing law in California or from representing himself or herself as being entitled to practice law during the period of the actual suspension [*Bus. & Prof. Code§ 6117*; Cal. State B. Stds. for Att'y Sanctions, 1.2(h); *Benninghoff v. Superior Court (2006) 136 Cal. App. 4th 61, 67-68, 38 Cal. Rptr. 3d 759* ("defrocked" attorney practicing law held to different standard then layperson practicing law)]. An attorney who advertises himself or herself as practicing or as entitled to practice law, or who practices law, after he or she has been suspended from membership in the State Bar is guilty of a crime punishable by imprisonment in the state prison or county jail [*Bus. & Prof. Code §§ 6125, 6126(b)*; *see also Bus. & Prof. Code § 6133* (suspended attorney's law firm has duty to prohibit attorney from practicing law)].

[iii] Length and Terms of Suspension

The actual length of suspension will vary depending on the case. Actual suspension must be for a period of at least 30 days [*see* Cal. State B. Stds. for Att'y Sanctions, Std. 1.4(c)(ii)]. Suspension for violation of the Rules of Professional Conduct cannot exceed three years [*Bus. & Prof. Code § 6077*]. Ordinarily, actual suspensions imposed for two or more years require satisfactory proof to the State Bar Court of the member's rehabilitation, present fitness to practice, and present learning and ability in the general law before the member is relieved of the actual suspension [Cal. State B. Stds. for Att'y Sanctions, Std. 1.4(c)(ii); *see also* Cal. State B. Rules Proc., Rules 630-641 (procedure for termination of suspension)].

In addition, under *Cal. Rules of Ct., Rule 9.20*, the Supreme Court may include an order that the suspended member send notices of the fact of his or her suspension to clients, opposing counsel, adverse parties, and courts in which his or her matters are pending, and return any papers or property to the client and refund any unearned advance fees [*Cal. Rules of Ct., Rule 9.20(a)*]. Failure to comply with this rule within the specific time periods will trigger a proceeding under Rule 9.20 to determine if the member willfully failed to comply with the provisions of the rule [*see Durbin v.*

State Bar (1979) 23 Cal. 3d 461, 466-469, 152 Cal. Rptr. 749, 590 P.2d 876] .

For discussion of these proceedings, see *§ 71.99*.

Other conditions or duties may be added to a recommendation of suspension [Cal. Stds. for Att'y Sanctions, Std. 1.5]. For a list of conditions that may be added, see *§ 71.34[1][d]*.

Any order suspending a State Bar member must include a direction by the Supreme Court that the member pay costs [*Bus. & Prof. Code § 6086.10(a)*; Cal. State B. Rules Proc., Rule 280]. These costs are added to, and become part of, the membership fee of the member for the next calendar year [*Bus. & Prof. Code § 6140.7*]. Costs unpaid by a member who is suspended must be paid as a condition of reinstatement of membership [*Bus. & Prof. Code § 6140.7*].

Any order of the Supreme Court imposing suspension may include an order that the member pay a monetary sanction not to exceed $5,000 for each violation, subject to a total limit of $50,000 [*Bus. & Prof. Code § 6086.13(a)*; *see Bus. & Prof. Code § 6086.13(c)* (State Bar authorized to adopt implementing rules), *Bus. & Prof. Code § 6086.13(d)* (authority to impose sanction in addition to *Bus. & Prof. Code § 6086.10*)]. Any monetary sanctions collected are deposited into the Client Security Fund [*Bus. & Prof. Code § 6086.13(b)*]. These monetary sanctions may not be collected, however, to the extent that the collection would impair the collection of criminal penalties or civil judgments arising out of transactions connected with the attorney's discipline [*Bus. & Prof. Code § 6086.13(e)* (includes provisions for reimbursement from Client Security Fund)].

[b] Determination of Actual Suspension in Default Proceedings; Interlocutory Review

If a member's default has been entered and the State Bar Court recommends that the member be placed on actual suspension, the recommendation will include a specific period of actual suspension and a statement that the member's actual suspension will continue unless the Court grants a motion to terminate the actual suspension at the conclusion of the specific period or at a later date ordered by the Court [Cal. State B. Rules Proc., Rule 205(a)]. However, if the Supreme Court has imposed a period of actual suspension that is two years or more, or if the Supreme Court has ordered the member placed on actual suspension for a specific period of time and the member has not yet shown his or her rehabilitation to the satisfaction of the State Bar Court, the member must comply with the provisions of Cal. State B. Rules Proc., Rules 630-641 in addition to Rule 205 [Cal. State B. Rules Proc., Rule 205(b)].

After the State Bar Court files its decision recommending actual suspension, the member may make a written motion to the Court to terminate the actual suspension at the conclusion of any specified period of actual suspension imposed by the Supreme Court, or upon the effective date of the State Bar Court's ruling on the motion, whichever is later [Cal. State B. Rules Proc., Rule 205(c)]. The motion must be accompanied by a written declaration providing stipulated information and assurances under penalty of perjury [Cal. State B. Rules Proc., Rule 205(c)]. The Chief Trial Counsel has 15 days to file a response to the motion [Cal. State B. Rules Proc., Rule 205(d)], and the State Bar Court, in its discretion, may hold a hearing on the motion [Cal. State B. Rules Proc., Rule 205(e)]. There is a presumption in favor of granting the motion if the member has met all requirements and has agreed to comply with any probation conditions imposed by the State Bar Court or agreed upon by the parties [Cal. State B. Rules Proc., Rule 205(f)].

If the State Bar Court denies the motion, it must its reasons clearly [Cal. State B. Rules Proc., Rule 205(f)]. If the State Bar Court grants the motion, it may place the member on probation for a specified period of time and may impose conditions of probation [Cal. State B. Rules Proc., Rule 205(f)]. The State Bar Court's order may be reviewed for abuse of discretion or error of law [Cal. State B. Rules Proc., Rule 206].

[c] Suspension for Nonpayment of Fees, Penalties, or Costs

Any member, active or inactive, who fails to pay fees, penalties, or costs after they become due will be suspended from

the State Bar. Two months' written notice of delinquency in payment must be given to the member before he or she may be suspended. The member can be reinstated on payment of accrued fees or costs and penalties as may be imposed by the Board of Governors, not exceeding double the amount of delinquent dues, penalties, or costs [*Bus. & Prof. Code § 6143*].

[5] Disbarment

[a] Nature and Effects

Disbarment is the most severe sanction in the disciplinary process [Cal. State B. Stds. for Att'y Sanctions, Stds. 1.2(c), 1.4(d)]. As with suspension, the California Supreme Court has the sole power to disbar attorneys [*Bus. & Prof. Code §§ 6077, 6078, 6100*]. The State Bar may only recommend disbarment [*Bus. & Prof. Code §§ 6077, 6078*]. If no review is sought, the Supreme Court may adopt the State Bar Court's recommendation of disbarment as its own order, without review of the recommendation [*Cal. Rules of Ct., Rule 9.18(b)*]. Furthermore, even if review is requested by one of the parties, the Court may decline to review a decision of the State Bar Court recommending disbarment if it determines that none of the five grounds for Supreme Court review apply [*see Cal. Rules of Ct., Rule 9.16(b)*]. In that case, denial of review constitutes a final judicial determination on the merits, and the recommendation of the State Bar Court is filed as an order of the Supreme Court [*see Cal. Rules of Ct., Rule 9.16(b)*]. A federal court is not bound by the state Supreme Court's disbarment of an attorney. "The federal court will extend great deference to the state court's determination unless the federal court's independent review reveals one of the following conditions: (1) a lack of due process; (2) insufficient proof of attorney misconduct; or (3) some other grave reason exists that should prevent the court from recognizing the state court's determination" [*Gadda v. Ashcroft (2004) 363 F.3d 861, 868]* . In a federal context, the United States Court of Appeals for the Ninth Circuit stated that suspension or disbarment was not appropriate for conduct that "was aberrant to an attorney's practice and/or did not affect the court's ability to function in the public interest" [*Gadda v. Ashcroft (2004) 363 F.3d 861, 868]* .

When a member is disbarred, he or she is precluded from practicing law (unless later reinstated by the Supreme Court), his or her membership in the State Bar is terminated, and his or her name is stricken from the roll of attorneys [*Bus. & Prof. Code § 6117*; Cal. State B. Stds. for Att'y Sanctions, Std. 1.2(c)]. Except as provided in the order of disbarment, no petition for reinstatement may be filed within five years after the effective date of the petitioner's disbarment or interim suspension following criminal conviction, or the filing date of the petitioner's resignation with charges pending, whichever occurred earliest [Cal. State B. Rules Proc., Rule 662(b)].

A disbarred attorney who thereafter practices law, or who advertises or holds himself or herself out as practicing or entitled to practice law, is guilty of a crime punishable by imprisonment in the state prison or county jail [*Bus. & Prof. Code §§ 6125, 6126(b)*; *see also Bus. & Prof. Code § 6133* (disbarred attorney's law firm has duty to prohibit attorney from practicing law); *Benninghoff v. Superior Court (2006) 136 Cal. App. 4th 61, 67-68, 38 Cal. Rptr. 3d 759* ("defrocked" attorney practicing law held to different standard then layperson practicing law)].

For further discussion of reinstatement proceedings, see *§ 71.100*.

[b] Involuntary Inactive Enrollment

Even though the respondent may appeal a decision of the Hearing Department Judge of the State Bar Court recommending disbarment to the Review Department of the State Bar Court, the decision must include an order that the respondent be involuntarily enrolled inactive [*Bus. & Prof. Code § 6007(c)(4)*]. The order of inactive enrollment is effective on personal service or three days after service by mail, whichever is earlier [Cal. State B. Rules Proc., Rule 220(c)].

[c] Compliance With Rule 9.20 Orders

Disbarment orders usually are accompanied by orders to comply with *Cal. Rules of Ct., Rule 9.20* [*see, e.g., Lebbos v. State Bar (1991) 53 Cal. 3d 37, 49-50, 278 Cal. Rptr. 845, 806 P.2d 317* ; *In re Scott (1991) 52 Cal. 3d 968, 980, 277 Cal. Rptr. 201, 802 P.2d 985]* . A 955 proceeding is commenced by filing a notice of disciplinary charges by the Office of the Chief Trial Counsel [*see* Cal. State B. Rules Proc., Rule 580 et seq.].

Under Rule 9.20, the Supreme Court may include in an order disbarring an attorney directions that the attorney give notice of the disbarment to all of his or her clients, opposing counsel, adverse parties, and courts in which his or her matters are pending, and that the attorney return any papers or property to the clients and refund any unearned advance fees [*Cal. Rules of Ct., Rule 9.20(a)*]. Failure to comply with this rule within the specified time periods can trigger a proceeding under *Cal. Rules of Ct., Rule 9.20*, to determine if the member willfully failed to comply with the provisions of the rule [*Durbin v. State Bar (1979) 23 Cal. 3d 461, 466-469, 152 Cal. Rptr. 749, 590 P.2d 876]* .

In addition, if a disbarred member has any intention of ever seeking reinstatement, he or she should comply with the terms of Rule 9.20 within the specified time limits to avoid denial of reinstatement, because disobeying a court order is grounds for suspension or disbarment [*see Bus. & Prof. Code § 6103*]. For discussion of reinstatement proceedings generally, see *§ 71.100*. Willful failure by a disbarred member to follow an order of the Supreme Court to comply with Rule 9.20 constitutes a crime punishable by imprisonment in the state prison or a county jail [*Bus. & Prof. Code § 6126(c)*].

[d] Payment of Costs and Sanctions

In an order disbarring a State Bar member, the Supreme Court must include a direction that the member pay costs [*see Bus. & Prof. Code § 6086.10(a)*; Cal. State B. Rules Proc., Rule 280]. An order pursuant to this subdivision is enforceable both as provided in *Bus. & Prof. Code § 6140.7* and as a money judgment [*see Bus. & Prof. Code § 6086.10(a)*]. Additionally, costs imposed pursuant to *Bus. & Prof. Code § 6086.10* are penalties, payable to and for the benefit of the State Bar of California to promote rehabilitation and to protect the public [*see Bus. & Prof. Code § 6086.10(e)*]. Costs unpaid by a disbarred member must be paid as a condition of reinstatement of membership [*Bus. & Prof. Code § 6140.7*]. For discussion of the costs assessable against the member, see *§ 71.71*.

An order of the Supreme Court imposing disbarment may include an order that the member pay a specified monetary sanction for each violation [*see Bus. & Prof. Code § 6086.13(a)*, as originally enacted by Stats. 1992, ch. 1270]. For discussion, see *§ 71.34[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsSanctionsDisbarmentsLegal EthicsSanctionsReprimandsLegal EthicsSanctionsSuspensions

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B. Grounds for Discipline, Reporting Attorney Conduct to State Bar, and Disciplinary Sanctions

6-71 California Forms of Pleading and Practice--Annotated §§ 71.35-71.49

AUTHOR: Regina E. Brenner Editorial Consultant

[Reserved]

§§ 71.35[Reserved]

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6-71 California Forms of Pleading and Practice--Annotated § 71.50

AUTHOR: Regina E. Brenner Editorial Consultant

[Reserved]

§ 71.50[Reserved]

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6-71 California Forms of Pleading and Practice--Annotated § 71.51

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.51 State Bar's Authority to Investigate Charges

The State Bar has the authority to investigate all matters affecting or relating to the discipline of members of the State Bar [*Bus. & Prof. Code § 6044(c)*]. The purpose of a State Bar investigation is to determine whether there is reasonable cause to believe that a member should be required to answer charges that he or she violated provisions of the State Bar Act or of the California Rules of Professional Conduct [Cal. State B. Rules Proc., Rule 2401].

An investigation may be commenced by the State Bar regardless of whether a complaint has been made to the State Bar [TRP Rule 503]. When a complaint is made, regardless of its form or source, it is deemed a request for review, investigation, or other appropriate action by the State Bar [Cal. State B. Rules Proc., Rule 2402].

PRACTICE TIP:

Respond Promptly to Complaints. It is in the attorney's best interest to promptly respond to any State Bar communication concerning a complaint. If the attorney is unable to personally respond, the attorney should promptly retain defense counsel. *By Regina E. Brenner*.

Legal Topics:

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

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6-71 California Forms of Pleading and Practice--Annotated § 71.52

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.52 Investigative Procedure

[1] Presentation of Complaints

Complaints concerning the conduct of a member of the State Bar may bepresented to the State Bar at its Los Angeles or San Francisco offices. Complaints or requests may be written or oral, but the complainant or applicant may be required to present appropriate information on a form or forms supplied by the State Bar [Cal. State B. Rules Proc., Rule 2404]. The State Bar must acknowledge receipt of a written complaint within two weeks of receipt [*see Bus. & Prof. Code § 6093.5*].

If the State Bar receives a complaint that it believes to be false and malicious, it may notify appropriate prosecutorial authorities and recommend prosecution of the complainant [*Bus. & Prof. Code § 6043.5(b)*]. Filing a State Bar complaint with knowledge that the complaint is false and malicious is a misdemeanor [*Bus. & Prof. Code § 6043.5(a)*].

[2] Period of Limitation

The period of limitation for initiating a disciplinary proceeding based solely on a complainant's allegation of a violation of the State Bar Act or the Rules of Professional Conduct is five years from the date of the alleged violation [Cal. State B. Rules Proc., Rule 51(a)]. The violation is deemed to occur when every element has occurred, or, in the case of a continuing offense, when the entire course of conduct has terminated [Cal. State B. Rules Proc., Rule 51(b)].

The period of limitation does not bar the State Bar from initiating a disciplinary proceeding based on information received from a source independent of a time-barred complaint [Cal. State B. Rules Proc., Rule 51(e)]. The period also does not apply to reinstatement proceedings [Cal. State B. Rules Proc., Rule 51(g); *see* Cal. State B. Rules Proc., Rule 660 et seq.].

The following conditions toll the five-year limitation period [Cal. State B. Rules Proc., Rule 51(c)]:

- The member continues to represent the complainant, a member of the complainant's family, or the complainant's business or employer;

- The complainant is under the age of majority, insane, or physically or mentally incapacitated;

- Civil, criminal, or administrative investigations are pending with any governmental agency, court, or tribunal with respect to substantially the same acts as the alleged violations;

- The member conceals facts constituting the violation;

- The member fails to cooperate with the investigation of the alleged violations;

- The member makes false or misleading statements to the State Bar concerning the alleged violations;

- The disciplinary investigation or proceeding is abated consistent with the Rules of Procedure of the State Bar;

- The member is participating in an ADR Resolution Mediation Discipline program or other authorized diversion program;

- The investigation is terminated by admonition;

- The complaint or investigation is pending before the Audit and Review Unit; or

- The member is suspended from the practice of law and must show rehabilitation before being reinstated to active practice of law when the allegations are used solely to rebut a member's claims of rehabilitation.

The member and State Bar may agree in writing to waive or extend the limitations set forth in State Bar Rules of Procedure, Rule 51 [Cal. State B. Rules Proc., Rule 51(f)].

[3] Effect of Complainant's Settlement With Member or Unwillingness to Proceed

The Office of the Chief Trial Counsel may, in its discretion, close an inquiry, investigation or complaint if the complainant fails to cooperate [Cal. State B. Rules Proc., Rule 2407]. However, in accordance with the factors enumerated in State Bar Rules of Procedure, Rule 2408, the Office of the Chief Trial Counsel may still choose to proceed, despite the complainant's failure to cooperate, request for withdrawal, or settlement or compromise of the claim.

[4] Decision to Terminate Matter at Investigative Stage or to Proceed

The Office of the Chief Trial Counsel may, in its discretion, close an inquiry, complaint or investigation. The inquiry, complaint or investigation may also be closed with the issuance of a warning letter or other appropriate manner not constituting discipline [Cal. State B. Rules Proc., Rule 2601; *see also Bus. & Prof. Code § 6093.5* (complainant's right to information concerning status of complaint)].

If the matter is not terminated by the Office of Chief Trial Counsel pursuant to State Bar Rules of Procedure, Rule 2601, the member whose conduct is being investigated, or his or her counsel, must have an opportunity to deny or explain the acts, omissions, or alleged physical or mental condition that is the subject of the investigation [Cal. State B. Rules Proc., Rules 2409, 2604].

If a determination is made that reasonable cause to proceed exists, the Office of Chief Trial Counsel issues a notice of disciplinary charges to the member [Cal. State B. Rules Proc., Rule 2604]. For further discussion of notices of disciplinary charges, see *§ 71.61[1]*.

With certain exceptions, the decision of the Office of Chief Trial Counsel to terminate a matter is a bar to further proceedings against the member based on the same alleged facts [TRP Rule 511]. However, the decision will not bar further proceedings in any of the following situations [Cal. State B. Rules Proc., Rule 2603]:

- There is new or additional evidence.
- On a showing of good cause, at the discretion of the Office of Chief Trial Counsel.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsSanctionsDisciplinary ProceedingsInvestigationsGovernmentsLegislationStatutes of LimitationsTime Limitations

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6-71 California Forms of Pleading and Practice--Annotated § 71.53

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.53 Privileged Nature of Communications in Disciplinary Proceedings

Communications made in the course of disciplinary proceedings are generally privileged, and a person may not bring a lawsuit predicated on them [*see Bus. & Prof. Code § 6094*]. *Bus. & Prof. Code § 6094* designates the following types of communications as privileged:

- Communications to the agency charged with discipline of attorneys (the State Bar) relating to lawyer misconduct or disability or competence.

- Communications related to an investigation or proceeding.

- Testimony given in a disciplinary proceeding.

The privilege does not limit or alter the privileges accorded communications to the State Bar or testimony given in investigations or proceedings conducted by it, or the immunities accorded complainants, informants, witnesses, and the State Bar and its officers and employees, as those privileges existed prior to the enactment of *Bus. & Prof. Code § 6094* [*Bus. & Prof. Code § 6094(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesGovernment PrivilegesGeneral OverviewLegal EthicsSanctionsDisciplinary ProceedingsInvestigationsEvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeInformer Privilege

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6-71 California Forms of Pleading and Practice--Annotated § 71.54

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.54 State Bar Access to Nonpublic Court Records

In a disciplinary proceeding, the State Bar has access, on an ex parte basis, to all nonpublic court records relevant to the competence or performance of its members, provided that the nonpublic records remain confidential [*Bus. & Prof. Code § 6090.6*]. This access for investigation and enforcement purposes, can only be limited by a court order authorized by *Penal Code §§ 851.6*, *851.7*, *851.8*, or *851.85*. The State Bar may disclose publicly the nature and content of nonpublic court records, including sealed records other than those authorized by these Penal Code sections, after it provides notice of its intention to disclose all or a part of the records to the parties in the underlying action. A party to the underlying action who would be adversely affected by the disclosure may serve notice on the State Bar within 10 days of receipt of the notice of intention to disclose the records that it opposes the disclosure and will seek a hearing in the court of competent jurisdiction on an expedited basis [*Bus. & Prof. Code § 6090.6*].

For general discussion of the Penal Code provisions governing sealed criminal records, see California Criminal Defense Practice, Ch. 103 *Expungement of Criminal Records* (Matthew Bender).

Legal Topics:

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

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6-71 California Forms of Pleading and Practice--Annotated § 71.55

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.55 Confidentiality of State Bar Proceedings

[1] Investigations

As a general rule, all disciplinary investigations are confidential until the filing of a notice of disciplinary charges, the pleading that initiates a disciplinary proceeding [*Bus. & Prof. Code § 6086.1*; Cal. State B. Rules Proc., Rules 2301-2302]. Thus, unless there is a waiver of confidentiality (*see § 71.55[2]*), there can be no disclosures to the general public concerning the status of an investigation, nor can there be a release to the general public of investigation files or records. At any time, however, the complainant or the complainant's designee may request and obtain information from the State Bar concerning the status of the complaint [Cal. State B. Rules Proc., Rule 2403].

Notwithstanding the confidentiality of investigations, the State Bar must disclose to any member of the public so inquiring, any information reasonably available to it pursuant to *Bus. & Prof. Code § 6068(o)* (judgments and other matters attorney is under duty to report to State Bar) or *Bus. & Prof. Code §§ 6086.7*, *6086.8*, and *6101* (court orders and judgments concerning attorneys reported to State Bar), concerning a member of the State Bar that is otherwise a matter of public record, including civil or criminal filings and dispositions [*Bus. & Prof. Code § 6086.1(c)*].

[2] Waiver of Confidentiality Regarding Investigations

Confidentiality concerning State Bar investigations may be waived by the member whose conduct is being investigated [*Bus. & Prof. Code § 6086.1(b)(1)*; Cal. State B. Rules Proc., Rule 2302(b), (c)].

When warranted for the protection of the public, the Chief Trial Counsel or President of the State Bar may waive confidentiality. After private notice to the member, the Chief Trial Counsel or President of the State Bar may issue, if appropriate, one or more public announcements or make information public confirming the fact of an investigation or proceeding, clarifying the procedural aspects and current status, and defending the right of the member to a fair hearing. The Chief Trial Counsel or President of the State Bar may designate a third party to act on his or her behalf in this regard. A member's conduct into which the State Bar is inquiring, but which is not the subject of a formal investigation,

must not be disclosed to the public [*Bus. & Prof. Code § 6086.1(b)(2)*; Cal. State B. Rules Proc., Rule 2302(d)].

The Chief Trial Counsel or President of the State Bar or his or her designee also may waive confidentiality pursuant to *Bus. & Prof. Code § 6044.5* [*Bus. & Prof. Code § 6086.1(b)(3)*; Cal. State B. Rules Proc., Rule 2302(e); *see also § 71.55[4]*].

[3] Hearings

State Bar disciplinary hearings generally are public, except as otherwise provided by law, the State Bar Rules of Procedure, or order of the State Bar Court [Cal. State B. Rules Proc., Rule 20]. Nevertheless, proceedings concerning inactive enrollment under *Bus. & Prof. Code § 6007(b)* (inactive enrollment based on attorney's mental infirmity, illness, or substance abuse) and moral character proceedings are confidential, unless the applicant or member waives the confidentiality of these proceedings [Cal. State B. Rules Proc., Rule 21].

All aspects of the deliberations of State Bar Court judges are confidential, however [Cal. State B. Rules Proc., Rule 24].

[4] Exchange of Information With Other Agencies

The State Bar must disclose, in confidence, information to the appropriate agency responsible for criminal or disciplinary enforcement, or exchange such information with that agency, if the investigation or formal proceeding concerns any of the following [*Bus. & Prof. Code § 6044.5*; see Cal. State B. Rules Proc., Rule 2302(e)]:

- Alleged misconduct that may subject the member to criminal prosecution for a felony.
- Alleged misconduct that may involve a nonfelony crime committed during the course of the practice of law.
- Alleged misconduct resulting in harm to the member's client.
- Alleged misconduct that may subject the member to disciplinary charges in another jurisdiction.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewLegal EthicsSanctionsDisciplinary ProceedingsInvestigationsLegal EthicsSanctionsDisciplinary ProceedingsHearings

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6-71 California Forms of Pleading and Practice--Annotated § 71.56

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.56 Power to Take Evidence, Administer Oaths, Issue Subpoenas, and Compel Witnesses' Attendance and Document Production

[1] In General

In conducting investigations and on the trial and hearing of all matters, the Board of Governors of the State Bar and any committees having jurisdiction, that is, the State Bar Court, have the authority to [*Bus. & Prof. Code § 6049(a)(1)-(3)*]:

- Take and hear evidence pertaining to the proceeding;
- Administer oaths and affirmations; and
- Compel, by subpoena the attendance of witnesses and the production of books, papers, and documents pertaining to the proceeding.

In addition, in the conduct of investigations, the Chief Trial Counsel or his or her designee may compel, by subpoena, the attendance of witnesses and the production of books, papers, and documents pertaining to the investigation [*Bus. & Prof. Code § 6049(b)*].

An attorney against whom disciplinary charges have been filed also has the right to the issuance of subpoenas for attendance of witnesses to appear and testify or to produce books and papers, as provided in the State Bar Act [*Bus. & Prof. Code §§ 6049(c), 6085*]. For discussion of the rights of an accused attorney generally, see *§ 71.57*.

[2] Contempt Proceedings for Violation of Subpoena

Whenever a witness subpoenaed to appear and give testimony, or to produce books, papers, or documents, refuses to appear, testify, answer any pertinent or proper questions, or produce the requested books, papers, or documents, the party by whom or on whose behalf the subpoena was issued may file a motion requesting the State Bar Court to report

to the superior court that the witness is in contempt of the subpoena, as provided in *Bus. & Prof. Code § 6051* [Cal. State B. Rules Proc., Rule 187(a); *see Bus. & Prof. Code § 6050*].

When a motion is filed, if it appears that the subpoena was properly issued and served and that there is no valid legal basis for the witness's noncompliance, the State Bar Court must report the witness's contempt to the superior court [Cal. State B. Rules Proc., Rule 187(b)]. On the Court's issuance of a report of contempt, the party by whom or on whose behalf the subpoena was issued may bring a proceeding in the appropriate superior court pursuant to *Bus. & Prof. Code § 6051*. Nothing in the report or in any finding or conclusion of the State Bar Court in connection with the alleged contempt is binding on the superior court [Cal. State B. Rules Proc., Rule 187(c)]. A party may report a contempt to the appropriate superior court without first making a motion to the State Bar Court if the party is authorized under *Bus. & Prof. Code § 6051* [Cal. State B. Rules Proc., Rule 187(a)].

When the alleged contempt has been reported to the superior court, the court proceeds in one of two ways. It may issue an attachment for the person in contempt and direct the sheriff to bring him or her before the court, or it can issue an order to show cause against the person in contempt, directing that person to show cause why he or she has not attended the hearing, testified, or produced the writings as required [*Bus. & Prof. Code § 6051*]. Under the first alternative, on the return of the attachment and the production of the person attached, the court has jurisdiction of the matter, and the person charged may purge himself or herself of the contempt in the same manner as a witness subpoenaed to appear and give evidence in a civil action before the court [*Bus. & Prof. Code § 6051*]. The same procedure is followed and the same penalties may be imposed as in a civil action [*Bus. & Prof. Code § 6051*]. For discussion of civil contempt proceedings, see Ch. 135, *Contempt* . Under the second alternative (issuance of an order to show cause), if it appears to the court that the subpoena was regularly issued and no good cause is shown for the refusal to appear or testify or to produce the writings, the court must enter an order that the person appear, testify, or produce documents [*Bus. & Prof. Code § 6051*]. Failure to obey the order subjects the person to contempt of court [*Bus. & Prof. Code § 6051*].

For discussion of discovery in the context of disciplinary proceedings, see *§ 71.64*.

[3] Procedural Rules Applicable to All Subpoenas Other Than Subpoenas Directed to Financial Institutions

[a] In General

Any party to a State Bar Court proceeding may issue discovery and trial subpoenas as provided in *Bus. & Prof. Code §§ 6049(c)* and *6085*, and in accordance with *Code Civ. Proc. § 1985*. Alternatively, any party may compel another party to testify at a deposition or at trial, with or without the production of documents, by serving a notice to appear as provided in *Code Civ. Proc. § 1987* [Cal. State B. Rules Proc., Rules 151(a), 152(a)]. Subpoenas issued by a party are subject to the applicable provisions of the Business and Professions Code and to *Code Civ. Proc. §§ 1985-1997*, except for those provisions concerning bench warrants and concealed witnesses, and except as modified or limited by the State Bar Rules of Procedure [Cal. State B. Rules Proc., Rules 151(b), 152(b)].

Subpoena forms may be obtained from the clerk of the State Bar Court. On request, the clerk will issue subpoenas on behalf of parties appearing in propria persona who are not entitled to practice law in California [Cal. State B. Rules Proc., Rule 158].

The party by whom or on whose behalf a subpoena is issued must bear the cost of serving the subpoena, obtaining proof of service, and paying any applicable witness fees or expenses. These costs may be included in a subsequent award of costs as provided by law [Cal. State B. Rules Proc., Rules 151(c), 152(c)].

A subpoena duces tecum must describe with particularity the records sought by the subpoena [Cal. State B. Rules Proc., Rules 151(d), 152(d)]. The party serving a subpoena duces tecum may request the subpoenaed party to provide an additional unsealed copy of the requested records, provided that the following are satisfied [Cal. State B. Rules Proc.,

Rules 151(f), 152(f)]:

- Notice of the request is given to all other parties;

- If a timely motion to quash the subpoena is filed, the subpoenaing party may not inspect, copy, or use the records except as permitted by court order; and

- Within five days after receiving the additional unsealed copy or, if a motion to quash is filed, after the service of an order on a motion to quash permitting examination of the records, the party that served the subpoena must provide all other parties with accurate copies of the records, or with a reasonable opportunity to inspect and copy them.

[b] Service

A copy of the subpoena must be served on the person or entity subpoenaed as provided in the Code of Civil Procedure. A copy of a subpoena duces tecum must also be served on all other parties to the proceeding and on any consumer involved in the proceeding. [Cal. State B. Rules Proc., Rule 155(b)].

Notwithstanding the service requirements of State Bar Rules of Procedure, Rule 155, any party issuing a subpoena to obtain public records from a court is not required to serve the subpoena on the target of the investigation or on the other parties to the State Bar Court proceeding [Cal. State B. Rules Proc., Rule 157].

[c] Motions to Quash

A subpoenaed person or entity may file a motion to quash the subpoena with the State Bar Court in accordance with the Code of Civil Procedure [Cal. State B. Rules Proc., Rule 155(c)].

The motion may be made on any grounds on which a motion to quash a subpoena in a civil action may be made. The facts on which the motion is based must be established by one or more declarations based on personal knowledge, and filed and served with the motion [Cal. State B. Rules Proc., Rule 155(c)].

If the motion seeks a stay of compliance with the subpoena pending a ruling on the motion, the Court may grant a stay, on a showing of good cause, without waiting for a response to the motion to be filed [Cal. State B. Rules Proc., Rule 156(c)].

The Court may hold a hearing on the motion. If the Court holds a hearing, it must set it on an expedited basis [Cal. State B. Rules Proc., Rule 156(b)(2)]. The order on the motion must include findings concerning any factual issues presented by the motion, and must state the reasons for the order [Cal. State B. Rules Proc., Rule 156(b)(3)]. On written notice of the order, any party may seek review by filing a petition for interlocutory review. The order will be reversed only if the factual findings are not supported by substantial evidence, or for an error of law or an abuse of discretion [Cal. State B. Rules Proc., Rules 156(d), 300].

For a form for a notice of motion to quash a subpoena, together with a supporting declaration, *see § 71.160*.

[4] Subpoenas Pertaining to Financial or Trust Fund Financial Records

[a] In General

The rules pertaining to the issuance of subpoenas directed to financial institutions for obtaining financial records, discussed below, are distinct from the rules pertaining to subpoenas generally in State Bar proceedings.

Special provisions apply to subpoenas for trust fund financial records issued by the State Bar before commencement of a State Bar Court proceeding [Cal. State B. Rules Proc., Rule 2503; *see also In the Matter of Member W (1996) 3 Cal. State Bar Ct. Rptr. 535* (constitutionality of provisions upheld)]. For discussion of the general rules pertaining tosubpoenas other than those directed to financial institutions for financial records, see *§ 71.56[3]*.

[b] Subpoenas Directed to Financial Institutions to Obtain Trust Fund Financial Records

[i] Issuance of Subpoena

Each member of the State Bar is deemed by operation of law to have authorized irrevocably the disclosure to the State Bar and Supreme Court of all financial records held by financial institutions pertaining to accounts the member must maintain in accordance with the California Rules of Professional Conduct [*Bus. & Prof. Code § 6069(a)*; *see Cal. Rules Prof. Conduct, Rule 4-100* (preserving identity of client funds and property)]. In other words, membership in the State Bar automatically authorizes disclosure of the member's trust account records to the State Bar. The records cannot be disclosed to the State Bar, however, without a subpoena issued pursuant to *Bus. & Prof. Code § 6049* [*Bus. & Prof. Code § 6069(a)*]. Additionally, the State Bar must comply with specific notice provisions [*Bus. & Prof. Code § 6069(b)*; *see* Cal. State B. Rules Proc., Rule 153 (discussed in *§ 71.56[4*][b][ii])].

[ii] Notice to Member

In addition to service of the subpoena on the financial institution pursuant to the Code of Civil Procedure, after initiation of State Bar Court proceedings, a copy of the subpoena must be served on the member (or members) whose trust account financial records are sought by the subpoena. Service must be made in the manner provided for the service of subsequent pleadings [*see* Cal. State B. Rules Proc., Rule 61]. The subpoena must designate the name, business address, and business telephone number of the State Bar investigator, deputy trial counsel, or other authorized agent who is requesting the records [Cal. State B. Rules Proc., Rule 153(b)].

The Office of the Chief Trial Counsel must notify the member in writing within 30 days after receiving trust account financial records from a financial institution in response to a subpoena. The notice must be mailed to the member's address furnished pursuant to *Bus. & Prof. Code § 6002.1* or to his or her counsel, and must include [Cal. State B. Rules Proc., Rule 2503(c)]:

- A description with particularity of the financial records received; and

- Notice of the member's right to file a written request as to the reasons for the State Bar's examination of the member's trust account financial records (within 15 days of the mailing of this notice).

[iii] Member's Request of Statement of Reasons for Request

Upon timely and written request, the Office of the Chief Trial Counsel must provide the member with a statement of the reasons for the State Bar's examination of the member's trust fund financial records [Cal. State B. Rules Proc., Rule 2503(d)].

[iv] Motions to Quash

In accordance with the Code of Civil Procedure, any person or entity served with the subpoena or a copy of the subpoena may file a motion with the State Bar Court to quash the subpoena. The motion must be served by overnight mail on all parties to the proceeding [Cal. State B. Rules Proc., Rule 153(c)].

The sole ground on which the motion may be made is that the records sought by the subpoena do not pertain to trust accounts the member must maintain in accordance with the Rules of Professional Conduct [Cal. State B. Rules Proc.,

Rule 153(d)]. The facts on which the motion is based must be established by one or more declarations based on personal knowledge, and must be filed and served with the motion [Cal. State B. Rules Proc., Rule 153(e)].

[c] Subpoenas Directed to Financial Institutions to Obtain Non-Trust-Fund Financial Records or Records of Nonmember

Occasionally, during the course of a State Bar investigation, the State Bar may find it necessary to review a member's non-trust-account financial records or the bank records of a nonmember, such as those of a client. A copy of a subpoena seeking to obtain these records from a financial institution must be served on the customer whose financial records are sought as provided in *Bus. & Prof. Code § 6069(b)*, and on the subpoenaed financial entity pursuant to the Code of Civil Procedure. A copy of the subpoena must also be served on all other parties to the proceeding [Cal. State B. Rules Proc., Rule 154(a), (b)].

In accordance with the Code of Civil Procedure, any person or entity served with a subpoena may file a motion with the State Bar Court to quash the subpoena. The motion may be granted based on the grounds applicable in civil actions under California law. The motion must be supported by one or more declarations based on personal knowledge, filed and served with the motion [Cal. State B. Rules Proc., Rule 154(c)].

[5] Witness Immunity

The agency charged with discipline of attorneys has authority to seek immunity for a witness in a disciplinary agency proceeding. To obtain immunity, the agency must apply to the superior court, giving notice to the appropriate prosecuting authority [*Bus. & Prof. Code § 6094(b)*].

[6] Discovery of Attorney Work Product

The State Bar may discover the work product of an attorney against whom disciplinary charges are pending if it is relevant to issues of breach of duty by the lawyer [*Code Civ. Proc. § 2018(e)* (*Code Civ. Proc. § 2018.070* effective July 1, 2005)]. Discovery is subject to applicable client approval and to a protective order, when requested and for good cause, to ensure the confidentiality of work product except for its use by the State Bar [*Code Civ. Proc. § 2018(e)* (*Code Civ. Proc. § 2018.070* effective July 1, 2005)]. Whenever a client has initiated a complaint against an attorney, the requisite client approval is deemed to have been granted [*Code Civ. Proc. § 2018(e)* (*Code Civ. Proc. § 2018.070* effective July 1, 2005)].

For discussion of protection against disclosure of work product generally, see Ch. 191, *Discovery: Privileges and Other Discovery Limitations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedurePretrial MattersSubpoenasLegal EthicsSanctionsDisciplinary ProceedingsInvestigationsLegal EthicsSanctionsDisciplinary ProceedingsHearings

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C. Investigation And Hearing

6-71 California Forms of Pleading and Practice--Annotated § 71.57

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§ 71.57 Rights of Accused Attorney

[1] In General

Although State Bar disciplinary proceedings are administrative in nature, they have been called "quasi-criminal" adversary proceedings [*In re Ruffalo (1968) 390 U.S. 544, 551, 88 S. Ct. 1222, 20 L. Ed. 2d 117* ; *Giddens v. State Bar (1981) 28 Cal. 3d 730, 734, 170 Cal. Rptr. 812, 621 P.2d 851]* . The purpose of the proceedings is not to punish an erring attorney but rather to reform the offender or to remove him or her from practice [*Giddens v. State Bar (1981) 28 Cal. 3d 730, 734, 170 Cal. Rptr. 812, 621 P.2d 851]* . The disciplinary procedures of the State Bar Act were enacted to protect the public, the courts, and the legal profession from unsuitable legal practitioners [*Giddens v. State Bar (1981) 28 Cal. 3d 730, 734, 170 Cal. Rptr. 812, 621 P.2d 851* ; *In re Higbie (1972) 6 Cal. 3d 562, 570, 99 Cal. Rptr. 865, 493 P.2d 97* ; *see also* Cal. State B. Stds. for Att'y Sanctions, Std. 1.3 (purposes of State Bar disciplinary proceedings)]. Disciplinary proceedings cannot be compared to criminal proceedings, and criminal procedural safeguards do not apply [*Bambic v. State Bar (1985) 40 Cal. 3d 314, 320, 219 Cal. Rptr. 489, 707 P.2d 862* ; *see Coppock v. State Bar (1988) 44 Cal. 3d 665, 676, 244 Cal. Rptr. 462, 749 P.2d 1317]* . Nevertheless, a person's right to practice his or her profession is sufficiently precious to surround it with a "panoply of legal protection" [*Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67* ; *Giddens v. State Bar (1981) 28 Cal. 3d 730, 735, 170 Cal. Rptr. 812, 621 P.2d 851]* .

Certain rights and protections of an accused attorney are statutorily mandated by *Bus. & Prof. Code § 6085*, which states that an attorney complained against must be given reasonable notice and have a reasonable opportunity and right to the following:

- To defend against the charge by the introduction of evidence.

- To receive all exculpatory evidence from the State Bar after initiation of a disciplinary proceeding in the State Bar Court, and thereafter when the evidence is discovered and available. The State Bar is not,

however, required to disclose mitigating evidence.

- To be represented by counsel.

- To examine and cross examine witnesses.

- To exercise any right guaranteed by the California constitution or the United States constitution, including the right against self-incrimination.

The accused attorney has the right to the issuance of subpoenas to compel witnesses to appear and testify or to produce books, papers, and documents pertaining to the disciplinary proceeding [*Bus. & Prof. Code §§ 6049(c), 6085*]. For discussion of the issuance of subpoenas for witnesses and documents generally, see *§ 71.56*.

[2] Right to Be Present at Hearing

To ensure a fair hearing, the accused attorney must have the right to be present at the disciplinary hearing [*Giddens v. State Bar (1981) 28 Cal. 3d 730, 735, 170 Cal. Rptr. 812, 621 P.2d 851]* . Thus, the State Bar's refusal to grant a continuance of the trial de novo in a disbarment proceeding violated the statutory rights of an attorney who was in prison at the time of the proceeding. Giving the attorney permission to file affidavits after the oral testimony had been given was not the equivalent of giving the attorney the opportunity to defend himself, because he was denied the right to present witnesses on his own behalf, to cross examine witnesses, to present evidence, and to testify and manifest his own credibility and demeanor [*Giddens v. State Bar (1981) 28 Cal. 3d 730, 735-736, 170 Cal. Rptr. 812, 621 P.2d 851]* .

If an attorney is voluntarily absent from the hearing, however, the hearing may proceed despite the attorney's absence, and the attorney's failure to participate is not grounds for a rehearing to present additional evidence [*Morales v. State Bar (1988) 44 Cal. 3d 1037, 1047, 245 Cal. Rptr. 398, 751 P.2d 457* ; *Bambic v. State Bar (1985) 40 Cal. 3d 314, 320, 219 Cal. Rptr. 489, 707 P.2d 862]* .

[3] Appointment of Counsel

An accused attorney is entitled to be represented by counsel in the disciplinary proceeding [*Bus. & Prof. Code § 6085*; *see § 71.57[1]*]. Nevertheless, there appears to be no constitutional right to appointed counsel at public expense analogous to the right to appointed counsel in criminal proceedings [*see In re Crooks (1990) 51 Cal. 3d 1090, 1096, 275 Cal. Rptr. 420, 800 P.2d 898* ; *Walker v. State Bar (1989) 49 Cal. 3d 1107, 1116, 264 Cal. Rptr. 825, 783 P.2d 184]* . There are no published rules regarding the appointment of counsel in a State Bar proceeding, and the procedure for appointment is informal [*Dixon v. State Bar (1985) 39 Cal. 3d 335, 342, 216 Cal. Rptr. 432, 702 P.2d 590]* .

In one case, the petitioner's unnecessary delay in pursuing replacement counsel when his attorney withdrew from representing him justified the State Bar's refusal to appoint an attorney to represent petitioner before the Review Department. Additionally, the petitioner had not challenged the State Bar's statement that he was not entitled to appointment of counsel, and, on that ground, the California Supreme Court upheld the Review Department's action [*Dixon v. State Bar (1985) 39 Cal. 3d 335, 342-343, 216 Cal. Rptr. 432, 702 P.2d 590]* .

In another case, the failure of the State Bar to appoint counsel for an attorney who allegedly suffered from mental illness, did not deny the attorney due process when circumstances of the case provided no substantial indication that the attorney's alleged mental illness was so severe that he was unable to obtain legal representation and when the attorney's actions demonstrated his ability to take intelligent and purposeful action and thus to assist in his own defense [*Slaten v. State Bar (1988) 46 Cal. 3d 48, 56-58, 249 Cal. Rptr. 289, 757 P.2d 1]* .

Denial of a continuance to enable an attorney to obtain retained counsel does not constitute a denial of due process if an associate of the attorney's original counsel is available to represent the attorney at the hearing [*Frazer v. State Bar (1987) 43 Cal. 3d 564, 567-568, 238 Cal. Rptr. 54, 737 P.2d 1338]* .

[4] Protections Not Applicable

Although disciplinary proceedings are considered to be "quasi-criminal" (*see § 71.57[1]*), they are not, strictly speaking, criminal proceedings, and certain protections given to criminal defendants are thus not applicable to attorneys accused of misconduct [*see Goldman v. State Bar (1977) 20 Cal. 3d 130, 140, 141 Cal. Rptr. 447, 570 P.2d 463* ; *Yokozeki v. State Bar (1974) 11 Cal. 3d 436, 447, 113 Cal. Rptr. 602, 521 P.2d 858* , *cert. denied, 419 U.S. 900]* . For example, in a disciplinary proceeding, an unreasonable delay is neither a denial of due process of law nor a jurisdictional defect requiring dismissal absent a showing of specific prejudice [*Ramirez v. State Bar (1980) 28 Cal. 3d 402, 412, 169 Cal. Rptr. 206, 619 P.2d 399* ; *Caldwell v. State Bar of California, (1975) 13 Cal. 3d 488, 496, 119 Cal. Rptr. 217, 531 P.2d 785]* . Duplicative charges in a disciplinary proceeding are acceptable [*see Goldman v. State Bar (1977) 20 Cal. 3d 130, 140, 141 Cal. Rptr. 447, 570 P.2d 463]* .

An attorney in a disciplinary proceeding does not have the complete immunity of a criminal defendant with regard to the privilege against self-incrimination and can be made to testify against himself or herself [*Goldman v. State Bar (1977) 20 Cal. 3d 130, 140, 141 Cal. Rptr. 447, 570 P.2d 463* ; *Black v. State Bar (1972) 7 Cal. 3d 676, 688, 103 Cal. Rptr. 288, 499 P.2d 968]* . However, the attorney cannot be made to answer specific questions if the testimony would tend to be incriminating [*In re Strick (1983) 34 Cal. 3d 891, 899, 196 Cal. Rptr. 509, 671 P.2d 1251* ; *Black v. State Bar (1972) 7 Cal. 3d 676, 688, 103 Cal. Rptr. 288, 499 P.2d 968]* . If an attorney does testify without objecting to questions on the ground of the privilege against self-incrimination, he or she waives that privilege [*In re Utz (1989) 48 Cal. 3d 468, 479, 256 Cal. Rptr. 561, 769 P.2d 417* ; *Black v. State Bar (1972) 7 Cal. 3d 676, 688, 103 Cal. Rptr. 288, 499 P.2d 968* ; *see also Franklin v. State Bar (1986) 41 Cal. 3d 700, 708-709, 224 Cal. Rptr. 738, 715 P.2d 699* (testifying attorney has duty under *Bus. & Prof. Code § 6068(d)* not to mislead State Bar, by false statement or intentional concealment of material fact)].

The ex post facto clauses of the federal and California constitutions apply only to penal statutes, and do not apply to the Standards for Attorney Sanctions [*see Morales v. State Bar (1988) 44 Cal. 3d 1037, 1047-1048, 245 Cal. Rptr. 398, 751 P.2d 457* ; *Greenbaum v. State Bar (1987) 43 Cal. 3d 543, 550, 237 Cal. Rptr. 168, 736 P.2d 754]* .

An attorney is not entitled to benefit from an amendment of a disciplinary rule enacted after the conduct for which the attorney was charged. Thus, even if the amended version of a rule lessens the standard of culpability, the attorney's conduct may be judged under the old version of the rule [*see Frazer v. State Bar (1987) 43 Cal. 3d 564, 569, 238 Cal. Rptr. 54, 737 P.2d 1338]* .

The State Bar is not a "labor organization" under the Labor Management Reporting and Disclosure Act (*29 U.S.C. § 402 et seq.*), and the Act's requirements do not apply when the State Bar disciplines or expels a member [*Rosenthal v. Justices of the Supreme Ct. of Cal. (9th Cir. 1990) 910 F.2d 561, 564]* .

[5] Burden and Standard of Proof

Although the constitutional presumption of innocence does not apply in State Bar disciplinary proceedings [*see Rosenthal v. Justices of the Supreme Ct. of Cal. (9th Cir. 1990) 910 F.2d 561, 564]* , the State Bar does have the burden of proving the grounds for discipline by clear and convincing evidence [Cal. State B. Rules Proc., Rule 213; *see Zitny v. State Bar(1966) 64 Cal. 2d 787, 790, 51 Cal. Rptr. 825, 415 P.2d 521* ; *Golden v. State Bar (1931) 213 Cal. 237, 247, 2 P.2d 325]* . If two or more equally reasonable inferences may be drawn from a proven fact, the inference leading to a conclusion of innocence rather than the one leading to a conclusion of guilt is accepted [*Zitny v. State Bar (1966) 64 Cal. 2d 787, 790, 51 Cal. Rptr. 825, 415 P.2d 521]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureGrand JuriesWitnessesRight to CounselLegal EthicsSanctionsDisciplinary ProceedingsInvestigationsLegal EthicsSanctionsDisciplinary ProceedingsHearingsConstitutional LawCongressional Duties & PowersEx Post Facto Clause & Bills of AttainderEx Post Facto ClauseGeneral OverviewEvidencePrivilegesSelf-Incrimination PrivilegeScope

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6-71 California Forms of Pleading and Practice--Annotated § 71.58

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§ 71.58 Abatement of Proceeding

On motion of a party, or on the State Bar Court's own motion after notice to the parties, the Court may order a proceeding before it abated in whole or in part, for such time and on such terms as it deems proper. Abatement of a proceeding stays the proceeding in the State Bar Court and tolls all time limitations in the proceeding, except that the Court, on motion and for good cause shown, may order the perpetuation of evidence [Cal. State B. Rules Proc., Rule 116(a)].

In determining the motion, the State Bar Court may consider any relevant factor, including [Cal. State B. Rules Proc., Rule 116(b)]:

- The need for disposing of the proceeding at the earliest time.

- The extent to which the issues in a related proceeding are the same or substantially the same as those before it.

- The extent to which the proceeding would probably be delayed by awaiting the trial or an appeal in a related proceeding.

- The extent to which the proceeding would probably be expedited by awaiting the disposition in a related proceeding.

- The extent to which evidence to be adduced in a related proceeding would aid in the determination of the State Bar Court proceeding.

- The extent to which evidence may be unavailable in the State Bar Court proceeding because of any delay resulting from the abatement.

- The extent to which parties, witnesses, or documents may be unavailable to participate in the State Bar Court proceeding for reasons beyond the parties' control.

- The extent to which a party or witness may be prejudiced in a related proceeding by withholding or failing to withhold further action.

- The extent to which a client security fund claim would be unnecessarily delayed.

A "related proceeding" is any civil, criminal, administrative, or State Bar Court proceeding in which a party, real party in interest, or witness is also a party or witness in the proceeding before the State Bar Court, or any civil, criminal, administrative, or State Bar Court proceeding that involves the subject matter of the proceeding before the State Bar Court [Cal. State B. Rules Proc., Rule 116(c)].

Review of a hearing judge's ruling on an abatement motion may be sought by a petition for interlocutory review [Cal. State B. Rules Proc., Rules 116(d), 300]. The standard of review of an abatement order is abuse of discretion [*In the Matter of Respondent L (1993) 2 Cal. State Bar Ct. Rptr. 454, 461]* .

For a form for a motion for abatement, *see § 71.161*.

[1] Abatement Due to Member's Mental Incapacity or Military Service

State Bar disciplinary proceedings may not be initiated or conducted against a member who has been judicially declared by a court of record to be of unsound mind or, on account of mental condition, incapable of managing his or her own affairs, until a subsequent judicial determination to the contrary is made [Cal. State B. Rules Proc., Rule 117(a)].

On motion of a party, a party's counsel, or the State Bar Court, the Court may order a pending disciplinary proceeding abated for such time and on such terms as it deems proper, because of the member's inability to assist in or conduct a defense of the proceeding due to mental illness or infirmity, or if probable cause has been found to believe that such inability exists [Cal. State B. Rules Proc., Rule 117(b)]. The appropriate standard for abatement in such a case is proof by a preponderance of the evidence that the member is incompetent to assist in a defense [*In the Matter of Respondent L (1993) 2 Cal. State Bar Ct. Rptr. 454, 463]* . Any proferred submission regarding the member's mental competency should address the nature of the medical examination or tests conducted, the member's symptoms, the diagnosis and cause of the condition, and any past or proposed treatment. It should also relate the member's condition to a recognized legal definition of competency [*In re the Matter of Respondent L (1993) 2 Cal. State Bar Ct. Rptr. 454, 463-464]* .

In addition, if a member who is the subject of a State Bar Court proceeding is on active duty in the United States armed forces, the Court must abate the proceeding if the member's military service will materially impair the member's ability to participate in the proceeding [Cal. State B. Rules Proc., Rule 118].

[2] No Abatement After Notice of Bankruptcy Served

Certain judicial or administrative proceedings against a debtor are automatically stayed when the debtor serves notice of bankruptcy [*11 U.S.C. § 362(a)(1)*]. Actions or proceedings by a governmental unit to enforce the governmental unit's police or regulatory powers are, however, exempt [*11 U.S.C. § 362(b)(4)*]. State Bar disciplinary proceedings are within the exemption, and are thus not subject to automatic stay [*Cooper v. State Bar (1987) 43 Cal. 3d 1016, 1024-1025, 239 Cal. Rptr. 709 . 741 P.2d 206]* .

[3] Abated Matters

All proceedings abated by order of the State Bar Court must, on the filing of the order, be placed in abated status [Cal. State B. Rules Prac., Rule 1132(a)].

[4] Requests for Information

The State Bar Court may at any time require a party to furnish information concerning an abated proceeding. The State Bar Court may also order the parties to appear at a conference concerning the abated proceeding [Cal. State B. Rules Prac., Rule 1132(b)].

[5] Termination of Abatement

A party may, by motion, seek an order terminating an abatement. The State Bar Court may terminate an abatement on its own motion, after affording the parties prior notice of its intent to do so and an opportunity to respond in writing [Cal. State B. Rules Prac., Rule 1132(c)(1)].

Abatement of all proceedings involving the same respondent is terminated automatically on the respondent's [Cal. State B. Rules Prac., Rule 1132(c)(2)]:

- Withdrawal of a resignation with charges pending; or

- Reinstatement as an active member after prior transfer to inactive membership under *Bus. & Prof. Code § 6007(b)*.

Legal Topics:

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

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6-71 California Forms of Pleading and Practice--Annotated § 71.59

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§ 71.59 Stipulations and Admissions Dispensing With Proof

[1] General Requirements

It is the duty of all parties, if practical, to endeavor to arrive at pretrial stipulations concerning some or all of the issues in the proceeding. All stipulations must be signed by each party and by each party's counsel, if any [Cal. State B. Rules Proc., Rule 130].

A stipulation is binding on the parties unless the State Bar Court, for good cause, rejects the stipulation or, on motion, relieves the parties from its binding effect [Cal. State B. Rules Proc., Rules 131, 135; *see Smith v. State Bar (1985) 38 Cal. 3d 525, 535, 213 Cal. Rptr. 236, 698 P.2d 139]* . Court approval is not required for stipulations as to facts, unless the respondent has pleaded nolo contendere to those facts [Cal. State B. Rules Proc., Rule 135]. The assigned judge must determine whether the stipulation is fair to the parties and adequately protects the public. The State Bar Court may [Cal. State B. Rules Proc., Rule 135(a)]:

- Order approval of the proposed stipulation;
- Order approval of the proposed stipulation with modifications accepted by the parties; or
- Reject the proposed stipulation.

[2] Stipulations as to Facts Only

Stipulations as to facts only are binding on all parties regardless of the disposition or degree of discipline recommended or imposed, and must contain a statement to that effect. The stipulation must also include a statement that the respondent admits the truth of the facts stated or pleads nolo contendere to those facts. If the member pleads nolo contendere to the stipulated facts, the stipulation must include an acknowledgment that the respondent completely understands that the plea of nolo contendere will be considered the same as an admission of the stipulated facts for

purposes of determining whether the respondent is culpable of professional misconduct and that the stipulated facts will be used for that determination.

If the parties agree that relief from a stipulation as to facts is appropriate, State Bar Court approval is still required. A motion for relief from a stipulation as to facts must demonstrate that the relief is necessary to prevent a miscarriage of justice or for other extraordinary reasons. Evidence is not admissible to prove or disprove a stipulated fact [Cal. State B. Rules Proc., Rule 131].

[3] Stipulations as to Facts and Conclusions of Law

The parties to a disciplinary proceeding may stipulate to facts and conclusions of law concerning culpability, while reserving the question of disposition [Cal. State B. Rules Proc., Rule 132(a)]. A proposed stipulation as to facts and conclusions of law must set forth all of the following [Cal. State B. Rules Proc., Rule 132(b)]:

- A statement of the investigations or proceedings included.

- A statement of acts or omissions acknowledged by the respondent as cause for discipline.

- Conclusions of law, drawn from and specifically referring to the facts admitted by the respondent, regarding the respondent's culpability of violating specified statutes and/or Rules of Professional Conduct.

- A statement that respondent either (1) admits that the facts set forth in the stipulation are true and that he or she is culpable of violations of the specified statutes and/or Rules of Professional Conduct; or (2) pleads nolo contendere to those facts and violations. If the respondent pleads nolo contendere, the stipulation must include an acknowledgment that the respondent completely understands that the plea of nolo contendere will be considered the same as an admission of the stipulated facts and of his or her culpability of the statutes and/or Rules of Professional Conduct specified in the stipulation.

- An enumeration of the charges, if any, to be dismissed.

- A statement that the stipulation resolves the entire proceeding except as expressly set forth in the stipulation and except as to disposition.

- A statement that the member acknowledges the provisions of *Bus. & Prof. Code §§ 6086.10* and *6140.7*.

- A statement as to whether or not the parties intend to be bound by the stipulated facts even if the conclusion of law are rejected and regardless of the degree of discipline recommended or imposed.

- A statement that the respondent has been advised in writing of any pending investigations or proceedings not resolved by the stipulation except for investigations, if any, by criminal law enforcement agencies, identified by investigation case number or proceeding case number, and complaining witness name(s), if any.

Stipulations as to facts and conclusions of law may include partial stipulations as to facts bearing on aggravation and mitigation. The parties may waive the right to an evidentiary hearing on aggravation and mitigation by submitting a stipulation containing a complete statement of aggravating and mitigating circumstances [Cal. State B. Rules Proc., Rule 132(c)].

[4] Stipulations as to Facts, Conclusions of Law, and Disposition

A proposed stipulation as to facts, conclusions of law, and disposition must set forth each of the following [Cal. State B. Rules Proc., Rule 133]:

- An acknowledgment that stipulations as to proposed disposition are not binding on the Supreme Court.

- A statement of the investigations or proceedings included.

- A statement of acts or omissions acknowledged by the respondent as cause or causes for discipline.

- Conclusions of law, drawn from and specifically referring to the facts admitted by the respondent, regarding the respondent's culpability of violating specified statutes and/or Rules of Professional Conduct.

- A statement that respondent either admits the facts set forth in the stipulation are true and that he or she is culpable of violations of the specified statutes and/or Rules of Professional Conduct, or pleads nolo contendere to those facts and violations. If the respondent pleads nolo contendere, the stipulation must include an acknowledgment that the respondent completely understands that the plea of nolo contendere will be considered the same as an admission of the stipulated facts and of his or her culpability of the violation of the statutes and/or Rules of Professional Conduct specified in the stipulation. If requested by the Court, the stipulation also must contain a statement by the deputy trial counsel that the factual stipulations are supported by evidence obtained in the State Bar investigation of the matter.

- An enumeration of the charges, if any, to be dismissed.

- A statement that the stipulation resolves the entire proceeding except as expressly set forth in the stipulation.

- A statement of aggravating and mitigating circumstances.

- The disposition to be recommended or imposed.

- A statement that the member acknowledges the provisions of *Bus. & Prof. Code §§ 6086.10* and *6140.7*.

- A statement as to whether or not the parties intend to be bound by the stipulated facts contained in the stipulation even if the conclusions of law and/or stipulated disposition are rejected.

- A statement that the respondent has been advised in writing of any pending investigations or proceedings not resolved by the stipulation except for investigations, if any, related to investigations by criminal law enforcement agencies, identified by investigation case number or proceeding case number, and complaining witness name(s), if any.

[5] Stipulations as to Disposition

The parties to a disciplinary matter may stipulate as to disposition after facts establishing culpability and conclusions of law have been previously adjudicated by the State Bar Court or stipulated to by the parties [Cal. State B. Rules Proc.,

Rule 134(a)]. Stipulations as to disposition must include, or have attached to them, a stipulated statement of all factual findings and legal conclusions relied on in support of the stipulated disposition that are not contained in a written decision filed by the State Bar Court or a previously filed stipulation [Cal. State B. Rules Proc., Rule 134(b)].

Stipulations as to disposition must set forth all of the following [Cal. State B. Rules Proc., Rule 134(c)]:

- An acknowledgment that stipulations as to proposed disposition are not binding on the Supreme Court.
- A statement of the pending investigations or proceedings included.
- A statement that the stipulation resolves the entire proceeding, except as expressly set forth in the stipulation.
- All factual stipulations regarding aggravation or mitigation on which the parties wish to rely.
- The disposition to be recommended or imposed.
- A statement that the member acknowledges the provisions of *Bus. & Prof. Code § 6086.10*.
- A statement as to whether or not the parties intend to be bound by the stipulated facts contained in the stipulation even if the conclusions of law or stipulated disposition are rejected.
- A statement that the respondent has been advised in writing of any pending investigations or proceedings not resolved by the stipulation, with the exception of certain criminal matters.

[6] Stipulating to Relief From or Extension of Time to Pay Costs

By written stipulation filed with the State Bar Court, the Chief Trial Counsel may relieve the respondent, in whole or in part, from the obligation to pay the costs of disciplinary proceedings, or, with the approval of the Court, may enter into an agreement extending the time to pay these costs, on the grounds of hardship, special circumstances, or other good cause [Cal. State B. Rules Proc., Rule 284].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsStipulationsLegal EthicsSanctionsDisciplinary ProceedingsGeneral Overview

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§ 71.60 Pre-Filing, Early Neutral Evaluation Conference

If the Office of the Chief Trial Counsel and the member are unable to reach agreement on the resolution or disposition of a matter prior to the filing of a notice of disciplinary charges, an Early Neutral Evaluation Conference, conducted by a State Bar Court hearing judge, must be held within 15 days of the request of either party [Cal. State B. Rules Proc., Rule 75(a)]. At the Conference, the Early Neutral Evaluation judge must provide the parties with an oral neutral evaluation of the alleged facts and charges and the potential for the imposition of discipline. If a resolution of the matter that requires the approval of the Court is reached by the parties at the Conference, the Office of the Chief Trial Counsel will document the resolution and submit it to the Early Neutral Evaluation judge for approval or rejection [Cal. State B. Rules Proc., Rule 75(b)].

In order for the Early Neutral Evaluation judge to provide a meaningful evaluation, the Office of the Chief Trial Counsel must provide the Early Neutral Evaluation judge with a copy of the draft notice of disciplinary charges. Each party may also provide the Early Neutral Evaluation judge with such documents and information that the party believes supports his or her position. The Conference is confidential and each party may designate any documents he or she provides for in camera inspection only and not to be exchanged with the opposing party. All documents provided to the Early Neutral Evaluation judge shall be returned to the respective parties at the conclusion of the Conference [Cal. State B. Rules Proc., Rule 75(c)]. Unless otherwise stipulated by the parties, the Early Neutral Evaluation judge may not act as the trial judge in a subsequent proceeding involving the same facts [Cal. State B. Rules Proc., Rule 75(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-71 California Forms of Pleading and Practice--Annotated § 71.61

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§ 71.61 Pleadings, Service, and Filing

[1] Notice of Disciplinary Proceeding

A State Bar Court proceeding is commenced by filing an initial pleading [Cal. State B. Rules Proc., Rule 50]. This pleading may be a notice of disciplinary charges, notice of hearing, petition, or other pleading [Cal. State B. Rules Proc., Rule 2.64]. However, unless otherwise specified in the State Bar Rules of Procedure regarding a particular type of proceeding, a notice of disciplinary charges is the initial pleading in a disciplinary proceeding [Cal. State B. Rules Proc., Rule 101(a); *see* Cal. State B. Rules Proc., Rule 2.78 ("notice to show cause" as used in State Bar Act is not used in State Bar Rules of Procedure; "notice of disciplinary charges" and "initial pleading," as used in Rules, include "notice to show cause" as used in State Bar Act)].

PRACTICE TIP:

Notice of Filing of Notice of Disciplinary Charges. The Office of the Chief Trial Counsel gives notice to an attorney that a notice of disciplinary charges will be filed against him or her based on its investigation, to give the attorney an opportunity to respond to the allegations. By correspondence served on respondent or on respondent's counsel if respondent is represented by counsel, the Office of the Chief Trial Counsel provides the opportunity to meet and confer by a specific date, usually within twenty days of the date of the correspondence; otherwise, a notice of disciplinary charges will be filed by that specific date. *By Regina E. Brenner.*

The purpose of the notice is to serve as a determination that probable cause exists to warrant formal charges [*In the Matter of Scapa and Brown (1993) 2 Cal. State Bar Ct. Rptr. 635, 647-648]* .

The notice of disciplinary charges must [Cal. State B. Rules Proc., Rule 101(b)]:

- Cite the statutes, rules, or court orders alleged to have been violated, or to warrant the proposed action.

- Contain a statement of facts constituting the alleged violation(s) in sufficient detail to permit the preparation of a defense.

- Relate the alleged facts set forth to specific statutes, rules, or court orders alleged to have been violated or to warrant the proposed action.

- Contain a specified notice, in prominent type, that the member's default may be entered if he or she fails to file a written response to the notice or fails to appear at trial.

- Contain a notice that the respondent may be ordered to pay costs pursuant to *Bus. & Prof. Code § 6086.10*.

If the State Bar intends to seek the involuntary inactive enrollment of the respondent under *Bus. & Prof. Code § 6007(c)*, the notice should alsoinclude a statement that the respondent may be involuntarily enrolled as an inactive member of the State Bar on a finding that the respondent's conduct poses a substantial threat of harm to the interests of the respondent's clients or the public [Cal. State B. Rules Proc., Rule 101(c); *see § 71.91*]. Because the State Bar Court will automatically order the involuntary inactive enrollment of the respondent on the respondent's failure to file a reponse, the notice must include the notice prescribed by *Bus. & Prof. Code § 6007(e)(1)(B)* [Cal. State B. Rules Proc., Rule 101(b)(4)].

Adequate notice requires only that the attorney be fairly apprised of the precise nature of the charges before disciplinary proceedings commence [*Van Sloten v. State Bar (1989) 48 Cal. 3d 921, 929, 258 Cal. Rptr. 235, 771 P.2d 1323]* . The notice need not expressly identify specific misconduct that will be examined by the State Bar, so long as the notice puts the attorney on notice that misconduct pertaining to a certain matter will be investigated [*see Natali v. State Bar (1988) 45 Cal. 3d 456, 466-467, 247 Cal. Rptr. 165, 754 P.2d 211]* .

The format of pleadings filed with the State Bar Court is specified in Cal. State B. Rules Prac., Rule 1110. Assertions in pleadings must be simple, concise, and direct [Cal. State B. Rules Proc., Rule 100].

[2] Service, Proof of Service, and Filing of Papers

The initial pleading in any State Bar Court proceeding must be served by the initiating party on all other parties, except in those matters in which service of the initial pleading is made by the clerk [Cal. State B. Rules Proc., Rule 60(a)].

Service upon a member who is the subject of a proceeding must be addressed to the member at the latest address shown on the official membership records of the State Bar pursuant to *Bus. & Prof. Code § 6002.1(a)(1)*. If the member's latest address is within the United States, the service must be made by certified mail, return receipt requested. If the member's latest address is outside the United States, service must be made by recorded delivery. If the person to be served is not a member and is not required by *Bus. & Prof. Code § 6002.1* to maintain an address on the official membership records of the State Bar, the person may be served by any method permitted under the Code of Civil Procedure for service of process. Where a written request, signed by the member, is made to the Office of the Chief Trial Counsel to serve counsel for a party, service may only be made upon counsel [Cal. State B. Rules Proc., Rule 60(b)].

Service on the State Bar is made by serving the Office of Trials in the appropriate venue by certified mail, return receipt requested, except if another method of service is specified in the rules governing a particular type of proceeding [Cal. State B. Rules Proc., Rule 60(c)]. The party serving the initial pleading must file proof of service within 10 days of service on the opposing parties [Cal. State B. Rules Prac., Rule 1111(a)].

Each pleading filed subsequent to the initial pleading, except joint pleadings, must be accompanied by proof of service

on all other parties [Cal. State B. Rules Proc., Rule 61(a); Cal. State B. Rules Prac., Rule 1111(b)]. Service upon the State Bar must be made by serving the designated deputy trial counsel of the Office of the Chief Trial Counsel. Members must be served at the address maintained by the member on the official membership records of the State Bar pursuant to *Bus. & Prof. Code § 6002.1(a)(1)*, unless, with respect to the proceeding in connection with which the service is made, the member has counsel of record or has expressly requested in the response that service be made upon the member at a different address. If the person to be served is not a member and is not required by *Bus. & Prof. Code § 6002.1* to maintain an address on the official membership records of the State Bar, the person must be served at the address given in the most recent pleading filed by the person, or, if the person has not filed a pleading giving an address, the person may be served at any address or location and by any method permitted under the Code of Civil Procedure for service of pleadings [Cal. State B. Rules Proc., Rule 61(b)].

A party or attorney whose address changes while a proceeding is pending, or who desires to be served with subsequent pleadings and notices at a different address, must file and serve on all parties a written notice of change of address and a specific request that all future service be made upon the party or attorney at the new address [Cal. State B. Rules Proc., Rule 61(c)].

Service of subsequent pleadings must be made pursuant to *Code Civ. Proc. §§ 1011, 1012*, or *1013(c)* and *(d)*, or by depositing the pleadings in the State Bar inter-office mail [Cal. State B. Rules Proc., Rule 62]. If service is made by United States mail, by State Bar interoffice mail, by personal delivery, or by overnight mail, the period of notice given by such service, or the time for doing any act in response to such service, must be computed in accordance with Cal. State B. Rules Proc., Rule 63 [Cal. State B. Rules Proc., Rule 61(d)]. Service may also be made by facsimile transmission, if the party being served consents to this service [Cal. State B. Rules Proc., Rule 61(e)].

Proof of service by a party must be made as provided in *Code Civ. Proc. § 1013a*. Proof of service by the clerk must be made as provided in *Code Civ. Proc. § 1013a(4)* [Cal. State B. Rules Proc., Rule 62].

Pleadings must be filed with the clerk in the venue in which the proceeding is located. Pleadings may be submitted for filing outside the proper venue in the event of an emergency or when ordered in advance by the State Bar Court. Pleadings filed in proceedings before the Review Department may be filed in either location of the State Bar Court [Cal. State B. Rules Proc., Rule 55].

Pleadings submitted for filing will be rejected if they are not accompanied by proper proof of service, are unsigned, or are not accompanied by the required number of copies [Cal. State B. Rules Prac., Rule 1112(a)]. When a party whose pleading has been rejected submits a corrected pleading for filing, the corrected pleading must be accompanied by proof of service showing that it was served on all parties and, if appropriate, by a motion for late filing [Cal. State B. Rules Prac., Rule 1112(c)].

[3] Response

[a] In General

In general, the respondent must file and serve a written response to a notice of disciplinary charges within 20 days after service of the notice. Demurrers and motions for further particulars are not allowed [Cal. State B. Rules Proc., Rules 3.00, 103(a)]. In addition, general denials to the notice are not permitted [Cal. State B. Rules Proc., Rule 103(c)(2)].

The time within which the response must be filed may be extended once before its expiration by not more than 15 days on the parties' written stipulation. The stipulation must be filed with the clerk before the original expiration date [Cal. State B. Rules Proc., Rule 103(b)].

The response must contain an address for service on the respondent. The response must also include either a specific

admission or denial of the charging allegations set forth in the notice of disciplinary charges, and any other facts by way of defense that may be relevant, or a plea of nolo contendere, subject to the approval of the State Bar Court, signed by the respondent and respondent's counsel, if any, with an acknowledgment of respondent's understanding of the plea, as set forth in the rule [Cal. State B. Rules Proc., Rule 103(c)].

If a written response is not filed within the required time limitations and a motion to dismiss is not pending, the deputy trial counsel may elect to proceed by the default procedures [Cal. State B. Rules Proc., Rule 103(d)]. Respondent's involuntary inactive enrollment will be automatically ordered by the State Bar Court. For detailed discussion of involuntary inactive enrollment under this provision, see *§ 71.91[2][e]*.

For a form for a response to a notice of disciplinary charges, *see § 71.162*.

[b] Entry of Default on Failure to File Timely Response

If the respondent fails to file a timely written response, the deputy trial counsel may file and serve a written motion for entry of the respondent's default [Cal. State B. Rules Proc., Rule 200(a), (b)]. If the respondent fails to file a written response with the clerk of the State Bar Court within 10 days after service of the motion, the clerk must enter the respondent's default by filing and serving on the respondent and the deputy trial counsel a notice of entry of default [Cal. State B. Rules Proc., Rule 200(c)].

Until the default is set aside, the factual allegations set forth in the notice of disciplinary charges are deemed admitted unless otherwise ordered by the State Bar Court, the respondent is precluded from participating in any proceedings except to file a motion to vacate the default, and no further notices or pleadings need be served on the respondent except for request for review filed by the deputy trial counsel and a copy of the Court's decisions [Cal. State B. Rules Proc., Rule 200(d)(1)].

The respondent's default may be vacated or set aside by stipulation of the parties before the commencement of the trial. After the commencement of trial, a default may be vacated or set aside only by court order [Cal. State B. Rules Proc., Rule 203(a)].

An improperly entered default may be vacated on motion of a party or on the Court's motion at any time the Court has jurisdiction of the matter. A default entered against a respondent while on active duty in the United States armed forces is deemed to have been entered improperly [Cal. State B. Rules Proc., Rule 203(b)].

A respondent may make a motion to set aside a properly entered default on the grounds of mistake, inadvertence, surprise, or excusable neglect. The motion must be filed as soon as practicable, but in no event more than 45 days after service of notice of entry of default [Cal. State B. Rules Proc., Rule 203(c); *In the Matter of Greenwood (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 831* (hearing judge erred in setting aside default where respondent's support for untimely motion for relief of default did not meet respondent's required burden of proof); *In the Matter of Hunter (1994) 3 Cal. State Bar Ct. Rptr. 63, 69-70* (judge and Review Department refused to set aside default when motion for relief from default was filed more than six months after respondent had notice of proceedings, where judge had repeatedly informed respondent of necessity of requesting relief from default, and where respondent failed to make sufficient showing justifying extraordinary delay)].

[4] Motion to Dismiss

Filing a timely motion to dismiss postpones the party's obligation to file a response to the notice of disciplinary charges or other initial pleading until 10 days after [Cal. State B. Rules Proc., Rule 102]:

- Notice or service of the Court's denial of the motion.

- Proper service of the initial pleading, if the motion was granted under Cal. State B. Rules Proc., Rule 262(b).

- Service of an amended pleading if the motion was granted with leave to file an amended initial pleading under Cal. State B. Rules Proc., Rule 262(c).

[5] Amended and Supplemental Pleadings

An initial pleading may be amended once before the filing of the response or the entry of default without court approval. The party initiating the proceeding must serve the amended initial pleading in accordance with Cal. State B. Rules Proc., Rule 60, and the time to respond must be calculated from the date the amended pleading is served [Cal. State B. Rules Proc., Rule 104(a)].

Pleadings other than initial pleadings may be amended once as a matter or course at any time before a response is due to be served or is served, whichever occurs first, or, if the pleading is one to which a response is not permitted and a trial date has not been set, within 20 days after the pleading is served. Otherwise, a party may amend a pleading by order of the State Bar Court for good cause shown or by stipulation of all other parties [Cal. State B. Rules Proc., Rule 104(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-71 California Forms of Pleading and Practice--Annotated § 71.62

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.62 Motions

In general, all motions must be made in writing, and supported by good cause shown. All supporting documents must be filed with the motion and served on all opposing parties [Cal. State B. Rules Proc., Rules 61, 105]. Motions should have supporting points and authorities, and declarations [*see Cal. Rules of Ct., Rule 3.1113(a)*; Cal. State B. Rules Proc., Rule 105(c)].

Except as otherwise ordered or provided in the State Bar Rules of Procedure, an opposing party has 10 days from service of the motion to file and serve a written response [Cal. State B. Rules Proc., Rule 105(b)].

Facts relied on in support of or in opposition to a motion, except facts already in the record or subject to judicial notice, must be supported by declaration [Cal. State B. Rules Proc., Rule 105(c)]. This declaration must comply with the requirements of *Code Civ. Proc. § 2015.5*, or may be in the form of an affidavit [Cal. State B. Rules Proc., Rule 2.40]. Exhibits submitted in support of or in opposition to a motion must be authenticated by declaration unless already admitted in evidence [Cal. State B. Rules Proc., Rule 105(c)].

Unless otherwise ordered, written motions must be submitted without a hearing [Cal. State B. Rules Proc., Rule 105(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-71 California Forms of Pleading and Practice--Annotated § 71.63

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.63 Orders Shortening and Extending Time

The time limits and notice periods specified in the State Bar Rules of Procedure may be shortened or extended by order of the State Bar Court, for good cause, on a party's motion or on the Court's own motion [Cal. State B. Rules Proc., Rule 64(a)]. On motion and for good cause shown, the Court grant an extension of time to file a pleading or permit the late filing of any pleading [Cal. State B. Rules Proc., Rule 64(b)]. A party filing a motion must state in a declaration whether the other parties to the proceeding have been requested to consent to the extension or late filing, and whether consent has been given [Cal. State B. Rules Proc., Rule 64(d)].

A motion or stipulation for an order shortening time must be supported by a statement of the reasons for the motion in the form of a declaration. Motions for orders shortening time must be served by personal delivery or overnight mail. The State Bar Court may direct the clerk to notify the parties by telephone that anyopposition to a motion to shorten time must be filed and served by a date set by the Court [Cal. State B. Rules Proc., Rule 64(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-71 California Forms of Pleading and Practice--Annotated § 71.64

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.64 Discovery

[1] In General

With certain exceptions, the Civil Discovery Act (*Code Civ. Proc. § 2016 et seq.* (*Code Civ. Proc. § 2016.010 et seq.* effective July 1, 2005)) applies in disciplinary proceedings [Cal. State B. Rules Proc., Rule 180].

PRACTICE TIP:
Informal Discovery. Informal discovery is encouraged. Informal and/or formal discovery will be necessary to comply with the mandatory discovery conference and report [*see* Cal. State B. Rules of Proc., Rule 182]. *By Regina E. Brenner.*

In general, all parties must complete formal discovery within 120 days after service of the initial pleading [Cal. State B. Rules Proc., Rule 181(a)]. Discovery requests must be served so as to allow each responding party a sufficient time to respond within the discovery period [Cal. State B. Rules Proc., Rule 181(c)]. A motion for an extension of the 120-day discovery period must show that the party seeking the extension has made reasonably diligent efforts to complete discovery within the 120-day period, and that the requested extension will materially contribute to settlement of the proceeding or to the party's presentation of evidence at trial. On motion by any party, on joint motion or agreement of the parties, or on the motion of the State Bar Court after notice to the parties and an opportunity to respond, the Court may order reasonable extensions of the discovery period or may order discovery to be completed within a shorter period [Cal. State B. Rules, Proc., Rule 181(d)].

The time period to engage in discovery is tolled from the filing of the clerk's entry of default until the default is set aside [§ 71.61[3][a]], or from the filing of a stipulation as to facts, conclusions of law, and disposition until ruled on by the State Bar Court [Cal. State B. Rules Proc., Rule 181(b); *see § 71.59[4]*].

No discovery may be conducted concerning the deliberations of judges or other persons who are or have been responsible for adjudicating attorney disciplinary or regulatory matters [Cal. State B. Rules Proc., Rule 183].

For detailed discussion of general procedures relating to formal discovery in civil actions, see Chs. 190- 200, *Discovery* , and DeMeo, California Deposition and Discovery Practice (Matthew Bender). The discussion in this chapter is limited to the special rules applicable to State Bar disciplinary proceedings.

[2] [Reserved]

[3] Discovery Conference and Report

Within 20 days after service of the responsive pleading in a proceeding in which discovery is permitted without order of the State Bar Court, the parties must engage in a discovery conference at which the parties must make a good faith effort to reach an agreement as to: (1) a plan and timetable for the completion of formal discovery no later than the discovery cut- off date [*see § 71.64[1]*]; and (2) an exchange of documents, witness names and addresses, and other information, without formal discovery requests from opposing parties, to occur on or before a date that is no later than 10 days after the discovery conference [Cal. State B. Rules Proc., Rule 182(a)].

The parties may stipulate, without leave of the State Bar Court, to one continuance of the discovery conference to a date not more than 30 days after service of the responsive pleading. The stipulation must be filed with the Court [Cal. State B. Rules Proc., Rule 182(c)].

A party may not serve a formal discovery request until 20 days after the date the responsive pleading is originally due [Cal. State B. Rules Proc., Rule 182(b)].

At the first status conference [§ 71.68[2]] that occurs after the discovery conference, the parties must report to the State Bar Court regarding the following [Cal. State B. Rules Proc., Rule 182(d)]:

- Any agreements for informal discovery reached at the discovery conference.
- Each party's plan and timetable for conducting formal discovery.
- Any anticipated discovery disputes or reasons why the parties may be unable to complete formal discovery by the discovery cut-off date.

Delays in conducting the discovery conference or in completing any agreed-on informal exchange will not extend the time for completion of formal discovery, except by order of the State Bar Court based on unforeseeable and exceptional circumstances [Cal. State B. Rules Proc., Rule 182(e)]. A party's failure to participate in good faith in a discovery conference, or to make a good faith effort to comply with all agreements reached at a discovery conference and reported to the State Bar Court, may constitute cause for an order compelling or precluding discovery or other appropriate discovery sanctions [Cal. State B. Rules Proc., Rule 182(f)].

[4] Physical and Mental Examinations

In any proceeding in which the mental or physical condition of a member is at issue, and to the extent to which discovery is permitted by rule or order of the State Bar Court, the State Bar may move for the issuance of an order requiring the member to undergo a mental and/or physical examination pursuant to *Bus. & Prof. Code § 6053*. The motion and supporting evidence must demonstrate that there is good cause for the examination, and must specify the manner, conditions, scope, and nature of the requested examination [Cal. State B. Rules Proc., Rule 184(b)(1)]. On its own motion, the State Bar Court may issue an order to show cause why a mental and/or physical examination of the member should not be ordered pursuant to *Bus. & Prof. Code § 6053*. The order to show cause must specify the manner, conditions, scope, and nature of the proposed examination, and must afford the parties at least 10 days from the service

of the order to show cause to file a response [Cal. State B. Rules Proc., Rule 184(b)(2)].

The State Bar Court may hold a hearing to determine if the need for the examination outweighs the member's right to privacy. If so, appropriate limitations or conditions should be included in the order to minimize the intrusiveness of the examination [Cal. State B. Rules Proc., Rule 184(d)].

The parties may also stipulate to the issuance of an order for a physical or mental examination [Cal. State B. Rules Proc., Rule 184(f)].

Unless otherwise ordered by the State Bar Court, or otherwise stipulated, the party moving for the examination must pay for its cost [Cal. State B. Rules Proc., Rule 184(g)].

[5] Motion to Compel Discovery

A party may file a motion to compel compliance with a discovery request within 30 days after the date on which the discovery response was due or served. This time limit may be extended by the parties' stipulation [Cal. State B. Rules Proc., Rule 185(b)]. Prior to filing a motion to compel, a party must make a reasonable and good faith attempt at an informal resolution of the issue. The motion must be accompanied by a declaration stating facts showing that a reasonable and good faith attempt at resolution was made [Cal. State B. Rules Proc., Rule 185(a)].

[6] Discovery Sanctions

The provisions of the Civil Discovery Act relating to misuse of the discovery process apply in State Bar Court proceedings, except that provisions for monetary sanctions and the arrest of a party are inapplicable, and dismissal may not be ordered as a discovery sanction unless the State Bar Court has first considered the impact of dismissal on the protection of the public [Cal. State B. Rules Proc., Rule 186].

[7] Review of Discovery Orders

Within 10 days after service of notice of a discovery ruling by a hearing judge, a party may serve and file with the clerk a petition for interlocutory review [Cal. State B. Rules Proc., Rules 189, 300; *see § 71.121[4]*].

[8] Joint Discovery in Related Proceedings

If two or more State Bar Court proceedings involve common questions of fact, but are not consolidated, the State Bar Court may permit joint discovery to be conducted on the motion of any party and on such terms and conditions as may be just. Joint discovery may not be conducted unless an order permitting such discovery has been made in each of the proceedings involved [Cal. State B. Rules Proc., Rule 188].

[9] Protective Orders

During the course of disciplinary investigations or formal proceedings, if a party seeks to discover the work product of an attorney as referenced in *Code Civ. Proc. § 2018* (*Code Civ. Proc. § 2018.070* effective July 1, 2005), either party may promptly move for a protective order from the State Bar Court [*see* Cal. State B. Rules Proc., Rule 180(a) (Civil Discovery Act applies in State Bar Court)].

For a more detailed discussion of protective orders, see Ch. 191, *Discovery: Privileges and Other Discovery Limitations*
.

Legal Topics:

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6-71 California Forms of Pleading and Practice--Annotated § 71.65

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.65 Venue

State Bar Court proceedings must be initiated in Los Angeles County if the member maintains his or her principal office for the practice of law or resides or resided in Imperial, Inyo, Kern, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Luis Obispo, Santa Barbara, or Ventura Counties, or if the alleged conduct that is the subject of the proceeding was committed in one of those counties [Cal. State B. Rules Proc., Rule 52]. State Bar Court proceedings must be initiated in the City and County of San Francisco if the member maintains his or her principal office for the practice of law or resides or resided, or if the alleged conduct that is the subject of the proceeding was committed, in any county in California other than the ones listed above. If both of these venue rules apply or if neither applies, the proceedings may be initiated in either Los Angeles County or the City and County of San Francisco [Cal. State B. Rules Proc., Rule 52].

For the convenience of parties and witnesses and on the timely motion of any party, the State Bar Court may authorize holding proceedings (or parts of proceedings) in a county other than Los Angeles County or the City and County of San Francisco. An order granting a motion may be conditioned on payment by the moving party of all or part of any resulting costs to the Court or to opposing parties. These orders are reviewable for an abuse of discretion by filing a petition for interlocutory review [Cal. State B. Rules Proc., Rules 53, 300; *see § 71.121[4]*].

Any party may file a motion for transfer of venue in the State Bar Court in which the proceeding is pending. The motion must be filed as soon as practicable, and in no event later than the last day of the discovery period [Cal. State B. Rules Proc., Rule 54; *see § 71.64[1]*]. A motion for transfer of venue may be made on the ground that the proceeding was initiated in an improper venue or on the ground that the proceeding should be transferred to a different venue for the convenience of witnesses and to promote the ends of justice. Rulings on motions for transfer are reviewable by filing a petition for interlocutory review [Cal. State B. Rules Proc., Rules 54, 300].

For a form of motion for transfer of venue, *see § 71.163*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.66 Consolidation and Severance

Consolidation may be ordered on motion of any party, on stipulation of the parties or on the Court's own motion with notice to the parties and an opportunity to be heard. Except where good cause is shown, motions to consolidate must be filed within 30 days of the filing of the notice of disciplinary charges or other initial pleading in the most recent of the proceedings sought to be consolidated. Proceedings may be consolidated if no substantial rights of any party will be prejudiced and if consolidation will not cause undue delay of either matter. Proceedings involving different members but common questions of fact may be consolidated for all purposes or for the purpose of joint hearing or joint trial [Cal. State B. Rules Proc., Rule 108(a)]. Proceedings in the Hearing Department may not be consolidated with proceedings in the Review Department. The Presiding Judge may order that a proceeding in the Review Department be remanded to the Hearing Department for a ruling as to whether consolidation is appropriate [Cal. State B. Rules Proc., Rule 108(b)]. If the proceedings which a party seeks to consolidate are pending in different venues, a motion for transfer of venue must be granted prior to the filing of a motion to consolidate [Cal. State B. Rules Proc., Rule 108(c); *see § 71.65*].

Severance may be ordered on a party's motion, on the parties' stipulation, or on the motion of the State Bar Court with notice to the parties and an opportunity to be heard. Motions to sever must be filed as soon as practicable. A proceeding may be severed into two or more proceedings for the convenience of the parties, to avoid substantial prejudice to a party, or when conducive to expedition and economy [Cal. State B. Rules Proc., Rule 109].

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.67 Submission and Decision

When a matter has been submitted, the State Bar Court will take the matter under submission, cause the clerk to file and serve the decision, and will not assign the duty of preparation of the decision, in whole or in part, to any party or any party's counsel [Cal. State B. Rules Proc., Rule 220(a)]. The State Bar Court's decision is final unless a timely request for review or posttrial motion is filed with the clerk, or unless the decision is modified by the State Bar Court on its own motion [Cal. State B. Rules Proc., Rule 220(a)].

The State Bar Court must file its decision within 90 days of taking the matter under submission, unless a shorter period for filing the decision in an expedited proceeding is required by statute, by Supreme Court rule or by the State Bar Rules of Procedure [Cal. State B. Rules Proc., Rule 220(b)]. If the State Bar Court recommends disbarment, it must also include in its decision an order that the respondent be enrolled as an inactive member [Cal. State B. Rules Proc., Rule 220(c)].

Legal Topics:

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AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.68 Conferences

[1] In General

A disciplinary proceeding will include one or more conferences that are distinct from the disciplinary hearing itself. The State Bar Court Rules of Practice require a status conference, and also authorize pretrial and settlement conferences [*see* Cal. State B. Rules Prac., Rules 1210, 1220, 1230].

[2] Status Conferences

Within 45 days of the filing of the notice of disciplinary charges (or other initial pleading), the assigned judge must order that a status conference be held in the State Bar Court, by telephone, or by other appropriate means [Cal. State B. Rules Prac., Rule 1210(a)].

PRACTICE TIP:

Initial Status Conference. Some State Bar Court judges request that the parties prepare and file, preferably jointly, a statement of availability with respect to scheduling the initial status conference. Some State Bar Court judges require that the initial status conference be in person. *By Regina E. Brenner.*

At the conference, participating parties must be prepared to respond on the subjects specified in any order noticing the conference [Cal. State B. Rules Prac., Rule 1210(b)]. In addition, the parties participating must be prepared to respond to inquiries concerning the following topics [Cal. State B. Rules Prac., Rule 1210(b)]:

- Jurisdiction and venue.
- The substance of the parties' claims and defenses and the definition of genuinely controverted issues.

- Anticipated motions.

- Further proceedings, including setting of dates for discovery cutoff, pretrial and trial, and compliance with rules.

- Modification of standard prescribed pretrial procedures on account of the proceeding's relative simplicity or complexity.

- Prospects for settlement.

- Any other matters that may be conducive to the just, efficient, and economical determination of the proceeding.

On request of any party, or on the assigned judge's own motion, additional status conferences may be held at any time [Cal. State B. Rules Prac., Rule 1210(c)].

Following any status conference, the assigned judge will enter an order addressing, as appropriate, the seven items listed *above*. This order, unless and until modified, governs all further proceedings. Copies of the order will be served on all parties who have appeared in the action [Cal. State B. Rules Prac., Rule 1211].

The Clerk of the State Bar Court must serve on all parties a written notice of the date, time, and place of any status conference, at least 10 days prior to the conference unless the Court orders otherwise [Cal. State B. Rules Prac., Rule 1240].

[3] Pretrial Conferences

[a] In General

One or more pretrial conferences may be held in any proceeding at a time the assigned judge may order [Cal. State B. Rules Prac., Rule 1220].However, a pretrial conference may not be held more than 45 days before the scheduled commencement of trial [Cal. State B. Rules Proc., Rule 211(d)].

The Clerk of the State Bar Court will serve all parties with a written notice of the date, time, and place of the pretrial conference at least 30 days before the conference unless the Court orders otherwise. The conference may be held in Court, by telephone, or by other appropriate means [Cal. State B. Rules Prac., Rule 1220].

The agenda for the pretrial conference consists of matters covered by the Rules of Procedure, the Rules of Practice, and any other matter germane to the proceeding. Each party must be present or represented at the pretrial conference by counsel having authority with respect to all matters on the agenda, including settlement of the proceeding [Cal. State B. Rules Prac., Rule 1220].

[b] Preparation of Pretrial Statement

Unless the State Bar Court orders that a pretrial statement need not be prepared, all counsel must meet in person (or by telephone) before the date on which the pretrial statement is due to be filed, and must discuss each of the following [Cal. State B. Rules Prac., Rule 1221]:

- Preparation of a joint pretrial statement.

- Coordination of pretrial statements if no agreement is reached on filing a joint statement.

- Settlement of the proceeding.

Unless otherwise ordered or provided by stipulation of the parties approved by the Court, the parties must file a joint pretrial statement. If after a good faith attempt, preparation of a joint statement is not feasible, the parties may serve and file separate pretrial statements [Cal. State B. Rules Proc., Rule 211(a)]. These statements must be filed and served at least 20 days before the pretrial conference, or as ordered by the Court [Cal. State B. Rules Proc., Rule 211(b)].

Unless otherwise ordered, objections to any portion of a pretrial statement must be made within 10 days of service of the statement [Cal. State B. Rules Proc., Rule 211(c)]. At the pretrial conference, the Court will rule on any objections to the pretrial statements, and may order these statements amended or supplemented [Cal. State B. Rules Proc., Rule 211(e)].

Failure to file a pretrial statement constitutes grounds for orders the Court deems proper, including, but not limited to, the exclusion of evidence or witnesses [Cal. State B. Rules Proc., Rule 211(f)].

[c] Contents of Pretrial Statement

Pretrial statements must include the following subject headings and information [Cal. State B. Rules Prac., Rule 1223]:

- *Party:* The names of the parties or party in whose behalf the statement is filed.

- *Substance of the Proceeding:* A brief description of the substance of the charges and defenses presented and of the issues to be decided.

- *Undisputed Facts:* A plain and concise statement of all material facts not reasonably disputable. Counsel are expected to make a good faith effort to stipulate to all facts not reasonably disputable for incorporation into the trial record without the necessity of supporting testimony or exhibits.

- *Disputed Issues:* A plain and concise statement of all disputed factual issues, evidentiary issues, and claims of work product or privilege.

- *Disposition Sought:* In disciplinary proceedings, a statement as to the disposition sought if culpability is found. In other proceedings, a statement of the relief sought. No party will be bound regarding disposition sought.

- *Points of Law:* A concise statement of each disputed point of law with respect to the issues in the proceeding, with reference to statues, rules, and decisions relied on. Extended legal argument is not to be included in the pretrial statement.

- *Witnesses to Be Called:* A list of all witnesses likely to be called at trial, except for impeachment or rebuttal, together with a brief statement following each name describing the substance of the testimony to be given, any anticipated difficulty in scheduling the witness, and any special needs of the witness (such as a need for an interpreter).

- *Exhibits, Schedules, and Summaries:* A list of all documents and other items to be offered as exhibits at the trial, except for impeachment or rebuttal, with a brief statement following each describing its substance or purpose and the identity of the sponsoring witness. Records of prior discipline to be used in aggravation may not be included in the exhibit list.

- *Further Discovery or Motions:* A statement of all remaining discovery or motions.

- *Stipulations:* A statement of stipulations requested or proposed for pretrial or trial purposes.

- *Amendments, Dismissals:* A statement of requested or proposed amendments to pleadings or dismissals of parties, charges, claims, or defenses.

- *Settlement Discussion:* A statement summarizing the status of settlement negotiations and indicating whether further negotiations are likely to be productive.

- *Bifurcation, Separate Trial of Issues:* A statement whether bifurcation or a separate trial of specific issues is feasible and desired.

- *Limitation of Experts:* A statement whether limitation of the number of expert witnesses is feasible and desired.

- *Estimate of Trial Time:* An estimate of the number of court days expected to be required for the presentation of each party's case. Counsel are expected to make a good faith effort to reduce the time required for trial by all means reasonably feasible, including stipulations, expedited means of presenting testimony and exhibits, and the avoidance of cumulative proof.

- *Claim of Privilege or Work Product:* A statement indicating whether any of the matters otherwise required to be stated by Cal. State B. Rules Prac., Rule 1223 is claimed to be covered by the work product or other privilege. On such indication, such matters may be omitted subject to further order at the pretrial conference.

- *Failure to Cooperate:* A statement concerning any failure of opposing counsel to cooperate in meeting and conferring on pretrial issues.

- *Miscellaneous:* Any other subjects relevant to the trial of the proceeding, or material to its just, efficient, and economical determination.

[d] Exchange of Trial Exhibits Before Conference

At least 10 days before the pretrial conference, the parties must exchange copies of all exhibits to be offered and all schedules, summaries, diagrams, and charts to be used at the trial other than for impeachment or rebuttal. Each proposed exhibit must be premarked for identification. On request, a party must make the original or underlying documents of any exhibit available for inspection and copying. Failure to comply with these requirements without good cause constitutes grounds for orders the State Bar Court deems proper, including, but not limited to, the exclusion of exhibits from evidence [Cal. State B. Rules Prac., Rule 1224].

Promptly after the receipt of exhibits and before the commencement of the trial, any parties proposing to object to the receipt in evidence of any proposed exhibit must advise the opposing parties of the objection. The parties must confer with respect to any objections in advance of the pretrial conference, and must attempt to resolve them. To the extent they are unable to arrive at a resolution, they must advise the pretrial conference judge of the objections and make reasonable efforts to present the matter to the judge for a ruling at the pretrial conference, or as ordered by the judge [Cal. State B. Rules Prac., Rule 1225].

[e] Pretrial Order

The assigned judge may make pretrial orders at or following the pretrial conference as may be appropriate, and these orders will control the subsequent course of the proceeding [Cal. State B. Rules Prac., Rule 1226].

[4] Settlement Conference

[a] In General

At any time after a proceeding has been initiated, any party may request a settlement conference, or the Court may order one on its own motion. The respondent, applicant or petitioner, whether or not represented by counsel, must attend the conference unless excused by the Court. Counsel appearing at the conference must be the counsel who will try the case and must have full authority to settle the matter at the settlement conference [Cal. State B. Rules Prac., Rule 1230].

Settlement conferences are ordinarily held before a judge other than the assigned judge. The settlement conference judge is appointed by the supervising judge or his or her designee. If all parties stipulate, the assigned judge may conduct the settlement conference. A party may request a specific settlement conference judge in the request for a conference. If the parties have agreed to request a specific settlement conference judge, the request for a conference must so state [Cal. State B. Rules Prac., Rule 1231].

Unless otherwise ordered by the State Bar Court, if the settlement conference is not conducted by the assigned judge, the clerk must notify all parties in writing of the name of the judge designated to conduct the settlement conference at least 10 days before the date of the conference [Cal. State B. Rules Prac., Rule 1232].

[b] Confidentiality of Settlement Conferences

Settlement conferences are not conducted on the record, except that any agreement among the parties may be memorialized on the record [Cal. State B. Rules Proc., Rules 3.04, 20].

If a settlement conference does not result in a settlement, no reference will be made nor consideration given in any subsequent aspect of any proceeding to the content of settlement discussions or written statements made in connection with the settlement conference or the parties' meeting and conferring process leading up to the settlement conference [Cal. State B. Rules Prac., Rule 1235].

[c] Meet and Confer

The parties must meet and confer in person or by telephone prior to the settlement conference. If the parties have developed positions concerning settlement offers, they must be communicated orally or in writing at this time [Cal. State B. Rules Prac., Rule 1233].

[d] Settlement Conference Statements

Each party, or both parties jointly, must lodge with the Court, but not file, a settlement conference statement at least five days before a scheduled settlement conference. The statement must be clearly marked as such, must be in letter form, must indicate in the heading the date and time of the scheduled settlement conference, and must be addressed to the settlement conference judge. Settlement conference statements may be served upon the opposing party [Cal. State B. Rules Prac., Rule 1233].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewLegal EthicsSanctionsDisciplinary ProceedingsGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil

ProcedureDiscoveryDisclosuresGeneral Overview

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
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C. Investigation And Hearing

6-71 California Forms of Pleading and Practice--Annotated § 71.69

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.69 Disqualification of Judges

A judge is disqualified if he or she is subject to disqualification under any of the grounds specified in *Code Civ. Proc. § 170.1* [Cal. State B. Rules Proc., Rule 106(a)(1)]. A judge pro tempore is also disqualified if he or she (or his or her office) is or represents either of the following [Cal. State B. Rules Proc., Rule 106(b)]:

- A party to pending litigation involving any party or counsel in the proceeding (or the law office of a party or counsel).

- A party represented by any party or counsel in the proceeding (or the law office of a party or counsel).

Only the provisions of *Code Civ. Proc. §§ 170.2, 170.3(b), 170.4*, and *170.5(b)-(g)* apply to judicial disqualification of State Bar Court proceedings [Cal. State B. Rules Proc., Rule 106(c); *see In the Matter of Stewart (1994) 3 Cal. State Bar Ct. Rptr. 52, 59* (no basis for charging impropriety by hearing judge simply because judge presided over prior disciplinary proceedings regarding member)].

A motion to disqualify must be made within the earliest of the following dates [Cal. State B. Rules Proc., Rule 106(e)]:

- 10 days after the ground for disqualification first became known to the party making the motion or to that party's counsel.

- Prior to commencement of trial.

- As to a judge of the Review Department, 20 days prior to oral argument held before the Review Department.

- If the assignment of the matter to the judge, or the grounds for disqualification were not known to the moving party sufficiently in advance to permit the filing of a written motion in accordance with these time limits, the party must file the motion promptly and must make an oral motion at the start of the next hearing, trial, conference, or argument.

Failure to seek timely review of a judge's decision not to disqualify himself or herself constitutes a waiver of the issue [*Calvert v. State Bar (1991) 54 Cal. 3d 765, 776, 1 Cal. Rptr. 2d 684, 819 P.2d 424]* .

A judge who recuses himself or herself must promptly give notice of the recusal to the judge who has authority to assign the matter to another judge [Cal. State B. Rules Proc., Rule 106(c)].

For a more detailed discussion of disqualification of judges, see Ch. 317, *Judges* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsSanctionsDisciplinary ProceedingsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral Overview

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6-71 California Forms of Pleading and Practice--Annotated § 71.70

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§ 71.70 Trial

[1] Notice of Trial

A "trial," within the meaning of the State Bar Rules of Procedure, is an evidentiary hearing on the merits of a State Bar Court proceeding before a hearing judge [Cal. State B. Rules Proc., Rule 3.16].

The clerk of the State Bar Court must serve notice of the trial date on the parties at least 30 days before that date, unless the parties agree to a shorter notice [Cal. State B. Rules Proc., Rule 212(a)]. If the trial date is rescheduled, at least 20 days' notice of the new date must be given to the parties, orally or by mail, unless the parties have agreed to a shorter notice [Cal. State B. Rules Proc., Rule 212(b)].

[2] Obligation to Appear at Trial

The respondent must appear at the trial, unless his or her default has been entered and has not been vacated. For of entry of default on respondent's failure to file a timely response to the notice of disciplinary charges, see *§ 71.61[3][a]*. The respondent may appear through counsel rather than in person, unless he or she is properly served with a trial subpoena or notice to appear at trial [Cal. State B. Rules Proc., Rule 210].

[3] Entry of Default on Failure to Appear at Trial

If the respondent fails to appear at trial in person or by counsel, the trial will still proceed on the merits, unless it is continued for good cause [Cal. State B. Rules Proc., Rule 201(a)]. If the respondent's default has not been previously entered, the State Bar Court will order the clerk to enter the respondent's default if it is shown that notice of disciplinary charges and/or notice of trial were properly served on the respondent, or the respondent has not appeared at trial [Cal. State B. Rules Proc., Rule 201(b)]. The clerk must file and serve on all parties a notice of entry of default [Cal. State B. Rules Proc., Rule 201(c)].

See *§ 71.61[3]* for a discussion of the procedure for vacating and setting aside a default.

[4] Order and Burden of Proof

In disciplinary proceedings, the parties must present evidence of culpability before presenting evidence of aggravating or mitigating circumstances, except as ordered by the State Bar Court. The judge may not consider evidence of aggravating or mitigating factors, including the respondent's prior disciplinary record, in determining culpability. However, evidence of a respondent's other acts of misconduct, including his or her disciplinary record, may be received in the culpability phase of a hearing if this evidence is admissible pursuant to *Evid. Code § 1101(b)* [Cal. State B. Rules Prac., Rule 1250; *see § 71.70[5][b]*].

At the trial of a disciplinary matter, the State Bar has the burden to prove culpability by clear and convincing evidence [Cal. State B. Rules Proc., Rule 213]. Any reasonable doubts must be resolved in favor of the respondent [*Golden v. State Bar (1931) 213 Cal. 237, 247, 2 P.2d 325]* . This standard is lower than the criminal standard of proof beyond a reasonable doubt [*see Penal Code § 1096*], and higher than the civil standard of a mere preponderance of the evidence [*Evid. Code § 115*; *Lillian F. v. Superior Court (1984) 160 Cal. App. 3d 314, 322, 206 Cal. Rptr. 603]* .

During a trial, after the party with the burden of proof has rested, and before the State Bar Court takes the matter under submission, an opposing party may make an oral or written motion for a determination that the party with the burden of proof has not met that burden. Alternatively, the Court may indicate on the record that it is considering making that determination on the Court's own motion. In that event, the Court must afford the parties an opportunity for argument on the issue [Cal. State B. Rules Proc., Rule 219(a)]. In making a determination, the Court must consider all of the evidence introduced, and must weigh the evidence and make determinations of credibility [Cal. State B. Rules Proc., Rule 219(b)]. If the motion is denied, the moving party may offer evidence without having reserved the right to do so and to the same extent as if the motion had not been made [Cal. State B. Rules Proc., Rule 219(c)]. If the motion is granted, the Court's decision must include findings of fact and conclusions of law [Cal. State B. Rules Proc., Rule 219(d)].

[5] Rules of Evidence

[a] In General

Except as otherwise provided in Rules of Procedure of the State Bar governing specific types of proceedings or hearings, and subject to the provisions of the State Bar Act and relevant decisions of the Supreme Court and State Bar Court, the Evidence Code (as applied in civil cases) is applicable in State Bar Court proceedings. The procedure for producing evidence in civil cases in courts of record applies, except as otherwise provided by the Rules of Procedure of the State Bar. However, no error in admitting or excluding evidence will invalidate a finding of fact, decision or determination, unless the error resulted in a denial of a fair hearing [Cal. State B. Rules Proc., Rule 214].

Accordingly, hearsay evidence is inadmissible unless the opposing party agrees to its admission or otherwise waives any hearsay objections, or the evidence is subject to an exception to the hearsay rule [*In the Matter of Scapa and Brown (1993) 2 Cal. State Bar Ct. Rptr. 635, 649]* .

[b] Admissibility of Record of Prior Discipline

A record (or the existence of a record) of prior discipline is inadmissible until a finding of culpability is made, unless it tends to prove a fact in issue in determining culpability [Cal. State B. Rules Proc., Rule 216(b); Cal. State B. Rules Prac., Rule 1260]. A record of prior discipline is not made inadmissible by the fact that the discipline has been recommended but not yet imposed. If a record of prior discipline that is not yet final is admitted, the State Bar Court must specify what the disposition is if the prior discipline recommendation is adopted, dismissed, or modified [Cal. State B. Rules Proc., Rule 216(c)].

A record of prior discipline is usually an aggravating factor in the determination of appropriate discipline [*see Alberton v. State Bar (1984) 37 Cal. 3d 1, 16, 206 Cal. Rptr. 373, 686 P.2d 1177 , cert. denied, 470 U.S. 1007 (1985)* ; *see also* Cal. State B. Stds. for Att'y Sanctions, Stds. 1.2(b)(i), 1.7].

[c] Admissibility of Complaints

Evidence of State Bar records of complaints or records of unproven charges against the respondent is not admissible on behalf of the State Bar. If the respondent introduces evidence that no complaints or charges have been made, then evidence of complaints or charges is admissible in rebuttal. Evidence of the facts underlying a record of complaint or an unproven charge may be admitted to prove a fact in issue [Cal. State B. Rules Proc., Rule 217].

[d] Admissibility of Prior Civil Proceedings

Transcripts of testimony from civil proceedings in which the attorney was a party are admissible in an attorney's disciplinary proceeding, so long as they are relevant and material to the issues in the disciplinary proceeding [*see Bus. & Prof. Code § 6049.2*; *Rosenthal v. State Bar (1987) 43 Cal. 3d 612, 633, 238 Cal. Rptr. 377, 738 P.2d 723]* . Transcripts of testimony from actions in which the attorney was merely a nominal party are also admissible [*see Evid. Code § 1291(a)(2)*; *Rosenthal v. State Bar (1987) 43 Cal. 3d612, 633 , 238 Cal. Rptr. 377, 738 P.2d 723]* . Transcripts of an attorney's prior testimony are admissible at a disciplinary proceeding brought against the attorney notwithstanding the fact that the attorney is an available witness at the proceeding [*see Bus. & Prof. Code § 6049.2*].

Because the standard of proof in State Bar disciplinary proceedings is higher than that in civil actions (*see § 71.70[4]*), any prior civil verdicts or judgments entered against an attorney in a prior action must be assessed independently at the disciplinary hearing [*see Maltaman v. State Bar (1987) 43 Cal. 3d 924, 947, 239 Cal. Rptr. 687, 741 P.2d 185]* . The civil findings bear a strong presumption of validity if supported by substantial evidence [*Maltaman v. State Bar (1987) 43 Cal. 3d 924, 947, 239 Cal. Rptr. 687, 741 P.2d 185]* . If, however, the evidence produced at the disciplinary hearing fails to support the civil findings by convincing proof and to a reasonable certainty, the civil verdict and judgment should carry no disciplinary significance apart from the underlying facts [*Maltaman v. State Bar (1987) 43 Cal. 3d 924, 947, 239 Cal. Rptr. 687, 741 P.2d 185]* .

[e] Evidence of Client Security Fund Proceedings

The fact that an application for reimbursement from the Client Security Fund (discussed in *§ 71.144[8][a]*) has been approved or denied, in whole or in part, is inadmissible in a discipline proceeding involving the same member except in the following instances [Cal. State B. Rules Proc., Rule 215(a)]:

- To prove the amount that was authorized as reimbursement after culpability was found.
- To impeach the applicant, complaining witness, or the member.
- For any purpose when a party who is the subject of the State Bar Court proceeding has already been disciplined for the same action that gave rise to the Client Security Fund application and the decision to discipline the party has become final.

If evidence of payment of a Client Security Fund claim is introduced, evidence of reimbursement is also admissible [Cal. State B. Rules Proc., Rule 215(b)].

[f] Admissibility of Polygraph Examinations

Polygraph examination evidence is inadmissible in State Bar disciplinary proceedings in the absence of a stipulation

between the attorney involved and the State Bar [*Arden v. State Bar (1987) 43 Cal. 3d 713, 724, 239 Cal. Rptr. 68, 739 P.2d 1236]* .

[g] Admissibility of Conversations Recorded Surreptitiously

Under *Penal Code § 632*, recordings of conversations made surreptitiously without the recorded attorney's consent or knowledge are generally not admissible as evidence in State Bar disciplinary proceedings [*see Penal Code § 632(d)*; *In re Berman (1989) 48 Cal. 3d 517, 524, 256 Cal. Rptr. 802, 769 P.2d 984* , *cert. denied, 493 U.S. 893]* . A witness in a State Bar disciplinary proceeding may, however, use the inadmissible recording, or a transcript thereof, to refresh his or her memory prior to testifying [*In re Berman (1989) 48 Cal. 3d 517, 525, 256 Cal. Rptr. 802, 769 P.2d 984* , *cert. denied, 493 U.S. 893* ; *see also Evid. Code § 771(a)* (requiring refreshed witness to produce recording or transcript on request of adverse party)].

[6] Continuances

[a] In General

Continuances of the trial date are not favored [Cal. State B. Rules Prac., Rule 1131(a); *Hawk v. State Bar (1988) 45 Cal. 3d 589, 597, 247 Cal. Rptr. 599, 754 P.2d 1096* ; *Bambic v. State Bar (1985) 40 Cal. 3d 314, 320, 219 Cal. Rptr. 489, 707 P.2d 862]* . A strong rule against unnecessary delay is essential to ensure that the public will be protected by the prompt discipline of erring practitioners [*Bambic v. State Bar (1985) 40 Cal. 3d 314, 320, 219 Cal. Rptr. 489, 707 P.2d 862]* .

For a form for a motion for continuance, *see § 71.164*.

[b] Ruling on Motion

Any motion for or stipulation to a continuance filed in the Hearing Department must be decided by the assigned judge. In unusual or urgent circumstances, the Supervising Judge may grant a continuance if the assigned judge is unavailable [Cal. State B. Rules Prac., Rule 1131(b)(1)].

Any motion for continuance of oral argument made in the Review Department must be decided by the Presiding Judge [Cal. State B. Rules Prac., Rule 1131(b)(2)].

[c] Showing Required

A continuance will be granted only on an affirmative showing of good cause requiring the continuance [Cal. State B. Rules Proc., Rule 115; Cal. State B. Rules Prac., Rule 1131(c); *Morales v. State Bar (1988) 44 Cal. 3d 1037, 1046, 245 Cal. Rptr. 398, 751 P.2d 457]* . In general, the necessity for the continuance should result from an emergency occurring after the setting of the settlement conference, hearing, or oral argument date that could not have been anticipated or avoided with reasonable diligence and cannot now be properly provided for other than by granting a continuance [Cal. State B. Rules Prac., Rule 1131(c)].

In ruling on a motion for a continuance, the Court must consider all matters relevant to a proper determination of the motion. These may include the following [Cal. State B. Rules Prac., Rule 1131(c)]:

- The Court's file in the case and any supporting declarations concerning the motion.

- The diligence of counsel, particularly in bringing the emergency to the Court's attention and to the attention of opposing counsel at the first available opportunity and in attempting otherwise to meet the emergency.

- The nature of any previous continuances, extensions of time, or other delays attributable to any party.

- The proximity of the settlement conference, hearing, or oral argument date.

- The condition of the Court's calendar and the availability of an earlier settlement conference, hearing, or oral argument date if the matter is ready.

- Whether the continuance may properly be avoided by substitution of attorneys or witnesses, use of depositions in lieu of oral testimony, or trailing the matter for settlement conference, hearing, or oral argument.

- Whether the interests of justice are best served by a continuance; by holding the settlement conference, hearing, or oral argument of the matter; or by imposing conditions on a continuance.

- The State Bar Court's time pendency guidelines, stated in Cal. State B. Rules Prac., Rule 1130.

- Whether the party requesting the continuance failed to appear at any hearing or settlement conference.

- Any other fact or circumstance relevant to a fair determination of the motion.

[7] Proceedings to Be Recorded or Reported

All hearings and trials in State Bar Court proceedings must be recorded by electronic equipment or reported by other methods approved by the Executive Committee. Copies of recordings of public proceedings must be available for purchase from the Clerk of the State Bar Court [Cal. State B. Rules Proc., Rule 30].

Photographing, recording for broadcasting, broadcasting or audio-recording to make personal notes of public State Bar Court proceedings is permitted only on written order of the assigned judge in the Hearing Department, or the assigned panel, if pending in the Review Department. A person or entity may seek the permission of an assigned judge or panel to photograph, record, broadcast, or audio-record by submitting the form approved by the Executive Committee at least five days prior to the proceeding in question. The clerk will notify the parties that such a request has been received. The assigned judge or panel must consider those factors relevant to a nonjury proceeding set forth in *Cal. Rules of Ct., Rule 1.150(e)(3)*. The assigned judge or panel may deny the request or limit or restrict the extent of the requested photographing, recording, or broadcasting, or condition the order on an agreement by the person or entity making the request to pay any increased court-incurred costs. When permission to audiotape is granted, recordings may not be used for any purpose other than as personal notes [Cal. State B. Rules Proc., Rule 32].

[8] Decision of Hearing Judge

When the matter has been submitted, the State Bar Court will take the matter under submission, and will thereafter have the clerk file and serve its decision. The Court may not assign the duty of preparing the decision, in whole or in part, to any party or any party's counsel. The decision is the final decision of the Court unless a timely request for review or a post-trial motion is filed with the clerk, or unless the Court modifies the decision on its own motion. Corrections to a decision that correct typographical errors or make insubstantial changes not affecting the merits do not constitute a modification of the Court's decision [Cal. State B. Rules Proc., Rule 220; Cal. State B. Rules Prac., Rule 1270].

The decision should ordinarily be filed within eight months of the filing of the initial pleading, and within 30 days of

taking the matter under submission [Cal. State B. Rules Prac., Rule 1130(b)(1), (4)].

For a discussion of post-trial remedies and review, see *§ 71.120* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceGeneral OverviewLegal EthicsSanctionsDisciplinary ProceedingsGeneral Overview

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6-71 California Forms of Pleading and Practice--Annotated § 71.71

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§ 71.71 Costs Assessable in Disciplinary Proceedings

A State Bar member may be required to pay the costs of certain types of proceedings against him or her. Any order imposing a public reproval on a member of the State Bar must include a direction that the member pay costs [*Bus. & Prof. Code § 6086.10(a)*; Cal. State B. Rules Proc., Rule 280]. Similarly, in any order imposing discipline or accepting a resignation with a disciplinary matter pending, the Supreme Court must include a direction that the member pay costs [*Bus. & Prof. Code § 6086.10(a)*; Cal. State B. Rules Proc., Rule 280].

The costs that must be imposed include all of the following:

- The actual expense incurred by the State Bar for the original and copies of any reporter's transcript of the State Bar proceedings, and any fee paid for the reporter's services [*Bus. & Prof. Code § 6086.10(b)(3)*].

- All expenses paid by the State Bar that would qualify as taxable costs recoverable in civil proceedings [*Bus. & Prof. Code § 6086.10(b)(2)*].

- The charges determined by the State Bar to be "reasonable costs" of investigation, hearing, and review [*Bus. & Prof. Code § 6086.10(b)(1)*].

PRACTICE TIP:
"Reasonable Costs." Reasonable costs of the investigation, hearing, and review are assessed at different levels and increase at each level:

- Level One Assessment--Stipulated disposition reached prior to filing of Notice to Show Cause.

- Level Two Assessment--Stipulated disposition reached prior to time of trial.

- Level Three Assessment--Stipulated disposition reached at time of trial or trial not exceeding one day is conducted.

- Level Four Assessment--Trial exceeding one day is conducted.

There is also a separate cost category for Resignation of Member with Charges Pending. *By Regina E. Brenner*.

The State Bar may grant relief to a disciplined member, in whole or in part, from an order assessing costs, or may grant the member an extension of time to pay the costs [*Bus. & Prof. Code § 6086.10(c)*]. Such a motion must be made no later than 30 days after the effective date of the public reproval or the filing of the Supreme Court order, with certain exceptions for a motion based in whole or in part on financial hardship [*see* Cal. State B. Rules Proc., Rule 282 (procedure for motion for relief)]. The State Bar exercises its discretion in evaluating the member's hardship, special circumstances, or other good cause [*Bus. & Prof. Code § 6086.10(c)*; Cal. State B. Rules Proc., Rule 282(a)].

If an attorney is exonerated of all charges following trial in the hearing department, he or she is entitled to reimbursement from the State Bar for reasonable expenses [*Bus. & Prof. Code § 6086.10(d)*; Cal. State B. Rules Proc., Rule 283(a)]. "Reasonable expenses" are determined by the State Bar, and do not include attorney's or expert's fees for preparation for the hearing [*Bus. & Prof. Code § 6086.10(d)*]. A motion for reimbursement of expenses may not be filed until the date of service of the final ruling exonerating the respondent of all charges, and must be filed no later than 30 days thereafter. The motion must be accompanied by appropriate documentation of the costs for which reimbursement is requested [Cal. State B. Rules Proc., Rule 283(b), (d)]. The motion must be heard and decided by the hearing judge who was assigned to the disciplinary proceeding [Cal. State B. Rules Proc., Rule 283(f)]. Within 15 days after service of the judge's written order deciding the motion, a party may file a petition for interlocutory review [Cal. State B. Rules Proc., Rules 283(h), 300; *see § 71.121[4]*].

Costs assessed against a publicly reproved or suspended member are added to and become a part of the membership fees of the member for the next calendar year [*Bus. & Prof. Code § 6140.7*]. For discussion of the penalties for failure to pay costs, see *§ 71.34[4][c]*.

The Chief Trial Counsel or designee has discretion, under certain circumstances, to provide a member with relief from the payment of costs or an extension of time to pay costs. For further discussion, see *§ 71.59[6]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewLegal EthicsSanctionsDisciplinary ProceedingsGeneral Overview

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§ 71.72 Motion for Order Sealing Portion of Record

A party or other person may move for an order sealing a portion of the record [Cal. State B. Rules Proc., Rule 23]. The motion must be supported by a showing of specific facts establishing that a statutory privilege or constitutionally protected interest of a party, nonparty, or witness outweighs the compelling public interest in the public nature of the proceeding. The relief sought must be narrowly tailored to serve the specific interest sought to be protected [Cal. State B. Rules Proc., Rule 23(c)]. A motion to seal protected material must be filed in the hearing department and, absent a showing of good cause for the delay, the motion may not be made for the first time on review [Cal. State B. Rules Proc., Rule 23(b)]. The motion may be filed under seal and if so filed must be treated as protected material, until further order of the court [Cal. State B. Rules Proc., Rule 23(c)]. Protected material must be kept under seal by the clerk, and must be marked and maintained by other custodians in a manner calculated to prevent improper disclosure [Cal. State B. Rules Proc., Rule 23(d)]. All persons to whom protected material is disclosed must be given a copy of the applicable order sealing a portion of the record by the person making the disclosure [Cal. State B. Rules Proc., Rule 23(e)]. Unless otherwise ordered, protected material may only be disclosed to [Cal. State B. Rules Proc., Rule 23(f)]:

- Parties to the proceeding and counsel.
- Personnel of the Supreme Court, the State Bar Court and independent audiotape transcribers.
- Personnel of the Office of Probation when necessary for their official duties.

Orders of the Hearing Department relating to a motion for an order sealing a portion of the record are reviewable by the Review Department on a petition for interlocutory review [Cal. State B. Rules Proc., Rules 23(g), 300; *see § 71.121[4]*].

A party is not prohibited from filing motions in limine or from requesting that portions of evidence that are protected be redacted [Cal. State B. Rules Proc., Rule 23(h)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCourt RecordsLegal EthicsSanctionsDisciplinary ProceedingsGeneral Overview

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C. Investigation And Hearing

6-71 California Forms of Pleading and Practice--Annotated §§ 71.73-71.89

AUTHOR: Regina E. Brenner Editorial Consultant

[Reserved]

§§ 71.73[Reserved]

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6-71 California Forms of Pleading and Practice--Annotated § 71.90

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.90 Resignation With Charges Pending and Perpetuation of Testimony

[1] In General

When charges are pending against a member, the member may opt to resign and relinquish the right to practice law and thus avoid the prospect of formal discipline [*see Cal. Rules of Ct., Rule 9.21(a)*]. The phrase "charges pending" means the member [Cal. State B. Rules Proc., Rule 650]:

- Is the subject of an investigation or a disciplinary proceeding;
- Is the subject of a criminal investigation or charge; or
- Has been convicted of a felony or misdemeanor.

When a resignation is filed under *Cal. Rules of Ct., Rule 9.21*, the Office of the Chief Trial Counsel may perpetuate testimony or documentary evidence pertaining to the member's conduct that is pertinent to any future inquiry into the member's conduct or qualification to practice law [Cal. State B. Rules Proc., Rule 651; *see* Cal. State B. Rules Proc., Rules 652-656; *see also § 71.90[3]*].

In submitting a resignation with disciplinary charges pending, an attorney agrees to be transferred to inactive membership in the State Bar effective on the filing of the resignation by the State Bar [*Cal. Rules of Ct., Rule 9.21(a)*]. A written resignation must be signed and dated by the member at the time it is tendered [*Cal. Rules of Ct., Rule 9.21(a)*]. The resignation must be tendered to the Office of the Clerk of the State Bar Court in Los Angeles [*Cal. Rules of Ct., Rule 9.21(a)*. An attorney's tender of resignation and transfer to inactive enrollment pursuant to *Cal. Rules of Ct., Rule 9.21* is public on filing of the resignation with the Clerk of the State Bar Court [Cal. State B. Rules Proc., Rule 22(a)]. If evidence is perpetuated by the Office of the Chief Trial Counsel, the record of perpetuated evidence is also public. A copy of the written resignation and the record of perpetuated evidence must be available for public inspection

[Cal. State B. Rules Proc., Rule 22(b)].

Within 30 days after filing of the resignation, the attorney must perform the acts specified in *Cal. Rules of Ct., Rule 9.20(a)(1)-(4), (b)*, and, within 40 days after filing of the resignation, the member must file with the Office of the Clerk of the State Bar Court proof of compliance as set forth in *Cal. Rules of Ct., Rule 9.20(c)* [*Cal. Rules of Ct., Rule 9.21(a)*]. For discussion of *Cal. Rules of Ct., Rule 9.20*, see *§ 71.99*. For a form of resignation with charges pending, see *§ 71.165*.

[2] State Bar Recommendation and Supreme Court Acceptance of Resignation

A resignation is not effective until it is accepted by the California Supreme Court after consideration and recommendation by the State Bar Court [*Cal. Rules of Ct., Rule 9.21(a)*]. On receipt of a member's resignation, tendered in conformity with the form *set forth in § 71.165*, as specified in *Cal. Rules of Ct., Rule 9.21(b)*, the Office of the Clerk of the State Bar Court must promptly file the resignation [*Cal. Rules of Ct., Rule 9.21(c)*]. The State Bar Court thereafter must consider the member's resignation and the stipulated facts and conclusions of law, if any, agreed upon between the member and the Chief Trial Counsel, and must recommend to the Supreme Court whether the resignation should be accepted. The State Bar Court's recommendation must be made in light of the grounds set forth in *Cal. Rules of Ct., Rule 9.21(d)* [*see below*], and, if the State Bar Court recommends acceptance of the resignation notwithstanding the existence of one or more of the grounds set forth there, the State Bar Court's recommendation must include an explanation of the reasons for the recommendation that the resignation be accepted [*Cal. Rules of Ct., Rule 9.21(c)*]. The Office of the Clerk of the State Bar Court must transmit to the Clerk of the Supreme Court three certified copies of the State Bar Court's recommendation together with the member's resignation, when, by the terms of the State Bar Court's recommendation, the resignation should be transmitted to the Supreme Court [*Cal. Rules of Ct., Rule 9.21(c)*].

In an order accepting a resignation with a disciplinary matter pending, the Supreme Court must include a direction imposing costs on the resigning member [*Bus. & Prof. Code § 6086.10(a)*]. Costs unpaid by the resigning member must be paid as a condition of reinstatement of membership [*Bus. & Prof. Code § 6140.7*]. An order of the Supreme Court accepting a resignation with a disciplinary matter pending may include an order that the member pay a specified monetary sanction for each violation [*see Bus. & Prof. Code § 6086.13(a)*]. For discussion, see *§ 71.34[4]*.

The Court may decline to accept a resignation for any of the following reasons [*Cal. Rules of Ct., Rule 9.21(d)*]:

- Preservation of necessary testimony is not complete.

- After transfer to inactive status, the member has practiced law or has advertised or held himself or herself out as entitled to practice law.

- The member has failed to perform the acts specified by *Cal. Rules of Ct., Rule 9.20(a), (b)* (discussed in *§ 71.99*).

- The member has failed to provide proof of compliance as specified in *Cal. Rules of Ct., Rule 9.20(c)*.

- The Supreme Court has filed an order of disbarment as to the member.

- The State Bar Court has filed a decision or opinion recommending the member's disbarment.

- The member has previously resigned or has been disbarred and reinstated to the practice of law.

- The member and the chief trial counsel have not reached agreement on a written stipulation as to facts and conclusions of law regarding the disciplinary matters and proceedings that were pending

against the member at the time the resignation was tendered.

- Acceptance of the resignation of the member will reasonably be inconsistent with the need to protect the public, the courts, or the legal profession.

If a member's resignation with charges pending is accepted by the Supreme Court, the member's name is stricken from the rolls of attorneys. After a specified period of time, the attorney may apply for reinstatement. For discussion of reinstatement proceedings generally, see *§ 71.100*.

[3] Perpetuation Proceeding

Within 30 days after the filing of the member's resignation with charges pending, the Office of the Chief Counsel may file and serve a notice of intent to perpetuate evidence, setting forth an estimate of the time required to complete perpetuation or a statement that perpetuation is not required [Cal. State B. Rules Proc., Rule 652]. On filing the notice, the Office of the Chief Trial Counsel may begin the perpetuation of evidence [Cal. State B. Rules Proc., Rule 653(a)].

Perpetuation of evidence must be accomplished by depositions or stipulations as to facts. If the member wishes to take depositions to perpetuate evidence, the member must show good cause in seeking a State Bar Court order [Cal. State B. Rules Proc., Rule 653(b)].

A hearing judge must be assigned to rule on motions filed in connection with the perpetuation of evidence. In addition to ruling on the motions, the judge may set status conferences or require status reports to monitor the progress of the perpetuation [Cal. State B. Rules Proc., Rule 653(c)].

The Office of Trial Counsel must file and serve a notice of completion of the perpetuation of evidence. On request, the member may obtain a copy of the perpetuated evidence from the Office of the Chief Trial Counsel at the member's expense [Cal. State B. Rules Proc., Rule 654].

In general, the perpetuated evidence may be admitted in evidence in any future proceeding concerning the member's conduct or qualifications to practice law, except that the Office of the Chief Trial Counsel may introduce deposition testimony as permitted by *Code Civ. Proc. § 2025(u)(3)* (*Code Civ. Proc. § 2025.620(c)* effective July 1, 2005), without making a showing that any of the factors listed in section 2025(u)(3) (*Code Civ. Proc. § 2025.620(c)* effective July 1, 2005) is present [Cal. State B. Rules Proc., Rule 655].

Legal Topics:

For related research and practice materials, see the following legal topics:
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6-71 California Forms of Pleading and Practice--Annotated § 71.91

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.91 Involuntary Enrollment as Inactive Member of Bar

[1] In General

Bus. & Prof. Code § 6007 sets forth procedures for the involuntary enrollment of an attorney as an inactive member of the State Bar. Inactive members are not entitled to practice law [*Bus. & Prof. Code § 6006*; *see Bus. & Prof. Code § 6126(b)*]. *Bus. & Prof. Code § 6007* provides five separate grounds and procedures for involuntary enrollment to inactive status. After the institution of a formal proceeding under *Bus. & Prof. Code § 6007*, the hearings and records of the proceeding are public [*Bus. & Prof. Code § 6086.1(a)(2)*].

[2] Grounds for Inactive Enrollment

[a] Judicial Declaration of Incompetency

A member may be involuntarily enrolled as inactive under *Bus. & Prof. Code § 6007(a)* on the ground that the member has been judicially declared to be mentally incompetent or is under involuntary treatment for a mental condition [*see Bus. & Prof. Code § 6007(a)*].

[b] Incapability of Attending to Practice

Under *Bus. & Prof. Code § 6007(b)*, a member may be involuntarily enrolled into inactive status in each of the following situations:

- The member asserts a claim of insanity or mental incompetence in a pending proceeding or action, alleging his or her inability to understand the nature of the proceeding or inability to assist counsel in the representation of the member [*Bus. & Prof. Code § 6007(b)(1)*; *see* Cal. State B. Rules Proc., Rules 400-406; *see also In the Matter of Respondent L (1993) 2 Cal. State Bar Ct. Rptr. 454, 460-461* (member required to be enrolled inactive on assertion of claim of insanity or mental incompetence in

pending proceeding, alleging inability to understand nature of proceeding or to assist counsel; no further showing required and State Bar Court does not have discretion not to enroll member inactive)].

- A court has made an order assuming jurisdiction over a member's practice pursuant to *Bus. & Prof. Code § 6180.5* when an attorney has died, resigned, become an inactive member of the State Bar, been disbarred, or been suspended from practice, or *Bus. & Prof. Code § 6190.3* when an attorney is incapable of attending to his or her practice because of alcohol, drugs, physical or mental illness, or other reasons, as discussed in *§ 71.93* [*Bus. & Prof. Code § 6007(b)(2)*; *see* Cal. State B. Rules Proc., Rules 410-416].

- The State Bar Court finds that the member, because of mental infirmity or habitual use of intoxicants or drugs, is unable or habitually fails to perform his or her duties competently or is unable to practice law without substantial threat of harm to the interests of his or her clients or the public [*Bus. & Prof. Code § 6007(b)(3)*; *see* Cal. State B. Rules Proc., Rules 420-429].

Effective January 1, 1999, the member must be represented at or before the time of issuance of a notice to show cause why the member should not be transferred to inactive enrollment under *Bus. & Prof. Code § 6007(b)(3)*, and the State Bar Court will provide appointed counselwithout expense to the member if the member is not represented [Cal. State B. Rules Proc., Rule 422].

In the best interests of a member's professional status or to protect the public, a member may stipulate or provide a supporting declaration to any petition seeking a member's inactive enrollment [*see Bus. & Prof. Code § 6007(b), (c)*].

A member who has been transferred to inactive enrollment pursuant to *Bus. & Prof. Code § 6007(b)* may petition to terminate the enrollment [Cal. State B. Rules Proc., Rule 440]. The member must attach to the petition written authorizations enabling the State Bar to examine and copy all medical, hospital, and related records relevant to his or her original mental infirmity, illness, or addiction, and his or her present condition [Cal. State B. Rules Proc., Rule 441].

The parties may stipulate to the member's transfer to active enrollment. However, the stipulation is not effective unless approved by a hearing judge [Cal. State B. Rules Proc., Rule 442]. The member may request a hearing on the petition, and a hearing may be ordered if it will materially contribute to the Court's determination of whether a basis for the member's involuntary inactive enrollment continues to exist [Cal. State B. Rules Proc., Rule 443].

A member's transfer to active enrollment does not relieve him or her of a suspension imposed on the member for any reason, or of any other independent restriction regarding the member's right to practice law [Cal. State B. Rules Proc., Rule 445].

Hearings and records regarding inactive enrollment under *Bus. & Prof. Code § 6007(b)* are confidential [Cal. State B. Rules Proc., Rule 21; *In the Matter of Respondent L (1993) 2 Cal. State Bar Ct. Rptr. 454, 458 n.3*].

[c] Substantial Threat of Harm to Clients or Public Posed by Attorney's Conduct

Under *Bus. & Prof. Code § 6007(c)*, the State Bar Court may order the involuntary inactive enrollment of an attorney on a finding that the attorney's conduct poses a substantial threat of harm to the attorney's clients or to the public, or on a finding that, based on all the available evidence including affidavits, the attorney has failed to maintain the information on State Bar records required by *Bus. & Prof. Code § 6002.1* and the attorney cannot be located after reasonable investigation [*Bus. & Prof. Code § 6007(c)(1)*; *see also Conway v. State Bar (1989) 47 Cal. 3d 1107, 1123, 255 Cal. Rptr. 390, 767 P.2d 657* (involuntary inactive enrollment under *Bus. & Prof. Code § 6007(c)* does not violate due process rights of disciplined attorney)]. To find that the attorney's conduct poses an substantial threat of harm to the attorney's clients or to the public, each of the following facts must be found, based on all the available evidence including affidavits [*Bus. & Prof. Code § 6007(c)(2)(A)-(C)*]:

- The attorney has caused or is causing substantial harm to the attorney's clients or the public.

- The attorney's clients or the public are likely to suffer greater injury from denial of the involuntary inactive enrollment than the attorney is likely to suffer if it is granted, or there is a reasonable likelihood that the harm will reoccur or continue.

- There is reasonable probability that the State Bar will prevail on the merits of the underlying disciplinary matter.

In an involuntary inactive enrollment proceeding, the judge may not draw an inference that the required facts are established from pending criminal charges in and of themselves. However, testimony offered under oath and subject to cross-examination in preliminary hearings on the criminal charges may support a judge's findings regarding the facts of the member's criminal conduct. The evidence must be sufficient to demonstrate a reasonable probability that the State Bar will prevail on the merits of disciplinary charges brought on the evidence [*In the Matter of Mesce (1993) 2 Cal. State Bar Ct. Rptr. 658, 662]* .

Declarations offered in support of an application for involuntary enrollment do not provide an evidentiary basis to find clear and convincing evidence of the member's likelihood of causing substantial harm, when the declarants simply identify themselves as authors of unverified reports without vouching for the truth of the reports or establishing a business records exception to the hearsay rule [*In the Matter of Mesce (1993) 2 Cal. State Bar Ct. Rptr. 658, 662]* .

The State Bar Court will automatically order a respondent's involuntary inactive enrollment upon a recommendation of disbarment being filed [*Bus. & Prof. Code § 6007(c)(4)*; Cal. State B. Rules Proc., Rules 220(c), 305(f)].

On proof that the attorney's conduct no longer poses a substantial threat of harm to the attorney's clients or the public, the Board of Governors must terminate the involuntary inactive enrollment [*Bus. & Prof. Code § 6007(c)(5)*]. Similarly, the Board of Governors must terminate an attorney's involuntary inactive status if an attorney who could not be located proves compliance with *Bus. & Prof. Code § 6002.1* [*Bus. & Prof. Code § 6007(c)(5)*].

The procedures for involuntary inactive enrollment under *Bus. & Prof. Code § 6007(c)* and subsequent retransfer to active status are set forth in Cal. State B. Rules Proc., Rules 450-495.

[d] Probation Violation

A hearing judge may order the involuntary inactive enrollment of an attorney for violation of probation on the occurrence of all of the following [*Bus. & Prof. Code § 6007(d)(1)(A)-(C)*; Cal. State B. Rules Proc., Rule 564]:

- The attorney is under a suspension order, a portion of which has been stayed during a period of probation.

- The judge finds that probation has been violated.

- The judge recommends to the Supreme Court that the attorney receive an actual suspension on account of the probation violation or other disciplinary matter.

The judge must terminate an involuntary inactive enrollment for violation of probation on expiration of a period equal to the period of stayed suspension in the probation matter or until the Supreme Court makes an order regarding the recommended actual suspension in the probation matter, whichever occurs first [*Bus. & Prof. Code § 6007(d)(2)*]. If the Court orders a period of actual suspension in the probation matter, a period of involuntary inactive enrollment for

violation of probation must be credited against the period of actual suspension ordered [*Bus. & Prof. Code § 6007(d)(3)*]. See *§ 71.94*.

[e] Failure to File Response to Notice Initiating Disciplinary Proceeding

The State Bar Court must order the involuntary inactive enrollment of an attorney when it appears that the attorney's default has been entered for failure to file a response to the notice initiating a disciplinary proceeding within the time allowed by the State Bar Rules of Procedure and any extensions granted under the Rule [*Bus. & Prof. Code § 6007(e)(1)*; Cal. State B. Rules Proc., Rule 500; for discussion of the requirements concerning responses, *see § 71.61[3]*]. No motion is necessary. The enrollment must be imposed when the following conditions are met [*Bus. & Prof. Code § 6007(e)(1)(A)-(B)*; Cal. State B. Rules Proc., Rule 500]:

- The notice has been duly served pursuant to *Bus. & Prof. Code § 6002.1(c)* [*see § 71.61[2]*].

- The notice contains the warning set forth in *Bus. & Prof. Code § 6007(e)(1)(B)*, informing the attorney that involuntary inactive enrollment will result from failure to file the answer in a timely manner.

The State Bar Court must terminate the involuntary inactive enrollment of a member for failure to serve a response in a timely manner when the response is filed on the member's behalf [*Bus. & Prof. Code § 6007(e)(2)*; Cal. State B. Rules Proc., Rule 501(a)]. The inactive enrollment also must be set aside when a proposed answer is filed with a request to set aside the member's default [*Bus. & Prof. Code § 6007(e)(2)*; Cal. State B. Rules Proc., Rule 501(a)].

If the member's involuntary inactive enrollment is still in effect on the effective date of the final order on the merits of the underlying disciplinary proceeding, the involuntary inactive enrollment terminates as of that date [Cal. State B. Rules Proc., Rule 501(b)]. The termination of the member's inactive enrollment does not relieve the member of any suspension imposed for any reason or of another independent restriction on the member's right to practice law [Cal. State B. Rules 501(c)].

The inactive enrollment and a transfer to active enrollment are administrative matters and no hearing is required [Cal. State B. Rules 502].

Legal Topics:

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6-71 California Forms of Pleading and Practice--Annotated § 71.92

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.92 Imposition of Interim Remedies and Final Discipline When Attorney's Conduct Poses Substantial Threat of Harm to Clients or Public

The State Bar Court may order a full range of interim remedies or final discipline short of involuntary inactive enrollment in order to restrict or supervise an attorney's practice of law if it finds the attorney's conduct poses a substantial threat of harm to the interests of the attorney's clients or to the public [*see Bus. & Prof. Code § 6007(c), (h)*; *see also* Cal. State B. Stds. for Att'y Sanctions, Std. 1.4(e); Cal. State B. Rules Proc., Rules 510-538]. Remedies may include restrictions as to scope of practice, monetary accounting procedures, review of performance by probation or other monitors appointed by the State Bar Court, or other measures as may be determined, after hearing, to protect present and future clients from likely substantial harm [*see Bus. & Prof. Code § 6007(h)*]. These restrictions may be imposed when the State Bar finds that each of the following factors are present [*see Bus. & Prof. Code § 6007(c), (h)*]:

- The attorney has caused or is causing substantial harm to the attorney's clients or the public.

- The attorney's clients or the public are likely to suffer greater injury from the denial of the interim remedy or final discipline than the attorney is likely to suffer if it is imposed, or there is a reasonable likelihood that the harm will recur or continue.

- There is a reasonable probability that the State Bar will prevail on the merits of the underlying disciplinary matter.

If the State Bar proposes license restriction, the showing of greater injury from denial of the remedy need not be made [*see Bus. & Prof. Code § 6007(c), (h)*].

Legal Topics:

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6-71 California Forms of Pleading and Practice--Annotated § 71.93

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.93 Incapacity to Attend to Law Practice

The courts may assume jurisdiction, as provided in *Bus. & Prof. Code §§ 6190-6190.6*, over the law practice of an attorney engaged in the active practice of law in California who becomes incapable of devoting the time and attention to, and providing the quality of service for, his or her law practice that is necessary to protect the interest of a client if there is an unfinished client matter for which no other active member of the State Bar, with the consent of the client, has agreed to assume responsibility [*Bus. & Prof. Code § 6190*]. This procedure is applicable when the incapacityis caused by any reason, including, but not limited to, excessive use of alcohol or drugs, physical or emotional illness, or another infirmity [*Bus. & Prof. Code § 6190*].

PRACTICE TIP:

Incapacity to Attend to Law Practice. The State Bar may request that the Superior Court assume jurisdiction over the law practice of a member as a result of inactive enrollment of the member pursuant to *Bus. & Prof. Code § 6007. By Regina E. Brenner*.

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6-71 California Forms of Pleading and Practice--Annotated § 71.94

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.94 Probation Revocation Proceeding

[1] Motion to Revoke Probation

Violation of a condition of probation constitutes cause for revocation of probation then pending, and may constitute cause for discipline [*Bus. & Prof. Code § 6093(b)*; *see* Cal. State B. Rules Proc., Rule 560]. The Office of Chief Trial Counsel may initiate a probation revocation proceeding by filing a motion to revoke probation if there is reasonable cause to believe that conditions of probation have been violated [Cal. State B. Rules Proc., Rules 560, 563(a); for discussion of the use of probation as a sanction, *see § 71.34[3]*]. The motion must be accompanied by one or more declarations setting forth facts relied on in support of the motion. The motion must be served on the respondent attorney in accordance with Cal. State B. Rules Proc., Rule 60 (discussed in *§ 71.61[2]*) [Cal. State B. Rules Proc., Rule 563(a)].

If the Office of Chief Trial Counsel wishes a hearing on the motion to revoke probation, the motion must include a request for hearing; otherwise, the State Bar's right to a hearing is waived [Cal. State B. Rules Proc., Rule 563(a)].

[2] Response to Motion

A response by the respondent attorney, including an opposition to the motion to revoke probation, must be filed and served within 20 days after service of the motion. The respondent must set forth supporting facts in one or more declarations [Cal. State B. Rules Proc., Rule 563(b)(1)].

If the respondent desires a hearing on the motion, the response must contain a request for hearing; otherwise, the respondent's right to a hearing is waived [Cal. State B. Rules Proc., Rule 563(b)(2), (3)]. If the respondent wishes to cross-examine the persons who filed declarations in support of the motion at the hearing, the respondent must expressly request an opportunity to do so in the response [*see* Cal. State B. Rules Proc., Rule 563(d)(2)].

[3] Procedures Governing Hearing of Motion

Probation revocation proceedings are to be expedited. The standard of proof in the formal proceeding is the preponderance of the evidence [*Bus. & Prof. Code § 6093(c)*; Cal. State B. Rules Proc., Rule 561]. No discovery is conducted in a probation revocation proceeding, except by leave of the State Bar Court on good cause shown [Cal. State B. Rules Proc., Rule 563(c)].

If a hearing is requested, or if the judge in the exercise of his or her discretion decides to set a hearing, the hearing must be set on an expedited basis [Cal. State B. Rules Proc., Rule 563(d)(1)].

At the hearing, declarations submitted in support of the motion are admitted in evidence, subject to appropriate objection, as the direct testimony of the respective declarants. If the respondent filed a timely response to the motion in which the respondent expressly requested an opportunity to cross-examine the declarants, the deputy trial counsel must produce the declarants at the hearing, and the respondent has the right to cross-examine them [Cal. State B. Rules Proc., Rule 563(d)(2)]. If the respondent filed declarations in response to the motion, the declarations must be admitted in evidence as the direct testimony of the respective declarants, subject to appropriate objection, only if the respondent produces the declarant at the hearing for cross-examination or the deputy trial counsel waives the right to cross-examine the declarant [Cal. State B. Rules Prob., Rule 563(d)(3)].

[4] Ruling on Motion

In a probation revocation proceeding, an actual suspension recommended may not exceed the entire period of the stayed suspension. The ruling may recommend that all or part of the actual suspension imposed as a result of the probation revocation be stayed and that a new period of probation be imposed, which may be of a different duration or under different conditions than the original probation [Cal. State B. Rules Proc., Rule 562].

In a probation revocation proceeding, the Court may order the involuntary inactive enrollment of the respondent on a finding that each of the elements of *Bus. & Prof. Code § 6007(d)* has occurred. Unless otherwise ordered by the judge, the order is effective on service. The involuntary inactive enrollment terminates on the occurrence of the conditions set forth in *Bus. & Prof. Code § 6007(d)(2)* [Cal. State B. Rules Proc., Rule 564; *see § 71.91[2][d]*].

The judge's ruling is reviewable by the Review Department on an expedited basis [*see* Cal. State B. Rules Proc., Rule 565; *see also § 71.121*].

A recommendation of the State Bar that a stay of suspension be set aside and that the recommended discipline be imposed may be reviewed by theSupreme Court [*Cal. Rules of Ct., Rule 9.13(b)*; *see Potack v. State Bar (1991) 54 Cal. 3d 132, 138-139, 284 Cal. Rptr. 335, 813 P.2d 1365]* . For discussion of Supreme Court review generally, see *§ 71.122*.

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6-71 California Forms of Pleading and Practice--Annotated § 71.95

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.95 Conviction Proceedings

[1] Conviction of Crime Involving Moral Turpitude

The conviction of a member of the State Bar of a felony or misdemeanor involving moral turpitude constitutes a cause for disbarment or suspension [*Bus. & Prof. Code § 6101(a)*; *see also § 71.96[5]*]. Until December 1, 1990, proceedings to disbar or suspend an attorney because of a conviction were undertaken by the California Supreme Court pursuant to *Bus. & Prof. Code §§ 6101* and *6102*, on the Court's receipt of the certified copy of the record of conviction [*Bus. & Prof. Code § 6101(d)*]. As of December 1, 1990, however, the State Bar Court has authority to exercise the Supreme Court's statutory powers pursuant to *Bus. & Prof. Code §§ 6101* and *6102* with respect to the discipline of attorneys convicted of crimes [*Cal. Rules of Ct., Rule 9.10(a)*; *see also Bus. & Prof. Code § 6087* (Supreme Court may delegate its statutory disciplinary authority to State Bar) and discussion in *§ 71.95[2]*].

A plea or verdict of guilty or a conviction after a plea of nolo contendere is deemed to be a conviction within the meaning of *Bus. & Prof. Code §§ 6101* and *6102* [*Bus. & Prof. Code § 6101(e)*]. For purposes of these proceedings, the record of conviction is conclusive evidence of the attorney's guilt of the crime for which he or she was convicted [*Bus. & Prof. Code § 6101(a)*; *In re Basinger (1988) 45 Cal. 3d 1348, 1358, 249 Cal. Rptr. 110, 756 P.2d 833]* . Consequently, the conviction cannot be collaterally attacked in the disciplinary proceeding [*In re Prantil (1989) 48 Cal. 3d 227, 231-233, 255 Cal. Rptr. 890, 768 P.2d 109* (upholding constitutionality of *Bus. & Prof. Code § 6101* against charge by attorney that statute deprived him of right to be heard at appropriate time and in meaningful manner as required by due process clause of United States Constitution)]. There are no constitutional or policy reasons that preclude the Legislature from giving conclusive effect to convictions based on pleas of nolo contendere for administrative disciplinary purposes [*Arneson v. Fox (1980) 28 Cal. 3d 440, 446-450, 170 Cal. Rptr. 778, 621 P.2d 817]* . After the institution of a formal proceeding under *Bus. & Prof. Code §§ 6101* or *6102*, the hearings and records of the proceeding are public [*Bus. & Prof. Code § 6086.1(a)(2)*].

[2] Authority of State Bar Court

The State Bar Court has authority to exercise statutory powers pursuant to *Bus. & Prof. Code §§ 6101* and *6102* with respect to the discipline of attorneys convicted of crimes, including the power to place attorneys on interim suspension and the power to vacate, to delay the effective date of, and temporarily to stay the effect of interim suspension orders [*Cal. Rules of Ct., Rule 9.10(a)*]. This authority of the State Bar Court does not affect the power of the Supreme Court to exercise its inherent jurisdiction over the lawyer discipline and admissions system [*Cal. Rules of Ct., Rule 9.10(g)*].

Conviction proceedings in the State Bar Court, pursuant to *Bus. & Prof. Code §§ 6101* and *6102*, are governed by State Bar Rules of Procedures, Rules 600 through 608.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsProfessional ConductIllegal ConductLegal EthicsSanctionsDisbarmentsLegal EthicsSanctionsSuspensions

California Forms of Pleading and Practice--Annotated

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 71 ATTORNEY DISCIPLINE
PART II. LEGAL BACKGROUND
D. Related Proceedings

6-71 California Forms of Pleading and Practice--Annotated § 71.96

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.96 Notices

[1] Notice of Action and Notice of Conviction

A member of the bar has a duty to report a conviction of a felony or misdemeanor to the State Bar [*see Bus. & Prof. Code § 6068(o)(5)*]. In addition, the district attorney, city attorney, or other prosecuting agency must notify the State Bar of the pendency of an action against an attorney charging a felony or misdemeanor immediately on obtaining information that the defendant is an attorney [*Bus. & Prof. Code § 6101(b)*]. The notice must identify the attorney and describe the crimes charged and the alleged facts [*Bus. & Prof. Code § 6101(b)*].

The prosecuting agency must also notify the clerk of the court in which the action is pending that the defendant is an attorney, and the clerk must record prominently in the file that the defendant is an attorney [*Bus. & Prof. Code § 6101(b)*].

The clerk of the court in which an attorney is convicted of a crime must transmit a certified copy of the record of conviction to the State Bar within 48 hours after the conviction [*Bus. & Prof. Code § 6101(c)*]. Within five days of receipt of the record, the State Bar must transmit the record of any conviction that involves or may involve moral turpitude to the Supreme Court, along with any other records and information that may be appropriate to establish the Court's jurisdiction [*Bus. & Prof. Code § 6101(c)*].

The State Bar may procure and transmit a record of conviction to the Supreme Court even if the clerk has not transmitted the record or if the conviction occurred in another state [*Bus. & Prof. Code § 6101(c)*]. On receipt of the certified copy of the record of conviction, the State Bar must also promptly forward a certified copy of the judgment of conviction to the disciplinary agency in each jurisdiction in which the lawyer is admitted [*Bus. & Prof. Code § 6092.5(c)*].

[2] Notice to Attorney

Conviction proceedings are initiated in the Review Department of the State Bar Court by the Office of the Chief Trial Counsel's filing of a certified copy of the record of conviction. If the conviction is not final as defined in *Cal. Rules of Court, Rule 9.10(a)*, at the time of the initial filing, the Office of the Chief Trial Counsel will file a supplemental record of conviction that contains a certified copy of evidence showing that the conviction has become final. Any record of conviction must be served on the respondent pursuant to Cal. State B. Rules Proc., Rule 60 [Cal. State B. Rules Proc., Rule 600].

After the State Bar Court temporarily suspends an attorney, the State Bar must mail notice of the suspension decision to the attorney and to his or her counsel of record, if any, at their respective addresses pursuant to *Bus. & Prof. Code § 6002.1* [*see Cal. Rules of Ct., Rule 9.13(c)*].

[3] Temporary Suspension of Attorney

[a] In General

When the State Bar Court receives the certified copy of the record of conviction, if it appears that the crime involved, or there is probable cause to believe it involved, moral turpitude or is a felony under the laws of California or the United States or its states or territories, the court may suspend the attorney until the judgment becomes final [*Bus. & Prof. Code § 6102(a)*; *Cal. Rules of Ct., Rule 9.10(a)*].

PRACTICE TIP:

Temporary Stay. The State Bar Court has the power to order or vacate an interim suspension, and to delay the effective date of or temporarily stay the effective date of an interim suspension order [*see Cal. Rules of Ct., Rule 9.10(a)*; Cal. State B. Rules of Proc., Rule 320(b)]. A motion to vacate, or to delay or temporarily stay the effective date of an interim suspension order should be filed with the Presiding Judge of the State Bar Court. *By Regina E. Brenner*.

A probable cause recommendation may be made on an examination of the record of conviction, with the record serving as conclusive evidence of guilt for these purposes [*see Bus. & Prof. Code §§ 6101(e), 6102(f)*; *In re Strick (1983) 34 Cal. 3d 891, 899-900, 196 Cal. Rptr. 509, 671 P.2d 1251]* . If the conviction is reversed on appeal, the record no longer serves as support for the interim suspension or for a conviction proceeding [*In re Strick (1983) 34 Cal. 3d 891, 900, 196 Cal. Rptr. 509, 671 P.2d 1251]* .

[b] Supreme Court Review of Temporary Suspension by State Bar Court

The Supreme Court, on its own motion or for good cause shown, may set aside a suspension when it appears to be in the interest of justice to do so, with due regard being given to maintaining the integrity of and confidence in the legal profession [*Bus. & Prof. Code § 6102(a)*]. A petition to the Supreme Court by a State Bar member to review a decision of the State Bar Court regarding interim suspension must be filed within 15 days after written notice of the adverse decision of the State Bar Court is mailed, postage prepaid, by the State Bar to the petitioner and to his or her counsel of record, if any [*Cal. Rules of Ct., Rule 9.13(c)*]. Within 15 days after service of the petition, the State Bar may serve and file an answer [*Cal. Rules of Ct., Rule 9.13(c)*]. Within five days after service of the answer, the petitioner may serve and file a reply [*Cal. Rules of Ct., Rule 9.13(c)*].

For a form of petition to set aside a temporary suspension, *see § 71.166*.

[c] Supreme Court Review of Decision Declining to Place Member on Temporary Suspension

The Chief Trial Counsel may petition for review of a decision by the State Bar Court declining to place an eligible member on interim suspension, within 15 days of notice of such decision [*Cal. Rules of Ct., Rule 9.14(c)*]. The petition must include proof of service on the member [*see Cal. Rules of Ct., Rules 9.13(f), 9.14*]. The member may file an

answer within 15 days after service of the Chief Trial Counsel's petition [*see Cal. Rules of Ct., Rules 9.13(c), 9.14*; *see also Cal. Rules of Ct., Rule 9.13(f)* (proof of service)].

[4] Definition of Felony

A crime is a felony for purposes of a disciplinary proceeding if it is so declared specifically or by *Penal Code § 17(a),* defining a felony, unless the crime is charged as a misdemeanor under *Penal Code § 17(b)(4)* or *(5),* irrespective of whether, as a result of the postconviction proceedings, the crime may be considered a misdemeanor under *Penal Code § 17(b)(1)* or *(3)* because of postconviction judgments imposing punishment other than imprisonment in the state prison or granting probation without imposing a sentence [*Bus. & Prof. Code § 6102(b)*].

[5] Definition of Moral Turpitude

The concept of moral turpitude cannot be precisely defined. It has been described as "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man" [*In re Strick (1983) 34 Cal. 3d 891, 901, 196 Cal. Rptr. 509, 671 P.2d 1251* ; *In re Craig (1938) 12 Cal. 2d 93, 97, 82 P.2d 442]* . It has also been described as any dishonest or immoral act or as crime or misconduct committed without excuse [*In re Higbie (1972) 6 Cal. 3d 562, 569-570, 99 Cal. Rptr. 865, 493 P.2d 97]* .

As applied to the licensing of attorneys, an act of moral turpitude is one that bears on the individual's honesty and veracity or demonstrates that the individual is unfit for the proper discharge of his or her duties as an attorney [*In re Johnson(1992) 1 Cal. 4th 689, 698-699, 4 Cal. Rptr. 2d 170, 822 P.2d 1317* ; *see Hallinan v. Committee of Bar Examiners (1966)65 Cal. 2d 447, 471-472, 55 Cal. Rptr. 228, 421 P.2d 76]* . However, even where the attorney has committed no intentionally dishonest acts, a "pattern of misconduct" can amount to moral turpitude [*In the Matter of Hindin (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 685-686* (moral turpitude found where attorney habitually disregards clients' interests and fails to communicate)].

Conviction of some crimes establishes moral turpitude on its face. A crime necessarily involves moral turpitude if the conviction would in every case evidence bad moral character [*In re Hallinan (1954) 43 Cal. 2d 243, 249, 272 P.2d 768* ; *In re Lesansky (2001) 25 Cal. 4th 11, 16, 104 Cal. Rptr. 2d 409, 17 P.3d 764]* . These include crimes that necessarily involve an intent to defraud or intentional dishonesty for the purpose of personal gain [*In re Hallinan (1954) 43 Cal. 2d 243, 247-248, 272 P.2d 768]* . It is the Supreme Court's duty to decide whether a particular crime involves moral turpitude [*In re Rothrock (1940) 16 Cal. 2d 449, 454, 106 P.2d 907]* . The fact of the record showing a conviction for certain crimes, including murder, forgery, extortion, bribery, perjury, robbery, embezzlement, and other forms of theft, shows the existence of moral turpitude [*In re Rothrock (1940) 16 Cal. 2d 449, 454, 106 P.2d 907]* .

Moral turpitude can be found in crimes unrelated to the practice of law [*In re Lesansky (2001) 25 Cal. 4th 11, 15-18, 104 Cal. Rptr. 2d 409, 17 P.3d 764* (attorney's attempted commission of lewd act on child was crime necessarily involving moral turpitude)]. Additionally, even if the type of crime is not one constituting moral turpitude per se, the Court can decide that, under the facts of the particular case, the offense involved a crime of moral turpitude as a matter of law [*see, e.g., In re Duggan (1976) 17 Cal. 3d 416, 422, 130 Cal. Rptr. 715, 551 P.2d 19* (although offense of contributing to delinquency of minor does not involve moral turpitude per se, on facts before it, Court held crime committed involved moral turpitude)].

The concept of moral turpitude depends on the state of public morals to some degree and may vary according to the community or the times, as well as in the degree of public harm produced by the act in question [*In re Fahey (1973) 8 Cal. 3d 842, 849, 106 Cal. Rptr. 313, 505 P.2d 1369* ; *In re Higbie (1972) 6 Cal. 3d 562, 570, 99 Cal. Rptr. 865, 493 P.2d 97]* .

An attorney subject to a conviction proceeding has the burden of showing that the finding of moral turpitude is not supported by the evidence [*In re Calaway (1977) 20 Cal. 3d 165, 169, 141 Cal. Rptr. 805, 570 P.2d 1223]* . Nevertheless, the question of moral turpitude itself is one of law [*In re Calaway (1977) 20 Cal. 3d 165, 169, 141 Cal. Rptr. 805, 570 P.2d 1223]* .

An attorney convicted of a crime that is a felony under California or federal law, or the law of another U.S. state or territory, is subject to summary disbarment, if an element of the crime is the specific intent to deceive, defraud, steal, or make or suborn a false statement, or the crime involves moral turpitude [*Bus. & Prof. Code § 6102(c)*; *see In re Paguirigan (2001) 25 Cal. 4th 1, 104 Cal. Rptr. 2d 402, 17 P.3d 758* (summary disbarment following felony conviction for forgery); *In re Lasansky (2001) 25 Cal. 4th 11, 104 Cal. Rptr. 2d 409, 17 P.3d 764* (summary disbarment following felony conviction for attempted child molestation)].

[6] Other Misconduct Warranting Discipline

The case law is unclear as to the extent to which an attorney may be disciplined in a conviction proceeding under *Bus. & Prof. Code §§ 6101* and *6102* for conduct that does not involve moral turpitude [*see In re Morales (1983) 35 Cal. 3d 1, 5-6, 196 Cal. Rptr. 353, 671 P.2d 857* ; *In re Rohan (1978) 21 Cal. 3d 195, 202-203, 145 Cal. Rptr. 855, 578 P.2d 102* ; *In re Fahey (1973) 8 Cal. 3d 842, 849-854, 106 Cal. Rptr. 313, 505 P.2d 1369]* .

PRACTICE TIP:

Criminal Conviction May Result in Discipline. Attorneys should be aware that any criminal conviction may result in disciplinary charges. In addition, attorneys have a duty to report any conviction to the State Bar, and a failure to do so may result in disciplinary charges. *By Regina E. Brenner.*

Before 1973, when the Supreme Court was notified that an attorney had been convicted of a crime that might involve moral turpitude and referred a case to the State Bar, the Court asked the State Bar only for a determination of whether moral turpitude was involved [*see In re Rohan (1978) 21 Cal. 3d 195, 202-203, 145 Cal. Rptr. 855, 578 P.2d 102]* . In 1973, in *In re Fahey,* the Court determined that an attorney should be subject to discipline only if he or she committed a crime involving moral turpitude, dishonesty, or corruption or if he or she abandons his or her professional responsibilities [*In re Fahey (1973) 8 Cal. 3d 842, 853, 106 Cal. Rptr. 313, 505 P.2d 1369]* .

After *Fahey,* the Court referred to the State Bar for a determination of whether the facts and circumstances surrounding the commission of the offense involved moral turpitude "or other misconduct warranting discipline" [*see In re Rohan (1978) 21 Cal. 3d 195, 203, 145 Cal. Rptr. 855, 578 P.2d 102]* .

In 1978, in *In re Rohan* the Court ordered an attorney suspended from practice following his conviction for willfully failing to file a federal income tax return. The State Bar, to whom the Court had referred the case for findings and a recommendation regarding discipline, had found that the attorney had not committed an act of moral turpitude, but that discipline was warranted (although the State Bar board could not agree on the discipline to be imposed). Although sixmembers of the Court voted in favor of imposing discipline consisting of actual suspension, there was no majority opinion concerning the rationale for the decision. Three separate opinions, each concurred in by two justices, presented three separate rationales.

The first opinion expressed the view that an attorney may be disciplined for criminal misconduct that "demeans the integrity of the legal profession and constitutes a breach of the attorney's responsibility to society," even in the absence of a finding of moral turpitude or a breach of an attorney's responsibilities in the performance of professional services [*In re Rohan (1978) 21 Cal. 3d 195, 203-204, 145 Cal. Rptr. 855, 578 P.2d 102* (opinion of Clark, J.)]. The second opinion found the standard in the first opinion too vague and stated that discipline should be limited to cases involving moral turpitude, which should be defined as conduct that indicates unfitness to practice law [*In re Rohan (1978) 21 Cal. 3d 195, 205-206, 145 Cal. Rptr. 855, 578 P.2d 102* (opinion of Tobriner, Acting C.J.)]. The third opinion favored

retention of the *Fahey* standard [*see In re Rohan (1978) 21 Cal. 3d 195, 206, 145 Cal. Rptr. 855, 578 P.2d 102* (opinion of Sullivan, J.)].

In *In re Morales*, an attorney was disciplined following his conviction for willful failure to pay certain employment taxes. The State Bar hearing panel and Review Department found that the attorney had not committed an act involving moral turpitude, but that his conviction involved "other misconduct warranting discipline," and recommended 18 months' suspension, to be stayed pending fulfillment of certain probationary conditions. In adopting the State Bar's recommendation, the Supreme Court noted that the *Rohan* decision had not resolved the question of whether moral turpitude was a prerequisite to the imposition of discipline based on *Bus. & Prof. Code §§ 6101, 6102*, and *6106*, but the Court found it unnecessary to resolve the issue because the conduct involved in *Morales* was sufficiently similar to the conduct involved in *Rohan* to warrant discipline under each of the approaches taken in the three *Rohan* opinions [*see In re Morales (1983) 35 Cal. 3d 1, 5-6, 196 Cal. Rptr. 353, 671 P.2d 857* ; *see also In the Matter of Respondent N (1993) 2 Cal. State Bar Ct. Rptr. 502, 507-508* (conviction of unemployment insurance violations conclusive evidence of member's guilt, but because conviction did not inherently involve moral turpitude, State Bar Court required to decide whether facts and circumstances of conviction involved moral turpitude or other basis for attorney discipline; attorney's conviction for failing to pay taxes withheld from employee wages warranted discipline because it involved misuse of employee trust funds, called into question attorney's ability to advise others on proper business practices, and involved willful decision to pay other creditors rather than state)].

Counsel should note that the State Bar now has an expanded role in determining whether a particular offense is of a nature warranting discipline. As of December 1, 1990, the State Bar Court has the power to conduct disciplinary proceedings with respect to discipline of attorneys convicted of crimes [*Cal. Rules of Ct., Rule 9.10(a)*]. Thus, the initial determination of whether conviction-related misconduct warrants discipline now rests entirely with the State Bar Court; this determination is no longer in the nature of a mere "recommendation" to the California Supreme Court. Following the State Bar Court's final ruling concerning temporary suspension, however, the State Bar Court's determination is subject to review in the California Supreme Court if the suspended member petitions for review [*Cal. Rules of Ct., Rule 9.13(c) see also Cal. Rules of Ct., Rule 9.16(a)* (grounds for review)].

[7] Summary Disbarment

[a] Offenses and Convictions Before January 1, 1997

In certain cases, the State Bar Court will summarily recommend the disbarment of an attorney. For offenses and convictions occurring before January 1, 1997, if it is determined that the crime for which the attorney was convicted is a felony, after the judgment of conviction has become final or after an order granting probation and suspending the sentence has been made (irrespective of whether the attorney subsequently withdraws a plea of guilty or nolo contendere under *Penal Code § 1203.4*), the Supreme Court must summarily recommend the disbarment of the attorney if the offense meets *both* of the following additional criteria [*Bus. & Prof. Code § 6102(c)*; *Cal. Rule of Ct., Rule 9.10(a)* (State Bar Court as exercising statutory powers granted to Supreme Court by *Bus. & Prof. Code § 6102(c)*)]:

- An element of the offense for which the attorney was convicted is the specific intent to deceive, defraud, steal, or make or suborn a false statement.

- The offense was committed in the course of the practice of law or in a manner such that a client of the attorney was a victim.

Summary disbarment may be recommended based on the attorney's victimization of a client, even if the crime did not occur in the practice of law, and even if the betrayal of the client's trust occurred after the client's death [*see In the Matter of Lilly (1993) 2 Cal. State Bar Ct. Rptr. 473, 478-479]* .

If the victims of the attorney's criminal conduct are not clients, the actual criminal offense, not merely the circumstances related to its commission, must have been committed in connection with the practice of law for *Bus. & Prof. Code § 6102(c)* to be an appropriate basis for disbarment [*see In re Utz (1989) 48 Cal. 3d 468, 482-483, 256 Cal. Rptr. 561, 769 P.2d 417* ; *see also Bus. & Prof. Code § 6102(c)* (if client was victim of offense, attorney may be disbarred under *Bus. & Prof. Code § 6102(c)* even if offense not committed in course of practice oflaw)]. For purposes of summary disbarment, the term "practice of law" includes appearances in a court proceeding on behalf of another party [*see In re Utz (1989) 48 Cal. 3d 468, 482-483, 483 n.11, 256 Cal. Rptr. 561, 769 P.2d 417]* .

If the attorney's crimes did not occur in the practice of law or victimize a client, the State Bar may not summarily recommend disbarment, and the attorney is entitled to a hearing on the appropriate degree of discipline [*In the Matter of Brazil (1994) 2 Cal. State Bar Ct. Rptr. 679, 687]* .

The Supreme Court has noted in dicta, that the summary disbarment procedure may be applicable retroactively to conduct predating January 1, 1986 [*see In re Ford (1988) 44 Cal. 3d 810, 816 n.6, 244 Cal. Rptr. 476, 749 P.2d 1331]* .

[b] Offenses and Convictions After December 31, 1996

For offenses and convictions occurring after December 31, 1996, summary disbarment may be recommended for felony convictions under the laws of California or the United States or any of its states or territories. In addition, the requirement that the offense be committed in the course of the practice of law was eliminated, and the nature of the felony required was changed, so that an element of the offense must be the specific intent to deceive, defraud, steal, or make or suborn a false statement, or involve moral turpitude [*In the Matter of Oheb (Review Dept. 2004)--Cal. State Bar Ct. Rptr.--, 2004 Calif. Op. LEXIS 5, *11-*18* (for summary disbarment, attorney must commit crime involving moral turpitude); *In the Matter of Jolly (1997) 3 Cal. State Bar Ct. Rptr. 740* ; *see In the Matter of Jebbia (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 51* (summary disbarment law may not be applied retroactively to offense occurring before December 31, 1996, even where conviction on offense occurs after December 31, 1996)].

Any State Bar Court decision recommending disbarment may be reviewed by the California Supreme Court if the disbarred attorney petitions for review [*Cal. Rules of Ct., Rule 9.13(a)*]. The Court will order review when it appears necessary to settle important questions of law, the State Bar Court has acted without or in excess of its jurisdiction, the petitioner did not receive a fair hearing, the State Bar Court's decision is not supported by the weight of the evidence, or the recommended discipline is not appropriate in light of the record as a whole [*Cal. Rules of Ct., Rule 9.16(a)*].

The attorney must file the petition for review no later than 60 days after the certified copy of the State Bar Court's decision is filed with the clerk of the Supreme Court [*Cal. Rules of Ct., Rule 9.13(a)*; *see also Cal. Rules of Ct., Rule 9.13(e)* (contents of petition), *(f)* (service of petition)]. If no petition for review is filed within the 60-day period or if the Supreme Court denies review, the State Bar Court's recommendation of disbarment will be filed as an order of the Supreme Court *Cal. Rules of Ct., Rules 9.16(b), 9.18(b)*].

[8] Final Order

[a] In General

In cases not meeting the criteria stated in *Bus. & Prof. Code § 6102(c)* (discussed in *§ 71.96[7]*) warranting summary disbarment, the State Bar Court decides whether to make a final order recommending disbarment or suspension or to dismiss the case [*see Bus. & Prof. Code § 6102(d)*; *Cal. Rules of Ct., Rule 9.10(a)* (State Bar Court as exercising statutory powers granted to Supreme Court by *Bus. & Prof. Code § 6102(d)*); *In the Matter of Oheb (Review Dept. 2004)--Cal. State Bar Ct. Rptr.--, 2004 Calif. Op. LEXIS 5, *47-*55* (court review whether disbarment appropriate for attorney who paid capper and who was involved in staged accidents for purposes of insurance fraud)].

The determination is made (1) after the attorney has been given notice and an opportunity to be heard, and (2) after the judgment of conviction has become final or an order granting probation and suspending imposition of a sentence has been made, irrespective of whether, when the probationary period is over, the plea of guilty or nolo contendere or the conviction is withdrawn or set aside under *Penal Code § 1203.4* [*Bus. & Prof. Code § 6102(d)*]. *Cal. Rules of Ct., Rule 9.10(a)* states that the judgment of conviction is deemed final when the availability of appeal has been exhausted and the time for filing a petition for certiorari in the United States Supreme Court on direct review of the judgment of conviction has elapsed and no petition has been filed, or, if filed, the petition has been denied, or the judgment of conviction has been affirmed [*Cal. Rules of Ct., Rule 9.10(a)*].

[b] Review by Supreme Court

If the State Bar Court recommends suspension or disbarment as final discipline, the attorney may seek review of the recommendation in the California Supreme Court [*see Cal. Rules of Ct., Rule 9.13(a)*]. The Chief Trial Counsel has a similar right to seek review if the State Bar Court dismisses the postconviction proceedings or recommends suspension [*see Cal. Rules of Ct., Rule 9.14(a)*].

The Supreme Court will order review when it appears necessary to settle important questions of law, the State Bar Court has acted without or in excess of jurisdiction, petitioner did not receive a fair hearing, the decision is not supported by the weight of the evidence, or the recommended discipline is not appropriate in light of the record as a whole [*Cal. Rules of Ct., Rule 9.16(a)*]. To obtain review, the attorney or Chief Trial Counsel must file a petition for review in the Supreme Court within 60 days after the certified copy of the State Bar Court's decision has been filed with the clerk of the Supreme Court [*Cal. Rules of Ct., Rules 9.13(a), 9.14(a)*]. The party opposing the petition may file an answer to the petition within 15 days after service, and the petitioner may serve and file a reply within five days after service of the answer [*Cal. Rules of Ct., Rules 9.13(a), 9.14*].

If no petition for review is filed within the 60-day period or if the Supreme Court denies review, the recommendation of the State Bar Court will be filed as an order of the California Supreme Court [*Cal. Rules of Ct., Rules 9.16(b), 9.18(b)*].

For a form of petition to review a final order of discipline in a conviction proceeding, *see § 71.167*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 71 ATTORNEY DISCIPLINE
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6-71 California Forms of Pleading and Practice--Annotated § 71.97

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§ 71.97 Suspension of State Bar Member for Delinquency in Support Payments

Any State Bar member, active or inactive, failing to pay child support after it becomes due will be subject to *Welf. & Inst. Code § 11350.6*, which requires compliance with support orders [*Bus. & Prof. Code § 6143.5*; *see Welf. & Inst. Code § 11350.6*].

The State Bar of California is authorized to transmit to the Supreme Court on an annual basis the names of those members listed by the State Department of Social Services (DSS) as delinquent in their payments of court-ordered child or family support with a recommendation for their suspension from the practice of law [*Cal. Rules Ct., Rule 9.22(a)*].

On receipt of the certified consolidated list, provided by the DSS on or about February 1 of each year, the State Bar must notify those State Bar members whose names appear on the list that they will be suspended for noncompliance with a judgment or order for child or family support, unless on or before the 150th day after the February 1 due date for payment of the annual membership fee, the State Bar has received a release from the district attorney who submitted the name of the member on the DSS certified list. The notice must include the address and telephone number of the district attorney who submitted the name of the member on the certified list and also inform the member that suspension for noncompliance will not relieve the member of the obligation to pay the annual membership fee and that any fee already paid will not be refunded. The notice must be made personally or by mail to the attorney's official membership records address [Cal. State B. Rules & Regulations, art. I, § 13(A)].

When the 150-day period expires, the Secretary of the State Bar must deliver to the Board of Governors a list of all members whose names appear on the DSS certified consolidated list and for whom no district attorney's release has been received. At its next meeting, the Board of Governors must make a recommendation for the suspension of the delinquent members, and a certified copy of the recommendation must then be filed with the Clerk of the California Supreme Court. On receipt of an order from the Court suspending a member for delinquent support payments, written notice of the suspension must be given to a member at his or her official membership records address [Cal. State B. Rules & Regulations, art. I, § 13(B)].

The State Bar may assess an administrative surcharge against a member whose name appears on the DSS certified consolidated list [Cal. State B. Rules & Regulations, art. I, § 13(E); *see Welf. & Inst. Code § 11350.6(n)*].

Reinstatement of a suspended State Bar member may occur only after receipt of notification from the State Bar that the member's name has been removed from the DSS certified list [*Cal. Rules of Ct., Rule 9.22(a)*; *Welf. & Inst. Code § 11350.6(b)*]. On receipt of the district attorney's release, the Secretary of the State Bar must certify the fact of the receipt of the release to the Clerk of the Supreme Court, and the member may be reinstated pursuant to order of the Supreme Court [Cal. State B. Rules & Regulations, art. I, § 13(C)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 71 ATTORNEY DISCIPLINE
PART II. LEGAL BACKGROUND
D. Related Proceedings

6-71 California Forms of Pleading and Practice--Annotated § 71.98

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§ 71.98 Expedited Disciplinary Proceedings After Imposition of Discipline in Another Jurisdiction

[1] In General

The Business and Professions Code and the California State Bar Rules of Procedure provide a procedure for an expedited disciplinary proceeding in California of attorneys who have been disciplined outside of California [*see Bus. & Prof. Code § 6049.1*; Cal. State B. Rules Proc., Rules 620-625]. In any disciplinary proceeding under the State Bar Act, a certified copy of a final order made by any court of record or any body authorized by law or by rule of court to conduct disciplinary proceedings against attorneys, of the United States or of any state or territory of the United States or of the District of Columbia, determining that a member of the State Bar of California committed professional misconduct in the other jurisdiction is conclusive evidence that the member is culpable of professional misconduct in California, subject only to the exceptions in *Bus. & Prof. Code § 6049.1(b)*, set forth under § 71.98[2] [*Bus. & Prof. Code § 6049.1(a)*]. A proceeding based on a determination of professional misconduct in another jurisdiction is a formal, original disciplinary proceeding, which is initiated by filing and serving a notice of disciplinary charges [*see* Cal. State B. Rules Proc., Rule 621].

[2] Issues

The issues in the expedited proceeding are limited to the following [*Bus. & Prof. Code § 6049.1(b)(1)-(3)*]:

- The degree of discipline to be imposed.

- Whether, as a matter of law, the member's culpability determined in the proceeding in the other jurisdiction would not warrant the imposition of discipline in California under the laws or rules binding on members of the State Bar at the time the member committed misconduct in that other jurisdiction, as determined by the previous disciplinary proceedings of theother jurisdiction.

- Whether the proceedings of the other jurisdiction lacked fundamental constitutional protections.

The member subject to the proceeding has the burden of establishing that the issues in subparagraphs (2) and (3), *above*, do not warrant the imposition of discipline in California [*Bus. & Prof. Code § 6049.1(b)*].

[3] Commencement of Proceeding

An expedited disciplinary proceeding is commenced by filing with the clerk of the State Bar Court a notice of disciplinary charges (discussed in *§ 71.61[1]*), and by serving a copy of the notice on the respondent [Cal. State B. Rules Proc., Rule 621(a)]. The notice may recite, as its only basis, and must have attached thereto and incorporated therein, a certified copy of the findings and final order of the other jurisdiction imposing discipline on the respondent with sufficient detail to permit identification of the foreign disciplinary proceeding [Cal. State B. Rules Proc., Rule 621(b)].

Within 20 days after service of the notice, the respondent must file a response with the clerk and must serve a copy of the response on the Office of Trial Counsel. The response must be limited to the issues set forth in *Bus. & Prof. Code § 6049.1(b)(1)-(3)* [Cal. State B. Rules Proc., Rule 621(c); *see § 71.98[2]*].

[4] Hearing in Expedited Proceedings

Formal discovery shall not be conducted unless the State Bar Court so orders on a showing of good cause, and then only on the terms and conditions ordered [*Bus. & Prof. Code § 6049.1(c)*; Cal. State B. Rules Proc., Rule 623]. A certified copy of any portion of the record of the previous disciplinary proceedings of another jurisdiction conducted pursuant to *Bus. & Prof. Code § 6049.1(a)* is admissible in evidence and may be part of the record of the expedited proceeding [*Bus. & Prof. Code § 6049.1(d)*; Cal. State B. Rules Proc., Rule 624].

[5] Effect on Other Proceedings

Bus. & Prof. Code § 6049.1 does not prohibit the initiation of any appropriate proceedings under *Bus. & Prof. Code § 6044* (giving the State Bar authority to investigate specified subjects), 6101, or 6102 (both sections regarding conviction proceedings, *discussed under § 71.95*) concerning any member of the State Bar based on the member's conduct in another jurisdiction, whether or not the member is licensed as an attorney in the other jurisdiction [*Bus. & Prof. Code § 6049.1(e)*].

Legal Topics:

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

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6-71 California Forms of Pleading and Practice--Annotated § 71.99

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.99 Rule 9.20 Proceedings for Failure to Comply With Duties of Disbarred, Suspended, or Resigned Attorneys

[1] Duties to Clients, Cocounsel, Opposing Counsel, and Adverse Parties

Under *Cal. Rules of Ct., Rule 9.20*, the Supreme Court may include in an order disbarring or suspending a State Bar member or accepting his or her resignation a direction that the member shall, within such time limits as the Supreme Court may prescribe, do any or all of the following [*Cal. Rules of Ct., Rule 9.20(a)*]:

- Notify all clients being represented in pending matters and any cocounsel of the attorney's disbarment, suspension, or resignation and his or her consequent disqualification to act as an attorney after the effective date of disbarment, suspension, or resignation.

- In the absence of cocounsel, notify the clients of the disbarred, suspended, or resigned attorney to seek legal advice elsewhere, calling attention to any urgency in seeking the substitution of another attorney or attorneys.

- Deliver to all clients being represented in pending matters any papers or other property to which the clients are entitled, or notify the clients and any cocounsel of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers or other property.

- Refund any part of fees that have not been earned.

- Notify opposing counsel in pending litigation or, in the absence of counsel, the adverse parties of the attorney's disbarment, suspension, or resignation and consequent disqualification to act as an attorney after the effective date of disbarment, suspension, or resignation, and file a copy of the notice with the

court, agency, or tribunal before which the litigation is pending for inclusion in the respective file or files.

The notice provisions of Rule 9.20 contemplate advance notice to existing clients of the attorney's prospective inability to represent their interests [*Athearn v. State Bar (1982) 32 Cal. 3d 38, 45, 184 Cal. Rptr. 728, 648 P.2d 950]* . The operative date for identification of clients being represented in pending matters and of others to be notified under Rule 9.20 is the filing date of the Supreme Court's order for compliance [*Athearn v. State Bar (1982) 32 Cal. 3d 38, 45, 184 Cal. Rptr. 728, 648 P.2d 950]* .

PRACTICE TIP:

Disbarred or Resigned Attorneys Failure to Comply With 955. The State Bar may request that the Superior Court assume jurisdiction overthe law practice of a member pursuant to *Bus. & Prof. Code § 6180,* as a result of disbarment or resignation and failure to comply with Rule 9.20. *By Regina E. Brenner.*

All notices required by an order of the Supreme Court or the State Bar Court pursuant to *Cal. Rules of Ct., Rule 9.20,* must be given by registered or certified mail, return receipt requested, and must contain an address where communications may be directed to the disbarred, suspended, or resigned State Bar member [*Cal. Rules of Ct., Rule 9.20(b)*].

The State Bar Court has the power, for good cause, to extend the time within which a State Bar member must comply with the provisions of Rule 9.20 [*Cal. Rules of Ct., Rule 9.10(d)*].

[2] Attorney's Affidavit

Within such time as the order may prescribe after the effective date of the State Bar member's disbarment, suspension, or resignation, the member must file with the Clerk of the Supreme Court an affidavit showing that he or she has fully complied with the provisions of the Rule 9.20 order [*Cal. Rules of Ct., Rule 9.20(c)*]. The affidavit must also set forth an address where communications may be sent to the member [*Cal. Rules of Ct., Rule 9.20(c)*].

[3] Sanctions for Failure to Comply

A disbarred or resigned member's willful failure to comply with the provisions of Rule 9.20 is a ground for denying his or her application for reinstatement or readmission [*Cal. Rules of Ct., Rule 9.20(d)*]. A suspended member's willful failure to comply is a cause for disbarment or suspension and for revocation for any pending probation [*Cal. Rules of Ct., Rule 9.20(d)*; *see Alberton v. State Bar (1987) 43 Cal. 3d 638, 639, 238 Cal. Rptr. 374, 738 P. 2d 720 , cert. denied 484 U.S. 973* (disbarment of attorney for willful failure to comply with provisions of *Cal. Rules of Ct., Rule 9.20*)].

Furthermore, willful failure to comply with an order under Rule 9.20 may be punished as a contempt or a crime [*Cal. Rules of Ct., Rule 9.20(d)*]. Willful failure by a member, or one who has resigned or been disbarred, to comply with an order of the Supreme Court to comply with Rule 9.20 constitutes a crime punishable by imprisonment in the state prison or county jail [*see Bus. & Prof. Code § 6126(c)*; *see also Penal Code §§ 17(b)* (crime punishable by imprisonment in state prison or county jail may be punished as misdemeanor or felony offense), 18 (punishment for felony), 19 (punishment for misdemeanor)].

The term "willful," as used in *Cal. Rules of Ct., Rule 9.20,* means simply a purpose or willingness to commit the act or omission. It does not require any intent to violate law, to injure another, or to acquire any advantage [*Durbin v. State Bar (1979) 23 Cal. 3d 461, 467, 152 Cal. Rptr. 749, 590 P.2d 876]* . Willfulness in the context of Rule 9.20 is not necessarily dependent on knowledge of the provision that is violated [*see Powers v. State Bar (1988) 44 Cal. 3d 337,*

341, 243 Cal. Rptr. 386, 748 P.2d 324] . Bad faith is not a prerequisite to a finding of a willful failure to comply with *Cal. Rules of Ct., Rule 9.20* [*Durbin v. State Bar (1979) 23 Cal. 3d 461, 467, 152 Cal. Rptr. 749, 590 P.2d 876]* .

If an attorney apparently has failed to comply with a Rule 9.20 order, the Supreme Court may refer the matter to the State Bar for determination of the issue of compliance and for a recommendation of the appropriate sanction to impose for a failure to comply [*see* Cal. State B. Rules Proc., Rules 580-587].

In a Rule 9.20 proceeding, the State Bar record includes all court orders and documents on file with the Clerk of the Supreme Court and the Clerk of the State Bar Court in the proceeding, including the Rule 9.20 order and all documents submitted to either court by the respondent in compliance or attempted compliance with the order or in response to the order, whether or not introduced in evidence [Cal. State B. Rules Proc., Rule 585]. The proceeding is an expedited proceeding [Cal. State B. Rules Proc., Rule 586(a)].

Rules which by their terms apply only to other specific proceedings do not apply in Rule 9.20 proceedings [Cal. State B. Rules Proc., Rule 587(a)]. All other rules apply, except that the discovery rules (Cal. State B. Rules Proc., Rules 180-189) apply in Rule 9.20 proceedings only to the extent that discovery is permitted by Cal. State B. Rules Proc., Rule 586 or by the Court pursuant to Cal. State B. Rules Proc., Rule 586 [Cal. State B. Rules Proc., Rule 587(b)]. The Office of the Chief Trial Counsel may conduct discovery without leave of court as to specified limited issues; no other discovery may be conducted by any party except by leave of the State Bar Court for good cause shown [Cal. State B. Rules Proc., Rule 586(b), (c)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsSanctionsDisbarmentsLegal EthicsSanctionsSuspensionsLegal EthicsSanctionsDisciplinary ProceedingsGeneral OverviewLegal EthicsProfessional ConductGeneral OverviewLegal EthicsProfessional ConductOpposing Counsel & Parties

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AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.100 Reinstatement Proceedings

[1] In General

The petition for reinstatement and the reinstatement proceedings are the vehicles used to regain membership for disbarred and resigned attorneys [*see* Cal. State B. Rules Proc., Rules 660-666]. Applications for reinstatement must, in the first instance, be filed and heard by the State Bar Court [*Cal. Rules of Ct., Rule 9.10(f)*]. However, no applicant who has been disbarred by the Supreme Court on two previous occasions may apply for readmission or reinstatement [*Cal. Rules of Ct., Rule 9.10(f)*].

If an attorney is dissatisfied with the State Bar Court's decision concerning reinstatement, he or she may petition for review in the California Supreme Court [*see Cal. Rules of Ct., Rule 9.13(d)* (requiring petition to be filed within 60 days after written notice of decision is mailed to petitioner)]. In addition, the Chief Trial Counsel may petition for Supreme Court review from a recommendation that a reinstatement petition be granted [Cal. Rules of Ct., Rule9.14(b) (requiring petition to be filed within 15 days from filing of recommendation with Supreme Court)].

[2] Earliest Time for Filing Petition

After resignation without charges pending, a first or subsequent petition for reinstatement may be filed at any time [Cal. State B. Rules Proc., Rule 662(a)].

Except as provided in the order of disbarment, no petition for reinstatement may be filed within five years after the effective date of the petitioner's disbarment or interim suspension following criminal conviction, or the filing date of the petitioner's resignation with charges pending, whichever occurred earliest [Cal. State B. Rules Proc., Rule 662(b)].

No petition for reinstatement may be filed unless and until the petitioner has provided satisfactory proof to the State Bar Court that he or she has paid all discipline costs imposed pursuant to Bus. & Prof. Code § 6068.10(a) and all reimbursement for payments made by the Client Security Fund as a result of the petitioner's conduct, plus applicable

interest and costs, pursuant to *Bus. & Prof. Code § 6140.5(c)* [Cal. State B. Rules Proc., Rule 662(c)].

A subsequent petition for reinstatement following disbarment or resignation with charges pending may not be filed earlier than two years after the effective date of an adverse decision upon a prior petition, unless a shorter period is ordered by the State Bar Court for good cause [Cal. State B. Rules Proc., Rule 662(d)].

[3] Contents and Form of Petition and Accompanying Documents

A petition for reinstatement must be verified by the petitioner and addressed to the State Bar Court. An original and three copies must be filed with the clerk. The petition must be on the form approved by the Court and completed in compliance with the instructions set forth on the form [Cal. State B. Rules Proc., Rule 661(a)].

The petitioner must serve a copy of the petition on the Office of Trials, accompanied by two sets of original fingerprints on record cards furnished by the State Bar. The State Bar uses and retains these fingerprints to establish the applicant's identity and to determine the applicant's character and fitness for reinstatement [*Bus. & Prof. Code § 6054*; Cal. State B. Rules Proc., Rule 661(b)].

The Court will not file the petition unless is it accompanied by a proof of service establishing compliance with the service requirements specified in State Bar Rules of Procedure, Rule 661(b). The petition must also be accompanied by the appropriate filing fee [Cal. State B. Rules Proc., Rule 661(c)].

[4] Investigation

Within 120 days from the filing of the petition with the State Bar Court, the Office of the Chief Trial Counsel must investigate the petition to determine whether it will be opposed. This investigation period may be extended by the Court for good cause [Cal. State B. Rules Proc., Rule 663(a)].

Discovery may be conducted after the end of the investigation period in accordance with State Bar Rules of Procedure, Rules 180 through 189 (*see § 71.64[1]*), as long as formal discovery is completed within 120 days after the filing of the petition (unless the Court extends the time period). The time limits set forth in State Bar Rules of Procedure, Rule 182, must be computed from the date of the filing of the petition, not from the date of service of or due date for the responsive pleading [Cal. State B. Rules Proc., Rule 663(b)].

State and local law enforcement and licensing bodies and departments must give reasonable assistance and information, including providing state and local summary criminal history information, to the State Bar in connection with a reinstatement investigation or proceeding [*Bus. & Prof. Code § 6054*]. Fingerprints of the applicant are also used to establish the identity of the applicant and determine whether the applicant has a record of criminal conviction in California or in other states [*Bus. & Prof. Code § 6054*].

The information obtained as a result of fingerprinting an applicant is limited to the official use of the State Bar in establishing the applicant's identity and in determining the character and fitness of the applicant for reinstatement, and in discovering prior and subsequent criminal arrests of an applicant, member, or applicant for reinstatement [*Bus. & Prof. Code § 6054*]. All fingerprint records of members reinstated must be retained by the State Bar for the limited purpose of criminal arrest notification [*Bus. & Prof. Code § 6054*].

[5] Requirements for Readmission

Applications for readmission or reinstatement must, in the first instance, be filed and heard by the State Bar Court. Applicants for readmission or reinstatement must [*Cal. Rules of Ct., Rule 9.10(f)*] [Cal. State B. Rules Proc., Rule 665(b); *see* In the Matter of Ainsworth (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 899]:

- Pass a professional responsibility examination.
- Establish their rehabilitation and present moral qualifications for readmission.
- Establish present ability and learning in the general law.

Applicants who resigned without charges pending more than five years before filing an application for reinstatement or readmission must establish present ability and learning in the general law by providing proof, at the time of filing the application, that they have taken and passed the Attorneys' Examination administered by the Committee of Bar Examiners within five years prior to the filing of the application for readmission or reinstatement. Applicants who resigned with charges pending or who were disbarred must establish present ability and learning in the general law by providing proof, at the time of filing the application for readmission or reinstatement, that they have taken and passed the Attorneys' Examination by the Committee of Bar Examiners within three years prior to the filing of the application for readmission or reinstatement [*Cal. Rules of Ct., Rule 9.10(f)*].

The petitioner also must show proof of passage of the Professional Responsibility Examination not more than one year before filing the petition for reinstatement [Cal. State B. Rules Proc., Rule 665(a)].

The burden of proving rehabilitation is on the petitioner, and the burden is a heavy one [*Tardiff v. State Bar (1980) 27 Cal. 3d 395, 403, 165 Cal. Rptr. 829, 612 P.2d 919* ; *Feinstein v. State Bar (1952) 39 Cal. 2d 541, 546, 248 P.2d 3]* . Rehabilitation requires a lengthy period of exemplary conduct [*In the Matter of Ainsworth (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 899]* . One seeking reinstatement after disbarment should be required to present stronger evidence of present moral fitness than one seeking admission for the first time, whose character has never been in question [*Stanley v. State Bar (1990) 50 Cal. 3d 555, 570, 268 Cal. Rptr. 183, 788 P.2d 697* ; *Calaway v. State Bar (1986) 41 Cal. 3d 743, 745-746, 225 Cal. Rptr. 267, 716 P.2d 371]* .

In determining whether the petitioner has met the burden, the evidence of present character must be considered in the light of the moral shortcomings that resulted in the imposition of discipline [*Tardiff v. State Bar (1980) 27 Cal. 3d 395, 403, 165 Cal. Rptr. 829, 612 P.2d 919* ; *Roth v. State Bar (1953) 40 Cal. 2d 307, 313, 253 P.2d 969]* .

If the petitioner has an otherwise respectable record, lack of repentance for prior conduct will not automatically disqualify the petitioner from reinstatement, and lack of repentance may, indeed, be considered as evidence of good character [*Calaway v. State Bar (1986) 41 Cal. 3d 743, 747-748, 225 Cal. Rptr. 267, 716 P.2d 371]* .

A minor omission in the petition for reinstatement will not necessarily disqualify the petitioner if the petitioner did not intend to mislead the State Bar or to conceal derogatory information [*see* *Calaway v. State Bar (1986) 41 Cal. 3d 743, 748, 225 Cal. Rptr. 267, 716 P.2d 371* (failure to disclose details of ancillary judicial proceedings)].

How the petitioner proves rehabilitation will depend on the nature of the misconduct that resulted in the disbarment. If the offense involved misappropriation of funds, restitution is the first step toward rehabilitation [*see* *Hippard v. State Bar (1989) 49 Cal. 3d 1084, 1092-1095, 264 Cal. Rptr. 684, 782 P.2d 1140* (attorney's failure to make restitution properly considered in denying reinstatement)]. The testimony of attorneys, judges, and friends about thepetitioner's current reputation for honesty and integrity is entitled to great weight [*see* *Tardiff v. State Bar (1980) 27 Cal. 3d 395, 403, 165 Cal. Rptr. 829, 612 P.2d 919* ; *Preston v. State Bar (1946) 28 Cal. 2d 643, 651, 171 P.2d 435]* .

[6] Reinstatement Hearing

The clerk of the State Bar Court must serve notice of the hearing on the parties. The Office of the Chief Trial Counsel may publish the fact that a petition for reinstatement has been filed with the Court, identifying the petitioner and other

relevant information identifying the proceeding [Cal. State B. Rules Proc., Rule 664].

The hearing on the petition is similar to hearings in original disciplinary proceedings. However, one major difference is that the petitioner has the burden of proving rehabilitation and present learning in the law [*Cal. Rules of Ct., Rule 9.10(f)*; Cal. State B. Rules Proc., Rule 665(b), (c); *Tardiff v. State Bar (1980) 27 Cal. 3d 395, 403, 165 Cal. Rptr. 829, 612 P.2d 919]* . Another difference is that the five-year period for initiating a disciplinary proceeding is inapplicable at a reinstatement hearing [Cal. State B. Rules Proc., Rule 51(g); *see § 71.52[2]*].

The hearing is public [*see* Cal. State B. Rules Proc., Rule 20]. The rules regarding discovery and stipulations as to facts and dispositions in disciplinary proceedings also apply to reinstatement proceedings [Cal. State B. Rules Proc., Rule 666].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 71.101 Inactive Enrollment Motion Based on Attorney's Failure to Comply With Fee Arbitration Award

When an attorney fails to comply with a fee arbitration award, the Presiding Arbitrator may file an inactive enrollment motion with the State Bar Court [*Bus. & Prof. Code § 6203(d)*; Cal. State B. Rules Proc., Rule 701(a)]. The attorney has 10 days following service of the motion within which to file and serve a response [Cal. State B. Rules Proc., Rule 702(a)].

If the attorney does not file and serve response, and if it appears to the State Bar Court that the requirements for involuntary inactive enrollment are satisfied, the Court must forthwith file an order placing the attorney on involuntary inactive enrollment. The order is effective five days after service unless otherwise ordered [Cal. State B. Rules Proc., Rule 702(b)].

If the attorney files a response, or if the Court denies the motion notwithstanding the lack of a response, the Presiding Arbitrator may file an amendment or supplement to the motion within five court days from service of the response or of the Court's order denying the motion [Cal. State B. Rules Proc., Rule 702(c)].

If the attorney files a response stating that the arbitration award has been paid in full or that he or she is willing to comply with a payment plan satisfactory to the client or the Presiding Arbitrator, the Presiding Arbitrator may withdraw the motion [Cal. State B. Rules Proc., Rule 703]. If the attorney files a timely response to the motion requesting a hearing, a hearing must be set by the State Bar Court on not less than 20 days' notice [Cal. State B. Rules Proc., Rule 704].

The Presiding Arbitrator has the burden of showing by clear and convincing evidence that the attorney failed to comply with the arbitration award and has not proposed a payment plan acceptable to the client or the State Bar, or that the attorney has agreed to a payment plan but has failed to make one or more payments required by the plan [Cal. State B. Rules Proc., Rule 705(a)].

The attorney has the burden of showing by clear and convincing evidence that any of the following are true [Cal State B. Rules Proc., Rule 705(b)]:

- The attorney is not personally responsible for making or ensuring payment of the arbitration award;
- The attorney is unable to pay the award or payments due under a previously agreed-upon plan; or
- The attorney has proposed and agrees to comply with a payment plan the State Bar has unreasonably rejected as unsatisfactory.

No discovery is permitted during these proceedings except to the extent permitted by the State Bar Court for good cause [Cal. State B. Rules Proc., Rule 706]. Issues that may be raised at a hearing are limited to whether any of the following are true as to the attorney as the award debtor [Cal. State B. Rules Proc., Rule 707(a)]:

- Has failed to comply with the arbitrarion award or with a previously agreed-on payment plan.
- Has proposed a payment plan acceptable to the client or the State Bar, or which the State Bar has unreasonably rejected as unsatisfactory.
- Is personally responsible for making or ensuring payment of the arbitration award.
- Is unable to pay the arbitration award or any payments due under a previously agreed-on payment plan.

The written order on the motion, unless otherwise stated, is effective five days after service [Cal. State B. Rules Proc., Rule 708(b)(1)]. On submission by the Presiding Arbitrator of a bill of costs, the State Bar Court must award reasonable costs to the State Bar [Cal. State B. Rules Proc., Rule 708(b)(2)]. If the Court finds that the State Bar unreasonably declined to approve a payment plan proposed by the attorney, the Court may deny the motion and order the attorney to comply with a payment plan satisfactory to the Court [Cal. State B. Rules Proc., Rule 708(c)].

When an attorney has paid the arbitration award in full, as well as any costs or penalties assessed as a result of his or her failure to comply with the award, the attorney may move to terminate the involuntary inactive enrollment [Cal. State B. Rules Proc., Rule 710].

Legal Topics:

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

§§ 71.102[Reserved]

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6-71 California Forms of Pleading and Practice--Annotated § 71.120

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.120 Post-Trial Motions for Reconsideration, New Trial, and to Reopen Record

Within 15 days after service of the decision in a disciplinary proceeding, a party may make a motion in the Hearing Department for reconsideration or for a new trial [Cal. State B. Rules Proc., Rules 223(a), 224(a)]. The grounds for a motion for reconsideration are (1) new or different facts, circumstances or law, as that ground is applied in civil matters under *Code of Civ. Proc. § 1008*; and/or (2) the order or decision contains one or more errors of fact and/or law based on the evidence already before the Court [Cal. State B. Rules Proc., Rule 224(b)]. A motion for a new trial must be accompanied by one or more declarations setting forth the facts that the moving party contends justify a new trial, under the standards for granting a motion for a new trial in civil actions [Cal. State B. Rules Proc., Rule 223(b)]. For discussion of motions for a new trial in civil proceedings generally, *see* Ch. 371, *Motions After Trial* .

A party may also make a motion in the Hearing Department to reopen the record in the proceeding to present additional evidence at any time before the expiration of the time to request review by the Review Department [Cal. State B. Rules Proc., Rule 222(a); *see § 71.121[5]*]. The motion to reopen must be accompanied by one or more declarations stating the substance of new evidence the moving party desires to present and showing all of the following [Cal. State B. Rules Proc., Rule 222(b)]:

- The evidence is newly discovered and could not with reasonable diligence have been discovered and produced earlier;
- The evidence is not merely cumulative and is the best available evidence on the issue; and
- Consideration of the evidence would probably lead to a different result.

For a form for a motion for reconsideration, *see § 71.168*. For a form for a motion for a new trial or to reopen the record to present additional evidence, *see § 71.169*.

These post-trial motions are governed by the rules applicable to motions in general [*see § 71.62*], except that they must be in writing and the opposing party must file and serve a written response within 15 days of service of the motion [Cal. State B. Rules Proc., Rule 221(a)]. The time to seek review of the Hearing Department's ruling on a post-trial motion commences on service of the ruling [Cal. State B. Rules Proc., Rule 221(b)(1)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.121 Review Department

[1] Overview and Function

The Review Department of the State Bar Court is the appellate department that reviews determinations of the Hearing Department [*see* Cal. State B. Rules Proc., Rules 3.02, 300-311, 1001]. Its function is to ensure that recommended discipline is uniform and in accordance with Supreme Court precedents. The Review Department consists of the following [*Bus. & Prof. Code § 6086.65(a)*]:

- The Presiding Judge of the State Bar Court.
- Two Review Court Judges appointed by the Supreme Court.

The Review Department decides matters before it en banc [Cal. State B. Rules Proc., Rule 305(c)]. Two judges of the Review Department constitute a quorum [Cal. State B. Rules Proc., Rule 305(c)]. A majority vote of the judges of the Review Department present and voting is sufficient to take action or arrive at a decision in matters before the Review Department [Cal. State B. Rules Proc., Rule 305(c)]. If one or more of the three judges is disqualified or unavailable to serve in a matter, the Presiding Judge may designate a hearing judge of the State Bar Court to act in place of the unavailable judge, provided that the hearing judge did not take part in the consideration or decision of the matter in the Hearing Department [Cal. State B. Rules Proc., Rule 305(e)]. If the Presiding Judge is disqualified or unavailable, the Lawyer Review Judge will act in place of the Presiding Judge, unless the Presiding Judge has designated another judge for this purpose [Cal. State B. Rules Proc., Rule 305(e)].

[2] [Reserved]

[3] Waiver of Review by Review Department

After service of a decision or order of the Hearing Department requiring action by the Supreme Court, if none of the

parties intends to seek review by the Review Department and the parties desire the recommentation to be transmitted to the Supreme Court without delay, the parties may file a stipulation waiving review by the Review Department. The stipulation must be accompanied by a certificate of costs from the Office of the Chief Trial Counsel (if applicable). On the filing of the stipulation, the Clerk of the State Bar Court must transmit the record to the Supreme Court on an expedited basis [Cal. State B. Rules Proc., Rule 251].

[4] Petition for Interlocutory Review

Interlocutory review is available as provided in the State Bar Rules of Procedure with respect to significant issues that require intervention of the Review Department prior to completion of proceedings in the Hearing Department and that are not readily remediable after trial [Cal. State B. Rules Proc., Rule 300(a)]. A party may seek interlocutory review by filing a petition with the Review Department for review of the challenged order within 15 days of service of a written order by a judge of the Hearing Department or the making of an oral order on the record, whichever is later [Cal. State B. Rules Proc., Rule 300(b)].

PRACTICE TIP:

Interlocutory Review. State Bar Rules of Procedure, Rule 300, is a limited type of review by the State Bar Court Review Department that is intended to provide parties with an expedited procedure in which the scope of review is limited. *By Regina E. Brenner.*

Unless otherwise ordered by the Review Department, no response to a petition for interlocutory review is required unless the Review Department grants review. If review is granted, the responding party may file and serve a response within 10 days of the service of the order granting review [Cal. State B. Rules Proc., Rule 300(e)].

The standard of review in a proceeding for interlocutory review is abuse of discretion or error of law [Cal. State B. Rules Proc., Rule 300(k)]. The issues raised by the petition and response will be decided by the Review Department without oral argument, unless the Department orders otherwise [Cal. State B. Rules Proc., Rule 300(j)]. The Review Department may summarily deny the petition before the time to file a response has expired if it concludes that the petition does not clearly demonstrate that the hearing judge's order was erroneous or does not present a significant issue that would materially affect the outcome of the proceeding in the Hearing Department [Cal. State B. Rules Proc., Rule 300(i)]. The Review Department may deny the petition, or may grant the petition in whole or in part [Cal. State B. Rules Proc., Rule 300(l)].

A party who intends to file a petition for interlocutory review, and who seeks to stay proceedings in the Hearing Department pending disposition of the petition, must make a motion to the hearing judge for a stay [Cal. State B. Rules Proc., Rule 300(h)].

[5] Request for Review of Decision That Fully Disposes of Entire Proceeding

Unless expressly provided otherwise in the rules governing a particular type of proceeding, all decisions, orders, or rulings by hearing judges that fully dispose of an entire proceeding are reviewable by the Review Department at the request of any party. A request for review must be filed within30 days after service of the hearing judge's decision if no post-trial motions have been filed, or within 30 days after service of the hearing judge's ruling on any post-trial motion [Cal. State B. Rules Proc., Rule 301(a)].

The party requesting review must file with the State Bar clerk's office one original copy of the request and four copies [Cal. State B. Rules Prac., Rule 1300(a)]. For a form of request for review, *see § 71.170*.

The Presiding Judge may grant permission for late filing of a request for review, on motion of the requesting party and for good cause shown [Cal. State B. Rules Prac., Rule 1301].

[6] Record on Review and Augmentation of Record

The party requesting review must order and pay for a trial transcript, unless the Presiding Judge orders otherwise [Cal. State B. Rules Proc., Rules 31, 301(a)(2); Cal. State B. Rules Prac., Rule 1311].

On the filing of a timely request for review, the State Bar Court Clerk's office will prepare the record on review, which consists of all pleadings, applications, and motions filed in the formal proceedings under review, as well as the decision of the Hearing Department judge and all other orders relating to the matter under review. The record also includes all exhibits offered or received in evidence and all tape recordings and transcripts of testimony relating to the matter under review [Cal. State B. Rules Prac., Rule 1310].

In general, the Review Department will only consider the evidence that was made a part of the record in the Hearing Department, or which was offered and excluded in the Hearing Department and which the Review Department determines should not have been excluded [Cal. State B. Rules Proc., Rule 306(a)]. However, on its own motion or at the request of a party, the Review Department may take judicial notice of orders and decisions of the Supreme Court or the State Bar Court arising out of any State Bar Court proceeding involving the party who is the subject of the proceeding under review [Cal. State B. Rules Proc., Rule 306(b)]. The Review Department may also augment the record to admit other judicially noticeable facts or stipulated facts, such as those bearing on restitution or rehabilitation occurring subsequent to the conclusion of evidentiary proceedings before the hearing judge [Cal. State B. Rules Proc., Rule 306(c)].

A party may file a motion to augment the record, or to remand the proceeding to present evidence occurring subsequent to the conclusion of evidentiary proceedings before the hearing judge. The Review Department may appoint a hearing judge as a referee to receive evidence and make proposed additional findings of fact based on this evidence [Cal. State B. Rules Proc., Rule 306(d)].

A motion or stipulation for augmentation or correction of the record must be filed and served on the date the appellant's opening brief is due [Cal. State B. Rules Proc., Rule 306(e)(1)]. All other parties must file and serve a response to the motion on the date the responsive brief is due [Cal. State B. Rules Proc., Rule 306(e)(2)]. The Review Department will grant a request for augmentation or correction of the record only if it determines that the original record is incomplete or incorrect [Cal. State B. Rules Proc., Rule 306(e)(3)].

[7] Supporting and Responsive Briefs

Within 45 days after service of the request for review or service by the clerk of the trial transcript, whichever occurs later, the appellant must file and serve an opening brief [Cal. State B. Rules Proc., Rule 302(a)]. A responsive brief must be filed and served within 30 days after service of the appellant's brief [Cal. State B. Rules Proc., Rule 303(a)]. The appellant may file and serve a rebuttal brief within 15 days after service of the responsive brief [Cal. State B. Rules Proc., Rule 303(b)].

A brief of amicus curiae may be filed on order of the Presiding Judge and subject to any prescribed conditions [Cal. State B. Rules Prac., Rule 1321].

Cal. State B. Rules Prac., Rule 1320, sets forth the requirements for briefs filed in the Review Department.

[8] Withdrawal of Request for Review

At any time before notice of the time and place of oral argument, the party who requested review may withdraw the request by filing and serving a notice of withdrawal [Cal. State B. Rules Prac., Rule 1302(a)].

After the State Bar Court clerk has served notice of the time and place of oral argument, the request for review may be withdrawn only by order of the Presiding Judge on written motion by the party who sought review [Cal. State B. Rules Prac., Rule 1302(b)].

A withdrawal of request for review nullifies the request and leaves standing the decision of the Hearing Department as the final decision of the State Bar Court [Cal. State B. Rules Prac., Rule 1302(c)].

[9] Oral Argument

Except as the rules otherwise provide, the Review Department must give the parties an opportunity for oral argument. The parties may waive oral argument at any time, but not less than five days prior to the date set for oral argument. Unless oral argument is waived or the parties agree to a shorter period of notice, written notice of the time and place of oral argument must be served on the parties at least 30 days prior to the oral argument [Cal. State B. Rules Proc., Rule 304].

In a matter before the Review Department, each side has a maximum of 20 minutes for oral argument, except as the Presiding Judge may otherwise direct. The Presiding Judge may extend the time for oral argument on motion filed and served at least 10 days before the oral argument and for good cause shown [Cal. State B. Rules Prac., Rule 1330].

During the time allotted each side, judges of the Department may ask questions of counsel for that side. Argument is confined to the record of the State Bar proceedings in the matter under review and to applicable legal authorities. Counsel for the party seeking review must commence the argument, and may reserve any unused allotted time for rebuttal. When review has been sought by more than one party or the matter has been set for hearing by the Review Department on its own motion, the deputy trial counsel must commence the argument [Cal. State B. Rules Prac., Rule 1330].

The Review Department regularly hears oral arguments in San Francisco and in Los Angeles. Ordinarily, oral argument will be scheduled in the venue in which the trial took place. By written request filed with the clerk at least 10 days before the date of oral argument, counsel entitled to present oral argument may request to do so by a conference telephone system operated by the State Bar Court. The Review Department may, however, require counsel to appear in person [Cal. State B. Rules Prac., Rule 1331].

[10] Decision

The Review Department must independently review the record and may adopt findings, conclusions, and a decision or recommendation at variance with those of the hearing judge. However, the hearing judge's findings of fact resolving issues of credibility of witnesses must be given great weight [Cal. State B. Rules Proc., Rule 305(a)].

The Review Department may determine issues not raised by the parties, but must permit the parties to file supplemental briefs regarding these issues [Cal. State B. Rules Proc., Rule 305(b)].

The Review Department may remand a proceeding to the Hearing Department for a new trial on specified issues, for a trial de novo, or for other proceedings. Proceedings on remand must be held before the same hearing judge, unless the Review Department orders otherwise or that judge is unavailable [Cal. State B. Rules Proc., Rule 305(a)].

If the Review Department recommends disbarment, it must include in its opinion an order that the respondent be placed on involuntary inactive enrollment. The inactive enrollment is effective on personal service or three days after service by mail, whichever is earlier [*Bus. & Prof. Code § 6007(c)(4)*; Cal. State B. Rules Proc., Rule 305]. If the recommendation of disbarment is subsequently changed to a lesser discipline, the order for involuntary inactive enrollment must be vacated [Cal. State B. Rules Proc., Rule 490].

Decisions of the Review Department are not subject to reconsideration unless the Department orders otherwise on its own motion or on a party's request for reconsideration filed and served within 15 days after service of the decision [Cal. State B. Rules Proc., Rule 309(a)].

Published opinions of the Review Department may be cited as precedent in State Bar Court proceedings [*see* Cal. State B. Rules Proc., Rule 310].

[11] Summary Review

A third type of review is called "summary review." The Review Department may summarily review matters raising limited issues on review that can be decided without a transcript of the entire record or the normal briefing schedule.

Summary review matters include but are not limited to matters in which no challenge has been made to the hearing judge's material findings of fact. Summary review is available for three issues [Cal. State B. Rules Proc., Rule 308(a)]:

- Contentions that the facts support conclusions of law different from those reached by the hearing judge;
- Disagreement as to the appropriate disposition or degree of discipline; or
- Other questions of law.

The rules regarding decisions of the Review Department, augmentation of the record, and reconsideration are applicable to matters subject to summary review [Cal. State B. Rules Proc., Rule 308(d)]. However, the rules regarding request for review, briefs, and oral argument are not applicable in summary review proceedings [Cal. State B. Rules Proc., Rule 308(d)]. Instead, special rules apply regarding requests for review, briefs, and oral argument [Cal. State B. Rules Proc., Rule 308(e)-(g)].

Legal Topics:

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 71 ATTORNEY DISCIPLINE
PART II. LEGAL BACKGROUND
E. Post-Trial Remedies And Review

6-71 California Forms of Pleading and Practice--Annotated § 71.122

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.122 Supreme Court Review

[1] Notice and Right to Review

If the State Bar makes a decision recommending suspension or disbarment of a member, the State Bar must immediately file a certified copy of the decision, the transcript, and the findings with the Supreme Court Clerk [*Bus. & Prof. Code § 6081*; *see also Bus. & Prof. Code § 6081.1* (State Bar not required to transcribe oral testimony unless ordered by Supreme Court or requested by party at party's expense)]. On the enrollment of a member of the State Bar as an inactive member or on termination of enrollment or refusal to terminate enrollment, the State Bar must immediately give appropriate written notice to the member and to the Supreme Court Clerk [*Bus. & Prof. Code § 6081*].

Any attorney complained against and any person whose reinstatement the State Bar may refuse to recommend may request to have the State Bar's decision reviewed by the Supreme Court in accordance with the procedure prescribed by the Court [*Bus. & Prof. Code § 6082*; *Cal. Rules of Ct., Rule 9.13(a)*]. The Supreme Court, however, will only order review of a decision recommending disbarment or suspension if it appears that any of the following are true [*Cal. Rules of Ct., Rule 9.16(a)*]:

- Review is necessary to settle important questions of law.
- The State Bar Court has acted without or in excess of jurisdiction.
- The petitioner did not receive a fair hearing.
- The State Bar Court's decision is not supported by the weight of the evidence.
- The recommended discipline is not appropriate in light of the record as a whole.

At any time before final disposition of the State Bar Court's decision imposing suspension or disbarment, the Supreme Court may remand the matter to the State Bar Court with instructions to conduct such further proceedings as the Supreme Court deems necessary [*Cal. Rules of Ct., Rule 9.17*].

If review is denied, the denial constitutes a final judicial determination on the merits. Following denial of review, the State Bar Court's recommendation is filed as an order of the Supreme Court [*Cal. Rules of Ct., Rule 9.16(b)*].

The Chief Trial Counsel of the Office of Trial Counsel may, as prescribed by the Supreme Court, petition the Court for a different disposition of a matter than that recommended by the Review Department or the Board of Governors to the Court [*Bus. & Prof. Code § 6079.5*; *Cal. Rules of Ct., Rule 9.14*]. For discussion of the situations in which the Chief Trial Counsel may petition for review, see *§ 71.122[3]*.

[2] Procedure on Review

[a] General Procedural Requirements in Supreme Court Review Proceedings

A petition to the Supreme Court for review of a State Bar Court decision must meet all of the following requirements [*Cal. Rules of Ct., Rule 9.13(e)*]:

- It must be verified.
- It must specify the grounds relied on for review.
- It must show that review within the State Bar Court has been exhausted.
- It must address why review is appropriate under one or more of the grounds set forth in *Cal. Rules of Ct., Rule 9.16(a)* [*see § 71.122*].
- It must have attached a copy of the State Bar Court decision from which relief is sought.

All petitions, briefs, reply briefs, and other pleadings filed by a petitioner with respect to review proceedings in the Supreme Court must be accompanied by proof of service of three copies on the General Counsel of the State Bar at the San Francisco office of the State Bar and of one copy on the Clerk of the State Bar Court at the Los Angeles office of the State Bar Court. The State Bar must serve the member at his or her address pursuant to *Bus. & Prof. Code § 6002.1* and his or her counsel of record, if any [*Cal. Rules of Ct., Rule 9.13(f)*].

[b] Transmittal of Recommendation to Supreme Court

Unless otherwise ordered by the State Bar Court, a recommendation of suspension or disbarment and the accompanying record must be transmitted to the Supreme Court after both of the following are true [Cal. State B. Rules Proc., Rule 250]:

- The disciplinary recommendation of the State Bar Court has become final.
- All applicable cost certificates have been filed, or an additional thirty (30) days has expired, whichever is earlier.

[c] Review of Recommendation of Disbarment or Suspension

A member who seeks Supreme Court review of the State Bar Court's recommendation of suspension or disbarment must file a petition for review with the Supreme Court within 60 days after the State Bar files the decision recommending

discipline with the Court [*Bus. & Prof. Code § 6083(a)*; *Cal. Rules of Ct., Rule 9.13(a)*; *see also § 71.122[2*], for discussion of general requirements concerning petitions for review]. For a form of petition, *see § 71.171*.

The State Bar may serve and file an answer to the petition within 15 days of service. Within five days after service of the answer, the petitioner may serve and file a reply. If the court grants review, the State Bar must serve and file a supplemental brief within 45 days after the order granting review is filed. Within 15 days of service of the State Bar's brief, the member may serve and file a reply brief [*Cal. Rules of Ct., Rule 9.13(a)*; *see also § 71.122[2*], regarding general procedural requirements].

[d] Review of Recommendation to Set Aside Stay of Suspension or to Modify Probation

A petition to the Supreme Court by a State Bar member to review a recommendation of the State Bar Court that a stay of an order of suspension be set aside or that the duration or conditions of probation be modified on account of a violation of probation must be filed within 15 days after the filing with the Clerk of the Supreme Court of a certified copy of the decision complained of [*Cal. Rules of Ct., Rule 9.13(b)*; *see § 71.122[2*] regarding general procedural requirements].

Within 15 days after service of the petition, the State Bar may serve and file an answer. Within five days after service of the answer, the petitioner may serve and file a reply [*Cal. Rules of Ct., Rule 9.13(b)*].

[e] Review of Interim Decisions

A petition to the Supreme Court by a State Bar member to review a decision of the State Bar Court regarding interim suspension, the exercise of powers delegated by *Cal. Rules of Ct., Rule 9.10(b)-(e)*, or on another interlocutory matter must be filed within 15 days after written notice of the adverse decision of the State Bar Court is mailed, postage prepaid, by the State Bar to the petitioner and to his or her counsel of record, if any, at their respective addresses pursuant to *Bus. & Prof. Code § 6002.1* [*Cal. Rules of Ct., Rule 9.13(c)*; *see § 71.122[2*] regarding general procedural requirements].

The petition must be accompanied by a record adequate to permit review of the ruling. If the record is not submitted, the Court may summarily deny the petition [*Cal. Rules of Ct., Rule 9.13(e)* (specifying contents of record)].

Within 15 days after service of the petition, the State Bar may serve and file an answer. Within five days after service of the answer, the petitioner may serve and file a reply [*Cal. Rules of Ct., Rule 9.13(c)*].

[f] Review of Other Decisions

The time period for filing a petition for review of any State Bar action other than a disbarment or suspension, an order or recommendation to set aside a stay of suspension, a modification of the duration or conditions of probation on account of a violation of probation, or an interim decision is 60 days after written notice of the action complained of is mailed, postage prepaid, to the petitioner, addressed to the petitioner at his or her address pursuant to *Bus. & Prof. Code § 6002.1* [*Cal. Rules of Ct., Rule 9.13(d)*; *see § 71.122[2*] regarding general procedural requirements]. Thus, a petition to review, reverse, or modify a decision reproving a member of the State Bar, enrolling a member as an inactive member, or refusing to restore a member to active membership pursuant to *Bus. & Prof. Code § 6007* must be filed within 60 days after service of notice of the decision or action [*Bus. & Prof. Code § 6083(b)*].

The petition must be accompanied by a record adequate to permit review of the ruling. If the record is not submitted, the Court may summarily deny the petition [*Cal. Rules of Ct., Rule 9.13(e)* (specifying contents of record)].

The State Bar may serve and file an answer and brief within 15 days after service of the petition. Within five days after

service of the answer, the petitioner may serve and file a reply. If the Supreme Court orders review, the State Bar may serve and file a supplemental brief within 45 days after the order for review is filed. The petitioner may then serve and file a reply brief within 15 days after service of the State Bar's supplemental brief [*Cal. Rules of Ct., Rule 9.13(d)*].

[3] Review at Request of Chief Trial Counsel

The Chief Trial Counsel may petition for review of recommendations and decisions of the State Bar Court, as follows [*Cal. Rules of Ct., Rule 9.14*; *see Bus. & Prof. Code § 6079.5*]:

- From recommendations that a member be suspended, within 60 days of filing of the recommendation with the Supreme Court.

- From recommendations that the duration or conditions of probation be modified or a reinstatement application be granted, within 15 days of the filing of the recommendation with the Supreme Court.

- From decisions not to place an eligible member on interim suspension, or vacating interim suspension, or a denial of a petition brought under *Bus. & Prof. Code § 6007(c)* (involuntary enrollment in inactive status), within 15 days of notice as provided by the rules adopted by the State Bar.

- From decisions dismissing disciplinary proceedings or recommending reproval, within 60 days of notice as provided by the rules adopted by the State Bar.

Proceedings under *Cal. Rules of Ct., Rule 9.14*, with regard to briefing and service of process and applicable time periods therefor correspond to proceedings brought under *Cal. Rules of Ct., Rule 9.13*, and its corresponding subdivisions, except that the rights and duties of the member and the State Bar in *Cal. Rules of Ct., Rule 9.13*, are reversed [*see Cal. Rules of Ct., Rule 9.14*].

[4] Effect of State Bar Court Orders When No Review Sought

Unless otherwise ordered, if no petition for review is filed within the time allowed by rule concerning a recommendation of the State Bar Court for the disbarment or suspension of a member (60-day period), the vacation of a stay (15-day period), or modification of the duration or conditions of a probation (15-day period), the recommendation of the State Bar Court will be filed as an order of the Supreme Court following the expiration of the time for filing a timely petition [*Cal. Rules of Ct., Rule 9.18(b)*; *see Cal. Rules of Ct., Rules 9.13(a), (b), 9.14(a), (b)*]. The Clerk of the Supreme Court will mail notice that the State Bar Court's recommendation has been entered as an order of the Court to the member at his or her address pursuant to *Bus. & Prof. Code § 6002.1* and to the State Bar [*Cal. Rules of Ct., Rule 9.18(b)*].

[5] Oral Argument

Once the briefing process has been completed, the matter will be set for oral argument, generally in either San Francisco or Los Angeles, depending on the Court's calendar [*see Cal. Rules of Ct., Rule 8.248(a)*]. When counsel or the member is advised of the date and time for argument, the clerk will provide a form in which counsel can indicate the amount of time requested for argument. The maximum amount of time for oral argument is 30 minutes [*Cal. Rules of Ct., Rule 8.256(b)*]. The member or counsel generally argues first, and the State Bar argues second [*cf. Cal. Rules of Ct., Rule 8.256(c)* (appellant generally has right to open and close)].

[6] Burden of Proof

In petitioning the Supreme Court for review of the State Bar's recommendation, the burden is on the petitioner to show that the decision or action is erroneous or unlawful [*Bus. & Prof. Code § 6083(c)*; *Trousil v. State Bar (1985) 38 Cal.*

3d 337, 341, 211 Cal. Rptr. 525, 695 P.2d 1066 ; *McCray v. State Bar (1985) 38 Cal. 3d 257, 263, 211 Cal. Rptr. 691, 696 P.2d 83]* . There is a presumption that the State Bar's findings are supported by the evidence, and, thus, the petitioner has the burden of showing that the findings are not supported by the evidence [*Stuart v. State Bar (1985) 40 Cal. 3d 838, 844, 221 Cal. Rptr. 557, 710 P.2d 357* ; *Dixon v. State Bar (1985) 39 Cal. 3d 335, 341, 216 Cal. Rptr. 432, 702 P.2d 590* ; *Trousil v. State Bar (1985) 38 Cal. 3d 337, 341, 211 Cal. Rptr. 525, 695 P.2d 1066]* . The petitioner's burden may be met by a demonstration that the charges of unprofessional conduct are not sustained by convincing proof to a reasonable certainty [*Stuart v. State Bar (1985) 40 Cal. 3d 838, 844, 221 Cal. Rptr. 557, 710 P.2d 357* ; *McCray v. State Bar (1985) 38 Cal. 3d 257, 263, 211 Cal. Rptr. 691, 696 P.2d 83]* . Merely repeating conflicts in the evidence does not satisfy this burden [*Kelly v. State Bar (1988) 45 Cal. 3d 649, 656, 247 Cal. Rptr. 608, 754 P.2d 1104]* .

[7] Determination of Discipline

The findings of the Hearing Department and Review Department are not binding on the Supreme Court, and the Court independently weighs the evidence and makes its own factual determinations [*Stuart v. State Bar (1985) 40 Cal. 3d 838, 843, 221 Cal. Rptr. 557, 710 P.2d 357* ; *McCray v. State Bar (1985) 38 Cal. 3d 257, 263, 211 Cal. Rptr. 691, 696 P.2d 83]* . The Court also exercises its independent judgment in determining the appropriate discipline in any given case [*In re Nevill (1985) 39 Cal. 3d 729, 734, 217 Cal. Rptr. 841, 704 P.2d 1332* ; *Garlow v. State Bar (1982) 30 Cal. 3d 912, 916, 180 Cal. Rptr. 831, 640 P.2d 1106]* . The Court may impose different or more severe discipline than that imposed by the State Bar if warranted by the circumstances of the case [*Stuart v. State Bar (1985) 40 Cal. 3d 838, 846-847, 221 Cal. Rptr. 557, 710 P.2d 357]* . The Court will give less weight to the State Bar's recommendation when the recommendation is based on an ambiguous set of findings [*see* *Carter v. State Bar (1988) 44 Cal. 3d 1091, 1100, 245 Cal. Rptr. 628, 751 P.2d 894]* . If the findings rest primarily on testimonial evidence, however, the Court is generally reluctant to reverse the decision of the State Bar because the panel hearing the case is in a better position to evaluate conflicting statements after observing the demeanor of the witnesses and the character of their testimony [*Gary v. State Bar (1988) 44 Cal. 3d 820, 826, 244 Cal. Rptr. 482, 749 P.2d 1336* ; *Stuart v. State Bar (1985) 40 Cal. 3d 838, 843-844, 221 Cal. Rptr. 557, 710 P.2d 357]* .

If there is a conflict between the hearing panel and the Review Department, the recommendation of the Review Department is generally given greater weight by the Court than that of the hearing panel [*Athearn v. State Bar (1982) 32 Cal. 3d 38, 46, 184 Cal. Rptr. 728, 648 P.2d 950* ; *see* *Coppock v. State Bar (1988) 44 Cal. 3d 665, 677-678, 244 Cal. Rptr. 462, 749 P.2d 1317]* .

The Court generally requires a showing of specific prejudice for procedural errors to invalidate the determination of the hearing panel. The rules of criminal procedure do not apply in attorney discipline proceedings, and reversible error will be found only when the errors complained of resulted in a deprivation of a fair hearing [*Calvert v. State Bar (1991) 54 Cal. 3d 765, 778, 1 Cal. Rptr. 2d 684, 819 P.2d 424]* . Normally, the Court will not consider new evidence, especially when the evidence was available at the time of the State Bar hearings [*In re Utz (1989) 48 Cal. 3d 468, 481, 256 Cal. Rptr. 561, 769 P.2d 417]* .

The discipline ultimately imposed by the Court must be consistent with its purpose, that is, of protecting the public, the courts, and the legal profession from unfit practitioners [*In re Nevill (1985) 39 Cal. 3d 729, 734, 217 Cal. Rptr. 841, 704 P.2d 1332* ; *In re Possino (1984) 37 Cal. 3d 163, 168, 207 Cal. Rptr. 543, 689 P.2d 115]* . In determining the discipline to impose, the Court considers each case on its own facts [*In re Nevill (1985) 39 Cal. 3d 729, 734, 217 Cal. Rptr. 841, 704 P.2d 1332* ; *Toll v. State Bar (1974) 12Cal. 3d 824, 831, 117 Cal. Rptr. 427, 528 P.2d 35]* . It also takes into account any mitigating or aggravating factors [*In re Nevill (1985) 39 Cal. 3d 729, 734, 217 Cal. Rptr. 841, 704 P.2d 1332* ; *Tarver v. State Bar (1984) 37 Cal. 3d 122, 133, 207 Cal. Rptr. 302, 688 P.2d 911]* .

The Supreme Court is not bound by past disciplinary results in prior similar Supreme Court cases, although the Court may consider prior results in assessing discipline [*Rodgers v. State Bar (1989) 48 Cal. 3d 300, 318, 256 Cal. Rptr.*

381, 768 P.2d 1058 (rejecting Review Department recommendation of disbarment when, in prior Court opinions, conduct similar to that at issue had been punished by actual suspension, probation, or both)].

For discussion of factors affecting determination of the proper discipline, including consideration of aggravating and mitigating circumstances by Supreme Court, see *§ 71.31[5]*.

[8] Order of Discipline

If no petition to review, reverse, or modify has been filed within the time allowed or the petition has been denied, the decision or order of the State Bar Court is final and enforceable [*Bus. & Prof. Code § 6084(a)*]. If a petition to review or to reverse or modify is filed by either party within the time allowed, the Supreme Court must make any order it may deem proper in the circumstances [*Bus. & Prof. Code § 6084(a)*]. Notice of the order must be given to the member and to the State Bar [*Bus. & Prof. Code § 6084(b)*]. Unless otherwise ordered, all orders of the Supreme Court imposing discipline or opinions deciding causes involving the State Bar become final 30 days after filing [*Cal. Rules of Ct., Rule 9.18(a)*; *see Cal. Rules of Ct., Rule 8.264(a)*].

PRACTICE TIP:

Order of Discipline. The effective date of the Supreme Court order imposing discipline is important in determining compliance with terms and conditions imposed under the order. *By Regina E. Brenner*.

[9] Rehearing

A petition for rehearing may be filed within the time generally provided for petitions for rehearing in civil cases, which is 15 days after the filing of the decision [*Bus. & Prof. Code § 6084(c)*; *Cal. Rules of Ct., Rules 8.268(b), 9.18(a)*]. An answer to the petition may be served and filed within 23 days after the filing of the decision [*Cal. Rules of Ct., Rule 8.268(b)*]. A rehearing may be granted on petition, or on the Court's own motion, at any time before the decision becomes final, that is, within 30 days after the decision is filed [*Cal. Rules of Ct., Rules 8.264(a), 8.268(a), 9.18(a)*]. The petition is deemed denied if no order regarding the rehearing is made before the decision becomes final [*Cal. Rules of Ct., Rule 8.268(c)*].

Unless otherwise ordered, when petitions for review of interim orders pursuant to *Cal. Rules of Ct., Rules 9.13(c)* and *9.14(c)*, are acted on summarily, the orders of the Supreme Court are final forthwith and will not have law-of-the-case effect in subsequent proceedings in the Supreme Court [*Cal. Rules of Ct., Rule 9.18(a)*].

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6-71 California Forms of Pleading and Practice--Annotated § 71.123

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.123 Court of Appeal Review

Persons complained against and persons whose reinstatement is denied by the State Bar may petition for review in the courts of appeal following disciplinary action by the State Bar [*Bus. & Prof. Code § 6082*]. Review must take place "in accordance with the procedure prescribed by the California Supreme Court" [*Bus. & Prof. Code § 6082*]. However, the Supreme Court has established no procedure for review of State Bar disciplinary actions by the courts of appeal. Thus, it appears that appellate review must be sought through the Supreme Court.

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6-71 California Forms of Pleading and Practice--Annotated § 71.124

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.124 Contempt

The State Bar may bring a contempt action against a member of the State Bar for that member's willful failure to comply with a disciplinary order or an order of the Supreme Court, or any part of an order [*Bus. & Prof. Code § 6084(d)*]. The contempt action may be brought in any of the following venues [*Bus. & Prof. Code § 6084(d)*]:

- The Los Angeles or San Francisco Superior Court.
- The superior court of the county of the member's address as shown on current State Bar membership records.
- The superior court of the county in which the act or acts occurred.
- The superior court of the county in which the member's regular business address is located.

Changes of venue may be requested pursuant to the provisions in the Code of the Civil Procedure governing venue [*Bus. & Prof. Code § 6084(d)*; *see Code Civ. Proc. § 392 et seq.* (governing place of trial of civil actions)].

For further discussion and forms regarding contempt proceedings generally, *see* Ch. 135, *Contempt* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsSanctionsGeneral OverviewCivil ProcedureSanctionsContemptCivil Contempt

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 71 ATTORNEY DISCIPLINE
PART II. LEGAL BACKGROUND
E. Post-Trial Remedies And Review

6-71 California Forms of Pleading and Practice--Annotated §§ 71.25-71.39

AUTHOR: Regina E. Brenner Editorial Consultant

[Reserved]

§§ 71.25[Reserved]

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PART III. RESEARCH GUIDE

6-71 California Forms of Pleading and Practice--Annotated § 71.140

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.140 Related Matthew Bender Publications

For points and authorities related to attorney disciplinary proceedings, see California Points and Authorities, Ch. 24, *Attorneys at Law* , Part III (Matthew Bender)

Legal Topics:

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

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6-71 California Forms of Pleading and Practice--Annotated § 71.141

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.141 State Statutes

Noncompliance with child or family support order is ground for nonissuance or nonrenewal of professional license. *Bus. & Prof. Code §§ 31, 6143.5*; *Welf. & Inst. Code § 11350.6*

State Bar Act. *Bus. & Prof. Code § 6000 et seq.*

Service of notice initiating disciplinary or other proceeding under State Bar Act. *Bus. & Prof. Code § 6002.1(c)*

Involuntary enrollment of attorney as inactive member of State Bar. *Bus. & Prof. Code § 6007*

Disciplinary authority of State Bar and courts; grounds for discipline; investigation, procedure, conduct, and review of disciplinary proceedings. *Bus. & Prof. Code §§ 6043, 6044, 6049-6050.1, 6075-6118, 6131, 6133*

Making false and malicious report to State Bar of professional misconduct is misdemeanor. *Bus. & Prof. Code § 6043.5*

Disclosure by State Bar of otherwise nonpublic information regarding attorney's alleged misconduct to other agencies. *Bus. & Prof. Code § 6044.5*

Duties of an attorney. *Bus. & Prof. Code § 6068*

Report of contempt holding against attorney; report of reversal of judgment based on attorney misconduct, incompetence or misrepresentation. *Bus. & Prof. Code § 6086.7*

Report to State Bar of judgment, settlement, or arbitration award against attorney. *Bus. & Prof. Code § 6086.8*

Overdrafts and misappropriations from attorney trust accounts; reports by financial institutions. *Bus. & Prof. Code § 6091.1*

Disobedience or violation of court order; violation of oath or duties. *Bus. & Prof. Code § 6103*

Violation of *Civ. Code § 2944.6* or § 2944.7 regarding arranging loan modification is grounds for attorney discipline. *Bus. & Prof. Code § 6106.3*

Disbarred or suspended attorney is prohibited from appearing as plaintiff in action to collect debt if action was assigned to attorney after disbarment or suspension. *Bus. & Prof. Code § 6130*

Discipline of law corporations. *Bus. & Prof. Code §§ 6167-6170, 6172*

Attorney work product discoverable by State Bar in State Bar disciplinary investigations. *Code Civ. Proc. § 2018(e)* (*Code Civ. Proc. § 2018.070* effective July 1, 2005)

Common barratry ("exciting groundless judicial proceedings") is punishable by imprisonment and fine. *Penal Code §§ 158, 159*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewLegal EthicsSanctionsDisbarmentsLegal EthicsSanctionsSuspensionsLegal EthicsSanctionsDisciplinary ProceedingsHearingsFamily LawChild SupportObligationsEnforcementLicenses

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6-71 California Forms of Pleading and Practice--Annotated § 71.142

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.142 Administrative Regulations

Rules of professional conduct. *Cal. Rules Prof. Conduct, Rules 1-100-5-320*

Rules of procedure in State Bar proceedings. Cal. State B. Rules Proc., Rules 1-4407

Standards for attorney sanctions for professional misconduct. Cal. State B. Stds. for Atty's Sanctions, Stds. 1.1-3.4

Rules of practice in proceedings before State Bar Court. Cal. State B. Rules Prac., Rules 1100-1333

Procedural rules concerning applications for reimbursement from Client Security Fund pursuant to *Bus. & Prof. Code § 6140.5*. Rules Proc. Client Sec. Fund, Rules 1-41

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsSanctionsGeneral OverviewLegal EthicsSanctionsDisciplinary ProceedingsGeneral OverviewLegal EthicsProfessional ConductGeneral Overview

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6-71 California Forms of Pleading and Practice--Annotated § 71.143

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.143 California Rules of Court

Authority of State Bar Court; grounds and procedure for review by Supreme Court of State Bar court decisions. *Cal. Rules of Ct., Rules 9.10-9.22*

Duties of disbarred or suspended attorneys set forth in Supreme Court order of disbarment or suspension. *Cal. Rules of Ct., Rule 9.20*

Appointment and discipline of State Bar Court judges. *Cal. Rules of Ct., Rule 9.11*

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsSanctionsDisbarmentsLegal EthicsSanctionsSuspensionsLegal EthicsSanctionsGeneral Overview

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6-71 California Forms of Pleading and Practice--Annotated § 71.144

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.144 Decisions

[1] Abstention of Federal Courts

Federal court properly abstains from considering challenge to constitutionality of attorney disciplinary rules that are subject of pending state court disciplinary proceeding, in absence of bad faith, harassment, or other exceptional circumstances. *Middlesex County Ethics Committee v. Garden State Bar Ass'n (1982) 457 U.S. 423, 435-437, 102 S. Ct. 2515, 73 L. Ed. 2d 116*

[2] Augmentation of Record

Supplemental statement of facts submitted by attorney after stipulation of facts executed by all parties was admissible even without referee approval when petitioner had been informed by State Bar that supplemental statement could be filed and statement did not contradict earlier stipulation. *Wells v. State Bar (1984) 36 Cal. 3d 199, 206-208, 203 Cal. Rptr. 134, 680 P.2d 1093*

Refusal of disciplinary board of State Bar to allow attorney to augment record at oral argument is not denial of due process when attorney fails to comply with State Bar Rules of Procedure. *Alkow v. State Bar of California (1971) 3 Cal. 3d 924, 933, 92 Cal. Rptr. 278, 479 P.2d 638*

[3] Complainant

Motivation in initiating investigation has little bearing on sufficiency of evidence to support factual findings of *Crane v. State Bar of California (1981) 30 Cal. 3d 117, 123, 177 Cal. Rptr. 670, 635 P.2d 163*

[4] Consolidation

State Bar not required to consolidate multiple disciplinary matters involving same attorney. *Rhodes v. State Bar (1989) 49 Cal. 3d 50, 57, 260 Cal. Rptr. 266, 775 P.2d 1035*

[5] Continuances

Attorney's request for continuance of disciplinary proceeding was properly denied when attorney was not diligent in avoiding necessity of continuance, request was made at last possible moment, and State Bar had gone to great expense to fly inout-of-state witness. *Chang v. State Bar (1989) 49 Cal. 3d 114, 125, 260 Cal. Rptr. 280, 775 P.2d 1049*

[6] Delay

Five-year delay between filing of complaint and issuance by State Bar of notice to show cause was not unreasonable when most of delay resulted from pendency of civil action that arose out of same transaction as disciplinary action. *Rodgers v. State Bar (1989) 48 Cal. 3d 300, 311, 256 Cal. Rptr. 381, 768 P.2d 1058*

Delay does not bar imposition of discipline in itself, but is factor to be considered in deciding what discipline is appropriate. *Chefsky v. State Bar (1984) 36 Cal. 3d 116, 132, 202 Cal. Rptr. 349, 680 P.2d 82*

[7] Discipline

[a] Disbarment

Habitual disregard by attorney of clients' interests is ground for disbarment, even when such neglect is grossly negligent or careless, rather than willful and dishonest. *Farnham v. State Bar (1988) 47 Cal. 3d 429, 446, 253 Cal. Rptr. 249, 763 P.2d 1339* ; *In the Matter of Hindin (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 685-686*

Disbarment is appropriate penalty for repeated acts of misappropriation, in absence of strong extenuating circumstances. *Rosenthal v. State Bar (1987) 43 Cal. 3d 658, 662, 238 Cal. Rptr. 394, 738 P.2d 740*

[b] Interim Suspension

Time spent by attorney on interim suspension is properly considered by Supreme Court as factor in determining whether Review Department's disciplinary recommendation is appropriate. *In re Young (1989) 49 Cal. 3d 257, 268, 261 Cal. Rptr. 59, 776 P.2d 1021*

Attorney is not automatically entitled, as matter of fundamental fairness, to "credit" for amount of time spent on interim suspension; interim suspension is worthy of some consideration, however, in imposition of final discipline. *In re Basinger (1988) 45 Cal. 3d 1348, 1361, 249 Cal. Rptr. 110, 756 P.2d 833*

[c] Mitigating Factors

[i] Candor to Court

Review Department gives respondent substantial mitigation for stipulation to facts underlying charged misconduct, in addition to other instances of cooperation, even where parties were unable to stipulate to appropriate level of discipline. *In the Matter of Silver (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 902, 906*

Attorney's candor to court in disciplinary proceedings is mitigating factor. *In the Matter of Yagman (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 788, 807*

[ii] Continued Practice Without Ethical Violations

Evidence of continued practice without further ethical violations considered in mitigation. *In re Aquino (1989) 49 Cal. 3d 1122, 1131, 264 Cal. Rptr. 833, 783 P.2d 192*

[iii] Emotional Problems

Attorney's emotional difficulties not considered in mitigation when difficulties are not established by expert testimony as being both "extreme" in nature and "directly responsible" for attorney's misconduct. *Bercovich v. State Bar (1990) 50 Cal. 3d 116, 128, 266 Cal. Rptr. 341, 785 P.2d 889*

Agoraphobia is mitigating factor only under strictest evidentiary circumstances. *Lydon v. State Bar (1988) 45 Cal. 3d 1181, 1188, 248 Cal. Rptr. 830, 756 P.2d 217*

[iv] Financial Problems

Financial pressures entitled to greater weight in mitigation if they are extreme and result from circumstances that are not reasonably foreseeable or beyond attorney's control. *In re Naney (1990) 51 Cal. 3d 186, 196, 270 Cal. Rptr. 848, 793 P.2d 54*

[v] Lack of Prior Record

Attorney's lack of prior record of discipline not entitled to great weight as mitigating factor when attorney has practiced law short time. *Coppock v. State Bar (1988) 44 Cal. 3d 665, 686, 244 Cal. Rptr. 462, 749 P.2d 1317*

Absence of prior discipline properly considered mitigating factor, but required to be considered in light of purpose of disciplinary proceedings. *Cooper v. State Bar (1987) 43 Cal. 3d 1016, 1029, 239 Cal. Rptr. 709, 741 P.2d 206* (upholding disbarment)

[vi] Preventive Measures

Attorney's engagement of management firm to avoid future misconduct was mitigating factor. *Hipolito v. State Bar (1989) 48 Cal. 3d 621, 626-627, 257 Cal. Rptr. 331, 770 P.2d 743*

[vii] Pro Bono or Volunteer Work

Attorney's zeal in undertaking pro bono work was mitigating factor. *Rose v. State Bar (1989) 49 Cal. 3d 646, 667, 262 Cal. Rptr. 702, 779 P.2d 761*

Substantial volunteer work is a mitigating factor. *In the Matter of Lais (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 907, 926*

[viii] Substance Abuse

Fact that attorney's drug addiction resulted from legitimate medical treatment was mitigating circumstance. *In re Nadrich (1988) 44 Cal. 3d 271, 276, 243 Cal. Rptr. 218, 747 P.2d 1146*

[d] Restitution

Attorney's failure to make restitution voluntarily to wronged clients did not constitute, in itself, affirmative basis for discipline. *Kent v. State Bar (1987) 43 Cal. 3d 729, 736, 239 Cal. Rptr. 77, 739 P.2d 1244*

[e] Suspension

Attorney who has been suspended from practice is not active member of State Bar while under suspension. *In re Johnson (1992) 1 Cal. 4th 689, 696 n.2, 4 Cal. Rptr. 2d 170, 822 P.2d 1317*

Suspension order disqualifies attorney not only from practicing law but also from holding self out as entitled to practice during suspension period. *Arm v. State Bar (1990) 50 Cal. 3d 763, 775, 268 Cal. Rptr. 741, 789 P.2d 922*

[8] Due Process

[a] In General

Attorney is entitled to procedural due process in disbarment proceedings, including prior notice of charge and opportunity to explain and defend. *In re Ruffalo (1968) 390 U.S. 544, 550, 88 S. Ct. 1222, 20 L. Ed. 2d 117*

Disbarred attorney not entitled to written opinion from California Supreme Court upholding State Bar Court's disbarment order; Supreme Court may summarily deny attorney's petition for review without violating due process. *In re Rose (2000) 22 Cal. 4th 430, 448-449, 456, 93 Cal. Rptr. 2d 298, 993 P.2d 956*

Fact that State Bar Court referees are not representative of population of California or members of State Bar did not support claim that State Bar procedures violate due process guarantees. *Bernstein v. State Bar (1990) 50 Cal. 3d 221, 232-233, 266 Cal. Rptr. 625, 786 P.2d 352*

Violation of statutory provision is improper basis for discipline if provision was not added until after the misconduct occurred and was not specified in either notice to show cause or stipulation of facts. *Slavkin v. State Bar (1989) 49 Cal. 3d 894, 902, 264 Cal. Rptr. 131, 782 P.2d 270*

Fact that attorney was unable to present witnesses on her own behalf at disciplinary proceeding did not constitute denial of due process when failure to present such witnesses was due to her own lack of diligence. *Jones v. State Bar (1989) 49 Cal. 3d 273, 288, 261 Cal. Rptr. 397, 777 P.2d 170*

Fact that State Bar Board of Governors oversees both "prosecutorial" and "judicial" functions in attorney discipline matters does not deprive attorney of due process right to fair hearing. *Kelly v. State Bar (1988) 45 Cal. 3d 649, 655 n.8, 247 Cal. Rptr. 608, 754 P.2d 1104*

Attorney's only due process entitlement in State Bar disciplinary proceeding is "fair hearing." *Rosenthal v. State Bar (1987) 43 Cal. 3d 612, 634, 238 Cal. Rptr. 377, 738 P.2d 723*

Holder of license to practice law is entitled to procedural due process in any disciplinary proceeding relating to license, including disciplinary proceedings by *State Bar. Gendron v. State Bar (1983) 35 Cal. 3d 409, 420, 197 Cal. Rptr. 590, 673 P.2d 260*

Due process rights of disciplined attorney require that discipline be imposed only on charges that appear in notice to show cause. *Gendron v. State Bar (1983) 35 Cal. 3d 409, 420, 197 Cal. Rptr. 590, 673 P.2d 260*

[b] Continuances

Denial of continuance does not deny attorney due process when attorney had ample opportunity to prepare and present defense, repeatedly failed to appear at prior scheduled proceedings, and failed to demonstrate that he was making any effort to arrange his calendar to accommodate State Bar proceedings. *Hawk v. State Bar (1988) 45 Cal. 3d 589, 597-598, 247 Cal. Rptr. 599, 754 P.2d 1096*

Denial of continuance to obtain presence of petitioner's retained counsel at hearing did not violate petitioner's due process when examiner had already subpoenaed witnesses for hearing and counsel's associate was available to represent petitioner at hearing. *Frazer v. State Bar (1987) 43 Cal. 3d 564, 567-568, 238 Cal. Rptr. 54, 737 P.2d 1338*

[c] Criminal Proceedings Distinguished

Attorney in State Bar proceeding does not possess same immunity from being called to testify as criminal defendant. *In re Utz (1989) 48 Cal. 3d 468, 479, 256 Cal. Rptr. 561, 769 P.2d 417*

Rules of criminal procedure are not applicable in State Bar disciplinary proceeding. *Coppock v. State Bar (1988) 44 Cal. 3d 665, 676, 244 Cal. Rptr. 462, 749 P.2d 1317*

State Bar disciplinary proceedings are not governed by reasonable doubt standard of proof, as in criminal trials; attorney does not have constitutional or statutory presumption of innocence. *Arden v. State Bar (1987) 43 Cal. 3d 713, 725, 239 Cal. Rptr. 68, 739 P.2d 1236*

State Bar proceedings are not comparable to criminal actions, and criminal procedural safeguards do not apply. *Bambic v. State Bar (1985) 40 Cal. 3d 314, 320, 219 Cal. Rptr. 489, 707 P.2d 862*

[d] Cross Examination

Lack of opportunity of accused attorney to cross examine complaining party in disciplinary proceedings was not denial of due process of law when complaining party was not witness at any part of proceeding; appearance of complaining party at disciplinary hearing was not required. *Walter v. State Bar (1970) 2 Cal. 3d 880, 890-891, 87 Cal. Rptr. 833, 471 P.2d 481*

[e] Double Jeopardy

Defense of double jeopardy is inapplicable in State Bar proceedings. *In re Crooks (1990) 51 Cal. 3d 1090, 1100-1101, 275 Cal. Rptr. 420, 800 P.2d 898*

[f] Exculpatory Evidence

State Bar is under no affirmative duty to disclose exculpatory evidence at hearing. *Martin v. State Bar (1991) 52 Cal. 3d 1055, 1063, 277 Cal. Rptr. 868, 804 P.2d 54*

[g] Notice

Attorney cannot be disciplined for violation not alleged in notice to show cause; evidence of uncharged conduct, however, is subject to consideration for other purposes relevant to proceeding, such as to establish circumstance in aggravation. *Edwards v. State Bar (1990) 52 Cal. 3d 28, 35-36, 276 Cal. Rptr. 153, 801 P.2d 396*

Determination of violations of criminal offenses not charged in notice to show cause is improper subject of State Bar disciplinary proceedings. *Slavkin v. State Bar (1989) 49 Cal. 3d 894, 903, 264 Cal. Rptr. 131, 782 P.2d 270*

[h] Withdrawal of Stipulation

Refusal by Review Department to allow attorney to withdraw factual stipulation did not constitute denial of fair hearing when purported justification for withdrawal of stipulation was attorney's unsupported contention that examiner improperly withheld evidence at disciplinary hearing. *Coppock v. State Bar (1988) 44 Cal. 3d 665, 674-676, 244 Cal. Rptr. 462, 749 P.2d 1317*

Refusal by Review Department to relieve attorney of prior factual stipulation did not constitute denial of due process, notwith standing fact that attorney originally entered stipulation with hearing panel, with understanding that hearing panel would recommend no actual suspension, and that Review Department, accepting most of the hearing panel's findings based on stipulation, later imposed actual suspension; attorney is relieved from factual stipulation only when stipulation is rejected by *State Bar. Schneider v. State Bar (1987) 43 Cal. 3d 784, 793-794, 239 Cal. Rptr. 111, 739 P.2d 1279*

[9] Evidence

[a] Civil Proceeding

Nontestimonial evidence from civil proceedings to which attorney was party was properly admitted against attorney in disciplinary proceeding. *Rosenthal v. State Bar (1987) 43 Cal. 3d 612, 622 n.11, 238 Cal. Rptr. 377, 738 P.2d 723*

Admission of civil court findings, conclusions, and judgments do not impermissibly lower standard of proof in State Bar proceeding from "clear and convincing" standard to lower "preponderance" standard applicable in civil cases. *Rosenthal v. State Bar (1987) 43 Cal. 3d 612, 634, 238 Cal. Rptr. 377, 738 P.2d 723*

[b] Criminal Conviction

Record of conviction is conclusive evidence of guilt of crime; in disciplinary proceeding based on prior criminal conviction, attorney was precluded from asserting that evidence in prior criminal trial was insufficient. *In re Chernik (1989) 49 Cal. 3d 467, 472-473, 261 Cal. Rptr. 595, 777 P.2d 631*

[c] Exclusionary Rule

Application of exclusionary rules of evidence of criminal law to State Bar disciplinary matters. *Emslie v. State Bar*

(1974) 11 Cal. 3d 210, 226-230, 113 Cal. Rptr. 175, 520 P.2d 991

[d] Extrinsic Evidence

Extrinsic evidence is considered by Supreme Court when it is only means by which attorney can meet heavy burden of proving rehabilitation from serious physical or emotional problem precipitating misconduct. *Slavkin v. State Bar (1989) 49 Cal. 3d 894, 905, 264 Cal. Rptr. 131, 782 P.2d 270*

[e] Hearsay

Attorney's failure to appear at disciplinary hearing constituted waiver of any hearsay objection to evidence introduced at hearing. *Bowles v. State Bar (1989) 48 Cal. 3d 100, 108-109, 255 Cal. Rptr. 846, 768 P.2d 65*

Complimentary letters from judges and other attorneys is excludable hearsay in State Bar proceeding, in absence of stipulation to contrary. *In re Ford (1988) 44 Cal. 3d 810, 818, 244 Cal. Rptr. 476, 749 P.2d 1331*

[f] Inferences

Evidence that balance in trust account fell below amount credited to client was sufficient to support finding of willful misappropriation. *Edwards v. State Bar (1990) 52 Cal. 3d 28, 37, 276 Cal. Rptr. 153, 801 P.2d 396*

Attorney's failure to keep adequate records and proper accounts is inherently suspicious and supports inference that attorney's testimony is untrue. *Rodgers v. State Bar (1989) 48 Cal. 3d 300, 311, 256 Cal. Rptr. 381, 768 P.2d 1058*

Evidence that attorney persistently refused to account to client for client's funds in face of repeated demands to do so justified board's finding of willful misappropriation. *Brody v. State Bar (1974) 11 Cal. 3d 347, 350, 113 Cal. Rptr. 371, 521 P.2d 107*

[g] New Evidence

New evidence normally not considered by Supreme Court on review of State Bar disciplinary proceeding, especially when evidence was available at time of State Bar hearings. *In re Utz (1989) 48 Cal. 3d 468, 481, 256 Cal. Rptr. 561, 769 P.2d 417*

In Supreme Court review of State Bar recommendation, attorney is relieved from binding effects of legal conclusions of stipulation with State Bar as to facts and discipline, but remains bound by factual stipulations; thus attorney is not allowed to offer new evidence of mitigating factor. *Rossman v. State Bar (1985) 39 Cal. 3d 539, 542, 216 Cal. Rptr. 919, 703 P.2d 390*

[h] Testimony of Attorney

In disciplinary hearing, attorney's testimony improperly disregarded when disbelievedby State Bar but not contradicted or impeached. *Edmondson v. State Bar (1981) 29 Cal. 3d 339, 343, 172 Cal. Rptr. 899, 625 P.2d 812*

[10] Judicial Notice

Supreme Court takes judicial notice of matters in civil action that arise out of course of conduct underlying charges against attorney in disbarment proceedings. *Yokozeki v. State Bar (1974) 11 Cal. 3d 436, 444, 113 Cal. Rptr. 602, 521 P.2d 858 , cert. denied, 419 U.S. 900*

Supreme Court in review of State Bar disciplinary proceeding has power to take judicial notice of decision in civil action bearing on charges. *Lee v. State Bar (1970) 2 Cal. 3d 927, 941, 88 Cal. Rptr. 361, 472 P.2d 449*

[11] Malicious Prosecution

Rules of Procedure of State Bar provide for independent investigation of complaints made by persons against attorneys, and when investigation occurs or is presumed to have occurred, attorney cannot bring action for malicious prosecution, even if bar proceedings are terminated in his or her favor. *Stanwyck v. Horne (1983) 146 Cal. App. 3d 450, 452, 194 Cal. Rptr. 228*

[12] Misconduct

[a] Breach of Fiduciary Duty to Nonclient

Breach of fiduciary duty owed to nonclient is basis for attorney discipline. *Hartford v. State Bar (1990) 50 Cal. 3d 1139, 1153, 270 Cal. Rptr. 12, 791 P.2d 598*

Even outside attorney-client context, attorney's breach of fiduciary duties owed to another warrants discipline. *Morales v. State Bar (1988) 44 Cal. 3d 1037, 1044-1045, 245 Cal. Rptr. 398, 751 P.2d 457* (misappropriation of funds from law firm's pension account was breach of fiduciary duty involving moral turpitude)

[b] Carelessness

Showing of willfulness not always necessary to establish that attorney has improperly withdrawn from employment or failed to act competently; showing of gross carelessness and negligence in failing to communicate with clients or attend to their needs is sufficient. *Walker v. State Bar (1989) 49 Cal. 3d 1107, 1117, 264 Cal. Rptr. 825, 783 P.2d 184*

Gross carelessness constitutes violation of oath of attorney to discharge faithfully duties of attorney to best of attorney's knowledge and ability. *Demain v. State Bar (1970) 3 Cal. 3d 381, 387, 90 Cal. Rptr. 420, 475 P.2d 652*

[c] Commingling of Client Funds

Former *Cal. Rules Prof. Conduct, Rule 8-101,* was violated when attorney commingled funds or failed to deposit or manage funds in manner designated by rule, even if no person was injured; rule left no room for inquiry into attorney's intent. *Guzzetta v. State Bar (1987) 43 Cal. 3d 962, 976, 239 Cal. Rptr. 675, 741 P.2d 172*

Commingling is established if client's money is intermingled with that of attorney in such way that it may be used by attorney for personal expenses or be subjected to claims of attorney's creditors. *Vaughn v. State Bar (1972) 6 Cal. 3d 847, 853, 100 Cal. Rptr. 713, 494 P.2d 1257*

Commingling is established where attorney deposits personal monies into and uses client trust account for personal reasons, regardless of whether client monies are in account. *In the Matter of Doran (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 871, 879*

[d] Conflict of Interest

Failure of attorney to obtain written waiver of conflict from clients with conflicting interests supported discipline. *Kapelus v. State Bar (1987) 44 Cal. 3d 179, 195-196, 242 Cal. Rptr. 196, 745 P.2d 917*

[e] Failure to Communicate With Client

Attorney's failure to communicate with and inattention to needs of client, standing alone, constituted grounds for discipline. *Lister v. State Bar (1990) 51 Cal. 3d 1117, 1125, 275 Cal. Rptr. 802, 800 P.2d 1232*

Attorney's repeated failure to communicate with and inattention to needs of client is proper ground for discipline, even if attorney's conduct is not willful. *Kapelus v. State Bar (1987) 44 Cal. 3d 179, 188, 242 Cal. Rptr. 196, 745 P.2d 917*

Attorney's failure to promptly notify client that client named as defendant in civil action as breach of fiduciary duty to communicate with client and as ground for discipline. *Shalant v. State Bar (1983) 33 Cal. 3d 485, 488, 189 Cal. Rptr. 374, 658 P.2d 737*

Attorney's pattern of misconduct in habitually disregarding clients' interests and failing to communicate amounted to moral turpitude and warranted disbarment. *In the Matter of Hindin (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 685-686*

[f] Failure to Notify Clients of Suspension

Suspended attorney's failure to notify clients of his or her status, as required by former Cal. Rules of Ct., Rule 955 (now see *Rule 9.20*), is cause for further discipline. *Athearn v. State Bar (1982) 32 Cal. 3d 38, 43-45, 184 Cal. Rptr. 728, 648 P.2d 950*

[g] Failure to Perform Legal Services

Isolated instances of failure to perform services for clients (four incidents over 17-year period) warranted lighter discipline than repeated "pattern" of failure to perform services. *Bledsoe v. State Bar (1991) 52 Cal. 3d 1074, 1079-1080, 278 Cal. Rptr. 80, 804 P.2d 705*

Willful failure to perform legal services for which attorney was retained constitutes breach of good faith and fiduciary duty and warrants discipline. *Finch v. State Bar (1981) 28 Cal. 3d 659, 665, 170 Cal. Rptr. 629, 621 P.2d 253*

[h] Failure to Provide Accounting

Failure to provide proper accounting for entrusted funds is cause for discipline, whether or not financial loss has ultimately occurred. *Ridge v. State Bar (1989) 47Cal. 3d 952, 961, 254 Cal. Rptr. 803, 766 P.2d 569*

[i] Failure to Support Constitution and Laws

Violation of *Bus. & Prof. Code § 6068(a)* (duty to support Constitution and laws of United States and California) is not automatically established each time attorney commits moral turpitude or violates Rules of Professional Conduct; State Bar is required to identify with specificity how attorney's misconduct violates *Bus. & Prof. Code § 6068(a)*. *Lipson v.*

State Bar (1991) 53 Cal. 3d 1010, 1016, 281 Cal. Rptr. 775, 810 P.2d 1007

[j] False Personation of State Bar Examinee

False personation of State Bar examinee and taking of State Bar examination in examinee's stead are grounds for disbarment, in absence of overwhelming evidence of mitigation. *In re Lamb (1989) 49 Cal. 3d 239, 241-246, 260 Cal. Rptr. 856, 776 P.2d 765*

[k] Fees

Charging of unconscionable fee is basis for discipline; test for unconscionability is whether fee is so exorbitant and wholly disproportionate to services performed as to shock conscience, and test is met when fee is almost twice amount of actual award of monetary damages. *Tarver v. State Bar (1984) 37 Cal. 3d 122, 134, 207 Cal. Rptr. 302, 688 P.2d 911*

Attorney's failure to maintain adequate records to support claim of costs purportedly incurred on behalf of client is breach of attorney's duty to client warranting discipline. *Fitzsimmons v. State Bar (1983) 34 Cal. 3d 327, 332, 193 Cal. Rptr. 896, 667 P.2d 700*

Retention of client's funds without client's knowledge is improper method of collecting fees. *Silver v. State Bar (1974) 13 Cal. 3d 134, 141-142, 117 Cal. Rptr. 821, 528 P.2d 1157*

[l] Misappropriation of Client Funds

Cal. State B. Stds. for Att'y Sanctions, Std. 2.2(b), requiring minimum of one-year actual suspension for willful misappropriation of entrusted funds, is not faithful to teachings of Supreme Court's decisions; lesser discipline is appropriate if mitigating factors present, such as absence of fraudulent intent. *Kelly v. State Bar (1991) 53 Cal. 3d 509, 518-520, 280 Cal. Rptr. 298, 808 P.2d 808*

Fact that misappropriation of client's funds did not result in harm is not determinative of whether misappropriation constitutes ground for discipline. *Friedman v. State Bar (1990) 50 Cal. 3d 235, 244, 266 Cal. Rptr. 632, 786 P.2d 359*

Bringing of separate disciplinary proceedings against attorney for misappropriating separate funds from separate clients on separate occasions is proper, and not barred by res judicata or laches, even if separate proceedings involve misappropriations from same client's trust account. *Weller v. State Bar (1989) 49 Cal. 3d 670, 675 n.1, 262 Cal. Rptr. 549, 779 P.2d 293*

Misappropriation of client's funds is not excused by fact that misappropriation was committed in response to duress. *Hitchcock v. State Bar (1989) 48 Cal. 3d 690, 709, 257 Cal. Rptr. 696, 771 P.2d 394*

[m] Misleading Court

Actual harm is not necessary to merit disciplinary action for misleading court and violating oath of attorney, if actual deception is intended and shown. *Reznik v. State Bar (1969) 1 Cal. 3d 198, 204, 81 Cal. Rptr. 769, 460 P.2d 969*

Knowingly including false statement of fact in verified complaint is violation of professional duty not to mislead judge

[*Bus. & Prof. Code § 6068(d)*] and cause for discipline under *Bus. & Prof. Code § 6103*. *Pickering v. State Bar (1944) 24 Cal. 2d 141, 144-145, 148 P.2d 1*

When looking at whether an attorney misled the court, the governing question is the nature of the conduct, not its effect on its intended hearer, or even the hearer's opinion of its gravity. *Spielbauer v. County of Santa Clara (2007) 146 Cal. App. 4th 914, 951, 53 Cal. Rptr. 3d 357*

Because it was probable that attorney violated *Bus. & Prof. Code § 6068(d)* by mischaracterizing facts of case, court of appeal requested clerk to forward a copy of opinion to the *State Bar of California. Mammoth Mountain Ski Area v. Graham (2006) 135 Cal. App. 4th 1367, 1374-1375, 38 Cal. Rptr. 3d 422*

[n] Moral Turpitude

Discipline is properly imposed for attorney's acts involving moral turpitude whether or not they relate to conduct in attorney's professional capacity. *In re Schwartz (1982) 31 Cal. 3d 395, 401, 182 Cal. Rptr. 640, 644 P.2d 833*

Pattern of misconduct can amount to moral turpitude even where attorney commits no intentionally dishonest acts, such as where attorney habitually disregards clients' interests and fails to communicate. *In the Matter of Hindin (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 657, 685-686*

[o] Practicing While Suspended

Practicing law or holding oneself out as practicing or entitled to practice law while under suspension is unlawful under *Bus. & Prof. Code § 6126* and is contempt under *Bus. & Prof. Code § 6127*. *In re Johnson (1992) 1 Cal. 4th 689, 696 n.2, 4 Cal. Rptr. 2d 170, 822 P.2d 1317*

Practice of law while under suspension is basis for discipline. *Morgan v. State Bar (1990) 51 Cal. 3d 598, 602-604, 606-608, 274 Cal. Rptr. 8, 797 P.2d 1186*

A "defrocked" attorney practicing law is held to a different standard then a layperson practicing law. *Benninghoff v. Superior Court (2006) 136 Cal. App. 4th 61, 67-68, 38 Cal. Rptr. 3d 759*

[13] Probation

Failure to file affidavit re compliance with probation conditions, as required by former Cal. Rules of Ct., Rule 955(c) (now see *Rule 9.20(c)*), is not excused by fact that attorney presently has no clients. *Bercovich v. State Bar (1990) 50 Cal. 3d 116, 129-130, 266 Cal. Rptr. 341, 785 P.2d 889*

[14] Rehabilitation

Requiring attorney to demonstrate his or her learning in general law at rehabilitation hearing before being able to resume practice after suspension is unwarranted if disciplined attorney's learning in general law was never at issue in disciplinary proceeding. *Snyder v. State Bar (1990) 49 Cal. 3d 1302, 1311-1312, 265 Cal. Rptr. 429, 783 P.2d 1146*

Rehabilitation requires lengthy period of exemplary conduct. *In the Matter of Ainsworth (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 894, 899*

[15] Reinstatement

Petitioner's failure to comply with former Cal. Rules of Ct., Rule 955 (now see *Cal. Rules of Ct., Rule 9.20*), properly considered as factor in denying reinstatement if there is significant infirmity in showing of rehabilitation. *Hippard v. State Bar (1989) 49 Cal. 3d 1084, 1096-1097, 264 Cal. Rptr. 684, 782 P.2d 1140*

Petitioner's discharge in bankruptcy of indebtedness to clients arising from misconduct did not preclude State Bar from considering, as indicator of rehabilitation, attorney's efforts to make restitution. *Hippard v. State Bar (1989) 49 Cal. 3d 1084, 1088, 1092-1095, 264 Cal. Rptr. 684, 782 P.2d 1140*

Petitioner seeking reinstatement is required to show by most clear and convincing evidence that efforts made towards rehabilitation have been successful. *Hippard v. State Bar (1989) 49 Cal. 3d 1084, 1092, 264 Cal. Rptr. 684, 782 P.2d 1140*

Stipulation to inactive enrollment pending Supreme Court disciplinary order is equivalent of interim suspension for purposes of Rules of Procedure specifying that petition for reinstatement may not be filed within five years after effective date of interim suspension. *In re Lamb (1989) 49 Cal. 3d 239, 248-249, 260 Cal. Rptr. 856, 776 P.2d 765*

In a disciplinary proceeding, when the State Bar has the burden of proving charges by clear and convincing evidence, the accused is entitled to the exercise of reasonable doubts, but in a reinstatement proceeding, when the petitioner unquestionably has the burden of presenting clear and convincing evidence of his or her qualifications, petitioner cannot be given the benefit of reasonable doubts. *In the Matter of Salant (Review Dept 1999) 4 Cal. State Bar Ct. Rptr. 1, 7*

Failure to comply with *Bus. & Prof. Code § 6140.5(c)* (obligation to reimburse Client Security Fund) does not preclude filing of reinstatement petition. *In the Matter of Jaurequi (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 56, 59*

Under Cal. State B. Rules Proc., Rule 665(a), passage of professional responsibility examination is not a condition precedent to filing of petition for reinstatement. *In the Matter of Sheppard (Review Dept 1999) 4 Cal. State Bar Ct. Rptr. 91, 96-97*

Petitioner seeking reinstatement based on rehabilitation must show lengthy period of exemplary conduct and present leaning and ability in the general law. *In the Matter of Ainsworth (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 894, 899-900*

[16] Review by Supreme Court

Disbarred attorney not entitled to written opinion from California Supreme Court upholding State Bar Court's disbarment order; Supreme Court may summarily deny attorney's petition for review without violating constitution. *In re Rose (2000) 22 Cal. 4th 430, 448-449, 456, 93 Cal. Rptr. 2d 298, 993 P.2d 956*

Disciplinary results in previous Supreme Court disciplinary cases are not binding on Supreme Court, though such results are entitled to consideration by *Court. Rodgers v. State Bar (1989) 48 Cal. 3d 300, 318, 256 Cal. Rptr. 381, 768 P.2d 1058*

Supreme Court accords limited weight to State Bar disciplinary recommendation based on ambiguous set of findings. *Carter v. State Bar (1988) 44 Cal. 3d 1091, 1100, 245 Cal. Rptr. 628, 751 P.2d 894*

Accordance by Supreme Court of greater deference to findings of Hearing Department than to findings of Review Department was inappropriate when no findings rested on conflicting testimony, attorney was sole testifying witness at hearing, attorney appeared before Review Department, and State Bar's case rested largely on documentary evidence.

Coppock v. State Bar (1988) 44 Cal. 3d 665, 677-678, 244 Cal. Rptr. 462, 749 P.2d 1317

Recommendation by Review Department of State Bar Court entitled to greater weight than that of hearing panel, but Supreme Court renders ultimate determination regarding discipline. *Bach v. State Bar (1987) 43 Cal. 3d 848, 856, 239 Cal. Rptr. 302, 740 P.2d 414*

Evidence not presented to State Bar during its review process generally not considered by Supreme Court; Court particularly wary of extrinsic evidence consisting of opinions about attorney's mental attitude based largely on attorney's own out-of-court statements. *Rosenthal v. State Bar (1987) 43 Cal. 3d 658, 663, 238 Cal. Rptr. 394, 738 P.2d 740*

Supreme Court exercises independent judgment in determining appropriate punishment for professional misconduct, and when appropriate, imposes more severe discipline than that recommended by either Review Department or hearing panel. *Franklin v. State Bar (1986) 41 Cal. 3d 700, 709-710, 224 Cal. Rptr. 738, 715 P.2d 699*

Finding by disciplinary board that rests primarily on testimonial evidence entitled to deference; Supreme Court not compelled to set aside finding on basis of simple assertion that supporting testimony is untrue. *Chefsky v. State Bar (1984) 36 Cal. 3d 116, 127, 202 Cal. Rptr. 349, 680 P.2d 82*

In seeking Supreme Court review of recommendation of disciplinary board, petitioner has burden of showing findings are not supported by evidence or are otherwise improper. *Wren v. State Bar (1983) 34 Cal. 3d 81, 89-90, 192 Cal. Rptr. 743, 665 P.2d 515*

[17] Rules of Professional Conduct

Ignorance of Rules of Professional Conduct is not excuse for their violation. *Ainsworth v. State Bar (1988) 46 Cal. 3d 1218, 1234, 252 Cal. Rptr. 267, 762 P.2d 431 , cert. denied, 489 U.S. 1081*

Rules of Professional Conduct intended not only to establish ethical standards for members of the bar, but also designed to protect public and to promote respect andconfidence in the legal profession. *Chambers v. Kay (2002) 29 Cal. 4th 142, 158, 126 Cal. Rptr. 2d 536, 56 P. 3d 645* ; *Ames v. State Bar (1973) 8 Cal. 3d 910, 917, 106 Cal. Rptr. 489, 506 P.2d 625*

Meaning of "willful breach" as used in *Bus. & Prof. Code § 6077*, permitting discipline of members of State Bar for willful breach of Rules of Professional Conduct. *Abeles v. State Bar of California (1973) 9 Cal. 3d 603, 610-611, 108 Cal. Rptr. 359, 510 P.2d 719*

[18] Self-Incrimination

Attorney is protected by privilege against self-incrimination [*U.S. Const., amend. V*] in disciplinary proceeding; state is precluded from imposing disbarment as price for asserting privilege [*U.S. Const., amends. V, XIV*]. *Spevack v. Klein (1967) 385 U.S. 511, 514, 87 S. Ct. 625, 17 L. Ed. 2d 574*

Attorney against whom disciplinary proceeding is brought does not have complete immunity from testifying as does criminal defendant; attorney may be called to testify but may decline to answer questions on ground that testimony would tend to incriminate him or her [*U.S. Const., amends. V, XIV*; *Cal. Const., art. I, § 13*]. *Black v. State Bar (1972) 7 Cal. 3d 676, 688, 103 Cal. Rptr. 288, 499 P.2d 968*

State Bar in disciplinary proceeding not required to give admonitions to accused attorney called to testify, regarding privilege against self-incrimination [*U.S. Const., amends. V, XIV*; *Cal. Const., art. I, § 13*]. *Black v. State Bar (1972)*

7 Cal. 3d 676, 688, 693, 103 Cal. Rptr. 288, 499 P.2d 968

Attorney waived privilege against self-incrimination [*U.S. Const., amends. V, XIV*; *Cal. Const., art. I, § 13*] by testifying fully at his disciplinary proceeding without objecting to any question. *Black v. State Bar (1972) 7 Cal. 3d 676, 688, 693, 103 Cal. Rptr. 288, 499 P.2d 968*

[19] State Bar Court

Legislation permitting appointment of State Bar Court hearing judges by Governor and state Legislature, instead of California Supreme Court, does not violate separation of powers doctrine. *Obrien v. Jones (2000) 23 Cal. 4th 40, 56, 96 Cal. Rptr. 2d 205, 999 P.2d 95*

[20] Stipulations Regarding Facts and Discipline

In considering increased discipline, Supreme Court may relieve attorney of stipulation's legal conclusions, but attorney remains bound by stipulation's factual recitals. *Pineda v. State Bar (1989) 49 Cal. 3d 753, 756, 263 Cal. Rptr. 377, 781 P.2d 1*

Refusal by Review Department to allow attorney to withdraw factual stipulation does not constitute denial of fair hearing when purported justification for withdrawal of stipulation was attorney's unsupported contention that examiner improperly withheld evidence at disciplinary hearing. *Coppock v. State Bar (1988) 44 Cal. 3d 665, 674-676, 244 Cal. Rptr. 462, 749 P.2d 1317*

Attorney who enters stipulation as to facts (and not to discipline) with hearing panel in contemplation of panel's announced disciplinary recommendation is not relieved of factual stipulation when Review Department later imposes more severe discipline. *Schneider v. State Bar (1987) 43 Cal. 3d 784, 793-794, 239 Cal. Rptr. 111, 739 P.2d 1279*

Attorney was not relieved of factual stipulations made by him, even though discipline imposed was greater, because stipulation itself provided for modification of discipline. *Smith v. State Bar (1985) 38 Cal. 3d 525, 533, 213 Cal. Rptr. 236, 698 P.2d 139*

A stipulation for a private reproval is not breached by posting a notice of an attorneys' public record of discipline on the State Bar website. *Mack v. State Bar (2001) 92 Cal. App. 4th 957, 112 Cal. Rptr. 2d 341*

Attorney's cooperation with disciplinary investigation by stipulating to facts which were difficult to prove is mitigating factor. *In the Matter of Silver (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 902, 906*

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsClient FundsLegal EthicsClient RelationsEffective RepresentationLegal EthicsProfessional ConductSubstance AbuseLegal EthicsSanctionsDisbarmentsLegal EthicsSanctionsSuspensions

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 71 ATTORNEY DISCIPLINE
PART III. RESEARCH GUIDE

6-71 California Forms of Pleading and Practice--Annotated § 71.145

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.145 Law Reviews

Comment, *Professional-Client Sex: Is Criminal Liability an Appropriate Means of Enforcing Professional Responsibility, 40 UCLA L. Rev. 1275 (1993)*

Keyes, *The Gross Inadequacy of Reimbursement of Costs by Disciplined Attorneys and Lack of Fines,* 26 Bev. Hills B.A.J. 184 (Fall 1992)

Perrine, *What to Do if the State Bar Calls,* 9(8) Cal. Law. 56 (1989)

Stein, *Of Impure Hearts and Empty Heads: A Hierarchy of Rule 11 Violations, 31 Santa Clara L. Rev. 393 (1991)*

Miller & Warren, *Conflicts of Interest and Ethical Issues for the Inside and Outside Counsel,* 40(2) Bus. Law. 631 (1985)

Comment, *California State Bar Complainants' Privilege Against Suit for Malicious Prosecution, 12 San Fernando V.L. Rev. 77 (1984)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsConflicts of Interest

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 71 ATTORNEY DISCIPLINE
PART III. RESEARCH GUIDE

6-71 California Forms of Pleading and Practice--Annotated § 71.146

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.146 Text References

Witkin, California Procedure, vol. 1, *Attorneys*, §§ 476, 477, 526-714 (4th ed. 1996)

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 71 ATTORNEY DISCIPLINE
PART IV. FORMS

6-71 California Forms of Pleading and Practice--Annotated § 71.160

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.160 Motion to Quash Subpoena [Cal. State B. Rules Proc., Rules 155(c), 156] and Supporting Declaration [Code Civ. Proc. § 2015.5]

[1] FORM Motion to Quash Subpoena [Cal. State B. Rules Proc., Rules 155(d), 156] and Supporting Declaration [Code Civ. Proc. § 2015.5]

[*Attorney identification*]

THE STATE BAR COURT OF THE
STATE BAR OF CALIFORNIA
HEARING DEPARTMENT--_____ [LOS ANGELES *or* SAN FRANCISCO]

	)	
	)	NO. _____
In the Matter of	)	MOTION TO QUASH
_____ [*name*],	)	SUBPOENA AND
A Member of the State Bar.	)	SUPPORTING
	)	DECLARATION
	)	

_____

TO THE STATE BAR COURT OF THE STATE BAR OF CALIFORNIA:

Respondent _____ [*name*] hereby requests that the subpoena issued in the above proceeding on

_____ [*date*], requiring _____ [*name of witness*] to attend the hearing in the above matter [and to produce _____ (*specify items to be produced under subpoena*)], be quashed on the ground(s) that _____ [*specify legal ground(s) for quashing of subpoena, e.g.,* the items sought to be produced pursuant to the subpoena arenot relevant to any issue in these proceedings]. The facts supporting this motion are set forth in the declaration of _____ [*name of declarant*] set forth below.
Dated: _____.

_____ [*firm name,if any*]
By:_____ [*signature*]
_____ [*typed name*]
[Attorney for] Respondent_____ [*name*]

DECLARATION OF _____[*name*]
IN SUPPORT OF MOTION TO QUASH SUBPOENA

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law who is the attorney of record herein for _____ (*name of Bar member subject to disciplinary proceeding*)].

2. On _____ [*date*], a subpoena issued in the above-entitled cause was served on _____ [*name of witness*], as a witness on behalf of _____ [*specify, e.g.,* the State Bar] at the hearing of the above-entitled matter [and for the production of the following items at that hearing: _____ (*specify items, e.g.,* the office records of _____ (*name of member subject to disciplinary proceeding*)].

3. _____ [*State reasons why subpoena should be quashed, e.g,* Good cause does not exist for the production of the subpoenaed records because the parties have entered stipulations with regard to the matters that would be covered by those records, and they are therefore irrelevant to the proceeding. A copy of the stipulation is attached hereto as Exhibit _____].

4. Therefore, it is requested that a motion to quash the above-mentioned subpoena be granted.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*declarant's signature*]

[*Attach proof of service*]

CAUTION:
The motion should be supported by a memorandum and declarations pursuant to *Cal. Rules of Ct., Rule 3.1113(a),* Cal. State B. Rules Prac., Rule 1110, Cal. State B. Rules Proc., Rule 105.

[2] Use of Form

This form is a motion to quash a subpoena issued in a disciplinary proceeding for the attendance of a witness at the

hearing and, optionally, to quash the production of certain items by that witness [*see Bus. & Prof. Code §§ 6049(c), 6050, 6051.1* (use of subpoenas in State Bar proceedings; motions to quash)]. The form includes a statement of supporting facts in the form of a declaration under penalty of perjury as required by the California State Bar Rules of Procedure [Cal. State B. Rules Proc., Rules 105(c), 155(c)(3); *see Code Civ. Proc. § 2015.5* (declaration under penalty of perjury)].

The papers must be filed in duplicate with the Clerk of the State Bar Court [Cal. State B. Rules Prac., Rules 1110(e), 1112]. At least one of the papers required tobe filed in duplicate must bear an original handwritten signature, as distinguished from a photocopied, typewritten, or other duplicated signature; that paper is the original of the duplicate documents filed [Cal. State B. Rules Prac., Rule 1110(c)].

For discussion of service and other procedures involving a motion to quash a subpoena, see *§ 71.56[4][b][iv]*.

[3] Administrative Regulations

Format, service, and filing of papers generally. Cal. State B. Rules Prac., Rule 1110-1112

Motions generally. Cal. State B. Rules Proc., Rule 105

Hearing on motion to quash. Cal. State B. Rules Proc., Rule 156

Motions in Hearing Department. Cal. State B. Rules Prac., Rule 1200

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Chapter 71 ATTORNEY DISCIPLINE
PART IV. FORMS

6-71 California Forms of Pleading and Practice--Annotated § 71.161

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.161 Motion for Abatement of Proceeding [Cal. State B. Rules Proc., Rule 116]

[1] FORM Motion for Abatement of Proceeding [Cal. State B. Rules Proc., Rule 116]

[*Attorney identification*]

THE STATE BAR COURT OF THE
STATE BAR OF CALIFORNIA
HEARING DEPARTMENT--_____ [LOS ANGELES *or* SAN FRANCISCO]

In the Matter of _____ [*name*], A Member of the State Bar.	)))))	NO. _____ MOTION FOR ORDER ABATING PROCEEDINGS

TO THE STATE BAR COURT OF THE STATE BAR OF CALIFORNIA:

The above-named member of the State Bar hereby requests that the above-referenced proceeding be abated until the resolution of _____ [*specify related proceeding, e.g.,* the pending civil litigation in the _____ Court of _____ County, entitled _____ (*name of plaintiff*) vs. _____ (*name of defendant*), No. _____, which involves the subject matter of the present proceeding. A copy of the complaint and other pleadings on file in that action are attached hereto as Exhibits

_____ - _____.]

The grounds for the motion to abate the present disciplinary proceeding are the following: _____ [*specify, e.g.,* (1) to a great extent there will be overlap in the issues, judicial resolution of which would expedite the above-referenced proceeding; (2) if the above-referenced proceeding is not abated, witnesses and evidence will not be available in the proceeding; and (3) the member will therefore be prejudiced by the failure to withhold further action in the above-referenced proceeding until the resolution of the pending civil proceeding].
Dated: _____.

_____ [*firm name,if any*]
By:_____ [*signature*]
_____ [*typed name*]
[Attorney for] Respondent_____[*name*]

[*Attach proof of service*]

CAUTION:
The motion should be supported by a memorandum and declarations pursuant to *Cal. Rules of Ct., Rule 3.1113(a)*, Cal. State B. Rules Prac., Rule 1110, Cal. State B. Rules Proc., Rule 105.

[2] Use of Form

This form is a motion for an order abating a disciplinary proceeding because a related proceeding is pending that involves the same subject matter [*see* Cal. State B. Rules Proc., Rule 116]. For purposes of such a motion, a "related proceeding" is any civil, criminal, administrative, or State Bar Court proceeding in which a party, real party in interest, or witness is also a party or witness in the proceeding before the Court, or any civil, criminal, administrative, or State Bar Court proceeding that involves the subject matter of the proceeding before the Court [Cal. State B. Rules Proc., Rule 116(c)].

For discussion of Cal. State B. Rules Proc., Rule 116, see *§ 71.58*.

The motion must be filed in duplicate with the Clerk of the State Bar Court [Cal. State B. Rules Prac., Rules 1110(e), 1112]. At least one of the papers required to be filed in duplicate must bear an original handwritten signature, as distinguished from a photocopied, typewritten, or other duplicated signature; that paper is the original of the duplicate documents filed [Cal. State B. Rules Prac., Rule 1110(c)].

[3] Cross References

For a related form, see *§ 71.160*.

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
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6-71 California Forms of Pleading and Practice--Annotated § 71.162

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.162 Response to Notice of Disciplinary Charges [Cal. State B. Rules Proc., Rule 103]

[1] FORM Response to Notice of Disciplinary Charges [Cal. State B. Rules Proc., Rule 103]

[*Attorney identification*]

THE STATE BAR COURT OF THE
STATE BAR OF CALIFORNIA
HEARING DEPARTMENT--_____ [LOS ANGELES *or* SAN FRANCISCO]

	)	
In the Matter of	)	NO. _____
_____ [*name*],	)	RESPONSE TO NOTICE
A Member of the State Bar.	)	OF DISCIPLINARY CHARGES
	)	

_____

Respondent, _____ [*name of attorney*], responds to the notice of disciplinary charges filed herein as follows:

1. The address to which all further notices to respondent in relation to these proceedings may be sent is as follows:

_____ [*street address*]

_____ [*city, state, and zip code*]

2. Respondent specifically denies each of the allegations and charges contained in [Paragraph(s) _____ of] the notice of disciplinary charges as follows: [, except that Respondent specifically admits the following: _____ (*specify any facts or charges admitted by respondent*)].

3. The matter and transactions complained of, which are the subject of this proceeding, may be fully and accurately explained as follows: _____ [*set forth explanation in clear and concise narrative form, using subparagraphs as necessary*].

FIRST AFFIRMATIVE DEFENSE

_____ [*Set forth any new matter alleged by way of defense, e.g.,* The acts charged in the notice of disciplinary charges as unlawful and unethical advertising were at all times protected by respondent's rights of freedom of speech under the Constitutions of the United States and the State of California].

SECOND AFFIRMATIVE DEFENSE

The allegations of the notice of disciplinary charges are insufficient to chargeprofessional misconduct in that _____ [*specify*].

[*Insert additional affirmative defenses as appropriate*]

EXTENUATING AND MITIGATING CIRCUMSTANCES

In the event respondent is found culpable of unprofessional conduct as charged in the notice of disciplinary charges, respondent respectfully submits the following facts in mitigation without admitting that such charges are true or that the facts alleged therein constitute professional misconduct:

[*Under separately numbered paragraphs, set forth extenuating or mitigating circumstances, such as the following:*]

1. Respondent has practiced law in the State of California for _____ years without any prior charges of misconduct or prior disciplinary record. Throughout his/her professional career, respondent has successfully endeavored to maintain a high level of respect and an excellent reputation among his/her fellow attorneys and the courts for honesty, integrity, and professional competence in diligently and vigorously representing his clients.

2. During the period in which the charged acts of misconduct allegedly occurred, and between _____ and _____ [*dates*], respondent was experiencing serious domestic difficulties and turmoil due to a pending dissolution of his/her marriage. Because of such difficulties, respondent was emotionally unable to devote the degree of attention and service to his/her professional duties that his/her active practice demanded. As a consequence thereof, the incident complained of occurred. Since _____ [*date*], however, respondent has completely recovered from the difficulties of his/her dissolution of marriage and has straightened out his/her personal affairs so that he/she is now able to devote the proper attention to his/her practice and professional activities.

[*CONTINUE*]

WHEREFORE, respondent prays that the Hearing Panel find that the act(s) charged did not constitute professional misconduct or, if misconduct is found, that it be excused by virtue of the mitigating circumstances submitted.
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
[Attorney for] Respondent_____[*name*]

[*Attach proof of service*]

[2] Use of Form

This form is a response to a notice of disciplinary charges initiating a disciplinary proceeding for professional misconduct. For discussion of notices of disciplinary charges, see *§ 71.61[1]*.

The form provides an address to which all further notices to the respondent may be sent [*see* Cal. State B. Rules Proc., Rule 103(c)(1) (requiring address in response); *see also* Cal. State B. Rules Prac., Rule 1110(b)(1) (requiring respondent's or respondent's attorney's State Bar number to appear in "attorney identification" section of response)]. It also contests charges against the respondent by denying and/or explaining the alleged misconduct, setting forth affirmative defenses to the notice of disciplinary charges, and setting forth any mitigating circumstances [*see* Cal. State B. Rules Proc., Rule 103(c)(2)]. For discussion of the effect of mitigating circumstances, see *§ 71.31[2][b], [4]*.

Paragraph 2 of the form contains an optional provision for admitting facts that the responding member does not intend to dispute. Counsel for the respondent should consider carefully whether or not to admit facts in the response. On the one hand, no specific sanctions are provided for failure to admit facts that are later proved by the State Bar. On the other hand, if the respondent denies matters that were obviously true and easily susceptible to proof by the State Bar, this could arguably be deemed an aggravating factor that may increase the discipline imposed if the respondent is ultimately found culpable [*see* Cal. State B. Stds. for Att'y Sanctions, Std. 1.2(b)(vi) (lack of candor and cooperation during disciplinary proceedings is aggravating factor); *see also § 71.31[2][b]*].

The response must be filed within 20 days after service of the notice of disciplinary charges to avoid default proceedings and involuntary inactive enrollment [*see* Cal. State B. Rules Proc., Rule 103(a), (b)]. In a written stipulation, the parties may agree to one extension of time in which the response must be filed within 15 days before its expiration and file the said stipulation with the clerk before the original expiration date [Cal. State B. Rules Proc., Rules 103(b), 1112].

The response must be filed in duplicate with the Clerk of the State Bar Court [Cal. State B. Rules Prac., Rules 1110(e), 1112]. At least one of the papers required to be filed in duplicate must bear an original handwritten signature, as distinguished from a photocopied, typewritten, or other duplicated signature; that paper is the original of the duplicate documents filed [Cal. State B. Rules Prac., Rule 1110(c)].

For discussion of responses to notices of disciplinary charges generally, and the required procedures with regard to responses, see *§ 71.61[3]*.

[3] Administrative Regulations

Response to notice of disciplinary charges; time to file; contents. Cal. State B. Rules Proc., Rule 103(a)-(c)

Default procedure for failure to respond to notice in timely manner. Cal. State B. Rules Proc., Rules 103(d), 200

[4] Cross References

See also *§ 71.160*.

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
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6-71 California Forms of Pleading and Practice--Annotated § 71.163

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.163 Motion for Transfer of Venue [Cal. State B. Rules Proc., Rule 54]

[1] FORM Motion for Transfer of Venue [Cal. State B. Rules Proc., Rule 54]

[*Attorney identification*]

THE STATE BAR COURT OF THE
STATE BAR OF CALIFORNIA
HEARING DEPARTMENT--_____ [LOS ANGELES *or*
SAN FRANCISCO]

	)	
In the Matter of	)	NO. _____
_____ [*name*],	)	MOTION FOR TRANSFER OF VENUE
A Member of the State Bar.	)	
	)	

TO THE STATE BAR COURT OF THE STATE BAR OF CALIFORNIA:

The above-named member of the State Bar hereby moves that the place of hearing of the above-referenced proceeding be moved from _____ County to _____ County. This motion is based on the ground that _____ [*specify, e.g.*, the present venue in this proceeding is improper under California State Bar Rules of Procedure, Rule 52, in that the above-named member does not reside in _____ County or in

any of the other counties specified in subdivision _____ of that Rule, he/she does not maintain his/her office in any of those counties, nor was the alleged offense committed in any of those counties. The above-named member resides and maintains his/her principal office for the practice of law in _____ County.]

Therefore, the ends of justice would be best served by moving the place of hearing to _____ County.
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
[Attorney for] Respondent _____ [*name*]
[*Attach proof of service*]

CAUTION:
The motion should be supported by a memorandum and declarations pursuant to *Cal. Rules of Ct., Rule 3.1113(a)*, Cal. State B. Rules Prac., Rule 1110, Cal. State B. Rules Proc., Rule 105.

[2] Use of Form

This form is a motion to transfer the venue of the hearing of the disciplinary proceeding. Cal. State B. Rules Proc., Rule 54(b), states that a motion for transfer of venue may be made on the ground that the proceeding was initiated in an improper venue (*see* Cal. State B. Rules Proc., Rule 52), or on the ground that the proceeding should be transferred for the convenience of witnesses and to promote the ends of justice. This form specifies the former ground. For discussion of Rule 54 and venue generally, see *§ 71.65*.

The motion must be filed in duplicate with the Clerk of the State Bar Court where the proceeding is pending [Cal. State B. Rules Proc., Rule 54(a); Cal. State B. Rules Prac., Rules 1110(e), 1112]. At least one of the papers required to be filed in duplicate must bear an original handwritten signature, as distinguished from a photocopied, typewritten, or other duplicated signature; that paper is the original of the duplicate documents filed [Cal. State B. Rules Prac., Rule 1110(c)]. Rulings on motions to transfer are reviewable under Cal State B. Rules Proc., Rule 300.

[3] Cross References

See also *§ 71.160*.

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6-71 California Forms of Pleading and Practice--Annotated § 71.164

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.164 Motion for Continuance [Cal. State B. Rules Prac., Rule 1131] and Supporting Declaration [Code Civ. Proc. § 2015.5]

[1] FORM Motion for Continuance [Cal. State B. Rules Prac., Rule 1131] and Supporting Declaration [Code Civ. Proc. § 2015.5]

[*Attorney identification*]

THE STATE BAR COURT OF THE
STATE BAR OF CALIFORNIA
HEARING DEPARTMENT--_____ [LOS ANGELES *or*
SAN FRANCISCO]

	)	
	)	NO. _____
In the Matter of	)	MOTION FOR
_____ [*name*],	)	CONTINUANCE AND SUPPORTING
A Member of the State Bar.	)	DECLARATION
	)	

_____

TO THE STATE BAR COURT OF THE STATE BAR OF CALIFORNIA:

The above-named respondent requests a continuance of the hearing date in the above-entitled matter

_____ [from _____ [*scheduled date*] to _____ [*requested date*] *or* for _____ days].

This motion is made on the ground(s) that _____ [*specify general ground(s) for motion, e.g.,* respondent was seriously injured in an automobile accident that occurred on _____ (*date*), in _____ (*location*). Because of the continuing effects of the accident, respondent is unable to defend his/her case, to assist counsel with the preparation of the case, or to be present at a hearing. Based on the advice of his/her physician, respondent believes that, if this continuance is granted, respondent will be physically well enough to participate and appear at the hearing on that future date].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*specify*], on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name,if any*]
By:_____ [*signature*]
_____ [*typed name*]
[Attorney for] Respondent _____ [*name*]

SUPPORTING DECLARATION OF _____ [*name*]

1. I, _____ [*name*], declare:

2. I am _____ [*identify declarant, e.g.,* a physician and surgeon duly licensed as such and engaged in the practice of my profession in California. Respondent has been a patient of mine since _____ (*date*).]

3. _____ [*Set forth facts showing good cause for continuance, e.g.,* At the time of my first examination of respondent, respondent informed me that he/she had been injured approximately 20 minutes earlier in an automobile collision. I found respondent to be suffering from fractures in both legs and a severe concussion. He/she was hospitalized from _____ to _____ (*dates*), and is presently recuperating at home. Because of the continuing effects of the accident, respondent has suffered from frequent dizzy spells and is unable to walk without assistance. To attend a court hearing would be extremely injurious to his/her health, and to testify would be dangerous to his/her physical well-being. The prognosis is good, and, in the absence of any complications, respondent should be able to attend a hearing on or after _____ (*date*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[*Attach proof of service*]

CAUTION:
The motion should be supported by a memorandum and declarations pursuant to *Cal. Rules of Ct., Rule 3.1113(a),* Cal. State B. Rules Prac., Rule 1110, Cal. State B. Rules Proc., Rule 105.

[2] Use of Form

This form is a motion for continuance of the hearing date of a disciplinary proceeding. Continuances in disciplinary proceedings are disfavored [*see* Cal. State B. Rules Prac., Rule 1131(a)]. Consequently, the attorney should be prepared to set forth grounds showing very good cause for the continuance and facts to support the request [*see* Cal. State B. Rules Prac., Rule 1131(c); Cal. State B. Rules Proc., Rule 115]. The motion for a continuance must be accompanied by supporting declarations [Cal. State B. Rules Proc., Rule 105(c); *see Code Civ. Proc. § 2015.5* (declaration under penalty of perjury)].

The motion must be filed in duplicate with the Clerk of the State Bar Court [Cal. State B. Provisional Rules Prac., Rules 1110(e), 1112]. At least one of the papers required to be filed in duplicate must bear an original handwritten signature, as distinguished from a photocopied, typewritten, or other duplicated signature; that paper is the original of the duplicate documents filed [Cal. State B. Rules Prac., Rule 1110(c)].

For discussion of Cal. State B. Rules Prac., Rule 1131, setting forth the requirements for obtaining a continuance, see *§ 71.144[8][b]*.

[3] Cross References

See also *§ 71.160*.

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6-71 California Forms of Pleading and Practice--Annotated § 71.165

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.165 Resignation With Disciplinary Charges Pending
[Cal. Rules of Ct., Rule 9.21]

[1] FORM Resignation With Disciplinary Charges Pending
[Cal. Rules of Ct., Rule 9.21]

RESIGNATION FROM MEMBERSHIP IN STATE BAR

I, _____ [*name of member*], against whom charges are pending, hereby resign as a member of the State Bar of California and relinquish all right to practice law in the State of California.

I agree that, in the event that this resignation is accepted and I later file a petition for reinstatement, the State Bar will consider in connection therewith all disciplinary matters and proceedings against me at the time this resignation is accepted, in addition to other appropriate matters.

I further agree that the Supreme Court may decline to accept my resignation unless I reach agreement with the Chief Trial Counsel on a written stipulation as to facts and conclusions of law regarding the disciplinary matters and proceedings that were pending against me at the time of my resignation.

I further agree that, on the filing of this resignation by the Office of the Clerk, State Bar Court, I will be transferred to inactive membership of the State Bar. On such transfer, I acknowledge that I will be ineligible to practice law or to advertise or hold myself out as practicing or as entitled to practice law.

I further agree that, within 30 days of the filing of the resignation by the Office of the Clerk, State Bar Court, I will perform the acts specified in *California Rules of Court, Rule 9.20(a), (b)* and, within 40 days of the date of filing of this resignation by the Office of the Clerk, State Bar Court, I will notify that office as specified in *California Rules of Court, Rule 9.20(c)*.

Dated: _____.

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form is for use by an attorney who wishes to resign with disciplinary charges pending. The resignation must be in substantially the form specified in *Cal. Rules of Ct., Rule 9.21(b)* [*Cal. Rules of Ct., Rule 9.21(a)*].

For discussion of procedure for resignation with charges pending, see *§ 71.90*.

[3] Cross References

See also *§ 71.160*.

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6-71 California Forms of Pleading and Practice--Annotated § 71.166

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.166 Motion to Vacate Temporary Suspension Following Criminal Conviction [Bus. & Prof. Code § 6102(a); Cal. State B. Rules of Proc., Rule 320(b)]

[1] FORM Motion to Vacate Temporary Suspension Following Criminal Conviction [Bus. & Prof. Code § 6102(a); Cal. State B. Rules of Proc., Rule 320(b)]

[*Attorney identification*]

THE STATE BAR COURT OF THE
STATE BAR OF CALIFORNIA
REVIEW DEPARTMENT

	)	
In the Matter of	)	NO. _____
_____ [*name*],	)	MOTION TO VACATE TEMPORARY
A Member of the State Bar.	)	SUSPENSION
	)	

TO THE STATE BAR COURT OF THE STATE BAR OF CALIFORNIA:

The above-named member of the State Bar _____ [*name*] respectfully requests, pursuant to *Business and Professions Code Section 6102(a)* and Cal. State B. Rules of Proc., Rules 320(b) and 321(b), that this Court vacate the temporary suspension from membership in the State Bar of California and from the practice of law in this state,

which was ordered by respondent State Bar Court on _____ [*date*].

In support of this motion, the member alleges:

1. Member was admitted to the State Bar of California on _____ [*date*], and, since that date, has been an active member in good standing of the State Bar and engaged in the practice of law in _____ [*city*], California.

2. Criminal proceedings were instituted against member by _____ [*name of prosecuting agency*] in _____ [*city and county*] on _____ [*date*], alleging the following charges: _____ [*specify charges*].

3. A judgment of conviction on charges of _____ [*specify crime(s) of which member was convicted*] was entered on _____ [*date*].

[*EITHER*]

4. The judgment of conviction will become final on _____ [*date*].

[*OR*]

4. Member _____ [has filed *or* will file] an appeal of the judgment of conviction on _____ [*date*].

[*CONTINUE*]

5. Member sought review of the temporary suspension on _____ [*date*], before the Presiding Judge of the State Bar Court, and a final ruling on the matter was obtained on _____ [*date*].

6. Good cause exists for the Court to vacate the temporary order of suspension of member in that _____ [*specify, e.g.,* the crime for which member was convicted did not constitute moral turpitude (nor was it a felony under the laws of California or of the United States). _____ (*Add supporting factual assertions explaining why the crime did not involve moral turpitude and/or authority for statement that the crime does not constitute a felony*).]

7. The State Bar Court is authorized under Cal. State B. Rules of Proc., Rules 320(b)(1) and 321(b), to vacate an order of interim suspension issued under *Cal. Rules of Ct., Rule 9.10(e)*, by the California Supreme Court following a criminal conviction.

WHEREFORE, member respectfully requests that this Court issue an order setting aside the order of temporary suspension issued on _____ [*date*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
[Attorney for] Member_____ [*name*]

[*Attach proof of service*]

CAUTION:
The motion should be supported by a memorandum and declarations pursuant to *Cal. Rules of Ct., Rule 3.1113(a)*, Cal. State B. Rules Prac., Rule 1110, Cal. State B. Rules Proc., Rules 105 and 321(b).

[2] Use of Form

This form is a motion for review by the Review Department of the State Bar in order to vacate a temporary suspension ordered by the California Supreme Court under *Bus. & Prof. Code § 6102(a)* (immediate suspension of attorney convicted of felony or crime involving moral turpitude) [*see* Cal. State B. Rules of Proc., Rules 320(b)(1) and 321(b); *see also Cal. Rules of Ct., Rule 9.10(e)*].

The motion must be filed with the clerk of the State Bar Court within 15 days after the filing of the suspension order, shall show good cause for the relief request, and must show proof of service on the Director, Office of Trials [Cal. State B. Rules of Proc., Rule 321(a)(1)].

The motion can be modified to petition for review by the California Supreme Court within 15 days after written notice of the State Bar Court's adverse decision [*Cal. Rules of Ct., Rule 9.13(c)*]. In this case, the petition must be accompanied by a record adequate to permit review of the ruling by the California Supreme Court, including all of the following [*Cal. Rules of Ct., Rule 9.13(e)*]:

- Copies of all documents and exhibits submitted to the State Bar Court supporting and opposing the petitioner's position.

- Copies of all other documents submitted to the State Bar Court that are necessary for a complete understanding of the case and the ruling.

- A transcript of the proceedings in the State Bar Court leading to the decision or, if a transcript is unavailable, a declaration by counsel (1) explaining why a transcript is unavailable, and (2) fairly summarizing the proceedings, including arguments by counsel and the basis of the State Bar Court's decision, if stated, or a declaration by counsel stating that the transcript has been ordered, the date it was ordered, and the date it is expected to be filed, which must be a date prior to any action requested of the Supreme Court other than issuance of a stay supported by other parts of the record.

[3] California Rules of Court

Review of interim suspension. *Cal. Rules of Ct., Rule 9.10(e)*

Exercise of Powers Delegated by Supreme Court. Cal. State B. Rules of Proc., Rules 320 and 321(b)

Motions for Relief Under Rule 9.10. Cal. State B. Rules of Proc., Rule 321

[4] Cross References

See also *§ 71.160*.

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6-71 California Forms of Pleading and Practice--Annotated § 71.167

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.167 Petition to Review Final Order of Discipline by State Bar Court in Conviction Proceeding [Bus. & Prof. Code § 6102; Cal. Rules of Ct., Rule 9.13(a)]

[1] FORM Petition to Review Final Order of Discipline by State Bar Court in Conviction Proceeding [Bus. & Prof. Code § 6102; Cal. Rules of Ct., Rule 9.13(a)]

[*Cover*]

THE SUPREME COURT OF THE STATE OF CALIFORNIA

_____ [*name*],	)	NO. _____
Petitioner,	)	PETITION TO REVIEW
vs.	)	DECISION OF STATE
	)	BAR COURT
THE STATE BAR OF CALIFORNIA and THE	)	RECOMMENDING _____
STATE BAR COURT OF	)	[SUSPENSION *or*
CALIFORNIA,	)	DISBARMENT]
Respondents.	)	

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner _____ [*name*] respectfully requests, pursuant to *Business and Professions Code Section 6102* and *California Rules of Court, Rule 9.13(a)*, that this Court set aside the recommendation of the respondent State Bar Court that petitioner be _____ [disbarred *or* suspended], which was filed with this Court on _____ [*date*]:

In support of the petition, petitioner alleges:

1. Petitioner was admitted to the State Bar of California on _____ [*date*], and, since that date, petitioner has been an active member in good standing of the State Bar and engaged in the practice of law in _____ [*city*], California.

2. Criminal proceedings were instituted against petitioner by _____ [*name of prosecuting agency*] in _____[*city and county*] on _____ [*date*], alleging the following charges: _____ [*specify charges*].

3. A judgment of conviction on charges of _____ [*specify crime(s) of which petitioner was convicted*] was entered on _____ [*date*].

4. The judgment of conviction became final on _____ [*date*].

5. On _____ [*date*], the respondent State Bar Court issued a decision recommending the _____ [disbarment *or* suspension] of petitioner. The State Bar Court's decision was based on the petitioner's conviction of _____ [*specify offense*].

6. Review of the State Bar Court's disciplinary recommendation has been exhausted in that _____ [*specify facts showing exhaustion of State Bar remedies, e.g.,* review by the Review Department of the State Bar has been conducted pursuant to Rules 450-455 of the State Bar's Transitional Rules of Procedure].

7. Review of the State Bar Court's decision by the Court is proper under *California Rules of Court, Rule 9.16(a)*, in that _____ [*specify, e.g.,* the State Bar Court's recommended discipline is not appropriate in light of the record as a whole].

[*In subsequent numbered paragraphs, as necessary, state reasons for requesting that attorney not be suspended or disbarred, addressing, whenever possible, grounds for review under Cal. Rules of Ct., Rule 9.16(a), e.g., that the offense for which petitioner was convicted had no direct effect on any of petitioner's clients or his/her practice of law, nor did it violate an ethical standard of practice, and it therefore has no bearing on petitioner's ability or fitness to practice and consequently does not constitute a crime involving moral turpitude; that the offense for which petitioner was convicted did not entail a state of mind in which intent to harm others was involved, and therefore petitioner's clients are in no danger if petitioner is allowed to continue to practice; that petitioner has already been sufficiently punished for the crime for which he/she was convicted and therefore imposition of the lesser discipline of probation or reproval would be a sufficient additional sanction; or that there are mitigating circumstances that warrant imposition of lesser discipline.*]

WHEREFORE, petitioner respectfully requests that this Court issue its writ of review and that the decision of the State Bar Court be _____ [reversed *or* modified as follows: _____ (*specify proposed modification*)].
Dated: _____.

_____ [*firm name,if any*]
By: _____ [*signature*]

_____ [*typed name*]
[Attorney for] Petitioner_____ [*name*]

[*Verification. see § 71.166*.]

[*Attach proof of service*]

[*Attach copy of State Bar Court decision from which review is sought*]

[2] Use of Form

This form is a petition seeking Supreme Court review of a State Bar Court decision that recommends the disbarment or suspension of an attorney, if the recommendation was based on the attorney's conviction of a crime [*see Bus. & Prof. Code § 6102* (final disbarment or suspension of attorney convicted of felony or crime involving moral turpitude)].

The petition must be filed no later than 60 days after the State Bar Court has filed its decision with the clerk of the Supreme Court [*Cal. Rules of Ct., Rule 9.13(a)*]. It must be verified, must specify the grounds relied on, must show that review within the State Bar Court has been exhausted, and must have attached a copy of the State Bar Court decision from which relief is sought [*Cal. Rules of Ct., Rule 9.13(e)*]. In addition, the petition must address why review is appropriate under one or more of the grounds set forth in *Cal. Rules of Ct., Rule 9.16(a)* [*Cal. Rules of Ct., Rule 9.13(e)*]. For discussion of those grounds, see *§ 71.122*.

The petition must be accompanied by proof of service of three copies on the General Counsel of the State Bar at the San Francisco office of the State Bar, and of one copy on the Clerk of the State Bar Court at the Los Angeles office of the State Bar Court [*Cal. Rules of Ct., Rule 9.13(f)*].

An original and 13 copies of the petition must be filed with the clerk of the Supreme Court [*Cal. Rules of Ct., Rule 8.44(a)(1)*]. The petition should conform in style with petitions filed in other contested civil appellate matters [*see Cal. Rules of Ct., Rules 8.40* (form and filing of papers), 8.486 (original proceedings)].

If review is ordered by the Supreme Court, the State Bar must serve and file a supplemental brief within 45 days after the filing of the order [*Cal. Rules of Ct., Rule 9.13(a)*]. Within 15 days of service of the brief, the petitioner may serve and file a reply brief [*Cal. Rules of Ct., Rule 9.13(a)*].

Denial of review constitutes a final judicial determination on the merits. If review is denied, the recommendation of the State Bar Court will be filed as an order of the Supreme Court [*Cal. Rules of Ct., Rule 9.16(b)*].

[3] Cross References

See also *§§ 71.160, 71.166*.

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6-71 California Forms of Pleading and Practice--Annotated § 71.168

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.168 Motion for Reconsideration of Decision by State Bar Court [Cal. State B. Rules Proc., Rule 224]

[1] FORM Motion for Reconsideration of Decision by State Bar Court [Cal. State B. Rules Proc., Rule 224]

[*Attorney identification*]

THE STATE BAR COURT OF THE
STATE BAR OF CALIFORNIA
HEARING DEPARTMENT--_____ [LOS ANGELES *or* SAN FRANCISCO]

	)	
	)	NO. _____
In the Matter of	)	MOTION FOR
_____ [*name*],	)	RECONSIDERATION OF
A Member of the State Bar.	)	DECISION
	)	

_____

TO THE STATE BAR COURT OF THE STATE BAR OF CALIFORNIA:

Application is hereby made by the respondent _____[*name*], pursuant to California State Bar's Rules of Procedure, Rule 224, for reconsideration of _____ [the hearing panel's decision of the hearing panel *or* that part of the hearing panel's decision _____ (*specify portion of decision regarding which reconsideration is sought, e.g.,* recommending discipline)] based on the ground that _____ [*specify,*

e.g., there were irregularities in the proceeding, which did not comply with California State Bar Rules of Procedure, Rule _____, in that _____ (*specify manner in which proceeding did not comply with rule*)].
Dated: _____.

_____ [*firm name,if any*]
By:_____ [*signature*]
_____ [*typed name*]
[Attorney for] Respondent_____[*name*]

[*Attach proof of service*]

CAUTION:
The motion should be supported by a memorandum and declarations pursuant to *Cal. Rules of Ct., Rule 3.1113(a)*, Cal. State B. Rules Prac., Rule 1110, Cal. State B. Rules Proc., Rule 105.

[2] Use of Form

This form is a motion for reconsideration of the decision of the Hearing Department [*see* Cal. State B. Rules Proc., Rule 224]. It must be served and filed within 15 days after service of the Hearing Department's decision [Cal. State B. Rules Proc., Rule224(a)]. Cal. State B. Rules Proc., Rule 224, which governs motions for reconsideration, is discussed in *§ 71.120*.

[3] Cross References

See also *§ 71.160*.

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6-71 California Forms of Pleading and Practice--Annotated § 71.169

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.169 Motion for New Trial by State Bar Court or to Reopen the Record to Present Additional Evidence [Cal. State B. Rules Proc., Rules 222, 223]

[1] FORM Motion for New Trial by State Bar Court or to Reopen the Record to Present Additional Evidence [Cal. State B. Rules Proc., Rules 222, 223]

[*Attorney identification*]

THE STATE BAR COURT OF THE
STATE BAR OF CALIFORNIA
HEARING DEPARTMENT--_____ [LOS ANGELES *or* SAN FRANCISCO]

	)	
	)	NO. _____
In the Matter of	)	MOTION FOR _____
_____ [*name*],	)	[NEW TRIAL *and/or*
A Member of the State Bar.	)	LEAVE TO REOPEN THE RECORD TO
	)	PRESENT ADDITIONAL EVIDENCE]

_____

TO THE STATE BAR COURT OF THE STATE BAR OF CALIFORNIA:

Application is hereby made by the respondent _____[*name*] for _____ [a new trial *and/or* leave to reopen the record to present additional evidence] pursuant to the California State Bar's Rules of

Procedure, [*specify, e.g.,* Rule 222 and/or Rule 223].

This application is made on the grounds that _____ [*specify, e.g.,* respondent has discovered new evidence and this evidence could not with reasonable diligence have been discovered and produced at the trial on _____ (*date*)].

The additional evidence that respondent seeks to present consists of the following: _____ [*specify*]. Such evidence is relevant and material to the issue(s) of _____ [*specify*].

This motion is based on the accompanying _____ [affidavit(s) *or* declaration(s) under penalty of perjury] of _____ [*name(s)*].
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
[Attorney for] Respondent_____[*name*]

[*Attach proof of service*]

CAUTION:
The motion should be supported by a memorandum and declarationspursuant to *Cal. Rules of Ct., Rule 3.1113(a)*, Cal. State B. Rules Prac., Rule 1110, Cal. State B. Rules Proc., Rule 105.

[2] Use of Form

This form is a motion for a new trial or to reopen the record to present additional evidence [*see* Cal. State B. Rules Proc., Rules 222, 223]. It is based on the ground that there is newly discovered evidence to present to the hearing panel. The attorney should determine whether to ask for a complete trial de novo or merely for leave to present the additional evidence.

Both a motion for a new trial and a motion to reopen the record to present additional evidence must be accompanied by an affidavit or declaration under penalty of perjury [Cal. State B. Rules Proc., Rules 222(b), 223 (b); *see Code Civ. Proc. § 2015.5* (form of declaration under penalty of perjury)]. Declarations in support of a motion for a new trial must set forth the facts justifying a new trial [Cal. State B. Rules Proc., Rule 223(b)]. Declarations in support of a motion to reopen the record must state the substance of the new evidence the moving party desires to present and must show that (1) the evidence is newly discovered and could not with reasonable diligence have been discovered and produced earlier; (2) the evidence is not merely cumulative and is the best available evidence on the issue; and (3) consideration of the evidence would probably lead to a different result [Cal. State B. Rules Proc., Rule 222(b)]. For further discussion, see *§ 71.120*.

[3] Cross References

See also *§ 71.160*.

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 71 ATTORNEY DISCIPLINE
PART IV. FORMS

6-71 California Forms of Pleading and Practice--Annotated § 71.170

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.170 Request for Review by Review Department of State Bar Court [Cal. State B. Rules Proc., Rule 301]

[1] FORM Request for Review by Review Department of State Bar Court [Cal. State B. Rules Proc., Rule 301]

[*Attorney identification*]

THE STATE BAR COURT OF THE
OF CALIFORNIA
REVIEW DEPARTMENT

	)	
In the Matter of	)	NO. _____
_____ [*name*],	)	REQUEST FOR REVIEW BY REVIEW
A Member of the State Bar.	)	DEPARTMENT
	)	

_____

TO THE STATE BAR COURT OF THE STATE BAR OF CALIFORNIA:

The above-named respondent hereby requests that the decision of the hearing panel in the above-entitled proceeding before the State Bar be reviewed by the Review Department of the State Bar Court and that respondent be given an opportunity to be heard before the Review Department. The hearing panel's decision [after reconsideration] was served on respondent on _____ [*date*].

This request is made pursuant to California State Bar's Rules of Procedure, Rule 301, and is based on the grounds that _____ [*specify, e.g.,* the findings of fact are not supported by the record and the recommended discipline is excessive].
Dated: _____.

_____ [*firm name,if any*]
By:_____ [*signature*]
_____ [*typed name*]
[Attorney for] Respondent_____[*name*]

CERTIFICATION REGARDING TRANSCRIPT

I, _____ [*name*], [attorney for] respondent in this proceeding, hereby certify that I have requested a reporter's transcript of the proceedings before the hearing panel and that I have made appropriate arrangements for payment for that transcript.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[*Attach proof of service*]

[2] Use of Form

This form is a request for review by the State Bar Court's Review Department of thehearing panel's decision in a disciplinary proceeding [Cal. State B. Rules Proc., Rule 301]. The request must be filed within 30 days after service of the hearing judge's decision if no post-trial has been filed under Cal. State B. Rules Proc., Rules 222-224 (governing motions for reconsideration, new trial, and to present additional evidence), or within 30 days after service of the notice of the hearing judge's action on a post-trial motion [Cal. State B. Rules Proc., Rule 301(a)(1)].

The request must be accompanied by a completed transcript order form [Cal. State B. Rules Prac., Rule 1311(a)].

The request must be filed as an original and four copies with the Clerk of the State Bar Court [Cal. State B. Rules Prac., Rule 1300(a)]. At least one of the papers required to be filed must bear an original handwritten signature, as distinguished from a photocopied, typewritten, or other duplicated signature; that paper is the original of the quadruplicate documents filed [Cal. State B. Rules Prac., Rule 1110(c)].

For discussion of Review Department proceedings, see *§ 71.121*.

[3] Administrative Regulations

Proceedings before Review Department generally. Cal. State B. Rules Proc., Rules 300-321; Cal. State B. Rules Prac., Rules 1300-1333

[4] Cross References

See also *§ 71.160*.

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Volume 6: Architects thru Attorney Discipline-Chs. 56-71
Chapter 71 ATTORNEY DISCIPLINE
PART IV. FORMS

6-71 California Forms of Pleading and Practice--Annotated § 71.171

AUTHOR: Regina E. Brenner Editorial Consultant

§ 71.171 Petition for Supreme Court Review of State Bar Court Decision Recommending Disbarment or Suspension [Bus. & Prof. Code §§ 6082, 6083; Cal.Rules of Ct., Rule 9.13(a)]

[1] FORM Petition for Supreme Court Review of State Bar Court Decision Recommending Disbarment or Suspension [Bus. & Prof. Code §§ 6082, 6083; Cal.Rules of Ct., Rule 9.13(a)]

[*Cover*]

[*Caption. See § 71.167[1].*]

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner, pursuant to *Business and Professions Code Sections 6082 through 6084* and *California Rules of Court, Rule 9.13(a)*, respectfully requests that this Court issue its writ of review to _____ [reverse *or* modify] the decision of the respondent State Bar Court recommending that petitioner be _____ [suspended *or* disbarred] from the practice of law.

In support of this petition, petitioner alleges:

1. Petitioner was admitted to the State Bar of California on _____ [*date*], and, since that date, petitioner has been an active member in good standing of the State Bar and engaged in the practice of law in _____ [*city*], California.

2. On or about _____ [*date*], respondent State Bar of California initiated disciplinary proceedings against petitioner [on the complaint of _____ (*name*)]. Respondent State Bar of California, through its Office of Investigation conducted an investigation into alleged professional misconduct by petitioner.

3. On _____ [*date*], following its investigation, the respondent State Bar of California, through its Office of Trial Counsel, issued a notice to show cause requiring petitioner to appear before a hearing panel of the respondent State Bar Court on _____ [*date*], and to show cause why petitioner should not be disciplined for certain acts and conduct alleged therein. A copy of the notice to show cause is attached as Exhibit _____ and incorporated by reference.

4. Petitioner filed an answer to the notice to show cause on _____ [*date*], and therein stated his/her denials and defenses to the charges. A copy of petitioner's answer is attached hereto as Exhibit _____ and incorporated by reference.

5. At the hearing, which commenced on _____ [*date*], and continued until _____ [*date*], petitioner fully participated with the aid of counsel and presented witnesses and other evidence of his/her innocence of the charges. [A copy of the transcript of the hearing is attached as Exhibit _____ and incorporated by reference.]

6. The hearing panel of the State Bar Court made its decision on _____ [*date*], which stated that _____ [*specify findings of hearing panel*] and recommended that the following discipline be imposed: _____ [*specify*]. A copy of the decision is attached as Exhibit _____ and incorporated by reference.

7. _____ [*If petitioner requested reconsideration, hearing de novo, and/orleave to present additional evidence, add:* On _____ (*date*), petitioner filed a _____ (request for reconsideration of the hearing panel's decision *or* request for a hearing de novo *or* request for leave to present additional evidence) on the grounds that _____ (*specify*). A copy of that _____ (request *or* application) is attached as Exhibit _____ and incorporated by reference. The _____ (request *or* application) was _____ (denied on _____ (*date*) *or* granted on _____ (*date*)). The hearing panel's ruling following _____ (reconsideration *or* hearing de novo *or* the petitioner's presentation of additional evidence) was served on petitioner on _____ (*date*). The hearing panel's decision stated that _____ (*specify hearing panel's findings following reconsideration, hearing de novo, or presentation of additional evidence*) and recommended the following discipline: _____ (*specify*). A copy of the ruling is attached as Exhibit _____ and incorporated by reference].

8. On _____ [*date*], petitioner served and filed with the Clerk of the State Bar Court a written request for review of the hearing panel's decision by the Review Department of the State Bar Court. A copy of such request is attached hereto as Exhibit _____ and made a part hereof. The Review Department held a hearing on _____ (*date*), at which petitioner appeared and presented his/her position. On _____ (*date*), the Review Department made its decision that _____ [*specify action taken*]. A copy of the decision is attached as Exhibit _____ and incorporated by reference.

9. The decision of the respondent State Bar Court's _____[hearing panel *and/or* Review Department] that petitioner is culpable of _____ [*specify charges of which petitioner was found culpable*] and recommending that petitioner be _____ [suspended *or* disbarred] is erroneous and contrary to law in that _____ [*specify reasons why decision is erroneous and/or contrary to law*].

10. Review by the California Supreme Court is appropriate in this case, under *California Rules of Court, Rule 9.16(a),* in that _____ [*address why review is appropriate under one or more of the grounds set forth in Cal. Rules of Ct., Rule 9.16(a), e.g.,* the State Bar Court's decision is not supported by the weight of the evidence].

WHEREFORE, petitioner respectfully requests that this Court issue its writ of review and that the decision of respondent State Bar Court's _____ [hearing panel *and/or* Review Department] be

_____ [reversed *or* modified as follows: _____ (*specify proposed modification*)].
Dated: _____.

_____ [*firm name,if any*]
By: _____ [*signature*]
_____ [*typed name*]
[Attorney for] Petitioner_____[*name*]

[*Verification. See § 71.166[1].*]
[*Attach proof of service*]
[*Attach copy of State Bar Court decision from which review is sought*]

[2] Use of Form

This form is a petition for review by the California Supreme Court of the decision of the State Bar recommending disbarment or suspension from practice [*see Bus. & Prof. Code §§ 6082, 6083(a)*]. Such a petition is governed by *Cal. Rules of Ct., Rule 9.13(a)*. which is discussed in *§ 71.122[2][c]*.

The petition must be verified, must specify the grounds relied on, must show that review within the State Bar Court has been exhausted, and must have attached a copy of the State Bar Court decision from which relief is sought [*Cal. Rules of Ct., Rule 9.13(e)*]. In addition, the petition must address why review is appropriate under one or more of the grounds set forth in *Cal. Rules of Ct., Rule 9.16(a)* [*Cal. Rules of Ct., Rule 9.13(e)*]. For discussion of those grounds, see *§ 71.122*.

The petition must be accompanied by proof of service of three copies on the General Counsel of the State Bar at the San Francisco office of the State Bar, and of one copy on the Clerk of the State Bar Court at the Los Angeles office of the State Bar Court [*Cal. Rules of Ct., Rule 9.13(f)*].

An original and 13 copies of the petition must be filed with the clerk of the Supreme Court [*Cal. Rules of Ct., Rule 8.44(a)(1)*]. The petition should conform in style with petitions filed in other contested civil appellate matters [*see Cal. Rules of Ct., Rules 8.40* (form and filing of papers), 8.486 (original proceedings)].

Denial of review of a decision of the State Bar Court constitutes a final judicial determination on the merits. Following denial of review, the recommendation of the State Bar Court is filed as an order of the Supreme Court [*Cal. Rules of Ct., Rule 9.16(b)*].

[3] Cross References

See also *§§ 71.160, 71.166, 71.167*.

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Volume 7: Attorney Practice and Ethics thru Auctions and Auctioneers-Chs.72-79
Chapter 72 ATTORNEY PRACTICE AND ETHICS

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[5] Service of Order

[6] Cross References

§ 72.718 Notice of Withdrawal of Attorney of Record [Code Civ. Proc. § 285]

[1] FORM

[2] Use of Form

[3] Cross References

§ 72.719 Substitution of Attorney--Civil [Code Civ. Proc. § 284(1)]--Judicial Council Form MC-050

[1] FORM

[1] Source of Form

[2] Use of Form

[3] Copies

§ 72.720 Proceedings to Substitute Attorneys [Code Civ. Proc. § 284(2)]--Notice of Motion and Supporting Papers

[1] FORM

[2] Use of Form

[3] Copies

[4] California Points and Authorities

[5] Cross References

§ 72.721 Proceedings to Substitute Attorneys [Code Civ. Proc. § 284(2)]--Order

[1] FORM

[2] Use of Form

[3] Cross References

§ 72.722 Notice of Substitution to Adverse Parties [Code Civ. Proc. § 285]

[1] FORM

[2] Use of Form

[3] Cross References

§ 72.723 Stipulation to Withdraw or Substitute Attorneys Pending Appeal [Cal. Rules of Ct., Rules 48(b), 139(b)]

[1] FORM

[2] Use of Form

§ 72.724 Proceedings to Disqualify Opposing Attorney Based on Conflict of Interest [Cal. Rules Prof. Conduct, Rule 3-310(E)]--Motion and Supporting Papers

[1] FORM

[2] Use of Form

[3] Cross References

§ 72.725 Proceedings to Disqualify Opposing Attorney Based on Conflict of Interest [Cal. Rules Prof. Conduct, Rule 3-310(E)]--Order

[1] FORM

[2] Use of Form

[3] Cross References

§ 72.726 Proceedings to Compel Former Attorney to Surrender Client's Records, Property, or Funds--Motion and Supporting Papers

[1] FORM

[2] Use of Form

[3] Cross References

§ 72.727 Proceedings to Compel Former Attorney to Surrender Client's Records, Property, or Funds--Order

[1] FORM

[2] Use of Form

[3] Cross References

§§ 72.728-72.739 [Reserved]

§ 72.740 Complaint [Code Civ. Proc. § 425.10] for Compensation for Legal Services--Action to Recover Fixed Amount [Civ. Code § 3302]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Copies

[6] Cross References

[7] State Statutes

[8] Decisions

§ 72.741 Complaint [Code Civ. Proc. § 425.10] for Compensation for Legal Services--Action to Recover Reasonable Value of Services [Civ. Code § 3302]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Decisions

[5] Cross References

§ 72.742 Complaint [Code Civ. Proc. § 425.10] for Compensation for Legal Services--Action to Recover Reasonable Value of Services Rendered Under Contingency Fee Agreement When Attorney Was Discharged or Withdrew Prior to Client's Recovery [Civ. Code § 3302]

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] Cross References

§ 72.743 Complaint [Code Civ. Proc. § 425.10] for Compensation for Legal Services--Action to Enforce Attorney's Charging Lien Based on Contingency Fee Agreement [Civ. Code §§ 2224, 3336]

[1] FORM

[2] Use of Form

[3] Decisions

§ 72.744 Complaint [Code Civ. Proc. § 425.10] for Compensation for Legal Services--Fee Measured by

Reasonable Value of Services--In Obtaining Settlement of Client's Case

[1] FORM

[2] Use of Form

[3] Cross References

§ 72.745 Complaint [Code Civ. Proc. § 425.10] for Compensation for Legal Services--Fee Measured by Reasonable Value of Services--Services Rendered Prior to Death of Client

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 72.746 Complaint for Declaratory Judgment [Code Civ. Proc. § 1060]--To Ascertain Attorney's Rights Under Contingent Fee Agreement and to Declare His or Her Right to Lien on Client's Recovery

[1] FORM

[2] Use of Form

[3] Allegations

[4] Oral Contingency Fee Contracts May Be Voidable by Client

[5] California Points and Authorities

[6] State Statutes

[7] Decisions

[8] Cross References

§ 72.747 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Tortious Interference With Contingent Fee Contract--By Attorney Against Person Who Induced Client to Discharge Attorney Without Cause

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

[5] California Points and Authorities

[6] Decisions

§ 72.748 Allegation in Answer to Complaint for Reasonable Attorney's Fee--That Defendant Tendered Full Amount of Reasonable Fee to Plaintiff Prior to Commencement of Action [Code Civ. Proc. § 1025]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 72.749 Complaint [Code Civ. Proc. § 425.10] by Client to Recover Money Improperly Retained by Attorney--Failure to Pay Client Sums Recovered Under Contingent Fee Contract

[1] FORM

[2] Use of Form

[3] Cross References

§ 72.750 Complaint [Code Civ. Proc. § 425.10] by Client to Recover Money Improperly Retained by Attorney After Discharge--Failure to Return Fees Advanced

[1] FORM

[2] Use of Form

[3] Cross References

§ 72.751 Notice of Client's Right to Arbitration [Bus. & Prof. Code § 6201(a)]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 72.752 [Reserved]

§ 72.753 Petition to Correct, Confirm, or Vacate Attorney-Client Fee Arbitration Award--Cal. Judicial Council Form ADR-103

[1] FORM

[2] Use of Form

§ 72.754 Rejection of Award and Request for Trial After Attorney-Client Fee Arbitration--Cal. Judicial Council Form ADR-104

[1] FORM

[2] Use of Form

§ 72.755 Information Regarding Rights After Attorney-Client Fee Arbitration--Cal. Judicial Council Form ADR-105

[1] FORM

[2] Use of Form

§ 72.756 Complaint by Client for Declaratory Relief [Code Civ. Proc. § 1060] and Trial After Nonbinding Arbitration Regarding Compensation for Legal Services--No Action Pending

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction and Venue

[5] Cross References

§§ 72.757-72.769 [Reserved]

§ 72.770 Notice of Limited Scope Representation [Cal. Rules of Ct., Rule 3.36]--Cal. Judicial Council Form MC-950

[1] FORM

[2] Use of Form

[3] Cross References

§ 72.771 Application to Be Relieved as Attorney on Completion of Limited Scope Representation [Cal. Rules of Ct., Rule 3.36]--Cal. Judicial Council Form MC-955

[1] FORM

[2] Use of Form

[3] Cross References

§ 72.772 Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation [Cal. Rules of Ct., Rule 3.36]--Cal. Judicial Council Form MC-956

[1] FORM

[2] Use of Form

[3] Cross References

§ 72.773 Order on Application to Be Relieved as Attorney on Completion of Limited Scope Representation [Cal. Rules of Ct., Rule 3.36]--Cal. Judicial Council Form MC-958

[1] FORM

[2] Use of Form

[3] Cross References

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§ 72.01 Scope of Chapter

This chapter provides a basic overview of the principles governing conflicts of interest encountered in civil practice both in and out of litigation, and the duties owed by the attorney to his or her client from which these principles arise. The chapter provides a practical guide for identifying potential and actual conflicts and obtaining client consent to such conflicts.

It includes discussion of the following topics:

- Basic principles governing conflicts of interest [*see § 72.30* et seq.].
- Parties to whom the attorney owes a duty with respect to conflicts [*see § 72.50* et seq.].
- Disclosure and consent to conflicts [*see § 72.70* et seq.].
- Conflicts under *Cal. Rules Prof. Conduct, Rule 3-300* arising from business transactions with a client and acquisition of financial interests adverse to a client [*see § 72.90* et seq.].
- Conflicts under *Cal. Rules Prof. Conduct, Rule 3-310* arising from representation of interests adverse to the client and relationships with persons or entities related to a representation [*see § 72.110* et seq.].
- Management of conflicts involving representation of adverse interests [*see § 72.130* et seq.].
- Personal relationships with another party's lawyer [*see § 72.150* et seq.].
- Sexual relationships with a client [*see § 72.170* et seq.].

This chapter also discusses the following topics on the creation and scope of the attorney-client relationship:

- Representation and fee agreements [*see § 72.190*].

- Authority of an attorney to act on a client's behalf [*see § 72.220*].

- Attorney advertising and solicitation [*see § 72.240*].

This chapter also discusses and analyzes the duty of competent representation and required communication with the client that arises in all legal representation, whether in a litigation or a nonlitigation context [*see § 72.270* et seq.]. It also discusses prohibited conduct [*see § 72.290* et seq.].

For coverage of civil actions against attorneys see Ch. 76, *Attorney Professional Liability* .

For coverage of State Bar disciplinary proceedings, see Ch. 71, *Attorney Discipline* .

This chapter also covers the requirements for handling client funds and maintaining client trust fund accounts, as well as the rigid disciplinary sanctions imposed on attorneys who, intentionally or not, violate these requirements [*see § 72.320* et seq.]. The chapter focuses on *Cal. Rules Prof. Conduct, Rule 4-100*, which has the primary purpose of preserving the identity of funds and property of a client. The chapter covers the following topics:

- The attorney's duty to preserve and segregate client funds.

- The duties regarding client trust fund accounts.

- The requirements for managing these accounts, such as notification and safekeeping, recordkeeping, and prompt payment and delivery of the client's funds and property.

This chapter also discusses the following topics for terminating the attorney-client relationship:

- The termination of the attorney-client relationship by the death or incapacity of either [*see § 72.350* et seq.].

- The withdrawal of the attorney [*see § 72.370* et seq.].

- The discharge or substitution of attorneys [*see § 72.390* et seq.].

- Disqualification of opposing counsel for conflict of interest based on a former representation [*see § 72.410* et seq.].

This chapter also covers collection of attorney's fees from clients, focusing on the following topics:

- General ethical and practical considerations involved in collecting fees [*see § 72.430* et seq.].

- Civil actions to recover fees [*see § 72.450* et seq.].

- Arbitration of attorney-client fee disputes [*see § 72.470* et seq.].

For discussion and forms relating to the recovery of attorney's fees as an element of costs from an opposing party, as distinguished from the recovery of fees from a client, see Ch. 174, *Costs and Attorney's Fees* .

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§ 72.02 Cross References

For discussion and forms relating to advertising generally, see Ch. 14, *Advertising*

For discussion and forms relating to attorney discipline, see Ch. 71, *Attorney Discipline*

For a notice of appearance by an attorney, see Ch. 323, *Jurisdiction, Inconvenient Forum, and Appearances*

For forms for use in appointing an attorney for a member of the military, see Ch. 205, *Defaults and Default Judgments*

For forms for use in actions by and against agents and concerning the principal-agent relationship, see Ch. 427, *Principal and Agent*

For a petition by a receiver for leave to appoint an attorney, see Ch. 486, *Receivers*

For stipulations by attorneys, see Ch. 533, *Stipulations*

For forms of substitution and dismissal of an attorney in a worker's compensation proceeding, see Ch. 577, *Workers' Compensation*

For a complaint alleging an account stated for attorney's fees, see Ch. 8, *Accounts Stated and Open Accounts*

For complaints in common count for compensation for legal services, see Ch. 121, *Common Counts*

For discussion and forms relating to the recovery of attorney's fees as an element of costs of suit, including recovery in contract actions based on a contract provision, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

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[Reserved]

§§ 72.03[Reserved]

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§ 72.10 Coverage of Ethical vs. Legal Issues

This chapter focuses on ethical, as distinguished from legal, issues. Nevertheless, there are many areas in which these issues overlap. Thus a number of related legal, or nondisciplinary, topics are covered as well, such as legal, nondisciplinary disqualification for violation of the ethical duty to avoid conflicts of interest (*see § 72.410* et seq.), legal measures for fee collections (*see § 72.450* et seq.), and the legal scope of authority in representing a client (*see § 72.220* et seq.).

It is important to recognize that while an attorney's ethical and legal obligations often overlap, they are not identical. For example, an attorney may breach an ethical duty and be subject to discipline by failing to obtain a client's informed written consent, yet a court may find that circumstances exist that justify not imposing the nondisciplinary measure of disqualifying the attorney. While the attorney may legally continue the representation, he or she may still be subject to discipline for failing to fulfill the ethical duty. Additionally, while a violation of a California Rule of Professional Conduct may subject an attorney to disciplinary proceedings, it does not in itself provide a basis for civil liability [*BGJ Assocs. v. Wilson (2003) 113 Cal. App. 4th 1217, 1227, 7 Cal. Rptr. 3d 140]* .

On the other hand, there may be some situations in which an attorney's conduct satisfies ethical, but not legal, requirements. For example, obtaining a former client's written consent to represent an adverse party may satisfy ethical obligations, but may not always suffice to avoid nondisciplinary disqualification [*see Cal. Rules Prof. Conduct, Rule 3-310*, Discussion]. An excellent discussion regarding the dichotomy between ethical and legal conflict of interest standards may be found in State Bar of California Formal Opinion No. 1997-152.

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§ 72.11 Governing Law

[1] California Rules of Professional Conduct

[a] Source of Rules

The basic rules governing attorney ethics are found in the California Rules of Professional Conduct. These rules are generally formulated by the State Bar of California and approved by the California Supreme Court [*Bus. & Prof. Code § 6076*; *see also Bus. & Prof. Code § 6076.5* (procedure for formulation by member initiative)]. Through the Rules of Professional Conduct, the Supreme Court has the power to impose a higher standard of conduct on attorneys than that applicable to other professionals [*Howard v. Babcock (1993) 6 Cal. 4th 409, 418, 25 Cal. Rptr. 2d 80, 863 P.2d 150]* .

Many rules are followed by the drafters' explanatory comments under the heading "Discussion." Other selected rules are followed by "Standards" adopted by the State Bar Board of Governors, which provide specific guidance on application of the particular rules [*see, e.g., Cal. Rules Prof. Conduct, Rule 1-400* (communications presumed to be in violation of advertising and solicitation rule)].

NOTE:

Function of "Discussion" Sections. The "Discussion" sections that follow some of the California Rules of Professional Conduct are described as follows: "Because it is a practical impossibility to convey in black letter form all of the nuances of these disciplinary rules, the comments contained in the Discussion of the rules, while they do not add independent basis for imposing discipline, are intended to provide guidance for interpreting the rules and practicing in compliance with them" [*Cal. Rules Prof. Conduct, Rule 1-100(C)*].

The current rules became effective May 27, 1989, with subsequent amendments. References to the former rules largely refer to those in effect between January 1, 1975, and May 26, 1989.

The text of the California Rules of Professional Conduct may be found in the Standard California Codes (Matthew

Bender), the California Compendium on Professional Responsibility (State Bar of California), in Deering'S California Codes Annotated, Rules of Court, or in other code services.

[b] Purpose and Effect of Rules

The Rules of Professional Conduct are intended to provide guidance for attorneys and standards for disciplinary action by the State Bar and have been approved by the Supreme Court of California in order to protect the public and to promote respect and confidence in the legal profession [*see Cal. Rules Prof. Conduct, Rule 1-100(A)*, and Discussion; *see also Chambers v. Kay (2002) 29 Cal. 4th 142, 158, 126 Cal. Rptr. 2d 536, 56 P. 3d 645]* .

The rules do not create or eliminate substantive legal duties for attorneys, and violation of the rules does not automatically give rise to a civil cause of action [*see Cal. Rules Prof. Conduct, Rule 1-100(A)*, and Discussion]. No independent cause of action exists for the breach of a Rule of Professional Conduct [*Wilhelm v. Pray, Price, Williams & Russell (1986) 186 Cal. App. 3d 1324, 1333 n.5, 231 Cal. Rptr. 355* ; *Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 658-659, 109 Cal. Rptr. 269]* .

Nevertheless, to the extent that the rules, taken together with statutes and general legal principles, help define the fiduciary duties of an attorney, the rules may be used to help prove whether an attorney has breached his or her fiduciary duties to a client [*Mirabito v. Liccardo (1992) 4 Cal. App. 4th 41, 45-46, 5 Cal. Rptr. 2d 571* ; *David Welch Co. v. Erskine & Tulley(1988) 203 Cal. App. 3d 884, 890, 250 Cal. Rptr. 339* ; *see also Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 1147, 217 Cal. Rptr. 89* (attorney's violation of rules established attorney's negligence, even in absence of expert testimony); State Bar of California Formal Opinion No. 1997-152; LACBA Formal Opinion No. 501 (1999)]. A jury instruction based on a disciplinary rule may be appropriate if the rule provides the standard by which an attorney's breach of fiduciary duty is measured [*Mirabito v. Liccardo (1992) 4 Cal. App. 4th 41, 47, 5 Cal. Rptr. 2d 571]* .

The rules are generally binding on all attorneys who are members of the State Bar of California [*Bus. & Prof. Code § 6077*]. They apply to a member's activities both inside and outside California, except to the extent that members lawfully practicing in another jurisdiction may be specifically required by that jurisdiction to follow professional conduct different from that provided in the rules [*Cal. Rules Prof. Conduct, Rule 1-100(D)(1)*]. With respect to attorneys who are not members, the rules also apply to their activities while engaged in lawyer functions within California to the extent that these activities are otherwise permitted by law [*Cal. Rules Prof. Conduct, Rule 1-100(D)(2)*].

The Rules of Professional Conduct do not supersede existing law relating to attorneys in nondisciplinary contexts [*see Cal. Rules Prof. Conduct, Rule 1-100(A)*, and Discussion].

[2] State Bar Act

The State Bar Act (*Bus. & Prof. Code § 6000 et seq.*) provides the authority under which the Rules of Professional Conduct are promulgated, and sets out other provisions governing the practice of law by attorneys in California.

Principal among the statutory provisions governing attorney conduct are *Bus. & Prof. Code § 6068*, which enumerates certain paramount duties, and *Bus. & Prof. Code § 6100 et seq.*, which specify certain types of misconduct that constitute cause for disbarment or suspension. Other provisions affecting attorney practice include those prohibiting unlawful solicitation [*Bus. & Prof. Code § 6150 et seq.*], those affecting the drafting of written legal fee agreements [*Bus. & Prof. Code § 6146 et seq.*], and those governing the arbitration of fee disputes between attorneys and clients [*Bus. & Prof. Code § 6200 et seq.*].

[3] American Bar Association Model Rules, Model Code, and Other Standards

The A.B.A.'s rules and disciplinary standards, as well as the rules and standards of other jurisdictions and bar associations, are not binding in California [*General Dynamics Corp. v. San Bernardino County Superior Court (1994) 7 Cal. 4th 1164, 1190* (Model Rules and Model Code have no legal force of their own, and have not been adopted by the Court); *People v. Ballard (1980) 104 Cal. App. 3d 757, 761* ; State Bar Formal Opinion No. 1983-71]. Nevertheless, they may be considered if there is no direct authority in California and there is no conflict with state public policy [*see Flatt v. Superior Court (1994) 9 Cal. 4th 275, 282 n.2, 36 Cal. Rptr. 2d 537, 885 P.2d 950* ; *San Gabriel Basin Water Quality Authority v. Aerojet-General Corporation (C.D. Cal. 2000) 105 F. Supp.2d 1095, 1105* ; State Bar Formal Opinion No. 1983-71; *see also Cal. Rules Prof. Conduct, Rule 1-100(A)*]. They may also apply to issues involving multi-jurisdiction activities.

The A.B.A. Model Rules of Professional Conduct were originally adopted in 1983. Each rule is followed by a Comment and a Code Comparison to the older A.B.A. Model Code of Professional Responsibility. The older Model Code is composed of Canons, which are each followed by Ethical Considerations ("ECs") and Disciplinary Rules ("DRs"). A convenient source for the text of the Model Rules or the older Model Code is the California Compendium on Professional Responsibility (State Bar of California).

[4] Court Decisions

Cal. Rules Prof. Conduct, Rule 1-100(A) acknowledges that "the prohibition of certain conduct in these rules is not exclusive." Lawyers are also bound by provisions of the State Bar Act (discussed under *§ 72.11[3]*) and by the opinions of California courts [*Cal. Rules Prof. Conduct, Rule 1-100(A)*]. In some situations statutes or case law may override a rule that would otherwise apply [*see, e.g., Cal. Rules Prof. Conduct, Rule 2-100(A)*, Discussion]. Case law is frequently the most important source of authority to the extent that courts analyze, interpret, and apply the rules [*see also § 72.11[6]*].

[5] State Bar Court Discipline Opinions

Discipline opinions of the State Bar Court's Review Department provide detailed analysis of Rules of Professional Conduct and State Bar Act provisions. The State Bar publishes these opinions in its *California State Bar Court Reporter*, a multi-volume set containing Review Department opinions from 1990 to the present and a topical digest of the opinions. New opinions also appear in California legal periodicals such as the *Los Angeles Daily Journal*.

Review Department opinions have taken on much greater significance due to changes in *Cal. Rules of Ct., Rules 9.10-9.20*. Under these provisions, the California Supreme Court essentially shifted the primary responsibility for reviewing disciplinary decisions of the State Bar Court from itself to the Review Department. Under the current rules, the Supreme Court rarely grants review of disciplinary matters. The Court's once significant contribution to the development of case law concerning attorney ethics has, since 1990, been greatly reduced. Since that time Review Department's opinions have comprised the chief source of developing case law in disciplinary matters.

Clearly the opinions of the Review Department of the State Bar Court are binding on the State Bar Court. It is less clear, however, whether they constitute binding precedent in the state's trial and appellate courts, which are constitutional courts of record [*see Cal. Const., art. VI, § 1*], whereas the Review Department exists only as a creature of statute adjudicating disciplinary matters on behalf of the Board of Governors of the State Bar [*Bus. & Prof. Code §§ 6086.5, 6086.65*]. On the other hand, Review Department opinions, which are in effect recommendations to the Supreme Court, are filed as orders of the Supreme Court whenever the Supreme Court denies review or no review is sought [*see Cal. Rules of Ct., Rules 9.18, 9.16*]. In any event, courts of record will undoubtedly regard Review Department opinions as persuasive authority of increasing significance.

[6] Ethics Opinions

Cal. Rules Prof. Conduct, Rule 1-100(A) directs lawyers to consult opinions of ethics committees in California "for guidance on proper professional conduct." Ethics opinions and rules from other jurisdictions may also be considered [*Cal. Rules Prof. Conduct, Rule 1-100(A)*].

The State Bar's Committee on Professional Responsibility and Conduct ("State Bar"), the Los Angeles County Bar Association ("LACBA") Committee on Professional Responsibility and Ethics, the Bar Association of San Francisco ("BASF") Legal Ethics Committee, the San Diego County Bar Association ("SDCBA") Ethics Committee, and the Orange County Bar Association ("OCBA") Professional and Ethics Committee each publish opinions addressing ethical issues raised by inquiries submitted by their respective members. These opinions are collected in the State Bar's California Compendium on Professional Responsibility. Ethics opinions are advisory and nonbinding [*Cal. Rules Prof. Conduct, Rule 1-100(A)*]. They are intended to provide thoughtful guidance to lawyers on subjects that often are not addressed in the case law.

PRACTICE TIP:

State Bar Ethics "Hotline." The State Bar maintains an ethics telephone "hotline" service that members may use to obtain guidance in resolving ethical issues requiring prompt resolution. While attorneys may also direct inquiries to the ethics committees of county bar associations and the State Bar for a formal opinion, this is a much slower method of obtaining guidance and may be more useful in situations that are likely to recur in the future. The State Bar Ethics Hotline number is: 1-800-2-ETHICS (if you're within the 415 area code, you may also dial (415) 538-2150). Some county bar associations also provide telephone ethics advice to their members.

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§ 72.12 Validity of Statutes Regulating Attorney Conduct

The California Supreme Court has inherent power to provide a higher standard of attorney-client conduct than the minimum standards prescribed by the Legislature. Any statute that would permit an attorney to seriously violate the integrity of the attorney-client relationship is therefore suspect. A party challenging a statute on these grounds must show that a direct and fundamental conflict exists between the operation of the challenged statute as it applies to attorneys, and attorneys' settled ethical obligations as set forth in the Rules of Professional Conduct or other well-established common law rules [*Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 544, 28 Cal. Rptr. 2d 617, 869 P.2d 1142]* .

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§ 72.13 Unauthorized Practice of Law

Since the passage of the State Bar Act in 1927, it has been well settled that individuals may represent their own interests in legal proceedings. In addition, under *Code Civ. Proc. § 371*, an individual who is not licensed to practice law may defend his or her spouse's right in a civil action if the spouse neglects to defend [*J.W. v. Superior Court (1993) 17 Cal. App. 4th 958, 966 n.6, 22 Cal. Rptr. 2d 527]* . Further, a party may be represented by a nonattorney on an application to the Workers' Compensation Appeals Board for compensation benefits [*Lab. Code § 5700*], and in formal proceedings before the Public Utilities Commission, including preparing pleadings and making appearances [97 Ops. Cal. Att'y Gen. 221]. Otherwise, the practice of law on behalf of a third party is unauthorized in order to ensure the competency of those performing legal services [*Bus. & Prof. Code § 6125*].

The following are examples of conduct that is prohibited as the unauthorized practice of law [*Drake v. Superior Court (1994) 21 Cal. App. 4th 1826, 1829-1832, 26 Cal. Rptr. 2d 829* ; *J.W. v. Superior Court (1993) 17 Cal. App. 4th 958, 966-969, 22 Cal. Rptr. 2d 527]* :

- A non-attorney parent cannot represent his or her minor child in a paternity action.
- A juvenile cannot have his or her non-attorney father assist in the juvenile's defense.
- A non-attorney cannot represent his or her parent's estate.
- A non-attorney cannot appear in a family law matter on behalf of an individual who has given him a power of attorney.
- A non-attorney trustee may not represent the trust in a court action [*Ziegler v. Nickel (1998) 64 Cal. App. 4th 545, 75 Cal. Rptr. 2d 312]* .

The practice of law in California by out-of-state attorneys not licensed in California or by an out-of-state law firm, none of whose attorneys are licensed in California at the time of performing the work in California, constitutes the

unauthorized practice of law under *Bus. & Prof. Code § 6125*, and precludes the collection of attorney fees by those attorneys for the work performed in California [*Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 Cal. 4th 119, 124, 70 Cal. Rptr. 2d 304, 949 P.2d 1* (practice of "substantial law" in California in violation of *Bus. & Prof. Code § 6125* precluded compensation under fee agreement for any services performed in California, but agreement enforceable to extent possible to sever portions of consideration attributable to services illegally rendered in California from those attributable to New York services)]. Mere fortuitous or attenuated contacts do not constitute the practice of law in California; however, sufficient contact with a California client by an out-of-state law firm or attorney to render the nature of the legal service a clear legal representation does constitute practicing law in California within the meaning of *Bus. & Prof. Code § 6125*. The primary question is whether the out-of-state attorney or firm engaged in sufficient activities in California or created a continuing relationship with a California client that included legal duties and obligations. Physical presence in California is only one factor to consider in determining a violation of *Bus. & Prof. Code § 6125*; the determination does not necessarily depend on or require physical presence. One may practice law in California without being physically present by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer or other modern technological means. On the other hand, a person does not automatically practice law in California whenever that person practices California law anywhere or "virtually" enters California by technological means. Each case must be decided on its individual facts [*see* *Estate of Condon (1998) 65 Cal. App. 4th 1138, 76 Cal. Rptr. 2d 922* (pursuant to California probate law, violation of *Bus. & Prof. Code § 6125* not found where out-of-state attorney represents out-of-state probate client, regardless of whether attorney is either physically orvirtually present in California)]. Exceptions to *Bus. & Prof. Code § 6125* are narrowly drawn and strictly interpreted and generally limited to allowing out-of-state attorneys to make brief appearances before a state court or tribunal [*Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 Cal. 4th 119, 128-129, 70 Cal. Rptr. 2d 304, 949 P.2d 1]* .

For further discussion of the unauthorized practice of law, see Ch. 70, *Attorney Admission and Discipline* .

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§ 72.14 Prohibited Discriminatory Conduct in a Law Practice

In the management or operation of a law practice, a State Bar member must not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race, national origin, sex, sexual orientation, religion, age or disability in any of the following [*Cal. Rules Prof. Conduct, Rule 2-400(B)*]:

- Hiring, promoting, discharging or otherwise determining the conditions of employment of any person.

- Accepting or terminating representation of any client.

There is no basis for disciplinary action under this rule absent a finding of civil unlawfulness under applicable state or federal law [*Cal. Rules Prof. Conduct, Rule 2-400(B)*, Discussion].

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7-72 California Forms of Pleading and Practice--Annotated § 72.15

§ 72.15 Applicability of Code of Judicial Conduct to Attorneys

[1] Canon 5

Cal. Rules Prof. Conduct, Rule 1-700, which became operative in 1997, clarifies that Canon 5 of the Code of Judicial Ethics applies to attorneys who are seeking judicial office by election [*Cal. Rules of Prof. Conduct, Rule 1-700(B)*].

Canon 5 prohibits candidates for judicial office from all of the following:

- Acting as leaders or holding any office in political organizations.
- Making speeches on behalf of political organizations.
- Publicly endorsing or opposing candidates for nonjudicial office.
- Soliciting funds for political organizations or nonjudicial candidates.

Canon 5 also sets limits on the amount of political contributions a candidate for judicial office may make in any calendar year [*see* Canon 5A(3)], and prohibits judges from any political activity, other than in relation to measures concerning the improvement of the law, the legal system or the administration of justice [*see* Canon 5A(3)].

Canon 5 permits candidates for judicial office to speak at political gatherings only on their own behalf or on behalf of another judicial candidate [*see* Canon 5A(3)].

[2] Canon 6D

Cal. Rules Prof. Conduct, Rule 1-710, which became operative in March, 1999, clarifies that Canon 6D of the Code of Judicial Ethics applies to attorneys who are serving as temporary judges, referees or court-appointed arbitrators. Rule 1-710 is intended to permit the State Bar to discipline attorneys who violate applicable portions of the Code of Judicial Ethics while acting in a judicial capacity pursuant to an order or appointment by a court. In conjunction with approval

of Rule 1-170, the Supreme Court also approved amendments to Canon 6D, which became operative in March, 1999.

Under Canon 6D, a temporary judge, a person serving as referee pursuant to *Code of Civ. Proc. §§ 638* or *639*, or a court-appointed arbitrator must comply with the Code of Judicial Ethics as discussed below.

An attorney actually presiding in a proceeding, or otherwise acting in the capacity of a temporary judge, referee or court-appointed arbitrator, must comply with the following provisions of the Code of Judicial Ethics:

- Integrity and independence of the judiciary [*see* Canon 1].
- Public confidence [*see* Canon 2], order and decorum in the proceeding, and patient, dignified and courteous treatment [*see* Canon 3B(3), (4)].
- Manifestations of bias or prejudice [*see* Canon 3B(6)].
- Misconduct by another judge or lawyer [*see* Canon 3D(1), (2)].

An attorney acting as temporary judge, referee or court-appointed arbitrator, from the time of notice and acceptance or appointment until termination of the appointment, must comply with the following provisions of the Code of Judicial Ethics:

- Family and other relationships [*see* Canon 2B(1)].
- Hear and decide matters, competence in the law [*see* Canon 3B(1)].
- Bias or prejudice in performing duties [*see* Canon 3B(5)].
- Right to be heard, ex-parte communication, disposition of matters [*see* Canon 3B(7), (8)].
- Administrative responsibilities [*see* Canon 3C(1), (2), (4)].
- Prestige of office, solicitations, gifts [*see* Canon 6D(2)(b), (8)(c)].
- Disqualification, written disclosures [*see* Canon 6D(2)(a), (5)(a)].

An attorney acting as temporary judge, referee or court-appointed arbitrator, from the time of notice and acceptance of appointment until the case is no longer pending in any court, must comply with the following provision of the Code of Judicial Ethics:

- Public comment [*see* Canon 6D(3)].

An attorney acting as temporary judge, referee or court-appointed arbitrator, from the time of appointment and continuing for two years after the case is no longer pending in any court, must comply with the following provision of the Code of Judicial Ethics:

- Gifts [*see* Canon 6D(4)].

An attorney acting as temporary judge, referee or court-appointed arbitrator, from the time of notice and acceptance of appointment and continuing indefinitely after the termination of the appointment, must comply with the following provisions of the Code of Judicial Ethics:

- Information acquired in judicial capacity, public comment on jurors [*see* Canon 6D(5)(a), (b)].

An attorney who has been a temporary judge, referee or court-appointed arbitrator must comply with the following provisions of the Code of Judicial Ethics:

- Related representations, confidential information [*see* Canon 6D(7), (8)].

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[Reserved]

§§ 72.16[Reserved]

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§ 72.30 Overview of Duties Governing Conflicts of Interest

A conflict of interest is a situation that interferes with a lawyer's ability to fulfill basic duties to a client [*see* State Bar Formal Opinion 1982-69 (1982); LACBA Formal Opinion 471 (1992)]. In general, there are two types of conflicts of interest: potential and actual conflicts.

Potential conflicts arise in situations in which the lawyer's ability to fulfill his or her basic duties is not impaired, but under the circumstances, such a situation could arise during the representation. Actual conflicts exist in situations in which the lawyer's ability to fulfill the basic duties is strained or impaired.

There are four basic duties that are involved in conflict situations:

- The fiduciary duty of undivided loyalty to a client.
- The duty to impart significant information to a client.
- The duty to maintain client confidences and secrets.
- The duty to represent a client competently.

All conflict situations involve conflicting loyalties either between the lawyer's interests and a client's interests or between the interests of two or more clients. In situations in which there are conflicting interests between clients, there can be a tension between the duty to maintain confidences and secrets of one client and the duty to inform the other client. These problems can, in turn, impair a lawyer's ability to represent a client competently.

The conflicts rules in the California Rules of Professional Conduct are designed to address situations that inherently strain a lawyer's ability to fulfill these basic duties. As a result, it is important to understand the scope of the basic duties and to keep them in mind when analyzing whether one has a potential or actual conflict. When in doubt, an analysis of

the basic duties involved in conflict situations can help in determining where a conflict may lie. It can also help in determining what disclosures are needed to obtain a client's informed consent and how to structure an engagement to avoid pitfalls.

Sections 72.31 et seq. will discuss the four basic duties outlined above and issues that may arise in conflict situations with respect to those duties.

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§ 72.31 Duty of Undivided Loyalty

Perhaps the most fundamental quality of the attorney-client relationship is the absolute and complete fidelity owed by the attorney to his or her client [State Bar Formal Opinion No. 1984-83]. Few precepts are more firmly entrenched than that the fiduciary relationship between attorney and client is of the very highest character [*Yorn v. Superior Court (1979) 90 Cal. App. 3d 669, 675, 153 Cal. Rptr. 295* ; *see Cal Pak Delivery, Inc. v. United Parcel Service, Inc. (1997) 52 Cal. App. 4th 1, 11, 60 Cal. Rptr. 2d 207]* .

Part of that fiduciary duty to a client is the duty to represent the client with undivided loyalty [*Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp. (1995) 36 Cal. App. 4th 1832, 1839-1840, 43 Cal. Rptr. 2d 327* ; *Commercial Standard Title Co. v. Superior Court (1979) 92 Cal. App. 3d 934, 945, 155 Cal. Rptr. 393* ; *Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 526, 50 Cal. Rptr. 592* ; LACBA Formal Opinion No. 435 (1985)]. The duty of loyalty forbids any act that would interfere with the dedication of a lawyer's entire energies to the client's interests [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 289, 36 Cal. Rptr. 2d 537, 885 P.2d 950* ; *Anderson v. Eaton (1930) 211 Cal. 113, 116, 293 P. 788]* . It is an attorney's duty to protect his or her client in every possible way, and assuming a position adverse or antagonistic to the client without their free and knowing consent given after full knowledge of all the facts and circumstances is a violation of that duty [*Moore v. Anderson Zeigler Disharoon Gallagher & Gray (2003) 109 Cal. App. 4th 1287, 1298-1300, 135 Cal. Rptr. 2d 888]* . The duty continues after the termination of the attorney-client relationship to the extent of the following [*Wutchumna Water Co. v. Bailey (1932) 216 Cal. 564, 571, 15 P.2d 505* ; *Yorn v. Superior Court (1979) 90 Cal. App. 3d 669, 675, 153 Cal. Rptr. 295]* :

- A lawyer may not act in a manner that will injure the former client in matters involving the former representation; and

- A lawyer may not subsequently use any information gained from the representation to the former client's disadvantage.

As part of the fiduciary duty, a lawyer must exercise independent judgment on a client's behalf. In the conflicts context,

the duty means that a lawyer must represent the interests of a client without being influenced by the interests of the lawyer or others that are extraneous to the lawyer--client relationship [*Anderson v. Eaton (1930) 211 Cal. 113, 116, 293 P. 788* ; *Apple Computer, Inc. v. Superior Court (2005) 126 Cal. App. 4th 1253, 1265, 24 Cal. Rptr. 3d 818* (class attorneys or their business associates may not act as class representative); *Gilbert v. National Corp. For Housing Properties (1999) 71 Cal. App. 4th 1240, 84 Cal. Rptr. 2d 204* ; *Yorn v. Superior Court (1979) 90 Cal. App. 3d 669, 675, 153 Cal. Rptr. 295* ; *Earl Scheib, Inc. v. Superior Court (1967) 253 Cal. App. 2d 703, 706, 61 Cal. Rptr. 386* ; State Bar Formal Opinion No. 1984-83; LACBA Formal Opinion No. 435 (1985); BASF Formal Opinion No. 1973-15; SDCBA Ethics Opinion Nos. 1978-5, 1978-11]. A lawyer is "precluded from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent" [*Anderson v. Eaton (1930) 211 Cal. 113, 116, 293 P. 788]* . The lawyer's judgment and advice should be independent of those influences.

Another aspect of this duty is embodied in *Bus. & Prof. Code § 6068(e)*, which requires a lawyer to "maintain inviolate the confidence ... of his or her client." In its broadest sense, the preservation of a client's "confidence" means that a lawyer must maintain the trust reposed in the lawyer by the client [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 288-289, 36 Cal. Rptr. 2d 537, 885 P.2d 950* ; *Gilbert v. National Corp. For Housing Properties (1999) 71 Cal. App. 4th 1240, 84 Cal. Rptr. 2d 204* ; *see State Farm Mutual Automobile Ins. Co. v. Federal Insurance Co. (1999) 72 Cal. App. 4th 1422, 86 Cal. Rptr. 2d 20* ; State Bar Formal Opinion No. 1986-87]. This duty is based on the proposition that when a client engages a lawyer in a given matter, the client is entitled to feel that he or she has the undivided loyalty of the lawyer as his or her advocate or champion until the matter is over [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 288-289, 36 Cal. Rptr. 2d 537, 885 P.2d 950* ; *see also Brooklyn Navy Yard Cogeneration Partners v. Superior Court (1997) 60 Cal. App. 4th 248, 255-256, 70 Cal. Rptr. 2d 419]* . In this context, the confidence and trust which a client reposes in the lawyer is seen as essential to the effective functioning of the fiduciary relationship [*Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp. (1995) 36 Cal. App. 4th 1832, 1839-1840, 43 Cal. Rptr. 2d 327* ; *Flatt v. Superior Court (1994) 9 Cal. 4th 275, 288-289, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* .

However, a lawyer's duty of loyalty is not unlimited. A lawyer may take a position as a private citizen that is adverse to the position of a prior client [*see Oasis West Realty, LLC v. Goldman (2010) 182 Cal. App. 4th 688, 699-703, 2010 Cal. App. LEXIS 287* (attorney may sign petition and ask neighbors to sign petition that was adverse to prior client's interests)].

ILLUSTRATIONS:

Violation of Duty of Loyalty. Lawyer represents Client A in a lawsuit against B. B now asks the lawyer to represent her in an unrelated matter. Taking on the engagement might affect the lawyer's ability to represent either client with undivided loyalty. The lawyer's advice to A might be tempered by a concern about how it would affect the lawyer's relationship with B. The lawyer's vigorous prosecution of the lawsuit, in turn, could undermine the lawyer-client relationship with B.

Lawyer is hired to advise Client A in connection with the formation of a partnership in which the lawyer will be a partner. Here too the lawyer's independent judgment on behalf of Client A may be compromised by the lawyer's concern about his or her own interests in the partnership.

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§ 72.32 Duty to Inform Client

Closely related to the lawyer's duty of loyalty is the duty to keep a client reasonably informed about significant developments relating to the engagement.

Under the Rules of Professional Conduct, a State Bar member must keep a client reasonably informed about significant developments relating to the employment or representation and promptly comply with reasonable requests for information and copies of significant documents when necessary to keep the client so informed [*Cal. Rules Prof. Conduct, Rule 3-500*].

In addition, under *Bus. & Prof. Code § 6068(m)*, an attorney has a duty "to respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services."

ILLUSTRATION:

Violation of Duty to Inform. Lawyer represents Clients A and B, who are defendants in a lawsuit. Client A gives the lawyer information that proves B has no liability and that A is responsible for a substantial loss sustained by the plaintiff. Client A instructs the lawyer not to disclose the information to B. The lawyer cannot fulfill his or her duty to Client B under *Cal. Rules Prof. Conduct, Rule 3-500*, and *Bus. & Prof. Code § 6068(m)*, without violating Client A's instruction. This conflict reveals the tension between the duty to inform and the duty to maintain client confidences and secrets discussed in the next section.

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§ 72.33 Duty to Maintain Client Confidence and Secrets

[1] Scope of Ethical Rule

It is the duty of an attorney to maintain the confidences and at "every peril to himself or herself" to preserve the secrets of the client. However, an attorney may, but is not required to, reveal confidential information relating to the representation of the client to the extent the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual [*Bus. & Prof. Code § 6086(e)*].

The broad scope and austere language of the statute reflect the policy behind it. The protection of confidences and secrets is not a rule of mere professional conduct, but instead involves public policies of paramount importance [*In re Charlisse C. (2008) 45 Cal. 4th 145, 160, 84 Cal. Rptr. 3d 597, 194 P.3d 330* ; *In re Jordan (1974) 12 Cal. 3d 575, 580, 116 Cal. Rptr. 371, 526 P.2d 523]* . Every client is entitled to know that his or her confidences are rigorously maintained by his or her attorney and will not even be suggested or hinted at by the attorney to others [LACBA Formal Opinion No. 403 (1982)]. For example, attorneys who share office space, services, staff or facilities without forming a law firm must take protective steps to maintain clients' confidential information, including agreeing on a clear delineation of responsibility for tracking correspondence, calendaring, filing, client communications and handling of funds, separately and with due regard for clients' confidential information [State Bar Formal Opinion 1997-150]. Nevertheless, the scope of *Bus. & Prof. Code § 6068(e)* is not without limits, which have been defined through an extensive body of cases and ethics opinions.

In addition, an attorney who represents a governmental organization and learns of improper governmental activity may urge reconsideration of the matter and refer it to a higher authority in the organization. Under specified circumstances, the attorney also may refer the matter to a law enforcement agency or to another governmental agency [*see* Bus. & Prof. Code § 6068.1].

[2] Confidence and Secrets Defined

The information protected under *Bus. & Prof. Code § 6068(e)* includes much more than communications protected by the attorney-client privilege [*Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 621 n.5, 120 Cal. Rptr. 253* ; State Bar Formal Opinion No. 1993-132]. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge [*see* ABA Code of Prof. Resp., Ethical Canon 4-4].

In defining the scope of this duty, ethics opinions have adopted the definitions of "confidence" and "secret" in Model Code of Professional Responsibility DR 4-101(A) (1980) [State Bar Formal Opinion Nos. 1976-37, 1980-52, 1981-58, 1986-87 and 1993-133; LACBA Formal Opinion Nos. 386 (1980), 436 (1985) and 456 (1990)]. This provision states that:

- "Confidence" refers to information protected by the attorney-client privilege under applicable law.

- "Secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be a detriment to the client.

NOTE:

DR 4-101 Superseded. The ABA Code of Professional Conduct and DR 4-101 have been superseded by the ABA Model Rules of Professional Conduct, which eliminated the distinction between "confidence" and "secret." Model Rule 1.6 states that a lawyer shall not reveal "information relating to the representation of the client" without the client's consent. However, because *Bus. & Prof. Code § 6068(e)* continues to use the terms "confidence" and "secret," ethics opinions continue to rely on the definitions in DR 4-101(A) [LACBA Formal Opinion No. 456 (1990)].

The broad scope of the rule is embodied in the concept of client "secrets." Client "secrets" include documents and information obtained from any source in the course of representing a client. It includes information obtained from third parties that is not communicated within the scope of the attorney-client privilege [LACBA Formal Opinion Nos. 305 (1968), 386 (1980), 417 (1983), 436 (1985)]. Client "secrets" include information that is a matter of public record [LACBA Formal Opinion No. 386 (1980); *see* In the Matter of Johnson (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179 (client's felony conviction, communicated to attorney by client with expectation of confidentiality); *see also In re Jordan (1974) 12 Cal. 3d 575, 580, 116 Cal. Rptr. 371, 526 P.2d 523]* .

[3] Types of Confidential and Secret Information

Examples of client secrets and confidential information include the following:

- *Information Obtained Before Lawyer Is Engaged*: The protection afforded client confidences and secrets under *Bus. & Prof. Code § 6068(e)* does not require a formal engagement. *Bus. & Prof. Code § 6068(e)* also applies when a lawyer is consulted before actual employment even when no employment ensues [LACBA Formal Opinion No. 366 (1970)].

PRACTICE TIP:

Information Acquired Before Client Consultation. Although no case or ethics opinion has yet to address the question, *Bus. & Prof. Code § 6068(e)* would appear to apply to information involved in the representation of a client which the lawyer acquired before the lawyer ever consulted with the client in a professional capacity. For example, if the lawyer acquired information from reading the newspaper or in a social relationship with a client, the lawyer may have a duty under *Bus. & Prof. Code § 6068(e)* with respect to that information if the lawyer later represents the client in a matter which involves that information. *By Stanley W. Lamport.*

- *Client's Criminal Conduct*: *Bus. & Prof. Code § 6068(e)* includes information that could link a client to criminal activity [*Ex parte McDonough (1915) 170 Cal. 230, 233, 149 P. 566* ; LACBA Formal Opinion No. 386 (1980) (client perjury), LACBA Formal Opinion No. 436 (1985) (unauthorized practice of law)]. As one court observed, "[h]owever desirable it may be to obtain proofs sufficient to insure the conviction of all persons who commit crimes ... and it will readily be conceded that it is most desirable, such proofs may not be obtained from those who are forbidden by our law to give them" [*People v. Singh (1932) 123 Cal. App. 365, 370, 11 P.2d 73]* . Confidential and secret information cannot be disclosed, even if it would exonerate someone wrongly convicted of a crime [LACBA Formal Opinion No. 389 (1981)]. But see the discussion of a lawyer's duty to turn over evidence or instrumentalities of a client's crime to the prosecution under § 72.33[6][f]. See also discussion of when an attorney should or may disclose information about an imminent serious crime under § 72.33[6][i].

- *Client's Fraudulent Conduct*: The protection includes information that a client has filed a fraudulent bankruptcy petition or that the client is receiving money to which the client is not entitled [LACBA Formal Opinion No. 422 (1983), 417 (1983)]. The confidential protection extends to cover information obtained by a lawyer while he or she is jointly representing an insured and an insurer, even if the information indicates that the insured may have no coverage or has perpetrated a fraud on the insurer. The lawyer is required not to reveal that information to the insurer, and may also be required to withdraw from representation [State Bar Formal Opinion No. 1995-139]. The protection also covers information known to the lawyer that a client-real estate developer has committed a fraud on home buyers. Although the lawyer may not reveal the information, he or she is ethically prohibited from in any way assisting in an on-going fraud [State Bar Formal Opinion No. 1996-146].

- *Information That Client Corporation Has Been Suspended*: However, the lawyer must avoid misleading the court with respect to the corporation's status [LACBA Formal Opinion 408 (1982)].

- *Identity of Client and Nature of Lawyer's Engagement*: Ordinarily the identity of a client is not a confidence or a secret [*Ex parte McDonough (1915) 170 Cal. 230, 231, 235, 149 P. 566* ; LACBA Formal Opinion Nos. 374 (1978), 456 (1990)]. However, in some instances *Bus. & Prof. Code § 6068(e)* will prevent disclosure of such information if it will expose the client to criminal or civil liability or necessarily reveals other confidential or secret information [*Hays v. Wood (1979) 25 Cal. 3d 772, 785, 160 Cal. Rptr. 102, 603 P.2d 19* ; *Ex parte McDonough (1915) 170 Cal. 230, 231, 236-237, 149 P. 566* ; *Rosso, Johnson, Rosso & Ebersold v. Superior Court (1987) 191 Cal. App. 3d 1514, 1519, 237 Cal. Rptr. 242* ; LACBA Formal Opinion Nos. 374 (1978), 456 (1990)].

- *Nature of Lawyer/Client Fee Arrangement*: Information about a lawyer's fee arrangement with a client is generally not a confidence or secret [*Willis v. Superior Court (1980) 112 Cal. App. 3d 277, 291, 169 Cal. Rptr. 301]* . However, here too, the information may be within the scope of *Bus. & Prof. Code § 6068(e)* if it necessarily involves the disclosure of other confidential or secret information [*see* LACBA Formal Opinion No. 456 (1990); *see also* BASF Formal Opinion Nos. 1975-5 (lawyer may not voluntarily disclose to IRS details of fees paid by client), 1974-3 (lawyer may not voluntarily disclose to IRS source of funds in client trust account)].

- *Information in Attorney Bills to Client*: Information in attorney bills about time spent, expenses and fees incurred, and specific work performed in connection with a lawyer's representation of the client may be within the scope of *Bus. & Prof. Code § 6068(e)* [LACBA Formal Opinion Nos. 374 (1978) and 456 (1990)].

[4] Duty Survives Termination of Attorney-Client Relationship

The duty to maintain client confidences and secrets survives the termination of the lawyer-client relationship [*In re Charlisse C. (2008) 45 Cal. 4th 145, 160, 84 Cal. Rptr. 3d 597, 194 P.3d 330* ; *Styles v. Mumbert (2008) 164 Cal. App. 4th 1163, 1167, 79 Cal. Rptr. 3d 880* ; *Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp. (1995) 36 Cal. App. 4th 1832, 1841-1842, 43 Cal. Rptr. 2d 327* ; *Commercial Standard Title Co. v. Superior Court (1979) 92 Cal. App. 3d 934, 945, 155 Cal. Rptr. 393* ; State Bar Formal Opinion No. 1993-133; LACBA Formal Opinion Nos. 159 (1945), 274 (1962), 389 (1981), 456 (1990)]. The attorney's duty survives notwithstanding the attorney's discharge by the client [*Wutchumna Water Co. v. Bailey (1932) 216 Cal. 564, 571, 15 P.2d 505]* . The duty continues after the client's death [*Swidler & Berlin v. United States (1998) 524 U.S. 399, 410, 118 S.Ct. 2081, 141 L. Ed. 2d 379* ; LACBA Formal Opinion No. 414 (1983)].

[5] Inadvertent Disclosure

Inadvertent disclosure of privileged communications does not necessarily constitute waiver of the attorney-client privilege. If the client or privilege holder clearly did not consent or intend to disclose privileged matter, the accidental, inadvertent disclosure of privileged matter by the client's attorney does not constitute a waiver under *Evid. Code § 912* [*State Comp. Ins. Fund v. WPS, Inc. (1999) 70 Cal. App. 4th 644, 652-654, 82 Cal. Rptr. 2d 799* (responses to requests for production that included obviously privileged communications between opposing party and party's attorney did not waive attorney-client privilege)]. For discussion of privileges and waiver generally, see Ch. 191, *Discovery: Privileges and Other Discovery Limitations* .

The California Supreme Court has adopted an "objective standard," to be applied prospectively when an attorney inadvertently receives obviously confidential or privileged material [*Rico v. Mitsubishi Motors Corp. (2007) 42 Cal. 4th 807, 817, 68 Cal. Rptr. 3d 758, 171 P.3d 1092]* . Under this standard, when an attorney receives materials obviously subject to attorney-client privilege, or otherwise clearly confidential and privileged, and it is reasonably apparent that they were made available through inadvertence, that attorney should refrain from examining them any more than is essential to ascertain if they are privileged, and must immediately notify the sender that he or she has possession of materials that appear to be privileged. The attorney also must notify the party entitled to the privilege. The parties then may proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and such other judicial intervention as may be justified [*Rico v. Mitsubishi Motors Corp. (2007) 42 Cal. 4th 807, 817, 68 Cal. Rptr. 3d 758, 171 P.3d 1092* ; *State Comp. Ins. Fund v. WPS, Inc. (1999) 70 Cal. App. 4th 644, 656-657, 82 Cal.Rptr. 2d 799]* .

In applying the preceding rule, courts must consider whether reasonably competent counsel, knowing the circumstances of the litigation, would have concluded the materials were privileged, how much review was reasonably necessary to draw that conclusion, and when counsel's examination should have ended [*Rico v. Mitsubishi Motors Corp. (2007) 42 Cal. 4th 807, 818, 68 Cal. Rptr. 3d 758, 171 P.3d 1092* (standard was "properly and easily" applied in this case, and disqualification was appropriate)].

When seeking to hold an attorney accountable for misuse of privileged materials received through inadvertence, the complaining attorney has the burden to demonstrate persuasively the inadvertence. Otherwise, an attorney might attempt to gain an advantage by sending privileged matter deliberately and then moving to disqualify the recipient. Mere exposure to the material alone does not warrant disqualification, although disqualification may be proper for an attorney who violates the standard now set for handling inadvertently disclosed privileged matter [*State Comp. Ins. Fund v. WPS, Inc. (1999) 70 Cal. App. 4th 644, 656-657, 82 Cal.Rptr. 2d 799]* .

[6] Situations in Which Disclosure Permitted

[a] In General

Specific exceptions have been recognized in court decisions and ethics opinions [*see § 72.33[6]*]. The policy is to narrowly construe exceptions in order to promote strict enforcement of the duty set forth in *Bus. & Prof. Code § 6068(e)* [LACBA Formal Opinion Nos. 374 (1978), 456 (1990)].

[b] Client's Informed Consent

A client may consent to disclosure of confidential and secret information [*Commercial Standard Title Co. v. Superior Court (1979) 92 Cal. App. 3d 934, 945, 155 Cal. Rptr. 393* ; LACBA Formal Opinion Nos. 389 (1981), 409 (1983), 456 (1990)].

For a client's consent to be informed, the lawyer should fully advise the client about the nature of the information, the purpose of the disclosure, the benefits and detriments, both legal and otherwise, that may result from the disclosure or nondisclosure and any other facts that could have an important bearing on the client's decision [LACBA Formal Opinion No. 456 (1990)].

PRACTICE TIP:

Obtain Written Consent. It is advisable that both the lawyer's advice and the client's consent be in writing, although neither the Rules of Professional Conduct nor *Bus. & Prof. Code § 6068(e)* require it [LACBA Formal Opinion Nos. 409 (1983), 456 (1990)].

Informed consent may be implied. Implied consent may be obtained if the lawyer writes the client advising of his or her intent to disclose the information and stating that if the client does not respond within a stated reasonable time, the lawyer will assume that the client has consented and will act accordingly. The client's subsequent failure to respond may be construed as consent [LACBA Formal Opinion No. 389 (1981) (involving disclosure of information indicating that innocent third party was convicted of crime)].

Factors that would indicate the client's failure to respond is an implied consent include the following [LACBA Formal Opinion No. 389 (1981)]:

- Whether the client received the letter.
- Whether the client was in a position to respond within the time given.
- Whether the client had the capacity to understand the import of the letter.
- Whether the letter adequately advised the client.

[c] Disclosure Compelled by Law

A lawyer may be legally compelled to disclose confidences and client secrets that *Bus. & Prof. Code 6068(e)* prevents the lawyer from disclosing voluntarily [*see* LACBA Formal Opinion No. 456 (1990); BASF Formal Opinion Nos. 1975-5, 1974-3]. See also discussion in *§ 72.290* et seq.

[d] [Reserved]

[e] Joint Clients

When a lawyer is engaged to represent two or more clients in a matter, the clients' communications with the lawyer in the course of that engagement are not privileged as between the clients. This rule is founded on *Evid. Code § 962*, which states in pertinent part that when two or more clients have retained or consulted a lawyer on a matter of common

interest, none of them may claim a privilege as to a communication made in that relationship when the communication is offered in a civil proceeding between one of the clients and another of the clients [*Evid. Code § 962*].

While *Evid. Code § 962* speaks in terms of the use of communications in a civil proceeding, the rule has been applied more broadly. The exception of *Evid. Code § 962* is intended to provide joint clients access to communications with the jointly retained attorney that touch on matters affecting both clients [*Wortham & Van Liew v. Superior Court (1987) 188 Cal. App. 3d 927, 932, 233 Cal. Rptr. 725]* . It includes communications that one of the clients has with the lawyer out of the presence of the other clients [*Wortham & Van Liew v. Superior Court (1987) 188 Cal. App. 3d 927, 932, 233 Cal. Rptr. 725* ; *Glacier Gen. Assurance Co. v. Superior Court (1979) 95 Cal. App. 3d 836, 841, 157 Cal. Rptr. 435]* .

Evid. Code § 962, and the cases that have interpreted it, do not specifically address the issue of client secrets in a joint representation. While the policy behind *Evid. Code § 962* and the lawyer's duty of disclosure suggest that a lawyer may not refrain from disclosing significant information about one joint client to another, the prudent course is to confirm that understanding with the clients.

For discussion of conflicts when representing multiple clients, see *§ 72.111*.

[f] Disclosure of Evidence

A lawyer has a duty not to suppress evidence. "A [State Bar] member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal or produce" [*Cal. Rules Prof. Conduct, Rule 5-220*].

In the criminal context, several courts have held that a defendant's counsel must turn over to the prosecution evidence or instrumentalities of the client's crime in the lawyer's possession [*People v. Meredith (1981) 29 Cal. 3d 682, 690-693, 175 Cal. Rptr. 612, 631 P.2d 46* ; *People v. Superior Court (Fairbank) (1987) 192 Cal. App. 3d 32, 35-36, 237 Cal. Rptr. 158* ; *People v. Lee (1970) 3 Cal. App. 3d 514, 526, 83 Cal. Rptr. 715* ; State Bar Formal Opinion No. 1984-76; LACBA Formal Opinion No. 466 (1991)].

PRACTICE TIP:

Evidence Concerning Client's Crime. Prior to taking possession of evidence of a client's crime, the defense attorney should inform the client of the attorney's obligation to turn over the evidence once possession is obtained. The attorney should seriously question the consequences of taking possession of the evidence at all [State Bar Formal Opinion No. 1984-76].

[g] Client's Attack on Lawyer

Confidences and client secrets may be disclosed when the lawyer is responding to a client's attacks on the lawyer's integrity, good faith, authority, or performance of duty [LACBA Formal Opinion No. 396 (1982)]. There is no evidentiary privilege concerning a communication relevant to an issue of breach, by the lawyer or the client, of a duty arising out of the lawyer-client relationship [*Evid. Code § 958*]. The Law Revision Commission observed that "it would be unjust to permit a client either to accuse his attorney of a breach of duty and to invoke the privilege to prevent the attorney from bringing forth evidence in defense of the charge or to refuse to pay his attorney and invoke the privilege to defeat the attorney's claim" [Law Rev. Comm'n Comment to *Evid. Code § 958*]. However, the disclosure must be relevant for the exception to apply [*Brockway v. State Bar (1991) 53 Cal. 3d 51, 63, 278 Cal. Rptr. 836, 806 P.2d 308]* .

A lawyer may disclose confidences and secrets as necessary to pursue an action for fees or file a claim in a bankruptcy and litigate if the claim is contested [LACBA Formal Opinion No. 452 (1988)]. However, the lawyer cannot assist other creditors in locating the former client's assets [LACBA Formal Opinion No. 452 (1988)].

The exception may apply in situations when the client has not asserted the claim against the lawyer directly. In LACBA Formal Opinion No. 396 (1982), the lawyer had properly withdrawn from representing a client before trial and had notified the opposing lawyer. When the client did not appear at trial, a default was entered. A new lawyer representing the client sought relief from the default claiming that the former lawyer committed malpractice. The Committee concluded that *Bus. & Prof. Code § 6068(e)* did not prevent the lawyer from submitting a declaration when asked to do so by the lawyer opposing the client's motion for relief from default [LACBA Formal Opinion No. 396 (1982)].

Similarly, pursuant to *Evid. Code § 958*, a court held that a law firm could not move to dismiss another lawyer's action for referral fees against it on the ground that defending itself would violate the attorney-client privilege [*Dietz v. Meisenheimer & Herron (2009)177 Cal. App. 4th 771, 785-794, 99 Cal. Rptr. 3d 464*].

[h] Disclosure for Billing and Other Services

The Los Angeles County Bar Association Ethics Committee has stated that it is not improper for a lawyer to give limited information from his or her files to an outside agency necessary for statistical bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided the lawyer uses due care in the selection of the agency, the agency agrees to keep the information in confidence, and the agency and its employees do not permit disclosure to unauthorized persons [LACBA Formal Opinion Nos. 374 (1978), 423 (1983)].

In LACBA Formal Opinion No. 374 (1978) the Committee noted that special circumstances may exist when the nature of the information is so sensitive that ethically this information should not be disclosed to an outside agency, and in some instances not even to other employees of the lawyer. It is the duty of the attorney to determine that such special circumstances do not exist before disclosure is made [LACBA Formal Opinion No. 374 (1978)].

By contrast, there are a number of opinions that have found that without client consent, a lawyer may not disclose confidential or secret information to outside agencies involved in the representation. Ethics opinions have found the following:

- A legal aid attorney may not disclose confidential information regarding a client's financial eligibility to the foundation's board of directors without client consent [LACBA Formal Opinion No. 358 (1976); *but see* BASF Formal Opinion No. 1976-1 (policy requiring approval by litigation director of federally funded legal services office prior to commencing certain actions does not violate client confidentiality)].

- Without client consent, a non-attorney conducting a research project regarding a local bar association's legal services program may not be given summarized confidential information even if the client is not identified and could not be identified by the summarized information [LACBA Formal Opinion No. 378 (1978)].

- A lawyer may not report to the State Bar confidential or secret information gained while representing a lawyer client [LACBA Formal Opinion No. 400 (1982)].

- A lawyer may not give a charity summarized confidential or secret information about clients the charity referred to the lawyer [LACBA Formal Opinion No. 403 (1982)].

- A lawyer may not bid or enter into a government contract that requires the attorney to obtain client consent to waive the attorney-client privilege and work product protection [LACBA Formal Opinion No. 435 (1985)].

[i] Client's Plan to Commit Serious Crime

Evid. Code Section 956.5 creates an exception to the lawyer-client privilege when the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

After decades of debate by various bar associations and ethics committees, *Bus. & Prof. Code § 6086(e)* has been modified to include an exception to the duty of confidentiality. An attorney may, but is not required to, reveal confidential information relating to the representation of the client to the extent the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in the death of, or substantial bodily harm to, an individual [*see Bus. & Prof. Code § 6086(e)(2)*].

Cal. Rules Prof. Conduct, Rule 3-100 was adopted effective July 1, 2004 to provide an exception to the duty of confidentiality and a procedure for the attorney to reveal certain information. A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual [*Cal. Rules Prof. Conduct, Rule 3-100(B)*]. However, before revealing the confidential information, a member must, if reasonable under the circumstances, make a good faith effort to persuade the client either not to commit or continue the criminal act, or to pursue a course of conduct that will prevent the threatened death or substantial bodily harm, or both [*Cal. Rules Prof. Conduct, Rule 3-100(C)(1)*]. The member must also inform the client, at an appropriate time, of the member's ability or decision to reveal the information [*Cal. Rules Prof. Conduct, Rule 3-100(C)(2)*]. While a member may consider whether the prospective harm is imminent, the imminence of the harm is not a prerequisite to disclosure [*Cal. Rules Prof. Conduct, Rule 3-100*, Discussion]. When revealing the information, the member must disclose no more than is necessary to prevent the criminal act, given the information the member knows at the time of the disclosure [*Cal. Rules Prof. Conduct, Rule 3-100(D)*]. A member is not obligated to reveal the information set forth in this rule [*Cal. Rules Prof. Conduct, Rule 3-100(E)*].

Previously, the San Diego Legal Ethics Committee had concluded that there was no exception that allowed even limited disclosure of confidential information that a client intended to seriously injure or kill someone [SDCBA Ethics Opinion No. 1990-1]. The Los Angeles County Bar Association in a number of opinions, on the other hand, had advanced a narrow exception that allowed for disclosure in limited circumstances involving a serious and imminent threat to human life or safety.

In LACBA Formal Opinion No. 353 (1976), the Committee concluded that when there appears to be the likelihood of a very serious crime, in the sense that significant injury to members of the public is highly likely, especially though not exclusively when the crime will involve physical violence, and when the attorney is satisfied beyond substantial doubt that the crime will occur and is imminent, there may be duties, not necessarily growing out of specific ethical rules, to take affirmative preventive steps involving disclosure to the intended victim or other third persons [LACBA Formal Opinion No. 353 (1976)].

The "at his peril" requirement of *Bus. & Prof. Code § 6068(e)* indicates that the lawyer should divulge an intended crime only under exceptional circumstances of serious and imminent damage to the public [LACBA Formal Opinion No. 353 (1976); *see also* LACBA Formal Opinion Nos. 264 (1959), 414 (1983), 417 (1983), 436 (1985) (all affirming view stated in LACBA Formal Opinion No. 353 (1976))].

Attempting to clarify when an attorney may disclose a client confidence, the Ninth Circuit held that "the guiding rule for the purpose of the exception [to confidentiality] for preventing criminal activity is objective reasonableness in light of the surrounding circumstances" [*McClure v. Thompson (2003) 323 F.3d 1233, 1245]* .

In LACBA Formal Opinion No. 436 (1985), the Committee narrowed the exception to permit disclosure in situations

when such crimes are likely to result in imminent death or serious bodily injury. This removed economic injuries from the ambit of the exception. The preservation of confidentiality has been consistently recognized as being more important than the potential injury to victims of purely economic crimes [LACBA Formal Opinion No. 436 (1985)].

The exception does not apply to information about a client's crime committed in the past [LACBA Formal Opinion Nos. 267 (1960), 386 (1980)]. The exception also does not apply if the disclosure necessarily involves information about past crimes or wrong doing [LACBA Formal Opinion Nos. 414 (1983), 417 (1983), 422 (1983)]. The information may not be disclosed even if it would exonerate someone wrongly convicted of a crime [LACBA Formal Opinion No. 389 (1981)].

The one case to address *Evid. Code § 956.5* is *People v. Dang (2001) 93 Cal. App. 4th 1293, 113 Cal. Rptr. 2d 763* . The court held that § 956.5 applied to threats made by the defendant against witnesses and the defendant's former attorney. The testimony of the defendant's former attorney concerning those threats was properly admitted over objection based on the attorney-client privilege [*People v. Dang (2001) 93 Cal. App. 4th 1293, 1298, 113 Cal. Rptr. 2d 763]* . While the *Dang* court noted the conflict between *Evid. Code § 956.5* and *Bus. & Prof. Code § 6068(e)* because that issue was not before the court, the conflict was not resolved. In dicta, the court further noted that the State Bar Court has held the duty of confidentiality under *Bus. & Prof. Code § 6068(e)* is modified by the exceptions to the attorney-client privilege codified in the Evidence Code [*People v. Dang (2001) 93 Cal. App. 4th 1293, 1298-1299, 113 Cal. Rptr. 2d 763]* .

[j] Disclosure to Attorney's Own Counsel When Attorney is the Client

A lawyer does not violate *Bus. & Prof. Code § 6068(e)* when he or she discloses client confidences to her own attorney for the purpose of determining whether those communications are admissible evidence under an exception to the attorney client privilege [*Fox Searchlight Pictures, Inc. v. Paladino (2001) 89 Cal. App. 4th 294, 314, 106 Cal. Rptr. 2d 906]* . In *Fox Searchlight*, in-house counsel who sued her former employer for wrongful termination was permitted to privately disclose to her lawyer all facts relevant to the termination to the extent necessary for the preparation and prosecution of the wrongful termination action against her former client-employer even if this included disclosing confidential information and privileged communications [*Fox Searchlight Pictures, Inc. v. Paladino, 89 Cal. App. 4th 294, 314-315, 106 Cal. Rptr. 2d 906]* . However, the attorney may not disclose confidences when he or she is not involved in a malpractice action or fee dispute [*Styles v. Mumbert (2008) 164 Cal. App. 4th 1163, 1167, 79 Cal. Rptr. 3d 880* (no disclosure permitted in action when attorney represented client and attorney seeks to step in as client's adversary)].

PRACTICE TIP:

Relationship of *Evid. Code § 956.5* and *Bus. & Prof. Code § 6068(e)*. While *Evid. Code § 956.5* eliminates the lawyer-client privilege in the situations described in the LACBA ethical opinions, does it address the broader obligation under *Bus. & Prof. Code § 6068(e)* to maintain client secrets? Although no court or ethics opinion has yet to address this question, the Legislature's adoption of a substantially similar standard in *Evid. Code § 956.5* may reflect a policy to permit such disclosures. Unlike other exceptions to the lawyer-client privilege in the Evidence Code, which apply to any communications of a certain type, *Evid. Code § 956.5* creates an exception only when the lawyer " *reasonably believes that disclosure ... is necessary* " to prevent the client from committing the criminal act. The fact that the exception is based on the lawyer's judgment that disclosure is necessary suggests a broader intent than merely creating an exception to the lawyer-client privilege. *By Stanley W. Lamport.*

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PART II. LEGAL BACKGROUND
B. Conflicts Of Interest
1. Basic Principles Governing Conflicts

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§ 72.34 Duty to Practice With Competence

Under *Cal. Rules Prof. Conduct, Rule 3-110*, a State Bar member must "not intentionally, recklessly or repeatedly fail to perform legal services with competence." "Competence in any legal service" means to apply the diligence, learning and skill, and mental, emotional, and physical ability reasonably necessary for the performance of the services [*Cal. Rules Prof. Conduct, Rule 3-110(A), (B)*].

Conflict situations inherently give rise to issues concerning the lawyer's ability to practice with competence. The lawyer's duties of undivided loyalty, disclosure, and preservation of client confidences and secrets are all duties that are fundamental to a lawyer's performance of legal services. Thus, situations that strain or impair the lawyer's ability to fulfill these duties also strain or impair the lawyer's duty to perform legal services competently. The effect on the lawyer's ability to practice competently is an important issue to analyze when advising a client about a conflict.

For further discussion of the duty of competence, see *§ 72.270 et seq. through § 72.290* et seq.

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[Reserved]

§§ 72.35[Reserved]

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§ 72.50 Duties Owed to Client

A lawyer's duties are owed to a client. This includes both formal and informal client relationships. *Evid. Code § 951* defines a "client" as "a person or entity who, directly or through an authorized representative, consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity." Whenever a party seeking legal advice consults a lawyer, the relation of attorney and client is established *prima facie* [*Beery v. State Bar (1987) 43 Cal. 3d 802, 811, 239 Cal. Rptr. 121, 739 P.2d 1289]* . A client "includes a person or entity which consults a lawyer for the purpose of retention or advice even if neither results" [State Bar Formal Opinion No. 1984-84 (citing *Beery v. State Bar (1987) 43 Cal. 3d 802, 811, 239 Cal. Rptr. 121, 739 P.2d 1289* ; *People v. Dorrance (1944) 65 Cal. App. 2d 125, 129, 150 P.2d 10* , and *Estate of Dupont (1943) 60 Cal. App. 2d 276, 288, 140 P.2d 866*); LACBA Formal Opinion No. 366 (1977); SDCBA Ethics Opinion No. 1990-3].

The existence of an attorney-client relationship turns on the intent and conduct of the parties [*Hecht v. Superior Court (1987) 192 Cal. App. 3d 560, 565, 237 Cal. Rptr. 528]* . The absence of a fee agreement does not prevent the relationship from arising [*Beery v. State Bar (1987) 43 Cal. 3d 802, 811-812, 239 Cal. Rptr. 121, 739 P.2d 1289]* . The payment of attorneys' fees may be an indication, but does not in itself determine the existence of an attorney-client relationship [*Lasky, Haas, Cohler & Munter v. Superior Court (1985) 172 Cal. App. 3d 264, 285, 218 Cal. Rptr. 205]* .

Courts are particularly prone to find an attorney-client relationship has arisen when confidential information has been imparted by the putative client [*see, e.g.,* *Miller v. Metzinger (1979) 91 Cal. App. 3d 31 39-40, 154 Cal. Rptr. 22* ; *Ferrara v. La Sala (1960) 186 Cal. App. 2d 263, 266-268, 9 Cal. Rptr. 179* , disapproved on other grounds in *Rader v. Thrasher (1962) 57 Cal. 2d 244, 252, 18 Cal. Rptr. 736, 368 P.2d 360* ; *see also* *Westinghouse Electric Corp. v. Kerr-McGee Corporation (7th Cir. 1978) 580 F.2d 1311, 1316-1317* , *cert. denied,* *439 U.S. 955]* .

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§ 72.51 Duties Owed to Nonclients

In some cases a lawyer may owe duties to a nonclient that may produce a conflict of interest in the representation of a client. In the context of former Rule 5-102(B), which stated that a member may not represent conflicting interests without written consent, the State Bar observed that a conflict of interest may arise from an attorney's relationship with a nonclient. The conflict may arise when an attorney's relationship with a person or entity creates an expectation that the attorney owes a duty of fidelity. A conflict may also arise when the attorney has acquired confidential information in the course of the relationship that will be, or may appear to the person or entity to be, useful in the attorney's representation in an action on behalf of a client [State Bar Formal Opinion No. 1981-63].

For example, the State Bar concluded that the law firm of a city council member could not represent tort claimants against the city. Although the city council member did not represent the city as its lawyer, both of the elements mentioned *above* (expectation of fidelity and acquisition of confidential information) were present in the council member's involvement with the city [State Bar Formal Opinion No. 1981-63; *see also* State Bar Formal Opinion No. 1977-46]. Several county bar association opinions have reached the same conclusion in situations involving similar facts [LACBA Formal Opinion 273 (1962); SDCBA Ethics Opinion Nos. 1976-12, 1969-1].

The same standard was applied in *William H. Raley Co. v. Superior Court (1983) 149 Cal. App. 3d 1042, 197 Cal. Rptr. 232* . In *Raley*, the court disqualified a law firm that represented a client in a lawsuit against a company whose assets were administered by a bank acting as a trustee. A lawyer in the firm was a director of the bank and a member of its trust committee, which discharged the bank's trustee responsibilities for various trusts, including the trust for the company in question. Although the lawyer did not act as an attorney for the trust committee, the court found that both aspects of the standard in State Bar Formal Opinion No. 1981-63 were present. By acting for the bank as a trustee, the lawyer had fiduciary duties to the company trust beneficiaries to manage the company with reasonable skill, prudence, and diligence. The lawyer also had ongoing accessibility to confidential information about the company that might have been pertinent to the lawsuit [*William H. Raley Co. v. Superior Court (1983) 149 Cal. App. 3d 1042, 1047-1048, 197 Cal. Rptr. 232* ; *see also* *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft (1999) 69 Cal. App. 4th 223, 81 Cal. Rptr. 2d 425* (law firm enjoined from representing water district in dispute with wholly owned subsidiary of

corporation, where law firm had never directly represented corporation or its wholly owned subsidiary, but had represented insurance underwriter of parent corporation on ongoing basis and was privy to confidential information about nonclient corporation's financial condition that could be useful to adversary); BASF Formal Opinion No. 1979-2 (lawyer serving as director is tantamount to representation of company)].

Raley and all of the ethics opinions discussed *above*, involved conflicts analyzed under old Rule 5-102(B), or its predecessors, which applied when a representation was adverse to an existing client. In *Allen v. Academic Games Leagues of America Inc. (C.D. Cal. 1993) 831 F. Supp. 785* , the court applied these principles to disqualify a lawyer who had a prior fiduciary relationship with the opposing party in which the lawyer may have been privy to material confidential information. *Allen* involved a suit between competing companies engaged in manufacturing and marketing educational games. The defendants' lawyer, while as a law student and later as a lawyer, served as a member of the plaintiff's advisory board and attended meetings at which the plaintiff's claims against the defendants may have been discussed. After the lawsuit was filed, the lawyer resigned from his position with the plaintiff and became the attorney of record for the defendants. Citing *Raley*, the court held that although the Rules of Professional Conduct were not directly applicable (due to the absence of the lawyer-client relationship), disqualification was proper based on the general intent of the rules expressed in *Cal. Rules Prof. Conduct, Rule 1-100(A)* (rules serve "to protect the public and promote respect and confidence in the legal profession" and "the prohibition of certain conduct in these Rules is not exclusive") [*Allen v. Academic Games Leagues of America, Inc. (C.D. Cal. 1993) 831 F. Supp. 785, 789* ; *see also Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft (1999) 69 Cal. App. 4th 223, 232-234, 81 Cal. Rptr. 2d 425]* .

The same principles discusses above were applied in *American Airlines v. Sheppard, Mullin, Richter & Hampton (2002) 96 Cal. App. 4th 1017, 117 Cal. Rptr. 2d 685* . In an action for breach of fiduciary duty, the court held that a lawyer and his law firm breached their fiduciary duty to an airline company who was their client when the lawyer, without the consent of the airline, agreed to testify as the Federal Rule 30(b)(6) spokesperson in a federal action on behalf of an aircraft broker. In the first matter, the law firm represented the airline company against an aircraft manufacturer. In the second matter, the lawyer acted as the spokesperson for the aircraft broker in a different case against the same aircraft manufacturer.

American Airlines applied the rule against the representation of concurrent clients notwithstanding the absence of an attorney-client relationship in the second matter. The court recognized the existence of a conflict between the fiduciary duties owed to the non-client aircraft broker to answer questions at a deposition such as to avoid being determined an inadequate witness and the duty to the client airline company to preserve the airline's confidences and secrets [*American Airlines v. Sheppard, Mullin, Richter & Hampton (2002) 96 Cal. App. 4th 1017, 117 Cal. Rptr. 2d 685]* .

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§ 72.52 Organization as Client

[1] Client Is Organization, Not Individuals

Effective May 27, 1989, Rule 3-600 sets forth the basic rules on representation when the client is an organization. When a lawyer represents an entity, the client is the organization itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement [*see Cal. Rules Prof. Conduct, Rule 3-600(A)*; *Brooklyn Navy Yard Cogeneration Partners v. Superior Court (1997) 60 Cal. App. 4th 248, 254-255, 70 Cal. Rptr. 2d 419]* . A lawyer who represents an organization does not thereby represent its officers, directors, shareholders or other constituents [*see Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft (1999) 69 Cal. App. 4th 223, 240, 81 Cal. Rptr. 2d 425* ; *Brooklyn Navy Yard Cogeneration Partners v. Superior Court (1997) 60 Cal. App. 4th 248, 254-255, 70 Cal. Rptr. 2d 419* ; *Skarbrevik v. Cohen, England & Whitfield (1991) 231 Cal. App. 3d 692, 703-707, 282 Cal. Rptr. 627* ; *Ward v. Superior Court (1977) 70 Cal. App. 3d 23, 33-34, 138 Cal. Rptr. 532* ; *Lewis v. Le Baron (1967) 254 Cal. App. 2d 270, 281, 61 Cal. Rptr. 903* ; *Jacuzzi v. Jacuzzi Bros., Inc. (1963) 218 Cal. App. 2d 24, 29, 32 Cal. Rptr. 188* ; SDCBA Ethics Opinion No. 1976-16 (revised)].

[2] Dealing With and Representing Constituents of Organization

A lawyer has a duty to explain the identity of the client for whom the lawyer is acting whenever it becomes apparent that the organization's interests are or may become adverse to those of the constituent with whom the lawyer is dealing [*see Cal. Rules Prof. Conduct, Rule 3-600(D)*]. Information disclosed by a constituent of the entity must be disclosed to the entity as required by the lawyer's duties to keep the entity reasonably informed of significant developments [*Jacuzzi v. Jacuzzi Bros., Inc. (1963) 218 Cal. App. 2d 24, 29, 32 Cal. Rptr. 188]* . A lawyer has a duty not to mislead a constituent into believing that confidential information will not be used against the constituent if the constituent's interests conflict with those of entity [*see Cal. Rules Prof. Conduct, Rule 3-600(D) National Football League Properties, Inc. v. Superior Court (1998) 65 Cal. App. 4th 100, 108, 75 Cal. Rptr. 2d 893* ; *Brooklyn Navy Yard Cogeneration Partners v. Superior Court (1997) 60 Cal. App. 4th 248, 255, 70 Cal. Rptr. 2d 419]* .

A lawyer may represent an entity and one or more of its constituents concurrently, provided that the lawyer complies

with the conflicts rules [*Cal. Rules Prof. Conduct, Rule 3-600(E)*; *see also Robinson v. Snell's Limbs & Braces (La. Ct. App. 1989) 538 So. 2d 1045, 1048* ; *United States Industries v. Goldman (S.D.N.Y. 1976) 421 F. Supp. 7, 11-12]* . If the organization's consent is required for dual representation, consent must be given by a constituent of the entity who is someone other than the constituent being represented.

[3] Whistle Blowing

A lawyer may take such actions as appear to be in the best lawful interest of the organization to avoid injuries to the organization in the following situations [*Cal. Rules Prof. Conduct, Rule 3-600(B)*]:

- When an actual or apparent agent of the organization acts or intends or refuses to act in a manner that may be a violation of law reasonably imputable to the organization.

- When an actual or apparent agent of the organization acts or intends or refuses to act in a manner that is likely to result in substantial injury to the organization.

The representation of a governmental entity presents unique problems in possible whistle blowing situations. Not only is it often difficult to identify the client precisely, the lawyer representing a governmental entity must also harmonize the attorney-client privilege and the ethical duty to protect the client's confidences and secrets with the whistleblower statutory protections applicable to employees of state and local public entities.

Guidance for lawyers representing governmental entities can be found in Attorney General Opinion No. 00-1203 which reaches the following conclusions [*84 Ops. Cal. Atty. Gen. 71]* :

- The "whistleblower" statutory protections applicable to employees of state and local public entities do not supersede the statutes and rules governing the attorney-client privilege.

- The statutory provisions relating to the disclosure of false claims actions, communications with the Legislature, and the filing of complaints or claims or the institution of proceedings pertaining to the rights of employment by employees of state and local public entities do not supercedes the statutes and rules governing the attorney-client privilege.

In these circumstances, Rule 3-600 states that the lawyer may follow one of the following courses of conduct provided the lawyer does not violate the duty to maintain client confidences and secrets [*Cal. Rules Prof. Conduct, Rule 3-600(B)*]:

- Urge reconsideration, and explain the likely consequences of the action or inaction to the organization.

- Refer the matter to the next higher authority in the organization, and to subsequent higher authorities, up to the highest internal authority that can act on behalf of the organization.

Rule 3-600 does not preclude a lawyer from taking other courses of action consistent with the lawyer's ethical duties. If the client fails to respond appropriately (in the lawyer's view), the lawyer may (and perhaps must) resign [*see Cal. Rules Prof. Conduct, Rule 3-600(C)*; *see also Cal. Rules Prof. Conduct, Rule 3-700* (termination of employment)].

[4] Lawyer's Duties to Corporation

Rule 3-600 applies to the representation of corporations [*National Football League Properties, Inc. v. Superior Court (1998) 65 Cal. App. 4th 100, 108, 75 Cal. Rptr. 2d 893* ; *Brooklyn Navy Yard Cogeneration Partners v. Superior Court*

(1997) 60 Cal. App. 4th 248, 254, 70 Cal. Rptr. 2d 419 ; *Skarbrevik v. Cohen, England & Whitfield (1991) 231 Cal. App. 3d 692, 703-707, 282 Cal. Rptr. 627* ; *see* Rule 3-600 Discussion].

Under Rule 3-600, and the cases decided before the rule, a lawyer does not represent the shareholders, officers or employees of the corporation by virtue of representing the corporation itself. The lawyer's first duty is to the corporation [*see National Football League Properties, Inc. v. Superior Court (1998) 65 Cal. App. 4th 100, 108, 75 Cal. Rptr. 2d 893* ; *Brooklyn Navy Yard Cogeneration Partners v. Superior Court (1997) 60 Cal. App. 4th 248, 254-255, 70 Cal. Rptr. 2d 419* ; *Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp. (1995) 36 Cal. App. 4th 1832, 1842, 43 Cal. Rptr. 2d 327* ; *Meehan v. Hopps (1956) 144 Cal. App. 2d 284, 293, 301 P.2d 10]* .

The lawyer's duties to the corporation take precedence even when the legal advice rendered to the corporation may affect the interests of the shareholders or other constituents. The lawyer's duty to the organization exists even when the corporation acts or intends to act improperly [*Skarbrevik v. Cohen, England & Whitfield (1991) 231 Cal. App. 3d 692, 704, 282 Cal. Rptr. 627* (citing Rule 3-600(B))].

As a result, courts have held that corporate counsel should refrain from taking part in any controversies or factual differences among shareholders as to control of the corporation so that counsel can advise the corporation without prejudice or bias [*Forrest v. Baeza (1997) 58 Cal. App. 4th 65, 74, 67 Cal. Rptr. 2d 857* ; *Skarbrevik v. Cohen, England & Whitfield (1991) 231 Cal. App. 3d 692, 704, 282 Cal. Rptr. 627* ; *Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 622, 120 Cal. Rptr. 253]* . This rule generally applies when a lawyer who has been representing a corporation is asked to represent one shareholder against another shareholder in a dispute over the control of the corporation [*see, e.g., Woods v. Superior Court (1983) 149 Cal. App. 3d 931, 197 Cal. Rptr. 185* (lawyer who for years represented corporation owned by husband and wife could not represent one shareholder against other in marital dissolution action when corporation was primary focus of dispute)].

In *Goldstein v. Lees*, the court held that a former corporate counsel who had material confidential information could not represent one shareholder in a proxy fight for control of the corporation. The court emphasized that a lawyer who has acquired confidential information while representing the corporation cannot monopolize that information for the benefit of one shareholder in a dispute over control of the corporation [*Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 619-623, 120 Cal. Rptr. 253]* .

On the other hand, a lawyer may not be prohibited from representing shareholders on certain matters related to the corporation. In *Jacuzzi v. Jacuzzi Bros., Inc.*, the court found that a former corporate lawyer could represent minority shareholders in a derivative action to address misfeasance on the part of the directors unless in so doing the lawyer may be called upon to breach a professional confidence entrusted to him by the corporation. The court held that since the action was for the benefit of the corporation, it was not an adverse representation [*Jacuzzi v. Jacuzzi Bros., Inc. (1963) 218 Cal. App. 2d 24, 29, 32 Cal. Rptr. 188]* .

Similarly, in *Forrest v. Baeza*, the court permitted a current corporate lawyer to represent two majority shareholders in a derivative action against two closely held corporations. The court, however, held that the lawyer could not simultaneously represent the corporations in the action because the majority shareholders, who were also directors, were accused of embezzling from the corporations, which created a conflict of interest between the corporations and the majority shareholders. Due to this conflict, the majority shareholders' prior consent on behalf of the corporations to the lawyer's simultaneous representation of the corporations and the majority shareholders was not valid under either *Cal. Rules Prof. Conduct, Rules 3-310(C)* or *3-600(E)*. In permitting the lawyer to continue to represent the majority shareholders, the court rejected the argument that the lawyer should be disqualified under *Cal. Rules Prof. Conduct, Rule 3-310(E)*, for possessing confidential information that could prejudice the corporations. The court found that there was no confidential information particular to the corporations, in that the majority shareholders were "the sole repositories" of all corporate information [*Forrest v. Baeza (1997) 58 Cal. App. 4th 65, 74-75, 67 Cal. Rptr. 2d 857]* .

A lawyer is also not prohibited from taking actions on behalf of the corporation that are adverse to the interests of a shareholder or other constituents. In *Skarbrevik v. Cohen, England & Whitfield*, the corporation's lawyer rendered advice and drafted documentation for the corporation that resulted in a dilution of a minority shareholder's interest in the company. The work was performed at the direction of the majority shareholders, who apparently were the ones authorized to oversee the lawyer's representation of the corporation. Applying Rule 3-600, the court held that because the lawyer represented the corporation, he did not represent the shareholder and owed no duty to the shareholder with respect to his advice or actions taken [*Skarbrevik v. Cohen, England & Whitfield (1991) 231 Cal. App. 3d 692, 704, 282 Cal. Rptr. 627* ; *see also Meehan v. Hopps (1956) 144 Cal. App. 2d 284, 290, 301 P.2d 10* (lawyer could bring action on behalf of corporation's receiver against majority shareholder who had previously dominated corporation)].

[5] Affiliate as Distinct Organization

Corporations and their affiliates are distinct entities for conflict purposes [*see Cal. Rules Prof. Conduct, Rule 3-600*; *Brooklyn Navy Yard Cogeneration Partners v. Superior Court (1997) 60 Cal. App. 4th 248, 254-259, 70 Cal. Rptr. 2d 419* ; State Bar Formal Opinion No. 1989-113; *but see Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft (1999) 69 Cal. App. 4th 223, 239-252, 81 Cal. Rptr. 2d 425* (corporation and subsidiary found to have "unity of interest" and constitute single client for conflict purposes)]. For large, publicly traded corporations, an attorney can generally be adverse to an affiliate of a corporation represented by the lawyer without violating the conflict rules [State Bar Formal Opinion No. 1989-113; *see Image Technical Services, Inc. v. Eastman Kodak Company (N.D. Cal. 1993) 820 F. Supp. 1212, 1214* (citing State Bar Formal Opinion No. 1989-113 with approval)].

[6] Close Corporations

The Discussion to Rule 3-600 observes that lawyers dealing with close corporations and small associations often perform services on behalf of both the organization and its major constituents. In resolving conflicts in these multiple relationships, the Discussion refers members to case law [*Cal. Rules Prof. Conduct, Rule 3-600*, Discussion].

Although the issue may arise in the representation of larger corporations as well, representation of close corporations in particular involves the potential for a lawyer-client relationship to arise with the corporation's principals individually. While under Rule 3-600 a lawyer does not have a lawyer-client relationship with the corporation's constituents by virtue of representing the corporation, a lawyer-client relationship may still arise based on the nature of the lawyer's interaction with the constituents [*see, e.g., National Football League Properties, Inc. v. Superior Court (1998) 65 Cal. App. 4th 100, 108, 75 Cal. Rptr. 2d 893* ; *Skarbrevik v. Cohen, England & Whitfield (1991) 231 Cal. App. 3d 692, 705, 282 Cal. Rptr. 627* (suggesting that lawyer-client or confidential relationship with individual shareholder in close corporation may arise when lawyer has close interaction with that shareholder); *see also* State Bar of California Formal Opinion No. 1999-153].

PRACTICE TIP:

Variation of Alter-Ego Analysis. In analyzing conflicts in situations involving close corporations, courts tend to use a variation of alter-ego analysis. In some cases, the rules governing a lawyer's relationship to a partnership client may apply [*see, e.g., Hecht v. Superior Court (1987) 192 Cal. App. 3d 560, 565, 237 Cal. Rptr. 528]* . Courts look to [*see, e.g., Woods v. Superior Court (1983) 149 Cal. App. 3d 931, 935, 197 Cal. Rptr. 185]* :

- The separateness of entities.
- The unity of interests.
- Whether corporate formalities are observed.

- The extent to which entities have distinct and independent managements.

Not every interaction with a shareholder in a close corporation necessarily leads to a lawyer-client relationship. On the one hand, when the lawyer is acting for the benefit of the corporation, the fact that the act also benefits an individual shareholder because of that shareholder's interest in the corporation does not give rise to a lawyer-client relationship with the shareholder [*Meehan v. Hopps (1956) 144 Cal. App. 2d 284, 293, 301 P.2d 10]* . On the other hand, where the corporation exists to serve the personal interests of the shareholders, a lawyer-client relationship with individual shareholders may be deemed to exist, particularly when there is close interaction between the lawyer and the shareholder [*Woods v. Superior Court (1983) 149 Cal. App. 3d 931, 197 Cal. Rptr. 185* (involving family corporation)].

PRACTICE TIP:

Determining Existence of Lawyer-Client Relationship With Shareholders. So far the courts have not yet adopted a clear rule concerning when a lawyer-client relationship arises with individual shareholders. In answering these questions in the future, courts may look to the factors that have been enunciated in cases involving partnerships [*see Responsible Citizens v. Superior Court (1993) 16 Cal. App. 4th 1717, 1731-1733, 20 Cal. Rptr. 2d 756]* . *By Stanley W. Lamport*.

Situations in which the lawyer is deemed to have a lawyer-client relationship with individual shareholders can lead to challenging conflict of interest problems for the lawyer. When there is a change in control, the lawyer may suddenly find that the once identical interests of the corporation and the shareholder are now in conflict. Courts tend to resolve these conflicts in favor of the corporation based on the principle that the lawyer's primary duty is to the corporation [*see, e.g., Skarbrevik v. Cohen, England & Whitfield (1991) 231 Cal. App. 3d 692, 704, 282 Cal. Rptr. 627* ; *Meehan v. Hopps (1956) 144 Cal. App. 2d 284, 293, 301 P.2d 10* ; *Hoiles v. Superior Court (1984) 157 Cal. App. 3d 1192, 1198, 204 Cal. Rptr. 111* ; *see also* State Bar Formal Opinion No. 1999-153]. However, in *Forrest v. Baeza*, the court permitted the corporate lawyer to continue to represent the majority shareholders in a derivative action against two closely held corporations, but held that the lawyer could not continue to simultaneously represent the corporations. The court reasoned that [*Forrest v. Baeza (1997) 58 Cal. App. 4th 65, 79-82, 67 Cal. Rptr. 2d 857]* :

- The lawyer would likely hold a residual bias in favor of the majority shareholders, even when the court permitted the lawyer to continue representation of the corporations only.

- No corporate confidences would be breached by the lawyer in continuing representation of the majority shareholders because the majority shareholders already possessed all material corporate information.

When a change or dispute over control is foreseeable, a lawyer may need to treat the relationship with the corporation and the individual shareholder as a potential conflict for purposes of analyzing how to conduct the lawyer-client relationship [State Bar Formal Opinion No. 1999-153]. A lawyer representing a close corporation that has shareholders in dispute may have difficulty determining which shareholder is authorized to speak or waive conflicts on behalf of the close corporation [*see* State Bar of California Formal Opinion No. 1999-153].

In cases in which the interests of the corporation and the shareholder are not in conflict, the relationship between the lawyer and the shareholder may disqualify the lawyer from acting adversely to the shareholder in matters involving a third party [*Meehan v. Hopps (1956) 144 Cal. App. 2d 284, 293, 301 P.2d 10]* .

[7] Partnerships

A partnership is an organization within the meaning of *Cal Rules Prof. Conduct, Rule 3-600* [*Responsible Citizens v.*

Superior Court (1993) 16 Cal. App. 4th 1717, 1729-1730, 20 Cal. Rptr. 2d 756 ; State Bar Formal Opinion No. 1994-137]. An attorney representing a partnership does not necessarily have an attorney-client relationship with an individual partner for purposes of applying the conflict of interest rules. Whether the relationship exists turns on finding an express or implied agreement that the lawyer also represents the partner. Among the factors that support or undercut the implication of an attorney-client relationship with individual partners are [*Responsible Citizens v. Superior Court (1993) 16 Cal. App. 4th 1717, 1731-1732, 20 Cal. Rptr. 2d 756* ; *see also* *Johnson v. Superior Court (1995) 38 Cal. App. 4th 463, 474-475, 45 Cal. Rptr. 2d 312* (under some circumstances, attorney for partnership may be found to also represent limited partners); *Buehler v. Sbardellati (1995) 34 Cal. App. 4th 1527, 1539, 41 Cal. Rptr. 2d 104* (lawyer and partners may agree and document that lawyer represents only partnership and not individual partners); *Kapelus v. State Bar (1987) 44 Cal. 3d 179, 191-192, 242 Cal. Rptr. 196, 745 P.2d 917* (lawyer does not represent limited partners by virtue of representing limited partnership); ABA Comm. on Ethics and Professional Responsibility, Formal Opinion 91-361 (partnership is organization within meaning of Model Rules of Professional Conduct, Rule 1.13 (1983), ABA rule on which Rule 3-600 is patterned)]:

- The type and size of the partnership.
- The nature and scope of the lawyer's engagement.
- The kind and extent of the lawyer's contacts with the individual partners.
- The nature of information to which the lawyer has access.

[8] Partners and Client for Purposes of Privilege

In the context of the attorney-client privilege, several courts have held that an attorney for a partnership represents all of the partners as to matters of partnership business [*Wortham & Van Liew v. Superior Court (1987) 188 Cal. App. 3d 927, 932, 233 Cal. Rptr. 725]* . These cases hold that the attorney must divulge information obtained from one partner about the partnership to all partners who have a right to the information under the joint-client exception to the attorney-client privilege in *Evid. Code § 962* [*Wortham & Van Liew v. Superior Court (1987) 188 Cal. App. 3d 927, 932-933, 233 Cal. Rptr. 725* ; *see also* *Hecht v. Superior Court (1987) 192 Cal. App. 3d 560, 566-567, 237 Cal. Rptr. 528* (adopting *Wortham* holding verbatim); *McCain v. Phoenix Resources, Inc. (1986) 185 Cal. App. 3d 575, 580-581, 230 Cal. Rptr. 25* (general partner may not assert attorney-client privilege to bar disclosure of information by partnership's lawyer to limited partners who have right of access to information under partnership agreement or statute); *Lasky, Haas, Cohler & Munter v. Superior Court (1985) 172 Cal. App. 3d 264, 284, 218 Cal. Rptr. 205* (legal counsel provided to partnership is intended to and does assist each and every general partner to fulfill joint management duties)].

All of the attorney-client privilege cases involving partnerships were decided before *Cal. Rules Prof. Conduct, Rule 3-600* was adopted. Rule 3-600 offers the potential of resolving much of the tension between the analysis in the conflict of interest cases that treat a partnership as an organization distinct from its partners, and the attorney-client privilege cases that treat a partnership as an aggregate of individual partners without changing the result achieved in those cases. Under *Cal. Rules Prof. Conduct, Rule 3-600(D)* communications between a partner and the partnership's lawyer may still be disclosed to other partners, just as in *Wortham*. However, Rule 3-600 apparently replaces the joint-client analysis in *Wortham* and related cases with a broader view of the partnership as the holder of the privilege, with individual partners having rights to disclosure as provided by statute or the partnership agreement.

[9] Conflicting Instructions From Partners

In State Bar Formal Opinion 1994-137, the State Bar addressed a lawyer's ethical duties when, in the course of representing a partnership, the lawyer receives conflicting instructions from the partners in circumstances in which it is

unclear which partner's instruction the lawyer must follow. The opinion addressed this problem under two scenarios:

- When there are conflicting instructions from two general partners who both have authority under the partnership agreement to instruct the lawyer.

- When the lawyer receives instructions by partners who claim to have removed the general partner authorized to oversee representation and it is unclear whether the removal was properly exercised under the partnership agreement.

The opinion concluded that in these cases, the lawyer should work with the partners to resolve the dispute, while explaining the likely consequences to the partnership if the dispute is not resolved. If the dispute is not resolved, the lawyer may withdraw pursuant to Rule 3-700(C)(1)(d) if the dispute renders it unreasonably difficult for the lawyer to represent the partnership or if other grounds exist for withdrawal under Rule 3-700 [State Bar Formal Opinion 1994-137].

The opinion noted that the problems that arise in the two scenarios may be addressed in the partnership agreement when the partnership is formed. It also observed that in some cases it may be appropriate for a lawyer to obtain an agreement from the partners at the outset of the representation defining which partner may instruct the lawyer and how that partner's authority may be terminated [State Bar Formal Opinion 1994-137].

However, the opinion recognized that these agreements may have practical limitations, particularly in the second scenario when there is a dispute about whether the partner instructing the lawyer has the authority to act on behalf of the partnership [State Bar Formal Opinion 1994-137]. In addition, beyond the ethical issues, there may be legal issues regarding the enforceability of the agreements depending on the circumstances.

[10] Member of Trade Association

Generally an attorney can be adverse to a member of an incorporated trade association when he or she represents the trade association itself. There is an exception, however, when an attorney receives confidential information from an association member under circumstances in which the association member has a reasonable expectation that the attorney will use the information for the member's benefit [*Glueck v. Jonathan Logan, Inc. (2d Cir. 1981) 653 F.2d 746, 748-749* ; *Westinghouse Electric Corp. v. Kerr-McGee Corporation (7th Cir. 1978) 580 F.2d 1311, 1318-1320 , cert. denied, 439 U.S. 955]* .

Several courts have held that when a lawyer represents an unincorporated association or informal group, the lawyer represents each member as well [*Halverson v. Convenient Food Mart. Inc. (7th Cir. 1972) 458 F.2d 927, 930* ; *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp. (E.D. Pa. 1969) 294 F. Supp. 1148, 1150* (involving attorney-client privilege); *Schwartz v. Broadcast Music, Inc. (S.D.N.Y. 1954) 16 F.R.D. 31, 32* ; *but see Glueck v. Jonathan Logan, Inc. (2d Cir. 1981) 653 F.2d 746, 749-750* (adopting substantial relationship test)]. It has not been decided whether Rule 3-600 establishes a different rule.

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[Reserved]

§§ 72.53[Reserved]

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§ 72.70 Waiver of Conflicts by Client Consent

One commonly hears reference to obtaining a client's waiver of a conflict. However, the term "waiver" is not used in the rules governing conflicts. The rules call for informed written consent. As a result, when thinking of "conflict waivers," a lawyer should think in terms of obtaining the client's informed consent. In a few instances the rules require written disclosure, but do not require written consent. In those situations, a lawyer should focus on providing sufficient information so that the client may decide whether to be represented by the lawyer.

Many conflicts can be waived by client consent. The policy is to permit clients to be represented by their choice of counsel and to lower the cost of legal representation by increasing the pool of available lawyers.

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§ 72.71 Nonwaivable Conflicts

[1] In General

Certain conflicts of interest cannot be waived or consented to by a client. These include the situations *discussed under § 72.71*.

[2] Representing Opposing Sides in Contested Hearing

An attorney may not assume a position at a trial or hearing in which he or she cannot advocate the interests of one client without adversely injuring those of the other [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 288, 36 Cal. Rptr. 2d 537, 885 P.2d 950* ; *Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 898, 142 Cal. Rptr. 509]* . For this reason, a lawyer cannot concurrently represent parties pursuing opposing claims in a trial or at a hearing, even with client consent.

However, a lawyer may represent adverse clients in a uncontested proceeding. In addition, a lawyer may represent adverse parties with their informed written consent in connection with the drafting of agreements and negotiations prior to a trial or hearing [*see, e.g.,* *In re Marriage of Egedi (2001) 88 Cal. App. 4th 17, 23-25, 105 Cal. Rptr. 2d 518* (marital settlement agreements); *Gregory v. Gregory (1949) 92 Cal. App. 2d 343, 349, 206 P.2d 1122* (marital settlement agreements); *Davidson v. Davidson (1949) 90 Cal. App. 2d 809, 819, 204 P.2d 71* ; *Lessing v. Gibbons (1935) 6 Cal. App. 2d 598, 605-606, 45 P.2d 258* (representing studio and actress in contract negotiations); BASF Formal Opinion No. 1973-26 (preparing contract between attorney's son and another party, both doctors)].

[3] Client Lacks Capacity to Give Consent

The concept of informed consent assumes that a client is in a position to understand and assess the lawyer's disclosure and the consent being sought. When the client lacks the capacity to do so, informed consent is not possible [*see* LACBA Formal Opinion No. 471 (1992)].

[4] Disclosure Precluded by Law

Other rules and laws may preclude making adequate disclosure under *Cal. Rules Prof. Conduct, Rule 3-310*. If adequate disclosure is precluded, informed written consent is likewise precluded [*Cal. Rules Prof. Conduct, Rule 3-310,* Discussion]. Thus, for example, if a lawyer cannot make adequate disclosure without violating the duty to maintain the confidences and secrets of another present or former client, the lawyer cannot make that disclosure, and therefore, cannot obtain informed consent to the representation.

[5] Lawyer Cannot Competently Represent Client

[a] When Competent Representation Unlikely

A client cannot waive a conflict that makes it unlikely that the lawyer can competently represent the client [LACBA Formal Opinion No. 471 (1992); *see also Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 526-527, 50 Cal. Rptr. 592* (part-time counsel should terminate lawyer-client relationship when discharge of duty to one client conflicts with duty to another client); *Dettamanti v. Lompoc Union School Dist. (1956) 143 Cal. App. 2d 715, 723, 300 P.2d 78* (lawyer representing school district cannot be employed to advise party about claim against district); *Hammett v. McIntyre (1952) 114 Cal. App. 2d 148, 157-158, 249 P.2d 885* (lawyer may not represent civil defendant and insurer at trial when insurer seeks to establish no coverage for defendant); *Pennix v. Winton (1943) 61 Cal. App. 2d 761, 773, 145 P.2d 561* (lawyer acted improperly by advancing interests of insurer over defendant client at trial); LACBA Formal Opinion No. 395 (1982); BASF Formal Opinion Nos. 1979-2, 1973-26, 1973-15; SDCBA Ethics Opinion No. 1990-3; *cf.* Model Rules of Professional Conduct, Rule 1.7(b) (1983) (lawyer must reasonably believe representation of one client will not be adversely affected by lawyer's responsibilities to another client or third party, or by lawyer's own interests)].

No matter how much disclosure is made, a client cannot waive a lawyer's duty to practice competently [LACBA Formal Opinion No. 471 (1992); *see, e.g., Cal. Rules Prof. Conduct, Rule 3-400(A)* (prohibiting attorney from contracting with client to prospectively limit attorney's malpractice liability)]. For example, a lawyer cannot adequately represent clients who give conflicting instructions so that the lawyer cannot act on one client's instruction without violating the other client's instruction [LACBA Formal Opinion No. 471 (1992)]. In that situation, the lawyer must withdraw from representing both clients [LACBA Formal Opinion No. 344 (1974)].

When interests of the lawyer in the subject matter of the representation are so great that the lawyer cannot be expected to competently represent the client, the client cannot consent to the representation. Some of these conflicts are covered by the following rules that prohibit a lawyer from engaging in certain practices altogether:

- *Cal. Rules Prof. Conduct, Rule 4-210* [*see § 72.71[5][b]*].
- *Cal. Rules Prof. Conduct, Rule 4-300* [*see § 72.71[5][c]*].
- *Cal. Rules Prof. Conduct, Rule 4-400* [*see § 72.71[5][d]*].

For additional discussion relating to the duty of competent representation, see *§ 72.270 et seq. through § 72.290* et seq.

[b] Payment of Client's Personal or Business Expenses Under Rule 4-210

A State Bar member may not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client [*Cal. Rules Prof. Conduct, Rule 4-210(A)*]. However, this rule does not prohibit a State Bar member from paying client expenses in the following situations [*Cal. Rules Prof. Conduct, Rule 4-210(A)*]:

- With the consent of the client, from paying or agreeing to pay such expenses to third persons from funds collected or to be collected for the client as a result of the representation.

- After employment, from lending money to the client on the client's promise in writing to repay the loan.

- From advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. These costs will be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.

Despite these exceptions, the following Rules may still apply [*Cal. Rules Prof. Conduct, Rule 4-210(B)*]:

- *Cal. Rules Prof. Conduct, Rule 4-300*, concerning purchases at foreclosure sales [*see § 72.71[5][c]*].

- *Cal. Rules Prof. Conduct, Rule 3-300*, relating to avoiding interests adverse to a client [*see § 72.90* et seq.].

- *Cal. Rules Prof. Conduct, Rule 3-310*, concerning avoiding the representation of adverse interests [*see § 72.110 et seq. and § 72.130* et seq.].

The reference to "personal or business expenses" in *Cal. Rules Prof. Conduct, Rule 4-210(A)* is generally understood to include litigation expenses [LACBA Formal Opinion No. 434 (1988)]. The reference to "costs of prosecuting or defending a claim or action" in the rule's third exception tends to confirm this view.

Rule 4-210 prohibits a lawyer from advancing client litigation expenses for which the client is not ultimately responsible, except when repayment is contingent on the outcome of the representation or when legal services are rendered as charity [State Bar Formal Opinion No. 1976-38; LACBA Formal Opinion Nos. 379 (1979), 434 (1988)]. The rule does not prohibit a lawyer from advancing expenses for which the client is responsible, even when there is a substantial likelihood that the client will never pay them [State Bar Formal Opinion No. 1976-38]. The rationale behind the prohibition against paying the client's litigation costs is to avoid the possibility that the attorney's independent judgment might be impaired if he or she had a financial interest in the outcome of the case [LACBA Formal Opinion No. 434 (1988)].

[c] Purchase of Property at Foreclosure Sale Under Rule 4-300

A State Bar member may not directly or indirectly purchase property at a probate, foreclosure, receiver's, trustee's, or judicial sale in an action or proceeding in which the member or any lawyer affiliated by reason of personal, business, or professional relationship with that member or with that member's law firm is acting as a lawyer for a party or as an executor, receiver, trustee, administrator, guardian, or conservator [*Cal. Rules Prof. Conduct, Rule 4-300(A)*].

In addition, a State Bar member may not represent the seller at a probate, foreclosure, receiver, trustee, or judicial sale in an action or proceeding in which the purchaser is any of the following [*Cal. Rules Prof. Conduct, Rule 4-300(B)*]:

- A spouse or relative of the member.

- A spouse or relative of another lawyer in the member's law firm.

- An employee of the member or the member's law firm.

[d] Inducing Client to Make Substantial Gift

[i] Rule Under Rule 4-400

A State Bar member may not induce a client to make a substantial gift, including a testamentary gift, to the member or to the member's parent, child, sibling, or spouse, except when the client is related to the member [*Cal. Rules Prof. Conduct, Rule 4-400*].

If the lawyer does not induce the client to make the gift, the lawyer may draft a will in which he or she is to receive the gift. In the case of testamentary gifts, however, there is a rebuttable presumption that a lawyer has exercised undue influence when the lawyer drafts a will under which he or she receives more than a modest gift [*Cal. Rules Prof. Conduct, Rule 4-400*, Discussion; *Magee v. State Bar (1962) 58 Cal. 2d 423, 429-430* (decided under prior version of rule); LACBA Formal Opinion No. 462 (1990)].

[ii] Testamentary Gifts Under Probate Code Provisions

Testamentary gifts pose special problems, because in many cases the undue influence may not be discovered until after the testator has died. As a result, there may be no witnesses to the lawyer's conduct, other than the lawyer or persons related to the lawyer. The problems in this area were highlighted in the "Gunderson case" in which the State Bar prosecuted a lawyer who had drafted large numbers of wills in which the lawyer or the lawyer's family members and staff received the bulk of the decedent's estate. Although Gunderson ultimately resigned from the Bar while disciplinary charges were pending, his actions prompted both the Legislature and the State Bar to take action.

The Legislature responded by enacting special rules concerning testamentary gifts to a lawyer who has drafted a will or trust making the gift. Under *Prob. Code § 21350*, a provision in any instrument making any donative transfer to a lawyer who drafted or transcribed the instrument or caused it to be drafted or transcribed is invalid [*Prob. Code § 21350(a)(1)*]. *Prob. Code § 21350* applies retroactively to donative instruments that become irrevocable after its effective date of September 1, 1993 [*Bank of America v. Angel View Crippled Children's Foundation (1999) 72 Cal. App. 4th 451*].

A provision in the instrument is also invalid if it makes a donative gift to the lawyer's employee or cohabitant or to a person related to the lawyer by marriage or by blood (defined to mean a spouse or predeceased spouse or a relative or a relative's spouse within the third degree of relation to the lawyer or the lawyer's spouse or predeceased spouse) [*Prob. Code §§ 21350(a)(2), (b)(2)*]. In addition, a provision is invalid if the donative gift is made to a partner or shareholder of a partnership or corporation in which the lawyer has ten percent or greater ownership interest or to any employee of such a corporation, partnership, shareholder or partner [*Prob. Code § 21350(a)(3)*].

The Probate Code provisions do not apply if the transferror is related by blood or marriage to, or is a cohabitant with the lawyer or the transferee or the instrument is reviewed by an independent lawyer who counsels the client about the nature of his or her intended transfer, and who signs and delivers a "certificate of independent review" which substantially complies with a form provided by statute [*Prob. Code § 21351(a), (b)*]. For a form for a certificate of independent review, see California Wills & Trusts Forms, Vol. 3, MISC 18 (Matthew Bender).

These transfers are also permitted if a court determines based on clear and convincing evidence that the transfer was not the product of fraud, menace, duress, or undue influence and that based on all of the facts and circumstances, it is fair, just and equitable to all interested persons. In such a proceeding, the clear and convincing evidence to support the court finding cannot include the testimony of the lawyer or the transferees who are related to the lawyer [*Prob. Code § 21351(d)*].

For discussion of when a personal representative's attorney can exercise an option given in a will to purchase estate

property, see California Probate Practice, Ch. 20, *Exchange of Lease of Assets and Options to Purchase* (Matthew Bender). For discussion of limitations on devises to attorneys or other fiduciaries, see California Probate Practice, Ch. 23, *Determining Heirs or Devises and Their Distributive Shares.*

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§ 72.72 Requirements for Disclosure and Informed Written Consent

Cal. Rules Prof. Conduct, Rule 3-310(A)(1) defines "disclosure" as "informing the client or former client of the relevant circumstances and of the actual or reasonably foreseeable adverse consequences to the client or former client" [*Cal. Rules Prof. Conduct, Rule 3-310(A)(1)*]. Merely informing a client that there is an actual or potential conflict is not sufficient. A lawyer must explain exactly what the problem is and how it may adversely affect the client.

The required level of disclosure is that necessary to permit the client's free and intelligent consent [*Anderson v. Eaton, (1930) 211 Cal. 113, 116, 293 P. 788]* . A lawyer must disclose all facts and circumstances which, in the judgment of a lawyer of ordinary skill and capacity, are necessary to enable the client to make free and intelligent decisions regarding the subject matter of the representation [*Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 528, 50 Cal. Rptr. 592]* . When the conflict relates to an ongoing representation, the "facts" should include a discussion of the detriment to which the conflict exposes the client and the possible need for different representation [*Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 526, n.3, 50 Cal. Rptr. 592]* .

The degree of the client's sophistication or experience may affect the amount of disclosure required. However, even with sophisticated clients, a lawyer must explain the nature of the conflict of interest in such detail that the client can understand the reasons why it may be desirable to have independent counsel with undivided loyalty to the client's interests [*Image Technical Services, Inc. v. Eastman Kodak Company (N.D. Cal. 1993) 820 F. Supp. 1212, 1216-1217* (Kodak's consent to law firm's participation in litigation adverse to Kodak was not "informed" because firm did not explain how its engagement would be adverse and what Kodak's exposure would be if firm prevailed on other client's behalf); *see also* BASF Formal Opinion No. 1973-26].

Cal. Rules Prof. Conduct, Rule 3-310(A)(2) defines "informed written consent" as "the client's or former client's written agreement to the representation following written disclosure." *Cal. Rules Prof. Conduct, Rule 3-310(A)(3)* defines "written" as "any writing as defined in *Evid. Code § 250*." *Evid. Code § 250* defines "writing" as "handwriting, typewriting, printing, photostating, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds or symbols, or combinations thereof." A

writing includes sound recordings [Law Rev. Comm'n Comment to *Evid. Code § 250*], as well as films and video tapes [*People v. Moran (1974) 39 Cal. App. 3d 398, 407, 114 Cal. Rptr. 413]* . The writing can be several writings cobbled together to constitute a waiver [*see, e.g., UMG Recordings, Inc. v. MySpace, Inc. (C.D. Cal. 2007) 526 F. Supp. 2d 1046, 1052*].

PRACTICE TIP:

Alternative Methods of Disclosure and Consent. Under Rule 3-310, informed written consent does not necessarily require a signed written instrument. It can be accomplished through a tape or video recording of the disclosure and the client's consent. In addition, disclosure and the client's consent do not have to appear in the same writing. For example, the requirements could be satisfied if disclosure is made in a letter and the consent to that disclosure is contained in a recorded message from the client. If disclosure and consent occur in this way, the consent should clearly establish that it is made in reference to and in light of the disclosure that preceded it.

PRACTICE TIP: Written Transcription of Verbal Consent. It is not clear whether a written but unsigned transcription of a client's verbal consent is sufficient, or whether a tangible expression by the client in the form of a signature or a recording of the client's voice is required. For example, does a client's consent in an unsigned deposition transcript satisfy the requirements? Is the client's consent recorded by the lawyer or the lawyer's staff on a telephone message slip a sufficient writing? To avoid these uncertainties, a lawyer should be sure to obtain a written consent signed by the client or a sound recording of the client's verbal consent.

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[Reserved]

§§ 72.73[Reserved]

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§ 72.90 Avoid Financial Interest Adverse to Client

[1] Rule 3-300 Requirements

A State Bar member may not enter into a business transaction with a client, or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied [*Cal. Rules Prof. Conduct, Rule 3-300*]:

- The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that should reasonably have been understood by the client.

- The client is advised in writing that the client may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice.

- The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

[2] Former Rule Compared

Cal. Rules Prof. Conduct, Rule 3-300 is derived from Cal. Rules Prof. Conduct, former Rule 5-101. Former Rule 5-101, on which most of the ethics opinions and cases are premised, was similar, but not identical, to the present rule. The former rule stated that a member of the State Bar may not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless the following three requirements were met:

- The transaction and terms in which the member of the State Bar acquired the interest were fair and reasonable to the client and were fully disclosed and transmitted in writing to the client in a manner and terms that should have reasonably been understood by the client.

- The client was given a reasonable opportunity to seek the advice of independent counsel of the client's choice on the transaction.

- The client consented in writing thereto.

Current *Cal. Rules Prof. Conduct, Rule 3-300* speaks to the fairness and consent not only to the terms of the transaction but also to the terms of the "acquisition." It now requires that the client be advised "in writing" that the client may seek the advice of an independent lawyer of the client's choice. The current rule also has a new "Discussion" section that helps explain the rule.

[3] Scope of Rule

Rule 3-300 is intended to address issues that arise out of the fiduciary nature of the lawyer-client relationship. The "relationship between an attorney and client is a fiduciary relationship of the highest character" [*Clancy v. State Bar (1969) 71 Cal. 2d 140, 146, 77 Cal. Rptr. 657, 454 P.2d 329]* . "The essence of a fiduciary or confidential relationship is that the parties do not deal on equal terms, because the person in whom trust and confidence is reposed is in a superior position to exert undue influence over the dependent party" [*Beery v. State Bar (1987) 43 Cal. 3d 802, 813, 239 Cal. Rptr. 121, 739 P.2d 1289]* . This is especially the case in transactions which are part of or intimately connected with the very business for which the lawyer-client relationship exists [*Beery v. State Bar (1987) 43 Cal. 3d 802, 812, 239 Cal. Rptr. 121, 739 P.2d 1289]* .

Another purpose of the Rule "is to protect clients from their attorneys' self-interested use of financial information gained from confidences disclosed during the attorney-client relationship" [*Arden v. State Bar (1987) 43 Cal. 3d 713, 726, 239 Cal. Rptr. 68, 739 P.2d 1236]* . The Supreme Court has observed that abuse of the trust arising from the lawyer-client relationship "is precisely the type of overreaching that Rule 5-101 [*now* Rule 3-300] is designed to prevent" [*Hunniecutt v. State Bar (1988) 44 Cal. 3d 362, 370, 243 Cal. Rptr. 699, 748 P.2d 1161]* .

There are two elements that trigger the application of Rule 3-300:

- There must be one of two types of transactions:

  - A business transaction; or

  - An acquisition by the lawyer of an ownership, possessory, security or other adverse pecuniary interest.

- The transaction or acquisition must be between lawyer and client.

Determining when the rule applies requires an understanding of these terms.

[4] Adverse Pecuniary Interests

The acquisition of an ownership, possessory, security or other adverse pecuniary interest is one of the two types of transactions that triggers the application of Rule 3-300. The Rule applies only when the interest acquired by the lawyer is adverse to the client's interests. The acquisition of an interest is adverse when it is reasonably foreseeable that it may be detrimental to the client's interests [*Hawk v. State Bar (1988) 45 Cal. 3d 589, 599-601, 247 Cal. Rptr. 599, 754 P.2d 1096* ; *Ames v. State Bar (1973) 8 Cal. 3d 910, 919-920*]. An interest is also adverse to a client for purposes of the Rule when it creates an actual or potential conflict of interest in which the lawyer may be required to choose between the client's interests and the lawyer's own financial interest [*Rodgers v. State Bar (1989) 48 Cal. 3d 300,*

313, 256 Cal. Rptr. 381, 768 P.2d 1058] .

Actual injury to the client is not required for an interest to be adverse [*Ames v. State Bar (1973) 8 Cal. 3d 910, 919-920, 106 Cal. Rptr. 489, 506 P.2d 625]* . The Rule is designed not only to regulate the dishonest practitioner, but also the honest lawyer, who, by acquiring an adverse interest puts himself or herself in the position where he or she may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests [*Ames v. State Bar (1973) 8 Cal. 3d 910, 919-920, 106 Cal. Rptr. 489, 506 P.2d 625* ; *Hawk v. State Bar (1988) 45 Cal. 3d 589, 600, 247 Cal. Rptr. 599, 754 P.2d 1096]* .

Adverse interests arise in two ways. One way is when the lawyer acquires an ownership, possessory, security or other interest which allows the lawyer to summarily extinguish the client's interest in a property without court scrutiny. This applies to most security interests acquired by a lawyer in a client's property [*Read v. State Bar (1991) 53 Cal. 3d 394, 400, 279 Cal. Rptr. 818, 807 P.2d 1047* (deed of trust on client property); *Hawk v. State Bar (1988) 45 Cal. 3d 589, 600, 247 Cal. Rptr. 599, 754 P.2d 1096* (deed of trust on client property); *Ames v. State Bar (1973) 8 Cal. 3d 910, 914-915, 106 Cal. Rptr. 489, 506 P.2d 625* (lawyer purchase of deed of trust on client property)].

An adverse interest also arises when a lawyer takes title to or possession of a client's property as security or for the client's benefit [*Brockway v. State Bar (1991) 53 Cal. 3d 51, 64, 278 Cal. Rptr. 836, 806 P.2d 308* (acquiring title to client's property as security); *Morgan v. State Bar (1990) 51 Cal. 3d 598, 605-606, 274 Cal. Rptr. 8, 797 P.2d 1186* (lawyer's use of client's credit cards); *Sugarman v. State Bar (1990) 51 Cal. 3d 609, 616, 274 Cal. Rptr. 246, 798 P.2d 843* ("loan" by which lawyer obtained control of client's funds); *Connor v. State Bar (1990) 50 Cal. 3d 1047, 1051-1053, 269 Cal. Rptr. 742, 791 P.2d 312* (acquisition of client property to avoid foreclosure)]. The Rule also applies when a lawyer takes an action that extinguishes a client's interest in property [*Silver v. State Bar (1974) 13 Cal. 3d 134, 138-139, 117 Cal. Rptr. 821, 528 P.2d 1157* (writ of execution levied on property on which client also had interest in levying writ of execution)].

In all of these cases the Supreme Court found that there was at least a potential conflict between the client's interest in preserving his or her rights in the property and the lawyer's interest in exercising rights that would extinguish the client's interest in the property. The Supreme Court suggested that where a potential conflict does not exist, the lawyer's acquisition may not be adverse [*see Hawk v. State Bar (1988) 45 Cal. 3d 589, 599*]. For example, if a lawyer acquires a lien on a property that is junior to a client's lien or does not afford the lawyer a right to extinguish the client's lien, the acquisition may not be adverse for purposing of applying Rule 3-300 (although other ethical rules may still apply, depending on the circumstances).

A second way in which an adverse interest may arise is when a lawyer acquires an interest in an obligation owed to a client or acquires an interest in an entity indebted to a client [*Rodgers v. State Bar (1989) 48 Cal. 3d 300, 313, 256 Cal. Rptr. 381, 768 P.2d 1058* (client's loan to third party secured by lawyer's property); *Kapelus v. State Bar (1987) 44 Cal. 3d 179, 193-194, 242 Cal. Rptr. 196, 745 P.2d 917* (lawyer's acquisition of non-recourse interest in partnership indebted to client)]. These cases differ from others discussed *above* because the lawyer does not acquire an interest in the client's property, but instead acquires an interest in connection with a debt owed to the client. In these cases the Court found that the adversity was the potential conflict between the lawyer's own financial interests and the client's interest in obtaining full repayment of the loan [*Rodgers v. State Bar (1989) 48 Cal. 3d 300, 313, 256 Cal. Rptr. 381, 768 P.2d 1058* ; *Kapelus v. State Bar (1987) 44 Cal. 3d 179, 193, 242 Cal. Rptr. 196, 745 P.2d 917]* .

Rule 3-300 applies even when the acquisition is intended to benefit the client. In *Connor v. State Bar*, an attorney entered into an agreement with his client in which he took full title to his client's property. Although the purpose of the agreement was to assist the client in avoiding a foreclosure, the court held that the lawyer's interest in the property was adverse to the client under former Rule 5-101 [*Connor v. State Bar (1990) 50 Cal. 3d 1047, 1057, 269 Cal. Rptr. 742, 791 P.2d 312]* . The same reasoning applies under Rule 3-300 [*see also Ames v. State Bar (1973) 8 Cal. 3d 910, 919-920, 106 Cal. Rptr. 489, 506 P.2d 625* (lawyer's purchase of deed of trust on client property to give client time to

cure default was subject to former rule)].

[5] Business Transactions

[a] Definition

The second type of transaction that is covered under Rule 3-300 is business transactions. The focus of the business transactions aspect of Rule 3-300 is on dealings with a client that are beneficial to the lawyer [*Rose v. State Bar (1989) 49 Cal. 3d 646, 662-663, 262 Cal. Rptr. 702, 779 P.2d 761* ; *Rodgers v. State Bar (1989) 48 Cal. 3d 300, 313, 256 Cal. Rptr. 381, 768 P.2d 1058* ; *see also Beery v. State Bar (1987) 43 Cal. 3d 802, 806, 239 Cal. Rptr. 121, 739 P.2d 1289]* .

In addition, the Supreme Court has directed the application of Rule 3-300 and its predecessor rules to transactions in which there exists an actual or potential conflict of interest between the lawyer and the client [*see Rose v. State Bar (1989) 49 Cal. 3d 646, 662-663* ; *Kapelus v. State Bar (1987) 44 Cal. 3d 179, 193-194, 242 Cal. Rptr. 196, 745 P.2d 917]* . The focus under this latter criteria is on whether the transaction might require the lawyer to choose between conflicting duties to the client and the lawyer's own financial interest in the transaction [*see Rodgers v. State Bar (1989) 48 Cal. 3d 300, 313, 256 Cal. Rptr. 381, 768 P.2d 1058* ; *see also People v. Corona (1978) 80 Cal. App. 3d 684, 720, 145 Cal. Rptr. 894* (lawyer's literary rights agreement with client in connection with client's criminal trial forced lawyer to choose between "his own pocketbook and the best interests of the client")].

Based on these principles, Rule 3-300 applies to a broad range of business dealings between lawyer and client. However, the Rule has been most frequently applied in the disciplinary cases before the Supreme Court in situations involving loans and business investments.

[b] Loans

The Supreme Court has held that the prior rules from which Rule 3-300 is derived prohibit a lawyer "from entering into *any* loan transaction with a client if it is reasonably foreseeable that his acquisition [of the loan] might be detrimental, i.e. adverse to the interests of his client" [*Rodgers v. State Bar (1989) 48 Cal. 3d 300, 314, 256 Cal. Rptr. 381, 768 P.2d 1058* (emphasis supplied)]. The Rule applies to transactions between the lawyer and client directly [*Sugarman v. State Bar (1990) 51 Cal. 3d 609, 616, 274 Cal. Rptr. 246, 798 P.2d 843* ; *Arden v. State Bar (1987) 43 Cal. 3d 713, 725-726, 239 Cal. Rptr. 68, 739 P.2d 1236* ; *Clancy v. State Bar (1969) 71 Cal. 2d 140, 77 Cal. Rptr. 657, 454 P.2d 329]* . It also applies to loans to entities controlled by the lawyer [*Ritter v. State Bar (1985) 40 Cal. 3d 595, 601-602, 221 Cal. Rptr. 134, 709 P.2d 1303* ; *Schneider v. State Bar (1987) 43 Cal. 3d 784, 796-797, 239 Cal. Rptr. 111, 739 P.2d 1279]* .

In addition, the Rule applies to a loan transaction by a client to a third party in which the lawyer receives a portion of the proceeds [*Rodgers v. State Bar (1989) 48 Cal. 3d 300, 314, 256 Cal. Rptr. 381, 768 P.2d 1058* (proceeds of loan by one client to another used to pay lawyer's fees); *Hunniecutt v. State Bar (1975) 44 Cal. 3d 362, 370, 243 Cal. Rptr. 699, 748 P.2d 1161* (loan to lawyer's business partner where lawyer received and used funds)].

[c] Investments

The Rule applies to investments between client and lawyer directly [*see, e.g., Clancy v. State Bar (1969) 71 Cal. 2d 140, 146, 77 Cal. Rptr. 657, 454 P.2d 329* (lawyer received funds from client based on the representation that he would invest it and pay her a 20-percent profit)]. The prior rules from which Rule 3-300 is derived also have been held to apply to client investments in assets or ventures in which the lawyer has an interest. These include the following:

- Investments in companies in which the lawyer is a principal [*Beery v. State Bar (1987) 43 Cal. 3d 802, 806, 239 Cal. Rptr. 121, 739 P.2d 1289* (investment in satellite communications company in which

lawyer was a principal)].

- Investments with third parties in ventures in which the lawyer is involved [*Hunniecutt v. State Bar (1988) 44 Cal. 3d 362, 370, 243 Cal. Rptr. 699, 748 P.2d 1161* (real estate investment in which lawyer's business partner in venture solicited investment)].

- Situations in which the lawyer receives compensation for the client's investment [*Rose v. State Bar (1989) 49 Cal. 3d 646, 662-663, 262 Cal. Rptr. 702, 779 P.2d 761* (investment in restaurant business for which lawyer received comission)].

- Situations in which the lawyer is requested by the client to invest the client's assets, where the lawyer then self-deals by investing in ventures in which the lawyer has a financial interest [In the Matter of Priamos (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 824 (creation of partnership with client, without client's knowledge or consent, to invest client's assets in speculative ventures in which attorney held financial interest)].

In applying the rule in these cases, the Supreme Court and the State Bar Court have emphasized the fiduciary nature of the lawyer-client relationship and the potential for undue influence that may arise in such a relationship.

[6] Non-Legal Services

An emerging area in which Rule 3-300 is being applied is in the field of non-legal services rendered by a lawyer or a lawyer controlled entity to a client. The term "non-legal services" refers to services that are not performed in connection with the practice of law and which may be performed by non-lawyers without constituting the practice of law. One example is where a real estate broker/lawyer brokers the sale of property for a client, whom the lawyer represents in other matters. Another example is where a law firm operates an underwriting company which performs services in connection with the firm's securities practice. Ethics opinions are beginning to address the applicability of Rule 3-300 to these services.

One ethics opinion found that when a lawyer/physician practicing in the area of personal injury and medical malpractice refers clients to a medical clinic in which the lawyer has an ownership interest, the referral is a business transaction that requires compliance with Rule 3-300 [LACBA Formal Opinion No. 477 (1994)]. The Rule applied because the referral related to a legal representation in which the lawyer was apt to have considerable influence over the client and where the lawyer's own financial interests in the clinic might conflict with the client's best interests.

Although the Los Angeles County Bar Association opinion focused on only one type of transaction, the rationale in that opinion would apply to most types of non-legal services provided by a lawyer or lawyer-controlled entity to a client when the service arises out of or is performed in connection with the rendition of legal services or involves the trust and confidence reposed by a client in the lawyer.

Another ethics opinion also addresses the situation in which a lawyer may render non-legal services that arise out of a lawyer-client or fiduciary relationship. Nonlegal services, such as investment advice or accounting services, constitute business transactions with a client. Accordingly, the lawyer is required to comply with all applicable Rules of Professional Conduct, including *Cal. Rules Prof. Conduct, Rules 3-300* and *3-310* [State Bar Formal Opinion No. 1995-141; *see also* Cal. State B. Formal Opinion Nos. 1999-154].

Under certain circumstances, it is ethically permissible for an attorney to advise a client to purchase insurance, refer the client to an insurance agent for that purchase, and accept compensation from the insurance agent for the referral. To avoid an ethical violation, the attorney must do all of the following [State Bar Formal Opinion No. 1995-140]:

- Make full disclosure in writing to the client under *Cal. Rules Prof. Conduct, Rule 3-310(B)(4),* of all relevant circumstances and all actual or reasonably foreseeable consequences to the client.

- Comply with *Cal. Rules Prof. Conduct, Rule 3-300* regarding written consent.

- Be capable of competently advising the client under the circumstances.

An attorney may directly sell financial products, including long-term insurance, life insurance, and annuities governed by the Insurance Code or its successors, to clients who are elders or dependent elders with whom the attorney has had an attorney client relationship within the preceding 3 years, if the transaction is fair and reasonable to the client and the attorney provides the client with a written disclosure that contains specified information about the financial product being sold and the terms of the proposed sale [*Bus. & Prof. Code § 6175.3*]. Attorneys who violate the provisions of *Bus. & Prof. Code § 6175 et seq.* in selling financial products to their elder clients are subject to State Bar discipline [*Bus. & Prof. Code § 6175.5*], and may be sued by clients for civil damages and other civil remedies, including injunctive relief [*Bus. & Prof. Code § 6175.4*].

An attorney who rendered both legal and nonlegal services to a client could not rely on an arbitration clause in his engagement letter to require arbitration of disputes arising out of a business transaction with the client. The engagement letter did not explain what it covered, and the client's explanation that he expected the arbitration clause only to extend to the attorney's legal representation for the client's divorce, and not to his financial investments, was "eminently reasonable." If the attorney wanted the arbitration clause to extend to the rendering of legal services and to unrelated business dealings, the attorney had the responsibility to draft a clear and explicit agreement to that effect and, pursuant to Rule 3-300, to advise the client of his right to independent legal advice [*Mayhew v. Benninghoff (1997) 53 Cal. App. 4th 1365, 1369-1370, 62 Cal. Rptr. 2d 27]* .

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§ 72.91 Transactions Not Covered by Rule 3-300

[1] Retainer Agreements

Rule 3-300 is not intended to apply to retainer agreements unless the agreement gives the attorney an ownership, possessory, security, or other pecuniary interest adverse to the client [*Cal. Rules Prof. Conduct, Rule 3-300*, Discussion; State Bar Formal Opinion No. 1989-116].

Whenever a lawyer takes a security interest in a client's assets to secure payment of fee, the lawyer must comply with Rule 3-300 [*Cal. Rules Prof. Conduct, Rule 3-300*, Discussion; *Hawk v. State Bar (1988) 45 Cal. 3d 589, 599* (deed of trust to secure payment of fees); *Brockway v. State Bar (1991) 53 Cal. 3d 51, 64, 278 Cal. Rptr. 836, 806 P.2d 308* (acquisition of title to client property to secure payment of fees); *Silver v. State Bar (1974) 13 Cal. 3d 134, 138-139, 117 Cal. Rptr. 821, 528 P.2d 1157* (execution levied on client property to recover fees); LACBA Formal Opinion No. 398 (1982) (deed of trust on client property to secure fees); *see also § 72.30* et seq.].

One recent ethics opinion holds that the Rules of Professional Conduct do not prohibit a lawyer from contracting with a client agreeing that the right to recover attorney's fees under civil rights statutes belongs to the attorney and may not be waived by the client. There is no violation so long as the lawyer properly complies with *Cal. Rules Prof. Conduct, Rules 3-300* and *3-310* [State Bar Formal Opinion No. 1994-136].

[2] Contingency Fee Agreements

Although they involve inherent conflicts of interest, contingency fees are exempt from the requirements of Rule 3-300 [*see* State Bar Formal Opinion, No. 1987-94; *see also Bus. & Prof. Code §§ 6146-6147.5* (requirements for contingent fee agreements)]. Contingency fee agreements are discussed in detail in *§ 72.190* et seq.

[3] Offerings to General Public

Rule 3-300 is not intended to apply when the attorney and client each make an investment on terms offered to the

general public or a significant portion of the general public. For example, the rule is not intended to apply when a lawyer invests in a limited partnership syndicated by a third party and the lawyer's client makes the same investment. Although the lawyer and client are each investing in the same business, they have not entered into a transaction with each other for purposes of the rule [*Cal. Rules Prof. Conduct, Rule 3-300,* Discussion].

This exception would not apply when the lawyer solicits the investment and receives some benefit from doing so [*see, e.g., Rose v. State Bar (1989) 49 Cal. 3d 646, 659-664, 262 Cal. Rptr. 702, 779 P.2d 761]* .

[4] Structured Settlements

An attorney representing a client on a contingency fee basis does not acquire a pecuniary interest adverse to a client if the attorney advises that the client accept or reject a structured settlement offer [State Bar Formal Opinion No. 1987-94]. In a structured settlement, the client receives a lump sum cash payment at the time of the settlement plus periodic payments over the course of the life expectancy of the client. The manner in which the member's fee is calculated under the structured settlement can give rise to other ethical considerations such as unconscionability [State Bar Formal Opinion No. 1987-94; *see also § 72.190* et seq.].

In Formal Opinion 1994-135, the State Bar cautioned that the exception may not be applicable when a lawyer contracts with a client to receive the entire fee out of the first payments under the structured settlement. Although the opinion did not conclude that Rule 3-300 applies, it states that lawyers should be aware "that a court of competent jurisdiction could conclude that Rule 3-300 does apply at least in these limited circumstances" [State Bar Formal Opinion, No. 1994-135].

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§ 72.92 Transactions Not Involving the Lawyer-Client Relationship

Although courts have yet to address the issue directly, one ethics opinion has noted that Rule 3-300 does not apply to transactions that do not involve the trust and confidence reposed by a client in the lawyer-client relationship [LACBA Formal Opinion No. 477 (1994)]. The same opinion notes that the Rule ordinarily would not apply to "routinized transactions" and transactions in which the client has at least as much bargaining power as the lawyer. State Bar Formal Opinion No. 1995-141 reaches the same conclusion.

PRACTICE TIP:

Transactions Without Lawyer-Client Relationship. This exception ordinarily applies when, for example, a lawyer purchases a meal at a client's restaurant or when the client pays for parking at a parking lot owned by a client. Such transactions typically do not involve the fiduciary relationship and a strict application of the Rule could lead to impractical results. However, the Rule would apply even to these examples if the trust and confidence, or potential adversity elements that trigger the Rule's application in other contexts are present. *By Stanley W. Lamport*.

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§ 72.93 Transactions With a Client

Rule 3-300 applies only when the business transaction is with a client and when the acquisition of a pecuniary interest is adverse to a client. Thus, Rule 3-300 does not apply when a lawyer enters into a transaction before a lawyer-client relationship arises. However, even in the absence of a lawyer-client relationship, a lawyer may still be subject to discipline if the lawyer violates a duty arising in a fiduciary or confidential relationship in connection with a business transaction [*Beery v. State Bar (1987) 43 Cal. 3d 802, 811-812, 239 Cal. Rptr. 121, 739 P.2d 1289* ; *Worth v. State Bar (1976) 17 Cal. 3d 337, 341, 130 Cal. Rptr. 712, 551 P.2d 16* ; *Sodikoff v. State Bar (1975) 14 Cal. 3d 422, 429, 121 Cal. Rptr. 467, 535 P.2d 331]* .

A lawyer's provision of nonlegal services to a client, such as real estate or brokerage services, is a business transaction under *Cal. Rules. Prof. Conduct, Rule 3-300* and requires compliance with Rule 3-300 [*see* State Bar of California Formal Opinion Nos. 1999-154, 1995-141; *see § 72.90[6]*].

There need not be any relationship between the legal representation and the transaction or acquisition obtained for Rule 3-300 to apply [*see* *Beery v. State Bar (1987) 43 Cal. 3d 802, 811-812, 239 Cal. Rptr. 121, 739 P.2d 1289* (lawyer disciplined when client sought legal advice regarding preparation of will but subsequently loaned attorney money for satellite entertainment project that failed)].

When a lawyer enters into a transaction with a former client, the transaction may still be scrutinized under the rule for signs of unfairness despite the fact that the lawyer-client relationship has terminated for most purposes [*Hunniecutt v. State Bar (1988) 44 Cal. 3d 362, 371, 243 Cal. Rptr. 699, 748 P.2d 1161]* .

If there is evidence that the client placed his or her trust in the attorney because of the representation, an attorney-client relationship exists for purposes of Rule 3-300 even if the representation has otherwise ended [*see* *Hunniecutt v. State Bar (1988) 44 Cal. 3d 362, 371, 243 Cal. Rptr. 699, 748 P.2d 1161* (decided under former Rule 5-101)]; *see also* *Beery v. State Bar (1987) 43 Cal. 3d 802, 812, 239 Cal. Rptr. 121, 739 P.2d 1289* (lawyer's duties to client continued when nothing had happened that would have signaled the end of the lawyer-client relationship to the client)].

The former client's lack of sophistication in financial matters and whether the transaction involves a fund (such as the proceeds of a settlement) which resulted from the lawyer's representation are important factors in determining whether a lawyer-client relationship exists for purposes of the rule [*Hunniecutt v. State Bar (1988) 44 Cal. 3d 362, 372-373, 243 Cal. Rptr. 699, 748 P.2d 1161* ; *Rose v. State Bar (1989) 49 Cal. 3d 646, 663, 262 Cal. Rptr. 702, 779 P.2d 761* ; *see also Beery v. State Bar (1987) 43 Cal. 3d 802, 812, 239 Cal. Rptr. 121, 739 P.2d 1289]* . When the client is sophisticated and the investment is not connected with the prior representation, an ongoing lawyer-client relationship may not exist for purposes of the rule [*Wallis v. State Bar (1942) 21 Cal. 2d 322, 327-329, 131 P.2d 531* (no discipline warranted when former client was a sophisticated businesswoman, who actively negotiated the terms and the transaction was not connected to the prior representation); *see also Hunniecutt v. State Bar (1988) 44 Cal. 3d 362, 371, 243 Cal. Rptr. 699, 748 P.2d 1161]* .

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§ 72.94 Complying With the Rule

[1] Five Prerequisites

Rule 3-300 does not prohibit a lawyer from entering into a business transaction with a client or from obtaining an ownership, possessory, security or other pecuniary interest adverse to a client. However, before doing so, a lawyer must comply with what the Supreme Court has characterized as "an extensive protocol for gaining the client's consent" [*Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 545, 28 Cal. Rptr. 2d 617, 869 P.2d 1142]* .

A lawyer must meet five prerequisites under the rule before entering into the transaction:

- The transaction and its terms must be "fair and reasonable to the client."
- The transaction and its terms must be "fully disclosed and transmitted in writing to the client in a manner which should reasonably have been understood by the client."
- The client must be "advised in writing that the client may seek the advice of an independent lawyer of the client's choice."
- The client must be "given a reasonable opportunity to seek that [independent] advice."
- The client must consent to the terms of the transaction in writing *after* the first four requirements have been accomplished.

Compliance with these requirements is more than a formality. Business dealings between a lawyer and a client are "scrutinized with the utmost strictness for any unfairness" [*Beery v. State Bar (1987) 43 Cal. 3d 802, 812-813, 239 Cal. Rptr. 121, 739 P.2d 1289* ; *Clancy v. State Bar (1969) 71 Cal. 2d 140, 146, 77 Cal. Rptr. 657, 454 P.2d 329]* .

The burden of proof is on the attorney to show by extrinsic evidence that the transaction is fair and reasonable and fully known and understood by the client [*Hunniecutt v. State Bar (1988) 44 Cal. 3d 362, 372-373, 243 Cal. Rptr. 699, 748 P.2d 1161* ; *Beery v. State Bar (1987) 43 Cal. 3d 802, 812, 239 Cal. Rptr. 121, 739 P.2d 1289]* . A lawyer must fulfill the rule's five requirements in light of these principles.

[2] Fair and Reasonable Transaction and Terms

The fair and reasonable requirement applies both to the transaction as a whole and to its individual terms. The principal issue is whether the transaction is "an arm's length business deal" [*Beery v. State Bar (1987) 43 Cal. 3d 802, 815, 239 Cal. Rptr. 121, 739 P.2d 1289* ; *Clancy v. State Bar (1969) 71 Cal. 2d 140, 150, 77 Cal. Rptr. 657, 454 P.2d 329]* . However, the analysis also focuses on the transaction's effect on the lawyer-client relationship in terms of the conflict of interest between the lawyer and the client resulting from the transaction [*see, e.g.,* *Rose v. State Bar (1989) 49 Cal. 3d 646, 663, 262 Cal. Rptr. 702, 779 P.2d 761* ; *Ames v. State Bar (1973) 8 Cal. 3d 910, 919, 106 Cal. Rptr. 489, 506 P.2d 625* ; In the Matter of Lane (1994) 2 Cal. State Bar Ct. Rptr. 735, 745]. If the transaction is not "fair and reasonable" to the client, it may be deemed to constitute a violation of the lawyer's fiduciary duty and therefore an act of moral turpitude [*Hunniecutt v. State Bar (1988) 44 Cal. 3d 362, 372, 243 Cal. Rptr. 699, 748 P.2d 1161]* .

A number of factors establish that a transaction is not fair and reasonable to a client. These include an under market purchase price or unsubstantiated value of security given to the client [*Sodikoff v. State Bar (1975) 14 Cal. 3d 422, 429-430, 121 Cal. Rptr. 467, 535 P.2d 331* ; *Hunniecutt v. State Bar (1988) 44 Cal. 3d 362, 372, 243 Cal. Rptr. 699, 748 P.2d 1161]* . Another factor is the absence of security, when security would ordinarily be considered essential to the client [*Hunniecutt v. State Bar (1988) 44 Cal. 3d 362, 373, 243 Cal. Rptr. 699, 748 P.2d 1161* ; *Beery v. State Bar (1987) 43 Cal. 3d 802, 814-815, 239 Cal. Rptr. 121, 739 P.2d 1289* (lack of security unreasonable where investment involved settlement funds of a young man with a family who was paralyzed and unable to perform his previous occupation); *Rodgers v. State Bar (1989) 48 Cal. 3d 300, 314, 256 Cal. Rptr. 381, 768 P.2d 1058* (lack of security for loan of conservatorship funds held unfair)].

Loan transactions between lawyer and client are not fair and reasonable when the terms of the original loan are not in writing and that the loan is not for a definite term [*Rodgers v. State Bar (1989) 48 Cal. 3d 300, 314, 256 Cal. Rptr. 381, 768 P.2d 1058* ; *Hunniecutt v. State Bar (1988) 44 Cal. 3d 362, 373, 243 Cal. Rptr. 699, 748 P.2d 1161* ; *Morgan v. State Bar (1990) 51 Cal. 3d 598, 606, 274 Cal. Rptr. 8, 797 P.2d 1186]* . When the transaction relates to a matter in which the lawyer represents the client, another element of unfairness is the inclusion of terms that are inconsistent with the client's interests in entering into the transaction [*Ames v. State Bar (1973) 8 Cal. 3d 910, 918-919, 106 Cal. Rptr. 489, 506 P.2d 625* (purchase of senior lien to preserve client's junior lien contained terms that allowed the lawyer to foreclose ahead of the client and did not allow the client to receive any surplus proceeds from the sale)].

In the case where the terms of the transaction are in writing, the Supreme Court's conclusion that the transaction was not fair and reasonable was coupled with a finding that material facts concerning the aspect of the transaction in question were not disclosed, or that the client did not understand the transaction. None of those cases held that a fully informed and sophisticated client who understood the transaction could not agree to the terms that were held not to be fair and reasonable. However, in the absence of an affirmative showing by the lawyer that the client made a fully informed and rational decision, the transaction may be presumed to be unfair and unreasonable even if the opposite is true [*see, e.g.,* *Hunniecutt v. State Bar (1988) 44 Cal. 3d 362, 373, 243 Cal. Rptr. 699, 748 P.2d 1161* (holding that the lawyer failed to carry burden due to the absence in the record of any evidence of the value of the security given to the client); *see also* *Beery v. State Bar (1987) 43 Cal. 3d 802, 812, 239 Cal. Rptr. 121, 739 P.2d 1289* (where court noted that transactions connected with the lawyer-client relationship are inherently suspect and will be set aside at "the mere instance of the client" unless the lawyer meets the burden of proof by use of extrinsic evidence); *Magee v. State Bar (1962) 58 Cal. 2d 423, 431, 24 Cal. Rptr. 839, 374 P.2d 807* (when circumstances suggest that a lawyer took advantage of a client's

weakness or inexperience or that the lawyer benefitted unduly, the lawyer must justify his or her action)].

PRACTICE TIP:

Recommended Documentation. To avoid the problems described above, it is important not only to document the terms of the transaction and the disclosure to the client, but also to document how values were determined and the basis of the client's decision to accept the transaction and the terms. *By Stanley W. Lamport*.

[3] Full Disclosure in Writing

The rule requires that the nature of the transaction and its terms be fully disclosed to the client in writing and in a manner that should be reasonably understood by the client. The standard suggested is that the attorney "must make it manifest that he gave to his client all that reasonable advice against himself that he would have given him against a third person" [*Beery v. State Bar (1987) 43 Cal. 3d 802, 813, 239 Cal. Rptr. 121, 739 P.2d 1289]* . It also requires a lawyer to disclose to the client "whatever information the attorney has or may acquire in relation to the subject matter of the transaction" [*Beery v. State Bar (1987) 43 Cal. 3d 802, 813, 239 Cal. Rptr. 121, 739 P.2d 1289]* .

In the first instance this obligation requires a lawyer to truthfully inform the client of the nature and terms of the transaction [*Beery v. State Bar (1987) 43 Cal. 3d 802, 813, 239 Cal. Rptr. 121, 739 P.2d 1289]* . In a number of cases, discipline has been imposed when the lawyer failed to disclose basic facts about the transaction [*Rodgers v. State Bar (1989) 48 Cal. 3d 300, 313* (failure to disclose business and professional relationship with borrower of client funds, how funds were used and subsequent pledge of security to a third party); *Clancy v. State Bar (1969) 71 Cal. 2d 140, 147, 77 Cal. Rptr. 657, 454 P.2d 329* (failure to disclose use of funds)].

The disclosure requirement includes informing the client about the lawyer's role and compensation in connection with the transaction [*Rodgers v. State Bar (1989) 48 Cal. 3d 300, 313, 256 Cal. Rptr. 381, 768 P.2d 1058* ; *Beery v. State Bar (1987) 43 Cal. 3d 802, 815, 239 Cal. Rptr. 121, 739 P.2d 1289* : *Clancy v. State Bar (1969) 71 Cal. 2d 140, 147, 77 Cal. Rptr. 657, 454 P.2d 329]* .

In addition, the disclosure must inform the client about how the lawyer's interests in the transaction could conflict with the client's interests and the adverse effect of that conflict on the client and the lawyer-client relationship [*see Rose v. State Bar (1989) 49 Cal. 3d 646* ; In the Matter of Lane (1994), 2 Cal. State Bar Ct. Rptr. 735, 745]. When the transaction involves the loan or investment of funds or the creation of a security interest between the lawyer and the client, the conflict involves the relative financial interests of the lawyer and the client in the replayment of the loan or investment or in the exercise of rights in the security [*Rodgers v. State Bar (1989) 48 Cal. 3d 300, 313, 256 Cal. Rptr. 381, 768 P.2d 1058* ; *Kapelus v. State Bar (1987) 44 Cal. 3d 179, 193-194, 242 Cal. Rptr. 196, 745 P.2d 917* ; *Silver v. State Bar (1974) 13 Cal. 3d 134, 139, 117 Cal. Rptr. 821, 528 P.2d 1157* ; *Ames v. State Bar (1973) 8 Cal. 3d 910, 920*].

In cases where the lawyer is compensated for the client's investment, the conflict involves whether the lawyer's recommendation to the client is influenced by the lawyer's interest in receiving the compensation [*see, e.g., Rose v. State Bar (1989) 49 Cal. 3d 646*]. When the transaction involves the purchase of an asset or some other valuation, such as an interest rate, the conflict involves the differing interests of the lawyer and the client in a higher or lower valuation [*Eschwig v. State Bar (1969) 1 Cal. 3d 8, 15, 81 Cal. Rptr. 352, 459 P.2d 904]* . In all of these cases disclosure of the potential adverse effect on the lawyer-client relationship resulting from problems associated with the business transaction may be required as well [*see, e.g.,* In the Matter of Lane (1994) 2 Cal. State Bar Ct. Rptr. 735, 745].

The disclosure requirements also involve a duty to fully apprise the client of the risks associated with the transaction [*Beery v. State Bar (1987) 43 Cal. 3d 802, 813, 239 Cal. Rptr. 121, 739 P.2d 1289]* . The focus here is on whether information is disclosed that might have discouraged the client from agreeing to the transaction [*Rodgers v. State Bar*

(1989) 48 Cal. 3d 300, 314, 256 Cal. Rptr. 381, 768 P.2d 1058] . In situations involving client investments or loans, the duty includes disclosure of facts that could affect the client's ability to be repaid [*see, e.g.,* *Clancy v. State Bar (1969) 71 Cal. 2d 140, 147, 77 Cal. Rptr. 657, 454 P.2d 329* (discipline imposed for failure to disclose lawyer needed the funds for his own use due to pressing financial obligations and his inability to obtain funds elsewhere)]. In the case of a lawyer's acquisition of a security interest in a client's property, the required disclosure may include the risk of losing the property and the possible protections available to the client [*see, e.g.,* *Brockway v. State Bar (1991) 53 Cal. 3d 51, 65, 278 Cal. Rptr. 836, 806 P.2d 308* ; *Ames v. State Bar, (1973) 8 Cal. 3d 910, 920, 106 Cal. Rptr. 489, 506 P.2d 625]* .

Because the obligation to make full disclosure under Rule 3-300 requires that the disclosure be communicated in a manner that should be reasonably understood by the client, disclosure of the terms of the transaction in the contract documents themselves may not be sufficient. Adequate disclosure may require that the lawyer explain to the client exactly how the transactions may adversely affect the client's interests [*see* *Rose v. State Bar (1989) 49 Cal. 3d 646* (court held contract documents which disclosed lawyer's interest did not adequately inform the client of the potential conflict of interest)].

[4] Written Advice to Seek Independent Counsel

Failure to advise the client in writing to seek the advice of independent counsel is a violation of Rule 3-300 [*Rose v. State Bar (1989) 49 Cal. 3d 646* ; *Ritter v. State Bar (1985) 40 Cal. 3d 595, 602, 221 Cal. Rptr. 134, 709 P.2d 1303* ; *Connor v. State Bar (1990) 50 Cal. 3d 1047, 1058, 269 Cal. Rptr. 742, 791 P.2d 312]* . The duty to advise a client to seek independent counsel is required even if the terms of the transaction are fair and reasonable and fully disclosed in writing in a manner reasonably understood by client [*Ritter v. State Bar (1985) 40 Cal. 3d 595, 602, 221 Cal. Rptr. 134, 709 P.2d 1303]* .

Merely informing a client that the client may or can seek the advice of independent counsel is not enough. A lawyer must encourage the client to seek such advice and cannot imply that such advice is unnecessary [*Rose v. State Bar (1989) 49 Cal. 3d 646* ; *Rodgers v. State Bar (1989) 48 Cal. 3d 300, 314, 256 Cal. Rptr. 381, 768 P.2d 1058]* . Pursuant to Rule 3-300, a client must be given a reasonable opportunity to consult with independent counsel. "The consent must follow the opportunity to consult with independent counsel; it is not an alternative to such consultation" [*BGJ Associates v. Wilson (2003) 113 Cal. App. 4th 1217, 1226-1227, 7 Cal. Rptr. 3d 140]* .

Independent counsel cannot be someone who has a financial interest in the transaction or is affiliated with the lawyer [*Connor v. State Bar (1990) 50 Cal. 3d 1047, 1058, 269 Cal. Rptr. 742, 791 P.2d 312* (referral to the lawyer's law partner and girlfriend who stood to profit from the transaction was not independent counsel as required by the Rule)]. Presumably, a referral to another lawyer in the same law firm, even if that lawyer does not have a financial interest in the transaction, would not meet the test for independence.

[5] Reasonable Opportunity to Seek Advice

The requirement that the client be afforded a reasonable opportunity to obtain the advice of independent counsel appears to require at least some passage of time between when the client first receives the contract documents and when the client consents to the transaction [*Ritter v. State Bar (1985) 40 Cal. 3d 595, 602-603, 221 Cal. Rptr. 134, 709 P.2d 1303]* (discipline imposed when agreement signed in lawyer's office within minutes after it was first presented to the client).

PRACTICE TIP:

Minimum Consultation. What constitutes a reasonable opportunity to consult with independent counsel will depend on the circumstances. At a minimum it would appear to require enough time for the client to obtain a lawyer and have a meaningful consultation about the adequacy of the terms and whether the client should enter into the transaction. *By Stanley W. Lamport*.

[6] Client's Written Consent

The client's consent to the terms of the transaction must be in writing under the rule. In addition, it must occur only after all of the other four requirements have been accomplished. Rule 3-300 does not define what it means for a client to consent in writing to the terms of the transaction. Using the definitions in Rule 3-310(A) as a guide, the term may mean the client's written agreement to the transaction after disclosure [*see Cal. Rules Prof. Conduct, Rule 3-310(A)(2)*].

PRACTICE TIP:

Evidence of Written Consent. It is not clear from the Rule whether the client's written consent can be evidenced by the client's execution of the contract documents in connection with the transaction. As a practical matter, it may be the better practice for the client to sign the document in which the disclosure to the client is made. *By Stanley W. Lamport.*

A prerequisite to a client's consent under the rule is the client's understanding of the transaction. A client's consent to the terms of the transaction will not satisfy the rule's requirements if the client does not understand the transaction [*see, e.g., Hunniecutt v. State Bar (1988) 44 Cal. 3d 362, 373, 243 Cal. Rptr. 699, 748 P.2d 1161]* .

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§ 72.95 Duty to Retain Writings

Since under *Cal. Rules Prof. Conduct, Rule 3-300* the attorney is required to disclose in writing, advise in writing, and receive consent in writing, it is imperative that the attorney retain the writing. An attorney's failure to keep adequate records is inherently suspicious and can support an inference that his or her testimony is untrue [*Rodgers v. State Bar (1989) 48 Cal. 3d 300, 311, 256 Cal. Rptr. 381, 768 P.2d 1058* (rejecting petitioner's claim that records for his defense had "literally disappeared")].

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[Reserved]

§§ 72.96[Reserved]

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§ 72.110 Rule 3-310(B): Lawyer Relationships and Interests

[1] Scope and History of Rule

Cal. Rules Prof. Conduct, Rule 3-310(B) provides that a State Bar member may not accept or continue representation of a client without providing written disclosure to the client when:

- The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or
- The member knows or reasonably should know that:
  - The member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
  - The previous relationship would substantially affect the member's representation; or
- The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or
- The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

Current Rule 3-310(B), operative September 14, 1992, is a substantial revision of old Rule 3-310(A), which went into effect on May 27, 1989. Old Rule 3-310(A) in turn superseded old Rule 5-102. Both prior rules required informed written consent by a client in situations involving the lawyer's current or prior relationship with another party or the lawyer's current interest in the subject matter of the engagement.

NOTE:

Significant 1992 Amendments to Rule 3-310. Rule 3-310 was amended operative September 14, 1992. In some cases the current rule reflects a significant rewriting of the old rule, and in others does not substantially change it. The scope and extent of the more substantial revisions are still not fully known. As a result, the discussion of some of the current rules that follows in § 72.110 et seq. is necessarily tentative. The focus in these sections is on acquainting the practitioner with the issues that will allow for an informed application of the current requirements and the requirements that have not changed substantially.

Old Rule 3-310(A) was criticized for vagueness. It was unclear from the text whether the consent of a former client, as opposed to the current client, was required when the lawyer previously had a relationship with another interested party (although LACBA Formal Opinion No. 463 (1990) concluded that the consent of the former client was not required under old Rule 3-310(A)). Further, the term "relationship with another party" who is "interested in the subject matter" of the engagement found in the old rule lacked clarity. These uncertainties have been addressed in current Rule 3-310(B).

Current Rule 3-310(B) also eliminates the written consent requirement. Now only written disclosure must be made to the client represented by the lawyer in the matter. "Disclosure" is defined in *Cal. Rules Prof. Conduct, Rule 3-310(A)* as "informing the client ... of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client." The current rule assumes that the client can make his or her own decision whether to continue a relationship with the lawyer after disclosure is made without having to give written consent [*Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 546 n.3, 28 Cal. Rptr. 2d 617, 869 P.2d 1142]* .

[2] Rule 3-310(B)(1): Lawyer's Current Relationship With Party or Witness

[a] Overview of Rule

A State Bar member may not accept or continue representation of a client without providing written disclosure to the client when the member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter [*Cal. Rules Prof. Conduct, Rule 3-310(B)(1)*].

Rule 3-310(B)(1) requires written disclosure to the client when the lawyer *currently* has one of the specified kinds of relationships in a matter in which the client has engaged the lawyer. The rule specifies five categories of relationships that appear to encompass the entire gamut of relationships a lawyer may have. These categories are [*Cal. Rules Prof. Conduct, Rule 3-310(B)(1)*]:

- Legal
- Business
- Financial
- Professional
- Personal

The rule does not define what is included in these categories. The categories have not yet been defined in case law or ethics opinions.

While there is likely to be considerable overlap between the five categories, there are some distinguishing characteristics that may be of use in analyzing whether a lawyer has a relationship requiring disclosure.

Although *Cal. Rules Prof. Conduct, Rule 3-310(B)* speaks of an attorney's "relationship" to another party who would be affected, it does not include the word "adverse" or similar term except in the title of the rule ("Avoiding the Representation of Adverse Interests"). One court has opined that the rule does not require informed consent to every relationship, but only to those relationships which "could in some manner impinge on the attorney's representation of the client by compromising the attorney's loyalty to the client" [*Giannini, Shin & Valinoti v. Superior Court (1995) 36 Cal. App. 4th 600, 610, 42 Cal. Rptr. 2d 394]* .

For discussion of managing conflicts under Rule 3-310(B)(1), see *§ 72.131[2]*.

[b] Current Relationships Covered by Rule

[i] Personal Relationships

Perhaps the broadest category of relationships is personal relationships. The term appears to include both friendships and familial relationships. *Cal. Rules Prof. Conduct, Rule 3-310(B)* provides no thresholds. The relationships do not have to be close or even positive. A personal relationship may involve an acquaintance or someone with whom the lawyer has a hostile relationship.

The term "relationship" itself may provide some parameters. It is defined as "a connection, association, or involvement" or as "an emotional or other connection between people" [Random House Dict. of the English Language (1983 ed.) p. 1089, col. 2]. Using this definition as a guide, situations when a lawyer has an association, connection, or involvement at some level with another party or witness are likely to be "personal relationships" under *Cal. Rules Prof. Conduct, Rule 3-310(B)*.

[ii] Professional Relationships

A profession is "a vocation or occupation requiring special, usually advanced, education and skill" [Black's Law Dict. (6th ed. 1990) p. 1210, col. 2]. Relationships that arise in connection with the performance of one's profession are likely to be professional relationships.

The most common type of professional relationship is the attorney-client relationship. Other professional relationships may include relationships with other lawyers with whom a lawyer practices law (e.g., partners or associates in the same firm or government lawyers employed by the same agency) or with whom the lawyer is involved in a professional organization. Rule 3-310(B), however, does not apply to relationships with another party's lawyer. Those relationships are governed by *Cal. Rules Prof. Conduct, Rule 3-320* [*see Cal. Rules Prof. Conduct, Rule 3-310*, Discussion].

Professional relationships may also include situations when the lawyer is employed as an expert witness for a party or witness or when the party or witness has been so employed by the lawyer. If the lawyer has another profession in addition to law, relationships arising out of the performance of that profession would also likely be considered professional relationships under Rule 3-310(B).

Southwestern University Law Review has published an exhaustive review of conflicts of interest as they relate to lawyers employed or previously employed by a public agency. The specific situation under consideration must be evaluated on its own fact pattern. Much of the analysis depends on the agency's organization and reporting relationships [*Wearing Many Hats, 25 Sw. U. L. Rev. 301, 312 (1996)*].

[iii] Business and Financial Relationships

A connection, association, or involvement related to the conduct of a business or to financial matters is likely to be considered a business or financial relationship. In many cases, business and financial relationships will be the same,

since most relationships in connection with a business are for financial gain. The terms may also encompass attorney-client relationships and relationships between lawyers for the practice of law, which are also professional relationships.

Business relationships obviously arise when a lawyer is in business with a party or witness. They may be partners, coshareholders, coinvestors, coemployees, or employer and employee. All of these relationships require disclosure.

There is nothing in Rule 3-310(B) that requires that the lawyer and the party or witness be in the same business. A business relationship may include a relationship when the party or witness refers business to the lawyer or vice versa. It may include situations when the party or witness supplies materials or services to a business in which the lawyer is involved.

There are also relationships that are not related to a business that may still qualify as financial relationships. For example, if the lawyer maintains accounts at a bank, that involvement with the bank may be considered a financial relationship, whether or not the accounts are personal or for a business. Financial relationships likely include situations when the lawyer has loaned money to or received a loan from a party or witness. They may also include relationships with an insurer or relationships when either the lawyer or the party or witness manages funds for the other.

A lawyer who prepares living trusts at the direction of a nonlawyer who markets living trust packages to the public has a business, financial and professional relationship with the marketer which warrants disclosure under *Cal. Rules Prof. Conduct, rule 3-310(B)*. The lawyer's relationship with the marketer creates the possibility of a conflict of interest because of the potential interference with the lawyer's loyalty to the person for whom the lawyer drafts the living trust and the lawyer's exercise of independent professional judgment on the client's behalf, since the lawyer may not consider estate planning options for the client other than a living trust because the marketer's best interest may most often only be served by an estate plan that includes a living trust [State Bar Formal Opinion 1997-148].

[iv] Legal Relationships

It is not entirely clear what is meant by a "legal relationship." Relationships arising out of the practice of law, which also constitute professional relationships, might be considered legal relationships.

One definition of "legal" is "created by law" [Black's Law Dict. (6th ed. 1990) p. 992, col. 2]. If this definition is used, legal relationships would include associations, connections, or involvements created by law. Business relationships created by law, such as those involving corporations, partnerships, associations and the like, may also be legal relationships. Financial relationships created by law, such as in connection with a trust, may also be legal relationships.

There may be legal relationships that do not fit within the other four categories. For example, a relationship created by marriage may be considered a legal relationship even though the lawyer may have no other contact with that party or witness.

[c] Who Is Party or Witness

Disclosure is required when the lawyer's relationship is with a party or witness in the same matter [*see Cal. Rules Prof. Conduct, Rule 3-310(B)(1)*].

In a litigation context the terms have a fairly clear meaning. "Party" is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or in equity [*Poe v. Diamond (1987) 191 Cal. App. 3d 1394, 1399, 237 Cal. Rptr. 80* (quoting Black's Law Dict. (5th ed. 1979) p. 1010, col. 2)]. A party is also recognized as anyone who is allowed to appear in a proceeding [*Poe v. Diamond (1987) 191 Cal. App. 3d 1394, 1398-1399, 237 Cal. Rptr. 80]* .

In the same context, a "witness" is defined as a person whose declaration under oath is received for any purpose, whether the declaration is made on oral examination, or by deposition or affidavit [*Code Civ. Proc. § 1878*]. This definition assumes that the testimony has already been given. However, Rule 3-310(B) may require a broader definition. A more general definition of a "witness" is someone "who, being present, personally sees or perceives a thing; a beholder, spectator or eyewitness" [Black's Law Dict. (6th ed. 1990) p. 1603, col. 2]. It is not yet clear how these definitions should be applied. For example, should disclosure be required when the person with whom the lawyer has a relationship is identified as a potential witness even though that person has not yet given any testimony? Prudence suggests that disclosure should occur as early in the process as possible, but the point at which that disclosure must occur has not yet been fixed.

Outside the litigation context, the terms "party" and "witness" are more illusive. The most general definition of "party" in Black's Law Dictionary is "[a] person concerned or having or taking part in any affair, matter, transaction or proceeding considered individually" [Black's Law Dict. (6th ed. 1990) p. 1122, col. 1]. Coupled with a broad definition of a witness, the scope of people covered by *Cal. Rules Prof. Conduct, Rule 3-310(B)(1)* in nonlitigation situations would be very broad. It would include anyone having any involvement in the transaction whatsoever.

The precise limits of what constitutes a "party" or a "witness" in a nonlitigation context have yet to be defined. At a minimum the terms are likely to include persons and entities concerned with or taking part in the matter. What other involvements will trigger disclosure are as yet unclear. When in doubt, it should be kept in mind that if a lawyer knows of someone with whom the lawyer has a relationship, whose involvement could affect the lawyer's loyalty or independent judgment, that relationship should be disclosed to the client.

NOTE:

Lawyer's Relationship With Other Party's Lawyer. A lawyer for a party is not a party [*Poe v. Diamond (1987) 191 Cal. App. 3d 1394, 1399, 237 Cal. Rptr. 80* ; *see Cal Rules Prof Cond, Rule 3-310*, Discussion (noting that *Cal Rules Prof Cond, Rule 3-310(B)* is not intended to apply to relationship of State Bar member to another party's lawyer)]. Such relationships are governed by *Cal. Rules Prof. Conduct, Rule 3-320*.

[d] Persons Whose Relationships Are Covered by Rule

Cal. Rules Prof. Conduct, Rule 3-310(B) refers to a "member's" relationship with a party or witness. Moreover, it is the member involved in the representation that must provide the disclosure. A "member" is defined as a member of the State Bar [*Cal. Rules Prof. Conduct, Rule 1-100(B)*]. Thus, as written, the rule requires the lawyers handling an engagement to disclose their relationships with parties or witnesses.

In certain instances, however, a lawyer must also disclose relationships between a party or witness and another lawyer in the same firm. This requirement is found in the Discussion to Rule 3-310, which states that Rule 3-310(B) is intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.

The Discussion appears to require actual knowledge of such relationships [*compare Cal. Rules Prof. Conduct, Rule 3-310(B)(2) with Cal. Rules Prof. Conduct, Rule 3-310(B)(3)*]. The most common situation in which such disclosure will be required is when the party or witness is a client of the member's firm. The existence of a client relationship should be revealed in a conflict search performed to determine if consent is required from the party or witness under other parts of Rule 3-310. Even if consent is not required from the party or witness, the relationship must still be disclosed to the client in the matter.

For discussion of imputing the receipt of confidential information acquired from a present or former client to the firm, which may result in a conflict of interest under *Cal. Rules Prof. Conduct, Rule 3-310(E)*, § 72.113[6].

[e] To Whom Disclosure Is Made

In the situations outlined in *Cal. Rules Prof. Conduct, Rule 3-310(B)(1)*, a member may not accept or continue representation of a client without providing written disclosure to the client [*Cal. Rules Prof. Conduct, Rule 3-310(B)*]. As written, Rule 3-310(B) requires disclosure only to the client being represented in the matter [*see* LACBA Formal Opinion No. 463 (1990) (term "client" refers to existing clients only); *see also Allen v. Academic Games Leagues of America, Inc. (C.D. Cal. 1993) 831 F. Supp. 785, 788]* .

Thus, for example, if the party or witness is a client of the lawyer's firm, but is not represented by the firm in the action, *Cal. Rules Prof. Conduct, Rule 3-310(B)(1)* requires disclosure only to the client the lawyer is representing in the action. However, the lawyer may be required to obtain informed written consent of the party or witness under other parts of Rule 3-310.

[3] Rule 3-310(B)(2): Lawyer's Past Relationship With Party or Witness

[a] Overview of Rule

Cal. Rules Prof. Conduct, Rule 3-310(B)(2) requires written disclosure of the lawyer's past legal, business, financial, professional, or personal relationships with a party or witness when the previous relationship would substantially affect the representation. Rule 3-310(B)(2) involves the same scope of relationships and the same requirement that the relationship involve a party or witness found in Rule 3-310(B)(1) [*see § 72.110[2][b]*]. As with Rule 3-310(B)(1), a lawyer must disclose relationships the lawyer knows other lawyers in the same firm have with a party or witness [*see § 72.110[2][d]*]. Disclosure is required to be made only to the client being represented in the matter and not to the party or witness unless required under other parts of Rule 3-310 [*see § 72.110[2][e]*].

There are two aspects of Rule 3-310(B)(2) that are different from Rule 3-310(B)(1) [*compare Cal. Rules Prof. Conduct, Rule 3-310(B)(1) with* (B)(2)]:

- Disclosure is required only if the previous relationship would substantially affect the representation [*see § 72.110[3][b]*].

- The standard is whether the lawyer knows or reasonably should know about the prior relationship and its effect on the current representation [*see § 72.110[3][c]*].

For discussion of managing conflicts under Rule 3-310(B)(2), see *§ 72.131[3]*.

[b] Substantial Effect on Representation

The most common situation in which *Cal. Rules Prof. Conduct, Rule 3-310(B)(2)* is likely to require disclosure is when the lawyer or the lawyer's firm had a prior attorney-client relationship with a party or witness in which confidential information material to the current representation was obtained or may have been obtained. Depending on the circumstances, the former client's consent may be required before the lawyer may accept the current representation:

- If material confidential information was obtained, and the current representation is adverse to the former client, the former client's consent is required under *Cal. Rules Prof. Conduct, Rule 3-310(E)* before the lawyer may accept the current representation.

- If material confidential information was obtained, but the current representation is not adverse to the

former client, consent from the former client under *Cal. Rules Prof. Conduct, Rule 3-310(E)* is not required unless the representation becomes adverse to the former client.

- If the confidential information obtained is not material or potentially material to the current representation, the former client's consent is not required under *Cal. Rules Prof. Conduct, Rule 3-310(E)*; however, if circumstances change, the consent might be required [*see § 72.113[1]*].

All of these situations will likely require disclosure to a current or potential client under Rule 3-310(B)(2). They all hold the potential for the lawyer to be disqualified or for the representation to be affected by restrictions on the use of confidential information from the prior relationship.

Other examples when a prior relationship would substantially affect a lawyer's current representation include situations that would impact the lawyer's loyalty, independent judgment, or performance. For example, if the party or witness previously sued the lawyer, the prior lawsuit might affect the lawyer's objectivity and, as a result, the lawyer's independent judgment. If the prior lawsuit becomes a factor in the current representation, the lawyer might become a less effective advocate for the client. If the lawyer has a strong affiliation with the party or witness as a result of the prior relationship, that too might substantially affect the lawyer's loyalty and independent judgment in the current representation.

[c] Knowledge Standard Under Rule 3-310(B)(2)

Written disclosure is required when a lawyer knows or reasonably should know of both the prior relationship and its effect on the representation [*Cal. Rules Prof. Conduct, Rule 3-310(B)(2)*]. The "reasonably should know" standard indicates that a lawyer must make some investigation into both the existence of the prior relationship and its effect. This standard has a specific application in the case of former clients. It appears to require an investigation into whether there was an attorney-client relationship and whether material confidential information was obtained.

[d] Disclosure to Former Client Not Required

Cal. Rules Prof. Conduct, Rule 3-310(B)(2) does not require disclosure to the former client [*Allen v. Academic Games Leagues of America, Inc. (C.D. Cal. 1993) 831 F. Supp. 785, 788]* . This point is underscored in the Discussion to the rule, which states that Rule 3-310(B) is not intended to require either disclosure of the new engagement to a former client or the consent of the former client to the new engagement, but that the disclosure or consent is required if *Cal. Rules Prof. Conduct, Rule 3-310(E)* applies [*Cal. Rules Prof. Conduct, Rule 3-310(B)*, Discussion; *see also § 72.113[1]*].

[4] Rule 3-310(B)(3): Lawyer's Relationship With Another Who Would Be Substantially Affected

[a] Overview of Rule

Disclosure to the client is required when when the lawyer has or had one of the five specified kinds of relationships [*see § 72.110[2][b]*] with another person or entity the lawyer knows or reasonably should know would be substantially affected by a resolution of the matter [*Cal. Rules Prof. Conduct, Rule 3-310(B)(3)*]. As with *Cal. Rules Prof. Conduct, Rule 3-310(B)(1)* and *(B)(2)*, the lawyer must disclose relationships that the lawyer knows other lawyers in the same firm have or had with such a person or entity [*see § 72.110[2][d]*]. As with the other parts of Rule 3-310(B), disclosure must be made to the client being represented in the matter [*see § 72.110[2][e]*].

Unlike Rule 3-310(B)(1) and (B)(2), Rule 3-310(B)(3) is not limited to parties and witnesses in a matter. It applies to a relationship with any person or entity. In addition, while Rule 3-310(B)(2) focuses on whether a prior relationship would substantially affect the representation, Rule 3-310(B)(3) focuses on whether the representation would substantially affect the person or entity with whom the lawyer has or had the relationship.

For discussion of managing conflicts under Rule 3-310(B)(3), see *§ 72.131[4]*.

[b] Substantial Effect on Another Person or Entity

Under *Cal. Rules Prof. Conduct, Rule 3-310(B)(3)*, a lawyer is likely to be required to disclose past or present relationships with others whose fortunes will be directly affected by the outcome of the client's case. However, the rule is not intended to apply to relationships with another party's lawyer [*Cal. Rules Prof. Conduct, Rule 3-310*, Discussion].

For example, if the lawyer represents several plaintiffs in separate lawsuits against the same entity arising out of similar conduct by the entity (such as a toxic tort), the resolution of the action by one of them could affect substantially the claims of the others. The other plaintiffs may benefit from findings made in the one action and may lose the benefit of those findings if the case settles before trial. Even if the issues between the clients are not the same, the other clients would still be substantially affected if a resolution of the one action would render the entity less able to pay judgments or settlements in the other actions. Another example would be if the lawyer prosecuting an antitrust action has a relationship with another entity that would benefit or would lose money if the client prevails in the action.

The requirement to make disclosure under Rule 3-310(B)(3) does not depend on whether the person or entity would be affected positively or negatively. Disclosure is required whenever the effect would be substantial.

[c] Application to Legal Advocacy

The examples in § 72.110[4][b] relate to situations when the person or entity is substantially affected by the factual outcome of the matter. However, the rule may also apply when the person or entity would be affected substantially by the legal precedent created in the matter.

The opening paragraph in the Discussion to Rule 3-310 states that the rule is not intended to prohibit a member from representing parties having antagonistic positions on the same legal question that has arisen in different cases, unless representation of either would be adversely affected. This statement was also part of the Discussion in former Rule 3-310. It is continued in new Rule 3-310 without change. However, it was not considered to create a duty to obtain informed written consent under the old rule. State Bar Formal Opinion No. 1989-108 concluded that former Rule 3-310 itself did not specifically address such situations. The opinion concluded it was not unethical, under the old rule, for a lawyer to argue opposite sides of the same legal question before the same judge on behalf of different clients who are not directly adverse. The opinion observed, however, that it would be prudent for the lawyer to advise both clients of the situation, provided that the lawyer does not violate duties to either client, and allow each an opportunity to seek new counsel [State Bar Formal Opinion No. 1989-108].

When the result of the advocacy could substantially affect another client, Rule 3-310(B)(3) may change the conclusion reached in State Bar Formal Opinion No. 1989-108. For example, if a lawyer is advocating antagonistic positions on behalf of different clients before the same judge, the clients may be substantially affected by which position that judge adopts. Similarly, if the lawyer is advocating one or both positions in courts whose decisions will establish binding precedent, the clients again may be substantially affected by the outcome.

If Rule 3-310(B)(3) is found to apply to issue advocacy, what will be the outer limits of its application? One limit, of course, is whether a client is affected substantially, but how direct must the effect be? The situation covered in the Discussion involves clients whose cases involve antagonistic positions. However, what if a lawyer has a relationship with an entity that has no case pending, but that nevertheless will be substantially affected by the outcome? For example, consider the situation when a lawyer represents a client whose case turns on the court's adopting a legal precedent that will create an onerous duty of disclosure on real estate brokers and agents. Is the lawyer required to disclose to the client his or her relationship with brokers or agents who will be adversely affected if the precedent is

adopted? The answer is not yet known.

[d] Knowledge Standard Under Rule 3-310(B)(3)

Like Rule 3-310(B)(2), *Cal. Rules Prof. Conduct, Rule 3-310(B)(3)* refers to information the lawyer "knows or reasonably should know." However, unlike Rule 3-310(B)(2), the phrase is not used with respect to the lawyer's knowledge of the relationship. Instead, the phrase is used only with respect to knowledge of the substantial effect that resolution of the matter would have on the person or entity.

The significance of this distinction is not clear. It may indicate that a lawyer is not required to search out relationships with persons or entities that would be affected substantially. However, a lawyer may be required to inquire into whether persons or entities with whom the lawyer knows he or she has or had a relationship would be substantially affected by a resolution of the matter.

[5] Rule 3-310(B)(4): Lawyer's Interest in Subject Matter

A State Bar member may not accept or continue representation of a client without providing written disclosure to the client when the member has or had a legal, business, financial, or professional interest in the subject matter of the representation [*Cal. Rules Prof. Conduct, Rule 3-310(B)(4)*].

Rule 3-310(B)(4) addresses the lawyer's own interests in the subject matter of the representation, not conflicts the lawyer and client might have outside the subject matter of the representation [*Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 546, 28 Cal. Rptr. 2d 617, 869 P.2d 1142]* . The rule applies not only to the lawyer's current interest in the subject matter, but also to past interests that have ended [*compare* Cal. Rules Prof. Conduct, former Rule 3-310(A) (predecessor rule applied only when lawyer had current interest in subject matter of representation)].

Unlike the other parts of Rule 3-310(B) that mention five categories of relationships, Rule 3-310(B)(4) mentions only four of those categories in referring to a lawyer's interest--legal, business, financial, or professional. The rule does not require disclosure of a lawyer's personal interest in the subject matter [*see Cal. Rules Prof. Conduct, Rule 3-310(B)(4)*].

As the Supreme Court stated in *Santa Clara County Counsel*, "The primary purpose of this prophylactic rule is to prevent situations in which an attorney might compromise his or her representation of the client in order to advance the attorney's own financial or personal interests" [*Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 546, 28 Cal. Rptr. 2d 617, 869 P.2d 1142]* . The client may be adversely affected in situations in which the lawyer's own interest might limit his or her actions on behalf of the client [SDCBA Ethics Opinion No. 1989-4]. The rule seeks to remove the possibility of self-dealing that may arise when the lawyer has any interest in the subject matter of employment [*see* State Bar Formal Opinion No. 1987-92].

The rule applies to a lawyer who becomes a beneficiary under a deed of trust when the lawyer is handling litigation in which the client is seeking to enjoin a foreclosure under that deed of trust [*Ames v. State Bar (1973) 8 Cal. 3d 910, 919-920, 106 Cal. Rptr. 489, 506 P.2d 625]* . The rule applies when a lawyer levies a writ of execution on property which the client is seeking to recover in litigation handled by the lawyer and on which the client also has a right to levy a writ of execution on a judgment obtained by the lawyer [*Silver v. State Bar (1974) 13 Cal. 3d 134, 139, 117 Cal. Rptr. 821, 528 P.2d 1157]* . It may also apply when a lawyer acquires the literary rights to a client's story in connection with the legal proceeding in which the lawyer represents the client [*see People v. Corona (1978) 80 Cal. App. 3d 684, 719-727, 145 Cal. Rptr. 894]* .

Whenever a lawyer has a motive for obtaining a particular result in a matter that is different than the result that is in the best interest of the client, the lawyer may have an interest in the subject matter for purposes of Rule 3-310(B)(4). For

example, if the lawyer is living with or is about to live with a client seeking custody of children, the lawyer may have financial reasons for not having custody awarded that would constitute an interest in the subject matter of the representation [State Bar Formal Opinion No. 1987-92].

Another example is when a lawyer is negotiating a lease for a client with a professional organization in which the lawyer is a member. The lawyer's membership in the organization is a professional interest requiring disclosure under *Cal. Rules Prof. Conduct, Rule 3-310(B)(4)*. However, disclosure is not required when the lawyer only represents the client in a matter that does not involve the lease negotiations [*Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 547 n.5, 28 Cal. Rptr. 2d 617, 869 P.2d 1142]* .

Certain kinds of fee arrangements may create a financial interest in the subject matter that may require disclosure under Rule 3-310(B)(4). For example, if the lawyer agrees to be paid only if a transaction closes, the lawyer may have a financial interest in the subject matter that may affect the lawyer's independent judgment. The lawyer's interest may make it more difficult to advise the client to forego the transaction. If the client asserts a malpractice claim against the lawyer that is dependent on the outcome of the representation, the lawyer's interest in the outcome may also affect the lawyer's independent judgment. These situations will likely require disclosure to the client under Rule 3-310(B)(4).

When a lawyer represents a client and receives compensation as a result of the provision of related nonlegal services to the client, the lawyer has a financial interest in the subject matter of the representation and must comply with *Cal. Rules Prof. Conduct, Rule 3-310(B)(4)* [*see* State Bar of California Formal Opinion Nos. 1999-154, 1995-141].

Routine motions for sanctions against the lawyer and the client in connection with civil discovery disputes do not require a written disclosure of conflict of interest to the client pursuant to *Cal. Rules Prof. Conduct, Rule 3-310(B)(4)*. Although the lawyer may be considered to have a financial interest because of the potential financial burden if the lawyer is ordered to pay sanctions, when the lawyer and client agree to take a common position with respect to the motion, there is no conflict of interest Rule 3-310(B)(4) is intended to address [State Bar Formal Opinion 1997-151 (Rules of Professional Conduct not intended as litigation tactic to drive wedge between lawyer and client); *but see § 72.271[1], [2]* (duty to inform under *Cal. Rules Prof. Conduct, Rule 3-500* and *Bus. & Prof. Code § 6068(m)* requires notifying client of motion as significant development in case)]. However, if the lawyer and client intend to present different defenses to the motion, a conflict of interest arises that requires the lawyer to make written disclosure under *Cal. Rules Prof. Conduct, Rule 3-310(B)(4)*. If the lawyer and client agree that the lawyer may present a different defense than the client's, the lawyer may continue to represent the client in the motion, so long as the defenses are not competing and the lawyer complies with ethical obligations to be truthful to the court under *Cal. Rules Prof. Conduct, Rule 5-200* and *Bus. & Prof. Code § 6068(d)*. If the lawyer and client agree to present competing defenses, the lawyer may not represent the client in opposing the motion, since advocacy of antagonistic positions in a hearing or trial is a conflict of interest the lawyer and client cannot agree to waive. [State Bar Formal Opinion 1997-151; *Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 898, 142 Cal. Rptr. 509]* . The lawyer and client may agree that the client retain separate counsel to oppose the motion on the client's behalf. The lawyer must protect the client's confidential information in opposing the motion; if the lawyer's defense involves disclosure of confidential information and the client does not consent, the lawyer may not make the disclosure [State Bar Formal Opinion 1997-151]. If the lawyer insists on exonerating himself or herself from liability for sanctions and the client does not agree with the approach, the lawyer must withdraw [*see § 72.370[4]*].

A relatively new area of concern regarding conflicts involves criminal cases under the "three strikes" provisions, *Penal Code § 667*. One ethics opinion addressed the potential conflict which arises when the lawyer or law firm under consideration to represent the defendant also has represented the client in one or more prior serious felony convictions, which brings the "three strikes" law into play. Since effective representation of this client may involve attack on the validity of the prior conviction(s), possibly based on lack of prior counsel's effectiveness, there is a potential conflict of interest. The lawyer may be reluctant to probe the adequacy of his or her (firm's) earlier representation. The representation is permissible if the disclosure requirements of *Cal. Rules Prof. Conduct, Rule 3-310(B)* are satisfied.

However, because of the nature of criminal proceedings and the importance of effective assistance of counsel, the opinion discourages the representation [San Diego County Bar Association Ethics Opinion 1995-1].

For discussion of managing conflicts under Rule 3-310(B)(4), see *§ 72.131[5]*.

California Forms of Pleading and Practice--Annotated

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B. Conflicts Of Interest
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§ 72.111 Rule 3-310(C): Representation of Multiple Clients

[1] Scope and History of Rule

A State Bar member may not, without the informed written consent of each client [*Cal. Rules Prof. Conduct, Rule 3-310(C)*]:

- Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

- Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

- Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

Rule 3-310(C) is in part a revision of old Rule 3-310(B), which stated that "[a] member shall not concurrently represent clients whose interests conflict, except with their informed written consent."

Old Rule 3-310(B) was a general standard that had been construed to apply not only in joint representations, but also when a lawyer represents a client in a matter that is adverse to another client. The new rule is more defined than the old rule and may not cover all of the scenarios that were thought to be within the scope of the old rule.

Rule 3-310(C) also requires informed written consent in joint representations when the clients' interests potentially conflict. Old Rule 3-310(B) did not require consent in potential conflict situations, although it was thought that old Rule 3-310(A) required consent in such cases.

Cal. Rules Prof. Conduct, Rule 3-310(C) applies to criminal as well as civil cases [*People v. Christian (1996) 41 Cal.*

App. 4th 986, 996, 48 Cal. Rptr. 2d 867] and under some circumstances, may apply to child protective services cases, requiring appointment of separate counsel for the child [*In re Mary C. (1995) 41 Cal. App. 4th 71, 79, 48 Cal. Rptr 2d 346]* .

The Court of Appeals for the Ninth Circuit stated that the term "actual conflict" was not a synonym for "direct conflict" and that the duty of loyalty owed by an attorney to his firm's clients was "equivalent to the duty of loyalty owed to an attorney's own clients." As such, the Court found that there was no distinction between direct and imputed conflicts for purposes of the *Sullivan* analysis [*U.S. v. Rodrigues (2003) 347 F.3d 818, 821-822]* .

The Court of Appeals of California for the First Appellate District stated that while *California Rule of Professional Conduct 3-310* does not strictly apply to an attorney acting as a mediator, "an attorney accepting the role of mediator has the same duty of full disclosure as an attorney accepting the representation of clients with actual or potentially conflicting interests" [*Furia v. Helm (2003) 111 Cal. App. 4th 945, 954, 4 Cal. Rptr. 3d 357]* .

In addition, the Court of Appeal for the Second Appellate District has held that a claim for breach of loyalty under Rule 3-310 is not subject to a special motion to strike pursuant to *Code of Civ. Proc. § 425.16*, the anti-SLAPP statute [*Benasra v. Mitchell Silberberg & Knupp LLP (2004) 123 Cal. App. 4th 1179, 1185-1189, 20 Cal. Rptr. 3d 621]* .

For a form of disclosure for obtaining informed written consent in joint representation, *see § 72.651, below*.

[2] Rule 3-310(C)(1), (2): Potential or Actual Conflicts in Joint Representations

[a] Overview of Rule

A State Bar member may not, without the informed written consent of each client [*Cal. Rules Prof. Conduct, Rule 3-310(C)(1), (2)*]:

- Accept representation of more than one client in a matter in which the interests of the clients potentially conflict.

- Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict.

As written, the rule applies to joint representations. It requires that the potential or actual conflict relate to the clients' interests in the matter in which they are jointly represented. The rule does not require consent when there is no potential or actual conflict of interest in the joint representation, even if the clients' interests potentially or actually conflict in other matters that are not involved in the joint representation.

For discussion of managing conflicts under Rule 3-310(C)(1) and (2), see *§ 72.132[1]*.

[b] When Potential or Actual Conflicts Occur

A conflict of interest between jointly represented clients occurs whenever their common lawyer's representation of the one is rendered less effective by reason of his or her representation of the other [*Spindle v. Chubb/Pacific Indemnity Group (1979) 89 Cal. App. 3d 706, 713, 152 Cal. Rptr. 776]* . The basic distinction between Rule 3-310(C)(1) and Rule 3-310(C)(2) is the difference between potential and actual conflicts. Understanding the distinction between the two types of conflicts is a key to understanding the rule.

Potential conflicts arise in circumstances that may later result in a direct conflict [LACBA Formal Opinion No. 471 (1992)]. Many joint representations of distinct clients raise a potential conflict. While the clients' interests may be

harmonious at the outset of the engagement, there is often a potential for their interests to become adverse [LACBA Formal Opinion No. 471 (1992)].

PRACTICE TIP:

Identifying Potential Conflicts. Identifying potential conflicts involves an analysis of the types of actual conflicts that could arise in the representation. If actual conflicts could arise in the representation, there is likely to be a potential conflict if there is any possibility that the conflict would actually occur.

Actual conflicts arise when the clients' interests become directly adverse so that the lawyer cannot effectively or simultaneously advance the interests of both. In joint representations actual conflicts typically arise:

- When the clients have claims against each other arising out of the matter.
- When the clients have inconsistent interests, or objectives, claims, or defenses in the matter that the lawyer cannot pursue effectively simultaneously.
- When the clients give the lawyer conflicting instructions so that the lawyer cannot follow one client's instruction without violating the other client's instruction.
- When the clients have conflicting expectations of confidentiality concerning their respective communications with the lawyer.
- When the clients make conflicting demands.

For example, a lawyer jointly defending an employer and employee in a lawsuit may have an actual conflict if discovery in the lawsuit indicates that the employer has a cause of action against the employee or vice versa. A lawyer also may have an actual conflict if the clients instruct the lawyer to pursue inconsistent or incompatible outcomes. If the lawyer cannot advance one client's interests without adversely affecting the other client's interests, there is an actual conflict.

In another situation, a lawyer may discover information while representing both an insured and an insurer. If the lawyer becomes aware that the insured may have no coverage, or even that the insured has perpetrated a fraud for the purpose of obtaining coverage, the lawyer may not reveal that information to the insurer, and may be required to withdraw from representation [State Bar Formal Opinion No. 1995-139; *see § 72.111[2][b]*]. The Supreme Court of California, in interpreting the Rule 3-310 concept of potential conflict, has held that, in the context of dependency proceedings such as the representation of siblings, an attorney may not accept representation of multiple clients if there is a reasonable likelihood an actual conflict of interest between the clients may arise [*In re Celine R. (2003) 31 Cal. 4th 45, 57-59, 1 Cal. Rptr. 3d 432, 71 P.3d 787* ; *see also In re Zamer G. (2007) 153 Cal. App. 4th 1253, 1263-1271, 63 Cal. Rptr. 3d 769* , (applying *Cal. Rules of Court, Rule 5.660(c)*); *see also In re Zamer G. (2007) 153 Cal. App. 4th 1253, 1263-1271, 63 Cal. Rptr. 3d 769* (applying *Cal. Rules of Court, Rule 5.660(c)*)].

A lawyer who prepares living trusts at the direction of a nonlawyer who markets living trust packages to the public may have a lawyer-client relationship with both a member of the public for whom the lawyer drafts a living trust and the nonlawyer-marketer, which creates at least a potential conflict of interest requiring consent of both under *Cal. Rules Prof. Conduct, Rule 3-310(C)(1), (2)*. To the extent the lawyer's relationship with one client, that is, the marketer, affects the lawyer's loyalty and independent judgment on behalf of another client, that is, the person for whom the lawyer drafts the living trust, because the lawyer cannot exercise independent judgment as to whether a living trust should be a part of this person's estate plan, an actual conflict exists [State Bar Formal Opinion 1997-148].

[c] Separate Consent to Potential and Actual Conflicts

The fact that a lawyer obtains consent to a representation involving a potential conflict does not eliminate the need to obtain consent again when an actual conflict arises. The requirement of additional consent when an actual conflict arises is founded both in the Rule 3-310 and in its Discussion. While subpart (1) states that a member cannot *accept* a joint representation in which there is a potential conflict without informed written consent, subpart (2) states that a member cannot *accept or continue* a representation in which there is an actual conflict without such consent. Thus, the rule itself requires additional consent when actual conflicts arise [*see Cal. Rules Prof. Conduct, Rule 3-310(C)(1), (2)*]. The Discussion confirms this conclusion by stating that if the potential adversity should become actual, the member must obtain further informed written consent of the clients [*Cal. Rules Prof. Conduct, Rule 3-310*, Discussion].

[d] Disclosure and Consent to Potential Conflicts

Cal. Rules Prof. Conduct, Rule 3-310(C)(1) allows a lawyer to represent multiple parties with potentially conflicting interests in the same matter, provided that informed written consent is obtained. Dual representation is not automatically barred, but is permitted only when disclosure is sufficient to enable the client to make free and intelligent decisions regarding the subject matter of the representation [*Sharp v. Next Entertainment, Inc. (2008) 163 Cal. App. 4th 410, 427-430, 78 Cal. Rptr. 3d 37* (obtaining consent from all absent class members prior to certification not required); *McPhearson v. Michaels Company (2002) 96 Cal. App. 4th 843, 117 Cal. Rptr. 2d 489* ; *Gilbert v. National Corp. For Housing Properties (1999) 71 Cal. App. 4th 1240, 84 Cal. Rptr. 2d 204* ; *Zador Corp. v. Kwan (1995) 31 Cal. App. 4th 1285, 1300-1302, 37 Cal. Rptr. 2d 754* ; *Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 1148-1149, 217 Cal. Rptr. 89; see also Dino v. Pelayo (2006) 145 Cal. App. 4th 347, 355-357, 51 Cal. Rptr. 3d 620 (no need for mediation-disqualification rule when parties who knowingly consent to joint representation participate in mediation)]* .

The Model Code of Professional Responsibility notes that there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation [Model Code of Professional Responsibility EC 5-15 (1980)]. Dual representation of parties to some business transactions may be permissible if done in utmost good faith and with the full consent of all parties concerned [*Lessing v. Gibbons (1935) 6 Cal. App. 2d 598, 606, 45 P.2d 258]* .

If the attorney has obtained informed, detailed consent and waiver regarding potential conflict from one client, both before and after the actual conflict arose, then the attorney will be allowed to continue to represent the other party [*Zador Corp. v. Kwan (1995) 31 Cal. App. 4th 1285, 1300-1302, 37 Cal. Rptr. 2d 754]* .

Examples of transactions, common enterprises, or legal relationships in which the parties may prefer to employ a single attorney for the sake of convenience or economy include the following [*Cal. Rules Prof. Conduct, Rule 3-310*, Discussion]:

- Formation of a partnership for several partners or a corporation for severalshareholders.
- Preparation of an antenuptial agreement or joint or reciprocal wills for a husband and wife.
- Resolution of an uncontested marital dissolution.

An attorney may represent two clients whose interests potentially conflict if both of the following requirements are met:

- The attorney reasonably believes that competent representation can be given to each client.
- There is informed, written consent to the joint representation from both clients.

Rule 3-310 requires full and fair disclosure to the client of all facts which materially affect the client's rights and interests [*Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 1148]* . The lawyer should disclose to each client or

prospective client the nature of the potential conflict and the possible adverse consequences if the potential conflict becomes actual [*see Cal. Rules Prof. Conduct, Rule 3-310(A)*].

The disclosure should include a discussion of the ramifications of *Evid. Code § 962*, which limits the applicability of the attorney-client privilege in joint representations [*see Cal. Rules Prof. Conduct, Rule 3-310*, Discussion]. Although not required under Rule 3-310, in some instances it may be prudent to advise one or both clients about the option of seeking independent legal advice before giving their consent, particularly when the clients may not have the experience or sophistication to understand the disclosure [*see* LACBA Formal Opinion No. 471 (1992)].

If the potential conflict is likely to become an actual conflict (e.g., the facts known at the outset indicate that one codefendant probably has or probably will gain a claim against the other codefendant, or that one codefendant may need to confide in counsel and expect counsel to keep that information from the other codefendant), the attorney probably should not undertake to represent both clients even if both clients are willing to sign a consent [*see Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 898-899, 142 Cal. Rptr. 509* ; *Dettamanti v. Lompoc Union School Dist. (1956) 143 Cal. App. 2d 715, 722-723, 300 P.2d 78]* .

If the attorney has represented both sides in a transaction, and a dispute about the transaction later develops between them, the attorney may be precluded from representing either of the parties in the dispute without the consent of the party the lawyer is not representing in the dispute. If the attorney has obtained material confidential information from the other party, that party's consent would be required under *Cal. Rules Prof. Conduct, Rule 3-310(E)* [*Civil Service Com. v. Superior Court (1984) 163 Cal. App. 3d 70, 80, 209 Cal. Rptr. 159* ; *see also Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 899, 142 Cal. Rptr. 509* (court approved dual representation in uncontested divorce, but if wife should change her mind as to child support, attorney would be precluded from representing either spouse in future contested hearings on the issue); LACBA Formal Opinion No. 448 (1987) (attorney who represented husband and wife in estate plan may not later represent husband in preparation of *Marvin* agreement with another woman without wife's consent); *but see § 72.113[2]*].

[e] Disclosure and Consent to Actual Conflicts

If, during a dual representation, an actual conflict develops, the attorney must immediately disclose the problem to both clients and explain the options. *Cal. Rules Prof. Conduct, Rule 3-310(C)(2)* appears to condone dual representation of conflicting interests as long as informed, written consent is obtained [*see Cal. Rules Prof. Conduct, Rule 3-310*, Discussion]. However, some courts have held that even informed consent is insufficient to permit continued dual representation when an actual conflict exists in a litigation matter [*see San Diego Navy Fed. Credit Union v. Cumis Ins. Society (1984) 162 Cal. App. 3d 358, 374-375, 208 Cal. Rptr. 494* ; *Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 898, 142 Cal. Rptr. 509* ; *Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 526-527, 50 Cal. Rptr. 592* ; *Dettamanti v. Lompoc Union School Dist. (1956) 143 Cal. App. 2d 715, 722-723, 300 P.2d 78* ; *see also Gilbert v. National Corp. For Housing Properties (1999) 71 Cal. App. 4th 1240, 84 Cal. Rptr. 2d 204]* . These cases seem to turn on the courts' conclusion that the lawyer could not concurrently represent both clients competently.

If the attorney must withdraw from the representation, he or she will most likely have to withdraw from representing both parties, absent an express or implied agreement between the parties to the contrary [*compare Big Bear Mun. Water Dist. v. Superior Court (1969) 269 Cal. App. 2d 919, 926-927, 75 Cal. Rptr. 580 with Cornish v. Superior Court (1989) 209 Cal. App. 3d 467, 472-473, 257 Cal. Rptr. 383* ; *see also* SDCBA Ethics Opinion No. 1968-3].

If the attorney has obtained informed, detailed consent and waiver from one client, both before and after the actual conflict arose, then the attorney will be allowed to continue to represent the other party [*Zador Corp. v. Kwan (1995) 31 Cal. App. 4th 1285, 1300-1302, 37 Cal. Rptr. 2d 754]* .

PRACTICE TIP:

Disagreements Among Joint Clients in Transactional Matters. Representation of joint clients for transactional matters becomes problematic when two or more clients start to disagree about the objectives of the venture and give the lawyer inconsistent instructions. If the two clients are at odds with each other over the very matter in which they have engaged the lawyer, such that their interests conflict, a Rule 3-310(C)(2) problem exists. The lawyer will have to disclose the conflict and, depending on the severity of the disagreement, either seek further written consents to continue as counsel for both or withdraw from the representation.

[3] Rule 3-310(C)(3): Representations Adverse to a Client

[a] Overview

Conflicts of interest issues arise when a lawyer represents one client in a matter against another client. These issues arise in two types of situations:

- When a lawyer represents a client against a third party, and the lawyer assumes a representation of the third party while the adverse representation is pending.

- When a lawyer assumes a representation adverse to an existing party.

While the former rules covered both scenarios, the current rules expressly cover only the first scenario [*see Cal. Rules. Prof. Conduct, Rule 3-310(C)(3)*]. However, courts continue to recognize that a conflict of interest exists in the latter scenario. The California Supreme Court addressed issues arising in the second scenerio, holding that a lawyer is prohibited from assuming a representation that is adverse to an existing client [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 284, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* . Because there is considerable overlap between the two rules, the following discussion considers them together.

The resolution of conflicts issues in these scenerios all turn on the lawyer's duty of loyalty [*see Flatt v. Superior Court (1994) 9 Cal. 4th 275, 284, 36 Cal. Rptr. 2d 537, 885 P.2d 950* ; *Sharp v. Next Entertainment, Inc. (2008) 163 Cal. App. 4th 410, 427-430, 78 Cal. Rptr. 3d 37* (obtaining consent from all absent class members prior to certification not required); *Truck Ins. Exchange v. Fireman's Fund Ins. Co. (1992) 6 Cal. App. 4th 1050, 1056, 8 Cal. Rptr. 2d 228* ; *Civil Service Com. v. Superior Court (1984) 163 Cal. App. 3d 70, 78 n.1, 209 Cal. Rptr. 159* ; *see also § 71.31 above*]. The prohibition on concurrently representing conflicting interests was seen as a means "to protect client confidences as well as to protect the client's confidence in the adequacy of his representation" [*Vivatar Corp. v. Broidy (1983) 143 Cal. App. 3d 878, 883, 192 Cal. Rptr. 281]* .

In *Flatt*, the Supreme Court emphasized the damage to the client's sense of trust and security in the lawyer-client relationship that was likely to result in such situations [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 285, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* . While not stated as a factor in *Flatt*, some cases have also adopted a broader public policy view that violations of a lawyer's duty of undivided loyalty undermines public confidence in the legal profession and the judicial process [*Truck Ins. Exchange v. Fireman's Fund Ins. Co. (1992) 6 Cal. App. 4th 1050, 1056, 8 Cal. Rptr. 2d 228* ; *Jeffry v. Pounds (1977) 67 Cal. App. 3d 6, 10-11, 136 Cal. Rptr. 373]* . The court condemned the acceptance of employment adverse to a current client even in wholly unrelated matters based on the interests of maintaining the integrity of the legal profession. The attorney represented the defendant in a matter and aggressively sought to impeach the professional reputation and credibility of an expert witness whom her firm was representing in a separate matter. The court found this to be a "shocking breach of her duty of loyalty," and held that under such circumstances, "the court cannot permit, much less preside over, an attorney's attack on his or her own client. ... In the interest of the integrity of the bench and bar, it must declare a mistrial" [Hernandez v. Paicius (2003) 109 Cal. App. 4th 452, 467-468, 134 Cal. Rptr. 2d 756] .

[b] Determining When Employment Is Adverse to Client

Cal. Rules Prof. Conduct, Rule 3-310(C)(3) applies when a new client's interests are adverse to a client in a lawyer's preexisting representation. As written, the Rule does not apply when the new client's interests are *not* adverse to the interests of the client in the preexisting matter.

PRACTICE TIP:

Disclosure When Employment Is Not Adverse to Client. While the new client's involvement in the preexisting matter does not trigger the written consent requirements of Rule 3-310(C)(3) when the new and existing clients' interests are not adverse, written disclosure to the client in the preexisting matter may still be required under *Cal. Rules Prof. Conduct, Rule 3-310(B)(1)* (if the new client is a party or a witness) or under *Cal. Rules Prof. Conduct, Rule 3-310(B)(3)* (if the new client would be affected substantially by a resolution of the matter). *By Stanley W. Lamport*.

The term "adverse" is defined as acting against or in a contrary direction, being detrimental or unfavorable, or having opposing interests [*see Ames v. State Bar (1973) 8 Cal. 3d 910, 919-920, 106 Cal. Rptr. 489, 506 P.2d 625]* . In general, the term "adverse" has been interpreted to mean actions that are unfavorable or opposed to the client's interests [*David Welch Co. v. Erskine & Tulley (1988) 203 Cal. App. 3d 884, 891, 250 Cal. Rptr. 339* ; State Bar Formal Opinion No. 1993-133].

An adverse employment arises when the clients are opposing parties. When a lawyer represents a client in a lawsuit or in negotiations against another client, the lawyer's employment is plainly adverse. In two opinions, the State Bar has limited the concept of "adversity" to situations where the adverse consequences are direct [State Bar Formal Opinion Nos. 1989-108 and 1989-113; *see also Abbott v. United States Internal Revenue Service (9th Cir. 2005) 399 F.3d 1083, 1086-1087* (no conflict when taxpayer's lawyer was employed as consultant by IRS while he represented taxpayer before IRS)].

The concept of direct adversity recognizes the practical limitations of applying the rule to matters in which the client is not involved and does not have a direct stake in the outcome. In Formal Opinion No. 1989-108, the State Bar observed that "[m]ost authorities speak of conflicts of interests only where the representation involves the same case or transaction." The same opinion observed that "[n]ormally the scope of the "adversity" which gives rise to a conflict has been limited to party identification" [State Bar Formal Opinion No. 1989-108]. For example, a court held an attorney's employment was not adverse to a client when the attorney represented the referee and the potential buyer in a partition sale. The owner had no standing to challenge the attorney's dual representation [*Sullivan v. Dorsa (2005) 128 Cal. App. 4th 947, 963-964, 27 Cal. Rptr. 3d 547]* .

In Formal Opinion 1989-108, the State Bar first addressed this question in connection with "issue conflicts" that arise when a lawyer is asked to advocate a rule of law on behalf of one client that is opposed to the interests of another client who is not involved in the matter in which the lawyer is making the argument. The opinion concludes that as a matter of policy, the rules against representing one client's interests against another do not apply to these types of conflicts [State Bar Formal Opinion No. 1989-108].

Formal Opinion 1989-108 noted that "to find a conflict employing a test which could be imposed uniformly to'issue conflicts' of all stripes threatens the ability of attorneys to carry out their roles in the legal system." The opinion observed that in small communities "the practical problems stemming from such an expansive rule would be insurmountable." It also noted that "[t]here is simply no practical way that attorneys can track the legal issues that evolve during the course of an engagement in a system which will enable the attorney to later retrieve the information before a contrary position is taken for another client" [State Bar Formal Opinion No. 1989-108].

The State Bar applied the same standard in Formal Opinion No. 1989-113, which concluded that a lawyer may be

adverse to the subsidiary of a corporate client provided that the subsidiary was not an alter ego of the parent and the lawyer had not acquired any material confidential information from the parent. The opinion posited facts in which the parent was a large publicly traded company that was not a party in the matter and had no prospect of becoming a party so that the only impact to the parent would be the possible reduction in the value of the subsidiary's shares as a result of the representation [State Bar Formal Opinion No. 1989-113].

The State Bar concluded that the "possible indirect impact is insufficient to give rise to a breach of the duty of loyalty owed to the parent." It noted that if such indirect adverse consequences were subject to the rule "attorneys would be conflicted out of representations where the indirect adverse impact was slight or unpredictable." The State Bar also recognized the extreme practical limitations of tracking client ownership interests in entities to which the lawyer is adverse and the difficulty of fashioning a principled test that could distinguish between types of indirect adverse consequences [State Bar Formal Opinion No. 1989-113].

Cal. Rules Prof. Conduct, Rule 3-310(C)(3) does not prohibit the concurrent representation of clients whose interests are adverse only in a matter in which the attorney does not represent either client [*Fremont Indemnity Co. v. Fremont General Corp. (2006) 143 Cal. App. 4th 50, 65, 49 Cal. Rptr. 3d 82]* .

PRACTICE TIP:

Direct Adversity and Nonparties. The concept of direct adversity as expressed in these opinions does not necessarily require that the adversely affected client be a party. It is possible that it would apply to a client who has a direct stake in the outcome. For example, if lawyer is asked to negotiate an agreement with a third party on behalf of one client that would extinguish the rights of another client in the subject matter of the contract, such a representation might be adverse to the other client who will be directly affected by the outcome of the negotiation. *By Stanley W. Lamport*.

[c] Obtaining Client Consent

In *Flatt*, the Supreme Court suggested that the circumstances under which consent may be obtained is limited [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 285 n.4, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* . After noting the general rule that "courts and ethical codes alike prohibit an attorney from simultaneously representing two client adversaries, even where the substance of the representations is unrelated," the Court stated in a footnote [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 285 n.4, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* :

> There are of course exceptions to this rule. The principle of loyalty is for the *client's* benefit: most courts thus permit an attorney to continue to permit the simultaneous representation of clients whose interests are adverse as to unrelated matters provided full disclosure is made and both agree in writing to waive the conflict. But this class of cases is a rare circumstance, typically involving corporate clients and overcoming the presumption of "prima facie impropriety" is not easily accomplished. (Emphasis supplied, citations omitted).

After making this statement, the Court went on to state that the exception "is not, in any event, one that concerns us in this case" [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 285 n.4, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* . Thus, the Court appears to have left the issue open.

PRACTICE TIP:

Unanswered Issues After *Flatt.* The California Supreme Court opinion in *Flatt* raises more questions than it answers.

- Do the circumstances under which consent is permitted only apply to corporate clients? On the one hand, the opinion suggests that consent may be obtained only when the client possesses the

sophistication to comprehend the ramifications of this type of conflict. On the other hand, the reference to corporate clients might reflect that Court's assumption the impacts on client trust in the lawyer may not be as pronounced when the representations involve different personnel in the same corporation.

- May consent be obtained only when the two matters are unrelated? The footnote addressing the consent issue suggests that the exception allowing for consent may not apply when the two matters are related. In making this suggestion, the Court appears to have had in mind the situation where a lawyer is representing opposing interests in the same litigation [*see Flatt v. Superior Court (1994) 9 Cal. 4th 275, 284, n.3, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* . It is not clear that the same limitation would apply when the two matters are factually related but the lawyer is not representing opposing interests on the same subject. While *Flatt* emphasized that client loyalty is the primary concern, when the representations are related, preservation of client confidences is also a concern.

- Is there a distinction between adverse representations in situations where the clients are hostile and those where they are not hostile? In practice, it is not uncommon for a client to consent for the client's lawyer to represent another party in negotiations, but not in litigation that might arise out of the transaction.

- Under *Flatt*, would a lawyer be precluded from obtaining the client's informed written consent except in the rare circumstance?

- If loyalty is for the client's benefit, except in those cases where competent representation is unlikely, why should a properly informed client be precluded from freely consenting to an adverse representation?Given the absence of a principled discussion by the Court, these questions remain open. In the absence of precise standards, the practitioner is left to the general rules for when a conflict cannot be waived [*see § 72.71*]. In addition, the practitioner must carefully consider and fully disclose whether the adverse representation will adversely affect the client's trust. In those situations where client trust is (or, perhaps, is likely to be) adversely affected, *Flatt* suggests, while not necessarily holding, that consent may not be obtained. *By Stanley W. Lamport*.

PRACTICE TIP: Steps Before Accepting New Concurrent Representation. If an attorney currently represents two or more clients in unrelated matters, for example, A and B, whose interests may or do conflict as to a new matter in which client A proposes to retain the attorney, before taking on the new representation, the attorney should:

- Ensure that the matter on which he or she represents client B is sufficiently separate factually so that no confidence of either client will be violated.

- Fully disclose the potential conflict and its possible effect to each client to enable the clients to make free and intelligent choices.

- Undertake the new representation of A only if (1) both clients give their informed, written consent; (2) the lawyer can continue to competently represent the client;

- The representation will not adversely affect the lawyer-client relationship. *By Stanley W. Lamport*.

[4] Accepting Adverse Party as Client

A State Bar member may not, without the informed written consent of each client, represent a client in a matter and at

the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter [*Cal. Rules Prof. Conduct, Rule 3-310(C)(3)*].

Rule 3-310(C)(3) specifically applies when a lawyer represents client A in a matter against B, and B subsequently asks the lawyer to represent him or her in a separate matter while the representation of A is ongoing. Under the rule, a lawyer may not accept employment by B without the informed written consent of both A and B.

For discussion of managing conflicts under Rule 3-310(C)(3), see *§ 72.132[3]*.

[a] Other Representations Adverse to Existing Clients

[i] Situations Covered by Predecessor Rule

Rule 3-310(C)(3) is much narrower than its predecessor, Rule 3-310(B), which applied whenever a lawyer concurrently represented adverse interests. Under old Rule 3-310(B) and the case law interpreting it, consent was required whenever a lawyer, or a lawyer's firm, accepted a representation adverse to an existing client.

There are three situations covered under old Rule 3-310(B) that do not seem to be covered under new Rule 3-310(C)(3):

- When a lawyer represents client A in a matter and is asked by B to sue A in a matter unrelated to the lawyer's representation of A.

- When clients A and B are existing clients and one of them (client B for example) asks the lawyer to represent it in a matter adverse to the other.

- When a lawyer brings his or her own suit against an existing client.

None of the foregoing examples fit within a literal reading of Rule 3-310(C)(3). The rule appears to contemplate a situation when a lawyer accepts a client who is adverse to a client represented by the lawyer in another matter. The event that triggers consent is accepting representation of someone "adverse to the client in the first matter." In the examples cited above, neither the lawyer nor client B is adverse to A in "the first matter" in which the lawyer represents A. In the second example, the lawyer is arguably not accepting B as a client, since B is already a client.

So far courts have yet to grasp the distinction between old Rule 3-310(B) and new Rule 3-310(C)(3); although, in *Flatt* and *Santa Clara County Counsel*, the California Supreme Court recognized that the principles underlying the old rules continue to apply in these situations [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 296 n.4, 36 Cal. Rptr. 2d 537, 885 P.2d 950* (dissent); *Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 547 n.6, 28 Cal. Rptr. 2d 617, 869 P.2d 1142* ; *see Responsible Citizens v. Superior Court (1993) 16 Cal. App. 4th 1717, 1724-1725, 20 Cal. Rptr. 756]* .

[ii] Representing One Client Against Another

While situations in which a lawyer assumes a representation of one client that is adverse to another client may not fall within the express terms of Rule 3-310(C)(3), courts required informed consent in these cases under former Rules 3-310(B) and 5-102(B) and former Rule 7. Those rules prohibited lawyers from concurrently representing clients whose interests are adverse (in the case of old Rule 3-310(B)) or adverse interests (in the case of old Rule 5-102(B)) or conflicting interests (in the case of old Rule 7) without informed written consent [*see In re California Canners and Growers (Bankr. N.D. Cal. 1987) 74 Bankr. 336, 342* (law firm represented bank in lending practices litigation and, while so doing, advised existing client about litigation against the bank); *State Farm Mutual Automobile Ins. Co. v. Federal Insurance Co. (1999) 72 Cal. App. 4th 1422, 86 Cal. Rptr. 2d 20* (law firm filed action naming insurance

company as defendant while currently representing insurance company on another matter); *Truck Ins. Exchange v. Fireman's Fund Ins. Co. (1992) 6 Cal. App. 4th 1050, 1056, 8 Cal. Rptr. 2d 228* (law firm discharged one client to accept adverse representation for another client); *Civil Service Com. v. Superior Court (1984) 163 Cal. App. 3d 70, 78, 209 Cal. Rptr. 159* (representation by county counsel of one agency client against another); *Jeffry v. Pounds (1977) 67 Cal. App. 3d 6, 10, 136 Cal. Rptr. 373* (law firm represented husband in lawsuit and, while doing so, accepted representation of wife in marital dissolution)].

[iii] Lawyer's Suit Against Client

Cal. Rules Prof. Conduct, Rule 3-310(C) does not apply when a lawyer sues a client [*Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 547-548 n.6, 28 Cal. Rptr. 2d 617, 869 P.2d 1142]* . Those actions, however, are governed by common obligations arising out of the lawyer's duty of loyalty to a client [*Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 549, 28 Cal. Rptr. 2d 617, 869 P.2d 1142* (citing *Cal. Rules Prof. Conduct, Rule 1-100*)]. While the Supreme Court in *Santa Clara County Counsel* discussed a lawyer's duty of loyalty, it did not decide whether that duty precludes a suit against a client in general.

In *Santa Clara County Counsel*, the Supreme Court held that as a matter of public policy lawyers employed by the office of county counsel could sue their government employer under the Meyers-Milias-Brown Act, and that the suit did not violate their ethical obligations to their employer-client [*Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 532-533, 553, 28 Cal. Rptr. 2d 617, 869 P.2d 1142]* . The Court limited its decision to the specific factual issue before it, and expressly did not decide the larger question of when a lawyer may sue an existing client in general. Nevertheless, the Court stated [*Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 553 n.8, 28 Cal. Rptr. 2d 617, 869 P.2d 1142]* :

> We do not, by this holding, approve the general proposition that an attorney suit against a present client is ethically permissible. When the attorney is an independent contractor, and when no statute protects an attorney's employment rights, it may well be the case that the attorney's general duty of loyalty dictates that the attorney not sue the present client and that such a suit may subject the attorney to discipline--a question not before us here.

The Court cited with approval LACBA Formal Opinion No. 212 (1953), which concluded that a lawyer in a fee dispute with a client must withdraw prior to filing suit against the client for the fees [*Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 549, 28 Cal. Rptr. 2d 617, 869 P.2d 1142* ; *see also § 72.430* et seq.].

While all of these references suggest that a lawyer may not sue a client, *Santa Clara County Counsel* also suggests that a suit may be permitted if it does not interfere with the lawyer-client relationship. Generally a lawyer "is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests" [*Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 548, 28 Cal. Rptr. 2d 617, 869 P.2d 1142* ; *Anderson v. Eaton (1930) 211 Cal. 113, 116, 293 P. 788]* . In *Santa Clara County Counsel*, the Court focused on whether the antagonism between lawyer and client resulting from the lawyer's suit against the client would compromise the lawyer's representation of the client.

Thus, a suit against an existing client may be permissible when the lawyer-client relationship is merely a formality, such that the suit against the client would not interfere with the lawyer's ability to fulfill the tasks that remain in the representation. For example, if the lawyer is attorney of record in a lawsuit in which a request for dismissal of the action has been filed, the lawyer's suit against the client filed before entry of the dismissal may not be prohibited if the lawyer has no further substantive obligations in the action. However, since *Santa Clara County Counsel* did not decide the question, these issues remain open.

[iv] Application to Law Firms

Cal. Rules Prof. Conduct, Rule 3-310(C)(3) refers only to when the member is representing a client and accepts employment by an adverse party. It does not refer to law firms. While the Discussion points out that *Cal. Rules Prof. Conduct, Rule 3-310(B)* applies when a lawyer knows that other lawyers in the firm have relationships or interests that require disclosure, there is no corresponding comment with respect to Rule 3-310(C)(3). As a result, it is not clear on the face of Rule 3-310(C)(3) whether it applies if the representation adverse to the "client in the first matter" is handled by a different lawyer in the same firm.

While the rule may be unclear, in cases involving representations adverse to an existing client, California courts have routinely held under the rules that preceded Rule 3-310(C)(3) that the rule applied when the adverse representation is handled by different lawyers in the firm [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 285, 36 Cal. Rptr. 2d 537, 885 P.2d 950* ; *Truck Ins. Exchange v. Fireman's Fund Ins. Co. (1992) 6 Cal. App. 4th 1050, 1055-1056, 8 Cal. Rptr. 2d 228* ; *Jeffry v. Pounds (1977) 67 Cal. App. 3d 6, 10, 136 Cal. Rptr. 373* ; *see also* BASF Formal Opinion No. 1985-1; SDCBA Ethics Opinion No. 1976-12].

[b] Lawyer's Duties When a Conflict Arises

[i] General Issues

Certain questions arise when a lawyer discovers that he or she is in a lawyer-client relationship that is adverse to an existing client. One question is whether the lawyer (or the lawyer's firm) may withdraw from representing the existing client in order to take on the adverse representation. If the lawyer must withdraw from representing the new client, another question is what duties the lawyer has to advise the new client to seek new counsel or to advise the new client about the statute of limitations or other matters that may affect the continuing viability of the new client's claim or rights. The courts have addressed both of these issues.

[ii] Discharging Existing Client to Avoid Conflict

A law firm cannot avoid the requirement of obtaining informed, written consent from client A in order to take on the representation of new client B by simply withdrawing from representing client A [*Cal West Nurseries, Inc. v. Superior Court (2005) 129 Cal. App. 4th 1170, 1175, 29 Cal. Rptr. 3d 170* (fact that same attorney did not represent adverse parties on cross-complaint did not eliminate parties' adverse relationship); *American Airlines v. Sheppard, Mullin, Richter & Hampton (2002) 96 Cal. App. 4th 1017, 117 Cal. Rptr. 2d 685* ; *Flatt v. Superior Court (1994) 9 Cal. 4th 275, 288, 36 Cal. Rptr. 2d 537, 885 P.2d 950* ; *Truck Ins. Exchange v. Fireman's Fund Ins. Co. (1992) 6 Cal. App. 4th 1050, 1056-1060, 8 Cal. Rptr. 2d 228]* . Nor may a lawyer avoid the automatic disqualification rule applicable to concurrent representation of conflicting interests by unilaterally converting a present client into a former client [*American Airlines v. Sheppard, Mullin, Richter & Hampton (2002) 96 Cal. App. 4th 1017, 1037, 117 Cal. Rptr. 2d 685* (citing *Truck Ins. Exchange v. Fireman's Fund Ins. Co. (1992) 6 Cal. App. 4th 1050, 1057, 8 Cal. Rptr. 2d 228*)]. While these cases involve representations adverse to an existing client that are not expressly covered by Rule 3-310(C)(3), it seems that the courts' rationale would apply equally to situations covered under *Cal. Rules Prof. Conduct, Rule 3-310(C)(3).*

The rule prohibiting withdrawal to avoid obtaining client consent was first stated in *Truck*, and then endorsed by the Supreme Court in *Flatt*. *Truck* relied on authority from outside California that held that "a law firm that knowingly undertakes adverse concurrent representation may not avoid disqualification by withdrawing from representation of the less favored client" [*Truck Ins. Exchange v. Fireman's Fund Ins. Co. (1992) 6 Cal. App. 4th 1050, 1057* (citing *United Sewerage Agency v. Jelco Inc. (1981) 646 F.2d 1339, 1345* ; *Picker Intern., Inc. v. Varian Associates, Inc. (N.D. Ohio 1987) 670 F. Supp. 1363, 1366* , affirmed *869 F.2d 578 (Fed. Cir. 1989)* ; *see also State Farm Mutual Automobile Ins. Co. v. Federal Insurance Co. (1999) 72 Cal. App. 4th 1422, 86 Cal. Rptr. 2d 20* ; *Margulies by Margulies v. Upchurch (Utah 1965) 696 P.2d 1195]* .

In *Truck*, the law firm created the conflict by taking on a representation that was adverse to the firm's existing client. However, the *Truck* court recognized that withdrawal to avoid a conflict would be permissible if the law firm already represents a client and an unforeseen adverse concurrent representation is created by another client [*Truck Ins. Exchange v. Fireman's Fund Ins. Co. (1992) 6 Cal. App. 4th 1050, 1059, 8 Cal. Rptr. 2d 228* ; *see, e.g., Florida Ins. Guar. Ass'n, Inc. v. Carey Canada (S.D. Fla 1990) 749 F. Supp. 255* (when law firm represented client in action against insurers that became insolvent and were taken over by entity represented by firm in unrelated matter, withdrawal from representing entity was permissible to avoid conflict)].

Although not mentioned in either *Truck* or *Flatt*, it is possible that a withdrawal to avoid a concurrent adverse representation conflict might be permissible if grounds for withdrawal otherwise exist under *Cal. Rules Prof. Conduct, Rule 3-700*. For example, withdrawal might be permissible if the client being discharged breached an agreement to pay the lawyer's fees and expenses [*see Cal. Rules Prof. Conduct, Rule 3-700(C)(1)(f)*].

[iii] Duties to the New Client Being Discharged

The Supreme Court has held that when a lawyer has had an initial meeting with a new client about a new matter and shortly thereafter learns that the new matter is adverse to an existing client, the duty of loyalty to the existing client requires the lawyer to sever the lawyer-client relationship with the new client [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 285, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* . The duty of loyalty to the existing client also absolves the lawyer of a duty to provide any advice to the new client that would be adverse to the interests of the existing client [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 285, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* . As a result, a lawyer does not have a duty to advise the client to seek new counsel or about the running of the statute of limitations.

In *Flatt*, a lawyer had met for an hour with a prospective client about a legal malpractice claim against another lawyer. The meeting occurred shortly after the prospective client's claim arose. A week after the meeting, the lawyer informed the prospective client that she could not represent him because she had discovered that her firm represented the other lawyer in an unrelated matter. She did not advise the prospective client to seek new counsel or that the statute of limitations would expire in a year. The prospective client, who did not seek new counsel until after the statute of limitations had expired, sued the lawyer for malpractice claiming that she should have advised him on these issues when she withdrew from further representation [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 279-280, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* .

The majority of a sharply divided Court held that while the initial meeting may have been enough to establish a lawyer-client relationship, the lawyer's duty of loyalty to her existing client was paramount [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 278-279, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* . The Court observed that if the duty of loyalty to the existing client forbids any act that would interfere with the dedication of a lawyer's entire energies to the client's interests, it ought to follow that the lawyer had no duty to give advice that would have incrementally aided the new client's contemplated lawsuit against the existing client [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 290, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* .

While the rule stated in *Flatt* appears to have a broad application, the majority acknowledged that "in a different factual situation--one involving, perhaps, the lapse of considerable time and the expenditure of substantial resources before discovery of the conflicting representation--an attorney's mere withdrawal from the second representation may not be sufficient in itself to resolve all ethical responsibilities" [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 290, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* . While the majority declined to decide whether such a showing would lead to a different result, they suggested that a showing of substantial prejudice might be required in such a case [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 290, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* .

PRACTICE TIP:

Flatt Does Not Mandate Withdrawal in All Cases. Although the Court did not decide the issue, *Flatt* does not suggest that the lawyer in that case could not have represented the new client in matters that were not adverse to the existing client, even though the new client contemplated using another lawyer to sue the existing client. In addition, *Flatt* did not involve a situation in which an existing client consults the lawyer about a matter that would be adverse to another existing client. While *Flatt* indicates that the lawyer must withdraw when the conflict is discovered, the case does not suggest that the lawyer could not continue to represent the client in matters that are not adverse to the other client. *By Stanley W. Lamport*.

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Volume 7: Attorney Practice and Ethics thru Auctions and Auctioneers-Chs.72-79
Chapter 72 ATTORNEY PRACTICE AND ETHICS
PART II. LEGAL BACKGROUND
B. Conflicts Of Interest
5. Rule 3-310 Conflicts: Lawyer's Relationships Or Conflicts Between Clients

7-72 California Forms of Pleading and Practice--Annotated § 72.112

§ 72.112 Rule 3-310(D): Aggregate Settlements

A State Bar member who represents two or more clients may not enter into an aggregate settlement of the claims of or against the clients without the written consent of each client [*Cal. Rules Prof. Conduct, Rule 3-310(D)*].

An aggregate settlement involves settling more than one client's claim or defense at once. The rule applies to both plaintiffs and defendants. Rule 3-310(D) is patterned after ABA Model Rule 1.8(g), which specifies that the disclosure must include "the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement" [*see* Model Rules of Professional Conduct, Rule 1.8(g) (1983)].

ILLUSTRATION:

Informed Written Consent to Settlement Required. Rule 3-310(D)'s requirement of informed, written consent of all clients to a settlement would be triggered, for example, when:

- Attorney represents homeowners 1 through 10 in a suit against the developer of a housing tract, and the developer's attorneys propose a settlement whereby the homeowners will share in a fund.

- Attorney represents a dozen workers suing their employer over alleged discrimination in employment, and employer proposes a settlement involving back pay to all 12, but no compensation for the distress that three clients claim to have suffered.

- Attorney represents company X and one of its executives, Y, in defense of a suit for alleged interference with contract, and plaintiff's counsel proposes a settlement consisting of a monetary payment (which X can and would like to pay to end the defense costs) and a stipulated injunction limiting Y's activities for a year.

Conflicts under Rule 3-310(D) affect a lawyer's loyalty and exercise of independent judgment on behalf of both clients.

In aggregate settlement situations the clients may have conflicting interests. A lawyer may favor the interests of one client as a result of the lawyer's relationship with that client or as a result of other factors. Moreover, a lawyer may not be able to exercise independent judgment for one or both clients if placed in a situation of having to advise both clients about their conflicting interests.

Rule 3-310(D) is not intended to apply to class action settlements subject to court approval [*Cal. Rules Prof. Conduct, Rule 3-310(D)*, Discussion].

For discussion of managing conflicts under Rule 3-310(D), see *§ 72.133*.

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7-72 California Forms of Pleading and Practice--Annotated § 72.113

§ 72.113 Rule 3-310(E): Representation Adverse to Present or Former Client When Confidential Information Acquired

[1] Overview of Rule

A State Bar member may not, without the informed written consent of the client or former client, accept employment adverse to the client or former client when, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment [*Cal. Rules Prof. Conduct, Rule 3-310(E)*]. Former Rule 4-101 was replaced by Rule 3-310(D) in May 1989. Rule 3-310(D) was replaced by Rule 3-310(E) in September 1992. Former Rule 3-310(D) was not substantively changed by Rule 3-310(E).

Rule 3-310(E) expresses the principle that, after severing a relationship with a former client, an attorney "may not do anything which will injuriously affect his former client in any manner in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship" [*People ex rel. Deukmejian v. Brown (1981) 29 Cal. 3d 150, 155, 172 Cal. Rptr. 478, 624 P.2d 1206* ; *Yorn v. Superior Court (1979) 90 Cal. App. 3d 669, 675, 153 Cal. Rptr. 295]* . The prohibition against adverse use of material, confidential information applies to both current and former clients. However, as to current clients, *Cal. Rules Prof. Conduct, Rule 3-310(C)(3)* prohibits an adverse representation in at least some situations, in the absence of consent, even when there is no risk of adverse use of material confidential information.

Rule 3-310(E) focuses on the potential misuse of confidential information [*see Derivi Construction & Architecture, Inc. v. Wong (2004) 118 Cal. App. 4th 1268, 1273, 14 Cal. Rptr. 3d 329* (speculative contentions of conflict of interest cannot justify disqualification); *see also Galbraith v. The State Bar (1933) 218 Cal. 329, 332, 23 P.2d 291]* .

The rule raises five main issues:

- What is "confidential" information [*see § 72.113[2]*].

- Who is a client for purposes of the rule [*see § 72.113[3]*].
- When is employment adverse to the client [*see § 72.113[4]*].
- When is the information "material" to the representation [*see § 72.113[5]*].
- When, if ever, can a law firm eliminate the risk that confidential, material information will be shared among lawyers in the firm and thereby satisfy ethical duties [*see § 72.113[6]*].

For discussion of managing conflicts under Rule 3-310(E), see *§ 72.131* et seq.

For a form of written informed consent by a former client to adverse representation by a former attorney, *see § 72.650*.

[2] Confidential Information

[a] Confidences and Secrets

The term "confidential information" is not defined in the Rules of Professional Conduct. Does it include confidences and secrets protected under *Bus. & Prof. Code § 6068(e)*, or does it refer only to the attorney-client communications that fall within the definition of client confidences? Elsewhere in the rules, when reference is made to confidential information, there is a specific reference to *Bus. & Prof. Code § 6068(e)* [*see, e.g.*, Cal. *Rules Prof. Conduct, Rules 3-310(F)(2), 3-600(B)*]. Does the absence of such a reference in *Cal. Rules Prof. Conduct, Rule 3-310(E)* indicate that "confidential information" has a more limited meaning?

One case and one ethics opinion suggest that confidential information includes both confidences and secrets [*see Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 620-621, 120 Cal. Rptr. 253 (1975)* ; State Bar Formal Opinion No. 1993-133]. Given the scope of the duty to maintain client confidences and secrets in *Bus. & Prof. Code § 6068(e)*, it appears that *Cal. Rules Prof. Conduct, Rule 3-310(E)* should be interpreted to provide less protection to a present or former client than is afforded in *Bus. & Prof. Code § 6068(e)* [*see In re Complex Asbestos Litigation (1991) 232 Cal. App. 3d 572, 587, 283 Cal. Rptr. 732* (citing former Rule 3-310(D) and *Bus. & Prof. Code § 6068(e)*); *see also* BASF Formal Opinion No. 1973-19 (knowledge concerning former client's bank accounts could constitute confidential information)].

This view is consistent with the policy behind *Cal. Rules Prof. Conduct, Rule 3-310(E)* and its predecessor, former Rule 4-101. One of the primary purposes of Rule 4-101 was to protect the confidential relationship that exists between attorney and client [*David Welch Co. v. Erskine & Tulley (1988) 203 Cal. App. 3d 884, 891, 250 Cal. Rptr. 339]* . The Supreme Court stated that a lawyer may not at any time use against his or her former client knowledge or information acquired by virtue of the previous relationship [*Galbraith v. The State Bar (1933) 218 Cal. 329, 333, 23 P.2d 291* ; *Wutchumna Water Co. v. Bailey (1932) 216 Cal. 564, 573-574, 15 P.2d 505]* .

In light of these factors, it appears Rule 3-310(E) applies whenever a lawyer has confidences or secrets about the present or former client that are material to a representation that is adverse to that client.

[b] Expectation of Confidentiality

[i] No Reasonable Expectation

Client disclosures to an attorney are not always made in confidence. Some courts have declined to disqualify attorneys or firms when the person or entity complaining of an alleged violation of the rule had no legitimate expectation that the lawyer would keep the information confidential or not use it to another's benefit or against the disclosing person or entity. For example, some federal decisions hold that the lack of a reasonable expectation of confidentiality will permit

representation of one client against a former client when the lawyer previously served both clients in a matter [*see, e.g., Christensen v. U.S. D. Court For Cent. D. of Cal. (9th Cir. 1988) 844 F.2d 694, 698* (firm may represent director of company in receivership in suit by receiver against directors and officers when firm previously represented director and company, and it was not clear that company could reasonably have expected firm to withhold the information from the director); *Allegaert v. Perot (2d Cir. 1977) 565 F.2d 246, 250* ; *see also Trinity Amb. Serv. v. G & L Amb. Serv. (D. Conn. 1984) 578 F. Supp. 1280, 1285* (disqualification denied when it was unreasonable to assume that information shared among coparties' counsel would not be shared with clients)].

[ii] *Croce* and Competing Line of Cases

California case law has been somewhat equivocal on this issue. Early cases, starting with *Croce v. Superior Court (1937) 21 Cal. App. 2d 18, 68 P.2d 369* , held that a lawyer could represent a client against a former client in a matter related to a prior joint representation [*Arden v. State Bar (1959) 52 Cal. 2d 310, 318, 341 P.2d 6* (lawyer who jointly represented mother and family adopting her child could represent family in action to set aside the adoption); *Petty v. Superior Court (1953) 116 Cal. App. 2d 20, 30, 253 P.2d 28* (lawyer who represented both clients in drafting agreement could subsequently represent one against the other in action for accounting under the agreement); *Croce v. Superior Court (1937) 21 Cal. App. 2d 18, 20, 68 P.2d 369* (lawyer who jointly defended clients based on defense that no partnership existed between them could later represent one client against the other in litigation in which existence of partnership is alleged)]. The rationale for these decisions is that the common employment of the attorney removed the communications of the parties to one another and to the attorney from the privileged category. The communications not being deemed confidential, there is no impediment to or impropriety in the adverse representation by the attorney [*Arden v. State Bar (1959) 52 Cal. 2d 310, 318, 341 P.2d 6]* .

The *Croce* line of cases fell into disrepute in later cases [*see Cord v Smith (9th Cir. 1964) 338 F.2d 516, 524-525* ; *E. F. Hutton & Company v. Brown (S.D. Tex. 1969) 305 F. Supp. 371, 393* ; *see also Industrial Indem. Co. v. Great American Ins. Co. (1977) 73 Cal. App. 3d 529, 536-538, 140 Cal. Rptr. 806* ; *Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 623 n.9, 120 Cal. Rptr. 253* (distinguishing *Croce* and acknowledging criticism); BASF Formal Opinion No. 1973-22; *but see* BASF Formal Opinion No. 1973-10 (confidential information was determining factor)].

In *Western Continental Operating Co. v. Natural Gas Corp.*, the court distinguished *Christensen* and *Allegaert* (discussed under § 72.113[2][b][i] *above*). The court in *Western Continental* rejected the argument that the joint--client exception to the attorney-client privilege should apply to make it unreasonable as a matter of law for one joint client to expect confidentiality vis-a-vis another joint client and thereby create an automatic exception to the prohibition against representation adverse to a former client [*Western Continental Operating Co. v. Natural Gas Corp. (1989) 212 Cal. App. 3d 752, 761-762, 261 Cal. Rptr. 100]* . Since *Croce*, a competing line of cases has developed that hold that a lawyer "may not do anything which will injuriously affect his former client in any matter in which he formerly represented him ..." [*Big Bear Mun. Water Dist. v. Superior Court (1969) 269 Cal. App. 2d 919, 926, 75 Cal. Rptr. 580* ; *Earl Scheib, Inc. v. Superior Court (1967) 253 Cal. App. 2d 703, 706, 61 Cal. Rptr. 386]* . However, later cases that cited the preceding language concluded that it is confidences acquired in the course of an attorney-client relationship that are protected under that standard [*see Maruman Integrated Circuits, Inc. v. Consortium Co. (1985) 166 Cal. App. 3d 443, 448-449, 212 Cal. Rptr. 497* ; *Cooke v. Superior Court (1978) 83 Cal. App. 3d 582, 591, 147 Cal. Rptr. 915]* .

The *Croce* line of cases was revived in *Cornish v. Superior Court*, which held that a firm could represent a client against a party it had jointly represented with the client, because, under the circumstances, the party could not have reasonably expected that its communications with the firm would not be disclosed to the other client. The *Cornish* court acknowledged the criticism of *Croce* and recognized that there might be situations in which a firm should not represent one former joint client against the other, but concluded its case was not such a situation [*Cornish v. Superior Court (1989) 209 Cal. App. 3d 467, 477-478, 257 Cal. Rptr. 383* ; *cf. Industrial Indem. Co. v. Great American Ins. Co. (1977) 73 Cal. App. 3d 529, 538, 140 Cal. Rptr. 806* (*Croce* did not apply because law firm had concurrently

represented conflicting interests without disclosure or consent)]. The court in *Western Continental* distinguished *Cornish* on its facts and concluded that the joint representation alone did not overcome the client's expectation of confidentiality [*Western Continental Operating Co. v. Natural Gas Corp. (1989) 212 Cal. App. 3d 752, 763, 261 Cal. Rptr. 100]* . Nevertheless, *Western Continental* did not question the premise of the *Cornish* holding.

[iii] Focus Under Revised Rules

All of these cases were decided before the revisions to the Rules of Professional Conduct in 1989 and 1992. While former Rule 4-101 focused on the relationship between the current adverse representation and the prior representation, this focus has been eliminated in the rules adopted in 1989 and 1992. *Cal. Rules Prof. Conduct, Rule 3-310(E)* now focuses only on whether the lawyer acquired material confidential information during the prior representation. Thus, the emphasis under the current rules is the same as in the *Croce* line of cases--on whether the lawyer gained confidential information [*see, e.g.,* *Flatt v. Superior Court (1994) 9 Cal. 4th 275, 285, 36 Cal. Rptr. 2d 537, 885 P.2d 950* (chief fiduciary value jeopardized by successive representation of clients with potentially adverse interests is that of client confidentiality)].

In one of the few cases decided under the new rule, an appellate court used extensive case law to broadly construe *Cal. Rules Prof. Conduct, Rule 3-310(E)* to protect a client [*Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp. (1995) 36 Cal. App. 4th 1832, 1842, 43 Cal. Rptr. 2d 327]* . At issue were two separate client corporations, involved in two separate lawsuits. The lawsuits were based on separate transactions, but both involved the same factual allegations regarding the value of stock. The law firm represented client B in one suit, in which client B's interest was adverse to client A's interest, who was not a party to that suit but was involved in the other suit. The law firm currently represented client A only in one "long dormant" matter, but had previously represented client A for a number of years as general counsel, including involvement in some transactions which also related to the value of stock. The court held that even though client A was not a party to the legal action in which the law firm represented client B, the "proscription [against representation] exists where counsel's employment is adverse to the client or former client, and can exist even though a prior client is not a party to the litigation" [*Metro-Goldwyn-Mayer, Inc. v. Tracinda Corp. (1995) 36 Cal. App. 4th 1832, 1843, 43 Cal. Rptr. 2d 327* ; *also see* *American Airlines v. Sheppard, Mullin, Richter & Hampton (2002) 96 Cal. App. 4th 1017, 1039, 117 Cal. Rptr. 2d 685]* .

In another case decided under the new rule, the court found that whether confidential, material information would normally have been imparted to the attorney depends on three factors [*Dieter v. Regents of the University of California (E.D. Cal. 1997) 963 F. Supp. 908, 911-912* ; *see also* *San Gabriel Basin Water Quality Authority v. Aerojet-General Corporation (C.D. Cal. 2000) 105 F. Supp.2d 1095, 1104-1106]* :

- The factual similarities between the current and former representations.
- The similarities between the legal questions posed.
- The nature and extent of the attorney's involvement with the former representation.

The California Supreme Court has held that in successive representation cases, the primary fiduciary value to be protected is client confidences, whereas in simultaneous representation cases the primary fiduciary value is loyalty. The Court held that in successive representation cases, the court should determine whether the attorney adequately protected, and would continue to adequately protect, the former client's confidences through timely, appropriate, and effective screening measures and/or structural safeguards [*In re Charlisse C. (2008) 45 Cal. 4th 145, 165, 84 Cal. Rptr. 3d 597, 194 P.3d 330]* .

In general, courts recognize that there is no expectation of confidentiality when an attorney-client relationship did not in fact exist [*Jacuzzi v. Jacuzzi Bros., Inc. (1963) 218 Cal. App. 2d 24, 29, 32 Cal. Rptr. 188* (attorney for corporation

did not represent officers and directors personally and could pursue action against them on corporation's behalf); *Meehan v. Hopps (1956) 144 Cal. App. 2d 284, 290, 301 P.2d 10* (same); *see also Ward v. Superior Court (1977) 70 Cal. App. 3d 23, 34, 138 Cal. Rptr. 532* (applying same rule in government attorney context)]. Other courts hold that there is no expectation of confidentiality when the client expressly or impliedly consents to the adverse representation [*Cornish v. Superior Court (1989) 209 Cal. App. 3d 467, 477-478, 257 Cal. Rptr. 383* (client informed at outset that lawyer intended to represent other client in event of a conflict); *see generally Grove v. Grove Valve & Regulator Co. (1963) 213 Cal. App. 2d 646, 652-654, 29 Cal. Rptr. 150]* .

PRACTICE TIP:

Customary Expectation of Confidentiality. With the possible exception of the joint-client situation (discussed *above*), it is rare that a client does not have an expectation of confidentiality about information shared with the lawyer.

[3] Client to Whom Duty Is Owed

Informed written consent must be obtained from the current or former client from whom or about whom the material, confidential information was learned [*Cal. Rules Prof. Conduct, Rule 3-310(E)*]. "Before an attorney may be disqualified from representing a party in litigation because his representation of that party is adverse to the interest of a current or former client, it must first be established that the party seeking the attorney's disqualification was or is 'represented' by the attorney in a manner giving rise to an attorney-client relationship" [*Civil Service Com. v. Superior Court (1984) 163 Cal. App. 3d 70, 76-77, 209 Cal. Rptr. 159* ; *see also Oasis West Realty, LLC v. Goldman (2010) 182 Cal. App. 4th 688, 696-698, 2010 Cal. App. LEXIS 287* (no violation when attorney did not have second attorney-client relationship)].

Courts have found the rule applicable in a variety of settings even though no formal attorney-client relationship existed [*see Trone v. Smith (9th Cir. 1980) 621 F.2d 994, 1002* (fiduciary obligations and professional responsibilities may warrant disqualification of counsel even in absence of strict contractual attorney-client relationship); *In re Marriage of Zimmerman (1993) 16 Cal. App. 4th 556, 564 n.2, 20 Cal. Rptr. 2d 132* (person who consults with but does not retain attorney may be considered "client" to protect prospective client's expectation of confidentiality even in preliminary discussions; act of consultation is key to finding whether there had been attorney-client relationship; but no such relationship found under facts); Model Code of Professional Responsibility EC 4-1 (1980); *see also* State Bar of California Formal Opinion No. 1997-152 (recommending that lawyer should not accept representation adverse to former client of lawyer's law firm, whom lawyer never personally represented, without first obtaining that client's consent when lawyer knows or reasonably should know that another attorney in lawyer's law firm, who personally represented client, obtained material confidential information during representation of that former client); Comment, *Developments in the Law--Conflicts of Interest in the Legal Profession, 94 Harv. L. Rev. 1244, 1321 (1981)* (suggesting as test whether person divulging confidences is approaching attorney in professional capacity with intent to secure legal advice); and discussion in Subpart B under Duties Owed to Client,; *but see* LACBA Formal Opinion No. 501 (1999) (where lawyer did not obtain confidential information at former law firm about former firm's client that is material to matter at new law firm, neither *Cal. Rules Prof. Conduct, Rule 3-310(E)* nor "imputed knowledge" rule should apply to prohibit lawyer or lawyer's new firm from handling matter)].

ILLUSTRATION:

Who Is Former Client. A person consults an attorney about a potential lawsuit against Company. The attorney declines the representation. Several years later, may the attorney represent Company in a suit against the person who the attorney consulted previously? No, unless the attorney is wholly satisfied that by virtue of the passage of time or the nature of the confidential information in his or her possession there is no reasonably foreseeable likelihood that the confidential information might be usable to the detriment of the former client. The person who consulted the attorney will be considered a "former client" for purposes of *Cal. Rules Prof. Conduct, Rule 3-310(E)* [*see* State Bar Formal Opinion No.

1984-84; *see also In re Marriage of Zimmerman (1993) 16 Cal. App. 4th 556, 564 n.2, 20 Cal. Rptr. 2d 132* (recognizing possibility of duty when no formal attorney-client relationship, but declining to find duty under facts)].

[4] Employment Adverse to Client

Cal. Rules Prof. Conduct, Rule 3-310(E) applies only when the lawyer's employment is adverse to the client or former client from whom the lawyer obtained material confidential information.

Nothing in the Rule prohibits an attorney from accepting employment that is not adverse to a present or former client, even if the lawyer is privy to confidential information material to a former client [*see Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 619, 120 Cal. Rptr. 253* ; *see also Oasis West Realty, LLC v. Goldman (2010) 182 Cal. App. 4th 688, 696-698, 2010 Cal. App. LEXIS 287* (no violation when attorney did not have second attorney-client relationship)].

The term "adverse" has the same meaning as in the case of representations adverse to an existing client [*see § 72.111[3][b]*]. An adverse employment most commonly arises when the client or former client is an opposing party.

Adversity, however, may also arise in other situations. The underlying purpose of Rule 3-310(E) is to prevent a lawyer from doing two things [*Galbraith v. The State Bar (1933) 218 Cal. 329, 333, 23 P.2d 291]* :

- Doing anything that will injuriously affect the former client in any matter in which the lawyer formerly represented the client.

- Using against the former client knowledge or information acquired by virtue of the previous relationship.

As a result, representations have also been recognized to be adverse when confidential information might be used to the detriment of a present or former client [*Woods v. Superior Court (1983) 149 Cal. App. 3d 931, 936, 197 Cal. Rptr. 185* ; State Bar Formal Opinion No. 1984-84; LACBA Formal Opinion No. 366 (1977)]. For example, if the present or former client is a witness, the rule would apply if confidential information might be used for impeachment [State Bar Formal Opinion No. 1980-52]. A law firm's use of confidential information to acquire the collection business of a former client collection agency was held to be adverse employment [*David Welch Co. v. Erskine & Tulley (1988) 203 Cal. App. 3d 884, 891, 250 Cal. Rptr. 339]* . The determinative factor in each case was the detriment to the client and the possible use of confidential information to produce that result.

Even if the client does not have a direct or personal stake in the outcome, an adverse representation exists if it would adversely affect a present or former client's credibility, reputation, or other interests [State Bar Formal Opinion Nos. 1980-52, 1993-133]. An adverse representation also exists if it threatens the revelation or use of the present or former client's confidences or secrets without that client's consent [*Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 620, 120 Cal. Rptr. 253* ; State Bar Formal Opinion No. 1993-133; SDCBA Ethics Opinion No. 1976-10]. For example, the rule applies when a lawyer for a corporation possessing confidential information is hired to represent a shareholder in a proxy fight [*Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 621, 120 Cal. Rptr. 253]* . The rule also applies when a lawyer, who represented a client in a lawsuit, is hired by the opposing party after the lawsuit is over to sue the opposing party's lawyer for malpractice or to handle another lawsuit arising out of the same facts [State Bar Formal Opinion No. 1993-133; SDCBA Ethics Opinion No. 1976-10]. The potential use of the former client's confidences without the former client's consent is an important factor.

[5] Information Material to Employment

[a] Substantial Relationship Test and Presumption Under Former Rule

The ethical prohibition against acceptance of adverse employment involving prior confidential information includes potential as well as actual use of the previously acquired information [*Galbraith v. The State Bar (1933) 218 Cal. 329, 332-333, 23 P.2d 291* ; *Yorn v. Superior Court (1979) 90 Cal. App. 3d 669, 675, 153 Cal. Rptr. 295* ; *Woods v. Superior Court (1983) 149 Cal. App. 3d 931, 936, 197 Cal. Rptr. 185* ; *see also* SDCBA Ethics Opinion No. 1987-1 (adverse employment prohibited unless there is no foreseeable likelihood of use of confidential information)]. The actual use or misuse of confidential information against a present or former client is not determinative. It is the possible use of such information that controls.

The question faced by the courts was how to determine whether a lawyer has such information. "Although requiring some showing of the general nature of the information and its relationship to the proceeding can be proper, requiring disclosure of the information itself is not" [*In re Complex Asbestos Litigation (1991) 232 Cal. App. 3d 572, 592, 283 Cal. Rptr. 732* (citations omitted); *see also* State Bar of California Formal Opinion No. 1997-152]. The substantial relationship test arose as a means to address this problem.

Under former Rule 4-101, a conflict existed when an attorney's current representation of client A was adverse to client B and "relating to a matter in reference to which he has obtained confidential information [from or about client B]." Courts applying this standard in the context of disqualification motions held that if the two matters were "substantially related," a presumption arose (at least in disqualification proceedings) that the attorney had gained knowledge of relevant, confidential information [*Trone v. Smith (9th Cir. 1980) 621 F.2d 994, 998* ; *River West, Inc. v. Nickel (1987) 188 Cal. App. 3d 1297, 1303-1304, 234 Cal. Rptr. 33* ; *Global Van Lines Inc. v. Superior Court (1983) 144 Cal. App. 3d 483, 488, 192 Cal. Rptr. 609]* . This presumption is not rebuttable [*People ex rel. Deukmejian v. Brown (1981) 29 Cal. 3d 150, 156, 172 Cal. Rptr. 478, 624 P.2d 1206]* . As long as the matters were substantially related, and it appeared that confidential information material to the current dispute would normally have been imparted to the attorney (or to the attorney's subordinates), the courts would not inquire whether relevant confidences had actually been disclosed [*Global Van Lines Inc. v. Superior Court (1983) 144 Cal. App. 3d 483, 489, 192 Cal. Rptr. 609* ; *see Trone v. Smith (9th Cir. 1980) 621 F.2d 994, 998* ; *see also People ex rel. Deukmejian v. Brown (1981) 29 Cal. 3d 150, 155, 172 Cal. Rptr. 478, 624 P.2d 1206* ; *but see Elliott v. McFarland Unified School Dist. (1985) 165 Cal. App. 3d 562, 568-573, 211 Cal. Rptr. 802* (appearing to adopt actual disclosure test)].

The substantial relationship test and presumption narrow the scope of inquiry. Requiring a party moving to disqualify opposing counsel to prove that opposing counsel had in fact received confidential information would involve disclosure of the very information the rule is intended to protect [*Woods v. Superior Court (1983) 149 Cal. App. 3d 931, 934, 197 Cal. Rptr. 185]* . The goal of preserving confidences would also be impaired if the disclosure (that is, the evidentiary showing in support of the motion) is made to the court *in camera* [*see Civil Service Com. v. Superior Court (1984) 163 Cal. App. 3d 70, 79-80, 209 Cal. Rptr. 159* (actual confidential matters should not be revealed to court)]. Therefore, such proof is not required [*Rosenfeld Construction Co. v. Superior Court (1991) 235 Cal. App. 3d 566, 575, 286 Cal. Rptr. 609* ; *Western Continental Operating Co. v. Natural Gas Corp. (1989) 212 Cal. App. 3d 752, 759, 261 Cal. Rptr. 100* ; *see also Trone v. Smith (9th Cir. 1980) 621 F.2d 994, 999* ; *but see Cornish v. Superior Court (1989) 209 Cal. App. 3d 467, 479-480, 257 Cal. Rptr. 383* (not error for trial court to refer disclosure-of-confidences issue to referee for *in camera* inspection; procedure not prohibited by *Evid. Code § 915*)].

[b] Impact of Current Ethics Rules

Under present *Cal. Rules Prof. Conduct, Rule 3-310(E)*, the current representation of client A is prohibited if, in the current or former representation of client B, the attorney obtained confidential information material to the current employment for client A [*see Cal. Rules Prof. Conduct, Rule 3-310(E)*].

The current rule represents a change from old Rule 4-101. The old rule's focus on the relationship between the two matters has been replaced by the new rule's focus on whether the confidential information obtained in the other

representation is material to the current representation [*see* LACBA Formal Opinion No. 463 (1990) (discussion of "materiality" under current rule)].

This change reflects the evolution of the substantial relationship test as a means to determine if material confidential information was likely to have been transmitted during the representation of the other present or former client. The early formulations of the substantial relationship test, which focused primarily on the relationship between the representations, were criticized as overly inclusive and unduly harsh [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 279-280, 36 Cal. Rptr. 2d 537, 885 P.2d 950* ; *Ochoa v. Fordel, Inc. (2007) 146 Cal. App. 4th 898, 908, 53 Cal. Rptr. 3d 277* ; *H.F. Ahmanson & Co. v. Salomon Brothers, Inc. (1991) 229 Cal. App. 3d 1445, 1453, 280 Cal. Rptr. 614]* .

The focus now is less on the meaning of the words "substantial" and "relationship" and instead on the practical consequences of the attorney's representation of the affected client [*Med-Trans Corp. v. City of California City (2007) 156 Cal. App. 4th 655, 666-669, 68 Cal. Rptr. 3d 17* ; *H.F. Ahmanson & Co. v. Salomon Brothers, Inc. (1991) 229 Cal. App. 3d 1445, 1454, 280 Cal. Rptr. 614* ; *see also City National Bank v. Adams (2002) 96 Cal. App. 4th 315, 326, 117 Cal. Rptr. 2d 125* ; *Adams v. Aerojet-General Corporation (2001) 86 Cal. App. 4th 1324, 1332, 104 Cal. Rptr. 2d 116]* . Courts instead ask whether confidential information material to the current dispute would normally have been imparted to the attorney by virtue of the nature of the former representation [*Med-Trans Corp. v. City of California City (2007) 156 Cal. App. 4th 655, 666-669, 68 Cal. Rptr. 3d 17* ; *Ochoa v. Fordel, Inc. (2007) 146 Cal. App. 4th 898, 908, 53 Cal. Rptr. 3d 277* ; *H.F. Ahmanson & Co. v. Salomon Brothers, Inc. (1991) 229 Cal. App. 3d 1445, 1454, 280 Cal. Rptr. 614* ; *Global Van Lines Inc. v. Superior Court (1983) 144 Cal. App. 3d 483, 489, 192 Cal. Rptr. 609* ; *see also City National Bank v. Adams (2002) 96 Cal. App. 4th 315, 326, 117 Cal. Rptr. 2d 125* ; *Adams v. Aerojet-General Corporation (2001) 86 Cal. App. 4th 1324, 1332, 104 Cal. Rptr. 2d 116* ; *In re Marriage of Zimmerman (1993) 16 Cal. App. 4th 556, 564-566, 20 Cal. Rptr. 2d 132* ; *Dieter v. Regents of the University of California (E.D. Cal. 1997) 963 F. Supp. 908, 911-912]* .

As a result, courts still apply the "substantial relationship" test under the current rule [*see, e.g.,* *Meza v. H. Muehlstein & Co. (2009) 176 Cal. App. 4th 969, 977-978, 98 Cal. Rptr. 3d 422* ; *Faughn v. Perez (2006) 145 Cal. App. 4th 592, 603-610, 51 Cal. Rptr. 3d 692* ; *Rosenfeld Construction Co. v. Superior Court (1991) 235 Cal. App. 3d 566, 578, 286 Cal. Rptr. 609* (issued writ of mandate directing trial court to apply substantial relationship test, rather than looking to see if lawyers had actual recollection of matters relating to prior representation, when defendant had once been represented in similar suit by firm that plaintiff's attorney joined during pendency of present action); *H.F. Ahmanson & Co. v. Salomon Brothers, Inc. (1991) 229 Cal. App. 3d 1445, 1452-1460, 280 Cal. Rptr. 614* (substantial relationship test elucidated and applied); *see also City National Bank v. Adams (2002) 96 Cal. App. 4th 315, 324-329, 117 Cal. Rptr. 2d 125* (substantial relationship test elucidated and applied); *Adams v. Aerojet-General Corporation (2001) 86 Cal. App. 4th 1324, 1340-1341, 104 Cal. Rptr. 2d 116* (applying substantial relationship test); *In re Marriage of Zimmerman (1993) 16 Cal. App. 4th 556, 563, 20 Cal. Rptr. 2d 132* (applying substantial relationship test); State Bar of California Formal Opinion No. 1997-152 (discussing substantial relationship test); LACBA Formal Opinion No. 501 (1999) (discussing substantial relationship test and imputed knowledge rule)].

[c] Evaluation of Relationship

The court of appeal in *H.F. Ahmanson & Co. v. Salomon Brothers. Inc.* adopted a practical approach to determining when a "substantial relationship" exists that may prohibit continuing representation under *Cal. Rules Prof. Conduct, Rule 3-310(E)*. A trial court should focus on the following [*H.F. Ahmanson & Co. v. Salomon Brothers, Inc. (1991) 229 Cal. App. 3d 1445, 1455, 280 Cal. Rptr. 614* ; *see also Adams v. Aerojet-General Corporation (2001) 86 Cal. App. 4th 1324, 1332, 104 Cal. Rptr. 2d 116* ; *UMG Recordings, Inc. v. MySpace, Inc. (C.D. Cal. 2007) 526 F. Supp. 2d 1046, 1060* ; *Dieter v. Regents of the University of California (E.D. Cal. 1997) 963 F. Supp. 908, 911-912]* :

- The similarities between the two factual situations.

- The legal questions posed.
- The nature and extent of the attorney's involvement with the cases.

The trial court should also examine the following [*H.F. Ahmanson & Co. v. Salomon Brothers, Inc. (1991) 229 Cal. App. 3d 1445, 1455, 280 Cal. Rptr. 614]* :

- The time spent by the attorney on the earlier cases.
- The type of work performed.
- The attorney's possible exposure to formulation of policy or strategy.

Applying this test, the appellate court in *H.F. Ahmanson* upheld the trial court's determination that there was no factual or legal similarity between the two matters and that the particular lawyer's prior involvement was on the periphery of the prior client's overall business policies and strategies [*H.F. Ahmanson & Co. v. Salomon Brothers, Inc. (1991) 229 Cal. App. 3d 1445, 1457, 280 Cal. Rptr. 614* ; *see also Ochoa v. Fordel, Inc. (2007) 146 Cal. App. 4th 898, 908, 53 Cal. Rptr. 3d 277* ; *Fremont Indemnity Co. v. Fremont General Corp. (2006) 143 Cal. App. 4th 50, 65, 49 Cal. Rptr. 3d 82* (no substantial relationship between subject of current representation and subject of former representation that would make disqualification mandatory); *Adams v. Aerojet-General Corporation (2001) 86 Cal. App. 4th 1324, 1340, 104 Cal. Rptr. 2d 116]* .

Elaborating on the rationale of *H.F. Ahmanson, above*, the court in *Jessen v. Hartford Casualty Insurance Co.* stated that the question whether an attorney should be disqualified in a successive representation case turns on two variables [*Jessen v. Hartford Casualty Co. (2003) 111 Cal. App. 4th 698, 710, 3 Cal. Rptr. 3d 877*]:

- The relationship between the legal problem involved in the former representation and the legal problem involved in the current representation; and
- The relationship between the attorney and the former client with respect to the legal problem involved in the former representation.

The *Jessen* court emphasized the significance of the latter factor in the application of the *Ahmanson* formula. If the relationship between the attorney and the former client is shown to have been "direct"--that is, if the lawyer was personally involved in providing legal advice and services to the former client--then it must be presumed that confidential information has passed to the attorney and there cannot be any further inquiry into the specifics of the communications between the attorney and the former client. Disqualification "will depend upon the strength of the similarities between the legal problem involved in the former representation and the legal problem involved in the current representation." This is so because "a direct attorney-client relationship is inherently one during which confidential information 'would normally have been imparted to the attorney by virtue of the nature of [that sort of] former representation' and therefore it will be conclusively presumed that the attorney acquired confidential information relevant to the current representation if it is congruent with the former representation" [*Jessen v. Hartford Casualty Co. (2003) 111 Cal. App. 4th 698, 710, 3 Cal. Rptr. 3d 877 , citing H.F. Ahmanson & Co. v. Solomon Brothers, Inc. (1991) 229 Cal. App. 3d 1445, 1454, 280 Cal. Rptr. 614* ; *see also Adams v. Aerojet-General Corp (2001) 86 Cal. App. 4th 1324, 1332, 104 Cal. Rptr. 2d 116*]. Accordingly, when ruling on a disqualification motion in a successive representation case, the trial court must first determine where the attorney's former representation placed the attorney with respect to the prior client. If the court determines that the placement was "direct and personal," this facet of *Ahmanson* is settled as a matter of law in favor of disqualification and the only remaining question is whether there is a connection between the two successive representations. This latter question may not include an "inquiry into the actual state of the lawyer's knowledge" acquired during the lawyer's representation of the former client [*Jessen v. Hartford*

Casualty Co. (2003) 111 Cal. App. 4th 698, 710-711, 3 Cal. Rptr. 3d 877]. However, if the court determines the former attorney was not placed in a direct, personal relationship with the former client, the court must assess whether the attorney was positioned during the first representation so as to make it likely the attorney acquired confidential information relevant to the current representation, given the similarities or lack of similarities between the two" [*Jessen v. Hartford Casualty Ins. Co. (2003) 111 Cal. App. 4th 698, 711, 3 Cal. Rptr. 3d 877]* . Additionally, the court in *Jessen*, when deciding which matters should be relied upon when applying the substantial relationship test, interpreted *Flatts* use of the word "subjects" as including "information material to the evaluation, prosecution, settlement or accomplishment of the litigation or transaction given its specific legal and factual issues" [*Jessen v. Hartford Casualty Ins. Co. (2003) 111 Cal. App. 4th 698, 712, 3 Cal. Rptr. 3d 877]* . The attorney whose disqualification is sought has the burden of proving that he or she had no exposure to confidential information relevant to the current action. That burden requires an affirmative showing and is not satisfied by a cursory denial [*Ochoa v. Fordel, Inc. (2007) 146 Cal. App. 4th 898, 911, 53 Cal. Rptr. 3d 277]* .

Interpreting *Jessen*, the same court of appeal held that *Jessen* did not create a lifetime prohibition against representation adverse to a former client, treating the former client in the same fashion as a current client, or automatically mandating disqualification when the two compared matters are entirely unrelated [*Farris v. Fireman's Fund Insurance Company (2004) 119 Cal. App. 4th 671, 680, 14 Cal. Rptr. 3d 618]* . The court made clear the critical concern is the possibility of use in the second representation of confidential information acquired during the first representation [*Farris v. Fireman's Fund Insurance Company (2004) 119 Cal. App. 4th 671, 681, 14 Cal. Rptr. 3d 618* (attorney disqualified when he previously represented insurer in coverage issues and subsequently represented insured in bad faith action against insurer); *see also* *Faughn v. Perez (2006) 145 Cal. App. 4th 592, 603-610, 51 Cal. Rptr. 3d 692* (no evidence showing whether policies and procedures with which attorney was familiar were applied in situation presented by second lawsuit)].

In *Kirk Corp. v. First American Title Co.*, the court held that a member of a law firm representing the defendant was not disqualified by the fact that the member had once assisted the plaintiff homeowners in preparing a declaration of CC&Rs for the same condominium project involved in the current breach of fiduciary duty lawsuit, because the subject matters of the current and former representations were not substantially related [*Kirk Corp. v. First American Title Co. (1990) 220 Cal. App. 3d 785, 812-813, 270 Cal. Rptr. 24* ; *see also* *Health Maintenance Network v. Blue Cross of So. California (1988) 202 Cal. App. 3d 1043, 1062-1063, 249 Cal. Rptr. 220* (no disqualification when attorney accepts employment adverse to former client if matter bears no relationship to confidential information acquired by attorney as result of former attorney-client relationship); *Elliott v. McFarland Unified School Dist. (1985) 165 Cal. App. 3d 562, 572, 211 Cal. Rptr. 802* ; *but see* *In re Marriage of Zimmerman (1993) 16 Cal. App. 4th 556, 564, 20 Cal. Rptr. 2d 132* (wife's brief consultation with lawyer about issue in litigation in which lawyer's partner represented husband against wife was substantial relationship, but material confidential information was not likely to have been imparted); SDCBA Ethics Opinion No. 1977-6].

LACBA Formal Opinion No. 406 (1982) suggested that an attorney may take on a representation adverse to a former client debt collector, even though the new matter involves collections, so long as no confidential information relating to the current collection matter was obtained [*see also* SDCBA Ethics Opinion No. 1984-2 (subsequent adverse representation not prohibited in unrelated matter if relationship to prior representation is incidental)].

[d] Length of Relationship

In the disqualification context, when a client has a long-term relationship with an attorney, it is especially likely that confidential communications will occur [*Employers Ins. of Wausau v. Albert D. Seeno Const. Co. (N.D. Cal. 1988) 692 F. Supp. 1150, 1162* (citing *Global Van Lines Inc. v. Superior Court (1983) 144 Cal. App. 3d 483, 489, 192 Cal. Rptr. 609*)].

Courts have deemed disqualification to be unnecessary when the prior relationship between the attorney and the client

was short-lived and unrelated to the current engagement [*Goldberg v. Warner/Chappell Music, Inc. (2005) 125 Cal. App. 4th 752, 759-762, 23 Cal. Rptr. 3d 116* (disqualification not required when client consulted briefly with firm three years previously with attorney no longer working with firm); *Vangsness v. Superior Court (1984) 159 Cal. App. 3d 1087, 1090, 206 Cal. Rptr. 45]* .

[e] Immaterial or Old Information

The fact that the opposing party is the attorney's former client is not in itself sufficient to bar the attorney from accepting or continuing the case against that party if either of the following is true:

- No confidential information material to the new case was given to the attorney [*Kirk Corp. v. First American Title Co. (1990) 220 Cal. App. 3d 785, 812-813, 270 Cal. Rptr. 24* (information gathered in preparing condominium association's CC&Rs was not relevant to subject matter of current litigation between association and party represented by firm); BASF Formal Opinion No. 1973-6 (employment adverse to former client respecting matters unrelated to confidential information is not prohibited)].

- The former representation is so far in the past that any confidential information obtained would no longer be material [*Johnson v. Superior Court (1984) 159 Cal. App. 3d 573, 579, 205 Cal. Rptr. 605* (passage of time may lessen significance of any confidential information given)].

The more time that has passed since the information was disclosed, the more likely it is that the attorney no longer has confidential information that is relevant or material to the current dispute [*see Westinghouse Electric Corp. v. Kerr-McGee Corporation (7th Cir. 1978) 580 F.2d 1311, 1322* (no abuse of discretion in denying disqualification when 10 years had passed and two matters were not substantially related); *Johnson v. Superior Court (1984) 159 Cal. App. 3d 573, 579, 205 Cal. Rptr. 605]* .

[6] Imputing Receipt of Information to Firm

[a] Imputed Knowledge Doctrine

Although the California Rules of Professional Conduct are silent on the point, the ABA Model Rules treat all lawyers within a single firm as oneunit for conflict of interest purposes [Model Rules of Professional Conduct Rule 1.10(a) (1983); *see also* Model Code of Professional Responsibility DR 5-105(D) (1980)]. The doctrine of imputed knowledge or vicarious disqualification has arisen out of these rules [*see Chambers v. Superior Court (1981) 121 Cal. App. 3d 893, 898, 175 Cal. Rptr. 575]* . The doctrine is based on the presumption that attorneys in a law firm will consult with each other and share their clients' confidences [*see, e.g., Employers Ins. of Wausau v. Albert D. Seeno Const. Co. (N.D. Cal. 1988) 692 F. Supp. 1150, 1163* ; *see also Trone v. Smith (9th Cir. 1980) 621 F.2d 994, 999* ; *Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc. (7th Cir. 1979) 607 F.2d 186, 196]* .

In California, it has been held that if one lawyer in a firm has a Rule 3-310(E) conflict involving a risk of disclosure of material confidences, all lawyers in the firm are deemed to have the conflict and are accordingly ineligible to represent the party. [*Meza v. H. Muehlstein & Co. (2009) 176 Cal. App. 4th 969, 978-980, 98 Cal. Rptr. 3d 422* (firm disqualified even after lawyer with conflict left firm)]. Knowledge obtained by one member of a firm is imputed to all other members [*Rosenfeld Construction Co. v. Superior Court (1991) 235 Cal. App. 3d 566, 573, 286 Cal. Rptr. 609]* . The imputed knowledge theory holds that knowledge by any member of a law firm is knowledge by all of the attorneys in the firm, partners as well as associates [*Chadwick v. Superior Court (1980) 106 Cal. App. 3d 108, 116, 164 Cal. Rptr. 864]* . The rule has been applied in numerous cases [*see, e.g., Pound v. DeMera DeMera Cameron (2005) 135 Cal. App. 4th 70, 76-77, 36 Cal. Rptr. 3d 922* (disqualification of lawyer representing plaintiffs after that lawyer hired another lawyer to assist, when other lawyer had previously represented defendants and, in the course of that representation, obtained confidential information); *Farris v. Fireman's Fund Insurance Company (2004) 119 Cal.*

App. 4th 671, 689 n.17, 14 Cal. Rptr. 3d 618 (attorney and his firm disqualified when attorney previously represented insurance company in coverage issues and subsequently represented insured in bad faith action); *Frazier v. Superior Court of Orange County (2002) 97 Cal. App. 4th 23, 30, 118 Cal. Rptr. 2d 129* ; *Henriksen v. Great American Savings & Loan (1992) 11 Cal. App. 4th 109, 114, 14 Cal. Rptr. 2d 184* ; *Klein v. Superior Court (1988) 198 Cal. App. 3d 894, 909, 244 Cal. Rptr. 226* ; *Dill v. Superior Court (1984) 158 Cal. App. 3d 301, 306, 205 Cal. Rptr. 671* ; *William H. Raley Co. v. Superior Court (1983) 149 Cal. App. 3d 1042, 1048-1049, 197 Cal. Rptr. 232* ; *Chambers v. Superior Court (1981) 121 Cal. App. 3d 893, 898, 175 Cal. Rptr. 575* ; *see also* State Bar of California Formal Opinion No. 1997-152; LACBA Formal Opinion No. 501 (1999)]. However, it has also been held that when an attorney with client confidences moves from one private law firm to another, there is a rebuttable presumption of imputed knowledge to the law firm, which may be rebutted by evidence of effective ethical screening [*Kirk v. First American Title Insurance (2010) 183 Cal. App. 4th 776, 792-816, 2010 Cal. App. LEXIS 478]* .

If only one attorney in a firm has violated an ethical rule that does not pertain to potential breach of client confidences, disqualification of a whole firm generally is unnecessary [*see, e.g.,* *Mills Land & Water Co. v. Golden West Refining Co. (1986) 186 Cal. App. 3d 116, 131-133, 230 Cal. Rptr. 461* (individual lawyer, not firm, disqualified for violation of former Rule 7-103); *Chronometrics, Inc. v. Sysgen, Inc. (1980) 110 Cal. App. 3d 597, 607-608, 168 Cal. Rptr. 196* (involving same rule)]. Similarly, if the lawyer who handled the previous matter is no longer working for the firm and left before the new matter arose, there is no need to disqualify the entire firm because there is no concern that the "tainted" attorney will spread information to the "nontainted" attorneys [*Goldberg v. Warner/Chappell Music, Inc. (2005) 125 Cal. App. 4th 752, 765, 23 Cal. Rptr. 3d 116* (disqualification not required when client consulted with firm briefly three years previously with attorney no longer working with firm)].

In one case, a court of appeal held in effect that two divisions of a public interest law firm should not be treated as a single firm for imputation of knowledge purposes [*In re Jasmine S. (2007) 153 Cal. App. 4th 835, 838-839, 846, 63 Cal. Rptr. 3d. 593]* . The court held that an attorney representing multiple siblings in dependency proceedings may be disqualified only if the siblings have an actual, present conflict of interest; a mere potential conflict does not warrant disqualification [*In re Jasmine S. (2007) 153 Cal. App. 4th 835, 844, 63 Cal. Rptr. 3d. 593]* .

Knowledge is not imputed between married attorneys who work for different firms. Courts have rejected the argument that an imputation of possession of confidential client information may be based solely on a marital relationship [*see Derivi Construction & Architecture, Inc. v. Wong (2004) 118 Cal. App. 4th 1268, 1276, 14 Cal. Rptr. 3d 329]* (refusing to impute former attorney's access to client's confidential information to attorney in same firm and then to latter attorney's husband). If courts regularly disqualified attorneys and their law firms from representing clients with interests adverse to clients represented by the attorney's spouses' law firms, courts would effectively preclude married lawyers from practicing in the same communities as their spouses [*Derivi Construction & Architecture, Inc. v. Wong (2004) 118 Cal. App. 4th 1268, 1276, 14 Cal. Rptr. 3d 329* (citing *Non-Punitive Segregation Inmates v. Kelly (D.C. Pa. 1984) 589 F. Supp. 1330, 1339* , affd. without opinion *845 F.2d 1014 (3d Cir. 1988)*)].

For discussion of when an attorney must disclose relationships between a *party or witness* and another attorney in the firm, see *§ 72.110[2][d]*.

[b] Impact of Imputed Knowledge

[i] Presumptions Created by Substantial Relationship Test and Imputed Knowledge Doctrine

The substantial relationship test and the imputed knowledge doctrine create two presumptions. The former test creates a conclusive presumption that material confidential information was disclosed to the lawyer handling the matter [*see Rosenfeld Construction Co. v. Superior Court (1991) 235 Cal. App. 3d 566, 577, 286 Cal. Rptr. 609* , and discussion in *§ 72.113[5]*]. The latter doctrine apparently creates a presumption that the lawyer has shared that information with all of the lawyers in the firm [*see § 72.113[6][a]*].

The impact of these presumptions is most profound when lawyers change firms. When a lawyer possessing material confidential information changes firms, the lawyer's knowledge is imputed to the new firm [*see* *Kirk v. First American Title Insurance (2010) 183 Cal. App. 4th 776, 792-816, 2010 Cal. App. LEXIS 478* (presumption is rebuttable); *Pound v. DeMera DeMera Cameron (2005) 135 Cal. App. 4th 70, 76-77, 36 Cal. Rptr. 3d 922* ; *Henriksen v. Great American Savings & Loan (1992) 11 Cal. App. 4th 109, 112-114, 14 Cal. Rptr. 2d 184* ; *Klein v. Superior Court (1988) 198 Cal. App. 3d 894, 909, 244 Cal. Rptr. 226* ; *Dill v. Superior Court (1984) 158 Cal. App. 3d 301, 304, 205 Cal. Rptr. 671]* . However, more difficult questions arise when the lawyer changing firms has no actual knowledge of confidential information, and when the lawyer who was involved in a "tainted" representation leaves the firm. The question in the former situation is whether the prior firm's knowledge is imputed to the lawyer and the new firm. The question in the latter scenario is whether the departed lawyer's knowledge is still imputed to the old firm.

[ii] Imputing Knowledge to Lawyer and Lawyer's New Firm

It is not clear in California whether a lawyer who does not actually possess material confidential information carries imputed knowledge to a new firm and whether that knowledge is then imputed to the new firm. Several cases suggest that the prior firm's knowledge is not imputed to the lawyer.

In *Chambers v. Superior Court*, the Third District Court of Appeal held that disqualification of the plaintiff's firm, which hired a lawyer who had been employed by a government agency defendant, was unwarranted because there was no evidence that the lawyer had any responsibility over matters related to the action in question or that he acquired confidential information regarding the action. However, the *Chambers* court added that sufficient measures had been taken to screen the lawyer from any participation in the lawsuit [*Chambers v. Superior Court (1981) 121 Cal. App. 3d 893, 903, 175 Cal. Rptr. 575]* .

In *Dill v. Superior Court*, the Third District Court of Appeal distinguished its opinion in *Chambers* on the basis that the lawyer in *Dill* had been involved in the lawsuit in question while employed at the law firm representing the opposing party. No mention was made of screening as a distinguishing feature. However the *Dill* court observed that *Chambers* noted that vicarious disqualification of a former government employee's law firm is not imposed as strictly as it is in other instances. This statement suggests that *Chambers* may not apply when a lawyer is moving between private firms [*Dill v. Superior Court (1984) 158 Cal. App. 3d 301, 305-306, 205 Cal. Rptr. 671]* .

In *Klein v. Superior Court*, the Sixth District Court of Appeal analyzed *Chambers* as an exception to the vicarious disqualification rule that applied to former government lawyers. After reviewing the *Chambers* holding, the court concluded that the *Chambers* test involves both of the following considerations [*Klein v. Superior Court (1988) 198 Cal. App. 3d 894, 909, 244 Cal. Rptr. 226]* :

- Whether the individual attorney had any responsibility over matters related to the instant action or had acquired confidential information regarding the action.

- Whether the firm had taken sufficient protective measures to screen the attorney from participation.

Under the *Klein* formulation of the *Chambers* test, the transferring lawyer would need to be screened even though that lawyer brought no confidential informationto the new firm [*see* discussion of screening in § 72.113[6][c]].

However, it is shown that the firm-switching lawyer never represented the former client personally while working at the former law firm, disqualification of the lawyer and the lawyer's new firm will not be automatic. In *Adams v. Aerojet-General Corporation*, the Third District Court of Appeal reversed and remanded the trial court's disqualification of a lawyer and the lawyer's new firm where the firm-switching lawyer had never represented the former client personally [*Adams v. Aerojet-General Corporation (2001) 86 Cal. App. 4th 1324, 1340-1341, 104 Cal. Rptr. 2d 116]* .

Although the representations by the lawyer's new firm and old firm were substantially related, the court of appeal concluded that disqualification should not be ordered when there was no reasonable probability that the firm-switching lawyer had access to material confidential information while at the former firm [*Adams v. Aerojet-General Corporation (2001) 86 Cal. App. 4th 1324, 1340, 104 Cal. Rptr. 2d 116]* .

The *Adams* court held that when a substantial relationship exists between the current case and the matters handled by the firm-switching lawyer's former firm, but the lawyer never represented the client personally while at the former firm, a modified version of the substantial relationship test described in *Ahmanson* is to be applied [*Adams v. Aerojet-General Corporation (2001) 86 Cal. App. 4th 1324, 1340, 104 Cal. Rptr. 2d 116]* . The trial court should determine whether confidential information material to the current representation would normally have been imparted to the lawyer during the lawyer's tenure at the former firm. The trial court should focus on the relationship, if any, between the lawyer and the former client's representation. It should consider any time spent by the lawyer working on behalf of the former client, as well as the lawyer's "possible exposure to formulation of policy or strategy" in matters related to the current dispute. It should take into account whether the lawyer worked out of the same office that handled the former litigation. It should also consider whether the lawyer's administrative duties, including the lawyer's responsibilities as a partner and principal in the former firm, placed the lawyer in a position in which he or she would have been exposed to matters relevant to the current dispute [*Adams v. Aerojet-General Corporation (2001) 86 Cal. App. 4th 1324, 1340, 1341, 104 Cal. Rptr. 2d 116]* .

The outer boundaries of the application of the substantial relationship test for vicarious disqualification of counsel was examined in *Frazier v. Superior Court of Orange County (2002) 97 Cal. App. 4th 23, 118 Cal. Rptr. 2d 129* . The superior court entered an order disqualifying petitioner's *Cumis* counsel because the insurer's counsel, which had a conflict of interest of which it was then unaware, covered a few depositions for *Cumis* counsel. The petitioner sought a writ of mandate directing the superior court to vacate its disqualification order, contending the court overextended the rules of vicarious disqualification.

In *Frazier*, the Fourth District Court of Appeal granted the petition to vacate the superior court's disqualification order, holding that the disqualification of *Cumis* counsel would require a double imputation of knowledge of confidential information--first from one member of the law firm representing the insurer to another member of that firm, and secondly from the latter attorney to a different law firm entirely. Case law did not support the double imputation in this context [*Frazier v. Superior Court of Orange County (2002) 97 Cal. App. 4th 23, 26-27, 118 Cal. Rptr. 2d 129]* .

City of Santa Barbara v. Superior Court (2004) 122 Cal. App. 4th 17, 18 Cal. Rptr. 3d 403 is the first court of appeal case to look at what measures must be employed when an attorney leaves private practice to join a public law office and the public law office represents the city in a case against the attorney's client on which the attorney was actively involved. The court reiterated the general rule that an attorney's ethical duties to maintain undivided loyalty to his or her clients and to preserve the confidentiality of client communications require that the attorney refrain from simultaneous or successive representation of clients with adverse interests [*City of Santa Barbara v. Superior Court (2004) 122 Cal. App. 4th 17, 23, 18 Cal. Rptr. 3d 403]* . The court also held that an individual attorney's disqualification extends to his or her entire law firm [*City of Santa Barbara v. Superior Court (2004) 122 Cal. App. 4th 17, 23-24, 18 Cal. Rptr. 3d 403]* . The court then looked at whether the attorney's disqualification requires the vicarious disqualification of the entire city attorney's office and whether screening with an "ethical wall" could prevent the vicarious disqualification. If the lawyer were with a private law firm, the answer would be clear: the lawyer's disqualification would be mandatory and would extend to his or her entire law firm. However, because the attorney was employed by a public law office, not a private law firm, the court held otherwise. Unlike private sector lawyers, public sector lawyers do not have a financial interest in the matters on which they work. Thus, they may have less incentive to breach client confidences [*City of Santa Barbara v. Superior Court (2004) 122 Cal. App. 4th 17, 24, 18 Cal. Rptr. 3d 403]* . In addition, public sector lawyers do not recruit clients or accept fees. Thus, they have no financial incentive to favor one client over another [*City of Santa Barbara v. Superior Court (2004) 122 Cal. App. 4th 17, 24, 18 Cal. Rptr. 3d 403]* .

In light of these considerations, the court accepted the use of an ethical wall as an alternative to vicarious disqualification of the entire public law office [*City of Santa Barbara v. Superior Court (2004) 122 Cal. App. 4th 17, 27, 18 Cal. Rptr. 3d 403]* .

Similarly, the California Supreme Court held that a public law firm should be held to a different, less stringent standard than a private law firm with respect to protecting confidences [*In re Charlisse C. (2008) 45 Cal. 4th 145, 165, 84 Cal. Rptr. 3d 597, 194 P.3d 330]* . A nonprofit law firm does not have the same financial incentives as a private firm insofar as the clients do not pay for services; therefore, no single client becomes more important than others, and ethical walls are more effective [*In re Charlisse C. (2008) 45 Cal. 4th 145, 165, 84 Cal. Rptr. 3d 597, 194 P.3d 330]* .

In *Rhaburn v. Superior Court (2006) 140 Cal. App. 4th 1566, 45 Cal. Rptr. 3d 464* , the similar issue arose in a criminal case. At issue was whether a public defender whose office had previously represented a witness for the prosecution was subject to automatic disqualification for conflict of interest under Rule 3-310(E). The court held that the trial court erred in applying a rigid rule of vicarious disqualification. In that case, the public defender did not have a direct and personal relationship with the witness, and the direct acquisition of confidential information did not need to be presumed. Instead, the appellate court held, the trial court should have evaluated the totality of the circumstances in determining whether there was a reasonable possibility that the individual attorney representing defendant either had obtained confidential information about the witness collected by his or her office, or might inadvertently acquire such information through file review, office conversation, or otherwise. The court held that in cases that do not involve direct and personal representation of the witness, trial courts should accept counsel's representation that he or she had not come into possession of any confidential information acquired from the witness and would not seek to do so [*Rhaburn v. Superior Court (2006) 140 Cal. App. 4th 1566, 1581, 45 Cal. Rptr. 3d 464]* .

Inside and outside of California, federal courts have held that knowledge of a lawyer's prior firm is not imputed to the lawyer or the new firm when there is no evidence that the lawyer was likely to have acquired that knowledge [*Dieter v. Regents of the University of California (E.D. Cal. 1997) 963 F. Supp. 908, 911-912* ; *Panduit Corp. v. All States Plastic Mfg. Co. (7th Cir. 1984) 744 F.2d 1564, 1578-1579* (criticized on other grounds in *Richardson-Merrell, Inc. v. Koller (1985) 472 U.S. 424, 432)* ; *Gas-A-Tron of Arizona v. Union Oil Co. of California (9th Cir. 1976) 534 F.2d 1322, 1325 , cert. denied, 429 U.S. 861* ; *American Can Company v. Citrus Feed Co. (5th Cir. 1971) 436 F.2d 1125, 1129* ; *Laskey Bros. of W. Va., Inc. v. Warner Bros. Pictures (2d Cir. 1955) 224 F.2d 824, 827* ; *see* LACBA Formal Opinion No. 501 (1999) (analyzing case law)].

In *Panduit v. All States Plastic Mfg. Co.*, the court held that the presumption created by the imputed knowledge doctrine could be rebutted by a showing that the lawyer did not acquire confidential information. The *Panduit* court noted that while screening might also rebut the presumption, the absence of screening was not fatal [*Panduit Corp. v. All States Plastic Mfg. Co. (7th Cir. 1984) 744 F.2d 1564, 1580-1581]* .

In *Gas-A-Tron of Arizona v. Union Oil Co. of California*, the court reversed the disqualification of a lawyer who had worked as a young associate in the firm that represented two defendants in the action. The lawyer had not actually obtained any confidential information about either defendant that would be relevant to the pending litigation, and he had not worked on matters that were substantially related to the pending litigation [*Gas-A-Tron of Arizona v. Union Oil Co. of California (9th Cir. 1976) 534 F.2d 1322, 1325]* .

Panduit and *Gas-A-Tron* have both been cited in passing in California. *Klein v. Superior Court* distinguished *Panduit* because the evidence before the trial court did not demonstrate that the client's confidences had been passed on or were likely to have been passed on to members of the second firm [*Klein v. Superior Court (1988) 198 Cal. App. 3d 894, 911, 244 Cal. Rptr. 226]* . The holding in *Gas-A-Tron* is discussed without comment in *Chronometrics, Inc. v. Sysgen, Inc. (1980) 110 Cal. App. 3d 597, 604, 168 Cal. Rptr. 196* . LACBA Formal Opinion No. 501 (1999), analyzing this issue, maintains that if a lawyer did not obtain confidential information at a former law firm about the former firm's client that is material to a matter at the lawyer's new law firm, neither *Cal. Rules Prof. Conduct, Rule 3-310(E)* nor the

imputed knowledge doctrine rule should apply to prohibit the lawyer or the lawyer's new firm from handling that matter.

The preceding discussion demonstrates that the rule in California is unsettled. Whether *Chambers v. Superior Court* (discussed *above*) applies only when public sector lawyers change firms and whether screening is an essential element of the *Chambers* test are unclear. The applicability of the rule in the federal cases is also undecided.

[iii] Imputing Knowledge When Lawyers Leave With Matter

What happens when a lawyer working on a matter leaves the firm and takes the matter with him or her? If there are no other lawyers in the firm who worked on the matter, may the presumption be rebutted by evidence that none of the remaining lawyers have any material confidential information? No California state court has yet to decide this question.

ABA Model Rule 1.10(c) allows a law firm to represent adverse interests in matters substantially related to the matter handled by the departed lawyer unless any remaining lawyer acquired material confidential information [Model Rules of Professional Conduct, Rule 1.10(c) (1983)]. However, a federal decision applying California law refused to apply Rule 1.10.

In *Elan Transdermal Limited v. Cygnus Therapeutic Systems*, the court found that the presumption was not rebuttable when lawyers who shared office space or interacted with the departed lawyers remained at the firm. In *Elan*, a large firm with several offices had attempted a merger with a smaller firm which, while affiliated with the larger firm, did significant work for Cygnus on a patent. After the merger failed and the lawyers left, the firm was retained by Elan to challenge the patent. The court concluded that there was still ample opportunity for shared confidences with attorneys who remained after the merger collapsed, and there is still an appearance of impropriety in the representation of a new client attacking the very work a firm did for a previous client [*Elan Transdermal Limited v. Cygnus Therapeutic Systems (N.D. Cal. 1992) 809 F. Supp. 1383, 1390-1391]* . Citing *Rosenfeld Construction Co. v. Superior Court (1991) 235 Cal. App. 3d 566, 577, 286 Cal. Rptr. 609* , the *Elan* court held that the presumption of shared confidences is a conclusive presumption [*Elan Transdermal Limited v. Cygnus Therapeutic Systems (N.D. Cal. 1992) 809 F. Supp. 1383, 1390]* . However, even if the presumption were rebuttable, the firm had failed to present sufficient evidence. The court had no information about the knowledge that other current firm attorneys may have learned from those who have since left in casual conversations, firm retreats, etc. [*Elan Transdermal Limited v. Cygnus Therapeutic Systems (N.D. Cal. 1992) 809 F. Supp. 1383, 1392]* . The opinion suggests that declarations from all of the remaining lawyers in the firm may have been necessary if the presumption is to be rebutted.

It is not clear whether California courts will adopt the *Elan* holding that the presumption of shared confidences is conclusive. *Elan* was apparently relying on a statement in *Rosenfeld* that if the trial court found that the firm's current representation was substantially related to former representation in question, it would create a conclusive presumption that the firm possessed confidential information [*Rosenfeld Construction Co. v. Superior Court (1991) 235 Cal. App. 3d 566, 577, 286 Cal. Rptr. 609]* . However, the discussion in *Rosenfeld* had more to do with the presumption created by the substantial relationship test than with the presumption of shared confidences. Moreover, in *Rosenfeld* the lawyers involved in the prior representation were still employed at the firm. If the presumption is rebuttable, *Elan* demonstrates what showing is necessary to rebut the presumption.

[iv] Imputing Knowledge From "Of Counsel" to Law Firm

If a lawyer is held out as "of counsel" to another lawyer or law firm, the "of counsel" will be treated as a partner or associate for conflicts purposes [*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems (1999) 20 Cal. 4th 1135, 1155, 86 Cal. Rptr. 2d 816, 980 P.2d 371]* . In *Speedee Oil*, a lawyer who held out as "of counsel" to a law firm consulted with and gained confidential information from the opposing party of a firm client. The California Supreme Court applied the imputed knowledge doctrine and disqualified the law firm from further representation [

People ex rel. Dept. of Corporations v. Speedee Oil Change Systems (1999) 20 Cal. 4th 1135, 1152-1156, 86 Cal. Rptr. 2d 816, 980 P.2d 371] . The Court noted that *Cal. Rules of Prof. Conduct, Rule 1-400(E)*, Standard 8, defines an "of counsel" relationship as a "close, personal, continuous, and regular" relationship between a lawyer (or law firm) and another lawyer or law firm which is not that of associate or partner [*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems (1999) 20 Cal. 4th 1135, 1153, 86 Cal. Rptr. 2d 816, 980 P.2d 371]* . The Court held that closeness of the "of counsel" relationship justifies the presumption that confidences are shared between an "of counsel" and his or her law firm [*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems (1999) 20 Cal. 4th 1135, 1155, 86 Cal. Rptr. 2d 816, 980 P.2d 371]* .

[v] Imputing Knowledge From Expert Witness Previously Interviewed by Opposing Party

When a law firm retains an expert witness who was interviewed previously by opposing counsel and exposed to the opposing side's confidential information, a rebuttable presumption arises that the expert disclosed that confidential information to the law firm that subsequently hired the expert witness [*Western Digital Corporation v. Superior Court (1998) 60 Cal. App. 4th 1471, 1485, 71 Cal. Rptr. 2d 179* ; *see also Shadow Traffic v. Superior Court (1994) 24 Cal. App. 4th 1067, 1085, 29 Cal. Rptr. 2d 693]* . The purpose of this presumption is to implement the public policy of protecting confidential information; thus, the presumption affects the burden of proof [*Evid. Code § 605*], imposing on the party against whom it operates the burden of proving by a preponderance of the evidence, the nonexistence of the presumed fact [*Evid. Code § 606*; *see Western Digital Corporation v. Superior Court (1998) 60 Cal. App. 4th 1471, 1485, 71 Cal. Rptr. 2d 179]* . The presumption does not apply, however, when the expert witness remains a consultant for and in the employ of the party that originally retained the expert [*Shandralina G. v. Homonchuk (2007) 147 Cal. App. 4th 395, 412-417, 54 Cal. Rptr. 3d 207* ; *Collins v. State of California (2004) 121 Cal. App. 4th 1112, 1128-1129, 18 Cal. Rptr. 3d 112* (no disqualification when, once law firm discovered it had retained same expert as opposing party, it refrained from talking with expert until court resolved issue)].

[c] Ethical Walls or Screening

[i] Former Government Lawyers and Judges

May a law firm undertake or continue a representation without obtaining consent under *Cal. Rules Prof. Conduct, 3-310(E)* by sequestering the "tainted" attorney from the other lawyers in the firm--known as building an "ethical wall" or "screening"?

In situations involving former government lawyers, California courts in the context of disqualification issues have been receptive to the ethical wall solution in order to avoid unduly restricting the functioning of government law offices and the career mobility of government lawyers [*Higdon v. Superior Court (1991) 227 Cal. App. 3d 1667, 1680, 278 Cal. Rptr. 588* (screening acceptable to eliminate appearance of impropriety resulting from its hiring of court commissioner who had decided motions in case handled by firm); *Chambers v. Superior Court (1981) 121 Cal. App. 3d 893, 903, 175 Cal. Rptr. 575* (firm that hired public agency attorney not disqualified because there was no evidence lawyer acquired confidential information and lawyer was sufficiently screened from any participation in litigation); *Chadwick v. Superior Court (1980) 106 Cal. App. 3d 108, 119, 164 Cal. Rptr. 864* (district attorney's office not disqualified because former public defender was sufficiently isolated from prosecution of his former clients so as to rebut any inference of assistance); *but see City and County of San Francisco v. Cobra Solutions, Inc. (2006) 38 Cal. 4th 839, 846-854, 43 Cal. Rptr. 3d 771, 135 P.3d 20* (when attorney left private practice to become head of public law office, vicarious disqualification of entire public law office was required and no screening was allowed)].

Regarding former judges who join law firms, the vicarious disqualification of a law firm does not automatically follow upon the personal disqualification of a former settlement judge who has become a partner in the law firm [*In re County of Los Angeles (9th Cir. 2000) 223 F.3d 990, 997]* . Timely and effective screening mechanisms can rebut the presumption that a former settlement judge has disclosed confidences to other members of the firm [*In re County of*

Los Angeles (9th Cir. 2000) 223 F.3d 990, 997 ; *but see Cho v. Superior Court (1995) 39 Cal. App. 4th 113, 125, 45 Cal. Rptr. 2d 863* (screening mechanisms not sufficient)].

[ii] Nongovernment Lawyers

Outside the government lawyer context, California courts have not been receptive to screening [*see Pound v. DeMera DeMera Cameron (2005) 135 Cal. App. 4th 70, 76-77, 36 Cal. Rptr. 3d 922* ; *Klein v. Superior Court (1988) 198 Cal. App. 3d 894, 912, 244 Cal. Rptr. 226]* . By contrast, federal courts have been more willing to approve of ethical walls [*see, e.g., UMG Recordings, Inc. v. MySpace, Inc. (C.D. Cal. 2007) 526 F. Supp. 2d 1046, 1060* ; *United States use of Lord Electric Co. v. Titan Pacific Const. Corp. (W.D. Wash. 1986) 637 F. Supp. 1556, 1564-1565* ; *but see Employers Ins. of Wausau v. Albert D. Seeno Const. Co. (N.D. Cal. 1988) 692 F. Supp. 1150, 1164 n.17* (validity still open question in California)].

However, the California Supreme Court has held that ethical screening might suffice to shield a various departments of a public law firm [*In re Charlisse C. (2008) 45 Cal. 4th 145, 165, 84 Cal. Rptr. 3d 597, 194 P.3d 330]* . A nonprofit law firm does not have the same financial incentives as a private firm insofar as the clients do not pay for services; therefore, no single client becomes more important than others, and ethical walls are more effective [*In re Charlisse C. (2008) 45 Cal. 4th 145, 165, 84 Cal. Rptr. 3d 597, 194 P.3d 330]* .

A number of California cases have found screening to be inapplicable in the following situations:

- When a nongovernment lawyer performed work for the opposing party in the same lawsuit handled by the lawyer's new firm [*Pound v. DeMera DeMera Cameron (2005) 135 Cal. App. 4th 70, 76-77, 36 Cal. Rptr. 3d 922* ; *Henriksen v. Great American Savings & Loan (1992) 11 Cal. App. 4th 109, 114-117, 14 Cal. Rptr. 2d 184* ; *Dill v. Superior Court (1984) 158 Cal. App. 3d 301, 306, 205 Cal. Rptr. 671* ; *see Klein v. Superior Court (1988) 198 Cal. App. 3d 894, 912, 244 Cal. Rptr. 226]* .

- To sequester a lawyer who brings a lawsuit to a new firm that had represented the opposing party in the lawsuit in a substantially related matter [*Rosenfeld Construction Co. v. Superior Court (1991) 235 Cal. App. 3d 566, 577, 286 Cal. Rptr. 609]* .

- When the adverse party is a current client of the firm [*William H. Raley Co. v. Superior Court (1983) 149 Cal. App. 3d 1042, 1049, 197 Cal. Rptr. 232]* . But screening is available to government lawyers in this situation [*Howitt v. Superior Court (1992) 3 Cal. App. 4th 1575, 1586-1587, 5 Cal. Rptr. 2d 196* (county counsel office could represent employee at administrative hearing before county employment appeals board in which same office would advise board, provided board's advisor was screened); *Castro v. Los Angeles County Bd. of Supervisors (1991) 232 Cal. App. 3d 1432, 1439-1445, 284 Cal. Rptr. 154* (Dependency Court Legal Services Office may represent more than one party in lawsuit by dividing itself into separate and independent offices)].

However, in cases in which the incoming lawyer may have acquired material confidential information from a different representation at a prior firm, one case has suggested screening may be available. In *Klein v. Superior Court*, a lawyer, while employed at another firm, had received confidential information "possibly relevant" to the firm's current representation against the former client. The court held that California law clearly prohibits continued representation by the firm under the circumstances of the case when there has been no attempt to screen the lawyer from the litigation at hand [*Klein v. Superior Court (1988) 198 Cal. App. 3d 894, 913-914, 244 Cal. Rptr. 226* ; *see also In re Complex Asbestos Litigation (1991) 232 Cal. App. 3d 572, 592-594, 283 Cal. Rptr. 732* (adopting rebuttable presumption of shared confidences when law firm hires employee of opposing firm, e.g., paralegal, who had access to material confidential information; presumption may be rebutted by implementing procedure referred to as "cone of silence" that "effectively screens the employee from any involvement with the litigation")].

While *Klein* suggests that screening may be available in certain cases that do not involve government lawyers, no California court has yet to hold that a law firm may avoid obtaining client consent by erecting a screen. Moreover, it is unlikely that a court will accept an ethical wall if it involves nothing more than a declaration by the tainted lawyer not to discuss the case [*see Henriksen v. Great American Savings & Loan (1992) 11 Cal. App. 4th 109, 116, 14 Cal. Rptr. 2d 184]* .

[iii] Establishing Ethical Wall

In cases in which screening is permitted, the typical elements of an ethical wall are the following [*see Kirk v. First American Title Insurance (2010) 183 Cal. App. 4th 776, 809-814, 2010 Cal. App. LEXIS 478* ; *Henriksen v. Great American Savings & Loan (1992) 11 Cal. App. 4th 109, 116 n.6, 14 Cal. Rptr. 2d 184* ; *see also Peat, Marwick, Mitchell & Co. v. Superior Court (1988) 200 Cal. App. 3d 272, 293-294* (term "Chinese Wall" to describe screening mechanisms should not be used)]:

- Instituting physical, geographic, and departmental separation of attorneys.
- Establishing prohibitions against and sanctions for discussing confidential matters.
- Establishing rules and procedures that prevent access to confidential information and files.
- Establishing procedures preventing a disqualified attorney from sharing in the profits of the representation.
- Ensuring that firm attorneys obtain continuing education in professional responsibility.
- Ensuring that the disqualified attorney has no supervisory powers over the attorneys involved in the litigation, and vice versa.
- Providing notice to the former client.

An "ethical wall" may not be acceptable if it is not erected as soon as the potential conflict is or should have been discovered [*see Atasi Corp. v. Seagate Technology (F. Cir. 1988) 847 F.2d 826, 831* ; *see also Klein v. Superior Court (1988) 198 Cal. App. 3d 894, 910-913, 244 Cal. Rptr. 226]* .

An ethical wall or screening device is available as a means to protect against disclosure of confidential, material information consistent with *Cal. Rules Prof. Conduct, Rule 3-310(E)* if the present or former client consents to it. However, it is still not clear whether screening will ever be available to avoid obtaining consent under Rule 3-310(E). California law on this subject as it pertains to disqualification in situations not involving government lawyers appears to be still evolving.

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7-72 California Forms of Pleading and Practice--Annotated § 72.114

§ 72.114 Rule 3-310(F): Third Party Paying for Client's Representation

[1] Overview of Rule

A State Bar member may not accept compensation for representing a client from someone other than the client unless the following three requirements are met [*Cal. Rules Prof. Conduct, Rule 3-310(F)*]:

- There is no interference with the member's independence of professional judgment or with the client-lawyer relationship.

- Information relating to representation of the client is protected as required by *Bus. & Prof. Code § 6068(e)*.

- The member obtains the client's informed written consent, provided that no disclosure or consent is required if either of the following is true:

  - Nondisclosure is otherwise authorized by law.

  - The member is rendering legal services on behalf of any public agency that provides legal services to other public agencies or the public.

Rule 3-310(F) is patterned after Model Rules of Professional Conduct, Rule 1.8(f) (1983). It was adopted as Rule 3-310(E) in May 1989, which was superseded without substantial change by Rule 3-310(F) in September 1992.

Rule 3-310(F) applies both when the third party paying the fees is a client in the same representation, and when the third party is a not a client in the representation [LACBA Formal Opinion No. 471 (1992); *see also* SDCBA Ethics Opinion No. 1990-3].

For discussion of managing conflicts under Rule 3-310(F), see *§ 72.135*.

[2] When Third Party Is Not Client

Under *Cal. Rules Prof. Conduct, Rule 3-310(F),* a lawyer does not represent a third party merely because that party is paying for the representation of a client. Unless an attorney-client relationship exists with the third party for some other reason, the lawyer's duties are to the client in the representation alone. The lawyer may not accept compensation from a nonclient third party unless the client consents and the third party is not permitted to interfere with the lawyer's independent judgment or the attorney-client relationship, and the third party is not privy to the client's confidences and secrets [*Cal. Rules Prof. Conduct, Rule 3-310(F)*; *see* LACBA Formal Opinion No. 500 (1999) (*Cal. Rules Prof. Conduct, Rule 3-310(F)* and *Bus. & Prof. Code § 6068(e)* apply where lawyer receives compensation from third-party finance company that agreed with client to finance client's lawsuit in exchange for assignment of interest in judgment)].

[3] When Third Party Is Client

It is not uncommon in joint representations that one of the clients will pay all of the fees for the representation. For example, when an employer and employee have been sued, the employer will often retain one lawyer to represent both and will pay for the representation. Because the lawyer is accepting compensation for representing the employee client from someone other than that client (the employer client), *Cal. Rules Prof. Conduct, Rule 3-310(F)* applies [LACBA Formal Opinion No. 471 (1992)]. As a result, the employee's informed written consent to the lawyer's receiving compensation from the employer must be obtained.

Because the attorney-client relationship imposes duties on the lawyer to both the paying and nonpaying client, Rule 3-310(F) does not apply in the same way in joint representations that it does when the party compensating the lawyer is not a client. In joint representations, the lawyer's duty to maintain the nonpaying client's confidences and secrets referred to in *Cal. Rules Prof. Conduct, Rule 3-310(F)(2)* is qualified by *Evid. Code § 962*, which establishes that there is no confidentiality between jointly represented clients with respect to communications made in the course of the joint representation [LACBA Formal Opinion No. 471 (1992)]. However, if revealing the information would involve a conflict of interest between the clients, *Cal. Rules Prof. Conduct, Rule 3-310(C)* would come into play [*see Cal. Rules Prof. Conduct, Rule 3-310(C)(1), (2),* discussed in *§ 72.111[2]*].

While *Cal. Rules Prof. Conduct, Rule 3-310(F)(1)* states that there can be no interference with the lawyer's independent judgment, the thrust of that provision is that the lawyer's independent judgment should not be affected by the fact that someone other than the client is compensating the lawyer. Other influences on the lawyer's independent judgment should be analyzed under other parts of Rule 3-310 [LACBA Formal Opinion No. 471 (1992)].

[4] When Nonpaying Client's Consent Is Not Required

Cal. Rules Prof. Conduct, Rule 3-310(F)(3) sets forth two situations when disclosure and consent are not required. One situation is when the lawyer is rendering services on behalf of a public agency that provides legal services to other public agencies or to the public [*Cal. Rules Prof. Conduct, Rule 3-310(F)(3)(b)*].

The other situation is when consent is not required by law [*Cal. Rules Prof. Conduct, Rule 3-310(F)(3)(a)*]. The most common example is counsel selected by a liability insurer to defend an insured. *Cal. Rules Prof. Conduct, Rule 3-310(F)* is not intended to abrogate existing relationships between insurers and insureds whereby the insurer has a contractual right to unilaterally select counsel for the insured, when there is no conflict of interest [*Cal. Rules Prof. Conduct, Rule 3-310,* Discussion]. However, disclosure and consent are required when the insurer reserves its right to deny coverage if, based on the outcome of the lawsuit, the insured's liability is determined to be outside the scope of coverage [*see Civ. Code § 2860*; *McGee v. Superior Court (1985) 176 Cal. App. 3d 221, 226-227, 221 Cal. Rptr. 421* ; *San Diego Federal Credit Union v. Cumis Ins. Society, Inc. (1984) 162 Cal. App. 3d 358, 364-365, 208 Cal. Rptr. 494* ;

LACBA Formal Opinion No. 464 (1990)].

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[Reserved]

§§ 72.115[Reserved]

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§ 72.130 Overview of Conflict Management

This analysis focuses on approaches to providing written disclosure, obtaining client consent, and managing attorney-client relationships to avoid situations when the lawyer must withdraw because of a conflict. In general, a lawyer has a duty to make full and fair disclosure to the client of all facts which materially affect his rights or interests [*Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 189, 98 Cal. Rptr. 837, 491 P.2d 421* ; *Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 1148, 217 Cal. Rptr. 89]* .

The overall objective of written disclosure and informed consent is to assure that the client is apprised of the significant facts and possible adverse consequences in a manner the client can understand and appreciate [LACBA Formal Opinion No. 471 (1992)]. Another objective is to provide a structure for the representation that will allow a lawyer to competently represent a client [LACBA Formal Opinion No. 471 (1992)].

When it comes to implementing these objectives, the only general rule that can be stated is that there is no general rule. What is necessary to establish that a client is sufficiently informed depends on all of the facts in a given situation. What is adequate in one case may be inadequate in another [LACBA Formal Opinion No. 471 (1992)].

In providing disclosure and obtaining consent, it is imperative that the client understands the significance of the facts presented and the adverse consequences. If the client is unable to do so, adequate disclosure and informed consent is not possible [LACBA Formal Opinion No. 471 (1992)].

CAUTION:

Carefully Review Circumstances of Case Before Selecting Approach to Conflict Management. What follows in Subpart F is an effort to provide guidance in a field where there is very little guidance. It does not necessarily reflect the views of the LACBA Committee. The approaches suggested in this section should not be followed unless after careful review they are determined to be appropriate under the circumstances.

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§ 72.131 Disclosing and Managing Conflicts Under Rule 3-310(B)

[1] In General

Cal. Rules Prof. Conduct, Rule 3-310(B) is the sole aspect of Rule 3-310 that only requires written disclosure (*Cal. Rules Prof. Conduct, Rule 3-310(C)-(F)* require informed written consent). The rule addresses potential and actual conflicts arising out of a lawyer's relationship with others or with the lawyer's interest in the subject matter of the representation. Conflicts of this nature inherently call into question a lawyer's undivided loyalty and ability to exercise independent judgment for a client. An attorney is precluded from assuming any relationship that would prevent the attorney from devoting his or her entire energies to his or her client's interests [*Anderson v. Eaton (1930) 211 Cal. 113, 116, 293 P. 788* ; *see also § 72.31*]. Written disclosure under Rule 3-310(B) must address these issues.

When the relationship being disclosed involves another client about whom the lawyer has or may have material confidential information, written disclosure must also address the potential ramifications of that fact [*see Cal. Rules Prof. Conduct, Rule 3-310(B), (E)*].

The following subsections discuss how to address these issues.

[2] Managing Potential Conflicts Under Rule 3-310(B)(1)

[a] Disclosing Current Relationship

Cal. Rules Prof. Conduct, Rule 3-310(B)(1) requires disclosure of relationships with another party or a witness in the matter. It applies when the interests of the party or witness are adverse to the client in the matter, as well as when the interests are not adverse. The nature of the lawyer's relationship with the party or witness and the compatibility of the interests are key elements of the disclosure to the client [*see § 72.110[2]*].

The disclosure should include enough information to allow the client to determine if the lawyer might tend to favor interests that are inconsistent with the client's interests. The factors to disclose may include:

- The nature of the relationship (that is, whether the other party is a client, friend, business associate, relative, or the like).
- The length of the relationship.
- The frequency of the lawyer's contact with the party or witness.
- Any significant events that have affected the relationship positively or negatively.
- The lawyer's personal feelings toward the person or entity.
- Any other factors that would assist in providing the client with a clear picture of the relationship.

[b] Explaining Effect on Loyalty and Independent Judgment

[i] General Considerations

It is one thing to inform a client about the potential for conflicting loyalties. It is another to try to advise a client about how that potential will affect the engagement. The lawyer may not be truly objective in this situation and may be subject to the criticism that the disclosure is tainted by the very divided loyalty being disclosed [*see* LACBA Formal Opinion No. 471 (1992)].

At best a lawyer can disclose the nature and extent of the relationship, state why the lawyer believes his or her independent judgment will not be affected, and ask the client to make its own determination about whether to continue a relationship with the lawyer [LACBA Formal Opinion No. 471 (1992)]. There may be situations when a client does not have the experience or sophistication to make such a determination.

PRACTICE TIP:

Advice of Independent Counsel. Although *Cal. Rules Prof. Conduct, Rule 3-310* does not require it, such a client may need to be advised to consult independent counsel [LACBA Formal Opinion No. 471 (1992)].

There are likely to be situations when a lawyer's relationship with another party will be so strong that the lawyer should question whether to accept the engagement at all. The lawyer may not undertake the representation if he or she cannot represent the client competently [*see generally Cal. Rules Prof. Conduct, Rule 3-110* and discussion of competent and zealous representation in § 72.270 et seq. through § 72.290 et seq.].

If a lawyer believes in good faith that a relationship with another party or witness will not impair his or her loyalty or exercise of independent judgment, the lawyer should be able to explain the reason for that belief to a client. Given the fact-specific nature of the inquiry, it is not possible to produce a definitive list of factors to consider in determining whether a lawyer can fulfill these basic duties. A list of possible ways of making the determination is provided under § 72.131[2][b][ii].

[ii] Insubstantial Relationships

Cal. Rules Prof. Conduct, Rule 3-310(B)(1) requires disclosure of any legal, business, financial, professional, or personal relationship. It does not specify that the relationship must be close, significant, or substantial. As a result, the rule encompasses relationships that in their nature may not have any effect on the lawyer's loyalty or independent judgment in the particular engagement.

For example, if the lawyer and the party or witness are members of the same club, but are not close and are not in frequent contact, the relationship may not be substantial enough to affect the lawyer's representation of the client. However, the lawyer may need to consider whether the representation would have ramifications within the club that would affect the lawyer. For example, if the lawyer is aggressively pursuing a lawsuit against the member, will other members of the club react in a way that would adversely affect the lawyer's social standing in the club? If the lawyer is not active in the club there might be no effect.

The preceding example illustrates that the analysis involves more than just a determination of whether a relationship is close or significant. It also involves consideration of the role of the party or witness in the matter and the ramifications of the lawyer's involvement in the matter on the relationship.

[iii] Common Interests

Situations in which the interests of the party or witness are consistent with the client's may indicate that the lawyer may be able to adequately represent the client [LACBA Formal Opinion No. 471 (1992)]. However, a client may need to be made aware of the possibility that the interests may become inconsistent, and thus affect the lawyer's loyalty and judgment. The possibility that the lawyer may be required to withdraw in such circumstances and the potential ramifications of a withdrawal should be discussed.

The risk of inconsistent interests arising might be reduced if the third party's role is limited. For example, if the lawyer's relationship is with a witness involved in a minor aspect of the transaction, there may be little risk of an actual conflict arising. In the case of a witness, the risk may also be minimized if the witness is not expected to testify at trial.

[iv] No Effect on Relationship

A lawyer may be able to remain loyal to a client if the lawyer's relationship with the party or witness will not be affected no matter what the outcome of the representation. For example, if the client and the other party are creditors in a bankruptcy proceeding whose interests are adequately secured by separate and unrelated assets, the lawyer's representation of the client may not have any effect on the other party. Similarly, if the other party is a witness whose role is limited, such as a custodian of records, the lawyer's representation of the client may not have any effect on the lawyer's relationship with the witness. The client may need to be advised about the possibility that if circumstances change, the relationship may be affected by the outcome. The potential adverse effect on the representation as a result of a change in circumstances may need to be disclosed.

[v] Adverse Relationships

There may be situations when the lawyer's relationship with the party or witness is already adverse. For example, the lawyer and the party or witness may not like each other, or one may have sued the other. In these situations, the lawyer may be able to show that the interests of the party or witness will not influence the lawyer's loyalty or independent judgment.

In these situations the lawyer must consider and disclose whether his or her feelings about the party or witness will influence his or her judgment for the client. In addition, the lawyer must consider and disclose whether the adversity of the relationship will diminish the lawyer's effectiveness. For example, if the representation involves negotiations with the party, will the lawyer's presence detract from or interfere with the negotiations? The lawyer must be able to explain the potential problems to the client and why the lawyer believes the representation would not be adversely affected.

[vi] Different Lawyers in Same Firm

Cal. Rules Prof. Conduct, Rule 3-310(B) refers to the relationships and interests of a "member." However, the Discussion states that Rule 3-310(B) also applies when the member knows that another partner or associate in the firm

has a relationship or interest covered by the rule. In such situations, the fact that the lawyer involved in the representation does not have the relationship or interest may help demonstrate that the lawyer can adequately represent the client.

In using this approach, the client may need to be apprised about the nature of the relationship between the other lawyer in the firm who has the relationship with the third party or interest in the subject matter and the lawyer handling the representation. For example, is the other lawyer a senior partner or a junior associate? Do the two lawyers work together on other matters or is there little contact between them?

Another factor to consider is the significance of the relationship to the firm. For example, is the third party someone who refers business or provides services to the firm? All of these factors will help elucidate whether the lawyer handling the representation will be able to exercise loyalty and independent judgment for the client. There may be other factors based on the particular circumstances that should be considered as well.

[c] When Relationship Is With Another Client

[i] Disclosing Relationship

When the party or witness with whom the attorney has a relationship is a client, disclosure involves special considerations because of the special duties lawyers owe clients. Disclosure of such relationships will not only be required for clients represented by the particular lawyer, but also for clients of the lawyer's firm, whose identities are disclosed through normal conflicts searches. Under *Cal. Rules Prof. Conduct, Rule 3-310(B)(1)*, disclosure will be required whether or not the other client's interest will be affected by the representation.

The disclosure of the relationship should include facts that will allow the client to determine if the lawyer might tend to favor the other client and how the attorney-client relationship with the other client may otherwise affect the representation. The factors to disclose and discuss may include:

- The length of the relationship with the other client.
- The number of matters handled.
- The volume of billings to the other client (without disclosing any confidences or secrets).
- The potential for future business from the other client.
- The extent to which the lawyer has a personal, social, or other relationship with the other client that goes beyond the attorney-client relationship.

In making this disclosure, a lawyer may not disclose the confidences and secrets of the other client [*see Bus. & Prof. Code § 6068(e)*]. In many cases the foregoing factors will not be confidences or secrets since they are not privileged or embarrassing or detrimental to the other client. However, if under the circumstances the information is confidential or secret, the lawyer may not disclose it. If the lawyer cannot make an adequate disclosure as a result, the lawyer may not accept or continue the representation [*see Cal. Rules Prof. Conduct, Rule 3-310*, Discussion].

[ii] Explaining Effect of Rule 3-310(B)(1) Conflict on Representation

When the lawyer has or may have material confidential information about the client, the possession of that information may substantially affect the representation [*see § 72.131[3][c][ii]*]. Even when material confidential information is not involved, there are likely to be situations when the lawyer's relationship with another client will be so strong that the

lawyer must question whether the engagement should be accepted at all. This situation may be present when the other client has a close and substantial relationship with the lawyer or the lawyer's firm, and the lawyer is personally handling matters for the other client. If the disclosure is adequate, a client should be expected to make an informed decision.

If the nature of the work being performed is different for each client, the lawyer may be better able to exercise independent judgment for both. However, the differing nature of work alone may not be sufficient. For example, consider the situation when the lawyer represents a client in a lawsuit in which B, whom the lawyer represents in an unrelated matter, is an adverse witness. There may still be a risk to A that the lawyer may not be aggressive with respect to B's testimony in the lawsuit because the lawyer now has a relationship with B. The lawyer has to assure A that the representation of B will have no effect on the course of action the lawyer pursues on behalf of A.

In some instances the common interests of the client represented in the matter and the client who is another party or witness in the matter may provide assurance that the lawyer can adequately exercise independent judgment for the client in the representation [LACBA Formal Opinion No. 471 (1992)]. Here again the disclosure may need to address the possibility that circumstances could change and the interests could become inconsistent or adverse.

In law firms, it is often possible that another lawyer will be representing the party or witness in unrelated matters. The fact that another lawyer is representing the witness or party may help to show that independent judgment and loyalty can be exercised on behalf of the client in the matter. However, the other client's consent will be required if the representation is adverse to the other client.

A screening procedure may be a useful tool to demonstrate to the client to whom disclosure is made that the lawyer will be able to represent the client without being affected by the firm's relationship with the other client. The elements of a screen include:

- Restricting the work on the clients' matters to specific lawyers and other personnel who will only work for one of the clients and not the other.

- An agreement by the lawyers and other personnel working for the respective clients not to discuss the engagement with anyone else in the firm (to avoid the risk of indirect disclosure of information).

- Restricting access to the respective clients' files to only those working on the files. A law firm may want to establish a continuing education program and a policy of internal disciplinary sanctions for violations of the foregoing restrictions in order to demonstrate the screen's effectiveness.

Provided that the other client consents, a screen may also serve to protect against disclosures of material confidential information about the other client. However, if the other client does not consent to the screen and the representation is or may be adverse to that client and involves or may involve material confidential information about the other client, the firm runs the risk of disqualification. Moreover, when screening may be available without consent, the requirements for the screen may be more stringent than what would be sufficient with the other client's consent [*see Henriksen v. Great American Savings & Loan (1992) 11 Cal. App. 4th 109, 116 n.6, 14 Cal. Rptr. 2d 184]* .

There are certain situations when screening may not work. For example, screening may not work when the lawyers and other personnel working on the matters are in such close proximity that it would be impossible to assure that the procedure could be implemented. As a result, the proximity of the lawyers and other personnel should be part of the disclosure to the client. Another example when screening may not work is when one client is particularly close or valuable to the organization.

For detailed discussion of the use of screening in the context of *Cal. Rules Prof. Conduct, Rule 3-310(E)*, see *§ 72.113[6][c]*.

[3] Managing Potential Conflicts Under Rule 3-310(B)(2)

[a] Disclosing Past Relationship

Cal. Rules Prof. Conduct, Rule 3-310(B)(2) requires disclosure of a past relationship with a party or witness if the lawyer knows or should know that the previous relationship would substantially affect the current representation [*see § 72.110[3]*]. While some of the same considerations in making disclosure under *Cal. Rules Prof. Conduct, Rule 3-310(B)(1)* apply to disclosure under Rule 3-310(B)(2), the inquiry under the latter rule is focused on the substantial effect on the current representation. The rule does not require that the effect be adverse. Both positive and negative effects must be disclosed.

The factors in disclosing the past relationship may include:

- The nature of the relationship (that is, whether the other party was a client, friend, business associate, relative, or the like).
- The length of the relationship.
- The frequency of the lawyer's contact with the party or witness.
- When the relationship terminated.
- The circumstances of and reasons for its termination.
- The potential for reestablishing the relationship.
- Any significant events that affected the relationship positively or negatively.
- The lawyer's personal feelings toward the party or witness.
- Any other factors that would assist in providing the client with a clear picture of the relationship.

[b] Explaining Effect of Rule 3-310(B)(2) Conflict on Representation

The disclosure to the client should explain the prior relationship's effect on the representation and the reasons why the lawyer believes he or she will be able to adequately represent the client.

A lawyer should seriously question accepting or continuing an engagement in which the lawyer's prior relationship would have a substantial adverse effect on the representation. In these situations it is likely that the lawyer's ability to competently represent the client will be impaired [*see, e.g.*, LACBA Formal Opinion No. 366 (1977)]. A lawyer may not avoid his or her duty to practice competently merely by making disclosure to the client. If a lawyer believes in good faith that he or she will be able to represent the client competently, the lawyer should be able explain the reason for that belief to the client.

In some situations the prior relationship may have a positive effect on the representation. For example, a lawyer's prior relationship may allow the lawyer to deal more effectively with a party or witness. However, the disclosure should address whether the lawyer's loyalty or independent judgment would be affected as a result of the prior relationship. The factors described above in connection with *Cal. Rules Prof. Conduct, Rule 3-310(B)(1)* should be considered here as well.

[c] Special Considerations When Prior Relationship Was With Another Client

[i] Describing Relationship

There are special considerations when the prior relationship was an attorney-client relationship, which apply both to the disclosure of the relationship and to the effect on the representation.

In addition to the factors listed under § 72.131[3][a], in disclosing the relationship, the lawyer should include whether he or she has any interest in or expectation of future business from the former client. A lawyer's independent judgment and loyalty to an existing client may be affected if the lawyer has such an expectation, either because the lawyer does not want to offend the former client or because the lawyer's performance is motivated by factors other than the client's interest. If the lawyer has an interest in or expectation of future business from the former client, the lawyer must address why that interest or expectation will not affect the representation [SDCBA Ethics Opinion No. 1989-4].

As in the case of disclosure under Rule 3-310(B)(1) [*see § 72.131[2]*], the disclosure may not include confidences or secrets of the former client. If the lawyer cannot make an adequate disclosure without disclosing such information, the lawyer may not accept or continue representing the client [*see Bus. & Prof. Code § 6068(e)*].

[ii] Describing Effect of Relationship on Representation

When the lawyer has or may have material confidential information about a former client, the possession of the information may substantially affect a representation. If the representation is adverse to the former client, the lawyer may not accept it without the former client's consent under *Cal. Rules Prof. Conduct, Rule 3-310(E)*. If the representation is not adverse, but could become adverse, or if no confidential information is material at the outset, but such information could become material later, the former client's consent would be required at that time. These factors should be disclosed to the client.

If the former client's consent is required when the disclosure to the existing client is required, the lawyer should disclose that he or she may not be able to accept or continue the representation without the former client's consent. Even if the former client consents, there is often a risk that the former client could attempt to withdraw its consent later. For example, the former client could claim that the disclosure was inadequate or that, due to changed circumstances, the consent is not applicable [*see* LACBA Formal Opinion No. 366 (1977); SDCBA Ethics Opinion No. 1984-2].

Whether such objections are well-founded or not, they are likely to have a substantial effect on the representation. Decisions may be made based on the objection that would not have been made if the objection was not made. Responding to the objection may entail additional cost or delay to the client. If the lawyer is required to withdraw, the client will likely need to retain new counsel, who will not be as familiar with the case, which could adversely affect the client through delay, cost, or tactical disadvantage. All of these factors should be considered as part of the disclosure [*see also* LACBA Formal Opinion No. 366 (1977) (discusses situations when lawyer may be called as witness because of prior attorney-client relationship with adverse witness that could be detrimental to current client)].

If the former client's consent may be required in the future, the possibility that the former client may not give its consent or that the former client might later withdraw its consent should be disclosed and explained as well. A lawyer should also consider disclosing whether concern about avoiding the need to obtain the prior client's consent could affect future decisions in the representation. For example, the lawyer may want to avoid issues that would involve material confidential information or may avoid placing the client in a position adverse to the former client. These may be decisions that would not be made by a lawyer who did not have a prior client relationship with the party or witness. The potential adverse affect on the client should be disclosed.

If a lawyer or firm is using screening to avoid obtaining the former client's consent, the disclosure should discuss the

potential that a court may still disqualify the lawyer or firm or that the lawyer or firm may have to withdraw despite the screen. The adverse affects on the representation related to responding to attempts to have the lawyer or firm withdraw and the adverse affect of the lawyer's withdrawal should be disclosed [*see § 72.131[2][c][ii]*].

[4] Managing Potential Conflicts Under Rule 3-310(B)(3)

[a] Disclosing Relationship

Cal. Rules Prof. Conduct, Rule 3-310(B)(3) requires disclosure when the lawyer has or had a relationship with a person or entity that the lawyer knows or reasonably should know would be affected substantially by a resolution of the matter [*see § 72.110[4]*]. Many of the same considerations affecting disclosure under *Cal. Rules Prof. Conduct, Rules 3-310(B)(1)* and *(2)* apply [*see §§ 72.131[2][a]* and *72.131[3]*]. However, there are some differences between Rule 3-310(B)(3) and Rules 3-310(B)(1) and (2) that affect the disclosure, as discussed below.

[b] Disclosing Effect on Person or Entity

The disclosure should include a description of how the person or entity would be affected substantially by the resolution of the representation. Many representations may have several possible outcomes. In those situations the disclosure may need to discuss how the person or entity would be affected by each possible outcome.

[c] Explaining Effect of Rule 3-310(B)(3) Conflict on Representation

Cal. Rules Prof. Conduct, Rule 3-310(B)(3) addresses relationships that may affect a lawyer's loyalty and exercise of independent judgment. As is the case of situations governed by *Cal. Rules Prof. Conduct, Rules 3-310(B)(1)* and *(2)*, there may be situations when the relationship's effect on the lawyer's loyalty and judgment are such that a lawyer should not accept or continue the representation. On the other hand, there may be some situations in which the lawyer's loyalty or judgment will not be affected, as in the following cases:

(1) *Insubstantial Relationships* : As under Cal. Rules Prof. Conduct, *Rule 3-310(B)(1), Cal. Rules Prof. Conduct*, Rule 3-310(B)(3) does not specify that the relationship must be close, significant, or substantial [*see § 72.131[2][b][ii]*]. As a result, a lawyer may be able to adequately represent the client because the relationship, by its nature, may not have any effect on the lawyer's loyalty and independence.

(2) *Termination of Prior Relationship* : *Cal. Rules Prof. Conduct, Rule 3-310(B)(3)* encompasses both past and present relationships. The fact that a relationship with the person or entity has ended may demonstrate that a lawyer can represent a client loyally. However, if the lawyer has an expectation or desire to reestablish the relationship, the termination of the prior relationship may not be sufficient [SDCBA Ethics Opinion No. 1989-4]. If events took place during the time the lawyer had the relationship that continue to affect the lawyer's objectivity, the termination of the prior relationship again may not be a sufficient consideration alone.

(3) *Common Interests* : As under *Cal. Rules Prof. Conduct, Rule 3-310(B)(1)*, situations when the interests of the person or entity are consistent with the client's may indicate that the lawyer can adequately represent the client [*see § 72.131[2][b][iii]*]. Here again, however, the possibility that the interests may become inconsistent, and thus affect the lawyer's loyalty or judgment, should be disclosed, along with the potential adverse effects to the client.

(4) *No Effect on Relationship* : As under *Cal. Rules Prof. Conduct, Rule 3-310(B)(1)*, a lawyer may be able to adequately represent the client if the lawyer can establish that his or her relationship with the person or entity would not be affected no matter how the matter is resolved [*see § 72.131[2][b][iv]*].

(5) *Adverse Relationships* : As under *Cal. Rules Prof. Conduct, Rule 3-310(B)(1)*, a lawyer may be able to adequately represent the client if the relationship with the person or entity is or was adverse [*see § 72.131[2][b][v]*]. However, if

the lawyer bears hostility toward the person or entity, the resulting effect on the lawyer's independent judgment should be considered and disclosed to the client.

(6) *Different Lawyers in Same Firm* : When another lawyer in the firm has or had a relationship requiring disclosure under *Cal. Rules Prof. Conduct, Rule 3-310(B)(3),* the fact that the lawyer involved in the representation does or did not have the relationship may help demonstrate that the lawyer can adequately represent the client [*see § 72.131[2][b][vi]*].

[5] Managing Potential Conflicts Under 3-310(B)(4)

[a] Describing Lawyer's Interest

Unlike the other three parts of *Rule 3-310(B), Cal. Rules Prof. Conduct,* Rule 3-310(B)(4) does not apply to a lawyer's relationship with other parties, witnesses, persons, or entities. Rule 3-310(B)(4) instead applies to the lawyer's past or present interest in the *subject matter* [*see § 72.110[5]*]. Nevertheless, many of the same factors apply when disclosing a lawyer's past or present legal, business, financial, or professional interest in the subject matter of a representation that apply when disclosing a past or present relationship. The nature, duration, circumstances, and extent of the lawyer's interest are all factors that should be considered in making disclosure. If the interest terminated, the time and circumstances of the termination should be disclosed, as well as whether the lawyer has a desire to or expectation of reacquiring the interest.

[b] Explaining Effect of Rule 3-310(B)(4) Conflict on Representation

The disclosure should include a discussion of how the lawyer's interest may be affected by the outcome of the engagement and how that could affect the lawyer's advice to the client. Here again, a lawyer should not accept or continue a representation if his or her interest in the subject matter would affect the lawyer's ability to represent the client competently. While it is not possible to create a complete list of factors when a lawyer could adequately represent a client, many of the same factors described above are also applicable here. Ultimately the lawyer must be able to explain why the lawyer's loyalty and judgment will not be affected by the interest.

There may be situations when the lawyer's interest is so small that the effect of the representation on the interest would be negligible. For example, if the representation involves a large publicly traded company in which the lawyer owns a small number of shares, the effect of the representation on the lawyer's financial interest may be inconsequential. If the lawyer's interest would not be affected one way or the other by the representation, the lawyer may also be able to demonstrate the ability to adequately represent the client. However, in both examples the lawyer would need to address whether the lawyer's loyalty or judgment would be affected by the fact that he or she has the interest.

As under *Cal. Rules Prof. Conduct, Rule 3-310(B)(3)* [*see § 72.131[4]*], the fact that the lawyer's interest has terminated may demonstrate that the lawyer can adequately represent the client. However, the termination of the prior interest may not be sufficient if the lawyer desires or expects to reacquire the interest [SDCBA Ethics Opinion No. 1989-4]. If events took place while the lawyer held the interest that would affect the lawyer's objectivity, the termination of the interest may not be a suficient consideration alone.

A lawyer may be able to adequately represent the client if the interests or obhectives of the lawyer and the client are the same. However, this factor should be closely scrutinized. The fact that the client is paying for the lawyer's services and the lawyer does not bear the cost of the engagement may be a significant distinction. There could come a point in the representation when cost factors might influence a client to consider discontinuing the lawyer's efforts. The lawyer may need todisclose to the client whether be he or she can exercise independent judgment for the client at that point. Moreover, as in all common interst situations, the lawyer needs to disclose the potential for the client's interests to become inconsistent with lawyer's and the possible effect on the lawyer's loyalty and independent judgment as a result.

When another lawyer in the firm has or had the interest in the subject matter, that fact may demonstrate that the lawyer can adequately represent the client.

California Forms of Pleading and Practice--Annotated

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Chapter 72 ATTORNEY PRACTICE AND ETHICS
PART II. LEGAL BACKGROUND
B. Conflicts Of Interest
6. Managing Rule 3-310 Conflicts

7-72 California Forms of Pleading and Practice--Annotated § 72.132

§ 72.132 Disclosing and Managing Conflicts Under Rule 3-310(C)

[1] Managing Conflicts Under Rule 3-310(C)(1), (2)--General Considerations

Potential and actual conflicts under *Cal. Rules Prof. Conduct, Rule 3-310(C)(1)* and *(2)* [*see § 72.111[2]*] tend to arise in five situations:

- When the clients have conflicting expectations of confidentiality of their respective communications with the lawyer.
- When the clients may give or do actually give the lawyer conflicting instructions.
- When clients are asserting or may assert claims against each other arising out of the subject matter of the representation.
- When the clients have inconsistent interests or objectives in the matter that the lawyer may not or cannot pursue effectively simultaneously.
- When the clients make conflicting demands for the file.

A lawyer should consider the conflicts that arise in these situations in providing disclosure to the clients. A threshold question in considering these issues is the lawyer's ability to exercise loyalty and independent judgment for both clients in the representation. These factors are addressed in the following subsections.

PRACTICE TIP:

Disclosures to Clients. Disclosure of potential conflicts in joint representation should be in writing. When disclosure is being made at the outset for the representation, consider making the disclosure and obtaining the consent as part of the fee agreement with the clients.

[2] Loyalty and Independent Judgment

Before accepting a joint representation of two or more clients, a lawyer should carefully consider whether he or she can represent all of the clients loyally and exercise independent judgment for all of them. Loyalty and independent judgment can be influenced by many factors depending on the circumstances. The basic question is whether the lawyer will tend to favor the interest of one client over another.

One area that should always be considered is when the lawyer has or has had a relationship with one or more of the clients. The issues concerning the lawyer's loyalty and exercise of independent judgment as a result of the relationship are similar to the issues requiring disclosure under *Cal. Rules Prof. Conduct, Rule 3-310(B)* [*see § 72.131[1]*]. The nature and extent of the relationship with the one client should be disclosed to the other clients [LACBA Formal Opinion No. 471 (1992)]. The potential that the relationship would adversely affect the lawyer's ability to represent any of the clients with complete loyalty and independent judgment should be discussed [LACBA Formal Opinion No. 471 (1992)].

There are inherent difficulties in advising a client about consenting to potential conflicting loyalties. Although the clients should be encouraged when possible to make their own assessment, a lawyer should explain why he or she believes the clients can be adequately represented. The clients' common interests in the representation may provide assurance that the lawyer can represent their interests equally [LACBA Formal Opinion No. 471 (1992)].

PRACTICE TIP:

Advice of Independent Counsel. Although *Cal. Rules Prof. Conduct, Rule 3-310* does not require it, it may be prudent to suggest that one or both clients consult with independent counsel before consenting to the joint representation, particularly when the clients lack the experience or sophistication to understand the ramifications of the disclosure [LACBA Formal Opinion No. 471 (1992)].

If, after going through the foregoing analysis, the lawyer determines that he or she cannot remain loyal to or exercise independent judgment for all of the clients in the representation, the lawyer should not accept the joint representation. If the lawyer can fulfill these duties to the clients, then the lawyer should next consider two situations in joint representations--conflicting instructions and conflicting claims or objectives--that tend to produce potential and actual conflicts [*see § 72.132[2][b]* and *[c]*].

[a] Confidential and Secret Information

A lawyer has a duty to maintain client confidences and secrets under *Bus. & Prof. Code § 6068(e)* [*see § 72.33[1]*; *see also § 72.132[2][c]* (regarding confidential information under *Cal. Rules Prof. Conduct, Rule 3-310(E)*)]. At the same time, a lawyer has a duty to inform the clients under *Bus. & Prof. Code § 6068(m)* and *Cal. Rules Prof. Conduct, Rule 3-500* [*see § 72.271[1]*]. Under *Evid. Code § 962*, a jointly represented client may not invoke the attorney-client privilege to prevent disclosure to the other jointly represented client of a communication with the lawyer during the course of the common representation.

The ramifications of the foregoing rules should be explained to the clients [LACBA Formal Opinion No. 471 (1992); *see Cal. Rules Prof. Conduct, Rule 3-310*, Discussion]. When representing more than one client in the same matter, there is a potential conflict when the lawyer learns confidential or secret information about one client that is unknown to the other client. Without an agreement concerning the handling of such information, a lawyer risks an actual conflict arising. There are two options available to handle this situation:

- *Free Disclosure Among Clients* : The clients agree that the lawyer can disclose any information obtained about any one of them to the others. However, the clients should be informed of the risk that

they may not want to be as candid with the lawyer as they would be if separately represented [LACBA Formal Opinion No. 471 (1992)].

- *No Disclosure if Instructed Not to Disclose* : The clients agree that either could require the lawyer not to disclose confidential or secret information to the other. However, the clients should be informed that this could result in a situation when one client may not learn information that client might want or need to know.

Both alternatives offer the possibility that the lawyer cannot adequately represent the clients if they interfere with the free flow of significant information between lawyer and client [*see City & County of S. F. v. Superior Court (1951) 37 Cal. 2d 227, 235, 231 P.2d 26* ("adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his attorney. Unless he makes known to the lawyer all the facts, the advice that follows will be useless, if not misleading.")]. When that occurs, neither alternative is acceptable [LACBA Formal Opinion No. 471 (1992)].

In those situations, the lawyer might consider advising the clients that the lawyer will have to withdraw in the event that the lawyer receives confidences or secrets about one client that the lawyer would have a duty to disclose but that the lawyer cannot disclose to the other client. However, this approach is not likely to work well. By withdrawing, the lawyer will likely highlight the existence of the very information one of the clients is trying to keep secret. This approach also presents the same risks with respect to lack of candor that the two approaches described above present.

PRACTICE TIP:

Advice of Independent Counsel. Although not required by *Cal. Rules Prof. Conduct, Rule 3-310,* consider advising the clients to seek the advice of independent counsel before consenting to the joint representation if it is likely that one or both clients have confidences or secrets that could affect the joint representation.

[b] Conflicting Instructions

Clients with conflicting interests or objectives may engage a lawyer for a common purpose without an actual conflict arising. For example, several property owners may hire a lawyer to obtain a land use entitlement from a city or county, like a zone change. They may have conflicting reasons for seeking the entitlement, yet they are united for a common purpose. In this situation only a potential conflict exists.

An actual conflict arises when the lawyer receives conflicting instructions. For example one client instructs the lawyer to do something that another instructs the lawyer not to do. The lawyer is placed in a situation in which he or she cannot fulfill the duty to follow one client's instruction without concurrently violating that duty to the other. In that situation, the lawyer would be required to withdraw [*see Cal. Rules Prof. Conduct, Rule 3-700(B)(2)*]. The potential for this to occur should be disclosed to the clients [LACBA Formal Opinion No. 471 (1992)].

For the lawyer to continue representing the clients, the clients must resolve their conflict and decide on a common instruction that the lawyer can follow [LACBA Formal Opinion No. 471 (1992)]. While *Cal. Rules Prof. Conduct, Rule 3-310(C)(2)* requires informed written consent when an actual conflict arises, it is not clear that the consent is required when the clients resolve the conflict among themselves without the lawyer's involvement, although written consent is required for the potential conflict under *Cal. Rules Prof. Conduct, Rule 3-310(C)(1)*.

PRACTICE TIP:

Written Confirmation of Conflict Resolution. Whether required by the rule or not, it is nevertheless prudent to confirm the resolution of the conflict with the clients in writing.

[c] Conflicting Claims or Objectives

[i] In General

Representing opposing sides in a lawsuit is a conflict that cannot be waived [*see Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 898, 142 Cal. Rptr. 509* , and discussion in *§ 72.71[2]*]. Even without a lawsuit, when a lawyer owes a duty of loyalty to two clients, it is impossible for him or her to advise either one about a disputed claim between them [*Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd. (1993) 12 Cal. App. 4th 74, 95-96, 15 Cal. Rptr. 2d 585]* . A lawyer cannot possibly exercise independent judgment on behalf of both and will inevitably face conflicting instructions [*see Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd. (1993) 12 Cal. App. 4th 74, 96, 15 Cal. Rptr. 2d 585* (an attorney representing clients with conflicting interests may be tempted to favor the interests of one over the other)].

If the clients are asserting conflicting claims or are pursuing incompatible objectives at the outset of the engagement, the lawyer has an actual conflict requiring disclosure and consent under *Cal. Rules Prof. Conduct, Rule 3-310(C)(2)*. If only the potential for a conflict exists, disclosure and consent are required under *Cal. Rules Prof. Conduct, Rule 3-310(C)(1)*. In either case, certain factors should be considered in providing disclosure to the client, as discussed below.

[ii] Disclosure of Potential That Lawyer Must Withdraw

If an actual conflict arises and the clients do not consent to the lawyer's continued representation, the lawyer may be required to withdraw [*see Cal. Rules Prof. Conduct, Rule 3-700(B)*]. The clients should be advised of this potential at the outset of the engagement [*see* LACBA Formal Opinion No. 471 (1992)]. The withdrawal of counsel can have severe consequences to the clients, particularly when the engagement is in an advanced stage and considerable time and money have been spent. Such consequences include the cost of retaining new counsel who may not be as familiar with the case as the withdrawing lawyer and who may not have as much time as the withdrawing lawyer had to become familiar with the case. The clients should be advised of the possible consequences and the need on their part to avoid putting the lawyer in a conflict situation if they want to continue being jointly represented [*see* LACBA Formal Opinion No. 471 (1992)].

[iii] Representing Both Clients for Common Purpose

Clients who are asserting claims against each other or who have conflicting interests may nevertheless want to hire a lawyer to pursue a common objective that involves facts relating to each client's claim. For example, a lawyer may be hired to pursue a claim against an insurer for coverage of the clients' loss. While the clients may be asserting claims against each other in connection with the loss, if informed consent is given, the lawyer may be able to represent the common interests of both clients against the insurer [*see, e.g.* LACBA Formal Opinion No. 471 (1992)].

To reduce the risk of an actual conflict arising, advice about the clients' claims against each other should be excluded from the engagement in potential conflict situations. The clients should be advised not to consult the lawyer about possible claims against each other, and, in turn, the lawyer should refrain from giving such advice. In actual conflict situations, because the lawyer may not simultaneously pursue each client's claim against the other, the lawyer should also consider refraining from advising both sides about their claims [*see* LACBA Formal Opinion No. 471 (1992)].

PRACTICE TIP:

Advice of Independent Counsel. Although not required by *Cal. Rules Prof. Conduct, Rule 3-310*, in either situation a lawyer should consider recommending that the clients seek independent advice to protect their interests [*see* LACBA Formal Opinion No. 471 (1992)].

May the clients consent to the lawyer advising one of the clients about its claims and not the other? In certain circumstances the answer may be "yes" [*see* LACBA Formal Opinion No. 471 (1992)]. While providing advice is likely

to produce an actual conflict, the arrangement does not have the problems inherent in advising both sides. However, the client who is not being advised must be informed about whether the lawyer can exercise independent judgment on behalf of that client in connection with the common engagement in light of the advice being given to the other client [*see* LACBA Formal Opinion No. 471 (1992)]. For example, the client not being advised should be informed about the likelihood that the lawyer would pursue a result in the common engagement that would be more favorable to the other client's claim in light of the fact that the lawyer is advising the other client about its claim [*see* LACBA Formal Opinion No. 471 (1992)].

The lawyer may want to suggest that the client the lawyer is not advising engage separate counsel. Care should also be taken to make clear whether the advice being given to the one client about its claims may be disclosed to the other [LACBA Formal Opinion No. 471 (1992)].

[iv] Agreement to Toll Statute of Limitations

If the clients have decided not to pursue their respective claims presently, an agreement tolling the applicable statutes of limitation may be in order [*see Code Civ. Proc. § 360.5*, discussed in Ch. 345, *Limitation of Actions*]. The advantage of this approach is that the clients will not be compelled to pursue their claims to avoid the running of the statute of limitations. It also helps avoid situations in which the lawyer may have a duty to advise the clients in the course of the engagement about the running of the statutes.

A possible problem is that it may not be to the clients' mutual advantage to toll the statute (for example in situations in which one client's statute has already run or is about to run). As a result, the lawyer should advise both clients to seek the advice of independent counsel. If the clients do not want to consult independent counsel, the lawyer should consider suggesting that it may not be to each client's advantage to toll the statutes, while at the same time informing the clients that the lawyer is not in a position to give substantive advice about the claims.

PRACTICE TIP:

Written Confirmation. It is advisable to confirm in writing the clients' decision not to consult separate counsel as well as the advice *above*.

[v] Continuing to Represent One Client in Event of Withdrawal

In some instances an existing client may want the lawyer to represent it and someone else jointly. However, the existing client may want the lawyer to continue representing it in the event that an actual conflict requires the lawyer to withdraw from representing both clients jointly.

For example, an employer client asks the lawyer to represent it and an employee as defendants in a lawsuit. However, the employer also wants the lawyer to continue representing it in the event that an actual conflict arises. An actual conflict would arise if the lawyer receives conflicting instructions from the employer and employee or if the employer wants to assert a claim against the employee. May the lawyer obtain the employee's informed consent to such an arrangement? Such agreements are not *per se* invalid provided that the lawyer can represent both clients competent1y [LACBA Formal Opinion No. 471 (1992); *see also Maxwell v. Superior Court (1982) 30 Cal. 3d 606, 612-615, 180 Cal. Rptr. 177, 639 P.2d 248 , overruled in part, 45 Cal. 4th 390 (2009)* ; *Cornish v. Superior Court (1989) 209 Cal. App. 3d 467, 474-479, 257 Cal. Rptr. 383* ; State Bar Formal Opinion No. 1989-115 (waiver of client's right to disqualify counsel if any actual conflict arises)]. Much depends on the facts at the time the actual conflict arises, and whether the client's consent was truly informed in the sense that the client understands the significance of the risks involved with the arrangement [LACBA Formal Opinion No. 471 (1992)].

For detailed discussion of procedures for withdrawal, see *§ 72.370* et seq.

[vi] Required Disclosures for Agreement Regarding Future Withdrawal

LACBA Formal Opinion No. 471 (1992) provides a detailed analysis of the disclosure required for this kind of agreement. A lawyer considering entering into such an agreement with a client should thoroughly review Formal Opinion 471 before doing so. In general, the disclosure should cover five areas:

- The potential conflicts and the possibility of withdrawal if a conflict actually arises.
- The handling and use of confidential information during and after the representation.
- Issues affecting loyalty and independent judgment.
- The effect of the lawyer's withdrawal.
- The handling of advice to the clients about their possible conflicting claims.

When the clients are an employer and employee, the disclosure should include a discussion of the employee's right to separate counsel under the Labor Code. The disclosure should also include what rights the employer may have against the employee for contribution or reimbursement of defense costs [LACBA Formal Opinion No. 471 (1992); *see, e.g., Corp. Code § 317* (limiting corporation's authority to indemnify employee, and allowing corporate employer to advance employee's defense costs on receipt of employee's undertaking to repay corporation if it is determined employee is not entitled to indemnification)].

As detailed in Formal Opinion No. 471, the disclosure of potential conflicts requires the lawyer to discuss the possibility that one of the clients (for example, the employer) may assert a claim against the other (the employee), the circumstances under which that may occur, and what would happen in that event. The disclosure should also cover the possibility that the law firm may be required to withdraw if it receives conflicting instructions from the clients.

The use of confidential and secret information against the now-former client (the employee) is also an important issue. The employee must be advised at the outset of the representation that information obtained by the lawyer while representing the employee may be used against him or her for any purpose in the course of the lawyer's continuing representation of the employer [LACBA Formal Opinion No. 471 (1992); *see* State Bar Formal Opinion No. 1989-115]. If the employer and employee have already agreed to the unrestricted disclosure of each party's confidences and secrets, it is possible that the employee has taken no greater risk regarding the use of confidences and secrets by agreeing to allow the lawyer to continue to represent the employer than he or she took by agreeing to free disclosure in the first place. The possible chilling effect on the employee's willingness to be candid with the lawyer [*see § 72.132[2][a]*] should be disclosed to the clients.

The arrangement also creates a possible situation in which the lawyer in whom the employee has reposed trust and confidence suddenly becomes an adversary. The employee should be made aware of this possibility. In addition, the employee should be made aware that in the event the lawyer withdraws from representing the employee, the employee will likely need to retain his or her own counsel who probably will not be as familiar with facts as the withdrawing lawyer, which could adversely affect his or her case as well [*see* LACBA Formal Opinion No. 471 (1992)].

The fact that the employer has requested the arrangement may also be a factor in the employee's assessment of the lawyer's potential loyalty to him or her.

PRACTICE TIP:

Advice of Independent Counsel. Although not required by *Cal. Rules Prof. Conduct, Rule 3-310*, consider advising the employee to consult with independent counsel, particularly if the employee lacks the sophistication to understand the potential consequences [LACBA Formal Opinion No. 471 (1992)].

If the employer is paying for the employee's defense in the lawsuit, the employee's consent must also be obtained under *Cal. Rules Prof. Conduct, Rule 3-310(F)* [*see § 72.135*].

[vii] Disqualification by Court Despite Agreement

The employer should be advised that even if all of these measures are taken, there is a risk that the lawyer may still be precluded from continuing to represent the employer by a court or in the event that an issue arises that was not within the scope of the employee's consent. In a litigated matter, the court retains the right to disqualify counsel despite the agreement if enforcing the agreement would seriously compromise the integrity of the judicial process or fairness in a particular proceeding [*Code Civ. Proc. § 128(a)(5)*; *Forrest v. Baeza (1997) 58 Cal. App. 4th 65, 73-76, 67 Cal. Rptr. 2d 857* ; *Elliott v. McFarland Unified School Dist. (1985) 165 Cal. App. 3d 562, 567, 211 Cal. Rptr. 802* ; *see* LACBA Formal Opinion No. 471 (1992); State Bar Formal Opinion No. 1989-115].

To effectively implement this arrangement, the lawyer should be alert for the earliest signs of the need to withdraw, and then withdraw from representing the employee as early as possible in order to reduce the possible prejudice to both clients [*see Cal. Rules Prof. Conduct, Rule 3-700*].

[d] Disposition of File

With limited exceptions, a lawyer's file in the representation of a client belongs to the client. During or at the conclusion of the representation, a client may request custody of the file. A lawyer is obligated to honor that request [State Bar Formal Opinion No. 1994-134]. For discussion of the duty to return a client's file and other property, see *§ 72.370* et seq.

The obvious problem in a joint representation is that a lawyer cannot honor demands to deliver the original file to all of the clients. This may become a particularly thorny problem if the lawyer withdraws from the representation and the clients each retain separate counsel.

To address this concern, the lawyer should establish who receives the original file at the outset of the representation. One option is for the clients to agree that the lawyer retains the original file until the lawyer receives a common set of instructions from all of the clients to deliver the file to someone else. The clients should be entitled to receive a copy of the file and must be afforded the ability to inspect the original file in the lawyer's possession as needed. A lawyer cannot withhold the copy until the copying charge is paid [*see* State Bar Formal Opinion No. 1994-134]. A second option is for the clients to agree that one of them will have the right to retain the original file and will afford the others access as necessary. Here again the other clients should receive a copy of the file if they so request or as necessary to avoid prejudice to their interests.

In either case, the lawyer should advise the clients of each client's right to the file and the conflict that will arise if they each make a demand for the original file.

[3] Managing Conflicts Under Rule 3-310(C)(3)

Read literally, Rule 3-310(C)(3) requires informed written consent when a lawyer accepts as a client a party who is adverse to a client represented by the lawyer in another matter. However, the rule may also apply whenever a lawyer is representing one client against another client [*see § 72.111[4]*].

ILLUSTRATION:

Informed Consent Under Rule 3-310(C)(3). A lawyer represents client A in connection with A's pursuit of a property tax refund on certain real property. The lawyer also represents client B, a car dealership, on unrelated matters. B asks the lawyer to sue A for payment for repair of A's car. If the

lawyer or the firm has confidential information about client A that is material to the prosecution of client B's claim, A's informed written consent under *Cal. Rules Prof. Conduct, Rule 3-310(E)* is required [*see §§ 72.113* and *72.135*]. Whether the lawyer has such information or not, A should be advised in writing not to discuss the matter with the lawyer or seek advice from the lawyer about the claim. Indeed, if A is represented by counsel in the lawsuit, the lawyer has a duty under *Cal. Rules Prof. Conduct, Rule 2-100* not to have such communications. If A is not represented by counsel, the lawyer may have to communicate with him about the claim. Care should be taken to make sure A understands the lawyer's separate roles as A's counsel in the tax refund matter and as B's lawyer in the lawsuit. Although *Cal. Rules Prof. Conduct, Rule 3-310(C)* does not require it, prudence suggests that A be advised to seek independent counsel before consenting to the lawyer's representation of B.

The issues concerning the lawyer's loyalty and exercise of independent judgment in this situation are similar to the issues in the conflict situations requiring disclosure under *Cal. Rules Prof. Conduct, Rule 3-310(B)* [*see § 72.131*]. The basic concerns are:

- Whether the lawyer's relationship with A will adversely affect the lawyer's ability to adequately represent B in the lawsuit against A.

- Whether the lawyer's representation of B in the lawsuit against A will adversely affect the lawyer's representation of A in connection with the refund.

The disclosure to B should include a discussion of the lawyer's relationship with A. In explaining the effect of the relationship with A on the lawyer's independent judgment, the differing nature of the engagements may be a factor. If different lawyers in the same firm are handling the engagements, that fact along with the use of a screening procedure may help show that independent judgment can be exercised on behalf of both.

The disclosure to A should allow A to consider whether he or she would be comfortable having the lawyer in an adversarial position. Client A may find that he or she is less willing to be candid with the lawyer as a result of the adversarial relationship. The representation of B could also interfere with the sense of trust A reposes in the lawyer. All of these factors could interfere with the lawyer's ability to adequately represent A.

The differing nature of the engagements or the use of different lawyers in the same firm along with a screening procedure might reduce A's concerns [*see § 72.113[6][c]*]. For example, if the work performed for A is completely different from the issue the lawyer is handling for B, and the lawyer's contact with A is limited, A's concerns might be satisfied. The same might be true if a different lawyer in the firm is representing B and A is satisfied that an effective screen is in place.

In any event, after full disclosure A and B need to make their own determinations.

PRACTICE TIP:

Advice of Independent Counsel. Although not required by *Cal. Rules Prof. Conduct, Rule 3-310,* it may be appropriate to suggest that either or both parties consult independent counsel before making their decision.

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7-72 California Forms of Pleading and Practice--Annotated § 72.133

§ 72.133 Disclosing and Managing Conflicts Under Rule 3-310(D)

Cal. Rules Prof. Conduct, Rule 3-310(D), requiring a lawyer to obtain written consent from clients prior to entering into an aggregate settlement, was adopted in 1989 [*see § 72.112*]. It has not been addressed by any court or California ethics opinion. In this vacuum, the following approaches are suggested:

- *Disclosure of Settlement Terms* : This duty already exists under *Cal. Rules Prof. Conduct, Rule 3-500* and *Bus. & Prof. Code § 6068(m)*, as well as *Cal. Rules Prof. Conduct, Rule 3-510*, which requires disclosure of written settlement offers. The disclosure might include each party's role in effecting the settlement.

- *Disclosure of Merits of Clients' Respective Cases* : Depending on the facts, the clients may need to understand the merits of their case. For example, if the clients are to pay equal amounts to settle a claim, it may be necessary for them to consider whether their potential liability is equal.

- *Disclosure of Possible Non-Monetary Implications* : The clients may need to know whether the settlement will affect their rights against others or the rights of others against them.

- *Loyalty and Exercise of Independent Judgment* : It may be necessary to readdress issues of loyalty and exercise of independent judgment that were part of the clients' original consent under *Cal. Rules Prof. Conduct, Rule 3-310(C)*.

- *Advice of Independent Counsel* : There may be situations in which the lawyer may not be able to adequately advise the clients about the settlement. For example, if the clients have claims against each other, the lawyer may not be in a position to advise them about how the settlement may affect those claims. In this situation, it may be necessary to suggest to the clients that they seek the advice of independent counsel.

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§ 72.134 Disclosing and Managing Conflicts Under Rule 3-310(E)

Cal. Rules Prof. Conduct, Rule 3-310(E) conflicts arise when a lawyer, while representing a current or former client, has obtained confidential information that is material to an engagement on behalf of another client. The rule requires informed written consent by the client to whom the information pertains [*see § 72.113[1]*].

Disclosure to the present or former client is a relatively straightforward proposition. The client should be informed about:

- The facts and circumstances about the lawyer's current employment (to the extent permitted by the lawyer's duty to maintain confidences and secrets).
- The confidential information the lawyer acquired that is material to the current employment.
- How the information could be used in the current employment.
- The potential adverse consequences to the client as a result of the information's use [*see* SDCBA Ethics Opinion No. 1984-2].

The writing can be several writings cobbled together to constitute a waiver [*see, e.g., UMG Recordings, Inc. v. MySpace, Inc. (C.D. Cal. 2007) 526 F. Supp. 2d 1046, 1052*].

When the information would be used against the client, it is doubtful in many instances that a client would give its consent when the adverse consequences have been disclosed. However, in situations in which the information was disclosed to a lawyer in the firm who is not involved in the current employment and who has not disclosed the information to others in the firm, the client might agree to a screening procedure that would assure that the information would not be used in the current engagement.

It is not a defense to a claim under *Cal. Rules Prof. Conduct, Rule 3-310(E)* that the attorney's actions were protected activity under *Code Civ. Proc. § 425.16*, the anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) statute [*United States Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton (2009) 171 Cal. App. 4th 1617, 1625-1629, 90 Cal. Rptr. 3d 669*].

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§ 72.135 Disclosing and Managing Conflicts Under Rule 3-310(F)

Cal. Rules Prof. Conduct, Rule 3-310(F) requires a client's informed written consent whenever someone other than the client is compensating the lawyer. It also requires that the lawyer not accept the compensation unless there is no interference with the attorney-client relationship or the lawyer's independent judgment and the client's confidences and secrets are maintained. The kind of disclosure to be given will depend on whether or not the person compensating the lawyer is also a client in the matter [*see § 72.114[1]*].

In situations in which the person compensating the lawyer is not a client in the matter, disclosure to the client involves informing the client of the manner of compensation and a discussion of whether the lawyer's loyalty and independent judgment would be affected by that manner of compensation. In situations in which the party compensating the lawyer is an indemnitor, that party may be substantially affected by a resolution of the matter. As a result, in many instances the disclosure should be the same as disclosure under *Cal. Rules Prof. Conduct, Rule 3-310(B)(3)* [*see § 72.131[4]*].

Although it is not specifically required under the rule, it may be prudent to confirm the requirements of *Cal. Rules Prof. Conduct, Rule 3-310(F)* in writing to the party compensating the lawyer and obtain the party's agreement to those terms. The lawyer should confirm that the party may not interfere with the representation or the lawyer's judgment and that the lawyer may not disclose to that party communications with the client or information that constitutes a client secret.

In situations in which the person compensating the lawyer is jointly represented with the nonpaying client in the matter, disclosure and consent of both clients will likely be required under *Cal. Rules Prof. Conduct, Rule 3-310(C)* [LACBA Formal Opinion No. 471 (1992); *see § 72.132*]. The only additional requirement imposed under *Cal. Rules Prof. Conduct, Rule 3-310(F)* is disclosure of the manner of compensation to the nonpaying client, and a discussion of whether the lawyer's independent judgment would be affected as a result of that manner of compensation [LACBA Formal Opinion No. 471 (1992)].

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7-72 California Forms of Pleading and Practice--Annotated §§ 72.136-72.149

[Reserved]

§§ 72.136[Reserved]

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7-72 California Forms of Pleading and Practice--Annotated § 72.150

§ 72.150 Duty to Avoid Representation if Close Relationship With Other Party's Lawyer

[1] Overview of Rule 3-320

Unless the member informs the client in writing of the relationship, a State Bar member must not represent a client in a matter in which another party's lawyer is one of the following [*Cal. Rules Prof. Conduct, Rule 3-320*]:

- A spouse, parent, child, or sibling of the member.
- A person living with the member.
- A client of the member.
- A person having an intimate personal relationship with the member.

Rule 3-320 was first adopted in 1989. It has no direct predecessor in the Rules of Professional Conduct in effect before 1989. However, one court interpreted former Rule 5-102(A) to have a similar effect on a lawyer's relationship with opposing counsel [*Stanley v. Richmond (1995) 35 Cal. App. 4th 1070, 41 Cal. Rptr. 2d 768]* . In *Stanley*, the court considered a situation which occurred prior to *Cal. Rules Prof. Conduct, Rule 2-100*, and gave former Rule 5-102(A) a similar effect. The client's lawyer in an ongoing family law matter, and the opposing counsel in that same matter, decided to open a law office together. It was held that this decision gave the lawyer a relationship with the adverse party, which "flowed through" opposing counsel, under former Rule 5-102(A). The court found that the lawyer did not adequately disclose the situation and the possible conflict to the client [*Stanley v. Richmond (1995) 35 Cal. App. 4th 1070, 1083-1084, 41 Cal. Rptr. 2d 768]* .

[2] When Other Party's Lawyer Is Client

Cal. Rules Prof. Conduct, Rule 3-320 applies when the other party's lawyer is a client of the member. The rule certainly applies when the member represents the other party's lawyer in another lawsuit or transaction. The rule and its

Discussion are silent, however, about whether consent is required when the member represents the law firm representing the other party. Given the specific reference to another party's "lawyer" and the limitation in the Discussion [*see § 72.150[3]*], apparently the rule would not apply unless the other party's lawyer is involved in the member's representation of the firm.

One ethics committee has concluded that the rule does not apply when the member is retained by the other party's lawyer as an expert witness in another matter [SDCBA Ethics Opinion No. 1989-4]. Such a relationship, however, may give the lawyer an interest in the representation that would require disclosure.

Cal. Rules Prof. Conduct, Rule 3-320 as written does not apply when the member is a client of the other party's lawyer. Nevertheless, disclosure of the relationship may still be required if it is a significant development in the representation under *Cal. Rules Prof. Conduct, Rule 3-500* and *Bus. & Prof. Code § 6068(m)*.

[3] Intimate Personal or Family Relationship

Cal. Rules Prof. Conduct, Rule 3-320 does not define the term "intimate personal relationship." It apparently includes both sexual and social relationships. *People v. Jackson (1985) 167 Cal. App. 3d 829, 213 Cal. Rptr. 521* , arose in the criminal context, but still may provide some guidance in this area. In that case a conviction was reversed because the counsel appointed to represent a criminal defendant was involved in a sustained "dating" relationship with the prosecutor during the criminal proceedings and the defendant was not informed of this relationship. The sustained "dating" relationship consisted of meetings on a "regular basis" for movies and dinner dates. The two were never engaged to each other nor did they ever live together [*see People v. Jackson (1985) 167 Cal. App. 3d 829, 831-834, 213 Cal. Rptr. 521]* . Given the court's rationale and the underlying purpose of the rule, it is likely that a relationship like the one in *People v. Jackson* is within the scope of Rule 3-320.

Rule 3-320 is not intended to apply when the member has a relationship with a lawyer who is a partner or associate in the same law firm as the adverse party's counsel, and has no direct involvement in the matter [*Cal. Rules Prof. Conduct, Rule 3-320*, Discussion; *see also* State Bar Formal Opinion No. 1984-83 (when one spouse, district attorney, is not representing State against client of other spouse, public defender, no disclosure or consent is required); SDCBA Ethics Opinion No. 1976-12 (husband and wife not practicing together)].

[4] Written Disclosure to Client

Unlike *Cal. Rules Prof. Conduct, Rules 3-300* and *3-310*, which require written consent, *Cal. Rules Prof. Conduct, Rule 3-320* only requires the attorney to inform the client in writing of the relationship. Consent is not required.

While Rule 3-320 speaks of informing the client of the "relationship," the attorney should also inform the client of how the relationship could adversely affect the representation, including the effect on the lawyer's ability to exercise independent judgment on the client's behalf [SDCBA Ethics Opinion No. 1976-12]. It is advisable to include the substance of this disclosure in the writing disclosing the relationship. If the relationship has a significant effect on the representation, disclosure of that effect may be required under *Cal. Rules Prof. Conduct, Rule 3-500* and *Bus. & Prof. Code § 6068(m)*. As with other conflicts of interest, the lawyer may not represent the client if the relationship with the other party's lawyer would interfere with the competent representation of the client [SDCBA Ethics Opinion No. 1976-12].

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7-72 California Forms of Pleading and Practice--Annotated §§ 72.151-72.169

[Reserved]

§§ 72.151[Reserved]

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7-72 California Forms of Pleading and Practice--Annotated § 72.170

§ 72.170 Potential Breach of Ethical and Fiduciary Duties

Sexual relations with a client can put a lawyer in a position of violating a number of ethical duties, including [State Bar Formal Opinion No. 1987-92]:

- Interference with the duty to practice competently [*see Cal. Rules Prof. Conduct, Rule 3-110*].
- Conflicts resulting from an interest in the subject matter of the employment [*see Cal. Rules Prof. Conduct, Rule 3-310(B)(4)*].
- Interference with the lawyer's duty to maintain confidences and secrets [*see Bus. & Prof. Code § 6068(e)*].
- Interference with the client's ability to exercise judgment in connection with the representation.
- Interference with the lawyer's ability to exercise independent judgment.
- Undue influence.

Sexual relations with a client may also cause a lawyer to breach fiduciary duties to a client. In *Barbara A. v. John G.*, the plaintiff suffered an ectopic pregnancy and was forced to undergo surgery that left her sterile. The plaintiff sued her former lawyer who impregnated her. The complaint alleged that the attorney-client relationship had produced a sense of trust in the plaintiff. The appellate court held that the scope of the lawyer's fiduciary duty to the plaintiff was not limited to actions involving financial claims, and included physical damage resulting from a violation of the duties [*Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 383, 193 Cal. Rptr. 422]* .

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7-72 California Forms of Pleading and Practice--Annotated § 72.171

§ 72.171 Prohibition Under Ethical Rule

California's rule of professional conduct concerning sexual relations with a client became operative September 14, 1992. The rule is intended to prohibit sexual exploitation by a lawyer in the course of a professional representation [*Cal. Rules Prof. Conduct, Rule 3-120*, Discussion].

Cal. Rules Prof. Conduct, Rule 3-120 states that a State Bar member must not do any of the following [*Cal. Rules Prof. Conduct, Rule 3-120(B)*]:

- Require or demand sexual relations with a client incident to or as a condition of any professional representation.

- Employ coercion, intimidation, or undue influence in entering into sexual relations with a client.

- Continue representation of a client with whom the member has sexual relations if the sexual relations cause the member to perform legal services incompetently in violation of *Cal. Rules Prof. Conduct, Rule 3-110*.

For purposes of Rule 3-120, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse [*Cal. Rules Prof. Conduct, Rule 3-120(A)*].

Rule 3-120 does not apply to [*Cal. Rules Prof. Conduct, Rule 3-120(C)*]:

- Sexual relations between attorneys and their spouses.

- Ongoing consensual sexual relationships that predate the initiation of the attorney-client relationship.

Although Rule 3-120 does not apply to these types of clients, their exclusion does not preclude the applicability of other

disciplinary rules to the representations, such as the lawyer's duty to practice competently under *Cal. Rules Prof. Conduct, Rule 3-110* [*Cal. Rules Prof. Conduct, Rule 3-120*, Discussion].

If a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm are not subject to discipline under Rule 3-120 solely because of that sexual relationship [*Cal. Rules Prof. Conduct, Rule 3-120(D)*].

For purposes of Rule 3-120, if the client is an organization, any individual overseeing the representation is be deemed to be the client [*Cal. Rules Prof. Conduct, Rule 3-120*, Discussion].

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7-72 California Forms of Pleading and Practice--Annotated § 72.172

§ 72.172 Statutory Prohibition

In 1992, the California Legislature added *Bus. & Prof. Code § 6106.9* to the State Bar Act. Section 6106.9 provides that the following conduct constitutes cause for attorney discipline under the Act [*Bus. & Prof. Code § 6106.9(a)*]:

- Expressly or impliedly conditioning the performance of legal services for a current or prospective client on the client's willingness to engage in sexual relations with the attorney.

- Employing coercion, intimidation, or undue influence in entering into sexual relations with a client.

- Continuing representation of a client with whom the attorney has sexual relations if either of the following is true:

  - The sexual relations cause the attorney to perform legal services incompetently in violation of *Cal. Rules Prof. Conduct, Rule 3-110*.

  - The sexual relations would, or would be likely to, damage or prejudice the client's case.

Any complaint made to the State Bar alleging a violation of the statute must be verified under oath by the person making the complaint [*Bus. & Prof. Code § 6106.9(e)*].

For purposes of *Bus. & Prof. Code § 6106.9*, "sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse [*Bus. & Prof. Code § 6106.9(d)*].

Section 6106.9 does not apply to [*Bus. & Prof. Code § 6106.9(b)*]:

- Sexual relations between attorneys and their spouses or persons in an equivalent domestic

relationship.

- Ongoing consensual sexual relationships that predate the initiation of the attorney-client relationship.

If a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm are not subject to discipline under *Bus. & Prof. Code § 6106.9* solely because of the occurrence of the sexual relations [*Bus. & Prof. Code § 6106.9(c)*].

Bus. & Prof. Code § 6106.9, to a great extent, tracks the language of Rule 3-120 [*compare Bus. & Prof. Code § 6106.9 with Cal. Rules Prof. Conduct, Rule 3-120*]. The key differences are:

- Section 6106.9 requires a complaining party to lodge a verified complaint [*see Bus. & Prof. Code § 6106.9(e)*].

- Section 6106.9 explicitly covers relationships with "prospective" clients, while Rule 3-120 does not [*see Bus. & Prof. Code § 6106.9(a)(1)*; *Cal. Rules Prof. Conduct, Rule 3-120(A)(1)*].

- Section 6106.9 provides an explicit exception for relationships with nonspousal domestic partners, not found in Rule 3-120 [*see Bus. & Prof. Code § 6106.9(b)*; *Cal. Rules Prof. Conduct, Rule 3-120(C)*].

An attorney may be subject to discipline, including disbarment or suspension, for violating Rule 3-120, Section 6106.9, or both [*see Bus. & Prof. Code § 6106.9(a)*; *Cal. Rules Prof. Conduct, Rule 1-100* (willful breach of rule of professional conduct is cause for attorney discipline); *see also Bus. & Prof. Code § 6103* (any violation of attorney's duties constitutes cause for disbarment or suspension)].

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7-72 California Forms of Pleading and Practice--Annotated §§ 72.173-72.189

[Reserved]

§§ 72.173[Reserved]

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C. Creation And Scope Of Attorney-Client Relationship
1. Drafting The Representation Agreement And Fee Arrangements

7-72 California Forms of Pleading and Practice--Annotated § 72.190

§ 72.190 Creation of Attorney-Client Relationship

[1] By Contract

With the exception of a court appointment, the relationship of attorney and client generally is created by contract [*Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 181, 98 Cal. Rptr. 837, 491 P.2d 421* ; *Kim v. Orellana (1983) 145 Cal. App. 3d 1024, 1028, 193 Cal. Rptr. 827* ; *but see § 72.190[2]*]. The contract may be express or implied, and the general rules of agency apply [*Houston Gen. Ins. Co. v. Superior Court (1980) 108 Cal. App. 3d 958, 964, 166 Cal. Rptr. 904* ; *see also Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology, Inc. (1999) 69 Cal. App. 4th 1399, 1404, 82 Cal. Rptr. 2d 326* ; *American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 590-591, 113 Cal. Rptr. 561* ; *Fidelity & Casualty Co. v. Abraham (1945) 70 Cal. App. 2d 776, 783, 161 P.2d 689* and discussion in *§ 72.220*)].

Under agency law, it is sufficient for the creation of an agency relationship that the conduct of the alleged principal (the client) and agent (attorney) manifests acceptance of a relationship in which the agent acts for the principal [*see Malloy v. Fong (1951) 37 Cal. 2d 356, 372, 232 P.2d 241* ; *see also Civ. Code § 1550* (consent as essential element of contract)]. Although the existence of a contract is generally a question of law [*see Houston Gen. Ins. Co. v. Superior Court (1980) 108 Cal. App. 3d 958, 964, 166 Cal. Rptr. 904]* , whether or not the facts that would create an attorney-client relationship have been established is an issue of fact [*see Miller v. Metzinger (1979) 91 Cal. App. 3d 31, 39, 154 Cal. Rptr. 22]* .

PRACTICE TIP:

Clarifying Your Obligation to Perform Services. Consider adding a clause in your written fee agreement that makes it clear to the prospective client that unless and until the client executes the fee agreement no obligation is undertaken to proceed or render services to the client. It is important to make clear to the client that you have not agreed to perform services until you are formally retained. *By Joel M. Simon.*

[2] By Other Methods

In the typical case an attorney enters into a contract or retainer agreement with a client to perform services for a specific purpose. However, neither a retainer nor other formal agreement is required to establish the attorney-client relationship [*Farnham v. State Bar (1976) 17 Cal. 3d 605, 612, 131 Cal. Rptr. 661, 552 P.2d 445* ; *Kane, Kane & Kritzer, Inc. v. Altagen (1980) 107 Cal. App. 3d 36, 40, 165 Cal. Rptr. 534* ; *Brandlin v. Belcher (1977) 67 Cal. App. 3d 997, 1001, 134 Cal. Rptr. 1* ; *see also Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology (1999) 69 Cal. App. 4th 1399, 1404, 82 Cal. Rptr. 2d 326* (in determining whether attorney-client relationship has been created, courts should consider whether totality of circumstances, including parties' conduct, implies agreement by attorney not to accept other representations adverse to putative client's personal interests); *Fox v. Pollack (1986) 181 Cal. App. 3d 954, 959, 226 Cal. Rptr. 532* (although formation of attorney-client relationship may be informal, relationship does not exist merely because party believes that attorney is representing his or her interests)].

For example, an attorney-client relationship may be established when:

- An attorney volunteers his or her services [*see Miller v. Metzinger (1979) 91 Cal. App. 3d 31, 39, 154 Cal. Rptr. 22]* .

- An attorney is appointed by the court to represent a given client [*see Houston Gen. Ins. Co. v. Superior Court (1980) 108 Cal. App. 3d 958, 964, 166 Cal. Rptr. 904]* .

- An attorney makes a single, special appearance for a litigant [*see Streit v. Covington & Crowe (2000) 82 Cal. App. 4th 441, 447, 98 Cal. Rptr. 2d 193* ; *see also* State Bar Formal Opinion No. 2004-165 (outside contract attorney must comply with ethical rules)].

- An attorney agrees to investigate a case or provides legal advice to a prospective client, even if there is no fee arrangement [*Beery v. State Bar (1987) 43 Cal. 3d 802, 811-812, 239 Cal. Rptr. 121, 739 P.2d 1289* ; *Miller v. Metzinger (1979) 91 Cal. App. 3d 31, 39, 154 Cal. Rptr. 22* (fact that attorney had agreed only to investigate plaintiff's wrongful death claim and did not charge fee for his services did not suffice to eliminate existence of attorney-client relationship as a matter of law); *see also § 72.50*].

The attorney-client relationship can also arise from a pattern of custom and practice between the attorney and client [*see Kane, Kane & Kritzer, Inc. v. Altagen (1980) 107 Cal. App. 3d 36, 40-42, 165 Cal. Rptr. 534* (longstanding relationship between attorney and client, during which pattern of handling collection cases evolved, sufficient to establish limited employment undertaken by attorney with regard to specific collection matter)].

If an attorney serves a single client both as an attorney and as one who renders nonlegal services, he or she must conform to the Rules of Professional Conduct in the provision of all services [*Kelly v. State Bar (1991) 53 Cal. 3d 509, 517, 280 Cal. Rptr. 298, 808 P.2d 808* ; *see Layton v. State Bar (1990) 50 Cal. 3d 889, 904, 268 Cal. Rptr. 845, 789 P.2d 1026* (attorney who was both executor and attorney for estate may be disciplined for misconduct in capacity as executor)].

[3] Prohibited Discrimination When Accepting Client

An attorney shall not unlawfully discriminate or knowingly permit unlawful discrimination when accepting representation of a client on the basis of race, national origin, sex, sexual orientation, religion, age or disability [*Cal. Rules Prof. Conduct, Rule 2-400(B)*]. There is no basis for disciplinary action under this rule absent a finding of civil unlawfulness under applicable state or federal law [*Cal. Rules Prof. Conduct, Rule 2-400(B)*, Discussion].

[4] Limitation to Specific Matter

[a] Limited Scope Representation

When the attorney-client relationship is limited to a specific matter, the attorney's duty to represent the client extends only to that matter [see *Sullivan v. Dunne (1926) 198 Cal. 183, 190, 244 P. 343* (representation of incompetent client in one action as not constituting authorization for representation in unrelated action)].

Effective January 1, 2007, the Judicial Council established "limited scope representation" [*Cal. Rules of Ct., Rule 3.35*]. "Limited scope representation" is a relationship between an attorney and a person seeking legal services in which they have agreed that the scope of the legal services will be limited to specific tasks that the attorney will perform for the person [*Cal. Rules of Ct., Rule 3.35(a)*].

The rules recognize two types of limited scope representation: noticed representation in which the attorney and party notify the court and the other parties of the limited scope representation [*see Cal. Rules of Ct., Rule 3.36*] and undisclosed representation, in which the limited scope representation is not disclosed [see *Cal. Rules of Ct., Rule 3.37*].

PRACTICE TIP:

Delineate Scope of Representation. In an initial consultation, before any formal representation agreement, counsel should make clear the limited scope of the attorney-client relationship at this stage, explaining the limited nature of his or her advice or comments, e.g., that counsel has not conducted an independent investigation, reviewed pertinent documents, or carefully researched the applicable law, and that the comments are preliminary and subject to modification based on information the attorney may not yet have. Even when there is a more formal attorney-client relationship, counsel should always carefully delineate the nature and scope of his or her representation, with as much detail as possible, to avoid later misunderstandings with the client regarding the representation.

[b] Notice of Limited Scope Representation

A party and an attorney may provide notice of their agreement to limited scope representation by serving and filing a Notice of Limited Scope Representation (Judicial Council form MC-950) [*Cal. Rules of Ct., Rule 3.36(a)*]. After the notice is received and until either a substitution of attorney or an order to be relieved as attorney is filed and served, papers in the case must be served on both the attorney providing the limited scope representation and the client.

For an illustrative version of Judicial Council Form Notice of Limited Scope Representation--MC-950, see *§ 72.770*.

[c] Nondisclosure of Attorney Assistance in Preparation of Court Documents

An attorney who contracts with a client to draft or assist in drafting legal documents, but not to make an appearance in the case, is not required to disclose within the text of the documents that he or she was involved in preparing the documents [*Cal. Rules of Ct., Rule 3.37(a)*]. If a litigant seeks a court order for attorney's fees incurred as a result of document preparation, the litigant must disclose to the court information required for a proper determination of the attorney's fees, including [*Cal. Rules of Ct., Rule 3.37(b)*]:

- The name of the attorney who assisted in preparing the documents.
- The time involved or other basis for billing.
- The tasks performed.
- The amount billed.

Cal. Rules of Ct., Rule 3.37 does not apply to an attorney who has made a general appearance in a case [*Cal. Rules of Ct., Rule 3.37(c)*].

[5] Representation of Member Organizations

An attorney who is handling a labor grievance on behalf of a union has not entered into an "attorney-client" relationship in the ordinary sense with the particular union member who is asserting the underlying grievance. In such a case, although the attorney may have certain ethical obligations to the member, his or her principal client is the union [*Peterson v. Kennedy (9th Cir. 1985) 771 F.2d 1244, 1258-1259* ; *see also Aragon v. Pappy, Kaplon, Vogel & Phillips (1989) 214 Cal. App. 3d 451, 463-464, 262 Cal.Rptr. 646* (retained counsel functioning as union agent in collective bargaining process held to be immune from malpractice suit by individual labor union member)]. This same principle would apply to an attorney's obligations to a corporate employee when his or her principal client is the corporation.

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PART II. LEGAL BACKGROUND
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1. Drafting The Representation Agreement And Fee Arrangements

7-72 California Forms of Pleading and Practice--Annotated § 72.191

§ 72.191 Agreement to Matters Other Than Fees

A lawyer and client may agree at the outset of the relationship or during its course about the allocation of payment of sanctions resulting from civil discovery disputes sought against them by the opposing party. Such an agreement may be unethical, however, if the agreement requires the client to pay sanctions ordered as a result of the lawyer's misconduct or which the court intends the lawyer to bear alone. Enforcement of the agreement under these circumstances could violate the lawyer's ethical duties arising from the fiduciary relationship with the client and could also constitute contempt of court of ignoring the court's order as to against whom the court imposed the sanctions [State Bar Formal Opinion 1997-151; *see Bus. & Prof. Code § 6103* (wilful disobedience of court order requiring attorney to do or forebear from act in connection with profession constitutes cause for disbarment or suspension)]. The client may also not be able to give fully informed consent to future sanctions when their nature and amount are unknown at the time of the original agreement. However, the lawyer may be able to include sufficient disclosure to cover the most likely instances in which civil discovery sanctions will arise and the procedures or methods for allocating payment responsibility to which the lawyer and client agree in advance. As an alternative, the lawyer and client could include a provision in the retainer agreement or a later agreement in which they agree that if sanctions are awarded against both of them during the course of the representation, they will defer resolution of a dispute regarding responsibility for the sanctions until termination of the litigation, at which time they will submit their dispute to, for example, mediation or arbitration [State Bar Formal Opinion 1997-151].

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§ 72.192 Overview of Contractual Fee Arrangements

[1] Fee Agreement Desirable and Often Mandatory

The fee agreement is in most situations required by statute to be in writing [*see Bus. & Prof. Code §§ 6147, 6147.5, 6148*; *see also* further *discussion under § 72.192[4]*].

Even when a written agreement is not required, a clear understanding between the attorney and client about the fee arrangement will foster a good professional relationship and prevent later misunderstandings. Failure to reach a clear understanding about the fee arrangement is a major cause of disputes between clients and attorneys [*see* Steele & Nimmer, *Lawyers, Clients, and Professional Regulation*, Am. B. Found. Res. J. 917, 952-954 (1976)]. To prevent such misunderstandings, the attorney should clearly explain his or her fee policies to the client as soon as possible after the formation of the professional relationship, as well as the reasons for the proposed fee arrangement [*see* Model Code of Professional Responsibility EC 2-19 (1980); *see also §§ 72.670 -72.676*].

An attorney has a professional responsibility to make sure the client understands the billing procedures and rates. This responsibility logically precludes any changes in agreed-on rates without notification [*Severson & Werson v. Bolinger (1991) 235 Cal. App. 3d 1569, 1573, 1 Cal. Rptr. 2d 531]* .

PRACTICE TIP:

Written Agreement Preferred. Even when the agreement is not legally required to be in writing, a written explanation of the fee arrangement is preferred [Model Rules of Professional Conduct, Rule 1.5(b) (1994)]. At a minimum, the attorney should provide a written explanation concerning whether the rate is on an hourly, fixed, or estimated basis, or will be based on other factors. Furnishing the client with a memorandum about the attorney's fee policies or a copy of the attorney's customary fee schedules stating the basis or rate of his or fee charges is one way of accomplishing this [Model Rules of Professional Conduct, Rule 1.5 cmt. (1994)]. When developments occur that make an earlier estimate inaccurate, the client should be provided with a revised estimate [Model Rules of Professional Conduct, Rule 1.5, cmt. (1994)].

PRACTICE TIP: Clarify Fee Provisions. Be as detailed in possible in drafting and explaining fee provisions to the client. If appropriate, for example, clearly provide for and disclose annual rate changes, charges on delinquent payments, and the possibility of fees of additional personnel not specified in the original agreement.

[2] Format of Fee Agreement

In California, the mode and amount of compensation for attorneys, unless provided for by statute, is determined by the express or implied agreement of the client and attorney [*Code Civ. Proc. § 1021*]. The express contract can be:

- Formal, such as a detailed contract, [*see Preston v. Herminghaus (1930) 211 Cal. 1, 5, 292 P. 953]* .

- Informal, such as by letter [*see Goldberg v. City of Santa Clara (1971) 21 Cal. App. 3d 857, 861, 98 Cal. Rptr. 862]* or memorandum [*see* Model Rules Prof. Conduct, Rule 1.5, cmt. (1994)].

PRACTICE TIP:
Choosing Format of Fee Agreement. Whether to use a letteror memorandum, a simple contract and an explanatory brochure, or a lengthy formal contract is largely a matter of personal preference for the attorney. Some attorneys use a letter agreement, accompanied by an explanatory brochure, because it allows the attorney-client relationship to begin in an informal and friendly way. A simple contract is more likely to be read and easily understood by the client than a lengthy formal contract. The client can refer to the explanatory brochure for more detailed information. Other attorneys like to use a formal contract because it is more traditional and lawyer-like and also perhaps more precise and less subject to dispute. Regardless of the form of written agreement used, the attorney must ensure that the agreement contains any information or other provisions required by law [*see, e.g., Bus. & Prof. Code §§ 6147, 6148*; *see also § 72.192[4],* and *see §§ 72.670 -72.683*].

[3] Implied Agreement

When an attorney is retained by a client without an express agreement about compensation, one part of the consideration for the contract is the client's implied promise to pay the reasonable value of the attorney's services [*see Elconin v. Yalen (1929) 208 Cal. 546, 549, 282 P. 791* ; *Trafton v. Youngblood (1968) 69 Cal. 2d 17, 26, 69 Cal. Rptr. 568, 442 P.2d 648]* . The parties may also expressly agree that the attorney will be compensated for the reasonable value of his or her services [*see Hannon v. Goucher (1931) 117 Cal. App. 455, 457, 4 P.2d 239]* . For discussion of actions to recover the reasonable value of an attorney's services when no express fee is provided for, see *§ 72.451*.

PRACTICE TIP:
Fees for Uncontemplated Services. When the attorney, after execution of the fee agreement, provides uncontemplated services that were not mentioned in the contract, the attorney risks not being compensated for the extra services. In some circumstances, it is advisable to indicate clearly in the contract what services are not included. If an uncontemplated matter arises, the contract can be amended to provide for compensation for the additional services.

[4] When Written Fee Agreement Is Mandatory

[a] Contingency Fee Agreements

A contract by which an attorney agrees to represent a client on a contingency fee basis is required by statute to be in writing and to contain certain information [*see Bus. & Prof. Code § 6147*]. This applies generally to all such

contingency fee contracts except those for the recovery of workers' compensation benefits and those involving certain claims between merchants [*see Bus. & Prof. Code §§ 6147(c), 6147.5*]. Failure to complywith the requirements of *Bus. & Prof. Code § 6147* may entitle the client to avoid the agreement. For further discussion of requirements relating to contingency fee agreements, see *discussion under § 72.196*. For State Bar sample contingent fee agreements, *see §§ 72.675* and *72.676*.

[b] Non-Contingency Fee Agreements

[i] Contents

When a non-contingency case involves a matter in which it is reasonably foreseeable that the total fees and expenses will exceed $1,000, and the client is not a corporation, *Bus. & Prof. Code § 6148* also generally requires a written agreement [*Bus. & Prof. Code § 6148(a)*]. *Bus. & Prof. Code § 6148* prescribes the contents of these mandatory written agreements and lists situations in which such agreements are not required [*see Bus. & Prof. Code § 6148(a), (d)*]. A fee agreement pursuant to the statute must contain the following:

- Any basis of compensation, including, but not limited to, hourly rates, statutory or flat fees, and other standard rates, fees, and charges applicable to the case [*Bus. & Prof. Code § 6148(a)(1)*].

- The general nature of the legal services to be provided [*Bus. & Prof. Code § 6148(a)(2)*].

- The respective responsibilities of the attorney and the client as to the performance of the contract [*Bus. & Prof. Code § 6148(a)(3)*].

- If the attorney does not meet any of the following criteria, a statement disclosing that fact [*Bus. & Prof. Code § 6148(a)(4)*; *see Bus. & Prof. Code § 6148(f)* (this disclosure requirement expires January 1, 1997, unless the legislature changes or deletes that date)]:

  - Maintains errors and omissions insurance coverage;

  - Has filed with the State Bar an executed copy of a written agreement guaranteeing payment of all claims established against the attorney by his or her clients for errors or omissions arising out of the practice of law by the attorney in the amount specified in State Bar Law Corp. Rules, Rule IV(B)(1)(c);

  - If a law corporation, has filed with the State Bar an executed copy of the written agreement required pursuant to State Bar Law Corp. Rules, Rule IV(B)(1)(a), (b), or (c).

For State Bar sample noncontingent fee agreements, *see §§ 72.670 -72.674*.

At the time the agreement is entered into, the attorney must provide a duplicate copy of the agreement, signed by both the attorney and the client (or the client's guardian or representative), to the client (or the client's guardian or representative) [*Bus. & Prof. Code § 6148(a)*].

If the attorney does not comply with the requirements of *Bus. & Prof. Code § 6148*, the fee agreement is voidable at the option of the client, and the attorney is then entitled to collect only a reasonable fee [*Bus. & Prof. Code § 6148(c)*].

[ii] Billing

All bills rendered by an attorney to a client must clearly state the basis thereof. Bills for the fee portion of the bill must

include the amount, rate, basis for calculation, or other method of determination of the attorney's fees and costs. Bills for the costs and expense portion of the bill must clearly identify the costs and expenses incurred and the amount of the costs and expenses [*Bus. & Prof. Code § 6148(b)*].

On the client's request, the attorney must provide a bill to the client no later than 10 days following the request unless the attorney has provided a bill to the client within 31 days prior to the request, in which case the attorney may provide a bill to the client no later than 31 days following the date the most recent bill was provided. After this initial request, the client is entitled to make similar requests at intervals of no less than 30 days. In providing responses to client requests for billing information, the attorney may use billing data that is currently effective on the date of the request, or, if any fees or costs to that date cannot be accurately determined, they must be described and estimated [*Bus. & Prof. Code § 6148(b)*].

[5] Organization as Client

Cal Rules Prof. Conduct, Rule 3-600(A) provides that in representing an organization the attorney must conform the representation to the concept that the client is the organization itself, acting through its highest authorized officer, employee, body or constituent overseeing the particular engagement.

PRACTICE TIP:

Delineation of Authorized Person. The fee arrangement should specify a single authorized person on behalf of the entity that the attorney is to take instructions in the event of conflicts between the principals with respect to the subject matter of the engagement. This will avoid the situation where the attorney may be given conflicting instructions with respect to the engagement. *By Joel M. Simon.*

[a] Exceptions to Written Fee Agreement Requirement

Under the following circumstances, *Bus. & Prof. Code § 6148* does not apply:

- When the attorney must render services in an emergency to avoid foreseeable prejudice to the rights or interests of the client or when a writing is otherwise impractical [*Bus. & Prof. Code § 6148(d)(1)*].

- When the attorney's services are of the same general kind as previously rendered to and paid for by the client, thus implying an arrangement as to the fee [*Bus. & Prof. Code § 6148(d)(2)*].

- When the client knowingly states in writing, after full disclosure of his or her entitlement to a written agreement under *Bus. & Prof. Code § 6148*, that a writing concerning fees is not required [*Bus. & Prof. Code § 6148(d)(3)*].

- When the client is a corporation [*Bus. & Prof. Code § 6148(d)(4)*].

[b] Fee Contract Is Confidential Communication

A written fee contract is deemed to be a confidential communication within the meaning of *Bus. & Prof. Code § 6068(e)* (relating to attorney's duty to preserve client confidences) and *Evid. Code § 952* (relating to the attorney-client privilege) [*Bus. & Prof. Code § 6149*]. For discussion of other law regarding the attorney's duty to preserve client confidences, see *§ 72.33*.

[6] Types of Fees

The basis for computing an attorney's compensation can take a variety of forms. Two of the most common types of fees charged are fees based on payments at hourly rates and contingency fees, which provide for the attorney to receive a fee

only if a certain contingency occurs, such as the client's recovery after trial or settlement of a lawsuit.

In addition to these two types of fee arrangements, some other common types of fee arrangements include:

- Retainer fee, or earned-on-receipt, agreements [*see § 72.195[1]*].

- Exploratory or diagnostic fee provisions, providing for a set fee to explore the potential cost of a fixed-fee transaction [*see § 72.195[3]*].

- Per diem fee provisions, based on a specified charge for certain tasks done by the attorney [*see § 72.195[4]*].

- Transaction or lump sum provisions, providing for payment for the performance of a complete transaction.

- Incentive fee provisions, to be paid in the event that the attorney achieves a certain result for which the parties agree that an extra fee should be paid.

[7] Construction of Fee Agreements

[a] Contract Construed in Favor of Client

The attorney's fee contract ordinarily is construed in favor of the client. The attorney has a duty to ensure that the contract is "clearly and definitely stated and understood" in its language, "spirit, legal consequences, andpractical results" [*Reynolds v. Sorosis Fruit Company (1901) 133 Cal. 625, 630, 66 P. 21]* .

An attorney should seek to minimize any ambiguities in the fee agreement and to review the agreement with the client to insure that the client fully understands its provisions. Insuring the client's understanding is particularly important on points that are ambiguous in the agreement or on points that involved substantial discussion and negotiation between the attorney and client. When the attorney seeks to enforce the contract, he or she must show that the client "fully understood" it [*Reynolds v. Sorosis Fruit Company (1901) 133 Cal. 625, 630, 66 P. 21]* .

ILLUSTRATION:

Construction of Fee Agreement Against Attorney. Attorneys representing a plaintiff in a wrongful death case include a clause in the fee contract providing the attorneys with a percentage of "any money recovered." The contract does not contemplate a monthly annuity for life. As part of the settlement of the wrongful death case, plaintiff receives an annuity to be paid monthly during her lifetime. Plaintiff's attorneys contend that they are entitled to receive a flat percentage of the present cash value of the annuity portion of the settlement. Should the contract be construed against the attorneys who drafted the agreement, so that the attorneys share in the monthly annuity payments as received by the client, rather than receiving the full amount of their fee at the time that the case is settled? Yes. Since the attorneys prepared the contract, and in light of the oppressive nature of the attorneys' interpretation of the clause at issue, and even if it can be argued that the contract is ambiguous, the court must resolve any uncertainties in favor of a fair and reasonable interpretation and against the inflexible construction urged by the attorneys [*see* *Sayble v. Feinman (1978) 76 Cal. App. 3d 509, 514-515, 142 Cal. Rptr. 895]* .

[b] Rule of "Reasonable Construction" Applicable

The rule requiring reasonable construction of a contract in light of all the circumstances when a term of the contract is ambiguous applies to attorney's fees contracts [*see* *Setzer v. Moore (1927) 202 Cal. 333, 338, 260 P. 550]* .

ILLUSTRATIONS:

Reasonable Construction of Fee Agreements. A client agrees to pay the remaining half of a fee either on the date the trial began or on the date the action was settled. The client dismisses the action without prejudice and refuses to pay the balance of the fee because the case has not been tried or settled. May the client avoid paying the balance of the fee? No. The word "settled" has no universal definition, and it is appropriate to construe the contract as requiring payment of the second installment when the case was terminated, either by trial or dismissal without trial [*see Setzer v. Moore (1927) 202 Cal. 333, 339-340, 260 P. 550]* .

A client retains an attorney to obtain a rezoning of some real property. Under the fee agreement, the attorney is to be paid $7,500 only if he is successful. The attorney succeeds in obtaining the rezoning. The client congratulates the attorney and pays him $5,000. The client promises several times to pay the balance, knowing at the time that attempts were being made to repeal the rezoning. (The client had originally insisted that the attorney perform within a time period that was not long enough to include the attorney's protection against a repeal of the rezoning.) The zoning ordinance is repealed. The client refuses to pay the balance, and demands return of the $5,000. Is the attorney entitled to recover the full $7,500? Yes. Applying the rule of reasonable construction, the attorney is entitled to recover since both parties had acted as if the objective of the agreement had been obtained [*Crestview Cemetery Assn. v. Dieden (1960) 54 Cal. 2d 744, 751-752, 8 Cal. Rptr. 427, 356 P.2d 171]* .

[c] Terms of Arrangement Must Be Reasonably Certain

An attorney's fee arrangement must be reasonably certain in order to be enforceable. In one case, the attorney by letter specified his hourly rate and an estimated fee range. He also indicated that he would expect additional compensation if his efforts resulted in a significant savings to the client. What would constitute a significant savings was not specified. The amount of the additional compensation was to be left to the client's judgment. The court distinguished between two kinds of uncertainty. Uncertainty about the amount of compensation was not fatal to the agreement because if one contracting party allows the other to determine the amount of compensation, and that party acts in bad faith by setting an unreasonable amount, the trier of fact may determine a reasonable amount. On the other hand, uncertainty about what would constitute a saving to the client sufficiently significant to require additional compensation is fatally uncertain because an objective standard is lacking for the amount of savings and for the time period for computation of the savings. The court stated that when a contract is too vague to permit a true meeting of the minds it cannot be upheld [*Goldberg v. City of Santa Clara (1971) 21 Cal. App. 3d 857, 861-863, 98 Cal. Rptr. 862]* .

[8] Spanish Translation of Fee Agreement

When an attorney negotiates a fee arrangement primarily in Spanish, he or she must furnish a Spanish translation of the contract before it is executed [*see Civ. Code § 1632(b)(6)*]. This requirement does not apply if the client negotiates the terms of the agreement through his or her own interpreter, as defined by statute [*see Civ. Code § 1632(h)*]. If the attorney does not comply with this requirement, the client may rescind the contract [*see Civ. Code § 1632(k)*].

[9] Court Approval of Agreement Required in Specific Cases

[a] Minors

A contract made by or on behalf of a minor for attorney's fees for services in litigation is void unless the contract is approved by the court in which the litigation is pending or by the court having jurisdiction of the guardianship estate of the minor [*Fam. Code § 6602*]. Judicial approval of the fee contract may be obtained by petition of any interested person [*Fam. Code § 6602*]. If no such contract is approved and a judgment is recovered by or on behalf of a minor, the attorney's fees chargeable against the minor are fixed by the court rendering the judgment [*Fam. Code § 6602*].

For discussion and forms, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , through Ch. 290H, *Guardianship and Conservatorship:Termination of Guardianships and Conservatorships* .

[b] Contingency Fee Contract Involving Ward or Conservatee

When it is to the advantage, benefit, and best interest of a ward or conservatee (or that person's estate), the guardian or conservator of the estate may contract with an attorney for a contingency fee for the attorney's services in representing the ward, conservatee, or estate in connection with a matter that is of a type that is customarily the subject of a contingency fee contract [*Prob. Code § 2644(a)*; *see also* discussion regarding contingency fee agreements generally in *§ 72.192[4][a], above* , and *§ 72.196, below*].

PRACTICE TIP:

Limitations on Contingency Fees For Representing Minors. Local court rules may limit the amount of fees that can be charged on a contingency basis for minors. For example, Los Angeles Co. Super. Ct. Rules, Rule 10.187(e) provides in connection with a minor's compromises, that except for good cause, attorney's fees shall not exceed an amount equal to 25 percent of the gross proceeds of a settlement. *By Joel M. Simon.*

A contingency fee contract involving a ward or conservatee is valid only if one or both of the following is true [*Prob. Code § 2644(a)*]:

- The contract is made pursuant to a court order authorizing the guardian or conservator to execute the contract.

- The contract is approved by court order.

To obtain an order authorizing execution of such a contract or approving the contract, the guardian or conservator must file a petition showing the advantage, benefit, and best interest of the contingency fee contract to the ward, conservatee, or estate [*Prob. Code § 2644(b)*].

The petition must be filed with either the court in which the guardianship or conservatorship proceeding is pending, or if the contract is in connection with a matter in litigation, the court in which the litigation is pending [*Prob. Code § 2644(b), (d)*].

Notice of the hearing on the petition must be given for the period and in the manner provided for guardianship and conservatorship proceedings generally [*Prob. Code § 2644(c)*; *see Prob. Code § 1460 et seq.* (rules relating to notice in guardianship and conservatorship proceedings)].

[c] Unemployment Insurance Appeal

Fee agreements in cases in which an attorney brings an appeal before the California Unemployment Insurance Appeals Board must be approved by the Board [*see Unemp. Ins. Code § 1957*]. For discussion, see Ch. 564, *Unemployment and Disability Insurance* .

[10] Effect of Illegal Fee Contract

[a] Invalidity

As in the case of any contract, a fee contract in which the object or consideration is illegal and against public policy is void [*see Civ. Code §§ 1596, 1598, 1607, 1667*], and the attorney cannot collect his or her fee on the contract [*see Kallen v. Delug (1984) 157 Cal. App. 3d 940, 949-951, 203 Cal. Rptr. 879* (fee-splitting agreement for which sole

consideration was attorney's agreement to execute substitution and return client's files); *Academy of California Optometrists, Inc. v. Superior Court (1975) 51 Cal. App. 3d 999, 1005-1006, 124 Cal. Rptr. 668* (retaining lien used only to extort disputed fee from client)].

Some cases recognize, however, that the existence of an illegal provision that is against public policy does not necessarily invalidate the entire contract nor affect the attorney's compensation for the reasonable value of services performed [*see, e.g.*, *Calvert v. Stoner (1948) 33 Cal. 2d 97, 104-105, 199 P.2d 297]* . Some cases have allowed recovery of the reasonable value of services performed even when the entire contract is invalidated [*see, e.g.*, *Rosenberg v. Lawrence (1938) 10 Cal. 2d 590, 592-595, 75 P.2d 1082* (express contract that was invalid because of provision providing that portion of payment should be made to broker did not preclude recovery by attorneys for reasonable value of services)].

It can be argued that an attorney should not be able to recover in quasi-contract for attorney's fees when the contract is prohibited by statute or public policy. When a contract has an illegal objective or is in some other way contrary to public policy, such as a fee splitting contract with a nonattorney, one commentator believes that certain California cases are incorrect in allowing attorneys to recover the reasonable value of their services [Witkin, California Procedure, vol. 1, *Attorneys*, § 224, (4th ed. 1996); *see, e.g.*, *Theisen v. Keough (1931) 115 Cal. App. 353, 359, 1 P.2d 1015* (contract for contingent fee in divorce action is against public policy); *Wiley v. Silsbee (1934) 1 Cal. App. 2d 520, 522, 36 P.2d 854* (same)]. The rationale for this position is that if an attorney can recover in *quantum meruit* on an illegal contract, the policy of the law is undermined and attorneys are not deterred from entering into illegal contracts [*see* *Rosenberg v. Lawrence (1938) 10 Cal. 2d 590, 602, 75 P.2d 1082* (Houser, J., Seawell, J., and Curtis, J., dissenting)].

A California attorney is subject to discipline for entering into an agreement for charging or collecting an illegal fee [*see Cal. Rules Prof. Conduct, Rule 4-200(A)*].

A fee is illegal if it is in violation of:

- A statute [*see, e.g.*, *Estate of Hastings (1952) 108 Cal. App. 2d 713, 716, 239 P.2d 684* (violation of former Prob. Code § 910 by charging of indefinite contingency fee rather than statutory fixed fee); *Workmen's Comp. Appeals Bd. v. Small Claims Court (1973) 35 Cal. App. 3d 643, 646, 111 Cal. Rptr. 6* (violation of *Lab Code §§ 4903, 4906* for charging fees in excess of those allowed by board); *see also Civ. Code §§ 1607, 1667* (consideration for contract must not be illegal; consideration is illegal if contrary to express provision of law)].

- Public policy [*cf.* *Calvert v. Stoner (1948) 33 Cal. 2d 97, 103, 199 P.2d 297* (illegal provision in contingency fee contract preventing client from settling case); *Kallen v. Delug (1984) 157 Cal. App. 3d 940, 949-951, 203 Cal. Rptr. 879* (discharged attorney's refusal to forward client's case files and substitute attorneys without first obtaining fee-splitting contract from second attorney as violation of ethical duty to client)].

- The Rules of Professional Conduct [*cf.* *Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 618-619, 120 Cal. Rptr. 253* (acceptance of employment adverse to client in violation of confidentiality of client under former Cal. Rules Prof. Conduct Rule 5); *see also Civ. Code §§ 1607, 1667* (consideration for contract must not be illegal; consideration is illegal if contrary to express provision of law)].

Examples of illegal fees include:

- Certain types of contingency fee agreements in marital dissolution actions, which may in some circumstances be considered promotive of divorce [*see* *Theisen v. Keough (1931) 115 Cal. App. 353, 358-359, 1 P.2d 1015* ; *see also § 72.196[7][d]*].

- Agreements that allow billing and receiving payment for work not actually performed by the attorney [*see Goldstone v. The State Bar of California (1931) 214 Cal. 490, 497, 6 P.2d 513]* .

- Fee agreements with attorneys not licensed to practice in California for work performed in California in violation of *Bus. & Prof. Code § 6125* (unauthorized practice of law) [*see Birbrower, Montalbano,Condon & Frank v. Superior Court (1998) 17 Cal. 4th 119, 124, 70 Cal. Rptr. 2d 304, 949 P.2d 1* ; *see § 72.192[10][b]*].

[b] Fee Agreement With Out-of-State Attorney or Law Firm

The practice of law in California by out-of-state attorneys not licensed to practice in California or by an out-of-state law firm, none of whose attorneys are licensed in California at the time of performing work in California, constitutes the unauthorized practice of law under *Bus. & Prof. Code § 6125*, and precludes the collection of attorney fees under fee agreements by those attorneys for work performed in California [*Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 Cal. 4th 119, 124, 70 Cal. Rptr. 2d 304, 949 P.2d 1* (practice of "substantial law" in California in violation of *Bus. & Prof. Code § 6125* precluded compensation under fee agreement for any services performed in California)]. For further discussion of unauthorized practice of law, see *§ 72.13*.

Physical presence in California is only one factor to consider in determining a violation of *Bus. & Prof. Code § 6125*. A person may be found to have practiced law in California when that person practices California law elsewhere or "virtually" enters California by technological means, with each case to be determined on its individual facts. Exceptions to *Bus. & Prof. Code § 6125* are narrowly drawn and strictly interpreted and generally limited to allowing out-of-state attorneys to make brief appearances before a state court or tribunal [*Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 Cal. 4th 119, 128-129, 70 Cal. Rptr. 2d 304, 949 P.2d 1]* .

However, a fee agreement with an out-of-state attorney not licensed to practice in California will be enforceable to extent it is possible to sever the portions of the consideration attributable to services illegally rendered in California from those attributable to services performed outside the state [*Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 Cal. 4th 119, 124, 139, 70 Cal. Rptr. 2d 304, 949 P.2d 1]* . Although the fee agreement becomes illegal when an out-of-state attorney or firm performs legal services in violation of *Bus. & Prof. Code § 6125*, the law of contract severability [*Civ. Code § 1599*] allows courts to enforce the valid parts of contracts that are only partially void when the contract has several distinct objects, of which one at least is lawful. The object of a fee agreement with an out-of-state attorney or law firm may not be entirely illegal, assuming the client was to pay compensation based in part on work that does not amount to the practice of law in California [*Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 Cal. 4th 119, 137-139, 70 Cal. Rptr. 2d 304, 949 P.2d 1]* .

[11] Mandatory Disclosure Regarding Lack of Professional Liability Insurance

Effective January 1, 2010, an attorney who knows or should know that he or she does not have professional liability insurance must inform a client in writing, at the time of the client's engagement of the attorney, that the attorney does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the attorney's legal representation of the client in the matter will exceed four hours [*Cal. Rules Prof. Conduct, Rule 3-410(A)*]. If an attorney does not provide this notice at the time of a client's engagement of the attorney, and the attorney subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the attorney must inform the client in writing within 30 days of the date that the attorney knows or should know that he or she no longer has professional liability insurance [*Cal. Rules Prof. Conduct, Rule 3-410(B)*].

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§ 72.193 Amount of Fee

[1] Standards for Fees

Generally the law favors allowing the attorney and client to determine what is an appropriate fee. In light of the attorney's duty not to charge an unconscionable fee [*see Cal. Rules Prof. Conduct, Rule 4-200(A)* and discussion under § 72.193[2]], however, an attorney must make an initial determination, after investigation if appropriate, of what constitutes a reasonable fee to negotiate with the client under the circumstances of a particular attorney-client relationship.

This determination depends on a variety of factors, such as the attorney's level of expertise and reputation in the legal community, the "going rate" or the range that is generally accepted in the legal community for the particular type of fee to be charged, and the particular type of work to be done [*see also* discussion under §§ 72.193[2][b], *72.193[2][c]* and *72.193[3]*].

There are also numerous statutes and rules that impose specific restrictions on contingency and fixed rate fees in particular cases, such as medical malpractice, workers' compensation, probate matters, and claims under the Federal Torts Claims Act [*see* discussion under § 72.196[7]]. These are in addition to common local restrictions on the recovery of attorney's fees as costs when this is permitted under contract or statute [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 9.47]. The attorney must familize himself or herself with those provisions that may apply in a particular case.

[2] Unconscionable Fees

[a] Ethical Prohibition

A California attorney is subject to discipline for entering into an agreement for, charging, or collecting an unconscionable fee [*see Cal. Rules Prof. Conduct, Rule 4-200(A)*]. Usually, fraud or overreaching by the attorney is involved in an unconscionable fee arrangement such that the fee constitutes an appropriation of the client's funds [*see Warner v. State Bar (1983) 34 Cal. 3d 36, 43, 192 Cal. Rptr. 244, 664 P.2d 148* ; *Herrscher v. State Bar (1935) 4 Cal.*

2d 399, 403, 49 P.2d 832] .

In addition to the attorney being disciplined for an unconscionable fee arrangement, the contract may be held unenforceable [*see Baron v. Mare (1975) 47 Cal. App. 3d 304, 312, 120 Cal. Rptr. 675]* .

The determination of a proper fee involves the interests of both the client and the attorney. An excessive charge abuses the relationship between them. Ultimately, it is advantageous to the legal profession for an attorney to charge reasonable fees; improper fees will deter laypersons from using attorneys to protect their legal rights [*see* Model Code of Professional Responsibility EC 2-17 (1980)]. Attorneys, however, are ethically entitled to adequate compensation and should charge reasonable fees in appropriate circumstances to clients financially able to pay them [Model Code of Professional Responsibility EC 2-16 (1980)].

PRACTICE TIP:

Charging Reasonable Fee. To avoid disputes regarding fees, the attorney should, and in many instances must, explain the fees to be charged clearly and in writing, with advance disclosure of any changes in the charges. For example, when a different attorney or additional personnel are needed to work on the client's case, the attorney should advise the client of this in advance and disclose any significant changes in the representation [*see Cal. Rules Prof. Conduct, Rule 3-500* (duty to communicate with client promptly regarding developments relating to employment or representation); LACBA Formal Opinion No. 473 (1990); *see also § 72.192* et seq.].

Absent an objection by the client, courts normally do not inquire into a fee's reasonableness. In cases in which the court is required by statute to approve the payment of reasonable costs and fees, however, the court may decline to approve a fee it views as unreasonable [*Ojeda v. Sharp Cabrillo Hospital (1992) 8 Cal. App. 4th 1, 17, 10 Cal. Rptr. 2d 230* ; *see, e.g., Prob. Code §§ 3600, 3601* (when lawyer represents minor or incompetent person and recovers fees by way of judgment or settlement, court must approve payment of reasonable costs and fees)].

The following are examples of fees that have been held to be unconscionable:

- Charging $2,800 and taking a $5,000 promissory note to defend a simple divorce action [*Bushman v. State Bar (1974) 11 Cal. 3d 558, 563-564, 113 Cal. Rptr. 904, 522 P.2d 312]* .

- Entering into a 70% contingency fee contract [*Jackson v. Campbell (1932) 215 Cal. 103, 106, 8 P.2d 845]* .

- Entering into a 50% contingency fee when recovery was reasonably sure [*see Swanson v. Hempstead (1944) 64 Cal. App. 2d 681, 688-689, 149 P.2d 404]* .

- Taking 45% of the total judgment plus statutory "reasonable attorney's fees" awarded by the court in a civil rights action [In the Matter of Yagman (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 788, 807].

For discussion of fee collection, see *§ 72.430* et seq. through 72.470 et seq.

[b] Determining Whether Fee Is Reasonable

[i] Conscionability

The question of the conscionability of the fees charged is significant for two reasons:

First, the California Rules of Professional Conduct prohibit an attorney from charging unconscionable fees, and if an

attorney enters into an unconscionable contract with a client, the contract may be unenforceable [*see Cal. Rules Prof. Conduct, Rule 4-200(A)*; *Baron v. Mare (1975) 47 Cal. App. 3d 304, 312, 120 Cal. Rptr. 675* ; *see also § 72.199[3][a]*].

Also, the issue arises in the context of the collection of fees in *quantum meruit* when the attorney is allowed to recover reasonable (that is, conscionable) fees. This may arise when a lawyer has been discharged or justifiably withdrew from the case [*see Fracasse v. Brent (1972) 6 Cal. 3d 784, 792, 100 Cal. Rptr. 385, 494 P.2d 9* (discharge by client); *Pearlmutter v. Alexander (1979) 97 Cal. App. 3d Supp. 16, 20* (justifiable withdrawal by attorney)]. It also may arise when the lawyer cannot recover on the contract because of the invalidity or illegality of the contract but is still entitled to reasonable fees for work performed [*see, e.g., Calvert v. Stoner (1948) 33 Cal. 2d 97, 104, 199 P.2d 297]* . For discussion regarding recovery in *quantum meruit*, see *§ 72.430* et seq. through § 72.470 et seq.

[ii] Factors Affecting Conscionability under California Rules of Professional Conduct

Unconscionability of a fee is determined on the basis of all the facts and circumstances existing at the time the agreement is entered into except when the parties contemplate that the fee will be affected by later events [*Cal. Rules Prof. Conduct, Rule 4-200(B)*]. The California Rules of Professional Conduct set forth the following factors to be considered in determining whether or not a fee is conscionable [*Cal. Rules Prof. Conduct, Rule 4-200(B)*]:

- The amount of the fee in proportion to the value of the services performed.
- The relative sophistication of the lawyer and the client.
- The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
- The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- The amount involved and the results obtained [*see § 72.193[2][c]*].
- The time limitations imposed by the client or by the circumstances.
- The nature and length of the professional relationship with the client [*see § 72.193[2][c][ii]*].
- The experience, reputation, and ability of the lawyer or lawyers performing the services [*see § 72.193[2][c][iii]*].
- Whether the fee is fixed or contingent [*see § 72.193[2][c][iv]*].
- The time and labor required [*see § 72.193[2][c][v]*].
- The informed consent of the client to the fee.

The decisions differ according to the circumstances of each case with respect to the importance of the various factors in determining the reasonableness of a fee [*see, e.g., Glendora Community Redevelopment Agency v. Demeter (1984) 155 Cal. App. 3d 465, 474-481, 202 Cal. Rptr. 389]* .

[iii] Additional Factors

In addition to the factors listed in the Rules of Professional Conduct, courts have also considered:

- The amount of out-of-pocket expenses advanced by the attorney [*Tasker v. Cochrane (1928) 94 Cal. App. 361, 368, 271 P. 503]* .

- The delay expected in payment and the hours worked without guarantee of payment [*Elser v. I.A.M. Nat. Pension Fund (C.D. Cal. 1984) 579 F. Supp. 1375, 1378]* .

- The financial risk taken by the attorney [*see Cline v. Zappettini (1955) 131 Cal. App. 2d 723, 728, 281 P.2d 35]* .

- The difficulty of proving the case [*Hurst v. Hurst (1964) 227 Cal. App. 2d 859, 871-872, 39 Cal. Rptr. 162]* .

- The client's financial status [*In re Marriage of Cueva (1978) 86 Cal. App. 3d 290, 296, 149 Cal. Rptr. 918* ; *Hurst v. Hurst (1964) 227 Cal. App. 2d 859, 872, 39 Cal. Rptr. 162]* .

[c] Specific Factors

[i] Amount Involved

The "amount involved" factor is important because it determines the risk to which the client is exposed and the commensurate responsibility that the attorney assumes [*see Los Angeles v. Los Angeles-Inyo Farms Co. (1933) 134 Cal. App. 268, 277, 25 P.2d 224]* . Likewise, the result obtained is an important factor because it determines the real benefit to the client [*see Cline v. Zappettini (1955) 131 Cal. App. 2d 723, 728, 281 P.2d 35]* . It is generally presumed that the benefit to the client is directly due to the attorney's services [*see Berry v. Chaplin (1946) 74 Cal. App. 2d 669, 681, 169 P.2d 453]* .

[ii] Nature and Length of Professional Relationship

The nature of the professional relationship is relevant, for example, when a history of dealing has generated a high level of client trust or confidence in the attorney. In such a case, the attorney's advice may be more valuable to the client than advice from someone less trustworthy. The length of the professional relationship may be relevant, for example, when long service gives an attorney more knowledge about the client's needs or problems than a new attorney would have. Of course, an attorney's greater familiarity with a client may permit him or her to handle a problem more quickly. In turn, less time spent could militate for a lower fee [*see § 72.193[2][c][v]*]. Nevertheless, other things being equal, an attorney' with longer service or greater client trust will command a higher fee.

[iii] Attorney's Status or Reputation

The attorney's status or reputation may justify a higher hourly rate [*see Glendora Community Redevelopment Agency v. Demeter (1984) 155 Cal. App. 3d 465, 477, 202 Cal. Rptr. 389]* . Whether the attorney is a partner or an associate is another relevant factor [*see Glendora Community Redevelopment Agency v. Demeter (1984) 155 Cal. App. 3d 465, 476-477, 202 Cal. Rptr. 389]* . However, the fact that an attorney has special experience cannot be considered as a factor in evaluating the reasonableness of the fee if it gave the attorney no special advantage in handling a particular matter [*see Smith v. Smith (1969) 1 Cal. App. 3d 952, 959, 82 Cal. Rptr. 282]* .

In a lawsuit filed by a client against a law firm, alleging unconscionable fees, the client sought to discover the hourly rate the firm paid a contract staff attorney for work done on his case. The court found that a determination of whether a fee is unconscionable should not be based on an attorney's cost or profit margin [*Shaffer v. Superior Court (1995) 33 Cal. App. 4th 993, 1001-1002, 39 Cal. Rptr. 2d 506]* .

[iv] Flat or Contingent Fee

One commentator has interpreted the factor of whether the fee is fixed or contingent to mean that a higher contingency fee dependent on the case result is more likely to be held reasonable than a high fixed fee not dependent on the case result [*see Attorneys' Fees: Practical and Ethical Considerations, Program Materials* 14 (Cal. C.E.B. March 1984)]. Because contingency fee contracts provide for substantially greater compensation than fixed fee arrangements because of the risk involved, one federal court has stated that contingency fee arrangements should not be used to determine a comparable reasonable fee in a non-contingency fee case [*see Elser v. I.A.M. Nat. Pension Fund (C.D. Cal. 1984) 579 F. Supp. 1375, 1378]* .

[v] Actual Time Spent on Case

The actual time spent by the attorney on the matter is a baseline for the determination of a reasonable fee. One federal court has called the hours spent and the value per hour of the attorney's service the "core" of fee calculation [*Lockheed Min. Sol. Coalition v. Lockheed M. & S. Co. (N.D. Cal. 1976) 406 F. Supp. 828, 832]* . However, the skilled completion of a legal task that is completed more quickly by an attorney due to his or her expertise than it could have by other attorneys lacking this expertise may warrant a higher fee than only the actual time spent would justify [*see Boller v. Signal Oil & Gas Co. (1964) 230 Cal. App. 2d 648, 656, 41 Cal. Rptr. 206]* . Otherwise, determining the fee on an actual time basis would penalize expertise and reward incompetence and inexperience [*see In re Marriage of Cueva (1978) 86 Cal. App. 3d 290, 302-303, 149 Cal. Rptr. 918]* . A federal case has held that although an attorney can charge more per hour because of his or her expertise, accumulated over the course of several cases sharing the same issues, an attorney cannot charge multiple clients for work that has only been done once [*Lockheed Min. Sol. Coalition v. Lockheed M. & S. Co. (N.D. Cal. 1976) 406 F. Supp. 828, 832]* .

An attorney may not bill a full hourly rate for work done on more than one matter for the same time period. For instance, if a lawyer appears in court on two separate matters in one four-hour period, he or she may not bill four hours for each matter, unless the attorney has made full disclosure and obtained client consent for this billing practice, and such billing does not result in an unconscionable fee [State Bar Formal Opinion No. 1996-147].

[3] Minimum Fee Schedules and Antitrust Considerations

Although California county bar associations formerly promulgated minimum fee schedules, this type of guide is no longer a viable means of gauging acceptable fees in a geographic area. In 1975, the United States Supreme Court, in *Goldfarb v. Virginia State Bar*, held that minimum fee schedules that provide a fixed, rigid price floor enforced by threat of professional discipline violate the Sherman Antitrust Act [*Goldfarb v. Virginia State Bar (1975) 421 U.S. 773, 791-792, 95 S. Ct. 2004, 44 L. Ed. 2d 572* ; *see also 15 U.S.C. § 1 et seq.* (Sherman Act)]. In *Goldfarb*, Mr. and Mrs. Goldfarb contracted to buy a residence in Fairfax County, Virginia. The lender required title insurance. In Virginia, only members of the state bar performed title examinations. Mr. and Mrs. Goldfarb were unable to find an attorney who would examine title for a fee of less than the 1% of the property value, the minimum fee specified in the schedule published by the county bar association.

The Supreme Court held that the state and county bars' activities constituted a classic illustration of price fixing [*Goldfarb v. Virginia State Bar (1975) 421 U.S. 773, 783, 95 S. Ct. 2004, 44 L. Ed. 2d 572]* . Instead of being purely advisory, the fee schedule operated as a fixed price floor. It was enforced through the possibility of state bar discipline, the desire of attorneys to conform with professional norms, and the assurance that other attorneys would not charge less than the recommended minimum fee [*Goldfarb v. Virginia State Bar (1975) 421 U.S. 773, 781-782, 95 S. Ct. 2004, 44 L. Ed. 2d 572]* .

The Court found that the fee schedule sufficiently affected interstate commerce because a significant amount of financing for home purchases in Fairfax County was obtained from out-of-state sources and title examinations were a

prerequisite to securing this financing. The Court held that no "learned profession" exclusion from the Sherman Act applied, that the title examination is a service, and that payment for the service constituted commerce. The Court also held that neither the state nor county bar were exempted from the Sherman Act under the state action exemption. Neither the Virginia Supreme Court nor Legislature required a minimum fee schedule. The Virginia Supreme Court did not approve the state bar's ethics opinions that indicated failure to conform with minimum fee schedules might result in professional discipline. Thus, the state and county bars' activities were not compelled by the state acting as a sovereign, but were essentially private in nature and anticompetitive [*Goldfarb v. Virginia State Bar (1975) 421 U.S. 773, 787-791, 95 S. Ct. 2004, 44 L. Ed. 2d 572]* .

The Court left undecided the issue of whether a purely advisory fee schedule issued to provide guidelines or an exchange of price information that does not result in an actual restraint of trade violates the Sherman Act [*Goldfarb v. Virginia State Bar (1975) 421 U.S. 773, 781, 95 S. Ct. 2004, 44 L. Ed. 2d 572]* . Apparently no California case has expressly addressed this issue. The Fifth Circuit has held that the Texas State Bar real estate note and builder's and mechanic's lien note forms that include attorney's fees provisions for 10% of the unpaid balance do not constitute the fixing of attorney's fees in violation of the Sherman Act [*Guzik v. State Bar of Texas (5th Cir 1981) 659 F.2d 528, 530-531]* . The Texas State Bar does not require that its members use the forms, does not discipline members who do not use the forms, does not take a public position on the attorney's fees provision, and does not prohibit modification of the fee percentage. The attorney's fee provision in the note form is also negotiable between the lender and the borrower [*Guzik v. State Bar of Texas (5th Cir 1981) 659 F.2d 528, 531]* .

[4] Incentive Fee Provisions

An incentive fee provision may be used in a fee agreement if the client and attorney agree that the attorney should be paid an extra fee if the attorney's efforts achieve an excellent result for the client. If they agree, the provision set forth in § 72.681 may be added as an additional paragraph to a general fee agreement, such as the hourly fee agreements set forth in §§ 72.670-72.674. The provision should specifically set forth the circumstances under which additional compensation is justified as well as how much additional compensation should be paid. The basis for payment of additional compensation should not be a general declaration that the attorney will be paid additional compensation if, in the parties' opinion, additional payment is warranted because there would be no objective standard to determine whether liability for payment existed, and the contract would thus be unenforceable because of the uncertainty [*see Goldberg v. City of Santa Clara (1971) 21 Cal. App. 3d 857, 860-861, 98 Cal. Rptr. 862]* .

For example, a fee arrangement may be devised that will provide for a defense attorney to receive an additional fee as a percentage of the amount of savings to the client. Similarly, a fee arrangement may be devised to provide that an attorney for a plaintiff will receive a bonus based on a percentage of any recovery that exceeds the expected recovery.

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§ 72.194 Costs and Expenses

[1] Payment for Costs of Litigation or Other Legal Services

Cal. Rules Prof. Conduct, Rule 4-210(A) provides that an attorney is not prohibited from "advancing" the costs of prosecuting or defending a claim or action, the repayment of which may be contingent on the outcome of the matter, or otherwise protecting or promoting the client's interests [*Cal. Rules Prof. Conduct, Rule 4-210(A)(3)*]. The costs that the attorney may advance are limited to the reasonable expenses of litigation, as well as the reasonable expenses of preparing for litigation or providing any other legal services to the client [*Cal. Rules Prof. Conduct, Rule 4-210(A)(3)*]. An attorney may also act as a surety for the client and guarantee the client's obligation on a litigation cost bond [*see* State Bar Formal Opinion No. 1981-55]. However, *Code Civ. Proc. § 995.510(a)* precludes an attorney from acting as a personal surety in connection with an undertaking directly to the court.

The State Bar Standing Committee on Professional Responsibility and Conduct, interpreting former Rule 5-104(A), the immediate predecessor of Rule 4-210, has taken the position that a client must be obligated to repay any advanced costs and that the attorney must inform the client of his or her ultimate liability for such costs [State Bar Formal Opinion No. 1976-38; *but see* LACBA Formal Opinion No. 495 (1998) (attorney may advance litigation costs notwithstanding client's stated refusal to pay costs)]. The Committee reasoned that the concept of "advancing" costs necessarily implies that the client is ultimately responsible for the costs [State Bar Formal Opinion No. 1976-38]. Of course, the Committee's opinion is advisory only and is not binding on the courts or the members of the State Bar [*see* State Bar Formal Opinion No. 1976-38].

The Committee's interpretation of former Rule 5-104 is consistent with the former provisions of the American Bar Association Model Code of Professional Responsibility, which provided that an attorney may advance litigation costs and expenses as long as the client remains ultimately responsible for those costs [*see* Model Code of Professional Responsibility DR 5-103(B) (1980); Model Code of Professional Responsibility EC 5-8 (1980)]. The rationale for this rule was that an attorney's payment of such expenses, absent an obligation on the part of the client to repay them, would give the attorney a personal financial interest in the outcome of the litigation, which might impair his or her independent

judgment on behalf of the client [*see* Model Code of Professional Responsibility EC 5-7, 5-8 (1980)].

In one case, the California Supreme Court, relying on the public policy ground of making legal services available to indigents who cannot afford to pay costs, expressed approval of an attorney's subsidization of litigation through the advance of costs in a contingency fee case, even though repayment by the client was unlikely [*see Isrin v. Superior Court (1965) 63 Cal. 2d 153, 164, 45 Cal. Rptr. 320, 403 P.2d 728* ; *see also*; LACBA Formal Opinion No. 495 (1998) (attorney may advance litigation costs notwithstanding client's stated refusal to pay costs) LACBA Formal Opinion No. 379 (1979) (pro bono attorney can advance costs when there is substantial likelihood that client will not be able to repay absent a recovery in action)]. The ABA Model Rules of Professional Conduct expressly states that an attorney representing an indigent client may pay court costs and litigation expenses on the client's behalf [Model Rules of Professional Conduct, Rule 1.8(e)(2)].

PRACTICE TIP:

Include Agreement for Repayment of Costs in Fee Agreement. An attorney should include in the fee agreement an express provision for repayment of costs advanced by the attorney.

Although the client must be responsible for repaying any litigation costs that are advanced, the attorney is nevertheless not required at the time of entering into a fee contract to evaluate a client's ability to pay in the event that the litigation is unsuccessful or to decide whether to sue the client if the attorney is not reimbursed [*see* State Bar Formal Opinion No. 1976-38; LACBA Formal Opinion No. 495 (1998)]. Furthermore, there is no Rule of Professional Conduct expressly requiring an attorney to try to collect costs previously advanced to a client--so long as the subsequent forgiveness does not imply or evince an earlier agreement by the attorney to pay the costs.

[2] Client's Liability for Costs Under Fee Agreement

If the attorney and client do, in fact, agree that the client will be liable for costs and expenses, the attorney is, of course, entitled to be reimbursed for any costs actually advanced [*see Cooley v. Miller & Lux (1909) 156 Cal. 510, 525-526, 105 P. 981]* . Recoverable costs would normally include litigation expenses such as filing, witness, and jury fees [*see Cooley v. Miller & Lux (1909) 156 Cal. 510, 525-526, 105 P. 981]* . Travel expenses may be recovered if specified in the agreement or if such expenses are otherwise contemplated by the parties [*see Darnell v. Woodruff (1936) 14 Cal. App. 2d 628, 634, 58 P.2d 975]* . Unless specifically mentioned in the agreement as an expense to be reimbursed by the client, the attorney is responsible for general office overhead expenses [*Tasker v. Cochrane (1928) 94 Cal. App. 361, 368, 271 P. 503]* .

For examples of provisions of costs and expenses, see the State Bar Sample Fee Agreements, *see §§ 72.670*-72.676.

[3] Payment for Client's Business or Personal Expenses

Cal. Rules Prof. Conduct, Rule 4-210 provides that a California attorney may not, directly or indirectly, pay or agree to pay, guarantee, or represent or sanction the representation that he or she will pay, an existing or prospective client's personal or business expenses. Rule 4-210 does not prohibit an attorney from doing the following:

- Paying or agreeing to pay third parties for business or personal expenses with the client's consent from funds collected or to be collected on the client's behalf as a result of the representation [*Cal. Rules Prof. Conduct, Rule 4-210(A)(1)*].

- Lending money to the client after the attorney's employment if the client promises in writing to repay the loan [*Cal. Rules Prof. Conduct, Rule 4-210(A)(2)*].

Note, however, that any loan transaction between the attorney and client must comply with the requirements of *Cal.*

Rules Prof. Conduct, Rule 3-300, governing business transactions between attorneys and clients [*see Cal. Rules Prof. Conduct, Rule 4-210(B)*]. For further discussion of this rule as well as of restrictions on adverse business relations with clients, generally, see *§ 72.30* et seq. through § 72.170 et seq.

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§ 72.195 Compensation Arrangements Not Involving Contingent Fees

[1] Retainer Fee Agreements

It is important to distinguish between a true retainer, advance fee payment, and fixed fees. A true retainer fee is a sum of money paid by a client to secure an attorney's availability over a given period of time [*Baranowski v. State Bar (1979) 24 Cal. 3d 153, 164 n.4, 154 Cal. Rptr. 752, 593 P.2d 613]* . The client paying the retainer fee essentially has an option to be able to hire the attorney within the stated duration. The retainer is not a payment for the performance of any particular legal services [*see Cal. Rules Prof. Conduct, Rule 3-700(D)(2)*], and thus does not, like a fixed fee, necessarily limit the amount of compensation the attorney may ultimately charge for actual representation of the client. The purpose of a retainer is to compensate the attorney for the loss of an opportunity to represent another client [*Knight v. Russ (1888) 77 Cal. 410, 412, 19 P. 698]* . Thus, a retainer is earned by the attorney when paid because the attorney is entitled to the money whether or not he or she actually performs any services for the client [*Baranowski v. State Bar (1979) 24 Cal. 3d 153, 164 n.4, 154 Cal. Rptr. 752, 593 P.2d 613]* .

The true retainer should be distinguished from an advance fee payment, with which the retainer is often confused. An advance fee payment, which is required by some attorneys before commencing work on a case, is distinguishable from a retainer because it is a payment for the performance of a particular service in advance of the work being done, for example, the incorporation of a business or the preparation of a will [*see Baranowski v. State Bar (1979) 24 Cal. 3d 153, 164 n.4, 154 Cal. Rptr. 752, 593 P.2d 613]* . The fee is not actually earned until the service is performed and if it is never performed, the fee must be returned. For discussion of advance fee payments, *see § 72.197[1]*]. An advance fee payment, as opposed to a retainer payment, should probably be kept in a trust account for the benefit of the client until the fee, or portion thereof, is earned [*see Cal. Rules Prof. Conduct, Rule 4-100(A)*; *Baranowski v. State Bar (1979) 24 Cal. 3d 153, 164 n.4, 154 Cal. Rptr. 752, 593 P.2d 613* (case discussed requirement of trust account without resolving issue); *see also, § 72.197[1][a] below*]. A fixed fee payment is also distinguishable from a true retainer in that it is paid to the attorney to perform certain services for a specified fee, which generally cannot be increased [*see § 72.324[4][d]*].

The retainer agreement set out in § 72.677 is a standard retainer agreement to secure an attorney's availability to a client

for a certain time period. The agreement should specify the amount of the retainer, whether the retainer has been paid or the date on which payment is due, and the length of time that the attorney's availability will be assured. The agreement should indicate whether or not the attorney will be available at his or her regular fee for additional or extraordinary services. It is a good idea to keep time records to determine what would be a fair basis for a similar retainer fee arrangement in the future.

[2] Fixed or Flat Fee

In a "flat" or "fixed" fee agreement the lawyer charges a fixed fee for a particular matter. For example, a criminal attorney may charge a fixed fee to take the matter through a preliminary examination, a business lawyer may charge a fixed fee to provide the client with a corporation, or a family law practitioner may charge a fixed fee in an adoption proceeding. Bankruptcy attorneys also generally charge flat fees. Often, though not invariably, the flat fee includes the out-of-pocket costs the attorney will incur (for example, filing fees) that are not separately itemized.

Although the lawyer who enters into this type of agreement takes the risk that unforeseen complications may require an unusually large expenditure of time, the slight risk may be more than compensated for by the obviation of the need to keep accurate time records and make periodic billings.

PRACTICE TIP:

"Value Billing." "Value billing" is an increasingly popular concept, under which attorneys who work under a flat fee agreement become entitled to additional compensation when the client obtains a "good" or beneficial (and usually prompt) result, a device that theoretically is intended not only to reduce the risk of uncompensated effort but also reduce "padding" by the flat fee attorney. For discussion, *see § 72.193[4]*.

In some instances a flat fee may become excessive, giving rise to a duty on the attorney's part to arrive at some equitable settlement based on the reasonable value of his or her services. For further discussion regarding excessive fees, see *§ 72.193*.

Lawyers entering into this kind of agreement should be extremely careful in drafting the fee agreement. Specifically, the lawyer should clearly specify exactly what the fee is intended to cover. For example, in the formation of a corporation the agreement should specify that the fee does or does not include the issuance of securities, preparation of a shareholders agreement, election of Subchapter S status, etc. In the case of an adoption, it should be made clear whether the fee includes handling contested matters if the adoption is opposed. For a form adapted from the State Bar Sample Form of Short Fixed Fee Agreement, *see § 72.672*.

The agreement should also clearly state that the client agrees that the lawyer may place the entire fee in his or her personal account. For discussion of how to handle a fixed fee, see *§ 72.324[4][d][ii]*.

[3] Exploratory or Diagnostic Fee Agreements

The exploratory or diagnostic fee agreement form set out in § 72.678 is for use if the client wants a fixed fee arrangement, and if the attorney does not know enough about the facts and/or applicable law to quote a fixed fee. Prior to the parties making a fee arrangement, the attorney and client can agree that the attorney will work a certain number of hours at a set rate and then provide the client with an estimate of the necessary legal work and the fixed fee. If the attorney and client agree to go forward with the case after the attorney has done the exploratory work, they can use whatever subsequent fee agreement they desire.

[4] Per Diem Fee Provisions

The per diem fee provision set out in § 72.679, which is for use in a fee agreement, provides for a set rate based on the

type of legal service performed, such as preparing, filing, serving, and appearing on a particular type of motion or for a trial day. In criminal actions, for example, each court appearance may be made for a specified charge.

[5] Attorney's Fee Provisions

The attorney's fee provision set out in § 72.680 may be incorporated into a fee agreement. It is an optional provision stating that the prevailing party in an action to enforce the terms of the agreement is entitled to attorney's fees.

This provision would have the effect of allowing an attorney to collect attorney's fees in an action to collect the debt owed by a client who did not pay for the attorney's services. Of course, the client will also be entitled to collect any attorney's fees he or she incurred in defending an action to collect the fees due under the contract if the client prevails in that action [*see Civ. Code § 1717(a)*].

Some attorneys may feel that the provision will have a negative impact on the dealings between the attorney and client at the inception of the relationship.

Moreover, an attorney who is planning to include such a provision should keep in mind that he or she may not recover an award of fees pursuant to that provision and *Civ. Code § 1717* unless he or she actually incurs the expense of attorney's fees. In particular, an attorney who acts *pro se*, representing himself or herself in an action on a fee agreement, does not incur any actual expense and therefore may not recover an award of fees under *Civ. Code § 1717* [*Trope v. Katz (1995) 11 Cal. 4th 274, 282, 292, 45 Cal. Rptr. 2d 241, 902 P.2d 259* ; *see also Musaelian v. Adams (2009) 45 Cal. 4th 512, 516-520, 87 Cal. Rptr. 3d 475, 198 P.3d 560* (self-represented attorney could not recover sanctions under *Code Civ. Proc. § 128.7(c)(1)*)].

For detailed discussion and forms relating to the recovery of attorney's fees as an element of costs pursuant to *Civ. Code § 1717*, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

California Forms of Pleading and Practice--Annotated

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Volume 7: Attorney Practice and Ethics thru Auctions and Auctioneers-Chs.72-79
Chapter 72 ATTORNEY PRACTICE AND ETHICS
PART II. LEGAL BACKGROUND
C. Creation And Scope Of Attorney-Client Relationship
1. Drafting The Representation Agreement And Fee Arrangements

7-72 California Forms of Pleading and Practice--Annotated § 72.196

§ 72.196 Compensation Arrangements Involving Contingent Fees

[1] Use of Contingency Fee Agreement

Under a contingency fee agreement, the attorney's right to receive his or her fee is conditioned on obtaining a successful outcome for the client. Typically the attorney agrees to provide legal services in return for a percentage of the client's recovery. If no recovery is made, the attorney does not receive a fee [*see* Black's Law Dictionary 320, 614 (6th ed. 1990)]. The justification for the contingency fee arrangement is that it allows individuals who might not otherwise be able to afford legal representation an opportunity to protect their legal rights [*Newman v. Freitas (1900) 129 Cal. 283, 292, 61 P. 907* ; *see* Model Code of Professional Responsibility EC 2-20 (1980)]. A contingency fee contract is considered to be a normal arrangement for the payment of attorney's fees in various types of cases [*see Eaton v. Thieme (1936) 15 Cal. App. 2d 458, 463, 59 P.2d 638]* . Usually, it is used in litigation matters such as personal injury actions. The American Bar Association Model Rules of Professional Conduct suggest that if it is doubtful that a contingency fee is in the client's best interest, the attorney should offer the client alternative bases for the fee and explain their implications [Model Rules of Professional Conduct Rule 1.5, cmt. (1994)].

[2] State Bar Act Requirements

In most types of actions, an attorney who contracts to represent a client on a contingency fee basis must comply with the requirements of *Bus. & Prof. Code § 6147* in a written agreement [*see Bus. & Prof. Code § 6147(a), (c)*]. Two types of contingency fee agreements excepted from these requirements by statute are:

- Those for the recovery of workers' compensation benefits [*Bus. & Prof. Code § 6147(c)* and *discussion in § 72.196[7][g][iii]*].

- Those involving certain claims between merchants [*see Bus. & Prof. Code § 6147.5* and *discussion in § 72.196[7][g][i]*].

At least one appellate court has held that the *Bus. & Prof. Code § 6147* requirements apply only to contingency fee

agreements involving plaintiffs in damages actions [*Franklin v. Appel (1992) 8 Cal. App. 4th 875, 879, 891, 10 Cal. Rptr. 2d 759 (Second Dist., Div. Three)]* . However, another court has read the statute as encompassing all contingency fee agreements [*see Alderman v. Hamilton (1988) 205 Cal. App. 3d 1033, 1037, 252 Cal. Rptr. 845 (Second Dist., Div. Five)]* .

Bus. & Prof. Code § 6147 requires that the contract be in writing and that the attorney provide to the client, or to the client's guardian or representative, a duplicate copy of the contract at the time the contract is entered into, signed by both the attorney and the client or his or her guardian or representative [*Bus. & Prof. Code § 6147(a)*]. The statute also requires certain information to be contained in the contract, as *set forth in § 72.196[3]* [*see Bus. & Prof. Code § 6147(a)*].

If the attorney does not comply with the requirements of *Bus. & Prof. Code § 6147*, the agreement is voidable at the option of the client, and the attorney is then only entitled to collect a reasonable fee [*Bus. & Prof. Code § 6147(b)*; *Alderman v. Hamilton (1988) 205 Cal. App. 3d 1033, 1037-1038, 252 Cal. Rptr. 845* (clients voided part, but not all, of contingency fee contract that failed to meet statutory requirements)]. An attorney may also be subject to disciplinary action for violating these requirements. Modifications to a contingency fee contract also must comply with *Bus. & Prof. Code § 6147* [*Stroud v. Tunzi (2008) 160 Cal. App. 4th 377, 382-383, 72 Cal. Rptr. 3d 756*].

For State Bar sample contingent fee agreement forms, *see §§ 72.675* and *72.676*.

[3] Mandatory Statements Required Under State Bar Act

[a] Contents of Contract

Under *Bus. & Prof. Code § 6147*, a contingency fee contract must include, but is not limited to, statements of the following [*Bus. & Prof. Code § 6147(a)(1)-(3), (6)*]:

- The contingency fee rate on which the client and attorney have agreed.

- The manner in which disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery.

- The extent, if any, to which the plaintiff could be required to pay any compensation to the attorney for related matters that arise out of their relationship but are not covered by the contingency fee agreement, including any amounts collected by the attorney for the client.

- If the attorney does not meet any of the following criteria, a statement disclosing that fact (this disclosure requirement expires January 1, 1997, unless the legislature changes or deletes that date [*see Bus. & Prof. Code § 6147(d)*]):

  - Maintains errors and omissions insurance coverage;

  - Has filed with the State Bar an executed copy of a written agreement guaranteeing payment of all claims established against the attorney by his or her clients for errors or omissions arising out of the practice of law by the attorney in the amount specified in State Bar Law Corp. Rules, Rule IV(B)(1)(c);

  - If a law corporation, has filed with the State Bar an executed copy of the written agreement required pursuant to State Bar Law Corp. Rules, Rule IV(B)(1)(a), (b), or (c).

The contingency fee agreement must be in writing [*Bus. & Prof. Code § 6147(a)*]. In addition, the agreement must contain a statement that the fee is not set by law but is negotiable between the attorney and client, unless the claim is one against a health care provider for professional negligence and is governed by *Bus. & Prof. Code § 6146* [*Bus. & Prof. Code § 6147(a)(4)*]. If the agreement involves a claim against a health care provider for professional negligence, and is thus governed by *Bus. & Prof. Code § 6146*, the agreement must contain a statement that the rates set forth in *Bus. & Prof. Code § 6146* are the maximum limits for the contingency fee agreement, and that the attorney and client may negotiate a lower rate [*Bus. & Prof. Code § 6147(a)(5)*]. For discussion of contingency fee agreements governed by *Bus. & Prof. Code § 6146*, see § 72.196[7]; *see also §§ 72.675* and *72.676*.

PRACTICE TIP:

Determining Contingency Fees. There are several ways to fix the basis for determining the contingency fee. The percentage of recovery owed to the attorney may remain the same throughout the matter, or the percentage may vary depending on the stage of the proceeding at which the recovery is obtained. For example, the agreement may call for the recovery of different percentages, depending on whether the matter is resolved prior to filing suit, after filing suit, during or on completion of trial, or after appeal. The fee can also be based on a sliding scale so that, as the amount of the potential recovery increases, the percentage of fee pertaining to the higher levels of recovery decreases. For example, the fee might be 40% of the first $10,000, 33 1/3 of the next $15,000, 25% of the next $25,000, 20% of the next $50,000, and 10% of any part of the recovery over $100,000.

[b] Fees

[i] Conscionability

Like other types of fee contracts, contingency fee agreements are subject to the general prohibition against unconscionable fee agreements [*see Cal. Rules Prof. Conduct, Rule 4-200*]. Several factors are involved in determining the conscionability of a contingency fee, including the novelty and difficulty of the questions involved, the amounts involved, and the time and labor required [*see Cal. Rules Prof. Conduct, Rule 4-200(B)(3), (5), (10)*]. For discussion of other factors involved in determination of reasonableness of fees generally, see discussion under § 72.193.

[ii] Fees Based on Gross Recovery

A contingent fee agreement that calculates the attorney's fees based on the gross recovery rather than the net recovery after costs is not unfair to the client, unless the fee is so exorbitant and wholly disproportionate to the services performed by the attorney as to shock the conscience [*Ramirez v. Sturdevant (1994) 21 Cal. App. 4th 904, 913, 26 Cal. Rptr. 2d 554]* .

[iii] Fees Payable Apart From Damages

A provision in a contingent fee agreement entitling the attorney to any fees payable apart from damages is not unfair to the client. Pursuant to such a provision, an attorney may be entitled to any award or payment of attorney's fees made in addition to, or separate from, any award or payment of damages to the plaintiff [*Ramirez v. Sturdevant (1994) 21 Cal. App. 4th 904, 913-914, 26 Cal. Rptr. 2d 554]* .

[iv] Actions Against Health Care Providers

There are statutory limits on the amount of contingency fees that may be charged in actions against health care providers for professional negligence [*see Bus. & Prof. Code § 6146*]. For discussion of these statutory limits, see *§ 72.196[7][a]*.

[v] Case-Related Disbursements and Costs

The contingency fee contract must state how case-related disbursements and costs will affect the client's net recovery and the attorney's total fee [*Bus. & Prof. Code § 6147(a)(2)*; *see also § 72.194*]. Two of the principal accounting methods for the client's reimbursement of costs advanced by the attorney under a contingency fee contract are:

- *The gross fee or recovery method:* Under this method, the contingency fee is calculated on the gross recovery, costs and expenses are deducted from the remainder, and the client receives the balance. For example, if the recovery is $10,000, the contingency fee is 40%, and the costs advanced are $1,000, the attorney's fee is $4,000 and the client receives $5,000 (the remaining $6,000 less $1,000 in costs).

- *The net fee or recovery method:* Under this method, the costs and expenses are deducted from the gross recovery, the contingency is calculated on the remainder, and the client receives the balance. Under the net fee or recovery method, using the example above, the $1,000 in costs is subtracted from the $10,000 recovery, the attorney's fee is then calculated as 40% of $9,000, which is $3,600, and the client's recovery is $5,400. The medical malpractice contingency fee statute, *Bus. & Prof. Code § 6146*, requires a net recovery method [*Bus. & Prof. Code § 6146(c)(1)*; *see § 72.196[7][a]*; *see also §§ 72.675* and *72.676*].

[4] Potential Conflict of Interest When Attorney Has Discretion to Negotiate Lump-Sum or Bifurcated Settlement

A provision of a contingent fee agreement that gives the attorney the discretion to negotiate either a lump-sum settlement or a bifurcated (or trifurcated) settlement, one part of which would be his or her attorney fee, creates a *potential* conflict of interest. Under such a provision, the attorney could determine which approach might lead to the greatest amount of attorney's fees, and could maximize these fees at the client's expense [*Ramirez v. Sturdevant (1994) 21 Cal. App. 4th 904, 916-917, 26 Cal. Rptr. 2d 554]* .

A court may conclude, however, that the attorney did not breach a fiduciary duty to the client by including such a provision in the fee agreement if the evidence shows that the transaction was conducted at arm's length with an intelligent, experienced, and sophisticated client, and that no undue influence was involved [*Ramirez v. Sturdevant (1994) 21 Cal. App. 4th 904, 917, 26 Cal. Rptr. 2d 554]* .

The parties may negotiate a separate settlement of damages and attorney's fees, but this settlement should be subject to review and approval by the court at a settlement conference or on motion of a party, to determine whether a fair and reasonable balancing of the interests of the attorney and the client was reflected in the negotiations. The court may presume that the conflict prejudiced in the client in the absence of any evidence to the contrary [*Ramirez v. Sturdevant (1994) 21 Cal. App. 4th 904, 923-925, 26 Cal. Rptr. 2d 554]* .

PRACTICE TIP:

Use of an Example Calculation to Reduce Fee Disputes. Consider setting forth an example of how the fees on a hypothetical recovery would be calculated, showing how the fees and costs would be paid under the fee agreement, especially if the gross recovery method is used. This may reduce disputes between the attorney and the client that the client did not understand how the attorney's fees and reimbursement were to be handled. *By Joel M. Simon.*

[5] Other Recommended Statements

[a] Provision Regarding Attorney's Lien

Because the client has the absolute right to discharge the attorney with or without cause [*Fracasse v. Brent (1972) 6 Cal. 3d 784, 790, 100 Cal. Rptr. 385, 494 P.2d 9]* , the attorney should, for self protection, include lien and discharge

provisions in the contract. A fee agreement may expressly provide an attorney's lien, or a lien may be implied if the agreement limits the attorney's recovery of a fee to the proceeds of a settlement or judgment [*Cetenko v. United California Bank (1982) 30 Cal. 3d 528, 531, 179 Cal. Rptr. 902, 638 P.2d 1299]* .

An attorney's charging lien [*see § 72.198[1][a]*] survives the discharge of the attorney by the client [*Siciliano v. Fireman's Fund Ins. Co. (1976) 62 Cal. App. 3d 745, 752, 133 Cal. Rptr. 376* ; *Weiss v. Marcus (1975) 51 Cal. App. 3d 590, 598, 124 Cal. Rptr. 297]* . In addition, when the client's conduct makes it unreasonably difficult to perform, the attorney can voluntarily withdraw and recover on the lien [*Pearlmutter v. Alexander (1979) 97 Cal. App. 3d Supp. 16, 20* ; *see also* discussion regarding attorney withdrawal and recovery of fees in § 72.350 et seq. through § 72.470 et seq.]. Furthermore, a contractual lien may provide the basis for a cause of action for interference with a prospective economic advantage if the successor counsel disburses the recovery proceeds without satisfying the lien [*Pearlmutter v. Alexander (1979) 97 Cal. App. 3d Supp. 16, 19-20*].

For forms of lien provision, *see §§ 72.675* and *72.676*.

[b] Provision Regarding Compensation in Event of Discharge

If the client discharges the attorney before the attorney completes performance of the agreement, the attorney may not recover the full contingency fee, but is limited to recovery of the reasonable value of his or her services rendered prior to the discharge [*Fracasse v. Brent (1972) 6 Cal. 3d 784, 792, 100 Cal. Rptr. 385, 494 P.2d 9* ; *see §§ 72.675* and *72.676*; *see also § 72.451* et seq.].

PRACTICE TIP:

Reasonable Value Clause. The attorney may wish to consider including a clause in a contingency fee contract to provide the basis for determining the reasonable value of an attorney's services on discharge. One method is to provide that the attorney will be compensated at an hourly rate for services actually rendered. The attorney should maintain records of the actual time spent on the action if this method is chosen.

[c] Provision Regarding Payment of Fee in Case of Structured Settlement

If the recovery may involve periodic future payments in lieu of or in addition to a lump sum recovery (for example, in a structured settlement providing for an annuity), the contract should specifically provide for the manner of compensation to the attorney in that eventuality. Without a specific provision regarding the attorney's entitlement to payment out of the lump sum portion of the recovery based on the present value of the annuity amount, payment of any percentage of the annuity to the attorney may not be allowed until the payments are actually received on a periodic basis by the client [*see Sayble v. Feinman (1978) 76 Cal. App. 3d 509, 514-515, 142 Cal. Rptr. 895]* .

[6] Provision Regarding Billing Statements and Objections

A statement in the fee agreement may provide that the client will be billed monthly and is required to pay the statement within a prescribed period of time. The provision should explain that one reason for monthly billing is to provide the client the opportunity to bring any problems to the attention of the attorney. The client should agree to read the statements carefully and to bring any objections the client may have to the attorney in writing within a prescribed period of time otherwise the objections will be deemed waived.

ILLUSTRATION:

Sample Billing Statement. We will bill you monthly. you agree to pay each statement in full within twenty (20) days after billing. If in any month you do not receive a bill, please let us know. One reason for billing monthly is to give you an opportunity to bring any problems promptly to our attention. REVIEW YOUR BILLS CAREFULLY, immediately upon receipt. Any objections you may have to our

billing must be communicated to us in writing within sixty (60) days of the date on each statement; otherwise, all objections to our charges will be deemed waived.

[7] Limitations on Contingency Fee Agreements in Specific Substantive Areas

[a] Medical Malpractice Actions--Monetary Limits

An attorney must not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damages against a health care provider based on that person's alleged professional negligence in excess of the following limits [*Bus. & Prof. Code § 6146(a)*]:

- 40 percent of the first $50,000 recovered.
- 331/3 percent of the next $50,000 recovered.
- 25 percent of the next $500,000 recovered.
- 15 percent of any amount on which the recovery exceeds $600,000.

The original 1975 version of *Bus. & Prof. Code § 6146*, and not its 1987 amendment, sets the maximum fee in cases in which the contingency fee agreement was entered into before the effective date of the 1987 amendment (January 1, 1988), even if settlement and fee distribution took place after the effective date of the amendment [*Wienholz v. Kaiser Foundation Hospitals (1989) 217 Cal. App. 3d 1501, 1503, 267 Cal. Rptr. 1* (also holding that 1987 amendment increasing maximum contingency fee in recoveries greater than $200,000 is prospective only)].

[b] Limits Strictly Applied

The limitations in *Bus. & Prof. Code § 6146* apply whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind [*Bus. & Prof. Code § 6146(a)*]. A trial court does not have the power to award extraordinary attorney's fees under *Bus. & Prof. Code § 6146* [*Hathaway v. Baldwin Park Community Hospital (1986) 186 Cal. App. 3d 1247, 1251-1253, 231 Cal. Rptr. 334]* . Furthermore, a client may not waive the provisions of *Bus. & Prof. Code § 6146* by agreeing to pay fees in excess of the statutory limits [*Fineberg v. Harney & Moore (1989) 207 Cal. App. 3d 1049, 1055, 255 Cal. Rptr. 299* (client's action to recover already-paid contingent fees that exceeded statutory limits); *see also Civ. Code § 3513* (law established for public reason as not contravenable by private agreement)].

For purposes of calculating the maximum attorney fees allowable under MICRA (*Bus. & Prof. Code § 6146*) the "total value" of the settlement or award is the present value of the periodic payments [*Nguyen v. Los Angeles County Harbor/UCLA Medical Center (1995) 40 Cal. App. 4th 1433, 1453-1454, 48 Cal. Rptr. 2d 301]* .

PRACTICE TIP:

"Safe Harbor" Provision. Consider including a MICRA limitation clause in the fee agreement providing that the client will be charged the *lesser* of either the fee stated or the maximum fee allowed under MICRA.

An attorney representing several plaintiffs in a wrongful death case based on professional negligence must apply the fee scale in *Bus. & Prof. Code § 6146(a)* to the judgment as a whole. The attorney may not compute fees separately on each plaintiff's share of the award [*Yates v. Law Offices of Samuel Shore (1991) 229 Cal. App. 3d 583, 588-590, 280 Cal. Rptr. 316]* .

Bus. & Prof. Code § 6146 fixes the maximum allowable contingent fee for a medical malpractice action as a whole, including an appeal, and the limitation may not be avoided by charging separate fees for segments of the case or by charging both contingent and hourly fees [*see Yates v. Law Offices of Samuel Shore (1991) 229 Cal. App. 3d 583, 591-592, 280 Cal. Rptr. 316* (attorney is prohibited from charging in excess of statutory formula for hourly fees of attorney he associated to handle appeal)].

[i] Constitutionality of Fee Limitations

The constitutionality of the *Bus. & Prof. Code § 6146* contingency fee limitations has been upheld by the California Supreme Court, which rejected the contentions that the limitations constituted a denial of due process, violation of equal protection, or violation of the separation of powers doctrine [*Roa v. Lodi Medical Group, Inc. (1985) 37 Cal. 3d 920, 925-934, 211 Cal. Rptr. 77, 695 P.2d 164* ; *see also Fineberg v. Harney & Moore (1989) 207 Cal. App. 3d 1049, 1054-1055, 255 Cal. Rptr. 299* (*Bus. & Prof. Code § 6146* does not deprive client of right to counsel)].

[ii] Application of Limitations to Actions for "Professional Negligence"

Like other provisions of the Medical Injury Compensation Reform Act (MICRA), *Bus. & Prof. Code § 6146* does not apply to all types of actions against doctors or other "health care providers"--it applies only to actions that are based on the provider's alleged professional negligence [*Waters v. Bourhis (1985) 40 Cal. 3d 424, 431, 220 Cal. Rptr. 666, 709 P.2d 469]* . "Professional negligence" is defined as a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that the services are within the scope of services for which the provider is licensed and are not within any restriction imposed by the licensing agency or licensed hospital [*Bus. & Prof. Code § 6146(c)(3)*].

Within the meaning of *Bus. & Prof. Code § 6146(c)(3)*, "professional negligence" may include conduct that is an intentional departure from professional standards. In addition to an action for professional malpractice or negligence, that conduct might be the basis of a tort action not within the scope of *Bus. & Prof. Code § 6146*. For example, when a psychiatrist purposefully abuses the therapist-patient relationship to satisfy his or her own personal desires, the patient may maintain both an action for professional malpractice or negligence and an action for an intentional tort [*see Waters v. Bourhis (1985) 40 Cal. 3d 424, 433-435, 220 Cal. Rptr. 666, 709 P.2d 469]* .

When a plaintiff knowingly brings a "hybrid" action against a health care provider, that is, an action partially based on professional negligence as defined by MICRA and partially based on another, non-MICRA cause of action, and obtains a recovery that may be based on a non-MICRA theory, the attorney's fee limitations of *Bus. & Prof. Code § 6146* do not apply [*Waters v. Bourhis (1985) 40 Cal. 3d 424, 437, 220 Cal. Rptr. 666, 709 P.2d 469]* . However, an attorney may not collect fees in excess of the maximum amount authorized by MICRA unless he or she specifically advised the client of the advantages and disadvantages of alternative litigation strategies, including potential attorney's fees, and obtained the client's consent to pursue the non-MICRA action as well as the MICRA claim [*Waters v. Bourhis (1985) 40 Cal. 3d 424, 437-438, 220 Cal. Rptr. 666, 709 P.2d 469]* .

An additional problem may arise if a hybrid action is resolved by settlement rather than by trial, so that the basis of liability is not adjudicated by the court. In that case, a potential conflict of interest arises between the plaintiff and his or her attorney, who would wish to settle the case on the basis of a non-MICRA theory so as to avoid the limitations on the amount of the contingency fee. Of course, the conflict may be avoided if the attorney agrees to waive any fee in excess of the MICRA limits. In the *Waters* case, the Supreme Court did not specify exactly when the client's consent to pursue the hybrid action must be obtained, but it appears that to be effective, the consent should be obtained as soon as possible in the representation, preferably before the fee agreement is signed. Consent obtained after a settlement or judgment is recovered is probably not sufficient to permit recovery of a fee in excess of the MICRA limits. Also, even if the client does consent to pursuit of a non-MICRA cause of action and a higher contingency fee, the fee will nevertheless be subject to the MICRA limits if the plaintiff thereafter obtains a recovery based solely on a MICRA cause of action [

Waters v. Bourhis (1985) 40 Cal. 3d 424, 439 n.15, 220 Cal. Rptr. 666, 709 P.2d 469 (dictum)].

[iii] Effect of Contingent Consulting Agreements

A plaintiff may contract with a consulting firm on a contingent basis to assist the plaintiff's attorney in reviewing medical records and locating medical expert witnesses [*see Ojeda v. Sharp Cabrillo Hospital (1992) 8 Cal. App. 4th 1, 4-5, 10 Cal. Rptr. 2d 230]* . Although such consulting agreements are not invalid per se as against public policy, in medical malpractice cases, the trial court must determine that the total of the attorney's and consultant's fees are reasonable under the MICRA guidelines. The amount that a plaintiff agrees to pay in attorney's fees, consultant's fees, and separately identified costs must not exceed the maximum attorney's fees under *Bus. & Prof. Code § 6146(a)* plus all allowable disbursements and costs under *Bus. & Prof. Code § 6146(c)* [*Ojeda v. Sharp Cabrillo Hospital (1992) 8 Cal. App. 4th 1, 17-19, 10 Cal. Rptr. 2d 230]* .

ILLUSTRATION:

Calculating Attorney's Fee. In a medical malpractice case, an attorney contracts with a consulting service for expert assistance. Under the contract, compensation for the consulting service is to be provided on a contingent fee basis, with the service to receive 10% of the gross recovery. The service spends a total of 170.5 hours on the case, and 150 of the total hours constitute legitimate "disbursements or costs" that a reasonable attorney could charge to the client above and beyond the attorney's fee. During the case, the lawyers advance $27,528 in costs. The case settles for $1.1 million. What is the maximum the attorneys may receive under MICRA? $126,034.

- To make the fee calculation:
    - Determine the total amount of the "off the top" costs for services that fall into the "disbursements or costs" category:
    - The consulting service's fee is 10% of 1.1 million, or $110,000. Of the actual hours spent on the case by the service 150 out of 170.5, or 88% (150/170.5) are legitimate charges, and 88% of $110,000 is 96,800.
    - To this figure, add the costs advanced by plaintiff's laywers ($27,528) for a total costs of $124,328.
- Deduct the total costs of $124,328 from the total settlement ($1.1 million) leaving an amount of $975,672 from which to calculate the attorneys' fee under MICRA.
- Using the appropriate percentages [*see § 72.196[7][a][i]*, the maximum attorney's fee under MICRA would be approximately $139,234.
- Of the $139,234, $13,200 must be subtracted, leaving a fee of $126,034. (The $13,200 represents the 12% of the consultant's fee that exceeded the "reasonable" amount that could be charged as costs.)
- Thus, the attorneys could receive a maximum fee of $126,034. The consulting firm would be paid its fee of $110,000 [*see Ojeda v. Sharp Cabrillo Hospital (1992) 8 Cal. App. 4th 1, 20-21 n.21, 10 Cal. Rptr. 2d 230]* .

[iv] Determination of Amount Recovered

The recovery from which the percentages are to be calculated is the net sum recovered, after deduction of disbursements or costs incurred in the prosecution of the action [*Bus. & Prof. Code § 6146(c)(1)*]. The client's medical care costs and the attorney's office overhead costs are not deductible for this purpose [*Bus. & Prof. Code § 6146(c)(1)*].

[v] Fee Recovery if Award of Periodic Payments Made

If the client receives a damage award of periodic future payments, the basis for the computation of the fee is a total value placed on the payments based on the client's projected life expectancy [*Bus. & Prof. Code § 6146(b)*]. If the recovery may involve periodic future payments in lieu of or in addition to a lump sum recovery, the agreement should specify whether the total fee will be payable from the lump sum or periodically out of the client's payments [*see Sayble v. Feinman (1978) 76 Cal. App. 3d 509, 514, 142 Cal. Rptr. 895]* .

The appropriate measure of the recovery is the present value of the periodic payments, not the arithmetic sum of all future payments required by the award (present value being the present, discounted value of future payments) [*Schneider v. Kaiser Foundation Hospitals (1989) 215 Cal. App. 3d 1311, 1314, 1320, 264 Cal. Rptr. 227]* . If the future periodic payments are to be made from an annuity purchased by the defendant from a third party insurance company, the cost of this annuity may be used to determine present value [*see Schneider v. Kaiser Foundation Hospitals (1989) 215 Cal. App. 3d 1311, 1314, 1319-1320, 264 Cal. Rptr. 227]* .

An attorney representing a plaintiff on a contingency fee basis who is discharged shortly before the conclusion of a case, and before the court has an opportunity to determine the present value of an award of periodic payments, has standing to participate at a hearing to determine the present value of the payments [*Schneider v. Kaiser Foundation Hospitals (1989) 215 Cal. App. 3d 1311, 1314, 1316-1317, 264 Cal. Rptr. 227]* .

[vi] Contents of Agreement

Like other types of contingency fee contracts, the medical malpractice contingency fee contract must be written, a copy must be presented to the client at the time of execution, and the contract must state if the client is required to reimburse the attorney for related matters not covered in the contract [*Bus. & Prof. Code § 6147(a)*]. For discussion of the statutory requirements for contingency fee contracts, see *§ 72.196[1], [3],* and *[5]*.

[c] Condemnation Proceedings

Contingency fee contracts in condemnation cases differ from contingency fee arrangements in other types of cases because of the nature of the condemnation process. Generally, the condemning agency makes an initial offer to the property owner [*see Code Civ. Proc. § 1250.410(a)*].

Unless the condemning agency is relying on an improper appraisal theory or an unrealistically low appraisal, the attorney's efforts the property owner' behalf in condemnation litigation probably will not attain a court award significantly higher than the offer. The fee can be calculated several different ways in order to deal with this reality:

- One basis is a substantial percentage of the "betterment," that is, the difference between the condemnor's last offer prior to execution of the attorney's fees contract and the actual recovery by settlement or trial.

- Another method is to calculate the fee as a smaller percentage of the total recovery.

- Still another approach is for the contract to contain alternative "betterment" and percentage of total recovery provisions with the actual fee being determined by whichever method produces the larger fee.

Some courts have looked more closely at contingency fee agreements, to determine if they are reasonable under the particular circumstances of the case. This scrutiny has been justified in cases where the taxpayers, through the public entity involved, ultimately pay the attorney's fee [*People ex rel. Dept. of Transportation v. Yuki (1995) 31 Cal. App. 4th 1754, 1769-1771, 37 Cal. Rptr. 2d 616]* .

If the attorney successfully contests the agency's condemnation power, however, the client will not recover any award on which a contingency fee can be based. In this situation, the fee agreement should allow for another type of appropriate compensation, e.g., by fixed hourly rate.

For discussion of eminent domain, including the limited circumstances under which the property owner may recover attorney's fees [*see Code Civ. Proc. §§ 1235.140, 1250.410*], see *Ch. 247, Eminent Domain, § 247.10* et seq.

[d] Domestic Relations Proceedings

California case law has held that, if a contingency fee contract promotes divorce because the attorney has an interest in discouraging reconciliation of the spouses, the contract is against public policy and void [*see Newman v. Freitas (1900) 129 Cal. 283, 289, 61 P. 907]* . However, if the marriage is "moribund," without any possibility of reconciliation, a contingency fee arrangement may be proper [*Krieger v. Bulpitt (1953) 40 Cal. 2d 97, 100-101, 251 P.2d 673]* .

The California Supreme Court has held that the validity of a contingency fee agreement should be determined in light of the factual circumstances of the case and the appropriate public policy considerations [*Krieger v. Bulpitt (1953) 40 Cal. 2d 97, 100, 251 P.2d 673]* . For example, the Court upheld a contingency fee agreement between an attorney and a husband who was defending a suit involving his property rights, who otherwise would not have had funds available with which to pay attorney's fees. The Court stated that a contract entered into under those circumstances does not involve considerations contrary to public policy or promotive of divorce [*Krieger v. Bulpitt (1953) 40 Cal. 2d 97, 100-101, 251 P.2d 673]* .

The Standing Committee on Professional Responsibility and Conduct of the California State Bar has issued an advisory opinion stating that it is not per se improper for an attorney to enter into a contingency fee contract in a domestic relations case based on a percentage of the property or support arrearage awarded to the client, provided that the contract does not violate public policy by promoting divorce or involving the attorney in a conflict of interest [State Bar Formal Opinion No. 1983-72]. The Committee stated that a contingency fee agreement may not be proper in a case in which an attorney must prove valuation of the marital property. For example, a conflict of interest could exist between the attorney and client when the client wants a community property item valued low for the client's advantage in the property division and the attorney wants the property valued high as a basis for calculating the contingency fee [State Bar Formal Opinion No. 1983-72]. Another conflict of interest may occur when the client wants more support and less property in a settlement, while the attorney wants more property awarded to increase the fee basis. One possible way to reduce these problems is to insert provisions in the contract that exclude an asset as a basis for a fee, provide for a higher proportional fee the lower the valuation placed on the asset, or provide for a present cash value for the entire settlement as a basis for calculation of the fee [*see* Adams, 1985 Cal. Fam. L. Rep. 2687].

Although the Committee has stated that a contingency fee contract for past due child support and spousal support arrearages is proper, it has not determined the propriety of a contingency fee contract for an award of future child support and spousal support [State Bar Formal Opinion No. 1983-72].

[e] Criminal Defense

California has no express prohibition against contingency fee contracts in criminal defense matters. However, it would appear that in some situations such an agreement could violate *Cal. Rules Prof. Conduct, Rule 3-310*, concerning

conflicts with the client's interests [*see* generally discussion in *§ 72.30* et seq.].

Such contracts have been prohibited in other jurisdictions [*see United States ex rel. Simon v. Murphy (E.D. Pa. 1972) 349 F. Supp. 818, 823-824* ; *Matter of Fasig (Ind. 1983) 444 N.E.2d 849, 850* ; *Schoonover v. State (1975) 218 Kan. 377, 384-385, 543 P.2d 881* , *cert. denied, (1976) 424 U.S. 944, 96 S. Ct. 1412, 47 L. Ed. 2d 349* ; *In re Steere (1975) 217 Kan. 276, 276, 536 P.2d 54]* . The reason for the prohibition is that there may be an inherent conflict of interest between the attorney's interests and those of the client. For example, if the contingency that triggers the basis for the fee is an acquittal, and an opportunity to plead guilty to a lesser offense is offered, the client's best interest may be to accept a guilty plea. The attorney, however, will be denied a fee if a plea is entered and an acquittal is not obtained; therefore, the attorney may be tempted to advise the client not to accept the plea.

Other jurisdictions also have held that the client may be denied his or her constitutional right to effective assistance of counsel by a conflict of interest with the attorney caused by the contingency fee contract [*see, e.g., United States ex rel. Simon v. Murphy (E.D. Pa. 1972) 349 F. Supp. 818, 823-824* (based on federal constitution); *Schoonover v. State (1975) 218 Kan. 377* , *cert. denied (1976) 424 U.S. 944* (totality of circumstances determine whether right to effective counsel violated)].

Contingency fee contracts in the representation of criminal defendants are generally considered unethical [*see* Model Rules of Professional Conduct, Rule 1.5(d)(2) (1994); Model Code of Professional Responsibility DR 2-106(C) (1980); A.B.A. Standards for Criminal Justice (2nd ed. 1986), § 4-3.3(e)].

[f] Representation of Government Entity

The California Supreme Court has held that at least in certain cases it is not appropriate for a government attorney, or a private attorney representing a governmental entity, to represent the government on a contingency fee basis [*People ex rel. Clancy v. Superior Court (1985) 39 Cal. 3d 740, 748, 218 Cal. Rptr. 24, 705 P.2d 347]* . In *People ex rel. Clancy v. Superior Court*, a private attorney entered into an agreement to represent a city in an action to abate a public nuisance. The agreement provided that the attorney's hourly fee would double if the city prevailed in the action. The Supreme Court held that such an agreement was improper and issued a writ of mandate ordering that the attorney be disqualified from representing the city in the action [*People ex rel. Clancy v. Superior Court (1985) 39 Cal. 3d 740, 750, 218 Cal. Rptr. 24, 705 P.2d 347]* . The Court reasoned that prosecutors and other government attorneys involved in law enforcement have a duty to see to it that the laws are enforced impartially. This duty of neutrality is violated if the attorney has a personal interest or financial stake in the litigation [*People ex rel. Clancy v. Superior Court (1985) 39 Cal. 3d 740, 746, 218 Cal. Rptr. 24, 705 P.2d 347]* . The Court held that the attorney in this case had essentially assumed the duties of a city attorney and was therefore governed by the same standards of neutrality [*People ex rel. Clancy v. Superior Court (1985) 39 Cal. 3d 740, 747, 218 Cal. Rptr. 24, 705 P.2d 347]* . Because the contract gave the attorney a personal financial interest in the outcome of the case, the contract violated the duty of neutrality [*People ex rel. Clancy v. Superior Court (1985) 39 Cal. 3d 740, 746-748, 750, 218 Cal. Rptr. 24, 705 P.2d 347]* .

In *Clancy*, the Court noted in dictum that, although there was no law on the subject, contingency fee agreements for criminal prosecutors were generally recognized to be unethical and potentially unconstitutional [*People ex rel. Clancy v. Superior Court (1985) 39 Cal. 3d 740, 748, 218 Cal. Rptr. 24, 705 P.2d 347]* . The Court observed that a public nuisance action, like a criminal prosecution, involves a delicate balancing of interests. For example, the case before the Court required a balancing of the public's interest in ridding their city of an obnoxious or dangerous condition versus that of a property owner in using his or her property as he or she wishes [*People ex rel. Clancy v. Superior Court (1985) 39 Cal. 3d 740, 749, 218 Cal. Rptr. 24, 705 P.2d 347]* . The Court concluded that any financial arrangement that would tempt a government attorney to tip the scales cannot be tolerated [*People ex rel. Clancy v. Superior Court (1985) 39 Cal. 3d 740, 749, 218 Cal. Rptr. 24, 705 P.2d 347]* . The Court did observe, however, that there may be some classes of cases in which absolute neutrality is not required of the government attorney and in which a contingency fee agreement may be proper [*People ex rel. Clancy v. Superior Court (1985) 39 Cal. 3d 740, 748, 218*

Cal. Rptr. 24, 705 P.2d 347 , citing *Denio v. City of Huntington Beach (1943) 22 Cal. 2d 580, 140 P.2d 392* (city hired law firm on contingency fee basis to represent city in all matters relating to protection of oil rights)]. For example, one court of appeal held that *Clancy* does not bar public entities from engaging private counsel under a contingent fee arrangement to assist in public nuisance abatement litigation, as long as the public entities' in-house counsel retains control over all decision making [*County of Santa Clara v. Superior Court (2008) 161 Cal. App. 4th 1140, 1148-1155, 74 Cal. Rptr. 3d 842*]. In addition, *Clancy* does not bar contingency fee lawyers from assisting government lawyers as co-counsel in ordinary civil litigation [*Priceline.com Inc. v. City of Anaheim (2010) 180 Cal. App. 4th 1130, 1138-1148, 103 Cal. Rptr. 3d 521* (tax assessment proceeding)].

[g] Other Statutory Restrictions

[i] Claims Between Merchants

Bus. & Prof. Code §§ 6147 and *6148*, requiring fee agreements to be in writing, do not apply to contingency fee contracts for the recovery of claims between merchants arising from the sale or lease of goods or services rendered, or money loaned for use, in the conduct of a business or profession if the merchant contracting for legal services employs 10 or more individuals [*Bus. & Prof. Code § 6147.5(a)*].

When no written contract for legal services exists, however, an attorney may not collect a contingency fee in excess of the following [*Bus. & Prof. Code § 6147.5(b)(1)*]:

- 20 percent of the first $300 collected.
- 18 percent of the next $1,700 collected.
- 13 percent of sums collected in excess of $2,000.

Notwithstanding these limits, the following minimum charges may be charged and collected [*Bus. & Prof. Code § 6147.5(b)(2)*]:

- $25 in collections of $75 to $125.
- 331/3 percent of collections less than $75.

For purposes of *Bus. & Prof. Code § 6147.5*, the term "merchant" means a person who deals in goods of the kind or otherwise by his or her occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his or her occupation holds himself or herself out as having such knowledge or skill [*see Bus. & Prof. Code § 6147.5(a)*; *Comm. Code § 2104(1)*].

[ii] Worker's Compensation Matters

The Worker's Compensation Appeals Board establishes reasonable attorney's fees in worker's compensation matters at the hearing and appellate levels [*see Lab. Code § 4906*; *see also Lab. Code § 3856* (attorney's fees in actions against third parties)]. The usual award is 10% of the recovery [*see Robert G. Beloud, Inc. v. Workers' Comp. Appeals Bd. (1975) 50 Cal. App. 3d 729, 736, 123 Cal. Rptr. 750]* . For further discussion and the required form for the attorney's fee disclosure statement, see Ch. 577, *Workers' Compensation* .

The *Bus. & Prof. Code § 6147* requirements for contingency fee agreements do not apply in actions to recover workers' compensation benefits [*Bus. & Prof. Code § 6147(c)*].

[iii] Claims Before State Board of Control

Under the "Good Samaritan" law [*see Gov. Code § 13970 et seq.*], attorneys who assist clients in obtaining awards from the State Board of Control cannot charge or receive any fee other than that included in the award. The awarded fee should reflect the reasonable value of the legal services, but cannot exceed 10% of the award [*Gov. Code § 13973(e)*].

Similarly, when an attorney assists a victim of criminal violence in processing a claim before the State Board of Control, the attorney is prohibited from charging or receiving any fee in addition to that included in the award. The fee is limited to 10% of the award, or $500, whichever is less [*Gov. Code § 13965(d)*].

[8] Invalidity of Provision Prohibiting Client's Settlement of Case

A provision that prevents the client from settling the claim without the attorney's consent is void because it interferes with the client's ownership of the cause of action and control over the suit, and it contravenes the policy of permitting parties to settle their differences amicably without the intervention of attorneys [*Calvert v. Stoner (1948) 33 Cal. 2d 97, 103, 199 P.2d 297* (void clause was severable from otherwise valid contract); *Hall v. Orloff (1920) 49 Cal. App. 745, 748-750, 194 P. 296]* . In one case, the contract provided for no settlement without the mutual consent of the client and attorney. The contract also stated that the client would pay the attorney 50% of any settlement, but not less than $1,000. The court held that the $1,000 minimum was a penalty and indicated that an express agreement by a client to pay a penalty for settling a matter without the attorney's consent would be against public policy and void [*Hall v. Orloff (1920) 49 Cal. App. 745, 748-750, 194 P. 296]* .

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§ 72.197 Modes of Payment

[1] Advance Payment

[a] Use of Advance Payment Before Commencing Work

Many attorneys, especially in the family law and criminal law fields, require an advance payment for fees and costs before commencing any legal work for the client. The advance payment makes economic sense because the attorney avoids the risk of doing the work and not being paid. When an advance payment is desirable, the agreement should specify whether, and in what amounts, the payment is to be allocated to fees and costs, and should specify that the attorney will periodically bill against the advance as the fees are earned. Absent express agreement to the contrary, an advance payment retainer does not vest the attorney with an immediate right to the funds. Rather, the funds remain the property of the client until the attorney has earned fees or incurred costs on the client's behalf. An attorney who fails to deposit the advance payment retainer funds in a trust account is liable for negligence and breach of fiduciary duty [*T. & R. Foods, Inc. v. Rose (1996) 47 Cal. App. 4th Supp. 1, 7-8*]. For a form of an advance payment provision to include in a fee agreement, *see § 72.682*.

PRACTICE TIP:

Periodic Accounting. It is recommended that the attorney provide the client with a periodic accounting of the advance payment. If the attorney wishes to apply any unexpended balance of the advance payment to a different matter, the provision should specifically provide for this situation.

For discussion regarding the handling of advance fees, and the currently controversial issue of whether they must be placed in the client's trust account, see *§ 72.430* et seq. through § 72.470 et seq.

[b] Advance Insufficient to Cover Fees

If the advance is insufficient to cover fees and expenses incurred, the client is billed for the additional fees and costs. The client's failure to pay additional funds may not allow the attorney to withdraw from the representation. An attorney

may withdraw if the client breaches an agreement or obligation as to expenses or fees [*Cal. Rules Prof. Conduct, Rule 3-700(C)(1)(f)*], but the attorney may not withdraw in any event until he or she has taken reasonable steps to avoid foreseeable prejudice to the client [*Cal. Rules Prof. Conduct, Rule 3-700(A)(2)*]. For further discussion, see *§ 72.371*.

The attorney may also wish to include a provision requiring additional advances as the fees are depleted by earned charges [*see § 72.673*].

[2] Installment Payment

When an attorney enters into an agreement with an individual client to provide legal services for personal or household purposes and for the fee to be paid in installments with finance charges, the attorney may be required to comply with the California Unruh Act [*Civ. Code § 1801 et seq.*] and the federal Truth in Lending Act [*15 U.S.C. § 1601 et seq.*], as interpreted in Regulation Z [12 C.F.R. § 226].

Under the Unruh Act, attorneys' services rendered primarily for personal purposes, as opposed to commercial or business purposes, may be the subject of a retail installment sale [*see Civ. Code §§ 1802.2* (definition of services as excluding those for commercial or business use; excluding services of physicians and dentists, but not excluding attorneys), *1802.5* ("retail installment sale" defined as furnishing of services by retail seller to retail buyer for deferred payment price payable in installments)]. An agreement that provides for repayment in installments with finance charges or for payment in more than four installments is a "retail installment contract" [*see Civ. Code § 1802.6*]. Finance charge rates for transactions subject to the Unruh Act are limited by statute [*see Civ. Code §§ 1805.1* (limitations on finance charges in retail installment contracts), *1810.2* (limitations on finance charges in retail installment accounts)].

The federal Truth in Lending Act applies to each individual or business that offers or extends credit when the following four conditions are met [*12 C.F.R. § 226.1(c)(1)*]:

- The credit is offered or extended to consumers.
- The offering or extension of credit is done regularly [*see 12 C.F.R. § 226.2(a)(17)* (defining "regularly")].
- The credit is subject to a finance charge or is payable by a written agreement in more than four installments.
- The credit is primarily for personal, family, or household purposes.

The Unruh Act and Truth in Lending Act should be consulted to determine any disclosure requirements when an attorney extends consumer credit [*Civ. Code §§ 1803.1-1803.7, 1810.1*; *12 C.F.R. §§ 226.17, 226.18*]. In open-end credit plans, or retail installment accounts, the debtor must be furnished with an initial disclosure statement before the first transaction is made [*Civ. Code § 1810.1*; *12 C.F.R. § 226.5(b)(1)*]. Additionally, the debtor is entitled to a periodic statement at the end of each billing cycle [*Civ. Code § 1810.3*; *12 C.F.R. § 226.5(b)(2)(i)*]. The periodic statement must include, among other things, the amount and date of each transaction, and a brief identification of the services rendered [*Civ. Code § 1810.3(a)(2)*; *12 C.F.R. § 226.8(a)(2)*]. Also, under Regulation Z, the creditor must provide a long or short form billing error rights statement annually or with each periodic statement [*12 C.F.R. § 226.9(a)*; *see* Bardet, "Ethics Advisory: Charging Your Clients 'Interest'," *2 Cal. Law. 29 (July/Aug. 1982)*; *see also § 72.197[5]*].

For further discussion, see Ch. 501, *Sales: Retail Installment Sales* .

[3] Credit Card Payment

The State Bar Board of Governors' official position is not to oppose the use of credit cards for payment of legal fees and costs so long as the attorney complies with the State Bar Act and the Rules of Professional Conduct [Cal. State Bar Bd. of Governors, Policy Statement on Use of Credit Cards for the Payment of Legal Services and Expenses (Feb. 11, 1975)]. In particular, the Board requires that attorneys who participate in credit card finance plans not increase their fees to a client for using a credit card, not pay a client's personal or business expenses unless permitted under Cal. Rules Prof. Conduct, former Rule 5-104 (*now see Cal. Rules Prof. Conduct, Rule 4-210*), and not permit improper advertising by the credit card issuer on behalf of the attorney. In addition, the Board of Governors' policy statement specifically requires attorneys using credit card plans to comply with the State Bar Act provisions and Rules of Professional Conduct dealing with client confidences, illegal or unconscionable fee agreements, and trust accounts involving the client's money paid in advance [Cal. State Bar Bd. of Governors, Policy Statement on Use of Credit Cards for the Payment of Legal Services and Expenses (Feb. 11, 1975); *see Bus. & Prof. Code § 6068(e)*; *Cal. Rules Prof. Conduct, Rules 4-100, 4-200*].

For discussion of credit card transactions, see Ch. 127, *Consumer Contracts and Loans* .

[4] Charging of Interest and Penalties

California attorneys can ethically charge interest, or impose late charges, provided that they obtain the client's informed consent and comply with applicable law [*see Southwest Concrete Products v. Gosh Construction Corp. (1990) 51 Cal. 3d 701, 709, 274 Cal. Rptr. 404, 798 P.2d 1247* (approving 1.5 percent monthly late charge fee); *see also* LACBA Formal Opinion No. 499 (1999) (attorney-client fee contract may include clause charging interest on costs advanced by attorney covering time period from when attorney advances costs to period when attorney bills client for costs)]. The client must be advised that the attorney intends to charge interest and agree to payment of interest on the account if it is delinquent for more than a specified time period [State Bar Formal Opinion No. 1980-53; A.B.A. Comm. on Ethics and Professional Responsibility, Formal Opinion 74-388 (1974)].

ILLUSTRATION:

Example of Clause Providing Late Charge. Your unpaid balances of fees and costs are subject to a LATE CHARGE at the annual percentage rate of 10 percent per annum, which corresponds to a monthly rate of 0.83 percent. Late charges will be imposed on your unpaid balance of fees and costs from the date of our billing only if the unpaid balance is not paid within twenty (20) days after the date of our billing. You may pay the balance within the twenty (20) days and you will not incur a late charge. Your unpaid balance of fees and costs is determined by taking the beginning balance of your account during each month, adding any new charges for fees and costs and subtracting any payments or credits made to your account. We will then multiply this amount by the applicable periodic rate above to compute the late charge for your account.

The interest rate charged must be reasonable at the time that the attorney and client make the agreement [*see Cal. Rules Prof. Conduct, Rule 4-200(B)*; *see also Cal. Rules Prof. Conduct, Rule 3-300(A)* (business transactions with clients required to be fair and reasonable)]. The usury provisions of the California Constitution [*see Cal. Const., art. XV, § 1*] do not apply to interest on past-due receivables [*see Verbeck v. Clymer (1927) 202 Cal. 557, 563, 261 P. 1017* (credit sale may be for higher price than cash sale, and credit sale will not constitute usury unless buying and selling was mere pretense)]. A bona fide credit sale of services, which is not subject to the usury law, is distinguishable from a loan of money, which is subject to the usury law [*Boerner v. Colwell Co. (1978) 21 Cal. 3d 37, 45, 145 Cal. Rptr. 380, 577 P.2d 200]* . Interest rates on credit sales of legal services for personal, family, or household purposes, however, may be subject to the limitations of the Unruh Act [*see Civ. Code § 1801 et seq.*]. For a discussion of the applicability of the Unruh Act and the federal Truth in Lending Act, see § 72.197[3].

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§ 72.198 Security for Payment

[1] Permissible Sources--Nonpossessory Lien Against Client's Recovery

An enforceable contractual attorney's charging or nonpossessory lien, which enables the attorney to satisfy his or her fees and expenses from the client's recovery, may be created by an express agreement between the client and attorney [*see* *Fletcher v. Davis (2004) 33 Cal. 4th 61, 68-70, 14 Cal. Rptr. 3d 58, 90 P.3d 1216* (charging lien must comply with *Cal. Rules of Prof. Conduct, Rule 3-300*); *Haupt v. Charlie's Kosher Market (1941) 17 Cal. 2d 843, 845, 112 P.2d 627* ; *see also* *Waltrip v. Kimberlin (2008) 164 Cal. App. 4th 517, 524-525, 79 Cal. Rptr. 3d 460* (discussing priority of attorney's lien); *Epstein v. Abrams (1997) 57 Cal. App. 4th 1159, 1169, 67 Cal. Rptr. 2d 555* (valid contractual attorney lien against prospective recovery may be created to secure payment of attorney's contingency fee); *see also* LACBA Formal Opinion No. 496 (1998) (attorney-client fee agreement may include lien on anticipated recovery in amount sufficient to pay for attorney's representation of client in unrelated matter)]. The common law attorney's charging or non-possessory lien, however, has not been judicially recognized in California. Note that even if a lien is invalid or otherwise unenforceable, the underlying obligation remains valid [*Shopoff & Cavallo LLP v. Hyon (2008) 167 Cal. App. 4th 1489, 1522-1524, 85 Cal. Rptr. 3d 268]* .

PRACTICE TIP:

Requirements Governing Security Agreements. The California Supreme Court has held that an agreement to create a charging lien must comply with the requirements of *Cal. Rules of Prof. Conduct, Rule 3-300* [*Fletcher v. Davis (2004) 33 Cal. 4th 61, 68-70, 14 Cal. Rptr. 3d 58, 90 P.3d 1216]* . The Court held that such a lien may be adverse to the client and therefore must comply with Rule 3-300. The Court expressly did not decide whether Rule 3-300 applies to a contingency-fee arrangement coupled with a lien on the client's prospective recovery in the same proceeding [*Fletcher v. Davis (2004) 33 Cal. 4th 61, 70 n.3, 14 Cal. Rptr. 3d 58, 90 P.3d 1216]* . For further discussion of these requirements see discussion under §§ 72.198[2][b] and *72.198*.

The attorneys' lien contract may be made prior to provision of the legal services and the client's recovery [*Wagner v. Sariotti (1943) 56 Cal. App. 2d 693, 697, 133 P.2d 430]* . Although it is not absolutely necessary that the word "lien" be

stated in the contract provision, the intent to create a lien should be indicated in specific language [*Gelfand, Greer, Popko, & Miller v. Shivener (1973) 30 Cal. App. 3d 364, 371, 105 Cal. Rptr. 445* ; *cf. Trimble v. Steinfeldt (1986) 178 Cal. App. 3d 646, 651, 224 Cal. Rptr. 195* (no basis for imposing a lien when no express or implied agreement between recovering plaintiff and attorney exists)].

[2] Advantages and Priority of Lien

A valid contractual charging or non-possessory lien has several advantages:

- The lien protects the attorney's fee on discharge by the client [*Siciliano v. Fireman's Fund Ins. Co. (1976) 62 Cal. App. 3d 745, 752, 133 Cal. Rptr. 376* ; *Weiss v. Marcus (1975) 51 Cal. App. 3d 590, 598, 124 Cal. Rptr. 297]* or on the attorney's justifiable withdrawal from the case [*Pearlmutter v. Alexander (1979) 97 Cal. App. 3d Supp. 16, 19-20*].

- The lien may provide a basis for a cause of action for interference with prospective economic advantage if substituted counsel disburses the client's recovery proceeds without satisfying the lien [*Pearlmutter v. Alexander (1979) 97 Cal. App. 3d Supp. 16, 19-20*].

- Attorneys' liens have priority over several other types of claims, including:

  - A subsequent attachment [*Haupt v. Charlie's Kosher Market (1941) 17 Cal. 2d 843, 846, 112 P.2d 627]* .

  - A subsequent judgment creditor's lien [*Cetenko v. United California Bank (1982) 30 Cal. 3d 528, 534, 179 Cal. Rptr. 902, 638 P.2d 1299* (decided under former *Code Civ. Proc. § 688.1*); *Waltrip v. Kimberlin (2008) 164 Cal. App. 4th 517, 527-531, 79 Cal. Rptr. 3d 460* (priority over bank's judgment lien); *Cappa v. F & K Rock & Sand, Inc. (1988) 203 Cal. App. 3d 172, 174, 249 Cal. Rptr. 718* (judgment creditor's lien for child support arrearages)].

  - A federal tax lien [*Bree v. Beall (1981) 114 Cal. App. 3d 650, 657-658, 171 Cal. Rptr. 73]* .

  - A medical lien, regardless of which lien was first in time [*Gilman v. Dalby (2009) 176 Cal. App. 4th 606, 616-620, 98 Cal. Rptr. 3d 231*].

I.R.C. § 6323(b)(8) creates a super-priority for attorney's liens against previously filed federal tax liens. The rationale is that the attorney's fees should be protected because the attorney's efforts resulted in the collection of the judgment by the taxpayer. The attorney's services are regarded as similar to a repairperson's services by increasing the value of the taxpayer's property [*Bree v. Beall (1981) 114 Cal. App. 3d 650, 657-658 n.2, 171 Cal. Rptr. 73]* . Another public policy consideration supporting the priority of attorney's liens is that persons with meritorious claims, including creditors, might not be able to secure legal representation if attorneys were not assured of their liens [*see Cetenko v. United California Bank (1982) 30 Cal. 3d 528, 535-536, 179 Cal. Rptr. 902, 638 P.2d 1299]* .

[a] Enforcement of Lien From Funds Paid Directly to Attorney

If the client's recovery has been paid directly to the attorney and the attorney wishes to assert his or her lien on the recovery, the attorney must first deposit the proceeds in a client trust account, not the attorney's own business account [*see Cal. Rules Prof. Conduct, Rule 4-100(A)(2)*]. If the client disputes the attorney's entitlement to any or all of the fee,

the attorney may not withdraw the disputed portion until the dispute is finally resolved [*see Cal. Rules Prof. Conduct, Rule 4-100(A)(2)*; *Trafton v. Youngblood (1968) 69 Cal. 2d 17, 26, 69 Cal. Rptr. 568, 442 P.2d 648* (attorney may not unilaterally determine fee and deduct it from client's funds)]. For discussion of trust accounts and the attorney's obligation with regard to client funds, see *§ 72.320* et seq.

[b] Promissory Notes and Deeds of Trust

A California attorney can take a promissory note from a client as a method of protecting a fee [*Law Offices of Dixon R. Howell v. Valley (2005) 129 Cal. App. 4th 1076, 1104, 29 Cal. Rptr.3d 499* (unsecured promissory note executed by client does not give attorney present interest in client's property required to trigger *Cal. Rules Prof. Conduct, Rule 3-300*)]. One court has upheld the enforceability of a promissory note signed by the clients midway through the representation [*see Walton v. Broglio (1975) 52 Cal. App. 3d 400, 403-404, 125 Cal. Rptr. 123]* .

In taking a promissory note, the attorney must comply with *Cal. Rules Prof. Conduct, Rule 3-300* [State Bar Formal Opinion No. 1981-62 (decided under Cal. Rules Prof. Conduct, former Rule 5-101)]:

- The transaction and the terms must be fair and reasonable, and must be disclosed to the client in writing in a manner and in terms which are reasonably understandable to the client.

- The client must be allowed a reasonable opportunity to obtain independent advice from another attorney of the client's own choice.

- The client must consent in writing to use of the promissory note.

In *Hawk v. State Bar*, the California Supreme Court held that an attorney using a deed of trust must comply with the requirements of a fair and reasonable transaction, written disclosure, opportunity for the client to consult independent counsel, and written consent [*see Hawk v. State Bar (1988) 45 Cal. 3d 589, 601, 247 Cal. Rptr. 599, 754 P.2d 1096* (decided under Cal. Rules Prof. Conduct, former Rule 5-101); *see also* State Bar Formal Opinion No. 1981-62 (decided under Cal. Rules Prof. Conduct, former Rule 5-101; stating that a California attorney can take a promissory note secured by a deed of trust as a method of protecting a fee)].

Neither the Supreme Court nor the State Bar Committee on Professional Responsibility and Conduct has addressed the issue of whether or how an attorney can ethically commence foreclosure proceedings or exercise the power of sale under the deed of trust [*see Hawk v. State Bar (1988) 45 Cal. 3d 589, 598-601, 247 Cal. Rptr. 599, 754 P.2d 1096* ; State Bar Formal Opinion No. 1981-62].

For additional, detailed discussion of these requirements, see *§ 72.30* et seq. through § 72.170 et seq.

[c] Pledge Agreement in Client's Assets

The Committee on Legal Ethics of the Los Angles County Bar Association has stated that it is ethically permissible for a law firm to take a security interest by means of pledge agreements in a client's assets in order to secure payment of fees [LACBA Formal Opinion No. 398 (1982)]. The Committee stated that the attorneys must comply with the California Rules of Professional Conduct, former Rule 5-101 (*now see Cal. Rules Prof. Conduct, Rule 3-300*) requirements of a fair and reasonable transaction, written disclosure, opportunity for the client to consult independent counsel, and written consent. For further discussion of these requirements, see discussion under § 72.198[2][b], and *§ 72.30* et seq. through § 72.180 et seq. The Committee did not decide the question of the attorney's proceeding to foreclose on the security [LACBA Formal Opinion No. 398 (1982)].

A third party, such as a client's friend or relative, may pledge his or her own funds or other property as security for the

client's attorney's fees [*see, e.g., Hartford v. State Bar (1990) 50 Cal. 3d 1139, 1147, 270 Cal. Rptr. 12, 791 P.2d 598]* . If the attorney has full knowledge of the terms of the pledge agreement between the third party and the client, the attorney will owe a duty of care concerning the funds or property not only to the client but also to the third party [*Hartford v. State Bar (1990) 50 Cal. 3d 1139, 1153, 270 Cal. Rptr. 12, 791 P.2d 598]* .

[d] Family Law Attorney's Real Property Lien

In a family law case, either party may encumber his or her interest in community real property to pay reasonable attorney's fees in order to retain or maintain legal counsel. Such a lien, known as a "family law attorney's real property lien," attaches only to the encumbering party's interest in the community real property [*Fam. Code § 2033(a)*]. An attorney for whom a family law attorney's real property lien is obtained must comply with *Cal. Rules Prof. Conduct, Rule 3-300* [*Fam. Code § 2033(e)*; *see also § 72.198[2][d]*].

[3] Impermissible to Take Possessory Lien on Client's Files or Personal Property

Neither a contractual nor a common law attorneys' retaining or possessory lien, which attaches to the client's personal property and papers in the attorney's possession, has been recognized in California to secure an attorney's fee [*see Hulland v. State Bar (1972) 8 Cal. 3d 440, 447, 105 Cal. Rptr. 152, 503 P.2d 608]* . Courts have held that an attorney who has been discharged by his or her client may not rely on a contractual or common law retaining lien on the client's files, papers, documents, or other property in the attorney's possession as a basis for refusing to give the client's subsequent attorney the client's papers or to substitute out of the case until the first attorney receives payment for his or her work on the case [*see Kallen v. Delug (1984) 157 Cal. App. 3d 940, 949-951, 203 Cal. Rptr. 879* ; *Academy of California Optometrists, Inc. v. Superior Court (1975) 51 Cal. App. 3d 999, 1006, 124 Cal. Rptr. 668]* . Such conduct by an attorney violates *Cal. Rules Prof. Conduct, Rule 3-700(D)(1),* which requires that the attorney return the client's papers and property at the client's request on termination of the attorney-client relationship [*see Kallen v. Delug (1984) 157 Cal. App. 3d 940, 950-951, 203 Cal. Rptr. 879* (decided under Cal. Rules Prof. Conduct, former Rule 2-111(A)(2)); *Academy of California Optometrists, Inc. v. Superior Court (1975) 51 Cal. App. 3d 999, 1005, 124 Cal. Rptr. 668* (decided under Cal. Rules Prof. Conduct, former Rule 2-111(A)(2))]. For additional discussion of an attorney's duties with regard to his or her client's files and property, *see § 72.371[2][a]*.

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§ 72.199 Fee-Splitting Arrangements

[1] Between Attorney and Outside Associated Counsel

If the attorney and client contemplate that outside counsel will be associated to accomplish the client's objective, the attorney's fee agreement should include authorization and reimbursement provisions. An attorney has no implied authority to hire outside associates, assistants, or investigators on behalf of the client. If an attorney hires an outside associate without the client's express authorization, the attorney cannot obtain reimbursement [*see Johnson v. California I.M.T. Asso. (1938) 24 Cal. App. 2d 322, 335, 74 P.2d 1073]* .

When the attorney and client recognize that the assistance of a specialist is necessary, the contract can provide that the specialist will be associated at a specified fee, or the client can contract directly with the specialist. In some circumstances, an attorney's ethical duty of competence will require that he or she not accept employment or continue in the representation of the client unless another attorney who is competent in the subject matter is associated [*Cal. Rules Prof. Conduct, Rule 3-110*; *see §§ 72.221*, *72.270*].

Cal. Rule of Prof. Conduct, Rule 2-200(A) permits a division of fees between attorneys provided that [*Cal. Rules Prof. Conduct, rule 2-200(A)*; *see also Cal. Rules Prof. Conduct, rule 4-200* (discussed in *§ 72.193*)]:

- A full written disclosure pertaining to the proposed division of fees is made to the client.
- The client consents in writing to the appointment of the other attorney.
- The total fee charged by the attorneys is not increased solely because of the fee-splitting arrangement and is not unconscionable as that term is defined in *Cal. Rules Prof. Conduct, Rule 4-200*.

Rule 2-200 does not require that the attorneys' fee-splitting arrangement be in writing [*Mink v. Maccabee (2004) 121 Cal. App. 4th 835, 838, 17 Cal. Rptr. 3d 486]* . The Rule also requires that the client's consent to a division of fees be

given prior to the actual division of the fees; it does not require client consent prior to the commencement of work by the associated in attorney [*Cohen v. Brown (2009) 173 Cal. App. 4th 302, 320 93 Cal. Rptr. 3d 24*].

Rule 2-200 is not limited in its application to "pure referral fees" nor does it purport to exempt fee division categorically among attorneys who work jointly on behalf of a client. The rule encompasses any division of fees where the attorneys working for the client are not partners or associates of each other, or are not shareholders in the same law firm [*Chambers v. Kay (2002) 29 Cal. 4th 142, 148, 126 Cal. Rptr. 2d 536]* .

While Rule 2-200 expressly exempts from the written disclosure and consent requirements fee divisions between attorneys who are partners, it does not exempt fee divisions between attorneys who are joint venturers [*Chambers v. Kay (2002) 29 Cal. 4th 142, 151, 126 Cal. Rptr. 2d 536]* . Nor should Rule 2-200 be read to exempt outside counsel who is retained and functions on a particular client matter essentially on the same basis as an "associate" of the law firm [*Chambers v. Kay (2002) 29 Cal. 4th 142, 154, 126 Cal. Rptr. 2d 536* , citing with disfavor *Sims v. Charness (2001) 86 Cal. App. 4th 884, 103 Cal. Rptr. 2d 619* ; *see also* LACBA Formal Opinion No. 511 (2003) (attorney may not concurrently serve as partner or associate in two law firms and share in fees generated by each firm unless attorney complies with *Cal. Rules Prof. Conduct, Rule 2-200*)].

If the requirements of *Cal. Rules Prof. Conduct, Rule 2-200* for fee-splitting between attorneys are not followed, any agreement between attorneys for a division of fees is not enforceable [*Chambers v. Kay (2002) 29 Cal. 4th 142, 162, 126 Cal. Rptr. 2d 536* ; *Mark v. Spencer (2008) 166 Cal. App. 4th 219, 225-227, 82 Cal. Rptr. 3d 569* (attorneys' failure to fully disclose fee-splitting agreement to court when they petitioned for approval of class action settlement bars enforcement of agreement); *see also* State Bar Formal Opinion No. 1994-138 (certain situations in which Rule 2-200 is not applicable)].

Even if an agreement for the division of fees is found unenforceable because of a failure to comply with the requirements of *Cal. Rules of Conduct, Rule 2-200*, an attorney can recover fees in quantum meruit [*Huskinson & Brown v. Wolf (2004) 32 Cal. 4th 453, 461, 9 Cal. Rptr. 3d 693, 84 P.3d 379* ; *Mink v. Maccabee (2004) 121 Cal. App. 4th 835, 838-839, 17 Cal. Rptr. 3d 486]* . Allowing recovery in quantum meruit does not discourage compliance with *Cal. Rules of Conduct, Rule 2-200* because attorneys "prefer to receive their negotiated fees rather than the typically lesser amounts representing the reasonable value of the work performed" [*Huskinson & Brown v. Wolf (2004) 32 Cal. 4th 453, 460, 9 Cal. Rptr. 3d 693, 84 P.3d 379]* . Allowing an attorney to recover the reasonable value of his or her services from a client is premised on the services being requested by the client. Thus, when an attorney performs services under a fee-sharing agreement between the attorney and another attorney that violates *Cal. Rules of Conduct, Rule 2-200*, and the client neither requested the services from the attorney seeking recovery nor offered to pay that attorney, the attorney who performed the services may recover in quantum meruit only from the attorney who was the other party to the agreement, not from the client for whom the services were performed [*Strong v. Beydoun (2008) 166 Cal. App. 4th 1398, 1404, 83 Cal. Rptr. 3d 632*].

[2] Between Referring Attorney and Referred Attorney

Fee-splitting arrangements, involving bare referrals from one attorney to another attorney, were held to be unearned forwarding fee arrangements and unenforceable as contrary to public policy under Cal. Rules Prof. Conduct, former Rule 22, which was enacted in 1972, and under its successor, Cal. Rules Prof. Conduct, former Rule 2-108, until its amendment in 1979 [*see* *Altschul v. Sayble (1978) 83 Cal. App. 3d 153, 159-164, 147 Cal. Rptr. 716]* . These two rules allowed enforcement of fee-splitting agreements so long as there was a true division of services performed and responsibility assumed by the attorneys [*see* *Breckler v. Thaler (1978) 87 Cal. App. 3d 189, 194-196, 151 Cal. Rptr. 50]* . The 1979 amendment of former Rule 2-108 deleted from the rule the requirement that the division of fees must have been made in proportion to the services performed or responsibility assumed by each attorney [*see* Cal. Rules Prof. Conduct, former Rule 2-108(A) (superseded by *Cal. Rules Prof. Conduct, Rule 2-200* on May 27, 1989)].

Thus, fee-splitting arrangements that comply with *Cal. Rules Prof. Conduct, Rule 2-200(A)* (discussed in *§ 72.199[1]*) are not contrary to public policy and are enforceable even if they involve a bare referral [*see Mink v. Maccabee (2004) 121 Cal. App. 4th 835, 838, 17 Cal. Rptr. 3d 486* (client's written consent must be obtained prior to division of fees, not prior to lawyers' entering into fee-splitting arrangement); *Moran v. Harris (1982) 131 Cal. App. 3d 913, 916, 920-922, 182 Cal. Rptr. 519* (decided under former Rule 2-108(A), as amended in 1979)]. The justification for referral fees is that this device serves the best interests of many clients. If an inexperienced attorney is retained by a client to handle a complex case, and referral fees are not allowed, the attorney may attempt to handle the case because he or she needs the fee. If the attorney does not perform competently, the client suffers. However, if the inexperienced attorney can refer the case to a specialist and receive a referring fee, the attorney will be more likely to assist the client in finding competent counsel. The result is that the client receives better representation and the referring attorney is subsidized while handling cases within his or her competence. The long range effect is that the inexperienced attorney will look for referral cases, and the specialist will have a continuing flow of clients [*Moran v. Harris (1982) 131 Cal. App. 3d 913, 921-922, 182 Cal. Rptr. 519]* .

PRACTICE TIP:

Timing of Written Consent. Despite the holding in *Mink v. Maccabee (2004) 121 Cal. App. 4th 835, 838, 17 Cal. Rptr. 3d 486* , that a client's written consent must be obtained prior to the actual division of fees, not prior to the lawyers' entering into fee-splitting arrangement, it is preferable that the written consent be given prior to entering into the fee-splitting arrangement. Failure to do so is fraught with peril. It may be construed as a breach of the fiduciary duties to the client as well as of the lawyer's duty to keep the client reasonably appraised of developments relating to the engagement [*see Cal. Rules Prof. Conduct, Rule 3-500*]. Certain factors that may be of concern to the client cannot be addressed at the conclusion of the engagement. These concerns may include:

- Whether the client is actually retaining the best attorney for the work or whether the referred attorney was recommended simply because of his or her agreement to pay a referral fee.

- Whether the referred attorney will devote sufficient time to the matter in light of the fact that he or she will be receiving a reduced fee.

- Whether the client may prefer to negotiate a more favorable arrangement directly with the referring and referred attorney.

Each of these factors militates in favor of disclosure at the time of the referral or at a time reasonably close to the fee arrangement [LACBA Formal Opinion No. 467 (1993)].

If the requirements of *Cal. Rules Prof. Conduct, Rule 2-200* (former Rule 2-108) for fee-splitting between attorneys are not followed, any agreement between the attorneys for a referral fee is not enforceable [*Margolin v. Shemaria (2000) 85 Cal. App. 4th 891, 899-903, 102 Cal. Rptr. 2d 502* ; *Scolinos v. Kolts (1995) 37 Cal. App. 4th 635, 639-640, 44 Cal. Rptr. 2d 31* ; *see also* State Bar Formal Opinion No. 1994-138 (certain situations in which Rule 2-200 is not applicable)].

A bonus paid to outside counsel based on fees received in a particular matter or matters is a division of fees under *Cal. Rules Prof. Conduct, Rule 2-200*, and is subject to the requirements of the rule. For example, the payment of a year-end bonus to an "of counsel" attorney who is not a partner, associate, or shareholder of the law firm and whose relationship to the law firm consists primarily of the reciprocal referral of business, is prohibited without client consent under *Cal. Rules Prof. Conduct, Rule 2-200* [LACBA Formal Opinion No. 470 (1993); *see also § 72.199[3][a]* (when bonus to layperson employee permitted)].

For discussion of gifts or gratuities to referring attorneys, see *§ 72.249[2]*.

[3] Between Attorney and Non-Attorney

[a] Ethical Prohibition

Cal. Rules Prof. Conduct, Rule 1-320(A) prohibits an attorney from directly or indirectly sharing fees with non-attorneys except with the following:

- A deceased attorney's estate [*see Cal. Rules Prof. Conduct, Rule 1-320(A)(1), (2)*].
- Employees through a profit sharing plan [*see Cal. Rules Prof. Conduct, Rule 1-320(A)(3)*].
- A lawyer referral service [*see Cal. Rules Prof. Conduct, Rule 1-320(A)(4)*].

The perceived dangers from lawyers sharing legal fees with laypersons include [*Emmons, Williams, Mires & Leech v. State Bar (1970) 6 Cal. App. 3d 565, 573-574, 86 Cal. Rptr. 367]* :

- Encouragement of competitive solicitation for attorneys by laypersons.
- Potential interference or control by laypersons over the attorney's duty to exercise independent professional judgment on behalf of the client.
- Selection by laypersons receiving fee splits of the most generous, rather than the most competent, attorneys.

Thus, for example, an agreement between an attorney and a private investigator under which the investigator was to be compensated by a designated percentage of net fees received by the attorney was held to be improper [*Cain v. Burns (1955) 131 Cal. App. 2d 439, 441-442, 280 P.2d 888]* . Although the investigator was paid from the attorney's general funds, rather than from the individual client's recovery, the device was regarded as a subterfuge to avoid the proscription against sharing of fees with laypersons [*Cain v. Burns (1955) 131 Cal. App. 2d 439, 442, 280 P.2d 888* ; *see also McIntosh v. Mills (2004) 121 Cal. App. 4th 333, 349-350, 17 Cal. Rptr. 3d 66* (contract between lawyer and nonlawyer for fee-splitting void and unenforceable when both were aware of contract's illegality)].

A lawyer who prepares living trusts at the direction of a nonlawyer who markets living trust packages to the public, who pay either the lawyer or the marketer for the trust, violates the prohibition of *Cal. Rules Prof. Conduct, Rule 1-320* against sharing legal fees with a nonlawyer, specifically the giving of value in exchange for recommending or securing employment for the lawyer. The lawyer may not receive payment from the public for the trusts and then pay the marketer a share for finding the clients and referring them to the lawyer. They lawyer also may not have the marketer receive the funds and divide them with the lawyer. In either case, the risk posed is the possibility of control of legal matters by a nonlawyer interested more in personal profit than the client's welfare to the extent of controlling the lawyer's exercise of independent judgment on behalf of the client in being able to advise the client that a living trust might not be a useful part of the client's estate plan [State Bar Formal Opinion 1997-148].

In the opinion of one local bar association, a financing program by which a lender loans money to pay the cost of prosecuting a case that an attorney has accepted on a contingency fee basis and by which the lender is to be reimbursed an agreed percentage from the attorney's fee recovery is impermissible fee-splitting with a layperson [Bar Ass'n of San Francisco Legal Ethics Committee, Opinion No. 1981-1].

PRACTICE TIP:

Avoid Compensation Tied to Fees Collected. To avoid violating the prohibition against sharing fees with laypersons, the attorney should be careful about *any* type of arrangement by which a layperson's compensation for services is in some way tied to the amount of fees collected by the attorney.

[b] Bonuses to Laypersons Permitted

The Los Angeles County Bar Association has opined that *Cal. Rules Prof. Conduct, Rule 1-320* does not bar an attorney from paying bonuses to laypersons (e.g., paralegals) to reward excellent performance. Compensation is ethically proper provided that [LACBA Formal Opinion No. 457 (1990)]:

- The bonus is not paid as a percentage of the lawyer's fees.
- The bonus is not bargained for based on the fee the lawyer is to receive in a particular case.
- The layperson has no expectation of receiving the bonus.
- The bonus is paid as compensation for the laypersons' productivty and performance based on the lawyer's subjective assessment.

The prohibition against sharing fees with laypersons must be distinguished from paying fees to third parties from the client's funds. An attorney, with the client's consent, may pay third parties from funds collected for the client [*Cal. Rules Prof. Conduct, Rule 4-210(A)(1)*].

[c] Contingent Fee Contracts With Non-Lawyer Consultants

Contingent fee consulting contracts are not per se invalid as violating *Cal. Rules Prof. Conduct, Rule 1-320*. They are ethically permissible provided that they are consistent with the purposes of Rule 1-320 [*see Ojeda v. Sharp Cabrillo Hospital (1992) 8 Cal. App. 4th 1, 15-17, 10 Cal. Rptr. 2d 230]* .

ILLUSTRATION:

Medical Malpractice Consulting Contract. After retaining an attorney, a plaintiff in a medical malpractice case contracts with a medical-legal consulting service to assist the attorney. The consideration for the services is a percentage of the plaintiff's gross recovery in the action. *Bus. & Prof. Code § 6146* requires the attorney's maximum compensation to be calculated based on a percentage of the client's net recovery (that is, gross recovery minus costs of prosecution). Is the contract with the consulting service ethically prohibited under *Cal. Rules Prof. Conduct, Rule 1-320*? No. The rationale underlying the fee-splitting doctrine would not justify its application to invalidate an otherwise proper contract. The purpose of Rule 1-320 is to discourage solicitation by lay intermediaries, assure control of the litigation by the lawyer, and to protect clients from unreasonably high fees. Concerns about solicitation are irrelevant when the lay organization receiving a fee becomes involved in the case only after the lawyer is retained by the client. Concerns about control may be relevant, but they exist any time an entity other than the lawyer is paid on a contingent basis. Finally, the interest in protecting clients from unreasonably high fees would not be served by prohibiting the contract [*see Ojeda v. Sharp Cabrillo Hospital (1992) 8 Cal. App. 4th 1, 16-17, 10 Cal. Rptr. 2d 230* ; *see also § 72.196[7][b][iii]*].

[d] Remitting Part of Fee Back to Client

The Los Angeles County Bar Association Committee on Legal Ethics opined that when a private individual client employed an attorney under a prior specified contingency fee agreement, and the court awards the attorney and client attorney's fees that exceed what the attorney would have received under the fee agreement, the attorney may remit the difference to the client. Remission of fees is ethically permissible provided that both of the following requirements are

met [LACBA Formal Opinion No. 447 (1988) (interpreting Cal. Rules Prof. Conduct, former Rule 3-102(A); *now see Cal. Rules Prof. Conduct, Rule 1-320*)]:

- The lawsuit was brought in good faith and not for the purpose of generating attorney's fees.

- The proposed new fee was not contemplated until after the court has awarded attorney's fees. (If prior to the award of fees, attorney and client agreed that court-awarded attorney fees will be remitted in part to the client, then the attorney should inform the court of that fact prior to its award of any attorney's fees). This type of arrangement does not implicate the concerns typically associated with fee-splitting: the client is not encouraged to practice law, the attorney's professional independence is not compromised, and there is no issue of solicitation of attorney services [LACBA Formal Opinion No. 447 (1988)].

[4] Between Lawyer Referral Services and Panel Attorneys

Fee splitting between lawyer referral services and their panel attorneys is authorized by *Cal. Rules Prof. Conduct, Rule 1-320(A)(4)*, which states that a State Bar member may pay a prescribed registration, referral, or participation fee to a lawyer referral service meeting State Bar standards [*see Cal. Rules Prof. Conduct, Rule 1-320(A)(4)*; *see also Emmons, Williams, Mires & Leech v. State Bar (1970) 6 Cal. App. 3d 565, 573-574, 86 Cal. Rptr. 367* (judicial approval of fee splitting between lawyer referral services and their panel attorneys)].

This type of fee splitting furthers a public purpose and does not involve the dangers perceived in fee splitting with or receipt of referral fees from laypeople [*see § 72.199[3]*], which are prohibited by the Rules of Professional Conduct [*see Cal. Rules Prof. Conduct, Rule 1-320*]. Bar association lawyer referral services fulfill public and professional objectives by making legal services more readily available to the general public. The bar association lawyer referral services do not seek a profit. The fees charged to panel members are necessary to finance the service. Unlike fee arrangements in which attorneys split fees with laypeople, fee arrangements between lawyer referral services and panel attorneys do not result in neither solicitation by nonattorneys, nor selection of the most generous rather than the most competent referral attorney, or exercise of control by a third party over the referral attorney [*see Emmons, Williams, Mires & Leech v. State Bar (1970) 6 Cal. App. 3d 565, 573-574, 86 Cal. Rptr. 367]* .

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§ 72.200 Payment of Fees by Third Persons

The Rules of Professional Conduct provide that an attorney can accept payment from a third person for representing a client if the payment does not interfere with the attorney's independence of professional judgment or with the client-lawyer relationship, and if the client's confidences and secrets are protected as required under *Bus. & Prof. Code § 6068(e)* [*Cal. Rules Prof. Conduct, Rule 3-310(F)(1), (2)*; *see also Bus. & Prof. Code § 6068(e)* (attorney's duty to maintain client confidences and secrets inviolate); LACBA Formal Opinion No. 500 (1999) (*Cal. Rules Prof. Conduct, Rule 3-310(F)* and *Bus. & Prof. Code § 6068(e)* apply where lawyer receives compensation from third party finance company that has agreed with client to finance client's lawsuit in exchange for assignment of interest in judgment)].

The client must be informed of the payment and give written consent, unless nondisclosure is authorized by law, or the attorney is rendering legal services on behalf of a public agency that provides legal services to other public agencies or members of the public [*Cal. Rules Prof. Conduct, Rule 3-310(F)(3)*].

For further discussion of *Cal. Rules Prof. Conduct, Rule 3-310(F)*, see *§ 72.114[4]*.

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§ 72.201 Publication Rights as Fee in Criminal Case

An agreement by which an attorney, usually representing a notorious criminal defendant, receives the literary and film rights to the client's life story for all or part of the fee may lead to a conflict of interest between the attorney and client. Some courts have held that a conflict of interest caused by the existence of an agreement constitutes a violation of the defendant's constitutional right to effective assistance of counsel if the client's defense is prejudiced by it [*see, e.g., People v. Corona (1978) 80 Cal. App. 3d 684, 702-705, 719-727, 145 Cal. Rptr. 894* ; *Ray v. Rose (6th Cir. 1974) 491 F.2d 285, 289-290]* . The attorney may want to handle the case in a way that will make the book or film right more salable, rather than in a way that best protects the client's interests. Nevertheless, these agreements are permissible in California if the client adequately consents to any conflict of interest. For a publication rights fee agreement to be upheld, the attorney must make an adequate disclosure to the client of the conflict of interest, and the client in an informed manner must knowingly and intelligently consent to it [*Maxwell v. Superior Court (1982) 30 Cal. 3d 606, 619, 180 Cal. Rptr. 177, 639 P.2d 248 , overruled in part, 45 Cal. 4th 390 (2009)* ; *see also People v. Bonin (1989) 47 Cal. 3d 808, 843, 254 Cal. Rptr. 298, 765 P.2d 460* (court's failure to inquire into potential conflict concerning literary-rights fee arrangement is not constituting reversible error absent showing that conflict adversely affected counsel's performance)].

In *Maxwell v. Superior Court*, the defendant was charged with robbery and ten counts of murder. He entered into a "life story" fee agreement with his counsel. The trial court held a hearing on the issue of the defendant's competence and his knowing and intelligent consent to the agreement. Although the defendant insisted he wanted his attorney to continue to represent him, the trial court ordered his counsel removed because of a conflict of interest. The California Supreme Court granted the defendant's petition for writ of mandate and directed the trial court to reinstate the defendant's original counsel. The Court pointed out that the defendant's right to choose his own counsel prevails unless significant prejudice or disruption will be caused to the judicial process. The Court held that the mere possibility of a conflict of interest did not justify removal of counsel prior to trial over the defendant's informed objections [*Maxwell v. Superior Court (1982) 30 Cal. 3d 606, 619, 180 Cal. Rptr. 177, 639 P.2d 248] , overruled in part, 45 Cal. 4th. 390 (2009)* . However, the Court criticized the "life story" fee arrangement, stating that such contracts tempt attorneys to tilt the defense for commercial reasons, presenting a threat of adverse or deficient representation, and raise ethical questions under the

Rules of Professional Conduct [*Maxwell v. Superior Court (1982) 30 Cal. 3d 606, 616-617, 180 Cal. Rptr. 177, 639 P.2d 248]* .

Under *Civ. Code § 2225*, all proceeds from the preparation for sale, the sale of rights to, or the sale of materials that include or are based on the story of a felony for which a felon was convicted are subject to an involuntary trust for the benefit of the victim of the felony or his or her heirs or beneficiaries [*Civ. Code § 2225(a), (b)*]. An action to enforce the trust may be brought by the victim or the beneficiaries or by the Attorney General [*see Civ. Code § 2225(c), (e)*]. "Proceeds" under Section 2225 are defined as fees, royalties, real property, or other consideration "received by or owing to a felon or his or her representatives" [*Civ. Code § 2225(a)(9)*]. The existence of this legislation would seem to greatly diminish the desirability, from the attorney's standpoint, of a fee arrangement involving the transfer of publication rights.

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§ 72.202 Arbitration and Mediation Provisions in Fee Agreements

A contract provision requiring the arbitration of a future dispute is generally valid and legally enforceable, [*see Code Civ. Proc. § 1281*]. There are, however, both statutory and ethical requirements affecting the inclusion of an arbitration provision in an agreement between an attorney and his or her client.

With respect to the arbitration of future disputes over fees, a statutory scheme exists under which the disputes are arbitrated by the State or local bar associations [*see Bus. & Prof. Code § 6200 et seq.*]. Under this scheme, unless the client has agreed in writing to arbitration of all disputes concerning fees, costs, or both, arbitration is voluntary for the client, but mandatory for the attorney if requested by the client [*see Bus. & Prof. Code § 6200(c)*]. This statutory scheme cannot be contravened by private agreement between the attorney and client to conduct their fee arbitration in an outside forum, such as the American Arbitration Association [*Alternative Systems, Inc. v. Carey (1998) 67 Cal. App. 4th 1034, 1041-1042, 79 Cal. Rptr. 2d 567]* . For discussion of the statutory scheme for arbitrating fee disputes, see *§ 72.470* et seq.

No similar scheme or statutory prohibition exists to preclude an initial employment agreement between an attorney and client from including a provision requiring the arbitration of potential malpractice claims. When there is no pre-existing attorney-client relationship, the client's knowledge and consent to such a provision affects its legal enforceability rather than its ethical propriety [*see, e.g.,* *Lawrence v. Walzer & Gabrielson (1989) 207 Cal. App. 3d 1501, 1504-1508, 256 Cal. Rptr. 6* (affirming denial of attorney's petition to compel arbitration; arbitration provision was not enforceable based on finding that client did not knowingly consent to it)]. This is due in part to the public policy encouraging the arbitration of claims. Moreoever, *Cal. Rules Prof. Conduct, Rule 3-400(A)*, which forbids an attorney from prospectively limiting malpractice liability, does not apply in this situation because it is essentially the forum, not the liability, that is being limited by an arbitration provision [State Bar Formal Opinion No. 1989-116].

PRACTICE TIP:

Provision Must Be Conspicuous and Clear. To ensure the enforceability of an arbitration provision, counsel should make it conspicuous and clear. The State Bar has suggested that these provisions be

drafted like those in medical service contracts as required under *Code Civ. Proc. § 1295* [State Bar Formal Opinion No. 1989-116].

When, however, there is a pre-existing attorney-client relationship, the attorney has an ethical duty to ensure that the client is fully aware of and knowingly consents to the terms and consequences of any arbitration provision the attorney seeks to negotiate with the client [State Bar Formal Opinion No. 1989-116]. For detailed discussion of the applicable ethical duties, see *§ 72.30* et seq. through § 72.170 et seq.

Disputes over fees may also be subject to voluntary mediation [*Bus. & Prof. Code § 6200(a), (c), (d), (f)*]. Participation in mediation is a voluntary, consensual process, based on direct negotiations between the attorney and the client, and is an extension of the negotiated settlement process. All discussions and offers of settlement are confidential, and may not be disclosed in any subsequent arbitration or other proceedings [*Bus. & Prof. Code § 6200(h)*].

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1. Drafting The Representation Agreement And Fee Arrangements

7-72 California Forms of Pleading and Practice--Annotated § 72.203

§ 72.203 Denial of Fees for Ethical Violations

An attorney can be denied all or part of a fee for an ethical violation [*see, e.g., Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 618-619, 120 Cal. Rptr. 253* (violating duty of confidentiality under *Bus. & Prof. Code § 6068(e)*)]. For discussion of limitations on collection of fees, see *§ 72.430* et seq.

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[Reserved]

§§ 72.204[Reserved]

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C. Creation And Scope Of Attorney-Client Relationship
2. Attorney's Authority

7-72 California Forms of Pleading and Practice--Annotated § 72.220

§ 72.220 General Authority of Attorney

[1] Agency Principles

As a general proposition, the attorney-client relationship, insofar as it concerns the authority of the attorney to bind his or her client by agreement or stipulation, is governed by principles of agency [*Blanton v. Womancare, Inc. (1985) 38 Cal. 3d 396, 403, 212 Cal. Rptr. 151, 696 P.2d 645* ; *Stewart v. Preston Pipeline Inc. (2005) 134 Cal. App. 4th 1565, 1581, 36 Cal. Rptr. 3d 901* (matters concerning attorney's authority to bind client through stipulation or agreement governed by agency principles); *American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 590-591, 113 Cal. Rptr. 561* ; *Yanchor v. Kagan (1971) 22 Cal. App. 3d 544, 549, 99 Cal. Rptr. 367* ; *see Civ. Code § 2295 et seq.* (agency)].

The client, as principal, is bound by the attorney-agent's acts within the scope of his or her actual authority, express or implied, or by his or her apparent or ostensible authority, or by unauthorized acts that are ratified by the client [*Blanton v. Womancare, Inc. (1985) 38 Cal. 3d 396, 403, 212 Cal. Rptr. 151, 696 P.2d 645* ; *see also Sauer v. Superior Court (1987) 195 Cal. App. 3d 213, 231, 240 Cal. Rptr. 489* (attorney's negligence imputed to client)]. This is especially so if third parties have changed their positions in justifiable reliance on the attorney's ostensible authority [*Phelps v. Kozakar (1983) 146 Cal. App. 3d 1078, 1082, 194 Cal. Rptr. 872]* .

Any knowledge obtained by the lawyer in the course of the particular transaction in which he or she has been employed by the client is generally imputed to the client, under principles of agency [*Zirbes v. Stratton (1986) 187 Cal. App. 3d 1407, 1413, 232 Cal. Rptr. 653]* . However, knowledge gained by the attorney outside of the particular transaction is ordinarily not imputed to the client [*Zirbes v. Stratton (1986) 187 Cal. App. 3d 1407, 1413, 232 Cal. Rptr. 653]* .

Although an attorney is treated as the agent of his or her client in transactions undertaken on the client's behalf, the client is not the agent of the attorney, and the client's misconduct cannot be imputed to counsel [*Tool Research & Engineering Corp. v. Henigson (1975) 46 Cal. App. 3d 675, 682, 120 Cal. Rptr. 291* (rejecting argument that in malicious prosecution action brought against attorney and his former client, client's alleged malfeasance was imputable

to counsel), disapproved on other grounds in *Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 883 n.9, 254 Cal. Rptr. 336, 765 P.2d 498]* .

For discussion of agency in general, see Ch. 427, *Principal and Agent* .

[2] Attorney's Presumed Authority in Relation to Third Parties

There is a strong presumption that the attorney who appears on behalf of a person is authorized to represent that person, and that the attorney's actions are within the scope of his or her employment [*Gagnon Co., Inc. v. Nevada Desert Inn (1955) 45 Cal. 2d 448, 460-461, 289 P.2d 466* ; *Sullivan v. Dunne (1926) 198 Cal. 183, 190, 244 P. 343* ; *see Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 13, 118 Cal. Rptr. 21, 529 P.2d 53* (authority of guardian ad litem similar to that of attorney)]. The presumption is rebuttable [*Sullivan v. Dunne (1926) 198 Cal. 183, 190, 244 P. 343]* , and the court may require the attorney to provide evidence of his or her authority on a motion; however, the burden of proof rests on the person attacking the attorney's authority to act [*Kallman v. Henderson (1965) 234 Cal. App. 2d 91, 98, 44 Cal. Rptr. 108]* .

For further discussion regarding an opposing party's challenge to an attorney acting without actual authority, see discussion under § 72.220[6].

[3] Scope of Attorney's Authority in Relation to Client

[a] Broad Authority to Bind Client

An attorney's authority to bind his or her client extends to all acts, in or out of court, that are necessary or incidental to the transaction in question or the management of a lawsuit or the accomplishment of some other purpose for which the attorney is retained [*Zurich G. A. & L. Ins.Co., Ltd., v. Kinsler (1938) 12 Cal. 2d 98, 106, 81 P.2d 913* , disapproved on other grounds in *Fracasse v. Brent (1972) 6 Cal. 3d 784, 792, 100 Cal. Rptr. 385, 494 P.2d 9]* . Matters that are within the attorney's general authority include:

- The choice of proceedings.
- The forum.
- The manner of trial.
- All matters of procedure.

In these matters, the attorney has authority to bind the client without consulting him or her, even against the client's wishes [*Zurich G. A. & L. Ins. Co., Ltd., v. Kinsler (1938) 12 Cal. 2d 98, 106, 81 P.2d 913* , disapproved on other grounds in *Fracasse v. Brent (1972) 6 Cal. 3d 784, 792, 100 Cal. Rptr. 385, 494 P.2d 9]* .

Matters that are, by contrast, within the exclusive control of the client include the following:

- The cause of action.
- The claim or demands sued upon.
- The subject matter of the litigation.

An attorney may not impair compromise, settle, surrender, or destroy these without the client's consent [*Zurich G. A.*

& L. Ins. Co., Ltd., v. Kinsler (1938) 12 Cal. 2d 98, 106, 81 P.2d 913 , disapproved on other grounds in *Fracasse v. Brent (1972) 6 Cal. 3d 784, 792, 100 Cal. Rptr. 385, 494 P.2d 9]* . An attorney ordinarily does not have implied authority to do an act without the client's consent that will effect the surrender or loss of a client's substantial rights [*Gagnon Co., Inc. v. Nevada Desert Inn (1955) 45 Cal. 2d 448, 460, 289 P.2d 466* ; *Stewart v. Preston Pipeline Inc. (2005) 134 Cal. App. 4th 1565, 1580-1584, 36 Cal. Rptr. 3d 901* (stipulation waiving mediation confidentiality does not impact client's substantial rights and therefore client bound by attorney's agreement)]. A client may have a legal claim against the attorney for exceeding his or her authority in compromising the client's substantive rights in litigation [*see Blanton v. Womancare, Inc. (1985) 38 Cal. 3d 396, 406, 212 Cal. Rptr. 151, 696 P.2d 645]* .

Code Civ. Proc. § 283 provides that an attorney has authority to do the following:

- Bind the client in any of the steps of an action or proceeding by his or her agreement filed with the clerk, or entered on the minutes of the court, and not otherwise.

- Receive money claimed by the client in an action or proceeding during the pendency thereof, or after judgment, unless a revocation of the attorney's authority is filed, and on payment, and not otherwise, to discharge the claim or acknowledge satisfaction of the judgment.

Section 283 does not enlarge or abridge an attorney's authority, but only prescribes the manner of its exercise by requiring the filing of the attorney's agreement with the clerk or its entry on the minutes [*Preston v Hill (1875) 50 Cal. 43, 53* ; *City of Fresno v. Baboian (1975) 52 Cal. App. 3d 753, 757, 125 Cal. Rptr. 332]* .

[b] Binding Client in Regular Conduct of Litigation

In civil litigation, the attorney, as the client's agent and in the absence of fraud, has authority to bind his or her client in all matters pertaining to the regular conduct of a case. Absent special instructions from the client, the conduct and management of the action is entrusted to the attorney's judgment; the attorney decides what should be contested, what points should be taken, and what should be abandoned [*Gagnon Co., Inc. v. Nevada Desert Inn (1955) 45 Cal. 2d 448, 460, 289 P.2d 466* ; *see Gdowski v. Gdowski (2009) 175 Cal. App. 4th 128, 138, 95 Cal. Rptr. 3d 799* (client had no power to control attorney's cross-examination)].

When counsel is retained to represent a client in a lawsuit, his or her general authority includes the right to do many actions incidental to the prosecution or defense of that action. For example, the attorney has the authority to enter into stipulations and agreements in all matters of procedure during the course of the trial. These actions are binding on the client to the extent that they are necessary or incidental to the management of the suit and affect only the procedure or remedy, as distinguished from the cause of action itself and the client's essential rights [*Linsk v. Linsk (1969) 70 Cal. 2d 272, 277, 74 Cal. Rptr. 544, 449 P.2d 760* ; *see In re Marriage of Helsel (1988) 198 Cal. App. 3d 332, 337, 243 Cal. Rptr. 657]* .

For example, an attorney may:

- Refuse to call a witness even though the client desires that the witness testify [*Nahhas v. Pacific Greyhound Lines (1961) 192 Cal. App. 2d 145, 146, 13 Cal. Rptr. 299]* .

- Abandon a defense the attorney deems unmeritorious [*see Duffy v. Griffith Co. (1962) 206 Cal. App. 2d 780, 790-791, 24 Cal. Rptr. 161]* .

- Stipulate that the trial judge could view premises at issue in litigation [*Lachman Bros. v. Muenzer (1956) 143 Cal. App. 2d 520, 525, 300 P.2d 295]* .

- Stipulate to waive the confidentiality of communications during mediation [*Stewart v. Preston Pipeline Inc. (2005) 134 Cal. App. 4th 1565, 1580-1584, 36 Cal. Rptr. 3d 901]* .

In these tactical matters, the attorney's authority is implied in law, as a necessary incident to the function he or she is engaged to perform [*Blanton v. Womancare, Inc. (1985) 38 Cal. 3d 396, 404, 212 Cal. Rptr. 151, 696 P.2d 645]* .

[c] Limitation on Binding Client Regarding Substantive Rights

The courts draw a distinction between actions that bind the client in procedural matters arising during the course of the action, and those that impair the client's substantive rights or the cause of action itself [*see* *Linsk v. Linsk (1969) 70 Cal. 2d 272, 277, 74 Cal. Rptr. 544, 449 P.2d 760* ; *Stewart v. Preston Pipeline Inc. (2005) 134 Cal. App. 4th 1565, 1580-1584, 36 Cal. Rptr. 3d 901* ; *City of Fresno v. Baboian (1975) 52 Cal. App. 3d 753, 757-758, 125 Cal. Rptr. 332]* . In the latter case, the attorney has no implied or ostensible authority merely on the basis of his or her employment to do an act that will effect the surrender or loss of a client's substantial rights [*Linsk v. Linsk (1969) 70 Cal. 2d 272, 276, 74 Cal. Rptr. 544, 449 P.2d 760* ; *Whittier Union High Sch. Dist. v. Superior Court (1977) 66 Cal. App. 3d 504, 508, 136 Cal. Rptr.86]* . For example, an attorney may not do the following without the client's authorization:

- Settle and compromise a claim [*Alvarado Community Hospital v. Superior Court (1985) 173 Cal. App. 3d 476, 480, 219 Cal. Rptr. 52* ; *see* *Bowden v. Green (1982) 128 Cal. App. 3d 65, 73-74, 180 Cal. Rptr. 90* (ordering trial court to grant motion to vacate dismissal of cross-complaint); *Whittier Union High Sch. Dist. v. Superior Court (1977) 66 Cal. App. 3d 504, 508, 136 Cal. Rptr. 86* (affirming setting aside dismissal of complaint); *see also* *In re Marriage of Helsel (1988) 198 Cal. App. 3d 332, 339-340, 243 Cal. Rptr. 657]* .

- Stipulate to submit a claim to binding arbitration [*Blanton v. Womancare, Inc. (1985) 38 Cal. 3d 396, 405, 212 Cal. Rptr. 151, 696 P.2d 645* ; *Toal v. Tardif (2009) 178 Cal. App. 4th 1208, 1221-1223, 101 Cal. Rptr. 3d 97*].

- Stipulate that an action can be decided on the record made in a prior trial, thus waiving the party's right to have the trier of fact observe the demeanor of the parties and their witnesses [*see* *Linsk v. Linsk (1969) 70 Cal. 2d 272, 275-276, 74 Cal. Rptr. 544, 449 P.2d 760]* .

- Agree to the entry of a default judgment [*see* *Ross v. Ross (1953) 120 Cal. App. 2d 70, 74, 260 P.2d 652]* .

- Agree to a judgment to the extent it included a conservatee's placement, disabilities, and conservator powers without the trial court obtaining the conservatee's on-the-record consent [*see* *Conservatorship of Christopher A. (2006) 139 Cal. App. 4th 604, 612-613, 43 Cal. Rptr. 3d 427]* .

These decisions differ from the routine and tactical decisions, which have been called "procedural," both because of the degree to which they affect the client's interest, and because they involve matters of judgment that extend beyond technical competence, so that any client may be expected to share in the decisionmaking [*Blanton v. Womancare, Inc. (1985) 38 Cal. 3d 396, 405, 212 Cal. Rptr. 151, 696 P.2d 645]* .

Although a client may have a legal claim against the attorney for exceeding his or her authority in compromising the client's substantive rights in litigation, there may be some situations in which the client is nevertheless bound by an attorney's unauthorized compromise of substantive rights. This may occur, for example, when the compromise has been completed, carried into final judgment, and is not challenged by the client for a considerable period of time [*see* *Gagnon Co., Inc. v. Nevada Desert Inn (1955) 45 Cal. 2d 448, 459-460, 289 P.2d 466* (suggesting that presumption of attorney's authority, even in substantive matters, may be conclusive on collateral attack of a final judgment); *Burns v.*

McCain (1930) 107 Cal. App. 291, 294-295, 290 P. 623 (dictum)].

However, in *Blanton v. Womancare, Inc.*, the California Supreme Court reversed a judgment on an arbitration award in defendants' favor, when it concluded that the attorney for plaintiff lacked the authority to stipulate to submission of the claim to arbitration without the plaintiff's consent. The Court noted that defense counsel knew of plaintiff's objections and her attorney's lack of actual authority before arbitration began, and chose not to allow the case to proceed to trial. It was only after the trial judge refused to grant plaintiff's motion to invalidate the agreement that plaintiff appeared and participated in the arbitration hearing [*Blanton v. Womancare, Inc. (1985) 38 Cal. 3d 396, 408, 212 Cal. Rptr. 151, 696 P.2d 645]* .

In reaching this decision, the Court considered on the one hand the "commendable" practice of attorneys to rely on representations made by other attorneys with respect to the scope of their authority, and on the other hand the well-established principles of the law of agency, in which the rights of the clients as between themselves are concerned. The Court also noted the rule in other jurisdictions that when an attorney undertakes to bind his or her client by an agreement to compromise the client's substantial rights, the opposing party must ascertain at his or her peril whether the attorney has authority to make the agreement [*Blanton v. Womancare, Inc. (1985) 38 Cal. 3d 396, 406, 212 Cal. Rptr. 151, 696 P.2d 645]* . Thus, the Court concluded that when a client does not consent to an agreement that compromises his or her substantive rights in litigation, does nothing beyond retention of the attorney to suggest that the attorney had authority to enter into such an agreement on the client's behalf, and repudiates the agreement as soon as he or she learns of it, the client is not bound by the attorney's act [*Blanton v. Womancare, Inc. (1985) 38 Cal. 3d 396, 402, 408, 212 Cal. Rptr. 151, 696 P.2d 645* ; *see also Toal v. Tardif (2009) 178 Cal. App. 4th 1208, 1221-1223, 101 Cal. Rptr. 3d 97* (remanding to determine whether client consented to arbitration)].

Another court held similarly that when a family law proceeding is substantially resolved by a stipulation, tantamount to a settlement and dismissal in a civil case, the stipulation must be set aside if the client demonstrates that his or her attorney entered into the stipulation without the client's authorization or consent [*In re Marriage of Helsel (1988) 198 Cal. App. 3d 332, 339-340, 243 Cal. Rptr. 657* (also noting that stipulations that do not dispose of dispute but only narrow issues for trial should not be routinely set aside for lack of client authorization)].

[d] Ratification by Client

A client may also ratify his or her attorney's unauthorized action, such as an unauthorized settlement or compromise, and thereby become bound by it [*see Toal v. Tardif (2009) 178 Cal. App. 4th 1208, 1221-1223, 101 Cal. Rptr. 3d 97* (remanding to determine whether client ratified agreement to arbitrate); *Lazarus v. Titmus (1998) 64 Cal. App. 4th 1242, 1247-1249, 75 Cal. Rptr. 2d 676* ; *Caro v. Smith (1997) 59 Cal. App. 4th 725, 69 Cal. Rptr. 2d 306* ; *Alvarado Community Hospital v. Superior Court (1985) 173 Cal. App. 3d 476, 480, 219 Cal. Rptr. 52]* . However, a client may not base rights on an unauthorized act by subsequently ratifying the act if to do so would prejudice the rights of third parties [*see Title Ins. etc. Co. v. California etc. Co. (1914) 168 Cal. 397, 401, 143 P. 723* (defendant could not ratify attorneys' unauthorized filing of notice of appeal after time for filing notice of appeal had expired)].

[e] Binding Client in Criminal Litigation

Like the civil practitioner, a criminal defense attorney controls the court proceedings, and has the authority and duty to determine all questions of strategy and trial tactics [*see People v. Whittington (1977) 74 Cal. App. 3d 806, 820, 141 Cal. Rptr. 742]* . It is the criminal defense attorney's responsibility to determine which witnesses to call, what motions to make, which jurors to challenge, and the extent and conduct of cross-examination [*see People v. McKenzie (1983) 34 Cal. 3d 616, 631, 194 Cal. Rptr. 462, 668 P.2d 769* ; *Townsend v. Superior Court (1975) 15 Cal. 3d 774, 781, 126 Cal. Rptr. 251, 543 P.2d 619* ; *People v. Whittington (1977) 74 Cal. App. 3d 806, 820, 141 Cal. Rptr. 742]* . However, fundamental protections guaranteed to an accused may not be waived by counsel without the client's concurrence, and substantive decisions such as what plea to enter, whether to waive a jury trial, and whether to testify are ultimately to be

made by the defendant after consultation with counsel [*People v. McKenzie (1983) 34 Cal. 3d 616, 631 n.9, 194 Cal. Rptr. 462, 668 P.2d 769* ; *see People v. Robles (1970) 2 Cal. 3d 205, 214-215, 85 Cal. Rptr. 166, 466 P.2d 710]* .

[4] Exclusivity of Authority of Attorney of Record

The general rule is that the attorney of record has the exclusive right to appear in court for his or her client and to control the court proceedings, so that neither the client nor another attorney can be recognized by the court in the conduct or disposition of the case [*Wells Fargo & Co. v. City etc. of S.F. (1944) 25 Cal. 2d 37, 42-43, 152 P.2d 625* ; *Magee v. Superior Court (1973) 34 Cal. App. 3d 201, 213, 109 Cal. Rptr. 758* , disapproved on other grounds in *People v. Norris (1985) 40 Cal. 3d 51, 56, 219 Cal. Rptr. 7, 706 P.2d 1141* ; *see also § 72.222*]. Unless the adverse party receives written notice of a change of attorney, he or she must recognize the former attorney [*Code Civ. Proc. § 285*; for discussion and forms of substitution of attorneys, *see § 72.30* et seq. through § 72.410 et seq.].

A party to an action may appear *in propria persona* or by attorney, but cannot do both. If a party appears by attorney, he or she must be heard through the attorney. The attorney has management and control of the action, and his or her authority generally must go unquestioned by anyone except the party whom the attorney represents. The court cannot recognize anyone other than the attorney of record as having the management of the case. The client may move the court for leave to change his or her attorney, but until that has been done, the client cannot assume control of the case [*Commissioners S.J. v. Younger (1865) 29 Cal. 147, 149* ; *see also Code Civ. Proc. § 284* (substitution of attorney)]. Once a party is represented by counsel, *pro se* documents may normally not be filed [*People v. Mattson (1959) 51 Cal. 2d 777, 798, 336 P.2d 937* ; *Lovret v. Seyfarth (1972) 22 Cal. App. 3d 841, 857-858, 101 Cal. Rptr. 143* ; *see also Mott v. Foster (1872) 45 Cal. 72, 72-73* (court must disregard stipulation signed by party who has attorney of record, even though attorney was unable to sign because of his temporary absence)].

[5] Termination of Authority by Death, Incapacity, or Insanity of Client

The death, incapacity, or insanity of a client terminates an attorney's authority to represent that client [*see Civ. Code § 2356* (termination of agency on death or incapacity of principal); *Deiter v. Kiser (1910) 158 Cal. 259, 262, 110 P. 921* ; *Swartfager v. Wells (1942) 53 Cal. App. 2d 522, 527-528, 128 P.2d 128* ; *cf. Civ. Code § 2400 et seq.* (Uniform Durable Power of Attorney Act; authority of one with durable power of attorney to represent principal in claims and litigation not affected by principal's subsequent incapacity)]. The client, or in some instances the court, may also terminate an attorney's authority to act for the client [*see § 72.224*].

For discussion of terminating the attorney's authority, see *§ 72.350* et seq. through § 74.410 et seq.

[6] Challenge by Party to Authority of Attorney

A party to an action who disputes the authority of the attorney who purports to represent the party must take prompt action and establish his or her contention by cogent and strong evidence [*Garrison v. McGowan (1874) 48 Cal. 592, 600]* , as does an adverse party who challenges the authority of the attorney for his or her opponent [*see Turner v. Caruthers (1861) 17 Cal. 431, 433* (mere suggestion by adverse party insufficient)]. A motion to dismiss is the proper procedure for a defendant to challenge an attorney's authority to bring an action on behalf of the purported plaintiff client [*see County of Ventura v. Clay (1897) 119 Cal. 213, 214, 51 P. 189* ; *see §§ 72.684, 72.685*]. The authority of an attorney to appear on behalf of a defendant may be challenged by a motion to strike the answer [*People v. Honey Lake Valley Irr. Dist. (1926) 77 Cal. App. 367, 374, 246 P. 819* (decided before enactment of *Code Civ. Proc. § 437*, which provides that grounds for motion to strike must appear on face of pleading or from matter subject to judicial notice); *see §§ 72.688, 72.689*]. A motion to dismiss or motion to strike is appropriate, for example, when the party, due to mental illness or other disability, was not competent to authorize the attorney to file the action [*see also § 72.220[5]*].

When it is clearly shown that the attorney had no authority to perform a particular act, the party whom he or she

purported to represent cannot base any rights on the unauthorized act by ratifying the act if to do so would prejudice the rights of third parties [*Title Ins. etc. Co. v. California etc. Co. (1914) 168 Cal. 397, 401, 143 P. 723* (defendant could not ratify attorneys' unauthorized filing of notice of appeal after time for filing notice of appeal had expired)].

For related discussion regarding a motion by a party to disqualify opposing counsel for conflict of interest, see *§ 72.350* et seq. through § 72.410 et seq.

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§ 72.221 Attorney's Authority to Enter Stipulation on Client's Behalf

[1] Binding Client by Stipulation

An attorney has the authority to bind his or her client in any of the steps of an action or proceeding [*see Code Civ. Proc. § 283(1)* and discussion in *§ 72.220*]. Thus, an attorney has the power to enter into stipulations that are binding on the client so far as they are simply necessary or incidental to the management of the suit, and that affect only the procedure or remedy as distinguished from the cause of action itself or the essential rights of the client [*Stewart v. Preston Pipeline Inc. (2005) 134 Cal. App. 4th 1565, 1580-1584, 36 Cal. Rptr. 3d 901* (stipulation waiving mediation confidentiality does not impact client's substantial rights and therefore client bound by attorney's agreement); *Armstrong v. Brown (1936) 12 Cal. App. 2d 22, 28, 54 P.2d 1118]* .

An attorney must obtain his or her client's consent to enter into a stipulation that surrenders the client's substantial rights or sole interest in the litigation [*Linsk v. Linsk (1969) 70 Cal. 2d 272, 276-278, 74 Cal. Rptr. 544, 449 P.2d 760* ; *Conservatorship of Christopher A. (2006) 139 Cal. App. 4th 604, 612-613, 43 Cal. Rptr. 3d 427* ; *Harness v. Pacific Curtainwall Co. (1965) 235 Cal. App. 2d 485, 491, 45 Cal. Rptr. 454* ; *see § 72.220*]. However, a client may ratify an unauthorized stipulation entered into by his or her attorney [*Redsted v. Weiss (1945) 71 Cal. App. 2d 660, 664-665, 163 P.2d 105]* .

[2] Matters Subject to Stipulation

The parties may make valid and enforceable stipulations respecting any of the steps of an action or proceeding [*Barendregt v. Downing (1959) 175 Cal. App. 2d 733, 736, 346 P.2d 870* ; *see Code Civ. Proc. § 283*]. For discussion concerning the circumstances under which an attorney may make a stipulation binding on his or her client, depending on whether the stipulation relates to procedural matters or affects substantive rights of the client, see discussion under § 72.220.

The rights growing out of a stipulation are similar to those arising from a contract [*Harris v. Spinali Auto Sales, Inc. (1966) 240 Cal. App. 2d 447, 453, 49 Cal. Rptr. 610* ; *L. A. City Sch. Dist. v. Landier Inv. Co. (1960) 177 Cal. App. 2d*

744, 752, 2 Cal. Rptr. 662] .

For discussion of matters that are and are not proper subjects of an otherwise authorized stipulation and the interpretation or construction of stipulations, see Ch. 533, *Stipulations* .

[3] Requirement That Stipulation Be Written

A stipulation must usually be in writing, filed with the clerk, or entered on the minutes of the court [*Code Civ. Proc. § 283(1)*; *see Lipscomb v. Krause (1978) 87 Cal. App. 3d 970, 974, 151 Cal. Rptr. 465]* . Binding effect may, however, be given to an executed oral agreement on the basis of estoppel or ratification [*see Smith v. Whittier (1892) 95 Cal. 279, 288-289, 30 P. 529* ; *Harding v. Collazo (1986) 177 Cal. App. 3d 1044, 1052, 223 Cal. Rptr. 329]* .

For further discussion, see Ch. 533, *Stipulations* .

[4] Relief From Stipulations

The issue of relief from stipulations that were beyond the attorney's authority may arise in a variety of procedural contexts. For example, the issue has been raised by motion to set aside the stipulation on the ground of the client's lack of consent [*see Blanton v. Womancare, Inc. (1985) 38 Cal. 3d 396, 400, 403-408, 212 Cal. Rptr. 151, 696 P.2d 645]* (stipulation submitting dispute to binding arbitration), by motion for new trial [*Linsk v. Linsk (1969) 70 Cal. 2d 272, 275-279, 74 Cal. Rptr. 544, 449 P.2d 760* (stipulation that judge could decide case entirely on basis of record made before another judge who had become disabled)], and by motion to correct a judgment on the ground of clerical error [*Bowden v. Green (1982) 128 Cal. App. 3d 65, 69-70, 73-74, 180 Cal. Rptr. 90* (stipulation to dismiss cross complaint was not authorized by client and judge did not notice or intend that provision of judgment)].

A motion under *Code Civ. Proc. § 473* to set aside the stipulation for mistake, inadvertence, surprise, or excusable neglect is also available [*see Roth v. Morton's Chefs Services, Inc. 173 Cal. App. 3d 380, 383, 385-387, 218 Cal. Rptr. 684* (setting aside due to surprise, not related to attorney's authority)].

For forms for motions and orders to set aside a stipulation based on the attorney's lack of authority to enter into it, *see §§ 72.686* and *72.687*. For further discussion of the procedure and general forms for obtaining relief from stipulations, including time limitations, see Ch. 533, *Stipulations* .

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§ 72.222 Authority of Attorney to Associate Other Counsel

[1] Attorney of Record May Associate Another Attorney

As an exception to the general rule that the attorney of record has the exclusive right to appear in court for the client, it is recognized, though not by statute, that the attorney of record may associate another attorney and divide the duties concerning the conduct of the cause [*Wells Fargo & Co. v. City etc. of S.F. (1944) 25 Cal. 2d 37, 42-43, 152 P.2d 625]* . The associated attorney may not act as the sole attorney of record, however, unless an actual substitution of attorneys is effected [*Prescott v. Salthouse (1878) 53 Cal. 221, 222-223* ; *see Code Civ. Proc. §§ 284, 285* (procedure for substituting attorney)]. The associated attorney may properly act as "one of the attorneys for" the party while referring to the association with the attorney of record from whom the associated attorney derives his or her authority [*Wells Fargo & Co. v. City etc. of S.F. (1944) 25 Cal. 2d 37, 42-43, 152 P.2d 625]* .

If a party litigant is also an attorney and officer of the court, he or she may be recognized as an associate attorney when participating in the presentation of the case with the ostensible authority of the attorney of record [*Muller v. Tanner (1969) 2 Cal. App. 3d 445, 456-457, 82 Cal. Rptr. 738]* .

Associations may be made between otherwise unaffiliated attorneys who agree to provide services on behalf of particular clients in particular cases. However, if a lawyer holds himself or herself out as being a partner or associate in a law firm when the lawyer is not one in fact, the lawyer may be held liable for wrongful acts of the alleged partners [*see* *Blackmon v. Hale (1970) 1 Cal. 3d 548, 557, 83 Cal. Rptr. 194, 463 P.2d 418* ; *cf.* A.B.A. Model Code of Professional Responsibility EC 2-13 (1980)].

PRACTICE TIP:

When Association of Counsel Appropriate. Association of counsel may be appropriate when referral is not: when the first attorney retains responsibility and control over the client matter and, accordingly, continues to perform services for the client. For example, an attorney qualified to try a personal injury matter may associate trial counsel to handle the trial of the case either because the first attorney prefers pretrial matters or because the first attorney's schedule has conflicting trial dates.

When an attorney is associated on a case and there is an agreement for the sharing of a fee, an express agency relationship may be created. A breach of agency duties may support an action for fees lost brought by the original attorney (principal) against the associated attorney (agent) [*Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 942-943, 175 Cal. Rptr. 81* (malpractice action against second attorney precluded by public policy, but breach of duty by agent permitted action); *see also § 72.220*].

[2] Procedure for Associating Counsel

As association of counsel is not required to be effected formally, there is no prescribed form for association of counsel. When the association is made, the attorney of record has the professional responsibility to prepare the associate counsel for trial proceedings at which he or she appears and may be disciplined for failure to do so [*see Vaughn v. State Bar (1973) 9 Cal. 3d 698, 701-702, 108 Cal. Rptr. 806, 511 P.2d 1158]* .

PRACTICE TIP:

File Formal Association of Counsel. Even though it is not required, it is a good practice to file a formal association of counsel stating the name, address, and telephone number of the attorney associated, and showing the consent of the associated counsel. It then becomes part of the record to explain the participation of the associated attorney in the conduct of the case.

Although there is no authority requiring that a client consent to an association of counsel for the conduct of the case, it is good practice to obtain the client's consent and agreement to incur the expenses of the associate's fees and costs [*see Tasker v. Cochrane (1928) 94 Cal. App. 361, 366, 271 P. 503* (client not liable for fees and costs of associate without an express agreement); *see also Cal. Rules Prof. Conduct, Rule 2-200(A)(1)* (requiring client's informed written consent for division of fees with lawyer who is not partner of, associate of, or shareholder with attorney)].

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§ 72.223 Counsel *Pro Hac Vice*

[1] Association of Out-of-State Attorney

State courts have customarily extended, in their discretion, permission for out-of-state attorneys to appear in a particular case despite *Bus. & Prof. Code § 6125*, which provides that only active members of the State Bar may practice in state courts [*In re McCue (1930) 211 Cal. 57, 67, 293 P. 47* ; *see Bluestein v. State Bar (1974) 13 Cal. 3d 162, 174, 174 n.10, 118 Cal. Rptr. 175, 529 P.2d 599* ; *see also Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 Cal. 4th 119, 70 Cal. Rptr. 2d 304, 949 P.2d 1* (unauthorized practice of law in California by out-of-state law firm)].

Appearances as counsel *pro hac vice* (i.e., for a particular case only) by an out-of-state attorney are regulated by *Cal. Rules of Ct., Rule 9.40* [*Consumers Lobby Against Monopolies v. Public Utilities Com. (1979) 25 Cal. 3d 891, 913-914 n.12, 160 Cal. Rptr. 124, 603 P.2d 41* ; *cf. Katz v. Superior Court (1977) 73 Cal. App. 3d 952, 972, 141 Cal. Rptr. 234* (consent granted without compliance with this rule not questioned on appeal absent timely objection)]. For a form for an application under *Cal. Rules of Ct., Rule 9.40, see § 72.695*.

PRACTICE TIP:

Out-of-State Attorneys May Appear *Pro Hac Vice* in Arbitrations and Hearings. *Code Civ. Proc. § 1282.4* and *Cal. Rules. of Ct., Rule 9.43* allow out-of-state attorneys to appear as counsel *pro hac vice* in arbitration proceedings and hearings held in California. The statutory requirements for *pro hac vice* appearances in arbitrations are generally similar to those for *pro hac vice* appearances in state court [*see § 72.223[3]*]. The out-of-state attorney, prior to the first scheduled hearing in arbitration, must serve a certificate on the arbitrator, the State Bar of California and all parties and counsel, containing information required by *Code Civ. Proc. § 1282.4* [*see Code Civ. Proc. § 1282.4(c)*]. An attorney who files a certificate containing false information or who otherwise fails to comply with the standards of professional conduct required of members of the State Bar or California will be subject to the disciplinary jurisdiction of the State Bar with respect to any of his or her acts occurring in the course of the arbitration [*see Cal. Rules. of Ct., Rule 9.43*]. Lawyers with compliance questions regarding *Code Civ. Proc. § 1282.4* should write or call the State Bar of California Office of Certification (180 Howard

Street, San Francisco, CA 94105; (415) 538-2100).

[2] Eligibility

Under *Cal. Rules of Ct., Rule 9.40*, a state court has discretion to grant a written application for leave to appear as counsel *pro hac vice*, submitted by an applicant who has been retained in a particular cause pending before the court, who is not a member of the State Bar, but is a practicing member in good standing of a federal court bar, or the bar of the highest court of a state, territory, or insular possession of the United States. The court can only permit appearances made in association with an active State Bar member who acts as the attorney of record [*Cal. Rules of Ct., Rule 9.40(a)*; *see People v. Cooks (1983) 141 Cal. App. 3d 224, 290, 190 Cal. Rptr. 211* (attorney of record acting in association with counsel *pro hac vice* has more than perfunctory duty and must appear regularly at trial); *see also Daybreak Group, Inc. v. Three Creeks Ranch, LLC (2008) 162 Cal. App. 4th 37, 41, 75 Cal. Rptr. 3d 365* (law firm not required to be admitted *pro hac vice*)].

Consent to appear may not be given to an applicant who resides in; has regular employment in; or regularly engages in substantial business, professional, or other activities in California [*Cal. Rules of Ct., Rule 9.40(a)*; *but see Walter E. Heller Western, Inc. v. Superior Court (1980) 111 Cal. App. 3d 706, 711, 168 Cal. Rptr. 785* (trial court's consent upheld despite close question as to applicant's business activities in California)]. The fact that *Cal. Rules of Ct., Rule 9.40* allows courts to accord *pro hac vice* status to an non-resident attorney admitted to practice in a foreign jurisdiction, but does not allow such status to be accorded to a resident attorney who is admitted to practice in a foreign jurisdiction but is not a member of the California bar, does not render Rule 9.40 unconstitutional [*Paciulan v. George (9th Cir. 2000) 229 F.3d 1226, 1227-1228, 1231* (upholding constitutionality of rule under challenges based on privileges and immunities clause of U.S. *Const., art. IV, § 2*, free association clause of *U.S. Const., amend. I*, and due process and privileges and immunities clauses of *U.S. Const., amend. XIV*)].

Repeated prior appearances are also a cause for denial of an application absent special circumstances [*Cal. Rules of Ct., Rule 9.40(b)*; *see Walter E. Heller Western, Inc. v. Superior Court (1980) 111 Cal. App. 3d 706, 710, 168 Cal. Rptr. 785* (one prior appearance not cause for denial)].

Despite these limitations, an appellate court may permit argument in a particular case from one who is not a member of the State Bar, but who is licensed to practice in another jurisdiction and has special expertise in the particular field affected by the proceeding [*Cal. Rules of Ct., Rule 9.40(g)*].

Out-of-state attorneys may appear as counsel *pro hac vice* in arbitration proceedings and hearing held in California [*Code Civ. Proc. § 1282.4*; *Cal. Rules of Ct., Rule 9.43*; *see § 72.223[1]*].

[3] Procedure

An out-of-state attorney desiring to appear *pro hac vice* in a superior court must file a verified application with proof of service under *Code Civ. Proc. § 1013a* that all parties who have appeared in the cause and the State Bar have been served by mail with the application and a notice of hearing. The notice of hearing must be given in the manner provided by *Code Civ. Proc. § 1005*, unless the court authorizes a shorter period [Cal. State Bar Rules, Counsel Pro Hac Vice Program, Rules 4.1, 4.3]. Thus, all moving and supporting papers must be served and filed at least 16 court days before the time appointed for the hearing; if the notice is served by mail, this period is increased by 5 days if the place of mailing and the place of address are within the State of California, by 10 days if either the place of mailing or the place of address is outside the State of California but within the United States, and by 20 days if either the place of mailing or the place of address is outside the United States; if notice is served by fax, express mail or other overnight delivery method, the period is extended by two days [*Code Civ. Proc. § 1005(b)*].

Counsel applying to appear *pro hac vice* in the Supreme Court or a court of appeal must make a motion as provided in

Cal. Rules of Ct., Rule 8.54 (procedure and format for motions in reviewing courts), with proof of service on all parties who have appeared in the cause and the State Bar [Cal. State Bar Rules, Counsel Pro Hac Vice Program, Rule 4.4].

Counsel applying to appear *pro hac vice* in arbitration proceedings and hearings in California must serve a certificate on the arbitrator, the State Bar of California and all parties and counsel, containing information required by *Code Civ. Proc. § 1282.4* [*see Code Civ. Proc. § 1282.4(c)*].

The copy of the application and notice of hearing that is served on the State Bar must be accompanied by a reasonable fee, fixed by the Board of Governors [*Cal. Rules of Ct., Rule 9.40(e)*].

[4] State Jurisdiction Over Professional Conduct

While appearing *pro hac vice*, an out-of-state attorney submits to the jurisdiction of state courts regarding state laws governing attorney conduct to the same extent as a State Bar member. Familiarity and compliance with the State Bar Rules of Professional Conduct are also required, subject to disciplinary action by the State Bar under *Bus. & Prof. Code § 6075 et seq.* and the State Bar Rules of Procedure. A trial court's inherent powers include the authority to revoke an attorney's *pro hac vice* status when that attorney has engaged in conduct that would be sufficient to disqualify a California attorney [*Sheller v. Superior Court of Los Angeles County (2008) 158 Cal. App. 4th 1697, 1716, 71 Cal. Rptr. 3d 207*]. For further discussion concerning disciplinary proceedings in general, see Ch. 71, *Attorney Discipline* .

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§ 72.224 Termination of Attorney-Client Relationship

Unless the agreement between the parties provides otherwise, the attorney-client relationship terminates once the task for which the attorney was retained is concluded [*see Ruszovan v. Ruszovan (1969) 268 Cal. App. 2d 902* ; *Mizrahi v. Miscione (1967) 252 Cal. App. 2d 673, 677, 60 Cal. Rptr. 680* ; *see also BAJI No. 6.37.3*; *but see Barboza v. West Coast Digital GSM, Inc. (2009) 179 Cal. App. 4th 540, 545-546, 102 Cal. Rptr. 3d 295* (general rule may be inapplicable to class counsel representing absent class members)]. The cautious attorney, however, will communicate with the client to confirm that the client understands that the relationship has terminated. An attorney is prohibited from terminating representation of any cient on the basis of race, national origin, sex, sexual orientation, religion, age or disability [*Cal. Rules Prof. Conduct, Rule 2-400(B)*].

The relationship also may end when an attorney is relieved either by the court or by the client [*see Code Civ. Proc. § 284*]. The client's power to discharge an attorney, with or without cause, is generally absolute under *Code Civ. Proc. § 284* [*Fracasse v. Brent (1972) 6 Cal. 3d 784, 790, 100 Cal. Rptr. 385, 494 P.2d 9* ; *Echlin v. Superior Court (1939) 13 Cal. 2d 368, 372, 90 P.2d 63* ; *see also Jones & Matson v. Hall (2007) 155 Cal. App. 4th 1596, 1610, 66 Cal. Rptr. 3d 872* ; *Redevelopment Agency v. Superior Court (1961) 195 Cal. App. 2d 591, 595, 16 Cal. Rptr. 45* (setting forth nature of attorney's interest necessary to preclude substitution)].

Once the attorney-client relationship has been terminated, the attorney does not have a duty to represent the client in another matter [*see Brandlin v. Belcher (1977) 67 Cal. App. 3d 997, 1001, 134 Cal. Rptr. 1]* or, particularly if other counsel is retained, to further represent the client in the matter for which the attorney was originally retained [*see Steketee v. Lintz, Williams & Rothberg (1985) 38 Cal. 3d 46, 57, 210 Cal. Rptr. 781, 694 P.2d 1153* (attorney not liable for failing to file action prior to expiration of statute of limitations when he ceased to represent client and was replaced by other counsel before statute ran on client's action)].

For discussion of the termination of the attorney-client relationship, see *§ 72.350* et seq. through § 72.410 et seq.

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[Reserved]

§§ 72.225[Reserved]

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7-72 California Forms of Pleading and Practice--Annotated § 72.240

§ 72.240 Governing Law

The law regulating advertising and solicitation by attorneys is derived primarily from the following:

- United States Supreme Court cases defining the constitutional limits of regulation,
- State Bar Act provisions prescribing certain activities as unlawful (*Bus. & Prof. Code §§ 6126, 6150-6156*),
- State Bar Act provisions setting forth specific standards for solicitation and advertising (*Bus. & Prof. Code §§ 6157-6159.2*), and
- *Cal. Rules Prof. Conduct, Rule 1-400*.

Bar association opinions may also provide useful guidance concerning "grey" areas of conduct, but those opinions lack precedential value in the courts [*see § 72.11[7]*].

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§ 72.241 Solicitation and Advertising Distinguished

Broadly defined, solicitation refers to any activity by which an attorney seeks professional employment from a potential client for pecuniary gain [*see Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 454, 462 n.20, 98 S. Ct. 1912, 56 L. Ed. 2d 444]* . Advertising involves informing or advising the public about the availability of an attorney's services [*see Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 454-455, 457, 98 S. Ct. 1912, 56 L. Ed. 2d 444]* . Advertising is thus a form of solicitation because the attorney hopes to gain new clients from the advertisement's audience [*see Millsberg v. State Bar (1971) 6 Cal. 3d 65, 74, 98 Cal. Rptr. 223, 490 P.2d 543* ; Bar Assn. of San Francisco Legal Ethics Committee, Opinion No. 1979-1; Cal. Rules Prof. Conduct, former Rule 2 (in effect 1928-1975, set out in 1 Cal. 3d (1970)); *see also Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 454-455, 98 S. Ct. 1912, 56 L. Ed. 2d 444]* .

To avoid confusion, this part generally uses the term "solicitation" to refer specifically to forms of solicitation that are directed at specific individuals or entities, such as in-person contact and telephone calls, rather than forms directed at the public generally, for which the term "advertising" is used [*see Cal. Rules Prof. Conduct, Rule 1-400(B)* (discussed in § 72.531[11]) and *Bus. & Prof. Code § 6157(c)* (discussed in § 72.242[3])].

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§ 72.242 California Terminology

[1] Communication

Cal. Rules Prof. Conduct, Rule 1-400, governing advertising and solicitation, uses the general term "communication" to refer to any message or offer made by or on behalf of a California State Bar member concerning the availability for professional employment of a member or law firm directed to any former, present, or prospective client [*Cal. Rules Prof. Conduct, Rule 1-400(A)*]. Communications include the following types of conduct [*Cal. Rules Prof. Conduct, Rule 1-400(A)*]:

- Any use of firm name, trade name, fictitious name, or other professional designation of the member or law firm;
- Any stationery, letterhead, business card, sign, brochure, or other comparable written material describing the member, law firm, or lawyers;
- Any advertisement (regardless of medium) of the member or law firm directed to the general public or any substantial portion thereof; or
- Any unsolicited correspondence from a member or law firm directed to any person or entity.

[2] Solicitation

Rule 1-400 also regulates "solicitations." [*see Cal. Rules Prof. Conduct, Rule 1-400*]. A "solicitation" is a specific type of "communication" concerning the availability for professional employment of a member or a law firm in which a significant motive is pecuniary gain. Such a communication is a "solicitation" if it is conveyed in any of following ways [*see Cal. Rules Prof. Conduct, Rule 1-400(B)*]:

- Delivered in person;

- Delivered by telephone; or

- Directed by any means to a person known to the sender to be represented by counsel in a matter that is a subject of the communication.

[3] Advertising

The State Bar Act provisions regulating legal advertising, uses the term "advertising" to refer to any communication by a lawyer or attorney directed to the general public soliciting employment of legal services, which is paid for, or on the behalf of an attorney by [*Bus. & Prof. Code § 6157(c)*]:

- Television or radio;

- Any print medium including, but not limited to newspapers and billboards; or

- Mailings directed generally to members of the public and not to a specific person.

PRACTICE TIP:

Regulation of Advertising. Historically, advertising and solicitation by attorneys were considered unethical conduct subject to discipline by the State Bar. With the advent of constitutional protection for commercial speech, the State Bar has been forced to permit some forms of truthful advertising and solicitation. To the extent that it is permitted by the Constitution, the State Bar has tried to regulate the content of advertising and ensure that it is not false, misleading, or deceptive.

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§ 72.243 Retention of Records

An attorney must keep for two years a copy or recording of any "communication" as that term is defined in the Rules of Professional Conduct (discussed under § 72.242[1]) made by any type of written or electronic media [*Cal. Rules of Prof. Conduct, Rule 1-400(F)*]. The attorney must make these records available to the State Bar on written request and, if requested, must provide evidence to support any factual or objective claim contained in the "communication" [*Cal. Rules Prof. Conduct, Rule 1-400(F)*].

An attorney must retain for one year a true and correct copy of any advertisement as that term is defined in the State Bar Act (discussed under § 72.242[3]) [*Bus. & Prof. Code § 6159.1*]. Any person found in violation of this requirement shall be reported by the court to the appropriate professional agency for review and possible disciplinary action [*Bus. & Prof. Code § 6159*].

PRACTICE TIP:

Include Dates in Records. It is important that records of advertisements or letters include the dates on which the communications were made. The rules that permit a certain advertisement or letter at a certain time may well change by the time a State Bar investigation commences.

The United States Supreme Court has stated that attorneys may be constitutionally required to file a copy of a mass mailing with the State Bar [*In re R.M.J. (1982) 455 U.S. 191, 206, 206 n.20, 102 S. Ct. 929, 71 L. Ed. 2d 64]* . Presently, however, the State Bar of California does not require an attorney to file copies of communications.

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§ 72.244 Types of Communication Prohibited

[1] False Statements

A communication or solicitation made by or on behalf of an attorney may not contain any untrue statement [*Cal. Rules Prof. Conduct, Rule 1-400(D)(1)*; *see Best Buy Stores, L.P. v. Superior Court (2006) 137 Cal. App. 4th 772, 40 Cal. Rptr. 3d 575* (state may not bar lawyers from sending truthful letters soliciting legal business for pecuniary gain)]. For example, the inclusion in an advertisement of the words, "Approved as a Bankruptcy Trustee by U.S. Courts," when the attorney has not been officially appointed by the courts, is a false statement that violates this rule [*see Standing Committee on Discipline etc. v. Ross (9th Cir. 1984) 735 F.2d 1168, 1172* (decided under Cal. Rules Prof. Conduct, former rule 2-101)].

This rule is extended by statute to nonattorneys and to attorneys who are inactive, suspended, disbarred, or otherwise not current active members of the State Bar, at least to the extent that such persons are prohibited from advertising or holding themselves out as "practicing or entitled to practice law" [*see Bus. & Prof. Code § 6126* (violation a misdemeanor)].

[2] Deceptive Matter

The Rules of Professional Conduct prohibit communications and solicitations that contain any matter, or present or arrange any matter in a manner that is false, deceptive, or that tends to confuse, deceive, or mislead the public [*Cal. Rules Prof. Conduct, Rule 1-400(D)(2)*]. The California Supreme Court has held that the provisions of the Rules of Professional Conduct prohibiting communications that contain false, confusing, misleading, or deceptive statements are a constitutionally permissible regulation of misleading advertisements [*Leoni v. State Bar (1985) 39 Cal. 3d 609, 626, 217 Cal. Rptr. 423, 704 P.2d 183* (construing Cal. Rules Prof. Conduct, former Rule 2-101(A)(1)-(3), which is similar to present *Cal. Rules Prof. Conduct, Rule 1-400(D)(1)-(3)*)]. For further discussion of constitutional restrictions regarding regulation of attorney advertising, *see § 72.251*.

A statement may be misleading if it involves the use of words that are not well known to the public. For example, use of

the term "approved" as a Bankruptcy Trustee, when the attorney was not officially "appointed" as a trustee, was found to be misleading because the lay public is not familiar with the appointment process of bankruptcy trustees [*Standing Committee on Discipline etc. v. Ross (9th Cir. 1984) 735 F.2d 1168, 1172* (decided under former Rule 2-101); *cf. Friedman v. Rogers (1979) 440 U.S. 1, 11-16, 99 S. Ct. 887, 59 L. Ed. 2d 100* (Texas statute prohibiting practice of optometry under trade name as constitutional regulation of potentially misleading practice)].

In another case, the California Supreme Court found that letters that were mailed to certain potential clients who had lawsuits pending against them had a tendency to and actually did mislead members of the public, although they contained no literally untrue statements. The Court made note of one particular letter, stating that it was misleading because it implied that an adverse judgment was imminent and that the recipients' personal assets would be attached as a result of the judgments [*see Leoni v. State Bar (1985) 39 Cal. 3d 609, 626-627, 217 Cal. Rptr. 423, 704 P.2d 183* (decided under former Rule 2-101); *but see Shapero v. Kentucky Bar Ass'n. (1988) 486 U.S. 466, 472-478, 108 S. Ct. 1916, 100 L. Ed. 2d 475* (targeted direct-mail solicitation is a constitutionally protected category of attorney advertising)].

In the first Supreme Court discipline case regarding solicitation in several years, the court found that an attorney had engaged in mass mailing of misleading advertisements entitled "homestead information sheet" [*In re Morse (1995) 11 Cal. 4th 184, 201-202, 44 Cal. Rptr. 2d 620, 900 P.2d 1170]* . The court found the content of the mailings misleading in four specific ways. Further, Morse did not comply with the specific provisions of *Bus. & Prof. Code § 17537.6*, which requires certain important disclosures regarding homestead declarations [*In re Morse (1995) 11 Cal. 4th 184, 203, 44 Cal. Rptr. 2d 620, 900 P. 2d 1170]* . The court placed the attorney on disciplinary probation for four years, on conditions including at least two years of actual suspension [*In re Morse (1995) 11 Cal. 4th 184, 212, 44 Cal. Rptr. 2d 620, 900 P.2d 1170]* .

A lawyer who prepares living trusts at the direction of a nonlawyer who markets living trust packages to the public violates the prohibition of *Cal. Rules Prof. Conduct, Rule 1-400* against misleading advertising. Statements by the marketer regarding lawyer preparation of living trusts and the lawyer's availability for professional employment are "communications" within the meaning of *Cal. Rules Prof. Conduct, Rule 1-400(A)*. The communications have the potential to mislead the public through a generic "one-size-fits-all" recommendation of living trusts to the public, which contain untrue statements and omit facts, for example, that living trusts may not be best in every case, necessary to make them not misleading [State Bar Formal Opinion 1997-148].

[3] Omissions of Fact

Omissions of fact that make a communication or solicitation misleading are forbidden by the Rules of Professional Conduct [*Cal. Rules Prof. Conduct, Rule 1-400(D)(3)*]. The circumstances under which the communication or solicitation is made will be considered in determining whether the omission is misleading [*Cal. Rules Prof. Conduct, Rule 1-400(D)(3)*].

In one case, letters sent to a number of potential clients were held to have violated this rule because they stated that clients needed only $60 in cash to apply for debt relief under the bankruptcy laws, but failed to state that the firm would also charge attorney's fees equal to 10 times that amount [*see Leoni v. State Bar (1985) 39 Cal. 3d 609, 627, 217 Cal. Rptr. 423, 704 P.2d 183* (decided under former Rule 2-101)].

[4] Failure to Indicate Nature of Communication

An attorney's communication must not fail to indicate that it is a "communication" or "solicitation," as those terms are used in the Rules [*Cal. Rules Prof. Conduct, Rule 1-400(D)(4)*]. In other words, the communication must somehow indicate that its purpose is to offer the availability of the attorney or his or her firm for professional employment [*see Cal. Rules Prof. Conduct, Rule 1-400(A), (B)*]. The communication or solicitation must state its nature clearly,

expressly, or by context [*Cal. Rules Prof. Conduct, Rule 1-400(D)(4)*]. A communication that does not have the word "Advertisement," "Newsletter," or similar words on the first page and, if mailed, also on the outside of the envelope is presumed to violate this rule [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400,* Std. 5 (word on first page required to be in 12-point type); *see § 72.245*].

In one case, the California Supreme Court disciplined the lawyers in a law firm for sending mass mailings of letters that violated this rule, among others. The letters in question were specifically directed at certain potential clients who had legal proceedings pending against them. The Court noted that, although the letters could have been interpreted by a lawyer as indicating that they were messages concerning the firm's availability for employment, the letters did not clearly state that they were for that purpose and a layperson would not necessarily have understood that they were advertisements. The Court stated that the rule "could easily be satisfied by including a statement such as 'This is an advertisement' " [*Leoni v. State Bar (1985) 39 Cal. 3d 609, 627, 217 Cal. Rptr. 423, 704 P.2d 183* (decided under former Rule 2-101); *see also Shapero v. Kentucky Bar Ass'n (1988) 486 U.S. 466, 472-478, 108 S. Ct. 1916, 100 L. Ed. 2d 475* (truthful and nondeceptive targeted direct-mail solicitation is a constitutionally protected category of attorney advertising)].

[5] Intrusive or Coercive Manner

The Rules of Professional Conduct prohibit communications and solicitations that are transmitted in an intrusive or coercive manner, or in any manner involving duress, compulsion, intimidation, threats, or vexatious or harassing conduct [*Cal. Rules Prof. Conduct, Rule 1-400(D)(5)*]. In one case, the California Supreme Court held that particularized, misleading, and unsolicited letters mailed to defendants against whom cases were pending, and that were bound to cause panic and fear in the lay recipients of those letters, violated this prohibition [*Leoni v. State Bar (1985) 39 Cal. 3d 609, 627, 217 Cal. Rptr. 423, 704 P.2d 183* (decided under former Rule 2-101); *but see Shapero v. Kentucky Bar Ass'n. (1988) 486 U.S. 466, 472-478, 108 S. Ct. 1916, 100 L. Ed. 2d 475* (impliedly overruling *Leoni* in part and holding that targeted, direct-mail solicitation is a constitutionally protected category of attorney advertising)].

[6] Direct Solicitation by Attorney

The Rules of Professional Conduct provide that no "solicitation" (as defined under § 72.531[11]) may be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship, unless the solicitation is protected from abridgment by the United States or California Constitutions [*Cal. Rules Prof. Conduct, Rule 1-400(C)*]. Nevertheless, a solicitation to a former or present client in the discharge of a member's or law firm's professional duties is not prohibited [*Cal. Rules Prof. Conduct., Rule 1-400(C)*]. A lawyer's claim against another lawyer for soliciting a client did not come within the statutory exemption to the anti-SLAPP statute (*Code Civ. Proc. § 425.17*) [*Taheri Law Group v. Evans (2008) 160 Cal. App. 4th 482, 490, 72 Cal. Rptr. 3d 847*].

A lawyer who prepares living trusts at the direction of a nonlawyer who markets living trust packages to the public violates the prohibition of *Cal. Rules Prof. Conduct, Rule 1-400(B), (C)* against in-person solicitation. A significant motivation for promotion of the lawyer's services is pecuniary gain for the marketer and the lawyer, and the solicitation is directed at obtaining prospective clients with whom the lawyer has no prior professional relationship. The use of the marketer does not insulate the communication, since *Cal. Rules Prof. Conduct, Rule 1-400(C)* prohibits solicitations made "on behalf of" the lawyer [State Bar Formal Opinion 1997-148].

For discussion of the scope of the permissible constitutional limitations on in-person and telephone solicitation, see §§ 72.246, *72.247* and 72.249. For discussion of the constitutional limitations on the above prohibitions as they apply to unsolicited mailings and advertisements containing legal advice or pertaining to specific potential clients, see § 72.253[4].

PRACTICE TIP:

Rule Prohibiting Solicitation Unclear. The California rule prohibiting solicitation is not as clear as it should be. It requires legal research into the current status of law of commercial speech each time an attorney proposes to engage in solicitation.

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§ 72.245 Presumptive Violations

The State Bar Board of Governors, as required by the Rules of Professional Conduct, has adopted standards setting forth what communications will be presumed to violate Rule 1-400 [*see Cal. Rules Prof. Conduct, Rule 1-400(E)* (requirement of adoption); Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*]. The standards may only be used as presumptions affecting the burden of proof in State Bar disciplinary proceedings [*Cal. Rules Prof. Conduct, Rule 1-400(E)*; *see Evid. Code §§ 605, 606* (effect of presumption affecting burden of proof)]. Violation of some of these standards also is prohibited by provisions of the State Bar Act regulating legal advertising [*see Bus. & Prof. Code § 6157.2* discussed under § 72.592[4][a]].

The following types of communications are presumed to violate *Cal. Rules Prof. Conduct, Rule 1-400*:

- A communication containing guarantees, warranties, or predictions regarding the result of the representation [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 1].

- A communication containing testimonials about, or endorsements of, a State Bar member, unless such communication also contains an express disclaimer of guarantees, warranties, or predictions regarding the outcome of the legal matter [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 2].

- A communication delivered to a potential client whom the attorney knows or should reasonably know is in such a physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 3].

- A communication transmitted at the scene of an accident, or at, or en route to, a hospital or other health care facility [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 4; *see also § 72.247*].

- A communication, except professional announcements, seeking professional employment for pecuniary gain that is transmitted by mail or equivalent means that does not bear the word "Advertisement'," "Newsletter," or words of similar import in 12 point print on the first page. If the communication, including firm brochures, newsletters, recent legal development advisories, and similar materials, is transmitted in an envelope, the outside of the envelope must bear the word "Advertisement'," "Newsletter," or similar word [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 5].

PRACTICE TIP:

Labeling Mailing to Prospective Client. Because letters from attorneys can often have an strong impact on their recipients, the State Bar requires attorney advertisements to be clearly labeled as such both on the outside of the envelope and inside. Members of the public are entitled to know that their legal rights are not at stake as they open and after they have opened a letter from an unknown lawyer. If an attorney opts to choose a label other than "advertisement" or "newsletter," the chosen label should be clear enough to apprise the public that the attorney is seeking business and that there is no duty to respond to the letter.

- A communication in the form of a firm name, trade name, fictitious name, or other professional designation that states or implies a relationship between any member in private practice and a government agency or instrumentality or a public or nonprofit legal services organization [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 6].

- A communication in the form of a firm name, trade name, fictitious name, or other professional designation that states or implies that a member has a relationship to any other member or a law firm as a partner or associate or as officer or shareholder pursuant to *Bus. & Prof. Code § 6160 et seq.*, unless that relationship in fact exists [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 7].

- A communication that states or implies that a member or law firm is "of counsel" to another member or a law firm, unless the former has a relationship with the latter (other than as a partner or associate or as officer or shareholder pursuant to *Bus. & Prof. Code § 6160 et seq.*) that is close, personal, continuous, and regular [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 8].

PRACTICE TIP:

Treatment of "Of Counsel" Attorney. If a lawyer or law firm is to be held out as "of counsel" to another lawyer, the "of counsel" lawyer will be treated as a partner or associate for conflicts purposes [*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems (1999) 20 Cal. 4th 1135, 86 Cal. Rptr. 2d 816, 980 P.2d 371* ; *see § 72.113[6][b][iv]*]. Before holding out another lawyer as "of counsel," counsel should consider the potential impact of conflicts of interest. For discussion of conflicts generally, see *§ 72.30* et seq. through § 72.170 et seq.

- A communication in the form of a firm name, trade name, fictitious name, or other professional designation used by a member or law firm in private practice that differs materially from any other such designation used by such member or law firm at the same time in the same community [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 9].

- A communication that implies that the member or member's firm is participating in a lawyer-referral service that has been certified by the State Bar of California or as having satisfied the Minimum Standards for Lawyer Referral Services in California, when that is not the case [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 10].

- A communication that states or implies that a member is a "certified specialist" unless such communication also states the complete name of the entity that granted the certification as a specialist [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 11].

PRACTICE TIP:

Advertising Areas of Expertise. Attorneys occasionally advertise that they are specialists or experts in particular areas. This is not prohibited by Standard 11, which deals with attorneys who state that they are "certified" specialists. As discussed in *§ 72.270* et seq. through § 72.290 et seq., however, attorneys holding themselves out as specialists are likely to be held to a higher standard of care than general practitioners.

- A communication, except professional announcements, in the form of an advertisement primarily directed to seeking professional employment primarily for pecuniary gain that is transmitted to the general public or any substantial portion of the public by mail or equivalent means or by means of television, radio, newspaper, magazine or other commercial mass media that does not state the name of the member responsible for the communication. If the communication is on a law firm's behalf, the communication must state the name of at least one member responsible for it [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 12].

- A communication that contains a dramatization without including a disclaimer stating 'this is a dramatization' or words of similar import [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 13].

- A communication that states or implies "no fee without recovery" unless it also expressly discloses whether or not the client will be liable for costs [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 14].

- A communication that states or implies that a member is able to provide legal services in a language other than English unless the member can actually do so or the communication states, in the language of the communication, the employment title of the person who speaks the language and that the person is not a member of the State Bar of California, if that is the case [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 15].

- An unsolicited communication transmitted to the general public or any substantial portion of the public primiarily directed to seeking professional employment primarily for pecuniary gain that sets forth a specific fee or range of fees for a particular service if, in fact, the member charges a greater fee within 90 days following dissemination of the communication, unless the communication expressly specifies a shorter period when the advertised fee is available. If the communication is published in the classified ("yellow pages") of telephone, business, or legal directories or other media not published more than once a year, the member must conform to the advertised rate for one year from initial publication, unless the communication expressly specifies a shorter period regarding the fee [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 16].

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§ 72.246 Constitutionality of Prohibition Against Solicitation

[1] General Rule--By Attorney In Person

Cal. Rules Prof. Conduct, Rule 1-400, prohibits communications delivered in person or by telephone concerning the availability for professional employment of an attorney or law firm in which a significant motive is pecuniary gain, provided that there is no prior professional or familial relationship between the attorney or firm and the solicited party [*Cal. Rules Prof. Conduct, Rule 1-400(B), (C)*]. Rule 1-400 provides, however, that in-person or telephone solicitation may take place if it is protected by the California or United States Constitutions [*Cal. Rules Prof. Conduct, Rule 1-400(C)*]. A determination of the permissible scope of in-person solicitation, therefore, requires an examination of the decisions of the United States and California Supreme Courts regarding the constitutionality of restrictions on such solicitation.

In *Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 98 S. Ct. 1912, 56 L. Ed. 2d 444* , the United States Supreme Court held that a state may constitutionally prohibit an attorney's in-person solicitation of legal employment for pecuniary gain under circumstances likely to present dangers that the state has a right to prevent [*Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 449, 98 S. Ct. 1912, 56 L. Ed. 2d 444]* . In *Ohralik*, an attorney was disciplined for soliciting potential clients in person at a hospital and at their homes, in violation of Ohio's Code of Professional Responsibility. The Court held that the state's restraint of this type of conduct does not violate *U.S. Const., amend. I* [*Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 459, 462, 468, 98 S. Ct. 1912, 56 L. Ed. 2d 444]* .

One of the two rules of professional conduct considered in *Ohralik* was identical to former Rule 2-104(A) of the California Rules of Professional Conduct, in effect from 1975 to 1979 [*see* *Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 453 n.9, 98 S. Ct. 1912, 56 L. Ed. 2d 444]* . The rule prohibited an attorney from recommending himself or herself or an associate or partner to a layperson who had not asked for a recommendation of an attorney [*see* Cal. Rules Prof. Conduct, former Rule 2-104(A) (repealed April 1, 1979)]. The other rule considered in *Ohralik* prohibited an attorney from accepting employment resulting from unsolicited legal advice [*see* *Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 453 n.9, 98 S. Ct. 1912, 56 L. Ed. 2d 444]* .

The Court held that the dangers that the state is entitled to avert by regulation of in-person solicitation of professional legal employment include fraud, undue influence, intimidation, overreaching, invasion of privacy, subordination of the client's interests to the attorney's financial interests, and other vexatious conduct [*Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 461-462, 468, 98 S. Ct. 1912, 56 L. Ed. 2d 444]* . The state has a compelling interest in protecting the public from these potential dangers; therefore, the preventive nature of in-person solicitation restraints is justified [*Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 462-464, 98 S. Ct. 1912, 56 L. Ed. 2d 444]* . The possibility of the identified dangers occurring is constitutionally sufficient to warrant the prohibition; actual injury to a potential client is not required to be shown [*Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 465-468, 98 S. Ct. 1912, 56 L. Ed. 2d 444]* . If the purpose of solicitation involves the furtherance of civil rights, however, the solicitation is permissible unless actual misconduct or injury is shown [*In re Primus (1978) 436 U.S. 412, 434, 98 S. Ct. 1893, 56 L. Ed. 2d 417]* . For discussion of the civil liberties exception, see *§ 72.246[3]*.

Although their purposes may be the same, in-person solicitation for monetary gain differs significantly from the type of truthful advertising that is permitted. Although both activities ostensibly give information about the availability and terms of legal services, in-person solicitation, unlike advertising, invokes the negative elements of undue pressure and demand for an immediate answer and fails to give potential clients time and opportunity for reflection and comparison [*Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 455-458, 98 S. Ct. 1912, 56 L. Ed. 2d 444]* .

In *Edenfield v. Fane*, the United States Supreme Court addressed the constitutionality of Florida's blanket prohibition on solicitation by certified public accountants. The accountant who challenged the prohibition had solicited prospective clients who were sophisticated and experienced business executives who understood well the services offered by a CPA. The Supreme Court held that, as applied to CPA solicitation in the business context, the Florida ban was unconstitutional [*Edenfield v. Fane (1993) 507 U.S. 761, 113 S. Ct. 1792, 123 L. Ed. 2d 543, 550]* . Unpersuaded that allowing solicitation by CPAs in the business context would result in fraud and overreaching, the Court held that the ban did not advance state interests in any direct and material way. Contrasting the instant case from *Ohralik*, where dangers of fraud and overreaching were found in the context of attorney solicitation of a young accident victim, the Court noted that a CPA is not "a professional trained in the art of persuasion," and that a CPA's training emphasizes independence and objectivity, not advocacy. Also, the Court opined that a typical client of a CPA is far less susceptible to manipulation than a client such as the young accident victim in *Ohralik* [*Edenfield v. Fane (1993) 507 U.S. 761, 113 S. Ct. 1792, 123 L. Ed. 2d 543, 558]* . The Court in *Edenfield* noted that under *Ohralik*, a preventive rule is justified only in situations "inherently conducive to overreaching and other forms of misconduct" [*Edenfield v. Fane (1993) 507 U.S. 761, 113 S. Ct. 1792, 123 L. Ed. 2d 543, 557-558]* . The Court concluded that the Florida rule did not advance substantial government interests, and suppressed legitimate commercial speech; consequently, the rule infringed on the accountant's constitutional free speech rights [*Edenfield v. Fane (1993) 507 U.S. 761*]. In light of *Edenfield*, it seems possible that the Court would view attorney solicitation of sophisticated business clients (for example, corporate CEOs and other attorneys) as constitutionally protected speech, inasmuch as dngers of fraud, overreaching, or other misconduct, are minimal with respect to such clients, and prohibitions on such speech would not directly advance a substantial government interest. Solicitation of sophisticated business clients, if constitutionally protected, would not be prohibited under *Cal. Rules Prof. Conduct, Rule 1-400(C)*.

[2] By Telephone

Attorneys are subject to discipline for soliciting clients directly over the telephone [In the Matter of Kroff (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 838 (4/15/98; 1998 D.A.R. 4151) (attorney violated *Cal. Rules Prof. Conduct, Rule 1-400(C)*, by calling accident victims at their homes seeking to represent them); *see also* State Bar Formal Opinion No. 1988-105 (construing Cal. Rules Prof. Conduct, former Rule 2-101(B); telephone solicitation involves same danger of abuse and difficulty of regulation inherent in "face-to-face" solicitation and is therefore both constitutionally unprotected and prohibited under California Rules of Professional Conduct); *but see* LACBA Formal Opinion No. 494 (1998) (telephone call by attorney offering to conduct in-house educational seminar not solicitation under *Cal. Rules*

Prof. Conduct, Rule 1-400, where attorney does not communicate message or offer concerning availability for professional employment in practice of law)].

[3] Through Runners and Cappers

An attorney's solicitation of clients through agents, commonly called runners and cappers, may be constitutionally prohibited [*see Kitsis v. State Bar (1979) 23 Cal. 3d 857, 863-864, 153 Cal. Rptr. 836, 592 P.2d 323* (construing Cal. Rules Prof. Conduct, former Rules 2 and 3, repealed January 1, 1975); *In re Arnoff (1978) 22 Cal. 3d 740, 746, 150 Cal. Rptr. 479, 586 P.2d 960* ; for the current California rules prohibiting the use of runners and cappers, *see § 72.247[2]*]. The same kinds of evils that inure to in-person solicitation are presented by solicitation through runners and cappers [*Kitsis v. State Bar (1979) 23 Cal. 3d 857, 863-864, 153 Cal. Rptr. 836, 592 P.2d 323* ; *see Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 464 n.22, 98 S. Ct. 1912, 56 L. Ed. 2d 444* ; *see also § 72.246[1][a][i]*]. Solicitation through others also involves undesirable factors such as a demand for an immediate response and lack of opportunity for comparison and reflection [*Kitsis v. State Bar (1979) 23 Cal. 3d 857, 863-864, 153 Cal. Rptr. 836, 592 P.2d 323* ; *see Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 464 n.22, 98 S. Ct. 1912, 56 L. Ed. 2d 444]* .

[4] Exception for Activities Involving Political Expression and Association

[a] In General

As noted under § 72.246[1][a][i], the United States Supreme Court held that states generally may proscribe in-person and other types of solicitation under circumstances likely to cause deception, undue influence, overreaching, conflicts of interest, invasion of privacy, or other evils against which the state has the right to protect, regardless of whether those circumstances are actually present in a particular case [*Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 465-468, 98 S. Ct. 1912, 56 L. Ed. 2d 444]* . The Court also held, however, that certain types of solicitation involving political expression and association are protected under *U.S. Const., amend. I*, and may not constitutionally be proscribed unless the particular activity actually involves the type of misconduct that the state seeks to prevent [*see In re Primus (1978) 436 U.S. 412, 434-436, 98 S. Ct. 1893, 56 L. Ed. 2d 417* ; *N.A.A.C.P. v. Button (1963) 371 U.S. 415, 431-438, 437, 83 S. Ct. 328, 9 L. Ed. 2d 405]* .

For example, the efforts of the National Association for the Advancement of Colored People to advise potential litigants that their civil rights have been violated, and to refer them to particular attorneys, were permissible activities that could not be prohibited under the State of Virginia's antisolicitation statutes [*N.A.A.C.P. v. Button (1963) 371 U.S. 415, 428-429, 437, 83 S. Ct. 328, 9 L. Ed. 2d 405]* . Because the NAACP employed litigation for the purpose of redressing civil rights violations, its activities were protected as forms of political expression and association [*N.A.A.C.P. v. Button (1963) 371 U.S. 415, 429-431, 437, 83 S. Ct. 328, 9 L. Ed. 2d 405]* . In another case, an attorney's offer of free legal assistance by the American Civil Liberties Union to vindicate a potential client's civil rights was constitutionally protected in the absence of a showing of actual undue influence, overreaching, misrepresentation, invasion of privacy, or other misconduct, or a serious likelihood of such misconduct [*see In re Primus (1978) 436 U.S. 412, 431-436, 98 S. Ct. 1893, 56 L. Ed. 2d 417]* .

[b] Assertion of Legal Rights by Unions and Other Groups

Activities protected by *U.S. Const., amend. I*, include collective activity undertaken to obtain meaningful access to the courts [*In re Primus (1978) 436 U.S. 412, 425-426, 98 S. Ct. 1893, 56 L. Ed. 2d 417* ; *United Transportation Union v. State Bar of Michigan (1971) 401 U.S. 576, 585, 91 S. Ct. 1076, 28 L. Ed. 2d 339]* . The constitutional right to engage in collective activities encompasses the right of unions and other groups to assert their legal rights in the most effective and economical way practicable [*United Transportation Union v. State Bar of Michigan (1971) 401 U.S. 576, 580, 91 S. Ct. 1076, 28 L. Ed. 2d 339]* . Protected activities include the following:

- Offering advice regarding legal rights to group members [*Brotherhood of Railroad Trainmen v.*

Virginia (1964) 377 U.S. 1, 8, 84 S. Ct. 1113, 12 L. Ed. 2d 89, 94 Ohio Law Abs. 33] ;

- Recommending an attorney to group members [*Brotherhood of Railroad Trainmen v. Virginia (1964) 377 U.S. 1, 8, 84 S. Ct. 1113, 12 L. Ed. 2d 89, 94 Ohio Law Abs. 33]* ;

- Employing attorneys to represent group members, either on staff or outside the organization [*United Mine Workers v. Illinois Bar Asso. (1967) 389 U.S. 217, 221-222, 88 S. Ct. 353, 19 L. Ed. 2d 426* ; *see N.A.A.C.P. v. Button (1963) 371 U.S. 415, 428-429, 83 S. Ct. 328* ; *9 L. Ed. 2d 405]* ;

- Furnishing the names of potential clients and information about accidents to particular attorneys [*United Transportation Union v. State Bar of Michigan (1971) 401 U.S. 576, 581-582, 91 S. Ct. 1076, 28 L. Ed. 2d 339]* ;

- Arranging with attorneys to limit their fees [*United Transportation Union v. State Bar of Michigan (1971) 401 U.S. 576, 584-585, 91 S. Ct. 1076, 28 L. Ed. 2d 339]* ; and

- Receiving reimbursement for costs of transporting group members to attorneys' offices [*United Transportation Union v. State Bar of Michigan (1971) 401 U.S. 576, 582, 91 S. Ct. 1076, 28 L. Ed. 2d 339]* .

For discussion of the California rule regarding participation by attorneys in group legal services programs, *Cal. Rules Prof. Conduct, Rule 1-600, see § 72.249[4]*.

[5] Permissible Restrictions on Solicitation

As discussed under § 72.246[1], a state may constitutionally restrain in-person solicitation by attorneys for pecuniary gain and other types of solicitation by attorneys that is in fact misleading, overbearing, or otherwise deceptive. In addition, state regulations may forbid solicitation by lawyers on behalf of lay organizations that exercise control over the conduct of the litigation [*Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 449, 98 S. Ct. 1912, 56 L. Ed. 2d 444* ; *In re Primus (1978) 436 U.S. 412, 438-439, 98 S. Ct. 1893, 56 L. Ed. 2d 417]* . Reasonable restrictions on the time, place, and manner of solicitation are also constitutionally permitted [*In re Primus (1978) 436 U.S. 412, 438, 98 S. Ct. 1893, 56 L. Ed. 2d 417]* .

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§ 72.247 Prohibited Acts of Solicitation

[1] Ambulance Chasing

One form of legal solicitation that has achieved notoriety and virtually unanimous condemnation involves attorneys or their agents seeking professional legal employment at accident scenes or at hospitals, an activity commonly known as "ambulance chasing" [*see, e.g., Tonini v. State Bar (1956) 46 Cal. 2d 491, 497, 297 P.2d 1* ; *People v. Kitsis (1977) 77 Cal. App. 3d Supp. 1, 2 , cert. denied, 436 U.S. 950 (1978)* (describing *Bus. & Prof. Code § 6152* as prohibiting ambulance chasing)]. This form of solicitation is considered especially reprehensible because it involves a high potential for overreaching [*see Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 464-465, 468, 98 S. Ct. 1912, 56 L. Ed. 2d 444]* . In these situations, the victim is usually distressed and may even be semi-conscious or not cognizant of what is going on around him or her [*see Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 464-466, 98 S. Ct. 1912, 56 L. Ed. 2d 444* ; *Kitsis v. State Bar (1979) 23 Cal. 3d 857, 866, 153 Cal. Rptr. 836, 592 P.2d 323* ; *Tonini v. State Bar (1956) 46 Cal. 2d 491, 493-494, 297 P.2d 1]* .

Ambulance chasing may encompass activities that involve an attorney personally [*see Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 449-452, 98 S. Ct. 1912, 56 L. Ed. 2d 444* ; *Tonini v. State Bar (1956) 46 Cal. 2d 491, 493-497, 297 P.2d 1]* or an attorney's runners and cappers [*see Kitsis v. State Bar (1979) 23 Cal. 3d 857, 861-862, 153 Cal. Rptr. 836, 592 P.2d 323]* . An attorney's use of runners or cappers to solicit business under these circumstances is a violation of the State Bar Act and subjects both the attorney and the runner or capper to criminal penalties [*see Bus. & Prof. Code §§ 6152(a), 6153* (discussed under § 72.247[2][a])]. Furthermore, a communication regarding an attorney's availability for professional employment is presumed to violate *Cal. Rules Prof. Conduct, Rule 1-400*, if the communication is transmitted at either of the following places [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 4; *see Cal. Rules Prof. Conduct, Rule 1-400(E)* (authorizing State Bar Board of Governors to adopt standards regarding communications that are presumed to violate the rule); *see also § 72.245*]:

- The scene of an accident.

- At or en route to a hospital, emergency care center, or other health care facility.

Places in which solicitation of potential clients is generally prohibited include the following [*see, e.g., Urbano v. State Bar (1977) 19 Cal. 3d 16, 19, 136 Cal. Rptr. 572, 560 P.2d 1* ; *Kelson v. State Bar (1976) 17 Cal. 3d 1, 4-5, 130 Cal. Rptr. 29, 549 P.2d 861* ; *see also Bus. & Prof. Code § 6152(a)(1)* (listing specific places, such as jails, hospitals, courts, and highways, where solicitation by runners and cappers is prohibited)]:

- Accident scenes.
- Car repair shops.
- Hospitals.
- The victim's home shortly after an accident.

Prohibited ambulance chasing may involve:

- Communication with the victim directly [*see Ohralik v. Ohio State Bar Ass'n. (1978) 436 U.S. 447, 449-452, 98 S. Ct. 1912, 56 L. Ed. 2d 444* ; *Tonini v. State Bar (1956) 46 Cal. 2d 491, 493-495, 297 P.2d 1* ; In the Matter of Kroff (Review Dept. 1998)--Cal. State B. Ct. Rptr.--(4/15/98; 1998 D.A.R. 4151)].

- Communication with the victim's family [*see Ohralik v. Ohio State Bar Ass'n. (1978) 436 U.S. 447, 449-452, 98 S. Ct. 1912, 56 L. Ed. 2d 444* ; *Younger v. State Bar (1974) 12 Cal. 3d 274, 278-283, 113 Cal. Rptr. 829, 522 P.2d 5* ; In the Matter of Kroff (Review Dept. 1998)--Cal. State B. Ct. Rptr.--(4/15/98; 1998 D.A.R. 4151)].

[2] Activities of Runners and Cappers

[a] Statutory Prohibition

Bus. & Prof. Code § 6152(a) makes it unlawful for a person to act as a runner or capper for an attorney or otherwise to solicit employment for an attorney [*Bus. & Prof. Code § 6152(a)(1)*]. As used in Section 6152(a), a runner or capper is any person, firm, association, or corporation acting for consideration in any manner or in any capacity as an agent for an attorney at law or law firm, whether the attorney or any member of the law firm is admitted in California or in any other jurisdiction, in the solicitation or procurement of business for the attorney or law firm [*Bus. & Prof. Code § 6151(a)*]. The statute lists specific places, such as jails, prisons, hospitals, and courts, where such solicitation is prohibited, but also prohibits solicitation "in any public place," "upon any public street or highway" and "upon private property of any character whatsoever" [*Bus. & Prof. Code § 6152(a)(1)*].

The statute also prohibits any person from soliciting another person to act as a runner or capper or from otherwise joining in the activities of a runner or capper [*Bus. & Prof. Code § 6152(a)(2)*]. This subsection was added in 1976 to clarify Section 6152(a) and to codify previous judicial holdings that an attorney can be criminally liable for aiding, abetting, or conspiring with others to act as runners and cappers [*see Hutchins v. Municipal Court (1976) 61 Cal. App. 3d 77, 81-90, 132 Cal. Rptr. 158* ; *see also § 72.247[2][b]*].

Violation of *Bus. & Prof. Code § 6152(a)* is punishable by criminal penalties [*Bus. & Prof. Code § 6153*], and may be, under certain circumstances, a violation of the Rules of Professional Conduct [*see Cal. Rules Prof. Conduct, Rule 1-400(C), (D)* (certain types of "communications" prohibited); *see also Cal. Rules Prof. Conduct, Rule 1-400(A)* (offers "made by or on behalf of" an attorney are form of "communication")]. For discussion of the criminal penalties and

potential disciplinary consequences of a violation of the section, see *§ 72.250*.

PRACTICE TIP:

Private Investigator Must Be Monitored. The practice of using a so-called "private investigator" to talk to witnesses or victims at accident scenes must be carefully monitored by the attorney to make sure that there is no violation on the prohibition against running and capping. Merely giving the runner or capper a different label does not alleviate the violation of the rules.

Bus. & Prof. Code § 6152 exempts from criminal liability a public defender or appointed counsel who makes the availability of his or her services as a criminal defense attorney known to criminal defendants [*Bus. & Prof. Code § 6152(d)*]. For a discussion of permissible activities involving solicitation by public defenders and appointed counsel, see *§ 72.249[5]*. Additionally, Section 6152 is not intended to prohibit any recommendation of legal employment that is permissible under the Rules of Professional Conduct [*Bus. & Prof. Code § 6152(c)*]. For a discussion of permissible types of recommendation of employment, see *§ 72.249[1]*.

The impermissible activities of runners and cappers frequently involve "ambulance chasing," or soliciting at accident scenes and hospitals [*see § 72.247*]. The runner's or capper's method usually consists of approaching the victim, presenting the attorney's business card, and urging, to various degrees, the person to hire the attorney [*see, e.g., Urbano v. State Bar (1977) 19 Cal. 3d 16, 19, 136 Cal. Rptr. 572, 560 P.2d 1* ; *Kelson v. State Bar (1976) 17 Cal. 3d 1, 4-5, 130 Cal. Rptr. 29, 549 P.2d 861]* . Sometimes, runners and cappers are employees of hospitals who work part-time as so-called "investigators" for an attorney. In other cases, the "investigator" may be a full-time employee of the attorney. The runner or capper improperly solicits patients at the hospital and turns over signed retainer agreements to the attorney [*see, e.g., Goldman v. State Bar (1977) 20 Cal. 3d 130, 135-136, 141 Cal. Rptr. 447, 570 P.2d 463]* .

An heir hunter's practice of requiring a discovered estate beneficiary to sign a general power of attorney whereby the beneficiary effectively retained the heir hunter's own counsel to represent the beneficiary at no cost to the beneficiary amounted to unlawful solicitation of business for the attorney in violation of *Business and Professions Code § 6152* [*see Estate of Wright (2001) 90 Cal. App. 4th 228, 235, 108 Cal. Rptr. 2d 572]* .

Furthermore, the arrangement described above also presented the attorney with an unsurmountable conflict of interest. The attorney representing the heir hunter cannot advise the estate beneficiary concerning the reasonableness of the heir-hunting fee or whether the assignment to the heir hunter the beneficiary's interest in the estate was suspect or unreasonable [*See* Estate of Wright, *above, 90 Cal. App. 4th 228, 235-236, 108 Cal. Rptr. 2d 572* . *See also* discussion under § 72.110[4][i]].

[b] Participation by Attorney

As noted under § 72.247[2][a], the attorney may be subject to criminal liability as well as discipline by the State Bar for obtaining employment through the use of runners and cappers [*see Bus. & Prof. Code § 6152(a)(2)* (criminal liability for soliciting another to act as runner or capper or for joining in commission of such act); *Cal. Rules Prof. Conduct, Rule 1-400(C)*; *Hutchins v. Municipal Court (1976) 61 Cal. App. 3d 77, 83-89, 132 Cal. Rptr. 158* (criminal liability under *Bus. & Prof. Code §§ 6152, 6153* not limited to runners and cappers themselves, but includes attorney who uses them to obtain clients)]. The attorney's knowledge or participation in solicitation by a runner or capper may be shown by circumstantial evidence [*Geffen v. State Bar (1975) 14 Cal. 3d 843, 853, 122 Cal. Rptr. 865, 537 P.2d 1225]* . For example, in a case in which the attorney's investigator had approached accident victims and made unsolicited recommendations that the victim retain his employer, the California Supreme Court found sufficient evidence to indicate that the employing attorney had willfully participated in the activities from the fact that the attorney had failed to instruct the investigator sufficiently regarding the ethical restrictions on soliciting potential clients [*see Geffen v. State Bar (1975) 14 Cal. 3d 843, 853-856, 122 Cal. Rptr. 865, 537 P.2d 1225]* .

[3] Accepting Employment From Unsolicited Advice

The current rule regarding the propriety of accepting employment as a result of unsolicited legal advice offered by an attorney is not entirely clear. Cases have indicated that it is not improper for an attorney to offer unsolicited legal advice [*see Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 458* ; *Kitsis v. State Bar (1979) 23 Cal. 3d 857, 864, 153 Cal. Rptr. 836, 592 P.2d 323]* because helping to educate the public about their legal rights is a laudable objective [*see Colonial Life & Accident Ins. Co. v. Superior Court (1982) 31 Cal. 3d 785, 795, 795 n.13, 183 Cal. Rptr. 810, 647 P.2d 86* ; A.B.A. Model Code of Professional Responsibility, EC 2-3].

The California Supreme Court stated in dictum that it is improper for an attorney to accept employment resulting from such unsolicited advice [*see Colonial Life & Accident Ins. Co. v. Superior Court (1982) 31 Cal. 3d 785, 795, 183 Cal. Rptr. 810, 647 P.2d 86* ; *Kitsis v. State Bar (1979) 23 Cal. 3d 857, 864, 153 Cal. Rptr. 836, 592 P.2d 323* (quoting from *Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 458, 98 S. Ct. 1912, 56 L. Ed. 2d 444*)]. In a more recent decision, however, the United States Supreme Court held that *U.S. Const., amend. I*, precludes a state from disciplining an attorney for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding the legal rights of potential clients [*Zauderer v. Office of Disciplinary Counsel (1985) 471 U.S. 626, 647, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315* ; for a discussion of the permissible contents of advertising, *see § 72.254*]. The extent to which this holding would apply to unsolicited advice offered by means other than printed advertising is not settled. In its opinion, the Court appeared to distinguish between printed advertisements and in-person contact by attorneys, which involves dangers of undue influence and overreaching, suggesting that constitutional protection might not apply to employment accepted as a result of unsolicited advice offered by the attorney through in-person contact [*see Zauderer v. Office of Disciplinary Counsel (1985) 471 U.S. 626, 642, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315* ; *see also Adams v. Attorney Registration & Disciplinary Com'n (7th Cir. 1986) 801 F.2d 968, 971-974* (noting potential distinction between advertising and in-person solicitation, but holding that rule protecting advice ven in printed advertisements applies to mailings directed toward specific target audiences)].

PRACTICE TIP:

Newsletters and Legal Development Advisories. The most common forms of providing legal advice as a means of seeking business are newsletters or legal development advisories. These are not prohibited, but the outside of the envelope must be labeled with an identifying term, such as "advertisement" or "newsletter." Also, the materials must bear those words on the first page in 12-point print [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 5; *see § 72.245*].

[4] Providing Unsolicited Legal Services

An attorney may not provide legal services not actually ordered or requested by the recipient [*see Civ. Code § 1584.5*]. The recipient may keep as an unconditional gift any unsolicited services that are provided and may bring an action to enjoin the sending of bill statements or requests for payment with respect to those unsolicited services [*see Civ. Code § 1584.5*].

[5] Providing Combined Legal and Non-Legal Services

Cal. Rules Prof. Conduct, Rule 1-400 applies when a lawyer uses his or her credentials (e.g., "Esq.," "Attorney at Law") to market combined services that include legal services. The lawyer's advertisements must meet all Rule 1-400 communication requirements, and the lawyer is prohibited from improper solicitation of clients [*see* State Bar of California Formal Opinion No. 1999-154].

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7-72 California Forms of Pleading and Practice--Annotated § 72.248

§ 72.248 Improper Solicitation Not Waivable by Client

The State Bar Committee on Professional Responsibility and Conduct has issued an opinion that an attorney cannot shield improper solicitation from scrutiny by securing a written waiver of the conduct from the client in the retainer agreement [State Bar Formal Opinion No. 1988-105 (construing Cal. Rules Prof. Conduct, former Rule 2-101(B))].

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§ 72.249 Permissible Activities Involving Solicitation

[1] Personal Recommendations or Referrals by Laypersons

Although the Rules of Professional Conduct do not address the issue directly, most likely, an attorney may accept legal employment from a person who was referred to the attorney through the personal recommendation of a friend, relative, or present or former client [*see Ashe v. State Bar (1969) 71 Cal. 2d 123, 138-139, 77 Cal. Rptr. 233, 453 P.2d 737* ; *Hildebrand v. State Bar (1941) 18 Cal. 2d 816, 828, 117 P.2d 860]* . Furthermore, an attorney may apparently contact a potential client to whom the attorney reasonably believes he or she has been recommended, even if it turns out that the belief was mistaken [*see Hildebrand v. State Bar (1941) 18 Cal. 2d 816, 822, 117 P.2d 860* (doctor in hospital recommended attorney when asked by patients; attorney visited patients at physician's request; attorney held not to have improperly solicited patients even though patients testified that they had not requested that attorney visit them)].

It is improper for an attorney to compensate a nonlawyer by giving, or promising to give, anything of value in exchange for referring legal business to the attorney or to the attorney's firm [*Cal. Rules Prof. Conduct, Rule 1-320(B)*; *see also* State Bar Formal Opinion No. 1983-75 (attorney may not ethically mail letter to all real estate brokers in area, encouraging them to refer potential clients to attorney by offering discount on legal fees for clients so referred)]. An attorney is not prohibited, however, from offering or giving a gift or gratuity to a person or entity that has made a recommendation resulting in employment of the attorney or the attorney's firm, if the gift or gratuity was not given in consideration of an agreement or understanding that such a gift would be made or that referrals would be made or encouraged in the future [*Cal. Rules Prof. Conduct, Rule 1-320(B)*].

PRACTICE TIP:

Single Gift or Gratuity Permitted. The Rules of Professional Conduct apparently would permit an attorney to give a gift or gratuity on a one-time basis following a referral. However, a pattern of gifts or gratuities to a single referring party could be viewed by the State Bar as circumstantial evidence of an impermissible agreement or understanding concerning future gifts or referrals.

[2] By Attorneys or Attorney Referral Services

It is common practice for attorneys to refer potential clients to other attorneys, and the Rules of Professional Conduct contain no provision prohibiting acceptance of employment based on such referrals. In many cases, the attorney may have a duty to refer a client to another attorney if the first attorney does not have the experience, skills, or time to handle the particular matter competently [*see Lewis v. State Bar (1981) 28 Cal. 3d 683, 687-688, 170 Cal. Rptr. 634, 621 P.2d 258* ; *Horne v. Peckham (1979) 97 Cal. App. 3d 404, 414-415, 158 Cal. Rptr. 714* ; *Cal. Rules Prof. Conduct, Rule 3-110(A), (B)*]. An attorney may enter into a fee-splitting agreement with the referring attorney if the attorneys comply with *Cal. Rules Prof. Conduct, Rule 2-200(A)* [for discussion, *see § 72.199[2]*]. Except for fee division agreements permitted by *Cal. Rules Prof. Conduct, Rule 2-200* or sale or purchase of a law practice permitted by *Cal. Rules Prof. Conduct, Rule 2-300*, an attorney may not give or promise anything of value to another attorney for the purpose of obtaining a recommendation or securing employment of the first attorney or his or her firm by a client [*Cal. Rules Prof. Conduct, Rule 2-200(B)*]. An attorney, however, is not prohibited from offering or giving a gift or gratuity to another attorney who has made a recommendation resulting in the employment of the attorney or the attorney's firm if the gift or gratuity was not given in consideration of an agreement or with the understanding that such a gift would be made or that referrals would be made or encouraged in the future [*Cal. Rules Prof. Conduct, Rule 2-200(B)*].

An attorney's participation in a referral service that is established, sponsored, supervised, and operated in conformity with the Minimum Standards for a Lawyer Referral Service adopted by the Board of Governors of the State Bar is also permitted and encouraged and does not, of itself, violate the Rules of Professional Conduct [*Cal. Rules Prof. Conduct, Rule 1-600*, Drafter's Notes; for discussion of fee splitting with referral services, *see § 72.199[4]*]. Such officially sanctioned referral services should be distinguished, however, from private, profit-making services, which are not sanctioned by the Rules of Professional Conduct [*see Selten v. Hyon (2007) 152 Cal. App. 4th 463, 468-469, 60 Cal. Rptr. 3d 896]* . Any advertisement created or disseminated by a lawyer referral service must disclose whether the attorneys on the organization's referral list paid any consideration, other than a proportional share of actual cost, to be included on that list [*Bus. & Prof. Code § 6157.4*].

PRACTICE TIP:

Inference of Rule Violation. As with gifts or gratuities to laypersons under Rule 1-320(B), an attorney must exercise caution when giving more than one gift or gratuity to any attorney. Multiple gifts or gratuities may raise an inference that the attorney provided the gifts or gratuities in consideration of an agreement or pursuant to an understanding regarding future referrals.

[3] Solicitation Made to Another Attorney

The State Bar Standing Committee on Professional Responsibility and Conduct has issued an advisory opinion that an attorney may recommend himself or herself to another attorney for legal employment, notwithstanding Cal. Rules Prof. Conduct, former Rule 2-101 [State Bar Formal Opinion No. 1981-61]. Such a solicitation is permitted regardless of whether the purpose is to obtain a client of the second attorney or to obtain the second attorney as a client [State Bar Formal Opinion No. 1981-61]. The committee reasoned that attorneys, unlike the general public, have superior knowledge regarding the law and other resources to allow them to evaluate an attorney's recommendation effectively. Furthermore, fellow attorneys are less likely to be susceptible to the undue influence, deception, and other dangers that may result from solicitations made to members of the general public. Finally, uninhibited communication between attorneys is worth preserving because it is the most efficient way to foster appropriate association, consultation, and referrals [State Bar Formal Opinion No. 1981-61].

Cal. Rules Prof. Conduct, Rule 1-400, the successor of former Rule 2-101, generally prohibits in-person solicitation made for pecuniary gain, unless such solicitation is protected under the California or United States Constitutions or the prospective client is one with whom the lawyer has a family or prior professional relationship [*see Cal. Rules Prof. Conduct, Rule 1-400(B), (C)*]. The rule does not provide an exception when the solicited party is an attorney [*see Cal. Rules Prof. Conduct, Rule 1-400*]. It remains to be seen whether the State Bar Court or the Supreme Court will follow

the Standing Committee's advisory opinion allowing attorneys to solicit other attorneys.

PRACTICE TIP:

Possible Constitutional Protection for Solicitation Directed at Attorney. It appears that the United States Supreme Court would take a position in accord with the Standing Committee's advisory opinion allowing attorneys to solicit other attorneys. In *Edenfield v. Fane*, the Court ruled that certified public accountants, in the business context, could not constitutionally be prohibited from soliciting because of the relatively high level of sophistication of their clients [*see Edenfield v. Fane (1993) 507 U.S. 761, 113 S. Ct. 1792, 123 L. Ed 2d 543, 558-559]* . It seems to follow from *Edenfield* that an attorney's solicitation of other attorneys would be constitutionally protected and thus not prohibited by Rule 1-400.

[4] Group Legal Service Programs

State Bar members are prohibited from participating in a nongovernmental program, activity, or organization furnishing, recommending, or paying for legal services if the entity does any of the following [*Cal. Rules Prof. Conduct, Rule 1-600(A)*]:

- Allows a third person or organization to interfere with the attorney's independence of professional judgment, or with the client-lawyer relationship;

- Allows unlicensed persons to practice law;

- Allows any third person or organization to receive directly or indirectly any part of the consideration paid to the attorney except as permitted by the Rules of Professional Conduct [*see Cal. Rules Prof. Conduct, Rules 1-320(A), 2-200(A)* (restrictions on splitting legal fees)]; or

- Violates the State Bar Act (*Bus. & Prof. Code § 6000 et seq.*) or the Rules of Professional Conduct.

For example, a lawyer who permits a nonlawyer who markets living trust packages to represent to the public that the lawyer will prepare the documents, but allows the marketer to interfere with the lawyer's ability to exercise independent judgment regarding the type of estate plan involved and other matters, acts unethically [State Bar Formal Opinion No. 1997-148].

These prohibitions are not intended to override any contractual agreement or relationship between insurers and insured regarding the provision of legal services [*Cal. Rules Prof. Conduct, Rule 1-600*, Drafter's Notes]. Nor are these prohibitions intended to apply to the activities of a public agency responsible for providing legal services to a government or to the public [*Cal. Rules Prof. Conduct, Rule 1-600*, Drafter's Notes].

[5] Public Defenders and Appointed Counsel

The statutory rules against unlawful solicitation do not prohibit a public defender or assigned counsel from making known his or her services as a criminal defense attorney to an indigent defendant, whether or not the defendant is in custody [*Bus. & Prof. Code § 6152(d)*; *see In re Brindle (1979) 91 Cal. App. 3d 660, 682, 154 Cal. Rptr. 563]* . Nevertheless, a public defender does not have a broad right to consult, unrequested, with all persons held under investigation in a jail or detention facility. A public defender may merely make known his or her presence; the detained person then has the right to decide whether or not to consult with the attorney [*In re Brindle (1979) 91 Cal. App. 3d 660, 677, 154 Cal. Rptr. 563]* .

It is not unlawful solicitation for an attorney to submit a contract bid to represent indigent defendants in counties without a public defender, at least when the idea to offer legal services on a contract basis originated with the county

and not with the attorney [*see* *Phillips v. Seely (1974) 43 Cal. App. 3d 104, 118, 117 Cal. Rptr. 863]* .

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§ 72.250 Sanctions for Violations of Solicitation Rules

[1] Criminal Penalties

Any person, firm, partnership, association, or corporation violating the statutory prohibition on solicitation through runners or cappers may be punished, on a first conviction, by imprisonment in a county jail for not more than one year, or by a fine not exceeding $15,000, or both. For a second or subsequent conviction, a person, firm, partnership, association, or corporation is punishable by imprisonment in a county jail for not more than one year, a state jail for two, three or four years, or by a fine not exceeding $15,000, or by both that imprisonment and fine [*Bus. & Prof. Code § 6153*]. If the violator is employed by the state or a local public entity, the violator also forfeits his or her job [*Bus. & Prof. Code § 6153*].

[2] Disciplinary Action

The State Bar has the power to discipline an attorney for willfully violating the Rules of Professional Conduct, by public or private reproval or by recommending suspension for no more than three years [*Bus. & Prof. Code § 6077*; *see Cal. Rules Prof. Conduct, Rule 1-100(A)*]. The State Bar may also recommend that suspension or disbarment be ordered by the California Supreme Court if the attorney's acts violate the attorney's oath or duties, involve moral turpitude, dishonesty, or corruption, or lead to a conviction of a felony or misdemeanor involving moral turpitude [*see Bus. & Prof. Code §§ 6078, 6101-6103, 6106*]. For a detailed discussion of disciplinary proceedings, see Ch. 71, *Attorney Discipline* .

It has not been decided whether a conviction under *Bus. and Prof. Code §§ 6152(a)* and *6153* (discussed under § 72.247[2][a]), prohibiting attorneys from soliciting business through the use of runners and cappers, involves moral turpitude [*see Kitsis v. State Bar (1979) 23 Cal. 3d 857, 865-866, 153 Cal. Rptr. 836, 592 P.2d 323* (implying conviction for solicitation involves moral turpitude)]. One court has found, however, that a guilty plea to a solicitation charge constitutes a violation of the attorney's oath and duties, and a knowing violation of the oath and duties generally is an act involving moral turpitude [*Kitsis v. State Bar (1979) 23 Cal. 3d 857, 865-866, 153 Cal. Rptr. 836, 592 P.2d 323]* . In addition, an attorney's conduct in misleading a runner or capper by stating that solicitation was not illegal has

been held to be an act involving moral turpitude [*Kitsis v. State Bar (1979) 23 Cal. 3d 857, 866, 153 Cal. Rptr. 836, 592 P.2d 323]* .

The California Supreme Court has not rendered any written opinions regarding appropriate sanctions for violations of the solicitation provisions of the current Rules of Professional Conduct. Under former versions of the Rules, which were more restrictive than the current rules, discipline for solicitation violations in reported cases usually consisted of suspension [*see, e.g.,* *Urbano v. State Bar (1977) 19 Cal. 3d 16, 20-21, 136 Cal. Rptr. 572, 560 P.2d 1* ; *Geffen v. State Bar (1975) 14 Cal. 3d 843, 856, 122 Cal. Rptr. 865, 537 P.2d 1225]* . The terms ranged from three months [*Ewell v. State Bar (1934) 2 Cal. 2d 209, 220, 40 P.2d 264]* to two years [*Rose v. State Bar (1989) 49 Cal. 3d 646, 667-668, 262 Cal. Rptr. 702, 779 P.2d 761* (two-year actual suspension); *In re Arnoff (1978) 22 Cal. 3d 740, 748, 150 Cal. Rptr. 479, 586 P.2d 960]* . The higher term was imposed when other violations of the rules were also involved [*see Rose v. State Bar (1989) 49 Cal. 3d 646, 666, 262 Cal. Rptr. 702, 779 P.2d 761* (other violations included willful failure to communicate with clients, willful failure to provide services, and improper business dealings with a client); *In re Arnoff (1978) 22 Cal. 3d 740, 748, 150 Cal. Rptr. 479, 586 P.2d 960* (other violations included fee splitting with nonlawyer and knowing use of fraudulent medical reports)].

Disbarment proceedings have been instituted when the solicitation was coupled with other acts involving moral turpitude [*see* *Kitsis v. State Bar (1979) 23 Cal. 3d 857, 866-867, 153 Cal. Rptr. 836, 592 P.2d 323]* , such as giving false testimony under oath to the State Bar during an investigation [*Waterman v. State Bar (1939) 14 Cal. 2d 224, 227-228, 93 P.2d 95.]* or making false statements to a judge [*Best v. State Bar (1962) 57 Cal. 2d 633, 638-639, 21 Cal. Rptr. 589, 371 P.2d 325]* , or with previous disciplinary action [*Best v. State Bar (1962) 57 Cal. 2d 633, 638-639, 21 Cal. Rptr. 589, 371 P.2d 325* ; *Waterman v. State Bar (1939) 14 Cal. 2d 224, 226, 228, 93 P.2d 95]* . Also, a large number of solicitations, indicating a continuing course of misconduct, may warrant disbarment [*Kitsis v. State Bar (1979) 23 Cal. 3d 857, 866-867*].

The Board of Governors of the State Bar has promulgated Standards for Attorney Sanctions for Professional Misconduct, which are intended to help achieve greater consistency in disciplinary sanctions for similar offenses [Cal. State B. Stds. for Att'y Sanctions, Introduction]. The Standards provide that a State Bar member who violates *Bus. & Prof. Code §§ 6151-6153* shall be suspended or disbarred, depending on the gravity of the offense or harm, if any, to the victim, to the extent consistent with the purposes of the disciplinary proceedings [Cal. State B. Stds. for Att'y Sanctions, Std. 2.6(f); *see* Cal. State B. Stds. for Att'y Sanctions, Std. 1.3 (setting forth purposes of imposing discipline)]. Absent compelling mitigating circumstances, disbarment must be imposed if the member is convicted in a criminal proceeding and the crime is found to involve moral turpitude [Cal. State B. Stds. for Att'y Sanctions, Std. 3.2]. No specific standard is provided for violations of *Cal. Rules Prof. Conduct, Rule 1-400*, relating to advertising and solicitation.

[3] Unenforceability of Contract

By statute, any contract for legal services obtained through the illegal solicitation activities of a runner or capper is void [*see Bus. & Prof. Code § 6154*]. The contract between an attorney and his or her runners and cappers is also void [*Alpers v. Hunt (1890) 86 Cal. 78, 84, 90, 24 P. 846]* . For discussion of the enforcement of fee agreements, see *§ 72.430* et seq.

In any action against any attorney or law firm under the Unfair Practices Act, Chapter 4 of Division 7 (*Bus. & Prof. Code § 17000 et seq.*) or Chapter 5 of Division 7 (*Bus. & Prof. Code § 17200 et seq.*), any judgment must include an order divesting the attorney or law firm of any fees and other compensation received pursuant to a contract for legal services obtained through the services of a runner or capper. Those fees and compensation will be recoverable as additional civil penalties under the Unfair Practices Act [*Bus. & Prof. Code § 6154(a)*]. For discussion of the Unfair Practices Act, see *Ch. 565, Unfair Competition, § 565.10* et seq.

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§ 72.251 Constitutional Right to Advertise

[1] General Rule Against Blanket Prohibition of Advertising

In *Bates v. State Bar of Arizona*, the United States Supreme Court declared that attorneys enjoy a limited constitutional right to advertise their professional services [*Bates v. State Bar of Arizona (1977) 433 U.S. 350, 384, 97 S. Ct. 2691, 53 L. Ed. 2d 810]* . The Court held that a state, through its state bar association, could not prohibit an attorney's truthful advertisement regarding the availability and terms of routine legal services [*Bates v. State Bar of Arizona (1977) 433 U.S. 350, 384, 97 S. Ct. 2691, 53 L. Ed. 2d 810* ; *see Leoni v. State Bar (1985) 39 Cal. 3d 609, 624, 217 Cal. Rptr. 423, 704 P.2d 183]* . The Court also held that the possibility of various abuses by attorneys in specific instances did not constitutionally justify a blanket suppression of all attorney advertising [*Bates v. State Bar of Arizona (1977) 433 U.S. 350, 366-379, 383, 97 S. Ct. 2691, 53 L. Ed. 2d 810]* .

The challenged disciplinary rule in *Bates* was similar to Cal. Rules Prof. Conduct, former Rule 2-102(B) (set forth at *14 Cal. 3d 2-3 (1975))* , which was in effect from 1975 to 1979. The disciplinary rule prohibited an attorney from publicizing himself or herself, through various media, as an attorney except in a few limited circumstances, such as political advertisements and legal documents prepared by the attorney [*Bates v. State Bar of Arizona (1977) 433 U.S. 350, 355, 355 n.5, 97 S. Ct. 2691, 53 L. Ed. 2d 810]* .

California statute expressly provides that Article 9.5 of the Business and Professions Code (*Bus. & Prof. Code § 6157 et seq.*), regulating legal advertisi 14 Cal. 3d 2-3 (1975)) Bates v. State Bar of Arizona (1977) 433 U.S. 350, 355, 355 n.5, 97 S. Ct. 2691, 53 L. Ed. 2d 810] Bus. & Prof. Code § 6157 et seq.ng, does not limit the right of advertising under the California or United States Constitution. Provisions that are found to violate either Constitution are severable, and the remaining provisions are enforceable without the severed provision [*Bus. & Prof. Code § 6159.2(b)*].

[2] Permissible Restrictions on Advertising

[a] False, Deceptive, Misleading Advertising

The right of advertising does not extend to false, deceptive, and misleading advertising [*Bates v. State Bar of Arizona (1977) 433 U.S. 350, 383, 97 S. Ct. 2691, 53 L. Ed. 2d 810* ; *Leoni v. State Bar (1985) 39 Cal. 3d 609, 624-625, 217 Cal. Rptr. 423, 704 P.2d 183* ; *see Cal. Rules Prof. Conduct, Rule 1-400(D)(1)-(3)* (prohibiting false, deceptive, or misleading communications by attorneys; discussed under § 72.244[3] and *Bus. & Prof. Code § 6157.1* discussed under § 72.592[4][a])]. Claims regarding the quality of legal services are a type of advertisement that will most likely be considered misleading [*Bates v. State Bar of Arizona (1977) 433 U.S. 350, 383-384, 97 S. Ct. 2691, 53 L. Ed. 2d 810* (dictum); for discussion of permissible regulations on advertising claims regarding quality of service, see *§ 72.254[6]*].

To protect the public from misleading advertising, some regulations may be necessary; for example, warnings or disclaimers may be required in legal advertisements [*Bates v. State Bar of Arizona (1977) 433 U.S. 350, 384, 97 S. Ct. 2691, 53 L. Ed. 2d 810]* . Any disclosure requirements, however, must be reasonably related to the state's interest in preventing deception of consumers [*Zauderer v. Office of Disciplinary Counsel (1985) 471 U.S. 626, 651, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315]* .

Supreme Court cases subsequent to *Bates* have reaffirmed that truthful advertising related to lawful activities enjoys protection under *U.S. Const., amend. I*, as commercial speech [*In re R.M.J. (1982) 455 U.S. 191, 203, 102 S. Ct. 929, 71 L. Ed. 2d 64]* . Restrictions on such advertisements are permissible, however, if the advertising is inherently misleading or has proven to be misleading in practice, but restrictions may be no broader than reasonably necessary to prevent possible deception. Potentially misleading information cannot be completely banned if it can be presented in a nondeceptive manner [*In re R.M.J. (1982) 455 U.S. 191, 206-207, 102 S. Ct. 929, 71 L. Ed. 2d 64* ; *see Zauderer v. Office of Disciplinary Counsel(1985) 471 U.S. 626, 644-646, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315* (blanket prohibition of all advertising is not justified by argument that some advertising may be deceptive and prohibition against only deceptive advertising would be difficult to enforce; distinguishing between deceptive and nondeceptive advertising is no more difficult in cases of attorneys' advertising than in other types of commercial advertising)]. Nevertheless, a blanket prohibition on purely misleading advertising is permissible [*In re R.M.J. (1982) 455 U.S. 191, 203, 102 S. Ct. 929, 71 L. Ed. 2d 64]* . Attorney advertisements that are not misleading may also be subjected to some regulations, but the regulations must be necessary to further substantial state interests and must be narrowly drawn [*In re R.M.J. (1982) 455 U.S. 191, 203, 102 S. Ct. 929, 71 L. Ed. 2d 64]* .

Applying these principles, the California Supreme Court has held that the provisions in the Rules of Professional Conduct prohibiting, among other things, advertisements that contain false, confusing, misleading, or deceptive statements are a constitutionally permissible regulation of misleading advertisements [*Leoni v. State Bar (1985) 39 Cal. 3d 609, 626, 217 Cal. Rptr. 423, 704 P.2d 183* (decided under Cal. Rules Prof. Conduct, former Rule 2-101)].

[b] Time, Place, and Manner Restrictions

Reasonable restrictions on the time, place, and manner of attorney advertising are also permissible. Advertisements that concern illegal transactions may be prohibited [*Bates v. State Bar of Arizona (1977) 433 U.S. 350, 384, 97 S. Ct. 2691, 53 L. Ed. 2d 810]* . Additional regulations concerning advertisements on electronic broadcast media may also be required in the future [*see Bates v. State Bar of Arizona (1977) 433 U.S. 350, 384, 97 S. Ct. 2691, 53 L. Ed. 2d 810]* .

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§ 72.252 Types of Advertising Prohibited

Article 9.5 of the Business and Professions Code (*Bus. & Prof. Code §§ 6157-6159.2*) regulates legal advertising; however, it does not preempt enforcement of other provisions of the law, any court rule, or the Rules of Professional Conduct [*Bus. & Prof. § 6159.2(a)*]. Any person found by a court to violate these Business and Professions Code provisions must be reported to the appropriate professional licensing agency for review and possible disciplinary action [*Bus. & Prof. Code § 6159*].

Legal advertising as defined by *Bus. & Prof. Code § 6157(b)* (§ 72.242[3]), which is not paid for by the attorney soliciting business, must disclose the business relationship, past or present, between the attorney and the person paying for the advertisement [*Bus. & Prof. Code § 6157.3*]. Legal advertising is prohibited if it contains any false, misleading, or deceptive statement; or omits any fact that makes an advertisement false, misleading, or deceptive [*Bus. & Prof. Code § 6157.1*]. In addition, no legal advertisement shall contain:

- Any guarantee or warranty regarding the outcome of a legal matter [*Bus. & Prof. Code § 6157.2(a)*]; or

- Statements or symbols stating that an attorney featured in the advertisement can generally obtain immediate cash or quick settlements [*Bus. & Prof. Code § 6157.2(b)*].

A dramatization of events, or an impersonation of the name, voice, photograph, or electronic image of any person purporting to be that of the attorney or a client also is prohibited unless the advertisement discloses that it contains an impersonation or dramatization [*Bus. & Prof. Code § 6157.2(c)(1), (2)*; *see* Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 13]. A spokesperson may be used, so long as there is no direct or implicit suggestion that the spokesperson is the advertising attorney, and the spokesperson's title is disclosed [*Bus. & Prof. Code § 6157.2(c)(3)*].

An advertisement refering to representation on a contingent basis must contain a statement that advises whether a client

is responsible for any costs advanced by the attorney when no recovery is obtained [*Bus. & Prof. Code § 6157.2(d)*; *see* Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400,* Std. 14].

For additional restrictions on advertising, see *§ 72.245*].

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§ 72.253 Form of Advertisement

[1] No Restriction of Medium

The Rules of Professional Conduct do not restrict attorneys' advertising to any particular form or medium. The rules do, however, provide that a communication may not present or arrange any matter in a manner or format that is false or deceptive or that tends to confuse, deceive, or mislead the public [*Cal. Rules Prof. Conduct, Rule 1-400(D)(2)*].

[2] Visual Media

The United States Supreme Court has held that visual media of expression in advertisements are entitled to the same constitutional protection as verbal or written expressions [*Zauderer v. Office of Disciplinary Counsel (1985) 471 U.S. 626, 647, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315]* . Consequently, illustrations and pictures may not constitutionally be prohibited in attorney advertising as long as they are not inaccurate or misleading [*see Zauderer v. Office of Disciplinary Counsel (1985) 471 U.S. 626, 647-649, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315]* . For example, the Court held that an accurate and nondeceptive illustration of the Dalkon Shield intrauterine device in an advertisement informing the public of an attorney's availability to represent plaintiffs in actions against the manufacturer of the device was constitutionally protected, and the State of Ohio therefore could not subject the attorney who placed the advertisement to disciplinary action [*Zauderer v. Office of Disciplinary Counsel (1985) 471 U.S. 626, 647-649, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315]* .

[3] Electronic Media

[a] Prohibition Against False, Misleading, or Deceptive Advertising

To comply with the prohibition against false, misleading, or deceptive statements [*see § 72.251[2]*], an advertisement in the electronic media may not, taken as a whole, be false, misleading, or deceptive, and the message as a whole must be factually substantiated [*Bus. & Prof. Code § 6158*]. For this purpose, "electonic media" includes television, radio, and computer networks [*Bus. & Prof. Code § 6157(d)*].

The "message" subject to this regulation includes the combination, of the spoken word, sound, background, action, symbols, visual image, or any other technique employed to create the message. The message is "factually substantiated" when it is capable of verification by a credible source [*Bus. & Prof. Code § 6158*].

[b] Rebuttable Presumption That Message Is False, Misleading or Deceptive

There is a rebuttable presumption that the following messages are false, misleading, or deceptive, which affects the attorney's burden of producing evidence [*Bus. & Prof. Code § 6158.1*]:

- A message as to the ultimate result of a specific case (or cases) presented out of context, without adequately providing information as to the facts or law giving rise to the result.

- The depiction of an event through methods such as the use of displays of injuries, accident scenes, or portrayals of other injurious events that may or may not be accompanied by sound effects and that may give rise to a claim for compensation.

- A message referring to or implying money received by or for a client in a particular case (or cases), or to potential monetary recovery for a prospective client.

- A reference to money or monetary recovery includes, but is not limited to, a specific dollar amount, characterization of a sum of money, monetary symbols, or the implication of wealth.

[c] Presumption That Information Is Not False, Misleading or Deceptive

The following information is presumed *not* to be misleading or deceptive when presented in electronic media advertising [*Bus. & Prof. Code § 6158.2*]:

- The attorney's fields of practice

- Fees for routine legal services

- Schools attended

- Legal authorship

- Technical or professional licenses

- Foreign language ability of the attorney or member of the attorney's firm.

[d] Required Disclosures

One of the following disclosures must appear in electronic media advertising that conveys a message portraying a result in a particular case (or cases) [*Bus. & Prof. Code § 6158.3*]:

- The advertisement must adequately disclose the factual and legal circumstances justifying the result portrayed in the message, including the basis for liability and the nature of the injury or damage sustained; or

- The advertisement must state that the result portrayed was dependent on the facts of that case, and

that the results will differ if based on different facts.

[e] Remedies For Violations

Any person claiming a violation of these provisions may file a complaint with the State Bar [*Bus. & Prof. Code § 6158.4(a)*]. A civil enforcement action may also be brought by any California resident for an amount up to $5,000 for each individual broadcast that violates these provisions [*Bus. & Prof. Code § 6158.4(e)*].

[4] Unsolicited Mailings

Attorneys' advertising in the form of unsolicited mass mailings to nonclients is constitutionally protected, provided that the content of the mailing is not misleading or otherwise improper [*see In re R.M.J. (1982) 455 U.S. 191, 206, 102 S. Ct. 929, 71 L. Ed. 2d 64* ; *Bates v. State Bar of Arizona (1977) 433 U.S. 350, 383-384, 97 S. Ct. 2691, 53 L. Ed. 2d 810* ; *Adams v. Attorney Registration & Disciplinary Com'n (7th Cir. 1986) 801 F.2d 968, 971-974* ; Bar Ass'n of San Francisco Legal Ethics Committee, Opinion No. 1979-1; *cf. Leoni v. State Bar (1985) 39 Cal. 3d 609, 627, 217 Cal. Rptr. 423, 704 P.2d 183* (noting generally that attorney advertising by mail is subject to constitutional protection, but holding that unsolicited mass mailings in that particular case were misleading and involved intrusion, threats, intimidation, harassment, or duress and therefore violated Cal. Rules Prof. Conduct, former Rule 2-101(A)); *Best Buy Stores, L.P. v. Superior Court (2006) 137 Cal. App. 4th 772, 776-777, 40 Cal. Rptr. 3d 575* (discovery to permit class representative to obtain substitute plaintiff did not constitute solicitation); *see also* LACBA Formal Opinion No. 494 (1998) (attorney's unsolicited mailing of recent legal developments bulletins not regulated "communication" under *Cal. Rules Prof. Conduct, Rule 1-400*, where attorney does not communicate message or offer concerning availability for professional employment in practice of law)]. The fact that the mailing is targeted to a particular audience and mailed only to persons likely to have a particular legal problem does not diminish its constitutional protection [*see Shapero v. Kentucky Bar Ass'n. (1988) 486 U.S.466, 473-474, 108 S. Ct. 1916, 100 L. Ed. 2d. 475* ; *Adams v. Attorney Registration & Disciplinary Com'n (7th Cir. 1986) 801 F.2d 968, 973* ; *Zauderer v. Office of Disciplinary Counsel (1985) 471 U.S. 626, 639-647, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315* ; *see also § 72.254[7]*].

The United States Supreme Court has stated that attorneys may be constitutionally required to file a copy of a mass mailing with the State Bar or to include the statement, "This is an advertisement," on the envelope [*In re R.M.J. (1982) 455 U.S. 191, 206, 206 n.20, 102 S. Ct. 929, 71 L. Ed. 2d 64]* . The Rules of Professional Conduct do not require that attorneys' mailings be filed. The rules do, however, require that the attorney retain a copy of any advertisement for two years and make a copy available to the State Bar on request [*Cal. Rules Prof. Conduct, Rule 1-400(F)*; *see § 72.243*]. Also, the standards under *Cal. Rules Prof. Conduct, Rule 1-400(E)* establish a presumpiton that mailings violate the rule unless they are labeled as advertisements [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 5; *see § 72.245*].

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§ 72.254 Content of Advertisement

[1] Basic Factual and Biographical Information

An attorney may advertise basic factual and biographical information about the legal services offered [*see Bates v. State Bar of Arizona (1977) 433 U.S. 350, 366-367, 97 S. Ct. 2691, 53 L. Ed. 2d 810* ; State Bar Formal Opinion No. 1982-67]. Disclosure of an attorney's name, address, and telephone numbers has historically been permitted [*see* Cal. Rules Prof. Conduct, former Rules 2(b) (effective 1928-1975), 2-103(A) (effective 1975-1979)]. The *Bates* decision indicated that this information plus "office hours, and the like," is constitutionally protected [*Bates v. State Bar of Arizona (1977) 433 U.S. 350, 366, 97 S. Ct. 2691, 53 L. Ed. 2d 810]* .

The advertisement of relevant biographical information about an attorney is also protected, provided that such information is not misleading [*see In re R.M.J. (1982) 455 U.S. 191, 205-206, 102 S. Ct. 929, 71 L. Ed. 2d 64* ; *Bates v. State Bar of Arizona (1977) 433 U.S. 350, 366-367, 367 n.18, 97 S. Ct. 2691, 53 L. Ed. 2d 810* ; State Bar Formal Opinion No. 1982-67]. An attorney's qualifications, including biographical information, are necessary information for helping the public make an informed choice about legal counsel [*see* State Bar Formal Opinion No. 1982-67]. Relevant biographical information may include schools attended, public offices held, and memberships in legal associations [*see Bates v. State Bar of Arizona (1977) 433 U.S. 350, 367 n.18, 97 S. Ct. 2691, 53 L. Ed. 2d 810]* .

[2] Name of Firm

Under the Rules of Professional Conduct, use of a firm name is subject to restrictions. *Cal. Rules Prof. Conduct, Rule 1-400(A)*, defining "communications," states that any use of a firm name, trade name, fictitious name, or other professional designation of a State Bar member or law firm is a "communication" for purposes of the rule [*see Cal. Rules Prof. Conduct, Rule 1-400(A)(1)*]. Therefore, uses of a firm name may not violate the restrictions on communications set forth in Rule 1-400(D) [*see Cal. Rules Prof. Conduct, Rule 1-400(A), (D)*; *see also* discussion in *§ 72.244*]. The names that may be used by law corporations are subject to additional restrictions [*see Bus. & Prof. Code § 6171(c)*; Cal. State B. Law Corp. Rules, Rule IV(A)(5)]. When a communication is on behalf of a law firm, the communication must identify the name of at least one member of the State Bar responsible for it [Standards for

Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 12].

Three types of firm name uses are presumed to violate the rule governing solicitation and advertising [*see Cal. Rules Prof. Conduct, Rule 1-400(E)* (discussed under § 72.245)]:

- Uses that state or imply a relationship between any State Bar member in private practice and a government agency or instrumentality or a public or nonprofit legal services organization [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 6];

- Uses that state or imply that a State Bar member has a relationship to any other State Bar member, or to a law firm as a partner or associate or as officer or shareholder pursuant to *Bus. & Prof. Code § 6160 et seq.*, unless the relationship in fact exists [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 7; *see also Bus. & Prof. Code § 6160 et seq.* (licensing and regulation of law corporations)]; and

- Uses by a State Bar member or law firm in private practice that differ materially from any other such designation used by such State Bar member or law firm at the same time in the same community [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 9].

When used in an advertisement, the name may not be false or misleading [*Cal. Rules Prof. Conduct, Rule 1-400(D)(1), (2)*; State Bar Formal Opinion No. 1982-66 (decided under former rule 2-101]. The State Bar Standing Committee on Professional Responsibility and Conduct has suggested that the following factors may be useful in determining whether a firm name is misleading [Cal. State Bar Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 1982-66]:

- Whether the name implies that the firm is publicly supported;

- Whether the name is deceptive with respect to the identity of the attorney actually performing the legal services;

- Whether the name is deceptive regarding the types of services offered.

The term "Legal Clinic" as part of a firm name has been found not to be misleading [*Jacoby v. State Bar (1977) 19 Cal. 3d 359, 366-367, 138 Cal. Rptr. 77, 562 P.2d 1326* (decided under Cal. Rules Prof. Conduct, former Rule 2 (effective 1928-1975))]. The practice of retaining the name of deceased or retired members of the firm in the firm name is permissible, as long as it is not misleading [*see Crawford v. State Bar (1960) 54 Cal. 2d 659, 666, 7 Cal. Rptr. 746, 355 P.2d 490]* .

Attorneys sharing space, services, facilities or staff without forming a law firm must ensure that in any communications, the public is not confused, deceived or misled that there is any law firm, partnership, corporate, "of counsel" or other relationship when no such relationship exists, such as by using separate business cards and letterhead or some other clear identification of separate practices [State Bar Formal Opinion 1997-150].

[3] Jurisdiction Admitted to Practice

An attorney may advertise the jurisdictions in which he or she is admitted to practice. This information is not per se misleading and may be relevant to potential clients, particularly if an attorney practices in a geographical area located close to another jurisdiction [*In re R.M.J. (1982) 455 U.S. 191, 205-206, 102 S. Ct. 929, 71 L. Ed. 2d 64* ; State Bar Formal Opinion No. 1982-67].

A statement that an attorney is admitted to the bar of the United States Supreme Court has been termed "at least bad taste," although the statement was not held to be misleading in the circumstances of the particular case [*In re R.M.J. (1982) 455 U.S. 191, 205-206, 102 S. Ct. 929, 71 L. Ed. 2d 64]* . The Court has stated that this information has the potential for being misleading because the public is not generally aware of the requirements for admission to that bar [*In re R.M.J. (1982) 455 U.S. 191, 205, 102 S. Ct. 929, 71 L. Ed. 2d 64]* .

[4] Areas of Practice and Specialization

An attorney is entitled to state in advertisements the areas of law in which he or she practices. A state bar cannot constitutionally require that an attorney use only certain words to identify the fields of law in question; a listing of areas of practice is not per se misleading [*In re R.M.J. (1982) 455 U.S. 191, 205, 102 S. Ct. 929, 71 L. Ed. 2d 64]* .

Regarding specialization, a communication is presumed to be in violation of *Cal. Rules Prof. Conduct, Rule 1-400*, if it states or implies that a member is a "certified specialist" unless the communication also states the complete name of the entity that granted the certification as a specialist [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 11]. Although the use of the words "certified specialist" isrestricted, the State Bar Standing Committee on Professional Responsibility and Conduct has indicated in an advisory opinion that the terms "specialist" and "specializing in" are generally permissible [State Bar Formal Opinion No. 1982-67]. Such terms could be misleading, however, if used in conjunction with an area of law in which Board certification is available [*see* State Bar Formal Opinion No. 1982-67]. The words "practice limited to" and "experience in" are also apparently permissible [State Bar Formal Opinion No. 1982-67].

States may not impose blanket prohibitions on designations of specialty in attorney advertising [*Peel v. Attorney Reg. & Disciplinary Com'n (1990) 496 U.S. 91, 110-111, 110 S. Ct. 2281, 110 L. Ed. 2d 83]* . When the United States Supreme Court was called on to decide whether a member of the Illinois State Bar could be prohibited from using on his professional letterhead the words, "Certified Civil Trial Specialist by the National Board of Trial Advocacy," under an Illinois rule prohibiting an attorney from holding himself or herself out as "certified" or as a "specialist," the Court held that the attorney's letterhead was neither actually nor inherently misleading, and that the letterhead was protected commercial speech under *U.S. Const., amend. I* [*Peel v. Attorney Reg. & Disciplinary Com'n (1990) 496 U.S. 91, 98, 110-111, 110 S. Ct. 2281, 110 L. Ed. 2d 83]* . The Court noted that the state rule was broader than reasonably necessary to prevent the perceived evil of misleading the public [*Peel v. Attorney Reg. & Disciplinary Com'n (1990) 496 U.S. 91, 107, 110 S. Ct. 2281, 110 L. Ed. 2d 83]* . The Court stated that, to the extent that potentially misleading statements of private certification or specialization could confuse consumers, a state might consider screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty [*Peel v. Attorney Reg. & Disciplinary Com'n (1990) 496 U.S. 91, 110, 110 S. Ct. 2281, 110 L. Ed. 2d 83]* .

An attorney who chooses to advertise that he or she has special knowledge or experience in a particular field of law will be held to the standard of care of a specialist in that field [*see Wright v. Williams (1975) 47 Cal. App. 3d 802, 810, 121 Cal. Rptr. 194]* . For discussion of the standard of care, see Ch. 76, *Attorney Professional Liability* .

[5] Price for Routine Services

A state cannot constitutionally prohibit an attorney from advertising the price charged for routine legal services [*Bates v. State Bar of Arizona (1977) 433 U.S. 350, 372-373, 384, 97 S. Ct. 2691, 53 L. Ed. 2d 810]* . "Routine" legal services include matters such as uncontested divorces, simple adoptions, uncontested personal bankruptcies, and name changes [*see Bates v. State Bar of Arizona (1977) 433 U.S. 350, 372, 97 S. Ct. 2691, 53 L. Ed. 2d 810]* . The state may, however, define specifically what services can and must be included in an advertisement for routine legal services [*Bates v. State Bar of Arizona (1977) 433 U.S. 350, 373* ; *see In re R.M.J. (1982) 455 U.S. 191, 200 n.11, 102 S. Ct. 929, 71 L. Ed. 2d 64]* . Failure to adhere to advertised fees is a presumed violation of *Cal. Rules Prof. Conduct, Rule 1-400* [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 16; for discussion, *see § 72.245*

]. The State Bar Standing Committee on Professional Responsibility and Conduct has advised that an attorney clearly define the services that are included in an advertisement and add disclaimers regarding any limitation on the quoted price [*see* State Bar Formal Opinion No. 1982-67]. Failure to include such information could possibly result in a violation of *Cal. Rules Prof. Conduct, Rule 1-400(D)(3)*, requiring that an advertisement include any facts necessary to prevent the advertisement from being misleading.

Disclosure of the cost of an initial consultation and credit arrangements for payment are also protected [*see Bates v. State Bar of Arizona (1977) 433 U.S. 350, 367, 372 n.26, 97 S. Ct. 2691, 53 L. Ed. 2d 810]* .

The United States Supreme Court has held that a state may constitutionally require an attorney advertising services on a contingency fee basis to include a statement that the client may be liable for costs even if the lawsuit is unsuccessful [*Zauderer v. Office of Disciplinary Counsel (1985) 471 U.S. 626, 652, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315]* . The standards establishing presumed violations of *Cal. Rules Prof. Conduct, Rule 1-400* require any communication that states or implies "no fee without recovery" to expressly disclose whether or not the client will be liable for costs [Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Std. 14; *see § 72.245*].

[6] Quality of Services and Other Subjective Claims

The United States Supreme Court has indicated in dictum that advertising claims concerning the quality of legal services offered can constitutionally be prohibited [*see Bates v. State Bar of Arizona (1977) 433 U.S. 350, 383-384, 97 S. Ct. 2691, 53 L. Ed. 2d 810]* . The main objection to claims of quality is that they are not capable of measurement or verification; hence, their potential for misleading the public is great [*Bates v. State Bar of Arizona (1977) 433 U.S. 350, 383-384, 97 S. Ct. 2691, 53 L. Ed. 2d 810]* .

The provisions of the State Bar Act regulating legal advertising prohibit statements or symbols stating that an attorney featured in the advertisement can generally obtain immediate cash or quick settlements [*Bus. & Prof. Code § 6157.2(b)*]. In addition, advertisements or communications that contain guarantees, warranties, or predictions about the result of any legal action and testimonials about, or endorsements of, an attorney made without an express disclaimer is prohibited [*see Bus. & Prof. Code § 6157.2(a)*; *Cal. Rules Prof. Conduct, Rule 1-400(E)*; Standards for Presumed Violations of *Cal. Rules Prof. Conduct, Rule 1-400*, Stds. 1, 2 discussed under § 72.245].

[7] Advertisements Containing Legal Advice or Directed at Particular Potential Clients

[a] Constitutionally Protected

A state may not constitutionally prohibit an advertisement containing truthful and nondeceptive information and advice regarding the legal rights of potential clients [*Zauderer v. Office of Disciplinary Counsel (1985) 471 U.S. 626, 647, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315]* . Thus, an attorney may not be disciplined for soliciting legal business by placing an advertisement geared toward people with a specific legal problem and containing advice about that legal problem. For example, an advertisement reporting that the Dalkon Shield intrauterine device has led to numerous lawsuits and indicating that the attorney placing the advertisement is available to represent women with similar legal claims is constitutionally protected [*Zauderer v. Office of Disciplinary Counsel (1985) 471 U.S. 626, 639-647, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315]* .

The challenged disciplinary rules in the Dalkon Shield advertisement case prohibited self-recommendation and acceptance of employment resulting from unsolicited advice [*see Zauderer v. Office of Disciplinary Counsel (1985) 471 U.S. 626, 633, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315]* . The Court held that the challenged rule as applied to the advertisements in that case violated *U.S. Const., amend. I*, under the commercial speech doctrine because the advertisements were not deceptive and did not present any dangers of undue influence or overreaching [*Zauderer v. Office of Disciplinary Counsel (1985) 471 U.S. 626, 642, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315]* .

Furthermore, the Court rejected the state's arguments that a broad prophylactic rule barring all advertisements containing legal advice was necessary to guard against the possibility that some advertisements might be misleading. The Court reasoned that it is no more difficult to ferret out actually misleading ads relating to legal services than it is to regulate misleading ads relating to other types of services or goods [*Zauderer v. Office of Disciplinary Counsel (1985) 471 U.S. 626, 643-647, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315]* . The Court thus concluded that the state had failed to demonstrate that the rules directly advanced a substantial government interest, as is necessary to support a restriction of advertising under *U.S. Const., amend. I* [*see Zauderer v. Office of Disciplinary Counsel (1985) 471 U.S. 626, 641-642, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315]* .

[b] By Mass Mailing

Mass mailings of form letters directed at particular types of potential clients are constitutionally protected unless the letters are actually misleading or deceptive [*Adams v. Attorney Registration & Disciplinary Com'n (7th Cir. 1986) 801 F.2d 968, 973-974]* .

The United States Supreme Court has held that a blanket prohibition on targeted, direct-mail solicitation by lawyers for pecuniary gain isunconstitutional under *U.S. Const., amend. I* [*Shapero v. Kentucky Bar Ass'n. (1988) 486 U.S. 466, 472-478, 108 S. Ct. 1916, 100 L. Ed. 2d 475]* . In this case, an attorney sought permission from the Kentucky Attorneys Advertising Commission to send a letter to potential clients who faced foreclosures on their homes, inviting these potential clients to call him for free information on how they could keep their homes. The Commission could find nothing in the letter that was false or misleading, but nevertheless denied the attorney's request on the ground that a Kentucky Supreme Court rule prohibited the mailing. The rule in question prohibited targeted, direct-mail solicitation by lawyers for pecuniary gain, without a particularized finding that the solicitation is false or misleading. The United States Supreme Court found that Kentucky's unconditional prohibition on direct-mail solicitation violated *U.S. Const., amend. I*, noting that targeted solicitation by mail does not involve the same danger of overreaching and undue influence as in-person targeted solicitation [*Shapero v. Kentucky Bar Ass'n. (1988) 486 U.S. 466, 475, 108 S. Ct. 1916, 100 L. Ed. 2d 475]* . The Court acknowledged that targeted, direct-mail solicitation might present lawyers with opportunities for isolated abuses or mistakes. This possibility of such opportunities, however, would not justify a total ban on that mode of protected commercial speech. The Court commented that states can regulate abuses and minimize mistakes in direct-mail advertising through far less restrictive and more precise means. For example, states may require lawyers to file solicitation letters with a state agency [*Shapero v. Kentucky Bar Ass'n. (1988) 486 U.S. 466, 476, 108 S. Ct. 1916, 100 L. Ed. 2d 475]* .

[c] Letters to Particular Potential Client Regarding Specific Case

The cases discussed under § 72.254[7][a] and *[b]* make it clear that attorneys can solicit employment by mailing advertisements in the form of letters to groups of potential clients containing truthful and nondeceptive information and advice concerning the potential clients' legal rights. It should be noted, however, that, in these cases, the communications, although directed at groups of people who might have particular types of legal problems, did not attempt to address the specifics of any particular potential client's rights regarding a particular case. The United States Supreme Court has not expressly addressed the issue of the constitutionality of restrictions regarding letters directed at a particular potential client regarding a specific case. Thus, it is not clear whether such letters would be regarded as akin to in-person solicitation, which, the Court has held, may constitutionally be prohibited in most situations (as discussed in *§ 72.246[1]*) or as a form of constitutionally protected targeted advertising. The State Bar Committee on Professional Responsibility and Conduct has issued an opinion that it is ethically permissible for an attorney to solicit employment for pecuniary gain by means of a letter to a particular individual regarding a specific case involving that individual, provided that the letter is not false, deceptive, or misleading [State Bar Formal Opinion No. 1988-105].

Assuming that letters regarding a particular case are entitled to some constitutional protection, the attorney must ensure that they are not misleading and that they clearly indicate that their purpose is to inform the client of the attorney's

availability for professional employment [*see Cal. Rules Prof. Conduct, Rule 1-400(A)(4), (D)(2)-(4)*; *see also* discussion in *§ 72.244*].

In one case, a law firm instituted a program of mailing informational letters to potential clients who had various types of legal proceedings pending against them, containing information about debt collection, asset protection, bankruptcy, and related topics. The letters were personalized and contained information relating to the status of the actions pending against them. The purpose of the letters was, in part, to encourage the recipients to hire the firm to represent them. The California Supreme Court held that one particularized unsolicited mailing involved in this case was misleading in that it implied that adverse judgments and consequent attachment of the recipients' personal assets were imminent [*Leoni v. State Bar (1985) 39 Cal. 3d 609, 626-627, 217 Cal. Rptr. 423, 704 P.2d 183]* . Furthermore, the Court found that the mailing violated the provisions of Rules of Professional Conduct because the letter did not clearly indicate to laypersons that they were messages regarding the firm's availability for employment [*Leoni v. State Bar (1985) 39 Cal. 3d 609, 627, 217 Cal. Rptr. 423, 704 P.2d 183* (construing Cal. Rules Prof. Conduct., former Rule 2-101(A)(4), which was similar to *Cal. Rules Prof. Conduct, Rule 1-400(D)(4)*]. Finally, although noting that transmission of commercial speech by mail appears to be entitled to some constitutional protection, the Court found that the particularized, misleading, and unsolicited letters involved in this case were bound to cause panic and fear in the lay recipients and therefore violated the rule prohibiting transmission in a manner involving intrusion, threats, intimidation, harassment, or duress [*Leoni v. State Bar (1985) 39 Cal. 3d 609, 627, 217 Cal. Rptr. 423, 704 P.2d 183* ; *see Cal. Rules Prof. Conduct, Rule 1-400(D)(5)*; *see also* discussion under § 72.244[5]].

In another case, an attorney who was acting as both class counsel and the class representative sought precertification discovery to allow him to seek substitute class representatives. The trial court allowed him to send a notice to other customers who were charged a restocking fee for not providing an original box or carton at the time of returning an item, seeking a qualified class representative. The defendant challenged the discovery on the ground that it was an unlawful solicitation. The court of appeal upheld the discovery order, holding that *Cal. Rules Prof. Conduct, Rule 1-400(B)* did not cover the type of communication proposed here [*Best Buy Stores, L.P. v. Superior Court (2006) 137 Cal. App. 4th 772, 776-777, 40 Cal. Rptr. 3d 575]* .

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§ 72.255 Publicity

[1] Constitutional Protection

The California Supreme Court has held that an attorney's participation in a news report and statements made to the news media concerning newsworthy topics are protected by *U.S. Const., amend. I.* Thus, the State Bar may not discipline an attorney for such participation, even though the news report may result in publicity for the attorney and may have the indirect result of attracting clients [*Jacoby v. State Bar (1977) 19 Cal. 3d 359, 371-380, 138 Cal. Rptr. 77, 562 P.2d 1326]* . Such statements and participation are not subject to the restrictions relating to advertising andsolicitation unless they serve no discernible purpose other than the attraction of clients; if a legitimate purpose appears on the face of a publication or in the demonstrated motivation of the attorney, the publication must receive at least prima facie protection under *U.S. Const., amend. I* [*Jacoby v. State Bar (1977) 19 Cal. 3d 359, 371, 138 Cal. Rptr. 77, 562 P.2d 1326]* .

In one case, two attorneys responded to news reporters' questions and held their own press conference about their new type of legal clinic and the pending disciplinary action against them [*Jacoby v. State Bar (1977) 19 Cal. 3d 359, 363-365, 138 Cal. Rptr. 77, 562 P.2d 1326]* . The Supreme Court found that the attorneys' statements, viewed in their entirety, were newsworthy and served a legitimate purpose of educating the public. Because they served this purpose, rather than one of primarily soliciting clients, the attorneys' statements were protected free speech [*Jacoby v. State Bar (1977) 19 Cal. 3d 359, 371-374, 138 Cal. Rptr. 77, 562 P.2d 1326]* .

In another case, certain acts of an attorney's personal publicity agent were found not to violate a former Rule of Professional Conduct prohibiting solicitation and advertising, whereas other acts were found to be violations [*Belli v. State Bar (1974) 10 Cal. 3d 824, 841, 112 Cal. Rptr. 527, 519 P.2d 575* ; *see* Cal. Rules Prof. Conduct, former Rule 2 (effective 1928-1975)]. The publicist's activities, directed primarily at obtaining lecture engagements for the attorney and publicizing the attorney's law seminars, were held to be permissible and protected by *U.S. Const., amend. I.* Because lectures and seminars by the attorney were protected free speech, advertisements concerning those activities were also held to be protected free speech [*Belli v. State Bar (1974) 10 Cal. 3d 824, 836, 112 Cal. Rptr. 527, 519*

P.2d 575] . Acts of the agent directed primarily at soliciting clients for the attorney's legal practice, however, were found to violate the Rules of Professional Conduct. These acts consisted of publicizing client testimonials and procuring a liquor company's endorsement for the attorney [*Belli v. State Bar (1974) 10 Cal. 3d 824, 837-841, 112 Cal. Rptr. 527, 519 P.2d 575* ; *see* Cal. Rules Prof. Conduct, former Rule 2 (1928-1975)]. It should be noted, however, that this case was decided before the United States Supreme Court decision in *Va. Pharmacy Bd. v. Va. Consumer Council (1976) 425 U.S. 748, 770, 96 S. Ct. 1817, 48 L. Ed. 2d 346* , and its progeny, holding that even purely commercial speech is entitled to some protection under *U.S. Const., amend. I*. Thus, some of the reasoning used by the California Supreme Court in holding the publicity agent's acts improper may no longer apply.

[2] Improper Compensation for Publicity

The Rules of Professional Conduct forbid an attorney from compensating a member of the news media in exchange for publicity about the attorney, the attorney's firm, or even another attorney, in a news item [*Cal. Rules Prof. Conduct, Rule 1-320(C)*]. With the exception of giving incidental food and beverages, compensation includes giving, or promising to give, anything of value [*Cal. Rules Prof. Conduct, Rule 1-320(C)*]. The prohibition on compensation for publicity in the Rules of Professional Conduct is not intended to preclude compensation to the communications media in exchange for advertising the member's or law firm's availability for professional employment [*Cal. Rules Prof. Conduct, Rule 1-320*, Drafter's Notes].

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§ 72.256 Disciplinary Sanctions for Violations of Advertising Rules

The California State Bar has the power to take disciplinary action against attorneys for violations of the Rules of Professional Conduct [*Bus. & Prof. Code § 6077*; *Cal. Rules Prof. Conduct, Rule 1-100(A)*]. Any person found by a court to violate the provisions of the State Bar Act regulating legal advertising (*Bus. & Prof. Code §§ 6157-6159.2*) must be reported to the appropriate professional licensing agency for review and possible disciplinary action [*Bus. & Prof. Code § 6159*].

Discipline may take the form of public or private reproval, or a recommendation of suspension for no more than three years [*Bus. & Prof. Code § 6077*]. If an attorney's misconduct involves a violation of the oath or duties of an attorney or an act of moral turpitude, dishonesty, or corruption, the attorney may be suspended or disbarred by the California Supreme Court [*Bus. & Prof. Code §§ 6103, 6106*]. For discussion of disciplinary proceedings, see Ch. 70, *Attorney Admission and Discipline* .

In cases interpreting Cal. Rules Prof. Conduct, former Rule 2-101, which prohibited similar types of advertising as the present Rule, the California Supreme Court imposed discipline ranging from public reprimand to disbarment [*see Leoni v. State Bar (1985) 39 Cal. 3d 609, 628, 217 Cal. Rptr. 423, 704 P.2d 183* (public reprimand); *Ballard v. State Bar (1983) 35 Cal. 3d 274, 293, 197 Cal. Rptr. 556, 673 P.2d 226* (disbarment)]. Public reprimand was imposed when the firm was guilty of violating the provisions of former Rule 2-101 regarding misleading advertising, but had no previous disciplinary record and had made good faith efforts to modify its statements to make them truthful and not misleading [*see Leoni v. State Bar (1985) 39 Cal. 3d 609, 628, 217 Cal. Rptr. 423, 704 P.2d 183]* . Disbarment was imposed in a case in which violations of former Rule 2-101 were combined with numerous other willful ethical violations [*see Ballard v. State Bar (1983) 35 Cal. 3d 274, 278-280, 292-293, 197 Cal. Rptr. 556, 673 P.2d 226]* .

Sanctions for violating earlier Rules of Professional Conduct on advertising, which were more restrictive than former Rule 2-101, included public censure [*Millsberg v. State Bar (1971) 6 Cal. 3d 65, 75, 98 Cal. Rptr. 223, 490 P.2d 543]* , suspensions ranging from one month [*Belli v. State Bar (1974) 10 Cal. 3d 824, 841-842, 112 Cal. Rptr. 527, 519 P.2d 575]* to three years [*Johnson v. State Bar (1935) 4 Cal. 2d 744, 760, 52 P.2d 928]* , and disbarment [*Mayer v.*

State Bar (1934) 2 Cal. 2d 71, 75, 39 P.2d 206] . Suspensions for longer periods of time were imposed in cases in which violations of other rules were also involved. For example, advertising plus charging an unconscionable fee [*Bushman v. State Bar (1974) 11 Cal. 3d 558, 560-561, 564, 570, 113 Cal. Rptr. 904, 522 P.2d 312]* and advertising coupled with pursuing meritless litigation contrary to clients' instructions [*Johnson v. State Bar (1935) 4 Cal. 2d 744, 752, 759, 52 P.2d 928]* have been held to warrant longer suspensions. Disbarment was imposed in a case in which the advertising also violated former *Penal Code § 159a*, which prohibited advertising to procure a divorce [*Mayer v. State Bar (1934) 2 Cal. 2d 71, 73-74, 39 P.2d 206]* .

The Standards for Attorney Sanctions for Professional Misconduct do not contain any specific standards for violations of the provisions of the Rules of Professional Conduct relating to advertising. If, however, an advertisement contains intentional misrepresentations, it could possibly be regarded as an act of fraud, for which the Standards provide for actual suspension or disbarment, depending on the extent of harm or deception caused to the victim, the magnitude of the misconduct, and the degree to which it relates to the attorney's law practice [*see* Cal. State B. Stds. for Att'y Sanctions, Std. 2.3].

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[Reserved]

§§ 72.257[Reserved]

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1. Duties Of Representation

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§ 72.270 Duty of Competence

[1] Ethical Duty of Competence

An attorney must not intentionally, recklessly, or repeatedly fail to perform legal services competently [*Cal. Rules Prof. Conduct, Rule 3-110(A)*]. "Intent" is a willful violation referring to an intent to perform an act in violation of the rules, and does not require a specific intent to violate the California Rules of Professional Conduct [*see* In the Matter of Respondent G (1992) 2 Cal. State Bar Ct. Rptr. 181, 183]. To "perform legal services competently" means to apply the diligence, learning, and skill, and mental, emotional, and physical ability, reasonably necessary for the performance of legal services [*Cal. Rules Prof. Conduct, Rule 3-110(B)*].

Rule 3-110 may be violated, for example, when an attorney unexplainedly fails to appear at court hearings or fails to timely file a client's claim after providing the client with assurances that the claim is progressing [*see Gary v. State Bar (1988) 44 Cal. 3d 820, 826-827, 244 Cal. Rptr. 482, 749 P.2d 1336* (decided under former Rule 6-101, *now see Cal. Rules Prof. Conduct, Rule 3-110*); *see also* In the Matter of Johnson (2000) 4 Cal. State Bar Ct. Rptr. 179 ; In the Matter of Rodriguez (1993) 2 Cal. State Bar Ct.Rptr. 480, 482 ; In the Matter of Bach (1991) 1 Cal. State Bar Ct. Rptr. 631, 643]. In that case, the gravamen is not the failure to appear, but the lack of appearance coupled with misrepresentation regarding the status of the case.

If the lawyer does not have sufficient learning and skill when the legal service is undertaken, the attorney may nonetheless perform duties competently by doing either of the following [*Cal. Rules Prof. Conduct, Rule 3-110(B)*]:

- Associating with or, when appropriate, professionally consulting another attorney reasonably believed to be competent.
- Acquiring sufficient learning and skill before performance is required.

[2] Reckless Disregard or Gross Negligence

A finding of willfullness is not necessary for a violation of *Cal Rules Prof. Conduct, Rule 3-110* [*see, e.g.,* In the Matter of Respondent G (1992) 2 Cal. State Bar Ct. Rptr. 181, 183]. Under the "reckless disregard"standard, repeated inattention to the needs of the client is sufficient [*see* In the Matter of Respondent G (1992) 2 Cal. State Bar Ct. Rptr. 171, 178 ; In the Matter of Layton (1993) 2 Cal. State Bar Ct. Rptr. 366, 377-378].

Reckless disregard encompasses concepts such as "gross negligence" [*see Davis v. State Bar (1983) 33 Cal. 3d 231, 238, 188 Cal. Rptr. 441, 655 P.2d 1276]* , "extreme neglect" [*see Spindell v. State Bar (1975) 13 Cal. 3d 253, 259-260, 118 Cal. Rptr. 480, 530 P.2d 168]* , "gross carelessness" [*see Ridley v. State Bar (1972) 6 Cal. 3d 551, 560, 99 Cal. Rptr. 873, 493 P.2d 105]* , and "habitual disregard" [*see* In the Matter of Hindin (Review Dept. 1997) 3 Cal. State B. Ct. Rptr. 657, 686], but not discrete acts amounting to simple negligence [*see Call v. State Bar (1955) 45 Cal. 2d 104, 111, 287 P.2d 761* ; *Friday v. State Bar (1943) 23 Cal. 2d 501, 505, 144 P.2d 564* (act committed due to mere ignorance does not constitute moral turpitude)].

With the inception of the State Bar Court and increasing civil liability for violations of the Rules of Professional Conduct [*see Mirabito v. Liccardo (1992) 4 Cal. App. 4th 41, 46, 5 Cal. Rptr. 2d 571* (violation of *Cal. Rules Prof. Conduct, Rule 1-100* does not create civil cause of action but can be utilized to establish breach of fiduciary duty in subsequent malpractice action)], matters that would have traditionally constituted simple malpractice (for example, missing a statute of limitations) [*see, e.g.,* In the Matter of Bach (1991) 1 Cal. State Bar Ct. Rptr. 631, 643] are increasingly being investigated by the State Bar.

PRACTICE TIP:

Gross Negligence. For the State Bar Court to find gross negligence, the cases present scenarios involving lack of competence coupled with other reprehensible conduct, or repeated misconduct, usually involving misrepresentations concerning the filing of the suit or the status of the case.

[3] Nonmitigating Factors

The State Bar Court strictly applies the standards of competent performance, even in the presence of factors cited as mitigating by the disciplined attorney. For example, the following circumstances do not reduce the strict standards of competent performance required by *Cal. Rules Prof. Conduct, Rule 3-110*:

- *Heavy workload*: A large volume of cases will not vitiate incompetent performance [*Blair v. State Bar (1989) 49 Cal. 3d 762, 780, 263 Cal. Rptr. 641, 781 P.2d 933* ; *Garlow v. State Bar (1988) 44 Cal. 3d 689, 711, 244 Cal. Rptr. 452, 749 P.2d 1307]* .

- *Attorney is not a specialist*: If an attorney represents that he or she can perform competently with respect to a specific matter, the fact that he or she is not a specialist in the matter is not weighed in assessing competence [*see Layton v. State Bar (1990) 50 Cal. 3d 889, 904-905, 268 Cal. Rptr. 845, 789 P.2d 1026* (attorney unsuccessfully argued that he was a family law attorney, not probate specialist, and thus should not be held to probate attorney's standard)].

- *Attorney is acting in dual capacity*: Attorneys are uniformly held to the requirements of the Rules of Professional Conduct regardless of what other capacity they may believe they are performing in (for example, as a real estate agent, collection agent, executor, etc.). Attorneys will be held to the Rules vis-a-vis their performance and cannot claim a lesser degree of competency due to the other activity. Lower standards for executors, for example, will not vitiate an attorney's duties or the requirement of competent performance [*see Layton v. State Bar (1990) 50 Cal. 3d 889, 904, 268 Cal. Rptr. 845, 789 P.2d 1026* ; *see also Crawford v. State Bar (1960) 54 Cal. 2d 659, 667, 7 Cal. Rptr. 746, 355 P.2d 490* (attorney must conform to professional standards when performing services that might lawfully have been performed by title companies, insurance companies, brokers, and other laypeople); *Alkow v. State*

Bar (1952) 38 Cal. 2d 257, 263, 239 P.2d 871 (attorney acting as collection agency's representative must conform to professional standards)].

- *Case taken on pro-bono basis*: The fact that a lawyer takes a case on a pro-bono or quasi pro-bono basis is not a defense to the rule requiring attorney competence. Whether a fee is paid does not affect the standards of performance pursuant to the Rules [*see Segal v. State Bar (1988) 44 Cal. 3d 1077, 1084-1085, 245 Cal. Rptr. 404, 751 P.2d 463]* .

- *Attorney limits practice to residents of high-crime area*: An attorney's continuing practice in a poverty-stricken area or a practice limited to residents of a high crime area does not justify incompetent representation or allow the attorney's clients to be subjected to lesser standards of legal representation [*see Blair v. State Bar (1989) 49 Cal. 3d 762, 780, 263 Cal. Rptr. 641, 781 P.2d 933]* .

[4] Other Standards of Competence Distinguished

[a] Professional Liability Standard in Civil Actions

An attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks that they undertake [*Lucas v. Hamm (1961) 56 Cal. 2d 583, 591, 15 Cal. Rptr. 821, 364 P.2d 685]* . If an attorney breaches this duty to the client, the attorney may be liable for damages resulting from the breach, either in tort or breach of contract [*Lysick v. Walcom (1968) 258 Cal. App. 2d 136, 147, 65 Cal. Rptr. 406]* . The standard of proof is by a preponderance of the evidence [*see Evid. Code § 115*].

For detailed discussion and forms, see Ch. 76, *Attorney Professional Liability* .

[b] Attorney's Oath

The California Supreme Court has held that gross negligence or neglect and carelessness in the handling of client matters constitutes a violation of the attorney's oath pursuant to *Bus. & Prof. Code § 6077* to faithfully discharge the duties of an attorney to the best of his or her knowledge and ability [*Black v. State Bar (1972) 7 Cal. 3d 676, 692, 103 Cal. Rptr. 288* ; *Vaughn v. State Bar (1972) 6 Cal. 3d 847, 857-859, 100 Cal. Rptr. 713* ; *Moore v. State Bar (1964) 62 Cal. 2d 74, 81, 41 Cal. Rptr. 161]* .

[5] Common Performance Problems

[a] Abandonment of Client Matters

The following examples illustrate instances of abandonment of client matters:

ILLUSTRATION:

Failure to Perform Services. On August 2, 1992, Landlord hires Attorney to take prompt action to evict a nonpaying tenant. Landlord gives Attorney $500 as an advance on attorney's fees. During the next three weeks, Landlord repeatedly calls attorney to ask about the case. Attorney takes no action on Landlord's behalf. On August 28, 1992, Landlord asks Attorney to return the advance on fees. Landlord prosecutes the unlawful detainer action on his own. Landlord complains to the State Bar when Attorney refuses to repay the $500. Has Attorney violated *Cal. Rules Prof. Conduct, Rule 3-110*, by failing to perform the services for which attorney was retained? Yes. Attorney's reckless disregard is established by the client's repeated reminders that prompt action was required followed by lawyer's total failure to act [*see* In the Matter of Koehler (1991) 1 Cal. State Bar Ct. Rptr. 615, 629].

ILLUSTRATION: Failure to File Within Limitation Period. On January 5, 1992, Victim, an automobile accident victim, hires Attorney on a contingency basis to pursue Victim's personal injury claims. On December 30, 1991, Victim was riding as a passenger with her supervisor, who had consumed beer. They were returning from a business luncheon meeting to Megabucks, Inc., an office building in downtown Los Angeles. Another vehicle, driven by Wealthy Actor, rear-ended the car in which Supervisor and Victim were riding. In June 1992, Attorney receives x-rays and final medical reports from Victim's doctor showing the extent of Victim's soft tissue injuries and estimating that treatment will cost about $10,000. Victim telephones Attorney in March, June, August, and October 1992, asking about the status of her case. Each time Attorney tells her that the case is "progressing nicely." Megabucks' insurance company adjuster rejects a settlement offer made by Attorney in December 1992, and orally advises Attorney that the statute of limitations is about to run. Attorney fails to file the complaint on victim's behalf within the statute of limitations, and fails to pursue any other remedies on her behalf. Victim complains to the State Bar when she reviews the index of actions in Los Angeles and finds that no action has been filed on her behalf. Has Attorney violated *Cal. Rules Prof. Conduct, Rule 3-110(A)*? Yes. Attorney failed to file the complaint within the statutory period, the time when performance would have been due. Attorney's reckless disregard is established by (1) the oral reminder of the insurance adjuster, (2) the receipt of the medical evidence that there was injury, and (3) the client's repeated reminders.

[b] Great Delay in Performing Client Matters

The following examples illustrate what may or may not constitute great delay in performing client matters:

ILLUSTRATION:

Failure to File Incorporation Papers. In January 1992, Group retains Attorney to incorporate Group and obtain status as a nonprofit religious organization. Attorney is paid $300. Attorney estimates that 60 to 90 days will be needed to perform the legal services. In May, June, and early September 1992, Group's representative writes letters to Attorney requesting evidence that the incorporation and nonprofit status had been accomplished. Attorney fails to respond. On September 14, 1992, Group demands a refund of its money. On September 12, 1992, the Secretary of State receives an incorporation document that it rejects because the articles of incorporation were not acknowledged and the fee payment was insufficient. In October 1992, the documents are resubmitted by Attorney and again rejected. In October 1992, Group hires subsequent counsel who promptly files the required documents with the Secretary of State. Has the attorney violated *Cal. Rules Prof. Conduct, Rule 3-110*? Yes. Attorney failed to use due diligence in filing the papers necessary to obtain nonprofit status and incorporation on behalf of the client. The element of reckless disregard is established by Group's persistent reminders that they had not seen the incorporation documents and by Attorney's failure to perform following those reminders until September 1992.

ILLUSTRATION: No Delay if Complaint Filed Within Limitation Period. On January 5, 1990, Attorney is hired on a contingency basis to pursue the personal injury claims of Victim, who was injured in an automobile accident. On December 30, 1989, Victim was driving from a business luncheon meeting back to Supermedia Co.'s office building in west Los Angeles. Another vehicle, driven by Wealthy Producer, rear-ended Victim's car. Victim has only soft tissue injuries. Attorney files a complaint for Victim's personal injuries on December 29, 1990, naming all possible defendants and appropriately serves the complaint on all parties. Victim complains to the State Bar that Attorney delayed in the filing of the complaint. Has the attorney violated *Cal. Rules Prof. Conduct, Rule 3-110*? No. Without more facts, Attorney has not violated Rule 3-110. Attorney filed the complaint within the statutory period, the time when performance would have been due.

A lawyer may make a strategic or tactical decision to delay. Nevertheless, an attorney violates his or her ethical duties if the delaying strategy is not explained to the client and the attorney presumes the goal the client is seeking to accomplish [*see Bus. & Prof. Code § 6068(m)*; *Cal. Rules Prof. Conduct, Rule 3-500*; *Calvert v. State Bar (1991) 54 Cal. 3d 765, 782, 1 Cal. Rptr. 2d 684, 819 P.2d 424* ; *see also § 72.271[1]*].

PRACTICE TIP:

Effect of Fast-Track Rules. Delay reduction or "fast track" programs providing expedited time frames for pretrial proceedings will, in many cases, result in a decrease in the time for performance that a court will consider as "timely" or "reasonably diligent."

[c] Failure to Properly Supervise Others

The duty to supervise includes support staff, office managers, and associate attorneys [*see Gadda v. State Bar (1990) 50 Cal. 3d 344, 356, 267 Cal. Rptr. 114, 787 P.2d 95* (associate attorney); In the Matter of Whitehead (1991) 1 Cal. State Bar Ct. Rptr. 354, 368 (associate attorney); In the Matter of Bouyer (1991) 1 Cal. State Bar Ct. Rptr. 404, 414 (office staff); *see also* State Bar Formal Opinion No. 1988-103 (duty to supervise paralegal); *Bus. & Prof Code § 6452(b)* (attorney using services of paralegal liable for any harm caused as result of paralegal's negligence, misconduct, or violation of paralegal duties found in *Bus. & Prof. Code §§ 6450-6456*)]. Although an attorney is not responsible for every event that takes place in the attorney's office, gross neglect in addressing office and staff problems of which the attorney is aware can amount to a failure to perform competently and lead to discipline of the attorney [*see* In the Matter of Hindin (Review Dept. 1997) 3 Cal. State B. Ct. Rptr. 657, 681-683]. The supervising attorney of a group of associates is considered responsible for the misconduct of his or her subordinates [*see Gadda v. State Bar (1990) 50 Cal. 3d 344, 356, 267 Cal. Rptr. 114, 787 P.2d 95]* .

PRACTICE TIP:

Properly Instruct Staff. The duty to maintain inviolate client confidences and secrets applies to paralegals, secretaries, and law clerks [*see In re Complex Asbestos Litigation (1991) 232 Cal. App. 3d 572, 587-591, 283 Cal. Rptr. 732* ; *see also Bus. & Prof. Code § 6452(b)* (attorney using services of paralegal liable for any harm caused as result of paralegal's negligence, misconduct, or violation of paralegal duties found in *Bus. & Prof. Code §§ 6450-6456*)]. Good practice would mandate that this be explained and understood by staff.

The failure to supervise others is illustrated by the following examples:

ILLUSTRATION:

Insufficient Supervision of Associate. On January 5, 1990, Defendant retains Attorney to defend him in a civil action that had been served in December 1989. Attorney introduces Defendant to Associate, who will be handling much of the paperwork. In February 1990, Defendant meets with Associate and signs a piece of paper that "would enable Associate to proceed with the defense." In May 1990, Defendant learns from Plaintiff (who was representing himself in propria persona) that Plaintiff has obtained a default judgment against Defendant. Defendant immediately contacts Attorney, who then contacts Associate. Associate advises Attorney that he had prepared the answer but had failed to file it. Attorney instructs Associate and Secretary to prepare a motion for relief from default to be filed by the end of the week. In July 1990, Defendant receives a Notice for a Judgment Debtor's Examination to take place in August 1990. Defendant takes the Notice to Attorney, who tells him that he (Attorney) would take care of everything and that Defendant should not appear as noticed. Attorney then determines that Associate has still not filed the motion for relief, which he ordered Associate and the Secretary to do by the end of the week. At the end of August, Defendant receives a notice that a warrant has been issued for his arrest. Defendant complains about Attorney to the State Bar. Has Attorney violated his duties as an attorney? Yes. Since Attorney was retained by Defendant to perform legal services, Attorney bears responsibility for the proper delegation of the work and for proper supervision of Associate. When

Attorney learned that Defendant's default had been taken, he was on notice that Associate had already failed to perform. His continued reliance on Associate without close supervision and follow-up was gross negligence, amounting to a breach of his oath as an attorney.

ILLUSTRATION: Improper Signatures and Recording of Funds. Attorney, who represented Wife in a dissolution action, obtains an order that Husband should pay $1,000 in attorney's fees to Attorney by May 1990. On January 2, 1990, Husband comes to Attorney's office and hands Attorney a $500 check, which is then cashed. Thereafter, Husband sends Attorney the remaining $500 in $125 increments every month. In July 1990, Attorney causes a writ of execution to be issued, accompanied by a declaration under penalty of perjury, purportedly signed by Attorney, stating that Husband has failed to pay $500 of the $1,000 judgment. Husband's wages are ultimately garnished to satisfy the $500 amount. When Husband complains to the State Bar, Attorney states that his office has no receipt for the $500 received in January 1990. Evidence at trial shows that the $500 was deposited into Attorney's personal account and that Attorney's secretary was authorized to sign Attorney's name to pleadings and declarations under penalty of perjury and to thereafter file the pleadings. Has Attorney violated his duties? Yes. Attorney's practice of allowing a secretary to sign his name to pleadings and documents sworn under penalty of perjury is gross neglect. His failure to have office procedures noting the receipt of all funds received by the office is also gross neglect, amounting to a breach of his oath under *Bus. & Prof. Code § 6077*.

[6] Sanctions for Violation of Duty of Competence

The Standards for Attorney Sanctions for Professional Misconduct, Standard 2.4, deals with offenses involving willful failure to perform services for which the attorney has been retained, as well as willful failure to communicate with a client. The discipline normally imposed in cases when there is a pattern of willful failure to perform demonstrating abandonment of the client is disbarment [Cal. State B. Stds. for Att'y Sanctions, Std. 2.4(a); *but see* In the Matter of Kennon (1990) 1 Cal. State Bar Ct. Rptr. 267, 277 (two years stayed suspension, two years probation, and 30 days actual suspension were recommended when respondent had no prior discipline record)].

If a lawyer is found to have willfully failed to perform services in an individual matter, or in several matters but not demonstrating a pattern of misconduct, the discipline imposed will range from reproval to suspension, depending on the extent of misconduct and the degree of harm to the client [Cal. State B. Stds. for Att'y Sanctions, Std. 2.4(b); *see also Van Sloten v. State Bar (1989) 48 Cal. 3d 921, 933-934, 258 Cal. Rptr. 235, 771 P.2d 1323* (proper discipline for single instance of client abandonment); *but see* In the Matter of Nunez (1992) 2 Cal. State Bar Ct. Rptr. 196, 206 ; In the Matter of Stamper (1990) 1 Cal. State Bar Ct. Rptr. 96, 106 (Standards are guidelines for use by State Bar Court, not mandatory sentencing provisions)].

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§ 72.271 Duty to Communicate With Clients

[1] Inform Client of Case Developments

An attorney has a duty to keep clients reasonably informed about significant developments relating to the attorney's employment or representation, and must comply promptly with reasonable client requests for information and copies of significant documents when necessary to keep clients so informed [*Cal. Rules Prof. Conduct, Rule 3-500*; *see Bus. & Prof. Code § 6068(m)*]. Failure to communicate with or inattention to the needs of the client, standing alone, may constitute a violation of an attorney's oath of office [*Shalant v. State Bar (1983) 33 Cal. 3d 485, 489, 189 Cal. Rptr. 374, 658 P.2d 737* (failure to inform client that client had been named as defendant in civil action); *McMorris v. State Bar (1981) 29 Cal. 3d 96, 99-100 , cert. denied 466 U.S. 958 (1984)* ; *Doyle v. State Bar (1976) 15 Cal. 3d 973, 978, 126 Cal. Rptr. 801, 544 P.2d 937* ; *see Bus. & Prof. Code § 6067*; *McMorris v. State Bar (1983) 35 Cal. 3d 77, 81-82 , cert. denied 466 U.S. 958 (1984)* (failure to respond to inquiries)]. Failure to communicate with a client, coupled with habitual client neglect, constitutes moral turpitude and is grounds for disbarment [*Carter v. State Bar (1988) 44 Cal. 3d 1091, 1100, 245 Cal. Rptr. 628, 751 P.2d 894* ; In the Matter of Hindin (Review Dept. 1997) 3 Cal. State B. Ct. Rptr. 657]. However, a member will not be disciplined for failing to communicate insignificant or irrelevant information [*Cal. Rules Prof. Conduct, Rule 3-500*, Discussion].

An attorney may breach the standard of care to a client when the attorney fails to inform a client fully about his or her rights and the alternatives available under the circumstances, their cost, and the liklihood of success [*Considine Co. v. Shadle, Hunt & Hagar (1986) 187 Cal. App. 3d 760, 765, 232 Cal. Rptr. 250]* . For example, an attorney must inform a client of the existence of a motion for discovery sanctions that would affect the client's interest before the court or impose liability on the client, the fact that sanctions are sought against the client and the attorney, the amount of sanctions sought, the practical consequences if the motion is granted or denied, and additional information necessary to permit the client to make informed decisions with respect to the motion [State Bar Formal Opinion 1997-151 (extent of information to be provided depends on circumstances)].

While the attorney's standard of care requires that he or she fully inform the client concerning the likelihood of success

as part of a discussion of available alternatives, a guarantee, warranty, or prediction of outcome is presumed to violate the Rules of Professional Conduct [*see Cal. Rules Prof. Conduct, Rule 1-400*].

PRACTICE TIP:

Advice as to Alternatives. The *Considine* case requires the lawyer to advise his or her client of alternative courses of action and the costs and likelihood of success. At one extreme, the lawyer should not attempt to defend his or her activities as those of a mere scribner who did not advise on, and therefore is not responsible for, the success or failure of the project. At the other extreme, the lawyer cannot attempt to guarantee or predict the outcome. *By Robert L. Kehr.*

[2] Communicate Settlement Offers to Client

An attorney must promptly communicate to his or her client all terms and conditions of any offer made to the client in a criminal matter and all amounts, terms, and conditions of any written offer of settlement made to the client in all other matters [*Bus. & Prof. Code § 6103.5*; *Cal. Rules Prof. Conduct, Rule 3-510*; *see* In the Matter of Yagman (Review Dept. 1997) 3 Cal. State B. Ct. Rptr. 788, 795 (attorney must communicate all written settlement offers to client regardless of whether they are significant or binding under contract law)]. The "client" includes any person employing the attorney who has authority to accept a settlement offer. In a class action, it is the representative of the class [*Bus. & Prof. Code § 6103.5(a)*]. Implicit in this rule is the notion that the client and not the attorney must decide whether to accept or reject a settlement offer [*cf.* Model Code of Professional Responsibility EC 7-7 (1980) (client must decide whether to accept settlement offer)], although the attorney should fully advise the client of all relevant considerations [*see* Model Code of Professional Responsibility EC 7-8 (1980)].

An attorney who represents two or more clients must obtain each clients' informed written consent prior to entering into an aggregate settlement of the claims of or against the clients [*Cal. Rules Prof. Conduct, Rule 3-310(D)*; *see § 72.110* et seq. and § 72.130 et seq. regarding conflicts of interest].

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§ 72.272 Duty of Diligence in Zealous Representation

[1] General Standard of Diligence

When an attorney accepts employment to give legal advice or to render other legal services, the attorney impliedly agrees to use such skill, prudence, and diligence as attorneys of ordinary skill and capacity commonly possess and exercise in the performance of the tasks they undertake [*Kirsch v. Duryea (1978) 21 Cal. 3d 303, 308, 146 Cal. Rptr. 218, 578 P.2d 935* ; *see Bus. & Prof. Code § 6067*]. The standard is that of members of the legal profession in the same or similar locality under similar circumstances [*Wright v. Williams (1975) 47 Cal. App. 3d 802, 809, 121 Cal. Rptr. 194]* . An attorney who holds himself or herself out to the public and the legal profession as a specialist in an area of law is required to exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity who specialize in the same field [*Wright v. Williams (1975) 47 Cal. App. 3d 802, 810, 121 Cal. Rptr. 194]* .

[2] State Bar Sanctions and Civil Liability for Lack of Diligence

An attorney's willful failure to perform legal services for which the attorney has been retained constitutes a breach of the good faith and fiduciary duty the attorney owes to his or her clients and warrants disciplinary action [*Harris v. State Bar (1990) 51 Cal. 3d 1082, 1088, 275 Cal. Rptr. 428, 800 P.2d 906* ; *Slavkin v. State Bar (1989) 49 Cal. 3d 894, 898, 264 Cal. Rptr. 131, 782 P.2d 270* ; *Smith v. State Bar (1985) 38 Cal. 3d 525, 539, 213 Cal. Rptr. 236, 698 P.2d 139* ; *see Bus. & Prof. Code §§ 6067, 6103*]. Moreover, an attorney's habitual disregard of his or her clients' interests combined with failure to communicate with those clients constitutes disciplinable acts of moral turpitude [*McMorris v. State Bar (1983) 35 Cal. 3d 77, 85 , cert. denied 466 U.S. 958 (1984)*]. Even when such inaction is grossly negligent or careless rather than willful or dishonest, the inaction constitutes moral turpitude and professional misconduct [*Selznick v. State Bar (1976) 16 Cal. 3d 704, 709, 129 Cal. Rptr. 108, 547 P.2d 1388]* .

Delay, as well as complete inaction, is improper. An attorney's delay of five years in completing the probate of a relatively simple estate was a breach of his duty to his client and to the other parties interested in the estate, and unnecessarily burdened the court system, warranting public reproval [*see Samuelsen v. State Bar (1979) 23 Cal. 3d 558, 563, 152 Cal. Rptr. 918, 591 P.2d 15]* . In another case, an attorney's disregard of his clients' interests in seven

matters and his failure to pursue legal actions in these matters for which he had been retained was held to constitute habitual disregard of his clients' interests warranting disbarment [*see Schullman v. State Bar (1976) 16 Cal. 3d 631, 635, 128 Cal. Rptr. 671, 547 P.2d 447]* .

If an attorney breaches the duty owed to the client, the attorney can be civilly liable for breach, either in tort or breach of contract [*Lysick v. Walcom (1968) 258 Cal. App. 2d 136, 147, 65 Cal. Rptr. 406]* . For detailed discussion and forms relating to civil liablity, see Ch. 76, *Attorney Professional Liability* .

[3] Aspects of Duty of Diligence

[a] Possess Knowledge of Law

An attorney is expected to possess a knowledge of those plain and elementary principles of law that are commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may be readily found by standard research techniques [*Smith v. Lewis (1975) 13 Cal. 3d 349, 358, 530 P.2d 589* , disapproved on other grounds in *In re Marriage of Brown (1976) 15 Cal. 3d 838, 851 n.14, 126 Cal. Rptr. 633, 544 P.2d 561* ; *see Aloy v. Mash (1985) 38 Cal. 3d 413, 419, 212 Cal. Rptr. 162, 696 P.2d 656* (act of malpractice to base legal decision on incomplete reading of single case); *see also Beverly Union Co. v. Superior Court (1988) 206 Cal. App. 3d 40, 43, 253 Cal. Rptr. 359* (professional responsibility to be aware of local trial delay reduction rules); *Brekhus & Williams v. Parker-Rhodes (1988) 198 Cal. App. 3d 788, 791, 244 Cal. Rptr. 48* (duty to be knowledgeable about local court rules)].

[b] Undertake Diligent Research of Law and Facts

If the law in a particular area is unsettled, an attorney has an obligation to his or her client to undertake reasonable research in an effort to ascertain the relevant legal principles and to make an informed decision as to a course of conduct based on an intelligent assessment of the problem [*Smith v. Lewis (1975) 13 Cal. 3d 349, 359, 118 Cal. Rptr. 621, 530 P.2d 589* , *disapproved on other grounds in In re Marriage of Brown (1976) 15 Cal. 3d 838, 851 n.14, 126 Cal. Rptr. 633, 544 P.2d 561*); *see also Stanley v. Richmond (1995) 35 Cal. App. 4th 1070, 1084-1085, 41 Cal. Rptr. 2d 768]* . If the law is unsettled but the attorney researches the area of the law and makes an informed judgment based on this research, the attorney is not negligent if subsequently the matter is settled contrary to the conclusion reached by the attorney [*Davis v. Damrell (1981) 119 Cal. App. 3d 883, 888-889, 174 Cal. Rptr. 257]* . An attorney is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed attorneys [*Kirsch v. Duryea (1978) 21 Cal. 3d 303, 308, 146 Cal. Rptr. 218, 578 P.2d 935]* .

Although an attorney may often rely on statements made by his or her client without further investigation, an attorney may be obliged to conduct a further investigation when circumstances known to the attorney indicate that further investigation is needed [*Butler v. State Bar (1986) 42 Cal. 3d 323, 329, 228 Cal. Rptr. 499, 721 P.2d 585]* .

[c] Make Referral to Specialist When Appropriate

An attorney in general practice has a duty to refer his or her client to a specialist or to recommend the assistance of a specialist if, under the circumstances, a reasonably careful and prudent practitioner would do so [*Horne v. Peckham (1979) 97 Cal. App. 3d 404, 414-415, 158 Cal. Rptr. 714]* . The attorney generally must inform the client of the outside attorney's involvement [State Bar Formal Opinion No. 1994-138].

PRACTICE TIP:

Emergency Assistance. In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required when referral to or consultation with another lawyer would be impracticable [*Cal. Rules Prof. Conduct, Rule 3-110*, Discussion]. But assistance should be limited to that reasonably necessary in the circumstances. Attorneys should be careful not to

rely too heavily on this apparent emergency exception to Rule 3-110.

[d] Only Undertake Representation if Adequate Time Available

An attorney has an obligation not to undertake legal representation in a matter unless the attorney has adequate time to pursue the matter with reasonable diligence. When an attorney takes on more cases than he or she can handle, the attorney jeopardizes both the client's cause and the public interest in sound and efficient administration of justice [*Lopez v. Larson (1979) 91 Cal. App. 3d 383, 400, 153 Cal. Rptr. 912* (failure to serve sole defendant for 28 months or to take any action to prosecute case to trial until defendant moved to dismiss, 30 months after suit filed)]. If an attorney lacks the time and resources to pursue a client's case with reasonable diligence, the attorney is obliged to decline representation, regardless of whether the attorney is paid or performs services pro bono [*Segal v. State Bar (1988) 44 Cal. 3d 1077, 1084, 245 Cal. Rptr. 404, 751 P.2d 463]* .

PRACTICE TIP:

Advice as to Time Constraints. Because an attorney's standard of care requires, among other things, that he or she fully inform a client concerning the likelihood of success, it is fundamental that an attorney advise the client concerning problems created by deadlines imposed by the client or by law. The time limits might compel the lawyer to retain co-counsel, refer the matter to an attorney more knowledgeable in the field, or refer the matter to another law firm better able to staff the project. In an extreme situation, when the attorney thinks it is unlikely that any law firm could competently handle the matter within the time permitted, the lawyer should explain the difficulty to the client and refuse to handle the project (especially in a business transaction in which the client is not obliged to involve him- or herself). *By Robert L. Kehr.*

[e] Zealously Prepare Defense on Behalf of Insurer and Insured

An insurance defense counsel owes a duty of zealous representation to both the insurer and the insured under the policy [*see* *Houston Gen. Ins. Co. v. Superior Court (1980) 108 Cal. App. 3d 958, 964, 166 Cal. Rptr. 904]* . The obligation of an attorney selected by an insurance company to the insured is the same obligation of good faith that is owed by an attorney who is personally retained by the client [*American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 590, 113 Cal. Rptr. 561]* .

An attorney hired by an insurance company to defend an insured is ethically bound to explain to the insurer and the insured the full implications of joint representation in a situation in which the insurer has reserved its right to deny coverage [*McGee v. Superior Court (1985) 176 Cal. App. 3d 221, 227, 221 Cal. Rptr. 421* (superseded on issue of insurer's duty to provide independent counsel by *Civ. Code § 2860*); *San Diego Federal Credit Union v. Cumis Ins. Society, Inc. (1984) 162 Cal. App. 3d 358, 375, 208 Cal. Rptr. 494* (superseded on issue of insurer's duty to provide independent counsel by *Civ. Code § 2860*); *see also Civ. Code § 2860(a), (b)*]. If the insured does not give an informed consent to the joint representation, the attorney must cease to represent both parties and the insurer must pay for the reasonable cost of hiring independent counsel for the insured [*see Civ. Code § 2860(a)*].

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[Reserved]

§§ 72.273[Reserved]

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§ 72.290 Acceptance of Employment With Improper Objective

An attorney must counsel or maintain such actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a crime [*Bus. & Prof. Code § 6068(c)*]. He or she may not encourage either the commencement or continuance of an action or proceeding from any corrupt motive of passion or interest [*Bus. & Prof. Code § 6068(g)*]. *Cal. Rules Prof. Conduct, Rule 3-200* prohibits an attorney from seeking, accepting, or continuing employment if the attorney knows or should know that the objective of the employment is either of the following:

- To bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person [*Cal. Rules Prof. Conduct, Rule 3-200(A)*].

- To present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of such existing law [*Cal. Rules Prof. Conduct, Rule 3-200(B)*].

ILLUSTRATION:

Improper Means of Redress. Court Reporter sends Attorney A a $94.05 bill for services rendered. Attorney A disputes the amount as being excessive. Court Reporter files a small claims action to recover her fee, plus costs and interest. Attorney A's associate, Attorney B, agrees to represent Attorney A in the matter. Attorney B fails to return any of Court Reporter's phone calls and letters for six months and does not answer the small claims complaint. On the day before the small claims trial, Attorney B files an action against Court Reporter for fraud and deceit, seeking damages according to proof, as well as $14,000 in punitive damages. At the small claims trial, Court Reporter obtains a judgment of $123.94, including costs and interest. As Court Reporter leaves the court room, Attorney B serves her with the complaint. Attorney A fails to appear for a deposition noticed by opposing counsel and Attorney B fails to return opposing counsel's calls. The fraud action is eventually dismissed on Court Reporter's

> unopposed motion for summary judgment, after Court Reporter incurs over $4,000 in legal fees. Has Attorney B violated *Cal. Rules Prof. Conduct, Rule 3-200*? Yes. Attorney B was motivated in large measure by spite and vindictiveness, and he acted on these base impulses by selecting the most oppressive and financially taxing means of redress, out of all proportion to the minor sum and rather innocuous incident in controversy. A reasonable attorney would not have acted like B; the case was a simple and minor billing dispute, clearly not a case of fraud [*see Sorensen v. State Bar (1991) 52 Cal. 3d 1036, 1042-1043, 277 Cal. Rptr. 858, 804 P.2d 44* (decided under Cal. Rules Prof. Conduct, former Rule 2-110); *see also § 72.296[3]*].

If an attorney is asked to pursue an unwarranted or frivolous claim, he or she should refuse to do so and if necessary withdraw from employment [*see § 72.370* et seq.]. If an attorney decides not to undertake representation of a client after meeting with the client and conducting a preliminary investigation of the case, the attorney is advised to confirm this decision by a letter to the client, although the attorney is not required to do so [*see Chefsky v. State Bar (1984) 36 Cal. 3d 116, 130, 202 Cal. Rptr. 349, 680 P.2d 82* (absence of letter, in itself, did not support conclusion that client did not receive notice of attorney's withdrawal from employment)].

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§ 72.291 Withdrawal From Meritless Case

[1] Not Warranted Under Existing Law

An attorney may not present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law [*Cal. Rules Prof. Conduct, Rule 3-200(B)*; *see Bus. & Prof. Code § 6068(c), (g)*]. When an attorney loses faith in the justness of the cause, the attorney should either retire from the case or dismiss the action [*Kirsch v. Duryea (1978) 21 Cal. 3d 303, 309-310, 146 Cal. Rptr. 218, 578 P.2d 935]* .

ILLUSTRATION:

Withdrawal From Medical Mapractice Action. An attorney files a medical malpractice action for his client. He subsequently concludes that the action is not justified because of insufficient evidence of malpractice. He notifies the client by letter of his intention to withdraw from the case and advises the client to obtain other counsel if the client wishes to pursue the case. Has the attorney acted properly? Yes. Confronted with a choice between his duty to advance his client's cause by continuing to prosecute the action and his duty to the fair administration of justice to refuse to maintain actions he believed to lack merit, the attorney has acted properly in this matter [*see Kirsch v. Duryea (1978) 21 Cal. 3d 303, 306-309, 146 Cal. Rptr. 218, 578 P.2d 935]* .

[2] "Reasonableness" Standard for Evaluating Merits of Claim

The determination of whether or not a claim is warranted is subject to a standard of reasonableness. If an attorney does not prosecute a claim that a reasonable attorney would regard as untenable or does not unreasonably neglect to investigate the facts and the law before determining to proceed, the client's adversary will have no right to assert a claim of malicious prosecution against the attorney if the client does not prevail on the claim [*see Norton v. Hines (1975) 49 Cal. App. 3d 917, 924, 123 Cal. Rptr. 237]* .

An attorney may urge any permissible construction of the law that is favorable to the client, without regard to the

attorney's professional opinion as to the likelihood that the construction will ultimately prevail, provided the claim is not frivolous [*see* Model Code of Professional Responsibility EC 7-4]. If the issue that the attorney is called on to decide is fairly debatable, the attorney has an obligation to present and urge the client's claim, and the attorney will not be liable for malicious prosecution if it is subsequently determined that the position honestly taken by the attorney was erroneous [*Kirsch v. Duryea (1978) 21 Cal. 3d 303, 309, 146 Cal. Rptr. 218, 578 P.2d 935* ; *Silver v. Shemanski (1949) 89 Cal. App. 2d 520, 546, 201 P.2d 418* ; *see* Model Rules of Professional Conduct, Rule 3.1 cmt. (1983) (filing action not frivolous merely because attorney has not first fully substantiated facts or expects to develop vital evidence only by discovery, even if attorney believes client ultimately will not prevail)].

For detailed discussion relating to malicious prosecution, see Ch. 357, *Malicious Prosecution and Abuse of Process* .

[3] Frivolous Appeal

An appeal is frivolous if it is prosecuted for an improper motive, such as to harass the respondent or to delay the effect of an adverse judgment, or when it indisputably has no merit, such that any reasonable attorney would agree that the appeal is totally and completely without merit [*see, e.g.,* *In re Marriage of Flaherty (1982) 31 Cal. 3d 637, 650, 183 Cal. Rptr. 508, 646 P.2d 179* ; *Caro v. Smith (1997) 59 Cal. App. 4th 725, 69 Cal. Rptr. 2d 306* ; *Summers v. City of Cathedral City (1990) 225 Cal. App. 3d 1047, 1075, 275 Cal. Rptr. 594* ; *see also Taylor v. Sentry Life Ins. Co. (9th Cir 1984) 729 F.2d 652, 656* (appeal is frivolous in Ninth Circuit if result is obvious or appellant's arguments of error are totally without merit); *see also Bus. & Prof. Code § 6068(c), (g)* (duties of attorney); *Code Civ. Proc. § 907* (damages for frivolous or dilatory appeal)]. For further discussion of frivolous appeals, see Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* .

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§ 72.292 Acceptance of Employment Compensated by Proceeds From Unlawful Activities

An attorney may be subject to criminal penalties for accepting employment compensated from an illegal source. *18 U.S.C. § 1957* makes it a criminal offense for a person, under specified circumstances, to knowingly engage in or attempt to engage in monetary transactions in property constituting, or derived from, proceeds obtained from a criminal offense [*18 U.S.C. § 1957(a), (d)*]. Section 1957 apparently would enable the federal government to prosecute defense attorneys who knowingly accept tainted money from their clients.

Section 1957 applies only when the criminally derived property is worth more than $10,000 and is derived from one of the "specified unlawful activities" listed in *18 U.S.C. § 1956(c)(7)* [*18 U.S.C. § 1957(a), (d), (f)(3)*]. Listed activities include racketeering, bribery, smuggling, and various drug offenses [*see 18 U.S.C. § 1956(c)(7)*]. In a prosecution under 18 U.S.C. *§ 1957, the Government* is not required to prove that the defendant knew that the offense from which the criminally derived property was derived was "specified unlawful activity" [*18 U.S.C. § 1957(c)*]. Penalties for violation of Section 1957 may include up to 10 years' imprisonment and/or a fine [*18 U.S.C. § 1957(b)*].

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§ 72.293 Advising Violation of Law

[1] Scope of Prohibition

An attorney may not advise the violation of any law, rule, or court ruling, unless the attorney believes in good faith that the law, rule, or court ruling is invalid. An attorney may take appropriate steps in good faith to test the validity of any law, rule, or court ruling [*Cal. Rules Prof. Conduct, Rule 3-210*; *see Wolfrich Corp. v. United Services Automobile Assn. (1983) 149 Cal. App. 3d 1206, 1211, 197 Cal. Rptr. 446* , disapproved on other grounds in *Doctors' Co. v. Superior Court (1989) 49 Cal. 3d 39, 42, 260 Cal. Rptr. 183, 775 P.2d 508* (attorneys have high obligation to represent and protect their clients' interests zealously, and to that end may properly challenge the validity of any law or decision); *see also* Model Code of Professional Responsibility DR 7-102(A)(7) (1980)].

In its "good faith" exception, *Cal. Rules Prof. Conduct, Rule 3-210*, demonstrates the tension that exists in the law as attorneys attempt to test established boundaries in order to achieve social and legal growth. As articulated in one appellate opinion, "[t]he law... is not immutable. It remains in flux to allow constructive change through the effort of diligent and conscientious lawyers. It is through legal imagination and ingenuity in pleading that evolution of the law occurs" [*Umansky v. Urquhart (1978) 84 Cal. App. 3d 368, 372, 148 Cal. Rptr. 547]* .

Cal. Rules Prof. Conduct, Rule 3-210, is intended to apply not only to the prospective conduct of a client, but also to the interaction between the attorney and client [*Cal. Rules Prof. Conduct, Rule 3-210*, Discussion]. For example, it applies to the handling of physical evidence of a crime in the possession of the client and offered to the attorney [*Cal. Rules Prof. Conduct, Rule 3-210*, Discussion; *see also* State Bar Formal Opinion Nos. 1984-76, 1986-89; LACBA Formal Opinion No. 477 (1993)]. Rule 3-210 also is intended to apply to the specific legal service sought by the client from the attorney [*Cal. Rules Prof. Conduct, Rule 3-210*, Discussion]. For example, the rule applies to a request that the attorney negotiate the return of stolen property in exchange for the owner's agreement not to report the theft to the police or prosecutorial authorities [*Cal. Rules Prof. Conduct, Rule 3-210*, Discussion; *see People v. Pic'l (1982) 31 Cal. 3d 731, 737-745, 183 Cal. Rptr. 685, 646 P.2d 847]* .

[2] Discipline or Contempt Citation

An attorney is subject to discipline for advising a client to violate a lawful order of the court [*see Snyder v. State Bar (1976) 18 Cal. 3d 286, 288-289, 293, 133 Cal. Rptr. 864* (advising clients not to appear for their depositions, notwithstanding court order requiring appearance, in addition to numerous other acts of misconduct warranted disbarment)]. For example, the State Bar imposed discipline on an attorney who advised his client and other witnesses not to appear and testify in a State Bar proceeding against him after the client and witnesses had been served with subpoenas directing them to appear [*see Waterman v. State Bar (1936) 8 Cal. 2d 17, 19, 63 P.2d 1133* (six months' suspension ordered)].

An attorney who advises his or her client to violate a lawful order of the court may also be held in contempt [*Hawk v. Superior Court (1974) 42 Cal. App. 3d 108, 117, 116 Cal. Rptr. 713]* . In *Hawk*, an attorney was held in contempt for instructing his client not to provide handwriting samples ordered by the court [*see Hawk v. Superior Court (1974) 42 Cal. App. 3d 108, 117, 116 Cal. Rptr. 713]* .

Other examples of discipline for wrongfully advising violations of law include the following:

- Advising a client to make a conveyance of real property for the purpose of defrauding one of the client's creditors warranted a three-year suspension [*see Townsend v. State Bar (1948) 32 Cal. 2d 592, 598, 197 P.2d 326* ; *see also Bus. & Prof. Code § 6068(d)*].

- In two annulment actions, instructing clients not to disclose to the court the existence of the clients' children, and in another action, telling a client to forge his wife's name to a document, warranted a two-year suspension [*see Paonessa v. State Bar (1954) 43 Cal. 2d 222, 225-227, 272 P.2d 510]* .

[3] Penalties for Advising Perjury

Advising a client to commit perjury is a serious ethical violation. An attorney who advises a client to commit perjury is subject to discipline and criminal prosecution under an array of ethical rules and statutes, including the following:

- *Cal. Rules Prof. Conduct, Rule 3-210*, which prohibits an attorney from advising the client to violate the law [*see In re Jones (1929) 208 Cal. 240, 241-243, 280 P. 964* (attorney merited one-year suspension for advising his clients in criminal case to commit perjury)].

- *Cal. Rules Prof. Conduct, Rule 5-200*, which prohibits an attorney from presenting false statements to the court.

- *Bus. & Prof. Code § 6068(d)*, which requires an attorney to employ only such means as are consistent with the truth and never to seek to mislead the court by making false statements [*see Bus. & Prof. Code § 6103* (violation of attorney's duties as cause for disbarment or suspension)].

- *Bus. & Prof. Code § 6128*, which states that an attorney is guilty of a misdemeanor if the attorney is guilty of any deceit or collusion, or consents to any deceit or collusion, with the intent to deceive the court or any party.

- *Penal Code § 127*, which authorizes an attorney who advises a client to testify falsely to be prosecuted either for subornation or solicitation of perjury if the client, in fact, testifies falsely [*In re Branch (1969) 70 Cal. 2d 200, 210-211, 74 Cal. Rptr. 238, 449 P.2d 174* (attorney who attempts to benefit client through use of perjured testimony may be subject to criminal prosecution as well as severe disciplinary action)].

- *Penal Code § 653f(a)*, which permits an attorney who advises a client to testify falsely to be prosecuted for solicitation of perjury if the client does not, in fact, testify falsely.

An attorney has no duty to cooperate with a client in presenting perjured testimony [*see Nix v. Whiteside (1986) 475 U.S. 157, 168-171, 106 S. Ct. 988, 89 L. Ed. 2d 123* (criminal defendant not deprived of *U.S. Const., amend. VI* right to effective assistance of counsel when counsel refused to cooperate in presenting perjured testimony); *see also § 72.304[2]* (attorney's ethical responsibilities when client insists on testifying falsely or attorney discovers client has done so)].

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§ 72.294 Debt Collection

An attorney who regularly tries to collect through litigation "consumer" debts, i.e., those arising out of transactions primarily for personal, family, or household purposes, is subject to the federal Fair Debt Collection Practices Act (FDCPA), *15 U.S.C. §§ 1692-1692o*, which prohibits debt collectors from making false or misleading representations and engaging in specified abusive and unfair practices, and subjects to violators to civil liability to those they, for example, harass, mislead, or treat unfairly [Heintz v. Jenkins (1995) 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395] . California's Rosenthal Fair Debt Collection Practices Act, *Civ. Code § 1788 et seq.*, expressly exempts attorneys from compliance with its provisions [*Civ. Code § 1788.2(c)*]. However, the FDCPA expressly supersedes state laws affording less protection to consumers [*15 U.S.C. § 1692(n)*].

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§ 72.295 Malfeasance of Government Attorneys

Attorneys in government service are subject to the same rules of professional conduct as are private attorneys [*see* People ex rel. Younger v. Superior Court (1978) 86 Cal. App. 3d 180, 192, 150 Cal. Rptr. 156 (district attorneys and deputies subject to Rules of Professional Conduct); *Ward v. Superior Court (1977) 70 Cal. App. 3d 23, 30* (county counsel subject to Rules of Professional Conduct); *Chaleff v. Superior Court (1977) 69 Cal. App. 3d 721, 724* (public defenders and deputies subject to Rules of Professional Conduct)].

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§ 72.296 Misuse of Legal Process

[1] Threatening Prosecution

A State Bar member may not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute [*Cal. Rules Prof. Conduct, Rule 5-100(A)*; *see Flatley v. Mauro (2006) 39 Cal. 4th 299, 327-332, 46 Cal. Rptr. 3d 606* (attorney's threats to publicly accuse entertainer of rape and other unspecified violations unless he settled violated rule); *Cohen v. Brown (2009) 173 Cal. App. 4th 302, 317-318, 93 Cal. Rptr. 3d 24* (improper to file state bar complaint in order to coerce attorney to sign contract)]. The threat need not be expressly stated [*see Crane v. State Bar (1981) 30 Cal. 3d 117, 121, 123, 177 Cal. Rptr. 670* (decided under Cal. Rules Prof. Conduct, former Rule 7-104; threatening letter interpreted "in context")]. Nor may an attorney threaten to have his or her client present criminal, administrative or disciplinary charges to obtain an advantage in a civil dispute [LACBA Formal Opinion No. 469 (1993)]. Reporting a bar disciplinary matter to the State Bar knowing that the report or complaint is false or malicious is a misdemeanor [*Bus. & Prof. Code § 6043.5(a)*].

Rule 5-100 does not prohibit an attorney from presenting criminal, administrative, or disciplinary charges with respect to matters arising out of the same transaction as a civil dispute. Such action may be appropriate where the attorney has a good faith basis for presenting the charges. An attorney then may reveal to the proper authority all unprivileged knowledge which the attorney in good faith believes to be a violation of the applicable criminal, adminstrative, or disciplinary standards [LACBA Formal Opinion No. 469 (1993)].

For purposes of Rule 5-100, the term "administrative charges" means the filing or lodging of a complaint with a federal, state, or local governmental entity that may order or recommend the loss or suspension of a license, or may impose or recommend the imposition of a fine, pecuniary sanction, or other sanction of a quasi-criminal nature [*Cal. Rules Prof. Conduct, Rule 5-100(B)*]. The term does not include filing charges with an administrative entity required by law as a condition precedent to maintaining a civil action [*Cal. Rules Prof. Conduct, Rule 5-100(B)*]. The term "civil dispute" means a controversy or potential controversy over the rights and duties of two or more parties under civil law, whether or not an action has been commenced, and includes an administrative proceeding of a quasi-civil nature pending before

a federal, state, or local government entity [*Cal. Rules Prof. Conduct, Rule 5-100(C)*].

[2] Examples of Threatening Prosecution

Prior to the 1989 amendment and renumbering of the California Rules of Professional Conduct, former Rule 7-104, the predecessor of Rule 5-100, contained a prohibition on threats similar to that found in the present rule [*compare Cal. Rules Prof. Conduct, Rule 5-100(A) with* Cal. Rules Prof. Conduct, former Rule 7-104; *see also* SFCBA Formal Opinion No. 1975-6 (prosecutor may not threaten criminal prosecution to obtain acceptance of final judgment in civil suit)]. The following types of actions were found to violate former Rule 7-104:

- Sending a letter to opposing parties stating that if the attorney did not receive a beneficiary statement from a party within five days, he would request the Department of Savings and Loan and the Attorney General's office to assist him in resolving the matter, noting on the letter that copies were being sent to a named commissioner of the Department of Savings and Loan and to a named deputy attorney general [*Crane v. State Bar (1981) 30 Cal. 3d 117, 121-123, 177 Cal. Rptr. 670, 635 P.2d 163]* .

- Sending a letter to an opposing party, in an attempt to collect a bad check that the party had given to the attorneys' client, stating that issuing a check with insufficient funds to cover it is a misdemeanor and that the attorneys planned to exercise their rights to file a criminal complaint against the party [*Kinnamon v. Staitman & Snyder (1977) 66 Cal. App. 3d 893, 895-896, 136 Cal. Rptr. 321* (attorneys' conduct was of such an extreme nature as to be outrageous; plaintiff could state cause of action against attorneys for intentional infliction of emotional distress), disapproved on other grounds in *Silberg v. Anderson (1990) 50 Cal. 3d 205, 212-213, 266 Cal. Rptr. 638, 786 P.2d 365]* .

- Sending a letter to a company hired by an opposing party to manage an apartment complex in which the attorney demanded that the company resign, and stated that failure to comply with this demand would result in a request for criminal charges against the company for embezzlement and other appropriate offenses [*Standing Committee. on Discipllline etc. v. Ross (9th Cir 1984) 735 F.2d 1168, 1171-1172]* .

- Telling the mother of a child to be adopted that her demand for an additional $3,000 was an attempt at extortion for which she could be prosecuted [*Arden v. State Bar (1959) 52 Cal. 2d 310, 320-321, 341 P.2d 6* (attorney was threatening mother with prosecution unless she desisted from her threat to interfere with and overturn the pending adoption)].

A statement that "all available legal remedies will be pursued" unless satisfactory settlement is promptly forthcoming is not, in itself, ethically improper [State Bar Formal Opinion No. 1991-124].

PRACTICE TIP:

Client Threatening Prosecution. If a client wishes to threaten to present charges (or actually files charges solely to obtain an advantage in a civil action), unless the course of action would constitute a crime or expose the client to civil liability, the attorney may advise the client that he or she is free to do so, but that the attorney may not assist the client. The attorney should not give the client any support or advice in the matter [State Bar Formal Opinion No. 1983-73; *see also* LACBA Formal Opinion No. 469 (1993)].

[3] Commencement of Action for Improper Purpose

An attorney may not encourage the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest [*Bus. & Prof. Code § 6068(g)*]. An attorney also may not bring a legal action without

probable cause [*Cal. Rules Prof. Conduct, Rule 3-200(A)*].

An attorney violated the predecessor of *Cal. Rules Prof. Conduct, Rule 3-200*, former Rule 2-110, in two cases by filing an involuntary bankruptcy petition against the opposing parties, falsely alleging that his clients were creditors of the opposing parties, solely for the purpose of harassing the opposing parties and in an attempt to delay the proceedings against his clients by obtaining a stay of proceedings in the trial court [*see Snyder v. State Bar (1976) 18 Cal. 3d 286, 288-290, 293, 133 Cal. Rptr. 864, 555 P.2d 1104* (conduct warranted disbarment)].

In another case, an attorney violated Rule 2-110 by filing duplicative lawsuits involving the same transactions and parties [*see Standing Committee on Discipline etc. v. Ross (9th Cir 1984) 735 F.2d 1168, 1171*]. The canons of professional ethics impose on every attorney an obligation not to clog the courts with frivolous actions; filing a single frivolous claim, after a warning, may be sufficient to trigger disciplinary proceedings [*Standing Committee on Discipline etc. v. Ross (9th Cir 1984) 735 F.2d 1168, 1171]* .

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7-72 California Forms of Pleading and Practice--Annotated § 72.297

§ 72.297 Communication With Adverse Party Represented by Counsel

[1] Basic Rule

An attorney, while representing a client, must not communicate directly or indirectly about the subject of the representation with a party the attorney knows to be represented by another lawyer in the matter, unless the attorney has the consent of the other lawyer [*Cal. Rules Prof. Conduct, Rule 2-100(A)*]. The purpose of this rule is to allow an attorney to function adequately in his or her proper role and to prevent another attorney from impeding his or her performance in this role. If a party's counsel is present when another attorney communicates with the party, the party's counsel can correct any error in the communication to the party [*Mitton v. State Bar (1969) 71 Cal. 2d 525, 534, 78 Cal. Rptr. 649, 455 P.2d 753* (decided under Cal. Rules Prof. Conduct, former Rule 12)]. The rule shields the other party not only from an attorney's approaches that are intentionally improper, but also from approaches that are well intentioned but misguided [*Mitton v. State Bar (1969) 71 Cal. 2d 525, 534, 78 Cal. Rptr. 649, 455 P.2d 753]* .

An attorney's violation of *Cal. Rules Prof. Conduct, Rule 2-100* can properly serve as the basis for that attorney's disqualification from an action only if the misconduct that is urged as a ground for disqualification will have a continuing effect on the judicial proceedings that are before the court [Bell v. 20th *Century Ins. Co. (1989) 212 Cal. App. 3d 194, 200, 260 Cal. Rptr. 459* (decided under Cal. Rules Prof. Conduct, former Rule 7-103)].

[2] Definition of Party

For purposes of *Cal. Rules Prof. Conduct, Rule 2-100*, a "party" includes a current officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership [*Cal. Rules Prof. Conduct, Rule 2-100(B)(1)*; *see* *Continental Insurance Co. v. Superior Court (1995) 32 Cal. App. 4th 94, 118-119, 37 Cal. Rptr. 2d 843* ; *Nalian Truck Lines, Inc. v. Nakano Warehouse & Transportation Corp. (1992) 6 Cal. App. 4th 1256, 1261-1264, 8 Cal. Rptr. 2d 467* ("party" does not include former employees); *see also* SFCBA Formal Opinion No. 1973-4 (ex parte contact of hospital employee and physicians practicing medicine at party hospital is permissible)]. The definition includes directors: it is improper for an opposing party's attorney to have unauthorized ex parte communications with a dissident director concerning the subject of the representation regardless of who initiates the communication [State Bar

Formal Opinion 1991-125]. The definition also includes an association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such a person that may be binding on or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization [*Cal. Rules Prof. Conduct, Rule 2-100(B)(2)*; *Truitt v. Superior Court (1997) 59 Cal. App. 4th 1183, 69 Cal. Rptr. 2d 558]* .

A "party represented by another lawyer" includes a party who has counsel of record, whether or not that counsel is in fact authorized to act for the party [*see People v. Sharp (1983) 150 Cal. App. 3d 13, 18, 197 Cal. Rptr. 436* (interpreting meaning of "party represented by counsel" under former Rule 7-103, the predecessor of *Cal. Rules Prof. Conduct, Rule 2-100*)]. Although a prosecutor may not communicate, ex parte and without defense counsel's permission, once formal proceedings have commenced, it is unclear whether there is a prohibition regarding unauthorized ex parte communications on the subject of the representation before the filing of criminal charges [*see United States v. Lopez (9th Cir. 1993) 989 F.2d 1032, 1036-1041* ; 91 Ops. Cal. Att'y Gen. 1205 (1992)]. Rule 2-100 is triggered by a court's conditional class certification [*Hernandez v. Vitamin Shoppe Industries Inc. (2009) 174 Cal. App. 4th 1441, 1459-1460, 95 Cal. Rptr. 3d 734*].

PRACTICE TIP:

Adverse Party Includes a Non-Litigant. The application of Rule 2-100 is not limited to the litigation context, so it is important not to be misled by the use of the word "party" in the text and title of the rule. It is helpful to think of the rule as applying to "persons" who are represented by counsel.

[3] Permissible Communications

[a] In General

Cal. Rules Prof. Conduct, Rule 2-100 states that three types of communications are not prohibited under the rule:

- Communications with a public officer, board, committee, or body [*Cal. Rules Prof. Conduct, Rule 2-100(C)(1)*]. For example, an attorney may discuss the subject of litigation against a city with a city council or city manager without consent of the city attorney [*see* State Bar Formal Opinion 1977-43].

- Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice [*Cal. Rules Prof. Conduct, Rule 2-100(C)(2)*]. This rule is intended to permit an attorney to communicate with an individual seeking to hire new counsel or to obtain a second opinion [*Cal. Rules Prof. Conduct, Rule 2-100,* Discussion].

- Communications otherwise authorized by law [*Cal. Rules Prof. Conduct, Rule 2-100(C)(3)*; *see also* 75 Ops. Cal. Att'y Gen. 223, 232 (1992) (for purposes of Rule 2-100, public prosecutor is "authorized by law" to communicate with person known to be represented by counsel during investigative phase of proceeding, concerning subject of representation, without consent of counsel)].

Rule 2-100 does not prohibit an attorney from communicating with employees of a law firm representing an opposing party without disclosing substantive information [*see Gregori v. Bank of America (1989) 207 Cal. App. 3d 291, 303, 254 Cal. Rptr. 853* (decided under Cal. Rules Prof. Conduct, former Rule 7-103)].

[b] Communications Between Parties Themselves

Cal. Rules Prof. Conduct, Rule 2-100, is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents an attorney from advising the client that the communication can be made as long as the attorney does not make the client his or her agent [*Cal. Rules Prof. Conduct, Rule 2-100,* Discussion; *see* SFCBA Informal Opinion No. 1985-1 (client may negotiate directly, ex parte,

with opposing represented party where client does not act as attorney's agent); *see also* State Bar Formal Opinion No. 1993-131 (permitting communication of parties in dissolution proceeding)].

Furthermore, Rule 2-100 does not prohibit an attorney who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party [*Cal. Rules Prof. Conduct, Rule 2-100,* Discussion]. The attorney has independent rights as a party that should not be abrogated because of his or her professional status [*Cal. Rules Prof. Conduct, Rule 2-100,* Discussion]. To prevent any possible abuse in these situations, the counsel for the opposing party may advise that party about the risks and benefits of communications with a lawyer-party, and not to accept or engage in communications with the lawyer-party [*Cal. Rules Prof. Conduct, Rule 2-100,* Discussion].

[c] Communications With Corporate Adversaries

With respect to corporate adversaries, the following activities have been held permissible under Rule 2-100:

- Communicating ex parte with former members of a corporate adversary's control group of officers and agents who were responsible for directing the corporation's actions in response to legal advice [*Nalian Truck Lines, Inc. v. Nakano Warehouse & Transportation Corp. (1992) 6 Cal. App. 4th 1256, 1261-1264, 8 Cal. Rptr. 2d 467]* .

- Initiating ex parte contacts with unrepresented former employees of the corporation, and present employees of the corporation (other than officers, directors, or managing agents) who are not separately represented, so long as the communication does not involve the employee's act or failure to act in connection with the matter that may bind the corporation, be imputed to it, or constitute an admission of the corporation for purposes of establishing liability [*Triple A Machine Shop, Inc. v. State of California (1989) 213 Cal. App. 3d 131, 140, 261 Cal. Rptr. 493* ; *see Bobele v. Superior Court (1988) 199 Cal. App. 3d 708, 713, 245 Cal. Rptr. 144* (decided under former Rule 7-103)].

- Communicating with an officer or Board of Directors provided that the communication is in writing with delivery made through the attorney representing the organization in the matter [LACBA Formal Opinion No. 472 (1993)].

- Communicating with an employee of a defendant corporation, who was allegedly represented by corporation's counsel, at the employee's request regarding the employee's allegations that corporate officers were attempting to suborn perjury and obstruct justice [*United States v. Talao (9th Cir. 2000) 222 F.3d 1133, 1140]* .

- Having an investigator interview unrepresented current corporate employees without consent of the corporation's counsel seven months before filing action against the corporation and one of the employees as routine prelitigation activities, where counsel did not know the interviewed employees were represented by another lawyer in the matter [*Jorgensen v. Taco Bell Corp. (1996) 50 Cal. App. 4th 1398, 58 Cal. Rptr. 2d 178]* .

- Having an investigator obtain a written statement from a current corporation employee without obtaining the consent of the defendant corporation's counsel, where plaintiff's attorney had filed a complaint but corporate counsel had not yet served defendant's answer, and where there was no evidence that plaintiff's attorney had actual knowledge that the corporate employer and employee were represented at the time of the interview in question [*Truitt v. Superior Court (1997) 59 Cal. App. 4th 1183, 1187-1188, 69 Cal. Rptr. 2d 558]* .

[4] Prohibited Communications

Former Rule 7-103, the predecessor to *Cal. Rules Prof. Conduct, Rule 2-100*, provided a prohibition on attorney communications with represented parties that was similar to that found in Rule 2-100. Attorneys were found to have violated former Rule 7-103 in the following circumstances:

- The attorney asked the father of a former client, now represented by other counsel, to contact him about resolution of a fee dispute between himself and another attorney arising out of his representation of the former client [*Shalant v. State Bar (1983) 33 Cal. 3d 485, 488-489, 189 Cal. Rptr. 374, 658 P.2d 737]* .

- The attorney sent two demand letters to opposing parties whom he knew were represented by counsel without notifying their counsel [*Crane v. State Bar (1981) 30 Cal. 3d 117, 121-122, 177 Cal. Rptr. 670, 635 P.2d 163]* .

- The attorney talked with the opposing party on several occasions after he knew she was represented by counsel, discussing a new trial motion with her and advising her to obtain new counsel to represent her in opposing the motion [*Mitton v. State Bar (1969) 71 Cal. 2d 525, 534, 78 Cal. Rptr. 649, 455 P.2d 753]* .

- The attorney, who had previously represented the defendants in a case, negotiated a settlement with the plaintiffs after a judgment was rendered in plaintiffs' favor when the plaintiffs were represented by counsel who opposed the settlement [*Turner v. State Bar (1950) 36 Cal. 2d 155, 158, 222 P.2d 857]* .

- The attorney interviewed a former president and current director of a corporation (which was the opposing party) without contacting the corporation's counsel [*Mills Land & Water Co. v. Golden West Refining Co. (1986) 186 Cal. App. 3d 116, 131, 230 Cal. Rptr. 461]* .

By violating the prohibition of Rule 2-100 on unauthorized ex parte communication with an adverse party represented by counsel, an attorney is not only subject to disciplinary proceedings by the State Bar, but in addition may be disqualified from continuing to represent the client in the matter. An attorney who had communicated with the opposing party was held to have been properly disqualified from acting as attorney of record in the action because he would have an unfair advantage if allowed to use the information he improperly obtained from the opposing party [*see Chronometrics, Inc. v. Sysgen, Inc. (1980) 110 Cal. App. 3d 597, 607-608, 168 Cal. Rptr. 196* (rejecting disqualification of attorney's entire firm); *see also Mills Land & Water Co. v. Golden West Refining Co. (1986) 186 Cal. App. 3d 116, 132-133, 230 Cal. Rptr. 461* (defendants' attorney properly disqualified for interview of corporate plaintiff's director in violation of former Rule 7-103, but trial court's disqualification of attorney's entire firm was abuse of discretion)].

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7-72 California Forms of Pleading and Practice--Annotated § 72.298

§ 72.298 Communication With Adverse Party Not Represented by Counsel

When an opposing party is not represented by counsel, the attorney is under a strict duty to deal fairly and objectively with the opposing party [*Gregory v. Gregory (1949) 92 Cal. App. 2d 343, 349, 206 P.2d 1122]* . When an attorney must deal directly with an opposing party not represented by counsel, he or she should not undertake to give advice to the opposing party, except to advise the opposing party to obtain a lawyer [*see* Model Code of Professional Responsibility EC 7-18 (1980); *see also* Model Code of Professional Responsibility DR 7-104(A)(2) (1980)]. An opposing attorney should not state or imply that he or she is disinterested. If the attorney knows or reasonably should know that the unrepresented party misunderstands the attorney's role in the matter, the attorney should make reasonable efforts to correct the misunderstanding [*see* Model Rules of Professional Conduct Rule 4.3 (1983)].

An attorney may communicate directly with an opposing party not represented by counsel of record, even if the unrepresented party seeks advice from counsel who is not of record [*McMillan v. Shadow Ridge at Oak Park Homeowner's Association (2008) 165 Cal. App. 4th 960, 965-968, 81 Cal. Rptr. 3d 550* (no violation of *Cal. Rules Prof. Conduct, Rule 2-100*)].

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§ 72.299 Trial Publicity

Effective October 1, 1995, *Cal. Rules Prof. Conduct, Rule 5-120* was added to the Rules of Professional Conduct. This rule, titled "Trial Publicity," prohibits an attorney who is participating or has participated in the investigation or litigation of a matter from making any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the attorney knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. There are several factual statements specified in the rule as being exceptions to the prohibited statements, such as:

- Information contained in a public record;
- The identity, residence and occupation of an accused defendant; and
- The scheduling or result of any step in litigation.

Following the language of the new rule is a "Discussion" section, which sets forth the intent and further meaning of new Rule 5-120. Since this is a very recent addition to the ethical responsibilities of lawyers, the new rule and discussion should be carefully reviewed and researched for recent case law and ethics opinions before relying on it [*Cal. Rules Prof. Conduct, Rule 5-120*].

The Supreme Court, addressing this new issue, has held that a prosecutor had not violated *Cal. Rules Prof. Conduct, Rule 5-120* when he spoke to a reporter regarding limited information [*People v. Marshall (1996) 13 Cal. 4th 799, 800, 55 Cal. Rptr. 2d 347, 919 P. 2d 1280]* .

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7-72 California Forms of Pleading and Practice--Annotated § 72.300

§ 72.300 Communication With or Investigation of Jurors

[1] Before or During Trial

Cal. Rules Prof. Conduct, Rule 5-320 prohibits an attorney connected with a case from:

- Communicating directly or indirectly before trial with anyone the attorney knows to be a member of the jury pool from which the jury will be selected for the trial of the case, except as a part of the official proceedings [*Cal. Rules Prof. Conduct, Rule 5-320(A), (H)*].

- Communicating directly or indirectly with any impaneled, discharged, or excused juror during trial except as a part of the official proceedings [*Cal. Rules Prof. Conduct, Rule 5-320(B), (H)*; State Bar Formal Opinion 1989-100; *see In re Possino (1984) 37 Cal. 3d 163, 170, 207 Cal. Rptr. 543, 689 P.2d 115* (attorney on trial for a drug offense approached juror outside of courtroom, and, although they did not discuss merits of the case, attorney did ask juror what she thought of the prosecutor and talked to her about himself, others involved in the trial, and the judge)].

- Conducting directly or indirectly an out-of-court investigation of an impaneled, discharged, or excused juror, or a member of the jury pool from which the jury will be selected, in a manner that is likely to influence the subject's state of mind in present or future jury service [*Cal. Rules Prof. Conduct, Rule 5-320(E), (I)*; *see also* State Bar Formal Opinion No. 1988-100]. These restrictions on attorney conduct also apply to communications with or investigations of the family of a juror or a member of the jury pool [*Cal. Rules Prof. Conduct, Rule 5-320(F)*].

In addition, an attorney communicating with a juror might be subject to criminal prosecution. It is a felony to corruptly attempt to influence a juror, or any person summoned as a juror, in respect of the juror's verdict or decision in any proceeding that is pending in or about to be brought before the juror, by means of any oral or written communication with the juror, except in the regular course of the proceedings [*Penal Code § 95*; *see In re Possino (1984) 37 Cal. 3d*

163, 170, 207 Cal. Rptr. 543, 689 P.2d 115] .

Permitted investigation of jurors should be conducted with circumspection and restraint [*see* Model Code of Professional Responsibility EC 7-30 (1980)]. During the course of a judicial proceeding, an attorney should avoid undue solicitude for the comfort or convenience of the jury and should avoid any other conduct calculated to gain special consideration [*see* Model Code of Professional Responsibility EC 7-36 (1980)]. An attorney must reveal promptly to the court any improper conduct by a member of the jury pool or by a juror, or by any person toward a member of the jury pool or a juror or a member of the juror's family, of which the attorney has knowledge [*Cal. Rules Prof. Conduct, Rule 5-320(G)*].

During trial, an attorney who is not connected with the case may not communicate directly or indirectly concerning the case with anyone the attorney knows is a juror in the case [*Cal. Rules Prof. Conduct, Rule 5-320(C)*].

[2] After Trial

After discharge of the jury, an attorney may not ask questions of or make comments to a juror that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service [*Cal. Rules Prof. Conduct, Rule 5-320(D)*]. This prohibition also applies to communications with or investigations of the family of a juror or a member of the jury pool [*Cal. Rules Prof. Conduct, Rule 5-320(F)*]. The prohibition remains fully applicable in the period from jury discharge to expiration of the time for filing new trial motions in the case in which the jurors served [*Lind v. Medevac, Inc. (1990) 219 Cal. App. 3d 516, 520-521, 268 Cal. Rptr. 359* ; In the Matter of Respondent A (1990) 1 Cal. State Bar Ct. Rptr. 255, 265 ; *see Code Civ. Proc. §§ 657(2), 658, 659*].

After the trial, an attorney may communicate with a juror to ascertain whether or not the verdict might be subject to legal challenge, so long as the attorney refrains from asking questions or making comments that tend to harass or embarrass the juror [*see* Model Code of Professional Responsibility EC 7-29 (1980); *see also Cal. Rules Prof. Conduct, Rule 5-320(D)* (prohibiting harassing or embarrassing questions and comments)].

An attorney may disclose excluded evidence to discharged jurors absent an intent to harass, embarrass, or influence future juror service [State Bar Formal Opinion No. 1987-95 *disapproving* State Bar Formal Opinion No. 1976-39].

If the attorney has won a jury trial, he or she may write jurors post verdict and thereby request notification of any posttrial contact with jurors by the adverse side [*Lind v. Medevac, Inc. (1990) 219 Cal. App. 3d 516, 522, 268 Cal. Rptr. 359* (dictum)]. The attorney may also request that he or she be present for any interviews granted by the adverse side or to discuss with the juror any telephonic or written communications received from the adverse side [*Lind v. Medevac, Inc. (1990) 219 Cal. App. 3d 516, 522, 268 Cal. Rptr. 359* (dictum)].

ILLUSTRATION:

Improper Communication With Jurors After Trial. Attorney mails a letter to jurors after trial warning that the other side might employ "sharp investigative tactics" to "impeach" the jury's verdict and have it set aside as "improper." The purpose of the letter was to prevent the losing side from communicating with the jurors in an effort to determine if juror misconduct had occurred. Does the letter violate the ethical rule restricting contact with jurors after trial? Yes. The Rules of Professional Conduct prohibit an attorney from making comments to a juror after discharge of the jury that are intended to influence the juror's actions in future jury service. In this case, the letter could easily influence jurors in their present or future jury service [*Lind v. Medevac, Inc. (1990) 219 Cal. App. 3d 516, 521-522, 268 Cal. Rptr. 359* (decided under Cal. Rules Prof. Conduct, former Rule 7-106)].

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§ 72.301 Communication With Media

An attorney is restricted from making potentially prejudicial statements to the media [*see Cal. Rules Prof. Conduct, Rule 5-120*]. While this rule was developed primarily to address perceived abuses in high-publicity criminal cases, it may apply in many civil proceedings as well.

An attorney who is participating or has participated in the investigation or litigation of a matter is prohibited from making any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication, if the attorney knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adudicative proceeding in the matter [*Cal. Rules Prof. Conduct, Rule 5-120(A)*]. This applies to statements made by on behalf of the attorney [*see Cal. Rules Prof. Conduct, Rule 5-120*, Discussion].

The attorney may, however, communicate the following information [*Cal. Rules Prof. Conduct, Rule 5-120(B)*]:

- The claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved.
- The information contained in a public record.
- That the investigation of a matter is in progress.
- The scheduling or result of any step in litigation.
- A request for assistance in obtaining evidence and information necessary thereto.
- A warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest. (This provision is not intended to alter, enlarge, or diminish any application of the lawyer-client privilege nor the

attorney's duty to maintain client confidences [*see Cal. Rules Prof. Conduct, Rule 5-120*, Discussion].)

- Additional specified matters in criminal cases.

The attorney may also make a statement that a reasonable attorney would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the attorney or his or her client. Any such statement must be limited to such information as is necessary to mitigate the recent adverse publicity [*Cal. Rules Prof. Conduct, Rule 5-120(C)*].

Whether an attorney violates this rule depends on many factors, including the timing of the statement, whether it violates any lawful "gag" or protective order, when it is knowingly false or deceptive, or when it presents clearly inadmissible matters as evidence to prove or disprove a material fact in issue [*see Cal. Rules Prof. Conduct, Rule 5-120*, Discussion].

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7-72 California Forms of Pleading and Practice--Annotated § 72.302

§ 72.302 Contacts With Witnesses

[1] Payment of Witnesses

[a] Limitations

Cal. Rules Prof. Conduct, Rule 5-310(B) prohibits an attorney from directly or indirectly paying, offering to pay, or acquiescing in the payment of compensation to a witness contingent on the content of the witness's testimony or the outcome of the case. However, the attorney may advance, guarantee, or acquiesce in the payment of:

- Expenses reasonably incurred by a witness in attending the proceeding or testifying [*Cal. Rules Prof. Conduct, Rule 5-310(B)(1)*; *see* Model Code of Professional Responsibility DR 7-109(C) (1980)].

- Reasonable compensation to a witness for the witness's loss of time in attending the proceeding or testifying [*Cal. Rules Prof. Conduct, Rule 5-310(B)(2)*; *see* Model Code of Professional Responsibility DR 7-109(C) (1980)].

- A reasonable fee to an expert witness for his or her professional services [*Cal. Rules Prof. Conduct, Rule 5-310(B)(3)*; *see Gov. Code § 68092.5* (expert witness has right to reasonable fees in addition to witness fees otherwise provided by law); *Bureau of Medical Economics v. Cossette (1974) 44 Cal. App. 3d Supp. 1, 9* ; *see also* Model Code of Professional Responsibility DR 7-109(C) (1980)].

An attorney may pay a nonexpert witness for time spent preparing for deposition or trial. The compensation must be reasonable in light of all the circumstances, and may not be contingent on the content of testimony or the outcome of the matter. Possibly objective bases on which to determine reasonable compensation might include the witness' rate of pay if currently employed or what the witness last earned if unemployed, or what others earn for comparable activity [State Bar Formal Opinion 1997-149].

Any person who gives, offers, or promises to give, to any witness a bribe on the understanding or agreement that the

witness's testimony is to be influenced by the bribe is guilty of a felony [*Penal Code § 137(a)*]. In a case in which an attorney offered a witness $500 not to testify against the attorney's client in a murder trial, the court held that the attorney merited disbarment following a conviction under *Penal Code § 137* [*see In re Hanley (1975) 13 Cal. 3d 448, 450, 119 Cal. Rptr. 5]* .

The payment of a larger sum than is reasonable to compensate the witness is judicially condemned because it may induce a witness to color testimony or present it in a light most favorable to the party paying the compensation [*Crutchfield v. Davidson Brick Co. (1942) 55 Cal. App. 2d 34, 37-38, 130 P.2d 183]* . Also, a witness may not be paid on a contingency basis [*Cal. Rules Prof. Conduct, Rule 5-310(B)*; *see Pelkey v. Hodge (1931) 112 Cal. App. 424, 425, 296 P. 908* (contingency fee agreement with expert witness is void as against public policy because it offers inducement to perjury)].

[b] Medical Malpractice Cases

In medical malpractice cases, attorneys occasionally contract with legal-medical consulting services to obtain expert assistance. Typically, payment to the service is contingent on the outcome of the plaintiff's case. When a consulting service hires expert witnesses to testify on the client's behalf, the arrangement does not violate Rule 5-310, so long as the expert witnesses hired by the service are themselves compensated on a noncontingency basis [*see Ojeda v. Sharp Cabrillo Hospital (1992) 8 Cal. App. 4th 1, 15, 10 Cal. Rptr. 2d 230* (flat rate hourly compensation to expert witnesses is permissible); *see also Medical Legal Consulting Services, Inc. v. Covarrubias (1991) 234 Cal. App. 3d 80, 92, 285 Cal. Rptr. 559* (no California public policy bars enforcement of Maryland sister-state judgment based on legal-medical consulting services contract)].

[2] Secretion of Witnesses

Cal. Rules Prof. Conduct, Rule 5-310(A) prohibits an attorney from advising or directly or indirectly causing a person to secrete himself or herself or to leave the jurisdiction of a court for the purpose of making the person unavailable as a witness in the court. An attorney who advised his client and other witnesses not to appear and testify in a proceeding against the attorney by the State Bar after the client and witnesses had been served with subpoenas directing them to appear was found to have clearly violated former Rule 7-107(B), the predecessor to Rule 5-320 [*see Waterman v. State Bar (1936) 8 Cal. 2d 17, 19, 63 P.2d 1133* ; *see also Bus. & Prof. Code § 6068(d)*].

An attorney who advises a client or witness not to testify could also be guilty of a misdemeanor and held in contempt. Any person who knowingly and maliciously prevents or dissuades, or attempts to prevent or dissuade, a witness from attending or testifying at trial or any other legal proceeding is guilty of a misdemeanor [*Penal Code § 136.1(a)*; *see In re Holmes (1983) 145 Cal. App. 3d 934, 942, 193 Cal. Rptr. 790* (assisting witness to avoid service of subpoena violates *Penal Code § 136.1*)]. Such acts constitute a felony if they are accompanied by force or a threat of force, are in furtherance of a conspiracy, or are committed for pecuniary gain [*see Penal Code § 136.1(c)*]. The offending attorney may also be guilty of contempt under *Code Civ. Proc. § 1209(a)(8)* [*In re Holmes (1983) 145 Cal. App. 3d 934, 936, 193 Cal. Rptr. 790]* .

[3] Suppression of Evidence

Bus. & Prof. Code § 6068(d) requires an attorney to use only such means as are consistent with truth in maintaining the causes confided to him or her and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

Cal. Rules Prof. Conduct, Rule 5-220 prohibits an attorney from suppressing any evidence that the attorney or the client is legally obligated to reveal or produce. An attorney clearly violates Rule 5-220 by altering evidence or documents submitted to the court [*see Price v. State Bar (1982) 30 Cal. 3d 537, 543, 179 Cal. Rptr. 914, 638 P.2d 1311*

(prosecutor altered evidence in criminal trial to conform to witness's testimony, giving copy of altered document to defense counsel and destroying original copy of document); *Snyder v. State Bar (1976) 18 Cal. 3d 286, 290, 133 Cal. Rptr. 864, 555 P.2d 1104* (attorney transformed an assignment of contract form into confession of judgment and offered it to the court to obtain judgment)].

The attorney-client privilege does not bar revelation of the original location or condition of evidence if the attorney removes or alters the evidence [*People v. Meredith (1981) 29 Cal. 3d 682, 695, 175 Cal. Rptr. 612, 631 P.2d 46* ; *see also* State Bar Formal Opinion No. 1986-89; LACBA Formal Opinion No. 466 (1993)]. Furthermore, anyone who knowingly and willfully destroys or conceals any evidence about to be produced in evidence in any trial, inquiry, or investigation authorized by law is guilty of a misdemeanor [*Penal Code § 135*].

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7-72 California Forms of Pleading and Practice--Annotated § 72.303

§ 72.303 Contacts With Judges or Court Officials

[1] Prohibited Communications

Cal. Rules Prof. Conduct, Rule 5-300(B) prohibits a State Bar member from directly or indirectly communicating with or arguing to a judge or judicial officer on the merits of a contested matter pending before such judge or judicial officer, except in the following five contexts:

- In open court.
- With the consent of all other counsel in the matter.
- In the presence of all other counsel in the matter.
- In writing with a copy thereof furnished to the other counsel.
- In *ex parte* matters.

As used in *Cal. Rules Prof. Conduct, Rule 5-300,* the terms "judge" and "judicial officer" include law clerks, research attorneys, and other court personnel who participate in the decision-making process [*Cal. Rules Prof. Conduct, Rule 5-300(C)*].

Rule 5-300(B) is a rule of fairness that is designed to ensure that all interested sides will be heard on an issue [*Heavey v. State Bar (1976) 17 Cal. 3d 553, 559, 131 Cal. Rptr. 406, 551 P.2d 1238* (decided under Cal. Rules Prof. Conduct, former Rule 7-108(B), the predecessor of Rule 5-300(B), which prohibited similar types of contacts as Rule 5-300(B))].

ILLUSTRATIONS:

Application of Rule 5-300(B). An attorney represents a plaintiff in a wrongful death action. The judge orders dismissal based on plaintiff's failure to answer an interrogatory, but later orders the dismissal

vacated on the condition that the plaintiff's attorney personally pay to the defendant $600 in attorney's fees and costs. The attorney sends four letters to the judge, asking the judge to annul the penalty and unconditionally vacate the dismissal. The attorney does not send a copy of the letters to opposing counsel, after two warnings by the judge to do so. Has the attorney violated Rule 5-300(B)? Yes. The attorney's letters arguing that that the dismissal should be unconditionally vacated clearly concerned the merits of the case, which were still being contested [*see Heavey v. State Bar (1976) 17 Cal. 3d 553, 557, 559, 131 Cal. Rptr. 406, 551 P.2d 1238]* .

In an *ex parte* communication between a prosecutor and a juvenile court judge, the prosecutor raises the issue of whether or not the court had jurisdiction to grant a rehearing. Has the prosecutor violated Rule 5-300(B)? No. The communication did not prejudice the juvenile and did not violate the ethical rule, because the contacts did not concern the exercise of the court's discretion to grant a rehearing but only the court's power to do so [*see In re Jonathan S. (1979) 88 Cal. App. 3d 468, 471-472, 151 Cal. Rptr. 810]* .

PRACTICE TIP:

Ex Parte Contacts Regarding Contested Matter. Unless expressly authorized by law, *ex parte* contacts between the court and an attorney are always ill-advised and violate the Rules of Professional Conduct if the contacts concern the merits of a pending, contested matter [*In re Jonathan S. (1979) 88 Cal. App. 3d 468, 471, 151 Cal. Rptr. 810]* .

An attorney should not communicate *ex parte* with a trial judge on the merits of a contested matter decided by that judge and on review by a higher court. Such a matter is "pending" before the trial judge if it may come before trial judge again [State Bar Formal Opinion 1984-78].

An attorney is not prohibited by *Cal. Rules Prof. Conduct, Rule 5-300(B)* from communicating with the court regarding a matter that is no longer pending. Thus, an *ex parte* communication between defense counsel and the court that sentenced the defendant in which counsel asked the court to initiate proceedings to recall the defendant's sentence did not violate the rule, because no contested matter was pending and such a request is not a matter to be heard in open court [*see People v. Laue (1982) 130 Cal. App. 3d 1055, 1060-1061, 182 Cal. Rptr. 99]* .

[2] Prohibited Gifts

Cal. Rules Prof. Conduct, Rule 5-300(A) prohibits a State Bar member from directly or indirectly giving or lending anything of value to a judge or court official or employee, unless the personal or family relationship between the attorney and the judge, official, or employee is such that they customarily give and exchange gifts [*Cal. Rules Prof. Conduct, Rule 5-300(A)*]. However, Rule 5-300(A) does not prohibit a State Bar member from contributing to the campaign fund of a judge running for election or confirmation pursuant to applicable law pertaining to such contributions [*Cal. Rules Prof. Conduct, Rule 5-300(A); see also* LACBA Formal Opinion No. 387 (1981)].

As used in Rule 5-300(A), the term "judge" includes law clerks, research attorneys, or other court personnel who participate in the decision-making process [*Cal. Rules Prof. Conduct, Rule 5-300(C)*].

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7-72 California Forms of Pleading and Practice--Annotated § 72.304

§ 72.304 Moral Turpitude and Deception

[1] Deception of Court by Attorney

An attorney has a duty to use only means that are consistent with the truth and never to mislead the judge by an artifice or false statement of fact or law [*Bus. & Prof. Code § 6068(d)*]. An attorney is subject to discipline under *Bus. & Prof. Code § 6106* for engaging in conduct intended to deceive the court.

Prohibited conduct includes:

- Perjury [*Montag v. State Bar (1982) 32 Cal. 3d 721, 723, 726, 186 Cal. Rptr. 894, 652 P.2d 1370* (attorney gave false testimony at grand jury proceeding); *Codiga v. State Bar (1978) 20 Cal. 3d 788, 793, 144 Cal. Rptr. 404, 575 P.2d 1186* (attorney prepared will containing ambiguity and, after testator's death, substituted page in original will to cure ambiguity, filing declaration under penalty of perjury stating that he had witnessed testator's execution of altered will); *see also § 72.293[1]*].

- Fraudulently altering legal documents [*Snyder v. State Bar (1976) 18 Cal. 3d 286, 291, 133 Cal. Rptr. 864, 555 P.2d 1104* (fraudulent transformation of assignment of contract form into confession of judgment and submission of altered document to court for purposes of obtaining judgment)].

- Concealing evidence [*Sullins v. State Bar (1975) 15 Cal. 3d 609, 613, 125 Cal. Rptr. 471, 542 P.2d 631* (attorney deliberately misled trial court by concealing existence of letter sent to attorney by party interested in matter before the court that contained material facts relevant to issues)].

- Having the client sign blank verification forms, and later attaching the forms to discovery responses prepared by the attorney [*Drociak v. State Bar (1991) 52 Cal. 3d 1085, 1087-1088, 278 Cal. Rptr. 86, 804 P.2d 711]* .

- Failing to disclose to the court suspension from practice [*Arm v. State Bar (1990) 50 Cal. 3d 763, 770-772, 774, 268 Cal. Rptr. 741, 789 P.2d 922]* .

- Advising and assisting client to violate court custody order [In the Matter of Lais (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112].

- False representations of fact [*Mammoth Mountain Ski Area v. Graham (2006) 135 Cal. App. 4th 1367, 1374-1375, 38 Cal. Rptr. 3d 422* (false representation during appellate argument); In the Matter of Chesnut (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166 (false representation to two judges that attorney had personally served summons and complaint on opposing party)].

- Requesting or agreeing to a trial date when the attorney does not intend to commence trial on that date [State Bar Formal Opinion No. 1972-30].

If the attorney suborns perjury of a witness [*Penal Code § 127*] or offers in evidence as genuine any writing known by him or her to have been forged or fraudulently altered [*Penal Code § 132*], he or she is guilty of a felony.

For discussion of the prohibition on misleading the court, see *§ 72.305[1]*.

[2] Deception of Court by Client

[a] No Attorney Participation

Any attorney who condones a client's commission of perjury may be guilty of a misdemeanor under *Bus. & Prof. Code § 6128(a)*, which states that an attorney is guilty of a misdemeanor if the attorney is guilty of any deceit or collusion, or consents to any deceit or collusion with the intent to deceive the court or any party. Additionally, an attorney who permits his or her client to testify falsely may be subject to criminal prosecution under *Penal Code § 127* for subornation of perjury, as well as to severe disciplinary action [*In re Branch (1969) 70 Cal. 2d 200, 210-211, 74 Cal. Rptr. 238, 449 P.2d 174* ; *see People v. Pike (1962) 58 Cal. 2d 70, 97, 22 Cal. Rptr. 664, 372 P.2d 656* (attorney may not knowingly allow his or her client to testify falsely); *but cf. Imbler v. Pachtman (1976) 424 U.S. 409, 427, 96 S. Ct. 984, 47 L. Ed. 2d 128* (state prosecutor who knowingly used false testimony is absolutely immune from civil liability under *42 U.S.C. § 1983*)].

[b] When Client Intends to Commit Perjury

If the attorney discovers that his or her client intends to commit perjury, he or she should immediately attempt to dissuade the client from doing so, and withdraw from the representation if the client insists on testifying falsely [*see Cal. Rules Prof. Conduct, Rule 3-700(B)(2)* (withdrawal mandatory when attorney knows or should know continued employment will result in violation of the Rules of Professional Conduct or the State Bar Act); *see also Bus. & Prof. Code §§ 6068(d), 6128(a)*; *Cal. Rules Prof. Conduct, Rule 5-200(A), (B)*]. Counsel is not required to disclose to the court the precise reason for wishing to withdraw when the disclosure would violate attorney-client confidentiality [*see In re Branch (1969) 70 Cal. 2d 200, 213, 74 Cal. Rptr. 238, 449 P.2d 174* ; *Chaleff v. Superior Court (1977) 69 Cal. App. 3d 721, 724, 138 Cal. Rptr. 735* ; *People v. Blye (1965) 233 Cal. App. 2d 143, 148-149, 43 Cal. Rptr. 231* ; *see also Nix v. Whiteside (1986) 475 U.S. 157, 171, 106 S. Ct. 988, 89 L. Ed. 2d 123* (defendant not deprived of *U.S. Const., amend. VI* right to effective assistance of counsel when counsel refused to cooperate with defendant in presenting perjured testimony); *but see People v. Johnson (1998) 62 Cal. App. 4th 608, 619-634, 72 Cal. Rptr. 2d 805* (defendant has constitutional right to testify even over objection of defense counsel; trial court should follow California's "narrative approach" in which defense counsel calls defendant as witness and allows defendant to testify in free narrative manner)].

PRACTICE TIP:

Maintain Client Confidentiality. As noted above, counsel is not required to disclose to the court the precise reason for withdrawal. In many instances, disclosure of the reason may be a breach of the duty of client confidences and secrets. Consequently, a sanitized motion for withdrawal, discussing a "failure of the meeting of the minds" in vague contractual terms may be appropriate. If questioned in chambers, the attorney should still maintain client confidentiality.

A trial court has discretion to deny an attorney's motion to withdraw that is based on his or her belief that the client is about to give perjured testimony at trial if no evidence is presented to show that the disagreement has resulted in a breakdown of the attorney-client relationship of such a magnitude as to jeopardize the client's right to the effective assistance of counsel [*People v. Brown (1988) 203 Cal. App. 3d 1335, 1341, 250 Cal. Rptr. 762]* .

[c] When Client Has Committed Perjury

If the attorney discovers that the client has already committed perjury the attorney should urge the client to correct the testimony. If the client will not, the attorney may withdraw from the case [*see Nix v. Whiteside (1986) 475 U.S. 157, 169-170, 106 S. Ct. 988, 89 L. Ed. 2d 123* (criminal defendant not deprived of *U.S. Const., amend. VI* right to effective assistance of counsel when counsel refused to cooperate with defendant in presenting perjured testimony)].

The Committee on Professional Responsibility and Conduct of the State Bar has concluded that an attorney in a civil, nonjury trial is not bound to inform the court if he or she knows that the client has testified falsely during the trial. Furthermore, it expressed the opinion that the attorney is precluded from divulging the perjury without the client's consent due to the mandate of *Bus. & Prof. Code § 6068(e)*, requiring an attorney to maintain the confidences and preserve the secrets of the client [State Bar Formal Opinion No. 1983-74].

The attorney must take remedial action, however, by explaining to the client that if the perjured testimony is not corrected or at least removed from the record, the attorney is required to make a motion to the court to be allowed to withdraw from the case, but without disclosing the perjury, unless the client consents. The attorney must explain to the client that if the client attempts to correct the perjury by testifying contrary to his or her earlier testimony, he or she may be subject to criminal prosecution for perjury, may also be subject to cross-examination about his or hercredibility, and may lose the case. The attorney may also seek a stipulation from opposing counsel that the testimony be stricken from the record or may move that the testimony be stricken, but without disclosing that the testimony is false [State Bar Formal Opinion No. 1983-74].

For further discussion concerning advising client perjury, see *§ 72.293[1]*. For further discussion concerning misleading the court, see *§ 72.305*.

[3] Deception of Opposing Counsel

An attorney is subject to discipline for engaging in conduct that deceives opposing counsel [*see Bus. & Prof. Code §§ 6068(d), 6106*; *see also* State Bar Formal Opinion No. 1967-11]. Examples of such conduct include:

- Misleading opposing counsel about the validity of signatures on documents [*Coviello v. State Bar (1955) 45 Cal. 2d 57, 66, 286 P.2d 357* (attorney fraudulently inserted his client's name as grantee in blank deeds to property owned by opposing counsel's client); *Hallinan v. State Bar (1948) 33 Cal. 2d 246, 249, 200 P.2d 787* (attorney signed his client's name to settlement documents); *but see* In the Matter of Lazarus (1991) 1 Cal. State Bar Ct. Rptr. 387, 397-398 (with prior written authorization set forth in express power of attorney, attorney may sign client's name without stating his or her representative capacity)].

- Deceiving opposing counsel about the commencement of legal action [*Bryant v. State Bar (1942)*

21 Cal. 2d 285, 296, 299, 131 P.2d 523 (attorney willfully failed to keep his word to another attorney not to commence an action against the other attorney's clients while the other attorney was out of town, along with other dishonest actions)].

[4] Deception of State Bar

An attorney who deceives the State Bar during disciplinary proceedings is subject to disciplinary action for that conduct [*see Bus. & Prof. Code § 6106*]. Examples of such conduct include:

- Submitting fabricated documents to a State Bar hearing committee and making false representations to the committee [*Olguin v. State Bar (1980) 28 Cal. 3d 195, 200-201, 167 Cal. Rptr. 876, 616 P.2d 858* (18 months' suspension imposed)].

- Submitting misleading testimony to a State Bar hearing panel [*Franklin v. State Bar (1986) 41 Cal. 3d 700, 709, 224 Cal. Rptr. 738, 715 P.2d 699* ; *Wren v. State Bar (1983) 34 Cal. 3d 81, 90, 192 Cal. Rptr. 743, 665 P.2d 515]* .

- Falsifying a letter allegedly sent by the attorney to his client and submitting it to a State Bar hearing committee [*Phillips v. State Bar (1975) 14 Cal. 3d 492, 500, 121 Cal. Rptr. 605, 535 P.2d 733]* .

- Making false representations to a State Bar investigating committee [*Ridley v. State Bar (1972) 6 Cal. 3d 551, 555, 99 Cal. Rptr. 873, 493 P.2d 105]* .

An attorney has the duty to cooperate and participate in any State Bar investigation or proceeding pending against him or her, although he or she must not be deprived of any privilege guaranteed by *U.S. Const., amend. V* or any other constitutional or statutory privileges. An attorney is also not required to cooperate with a disciplinary request that requires the attorney to waive a constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable amount of time in light of the time constraints of the attorney's practice [*Bus. & Prof. Code § 6068(i)*; *see also* *Franklin v. State Bar (1986) 41 Cal. 3d 700, 708, 224 Cal. Rptr. 738, 715 P.2d 699* (attorney has no obligation to provide, on his or her own initiative, incriminating evidence in disciplinary hearing)].

PRACTICE TIP:

Cooperation vs. Self-Incrimination. Under *Bus. & Prof. Code § 6068(i)*, there is a delicate tension between cooperation and self-incrimination. Thus far, this problematic area has not been well delineated by the State Bar Court.

[5] Deception of Client

An attorney who knowingly makes false statements to his or her client concerning the matters the attorney is handling for the client is guilty of dishonest conduct under *Bus. & Prof. Code § 6106* [*Stevens v. State Bar (1990) 51 Cal. 3d 283, 289, 272 Cal. Rptr. 167* ; *see also* *Fitzpatrick v. State Bar (1977) 20 Cal. 3d 73, 87-88, 141 Cal. Rptr. 169* (disbarment warranted for numerous breaches of duties to clients)]. He or she is also guilty of violating the duty under *Bus. & Prof. Code § 6068(d)* to use only those means as are consistent with truth in maintaining the causes entrusted to him or her.

[6] Deception of Others

The ethical duty to avoid dishonesty and deception covers everyday dishonesty and includes deception of nonclient third parties. It is not necessary that criminal activity be involved, actual harm result to merit disciplinary action when actual deception is intended and shown [*Reznik v. State Bar (1969) 1 Cal. 3d 198, 81 Cal. Rptr. 769* ; *see Bus. & Prof. Code §§ 6068(b), (d), 6103, 6106*].

An attorney's conduct in deleting language in a trust deed beneficiary statement, without the consent or knowledge of the beneficiary, and in subsequently forwarding the altered document to the escrow company thatwas handling the sale of the property, was held to be willful, improper, and a dishonest act involving moral turpitude under *Bus. & Prof. Code § 6106*, warranting discipline [*Crane v. State Bar (1981) 30 Cal. 3d 117, 120-122, 177 Cal. Rptr. 670, 635 P.2d 163* (attorney was suspended for one year for this conduct and violations of Rules 7-103 and 7-104); *see also Bus. & Prof. Code § 6068(d)*]. An attorney's deception of a bank officer by presenting a forged intrabank transfer order to the officer was held to clearly exhibit conduct so unprofessional as to warrant discipline [*Allen v. State Bar (1977) 20 Cal. 3d 172, 178-179, 141 Cal. Rptr. 808, 570 P.2d 1226* (for this act and other deceitful acts, in addition to previous suspension for similar misconduct, appropriate discipline was disbarment); *see also Bus. & Prof. Code § 6068(d)*].

In addition, attorneys have been disciplined for making perjured representations on a lease application [*Marquette v. State Bar (1988) 44 Cal. 3d 253, 262, 242 Cal. Rptr. 886, 746 P.2d 1289]* , executing five rent checks against insufficient funds [*Marquette v. State Bar (1988) 44 Cal. 3d 253, 262, 242 Cal. Rptr. 886, 746 P.2d 1289]* , and establishing a client trust account to shield a client from judgment creditors [*Coppock v. State Bar (1988) 44 Cal. 3d 665, 683-684, 244 Cal. Rptr. 462, 749 P.2d 1317* (attorney also relinquished control of trust account to client, allowing client to use it without supervision in fraudulent investment scheme)].

[7] Insurance Fraud

[a] Prohibited Conduct

It is grounds for disbarment or suspension for an attorney to engage in any conduct prohibited by the following statutes [*Bus. & Prof. Code § 6106.5*]:

(a) *Penal Code § 550* (former *Ins. Code § 1871.1*, repealed and recodified by Stats. 1992, Ch. 675 §§ 4, 8); or

(b) *Ins. Code § 1871.4*.

Conduct prohibited by the two statutes includes doing any of the following or aiding abetting, soliciting, or conspiring with any person to do any of the following:

- Knowingly presenting or causing to be presented any false or fraudulent claim for the payment of a loss or injury, including payment of a loss or injury under a contract of insurance [former *Ins. Code § 1871.1(a)(1)*; *now see Penal Code § 550(a)(1)*].

- Knowingly presenting multiple claims for the same loss or injury, including presentation of multiple claims to more than one insurer, with an intent to defraud [former *Ins. Code § 1871.1(a)(2)*; *now see Penal Code § 550(a)(2)*].

- Knowingly causing or participating in a vehicular collision, or any other vehicular accident, for the purpose of presenting any false orfraudulent claim [former *Ins. Code § 1871.1(a)(3)*; *now see Penal Code § 550(a)(3)*].

- Knowingly presenting a false or fraudulent claim for the payments of a loss for theft, destruction, damage, or conversion of a motor vehicle, a motor vehicle part, or contents of a motor vehicle [former *Ins. Code § 1871.1(a)(4)*; *now see Penal Code § 550(a)(4)*].

- Knowingly preparing, making, or subscribing any writing, with intent to present or use the same, or

to allow it to be presented in support of any false or fraudulent claim [former *Ins. Code § 1871.1(a)(5)*; *now see Penal Code § 550(a)(5)*].

- Knowingly make or cause or be made any false or fraudulent claim for payment of a health care benefit [*Pen. Code § 550(a)(6)*].

- Knowingly submitting a claim for a health care benefit that was not used by, or on behalf of, the claimant [former *Ins. Code § 1871.1(a)(8)*; *now see Penal Code § 550(a)(7)*].

- Knowingly presenting multiple claims for payment of the same health care benefit with an intent to defraud [former *Ins. Code § 1871.1(a)(9)*; *now see Penal Code § 550(a)(8)*].

- Knowingly presenting for payment any undercharges for health care benefits on behalf of a specific claimant unless any known overcharges for health care benefits for that claimant are presented for reconciliation at that time [former *Ins. Code § 1871.1(a)(10)*; *now see Penal Code § 550(a)(9)*].

- Making or causing to be made a knowingly false or fraudulent material statement or material representation for the purpose of obtaining or denying any compensation, as defined in Lab Cal. § 3207 [*see Ins. Code § 1871.4(a)(1)*].

- Presenting or causing to be presented a knowingly false or fraudulent written or oral material statement in support of, or in opposition to, a claim for compensation for the purpose of obtaining or denying any compensation, as defined in Lab Cal. § 3207 [*see Ins. Code § 1871.4(a)(2)*].

- Making or causing to be made a knowingly false or fraudulent statement with regard to entitlement to benefits with the intent to discourage an injured worker from claiming benefits or pursuing a claim [*see Ins. Code § 1871.4(a)(4)*].

[b] Examples Resulting in Discipline

Attorneys have been disciplined for insurance fraud for:

- Knowingly submitting a false claim to an insurance company [*Sampson v. State Bar (1974) 12 Cal. 3d 70, 83, 115 Cal. Rptr. 43, 524 P.2d 139* (decided under *Bus. & Prof. Code § 6106*)].

- Knowingly duplicating items of special damage in claims submitted to insurance carriers on behalf of clients [*Scofield v. State Bar (1965) 62 Cal. 2d 624, 628, 43 Cal. Rptr. 825, 401 P.2d 217]* .

- Employing others to stage false automobile accidents for purposes of producing personal injury and property damage claims [*In re Petty (1981) 29 Cal. 3d 356, 359-360, 173 Cal. Rptr. 461, 627 P.2d 191]* .

- Falsifying medical reports and property damage reports [*In re Petty (1981) 29 Cal. 3d 356, 359-360, 173 Cal. Rptr. 461, 627 P.2d 191]* .

- Presenting false claims to insurers for settlement [*In re Petty (1981) 29 Cal. 3d 356, 359-360, 173 Cal. Rptr. 461, 627 P.2d 191]* .

- Forging the names of individuals to releases in order to obtain the settlement proceeds [*In re Petty (1981) 29 Cal. 3d 356, 359-360, 173 Cal. Rptr. 461, 627 P.2d 191]* .

[8] Disciplinary Action Based on Moral Turpitude

[a] Actual Harm Not Prerequisite

The commission of any act involving moral turpitude, dishonesty, or corruption, whether or not the act is committed while an attorney is acting as an attorney and whether or not the act is a felony or misdemeanor, constitutes cause for disbarment or suspension [*Bus. & Prof. Code § 6106*]. Any act of dishonesty by an attorney is grounds for disciplinary action against the attorney, whether or not any harm results from the dishonest act [*Olguin v. State Bar (1980) 28 Cal. 3d 195, 200, 167 Cal. Rptr. 876, 616 P.2d 858* ; *Bryant v. State Bar (1942) 21 Cal. 2d 285, 296, 131 P.2d 523]* . Actual injury or loss is not a prerequisite to discipline for fraudulent or deceitful acts under *Bus. & Prof. Code § 6106*. The purpose of a disciplinary proceeding is not to ascertain the extent of the damage caused by an attorney, but rather to determine whether or not the attorney's conduct was unprofessional [*Allen v. State Bar (1977) 20 Cal. 3d 172, 178, 141 Cal. Rptr. 808, 570 P.2d 1226]* . Discipline may be imposed when actual deception is intended and shown [*Coviello v. State Bar (1955) 45 Cal. 2d 57, 65, 286 P.2d 357]* .

[b] Moral Turpitude Defined

Moral turpitude determinations are a matter of law. Moral turpitude is not a concept that fits a precise definition. The definition most often recited by the Supreme Court is "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man" [In the Matter of Francscinella (1991) 1 Cal. State Bar Ct. Rptr. 543, 549 (quoting from *In re Craig (1938) 12 Cal. 2d 93, 97, 82 P.2d 442*)].

The definition of moral turpitude is measured by the morals of the day, and may vary according to the community or the times. The moral turpitude prohibition is a flexible standard, and its purpose is not the punishment of attorneys, but the protection of the public and the legal community against unsuitable practitioners. A holding that the attorney's act constitutes moral turpitude characterizes the attorney as unsuitable to practice law [In the Matter of Francscinella (1991) 1 Cal. State Bar Ct. Rptr. 543, 549].

Matters are also referred to the State Bar Court by the Supreme Court when an attorney is convicted of a criminal act (including the mere violation of a municipal code section) for a determination of whether the criminal act involved moral turpitude. The Office of Trials will launch a full inquiry in these cases, and it is not bound by pleas or findings. An attorney's criminal conviction is conclusive proof in a disciplinary action that the attorney committed the crime for which he or she was convicted [*see* *In re Crooks (1990) 51 Cal. 3d 1090, 1097, 275 Cal. Rptr. 420]* .

California Forms of Pleading and Practice--Annotated

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D. Duty To Represent Client Competently And Zealously
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7-72 California Forms of Pleading and Practice--Annotated § 72.305

§ 72.305 Disrespect for Judiciary

[1] Filing False Pleadings and Documents

An attorney violates *Cal. Rules Prof. Conduct, Rule 5-200* and *Bus. & Prof. Code § 6068(d)* by knowingly filing any pleading or document with the court or other judicial officer that:

(a) Contains false statements or allegations [*see* *Dixon v. State Bar (1982) 32 Cal. 3d 728, 739, 187 Cal. Rptr. 30, 653 P.2d 321* (attorney violated duty under *Bus. & Prof. Code § 6068(d)* by filing false declarations with court); *Weir v. State Bar (1979) 23 Cal. 3d 564, 576, 152 Cal. Rptr. 921, 591 P.2d 19* (attorney's repeated practice of filing false applications with the Immigration and Naturalization Service involved moral turpitude and warranted disbarment); *Snyder v. State Bar (1976) 18 Cal. 3d 286, 291, 133 Cal. Rptr. 864, 555 P.2d 1104* (attorney's filing of involuntary bankruptcy petitions containing false allegations for purposes of harassment and delay violated *Bus. & Prof. Code § 6068* and professional rules)];

(b) Is forged [*Garlow v. State Bar (1982) 30 Cal. 3d 912, 918, 180 Cal. Rptr. 831, 640 P.2d 1106* (attorney, by signing client's name to declaration under penalty of perjury and representing to court that signature was client's signature, willfully violated former *Cal. Rules Prof. Conduct, Rule 7-105* (*now see Cal. Rules Prof. Conduct, Rule 5-200*) and suspension was warranted)]; or

(c) Is fabricated [*Olguin v. State Bar (1980) 28 Cal. 3d 195, 199, 167 Cal. Rptr. 876, 616 P.2d 858* (submission of documents to State Bar committee that were fabrications intended to deceive the committee constituted violation of former Rule 7-105(1) (*now see Cal. Rules Prof. Conduct, Rule 5-200*) warranting suspension)].

An attorney has an unqualified duty to refrain from acts that mislead the court, and the representation to a court of facts known to be false is presumed intentional and is a violation of the attorney's duties as an officer of the court [*see*

Jackson v. State Bar (1979) 23 Cal. 3d 509, 513, 153 Cal. Rptr. 24, 591 P.2d 47 (attorney filed false accountings with probate court); In the Matter of Chesnut (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166 (attorney made false representations to two judges that attorney had personally served summons and complaint on opposing party)]. An attorney is subject to suspension for filing a false pleading even if there is no direct evidence of malice, intent to deceive, or hope of personal gain [*Giovanazzi v. State Bar (1980) 28 Cal. 3d 465, 473, 169 Cal. Rptr. 581, 619 P.2d 1005]* . Furthermore, it is not necessary that actual harm result before disciplinary action is warranted, when actual deception is intended and shown [*Garlow v. State Bar (1982) 30 Cal. 3d 912, 917, 180 Cal. Rptr. 831, 640 P.2d 1106]* . The filing of a false or misleading pleading or document that the attorney knows to be false or misleading presumes an intent to secure a determination based on it [*Davis v. State Bar (1983) 33 Cal. 3d 231, 239-240, 188 Cal. Rptr. 441, 655 P.2d 1276* (false allegations in answer)]. Misrepresentation exceeds the bounds of zealous advocacy and is grounds for discipline [*Davis v. State Bar (1983) 33 Cal. 3d 231, 239-240, 188 Cal. Rptr. 441, 655 P.2d 1276]* .

[2] Making False Statements to Court

An attorney also violates *Cal. Rules Prof. Conduct, Rule 5-200* and *Bus. & Prof. Code § 6068(d)* by making false statements to the court or to another judicial officer.

For example, in *Chefsky v. State Bar*, the Court held that an attorney's false statements to the court that he was prepared to pay a judgment at once and his concealment of any reservations or conditions to immediate payment of the judgment clearly violated former Rule 7-501(1) (the predecessor of Rule 5-200, which prohibited similar types of conduct as Rule 5-200) and involved moral turpitude [*Chefsky v. State Bar (1984) 36 Cal. 3d 116, 124, 202 Cal. Rptr. 349, 680 P.2d 82]* .

False testimony on a material issue is a serious breach of an attorney's duties and is grounds for disciplinary action even if no harm results from the false testimony [*Davis v. State Bar (1983) 33 Cal. 3d 231, 240, 188 Cal. Rptr. 441, 655 P.2d 1276* ; *Olguin v. State Bar (1980) 28 Cal. 3d 195, 200, 167 Cal. Rptr. 876, 616 P.2d 858* (same duty applies to proceedings conducted by State Bar); *see Dixon v. State Bar (1985) 39 Cal. 3d 335, 344* (attorney's lack of candor in proceedings before State Bar and numerous violations of duties owed to clients warranted disbarment); *see also Warner v. State Bar (1983) 34 Cal. 3d 36, 44, 192 Cal. Rptr. 244, 664 P.2d 148* (attorney's fraudulent statements to State Bar investigating committee may constitute greater offense than misappropriation of client's funds); *Spielbauer v. County of Santa Clara (2007) 146 Cal. App. 4th 914, 951, 53 Cal. Rptr. 3d 357* ; In re Regan, 2005 Calif. Op. LEXIS 7, 23,--Cal. State Bar Ct. Rptr.--(attorney who made false statement to judge is not exculpated based on belief he is acting in clients' best interest); In the Matter of Chesnut (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166 (attorney's false representations to two judges were material regardless of whether courts were successfully mislead)]. Additionally, lawyers may face court sanctions for making misrepresentations to the court [*Mammoth Mountain Ski Area v. Graham (2006) 135 Cal. App. 4th 1367, 1374-1375, 38 Cal. Rptr. 3d 422* (court of appeal requested clerk to forward copy of opinion to State Bar because it was probable that attorney mischaracterized facts of case); *Bryan v. Bank of America (2001) 86 Cal. App. 4th 185, 103 Cal. Rptr. 2d 148* (court of appeal has authority to issue sanctions against appellate attorney for misrepresentations made to appellate court)].

For discussion of client perjury, *see §§ 72.293[3]* and *72.304[2]*.

[3] Failing to Disclose Material Facts to Court

Intent to mislead a court by concealment of material information within the attorney's knowledge as effectively misleads a judge as does an overtly false statement. Both are improper [*Rodgers v. State Bar (1989) 48 Cal. 3d 300, 315, 256 Cal. Rptr. 381, 768 P.2d 1058* ; *Griffis v. S.S. Kresge Co. (1984) 150 Cal. App. 3d 491, 499, 197 Cal. Rptr. 771* ; *see Bus. & Prof. Code § 6068(d)*].

ILLUSTRATION:

Concealment of Telephone Number. In a custody dispute in which the attorney's client had taken the child from the jurisdiction to Los Angeles, the attorney fails to disclose to the judge that he knows the client's telephone number. Has the attorney violated his ethical duties? Yes. The attorney's failure to disclose to the judge that the attorney knew his client's telephone number in Los Angeles constituted concealment of a material fact, involving moral turpitude [*see Davidson v. State Bar (1976) 17 Cal. 3d 570, 574, 131 Cal. Rptr. 379, 551 P.2d 1211]* .

[4] Offensive or Disrespectful Acts

[a] Toward Court

An attorney has a duty to maintain the respect due to the courts and judicial officers [*Bus. & Prof. Code § 6068(b)*] and to abstain from all offensive personality and to advance no fact that is prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which the attorney is charged [*Bus. & Prof. Code § 6068(f)*; *see* Model Code of Professional Responsibility DR 7-106(C)(2), (6) (1980); Model Rules of Professional Conduct, Rules 3.5, 4.4 (1983); *see also In re S.C. (2006) 138 Cal. App. 4th 396, 422-424, 41 Cal. Rptr. 3d 453* (contemptuous for attorney to make unsupported assertion that trial judge was acting out of bias toward party); *but see United States v. Wunsch (9th Cir. 1996) 84 F.3d 1110* (*Bus. & Prof. Code § 6068(f)*, regarding refraining from "all offensive personality" is unconstitutionally void for vagueness)].

An attorney may breach his or her duty by making insulting remarks about judges in briefs filed with an appellate court. In *Ramirez v. State Bar*, the attorney falsely maligned court of appeal justices in a reply brief in which he alleged that in reversing a judgment in favor of his clients the justices acted "unlawfully" and "illegally" and had become "parties to the theft" of his clients' property, and in a petition for a writ of certiorari in which he implied the justices had falsified the record and suggested that their "unblemished" records were "undeserved"; the court rejected the attorney's argument that outrageous and unwarranted statements concerning a justice of the court were protected by free speech considerations and held that the attorney's allegations were not supported by any credible factual basis [*Ramirez v. State Bar (1980) 28 Cal. 3d 402, 404-405, 169 Cal. Rptr. 206, 619 P.2d 399]* .

The attorney may also violate this duty of respect by writing letters to or about a judge containing insulting and offensive language, or by disorderly, contemptuous, or insolent behavior toward the judge while holding court [*see Snyder v. State Bar (1976) 18 Cal. 3d 286, 289, 292, 133 Cal. Rptr. 864, 555 P.2d 1104* (unwarranted charge of bias and prejudice against all superior court judges in county in which matter was pending); *Heavey v. State Bar (1976) 17 Cal. 3d 553, 560, 131 Cal. Rptr. 406, 551 P.2d 1238* (court did not find attorney guilty of violating *Bus. & Prof. Code § 6068(f)* because this charge was redundant to charge of violation of Rule 16 (now *Cal. Rules Prof. Conduct, Rule 5-300(B)*), which prohibits communications with judge about matter pending before judge outside of opposing counsel's presence); *Hogan v. State Bar (1951) 36 Cal. 2d 807, 809-810, 228 P.2d 554* (attorney disparaged judge's fairness and quality of legal education in letter addressed to State Bar)]. This conduct may also be sanctioned by contempt proceedings [*Snyder v. State Bar (1976) 18 Cal. 3d 286, 289, 292, 133 Cal. Rptr. 864, 555 P.2d 1104* ; *see Ridge v. State Bar (1989) 47 Cal. 3d 952, 960, 254 Cal. Rptr. 803, 766 P.2d 569* (appearance at judicial hearing under influence of alcohol); *In re Siegel (1975) 45 Cal. App. 3d 843, 845, 120 Cal. Rptr. 8 , disapproved on other grounds in People v. Romero (1994) 8 Cal. 4th 728, 744, 35 Cal. Rptr. 2d 270, 883 P.2d 388* (two attorneys who accused trial judge of lack of integrity during course of trial properly held in contempt)].

Additionally, an attorney has a duty to respectfully yield to a court's ruling regardless of whether the ruling is right or wrong. The Court of Appeal found a district attorney's "continued bickering with the court and threats of disobedience, even at the risk of a mistrial" could not be characterized as "mere advocacy" [*People v. Pigage (2003) 112 Cal. App. 4th 1359, 1374, 6 Cal. Rptr. 3d 88]* .

[b] Toward Opposing Counsel or Party

Personal attacks on the character or motives of an adverse party, an adverse party's counsel, or an adverse party's witnesses constitute misconduct [*Stone v. Foster (1980) 106 Cal. App. 3d 334, 355, 164 Cal. Rptr. 901]* . An attorney was held to have engaged in "offensive personality," prohibited by *Bus. & Prof. Code § 6068(f)*, by preparing and filing a declaration of one of his clients that referred to the opposing parties as "flannel-mouth" and "The Mouche" and referred to their attorneys as "alleged attorneys" [*Snyder v. State Bar (1976) 18 Cal. 3d 286, 292, 133 Cal. Rptr. 864, 555 P.2d 1104]* . A defense attorney's reference to the prosecutor as a "high-priced lawyer" was behavior calculated to irritate the prosecutor and to annoy the court, and was a violation of the attorney's duty to abstain from all offensive personality under *Bus. & Prof. Code § 6068(f)*; after having been warned by the court to refrain from this conduct, the attorney was properly held in contempt [*see Hawk v. Superior Court (1974) 42 Cal. App. 3d 108, 129-130, 116 Cal. Rptr. 713]* .

[c] Toward Former Client

An attorney also has a duty to refrain from "offensive personality" toward a former client. In *Dixon v. State Bar*, the Court held that an attorney violated *Bus. & Prof. Code § 6068(f)* by alleging in a declaration filed in response to an action brought against the attorney by a former client that the client worried about everything, including an affair her husband had supposedly had with her sister. The declaration was irrelevant to any issues in the case and was made solely for the purpose of harassing and embarrassing both the former client and her sister. Importantly, the conduct evidenced the attorney's failure to adhere to the duty to maintain client confidences and secrets inherent in the basic and fundamental fiduciary duty owed by all attorneys to their clients [*Dixon v. State Bar (1982) 32 Cal. 3d 728, 739, 187 Cal. Rptr. 30, 653 P.2d 321]* .

[5] Disobedience of Court Order

[a] Grounds for Discipline

A willful disobedience or violation of a court order requiring an attorney to do or not to do an act connected with or in the course of his or her profession, which the attorney ought in good faith to do or not to do, constitutes cause for disbarment or suspension [*Bus. & Prof. Code § 6103*; *see Dixon v. State Bar (1982) 32 Cal.3d 728, 739, 187 Cal. Rptr. 30, 653 P.2d 321* (attorney violated *Bus. & Prof. Code § 6103* by willfully disobeying court order to turn over files to client after client had discharged attorney); *see also Montalto v. State Bar (1974) 11 Cal. 3d 231, 234, 113 Cal. Rptr. 97, 520 P.2d 721* (attorney who willfully disobeyed court's order to produce documents warranted suspension for this and two other breaches of duty to clients)].

Failure to obey a court order in an attorney's nonprofessional or personal capacity may also constitute cause for disbarment or suspension when noncompliance was in bad faith [*see Maltaman v. State Bar (1987) 43 Cal. 3d 924, 951, 239 Cal. Rptr. 687, 741 P.2d 185* ; *but see Marquette v. State Bar (1988) 44 Cal. 3d 253, 264, 242 Cal. Rptr. 886, 746 P.2d 1289* (attorney's single act of noncompliance with court order to appear at debtor's examination, which resulted in continuation of debtor's examination for two weeks, did not involve moral turpitude or breach of attorney duties)].

An attorney's refusal to accede to a court's ruling may also constitute contempt of court [*Hawk v. Superior Court (1974) 42 Cal. App. 3d 108, 127, 116 Cal. Rptr. 713* ; *see also Trans-Action Commercial Investors, Inc. v. Firmaterr, Inc. (1997) 60 Cal. App. 4th 352, 371-372, 70 Cal. Rptr. 2d 449]* . However, an attorney may take appropriate steps in good faith to test the validity of any court ruling [*Cal. Rules Prof. Conduct, Rule 3-210*; *see* Model Code of Professional Responsibility DR 7-106(A) (1980); Model Code of Professional Responsibility EC 7-22 (1980)].

An attorney has a duty to respectfully yield to the rulings of the court, whether right or wrong. If the ruling is adverse, the attorney does not have the right to resist it. The attorney's only right is to respectfully preserve the point for appeal [

People v. McKenzie (1983) 34 Cal. 3d 616, 632, 194 Cal. Rptr. 462, 668 P.2d 769 ; *Hawk v. Superior Court (1974) 42 Cal. App. 3d 108, 126, 116 Cal. Rptr. 713]* .

[b] Grounds for Contempt

A willful neglect or violation of a duty by an attorney is punishable as contempt [*Code Civ. Proc. § 1209(a)(3)*], as is disobedience of any lawful judgment, order, or process of the court [*Code Civ. Proc. § 1209(a)(5)*]. Attorneys have been found to be in contempt in the following situations:

- The attorney persistently repeated questions to witnesses after the court had sustained objections to these questions and admonished the attorney not to repeat them [*Hawk v. Superior Court (1974) 42 Cal. App. 3d 108, 126-127, 116 Cal. Rptr. 713]* .

- The attorney failed to appear for trial after the court had granted him a continuance of the trial date, without a valid excuse for his failure to appear [*In re Stanley (1981) 114 Cal. App. 3d 588, 591, 170 Cal. Rptr. 755]* .

- The attorney, without adequate justification, failed to appear for oral argument before the California Supreme Court and to notify the Court that he would not be appearing [*In re Aguilar (2004) 34 Cal. 4th 386, 389, 18 Cal. Rptr. 3d 874]* .

For detailed discussion and forms relating to contempt, see Ch. 135, *Contempt* .

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[Reserved]

§§ 72.306[Reserved]

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§ 72.320 Rigid Adherence to Rule 4-100

[1] Prophylactic Nature of Rule

Cal. Rules Prof. Conduct, Rule 4-100 is prophylactic in nature. Harm to the client is not a prerequisite to discipline. The rule was adopted to provide against the probability in some cases, the possibility in many cases, and the danger in all cases that misappropriation, commingling, or other mismanagement will result in the loss of the client's money. There is inherent danger in such a practice, for frequently unforeseen circumstances arise jeopardizing the safety of the client's funds, and as far as the client is concerned the result is the same whether the money is deliberately misappropriated by an attorney or is unintentionally lost by circumstances beyond the attorney's control [*Peck v. The State Bar (1932) 217 Cal. 47, 51, 17 P.2d 112]* .

The purpose of the rule, then, is to minimize the possibility that the lawyer will, intentionally, negligently, or inadvertently, improperly use clients' funds, and to minimize the possibility that creditors of the lawyer will be able to reach clients' funds by writ of execution or otherwise. The latter possibility arises not only if a client's funds are placed in the lawyer's personal account, but also if the integrity of the trust account is compromised by the lawyer's placing his or her own funds in it. Commingling occurs when a client's money is intermingled with that of the attorney and its separate identity is lost so that it may be used for the attorney's personal expenses or subjected to the claims of his or her creditors [*Black v. State Bar (1962) 57 Cal. 2d 219, 225-226, 18 Cal. Rptr. 518, 368 P.2d 118]* .

[2] Harsh Sanctions for Violations of Rule

The purpose of *Cal. Rules Prof. Conduct, Rule 4-100* is fundamental. Clients are compelled to entrust their claims and property to attorneys, who are often essential agents in vindicating their rights through the legal process. Attorneys are therefore rightly expected to exercise extraordinary care and fidelity in dealing with clients' money and other property. These requirements are perhaps among the most important of any encountered by practicing attorneys. Thus, misappropriation or mismanagement of client funds is perhaps the most grievous breach of attorney ethics and fiduciary duty.

Disciplinary sanctions are relatively harsh and inflexible for misappropriation or commingling of client funds, for

otherwise failing to properly safeguard the client's property or maintain adequate records, or for failing to deliver client property to the client on request. Violators are subject to severe discipline, often without regard to harm to the client or any but the most compelling mitigating factors [*see, e.g., Pineda v. State Bar (1989)49 Cal. 3d 753, 759-760, 263 Cal. Rptr. 377, 781 P.2d 1* ; *Silva-Vidor v. State Bar (1989) 49 Cal. 3d 1071, 1079, 264 Cal. Rptr. 439, 782 P.2d 680* ; *Guzzetta v. State Bar (1987) 43 Cal. 3d 962, 980-981, 239 Cal. Rptr. 675, 741 P.2d 172* (claim that mismanagement is not willful or fraudulent is no defense to charge of violating trust accounting requirements); *see also* In the Matter of Respondent F. (1992) 2 Cal. State Bar Ct. Rptr. 17, 29-31 (private reproval imposed for inadvertent mishandling of small sum of trust funds)]. For further discussion, see *§ 72.329*.

PRACTICE TIP:

Record-Keeping Standards. Be aware that 1993 changes imposing mandatory client trust accounting standards will make the imposition of discipline by the State Bar even more effortless in this area. Counsel are advised to adhere carefully to the requirements for identifying, protecting, and otherwise maintaining and administering client funds and property [*see § 72.321[4]*].

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§ 72.321 Components of Rule 4-100

[1] Summary of Components

Analytically, there are at least five basic components of *Cal. Rules Prof. Conduct, Rule 4-100*:

(1) *The segregation rule.* Funds received or held for the benefit of clients must be segregated from the lawyer's personal funds and placed in one or more trust accounts, generally in California [*Cal. Rules Prof. Conduct, Rule 4-100(A)*; *see also § 72.321[2]*].

(2) *The notification rule.* The lawyer must promptly notify a client of the receipt of any of the client's property [*Cal. Rules Prof. Conduct, Rule 4-100(B)(1)*; *see also § 72.321[3]*].

(3) *The identification and safekeeping rule.* The lawyer must identify and label property of the client and place it in a safe place as soon as possible [*Cal. Rules Prof. Conduct, Rule 4-100(B)(2)*; *see also § 72.321[3]*].

(4) *The recordkeeping requirement.* This includes not only a record preservation provision, but also a requirement of compliance with any proper order for an audit of the lawyer's trust account [*Cal. Rules Prof. Conduct, Rule 4-100(B)(3)*; *see also § 72.321[4]*].

(5) *The payment-delivery rule.* This requires the lawyer to pay or deliver, on the client's request, all the property to which the client is entitled, either to the client or to a third person as requested by the client [*Cal. Rules Prof. Conduct, Rule 4-100(B)(4)*; *see § 72.321[5][a]*].

[2] Segregation of Client Funds in Trust Account

[a] Prohibition Against Commingling

The primary component of *Cal. Rules Prof. Conduct, Rule 4-100* is doubtless the commingling prohibition. Commingling occurs when a client's money is intermingled with that of his or her attorney and its separate identity is

lost so that it may be used for the attorney's personal expenses or subjected to the claims of his creditors [*see Clark v. State Bar (1952) 39 Cal. 2d 161, 167-168, 246 P.2d 1]* . A violation occurs if the attorney fails to deposit and manage funds in the required manner, even if the failure does not harm the client and is never discovered by the client [*Murray v. State Bar (1985) 40 Cal. 3d 575, 584, 220 Cal. Rptr. 677, 220 Cal. Rptr. 677, 709 P.2d 480]* . An attorney's honest, but mistaken, belief that he or she has the client's permission to retain client funds is no defense to a charge of commingling those funds with those of the attorney [*see Dudugjian v. State Bar (1991) 52 Cal. 3d 1092, 1099, 278 Cal. Rptr. 90, 804 P.2d 715]* .

An attorney also may not allow the attachment of the trust account to secure the attorney's personal debts. In this situation the client account functions as security for the attorney's personal obligations; the attorney's failure to substitute his or her personal funds amounts to commingling [*Vaughn v. State Bar (1972) 6 Cal. 3d 847, 853, 100 Cal. Rptr. 713, 494 P.2d 1257]* .

[b] No Deposit of "Buffer" Funds

Deposits of an attorney's own funds constitute commingling even if they are made for the purpose of providing a "buffer" or "cushion" against the potentially harsh effect of misappropriation or mismanagement (such as overdrafts) [*see Jackson v. State Bar (1979) 25 Cal. 3d 398, 404, 158 Cal. Rptr. 869, 600 P.2d 1326* ; *Silver v. State Bar (1977) 13 Cal. 3d 134, 145 n.7, 117 Cal. Rptr. 821, 528 P.2d 1157* (rule violated when attorneys placed $2,000 of their own funds in client account as buffer)]. Such commingling, by itself, may be considered a violation warranting up to three years' suspension [*see Fitzpatrick v. State Bar (1977) 20 Cal. 3d 73, 87, 141 Cal. Rptr. 169, 569 P.2d 763* (dictum); *see also § 72.329*].

If an attorney misappropriates client funds, there is a violation of *Cal. Rules Prof. Conduct, Rule 4-100(A)*. The attorney does not, however, commit a further violation based on commingling if he or she subsequently reimburses the client account out of personal funds [*Guzzetta v. State Bar (1987) 43 Cal. 3d 962, 978-979, 239 Cal. Rptr. 675, 741 P.2d 172]* .

[c] Attorney Acting in Dual Capacity

An attorney's obligation to maintain separate client trust accounts exists regardless of the fact that the attorney is acting in another capacity, or in a dual capacity [*Ridge v. State Bar (1989) 47 Cal. 3d 952, 961-962* (executor); *Worth v. State Bar (1976) 17 Cal. 3d 337, 341, 130 Cal. Rptr. 712, 551 P.2d 16* (developer); *Simmons v. State Bar (1969) 70 Cal. 2d 361, 365, 74 Cal. Rptr. 915, 450 P.2d 291* (real estate developer)].

[d] Identifiable Trust Account Maintained in California

Stated simply, Rule 4-100 requires that clients' funds be placed in one or more trustee accounts [*Cal. Rules Prof. Conduct, Rule 4-100(A)*]. The rule against commingling is absolute; all funds received or held for the benefit of clients by an attorney must be deposited in one or more identifiable bank accounts labeled "Trust Account," "Client's Funds Account" or words of similar import, and no funds belonging to the attorney may be commingled with them [*Arm v. State Bar (1990) 50 Cal. 3d 763, 776-777, 268 Cal. Rptr. 741, 789 P.2d 922* (construing former Rule 8-101(A); *now see Cal. Rules Prof. Conduct, Rule 4-101(A)*)].

Absent specific circumstances, such as a significant amount of money or funds held by the attorney for more than a short period of time, there is no need to segregate individual clients' funds; all client funds may be commingled in one trust account. Those funds that are nominal in amount or are on deposit for a short period of time must be placed in an interest-bearing demand trust account, the interest on which must be paid to the State Bar [*Bus. & Prof. Code § 6211*; *see § 72.323*].

Funds ordinarily must be deposited in a bank account maintained in the State of California. They may be deposited in non-California institutions with the client's consent if there is a substantial relationship between the client and the jurisdiction in which the funds are deposited [*Cal. Rules Prof. Conduct, Rule 4-100(A)*].

[e] Account Management

When the account is opened or closed, the attorney should send a deposit slip or voided blank check on the account to the Legal Services Trust Fund Program at the State Bar, including the attorney's bar membership number [*see § 72.323*]. For discussion of additional record-keeping requirements, see *§ 72.321[4]*.

The rule against commingling requires that an attorney withdraw any funds from the client trust account when those funds become property of the attorney. The attorney must withdraw such funds at the earliest reasonable time after the attorney's interest in them becomes fixed [*Cal. Rules Prof. Conduct, Rule 4-100(A)(2)*]. For further discussion, see *§ 72.324[1]*.

[f] Exception for Payment of Bank Charges

There is a limited exception to the rule against commingling, which has been strictly construed: the attorney may deposit funds "reasonably sufficient" to pay bank charges into the client's trust account [*Cal. Rules Prof. Conduct, Rule 4-100(A)(1)*].

PRACTICE TIP:

Only Deposit Amount Needed to Fund Charges. The maximum prudent reserve permitted to be maintained in a client trust account to handle "bank charges" is approximately $500. Avoid depositing additional amounts, e.g., to cover overdrafts [*see § 72.321[2][b]*]. The deposit of an attorney's own funds into a client's trust account is a "red flag" should future investigation occur.

[3] Notification and Safekeeping Requirements

[a] Basic Duties

A lawyer must promptly notify a client of the receipt of his or her funds, securities, or other property [*Cal. Rules Prof. Conduct, Rule 4-100(B)(1)*], and must promptly identify and label the property and place it in a safe deposit box or other place of safekeeping as soon as practicable [*Cal. Rules Prof. Conduct, Rule 4-100(B)(2)*]. Funds must be deposited in a trust account [*Cal. Rules Prof. Conduct, Rule 4-100(A*); *see also § 72.321[2][d]*].

The attorney's duties with regard to the safekeeping of client funds are nondelegable. An attorney will be subject to discipline for commingling or other violations that occur because of the negligence of office employees [*see Palomo v. State Bar (1984) 36 Cal. 3d 785, 795-796, 205 Cal. Rptr. 834, 685 P.2d 1185]* .

[b] Grounds for Disciplinary Sanctions

Violations of the notification or safekeeping requirements are usually accompanied by commingling, misappropriation of the client's funds, or other serious violations [*see, e.g., McCray v. State Bar (1985) 38 Cal. 3d 257, 260, 211 Cal. Rptr. 691, 696 P.2d 83* (misappropriation); *Phillips v. State Bar (1975) 14 Cal. 3d 492, 495-496, 121 Cal. Rptr. 605, 535 P.2d 733* (unauthorized endorsement of release and settlement check); *Monroe v. State Bar (1961) 55 Cal. 2d 145, 152, 10 Cal. Rptr. 257, 358 P.2d 529* (intentionally deceiving opposing counsel); *Griffith v. State Bar (1945) 26 Cal. 2d 273, 277, 158 P.2d 1* (misappropriation and commingling)].

Nonetheless, there have been cases in which the failure to comply with the notification or safekeeping requirements, or both, was used to justify disciplinary sanctions. For example, in *Browne v. State Bar*, the lawyer received his client's

money and went to a local bar where he was allegedly given knockout drops and robbed of the money [*Browne v. State Bar (1955) 45 Cal. 2d 165, 166-168, 287 P.2d 745]* . Even though no misappropriation was proved, the Supreme Court nevertheless suspended the attorney for three months for failure to notify his client promptly of the receipt and loss of the funds. Similarly, in *Walter v. State Bar*, the Supreme Court referred to a prior proceeding involving Mr. Walter in which he was reproved for taking his client's check and depositing a like amount of cash in an envelope attached to the client's file in his office, even though there was no finding of misappropriation or commingling [*Walter v. State Bar (1970) 2 Cal. 3d 880, 887, 87 Cal. Rptr. 833, 471 P.2d 481]* .

In both *Browne* and *Walter*, it may be that the Supreme Court was somewhat unpersuaded of the bona fides of the lawyers' conduct. In other cases, conduct arguably in violation of the rules regarding safekeeping of client funds and notification has not been sufficient to warrant sanctions when the Court was clearly persuaded of the lawyer's good faith. For example, in *Russill v. State Bar*, the lawyer had an open book account with a third party and possessed a full power of attorney with regard to his affairs. The lawyer was given money by his client to give to the third party. Instead of doing so, he put the money in his own account because the third party owed him more than the money he was given by the client. While the Court criticized the lawyer's conduct as bad business practice, it found no moral turpitude and dismissed the proceeding [*Russill v. State Bar (1941) 18 Cal. 2d 321, 328, 115 P.2d 464]* .

[4] Record Keeping

[a] Basic Requirements

A lawyer must maintain complete records of the clients' funds, securities, and other property he or she holds, preserve those records for no less than five years after the final appropriate disposition of the property, render appropriate accountings to his or her clients, and comply with any order for an audit of such records issued pursuant to the Rules of Procedure of the State Bar [*Cal. Rules Prof. Conduct, Rule 4-100(B)(3)*; *see also § 72.321[4][d]*].

PRACTICE TIP:

State Bar Access to Financial Records. The State Bar also has access to trust accounts for purposes of any audit, by issuance of a subpoena [*see Bus. & Prof. Code § 6069*]. Although an attorney may seek to quash the subpoena, this is usually a waste of valuable time [*see Bus. & Prof. Code § 6049*].

[b] Breach of Duties Generally

The failure to keep proper books of accounts, vouchers, receipts, and checks is a breach of the attorney's duty to his or her clients [*Fitzsimmons v. State Bar (1983) 34 Cal. 3d 327, 332, 193 Cal. Rptr. 896, 667 P.2d 700* ; *see Bus. & Prof. Code § 6128(c)*]. The fact that the failure was in good faith and without injury to the client is irrelevant [*Fitzsimmons v. State Bar (1983) 34 Cal. 3d 327, 331, 193 Cal. Rptr. 896, 667 P.2d 700]* . Moreover, the duties are nondelegable, so that an attorney is subject to discipline for negligent lapses in recordkeeping procedures by office employees; serious and inexcusable lapses may be deemed willful for disciplinary purposes [*Palomo v. State Bar (1984) 36 Cal. 3d 785, 795-796, 205 Cal. Rptr. 834, 685 P.2d 1185* ; *see Edwards v. State Bar (1990) 52 Cal. 3d 28, 37, 276 Cal. Rptr. 153, 801 P.2d 396]* .

As with the notification and safekeeping requirement, it is unlikely that violation of the recordkeeping requirement will be unaccompanied by other violations. For example, in *Fitzsimmons v. State Bar*, the attorney failed to obtain a receipt for cash he allegedly gave to a third party on instructions of his client. Under the circumstances of the case, the Court held his conduct in violation of the recordkeeping requirement. However, the reproval administered was in part based on his failure to deposit large sums of clients' funds in his trust account [*Fitzsimmons v. State Bar (1983) 34 Cal. 3d 327, 330, 193 Cal. Rptr. 896, 667 P.2d 700]* .

Nonetheless, an attorney's failure to provide a proper accounting to the client for funds received on the client's behalf is grounds for discipline regardless of whether there is consequent financial loss by the client [*McCray v. State Bar*

(1985) 38 Cal. 3d 257, 270, 211 Cal. Rptr. 691, 696 P.2d 83] . Failure to keep records is a "suspicious circumstance" that gives rise to an adverse inference in disciplinary proceedings, for example, of conversion of the proceeds [*see Rodgers v. State Bar (1989) 48 Cal. 3d 300, 311, 256 Cal. Rptr. 381, 768 P.2d 1058* ; *Walter v. State Bar (1970) 2 Cal. 3d 880, 889, 87 Cal. Rptr. 833, 471 P.2d 481]* .

[c] Improper Use of ATM Cards or Overdraft Protection

An attorney who repeatedly withdraws small amounts of cash for personal use from a trust account by means of his or her ATM card may be regarded as improperly treating the trust account as a personal or general office account, and either allowing the attorney's own funds to remain in the trust account longer than they should or misappropriating funds that properly belong to the attorney's client. This is true regardless of the means by which the withdrawals are accomplished--check, ATM card, withdrawal slip, or other means. This does not mean that all use of ATM cards in connection with client trust accounts is inherently improper or suspect. For example, an attorney may not be precluded from using an ATM card to accomplish a transfer of funds from a client trust account to a general office account that is otherwise proper, provided that adequate records are kept [*see* In re Heiner (1990) 1 State Bar Ct Rptr 301].

Similarly, the use of "instant over draft protection" and so-called instant availability of funds may be improper with respect to a client trust account. In these situations the bank is in reality extending a loan to the attorney on the basis of the "balances" maintained in the client trust account, which is improper in that it represents the utilization of the client's funds as security. Although many attorneys maintain accounts with these attributes, it is improper to maintain automatic "overdraft" protection because of the requirement to report all overdrafts.

[d] Standards for Recordkeeping

[i] Client Funds

The Board of Governors of the State Bar has adopted standards, effective January 1, 1993, as to what "records" shall be maintained by members and law firms in accordance with *Cal. Rules Prof. Conduct, Rule 4-100(B)(3)*. These standards are effective and binding on all State Bar members [*see Cal. Rules Prof. Conduct, Rule 4-100(C)*].

Under the Standards, a State Bar member must, from the date of receipt of client funds through the period ending five years from the date of appropriate disbursement of such funds, maintain the following [*Cal. Rules Prof. Conduct, Rule 4-100,* Standards]:

- A written ledger for each client on whose behalf funds are held that sets forth:
  - The name of the client.
  - The date, amount, and source of all funds received on behalf of the client.
  - The date, amount, payee, and purpose of each disbursement made on behalf of the client.
  - The current balance for the client.
- A written journal for each bank account that sets forth:
  - The name of the account.
  - The date, amount, and client affected by each debit and credit.

- The current balance in the account.

- All bank statements and canceled checks for each bank account.

- Each monthly reconciliation (balancing) of the above items.

Under the Check Clearing for the 21st Century Act [Pub. L. 108-100], banks have the option to abandon returning original checks to customers with their monthly bank statements. Banks may destroy the original checks and send the customer a digital image of the check called a substitute check. To remain in compliance with *Cal. Rules Prof. Conduct Rule 4-100*, lawyers should determine their bank's policy regarding returning original checks or substitute checks.

[ii] Client Securities or Other Property

The Standards also require a member, from the date of receipt of all securities and other properties held for the benefit of the client through the period ending five years from the date of appropriate disbursement of the securities and other properties, to maintain a written journal that specifies the following [*Cal. Rules Prof. Conduct, Rule 4-100*, Standards]:

- Each item of security and property held.

- The person on whose behalf the security or property is held.

- The date of receipt of the security or property.

- The date of distribution of the security or property.

- Each person to whom the security or property was distributed.

[5] Payment and Delivery of Property to Which Client Is Entitled

[a] Basic Requirements

A lawyer must promptly pay or deliver to the client funds, securities, or property that the client requests and is entitled to [*Cal. Rules Prof. Conduct, Rule 4-100(B)(4)*]. Violations of this rule will almost invariably be accompanied by misappropriation [*see, e.g., Warner v. State Bar (1983) 34 Cal. 3d 36, 41-42, 192 Cal. Rptr. 244, 664 P.2d 148* ; *Doyle v. State Bar (1982) 32 Cal. 3d 12, 16-18, 184 Cal. Rptr. 720, 648 P.2d 942]* , because there is no reason for a lawyer to refuse a client's request for his or her funds unless the lawyer simply does not have the money or property which, except in an extraordinarily unusual case [*see, e.g., Butts v. State Bar (1948) 31 Cal. 2d 453, 457-458, 189 P.2d 1* (attorney's mistaken but good faith withholding, after client's death, of part of trust fund as payment for monies advanced to penniless client for necessaries of life was improper but was not moral turpitude)], would establish misappropriation.

Generally, when an attorney unreasonably refuses to or delays in endorsing a client's settlement draft that requires the attorney's signature, the attorney will be found to violate *Cal. Rules Prof. Conduct, Rule 4-100(B)(4)* for failure to promptly pay or deliver funds to the client [*see* In the Matter of Berg (Review Dept. 1997) 3 Cal. State B. Ct. Rptr. 725 ; In the Matter of Kaplan (Review Dept. 1993) 2 Cal. State B. Ct. Rptr. 509 ; *but see* In the Matter of Feldsott (Review Dept. 1997) 3 Cal. State B. Ct. Rptr. 754 (attorney's refusal to sign settlement draft after taking appropriate steps not unreasonable)].

If there is a dispute between the lawyer and client as to whether the funds belong to the lawyer (for example, as his or

her fee) or to the client, the funds must be retained in the lawyer's trust account until the dispute is resolved [*Cal. Rules Prof. Conduct, Rule 4-100(A)(2)*]. While the lawyer may not put the disputed amount into his or her general account, he or she will not be disciplined for retaining it in the trust account if there is a bona fide dispute over the right to the funds. There may also be a dispute over whether a lawyer has a lien on property belonging to the client. For a discussion of the attorney's lien rights, see *§ 72.198*.

For further discussion of the extent to which an attorney is obligated to return property to a client other than trust account funds, particularly files and attorney work product, *see §§ 72.198[3]* and *72.371[2][a]*.

[b] Effect of Third-Party Liens

In some situations, the attorney will hold money on which a third party has placed a lien. For example, in a personal injury action a doctor may require a medical lien for reports and examinations. Because the client is not necessarily entitled to the full sum in the account, the attorney need not pay the amount to the client that is in dispute [LACBA Formal Opinion No. 368 (1977)]. Nevertheless, it appears that the attorney may not pay the amount of the lien without the client's consent [*see Cal. Rules Prof. Conduct, Rule 4-210(A)(1)*].

If a third party has a lien on the client's property in the attorney's possession of which the attorney has notice, and the client objects to the payment of the lien, the attorney should notify both the holder of the lien and the client that the attorney will hold the funds until the dispute between them is settled [LACBA Formal Opinion No. 368 (1977)]. However, the attorney should also, consistent with his or her obligations to the client, encourage a reasonably prompt resolution of the dispute to avoid the necessity of bringing an action of interpleader, such as settlement discussions or arbitration [LACBA Formal Opinion No. 368 (1977)].

For discussion of payment of medical liens, see *§ 72.327[1]*.

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§ 72.322 Fiduciary Duty to Nonclients

An attorney acting as a fiduciary for a nonclient may be disciplined for violating his or her fiduciary duty to that person, notwithstanding the lack of an attorney-client relationship [*Guzzetta v. State Bar (1987) 43 Cal. 3d 962, 979, 239 Cal. Rptr. 675, 741 P.2d 172* ; *Galardi v. State Bar (1986) 43 Cal. 3d 683, 691, 238 Cal. Rptr. 774, 739 P.2d 134* , *cert. denied, 484 U.S. 1062 (1988)* ; *Worth v. State Bar (1976) 17 Cal. 3d 337, 341, 130 Cal. Rptr. 712, 551 P.2d 16]* .

For example, an attorney breached his fiduciary duties to nonclients when he entered into joint venture agreements with them to improve and sell real properties, and then subsequently diverted funds from loans secured by the properties, failed to obtain consent of the co-joint venturers before encumbering the properties, and failed to comply with the request of one of the co-joint venturers for an accounting, all of which eventually resulted in foreclosures on the properties [*Galardi v. State Bar (1986) 43 Cal. 3d 683, 691-693, 238 Cal. Rptr. 774, 739 P.2d 134]* .

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§ 72.323 Placement of Client Funds in Interest Bearing Trust Account

[1] IOLTA Requirements

Prior to 1981, attorneys were required only to segregate client funds from their own funds. Typically, all client funds were put in one demand (that is, checking) account, and no interest was paid on the account. After banks were allowed to pay interest on checking accounts, the Legislature, in 1981, enacted *Bus. & Prof. Code § 6210 et seq.*, entitled "Funds for the Provision of Legal Services to Indigent Persons," generally referred to as "IOLTA" (Interest on Lawyers Trust Accounts). These statutes require any lawyer who receives or disburses trust funds to establish and maintain an IOLTA account in which the attorney or law firm must deposit or invest all client deposits or funds that are nominal in amount or are on deposit or invested for a short period of time [*Bus. & Prof. Code § 6211(a)*].

Interest earned on these accounts must be transmitted to the State Bar of California at least quarterly [*Bus. & Prof. Code § 6212(e)(1)*]. The monies received by the State Bar must be used to fund "qualified legal services projects" [*Bus. & Prof. Code §§ 6213(a), 6214*] in accordance with criteria established by the legislation [*Bus. & Prof. Code § 6216*]. There is no discretion to use the interest earned on nominal or short term accounts for any purpose other than the statutory one [*Carroll v. State Bar (1985) 166 Cal. App. 3d 1193, 1200-1201, 213 Cal. Rptr. 305 , cert. denied, 474 U.S. 848]* .

PRACTICE TIP:

Setting Up State Bar Trust Account. Most banks are familiar with *Bus. & Prof. Code § 6210 et seq.* and will be able to set up an account that complies with these provisions. Banks generally automatically remit interest to the State Bar. It is important for the attorney to check periodically to ensure that the bank has set up the right type of account and is sending the interest to the State Bar. There have been some instances in which a bank fails to set up the account properly or later stops sending interest to the State Bar.

[2] Implementing Regulations

Requirements and restrictions imposed on recipients of the funds are also established by the legislation [*see Bus. &*

Prof. Code § 6217 et seq.]. The Board of Governors of the State Bar has adopted regulations and procedures necessary to implement the legislation [*see* Rules Regulating Interest-Bearing Trust Fund Accounts, Rule 1 et seq.].

The statutory scheme is not an unconstitutional "taking" of property without just compensation [*Carroll v. State Bar (1985) 166 Cal. App. 3d 1193, 1204-1206, 213 Cal. Rptr. 305 , cert. denied, 474 U.S. 848* ; *Brown v. Legal Foundation of Washington (2003) 538 U.S. 216, 235, 123 S. Ct. 1406, 155 L. Ed. 2d 376* (interest earned in the IOLTA accounts is the private property of the owner of the principal, the transfer of which could be a *per se* taking, requiring just compensation)], or unconstitutionally vague because of its reference to "deposits that are nominal in amount or are on deposit for a short period of time" [*Carroll v. State Bar (1985) 166 Cal. App. 3d 1193, 1203-1204, 213 Cal. Rptr. 305 , cert. denied, 474 U.S. 848]* .

The program is mandatory and the client has no right to have his or her funds deposited in any other account, so long as they are either "nominal" in amount or held "for a short period of time." Funds are nominal if it is impractical to segregate them to earn income for the benefit of the client, in light of the income the funds could earn or the costs involved in earning or accounting for such income [Rules Regulating Interest-Bearing Trust Fund Accounts, Rule 1.4].

Constitutionality of IOLTA Program. In *Brown v. Legal Foundation of Washington (2003) 538 U.S. 216, 123 S. Ct. 1406, 155 L. Ed. 2d 376* , the Supreme Court reiterated its stance in *Phillips* that the interest earned in an IOLTA account is the "private property" of the owner of the principal. The court went on to hold that a state law that requires client funds which could not otherwise generate net earnings for the client to be deposited in an IOLTA account is not a "regulatory taking." The court further held that a law requiring the interest on such funds to be transferred to a different owner "for a legitimate public use" could be a *per se* taking requiring the payment of just compensation to the client, but that compensation was to be measured by the client's pecuniary loss, that is, the net interest actually earned. (For example, if the interest generated was less than the cost of distributing the interest to the client, then no net interest would have been earned.) The court reasoned that if the pecuniary loss was zero, then no violation of the *Just Compensation Clause of the Fifth Amendment* occurred. Thus, the constitutionality of an IOLTA program, in this respect, appears to hinge on whether adherence to the laws of a particular program result in a pecuniary loss to the client. While California's IOLTA program is currently in effect, it is unclear whether *Bus. & Prof. Code Section 6210* is constitutional.

Each attorney or firm must make a determination of whether the criteria are met [Rules Regulating Interest-Bearing Trust Fund Accounts, Rule 1.5]. The Rules also provide, however, that regardless of the determination of the attorney, no disciplinary action will be brought if the determination was made in good faith [Rules Regulating Interest-Bearing Trust Fund Accounts, Rule 1.5].

PRACTICE TIP:

Deposit of Client Trust Funds. Any client trust funds that are more than nominal, or are to be held for more than a short period of time, should also be placed in an interest bearing account with the interest payable to the client. A fiduciary has a general duty to make the trust productive by depositing funds in interest bearing accounts [*see Prob. Code §§ 16007, 16225, 16440(a)(3)*]. Under similar fiduciary duties to preserve the trust corpus [*see Prob. Code § 16006*], an attorney should only deposit funds into federally insured accounts, and open several accounts if necessary at separate banks when a client's trust funds exceed the federally insured limits.

[3] Overdraft Reporting

Depositories for attorney trust accounts are required to report overdrafts from the accounts to the State Bar, irrespective of whether the instrument drawn on insufficient funds is honored [*Bus. & Prof. Code §§ 6091.1(a), 6091.2(a), (b)*; *see also Bus. & Prof. Code § 6091.1(b)* (format of reports)]. As a condition of practicing law in California, attorneys are deemed to have consented to reporting [*Bus. & Prof. Code § 6091.1(c)*]. A financial institution may charge an attorney

or law firm for the reasonable cost of producing reports and records concerning overdrafts from attorney trust accounts [*see Bus. & Prof. Code § 6091.1(d)*; *see also Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 924-929, 216 Cal. Rptr. 345, 702 P.2d 503* (charge for check drawn on insufficient funds must not be unconscionable)].

PRACTICE TIP:

Overdraft Report Sent to State Bar. The requirements that banks report overdrafts on IOLTA accounts to the State Bar do not require that the banks also notify the attorney. Often the attorney's first notice of an overdraft will be through contact by the State Bar.

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§ 72.324 Withdrawal From Trust Account

[1] By Attorney for Earned Fees

To the extent that a lawyer becomes entitled to a portion of the client's funds (for example, for services performed), he or she must withdraw that portion at the earliest reasonable time after his or her interest in the funds becomes fixed. If, however, there is a dispute over the lawyer's right to withdraw the funds, then the disputed amount must remain in the trust account until the dispute is resolved [*Cal. Rules Prof. Conduct, Rule 4-100(A)(2)*; *see also § 72.324[3]*].

To assure the integrity of the trust account, Rule 4-100(A)(2) requires that the attorney withdraw funds "at the earliest reasonable time" after the attorney's interest in those funds becomes fixed [*Cal. Rules Prof. Conduct, Rule 4-100(A)(2)*]. Failure to do this subjects the client's funds to the very risks the commingling rule was designed to protect against [*see Arm v. State Bar (1990) 50 Cal. 3d 763, 777, 268 Cal. Rptr. 741, 789 P.2d 922]* .

[2] Deposit and Distribution of Settlement Proceeds

Often funds placed in a trust account belong, either currently or potentially, to both the lawyer and the client. For example, a lawyer may receive a settlement check, from the proceeds of which the client is to receive the net settlement and the lawyer is to receive his or her fee. In these circumstances, the check should, after proper endorsement, be deposited in the lawyer's trust account. After the check is properly endorsed, the lawyer should write two checks on the trust account: one to the client and one to the attorney, to be placed in his or her general account. An accounting should also be given to the client. Thus it is not proper for the lawyer to leave his or her funds in the trust account, nor is it proper for the lawyer to deposit the initial settlement check in his or her general account.

[3] When Fee in Dispute

If there is a fee dispute between the lawyer and the client, any portion of the lawyer's fee that is disputed must remain in the trust account until the dispute is finally resolved and any interest has become fixed [*Cal. Rules Prof. Conduct, Rule 4-100(A)(2)*; *see also Garlow v. State Bar (1988) 44 Cal. 3d 689, 707-710, 244 Cal. Rptr. 452, 749 P.2d 1037* (attorney may not sell chattels pledged as security for attorney's fees if client disputes disposition of the chattels)]. A

lawyer may not unilaterally determine his or her fee and withhold trust funds to satisfy that fee, even though he or she may be entitled to reimbursement for services [*see* *Jackson v. State Bar (1979) 25 Cal. 3d 398, 404, 158 Cal. Rptr. 869, 600 P.2d 1326* ; *Brody v. State Bar (1974) 11 Cal. 3d 347, 350 n.5, 113 Cal. Rptr. 371, 521 P.2d 107]* .

ILLUSTRATION:

Disputed Amount Left in Trust Account. Client and attorney enter a one-third contingency fee contract. However, the contract is not put in writing, as required by *Bus. & Prof. Code § 6147*. The client exercises the statutory right to avoid the contract, and as a consequence, the lawyer is only entitled to the reasonable value of his or her services [*Bus. & Prof. Code § 6147(b)*]. The recovery in the case is $60,000. The client contends that the lawyer's services are worth $10,000. The lawyer claims one-third of the recovery ($20,000) as reasonable compensation. What should the lawyer do? The lawyer should pay the client $40,000, pay himself or herself $10,000, and leave the remaining (disputed) amount in the trust account until the dispute is resolved [*see* *Jackson v. State Bar (1979) 25 Cal. 3d 398, 404, 158 Cal. Rptr. 869, 600 P.2d 1326]* .

If funds are claimed by another attorney, and the client has not directed their disbursement to this attorney, the attorney holding the funds does not violate his or her duties by withdrawing the disputed funds from the account after the client has received the share due to him or her [*Shalant v. State Bar (1983) 33 Cal. 3d 485, 489, 189 Cal. Rptr. 374, 658 P.2d 737]* .

[4] Determining Client's Funds

[a] Dependent on Nature of Agreement

Determining which funds in a trust account belong to a client is relatively simple when those funds are received by the lawyer on behalf of the client by way of settlement of litigation, proceeds from a sale of property, or the like. The problem becomes more complex, however, when the funds are given to the lawyer by the client for services to be performed. Analytically, there are three possible agreements (or interpretations of ambiguous agreements) that might have been intended:

- The so-called "true retainer."
- The so-called "flat" or "fixed" fee.
- The advance against fees to be earned.

Adding to the confusion is the fact that an arrangement by which funds are advanced against fees to be earned is often loosely referred to as a "retainer" [*see* Bar Ass'n of San Francisco, Legal Ethics Committee, Opinion No. 1980-1]. For further discussion of fee agreements, see *§ 72.195[1]*.

[b] True Retainer Agreement

The "true retainer" is a sum of money paid to the attorney to assure his or her availability for future services that he or she may or may not ever be called on to render. The amount paid as a retainer is solely for the purpose of assuring the lawyer's availability and will not reduce the lawyer's fee for future services. The lawyer may never be called on to perform any services. In this true retainer agreement, the money paid to the lawyer becomes his or hers on payment and should be placed in the general account [*see* *Baranowski v. State Bar (1979) 24 Cal. 3d 153, 164 n.4, 154 Cal. Rptr. 752, 593 P.2d 613]* . If the payment is to be billed against the future performance of work, it is not a "true retainer."

The determination that funds belong to the lawyer is made for the specific purpose of determining whether they must be placed in a trust account. It does not immunize the lawyer from, for example, a failure-of-consideration claim against

the estate of a deceased lawyer who died before the end of the retainer period [*see* Bar Ass'n of San Francisco, Legal Ethics Committee, Opinion No. 1980-1]. It is also an open question whether the discharge of the lawyer before the end of the retainer period entitles the attorney only to the value of his or her services [*see Fracasse v. Brent (1972) 6 Cal. 3d 784, 791, 100 Cal. Rptr. 385, 494 P.2d 9]* . In any event, for purposes of the commingling rules, fees given for a true retainer belong to the lawyer when received [*see Baranowski v. State Bar (1979) 24 Cal. 3d 153, 164 n.4, 154 Cal. Rptr. 752, 593 P.2d 613]* .

One court has identified a third type of fee falling between a "true retainer" and an "advance payment retainer." In discussing this intermediate "security retainer," the court defined it as an amount paid by the client to the attorney to secure payment of fees for future services that the attorney is expected to provide. It remains the property of the client until the attorney applies it to services actually rendered, and it acts as a "credit toward fees." The court found that such a "security retainer" must be deposited into a client trust account and withdrawn only as it is earned [*T. & R. Foods, Inc. v. Rose (1996) 47 Cal. App. 4th Supp. 1, 7-8*].

ILLUSTRATION:

True Retainer Agreement. On January 2, 1991, Lawyer receives $10,000 from Megabucks Corporation to be available to handle any civil litigation in which it is a defendant during 1991. On January 5, 1991, Lawyer deposits the $10,000 received from Megabucks into his office account. Megabucks Corporation does not need Lawyer during 1991. Is this a true retainer fee? Yes. A true retainer fee is paid solely for the purpose of ensuring the availability of the attorney for the matter. The true retainer fee is not paid for the performance of any legal service or specific engagement. A true retainer does not include a flat or fixed fee arrangement. The true retainer is earned when received and should not be placed in the client trust account, because it is not held for the benefit of the client. A true retainer does not have to be returned to the client if the client does not utilize the attorney's services [*Cal. Rules Prof. Conduct, Rule 3-700(D)(2)*].

ILLUSTRATION: Fee Advance and Security Deposit. On January 2, 1991, Lawyer receives $3,000 from Defendant, $2,500 as a "retainer" to represent Defendant in a civil action against her and $500 for advanced costs. Lawyer tells Defendant that he will deduct $150 per hour from the retainer as he does work. Lawyer deposits the entire $3,000 check into his general account. Is this a true retainer? No. Although this is styled by the lawyer as a "retainer," it is not a true retainer because deductions will be taken as work is performed. It is really in the nature of an advance on attorney's fees and a security against fees. The attorney's failure to place the advanced costs in the client trust account may be a violation of *Cal. Rules Prof. Conduct, Rule 4-100(A).* Should the office account drop below $500 at any time before the costs are paid out, the attorney may also be found culpable of misappropriation and dishonesty constituting moral turpitude [*see Bus. & Prof. Code § 6106*]. Note, on the other hand, that it may be arguable that the $2,500 "advance" becomes the lawyer's property on receipt [*see* Bar Ass'n of San Francisco, Legal Ethics Committee, Opinion No. 1973-14; *see also § 72.324[4][c]*].

[c] Charges Against Advance Fees

Probably more common than the true retainer agreement is the advance against fees to be earned, sometimes referred to as a retainer. In this type of agreement, the attorney estimates the fee that will be involved in the particular matter and then, to assure payment, requires that some or all of the estimated fee be advanced prior to accepting employment. This type of agreement differs from the flat fee agreement discussed under § 72.324[4][d][i] *below*.

The issue of where to place advance fees, whether in a client trust account or in the attorney's general account, is unclear and currently a subject of controversy. The California Supreme Court has not yet imposed discipline in any reported decision for a violation of former Rule 8-101(A) for the failure of an attorney to place advances against fees in a client's trust account [*see Read v. State Bar (1991) 53 Cal. 3d 394, 408-409, 279 Cal. Rptr. 818, 807 P.2d 1047* ;

Baker v. State Bar (1989) 49 Cal. 3d 804, 817-818, 263 Cal. Rptr. 798, 781 P.2d 1344 ; *Baranowski v. State Bar (1979) 24 Cal. 3d 153, 164, 154 Cal. Rptr. 752, 593 P.2d 613]* .

Under current practice in California, it appears that it may be permissible in some circumstances for attorneys to place advance fees in their general account, to be billed against as they are earned [*see* Bar Ass'n of San Francisco, Legal Ethics Committee, Opinion No. 1973-14 (advance fees that are relatively small and commensurate with services to be performed reasonably current with their receipt become attorney's property on receipt)]. If the attorney has a 30-day billing period, they may be properly removed after 30 days if the client fails to dispute the billing during that time period [*see also § 72.450[5]*].

The State Bar's Commission on the Revision of the Rules of Professional Conduct has been working with the State Bar Board of Governors to clarify the issue of where advances against fees should be deposited under *Cal. Rules Prof. Conduct, Rule 4-100*.

PRACTICE TIP:

Client Trust or General Account. The general practice of many firms is to place these funds into the general account. Some firms adopt the "prudent" course of placing the funds in the client trust account. One possible middle course is to deposit such funds into a separate account labeled "advance fee account."

In any event, the attorney may withdraw the funds periodically as earned. Monthly bills sent to the client will indicate the services performed, fees or costs involved, funds withdrawn from the trust account, and the balance remaining. If the matter is concluded before the entire advance is expended, the remaining balance must be remitted to the client.

[d] Fixed or Flat Fee

[i] Nature of Agreement

A third type of agreement is the so-called "flat" or "fixed" fee agreement. Here, the lawyer charges a fixed fee for a particular matter. For example, a criminal attorney may charge a fixed fee to take the matter through a preliminary examination, a business lawyer may charge a fixed fee to provide the client with a corporation, or a family law practitioner may charge a fixed fee in an adoption proceeding. Bankruptcy attorneys also generally charge flat fees. Often, though not invariably, the flat fee includes the out-of-pocket costs the attorney will incur (for example, filing fees) that are not separately itemized.

Although the lawyer who enters into this type of agreement takes the risk that unforeseen complications may require an unusually large expenditure of time, the slight risk may be more than compensated for by the obviation of the need to keep accurate time records and make periodic billings.

PRACTICE TIP:

"Value Billing." "Value billing" is an increasingly popular concept, under which attorneys who work under a flat fee agreement become entitled to additional compensation when the client obtains a "good" or beneficial (and usually prompt) result, a device that theoretically is intended not only to reduce the risk of uncompensated effort but also reduce "padding" by the flat fee attorney.

In some instances a flat fee may become excessive, giving rise to a duty on the attorney's part to arrive at some equitable settlement based on the reasonable value of his or her services. For further discussion regarding excessive fees, see *§ 72.193*.

[ii] Where to Deposit Fee

For purposes of *Cal. Rules Prof. Conduct, Rule 4-100*, how are funds received pursuant to this type of agreement to be treated? On one hand, as in the advance against fees arrangement, the lawyer is clearly required to perform specified services. On the other hand, as in the true retainer, the lawyer is under no obligation to account to the client for time or funds expended. The majority of a sharply divided legal ethics committee of the San Francisco Bar Association has given the opinion that such fees belong to the lawyer and should be deposited in the general account [Bar Ass'n of San Francisco, Legal Ethics Committee, Opinion No. 1980-1; *cf. Baranowski v. State Bar (1979) 24 Cal. 3d 153, 164, 154 Cal. Rptr. 752, 593 P.2d 613]* .

[iii] Fee When Attorney Discharged

It seems clear that a flat fee agreement is subject to the rule of *Fracasse v. Brent*. Thus, if the client exercises his or her absolute right to discharge the attorney, the attorney is entitled only to the reasonable value of services rendered to the date of discharge [*Fracasse v. Brent (1972) 6 Cal. 3d 784, 791, 100 Cal. Rptr. 385, 494 P.2d 9]* .

The fact that for purposes of the commingling rule the lawyer need not put the fee in a trust account does not necessarily allow him or her to retain the entire fee if he or she is discharged before the services have been performed. It is as if the client paid cash under a contract that gave him or her a conditional right to rescind. The right to rescind (to discharge the lawyer and pay only the reasonable value of services rendered) is not affected by the fact that the contracting party has the immediate use of the cash (that the lawyer need not put it in a trust account).

For further discussion of the client's right to discharge the attorney, and recovery of reasonable value of services rendered, see respectively §§ 72.592[2] and *72.451*.

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§ 72.325 Account Statement Furnished to Client

At the client's written request, a lawyer must provide the client with a full accounting of the funds received and disbursed and any charges on the trust account [*Bus. & Prof. Code § 6091*]. The attorney must furnish this statement within 10 calendar days after receipt of the request [*Bus. & Prof. Code § 6091*]. A client may not file more than one request in a 30-day period unless he or she files a complaint with the State Bar and the State Bar determines that more statements are warranted [*Bus. & Prof. Code § 6091*].

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§ 72.326 Notice of Insurance Settlement Payment Delivered to Attorney

On payment of $100 or more in settlement of a third-party liability claim, an insurer is required to provide written notice to the claimant if the claimant is a natural person and if the payment is delivered to the claimant's attorney or other representative by draft, check, or otherwise [*Bus. & Prof. Code § 6149.5(a)*].

An insurer may satisfy this requirement by providing the claimant with a copy of the cover letter sent to the claimant's attorney or representative that accompanied the settlement payment [*Bus. & Prof. Code § 6149.5(b)*]. This notice requirement does not create a cause of action for any person against an insurer for failure to provide notice, and does not create a defense for any party to any cause of action based on the insurer's failure to provide notice [*Bus. & Prof. Code § 6149.5(c)*].

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§ 72.327 Payment of Medical Liens

[1] Require Prompt Resolution

Failure to promptly pay medical liens when withholding funds from settlement to satisfy the liens can result in discipline pursuant to *Cal. Rules Prof. Conduct, 4-100(B)(4)* [In the Matter of Mapps (1990) 1 Cal. State Bar Ct. Rptr. 1, 10-11, 16-18 (violation under former Rule 8-101(B)(4))].

Funds held to pay medical liens must be maintained in the client trust account until disbursed. Complaints generated by medical lienholders result in auditing of client trust accounts.

Note that it appears that if the client disputes the lien, the attorney may not pay the amount disputed without the client's consent [*see Cal. Rules Prof. Conduct, Rule 4-210(A)(1)*; *see § 72.321[5][b]*].

[2] Discounting of Liens

The discounting or obtaining a reduction of the full medical lien is a very common feature of personal injury practice. The fee agreement or retainer in these cases should specify what percentage of the funds realized by the discount are disbursable to the client and to the attorney. The better theory is that the client should receive the amount designated in the fee agreement even if this results in a "windfall," and that the attorney conversely is not required to negotiate the discount.

[3] Illustrations of Lien Payments From Trust Account

The following examples illustrate common questions that arise regarding payment of medical liens from a client's trust account:

(1) Attorney does not enter into medical lien with a medical provider, but client does. Attorney does not withhold funds from settlement for doctor. Has the attorney acquired a fiduciary duty to the doctor to withhold funds from the settlement? No. Since the lawyer has executed no lien with the doctor, the lawyer has acquired no fiduciary duty to the

doctor to withhold funds from the settlement. In this instance, the lawyer's fiduciary duty is to pay the client the proceeds of the settlement demanded by the client, including any funds that the client owes the doctor. The attorney has a duty to advise the client of the legal consequences of the client's failure to pay the doctor's lien.

(2) Attorney and client sign a lien. Attorney retains money for the medical lien in the general account prior to payment of the medical provider. Has the attorney assumed fiduciary responsibilities to the doctor? Yes. The attorney has assumed fiduciary responsibilities to the doctor respecting the handling of the amount necessary to pay the lienholder and violates *Cal. Rules Prof. Conduct, Rule 4-100(A)* in failing to maintain the funds in trust.

(3) Attorney and client sign a lien. Attorney retains money for the medical lien in the trust account. Client contests the fairness of the medical bill. Attorney negotiates the dispute on behalf of client. Is the attorney's conduct appropriate and permissible? Yes [*see § 72.321[5][b]*].

(4) Attorney and client sign a lien. Attorney retains money for the medical lien in the trust account. Client contests the fairness of the medical bill. Client demands that attorney give client the money while the dispute over the medical bills proceeds. Can the attorney give the client the money? No. The attorney cannot give the money to the client, because the attorney has acquired fiduciary responsibilities to hold the money in trust to satisfy the lien. Because the client also signed the lien, the attorney owes no paramount duty to follow the client's wishes. Interpleading the disputed amount is a more impractical and costly alternative (in that it reduces recovery and raises the possibility that the funds will escheat to the state) [*see* State Bar Formal Opinion 1988-101; *see also § 72.321[5][b]*].

PRACTICE TIP:

Obtain Authority to Hold Disputed Funds in Trust. This type of problem may be avoided by anticipating it in the fee agreement or in the lien agreement itself. Authority should be obtained from the client and the health care provider to hold the funds in the trust account pending resolution of any dispute between them. In the absence of such an agreement by both the provider and client, the attorney may have no alternative but to interplead the money in dispute.

(5) Attorney and client sign a lien. Attorney retains money for the medical lien in the trust account. Client contests the fairness of the medical bill. Attorney negotiates the dispute on behalf of client. Attorney's trust account dips below the amount of the lien. Is the attorney guilty of an ethical violation? Yes. The attorney violated *Cal. Rules Prof. Conduct, Rule 4-100(A)* by failing to maintain the amount of the lien in trust.

(6) Attorney and client sign a lien. Attorney retains money for the medical lien in the trust account. Client contests the fairness of the medical bill. Attorney negotiates the dispute on behalf of client and obtains a 50% reduction. Attorney then fails to disburse the funds to the doctor for over six months and fails to give the client any further moneys. Is the attorney guilty of an ethical violation? Yes. The attorney violated *Cal. Rules Prof. Conduct, Rule 4-100(B)(4)* by failing to pay the compromised medical lien promptly to the doctor on behalf of the client. The attorney also failed to promptly pay the client's portion of the savings obtained by the compromise of the medical lien.

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§ 72.328 Examples of Common Problems in Trust Account Management

[1] Failure to Place Client Funds in Client Trust Account

The following examples illustrate potential violations of *Cal. Rules Prof. Conduct, Rule 4-100(A)* regarding the placement of client funds into trust accounts:

ILLUSTRATION:

Failure to Deposit Client Funds in Trust Account. On January 2, 1991, ABC Law Firm's Los Angeles office receives $100,000 from its client, California Corporation, to be used as a down payment for real property, the purchase of which ABC Law Firm is handling. Pursuant to the partnership agreement of this multistate law firm, all monies received from clients are transferred for deposit into the firm's client trust account located in Big Bank in New York, New York. California Corporation has no offices in New York state. Has ABC Law Firm violated *Cal. Rules Prof. Conduct, Rule 4-100(A)*? Yes. ABC Law Firm has violated Rule 4-100(A) because it failed to deposit California Corporation's funds in a trust account in a bank situated in the state of California.

Attorney is representing Buyer in a large commercial lease transaction. Attorney, on demand of Seller's lawyers, represents that Attorney is holding $10,000 in trust to be paid to Seller, during the lease negotiations and while Seller takes the commercial property off of the market. Buyer gives Attorney a third party check for $10,000 that Attorney, at Buyer's request, deposits into his office account. Has Attorney violated *Cal. Rules Prof. Conduct, Rule 4-100(A)*? Yes. By making the agreement to hold funds in trust for the benefit of Seller, Attorney has acquired fiduciary responsibility to Seller to hold the funds in a client's trust account [*see § 72.322*].

[2] Insufficiently Funded Checks

Examples of ethical violations with regard to insufficiently funded checks include the following:

- *Trust Accounts* : One insufficiently funded check drawn on a trust account, coupled with the

attorney's promise to make good on the check and failing to make good on it (a deceitful promise to pay), constitutes an act of moral turpitude [*Bowles v. State Bar (1989) 48 Cal. 3d 100, 109, 111, 255 Cal. Rptr. 846, 768 P.2d 65]* .

- *Office Accounts* : Numerous bounced checks from the office accounts with knowledge of insufficient funds constitute acts of moral turpitude [In the Matter of Heiser (1990) 1 Cal. State Bar Ct. Rptr. 47, 53-54].

- *Personal Checking Accounts for Non-Legal Expenses* : Knowingly issuing checks from personal accounts that the attorney should know contain insufficient funds and that would not be honored is a violation of the oath and duties of an attorney [*Rhodes v. State Bar (1989) 49 Cal. 3d 50, 55-56, 59, 260 Cal. Rptr. 266, 775 P.2d 1035* ; *Segal v. State Bar (1988) 44 Cal. 3d 1077, 1086-1087, 245 Cal. Rptr. 404, 751 P.2d 463]* .

See also discussion under § 72.328[3][a].

[3] Commingling Funds

[a] In General

The following examples illustrate potential violations of *Cal. Rules Prof. Conduct, Rule 4-100(A)(2)* by commingling funds:

ILLUSTRATION:

Commingling Funds. Lawyer receives a settlement draft of $100,000 on behalf of Client in a personal injury action settlement. The draft is deposited into Lawyer's client's trust account the following day. Pursuant to their written contingency agreement, Lawyer disburses $10,000 to medical lienholders, $60,000 to the client, and leaves the $30,000 representing Lawyer's fees in the trust account for six months. Has Lawyer breached *Cal. Rules Prof. Conduct, Rule 4-100(A)(2)*? Yes. Lawyer has breached the rule by leaving the fees in the trust account, where they have been commingled with the funds of clients.

Lawyer discovers that his bookkeeper has embezzled $10,000 in trust funds from the client's trust account. Immediately on discovery of the embezzlement, Lawyer terminates the bookkeeper, files a complaint with the police department against bookkeeper, safeguards all checks and other financial access, and deposits $10,000 of the Lawyer's personal funds into the clients trust account. Has Lawyer breached *Cal. Rules Prof. Conduct, Rule 4-100(A)(2)*? No. This is not commingling of personal funds, since the Lawyer is replacing funds over which Lawyer had fiduciary duties.

[b] Dips Below Minimum Amount Required

Once the trust account balance is shown to have dipped below the appropriate amount, an inference of misappropriation may be drawn. The burden then shifts to the attorney to show that his or her office procedure was adequate [*see* In the Matter of Respondent F (1992) 2 Cal. State Bar Ct. Rptr. 17, 26].

The following examples illustrate potential violations of *Cal. Rules Prof. Conduct, Rule 4-100(A)* by allowing account balances to dip below the required minimum:

ILLUSTRATION:

Balance Falls Below Minimum. Lawyer receives a settlement draft of $100,000 on behalf of Client in a personal injury action settlement. Pursuant to their written contingency agreement, Lawyer disburses

$10,000 to medical lienholders, $60,000 to the client by trust account check, and takes a draw of $30,000 representing Lawyer's attorney's fees. Lawyer's secretary fails to deposit the settlement draft for 5 days. Lawyer's trust account falls beneath the limit he is required to maintain on behalf of all clients. Has Lawyer violated *Cal. Rules Prof. Conduct, Rule 4-100(A)*? Yes. The mere fact that the balance in an attorney's trust account has fallen below the total of amounts deposited and purportedly held in trust supports a conclusion of misappropriation [*Giovanazzi v. State Bar (1980) 28 Cal. 3d 465, 474, 169 Cal. Rptr. 581, 619 P.2d 1005]* . It is at least a technical violation. Care should be taken that the deposited check has cleared prior to writing checks to clients.

Lawyer receives a settlement draft of $100,000 on behalf of Client in a personal injury action settlement. The settlement draft is deposited into the client's trust account on the following day. Pursuant to their written contingency agreement, Lawyer disburses $10,000 to medical lienholders, $60,000 to the client by trust account check, and takes a draw of $30,000 representing Lawyer's attorney's fees. The bank places a 10-day hold on the check and then the check is returned by the insurance company's bank for improper endorsements. Lawyer's trust account falls beneath the limit he is required to maintain on behalf of all clients. Has Lawyer violated *Cal. Rules Prof. Conduct, Rule 4-100(A)*? Yes. There is a presumption that misappropriation has occurred because the balance in the trust account has fallen below the total of amounts deposited in and purportedly held in trust. Because Lawyer has a duty to safeguard all clients' funds, *Cal. Rules Prof. Conduct, Rule 4-100(A)* has been violated. Care should be taken that settlement drafts clear before such monies are disbursed.

Lawyer receives a settlement draft of $100,000 on behalf of Client in a personal injury action settlement. The settlement draft is deposited into the clients' trust account on the following day. When first retained in 1990, Lawyer and client had an oral agreement that Lawyer would receive 50% of any recovery. Lawyer disburses $10,000 to medical lienholders, $45,000 to the client by trust account check, and takes a draw of $45,000 representing Lawyer's attorney's fees. On receipt of Client's portion of the proceeds, Client telephones the Lawyer and tells Lawyer that Lawyer should have only gotten $30,000, or 1/3 of the recovery, according to Client's memory. Lawyer does nothing. Has Lawyer violated *Cal. Rules Prof. Conduct, Rule 4-100(A)(2)*? Yes. Pursuant to Rule 4-100(A)(2), when the Lawyer learns that Client is disputing the amount of the fee, Lawyer has a duty to place the disputed portion of the funds ($15,000) into the trust account until the dispute is resolved.

The deposit of a draft into a client trust account does not mean that the funds are automatically available; availability depends on when the draft is cleared at the home office of the issuing organization (possibly an out-of-state carrier). Consequently, financial institutions place "holds" on checks. The length of time for a "hold" can increase substantially, depending on the status of the carrier (admitted or non-admitted, frequently termed "off shore") and the amount of the recovery (longer holds are imposed for larger sums).

PRACTICE TIP:

Ascertain Availability of Funds. Attorneys should not disburse funds until they have verified with the bank that funds are available. Do not rely on friendly acquaintances with managers or bank employees; an NSF check may still result if the acquaintance is not in the office, or if a "hold" policy applies. Familiarity with the bank's "hold chart" may be unreliable in itself, as these may change periodically.

[4] Trust Account Used for Questionable Purposes

The following examples illustrate potentially improper use of trust account funds:

ILLUSTRATION:

Improper Use as Attorney's Account. Attorney receives a settlement on behalf of Client X for

$100,000. Costs are $10,000, attorney's fees are $30,000, and $60,000 is remitted to the client. Attorney pays her Porsche monthly payment with a client's trust account check for $5,000. Attorney pays her secretary's salary of $2,000 and her VISA bill of $3,000. Has Attorney handled her trust account properly? No. While Attorney may prove to the State Bar's satisfaction that she is not misappropriating money, under these circumstances, the bar will audit her financial records to determine that no misappropriation has occurred. The better practice is to take one draw representing the undisputed amount of your fees and pay personal bills out of other accounts.

Attorney shelters funds from other creditors, including his former spouse and the IRS, through use of his Clients Trust Account. Is such use of the fund ethically proper? No. Such conduct is improper, and may even be commingling in violation of *Cal. Rules Prof. Conduct, Rule 4-100(A)* [*see Vaughn v. State Bar (1972) 6 Cal. 3d 847, 853, 100 Cal. Rptr. 713, 494 P.2d 1257* ; *Clark v. State Bar (1952) 39 Cal. 2d 161, 167-168, 246 P.2d 1]* .

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7-72 California Forms of Pleading and Practice--Annotated § 72.329

§ 72.329 Sanctions for Violation of Trustee Duties

[1] State Bar Standards

The State Bar may investigate complaints by clients who allege trust fund mismanagement by an attorney, and may require an audit of an attorney if it determines that circumstances warrant it [*Bus. & Prof. Code § 6091*].

The State Bar Board of Governors has adopted Standards For Attorney Sanctions For Professional Misconduct, which define the relevant terms used in disciplinary proceedings [Standards For Attorney Sanctions For Professional Misconduct, Standard 1.2], and set forth the degrees of sanctions available [Standards For Attorney Sanctions For Professional Misconduct, Standards 1.4, 1.5]. The Supreme Court is not bound by these standards, and may temper them with factors peculiar to each case, but it nevertheless accords them great weight [*see In re Lamb (1989) 49 Cal. 3d 239, 245, 260 Cal. Rptr. 856, 776 P.2d 765* ; *Lawhorn v. State Bar (1987) 43 Cal. 3d 1357, 1366, 240 Cal. Rptr. 848, 743 P.2d 908]* .

[2] For Willful Misappropriation

[a] Disbarment as Usual Discipline

Misappropriation has always been considered a serious violation of an attorney's professional obligations. The usual discipline is disbarment in the absence of strong mitigating circumstances [*McKnight v. State Bar (1991) 53 Cal. 3d 1025, 1035, 281 Cal. Rptr. 766, 810 P.2d 998* ; *Sugarman v. State Bar (1990) 51 Cal. 3d 609, 618, 274 Cal. Rptr. 246, 798 P.2d 843* ; *see also Hitchcock v. State Bar (1989) 48 Cal. 3d 690, 709, 257 Cal. Rptr. 696, 771 P.2d 394* (disbarment proper, notwithstanding attorney's claim that misappropriation was committed in response to threats of violence against him and his family)].

Willful misappropriation of entrusted funds or property must result in disbarment, unless the amount of funds or property misappropriated is insignificant or the most compelling mitigating circumstances clearly predominate [Standards For Attorney Sanctions For Professional Misconduct, Standard 2.2(a)]. In the latter cases, the Standards prescribe that discipline must not be less than one year actual suspension, regardless of mitigating circumstances

[Standards For Attorney Sanctions For Professional Misconduct, Standard 2.2(a); *but see* *Edwards v. State Bar (1990) 52 Cal. 3d 28, 38, 276 Cal. Rptr. 153, 801 P.2d 396* (Standard 2.2(a)'s one year minimum "should be regarded as a guideline, not an inflexible mandate"); *Howard v. State Bar (1990) 51 Cal. 3d 215, 220-223, 270 Cal. Rptr. 856, 793 P.2d 62* (six months' actual suspension imposed by Supreme Court for single act of willful misappropriation, accompanied by strong mitigating circumstances)].

[b] Specialized Usage of "Willful"

The term "willful" has a specialized usage in disciplinary proceedings. Misconduct need not be deliberate or even intentional to be deemed willful, as indicated by the following:

- Misappropriation or other misconduct is willful if the attorney had "general purpose or willingness to commit the act, or make the omission" [*see* *Durbin v. State Bar (1979) 23 Cal. 3d 461, 467, 152 Cal. Rptr. 749, 590 P.2d 876]* .

- Evidence that the balance in a trust account fell below the amount credited to a client is sufficient to support a finding of willful misappropriation [*Palomo v. State Bar (1984) 36 Cal. 3d 785, 795, 205 Cal. Rptr. 834, 685 P.2d 1185]* .

- If a misappropriation resulted from serious and inexcusable lapses in office procedures, resulting in violations of the attorney's duties to oversee client funds entrusted to his or her care and to keep detailed records and accounts, it may be deemed willful even in the absence of deliberate wrongdoing [*Palomo v. State Bar (1984) 36 Cal. 3d 785, 795-796, 205 Cal. Rptr. 834, 685 P.2d 1185]* .

The degree of culpability involved in an attorney's "willful" misconduct is usually simply a factor in determining the degree of sanction to be imposed. It will be much more severe, for example, when an attorney has deliberately taken a client's funds with the intent to keep them permanently, and has answered the client's inquiries with lies and evasions. Alternately it may be less severe when the attorney has merely acted negligently, without intent to deprive and without acts of deception [*see* *Murray v. State Bar (1985) 40 Cal. 3d 575, 582, 220 Cal. Rptr. 677, 220 Cal. Rptr. 677, 709 P.2d 480]* .

[3] For Commingling or Other Failure to Safeguard Property

In the event that there is no willful misappropriation, an attorney guilty of commingling, failure to properly safeguard the client's property, or failure to maintain adequate records and deliver client property to the client on request must receive at least a three-month actual suspension from the practice of law. The punishment must be imposed regardless of mitigating circumstances [*see* Standards For Attorney Sanctions For Professional Misconduct, Standard 2.2(b) (referring to violations of Cal. Rules Prof. Conduct, former Rule 8-101)].

[4] For Moral Turpitude, Fraud, or Dishonesty

If the attorney has committed an act of moral turpitude, fraud, or intentional dishonesty toward a court, client, or another person, or of concealment of a material fact to any of them, he or she must be suspended or disbarred, depending on the extent to which the victim of the misconduct is harmed or misled and depending on the magnitude of the act of misconduct and the degree to which it relates to the attorney's act within the practice of law [Standards For Attorney Sanctions For Professional Misconduct, Standard 2.3].

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7-72 California Forms of Pleading and Practice--Annotated § 72.350

§ 72.350 Death or Incapacity of Attorney

[1] Application of General Agency Principles

Under the law of agency, an agency is terminated as to every person having notice of it by the death or incapacity of the agent to act as such [*Civ. Code § 2355(c), (e)*]. Whether the attorney is an employee or independent contractor, the attorney is normally the agent of the client; hence, the law of principal and agent generally applies to the attorney-client relationship [*Sullivan v. Dunne (1926) 198 Cal. 183, 192, 244 P. 343* ; *see also § 72.220* et seq. (authority of attorney)].

For discussion of the law of agency, see Ch. 427, *Principal and Agent* .

[2] When Agreement Is With Law Firm

When the attorney-client relationship is created by an agreement between a client and a law firm, the law firm is the agent of the client. The death or incapacity of a member or associate of the firm does not terminate the agency relationship. Similarly, the voluntary departure of an individual attorney from the firm does not affect the agency. Significant changes in the structure of the firm may, however, give rise to the obligations to advise the client of (1) significant events; and (2) his or her right to elect to substitute in counsel of his or her own choice. For further discussion, see *§ 72.350[4]*.

PRACTICE TIP:

Assumption of Law Practice. If an attorney dies or becomes incapacitated (including by reason of suspension or disbarment), the client, the superior court, the State Bar of California, or any interested person may apply for assumption of jurisdiction by the superior court over the attorney's law practice [*see Bus. & Prof. Code § 6180.2*]. If an attorney becomes incapable of properly representing a client for any reason (including by reason of substance abuse or physical or mental illness), such persons or entities may similarly apply to the superior court for the assumption of that attorney's law practice by the court, another attorney, or the State Bar of California [*see Bus. & Prof. Code § 6190 et seq.*].

[3] Incapacity Includes Attorney's Suspension or Disbarment

Under *Civ. Code § 2355(e)*, the term "incapacity of the agent to act as such" with respect to attorneys includes suspension and disbarment, since the attorney is precluded from practicing law [*see Bus. & Prof. Code § 6117*] and is no longer able to act as an attorney [*see Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 741, 216 Cal. Rptr. 300* (involving suspension)].

When an attorney is suspended or disbarred, his or her authority to act as such on behalf of the client terminates by operation of law and, as a result, the agency relationship dissolves like any agency that is not coupled with an interest. In these circumstances, service on the attorney does not constitute constructive notice to the client [*Lovato v. Santa Fe Internat. Corp. (1984) 151 Cal. App. 3d 549, 553, 198 Cal. Rptr. 838* ; *see also § 72.390[2]*].

An order suspending or disbarring an attorney is authorized to include, and typically does include, a direction requiring the suspended or disbarred attorney to do the following [*Cal. Rules of Ct., Rule 9.20(a)*]:

- Notify, within a specified time, all clients being represented in pending matters, together with any co-counsel, of the attorney's suspension or disbarment and his or her consequent disqualification to act as an attorney.

- Notify these clients, in the absence of co-counsel, of their need to seek legal advice elsewhere, calling attention to any urgency in seeking the substitution of another attorney.

- Deliver to all clients being represented in pending matters any papers or other property to which the client's are entitled, or notify the clients or co-counsel of a suitable time and place at which they may obtain such papers or property, calling attention to any urgency for obtaining them.

- Refund any part of fees paid that have not been earned.

- Notify opposing counsel (or in the absence of opposing counsel, adverse parties) in pending litigation of the attorney's suspension or disbarment and his or her consequent disqualification to act as an attorney, and file a copy of the notice with court in which the litigation is pending.

See also *Cal. Rules of Ct., Rule 9.20(b)-(c)* for additional provisions regarding requirements for service of these notices, requirements for filing proof of compliance, and sanctions for failure to comply.

ILLUSTRATION:

Service on Suspended Attorney. Defendant hires Attorney in June 1979 to represent it in a lawsuit by Plaintiff. In January 1980, the State Bar suspends Attorney. In March 1980, Defendant fires Attorney, and hires new counsel. By mistake, a substitution is not accomplished. In October 1980, Plaintiff serves a set of interrogatories on Attorney, apparently unaware that Attorney had been suspended. Attorney never responds. Plaintiff files motions to compel answers and a motion for discovery sanctions that are both granted due to Attorney's nonopposition. Plaintiff successfully moves to strike Defendant's answer and obtains entry of default in April 1981. In April 1982, Defendant finds out about the these events and moves to set aside the default. Is the default judgment void? Yes. The default judgment is void under the federal constitution's due process clause because Defendant had no actual or constructive notice of the interrogatories and discovery motions. Defendant didn't actually learn of the interrogatories and default until approximately a year after entry of the default; and service on an attorney while he or she is suspended does not provide constructive notice to the client [*see Lovato v. Santa Fe Internat. Corp. (1984) 151 Cal. App. 3d 549, 553, 198 Cal. Rptr. 838]* .

[4] Death or Incapacity of Member of Law Firm

When a law firm is employed to conduct litigation, the client contracts for the services of all the members of the firm. Hence, when a member of the firm dies or becomes incapacitated, the employment contract is not extinguished; the law firm remains employed and is responsible for representing the client.

However, the client must be informed of the event, and the client has the option to declare the contract terminated. If the client does not do so and chooses to entrust a surviving attorney member of the firm with the further management of the litigation in which the firm was employed, the surviving attorney is bound to complete the unfinished contract for the benefit of the partnership [*Little v. Caldwell (1894) 101 Cal. 553, 559-561, 36 P. 107* ; *see also Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal. App. 3d 200, 218-219, 194 Cal. Rptr. 180]* .

PRACTICE TIP:

Suggested Procedures. If a member or associate of a law firm dies or becomes incapacitated, the firm should advise his or her clients of this event, since the firm must keep clients informed of all significant matters affecting the client's case. The client should also be advised of his or her right to seek substitute counsel of his or her choice [*see Bus. & Prof. Code § 6068(m)*; *Cal. Rules Prof. Conduct, Rule 3-500*]. Presumably this requirement does not arise with regard to clients for whose matters the deceased or incapacitated attorney had little or no responsibility. Thus, such clients need not be notified.

Attorneys who cease to practice law jointly also have an obligation to cooperate in notifying their former clients of this develpment. This duty arises not only from their obligations to the clients, but also from their fiduciary obligations to one another [*see Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal. App. 3d 200, 218-219, 194 Cal. Rptr. 180]* .

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§ 72.351 Appointment of New Attorney

[1] Statutory Notice Requirement

When an attorney dies, is removed or suspended, or ceases to act as an attorney, no further proceedings may be taken against the attorney's client until that client has been given written notice, to appoint another attorney or to appear in person [*Code Civ. Proc. § 286*]. For a form of notice by an adverse party to appoint a new attorney, *see § 72.710*. For an additional optional form for designating the identity of a new attorney, *see § 72.711*.

The purpose of this requirement is to provide notice to a party who might not be aware that his or her attorney has died, been removed or suspended, or ceased to act as an attorney [*see Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 742, 216 Cal. Rptr. 300* ; *Gion v. Stroud (1961) 191 Cal. App. 2d 277, 280, 12 Cal. Rptr. 540]* . It applies only when the attorney has died or ceased to be an attorney and not when the attorney has ceased to act for the client in a particular case [*De Recat Corp. v. Dunn (1926) 197 Cal. 787, 790-794, 242 P. 936* ; *California Water Service Co. v. Edward Sidebotham & Son (1964) 224 Cal. App. 2d 715, 734, 37 Cal. Rptr. 1]* .

[2] Required for Affirmative Actions by Opposing Party

Since the purpose of the statutory requirement is to protect against unnoticed proceedings that might be taken against the unrepresented client, it applies only to affirmative actions taken by an opposing party, such as a motion to dismiss an action for want of prosecution [*see Larkin v. Superior Court (1916) 171 Cal. 719, 724, 154 P. 841* (notice given)] or for failure to answer interrogatories [*Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 742-743, 216 Cal. Rptr. 300]* . It does not apply to suspend the mere running of mandatory time limits, such as the time to file a notice of appeal [*Voinich v. Poe (1921) 52 Cal. App. 597, 601-602, 199 P. 74]* or the time within which an action must be brought to trial to avoid dismissal [*Larkin v. Superior Court (1916) 171 Cal. 719, 724, 154 P. 841* (involving application of former *Code Civ. Proc. § 583* requiring dismissal of action not brought to trial within five years; *now see Code Civ. Proc. § 583.310 et seq.*)].

[3] Waiver of Notice

The right to notice under *Code Civ. Proc. § 286* may be waived by the party entitled to receive it [*California Water Service Co. v. Edward Sidebotham & Son (1964) 224 Cal. App. 2d 715, 736, 37 Cal. Rptr. 1]* . For example, the right is waived if:

- The party's attorney dies and the party is fully aware of it [*California Water Service Co. v. Edward Sidebotham & Son (1964) 224 Cal. App. 2d 715, 734, 736-737, 37 Cal. Rptr. 1]* .

- The party makes a voluntary formal appearance in the case after his or her attorney has ceased to act as an attorney [*Unwin v. Barstow-San Antonio Oil Co. (1918) 36 Cal. App. 508, 509, 172 P. 622]* .

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§ 72.352 Death or Incapacity of Client

The authority of an attorney, unless coupled with an interest, is terminated by either the death of the client [*Swartfager v. Wells (1942) 53 Cal. App. 2d 522, 527-528, 128 P.2d 128* ; *see Civ. Code § 2356(a)(2)*] or the client's subsequent insanity or incapacity to contract [*Sullivan v. Dunne (1926) 198 Cal. 183, 192, 244 P. 343* ; *see Civ. Code § 2356(a)(3)*; *see also § 72.390[2]*].

There are exceptions this rule. The attorney of record representing a decedent who, if alive, would have had a right of appeal, may file a notice of appeal in the court in which the judgment was rendered within the time in which the decedent could have filed a notice had he or she survived [*Code Civ. Proc. § 903*]. Furthermore, in the case of a special contract of employment between the client and attorney, such as a specific contract to conduct a suit to final judgment, or an agreement providing a fee for the entire case, the agency is not terminated by the death or incapacity of the client [*Estate of Mallory (1929) 99 Cal. App. 96, 104, 278 P. 488* (contract contained both elements)].

PRACTICE TIP:

Followup Measures. When a client dies, the attorney should immediately contact the personal representative of the decedent, inform him or her of the extent of attorney's authority while the client was living, and outline the status of any legal matters pending at the time of the client's death. The attorney should also take any actions immediately necessary to preserve any of the client's legal rights (for example, moving for a continuance in any pending litigation, if necessary) for a reasonable time to allow the personal representative to retain new counsel or give the attorney the authority to continue to act for the personal representative [*cf. Cal. Rules Prof. Conduct, Rule 3-700(A)(2)* (attorney may not withdraw from employment without taking reasonable steps to avoid prejudice to client's rights)].

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2. Withdrawal Of Attorney

7-72 California Forms of Pleading and Practice--Annotated § 72.370

§ 72.370 Grounds for Withdrawal From Employment

[1] Right to Withdraw

The right of an attorney to withdraw from employment is not absolute [*Vann v. Shilleh (1975) 54 Cal. App. 3d 192, 197, 126 Cal. Rptr. 401]* , but is limited by the following:

- Statutes [*see, e.g., Code Civ. Proc. § 284* (attorney may be changed with consent of client or on order of court); *Code Civ. Proc. § 285.2* (withdrawal when public funding reduced); *Penal Code § 987.1* (attorney at preliminary examination must continue to represent client until arraignment unless relieved by court); *Welf. & Inst. Code § 634.6* (attorney who appears in juvenile court on behalf of minor must continue to represent minor unless relieved by court)].

- Rules of Professional Conduct [*Cal. Rules Prof. Conduct, Rule 3-700* (attorney may not withdraw until the attorney has taken steps to avoid prejudice to client)].

- The California Rules of Court [*Cal. Rules of Ct., Rule 8.36* (withdrawal or substitution of attorney pending appeal)].

- Case law [*People v. Prince (1968) 268 Cal. App. 2d 398, 406, 74 Cal. Rptr. 197* ; *People v. Massey (1955) 137 Cal. App. 2d 623, 626, 290 P.2d 906* (criminal cases); *see also De Recat Corp. v. Dunn (1926) 197 Cal. 787, 791, 242 P. 936]* .

Consequently, an attorney desiring to withdraw from a case should take care to assure that withdrawal is allowed by law [*see § 72.370[4]* and *[5]*], and that the proper procedure is followed [*see §§ 72.371* and *72.372[1]*].

The Rules of Professional Conduct regarding withdrawal apply to all members of the State Bar of California, including:

- District attorneys and their deputies [People ex rel. Younger v. Superior Court (1978) 86 Cal. App. 3d 180, 192, 150 Cal. Rptr. 156] .

- Public defenders and their deputies [*Chaleff v. Superior Court (1977) 69 Cal. App. 3d 721, 724, 138 Cal. Rptr. 735]* .

- An attorney appointed to act as an adviser to a defendant conducting his or her own defense in a criminal action [*Chaleff v. Superior Court (1977) 69 Cal. App. 3d 721, 724, 138 Cal. Rptr. 735]* .

[2] Abandonment at Will or for Personal Considerations Prohibited

An attorney in a pending case may not abandon the representation of a client at will or for personal considerations, but must continue the representation until he or she is released by either the client or the court. An attorney's withdrawal from a case on the eve of trial without proper cause may constitute a violation of professional ethics [*County of San Bernardino v. Doria Mining & Engineering Corp. (1977) 72 Cal. App. 3d 776, 783 n.4, 140 Cal. Rptr. 383]* .

Thus, it has been held that the withdrawal of an attorney, who represented both a corporation and an individual in a breach of contract action, on the Friday preceding a Monday court date on the ground that the individual defendant refused to accept a settlement negotiated by the attorney, was held to be unethical under former *Cal. Rules Prof. Conduct, Rule 2-111(2)* (*now see Cal. Rules Prof. Conduct, Rule 3-700(A)(2)*) andconstituted an improper abandonment of the client [*Vann v. Shilleh (1975) 54 Cal. App. 3d 192, 197, 126 Cal. Rptr. 401]* .

On the other hand, an attorney has a duty to maintain only such actions as appear to the attorney to be legal or just [*see Bus. & Prof. Code § 6068(c)*]. Consequently, an attorney who loses faith in the cause for which he or she has been employed should request leave to withdraw [*see Cal. Rules Prof. Conduct, Rule 3-700(B)(1), (C)(1)(a)-(c), (e)*; *Kirsch v. Duryea (1978) 21 Cal. 3d 303, 309-310, 146 Cal. Rptr. 218, 578 P.2d 935* (attorney's determination that action was not meritorious could not be characterized as manifestly erroneous when several doctors gave opinion that plaintiff's injury was not due to negligence and the doctor who initially gave a contrary opinion later questioned his first opinion)].

[3] Avoidance of Nonconsenual Withdrawal

When an attorney seeks to withdraw from a civil case without the consent of the client, there is an obvious inference that the withdrawal is not for the client's purpose but for the attorney's purpose, often a lack of confidence in the merits of the case. Care must be taken to balance the interests of the client with the duty of the attorney *not* to assist a position without probable cause. The inference may be obvious to the parties in the case and will ordinarily gravely jeopardize any chance of settlement. On the other hand, consensual withdrawal or substitution of another attorney, as opposing counsel are well aware, may be due to a number of reasons and is less likely to jeopardize on the client's case. Ordinarily, an attorney should not seek a nonconsensual withdrawal immediately on forming a belief that the case lacks merit. Absent circumstances requiring mandatory withdrawal, the attorney should delay applying to the court for an order permitting him or her to withdraw to give the client an opportunity to obtain other counsel or to file a consensual withdrawal [*Kirsch v Duryea (1978) 21 Cal. 3d 303, 311, 146 Cal. Rptr. 218, 578 P.2d 935]* . For a discussion regarding the substitution of attorneys, see *§ 72.392[1]*.

[4] Mandatory Withdrawal

An attorney representing a client before a tribunal which requires permission for withdrawal, must seek such permission, and must withdraw from employment if any of the following occurs [*Cal. Rules Prof. Conduct, Rule 3-700(B)*]:

- The attorney knows or should know that the client is bringing an action, conducting a defense,

asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person [*see, e.g.,* *Cosenza v. Kramer (1984) 152 Cal. App. 3d 1100, 1103, 200 Cal. Rptr. 18* (attorney must withdraw if client insists on pursuing appeal that is frivolous or taken for purpose of delay); *Metzger v. Silverman (1976) 62 Cal. App. 3d Supp 30, 39,* (attorney must withdraw if client insists on bringing action in wrong forum and action is taken solely to harass or maliciously injure opposing party); *see also § 72.290* et seq.].

- The attorney knows or should know that his or her continued employment will result in a violation of the Rules of Professional Conduct or the State Bar Act [*Bus. & Prof. Code § 6000 et seq.*].

- The attorney's mental or physical condition renders it unreasonably difficult for him or her to carry out the employment effectively.

- See also discussion under § 72.371.

On a motion for sanctions from a lawyer and client in civil discovery proceedings, if the lawyer insists on exonerating himself or herself from liability for the sanctions and the client does not agree with that approach, the attorney must withdraw after satisfying the requirements of *Cal. Rules Prof. Conduct, Rule 3-700(A)(1)* [*see § 72.371[1], below*]. After withdrawing, the lawyer must continue to maintain the client's confidential information, unless the client contends that the request for sanctions is based on conduct for which the lawyer is solely responsible and the lawyer disputes the contention. In that case, the lawyer may reveal confidential information to the extent necessary to defend against the client's assertions, so long as the information is relevant to an alleged breach of duty arising out of the lawyer-client relationship [State Bar Formal Opinion 1997-151].

[5] Permissive Withdrawal

If *Cal. Rules Prof. Conduct, Rule 3-700(B)* (discussed under § 72.370[4]) does not apply, an attorney may not request permission to withdraw in matters pending before a tribunal and may not withdraw in other matters unless the request or withdrawal is based on one or more of the following grounds [*Cal. Rules Prof. Conduct, Rule 3-700(C)*]:

- The client insists on presenting a claim or defense that is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law [*see* *Davis v. State Bar (1983) 33 Cal. 3d 231, 238, 188 Cal. Rptr. 441, 655 P.2d 1276* (attorney who doubts client's credibility or legitimacy of claim should question client closely and withdraw if doubts persist); *Metzger v. Silverman (1976) 62 Cal. App. 3d Supp 30, 39,* ; *see also § 72.290* et seq.].

- The client seeks to pursue an illegal course of conduct.

- The client insists that the attorney pursue a course of conduct that is illegal or prohibited under the Rules of Professional Conduct or the State Bar Act [*Bus. & Prof. Code § 6000 et seq.*].

- The client by other conduct renders it unreasonably difficult for the attorney to carry out his or her employment effectively [*see* *Pearlmutter v. Alexander (1979) 97 Cal. App. 3d Supp 16, 20,* (withdrawal on client's refusal to consummate agreed-on settlement)].

- The client insists, in a matter not pending before a tribunal, that the attorney engage in conduct that is contrary to the judgment and advice of the attorney but not prohibited under the Rules of Professional Conduct or the State Bar Act [*Bus. & Prof. Code § 6000 et seq.*].

- The client breaches an agreement or obligation to the attorney regarding expenses or fees [*see, e.g.,*

Mandell v. Superior Court (1977) 67 Cal. App. 3d 1, 4, 136 Cal. Rptr. 354 (criminal case); *People v. Prince (1968) 268 Cal. App. 2d 398, 406-407, 74 Cal. Rptr. 197* (client failed to pay fees or expenses after reasonable request, motion to withdraw was made before trial date was set, and no showing client was prejudiced by withdrawal)].

- The attorney's continued employment is likely to result in a violation of the Rules of Professional Conduct or the State Bar Act [*Bus. & Prof. Code § 6000 et seq.*].

- The attorney's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal.

- The attorney's mental or physical condition renders it difficult for him or her to carry out the employment effectively.

- The client knowingly and freely assents to termination of the employment.

- The attorney believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

See also discussion under § 72.371.

[6] Prohibited Discrimination on Withdrawal

An attorney shall not unlawfully discriminate or knowingly permit unlawful discrimination when terminating representation of a client on the basis of race, national origin, sex, sexual orientation, religion, age or disability [*Cal. Rules Prof. Conduct, Rule 2-400(B)*]. There is no basis for disciplinary action under this rule absent a finding of civil unlawfulness under applicable state or federal law [*Cal. Rules Prof. Conduct, Rule 2-400(B)*, Discussion].

[7] Withdrawal for Lack of Public Funding of Legal Service Attorney Representing Indigent Client

[a] When Withdrawal Permitted

If a reduction in public funding for legal service materially impairs a legal service agency attorney's ability to represent an indigent client, either the attorney or the client may move for an order permitting the attorney to withdraw from the case, or the court on its own motion may permit the attorney to withdraw [*Code Civ. Proc. § 285.2*]. For forms of notice of motion and order under *Code Civ. Proc. 285.2, see §§ 72.712* and *72.713*.

The court is required to permit the attorney to withdraw as attorney of record from a case if it is shown that all of the following apply [*Code Civ. Proc. § 285.2*]:

- There are not adequate public funds to continue the effective representation of the indigent client.

- A good faith effort was made to find alternate representation for the client.

- All reasonable steps to reduce the legal prejudice to the client have been taken.

A showing of indigency, in and of itself, will not be deemed sufficient cause to deny the application for withdrawal [*Code Civ. Proc. § 285.2*].

[b] Tolling of Statute of Limitations

On granting a legal service agency's motion to withdraw, the court on its own motion or the motion of any party or attorney may toll the running of any statute of limitations, filing requirement, statute providing for mandatory dismissal, notice of appeal, or discovery requirement, for a period not to exceed 90 days when the court finds that tolling is required to avoid legal prejudice caused by the withdrawal of the legal service agency attorney [*Code Civ. Proc. § 285.3*].

[c] Appointment for No Compensation

On granting a legal service agency's motion to withdraw, statutory authority allows the court to appoint any member of the bar or any law firm or professional law corporation to represent the indigent client without compensation on a showing of good cause, and permits the appointed attorney to recover, on behalf of the client, any attorney's fees and costs to which the client may be entitled by law [*Code Civ. Proc. § 285.4*]. In determining the existence of good cause, the court may consider, but is not limited to, the following factors [*Code Civ. Proc. § 285.4*]:

- The probable merit of the client's claim.
- The client's financial ability to pay for legal services.
- The availability of alternative legal representation.
- The need for legal representation to avoid irreparable legal prejudice to the indigent client.
- The ability of appointed counsel to effectively represent the indigent client.
- Present and recent pro bono work of the appointed attorney, law firm, or private law corporation.
- The ability of the indigent client to represent him or herself.
- The appointed attorney's workload.

However, at least one court of appeal has found it is unconstitutional as a denial of equal protection to appoint attorneys to represent indigent defendants in paternity actions without compensation [*Cunningham v. Superior Court (1986) 177 Cal. App. 3d 336, 356, 222 Cal. Rptr. 854]* . In light of this opinion, it is questionable whether an appointment under *Code Civ. Proc. § 285.4* would be valid.

[8] Withdrawal After Judgment in Domestic Relations Case

An attorney of record for any party in certain family law proceedings may withdraw at any time subsequent to the time that the judgment in the action or proceeding becomes final and before he or she is served with any pleadings or motion papers in any proceeding then pending in the cause [*Code Civ. Proc. § 285.1*]. This rule applies to proceedings for [*Code Civ. Proc. § 285.1*]:

- Dissolution of marriage.
- Legal separation.
- A declaration of nullity of a void or voidable marriage.
- The support, maintenance, or custody of minor children.

For a form of notice of withdrawal as attorney of record in a domestic relations case, *see § 72.714*.

[9] Representation of Minor in Juvenile Court Proceeding

When the court appoints counsel to represent a parent or minor at a juvenile detention hearing, the appointed counsel must represent the parent or minor at all subsequent proceedings before the juvenile court. Counsel must continue to represent the parent or minor unless relieved by the court on the substitution of other counsel or for cause. The representation includes representing the parent or the minor in termination proceedings and in those proceedings relating to the institution or setting aside of a legal relationship [*Welf. & Inst. Code § 317(d)*].

In any proceeding to declare a minor a ward of the court, on entering an appearance on behalf of the minor, counsel must continue to represent that minor unless relieved by the court on the substitution of other counsel or for cause [*Welf. & Inst. Code § 634.6*; *see also Welf. & Inst. Code § 634* (stating when court must appoint counsel for minor in juvenile court proceeding to declare minor a ward of the court)].

[10] Representation of Minor Through Guardian Ad Litem

An attorney must obtain court approval to withdraw from representation of a minor who appears through a guardian ad litem [*Torres v. Friedman(1985) 169 Cal. App. 3d 880, 887-888, 215 Cal. Rptr. 604]* . The court has a duty to see that the minor's rights are not unfairly compromised by those appointed to represent the minor, and a trial judge will not ordinarily permit an attorney to withdraw unless other qualified counsel has been obtained [*see Torres v. Friedman (1985) 169 Cal. App. 3d 880, 887-888, 215 Cal. Rptr. 604]* .

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§ 72.371 Attorney's Duties on Withdrawal

[1] Avoiding Foreseeable Prejudice to Client's Interests

An attorney must not withdraw until he or she has taken reasonable steps to avoid foreseeable prejudice to the client's rights [*Cal. Rules Prof. Conduct, Rule 3-700(A)(2)*; *see In re Hickey (1990) 50 Cal. 3d 571, 580, 268 Cal. Rptr. 170, 788 P.2d 684* ; *Kapelus v. State Bar (1987) 44 Cal. 3d 179, 186-187, 242 Cal. Rptr. 196, 745 P.2d 917]* . This includes [*Cal. Rules Prof. Conduct, Rule 3-700(A)(2)*]:

- Giving the client due notice.
- Allowing the client time to employ other counsel.
- Complying with applicable laws and rules.

The requirement that an attorney take steps to avoid prejudice to the client prior to withdrawing applies when the attorney ceases to provide services, even absent formation of intent to withdraw as counsel for client [*Baker v. State Bar (1989) 49 Cal. 3d 804, 817 n.5, 263 Cal. Rptr. 798, 781 P.2d 1344]* . Even when a final judgment on an underlying action has been entered, the attorney-client relationship may be deemed to continue for the purpose of the attorney accepting service on follow-up motions regarding the action [*Maxwell v. Cooltech, Inc. (1997) 57 Cal. App. 4th 629, 632-633, 67 Cal. Rptr. 2d 293* (finding valid service made on attorney following final judgment for motion to vacate judgment under *Code. Civ. Proc. § 473*); *see also Barboza v. West Coast Digital GSM, Inc. (2009) 179 Cal. App. 4th 540, 545-546, 102 Cal. Rptr. 3d 295* (class counsel representing absent class members may be obligated to continue employment past entry of judgment)].

[2] Returning Client Property

[a] Client File and Other Property

An attorney whose employment has terminated must release to the client, promptly at the client's request, all the client's papers and property [*Cal. Rules Prof. Conduct, Rule 3-700(D)(1)*]. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not [*Cal. Rules Prof. Conduct, Rule 3-700(D)(1)*]. An attorney may not retain a client's papers or files to secure payment of fees or costs, even if the client has granted the lawyer a contractual lien on the papers [*Academy of California Optometrists, Inc. v. Superior Court (1975) 51 Cal. App. 3d 999,1006, 124 Cal. Rptr. 668* ; Bar Ass'n of San Francisco, Legal Ethics Committee, Opinion No. 1984-1; *see also § 72.193[3]*].

The requirement to return all papers and properties applies when the attorney ceases to provide services, even absent formation of intent to withdraw as counsel for the client [*Baker v. State Bar (1989) 49 Cal. 3d 804, 817 n.5, 263 Cal. Rptr. 798, 781 P.2d 1344]* . An attorney's obligation to return a client's files begins when the attorney is discharged. It is unnecessary for a client who has already requested return of papers and property prior to the attorney's discharge to be required to repeat that request after discharge [In re Regan, (2005) 4 Cal. State Car Ct. Rptr. 844].

Where an attorney has represented multiple clients jointly in a matter, and each of the clients seeks the original file, the attorney should consider whether an interpleader or declaratory relief action is appropriate [LACBA Formal Opinion No. 493 (1998)].

There may be limited circumstances in which portions of the client's file need not be released because of a protective order or nondisclosure agreement [*Cal. Rules Prof. Conduct, Rule 3-700(D)(1)*]. Counsel should, however, exercise caution in relying on this provision as a basis for withholding a portion of the client's file [*see also § 72.371[2][b]*].

Cal. Rules Prof. Conduct, Rule 3-700(D)(1) is intended to cover the recurring situation when new counsel seeks to obtain client's files in the former counsel's possession. But former counsel may still retain copies of the released files, particularly if they may be relevant to a future fee dispute or malpractice action. The attorney retaining copies must bear the cost of copying initially, unless the representation agreement provides otherwise, but the attorney may seek reimbursement for this cost in any subsequent legal proceeding [*see* Comment to *Cal. Rules Prof. Conduct, Rule 3-700(D)(1)*; BASF, Legal Ethics Committee, Opinion No. 1984-1; SDCBA, Ethics Opinions Nos. 1977-3, 1984-3].

PRACTICE TIP:

Fee Agreement Provision on Returning Client Files. An attorney may want to cover the return of files, and possibly even the destruction of files not retrieved, in his or her fee agreement. The provision should also address the continuing obligation to maintain and return files even after the dissolution of a law firm.

[b] Attorney Work Product

[i] Scope of Protection

It is unclear whether the client is entitled to all information in his or her file, particularly the attorney's work product [*see* Bar Ass'n of San Francisco, Legal Ethics Committee, Opinion No. 1984-1]. Some courts have stated that the attorney's "work product" belongs to the client regardless of whether the attorney has been paid for services rendered [*see* *Kallen v. Delug (1984) 157 Cal. App. 3d 940, 950, 203 Cal. Rptr. 879* ; *Weiss v. Marcus (1975) 51 Cal. App. 3d 590, 599, 124 Cal. Rptr. 297]* . However, while these decisions considered the attorney's work and effort expended on behalf of the client generally, they did not explicitly consider the application of *Code Civ. Proc. § 2018* (attorney work product protection) as a basis for nondisclosure of certain aspects of the client's file [*see generally* Ch. 191, *Discovery: Privileges and Other Discovery Limitations* and DeMeo, California Deposition and Discovery Practice, Ch. 28 (Matthew Bender)].

The issue of when material is protected from disclosure to the client was raised in *Lasky, Haas, Cohen & Munter v. Superior Court*. In *Lasky*, the sole trustee and a current income beneficiary of a trust was sued by beneficiaries with future interests who charged him with mismanagement and a variety of breaches of his fiduciary duties. In the course of discovery, the beneficiaries sought and received discovery of relevant written and oral communications between the trustee and his law firm. The law firm refused to disclose writings or oral discussions, to which it referred as its "uncommunicated work product," consisting of its impressions, conclusions, opinions, or legal research and theories that were never communicated to or produced for its client. The firm contended that since its own client had no right to the material, the beneficiaries had no right either [*Lasky, Haas, Cohler & Munter v. Superior Court (1985) 172 Cal. App. 3d 264, 269-270, 218 Cal. Rptr. 205]* . In interpreting former *Code Civ. Proc. § 2016* [*now see Code Civ. Proc. § 2018*], the court concluded that the attorney is the exclusive holder of the work product privilege, and that it may be asserted against the client in the context of litigation when it may be used by adversaries of the client to the client's disadvantage [*Lasky, Haas, Cohler & Munter v. Superior Court (1985) 172 Cal. App. 3d 264, 279, 218 Cal. Rptr. 205]* .

The factual context in which the work-product issue was raised by the court in *Lasky* is very unusual, however, and the breadth of its holding is unclear. The court specifically declined to reach the question of whether a different conclusion might be reached if the client had requested the work product in the context of a dispute with his former attorney [*Lasky, Haas, Cohler & Munter v. Superior Court (1985) 172 Cal. App. 3d 264, 274 n.4, 218 Cal. Rptr. 205]* ; it also did not attempt to resolve the potential conflict between the absolute language of the statutory privilege and the ethical obligation of the attorney not to assert the privilege against his or her client's wishes [*Lasky, Haas, Cohler & Munter v. Superior Court (1985) 172 Cal. App. 3d 264, 276 n.6, 218 Cal. Rptr. 205]* .

[ii] Action Between Attorney and Client

After the *Lasky* decision, the Legislature formulated a statutory exception to the work product privilege, applicable in attorney-client disputes. In an action between an attorney and his or her client or former client, no work product privilege exists if the work product is relevant to an issue of breach by the attorney of a duty to the attorney's client arising out of the attorney-client relationship [*Code Civ. Proc. § 2018(f)*]. For purposes of the rule, a "client" is a person who, directly or through an authorized representative, consults an attorney for the purpose of retaining the attorney or securing legal service or advice from him or her in his or her professional capacity, and includes an incompetent who personally consults the attorney or whose guardian or conservator personally consults the lawyer on behalf of the incompetent [*see Code Civ. Proc. § 2018(f)*; *Evid. Code § 951*].

[iii] Actions Against or Disclosures to Third Parties

Although *Code Civ. Proc. § 2018* (*Code Civ. Proc. § 2018.080* effective July 1, 2005) now limits the application of the work-product privilege with respect to disputes between attorney and client, it remains unclear whether an attorney's professional obligation under *Cal. Rules Prof. Conduct, Rule 3-700* should be construed to require disclosure to the client when the client asserts a need for the material to assist him or her in litigation against a third party. It is at least arguable that work product protection under *Code Civ. Proc. § 2018* (*Code Civ. Proc. § 2018.080* effective July 1, 2005) still exists and may be asserted by the attorney against the client in situations not covered by *Code Civ. Proc. § 2018(f)* (*Code Civ. Proc. § 2018.080* effective July 1, 2005).

In any case, even when an attorney has transmitted work product to his or her former client, he or she may still assert work product protection to preclude disclosure to third parties [*see, e.g.,* *Kaiser Foundation Hosp. v. Superior Court (1998) 66 Cal. App. 4th 1217, 1223-1228, 78 Cal. Rptr. 2d 543* ; *Wellpoint Health Networks, Inc. v. Superior Court (1997) 59 Cal. App. 4th 110, 120, 68 Cal. Rptr. 2d 844* ; *BP Alaska Exploration v. Superior Court (1988) 199 Cal. App. 3d 1240, 1260, 245 Cal. Rptr. 682* ; *Popelka, Allard, McCowan & Jones v. Superior Court (1980) 107 Cal. App. 3d 496, 501-502, 165 Cal. Rptr. 748* (malicious prosecution action by third party against attorney and former client)].

[c] Unearned Fees

An attorney who withdraws from employment must also promptly refund any part of a fee paid in advance that has not been earned, unless it has been properly designated as a non-refundable fee or a true retainer fee that is paid solely for the purpose of ensuring the availability of the attorney for the matter [*Cal. Rules Prof. Conduct, Rule 3-700(D)(2)*; *see Chefsky v. State Bar (1984) 36 Cal. 3d 116, 120, 126-127, 202 Cal. Rptr. 349, 680 P.2d 82* (evidence failed to support finding in State Bar disciplinary proceeding that attorney failed, after abandoning client, to return fee on demand of client, although it could have supported conclusion that attorney violated Rule); *see also Garlow v. State Bar (1988) 44 Cal. 3d 689, 706, 244 Cal. Rptr. 452, 749 P.2d 1307* (when attorney is fired for failing to perform services as agreed, attorney must refund unearned fees)]. For further discussion relating to fee agreements and fee collection, see respectively §§ 72.190 et seq., 72.610 et seq.

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§ 72.372 Procedure to Be Relieved as Counsel

[1] Obtaining Permission to Withdraw

When permission for withdrawal from employment is required by the rules of a particular tribunal, the attorney may not withdraw from a proceeding before that tribunal without its permission [*Cal. Rules Prof. Conduct, Rule 3-700(A)(1)*].

In an action or special proceeding before a California court, an attorney of record may be changed at any time, before or after judgment or final determination, by one of the following means [*Code Civ. Proc. § 284*]:

- On the consent of both client and attorney, filed with the clerk, or entered in the minutes.

- On the order of the court, on application by either the client or the attorney, after notice of one to the other.

These requirements apply to criminal as well as to civil cases [*Mandell v. Superior Court (1977) 67 Cal. App. 3d 1, 4, 136 Cal. Rptr. 354* ; *People v. Ward (1972) 27 Cal. App. 3d 218, 234, 103 Cal. Rptr. 671]* .

[2] Attempt to Obtain Consent

Because of the potential negative inference that may be drawn by adverse parties when an attorney withdraws without the consent of his or her client [*see* § 72.370[3]], and because of the attorney's duty to avoid foreseeable prejudice to the client's rights [*see § 72.371*], an attorney contemplating withdrawal must generally attempt to obtain the client's consent before making any motion for leave to withdraw. This attempt should include an explanation for the requested withdrawal and notice of the potential negative inference that may result if an application for withdrawal is made to the court. In any event, it must include prior written notice to the client that provides the client with a reasonable opportunity to retain and substitute other counsel [*see § 72.371*].

It appears that the Judicial Council form of Substitution of Attorney must be used, substituting either another attorney or

the party in propria persona, as this form is intended for mandatory statewide use because itincludes notice to the client regarding the advisability, and in some instances the necessity, of retaining other counsel [*see § 72.372[3]*]. For the form for substitution by consent, *see § 72.719*.

[3] Motion for Leave to Withdraw

If consent cannot be obtained and an application for leave to withdraw becomes necessary, the following requirements apply:

- The attorney must make the application by notice of motion and motion directed to the client, which must be made on the Judicial Council form Notice of Motion and Motion to Be Relieved as Counsel--Civil, MC-051 [*Cal. Rules of Ct., Rule 3.1362(a)*].

- No memorandum is required to be filed or served with a motion to be relieved as counsel [*Cal. Rules of Ct., Rule 3.1362(b)*].

- The motion must be supported by a declaration on the Judicial Council form Declaration in Support of Attorney's Motion to Be Relieved as Counsel--Civil, MC-052. The declaration must state in general terms, and without compromising the confidentiality of the attorney-client relationship, why a motion is being made under *Code Civ. Proc. § 284(2)* as opposed to filing a consent under *Code Civ. Proc. § 284(1)* [*Cal. Rules of Ct., Rule 3.1362(c)*].

- The notice of motion and motion, the declaration, and the proposed order must be served on the client and on all other parties who have appeared in the case. The notice may be served by personal service or mail. If service is by mail under *Code Civ. Proc. § 1013*, the notice must be accompanied by a declaration stating facts showing that either [*Cal. Rules of Ct., Rules 3.1362(d)*]:

  - The address is the client's current business or residence address, or,

  - The address is the client's last known business or residence, and the attorney has been unable to locate a more current address after making reasonable efforts to do so within 30 days prior to the filing of the motion.

For the purposes of *Cal. Rules of Ct., Rule 3.1362(d)*, "current" means that the address was confirmed within 30 days before the filing of the motion. Merely demonstrating that the notice was sent to the client's last known address and was not returned is not, by itself, sufficient to demonstrate that the address is current [*Cal. Rules of Ct., Rule 3.1362(d)*]. If the service is by mail, *Code Civ. Proc. § 1011(b)* applies [*Cal. Rules of Ct., Rule 3.1362(d)*].

PRACTICE TIP:

Disclosure of Facts. When contemplating withdrawal from representation without the client's consent, counsel must take care to preserve client confidences and avoid acts or statements detrimental to the client's interests. Counsel also has a duty to continue to represent the client zealously until the withdrawal is effective. Thus, neither the motion nor declaration should disclose facts that would breach confidentiality or jeopardize the client's interests. As a practical matter it is usually possible to obtain the court's permission to withdraw without disclosing the specific facts underlying the motion. Counsel may usually state simply that a disagreement regarding the direction of litigation has arisen, making continued representation unfeasible, or that the client has lost confidence in counsel. Counsel may also prepare a separate, more detailed supplemental declaration, and then state in the initial declaration that the supplemental declaration is available to be submitted to the court under seal for *in camera* review if the court requests additional evidentiary support.

For an illustrative version of the Judicial Council form Notice of Motion and Motion to Be Relieved as Counsel--Civil (MC-051), see *§ 72.715*; for an illustrative version of the Judicial Council form Declaration in Support of Attorney's Motion to Be Relieved as Counsel--Civil (MC-052), see *§ 72.716*. For an optional form for the notice of withdrawal, *see § 72.718*.

[4] Order Granting Leave to Withdraw

The proposed order relieving counsel must be prepared on the Judicial Council form Order Granting Attorney's Motion to Be Relieved as Counsel--Civil, MC-053, and lodged with the court with moving papers. The order must specify all hearing dates scheduled in the action or proceeding, including the date of trial if known. If no hearing date is presently scheduled, the court may set one and specify the date in the order [*Cal. Rules of Ct., Rule 3.1362(e)*].

After the court signs the order, a copy of the signed order must be served on the client and on all parties that have appeared in the case. The court may delay the effective date of the order until proof of service of a copy of the signed order on the client has been filed with the court [*Cal. Rules of Ct., Rule 3.1362(e)*].

For an illustrative version of the Judicial Council form Order Granting Attorney's Motion to Be Relieved as Counsel--Civil (MC-053), *see § 72.717*.

[5] Procedure to Be Relieved as Counsel on Completion of Limited Scope Representation

An application to be relieved as attorney on completion of limited scope representation [*see § 72.190[4]*] under *Code Civ. Proc. § 284(2)* must be directed to the client and made on the Application to Be Relieved as Attorney on Completion of Limited Scope Representation (Judicial Council form MC-955) [*Cal. Rules of Ct., Rule 3.36(d)*]. The application must be filed with the court and served on the client and on all other parties or attorneys for parties in the case [*Cal. Rules of Ct., Rule 3.36(e)*].

The client must also be served with a blank Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation (Judicial Council form MC-956) [*Cal. Rules of Ct., Rule 3.36(e)*]. If no objection is served and filed with the court within 15 days from the date that the application is served on the client, the attorney making the application must file an updated form MC-955 indicating the lack of objection, along with a proposed Order on Application to Be Relieved as Attorney on Completion of Limited Scope Representation (Judicial Council form MC-958) [*Cal. Rules of Ct., Rule 3.36(f)*]. The clerk must then forward the order for judicial signature [*Cal. Rules of Ct., Rule 3.36(f)*].

If the client serves and files an objection to the application within 15 days, the clerk must set a hearing date on the Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation (Judicial Council form MC-956) [*Cal. Rules of Ct., Rule 3.36(g)*]. The hearing must be scheduled no later than 25 days from the date the objection is filed. The clerk must send the notice of the hearing to the parties and the attorney [*Cal. Rules of Ct., Rule 3.36(g)*].

If no objection is served and filed and the court signs the proposed order, the attorney who filed the application must serve a copy of the signed order on the client and on all parties or the attorneys for all parties who have appeared in the case [*Cal. Rules of Ct., Rule 3.36(h)*]. The court may delay the effective date of the order relieving the attorney until proof of service of a copy of the signed order on the client has been filed with the court [*Cal. Rules of Ct., Rule 3.36(h)*].

For an illustrative version of Judicial Council Form Application to Be Relieved as Attorney on Completion of Limited Scope Representation--MC-955, see *§ 72.771*.

For an illustrative version of Judicial Council Form Objection on Application to Be Relieved as Attorney on Completion of Limited Scope Representation--MC-956, see *§ 72.772*.

For an illustrative version of Judicial Council Form Order on Application to Be Relieved as Attorney on Completion of Limited Scope Representation--MC-958, see *§ 72.773*.

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7-72 California Forms of Pleading and Practice--Annotated § 72.373

§ 72.373 Court's Discretion to Allow Withdrawal

If an attorney requests leave to withdraw, the court has the discretion to deny the motion if the withdrawal might work an injustice [*People v. McCracken (1952) 39 Cal. 2d 336, 350, 246 P.2d 913]* or cause undue delay in the proceeding [*see Manfredi & Levine v. Superior Court (1998) 66 Cal. App. 4th 1128, 1133-1136, 78 Cal. Rptr. 2d 494* (trial court has discretion to deny attorney's request for withdrawal for alleged, but undisclosed, conflict of interest where court justifiably suspects delaying tactic); *Linn v. Superior Court (1926) 79 Cal. App. 721, 725-726, 250 P. 880* (orderdenying motion to withdraw for nonpayment of fees heard day before trial was scheduled to begin not abuse of discretion when permitting withdrawal would have necessitated continuance so client could secure new counsel)]. However, the court's discretion must be exercised reasonably [*Mandell v. Superior Court (1977) 67 Cal. App. 3d 1, 4, 136 Cal. Rptr. 354* (abuse of discretion to deny motion based on erroneous belief that counsel who represented defendant at preliminary hearing must represent defendant at arraignment)].

Withdrawal has been permitted when a corporate client refused to cooperate with counsel or pay attorney's fees [*see Ferruzzo v. Superior Court (1980) 104 Cal. App. 3d 501, 502-504, 163 Cal. Rptr. 573* (issuing mandate directing trial court to grant motion to withdraw)], and when the client suspected and questioned the good faith of the attorney [*Heple v. Kluge (1951) 104 Cal. App. 2d 461, 462, 231 P.2d 505* (withdrawal pending appeal granted on express condition that attorneys were entitled to no compensation for services previously rendered in connection with appeal)].

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7-72 California Forms of Pleading and Practice--Annotated § 72.374

§ 72.374 Liability for Wrongful Withdrawal

Apart from any disciplinary action that may be taken against an attorney who withdraws from a case without a court order or the consent of the client [*see, e.g., Finch v. State Bar (1981) 28 Cal. 3d 659, 665, 170 Cal. Rptr. 629, 621 P.2d 253]* , and any forfeiture of his or her right to compensation [*see § 72.430[5][c]*], the attorney may be subject to civil liability to the client. To recover damages on this ground, however the client must show that he or she was damaged by or sustained loss as a result of the attorney's abandonment [*Lane v. Storke (1909) 10 Cal. App. 347, 351-352, 101 P. 937]* .

If an attorney appointed to represent a criminal defendant refuses to actively participate in the trial, the court may hold the attorney in contempt and, if the attorney persists in his or her refusal, the court should relieve the attorney of his or her duties in the case and advise the client that the client may either represent himself or herself or have substitute counsel appointed [*People v. McKenzie (1983) 34 Cal. 3d 616, 628, 194 Cal. Rptr. 462, 668 P.2d 769]* .

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§ 72.375 Attorney's Lien for Compensation

An attorney who is permitted by the court to withdraw from a case for cause is entitled to enforce any written lien for fees given by the client against any judgment subsequently rendered for the client [*Pearlmutter v. Alexander (1979) 97 Cal. App. 3d Supp. 16, 20*]. However, an attorney retained on a contingent fee basis who withdraws from the representation of a personal injury plaintiff without good cause is not entitled to assert a lien on amounts recovered by the plaintiff subsequently [*Hensel v. Cohen (1984) 155 Cal. App. 3d 563, 567-569, 202 Cal. Rptr. 85]* . For a discussion of attorney's liens, see *§ 72.190* et seq.

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[Reserved]

§§ 72.376[Reserved]

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§ 72.390 Discharge of Attorney

[1] Client's Right to Change Attorney--Basic Rules

Except as *discussed in § 72.390[2]*, the client's power and right to discharge an attorney in California or to change attorneys under *Code Civ. Proc. § 284*, with or without cause, is absolute [*Fracasse v. Brent (1972) 6 Cal. 3d 784, 790, 100 Cal. Rptr. 385, 494 P.2d 9* ; *Scott v. Superior Court (1928) 205 Cal. 525, 527, 271 P. 906* ; *Jones & Matson v. Hall (2007) 155 Cal. App. 4th 1596, 1610, 66 Cal. Rptr. 3d 872* ; *Kallen v. Delug (1984) 157 Cal. App. 3d 940, 950, 203 Cal. Rptr. 879* ; *Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal. App. 3d 200, 226-227, 194 Cal. Rptr. 180]* .

The interest of the client in the successful prosecution or defense of the action is superior to that of the attorney, and, consequently, the client has the right to employ the attorney who will in the client's opinion best serve the client's interest. The relation between attorney and client is such that the client has absolute discretion to dissolve that relation whenever he or she ceases to have absolute confidence in the integrity, the judgment, or the capacity of the attorney, or for any other reason [*see* *Fracasse v. Brent (1972) 6 Cal. 3d 784, 790, 100 Cal. Rptr. 385, 494 P.2d 9* ; *Gage v. Atwater (1902) 136 Cal. 170, 172, 68 P. 581]* .

The fact the attorney has rendered valuable services under the employment or that the client is indebted to the attorney for the services or for money advanced in the prosecution or defense of the action does not affect the right of discharge [*Fracasse v. Brent (1972) 6 Cal. 3d 784, 790, 100 Cal. Rptr. 385, 494 P.2d 9* ; *Isrin v. Superior Court (1965) 63 Cal. 2d 153, 159, 45 Cal. Rptr. 320, 403 P.2d 728]* . The right exists even though a contingent fee has been agreed on or an irrevocable power of attorney has been given [*Todd v. Superior Court of San Francisco (1919) 181 Cal. 406, 413, 184 P. 684]* . Consequently, the client need only request the change to justify the court's issuance of an order of substitution [*Scott v. Superior Court (1928) 205 Cal. 525, 527, 271 P. 906]* .

[2] Power Coupled With Interest Rarely Precludes Discharge

Under general agency principles, the principal has an absolute right to terminate an agency by revocation, "[u]nless the

power of [the] agent is coupled with an interest in the subject of the agency" [*see Civ. Code § 2356(a)*]. This exception, however, rarely applies to preclude a client's discharge of his or her attorney.

To be a power coupled with an interest, the interest must be in the subject on which the power is to be exercised, not an interest in that which is produced by the power [*see Todd v. Superior Court of San Francisco (1919) 181 Cal. 406, 414-415, 184 P. 684]* . Thus, for example, the interest of an attorney in the proceeds of the lawsuit (as a source of payment of his or her fees) is *not* a power coupled with an interest, because the interest is only in that which is to be produced by the attorney's exercise of power [*Echlin v. Superior Court (1939) 13 Cal. 2d 368, 372, 90 P.2d 63* (attorney employed under contingent fee contract); *Scott v. Superior Court (1928) 205 Cal. 525, 531-533, 271 P. 906* (same); *see also Todd v. Superior Court of San Francisco (1919) 181 Cal. 406, 414-415, 184 P. 684]* . This is true even if the client "assigns" to the attorney a proportionate share of the eventual proceeds or expressly grants the attorney a lien to secure the attorney's fee [*Isrin v. Superior Court (1965) 63 Cal. 2d 153, 160-161, 45 Cal. Rptr. 320, 403 P.2d 728]* .

Consequently it will be very unusual for an attorney in his or her representation of a client in a lawsuit to have a power coupled with an interest. This is particularly true in light of the current rules that restrict attorneys from obtaining or representing any interest adverse to his or her client [*see Cal. Rules Prof. Conduct, Rules 3-300, 3-310* and discussion in *§ 2.01* et seq.].

ILLUSTRATION:

City Attorney's Power Coupled With Interest. A city redevelopment agency agrees to have the city attorney represent it in actions to condemn certain lands for a redevelopment project. Under the redevelopment plan, part of these lands are to be later transferred to the city for public facilities, on the city's payment of at least one-third of the amounts assessed in the condemnation suits. The agency later decides to substitute its own general counsel in place of the city attorney. Does the city attorney hold a power coupled with an interest that precludes his discharge? Yes. In this unusual situation, the city attorney had a power coupled with an interest: the city had an interest in the subject of the action and the city attorney was empowered to act as the agency's attorney of record [*see Redevelopment Agency v. Superior Court (1961) 195 Cal. App. 2d 591, 594-595, 16 Cal. Rptr. 45]* .

[3] Formal Substitution Required for Change in Attorney

Once an attorney has actually undertaken the representation of a client and filed a pleading, the execution and filing of a substitution of attorney is essential to an effective change in representation. Until the substitution is a matter of record, the successor attorney cannot act affirmatively to protect the client's interests and the original attorney retains the power to bind the client by his or her actions [*Kallen v. Delug (1984) 157 Cal. App. 3d 940, 950, 203 Cal. Rptr. 879* ; *see also § 72.592[4][c]*].

As long as a party to an action or proceeding has an attorney of record, the court cannot recognize any other attorney as having management or control of the action and the party can act only through the attorney of record [*McMunn v. Lehrke (1915) 29 Cal. App. 298, 308, 155 P. 473]* . Therefore, in litigation matters, a client's power to substitute one attorney for another has little meaning unless its exercise is accompanied by the original attorney's prompt execution of a consent to substitution of attorney. An attorney who refuses to execute a consent to substitution of attorney (as a device, for example, to protect his or her right to fees) violates the duty of fidelity the attorney owes the client and commits a breach of the attorney's ethical duty under *Cal. Rules Prof. Conduct, Rule 3-700(A)(2)* [*Kallen v. Delug (1984) 157 Cal. App. 3d 940, 950-951, 203 Cal. Rptr. 879* ; *see also § 72.392*]. If the attorney refuses to sign such a substitution, the client may move the court to discharge the attorney involuntarily.

In situations in which the successor counsel has appeared in an action, courts have excused the absence of a record of formal substitution, particularly when the adverse party has not been misled or otherwise prejudiced [*see Baker v. Boxx*

(1991) 226 Cal. App. 3d 1303, 1309, 277 Cal. Rptr. 409] .

ILLUSTRATION:

Formal Substitution Excused. Plaintiffs' attorney files a complaint but never serves it. Later, plaintiffs change attorneys without filing a formal substitution. The new attorney files and serves an amended complaint. Does the new attorney's failure to file a substitution of attorneys render the amended complaint a nullity? No. Although an amended complaint filed by a new attorney technically should be preceded by a substitution, if the original complaint has never been served there is scant chance of the defendant being misled. In the absence of any showing that defendants were misled or prejudiced by the failure to file substitutions, the omission did not invalidate the pleading [*Baker v. Boxx (1991) 226 Cal. App. 3d 1303, 1311, 277 Cal. Rptr. 409]* .

[4] Court's Power to Discharge Attorney

Counsel may also be relieved on the court's own motion, even over the objection of defendant or defendant's counsel, but this power should be exercised with great circumspection [*People v. McKenzie (1983) 34 Cal. 3d 616, 629-630, 194 Cal. Rptr. 462, 668 P.2d 769]* . Nevertheless, a trial judge may remove defense counsel despite the objections of the defendant and his or her attorney if a serious conflict of interest arises during the trial proceedings resulting in an obviously deficient performance. Then the court's power and duty to ensure fairness and preserve the credibility of its judgment extends to recusal even when an informed defendant, for whatever reason, is cooperating in counsel's tactics [*People v. McKenzie(1983) 34 Cal. 3d 616, 630, 194 Cal. Rptr. 462, 668 P.2d 769]* . For discussion regarding disqualification for conflicts of interest, see *§ 72.410* et seq.

[5] Liability for Inducing Discharge

If the discharge is induced by the attorney for the adverse party, the attorney and the adverse party may be liable to the discharged attorney for damages for intentional interference with a contractual relation [*see Herron v. State Farm Mutual Ins. Co. (1961) 56 Cal. 2d 202, 205-207, 14 Cal. Rptr. 294* (defendant insurance company and defendant attorney had intentionally induced plaintiffs' clients to discharge plaintiffs as their counsel in personal injury action by representing to clients that they did not need attorney and that a satisfactory settlement of their claims would be made)].

[6] Attorney's Duties on Discharge

The duties imposed on an attorney who withdraws from employment apply with equal force to an attorney discharged by the client. The attorney's duty to the client is not altered by the circumstances of who terminates the relationship [*Kallen v. Delug (1984) 157 Cal. App. 3d 940, 950, 203 Cal. Rptr. 879* ; *Academy of California Optometrists, Inc. v. Superior Court (1975) 51 Cal. App. 3d 999, 1005-1006, 124 Cal. Rptr. 668]* . Consequently, an attorney who is discharged must deliver to the client all papers and property to which the client is entitled [*Cal. Rules Prof. Conduct, Rule 3-700(D)*]. An attorney who retains a client's case files after discharge or fails to forward the client's files to a successor attorney breaches the duty imposed on him or her by *Cal. Rules Prof. Conduct, Rule 3-700(D),* since the attorney's work product belongs absolutely to the client whether or not the attorney has been paid for services rendered prior to the discharge [*Kallen v. Delug (1984) 157 Cal. App. 3d 940, 950, 203 Cal. Rptr. 879* (decided under Cal. Rules Prof. Conduct, former Rule 2-111); *see also Finch v. State Bar (1981) 28 Cal. 3d 659, 665, 170 Cal. Rptr. 629, 621 P.2d 253* (disciplinary proceeding in which attorney, among other misconduct, failed to forward files and documents to substitute counsel)]. For further discussion, see *§ 72.371*.

[7] Discharged Attorney's Right to Compensation

The client's discharge of an attorney does not constitute a breach of contract because the right of the client to terminate the contract at will is a basic term of the contract implied by law by reason of the special relationship that exists between the contracting parties. However, an attorney discharged with or without cause is entitled to recover the

reasonable value of the services he or she rendered up to the time of discharge [*Fracasse v. Brent (1972) 6 Cal. 3d 784, 790-792, 100 Cal. Rptr. 385, 494 P.2d 9* ; *see also § 72.451*].

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§ 72.391 Discharged In-House Counsel Not Precluded From Recovering Damages

The general rule that a client may discharge an attorney at any time and for any reason [*see Fracasse v. Brent (1972) 6 Cal. 3d 784, 790, 100 Cal. Rptr. 385, 494 P.2d 9]* does not permit all clients to terminate the attorney-client relationship under all circumstances without consequence [*General Dynamics Corp. v. San Bernardino County Superior Court (1994) 7 Cal. 4th 1164, 1174-1175, 32 Cal. Rptr. 2d 1, 876 P.2d 487]* . An "in-house" attorney may therefore recover damages if he or she is discharged in breach of an employment contract, even if the contractual limitations on discharge are based on an implied-in-fact contract [*General Dynamics Corp. v. San Bernardino County Superior Court (1994) 7 Cal. 4th 1164, 1177-1179, 32 Cal. Rptr. 2d 1, 876 P.2d 487]* . Implied-in-fact limitations on a client-employer's right to discharge in-house counsel are not likely to present issues implicating the distinctive values subserved by the attorney-client relationship, and may therefore be treated the same as implied-in-fact claims brought by the nonattorney employee [*General Dynamics Corp. v. San Bernardino County Superior Court (1994) 7 Cal. 4th 1164, 1179, 32 Cal. Rptr. 2d 1, 876 P.2d 487]* .

In addition to actions based on breach of contract, an attorney's status as in-house counsel does not preclude a tort cause of action for discharge in violation of public policy. However, such an action may be stated only if the reasons for discharge contravene an attorney's mandatory ethical obligations, or if the reasons would support a claim by a non-attorney employee and a statutory or ethical code provision permits the attorney to depart from the usual rule that client matters remain confidential [*General Dynamics Corp. v. Superior Court (1994) 7 Cal. 4th 1164, 1188-1189, 32 Cal. Rptr. 2d 1, 876 P.2d 487]* . To protect the values underlying the professional relationship, judicial access is limited to claims grounded in explicit and unequivocal ethical norms embodied in Rules of Professional Responsibility and statutes, and to claims that could be maintained by a non-attorney employee under circumstances in which the Legislature has manifested a judgment that the principle of professional confidentiality does not apply [*General Dynamics Corp. v. San Bernardino County Superior Court (1994) 7 Cal. 4th 1164, 1189, 32 Cal. Rptr. 2d 1, 876 P.2d 487* ; *see Evid. Code § 950 et seq.* (attorney-client privilege)].

For discussion of wrongful termination actions generally, see Ch. 249, *Employment Law: Termination and Discipline* .

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§ 72.392 Substitution of Attorneys

[1] Pursuant to Consent Agreement

The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination with the consent of both the client and the attorney. The consent to substitution must be filed with the clerk or entered on the court's minutes [*Code Civ. Proc. § 284(1)*; *see also § 72.372[1]*]. This applies to criminal as well as to civil cases [*see Mandell v. Superior Court (1977) 67 Cal. App. 3d 1, 4, 136 Cal. Rptr. 354* ; *People v. Ward (1972) 27 Cal. App. 3d 218, 234, 103 Cal. Rptr. 671* ; *see also Simon v. Superior Court (1975) 13 Cal. 3d 864, 865, 120 Cal. Rptr. 75, 533 P.2d 203]* . For forms of consent to substitution, *see § 72.719*.

When an attorney represents more than one party on the same side, a substitution of attorneys need not be signed by all the parties involved, provided the party signing the form is authorized by his or her coparties to sign it on their behalf [*Ehret v. Ichioka (1967) 247 Cal. App. 2d 637, 641, 55 Cal. Rptr. 869]* .

For a discussion of the notice that must be given to adverse parties pursuant to *Code Civ. Proc. § 285*, § 72.592[4][c].

[2] Pursuant to Noticed Motion

[a] Availability

If either the attorney or client will not consent to a substitution of attorney or is unable to do so, the attorney in an action or special proceeding may be changed at any time before or after judgment or final determination by court order made on the application of either the client or attorney after notice from one to the other [*Code Civ. Proc. § 284(2)*; *see Mandell v. Superior Court (1977) 67 Cal. App. 3d 1, 4, 136 Cal. Rptr. 354* ; *People v. Ward (1972) 27 Cal. App. 3d 218, 234, 103 Cal. Rptr. 671]* . For forms on notice of motion and order for substitution, *see §§ 72.720* and *72.721*.

The purpose of the substitution procedure is to make it clear to the parties with whom they are authorized to deal [*People v. Metrim Corp. (1960) 187 Cal. App. 2d 289, 294, 9 Cal. Rptr. 584]* . The function of the notice is to apprise all

parties of what is happening and, if there is some lawful reason why the new attorney ought not to be recognized as the attorney of record, to permit the person having knowledge of the defect to appear and be heard [*People v. Metrim Corp. (1960) 187 Cal. App. 2d 289, 294, 9 Cal. Rptr. 584]* . For further discussion of the procedural requirements for making a motion under *Code Civ. Proc. § 284(2)*, see *§ 72.372[1]*.

[b] Review of Order

Should the trial court erroneously deny a motion for substitution, a writ of mandate may issue on appropriate application to compel the trial court to grant the motion [*see, e.g.,* *Scott v. Superior Court (1928) 205 Cal. 525, 526, 534, 271 P. 906]* .

An order granting a motion of substitution is not separately appealable by a discharged attorney. The order is not a final order because the attorney's right to recover earned fees is not impaired by it; the attorney can still pursue that right in a separate action [*People v. Metrim Corp. (1960) 187 Cal. App. 2d 289, 295, 9 Cal. Rptr. 584* ; *see also § 72.470* et seq.].

[3] Notice of Substitution

[a] Requirements

When an attorney is changed, either by written consent of the client and attorney filed with the clerk or entered in the minutes or by court order pursuant to a noticed motion [*Code Civ. Proc. § 284*], written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party [*Code Civ. Proc. § 285*]. In the case of a substitution by consent, the Judicial Council form of substitution also operates as the notice [*see § 72.719*]. It would appear that if the substitution is made on court order, the notice of the court's decision required by *Code Civ. Proc. § 1019.5* may be combined with this notice. Until the notice of the change or substitution is given, the adverse party must continue to recognize the former attorney [*Code Civ. Proc. § 285*]. For a form for notice of substitution, *see § 72.722*.

[b] Waiver by Acceptance of Papers or Failure to Object

The requirement of notice is for the benefit of the adverse party and may be waived by that party or by his or her attorney [*see* *Livermore v. Webb (1880) 56 Cal. 489, 490* ; *Withers v. Little (1880) 56 Cal. 370, 372* ; *Alliance Bank v. Murray (1984) 161 Cal. App. 3d 1, 7 n.1, 207 Cal. Rptr. 233]* . Slight circumstances of acquiescence are sufficient to show waiver [*Starkweather v. Eddy (1925) 196 Cal. 73, 75, 235 P. 734]* . For example, waiver may be found in the acceptance of papers served by the new attorney or by giving a written acknowledgment of service [*see* *Livermore v. Webb (1880) 56 Cal. 489, 490* (waiver of notice by adverse party's acknowledging "due service" of notice of appeal signed by party's new attorney although no substitution of attorneys had been filed); *Withers v. Little (1880) 56 Cal. 370, 372* (same)].

Consequently, if the attorney for the adverse party has not been notified of the substitution and is unaware of it, he or she should return any papers served on him or her by the new attorney or refuse to give any written acknowledgment of their service, stating as the ground that the attorney named is not the party's attorney of record. In addition, the attorney for the adverse party should object if the substituted attorney appears at any hearing or the trial and purports to act as the attorney for a party. The party effecting the change cannot, of course, object to his or her own failure to give the notice [*Anderson v. City Ry. Co. (1935) 9 Cal. App. 2d 205, 207, 48 P.2d 969* (plaintiffs who knew that attorney was acting for them could not subsequently contend that they were not bound by his appearance because he was not technically an attorney of record)].

[4] Substitution of Attorneys on Appeal

The withdrawal or substitution of attorneys pending an appeal may be effected by serving and filing a stipulation in the reviewing court. The stipulation must be signed by the party, the retiring attorney, and any substituted attorney [*Cal. Rules of Ct., Rules 8.36(b)* (appeal from superior court), *8.768(b)* (appeal from municipal court)]. For a form for stipulation to withdraw or substitute attorneys pending appeal, see *§ 72.723*.

In the absence of a stipulation, withdrawal or substitution may be effected only by an order made pursuant to a motion in the reviewing court, provided that unless otherwise ordered by the court, service of the motion need be made only on the party and the attorneys directly affected by it [*Cal. Rules of Ct., Rules 8.36(b), 8.768(b)*]. The form of notice for motion to be relieved as counsel [*see § 72.715*] may be modified for use as a notice of motion to withdraw or substitute attorneys pending an appeal. The order granting motion to be relieved as counsel [*see § 72.717*] also may be modified for use as an order allowing withdrawal or substitution of attorneys pending an appeal.

The clerk of the reviewing court is required to give a notification of the withdrawal or substitution to the clerk of the trial court. Substituted counsel must forthwith give notice of the substitution to all parties [*Cal. Rules of Ct., Rules 8.36(b), 8.768(b)*]. The notice of substitution of attorneys form [*see § 72.722*] may be adopted to serve as a notice of substitution to all parties.

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[Reserved]

§§ 72.393[Reserved]

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7-72 California Forms of Pleading and Practice--Annotated § 72.410

§ 72.410 Representation Adverse to Former Client Ethically Prohibited

It is a breach of professional ethics for an attorney to do either of the following:

- Engage in conduct that will injuriously affect a former client in any matter in which the attorney formerly represented the client [*People ex rel. Deukmejian v. Brown (1981) 29 Cal. 3d 150, 155-156, 172 Cal. Rptr. 478, 624 P.2d 1206* ; *Wutchumna Water Co. v. Bailey (1932) 216 Cal. 564, 573-574, 15 P.2d 505]* .

- Use against a former client knowledge or information acquired by virtue of the previous attorney-client relationship [*Leversen v. Superior Court (1983) 34 Cal. 3d 530, 538, 194 Cal. Rptr. 448, 668 P.2d 755* ; *Wutchumna Water Co. v. Bailey (1932) 216 Cal. 564, 573-574, 15 P.2d 505]* .

Bus. & Prof. Code § 6068(e) and *Cal. Rules Prof. Conduct, Rule 3-310(E)* codify these ethical principles:

- *Bus. & Prof. Code § 6068(e)* provides that it is an attorney's duty to maintain inviolate the confidence, and at every peril to himself or herself, to preserve the secrets, of his or her client.

- *Cal. Rules Prof. Conduct, Rule 3-310(E)* provides that a lawyer cannot, without the informed written consent of the client or former client, accept employment adverse to the client or former client when, by reason of the representation of the client or former client, the lawyer has obtained confidential information material to the employment.

For further, detailed discussion of an attorney's general ethical duties when faced with actual or potential conflicts of interest, see *§ 72.30* et seq. through § 72.170 et seq. For discussion of specific duties respecting use of confidential information obtained from a former client, see *§ 72.110* et seq. and § 72.130 et seq.

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7-72 California Forms of Pleading and Practice--Annotated § 72.411

§ 72.411 Disqualification Motions

[1] Former Client May Move to Disqualify Attorney for Adverse Party

When an adverse party is represented by counsel who violates the prohibition against representation adverse to a former client [*see* Representation Adverse to Former Client Ethically Prohibited, *above*], the former client may move to disqualify the attorney from representing the adverse party [*Elliott v. McFarland Unified School Dist. (1985) 165 Cal. App. 3d 562, 567, 211 Cal. Rptr. 802]* . For forms for notice of motion and order disqualifying opposing counsel, *see §§ 72.724* and *72.725*.

PRACTICE TIP:

Motion Procedure. There is no specific statutory procedure for making a motion to disqualify an attorney from representation adverse to a former client. A motion to disqualify opposing counsel should be made on written notice, accompanied by a supporting memorandum [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*].

[2] Showing in Support of Motion

In proceedings on a motion for disqualification, the key issue is the potential for misuse of confidential information obtained during the prior representation. Standing alone, the fact that the moving party was once represented by counsel for the opposing party is not sufficient to justify disqualification. The moving party must show either of the following [*H.F. Ahmanson & Co. v. Salomon Brothers, Inc. (1991) 229 Cal. App. 3d 1445, 1452, 280 Cal. Rptr. 614]* :

- That the attorney actually possesses confidential information relevant to the present controversy obtained from the former client.

- That the attorney is presumed to possess relevant confidential information because there is a "substantial relationship" between the former and current representation.

Disqualification of an individual attorney may be extended to the attorney's entire law firm, based on the presumption that information known to one member of the firm is shared with all partners and associates [*see, e.g., Klein v. Superior Court (1988) 198 Cal. App. 3d 894, 908-909, 244 Cal. Rptr. 226* ; *William H. Raley Co. v. Superior Court (1983) 149 Cal. App. 3d 1042, 1048, 197 Cal. Rptr. 232]* .

For detailed coverage of the substantial relationship test, the presumption resulting from the test, and the principle of vicarious disqualification, see *§ 72.110* et seq.

[3] Standing to Make Motion

A disqualification motion may be brought by a party who is a former client of an attorney representing the adverse party [*H.F. Ahmanson & Co. v. Salomon Brothers, Inc. (1991) 229 Cal. App. 3d 1445, 1452, 280 Cal. Rptr. 614]* .

One appellate court has stated, in dictum, that a moving party must establish that he or she was represented by the attorney in a manner giving rise to an attorney-client relationship [*Civil Service Com. v. Superior Court (1984) 163 Cal. App. 3d 70, 76-77, 209 Cal. Rptr. 159* ; *see also § 72.190* et seq. (creation of attorney-client relationship)]. However, fiduciary obligations and professional responsibilities may warrant disqualification of counsel in appropriate cases even in the absence of a strict contractual attorney-client relationship [*see Meza v. H. Muehlstein & Co. (2009) 176 Cal. App. 4th 969, 980-981, 98 Cal. Rptr. 3d 422* (nonclient had interest in protecting confidential attorney work product developed during joint defense efforts)].

For example, in *Trone v. Smith (9th Cir 1980) 621 F2d 994* , a law firm representing trustees in bankruptcy against a number of individuals and corporations was disqualified because of a prior substantial relationship with one of the defendants. The court held that the disqualification extended not only to the action against that defendant, but to all the other defendants. Although none of the defendants was ever technically in an attorney-client relationship with the plaintiff's attorney, the multiple and interlocking bonds between all defendants and the former client required the court to disqualify the firm from representing the plaintiffs against all defendants [*Trone v. Smith (9th Cir 1980) 621 F2d 994, 1001-1002]* .

[4] Reasonable Diligence Requirement

Reasonable diligence is required when making a motion to disqualify [*Earl Scheib, Inc. v. Superior Court (1967) 253 Cal. App. 2d 703, 709, 61 Cal. Rptr. 386* ; *see River West, Inc. v. Nickel (1987) 188 Cal. App. 3d 1297, 1309, 234 Cal. Rptr. 33]* . Mere delay in making the motion is not grounds for denial of the motion, but an unreasonable delay together with resulting prejudice may justify denial. Laches may thus be a bar to disqualification [*River West, Inc. v. Nickel (1987) 188 Cal. App. 3d 1297, 1309, 234 Cal. Rptr. 33* ; *see also § 72.411[5]*].

PRACTICE TIP:

Move to Disqualify Promptly. To avoid the potential bar under the doctrine of laches, it is important to make the disqualification motion as soon as practicable after discovery of the conflict.

ILLUSTRATION: Waiver. Plaintiffs bring an action against defendant. One of the plaintiff's attorneys had represented the defendant 30 years earlier in a matter substantially related to the subject of the present action. The defendant does not move for disqualification until 47 months after he files his answer, by which time the plaintiff's attorney has put in over 3,000 hours at a cost of $387,000. Has the defendant waived the right to disqualify the attorney? Yes. The delay in moving for disqualification is so unreasonable and the resulting prejudice so great that implied waiver must be presumed [*see River West, Inc. v. Nickel (1987) 188 Cal. App. 3d 1297, 1313, 234 Cal. Rptr. 33]* .

[5] Determination of Motion

[a] Evidence of Substantial Relationship

In determining a motion to disqualify an attorney, the judge may allow the presentation of evidence or may determine the motion on affidavits [*Big Bear Mun. Water Dist. v. Superior Court (1969) 269 Cal. App. 2d 919, 927, 75 Cal. Rptr. 580]* .

The grant or denial of the motion usually turns on whether there was a substantial relationship between the two representations [*see § 72.110* et seq.]. In making this determination, the court should focus on factual similarity, legal similarity, and the nature and extent of the attorney's involvement with the cases, including the time spent by the attorney, the type of work performed, and the attorney's possible exposure to formulation of policy and strategy [*see Rosenfeld Construction Co. v. Superior Court (1991) 235 Cal. App. 3d 566, 576, 286 Cal. Rptr. 609]* .

[b] Effect of Finding Substantial Relationship on Court's Discretion

A split of authority exists over whether a court has discretion to deny a disqualification motion even though it finds a "substantial relationship" between the current and former matters.

Courts exercise discretion when deciding motions to disqualify. There are cases where a motion to disqualify is not granted despite evidence establishing a presumption that the attorney possesses relevant confidential information obtained during the former representation. In *William H. Raley Co. v. Superior Court*, the court took an expansive view of the trial court's discretion in ruling on a disqualification motion involving representation adverse to a former client. A court must weigh competing interests, including the combined effect of a party's right to counsel of choice, an attorney's interest in representing a client, the financial burden on a client of replacing disqualified counsel, and any tactical abuse underlying a disqualification proceeding against the principle that a fair resolution of disputes requires vigorous representation by independent counsel unencumbered by conflicts of interest. The *Raley* court noted that, under the circumstances of the case, it was also required to consider in favor of disqualification the disruptive effect of repeated disqualification proceedings on the administrative process of the court and the financial burden of the disqualification proceedings on the moving party [*William H. Raley Co. v. Superior Court (1983) 149 Cal. App. 3d 1042, 1048, 197 Cal. Rptr. 232* ; *see Elliott v. McFarland Unified School Dist. (1985) 165 Cal. App. 3d 562, 567, 211 Cal. Rptr. 802]* .

Other courts, while not stating the discretion to deny disqualification so broadly as *Raley*, have expressed concern that the disqualification motion may be used as a tactical device. In one case, the court found that the motion may not be used "as a tactical device to delay litigation" [*Maruman Integrated Circuits, Inc. v. Consortium Co. (1985) 166 Cal. App. 3d 443, 450, 212 Cal. Rptr. 497]* . In *Western Continental Operating Co. v. Natural Gas Corp.*, the court stated that in exercising its discretion with respect to granting or denying a disqualification motion, a trial court may properly consider the possibility that the party brought the motion as a tactical device to delay litigation. If the party opposing the motion can demonstrate prima facie evidence of unreasonable delay in bringing the motion causing prejudice to the client, disqualification should not be ordered [*Western Continental Operating Co. v. Natural Gas Corp. (1989) 212 Cal. App. 3d 752, 763, 261 Cal. Rptr. 100* ; *see also In re Complex Asbestos Litigation (1991) 232 Cal. App. 3d 572, 599-600, 283 Cal. Rptr. 732* (prejudice as contemplated by *Western Continental* does not include mere loss of services of knowledgeable counsel and forced retention of new counsel)].

The view that the trial court should exercise discretion in balancing the interests of the former and current clients was criticized in *River West, Inc. v. Nickel*. In *River West*, the court stated that if a substantial relationship is established, disqualification should be ordered automatically, and the court should not enlarge its inquiry by balancing the parties' competing interests under its equity jurisdiction [*River West, Inc. v. Nickel (1987) 188 Cal. App. 3d 1297, 1304, 1308-1310, 234 Cal. Rptr. 33]* . Nevertheless, if there is convincing evidence that delay by the movant was inexcusable, and the present client will suffer prejudice, the court may find that the former client has waived any right to disqualify counsel despite the existence of a substantial relationship [*River West, Inc. v. Nickel (1987) 188 Cal. App. 3d 1297, 1310, 234 Cal. Rptr. 33* (discussed under § 72.411[4])].

[6] Scope of Consent by Joint Clients

When the prior representation involves joint clients, the determination of whether the attorney may be disqualified turns on whether the subsequent representation is within the scope of the consent of the clients, not on whether there is a substantial relationship [*Zador Corp. v. Kwan (1995) 31 Cal. App. 4th 1285, 1294-1295, 37 Cal. Rptr. 2d 754]* . The substantial relationship test, discussed under § 72.411[5][a] *above*, adds nothing to the disqualification analysis in these cases because a substantial relationship between the former representation and the subsequent action is inherent. Moreover, although the substantial relationship test determines whether confidences were likely disclosed, in a joint client situation, confidences are necessarily disclosed [*Zador Corp. v. Kwan (1995) 31 Cal. App. 4th 1285, 1294, 37 Cal. Rptr. 2d 754]* .

[7] Review of Order Granting or Denying Motion

An order granting or denying a motion to disqualify is reviewable by way of:

- Petition for writ of mandate [*Rosenfeld Construction Co. v. Superior Court (1991) 235 Cal. App. 3d 566, 572, 286 Cal. Rptr. 609]* .

- Direct appeal [*Truck Ins. Exchange v. Fireman's Fund Ins. Co. (1992) 6 Cal. App. 4th 1050, 1052 n.1, 8 Cal. Rptr.2d 228]* .

A petition for writ of mandate accompanied by a request for an immediate stay is preferable because generally extraordinary writs are determined more speedily than appeals. The specter of disqualification of counsel should not be allowed to hover over the proceedings for an extended period of time for an appeal [*Apple Computer, Inc. v. Superior Court (2005) 126 Cal. App. 4th 1253, 1264, 24 Cal. Rptr. 3d 818]* .

If a party does not seek pretrial review of an order granting or denying a motion to disqualify opposing counsel, and raises the issue only on appeal from the final judgment in the action, that party must show that the erroneous granting or denial of a motion affected the outcome of the proceeding to his or her prejudice [*In re Sophia B. (1988) 203 Cal. App. 3d 1436, 1439, 250 Cal. Rptr. 802]* .

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[Reserved]

§§ 72.412[Reserved]

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G. Fee Collection
1. General Ethical And Practical Considerations

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§ 72.430 Fee Collection and Attorney Ethics

[1] Suit for Fees Is Ethically Permissible

In California, an attorney may bring an action against a client to collect:

- Fees owed to him or her on an express contract [*see, e.g., Hardy v. San Fernando Valley C. of C. (1950) 99 Cal. App. 2d 572, 576-577, 222 P.2d 314* (breach of contract action); *Ferro v. Citizens Nat. Trust & Sav. Bank (1955) 44 Cal. 2d 401, 409, 282 P.2d 849* (common count for money had and received); *see also § 72.450*].

- The reasonable value of the services performed by the attorney for the client [*see, e.g., Spires v. American Bus Lines (1984) 158 Cal. App. 3d 211, 216, 204 Cal. Rptr. 531* ; *see also § 72.451*].

Although the American Bar Association's former position was to discourage attorneys' suits for fees, neither California courts nor the California State Bar have adopted this policy. One ethical consideration under the American Bar Association Model Code of Professional Responsibility, which was never adopted in California, states that an attorney should zealously attempt to avoid fee disputes, should try to resolve any disagreements amicably, and should not sue a client unless it is necessary to prevent fraud or a "gross imposition" [Model Code of Professional Responsibility EC 2-23 (1980)]. The State Bar Act and Rules of Professional Conduct, as well as the American Bar Association Model Rules of Professional Conduct, however, contain no provisions precluding an attorney from suing his or her client to recover a fee.

PRACTICE TIP:

Preliminary Measures to Avoid Lawsuits. Although actions to collect fees are ethically permissible, they are also last-resort measures. You can avoid these suits as much as possible by making certain practices, such as the following, part of your standard office management procedures:

- Make sure the initial fee agreement is detailed and covers all necessary terms concerning fees and payment. If a new client is involved and you suspect there may be problems with payment, be tough at the outset, e.g., demand a substantial fee deposit, and demand that the deposit be replenished as it nears depletion. For discussion of fee agreements generally, see *§ 72.190* et seq. through § 72.240 et seq.

- Keep the client informed regarding the work you are doing; one of the more common objections to collection efforts is the client's claim that he or she "did not know you were doing all that work."

- Bill frequently and monitor the returns. Respond promptly to inquiries about bills. If you get an inadequate response to a bill, talk to the client and attempt to ascertain and resolve problems early on in the attorney-client relationship.

- When a client falls behind in his or her bill payment, consider terminating the attorney-client relationship rather than continuing to do more and more work for the client indefinitely. Withdrawal becomes more and more difficult later on, e.g., as trial approaches, and as the client's arrears increase, so does the likelihood that he or she will put up a fight.

- Act promptly to recover fair and just claims for fees, but act just as promptly to reach a compromise on questionable claims.

[2] Terminating Attorney-Client Relationship Before Bringing Suit

While it may be permissible to bring suit to collect fees, counsel should not initiate an action before terminating the attorney-client relationship; to do so is generally regarded as ethically improper [*see, e.g.,* LACBA Formal Opinion No. 407 (1982); *see also Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 553 n.8, 28 Cal. Rptr. 2d 617, 869 P.2d 1142* (noting, without so deciding, that attorney's general duty of loyalty may dictate that attorney not sue present client)]. For discussion and forms relating to termination of the attorney-client relationship, see *§ 72.350* et seq. through § 72.410 et seq.

[3] Imposing Interest on Delinquent Fees and Costs

An attorney may not impose interest charges on delinquent statements of fees and costs unless the fee agreement signed by the client includes a provision expressly authorizing such charges. Moreover, even if the client has given such prior consent, the rate of interest imposed may not be unreasonable [LACBA Formal Opinion Nos. 499 (1999), 370 (1978)].

For a discussion of collection procedures that are unethical, see *§ 72.430[4]*. For discussion of interest on fees, see *§ 72.197[4]*.

[4] Fees May Be Denied for Ethical Misconduct

Attorney misconduct may result in denial of fees, even though the client was not damaged by the misconduct and benefits from the denial of fees. Denial is possible, for example, if the attorney does one of the following:

- Breaches a fiduciary duty [*Anderson v. Eaton (1930) 211 Cal. 113, 116-117, 293 P. 788]* .

- Violates a provision of the Rules of Professional Conduct [*Jeffry v. Pounds (1977) 67 Cal. App. 3d 6, 10, 136 Cal. Rptr. 373* ; *see also Sullivan v. Dorsa (2005) 128 Cal. App. 4th 947, 965-966, 27 Cal. Rptr. 3d 547* (no showing that attorney's violation of ethical rules serious enough to compel fee forfeiture); *In re the Marriage of Friedman (2002)100 Cal. App. 4th 65, 71, 122 Cal. Rptr. 2d 412 and Pringle v. La Chapelle (1999) 73 Cal. App. 4th 1000, 1006, 87 Cal. Rptr. 2d 90* (suggesting that there

must be a serious violation of the attorney's responsibilities before an attorney who violates an ethical rule is required to forfeit fees)].

- Violates a provision of the State Bar Act [*Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 618-619, 120 Cal. Rptr. 253]* .

The client can avoid payment of the fees even though he or she benefited from the attorney's ethical violation [*Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 618-619, 120 Cal. Rptr. 253]* .

If an attorney is disqualified for violating an ethical obligation, the attorney is generally not entitled to fees (a court need not specifically state that a violation of *California Rule of Professional Conduct 3-310(E)* has occurred) [*A.I. Credit Corp., Inc. v. Aguilar (2003) 113 Cal. App. 4th 1072, 1076, 6 Cal. Rptr. 3d 813]* .

If the attorney's fee contract violates the State Bar Act or the Rules of Professional Conduct at the time it is executed so that the contract can be considered voidable for public policy reasons, the attorney may in some instances not be able to recover fees at all [*Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 620, 120 Cal. Rptr. 253]* . For example, a contract was held voidable in one case in which an attorney accepted employment adverse to a former client and had obtained material, confidential information obtained from that former client in violation of former *Cal Rules of Prof Conduct, Rule 4-101* (now *see Cal. Rules Prof. Conduct, Rule 3-310(E)*) [*Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 620, 120 Cal. Rptr. 253]* .

If the violation occurs after the creation of the attorney-client relationship, the attorney may be denied fees for services rendered after the date of the violation [*Jeffry v. Pounds (1977) 67 Cal. App. 3d 6, 12, 136 Cal. Rptr. 373]* . Furthermore, in one federal case from another jurisdiction, the court held that the attorney may be compelled to disgorge fees already received when found to have engaged in professional misconduct [*see Financial General Bankshares, Inc. v. Metzer (D.D.C. 1981) 523 F. Supp. 744, 773 , vac. on other grounds, (D.C. Cir. 1982) 680 F.2d 768]* .

In an action to recover attorney's fees, the trial court may raise the issue of professional misconduct on its own motion and deny the recovery of fees if the attorney's misconduct is sufficiently egregious to require voiding the contract on public policy grounds [*see Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 623 n.10, 120 Cal. Rptr. 253]* .

[5] Unethical Fee Collection Practices

[a] Refusal to Execute Substitution of Attorneys and Turn Over Files

It is an ethical violation for a California attorney, as a means to protect a fee, to do the following:

- Refuse to execute a substitution of attorneys form [*Kallen v. Delug (1984) 157 Cal. App. 3d 940, 951, 203 Cal. Rptr. 879]* .

- Refuse to turn over the client's files [*Academy of California Optometrists, Inc. v. Superior Court (1975) 51 Cal. App. 3d 999, 1005, 124 Cal. Rptr. 668]* .

A client has an absolute right to substitute one attorney for another, even though a fee is owed [*Meadow v. Superior Court (1963) 59 Cal. 2d 610, 616, 30 Cal. Rptr. 824, 381 P.2d 648]* . In this event, the attorney must take reasonable steps to avoid foreseeable prejudice to the client's rights and deliver to the client, on the client's request, all papers and property to which the client is entitled [*see Cal. Rules Prof. Conduct, Rule 3-700(A)(2), (C)*; *Academy of California Optometrists, Inc. v. Superior Court (1975) 51 Cal. App. 3d 999, 1005, 124 Cal. Rptr. 668* ; *see also Cal. Rules Prof. Conduct, Rule 4-100(B)(4)*]. An attorney can be subjected to discipline for failing to forward the client's files to the

successor attorney [*Finch v. State Bar (1981) 28 Cal. 3d 659, 665, 170 Cal. Rptr. 629, 621 P.2d 253]* . For further discussion regarding discharge and substitution of attorneys, see *§ 72.350* et seq. through § 72.410 et seq.

Requiring that a fee-splitting agreement be executed by successor counsel before signing a substitution and turning over the files is illegal and against public policy [*see Kallen v. Delug (1984) 157 Cal. App. 3d 940, 949-950, 203 Cal. Rptr. 879]* .

[b] Disclosure of Confidential Client Information

An attorney has a duty to preserve confidential client information pursuant to *Bus. & Prof. Code § 6060(e)*, which is owed to both current and former clients [*Commercial Standard Title Company v. Superior Court (1979) 92 Cal. App. 3d 934, 945, 155 Cal. Rptr. 393]* . In collecting fees from clients, an attorney generally must preserve confidential client information inviolate. However, LACBA Formal Opinion No. 498 (1999) maintains that an attorney may reveal confidential client information in a fee dispute with a client, but only where the information is relevant to the dispute and reasonably necessary due to an issue raised by the client. The disclosure should be made in a manner that avoids any unnecessary disclosure of confidential client information [LACBA Formal Opinion No. 498 (1999)].

[c] Unilateral Withdrawal of Trust Funds

When the client disputes the attorney's right to receive a portion of funds held in trust by the attorney, the attorney may not unilaterally withdraw the disputed portion of funds until final resolution of the dispute [*Cal. Rules Prof. Conduct, Rule 4-100(A)(2)*]. Thus, an attorney cannot unilaterally determine his or her fee and withdraw that amount from the client's trust fund without the client's knowledge and consent [*Trafton v. Youngblood (1968) 69 Cal. 2d 17, 26, 69 Cal. Rptr. 568, 442 P.2d 648]* . If this were permitted, the attorney's claim for fees could be satisfied without even submitting a bill to the client, and the client would have the unfair burden of attempting to recover any excessive fee unilaterally withdrawn by the attorney [*Trafton v. Youngblood (1968) 69 Cal. 2d 17, 26-28, 69 Cal. Rptr. 568, 442 P.2d 648]* . The attorney may withdraw client trust funds to pay his or her fee only when the precise amount is fixed by agreement, judicial determination, or some other unequivocal manner. The attorney is further obligated to seek a prompt resolution of a dispute over fees and, absent any agreement, has an affirmative ethical obligation to seek arbitration or judicial determination of the respective interests in the trust funds [LACBA Formal Opinion No. 438 (1985)].

For further discussion of an attorney's duties with regard to withdrawal of client funds held in trust by the attorney, see *§ 72.370* et seq.

[d] Confession of Judgment

The use of a confession of judgment to collect attorney's fees is improper, and any confession of judgment executed for this purpose is unenforceable. If attorneys were allowed to use this device to secure the payment of fees, they would have opportunities to overreach that would not be subject to judicial review. Additionally, most clients probably would not understand the nature and effect of the confession of judgment [*Hulland v. State Bar (1972) 8 Cal. 3d 440, 449-450, 105 Cal. Rptr. 152, 503 P.2d 608]* . Furthermore, the California Supreme Court stated that use of a confession of judgment is unnecessary because a promissory note is equally effective as a means of enforcing the client's obligations to pay fees [*Hulland v. State Bar (1972) 8 Cal. 3d 440, 450, 105 Cal. Rptr. 152, 503 P.2d 608* ; *see Hawk v. State Bar (1988) 45 Cal. 3d 589, 600, 247 Cal. Rptr. 599, 754 P.2d 1096* ; *see* discussion of promissory notes in § 72.30 et seq. through § 72.170 et seq.].

[e] Prior Execution of Substitution of Attorneys

It is improper for an attorney to compel the client to execute at the commencement of the attorney-client relationship a substitution of attorney form for filing if the client later fails to pay the attorney's fees and costs in a timely manner [*see* LACBA Formal Opinion No. 371 (1977)]. This device violates the spirit and intent of the provisions of the California

Rules of Professional Conduct that pertain to withdrawal from employment. The use of a presigned, undated substitution of attorney form might be used in certain circumstances to avoid the requirement of obtaining the approval of the tribunal for withdrawal. There is a risk that the attorney may use a presigned form without taking reasonable steps to avoid foreseeable prejudice to the client as required under *Cal. Rules Prof. Conduct, Rule 3-700(A)(2)* [*see § 72.350* et seq. through § 72.410 et seq.]. Finally, knowing and free consent to the execution of the substitution of attorney cannot be given in advance, when the circumstances in which it will be used cannot be foreseen [LACBA Formal Opinion No. 371 (1977)].

[f] Delay in Prosecution of Client's Case

It is a misdemeanor for a California attorney willfully to delay a client's suit for the attorney's own gain [*Bus. & Prof. Code § 6128(b)*]. For example, it is improper for an attorney to delay a divorce action, such as by delaying entry of the final judgment, until the balance of fees is paid. If the client is deliberately disregarding an agreement or obligation related to payment of fees, the attorney has grounds for withdrawal. When an attorney delays a case because of nonpayment of fees and remains as attorney of record, the attorney places himself or herself in a position of conflict with the client's interest in having the matter completed promptly [State Bar Formal Opinion No. 1968-16; *see also* LACBA Formal Opinion No. 356 (1976) (attorney may not make payment of fee condition precedent to dismissal of action requested by client)].

[g] Threats to Coerce Payment

The making of certain types of threats to coerce payment of fees is an improper method of fee collection, which may subject the attorney to discipline or criminal charges. Examples of such behavior include the following:

- Offering to drop criminal charges against the client's husband if the client would pay the client's attorney's fee [*Bluestein v. State Bar (1974) 13 Cal. 3d 162, 170, 118 Cal. Rptr. 175, 529 P.2d 599]* .

- Threatening to report the client's wife to immigration authorities in an attempt to compel the client, who had filed bankruptcy, to pay his fee [*Lindenbaum v. State Bar (1945) 26 Cal. 2d 565, 573, 160 P.2d 9]* .

- Intentionally withholding the client's funds to attempt to coerce payment of the attorney's fee [*McGrath v. State Bar (1943) 21 Cal. 2d 737, 741, 135 P.2d 1]* .

- Utilizing a collection agency to collect a claim against a former client when the collection agency, through its association with a credit service, has the ability to impair the client's credit until the claim is paid [LACBA Formal Opinion No. 373 (1978)].

The attorney, in attempting to collect fees, should be sure that he or she is not using oppressive methods of collection constituting extortion. Extortion is defined as the obtaining of property from another with that person's consent, induced by a wrongful use of force or fear [*Penal Code § 518*]. Fear that will constitute extortion may be induced by a threat to accuse an individual, or relative of that individual, of a crime, or to expose them to a crime, or to expose any secret affecting them [*Penal Code § 519*].

Even if an attorney's acts do not constitute attempted extortion, they may constitute moral turpitude [*Bluestein v. State Bar (1974) 13 Cal. 3d 162, 170, 118 Cal. Rptr. 175, 529 P.2d 599* ; *see Bus. & Prof. Code § 6106* (suspension or disbarment for acts of moral turpitude)]. Moral turpitude has been defined as "conduct which is contrary to justice, honesty and good morals..." [*Fall v. State Bar (1944) 25 Cal. 2d 149, 160, 153 P.2d 1* ; *see also In re Craig (1938) 12 Cal. 2d 93, 97, 82 P.2d 442* ("an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and the customary rule of right and duty

between man and man")].

ILLUSTRATION:

Threat of Criminal Proceeding as Moral Turpitude. Wife retains Attorney to represent her in a divorce proceeding. A few weeks later, Husband comes to Attorney's office and initiates a fist fight with Attorney, who then prefers criminal charges of assault and battery against Husband. Attorney estimates sustaining $270 in property damage and medical expenses. Soon thereafter, Wife and Husband sign a marital settlement agreement, which among other things requires Husband to pay $1,000 in attorney's fees owed by Wife to Attorney. Not long afterward, however, Husband and Wife reconcile and no longer need the settlement agreement. As the trial date nears for Husband's criminal charges, both Wife and Husband's attorneys ask Attorney if he would be willing to drop the criminal charges against husband. Attorney informs them initially that he will drop the charges if Husband pays the $1,000 owed to him under the settlement agreement; later he offers to drop them if Husband pays him $700 of that amount. One of them asks Husband what the $700 has to do with the criminal charges, and Attorney replies "nothing, except that that's the only way I can make [Husband] pay me now that the parties have reconciled." The fee is never paid, and Husband is acquitted at the criminal trial. Does Attorney's conduct constitute moral turpitude? Yes. Moral turpitude includes oppressive methods of attempting to collect legal fees, such as this willful and wrongful attempt to use the threat of criminal proceedings in order to collect in a civil matter [*Bluestein v. State Bar (1974) 13 Cal. 3d 162, 169-170, 118 Cal. Rptr. 175, 529 P.2d 599]* .

[h] Willful Breach of Statutory Restrictions on Consumer Debt Collection

An attorney who represents another attorney in collecting a fee that is a consumer debt may be subject to discipline for willful breach of certain statutory restrictions on consumer debt collection [*Bus. & Prof. Code § 6077.5(i)*]. Under *Bus. & Prof. Code § 6077.5*, an attorney and his or her employees who are employed primarily to assist in the collection of a consumer debt owed to another, as defined by *Civ. Code § 1788.2*, must comply with specified statutory requirements. *Civ. Code § 1788.2*, a provision in the Rosenthal Fair Debt Collection Practices Act, defines a "consumer debt" as a debt owing from a natural person by reason of a consumer credit transaction [*Civ. Code § 1788.2(f)*]. A "consumer credit transaction" means a transaction between a natural person and another person in which property, services, or money is acquired on credit by that natural person from the other person primarily for personal, family, or household purposes [*Civ. Code § 1788.2(e)*]. If, under the above definition, the fee arrangement qualifies as a consumer credit transaction, the collecting attorney and his or her employees must do all of the following:

- Properly identify themselves when communicating with the consumer debtor [*Bus. & Prof. Code § 6077.5(b)*].

- Limit communications with the debtor to times and places convenient to the debtor [*Bus. & Prof. Code § 6077.5(c)*].

- Stop communications on the debtor's written request in several situations [*Bus. & Prof. Code § 6077.5(d)*].

- Not take or threaten to take nonjudicial action against property in certain cases [*Bus. & Prof. Code § 6077.5(e)*].

- Not include in a demand concealed charges for certain items such as telegrams and collect telephone calls [*Bus. & Prof. Code § 6077.5(f)*].

- Provide the debtor with written notice in unsecured debt collection matters about the amount of the

debt, the name of the creditor, and certain other information, and stop the unsecured debt collection effort except for filing suit if the debtor disputes all or part of the debt until the attorney obtains certain documentation [*Bus. & Prof. Code § 6077.5(g)*].

- Apply any payment in accordance with the debtor's instructions [*Bus. & Prof. Code § 6077.5(h)*].

Although attorneys are subject to restrictions under the foregoing provisions of the State Bar Act (i.e., *Bus. & Prof. Code § 6077.5*), they are not otherwise subject to the provisions of the The Fair Debt Collection Practice Act (*Civ. Code § 1788 et seq.*). This Act applies only to statutorily defined "debt collectors," a definition that specifically excludes attorneys [*see Civ. Code § 1788.2(c)*]. Thus, a debtor does not have a statutory cause of action under the Rosenthal Fair Debt Collection Practices Act against an attorney representing a creditor based on alleged violations of the Act [*see Carney v. Rotkin, Schmerin & McIntyre (1988) 206 Cal. App. 3d 1513, 1526, 254 Cal. Rptr. 478]* .

[i] Acceptance of Fee Derived From Proceeds of Federal Criminal Offense

18 U.S.C. § 1957 makes it a criminal offense for a person, under specified circumstances, to knowingly engage in or attempt to engage in monetary transactions in property constituting, or derived from, proceeds obtained from a criminal offense [*18 U.S.C. § 1957(a), (d)*]. The statute apparently enables the federal government to prosecute attorneys who knowingly accept tainted money from their clients.

The statute applies only if the criminally derived property is worth more than $10,000 and is derived from one of the "specified unlawful activities" listed in *18 U.S.C. § 1956(c)(7)* [*18 U.S.C. § 1957(a), (f)(3)*]. Listed activities include racketeering, bribery, smuggling, and various drug offenses. In a prosecution under *Section 1957, the Government* is not required to prove that the defendant knew that the offense from which the criminally derived property was derived was "specified unlawful activity" [*see 18 U.S.C. § 1957(c)(7)*]. Penalties for violation of Section 1957 may include up to ten years imprisonment, a fine, or both [*18 U.S.C. § 1957(b)*].

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7-72 California Forms of Pleading and Practice--Annotated § 72.431

§ 72.431 Factors Affecting Determination Whether to Sue Client for Fees

[1] Fee Agreement and Documentation of Attorney's Performance

Before initiating an action, counsel must determine the extent to which the written fee agreement, time records, and periodic billings establish the attorney's entitlement to the fee. A clear fee agreement should be reached, especially as to the basis for computing the fee, as soon as possible after establishment of the attorney-client relationship [Model Rules of Professional Conduct, Rule 1.5(b) (1983)]. Contingency fee contracts and most other fee agreements are required by statute to be in writing and to contain certain provisions [*see Bus. & Prof. Code §§ 6147, 6148*, discussed in *§ 72.196* et seq.]. If the attorney does not have any written documentary evidence, he or she may have difficulty establishing the amount of the claim for fees, and the claim may appear to be sloppy and unprofessional to the trier of fact in the fee collection proceeding.

[2] Quality of Work Performed

Counsel must also consider whether the services were done in a professionally competent manner. If there is some doubt concerning the quality of the services rendered, the attorney should consider the extent to which this may preclude recovery or raise an issue regarding the reasonableness of his or her fee.

[3] Risk of Malpractice Cross Complaint

If the quality of the services performed is doubtful, the attorney must also consider the likelihood that the client will cross complain for malpractice. Even if the client's cause of action for malpractice is barred by the applicable statute of limitations (*i.e., Code Civ. Proc. § 340.6*), the client's cause of action may be revived as an offset when the attorney files a fee collection action [*see Code Civ. Proc. § 431.70*; *Davis & Cox v. Summa Corp. (9th Cir. 1985) 751 F.2d 1507, 1521-1522]* . In addition to being a cross defendant in the action, the attorney must report the malpractice claim on any future application for malpractice insurance; in some instances, the claim must also be reported to the State Bar [*see Bus. & Prof. Code § 6068(o)(1), (2)*].

[4] Review Representation for Ethical Violations Before Filing Suit

Before filing suit against the client, the attorney should be certain he or she has not committed any ethical violations in the matter for which he or she is attempting to collect the fee. Even if the attorney believes that the violation had no impact on his or her performance or on the reasonableness of the fee, he or she may be denied fees or be reported to the State Bar for disciplinary action [*see § 72.430[3]*]. If the client or the client's attorney do not report the attorney to the State Bar for any professional misconduct, the arbitrator or court may do so.

[5] Reasonableness of Fee

The attorney must assess the reasonableness of the fee charged. If an attorney secures benefits from a client greatly out of proportion to the services rendered, the attorney violates *Cal. Rules Prof. Conduct, Rule 4-200(E)* [*see* discussion of fee agreements in § 72.192 et seq.]. An attorney may want to consult with other attorneys who have handled similar cases for their opinions about the reasonableness of the fee. If the fee is too high, the attorney may want to lower his or her demand before bringing suit. For discussion of the requirement of reasonableness, see *§ 72.190* et seq.

[6] Respective Effectiveness of Attorney and Client as Witnesses

The attorney must make a realistic evaluation concerning how the attorney, and his or her client, will come across as witnesses in the fee collection proceeding. Their respective impact on the trier of fact may have a substantive effect on the outcome.

[7] Expected Net Recovery

The anticipated net recovery to the attorney or firm must also be considered in determining whether to sue the client. If outside counsel is retained to prosecute the fee collection action, that attorney may want a contingency fee that must be deducted from the gross recovery or a fixed fee that will reduce the net recovery. Out-of-pocket litigation expenses will include arbitration, court filing fees, or both, and perhaps expert witness fees. At least one attorney will lose some time from practice in preparing the fee collection case and testifying. If a small claims court award or an arbitration award is appealed, some of this effort will be repeated. Some of that loss may be made up, however, if the attorney is the prevailing party in the appeal of an arbitration award and is awarded reasonable attorney's fees and costs [*Bus. & Prof. Code § 6204(d)* (attorney's fees awarded to prevailing party at trial de novo following arbitration); *see also § 72.479[5]*]. The final net recovery consideration is the after-tax return to the attorney and any partners.

[8] Likelihood of Collecting Award

If it is likely that an award would be difficult or impossible to collect even if the attorney prevails in the fee collection action, because the client is a candidate for bankruptcy or entitled to exemptions from execution, counsel should factor that likelihood into his or her determination of the likely net recovery.

[9] Existence of Civ. Code § 1717 Attorney's Fee Clause in Fee Agreement

If a written fee agreement, signed by the client, includes a provision for the recovery of attorney's fees, counsel should decide whether this fact militates for or against bringing a fee collection action. This determination depends on the strength of the attorney's case. If the agreement provides that the attorney may recover fees incurred in bringing a collection action, the client is also entitled to recover such fees if he or she prevails [*see Civ. Code § 1717(a)*]. Thus, if the attorney has a doubtful case and the amount to be collected is small, it may be better not to bring the action than to risk liability for an award of fees in the client's favor [*see, e.g., Kroff v. Larson (1985) 167 Cal. App. 3d 857, 862, 213 Cal. Rptr. 526* (attorney's fees on appeal)].

On the other hand, even if the attorney's case is strong, he or she may recover an award of fees under the contract

provision *only* if he or she actually incurs the expense of attorney's fees. In particular, an attorney who acts *pro se*, representing himself or herself in an action on the written fee agreement, has been held not to incur any actual expense; even if the attorney prevails in the action he or she cannot recover an award of attorney's fees pursuant to the contract provision allowing their recovery [*Trope v. Katz (1995) 11 Cal. 4th 274, 282, 292, 45 Cal. Rptr. 2d 241, 902 P.2d 259]* .

For detailed discussion and forms relating to the recovery of attorney's fees as an element of costs pursuant to *Civ. Code § 1717*, see *Ch. 174, Costs and Attorney's Fees, § 174.50*.

Although the California Supreme Court ruled in 1929 that an attorney may not recover attorney's fees when appearing in propria persona [*see City of Long Beach v. Sten (1929) 206 Cal. 473, 474, 274 P. 968]* , a court of appeal recently declined to follow that decision, noting that it had been subsequently questioned by the Supreme Court. Instead, the court of appeal ruled that an attorney who acts pro se to recover fees under a written agreement for compensation for services rendered to a client may recover attorney's fees and costs under *Civ. Code § 1717* for prosecuting the suit if an appropriate clause has been included in the written agreement [*Renfrew v. Loysen (1985) 175 Cal. App. 3d 1105, 1109-1110, 222 Cal. Rptr. 413* ; *see also Leaf v. City of San Mateo (1984) 150 Cal. App. 3d 1184, 1189, 198 Cal. Rptr. 447* (also rejecting *City of Long Beach*, ruling that attorney who acted pro se in prosecuting inverse condemnation action was entitled to recover reasonable value of professional services rendered during pretrial and trial proceedings)]. For further discussion of attorney's fees and costs in the context of contractual attorney's fees clauses under *Civ. Code § 1717*, see Ch. 174, *Costs and Attorney's Fees* .

[10] Negative Public Relations Impact

The attorney should also consider whether bringing the action could have a negative impact on other actual or potential clients. This may be a concern in some situations, caused either by the mere fact of suing a former client, by the consequent disclosure of the attorney's billing practices, or by the potential that the former client will make unfavorable statements about the attorney.

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§ 72.432 Notice of Client's Right to Arbitrate Must Accompany Filing of Suit

With certain exceptions, an action brought by an attorney to recover fees from a client in a court other than small claims court is subject to a request by the client for mandatory arbitration [*see Bus. & Prof. Code § 6200(b)*]. When a client requests arbitration of a fee dispute, the attorney must submit the dispute to arbitration [*Bus. & Prof. Code § 6200(c)*; Fee Arbitration Hearing Rules, Rule 2.0]. Prior to or at the time of the service of summons in any fee collection action other than one in small claims court, a written notice of the client's right to arbitrate the fee dispute must be sent to the client [*Bus. & Prof. Code § 6201(a)*; Fee Arbitration Hearing Rules, Rule 4.0]. Failure to give the notice is a ground for the dismissal of the action [*Bus. & Prof. Code § 6201(a)*].

For a form for notice of client's right to arbitration, see form at § 72.751. For discussion relating to arbitration of fee disputes, see *§ 72.470* et seq.

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[Reserved]

§§ 72.433[Reserved]

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7-72 California Forms of Pleading and Practice--Annotated § 72.450

§ 72.450 Action for Recovery of Fee on Express Contract

[1] Breach of Contract--Basis of Recovery

If the attorney has an express written or oral contract with a client setting a specific fee, the attorney can sue the client for breach of contract [*Hardy v. San Fernando Valley C. of C. (1950) 99 Cal. App. 2d 572, 576-577, 222 P.2d 314* ; *but see Bus. & Prof. Code §§ 6147-6148* (requiring specific types of fee contract to be in writing), discussed in *§ 72.190* et seq. through § 72.240 et seq.].

The elements of a cause of action for a breach of an attorney's fees contract are [*Hardy v. San Fernando Valley C. of C. (1950) 99 Cal. App. 2d 572, 576-577, 222 P.2d 314]* :

- An oral or written agreement for legal services providing for reimbursement.
- Performance by the attorney in accordance with the agreement.
- Breach of the agreement by the client by failure to pay for the services.
- Damages.

If an attorney has completed performance of the contract, he or she is entitled to recover damages based on the fee contract and is not limited to the reasonable value of services performed [*Berk v. Twentynine Palms Ranchos, Inc. (1962) 201 Cal. App. 2d 625, 637, 20 Cal. Rptr. 144* ; *Pinto v. Seely (1913) 22 Cal. App. 318, 327, 135 P. 43]* .

For example, in one case, the evidence showed that the attorney had contracted to do the necessary legal work to incorporate and to acquire certain real property for his clients. The clients refused to pay on the basis that the attorney had not additionally obtained approval for a subdivision of the property. The court held that there was no evidence that the agreement for fees required the attorney to obtain subdivision approval, and held that the attorney had fully

performed and was thus entitled to full compensation [*Berk v. Twentynine Palms Ranchos, Inc. (1962) 201 Cal. App. 2d 625, 635, 20 Cal. Rptr. 144]* .

[2] Recovery for Reasonable Value of Services if Contract Not Fully Performed

If the attorney has not fully performed the contract, he or she may be entitled to recover in quantum meruit for the reasonable value of his or her services [*Fracasse v. Brent (1972) 6 Cal. 3d 784, 791, 100 Cal. Rptr. 385, 494 P.2d 9* ; *see also § 72.451, below*]. Older cases have stated that if the client prevents performance by the attorney, the condition of performance is excused, and the attorney can recover the agreed fee [*Stone v. Carpenter (1963) 211 Cal. App. 2d 491, 496, 27 Cal. Rptr. 203]* . A later Supreme Court case indicates that if the performance is prevented due to the client's discharge of the attorney, the attorney is limited to the reasonable value of his or her services rather than the agreed contract price, even if the discharge was without cause, because the client has the absolute right to discharge the attorney [*Fracasse v. Brent (1972) 6 Cal. 3d 784, 791, 100 Cal. Rptr. 385, 494 P.2d 9* ; *see also § 72.451[2][b]*]. Although it appears that no case has expressly addressed the issue, the holding of this later case implies that prevention by the client may not excuse the condition of performance by the attorney, and that an attorney who has not performed the agreement will be limited to the reasonable value of his or her services, rather than the agreed fee. Actions to recover the reasonable value of services provided are discussed under § 72.451[1], *below.* For detailed discussion and forms relating to breach of contract generally, see Ch. 140, *Contracts* .

For a form of complaint for recovery of fee based on breach of contract, common count, and account stated, *see § 72.740*.

[3] Defenses

Among the defenses to an action for breach of an attorney's fees contract are:

- Unconscionability of a fee because of its excessiveness [*Newmire v. Ford (1913) 22 Cal. App. 712, 716, 136 P. 504]* .

- Undue influence [*Civ. Code §§ 1550(2), 1567(4), 1575*].

- Illegality of the contract [*Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 147-148, 308 P.2d 713]* .

- Negligent performance of the contract [*Estate of Kruger (1900) 130 Cal. 621, 626, 63 P. 31]* .

If the illegality of the contract is obvious on its face, or evidence introduced to prove the contract establishes its illegality, the defense of illegality need not have been raised in the answer or even in argument to preserve it on appeal, because an illegal contract is void [*Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 147, 308 P.2d 713]* . Of course, counsel would ordinarily raise the issue at the earliest opportunity, as in the answer or by demurrer.

When the attorney's negligence in handling the client's matter has caused a loss of assets [*Estate of Kruger (1900) 130 Cal. 621, 626, 63 P. 31* ; *see Kane, Kane & Kritzer, Inc. v. Altagen (1980) 107 Cal. App. 3d 36, 43-44, 165 Cal. Rptr. 534]* , greater expense than otherwise necessary, or increased difficulty in prevailing on appeal [*Bridges & Hall v. Paige (1859) 13 Cal. 640, 642]* , the client may offer evidence of this negligence in determining the amount of the fee owed.

[4] Common Counts

The common count for money had and received is generally used to recover on an express contract when the plaintiff

has fully performed and the defendant has not paid, or the defendant possesses money that in equity and good conscience belongs to the plaintiff [*Ferro v. Citizens Nat. Trust & Sav. Bank (1955) 44 Cal. 2d 401, 409, 282 P.2d 849]* . Common counts are the common-law counterpart to modern quasi-contractual relief, and an action on a common count may be brought when equitable considerations require that money be refunded to a plaintiff [*see Philpott v. Superior Court (1934) 1 Cal. 2d 512, 518-519, 36 P.2d 635]* . Common counts may be based on express contracts that have been fully performed [*see Castagnino v. Balletta (1889) 82 Cal. 250, 258, 23 P. 127]* , or on implied-in-fact contracts [*see Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 793, 256 P.2d 947]* . For discussion and forms relating to common counts generally, see Ch. 121, *Common Counts* .

[5] Account Stated

[a] Basis of Recovery

The elements of an account stated are [*Truestone, Inc. v. Simi West Industrial Park II (1984) 163 Cal. App. 3d 715, 725, 209 Cal. Rptr. 757* ; *Withers v. Matthews (1961) 192 Cal. App. 2d 139, 141, 13 Cal. Rptr. 165]* :

- An acknowledgment of an existing indebtedness from one party to the other.
- An agreement about the correct sum due from the debtor to the creditor.
- An express or implied promise by the debtor to the creditor to pay that sum.

If an attorney sends periodic billings, and the client does not object to the stated amounts within a reasonable time, the attorney can sue the client on an account stated because the client has impliedly agreed that the amount in question is due and owing [*Trafton v. Youngblood (1968) 69 Cal. 2d 17, 25, 69 Cal. Rptr. 568, 442 P.2d 648]* . If there is a dispute over one item or transaction, there may nevertheless be an account stated, or agreed balance owing, as to the remaining items or transactions in a billing [*see California Milling Corp. v. White (1964) 229 Cal. App. 2d 469, 477, 40 Cal. Rptr. 301]* .

When the client assents to the account, it becomes a new contract. The action is not based on the original items, but rather on the balance to which the parties agree [*Gardner v. Watson (1915) 170 Cal. 570, 574, 150 P. 994]* . A compromise of a claim is good consideration for an account stated [*Gardner v. Watson (1915) 170 Cal. 570, 574, 150 P. 994]* .

For a form of complaint for recovery of fee based on breach of contract, common count, and account stated, *see § 72.740*. For discussion and forms relating to accounts stated generally, see Ch. 8, *Accounts Stated and Open Accounts* .

[b] Open Book Account Distinguished

An open book account is different from an account stated in that in the former, the debtor has not expressly or impliedly agreed to the amount owed. An open book account consists of a detailed statement of one or more transactions between a debtor or creditor arising from a contractual or fiduciary relationship [*Code Civ. Proc. § 337a*]. The account must be recorded during the regular course of business by either the debtor or creditor, and maintained in a reasonably permanent form [*Code Civ. Proc. § 337a*; *Gardner v. Rutherford (1943) 57 Cal. App. 2d 874, 884, 136 P.2d 48]* . For example, an attorney's docket of court cases and a separate journal for office charges has been held to constitute a book account [*Egan v. Bishop (1935) 8 Cal. App. 2d 119, 122, 47 P.2d 500]* . An open book account can be converted into an account stated if both parties expressly or impliedly assent to the correctness of the account or the debtor impliedly acknowledges that he or she owes that amount [*R.E. Tharp, Inc. v. Miller Hay Co. (1968) 261 Cal. App. 2d 81, 84, 67 Cal. Rptr. 854]* . Interest can be recovered on an open book account if the amount due is a liquidated sum ascertainable prior to judgment by reference to a contract or other definite source [*Civ. Code § 3287*; *Schmidt v. Waterford Winery,*

Ltd. (1960) 177 Cal. App. 2d 28, 34-35, 1 Cal. Rptr. 874] . Under certain circumstances, the party prevailing in an action on a contract based on an open book account is entitled to reasonable attorney's fees in addition to other costs [*see Civ. Code § 1717.5*; *see also* Ch. 8, *Accounts Stated and Open Accounts*].

[c] Defenses

Among the defenses to an account stated are [*Gardner v. Watson (1915) 170 Cal. 570, 574, 150 P. 994* ; *see Civ. Code §§ 1565-1579*]:

- Fraud.
- Duress.
- Undue influence.
- Mistake.

Other defenses applicable to contracts generally include:

- Lack of consent [*see Civ. Code § 1565 et seq.*].
- Illegality [*see Civ. Code §§ 1595-1599*].
- Lack of capacity [*see Civ. Code § 1556*].

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§ 72.451 Action for Reasonable Value of Services

[1] When Action Is Available

Even if the attorney cannot recover a specific amount of payment under a fee contract, he or she may be able to recover the reasonable value of his or her services under the following circumstances:

- If the attorney and client expressly agree that the attorney's compensation will be the reasonable value of the attorney's services [*Stuart v. Preston (1934) 2 Cal. App. 2d 310, 315-316* ; *Lawrence Block Co. v. England (1962) 211 Cal. App. 2d 318, 325, 27 Cal. Rptr. 362]* .

- If the attorney is employed without any specific agreement about his or her compensation and the consideration for the services is the client's implied promise to pay the reasonable value of the services [*Batcheller v. Whittier (1909) 12 Cal. App. 262, 266, 107 P. 141]* .

- If the contract expressly provides for compensation, but the attorney's performance becomes impossible or is excused without fault by either the attorney or client [*Boardman v. Christin (1924) 65 Cal. App. 413, 419, 224 P. 97]* .

- If the contract is unenforceable, for example, a contract with a minor [*Spencer v. Collins (1909) 156 Cal. 298, 306, 104 P. 320]* or an incompetent client [*Estate of Doyle (1932) 126 Cal. App. 646, 647, 14 P.2d 920]* .

- If the contract contains a severable illegal provision, but is otherwise valid [*Calvert v. Stoner (1948) 33 Cal. 2d 97, 104, 199 P.2d 297]* .

In addition, if the attorney is discharged, he or she may recover the reasonable value of the services provided prior to the time of discharge [*Fracasse v. Brent (1972) 6 Cal. 3d 784, 792, 100 Cal. Rptr. 385, 494 P.2d 9* ; *see also §*

72.451[2][b]]. For a form of complaint in action to recover reasonable value of services, *see § 72.741*.

[2] Recovery in Quantum Meruit

[a] Promise to Pay Reasonable Value Implied in Absence of Fee Agreement

If the client and attorney do not have an agreement for the payment of a specific fee, the attorney can recover on a common count for the reasonable value of the services (quantum meruit) [*Elconin v. Yalen (1929) 208 Cal. 546, 549, 282 P. 791* (recovery under common count in action based on express contract); *see also § 72.450[4]*]. A formal contract is not a prerequisite to recovery in quantum meruit [*Spires v. American Bus Lines (1984) 158 Cal. App. 3d 211, 216, 204 Cal. Rptr. 531]* . When the attorney with the client's knowledge performs for the client a useful service for which a charge is usually made, and the client takes advantage of the service and does not object, a promise to pay the reasonable value of the service is implied [*see* *Gray v. Whitmore (1971) 17 Cal. App. 3d 1, 24, 94 Cal. Rptr. 904]* .

For a form of complaint to recover the reasonable value of the attorney's services, *see § 72.741*. For a form of complaint for compensation for legal services in obtaining settlement of a client's case, *see § 72.744*.

[b] Recovery by Discharged Attorney

[i] Contingent Fee Agreements

A client has both the power and the right to discharge an attorney with or without cause [*Fracasse v. Brent (1972) 6 Cal. 3d 784, 790, 100 Cal. Rptr. 385, 494 P.2d 9]* . In *Fracasse v. Brent*, the California Supreme Court held that when a client discharges an attorney before the attorney has completed performance, the attorney has no cause of action for breach of contract to recover damages for the contract amount, but the attorney is entitled to recover the reasonable value of his or her services rendered to the time of the discharge [*Fracasse v. Brent (1972) 6 Cal. 3d 784, 791, 100 Cal. Rptr. 385, 494 P.2d 9]* . The case involved a contingent fee contract, and the Court stated that the quantum meruit recovery depended on the occurrence of the contingency contemplated by the contract [*Fracasse v. Brent (1972) 6 Cal. 3d 784, 786, 100 Cal. Rptr. 385, 494 P.2d 9]* . For discussion of what constitutes the "reasonable value" of attorney's services, *see § 72.451[3]*. For a form of complaint to recover reasonable value of services by discharged attorney, *see § 72.742*.

[ii] Non-Contingent Fee Agreements

There appears to be some confusion regarding whether the rule permitting a discharged attorney to recover the reasonable value of his or her services is limited to contingency fee agreements, or applies as well to non-contingent fee agreements. Although *Fracasse* involved the dismissal of an attorney employed under a contingency fee agreement, the Court did not appear to limit its holding to contingency fee cases. The Court's reasoning in holding that the attorney was limited to the reasonable value of his services was based in large part on the premise that an attorney's discharge, even when without cause, does not constitute a breach of the fee contract because the client's right to discharge his or her attorney at will is a basic term of the contract, a term that is implied by law because of the special relationship between the parties [*Fracasse v. Brent (1972) 6 Cal. 3d 784, 791, 100 Cal. Rptr. 385, 494 P.2d 9]* . This reasoning appears equally applicable to all attorney's fees agreements, including non-contingent as well as contingency agreements. The Court further stated that "we find no injustice in a rule awarding a discharged attorney the reasonable value of the services he has rendered up to the time of discharge. In doing so, we preserve the client's right to discharge his attorney without undue restriction, and yet acknowledge the attorney's right to fair compensation for work performed" [*Fracasse v. Brent (1972) 6 Cal. 3d 784, 791, 100 Cal. Rptr. 385, 494 P.2d 9]* .

At least one commentator, however, takes the position that an attorney who is unjustly discharged under a fixed fee agreement can recover the total agreed contract price [*see* Witkin, California Procedure, vol. 1, *Attorneys*, §§ 175, 176 (3d ed. 1985)]. An attorney who has been discharged without cause under a fixed fee agreement may therefore wish to

allege counts for both breach of contract (seeking recovery of the contractual fee) and quantum meruit.

[iii] Accrual of Cause of Action

If the attorney has been employed on a contingency fee basis, the attorney's action for reasonable compensation accrues only when the contingency stated in the agreement has occurred, typically when the client has had a recovery by settlement or judgment, because until the matter has been finally resolved, the result obtained is impossible to determine and the amount involved is highly speculative. Additionally, without knowing the outcome of the litigation, it would be improper to burden the client with an absolute obligation to pay his or her former attorney. If judgment or settlement is not obtained, the attorney is denied any compensation [*Fracasse v. Brent (1972) 6 Cal. 3d 784, 791, 100 Cal. Rptr. 385, 494 P.2d 9]* . The same rule applies to the attorney's recovery under a contingency fee agreement of the costs of suit advanced to the client prior to the attorney's discharge. That is, the attorney cannot recover those costs until the client has made a recovery by settlement or judgment [*Kroff v. Larson (1985) 167 Cal. App. 3d 857, 860, 213 Cal. Rptr. 526]* .

[iv] No Recovery If Discharge Based on Attorney Impropriety

The general rule allowing a discharged attorney to recover the reasonable value of his or her services performed to the time of discharge is qualified by the rule that if the client discharges the attorney because of acts of impropriety inconsistent with the character of the legal profession and incompatible with the faithful discharge of professional duties, the attorney cannot recover for his or her services [*Jeffry v. Pounds (1977) 67 Cal. App. 3d 6, 9, 136 Cal. Rptr. 373]* . For example, in one case in which the attorney had been hired to represent the husband in a personal injury action and then undertook to represent the wife in a dissolution action, the court held that the attorney was not entitled to the reasonable value of his services in representing the husband because he had violated Cal. Rules Prof. Conduct, former Rule 5-102(B) (*now see Cal. Rules Prof. Conduct, Rule 3-310(B)*) by representing two clients with conflicting interests without obtaining the client's permission [*Jeffry v. Pounds (1977) 67 Cal. App. 3d 6, 9, 136 Cal. Rptr. 373]* .

[v] Completion of Contract Before Discharge

If the attorney has completed performance of the contract prior to discharge, he or she may bring an action for damages under the contract and is not required to prove the reasonable value of his or her services [*Berk v. Twentynine Palms Ranchos, Inc. (1962) 201 Cal. App. 2d 625, 637, 20 Cal. Rptr. 144* ; *see Franklin v. Appel (1992) 8 Cal. App. 4th 875, 893-894, 10 Cal. Rptr. 2d 759* ; *see also § 7.10*].

An attorney discharged shortly before the conclusion of a case may be able to assert entitlement to the entire contingent fee as the appropriate quantum meruit recovery [*Fracasse v. Brent (1972) 6 Cal. 3d 784, 790-791, 100 Cal. Rptr. 385, 494 P.2d 9]* . The appropriate quantum meruit recovery for an attorney discharged even at an earlier point in the proceedings may be measured by a percentage of the originally agreed-on contingent fee [*Cazares v. Saenz (1989) 208 Cal. App. 3d 279, 288-289, 256 Cal. Rptr. 209]* .

A discharged attorney in a medical malpractice case who has a potential entitlement to all or a percentage of a contingent fee has standing to participate at a hearing to determine the value of the award on which the fee is to be computed pursuant to *Bus. & Prof. Code § 6146* [*Schneider v. Kaiser Foundation Hospitals (1989) 215 Cal. App. 3d 1311, 1315-1316, 264 Cal. Rptr. 227* , *disapproved on other grounds in Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 27-28, 10 Cal. Rptr. 2d 183, 832 P.2d 899* ; for discussion of contingent fees generally, *see § 72.190* et seq. through § 72.240 et seq.].

[c] Recovery by Attorney Who Voluntarily Withdraws

The general rule is that the attorney can recover for services rendered prior to withdrawing from representation of the client only if justifiable cause exists for the withdrawal, such as the client's conduct making it unreasonably difficult for

the attorney to effectively carry out his or her employment [*see Moore v. Fellner (1958) 50 Cal. 2d 330, 342, 325 P.2d 857* (recognizing rule); *Cal. Rules Prof. Conduct, Rule 3-700(C)* (when attorneys may permissively withdraw from case); *see also § 72.350* et seq. through § 72.410 et seq.]. However, if no justifiable cause exists, and the attorney withdraws from the case, he or she cannot claim a quantum meruit lien on any future recovery of the client. The fact that a trial court has granted an attorney's motion to withdraw does not establish cause to withdraw for the purpose of awarding attorney's fees [*see Estate of Falco (1987) 188 Cal. App. 3d 1004, 1014, 233 Cal. Rptr. 807]* . In one case, for example, an attorney representing a client on a contingency fee basis determined that the case was not worth pursuing; the attorney instructed the client to dismiss the case, represent himself, or seek other counsel. The attorney then withdrew from the case and subsequently asserted the existence of a lien on any subsequent recovery by the attorney who had taken over the case. The court concluded that it would be highly unjust to permit the attorney to recover under these circumstances [*see Hensel v. Cohen (1984) 155 Cal. App. 3d 563, 564, 568-569, 202 Cal. Rptr. 85]* . In a case involving the granting of a permissive withdrawal for a law firm, the Court of Appeals stated that, "Good cause to withdraw is not necessarily good cause to recover money obtained in a settlement after withdrawal" [*Rus, Miliband & Smith v. Conkle & Olesten (2003) 113 Cal. App. 4th 656, 673, 6 Cal. Rptr. 3d 612]* .

When an attorney withdraws for ethical reasons, the attorney may be entitled to recover attorney's fees in quantum meruit, if withdrawal was justifiable [*see Estate of Falco (1987) 188 Cal. App. 3d 1004, 1016, 233 Cal. Rptr. 807]* . The attorney has the burden of proof to show [*see Estate of Falco (1987) 188 Cal. App. 3d 1004, 1016, 233 Cal. Rptr. 807]* :

- Counsel's withdrawal was mandatory, not merely permissive, under statute or state bar rules.
- The overwhelming and primary motivation for counsel's withdrawal was the obligation to adhere to these ethical imperatives under statute or state bar rules.
- Counsel commenced the action in good faith.
- Subsequent to counsel's withdrawal, the client obtained recovery.
- Counsel has demonstrated that his or her work contributed in some measurable degree towards the client's ultimate recovery.

In one case decided by the appellate department of the Superior Court, the court held that a client's failure to accept a settlement was justification for the attorney's withdrawal, entitling the attorney to receive attorney's fees on the basis of a written lien executed by the client [*Pearlmutter v. Alexander (1979) 97 Cal. App. 3d Supp. 16, 20*]. This holding was criticized, however, in a later court of appeal case, in which the court stated that a client's right to reject settlement is absolute, and that a client's exercise of the right cannot constitute cause for the purpose of awarding attorney's fees [*Estate of Falco (1987) 188 Cal. App. 3d 1004, 1018, 233 Cal. Rptr. 807]* . The court noted that a client's due process right to proceed to trial on the merits would be jeopardized under the rule espoused in *Pearlmutter* [*Estate of Falco (1987) 188 Cal. App. 3d 1004, 1018, 233 Cal. Rptr. 807]* . Nevertheless, restitution would be possible under a theory of unjust enrichment, if the client subsequently accepts settlement terms substantially similar to those negotiated by the attorney prior to his or her withdrawal [*Estate of Falco (1987) 188 Cal. App. 3d 1004, 1019, 233 Cal. Rptr. 807]* .

The issue of possible recovery under a contractual charging lien is discussed in § 72.452[1].

[3] Ascertaining Reasonable Value of Services

Although expert testimony on the reasonable value of an attorney's services is admissible [*Kurland v. Simmons (1954) 126 Cal. App. 2d 79, 81, 271 P.2d 553]* , it is not a prerequisite to recovery [*Bunn v. Lucas, Pino & Lucas (1959) 172 Cal. App. 2d 450, 468, 342 P.2d 508* ; *Ball v. Posey (1986) 176 Cal. App. 3d 1209, 1215, 222 Cal. Rptr. 746]* . Judges

are familiar with the value of attorneys' services. On receiving evidence of the nature and extent of the attorney's services, the court is presumed competent to find a value [*Excelsior Etc. School Dist. v. Lautrup (1969) 269 Cal. App. 2d 434, 448, 74 Cal. Rptr. 835]* . Even when expert testimony isreceived, the court can ignore it and rely on its own experience and judgment [*Freese v. Pennie (1895) 110 Cal. 467, 469, 42 P. 978]* . A jury can also determine the reasonable value of an attorney's services without hearing expert testimony [*Spencer v. Collins (1909) 156 Cal. 298, 307, 104 P. 320]* .

The factors to be considered in determining what is a reasonable fee are discussed in *§ 72.190* et seq. through § 72.240 et seq.

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§ 72.452 Action to Enforce Attorney's Contractual Charging Lien

[1] Lien Based on Agreement of Parties

Although California law does not recognize a common law attorney's charging or nonpossessory lien, which allows an attorney to satisfy his or her fees and expenses from the client's recovery even in the absence of an agreement to that effect, the parties can agree to a contractual charging or nonpossessory lien, and the agreement is enforceable to satisfy an attorney's fees and expenses out of the proceeds of the client's recovery [*see Gelfand, Greer, Popko & Miller v. Shivener (1973) 30 Cal. App. 3d 364, 371, 105 Cal. Rptr. 445* ; Witkin, California Procedure, vol. 1, *Attorneys* § 193 (4th ed. 1996); *see also § 72.190* et seq. through § 72.240 et seq.]. Any charging lien created by a contingency fee agreement survives the attorney's discharge and entitles the attorney to receive from any recovery by the client the reasonable value of services rendered prior to the discharge [*Weiss v. Marcus (1975) 51 Cal. App. 3d 590, 598, 124 Cal. Rptr. 297]* .

[2] Enforcing Lien

The attorney's contractual charging lien on the client's recovery is not self-executing. It can only be enforced by an independent action against the client after the client's recovery in the main action [*Bandy v. Mt. Diablo Unified Sch. Dist. (1976) 56 Cal. App. 3d 230, 234, 126 Cal. Rptr. 890* ; *see Cal-Western Reconveyance Corp. v. Reed (2007) 152 Cal. App. 4th 1308, 1321-1323, 62 Cal. Rptr. 3d. 244* ; *In re Marriage of Tushinsky (1988) 203 Cal. App. 3d 136, 143, 249 Cal. Rptr. 611* ; *but see Spires v. American Bus Lines (1984) 158 Cal. App. 3d 211, 215, 204 Cal. Rptr. 531* (allowing former attorney to intervene in settlement conference for purpose of asserting attorney's fee lien on client's settlement of case in which client was represented by subsequently hired attorneys)].

A discharged attorney who has a contractual lien on a prospective judgment may file a notice of his or her contractual lien during a pending action [*Hansen v. Jacobsen (1986) 186 Cal. App. 3d 350, 358, 230 Cal. Rptr. 580]* , although such notice apparently is not essential to enforcement of the lien [*see Cetenko v. United California Bank (1982) 30 Cal. 3d 528, 532-533, 179 Cal. Rptr. 902, 638 P.2d 1299* (notice of attorney's lien found to be superfluous)]. Any order or judgment granting the attorney fees made in the main (or pending) action is in excess of the court's jurisdiction and is

void [*Bandy v. Mt. Diablo Unified Sch. Dist. (1976) 56 Cal. App. 3d 230, 234, 126 Cal. Rptr. 890]* . If the question is erroneously determined in that forum, however, and the discharged attorney fails to directly attack the adverse determination by appealing, he or she may be barred from later reopening the fee dispute in an independent action, by principles of collateral estoppel, disfavor of collateral attack, and res judicata [*Law Offices of Stanley J. Bell v. Shine, Browne & Diamond (1995) 36 Cal. App. 4th 1011, 1021, 1027, 43 Cal. Rptr. 2d 717]* .

For a complaint in action to enforce attorney's charging lien based on a contingency fee agreement, see *§ 72.743*. For a complaint for a declaratory judgment to ascertain an attorney's rights under a contingent fee agreement and to declare his or her right to a lien on a client's recovery, see *§ 72.746*.

The attorney can enforce the charging lien by bringing causes of action for money had and received, an action for conversion, or an action to impose a constructive trust [*Weiss v. Marcus (1975) 51 Cal. App. 3d 590, 598, 124 Cal. Rptr. 297]* . The common count for money had and received is based on the defendant becoming indebted to the plaintiff for money had and received for the use and benefit of the plaintiff [*Pike v. Zadig (1915) 171 Cal. 273, 276]* . The conversion action is based on willful interference with the personal property of another without lawful justification resulting in the person entitled to the property being deprived of its use and possession [*De Vries v. Brumback (1960) 53 Cal. 2d 643, 647, 2 Cal. Rptr. 764, 349 P.2d 532]* . A constructive trust is a type of involuntary trust imposed by law on a person who has obtained property by fraud, accident, mistake, undue influence, violation of a trust, or other wrongful act [*see Civ. Code § 2224*]. The person who is not entitled to the property is required to restore it to the entitled person [*Bainbridge v. Stoner (1940) 16 Cal. 2d 423, 428, 106 P.2d 423]* . The purpose of a constructive trust is to prevent unjust enrichment [*Day v. Greene (1963) 59 Cal. 2d 404, 411, 29 Cal. Rptr. 785, 380 P.2d 385]* .

These actions may be brought directly against the client's second attorney who fails to pay the original attorney the amount of the lien to which he or she is entitled [*Levin v. Gulf Ins. Group (1999) 69 Cal. App. 4th 1282, 1287-1288, 82 Cal. Rptr. 2d 228* ; *Weiss v. Marcus (1975) 51 Cal. App. 3d 590, 598-599, 124 Cal. Rptr. 297]* . Additionally, when the client's suit is to recover benefits under an insurance policy, the attorney may in some circumstances bring a cause of action against the client's insurer for nonpayment of the lien [*see Levin v. Gulf Ins. Group (1999) 69 Cal. App. 4th 1282, 1287-1288, 82 Cal. Rptr. 2d 228* (insurer and attorneys retained to defend insured are liable for intentional interference with prospective economic advantage of insured's discharged attorney when, after receiving notice of contractual lien for attorney fees and costs filed by discharged attorney, they pay over settlement or judgment funds to attorney's former client and client's new attorney with knowledge of lien); *Siciliano v. Fireman's Fund Ins. Co. (1976) 62 Cal. App. 3d 745, 752-753, 133 Cal. Rptr. 376* (client discharged attorney and collected payment from his insurer in pro per, despite insurer's knowledge of attorney's lien on proceeds)]. When the contingency fee is insufficient to meet the quantum meruit claims of both the discharged and successor attorneys, a pro rata formula is applied in order to distribute the fee to the attorneys in proportion to the time each worked on the case [*Spires v. American Bus Lines (1984) 158 Cal. App. 3d 211, 216, 204 Cal. Rptr. 531]* .

For discussion of the required accompanying notice regarding the client's right to arbitration, see *§ 72.432*.

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§ 72.453 Subsequent Attorney May Be Liable for Tortious Interference with Contract

If an attorney has induced a client to discharge an attorney, a cause of action for tortious interference with contractual relations may be appropriate [*Herron v. State Farm Mutual Ins. Co. (1961) 56 Cal. 2d 202, 205, 14 Cal. Rptr. 294, 363 P.2d 310* ; *Skelly v. Richman (1970) 10 Cal. App. 3d 844, 861-862, 89 Cal. Rptr. 556]* . For a form of complaint for tortious interference with a contingent fee contract, *see § 72.747*. For discussion and forms relating to interference with contractual relationship generally, see *Ch. 565, Unfair Competition, § 565.130* et seq.

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§ 72.454 Compensation of Incapacitated Associated Counsel for Partial Performance

Associations may be made between otherwise unaffiliated attorneys who agree to provide services on behalf of particular clients in particular cases [*see Wells Fargo & Co. v. City etc. of S.F. (1944) 25 Cal. 2d 37, 42-43, 152 P.2d 625]* . During the course of such a relationship, associated counsel may become incapable of continuing to perform on the contract of association. Such incapacity may occur, for example, if an associated attorney is appointed to judicial office [*see Cazares v. Saenz (1989) 208 Cal. App. 3d 279, 285, 256 Cal. Rptr. 209]* .

Generally, the incapacitated associating attorney is entitled to recover in quantum meruit for any services provided up to the time of incapacity [*see Cazares v. Saenz (1989) 208 Cal. App. 3d 279, 287, 256 Cal. Rptr. 209]* . If by contract, the incapacitated attorney were to receive a percentage of a contingent fee, the incapacitated counsel may recover a fraction of the fee, even if it exceeds the actual market value of the services provided [*see Cazares v. Saenz (1989) 208 Cal. App. 3d 279, 287-290, 256 Cal. Rptr. 209]* . In contingent fee cases, the judge is required to calculate a fraction in which the numerator is the value of the legal services rendered by the particular attorney at issue and the denominator is the aggregate value of all the legal services rendered by any attorney in the case [*Cazares v. Saenz (1989) 208 Cal. App. 3d 279, 288, 256 Cal. Rptr. 209]* . Thus, on a partially performed contingent fee contract, the incapacitated associated attorney properly receives a pro rata share of the contract price [*Cazares v. Saenz (1989) 208 Cal. App. 3d 279, 289, 256 Cal. Rptr. 209]* .

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§ 72.455 Actions to Recover Fees

[1] Statute of Limitations--When Statute Begins to Run

The statute of limitations on an action begins to run when the cause of action accrues [*Heyer v. Flaig (1969) 70 Cal. 2d 223, 230, 74 Cal. Rptr. 225, 449 P.2d 161* (disapproved on other grounds in *Laird v. Blacker (1992) 2 Cal. 4th 606, 617, 7 Cal. Rptr. 2d 550, 828 P.2d 691*)], and a cause of action generally accrues when suit may be maintained [*Osborn v. Hopkins (1911) 160 Cal. 501, 506, 117 P. 519]* .

When the attorney is employed to represent the client in a matter, the attorney's cause of action for payment normally accrues on completion of that matter, because that is generally the time when the attorney is entitled to payment under the fee contract [*Johnson v. Bank of Lake (1899) 125 Cal. 6, 8, 57 P. 664* ; *see E.O.C. Ord, Inc. v. Kovakovich (1988) 200 Cal. App. 3d 1194, 1203, 1206, 246 Cal. Rptr. 456]* . If the attorney is retained under a general retainer and the attorney represents the client in separate matters, the cause of action accrues on completion of each matter unless the employment contract provides otherwise [*Osborn v. Hopkins (1911) 160 Cal. 501, 507, 117 P. 519]* . If the attorney is employed to provide continuous services, the cause of action accrues on completion of the services, or at the time that completion is prevented by an event beyond the attorney's control [*Brooks v. Van Winkle (1958) 161 Cal. App. 2d 734, 743, 327 P.2d 151]* .

[2] Limitations Periods Applicable to Various Types of Contract

If the action is on a written contract, the applicable limitations period is four years from the date of the breach [*Code Civ. Proc. § 337(1)*; *see E. O. C. Ord, Inc. v. Kovakovich (1988) 200 Cal. App. 3d 1194, 1202, 246 Cal. Rptr. 456]* . If the action is on an oral contract, the statute of limitations is two years from the date of the breach [*Code Civ. Proc. § 339(1)*; *see Iverson, Yoakum, Papiano & Hatch v. Berwald (1999) 76 Cal. App. 4th 990, 90 Cal. Rptr. 2d 665* (noncompliance with *Bus. & Prof. Code § 6148* written fee agreement requirement results in two-year statute of limitations on quantum meruit claim)].

When an account stated (discussed in *§ 72.613[1]*) is based on a written account, regardless of whether the

acknowledgment is written, the statute of limitations is four years from the date of the statement [*Code Civ. Proc. § 337(2)*]. When the account stated is based on one item, the cause of action accrues from the date of that item. When the account stated is based on more than one item, the cause of action accrues from the date of the last item [*Code Civ. Proc. § 337(2)*]. When an account stated is based on a transaction in an unsettled amount, such as for legal services, the cause of action commences from the date the account is stated [*Fleschler v. Strauss (1936) 15 Cal. App. 2d 735, 740, 60 P.2d 193]* .

The statute of limitations on an open book account is four years, regardless of the number of entries comprising the account [*Code Civ. Proc. § 337(2)*]. The statute of limitation commences to run from the date of the last entry in the book account [*Davidson v. Tilden (1978) 86 Cal. App. 3d 283, 287, 150 Cal. Rptr. 194]* . Even if there has been a lapse between some of the payments that exceeds the four-year period of the statute of limitations, if the action is commenced within four years of the last item on the account, the entire account is not barred by the statute of limitations [*Gardner v. Rutherford (1943) 57 Cal. App. 2d 874, 883, 136 P.2d 48]* . The statute of limitations is tolled each time a new entry is made in the account [*Furlow P.B. Co. v. Balboa L. & W. Co. (1921) 186 Cal. 754, 763, 200 P. 625]* . If the open book account has been terminated, the statute of limitations runs from the date of termination [*Davidson v. Tilden (1978) 86 Cal. App. 3d 283, 287-288, 150 Cal. Rptr. 194]* .

[3] Parties to Action

The person who performed the services for which compensation is sought must have been an active member of the State Bar at the time the services were performed [*Hardy v. San Fernando Valley C. of C. (1950) 99 Cal. App. 2d 572, 576, 222 P.2d 314]* . In addition to the attorney who contracted with the client to provide services, an assignee of the attorney's fee contract may file an action, even if the client did not consent to the assignment [*Taylor v. Black Diamond Coal M. Co. (1890) 86 Cal. 589, 590, 25 P. 51]* .

The proper defendant in an action to recover attorney's fees is usually the person or persons who employed the attorney. If an attorney is employed by someone other than the client and agrees that the other person should pay the fees, that other person is the proper defendant [*Cullinan v. McColgan (1927) 87 Cal. App. 684, 697-698, 263 P. 353]* . An attorney can also agree that the client not be liable, such as in a domestic relations case when the attorney agrees to recover fees from the spouse [*Sapiro v. Marquis (1951) 102 Cal. App. 2d 34, 37-38, 226 P.2d 736]* . If a person is a successor in interest to the original client, accepts the attorney's services with knowledge of the employment agreement, and makes payments to the attorney for services, that person is liable on a theory of ratification [*Olson v. Foster (1941) 42 Cal. App. 2d 493, 497, 109 P.2d 388]* . When an attorney is employed by two or more persons, the attorney is generally entitled to recover the entire fee from any one of these persons [*Wheeler v. Houston, Gore & Loy (1918) 37 Cal. App. 407, 408, 174 P. 121]* .

[4] Recovery of Fees on Death of Client

Generally, the attorney-client relationship is terminated by the client's death [*Swartfager v. Wells (1942) 53 Cal. App. 2d 522, 528, 128 P.2d 128]* . Subsequent to the client's death, the attorney usually cannot represent the deceased client's interests without authorization from the decedent's personal representative [*Judson v. Love (1868) 35 Cal. 463, 467]* . If the contract specifically provides for the attorney to conduct a suit to final judgment or for a fee for an entire case, the attorney's authority continues after the client's death to act on the deceased client's behalf [*Estate of Lanza (1964) 229 Cal. App. 2d 720, 724, 40 Cal. Rptr. 528]* .

If the client dies before the attorney has completed performance under the fee agreement, the attorney should be able to recover the reasonable value of his or her services from the client's estate based on quantum meruit. The situation is analogous to that in which an attorney who is discharged or justifiably withdraws from representation recovers the reasonable value of his or her services [*see* *Fracasse v. Brent (1972) 6 Cal. 3d 784, 791, 100 Cal. Rptr. 385, 494 P.2d 9* ; *Pearlmutter v. Alexander (1979) 97 Cal. App. 3d Supp. 16, 20*]. For discussion of quantum meruit recovery for

services rendered prior to discharge or voluntary withdrawal of attorney, *see § 72.451[2][b]* and *[2][c]*. For a form of complaint for compensation for legal services rendered prior to death of a client, *see § 72.745*.

For additional discussion of termination of the attorney-client relationship by death of the attorney or client and its effect on recovering fees, see *§ 72.350* et seq.

[5] Recovery of Fees on Death of Attorney

Because an attorney is an agent of the client [*Sullivan v. Dunne (1926) 198 Cal. 183, 192, 244 P. 343]* , the attorney's death terminates that agency and thus terminates the attorney-client relationship [*see Civ. Code § 2355(c)*]. When an attorney dies after having only partially performed services under a contingency fee agreement, his or her estate is not entitled to recover any fees for the decedent's services unless and until the contract is completed, that is, the contingency occurs [*Estate of Linnick (1985) 171 Cal. App. 3d 752, 761, 217 Cal. Rptr. 552]* . If the contingency does occur, the attorney's estate is entitled to recover the reasonable value of services rendered pursuant to the contract [*see Estate of Linnick (1985) 171 Cal. App. 3d 752, 761, 217 Cal. Rptr. 552]* . If one party to the agreement is a law partnership, the surviving partners are obligated to continue the representation unless the client terminates the agreement [*Little v. Caldwell (1894) 101 Cal. 553, 560, 36 P. 107]* . Of course, if the client consents to continued performance by the surviving partners, he or she must pay the firm according to the contract terms [*see California Water Service Co. v. Edward Sidebotham & Son (1964) 224 Cal. App. 2d 715, 735, 37 Cal. Rptr. 1]* .

For additional discussion of termination of the attorney-client relationship by death of the attorney or client and its effect on recovering fees, see *§ 72.350* et seq. through § 72.410 et seq.

[6] Burden of Proof

The attorney has the burden of proof on the issues of:

- Employment by the client or the client's authorized agent [*Cormac v. Murphy (1922) 58 Cal. App. 366, 369, 208 P. 360]* .

- Performance of the agreed-on services [*Mahony v. Haines (1924) 66 Cal. App. 456, 459, 226 P. 620]* .

- The value of the services [*Knight v. Russ (1888) 77 Cal. 410, 413, 19 P. 698]* .

[7] Inapplicability of Attorney-Client Privilege

Although an attorney has a duty to maintain client confidences and preserve client secrets [*Bus. & Prof. Code § 6068(e)*], and communications between attorneys and clients are generally privileged [*see Evid. Code § 950 et seq.*], under *Evid. Code § 958*, no attorney-client privilege exists with respect to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship. The California Law Revision Commission Comment to *Evid. Code § 958* specifically mentions the client's duty to pay for the attorney's services [Law Rev. Comm. Comment to *Evid. Code § 958*]. The Comment to *Evid. Code § 958* also refers to an earlier case as standing for the proposition that injustice would result if a client were allowed to refuse to pay an attorney's fee and then invoke the attorney-client privilege to defeat the attorney's claim [Law Rev. Comm. Comment to *Evid. Code § 958*, discussing *Fleschler v. Strauss (1936) 15 Cal. App. 2d 735, 739-740, 60 P.2d 193]* . In another case, decided prior to the effective date of the California Evidence Code, the court stated that it was an established principle that an attorney is released from the legal duty of preserving the client's secrets when it is necessary to protect the attorney's own rights [*Carlson, Collins, Gordon & Bold v. Banducci (1967) 257 Cal. App. 2d 212, 227-228, 64 Cal. Rptr. 915]* . In still another case, pursuant to *Evid. Code § 958*, a court held that a law firm could not move to dismiss another

lawyer's action for referral fees against it on the ground that defending itself would violate the attorney-client privilege [Dietz v. Meisenheimer & Herron (2009) 2009) *177 Cal. App. 4th 771, 785-794, 99 Cal. Rptr. 3d 464*].

There is a similar exception to the work product doctrine: Work product protection does not exist in an action between an attorney and a client or former client if the work product is relevant to the issue of a breach of duty owed by the attorney to the client arising out of the attorney-client relationship [*Code Civ. Proc. § 2018(f)* (*Code Civ. Proc. § 2018.080* effective July 1, 2005)].

For complete discussion of the attorney-client privilege and the work product doctrine in the context of fee disputes, see *§ 72.30* et seq.

[8] Defending Client Cannot Recover Attorney's Fees in Separate Action

When a client has incurred the expense of attorney's fees in successfully defending against an action brought by his or her former attorney, in which the former attorney had attempted to collect or retain an unreasonable fee, there is currently no authority under which the client may bring a later, separate cause of action against the former attorney to recover this expense in the form of a damage award [*see Schneider v. Friedman, Collard, Poswall & Virga (1991) 232 Cal. App. 3d 1276, 1281, 283 Cal. Rptr. 882* (rejecting "third party tort" exception to American rule that generally precludes recover of attorney's to successful party)]. However, the client may be entitled to recover attorney's fees in the original action if the agreement included a fees provision under *Civ. Code § 1717* [*see § 72.431[9]*].

[9] Standard of Appellate Review

The appellate courts sometimes exercise their own fact-finding power in appeals of attorney's fee judgments, on the ground that the appellate judges have the same basic expertise on the subject as the trial court judges [*Boller v. Signal Oil & Gas Co. (1964) 230 Cal. App. 2d 648, 656, 41 Cal. Rptr. 206]* . However, the general rule is that an appellate court will not interfere with a jury's verdict establishing a reasonable fee, unless it appears to have been the result of passion or is so grossly excessive as to shock the judicial conscience [*Stuart v. Preston (1934) 2 Cal. App. 2d 310, 318, 38 P.2d 155]* . Additionally, an appellate court will not interfere in a trial court's finding of a reasonable attorney's fee, unless there was a plain and palpable abuse of discretion by the trial court [*Still v. Plaza Marina Commercial Corp. (1971) 21 Cal. App. 3d 378, 384-385, 98 Cal. Rptr. 414]* .

[10] Advantages and Disadvantages of Proceeding in Small Claims Court

If the fee is less than the small claims court jurisdictional limit of $5,000 [*Code Civ. Proc. § 116.220(a)*; *see also Code Civ. Proc. § 116.220(c)* (exception to jurisdictional amount applicable to claims against guarantors)], or it is economically desirable to reduce the amount of the fee claim to sue in small claims court, small claims court is a viable alternative to arbitration or to an action in a unified superior court in a limited civil case.

A client may stay the action by serving and filing a request for arbitration [*Bus. & Prof. Code § 6201(b)*; *see § 72.475[1]*]. The small claims court has jurisdiction to confirm, correct, or vacate a binding fee arbitration award that does not exceed $5,000. The small claims court also has jurisdiction to conduct a de novo hearing between the attorney and the client after nonbinding arbitration of a fee dispute involving no more than $5,000 [*Code Civ. Proc. § 116.220(a)(4)*].

An attorney can prosecute an action in small claims court on behalf of [*see Code Civ. Proc. § 116.530(b)*]:

- Himself or herself.
- A law partnership in which he or she is a general partner.

- A professional corporation of which he or she is an officer and director and of which all other officers or directors are attorneys.

An assignee generally cannot file or prosecute a claim in small claims court [*Code Civ. Proc. § 116.420(a)*]. The plaintiff in a small claims action, if unsatisfied with the result, has no right to appeal the judgment on his or her claim [*Code Civ. Proc. § 116.710(a)*]. The defendant with respect to the plaintiff's claim, and a plaintiff with respect to a claim of the defendant, may appeal the judgment to the superior court in the county in which the action was heard [*Code Civ. Proc. § 116.710(b)*].

For complete discussion of small claims court actions and procedures, see Ch. 526, *Small Claims* .

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[Reserved]

§§ 72.456[Reserved]

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§ 72.470 Overview of Fee Arbitration and Mediation

[1] Administration of Program by State Bar

Bus. & Prof. Code §§ 6200-6206 provide for arbitration and voluntary mediation of attorney's fee and cost disputes. These sections impose on the State Bar's Board of Governors the duty to adopt rules establishing, maintaining, and administering a system and procedure for arbitration of attorney's fee and cost disputes [*Bus. & Prof. Code §§ 6200, 6201*].

The Board of Governors may also establish, maintain, and administer a system and procedure for voluntary mediation of attorney's fee and cost disputes [*Bus. & Prof. Code § 6200*].

The procedures provided in *Bus. & Prof. Code § 6200 et seq.* apply to disputes concerning fees, costs, or both, charged for professional services rendered on or after the date these statutes became effective: January 1, 1979, for disputes concerning fees, and January 1, 1990, for disputes concerning costs [*Bus. & Prof. Code § 6205*; *see also* Stats. 1978, Ch. 719 (legislation adding *Bus. & Prof. Code § 6200 et seq.* took effect on January 1, 1979); Stats. 1989, Ch. 1416 (legislation making *Bus. & Prof. Code § 6200 et seq.* applicable to disputes concerning costs took effect on January 1, 1990)].

[2] Matters Excepted From Fee Arbitration

The following matters are excepted from *Bus. & Prof. Code § 6200 et seq.* [*Bus. & Prof. Code § 6200(b)*]:

- Disputes either in which a member of the State Bar of California is also admitted to practice in another jurisdiction, or in which an attorney is only admitted to practice in another jurisdiction, and he or she maintains no office in the State of California, and no material portion of the services were rendered in the State of California.

- Claims for affirmative relief against the attorney for damages or otherwise based on alleged

malpractice or professional misconduct, except as provided in *Bus. & Prof. Code § 6203(a)* [*see § 72.477*].

- Disputes when the fee or cost to be paid by the client or on the client's behalf has been determined pursuant to statute or court order.

[3] Arbitration Conducted by State Bar, Local Bar Association, and Lawyer Referral Services

[a] In General

The State Bar, local bar associations, and lawyer referral services adjudicate fee and cost disputes. The State Bar arbitrates fee and cost disputes between attorneys and clients when there is no local fee arbitration program having jurisdiction over the dispute. If a local fee arbitration program run by a local bar association or lawyer referral service has jurisdiction over the dispute, however, the local program will provide the adjudicatory forum [*see* Fee Arbitration Rules, Rule 11.1(a), (c); Fee Arbitration Guidelines §§ I-1, I-2].

In most localities, a local program will have jurisdiction over the dispute. Over 40 entities, including the county bar associations of Alameda, Contra Costa, Los Angeles, Orange, Sacramento, San Diego, and San Francisco counties, have fee arbitration programs. The State Bar encourages local bar associations to use a geographic test of jurisdiction, that is, to accept jurisdiction of all matters when an office of the attorney is, or substantial legal services were performed, within the geographic boundaries of the association [Fee Arbitration Guidelines § III-1].

In the event of a fee dispute, an attorney should first contact his or her local bar association to determine whether the association offers a fee arbitration program.

A client or attorney who believes that he or she cannot obtain a fair and impartial hearing under the procedural rules of a local bar association or lawyer referral service is entitled to a hearing through a State Bar panel on protest [*see* Fee Arbitration Rules, Rule 11.1(b); Fee Arbitration Guidelines § IV-1]. In a matter already pending before a local program, the local bar association or lawyer referral service must release jurisdiction of the matter on notification of the State Bar's acceptance of the matter for arbitration [*see* Fee Arbitration Guidelines § IV-1].

[b] Rules Governing Fee Arbitration

The Rules of Procedure for the Hearing of Fee Arbitrations by the State Bar of California provide a comprehensive procedural scheme that applies when the State Bar conducts fee arbitration [*see* Fee Arbitration Rules, Rules 1-47]. These rules do not govern in arbitration proceedings conducted by a local entity, unless the entity has expressly adopted them.

Locally adopted fee arbitration rules govern fee arbitration by local bar associations and lawyer referral services. Local rules must conform with the Guidelines and Minimum Standards for the Operation of Mandatory Fee Arbitration Programs, requirements formulated by the State Bar to ensure fair, speedy, and impartial disposition of arbitration matters [*see* Fee Arbitration Guidelines § II-1; *see also Bus. & Prof. Code § 6200(d)* (power of State Bar to review local arbitration rules)].

[4] Mandatory Arbitration

Arbitration under *Bus. & Prof. Code § 6200(c)* is mandatory for the attorney if requested by the client, but voluntary for the client unless the client has agreed previously in writing to arbitrate all disputes concerning fees, costs, or both. All fee arbitrations must be conducted within the statutory system, that is, through the State Bar or an authorized county bar fee arbitration program, and the attorney and client may not contravene the statutory scheme by agreeing privately to conduct their fee arbitration in an outside forum, such as the American Arbitration Association [*Alternative Systems,*

Inc. v. Carey (1998) 67 Cal. App. 4th 1034, 1041-1042, 79 Cal. Rptr. 2d 567].

[5] Relationship Between Contractual Arbitration and Mandatory Fee Arbitration

An arbitration provision in a written retainer agreement between attorney and client generally is enforceable under the California Arbitration Act [*Code Civ. Proc. § 1280 et seq.*] absent the client's exercise of the statutory right to mandatory fee arbitration [*see Bus. & Prof. Code § 6200 et seq.* (MFAA)]. A client who waives MFAA rights by filing a malpractice action may be compelled to arbitrate that malpractice claim and any fee dispute in accordance with the arbitration provision in the retainer agreement and *Code Civ. Proc. § 1280 et seq.* [*Aguilar v. Lerner (2004) 32 Cal. 4th 974, 983-986, 12 Cal. Rptr. 3d 287, 88 P.3d 24*]. The MFAA does not limit the ability of attorneys and clients to enter into binding contractual arbitration [*Schatz v. Allen Matkins Leck Gamble & Mallory LLP (2009) 45 Cal. 4th 557, 564-575, 87 Cal. Rptr. 3d 700, 198 P.3d 1109*]. Thus, a client who does not request arbitration under the MFAA within 30 days of receiving the statutory notice can be compelled to arbitrate a fee dispute under *Code Civ. Proc. § 1280 et seq.*, in accordance with an arbitration provision in the retainer agreement [*Ervin, Cohen & Jessup, LLP v. Kassel (2007) 147 Cal. App. 4th 821, 826-830, 54 Cal. Rptr. 3d 685*].

Both types of arbitration can be coordinated in the attorney-client agreement. For example, an agreement could provide that if nonbinding arbitration under the MFAA was chosen and either party rejected that award, the matter would then proceed to binding arbitration under *Code Civ. Proc. § 1280 et seq.* [*see* *Schatz v. Allen Matkins Leck Gamble & Mallory LLP (2009) 45 Cal. 4th 557, 564-575, 87 Cal. Rptr. 3d 700, 198 P.3d 1109*].

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§ 72.471 Notice to Client of Right to Arbitration

An attorney, before or at the time of service of summons in an action against the client for recovery of fees and/or costs governed by *Bus. & Prof. Code § 6200 et seq.*, must forward to the client a written notice of the client's right to arbitration, containing a statement of the client's right to arbitration under *Bus. & Prof. Code § 6200 et seq.* Failure to give this notice is a ground for dismissal of the attorney's action [*see Bus. & Prof. Code § 6201(a)*; Fee Arbitration Rules, Rule 4.0; Fee Arbitration Guidelines § II-2]. However, dismissal of a case for an attorney's failure to provide notice is discretionary with the court [*Law Offices of Dixon R. Howell v. Valley (2005) 129 Cal. App. 4th 1076, 1087-1088, 1104, 29 Cal. Rptr. 3d 499]* . Additionally, the notice to the client must be provided by the attorney only after an actual fee dispute has arisen [*Huang v. Cheng (1998) 66 Cal. App. 4th 1230, 1234, 78 Cal. Rptr. 2d 550]* . For a form of notice of client's right to arbitration, *see § 72.751*.

Failure to provide a notification to a client does not deprive the court of jurisdiction over the attorney's action to recover fees. The burden is on thedefendant-client to move for dismissal based on the plaintiff-attorney's failure to give the required notice [*Aheroni v. Maxwell (1988) 205 Cal. App. 3d 284, 294-295, 252 Cal. Rptr. 369* (trial court had jurisdiction in fee action to enter default judgment against client, notwithstanding lack of notice to client of right to arbitrate)].

If an attorney brings an action against a client for recovery of fees, but failed to give the client notice of the client's right to arbitrate, as required by *Bus. & Prof. Code § 6201*, dismissal of the action is discretionary, not mandatory [*Richards, Watson & Gershon v. King (1995) 39 Cal. App. 4th 1176, 1180, 46 Cal. Rptr. 2d 169]* . When an individual other than the client has agreed to be responsible for payment of the attorney's fees or costs, notice under *Bus. & Prof. Code § 6201(a)* must given to that individual [*Wagner v. Mirzayance (1998) 67 Cal. App. 4th 1187, 1190-1191, 79 Cal. Rptr. 2d 661]* .

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§ 72.472 Initiating Arbitration

In arbitration proceedings conducted by the State Bar, arbitration is initiated by filing a written request for arbitration on the approved State Bar form and paying the appropriate filing fee established by the State Bar. The State Bar serves the request on the other party [Fee Arbitration Rules, Rule 15.0].

If arbitration is to be conducted by a local entity, counsel must consult local arbitration rules to determine the procedure for initiating fee arbitration.

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§ 72.473 Arbitrators

[1] Composition of Hearing Panel

Arbitration under *Bus. & Prof. Code § 6200 et seq.* is conducted by a hearing panel, typically composed of one or three arbitrators [*see* Fee Arbitration Rules, Rule 21.0; Fee Arbitration Guidelines §§ II-7, II-8, III-2]. In a three-member panel, one member must be a lay person and the other two members must be attorneys [*see Bus. & Prof. Code § 6200(e)(1)*; Fee Arbitration Rules, Rule 21.1; Fee Arbitration Guidelines § II-7]. If the panel consists of a sole arbitrator, the sole arbitrator must be an attorney [*Bus. & Prof. Code § 6200(e)(2)*; *see* Fee Arbitration Rules, Rule 21.1; Fee Arbitration Guidelines § II-7].

At the client's option, one member of a three-person panel or a sole arbitrator must be an attorney whose area of practice is either civil or criminal law [*Bus. & Prof. Code § 6200(e)*; Fee Arbitration Rules, Rule 21.2; Fee Arbitration Guidelines § II-8]. A client must be informed of this option at an early stage in the proceedings and provided with a means of exercising the option [Fee Arbitration Guidelines § II-8].

[2] Powers

In the conduct of arbitrations under *Bus. & Prof. Code § 6200 et seq.*, the arbitrator or arbitrators may [*Bus. & Prof. Code § 6200(g)*]:

- Take and hear evidence pertaining to the proceeding.
- Administer oaths and affirmations.
- Compel, by subpoena, the attendance of witnesses and the production of books, papers, and documents pertaining to the proceeding.

[3] Immunity

In a fee arbitration conducted by the State Bar or by a local entity, the arbitrator or arbitrators, as well as the arbitrating association and its directors, officers, and employees, have the same immunity that attaches in judicial proceedings [*Bus. & Prof. Code § 6200(f)*]. Thus, under *Bus. & Prof. Code § 6200(f)*, the immunity of a fee arbitrator is analogous to that of a judge in a judicial proceeding [*Olney v. Sacramento County Bar Ass'n (1989) 212 Cal. App. 3d 807, 811-813, 260 Cal. Rptr. 842* (fee arbitrator is immune from liability for error of law)]. When a fee arbitrator is immune from liability, the organization sponsoring the arbitration is immune from claims based exclusively on agency [*Olney v. Sacramento County Bar Ass'n (1989) 212 Cal. App. 3d 807, 814, 260 Cal. Rptr. 842]* .

[4] Disqualification

Local procedural rules for fee arbitration must provide an appropriate procedure for the parties to disqualify no less than one arbitrator without cause and have an unlimited number of challenges for cause [Fee Arbitration Guidelines § II-5].

In fee arbitration conducted by the State Bar, each party may disqualify one arbitrator without cause and may make unlimited challenges for cause [Fee Arbitration Rules, Rule 23.0; *see Bus. & Prof. Code § 6204.5(a)*].

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§ 72.474 Tolling Statute of Limitations

The time for filing a civil action seeking judicial resolution of a fee or cost dispute subject to arbitration under *Bus. & Prof. Code § 6200 et seq.* is tolled from the time an arbitration is initiated until whichever of the following events comes first [*Bus. & Prof. Code § 6206*]:

- 30 days after receipt of notice of the award of the arbitrators.
- Receipt of notice that the arbitration is otherwise terminated.

Code Civ. Proc. § 12a, which extends the time for performing an act when the last day falls on a holiday, applies to the 30-day time limit within which to file a complaint after service of an arbitration award in an attorney fee dispute [*McAvoy v. Harvey L. Lerer, Inc. (1995) 35 Cal. App. 4th 1128, 1129, 1132, 41 Cal. Rptr. 2d 803]* .

Arbitration may not, however, be commenced under *Bus. & Prof. Code § 6200 et seq.* if a civil action requesting the same relief would be barred by any provision of *Code Civ. Proc. § 312 et seq.* (limitation of actions); provided, however, that this limitation does not apply to a request for arbitration by a client, pursuant to the provisions of *Bus. & Prof. Code § 6201(b)* (discussed under § 72.475[1]), following the filing of a civil action by the attorney [*Bus. & Prof. Code § 6206*].

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§ 72.475 Stay of Attorney's Action for Fees

[1] Commencing Stay by Service of Request for Arbitration

If an attorney or the attorney's assignee commences an action to collect fees and/or costs in any court and the dispute is not one to which *Bus. & Prof. Code § 6200(b)* [*see § 72.470[2]*] applies, the client may stay the action by serving and filing a request for arbitration [*Bus. & Prof. Code § 6201(b)*; *see* Fee Arbitration Rules, Rule 9.0].

On the filing and service of the request for arbitration, the action will be stayed, without the necessity of a court order, until the award of the arbitrators is issued or the arbitration is otherwise terminated. The time of the pendency of the stay will not be part of the time limited for commencement of the action. The stay may be vacated in whole or in part after a duly noticed hearing by any party or the court, if the court finds that the matter or any part of it is not an appropriate one for arbitration under the provisions of *Bus. & Prof. Code § 6200 et seq.* The action may thereafter proceed subject to the provisions of *Bus. & Prof. Code § 6204* (discussed in *§ 72.479*) [*Bus. & Prof. Code § 6201(c)*].

[2] Vacating Stay

Bus. & Prof. Code § 6201(c) implies an authority and discretion in the trial court to determine that an action, or a portion of an action, is not appropriate for arbitration. The corollary to this implicit discretion is that the court has the authority to lift the stay of the judicial proceeding, in whole or in part, if it determines that the stay is no longer appropriate [*see Loeb & Loeb v. Beverly Glen Music, Inc. (1985) 166 Cal. App. 3d 1110, 1116-1117, 212 Cal. Rptr. 830* ; *Manatt, Phelps, Rothenberg & Tunney v. Lawrence (1984) 151 Cal. App. 3d 1165, 1172-1173, 199 Cal. Rptr. 246]* . Thus, a court has the authority to lift a stay on its determination that an attachment proceeding in a fee dispute case is an ancillary proceeding and is not amenable to arbitration [*Loeb & Loeb v. Beverly Glen Music, Inc. (1985) 166 Cal. App. 3d 1110, 1116-1118, 212 Cal. Rptr. 830]* .

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§ 72.476 Acts and Omissions Constituting Waiver of Client's Right to Arbitration

A client waives his or her right to fee arbitration by doing any of the following:

- Failing to request arbitration within 30 days after receipt of the notice of right to arbitration from the attorney (discussed under § 72.471) [*Bus. & Prof. Code § 6201(a)*; *see* Fee Arbitration Rules, Rule 8.3].

- Failing to send to the State Bar a request for arbitration on the approved State Bar form that is (a) postmarked within 15 days from the date of the letter from the State Bar mailing the arbitration packet in response to a timely requesst by the client as described in Fee Arbitration Rules, Rule 8.3, or (b) postmarked on or before the 30th day from receipt of the form entitled "Notice of Client's Right to Arbitration" given pursuant to Fee Arbitration Rules, Rule 4.0, whichever is later [Fee Arbitration Rules, Rule 8.4].

- Failing to serve and file the request for arbitration prior to the filing of an answer in the attorney's action (provided that notice of the client's right to arbitration has been given pursuant to *Bus. & Prof. Code § 6201(a)*) [*Bus. & Prof. Code § 6201(b)*; *see* Fee Arbitration Rules, Rule 8.1].

- Commencing an action or filing a pleading seeking judicial resolution of a fee and/or cost dispute to which *Bus. & Prof. Code § 6200 et seq.* applies [*Bus. & Prof. Code § 6201(d)*; *see* Fee Arbitration Rules, Rule 8.2].

- Seeking affirmative relief against the attorney for damages or otherwise based on alleged malpractice or professional misconduct [*Bus. & Prof. Code § 6201(d)*; *Juodakis v. Wolfrum (1986) 177 Cal. App. 3d 587, 591-592, 223 Cal. Rptr. 95* ; *see* Fee Arbitration Rules, Rule 8.2].

A client may waive its arbitration rights in certain instances even though it did not receive notice of its right to arbitrate under *Bus. & Prof. Code § 6201* [*Law Offices of Dixon R. Howell v. Valley (2005) 129 Cal. App. 4th 1076,*

1094-1095, 29 Cal. Rptr.3d 499] . A court may look at the following nonstatutory factors to determine whether a client has waived its arbitration rights [*Law Offices of Dixon R. Howell v. Valley (2005) 129 Cal. App. 4th 1076, 1097, 29 Cal. Rptr.3d 499]* :

- Whether the party's actions are inconsistent with the right to arbitrate.

- Whether the litigation machinery has been substantially invoked and the parties were well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate.

- Whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking a stay.

- Whether important intervening steps, such as taking advantage of judicial discovery procedures not available in arbitration, had taken place.

- Whether the delay affected, misled, or prejudiced the opposing party.

If the client waives the right to arbitration, the parties may stipulate to set aside the waiver and to proceed with the arbitration [*Bus. & Prof. Code § 6201(e)*].

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§ 72.477 Evidence in Fee Arbitration Proceedings

In fee arbitration proceedings, the provisions of *Evid. Code § 950 et seq.*, relating to the attorney-client privilege, do not prohibit the disclosure of any relevant communication. Furthermore, the provisions of *Code Civ. Proc. § 2018.010 et seq.* may not be construed to prohibit the disclosure of any relevant work product of the attorney in connection with an arbitration hearing pursuant to *Bus. & Prof. Code § 6200 et seq.* In no event, however, will such disclosure be deemed a waiver of the confidential character of such matters for any purpose not authorized in *Bus. & Prof. Code § 6202* [*Bus. & Prof. Code § 6202*].

Evidence relating to the claims of malpractice and professional conduct shall be admissible only to the extent that those claims bear on the fees and/or costs to which the attorney is entitled [*Bus. & Prof. Code § 6203(a)*].

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§ 72.478 Award

[1] Requirements for Making Arbitration Award

The arbitration award must be in writing and signed by the arbitrators concurring in it. It must include a determination of all the questions submitted to the arbitrators, the decision of which was necessary in order to determine the controversy, including the name of the responsible attorney or attorneys [*Bus. & Prof. Code § 6203(a)*; *see* Fee Arbitration Rules, Rule 37.2; *see also* Fee Arbitration Rules, Rule 37.3 (required language and structure of awards)].

The arbitrators may not award affirmative relief, in the form of damages or offset, or otherwise, for injuries arising out of any action of malpractice or professional misconduct. This, however, does not prevent the arbitrators from awarding the client a refund of unearned fees, costs, or both, previously paid to the attorney [*Bus. & Prof. Code § 6203(a)*; *see* Fee Arbitration Rules, Rules 37.3, 37.6].

The award may not include any award to either party for attorney's fees incurred in connection with the arbitration, notwithstanding any contract between the parties providing for such an award or attorney's fees. This rule, however, does not preclude an award of attorney's fees to either party by a court pursuant to *Bus. & Prof. Code § 6203(c)* or *6204(d)* [*Bus. & Prof. Code § 6203(a)*]. For discussion of fee awards under *Bus. & Prof. Code § 6203(c), see § 72.478[4]*. For discussion of fee awards under *Bus. & Prof. Code § 6204(d)*, § 72.479[5].

The State Bar, or the local entity delegated by the State Bar to conduct the arbitration, must deliver an original declaration of service of the award, as well as the award itself, to each of the parties [*Bus. & Prof. Code § 6203(a)*; *see* Fee Arbitration Rules, Rule 37.9].

[2] Notice of Post-Arbitration Rights

At the time the award is served on the parties, there must be served a notice of the parties' post-arbitration rights, which must substantially conform with the notice approved by the Board of Governors of the State Bar [*Bus. & Prof. Code § 6204.5(b)*; Fee Arbitration Rules, Rule 37.9; Fee Arbitration Guidelines § II-6]. For a form providing information

regarding rights after attorney-client fee arbitration, *see § 72.752*.

[3] Binding Effect of Award

The parties may agree in writing to be bound by the award of the arbitrators [*Bus. & Prof. Code § 6204(a)*]. In the absence of such an agreement, either party is entitled to a trial after arbitration if sought within 30 days [*see Bus. & Prof. Code § 6204(b), (c)* (discussed in *§ 72.479[2]*)]. If, however, either party willfully fails to appear at the arbitration hearing in the manner provided by the rules adopted by the board of governors, that party will not be entitled to a trial after arbitration. The determination of willfulness must be made by the court. The party who failed to appear at the arbitration hearing has the burden of proving that the failure to appear was not willful. In making its determination, the court may consider any findings made by the arbitrators on the subject of a party's failure to appear [*Bus. & Prof. Code § 6204(a)*]. In addition, if a party rejects an arbitration award by filing a request for a trial de novo [*see § 72.479*], the party effectively repudiates that rejection by causing or permitting the action to be dismissed [*Perez v. Grajales (2008) 169 Cal. App. 4th 580, 596-603, 86 Cal. Rptr. 3d 784*].

[4] Confirmation, Correction, or Vacation of Award

Even if the parties to the arbitration have not agreed in writing to be bound, the arbitration award becomes binding 30 days after service of notice of the award, unless a party, within the 30-day period, seeks a trial after arbitration pursuant to *Bus. & Prof. Code § 6204* [*Bus. & Prof. Code § 6203(b)*].

If an action previously has been filed in any court, any petition to confirm, correct, or vacate the award must be to the court in which the action is pending, and may be served by mail on any party who has appeared, as provided in *Code Civ. Proc § 1003 et seq.*; otherwise, service must be made in accordance with *Code Civ. Proc. § 1285 et seq.* [*Bus. & Prof. § 6203(b)*; *see Loeb v. Record (2008) 162 Cal. App. 4th 431, 449-451, 75 Cal. Rptr. 3d 551*]. If the claim is in small claims court, optional Judicial Council Form SC-100 and SC-101 may be used. If the lawsuit is in superior court, optional Judicial Council Form ADR-103 may be used [for form, *see § 72.253*].

If no action is pending in any court, the award may be confirmed, corrected, or vacated by petition to the court having jurisdiction over the amount of the arbitration award, in the same manner provided in *Code Civ. Proc. § 1285 et seq.* [*Bus. & Prof. § 6203(b)*]. If the amount in dispute is $5,000 or less, the action can be filed in small claims court and Judicial Council Forms SC-100 and SC-101 may be used. If the amount exceeds $5,000, the petition must be filed in Superior Court, and Judicial Council Form ADR-103 (*see above*) may *not* be used.

[5] When Court May Refuse to Confirm Award

The trial court may properly refuse to confirm an arbitration award if it finds that the arbitrated dispute was not a fee dispute between attorney and client [*National Union Fire Ins. Co. v. Stites Prof. Law Corp. (1991) 235 Cal. App. 3d 1718, 1728, 1 Cal. Rptr. 2d 570* (dispute between insurer and attorney in which relationship between insurer and attorney was not the usual relationship in which insurer, in fulfillment of its duty to defend, hires defense counsel and controls prosecution of the defense)]. The court can refuse to confirm an award in this situation even if the arbitrators specifically determine that they have subject matter jurisdiction to arbitrate the matter, because, in fact, *Bus. & Prof. Code § 6200 et seq.* do not confer subject matter jurisdiction on any arbitrator to arbitrate a fee dispute that is not between attorney and client. Furthermore, *Code Civ. Proc. § 1286.2(d)* gives the court the power to vacate an award in those circumstances because, by acting without subject matter jurisdiction, the arbitrators are deemed to have exceeded their powers [*National Union Fire Ins. Co. v. Stites Prof. Law Corp. (1991) 235 Cal. App. 3d 1718, 1723-1727, 1 Cal. Rptr. 2d 570* ; *see Code Civ. Proc. § 1286.2(d)*].

[6] Fees and Costs

A court confirming, correcting, or vacating an award under *Bus. & Prof. Code § 6203* may award to the prevailing party

reasonable fees and costs including, if applicable, fees or costs on appeal incurred in obtaining confirmation, correction, or vacation of the award. The party obtaining judgment confirming, correcting, or vacating the award will be the prevailing party, except that, without regard to consideration of who the prevailing party may be, if a party did not appear at the arbitration hearing in the manner provided by the rules adopted by the board of governors, that party is not entitled to attorney's fees or costs upon confirmation, correction, or vacation of the award [*Bus. & Prof. Code § 6203(c)*; *see also Pacific Law Group: USA v. Gibson (1992) 6 Cal. App. 4th 577, 582, 7 Cal. Rptr. 2d 878* (affirmation of trial court's judgment confirming arbitration award as, in effect, confirmation of arbitration award by appellate court so that attorney's fees may be awarded under *Bus. & Prof. Code § 6203(c)*)].

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§ 72.479 Trial After Arbitration

[1] Parties May Seek Trial De Novo After Arbitration

In the absence of an agreement by the parties to be bound by the arbitrators' award, either party is entitled to a trial after arbitration if sought within 30 days [*see Bus. & Prof. Code § 6204(b), (c)* (discussed in § 72.479[2]); *but see Bus. & Prof. Code § 6204(a)* (trial unavailable to party who willfully failed to appear at arbitration hearing), *discussed under § 72.478[3]*].

[2] Initiation of Trial

[a] If Action Pending

If an action is pending [*see Loeb v. Record (2008) 162 Cal. App. 4th 431, 445-447, 75 Cal. Rptr. 3d 551* (defining "action pending")] involving the parties to the arbitration, the trial after arbitration must be initiated by filing, within 30 days after service of notice of the award, both of the following [*Bus. & Prof. Code § 6204(b)*]:

- A rejection of the arbitration award.
- A request for trial after arbitration in that action.

If the rejection of arbitration award has been filed by the plaintiff in the pending action, all defendants must file a responsive pleading within 30 days following service on the defendant of the rejection of arbitration award and request for trial after arbitration. If the rejection or arbitration award has been filed by the defendant in the pending action, all plaintiffs must file a responsive pleading within 30 days after the filing of the rejection of arbitration award and request for trial after arbitration [*Bus. & Prof. Code § 6204(b)*]. For an optional Judicial Council form for rejection of arbitration award and request for trial after arbitration, *see § 72.754*, Judicial Council Form ADR-104. For a form detailing information regarding rights after attorney-client arbitration, *see § 72.754[1]*, Judicial Council Form ADR-105.

Service may be made by mail on any party who has appeared; otherwise, service must be made in the manner provided in *Code Civ. Proc. § 413.10 et seq.*, relating to service of summons in civil actions. On service and filing of the rejection of arbitration award, any stay entered pursuant to *Bus. & Prof. Code § 6201* [*see § 72.475*] will be vacated, without the necessity of a court order [*Bus. & Prof. Code § 6204(b)*].

[b] If No Action Pending

If no action is pending [*see Loeb v. Record (2008) 162 Cal. App. 4th 431, 445-447, 75 Cal. Rptr. 3d 551* (defining "action pending")], the trial after arbitration must be initiated by the commencement of an action, in the court having jurisdiction over the amount of money in controversy, within 30 days after service of notice of the award. After the filing of the action, the action will proceed in accordance with the provisions of Part 2 of the Code of Civil Procedure (*Code Civ. Proc. § 307 et seq.*), concerning civil actions generally [*Bus. & Prof. Code § 6204(c)*].

A client's filing of a malpractice action within 30 days of notice of an arbitration award is insufficient to constitute a timely request for a trial de novo under *Bus. & Prof. Code § 6204(c)* if the malpractice complaint does not disclose an intention to challenge the arbitration award. The client's later amendment of the malpractice complaint also cannot constitute a timely request on the theory that an amendment to include a declaratory relief action concerning the client's right to a trial de novo "relates back" to the initial filing of the complaint [*Shiver, McGrane & Martin v. Littell (1990) 217 Cal. App. 3d 1041, 1045, 1047, 266 Cal. Rptr. 298]* .

[3] Relief From Time Limits

Extensions granted under *Code Civ. Proc. § 1013* when service is "made by mail" do not apply to the mandatory 30-day limits for seeking a trial de novo [*Simpson v. Williams (1987) 192 Cal. App. 3d 285, 287-289, 238 Cal. Rptr. 566* ; *see Code Civ. Proc. § 1013*]. If, however, a party seeking to challenge an arbitration award fails to timely file within 30 days and the award is confirmed by the trial court, relief may be available under *Code Civ. Proc. § 473*, which allows a court to vacate a judgment based on mistake, inadvertence, surprise, or excusable neglect [*see Simpson v. Williams (1987) 192 Cal. App. 3d 285, 290-291, 238 Cal. Rptr. 566* ; *see also Code Civ. Proc. § 473*]. However, one court of appeal noted that the Supreme Court has declined relief under *Code Civ. Proc. § 473* in the context of appeal from arbitration under the Labor Code, and has refused to apply *Code Civ. Proc. § 473* to extend the time for challenging a fee arbitrator's award [*Shiver, McGrane & Martin v. Littell (1990) 217 Cal. App. 3d 1041, 1049, 266 Cal. Rptr. 298* (citing *Pressler v. Donald L. Bren Co. (1982) 32 Cal. 3d 831, 834 n.5, 187 Cal. Rptr. 449, 654 P.2d 219*)].

For further discussion and forms relating to *Code Civ. Proc. § 473*, see Ch. 489, *Relief From Judgments and Orders* .

[4] Evidence at Trial

Evid. Code § 950 et seq., relating to the attorney-client privilege, does not prohibit the disclosure of any relevant communication, nor may *Code Civ. Proc. § 2018.010 et seq* be construed to prohibit the disclosure of any relevant work product of the attorney in connection with a trial after arbitration. In no event, however, will such a disclosure be deemed a waiver of the confidential character of such matters for any purpose other than as authorized in *Bus. & Prof. Code § 6202* [*Bus. & Prof. Code § 6202*].

[5] Award of Attorney's Fees and Costs to Prevailing Party

The party seeking a trial after arbitration will be the prevailing party if that party obtains judgment more favorable than that provided by the arbitration award, and in all other cases the other party will be the prevailing party [*Bus. & Prof. Code § 6204*].

The prevailing party, in the discretion of the court, may be entitled to an allowance for reasonable attorney's fees and

costs incurred in the trial after arbitration. The allowance will be fixed by the court. In fixing the attorney's fees, the court must consider the award and determinations of the arbitrators, in addition to any other relevant evidence [*Bus. & Prof. Code § 6204*].

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§ 72.480 Enforcing Arbitration Award

[1] Scope of State Bar Enforcement

In any matter in which (1) the award of the arbitrators includes a refund of fees or costs, or both, to the client, (2) the award is binding or has become binding by operation of law or has become a judgment either after confirmation under *Bus. & Prof. Code § 6203(c)* or after a trial after arbitration under *Bus. & Prof. Code § 6204*, and (3) the attorney has not complied with the award, the State Bar must enforce the award by placing the attorney on involuntary inactive status until the award has been paid [*Bus. & Prof. Code § 6203(d)(1)*].

The State Bar has adopted, pursuant to statute, an administrative procedure to determine whether an award should be enforced [Fee Arbitration Rules, Rules 39.0-45.0; *see Bus. & Prof. Code § 6203(d)(2)*]. Under the statute and the rules, an award is enforced if either of the following applies [*Bus. & Prof. Code § 6203(d)(2)*]:

- The State Bar shows that the attorney has failed to comply with a binding fee arbitration award rendered pursuant to *Bus. & Prof. Code § 6200 et seq.*

- The attorney has not proposed a payment plan acceptable to the client or the State Bar.

The award will not be enforced if the attorney has demonstrated that he or she is not personally responsible for making or ensuring payment of the award, or is unable to pay the award [*Bus. & Prof. Code § 6203(d)(2)*; *see § 72.480[5]*].

[2] Requesting Enforcement

[a] Timing and Content of Request

A request for enforcement must be made within four years from the date the arbitration award was mailed. However, in no event may a request be made prior to 100 days from the date of the service of a signed copy of the award. In cases in which the award is appealed, a request cannot be made prior to 100 days from the date the award has become final [*Bus.*

& Prof. Code § 6203(d)(5); Fee Arbitration Rules, Rule 40.1]. The request must be made on the approved State Bar form, and may include all parties who were included in the original arbitration proceeding and who were awarded a refund of fees and/or costs [Fee Arbitration Rules, Rule 40.1].

The client's request for enforcement of the arbitration award will be served on the attorney by the State Bar [Fee Arbitration Rules, Rule 40.3].

[b] Reasonable Efforts to Contact Attorney Required Before Request

Before making the request, the client must make reasonable efforts to contact the attorney to arrange for payment of the award, including, at a minimum, mailing to the attorney a written request for payment. Proof of such a mailing may be required before the State Bar initiates an enforcement proceeding against the attorney [Fee Arbitration Rules, Rule 40.2].

[3] Attorney's Response to Request

Within 30 days from the date of service on the attorney of the request for enforcement of the award, the attorney must do one of the following [Fee Arbitration Rules, Rule 41.1]:

- Provide satisfactory proof to the State Bar that the award has been complied with.
- Agree to a payment plan that is satisfactory to the client or to the State Bar.
- Provide reasons why, under *Bus. & Prof. Code § 6203(d)*, the attorney should not comply with the award.

[4] Payment Plan

[a] Establishing Acceptable Plan

If the attorney has made a proposal for a payment plan to comply with the arbitration award, the State Bar must immediately transmit the proposed plan to the client, who may accept the proposal [Fee Arbitration Rules, Rule 42.1]. If the payment plan is not accepted by the client, the Presiding Arbitrator, or designee, may determine that the plan is reasonable and may accept the plan [Fee Arbitration Rules, Rule 42.2(a)], or may order that the plan be rejected [Fee Arbitration Rules, Rule 42.2(b)].

[b] Monitoring Compliance With Accepted Plan

If the payment plan is approved by the client or by the Presiding Arbitrator or designee, the State Bar will monitor the plan for compliance. If at any time the client advises the State Bar that the attorney has ceased to comply with the payment plan, and the attorney has not provided proof either of inability to pay (under Fee Arbitration Rules, Rule 43.1, discussed under § 72.480[5][a]), or of compliance with the payment plan, the Presiding Arbitrator or designee must file a motion with the State Bar Court to place the attorney on temporary inactive status [Fee Arbitration Rules, Rule 43.3].

On submission of satisfactory proof that the payment plan has been completed and the award has been fully complied with, the State Bar must close its file and notify the parties [Fee Arbitration Rules, Rule 42.4].

[5] Determination Whether Attorney Is No Longer Responsible for Award or Is Unable to Pay

[a] Procedures

If the attorney believes that he or she is no longer personally responsible for payment of the award due to a change in circumstances since the arbitration hearing, or does not have the financial means to comply, the attorney must provide reasons for this belief in his or her response [Fee Arbitration Rules, Rule 43.1; *see § 72.480[3]*].

If the attorney provides the name or names of the other attorney or attorneys he or she believes is now responsible for the award, the State Bar must serve on that attorney copies of the client's request for arbitration and the first attorney's response. The other attorney(s) have 20 days from the date of service to respond [Fee Arbitration Rules, Rule 43.2].

The Presiding Arbitrator or designee considers any challenge to the attorney's responsibility or claim of inability to pay the award. The Presiding Arbitrator or designee may hold a hearing or may require the parties to submit additional information [Fee Arbitration Rules, Rule 43.3].

[b] Orders

The Presiding Arbitrator or designee must enter one of the following orders [Fee Arbitration Rules, Rule 43.4]:

- That due to the attorney's inability to pay, the file will be closed.
- That one or all of the attorneys in the proceeding is responsible for the award.
- That the attorney or attorneys can afford to comply with the award.
- That the matter cannot be resolved under the Rules.

[c] Challenging Orders

Any challenges to the Presiding Arbitrator's order requiring an attorney to pay the award will be considered by the State Bar Court. A Presiding Arbitrator order closing the file is final [Fee Arbitration Rules, Rule 43.5].

[6] Motion to State Bar Court to Place Attorney on Inactive Status

The Presiding Arbitrator may petition the State Bar Court to place the attorney on temporary inactive status in any matter in which the Presiding Arbitrator or designee determines that the attorney has not done at least one of the following [Fee Arbitration Rules, Rule 44.0]:

- Agreed to a payment plan.
- Proven an inability to pay the award.
- Proven that he or she is not responsible for the award.
- Proven that he or she has complied with the payment plan.

These proceedings are governed by the Rules of Procedure for State Bar Court Proceedings [Fee Arbitration Rules, Rule 44.0; for discussion of the Rules of Procedure, *see § 72.320* et seq.].

The State Bar must enforce the award by placing the attorney on involuntary inactive status if all of the following are true [*Bus. & Prof. Code § 6203(d)(1)*]:

- The award of the arbitrators includes a refund of fees or costs, or both, to the client.

- The award is binding or has become binding by operation of law or has become a judgment either after confirmation under *Bus. & Prof. Code § 6203(c)* or after a trial after arbitration under *Bus. & Prof. Code § 6204*.

- The attorney has not complied with the award.

[7] Administrative Penalties and Costs

In any matter in which the attorney has failed to comply with a binding award, the Presiding Arbitrator or designee may require the attorney to pay administrative penalties. Penalties imposed may not exceed 20 percent of the amount awarded to the client or $1,000, whichever is greater [*Bus. & Prof. Code § 6203(d)(3)*; Fee Arbitration Rules, Rule 45.0]. If the attorney does not pay the administrative penalties, that amount will be added to the membership fee of the attorney for the next calendar year [*Bus. & Prof. Code § 6203(d)(3)*; Fee Arbitration Rules, Rule 45.0].

[8] Termination of Inactive Enrollment

The board must terminate the inactive enrollment on proof that the attorney has complied with the award and on payment of any costs or penalties, or both, assessed as a result of the attorney's failure to comply [*Bus. & Prof. Code § 6203(d)(4)*].

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§ 72.481 Voluntary Mediation

Disputes over fees may also be subject to voluntary mediation [*Bus. & Prof. Code § 6200(a), (c), (d), (f)*]. Participation in mediation is a voluntary, consensual process, based on direct negotiations between the attorney and the client, and is an extension of the negotiated settlement process. All discussions and offers of settlement are confidential, and may not be disclosed in any subsequent arbitration or other proceedings [*Bus. & Prof. Code § 6200(h)*].

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[Reserved]

§§ 72.482[Reserved]

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A. Conflicts of Interest

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§ 72.500 Decisions

[1] In General

No conflict of interest when lawyer for taxpayer was employed as consultant by IRS while he represented taxpayer before *IRS. Abbott v. United States Internal Revenue Service (9th Cir. 2005) 399 F.3d 1083, 1086-1087*

In a criminal case, petitioner's attorney had conflict of interest that caused procedural default when attorney interfered with petitioner's right to pursue habeas claim; conflict of interest existed because of attorney's interest in protecting himself from (1) damage that habeas claim would cause his professional career, and (2) exposure to potential malpractice liability or bar discipline. *Manning v. Foster (9th Cir. 2000) 224 F.3d 1129, 1134*

In criminal case, new trial was ordered when defendant's attorney had conflict of interest because a government witness was a co-defendant with whom attorney had an attorney-client relationship arising from a joint defense agreement. *United States v. Henke (9th Cir. 2000) 222 F.3d 633, 636-638*

A nonprofit law firm does not have the same financial incentives as a private firm insofar as the clients do not pay for services; therefore no single client becomes more important than others, and ethical walls are more effective. *In re Charlisse C. (2008) 45 Cal. 4th 145, 165, 84 Cal. Rptr. 3d 597, 194 P.3d 330*

Evidentiary burden on the disqualification issue should not fall on the party seeking disqualification. Instead, the burden should be on the attorney to show that the confidential information acquired during the prior representation of the client had been, and would be, adequately protected because it has unique access to the relevant information. *In re Charlisse C. (2008) 45 Cal. 4th 145, 166, 84 Cal. Rptr. 3d 597, 194 P.3d 330*

When attorney left private practice to become head of public law office, vicarious disqualification of entire public law office was required, and no screening was allowed. *City and County of San Francisco v. Cobra Solutions, Inc. (2006) 38 Cal. 4th 839, 846-854, 43 Cal. Rptr. 3d 771, 135 P.3d 20*

Attorneys' association had right to sue county employer for failing to bargain in good faith under Meyers-Milias-Brown Act (*Gov. Code § 3500 et seq.*) and not violate conflict of interest principles or common law ethical obligations to their employer-client. *Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 544-549, 28 Cal. Rptr. 2d 617, 869 P.2d 1142*

Attorney did not assume conflicting positions by representing both general contractor having claim of lien and materialman having similar claim. *Perkins v. West Coast Lumber Co. (1900) 129 Cal. 427, 429-430, 62 P. 57*

Attorney who acted for personal representative in administration of decedent's estate was not disabled from representing claimant in distribution proceeding when personal representative has no interest except fees and costs. *Jones v. Lamont (1897) 118 Cal. 499, 503-504, 50 P. 766*

When attorney with client confidences moves from one private law firm to another, there is rebuttable presumption of imputed knowledge to the law firm, which may be rebutted by evidence of effective ethical screening. *Kirk v. First American Title Ins. Co. (2010) 183 Cal. App. 4th 776, 792-816, 2010 Cal. App. LEXIS 478*

Lawyer may take position as a private citizen that is adverse to prior client's interests. *Oasis West Realty, LLC v. Goldman (2010) 182 Cal. App. 4th 688, 699-703, 2010 Cal. App. LEXIS 287*

Entire law firm may be disqualified even after the lawyer with the conflict left the firm. *Meza v. H. Muehlstein & Co. (2009) 176 Cal. App. 4th 969, 978-980, 98 Cal. Rptr. 3d 422*

It is not a defense to a claim under *Cal. Rules Prof. Conduct, Rule 3-310(E)* that the attorney's actions were protected activity under *Code Civ. Proc. § 425.16*, the anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) statute. *United States Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton (2009) 171 Cal. App. 4th 1617, 1625-1629, 90 Cal. Rptr. 3d 669*

Although nonparty ordinarily must file a separate action to prevent former counsel from continuing with an adverse representation, nonparty who is alleged to be alter ego and coconspirator of a party may have standing to make a motion. *Machado v. Superior Court (2007) 148 Cal. App. 4th 875, 880-882, 55 Cal. Rptr. 3d 902*

Party may not disqualify attorney jointly representing the opposing parties based solely on their agreement to participate in confidential mediation. *Dino v. Pelayo (2006) 145 Cal. App.4th 347, 355-357, 51 Cal. Rptr. 3d 620*

Court should look at totality of circumstances to determine whether to disqualify attorney under *Cal. Rules Prof. Conduct, Rule 3-310(E)*. *Rhaburn v. Superior Court (2006) 140 Cal. App. 4th 1566, 1581, 45 Cal. Rptr. 3d 464*

Fact that same attorney did not represent adverse parties on cross-complaint did not eliminate adverse relationship between the parties, and thus required disqualification of attorney. *Cal West Nurseries, Inc. v. Superior Court (2005) 129 Cal. App. 4th 1170, 1175, 29 Cal. Rptr. 3d 170*

Conflict existed when class representative was attorney employed by co-counsel of attorney representing class. *Apple Computer, Inc. v. Superior Court (2005) 126 Cal. App. 4th 1253, 1265, 24 Cal. Rptr. 3d 818*

Where attorney left private practice to work in city attorney's office, which was involved in suit against attorney's former client, vicarious disqualification of entire public law office not required, and screening allowed. *City of Santa Barbara v. Superior Court (2004) 122 Cal. App. 4th 17, 25, 18 Cal. Rptr. 3d 403*

Where attorney represented insurer in coverage claims, attorney had conflict of interest in new firm when representing insured against insurer in bad faith claim. *Farris v. Fireman's Fund Insurance Company (2004) 119 Cal. App. 4th*

671, 681, 14 Cal. Rptr. 3d 618

Lawyer not disqualified solely because spouse worked for disqualified attorney's firm. *Derivi Construction & Architecture, Inc. v. Wong (2004) 118 Cal. App. 4th 1268, 1276, 14 Cal. Rptr. 3d 329*

In action by investment banking firm against corporation for which it acted as underwriter for corporation's public stock offering, trial court's disqualification of plaintiff's law firm was in error even though law firm had represented plaintiff in connection with stock offering, and representation had been paid for by corporation. *Strasbourger Pearson Tulcin Wolff Inc. v. Wiz Technology (1999) 69 Cal. App. 4th 1399, 82 Cal. Rptr. 2d 326*

Law firm enjoined on basis of conflict of interest from representing water district in dispute with wholly owned subsidiary of corporation, where law firm had never directly represented corporation or its wholly owned subsidiary, but where law firm had represented insurance underwriter of parent corporation on ongoing basis and was privy to confidential information about nonclient corporation's financial condition, and where corporation, its subsidiary and insurance underwriter were found to have a "unity of interest." *Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft (1999) 69 Cal. App. 4th 223, 81 Cal. Rptr. 2d 425*

Where no conflict exists between attorney's clients in lawsuit, opposing counsel may not create conflict through meritless cross-complaint. *Federal Home Loan Mortgage Corp. v. La Conchita Ranch Co. (1998) 68 Cal. App. 4th 856, 862, 80 Cal. Rptr. 2d 634*

In shareholder's derivative action, current corporation lawyer simultaneously representing two closely held corporations and two majority shareholders disqualified from representing corporations but permitted to continue to represent majority shareholders. *Forrest v. Baeza (1997) 58 Cal. App. 4th 65, 74-75, 79-82, 67 Cal. Rptr. 2d 857*

Plaintiff's attorney in wrongful termination/discrimination action disqualified for conflict of interest where attorney simultaneously represented other plaintiffs in different action against same defendant, those plaintiffs had previously signed settlement agreement containing confidentiality clause, and attorney thereafter attempted to advance plaintiff's interests in instant action by calling one or more of other clients as witnesses in plaintiff's case, thereby risking harm to other clients' interests. *Gilbert v. National Corp. For Housing Properties (1999) 71 Cal. App. 4th 1240, 84 Cal. Rptr. 2d 204*

Dual representation of dissolved partnership and general partner results in actual conflict of interest when diligent representation of partnership requires attorney to raise defense that would work to general partner's detriment. *Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd. (1993) 12 Cal. App. 4th 74, 94-96, 15 Cal. Rptr. 2d 585*

Law firm not permitted to avoid disqualification for adverse concurrent representation by withdrawing from representation of less favored client prior to hearing on disqualification. *Truck Ins. Exchange v. Fireman's Fund Ins. Co. (1992) 6 Cal. App. 4th 1050, 1057, 8 Cal. Rptr. 2d 228*

Mere fact that law firm of party's attorney had previously been engaged to perform work for adverse party insufficient to support adverse party's motion to disqualify attorney, in absence of showing of substantial relationship between prior representation of adverse party and current representa tion of party. *Kirk Corp. v. First American Title Co. (1990) 220 Cal. App. 3d 785, 812-813, 270 Cal. Rptr. 24*

Client may not raise conflict of interest issue for first time on appeal; issue properly raised as defense in attorney's action to recover fees, in motion to disqualify attorney from acting for adverse party, or in separate action to enjoin adverse representation. *Asbestos Claims Facility v. Berry & Berry (1990) 219 Cal. App. 3d 9, 26-27 & n.6*

Conflict of interest concerns under California Rules of Professional Conduct arise if attorney is in position to acquire

confidential information from nonclient that may be useful in attorney's representation of client, and when attorney puts himself or herself in position, without client consent, where he or she may be required to choose between or reconcile his or her interests with client's conflicting interests. *Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg (1989) 216 Cal. App. 3d 1139, 1151, 265 Cal. Rptr. 330*

Attorney may accept employment adverse to former client when former client had, at time of prior representation, been represented by his own personal attorney and had consented to adverse employment. *Cornish v. Superior Court (1989) 209 Cal. App. 3d 467, 474-479, 257 Cal. Rptr. 383*

Rule presuming prejudice when representation of client is adverse to interest of former client is directed at protecting confidential communications between attorney and former client; reason for rule presuming prejudice nonexistent, however, when former client was unable to communicate with attorney. *In re Jessica B. (1989) 207 Cal. App. 3d 504, 512, 254 Cal. Rptr. 883* (former client was brain-damaged infant)

Presumption that communications between attorney and employee of adverse counsel have resulted in improper exchange of information does not come into play unless party seeking attorney's disqualification shows not only apparent conflict of interest but likelihood that, as result of conflict, attorney acquired confidential information useful to his or her client. *Gregori v. Bank of America (1989) 207 Cal. App. 3d 291, 304, 254 Cal. Rptr. 853*

Whether attorney's acceptance of employment adverse to former client presents conflict of interest based on confidential information depends on whether former representation is substantially related to current representation; when substantial relationship exists, especially when relationship is of the type in which confidential information would normally have been imparted to attorney, rule of necessity causes presumption of conflict of interest, and actual possession of confidential information need not be proved. *Elliott v. McFarland Unified School Dist. (1985) 165 Cal. App. 3d 562, 568-569, 211 Cal. Rptr. 802*

Attorney required to obtain informed written consent of client before undertaking any representation that involves even potential conflict of interest; informed consent requires attorney to make full disclosure of all facts and circumstances relevant to conflict, including areas of potential conflict and possibility and desirability of seeking independent legal advice; attorney claiming client consented to conflicting representation bears heavy burden of demonstrating that all relevant facts relating to conflict were disclosed and explained. *Civil Service Com. v. Superior Court (1984) 163 Cal. App. 3d 70, 82-83, 209 Cal. Rptr. 159*

When senior partner of law firm representing plaintiff in breach of lease action was also director of bank and member of its trust committee owning 100 percent of defendant corporation, vicarious conflicts of interest existed for law firm even though partner removed himself from committee matters involving defendant. *William H. Raley Co. v. Superior Court (1983) 149 Cal. App. 3d 1042, 1049, 197 Cal. Rptr. 232*

Attorney's position as counsel for family business disqualified him from representing husband in dissolution proceeding on ground of conflict of interest even in absence of showing that attorney obtained confidential information from position as counsel for business, since business was focus of dissolution proceeding. *Woods v. Superior Court (1983) 149 Cal. App. 3d 931, 936, 197 Cal. Rptr. 185*

Law firm is in breach of Cal. Rules Prof. Conduct, former Rule 5-102(B) (*now see Cal. Rules Prof. Conduct, Rule 3-310*) when, without knowledge and consent of current client, it undertakes to represent third person in suing client on unrelated matter. *Jeffry v. Pounds (1977) 67 Cal. App. 3d 6, 10, 136 Cal. Rptr. 373*

Attorney is permitted to represent both corporation and its officers and directors prior to judgment that corporation is entitled to relief against officers or directors. *Jacuzzi v. Jacuzzi Bros., Inc. (1966) 243 Cal. App. 2d 1, 36, 52 Cal. Rptr. 147*

Attorney assumes conflicting professional duties by representing two defendants, one of whom cross complains against plaintiff and other defendant. *Elberta Oil Co. v. Superior Court (1930) 108 Cal. App. 344, 346-348, 291 P. 668*

[2] Conflict Arising From Insurer's Duty to Defend Insured

Both insured and insurer which employs attorneys or law firm to defend insured under the policy are deemed clients of the attorney and insurance company does not engage in the practice of law regardless of whether the attorneys or law firm is retained outside counsel or in-house counsel. *Gafcon v. Ponsor (2002) 98 Cal. App.4th 1388, 1396-1397, 120 Cal. Rptr. 2d 392* .

Not every reservation of right creates a conflict of interest requiring appointment of independent counsel for insured. *Gulf Insurance Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone (2000) 79 Cal. App. 4th 114, 130, 93 Cal. Rptr. 2d 534*

For purposes of disqualification, law firm representing insured also deemed to concurrently represent insurer where no reservation of rights asserted by insurer. *State Farm Mutual Automobile Ins. Co. v. Federal Insurance Co. (1999) 72 Cal. App. 4th 1422, 86 Cal. Rptr. 2d 20*

Attorney retained by insurer to represent uninsured physician breached his fiduciary duty to physician where attorney corepresented physician, insurer and two other defendants in malpractice action in which actual conflict of interest existed between jointly represented clients. *Mosier v. Southern California Physicians Insurance Exchange (1998) 63 Cal. App. 4th 1022, 1044, 74 Cal. Rptr. 2d 550*

When conflict of interest arises between insured and insurer, insurer's assertion of right to approve attorneys privately retained by insureds does not breach insurer's obligation to insured as matter of law, if insurer's approval not unreasonably withheld. *Center Foundation v. Chicago Ins. Co. (1991) 227 Cal. App. 3d 547, 557-561, 278 Cal. Rptr. 13*

Law applied by court in conflict of interest dispute between insured and insurer determined by date dispute began; *Civ. Code § 2860* and *San Diego Federal Credit Union v. Cumis Ins. Society, Inc. (1984) 162 Cal. App. 3d 358, 208 Cal. Rptr. 494* , have no retroactive application. *Center Foundation v. Chicago Ins. Co. (1991) 227 Cal. App. 3d 547, 557-558, 278 Cal. Rptr. 13*

Insured has right to select independent counsel at insurer's expense when conflict of interest arises. *United States Fidelity & Guaranty Co. v. Superior Court (1988) 204 Cal. App. 3d 1513, 1520-1527, 252 Cal. Rptr. 320*

Conflict of interest arises between jointly represented clients whenever their common lawyer's representation of one is rendered less effective by lawyer's representation of other. *San Diego Federal Credit Union v. Cumis Ins. Society, Inc. (1984) 162 Cal. App. 3d 358, 365 n.4, 208 Cal. Rptr. 494*

Counsel representing insurer and insured owes both high duty of care; attorney hired by insurer is required to explain to insured and insurer full implications of joint representations in situations in which insurer has reserved its rights to deny coverage, and if insured does not give informed consent to continued representation, counsel must cease to represent both. *San Diego Federal Credit Union v. Cumis Ins. Society, Inc. (1984) 162 Cal. App. 3d 358, 374-375, 208 Cal. Rptr. 494*

Attorney for insurer able to act for insured; when conflict arises between insurer and its insured whom insurer has duty to defend, insurer's attorney required to withdraw from representation or make full disclosure to both clients, or risk

exposure to liability for harm resulting from failure to do so, in addition to charge of professional misconduct. *Purdy v. Pacific Automobile Ins. Co. (1984) 157 Cal. App. 3d 59, 76-77, 203 Cal. Rptr. 524*

[3] Conflicts Between Counsel

California and federal constitutions do not require complete compatability among appointed counsel in criminal case, judicial inquiry into all signs of disagreement between counsel or particular working relationships within defense team. *People v. Montiel (1993) 5 Cal. 4th 877, 905-906, 21 Cal. Rptr. 2d 705, 855 P.2d 1277*

There is no fiduciary duty between cocounsel, since client's right to undivided loyalty of attorney must be protected, even where result is to deny attorney's cause of action against cocounsel. *Joseph A. Saunders v. Weissburg & Aronson (1999) 73 Cal. App. 4th 1423 , mod. 74 Cal. App. 4th 869*

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§ 72.501 Attorney General Opinions

The statutes and rules governing the attorney-client privilege are not superceded by the "whistleblower" statutory protections applicable to employees of state and local public entities nor are the statutory provisions relating to the disclosure of false claims actions, communications with the Legislature, and the filing of complaints or claims or the institution of proceedings pertaining to the rights of employment by employees of state and local public entities. *84 Ops. Cal. Atty. Gen. 71 (2001)*

Legal ethics require law firm member elected to city council to refrain, along with other members and associates of firm, from representing clients in dealings with city during council member's term of office. *64 Ops. Cal. Att'y Gen. 282 (1981)*

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§ 72.502 Law Reviews

Morgan, *Attorney-Client Privilege in E-mail Communications,* 45(2) Prac. Law. 59 (1999)

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Note, *An Ethical Treatment of Attorneys' Personal Conflicts of Interest, 66 S. Cal. L. Rev. 881 (1993)*

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§ 72.503 Text References

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California Civil Actions--Pleading and Practice, Ch. 3 (B) (Matthew Bender)

R. Erwin, M. Millman, K. Monroe, C. Sevilla, B. Tarlow, California Criminal Defense Practice, Ch. 1 (D) (Matthew Bender)

California Points and Authorities, Ch. 24, *Attorneys at Law* (Matthew Bender)

California Probate Practice, Chs. 1 (A), 20 (Matthew Bender)

N. Levy, M. Golden & L. Sacks, eds., California Torts, Chs. 32, 70 (Matthew Bender)

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[Reserved]

§§ 72.504[Reserved]

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§ 72.520 California Civil Actions

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§ 72.521 California Criminal Defense Practice

R. Erwin, M. Millman, K. Monroe, C. Sevilla, B. Tarlow, California Criminal Defense Practice, Ch. 1, Part B (Matthew Bender)

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§ 72.522 California Family Law Practice and Procedure

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7-72 California Forms of Pleading and Practice--Annotated § 72.523

§ 72.523 California Points and Authorities

California Points and Authorities, Ch. 24, *Attorneys at Law: Substitution, Withdrawal, Disqualification, and Authority to Appear* (Matthew Bender)

California Points and Authorities, Ch. 25, *Attorney's Fees* (Matthew Bender)

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§ 72.524 California Probate Practice

Blaylock, B. Pearson, K. Schoknecht, T. Stikker, California Probate Practice, Chs. 1, 26 (Matthew Bender)

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§ 72.525 Forms of Discovery

For interrogatories from defendant to plaintiff dealing with unauthorized stipulations made by plaintiff's attorney in previous action, see Bender's Forms of Discovery, *Attorneys at Law* (Matthew Bender)

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§ 72.526 Federal Constitution

Freedom of speech. *U.S. Const., amend. I*

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§ 72.527 State Constitution

Freedom of speech. *Cal. Const., art. I, § 2(a)*

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§ 72.528 Federal Statutes

Truth in Lending Act. *15 U.S.C. § 1601 et seq.*

Super-priority for attorney's liens. *I.R.C. § 6323(b)(8)*

Maximum rates for contingency fees in federal tort claims. *28 U.S.C. § 2678*

Maximum attorney fee award for recovery of Social Security disability benefits. *42 U.S.C. § 406(b)(1)*

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§ 72.529 State Statutes

[1] Advertising and Solicitation

California State Bar Act. *Bus. & Prof. Code § 6000 et seq.*

Violation of Rules of Professional Conduct as basis for discipline. *Bus. & Prof. Code § 6077*

Violation of attorney's oath or of attorney's duties as cause for disbarment or suspension. *Bus. & Prof. Code § 6103*

Act involving moral turpitude, dishonesty, or corruption as ground for disbarment or suspension. *Bus. & Prof. Code § 6106*

Unlawful advertising of self as "practicing or entitled to practice law" by one who is not currently active member of State Bar as misdemeanor. *Bus. & Prof. Code § 6126*

Prohibitions against in-person solicitation. *Bus. & Prof. Code §§ 6151-6153*

Professional services contract secured by runner or capper as void. *Bus. & Prof. Code § 6154*

Attorney referral services. *Bus. & Prof. Code §§ 6155, 6156*

Electronic media advertising. *Bus. & Prof. Code §§ 6158-6158.4*

Requirements for legal advertising. *Bus. & Prof. Code §§ 6157-6159.2*

Review and disciplinary actions for illegal advertising. *Bus. & Prof. Code § 6159*

Retention of records of advertising. *Bus. & Prof. Code § 6159.1*

[2] Authority as Attorney

Duty of attorney with authority to accept offer of settlement to communicate promptly to client any written offer of settlement made by opposing party. *Bus. & Prof. Code § 6103.5(a)*

Authority of attorney to bind client. *Code Civ. Proc. § 283*

Client power to discharge attorney. *Code Civ. Proc. § 284*

[3] Representation and Fees

Fee agreements in action against health care provider. *Bus. & Prof. Code § 6146*

Contingency fee agreement mandatory provisions. *Bus. & Prof. Code § 6147*

Contingency fee agreement requirement exceptions. *Bus. & Prof. Code § 6147.5*

Non-contingency fee agreement mandatory provisions. *Bus. & Prof. Code § 6148*

Written fee contract as confidential communication. *Bus. & Prof. Code § 6149*

Consent as element of contract. *Civ. Code § 1550*

Spanish translation of contract. *Civ. Code § 1632*

Attorney's fees for defense of collection action. *Civ. Code § 1717*

Unruh Act. *Civ. Code § 1801 et seq.*

Proceeds from convicted felon's story subject to involuntary trust. *Civ. Code § 2225*

Family law attorney's real property lien. *Fam. Code §§ 2033, 2034*.

Mode and amount of compensation. *Code Civ. Proc. § 1021*

Court approval of contract by minor. *Fam. Code § 6602*

Worker's Compensation Appeals Board attorney fees. *Lab. Code §§ 3856, 4906*

Contingency contract for representation of ward or conservatee. *Prob. Code § 2644*

Fee agreements for appeals before Unemployment Insurance Appeals Board. *Unemp. Ins. Code § 1957*

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§ 72.530 California Rules of Court

Association of out-of-state counsel. *Cal. Rules of Ct., Rule 9.40*

Appointment of judge advocate to represent person in military service. *Cal. Rules of Ct., Rule 9.41*

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§ 72.531 Decisions

[1] Advertising and Solicitation

Illinois prohibition on lawyer holding self out in advertisement as "certified" or as "specialist" as overbroad under *U.S. Const., amend. I*; state as able, however, to screen certifying organizations or require disclaimer about certifying organization or standards of specialty. *Peel v. Attorney Reg. & Disciplinary Com'n (1990) 496 U.S. 91, 108-109, 110 S. Ct. 2281, 110 L. Ed. 2d 83*

Kentucky rule that categorically prohibited lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems as violation of *First Amendment* protection. *Shapero v. Kentucky Bar Assn. (1988) 486 U.S. 466, 472-487, 108 S. Ct. 1916, 100 L. Ed. 2d 475*

First Amendment as precluding state from disciplining attorney for soliciting legal business through printed advertising containing truthful and nondeceptive information and advice regarding legal rights of potential clients. *Zauderer v. Office of Disciplinary Counsel (1985) 471 U.S. 626, 647, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315*

Missouri rules that restricted manner in which law practice could be described in advertisement as unconstitutional; attorney as entitled to advertise nonmisleading description of his or her areas of practice. *In re R.M.J. (1982) 455 U.S. 191, 204-207, 102 S. Ct. 929, 71 L. Ed. 2d 64*

Prohibition of in-person solicitation of legal employment for pecuniary gain as constitutional; state is entitled to avert dangers inherent in in-person solicitation such as fraud, undue influence, intimidation, overreaching, invasion of privacy, subordination of client's interest to attorney's financial interests, and other vexatious conduct. *Ohralik v. Ohio State Bar Ass'n (1978) 436 U.S. 447, 461-462, 98 S. Ct. 1912, 56 L. Ed. 2d 444*

In-person solicitation is permissible when purpose of solicitation involves furtherance of civil rights, unless actual misconduct or injury shown. *In re Primus (1978) 436 U.S. 412, 434, 98 S. Ct. 1893, 56 L. Ed. 2d 417*

Arizona rule that prohibited commercial advertising of routine legal services by lawyers violated of *U.S. Const., amend. I.* *Bates v. State Bar of Arizona (1977) 433 U.S. 350, 354, 97 S. Ct. 2691, 53 L. Ed. 2d 810*

Direct solicitation of employment from accident victim is ethically improper. *Rose v. State Bar (1989) 49 Cal. 3d 646, 659, 262 Cal. Rptr. 702, 779 P.2d 761*

Solicitation of clients through mass mailings is commercial speech properly subject to regulation for misleading advertising under Cal. Rules Prof. Conduct, former Rule 2-101 (*now see Cal. Rules Prof. Conduct, Rule 1-400*). *Leoni v. State Bar (1985) 39 Cal. 3d 609, 622-626, 217 Cal. Rptr. 423, 704 P.2d 183*

Precertification discovery to permit class representative to obtain substitute class representative did not constitute unlawful solicitation. *Best Buy Stores, L.P. v. Superior Court (2006) 137 Cal. App. 4th 772, 776-777, 40 Cal. Rptr. 3d 575*

[2] Association of Counsel

Association of counsel to substitute at hearing in absence of attorney of record is proper and is not required to be effected formally. *Vaughn v. State Bar (1973) 9 Cal. 3d 698, 701-702, 108 Cal. Rptr. 806, 511 P.2d 1158*

Duty of attorney of record to prepare associate counsel for trial proceeding at which associate substitutes for attorney of record. *Vaughn v. State Bar (1973) 9 Cal. 3d 698, 701-702, 108 Cal. Rptr. 806, 511 P.2d 1158*

Attorney of record and associated attorney are entitled to divide duties concerning conduct of action, but associated attorney as not entitled to act as attorney of record without substitution. *Wells Fargo & Co. v. City etc. of S.F. (1944) 25 Cal. 2d 37, 43, 152 P.2d 625* (associated attorney may properly designate himself "one of the attorneys for" party when appearing for party in court)

Associate attorney is not entitled to appear or act on client's behalf as sole attorney of record without complying with procedure for substitution of attorneys provided in *Code Civ. Proc. §§ 284, 285*. *Prescott v. Salthouse (1878) 53 Cal. 221, 222-223*

When one member of law firm becomes incapable of performing association agreement with other lawyer, parties to agreement are discharged if it was contemplated that incapacitated attorney would perform substantial services under agreement; attorney who hired incapacitated attorney as not obligated to accept other member of incapacitated attorney's law firm as substitute. *Cazares v. Saenz (1989) 208 Cal. App. 3d 279, 282, 284-286, 256 Cal. Rptr. 209*

Attorney who is party to action was properly recognized by court as associated attorney in presenting his or her own case with ostensible authority of his or her attorney of record. *Muller v. Tanner (1969) 2 Cal. App. 3d 445, 457, 82 Cal. Rptr. 738*

[3] Attorney-Client Relationship in General

No attorney-client relationship existed when there was no evidence that client ever considered attorney to be its lawyer or potential lawyer, or that any confidential matters were disclosed. *Med-Trans Corp. v. City of California City (2007) 156 Cal. App. 4th 655, 666-669, 2007 Cal. App. LEXIS 1789*

Attorney making single, special appearance for litigant creates an attorney-client relationship with litigant, and owes a duty of care to litigant. *Streit v. Covington & Crowe (2000) 82 Cal. App. 4th 441, 447, 98 Cal. Rptr. 2d 193*

Attorney-client relationship is founded on general rules governing relationship of principal and agent. *Fidelity & Casualty Co. v. Abraham (1945) 70 Cal. App. 2d 776, 783, 161 P.2d 689*

[4] Attorney of Record

Service of papers after entry of judgment may be made on attorney of record when there has been no substitution in manner prescribed by law. *People v. Bouchard (1957) 49 Cal. 2d 438, 440, 317 P.2d 971* (dictum)

Attorney of record remains such for purpose of serving papers until notice of substitution filed, even if attorney in fact ceases to act as attorney for party. *Scarpel v. East Bay Street Ry. (1940) 42 Cal. App. 2d 32, 33, 115 P.2d 862*

[5] Authority of Attorney

[a] In Litigation

Plaintiff's attorney exceeded scope of implied authority by entering into agreement with defendants for binding arbitration without client's consent, when client did nothing beyond retaining attorney to suggest that attorney had authority to agree on her behalf, client had agreed only to nonbinding arbitration with right to trial de novo, and client repudiated agreement after learning of it. *Blanton v. Womancare, Inc. (1985) 38 Cal. 3d 396, 402-403, 406-408, 212 Cal. Rptr. 151, 696 P.2d 645*

Extent of attorney's authority to bind client. *Linsk v. Linsk (1969) 70 Cal. 2d 272, 276-280, 74 Cal. Rptr. 544, 449 P.2d 760* ; *Zurich G. A. & L. Ins. Co., Ltd. v. Kinsler (1938) 12 Cal. 2d 98, 105-106, 81 P.2d 913*

Fact that attorney is authorized to represent person in one case is not evidence of authority to represent that person in another and distinct proceeding. *Sullivan v. Dunne (1926) 198 Cal. 183, 190, 244 P. 343*

Respondent was entitled to move appellate court for order dismissing appeal on ground that attorney purporting to represent appellant in filing notice of appeal was not authorized. *Title Ins. etc. Co. v. California etc. Co. (1914) 168 Cal. 397, 400, 405, 143 P. 723* (appeal dismissed on respondent's motion)

Court of appeal has exclusive jurisdiction to determine whether attorney purporting to represent party in appeal has authority to do so. *Parkside Realty Co. v. MacDonald (1914) 167 Cal. 342, 346, 139 P. 805*

Proceeding based on appearance for defendant by attorney not authorized to appear was void when defendant was not duly served; appearance by attorney raises presumption of authority. *Garrison v. McGowan (1874) 48 Cal. 592, 599-600*

When several defendants appear by separate attorneys, attorney for one defendant is not authorized to give or accept notice, make stipulations, or consent to order or judgment on behalf of another defendant. *Hobbs v. Duff (1872) 43 Cal. 485, 491*

Attorney lacks apparent authority to sign arbitration contract on client's behalf; lawyer's signature alone is not sufficient evidence that client consented to arbitration. *Toal v. Tardif (2009) 178 Cal. App. 4th 1208, 1221-1223, 101 Cal. Rptr. 3d 97*

Extent of conservatee's attorney to agree to judgment that included conservatee's placement, disabilities, and conservator powers without conservatee's on-the-record consent. *Conservatorship of Christopher A. (2006) 139 Cal.*

App. 4th 604, 612-613, 43 Cal. Rptr. 3d 427

Attorney had no express or actual authority from defendant to appear on his behalf based on understanding from a co-defendant that attorney was to appear for all defendants. *Corcoran v. Arouh (1994) 24 Cal. App. 4th 310, 315-316, 29 Cal. Rptr. 2d 326*

Attorney's unauthorized voluntary dismissal with prejudice of client's cause of action constituted act beyond scope of attorney's authority and may be vacated at any time. *Romadka v. Hoge (1991) 232 Cal. App. 3d 1231, 1235-1237, 283 Cal. Rptr. 878*

When party represented by attorney of record, trial court was precluded from accepting stipulation or agreement made by party without knowledge and consent of attorney. *In re Marriage of Maricle (1990) 220 Cal. App. 3d 55, 58, 269 Cal. Rptr. 204*

Counsel has authority to enter into stipulations to resolve discovery disputes; stipulations clearly are binding on client when client has, by conduct, ratified stipulation. *Young v. Rosenthal (1989) 212 Cal. App. 3d 96, 115-117, 260 Cal. Rptr. 369 , cert. denied, 494 U.S. 1080, 110 S. Ct. 1811, 108 L. Ed. 2d 941 (1990)*

Stipulation entered into without client authorization is subject to being set aside if dispute is substantially resolved by virtue of stipulation. *In re Marriage of Helsel (1988) 198 Cal. App. 3d 332, 339-340, 243 Cal. Rptr. 657*

Attorney lacks authority to represent person when person lacks actual or constructive notice of representation by that attorney; trial court lacks jurisdiction to enter judgment against person when attorney's appearance for that person is unauthorized. *Zirbes v. Stratton (1986) 187 Cal. App. 3d 1407, 1412-1414, 232 Cal. Rptr. 653*

Trial attorney is in full charge of client's cause or defense and client is bound by attorney's action; trial judge and opposing counsel are justified in relying on apparent and presumptive authority of attorney and in acting on that basis. *Kim v. Orellana (1983) 145 Cal. App. 3d 1024, 1027, 193 Cal. Rptr. 827*

Dismissal of cause of action by attorney without client's authority is act beyond scope of attorney's authority that may be vacated at any time on proper proof. *Bowden v. Green (1982) 128 Cal. App. 3d 65, 73, 180 Cal. Rptr. 90* ; *Whittier Union High Sch. Dist. v. Superior Court (1977) 66 Cal. App. 3d 504, 509, 136 Cal. Rptr. 86*

[b] In Transactions

Absent express authority, attorney is without implied plenary authority to enter into contracts on behalf of his or her client. *Wilson v. Eddy (1969) 2 Cal. App. 3d 613, 618, 82 Cal. Rptr. 826*

[c] Challenging Authority

Third person is entitled to assert invalidity of attorney's act based on lack of authority in defense of proceeding to compel third person to do act he is bound to do if attorney's act valid. *Sullivan v. Dunne (1926) 198 Cal. 183, 190, 194-195, 244 P. 343* (writ of mandate to compel judge to certify record on appeal denied when judge refused certification on ground that attorney was not authorized to file notice of appeal)

Judgment valid on its face cannot collaterally attacked on ground attorney appeared without authority, but can be collaterally attacked on that ground only by motion in rendering court or by action to set judgment aside. *Parkside Realty Co. v. MacDonald (1914) 167 Cal. 342, 347-348, 139 P. 805*

Motion to dismiss is proper procedure for challenging authority of attorney to bring action. *County of Ventura v. Clay (1897) 119 Cal. 213, 215, 51 P. 189* (action by district attorney to recover money for county dismissed for lack of authorization from supervisors); *Clark v. Willett (1868) 35 Cal. 534, 538, 540* ; *Turner v. Caruthers (1861) 17 Cal. 431, 433*

Defendant wishing to have judgment vacated on ground that appearance on his behalf by attorney was unauthorized is required to take prompt action and to make out clear case by cogent and strong evidence. *Garrison v. McGowan (1874) 48 Cal. 592, 600*

Motion for dismissal on ground plaintiff's attorney is not authorized to appear on plaintiff's behalf must be supported by affidavit showing lack of authority. *People v. Mariposa Co. (1870) 39 Cal. 683, 685*

Court is authorized to require attorney to produce evidence of authority to appear on behalf of supposed client when either supposed client or adverse party challenges authority by proper motion. *Clark v. Willett (1868) 35 Cal. 534, 540* (motion by supposed client); *Turner v. Caruthers (1861) 17 Cal. 431, 433* (motion by adverse party)

Fact that attorney is in action without authority is no defense in action at law on judgment. *Carpentier v. City of Oakland (1866) 30 Cal. 439, 446*

Plea in abatement is improper procedure for challenging authority of plaintiff's attorney to appear and prosecute action; mere suggestion of adverse party that plaintiff's attorney lacks authority is not a sufficient basis for court's inquiry into attorney's authority. *Turner v. Caruthers (1861) 17 Cal. 431, 433*

Setting aside judgment under *Code Civ. Proc. § 473* is proper when defendant has shown that appearance on her behalf by attorney was unauthorized. *Zirbes v. Stratton (1986) 187 Cal. App. 3d 1407, 1410-1411, 232 Cal. Rptr. 653*

Motion to strike answer is proper procedure for challenging authority of defendant's attorney to represent defendant. *People v. Honey Lake Valley Irr. Dist. (1926) 77 Cal. App. 367, 374, 246 P. 819* (dictum)

[d] Conduct of Client

Court is authorized, in criminal action at least, to permit litigant both to have counsel and also to participate in conduct of case (examining witnesses, objecting, arguing, etc.) on substantial showing that justice will thereby be served and that orderly and expeditious conduct of court's business will not thereby be substantially hindered, hampered, or delayed. *People v. Mattson (1959) 51 Cal. 2d 777, 797, 336 P.2d 937*

Party to action is allowed to appear personally or by attorney but not both; court is required to recognize attorney of record as having management and control of action; client is not empowered to control action until attorney of record is removed. *Board of Comm'rs v. Younger (1865) 29 Cal. 147, 149*

[e] Presumption

Presumption of authority raised by attorney making appearance on behalf of party is rebuttable; party has no rights based on unauthorized act and is unable to validate unauthorized act by ratification after expiration of limitation period for doing act, even though act was timely. *Title Ins. etc. v. California Development Co. (1914) 168 Cal. 397, 401* (unauthorized notice of appeal not validated by ratification after expiration of period for filing notice; appeal dismissed)

Licensed attorney is presumed authorized to appear for any person whom he or she professes to represent. *Turner v. Caruthers (1861) 17 Cal. 431, 432-433* ; *Kraus v. Walt Disney Productions (1963) 221 Cal. App. 2d 736, 741-742, 34*

Cal. Rptr. 702

[f] Signing of Pleadings and Papers

Plaintiff who obtains dismissal on basis of stipulation signed by himself only, not by his attorney of record, is entitled to have trial court set aside judgment of dismissal on motion properly made through his attorney. *Toy v. Haskell (1900) 128 Cal. 558, 560, 61 P. 89*

Defendant who has appeared by attorney in an action is required to answer by pleading signed by attorney, not by defendant, absent evidence in record that attorney has been discharged. *Crane v. Crane (1898) 121 Cal. 99, 100, 53 P. 433* (appearance by attorney on demurrer; answer signed only by defendant unacceptable)

Notice of motion for new trial must be signed by attorney of record; notice signed by other attorney not properly substituted ground for denying motion. *McMahon v. Thomas (1896) 114 Cal. 588, 591, 46 P. 732*

Issuance of writ of execution is not dependent on request by judgment creditor's attorney; party himself entitled to apply for issuance. *Jones v. Spears (1880) 56 Cal. 163, 165*

Stipulation signed by party who has attorney of record is to be disregarded by court, even though attorney was unable to sign it because of temporary absence. *Mott v. Foster (1872) 45 Cal. 72, 72-73*

[6] Fee Agreements

Modifications to a contingency fee contract must comply with *Bus. & Prof. Code § 6147*. *Stroud v. Tunzi (2008) 160 Cal. App. 4th 377, 382-383, 72 Cal. Rptr. 3d 756*

Negotiation of fee agreement between attorney and client at arms-length gives client no cause to complain, even if terms negotiated by attorney are favorable to attorney. *Ramirez v. Sturdevant (1994) 21 Cal. App. 4th 904, 913, 26 Cal. Rptr. 2d 554*

Attorney was entitled to negotiate conditions under which he would continue to represent client, and for client's consent to terms of supplemental fee agreement. *Ramirez v. Sturdevant (1994) 21 Cal. App. 4th 904, 914-916, 26 Cal. Rptr. 2d 554*

[7] Fee Splitting

Fee splitting arrangement between attorneys who are not partners or associates of each other, or are not shareholders in the same law firm is unenforceable absent strict compliance with *Cal. Rule Prof. Conduct, Rule 2-200*. *Chambers v. Kay (2002) 29 Cal. 4th 142, 148, 126 Cal. Rptr. 2d 536* (neither attorney obtained the client's written consent to the fee division arrangement)

Assignment between attorney and laypersons, clients, of interests in attorney's fee allowed to clients under statute is not an unlawful fee splitting agreement. *Los Angeles v. Knapp (1936) 7 Cal. 2d 168, 171-172, 60 P.2d 127* (fees allowed to client defendant in condemnation action voluntarily dismissed; see *Code Civ. Proc. §§ 1268.510-1268.620*)

Cal. Rule Prof. Conduct, Rule 2-200 requires that the client's consent to a division of fees be given prior to the actual division of the fees; it does not require client consent prior to the commencement of work by the associated in attorney. *Cohen v. Brown (2009) 173 Cal. App. 4th 302, 320 93 Cal. Rptr. 3d 24*

Attorneys' failure to fully disclose fee-splitting agreement to court when they petitioned for approval of class action settlement bars enforcement of agreement. *Mark v. Spencer (2008) 166 Cal. App. 4th 219, 225-227, 82 Cal. Rptr. 3d 569*

Cal. Rule Prof. Conduct, Rule 2-200 was inapplicable to law firm's partnership agreement requiring former partner to pay firm 25 percent of revenues for services rendered to firm's clients who had followed partner when he departed during the 24 months following former partner's departure from firm. *Anderson, McPharlin & Connors v. Yee (2005) 135 Cal. App. 4th 129, 132-135, 37 Cal. Rptr. 3d 627*

Under *Cal. Rules Prof. Conduct, Rule 2-200*, client's written consent must be obtained prior to actual division of fees, not before lawyers enter into fee-splitting arrangement. *Mink v. Maccabee (2004) 121 Cal. App. 4th 835, 838, 17 Cal. Rptr. 3d 486*

Under *Cal. Rules Prof. Conduct, Rule 1-320(A)*, contract between lawyer and nonlawyer for fee-splitting is void and unenforceable when both are aware of contract's illegality. *McIntosh v. Mills (2004) 121 Cal. App. 4th 333, 349-350, 17 Cal. Rptr. 3d 66*

Two attorney shareholders of dissolved law corporation are entitled to share equally in fees received in all pending cases of corporation on date of dissolution. *Rothman v. Dolin (1993) 20 Cal. App. 4th 755, 757-759, 24 Cal. Rptr. 2d 571*

Agreement between discharged attorney and substituted attorney for splitting of fee was contrary to public policy and void when agreement was made after discharged attorney refused to turn over files or to execute substitution of attorney. *Kallen v. Delug (1984) 157 Cal. App. 3d 940, 951, 203 Cal. Rptr. 879*

Fee splitting arrangement between attorneys for referral of case was not contrary to public policy and enforceable by court if legal when entered into. *Moran v. Harris (1982) 131 Cal. App. 3d 913, 916, 920-922, 182 Cal. Rptr. 519*

Order apportioning fees is an appealable order under former *Code Civ. Proc. § 904.1(b)* (*now see Code Civ. Proc. § 904.1(a)(2)*) after final judgment. *Breckler v. Thaler (1978) 87 Cal. App. 3d 189, 193, 151 Cal. Rptr. 50*

Interpretation of agreement between law partners on withdrawal of one partner from partnership. *Dunne & Gaston v. Keltner (1975) 50 Cal. App. 3d 560, 564-565, 123 Cal. Rptr. 430* (see dissenting opinion for discussion of requirements in referral fee arrangements)

Fee splitting arrangement between local bar association and attorney to whom it referred client was not illegal. *Emmons, Williams, Mires & Leech v. State Bar (1970) 6 Cal. App. 3d 565, 573-575, 86 Cal. Rptr. 367* (judgment in favor of bar association for one third of $48,000 fee affirmed)

[8] No Due Process Right to Competent Representation in Civil Action

In civil proceeding, due process does not guarantee right of competent representation; inadequate representation on part of retained counsel is not attributable to state. *Kim v. Orellana (1983) 145 Cal. App. 3d 1024, 1027, 193 Cal. Rptr. 827*

[9] Ratification of Unauthorized Acts

Ratification by client of unauthorized acts of attorney. *Navrides v. Zurich Ins. Co. (1971) 5 Cal. 3d 698, 703, 97 Cal.*

Rptr. 309, 488 P.2d 637 ; *Lazarus v. Titmus (1998) 64 Cal. App. 4th 1242, 1247-1249, 75 Cal. Rptr. 2d 676* ; *Caro v. Smith (1997) 59 Cal. App. 4th 725, 69 Cal. Rptr. 2d 306* ; *Moving Picture etc. Union v. Glasgow Theaters, Inc. (1970) 6 Cal. App. 3d 395, 403, 86 Cal. Rptr. 33*

[10] Receipt of Money or Property for Client

Attorney who has authority to settle or collect claim also has authority to receive payment in money; payment to attorney discharges claim even though attorney subsequently absconds with money. *Navrides v. Zurich Ins. Co. (1971) 5 Cal. 3d 698, 705, 97 Cal. Rptr. 309, 488 P.2d 637* ; *Ely v. Liscomb (1914) 24 Cal. App. 224, 228, 140 P. 1086* ; *see also Minor v. Minor (1960) 184 Cal. App. 2d 118, 126, 7 Cal. Rptr. 455*

Authority of attorney to receive full payment of judgment and to acknowledge satisfaction [*Code Civ. Proc. § 283(2)*]; presumption that attorney performed duty and received full amount of judgment before filing satisfaction of judgment. *Wherry v. Rambo (1950) 97 Cal. App. 2d 569, 571-572, 218 P.2d 142*

Authority of attorney to receive property claimed in suit for claim and delivery; authority not limited by *Code Civ. Proc. § 283(2)* to receiving money on client's behalf. *Ely v. Liscomb (1914) 24 Cal. App. 224, 228, 140 P. 1086*

[11] Solicitation

Trial court properly enjoined attorney from mailing to public solicitations concerning homestead declarations without complying with *Bus. & Prof. Code § 17537.6*. *People v. Morse (1993) 21 Cal. App. 4th 259, 269-270, 25 Cal. Rptr. 2d 816*

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§ 72.550 Federal Statutes

Criminal offense to accept proceeds from criminal offense as compensation. *18 U.S.C. § 1957*

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§ 72.551 State Statutes

[1] Duty of Competence

Gross negligence or neglect and carelessness in handling of client matters. *Bus. & Prof. Code § 6077*

[2] Duty of Diligence in Representation

Willful failure to perform legal services constitutes breach of good faith and fiduciary duty. *Bus. & Prof. Code §§ 6067, 6103*

[3] Duty to Communicate

Duty to communicate and inform client of case developments. *Bus. & Prof. Code § 6068 et seq.*

Duty to communicate settlement offers to client. *Bus. & Prof. Code § 6103.5*

Insured must give informed consent to joint representation. *Civ. Code § 2860(a)*

[4] Prohibited Conduct

Acceptance of employment with improper objective. *Bus. & Prof. Code § 6068 et seq.*

Duty to maintain respect to courts and judicial officers. *Bus. & Prof. Code § 6068(b)*

Deception of court by attorney; suppression of evidence; making false statements to court. *Bus. & Prof. Code § 6068(d)*

Disciplinary action for deception of opposing counsel. *Bus. & Prof. Code §§ 6068(d), 6106*

Making false statements to court toward former client. *Bus. & Prof. Code § 6068(f)*

Sanctions for violation of attorney's duties. *Bus. & Prof. Code § 6103 et seq*

Penalty for disobedience of court order. *Bus. & Prof. Code § 6103*

Penalty for insurance fraud. *Bus. & Prof. Code § 6106.5*; *Ins. Code 1871.4*; *Penal Code § 550*

Sanctions for deceit or collusion of court or party. *Bus. & Prof. Code § 6128*

Penalty for deception of court by attorney. *Bus. & Prof. Code § 6128(a)*

Damages for frivolous of dilatory appeal *Code Civ. Proc. § 907*

Willful neglect or violation of duty punishable as contempt *Code Civ. Proc. § 1209(a)(3)*]

Expert witness fees. *Gov. Code § 68092.5*

Communication with or investigation of jurors. *Penal Code § 95*

Penalty for advising client to testify falsely. *Penal Code § 127*

Penalty for knowingly and willfully destroying or concealing evidence. *Penal Code § 135*

Bribery of witness. *Penal Code § 137*

Prosecution for solicitation of perjury. *Penal Code § 653f(a)*

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§ 72.552 California Rules of Professional Conduct

[1] Duty of Competence

Duty of competence. *Cal. Rules Prof. Conduct, Rule 3-110*

[2] Duty to Communicate

Representation of two or more clients in settlement. *Cal. Rules Prof. Conduct, Rule 3-310(D)*

Duty to communicate and inform client of case developments; no discipline for failure to communicate insignificant or irrelevant information. *Cal. Rules Prof. Conduct, Rule 3-500*

Duty to communicate settlement offers to client. *Cal. Rules Prof. Conduct, Rule 3-510*

[3] Prohibited Conduct

Communication with represented party. *Cal. Rules Prof. Conduct, Rule 2-100*

Discriminatory conduct in practice of law. *Cal. Rules Prof. Conduct, Rule 2-400*

Seeking case with improper objective. *Cal. Rules Prof. Conduct, Rule 3-200*

Bringing legal action without probable cause. *Cal. Rules Prof. Conduct, Rule 3-200(A)*

Advising violation of law; good faith exception. *Cal. Rules Prof. Conduct, Rule 3-210*

Threatening prosecution. *Cal. Rules Prof. Conduct, Rule 5-100*

Making false statements to court. *Cal. Rules Prof. Conduct, Rule 5-200*

Suppressing evidence. *Cal. Rules Prof. Conduct, Rule 5-220*

Prohibited gifts to officials. *Cal. Rules Prof. Conduct, Rule 5-300(A)*

Restricted communications with judicial officials. *Cal. Rules Prof. Conduct, Rule 5-300(B)*

Secretion of witnesses; payment of witness. *Cal. Rules Prof. Conduct, Rule 5-310*

Contact with jurors. *Cal. Rules Prof. Conduct, Rule 5-310*

[4] Withdrawal

Withdrawal of representation. *Cal. Rules Prof. Conduct, Rule 3-700*

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§ 72.553 State Standards for Attorney Sanctions

Willful failure to communicate with client. Cal. State B. Stds. for Att'y Sanctions, Std. 2.4

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§ 72.554 Model Code of Professional Responsibility

Zealous representation includes proper challenges to validity of any law or decision. Model Code of Professional Responsibility DR 7-102(A)(7)

Reimbursement of witness' fees. Model Code of Professional Responsibility DR 7-109

Communications permitted. Model Code of Professional Responsibility EC 7-4

Permissible construction of law without regard to attorney's opinion. Model Code of Professional Responsibility EC 7-4

Communications with unrepresented client. Model Code of Professional Responsibility EC 7-18, DR 7-104(A)(2)

Permitted investigation of jurors. Model Code of Professional Responsibility EC 7-30

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§ 72.555 Decisions

General rule that attorney's negligence is imputed to client is inapplicable when attorney abandons client through total failure to represent client. *Fleming v. Gallegos (1994) 23 Cal. App. 4th 68, 73, 28 Cal. Rptr. 2d 350*

Conduct of plaintiff's two attorneys constituted attorney abandonment when neither had ever done any work on case after assuring plaintiff that they would attend to case. *Fleming v. Gallegos (1994) 23 Cal. App. 4th 68, 73-74, 28 Cal. Rptr. 2d 350*

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§ 72.570 California Points and Authorities

For memoranda of points and authorities relating to State Bar disciplinary proceedings, see California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*

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§ 72.571 State Statutes

[1] Attorney Conduct

Accounting of funds received. *Bus. & Prof. Code § 6091*

Attorney's conduct constituting moral turpitude. *Bus. & Prof. Code § 6106*

[2] Interest on Attorneys' Trust Accounts

State Bar access to trust accounts by subpoena. *Bus. & Prof. Code § 6069*

Reporting requirements for depositories of trust accounts. *Bus. & Prof. Code §§ 6091.1(a), 6091.2(a), (b)*

Attorney consent for depository report. *Bus. & Prof. Code § 6091.1(c)*

Interest on lawyers' trust account. *Bus. & Prof. Code § 6210 et seq.*

Requirement for IOLTA trust account. *Bus. & Prof. Code § 6211*

Interest on IOLTA accounts transmitted to State Bar. *Bus. & Prof. Code § 6212*

IOLTA monies to fund qualified legal services projects. *Bus. & Prof. Code §§ 6213-6215*

Criteria to establish "qualified legal services projects." *Bus. & Prof. Code § 6216*

Requirements, restrictions on recipients of IOLTA funds. *Bus. & Prof. Code § 6217 et seq.*

Insurer required to notify client of settlement payment made to attorney of $100 or more. *Bus. & Prof. Code § 6149.5*

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§ 72.572 Rules of Professional Conduct

Attorney withdrawal for client breach of fee agreement. *Cal. Rules Prof. Conduct, Rule 3-700(C)(1)(f)*

True retainer fee. *Cal. Rules Prof. Conduct, Rule 3-700(D)(2)*

Client funds and property. *Cal. Rules Prof. Conduct, Rule 4-100*

Client funds must be segregated. *Cal. Rules Prof. Conduct, Rule 4-100(A)*

Attorney withdrawal from trust account. *Cal. Rules Prof. Conduct, Rule 4-100(A)(2)*

Notification of client on receipt of property. *Cal. Rules Prof. Conduct, Rule 4-100(B)(1)*

Identification and safekeeping of client's property. *Cal. Rules Prof. Conduct, Rule 4-100(B)(2)*

Record preservation and trust account audit compliance. *Cal. Rules Prof. Conduct, Rule 4-100(B)(3)*

Failure to pay medical liens. *Cal. Rules Prof. Conduct, 4-100(B)(4)*

Labeling of accounts. *Cal. Rules Prof. Conduct, Rule 4-101(A)*

Payment of lien. *Cal. Rules Prof. Conduct, Rule 4-210(A)(1)*

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Disbarment for willful misappropriation of client funds. Standards For Attorney Sanctions For Professional Misconduct, Standard 2.2(a)

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§ 72.590 State Statutes

Manner of obtaining substitution of attorney. *Code Civ. Proc. § 284*

Notice to adverse party of substitution of attorneys. *Code Civ. Proc. § 285*

Withdrawal of attorney after final judgment in domestic relations actions; notice of withdrawal. *Code Civ. Proc. § 285.1*

Withdrawal of legal service attorney representing indigent client. *Code Civ. Proc. §§ 285.2-285.4*

Party represented by attorney who dies or ceases to act as such is required, on notice from adverse party, to appoint another attorney or to appear in person before pending action or proceeding may proceed. *Code Civ. Proc. § 286*

Withdrawal and change of counsel in criminal cases. *Penal Code § 987.1*

Withdrawal and change of counsel in juvenile court proceedings. *Welf. & Inst. Code § 634.6*

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§ 72.591 California Rules of Court

Substitution and withdrawal of attorneys on appeal. *Cal. Rules of Ct., Rules 8.36(b)* (appeals), *Cal. Rules of Ct., Rule 8.768(b)* (pending appeals)

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§ 72.592 Decisions

[1] Death or Incapacity of Client

Attorney loses authority to represent client on learning of incompetency of client. *Sullivan v. Dunne (1926) 198 Cal. 183, 192, 244 P. 343*

Authority of attorney necessarily ceases with death of client. *Swartfager v. Wells (1942) 53 Cal. App. 2d 522, 528*

[2] Discharge of Attorney

Code Civ. Proc. § 284 gives clients, beyond context of litigation, absolute power to discharge attorney, with or without cause. *Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 555, 28 Cal. Rptr. 2d 617, 869 P.2d 1142*

Right of client to discharge attorney at any time, with or without cause, and without incurring liability for breach of contract. *Fracasse v. Brent (1972) 6 Cal. 3d 784, 790-791, 100 Cal. Rptr. 385, 494 P.2d 9*

Attorney's interest in counsel fees that client may be entitled to have awarded does not entitle attorney to prevent substitution. *Meadow v. Superior Court (1963) 59 Cal. 2d 610, 617, 30 Cal. Rptr. 824, 381 P.2d 648*

Attorney not subject to discharge when attorney has power coupled with interest in subject matter of litigation. *Echlin v. Superior Court (1939) 13 Cal. 2d 368, 372, 90 P.2d 63* (dictum); *Scott v. Superior Court (1928) 205 Cal. 525, 531, 271 P. 906* (dictum); *Redevelopment Agency v. Superior Court (1961) 195 Cal. App. 2d 591, 593, 16 Cal. Rptr. 45*

Good cause for discharge of attorney consists of conduct seriously affronting dignity of profession respecting subject of employment, and improprieties clearly inconsistent with faithful, proper, and dignified discharge of duties as attorney and officer of court. *Zurich G. A. & L. Ins. Co., Ltd. v. Kinsler (1938) 12 Cal. 2d 98, 102, 81 P.2d 913*

Party's right to change attorney under *Code Civ. Proc. § 284* at any time exists despite existence of contingent fee agreement or irrevocable power of attorney, and despite fact attorney has performed labor and expended money for and in behalf of client. *Estate of Cazaurang (1934) 1 Cal. 2d 712, 714, 36 P.2d 1069* (dictum); *Gage v. Atwater (1902) 136 Cal. 170, 172-173, 68 P. 581*

Clients have absolute power to discharge an attorney, with or without cause. *Jones & Matson v. Hall (2007) 155 Cal. App. 4th 1596, 1610, 66 Cal. Rptr. 3d 872*

Until client who is represented by attorney discharges attorney, court in civil case is not required to hear directly from client. *In re Marriage of Lemen (1980) 113 Cal. App. 3d 769, 785, 170 Cal. Rptr. 642*

[3] Removal of Attorney by Court

[a] In General

Vicarious disqualification of law firm does not automatically follow upon the personal disqualification of a former settlement judge, who has become a partner in the law firm, where timely and effective screening mechanisms have been created within law firm. *In re County of Los Angeles (9th Cir. 2000) 223 F.3d 990, 997*

Court is without authority to compel retained attorney to withdraw contrary to client's consent. *Ingram v. Justice Court (1968) 69 Cal. 2d 832, 840, 73 Cal. Rptr. 410, 447 P.2d 650* ; *Cloer v. Superior Court (1969) 271 Cal. App. 2d 143, 145-146, 76 Cal. Rptr. 217*

Court is authorized, if satisfied attorney has acted for one party in former trial of cause, to prohibit attorney from acting for adverse party in later trial of same cause. *Weidekind v. Water Co. (1887) 74 Cal. 386, 388, 19 P. 173*

Lawyer is not disqualified solely because spouse worked for disqualified attorney's firm. *Derivi Construction & Architecture, Inc. v. Wong (2004) 118 Cal. App. 4th 1268, 1276, 14 Cal. Rptr. 3d 329*

Representation of multiple parties with potentially adverse interests by public, nonprofit corporation created to provide legal services in dependency court does not create conflict of interest within corporation and among its attorneys. *Castro v. Los Angeles County Bd. of Supervisors (1991) 232 Cal. App. 3d 1432, 1439-1446, 284 Cal. Rptr. 154*

Superior court, acting on disqualification motion, lacks jurisdiction to disqualify law firm from representing party in related litigation in different superior court. *In re Complex Asbestos Litigation (1991) 232 Cal. App. 3d 572, 600-601, 283 Cal. Rptr. 732*

Recusal of entire law firm because of associate's previous activity as judicial officer who had heard earlier proceedings in action is not required if law firm screens associate from participation in matter so as to avoid appearance of impropriety. *Higdon v. Superior Court (1991) 227 Cal. App. 3d 1667, 1680, 278 Cal. Rptr. 588*

Trial court's disqualification of attorney for conflict of interest was reversible error when defendant's delay in bringing motion to disqualify was so unreasonable and resulting prejudice so great that there was implied waiver of right to disqualify plaintiff's attorney; implied waiver of objection extends to cocounsel of disqualified attorney. *River West, Inc. v. Nickel (1987) 188 Cal. App. 3d 1297, 1313, 234 Cal. Rptr. 33*

Reservation of rights of noncoverage by plaintiff's insurer in undertaking to represent defendant, as driver of plaintiff's automobile, does not create conflict of interest justifying removal of insurer's attorney when reservation is based on

issue extrinsic from defendant's liability for plaintiff's injuries. *McGee v. Superior Court (1985) 176 Cal. App. 3d 221, 227-228, 221 Cal. Rptr. 421*

Trial court in civil case is authorized to order disqualification of counsel when necessary for furtherance of justice, but court must weigh combined effect of party's right to counsel of choice, attorney's interest in representing client, financial burden on client of replacing disqualified counsel, and any tactical abuse underlying disqualification against principle favoring vigorous representation of parties by independent counsel unencumbered by conflicts of interest. *William H. Raley Co. v. Superior Court (1983) 149 Cal. App. 3d 1042, 1048, 197 Cal. Rptr. 232*

[b] Attorney as Trial Witness

Trial court retains discretion to order withdrawal of attorney serving as witness for plaintiffs in class action, despite amendment to former *Cal. Rules Prof. Conduct, Rule 2-111(A)(4)* (amendment allowed continued representation with client consent; *now see Cal. Rules Prof. Conduct, Rule 5-210*), because of difficulty in literally applying amendment to class actions. *Reich v. Club Universe (1981) 125 Cal. App. 3d 965, 972-973, 178 Cal. Rptr. 473*

Trial court did not abuse discretion by disqualifying law firm on ground that attorneys were to be witnesses for client without weighing equities or noting amendment in governing former *Cal. Rules Prof. Conduct, Rule 2-111(A)(4)* (*now see Cal. Rules Prof. Conduct, Rule 5-210*). *Lyle v. Superior Court (1981) 122 Cal. App. 3d 470, 479, 482-483, 175 Cal. Rptr. 918*

Trial court was not authorized to order withdrawal on ground that attorney may be called as witness other than on behalf of client without showing that client will be prejudiced by testimony. *Graphic Process Co. v. Superior Court (1979) 95 Cal. App. 3d 43, 50-52, 156 Cal. Rptr. 841*

[c] Attorney Received Confidential Information

When a law firm retains an expert witness who was interviewed previously by opposing counsel and exposed to the opposing side's confidential information, a rebuttable presumption arises that the expert disclosed that confidential information to the law firm that subsequently hired the expert witness; however, the presumption does not apply when the expert witness remains a consultant for and in the employ of the party that originally retained the expert. *Shandralina G. v. Homonchuk (2007) 147 Cal. App. 4th 395, 412-417, 54 Cal. Rptr. 3d 207*

Attorney representing in-house counsel against her former client-employer was not disqualified for learning underlying confidences from in-house counsel. *Fox Searchlight Pictures, Inc. v. Paladino (2001) 89 Cal. App. 4th 294, 106 Cal. Rptr. 2d 906*

Law firm retained by defendant was disqualified for having retained as expert witness accounting firm previously interviewed by plaintiff's attorneys for same lawsuit and to which plaintiff's attorneys had imparted confidential information before deciding not to retain firm as expert witness. *Shadow Traffic Network v. Superior Court (1994) 24 Cal. App. 4th 1067, 1078-1088, 29 Cal. Rptr. 2d 693*

Attorney is disqualified if he or she becomes privy to opposing attorney's work product after discussing case with expert who had been withdrawn as opposing party's expert, but who remained as consultant for opposing party. *County of Los Angeles v. Superior Court (1990) 222 Cal. App. 3d 647, 657-658, 271 Cal. Rptr. 698*

Disqualification of plaintiff's counsel, who had formerly been associated with law firm that had represented another person who also was suing defendant, was unwarranted when employment raised no present danger of continued disclosure of confidential information and when disqualification would not solve any perceived problem concerning

other lawsuit. Bell v. 20th *Century Ins. Co. (1989) 212 Cal. App. 3d 194, 198-199, 260 Cal. Rptr. 459*

Disqualification of entire law firm was required when partner of firm was disqualified from representing client because of prior receipt of confidential information from adverse party and partner's firm made no attempt to screen partner from litigation. *Klein v. Superior Court (1988) 198 Cal. App. 3d 894, 913-914, 244 Cal. Rptr. 226*

Attorney was not disqualified from case when there was no evidence that while he was state employee he had responsibility or acquired confidential information on case in question, and when firm took measures to screen him from case. *Chambers v. Superior Court (1981) 121 Cal. App. 3d 893, 902, 175 Cal. Rptr. 575*

[d] Ex Parte Communication With Represented Adverse Party

Cal. Rules Prof. Conduct, Rule 2-100, does not bar attorney from communicating directly with opposing party not represented by counsel of record, even if unrepresented party seeks advice from counsel who is not of record. *McMillan v. Shadow Ridge at Oak Park Homeowner's Association (2008) 165 Cal. App. 4th 960, 965-968, 81 Cal. Rptr. 3d 550*

Trial court has authority to order disqualification of attorney for violation of former *Cal. Rules Prof. Conduct, Rule 7-103* (former rule prohibiting attorney from communicating ex parte with represented adverse party; *now see Cal. Rules Prof. Conduct, Rule 2-100*), but was not authorized to disqualify attorney's entire law firm. *Mills Land & Water Co. v. Golden West Refining Co. (1986) 186 Cal. App. 3d 116, 131-133, 230 Cal. Rptr. 461* ; *Chronometrics, Inc. v. Sysgen, Inc. (1980) 110 Cal. App. 3d 597, 607-608, 168 Cal. Rptr. 196*

[e] Tort Liability for Unsuccessful Disqualification Motion

Motion to disqualify attorney for adverse party is insufficient basis for malicious prosecution action. *Silver v. Gold (1989) 211 Cal. App. 3d 17, 23, 259 Cal. Rptr. 185*

Motion to disqualify attorney for adverse party will not support claim of abuse of process when plaintiff fails to show that movant committed unauthorized or wrongful act. *Silver v. Gold (1989) 211 Cal. App. 3d 17, 24-25, 259 Cal. Rptr. 185*

[4] Substitution

[a] In General

Party is entitled under *Code Civ. Proc. § 284* to change attorney, whether engaged by party or appointed by court, and court is bound to order substitution on party's request. *Woodbury v. Nevada Etc. Ry. Co. (1898) 121 Cal. 165, 166, 53 P. 450* ; *Lee v. Superior Court (1896) 112 Cal. 354, 355, 44 P. 666*

Local rule conferring authority on court in civil case to refuse to accept consensual substitution of attorneys is inconsistent with *Code Civ. Proc. § 284(1)* and void. *Hock v. Superior Court (1990) 221 Cal. App. 3d 670, 673-674, 270 Cal. Rptr. 579*

Requirements of *Code Civ. Proc. § 286*, in case in which attorney has apparently ceased to act as such, as applying only when attorney has died or ceased to be an attorney, not when he or she has ceased to act for client in a particular matter. *Gion v. Stroud (1961) 191 Cal. App. 2d 277, 279, 12 Cal. Rptr. 540* (dictum explaining *De Recat Corp. v. Dunn (1926) 197 Cal. 787, 242 P. 936*)

Order granting substitution of attorneys as not appealable by discharged attorney who has no power coupled with interest. *People v. Metrim Corp. (1960) 187 Cal. App. 2d 289, 295, 9 Cal. Rptr. 584*

Main purpose for statutory procedure for substitution of attorney as that both court and opposing counsel may thereby know that they are dealing with attorney having power to bind party whom he purports to represent. *Carrara v. Carrara (1953) 121 Cal. App. 2d 59, 62, 262 P.2d 591*

Party appearing in propria persona as entitled under *Code Civ. Proc. § 284* to substitute attorney to appear for party. *Warden v. Lamb (1929) 98 Cal. App. 738, 742, 277 P. 867*

[b] Defective Substitution

Corporation as bound by notices served on it after notice of substitution by which corporation displaced attorney and appeared in propria persona, notwithstanding substitution is invalid for lack of capacity by corporation to appear in propria persona. *Johnson v. Hayes Cal Builders, Inc. (1963) 60 Cal. 2d 572, 577, 35 Cal. Rptr. 618, 387 P.2d 394*

Party's failure to follow statutory procedure for substitution of attorney as subject to waiver by adverse party. *Reynolds v. Reynolds (1943) 21 Cal. 2d 580, 585, 134 P.2d 251*

Party who obtains substitution and then proceeds in action under new attorney as precluded thereafter from challenging validity of substitution order and having proceedings under new attorney set aside, even if order is invalid for lack of notice to original attorney. *Gill v. Southern Pac. Co. (1916) 174 Cal. 84, 87, 161 P. 1153*

Irregularity in substitution as not giving ground for complaint by party who in fact knew of substitution and acted consistently with that knowledge. *Withers v. Little (1880) 56 Cal. 370, 372* ; *Carrara v. Carrara (1953) 121 Cal. App. 2d 59, 62-63, 262 P.2d 591*

Lack of formal substitution by party's new attorney prior to new attorney's filing and service of amended complaint as not making service of process with respect to such complaint invalid. *Baker v. Boxx (1991) 226 Cal. App. 3d 1303, 1308-1312, 277 Cal. Rptr. 409*

Trial court as not abusing discretion in recognizing plaintiff's attorney despite failure to file formal substitution after split of law firm when defendant was not misled or prejudiced; objection as waived by appearance in response to attorney's notice of motion and proceeding to argue merits. *Crocker National Bank v. O'Donnell (1981) 115 Cal. App. 3d 264, 268-269, 171 Cal. Rptr. 225*

Procedural irregularity in substitution as not depriving court of jurisdiction in proceedings conducted by improperly substituted attorney. *Carrara v. Carrara (1953) 121 Cal. App. 2d 59, 62, 262 P.2d 591*

[c] Notice of Substitution

Attorney for party seeking substitution as only person entitled to notice of motion; attorney as entitled to object to substitution and have it set aside if obtained without due notice. *Gill v. Southern Pac. Co. (1916) 174 Cal. 84, 87, 161 P. 1153* (suggesting that adverse party might also have substitution set aside on learning of lack of proper notice)

Language of *Code Civ. Proc. § 285* that party must recognize adversary's former attorney until notified of substitution as not mandatory; defects in substitution procedure, including irregular notice or lack of notice, as subject to waiver; waiver as inferrable from party's actions. *Livermore v. Webb (1880) 56 Cal. 489, 490* (acknowledgment of service of

notice of appeal)

[d] Pending Appeal

Party as entitled to seek, and appellate court as authorized to order, substitution of attorney in pending appeal; such substitution as not effective as to matters pending in trial court. *Estate of Cazaurang (1934) 1 Cal. 2d 712, 717, 36 P.2d 1069* (scope of appellate court's order of substitution); *Jacobus v. Jacobus (1929) 208 Cal. 562, 563, 282 P. 796* (trial court as lacking authority to substitute when appeal perfected)

[e] Power of Substituted Attorney

Attorney who is substituted for another as having no greater rights than predecessor; client's position as unchanged by substitution; substituted attorney as stepping into place of predecessor and as standing, with reference to case and other party, precisely as predecessor stood, and as able to repudiate or be relieved from agreement made by client only to same extent and in same manner as predecessor could. *Smith v. Whittier (1892) 95 Cal. 279, 289, 30 P. 529*

[5] Withdrawal

Attorney as having duty to client and to administration of justice to assume responsibility for effectuating consensual withdrawal and for presenting withdrawal to courts. *In re Hickey (1990) 50 Cal. 3d 571, 580, 268 Cal. Rptr. 170, 788 P.2d 684*

Requirement that attorney take steps to avoid prejudice to client prior to withdrawing, and to return all papers and properties to client, as applying when attorney ceases to provide services, even absent formation of intent to withdraw as counsel for client. *Baker v. State Bar (1989) 49 Cal. 3d 804, 817 n.5, 263 Cal. Rptr. 798, 781 P.2d 1344*

Attorney of record as not allowed to withdraw from representing party in pending litigation without leave of court. *De Recat Corp. v. Dunn (1926) 197 Cal. 787, 791, 242 P. 936* (dictum)

Attorney is entitled to withdraw from case if withdrawal can be accomplished without undue prejudice to client's interests; attorney was entitled to withdraw from representing plaintiff after trial and before prosecuting appeal. *Ramirez v. Sturdevant (1994) 21 Cal. App. 4th 904, 914-916*

When attorney has filed brief in reviewing court, subsequent order by superior court directing attorney's withdrawal as insufficient, under *Cal. Rules of Ct., Rule 8.36*, to also effect attorney's withdrawal in reviewing court. *Optical Surplus, Inc. v. Superior Court (1991) 228 Cal. App. 3d 776, 780 n.2, 279 Cal. Rptr. 194*

Attorney as having obligation to withdraw from case if client insists that attorney engage in bad faith litigation tactics or actions. *Young v. Rosenthal(1989) 212 Cal. App. 3d 96, 127-128 . 260 Cal. Rptr. 369 , cert. denied, 108 L. Ed. 2d 941 (1990)*

Attorney who voluntarily abandons contingent fee case without justifiable cause as not entitled to recover reasonable value of his or her services if client ultimately recovers in litigation. *Estate of Falco (1987) 188 Cal. App. 3d 1004, 1018-1020, 233 Cal. Rptr. 807* ; *Hensel v. Cohen (1984) 155 Cal. App. 3d 563, 564, 567-568, 202 Cal. Rptr. 85*

Absent provision for payment of money, order ruling on attorney's motion to withdraw as nonappealable interim order reviewable only by way of petition for extraordinary writ, unless order provides for payment of money. *Messih v. Lee Drug, Inc. (1985) 174 Cal. App. 3d 312, 315, 220 Cal. Rptr. 43*

Attorney as required to withdraw from representation of client who instructs attorney to pursue appeal that is frivolous or taken for purpose of delay. *Cosenza v. Kramer (1984) 152 Cal. App. 3d 1100, 1103, 200 Cal. Rptr. 18*

Failure or refusal of client to pay or secure proper fees or expenses of attorney after being reasonably requested to do so as ground for attorney's withdrawal from case. *People v. Prince (1968) 268 Cal. App. 2d 398, 406-407, 74 Cal. Rptr. 197*

Attorney as prohibited from withdrawing as counsel for one of two clients with conflicting interests, rather than from case altogether, when conflict existed at beginning of proceedings and court finds events during proceedings have created no new conflict. *Hodcarriers etc. Local Union v. Miller (1966) 243 Cal. App. 2d 391, 395, 52 Cal. Rptr. 251*

Attorney as entitled to withdraw from case when client suspects and questions attorney's good faith, unless continuing representation compelled for good reason; court as authorized in appropriate case to condition withdrawal on waiver of compensation. *Heple v. Kluge (1951) 104 Cal. App. 2d 461, 462, 231 P.2d 505*

Attorney as generally allowed to withdraw from representing party in pending litigation but, since attorney is an officer of the court, as not allowed to withdraw when withdrawal would work injustice on third party. *Linn v. Superior Court (1926) 79 Cal. App. 721, 725, 250 P. 880*

Client's refusal to consent to increase in attorney's fee as insufficient excuse for attorney's refusal to proceed further in action and as not cause for allowing attorney to withdraw. *Cassel v. Gregori (1937) 28 Cal. App. 2d Supp. 769, 771*

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§ 72.610 State Statutes

[1] Indemnification

Indemnification of corporate officer for attorney's fees in defending action. *Corp. Code § 317*

[2] Lien

Statutory authorization for attorney's lien for compensation. *Code Civ. Proc. §§ 874.010(a), 874.120* (partition proceedings); *Lab. Code § 4903* (workers' compensation proceedings)

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§ 72.611 Rules of Procedure

Attorney prosecuting application against Client Security Fund (Rules of Procedure, Rules 670-688) as precluded from being compensated from any source. Rules of Procedure, Rule 686

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§ 72.612 Rules of Professional Conduct

Refund of unearned advance fee on termination of employment. *Cal. Rules Prof. Conduct, Rule 3-700(D)(2)*

Illegal or unconscionable fees as prohibited. *Cal. Rules Prof. Conduct, Rule 4-200*

Payment of personal or business expenses of client as prohibited. *Cal. Rules Prof. Conduct, Rule 4-210*

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Chapter 72 ATTORNEY PRACTICE AND ETHICS
PART III. RESEARCH GUIDE
F. Fee Collection

7-72 California Forms of Pleading and Practice--Annotated § 72.613

§ 72.613 Decisions

[1] Account Stated

Attorney's bill for services as proper subject of account stated, but client's lack of objection to account on rendering as not creating liability where none existed before. *Trafton v. Youngblood (1968) 69 Cal. 2d 17, 25-26, 69 Cal. Rptr. 568, 442 P.2d 648* (dictum reporting rule)

[2] Arbitration

MFAA does not limit the ability of attorneys and clients to enter into binding contractual arbitration. *Schatz v. Allen Matkins Leck Gamble & Mallory LLP (2009) 45 Cal. 4th 557, 564-575, 87 Cal. Rptr. 3d 700, 198 P.3d 1109*

If a party rejects an arbitration award by filing a request for a trial de novo, the party effectively repudiates that rejection by causing or permitting the action to be dismissed. *Perez v. Grajales (2008) 169 Cal. App. 4th 580, 596-603, 86 Cal. Rptr. 3d 784*

When individual other than client agreed to be responsible for payment of attorney's fees or costs, notice under *Bus. & Prof. Code § 6201(a)* must given to that individual. *Wagner v. Mirzayance (1998) 67 Cal. App. 4th 1187, 1190-1191, 79 Cal. Rptr. 2d 661*

Statutory scheme created by *Bus. & Prof. Code § 6200 et seq.* cannot be contravened by private agreement between attorney and client to conduct their fee arbitration in outside forum, such as *American Arbitration Association. Alternative Systems, Inc. v. Carey (1998) 67 Cal. App. 4th 1034, 1041-1042, 79 Cal. Rptr. 2d 567*

Affirmance of trial court's judgment confirming arbitration award is, in effect, confirmance of arbitration award by appellate court so that attorney's fees may be awarded under *Bus. & Prof. Code § 6203(c).* *Pacific Law Group: USA v. Gibson (1992) 6 Cal. App. 4th 577, 582, 7 Cal. Rptr. 2d 878*

Client's filing of malpractice action within 30 days of notice of arbitration award is insufficient to constitute timely request for trial de novo under *Bus. & Prof. Code § 6204(c)* if malpractice complaint does not disclose intention to challenge arbitration award; relation back doctrine is inapplicable if client later amends complaint, after elapse of 30-day period, to include declaratory relief action regarding right to trial de novo. *Shiver, McGrane & Martin v. Littell (1990) 217 Cal. App. 3d 1041, 1045, 1047, 266 Cal. Rptr. 298*

Nonbinding arbitration award is binding unless party seeks trial within 30 days of mailing of notice of award; if trial sought, limitation period for correcting award under *Code Civ. Proc. § 1288.2* is tolled until plenary action resolved. *Shepherd v. Greene (1986) 185 Cal. App. 3d 989, 993-994, 230 Cal. Rptr. 233*

Purpose of mandatory fee arbitration to alleviate disparity in bargaining power is not defeated by trial court's refusal to terminate arbitration procedures. *Manatt, Phelps, Rothenberg & Tunney v. Lawrence (1984) 151 Cal. App. 3d 1165, 1174-1175, 199 Cal. Rptr. 246*

Trial court is within its discretion in deciding that party waived its right to return to trial court prior to end of arbitration, notwithstanding allegation of new cause of action. *Manatt, Phelps, Rothenberg & Tunney v. Lawrence (1984) 151 Cal. App. 3d 1165, 1173-1174, 199 Cal. Rptr. 246*

Arbitration panel has authority to determine jurisdiction, including decision concerning whether mandatory proceeding to determine fee dispute is terminated. *Manatt, Phelps, Rothenberg & Tunney v. Lawrence (1984) 151 Cal. App. 3d 1165, 1171, 199 Cal. Rptr. 246*

[3] Confession of Judgment

Use of confession of judgment by attorney to collect fees for legal services is improper. *Hulland v. State Bar (1972) 8 Cal. 3d 440, 450, 105 Cal. Rptr. 152, 503 P.2d 608* (disciplinary action in which it was shown that attorney willfully failed to perform legal services for which he was retained and for which confession of judgment was executed)

[4] Contract for Employment

Reasonableness of fee agreement is to be judged not by hindsight but by situation as it appeared to parties when contract was made. *Setzer v. Robinson (1962) 57 Cal. 2d 213, 218, 18 Cal. Rptr. 524, 368 P.2d 124*

Contract of employment drawn by attorney is construable strongly against attorney. *Bennett v. Potter (1919) 180 Cal. 736, 740, 183 P. 156*

Attorney who agreed that client will fix amount of fee is not entitled to sue for compensation in quantum meruit but required to stand on contract and allege either client repudiated contract or refused to perform obligation to fix fee. *Roche v. Baldwin (1902) 135 Cal. 522, 525, 67 P. 903* ; *Goldberg v. City of Santa Clara (1971) 21 Cal. App. 3d 857, 861, 98 Cal. Rptr. 862* (recognizing rule but holding facts did not show any agreement)

Attorney is required to abide by fee agreement and is not permitted to ignore contract price and sue for value of services. *Reynolds v. Sorosis Fruit Company (1901) 133 Cal. 625, 630, 66 P. 21*

Agreement for conveyance of one half of recovered lands as attorney's fee was not void; attorney was equitable owner of one half of all lands recovered; client was trustee for attorney for one half of settlement fund when client secretly compromised recovery action for payment of money. *Hoffman v. Vallejo (1873) 45 Cal. 564, 572*

Remaindermen who were children of deceased successful will contestant are not contractually liable for attorney's fees since they were not third party beneficiaries of contingent fee contract between attorneys and contestant. *Estate of Ott (1979) 99 Cal. App. 3d 605, 612, 160 Cal. Rptr. 402*

Contract to render legal services on behalf of minority shareholder and director in proxy fight by former counsel for corporation who holds corporate confidences and secrets that are relevant to proxy fight is illegal and void. *Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 617, 120 Cal. Rptr. 253*

Client is bound by fee stipulated in employment contract even if services prove to be less valuable than parties had in mind when contract was made. *Berk v. Twentynine Palms Ranchos, Inc. (1962) 201 Cal. App. 2d 625, 637, 20 Cal. Rptr. 144*

Attorney is entitled to bring action for amount of fee agreed on when measure of compensation is fixed by agreement. *Hardy v. San Fernando Valley C. of C. (1950) 99 Cal. App. 2d 572, 577, 222 P.2d 314*

[5] Financing of Lawsuit by Third-Party Investor

When plaintiff has entered agreement with third-party investors under which investors will finance plaintiff's lawsuit and share in plaintiff's recovery, defendant lacks standing to object to agreement on public policy grounds in underlying action when financing agreement was unrelated to underlying action; trial court lacks authority to void plaintiff's third-party financing agreement on defendant's motion in underlying action. *Killian v. Millard (1991) 228 Cal. App. 3d 1601, 1605-1607, 279 Cal. Rptr. 877*

[6] Insolvency of Client

Attorney who is entitled to receive reasonable fee is allowed to take conveyance of client's property in controversy, when client has no other property, even though conveyance may render client insolvent. *Hedden v. Waldeck (1937) 9 Cal. 2d 631, 638-639, 72 P.2d 114* ; see *Hibernia Sav. & Loan Soc. v. Belcher (1935) 4 Cal. 2d 268, 273-274, 48 P.2d 681* (assignment of rents to pay fee upheld although client rendered insolvent)

[7] Interference With Contract

Attorney has cause of action against third person who intentionally interferes with contingent fee contractual relationship between client and attorney by unlawful means or by lawful means but without sufficient justification. *Herron v. State Farm Mutual Ins. Co. (1961) 56 Cal. 2d 202, 205-206, 14 Cal. Rptr. 294, 363 P.2d 310*

Attorney whose client was induced unlawfully by third party to breach contractual obligation to pay attorney contingent fee is entitled to sue interfering party for damages without suing client for breach of contract. *Skelly v. Richman (1970) 10 Cal. App. 3d 844, 857, 89 Cal. Rptr. 556*

Notice of percentage constituting attorney's contingent fee is not necessary to establish cause of action against third party based on unlawful interference with contractual relationship when third party had notice that contingent fee contract existed. *Skelly v. Richman (1970) 10 Cal. App. 3d 844, 859, 89 Cal. Rptr. 556*

Client's absolute right to terminate attorney-client relationship at any time does not justify third party's inducing client not to pay contingent fee that has been earned. *Skelly v. Richman (1970) 10 Cal. App. 3d 844, 862, 89 Cal. Rptr. 556*

Damages in attorney's action against third party based on unlawful interference with contractual relationship need not

be measured exactly by contingent fee that client was unlawfully induced not to pay; verdict for damages reasonable close to exact fee is proper. *Skelly v. Richman (1970) 10 Cal. App. 3d 844, 866, 89 Cal. Rptr. 556* (fee $2,491.65, verdict $2,500 upheld)

[8] Interference With Prospective Economic Advantage

Insurer and attorneys retained to defend insured are liable for intentional interference with prospective economic advantage of insured's discharged attorney where, after receiving notice of contractual lien for attorney fees and costs filed in case by discharged attorney, they pay over settlement or judgment funds to attorney's former client and client's new attorney with knowledge of lien. *Levin v. Gulf Ins. Group (1999) 69 Cal. App. 4th 1282, 1287-1288, 82 Cal. Rptr. 2d 228*

[9] Intervention

Attorney is authorized to intervene in client's action, to settle dispute over fee, only when employment contract gives attorney specific present interest in subject matter of action that might be jeopardized by discharge. *Kelly v. Smith (1928) 204 Cal. 496, 500, 268 P. 1057* ; *Hendricks v. Superior Court (1961) 197 Cal. App. 2d 586, 588-589, 17 Cal. Rptr. 364*

Attorney's compensation from client must be sought in independent action against client and not by application to court in which client's litigation is pending. *Hendricks v. Superior Court (1961) 197 Cal. App. 2d 586, 589, 17 Cal. Rptr. 364*

[10] Lien

Contract provision giving attorney lien on client's claim of a share in decedent's estate or any sum recovered by settlement establishes lien on estate assets when claim vindicated. *Estate of Kerr (1966) 63 Cal. 2d 875, 48 Cal. Rptr. 707, 409 P.2d 931* (client was sole beneficiary)

Attorney's lien under contingent fee contract is security interest in proceeds of litigation and equitable right to have fees and costs due him or her for services in lawsuit secured to him or her out of judgment or recovery. *Isrin v. Superior Court (1965) 63 Cal. 2d 153, 158-159, 45 Cal. Rptr. 320, 403 P.2d 728* (dictum reporting rule)

Lien for payment of fees out of proceeds of judgment may be created by agreement between attorney and client. *Haupt v. Charlie's Kosher Market (1941) 17 Cal. 2d 843, 845, 112 P.2d 627*

Attorney does not have lien for compensation in absence of agreement with client. *Echlin v. Superior Court (1939) 13 Cal. 2d 368, 373, 90 P.2d 63*

Attorney's lien has priority over medical lien, regardless of which lien was first in time. *Gilman v. Dalby (2009) 176 Cal. App. 4th 606, 616-620, 98 Cal. Rptr. 3d 231*

Insurer and attorneys retained to defend insured are liable for intentional interference with prospective economic advantage of insured's discharged attorney where, after receiving notice of contractual lien for attorney fees and costs filed in case by discharged attorney, they pay over settlement or judgment funds to attorney's former client and client's new attorney with knowledge of lien. *Levin v. Gulf Ins. Group (1999) 69 Cal. App. 4th 1282, 1288, 82 Cal. Rptr. 2d 228*

Attorneys' contractual lien on settlement proceeds from tort claim is not governed by Article 9 of *Uniform Commercial Code. Bluxome Street Associates v. Fireman's Fund Ins. Co. (1988) 206 Cal. App. 3d 1149, 1155-1156, 254 Cal. Rptr. 198*

Contractual lien for attorney's fees and costs entered into prior to initiating legal action has priority over judgment creditor's lien created pursuant to *Code Civ. Proc. § 708.410*; fact that purpose of judgment creditor's lien was to reimburse state government for paying out client's child support arrearages does not justify new exception to "first in time, first in right" rule set forth in *Civ. Code § 2897*. *Cappa v. F & K Rock & Sand, Inc. (1988) 203 Cal. App. 3d 172, 175-176, 249 Cal. Rptr. 718*

Attorney does not have standing to appeal judgment purporting to rule on attorney's Notice of Attorney's Lien when notice was filed in underlying action to which attorney was not a party. *In re Marriage of Tushinsky (1988) 203 Cal. App. 3d 136, 143, 249 Cal. Rptr. 611*

Associate attorney as not entitled to lien on any recovery from plaintiff based on attorney's agreement between associate and plaintiff's attorney for work on plaintiff's case. *Trimble v. Steinfeldt (1986) 178 Cal. App. 3d 646, 650-651, 224 Cal. Rptr. 195*

Although attorney's lien on client's recovery has priority over federal tax liens pursuant to *I.R.C. § 6323(b)(8)*, court as properly refusing to uphold attorney's lien against judgment debtor when attorney failed to give judgment debtor sufficient notice of his lien before judgment debtor paid amount of judgment to Internal Revenue Service in response to government's tax levy. *Bree v. Beall (1981) 114 Cal. App. 3d 650, 659-661, 171 Cal. Rptr. 73*

Contingent fee contract containing no words as to lien, security, or assignment as not creating, as a matter of law, lien securing attorney's fees; question whether such contract creates a lien as one of fact depending on intention of parties. *Gelfand, Greer, Popko & Miller v. Shivener (1973) 30 Cal. App. 3d 364, 370, 105 Cal. Rptr. 445* ; *Wagner v. Sariotti (1943) 56 Cal. App. 2d 693, 697, 133 P.2d 430*

Contingent fee agreement as sufficient to create lien on recovery in favor of attorney if fee is percentage of *fund* recovered, rather than percentage of amount (i.e., judgment) recovered. *Skelly v. Richman (1970) 10 Cal. App. 3d 844, 865, 89 Cal. Rptr. 556* (dictum)

[11] Negligence

Effect of attorney's negligence on right to compensation and measure thereof. *Estate of Kruger (1900) 130 Cal. 621, 626, 63 P. 31*

Except for additur, recovery of attorney's fees as part of damages as unavailable after plaintiff stipulated that prevailing party should recover reasonable attorney's fees but failed to provide instructions and a form of verdict that would have assisted jury and jury's verdict did not include attorney's fees. *Clark Equipment Co. v. Mastelotto, Inc. (1978) 87 Cal. App. 3d 88, 98-99, 150 Cal. Rptr. 797*

[12] Out-of-State Attorney

Practice before federal courts is not governed by state court rules and, as such, bankruptcy attorney admitted before federal district court could not be denied fees simply because attorney was not licensed to practice in state courts. *In re Poole (9th Cir. 2000) 222 F.3d 618, 622*

Attorney licensed in another state but not licensed in California who comes to California to advise client, but not to

represent him, in bankruptcy proceeding pending in federal court in California, as not subject to regulation under State Bar Act in so doing and as entitled to recover from client, on basis of implied agreement to pay fee, reasonable value of his services rendered to client in *California. Cowen v. Calabrese (1964) 230 Cal. App. 2d 870, 872-873, 41 Cal. Rptr. 441*

[13] Pleading

Complaint in quantum meruit by discharged attorney as not required to allege contract, repudiation or rescission, but required simply to allege common count. *Oliver v. Campbell (1954) 43 Cal. 2d 298, 305, 273 P.2d 15* (dictum in action by attorney to collect fee after discharge)

Award of attorney's fees in connection with petition for family allowance out of decedent's estate on behalf of minor child as proper. *Estate of Filtzer (1949) 33 Cal. 2d 776, 781-782, 205 P.2d 377*

Probate court as not authorized in absence of express statutory provision to order executors of decedent's estate to pay successful will contestant's attorney's fees out of contestant's distributive share; contestant who is beneficiary of testamentary trust as having no interest subject to lien for attorney's fees. *Estate of Muhammad (1971) 16 Cal. App. 3d 726, 731-733, 94 Cal. Rptr. 856*

Propriety of award of attorney's fees on petition for family allowance on behalf of minor child. *Estate of Barkdull (1969) 275 Cal. App. 2d 729, 731, 80 Cal. Rptr. 317*

[14] Reasonable Value

Attorney as entitled to reasonable value of services when fee agreement is invalid. *Calvert v. Stoner (1948) 33 Cal. 2d 97, 105, 199 P.2d 297* (dictum)

Attorney as entitled to recover reasonable value of services rendered when contract of employment lacks any provision by which to measure compensation. *Elconin v. Yalen (1929) 208 Cal. 546, 549, 282 P. 791*

Trial judge as empowered to use own experience and judgment concerning reasonable value of legal services with or without aid of testimony as to value. *Elconin v. Yalen (1929) 208 Cal. 546, 549-550, 282 P. 791* ; *Clejan v. Reisman (1970) 5 Cal. App. 3d 224, 241, 84 Cal. Rptr. 897*

Minor client as entitled to disaffirm contract of employment with attorney on payment of reasonable value of services rendered to date of disaffirmance. *Spencer v. Collins (1909) 156 Cal. 298, 308, 104 P. 320*

Assignment by criminal defendant to attorney of all money and property seized by law enforcement officers after arrest as presumptively fraudulent when value of assignment was in excess of $200,000 and Franchise Tax Board and district attorney held claims against property. *Franchise Tax Board v. Superior Court (1985) 168 Cal. App. 3d 970, 975, 215 Cal. Rptr. 36*

Major factors to be considered in determining reasonableness of attorney's fees. *Clejan v. Reisman (1970) 5 Cal. App. 3d 224, 241, 84 Cal. Rptr. 897*

Fixing of amount of allowable attorney's fees as resting in sound discretion of trial court. *Kanner v. Globe Bottling Co. (1969) 273 Cal. App. 2d 559, 569, 78 Cal. Rptr. 25* ; *Scott v. Travelodge Corp. (1968) 265 Cal. App. 2d 881, 887, 71 Cal. Rptr. 547*

[15] Statute of Limitations

When attorney spelled out terms of fee agreement in letter to clients and clients orally accepted terms of agreement, four-year statute of limitations under *Code Civ. Proc. § 337(1)* as applicable in attorney's subsequent action against clients for breach of agreement. *E.O.C. Ord, Inc. v. Kovakovich (1988) 200 Cal. App. 3d 1194, 1199, 246 Cal. Rptr. 456*

[16] Trust Funds

Possessory lien for attorney's fees, if such exists in California, as not attaching to property coming into attorney's hands as trustee. *Hulland v. State Bar (1972) 8 Cal. 3d 440, 447, 105 Cal. Rptr. 152, 503 P.2d 608*

Attorney as not permitted to unilaterally determine fee for services and withdraw such from trust funds held for client without showing that transaction is fair and regular and is agreed to by client voluntarily and with full knowledge of facts. *Trafton v. Youngblood (1968) 69 Cal. 2d 17, 28, 69 Cal. Rptr. 568, 442 P.2d 648*

[17] Undue Influence

Presumption of undue influence by attorney applicable to contracts with client securing attorney advantage from client, as not applicable to employment contract for services and compensation; confidential relationship as not existing until after such contract is made. *Cooley v. Miller & Lux (1909) 156 Cal. 510, 524, 105 P. 981* ; *Berk v. Twentynine Palms Ranchos, Inc. (1962) 201 Cal. App. 2d 625, 637, 20 Cal. Rptr. 144*

Attorney as unable to recover fee from conservator when retainer and services connected with improper influence exerted by friend of conservatee. *Conservatorship of Chilton (1970) 8 Cal. App. 3d 34, 41-43, 86 Cal. Rptr. 860*

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§ 72.614 Attorney General Opinions

State as not responsible for proportionate share of attorney's fees and costs for legal proceedings in which state recovers money through lien under *Gov. Code § 13966(b)* (providing for financial assistance of up to $10,000 from state for crime victim who meets certain qualifications) when victim/claimant is active litigant responsible for recovery. *64 Ops. Cal. Att'y Gen. 540 (1981)*

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[Reserved]

§§ 72.617[Reserved]

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A. Terminating the Attorney-Client Relationship

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§ 72.630 Attorney Withdrawal

Considerations for Attorney Contemplating Rejection or Withdrawal From Case or Employment:

☐ Attorney of record in action or proceeding: written consent filed with court or order based on noticed motion required [*see § 72.372[1]*].

☐ Attorney in transactional matters: consider whether notice to third parties is necessary in addition to notice to client, e.g., parties to contract or lease, to whom attorney has been identified as client's agent.

☐ Rejection of, or withdrawal from, employment or case should be confirmed by a certified letter to the client, return receipt requested, which should include the following:

- ☐ Clear statement that attorney's law firm is not taking or going to continue representing the client in that case.
- ☐ Statement advising client to seek other legal counsel as soon as possible to pursue his or her rights.
- ☐ Statement advising client of any critical time limits that must be adhered to in order to keep a claim viable.

☐ Avoid stating the exact legal reason for rejecting a claim, or the exacts legal reasons for concluding that the case lacks merit or that certain defendants are not liable.

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[Reserved]

§§ 72.631[Reserved]

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PART V. FORMS
A. Conflicts Of Interest

7-72 California Forms of Pleading and Practice--Annotated § 72.650

§ 72.650 Written Informed Consent by Former Client to Adverse Representation by Former Attorney [Cal. Rules Prof. Conduct, Rule 3-310(E)]

[1] FORM Written Informed Consent by Former Client to Adverse Representation by Former Attorney [Cal. Rules Prof. Conduct, Rule 3-310(E)]

_____[*Name of former client*], former client of _____[*name of attorney*], Attorney, gives his/her informed consent to Attorney for Attorney to _____ [*specify action to be taken by attorney that is potentially adverse to former client, e.g.,* represent _____'s (*name of former client*) wife in a dissolution action against _____ (*name of former client*)]. Attorney has fully informed _____[*name of former client*] of the potentially adverse nature of such representation because of the potential for the disclosure of confidential information concerning _____[*name of former client*], which was obtained by Attorney while Attorney represented _____[*name of former client*] [and _____ (*name of any other parties represented with former client*)], in that Attorney had access to information of a confidential nature by virtue of such representation.

_____[*Name of former client*] acknowledges that he/she has read the foregoing consent carefully, that he/she fully understands that the contemplated representation of _____[*specify party to be represented by attorney*] by Attorney is potentially adverse to _____[*name of former client*] for the foregoing reasons, and _____[*name of former client*] nevertheless knowingly and voluntarily consents to such representation by Attorney.
Dated: _____.

_____ [*signature of former client*]
_____ [*typed name*]

[2] Use of Form

This form of written consent is for use by an attorney to obtain the consent of a former client to a potentially adverse representation by the attorney [*see Cal. Rules Prof. Conduct, Rule 3-310(E)*]. For further discussion of when consent

must be obtained, see the Introduction in Subpart E under Rule 3-310(E): Representation Adverse to Present or Former Client When Confidential Information Acquired--Overview of Rule et seq., and in Subpart F under Disclosing and Managing Conflicts Under Rule 3-310(E), *above*.

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§ 72.651 Disclosure and Consent to Joint Representation [Cal Rules Prof. Conduct, Rule 3-310(C)]--Joint Representation of Defendants

[1] FORM Disclosure and Consent to Joint Representation [Cal Rules Prof. Conduct, Rule 3-310(C)]--Joint Representation of Defendants

Re: _____[*identify lawsuit*]

Dear _____[*names of all clients*]:

You have asked our firm to represent each of you in the lawsuit referenced above. Because we will be representing all of you in this matter, the California Rules of Professional Conduct require that we make certain disclosures to you and obtain your informed written consent to our representation of all of you together.

Absence of Conflicts of Interest. At this stage, it does not appear that there is a conflict of interest that would prevent us from representing you. Each of you shares the same defenses to the claims which have been alleged by the plaintiffs. Nevertheless, it is possible that a conflict of interest could arise in the future which would require us to withdraw.

Request for Common Instructions. One way in which a conflict of interest could occur is if we receive conflicting instructions from you. For example, if one of you instructs us to take certain actions on your behalf which another of you instructs us not to take, we would be placed in a position where we could not follow one of the instructions without violating the other. That situation, if unresolved, could create a conflict of interest that would require each of you to seek new attorneys. It is therefore important that we receive a common set of instructions from you that we can follow so that a conflict of interest does not arise that would require our withdrawal.

Pursuit of Common Objectives. Another way in which a conflict could arise is if in the course of litigation, you develop inconsistent defenses or objectives. For example, if one of you wants us to pursue a defense that could adversely affect the defenses of the rest, a conflict of interest would exist that could require us to withdraw as your counsel. It will therefore be important during the course of our engagement to make sure that we are pursuing common objectives and

defenses for all of you so that we will not be required to withdraw later. At the same time, if any of you determine that pursuing a common objective is not in your best interests, we may be required to withdraw from representing you.

Indemnification Rights. You should be aware that each of you may have indemnification rights against the others. Because we are representing your common interest in this lawsuit, we cannot represent or advise you with respect to those claims. We strongly urge you to consult separate counsel with respect to any such claims. To the extent that you choose to assert claims against each other in this lawsuit, we again, may be required to withdraw.

Preventing Potential Conflicts From Becoming Real. At present it does not appear that any of these conflict of interest situations exist. Nevertheless, we cannot rule out the possibility that these conflicts could arise during the course of the representation. Since changing counsel in the midst of litigation can be expensive and detrimental to your interests, it is important that you are comfortable with us representing all of you together in light of these potential conflicts of interest. In addition, we will need you to work with us through the course of the litigation to keep these potential conflicts from becoming real.

Disclosure of Information to All Clients. In addition, because we represent all of you together, each of you has a right to learn the substance of the communications that we have with the rest of you. In other words, if one of you tells us something, that information may be disclosed to the rest of you. Although the attorney-client privilege will bar disclosure of our conversations with any of you to the outside world, the privilege does not bar disclosure to the rest of you of what any one of you tells us. Indeed, if the information is significant, we may have a duty to disclose information from or about one of you to the rest of you.

Comfort Zone. Here again, it is extremely important that you are comfortable with this arrangement. If each of you were separately represented, your lawyers would not be required to disclose your communications with them to the rest of you. Each of you needs to consider whether you will be as candid with us as you would be with a lawyer representing your interests alone. If you believe that you would not be comfortable with this arrangement or that there would be information that you would be unwilling to disclose to us, because you would not want to disclose to the others, you should obtain your own separate counsel.

Access to Case File. As you know, during the course of this lawsuit, we will be maintaining a file which will contain original correspondence, evidence, pleadings and other documentation. In the event we are required to withdraw from representing all of you, we will retain the original file until we receive a common set of instructions to transmit the file somewhere else. At your request, we will provide you or your new counsel with a copy of the file.

Costs and Attorneys Fees. As you know, _____[*name of paying client*] has agreed to pay our attorneys' fees and costs incurred in defending the rest of you in this action. The California Rules of Professional Conduct require us to obtain consent from the rest of you to this arrangement. The Rules are intended to allow the rest of you to consider whether the fact that _____[*name of paying client*] is paying our fees will interfere with our ability to represent the rest of you with the same degree of loyalty and independent judgment that you would expect from a lawyer you were paying. In other words, the rest of you should consider whether we would tend to favor the interests of _____[*name of paying client*] because _____[*name of paying client*] is paying our fees in this matter. While this risk exists, it is our intention to represent all of you without regard to which of you is paying our fees. Nevertheless, each of you must be comfortable with this arrangement.

Questions. Please forgive the relative length and formality of this letter. However, we want to be certain that you are fully informed about these important issues and that you are comfortable proceeding with our representation of all of you. Please do not hestitate to call if you have any questions about this letter. In addition, if you are having any trouble understanding the nature of the disclosures in this letter, you may want to consult with a separate lawyer.

Informed Consent. Once you had an opportunity to review this letter, kindly sign and date the enclosed copy of this

letter where indicated below, and return the signed copy to me in the enclosed self-addressed and stamped envelope. By signing this letter, you are agreeing to our representing all of you jointly in light of the disclosures above.

Thanks for your cooperation in connection with this matter.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

I have read the contents of this letter and consent to the firm representing me on the terms set forth in this letter.

_____ [*date*]
_____ [*signature of client*]
_____ [*typed name*]

[2] Use of Form

This form of disclosure is for use by an attorney to obtain the written consent of a group of defendants to joint representation by the attorney [*see Cal. Rules Prof. Conduct, Rule 3-310(C)*]. The form was provided by Stanley W. Lamport, Esq. Representing joint clients presents unique problems, and the attorney should carefully consider whether or not to do so. For further discussion of the factors involved, and of when consent must be obtained, and what disclosure are required, see *§§ 72.111* and *72.132*.

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Volume 7: Attorney Practice and Ethics thru Auctions and Auctioneers-Chs.72-79
Chapter 72 ATTORNEY PRACTICE AND ETHICS
PART V. FORMS
A. Conflicts Of Interest

7-72 California Forms of Pleading and Practice--Annotated § 72.652

§ 72.652 Complaint [Bus. & Prof. Code § 6175.4] by Client for Damages for Financial Products Improperly Sold by Attorney to Client--Action [to Recover Money Damages and/or to Restore Property and/or to Enjoin Violation of Law and/or for Punitive Damages]

[1] FORM Complaint [Bus. & Prof. Code § 6175.4] by Client for Damages for Financial Products Improperly Sold by Attorney to Client--Action [to Recover Money Damages and/or to Restore Property and/or to Enjoin Violation of Law and/or for Punitive Damages]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	[_____ AND RESTORATION OF
through _____],	)	PROPERTY (AND *or* OR) ENJOINING OF VIOLA-
Defendant(s).	)	TION OF LAW (AND *or* OR) PUNITIVE DAM-
	)	AGES]
		(Financial Products Improperly Sold by Attorney to Client [*Bus. & Prof. Code § 6175.4*])
		[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence of plaintiff*].

2. Plaintiff is, and at all times herein mentioned was, an _____[elder *or* dependent elder] adult within the meaning of *Business & Professions Code Section 6175(c)*.

3. Defendant _____[*name*] is, and at all times herein mentioned was, an attorney at law, _____[duly admitted and practicing in the State of California *or allege out-of-state licensing of defendant*], and residing in _____ County, California.

[4. Plaintiff is ignorant of the true names and capacities of defendants sued as Does I-_____, inclusive, and therefore sues those defendants by fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants is legally responsible in some manner for the actions herein alleged, and that plaintiff's damages were proximately caused by their misconduct.)]

[5. Defendant _____ (*name*) is, and at all times mentioned was, the agent of defendant _____ (*name*) and in doing the things herein alleged was acting within the scope of his/her authority.]

6. On or about _____[*date*], at _____[*address*], California, defendant acted as a broker for a commission in selling plaintiff _____[*specify financial product sold by defendant to plaintiff*], which is a financial product within the meaning of *Business & Professions Code Section 6175(d)*, [a copy of which is attached hereto and incorporated herein as Exhibit _____,] for which plaintiff agreed to pay defendant the sum of $_____. [This sum included $_____, which was the _____ (commission *or* fee) paid to defendant as compensation for selling plaintiff _____ (*specify financial product sold by defendant to plaintiff*).]

7. The _____[transaction *or* acquisition] and the terms of defendant's sale of _____[*specify financial product sold by defendant to plaintiff*] to plaintiff were not fair and reasonable to plaintiff, as required by law. _____[*Specify facts of transaction including, if appropriate under facts, applicable sections below*].

[*EITHER*]

8. At the time plaintiff sold defendant _____[*specify financial product sold by defendant to plaintiff*], plaintiff did not have, and had not had within the preceding three years, an attorney-client relationship with defendant, as required by law.

[*OR*]

8. At the time plaintiff sold defendant _____[*specify financial product sold by defendant to plaintiff*], plaintiff did not provide a written disclosure to defendant as required by law.

[*OR*]

8. At the time plaintiff sold defendant _____[*specify financial product sold by defendant to plaintiff*], plaintiff did not provide, as required by law, a valid written disclosure to defendant because the disclosure did not meet the legal requirement(s) that the disclosure [a copy of which is attached hereto and incorporated herein as Exhibit _____] _____ [be a separate document, appropriately entitled, in 12-point print with

one inch of space on all borders *and/or* be signed by the defendant _____ (*or the conservator, guardian, or agent under a valid durable power of attorney*) *and/or* state that the lawyer, _____ (*defendant's name*), will receive a commission and set forth the amount of the commission and the actual percentage rate of the commission (if any) *and/or*, because the actual amount of the commission could not be ascertained at the outset of the transaction, include the actual percentage rate of the commission or the alternate basis upon which the commission would be computed, including an example of how the commission would be calculated *and/or* identify the source of the commission and the relationship between the source of the commission and the person receiving the commission *and/or* be presented to the client at or prior to the time the recommendation of the financial product was made *and/or* advise the client, _____ (*plaintiff's name*), that the client could obtain independent advice regarding the purchase of the financial product and would be given a reasonable opportunity to seek that advice *and/or* contain a statement that the financial product may be returned to the issuing company within 30 days of receipt by the client for a refund as set forth in Section 10127.10 of the Insurance Code *and/or* contain a statement that if the purchase of the financial product is for the purposes of Medi-Cal planning, the client has been advised of other appropriate alternatives, including spend-down strategies, and of the possibility of obtaining a fair hearing or obtaining a court order].

9. Plaintiff has suffered actual and substantial physical, emotional, or economic damage resulting from the defendant's conduct. _____[*Specify nature of damage*].

10. Defendant knew or should have known that defendant's conduct was directed to one or more senior citizens or disabled persons.

11. Defendant's conduct caused one or more senior citizens or disabled persons, including plaintiff, to suffer _____[*specify one or more:* loss or encumbrance of a primary residence, principal employment, or source of income *and/or* substantial loss of property set aside for retirement, or for personal or family care and maintenance *and/or* substantial loss of payments received under a pension or retirement plan or a government benefits program *and/or* substantial loss of assets essential to the health or welfare of the senior citizen or disabled person].

12. Plaintiff is substantially more vulnerable than other members of the public to the defendant's conduct because of plaintiff's _____[*specify one or more:* age *and/or* poor health or infirmity *and/or* impaired understanding *and/or* restricted mobility *and/or* disability] and actually suffered substantial _____[*specify one or more:* physical *and/or* emotional *and/or* economic] damage resulting from defendant's conduct.

WHEREFORE, plaintiff prays for judgment against defendant as follows:

1. For actual damages in the sum of $_____[*$5,000 or more required*];

2. For punitive damages in the sum of $_____;

3. For restoration of plaintiff's property _____[*specify property*];

4. For an order enjoining plaintiff's violation of law;

5. For special damages in the sum of $_____[*available for Second Cause of Action only, $10,000 or less required*];

6. For other relief as the court deems proper.
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Add, if desired*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

By: _____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This complaint is for use in an action to recover damages, or for injunctive relief, against an attorney who, as a broker for commission, has improperly sold financial products, including long-term insurance, life insurance, and annuities governed by the Insurance Code or its successors, to a client who is an elder or dependent elder in violation of *Bus. & Prof. Code § 6175*. The complaint may allege special physical, emotional or financial damages under the Second Cause of Action.

The complaint contains the following general allegations:

- The plaintiff's residence (Paragraph 1).
- The proper venue for the action, alleging the residence of an individual defendant or the principle place of business of a corporate defendant (Paragraph 3).
- An optional fictitious name allegation for use if multiple defendants are sued and plaintiff is unaware of their names and capacities (Paragraph 4).
- An optional agency allegation for use if multiple defendants are sued and liability is sought to be imposed on the basis of respondeat superior (Paragraph 5).

The complaint specifically alleges the following:

- Plaintiff is an elder or dependent adult as specified in *Bus. & Prof. Code § 6175(c)* (Paragraph 2).
- Defendant is an attorney at law (Paragraph 3).

- Defendant acted as a broker for a commission in selling plaintiff a financial product covered by *Bus. & Prof. Code § 6175* for a specific sum, including the plaintiff's commission or fee on the sale (Paragraph 6).

- The transaction or acquisition and the terms of defendant's sale of the financial product to plaintiff were not fair and reasonable to plaintiff, as required by law (Paragraphs 7, 8).

The various alternative versions of Paragraph 8 set forth the specific requirements under *Bus. & Prof. Code § 6175* that must be met by an attorney in the sale of financial products to elder and dependent elder clients, and specifically allege that those requirements have not been met. The attorney should select and include in the complaint only those requirements the defendant attorney has allegedly breached:

- The first Paragraph 8 specifically alleges that at the time defendant sold a financial product to the plaintiff, the plaintiff did not have, and had not had within the preceding three years, an attorney-client relationship with defendant, as required by law.

- The second Paragraph 8 specifically alleges that at the time defendant sold a financial product to defendant, the defendant did not provide a written disclosure to plaintiff as required by law.

- The third Paragraph 8 specifically alleges that at the time defendant sold a financial product to plaintiff, defendant did not provide, as required by law, a valid written disclosure to plaintiff because the disclosure did not meet one or more of the following legal requirements under *Bus. & Prof. Code § 6175.3*:

  - That the disclosure be a separate document, appropriately entitled, in 12-point print with one inch of space on all borders.

  - That the disclosure be signed by the defendant or the plaintiff or the plaintiff's conservator, guardian, or agent under a valid durable power of attorney.

  - That the disclosure state that the lawyer, the defendant, will receive a commission and set forth the amount of the commission and the actual percentage rate of the commission (if any).

  - That the disclosure include the actual percentage rate of the commission or the alternate basis upon which the commission would be computed, including an example of how the commission would be calculated, where the actual amount of the commission could not be ascertained at the outset of the transaction.

  - That the disclosure identify the source of the commission and the relationship between the source of the commission and the person receiving the commission.

  - That the disclosure be presented to the client at or prior to the time the recommendation of the financial product was made.

  - That the disclosure advise the client, the plaintiff, that he or she could obtain independent advice regarding the purchase of the financial product and would be given a reasonable opportunity to seek that advice.

- That the disclosure contain a statement that the financial product may be returned to the issuing company within 30 days of receipt by the client, the plaintiff, for a refund as set forth in *Ins. Code § 10127.10*.

- That the disclosure contain a statement that if the purchase of the financial product is for the purposes of Medi-Cal planning, the client has been advised of other appropriate alternatives, including spend-down strategies, and of the possibility of obtaining a fair hearing or obtaining a court order.

- Plaintiff has suffered actual and substantial physical, emotional, or economic damage resulting from the defendant's conduct (Paragraph 9).

- Defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons (Paragraph 10).

- Defendant's conduct caused one or more senior citizens or disabled persons, including plaintiff, to suffer one or more of the following (Paragraph 11):

  - Loss or encumbrance of a primary residence, principal employment, or source of income.

  - Substantial loss of property set aside for retirement, or for personal or family care and maintenance.

  - Substantial loss of payments received under a pension or retirement plan or a government benefits program.

  - Substantial loss of assets essential to the health or welfare of the senior citizen or disabled person.

- Plaintiff is substantially more vulnerable than other members of the public to the defendant's conduct because of one or more of the following (Paragraph 12):

  - Age

  - Poor health or infirmity

  - Impaired understanding

  - Restricted mobility, or disability.

Under *Bus. & Prof. Code § 6175.4(b)*, the trier of fact must find that one or more of the factors set forth in Paragraphs 11-13, which restate the factors set forth in *Civ. Code § 3345* [*see Bus. & Prof. Code § 6175.4(b)*], has occurred to be able to award the plaintiff damages under *Bus. & Prof. Code § 6175.4*.

[3] Jurisdiction

The superior court has jurisdiction of the action even for a limited civil case (amount in controversy, exclusive of interest, is $25,000 or less) [*Code Civ. Proc. §§ 85, 85.1, 86(a)(1)*].

In limited civil cases the caption must state whether the demand exceeds or does not exceed $10,000. When a limited civil case is brought in the superior court, the caption must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(8), (9)*].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case in the superior court [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[5] Cross References

For alternative allegations as to capacity and residence of the parties, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction, Inconvenient Forum, and Appearances* ,

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

[6] State Statutes

Requirements to be met in the sale of financial products by attorneys to elder and dependent elder clients. *Bus. & Prof. Code §§ 6175-6175.4*

Violation of *Bus. & Prof. Code §§ 6175-6175.4* constitutes disciplinary violation by attorney. *Bus. & Prof. Code § 6175.5*

Court duty to report violation of *Bus. & Prof. Code §§ 6175-6175.4* by attorney to appropriate licensing agencies. *Bus. & Prof. Code § 6175.6*

Definition of "elder" and "dependent elder." *Welf. & Inst. Code § 15600 et seq.*

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[Reserved]

§§ 72.653[Reserved]

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B. Creation And Scope Of Attorney-Client Relationship

7-72 California Forms of Pleading and Practice--Annotated § 72.670

§ 72.670 State Bar Sample Fee Agreement--Short Hourly Fee Agreement [Bus. & Prof. Code § 6148]--Litigation

[1] FORM State Bar Sample Fee Agreement--Short Hourly Fee Agreement [Bus. & Prof. Code § 6148]--Litigation

_____[*name of law firm or attorney*]

_____[*address*]

_____[*telephone number*]

_____[*date*]

ATTORNEY-CLIENT FEE CONTRACT

This ATTORNEY-CLIENT FEE CONTRACT ("Contract") is entered into by and between _____[*name of client*] ("Client") and _____[*name of law firm or attorney*] ("Attorney").

1. CONDITIONS. This Contract will not take effect, and Attorney will have no obligation to provide legal services, until Client returns a signed copy of this Contract and pays the deposit called for under Paragraph 4.

2. SCOPE AND DUTIES. Client hires Attorney to provide legal services in connection with _____[*describe matter in which attorney is to provide services*]. Attorney shall provide those legal services reasonably required to represent Client, and shall take reasonable steps to keep Client informed of progress and to respond to Client's inquiries. Client shall be truthful with Attorney, cooperate with Attorney, keep Attorney informed of developments, abide by this Contract, pay Attorney's bills on time, and keep Attorney advised of Client's address, telephone number, and whereabouts.

[3. INSURANCE DISCLOSURE. Attorney does not meet any of the criteria for errors and omissions (malpractice) coverage set forth in *Business and Professions Code Section 6148*.]

4. DEPOSIT. Client shall deposit $_____ by _____[*date*]. The sum will be deposited in a trust account to be used to pay _____[costs and expenses only *or* costs and expenses and fees for legal services]. Client hereby authorizes Attorney to withdraw sums from the trust account to pay the _____[costs and expenses *or* costs and expenses and fees] Client incurs. Any unused deposit at the conclusion of Attorney's services will be refunded.

5. LEGAL FEES. Client agrees to pay for legal services at the following rates: partners-_____/hour; associates-_____/hour; paralegals-_____/hour; law clerks- _____/hour; and for other personnel as follows, _____[*specify rates to be paid to others providing services to client*]. Attorney charges in minimum units of _____ hours.

6. COSTS AND EXPENSES. In addition to paying legal fees, Client shall reimburse Attorney for all costs and expenses incurred by Attorney, including but not limited to process servers' fees, fees fixed by law or assessed by courts or other agencies, court reporters' fees, long distance telephone calls, messenger and other delivery fees, postage, in-office photocopying at $_____ per page, parking, mileage at $_____ per mile, investigation expenses, consultants' fees, expert witness fees, and other similar items. Client authorizes Attorney to incur all reasonable costs and to hire any investigators, consultants, or expert witnesses reasonably necessary in Attorney's judgment, unless one or both of the clauses below are initialed by Client and Attorney.

_____ Attorney shall obtain Client's consent before incurring any cost in excess of $_____.

_____ Attorney shall obtain Client's consent before retaining outside investigators, consultants, or expert witnesses.

7. STATEMENTS. Attorney shall send Client periodic statements for fees and costs incurred. Client shall pay Attorney's statements within _____ days after each statement's date. Client may request a statement at intervals of no less than 30 days. On Client's request Attorney will provide a statement within 10 days.

8. LIEN. Client hereby grants Attorney a lien on any and all claims or causes of action that are the subject of Attorney's representation under this Contract. Attorney's lien will be for any sums due and owing to Attorney at the conclusion of Attorney's services. The lien will attach to any recovery Client may obtain, whether by arbitration award, judgment, settlement or otherwise.

9. DISCHARGE AND WITHDRAWAL. Client may discharge Attorney at any time. Attorney may withdraw with Client's consent or for good cause. Good cause includes Client's breach of this Contract, Client's refusal to cooperate with Attorney or to follow Attorney's advice on a material matter, or any other fact or circumstance that would render Attorney's continuing representation unlawful or unethical.

10. CONCLUSION OF SERVICES. When Attorney's services conclude, all unpaid charges shall become immediately due and payable. After Attorney's services conclude, Attorney will, on client's request, deliver Client's file to Client, along with any client funds or property in Attorney's possession.

11. DISCLAIMER OF GUARANTEE. Nothing in this Contract and nothing in Attorney's statements to Client will be construed as a promise or guarantee about the outcome of Client's matter. Attorney makes no such promises or guarantees. Attorney's comments about the outcome of Client's matter are expressions of opinion only.

12. EFFECTIVE DATE. This Contract will take effect when Client has performed the conditions stated in Paragraph 1, but its effective date will be retroactive to the date Attorney first provided services. The date at the beginning of this Contract is for reference only. Even if this Contract does not take effect, Client will be obligated to pay Attorney the reasonable value of any services Attorney may have performed for Client.

_____ [*Name of law firm or attorney*]
By: _____ [*signature*]
_____ [*typed name*]
_____ [*signature*]
_____ [*client's typed name, address, and*]
[*telephone number*]

[2] Use of Form

This form is a short hourly fee agreement for use in relatively small, routine litigation matters in which billing will be on an hourly basis. It is adopted from § 72.650 of the Sample Written Fee Agreement Forms approved by the State Bar Board of Governors. Use of the State Bar sample forms is not mandatory, and the forms enjoys no preferred status.

[3] When Written Agreement Is Required

A written agreement must be used when a non-contingency case involves a matter in which it is reasonably foreseeable that the total fees and expenses will exceed $1,000, and the client is not a corporation, under *Bus. & Prof. Code § 6148*. When mandatory, the fee agreement must specify the basis of compensation, including, but not limited to, hourly rates, statutory or flat fees, and other standard rates, fees, and charges applicable to the case [*see* Paragraphs 5 and 6], the nature of the legal services to be provided [*see* Paragraph 2], the respective responsibilities of the attorney and client [*see* Paragraphs 1, 2, 4, 7-12], and if the attorney does not meet the criteria of *Bus. & Prof. Code § 6148(a)(4)*, relating to errors and omissions insurance, a statement disclosing that fact [*see* Optional Paragraph 3; for discussion, *see § 72.192[4][b]*].

At the time the agreement is entered into, the attorney must provide a duplicate copy of the agreement, signed by both the attorney and the client (or the client's guardian or representative), to the client (or the client's guardian or representative) [*Bus. & Prof. Code § 6148(a)*].

For discussion of fee agreements in general, see *§ 72.192*.

For a form of long agreement, *see § 72.673*. For contingent fee agreements, *see §§ 72.675* and *72.676*.

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7-72 California Forms of Pleading and Practice--Annotated § 72.671

§ 72.671 State Bar Sample Fee Agreement--Short Hourly Fee Agreement [Bus. & Prof. Code § 6148]--Nonlitigation

[1] FORM State Bar Sample Fee Agreement--Short Hourly Fee Agreement [Bus. & Prof. Code § 6148]--Nonlitigation

_____[*name of law firm or attorney*]

_____[*address*]

_____[*telephone number*]

_____[*Date*]

ATTORNEY-CLIENT FEE CONTRACT

This ATTORNEY-CLIENT FEE CONTRACT ("Contract") is entered into by and between _____[*name of client*] ("Client") and _____[*name of law firm or attorney*] ("Attorney").

1. CONDITIONS. This Contract will not take effect, and Attorney will have no obligation to provide legal services until Client returns a signed copy of this Contract and pays the deposit called for under Paragraph 4.

2. SCOPE AND DUTIES. Client hires Attorney to provide legal services in connection with _____[*describe matter in which attorney is to provide services*]. Attorney shall provide those legal services reasonably required to represent Client, and shall take reasonable steps to keep Client informed of progress and to respond to Client's inquiries. Attorney's services will not include litigation of any kind, whether in court, in administrative hearings, or before government agencies or arbitration tribunals. Client shall be truthful with Attorney,

cooperate with Attorney, keep Attorney informed of developments, abide by this Contract, pay Attorney's bills on time, and keep Attorney advised of Client's address, telephone number, and whereabouts.

[3. INSURANCE DISCLOSURE. Attorney does not meet any of the criteria for errors and omissions (malpractice) coverage set forth in *Business and Professions Code Section 6148*.]

4. DEPOSIT. Client shall deposit $_____ by _____[*date*]. The sum will deposited in a trust account to be used to pay _____[costs and expenses only *or* costs and expenses and fees for legal services]. Client hereby authorizes Attorney to withdraw sums from the trust account to pay the _____[costs and expenses *or* costs and expenses and fees] costs and/or fees Client incurs. Any unused deposit at the conclusion of Attorney's services will be refunded.

5. LEGAL FEES. Client agrees to pay for legal services at the following rates: partners-_____/hour; associates-_____/hour; paralegals-_____/hour; law clerks-_____/hour; and for other personnel as follows, _____[*specify rates to be paid to others providing other services to client*]. Attorney charges in minimum units of _____ hours.

6. COSTS AND EXPENSES. In addition to paying legal fees, Client shall reimburse Attorney for all costs and expenses incurred by Attorney, including, but not limited to, fees fixed by law or assessed by public agencies, long distance telephone calls, messenger and other delivery fees, postage, in-office photocopying at $_____ per page, parking, mileage at $_____ per mile, investigation expenses, consultants' fees, and other similar items. Client authorizes Attorney to incur all reasonable costs and to hire any investigators or consultants reasonably necessary in Attorney's judgment, unless one or both of the clauses below are initialed by Client and Attorney.

_____ Attorney shall obtain Client's consent before incurring any cost in excess of $_____.

_____ Attorney shall obtain Client's consent before retaining outside investigators or consultants.

7. STATEMENTS. Attorney shall send Client periodic statements for fees and costs incurred. Client shall pay Attorney's statements within _____ days after each statement's date. Client may request a statement at intervals of no less than 30 days. On Client's request Attorney will provide a statement within 10 days.

8. DISCHARGE AND WITHDRAWAL. Client may discharge Attorney at any time. Attorney may withdraw with Client's consent or for good cause. Good cause includes Client's breach of this Contract, Client's refusal to cooperate with Attorney or to follow Attorney's advice on a material matter, or any other fact or circumstance that would render Attorney's continuing representation unlawful or unethical.

9. CONCLUSION OF SERVICES. When Attorney's services conclude, all unpaid charges shall become immediately due and payable. After Attorney's services conclude, Attorney will, on client's request, deliver Client's file to Client, along with any client funds or property in Attorney's possession.

10. DISCLAIMER OF GUARANTEE. Nothing in this Contract and nothing in Attorney's statements to Client will be construed as a promise or guarantee about the outcome of Client's matter. Attorney makes no such promises or guarantees. Attorney's comments about the outcome of Client's matter are expressions of opinion only.

11. EFFECTIVE DATE. This Contract will take effect when Client has performed the conditions stated in Paragraph 1, but its effective date will be retroactive to the date Attorney first provided services. The date at the beginning of this Contract is for reference only. Even if this Contract does not take effect, Client will be obligated to pay Attorney the

reasonable value of any services Attorney may have performed for Client.

_____ [*Name of law firm or attorney*]
By: _____ [*signature*]
_____ [*typed name*]
_____ [*signature*]
_____ [*client's typed name, address, and*]
[*telephone number*]

[2] Use of Form

This form is a short hourly fee agreement for use in relatively small, routine non-litigation matters in which billing will be on an hourly basis. It is adopted from § 72.651 of the Sample Written Fee Agreement Forms approved by the State Bar Board of Governors. The form is intended to satisfy the basic requirements of *Bus. & Prof. Code § 6148*. For a form of long agreement, *see § 72.674*. For a fixed fee agreement, *see § 72.672*.

[3] Cross References

For a related form, *see § 72.670*

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B. Creation And Scope Of Attorney-Client Relationship

7-72 California Forms of Pleading and Practice--Annotated § 72.672

§ 72.672 State Bar Sample Fee Agreement--Short Fixed Fee Agreement [Bus. & Prof. Code § 6148]--Nonlitigation

[1] FORM State Bar Sample Fee Agreement--Short Fixed Fee Agreement [Bus. & Prof. Code § 6148]--Nonlitigation

_____[*name of law firm or attorney*]

_____[*address*]

_____[*telephone number*]

_____[*Date*]

ATTORNEY-CLIENT FEE CONTRACT

This ATTORNEY-CLIENT FEE CONTRACT ("Contract") is entered into by and between _____[*name of client*] ("Client") and _____[*name of law firm or attorney*] ("Attorney").

1. CONDITIONS. This Contract will not take effect, and Attorney will have no obligation to provide legal services until Client returns a signed copy of this Contract and pays the fixed fee and deposit called for under Paragraphs 4 and 6.

2. SCOPE AND DUTIES. Client hires Attorney to provide legal services in connection with _____[*describe matter in which attorney is to provide services*]. Attorney shall provide the following services: _____[*state services to be provided*]. Attorney's services will not include litigation of any kind, whether in court, in administrative hearings, or before government agencies or arbitration tribunals. Attorney shall take reasonable steps to keep Client informed of progress and to respond to Client's inquiries. Client shall be truthful

with Attorney, cooperate with Attorney, keep Attorney informed of developments, abide by this Contract, pay Attorney's bills on time, and keep Attorney advised of Client's address, telephone number, and whereabouts.

[3. INSURANCE DISCLOSURE. Attorney does not meet any of the criteria for errors and omissions (malpractice) coverage set forth in *Business and Professions Code Section 6148*.]

4. FIXED FEE. Client agrees to pay a fixed fee of $_____[*amount*] for Attorney's services under this Contract. The fixed fee is due by _____. Attorneys shall have no obligation whatsoever to provide services to Client until the fixed fee is paid in full. Unless the fee retained would be unconscionable and except as provided in Paragraph 8, the fixed fee will be earned in full and no portion of it will be refunded once any substantial services have been performed.

5. COSTS AND EXPENSES. In addition to the fixed fee, Client shall reimburse Attorney for all costs and expenses incurred by Attorney, including, but not limited to, fees fixed by law or assessed by public agencies, long distance telephone calls, messenger and other delivery fees, postage, in-office photocopying at $_____ per page, parking, mileage at $_____ per mile, investigation expenses, consultants' fees, expert witness fees, and other similar items. Client authorizes Attorney to incur all reasonable costs and to hire any investigators or consultants reasonably necessary in Attorney's judgment, unless one or both of the clauses below are initialed by Client and Attorney.

_____ Attorney shall obtain Client's consent before incurring any cost in excess of $_____.

_____ Attorney shall obtain Client's consent before retaining outside investigators or consultants.

6. DEPOSIT. In addition to the fixed fee Client shall deposit $_____ by _____. The sum will be deposited in a trust account, to be used to pay for costs and expenses. Client hereby authorizes Attorney to withdraw sums from the trust account to pay the costs Client incurs. Any unused deposit at the conclusion of Attorney's services will be refunded.

7. STATEMENTS. Attorney shall send Client periodic statements for costs incurred. Client shall pay Attorney's statements within _____ days after each statement's date. Client may request a statement at intervals of no less than 30 days. On Client's request Attorney will provide a statement within 10 days.

8. DISCHARGE AND WITHDRAWAL. Client may discharge Attorney at any time. Attorney may withdraw with Client's consent or for good cause. Good cause includes Client's breach of this Contract, Client's refusal to cooperate with Attorney or to follow Attorney's advice on a material matter, or any other fact or circumstance that would render Attorney's continuing representation unlawful or unethical. If Attorney withdraws before completing Attorney's duties under this Contract, Client may be entitled to a refund of some or all of the fixed fee, depending on the facts and circumstances.

9. CONCLUSION OF SERVICES. When Attorney's services conclude, all unpaid charges shall immediately become due and payable. After Attorney's services conclude, Attorney will, on client's request, deliver Client's file to Client, along with any client funds or property in Attorney's possession.

10. DISCLAIMER OF GUARANTEE. Nothing in this Contract and nothing in Attorney's statements to Client will be construed as a promise or guarantee about the outcome of Client's matter. Attorney makes no such promises or guarantees. Attorney's comments about the outcome of Client's matter are expressions of opinion only.

11. EFFECTIVE DATE. This Contract will take effect when Client has performed the conditions stated in Paragraph 1,

but its effective date will be retroactive to the date Attorney first provided services. The date at the beginning of this Contract is for reference only. Even if this Contract does not take effect, Client will be obligated to pay Attorney the reasonable value of any services Attorney may have performed for Client.

_____ [*Name of law firm or attorney*]
By: _____ [*signature*]
_____ [*typed name*]
_____ [*signature*]
_____ [*client's typed name, address, and*]
[*telephone number*]

[2] Use of Form

This form is a short fixed-fee agreement for use in relatively small, routine non-litigation matters in which billing to be for a fixed fee. It is adopted from § 72.652 of the Sample Written Fee Agreement Forms approved by the State Bar Board of Governors. The form is intended to satisfy the basic requirements of *Bus. & Prof. Code § 6148*. For discussion of fixed fee agreements, see *§ 72.324[4][d]*. For forms of hourly fee agreements, *see §§ 72.671* and *72.674*.

[3] Cross References

For a related form, *see § 72.670*

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B. Creation And Scope Of Attorney-Client Relationship

7-72 California Forms of Pleading and Practice--Annotated § 72.673

§ 72.673 State Bar Sample Fee Agreement--Long Hourly Fee Agreement [Bus. & Prof. Code § 6148]--Litigation

[1] FORM State Bar Sample Fee Agreement--Long Hourly Fee Agreement [Bus. & Prof. Code § 6148]--Litigation

_____[*name of law firm or attorney*]

_____[*address*]

_____[*telephone number*]

_____[*date*]

ATTORNEY-CLIENT FEE CONTRACT

This document (the "agreement") is the written fee contract that California law requires lawyers to have with their clients. We _____[*name of law firm or attorney*] will provide services to you _____[*name of client*] on the terms set forth below.

1. CONDITIONS. This agreement will not take effect, and we will have no obligation to provide legal services, until you return a signed copy of this agreement and pay the initial deposit called for under Paragraph 5.

2. SCOPE OF SERVICES. You are hiring us as your attorneys, to represent you in the matter described on the attached Rate Schedule. We will provide those legal services reasonably required to represent you. We will take reasonable steps to keep you informed of progress and to respond to your inquiries. If a court action is filed, we will represent you through trial and posttrial motions. After judgment we will not represent you on appeal or in execution proceedings. Unless you and we make a different agreement in writing, this agreement will govern all future services we may perform for you.

[3. INSURANCE DISCLOSURE. Attorney does not meet any of the criteria for errors and omissions (malpractice) coverage set forth in *Business and Professions Code Section 6148*.]

4. CLIENT'S DUTIES. You agree to be truthful with us, to cooperate with us, to keep us informed of developments, to abide by this agreement, to pay our bills on time, and to keep us advised of your address, telephone number, and whereabouts.

5. MINIMUM FEE/DEPOSIT. You agree to pay us an initial deposit of $_____ by _____[*date*]. Of the initial deposit, $_____ will be our minimum fee, paid in exchange for our agreement to represent you. The minimum fee is nonrefundable, but our hourly charges will be credited against it. The remainder of the initial deposit, as well as any future deposit, will be held in a trust account. You authorize us to use that fund to pay the fees and other charges you incur.

Whenever your deposit is exhausted, we reserve the right to demand further deposits, each up to a maximum of $_____. Once a trial or arbitration date is set, we will require you to pay all sums then owing to us and to deposit the attorneys' fees we estimate will be incurred in preparing for and completing the trial or arbitration, as well as the jury fees or arbitration fees likely to be assessed. Those sums may exceed the maximum deposit.

You agree to pay all deposits after the initial deposit within _____ days of our demand. Except for the minimum fee, any unused deposit at the conclusion of our services will be refunded.

6. LEGAL FEES AND BILLING PRACTICES. You agree to pay by the hour at our prevailing rates for time spent on your matter by our legal personnel. Our current hourly rates for legal personnel (and other billing rates) are set forth on the attached Rate Schedule. The Rate Schedule also provides for periodic increases.

We will charge you for the time we spend on telephone calls relating to your matter, including calls with you, opposing counsel, or court personnel. The legal personnel assigned to your matter will confer among themselves about the matter, as required. When they do confer, each person will charge for the time expended. Likewise, if more than one of our legal personnel attends a meeting, court hearing, or other proceeding, each will charge for the time spent. We will charge for waiting time in court and elsewhere and for travel time, both local and out of town.

7. COSTS AND OTHER CHARGES.

(a) *In General*. We will incur various costs and expenses in performing legal services under this agreement. You agree to pay for those costs and expenses in addition to the hourly fees. The costs and expenses commonly include process servers' fees, fees fixed by law or assessed by courts and other agencies, court reporters' fees, long distance telephone calls, messenger and other delivery fees, postage, parking and other local travel expenses, photocopying and other reproduction costs, clerical staff overtime, word processing charges, charges for computer time, and other similar items. Except for the items listed on the Rate Schedule, all costs and expenses will be charged at our cost.

(b) *Out of Town Travel*. You agree to pay transportation, meals, lodging, and all other costs of any necessary out-of-town travel by our personnel. You will also be charged the hourly rates for the time legal personnel spend traveling.

(c) *Experts, Consultants and Investigators*. To aid in the preparation or presentation of your case, it may become necessary to hire expert witnesses, consultants, or investigators. We will not hire such persons unless you agree to pay their fees and charges. We will select any expert witnesses, consultants, or investigators to be hired.

8. BILLING STATEMENTS. We will send you periodic statements for fees and costs incurred. Each statement will be

due within _____ days of its date. You may request a statement at intervals of no less than 30 days. If you do, we will provide one within 10 days.

9. LIEN. You hereby grant us a lien on any and all claims or causes of action that are the subject of our representation under this agreement. Our lien will be for any sums owing to us at the conclusion of our services. The lien will attach to any recovery you may obtain, whether by arbitration award, judgment, settlement or otherwise.

10. DISCHARGE AND WITHDRAWAL. You may discharge us at any time. We may withdraw with your consent or for good cause. Good cause includes your breach of this agreement, your refusal to cooperate with us or to follow our advice on a material matter, or any fact or circumstance that would render our continuing representation unlawful or unethical.

When our services conclude, all unpaid charges will immediately become due and payable. After our services conclude, we will, on your request, deliver your file to you, along with any funds or property of yours in our possession.

11. DISCLAIMER OF GUARANTEE. Nothing in this agreement and nothing in our statements to you will be construed as a promise or guarantee about the outcome of your matter. We make no such promises or guarantees. Our comments about the outcome of your matter are expressions of opinion only.

12. EFFECTIVE DATE. This agreement will take effect when you have performed the conditions stated in Paragraph 1, but its effective date will be retroactive to the date we first performed services. The date at the beginning of this agreement is for reference only. Even if this agreement does not take effect, you will be obligated to pay us the reasonable value of any services we may have performed for you.

_____ [*Name of law firm or attorney*]
By: _____ [*signature*]
_____ [*typed name*]

I/We have read and understood the foregoing terms and those set forth on the attached Rate Schedule and agree to them, as of the date _____[*name of law firm or attorney*] first provided services. If more than one party signs below, we each agree to be liable, jointly and severally, for all obligations under this agreement.

_____ [*signature*]
_____ [*client's name, address, and telephone number*]

RATE SCHEDULE

A. Identification

Client: _____[*name*]

Matter: _____[*specify subject matter*]

B. Hourly rates for legal personnel

Senior partners	/hour
Partners	/hour
Associates	/hour
Paralegals	/hour
Law Clerks	/hour

C. Standard charges

We charge for our time in minimum units of _____ hours. _____[*Specify other standard charges or minimum time units, if any*].

D. Costs and expenses

In-office photocopying	/page
Mileage	/mile
Computerized legal research	/hour
Word processing	/hour
Other computer time	/hour

Clerical staff overtime will be charged at 1.5 times the base hourly rate or at the rates required by applicable law, whichever is greater. The base hourly rates for clerical personnel presently range between $_____ and $_____.

E. Subject to change

The rates on this schedule are subject to change on _____ days' written notice. If you decline to pay any increased rates, we will have the right to withdraw as your lawyers.

[2] Use of Form

This form is a long hourly fee agreement for use in complex litigation matters in which billing is to be on an hourly basis. It is adopted from Form 4 of the Sample Written Fee Agreement Forms approved by the State Bar Board of Governors. The form is intended to satisfy the basic requirements of *Bus. & Prof. Code § 6148*. For a form of short agreement, *see § 72.670*.

[3] Cross References

For a related form, *see § 72.670*

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7-72 California Forms of Pleading and Practice--Annotated § 72.674

§ 72.674 State Bar Sample Fee Agreement--Long Hourly Fee Agreement [Bus. & Prof. Code § 6148]--Nonlitigation

[1] FORM State Bar Sample Fee Agreement--Long Hourly Fee Agreement [Bus. & Prof. Code § 6148]--Nonlitigation

_____[*name of law firm or attorney*]

_____[*address*]

_____[*telephone number*]

_____[*Date*]

ATTORNEY-CLIENT FEE CONTRACT

This document (the "agreement") is the written fee contract that California law requires lawyers to have with their clients. We _____[*name of law firm or attorney*] will provide services to you _____[*name of client*] on the terms set forth below.

1. CONDITIONS. This agreement will not take effect, and we will have no obligation to provide legal services, until you return a signed copy of this agreement and pay the initial deposit called for under Paragraph _____[4 *or* 5].

2. SCOPE OF SERVICES. You are hiring us as your attorneys, to represent you in the matter described on the attached Rate Schedule. We will provide those legal services reasonably required to represent you. We will take reasonable steps to keep you informed of progress and to respond to your inquiries. Our services will not include litigation of any kind, whether in court, in administrative hearings, or before government agencies or arbitration tribunals. Unless you and we

make a different agreement in writing, this agreement will govern all future services we may perform for you, other than litigation.

[3. INSURANCE DISCLOSURE. Attorney does not meet any of the criteria for errors and omissions (malpractice) coverage set forth in *Business and Professions Code Section 6148*.]

4. CLIENT'S DUTIES. You agree to be truthful with us, to cooperate, to keep us informed of developments, to abide by this agreement, to pay our bills on time, and to keep us advised of your address, telephone number, and whereabouts.

5. MINIMUM FEE/DEPOSIT. You agree to pay us an initial deposit of $_____ by _____[*date*]. Of the initial deposit, $_____ will be our minimum fee, paid in exchange for our agreement to represent you. The minimum fee is nonrefundable, but our hourly charges will be credited against it. The remainder of the initial deposit, as well as any future deposit, will be held in a trust account. You authorize us to use that fund to pay the fees and other charges you incur.

Whenever your deposit is exhausted, we reserve the right to demand further deposits, each up to a maximum of $_____. You agree to pay all further deposits within _____ days of our demand. Except for the minimum fee, any unused deposit at the conclusion of our services will be refunded.

6. LEGAL FEES AND BILLING PRACTICES. You agree to pay by the hour at our prevailing rates for time spent on your matter by our legal personnel. Our current hourly rates for legal personnel (and other billing rates) are set forth on the attached Rate Schedule. The Rate Schedule also provides for periodic increases.

We will charge you for the time we spend on telephone calls relating to your matter, including calls with you or opposing counsel. The legal personnel assigned to your matter will confer among themselves about the matter, as required. When they do confer, each person will charge for the time expended. Likewise, if more than one of our legal personnel attends a meeting or other proceeding, each will charge for the time spent. We will charge for waiting time and for travel time, both local and out of town.

7. COSTS AND OTHER CHARGES.

(a) *In General*. We will incur various costs and expenses in performing legal services under this agreement. You agree to pay for those costs and expenses in addition to the hourly fees. The costs and expenses commonly include fees fixed by law or assessed by public agencies, long distance telephone calls, messenger and other delivery fees, postage, parking and other local travel expenses, photocopying and other reproduction costs, clerical staff overtime, word processing charges, charges for computer time, and other similar items. Except for the items listed on the Rate Schedule, all costs and expenses will be charged at our cost.

(b) *Out of Town Travel*. You agree to pay transportation, meals, lodging, and all other costs of any necessary out-of-town travel by our personnel. You will also be charged the hourly rates for the time legal personnel spend traveling.

(c) *Consultants and Investigators*. To aid in the preparation or presentation of your case, it may become necessary to hire consultants or investigators. We will not hire such persons unless you agree to pay their fees and charges. We will select any consultants or investigators to be hired.

8. BILLING STATEMENTS. We will send you periodic statements for fees and costs incurred. Each statement will be due within _____ days of its date. You may request a statement at intervals of no less than 30 days. If you do, we will provide one within 10 days.

9. DISCHARGE AND WITHDRAWAL. You may discharge us at any time. We may withdraw with your consent or for good cause. Good cause includes your breach of this agreement, your refusal to cooperate with us or to follow our advice on a material matter, or any fact or circumstance that would render our continuing representation unlawful or unethical.

When our services conclude, all unpaid charges will immediately become due and payable. After our services conclude, we will, on your request, deliver your file to you, along with any funds or property of yours in our possession.

10. DISCLAIMER OF GUARANTEE. Nothing in this agreement and nothing in our statements to you will be construed as a promise or guarantee about the outcome of your matter. We make no such promises or guarantees. Our comments about the outcome of your matter are expressions of opinion only.

11. EFFECTIVE DATE. This agreement will take effect when you have performed the conditions stated in Paragraph 1, but its effective date will be retroactive to the date we first performed services. The date at the beginning of this agreement is for reference only. Even if this agreement does not take effect, you will be obligated to pay us the reasonable value of any services we may have performed for you.

_____ [*Name of law firm or attorney*]
By: _____ [*signature*]
_____ [*typed name*]

I/We have read and understood the foregoing terms and those set forth on the attached Rate Schedule and agree to them, as of the date _____[*name of law firm or attorney*] first provided services. If more than one party signs below, we each agree to be liable, jointly and severally, for all obligations under this agreement.

_____ [*signature*]
_____ [*client's name, address, and*]
[*telephone number*]

RATE SCHEDULE

A. Identification

Client: _____[*name*]

Matter: _____[*specify subject matter*]

B. Hourly rates for legal personnel

Senior partners	_____/hour
Partners	_____/hour
Associates	_____/hour
Paralegals	_____/hour
Law Clerks	_____/hour

C. Standard charges

We charge for our time in minimum units of _____ hours. _____[*Specify other standard charges or minimum time units, if any*].

D. Costs and expenses

In-office photocopying	_____/page
Mileage	_____/mile
Computerized legal research	_____/hour
Word processing	_____/hour
Other computer time	_____/hour

Clerical staff overtime will be charged at 1.5 times the base hourly rate or at the rates required by applicable law, whichever is greater. The base hourly rates for clerical personnel presently range between $_____ and $_____.

E. Subject to change

The rates on this schedule are subject to change on _____ days' written notice. If you decline to pay any increased rates, we will have the right to withdraw as your lawyers.

[2] Use of Form

This form is a long hourly fee agreement for use in complex non-litigation matters in which billing is to be on an hourly basis. It is adopted from Form 5 of the Sample Written Fee Agreement Forms approved by the State Bar Board of Governors. The form is intended to satisfy the basic requirements of *Bus. & Prof. Code § 6148*. For a form of short agreement, *see § 72.671*. For a fixed fee agreement, *see § 72.672*.

[3] Cross References

For a related form, *see § 72.670*

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7-72 California Forms of Pleading and Practice--Annotated § 72.675

§ 72.675 State Bar Sample Fee Agreement--Short Contingent Fee Agreement [Bus. & Prof. Code § 6147]

[1] FORM State Bar Sample Fee Agreement--Short Contingent Fee Agreement [Bus. & Prof. Code § 6147]

_____[*name of law firm or attorney*]

_____[*address*]

_____[*telephone number*]

_____[*Date*]

ATTORNEY-CLIENT CONTINGENT FEE CONTRACT

This ATTORNEY-CLIENT CONTINGENT FEE CONTRACT (the "Agreement") is the written fee contract that California law requires lawyers to have with their clients. It is between _____[*name of law firm or attorney*] ("Attorney") and you, _____[*name of client*] ("Client").

1. CONDITIONS. This Agreement will not take effect, and Attorney will have no obligation to provide legal services until Client returns a signed copy of this Agreement.

2. SCOPE AND DUTIES. Client is hiring Attorney to represent Client in the matter of your claims against _____[*name of party*], arising out of _____[*specify*], which occurred on or about _____[*date*]. Attorney will provide those legal services reasonably required to represent Client, and will take reasonable steps to inform Client of progress and to respond to Client's inquiries. Attorney will represent Client in any court action until a settlement or judgment, by arbitration or trial, is reached, and in connection with any appropriate posttrial motions.

After judgment Attorney will not represent Client on any appeal, or in any proceedings designed to execute on the judgment, without such additional compensation as Attorney and Client may agree on in a separate Agreement.

[3. INSURANCE DISCLOSURE. Attorney does not meet any of the criteria for errors and omissions (malpractice) coverage set forth in *Business and Professions Code Section 6147*.]

4. CLIENT'S DUTIES. Client agrees to be truthful with Attorney, to cooperate, to keep Attorney informed of developments, to abide by this Agreement, to pay bills for costs (if any) on time, and to keep Attorney informed of Client's address, telephone number, and whereabouts.

5. LEGAL FEES, COSTS, AND BILLING PRACTICES. Attorney will be compensated for legal services rendered only if a recovery is obtained for Client. If no recovery is obtained, Client will be obligated to pay only for costs, disbursements, and expenses, as described below.

The fees to be paid by Client to Attorney will be _____ percent (_____%) of the net recovery, (the term "net recovery" means the total of all amounts received by settlement, arbitration award, or judgment, *from which will be subtracted* all unpaid costs and disbursements set forth in Paragraph _____[6 *or* 7]).

In the event of discharge or withdrawal of Attorney as provided in Paragraph _____[8 *or* 9], Client agrees that Attorney shall be entitled to be paid by Client, on payment of the settlement, arbitration award, or judgment in favor of Client, a reasonable fee for the legal services provided by Attorney to Client.

[*EITHER*]

6. NEGOTIABILITY OF FEES. The rates set forth above are not set by law, but are negotiable between Attorney and Client.

[*OR, if underlying action is for medical malpractice*]

6. NEGOTIABILITY OF FEES. The rates set forth in *Business and Professions Code Section 6146* are the maximum limits for a contingency fee agreement; the Attorney and Client may negotiate a lower rate.

[*CONTINUE*]

7. COSTS AND EXPENSES. All costs, disbursements, and litigation expenses are the responsibility of Client. Attorney will advance such costs and expenses. Client will reimburse attorney for such advance costs and expenses on settlement, arbitration award, or judgment. These items include, but are not limited to, court fees, service of process charges, photocopying services, notary fees, computer-assisted legal research, long distance telephone charges, messenger and delivery fees, postage, in-office photocopying at $_____ per page, facsimile charges, deposition costs, parking, mileage at $_____ per mile, investigation expenses, consultants' fees, expert witness fees, and other similar items. Client authorizes Attorney to incur all reasonable costs and to hire any investigators, consultants, or expert witnesses reasonably necessary in Attorney's judgment, unless one or both of the clauses below are initialed by the Attorney.

_____ Attorney shall obtain Client's consent before incurring any cost in excess of $_____.

_____ Attorney shall obtain Client's consent before retaining outside investigators, consultants, or expert witnesses.

8. RELATED BUT UNKNOWN MATTERS. Client represents that Client does not know of any related legal matters that would require legal services to be provided under this Agreement. Such related matters might include, among other things, claims for property damage, workers' compensation, disputes with a health care provider about the amount owed for their services, or claims for reimbursement (subrogation) by any insurance company for benefits paid under an insurance policy. If such matters arise later, Client agrees that this Agreement does not apply to any such related legal matters, and a separate Agreement for provision of services and payment for those services will be required if Client desires Attorney to perform that additional legal work.

9. DISCHARGE AND WITHDRAWAL. Client may discharge Attorney at any time, on written notice to us, and Attorney will immediately after receiving such notice cease to render additional services. Such a discharge does not, however, relieve Client of the obligation to pay any costs incurred prior to such termination, and Attorney has the right to recover from you the reasonable value of Attorney's legal services rendered from the effective date of the Agreement (Paragraph 13) to the date of discharge.

Attorney may withdraw from representation of Client (a) with Client's consent, (b) on court approval, or (c) if no court action has been filed, on reasonable notice to Client.

10. LIEN. Client hereby grants Attorney a lien on any and all claims or causes of action that are the subject of Attorney's representation under this Agreement. Attorney's lien will be for any sums owing to Attorney for any unpaid costs or attorneys fees under this Agreement. The lien will attach to any recovery Client may obtain, whether by arbitration award, judgment, settlement or otherwise.

11. CONCLUSION OF SERVICES. When Attorney's services conclude, other than by discharge or withdrawal, all unpaid charges will immediately become due and payable. After Attorney's services conclude, Attorney will, on client's request, deliver Client's file to Client, along with any client funds or property in Attorney's possession.

12. DISCLAIMER OF GUARANTEE. Nothing in this Agreement and nothing in Attorney's statements to Client will be construed as a promise or guarantee about the outcome of the Client's matter. Attorney makes no such promises or guarantees. There can be no assurance that Client will recover any sum or sums in this matter. Attorney's comments about the outcome of Client's matter are expressions of opinion only.

13. EFFECTIVE DATE. This Agreement will take effect when Client has performed the conditions stated in Paragraph 1, but its effective date will be retroactive to the date Attorney first performed services. The date at the beginning of this Agreement is for reference only. Even if this Agreement does not take effect, Client will be obligated to pay Attorney the reasonable value of any services Attorney may have performed for Client.

_____ [*Name of law firm or attorney*]
By: _____ [*signature*]
_____ [*typed name*]

I/We have read and understood the foregoing terms and agree to them, as of the date _____[*name of law firm*] first provided services. If more than one party signs below, we agree to be liable jointly and severally for all obligations under this Agreement. By signing this Agreement, I/we acknowledge receipt of a fully executed duplicate of this Agreement.
Dated: _____.

_____ [*client's signature*]
Address: _____
_____
_____
_____
Telephone: _____

[2] Use of Form

This form is a short contingent fee agreement for use in litigation matters in which the attorney will recover fees only if a specified contingency occurs. It is adopted from the Sample Written Fee Agreement Forms approved by the State Bar Board of Governors. The form is intended to satisfy the basic requirements of *Bus. & Prof. Code § 6147*. For a form of long agreement, *see § 72.676*.

The State Bar sample forms are not mandatory, but contingency fee contracts must be in writing. The attorney must provide a duplicate copy of the contract at the time the contract is entered into to the client, or his or her guardian or representative [*Bus. & Prof. Code § 6147(a)*].

[3] Contents of Form

The contingency fee agreement must include statements regarding the following [*Bus. & Prof. Code § 6147(a)*; for discussion, *see § 72.196[3][a], above*]:

- The contingency fee rate [*see* Paragraph 5],
- The manner in which disbursements and costs incurred in connection with the claim will affect the contingency fee and recovery [*see* Paragraph 7],
- Whether the client could be required to compensate the attorney for related matters that are not covered by the fee agreement [*see* Paragraph 8],
- The negotiability of the fee [*see* Paragraph 6], and
- If the attorney does not meet the criteria of *Bus. & Prof. Code § 6147(a)(6)*, a statement to that effect [*see* Optional Paragraph 3].

It is recommended that statements addressing an attorney's lien, compensation in the event of discharge, and the provision regarding payment of a fee in the case of a structured settlement be included in a contingency fee agreement. For discussion of these provisions, see *§ 72.196[5]*.

For further discussion regarding contingency fee agreements in general, *see § 72.192*. Contingency fees are limited in some instances depending on the subject matter of the underlying litigation [*see, e.g., Bus. & Prof. Code § 6146(a)* (medical malpractice)]. For discussion, see *§ 72.196[7][a]*.

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7-72 California Forms of Pleading and Practice--Annotated § 72.676

§ 72.676 State Bar Sample Fee Agreement--Long Contingent Fee Agreement [Bus. & Prof. Code § 6147]

[1] FORM State Bar Sample Fee Agreement--Long Contingent Fee Agreement [Bus. & Prof. Code § 6147]

_____[*name of law firm or attorney*]

_____[*address*]

_____[*telephone number*]

_____[*Date*]

ATTORNEY-CLIENT CONTINGENT FEE RETAINER AGREEMENT

This document (the "Agreement") is the written fee contract that California law requires lawyers to have with their clients. We, _____[*name of law firm or attorney*], will provide legal services to you, _____[*name of client*], on the terms set forth below.

1. CONDITIONS. This Agreement will not take effect, and we will have no obligation to provide legal services, until you return a signed copy of this Agreement and pay the initial deposit, if any, called for under Paragraph _____[4 *or* 5].

2. SCOPE OF SERVICES. You are hiring us as your attorneys to represent you in the matter of your claims against _____[*name of party*], arising out of _____[*specify*], which occurred on or about _____[*date*]. We will provide those legal services reasonably required to represent you. We will take reasonable steps to keep you informed of the progress of the matter, and to respond to your inquiries. If a court action is filed, we will represent you until a settlement or judgment, by way of arbitration or trial, is reached.

We will oppose any motion for a new trial or any other posttrial motions filed by an opposing party, or will make any appropriate posttrial motions on your behalf. After judgment we will not represent you on any appeal, or in any proceedings designed to execute on the judgment, without such additional compensation as we may agree on in a separate Agreement.

Unless we make a different Agreement with you in writing, this Agreement will govern all future services we may perform for you.

[3. INSURANCE DISCLOSURE. Attorney does not meet any of the criteria for errors and omissions (malpractice) coverage set forth in *Business and Professions Code Section 6147*.]

4. CLIENT'S DUTIES. You agree to be truthful with us, to cooperate, to keep us informed of developments, to abide by this Agreement, to pay our bills for costs (if any) on time, and to keep us informed of your address, telephone number, and whereabouts. You agree to appear, if we so request, for all depositions and court appearances, and to generally cooperate fully with us in all matters related to the preparation and presentation of your claims.

5. DEPOSIT. You agree to pay us an initial deposit of $_____, to be returned with this signed Agreement. We will hold this initial deposit in a trust account. You hereby authorize us to use that deposit to pay the costs, disbursements, and other expenses incurred under this Agreement.

When your deposit is exhausted, we reserve the right to demand further deposits, each up to a maximum of $_____. Once a trial or arbitration date is set, we will require you to pay all sums then owing to us, and to deposit the costs we estimate will be incurred in preparing for and completing the trial or arbitration, as well as the jury fees or arbitration fees likely to be assessed. Those sums may exceed the maximum deposit.

You agree to pay all deposits required under this Agreement within 10 days of our demand. Any unused and unearned deposit at the conclusion of our services will be refunded.

6. LEGAL FEES, COSTS, AND BILLING PRACTICES. We will only be compensated for legal services rendered if a recovery is obtained for you. If no recovery is obtained, you will be obligated to pay only for costs, disbursements, and expenses, as described below.

(a) The fees to be paid to us will be a percentage of the net recovery, depending on the stage at which the settlement or judgment is reached (the term "net recovery" means the total of all amounts received by settlement, arbitration award, or judgment, *from which will be subtracted* all unpaid costs and disbursements set forth in Paragraph _____[7 *or* 8]):

(i) If settlement or judgment is reached before filing a lawsuit, then our attorneys' fees will be _____ percent (_____%) of the net recovery;

(ii) If settlement or judgment is reached prior to thirty (30) days before the first arbitration date (if the case is referred to arbitration) or prior to the date of the first Status or Trial Setting Conference where a trial date is set, whichever is earlier, then our attorneys' fees will be _____ percent (_____%) of the net recovery; and

(iii) If settlement or judgment is reached after the times set forth in (i) and (ii), above, then our attorneys' fees will be _____ percent (_____%) of the net recovery.

(b) We will incur various costs and expenses in performing legal services under this Agreement. You agree to pay for all costs, disbursements, and expenses paid or owed by you in connection with this matter, or that have been advanced by us on your behalf and that you have not previously paid or reimbursed to us.

(c) To aid in the preparation or presentation of your case, it may become necessary to hire expert witnesses, consultants, or investigators. We will not hire such persons unless you agree to pay their fees and charges. We will select any expert witnesses, consultants, or investigators to be hired.

(d) In the event of our discharge or withdrawal as provided in Paragraph 12, you agree that, on payment of the settlement, arbitration award or judgment in your favor in this matter, we shall be entitled to be paid by you a reasonable fee for the legal services provided by us to you. Such fee shall be determined by considering the following factors:

(1) the actual number of hours expended by us in performing legal services for you;

(2) our hourly rate of $_____;

(3) the extent to which our services have contributed to the result obtained;

(4) the amount of the fee in proportion to the value of the services performed;

(5) the amount of recovery obtained;

(6) time limitations imposed on us by you or by the circumstances; and

(7) the experience, reputation, and ability of our personnel performing the services.

[*EITHER*]

7. NEGOTIABILITY OF FEES. The rates set forth above are not set by law, but are negotiable between Attorney and Client.

[*OR, if underlying action is for medical malpractice*]

7. NEGOTIABILITY OF FEES. The rates set forth in *Business and Professions Code Section 6146* are the maximum limits for a contingency fee agreement; the Attorney and Client may negotiate a lower rate.

[*CONTINUE*]

8. COSTS AND LITIGATION EXPENSES. All costs, disbursements, and litigation expenses associated with this matter are your responsibility, including court fees, service of process charges, photocopy services, notary fees, computer-assisted legal research, long distance telephone charges, messenger and delivery fees, postage, in-office photocopying at $_____ per page, facsimile charges, deposition costs, parking, mileage at $_____ per mile, investigation expenses, consultants' fees, expert witness fees, and other similar items. All costs and expenses will be charged at our cost. You understand that, as set forth in Paragraph 5, above, you may be required to make a deposit for costs before the expenditure is made by _____[*name of law firm*].

Client authorizes Attorney to incur all reasonable costs and to hire any investigators, consultants or expert witnesses reasonably necessary in Attorney's judgment, unless one or both of the clauses below are initialed by Attorney.

_____ Attorney shall obtain Client's consent before incurring any cost in excess of $_____.

_____Attorney shall obtain Client's consent before retaining outside investigators, consultants, or expert witnesses.

In the event that an award of costs is sought on your behalf in this action, you understand that the amount that the court may order as costs is the amount the court believes the party is entitled to recover, and does not necessarily determine what costs _____[*name of law firm*] is entitled to charge its clients or that only the costs that were allowed were reasonable. You agree that, whether or not attorney's fees or costs are awarded by the court in this action, you remain responsible for the payment in full, of all attorney's fees and costs in connection with this matter.

9. BILLING STATEMENTS. We will send you periodic billing statements for costs, disbursements, and expenses incurred in connection with this matter. Each statement is to be paid in full within 15 days after the date of the statement. You may request a statement at intervals of no less than thirty days. Upon your request we will provide a statement within ten days.

10. APPROVAL NECESSARY FOR SETTLEMENT. We will not make any settlement or compromise of any nature of any of your claims without your prior approval. You agree that you will not make any settlement or compromise of any nature of any of your claims without prior notice to us.

11. LIMITATION OF REPRESENTATION. We are representing you only on the matter described in Paragraph 2. Our representation does not include independent or related matters that may arise, including, among other things, claims for property damage, workers' compensation, disputes with a health care provider about the amount owed for their services, defense of cross complaints on other matters, or claims for reimbursement (subrogation) by any insurance company for benefits paid under an insurance policy. If such matters arise later, you agree with us that this Agreement does not apply to any such related legal matters, and we will negotiate a separate Agreement if you wish to retain us for that additional legal work.

Unless we agree with each other by a separate Agreement, you will not be liable to compensate us for any such independent or related legal matter that is not specifically covered by this Agreement.

12. DISCHARGE AND WITHDRAWAL. You may discharge us at any time, on written notice to us, and we will immediately after receiving such notice cease to render additional services. Such a discharge does not, however, relieve you of the obligation to pay any costs incurred prior to such termination, and we have the right to recover from you the reasonable value of our legal services rendered from the effective date of this Agreement (Paragraph 17) to the date of discharge.

We may withdraw from representation of you (a) with your consent, (b) on court approval, or (c) if no court action has been filed, on reasonable notice to you.

13. CONCLUSION OF SERVICES. When our services conclude, all unpaid charges will immediately become due and payable. You authorize us to use any funds held in our trust account as a deposit against costs to apply to such unpaid charges. After our services conclude, we will, upon your request, deliver your file to you, along with any funds or property of your in our possession.

14. LIEN. You hereby grant us a lien on any and all claims or causes of action that are the subject of our representation under this Agreement. Our lien will be for any sums owing to us for any unpaid costs, or attorney's fees, at the conclusion of our services. The lien will attach to any recovery you obtain, whether by arbitration award, judgment,

settlement or otherwise.

15. DISCLAIMER OF GUARANTEE. Nothing in this Agreement and nothing in our statements to you will be construed as a promise or guarantee about the outcome of your matter. We make no such promises or guarantees. There can be no assurance that you will recover any sum or sums in this matter. Our comments about the outcome of your matter are expressions of opinion only.

16. ATTORNEY'S AUTHORITY. In connection with the claims covered by this Agreement, you hereby give us the power and authority to execute any and all claims, deposits, orders, and other papers that you could properly execute, and to receive on your behalf any monies or other things of value to which you may be entitled because of any judgment recovered or any settlement received.

17. EFFECTIVE DATE. This Agreement will take effect when you have performed the conditions stated in Paragraph 1, but its effective date will be retroactive to the date we first performed services. The date at the beginning of this Agreement is for reference only. Even if this Agreement does not take effect, you will be obligated to pay us the reasonable value of any services we may have performed for Client.

_____ [*Name of law firm or attorney*]
By: _____ [*signature*]
_____ [*typed name*]

I/We have read and understood the foregoing terms and agree to them, as of the date _____[*name of law firm*] first provided services. If more than one party signs below, we agree to be liable jointly and severally for all obligations under this Agreement. By signing this Agreement, I/we acknowledge receipt of a fully executed duplicate of this Agreement.
Dated: _____.

_____ [*client's signature*]
Address: _____
_____
_____
_____
Telephone: _____

[2] Use of Form

This form is a long contingent fee agreement for use in complex litigation matters in which the attorney will recover fees only if a specified contingency occurs. It is adopted from the Sample Written Fee Agreement Forms approved by the State Bar Board of Governors. The form is intended to satisfy the basic requirements of *Bus. & Prof. Code § 6147*. For a form of short agreement, *see § 72.675*.

[3] Cross References

For a related form, *see § 72.675*

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7-72 California Forms of Pleading and Practice--Annotated § 72.677

§ 72.677 Retainer Agreement [Bus. & Prof. Code § 6148]

[1] FORM Retainer Agreement [Bus. & Prof. Code § 6148]

_____[*name of law firm or attorney*]
_____[*address*]
_____[*telephone number*]
_____[*Date*]

RETAINER AGREEMENT

1. _____ [On execution of this agreement *or* Within _____ days of execution of this agreement], Client shall pay Attorney $_____ as a retainer to assure Attorney's availability for [a maximum of _____ hours during] the period from _____[*date*] to _____[*date*] to provide the following legal services: _____[*describe services, e.g.,* to provide counsel and advice to Client by telephone or in person regarding the conduct of Client's business, including the answering of legal questions and tax questions, and the writing of any incidental correspondence on matters in connection with the conduct of Client's business]. This retainer shall not be refundable; it shall be earned by Attorney whether or not any legal services are actually performed.

2. If any of the services specified in Paragraph 1 are actually required to be performed during the retainer period, Attorney will _____ [agree with Client at that time on the fees to be paid for those services *or* be compensated as follows: _____ (*specify rate of compensation, e.g.,* on an hourly basis at a fee of $_____ per hour)].

[3. Attorney does not meet any of the criteria for errors and omissions (malpractice) coverage set forth in *Business and Professions Code Section 6148*.]
Dated: _____

_____ [*Name of law firm or attorney*]
By: _____ [*signature*]
_____ [*typed name*]
_____ [*signature*]
_____ [*client's typed name, address, and*]
[*telephone number*]

[2] Use of Form

This form is a standard retainer agreement to secure an attorney's availability to a client for a certain time period. It satisfies the requirements of *Bus. & Prof. Code § 6148* governing fee agreements. It is recommended that the agreement specify the amount of the retainer, whether the retainer has been paid or the date on which payment is due, and the length of time that the attorney's availability will be assured. For discussion of retainer agreements, see *§ 72.195[1]*.

[3] Cross References

For a related form, *see § 72.670*

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7-72 California Forms of Pleading and Practice--Annotated § 72.678

§ 72.678 Exploratory or Diagnostic Fee Agreement [Bus. & Prof. Code § 6148]

[1] FORM Exploratory or Diagnostic Fee Agreement [Bus. & Prof. Code § 6148]

_____[*name of law firm or attorney*]
_____[*address*]
_____[*telephone number*]
_____[*Date*]

EXPLORATORY FEE AGREEMENT

Client shall compensate Attorney at the rate of _____ [$_____ per hour *or* in the sum of $_____] for investigating and researching _____ [*specify, e.g.,* whether or not Client has a cause of action against _____ (*name of adverse party*)] and for providing an opinion letter containing recommendations with respect to that matter. Attorney shall expend no less than _____ hours or more than _____ hours in completing this assignment. Client understands that Attorney may not within this time frame be able to completely investigate all of the facts or exhaustively research the applicable law. In either or both of these events, Attorney shall indicate what further investigation and/or research is recommended and its estimated cost. On completion of this investigation, research, and report, Attorney is not obligated to represent Client any further with respect to this matter. [Attorney does not meet any of the criteria for errors and omissions (malpractice) coverage set forth in *Business and Professions Code Section 6148*.]
Dated: _____

_____ [*Name of law firm or attorney*]
By: _____ [*signature*]
_____ [*typed name*]
_____ [*signature*]
_____ [*client's typed name, address, and*]
[*telephone number*]

[2] Use of Form

This form is for use when a client desires a fixed fee arrangement and the attorney's knowledge of the facts or applicable law are insufficient to quote a fixed fee. The attorney and client can then agree that the attorney will work a certain number of hours at a set rate and then provide the client with an estimate of the necessary legal work and the fixed fee. This agreement satisfies the writing requirments of *Bus. & Prof. Code § 6148*. For discussion of this type of fee agreement, see *§ 72.195[3]*.

[3] Cross References

For a related form, *see § 72.670*

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7-72 California Forms of Pleading and Practice--Annotated § 72.679

§ 72.679 Per Diem Fee Provision

[1] FORM Per Diem Fee Provision

COMPENSATION FOR SERVICES (PER DIEM RATE)

Client shall pay Attorney on a per diem basis as follows:

[*Specify per diem rate applicable to particular services, e.g.*]

(a) Prepare for and appear at preliminary hearing: $_____.

(b) Prepare for and appear at any hearings on pretrial motions, including motions to compel discovery: $_____.

(c) Appear at trial: $_____ per day; $_____ per half day.

[2] Use of Form

This provision is for use in a fee agreement when a set rate based on the type of legal service performed is desired. For example, it may be substituted for the fee provision (Paragraph 5) set *form in § 72.671*. For discussion, *see § 72.195[4]*.

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7-72 California Forms of Pleading and Practice--Annotated § 72.680

§ 72.680 Provision for Recovery of Attorney's Fees by Prevailing Party in Action to Enforce Agreement [Civ. Code § 1717(a)]

[1] FORM Provision for Recovery of Attorney's Fees by Prevailing Party in Action to Enforce Agreement [Civ. Code § 1717(a)]

ATTORNEY'S FEES FOR ENFORCEMENT OF AGREEMENT

If any legal action is necessary to enforce the terms of this agreement, including collection of the agreed fees for services performed by Attorney, the prevailing party shall be entitled to reasonable attorney's fees and costs of suit in addition to any other relief to which that party may be entitled.

[2] Use of Form

This provision is for use in a fee agreement to allow a prevailing party in an action arising out of the agreement to collect attorney's fees incurred in the action [*see Civ. Code § 1717(a)*]. For further discussion, *see § 72.195[5]*.

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7-72 California Forms of Pleading and Practice--Annotated § 72.681

§ 72.681 Incentive Fee Provision

[1] FORM Incentive Fee Provision

ADDITIONAL COMPENSATION

In addition to the agreed compensation specified in Paragraph _____, Client shall pay to Attorney an additional fee dependent on the result Attorney obtains for Client. If _____ [*specify circumstances entitling attorney to additional fee, e.g.,* Attorney obtains a recovery for Client in excess of $_____ *or* Attorney settles the action against Client for an amount less than $_____], Client shall pay Attorney as a bonus _____ [*specify, e.g.,*$_____ *or* _____percent of _____ (the amount of Client's recovery in excess of $_____ *or* the amount by which $_____ exceeds the amount of the recovery against Client)].

[2] Use of Form

This provision is for use in a fee agreement if the client and attorney agree that the attorney should be paid an extra fee if the attorney's efforts achieve an excellent result for the client. It may be added to a general fee agreement, such as the one *set out in § 72.671*. For discussion, *see § 72.193[4]*.

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7-72 California Forms of Pleading and Practice--Annotated § 72.682

§ 72.682 Advance Payment Provision

[1] FORM Advance Payment Provision

ADVANCE PAYMENT OF FEES

Client shall pay to Attorney by _____[*date*], an advance of $_____ for legal services and of $_____ for related costs. Attorney shall deposit the advance payment in a non-interest bearing trust account.

Attorney shall provide Client by the _____ day of each month a statement identifying the following: (1) the persons who performed services for Client during the preceding month, (2) the number of hours worked, (3) the hourly rate of pay, and (4) the total of the charges for the services. Attorney shall also provide the following information in that statement: (1) the amount of any costs incurred during the preceding month, (2) what the costs were incurred for, and (3) the total amount of the costs. The Statement shall indicate the total amount of advance fees and costs to be withdrawn from the trust account and shall specify the date by which Client must contact Attorney if Client objects to the amount of costs and/or fees claimed in the statement. The date specified shall be no less than _____ calendar days from the date that the statement was mailed to Client. In addition, the statement shall specify the amount of the remaining unearned balance of advances for services and costs. If Client does not object to the costs and/or fees set forth in the statement by the date specified, the Attorney may assume that Client does not object and shall be entitled on the day after the specified date to withdraw from the trust account an amount equal to the total value of hourly services provided and costs expended, as specified in the statement.

Attorney shall provide Client _____ days after completion of the services with a final billing, and return to Client any unearned advances for fees or costs. [Attorney may apply any unearned advance for either fees or costs in this matter on an outstanding balance for fees and costs owed by Client in another matter.]

[2] Use of Form

This provision may be used to require an advance payment for fees and costs before commencing legal work for a client to avoid the risk of providing services and not being paid. For discussion, see *§ 72.197[1][a]*.

This provision contemplates deposit of the advance payment in the attorney's trust account. While deposit in the trust account is not clearly required, an unofficial California State Bar publication recommends that advance fees be placed in the trust account and drawn periodically as earned [Handbook on Client Trust Accounting for California Attorneys, p. 14 (State Bar of California 1992); for discussion of trust accounts, *see § 72.320* et seq.].

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7-72 California Forms of Pleading and Practice--Annotated § 72.683

§ 72.683 Disclosure and Consent to Fee Splitting [Cal. Rules Prof. Conduct, Rule 2-200(A)]

[1] FORM Disclosure and Consent to Fee Splitting [Cal. Rules Prof. Conduct, Rule 2-200(A)]

DISCLOSURE AND AGREEMENT TO FEE SPLITTING ARRANGEMENT

DISCLOSURE

1. On _____[*date*], Client and Attorney entered into a legal representation agreement, (hereafter "the agreement"), a copy of which is attached hereto as Exhibit A.

2. Under the terms of the agreement, Attorney is to perform legal services on behalf of Client including: _____[*description*].

3. Under the terms of the agreement, Attorney is entitled to compensation as follows: _____[*specify hourly, per diem, contingency, or other basis for fee*].

4. Attorney desires to _____[associate *or* refer] this case to _____[*name*] to _____ [*specify role of associating attorney, e.g.,* control litigation of the case because of his/her special knowledge of _____ (*specify, e.g.,* malpractice litigation)].

5. Attorney at his/her own expense will pay _____[*name of associated attorney*] _____ [*specify fee to be paid associated attorney, e.g.,* a fee of $_____ *or* _____ percent of the contingency fee fixed by the agreement] for these services.

6. This _____[association *or* referral] will not cause any increase in fees owed by Client, and the total

fees charged by Attorneys will not be "unconscionable," as that term is defined in Cal. Rules Prof. Conduct, *Rule 4-200 of the California Rules of Professional Conduct.*
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name of attorney*]
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name of associated attorney*]

CLIENT'S CONSENT TO FEE SPLITTING ARRANGEMENT

I understand that _____[*name of associated attorney*] is being associated on my case in order to _____ [*specify role of associating attorney in case, e.g.*, control litigation of the case because of his/her special knowledge of _____ (*specify, e.g.*, malpractice litigation)] and that Attorney will pay _____[*name of associated attorney*] on the basis of _____ [*specify fee for associated attorney, e.g.*, a fee of $_____ *or* _____ percent of the contingency fee fixed by the agreement].

I have been advised that this association will not cause any increase in the fees to be paid by me and that the total fees charged by the Attorneys will not be "unconscionable" under *Cal. Rules Prof. Conduct, Rule 4-200*. I consent to this association of attorneys and splitting of the fee between _____[*name of original attorney*] and _____[*name of associated attorney*].
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This provision is for use when the attorney and client agree to associate outside counsel to accomplish the client's objective. An attorney has no implied authority to hire outside associates, assistants, or investigators on behalf of a client. If outside counsel is associated by the attorney, the client must consent in writing after full disclosure of the division of fees and the terms of the division. The total fee charged by all attorneys associated must not be increased solely by reason of the provision for division of fees under *Cal. Rules Prof. Conduct, Rule 2-200*. For discussion, see *§ 72.199[1]*.

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7-72 California Forms of Pleading and Practice--Annotated § 72.684

§ 72.684 Proceedings to Dismiss Complaint When Attorney Lacks Authority to File Suit--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Dismiss Complaint When Attorney Lacks Authority to File Suit--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	NOTICE OF MOTION TO DISMISS, SUPPORT-
_____ [*name*], Plaintiff,	)	ING DECLARATION OF _____
vs.	)	[*name*], AND
_____ [*name*], Defendant.	)	MEMORANDUM OF POINTS AND AUTHORIT-
	)	IES
	)	Date: _____
	)	Time: _____
	)	Dept: _____
		Trial Date: _____

_____

To _____[*identify party, e.g.*, plaintiff] _____[*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], _____[*specify party, e.g.*, defendant] will move for an order dismissing this action. The motion will be

made on the ground that plaintiff, _____[*name*], did not authorize the filing of this action.

The motion will be based on this notice of motion, on the declaration(s) of _____[*name(s)*] and the memorandum of points and authorities served and filed with it, on the records and file in this action, and on any evidence that may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____[*name*]

I, _____[*name*], declare:

1. I am _____ [*specify status or capacity of declarant showing competency to testify to the facts in the declaration, e.g.,* a physician duly licensed by the State of California to practice psychiatry. _____ (*Specify other credentials such as years of practice and posts held*).]

2. _____ [*Set forth probative facts showing that attorney had no authority from the plaintiff to file the complaint, e.g.,* On _____ (*date*), prior to the filing of this action, plaintiff became mentally incompetent as a result of _____ (*specify mental illness*) and thereafter lacked the capacity to authorize or retain _____ (*name of attorney of record*) or any attorney to file this action. Plaintiff has been under my care and treatment for the above-described mental disorder since _____ (*date*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion*]

[2] Use of Form

This form is for use by a party to challenge the authority of either his or her own or the opposing party's attorney to represent the party [*see County of Ventura v. Clay (1897) 119 Cal. 213, 214, 51 P. 189]* . For a discussion of contesting an attorney's authority to act on behalf of a purported client, see *§ 72.220[5]* and *[6]*.

For a form of order granting the motion, *see § 72.685*.

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PART V. FORMS
B. Creation And Scope Of Attorney-Client Relationship

7-72 California Forms of Pleading and Practice--Annotated § 72.685

§ 72.685 Proceedings to Dismiss Complaint When Attorney Lacks Authority to File Suit--Order

[1] FORM Proceedings to Dismiss Complaint When Attorney Lacks Authority to File Suit--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], Defendant.	)	ORDER
	)	
	)	

_____

The motion of _____[*identify party, e.g.,* defendant] for an order dismissing the action herein was heard by the court on _____[*date*]. Plaintiff appeared by counsel _____[*name*]; defendant appeared by counsel _____[*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the above entitled action be and the same is hereby dismissed, and that defendant have his/her costs in the sum of $_____.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use when the court grants a motion to dismiss a complaint when an attorney lacks authority to

file suit [*see § 72.684*].

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B. Creation And Scope Of Attorney-Client Relationship

7-72 California Forms of Pleading and Practice--Annotated § 72.686

§ 72.686 Proceedings to Invalidate Stipulation Based on Attorney's Lack of Authority--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Invalidate Stipulation Based on Attorney's Lack of Authority--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	NOTICE OF MOTION TO INVALIDATE
	)	STIPULATION,
_____ [*name*], Plaintiff,	)	SUPPORTING
vs.	)	DECLARATION OF _____
_____ [*name*], Defendant.	)	[*name*], AND
	)	MEMORANDUM OF POINTS AND AUTHORIT-
	)	IES
	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Trial Date: _____

_____

To _____[plaintiff *or* defendant] _____[*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], _____[

specify party, e.g., defendant] will move for an order invalidating the stipulation to _____[*specify nature of stipulation, e.g.,* submit this action to binding arbitration]. The stipulation was entered into between _____[*name*], [former] attorney of record for _____[plaintiff *or* defendant], and _____[*name*], attorney of record for _____[plaintiff *or* defendant] on _____[*date*], and approved by the court on _____[*date*]. An order incorporating the terms of the stipulation was issued on _____[*date*]. The motion will be made on the ground that _____[plaintiff *or* defendant] never authorized _____[*name of attorney*] to enter into the above-described stipulation.

The motion will be based on this notice of motion, on the declaration(s) of _____[*name(s*)] and the memorandum of points and authorities served and filed with it, on the records and file in this action, and on any evidence that may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____[*name*]

I, _____[*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____[*State facts showing why stipulation should be set aside*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion*]

[2] Use of Form

This form is for use by a client seeking relief from a binding stipulation. For discussion, see *§ 72.221[4]*.

[3] Contents of Declaration

The declaration should show facts negating the attorney's authority, such as the client's express objections and, if applicable, that the opposing party was aware of these objections *see Blanton v. Womancare, Inc. (1985) 38 Cal. 3d*

396, 403-408, 212 Cal. Rptr. 151, 696 P.2d 645] .

For a form of order granting the motion, *see § 72.687*.

[4] Decisions

A party may ordinarily only be relieved from a stipulation by noticed motion to set aside made in trial court and supported by affidavit or declaration stating grounds for relief. *Harris v. Spinali Auto Sales, Inc. (1966) 240 Cal. App. 2d 447, 453, 49 Cal. Rptr. 610* ; *L.A. City Sch. Dist. v. Landier Inv. Co. (1960) 177 Cal. App. 2d 744, 750, 2 Cal. Rptr. 662*

Individual not a party to stipulation nor the person for whose benefit it was entered into may not seek to set stipulation aside. *Estate of Miller (1956) 143 Cal. App. 2d 544, 553, 299 P.2d 1005*

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7-72 California Forms of Pleading and Practice--Annotated § 72.687

§ 72.687 Proceedings to Invalidate Stipulation Based on Attorney's Lack of Authority--Order

[1] FORM Proceedings to Invalidate Stipulation Based on Attorney's Lack of Authority--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], Defendant.	)	ORDER
	)	
	)	

_____

The motion of _____[*identify party, e.g.,* defendant] for an order invalidating the stipulation to _____[*specify nature of stipulation, e.g.,* submit the above-entitled action to binding arbitration] was heard by the court on _____[*date*]. Plaintiff appeared by counsel _____[*name*]; defendant appeared by counsel _____[*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the above stipulation be and the same is hereby invalidated, and that _____[plaintiff *or* defendant] have his/her costs in the sum of $_____.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use when the court grants a motion to invalidate a stipulation when an attorney lacked authority to make it [*see § 72.686*].

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7-72 California Forms of Pleading and Practice--Annotated § 72.688

§ 72.688 Proceedings to Strike Answer Filed by Attorney Without Defendant's Authority and Withdraw Appearance--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Strike Answer Filed by Attorney Without Defendant's Authority and Withdraw Appearance--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	NOTICE OF MOTION TO STRIKE ANSWER
	)	[AND WITHDRAW
_____ [*name*], Plaintiff,	)	APPEARANCE],
vs.	)	SUPPORTING
_____ [*name*], Defendant.	)	DECLARATION OF _____
	)	[*name*], AND
	)	MEMORANDUM OF POINTS AND AUTHORIT-
	)	IES
	)	Date: _____
	)	Time: _____
	)	Dept: _____
		Trial Date: _____

_____

To plaintiff _____[*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of]

this court, located at _____[*street address*], _____[*city*], defendant will [specially appear] to move for an order [for leave to withdraw appearance and] to strike the answer filed herein on _____[*date*]. The motion will be made on the ground that defendant _____[*name*] did not authorize that the answer be filed [or that appearance] by defendant be made.

The motion will be based on this notice of motion, on the declaration(s) of _____[*name(s)*] and the memorandum of points and authorities served and filed with it, on the records and file in this action, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____[*name*]

I, _____[*name*], declare:

1. I am _____[*specify status or capacity of declarant showing competency to testify to the facts in the declaration, e.g.,* the defendant in this action].

2. _____ [*Set forth probative facts showing that attorney had no authority from the defendant to file the answer, e.g.,* On _____ (*date*), I consulted _____ (*name of unauthorized attorney*) regarding the summons I received in this action. I did not, however, retain or agree to retain him/her as my attorney. At the end of our meeting I thanked him/her for his advice and told him/her I would be in touch if I wished further assistance in the matter. Later the same day I retained _____[*name of authorized attorney*] to represent me in this action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion*]

CAUTION:
A supporting memorandum is required to be served and filed with the foregoing notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*].

[2] Use of Form

This notice of motion is for use when defendant moves to strike an answer filed by an attorney without his

authorization. Optional language is included if the defendant seeks to make a special appearance so as not to submit to the court's jurisdiction [*see Wilson v. Barry (1951) 102 Cal. App. 2d 778, 780, 228 P.2d 331* (affirming order allowing withdrawal of appearances except as to one defendant who had made a general appearance by personally signing an affidavit supporting a summary judgment motion in the action)].

Alternatively, the plaintiff may also move to strike the unauthorized answer [*see People v. Honey Lake Valley Irr. Dist. (1926) 77 Cal. App. 367, 374, 246 P. 819* (dictum)].

For discussion, see *§ 72.220[6]*. For a form of order granting the motion, *see § 72.689*.

[3] California Points and Authorities

For memoranda of points and authorities supporting and opposing the foregoing motion, see California Points and Authorities, Ch. 24, *Attorneys at Law: Substitution, Withdrawal, Disqualification, and Authority to Appear*

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7-72 California Forms of Pleading and Practice--Annotated § 72.689

§ 72.689 Proceedings to Strike Answer Filed by Attorney Without Defendant's Authority and Withdraw Appearance--Order

[1] FORM Proceedings to Strike Answer Filed by Attorney Without Defendant's Authority and Withdraw Appearance--Order

[*Caption. See § 72.685.*]

The motion of defendant for an order [to withdraw his/her appearance and] to strike the answer filed herein on _____[*date*] came on regularly for hearing by the court on _____[*date*]. Plaintiff appeared by counsel _____[*name*]; defendant appeared by counsel _____[*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and [defendant is granted leave to withdraw his appearance and] the answer filed herein is ordered stricken from the files of this court
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This order is for use when the court grants a motion to strike an unauthorized answer [*see § 72.688*]. It includes optional language to withdraw the defendant's appearance. It is prepared by the moving party and presented to the judge for signature after the hearing and is then filed with the clerk of the court.

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7-72 California Forms of Pleading and Practice--Annotated § 72.690

§ 72.690 Notice of Change of Address of Attorney of Record [Cal. Rules of Ct., Rule 385]

[1] FORM Notice of Change of Address of Attorney of Record [Cal. Rules of Ct., Rule 385]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], Defendant.	)	NOTICE OF CHANGE OF ADDRESS OF ATTOR-
	)	NEY FOR _____ [*e.g.*,
	)	PLAINTIFF]

_____

To _____[*party*, *e.g.*, defendant] and to his attorney of record:

NOTICE IS HEREBY GIVEN that [effective _____ (*date*)] the new address and telephone number of _____[*party*, *e.g.*, plaintiff]'s attorney of record, _____[*name*], is as follows: _____[*specify*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This notice is for use to notify the parties and the court of a change of address and telephone number of an attorney of record. An attorney whose address changes while an action is pending must serve a written notice of change of address

on all parties and file it with the court [*see Cal. Rules of Ct., Rule 2.200*].

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7-72 California Forms of Pleading and Practice--Annotated § 72.691

§ 72.691 Revocation of Authority to Receive Money on Behalf of Client [Code Civ. Proc. § 283(2)]

[1] FORM Revocation of Authority to Receive Money on Behalf of Client [Code Civ. Proc. § 283(2)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], Defendant.	)	REVOCATION OF
	)	ATTORNEY'S AUTHORITY TO RECEIVE
	)	MONEY ON BEHALF OF CLIENT

_____

I, _____[*name*], the _____[*party*] in this action, hereby revoke the authority of _____[*name*], my attorney of record, to receive any money claimed by me in this action, both while the action is pending and after final judgment.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form is for use to revoke an attorney's statutory authority under to receive money claimed by the client during the pendency of an action and after judgment [*see Code Civ. Proc. § 283(2)*]. The revocation of authority is filed with the court in which the action is pending and a copy is served on the adverse party.

For discussion of the attorney's authority, see *§ 72.220[3][a]*.

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7-72 California Forms of Pleading and Practice--Annotated § 72.692

§ 72.692 Association of Counsel--General Form

[1] FORM Association of Counsel--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], Defendant.	)	ASSOCIATION OF COUNSEL
	)	
	)	

_____

_____[*Name*], being the attorney of record for _____[*e.g.*, plaintiff] in this action, hereby associates _____[*name*], attorney at law, as co-counsel for _____[*e.g.*, plaintiff] in this matter. The office address and telephone number of such associated counsel are: _____[*specify*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

_____[*Name of associated attorney*] hereby accepts the above association.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of association of counsel is for use when the attorney of record delegates responsibilities in the case to another attorney without an actual substitution of attorneys. The form is filed in the court in which the matter is pending. For discussion, see *§ 72.222*.

For a form of notice of association of counsel to inform the other parties of the association, *see § 72.694*.

[3] Contents

There is no prescribed form of association of counsel and association need not even be effected formally [*see Vaughn v. State Bar (1973) 9 Cal. 3d 698, 701-702, 108 Cal. Rptr. 806, 511 P.2d 1158]* . Nevertheless, it is a good practice to file a formal association of counsel stating the name, address, and telephone number of the attorney associated, and showing his consent. It then becomes part of the record to explain the part of the associated attorney in the conduct of the case.

[4] Decisions

Duty of attorney of record to prepare associate counsel for trial proceeding at which associate substitutes for attorney of record. *Vaughn v. State Bar (1973) 9 Cal. 3d 698, 701-702, 108 Cal. Rptr. 806, 511 P.2d 1158* (attorney disciplined for failure to prepare associate)

Associated attorney as not entitled to act as attorney of record without substitution but as entitled to designate himself as "one of the attorneys for" party when appearing for party in court. *Wells Fargo & Co. v. City etc. of S.F. (1944) 25 Cal. 2d 37, 43, 152 P.2d 625*

[5] Cross References

For a related form, *see § 72.693*

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7-72 California Forms of Pleading and Practice--Annotated § 72.693

§ 72.693 Association of Counsel--With Consent of Party

[1] FORM Association of Counsel--With Consent of Party

[*Caption. See § 72.692* .]

_____[*Name*], being the attorney of record for _____[*e.g.*, plaintiff] herein, hereby associates _____[*name*], attorney at law, as co-counsel for _____[*e.g.*, plaintiff] in the above entitled matter. The office address and telephone number of such associated counsel are: _____[*specify*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

_____[*Name of associated counsel*] hereby accepts the above association.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

_____[*Name*], _____[*e.g.*, plaintiff] herein consents to the above association.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]
_____ [*party's status e.g.*, plaintiff]

[2] Use of Form

This form of association of counsel is for use when the client consents to the association and indicates consent on the paper itself. Although there is no authority requiring that a client consent to an association of counsel for the conduct of his case, it is a good practice to obtain the client's consent incident to his or her agreement to incur the expense of the associate's fees and costs [*see Tasker v. Cochrane (1928) 94 Cal. App. 361, 366, 271 P. 503* (holding that the client is not liable for such fees or costs absent a special agreement)]. The agreement to pay an associate counsel's fees and costs should be expressly provided in the retainer agreement prior to employing the associate attorney. The client's consent is then obtained when the particular association is made.

[3] Cross References

For related forms, *see §§ 72.692* and *72.694*

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7-72 California Forms of Pleading and Practice--Annotated § 72.694

§ 72.694 Notice of Association of Counsel

[1] FORM Notice of Association of Counsel

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], Defendant.	)	NOTICE OF ASSOCIATION OF COUNSEL
	)	
	)	

_____

To _____[*specify party, e.g.*, defendant] and his attorney of record:

NOTICE IS HEREBY GIVEN that _____[*name of associated attorney*] has become associated with _____[*name of attorney of record*] as attorney for _____[*specify party, e.g.*, plaintiff] herein. The office address and telephone number of such associated attorney are: _____[*specify*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This notice of association of counsel is for use to notify the other parties and their counsel of the association.

[3] Cross References

For related forms, *see §§ 72.692* and *72.693*

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7-72 California Forms of Pleading and Practice--Annotated § 72.695

§ 72.695 Application by Out-of-State Counsel to Associate in Particular Case [Cal. State Bar Rules, Counsel Pro Hac Vice Program, Rule 8.0]

[1] FORM Application by Out-of-State Counsel to Associate in Particular Case [Cal. State Bar Rules, Counsel Pro Hac Vice Program, Rule 8.0]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF HEARING AND APPLICATION TO
Plaintiff,	)	APPEAR AS COUNSEL *PRO HAC*
vs.	)	*VICE*
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
_____		

To _____[*identify party, e.g.*, plaintiff] _____[*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], _____[*specify applicant*] will request leave to appear as counsel *pro hac vice* in the above-entitled

_____[action *or* proceeding].

The request will be based on this notice, on the verified application of _____[*specify applicant*], on the memorandum of points and authorities served and filed herewith, and on such evidence as may be presented at the hearing of the application.

VERIFIED APPLICATION

I, _____[*name*], declare:

I hereby request leave of this Court to appear in this _____[action *or* proceeding] as counsel *pro hac vice*. I have been retained to so appear in association with _____[*specify name, address, and telephone number*], who is counsel of record for _____[*specify party, e.g.,* defendant] and is an active member of the State Bar of California.

My residence address is _____, and my office address is _____.

I have been admitted to practice before _____[*specify court*] since _____[*specify admission date*][, and before _____ (*specify anyadditional courts and time of admission to practice before them*)]. I am a member in good standing in the Bar(s) of such court(s), and am not currently suspended or disbarred from practice in any court.

_____ [*Specify the title of court and cause, if any, in which the applicant has filed an application to appear as counsel pro hac vice in California during the preceding two years, including the date of each application, and whether the application was granted, e.g.,* I have filed only one application to appear as counsel *pro hac vice* in the state courts of California in the preceding two years, on _____ (*date*), in _____ (*specify title of court and action*). This application was granted on _____ (*date*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

CAUTION:

A supporting memorandum must to be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*; *see also Cal. Rules of Ct., Rule 8.54(a)* (supporting memorandum to be served and filed with motion on appeal)]. For further discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form of application and notice of hearing is for use by out-of-state attorneys who desire to appear before a state superior court in a particular case as counsel *pro hac vice* [*see Cal. Rules of Ct., Rule 9.40*]. All moving and supporting papers must be served and filed in the manner required by *Code Civ. Proc. § 1005* [Cal. State Bar Rules, Counsel Pro Hac Vice Program, Rule 4.3.1].

For further discussion of appearance as counsel *pro hac vice*, including eligibility requirements, see *§ 72.223[1]*.

[3] Contents of Application

The application portion of the form includes those statements required by Cal. State Bar Rules, Counsel Pro Hac Vice Program, Rule 4.2, and a declaration under penalty of perjury, which satisfies the requirement that the application be verified [Cal. State Bar Rules, Counsel Pro Hac Vice Program, Rule 4.1; *see Code Civ. Proc. §§ 1003, 2009, 2015.5*].

[4] Proof of Service

The original application filed with the court must be accompanied by proof, under *Code Civ. Proc. § 1013a*, of service by mail of a copy of theapplication and a notice of hearing on all parties who have appeared in the cause and on the State Bar at its San Francisco office [Cal. State Bar Rules, Counsel Pro Hac Vice Program, Rule 4.3; *see Code Civ. Proc. § 1014* (when defendant appears)]. For a form of proof of service by mail, see Ch. 518, *Service of Summons and Papers* .

[5] Supreme Court or Court of Appeals

The form may be modified for use to apply for leave to appear as counsel *pro hac vice* in an appellate court under *Cal. Rules of Ct., Rule 8.54* [*see* Cal. State Bar Rules, Counsel Pro Hac Vice Program, Rule 4.4]. The notice of hearing of the application may be omitted because notice of the hearing, if any, is given by the clerk of the appellate court [*see Cal. Rules of Ct., Rule 8.54(a), (b)*]. All motions in a reviewing court are made by filing a typewritten motion, which must set forth the grounds of motion, the papers on which it is based (in this instance the verified application), and the relief sought. Each copy of the motion must be accompanied by a supporting memorandum and, if the motion is based on matters not appearing of record, by affidavits or supporting evidence [*Cal. Rules of Ct., Rule 8.54(a)*]. The original motion must be filed with proof of service on all parties who have appeared in the cause and on the State Bar at its San Francisco office [*Cal. Rules of Ct., Rule 4.431*; Cal. State Bar Rules, Counsel Pro Hac Vice Program, Rule 4.4].

[6] Decisions

Former Cal. Rules of Ct., Rule 983 (now see Rule *9.40*), in limiting appearances *pro hac vice* to non-resident attorneys, excluding resident attorneys who are admitted to practice in foreign jurisdictions but not in California, is not unconstitutional violation of U.S. *Const., art. IV, § 2* (privileges and immunities clause) or rights protected under *U.S. Const., amend. I* or *XIV*. *Paciulan v. George (9th Cir. 2000) 229 F.3d 1226, 1227-1228, 1231*

Trial judge abused discretion in denying permission for out-of-state attorney to appear on behalf of criminal defendant, when basis for decision was that judge was not familiar with or confident of attorney; proper basis for decision was whether appearance by out-of-state attorney would disrupt orderly proceeding so as to justify abridgment of defendant's right to retain counsel of choice. *Magee v. Superior Court (1973) 8 Cal. 3d 949, 952-953, 106 Cal. Rptr. 647, 506 P.2d 1023*

A trial court's inherent powers include the authority to revoke an attorney's *pro hac vice* status when that attorney has engaged in conduct that would be sufficient to disqualify a California attorney. *Sheller v. Superior Court of Los Angeles County (2008) 158 Cal. App. 4th 1697, 1716, 71 Cal. Rptr. 3d 207*

Former Cal. Rules of Ct., Rule 983(a) (*now see* Cal. Rules of Ct., Rule *9.40(a)*) prohibition of appearance by out-of-state attorney in particular case when attorney regularly engages in business activities in California, does not apply to services rendered out-of-state for California client. *Walter E. Heller Western, Inc. v. Superior Court (1980) 111 Cal. App. 3d 706, 711, 168 Cal. Rptr. 785*

[7] Text References

Witkin, California Procedure, vol. 1, *Attorneys*, §§ 402, 403, 405 (4th ed. 1996)

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7-72 California Forms of Pleading and Practice--Annotated §§ 72.696

§§ 72.696 Mandatory Disclosure Regarding Lack of Professional Liability Insurance

[1] FORM Mandatory Disclosure Regarding Lack of Professional Liability Insurance
[*Attorney or law firm letterhead*]
_____[*date*]
To: _____[*name of client*]

[*If attorney has no professional liability insurance at time of engagement, use the following at that time:*]

As required by *California Rule of Professional Conduct 3-410(A)*, _____[*I am or We are*] hereby informing you that _____[*I or the members of this law firm*] do not have professional liability insurance.

[*Or, if attorney subsequently knows or should know that he or she no longer has professional liability insurance, use the following:*]

As required by *California Rule of Professional Conduct 3-410(B)*, _____[*I am or We are*] hereby informing you that _____[*I or the members of this law firm*] no longer have professional liability insurance.
[*CONTINUE*]

Please indicate your receipt of this notice for our records by signing and dating the acknowledgment of receipt in the space indicated below, and returning the signed copy to the address above.

I hereby acknowledge receipt of a copy of this notice.

Dated _____

.....
[*client's signature*]

[2] Use of Form

This form is a notice to a client that an attorney does not carry professional liability insurance, or no longer carries such insurance. Effective January 1, 2010, an attorney who knows or should know that he or she does not have professional liability insurance must inform a client in writing, at the time of the client's engagement of the attorney, that the attorney does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the attorney's legal representation of the client in the matter will exceed four hours [*Cal. Rules Prof. Conduct, Rule 3-410(A)*]. If an attorney does not provide this notice at the time of a client's engagement of the attorney, and the attorney subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the attorney must inform the client in writing within 30 days of the date that the attorney knows or should know that he or she no longer has professional liability insurance [*Cal. Rules Prof. Conduct, Rule 3-410(B)*]. For discussion, *see § 72.192[11]*.

The disclosure obligation at the time of engagement applies with respect to both new clients and new engagements with returning clients [*Cal. Rules Prof. Conduct, Rule 3-410(A)*]. An attorney may include the language in a written fee agreement with the client or in a separate writing [Commission on the Revision of the Rules of Professional Conduct, Comment to *Cal. Rules Prof. Conduct, Rule 3-410*]. The disclosure in this form is a separate notice.

This form contains space for the client to acknowledge receipt. Although such acknowledgment is not required, it is recommended that such an acknowledgment be obtained and retained so that the attorney will have proof that the notice was given as required, and was received by the client.

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[Reserved]

§§ 72.697[Reserved]

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7-72 California Forms of Pleading and Practice--Annotated § 72.710

§ 72.710 Notice by Adverse Party to Appoint New Attorney [Code Civ. Proc. § 286]

[1] FORM Notice by Adverse Party to Appoint New Attorney [Code Civ. Proc. § 286]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE TO APPOINT ATTORNEY OR TO AP-
_____ [*name*],	)	PEAR
Defendant.	)	IN PERSON
	)	
	)	

_____

To _____[*identify party, e.g.,* plaintiff] _____[*name*]:

NOTICE IS HEREBY GIVEN that as a result of _____[*specify, e.g.,* the death] of your attorney on _____[*date*], you must either appoint another attorney to represent you or appear in person in order to protect yourself against any further proceedings that may be taken against you in this action.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form is for use by a party to give notice to the adverse party whose attorney has died, been removed or suspended, or otherwise has ceased to act to appoint another attorney or appear in person [*Code Civ. Proc. § 286*]. For related text, see *§ 72.351[1]*.

[3] Copies

The following copies of the form should be prepared:

(1) Original to be filed with the court;

(2) One copy to be served on adverse party;

(3) One office file copy; and

(4) Other copies as desired.

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7-72 California Forms of Pleading and Practice--Annotated § 72.711

§ 72.711 Designation of Attorney After Death, Removal, or Suspension of Attorney of Record

[1] FORM Designation of Attorney After Death, Removal, or Suspension of Attorney of Record

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	DESIGNATION OF
_____ [*name*],	)	ATTORNEY
Defendant.	)	
	)	
	)	

_____[*Name of attorney*], my attorney of record in the above entitled action, having _____[*specify, e.g.*, died], I do now designate _____[*name of new attorney*], whose address is _____[*specify*], as my attorney of record in the above entitled action
Dated: _____.

_____ [*signature*]
_____ [*typed name*]
Plaintiff

ACCEPTANCE BY ATTORNEY

The undersigned attorney accepts the foregoing appointment and does hereby appears as attorney for the

_____[*party*] in the above entitled action.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form of designation of an attorney is for use when a new attorney of record is appointed in place of one who has died, or has been removed or suspended. It is filed with the court in which the action or proceeding is pending and a copy is served on the adverse party.

[3] Cross References

For a related form, *see § 72.710*

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7-72 California Forms of Pleading and Practice--Annotated § 72.712

§ 72.712 Proceedings to Be Relieved as Counsel Due to Lack of Public Funding of Legal Service Attorney [Code Civ. Proc. § 285.2]--Motion and Supporting Papers

[1] FORM Proceedings to Be Relieved as Counsel Due to Lack of Public Funding of Legal Service Attorney [Code Civ. Proc. § 285.2]--Motion and Supporting Papers

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION TO BE RELIEVED AS
vs.	)	COUNSEL, DECLARATION OF
_____ [*name*],	)	_____ [*name*], AND MEMOR-
Defendant.	)	ANDUM OF POINTS AND AUTHORITIES
	)	Date: _____
	)	Time: _____
	)	Dept: _____
		Trial Date: _____

_____

To _____[*identify party, e.g.*, defendant *or* plaintiff] _____[*name of client*]:

YOU ARE HEREBY NOTIFIED that _____[*name*], your attorney of record, intends to apply to the court for an order relieving him/her as your attorney in this _____[action *or* proceeding]. The application will be presented to the court on _____[*date*] at _____[*time*] in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], _____. The reasons for the application are (1) your attorney is a legal service agency attorney, and (2) a reduction in public funding for legal

service materially impairs his/her ability to represent you.

The application is based on this notice of motion, on the declaration(s) of _____[*name(s*)] and the memorandum served and filed with it, on the records and file in this case, and on any evidence that may be presented to the court at the above-stated time and place.

[If the application is granted and the court orders that _____ (*name*) is relieved as your attorney of record, it will be necessary that you secure the services of another attorney to represent you in this _____ (action *or* proceeding) or that you represent yourself.]
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____[*name*]

I, _____[*name*], declare:

1. I am employed by _____[*name*], which is a legal service agency, and am the attorney of record for _____[*specify party, e.g.,* plaintiff] in the above-entitled matter.

2. _____[*Specify party, e.g.,* Plaintiff] is indigent and is financially unable to afford counsel.

3. _____[*Name of legal service agency*] is funded by _____[*specify source and manner of funding*].

4. _____[*Specify manner in which funding has been reduced and its effect on agency*].

5. There are not adequate public funds to continue the effective representation of the _____[*specify client, e.g.,* plaintiff] for the reason[s] that _____[*specify reasons*].

6. I have made the following efforts, all of which have been unsuccessful, to find alternate representation for the _____[*specify client e.g.,* plaintiff]: _____[*specify*].

7. I have taken the following steps to reduce the legal prejudice to the _____[*specify client e.g.,* plaintiff]: _____[*specify*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM

[*Add memorandum supporting motion*]

[2] Use of Form

The form is for use by a legal service agency attorney to request permission to be relieved as counsel when a reduction in public funding for legal service materially impairs his or her ability to represent the party [*Code Civ. Proc. § 285.2*]. For related text, see *§ 72.370[7]*.

[3] Cross References

For discussion and forms relating to motions generally, see Ch. 372, *Motions and Orders*

For discussion and forms relating to declarations generally, see Ch. 15, *Affidavits, Certifications, and Declarations*

For discussion relating to services of papers generally, see Ch. 518, *Service of Summons and Papers*

For a related form, *see § 72.710*

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7-72 California Forms of Pleading and Practice--Annotated § 72.713

§ 72.713 Proceedings to Be Relieved as Counsel Due to Lack of Public Funding of Legal Service Attorney [Code Civ. Proc. § 285.2]--Order

[1] FORM Proceedings to Be Relieved as Counsel Due to Lack of Public Funding of Legal Service Attorney [Code Civ. Proc. § 285.2]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

_____

The motion of _____[*name of attorney*] for an order relieving him/her as the attorney for _____[*name of client*] in the above-entitled _____[action *or* proceeding] was heard by the court on _____[*date*]. _____[*Name of attorney*] appeared for himself/herself. _____[*Specify other appearances, if any*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted and that _____ be relieved as counsel in this matter
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form is a form of order for use by a legal service agency attorney when the court has granted permission to be relieved as counsel because a reduction in public funding for legal service materially impaired his or her ability to represent the party [*Code Civ. Proc. § 285.2*]. For related text, see *§ 72.370[7]*.

[3] Cross References

For discussion and forms relating to orders generally, see Ch. 372, *Motions and Orders*

For a related form, *see § 72.712*

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7-72 California Forms of Pleading and Practice--Annotated § 72.714

§ 72.714 Notice of Withdrawal as Attorney of Record in Domestic Relations Case [Code Civ. Proc. § 285.1]

[1] FORM Notice of Withdrawal as Attorney of Record in Domestic Relations Case [Code Civ. Proc. § 285.1]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In re the Marriage of	)	NO. _____
Petitioner: _____ [*name*]	)	NOTICE OF WITHDRAWAL
and	)	OF ATTORNEY OF RECORD
Respondent: _____ [*name*]	)	
	)	

_____

To the petitioner and the respondent:

NOTICE IS HEREBY GIVEN that _____[*name of attorney*] withdraws as the attorney of record for the _____[respondent *or* petitioner], _____[*name*], in the above-captioned proceeding effective immediately.

The judgment for _____[*specify, e.g.*, dissolution of marriage] in the above-entitled proceeding was entered on _____[*date*] and became final on _____[*date*].

The _____[respondent's *or* petitioner's] last known address is _____[*set forth address*].
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form of notice of withdrawal is for use in notifying the parties of counsel's withdrawal after entry of a final judgment in a domestic relations case. The notice is filed with the court and a copy is mailed to the client and served on the adverse party [*Code Civ. Proc. § 285.1*].

A notice of withdrawal in a domestic relations case must state (1) the date of entry of the final decree or judgment, (2) the last known address of the party, and (3) that the attorney withdraws as attorney for such party [*Code Civ. Proc. § 285.1*].

For related text, see *§ 72.370[8]*.

[3] Cross References

For a related form, *see § 72.710*

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7-72 California Forms of Pleading and Practice--Annotated § 72.715

§ 72.715 Notice of Motion and Motion to Be Relieved as Council--Civil--Cal. Judicial Council Form MC-051

[1] FORM Notice of Motion and Motion to Be Relieved as Council--Civil--Cal. Judicial Council Form MC-051

Click here to view image.

[2] Use of Form

This form is an illustrative version of Cal. Judicial Council Form MC-051, Notice of Motion and Motion to Be Relieved as Counsel--Civil, which must be used by an attorney to request permission to be relieved as counsel when factors have arisen that require withdrawal from employment in accordance with the provisions of the *Cal. Rules of Prof. Conduct, Rule 3-700(B)* [*Code Civ. Proc. § 284(2)*; *Cal. Rules of Ct., Rule 3.1362(a)*]. It is used when the client has not consented to counsel's withdrawal. For example, the client's refusal to cooperate with his or her attorney provides proper support for a motion to withdraw [*see People v. Prince (1968) 268 Cal. App. 2d 398, 403-404, 74 Cal. Rptr. 197* (client's failure to pay attorney's fees)]. For related text, § 72.372. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents

A notice of motion to be relieved as counsel under *Code Civ. Proc. § 284(2)* must be directed to the client and made on the Judicial Council form Notice of Motion and Motion to Be Relieved as Counsel--Civil, form MC-051 [*Cal. Rules of Ct., Rule 3.1362(a)*]. Notwithstanding any other rule of court, no memorandum is required to be filed or served with a motion to be relieved as counsel [*Cal. Rules of Ct., Rule 3.1362(b)*].

The motion must be accompanied by a declaration on the Judicial Council form Declaration in Support of Attorney's Motion Be Relieved as Counsel--Civil, form MC-052 [*Cal. Rules of Ct., Rule 3.1362(c)*; *see § 72.716*]. The proposed order, prepared on the Judicial Council form Order Granting Attorney's Motion to Be Relieved as Counsel--Civil, form MC-053 [*see § 72.717*], must be lodged with the court with the moving papers [*Cal. Rules of Ct., Rule 3.1362(e)*].

[4] Service of Papers

The notice of motion and motion, the declaration, and the proposed order must be served on the client and on all other parties who have appeared in the case, by personal service or mail [*Cal. Rules of Ct., Rule 3.1362(d)*]. If the papers are served by mail, *Code Civ. Proc. § 1011(b)* (relating to service on a party) applies. However, it would appear that the intent of this rule is that if service by mail at the client's last known address is unsuccessful, then service may be made by delivery of the papers to the court clerk [*see Code Civ. Proc. §§ 1011(b), 1012*].

If the notice is served on the client by mail under *Code Civ. Proc. § 1013* (which relates to depositing the papers with the U.S. Postal Service), it must be accompanied by a declaration stating either (1) facts showing that the service address is the current residence or business address of the client,or (2) the service address is the last known residence or business address of the client and the attorney has checked with the county registrar of voters and has been unable to locate a more current address after making reasonable efforts to do so within 30 days before the filing of the motion to be relieved. For these purposes, "current" means that the address was confirmed within 30 days before the filing of the motion. Merely demonstrating that the notice was sent to the client's last known address and was not returned will not, by itself, be sufficient to demonstrate that the address is current [*Cal. Rules of Ct., Rule 3.1362(d)*].

[5] California Points and Authorities

For memoranda supporting and opposing a motion to withdraw as attorney of record, see California Points and Authorities, Ch. 24, *Attorneys at Law: Substitution, Withdrawal, Disqualification, and Authority to Appear* (Matthew Bender)

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7-72 California Forms of Pleading and Practice--Annotated § 72.716

§ 72.716 Declaration in Support of Attorney's Motion to Be Relieved as Counsel--Civil--Cal. Judicial Council Form MC-052

[1] FORM Declaration in Support of Attorney's Motion to Be Relieved as Counsel--Civil--Cal. Judicial Council Form MC-052

Click here to view image.

[2] Use of Form

This form is an illustrative version of Cal. Judicial Council Form MC-052, Declaration in Support of Attorney's Motion to Be Relieved as Counsel--Civil, which must accompany the Notice of Motion and Motion to Be Relieved as Counsel--Civil (*see § 72.715*) [*Cal. Rules of Ct., Rule 3.1362(e)*]. For further discussion, see the Comments to § 72.715.

This form is available in an interactive, electronic format in *LexisNexis(R)Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Contents

The declaration must state in general terms and without compromising the confidentiality of the attorney-client relationship why a motion under *Code Civ. Proc. § 284(2)* is brought instead of filing a consent under *Code Civ. Proc. § 284(1)* [*Cal. Rules of Ct., Rule 3.1362(c)*].

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7-72 California Forms of Pleading and Practice--Annotated § 72.717

§ 72.717 Order Granting Attorney's Motion to Be Relieved as Counsel--Civil--Cal. Judicial Council Form MC-053

[1] FORM Order Granting Attorney's Motion to Be Relieved as Counsel--Civil--Cal. Judicial Council Form MC-053

Click here to view image.

[2] Use of Form

This form is an illustrative version of Cal. Judicial Council Form MC-053, Order Granting Attorney's Motion to Be Relieved as Counsel--Civil, which must be prepared by the attorney moving to be relieved as counsel as a proposed order and lodged with the court with the moving papers [*Cal. Rules of Ct., Rule 3.1362(e)*]. For further discussion, see the Comments to § 72.715.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Notice of Withdrawal

Notice to the adverse party of a change of the attorney of record is required to be given by *Code Civ. Proc. § 285*. It may be given by service of the order itself or of a formal notice of withdrawal [*see § 72.718*] on the adverse party.

[4] Content of Order

The order must specify all hearing dates scheduled in the action or proceeding, including the date of trial, if known. If no hearing date is presently scheduled, the court may set one and specify the date in the order [*Cal. Rules of Ct., Rule 3.1362(e)*].

[5] Service of Order

After the order is signed, a copy of the signed order must be served on the client and on all parties that have appeared in the case. The court may delay the effective date of the order relieving counsel until proof of service of a copy of the signed order on the client has been filed with the court [*Cal. Rules of Ct., Rule 3.1362(e)*].

[6] Cross References

See also *§ 72.715*.

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7-72 California Forms of Pleading and Practice--Annotated § 72.718

§ 72.718 Notice of Withdrawal of Attorney of Record [Code Civ. Proc. § 285]

[1] FORM Notice of Withdrawal of Attorney of Record [Code Civ. Proc. § 285]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF WITHDRAWAL
_____ [*name*],	)	OF ATTORNEY OF RECORD
Defendant.	)	
	)	
	)	

To _____[*identify adverse party, e.g.*, defendant] and his/her attorney of record:

NOTICE IS HEREBY GIVEN that _____[*name of attorney*] has withdrawn as attorney of record for _____[*name of client*], _____[*designation of client in action or proceeding, e.g.*, plaintiff] in the above-entitled _____[action *or* proceeding], effective _____[*date*].

Until changed by appropriate notice, the address of record of _____[*name of client*] is as follows: _____[*specify mailing address and telephone number of client*].
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form is a notice to an adverse party of an attorney's withdrawal as attorney of record. It is served on the adverse party and filed with the court in which the action or proceeding is pending [*Code Civ. Proc. § 285*]. For a form for a notice of substitution of counsel under *Code Civ. Proc. § 285, see § 72.722*.

This form may be used when the withdrawal is by court order under *Code Civ. Proc. § 284(2)* [*see §§ 72.715, 72.717*]. However, service of the form does not appear to be strictly necessary, because the notice requirements of *Code Civ. Proc. § 285* are satisfied by service of the order itself as required under *Cal. Rules of Ct., Rule 3.1362(d)*.

[3] Cross References

For a related form, *see § 72.710*

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7-72 California Forms of Pleading and Practice--Annotated § 72.719

§ 72.719 Substitution of Attorney--Civil [Code Civ. Proc. § 284(1)]--Judicial Council Form MC-050

[1] FORM Substitution of Attorney--Civil [Code Civ. Proc. § 284(1)]--Judicial Council Form MC-050

Click here to view image.

[1] Source of Form

This form is issued by the Judicial Council and intended for mandatory statewide use in civil actions. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[2] Use of Form

This form is for use by a party in a civil action, his or her former attorney, and his or her new attorney (unless the party plans to represent himself or herself without an attorney). The form is filed with the court clerk [*Code Civ. Proc. § 284(1)*]. The form also serves as notice and proof of service of notice on all parties [*Code Civ. Proc. § 285*]. For related text, see *§§ 72.392[1]* and *72.592[4][c]*.

[3] Copies

The following copies of the form should be prepared:

- Original to be filed with the court clerk.
- One copy to be served as notice on each party.
- One copy for the former attorney's file (usually conformed with the court clerk's endorsement bearing date of filing).

- One office file copy.
- Other copies as desired.

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7-72 California Forms of Pleading and Practice--Annotated § 72.720

§ 72.720 Proceedings to Substitute Attorneys [Code Civ. Proc. § 284(2)]--Notice of Motion and Supporting Papers

[1] FORM Proceedings to Substitute Attorneys [Code Civ. Proc. § 284(2)]--Notice of Motion and Supporting Papers

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	NOTICE OF MOTION TO SUBSTITUTE ATTOR-
_____ [*name*], Plaintiff,	)	NEYS, DECLARATION OF
vs.	)	_____
_____ [*name*], Defendant.	)	[*name*], AND MEMORANDUM OF POINTS AND
	)	AUTHORITIES
	)	Date: _____
	)	Time: _____
	)	Dept.: _____
		Trial Date: _____

_____

To _____[*name of attorney of record*]:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], _____[*specify party, e.g.*, plaintiff] will, and hereby does, move for an order substituting _____[*name of new attorney*] as his/her attorney of record in this _____[action *or*

proceeding] in the place of _____[*name of present attorney of record*], and for an order directing _____[*name of present attorney*] to turn over to _____[*name of new attorney*] all the papers and records in connection with this case that he/she has in his/her possession. The motion is made on the ground that _____ [*specify grounds, e.g.,* plaintiff has discharged _____ (*name of present attorney*) as his/her attorney, but _____ (*name of present attorney*) has refused to withdraw from the case or to turn over the papers and records relating to this case in his/her possession to plaintiff or to _____ (*name of new attorney*), whom plaintiff has retained to represent him/her].

The motion is based on this notice of motion, on the declaration(s) of _____[*name(s)*] and the memorandum of points and authorities served and filed with it, on the records and file in this action, and on any evidence that may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____[*name of new attorney*]

I, _____[*name*], declare:

1. I am an attorney at law duly admitted to practice before all the courts of the State of California.

2. On or about _____[*date*], I was retained by _____[*specify party, e.g.,* plaintiff] to represent him/her in this _____[action *or* proceeding] and I agreed to do so.

[*Set forth evidentiary facts within declarant's personal knowledge that establish the grounds set forth in the notice of motion, such as the following:*]

3. By letter dated _____, a copy of which is attached hereto as Exhibit A and made a part hereof, I notified _____[*name of attorney of record*] of my employment by _____[*specify party, e.g.,* plaintiff] and of _____[*specify party, e.g.,* plaintiff's] wish to replace him/her with me as _____[*specify party, e.g.,* plaintiff's] attorney of record. I enclosed a Substitution of Attorneys form that had been signed by the _____[*specify party, e.g.,* plaintiff] with the request that _____[*name of attorney of record*] sign and return it in the stamped, self-addressed return envelope that I also enclosed. I requested in the letter that _____[*name of attorney of record*] forward to me any papers or records in his/her possession belonging to _____[*specify party, e.g.,* plaintiff] or related to this case. _____[*Name of attorney record*] failed to return the form, to forward the papers and records in his/her possession, or to otherwise reply to my letter.

4. Over the next several weeks, I phoned _____'s [*name of attorney of record*] office numerous times, but was unable to reach him/her. On each occasion, I left my name and phone number with _____'s [*name of attorney of record*] _____[secretary *or* answering service *or other*] with a request that _____[*name of attorney of record*] return my call. He/She failed to do so.

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated_____
_____ [*signature*]
_____ [*typed name*]

SUPPORTING DECLARATION OF _____[*name of party*]

I, _____[*name*], declare:

1. I am the _____[*specify party, e.g.,* plaintiff] in this _____[action *or* proceeding] and the moving party herein.

[*Set forth evidentiary facts within declarant's personal knowledge that establish the grounds set forth in the notice of motion, e.g.:*]

2. I originally employed _____[*name of attorney of record*] as my attorney to represent me in this matter.

3. On or about _____[*date*], I retained _____[*name of new attorney*] to represent me in the place of _____[*name of attorney of record*].

4. By letter dated _____[*date*], a copy of which is attached hereto as Exhibit A and made a part hereof, I discharged _____[*name of attorney of record*], as my attorney in this case and requested that he/she send all papers and records in his/her possession relating to this case to _____[*name of new attorney*].

5. I wish to remove _____[*name of attorney of record*] and to substitute _____[*name of new attorney*] as my attorney of record in this _____[*action or proceeding*].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated_____
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion*]

[2] Use of Form

The form is for use by a party to obtain court approval to substitute his or her new attorney for his or her present attorney [*Code Civ. Proc. § 284(2)*]. The application is usually made when the attorney of record refuses or is unable to consent to substitution pursuant to the procedure in *Code Civ. Proc. § 284(1)* [*see § 72.719*]. For related text, see *§ 72.392[2]*.

Code Civ. Proc. § 284(2) authorizes the client, rather than the new attorney, to make the motion for substitution. Without a formal substitution, the new attorney is not yet formally authorized to represent the client, or to file papers on the client's behalf [*see In re Marriage of Park (1980) 27 Cal. 3d 337, 343, 165 Cal. Rptr. 792, 612 P.2d 882]* . Due to the nature of the motion, however, it is probable that a court would accept papers signed by the new attorney, as is illustrated in the form above. Nevertheless, the client may wish to make the motion to assure the court of the client's consent to substitution.

[3] Copies

The following copies of the motion to substitute attorneys should be prepared:

(1) Original to be filed with the court;

(2) One copy to be served on the present attorney of record;

(3) One copy for the office file;

(4) Other copies as desired.

[4] California Points and Authorities

For memoranda of points and authorities supporting and opposing a motion for substitution of attorneys, see Ch. 24, *Attorneys at Law: Substitution, Withdrawal, Disqualification, and Authority to Appear* (Matthew Bender)

[5] Cross References

See also *§ 72.712*.

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7-72 California Forms of Pleading and Practice--Annotated § 72.721

§ 72.721 Proceedings to Substitute Attorneys [Code Civ. Proc. § 284(2)]--Order

[1] FORM Proceedings to Substitute Attorneys [Code Civ. Proc. § 284(2)]--Order

[*Caption. See § 72.713.*]

The motion of _____[*identify party, e.g.,* plaintiff] for an order substituting _____[*name of new attorney*] for _____[*name of original attorney*] as his/her attorney of record in this _____[action *or* proceeding] was heard by the court on _____[*date*]. _____ [*Set forth appearances, e.g.,* _____ (*Name of new attorney*) appeared for _____ (*party, e.g.,* plaintiff) who consented to such representation, and _____ (*name of original attorney*) appeared in person].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted and that _____[*name*] is hereby substituted in the place and stead of _____[*name*] as _____[*specify party, e.g.,* plaintiff's] attorney of record in this _____[action *or* proceeding].

IT IS FURTHER ORDERED that _____[*name of original attorney*] forthwith and without delay turn over to _____[*name of new attorney*], at _____[*street address and city*], California, all the papers and records concerning this _____[action *or* proceeding] that he/she has in his/her possession.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form or order is for use by a client and his or her new attorney when the court has granted the client's motion for substitution of attorneys [*Code Civ. Proc. § 284(2)*]. A copy of the order may be served on the adverse party to afford the notice required by *Code Civ. Proc. § 285*, or a formal notice of substitution of attorneys may be prepared and served [*see § 72.722*].

[3] Cross References

For related forms, *see §§ 72.713* and *72.720*

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7-72 California Forms of Pleading and Practice--Annotated § 72.722

§ 72.722 Notice of Substitution to Adverse Parties [Code Civ. Proc. § 285]

[1] FORM Notice of Substitution to Adverse Parties [Code Civ. Proc. § 285]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], Defendant.	)	NOTICE OF SUBSTITUTION
	)	OF ATTORNEYS
	)	

_____

To _____[*identify adverse party, e.g.,* defendant] _____[*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], by the _____ [consent of _____ (*specify party, e.g.,* plaintiff) and the attorneys involved _____ (filed with the court *or* entered in the court's minutes) *or* order of this court], _____[*name of new attorney*], whose address is _____[*street address and city*], California, was substituted as the attorney of record for _____[*specify party, e.g.,* plaintiff] in this _____[action *or* proceeding] in the place of _____[*name of original attorney*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This form may be used by a client to notify other parties that he or she has substituted attorneys by order of the court [*Code Civ. Proc. § 285*]. See *§ 72.719* for an a form of notice when the substitution is by consent. For related text, see *§ 72.592[4][c]*.

[3] Cross References

See also *§ 72.721*.

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7-72 California Forms of Pleading and Practice--Annotated § 72.723

§ 72.723 Stipulation to Withdraw or Substitute Attorneys Pending Appeal [Cal. Rules of Ct., Rules 48(b), 139(b)]

[1] FORM Stipulation to Withdraw or Substitute Attorneys Pending Appeal [Cal. Rules of Ct., Rules 48(b), 139(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	STIPULATION TO ATTORNEY'S
_____ [*name*], Defendant.	)	_____ [WITHDRAWAL *OR*
	)	SUBSTITUTION]
	)	

_____

It is hereby stipulated that _____[*name of attorney of record*] withdraws from this case as the attorney of record for _____[*specify party, e.g.,* defendant] effective _____ [forthwith *or* as of _____ (*date*)].

[It is further stipulated that _____ (*name of new attorney*) is substituted as the attorney of record for _____ (*specify party, e.g.,* defendant) effective _____ (forthwith *or* as of _____ (*date*). The new address of record is _____ (*specify mailing address and telephone number of new attorney of record*).]

It is further stipulated that _____[*specify party, e.g.,* defendant] consents to the withdrawal of _____[*name of attorney of record*] as attorney of record [and to the substitution of _____ (*name of new attorney*) as attorney of record] effective _____ [forthwith *or* as of _____ (*date*)].

Dated: _____.

_____ [*signature of attorney of record*]
_____ [*typed name*]
Dated: _____.
_____ [*signature of party*]
_____ [*typed name*]
[Dated: _____.
_____ (*signature of new attorney*)
_____ (*typed name*)]

[2] Use of Form

The form is for use by a party and his or attorney of record to stipulate to the withdrawal or substitution of the attorney pending an appeal [*Cal. Rules of Ct., Rules 8.36, 8.768((b)*]. For related text, see *§ 72.392[4]*.

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7-72 California Forms of Pleading and Practice--Annotated § 72.724

§ 72.724 Proceedings to Disqualify Opposing Attorney Based on Conflict of Interest [Cal. Rules Prof. Conduct, Rule 3-310(E)]--Motion and Supporting Papers

[1] FORM Proceedings to Disqualify Opposing Attorney Based on Conflict of Interest [Cal. Rules Prof. Conduct, Rule 3-310(E)]--Motion and Supporting Papers

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	)))))))))	NO. _____ NOTICE OF MOTION FOR ORDER DISQUALIFYING OPPOSING COUNSEL, DECLARATION OF _____ [*name*], AND MEMORANDUM OF POINTS AND AUTHORITIES Date: _____ Time: _____ Dept: _____ Trial Date: _____

_____

To _____[*identify party, e.g.*, plaintiff] _____[*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], _____[*specify party, e.g.*, defendant] will, and hereby does, move for an order disqualifying and

barring _____[name(s) of attorney(s) or firm] from representing or assisting _____[*specify opposing party, e.g.,* plaintiff] _____ [name] in this action. The motion is made on the grounds that _____ [*specify grounds for disqualifying opposing counsel, e.g.,* _____ (*name(s) of attorney(s) or firm(s*)) formerly represented _____ (*specify moving party, e.g.,* defendant) _____ (*name*) in the matter that is the subject of this action *or* _____ (*name(s) of attorney(s) or firm(s*)) was/were formerly employed by _____ (*specify moving party, e.g.,* defendant) _____ (*name*). In the course of this employment _____ (*name(s) of attorney(s) or firm(s*)) obtained confidential information that he/she/they may be called on to use against _____ (*specify moving party, e.g.,* defendant) _____ (*name*) in representing (*specify opposing party, e.g.,* plaintiff) _____ (*name*) in this action].

The motion is based on this notice of motion, on the declaration(s) of _____[*name(s*)] and the memorandum of points and authorities served and filed with it, on the records and file in this action, and on any evidence that may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____[*name*]

I, _____[*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

[*Set forth facts showing that opposing counsel represented moving party in the same matter that is the subject of the present action, or that opposing counsel obtained confidential information in the course of his/her former employment by moving party that he/she may be called on to use against the moving party in the present action, e.g.:*]

2. _____[*Name of opposing counsel*] was formerly associated with the firm of _____[*name*], which is representing _____[*name of moving party*] in the defense of this action.

3. While thus associated, _____[*name of opposing counsel*] represented _____[*specify moving party, e.g.,* defendant] _____[*name*] in the following matters: _____[*specify*].

4. In the course of representing _____[*specify moving party, e.g.,* defendant] _____[*name*] in these matters, _____[*name of opposing counsel*] obtained confidential information concerning _____[*specify, e.g.,* defendant's business operations] that is relevant to the subject matter of this action. _____[*Name of opposing counsel*] may thus be called on

to use this confidential information against _____[*specify moving party, e.g.,* defendant] _____[*name*] in the present action.

[*CONTINUE*]

5. _____[*Specify moving party, e.g.,* Defendant] _____[*name*] has never consented, either expressly or implicitly, to _____'s [*name of counsel*] representation of _____[*specify opposing party, e.g.,* plaintiff] _____[*name*] in this action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion*]

[2] Use of Form

The form is for use by a party to request the disqualification of opposing counsel based on a conflict of interest [*see Cal. Rules Prof. Conduct, Rule 3-310(E)*]. For related text, see *§ 72.411*.

[3] Cross References

See also *§ 72.712*.

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7-72 California Forms of Pleading and Practice--Annotated § 72.725

§ 72.725 Proceedings to Disqualify Opposing Attorney Based on Conflict of Interest [Cal. Rules Prof. Conduct, Rule 3-310(E)]--Order

[1] FORM Proceedings to Disqualify Opposing Attorney Based on Conflict of Interest [Cal. Rules Prof. Conduct, Rule 3-310(E)]--Order

[*Caption. See § 72.713.*]

The motion of _____[*identify party, e.g.,* defendant] for an order disqualifying and barring _____[*name(s) of opposing counsel*] from representing or otherwise assisting _____[*specify opposing party, e.g.,* plaintiff] _____[*name*] in this action was heard by the court on _____[*date*]. Plaintiff appeared by counsel _____[*name*]; defendant appeared by counsel _____[*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted and that _____[*name(s) of opposing counsel*] is/are hereby disqualified from representing _____[*name of opposing party*] in this action.

IT IS FURTHER ORDERED that _____[*name(s) of opposing counsel*] refrain from advising or assisting _____[*name of opposing party*] in any manner in connection with this action.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order is for use by a party when the court has granted the party's motion for to disqualify the opposing

attorney based on a conflict of interest [*see Cal. Rules Prof. Conduct, Rule 3-310(E)*].

[3] Cross References

For related forms, *see §§ 72.713* and *72.722*

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7-72 California Forms of Pleading and Practice--Annotated § 72.726

§ 72.726 Proceedings to Compel Former Attorney to Surrender Client's Records, Property, or Funds--Motion and Supporting Papers

[1] FORM Proceedings to Compel Former Attorney to Surrender Client's Records, Property, or Funds--Motion and Supporting Papers

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	NOTICE OF MOTION FOR ORDER COMPEL-
_____ [*name*], Plaintiff,	)	LING FORMER ATTORNEY TO SURRENDER
vs.	)	CLIENT RECORDS AND PROPERTY, DECLARA-
_____ [*name*], Defendant.	)	TION OF _____
	)	[*name*], AND
	)	MEMORANDUM OF POINTS
	)	AND AUTHORITIES
	)	Date: _____
	)	Time: _____
	)	Dept: _____
		Trial Date: _____

_____

To _____[*name of attorney*]:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], _____[

moving party, e.g., plaintiff] will move the court for an order compelling _____[*name of former attorney*] to surrender to _____[*substituted attorney or party appearing in propria persona*] at _____[*address*] within _____ days after the date of such order, the following: _____[*describe records, property, and/or funds*]. The motion will be made on the ground that _____ [*specify, e.g.*, the above described items are being wrongfully withheld from _____ (*identify, e.g.*, plaintiff's substituted attorney)].

The motion is based on this notice of motion, on the declaration(s) of _____[*name(s)*] and the memorandum of points and authorities served and filed with it, on the records and file in this action, and on any evidence that may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____[*name*]

I, _____[*name*], declare:

1. I am the _____[*specify, e.g.*, attorney for plaintiff].

[*Set forth probative facts from declarant's personal knowledge, as to which he/she is competent to testify, showing factual basis*
for motion, e.g.:]

2. On _____[*date*], I was retained by plaintiff and substituted as his/her attorney of record in this action in place of _____[*name of former attorney*]. The action was filed in this court on _____[*date*].

3. _____[*Name of former attorney*] has directly acknowledged to me that he/she has possession of the _____[*describe records, property, or funds sought*] and that he/she received them on plaintiff's behalf in the course of his/her representation of plaintiff.

4. Despite my frequent demands that these items be surrendered to me, _____[*name of former attorney*] refuses to do so, claiming that _____[*describe former attorney's reasons for refusing to surrender items sought*].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion*]

[2] Use of Form

The form of notice of motion and supporting declaration is for use to apply for an order compelling former counsel to surrender records, property, or funds that counsel obtained as a result of his or her representation of the moving party. The notice of motion is filed with the court and a copy is served on the former attorney.

[3] Cross References

For related forms, *see §§ 72.710* and *72.712*

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7-72 California Forms of Pleading and Practice--Annotated § 72.727

§ 72.727 Proceedings to Compel Former Attorney to Surrender Client's Records, Property, or Funds--Order

[1] FORM Proceedings to Compel Former Attorney to Surrender Client's Records, Property, or Funds--Order

[*Caption. See § 72.713.*]

The motion by _____[*specify, e.g.*, plaintiff] for an order compelling _____[*name of former attorney*] to surrender the _____[*describe records, property, or funds*] in his/her possession came on regularly for hearing on this date. Plaintiff appeared by attorney _____[*name*], and _____[*name of former attorney*] appeared on his/her own behalf.

On proof being made to the satisfaction of the court that the motion should be granted and good cause appearing therefor,

IT IS ORDERED that _____[*name of former attorney*] surrender the items described above to _____[*name*] on or before _____[*date*], at _____[*address*], California.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order is for use when the court grants a motion to compel a former attorney to surrender records, property, or funds received by the attorney in the course of his or her representation. It is prepared by counsel for the moving party and presented to the judge for signature after the hearing. It is then filed with the clerk of the court.

[3] Cross References

For related forms, *see §§ 72.713* and *72.726*

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7-72 California Forms of Pleading and Practice--Annotated §§ 72.728-72.739

[Reserved]

§§ 72.728[Reserved]

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D. Fee Collection

7-72 California Forms of Pleading and Practice--Annotated § 72.740

§ 72.740 Complaint [Code Civ. Proc. § 425.10] for Compensation for Legal Services--Action to Recover Fixed Amount [Civ. Code § 3302]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Compensation for Legal Services--Action to Recover Fixed Amount [Civ. Code § 3302]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONEY
_____ [*name*], [and DOES I	)	[Amount demanded _____ (exceeds
through_____,] Defendant(s).	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff Alleges:

FIRST CAUSE OF ACTION
(Breach of Contract)

1. Plaintiff is, and at all times herein mentioned was, an attorney at law, duly admitted and practicing law in the State of California.

2. Defendant _____[*name*] is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence of defendant*].

3. [Plaintiff is ignorant of the true names and capacities of defendants sued as DOES I-_____, inclusive, and therefore sues those defendants by fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants is legally responsible in some manner for the actions herein alleged, and that plaintiff's damages were proximately caused by their conduct.)]

[4. Defendant _____ (*name*) is, and at all times herein mentioned was, the agent of defendant _____ (*name*) and in doing the things herein alleged was acting within the scope of his/her authority.]

5. On or about _____[*date*], at _____[*address*], California, plaintiff and defendant entered into _____[a written *or* an oral] contract (hereafter the "Contract"), [a copy of which is attached hereto and incorporated herein as Exhibit _____,] in which plaintiff agreed to _____[*specify agreed legal services*] and defendant agreed to pay the sum of $_____ as plaintiff's fee for such services and to reimburse plaintiff for all costs and expenses including _____[*specify, e.g.,* taxable costs of litigation, travel expenses, and investigator's fees]. [The contract further provided that the prevailing party shall be entitled to recover reasonable attorney's fees necessitated by any legal action to enforce the terms of the agreement.]

6. Plaintiff has performed all the acts, services, and conditions required by the contract to be performed on his/her part[, except _____ (*specify any nonperformance and excuse therefor*)].

7. In rendering the services herein alleged, plaintiff has incurred costs and expenses on behalf of defendant in the sum of $_____.

8. Plaintiff has demanded from defendant payment of such compensation and reimbursement of costs and expenses in the amount of $_____, but defendant has not paid any part of that sum[, except the sum of $_____,] and there is now due and owing from defendant to plaintiff the sum of $_____.

SECOND CAUSE OF ACTION
(Common Count)

9. Plaintiff refers to and incorporates as though fully set forth herein Paragraphs 1-4 inclusive of this complaint.

10. On or about _____[*date*], at _____[*address*], California, defendant became indebted to plaintiff in the agreed sum of $_____ for legal services rendered and costs and expenses advanced by plaintiff at defendant's request.

THIRD CAUSE OF ACTION
(Account Stated)

11. Plaintiff refers to and incorporates as though fully set forth herein Paragraphs 1-4 inclusive of this complaint.

12. Between _____[*date*], and _____[*date*], plaintiff performed legal services and advanced costs and expenses for defendant at defendant's request.

13. On or about _____[*date*], at _____[*address*], California, an account was stated in writing by and between plaintiff and defendant and, on the statement, a balance of $_____ was found due from defendant to plaintiff, and defendant agreed to pay that balance. A copy of the account is attached hereto as

Exhibit _____ and made a part hereof.

14. Neither the whole nor any part of that sum has been paid[, except the sum of $_____], although plaintiff has demanded payment, and there is now due and unpaid from defendant to plaintiff the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ with interest thereon at _____ percent per year from _____[*date*].

2. For [reasonable attorney's fees and] costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Add, if desired*]

VERIFICATION

I, _____[*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

The foregoing complaint is for use in an action to recover fees and costs for legal services, when the fees are fixed by agreement of the parties.

The First Cause of Action alleges a breach of a contract, the Second Cause of Action alleges a common count, and the Third Cause of Action alleges an account stated. Generally speaking, the First and Second Causes of Action will be alleged in all cases, the First to establish that a contract did in fact exist, and the Second to establish that recovery of the reasonable value of the services provided is appropriate even if there is some defense that precludes recovery of the entire contract amount. The Third Cause of Action may be used if the requirements for an account stated have been met.

[3] Allegations

The foregoing complaint sets forth three counts as a basis for recovery of compensation for legal services and reimbursement of costs advanced. The First Cause of Action specifically alleges (1) that plaintiff is an attorney at law

(Paragraph 1), (2) the oral or written agreement for services providing for a fixed fee and reimbursement of costs (Paragraphs 5, 6, and 7), (3) that plaintiff performed in accordance with the agreement (Paragraph 8), (4) the costs advanced by plaintiff (Paragraph 9), and (5) that the fees and costs were demanded and are due, owing, and unpaid (Paragraph 10) [*see Hardy v. San Fernando Valley C. of C. (1950) 99 Cal. App. 2d 572, 576-577, 222 P.2d 314]* . The elements of a cause of action to recover on a fixed fee agreement are discussed in *§ 72.450* et seq. The Second Cause of Action alleges a common count for indebtedness for services rendered [*see § 72.450[2]*, and Ch. 121, *Common Counts*] and the Third Cause of Action alleges an account stated for legal services [*see § 72.450[5][a]*, and Ch. 8, *Accounts Stated and Open Accounts*].

Paragraph 2 establishes the proper venue for the action, alleging the residence of an individual defendant or the principal place of business of a corporate defendant [*see Code Civ. Proc. § 395* (venue in contract actions), *Code Civ. Proc. § 395.2* (venue in actions against partnerships), *Code Civ. Proc. § 395.5* (venue in actions against corporations)].

Paragraph 3 contains an optional fictitious name allegation, for use if multiple defendants are sued and plaintiff is unaware of their names and capacities.

Paragraph 4 contains an agency allegation, for use if multiple defendants are sued and liability is sought to be imposed on the basis of respondeat superior.

If appropriate, Paragraph 7 may be used to allege that the written agreement contains a clause providing that in any future litigation concerning the fees the prevailing party is entitled to attorney's fees and costs pursuant to *Civ. Code § 1717*. For discussion of the availability of fees and costs to an attorney acting pro se to recover fees, *see § 72.431[9], above*.

[4] Verification

Verification of this complaint is not required, but verification of the complaint requires the defendant to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446*] and precludes a general denial in superior court and in some limited civil cases [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Copies

The following copies of the foregoing complaint should be prepared:

(1) Original to be filed with the court;

(2) One copy to be served with summons on the defendant;

(3) One copy for the office file;

(4) Other copies as desired.

[6] Cross References

For complaints and related forms for use generally in actions on an account stated, see Ch. 8, *Accounts Stated and Open Accounts*

For alternative allegations as to capacity and residence of the parties, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used*

For complaints related forms for use generally in contract actions and actions on common counts, see Ch. 140, *Contracts* and Ch. 121, *Common Counts* , respectively

[7] State Statutes

Requirement that fee contract be written. *Bus. & Prof. Code §§ 6147, 6148*

Attorney's fees clause in contract. *Civ. Code § 1717*; *Code Civ. Proc. § 1021*

Detriment caused by breach of obligation to pay money only, as deemed to be amount due by terms of obligation with interest thereon. *Civ. Code § 3302*

Costs of suit as allowed as matter of course to plaintiff on judgment in his or her favor in action for recovery of money. *Code Civ. Proc. § 1032*

[8] Decisions

Attorney's fees as recoverable on account stated. *Trafton v. Youngblood (1968) 69 Cal. 2d 17, 25-26, 69 Cal. Rptr. 568, 442 P.2d 648* (dictum); *Bennett v. Potter (1919) 180 Cal. 736, 738-743, 183 P. 156* ; *Fleschler v. Strauss (1936) 15 Cal. App. 2d 735, 740, 60 P.2d 193*

Liability of client to reimburse attorney for outlays for costs and expenses. *Cooley v. Miller & Lux (1909) 156 Cal. 510, 525-526, 105 P. 981* ; *see* also *Porter v. Elizalde (1899) 125 Cal. 204, 207, 57 P. 899* ; *Davis v. Mackay (1920) 50 Cal. App. 251, 255-256, 194 P. 738*

Attorney as required to abide by fee agreement and as not permitted to ignore contract price and sue for value of services. *Reynolds v. Sorosis Fruit Company (1901) 133 Cal. 625, 630, 66 P. 21*

Attorney who acts pro se in bringing suit to enforce written compensation agreement that includes attorney's fees clause pursuant to *Civ. Code § 1717* as entitled to recover attorney's fees under *Civ. Code § 1717* on prevailing in enforcement action. *Renfrew v. Loysen (1985) 175 Cal. App. 3d 1105, 1109-1110, 222 Cal. Rptr. 413*

Client as bound by fee stipulated in employment contract even if services prove to be less valuable than parties had in mind when contract was made. *Berk v. Twentynine Palms Ranchos, Inc. (1962) 201 Cal. App. 2d 625, 637, 20 Cal. Rptr. 144*

Attorney suing on contract for agreed fee as not required to prove reasonable value of services. *Berk v. Twentynine Palms Ranchos, Inc. (1962) 201 Cal. App. 2d 625, 637, 20 Cal. Rptr. 144*

Allegations stating cause of action for fixed fees. *Hardy v. San Fernando Valley C. of C. (1950) 99 Cal. App. 2d 572, 577, 222 P.2d 314*

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Volume 7: Attorney Practice and Ethics thru Auctions and Auctioneers-Chs.72-79
Chapter 72 ATTORNEY PRACTICE AND ETHICS
PART V. FORMS
D. Fee Collection

7-72 California Forms of Pleading and Practice--Annotated § 72.741

§ 72.741 Complaint [Code Civ. Proc. § 425.10] for Compensation for Legal Services--Action to Recover Reasonable Value of Services [Civ. Code § 3302]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Compensation for Legal Services--Action to Recover Reasonable Value of Services [Civ. Code § 3302]

[*Caption. See § 72.740.*]

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Breach of Contract)

1. Plaintiff is, and at all times herein mentioned was, an attorney at law, duly admitted and practicing law in the State of California.

2. [*Capacity and residence of defendant. See § 72.740, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 72.740, Paragraph 3.*]

[4. *Agency allegation, if appropriate. See § 72.740, Paragraph 4.*]

5. On or about _____[*date*] at _____[*address*], California, plaintiff and defendant entered into _____[a written *or* an oral] agreement whereby plaintiff agreed _____ [*describe agreed services, e.g.,* to represent defendant in bringing an action against _____ (*name*) in the Superior Court of _____ County, California] and defendant agreed to pay plaintiff the reasonable value of such services.

6. Plaintiff has fully performed all acts, services, and conditions required by that agreement to be performed on his/her part, including _____[*describe services*].

7. The reasonable value of such services is the sum of $_____.

8. Plaintiff has demanded payment from defendant for that sum but neither the whole nor any part[, except the sum of $_____,] has been paid, and there is now due and unpaid from defendant to plaintiff the sum of $_____.

SECOND CAUSE OF ACTION
(Common Count)

9. Plaintiff refers to and incorporates as though fully set forth herein Paragraphs 1-4 inclusive of this complaint.

10. During the period _____[*date*] until _____[*date*], at _____[*city*], California, plaintiff rendered services as an attorney at law to defendant at defendant's request and defendant agreed to pay plaintiff the reasonable value of such services.

11. The reasonable value of such services is the sum of $_____.

12. Plaintiff has demanded payment from defendant for that sum but neither the whole nor any part[, except the sum of $_____,] has been paid, and there is now due and unpaid from defendant to plaintiff the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ with interest thereon at _____ percent per year from _____[*date*].

2. For [reasonable attorney's fees and] costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 72.740.*]

[2] Use of Form

The foregoing complaint is for use in an action for recovery of attorney's fees based on the reasonable value of the services rendered. Generally speaking, both causes of action will be alleged in all cases, the First to establish that a contract did in fact exist, and the Second to establish that recovery of the reasonable value of the services provided is appropriate even if there is some defense that precludes recovery under the contract.

An additional cause of action may be included, if appropriate, for relief on the alternative theory of account stated [*see §*

72.740].

[3] Allegations

The foregoing complaint sets forth two counts as a basis for recovery of compensation based on the reasonable value of legal services rendered. The First Count sepcifically alleges (1) that plaintiff is an attorney at law (Paragraph 1), (2) the oral or written agreement for services and compensation based on the reasonable value thereof (Paragraphs 5 and 6), (3) plaintiff's performance under the contract in rendering the agreed services (Paragraph 7), (4) the reasonable value of those services (Paragraph 8), and (5) plaintiff's demand for the fees that are due and unpaid (Paragraph 9) [*see Elconin v. Yalen (1929) 208 Cal. 546, 549, 282 P. 791* (right to reasonable value of services absent agreement for fixed fee); *Hardy v. San Fernando Valley C. of C. (1950) 99 Cal. App. 2d 572, 576-577, 222 P.2d 314* (elements of action for attorney's fees)]. For discussion of the elements of the cause of action, see *§ 72.451[1]*. The Second Count alleges a common count for the reasonable value of services rendered (quantum meruit) [*see § 72.450[2]*, and Ch. 121, *Common Counts*].

[4] Decisions

Right of discharged attorney to recover reasonable value of services to time of discharge. *Fracasse v. Brent (1972) 6 Cal. 3d 784, 792, 100 Cal. Rptr. 385, 494 P.2d 9*

Right to reasonable value of legal services when fee agreement is invalid. *Calvert v. Stoner (1948) 33 Cal. 2d 97, 105, 199 P.2d 297* (dictum); *see also Newman v. Freitas (1900) 129 Cal. 283, 288, 61 P. 907* (noting that trial court awarded attorney reasonable compensation when contingent fee agreement was unlawful)

Right to recover reasonable value of legal services when contract of employment lacks any provision by which to measure compensation. *Elconin v. Yalen (1929) 208 Cal. 546, 549, 282 P. 791*

Trial judge as authorized to use own experience and judgment as to reasonable value of legal services with or without aid of testimony as to value. *Elconin v. Yalen (1929) 208 Cal. 546, 549-550, 282 P. 791* ; *Clejan v. Reisman (1970) 5 Cal. App. 3d 224, 241, 84 Cal. Rptr. 897*

Major factors to be considered in determining reasonableness of attorney's fees. *Clejan v. Reisman (1970) 5 Cal. App. 3d 224, 241, 84 Cal. Rptr. 897*

[5] Cross References

For a related form, *see § 72.740*

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7-72 California Forms of Pleading and Practice--Annotated § 72.742

§ 72.742 Complaint [Code Civ. Proc. § 425.10] for Compensation for Legal Services--Action to Recover Reasonable Value of Services Rendered Under Contingency Fee Agreement When Attorney Was Discharged or Withdrew Prior to Client's Recovery [Civ. Code § 3302]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Compensation for Legal Services--Action to Recover Reasonable Value of Services Rendered Under Contingency Fee Agreement When Attorney Was Discharged or Withdrew Prior to Client's Recovery [Civ. Code § 3302]

[*Caption. See § 72.740.*]

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, an attorney at law, duly admitted and practicing law in the State of California.

2. [*Capacity and residence of defendant. See § 72.740, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 72.740, Paragraph 3.*]

[4. *Agency allegation, if appropriate. See § 72.740, Paragraph 4.*]

5. On or about _____[*date*] at _____[*address*], California, plaintiff and defendant entered into a written contingency fee agreement whereby plaintiff agreed to represent defendant in recovering compensation for defendant's injuries caused by _____[*name*], and defendant agreed to pay plaintiff _____ [*specify contractual payment provisions, e.g.,* _____ percent of any compensation received therefrom by defendant by compromise or settlement, and _____ percent of any judgment, verdict, or award after trial].

6. On or about _____[*date*], _____ [defendant discharged plaintiff from

representation in the aforementioned matter *or* plaintiff withdrew from representation of defendant in the aforementioned matter, and that withdrawal was justified by _____ (*specify reason justifying attorney's withdrawal*)].

7. Prior to plaintiff's _____[discharge *or* withdrawal] from the aforementioned matter, plaintiff had performed significant acts and services [and advanced costs in the sum of $_____] with regard to plaintiff's case, including: _____[*specify services performed by plaintiff, e.g.,* negotiating with insurance adjusters for settlement of the claim, filing a complaint on the claim, filing and answering motions on the claim, and consulting with investigators, witnesses, and medical personnel who treated plaintiff's injuries].

8. Plaintiff is informed and believes, and based on such information and belief alleges, that on _____[*date*], defendant received a _____[settlement *or* judgment] on the claim in the aforementioned matter in the amount of $_____.

9. The reasonable value of plaintiff's services to defendant to the time of _____[discharge *or* withdrawal] of plaintiff from providing services to defendant in the aforementioned matter is $_____.

10. Plaintiff has demanded payment from defendant for that sum but neither the whole nor any part[, except the sum of $_____,] has been paid, and there is now due and unpaid from defendant to plaintiff the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ with interest thereon at _____ percent per year from _____[*date*].

2. For [reasonable attorney's fees and] costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 72.740.*]

[2] Use of Form

This complaint is for use in an action for recovery of the reasonable value of services rendered by an attorney under a contingent fee agreement, when the attorney was discharged or withdrew from the representation before the client obtained a recovery by judgment or settlement that satisfies the contingency in the agreement. If plaintiff was discharged by defendant, plaintiff can recover the reasonable value of services performed before the discharge, unless the discharge was for acts of impropriety inconsistent with the character of the legal profession and incompatible with the faithful discharge of professional duties [*Jeffry v. Pounds (1977) 67 Cal. App. 3d 6, 9, 136 Cal. Rptr. 373* ; *see § 72.451[2][b]*]. If plaintiff withdrew from representing the client, he or she may recover the reasonable value of services performed before the withdrawal only if the withdrawal was justified [*see Moore v. Fellner (1958) 50 Cal. 2d 330, 341, 325 P.2d 857* (recognizing rule); *Cal. Rules Prof. Conduct, Rule 3-700(C)* (setting forth when attorneys may permissively withdraw from case); *see § 72.451[2][c]*].

[3] California Points and Authorities

For a memorandum of points and authorities in support of a motion for summary judgment on the foregoing complaint, see California Points and Authorities, Ch. 25, *Attorney's Fees* (Matthew Bender)

[4] Cross References

For related forms, *see §§ 72.740* and *72.741*

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7-72 California Forms of Pleading and Practice--Annotated § 72.743

§ 72.743 Complaint [Code Civ. Proc. § 425.10] for Compensation for Legal Services--Action to Enforce Attorney's Charging Lien Based on Contingency Fee Agreement [Civ. Code §§ 2224, 3336]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Compensation for Legal Services--Action to Enforce Attorney's Charging Lien Based on Contingency Fee Agreement [Civ. Code §§ 2224, 3336]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR CONVERSION, CONSTRUCT-
_____ [*name*], [and DOES I	)	IVE TRUST, AND MONEY HAD AND RECEIVED
through_____,] Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Conversion)

1. Plaintiff is, and at all times herein mentioned was, an attorney at law, duly admitted and practicing law in the State of California.

2. [*Capacity and residence of defendant. See § 72.740, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 72.740, Paragraph 3.*]

[4. *Agency allegation, if appropriate. See § 72.740, Paragraph 4.*]

5. Defendant _____[*second attorney's name*] is, and at all times herein mentioned was, an attorney at law, duly admitted and practicing law in the County of _____, California.

6. On or about _____[*date*], at _____[*address*], California, plaintiff and defendant _____[*client's name*] entered into a written contract (hereafter called the "Contract"), a copy of which is attached hereto and incorporated herein as Exhibit _____.

7. In Paragraph _____ of the Contract, plaintiff agreed to represent defendant _____[*client's name*] in a legal action in which defendant sought _____[*describe nature of legal action, e.g.,* a money judgment for damages for personal injuries] against _____[*name(s) of party or parties sued by client*], and defendant agreed to reimburse plaintiff for all costs and expenses including _____[*specify, e.g.,* taxable costs of litigation, travel expenses, and investigator's fees].

8. In Paragraph _____ of the Contract, defendant _____[*client's name*] agreed to compensate plaintiff for his/her services in an amount equal to _____ percent of any net sums collected for defendant, if any recovery was made, and that plaintiff would acquire a lien on any such net sums collected for the purpose of securing his/her fee.

9. Plaintiff has performed acts, services, and conditions required by the contract to be performed on his/her part, including _____[*describe services*] with a reasonable value of $_____[*state amount*].

10. On or about _____[*date*], at _____[*address*], California, defendant _____[*client's name*] [without cause] discharged plaintiff as his/her attorney of record in the legal action against _____[*party's or parties' name(s*)].

11. On or about _____[*date*], defendant [*client's name*] retained defendant _____[*second attorney's name*] to represent him/her in the _____[*specify type of action, e.g.,* personal injury] action against _____[*name(s) of party or parties*].

12. On or about _____[*date*], plaintiff by certified mail, return receipt requested, served notice on defendant _____[*former client*] and defendant _____[*second attorney*] that plaintiff had a lien on any recovery in the legal action against _____[*name of party or parties*] in the amount of $_____.

13. Plaintiff is informed and believes, and thereon alleges, that on or about _____[*date*], defendant _____[*former client*] and defendant _____[*second attorney*] entered into a settlement with _____ [*specify, e.g.,* the insurance carrier(s) for _____ (*party or parties*)] in the amount of $_____, and have received that sum.

14. Plaintiff has demanded from defendant _____[*former client*] and defendant _____[*second attorney*] payment in the amount of $_____, which is the amount of plaintiff's lien, but defendants have refused to pay plaintiff that sum.

15. On or about _____[*date*], plaintiff became entitled to payment of his/her lien on the proceeds of the settlement between _____[*name of former client*] and _____[*name(s) of party or*

parties to former client's suit], and plaintiff is still entitled to payment of his/her lien in the amount of $_____[*state amount*].

16. On or about _____[*date*], defendants _____[*former client*] and _____[*second attorney*] deprived attorney of his/her entitlement to his/her lien proceeds.

17. As a proximate result of defendants' conversion, plaintiff has been damaged in the sum of $_____.

[18. The aforementioned acts of defendants _____ (*former client*) and _____ (*second attorney*) were _____ (*specify statutory basis for award of punitive damages and conduct of defendant(s) that constitute oppression, fraud, or malice, e.g.*, undertaken with the intent to defraud plaintiff *or* intended to cause injury to plaintiff *or* despicable conduct undertaken with a conscious disregard of the rights of others), and justify an award of punitive damages _____ (in the amount of $_____ *or* in an amount appropriate to punish defendants and set an example for others).]

SECOND CAUSE OF ACTION
(Constructive Trust)

19. Plaintiff incorporates in this cause of action all of the allegations in Paragraphs 1 through 14 [and Paragraph 18] of the First Cause of Action as though set forth in full herein.

20. Between _____[*date*], and _____[*date*], a confidential relationship existed between plaintiff and defendant _____[*former client*].

21. Plaintiff is entitled to a lien in the amount of $_____[*state amount*] against the recovery obtained by defendant _____[*former client*].

22. At the time that defendant _____[*former client*] executed the contract, defendant _____[*former client*] represented that he/she would grant a lien on any recovery.

23. At the time that defendant _____[*former client*] made that representation, defendant _____[*former client*] knew that it was false.

24. In reliance on this representation by defendant _____[*former client*], plaintiff entered into the contract.

25. As a proximate result of plaintiff's reliance on the representation by defendant _____[*former client*], plaintiff has been damaged in the amount of $_____[*amount of lien*].

26. By reason of the fraudulent manner in which defendant _____[*former client*] and defendant _____[*second attorney*] have acted with respect to this matter, defendant _____[*former client*] and defendant _____[*second attorney*] are involuntary trustees holding the lien amount of $_____ in constructive trust for plaintiff with the duty to pay plaintiff that sum of money.

THIRD CAUSE OF ACTION
(Common Count)

27. Plaintiff incorporates in this cause of action all of the allegations in paragraphs 1 through 14 of the first cause of

action as though set forth in full herein.

28. On or about _____[*date*], at _____, California, defendants became indebted to plaintiff in the sum of $_____[*state amount*] for money had and received by defendants for the use and benefit of plaintiff.

29. Neither the whole nor part of this sum has been paid[, except the sum of $_____], although demand therefor has been made, and there is now due and unpaid the sum of $_____ with interest thereon at the rate of _____ percent per annum from _____[*date*].

WHEREFORE, plaintiff prays for judgment against defendants as follows:

1. For general damages in the sum of $_____;

2. For special damages in the sum of $_____;

3. For interest at the rate of _____ percent per annum from _____[*date*];

[4. For exemplary or punitive damages;]

5. For declaration of a constructive trust in favor of plaintiff with respect to the lien proceeds in the possession of defendants;

6. For costs of suit incurred herein; and

7. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 72.740.*]

[2] Use of Form

This complaint is for use in an action to enforce an attorney's charging lien based on a contingency fee agreement [*see Civ. Code §§ 2224, 3336*]. A charging lien created by a contingency fee agreement survives the attorney's discharge, and entitles the attorney to receive from any recovery by the client the reasonable value of services rendered prior to the discharge [*Weiss v. Marcus (1975) 51 Cal. App. 3d 590, 598, 124 Cal. Rptr. 297]* . The attorney's contractual charging lien on the client's recovery is not self-executing. It can only be enforced by an independent action against the client after the client's recovery in the main action [*Bandy v. Mt. Diablo Unified Sch. Dist. (1976) 56 Cal. App. 3d 230, 234, 126 Cal. Rptr. 890* ; *see Cal-Western Reconveyance Corp. v. Reed (2007) 152 Cal. App. 4th 1308, 1321-1323, 62 Cal. Rptr. 3d. 244* ; *In re Marriage of Tushinsky (1988) 203 Cal. App. 3d 136, 143, 249 Cal. Rptr. 611* ; *but see Spires v. American Bus Lines (1984) 158 Cal. App. 3d 211, 215, 204 Cal. Rptr. 531* (allowing former attorney to intervene in settlement conference for purpose of asserting attorney's fee lien on client's settlement of case in which client was represented by subsequently hired attorneys)]. For discussion of the bases for these causes of action, see *§ 72.452*.

This form is for use only if the contingency fee agreement includes a provision creating a charging lien on any recovery by plaintiff; if the agreement does not create a lien, counsel should instead use the complaint in § 72.742.

[3] Decisions

Charging lien must comply with *Cal. Rules of Prof. Conduct, Rule 3-300*. *Fletcher v. Davis (2004) 33 Cal. 4th 61, 68-70, 14 Cal. Rptr. 3d 58, 90 P.3d 1216*

Contract provision giving attorney lien on client's claim of a share in decedent's estate or any sum recovered by settlement establishes lien on estate assets when claim vindicated. *Estate of Kerr (1966) 63 Cal. 2d 875, 48 Cal. Rptr. 707, 409 P.2d 931* (client was sole beneficiary)

Attorney's lien under contingent fee contract is security interest in proceeds of litigation and provides equitable right to have fees and costs due him or her for services in lawsuit secured to him or her out of judgment or recovery. *Isrin v. Superior Court (1965) 63 Cal. 2d 153, 158-159, 45 Cal. Rptr. 320, 403 P.2d 728* (dictum reporting rule)

Lien for payment of fees out of proceeds of judgment may be created by agreement between attorney and client. *Haupt v. Charlie's Kosher Market (1941) 17 Cal. 2d 843, 845, 112 P.2d 627*

Attorney does not have lien for compensation in absence of agreement for such with client. *Echlin v. Superior Court (1939) 13 Cal. 2d 368, 373, 90 P.2d 63*

Attorney's lien has priority over medical lien, regardless of which lien was first in time. *Gilman v. Dalby (2009) 176 Cal. App. 4th 606, 616-620, 98 Cal. Rptr. 3d 231*

Even if lien is invalid or otherwise unenforceable, underlying obligation remains valid. *Shopoff & Cavallo LLP v. Hyon (2008) 167 Cal. App. 4th 1489, 1522-1524, 85 Cal. Rptr. 3d 268*

Attorney's lien on client's prospective recovery must be enforced in separate action, and any order or judgment granting attorney fees in the main action exceeds court's jurisdiction and is void. *Cal-Western Reconveyance Corp. v. Reed (2007) 152 Cal. App. 4th 1308, 1321-1323, 62 Cal. Rptr. 3d. 244*

Attorneys' contractual lien on settlement proceeds from tort claim was not governed by Article 9 of *Uniform Commercial Code. Bluxome Street Associates v. Fireman's Fund Ins. Co. (1988) 206 Cal. App. 3d 1149, 1155-1156, 254 Cal. Rptr. 198*

Contractual lien for attorney's fees and costs entered into prior to initiating legal action has priority over judgment creditor's lien created pursuant to *Code Civ. Proc. § 708.410*; fact that purpose of judgment creditor's lien was to reimburse state government for paying out client's child support arrearages does not justify new exception to "first in time, first in right" rule set forth in *Civ. Code § 2897*. *Cappa v. F & K Rock & Sand, Inc. (1988) 203 Cal. App. 3d 172, 175-176, 249 Cal. Rptr. 718*

Although attorney's lien on client's recovery has priority over federal tax liens pursuant to *I.R.C. § 6323(b)(8)*, court properly refused to uphold attorney's lien against judgment debtor when attorney failed to give judgment debtor sufficient notice of attorney's lien before judgment debtor paid amount of judgment to Internal Revenue Service in response to government's tax levy. *Bree v. Beall (1981) 114 Cal. App. 3d 650, 659-661, 171 Cal. Rptr. 73*

Contingent fee contract containing no words as to lien, security, or assignment does not create, as a matter of law, any lien securing attorney's fees; question whether such contract creates a lien is one of fact depending on intention of

parties. *Gelfand, Greer, Popko & Miller v. Shivener (1973) 30 Cal. App. 3d 364, 370, 105 Cal. Rptr. 445* ; *Wagner v. Sariotti (1943) 56 Cal. App. 2d 693, 697, 133 P.2d 430*

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7-72 California Forms of Pleading and Practice--Annotated § 72.744

§ 72.744 Complaint [Code Civ. Proc. § 425.10] for Compensation for Legal Services--Fee Measured by Reasonable Value of Services--In Obtaining Settlement of Client's Case

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Compensation for Legal Services--Fee Measured by Reasonable Value of Services--In Obtaining Settlement of Client's Case

[*Caption. See § 72.740.*]

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, an attorney at law, duly admitted and practicing in the State of California.

2. [*Capacity of defendant. See § 72.740, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 72.740, Paragraph 3.*]

[4. *Agency allegation, if appropriate. See § 72.740, Paragraph 4.*]

5. On or about _____[*date*], at _____[*address*], California, plaintiff and defendant entered into _____[*either* a written *or* an oral] agreement whereby plaintiff agreed to represent defendant in _____ [*specify agreed services, e.g.*, defending civil action wherein the sum of $_____ was claimed against defendant] and defendant agreed to pay plaintiff the reasonable value of such services and to reimburse plaintiff for costs and expenses advanced.

[6. *Allege existence of attorney's fees clause under Civ. Code § 1717, if appropriate. See § 72.740, First Count, Paragraph 7.*]

7. Under and pursuant to such representation, and at the instance and request of defendant and for his/her benefit, plaintiff negotiated and concluded a stipulation for judgment and performed other valuable services for defendant in connection therewith, with the result that plaintiff procured a settlement of such claim against defendant in the sum of $_____. Plaintiff has performed all acts, services, and conditions required by the agreement to be performed on plaintiff's part.

8. The reasonable value of such services is the sum of $_____.

9. Plaintiff has advanced costs and expenses on behalf of defendant in rendering such agreed services, in the sum of $_____.

10. Plaintiff has made demand on defendant for payment of such compensation and reimbursement of such costs and expenses in the total sum of $_____but neither the whole nor any part thereof [except the sum of $_____] has been paid, and there is due, owing, and unpaid from defendant to plaintiff the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ with interest thereon at _____ percent per year from _____[*date*].

2. For [reasonable attorney's fees and] costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 72.740.*]

[2] Use of Form

This complaint is for use in an action to recover the reasonable value of legal services performed pursuant to a contract to pay plaintiff the reasonable value of services rendered, when the plaintiff's legal services for defendant consisted of the negotiation of a settlement of an action against the client. The complaint alleges the existence of the contract (Paragraph 5), plaintiff's performance (Paragraph 7), and defendant's failure to pay (Paragraph 10).

This form may be used instead of the more general allegations set forth in § 72.741; in the alternative, the allegations in this form may be adapted and incorporated into § 72.741.

[3] Cross References

For related forms, *see §§ 72.740, 72.741*

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7-72 California Forms of Pleading and Practice--Annotated § 72.745

§ 72.745 Complaint [Code Civ. Proc. § 425.10] for Compensation for Legal Services--Fee Measured by Reasonable Value of Services--Services Rendered Prior to Death of Client

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Compensation for Legal Services--Fee Measured by Reasonable Value of Services--Services Rendered Prior to Death of Client

[*Caption. See § 72.740.*]

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, an attorney at law, duly admitted and practicing law in the State of California.

2. Defendant is the duly appointed, qualified, and acting personal representative of _____[*name*], who died on _____[*date*].

3. Prior to the death of _____[*name*], hereinafter called "the deceased," and during the period _____[*date*] until _____[*date*], at _____, California, plaintiff performed legal services for the deceased at his/her request and pursuant to decedent's agreement to compensate plaintiff for the reasonable value thereof. Such services included _____[*describe*].

[4. *Allege existence of attorney's fees clause under Civ. Code § 1717, if appropriate. See § 72.740, Paragraph 7.*]

5. The reasonable value of such services is the sum of $_____.

6. On _____[*date*], plaintiff duly filed with the clerk of the Superior Court of California, County of _____, wherein the deceased's estate is being administered, plaintiff's verified claim in writing in the sum of $_____ for compensation for such legal services.

7. Defendant rejected plaintiff's claim and on _____[*date*], served on plaintiff notice in writing of such rejection.

8. Neither the whole nor any part of such sum has been paid and there is due, owing, and unpaid from defendant to plaintiff the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ with interest thereon at _____ percent per year from _____[*date*].

2. For [reasonable attorney's fees and] costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 72.740.*]

CAUTION:
The claim on which the foregoing complaint is based must be filed or presented against a defendant's estate, or be barred, within the time specified in *Prob. Code §§ 9100-9104*, before a civil action may be commenced [*Prob. Code §§ 9002, 9150*]. For complete discussion of claims against a decedent's estate, see Ch. 453, *Probate: Estate Tax* .

[2] Use of Form

The foregoing complaint is for use in seeking recovery of attorney's fees, based on services performed before the client's death, against the client's estate after the representative of the estate has rejected the claim.

[3] State Statutes

Personal representative defined. *Prob. Code § 58*

Presentation and payment of claims against decedent's estate. *Prob. Code § 9000 et seq.*

Claim against decedent's estate as first required to be filed with court and copy mailed to personal representative before institution of civil action. *Prob. Code §§ 9002, 9150*

[4] Cross References

See generally, Chs. 440- 458E

For related forms, *see §§ 72.740, 72.741*

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7-72 California Forms of Pleading and Practice--Annotated § 72.746

§ 72.746 Complaint for Declaratory Judgment [Code Civ. Proc. § 1060]--To Ascertain Attorney's Rights Under Contingent Fee Agreement and to Declare His or Her Right to Lien on Client's Recovery

[1] FORM Complaint for Declaratory Judgment [Code Civ. Proc. § 1060]--To Ascertain Attorney's Rights Under Contingent Fee Agreement and to Declare His or Her Right to Lien on Client's Recovery

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DECLARATORY RELIEF
_____ [*name*], [and DOES I through_____,] Defendant(s).	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, an attorney at law, duly admitted and practicing law in the State of California.

2. [*Capacity and residence of defendant. See § 72.740, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 72.740, Paragraph 3.*]

[4. *Agency allegation, if appropriate. See § 72.740, Paragraph 4.*]

5. On or about _____[*date*], at _____[*address*], California, plaintiff and defendant entered into _____[a written *or* an oral] contract whereby plaintiff agreed _____ [*describe agreed services, e.g.,* to represent defendant in certain litigation wherein defendant sought a money judgment against _____ (*describe party*) in the sum of $_____] and defendant agreed _____[*describe contingent fee provision establishing lien rights, e.g.,* to compensate plaintiff for his services in an amount equal to 40 percent of any net sums or property collected for defendant if any recovery was made and that plaintiff would acquire a lien on such net sums or property collected for the purpose of securing payment of such compensation].

[6. *Allege existence and contents of attorney's fees clause under Civ. Code § 1717, if appropriate. See § 72.740, Paragraph 7.*]

7. Plaintiff has performed all acts, services, and conditions required by such agreement to be performed on his part. _____ [*Describe services and satisfaction of contingency, e.g.,* In so doing, plaintiff obtained a judgment in the amount of $_____ in such litigation in favor of defendant herein, and at defendant's request and for his benefit caused execution to be issued in such action and levied on certain real property, hereinafter described, belonging to the judgment debtor and caused the property to be sold by the Sheriff of _____ County, California, and at the sheriff's sale plaintiff purchased the said property for defendant for a portion of the sum then due on the judgment. Plaintiff thereafter negotiated, effected, and supervised certain releases and reconveyances of liens, encumbrances, and deeds of trust on such real property superior in right to defendant's rights as purchaser at the sheriff's sale, and negotiated, effected, and supervised a release by the judgment debtor of the right of redemption, and as a result thereof secured for defendant a fee simple title to the property, free and clear of liens and/or encumbrances. Thereafter plaintiff, for and on behalf of defendant, managed the real property, and negotiated, effected, and supervised the leasing and renting thereof and the collection of rents therefrom, and instituted and maintained two separate unlawful detainer suits to recover possession of the property for defendant from defaulting tenants, and performed various other valuable services in connection with the real property, its renting and prospective sale, all on behalf of said defendant, and at his special instance and request, from and after _____ (*date*), until on or about _____ (*date*).]

8. As a result of the services performed by plaintiff for defendant in pursuance of the agreement defendant has come into the possession of, collected, recovered, and realized, property and money in the aggregate and combined sum and value of approximately $_____. By reason of the aforesaid facts and premises, and of the performance of services for defendant by plaintiff, plaintiff became and is entitled to a fee equal to _____[*e.g.,* 40 percent] of the value of such property and moneys collected, recovered, and realized by defendant, as aforesaid, to the aggregate and combined amount and value of approximately $_____, no part of which has been delivered or paid.

9. The real property is that certain piece, parcel, or lot or land situate, lying, and being in the City of _____, County of _____, State of California, described as: _____[*legal description*].

10. A controversy has arisen relating to the legal rights and duties of plaintiff herein, in that the defendant has claimed, and now claims, that plaintiff has no right, title, or interest to the real property, or its rents, income, and profits and that defendant is not indebted to plaintiff in any sum or amount whatsoever.

Contrary to defendant's contentions, plaintiff contends that under the contingent fee agreement between plaintiff and defendant herein described plaintiff is entitled to compensation in the sum of $_____ and that, as security therefor, plaintiff has a lien on all properties and monies collected by defendant as a result of plaintiff's services under the agreement.

11. It is necessary and proper for the court at this time to ascertain, determine, and declare plaintiff's rights as sought herein in that _____[*specify*].

WHEREFORE, plaintiff prays judgment as follows:

1. That the court ascertain, determine, and declare the rights of the parties under the contingent fee contract herein alleged.

2. That the court declare that plaintiff is entitled to compensation for services rendered to defendant in the sum of $_____ and to a lien on all properties and monies collected by defendant for the purpose of securing plaintiff's compensation.

3. For [attorney's fees and] costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The foregoing complaint is for use in an action by an attorney to seek a declaratory judgment determining his or her right to compensation, and to a lien, under a contingent fee agreement. For discussion of the requisites for establishing a charging lien, see *§ 72.452[1]*.

[3] Allegations

A complaint for declaratory judgment alleges (1) the contract (Paragraphs 5, 6), (2) plaintiff's performance under the contract (Paragraph 7), (3) the property as to which he or she claims and seeks a declaration of rights (Paragraphs 8, 9), (4) the controversy between the parties (Paragraph 10), and (5) the necessity and propriety of the court's determination at the present time (Paragraph 11) [*see Code Civ. Proc. § 1060*; *see generally* Ch. 182, *Declaratory Relief*].

Paragraph 6 should be used if the parties entered into a written compensation contract that included an attorney's fees clause pursuant to *Civ. Code § 1717* to recover fees in any future action based on the contract. Although it is not clear whether a declaratory relief action is an action on a contract, it is arguable that attorney's fees are recoverable under *Civ. Code § 1717* in a declaratory action if the contractual clause does not limit the particular causes of action for which attorney's fees may be recovered, but instead provides for an award of attorney's fees in any action to determine the enforceability of the contract [*see Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc. (1981) 121 Cal. App. 3d 447, 462-463, 176 Cal. Rptr. 546* (parties to contract may provide for award of attorney's fees in any action to determine enforceability of contract)].

[4] Oral Contingency Fee Contracts May Be Voidable by Client

Contingency fee contracts are generally required to be in writing, although there are specific exceptions to this requirement [*Bus. & Prof. Code § 6147(a)*; *see Bus. & Prof. Code § 6147(c)* (contingent fee contracts for workers' compensation benefits excluded from provisions of *§ 6147), Bus. & Prof. Code* § 6147.5 (contingency fee contracts for recovery of claims between merchants excluded from provisions of § 6147); *see* discussion in Part II, Introduction, Subpart A]. If a contract that the statute requires to be in writing is oral, the contract is voidable at the option of the

client; however, the attorney is entitled to recover a "reasonable fee" [*Bus. & Prof. Code § 6147(b)*].

[5] California Points and Authorities

For a memorandum of points and authorities in support of a motion by an attorney for summary judgment on a complaint to enforce his attorney's lien right, see California Points and Authorities, Ch. 25, *Attorney's Fees* (Matthew Bender)

[6] State Statutes

Right to declaratory relief as to existing controversy over right to property under contract; proper court for action. *Code Civ. Proc. § 1060*

Necessity of showing that determination is necessary and proper at particular time. *Code Civ. Proc. § 1061*

Other relief as available in declaratory relief action. *Code Civ. Proc. § 1062*

[7] Decisions

Lien for payment of attorney's fees out of proceeds of judgment as created by contract. *Haupt v. Charlie's Kosher Market (1941) 17 Cal. 2d 843, 845, 112 P.2d 627*

Lien for attorney's fees created by written contract between attorney and client as surviving attorney's discharge and entitling attorney to recover reasonable value of services. *Weiss v. Marcus (1975) 51 Cal. App. 3d 590, 598, 124 Cal. Rptr. 297*

Question whether contract creates lien for attorney's fees as question of fact involving determination of intention of parties, in absence of express language in contract declaring lien. *Gelfand, Greer, Popko & Miller v. Shivener (1973) 30 Cal. App. 3d 364, 370, 105 Cal. Rptr. 445*

Contingent fee agreement as sufficient to create lien on recovery in favor of attorney if agreement provides that fee is to be percentage of fund recovered as distinguished from percentage of amount recovered. *Skelly v. Richman (1970) 10 Cal. App. 3d 844, 865, 89 Cal. Rptr. 556* (dictum)

[8] Cross References

See generally Ch. 182, *Declaratory Relief*

For a related form, *see § 72.740*

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7-72 California Forms of Pleading and Practice--Annotated § 72.747

§ 72.747 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Tortious Interference With Contingent Fee Contract--By Attorney Against Person Who Induced Client to Discharge Attorney Without Cause

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Tortious Interference With Contingent Fee Contract--By Attorney Against Person Who Induced Client to Discharge Attorney Without Cause

[*Caption. See § 72.740.*]

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, an attorney at law, duly admitted and practicing law in the State of California.

2. [*Capacity and residence of defendant. See § 72.740, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 72.740, Paragraph 3.*]

[4. *Agency allegation, if appropriate. See § 72.740, Paragraph 4.*]

5. On or about _____[*date*], at _____[*address*], California, plaintiff and _____[*name*] (hereinafter called "client"), entered into _____[*either* a written *or* an oral] contract whereby plaintiff agreed to _____[*specify agreed services, e.g.*, represent client by prosecuting a claim against (*describe claim*) and in bringing and maintaining a civil action thereon] and client agreed to _____[*specify contingent fee provision, e.g.*, reimburse plaintiff for all costs and expenses advanced and to pay to plaintiff as compensation for his services an amount equal to 40 percent of all monies recovered on client's claim].

6. _____ [*Describe services rendered by plaintiff, e.g.,* In representing client plaintiff prosecuted a civil action on his claim and judgment was rendered thereon in the sum of $_____. Subsequent to the rendition of such judgment, the judgment debtor thereon filed an appeal. Plaintiff was instructed by client to contest such appeal and plaintiff proceeded to do so but was prevented from doing so by defendant's interference and acts hereinafter alleged.]

7. _____[*Set forth facts showing unjustified interference by defendant, e.g.,* At all times herein mentioned defendant had full knowledge of the contingent fee contract between plaintiff and client herein alleged. In spite of such knowledge and with malicious intent to induce client to terminate such contract without just cause, defendant induced client to discharge plaintiff and to disaffirm and deny to plaintiff all rights and interest in monies recovered by client on such judgment, all for the purpose of depriving plaintiff of his rightful compensation for services rendered to client and in order to negotiate a settlement and satisfaction of such judgment by client without plaintiff's participation or consent.]

8. As a proximate result of such inducement by defendant, client discharged plaintiff without cause preventing plaintiff from completing his representation of client and from obtaining any compensation from client under such contingent fee contract, all to plaintiff's damage in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For compensatory damages in the sum of $_____.

[2. For punitive and exemplary damages (in the sum of $_____).]

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 72.740.*]

[2] Use of Form

The foregoing complaint is for use in an action by an attorney for tortious interference with a contract, based on the allegation that defendant induced the client to discharge plaintiff without cause from a contingent fee contract. For discussion of this cause of action, see *§ 72.453*. For discussion and forms concerning interference with economic relations generally, see *Ch. 565, Unfair Competition, § 565.130* et seq.

[3] Allegations

A complaint for tortious interference with a contractual relationship alleges (1) the contractual relationship between plaintiff and his client (Paragraph 5), (2) defendant's knowledge of such contract and his intent to induce the client to terminate such (Paragraph 7), and (3) the termination of the contract by plaintiff's client proximately caused by defendant's inducement and resulting damages to plaintiff (Paragraph 8) [*see Herron v. State Farm Mutual Ins. Co. (1961) 56 Cal. 2d 202, 205, 14 Cal. Rptr. 294, 363 P.2d 310* ; *Skelly v. Richman (1970) 10 Cal. App. 3d 844, 861-862, 89 Cal. Rptr. 556]* .

[4] Cross References

For further discussion of actions for tortious interference with contract relations, see *Ch. 565, Unfair Competition, § 565.130* et seq.

[5] California Points and Authorities

For memoranda of points and authorities supporting and opposing a demurrer to a complaint for tortious interference and supporting defendant's motion for summary judgment, see California Points and Authorities, Ch. 122, *Interference* (Matthew Bender)

[6] Decisions

Client as having right to discharge attorney with or without cause, without incurring liability for breach of contract. *Fracasse v. Brent (1972) 6 Cal. 3d 784, 791, 100 Cal. Rptr. 385, 494 P.2d 9*

Contingent fee contract as entitled to protection of law from unlawful interference by third parties. *Herron v. State Farm Mutual Ins. Co. (1961) 56 Cal. 2d 202, 205, 14 Cal. Rptr. 294, 363 P.2d 310* (interference by insurance company inducing client to discharge attorney for purpose of negotiating settlement of client's claim); *Skelly v. Richman (1970) 10 Cal. App. 3d 844, 862, 89 Cal. Rptr. 556* (interference by opposing attorney and his client inducing plaintiff's client to discharge him for purpose of negotiating settlement of claim)

Causes of action stated by attorney for value of services after discharge in money had and received, conversion, constructive trust, and intentional interference with contractual relationship. *Weiss v. Marcus (1975) 51 Cal. App. 3d 590, 599-600, 124 Cal. Rptr. 297*

Right of client to terminate attorney-client relationship at will as not justifying interference by third party. *Skelly v. Richman (1970) 10 Cal. App. 3d 844, 862, 89 Cal. Rptr. 556*

Plaintiff's client as not indispensable party to action for interference with contingent fee contract. *Skelly v. Richman (1970) 10 Cal. App. 3d 844, 856, 89 Cal. Rptr. 556*

Attorney as not required to pursue cause of action against client to mitigate damages caused by interference with attorney-client relationship. *Herron v. State Farm Mutual Ins. Co. (1961) 56 Cal. 2d 202, 207, 14 Cal. Rptr. 294, 363 P.2d 310*

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7-72 California Forms of Pleading and Practice--Annotated § 72.748

§ 72.748 Allegation in Answer to Complaint for Reasonable Attorney's Fee--That Defendant Tendered Full Amount of Reasonable Fee to Plaintiff Prior to Commencement of Action [Code Civ. Proc. § 1025]

[1] FORM Allegation in Answer to Complaint for Reasonable Attorney's Fee--That Defendant Tendered Full Amount of Reasonable Fee to Plaintiff Prior to Commencement of Action [Code Civ. Proc. § 1025]

Defendant admits that plaintiff performed legal services to defendant in _____[*specify services*] and that the reasonable value of such services does not exceed the sum of $_____. Defendant tendered that amount to plaintiff prior to commencement of this action and on filing this answer deposits such sum in court for plaintiff.

[2] Use of Form

The foregoing allegation is for use by defendant in the answer to a complaint for the reasonable value of legal services. If the allegation is found to be true, plaintiff cannot recover costs of suit and defendant is entitled to recover costs against plaintiff [*Code Civ. Proc. § 1025*]. In addition, if the allegation is found to be true and the parties had entered into a written compensation contract that included an attorney's fees clause pursuant to *Civ. Code § 1717*, the defendant is deemed to be a party prevailing on the contract within the meaning of *Civ. Code § 1717* and will therefore be entitled to recover attorney's fees in addition to costs incurred in the litigation [*Civ. Code § 1717(b)(2)*].

[3] State Statutes

Attorney's fees clause in contract. *Civ. Code § 1717*

Tender and deposit as deeming defendant party prevailing on the contract for purpose of recovering attorney's fees pursuant to clause in contract. *Civ. Code § 1717(b)(2)*

Tender and deposit as relieving defendant of liability for plaintiff's costs of suit and entitling defendant to his costs of suit. *Code Civ. Proc. § 1025*

[4] Cross References

See generally Ch. 211, *Deposit in Court*

For a related form, *see § 72.740*

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7-72 California Forms of Pleading and Practice--Annotated § 72.749

§ 72.749 Complaint [Code Civ. Proc. § 425.10] by Client to Recover Money Improperly Retained by Attorney--Failure to Pay Client Sums Recovered Under Contingent Fee Contract

[1] FORM Complaint [Code Civ. Proc. § 425.10] by Client to Recover Money Improperly Retained by Attorney--Failure to Pay Client Sums Recovered Under Contingent Fee Contract

[*Caption. See § 72.740.*]

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, an attorney at law, duly admitted and practicing in the State of California, and residing in _____County, California.

[2. *Fictitious name allegation, if appropriate. See § 72.740, Paragraph 3.*]

[3. *Agency allegation, if appropriate. See § 72.740, Paragraph 4.*]

4. On or about _____[*date*], at _____[*address*], California, plaintiff retained and employed defendant pursuant to _____[a written *or* an oral] contingent fee contract whereby defendant agreed to represent plaintiff in certain litigation for which plaintiff agreed to pay defendant _____ percent of any funds recovered for plaintiff if recovery was made [and to reimburse defendant for all taxable costs of suit advanced by defendant].

[5. *Attorney's fees clause under Civ. Code § 1717, if appropriate. See § 72.740, Paragraph 7.*]

6. In the course of such representation of plaintiff by defendant, defendant obtained a _____[settlement *or* judgment] in such litigation in the sum of $_____.

7. Plaintiff is informed and believes and thereon alleges that on or about _____[*date*] defendant received money for plaintiff in full payment of such _____[settlement *or* judgment] in the sum of $_____.

8. Plaintiff has performed all acts and conditions required by the agreement to be performed on his part [and has reimbursed defendant all taxable costs advanced].

9. Defendant's full compensation under the agreement is the sum of $_____, measured by _____ percent of the funds recovered, and plaintiff is entitled to the balance in the sum of $_____.

10. Plaintiff has made demand on defendant for payment of such sum but neither the whole nor any part thereof [except the sum of $_____] has been paid, and there is due, owing, and unpaid from defendant to plaintiff the sum of $_____.

[*Prayer. See § 72.740* .]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 72.740.*]

[2] Use of Form

The foregoing complaint is for use in an action by a client against his or her attorney for recovery of the client's share of funds collected by the attorney pursuant to services rendered on a contingent fee agreement.

If the parties had entered into a written compensation contract that included an attorney's fees clause pursuant to *Civ. Code § 1717* and the client is the prevailing party in the action to recovery his or her share of funds, the client is entitled to recover attorney's fees as well as costs incurred in the litigation [*Civ. Code § 1717(a)*].

[3] Cross References

For a complaint for accounting by a client against his or her attorney, see Ch. 7, *Accounting, Action for*

For a related form, *see § 72.740*

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7-72 California Forms of Pleading and Practice--Annotated § 72.750

§ 72.750 Complaint [Code Civ. Proc. § 425.10] by Client to Recover Money Improperly Retained by Attorney After Discharge--Failure to Return Fees Advanced

[1] FORM Complaint [Code Civ. Proc. § 425.10] by Client to Recover Money Improperly Retained by Attorney After Discharge--Failure to Return Fees Advanced

[*Caption. See § 72.740.*]

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, an attorney at law, duly admitted and practicing law in the State of California, and residing in _____ County, California.

[2. *Fictitious name allegation, if appropriate. See § 72.740, Paragraph 3.*]

[3. *Agency allegation, if appropriate. See § 72.740, Paragraph 4.*]

4. On or about _____[*date*], at _____[*address*], California, plaintiff retained and employed defendant by _____[a written *or* an oral] agreement to represent plaintiff in _____[*describe services*]. Defendant agreed to represent plaintiff on such matter [*specify provisions of fee agreement relevant to attorney's entitlement to fees, e.g.,* a fee of $_____ plus costs and expenses in the sum of $_____].

[5. *Attorney's fees clause under Civ. Code § 1717, if appropriate. See § 72.740, Paragraph 7.*]

6. At such time and place plaintiff advanced such fee [and costs] to defendant in the [total] sum of $_____.

7. On or about _____[*date*], plaintiff discharged defendant and terminated his services because of _____[*specify, e.g.,* defendant's failure to render the services agreed].

8. Plaintiff is informed and believes and thereon alleges that to the date of discharge defendant rendered _____ [no services to plaintiff *or* services of a value not exceeding $_____] [and incurred _____ (no costs on behalf of plaintiff *or* costs not exceeding the sum of $_____)], and plaintiff is entitled to the return of the fee and costs advanced to defendant and to payment thereof in the sum of $_____.

9. Plaintiff has made demand on defendant for payment of such sum but neither the whole nor any part thereof [except the sum of $_____] has been paid, and there is due, owing, and unpaid from defendant to plaintiff the sum of $_____.

[*Prayer. See § 72.740.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 72.740.*]

[2] Use of Form

The foregoing complaint is for use in an action by a client after discharge of his or her attorney, for return of fees and costs advanced. Depending on the exact provisions of the contract, the discharged attorney is entitled to recover the reasonable value of his or her services performed before the discharge, unless the discharge is based on the attorney's improper acts [*see Jeffry v. Pounds (1977) 67 Cal. App. 3d 6, 9, 136 Cal. Rptr. 373* ; for further discussion, *see § 72.451[2][b]*]. This complaint should be used if the client has advanced money to the attorney in an amount greater than the attorney is entitled to under the circumstances (including the contractual language that is the basis for the attorney's entitlement to fees). For further discussion of the factors that can affect the amount of fees to which the attorney is entitled under given circumstances, see *§ 72.190 et seq. through § 72.240* et seq.

[3] Cross References

For a related form, *see § 72.740*

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7-72 California Forms of Pleading and Practice--Annotated § 72.751

§ 72.751 Notice of Client's Right to Arbitration [Bus. & Prof. Code § 6201(a)]

[1] FORM Notice of Client's Right to Arbitration [Bus. & Prof. Code § 6201(a)]

Click here to view image.

[2] Use of Form

This form is for use by an attorney to notify the client of the client's right to arbitration of a dispute concerning costs and/or attorney's fees. If the attorney has already filed an action to recover fees or costs in a court, the attorney must serve the notice prior to or at the time of the service of summons in the fee action. Failure to give the notice is ground for dismissal of the court action [*Bus. & Prof. Code § 6201(a)*; *see Law Offices of Dixon R. Howell v. Valley (2005) 129 Cal. App. 4th 1076, 1088, 1104, 29 Cal. Rptr. 3d 499* (dismissal for failing to provide notice is discretionary)].

[3] State Statutes

Notice of client's right to arbitration. *Bus. & Prof. Code § 6201(a)*

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7-72 California Forms of Pleading and Practice--Annotated § 72.752

[Reserved]

§ 72.752[Reserved]

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7-72 California Forms of Pleading and Practice--Annotated § 72.753

§ 72.753 Petition to Correct, Confirm, or Vacate Attorney-Client Fee Arbitration Award--Cal. Judicial Council Form ADR-103

[1] FORM Petition to Correct, Confirm, or Vacate Attorney-Client Fee Arbitration Award

Click here to view image.

[2] Use of Form

This Judicial Council form, approved for optional use, is to petition to correct, confirm, or vacate an attorney client fee arbitration award. It may be used if a lawsuit has already been filed in the action. If a lawsuit has not been filed, this form may not be used. For complete discussion, *see § 72.478[4]*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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7-72 California Forms of Pleading and Practice--Annotated § 72.754

§ 72.754 Rejection of Award and Request for Trial After Attorney-Client Fee Arbitration--Cal. Judicial Council Form ADR-104

[1] FORM Rejection of Award and Request for Trial After Attorney-Client Fee Arbitration

Click here to view image.

[2] Use of Form

This Judicial Council form, approved for optional use, is to reject an arbitration award for attorney-client fee arbitration and to request a trial. This form may not be used if the arbitration was binding. This form must be served and filed with the court within 30 days of the date the arbitration award was mailed [*Bus & Prof. Code § 6204(a)*]. If a lawsuit for fees has already been filed, file the form in the same court where the lawsuit is filed. If a lawsuit for fees has not been filed, you must file a complaint in the proper court along with this form [*Bus & Prof. Code § 6204(c)*]. In conjunction with this form, *see § 72.752[3]* for Information Regarding Rights After Attorney-Client Fee Arbitration.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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7-72 California Forms of Pleading and Practice--Annotated § 72.755

§ 72.755 Information Regarding Rights After Attorney-Client Fee Arbitration--Cal. Judicial Council Form ADR-105

[1] FORM Information Regarding Rights After Attorney-Client Fee Arbitration

Click here to view image.

[2] Use of Form

This Judicial Council form, approved for optional use, details the procedures and answers questions regarding rights after binding and non binding arbitration; filing for a trial after arbitration; correcting, vacating or confirming an arbitration award, and enforcement of a binding arbitration award.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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7-72 California Forms of Pleading and Practice--Annotated § 72.756

§ 72.756 Complaint by Client for Declaratory Relief [Code Civ. Proc. § 1060] and Trial After Nonbinding Arbitration Regarding Compensation for Legal Services--No Action Pending

[1] FORM Complaint by Client for Declaratory Relief [Code Civ. Proc. § 1060] and Trial After Nonbinding Arbitration Regarding Compensation for Legal Services--No Action Pending

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DECLARATORY RELIEF
_____ [*name*], Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. At all times mentioned herein, defendant was, and now is, an attorney at law, duly admitted and practicing law in the State of California, and residing in _____ County, California.

2. On or about _____[*date*], _____ [*set out essential facts of transaction giving rise to the adverse contentions of the parties, e.g.,* plaintiff was served with summons and complaint in a dissolution and child custody matter entitled In re Marriage of Jones, filed in the Paradise County Superior Court, Case No. 1000. On or about _____ (*date*), plaintiff and defendant entered into a written agreement, a copy of which is attached hereto and marked as Exhibit "A," in which defendant agreed to provide professional services to plaintiff in the above-described action, and plaintiff agreed to compensate plaintiff at the rate of $75.00 an hour. After final judgment, the court found that defendant had spent five hours on the matter, and ordered the petitioner in the dissolution action to

pay $375.00 to defendant. Defendant then demanded that plaintiff pay to defendant a total sum of $7,500.00, less $375.00 paid to defendant by petitioner in the dissolution action and $200.00 paid to defendant by plaintiff.]

[3. The written agreement contains a clause that provides _____ (*describe attorney's fees clause, e.g.,* that in any future litigation concerning the fee for defendant's services, the prevailing party is entitled to recover attorney's fees and costs incurred in that future litigation, pursuant to *Section 1717 of the Civil Code*).]

4. An actual controversy has arisen and now exists between plaintiff and defendant concerning their respective rights and duties in that plaintiff contends that _____[*set forth plaintiff's contentions, e.g.,* the total amount owed defendant for legal services rendered in the above-described action is $375.00, representing five hours of work]; whereas defendant disputes these contentions and contends that _____[*set forth defendant's contentions, e.g.,* the total amount owed defendant is $7,500.00, representing 100 hours of work].

5. On or about _____[*date*], plaintiff and defendant entered into advisory arbitration pursuant to *Business and Professions Code Sections 6200-6206* for determination of the disputed fee. The matter was heard by _____[one arbitrator *or* a panel of three arbitrators] pursuant to the rules of the State Bar of California [and _____ (*name of bar association*)], under case number _____. Notice of the Award and Findings of the Arbitrators was mailed to plaintiff by the _____[State Bar of California *or name of bar association*] on _____[*date*]. The award and findings were adverse to plaintiff and in favor of defendant in the sum of $_____.

6. Plaintiff desires a judicial determination of his/her/its rights and duties, and a declaration as to the amount, if any, he/she/it owes to defendant for legal services.

7. A judicial declaration is necessary and appropriate at this time under the circumstances in order that plaintiff may ascertain his/her/its rights and duties under the written fee agreement.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. That the court ascertain, determine, and declare the rights of the parties under the fee agreement herein alleged;

2. That the court declare that plaintiff's total indebtedness to defendant under the fee agreement herein alleged is $_____;

3. For [attorney's fees and] costs of suit herein incurred; and

4. For other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 72.740.*]

[2] Use of Form

This form of complaint is for use by a client to obtain a trial after arbitration, by instituting an action to seek a judicial

determination regarding the fee dispute that was decided in the attorney's favor in advisory arbitration [*see Bus. & Prof. Code § 6204(c)*; *see generally* Bus. & Prof. Code §§ 6200-6206]. For forms for use by an attorney to seek recovery of fees and costs for legal services, *see §§ 72.740 -72.746*.

[3] Allegations

The complaint alleges:

- The defendant's status as an attorney and the basis for venue (Paragraph 1) [*see Code Civ. Proc. § 395*].

- The existence of a written fee agreement, and a description of the matter for which services were required (Paragraph 2).

- A statement of the controversy (Paragraph 4).

- The outcome of advisory arbitration (Paragraph 5) [*see Bus. & Prof. Code § 6200 et seq.*].

- That the plaintiff desires a declaration of the parties' rights and duties under the circumstances and that a declaration is necessary and appropriate at the time (Paragraphs 6-7) [*Code Civ. Proc. §§ 1060, 1061*; for a complete discussion of declaratory relief actions generally, see Ch. 182, *Declaratory Relief*].

The form includes an optional allegation that the contract included a clause providing that in any future litigation concerning the fees, the prevailing party is entitled to attorney's fees and costs pursuant to *Civ. Code § 1717* (Paragraph 3). Although it is not clear whether a declaratory action is an "action on a contract" under *Civ. Code § 1717*, it is arguable that attorney's fees are recoverable in a declaratory action under a contract clause generally providing for the recovery of attorney's fees in the event of litigation [*see Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc. (1981) 121 Cal. App. 3d 447, 462-463, 176 Cal. Rptr. 546* (parties to contract may provide for award of attorney's fees in any action to determine enforceability of contract)]. For further discussion of attorney's fees and costs, see Ch. 174, *Costs and Attorney's Fees* , General Introduction.

[4] Jurisdiction and Venue

Any person who desires a declaration of rights or duties with respect to another, or with respect to property may, in the cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action in the superior court, or in the superior court as a limited civil case to the extent allowed pursuant to *Code Civ. Proc. § 85 et seq.*, for a declaration of rights and duties in the premises, including a determination of any question of construction or validity arising under the contract [*Code Civ. Proc. § 1060*]. The superior court has original jurisdiction in declaratory relief actions to conduct a trial after a nonbinding fee arbitration between an attorney and client, pursuant to *Bus. & Prof. Code § 6200 et seq.*, when the amount in controversy is $25,000 or less [*Code Civ. Proc. § 85, 85.1, 86(a)(7)(B)*].

In limited civil cases the caption must state the character of the action, whether the demand exceeds or does not exceed $10,000. When a limited civil case is brought in the superior court, the caption must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(8), (9)*].

Except as otherwise provided by law and subject to the power of the court to transfer actions or proceedings, the county in which the defendants or some of them reside at the commencement of the action is the proper county for the trial of the action [*Code Civ. Proc. § 395*].

[5] Cross References

For a related form, *see § 72.746*

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7-72 California Forms of Pleading and Practice--Annotated §§ 72.757-72.769

[Reserved]

§§ 72.757[Reserved]

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7-72 California Forms of Pleading and Practice--Annotated § 72.770

§ 72.770 Notice of Limited Scope Representation [Cal. Rules of Ct., Rule 3.36]--Cal. Judicial Council Form MC-950

[1] FORM Notice of Limited Scope Representation [Cal. Rules of Ct., Rule 3.36]--Cal. Judicial Council Form MC-950

Click here to view image.

[2] Use of Form

This for is a mandatory form for use when the attorney-client relationship is limited to a specific matter, and the attorney's duty to represent the client extends only to that matter. "Limited scope representation" is a relationship between an attorney and a person seeking legal services in which they have agreed that the scope of the legal services will be limited to specific tasks that the attorney will perform for the person [*Cal. Rules of Ct., Rule 3.35(a)*].

A party and an attorney may provide notice of their agreement to limited scope representation by serving and filing a Notice of Limited Scope Representation (Judicial Council Form MC-950) [*Cal. Rules of Ct., Rule 3.36(a)*]. After the notice is received and until either a substitution of attorney or an order to be relieved as attorney is filed and served, papers in the case must be served on both the attorney providing the limited scope representation and the client.

[3] Cross References

For discussion on limited scope representation generally, see *§ 72.190[4]*

For discussion and related forms on being relieved as attorney on completion of limited scope representation, see *§§ 72.372[4], 72.771 -72.773*

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7-72 California Forms of Pleading and Practice--Annotated § 72.771

§ 72.771 Application to Be Relieved as Attorney on Completion of Limited Scope Representation [Cal. Rules of Ct., Rule 3.36]--Cal. Judicial Council Form MC-955

[1] FORM Application to Be Relieved as Attorney on Completion of Limited Scope Representation [Cal. Rules of Ct., Rule 3.36]--Cal. Judicial Council Form MC-955

Click here to view image.

[2] Use of Form

This form is a mandatory form used to apply to be relieved as attorney on completion of limited scope representation. It must be directed to the client. The application must be filed with the court and served on the client and on all other parties or attorneys for parties in the case [*Cal. Rules of Ct., Rule 3.36(e)*].

In addition, the client must also be served with a blank Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation (Judicial Council form MC-956) [*Cal. Rules of Ct., Rule 3.36(e)*]. If no objection is served and filed with the court within 15 days from the date that the application is served on the client, the attorney making the application must file an updated form MC-955 indicating the lack of objection, along with a proposed Order on Application to Be Relieved as Attorney on Completion of Limited Scope Representation (Judicial Council form MC-958) [*Cal. Rules of Ct., Rule 3.36(f)*]. The clerk must then forward the order for judicial signature [*Cal. Rules of Ct., Rule 3.36(f)*].

If the client serves and files an objection to the application within 15 days, the clerk must set a hearing date on the Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation (Judicial Council form MC-956) [*Cal. Rules of Ct., Rule 3.36(g)*]. The hearing must be scheduled no later than 25 days from the date the objection is filed. The clerk must send the notice of the hearing to the parties and the attorney [*Cal. Rules of Ct., Rule 3.36(g)*].

If no objection is served and filed and the court signs the proposed order, the attorney who filed the application must serve a copy of the signed order on the client and on all parties or the attorneys for all parties who have appeared in the

case [*Cal. Rules of Ct., Rule 3.36(h)*]. The court may delay the effective date of the order relieving the attorney until proof of service of a copy of the signed order on the client has been filed with the court [*Cal. Rules of Ct., Rule 3.36(h)*].

[3] Cross References

For discussion and forms on limited scope representation generally, see *§§ 72.190[4], 72.770*

For discussion and related forms on being relieved as attorney on completion of limited scope representation, see *§§ 72.372[4], 72.772 -72.773*

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7-72 California Forms of Pleading and Practice--Annotated § 72.772

§ 72.772 Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation [Cal. Rules of Ct., Rule 3.36]--Cal. Judicial Council Form MC-956

[1] FORM Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation [Cal. Rules of Ct., Rule 3.36]--Cal. Judicial Council Form MC-956

Click here to view image.

[2] Use of Form

This form is a mandatory form used to object to the application to be relieved as attorney on completion of limited scope representation. A blank Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation (Judicial Council form MC-956) must be served on the client along with the application [*Cal. Rules of Ct., Rule 3.36(e)*]. If no objection is served and filed with the court within 15 days from the date that the application is served on the client, the attorney making the application must file an updated form MC-955 indicating the lack of objection, along with a proposed Order on Application to Be Relieved as Attorney on Completion of Limited Scope Representation (Judicial Council form MC-958) [*Cal. Rules of Ct., Rule 3.36(f)*]. The clerk must then forward the order for judicial signature [*Cal. Rules of Ct., Rule 3.36(f)*].

If the client serves and files an objection to the application within 15 days, the clerk must set a hearing date on the Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation (Judicial Council form MC-956) [*Cal. Rules of Ct., Rule 3.36(g)*]. The hearing must be scheduled no later than 25 days from the date the objection is filed. The clerk must send the notice of the hearing to the parties and the attorney [*Cal. Rules of Ct., Rule 3.36(g)*].

If no objection is served and filed and the court signs the proposed order, the attorney who filed the application must serve a copy of the signed order on the client and on all parties or the attorneys for all parties who have appeared in the case [*Cal. Rules of Ct., Rule 3.36(h)*]. The court may delay the effective date of the order relieving the attorney until proof of service of a copy of the signed order on the client has been filed with the court [*Cal. Rules of Ct., Rule 3.36(h)*].

[3] Cross References

For discussion and forms on limited scope representation generally, see *§§ 72.190[4]*, *72.770*

For discussion and related forms on being relieved as attorney on completion of limited scope representation, see *§§ 72.372[4]*, *72.771*, *72.773*

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7-72 California Forms of Pleading and Practice--Annotated § 72.773

§ 72.773 Order on Application to Be Relieved as Attorney on Completion of Limited Scope Representation [Cal. Rules of Ct., Rule 3.36]--Cal. Judicial Council Form MC-958

[1] FORM Order on Application to Be Relieved as Attorney on Completion of Limited Scope Representation [Cal. Rules of Ct., Rule 3.36]--Cal. Judicial Council Form MC-958

Click here to view image.

[2] Use of Form

This optional form is used if no objection is served and filed with the court within 15 days from the date the application is served on the client. The attorney making the application must file an updated form MC-955 indicating the lack of objection, along with a proposed this form [*Cal. Rules of Ct., Rule 3.36(f)*]. The clerk must then forward the order for judicial signature [*Cal. Rules of Ct., Rule 3.36(f)*].

If no objection is served and filed and the court signs the proposed order, the attorney who filed the application must serve a copy of the signed order on the client and on all parties or the attorneys for all parties who have appeared in the case [*Cal. Rules of Ct., Rule 3.36(h)*]. The court may delay the effective date of the order relieving the attorney until proof of service of a copy of the signed order on the client has been filed with the court [*Cal. Rules of Ct., Rule 3.36(h)*].

[3] Cross References

For discussion and forms on limited scope representation generally, see *§§ 72.190[4], 72.770*

For discussion and forms on being relieved as attorney on completion of limited scope representation, see *§§ 72.372[4], 72.771 -72.772*

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[RESERVED]

Chapters 73[RESERVED]

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Chapter 76 ATTORNEY PROFESSIONAL LIABILITY

7-76 California Forms of Pleading and Practice--Annotated 76.syn

AUTHOR: GEORGE M. LINDAHL

§ 76.syn Synopsis to Chapter 76: ATTORNEY PROFESSIONAL LIABILITY

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§ 76.12 Common Areas of Liability

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§ 76.30 Attorney-Client Relationship

[1] Establishment of Relationship

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[5] Cross References

[6] California Torts

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[1] FORM

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[2] Use of Form

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[2] Use of Form

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Cross References

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[3] Decisions

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[4] Cross References

[5] California Points and Authorities

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[2] Use of Form

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[1] FORM

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[1] FORM

[2] Use of Form

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[2] Use of Form

[3] Cross References

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[5] Decisions

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[1] FORM

[2] Use of Form

[3] Cross References

[4] Rules of Professional Conduct

[5] Decisions

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[1] FORM

[2] Use of Form

[3] Cross References

[4] Decisions

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[2] Use of Form

[3] Allegations

[4] Cross References

[5] California Torts

[6] Decisions

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[2] Use of Form

[3] California Points and Authorities

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[5] State Statutes

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[v] Scope of Code Civ. Proc. § 340.6

[vi] Suspension of Corporate Powers

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[1] FORM

[2] Use of Form

[3] Accompanying Documents

[4] Cross References

[5] California Points and Authorities

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[1] FORM

[2] Use of Form

[3] Cross References

[4] California Torts

[5] Decisions

[6] Law Reviews

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[1] FORM

[2] Use of Form

[3] Cross References

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[5] Decisions

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[1] FORM

[2] Use of Form

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[3] Cross References

[4] California Points and Authorities

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[2] Use of Form

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[3] Cross References

[4] California Points and Authorities

[5] Decisions

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[2] Use of Form

[3] Elements

[4] Cross References

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[2] Use of Form

[3] Elements

[4] Cross References

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[2] Use of Form

[3] Cross References

[4] State Statutes

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[2] Use of Form

[3] Attachments

[4] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

§ 76.459 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Fraud and Deceit [Civ. Code § 1710] by Attorney--Nondisclosure

[1] FORM

[2] Use of Form

[3] California Torts

[4] State Statutes

[5] Decisions

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[2] Use of Form

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[4] California Torts

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[2] Use of Form

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[4] Cross References

[5] California Points and Authorities

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[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

§ 76.482 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Malicious Prosecution Action--Action Barred by Defense of Unclean Hands

[1] FORM

[2] Use of Form

[3] Cross References

[4] Decisions

§ 76.483 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Abuse of Process Action--Absolute Privilege Under Civ. Code § 47(b)

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

[5] Decisions

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FOOTNOTES:
(n45)Footnote *. **George M. Lindahl** is a partner in the law firm of Hawkins, Schnabel, Lindahl & Beck, Los Angeles, Calif. His practice includes professional liability litigation. This chapter is based in part on Levy, Golden, Sacks, California Torts, Ch. 32 (Matthew Bender) by Mr. Lindahl.

California Forms of Pleading and Practice--Annotated

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Volume 7: Attorney Practice and Ethics thru Auctions and Auctioneers-Chs.72-79
Chapter 76 ATTORNEY PROFESSIONAL LIABILITY
PART I. SCOPE

7-76 California Forms of Pleading and Practice--Annotated § 76.01

AUTHOR: GEORGE M. LINDAHL

§ 76.01 Scope of Chapter

This chapter covers [*see § 76.10* et seq.]:

- General principles that govern the liability of an attorney to a former client, such as the requirements for establishing an attorney-client relationship, the duties arising from that relationship, and the effect that termination of the relationship has on the attorney's liability.

- Fiduciary duties owed to a current client and those owed to a former client.

- Conflicts of interest that may affect malpractice liability.

- Vicarious liability of attorneys such as those in a partnership or corporation for malpractice committed by associated counsel.

- Liability based on the misconduct of other employees or referral attorneys.

See also the following related discussions:

- An attorney's ethical duty to protect confidences and avoid any conflicts affecting current or former clients [*see* Ch. 72, *Attorney Practice and Ethics* .

- The creation and termination of the attorney-client relationship [*see* Ch. 72, *Attorney Practice and Ethics* .

This chapter also discusses an attorney's liability to a former client for negligence [*see § 76.50* et seq.], including:

- Standard of care required of the attorney.

- Causation.
- Damages and costs that may generally be recovered.
- Requirement that actual damages be proven.
- Indemnification that the liable attorney may seek from other involved attorneys and from prior tortfeasors.
- Common acts of negligence that may result in liability, such as errors based on inadequate research or failure to meet required time limits.

The chapter also contains forms for complaints based on various types of negligent acts or omissions on the part of the attorney.

See also the following related discussions:

- An attorney's ethical duty to represent a client zealously and compentently [*see* Ch. 72, *Attorney Practice and Ethics* .
- An attorney's ethical duty to protect confidences and avoid any conflicts affecting current or former clients [*see* Ch. 72, *Attorneys Practice and Ethics* .

This chapter also discusses theories under which an attorney may be liable to a former client for wrongdoing other than negligence [*see § 76.150* et seq.], including:

- Breach of fiduciary duty.
- Improper representation of clients with adverse interests.
- Engaging in advantageous transactions with the client without taking proper safeguards to protect the client from undue influence.
- Infliction of emotional distress.
- Fraud.
- Breach of contract.

The analysis also contains forms for complaints based on these theories of liability.

See also the following related discussions:

- An attorney's ethical duty to protect confidences and avoid any conflicts affecting current or former clients [*see* Ch. 72, *Attorney Practice and Ethics* .
- An attorney's fiduciary duties with respect to trust accounts [*see* Ch. 72, *Attorney Practice and Ethics* .

This chapter also discusses and contains [*see § 76.170* et seq.]:

- Defenses that an attorney may invoke against a former client in a malpractice action, such as the lapse of the applicable statute of limitation or the client's comparative negligence.

- Doctrine of unclean hands.

- Lack of compliance with the Tort Claims Act, when attorney is a public employee.

- Collateral estoppel.

This chapter also discusses and contains [*see § 76.200* et seq.]:

- Availability and scope of the liability of an attorney to nonclients, primarily to intended beneficiaries of the attorney's services.

- Circumstances under which liability may be extended to other than intended beneficiaries.

- Specific theories of liability, including negligence, breach of contract, malicious prosection, abuse of process, negligent misrepresentation, fraud, infliction of emotional distress, and civil conspiracies with a client.

This chapter also discusses and contains some of the more common affirmative defenses that an attorney may invoke in a malpractice claim brought by a nonclient, such as lapse of the statutes of limitation and the litigation privilege under *Civ. Code § 47(b)* [*see § 76.220* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedFiduciary RelationshipsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsLegal EthicsClient RelationsConflicts of InterestTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceDefensesComparative NegligenceGeneral Overview

California Forms of Pleading and Practice--Annotated

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PART I. SCOPE

7-76 California Forms of Pleading and Practice--Annotated § 76.02

AUTHOR: GEORGE M. LINDAHL

§ 76.02 Cross References

For detailed discussion and forms relating to the creation or termination of the attorney-client relationship, an attorney's duty to avoid conflicts of interest, and other aspects of an attorney's practice of law, see Ch. 72, *Attorney Practice and Ethics*

For discussion and forms relating to conduct that constitutes and ethical violation of an attorney's duty to avoid conflicts of interest or an attorney's duty to represent his or her client zealously and competently, as well as discussion and forms relating to other aspects of an attorney's practice of law, see Ch. 72, *Attorney Practice and Ethics*

For discussion of damages generally, see Ch. 177, *Damages*

For discussion of negligence actions generally, see Ch. 380, *Negligence*

For discussion and forms relating an attorney's ethical duty to avoid conflicts of interest, an attorney's duty with respect to client trust accounts, and other aspects of an attorney's practice of law, see Ch. 72, *Attorney Practice and Ethics*

For discussion relating to an attorney's liability for intentional or negligent infliction of emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress*

For forms for use in seeking separate trial of the statute of limitations issue, see Ch. 125, *Consolidaiton, Severence, and Coordination of Actions*

For discussion and forms relating to releases generally, see Ch. 520, *Settlement and Release*

For forms and discussion relating to the causes of action for abuse of process and malicious prosecution, see Ch. 357, *Malicious Prosecution and Abuse of Process*

For forms and discussion relating to an attorney's liability for intentional or negligent infliction of emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress*

For forms for use in seeking separate trial of the statute of limitations issue, see Ch. 125, *Consolidation, Severence, and Coordination of Actions*

For forms and discussion relating to the causes of action for abuse of process and malicious prosecution, see Ch. 357, *Malicious Prosecution and Abuse of Process*

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsAccepting RepresentationLegal EthicsClient RelationsConflicts of InterestTortsDamagesCompensatory DamagesGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsNegligenceGeneral Overview

California Forms of Pleading and Practice--Annotated

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AUTHOR: GEORGE M. LINDAHL

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§§ 76.03[Reserved]

California Forms of Pleading and Practice--Annotated

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Chapter 76 ATTORNEY PROFESSIONAL LIABILITY
PART II. LEGAL BACKGROUND
A. In General

7-76 California Forms of Pleading and Practice--Annotated § 76.10

AUTHOR: GEORGE M. LINDAHL

§ 76.10 Nature of Malpractice

[1] Negligence

An attorney is bound to use ordinary skill and care in the course of his or her professional employment [*Gambert v. Hart (1872) 44 Cal. 542, 552]* . A breach of this duty can be the basis for a suit for legal malpractice. The elements of a cause of action for legal malpractice based on negligence are [*Budd v. Nixen (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433* ; *see CACI No. 600*]:

- The duty of the professional to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise.
- A breach of that duty.
- A proximate causal connection between the negligent conduct and the resulting injury.
- Actual loss or damage resulting from the professional's negligence.

It is only when these four elements coexist that an action for legal malpractice based on negligence will lie [*see Alhino v. Starr (1980) 112 Cal. App. 3d 158, 175-176, 169 Cal. Rptr. 136* (no cause of action stated when no breach or damages were established); *Ventura County Humane Soc'y v. Holloway (1974) 40 Cal. App. 3d 897, 902, 115 Cal. Rptr. 464* (no negligence cause of action when defendant's duty of care not established)]. For further discussion of liability based on negligence, see *§ 76.50* et seq.

[2] Malpractice in Criminal Case

An additional element applies when the malpractice plaintiff was a criminal defendant in the underlying action. In these "criminal malpractice" actions, the plaintiff must prove, by a preponderance of the evidence, his or her actual innocence

of the criminal charges in order to recover in a civil malpractice action against his or her defense attorney [*Wiley v. County of San Diego (1998) 19 Cal. 4th 532, 545, 79 Cal. Rptr. 2d 672, 966 P.2d 983]* . The Supreme Court's primary consideration in imposing this additional element was a concern that a criminal defendant who is factually guilty of the charged crime not be allowed to benefit in the form of civil damages recovered from a defense attorney [*see* *Wiley v. County of San Diego (1998) 19 Cal. 4th 532, 538-539, 79 Cal. Rptr. 2d 672, 966 P.2d 983]* . Unless there exists no triable issue of fact, the question of factual innocence must be decided by the jury [*Salisbury v. County of Orange (2005) 131 Cal. App. 4th 756, 764-766, 31 Cal. Rptr. 3d 831]* .

The Supreme Court has subsequently added that an individual convicted of a criminal offense must obtain reversal of the conviction, or other exoneration by postconviction relief, to establish actual innocence in a criminal malpractice case [*Coscia v. McKenna & Cuneo (2001) 25 Cal. 4th 1194, 1201, 108 Cal. Rptr. 2d 471, 25 P.3d 670]* . An intact conviction, regardless of whether it results from a trial or a plea of guilty or nolo contendere, bars proof of actual innocence in a legal malpractice action, even if ordinary collateral estoppel principles might not otherwise be controlling [*Coscia v. McKenna & Cuneo (2001) 25 Cal. 4th 1194, 1204-1205, 108 Cal. Rptr. 2d 471, 25 P.3d 670* (postconviction relief may be in form of acquittal after retrial, reversal on appeal with directions to dismiss, reversal followed by refusal to continue prosecution, or grant of habeas corpus relief)].

The factual innocence requirement applies not just to the criminal charges actually brought against the criminal defendant, but also to lesser-included criminal offenses [*Sangha v. LaBarbera (2006) 146 Cal. App. 4th 79, 88, 52 Cal. Rptr. 3d 640]* . In one case, for example, the malpractice plaintiff sued his former attorney for convincing him to plead guilty to felony vandalism, which required destruction of property worth at least $400, and plaintiff argued that he need only show that he was factually innocent of felony vandalism. The court of appeal disagreed, holding that plaintiff was required to show that he was factually innocent of the lesser-included offense of misdemeanor vandalism, which applies when the property damage is less than $400 but is otherwise the same crime. The court noted that the factual innocence requirement is designed to limit malpractice damages to those criminal defendants who were factually innocent of any criminal conduct. Plaintiff conceded that he was guilty of misdemeanor vandalism, disputing only the value of the damage [*Sangha v. LaBarbera (2006) 146 Cal. App. 4th 79, 88-89, 52 Cal. Rptr. 3d 640]* . In a subsequent case, the court of appeal extended this reasoning, and thus the requirement of factual innocence and exoneration, to transactionally related offenses stemming from the same criminal event that do not necessarily qualify as lesser-included offenses [*Wilkinson v. Zelen (2008) 167 Cal. App. 4th 37, 48, 83 Cal. Rptr. 3d 779*].

A plaintiff who was a criminal defendant is not required to prove actual innocence of the underlying criminal charges if the lawsuit against a former attorney is merely a fee dispute that challenges the attorney's billing practices and does not challenge the quality of the representation provided by the attorney [*Bird, Marella, Boxer & Wolpert v. Superior Court (2003) 106 Cal. App. 4th 419, 421, 427-428, 130 Cal. Rptr. 2d 782* (action for breach of contract, breach of fiduciary duty, fraud, and money had and received); *see also* *Brooks v. Shemaria (2006) 144 Cal. App. 4th 434, 440-441, 50 Cal. Rptr. 3d 430* (dispute as to terms of retainer agreement and return of unused portion of retainer)]. In addition, a plaintiff need not prove actual innocence in order to pursue a claim that the attorney committed negligence in failing to secure the return of plaintiff's property that had been seized in connection with the criminal arrest, at least when the relevant law enforcement authorities had concluded that the property should have been returned to plaintiff [*Brooks v. Shemaria (2006) 144 Cal. App. 4th 434, 441-443, 50 Cal. Rptr. 3d 430* (determination hinged on policy considerations underlying actual innocence requirement, rather than whether proceeding was labeled as "criminal" or "civil")].

[3] Breach of Contract

Because, in the usual case, the attorney undertakes to perform his or her duties pursuant to a contract with the client, the attorney's failure to exercise the requisite skill and care is also a breach of an express or implied term of that contract. Thus, legal malpractice may constitute both a tort and a breach of contract [*Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 180-181, 98 Cal. Rptr. 837, 491 P.2d 421]* . Though the decisions dealing with legal

malpractice have given little more than lip service to the breach of contract aspects, it has been pointed out that pleading both tort and contract will give rise to an election of remedies [*see Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 182, 98 Cal. Rptr. 837, 491 P.2d 421]* . Further, the measure of damages in a malpractice action alleging breach of contract is governed by *Civ. Code § 3300*, applicable to contract actions generally, rather than by *Civ. Code § 3333*, which is applicable to breach of noncontract obligations [*see Benard v. Walkup (1969) 272 Cal. App. 2d 595, 605, 77 Cal. Rptr. 544]* . For further discussion of breach of contract actions, see *§ 76.155*.

[4] Violation of Professional Ethics

An attorney's professional negligence may in some instances also constitute a violation of professional ethics, e.g., of the attorney's duty to represent his or her client zealously and competently [*see* Ch. 72, *Attorney Practice and Ethics*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachGeneral OverviewLegal EthicsClient RelationsEffective RepresentationTortsMalpractice & Professional LiabilityAttorneys

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Chapter 76 ATTORNEY PROFESSIONAL LIABILITY
PART II. LEGAL BACKGROUND
A. In General

7-76 California Forms of Pleading and Practice--Annotated § 76.11

AUTHOR: GEORGE M. LINDAHL

§ 76.11 Malpractice Distinguished From Other Actions

While malpractice is essentially an action for damages caused by the attorney's breach of his or her duty to exercise ordinary skill and care in the course of his or her professional employment [*see Gambert v. Hart (1872) 44 Cal. 542, 552]* , other causes of action against an attorney may be occasioned by the attorney's breach of fiduciary duty to his or her client irrespective of negligence. The relation between attorney and client is a fiduciary relation of the very highest character [*Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 189, 98 Cal. Rptr. 837, 491 P.2d 421* ; *see § 76.176*]. Thus, causes of action may arise for accounting [*see* Ch. 7, *Accounting, Action for*], for conversion [*see* Ch. 150, *Conversion*], for fraud [*see* Ch. 269, *Fraud and Deceit (Tort)*]; *see also § 76.154*], and for imposing a constructive trust [*see* Ch. 561, *Trusts: Constructive Trusts*]. Since the attorney-client relationship is also one of principal and agent, causes of action may also arise under agency law [*see* Ch. 427, *Principal and Agent*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsConstructive TrustsTortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsIntentional TortsConversionGeneral OverviewTortsMalpractice & Professional LiabilityAttorneys

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7-76 California Forms of Pleading and Practice--Annotated § 76.12

AUTHOR: GEORGE M. LINDAHL

§ 76.12 Common Areas of Liability

While a legal malpractice action can arise in any context, the most common source of legal malpractice claims is litigation activity. A study based on data compiled by the National Legal Malpractice Data Center between 1983 and 1985 found that 52.8 percent of all of the claims in the study arose out of litigation activities [*see* Gates, *The Newest Data on Lawyers' Malpractice Claims, 70 A.B.A. J. 78 (April 1984)* (statistics for the years 1981 through 1983)]. The study indicated that attorneys with the greatest risk of malpractice liability are those who represent plaintiffs in personal injury cases and clients in real estate matters; these areas accounted for 25 percent and 23 percent, respectively, of the total claims filed by area of law. Other common areas of malpractice by area of law were collection and bankruptcy (10 percent of all claims); family law (8 percent of all claims); and estate and probate (7 percent of all claims). Moreover, claims in the area of "corporations, business organizations" amounted to 5 percent of all claims.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityAttorneys

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[Reserved]

§§ 76.13[Reserved]

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PART II. LEGAL BACKGROUND
B. Liability to Client
1. Bases of Liability

7-76 California Forms of Pleading and Practice--Annotated § 76.30

AUTHOR: GEORGE M. LINDAHL

§ 76.30 Attorney-Client Relationship

[1] Establishment of Relationship

The relationship of attorney and client is usually created by contract. The contract may be express or implied, and the general rules of agency apply [*Houston Gen. Ins. Co. v. Superior Court (1980) 108 Cal. App. 3d 958, 964, 166 Cal. Rptr. 904* ; *see also American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 590-591, 113 Cal. Rptr. 561]* . Under agency law, it is sufficient for the creation of an agency relationship that the conduct of the alleged principal (the client, in attorney-client cases) and agent (attorney) manifests acceptance of a relationship in which the agent acts for the principal [*see Malloy v. Fong (1951) 37 Cal. 2d 356, 370, 232 P.2d 241* ; *see also Civ. Code § 1550* (consent as essential element of contract)]. Although the existence of a contract is generally a question of law [*see Houston Gen. Ins. Co. v. Superior Court (1980) 108 Cal. App. 3d 958, 964, 166 Cal. Rptr. 904]* , establishing the circumstances that would create an attorney-client relationship is an issue of fact [*Miller v. Metzinger (1979) 91 Cal. App. 3d 31, 39, 154 Cal. Rptr. 22]* .

In the typical case an attorney enters into a contract or retainer agreement with a client to perform services for a specific purpose. However, neither a retainer nor other formal agreement is required to establish the attorney-client relationship [*Kane, Kane & Kritzer, Inc. v. Altagen (1980) 107 Cal. App. 3d 36, 40, 165 Cal. Rptr. 534* ; *Brandlin v. Belcher (1977) 67 Cal. App. 3d 997, 1001, 134 Cal. Rptr. 1* ; *but see Fox v. Pollack (1986) 181 Cal. App. 3d 954, 959, 226 Cal. Rptr. 532* (although formation of attorney-client relationship may be informal, such relationship does not exist merely because party believes that attorney is representing his or her interests)]. For example, an attorney-client relationship may be established when an attorney volunteers his or her services [*see Miller v. Metzinger (1979) 91 Cal. App. 3d 31, 39, 154 Cal. Rptr. 22* ; *see also Wood v. Jamison (2008) 167 Cal. App. 4th 156, 163, 83 Cal. Rptr. 3d 877* (work performed by attorney in helping woman get loan was sufficient to support finding that attorney-client relationship existed)], or is appointed by the court to represent a given client [*see Houston Gen. Ins. Co. v. Superior Court (1980) 108 Cal. App. 3d 958, 964, 166 Cal. Rptr. 904]* . The relationship can also arise from a pattern of custom and practice

between the attorney and client [*Kane, Kane & Kritzer, Inc. v. Altagen (1980) 107 Cal. App. 3d 36, 40, 165 Cal. Rptr. 534]* . When the attorney-client relationship is limited to a specific matter, the attorney's duty to represent the client extends only to that matter [*see* *Sullivan v. Dunne (1926) 198 Cal. 183, 190, 244 P. 343* (representation of incompetent client in one action as not constituting authorization for representation in unrelated action)].

PRACTICE TIP:

Documenting Limited Scope. It is advisable for the attorney to set forth the limited scope of his or her representation in a writing signed by the client at the outset of the legal representation. A defense to a legal malpractice action based on "limited representation" is difficult to establish when there is no such supporting documentation, and it is often met with skepticism by the court and jury under such circumstances.

Moreover, simply agreeing to investigate a case or providing legal advice to a prospective client may give rise to an attorney-client relationship and concomitant duties despite the absence of a fee arrangement [*Miller v. Metzinger (1979) 91 Cal. App. 3d 31, 39, 154 Cal. Rptr. 22]* . For example, in *Miller v. Metzinger [(1979) 91 Cal. App. 3d 31, 154 Cal. Rptr. 22]* the defendant had agreed to investigate a claim for wrongful death, but later informed the client that he could not handle the case and referred the client to other counsel who agreed to represent the plaintiff. The trial court granted summary judgment to the defendant in the plaintiff's subsequent malpractice action, apparently on the ground that no triable issue of fact existed regarding the alleged attorney-client relationship between plaintiff and defendant. The court of appeal reversed, holding that the facts that an attorney's role was purely investigatory, that he stated in his letter to the client that he did not agree to represent the plaintiff, and that he did not charge a fee for his services or secure a retainer, did not suffice to eliminate the existence of an attorney-client relationship as a matter of law [*Miller v. Metzinger (1979) 91 Cal. App. 3d 31, 39-40, 154 Cal. Rptr. 22]* .

If one attorney, as a courtesy to another attorney, appears on behalf of that other attorney's client at a court hearing, the attorney making the special appearance in court is associated to the attorney of record and owes a duty of care to the client. Therefore, although the precise scope of this duty is determined by the particular facts of the case, as a general rule the attorney providing the special appearance may be liable to the client for malpractice [*Streit v. Covington & Crowe (2000) 82 Cal. App. 4th 441, 444-447, 98 Cal. Rptr. 2d 193]* .

For further discussion of the creation of the attorney-client relationship, see Ch. 72, *Attorney Practice and Ethics* .

[2] Duty Arising From Relationship

The lawyer is classified with members of various other professions who are considered to possess knowledge, skill, or even intelligence superior to that of an ordinary person and is, as a consequence, held to a higher minimum standard of conduct; similar rules of law are applicable to lawyers as to doctors and dentists [*Theobald v. Byers (1961) 193 Cal. App. 2d 147, 150, 13 Cal. Rptr. 864* ; *see* Ch. 209, *Dentists* , and Ch. 414, *Physicians: Medical Malpractice* . However, while an attorney has a clear duty to represent his or her client to the best of the attorney's ability, it has long been held that an attorney is not liable for every mistake that he or she may make in the course of practice [*Smith v. Lewis (1975) 13 Cal. 3d 349, 358, 118 Cal. Rptr. 621* , *530 P.2d; Lally v. Kuster (1918) 177 Cal. 783, 786, 171 P. 961* ; *see BAJI No. 6.37.2*]. Therefore, in the absence of an express agreement so providing, an attorney is not an insurer of the soundness of his or her opinions or of the validity of an instrument that the attorney has been retained to draft. Nor is an attorney liable for errors regarding questions of law on which reasonable doubt may be entertained by well-informed attorneys [*Kirsch v. Duryea (1978) 21 Cal. 3d 303, 308, 146 Cal. Rptr. 218, 578 P.2d 935* ; *Lucas v. Hamm (1961) 56 Cal. 2d 583, 591, 15 Cal. Rptr. 821, 364 P.2d 685]* .

An attorney is, however, expected to possess knowledge of the plain and elementary principles of law that are commonly known by well-informed attorneys. With respect to an unsettled area of the law, an attorney must undertake reasonable research and make an informed decision as to the proper course of conduct based on the particular problem

at hand [*Smith v. Lewis (1975) 13 Cal. 3d 349* ; *see also* *Aloy v. Mash (1985) 38 Cal. 3d 413, 418, 212 Cal. Rptr. 162, 696 P.2d 656]* .

It is axiomatic that the existence of an attorney-client relationship is required to create an attorney's duty to act for a client [*Daniels v. DeSimone (1993) 13 Cal. App. 4th 600, 607, 16 Cal. Rptr. 2d 615* (defendant was former partner of attorney retained to represent plaintiff, and no attorney-client relationship had ever been established with defendant); *McGregor v. Wright (1931) 117 Cal. App. 186, 193, 3 P.2d 624]* . In some circumstances, however, an attorney's duty extends to those other than his or her client. For example, an attorney retained by an insurance carrier owes duties to both the insurer and the insured [*see, e.g.,* *Zalta v. Billips (1978) 81 Cal. App. 3d 183, 187, 144 Cal. Rptr. 888]* . For a duty to be owed to a third party beneficiary of a legal services agreement, the third party must show that the purchaser of the services intended to impose such a duty. For example, in the absence of any such showing, the appointment of defendants as bond counsel for a senior housing project was insufficient to create a professional relationship between a third party housing developer and defendants; thus, defendants were under no duty to provide correct information to plaintiff regarding the need to pay the prevailing wage on the project [*B.L.M. v. Sabo & Deitsch (1997) 55 Cal. App. 4th 823, 832, 64 Cal. Rptr. 2d 335]* . An attorney owes no duty of care to an adverse third party in litigation. The third party's remedy, if any, is an action for malicious prosecution [*Weaver v. Superior Court (1979) 95 Cal. App. 3d 166, 181-183, 156 Cal. Rptr. 745]* .

PRACTICE TIP:

Primacy of Insured's Interests. The attorney should always bear in mind the primacy of his or her duty to the insured [*see* *American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 592, 113 Cal. Rptr. 561]* . When the interests of the insured and the insurer conflict, the attorney must defer to the insured's interests.

An attorney representing a corporation owes the same duties to the corporation as to an individual and can be liable to the corporation for legal malpractice to the same extent that the attorney would be liable to an individual [*see* *Moser v. Western Harness Racing Assn. (1948) 89 Cal. App. 2d 1, 6-7, 200 P.2d 7* (duty of ordinary care to corporation)]. In representing a corporation, an attorney must conform his or her representation to the concept that the client is the corporation itself, acting through its highest authorized officer, employee, body, or constituent overseeing the particular engagement [*Cal. Rules Prof. Conduct, Rule 3-600(A)*]. With the exception of potential exposure in the area of securities law, the types of legal malpractice claims asserted against corporate attorneys are not substantially different from those asserted against the attorney who primarily represents individuals. For discussion of liability imposed by the securities laws, see Marsh and Volk, Practice Under The California Securities Laws, Chapter 14 (Matthew Bender); Business Organizations, Volumes 11-11C (Matthew Bender).

[3] Termination of Relationship

Unless the agreement between the parties provides otherwise, the attorney-client relationship terminates once the task for which the attorney was retained is concluded [*see* *Ruszovan v. Ruszovan (1969) 268 Cal. App. 2d 902, 906, 74 Cal. Rptr. 507* ; *Mizrahi v. Miscione (1967) 252 Cal. App. 2d 673, 677, 60 Cal. Rptr. 680* ; *see also BAJI No. 6.37.3*]. The cautious attorney, however, should communicate in writing with the client to confirm that the client understands that the relationship has terminated. The relationship may also end when an attorney is relieved either by the court or by the client [*see Code Civ. Proc. § 284*].

In the event that an attorney desires to unilaterally withdraw from representing a client, he or she must take reasonable steps to avoid foreseeable prejudice to his or her client's rights. Thus, the attorney should give the client due notice of his or her intent to withdraw and a reasonable opportunity to employ new counsel [*Cal. Rules Prof. Conduct, Rule 3-700(A)(2)* (guidelines for withdrawal from employment); *see* ABA Model Code of Prof. Responsibility, DR 2-110(A)(2); *BAJI No. 6.37.3* (defining the duration of professional responsibility)]. The attorney should also deliver to the client all files connected with the client's case on reasonable request [*Cal. Rules Prof. Conduct, Rule 3-700(D)*

(guidelines for withdrawal from employment); *see* ABA Code of Prof. Responsibility, DR 2-110(A)(2); *BAJI No. 6.37.3* (defining the duration of professional responsibility)].

PRACTICE TIP:

Pitfalls in Asserting Work Product. Although the attorney is entitled to withhold his or her work product after the attorney's employment is terminated, the failure to provide such material to the former client or to the client's new attorney is a frequent source of friction that can lead to legal fee disputes and even legal malpractice litigation. Therefore, the attorney should carefully determine whether any real purpose is to be served by asserting this privilege when the former client requests the case files.

In some instances, representation of a client may terminate by operation of law. For example, if a workers' compensation insurer hires an attorney to represent the insurer and the insured employer in a workers' compensation claim, the attorney's representation of the employer terminates by operation of *Lab. Code § 3755* when the insurer notifies the injured employee and the workers' compensation appeals board that the insurer accepts liability for the claim [*see Lab. Code § 3755*]. At that moment, the employer is relieved of potential liability and dismissed from the claim. Thereafter, the insurer's attorney owes no duties to the employer [*Canton Poultry & Deli, Inc. v. Stockwell, Harris, Widom & Woolverton (2003) 109 Cal. App. 4th 1219, 1226-1228, 135 Cal. Rptr. 2d 695* (attorney had no duty to notify dismissed employer of claimant's stated desire to reach global settlement of both compensation claim and separate lawsuit brought against employer)].

Once the attorney-client relationship has been terminated, the attorney does not have a duty to represent the client in another matter [*see Brandlin v. Belcher (1977) 67 Cal. App. 3d 997, 1001, 134 Cal. Rptr. 1]* . Further, a substitution of attorney filed prior to the time when a client's right to sue is lost will relieve the substituted attorney from liability for damages arising from the loss of that right, as, for example, when a limitations period runs [*Stuart v. Superior Court (1992) 14 Cal. App. 4th 124, 127-128, 18 Cal. Rptr. 2d 142* (regarding limitations period for filing proof of service on complaint)]. However, as discussed under§ 76.31[2], an attorney's fiduciary obligations to a client may continue beyond termination of the attorney-client relationship.

For further discussion of the termination of the attorney-client relationship, see Ch. 72, *Attorney Practice and Ethics* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedFiduciary RelationshipsGeneral OverviewContracts LawThird PartiesBeneficiariesTypesIntended BeneficiariesLegal EthicsClient RelationsAccepting RepresentationTortsMalpractice & Professional LiabilityAttorneys

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7-76 California Forms of Pleading and Practice--Annotated § 76.31

AUTHOR: GEORGE M. LINDAHL

§ 76.31 Fiduciary Relationship

[1] With Client

The relationship between an attorney and client is a fiduciary relation of the very highest character [*Clancy v. State Bar (1969) 71 Cal. 2d 140, 146, 77 Cal. Rptr. 657, 454 P.2d 329* ; *Cox v. Delmas (1893) 99 Cal. 104, 123, 33 P. 836]* . In the role of fiduciary, an attorney must preserve all client confidences, unless disclosure is necessary to prevent a criminal act the attorney reasonably believes is likely to result in death or substantial bodily harm [*Bus. & Prof. Code § 6068(e)*; *Cal. Rules Prof. Conduct, Rule 1-100(A)*; *Earl Scheib, Inc. v. Superior Court (1967) 253 Cal. App. 2d 703, 706, 61 Cal. Rptr. 386]* , and must represent a client with undivided loyalty [*see Betts v. Allstate Ins. Co. (1984) 154 Cal. App. 3d 688, 715-716, 201 Cal. Rptr. 528]* . In addition, an attorney is under a fiduciary obligation to disclose to a client all information bearing on the client's case. For example, an attorney must inform a client of any conflicts of interests and may be obligated to advise a client to seek independent legal advice on a given matter [*Betts v. Allstate Ins. Co. (1984) 154 Cal. App. 3d 688, 716, 201 Cal. Rptr. 528* ; *see also San Diego Federal Credit Union v. Cumis Ins. Soc'y, Inc. (1984) 162 Cal. App. 3d 358, 375, 208 Cal. Rptr. 494* (attorney's duty to advise clients of conflict of interest as one basis for finding that insurer must furnish independent counsel to insured when latter's interest conflicts with insurer's); *Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 901, 142 Cal. Rptr. 509* (attorney representing both parties to transaction as casting doubt on validity of transaction)]. Similarly, an attorney has a fiduciary duty to deposit client funds in a trust account [*Cal. Rules Prof. Conduct, Rule 4-100*; *T. & R. Foods, Inc. v. Rose (1996) 47 Cal. App. 4th Supp. 1* (attorney's failure to comply with *Cal. Rules Prof. Conduct, Rule 4-100* was breach of fiduciary duty and professional negligence)].

In a case dealing with a conflict of interest between two clients, however, the California Supreme Court held that an attorney's duty of loyalty to his or her existing client, the target of contemplated litigation, requires that attorney to sever any professional relationship with the second client promptly on learning of the conflict. As a legal complement to that obligation, the attorney has no duty to provide any advice to the second client adverse to the interests of the first client,

including advice respecting the statute of limitations governing, and the advisability of engaging alternative counsel to pursue, the second client's contemplated lawsuit against the first client [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 281, 36 Cal. Rptr. 2d 537, 885 P.2d 950* (Court operated on assumption that second "client" *might* have taken on status as "client," and agreed with court of appeals that issues of fact material to that question remained in dispute, but disagreed that question of client status was material to dispositive issue raised by summary judgment motion)]. It should be noted that the Court limited its holding to cases in which an attorney is confronted with a mandatory and unwaivable duty *not* to represent the second client in light of an irremediable conflict with the existing client and acts promptly to terminate the relationship with the second client after learning of the conflict. The Court cautioned that, absent an irreducible conflict and mandatory duty to withdraw, an attorney's duty to advise a new or prospective client, once the nonengagement decision has been taken, may well be more extensive [*see* *Flatt v. Superior Court (1994) 9 Cal. 4th 275, 279, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* .

The existence of a fiduciary relationship between an attorney and client means that all business dealings between an attorney and a client are closely scrutinized. Under *Prob. Code § 16004(c)*, whose predecessor statute [*see* former *Civ. Code § 2235* (creating presumption of insufficient consideration and undue influence)] was applied to contractual dealings between an attorney and his or her client during the existence of the attorney-client relationship [*see* *Trafton v. Youngblood (1968) 69 Cal. 2d 17, 27, 69 Cal. Rptr. 568, 442 P.2d 648* (interpreting former *Civ. Code § 2235*)], a transaction between the trustee and a beneficiary that occurs during the existence of the trust or while the trustee's influence with the beneficiary remains, and by which the trustee obtains an advantage from the beneficiary, is presumed to be a violation of the trustee's fiduciary duties, unless the transaction relates to the hiring or compensation of the trustee [*Prob. Code § 16004(c)*]. An attorney who violates a fiduciary duty to the client may be liable for either negligence in failing to uphold the duty owed to the client or, in some cases, for fraud [*see* *Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 1143, 1147, 1159, 217 Cal. Rptr. 89]* .

[2] With Former Client

The fiduciary duties owed by an attorney to a client extend beyond the period of the actual attorney-client relationship. An attorney is not allowed to take any actions that would injure a former client in matters that are within the scope of the former representation, nor may the attorney use any information gained during the relationship against the former client [*Yorn v. Superior Court (1979) 90 Cal. App. 3d 669, 675, 153 Cal. Rptr. 295* ; *see* *People v. Thoi (1989) 213 Cal. App. 3d 689, 699, 261 Cal. Rptr. 789]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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7-76 California Forms of Pleading and Practice--Annotated § 76.32

AUTHOR: GEORGE M. LINDAHL

§ 76.32 Conflicting Interests and Obligations

[1] Corporate and Securities Law

Conflicts of interest are among the most common grounds for legal malpractice actions against corporate and securities attorneys. The corporate attorney frequently represents the corporation, its officers and directors, and sometimes its shareholders in the same matter. The conflict issue arises most often in stockholder derivative actions when both the corporation and its directors and officers have been named as defendants. The limited California case authority suggests that the attorney's primary duty is to the corporation rather than to corporate management [*see Meehan v. Hopps (1956) 144 Cal. App. 2d 284, 290, 301 P.2d 10]* .

Even if no actual or potential conflict of interest is apparent at the time the representation is undertaken, it may be argued that an attorney cannot represent both the corporation and corporate management without obtaining the written consent of all parties concerned [*see Cal. Rules Prof. Conduct, Rules 3-310(C), 3-600(E)*]. However, it may be impractical if not impossible to obtain meaningful consent for such dual representation when the officers and directors seeking legal representation dominate the corporate board of directors, which must execute the conflict waiver on behalf of the corporation [*see Messing v. FDI, Inc. (D.N.J. 1977) 439 F. Supp. 776, 782-784]* . Therefore, an attorney who represents both the corporation and directors accused of wrongdoing may be subject to malpractice liability in an action brought by the shareholder(s) who prosecuted the derivative action.

For detailed discussion of the ethical duty to protect client confidences and avoid potential conflicts with current or former clients, see Ch. 72, *Attorney Practice and Ethics* .

[2] Family Law

Conflict of interests problems can arise in family law cases in the context of dual representation. Athough dual representation is strongly disfavored [*see Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 526, 50 Cal. Rptr. 592* ;

see also *Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 897-899, 142 Cal. Rptr. 509* (pointing out ethical issues involved in representation of parties with adverse interests)], it may be acceptable under specified circumstances. For example, there may be dual representation at a hearing or trial if, at most, a potential (rather than an actual) conflict of interest exists between the parties, and full disclosure is made to and informed consent is obtained from both clients [*Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 899, 142 Cal. Rptr. 509]* . However, if the dual representation is in conjunction with a trial or hearing in which there is an actual, present, existing conflict and the discharge of duty to one client conflicts with the duty to another, a purported consent would be neither informed nor intelligent as a matter of law [*see* *Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 898, 142 Cal. Rptr. 509]* .

PRACTICE TIP:

Dual Representation Not Advisable. As a practical matter, it is difficult to conceive of any situation in which such dual representation would be advisable given the potential exposure of the attorney undertaking such representation to subsequent claims for legal malpractice, breach of fiduciary duty, and fraud.

The duty of care imposed on an attorney representing parties with divergent interests was set forth in *Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 50 Cal. Rptr. 592* . In that case, the court of appeal held that an attorney representing two parties with divergent interests must disclose all facts and circumstances that in the judgment of an attorney of ordinary skill and capacity are necessary to enable his or her client to make free and intelligent decisions regarding the subject matter of the representation [*Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 528, 50 Cal. Rptr. 592]* . It would seem that when there is an actual conflict, and no informed consent is possible [*see* *Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 898, 142 Cal. Rptr. 509]* , an attorney who continues to represent both parties would breach the duty of care in doing so. It may be argued that dual representation is not negligent only when the proceeding is truly uncontested in that the parties have agreed to all substantive matters, and have agreed to the dual representation as well [*see* *Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 899, 142 Cal. Rptr. 509]* .

[3] Trusts and Estates

An attorney practicing in the field of trusts and estates may try to represent parties with conflicting interests under a will or trust. It has been consistently held that an attorney should avoid representing more than one party involved in an estate proceeding or a trust instrument [*see* *Garcia v. Borelli (1982) 129 Cal. App. 3d 24, 32, 180 Cal. Rptr. 768* (representation of estate and joint tenant of testator); *Morales v. Field, DeGoff, Huppert & MacGowan (1979) 99 Cal. App. 3d 307, 313-317, 160 Cal. Rptr. 239* (representation of executor and unsecured creditor of testator in transaction settling creditor's claim against estate); *Potter v. Moran (1966) 239 Cal. App. 2d 873, 878-879, 49 Cal. Rptr. 229* (representation of trustee and guardian of estate of minor beneficiary)]. Moreover, it also appears that an attorney cannot act in a fiduciary capacity as a trustee or estate representative and simultaneously represent estate claimants [*see* *Richardson v. State Bar (1942) 19 Cal. 2d 707, 708-712, 122 P.2d 889* (disbarment of attorney who represented conflicting interests in guardianship and estate matters)]. These authorities seem to indicate that an attorney who represents parties with adverse interests in an estate should be held liable for any damages caused by the dual representation [*see* *Potter v. Moran (1966) 239 Cal. App. 2d 873, 877-880, 49 Cal. Rptr. 229]* .

It should be noted, however, that one case has held that an attorney could represent both the personal representative of an estate and an estate heir, depending on the circumstances, if the representation did not conflict with the interests of the estate [*see* *Morales v. Field, DeGoff, Huppert & MacGowan (1979) 99 Cal. App. 3d 307, 318-319, 160 Cal. Rptr. 239* (also holding that plaintiff could not object to representation when no objection was made at time of dispute)]. Thus, it appears that any imposition of liability based on dual representation depends on proof that the interests were actually in conflict.

[4] Existing Client as Potential Target of Action by New Client

Conflict of interests problems can arise when representation of a new client would conflict with the interests of an existing client. In such circumstances the California Supreme Court has held that an attorney who severs a relationship with a new or prospective client has no duty to advise that new client of the applicable statute of limitations or the need to seek other counsel [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 278-279, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* . As stated by the Court, the attorney's duty of loyalty toward the existing client (the potential target of the new client's cause of action) precludes the attorney from rendering any advice to the new client that might harm the existing client in any way [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 278-279, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* . The Court based its decision on the principles underlying the ethical prohibition of simultaneous representation of clients with conflicting interests. The Court also reasoned that the imposition of a duty to advise the new client would undermine the existing client's sense of trust and confidence in his or her attorney [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 282, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsDerivative ActionsGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawWillsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewLegal EthicsClient RelationsConflicts of Interest

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Volume 7: Attorney Practice and Ethics thru Auctions and Auctioneers-Chs.72-79
Chapter 76 ATTORNEY PROFESSIONAL LIABILITY
PART II. LEGAL BACKGROUND
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1. Bases of Liability

7-76 California Forms of Pleading and Practice--Annotated § 76.33

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§ 76.33 Vicarious Liability

[1] Partnerships

An attorney is vicariously liable under partnership law for the wrongful conduct of his or her actual or ostensible partners acting within the scope of their actual or ostensible authority [*see Blackmon v. Hale (1970) 1 Cal. 3d 548, 557-558, 83 Cal. Rptr. 194, 463 P.2d 418* ; *Redman v. Walters (1979) 88 Cal. App. 3d 448, 453, 152 Cal. Rptr. 42]* . Since the partnership and partners can be held jointly and severally liable for the wrongful conduct of the attorney who engaged in the wrongful conduct [*Corp. Code §§ 15014, 15015*; *see Blackmon v. Hale (1970) 1 Cal. 3d 548, 557, 83 Cal. Rptr. 194, 463 P.2d 418]* , it is customary for the partnership and partners to be included as defendants in a legal malpractice case.

However, a partner in a registered limited liability partnership that possesses a valid certificate of registration issued by the State Bar is not liable for the wrongful conduct of the partnership or another partner, except by agreement between the partners [*Corp. Code § 16306(c),(d)*]. Therefore, a partner in a limited liability partnership is not a proper party in a proceeding against a limited liability partnership unless the partner committed the tortious conduct, or the partners have agreed to assume the liabilities of the other partners [*Corp. Code § 16306(g)*].

PRACTICE TIP:

Naming Partners as Defendants. It is not essential that partners be named as defendants, however, because the partners or the firm's professional liability insurer will ultimately be required to satisfy any settlement or judgment in the legal malpractice action. Tactical considerations unique to each case should be carefully analyzed in deciding which, if any, of the defendant law firm's current or former partners should be sued. It is not unusual for a more effective and aggressive defense to be mounted in a legal malpractice case when partners are named individually and are thus more acutely interested in a favorable outcome of the case. Settlement prospects can also be affected by the inclusion of partners as defendants.

Ostensible authority is established in a legal malpractice action by showing that the partnership and its partners acted in a manner that caused third persons to believe that a partner had authority to act for the partnership in a given manner [*Blackmon v. Hale (1970) 1 Cal. 3d 548, 557, 83 Cal. Rptr. 194, 463 P.2d 418]* . A partner is an agent of the partnership for the purpose of its business, and the partnership is bound by the act of a partner who is apparently carrying on the business of the partnership in the usual way [*see Corp. Code § 16301(1)*; *see also Civ. Code § 2317* (defining ostensible authority of agents generally)]. Thus, acts are presumed to have been within the scope of the partnership business when (1) the business done by the supposed agent, so far as it is open to the observation of third parties, is consistent with the existence of an agency, and (2) the third party was justified in believing that an agency existed regarding the transaction in question [*see Blackmon v. Hale (1970) 1 Cal. 3d 548, 557, 83 Cal. Rptr. 194, 463 P.2d 418]* .

In some cases, the issue is not whether the negligent attorney was acting under the authority of the partnership, but whether there is a partnership at all. The duties and liabilities that would be imposed on partners will also be imposed on parties whose conduct and dealings with the world lead third parties to deal with them as though a partnership existed [*see Corp. Code § 16305(a)*; *Westcott v. Gilman (1915) 170 Cal. 562, 568-569, 150 P. 777]* . However, the factual showing required to establish what has been alternately called a partnership by "estoppel" or an ostensible partnership has not been clearly delineated by any reported cases in California [*see* Mallen, *Apparent Partnership and Real Partnership Liability*, 3 Prof. Liab. Rptr. 163 (1979)]. Nonetheless, the reasoning of *Redman v. Walters (1979) 88 Cal. App. 3d 448, 152 Cal. Rptr. 42* , suggests that reference to "partners" or the use of a name that appears to be of a partnership on letterheads, business cards, pleadings, office space, and/or in communications with clients may support a finding of ostensible partnership sufficient to impose vicarious liability for the acts of attorneys with whom the attorney is sharing office space or is otherwise associated in a relationship that is not a partnership. The existence of a partnership by estoppel is typically a question of fact, and is only one of law when the evidence is not in conflict and is susceptible of only one reasonable inference [*Redman v. Walters (1979) 88 Cal. App. 3d 448, 455, 152 Cal. Rptr. 42]* .

Although California case law in this area is sparse, it appears that a partner may be liable for the conduct of another partner that occurred before the creation of the partnership. An attorney may be liable for a partner's malicious prosecution when the partnership was created after the action alleged to have been malicious was filed, if some action was taken by a partner after the formation of the partnership. In such a situation, the partner acting on the maliciously-maintained action is the agent of the other partners [*Lujan v. Gordon (1977) 70 Cal. App. 3d 260, 262, 138 Cal. Rptr. 654* ; *see Corp. Code § 16305*]. Arguably, if an attorney has undertaken to prosecute an action before joining a partnership and acts negligently while a member of the partnership, the other partners could be vicariously liable under a similar agency theory. However, such liability would apparently require a finding that some act that damaged the plaintiff took place after the formation of the partnership [*see Lujan v. Gordon (1977) 70 Cal. App. 3d 260, 262-264, 138 Cal. Rptr. 654* (noting that continuation of malicious prosecution may cause additional damages to plaintiff; court apparently relied in part on that fact to hold partners liable)].

An attorney is liable for the wrongful conduct of his or her partners regarding matters for which the partnership was retained, even if the partnership is later dissolved, unless the contract between the attorney and the client has been performed or unless the other contracting party has expressly or impliedly agreed that the attorney need not so perform [*see Redman v. Walters (1979) 88 Cal. App. 3d 448, 453, 152 Cal. Rptr. 42]* . Thus, when a partnership accepts a client's case, each partner may be held liable for the negligence of the partner handling the case unless the client agrees to release the non-representing partner(s) by leaving them out of the contract of employment. This is true even if the negligence of the former partner handling the case occurs after the dissolution of the partnership [*see Redman v. Walters (1979) 88 Cal. App. 3d 448, 453, 152 Cal. Rptr. 42]* . However, a former partner who is held liable under such a theory may be entitled to indemnification from the negligent attorney [*see Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 943, 175 Cal. Rptr. 81]* .

PRACTICE TIP:

Pitfall in Limiting Liability. Care should be taken not to couch such an agreement as a release prospectively limiting the attorney's liability to the client for legal malpractice in violation of *Cal. Rule of Prof. Conduct Rule 3-400(A)*.

[2] Professional Corporations

A professional corporation is vicariously liable for the wrongful conduct of the attorney "employee" to the same extent that the attorney would be liable if he or she were not incorporated [*see Beane v. Paulsen (1993) 21 Cal. App. 4th 89, 95-96, 26 Cal. Rptr. 2d 486 , overruled in part by Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal. 4th 503, 66 Cal. Rptr. 3d 52* (disapproved on other grounds in *Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal. 4th 503, 514, 66 Cal. Rptr. 3d 52, 167 P.3d 666* , attorney members of dissolved corporate law firm vicariously liable for malpractice of corporation committed prior to dissolution); *see also* State Bar Law Corp. Rules, Rule IV(B)(1) (requiring joint and several guarantee of payment of claims of clients arising out of the practice of law by the corporation)]. Presumably, the plaintiff may sue either the corporation or the negligent attorney, or both, under the theories generally applicable to vicarious liability situations. Further, if the corporation is insolvent, the shareholder attorneys, as guarantors of the debts of the corporation, are jointly and severally liable for the malpractice liability of the corporation [*Beane v. Paulsen (1993) 21 Cal. App. 4th 89, 95-96, 26 Cal. Rptr. 2d 486 , overruled in part by* Beal Bank, SSB v. Arter & Hadden, LLP (2007) (disapproved on other grounds in *Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal. 4th 503, 514, 66 Cal. Rptr. 3d 52, 167 P.3d 666*); *see* State Bar Law Corp. Rules, Rule IV(B)(1)].

[3] Employees

An attorney is liable for the wrongful conduct of attorneys, law clerks, paralegals, secretaries, detectives, or other employees and agents acting in the course and scope of their employment [*see Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 663, 109 Cal. Rptr. 269* (private detective agency); *see also Moore v. State Bar (1964) 62 Cal. 2d 74, 81, 41 Cal. Rptr. 161, 396 P.2d 577* (attorney who failed to supervise associate properly, leading to breach of duty to client, subject to discipline)]. Such liability can encompass the intentional torts of employees of the attorney or the law partnership [*Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 663, 109 Cal. Rptr. 269]* .

[4] Attorney Referrals

It is not clear whether, and the extent to which, an attorney may be held liable for the negligence of counsel to whom he or she has referred a client or potential client. Presumably, any such liability would depend on the existence of a duty of the referring attorney to investigate the qualifications of an attorney to whom he or she refers a client, and the extent of that duty (if any such duty exists) [*see Tormo v. Yormark (D.N.J. 1975) 398 F. Supp. 1159, 1170-1172* (applying New Jersey law; court assumed that attorney had duty to exercise care in referring client to attorney to insure that latter was competent and trustworthy, and discussed nature of duty to investigate character of attorney to whom client was referred); *but see Christensen, O'Connor, Garrison & Havelka v. State, Dep't of Revenue (1982) 97 Wn.2d 764, 649 P.2d 839, 842* (dictum that referring attorney cannot be liable for negligence of attorney to whom client was referred)]. Such liability would be inappropriate when the client independently selects the attorney who is substituted in as counsel [*see* Mallen and Smith, Legal Malpractice, Ch. 5 § 5.6 (3d ed. 1989)].

Two separate relationships appear to be relevant to this issue: that between the client and the attorney who is making the referral, and that between the attorneys. It would seem that the existence of an attorney-client relationship between the client and the referring attorney would make it likely that the attorney has a duty to make the referral with care, and would be liable for a breach of that duty causing damage to the client [*see Miller v. Metzinger (1979) 91 Cal. App. 3d 31, 39-40, 154 Cal. Rptr. 22* (issues of fact existed regarding existence of attorney-client relationship between referring attorney and potential client who sought advice, and referring attorney's alleged breach of duty)]. Similarly, if there are any facts that support a finding that the attorneys have a principal-agent relationship, then the referring attorney may be liable as in an associated counsel case, as discussed under§ 76.33[5]. It appears, however, that an attorney who refers a

client to another qualified attorney, when either no attorney-client relationship was created or any relationship that did exist was terminated by the parties, would not be vicariously liable for the wrongful conduct of the subsequent attorney, although no reported California case has discussed this issue. It seems that in such a case there would be no agency relationship, and assuming that the referral itself was not negligent, there does not appear to be any basis for holding the original attorney liable.

In those instances when a client needs legal assistance in an area beyond an attorney's expertise, the attorney is required to refer the client to a specialist, or, at a minimum, to obtain the help of a specialist [*see Horne v. Peckham (1979) 97 Cal. App. 3d 404, 414-415, 158 Cal. Rptr. 714* ; *see also Lewis v. State Bar (1981) 28 Cal. 3d 683, 687-688, 170 Cal. Rptr. 634, 621 P.2d 258* (failure to refer case to specialist when counsel had inadequate knowledge of field of law as violation of former *Cal. Rules Prof. Conduct, Rule 6-101* (*now see Cal. Rules Prof. Conduct, Rule 3-110*)); *BAJI No. 6.04*]. It is open to question whether an attorney who has a duty to refer a case to a specialist may be liable if the person to whom the case is referred is negligent, and whether the duty to refer imposes any greater duty of care than would otherwise exist. The nature of any duty to investigate the qualifications of a specialist to whom a case is referred is also open to question.

[5] Associated Counsel

When associated counsel engages in wrongful conduct, the original attorney and associated counsel would seem to be jointly and severally liable to the client for the wrongful conduct [*see Floro v. Lawton (1960) 187 Cal. App. 2d 657, 671, 10 Cal. Rptr. 98]* . It appears that an attorney is liable for the acts of subordinate counsel under the doctrine of respondeat superior, whether the associate is brought from outside the principal's office or is the junior associate in a firm of attorneys [*see Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 943, 175 Cal. Rptr. 81]* . The limited case law implies that courts will apply agency law principles, and if an agency relationship exists, the original attorney may be held liable for the negligence of the subordinate attorney, although the principal attorney will be entitled to indemnification from the negligent agent [*see Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 943, 175 Cal. Rptr. 81]* .

Moreover, even if an attorney has little involvement in a case following retention of associated counsel, but does not terminate the attorney-client relationship and shares in the legal fee, the attorney is vicariously liable for the wrongful conduct of associated counsel [*see Floro v. Lawton (1960) 187 Cal. App. 2d 657, 671, 10 Cal. Rptr. 98* (original attorney was still attorney of record along with negligent attorney, although he did not take an active part in the case after negligent attorney was retained)]. It is unclear whether such vicarious liability would still be imposed if the associated attorney was an independent contractor rather than an agent.

In some cases the distinction between referral and association may be difficult to draw, as when an attorney of record in an action associates new counsel and then withdraws as counsel. In such a case, the attorney is arguably liable for the negligence of the attorney brought into the case. Such liability could be justified by analogy to a principal attorney's liability for the negligence of associated counsel [*see Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 941, 175 Cal. Rptr. 81* (principal attorney who was held liable to client for malpractice as entitled to seek indemnification from culpable associate attorney)]. An even stronger case may be made that an attorney is also liable for the negligence of associated counsel retained without the client's consent. In one case, an attorney associated another law firm as counsel of record for the plaintiffs without informing plaintiffs. After the law firm failed to serve summons on the complaint within three years of the filing of the complaint, plaintiffs' action was dismissed pursuant to former *Code Civ. Proc.§ 581a* (now *Code Civ. Proc. § 583.210*). In reversing a summary judgment for the defendant law firm on statute of limitations grounds and allowing the action to proceed, the California Supreme Court implicitly held that the attorney was potentially liable for the negligence of the associated law firm [*see Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 180, 193-194, 98 Cal. Rptr. 837, 491 P.2d 421]* .

PRACTICE TIP:

Pitfalls in Associating Counsel. The attorney who retains other counsel to effectively assume full

responsibility for a lawsuit is generally better-advised to formally withdraw or substitute out as counsel of record rather than remain as associated counsel of record. As associated counsel, the attorney is exposed to joint and several liability for legal malpractice and also to malicious prosecution, abuse of process, and sanction claims, among others, based on the conduct of co-counsel over whom no control may exist.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityAttorneysTortsVicarious LiabilityGeneral OverviewTortsVicarious LiabilityPartnersGeneral OverviewTortsVicarious LiabilityPartnersLimited Partners

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7-76 California Forms of Pleading and Practice--Annotated §§ 76.34-76.49

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[Reserved]

§§ 76.34[Reserved]

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Volume 7: Attorney Practice and Ethics thru Auctions and Auctioneers-Chs.72-79
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B. Liability to Client
2. Negligence Actions
I. Standard of Care

7-76 California Forms of Pleading and Practice--Annotated § 76.50

AUTHOR: GEORGE M. LINDAHL

§ 76.50 Governing Principles

[1] In General

An attorney's liability to his or her client for negligence will depend on whether the attorney has complied with the applicable standard of care. By accepting employment to give legal advice or to render other legal services, an attorney impliedly agrees to use such skill, prudence, and diligence as attorneys of ordinary skill and capacity commonly possess and exercise in the performance of the tasks that they undertake [*see, e.g., Smith v. Lewis (1975) 13 Cal. 3d 349, 356*]. An attorney has the duty to exercise that degree of learning and skill ordinarily possessed by other attorneys of good standing practicing in the same or similar locality and under similar circumstances [*Smith v. Lewis (1975) 13 Cal. 3d 349, 355 n. 3, 118 Cal. Rptr. 621 , 530 P.2d; Wright v. Williams (1975) 47 Cal. App. 3d 802, 809, 121 Cal. Rptr. 194* ; *see BAJI No. 6.37*]. Moreover, as discussed in detail under§ 76.51, an attorney who holds himself or herself out as a specialist or fails to refer a client to a specialist under certain circumstances must adhere to a higher standard of care and exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field [*Horne v. Peckham (1979) 97 Cal. App. 3d 404, 414, 158 Cal. Rptr. 714* ; *Wright v. Williams (1975) 47 Cal. App. 3d 802, 810, 121 Cal. Rptr. 194* ; *see also Lewis v. State Bar (1981) 28 Cal. 3d 683, 687-688, 170 Cal. Rptr. 634, 621 P.2d 258* (attorney who undertook probate case without knowledge of field or reference to more experienced counsel violated former *Cal. Rules Prof. Conduct, Rule 6-101* (*now see Cal. Rules Prof. Conduct, Rule 3-110*)); BAJI 6.].

Furthermore, it is an attorney's duty to follow the specific instructions of his or her client regarding subjects such as whether to file suit, as opposed to matters that involve the conduct of a case, which an attorney has the authority to decide [*see Shelly v. Hansen (1966) 244 Cal. App. 2d 210, 215, 53 Cal. Rptr. 20* (attorney's negligence based on failure to file suit when instructed to do so by client)]. An attorney may be held liable for all losses that result from a failure to follow a client's instructions in a reasonably prompt and careful manner [*Lally v. Kuster (19l8) 177 Cal. 783,*

786 ; *see Shelly v. Hansen (1966) 244 Cal. App. 2d 210, 215, 53 Cal. Rptr. 20]* . Although the exact parameters of the distinction between matters that do and do not involve the conduct of a case have not been specified by California courts, it has been held that an attorney's failure to file a complaint when told to do so by a client constitutes actionable malpractice [*Lally v. Kuster (1918) 177 Cal. 783, 786-787, 171 P. 961]* . The distinction may parallel the distinction between procedural matters that an attorney is authorized to act on by virtue of the retainer, and acts impairing the client's substantive rights or the cause of action itself, which the attorney is not authorized to undertake without the specific authorization of the client [*see Linsk v. Linsk (1969) 70 Cal. 2d 272, 276-280, 74 Cal. Rptr. 544, 449 P.2d 760]* .

[2] Definition of Standard of Care

The creation of the attorney-client relationship imposes on the attorney a duty to use such skill, prudence, and diligence as attorneys of ordinary skill and capacity commonly possess and exercise in the performance of the tasks that they undertake [*Smith v. Lewis (1975) 13 Cal. 3d 349, 356, 118 Cal. Rptr. 621* , *530 P.2d; Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 180, 98 Cal. Rptr. 837, 491 P.2d 421* ; *Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 523, 50 Cal. Rptr. 592]* . An attorney is not liable, however, for every mistake that he or she may make in the practice of law. In the absence of an express agreement, an attorney is not an insurer of the soundness of his or her opinions, and an attorney is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed attorneys [*Lucas v. Hamm (1961) 56 Cal. 2d 583, 591, 15 Cal. Rptr. 821, 364 P.2d 685* ; *see Kirsch v. Duryea (1978) 21 Cal. 3d 303, 308, 146 Cal. Rptr. 218, 578 P.2d 935* ; *see also BAJI No. 6.37.2*]. Thus, it is established that an attorney cannot be held legally responsible for an honest and reasonable mistake of law, or an unfortunate selection of remedy or other procedural step [*Banerian v. O'Malley (1974) 42 Cal. App. 3d 604, 613, 116 Cal. Rptr. 919]* .

Under this general standard of care, an attorney is responsible for a knowledge of the law and is under an obligation to perform diligent research and exercise informed judgment when representing a client [*see Aloy v. Mash (1985) 38 Cal. 3d 413, 418-419, 212 Cal. Rptr. 162, 696 P.2d 656* ; *Wright v. Williams (1975) 47 Cal. App. 3d 802, 809, 121 Cal. Rptr. 194]* . Additionally, an attorney's violation of an ethical duty owed to a client under the Rules of Professional Conduct may constitute negligence [*see Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 1147-1149, 217 Cal. Rptr. 89* (attorney liable for failure to disclose adverse interest); *see also § 76.53*].

In defining the standard of care owed by an attorney to a client, courts have traditionally included references to the locality or community in which the attorney practices. For example, in one case, the court approved of a jury instruction that limited the standard of care to the same or similar locality [*Smith v. Lewis (1975) 13 Cal. 3d 349, 355* ; *see also* Restatement (Second) of Torts § 299A (referring to similar communities); *BAJI No. 6.37* (referring to similar locality)]. The approved jury instruction for use in legal malpractice actions includes language referring to the "same or a similar locality and under similar circumstances" [*see Smith v. Lewis (1975) 13 Cal. 3d 349, 355* ; *BAJI No. 6.37*]. While no California case has defined the geographical boundaries prescribed by the term "locality," courts of other jurisdictions have held that the standard of care should be determined within the boundaries of the state or relevant county [*see, e.g., Hansen v. Wightman (1975) 14 Wash. App. 78, 538 P.2d 1238* (state); *Cook v. Irion (Tex. Civ. App. 1966) 409 S.W.2d 475, 478* (county)]. The most persuasive view seems to be that the standard of care should be defined in terms of a statewide boundary. Unlike other professions, there is no reason to lower the standard of care for a member of the legal profession practicing in a rural area [*see* Restatement (Second) of Torts § 299A, cmt. g].

It would appear that the basic statement of the attorney's standard of care, to use the skill, prudence, and diligence commonly used by members of the profession [*see, e.g., Kirsch v. Duryea (1978) 21 Cal. 3d 303, 308, 146 Cal. Rptr. 218, 578 P.2d 935]* , necessarily includes a working knowledge of local rules and practices. Therefore, an attorney would be required to be familiar with local rules and practices of the courts in any county in which he or she appeared, whether or not the attorney normally practiced in that county.

[3] Establishing Breach of Duty

Whether the applicable standard of care has been adhered to is generally a question of fact [*Wright v. Williams (1975) 47 Cal. App. 3d 802, 809, 121 Cal. Rptr. 194* ; *Starr v. Mooslin (1971) 14 Cal. App. 3d 988, 998, 92 Cal. Rptr. 583]* . In most cases, the attorney's exercise of due care in a given situation is not a matter of common knowledge, and expert testimony is required to establish a breach of the applicable standard of care [*see* *Wilkinson v. Rives (1981) 116 Cal. App. 3d 641, 647-648, 172 Cal. Rptr. 254* (case involving duty of attorney in executing instrument affecting land as beyond common knowledge of jurors); *Wright v. Williams (1975) 47 Cal. App. 3d 802, 810-811, 121 Cal. Rptr. 194* (case involving defendant holding self out as specialist, with claim related to expertise as such; person knowledgeable in specialty required to define duty of care and opine whether standard was met)]. There are cases, however, in which reasonable minds cannot differ on whether the standard of care has been violated, and in those circumstances the question is one of law [*Wright v. Williams (1975) 47 Cal. App. 3d 802, 809, 121 Cal. Rptr. 194* ; *see* *Moser v. Western Harness Racing Assn. (1948) 89 Cal. App. 2d 1, 9, 200 P.2d 7]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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7-76 California Forms of Pleading and Practice--Annotated § 76.51

AUTHOR: GEORGE M. LINDAHL

§ 76.51 Specialists' Standard of Care

An attorney who represents to the public and the profession that he or she specializes in a specific area of the law must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field [*Wright v. Williams (1975) 47 Cal. App. 3d 802, 810, 121 Cal. Rptr. 194* (maritime specialty); *see also BAJI No. 6.37.1*]. In addition, recognizing the modern trend towards specialization in the legal profession, at least one court has approved of a jury instruction stating that a general practitioner has a duty to refer a client to a specialist or recommend the assistance of a specialist if under the circumstances a reasonably careful and skilled practitioner would do so [*Horne v. Peckham (1979) 97 Cal. App. 3d 404, 414-415, 158 Cal. Rptr. 714]* .

PRACTICE TIP:

Specialist's Standard of Care. The plaintiff in a legal malpractice action should argue, whenever possible, that the defendant attorney is a specialist subject to the higher standard of care of a specialist. A frequent source of confusion and dispute in legal malpractice cases is whether an attorney is a specialist who should be held to the higher standard of care of a specialist, such that a jury should be instructed accordingly [*see BAJI No. 6.37*]. While California has certification standards for specialists in fields such as tax, criminal law, family law, and workers' compensation, there appears to be a trend to recognize what heretofore have been viewed as "subspecialties" as separate specialties for purposes of the applicable standard of care. It is unclear, though, under existing case law whether a litigation attorney handling a complex matter (e.g., patent infringement, intellectual property, antitrust) is to be held to a specialist's standard of care, as proscribed by the particular subject matter of the representation, or to a uniform standard of care generally applicable to the litigation attorney regardless of the subject matter of the representation.

It is not clear how the courts will define "specialty" and "specialist" for purposes of applying the higher standard of

care. It has been asserted that most attorneys limit their practices to selected areas of the law; therefore, even absent official recognition, many attorneys have become specialists [*see Horne v. Peckham (1979) 97 Cal. App. 3d 404, 415, 158 Cal. Rptr. 714]* . Clearly those attorneys who advertise themselves as specialists in an area of the law should be held to a specialist's standard of care. It remains unclear, however, when an attorney must refer a case to a specialist to avoid being held to a specialist's standard of care. In one case, for example, defendant attorney acknowledged that he needed expert assistance in a complicated tax matter and he knew that tax experts existed. Under these circumstances the court held that the defendant attorney should be held to a specialist standard of care for failing to make a referral to a tax expert [*Horne v. Peckham (1979) 97 Cal. App. 3d 404, 414-415, 158 Cal. Rptr. 714* ; *see also Lewis v. State Bar (1981) 28 Cal. 3d 683, 687-688, 170 Cal. Rptr. 634, 621 P.2d 258* (attorney faced with matter beyond his competence, who failed to associate or consult experienced attorney, was in violation of former *Cal. Rules Prof. Conduct, Rule 6-101* (*now see Cal. Rules Prof. Conduct, Rule 3-110*))]. The court also indicated, however, that the mere fact that a specialty exists does not mean that every case within that specialty must be referred to a specialist, because in many cases, matters within a specialty may be handled by a general practitioner [*see Horne v. Peckham (1979) 97 Cal. App. 3d 404, 415, 158 Cal. Rptr. 714]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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7-76 California Forms of Pleading and Practice--Annotated § 76.52

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§ 76.52 Expert Testimony

Expert testimony is admissible to establish both the applicable standard of care, and whether the attorney has adhered to the standard [*Wright v. Williams (1975) 47 Cal. App. 3d 802, 810-811, 121 Cal. Rptr. 194* ; *Starr v. Mooslin (1971) 14 Cal. App. 3d 988, 999, 92 Cal. Rptr. 583]* . Moreover, when a legal specialist is charged with negligence relating to his or her specialty, only a person knowledgeable in that specialty can testify regarding the applicable standard of care and whether the standard was met [*Wright v. Williams (1975) 47 Cal. App. 3d 802, 810, 121 Cal. Rptr. 194]* .

When the question of an attorney's alleged breach of duty turns on legal technicalities beyond common knowledge, requiring the fine exercise of legal judgment, expert testimony will be required to establish the attorney's breach [*see Wilkinson v. Rives (1981) 116 Cal. App. 3d 641, 647-648, 172 Cal. Rptr. 254* ; *Lipscomb v. Krause (1978) 87 Cal. App. 3d 970, 976, 151 Cal. Rptr. 465* ; *Wright v. Williams (1975) 47 Cal. App. 3d 802, 810, 121 Cal. Rptr. 194]* . If the issue involved in the case is one that is not within the common knowledge of the average juror, the plaintiff has the burden of proving, by expert testimony, that the defendant has breached the applicable standard of care [*see, e.g., Kirsch v. Duryea (1978) 21 Cal. 3d 303, 311, 146 Cal. Rptr. 218, 578 P.2d 935* (extent to which attorney will advance funds to hire investigators and depose witnesses or perform tests on a client as not matter of common knowledge); *Wilkinson v. Rives (1981) 116 Cal. App. 3d 641, 648, 172 Cal. Rptr. 254* (whether or not careful attorney would have client sign and verify optional affidavit to accompany homestead declaration as not matter of common knowledge); *see also Lipscomb v. Krause (1978) 87 Cal. App. 3d 970, 975, 976, 151 Cal. Rptr. 465* (implying that expert testimony required in all legal malpractice actions)].

Although no cases have interpreted *Evidence Code Section 720* [*see Evid. Code § 720* (sets forth qualifications for testimony as an expert witness)] in the context of legal malpractice, a court of appeal has held that the law's treatment of medical malpractice is sufficiently analogous to legal malpractice for the standards regarding the qualifications of experts in medical malpractice cases to serve as a guide in appellate review of the admissibility of expert testimony in

legal malpractice cases [*Jeffer, Mangels & Butler v. Glickman (1991) 234 Cal. App. 3d 1432, 1438, 286 Cal. Rptr. 243]* . The court found that analogizing to expert qualifications in medical malpractice cases is both logical and appropriate because (1) legal specialists, like medical specialists, are reluctant to testify against one another [*Jeffer, Mangels & Butler v. Glickman (1991) 234 Cal. App. 3d 1432, 1438-1439, 286 Cal. Rptr. 243]* ; (2) a broad standard of qualifications is as appropriate in the legal malpractice context as it is in the medical malpractice context [*Jeffer, Mangels & Butler v. Glickman (1991) 234 Cal. App. 3d 1432, 1439-1440, 286 Cal. Rptr. 243]* ; and (3) private study of a subject and contact with other professionals in the field may qualify an attorney expert just as it may qualify a physician expert [*Jeffer, Mangels & Butler v. Glickman (1991) 234 Cal. App. 3d 1432, 1440-1441, 286 Cal. Rptr. 243]* . One particular effect of analogizing to medical malpractice cases is that *Evidence Code Section 720* is broadly interpreted to permit an expert to testify even though that person has never performed the specific legal procedure deemed to constitute the legal malpractice in a given case [*Jeffer, Mangels & Butler v. Glickman (1991) 234 Cal. App. 3d 1432, 1441-1443, 286 Cal. Rptr. 243]* .

Under this broad interpretation of *Evidence Code Section 720,* the party offering the expert testimony must demonstrate that the expert's knowledge of the subject is sufficient. The determination of the sufficiency of the expert's knowledge of a subject is left to the sound discretion of the trial judge. The determinative issue of sufficiency and, by definition, admissibility, is whether the witness has sufficient skill or experience in the field such that his or her testimony would be likely to assist the jury in its search for the truth [*Jeffer, Mangels & Butler v. Glickman (1991) 234 Cal. App. 3d 1432, 1442, 286 Cal. Rptr. 243]* . Once this threshold has been met, the testimony is admissible. The question of the degree of the witness' knowledge, therefore, goes to the weight of the testimony rather than to its admissibility [*Jeffer, Mangels & Butler v. Glickman (1991) 234 Cal. App. 3d 1432, 1443, 286 Cal. Rptr. 243]* . Under this standard, the trial court will be deemed to have abused its discretion in refusing to admit the testimony if the witness has disclosed sufficient knowledge of the subject to entitle his or her opinion to go before the jury [*Jeffer, Mangels & Butler v. Glickman (1991) 234 Cal. App. 3d 1432, 1442-1443, 286 Cal. Rptr. 243]* .

There are situations when expert testimony is not required. When the failure of an attorney's performance is clear without the aid of expert testimony, a jury finding of negligence will be upheld, notwithstanding the lack of expert testimony [*Betts v. Allstate Ins. Co. (1984) 154 Cal. App. 3d 688, 716, 201 Cal. Rptr. 528* ; *see also Wilkinson v. Rives (1981) 116 Cal. App. 3d 641, 647-648, 172 Cal. Rptr. 254* ; *Wright v. Williams (1975) 47 Cal. App. 3d 802, 810, 121 Cal. Rptr. 194]* . The California Supreme Court has affirmed a judgment in which the jury was allowed to determine, without the benefit of expert testimony, whether the attorney's conduct constituted negligence or satisfied the duty of care [*Smith v. Lewis (1975) 13 Cal. 3d 349, 355 n. 3, 361*]. When an attorney's performance is clearly contrary to established procedures, the trier of fact may find professional negligence without expert testimony [*see Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 1146, 217 Cal. Rptr. 89* ; *see also David Welch Co. v. Erskine & Tulley (1988) 203 Cal. App. 3d 884, 892, 250 Cal. Rptr. 339* (cause of action for breach of fiduciary duty)].

Additionally, when reasonable minds cannot differ on the issue of whether an attorney's conduct satisfied the applicable standard of care, the issue is treated as one of law rather than as one of fact as it would be in any other negligence action. If that degree of certainty may be reached without the use of expert testimony, the liability or lack thereof will be established as a matter of law, notwithstanding the fact that expert testimony was not introduced [*see Wright v. Williams (1975) 47 Cal. App. 3d 802, 809, 121 Cal. Rptr. 194* ; *Moser v. Western Harness Racing Assn. (1948) 89 Cal. App. 2d 1, 9, 200 P.2d 7]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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7-76 California Forms of Pleading and Practice--Annotated § 76.53

AUTHOR: GEORGE M. LINDAHL

§ 76.53 Ethical Codes as Standards of Conduct

An attorney's violation of the California Rules of Professional Conduct may lead to consequences other than disciplinary proceedings before the State Bar. For example, an attorney's violation of a duty owed to a client under the Rules of Professional Conduct may constitute negligence [*see Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 1147-1149, 217 Cal. Rptr. 89]* . Thus, an attorney who became involved in business interests with his clients was liable under a negligence theory for violating the rules related to conflicts of interest [*Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 1147-1149, 217 Cal. Rptr. 89* ; *see* former Cal. Rules Prof. Conduct, Rules 4-7 (*now see Cal. Rules Prof. Conduct, Rules 3-300, 3-310*)]. In addition, a client may interpose an attorney's unethical conduct as a defense in the attorney's action for unpaid legal fees [*see Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 618, 623, 120 Cal. Rptr. 253* (attorney violated rule against accepting employment adverse to a former client, permitting client to avoid fees although client received benefit of attorney's knowledge)].

Although an ethical violation does not in itself establish a breach of duty, some courts have held that allegations that an attorney has violated an ethical rule may support a cause of action in tort. Thus, an allegation that an attorney violated the ethical rule against threatening criminal prosecution to obtain advantage in a civil action has been held sufficiently outrageous to support a complaint for intentional infliction of emotional distress [*Kinnamon v. Staitman & Snyder (1977) 66 Cal. App. 3d 893, 896, 136 Cal. Rptr. 321]* . However, the court of appeal has subsequently declined to follow the holding in that case that an attorney's violation of a rule of professional conduct is sufficient to support a finding that an attorney's conduct was outrageous. The court of appeal's decision not to follow that holding was based in part on the fact that the rules themselves now provide that a violation does not create a new civil cause of action [*Ross v. Creel Printing & Publ'g Co. (2002) 100 Cal. App. 4th 736, 746-747, 122 Cal. Rptr. 2d 787]* .

In addition, the court of appeal has rejected the plaintiff's argument that an attorney who was subject to disciplinary action for violating the rule against communicating directly with a party represented by counsel was subject to a civil

action for damages, whether or not the attorney committed an established tort [*see Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 658-659, 109 Cal. Rptr. 269* ; former Cal. Rules Prof. Conduct, Rule 12 (*now see Cal. Rules Prof. Conduct, Rule 2-100*)].

Although the violation of an ethical rule *as such* is not a tort, the violation of a statute, ordinance, or regulation of a public entity may create a presumption of negligence pursuant to the provisions of *Evidence Code section 669*. A presumption arises under section 669 if particular factual and legal findings are made. First, the trier of fact must find that the defendant violated a statute, ordinance, or regulation of a public entity and the violation proximately caused injury to person or property. Second, the court must find that the injury resulted from an occurrence the nature of which the rule violated was designed to prevent and that the person suffering the injury to his or her person or property was one of the class of persons for whose protection the rule was adopted [*see Ames v. State Bar (1973) 8 Cal. 3d 910, 917, 106 Cal. Rptr. 489, 506 P.2d 625* (Rules of Professional Conduct intended to protect members of public)]. Although no California appellate court has yet addressed this issue, there does not appear to be any reason to preclude the imposition of the presumption to an attorney's violation of an ethical rule in an appropriate case. The practice of law in California is regulated by the State Bar and rules regulating that practice appear to come within the definition of "statute, ordinance, or regulation of a public entity" for the purposes of *Evidence Code section 669*. "Public entity" in that statute includes public agencies and "every form of public authority" [*see Peterson v. City of Long Beach (1979) 24 Cal. 3d 238, 244-246, 155 Cal. Rptr. 360, 594 P.2d 477* (applying presumption of negligence to violation of police department regulations concerning use of firearms); *Barton v. State Bar (1930) 209 Cal. 677, 680-681, 289 P. 818* (Rules of Professional Conduct adopted pursuant to delegation by legislature)].

Aside from the presumption of negligence, which applies to a statute, ordinance, or regulation [*see Evid. Code § 669(a)(1)*], there is a possibility that standards of conduct established by a professional organization (such as the American Bar Association) may be judicially noticed by a court under *Evidence Code section 452(h)* as evidence of the professional's duty of care [*see Kirsch v. Duryea (1978) 21 Cal. 3d 303, 310, 146 Cal. Rptr. 218, 578 P.2d 935* (relying on ABA rule to find "long-accepted standard of professional conduct"); *Easton v. Strassburger (1984) 152 Cal. App. 3d 90, 101 n.5, 199 Cal. Rptr. 383* (court took judicial notice of criteria promulgated by National Association of Realtors to support finding regarding duty of real estate broker in action for negligence and negligent misrepresentation); *Pepper v. Underwood (1975) 48 Cal. App. 3d 698, 714, 122 Cal. Rptr. 343* (canons of conduct adopted by realtors as rebuttable evidence of realtors' standard of care in action for fraud and negligent misrepresentation)]. It is not clear, however, what effect rules that do not have the effect of law would have in legal malpractice actions, given the extensive regulation by the California Rules of Professional Conduct and the extensive case law setting forth the standard of care that attorneys must meet.

PRACTICE TIP:

Admission of Ethical Rules. Regardless of the possible admissibility of ethical rules that do not have the effect of law or the legal presumptions flowing from the violation of ethical standards, the plaintiff in a legal malpractice case can typically present such rules and violations indirectly through an expert witness who will cite them as a basis for the expert's opinion on the standard of care.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityAttorneysTortsNegligenceProofViolations of LawStandards of CareTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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[Reserved]

§§ 76.54[Reserved]

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7-76 California Forms of Pleading and Practice--Annotated § 76.70

AUTHOR: GEORGE M. LINDAHL

§ 76.70 Proximate Cause

For a plaintiff to be able to state a cause of action for negligence against an attorney, the attorney's negligence must be the proximate cause of damage to the plaintiff [*Budd v. Nixen (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433*]. As long as the attorney's negligence was a cause in fact of the client's damage, it need not be the only proximate cause [*see Cline v. Watkins (1977) 66 Cal. App. 3d 174, 178, 135 Cal. Rptr. 838* ; *Starr v. Mooslin (1971) 14 Cal. App. 3d 988, 1002, 92 Cal. Rptr. 583* ; *see also John B. Gunn Law Corp. v. Maynard (1987) 189 Cal. App. 3d 1565, 1573, 235 Cal. Rptr. 180* (*BAJI No. 3.78*, defining proximate cause in terms of a "substantial factor" contributing to injury, as proper jury instruction when plaintiff's injury could have been produced by either of two causes, and attorney defendant's conduct is one of those causes); *but see McGregor v. Wright (1931) 117 Cal. App. 186, 196, 3 P.2d 624* (early case holding that attorney's negligence must be sole and proximate cause of a client's damages)]. Moreover, a subsequent attorney's negligence is not a superseding cause that absolves the prior attorney of liability for the attorney's own negligence [*Cline v. Watkins (1977) 66 Cal. App. 3d 174, 179, 135 Cal. Rptr. 838* ; *see BAJI No. 3.79* and Use Note].

Proximate cause is generally a factual issue to be determined by the trier of fact, except in those cases in which reasonable people cannot disagree and the court determines the issue as a matter of law [*Zalta v. Billips (1978) 81 Cal. App. 3d 183, 191, 144 Cal. Rptr. 888* ; *Lysick v. Walcom (1968) 258 Cal. App. 2d 136, 153, 65 Cal. Rptr. 406]* . The burden of proof on the issue of causation in a legal malpractice case is the same as in a standard negligence action. The plaintiff must establish proximate cause by a preponderance of the evidence [*see Starr v. Mooslin (1971) 14 Cal. App. 3d 988, 1002, 92 Cal. Rptr. 583* ; *Lysick v. Walcom (1968) 258 Cal. App. 2d 136, 153, 65 Cal. Rptr. 406* ; *see also BAJI No. 2.60* (defining "preponderance of evidence")]. In an appropriate case, however, the burden may be shifted to the defendant attorney to disprove causation. Shifting the usual burden of proof is justified on public policy grounds. However, it is reserved for cases in which a substantial probability exists that the defendant's negligence was a cause of the damage to the plaintiff, but the nature of the negligence also makes it practically impossible for the plaintiff to prove

conclusively that the negligence was a proximate cause of damage to the plaintiff [*cf. Thomas v. Lusk (1994) 27 Cal. App. 4th 1709, 1717-1721, 34 Cal. Rptr. 2d 265* (error to shift burden to attorney to disprove causation when both plaintiff and attorney had equal access to evidence on causation in underlying products liability action, both parties were partially responsible for loss of evidence, and plaintiff failed to establish substantial probability of causal link between attorney negligence and damage)].

As discussed in *§ 76.71*, a plaintiff in a malpractice action arising out of underlying litigation is required to prove by a preponderance of the evidence that the plaintiff would have obtained a better result in the underlying litigation if not for the attorney's negligence [*see, e.g., Lysick v. Walcom (1968) 258 Cal. App. 2d 136, 153, 65 Cal. Rptr. 406]* . A similar requirement applies if the alleged malpractice occurs when advice is given, or documents are being prepared for, a business transaction. Thus, unless the harm is caused by concurrent independent causes, a plaintiff complaining of malpractice in a transactional setting is required to prove that but for the malpractice, the plaintiff would more likely than not have obtained a more favorable result [*Viner v. Sweet (2003) 30 Cal. 4th 1232, 1240-1244, 135 Cal. Rptr. 2d 629, 70 P.3d 1046* ; *see, e.g., Jalali v. Root (2003) 109 Cal. App. 4th 1768, 1777-1779, 1 Cal. Rptr. 3d 689* (plaintiff who alleged that attorney gave incorrect advice as to tax consequences of litigation settlement failed to prove that advice actually caused any damages, because settlement terms were very generous, given relative weakness of case, and no evidence was presented that more favorable settlement was possible)].

In a malpractice action brought by a criminal defendant against his or her former defense attorney, the plaintiff must prove by a preponderance of the evidence that he or she was factually innocent of the criminal charges in order to state a malpractice claim [*Wiley v. County of San Diego (1998) 19 Cal. 4th 532, 545, 79 Cal. Rptr. 2d 672, 966 P.2d 983]* . Although the Supreme Court imposed this requirement as a separate element of the cause of action based on "policy and pragmatism" [*see Wiley v. County of San Diego (1998) 19 Cal. 4th 532, 534, 79 Cal. Rptr. 2d 672, 966 P.2d 983]* , this requirement may be justified through the argument that proximate causation between the malpractice and the conviction cannot be proven since the original criminal action of a factually guilty defendant was the proximate cause of the criminal conviction. This argument had earlier been adopted in one court of appeal opinion and is consistent with language contained in the Supreme Court's decision [*see Wiley v. County of San Diego (1998) 19 Cal. 4th 532, 540, 79 Cal. Rptr. 2d 672, 966 P.2d 983* ; *Tibor v. Superior Court (1997) 52 Cal. App. 4th 1359, 1373, 61 Cal. Rptr. 2d 326* ; *see also Salisbury v. County of Orange (2005)131 Cal. App. 4th 756, 764-766, 31 Cal. Rptr. 3d 831* (if triable issue of fact exists, question of factual innocence is for jury)]. The Supreme Court has subsequently added that an individual convicted of a criminal offense must obtain reversal of the conviction, or other exoneration by postconviction relief, to establish factual innocence [*Coscia v. McKenna & Cuneo (2001) 25 Cal. 4th 1194, 1201, 108 Cal. Rptr. 2d 471, 25 P.3d 670]* .

The factual innocence requirement applies not just to the criminal charges actually brought against the criminal defendant, but also to lesser-included criminal offenses [*Sangha v. LaBarbera (2006) 146 Cal. App. 4th 79, 88, 52 Cal. Rptr. 3d 640*], as well as to transactionally related offenses stemming from the same criminal event that do not necessarily qualify as lesser-included offenses [*Wilkinson v. Zelen (2008) 167 Cal. App. 4th 37, 48, 83 Cal. Rptr. 3d 779*].

Not all claims brought by a convicted criminal defendant against his or her former attorney are subject to the requirement that the claimant prove his or her actual innocence of the criminal charges, however. For example, a fee dispute between a convicted criminal and his or her attorney may be litigated without a showing of actual innocence by the client [*Brooks v. Shemaria (2006) 144 Cal. App. 4th 434, 440-441, 50 Cal. Rptr. 3d 430* (dispute as to terms of retainer agreement and return of unused portion of retainer); *Bird, Marella, Boxer & Wolpert v. Superior Court (2003) 106 Cal. App. 4th 419, 432, 130 Cal. Rptr. 2d 782* (allegations of fraudulent billing practices)]. In addition, a plaintiff need not prove actual innocence in order to pursue a claim that the attorney committed negligence in failing to secure the return of plaintiff's property that had been seized in connection with the criminal arrest, at least when the relevant law enforcement authorities had concluded that the property should have been returned to plaintiff [*Brooks v. Shemaria (2006) 144 Cal. App. 4th 434, 441-443, 50 Cal. Rptr. 3d 430* (determination hinged on policy considerations

underlying actual innocence requirement, rather than whether proceeding was labeled as "criminal" or "civil")].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityAttorneysTortsNegligenceCausationProximate CauseGeneral OverviewTortsNegligenceCausationProximate CauseIntervening CausationTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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AUTHOR: GEORGE M. LINDAHL

§ 76.71 "Case-Within-a-Case" Requirement

In a legal malpractice case arising out of underlying litigation, the plaintiff is required to prove by a preponderance of the evidence both that the attorney was negligent and that the plaintiff would have obtained a better result in the underlying case if the attorney had conformed to the standard of practice [*see Barnard v. Langer (2003) 109 Cal. App. 4th 1453, 1461-1463, 1 Cal. Rptr. 3d 175* ; *Lysick v. Walcom (1968) 258 Cal. App. 2d 136, 153, 65 Cal. Rptr. 406* ; *see also BAJI No. 6.37.5*; *but see Sukoff v. Lemkin (1988) 202 Cal. App. 3d 740, 745 n.4, 249 Cal. Rptr. 42* (noting that burden of proof may shift when necessary evidence is unavailable because of defendant's alleged negligence)]. This trial-within-a-trial burden also applies in negligence actions against other types of professionals [*Mattco Forge, Inc. v. Arthur Young & Co. (1997) 52 Cal. App. 4th 820, 60 Cal. Rptr. 2d 780* (malpractice action against accountant)]. The plaintiff must establish the elements of duty, breach, proximate cause, and damages in the negligence action against the attorney [*Budd v. Nixen (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433]* .

To prove that the attorney's negligence in the underlying action proximately caused damage to the plaintiff, the plaintiff must essentially retry the underlying action to establish that he or she would have obtained a better result in the absence of the attorney's negligence [*see, e.g., Kessler v. Gray (1978) 77 Cal. App. 3d 284, 290-291, 143 Cal. Rptr. 496* ; *Walker v. Porter (1974) 44 Cal. App. 3d 174, 178, 118 Cal. Rptr. 468]* . The evidence admissible in a trial of the "case-within-a-case" is the evidence that would have been admissible in the underlying action [*Kessler v. Gray (1978) 77 Cal. App. 3d 284, 291, 143 Cal. Rptr. 496]* . Counsel should note, however, that if the underlying action involved a client's criminal conviction, the client is collateral estopped from relitigating the issue of the proximate cause of his or her conviction in a subsequent malpractice action against the defense attorney [*Weiner v. Mitchell, Silberberg & Knupp (1980) 114 Cal. App. 3d 39, 48, 170 Cal. Rptr. 533]* .

The "trial-within-a-trial" requirement calls for a determination of what an objectively reasonable judge and fact finder would have done in the underlying suit, rather than what the particular judge or fact finder in that underlying suit would

probably have done [*Mattco Forge, Inc. v. Arthur Young & Co. (1997) 52 Cal. App. 4th 820, 840, 60 Cal. Rptr. 2d 780* (accountant malpractice case)]. The question of what would have happened if a negligent attorney had acted otherwise is a factual one, and the legal malpractice plaintiff has a constitutional right to have the "case-within-a-case" decided by a jury, even if the underlying claim would have gone to arbitration [*Piscitelli v. Friedenberg (2001) 87 Cal. App. 4th 953, 969-971, 105 Cal. Rptr. 2d 88]* . Because it is the role of the fact finder, usually a jury, to determine what would have happened in the underlying suit absent the malpractice, a trial court errs if it allows an expert to testify as to what the probable result would have been. Such testimony effectively allows the expert to decide the ultimate issue entrusted to the jury [*Piscitelli v. Friedenberg (2001) 87 Cal. App. 4th 953, 973-974, 105 Cal. Rptr. 2d 88]* .

If the liability of an attorney in a legal malpractice action is based on a failure to act, the plaintiff cannot recover even if the failure to act was negligent, unless the plaintiff shows that he or she would have received a favorable judgment if the attorney had performed the act [*Kurinij v. Hanna & Morton (1997) 55 Cal. App. 4th 853, 866, 64 Cal. Rptr. 2d 324* (causation is ordinarily a question of fact); *Feldesman v. McGovern (1941) 44 Cal. App. 2d 566, 568, 112 P.2d 645* ; *see United Cmty. Church v. Garcin (1991) 231 Cal. App. 3d 327, 334, 282 Cal. Rptr. 368* (if attorney's inaction resulted in entry of default judgment in underlying action against client, client must show that he or she would have had viable defense in underlying action); *see also Campbell v. Magana (1960) 184 Cal. App. 2d 751, 754, 8 Cal. Rptr. 32]* .

If an attorney's conduct is alleged to be negligent, evidence that the underlying court itself acted erroneously does not necessarily absolve the attorney of malpractice liability on the basis of superseding causation. To resolve the issue of causation on a malpractice claim, the proper inquiry is what a reasonable court should have done if the attorney had acted within the applicable standard of care, not what a reasonable court faced with the attorney's actual conduct should have done [*Lombardo v. Huysentruyt (2001) 91 Cal. App. 4th 656, 668-669, 110 Cal. Rptr. 2d 691]* . Moreover, because the relevant inquiry involves determination of what a reasonable court would have done in the underlying action, an attorney sued for malpractice is permitted to defend on the grounds that the court in the underlying case made an error and that had the court made a proper decision, the malpractice plaintiff would not have been damaged [*Church v. Jamison (2006) 143 Cal. App. 4th 1568, 1584-1585, 50 Cal. Rptr. 3d 166]* .

If the alleged malpractice involves the failure to preserve evidence that was critical to the success of the underlying lawsuit, the burden may be shifted to the attorney to prove that the attorney's negligence did not cause the malpractice plaintiff to lose a lawsuit that was otherwise meritorious. This shifting of the burden is justified on the grounds that it is more appropriate to hold the attorney liable for failing to preserve critical evidence than to deny the malpractice plaintiff's claim, because the underlying malpractice is the very reason that the plaintiff lost the evidence necessary to prove that the underlying claim was meritorious [*Galanek v. Wismar (1999) 68 Cal. App. 4th 1417, 1426-1427, 81 Cal. Rptr. 2d 236]* . The malpractice plaintiff must establish a prima facie case or substantial probability of causation as a condition precedent to shifting the burden of proof [*Galanek v. Wismar (1999) 68 Cal. App. 4th 1417, 1427, 81 Cal. Rptr. 2d 236* (nonsuit was improper because malpractice plaintiff's opening statement alleged prima facie case against attorney for failing to preserve automobile critical to otherwise meritorious products liability suit)].

In addition to proving the viability of the underlying claim, in a legal malpractice case based on an attorney's negligent failure to obtain a judgment for the plaintiff, the plaintiff must prove the collectibility of the lost claim by establishing the solvency of the defendant in the underlying action [*Lally v. Kuster (1918) 177 Cal. 783, 787-788, 171 P. 961* ; *Garretson v. Harold I. Miller (2002) 99 Cal. App. 4th 563, 571-573, 121 Cal. Rptr. 2d 317* ; *Campbell v. Magana (1960) 184 Cal. App. 2d 751, 754, 8 Cal. Rptr. 32]* . It would seem that "solvency" in the strict sense is probably not required; if the defendant in the underlying action had insurance coverage that the plaintiff could have recovered, the plaintiff's proof of such insurance would seem to suffice for the purpose of establishing damages. This requirement is essentially a combination of causation and damage requirements in that the plaintiff must show that, but for the negligence of the attorney, the plaintiff could have recovered from the third party in the underlying action. Unless such proof is made, the plaintiff may not recover [*see Lally v. Kuster (1918) 177 Cal. 783, 787-788, 171 P. 961* ; *Garretson v. Harold I. Miller (2002) 99 Cal. App. 4th 563, 571-573, 121 Cal. Rptr. 2d 317* ; *Campbell v. Magana*

(1960) 184 Cal. App. 2d 751, 754-755, 8 Cal. Rptr. 32 ; *see also DiPalma v. Seldman (1994) 27 Cal. App. 4th 1499, 1507-1511* (malpractice plaintiffs were required to show solvency of defendants in underlying lawsuit to support malpractice claim based on failure to enforce judgment, although evidence of solvency was not required to support claim for malpractice based on negligence in advising malpractice plaintiffs to sign quitclaim deed relinquishing interest in property)]. Actual damages are an essential element of a malpractice cause of action; nominal damages alone are insufficient to state a cause of action [*Budd v. Nixen (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433]* .

PRACTICE TIP:

Solvency of Defendant in Underlying Action. The defendant in a legal malpractice action predicated on an allegedly mishandled lawsuit should determine through early investigation or discovery whether any judgment in the underlying action would have been collectible. Evidence occasionally can be developed that the defendant in the underlying case was an uninsured and defunct entity or bankrupt individual and thus "judgment-proof" at all relevant times, such that a sumary judgment motion can be made based on the absence of the essential element of damages. However, collectibility is an element of the plaintiff's case, and the defendant does not have the burden of pleading or proving that an underlying judgment would not have been collectible [*Garretson v. Harold I. Miller (2002) 99 Cal. App. 4th 563, 571-573, 121 Cal. Rptr. 2d 317; see also Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court (2006) 137 Cal. App. 4th 579, 595-599, 40 Cal. Rptr. 3d 446 (allowing limited discovery of financial details, including assets and insurance coverage, of underlying defendant in order to show collectibility)]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityAttorneysTortsNegligenceCausationProximate CauseGeneral OverviewTortsNegligenceCausationProximate CauseIntervening CausationTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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7-76 California Forms of Pleading and Practice--Annotated §§ 76.72-76.89

AUTHOR: GEORGE M. LINDAHL

[Reserved]

§§ 76.72[Reserved]

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7-76 California Forms of Pleading and Practice--Annotated § 76.90

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§ 76.90 Requirement of Actual Damages

Until a plaintiff has sustained actual damages as a result of the defendant attorney's wrongful conduct, no cause of action for legal malpractice accrues [*Budd v. Nixen (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433]* . Actual damages may take the form of unresolved subsequent litigation. The fact that subsequent litigation has not been completed does not render an action for legal malpractice premature, if the malpractice alleged was the failure to prevent the lawsuit [*Sindell v. Gibson, Dunn & Crutcher (1997) 54 Cal. App. 4th 1457, 1460, 63 Cal. Rptr. 2d 594]* .

Actual, provable damages are an essential element of a legal malpractice action, and a plaintiff is not entitled to recover nominal damages alone [*Budd v. Nixen (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433* ; *Alhino v. Starr (1980) 112 Cal. App. 3d 158, 176, 169 Cal. Rptr. 136* (breach of professional duty causing only nominal damages, speculative harm, or threat of future harm--not yet realized--as insufficient to create cause of action for negligence)]. Consequently, a legal malpractice complaint is subject to a demurrer if actual damages are not alleged [*Sisco v. Cosgrove, Michelizzi, Schwabacher, Ward & Bianchi (1996) 51 Cal. App. 4th 1302, 59 Cal. Rptr. 2d 647* (malpractice action by mother of boy who had been entitled to proceeds from structured settlement, against boy's attorneys for a failure to name her as his sole beneficiary in settlement documents); *Kluge v. O'Gara (1964) 227 Cal. App. 2d 207, 209, 38 Cal. Rptr. 607]* .

The court of appeal held in one case that a client had no malpractice action for failing to achieve a better result in underlying litigation because the statute of limitations had already expired on that underlying suit before the client first consulted the attorney about filing a lawsuit. Because the limitations period had expired, the court reasoned, the settlement recovery that the client obtained was a windfall to which the client was not legally entitled. Moreover, the client did not allege that a better settlement could have been obtained, only that a better result might have been obtained at trial. The court concluded under those circumstances that the client could not prove that she suffered any damages by failing to proceed to trial [*Slovensky v. Friedman (2006) 142 Cal. App. 4th 1518, 1527-1528, 49 Cal. Rptr. 3d 60]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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7-76 California Forms of Pleading and Practice--Annotated § 76.91

AUTHOR: GEORGE M. LINDAHL

§ 76.91 Requirement of Certainty of Damages

Speculative damages are not recoverable in a legal malpractice action [*see In re Easterbrook (1988) 200 Cal. App. 3d 1541, 1544, 244 Cal. Rptr. 652 , overruled on other grounds, People v. Romero (1994) 8 Cal. 4th 728, 35 Cal. Rptr. 2d 270, 883 P.2d 388* ; *Commercial Standard Title Co. v. Superior Court (1979) 92 Cal. App. 3d 934, 942, 155 Cal. Rptr. 393* ; *see also BAJI No. 14.60*]. Thus, when an attorney's alleged negligence creates only a threat of future harm, no cause of action for malpractice has accrued [*Budd v. Nixen (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433* ; *Alhino v. Starr (1980) 112 Cal. App. 3d 158, 176, 169 Cal. Rptr. 136* ; *see Blain v. Doctor's Co. (1990) 222 Cal. App. 3d 1048, 1063, 272 Cal. Rptr. 250* (mere exposure to liability, not resulting in compensable detriment to plaintiff, does not constitute "actual damage")]. Speculative damages should not, however, be confused with damages that are merely difficult to prove. If damages are ascertainable, they are recoverable regardless of the difficulty in proving them [*Brown v. Critchfield (1980) 100 Cal. App. 3d 858, 872, 161 Cal. Rptr. 342]* . Even an imprecise estimate of damages is sufficient evidence to support a claim for legal malpractice [*see Piscitelli v. Friedenberg (2001) 87 Cal. App. 4th 953, 989-990, 105 Cal. Rptr. 2d 88* (malpractice plaintiff could seek recovery for lost commissions to extent supported by testimony providing reasonable basis for calculation); *Ventura County Humane Soc'y v. Holloway (1974) 40 Cal. App. 3d 897, 907, 115 Cal. Rptr. 464* ; *Benard v. Walkup (1969) 272 Cal. App. 2d 595, 606, 77 Cal. Rptr. 544]* . However, the plaintiff must provide some competent evidence of all elements needed to support an award of damages [*see Marshak v. Ballesteros (1999) 72 Cal. App. 4th 1514, 1518-1519, 86 Cal. Rptr. 2d 1* (summary judgment for defendant proper because plaintiff failed to provide evidentiary support for allegations that marital settlement valuations were incorrect, that ex-wife would have accepted less, or that judge would have entered more favorable judgment)].

The distinction between speculative damages and recoverable damages is often a difficult one for the trier of fact to draw. It is perhaps most succinctly described by the court in *Brown v. Critchfield,* which applied the general rule that, while a plaintiff must show with reasonable certainty that he or she has suffered damages by reason of the wrongful act

of defendant, once the cause and existence of damages have been so established, recovery will not be denied because the damages are difficult to ascertain [*Brown v. Critchfield (1980) 100 Cal. App. 3d 858, 872, 161 Cal. Rptr. 342* ; *see also Bertero v. National Gen. Corp. (1967) 254 Cal. App. 2d 126, 150, 62 Cal. Rptr. 714]* .

Legal Topics:

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7-76 California Forms of Pleading and Practice--Annotated § 76.92

AUTHOR: GEORGE M. LINDAHL

§ 76.92 Compensatory Damages

[1] Generally

One who establishes malpractice on the part of an attorney in prosecuting or defending a lawsuit must also prove that careful management would have resulted in recovery of a favorable judgment and collection of the judgment or, in the case of a defense, that proper handling would have resulted in a judgment for the client [*see, e.g., Kessler v. Gray (1978) 77 Cal. App. 3d 284, 290-292, 143 Cal. Rptr. 496]* . There are no damages in the absence of these latter elements [*see Campbell v. Magana (1960) 184 Cal. App. 2d 751, 754, 8 Cal. Rptr. 32* ; *see also Lally v. Kuster (1918) 177 Cal. 783, 787-788, 171 P. 961* (damages for negligence in collection of note and mortgage as dependent on evidence of valid subsisting debt and solvency of debtor)]. Proving collectibility of the judgment in an underlying claim requires proving the solvency of the defendant in that action [*DiPalma v. Seldman (1994) 27 Cal. App. 4th 1499, 1508-1511* (nonsuit in favor of attorney reversed when evidence showed that defendants in underlying suit had assets available to satisfy all or some portion of judgment)]. However, when the alleged malpractice by the attorney does not involve the prosecution of a lawsuit by the attorney, the solvency of another party in any underlying transaction is irrelevant to proving damages in the malpractice suit [*DiPalma v. Seldman (1994) 27 Cal. App. 4th 1499, 1508* (when alleged malpractice was negligence in advising malpractice plaintiffs to sign quitclaim deed relinquishing interest in property, financial status of other party in underlying transaction was irrelevant to proving damages caused by attorney's negligence)].

The client is entitled to recover all damages directly and proximately caused by the negligence of the attorney [*Civ. Code § 3333*; *Smith v. Lewis (1975) 13 Cal. 3d 349, 362 , overruled on other grounds, In re Marriage of Brown (1976) 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561* ; *see Enriquez v. Smyth (1985) 173 Cal. App. 3d 691, 698, 219 Cal. Rptr. 267* (costs incurred in selling home properly recovered as damages proximately caused by defendant's negligence in persuading plaintiff to file for bankruptcy)]. Decisions of the California courts seem to support the view that an attorney is liable for all physical, mental, and emotional injuries, damage to reputation, and economic loss

caused by the negligence of the attorney, and suggest that the trend is to broaden the consequential damages recoverable in a legal malpractice action.

In one case, for example, the court of appeal stated in dictum that an attorney is liable for any loss of reputation or increased medical malpractice insurance costs suffered by the plaintiff physician and caused by the attorney's negligence [*Kirtland & Packard v. Superior Court (1976) 59 Cal. App. 3d 140, 146, 131 Cal. Rptr. 418]* . Another case held that an attorney who negligently caused a client to file for bankruptcy, and who then valued the client's home on the bankruptcy petition at a figure substantially lower than was accurate without obtaining an appraisal, was liable to the client for the resultant costs of sale incurred by the client when he was forced to sell the home to satisfy creditors' claims [*see* *Enriquez v. Smyth (1985) 173 Cal. App. 3d 691, 698-699, 219 Cal. Rptr. 267]* .

One court of appeal opinion has held that *Civ. Code § 1431.2*, which limits liability for noneconomic damages to several liability only in actions for personal injury, property damage, or wrongful death, does not apply to a malpractice claim against an attorney [*Brandon G. v. Gray (2003) 111 Cal. App. 4th 29, 39, 3 Cal. Rptr. 3d 330* (action to recover monetary value of claim lost due to attorney's failure to press meritorious claim within requisite time period was not action for "personal injury, property damage, or wrongful death")]. A subsequent court of appeal opinion rejected such a broad rule, however, and held that *Civ. Code § 1431.2* could be applied to an attorney malpractice action that seeks primarily noneconomic damages, such as damages for emotional distress caused when a criminal defense attorney's malpractice resulted in his client's criminal conviction [*Ovando v. County of Los Angeles (2008) 159 Cal. App. 4th 42, 73-74, 71 Cal. Rptr. 3d 415*].

If a malpractice plaintiff received a larger damage award in the underlying action than the proof shows the claim should have actually been worth, then the malpractice plaintiff has suffered no damages by any negligence on the part of the attorney [*Loube v. Loube (1998) 64 Cal. App. 4th 421, 425-427, 74 Cal. Rptr. 2d 906]* . In one case, for example, the malpractice plaintiffs received $25,000 in compensatory damages and $200,000 in punitive damages following a default judgment and prove-up hearing in the underlying action, although their original award of compensatory damages had been reduced from $248,102 due to their attorneys' negligent failure to specify an amount of damages in the complaint. The plaintiffs argued that their attorneys' negligence cost them the additional amount of compensatory damages originally awarded. However, in the malpractice action, the trial court required a "trial within a trial" to ascertain the value of the underlying action, and the proof showed that had the underlying action gone to trial, the plaintiffs would have only been able to prove compensatory damages of $12,850 and no punitive damages. The trial court held, and the court of appeals agreed, that plaintiffs had not been damaged by their attorneys' negligence, since plaintiffs in the underlying action received an award vastly greater than the damages they actually sustained [*Loube v. Loube (1998) 64 Cal. App. 4th 421, 425-427, 74 Cal. Rptr. 2d 906]* . The court of appeal also noted that it was pure speculation that, but for the negligent failure to specify in the complaint the amount of damages sought, plaintiffs would have still received a default judgment awarding compensatory damages of $248,102 to each [*Loube v. Loube (1998) 64 Cal. App. 4th 421, 426, 74 Cal. Rptr. 2d 906* ; *see § 76.91*].

[2] No Recovery for Lost Punitive Damages

Resolving a split in authority from the court of appeal, the California Supreme Court held that a legal malpractice plaintiff may not recover as compensatory damages the value of a claim for punitive damages that was lost in the underlying lawsuit due to the attorney's negligence [*Ferguson v. Lieff, Cabraser, Heimann & Bernstein (2003) 30 Cal. 4th 1037, 1041, 135 Cal. Rptr. 2d 46, 69 P.3d 965]* . The Court, recognizing the general rule that the measure of damages is the measure of the claim that is lost, concluded that policy considerations militated against recognizing the right to recover from a negligent attorney the value of a lost punitive damages claim [*Ferguson v. Lieff, Cabraser, Heimann & Bernstein (2003) 30 Cal. 4th 1037, 1046-1051, 135 Cal. Rptr. 2d 46, 69 P.3d 965]* .

The Court first held that allowing a recovery for a lost punitive damages claim would not further the purpose of punitive damages, which is to serve a societal interest by punishing the wrongdoer and deterring similar misconduct. A

compensatory award of lost punitive damages would serve no societal interest, because the attorney had no control over the intentional misconduct justifying the underlying punitive damages claim, and the underlying tortfeasor would not be deterred. Moreover, the amount of an award of punitive damages is properly measured by the gravity of the wrongdoer's conduct and the wealth of the wrongdoer. An award "transferred" to the negligent attorney, however, bears no relation to the gravity of the attorney's misconduct, nor does it bear any relation to the attorney's ability to pay [*Ferguson v. Lieff, Cabraser, Heimann & Bernstein (2003) 30 Cal. 4th 1037, 1046-1047, 135 Cal. Rptr. 2d 46, 69 P.3d 965]* .

Second, the Court held that permitting recovery of a lost punitive damages claim would violate the public policy against speculative damages. Compensatory damages in a legal malpractice action are based on what a reasonable factfinder in the underlying action would have done, while punitive damages are based primarily on the moral outrage of the jury. Therefore, a jury in a legal malpractice action would be in the position of having to determine what level of moral outrage a reasonable jury would have felt in the underlying action, a standard that the Court concluded was too speculative [*Ferguson v. Lieff, Cabraser, Heimann & Bernstein (2003) 30 Cal. 4th 1037, 1048-1049, 135 Cal. Rptr. 2d 46, 69 P.3d 965]* .

Third, the Court held that the standard of proof applicable to such claims would be too unwieldy to apply. Compensatory damages are based on proof by a preponderance of the evidence, while punitive damages are awarded only on clear and convincing evidence. Therefore, a plaintiff in a malpractice action would have to prove by a preponderance of the evidence that the jury in the underlying case would have found by clear and convincing evidence that the underlying defendant was guilty of oppression, fraud, or malice [*Ferguson v. Lieff, Cabraser, Heimann & Bernstein (2003) 30 Cal. 4th 1037, 1049, 135 Cal. Rptr. 2d 46, 69 P.3d 965]* .

Fourth, the Court held that allowing the recovery of lost punitive damages would likely increase the cost of malpractice insurance and, at a minimum, encourage the practice of "defensive law" by the attorney trying to avoid malpractice claims at all cost [*Ferguson v. Lieff, Cabraser, Heimann & Bernstein (2003) 30 Cal. 4th 1037, 1050, 135 Cal. Rptr. 2d 46, 69 P.3d 965]* .

Because the issue came before the Supreme Court in the context of a class action lawsuit, the Court also noted that allowing the recovery of lost punitive damages in the class action context would hinder the ability of trial courts to manage and resolve mass tort suits by discouraging the use of mandatory, non-opt-out punitive damages classes, because attorneys using these classes would face the prospect of multiple malpractice lawsuits by dissatisfied class members [*Ferguson v. Lieff, Cabraser, Heimann & Bernstein (2003) 30 Cal. 4th 1037, 1049-1050, 135 Cal. Rptr. 2d 46, 69 P.3d 965]* .

This holding applies retroactively, even if the negligent attorney was retained prior to the date of the Supreme Court's decision [*see* *Expansion Pointe Properties Limited Partnership v. Procopio, Cory, Hargreaves & Savitch, LLP (2007) 152 Cal. App. 4th 42, 56, 61 Cal. Rptr. 3d 166]* .

[3] Lost Postjudgment Interest

If the client was entitled to recover postjudgment interest on any recovery in the underlying action, that interest is also recoverable as an element of damages in the legal malpractice action [*Armstrong v. Adams (1929) 102 Cal. App. 677, 683, 283 P. 871]* .

[4] Emotional Distress

Damages for emotional distress that are a proximate result of the defendant's legal malpractice may be recovered by a former client of the attorney [*compare* *Betts v. Allstate Ins. Co. (1984) 154 Cal. App. 3d 688, 717-718, 201 Cal. Rptr. 528* (emotional distress damages allowed when proximately caused by defendants' malpractice); *with* *Merenda v. Superior Court (1992) 3 Cal. App. 4th 1, 10-11, 4 Cal. Rptr. 2d 87* (emotional distress damages not allowed when not

proximately caused by defendant's malpractice)]. However, emotional distress damages are only appropriate in a particular case when the emotional shock to the plaintiff stems from an abnormal event and it was highly foreseeable that the defendant's actions would cause shock to the plaintiff [*Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 168, 216 Cal. Rptr. 661, 703 P.2d 1* ; *Pleasant v. Celli (1993) 18 Cal. App. 4th 841, 853-854, 22 Cal. Rptr. 2d 663* (plaintiff's frustration at delay in resolution of underlying medical malpractice suit that followed death of plaintiff's infant daughter and anger at being misused by both doctors and lawyers does not meet requirements for recovery of emotional distress damages)].

Because physical injury is no longer a prerequisite for recovery of emotional distress damages [*Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 929-931, 167 Cal. Rptr. 831, 616 P.2d 813]* , the same conduct may be malpractice and constitute negligent infliction of emotional distress [*see* *Betts v. Allstate Ins. Co. (1984) 154 Cal. App. 3d 688, 717-718, 201 Cal. Rptr. 528]* . However, in those instances, double recovery of damages would not be permitted [*see* *Mozzetti v. City of Brisbane (1977) 67 Cal. App. 3d 565, 576, 136 Cal. Rptr. 751* (plaintiff not entitled to two alternative measures of damages for same injury)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: GEORGE M. LINDAHL

§ 76.93 Interest

A plaintiff in an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, may be awarded interest in the discretion of the jury [*Civ. Code § 3288*]. However, prejudgment interest cannot be based on plaintiff's general damages, but only on plaintiff's damages based on economic loss [*see Greater Westchester Homeowners Ass'n Inc. v. City of Los Angeles (1979) 26 Cal. 3d 86, 103, 160 Cal. Rptr. 733, 603 P.2d 1329]* . There does not seem to be case law regarding the application of this provision in legal malpractice actions, but there is no reason to preclude its application when economic loss is an element of plaintiff's damages.

PRACTICE TIP:

Special Verdict on Damages. The legal malpractice plaintiff should request a special verdict on damages when economic loss is a significant element of plaintiff's damages, particularly if substantial time has passed since they were incurred. A special verdict specifying the amount and possibly the date of such economic loss would support a further award of prejudgment interest.

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: GEORGE M. LINDAHL

§ 76.94 Punitive Damages

Punitive damages may be awarded only if the plaintiff establishes by clear and convincing evidence that the attorney-defendant was guilty of oppression, fraud, or malice in the conduct on which the liability of the defendant is based [*Civ. Code § 3294*; *see BAJI No. 14.71*]. A plaintiff seeking punitive damages must make specific factual assertions in the complaint supporting a conclusion that the defendant acted with oppression, fraud, or malice. Unspecific allegations of fraud, malice, or oppression are subject to a motion to strike [*see Smith v. Superior Court (1992) 10 Cal. App. 4th 1033, 1041-1042, 13 Cal. Rptr. 2d 133]* . Punitive damages are not available if a jury finds the defendant guilty of malpractice but awards no compensatory damages to plaintiff [*Jackson v. Johnson (1992) 5 Cal. App. 4th 1350, 1355-1358, 7 Cal. Rptr. 2d 482]* .

A cause of action frequently asserted in legal malpractice litigation is constructive fraud, pursuant to which the client usually seeks punitive damages. In a case outside the legal malpractice context, a court held that it was error to instruct that punitive damages can be awarded for constructive fraud, because the breach of a fiduciary duty alone without malice, fraud, or oppression does not permit an award of punitive damages [*Delos v. Farmers Group Inc. (1979) 93 Cal. App. 3d 642, 656-657, 155 Cal. Rptr. 843* ; *see also Civ. Code § 3294(c)* (defining oppression, fraud, and malice for purposes of awarding punitive damages)]. It therefore appears that, except when an attorney is liable to the client on a theory of actual fraud or for some other malicious or oppressive act (*e.g.*, misappropriation of client's funds), punitive damages should not be recoverable in a legal malpractice action.

In one case, however, the court of appeal suggested that a client might be entitled to recover punitive damages if the client can establish that the attorney showed a "conscious disregard of petitioner's safety" in the course of the representation [*Blegen v. Superior Court (1981) 125 Cal. App. 3d 959, 963, 178 Cal. Rptr. 470* (decided before 1987 amendment to *Civ. Code § 3294* became effective); *see Civ. Code § 3294(c)(1)* (defining "malice" as conduct intended by defendant to cause injury to plaintiff, or despicable conduct carried on by defendant with willful and conscious

disregard of rights or safety of others); *Taylor v. Superior Court (1979) 24 Cal. 3d 890, 894-895, 157 Cal. Rptr. 693, 598 P.2d 854* (conscious disregard of others' rights as permissible basis for punitive damages award; decided before 1987 amendment to *Civ. Code § 3294*)]. In that case the attorney representing the plaintiff in the underlying medical malpractice case was also a physician. The defendant allegedly advised the plaintiff to delay necessary surgery to enhance the value of the medical malpractice action, even though the attorney knew that the plaintiff should undergo immediate surgery. The court found these contentions sufficient to establish "conscious disregard of petitioner's safety" and that the plaintiff was entitled to seek punitive damages [*Blegen v. Superior Court (1981) 125 Cal. App. 3d 959, 963, 178 Cal. Rptr. 470* (decided before 1987 amendment to *Civ. Code § 3294*)].

PRACTICE TIP:

Pitfalls When Punitive Damages Sought. The defendant attorney should vigorously resist all efforts by the legal malpractice plaintiff to assert a punitive damage claim. Among other problems such a claim presents, it is not covered by the attorney's liability insurance as a matter of law [*see Ins. Code § 533*] and it frequently affords the plaintiff an opportunity to inflame the jury with evidence of the defendant's substantial wealth, should plaintiff meet the requirements of *Civ. Code §§ 3294* and *3295* for the admissibility of such evidence.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsRequirementsEvidenceProcedural ConsiderationsBurdens of ProofClear & Convincing ProofTortsDamagesPunitive DamagesConduct Supporting AwardsTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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7-76 California Forms of Pleading and Practice--Annotated § 76.95

AUTHOR: GEORGE M. LINDAHL

§ 76.95 Recovery of Legal Fees and Costs Other Than for Bringing Malpractice Action

The legal fees incurred by the client in pursuing the legal malpractice action itself are not recoverable from the defendant attorney [*see Roberts v. Ball, Hunt, Hart, Brown & Baerwitz (1976) 57 Cal. App. 3d 104, 112, 128 Cal. Rptr. 901]* . This is consistent with the longstanding rule that a litigant is not entitled to recover legal fees from the opposing party in the absence of an express statutory or contractual provision authorizing recovery [*Code Civ. Proc. § 1021*]. An exception to this general rule, however, provides that a party who has been required, through the tort of another, to protect an interest by bringing or defending an action against a third person, is entitled, in an action against the tortfeasor, to recover compensation for the reasonable necessary loss of time, attorney's fees, and other expenditures incurred thereby. These attorney's fees are damages caused by defendant's wrongful actions [*Prentice v. North Am. Title Guar. Corp. (1963) 59 Cal. 2d 618, 620-621, 30 Cal. Rptr. 821, 381 P.2d 645]* .

This exception lends support to a claim in a legal malpractice case for attorney's fees attributable to further legal work necessitated by the wrongful conduct of the attorney. It has also been argued by one commentator that fees and costs that the plaintiff was required to pay to another party in the underlying litigation as a result of the attorney's negligence, or the legal expenses charged a client for unjustified or negligent legal work, are recoverable damages in a legal malpractice action [*see* Mallen & Smith, Legal Malpractice, Ch. 16 § 16.6 (3d ed. 1989)].

However, one court of appeal decision has specifically rejected the notion that a malpractice plaintiff dissatisfied by the quality of an attorney's services can generate recoverable tort damages merely by hiring new attorneys and incurring legal fees in attempting to challenge or overturn an earlier settlement or judgment. Similarly, the court found absurd the notion that a malpractice plaintiff can prove recoverable tort damages merely by seeking to recover the fees paid to the allegedly negligent attorney. According to the court, a contrary conclusion on either point would obviate the need to prove that in the absence of the attorney's negligence, the plaintiff would have achieved a better result [*Orrick Herrington & Sutcliffe v. Superior Court (2003) 107 Cal. App. 4th 1052, 1058, 132 Cal. Rptr. 2d 658]* .

In the case before the court, the plaintiff brought a malpractice action against his former attorneys for alleged negligence in drafting a marital settlement agreement that the plaintiff claimed could expose him to future legal liabilities. However, the plaintiff failed to show that absent these alleged errors, the plaintiff's ex-wife would have accepted a lesser settlement, or that any legal claims had been filed against him because of the settlement deficiencies. Instead, the plaintiff argued that he suffered recoverable damages in the form of the fees that he paid his former attorneys for their inadequate representation, as well as the fees that he paid to other attorneys in his unsuccessful attempt to overturn the settlement agreement. The court of appeal rejected these as damages under the circumstances of the case. Because no claims had been made against the plaintiff because of the settlement, there was no compelling reason for him to spend hundreds of thousands of dollars attempting to overturn it, although the court recognized that if a claim had actually been filed against him, the plaintiff might be able to recover as tort damages the fees expended in defending that claim [*Orrick Herrington & Sutcliffe v. Superior Court (2003) 107 Cal. App. 4th 1052, 1060, 132 Cal. Rptr. 2d 658]* . As for the fees paid to the attorneys for their allegedly deficient representation, the court concluded that these appeared to be contract, rather than tort, damages, and therefore that the plaintiff's only remedy was to try and prove a claim for breach of contract [*Orrick Herrington & Sutcliffe v. Superior Court (2003) 107 Cal. App. 4th 1052, 1060-1061, 132 Cal. Rptr. 2d 658]* .

When a retainer agreement contains an attorney fee provision that substantially tracks the language of *Civ. Code § 1717*, allowing attorney fees to the prevailing party following an action "on the contract" or to enforce the contract, an action for legal malpractice is not an action "on the contract" for purposes of recovering attorney's fees [*Loube v. Loube (1998) 64 Cal. App. 4th 421, 429, 74 Cal. Rptr. 2d 906]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesAmerican RuleTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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§ 76.96 Damage Offsets

Defendants in legal malpractice actions sometimes assert offsets for either of the following:

- The fee, usually a contingency fee, that the defendant attorney would have earned in the underlying action.

- The amount ultimately obtained by the client through a settlement, judgment, or other resolution of the underlying matter.

Offsets based on the reasonable fees the attorney would have received for full performance in the underlying matter have not been allowed in the two reported California cases addressing this issue [*Kane, Kane & Kritzer, Inc. v. Altagen (1980) 107 Cal. App. 3d 36, 43-44, 165 Cal. Rptr. 534* ; *Benard v. Walkup (1969) 272 Cal. App. 2d 595, 606, 77 Cal. Rptr. 544]* . In one of these cases, the court of appeal held that the negligent attorney could not be credited with a fee he failed to earn because this not only would reward wrongdoing, but would also require the plaintiff to pay twice for the same service, presumably because the plaintiff will have a recovery in the malpractice action reduced by attorney's fees incurred in that action [*Kane, Kane & Kritzer, Inc. v. Altagen (1980) 107 Cal. App. 3d 36, 43-44, 165 Cal. Rptr. 534]* . In the other case, the court held that because the defendant's negligent conduct effectively precluded a determination of the amount of the contingency fee the defendant attorney sought to offset against the client's damages, no offset could be allowed. The court based this conclusion on the possibility that the defendant could have discovered other damages had the investigation of the plaintiff's case been done with due care, and the possibility that the case could have been settled before trial, with a reduction in the amount of the contingent fee due to the defendant [*Benard v. Walkup (1969) 272 Cal. App. 2d 595, 605-606, 77 Cal. Rptr. 544]* .

Although there are no reported California cases bearing directly on the issue of whether the defendant attorney is

entitled to an offset in the amount of the recovery ultimately obtained through a settlement, judgment, or other resolution of the underlying matter, one decision suggests that the offset is available. The California Supreme Court held in that case that when the client's damages were caused by her attorney's negligent failure to prosecute a mortgage foreclosure action, the damages should be reduced by the value, if any, of the barred note and mortgage [*Lally v. Kuster (1918) 177 Cal. 783, 791, 171 P. 961]* . However, the court of appeal has used the collateral source rule to bar an attorney from obtaining an offset of damages to reflect insurance proceeds the client received for an injury from a source unrelated to the tortfeasor in the underlying action [*Norton v. Superior Court (1994) 24 Cal. App. 4th 1750, 1758, 30 Cal. Rptr. 2d 217]* .

It has also been suggested that damages attributable to the negligent conduct of the client, rather than to the wrongful conduct of the attorney, can be offset against the plaintiff's damages [*see Martin v. Hall (1971) 20 Cal. App. 3d 414, 428, 97 Cal. Rptr. 730]* . However, this damage reduction should not be seen as based on a theory of offset, but rather on the comparative negligence of the client [*see § 76.171*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesGeneral OverviewTortsDamagesCollateral Source RuleGeneral OverviewTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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7-76 California Forms of Pleading and Practice--Annotated § 76.97

AUTHOR: GEORGE M. LINDAHL

§ 76.97 Mitigation of Damages

The plaintiff in a legal malpractice case has a duty to make a reasonable effort to avoid or mitigate damages [*Horne v. Peckham (1979) 97 Cal. App. 3d 404, 418, 158 Cal. Rptr. 714 , overruled on other grounds, ITT Small Bus. Fin. Corp. v. Niles (1994) 9 Cal. 4th 245, 36 Cal. Rptr. 2d 552, 885 P.2d 965* ; *see also CACI No. 3931*]. However, the mitigation doctrine does not require the client to take measures that are unreasonable or impractical, that involve expenditures disproportionate to the loss sought to be avoided, or that may lie beyond the client's financial means [*Horne v. Peckham (1979) 97 Cal. App. 3d 404, 418, 158 Cal. Rptr. 714 , overruled on other grounds, ITT Small Bus. Fin. Corp. v. Niles (1994) 9 Cal. 4th 245, 36 Cal. Rptr. 2d 552, 885 P.2d 965]* . Whether a plaintiff has satisfied the duty to mitigate is usually a question of fact, which turns on whether the client made a reasonable effort to avoid damages [*see Lewis v. Superior Court (1978) 77 Cal. App. 3d 844, 853, 144 Cal. Rptr. 1* ; *see generally Green v. Smith (1968) 261 Cal. App. 2d 392, 396-397, 67 Cal. Rptr. 796* (discussing general principles relating to mitigation of damages)].

If the client has a duty to mitigate damages and fails to do so, the client's damages will be reduced by the amount attributable to the failure [*see Lewis v. Superior Court (1978) 77 Cal. App. 3d 844, 853, 144 Cal. Rptr. 1* ; *Theobald v. Byers (1961) 193 Cal. App. 2d 147, 153, 13 Cal. Rptr. 864]* . In *Theobald v. Byers [(1961) 193 Cal. App. 2d 147, 13 Cal. Rptr. 864]* , the defendant attorneys were deemed negligent in their preparation of a note and chattel mortgage in connection with a loan that their clients were making. Because of the attorney's negligence, the plaintiffs obtained an invalid chattel mortgage and were ultimately relegated to the position of unsecured creditors who were unable to collect on their note. Evidence was produced at trial, however, that the plaintiffs had failed to file a claim in bankruptcy as general unsecured creditors of the individuals who executed the note in their favor. Had they done so, they would have recovered a percentage of their claim. The court held that the damages awarded to plaintiffs should be reduced by the amount that plaintiffs could have recovered in the bankruptcy proceeding [*Theobald v. Byers (1961) 193 Cal. App. 2d 147, 153, 13 Cal. Rptr. 864]* .

Legal Topics:

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

§§ 76.98[Reserved]

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7-76 California Forms of Pleading and Practice--Annotated § 76.110

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§ 76.110 Indemnification From Prior Tortfeasor

The limited California case law holds that the defendant attorney cannot seek indemnity on any basis from a prior tortfeasor because the prior tortfeasor and the negligent attorney are not joint tortfeasors [*Munoz v. Davis (1983) 141 Cal. App. 3d 420, 425-430, 190 Cal. Rptr. 400* ; *cf. Commercial Standard Title Co. v. Superior Court (1979) 92 Cal. App. 3d 934, 943, 155 Cal. Rptr. 393* (prior tortfeasor not entitled to indemnity from negligent attorney)]. *Munoz v. Davis [(1983) 141 Cal. App. 3d 420, 190 Cal. Rptr. 400]* involved a cross complaint by an attorney who had been sued for malpractice for allowing the statute of limitations to expire on a personal injury claim. The attorney cross complained against the person alleged to have caused the damage to the attorney's client, seeking implied equitable indemnity. The attorney argued that the negligence of the cross defendant was the proximate cause of any damage suffered by the client. The trial court sustained the cross defendant's demurrer and dismissed the cross complaint, and the court of appeal affirmed. The court based its holding on two alternate grounds. First, the court held that a negligent attorney is not entitled to indemnity from a negligent driver because they are not jointly and severally liable to the injured party for the attorney's negligence. Second, as an independently sufficient ground, the court held that equitable and policy considerations render equitable indemnity unavailable to shift an attorney's malpractice liability to the tortfeasor whose actions happened to provide the attorney with the opportunity to commit malpractice [*Munoz v. Davis (1983) 141 Cal. App. 3d 420, 422, 190 Cal. Rptr. 400]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled ProfessionalsTortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsProcedureMultiple DefendantsIndemnityNoncontractual IndemnityTortsProcedureMultiple DefendantsJoint & Several Liability

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7-76 California Forms of Pleading and Practice--Annotated § 76.111

AUTHOR: GEORGE M. LINDAHL

§ 76.111 Indemnification From Successor Attorney

When an attorney is hired to extricate a client from a situation that may be the result of another attorney's negligence, an issue may arise regarding whether the successor attorney may be held liable to the prior attorney for indemnification. Whether a successor attorney may be held liable for indemnity under these circumstances remains unclear in California. In some cases an attorney who has been sued for legal malpractice has attempted to cross complain against an attorney who substituted in as attorney of record for the client in the matter underlying the malpractice action. The cross complaint is usually based on the ground that the substituted attorney's negligence compounded or exacerbated the errors made by the original attorney, but courts have held that indemnity is not available under these circumstances [*see, e.g., Held v. Arant (1977) 67 Cal. App. 3d 748, 750, 134 Cal. Rptr. 422* ; *see also Lewis v. Purvin (1989) 208 Cal. App. 3d 1208, 1214-1217, 256 Cal. Rptr. 827* (fact that "successor" attorney also represented plaintiffs before and during defendant's alleged malpractice did not permit indemnity action); *Holland v. Thacher (1988) 199 Cal. App. 3d 924, 936, 245 Cal. Rptr. 247* (prohibition on cross complaints for indemnity against successor attorneys as not violating predecessor attorney's statutory right to contribution under *Civ. Code § 1432*)]. The rationale underlying this rule is that an attorney who represents a client whose potential or actual adversaries include both a private person and a previous attorney should not be subjected to the potential of being required to indemnify the prior attorney in the event that there is an action against the prior attorney. Such potential liability for indemnity could influence the attorney to the detriment of the attorney's duty of undivided loyalty to the client's interests [*see, e.g., Holland v. Thacher (1988) 199 Cal. App. 3d 924, 933, 245 Cal. Rptr. 247* ; *Gibson, Dunn & Crutcher v. Superior Court (1979) 94 Cal. App. 3d 347, 355, 156 Cal. Rptr. 326* ; *but see Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 942-943, 175 Cal. Rptr. 81* (expressing disagreement with this policy in context of associated attorney's liability to principal attorney based on agency law)].

At least one California case, however, has held that a successor attorney may be liable on a cross complaint for indemnity. In that case [*Parker v. Morton (1981) 117 Cal. App. 3d 751, 173 Cal. Rptr. 197]* , the court of appeal held that the successor attorney could be liable for indemnity for failing to pursue an available remedy that required no

exercise of professional judgment and would have furthered the best interest of the client [*Parker v. Morton (1981) 117 Cal. App. 3d 751, 767, 173 Cal. Rptr. 197]* . The court noted the public policy considerations designed to keep successor attorneys from facing situations in which their duty of undivided loyalty to the client may be influenced by the potential liability to the first attorney [*Parker v. Morton (1981) 117 Cal. App. 3d 751, 760, 173 Cal. Rptr. 197]* . The court held, however, that the public policy considerations did not apply when no exercise of judgment in choosing between alternative remedies was involved, and the possibility of a cross complaint for proportional indemnity could not have affected the exercise of any such judgment [*Parker v. Morton (1981) 117 Cal. App. 3d 751, 767, 173 Cal. Rptr. 197* (indemnity available when successor failed to advise client in dissolution action to seek division of spouse's vested military retirement benefits)]. Absent the possibility of an exercise of judgment by the attorney, there can be no conflict between the attorney and the client's best interests [*Parker v. Morton (1981) 117 Cal. App. 3d 751, 767, 173 Cal. Rptr. 197]* . However, more recent court of appeal decisions have uniformly rejected this approach [*see, e.g., Austin v. Superior Court (1999) 72 Cal. App. 4th 1126, 1129, 85 Cal. Rptr. 2d 644]* .

The cases cited above all involved cross complaints for indemnity, however, and the courts might not prohibit indemnity if the defendant attorney brought a separate action for indemnity rather than a cross complaint. To highlight the significance of the cross complaint on the potential for creating a conflict of interest, some courts have mentioned the need for an attorney against whom a cross complaint is filed to withdraw from representation of the plaintiff in the malpractice action [*see Gibson, Dunn & Crutcher v. Superior Court (1979) 94 Cal. App. 3d 347, 352, 156 Cal. Rptr. 326*].

Counsel should also note that a predecessor attorney can raise the issue of a successor attorney's comparative negligence by way of affirmative defense. Thus, an attorney may reduce his or her own exposure by the extent of the successor attorney's responsibility for the client's injury [*see Holland v. Thacher (1988) 199 Cal. App. 3d 924, 929, 245 Cal. Rptr. 247* ; *see* discussion in*§ 76.171*].

PRACTICE TIP:

Tactical Advantage of Affirmative Defense. It is sometimes tactically advantageous that a successor attorney's comparative negligence can only be asserted by affirmative defense because the defendant has the proverbial "empty chair" defense and need not respond to a defense mounted by the successor attorney or to the associated "finger-pointing" which typically enhances plaintiff's case.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled ProfessionalsTortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsProcedureMultiple DefendantsIndemnityNoncontractual Indemnity

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AUTHOR: GEORGE M. LINDAHL

§ 76.112 Indemnification From Associate Attorney

Unlike courts adhering to the majority, "bright-line" rule that a successor attorney is not liable for indemnification of a predecessor attorney [*see § 76.112*], the California Supreme Court has ruled that the question of whether an attorney being sued for malpractice may recover indemnity from concurrent counsel must be decided on a case-by-case basis [*Musser v. Provencher (2002) 28 Cal. 4th 274, 284, 121 Cal. Rptr. 2d 373, 48 P.3d 408]* . If the policy reasons justifying the rule preventing indemnification from a successor attorney do not apply, indemnification from concurrent counsel may be allowed. Thus, under the facts of the particular case, indemnification may be allowed if the claim creates no conflict of interest between the indemnifying attorney's duty to the client and the attorney's self-interest, and if there is no non-waived attorney-client privilege that will prevent the attorney from whom indemnity is sought from providing a defense [*Musser v. Provencher (2002) 28 Cal. 4th 274, 284-285* (indemnity claim allowed because no conflict of interest was identified and client waived attorney-client privilege as to attorney from whom indemnity was sought)].

In cases decided before the Supreme Court's opinion in *Musser v. Provencher,* but which apply the case-by-case approach adopted by the Court in that case, the court of appeal has held that the policy concerns that bar an attorney from seeking indemnity from a client's successor attorney also bar an indemnity cross-complaint between two independent attorneys who concurrently represented a client, if one attorney represented the client as a defense counsel provided by an insurance company and the other attorney represented the client as independent counsel required because the insurer provided the client's defense under a reservation of rights provided in the insurance policy [*Kroll & Tract v. Paris & Paris (1999) 72 Cal. App. 4th 1537, 1540, 86 Cal. Rptr. 2d 78* ; *see also Shaffery v. Wilson, Elser, Moskowitz, Edelman & Dicker (2000) 82 Cal. App. 4th 768, 777-778, 98 Cal. Rptr. 2d 419* (attorney representing insured could not seek indemnity from insurer's separate "monitoring counsel")]. For further discussion, see *§ 76.114*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled ProfessionalsTortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsProcedureMultiple DefendantsIndemnityNoncontractual Indemnity

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7-76 California Forms of Pleading and Practice--Annotated § 76.113

AUTHOR: GEORGE M. LINDAHL

§ 76.113 Indemnification From Predecessor Attorney

At least one court of appeal opinion held that, despite the policy concerns that might caution against allowing a predecessor attorney to seek equitable indemnity from a successor attorney [*see § 76.111*], those concerns seem inapplicable when a successor attorney seeks indemnity from a predecessor attorney. The court in that case concluded that a predecessor attorney was not subject to any conflict of interest and had no continuing privileged communications or work product to protect, and thus, a successor attorney could seek indemnity when the predecessor's negligence contributed to the injury for which the successor was liable [*Crouse v. Brobeck, Phleger, & Harrison (1998) 67 Cal. App. 4th 1509, 1545-1548, 80 Cal. Rptr. 2d 94* ; *but see Kroll & Tract v. Paris & Paris (1999) 72 Cal. App. 4th 1537, 1544 n.4, 86 Cal. Rptr. 2d 78* (unwilling to agree with *Crouse* opinion's sweeping statements suggesting that action for indemnity always exists against predecessor attorney)].

Legal Topics:

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7-76 California Forms of Pleading and Practice--Annotated § 76.114

AUTHOR: GEORGE M. LINDAHL

§ 76.114 Indemnification From Attorney Representing Insurance Claimant

If an insured party brings a bad-faith action against his or her insurer, the insurer may not obtain comparative equitable indemnity from the insured's attorney on the theory that the attorney's negligence at least partially caused the insured's damage [*California State Auto. Assn. Inter-Ins. Bureau v. Bales (1990) 221 Cal. App. 3d 227, 230-231, 270 Cal. Rptr. 421]* . This rule is based on a policy rationale that seeks to prevent conflicts of interest for the insurance claimant's attorney. If the attorney represents either a first- or third-party claimant on an insurance policy, the interest of the client is necessarily adverse to that of the insurer, even though there may not be any underlying action against the insurer [*California State Auto. Assn. Inter-Ins. Bureau v. Bales (1990) 221 Cal. App. 3d 227, 231, 270 Cal. Rptr. 421]* . In such situations, there is a possibility that the conduct of the insurer may subject it to liability for bad faith [*California State Auto. Assn. Inter-Ins. Bureau v. Bales (1990) 221 Cal. App. 3d 227, 231, 270 Cal. Rptr. 421]* . That possibility in turn creates a potential conflict between the attorney's duty to pursue the client's claim vigorously, and the understandable desire to avoid conduct that may later be the basis for the attorney's personal liability in indemnity to the insurer [*California State Auto. Assn. Inter-Ins. Bureau v. Bales (1990) 221 Cal. App. 3d 227, 231, 270 Cal. Rptr. 421]* .

An attorney who believed that the insurer had engaged or was about to engage in bad-faith claims practices might well choose to avoid such liability by acting to shield the insurer, even though his or her client would be ill-served by such action [*California State Auto. Assn. Inter-Ins. Bureau v. Bales (1990) 221 Cal. App. 3d 227, 231, 270 Cal. Rptr. 421]* . Consequently, the public policy in favor of preserving the undivided loyalty of the attorney to the client dictates that the insurer may not obtain indemnity from the claimant's attorney [*California State Auto. Assn. Inter-Ins. Bureau v. Bales (1990) 221 Cal. App. 3d 227, 230, 270 Cal. Rptr. 421]* .

An attorney appointed by an insurer to provide a defense for an insured under a reservation of the insurer's rights under the insurance policy is barred from obtaining indemnity from the attorney who provided the insured with independent counsel in the same action [*Kroll & Tract v. Paris & Paris (1999) 72 Cal. App. 4th 1537, 1540, 86 Cal. Rptr. 2d 78]* .

Under these circumstances, the loyalties of the independent counsel representing the insured are to the insured, while the loyalties of the counsel provided by the insurer run to the insurer as well as to the insured and may conflict, given the insurer's reservation of rights under the policy. Therefore, the concern with protecting an attorney's undivided loyalty and the preservation of the attorney-client privilege cautions against allowing an action for indemnity between those attorneys, even if the client's independent counsel no longer represents the client [*Kroll & Tract v. Paris & Paris (1999) 72 Cal. App. 4th 1537, 1542-1545, 86 Cal. Rptr. 2d 78]* . For example, if the indemnity claim were allowed, the independent counsel would be put into the position of having to defend itself without revealing client confidences that may have been revealed during the representation, because revealing those confidences could violate the attorney-client privilege, which runs to the client rather than to the attorney [*Kroll & Tract v. Paris & Paris (1999) 72 Cal. App. 4th 1537, 1544, 86 Cal. Rptr. 2d 78]* . For further discussion of the independent counsel requirement and its effects, see Ch. 308, *Insurance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled ProfessionalsTortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsProcedureMultiple DefendantsIndemnityNoncontractual Indemnity

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7-76 California Forms of Pleading and Practice--Annotated § 76.115

AUTHOR: GEORGE M. LINDAHL

§ 76.115 Indemnification of Expert Witness From Hiring Attorney

The court of appeal has adopted the Supreme Court's analysis of indemnification between concurrent counsel, as discussed in*§ 76.112*, in concluding that an expert witness, sued for negligence by the clients on whose behalf the expert was hired, could seek indemnity from the clients' former law firm, which hired the expert. Applying the same case-by-case approach promoted in *Musser v. Provencher* [*Musser v. Provencher (2002) 28 Cal. 4th 274, 284, 121 Cal. Rptr. 2d 373, 48 P.3d 408]* , the court of appeal concluded that the law firm, which was not named as a defendant by the former clients, was a potential joint tortfeasor with the expert for negligent handling of the underlying lawsuit. Given that the indemnification issue centered on whether the expert witness was sufficiently knowledgeable to testify and whether the law firm properly guided the expert on the relevant legal issues, the court concluded that there was no danger, under these circumstances, that the law firm would be faced with conflicts of interest in defending the indemnity claim or that the law firm would be forced to reveal confidential communications made by the former clients [*Forensis Group, Inc. v. Frantz, Townsend & Foldenauer (2005) 130 Cal. App. 4th 14, 34-40, 29 Cal. Rptr. 3d 622]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyExpertsGeneral OverviewTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled ProfessionalsTortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsProcedureMultiple DefendantsIndemnityNoncontractual Indemnity

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7-76 California Forms of Pleading and Practice--Annotated § 76.116

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§ 76.116 No Indemnification of Expenses and Fees From Corporate Plaintiff

Corp. Code § 317 generally provides a right to indemnification for a person who "was or is a party or is threatened to be made a party" to a legal proceeding "by reason of the fact that the person is or was an agent of the corporation" [*see Corp. Code § 317(c),(d)*]. However, although an outside attorney hired to represent a corporate client at trial is in part an agent of the corporation, this statute may not be used by an attorney who has represented a corporation in the capacity of outside counsel to recover the costs and attorney's fees incurred in successfully defending a malpractice action brought by the corporation [*Channel Lumber Co. v. Porter Simon (2000) 78 Cal. App. 4th 1222, 1230-1232, 93 Cal. Rptr. 2d 482* (*Corp. Code § 317* not intended to be attorney's fee statute)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled ProfessionalsTortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsProcedureMultiple DefendantsIndemnityNoncontractual Indemnity

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[Reserved]

§§ 76.117[Reserved]

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7-76 California Forms of Pleading and Practice--Annotated § 76.130

AUTHOR: GEORGE M. LINDAHL

§ 76.130 Error of Judgment Based on Inadequate Research

An attorney is responsible for a knowledge of the law and is under an obligation to perform diligent research and exercise informed judgment when representing a client [*see Aloy v. Mash (1985) 38 Cal. 3d 413, 418-419, 212 Cal. Rptr. 162, 696 P.2d 656* ; *Wright v. Williams (1975) 47 Cal. App. 3d 802, 809, 121 Cal. Rptr. 194]* . For example, in one case, the client sued her divorce attorney for legal malpractice on the grounds that the attorney negligently failed to assert her community property interest in her husband's retirement benefits. Defendant attorney asserted at trial that the law defining the character of retirement benefits was uncertain at the time of his legal services to the plaintiff. Therefore he contended that he should have been held not negligent as a matter of law because all informed attorneys in the community entertained reasonable doubt as to the proper characterization of military retirement benefits at that time. The California Supreme Court stated that, although an attorney does not ordinarily guarantee the soundness of his or her opinions and is therefore not liable for every mistake he or she may make in his or her practice, an attorney is expected to possess knowledge of those plain and elementary principles of law commonly known by well informed attorneys and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques. With respect to an unsettled area of the law, while an attorney will not be held responsible for failing to anticipate the manner in which the uncertainty will be resolved, an attorney must undertake reasonable research and make an informed decision as to the proper course of conduct based on the particular problem at hand [*Smith v. Lewis (1975) 13 Cal. 3d 349, 358-359*].

In a later case, the California Supreme Court found that if an attorney does not research an issue thoroughly, the attorney may be liable for malpractice for failing to assert a claim that would have been correct at a later time under a decision given in a subsequent case [*Aloy v. Mash (1985) 38 Cal. 3d 413, 418-421, 212 Cal. Rptr. 162, 696 P.2d 656]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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7-76 California Forms of Pleading and Practice--Annotated § 76.131

AUTHOR: GEORGE M. LINDAHL

§ 76.131 Failure to Meet Time Limits

[1] Failure to Bring Action Within Statute of Limitations

A common basis for a legal malpractice action against the litigation attorney is the failure to institute a lawsuit or other proceeding in a timely manner. An attorney who fails to bring an action within the applicable statute of limitations may be held liable for such a failure [*see Shelly v. Hansen (1966) 244 Cal. App. 2d 210, 214-215, 53 Cal. Rptr. 20* ; *see also Bland v. Reed (1968) 261 Cal. App. 2d 445, 449, 67 Cal. Rptr. 859* (dictum)]. Apart from the numerous statutes of limitation embodied in the Code of Civil Procedure, the litigation attorney must also be conversant with the statutory filing deadlines applicable to claims against municipal, state, and federal government entities [*see, e.g., 28 U.S.C. § 2401*; *Gov. Code § 911.2*; *see also Southland Mech. Constructors Corp. v. Nixen (1981) 119 Cal. App. 3d 417, 423-424, 173 Cal. Rptr. 917 , disapproved on other grounds, Laird v. Blacker (1992) 2 Cal. 4th 606, 7 Cal. Rptr. 2d 550, 828 P.2d 691* (failure to file claim for additional moneys due under government contract)]. The attorney must also be prepared to move in a timely manner for trial preference in cases in which the client is at least 70 years old and has a substantial interest in the action as a whole, and the client's health is such that a preference is necessary to prevent prejudicing his or her interest in the litigation [*see Code Civ. Proc. § 36(a)*; *Granquist v. Sandberg (1990) 219 Cal. App. 3d 181, 186-187, 268 Cal. Rptr. 109* (attorney's failure to move for trial preference as basis of malpractice suit by client's personal administrator)].

PRACTICE TIP:

Precautions Regarding Preferential Trial Setting. Due to the attorney's potential exposure to a legal malpractice claim based upon a failure to seek a preferential trial setting under *Code Civ. Proc. § 36* and the tactical considerations weighing against such action in some cases, the prudent attorney should advise the client in writing of his or her right to seek a trial preference and make a recommendation to the client as to whether that right should be exercised. The attorney should let the client make the final decision given the case law suggesting that this decision does not fall within the exercise of the attorney's

judgment.

[2] Involuntary Dismissal of Action

A failure to serve and return the summons and complaint within three years [*see Code Civ. Proc. §§ 583.210-583.250*], or the failure to bring a case to trial within five years after it was filed [*see Code. Civ. Proc. §§ 583.310-583.360*], may spawn a legal malpractice action [*see Lopez v. Larson (1979) 91 Cal. App. 3d 383, 405, 153 Cal. Rptr. 912* (party whose cause of action was dismissed because of attorney's failure to prosecute as limited to remedy against attorney)]. Although they are infrequently granted, motions to dismiss for failure to prosecute diligently and bring a case to trial within two years [*see Code Civ. Proc. §§ 583.410-583.430*] can be asserted by defendants in state court actions and, if successful, can expose a plaintiff's attorney to liability for legal malpractice [*see Lopez v. Larson (1979) 91 Cal. App. 3d 383, 405, 153 Cal. Rptr. 912* (party whose cause of action dismissed because of attorney's failure to prosecute as limited to remedy against attorney)].

[3] Causing Default Judgment to be Entered Against Client

A defense attorney's actions may cause a default judgment to be entered against his or her client [*see Code Civ. Proc. §§ 585-587.5*]. The entry of a default judgment typically occurs when the defense attorney fails to file a responsive pleading [*see Code Civ. Proc. § 585*]. It has been suggested that the failure to move to set aside a default judgment within the six-month period specified in *Code Civ. Proc. § 473* is also negligence if the motion could have relieved the client of the default [*cf. Bowen v. Cowett (1963) 216 Cal. App. 2d 766, 769, 31 Cal. Rptr. 184* (attorney's failure to set aside default caused no damage)].

[4] Failure to File Timely Appeal

An attorney is liable for negligence if he or she failed to take an appeal that would have succeeded [*Drais v. Hogan (1875) 50 Cal. 121, 127-128]* . There is no liability for failure to file a timely appeal from judgment absent proof that the appeal would have been successful [*Kilmer v. Carter (1969) 274 Cal. App. 2d 81, 82, 78 Cal. Rptr. 800* ; *see also Redante v. Yockelson (2003) 112 Cal. App. 4th 1351, 1357, 6 Cal. Rptr. 3d 10* (criminal defense attorney not liable for choosing not to raise issues on appeal that attorney believed were not meritorious)]. The trial court must determine whether the appeal, if taken, would have resulted in reversal [*Pete v. Henderson (1954) 124 Cal. App. 2d 487, 491-492, 269 P.2d 78* ; *see also Croce v. Sanchez (1967) 256 Cal. App. 2d 680, 683-684, 64 Cal. Rptr. 448* (in malpractice action, plaintiff had no entitlement to jury trial on issue of attorney's liability for failing to perfect appeal, as transcript revealed plaintiff's failure to establish liability or damage in action as to which appeal was dismissed)].

If the attorney decides an appeal is futile, too expensive, or that his or her compensation is not adequate, and decides against filing a notice of appeal, the attorney should consult with the client and if the client disagrees, the attorney may choose to withdraw. However, it is improper to allow the time for the appeal to lapse without advising the client of the danger of his or her loss of the right to appeal [*In re Fountain (1977) 74 Cal. App. 3d 715, 719, 141 Cal. Rptr. 654]* .

PRACTICE TIP:

Precautions Regarding Timely Appeal. While attorney-client retainer agreements frequently state that the legal representation will not encompass any appeal and that any appellate work must instead be the subject of a separte agreement, the attorney should nonetheless remind the client of this feature of the agreement in writing after a judgment is rendered and well before the deadline for noticing the appeal. The attorney's reliance on the original notice to this effect in the fee agreement could prove troublesome in defending a legal malpractice case based on a failure to timely file an appeal.

An appointed defense counsel in noncapital criminal appeals has no duty to investigate the possible bases for collateral attack on a judgment and no duty to file or prosecute an extraordinary writ that the client desires or thinks is appropriate by the client [*Redante v. Yockelson (2003) 112 Cal. App. 4th 1351, 1356, 6 Cal. Rptr. 3d 10]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedureAppealsDismissals of AppealsInvoluntary DismissalsGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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AUTHOR: GEORGE M. LINDAHL

§ 76.132 Failure to Assert Meritorious Defense

A defense attorney may be liable for a failure to assert appropriate defenses in a lawsuit [*see Budd v. Nixen (1971) 6 Cal. 3d 195, 198, 98 Cal. Rptr. 849, 491 P.2d 433* (alleged negligence based on failure to plead a critical defense)]. However, the defendant must establish that the unasserted defense was not only legally cognizable but provable and that its assertion would have achieved a better result for the defendant [*see Campbell v. Magana (1960) 184 Cal. App. 2d 751, 754, 8 Cal. Rptr. 32]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: GEORGE M. LINDAHL

§ 76.133 Failure to Join Claims

The issue of whether an attorney has a duty to cross complain was presented in *Banerian v. O'Malley (1974) 42 Cal. App. 3d 604, 116 Cal. Rptr. 919* , in which an attorney who had represented sellers of real property in an action against them was sued by his former clients for, inter alia, failing to cross complain in the action against codefendants and certain nonparties allegedly responsible for the damages. The court held that as a matter of law the attorney, in the reasonable exercise of his judgment, did not have a duty to bring the cross-complaints since they were permissive in nature, and a defendant cannot be negligent for failing to do what he had no duty to undertake [*Banerian v. O'Malley (1974) 42 Cal. App. 3d 604, 612-613, 116 Cal. Rptr. 919]* . By implication, failure to bring a compulsory counterclaim against an opposing party [*see Code Civ. Proc. § 426.30*] may constitute actionable negligence for purposes of a malpractice action [*see Banerian v. O'Malley (1974) 42 Cal. App. 3d 604, 612, 116 Cal. Rptr. 919* (distinguishing between compulsory and permissive cross-complaints)].

PRACTICE TIP:

Insurance Defense Counsel; Compulsory Counterclaims. The insurance defense attorney must be particularly careful in identifying possible compulsory counterclaims. Typically, the insurer that has appointed defense counsel has no obligation to pay for the prosecution of any affirmative claims that the insured may have against the opposing party, and the appointed defense counsel is thus neither expected nor authorized to pursue such claims by the insurer. However, the insurance defense attorney is nonetheless obligated to give primacy to the interests of the insured [*see American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 592, 113 Cal. Rptr. 561]* , and thus should, at a minimum, promptly alert the client to the existence of the compulsory counterclaim and advise the client to retain separate counsel to pursue it if the insurer will not pay to do so.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProcedurePleading & PracticePleadingsCounterclaimsCompulsory CounterclaimsTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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7-76 California Forms of Pleading and Practice--Annotated § 76.134

AUTHOR: GEORGE M. LINDAHL

§ 76.134 Failure to Follow Client's Instructions

It would appear that while an attorney is not required to defer to the client's instructions on tactical or legal considerations beyond the client's knowledge, the attorney is under a duty to follow promptly and carefully the client's general instructions regarding the disposition of a lawsuit and is liable for all damages flowing from a failure to follow such instructions [*see Lally v. Kuster (1918) 177 Cal. 783, 786-787, 171 P. 961* (attorney's delay in serving summons despite client's instruction to proceed at once as negligent; however, negligence did not cause damage to plaintiff)]. Although the exact parameters of the distinction between matters involving tactics and legal decisions on the one hand and matters on which the attorney must defer to the client's wishes on the other has not been specified by California courts, it has been held that an attorney's failure to file a complaint when told to do so by a client constitutes actionable malpractice [*Lally v. Kuster (1918) 177 Cal. 783, 786-787, 171 P. 961]* . The distinction may parallel the distinction between procedural matters that an attorney is authorized to act on by virtue of the retainer and acts impairing the client's substantive rights or the cause of action itself, which the attorney is not authorized to undertake without the specific authorization of the client [*see Linsk v. Linsk (1969) 70 Cal. 2d 272, 276-280, 74 Cal. Rptr. 544, 449 P.2d 760]* .

PRACTICE TIP:

Precautions Regarding Client's Instructions. The attorney's retention agreement with the client should clearly define the matters that involve tactics and legal decisions which are within the attorney's discretion and those more substantive matters on which the attorney must defer to the client. Absent such an agreement, clients can take issue with virtually everything the attorney does, and the attorney will be forced to rely on sparse case authority in defending an ensuing legal malpractice case on the ground that he or she was legitimately exercising his or her discretion.

ILLUSTRATION: Attorney's Discretion in Discovery. An attorney has taken numerous depositions

> of witnesses whose testimony is critical to the defense of client's business litigation case, only to later learn from the client that this discovery has severely compromised the client's customer relations to its detriment. Query: Should the attorney have deferred to the client in this case concerning appropriate discovery?

However, an attorney is never required to follow a client's instructions to engage in illegal or unethical conduct. In one case, for example, the California Supreme Court held that when an attorney is confronted with a choice between advancing the client's case, which the attorney believes lacks merit, and the attorney's ethical obligations to pursue only those actions that appear meritorious, the attorney cannot be liable to the client for mistakenly withdrawing from the case unless the attorney's choice to honor the public obligation is so manifestly erroneous that no prudent attorney would have done so [*Kirsch v. Duryea (1978) 21 Cal. 3d 303, 309, 146 Cal. Rptr. 218, 578 P.2d 935]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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7-76 California Forms of Pleading and Practice--Annotated § 76.135

AUTHOR: GEORGE M. LINDAHL

§ 76.135 Failure to Convey Settlement Offer or to Secure Client's Consent to Settlement

The most common problems relating to settlements occur when an attorney either fails to convey a settlement offer to a client or settles a lawsuit without the client's consent. *California Rules of Professional Conduct, Rule 3-510*, requires an attorney to inform a client promptly of the amount, terms, and conditions of a written settlement offer, and the failure to convey any settlement offer may constitute negligence, if not an intentional tort such as deceit [*Cal. Rules Prof. Conduct, Rule 3-510*; *see Civ. Code §§ 1709, 1710*]. By analogy to the rules relating to legal malpractice actions generally, which require the plaintiff to prove that he or she would have obtained a better result in the underlying case if the attorney had conformed to the standard of practice [*see Lysick v. Walcom (1968) 258 Cal. App. 2d 136, 153, 65 Cal. Rptr. 406* ; *Campbell v. Magana (1960) 184 Cal. App. 2d 751, 754, 8 Cal. Rptr. 32* ; *see also BAJI No. 6.37.5*], it appears that to recover under this theory the plaintiff would have to establish (1) that he or she would have accepted the settlement offer had it been conveyed, and (2) that the settlement would have been more favorable to the client than the ultimate resolution of the case [*cf. Campbell v. Magana (1960) 184 Cal. App. 2d 751, 758, 8 Cal. Rptr. 32* (client failed to prove that offer would have been accepted)].

The settlement of a case without the client's consent also should constitute negligence. While there are no California cases directly addressing this issue, it seems clear that an attorney who settles a lawsuit without the client's authority is liable to the client for all resulting damages [*see Bronson v. Borst (D.C. 1979) 404 A.2d 960, 962-963* ; *Roberts v. Roberts (Mo. App. 1977) 552 S.W.2d 296, 297-298* (dictum)]. Presumably, the resulting damages would be the difference between the probable resolution of the case without the settlement (as proven in the "case-within-a-case") and the result under the settlement agreed to by the attorney. However, when a client is represented by the attorney under a contract of insurance or an indemnity agreement that does not give the client the right to consent to settlement, the attorney is not required to obtain the client's settlement consent [*see, e.g., New Plumbing Contractors, Inc. v. Edwards, Sooy & Byron (2002) 99 Cal. App. 4th 799, 801-802, 121 Cal. Rptr. 2d 472* (attorneys hired by insurer not liable to insured for recommending settlement to insurer, who had contractual right to settle without approval from

insured)].

A member of a plaintiff class in a class action cannot, after the class action has settled, sue class counsel for negligence on the grounds that counsel should have negotiated a different settlement notice procedure, at least when the trial court approved the final settlement and notice procedures after providing class members an opportunity to object. Under those circumstances, collateral estoppel will defeat any malpractice claim based on the alleged insufficiency of the settlement procedures [*Martorana v. Marlin & Saltzman (2009) 175 Cal. App. 4th 685, 694-697, 96 Cal. Rptr. 3d 172*]. In addition, class attorneys utilizing an approved procedure for providing mass notification of settlement claims procedures to class members have no additional duty to follow up with individual class members who do not respond before the deadline for doing so [*Martorana v. Marlin & Saltzman (2009) 175 Cal. App. 4th 685, 697, 96 Cal. Rptr. 3d 172*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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[Reserved]

§§ 76.136[Reserved]

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§ 76.150 Breach of Fiduciary Duty

The relationship between attorney and client is of the highest fiduciary character [*see Hicks v. Clayton (1977) 67 Cal. App. 3d 251, 262, 136 Cal. Rptr. 512* ; *see § 76.31[1]*]. If an attorney breaches the fiduciary duty owed to the client, the attorney may be held liable for the breach. For example, under case law interpreting the predecessor statute to *Probate Code Section 16004(c)* (which now creates a presumption of violation of trustee's fiduciary duties in specified circumstances) [*see* former *Civ. Code § 2235* (presumption of insufficient consideration and undue influence in transaction between trustee and beneficiary)], if an attorney profits from a transaction with the client, the client may rescind the transaction on the grounds of undue influence and inadequate consideration unless the attorney establishes by clear and satisfactory evidence that the transaction was fair and equitable, and that the client was fully informed as to all matters relative to the transaction [*see Hicks v. Clayton (1977) 67 Cal. App. 3d 251, 262, 136 Cal. Rptr. 512* (interpreting former *Civ. Code § 2235*); *see also Ball v. Posey (1986) 176 Cal. App. 3d 1209, 1214, 222 Cal. Rptr. 746* (undue influence by attorney presumed when in all transactions forming basis of action for breach of fiduciary duty, attorney was agent for elderly client by reason of signed power of attorney, and never advised client to obtain separate counsel when his name appeared as joint tenant on her bank accounts)].

Although it is not clear at this point, it would seem that courts would extend application of the presumption under *Prob. Code § 16004(c)* to other situations founded on the principal-agent relationship [*see Civ. Code § 2322(c)* (agent not having authority to violate duty of trustee pursuant to *Prob. Code §§ 16002, 16004, 16005*, or *16009*)], as with application of the presumption under the former statute. The client may also obtain other equitable remedies, including imposition of a constructive trust and restitution, as well as incidental damages [*David Welch Co. v. Erskine & Tulley (1988) 203 Cal. App. 3d 884, 894, 250 Cal. Rptr. 339* (constructive trust imposed); *Hicks v. Clayton (1977) 67 Cal. App. 3d 251, 264, 136 Cal. Rptr. 512]* .

An attorney is subject to liability for constructive fraud when the attorney breaches a fiduciary duty to the client [*cf. American Box & Drum Co. v. Harron (1941) 44 Cal. App. 2d 370, 378, 112 P.2d 332* (court found no evidence of intent

to defraud necessary for imposition of constructive trust)]. An attorney can also be liable to his or her client for actual fraud if the elements of fraud are proven [*cf. Frost v. Hanscome (1926) 198 Cal. 550, 559, 246 P. 53* (no grounds for finding of extrinsic fraud on record); *see also § 76.154*].

Additionally, the fiduciary duties owed by an attorney to a client extend beyond the period of the actual attorney-client relationship. An attorney is not allowed to take any actions that would injure a former client in matters that are within the scope of the former representation, nor may the attorney use any information gained during the relationship against the former client [*Yorn v. Superior Court (1979) 90 Cal. App. 3d 669, 675, 153 Cal. Rptr. 295* ; *see People v. Thoi (1989) 213 Cal. App. 3d 689, 699, 261 Cal. Rptr. 789]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsCauses of Action & RemediesBreach of Fiduciary DutyRemediesEstate, Gift & Trust LawTrustsConstructive TrustsLegal EthicsClient RelationsGeneral OverviewTortsBusiness TortsFraud & MisrepresentationConstructive FraudGeneral OverviewTortsIntentional TortsBreach of Fiduciary DutyGeneral Overview

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7-76 California Forms of Pleading and Practice--Annotated § 76.151

AUTHOR: GEORGE M. LINDAHL

§ 76.151 Adverse Representation

It is an attorney's duty to protect his or her client in every possible way, and it is a violation of that duty for the attorney to assume a position that is adverse or antagonistic to the client without the latter's free and intelligent consent given after full knowledge of the facts and circumstances [*Anderson v. Eaton (1930) 211 Cal. 113, 116, 293 P. 788]* .

As a general rule, an attorney may not simultaneously represent clients with conflicting interests, even if the subject matter of the two representations is unrelated [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 285, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* . The attorney's duty of loyalty toward an existing client places limitations upon the attorney's duty of care toward a new or prospective client whose interests might conflict with those of the existing client. Thus, when an attorney declined to represent a new client after learning that the new client wished to sue an existing client, the attorney had no duty to advise the new client about the applicable statute of limitations or the need to obtain alternate counsel [*Flatt v. Superior Court (1994) 9 Cal. 4th 275, 278-279, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* .

If the attorney represents two clients with divergent interests, the loyalty owed to one client cannot consume that owed to the other [*Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 526, 50 Cal. Rptr. 592]* . A conflict of interest between jointly represented clients occurs whenever their common lawyer's representation of the one is rendered less effective by reason of his or her representation of the other [*Bogard v. Employers Cas. Co. (1985) 164 Cal. App. 3d 602, 609-610, 210 Cal. Rptr. 578* ; *Spindle v. Chubb/Pac. Indem. Group (1979) 89 Cal. App. 3d 706, 713, 152 Cal. Rptr. 776]* .

Provided there is full disclosure and consent, an attorney may undertake to represent dual interests. If the parties have divergent interests, the attorney owes the highest duty to make to each a full disclosure of all facts and circumstances necessary to enable the parties to make a fully informed decision regarding the subject matter of the litigation, including the areas of potential conflict and the possibility and desirability of seeking independent legal advice [*Betts v. Allstate Ins. Co. (1984) 154 Cal. App. 3d 688, 716, 201 Cal. Rptr. 528* ; *Klemm v. Superior Court (1977) 75 Cal. App. 3d 893,*

901, 142 Cal. Rptr. 509] .

Even though dual representation is acceptable under specified circumstances, it is nonetheless strongly disfavored [*see Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 526-527, 50 Cal. Rptr. 592* (citing condemnation by various bar associations and committees of dual representation in divorce suits even with the parties' consent, and raising questions about "ethical implications" of dual representation); *see also Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 897-899, 142 Cal. Rptr. 509* (also pointing out ethical issues involved in representation of parties with adverse interests)]. For further discussion of the problems of dual representation and other conflicting interests that may lead to liability for malpractice in particular contexts, see *§ 76.32*.

For detailed discussion and forms relating to an attorney's ethical duty to protect client confidences and avoid conflicts with current or former clients, see Ch. 72, *Attorney Practice and Ethics* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsConflicts of InterestTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceProofViolations of LawStandards of CareTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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7-76 California Forms of Pleading and Practice--Annotated § 76.152

AUTHOR: GEORGE M. LINDAHL

§ 76.152 Advantageous Transactions With Client

All transactions between an attorney and his or her client during the existence of their fiduciary relationship, or while the influence acquired by the attorney remains, by which the attorney obtains any advantage from the client, are presumed to be entered into by the client without sufficient consideration and under undue influence [*see Trafton v. Youngblood (1968) 69 Cal. 2d 17, 27, 69 Cal. Rptr. 568, 442 P.2d 648* (former *Civ. Code § 2235* (*now see Prob. Code § 16004(c)*) applicable to contractual dealings between attorney and client during existence of attorney-client relationship); *Gleason v. Klamer (1980) 103 Cal. App. 3d 782, 787, 163 Cal. Rptr. 483* (account stated subject to presumption of undue influence when entered into between attorney and client during their fiduciary relationship); *Hicks v. Clayton (1977) 67 Cal. App. 3d 251, 262, 136 Cal. Rptr. 512* (contract between attorney and client for sale of real property to attorney); *see also Prob. Code § 15003*]. An advantage is obtained when the attorney enters into a transaction with the client whereby the attorney's position is improved, or he or she obtains a favorable opportunity or otherwise gains, benefits, or profits; it is not necessary to show that the advantage obtained was unfair or unjust in order for the presumption of undue influence to arise [*see Trafton v. Youngblood (1968) 69 Cal. 2d 17, 27-28, 69 Cal. Rptr. 568, 442 P.2d 648]* . The transaction is deemed voidable unless and until the attorney can establish full compliance with fiduciary obligations [*see Gleason v. Klamer (1980) 103 Cal. App. 3d 782, 787, 163 Cal. Rptr. 483* ; *see also Oliker v. Gershunoff (1987) 195 Cal. App. 3d 1288, 1294-1295, 241 Cal. Rptr. 415* (presumption of undue influence successfully rebutted)], and the burden is on the attorney to show that the transaction was fair and regular and entered into voluntarily by the client with full knowledge of the facts [*see Trafton v. Youngblood (1968) 69 Cal. 2d 17, 28, 69 Cal. Rptr. 568, 442 P.2d 648* (no acquiescence in attorney's statement of account arose from client's failure to object to account for two years); *Hicks v. Clayton (1977) 67 Cal. App. 3d 251, 262, 136 Cal. Rptr. 512* (presumption of unfairness shifts burden of proof to attorney); *Thompson v. Price (1967) 251 Cal. App. 2d 182, 188, 59 Cal. Rptr. 174* (trial court erred in requiring corporation to prove unfairness and unreasonableness of salaries and fees drawn by corporate director/counsel)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawConsiderationSufficient ConsiderationContracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawDefensesDuress & Undue InfluenceGeneral OverviewTortsIntentional TortsBreach of Fiduciary DutyGeneral Overview

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7-76 California Forms of Pleading and Practice--Annotated § 76.153

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§ 76.153 Infliction of Emotional Distress

When emotional distress has been suffered by the plaintiff, counsel may wish to allege a cause of action for negligent infliction of emotional distress in addition to alleging that the plaintiff suffered emotional distress as a result of the defendant's malpractice [*see* *Betts v. Allstate Ins. Co. (1984) 154 Cal. App. 3d 688, 718, 201 Cal. Rptr. 528* (court instructed jury that damages for negligent infliction of emotional distress could be awarded in action alleging negligence by attorneys); *see* discussion in*§ 76.92[4]*]. However, a claim for recovery for emotional distress will only be appropriate in a particular case when the emotional shock to the plaintiff stems from an abnormal event and it was highly foreseeable that the defendant's actions would cause shock to the plaintiff [*Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 168, 216 Cal. Rptr. 661, 703 P.2d 1* ; *Betts v. Allstate Ins. Co., (1984) 154 Cal. App. 3d 688, 718, 201 Cal. Rptr. 528* (negligence of attorneys was a proximate cause of damage to plaintiff for emotional distress); *Pleasant v. Celli (1993) 18 Cal. App. 4th 841, 853-854, 22 Cal. Rptr. 2d 663* (plaintiff's frustration at delay in resolution of underlying medical malpractice suit that followed death of plaintiff's infant daughter and anger at being misused by both doctors and lawyers as not meeting requirements for recovery of emotional distress damages)].

As a general rule, when the harm to the plaintiff arising from a defendant attorney's unintentional, but negligent, conduct is solely economic, courts will disallow claims for emotional distress damages [*see* *Smith v. Superior Court (1992) 10 Cal. App. 4th 1033, 1040, 13 Cal. Rptr. 2d 133* (mere negligence does not support recovery for mental suffering when defendant's tortious conduct results in only economic injury); *Merenda v. Superior Court (1992) 3 Cal. App 4th 1, 6-11, 4 Cal. Rptr. 2d 87* (affirming rejection of emotional distress damages when attorney's negligence resulted in loss of client-plaintiff's opportunity to recover damages in sexual harassment lawsuit); *Smith v. Superior Court (1992) 10 Cal. App. 4th 1033, 1037-1040, 13 Cal. Rptr. 2d 133* (no recovery of damages for emotional distress when plaintiff pleaded that attorney failed to adequately represent her and her property interests in a prior dissolution proceeding, resulting in loss of interests in certain assets)]. The courts, in following the general principle that damages for emotional distress arising out of acts that invade an interest protected by established tort law can be recovered only if the claimed emotional distress naturally ensues from the acts that are the basis for the complaint [*Smith v. Superior*

Court (1992) 10 Cal. App. 4th 1033, 1038, 13 Cal. Rptr. 2d 133 ; *Merenda v. Superior Court (1992) 3 Cal. App. 4th 1, 6, 4 Cal. Rptr. 2d 87]* , have reasoned that the primary interest protected in legal malpractice actions is economic, and that serious emotional distress is not an inevitable consequence of the loss of money. Consequently, there should be no recovery of emotional distress damages when the plaintiff's injuries are solely economic [*Smith v. Superior Court (1992) 10 Cal. App. 4th 1033, 1038, 1040, 13 Cal. Rptr. 2d 133* ; *Merenda v. Superior Court (1992) 3 Cal. App. 4th 1, 10, 4 Cal. Rptr. 2d 87]* .

By contrast, when an attorney's misconduct has resulted in injury to a plaintiff's interest in personal liberty, emotional distress damages may be available. For example, a client may recover emotional distress damages if his or her attorney's incompetence resulted in the client's improper confinement [*see* *Holliday v. Jones (1989) 215 Cal. App. 3d 102, 112-120, 264 Cal. Rptr. 448* (client, whose conviction of involuntary manslaughter was reversed on grounds of incompetent representation, prevailed in subsequent malpractice action against former counsel for emotional distress damages relating to his confinement between initial conviction and acquittal on retrial)].

An attorney's misconduct may be actionable as intentional infliction of emotional distress if the attorney's conduct was outrageous, the attorney intended to cause emotional distress or had reckless disregard of the probability of causing emotional distress, the client experienced severe emotional suffering, and the attorney's conduct actually and proximately caused emotional distress to the client [*see* *McDaniel v. Gile (1991) 230 Cal. App. 3d 363, 372-374, 281 Cal. Rptr. 242* (action based on attorney's repeated sexual harassment of client, and attorney's conditioning of professional performance on provision of sexual favors by client); *see also* *Agarwal v. Johnson (1979) 25 Cal. 3d 932, 946-947, 160 Cal. Rptr. 141, 603 P.2d 58* (examples of outrageous behavior sufficient to support claim for intentional infliction of emotional distress)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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7-76 California Forms of Pleading and Practice--Annotated § 76.154

AUTHOR: GEORGE M. LINDAHL

§ 76.154 Fraud

An attorney can be liable to his or her client for fraud if the elements of fraud are proven [*cf. Frost v. Hanscome (1926) 198 Cal. 550, 559, 246 P. 53* (no grounds for finding of extrinsic fraud on record)]. to establish that an attorney is liable for fraud, the plaintiff must show a misrepresentation, knowledge of its falsity, intent to defraud, justifiable reliance, and resulting damage [*Roberts v. Ball, Hunt, Hart, Brown & Baerwitz (1976) 57 Cal. App. 3d 104, 109, 128 Cal. Rptr. 901]* . Every element of the cause of action for fraud must be alleged in the proper manner, and the facts constituting the fraud must be alleged with sufficient specificity to allow the defendant to understand fully the nature of the charge made [*see Wilhelm v. Pray, Price, Williams & Russell (1986) 186 Cal. App. 3d 1324, 1331-1332, 231 Cal. Rptr. 355* ; *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz (1976) 57 Cal. App. 3d 104, 109, 128 Cal. Rptr. 901]* .

The requirements for establishing and defending against an action for fraud are the same whether or not the plaintiff is a client or nonclient. A third party who is not a client may, however, have difficulty proving the element of justifiable reliance on an attorney's legal opinion [*see B.L.M. v. Sabo & Deitsch (1997) 55 Cal. App. 4th 823, 835, 64 Cal. Rptr. 2d 335* (housing developer did not establish justifiable reliance on legal opinion of attorneys appointed by city council as special counsel to housing project)]. The client also has the option of bringing an action for constructive fraud based on the attorney's breach of his or her fiduciary duties. Unlike an action for fraud, an action for constructive fraud does not require a showing of an intent to deceive [*see Civ. Code § 1573*; *see also Strangman v. Arc-Saws, Inc. (1954) 123 Cal. App. 2d 620, 624625* (attorney liable for misrepresentation that induced client to invest in corporation of which attorney was an officer, even though there was nothing to indicate that attorney acted with dishonest motive)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsFraud & MisrepresentationActual FraudGeneral Overview

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7-76 California Forms of Pleading and Practice--Annotated § 76.155

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§ 76.155 Breach of Express or Implied Contract

An attorney typically undertakes to perform duties for a client pursuant to a contract. Consequently, an action for legal malpractice may sound in both tort and contract [*Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 181, 98 Cal. Rptr. 837, 491 P.2d 421* ; *Southland Mech. Constructors Corp. v. Nixen (1981) 119 Cal. App. 3d 417, 435, 173 Cal. Rptr. 917* (disapproved on other grounds in *Laird v. Blacker (1992) 2 Cal. 4th 606, 617, 7 Cal. Rptr. 2d 550, 828 P.2d 691*)]. In most cases, the broader range of damages awarded in tort actions will persuade counsel to pursue the tort cause of action [*compare Civ. Code § 3300* (measure of damages for breach of contract) *with Civ. Code § 3333* (measure of damages for tort)]. In rare cases, however, an attorney may have breached an express contractual promise, but without any negligence. In such a case, a breach of contract action may be the only available remedy.

Although there are no reported cases in California on the subject, other jurisdictions hold that neither an express nor implied warranty arises out of the attorney-client relationship [*see, e.g., Corceller v. Brooks (La. App. 1977) 347 So. 2d 274, 277]* . With the emergence of attorney advertising, however, some commentators have suggested that attorneys should be subject to warranty liability [*see* Steinberg & Rosen, *Lawyer's Adverstising and Warranties: Caveat Advocatus, 64 A.B.A. J. 867, 870 (June 1978)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachGeneral OverviewContracts LawTypes of ContractsExpress ContractsContracts LawTypes of ContractsImplied-in-Fact ContractsLegal EthicsClient RelationsEffective Representation

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[Reserved]

§§ 76.156[Reserved]

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4. Defenses

7-76 California Forms of Pleading and Practice--Annotated § 76.170

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§ 76.170 Statute of Limitations

[1] Code Civ. Proc. § 340.6: General Principles

Actions against attorneys based on professional practice have been covered by *Code Civ. Proc. § 340.6* since its enactment effective January 1, 1978. Section 340.6 provides that an action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services must be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first [*Code Civ. Proc. § 340.6(a)*]. If the plaintiff is required to establish his or her factual innocence for an underlying criminal charge as an element of his or her malpractice claim [*see § 76.70*], the action must be commenced within two years after the plaintiff achieves postconviction exoneration in the form of a final judicial disposition of the criminal case [*Code Civ. Proc. § 340.6(a)*]. An action for fraud is subject to a three-year statute of limitations [*Code Civ. Proc. § 338(d)*; *see Bustamante v. Haet (1963) 222 Cal. App. 2d 413, 416, 35 Cal. Rptr. 176]* .

The court of appeal held that despite the use of the words "wrongful act or omission," *Code Civ. Proc. § 340.6* applies to actions in contract, as well as actions in tort [*Southland Mech. Constructors Corp. v. Nixen (1981) 119 Cal. App. 3d 417, 173 Cal. Rptr. 917 , disapproved on other grounds, Laird v. Blacker (1992) 2 Cal. 4th 606, 7 Cal. Rptr. 2d 550, 828 P.2d 691]* . The court concluded that the phrase "wrongful act or omission" should be interpreted to include both tortious and contractual wrongdoing, given the legislative history of *Section 340.6* [*Southland Mech.Constructors Corp. v. Nixen (1981) 119 Cal. App. 3d 417, 429-431, 173 Cal. Rptr. 917* (disapproved on other grounds in *Laird v. Blacker (1992) 2 Cal. 4th 606, 617, 7 Cal. Rptr. 2d 550, 828 P.2d 691*)].

Code Civ. Proc. § 340.6 does not apply to all professional services performed by an attorney, only to legal services. Therefore, a lawyer who provides administrative consulting services on behalf of a client sheds the protection of *Code Civ. Proc. § 340.6* and is subject to the ordinary statute of limitations [*Quintilliani v. Mannerino (1998) 62 Cal. App.*

4th 54, 65, 72 Cal. Rptr. 2d 359] .

It is unclear, however, whether the statute of limitations in *Code Civ. Proc. § 340.6* applies in a legal malpractice action based on an attorney's breach of fiduciary duty. One court of appeal held that when a cause of action is based on an attorney's breach of fiduciary duties, the four-year catchall statute in *Code Civ. Proc. § 343* applies, rather than *Code Civ. Proc. § 340.6* [*David Welch Co. v. Erskine & Tulley (1988) 203 Cal. App. 3d 884, 893, 250 Cal. Rptr. 339 (1st Dist., Div. 4)]* . However, another court of appeal held that *Code Civ. Proc. § 340.6* does apply in legal malpractice actions based on breach of fiduciary duty [*Stoll v. Superior Court (1992) 9 Cal. App. 4th 1362, 1363-1364, 1366-1369, 12 Cal. Rptr. 2d 354 (1st Dist., Div. 5)]* .

Except for claims in which the plaintiff is required to establish his or her factual innocence for an underlying criminal conviction, the time for commencement of an action for legal malpractice cannot generally exceed four years from the date of the wrongful act or omission, although the period is tolled during the time that any of the following exist [*Code Civ. Proc. § 340.6(a)*]:

- The plaintiff has not sustained actual injury;
- The attorney continues to represent the plaintiff regarding the specific subject matter in which the alleged wrongful act or omission occurred;
- The attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, except that this provision tolls only the four-year limitation; and
- The plaintiff is under a legal or physical disability that restricts the plaintiff's ability to commence legal action.

In an action based on an instrument in writing, the effective date of which depends on some act or event of the future, the period of limitations provided for by *Code Civ. Proc. § 340.6* begins to run when the act or event occurs [*Code Civ. Proc. § 340.6(b)*].

When a legal malpractice plaintiff files a bankruptcy petition before the expiration of the limitations period under *Code Civ. Proc. § 340.6*, federal bankruptcy law preempts state law and defines the applicable limitations period for filing the malpractice action [*California Aviation, Inc. v. Leeds (1991) 233 Cal. App. 3d 724, 734, 284 Cal. Rptr. 687]* . In the case of a Chapter 11 bankruptcy, *11 U.S.C.S. § 108(a)* applies to extend the applicable limitations period by two years [*California Aviation, Inc. v. Leeds (1991) 233 Cal. App. 3d 724, 734, 284 Cal. Rptr. 687]* .

The four-year outside limit in *Code Civ. Proc. § 340.6* restricts malpractice actions based on actual injury that occurred prior to January 1, 1978 the effective date of the statute. Actions based on pre-1978 injury brought after January 1, 1982 are generally barred, unless statutory tolling is applicable [*see Rubinstein v. Barnes (1987) 195 Cal. App. 3d 276, 279-282, 240 Cal. Rptr. 535]* .

When an attorney brings suit against his or her client for fees, the client may, under specified circumstances, assert the defense of malpractice even when the statute of limitations on the claim has otherwise lapsed. However, this defense may be asserted only to the extent of offsetting the amount sought by the attorney's claim for payment [*Safine v. Sinnott (1993) 15 Cal. App. 4th 614, 618-619, 19 Cal. Rptr. 2d 52* ; *see Code Civ. Proc. § 431.70*].

PRACTICE TIP:

Considerations in Suit for Fees. An attorney contemplating a fee collection action against a former client should consider deferring the filing of the action until more than one year after the legal representation of the client is terminated because any claims for legal malpractice that the client might be

inclined to pursue in response to the collection action would then be time-barred. The principal benefit of this approach is that it eliminates the attorney's potential exposure in a legal malpractice action, as well as the attorney's need to report the claim to his or her professional liability insurer and to disclose the claim in subsequent professional liability insurance applications. An affirmative defense of offset in the fee collection action, based on alleged legal malpractice, should not be considered a legal malpractice claim for disclosure purposes.

[2] Discovery of Wrongful Act

[a] In General

Cases interpreting *Code Civ. Proc. § 340.6* have attempted to clarify the concepts of "discovery" and "occurrence" of the attorney's wrongful conduct. In one case, the court of appeal held that the question of when a plaintiff in a legal malpractice case discovered, or through the use of reasonable diligence should have discovered, the wrongful act giving rise to the claim is usually a question of fact. The only exception to this general rule is when reasonable minds cannot differ, and the question then becomes a matter of law [*Baright v. Willis (1984) 151 Cal. App. 3d 303, 311, 198 Cal. Rptr. 510]* .

The defendant in an attorney malpractice action bears the burden of proving when the plaintiff discovered, or through the use of reasonable diligence should have discovered, the facts constituting the alleged malpractice [*Samuels v. Mix (1999) 22 Cal. 4th 1, 8-9, 91 Cal. Rptr. 2d 273, 989 P.2d 701]* . Although the burden of proving discovery usually falls on the plaintiff when applying other discovery rules, such as the common law discovery rule [*see* Ch. 345, *Limitation of Actions* ., the burden when applying *Code Civ. Proc. § 340.6(a)* falls instead on the defendant, primarily because this particular statutory discovery rule is technically an element of the affirmative statute of limitations defense, rather than an exception used by a plaintiff to argue for a delay in accrual of the applicable limitations period [*Samuels v. Mix (1999) 22 Cal. 4th 1, 8-9, 91 Cal. Rptr. 2d 273, 989 P.2d 701* ; *see Evid. Code § 500* (party generally has burden of proof as to each essential fact of claim or defense that party asserts)].

Under the discovery rule as it existed before the enactment of *Code Civ. Proc. § 340.6*, the client's failure to discover facts constituting fraud or misrepresentation by the attorney was often excused until the attorney-client relationship was terminated, because a client may not be able to recognize the negligence of his or her attorney when he or she sees it, and because a confidential relationship normally exists between attorney and client [*see* *Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 1166-1167, 217 Cal. Rptr. 89* (conduct predated effective date of *Code Civ. Proc. § 340.6*)].

Discovery of one wrongful act committed by an attorney does not necessarily begin the running of the limitations period for a suit based on a related but separate act. The court of appeal reversed a summary judgment that was granted to defendant on the basis of the one-year provision of *Code Civ. Proc. § 340.6(a)*. The trial court had granted the motion for summary judgment on the ground that the defendant established that plaintiff had discovered some related acts of malpractice concerning certain community assets in a marital dissolution proceeding more than one year prior to suit. The court of appeal held that *Code Civ. Proc. § 340.6* provides that discovery of a wrongful act or omission starts the running of the statute of limitation as to that wrongful act or omission. The court rejected the defendant's contention that the discovery of a single wrongful act should commence the limitation period for a suit on a related but separate act [*McCann v. Welden (1984) 153 Cal. App. 3d 814, 820-821, 200 Cal. Rptr. 703]* .

The statute of limitations is not tolled by a belated discovery by the plaintiff of the legal theories, as distinguished from the facts, underlying a legal malpractice action. The test is whether or not the plaintiff has knowledge of circumstances, or a reasonable opportunity to have obtained the knowledge from available sources, sufficient to put a reasonable person on notice of a potential legal malpractice claim. If the client believes that damages were suffered because the attorney has done something wrong, this fact is sufficient notice to the plaintiff of the need for an investigation and the pursuit of a remedy [*see* *Johnson v. Haberman & Kassoy (1988) 201 Cal. App. 3d 1468, 1476, 247 Cal. Rptr. 614* ; *see also*

McGee v. Weinberg (1979) 97 Cal. App. 3d 798, 803, 159 Cal. Rptr. 86 (applying *Code Civ. Proc. § 339(1)*, formerly applicable to legal malpractice actions)].

[b] Accrual of Cause of Action

In enacting *Code Civ. Proc. § 340.6*, the legislature appeared to follow the cases that held that a legal malpractice action did not accrue, and the statute of limitations therefore did not begin to run, until a plaintiff had sustained actual damage [*Budd v. Nixen (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433* ; *see Alhino v. Starr (1980) 112 Cal. App. 3d 158, 176, 169 Cal. Rptr. 136]* . Subsequent case authority supports the view that the portion of *Code Civ. Proc. § 340.6* providing for the tolling of the statute of limitations during the period that the plaintiff has not sustained "actual injury" [*Code Civ. Proc. § 340.6(a)(1)*] is a codification of this rule [*see, e.g., Jordache Enters., Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal. 4th 739, 748-751, 76 Cal. Rptr. 2d 749, 958 P.2d 1062* ; *Laird v. Blacker (1992) 2 Cal. 4th 606, 614-615, 7 Cal. Rptr. 2d 550, 828 P.2d 691* ; *Turley v. Wooldridge (1991) 230 Cal. App. 3d 586, 590-594, 281 Cal. Rptr. 441* ; *Troche v. Daley (1990) 217 Cal. App. 3d 403, 410, 266 Cal. Rptr. 34]* .

The Supreme Court has held that the test for actual injury under Section 340.6 is whether the plaintiff has sustained any damages compensable in a legal action, other than one for actual fraud, against an attorney for a wrongful act or omission arising in the performance of professional services. [*Jordache Enters., Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal. 4th 739, 751, 76 Cal. Rptr. 2d 749, 958 P.2d 1062.]* The Court has also made clear that there is no "bright line" rule establishing when actionable harm occurs and a cause of action therefore accrues, and that the codification of *Code Civ. Proc. § 340.6(a)(1)* has not altered the well-settled principle that in legal malpractice actions, statute of limitiations issues, including injury, are at base factual inquiries [*Jordache Enters., Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal. 4th 739, 751, 76 Cal. Rptr. 2d 749, 958 P.2d 1062* ; *Adams v. Paul (1995) 11 Cal. 4th 583, 588, 46 Cal. Rptr. 2d 594, 904 P.2d 1205]* .

It is the fact of damage, rather than the amount, that is the critical factor when determining whether the malpractice plaintiff has sustained actual damage, although the legally cognizable damages that are sufficient to run the limitations period must be more than nominal damages [*Jordache Enters., Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal. 4th 739, 752, 76 Cal. Rptr. 2d 749, 958 P.2d 1062]* . However, neither difficulty in proving damages nor uncertainty as to the amount of damages will toll the limitations period [*Jordache Enters., Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal. 4th 739, 752, 76 Cal. Rptr. 2d 749, 958 P.2d 1062]* .

Actual injury may consist of the impairment or diminution of a right or remedy, as well as the total loss or extinction of a right or remedy [*Jordache Enters., Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal. 4th 739, 750, 76 Cal. Rptr. 2d 749, 958 P.2d 1062* ; *Adams v. Paul (1995) 11 Cal. 4th 583, 590, 46 Cal. Rptr. 2d 594, 904 P.2d 1205]* . Moreover, while no actual injury has been sustained merely because an attorney's error may have created a potential for harm in the future [*see, e.g., Fritz v. Ehrmann (2006) 136 Cal. App. 4th 1374, 1383, 39 Cal. Rptr. 3d 670]* , an actual injury may be sustained for limitations purposes even though future developments may remedy or reduce the amount of the damages suffered [*Jordache Enters., Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal. 4th 739, 754, 76 Cal. Rptr. 2d 749, 958 P.2d 1062]* . Thus, for cases in which the actual injury is sustained at the time of adjudication of an underlying lawsuit, there is no statutory or common-law requirement that the injury be irremediable, in terms of appellate finality or exhaustion, in order to be actual [*Laird v. Blacker (1992) 2 Cal. 4th 606, 617-620, 7 Cal. Rptr. 2d 550, 828 P.2d 691]* .

Actual injury refers only to the legally cognizable damage needed to assert the cause of action for legal malpractice. There is no requirement that an adjudication or settlement must first confirm a causal nexus between the attorney's error and the asserted injury. The determination of actual injury requires only a factual analysis of the alleged error and its consequences [*Jordache Enters., Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal. 4th 739, 752, 76 Cal. Rptr. 2d 749, 958 P.2d 1062]* . Thus, for example, if the alleged malpractice consists of negligent advice that prompts plaintiff to sign a contract he or she later seeks to rescind, actual injury may be sustained when the plaintiff hires a new attorney to

pursue rescission, as plaintiff at that point incurs liability for legal fees due to the first attorney's malpractice [*Truong v. Glasser (2009) 181 Cal. App. 4th 102, 114-115, 103 Cal. Rptr. 3d 811]* .

Prior to the decision of the Supreme Court in *Jordache Enterprises,* the Supreme Court had held earlier in *Laird v. Blacker* that in cases in which the malpractice arises from litigation, actual injury occurs and the statute of limitations begins to run on entry of adverse judgment or final order of dismissal in the underlying action in which the malpractice occurred [*Laird v. Blacker (1992) 2 Cal. 4th 606, 615, 7 Cal. Rptr. 2d 550, 828 P.2d 691* ; *cf. Code Civ. Proc. § 340.6(a)(2)* (statutory period tolled while attorney continues to represent plaintiff regarding specific subject matter in which alleged wrongful act or omission occurred)]. Nothing in *Jordache Enterprises* expressly questions the continued viability of the holding in *Laird,* and it seems likely that the holding is still valid for straightforward cases in which the alleged malpractice occurred in the course of litigation while representing the malpractice plaintiff.

However, caution should be exercised, because under the appropriate set of facts, actual injury may arguably be sustained earlier. For example, in one case decided prior to the opinion in *Jordache Enterprises,* the court of appeal suggested that in cases in which the malpractice consists of failure to prosecute the underlying case, actual injury may be sustained prior to dismissal of the suit, for example, when there is a delay between expiration of the time period for prosecuting the action and actual dismissal of the suit and dismissal might have been avoided under the particular facts of the case [*see* *Moss v. Stockdale, Peckham & Werner (1996) 47 Cal. App. 4th 494, 501-503, 54 Cal. Rptr. 2d 805* (expiration of five-year period for bringing case to trial as required by *Code Civ. Proc. § 583.310* did not constitute actual injury as matter of law when dismissal did not occur until two months later and factual question existed as to whether provision tolling five-year period was applicable)].

While the continued viability of *Laird* may not be entirely clear, the Court in *Jordache Enterprises* did expressly overrule its earlier holding in *ITT Small Business Finance Corp. v. Niles,* in which the Court attempted to establish a bright-line rule that actual damages are sustained in transactional malpractice cases in which the adequacy of the documentation is the subject of the dispute upon entry of adverse judgment, settlement, or dismissal of the underlying action [*see* *ITT Small Bus. Fin. Corp. v. Niles (1994) 9 Cal. 4th 245, 258, 36 Cal. Rptr. 2d 552, 885 P.2d 965]* . The *ITT* holding was overruled precisely for its attempt to establish a bright-line rule, which conflicted with the fact-specific approach subsequently utilized by the Supreme Court plurality in *Adams v. Paul* and adopted by the Court majority in *Jordache Enterprises* [*Jordache Enters., Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal. 4th 739, 763, 76 Cal. Rptr. 2d 749, 958 P.2d 1062]* . Given the Court's express overruling of *ITT,* extreme caution should be used before relying on court of appeal opinions decided after *ITT* and before *Jordache Enterprises,* at least to the extent that such cases rely on *ITT*'s bright-line approach, rather than a more fact-specific analysis [*compare* *Karno v. Biddle (1995) 36 Cal. App. 4th 622, 629, 42 Cal. Rptr. 2d 318* (applying *ITT,* cause of action accrued when litigation was settled); *with Sindell v. Gibson, Dunn & Crutcher (1997) 54 Cal. App. 4th 1457, 1468-1471, 63 Cal. Rptr. 2d 594* (distinguishing *ITT,* actual damages were sustained when plaintiffs were forced to incur attorney's fees and other costs)].

The California Supreme Court has held that the myriad of circumstances under which statute of limitations issues may arise in cases in which the attorney allegedly missed a statute of limitations in the underlying action illustrates the practicality of applying the prevailing "question-of-fact" rule to the determination of when actual injury occurred. The number of potential variables, which do not necessarily follow a set pattern, precludes defining the point of harm as a fixed point or event because reasonable application becomes too problematic. Thus, the issue may be resolved as a matter of law only if the facts are undisputed [*Adams v. Paul (1995) 11 Cal. 4th 583, 588, 46 Cal. Rptr. 2d 594, 904 P.2d 1205]* . The illustrative cases discussed below should therefore be read in light of this general deference to the trier of fact.

In the "classic" missed statute situation, in which the attorney negligently fails to file the underlying lawsuit within the applicable statutory period and does nothing further, actual injury for purposes of *Code Civ. Proc. § 340.6* occurs when the client's underlying action becomes time-barred [*Finlayson v. Sanbrook (1992) 10 Cal. App. 4th 1436, 1444, 13 Cal. Rptr. 2d 406]* . After the underlying action becomes time-barred, plaintiff's attempts to remedy his or her injury do

not delay commencement of the statute of limitations for attorney malpractice [*Finlayson v. Sanbrook (1992) 10 Cal. App. 4th 1436, 1443, 13 Cal. Rptr. 2d 406* (plaintiff attempted to file third-party action after original action was time-barred)]. Similarly, when an attorney's alleged malpractice prevented a client from protecting its right to develop a parcel of property by exercising its right to automatically annex the property within a three-year time period, the statute of limitations began to run when the time limit for automatic annexation expired, rather than when the client later received an adverse judgment in litigation against a third party over its annexation rights [*Foxborough v. Van Atta (1994) 26 Cal. App. 4th 217, 227, 31 Cal. Rptr. 2d 525]* .

If the attorney's negligence results in a judicial judgment or order causing harm to the client, the fact that the judgment or order could be remedied pursuant to *Code Civ. Proc. § 473* for six months after it is taken does not delay the accrual of the client's cause of action against the attorney [*see Turley v. Wooldridge (1991) 230 Cal. App. 3d 586, 590-594, 281 Cal. Rptr. 441* (statute of limitations began to run on date judgment was entered, not six months thereafter); *see also Code Civ. Proc. § 473(b)* (relief from judgment or order taken by mistake, inadvertence, surprise, or excusable neglect)]. Similarly, if the attorney's negligence results in the entry of judgment in a dissolution action that causes harm to the client, the statutory provision giving the court in a separation, dissolution, or annulment action continuing jurisdiction to award to parties community assets or community liabilities that have not been previously awarded by a judgment in that action does not toll the running of the statute of limitations [*Worton v. Worton (1991) 234 Cal. App. 3d 1638, 1651-1652, 286 Cal. Rptr. 410* (malpractice action based on attorney's failure in dissolution action to discover and obtain evidence of client's spouse's excess assets, resulting in entry of judgment of dissolution that failed to divide the excess assets); *see Fam. Code § 2556*].

If an attorney commits two distinct acts of malpractice with two distinct injuries or potential injuries, the statute of limitations may accrue and run for one injury without affecting the limitations period for bringing suit for the other injury [*Fritz v. Ehrmann (2006) 136 Cal. App. 4th 1374, 1386-1387, 39 Cal. Rptr. 3d 670]* .

[c] Continuous Representation of Client

The limitations period of *Code Civ. Proc. § 340.6* is tolled during the period that the negligent attorney continues to represent the plaintiff regarding the specific subject matter in which the allegedly wrongful act or omission occurred [*Code Civ. Proc. § 340.6(a)*]. This tolling rule is justified because it avoids disrupting an ongoing attorney-client relationship with a malpractice claim against the attorney, while also providing the attorney time to correct or minimize his or her error. In addition, this tolling period prevents the attorney from defeating a malpractice action by continuing to represent the client until after the statute of limitations has expired [*Gold v. Weissman (2004) 114 Cal. App. 4th 1195, 1199, 8 Cal. Rptr. 3d 480* ; *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort (2001) 91 Cal. App. 4th 875, 887, 110 Cal. Rptr. 2d 877]* .

The court of appeal held that an attorney who allows a statute of limitations to expire "continues to represent" the client regarding the "specific subject matter" in which the malpractice occurred as long as the attorney represents the client in a related action. In that case, the attorney had allowed the statute of limitations to expire on a personal injury claim against a nonemployer third-party tortfeasor, but continued to represent the plaintiff in a workers' compensation action arising out of the same accident. The court ruled that the "specific subject matter" of the representation included both the workers' compensation claim and the third-party action, and the attorney's continued representation of the plaintiff tolled the statute of limitations during the period of this representation [*Baright v. Willis (1984) 151 Cal. App. 3d 303, 309-310, 198 Cal. Rptr. 510* ; *see also Nielsen v. Beck (2007) 157 Cal. App. 4th 1041, 1054, 69 Cal. Rptr. 3d 435* (triable issue existed as to whether representation on bankruptcy matters was same subject matter as representation on unlawful detainer action); *Gold v. Weissman (2004) 114 Cal. App. 4th 1195, 1200-1201, 8 Cal. Rptr. 3d 480* (attorney's efforts on behalf of client in preparing complaint against doctor for filing with California Board of Medical Quality Assurance constituted continued representation stemming from underlying medical malpractice claim)].

Similarly, an attorney continued to represent a client on the specific subject matter in which the alleged malpractice

occurred, relating to the client's sale of a partnership interest, when the attorney's continued representation included assisting the client in restructuring the transaction and collecting on a new note that was created as a part of the restructuring [*Crouse v. Brobeck, Phleger, & Harrison (1998) 67 Cal. App. 4th 1509, 1528-1529, 80 Cal. Rptr. 2d 94]* .

In contrast, continuous representation was found not to exist when there was a four-year gap between an attorney's representation of a client in a real estate development matter and his subsequent acts of serving as a consultant and expert in litigation arising out of that transaction. That court opinion distinguished continuous, non-sporadic representation regarding a specific subject matter from the existence of a continuing attorney-client relationship. It concluded as a matter of law that the continuous representation requirement had not been met because of the client's retention of new counsel, the lack of contact between the attorney and the client during the four-year period, and the significant change in the attorney's role in the subsequent litigation [*Foxborough v. Van Atta (1994) 26 Cal. App. 4th 217, 227, 31 Cal. Rptr. 2d 525]* .

However, at least one court of appeal opinion has held that if the case involves negligence in the preparation of transactional documents, the statute of limitations is tolled under the continued representation provision when the client comes to the attorney after the potential malpractice manifests itself, and before the limitations period has run, in an attempt to have the attorney rectify the problem or mitigate the damage. Under these circumstances, it does not matter if there is a gap in time, after the completion of the documents and until the client returns to the attorney with the problem, during which the attorney was not actually "continuing to represent" the client with respect to that specific subject matter [*Fritz v. Ehrmann (2006) 136 Cal. App. 4th 1374, 1390-1391, 39 Cal. Rptr. 3d 670]* .

Court of appeal opinions disagree on whether continuous representation is determined by an objective or subjective standard. At least one opinion has concluded that the determination of whether an attorney's representation is continuous is generally an objective determination and that the subjective beliefs of the parties are not dispositive [*Worthington v. Rusconi (1994) 29 Cal. App. 4th 1488, 1495-1499, 35 Cal. Rptr. 2d 169* . However, another court of appeal opinion has applied a more subjective standard and held that if an attorney unilaterally withdraws or abandons the client, the representation ends for these purposes when the client actually has or reasonably should have no expectation that the attorney will provide further legal services. Therefore, the representation may end when the attorney provides express notification to the client that the attorney will perform no further services, or, if the attorney remains silent, the end of the representation may be inferred from the circumstances of the case. The issue of whether the client actually and reasonably believed that the attorney would provide further legal services in the matter is predominantly a question of fact [*Gonzalez v. Kalu (2006) 140 Cal. App. 4th 21, 30-31, 43 Cal. Rptr. 3d 866* ; *see also Hensley v. Caietti (1993) 13 Cal. App. 4th 1165, 1172, 16 Cal. Rptr. 2d 837* (determination of when attorney-client relationship ends is based on client's perspective)].

In that case, for example, a triable issue existed as to whether the limitations period was tolled when the client had no contact with the attorney for two-and-a-half years after hiring the attorney to prosecute a sexual harassment claim against the client's employer. During that period, the limitations period had expired on both the underlying claims and the attorney malpractice claim. However, the plaintiff presented evidence that the attorney's office had told her that the claim would take a very long time and that the office would contact her, although the attorney never prosecuted the claim beyond filing an administrative claim and never contacted her. In addition, there was no evidence that the plaintiff had been advised as to the time frames within which specific actions would need to be taken. Under those circumstances, the court could not say as a matter of law that it was unreasonable for the plaintiff not to have known during the long period with no contact that the attorney was no longer representing her [*Gonzalez v. Kalu (2006) 140 Cal. App. 4th 21, 31-33, 43 Cal. Rptr. 3d 866]* .

Even if clients continue to retain attorneys whom they suspect have committed malpractice, the limitations period for filing a malpractice action is tolled, despite any lack of trust and confidence in the attorney-client relationship. "Trust and confidence" are not express requirements of the continued representation tolling provision of *Code Civ. Proc. §*

340.6 [*O'Neill v. Tichy (1993) 19 Cal. App. 4th 114, 120-121, 25 Cal. Rptr. 2d 162]* .

Execution of a substitution of attorney form does not necessarily dictate a finding that the attorney's representation of the client has ceased, at least if there is contrary evidence from which the trier of fact could conclude that the representation continued beyond that date [*see Nielsen v. Beck (2007) 157 Cal. App. 4th 1041, 1051, 69 Cal. Rptr. 3d 435* (triable issue existed when attorney provided, and billed for, phone advice solicited by client after substitution of attorney form was executed)].

If an attorney leaves a law firm and takes the representation of a particular client with him or her, the statute of limitations does not continue to toll under the continued representation exception on a malpractice action that the client may have against the attorney's former law firm or any of the other attorneys in that firm [*Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal. 4th 503, 505, 66 Cal. Rptr. 3d 52, 167 P.3d 666* (disapproving contrary conclusion of *Beane v. Paulsen (1993) 21 Cal. App. 4th 89, 26 Cal. Rptr. 2d 486*); *Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal. App. 4th 1509, 1538-1539, 80 Cal. Rptr. 2d 94]* . In so holding, the California Supreme Court concluded that this result was more consistent with the language of *Code Civ. Proc. § 340.6*, which extends this tolling exception to the period during ongoing representation by "the attorney" [*Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal. 4th 503, 508-509, 66 Cal. Rptr. 3d 52, 167 P.3d 666]* .

The Court also concluded that the purposes underlying the continued representation exception--to avoid disruption of the attorney-client relationship while providing the attorney an opportunity to correct or minimize any error, and to prevent an attorney from defeating a malpractice action by continuing to represent the client until the limitations period on the malpractice claim has expired--are only minimally implicated when the individual defendant attorney actually providing representation has left a defendant law firm. There is no longer any risk a defendant firm that is no longer providing representation to plaintiff will try to stall until the expiration period on the malpractice claim has expired by providing assurances to the plaintiff. Conversely, the law firm loses all ability to mitigate any potential damage to the client and there is no longer any attorney-client relationship to protect [*Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal. 4th 503, 511-512, 66 Cal. Rptr. 3d 52, 167 P.3d 666]* . Moreover, a contrary rule, according to the Court, would subject the former law firm to an indeterminate period of potential liability over which it has no control, frustrating one goal of the statute of limitations [*Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal. 4th 503, 512, 66 Cal. Rptr. 3d 52, 167 P.3d 666]* . The Court also noted that voluntary tolling agreements and stays of litigation could be used to reduce the impact of any lawsuit brought against the former employing firm, which when sued might counter with an indemnity suit against the individual attorney that continues to represent the client [*Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal. 4th 503, 505, 66 Cal. Rptr. 3d 52, 167 P.3d 666]* .

[d] Concealment Rule

The statute of limitations is tolled during the time that the attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the attorney, although this applies only to the four-year limitation of *Code Civ. Proc. § 340.6(a)* [*Code Civ. Proc. § 340.6(a)(3)*].

[e] Tolling During Incapacities

The statute of limitations is tolled while the plaintiff is under a legal or physical disability that restricts the plaintiff's ability to commence legal action [*Code Civ. Proc. § 340.6(a)(4)*]. Consequently, if the plaintiff is under the age of majority or insane, the statute of limitations will be tolled during the time that the incapacity exists [*see Code Civ. Proc. § 352(a)*; *Bledstein v. Superior Court (1984) 162 Cal. App. 3d 152, 162, 208 Cal. Rptr. 428]* . The statute of limitations is also tolled for up to two years for periods during which the claimant is imprisoned on a criminal charge [*see Code Civ. Proc. § 352.1*]. The statute would also be tolled during the time that other disabilities contained in Chapter 4 of the Code of Civil Procedure apply [*Bledstein v. Superior Court (1984) 162 Cal. App. 3d 152, 163, 208 Cal. Rptr. 428* ; *see, e.g., Code Civ. Proc. §§ 351, 353-356*].

[f] Equitable Tolling and Equitable Estoppel

The equitable tolling doctrine, under which a plaintiff may be relieved of the effects of a statute of limitations to prevent a technical forfeiture and an unjustifiable deprivation of a trial on the merits, does not apply to attorney malpractice actions subject to *Code Civ. Proc. § 340.6* [*Gordon v. Law Offices of Aguirre & Meyer (1999) 70 Cal. App. 4th 972, 979-980, 83 Cal. Rptr. 2d 119]* . The courts have interpreted the language of *Code Civ. Proc. § 340.6(a),* which provides that "in no event" shall the limitations period be tolled except under the circumstances specified in the statute, as evidence of a legislative intent to disallow tolling in any other circumstances [*Gordon v. Law Offices of Aguirre & Meyer (1999) 70 Cal. App. 4th 972, 979-980, 83 Cal. Rptr. 2d 119]* . Thus, despite any lack of prejudice to the defendants, the court of appeal declined to apply the equitable tolling doctrine to a cause of action that was filed in an Arizona state court within the limitations period, dismissed due to lack of personal jurisdiction over the defendants, and then promptly refiled in a California court after expiration of the limitations period [*Gordon v. Law Offices of Aguirre & Meyer (1999) 70 Cal. App. 4th 972, 980, 83 Cal. Rptr. 2d 119]* . However, in that case the court also suggested that the equitable tolling doctrine would not apply under the facts in any event, because trial on the merits was not denied due to an error of the trial court or through forces outside of the plaintiffs' control, but because the plaintiffs mistakenly filed suit in Arizona against California defendants [*Gordon v. Law Offices of Aguirre & Meyer (1999) 70 Cal. App. 4th 972, 980 n.8, 83 Cal. Rptr. 2d 119]* .

Unlike equitable tolling, however, a defendant in a legal malpractice action may be equitably estopped from asserting the statute of limitations under the appropriate circumstances. Estoppel may be applied if: (1) the attorney renders legal advice to the client with knowledge of the effect this would have on the statute of limitations; (2) the attorney intends the client to rely on the advice, or the client has the right to believe the attorney so intended; (3) the client was unaware of the effect the advice would have on the statute of limitations; and (4) the client relies on the advice to the client's detriment [*see* *Leasequip, Inc. v. Dapeer (2002) 103 Cal. App. 4th 394, 403-404, 126 Cal. Rptr. 2d 782]* .

In one case, for example, an attorney advised his corporate client that the failure to comply with corporate formalities would have no negative effect on the corporation's ability to pursue legal claims, and in reliance on that advice, the corporation failed to file required statements with the state and was suspended. While suspended, the corporation filed a malpractice suit against the attorney, but could not legally do so while its corporate powers were suspended, so the corporation was forced to wait until after its corporate powers were restored to prosecute the suit. By then, however, the statute of limitations had expired. The court of appeal held that the attorney was equitably estopped from asserting the statute of limitations, because the client's reliance on the attorney's advice was the cause of both the corporation's suspension and the expiration of the statute of limitations [*Leasequip, Inc. v. Dapeer (2002) 103 Cal. App. 4th 394, 404-405, 126 Cal. Rptr. 2d 782]* . The court noted that although Section 340.6 may not be tolled for reasons not specified by the statute, estoppel is a distinct concept that does not seek to extend the limitations period, but comes into play only after the limitations period has expired to prevent a defendant from benefiting from the defendant's own wrongdoing [*Leasequip, Inc. v. Dapeer (2002) 103 Cal. App. 4th 394, 406-407, 126 Cal. Rptr. 2d 782]* .

[g] Effect of Pursuing Administrative Remedies

If administrative remedies exist to rectify problems created by an attorney's malpractice, the statute of limitations is tolled while the plaintiff seeks those remedies [*Robinson v. McGinn (1987) 195 Cal. App. 3d 66, 74, 77-78, 240 Cal. Rptr. 423* (disapproved in *Laird v. Blacker (1992) 2 Cal. 4th 606, 617, 7 Cal. Rptr. 2d 550, 828 P.2d 691* , to extent it conflicts with *Laird's* holding that claim accrues when actual injury occurs rather than when injury becomes irremediable)]. This is because actual injury occurs and the malpractice claim accrues when administrative remedies have been exhausted, without regard to potential judicial remedies [*see* *Turley v. Wooldridge (1991) 230 Cal. App. 3d 586, 592, 281 Cal. Rptr. 441* ; *see also* *Laird v. Blacker (1992) 2 Cal. 4th 606, 617, 7 Cal. Rptr. 2d 550, 828 P.2d 691* (citing *Turley* with approval and disapproving *Robinson* to extent it conflicts with *Laird's* holding that claim accrues when actual injury occurs rather than when injury becomes irremediable)].

[h] Effect of Attorney's Failure to Withdraw Formally

Failure to withdraw formally as a client's attorney of record, standing alone, will not toll the statute of limitations under *Code Civ. Proc. § 340.6(a)* [*Shapero v. Fliegel (1987) 191 Cal. App. 3d 842, 846-849, 236 Cal. Rptr. 696* ; *see Hensley v. Caietti (1993) 13 Cal. App. 4th 1165, 1172, 16 Cal. Rptr. 2d 837* (action time-barred when filed more than one year after attorney-client oral disagreement, but less than one year after substitution of attorney)]. If the attorney-client relationship disintegrates, the statute will begin to run, regardless of the attorney's technical status [*see Shapero v. Fliegel (1987) 191 Cal. App. 3d 842, 846-849, 236 Cal. Rptr. 696* (failure of divorce counsel formally to withdraw as counsel of record under *Code Civ. Proc. § 285.1* does not satisfy "continued representation" provision of *Code Civ. Proc. 340.6*); *see generally § 76.170[1][a]*].

[i] Effect of Suspension and Revival of Plaintiff's Corporate Status

Suspension of corporate powers for nonpayment of corporate taxes can effectively bar a corporate plaintiff from bringing a malpractice action, and can also facilitate a defendant's pleading of the statute of limitations as an affirmative defense [*ABA Recovery Servs., Inc. v. Konold (1988) 198 Cal. App. 3d 720, 724-725, 244 Cal. Rptr. 27]* . In one case, the plaintiff corporation's charter was suspended on March 1, 1985, under *Rev. & Tax. Code § 23301* for nonpayment of fees and taxes. Plaintiff discovered defendant attorney's negligence on March 19, 1985, and therefore had until March 19, 1986, to file its malpractice lawsuit [*see Code Civ. Proc. § 340.6(a)*]. It filed its lawsuit on March 17, 1986, within the one-year period, but while its corporate powers were still suspended. Defendants moved for summary judgment, based on the statute of limitations, and prevailed in the trial court. The court of appeal affirmed, finding that the plaintiff had no capacity to prosecute a civil action during the suspension, and therefore could not bring its action within the one-year statutory period mandated by Civ. Code § 340.6 [*ABA Recovery Servs., Inc. v. Konold (1988) 198 Cal. App. 3d 720, 724-725, 244 Cal. Rptr. 27* (citing *Welco Constr. Inc. v. Modulux, Inc. (1975) 47 Cal. App. 3d 69, 71, 120 Cal. Rptr. 572* for proposition that corporation suspended pursuant to *Rev. & Tax. Code § 23301* lacks capacity to sue)]. Plaintiff argued that it obtained a certificate of revivor during pendency of the action and that therefore the trial court should have permitted it to maintain its action. The court of appeal disagreed, holding that when a substantive defense accrues during corporate suspension, a corporate revival will not prejudice that defense [*ABA Recovery Servs., Inc. v. Konold (1988) 198 Cal. App. 3d 720, 724, 244 Cal. Rptr. 27* (construing *Rev. & Tax. Code § 23305a*, which states that reinstatement of corporate status must be without prejudice to any defense that has accrued by reason of the original suspension)].

Although expiration of the statute of limitations would generally prevent a suspended corporate plaintiff from bringing a legal malpractice action, if the suspension is caused by the legal advice given by the attorney to the corporation, the attorney may be equitably estopped from asserting the statute of limitations [*see § 76.170[2][e]*].

PRACTICE TIP:

Ascertaining Plaintiff's Corporate Status. The defendant in a legal malpractice action instituted by a corporation should always ascertain the plaintiff's corporate status at the outset of the lawsuit in order to determine if a statute of limitations defense can be interposed based on the plaintiff's lack of capacity to sue during the relevant time period.

[j] Effect of Statute on Equitable Indemnity Actions

A tort defendant's equitable indemnity action is separate and distinct from the tort plaintiff's action against the defendant. The indemnity action is governed by its own limitations period, even though the tort plaintiff's direct action against the indemnitor may be barred by its own statute of limitations. Moreover, the indemnity action does not accrue for purposes of the statute of limitations until the defendant pays a judgment or settlement for which the defendant is entitled to indemnity [*Crouse v. Brobeck, Phleger, & Harrison (1998) 67 Cal. App. 4th 1509, 1541, 80 Cal. Rptr. 2d 94]* . Thus, *Code Civ. Proc. § 340.6* does not apply to claims for equitable indemnity brought by one liable attorney

against other potentially liable attorneys [*Crouse v. Brobeck, Phleger, & Harrison (1998) 67 Cal. App. 4th 1509, 1542-1544, 80 Cal. Rptr. 2d 94]* .

[3] Bifurcation

In California the trial judge is given discretion to grant a trial of special defenses or of any issue or any part thereof before the trial of any other issue [*see Code Civ. Proc. §§ 597, 597.5*], and in legal malpractice litigation counsel may wish to seek trial of the issue of the statute of limitations prior to a separate trial of the issue of the attorney's negligence.

PRACTICE TIP:

Considerations Regarding Separate Juries. Since there is a serious tactical disadvantage to a defendant of failing to prevail on a technical defense like the statute of limitations before the same jury that will subsequently hear the case on the merits, defendant's counsel should assess whether to abandon the defense if the court refuses to empanel separate juries for the trials of the statute of limitations and the case in chief, respectively. Busy trial judges typically do not empanel separate juries under these circumstances for reasons of judicial economy, and thus, it is often better for the defendant to abandon the statute of limitations defense unless it (1) has a strong chance of success, or (2) is the only viable defense that can be asserted and the case is apt to be lost on the merits.

Due to these concerns, it is almost invariably advisable for the defendant to most aggressively pursue any available statute of limitations defense through a summary judgment motion.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLegislationStatutes of LimitationsTollingTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled ProfessionalsTortsProcedureMultiple DefendantsIndemnityNoncontractual Indemnity

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7-76 California Forms of Pleading and Practice--Annotated § 76.171

AUTHOR: GEORGE M. LINDAHL

§ 76.171 Comparative Negligence

An attorney can assert the affirmative defense of comparative negligence to a cause of action for negligence in a legal malpractice case [*see, e.g., Kirsch v. Duryea (1978) 21 Cal. 3d 303, 308, 311, 146 Cal. Rptr. 218, 578 P.2d 935* (plaintiff found 2.5 percent negligent but judgment reversed on other grounds); *BAJI No. 3.50*]. Prior to California's adoption of the comparative negligence doctrine in 1975 [*see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226]* , the defense of contributory negligence was held to apply to legal malpractice actions [*Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 530, 50 Cal. Rptr. 592* ; *Theobald v. Byers (1961) 193 Cal. App. 2d 147, 150, 13 Cal. Rptr. 864]* . While the term "contributory negligence" has not been abolished, the former result, a bar to plaintiff's recovery, has [*Wittenbach v. Ryan (1976) 63 Cal. App. 3d 712, 718, 134 Cal. Rptr. 47]* . Presently, the contributory negligence of the person injured reduces the damages awarded in proportion to the amount of negligence attributable to the person recovering [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858, 532 P.2d 1226]* . Therefore, cases decided before the doctrine of comparative negligence was adopted should still be good law to the extent that they permit evidence of the plaintiff's negligence to reduce the plaintiff's recovery.

The defense of comparative negligence is often asserted in two general contexts in a legal malpractice case. The first is when the client fails to follow the advice of counsel and sustains damages as a result of this failure. In one case, the court of appeal suggested in dictum that a client's failure to follow the attorney's advice could support a contributory negligence defense [*Theobald v. Byers (1961) 193 Cal. App. 2d 147, 150, 13 Cal. Rptr. 864]* . The second context in which the comparative negligence defense may be appropriate is when the client has failed to cooperate with the attorney and damages result. This sometimes amounts to an actual obstruction of the attorney's representation. However, it typically falls into the category of a client's refusal or failure to act, such as the failure of a personal injury plaintiff to comply with court-ordered discovery, causing a dismissal of the underlying case. This arose in another context in a case in which the attorney had negotiated for the client, a criminal defendant, to receive psychiatric treatment instead of a prison sentence, but the client was sentenced to prison after failing to appear for his sentencing. In reversing the trial court, the appellate court held that the attorney should have been allowed to offer evidence that the client was

imprisoned solely because he failed to follow the attorney's instructions to appear for sentencing [*Martin v. Hall (1971) 20 Cal. App. 3d 414, 428, 97 Cal. Rptr. 730]* . It should be noted, however, that the court deemed this evidence relevant on the issue of damages and did not consider whether it was also relevant evidence of contributory negligence [*Martin v. Hall (1971) 20 Cal. App. 3d 414, 428, 97 Cal. Rptr. 730]* .

It might be argued that a client's failure to cooperate with the attorney is technically not comparative negligence, but rather negates the allegation that the attorney was negligent. However, there is a fine line between these two concepts, and the prudent attorney defending a legal malpractice action should assert the affirmative defense of comparative negligence when there is evidence of a client's failure to cooperate in his or her legal representation.

When the plaintiff alleges an intentional tort, the defense of contributory negligence does not apply [*see Godfrey v. Steinpress (1982) 128 Cal. App. 3d 154, 176, 180 Cal. Rptr. 95* (contributory negligence not applicable in fraud action when no negligence involved)]. There are also other situations in which the defense of contributory negligence has been unsuccessful. One such situation is when the client fails to oversee the work of the attorney, particularly the litigation attorney. The courts have held that a client is not under a duty to keep abreast of a lawsuit or other legal matter and actually oversee it [*see Daley v. County of Butte (1964) 227 Cal. App. 2d 380, 392-393, 38 Cal. Rptr. 693* ; *Theobald v. Byers (1961) 193 Cal. App. 2d 147, 151, 13 Cal. Rptr. 864* ; *see also Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 530, 50 Cal. Rptr. 592* (plaintiff's failure to question defendant's actions as at most raising a jury issue regarding contributory negligence)].

Another basis on which the comparative negligence defense is sometimes improperly alleged is the failure of the plaintiff to mitigate damages. There are no reported cases discussing the client's failure to mitigate damages as comparative negligence. However, mitigation of damages should be considered a separate and distinct defense from comparative negligence [*see Green v. Smith (1968) 261 Cal. App. 2d 392, 397398* ; *see also BAJI Nos. 14.67, 14.68*; *see § 76.97*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityAttorneysTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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7-76 California Forms of Pleading and Practice--Annotated § 76.172

AUTHOR: GEORGE M. LINDAHL

§ 76.172 Good Faith and Error of Judgment

An attorney is not liable for every mistake he or she makes in his or her practice. The attorney does not insure the accuracy of his or her opinions or the validity of the document drafted for a client. Nor is the attorney liable for a mistake as to a legal question on which well-informed attorneys may entertain reasonable doubt [*Kirsch v. Duryea (1978) 21 Cal. 3d 303, 308, 146 Cal. Rptr. 218, 578 P.2d 935* ; *Smith v. Lewis (1975) 13 Cal. 3d 349, 358-359*]. However, before this defense may be asserted successfully, it must be shown that the attorney has met his or her duty to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based on an intelligent assessment of the problem [*Aloy v. Mash (1985) 38 Cal. 3d 413, 418, 212 Cal. Rptr. 162, 696 P.2d 656* ; *Smith v. Lewis (1975) 13 Cal. 3d 349, 358-359*]. Additionally, when an attorney does not have sufficient knowledge in a specific field of the law, he or she has a duty to refer a legal problem to a specialist, or be held to the standard of care required of a specialist in the problem area [*Horne v. Peckham (1979) 97 Cal. App. 3d 404, 414-415, 158 Cal. Rptr. 714]* .

If an attorney is faced with a problem concerning the manner in which a doubtful or debatable legal subject will be resolved, performing reasonable research in an effort to ascertain relevant legal principles and make an informed decision regarding a course of conduct will preclude liability for malpractice, even when the course of conduct selected is shown to be erroneous by subsequent events [*see* *Davis v. Damrell (1981) 119 Cal. App. 3d 883, 888-889, 174 Cal. Rptr. 257]* . If such reasonable research is not undertaken, however, an attorney will be held liable for the failure to exercise informed discretion regarding the rights of the client [*Smith v. Lewis (1975) 13 Cal. 3d 349, 358-359*]. Such liability regarding a debatable point of law may be imposed even if the attorney's decision was subsequently vindicated [*see* *Aloy v. Mash (1985) 38 Cal. 3d 413, 212 Cal. Rptr. 162, 696 P.2d 656* (despite fact that attorney's conclusion of law that military pensions were community property was subsequently vindicated by the United States Supreme Court in *McCarty v. McCarty (1981) 453 U.S. 210,* (*superseded by statute as stated in* *In re Marriage of Smith (2007) 148 Cal. App. 4th 1115, 56 Cal. Rptr. 3d 341*), attorney held negligent for failure to thoroughly research law in area of community property treatment of military pensions when attorney had never considered doctrine of federal

preemption)].

Although no case has directly so held, one court has suggested that if an attorney's research reveals several equally viable legal options, the attorney should advise the client of the options and the risks associated with each of them and afford the client the opportunity to decide which to pursue [*see Horne v. Peckham (1979) 97 Cal. App. 3d 404, 416, 158 Cal. Rptr. 714* (dictum)]. However, it is not at all clear that this dictum will serve as a basis for imposing malpractice liability.

While an attorney's duty regarding procedural steps is not completely clear, making a reasonable choice among permissible options will generally preclude negligence liability. In one case, it was alleged that an attorney negligently failed to notify the property insurers of a pending action against the insured sellers of the real property, and thus forced the sellers to defend the action themselves. The complaint also alleged that the attorney was negligent in failing to cross complain against other parties allegedly responsible for the damages in the underlying action. The court characterized the issue before it as whether or not the attorney had a duty to cross complain or notify the insurer of the action. The court also held that the existence of a particular duty was a question of law [*Banerian v. O'Malley (1974) 42 Cal. App. 3d 604, 613, 116 Cal. Rptr. 919]* . The court held as a matter of law that the attorney, in the reasonable exercise of his judgment, did not have a duty to cross complain or to notify the insurance carrier of the pending litigation. The court based its conclusion on the permissive nature of cross complaints, and the doubts that existed regarding the insurer's potential coverage of the incident that was the basis of the underlying action [*Banerian v. O'Malley (1974) 42 Cal. App. 3d 604, 613-615, 116 Cal. Rptr. 919]* .

Another area in which an attorney will not be held liable for a reasonable, good faith mistake is when the attorney believes that a proposed action lacks merit, and seeks to withdraw from representation [*see Kirsch v. Duryea (1978) 21 Cal. 3d 303, 308-311, 146 Cal. Rptr. 218, 578 P.2d 935]* . In one such case, the California Supreme Court has held that an attorney faced with an apparent conflict between the duty to the client and the public obligation to the judiciary not to pursue actions lacking in merit cannot be held liable for damages caused by the withdrawal from representation of the client unless the choice was so manifestly erroneous that no prudent attorney would have done so [*Kirsch v. Duryea (1978) 21 Cal. 3d 303, 309-310, 146 Cal. Rptr. 218, 578 P.2d 935]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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AUTHOR: GEORGE M. LINDAHL

§ 76.173 Release

Under the California Rules of Professional Conduct, a member of the State Bar of California may not contract with a client to prospectively limit the member's liability to the client for the member's professional malpractice [*Cal. Rules Prof. Conduct, Rule 3-400(A)*]. A member of the State Bar may not settle a claim or potential claim for malpractice unless the client is informed in writing that the client may seek the advice of an independent lawyer of the client's choice regarding the settlement and is given a reasonable opportunity to seek that advice [*Cal. Rules Prof. Conduct, Rule 3-400(B)*; *see also Donnelly v. Ayer (1986) 183 Cal. App. 3d 978,* (agreement to settle was proper when executed after attorney-client relationship had been terminated and client had consulted several other attorneys)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled ProfessionalsTortsProcedureSettlementsReleasesValidity

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7-76 California Forms of Pleading and Practice--Annotated § 76.174

AUTHOR: GEORGE M. LINDAHL

§ 76.174 Limited or Terminated Representation

The duty of an attorney to the client depends on the agreed scope of the attorney's representation. Consequently, the attorney may reduce his or her potential liability for legal malpractice by contractually limiting the representation in either its scope or duration [*see, e.g., Kalmus v. Kalmus (1951) 103 Cal. App. 2d 405, 424-426, 230 P.2d 57* (attorney engaged only to secure a continuance had no duty to defend lawsuit and could withdraw as counsel)]. For example, a tax attorney may agree to undertake the representation of a client strictly in corporate tax matters pertaining only to a particular tax year.

The defense of limited representation is perhaps most frequently asserted when a client sues an attorney for failing to include an additional cause of action in a lawsuit or for neglecting to institute a separate lawsuit on a matter related to the subject matter of the original representation. It has been argued that when the attorney and client agree to limit the scope of representation, the attorney is under no duty to the client to pursue any cause of action outside the scope of the agreement [*see Kane, Kane & Kritzer, Inc. v. Altagen (1980) 107 Cal. App. 3d 36, 42, 165 Cal. Rptr. 534* (representation limited to collection action); *Kalmus v. Kalmus (1951) 103 Cal. App. 2d 405, 424-426, 230 P.2d 57* (attorney engaged only to secure a continuance cannot be required to defend lawsuit and could withdraw as counsel)]. It appears that if an attorney clearly discloses the limited scope of the representation and the client knowingly agrees to it, the client cannot state a cause of action for legal malpractice based on the attorney's failure to represent the client beyond the limited scope of the agreed representation [*see Kane, Kane & Kritzer, Inc. v. Altagen (1980) 107 Cal. App. 3d 36, 42, 165 Cal. Rptr. 534]* .

If an attorney represents the plaintiff class in a class action lawsuit, the certification of the class does not relieve the attorney from a duty to advise about other potential claims the plaintiffs may have that arise from the same facts that underlie the certified claims [*Janik v. Rudy, Exelrod & Zieff (2004) 119 Cal. App. 4th 930, 934, 14 Cal. Rptr. 3d 751]* . This does not mean that the attorney must include other related claims, because doing so may expand the scope of the lawsuit and create additional grounds for the defendant to challenge the propriety of the class as certified. A failure to

actually include the additional claims in the lawsuit, however, goes to the issue of whether the attorney has breached the duty of care, and not to the issue of whether a duty of care exists to advise as to the potential claims [*Janik v. Rudy, Exelrod & Zieff (2004) 119 Cal. App. 4th 930, 942-943, 14 Cal. Rptr. 3d 751]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsAccepting RepresentationTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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7-76 California Forms of Pleading and Practice--Annotated § 76.175

AUTHOR: GEORGE M. LINDAHL

§ 76.175 Agreement to Arbitrate Claim

There are no published California appellate cases expressly upholding the enforceability of an agreement to arbitrate a legal malpractice claim [*but see Lawrence v. Walzer & Gabrielson (1989) 207 Cal. App. 3d 1501, 1507, 256 Cal. Rptr. 6* (denying enforcement of agreement on ground that it extended only to fee-related matters, not to legal malpractice)]. However, arbitration agreements frequently have been invoked by defendants in cases instituted by patients against their physicians, by patients against hospitals, and by customers against stock brokerage firms.

An agreement to arbitrate future claims is not effective unless the client is fully advised of the consequences of the agreement and is made aware that the agreement will apply to legal malpractice actions [*Lawrence v. Walzer & Gabrielson (1989) 207 Cal. App. 3d 1501, 1504-1508, 256 Cal. Rptr. 6]* . In one case, for example, the client had signed a retainer agreement that contained an arbitration provision. This provision, which required arbitration of any dispute concerning "fees, costs, or any other aspect of [the] attorney-client relationship," was located in the retainer agreement after several clauses regarding resolution of fee and cost disputes. The client argued that the arbitration clause applied only to disputes over fees and costs. The client's attorneys, who drafted the agreement, alleged that they had intended the agreement to apply as well to future legal malpractice claims, but did not explain their interpretation of the agreement to the client before the client signed. Later, when the attorneys attempted to compel arbitration in a malpractice action brought by the client, the trial court refused to apply the arbitration agreement to the malpractice claim. The court of appeal affirmed, finding that the client never agreed to binding arbitration of her claims of legal malpractice [*Lawrence v. Walzer & Gabrielson (1989) 207 Cal. App. 3d 1501, 1504-1508, 256 Cal. Rptr. 6]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityContracts LawContract Conditions & ProvisionsArbitration ClausesTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of

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7-76 California Forms of Pleading and Practice--Annotated § 76.176

AUTHOR: GEORGE M. LINDAHL

§ 76.176 Unclean Hands

If a plaintiff's injury was due in some degree to his or her own knowing misconduct, the plaintiff's legal malpractice action may be barred under the equitable doctrine of unclean hands [*see Blain v. Doctor's Co. (1990) 222 Cal. App. 3d 1048, 1063-1064, 272 Cal. Rptr. 250]* . This doctrine provides that when a party who seeks to set judicial machinery in motion and obtain some remedy has violated conscience, good faith, or other equitable principles in his or her prior conduct, the court will refuse to interfere on that party's behalf to afford him or her a remedy [*see Unilogic, Inc. v. Burroughs Corp. (1992) 10 Cal. App. 4th 612, 620, 12 Cal. Rptr. 2d 741* (unclean hands defense as available in both actions for legal remedies and actions for equitable remedies)]. However, the rule is qualified by the requirement that the party against whom the doctrine is invoked has directly "infected" the actual cause of action before the court, and is not merely guilty of some unrelated improper past conduct [*Pond v. Insurance Co. of N. Am. (1984) 151 Cal. App. 3d 280, 289-290, 198 Cal. Rptr. 517]* . The doctrine of "unclean hands" does not require the party seeking relief to be guilty of fraud; it is sufficient if he or she merely acted unconscientiously [*DeRosa v. Transamerica Title Ins. Co. (1989) 213 Cal. App. 3d 1390, 1396, 262 Cal. Rptr. 370]* .

Application of the doctrine depends on the nature of the plaintiff's misconduct, and the relationship of the plaintiff's misconduct to the plaintiff's claimed injuries [*Blain v. Doctor's Co. (1990) 222 Cal. App. 3d 1048, 1060, 272 Cal. Rptr. 250]* . In a malpractice action based on allegations that a defendant, while acting as plaintiff's attorney in an underlying action, had led plaintiff to commit perjury in a civil action, resulting in damages to the client, a court of appeal held that the action was barred under the doctrine of unclean hands [*Blain v. Doctor's Co. (1990) 222 Cal. App. 3d 1048, 1064, 272 Cal. Rptr. 250]* . The court noted that the plaintiff's damages, if any, were attributable to the plaintiff's own knowing misbehavior, and the relationship of the misconduct to the harm was direct and not incidental [*Blain v. Doctor's Co. (1990) 222 Cal. App. 3d 1048, 1063, 272 Cal. Rptr. 250]* .

PRACTICE TIP:

Unclean Hands Defense. The unclean hands defense frequently affords the defendant an opportunity to

introduce otherwise inadmissible evidence prejudicial to plaintiff, thereby enhancing defendant's case even if the unclean hands defense itself is ultimately unsuccessful.

Although not relying on the equitable doctrine of unclean hands, the court of appeal in another case held that a plaintiff could not pursue a legal malpractice action if the receipt of bad legal advice led to the plaintiff's commission of a felony [*Chapman v. Superior Court (2005) 130 Cal. App. 4th 261, 276-277, 29 Cal. Rptr. 3d 852]* . In that particular case, the plaintiff was a former public official attempting to pursue a legal malpractice action against counsel for the public board on which the plaintiff formerly served, based on the fact that counsel provided erroneous legal advice to the plaintiff about how to handle the plaintiff's conflicts of interest. As a result, the plaintiff had to plead guilty to a felony for having financial interests in public contracts made by the board, in willful violation of *Gov. Code § 1090*. The court of appeal held that public policy prohibited the plaintiff from seeking what would amount to indemnification from the public counsel and the public counsel's employer for the damages that the plaintiff sustained by virtue of his commission of a felony while a public official. The court noted that the plaintiff should have recognized the wrongfulness of his conduct when he entered into self-serving private financial contracts and failed to relinquish his seat on the board [*Chapman v. Superior Court (2005) 130 Cal. App. 4th 261, 276-277, 29 Cal. Rptr. 3d 852]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesEquitable ReliefUnclean HandsTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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7-76 California Forms of Pleading and Practice--Annotated § 76.177

AUTHOR: GEORGE M. LINDAHL

§ 76.177 Defenses Provided by Tort Claims Act

A salaried public defender engaged in representing an assigned client is an employee acting in the scope of his or her employment within the meaning of the California Tort Claims Act [*Briggs v. Lawrence (1991) 230 Cal. App. 3d 605, 618, 281 Cal. Rptr. 578* ; *see Gov. Code §§ 810-996.6*]. A client who sues such a defender for malpractice must file, as a precondition to suit, a Tort Claims Act claim against the employing public agency [*Briggs v. Lawrence (1991) 230 Cal. App. 3d 605, 618, 281 Cal. Rptr. 578* ; *see Gov. Code § 945.4*]. Failure to allege compliance with the Tort Claims Act requirements in a malpractice complaint against a public defender will render the complaint demurrable [*see Briggs v. Lawrence (1991) 230 Cal. App. 3d 605, 613, 619, 281 Cal. Rptr. 578]* . In addition, failure to meet the claim requirements within statutory timeframes may result in a complete bar to the plaintiff's action [*see Briggs v. Lawrence (1991) 230 Cal. App. 3d 605, 619, 281 Cal. Rptr. 578]* .

Although the Tort Claims Act may be generally applicable to an action for professional negligence brought against a public defender, a deputy public defender is not immune from liability under *Gov. Code § 820.2* for his or her acts or omissions in representing a criminal defendant [*Barner v. Leeds (2000) 24 Cal. 4th 676, 679-680, 102 Cal. Rptr. 2d 97, 13 P.3d 704]* . The Tort Claims Act generally provides immunity to public employees for injuries caused by acts or omissions that are the result of the exercise of discretion granted to the employee, but case law has limited immunity under that statute to basic policy decisions and has not extended immunity to lower-level acts or omissions that are merely operational in nature [*Barner v. Leeds (2000) 24 Cal. 4th 676, 685, 102 Cal. Rptr. 2d 97, 13 P.3d 704]* . Applying this distinction, the California Supreme Court has held that once the decision to provide legal services to a defendant is made, legal representation provided by a deputy public defender entails operational decisions that are incident to the normal functioning of the office of the public defender, rather than the type of policy decisions that are immunized from liability under *Gov. Code § 820.2* [*Barner v. Leeds (2000) 24 Cal. 4th 676, 689-690, 102 Cal. Rptr. 2d 97, 13 P.3d 704]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled ProfessionalsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployeesTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From Liability

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7-76 California Forms of Pleading and Practice--Annotated § 76.178

AUTHOR: GEORGE M. LINDAHL

§ 76.178 Attorney's Work Product Privilege

Ordinarily, the work product of an attorney is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in prejudice [*Code Civ. Proc. § 2018.030(b)*]. In an action between an attorney and his or her client or former client, however, no work-product privilege exists if the work product is relevant to an issue of breach by the attorney of a duty to the attorney's client arising out of the attorney-client relationship [*Code Civ. Proc. § 2018.080*]. For purposes of the exception, a "client" is a person who directly or through an authorized representative, consults an attorney for the purpose of retaining the attorney or securing legal service or advice from him or her in his or her professional capacity, and includes an incompetent who personally consults the attorney or whose guardian or conservator personally consults the lawyer on behalf of the incompetent [*see Code Civ. Proc. § 2018.020* (*Evid. Code § 951* as defining term "client" for purposes of work-product exception); *Evid. Code § 951* (defining "client" in context of evidentiary lawyer-client privilege)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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7-76 California Forms of Pleading and Practice--Annotated § 76.179

AUTHOR: GEORGE M. LINDAHL

§ 76.179 Attorney-Client Privilege Prevents Proper Defense of Suit

A special problem may arise if the malpractice plaintiff is also an attorney and the alleged malpractice consists of negligence in providing faulty legal advice to the plaintiff while he or she was consulting the defendant in connection with the plaintiff's representation of a client. Proper resolution of the issues in the malpractice claim may require the defendant to reveal precisely what the malpractice plaintiff said to the defendant when the plaintiff sought legal advice, in order for the defendant to explain precisely why the particular legal advice was given to the plaintiff. However, if this would require revealing confidential information about the plaintiff's original client, and if that client has not consented to waive the attorney-client privilege, the plaintiff in the malpractice action is under an obligation to object to the introduction of that information as evidence. Absent an applicable statutory exception to the attorney-client privilege, the trial court is obligated to sustain the objection. Because the malpractice defendant in this situation is thus precluded from presenting all relevant evidence because of the plaintiff's disclosure of client confidences to the defendant, the malpractice action is subject to dismissal [*Solin v. O'Melveny & Myers (2001) 89 Cal. App. 4th 451, 463, 467, 107 Cal. Rptr. 2d 456* (clients intervened in suit to seek dismissal)].

However, dismissal for inability to present a defense due to client confidences should be reserved for rare cases, and the court must consider at least four factors before deciding to dismiss. First, the relevant evidence must be the client's confidential information and the client must be insisting that the information remain confidential. Second, the confidential information must be highly material to the defense. Third, the court must determine whether it is able to protect the information, and thus allow the action to proceed, through use of such measures as sealing or protective orders, limited admissibility or use orders, or in camera proceedings. Finally, the court should consider whether it would be fundamentally unfair to allow the action to proceed [*Dietz v. Meisenheimer & Herron (2009) 177 Cal. App. 4th 771, 792-793, 99 Cal. Rptr. 3d 464*]. For example, it might be fundamentally unfair to allow a plaintiff to bring a claim which, by its very nature, necessitates a defense based on confidential information, when the plaintiff has directly supplied such information to the defendant or the plaintiff seeks to derivatively represent a third party who has supplied such information [see *Dietz v. Meisenheimer & Herron (2009) 177 Cal. App. 4th 771, 793-794, 99 Cal. Rptr. 3d 464*

(citing *Solin v. O'Melveny & Myers (2001) 89 Cal. App. 4th 451, 463, 107 Cal. Rptr. 2d 456* , and *McDermott, Will & Emery v. Superior Court (2000) 83 Cal. App. 4th 378, 384, 99 Cal. Rptr. 2d 622*)].

In these cases, it is irrelevant whether the malpractice plaintiff needs to reveal confidential information to prove his or her case. The relevant question is whether the malpractice defendant needs to reveal confidential information to defend [*see Solin v. O'Melveny & Myers (2001) 89 Cal. App. 4th 451, 462-463, 107 Cal. Rptr. 2d 456]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesAttorney-Client PrivilegeScopeTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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Volume 7: Attorney Practice and Ethics thru Auctions and Auctioneers-Chs.72-79
Chapter 76 ATTORNEY PROFESSIONAL LIABILITY
PART II. LEGAL BACKGROUND
B. Liability to Client
4. Defenses

7-76 California Forms of Pleading and Practice--Annotated § 76.180

AUTHOR: GEORGE M. LINDAHL

§ 76.180 Collateral Estoppel

The doctrine of collateral estoppel may be used as a defense by an attorney in a legal malpractice suit if the issue of the attorney's liability has already been decided in a prior action in favor of the attorney. Collateral estoppel bars relitigation of an issue decided at a prior proceeding if (1) the issue necessarily decided at the prior proceeding is identical to the one sought to be relitigated, (2) the previous proceeding resulted in a final judgment on the merits, and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior proceeding [*Mooney v. Caspari (2006) 138 Cal. App. 4th 704, 717, 41 Cal. Rptr. 3d 728]* . A party is in privity with another if the two share a mutual or successive relationship to the same rights of property, or if there is such an identification in interest of one person with another as to represent the same legal rights [*Mooney v. Caspari (2006) 138 Cal. App. 4th 704, 718, 41 Cal. Rptr. 3d 728]* .

In one case, for example, a real estate developer and a real estate broker shared a common interest in pursuing a claim against the developer's former joint venture partner when their real estate venture broke down. When that claim failed, the developer brought a malpractice suit against his former attorney, and although he was not a party to the action, the real estate broker participated extensively in assisting the developer. However, judgment was reached on the merits in favor of the developer's former attorney. Before that judgment was reached, the real estate broker brought a malpractice claim of his own against the developer's current attorney for failing to file a malpractice action on the broker's behalf against the developer's former attorney. The court of appeal held that the broker's action was barred by the doctrine of collateral estoppel. The court concluded that because the developer's former attorney was found not to have been liable for malpractice, any action against the developer's current attorney based on failure to file a malpractice action against the former attorney would fail for lack of damages. Although the broker was not a party to the developer's malpractice action, the broker's interest in the litigation was interconnected with the developer's to such a close degree that he was in privity with the developer, and application of collateral estoppel was appropriate [*Mooney v. Caspari (2006) 138 Cal. App. 4th 704, 718-721, 41 Cal. Rptr. 3d 728]* .

If a plaintiff's civil malpractice complaint is based on the same factual allegations of attorney neglect that were actually determined against the plaintiff after a full evidentiary hearing in a prior habeas corpus proceeding, the action is barred by collateral estoppel [*Younan v. Caruso (1996) 51 Cal. App. 4th 401, 414, 59 Cal. Rptr. 2d 103]* . For further discussion, see Ch. 491, *Res Judicata* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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AUTHOR: GEORGE M. LINDAHL

[Reserved]

§§ 76.181[Reserved]

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Chapter 76 ATTORNEY PROFESSIONAL LIABILITY
PART II. LEGAL BACKGROUND
C. Liability to Nonclients
1. Bases of Liability

7-76 California Forms of Pleading and Practice--Annotated § 76.200

AUTHOR: GEORGE M. LINDAHL

§ 76.200 Duty to Intended Beneficiaries and Other Third Parties

[1] When Duty Exists--In General

An attorney's duty of care may extend to third parties in situations in which public policy so demands. In determining whether the duty extends to third parties, courts will balance the following factors [*Heyer v. Flaig (1969) 70 Cal. 2d 223, 227, 74 Cal. Rptr. 225, 449 P.2d 161* ; *Lucas v. Hamm (1961) 56 Cal. 2d 583, 588, 15 Cal. Rptr. 821, 364 P.2d 685* ; *see also Biakanja v. Irving (1958) 49 Cal. 2d 647, 650-651, 320 P.2d 16* (liability of negligent notary to third party not in privity); *cf.* Restatement (Second) of Torts, § 324A]:

- The extent to which the transaction was intended to affect the plaintiff [*see, e.g., Donald v. Garry (1971) 19 Cal. App. 3d 769, 772, 97 Cal. Rptr. 191* (attorney representing collection agency in debt collection action as liable to creditor for negligent failure to prosecute lawsuit diligently, since creditor was intended beneficiary of services of collection agency and its attorney in collection action)];

- The foreseeability of harm to the plaintiff;

- The degree of certainty that the plaintiff suffered injury;

- The closeness of the connection between the attorney's conduct and the injuries suffered by the plaintiff; and

- The policy of preventing future harm.

An attorney may owe a duty to a nonclient if the attorney assumes a role that is something other than the role of an advocate. In one case, for example, an attorney who represented one party in a construction dispute agreed to act as a

mediator between his client and the contractor. Although the court of appeal agreed that there was no attorney-client relationship between the attorney and the contractor, the court held that the attorney did owe a duty to the contractor based on the attorney's role as mediator, and that this duty extended at least to the duty to disclose fully all facts and circumstances that might reasonably have caused the contractor to believe that the attorney would not or could not be impartial [*Furia v. Helm (2003) 111 Cal. App. 4th 945, 954-955, 4 Cal. Rptr. 3d 357]* . In another case, an attorney acting as an escrow holder was liable for conversion to a nonclient who placed property into escrow, because the attorney disposed of the property in a way that was not in accordance with the escrow instructions provided when the property was deposited [*Virtanen v. O'Connell (2006) 140 Cal. App. 4th 688, 697-700, 44 Cal. Rptr. 3d 702]* .

[2] Liability to Insurer for Negligent Representation of Insured

[a] In General

Under certain circumstances, an attorney may also be liable to a liability insurer who is not the attorney's client. When a conflict of interest necessitates that the insurer pay for separate counsel for the insurer and insured in defending an action brought by a third party, the insurer may sue the insured's counsel for negligence, but only for violating the statutory duties imposed on that attorney by *Civ. Code § 2860*. The fact that the attorney's client is the insured rather than the insurer offers only limited protection in those cases [*Assurance Co. of Am. v. Haven (1995) 32 Cal. App. 4th 78, 83-84, 38 Cal. Rptr. 2d 25* (insured's separate counselis not liable to insurer for failing to investigate, prepare, assert, establish, or perform similar functions regarding complete defense to action against insured); *see Civ. Code § 2860*].

[b] Attorney Intends Advice to Influence Third Party

In a case concerning the liability of accountants performing audits, the California Supreme Court held that an auditor owes no general duty of care regarding the conduct of an audit to persons other than the client [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 376, 406, 11 Cal. Rptr. 2d 51, 834 P.2d 745]* . The Court also held, however, that an auditor may be liable for negligent misrepresentations in an audit report to those persons who act in reliance on those misrepresentations in a transaction that the auditor intended to influence [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 376, 407-412, 11 Cal. Rptr. 2d 51, 834 P.2d 745]* . This decision, if applied by analogy to attorneys, suggests that an attorney may be liable to third parties for negligent advice in situations in which the third party actually relied on the attorney's advice and in which the attorney actually intended his or her advice to influence the third party with respect to a specific transaction.

[3] When No Duty Owed

[a] In General

An attorney's exposure to legal malpractice extends only to the intended beneficiaries of the attorney's actions [*see National Auto. & Cas. Ins. Co. v. Atkins (1975) 45 Cal. App. 3d 562, 565, 119 Cal. Rptr. 618]* . For example, an attorney is not liable for failing to notify the potential creditors of an estate of a client's death or of the pendency of probate proceedings, because the attorney's duties were to the client, and to the estate after the death of the client, rather than to the decedent's creditors. The creditor is not an intended beneficiary of the attorney's representation of the client [*National Auto. & Cas. Ins. Co. v. Atkins (1975) 45 Cal. App. 3d 562, 565, 119 Cal. Rptr. 618]* . Conversely, an attorney employed by a collection agency may be held liable to a creditor if a collection proceeding is dismissed for lack of prosecution due to the attorney's negligence, on the ground that the creditor is clearly the intended beneficiary of the collection agency's retainer of the attorney to prosecute an action against the debtor [*Donald v. Garry (1971) 19 Cal. App. 3d 769, 772, 97 Cal. Rptr. 191]* .

An attorney is not liable to a third party, even if the attorney was negligent, if the attorney did not owe a duty to the third party. For example, the court of appeal held that an attorney representing an injured employee has no duty to the employer to institute an action against a third-party defendant so that the employer may recover its lien [*Soliz v.*

Spielman (1974) 44 Cal. App. 3d 70, 72, 118 Cal. Rptr. 127 ; *see also Brian v. Christensen (1973) 35 Cal. App. 3d 377, 381-382, 110 Cal. Rptr. 688* (attorney has no duty to notify employer of employee's lawsuit)]. Similarly, an attorney representing a television writer-producer in negotiating a contract was held to owe no duty to the client's agent, because the agent was not a client of the attorney, was not an intended beneficiary of the legal services provided, and was even a potential adverse party on the issue of commission obligations owed to the agent under the negotiated contract [*Major Clients Agency v. Diemer (1998) 67 Cal. App. 4th 1116, 1132-1133, 79 Cal. Rptr. 2d 613* (cautioning against imposing duties on attorney owed to client's other advisors, unless others are clearly intended beneficiaries)].

The California Supreme Court has held as a matter of law that co-counsel do not owe one another a fiduciary duty to conduct their joint representation in a manner that does not diminish or eliminate the fees each expects to collect in the case, because recognition of such a duty could interfere with each attorney's undivided duty of loyalty to the client [*Beck v. Wecht (2002) 28 Cal. 4th 289, 297-298, 121 Cal. Rptr. 2d 384, 48 P.3d 417]* . Therefore, it appears that co-counsel may not bring a malpractice claim against one another.

An attorney also does not owe a duty to parties with whom his or her client deals at arm's length. Thus, the California Supreme Court held that a party who was damaged because an attorney's client relied on the attorney's negligent advice regarding a sale of stock could not recover from the attorney. The Court found that the attorney had no duty toward the third party under the circumstances, and could not be held liable absent fraud or malice [*Goodman v. Kennedy (1976) 18 Cal. 3d 335, 344, 134 Cal. Rptr. 375, 556 P.2d 737]* . An attorney therefore also owes no duty to an adversary in litigation [*Morales v. Field, DeGoff, Huppert & MacGowan (1979) 99 Cal. App. 3d 307, 318, 160 Cal. Rptr. 239* ; *see also De Luca v. Whatley (1974) 42 Cal. App. 3d 574, 576, 117 Cal. Rptr. 63* (client accused of crime is only intended beneficiary of defense attorney); *but see Carney v. Rotkin, Schmerin & McIntyre (1988) 206 Cal. App. 3d 1513, 1525, 254 Cal. Rptr. 478* (court noting, in dicta, that *Bus. & Prof. Code § 6128* requires an attorney to deal honestly and fairly with adverse parties and counsel, and that violation of this statute would, in court's opinion, "impl[y] a breach of the duty of care" to adverse parties)].

An attorney who, on behalf of a client, signs a contract that contains a signature recital reading "approved as to form and content" does not by doing so make a representation to the attorney for the other contracting party that may form the basis for tort liability to that other attorney. In so holding, the court of appeal concluded that the signature recital simply means that the signing attorney is agreeing that he or she is the attorney for his or her client and that the document is in the proper form and embodies the deal made between the parties [*Freedman v. Brutzkus (2010) 182 Cal. App. 4th 1065, 1070, 106 Cal. Rptr. 3d 371]* .

[b] Specific Situations

[i] Real Estate Transactions

There are specific situations in which it has been determined that an attorney does not owe a duty of care to third parties. In the context of real estate transactions, for example, an attorney who represents a client in a transaction between the client and an unrepresented party generally owes no duty of care to the unrepresented party, at least if the attorney does not undertake to render legal advice to that party [*Fox v. Pollack (1986) 181 Cal. App. 3d 954, 959-962, 226 Cal. Rptr. 532]* . Similarly, an attorney who represents a buyer of real property does not owe a duty of care to the escrow agent concerning the drafting and formation of the escrow instructions [*St. Paul Title Co. v. Meier (1986) 181 Cal. App. 3d 948, 950-952, 226 Cal. Rptr. 538* ; *see also Shawmut Bank, N.A. v. Kress Assocs. (9th Cir. 1994) 33 F.3d 1477, 1505* (case remanded for adjudication of factual question of whether law firms representing bond underwriter and city in municipal bond transaction related to development project owed duty to trustee bank when drafting offering documents such that law firms could be liable to indemnify trustee, even though bank was represented by separate counsel during earlier transaction)]. Additionally, an attorney who represents a seller of real property is not held to the same duties of disclosure that a real estate broker is required to make. Specifically, the attorney is not required to disclose known defects to the buyer, at least when he or she did not attempt to persuade the buyer to purchase the

property and made no effort to interfere with the buyer's attempts to inspect the property [*Heliotis v. Schuman (1986) 181 Cal. App. 3d 646, 650-651, 226 Cal. Rptr. 509]* .

[ii] Probate

Despite the general tendency toward finding a duty owed to intended beneficiaries of a will, a court of appeal has held that an attorney owes no duty to an intended beneficiary of a will for alleged negligence in ensuring that the will be executed prior to the death of the client. In that case, the decedent had indicated to the attorney a desire to consider the testamentary plan further and had sufficient opportunity to execute the will. Imposing a duty under such circumstances would, according to the court, compromise the attorney's undivided loyalty to the client by creating an incentive for the attorney to pressure the client to execute the document. Moreover, in this case the decedent's apparent indecision about executing the will was as much a cause of the plaintiff's alleged harm as any action of the attorney [*Radovich v. Locke-Paddon (1995) 35 Cal. App. 4th 946, 954-966, 41 Cal. Rptr. 2d 573]* .

The court of appeal has held that an attorney preparing or amending a will for a testator owes no duty to the beneficiary of the will, or to the beneficiary of a previous will, to ascertain and document the testamentary capacity of the testator [*Moore v. Anderson Zeigler Disharoon Gallagher & Gray (2003) 109 Cal. App. 4th 1287, 1298, 135 Cal. Rptr. 2d 888]* . In contrast to cases that have imposed a duty that runs to a will beneficiary, the court concluded that imposing a duty on the attorney to determine testamentary capacity that runs to third-party beneficiaries would compromise the duty of loyalty that the attorney owes to the client. The attorney who is persuaded of the client's testamentary capacity through personal observation fulfills his or her duty of loyalty to the client by drafting the will according to the client's wishes. By contrast, if a duty to third parties were recognized, the testator's attorney would face potential liability to either the beneficiaries disinherited if the attorney prepares the will, or to the potential beneficiaries of the new will if the attorney refuses to prepare it in accordance with the testator's stated desires. Not only would the attorney face potential conflicting duties between the client and the beneficiaries, but also conflicting duties between different sets of beneficiaries [*Moore v. Anderson Zeigler Disharoon Gallagher & Gray (2003) 109 Cal. App. 4th 1287, 1298-1299, 135 Cal. Rptr. 2d 888]* . The court also recognized the difficulties that an attorney might have in properly evaluating a lack of testamentary capacity, as well as the problems of proving that a testator actually intended something other than what was in the final will, and noted that aggrieved beneficiaries are not left without a remedy, because they may challenge the testator's testamentary capacity in probate court [*Moore v. Anderson Zeigler Disharoon Gallagher & Gray (2003) 109 Cal. App. 4th 1287, 1300, 135 Cal. Rptr. 2d 888]* .

Another court of appeal opinion held that an estate trust beneficiary could not state a claim against the testator's attorney based on the attorney's failure to modify the trust to increase the beneficiary's bequest, an increase that was allegedly in accordance with the decedent's wishes as expressed to both the beneficiary and the attorney in the final months before he died. After reviewing existing case law, the court concluded that attorney liability to third-party beneficiaries of estate documents was limited to instances in which the testator's intent was explicitly memorialized in a signed will or trust document, but negligence on the part of the attorney in drafting or executing the document caused the testator's stated intent to be frustrated [*Chang v. Lederman (2009) 172 Cal. App. 4th 67, 81-82, 90 Cal. Rptr. 3d 758*]. Conversely, in the case before the court, although the beneficiary was listed in the trust as a beneficiary of a stated bequest, there was no written document memorializing the change that the beneficiary argued the decedent intended to make. Recognizing a duty in such a case would, according to the court, impose an undue burden on the profession by exposing attorneys to potential liability that was almost limitless, as any potential beneficiary could argue that the now-deceased testator intended to change the estate plan but failed to do so due to the attorney's negligence [*Chang v. Lederman (2009) 172 Cal. App. 4th 67, 82-86, 90 Cal. Rptr. 3d 758*].

Under *Prob. Code § 21350(a)*, certain persons are presumptively disqualified from receiving donative property transfers through instruments such as a will or trust, generally based on the potential for exerting self-serving and undue influence on the transferor. These presumptively disqualified persons include [*Prob. Code § 21350(a)*]:

- The person drafting the instrument.

- A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, the person who drafted the instrument.

- Any partner or shareholder of any law partnership or law corporation in which the person drafting the instrument has an ownership interest, and any employee of that law partnership or law corporation.

- Any person who has a fiduciary relationship with the transferor, including, but not limited to, a conservator or trustee, who transcribes the instrument or causes it to be transcribed.

- A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of a person described in the paragraph immediately above.

- A care custodian of a transferor who is a dependent adult;

- A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, a person described in the paragraph immediately above.

However, a person is not subject to this presumption of disqualification if the transferor is related by blood or marriage to, is a cohabitant with, or is the registered domestic partner of, the transferee or the person who drafted the transfer instrument [*Prob. Code § 21351(a)*].

If a client seeks an attorney's services to effect a transfer to one of these beneficiaries, the attorney owes a duty of care that runs both to the client and to the intended beneficiary to advise the client that the proposed transfer, if challenged, would have a significant likelihood of failing unless steps are taken under *Prob. Code § 21351* to exempt the transfer from this statutory presumption of disqualification. At a minimum, the attorney must recommend to the client that he or she seek independent counsel in an effort to obtain a Certificate of Independent Review as described in *Prob. Code § 21351(b)* [*Osornio v. Weingarten (2004) 124 Cal. App. 4th 304, 334, 21 Cal. Rptr. 3d 246* ; *see Prob. Code § 21351*].

An attorney hired by the fiduciary representative of an estate to provide legal services for the estate may be sued for malpractice by the fiduciary to recover for damage caused to the estate, and this right to sue extends to successor fiduciaries who replace the original fiduciary who hired the attorney [*Borissoff v. Taylor & Faust (2004) 33 Cal. 4th 523, 530, 15 Cal Rptr. 3d 735, 93 P.3d 337* (Probate Code specifically gives successor fiduciaries same powers and duties of their predecessors); *see Prob. Code §§ 8524(c), 9820(a)*].

[iii] Marital Dissolution Proceedings

In the context of marital dissolution proceedings, it appears that only one reported California case has considered whether an attorney should be held liable to a third party for professional negligence. In that case, the court of appeal held that an attorney who was retained by a husband to obtain a divorce from the husband's first wife owed no duty of care to the husband's second wife, and consequently had no liability to the second wife for professional negligence [*Burger v. Pond (1990) 224 Cal. App. 3d 597, 607, 273 Cal. Rptr. 709]* .

[iv] Child Support Proceedings

In child support proceedings, a district attorney representing a county in proceedings to establish, modify, and enforce support obligations owed to a custodial parent has no attorney-client relationship with, and owes no duty of care to, the custodial parent. Notwithstanding the collateral benefit to the custodial parent, the client in those proceedings is the county [*Jager v. County of Alameda (1992) 8 Cal. App. 4th 294, 297, 10 Cal. Rptr. 2d 293]* .

[v] Insurance

In the insurance context, a lawyer hired by a primary insurer to defend a hospital and a nurse in a wrongful death suit has no attorney-client relationship with and owes no duty of care to the nurse's own liability insurer. The liability insurer neither retained defense counsel nor had anything to do with the services the firm rendered [*Am. Cas. Co. v. O'Flaherty (1997) 57 Cal. App. 4th 1070, 1075, 67 Cal. Rptr. 2d 539]* . However, when an insurer hires and compensates counsel to defend an insured, provided that the interests of the insurer and the insured are not in conflict, the retained attorney owes a duty of care to the insurer which will support its independent right to bring a legal malpractice action against the attorney for negligent acts committed in the representation of the insured [*Unigard Ins. Group v. O'Flaherty & Belgum (1995) 38 Cal. App. 4th 1229, 1235, 45 Cal. Rptr. 2d 565* ; *see also Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone (2000) 79 Cal. App. 4th 114, 129-133, 93 Cal. Rptr. 2d 534* (insurer's general reservation of rights does not automatically create conflict of interest preventing insurer from suing attorney hired to defend insured)].

An attorney for an insurer can be liable for fraud to claimants under an insurance policy who have obtained a judgment against the insured, if the attorney provides knowingly false information about the amount of coverage under the policy. Claimants under these circumstances are third-party beneficiaries under the policy, stand in the shoes of the insured, and are not considered to be an opposing party when discussing policy coverage with the attorney [*Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone (2003) 107 Cal. App. 4th 54, 76, 131 Cal. Rptr. 2d 777]* .

If an insurer contracts with a reinsurer to obtain reimbursement coverage for some of the insurer's coverage liabilities, and the insurer subsequently hires an attorney to represent it when a claim is brought against its insured, the reinsurer on that claim does not become a client of the insurer's attorney in the absence of an express agreement between the retained attorney and the reinsurer [*Zenith Ins. Co. v. O'Connor (2007) 148 Cal. App. 4th 998, 1006-1007, 55 Cal. Rptr. 3d 911]* . In addition, the reinsurer is not a third-party beneficiary of the attorney's services given the potential, if not actual, conflict of interest between the insurer and the reinsurer [*Zenith Ins. Co. v. O'Connor (2007) 148 Cal. App. 4th 998, 1008-1009, 55 Cal. Rptr. 3d 911]* .

[vi] Corporate Counsel; Nonclient Shareholders

It has been held that corporate counsel do not owe a professional duty of care to nonclient shareholders, at least in the absence of a personal relationship of trust and confidence between the shareholder and counsel [*see Skarbrevik v. Cohen, England & Whitfield (1991) 231 Cal. App. 3d 692, 705-706, 707, 282 Cal. Rptr. 627* (counsel for close corporation held to owe no professional duty of care to minority shareholder)]. A corporate counsel's direct duty is to the client corporation, not to shareholders individually, even though the legal advice rendered by the corporation may affect the shareholders [*Skarbrevik v. Cohen, England & Whitfield (1991) 231 Cal. App. 3d 692, 704, 282 Cal. Rptr. 627* ; *see also Cal. Rules Prof. Conduct, Rule 3-600* (professional duties of attorney representing organization)]. In addition, a shareholder may not bring a derivative action for malpractice against outside counsel hired by the corporation. Because the corporation holds the attorney-client privilege, in the absence of a waiver of the privilege by the corporation, the attorney sued by shareholders would be prevented from mounting any meaningful defense to the malpractice claim for actions taken while representing the corporation [*McDermott, Will & Emery v. Superior Court (2000) 83 Cal. App. 4th 378, 384-385, 99 Cal. Rptr. 2d 622]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawThird PartiesBeneficiariesTypesDoneesContracts LawThird PartiesBeneficiariesTypesIntended BeneficiariesTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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7-76 California Forms of Pleading and Practice--Annotated § 76.201

AUTHOR: GEORGE M. LINDAHL

§ 76.201 Theories of Liability

[1] Negligence

In determining whether an attorney will be liable to a third party for negligence committed in the performance of a contract between an attorney and a client, courts will balance the following factors [*Lucas v. Hamm (1961) 56 Cal. 2d 583, 588, 15 Cal. Rptr. 821, 364 P.2d 685* ; *see also* *Biakanja v. Irving (1958) 49 Cal. 2d 647, 650-651, 320 P.2d 16* (liability of negligent notary to third party not in privity); *cf.* Restatement (Second) of Torts § 324A]:

- The extent to which the transaction was intended to affect the plaintiff [*see, e.g.,* *Donald v. Garry (1971) 19 Cal. App. 3d 769, 772, 97 Cal. Rptr. 191* (attorney representing collection agency in debt collection action was liable to creditor for negligent failure to prosecute lawsuit diligently, because creditor was intended beneficiary of services of collection agency and its attorney in collection action)];

- The foreseeability of harm to the plaintiff;

- The degree of certainty that the plaintiff suffered injury;

- The closeness of the connection between the attorney's conduct and the injuries suffered by the plaintiff; and

- The policy of preventing future harm.

The one context in which it is established that third parties may recover for an attorney's negligence is probate and estate planning. Specifically, intended beneficiaries of a will who lose their testamentary rights because of a negligent failure of the attorney who drew the will to properly carry out the testator's intent may recover on a tort theory for

breach of duty owed directly by the attorney to the intended beneficiaries [*Lucas v. Hamm (1961) 56 Cal. 2d 583, 588, 15 Cal. Rptr. 821, 364 P.2d 685]* . The duty of care arises because, in undertaking to fulfill the testamentary instructions of the client, the attorney "realistically and in fact assumes a relationship not only with the client but also with the client's intended beneficiaries" [*Heyer v. Flaig (1969) 70 Cal. 2d 223, 228, 74 Cal. Rptr. 225, 449 P.2d 161 , disapproved on other grounds, Laird v. Blacker (1992) 2 Cal. 4th 606, 617, 7 Cal. Rptr. 2d 550, 828 P.2d 691]* . Intended beneficiaries of a will may also recover as third party beneficiaries of the contract between the attorney and the testator, based on the failure of the attorney who drew the will to properly fulfill his or her contractual obligations [*Lucas v. Hamm (1961) 56 Cal. 2d 583, 591, 15 Cal. Rptr. 821, 364 P.2d 685* ; *see also Garcia v. Borelli (1982) 129 Cal. App. 3d 24, 32, 180 Cal. Rptr. 768]* .

The fact that a plaintiff's share of a decedent's estate was determined by settlement of probate proceedings rather than by judicial determination does not preclude a malpractice action against the attorney who drafted the will [*see Garcia v. Borelli (1982) 129 Cal. App. 3d 24, 32, 180 Cal. Rptr. 768]* . However, the settlement is relevant to the malpractice action to the extent that it reduces the amount of damage sustained by the beneficiary as a result of the alleged negligence of the attorney [*see Garcia v. Borelli (1982) 129 Cal. App. 3d 24, 32, 180 Cal. Rptr. 768]* .

[2] Breach of Contract

When the plaintiff is a nonclient, the California Supreme Court has held that a breach of contract action based on a third-party beneficiary theory is conceptually superfluous, because the third party cannot recover unless the attorney was negligent [*Heyer v. Flaig (1969) 70 Cal. 2d 223, 227, 74 Cal. Rptr. 225, 449 P.2d 161 , disapproved on other grounds, Laird v. Blacker (1992) 2 Cal. 4th 606, 617, 7 Cal. Rptr. 2d 550, 828 P.2d 691*)]. Nevertheless, intended beneficiaries of a will may recover as third-party beneficiaries of the contract between the attorney and the testator, when the attorney who drew the will fails to properly fulfill his or her contractual obligations [*Lucas v. Hamm (1961) 56 Cal. 2d 583, 591, 15 Cal. Rptr. 821, 364 P.2d 685* ; *see Garcia v. Borelli (1982) 129 Cal. App. 3d 24, 32, 180 Cal. Rptr. 768* ; *see also § 76.201[1]*].

[3] Malicious Prosecution

Although an attorney may owe no duty of care to an adverse third party in litigation [*see § 76.200[3]*], the attorney may be sued by the third party for malicious prosecution [*Weaver v. Superior Court (1979) 95 Cal. App. 3d 166, 178, 183-190, 156 Cal. Rptr. 745]* . A cause of action for malicious prosecution requires that the plaintiff establish that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in plaintiff's favor; (2) was brought without probable cause; and (3) was initiated with malice [*Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 50, 118 Cal. Rptr. 184, 529 P.2d 608* ; *Weaver v. Superior Court (1979) 95 Cal. App. 3d 166, 184, 156 Cal. Rptr. 745]* .

The issue of whether an attorney has instituted an action without probable cause is determined by the court as a matter of law [*Williams v. Coombs (1986) 179 Cal. App. 3d 626, 636-637, 224 Cal. Rptr. 865]* . The test for probable cause is whether any reasonable attorney would find the claim legally tenable [*Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 885-886, 254 Cal. Rptr. 336, 765 P.2d 498]* . In evaluating whether probable cause exists, a court is required to take into account the evolutionary potential of legal principles [*Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 886*]. Probable cause does not mean "legal cause," because if it did, then every plaintiff who failed to recover in his or her lawsuit would be liable in an action for malicious prosecution [*Lucchesi v. Giannini & Uniack (1984) 158 Cal. App. 3d 777, 785, 205 Cal. Rptr. 62* ; *Albertson v. Raboff (1960) 185 Cal. App. 2d 372, 385, 8 Cal. Rptr. 398]* .

The court determines the issue of probable cause of the attorney to bring the action with regard to the theory on which the allegedly malicious civil action is actually based. The test for malicious prosecution is not whether the attorney had reasonable grounds to seek some kind of relief in the original action, but whether he or she had reasonable grounds for

asserting the theory for relief contained in the complaint and tried to the fact finder. Thus, if an attorney has grounds for initiating a suit, but fails to prosecute the suit on those grounds and instead prosecutes the suit on untenable grounds, that attorney may be found liable for malicious prosecution [*Williams v. Coombs (1986) 179 Cal. App. 3d 626, 644, 224 Cal. Rptr. 865]* .

[4] Abuse of Process

An action for abuse of process, like an action for malicious prosecution, is typically brought by one who was a party opposing the attorney's client in previous litigation. Abuse of process differs from malicious prosecution in that the tort is not committed by commencing an action or causing process to issue without justification, but rather by the misuse of process for a purpose other than the purpose that the process was designed to accomplish. Thus, in an abuse of process action, the plaintiff does not have to prove favorable termination or that process was commenced without probable cause [*Clark Equip. Co. v. Wheat (1979) 92 Cal. App. 3d 503, 526, 154 Cal. Rptr. 874]* .

The tort of abuse of process has two elements: (1) the employment of legal process for an ulterior purpose, and (2) a willful act in the use of process not proper in the regular conduct of the proceedings [*Ion Equip. Corp. v. Nelson (1980) 110 Cal. App. 3d 868, 876, 168 Cal. Rptr. 361* ; *Clark Equip. Co. v. Wheat (1979) 92 Cal. App. 3d 503, 524, 154 Cal. Rptr. 874* ; *Christensen v. Younger (1975) 47 Cal. App. 3d 613, 617-618, 120 Cal. Rptr. 923]* . The improper purpose that forms the basis of an action for abuse of process usually takes the form of coercion to obtain a collateral advantage not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club. The original commencement of an action may also constitute "process" if the other elements of the cause of action are present [*see Umansky v. Urquhart (1978) 84 Cal. App. 3d 368, 371, 148 Cal. Rptr. 547]* .

[5] Negligent Misrepresentation

In certain circumstances, an attorney may be liable for damages caused by his or her negligent misrepresentation to a third-party nonclient, with an important exception relating to the judicial proceeding privilege discussed in*§ 76.222* [*see Roberts v. Ball, Hunt, Hart, Brown & Baerwitz (1976) 57 Cal. App. 3d 104, 110-111, 128 Cal. Rptr. 901]* . Negligent misrepresentation consists of the assertion as a fact of that which is not true, by one who has no reasonable ground for believing it to be true, made with intent to induce another to alter his or her position to his or her injury or risk [*Civ. Code §§ 1709, 1710(2)*; *Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 407-408, 11 Cal. Rptr. 2d 51, 834 P.2d 745* ; *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz (1976) 57 Cal. App. 3d 104, 110, 128 Cal. Rptr. 901]* .

In one case, the plaintiff alleged that the defendant law firm negligently misrepresented that its client was a general partnership and thereby induced plaintiff to loan monies to its client. The trial court sustained the defendant law firm's demurrer and dismissed the action, but the court of appeal reversed the order of dismissal regarding the cause of action for negligent misrepresentation. The court of appeal noted that an attorney may owe a duty to a third person who is not a client, and may be liable if the third person who was intended to be benefitted by the attorney's performance is injured by the negligent execution of that duty. The court of appeal held that when it is clearly foreseeable that harm to a third party may result from the issuance of a legal opinion intended to secure benefit for an attorney's client, the attorney must issue the opinion with due care. The failure to do so will constitute a breach of the duty owed to the third party that the attorney attempted or expected to influence on behalf of the client [*Roberts v. Ball, Hunt, Hart, Brown & Baerwitz (1976) 57 Cal. App. 3d 104, 110-111, 128 Cal. Rptr. 901]* .

However, the California Supreme Court has distinguished this case and found no liability in a case in which there was no allegation that the advice to the client was communicated to the third party, and therefore no reliance on the allegedly negligent advice [*see Goodman v. Kennedy (1976) 18 Cal. 3d 335, 343-344, 134 Cal. Rptr. 375, 556 P.2d 737]* . In a footnote, the Court suggested that the result in *Roberts* depended on a duty of care created by the attorney's intent that the advice be relied on by the third party [*see Goodman v. Kennedy (1976) 18 Cal. 3d 335, 343 n.4, 134*

Cal. Rptr. 375, 556 P.2d 737] . In the absence of such an allegation, it seems unlikely that an attorney would be held liable for negligent advice to his or her client in an action brought by a third party. California courts have consistently required some manifestation on the part of a professional who offers an opinion, information, or advice that he or she is acting to benefit a third party or defined group of third parties in a specific and circumscribed transaction [*see Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 411-412, 11 Cal. Rptr. 2d 51, 834 P.2d 745* (citing cases)].

Several court of appeals cases, following *Roberts*, have upheld the proposition that an attorney may be held liable to a nonclient third party for negligent misrepresentation [*see Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices (1989) 207 Cal. App. 3d 1277, 1284-1285, 255 Cal. Rptr. 483* (liability to client's mortgage broker); *Courtney v. Waring (1987) 191 Cal. App. 3d 1434, 1443-1444, 237 Cal. Rptr. 233* (liability to client's franchisees); *Cicone v. URS Corp. (1986) 183 Cal. App. 3d 194, 210, 227 Cal. Rptr. 887* (liability to other attorney for misrepresentations made on behalf of client in connection with business transaction)].

In a case in which third-party nonclients sought to hold accountants liable for misrepresentations made in a client audit, the California Supreme Court expressly endorsed an approach to liability stated in Section 552 of the Restatement (Second) of Torts; under the Restatement, a supplier of information is liable for negligence to a third party only if he or she intends to supply the information for the benefit of one or more third parties in a specific transaction or type of transaction identified to the supplier [*see Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 392, 408, 11 Cal. Rptr. 2d 51, 834 P.2d 745]* . It seems possible that California appellate courts will follow this approach in future cases involving an attorney's negligent misrepresentation to nonclients in which liability is predicated on providing misinformation.

[6] Fraud

The requirements for establishing and defending against an action for fraud are the same whether or not the plaintiff is a client or nonclient [*see § 76.154*]. Thus, to establish that an attorney is liable for fraud, the plaintiff who is a nonclient must show misrepresentation, knowledge of its falsity, intent to defraud, justifiable reliance, and resulting damage [*Roberts v. Ball, Hunt, Hart, Brown & Baerwitz (1976) 57 Cal. App. 3d 104, 109, 128 Cal. Rptr. 901]* . Every element of the cause of action for fraud must be alleged in the proper manner, and the facts constituting the fraud must be alleged with sufficient specificity to allow the defendant to understand fully the nature of the charge made [*see Wilhelm v. Pray, Price, Williams & Russell (1986) 186 Cal. App. 3d 1324, 1331, 231 Cal. Rptr. 355* ; *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz (1976) 57 Cal. App. 3d 104, 109, 128 Cal. Rptr. 901]* .

[7] Infliction of Emotional Distress

A nonclient may state a cause of action against an attorney for intentional infliction of emotional distress if the elements of that cause of action are alleged [*see Kinnamon v. Staitman & Snyder (1977) 66 Cal. App. 3d 893, 895-896, 136 Cal. Rptr. 321]* and the conduct of the attorney is not privileged [*see Lerette v. Dean Witter Org., Inc. (1976) 60 Cal. App. 3d 573, 579, 131 Cal. Rptr. 592* (privilege afforded attorney by former *Civ. Code § 47(2)* (now *Civ. Code § 47(b)*) as barring action for intentional infliction of emotional distress based on privileged statement)]. The elements of a prima facie case for the tort of intentional infliction of emotional distress are: (1) outrageous conduct by the defendant; (2) the defendant's intention of causing or reckless disregard of the probability of causing emotional distress; (3) the plaintiff's suffering severe or extreme emotional distress; and (4) actual and proximate causation of the emotional distress by the defendant's outrageous conduct [*Kinnamon v. Staitman & Snyder (1977) 66 Cal. App. 3d 893, 895-896, 136 Cal. Rptr. 321]* .

An action for intentional infliction of emotional distress against an attorney was successfully pleaded when plaintiff alleged that the defendant attorney had threatened her with the filing of a criminal complaint in his efforts to collect a debt for his client [*Kinnamon v. Staitman & Snyder (1977) 66 Cal. App. 3d 893, 895, 136 Cal. Rptr. 321* ; *see also Carney v. Rotkin, Schmerin & McIntyre (1988) 206 Cal. App. 3d 1513, 1524, 254 Cal. Rptr. 478* (action for intentional infliction of emotional distress successfully pleaded when plaintiff alleged that attorney, in an attempt to collect a debt

from plaintiff, threatened plaintiff with arrest under nonexistent bench warrant)]. However, the court of appeal has subsequently declined to follow the holding of that case, in part because the rules of professional conduct themselves now provide that a violation does not create a new civil cause of action [*Ross v. Creel Printing & Publ'g Co. (2002) 100 Cal. App. 4th 736, 746-747, 122 Cal. Rptr. 2d 787]* .

In many cases, however, the attorney will be protected by the privilege granted by *Civ. Code § 47(b)*. This privilege precludes actions for intentional infliction of emotional distress as well as actions for defamation [*see Wallin v. Vienna Sausage Mfg. Co. (1984) 156 Cal. App. 3d 1051, 1056-1057, 203 Cal. Rptr. 375* ; *Lerette v. Dean Witter Org., Inc. (1976) 60 Cal. App. 3d 573, 579, 131 Cal. Rptr. 592* ; *see also Williams v. Coombs (1986) 179 Cal. App. 3d 626, 644-645, 224 Cal. Rptr. 865* (absolute privilege for filing malicious complaint, thus defeating claim for intentional infliction of emotional distress)]. For further discussion of this privilege, see *§ 76.222*.

A nonclient's recovery of damages for emotional distress suffered as a result of the attorney's negligent conduct (as opposed to conduct constituting intentional infliction of emotional distress) seems possible only if the nonclient can establish that the attorney's negligence was a breach of a duty owed directly to the nonclient [*see Pleasant v. Celli (1993) 18 Cal. App. 4th 841, 852, 22 Cal. Rptr. 2d 663* (action for negligent infliction of emotional distress as requiring breach of duty of care owed to plaintiff)]. Such a duty arises under the circumstances described in§ 76.200[1] and may arguably arise in other situations. However, it is clear that the mere foreseeability that any negligence will cause emotional distress to one or more nonclients is not sufficient to create a duty, the breach of which can be the basis for a cause of action [*see Holliday v. Jones (1989) 215 Cal. App. 3d 102, 111, 264 Cal. Rptr. 448]* . Some sort of relationship between the nonclient and the defendant, or facts showing that the nonclient was a direct object of some aspect of the defendant's conduct, are required [*see Holliday v. Jones (1989) 215 Cal. App. 3d 102, 105, 111-112, 264 Cal. Rptr. 448]* .

[8] Civil Conspiracy With Client

A cause of action against an attorney based on a civil conspiracy with his or her client may not be included in a complaint or other pleading unless the court enters an order allowing the pleading to be filed. The party seeking to file the pleading must establish that there is a reasonable probability that he or she will prevail in the action. This showing may be made by filing a verified petition accompanied by (1) the proposed pleading and (2) supporting affidavits (or declarations under penalty of perjury) stating the facts on which liability is based. If the court rules favorably on the petition, it must permit the proposed pleading to be filed [*Civ. Code § 1714.10*; *see Code Civ. Proc. § 2015.5*; *see also Castro v. Higaki (1994) 31 Cal. App. 4th 350, 356-359, 37 Cal. Rptr. 2d 84* (denial of plaintiff's petition for leave to file complaint for conspiracy against defendant's attorneys on grounds plaintiff did not establish reasonable probability of prevailing as judgment on merits with res judicata effect in plaintiff's subsequent civil conspiracy action against same attorneys)].

A civil conspiracy is a combination of two or more persons to accomplish by concerted action a criminal or unlawful purpose or a lawful purpose by criminal or unlawful means [*Parkinson Co. v. Bldg. Trades Council (1908) 154 Cal. 581, 593, 98 P. 1027* ; *Peskin v. Squires (1957) 156 Cal. App. 2d 240, 246, 319 P.2d 405* ; *see also Unruh v. Truck Ins. Exch.(1972) 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815, 498 P.2d 1063* (noting that civil conspiracy in and of itself is not a tort)]. The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to the plaintiff from an act or acts done in furtherance of the common design [*Mox Inc. v. Woods (1927) 202 Cal. 675, 677, 262 P. 302* ; *Barney v. Aetna Cas. & Sur. Co. (1986) 185 Cal. App. 3d 966, 981, 230 Cal. Rptr. 215]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawThird PartiesBeneficiariesTypesIntended BeneficiariesEstate, Gift & Trust LawWillsBeneficiariesGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral

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Volume 7: Attorney Practice and Ethics thru Auctions and Auctioneers-Chs.72-79
Chapter 76 ATTORNEY PROFESSIONAL LIABILITY
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1. Bases of Liability

7-76 California Forms of Pleading and Practice--Annotated § 76.202

AUTHOR: GEORGE M. LINDAHL

§ 76.202 Legal Malpractice Action Not Assignable

A cause of action for legal malpractice is not assignable [*Goodley v. Wank & Wank, Inc. (1976) 62 Cal. App. 3d 389, 398, 133 Cal. Rptr. 83* ; *see also* *Kracht v. Perrin, Gartland & Doyle (1990) 219 Cal. App. 3d 1019, 1022-1023, 268 Cal. Rptr. 637* (involuntary assignment of attorney malpractice claim, made pursuant to *Code Civ. Proc. § 708.510*, is unenforceable)]. One court based its conclusion that the cause of action is not assignable on the policy ground that attorneys would need to be more selective in accepting clients if a dissatisfied client could discount and sell a purported malpractice cause of action [*Goodley v. Wank & Wank, Inc. (1976) 62 Cal. App. 3d 389, 398, 133 Cal. Rptr. 83]* .

Labelling an action as "constructive fraud," "fraud," or "breach of contract" does not turn an otherwise unassignable legal malpractice action into an assignable action [*see* *Kracht v. Perrin, Gartland & Doyle (1990) 219 Cal. App. 3d 1019, 1022-1023, 268 Cal. Rptr. 637* ; *Jackson v. Rogers & Wells (1989) 210 Cal. App. 3d 336, 345-348, 258 Cal. Rptr. 454]* . If an action involves injury suffered by reason of an attorney's professional negligence, the gravamen of the claim is legal malpractice, regardless of whether it is pled in tort or contract [*see* *Jackson v. Rogers & Wells (1989) 210 Cal. App. 3d 336, 348-349, 258 Cal. Rptr. 454]* . Similarly, a liability insurer cannot proceed as a subrogee in its insured's malpractice claim against the insured's attorney, since subrogation in those instances violates the public policy against assigning malpractice claims [*Fireman's Fund Ins. v. McDonald, Hecht & Sol. (1994) 30 Cal. App. 4th 1373, 1383-1384, 36 Cal. Rptr. 2d 424]* .

Public policy dictates that an assignment made outside of California is not enforceable in California courts, even if the law of the jurisdiction in which the assignment was made permits assignment of attorney malpractice actions [*Kracht v. Perrin, Gartland & Doyle (1990) 219 Cal. App. 3d 1019, 1027-1028, 268 Cal. Rptr. 637]* .

In conformity with the rule in California, the trustee of a bankruptcy estate for a corporation may not assign a legal malpractice claim belonging to the estate to a creditor of the corporation or to any other person, including a person who had been the sole owner of the bankrupt corporation [*Curtis v. Kellogg & Andelson (1999) 73 Cal. App. 4th 492,*

505-506, 86 Cal. Rptr. 2d 536 (bankruptcy trustee had sole right to assert action belonging to bankrupt estate, and trustee could not assign legal malpractice action to debtor); *Baum v. Duckor, Spradling & Metzger (1999) 72 Cal. App. 4th 54, 69, 84 Cal. Rptr. 2d 703* (under federal law, bankruptcy estate may have right to legal malpractice claims arising under state law)].

However, unlike Chapter 7 bankruptcy proceedings, federal law governing Chapter 11 bankruptcy proceedings provides that a bankruptcy plan may permit the estate to retain claims enforceable by a representative other than the trustee, and in those instances, a legal malpractice claim retained by the estate may be brought by a representative authorized by the estate to do so [*Office of Statewide Health Planning & Dev. v. Musick, Peeler & Garrett (1999) 76 Cal. App. 4th 830, 834-835, 90 Cal. Rptr. 2d 705]* . In those Chapter 11 proceedings, the proceeds of the malpractice action still belong to the bankruptcy estate, although the representative is entitled to costs and expenses, subject to approval by the bankruptcy court [*Office of Statewide Health Planning & Dev. v. Musick, Peeler & Garrett (1999) 76 Cal. App. 4th 830, 835, 90 Cal. Rptr. 2d 705]* .

The rule that a claim for legal malpractice is not assignable does not prevent the insurer of an attorney who is seeking indemnification from concurrent counsel from being subrogated to that indemnity claim [*see generally § 76.112*]. Under those circumstances, the party to whose rights the insurer seeks subrogation is not the client suing for malpractice, but rather one of the negligent attorneys, and the policy considerations that justify prohibiting the assignment of a malpractice claim do not apply [*Musser v. Provencher (2002) 28 Cal. 4th 274, 285-287, 121 Cal. Rptr. 2d 373, 48 P.3d 408]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAssignmentGeneral OverviewTortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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7-76 California Forms of Pleading and Practice--Annotated §§ 76.203-76.219

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[Reserved]

§§ 76.203[Reserved]

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7-76 California Forms of Pleading and Practice--Annotated § 76.220

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§ 76.220 Statute of Limitations

[1] Action Brought by Will Beneficiary

Ordinarily, an action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services must be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence sould have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first [*Code Civ. Proc. § 340.6(a)*]. In an action based on an instrument in writing, the effective date of which depends on some act or event of the future (such as the death of a testator), the period of limitations commences to run on the occurrence of the act or event [*Code Civ. Proc. § 340.6(b)*].

In *Heyer v. Flaig*, the California Supreme Court rejected the argument that the limitations period for a malpractice action by an intended will beneficiary commences when the act of negligent drafting occurs [*see Heyer v. Flaig (1969) 70 Cal. 2d 223, 230, 74 Cal. Rptr. 225, 449 P.2d 161]* . The Court held that the limitations period starts from the date that the cause of action accrues, namely, the date of the testator's death, when the negligent failure to perfect the requested testamentary scheme becomes irremediable and the impact of the injury occurs [*see Heyer v. Flaig (1969) 70 Cal. 2d 223, 230, 74 Cal. Rptr. 225, 449 P.2d 161]* . Before that time, an intended beneficiary acquires no recognized legal rights under a will, and there can be no injury [*Heyer v. Flaig (1969) 70 Cal. 2d 223, 231, 74 Cal. Rptr. 225, 449 P.2d 161]* . Only at the death of the testator does a remedy become available, and the cause of action accrue [*see Heyer v. Flaig (1969) 70 Cal. 2d 223, 230-231, 74 Cal. Rptr. 225, 449 P.2d 161]* .

Heyer was decided before the enactment of *Code Civ. Proc. § 340.6*, which now governs attorney malpractice actions [*see Laird v. Blacker (1992) 2 Cal. 4th 606, 611, 7 Cal. Rptr. 2d 550, 828 P.2d 691* ("irremediable damage" requirement of *Heyer* recognized as rejected by 1977 statutory adoption of section 340.6)]. It might be argued that, under the present statute, the limitations period commences on probate of the will, rather than on the testator's death [*see*

Code Civ. Proc. § 340.6(a)(1),(b) (in action based on written instrument, effective date of which depends on future act or event, limitations period commences to run on occurrence of the act or event, although limitations period is tolled during time plaintiff has not sustained "actual injury"); *see also Prob. Code §§ 8200-8272* (probate of wills)]. However, no court has yet addressed this issue, and the cautious attorney will proceed under the reasoning of *Heyer* and file an action as if the statute of limitations begins to run from the date of the testator's death. The beneficiary should therefore commence the action within the earlier of (1) one year after he or she discovered (or in the exercise of reasonable diligence should have discovered) the diminution of his or her testamentary interest because of the attorney's negligent drafting of the will, or (2) four years after the testator's death [*see Code Civ. Proc. § 340.6(a)*].

[2] Action for Malicious Prosecution

The period of limitation for filing an action for malicious prosecution is two years (one year, prior to January 1, 2003) [*Code Civ. Proc. § 335.1*; *Rutherford v. Johnson (1967) 250 Cal. App. 2d 316, 319, 58 Cal. Rptr. 546* ; *see* former *Code Civ. Proc. § 340(3)*; *see also Ch. 345, Limitation of Actions, § 345.14*]. The limitation period begins to run on the date that the proceedings in the prior action were dismissed or terminated [*Babb v. Superior Court (1971) 3 Cal. 3d 841, 846, 92 Cal. Rptr. 179, 479 P.2d 379]* .

If after entry of judgment in the trial court, an appeal is filed from the underlying action that is alleged to be maliciously prosecuted, special rules govern the period of limitation. The period of limitation runs from the time of the entry of the judgment in the trial court until the notice of appeal is filed [*see Gibbs v. Haight, Dickson, Brown & Bonesteel (1986) 183 Cal. App. 3d 716, 722, 228 Cal. Rptr. 398]* . Once the notice of appeal is filed, the appeals process will toll the period of limitation until the process is exhausted [*see Feld v. Western Land & Dev. Co. (1992) 2 Cal. App. 4th 1328, 1334, 4 Cal. Rptr. 2d 23* ; *Gibbs v. Haight, Dickson, Brown & Bonesteel (1986) 183 Cal. App. 3d 716, 722, 228 Cal. Rptr. 398* ; *see also Friedman v. Stadum (1985) 171 Cal. App. 3d 775, 778-779, 217 Cal. Rptr. 585* (relying in part on Restatement (Second) of Torts § 674, cmt. j, the element of favorable termination cannot exist until the appeal is resolved)]. When no review is sought beyond the California Supreme Court, the issuance of the remittitur in the underlying action exhausts the appellate process and recommences the running of the limitations period [*Rare Coin Galleries, Inc. v. A-Mark Coin Co., Inc. (1988) 202 Cal. App. 3d 330, 338, 248 Cal. Rptr. 341]* .

If the underlying action involves an appeal in federal appeals court, the statute of limitations for malicious prosecution is tolled until the court of appeals issues its mandate [*Korody-Colyer Corp. v. General Motors Corp. (1989) 208 Cal. App. 3d 1148, 1152-1153, 256 Cal. Rptr. 658* ; *see Berg v. Leason (N.D. Cal. 1992) 793 F. Supp. 930, 933* (limitations period in malicious prosecution action as not beginning to run until court of appeals issued mandate affirming trial court's dismissal of underlying action)]. A federal circuit court is required under the Federal Rules of Appellate Procedure to issue its mandate within 21 days of entry of judgment [*Fed. Rules App. Proc., Rule 41(a)*]. However, if the court takes longer than 21 days to issue its mandate, tolling is not confined to the 21-day period [*Korody-Colyer Corp. v. General Motors Corp. (1989) 208 Cal. App. 3d 1148, 1153, 256 Cal. Rptr. 658* (mandate issued 39 days after entry of judgment)].

[3] Action for Abuse of Process

The two-year (one-year prior to January 1, 2003) period of limitations [*Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340.1*; *see also Ch. 345, Limitation of Actions, § 345.14*] applies to an action for abuse of process [*Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 95, 53 Cal. Rptr. 706]* . The period applies even when the plaintiff claims only property damage [*McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 590-591, 33 Cal. Rptr. 389* (seizure of merchandise pursuant to provisional remedy of claim and delivery)]. The limitations period for an abuse of process claim usually begins to run when the abuse of process occurs [*Cantu v. Resolution Trust Corp. (1992) 4 Cal. App. 4th 857, 887, 6 Cal. Rptr. 2d 151]* . Thus, unlike with a malicious prosecution action, the limitations period can accrue while the proceedings at issue are in progress, since a claim for abuse of process can be raised before termination of the proceedings complained of, and even within the proceedings in which the wrongful process issued [*White Lighting*

Co. v. Wolfson (1968) 68 Cal. 2d 336, 347, 66 Cal. Rptr. 697, 438 P.2d 345 (claim for abuse of process based on excessive attachment properly raised as cross-complaint in action to recover money owed)]. However, if the injury to the plaintiff does not occur at the time the abuse of process occurs, the limitations period begins to run when the injury occurs [*Kappel v. Bartlett (1988) 200 Cal. App. 3d 1457, 1467-1469, 246 Cal. Rptr. 815]* .

[4] Action for Fraud

Actions for relief on the ground of fraud must be commenced within three years after the discovery by the aggrieved party of the facts constituting the fraud [*see Code Civ. Proc. § 338(d)*]. The statutory period applies regardless of whether the remedy sought is legal or equitable [*see Security First Nat'l Bank v. Ross (1963) 214 Cal. App. 2d 424, 429-430, 29 Cal. Rptr. 538* ; *see also Zastrow v. Zastrow (1976) 61 Cal. App. 3d 710, 714, 132 Cal. Rptr. 536* (action to vacate judgment obtained through fraud); *Goodfellow v. Barritt (1933) 130 Cal. App. 548, 556-557, 20 P.2d 740* (action for reformation of contract on ground of fraud)].

Despite the statutory provision that an action for fraud does not accrue until the aggrieved party has "discovered the facts constituting the fraud" [*see Code Civ. Proc. § 338(d)*], many cases qualify this rule by requiring that the plaintiff use reasonable diligence to discover the true facts if he or she has reason to suspect fraud [*see, e.g., Sun'N Sand, Inc. v. United Cal. Bank (1978) 21 Cal. 3d 671, 701-702, 148 Cal. Rptr. 329, 582 P.2d 920]* . The most frequently quoted language found in the cases is that the "statute commences to run only after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on inquiry" [*see, e.g., Hobart v. Hobart Estate Co. (1945) 26 Cal. 2d 412, 437, 159 P.2d 958]* . If the plaintiff has no reason to suspect fraud, the right of action will not accrue until actual discovery of the facts constituting the fraud [*Hobart v. Hobart Estate Co. (1945) 26 Cal. 2d 412, 439, 159 P.2d 958* ; *see also Snow v. A.H. Robins Co. (1985) 165 Cal. App. 3d 120, 131-135, 211 Cal. Rptr. 271]* .

In cases involving a fiduciary relationship, facts that would ordinarily require investigation may not excite suspicion, and therefore the same degree of diligence is not required [*Hobart v. Hobart Estate Co. (1945) 26 Cal. 2d 412, 439-440, 159 P.2d 958]* . Ordinarily there will be no fiduciary relationship between an attorney and a nonclient, although such a relationship necessarily exists between an attorney and his or her client [*see* discussion in*§ 76.31[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawWillsBeneficiariesGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsMalpractice & Professional LiabilityAttorneys

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C. Liability to Nonclients
2. Defenses

7-76 California Forms of Pleading and Practice--Annotated § 76.221

AUTHOR: GEORGE M. LINDAHL

§ 76.221 Unclean Hands

As in malpractice actions brought by former clients [*see § 76.176*], the doctrine of unclean hands may be invoked as a defense against liability to parties who are not former clients. This doctrine is used generally when a party who seeks to set judicial machinery in motion and obtain some remedy has violated conscience, good faith, or other equitable principles in his or her prior conduct, and may be useful in defending against claims such as those for malicious prosecution or abuse of process [*see Unilogic, Inc. v. Burroughs Corp. (1992) 10 Cal. App. 4th 612, 620, 12 Cal. Rptr. 2d 741* (unclean hands defense as available in both actions for legal remedies and actions for equitable remedies)]. For example, in one case, an insurance agent brought a malicious prosecution action against an insurer based on an underlying action for indemnity. The defendant successfully raised the equitable defense of unclean hands, based on the plaintiff's failure to disclose critical evidence in the original action, which evidence might have changed the outcome of the indemnity action against the agent [*Pond v. Insurance Co. of N. Am. (1984) 151 Cal. App. 3d 280, 289-290, 198 Cal. Rptr. 517]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityMaximsClean Hands PrincipleTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsMalpractice & Professional LiabilityAttorneys

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7-76 California Forms of Pleading and Practice--Annotated § 76.222

AUTHOR: GEORGE M. LINDAHL

§ 76.222 Litigation Privilege Under Civ. Code § 47(b)

As discussed in*§ 76.201[5]*, an attorney may be liable to a third-party nonclient for negligent misrepresentation of facts. However, if the attorney's alleged negligent misrepresentation (1) is made in connection with a legal proceeding, (2) had some connection or logical relation to the action, (3) was made to achieve the objects of the litigation, and (4) involved litigants or other participants authorized by law, it is absolutely privileged under *Civ. Code § 47(b)* [*Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 825, 106 Cal. Rptr. 718* ; *see Tiedemann v. Superior Court (1978) 83 Cal. App. 3d 918, 924, 148 Cal. Rptr. 242* ; *Friedman v. Knecht (1967) 248 Cal. App. 2d 455, 460, 56 Cal. Rptr. 540]* . Such a statement may be absolutely privileged even though it was made outside the confines of a courtroom and was not directly related to any material issue before the court, provided that the alleged misrepresentation has some connection or logical relation to the underlying judicial proceedings [*Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 824, 106 Cal. Rptr. 718* ; *see also Jordan v. Lemaire (1963) 222 Cal. App. 2d 622, 625, 35 Cal. Rptr. 337]* . Moreover, an otherwise privileged communication need not have been made in the "interest of justice" to qualify for protection under *Civ. Code § 47(b)* [*Silberg v. Anderson (1990) 50 Cal. 3d 205, 218-219, 266 Cal. Rptr. 638, 786 P. 2d 365]* .

For example, in one case, the defendant attorneys were the attorneys of record for an insurance company that had been found liable to the plaintiff. At the time that the insurance company had been found liable, the defendant attorneys sought to avoid the filing of an appeal bond pursuant to *Code Civ. Proc. § 917.1*. Defendant attorneys assured plaintiff's counsel, both orally and by letter, that the insurance company was "financially as sound as a dollar," a representation that was later proved to have been false when it was made. This suit for negligent misrepresentation was then filed. The trial court granted defendant attorneys' motion for judgment on the pleadings on the basis that the representation was privileged pursuant to the judicial proceedings privilege [*see Civ. Code § 47(b)*]. The court of appeal affirmed on the basis that the alleged misrepresentation, although not relevant in a technical sense to any issue in the case, was absolutely privileged because it need only have some connection or relation to the legal proceedings [*Portman v. George McDonald Law Corp. (1979) 99 Cal. App. 3d 988, 991, 160 Cal. Rptr. 505* ; *see also Thornton v. Rhoden*

(1966) 245 Cal. App. 2d 80, 90, 53 Cal. Rptr. 706 (extending privilege to deponents)].

The privilege will not attach, however, when an attorney's alleged misrepresentation is also grounds for discipline of the attorney, and therefore cannot serve the purposes of the litigation [*see Carney v. Rotkin, Schmerin & McIntyre (1988) 206 Cal. App. 3d 1513, 1522-1523, 254 Cal. Rptr. 478* (attorney threatened plaintiff with nonexistent arrest warrant in attempt to deceive plaintiff and gain advantage over her, in apparent violation of *Bus. & Prof. Code § 6128* (deceit of party is misdemeanor)); *but see Lerette v. Dean Witter Org., Inc. (1976) 60 Cal. App. 3d 573, 576-579, 131 Cal. Rptr. 592* (threat of suit for securities law violations in letter sent before filing of action as privileged under former *Civ. Code § 47(2)* (now *Civ. Code § 47(b)*))].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationDefensesTortsNegligenceDefensesPrivate ImmunitiesGeneral Overview

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7-76 California Forms of Pleading and Practice--Annotated §§ 76.223-76.239

AUTHOR: GEORGE M. LINDAHL

[Reserved]

§§ 76.223[Reserved]

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7-76 California Forms of Pleading and Practice--Annotated § 76.240

AUTHOR: GEORGE M. LINDAHL

§ 76.240 California Torts

For discussion of vicarious liability generally, see Levy, Golden & Sacks, California Torts, Ch. 8 (Matthew Bender)

For discussion of factors involved in determining whether attorney owes duty of care in particular situations, see Levy, Golden & Sacks, California Torts, Ch. 1 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityAttorneysTortsNegligenceStandards of CareSpecial CareHighly Skilled ProfessionalsTortsVicarious LiabilityGeneral Overview

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7-76 California Forms of Pleading and Practice--Annotated § 76.241

AUTHOR: GEORGE M. LINDAHL

§ 76.241 State Statutes

Attorney as required to preserve client confidences. *Bus. & Prof. Code § 6068(e)*

Attorney-client relationship as terminating when attorney is relieved by court or by client. *Code Civ. Proc. § 284*

Partner as agent of partnership. *Corp. Code § 15009(1)*

Joint and several liability of partners and partnership. *Corp. Code §§ 15014, 15015*

Transaction between trustee and beneficiary occurring during existence of trust or while trustee's influence with beneficiary remains, and by which trustee obtains advantage from beneficiary, as presumed to be violation of trustee's fiduciary duties, unless transaction relates to hiring or compensation of trustee. *Prob. Code § 16004(c)*

Limited liability of partners in registered limited liability partnership. *Corp. Code § 16306(c)-(h)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionPartnership LiabilitiesBusiness & Corporate LawLimited Liability PartnershipsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of CareLegal EthicsClient RelationsConfidentiality of Information

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7-76 California Forms of Pleading and Practice--Annotated § 76.242

AUTHOR: GEORGE M. LINDAHL

§ 76.242 Law Corporation Rules

Law corporation as required to provide security, in form of malpractice insurance or shareholder guarantee, for claims by clients. State Bar Law Corp. Rules, Rule IV

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawProfessional Associations & CorporationsInsurance LawMalpractice InsuranceAttorneys

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7-76 California Forms of Pleading and Practice--Annotated § 76.243

AUTHOR: GEORGE M. LINDAHL

§ 76.243 Rules of Professional Conduct

Attorney as required to preserve client confidences. *Cal. Rules Prof. Conduct, Rule 1-100(A)*

Attorney as not allowed to represent clients with conflicting interests without written consent of all parties. *Cal. Rules Prof. Conduct, Rule 3-310(C)*

Attorney for corporation as required to conform representation to concept that client is corporation itself, acting through highest authorized officer, employee, body, or constituent overseeing particular engagement. *Cal. Rules Prof. Conduct, Rule 3-600(A)*

Guidelines for withdrawal from attorney-client relationship. *Cal. Rules Prof. Conduct, Rule 3-700*

Attorney as required to deposit client funds in trust account. *Cal. Rules Prof. Conduct, Rule 4-100*

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsClient FundsLegal EthicsClient RelationsConfidentiality of InformationLegal EthicsClient RelationsConflicts of Interest

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7-76 California Forms of Pleading and Practice--Annotated § 76.244

AUTHOR: GEORGE M. LINDAHL

§ 76.244 Decisions

[1] Declining Employment

Attorney who declines employment after consulting with potential client and investigating case as bound, if aware of facts, to advise when limitation period for commencing action will expire and what must be done to preserve right of action, particularly when attorney declines employment soon before limitation period will expire. *Miller v. Metzinger (1979) 91 Cal. App. 3d 31, 41-42, 154 Cal. Rptr. 22*

[2] Duty

[a] In General

When attorney severs relationship with prospective client because target of contemplated litigation is existing client, attorney has no duty to provide any advice to prospective client adverse to interests of existing client, including advice respecting statute of limitations governing, and advisability of engaging alternative counsel to pursue, prospective client's contemplated lawsuit. *Flatt v. Superior Court (1994) 9 Cal. 4th 275, 281, 36 Cal. Rptr. 2d 537, 885 P.2d 950*

Attorney's duty toward existing client negates any duty to give prospective new client advice when existing client is potential target of new client's cause of action; thus, when attorney severs relationship with new client under these circumstances, attorney has no duty to advise new client regarding applicable statute of limitations or need to seek other counsel. *Flatt v. Superior Court (1994) 9 Cal. 4th 275, 278-279, 36 Cal. Rptr. 2d 537, 885 P.2d 950*

Attorney as not insurer of soundness of own opinions or of validity of instruments drafted by attorney and as not liable for errors of law on questions subject to reasonable doubt among well informed lawyers. *Kirsch v. Duryea (1978) 21*

Cal. 3d 303, 308, 146 Cal. Rptr. 218, 578 P.2d 935 ; *Lucas v. Hamm (1961) 56 Cal. 2d 583, 591, 15 Cal. Rptr. 821, 364 P.2d 685*

With respect to unsettled area of law, attorney as required to undertake reasonable research and make informed decision as to proper course of conduct based on particular problem at hand. *Smith v. Lewis (1975) 13 Cal. 3d 349, 358-359* ; *see also Aloy v. Mash (1985) 38 Cal. 3d 413, 418, 212 Cal. Rptr. 162, 696 P.2d 656*

Attorney as not liable for every mistake that he or she may make in course of practice. *Smith v. Lewis (1975) 13 Cal. 3d 349, 358, 118 Cal. Rptr. 621* , *530 P.2d; Lally v. Kuster (1918) 177 Cal. 783, 786, 171 P. 961*

Duty of attorney to communicate to client information he or she acquires in relation to subject matter involved in transaction. *Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 189-190*

Attorney-client relationship as imposing fiduciary duties. *Clancy v. State Bar (1969) 71 Cal. 2d 140, 146, 77 Cal. Rptr. 657, 454 P.2d 329* ; *Cox v. Delmas (1893) 99 Cal. 104, 123, 33 P. 836*

When attorney-client relationship is limited to specific matter, attorney's duty to represent client as extending only to that matter. *See Sullivan v. Dunne (1926) 198 Cal. 183, 190, 244 P. 343*

Existence of attorney-client relationship as required to create attorney's duty to act for client. *Daniels v. DeSimone (1993) 13 Cal. App. 4th 600, 607, 16 Cal. Rptr. 2d 615*

Attorney as having duty to be aware of and knowledgeable about local court rules. *Massie v. AAR W. Skyways, Inc. (1992) 4 Cal. App. 4th 405, 408, 5 Cal. Rptr. 2d 654*

Attorney as having duty to fully inform client of his or her rights and alternatives available under particular circumstances. *Considine Co. v. Shadle, Hunt & Hagar (1986) 187 Cal. App. 3d 760, 765, 232 Cal. Rptr. 250*

Attorney as required to represent client with undivided loyalty. *see Betts v. Allstate Ins. Co. (1984) 154 Cal. App. 3d 688, 715-716, 201 Cal. Rptr. 528*

Attorney as under fiduciary obligation to disclose to client all information bearing on client's case. *Betts v. Allstate Ins. Co. (1984) 154 Cal. App. 3d 688, 716, 201 Cal. Rptr. 528* ; *see also San Diego Fed. Credit Union v. Cumis Ins. Soc'y, Inc. (1984) 162 Cal. App. 3d 358, 374, 208 Cal. Rptr. 494* (attorney's duty to advise clients of conflict of interest as one basis for finding that insurer must furnish independent counsel to insured when latter's interest conflicts with insurer's); *Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 901, 142 Cal. Rptr. 509* (attorney representing both parties to transaction as casting doubt on validity of transaction)

Attorney as having duty to avoid representing more than one party involved in estate proceeding or trust instrument. *Garcia v. Borelli (1982) 129 Cal. App. 3d 24, 29, 32, 180 Cal. Rptr. 768* (representation of estate and joint tenant of testator); *Morales v. Field, DeGoff, Huppert & MacGowan (1979) 99 Cal. App. 3d 307, 313-317, 160 Cal. Rptr. 239* (representation of executor and unsecured creditor of testator in transaction settling creditor's claim against estate); *Potter v. Moran (1966) 239 Cal. App. 2d 873, 878-879, 49 Cal. Rptr. 229* (representation of trustee and guardian of estate of minor beneficiary)

Attorney as required to refer client to specialist or to obtain help of specialist when client needs legal assistance in area beyond attorney's expertise. *see Horne v. Peckham (1979) 97 Cal. App. 3d 404, 414-415, 158 Cal. Rptr. 714* ; *see also Lewis v. State Bar (1981) 28 Cal. 3d 683, 687-688, 170 Cal. Rptr. 634, 621 P.2d 258*

Attorney as not allowed to take actions that would injure former client in matters within scope of former representation

and as not allowed to use any information gained during relationship against former client. *Yorn v. Superior Court (1979) 90 Cal. App. 3d 669, 675, 153 Cal. Rptr. 295* ; *see People v. Thoi (1989) 213 Cal. App. 3d 689, 699, 261 Cal. Rptr. 789*

Attorney's duties to insured and insurer when representing both. *Zalta v. Billips (1978) 81 Cal. App. 3d 183, 187, 144 Cal. Rptr. 888* ; *Lysick v. Walcom (1968) 258 Cal. App. 2d 136, 146-150, 65 Cal. Rptr. 406*

Duty of care imposed on attorney representing clients with divergent interests. *Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 897-899, 142 Cal. Rptr. 509* ; *Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 526-528, 50 Cal. Rptr. 592*

Attorney as having as much right and duty to correct his or her mistakes as a judge has very considerable right and duty to grant new trial for his or her own errors. *Gera v. Gera (1969) 272 Cal. App. 2d 492, 498, 77 Cal. Rptr. 336*

Attorney's duty to protect client's interests as including duty to prepare judgment papers that opposing attorney was ordered to prepare if opposing attorney delays unreasonably in so doing, when client's interests call for prompt conclusion of lawsuit. *Chavez v. Carter (1967) 256 Cal. App. 2d 577, 579-580, 64 Cal. Rptr. 350*

Attorney as required to preserve client confidences. *Earl Scheib, Inc. v. Superior Court (1967) 253 Cal. App. 2d 703, 706, 61 Cal. Rptr. 386*

Attorney representing parties with divergent interests as required to disclose all facts and circumstances which, in judgment of lawyer of ordinary skill and capacity, are necessary to enable client to make free and intelligent decisions regarding subject matter of representation. *Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 528, 50 Cal. Rptr. 592*

Attorney as considered to possess knowledge, skill, and intelligence superior to that of ordinary person and, as consequence, held to higher minimum standard of conduct. *Theobald v. Byers (1961) 193 Cal. App. 2d 147, 150, 13 Cal. Rptr. 864*

[b] To Corporate Client

Corporate attorney's primary duty as owed to corporation rather than to corporate management. *see Meehan v. Hopps (1956) 144 Cal. App. 2d 284, 290, 301 P.2d 10*

Attorney representing corporation as owing same duties to corporation as to individual. *See Moser v. Western Harness Racing Assn. (1948) 89 Cal. App. 2d 1, 6-7, 200 P.2d 7*

[3] Establishing Attorney-Client Relationship

Attorney-client relationship as usually created by express or implied contract. *Houston Gen. Ins. Co. v. Superior Court (1980) 108 Cal. App. 3d 958, 964, 166 Cal. Rptr. 904* (general rules of agency apply); *see also American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 590-591, 113 Cal. Rptr. 561*

Establishing attorney-client relationship as requiring neither retainer nor other formal agreement. *Kane, Kane & Kritzer, Inc. v. Altagen (1980) 107 Cal. App. 3d 36, 40, 165 Cal. Rptr. 534* ; *Brandlin v. Belcher (1977) 67 Cal. App. 3d 997, 1001, 134 Cal. Rptr. 1* ; *but see Fox v. Pollack (1986) 181 Cal. App. 3d 954, 959, 226 Cal. Rptr. 532* (although formation of attorney-client relationship may be informal, such relationship does not exist merely because party believes that attorney is representing his or her interests)

Attorney-client relationship as arising from pattern of custom and practice between attorney and client. *Kane, Kane & Kritzer, Inc. v. Altagen (1980) 107 Cal. App. 3d 36, 40, 165 Cal. Rptr. 534*

Establishing circumstances that would create attorney-client relationship as issue of fact. *Miller v. Metzinger (1979) 91 Cal. App. 3d 31, 39, 154 Cal. Rptr. 22*

Agreeing to investigate case or providing legal advice to prospective client as giving rise to attorney-client relationship and concomitant duties despite absence of fee arrangement. *Miller v. Metzinger (1979) 91 Cal. App. 3d 31, 39-40, 154 Cal. Rptr. 22*

Attorney handling labor grievance on behalf of union as not entering into attorney-client relationship with particular union member who is asserting underlying grievance. *Peterson v. Kennedy (9th Cir. 1985) 771 F.2d 1244* ; *see also Aragon v. Pappy, Kaplon, Vogel & Phillips (1989) 214 Cal. App. 3d 451, 463-464, 262 Cal. Rptr. 646* (retained counsel functioning as union agent in collective bargaining process as immune from malpractice suit by individual labor union member)

[4] Terminating Attorney-Client Relationship

Substitution of attorney filed prior to time when client's right to sue is lost as relieving substituted attorney from liability for damages arising from loss of right to sue. *Stuart v. Superior Court (1992) 14 Cal. App. 4th 124, 127-128, 18 Cal. Rptr. 2d 142* (limitations period expired)

Attorney-client relationship as terminating once task for which attorney was retained is concluded. *see Ruszovan v. Ruszovan (1969) 268 Cal. App. 2d 902, 906, 74 Cal. Rptr. 507* ; *Mizrahi v. Miscione (1967) 252 Cal. App. 2d 673, 677, 60 Cal. Rptr. 680*

[5] Vicarious Liability

[a] Employees

Attorney as liable for wrongful conduct of attorneys, law clerks, paralegals, secretaries, detectives, or other employees and agents acting in course and scope of employment. *see Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 663, 109 Cal. Rptr. 269*

[b] Partners and Associates

Attorney's liability for acts of law partners as governed by Uniform Partnership Act [*see Corp. Code §§ 15001-15046*]. *Blackmon v. Hale (1970) 1 Cal. 3d 548, 557, 83 Cal. Rptr. 194, 463 P.2d 418*

Former law partner as jointly and severally liable with second attorney who subsequently diverted plaintiff's trust funds for his own use; former law partner, in his capacity of cotrustee, as liable with plaintiff's attorney who misappropriated plaintiff's money deposited in firm's trust account when plaintiff had not been consulted about the transfer. *Blackmon v. Hale (1970) 1 Cal. 3d 548, 556-561, 83 Cal. Rptr. 194, 463 P.2d 418*

Attorney who employs other attorneys as liable for their wrongful acts in same manner as principal is liable for agent's acts. *Gudger v. Manton (1943) 21 Cal. 2d 537, 549, 134 P.2d 217*

Former shareholder attorneys of dissolved corporate law firm as vicariously liable for malpractice of corporation

committed prior to dissolution of firm. *Beane v. Paulsen (1993) 21 Cal. App. 4th 89, 95-96, 26 Cal. Rptr. 2d 486* , *overruled in part by* *Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal. 4th 503, 66 Cal. Rptr. 3d 52* (disapproved on other grounds in *Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal. 4th 503, 514, 66 Cal. Rptr. 3d 52, 167 P.3d 666*)

Finding of ostensible partnership as sufficient to impose vicarious liability for acts of attorneys with whom attorney is sharing office space or is otherwise associated in relationship that is not partnership. *Redman v. Walters (1979) 88 Cal. App. 3d 448, 455, 152 Cal. Rptr. 42*

Attorney as liable for partner's malicious prosecution when partnership was created after action alleged to have been malicious was filed, if some action was taken by partner after formation of partnership. *Lujan v. Gordon (1977) 70 Cal. App. 3d 260, 262-264, 138 Cal. Rptr. 654*

Attorney who substituted for original attorney as equally liable with original attorney for professional negligence in handling case when client consented to substitution, attorneys were to divide fee, if and when it was collected, and attorneys were each responsible to the client. *Floro v. Lawton (1960) 187 Cal. App. 2d 657, 671, 10 Cal. Rptr. 98*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionPartnership LiabilitiesLegal EthicsClient RelationsAccepting RepresentationLegal EthicsClient RelationsConfidentiality of InformationTortsMalpractice & Professional LiabilityProfessional ServicesTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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7-76 California Forms of Pleading and Practice--Annotated § 76.245

AUTHOR: GEORGE M. LINDAHL

§ 76.245 Law Reviews

Mallen, *Apparent Partnerships and Real Legal Malpractice Liability*, 55 Cal. St. B.J. 334 (August 1980)

Mallen, *The Fine Art of Delegation, Association and Referral*, 55 Cal. St. B.J. 510 (Dec. 1980)

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Volume 7: Attorney Practice and Ethics thru Auctions and Auctioneers-Chs.72-79
Chapter 76 ATTORNEY PROFESSIONAL LIABILITY
PART III. RESEARCH GUIDE
A. Liability to Client
1. Bases of Liability

7-76 California Forms of Pleading and Practice--Annotated § 76.246

AUTHOR: GEORGE M. LINDAHL

§ 76.246 Text References

Witkin, California Procedure (4th ed. 1997), Vol. 1, *Attorneys*, §§ 311-354

7 C.J.S., *Attorney and Client*, §§ 234-253, 252-253

7 Am. Jur. 2d, *Attorneys at Law*, §§ 197-216

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityProfessional ServicesTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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7-76 California Forms of Pleading and Practice--Annotated §§ 76.247-76.259

AUTHOR: GEORGE M. LINDAHL

[Reserved]

§§ 76.247[Reserved]

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7-76 California Forms of Pleading and Practice--Annotated § 76.260

AUTHOR: GEORGE M. LINDAHL

§ 76.260 California Points and Authorities

For memoranda of points and authorities related to the negligence of an attorney, see California Points and Authorities, Ch. 24, *Attorneys at Law* . (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityProfessional ServicesTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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7-76 California Forms of Pleading and Practice--Annotated § 76.261

AUTHOR: GEORGE M. LINDAHL

§ 76.261 California Torts

For a general discussion of causation in negligence suits, see California Torts, Ch. 2 (Matthew Bender)

For a discussion of the requirements for establishing the presumption of negligence under *Evid. Code § 669*, including the respective issues resolved by the court and the jury, and the manner in which the presumption may be rebutted, see California Torts, Ch. 3 (Matthew Bender)

For discussion of the cause of action for negligent infliction of emotional distress, see California Torts, Ch. 5 (Matthew Bender)

For discussion of the qualifications of experts in medical malpractice actions, see California Torts, Ch. 31 (Matthew Bender)

For discussion of the cause of action for intentional infliction of emotional distress, see California Torts, Ch. 44 (Matthew Bender)

For discussion of recovery of interest in tort actions generally, see California Torts, Ch. 50 (Matthew Bender)

For discussion of emotional distress damages generally, see California Torts, Ch. 51 (Matthew Bender)

For a discussion of mitigation of damages in tort actions generally, see California Torts, Ch. 53 (Matthew Bender)

For discussion of punitive damages generally, see California Torts, Ch. 54 (Matthew Bender)

For discussion of the Rules of Professional Conduct and their application to the attorney-client relationship, see California Torts, Ch. 70 (Matthew Bender)

For discussion of an attorney's duties relating to settlement of a case, see California Torts, Ch. 73 (Matthew Bender)

For a detailed discussion of indemnity generally, see California Torts, Ch. 74 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesPunitive DamagesConduct Supporting AwardsTortsMalpractice & Professional LiabilityProfessional ServicesTortsNegligenceStandards of CareSpecial CareHighly Skilled ProfessionalsTortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsProcedureSettlementsGeneral Overview

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7-76 California Forms of Pleading and Practice--Annotated § 76.262

AUTHOR: GEORGE M. LINDAHL

§ 76.262 State Statutes

Discretionary interest awards. *Civ. Code § 3288*

Awards of punitive damages. *Civ. Code § 3294*

Measure for recovery of damages. *Civ. Code § 3333*

Statute of limitations for legal malpractice actions. *Code Civ. Proc. § 340.6*

Violation of statute, ordinance, or regulation creates presumption of negligence. *Evid. Code § 669*

Qualifications for testimony as expert witness. *Evid. Code § 720*

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyExpertsQualificationsTortsDamagesPunitive DamagesGeneral OverviewTortsMalpractice & Professional LiabilityProfessional ServicesTortsNegligenceProofViolations of LawStatutesTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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7-76 California Forms of Pleading and Practice--Annotated § 76.263

AUTHOR: GEORGE M. LINDAHL

§ 76.263 Rules of Professional Conduct

Communication of settlement offer to client is required. *Cal. Rules Prof. Conduct, Rule 3-510*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewLegal EthicsClient RelationsGeneral OverviewTortsMalpractice & Professional LiabilityProfessional ServicesTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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7-76 California Forms of Pleading and Practice--Annotated § 76.264

AUTHOR: GEORGE M. LINDAHL

§ 76.264 Decisions

[1] Causation

Attorney's negligence as proximate cause of damage to plaintiff in order to state cause of action. *Budd v. Nixen (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433* ; *see also John B. Gunn Law Corp. v. Maynard (1987) 189 Cal. App. 3d 1565, 1570-1573, 235 Cal. Rptr. 180* ; *Starr v. Mooslin (1971) 14 Cal. App. 3d 988, 1002, 92 Cal. Rptr. 583* (attorney's negligence need not be the only proximate cause)

In five of seven claims, plaintiffs presented no substantial evidence that they would have reached more favorable result if attorneys had not been negligent when drafting and negotiating agreement to sell plaintiffs' ownership interest in company. *Viner v. Sweet (2004) 117 Cal. App. 4th 1218, 1226-1231, 12 Cal. Rptr. 3d 533*

Malpractice plaintiff's allegation that she would have settled underlying lawsuit had attorney not provided negligent advice was sufficient allegation of causation to withstand demurrer; express allegation that plaintiff in underlying suit would have settled for $25,000, when that party was only seeking $19,000, was not required. *Charnay v. Cobert (2006) 145 Cal. App. 4th 170, 180-181, 51 Cal. Rptr. 3d 471*

Subsequent attorney's negligence does not absolve prior attorney of liability for own negligence. *Cline v. Watkins (1977) 66 Cal. App. 3d 174, 179, 135 Cal. Rptr. 838*

[2] Compensation

Effect of attorney's negligence on his or her right to compensation and measure thereof. *Estate of Kruger (1900) 130 Cal. 621, 626, 63 P. 31*

[3] Damages

[a] In General

As matter of policy, malpractice plaintiff may not recover value of lost claim for punitive damages as compensatory damages from malpractice defendant. *Ferguson v. Lieff, Cabraser, Heimann & Bernstein (2003) 30 Cal. 4th 1037, 1046-1051, 135 Cal. Rptr. 2d 46, 69 P.3d 965* ; *see also Piscitelli v. Friedenberg (2001) 87 Cal. App. 4th 953, 979-983, 105 Cal. Rptr. 2d 88*

Actual damages is essential element of malpractice cause of action; nominal damages alone are insufficient to state cause of action. *Budd v. Nixen (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433* ; *Alhino v. Starr (1980) 112 Cal. App. 3d 158, 176, 169 Cal. Rptr. 136* ; *Zalta v. Billips (1978) 81 Cal. App. 3d 183, 188-189, 144 Cal. Rptr. 888* ; *Kirtland & Packard v. Superior Court (1976) 59 Cal. App. 3d 140, 144, 131 Cal. Rptr. 418*

Measure of damages, when client sues attorney who negligently failed to prosecute lawsuit for collection of debt with result that lawsuit was dismissed, is amount that could have been recovered in dismissed action. *Lally v. Kuster (1918) 177 Cal. 783, 791, 171 P. 961*

Even if attorney provided by insurer breached duty in failing to disclose conflict of interest, attorney's fees and costs incurred by plaintiff did not constitute malprac tice damages when insurer was responsible for paying defense costs and plaintiff was not required to pay anything in satisfaction of underlying claim. *Lazy Acres Market, Inc. v. Tseng (2007) 152 Cal. App. 4th 1431, 1436, 62 Cal. Rptr. 3d 378*

Collateral source rule bars attorney, who was sued for malpractice, from obtaining offset of damages to reflect insurance proceeds client received for injury from source unrelated to tortfeasor in underlying action. *Norton v. Superior Court (1994) 24 Cal. App. 4th 1750, 1758, 30 Cal. Rptr. 2d 217*

Plaintiff is entitled to recover, as compensatory damages from legal malpractice defendant, punitive damages that plaintiff would have obtained from defendant in underlying action giving rise to malpractice claim. *Merenda v. Superior Court (1992) 3 Cal. App. 4th 1, 12* ; *but see Piscitelli v. Friedenberg (2001) 87 Cal. App. 4th 953, 979-983, 105 Cal. Rptr. 2d 88*

Speculative damages are not recoverable in legal malpractice action. *In re Easterbrook (1988) 200 Cal. App. 3d 1541, 1544, 244 Cal. Rptr. 652 , overruled on other grounds, People v. Romero (1994) 8 Cal. 4th 728, 35 Cal. Rptr. 2d 270, 883 P.2d 388* ; *Commercial Standard Title Co. v. Superior Court (1979) 92 Cal. App. 3d 934, 942, 155 Cal. Rptr. 393* ; *McGregor v. Wright (1931) 117 Cal. App. 186, 196-197, 3 P.2d 624*

Award of damages that included costs of sale is proper in action by client against attorney who negligently caused client to file for bankruptcy and then undervalued client's home on bankruptcy petition, resulting in the forced sale of home to satisfy creditor's claims. *Enriquez v. Smyth (1985) 173 Cal. App. 3d 691, 698-699, 219 Cal. Rptr. 267*

Reduction of legal malpractice damages by amount of fees that attorney would have been paid had claim been competently handled is improper. *Kane, Kane, & Kritzer, Inc. v. Altagen (1980) 107 Cal. App. 3d 36, 44, 165 Cal. Rptr. 534* ; *Benard v. Walkup (1969) 272 Cal. App. 2d 595, 606, 77 Cal. Rptr. 544*

Plaintiff in legal malpractice case has duty to make reasonable effort to avoid or mitigate damages. *Horne v. Peckham (1979) 97 Cal. App. 3d 404, 418, 158 Cal. Rptr. 714* ; *see also Lewis v. Superior Court (1978) 77 Cal. App. 3d 844, 853, 144 Cal. Rptr. 1* (failure to mitigate damages justifies reduction in client's damages); *Theobald v. Byers (1961) 193 Cal. App. 2d 147, 153, 13 Cal. Rptr. 864*

Fact that attorney's professional negligence would have resulted in less harm than client actually suffered, if client had cooperated in attorney's negligent handling of case, is relevant to issue of client's damages. *Martin v. Hall (1971) 20 Cal. App. 3d 414, 428, 97 Cal. Rptr. 730*

Damages awarded client in malpractice action against attorney based on attorney's failure to file personal injury action before it was barred by statute of limitations are not subject to reduction in amount of fee attorney would have earned if personal injury action had been timely filed and brought to judgment, since such fee cannot be ascertained with reasonable certainty. *Benard v. Walkup (1969) 272 Cal. App. 2d 595, 605-606, 77 Cal. Rptr. 544* (contingent fee agreement involving two alternative contingencies)

Attorney is liable to client for all damages directly and proximately caused by his or her negligent failure to exercise due care in handling client's affairs and performing professional duties to best of his or her ability. *Pete v. Henderson (1954) 124 Cal. App. 2d 487, 489, 269 P.2d 78* (dictum)

[b] Emotional Distress

Emotional distress damages are only appropriate when emotional shock to plaintiff stems from abnormal event and it was highly foreseeable that defendant's actions would cause shock to plaintiff. *Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 168, 216 Cal. Rptr. 661, 703 P.2d 1*

Plaintiff's frustration at delay in resolution of underlying medical malpractice suit that followed death of plaintiff's infant daughter and anger at being misused by both doctors and lawyers does not meet requirements for recovery of emotional distress damages. *Pleasant v. Celli (1993) 18 Cal. App. 4th 841, 853-854, 22 Cal. Rptr. 2d 663* ; *overruled on other grounds, Adams v. Paul (1995) 11 Cal. 4th 583, 46 Cal. Rptr. 2d 594, 904 P.2d 1205*

When plaintiff alleges that interest invaded by legal malpractice is economic interest in recovering damages for antecedent tort of sexual battery, emotional distress is not inevitable consequence of economic loss, and court is required to balance policy considerations in deciding whether to award damages for emotional distress. *Merenda v. Superior Court (1992) 3 Cal. App. 4th 1, 10-11, 4 Cal. Rptr. 2d 87* (emotional distress damages not awarded)

In action by insured against attorney hired to defend her by insurer, award of money damages for negligent infliction of emotional distress is proper when evidence showed that attorneys neglected insured's interests in favor of insurer's, and insured suffered resulting shock and trauma when verdict far exceeding policy limits was rendered against her in underlying action. *Betts v. Allstate Ins. Co. (1984) 154 Cal. App. 3d 688, 717-718, 201 Cal. Rptr. 528*

[c] Joint Tortfeasors

Under *Code Civ. Proc. § 877*, plaintiff's medical malpractice damage award is reduced by amount received in settlement of related legal malpractice claim to avoid double recovery when plaintiff, in complaint, on appeal, and through continued prosecution of action against attorney, claimed attorney was liable for damages resulting from medical malpractice. *Lafayette v. County of Los Angeles (1984) 162 Cal. App. 3d 547, 554-556, 208 Cal. Rptr. 668*

[d] Punitive Damages

Punitive damages are not available if jury finds defendant guilty of malpractice but awards no compensatory damages to plaintiff. *Jackson v. Johnson (1992) 5 Cal. App. 4th 1350, 1355-1358, 7 Cal. Rptr. 2d 482*

Punitive damages are supported by allegations that attorney advised client to delay medical treatment in order to increase monetary value of medical malpractice case, knowing that delay would worsen client's condition, and that attorney misrepresented to client that valid cause of action existed after statute of limitations period expired. *Blegen v. Superior Court (1981) 125 Cal. App. 3d 959, 962-963, 178 Cal. Rptr. 470*

[4] Elements

Elements of cause of action in tort for professional negligence. *Budd v. Nixen (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433* ; *In re Easterbrook (1988) 200 Cal. App. 3d 1541, 1544, 244 Cal. Rptr. 652*

Attorney's negligence does not provide basis for cause of action for malpractice until client suffers appreciable harm as consequence; cause of action arises when any appreciable and actual harm flows from attorney's negligent conduct. *Budd v. Nixen (1971) 6 Cal. 3d 195, 200-201, 98 Cal. Rptr. 849, 491 P.2d 433*

Cause of action based on professional negligence of attorney as not accruing until client knows, or should know, all material facts essential to show elements of cause of action. *Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 190, 98 Cal. Rptr. 837, 491 P.2d 421*

Professional negligence by attorney as consisting of failure to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks that they undertake. *Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 180, 98 Cal. Rptr. 837, 491 P.2d 421* ; *Kim v. Orellana (1983) 145 Cal. App. 3d 1024, 1028, 193 Cal. Rptr. 827*

Client suing attorney for alleged negligent failure to collect debt as required to allege and prove that claim was turned over to attorney for collection, that failure to collect was due to negligence, that claim was valid and subsisting, and that debtor was solvent. *Lally v. Kuster (1918) 177 Cal. 783, 787-788, 171 P. 961*

Complaint based on negligent failure to prosecute client's lawsuit as required to allege facts showing client has fulfilled all conditions precedent to right to commence such lawsuit. *Bayly v. Lee (1916) 174 Cal. 137, 139, 162 P. 96*

In malpractice action against former partner of attorney retained to represent plaintiff in medical malpractice action dismissed for lack of service, attorney-client relationship as nonexistent; summary judgment for defendant as proper based on absence of element of duty to plaintiff. *Daniels v. DeSimone (1993) 13 Cal. App. 4th 600, 607-608, 16 Cal. Rptr. 2d 615*

Summary judgment in malpractice action based on failure to return proof of service within statutory time as upheld with regard to attorney who filed action and obtained service when another attorney was substituted in five months before the expiration date, and thus, first attorney did not represent plaintiff when right to pursue underlying action was lost. *Stuart v. Superior Court (1992) 14 Cal. App. 4th 124, 127-128, 18 Cal. Rptr. 2d 142*

Plaintiff as required to plead specific facts affording inference that attorney's negligence caused injury if pleaded facts of negligence and injury do not naturally give rise to inference of causation. *Blain v. Doctor's Co. (1990) 222 Cal. App. 3d 1048, 1066, 272 Cal. Rptr. 250*

Client's exposure to liability because of attorney's misconduct as not constituting element of "actual damage" unless exposure actually resulted in compensable detriment. *Blain v. Doctor's Co. (1990) 222 Cal. App. 3d 1048, 1063, 272 Cal. Rptr. 250*

Plaintiff in attorney malpractice action as required to establish (1) attorney-client relationship or other basis for duty,

(2) negligent act or omission, (3) proximate causation of damages, and (4) measure of damages. *Sukoff v. Lemkin (1988) 202 Cal. App. 3d 740, 744, 249 Cal. Rptr. 42*

Attorney malpractice action as requiring proof that underlying case was meritorious in addition to other elements of duty, breach, proximate cause, and damages. *Harris v. Smith (1984) 157 Cal. App. 3d 100, 104, 203 Cal. Rptr. 541*

Elements of cause of action for malpractice as (1) duty to use such skill, prudence, and diligence as other members of bar commonly possess, (2) breach of that duty, (3) proximate causal connection between negligence and injury, and (4) actual damages. *Purdy v. Pacific Auto. Ins. Co. (1984) 157 Cal. App. 3d 59, 76, 203 Cal. Rptr. 524* ; *Bucquet v. Livingston (1976) 57 Cal. App. 3d 914, 920-921, 129 Cal. Rptr. 514*

Complaint against attorney based on professional negligence as not required to allege negligence was sole cause of client's loss or to negate any other probable cause, but required to allege attorney's negligence was proximate cause of loss. *Modica v. Crist (1954) 129 Cal. App. 2d 144, 147-148, 276 P.2d 614*

[5] Implied Indemnity

Ordinary rules of comparative indemnity as inapplicable if claim for indemnity is made against attorney, is based on breach of attorney's duty to his or her client, and is brought by adverse party in litigation that is same or related to that in which alleged professional negligence occurred. *California State Auto. Assn. Inter-Ins. Bureau v. Bales (1990) 221 Cal. App. 3d 227, 230-231, 270 Cal. Rptr. 421* (insurer sued by insured for bad faith as not entitled to obtain comparative equitable indemnity from insured's attorney on theory that attorney's negligence at least partially caused insured's damage)

Public policy considerations as precluding cross complaint for indemnity by attorney against subsequent attorney bringing legal malpractice action on behalf of client, even though subsequent attorney's alleged negligence occurred concurrently with defendant's in course of representation of client and not with regard to malpractice action. *Lewis v. Purvin (1989) 208 Cal. App. 3d 1208, 1214-1217, 256 Cal. Rptr. 827*

Prohibition on cross complaints by defendant predecessor attorneys for equitable indemnity against successor attorneys as not inconsistent with or violative of right to contribution provided in *Civ. Code § 1432*. *Holland v. Thacher (1988) 199 Cal. App. 3d 924, 936, 245 Cal. Rptr. 247*

Court's refusal to allow attorney sued for attorney malpractice to cross complain against successor attorney for equitable indemnity as not denying attorney equal protection or due process. *Holland v. Thacher (1988) 199 Cal. App. 3d 924, 935, 245 Cal. Rptr. 247*

Attorney sued for malpractice by former client as barred from cross complaining for indemnity against successor attorney hired to assist client in limiting injury caused by original attorney; original attorney as having option, in lieu of seeking indemnity, of asserting successor attorney's negligence as affirmative defense. *Holland v. Thacher (1988) 199 Cal. App. 3d 924, 929-935, 245 Cal. Rptr. 247*

Attorney as liable for equitable indemnity when plaintiff restaurateur sued lessor in tort and contract for failure to provide outdoor dining area as promised in lease; although lessor and lessee retained attorney after lease was signed, attorney's negligent defense against third party's suit to enjoin construction of dining area as partly responsible for plaintiff's damages. *Considine Co. v. Shadle, Hunt & Hagar (1986) 187 Cal. App. 3d 760, 767-768, 232 Cal. Rptr. 250*

If two attorneys, not in privity, successively represented same client in prior action, first attorney sued for malpractice

as prohibited by public policy from maintaining claim for equitable, or partial equitable, indemnity against second attorney on alleged ground that client's damages were actually caused or exacerbated by second attorney. *Goldfisher v. Superior Court (1982) 133 Cal. App. 3d 12, 21-23, 183 Cal. Rptr. 609*

Attorney sued by former client for malpractice as permitted to cross complain for partial indemnity against client's second attorney whose negligence as a matter of law contributed to client's loss. *Parker v. Morton (1981) 117 Cal. App. 3d 751, 755-767, 173 Cal. Rptr. 197* (distinguishing prior cases holding attorney sued by former client for malpractice may not cross complain against client's successor attorney who is retained to extricate client from situation created by first attorney when second attorney's alleged negligence consisted of choice of alternative remedies requiring exercise of professional judgment)

Lawyer sued by former client for professional negligence as not permitted to cross complain for partial equitable indemnity against client's second lawyer who was retained to extricate client from situation created by alleged negligence of first lawyer; rule as applying whether or not person seeking indemnification was a lawyer. *Gibson, Dunn & Crutcher v. Superior Court (1979) 94 Cal. App. 3d 347, 349, 156 Cal. Rptr. 326*

Attorney whose malpractice (failure to advise client entering land-exchange transaction to obtain title insurance respecting parcel to be acquired) contributed to client's injury as not "joint" tortfeasor with title company (liable for negligent failure to report encumbrance on parcel client acquired), at least for purpose of title company's claim for equitable indemnity from attorney. *Commercial Standard Title Co. v. Superior Court (1979) 92 Cal. App. 3d 934, 941-943, 155 Cal. Rptr. 393*

[6] Nature of Action

Attorney's asserted failure to exercise requisite skill and care as possible basis for legal malpractice action grounded on breach of contract and tort, but failure of attorney as not furnishing basis for reversal of judgment entered against client in civil trial. *Kim v. Orellana (1983) 145 Cal. App. 3d 1024, 1028, 193 Cal. Rptr. 827*

Similar rules regarding standard of care applied to doctors and dentists and members of other professions as applicable to lawyers. *Theobald v. Byers (1961) 193 Cal. App. 2d 147, 150, 13 Cal. Rptr. 864*

[7] Particular Errors and Omissions

[a] Appeal

Attorney who omits to take appeal that would not have been successful as not negligent. *Hays v. Ewing (1886) 70 Cal. 127, 128, 11 P. 602*

Attorney as negligent in failing to take appeal that would have succeeded, and choosing instead to secure order for new trial that was vacated as improperly granted; client's damage as including costs on appeal of order granting new trial when client had no reasonable hope of affirmance. *Drais v. Hogan (1875) 50 Cal. 121, 127-128*

If client is sanctioned for filing frivolous appeal, it does not mean that attorney is liable as matter of law for committing malpractice. *Dawson v. Toledano (2003) 109 Cal. App. 4th 387, 390, 134 Cal. Rptr. 2d 689*

Nonliability of attorney for malpractice for failing to file timely appeal from judgment absent proof that appeal would have been won. *Kilmer v. Carter (1969) 274 Cal. App. 2d 81, 82, 78 Cal. Rptr. 800*

Trial court as having authority in malpractice action based on allegedly negligent failure to take appeal in another case,

to decide whether appeal, if taken, would have resulted in reversal. *Pete v. Henderson (1954) 124 Cal. App. 2d 487, 491-492, 269 P.2d 78*

[b] Asserting Defenses

Defense attorney as liable for failure to assert appropriate defenses in lawsuit. *See Budd v. Nixen (1971) 6 Cal. 3d 195, 198, 98 Cal. Rptr. 849, 491 P.2d 433* (alleged negligence based on failure to plead a critical defense); *but see Campbell v. Magana (1960) 184 Cal. App. 2d 751, 754, 8 Cal. Rptr. 32* (defendant as required to establish that unasserted defense was not only legally cognizable but provable and that its assertion would have achieved a better result for the defendant)

Complaint based on attorney's negligent failure to set up defense as required to allege that facts constituting defense existed and were susceptible of proof at trial by properly diligent attorney. *Hastings v. Halleck (1859) 13 Cal. 203*

Attorney's failure to assert viable defenses in criminal action as professional negligence. *Martin v. Hall (1971) 20 Cal. App. 3d 414, 422-428, 97 Cal. Rptr. 730*

[c] Client's Instructions

Attorney as liable for losses resulting to client from attorney's failure to follow client's instructions with reasonable promptness and care, except instructions as to details connected with conduct of lawsuit. *Lally v. Kuster (1918) 177 Cal. 783, 786, 787, 171 P. 961*

[d] Commencing Suit

Attorney as not liable for failure to file action prior to expiration of statute of limitations if he or she ceased to represent client before statute ran on client's action. *Steketee v. Lintz, Williams & Rothberg (1985) 38 Cal. 3d 46, 57, 210 Cal. Rptr. 781, 694 P.2d 1153*

Failure to file action for client within period of limitation as professional negligence. *Shelly v. Hansen (1966) 244 Cal. App. 2d 210, 214-215, 53 Cal. Rptr. 20* ; *Hege v. Worthington, Park & Worthington (1962) 209 Cal. App. 2d 670, 678-679, 26 Cal. Rptr. 132*

[e] Cross Claims

Attorney as not having duty to file cross complaint, filing of which was not compulsory by law. *Banerian v. O'Malley (1974) 42 Cal. App. 3d 604, 612-613, 116 Cal. Rptr. 919*

[f] Dismissal of Criminal Charges Filed by Attorney

Court's dismissal of criminal charges as improper basis for legal malpractice action against attorney who caused charges to be filed; if charges were false and client asserting charges and malpractice action knew charges were false when made, attorney's conduct not proximate cause of damages. *Tushinsky v. Arnold (1987) 195 Cal. App. 3d 666, 673, 241 Cal. Rptr. 103*

[g] Enforcement of Judgment

Attorney who delayed executing on judgment debtor's property until judgment lien expired as not liable for professional negligence when debtor owned no property subject to execution. *Siddall v. Haight (1901) 132 Cal. 320, 321-323, 64 P. 410*

[h] Errors of Judgment

Attorney as not liable on account of every mistake made in practice of law; as not being insurer, in absence of express contrary agreement, of soundness of his opinions or validity of instruments he drafts; as not liable on account of error as to question of law on which reasonable doubt may be entertained by well informed laywers. *Lucas v. Hamm (1961) 56 Cal. 2d 583, 591, 15 Cal. Rptr. 821, 364 P.2d 685* (invalidity of will resulting from attorney's misunderstanding rule against perpetuities not a basis for liability)

Attorney as not negligent in acting in reliance on decision of Supreme Court he reasonably believes establishes law in client's case and controls. *Hastings v. Halleck (1859) 13 Cal. 203*

Summary judgment in favor of defendant attorney in malpractice action as reversed when defendant attorney did not make rational professional judgment based on all available data; lack of professional judgment as indicated by attorney's failure to act based on incomplete reading of single case without appreciating vital factual difference between that case and client's situation. *Aloy v. Mash (1985) 38 Cal. 3d 413, 419, 212 Cal. Rptr. 162, 696 P.2d 656*

Attorney as not liable for malpractice in failing to obtain for client share of client's husband's military pension in property settlement because later U.S. Supreme Court case disallowed community property share of military pensions and was applied retroactively. *Sharpe v. Superior Court (1983) 143 Cal. App. 3d 469, 472-473, 192 Cal. Rptr. 16*

Attorney as not liable for lack of knowledge as to true state of law when doubtful or debatable point is involved, provided that he or she renders advice on basis of informed judgment; attorney as under no duty to advise client of unsettled state of law at time advice is rendered. *Davis v. Damrell (1981) 119 Cal. App. 3d 883, 887-888, 889, 174 Cal. Rptr. 257*

Attorney's lack of knowledge of correct rule of law involving matter open to doubt or debate, and his lack of sufficient prudence to file action promptly even though it reasonably appeared to him to be futile, as not constituting professional negligence. *Sprague v. Morgan (1960) 185 Cal. App. 2d 519, 523, 8 Cal. Rptr. 347*

[i] Failure to Advise

Attorney who signs application for adjudication of workers' compensation claim and attorney who accepts referral to prosecute workers' compensation claim as having duty of care to advise client about other available remedies such as third-party actions. *Nichols v. Keller (1993) 15 Cal. App. 4th 1672, 1687, 19 Cal. Rptr. 2d 601*

[j] Failure to Perform Adequate Research

Defendants had no duty in underlying case to consult and retain neuropsychologist to establish plaintiff's brain injury because none of three neurologists who examined plaintiff for purposes of diagnosis and treatment recommended that plaintiff see neuropsychologist. *Bolton v. Trope (1999) 75 Cal. App. 4th 1021, 1024-1026, 89 Cal. Rptr. 2d 637*

[k] Filing Petition to Enjoin Suspected Child Abuse

Attorney's filing of petition for order to restrain non-client third party from abusing child as privileged conduct under *Penal Code § 11172(a)*; attorney as immune from malpractice liability for such conduct unless attorney filed petition with knowledge that facts contained within petition were false. *Tushinsky v. Arnold (1987) 195 Cal. App. 3d 666, 674, 241 Cal. Rptr. 103*

[l] Prosecution of Suit

Cause of action based on attorney's negligent failure to prosecute lawsuit diligently as arising when lawsuit dismissed for want of prosecution; client as not required to refile lawsuit thereafter and await adverse judgment before suing attorney. *Lally v. Kuster (1918) 177 Cal. 783, 791, 171 P. 961*

[m] Sexual Exploitation of Client

Attorney's delay in rendering legal services, withholding of legal services, and provision of substandard legal services, due to client's refusal to grant attorney sexual favors, as falling below standard of care of members of legal profession. *McDaniel v. Gile (1991) 230 Cal. App. 3d 363, 375, 281 Cal. Rptr. 242*

[n] Wills

Complaint alleging negligence of attorney for executor based on failure to obtain all inclusive releases from will contestants (rather than releases as to single specified ground for contest) as required to allege contestants were willing to execute such releases and attorney failed to request that they do so. *Lucas v. Hamm (1961) 56 Cal. 2d 583, 594-595, 15 Cal. Rptr. 821, 364 P.2d 685*

[8] Pleading and Proof

In case based on attorney's negligent failure to obtain judgment for plaintiff, plaintiff as required to prove collectibility of lost claim by establishing solvency of defendant in underlying action. *Lally v. Kuster (1918) 177 Cal. 783, 787-788, 171 P. 961* ; *Campbell v. Magana (1960) 184 Cal. App. 2d 751, 754, 8 Cal. Rptr. 32*

Nonsuit for attorney as improperly granted because malpractice plaintiff's opening statement alleged prima facie case against attorney for failing to preserve automobile critical to otherwise meritorious products liability suit and, under appropriate circumstances, burden of proving that attorney's negligence did not cause harm to plaintiff may be shifted to attorney if alleged malpractice makes it practically impossible for malpractice plaintiff to prove causation. *Galanek v. Wismar (1999) 68 Cal. App. 4th 1417, 1426-1427, 81 Cal. Rptr. 2d 236*

Shifting burden to attorney of proving lack of causation reserved for cases in which substantial probability is demonstrated that defendant's negligence was cause of damage to plaintiff, but nature of negligence makes it practically impossible for plaintiff to prove conclusively that negligence was proximate cause of damage to plaintiff. *Thomas v. Lusk (1994) 27 Cal. App. 4th 1709, 1717, 34 Cal. Rptr. 2d 265*

Solvency of another party in underlying transaction is irrelevant to proving damages in malpractice suit when alleged malpractice by attorney does not involve prosecution of lawsuit by attorney. *DiPalma v. Seldman (1994) 27 Cal. App. 4th 1499, 1508*

Standards regarding qualifications of experts in medical malpractice cases as being serviceable as guides for appellate

review of qualifications of experts in legal malpractice cases. *Jeffer, Mangels & Butler v. Glickman (1991) 234 Cal. App. 3d 1432, 1438, 1441, 286 Cal. Rptr. 243*

Proof of legal malpractice as requiring "trial within a trial" to establish that, but for attorney's negligence, client would have prevailed in underlying action. *United Cmty. Church v. Garcin (1991) 231 Cal. App. 3d 327, 334, 282 Cal. Rptr. 368*

Expert testimony on duty of care as unnecessary when failure of attorney's performance readily apparent from facts of case. *Goebel v. Lauderdale (1989) 214 Cal. App. 3d 1502, 1508, 263 Cal. Rptr. 275*

Plaintiff's allegations that attorney conducted inadequate pretrial preparation in lawsuit as insufficient to establish attorney's malpractice; plaintiff as required to establish that, but for attorney's alleged negligence, plaintiff would have been successful in action. *Sukoff v. Lemkin (1988) 202 Cal. App. 3d 740, 744, 249 Cal. Rptr. 42*

Absence of allegation that defendant attorney failed to act properly with respect to disclosure of conflict of interest as fatal defect in pleadings and cause of action fails for lack of sufficient proximate cause. *Purdy v. Pacific Auto. Ins. Co. (1984) 157 Cal. App. 3d 59, 78, 203 Cal. Rptr. 524*

Establishing malpractice for attorney's failure to perform act as requiring expert testimony of standard of care and attorney's performance in relation to standard when significance of omitted act is not matter of common knowledge. *Wilkinson v. Rives (1981) 116 Cal. App. 3d 641, 647-648, 172 Cal. Rptr. 254*

Failure to grant judgment notwithstanding verdict in favor of defendant attorneys as improper when record lacks evidence from which it may be inferred that defendants' allegedly negligent acts caused any injury to plaintiffs. *Sprigg v. Garcin (1980) 105 Cal. App. 3d 869, 874-875, 164 Cal. Rptr. 677* (any damages suffered by plaintiffs as caused by circumstances other than defendants' management of their litigation)

If question of malpractice is not one of law in which reasonable minds do not differ as to existence of duty, plaintiff's proof, being one of fact regarding the standard for members of the profession in the same or a similar locality under similar circumstances, as requiring expert testimony. *Lipscomb v. Krause (1978) 87 Cal. App. 3d 970, 975-976, 151 Cal. Rptr. 465*

Expert testimony as required to determine whether attorney's stipulation to dismiss action without client's consent constituted malpractice. *Lipscomb v. Krause (1978) 87 Cal. App. 3d 970, 974-976, 151 Cal. Rptr. 465*

Nonsuit as improper in action against attorney for allowing statute of limitations on personal injury action to run when plaintiff makes prima facie case that one or more of three potential defendants in personal injury action was legally responsible for accident. *Walker v. Porter (1974) 44 Cal. App. 3d 174, 178, 118 Cal. Rptr. 468*

Complaint based on attorney's professional negligence consisting in failure to commence client's lawsuit before it was barred by statute of limitations as not required to allege conclusion that lawsuit would have been successful but, rather, as required to allege facts from which court could deduce that client would have recovered judgment. *Hege v. Worthington, Park & Worthington (1962) 209 Cal. App. 2d 670, 677, 26 Cal. Rptr. 132*

Establishing malpractice in prosecuting or defending lawsuit as requiring proof that careful management would have resulted in recovery of judgment and collection of it or, in case of defense, proper handling would have resulted in judgment for client; absence of such proof as establishing lack of damage; client as having burden of proof. *Hastings v. Halleck. (1859) 13 Cal. 203* ; *Campbell v. Magana (1960) 184 Cal. App. 2d 751, 754, 8 Cal. Rptr. 32* (dictum)

Complaint based on attorney's alleged professional negligence as sufficiently alleging negligence by alleging facts of

what was done and then alleging generally that it amounted to negligence. *Modica v. Crist (1954) 129 Cal. App. 2d 144, 146, 276 P.2d 614*

Client alleging professional negligence consisting of attorney's failure to file notice of appeal before time therefor expired as required to plead and prove that appeal, if taken, would have resulted in reversal. *Pete v. Henderson (1954) 124 Cal. App. 2d 487, 490, 491, 269 P.2d 78*

Complaint in action by client against attorney based on alleged negligence in failing to perform some act in client's behalf as required to specify act and specifically allege (and client as required to prove) that if attorney had performed act it would have resulted beneficially to client. *Feldesman v. McGovern (1941) 44 Cal. App. 2d 566, 568-569, 112 P.2d 645* (dictum)

Complaint based on attorney's alleged professional negligence consisting of giving advice as required to allege that attorney-client relationship existed, that attorney gave advice, that client did something he would not otherwise have done, and that as proximate result thereof client suffered loss. *McGregor v. Wright (1931) 117 Cal. App. 186, 193, 3 P.2d 624*

[9] Res Judicata

Attorney malpractice action as barred by res judicata when factual issue determinative of proximate causation was resolved against plaintiff in prior action. *Tushinsky v. Arnold (1987) 195 Cal. App. 3d 666, 673, 241 Cal. Rptr. 103*

[10] Standard of Care

Attorney as responsible for knowledge of law and as under obligation to perform diligent research and exercise informed judgment when representing client. *see Aloy v. Mash (1985) 38 Cal. 3d 413, 418-419, 212 Cal. Rptr. 162, 696 P.2d 656* ; *Wright v. Williams (1975) 47 Cal. App. 3d 802, 809, 121 Cal. Rptr. 194*

Attorney as liable for want of such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise. *Smith v. Lewis (1975) 13 Cal. 3d 349, 355* (attorney as having duty to exercise degree of learning and skill ordinarily possessed by other attorneys of good standing practicing in same or similar locality under similar circumstances), *disapproved on other grounds, In re Marriage of Brown (1976) 15 Cal. 3d 838, 851 n.14, 126 Cal. Rptr. 633, 544 P.2d 561* ; *Lucas v. Hamm (1961) 56 Cal. 2d 583, 591, 15 Cal. Rptr. 821, 364 P.2d 685* ; *Gambert v. Hart (1872) 44 Cal. 542, 552-553* ; *Sprague v. Morgan (1960) 185 Cal. App. 2d 519, 523, 8 Cal. Rptr. 347*

Attorney who specializes as required to meet standards of knowledge and skill of such specialists. *Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 188, 98 Cal. Rptr. 837, 491 P.2d 421* (dictum); *see also Horne v. Peckham (1979) 97 Cal. App. 3d 404, 414, 158 Cal. Rptr. 714* ; *Wright v. Williams (1975) 47 Cal. App. 3d 802, 810, 121 Cal. Rptr. 194*

Absent express agreement, attorney as not being insurer of soundness of opinions, and as not liable for being in error as to question of law on which reasonable doubt may be entertained by well-informed attorneys. *Lucas v. Hamm (1961) 56 Cal. 2d 583, 591, 15 Cal. Rptr. 821, 364 P.2d 685* ; *see Kirsch v. Duryea (1978) 21 Cal. 3d 303, 308, 146 Cal. Rptr. 218, 578 P.2d 935*

Attorney as liable for all losses that result from failure to follow client's instructions in reasonably prompt and careful manner. *Lally v. Kuster (1918) 177 Cal. 783, 786, 171 P. 961* ; *see Shelly v. Hansen (1966) 244 Cal. App. 2d 210, 215, 53 Cal. Rptr. 20* , *disapproved on other grounds, Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 190 n.29, 98 Cal. Rptr. 837, 491 P.2d 421*

Advising client to violate Penal Code as conduct below attorney's standard of care, as matter of law. *Goebel v. Lauderdale (1989) 214 Cal. App. 3d 1502, 1508-1509, 263 Cal. Rptr. 275*

Attorney as not liable for honest and reasonable mistake of law, or for unfortunate selection of remedy or other procedural step. *Banerian v. O'Malley (1974) 42 Cal. App. 3d 604, 613, 116 Cal. Rptr. 919*

[11] Summary Judgment

Summary judgment as not appropriate when malpractice complaint ambiguous on its face. *Blanch v. Young (1984) 152 Cal. App. 3d 1016, 1019, 200 Cal. Rptr. 9*

[12] Survival of Action

Former *Prob. Code § 573(c)* (limiting damages to those sustained before death when person with cause of action dies before judgment; *now see Code Civ. Proc. § 377.34*) as inapplicable to malpractice action based on attorney's failure to set elderly and ill client's lawsuit for trial under *Code Civ. Proc. § 36(a)*; personal representative of deceased client as permitted to bring malpractice suit against dilatory trial attorney when client lost substantive rights through attorney's negligence. *Granquist v. Sandberg (1990) 219 Cal. App. 3d 181, 185-186, 268 Cal. Rptr. 109*

Action for damages arising out of attorney's malpractice as surviving attorney's death. *Fazio v. Hayhurst (1966) 247 Cal. App. 2d 200, 202, 55 Cal. Rptr. 370* (dictum), *disapproved on other grounds, Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 190 n.29, 98 Cal. Rptr. 837, 491 P.2d 421*

[13] Trial

[a] In General

Use of Rules of Professional Conduct to prove breach of fiduciary duty to client. *Mirabito v. Liccardo (1992) 4 Cal. App. 4th 41, 45-46, 5 Cal. Rptr. 2d 571* ; *see also Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 1147-1149, 217 Cal. Rptr. 89*

Use of expert testimony of other practicing attorneys to establish breach of duty in malpractice action. *Lysick v. Walcom (1968) 258 Cal. App. 2d 136, 155, 65 Cal. Rptr. 406* ; *see also Wilkinson v. Rives (1981) 116 Cal. App. 3d 641, 647-648, 172 Cal. Rptr. 254* ; *Lipscomb v. Krause (1978) 87 Cal. App. 3d 970, 976, 151 Cal. Rptr. 465* ; *Wright v. Williams (1975) 47 Cal. App. 3d 802, 810, 121 Cal. Rptr. 194*

[b] Issues of Fact or Law

Court as without jurisdiction to make summary determination that attorney neglected his duty and failed to perform services or to order summarily on that basis refund of money paid to attorney; attorney as entitled to defend charges of negligence in proper civil action. *Tomsky v. Superior Court (1901) 131 Cal. 620, 623-624, 63 P. 1020*

In action against attorney based on alleged professional negligence, question of negligence as question of law to be decided by court when facts are ascertained. *Gambert v. Hart (1872) 44 Cal. 542, 552* ; *but see Starr v. Mooslin (1971) 14 Cal. App. 3d 988, 996-999, 92 Cal. Rptr. 583* (questioning current applicability of rule and tracing history of contrary rule)

Issues as to existence of duty of care and complementary degree of care as questions of law; breach of duty and causation of damage (causation in fact) as questions of fact in negligent malpractice action. *Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 525, 50 Cal. Rptr. 592*

Complaint alleging attorney's professional negligence in failing to disclose to wife in divorce action that she was receiving limited representation from attorney (who also represented husband) and in failing to advise wife to retain her own counsel as raising triable issue of fact whether such activity was breach of attorney's duty. *Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 528-529, 50 Cal. Rptr. 592* (reversing order granting attorney's motion for summary judgment)

Alleged professional negligence of attorney consisting of failure to assert specified defenses in criminal action as presenting preliminary question of law for court whether such defenses would have been successful as a matter of law; negative decision on that question as precluding introduction in malpractice action of evidence of failure to raise defenses. *Martin v. Hall (1971) 20 Cal. App. 3d 414, 420, 97 Cal. Rptr. 730*

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AUTHOR: GEORGE M. LINDAHL

§ 76.265 Law Reviews

Comment, *Attorney Malpractice in California: The Liability of a Lawyer Who Drafts an Imprecise Contract or Will, 24 U.C.L.A. L. Rev. 422 (1976)*

Braun, *Gibson, Dunn & Crutcher v. Superior Court Revisited: A Critical Analysis and Proposal Respecting an Attorney Malpractice Defendant's Right to Cross-Complain for Comparative Indemnity Against the Former Client's Present Attorney, 22 Santa Clara L. Rev. 1 (1982)*

Bridgman, *Legal Malpractice Litigation-- A Plaintiff's Lawyer's View*, 17 Cal. Trial Law. J. 193 (1978)

Note, *Negligent Spoliation of Evidence: Skirting the "Suit Within a Suit" Requirement of Legal Malpractice Actions, 41 Hastings L.J. 1077 (1990)*

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§ 76.266 Text References

Witkin, California Procedure, Vol. 1, *Attorneys*, § 342 (4th ed. 1997)

Restatement (Second) of Torts § 299A, cmt. g

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§ 76.280 California Torts

For discussion of the cause of action for negligent infliction of emotional distress, see Levy, Golden & Sacks, California Torts, Ch. 5 (Matthew Bender)

For discussion of the cause of action for fraud and deceit, see Levy, Golden & Sacks, California Torts, Ch. 40 (Matthew Bender)

For discussion of the cause of action for intentional infliction of emotional distress, see Levy, Golden & Sacks, California Torts, Ch. 44 (Matthew Bender)

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§ 76.281 State Statutes

Requirements for action for constructive fraud. *Civ. Code § 1573*

Measure of damages for breach of contract. *Civ. Code § 3300*

Measure of damages for tort. *Civ. Code § 3333*

Four-year period of limitation for action on contract, obligation, or liability founded on instrument of writing. *Code Civ. Proc. § 337(1)*

Two-year period of limitation for action on contract, obligation, or liability not founded on instrument of writing. *Code Civ. Proc. § 339(1)*

Statute of limitations for legal malpractice actions. *Code Civ. Proc. § 340.6*

Presumption of violation of trustee's fiduciary duties as created under specified circumstances. *Prob. Code § 16004(c)*

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§ 76.282 Rules of Professional Conduct

Avoiding interests adverse to a client. *Cal. Rules Prof. Conduct, Rule 3-300*

Avoiding representation of adverse interests. *Cal. Rules Prof. Conduct, Rule 3-310*

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7-76 California Forms of Pleading and Practice--Annotated § 76.283

AUTHOR: GEORGE M. LINDAHL

§ 76.283 Decisions

[1] Damages--Emotional Distress

Emotional distress damages as only appropriate when emotional shock to plaintiff stems from abnormal event and it was highly foreseeable that defendant's actions would cause shock to plaintiff. *Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 168, 216 Cal. Rptr. 661, 703 P.2d 1*

Plaintiff's frustration at delay in resolution of underlying medical malpractice suit that followed death of plaintiff's infant daughter and anger at being misused by both doctors and lawyers as not meeting requirements for recovery of emotional distress damages. *Pleasant v. Celli (1993) 18 Cal. App. 4th 841, 853-854, 22 Cal. Rptr. 2d 663*

Damage to plaintiff that is solely economic as insufficient to support claim for emotional distress damages. *see Smith v. Superior Court (1992) 10 Cal. App. 4th 1033, 1040, 13 Cal. Rptr. 2d 133* (mere negligence does not support recovery for mental suffering when defendant's tortious conduct results in only economic injury)

Attorney's misconduct actionable as intentional infliction of emotional distress if conduct was outrageous, attorney intended to cause emotional distress or had reckless disregard of probability of causing emotional distress, client experienced severe emotional suffering, and attorney's conduct actually and proximately caused emotional distress to client. *McDaniel v. Gile (1991) 230 Cal. App. 3d 363, 372-374, 281 Cal. Rptr. 242* (action based on attorney's repeated sexual harassment of client, and attorney's conditioning of professional performance on provision of sexual favors by client)

Attorney's incompetence resulting in client's improper confinement as supporting emotional distress damages. *Holliday v. Jones (1989) 215 Cal. App. 3d 102, 112-120, 264 Cal. Rptr. 448*

Emotional distress damages (after trial court remitted jury's verdict awarding $500,000) as supported by evidence of attorneys' conduct. *Betts v. Allstate Ins. Co. (1984) 154 Cal. App. 3d 688, 718, 201 Cal. Rptr. 528*

[2] Duty

[a] Avoiding Adverse Representation

Attorney's assumption of positions that are adverse or antagonistic to client as violation of duty, absent free and intelligent consent given by client after full knowledge of facts and circumstances. *Anderson v. Eaton (1930) 211 Cal. 113* ; *see also Betts v. Allstate Ins. Co. (1984) 154 Cal. App. 3d 688, 715, 201 Cal. Rptr. 528* ; *Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 901-902, 142 Cal. Rptr. 509*

[b] Protecting Fiduciary Relationship

Attorney's duty toward existing client negates any duty to give prospective new client advice when existing client is potential target of new client's cause of action; thus, when attorney severs relationship with new client under these circumstances, attorney has no duty to advise new client regarding applicable statute of limitations or need to seek other counsel. *Flatt v. Superior Court (1994) 9 Cal. 4th 275, 278-279, 36 Cal. Rptr. 2d 537, 885 P.2d 950*

Transactions between attorney and client during existence of fiduciary relationship, or while influence acquired by attorney remains, by which attorney obtains any advantage from client, as presumed to be entered into by client without sufficient consideration and under undue influence. *See Trafton v. Youngblood (1968) 69 Cal. 2d 17, 27, 69 Cal. Rptr. 568, 442 P.2d 648* (former *Civ. Code § 2235* (*now see Prob. Code § 16004(c)*) applicable to contractual dealings between attorney and client during existence of attorney-client relationship)

Undue influence by attorney as presumed when in all transactions forming basis of action for breach of fiduciary duty, attorney was agent for elderly client by reason of signed power of attorney, and never advised client to obtain separate counsel when his name appeared as joint tenant on her bank accounts. *Ball v. Posey (1986) 176 Cal. App. 3d 1209, 1214, 222 Cal. Rptr. 746*

Transaction between attorney and client as voidable unless and until attorney establishes full compliance with fiduciary obligations. *See Gleason v. Klamer (1980) 103 Cal. App. 3d 782, 787, 163 Cal. Rptr. 483* ; *see also Oliker v. Gershunoff (1987) 195 Cal. App. 3d 1288, 1294-1295, 241 Cal. Rptr. 415* (presumption of undue influence successfully rebutted)

Attorney as not allowed to take actions that would injure former client in matters within scope of former representation and as not allowed to use any information gained during relationship against former client. *Yorn v. Superior Court (1979) 90 Cal. App. 3d 669, 675, 153 Cal. Rptr. 295* ; *see People v. Thoi (1989) 213 Cal. App.3d 689, 699, 261 Cal. Rptr. 789*

Relationship between attorney and client as being of fiduciary character. *See Hicks v. Clayton (1977) 67 Cal. App. 3d 251, 262, 136 Cal. Rptr. 512*

[3] Fraud

Attorney as liable to his or her client for fraud if elements of fraud are proven. *Cf. Frost v. Hanscome (1926) 198 Cal. 550, 559, 246 P. 53* (no grounds for finding of extrinsic fraud on record)

Facts constituting fraud as required to be alleged with sufficient specificity to allow defendant to understand fully nature of charge. *Wilhelm v. Pray, Price, Williams & Russell (1986) 186 Cal. App. 3d 1324, 1331-1332, 231 Cal. Rptr. 355*

Elements of fraud action. *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz (1976) 57 Cal. App. 3d 104, 109, 128 Cal. Rptr. 901*

Attorney as subject to liability for constructive fraud when attorney breaches fiduciary duty to client. *Cf. American Box & Drum Co. v. Harron (1941) 44 Cal. App. 2d 370, 378, 112 P.2d 332* (court found no evidence of intent to defraud necessary for imposition of constructive trust)

[4] Nature of Malpractice

Legal malpractice as constituting both tort and breach of contract. *Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 180-181, 98 Cal. Rptr. 837, 491 P.2d 421*

Attorney's asserted failure to exercise requisite skill and care as possible basis for legal malpractice action grounded on breach of contract and tort, but failure of attorney as not furnishing basis for reversal of judgment entered against client in civil trial. *Kim v. Orellana (1983) 145 Cal. App. 3d 1024, 1028, 193 Cal. Rptr. 827*

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7 C.J.S., *Attorney and Client,* §§ 237-246, 251

7 Am. Jur. 2d, *Attorneys at Law,* §§ 198, 215, 221

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Volume 7: Attorney Practice and Ethics thru Auctions and Auctioneers-Chs.72-79
Chapter 76 ATTORNEY PROFESSIONAL LIABILITY
PART III. RESEARCH GUIDE
A. Liability to Client
4. Defenses

7-76 California Forms of Pleading and Practice--Annotated § 76.300

AUTHOR: GEORGE M. LINDAHL

§ 76.300 California Points and Authorities

For memoranda of points and authorities supporting and opposing motions for summary judgment on the issue of the statute of limitations, see California Points and Authorities, Ch. 24, *Attorneys at Law* (Matthew Bender)

For memoranda of points and authorities related to the special defense that the action for malpractice is barred by the relevant statute of limitations, see California Points and Authorities, Ch. 143, *Limitation of Actions* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsTortsMalpractice & Professional LiabilityProfessional ServicesTortsNegligenceStandards of CareSpecial CareHighly Skilled ProfessionalsTortsProcedureStatutes of LimitationsGeneral Overview

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7-76 California Forms of Pleading and Practice--Annotated § 76.301

AUTHOR: GEORGE M. LINDAHL

§ 76.301 California Torts

For detailed discussion of the plaintiff's negligence as a defense, see California Torts, Ch. 4 (Matthew Bender)

For discussion of arbitration agreements in the context of actions based on professional liability, see California Torts, Ch. 30 (Matthew Bender)

For discussion of actions based on fraud, see California Torts, Ch. 40 (Matthew Bender)

For general discussion of the requirements for claims against public entity defendants, see California Torts, Ch. 62 (Matthew Bender)

For discussion of incapacities that toll running of statutes of limitation, see California Torts, Ch. 71 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsMalpractice & Professional LiabilityProfessional ServicesTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsNegligenceStandards of CareSpecial CareHighly Skilled ProfessionalsTortsProcedureStatutes of LimitationsTollingDisabilities

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7-76 California Forms of Pleading and Practice--Annotated § 76.302

AUTHOR: GEORGE M. LINDAHL

§ 76.302 State Statutes

Four-year period of limitation for action on contract, obligation, or liability founded on instrument of writing. *Code Civ. Proc. § 337(1)*

Three-year statute of limitations for actions based on fraud. *Code Civ. Proc. § 338(d)*

Two-year period of limitation for action on contract, obligation, or liability not founded on instrument of writing. *Code Civ. Proc. § 339(1)*

Statute of limitations for legal malpractice actions. *Code Civ. Proc. § 340.6*

Inapplicability of work-product privilege in action between attorney and client or former client when work product is relevant to issue of attorney's breach of duty. *Code Civ. Proc. § 2018.080*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsMalpractice & Professional LiabilityProfessional ServicesTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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7-76 California Forms of Pleading and Practice--Annotated § 76.303

AUTHOR: GEORGE M. LINDAHL

§ 76.303 Rules of Professional Conduct

Limitations on obtaining release from liability for malpractice. *Cal. Rules Prof. Conduct, Rule 3-400*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityProfessional ServicesTortsNegligenceStandards of CareSpecial CareHighly Skilled ProfessionalsTortsProcedureSettlementsReleasesValidity

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7-76 California Forms of Pleading and Practice--Annotated § 76.304

AUTHOR: GEORGE M. LINDAHL

§ 76.304 Decisions

[1] Arbitration

Client's malpractice claim against attorney as not covered by prior arbitration agreement when context of agreement led client to believe, at time agreement was signed, that agreement would only apply to attorney-client fee disputes. *Lawrence v. Walzer & Gabrielson (1989) 207 Cal. App. 3d 1501, 1504-1508, 256 Cal. Rptr. 6*

[2] Comparative Negligence

Contributory negligence of person injured as reducing damages awarded in proportion to amount of negligence attributable to person recovering. *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858, 532 P.2d 1226*

Defense of comparative negligence as not applying when plaintiff alleges intentional tort. *see Godfrey v. Steinpress (1982) 128 Cal. App. 3d 154, 176, 180 Cal. Rptr. 95* (contributory negligence not applicable in fraud action when no negligence involved)

[3] Good Faith Errors

In order to defend against malpractice suit on basis of good-faith error, attorney as required to undertake reasonable research to ascertain relevant legal principles and to make informed decision as to course of conduct based on intelligent assessment of particular problem. *Aloy v. Mash (1985) 38 Cal. 3d 413, 418, 212 Cal. Rptr. 162, 696 P.2d 656* ; *Smith v. Lewis (1975) 13 Cal. 3d 349, 358*

Attorney as not required to insure accuracy of opinions or validity of document drafted for client, nor as liable for mistake as to legal question on which well-informed attorneys may entertain reasonable doubt. *Kirsch v. Duryea (1978) 21 Cal. 3d 303, 308, 146 Cal. Rptr. 218, 578 P.2d 935* ; *Smith v. Lewis (1975) 13 Cal. 3d 349, 358-359, 118 Cal. Rptr. 621* , *530 P.2d; Lucas v. Hamm (1961) 56 Cal. 2d 583, 591, 15 Cal. Rptr. 821, 364 P.2d 685*

Failure of attorneys to prove they actually researched uncertain point of law before advising client precluded successful defense based on honest error in judgment. *Village Nurseries v. Greenbaum (2002) 101 Cal. App. 4th 26, 38-39, 123 Cal. Rptr. 2d 555*

If reasonable research into how doubtful or debatable legal subject will be resolved is undertaken, fact that course of conduct selected is shown to be erroneous by subsequent events as not justifying negligence liability. *see* *Davis v. Damrell (1981) 119 Cal. App. 3d 883, 888-889, 174 Cal. Rptr. 257*

Attorney lacking sufficient knowledge in specific field of law as having duty to refer legal problem to specialist, or be held to standard of care required of specialist in problem area. *Horne v. Peckham (1979) 97 Cal. App. 3d 404, 414-415, 158 Cal. Rptr. 714*

[4] Immunity

Retained counsel functioning as union agents in collective bargaining process as immune, pursuant to Labor Management Relations Act (*29 U.S.C. § 185(b)*), from suit for malpractice. *Aragon v. Pappy, Kaplon, Vogel & Phillips (1989) 214 Cal. App. 3d 451, 462-463, 262 Cal. Rptr. 646*

Court-appointed attorney for indigent defendant in federal criminal trial who was later sued by defendant in state court for malpractice as not absolutely immune from suit. *Ferri v. Ackerman (1979) 444 U.S. 193, 205, 100 S. Ct. 402, 62 L. Ed. 2d 355*

[5] Public Defenders

Client who sues public defender for malpractice as required to file, as precondition to suit, claim against employing public agency pursuant to Tort Claims Act [*see Gov. Code §§ 810-996.6*]. *Briggs v. Lawrence (1991) 230 Cal. App. 3d 605, 618, 281 Cal. Rptr. 578*

[6] Statute of Limitations

[a] In General

Statute of limitations for legal malpractice as one year after plaintiff discovers or should have discovered facts constituting malpractice or four years from actual date of wrongful act, whichever occurs first. *Bell v. Hummel (1982) 136 Cal. App. 3d 1009, 1015, 186 Cal. Rptr. 688* (disapproved on other grounds in *Laird v. Blacker (1992) 2 Cal. 4th 606, 617, 7 Cal. Rptr. 2d 550, 828 P.2d 691*)

[b] Actual Injury

Test for actual injury under *Code Civ. Proc. § 340.6* is whether plaintiff has sustained any damages compensable in legal action, other than one for actual fraud, against attorney for wrongful act or omission arising in performance of professional services, and inquiry is predominantly factual in nature. *Jordache Enters., Inc. v. Brobeck, Phleger &*

Harrison (1998) 18 Cal. 4th 739, 751, 763 (overruling "bright-line" rulemaking approach of *ITT Small Bus. Fin. Corp. v. Niles (1994) 9 Cal. 4th 245, 36 Cal. Rptr. 2d 552, 885 P.2d 965*)

Actual injury sufficient to trigger limitations period in malpractice action as occurring on entry of adverse judgment or final order of dismissal in underlying action in which malpractice occurred. *Laird v. Blacker (1992) 2 Cal. 4th 606, 615, 7 Cal. Rptr. 2d 550, 828 P.2d 691* (appellate finality not required)

Actual injury for purposes of triggering statute of limitations in legal malpractice action was sustained when bankruptcy trustee questioned validity of plaintiff's liens asserted against estate in bankruptcy, because trustee's opinion about liens reduced settlement value of plaintiff's claims for payment; subsequent court declaration that liens were invalid was not required to begin limitations period. *Village Nurseries v. Greenbaum (2002) 101 Cal. App. 4th 26, 41-42, 123 Cal. Rptr. 2d 555*

When attorney's malpractice prevented client from protecting its right to develop property by exercising its right to automatically annex property within three-year time period, statute of limitations began to run when time limit for automatic annexation expired, rather than when client later loses suit against third party. *Foxborough v. Van Atta (1994) 26 Cal. App. 4th 217, 227, 31 Cal. Rptr. 2d 525*

When underlying action was dissolution proceeding and plaintiff alleged that attorneys were negligent in drafting unfair settlement agreement, actual injury as occurring no later than date plaintiff paid retainer fee to successor attorney hired to rectify alleged negligence of defendant attorneys. *Bennett v. McCall (1993) 19 Cal. App. 4th 122, 126, 23 Cal. Rptr. 2d 268* ; *see also Hensley v. Caietti (1993) 13 Cal. App. 4th 1165, 1175-1176, 16 Cal. Rptr. 2d 837* (client alleging that attorney negligently induced her to enter into unfair marital settlement agreement suffered actual injury on date of entry in the agreement)

When attorney malpractice consists of not filing underlying action within applicable statute of limitations, actual injury as occurring when client's cause of action is proscribed. *Finlayson v. Sanbrook (1992) 10 Cal. App. 4th 1436, 1444, 13 Cal. Rptr. 2d 406*

In case alleging attorney's negligence in failing to properly advise physician regarding medical malpractice insurance, "actual harm" to plaintiff physician as occurring when plaintiff incurred attorney's fees in defending underlying medical malpractice action, not when action was settled. *Sirott v. Latts (1992) 6 Cal. App. 4th 923, 928-930, 8 Cal. Rptr. 2d 206*

In malpractice action based on attorney's failure in dissolution action to discover and obtain evidence of client's spouse's excess assets, actual injury as occurring on entry of judgment of dissolution when judgment failed to divide excess assets. *Worton v. Worton (1991) 234 Cal. App. 3d 1638, 1651-1652, 286 Cal. Rptr. 410*

Fact that judgment could potentially be set aside, under *Code Civ. Proc. § 473* or under court's general equitable powers, as not delaying accrual of actual injury. *Turley v. Wooldridge (1991) 230 Cal. App. 3d 586, 588, 590-594, 281 Cal. Rptr. 441*

In malpractice action based on attorney's alleged failure to introduce evidence that would have resulted in more favorable outcome in client's marital dissolution proceeding, actual harm, if any, as taking place no later than time of judgment of dissolution. *Kabbe v. Miller (1990) 226 Cal. App. 3d 93, 97, 275 Cal. Rptr. 893*

Dismissal of lawsuit due to attorney's negligence as constituting actual injury triggering limitations period. *Troche v. Daley (1990) 217 Cal. App. 3d 403, 410, 266 Cal. Rptr. 34*

Commencement of one-year limitation period concerning former attorney's misrepresentation of legal effect of

stipulation provision as tolled under *Code Civ. Proc. § 340.6(a)(1)* until plaintiff suffered actual injury by seeking but failing to obtain court order giving effect to provision according to misrepresentation. *McCann v. Welden (1984) 153 Cal. App. 3d 814, 824, 200 Cal. Rptr. 703*

[c] Continued Representation

If attorney leaves law firm and takes representation of particular client with him or her, statute of limitations does not continue to toll under continued representation exception on malpractice action that client may have against attorney's former law firm or any other attorneys in firm. *Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal. 4th 503, 505, 66 Cal. Rptr. 3d 52, 167 P.3d 666* (disapproving contrary conclusion of *Beane v. Paulsen (1993) 21 Cal. App. 4th 89, 26 Cal. Rptr. 2d 486*)

Statute of limitations was not tolled due to continuous representation when attorney advised client in December 2005 about signing commercial lease document and provided no further services relating to lease thereafter, client hired new attorney in March 2006 to pursue litigation against landlord with respect to lease, and client did not file malpractice lawsuit against original attorney based on allegedly negligent advice concerning lease until September 2007. *Truong v. Glasser (2009) 181 Cal. App. 4th 102, 116-117, 103 Cal. Rptr. 3d 811*

Because law firm hired to represent client in workers' compensation claim advised client to sign compromise and release agreement between client and employer, claim and settlement agreement constituted same specific subject matter for purposes of tolling statute of limitations under continuous representation rule. *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort (2001) 91 Cal. App. 4th 875, 889, 110 Cal. Rptr. 2d 877*

Determination of whether attorney's representation was continuing is objective one based on evidence of ongoing mutual relationship and whether activities had been taken to further that relationship. *Worthington v. Rusconi (1994) 29 Cal. App. 4th 1488, 1498, 35 Cal. Rptr. 2d 169*

Attorney's conduct in acting as consultant and expert in litigation arising out of matter in which he had previously represented client as not tolling statute of limitations governing malpractice action arising from earlier representation. *Foxborough v. Van Atta (1994) 26 Cal. App. 4th 217, 227, 31 Cal. Rptr. 2d 525*

When attorney continues to represent client regarding specific subject matter in which alleged negligence occurred, client's awareness of attorney's negligence as not interrupting tolling of limitations period under *Code Civ. Proc. § 340.6*. *O'Neill v. Tichy (1993) 19 Cal. App. 4th 114, 119-121, 25 Cal. Rptr. 2d 162*

Attorney-client relationship as terminated for purposes of *Code Civ. Proc. § 340.6* when no court or administrative tribunal retains jurisdiction over matter and nothing remains to be done with regard to proceedings in which legal representation was rendered. *Panattoni v. Superior Court (1988) 203 Cal. App. 3d 1092, 1097, 250 Cal. Rptr. 390*

Failure to formally withdraw as counsel "standing alone" as not constituting continued representation for purposes of tolling *Code Civ. Proc. § 340.6*; however, defendant attorneys as estopped from claiming that their representation of plaintiff did not continue when attorneys undertook to represent very parties they were hired by plaintiff to investigate, attorneys failed to obtain waiver from plaintiff, and attorneys did not formally terminate relationship with plaintiff. Johnson v. *Haberman & Kassoy (1988) 201 Cal. App. 3d 1468, 1475, 247 Cal. Rptr. 614*

Defendant's failure to withdraw formally as attorney of record, standing alone, as not tolling statute of limitations under *Code Civ. Proc. § 340.6(a)(2)*; period of limitation as commencing to run when attorney-client relationship terminates. *Shapero v. Fliegel (1987) 191 Cal. App. 3d 842, 846-849, 236 Cal. Rptr. 696*

Because client may not be able to recognize negligence of his or her attorney and because confidential relationship normally exists between attorney and client, client's failure to discover facts constituting fraud or misrepresentation by attorney as often excused until attorney-client relationship has been terminated. *Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 1166-1167, 217 Cal. Rptr. 89*

Tolling of statute of limitations while attorney is employed by client under *Code Civ. Proc. § 340.6(a)(2)* as applying to both one-year and four-year provisions of *Code Civ. Proc. § 340.6*. *Baright v. Willis (1984) 151 Cal. App. 3d 303, 310, 198 Cal. Rptr. 510*

Employment of attorney by client pursuant to retainer agreement as continuing to toll statute of limitations after cause of action that is subject of malpractice claim became barred by its own statute of limitations. *Baright v. Willis (1984) 151 Cal. App. 3d 303, 309, 198 Cal. Rptr. 510*

Attorney's status as pledgeholder under agreement for sale of business as not constituting continued representation under *Code Civ. Proc. § 340.6* for purposes of tolling statute of limitations for malpractice in setting up sale. *Von Rott v. Johnson (1983) 148 Cal. App. 3d. 608, 612-613, 196 Cal. Rptr. 55*

Unsettled matters tangential to case that are handled by attorney as manifestation of continuing representation under *Code Civ. Proc. § 340.6(a)(2)* so as to toll both the one-year and four-year provisions of statute of limitations. *Gurkewitz v. Haberman (1982) 137 Cal. App. 3d 328, 333-336, 187 Cal. Rptr. 14*

Statute of limitations for legal malpractice as tolled during time attorney continues to represent plaintiff regarding specific matter in which malpractice occurred. *Bell v. Hummel (1982) 136 Cal. App. 3d 1009, 1015, 186 Cal. Rptr. 688* (disapproved on other grounds in *Laird v. Blacker (1992) 2 Cal. 4th 606, 617, 7 Cal. Rptr. 2d 550, 828 P.2d 691*)

[d] Discovery of Malpractice

Defendant in attorney malpractice action alleging plaintiff's action is barred under one-year limitations period of *Code Civ. Proc. § 340.6(a)* bears burden of proving when plaintiff discovered, or through use of reasonable diligence should have discovered, facts constituting alleged malpractice. *Samuels v. Mix (1999) 22 Cal. 4th 1, 8-9, 91 Cal. Rptr. 2d 273, 989 P.2d 701*

Crucial time for determining "date of discovery" as time when plaintiff discovered or should have discovered that his or her lawyers acted negligently. *Johnson v. Haberman & Kassoy (1988) 201 Cal. App. 3d 1468, 1476, 247 Cal. Rptr. 614*

Whether plaintiff reasonably should have discovered wrongful act or omission of attorney so as to trigger commencement of one-year limitation period under *Code Civ. Proc. § 340.6(a)* as depending on whether plaintiff had knowledge sufficient to put reasonable person on inquiry or had opportunity to learn of alleged malpractice from available sources. *McCann v. Welden (1984) 153 Cal. App. 3d 814, 822, 200 Cal. Rptr. 703*

Question of when plaintiff discovered or reasonably should have discovered attorney malpractice and suffered injury, within meaning of one-year limitation provision of *Code Civ. Proc. 340.6(a)* as generally one of fact. *McCann v. Welden (1984) 153 Cal. App. 3d 814, 824, 200 Cal. Rptr. 703*

Degree of diligence required of plaintiff in ferreting out negligence for purposes of determining belated discovery of cause of action as diminished in case of professional relationship; malpractice plaintiff who sought professional advice regarding existence of cause of action as entitled to rely on advice received. *Baright v. Willis (1984) 151 Cal. App. 3d 303, 311, 198 Cal. Rptr. 510*

Statute of limitations as tolled by belated discovery of facts but not by belated discovery of legal theories. *McGee v. Weinberg (1979) 97 Cal. App. 3d 798, 803, 159 Cal. Rptr. 86*

[e] Legal Disability

Code Civ. Proc. § 340.6(a)(4), allowing tolling of period of limitation for legal disability that restricts ability to commence action, as intended to be interpreted in connection with general tolling provision for prisoners contained in former *Code Civ. Proc. § 352* [*now see Code Civ. Proc. § 352.1*], which defines legal disability as including time during which plaintiff is imprisoned on criminal charge. *Bledstein v. Superior Court (1984) 162 Cal. App. 3d 152, 166, 208 Cal. Rptr. 428*

Statute of limitations for malpractice action against criminal attorney as tolled during time plaintiff was imprisoned on criminal charges; plaintiff as not required to prove that incarceration actually made filing lawsuit against attorney impossible. *Bledstein v. Superior Court (1984) 162 Cal. App. 3d 152, 160-166, 208 Cal. Rptr. 428*

[f] Scope of Code Civ. Proc. § 340.6

Code Civ. Proc. § 340.6, rather than "catchall" statute of limitation set forth in *Code Civ. Proc. § 343*, as applicable in cause of action against attorney based on attorney's breach of fiduciary duties. *Stoll v. Superior Court (1992) 9 Cal. App. 4th 1362, 1366-1369, 12 Cal. Rptr. 2d 354* ; *but see David Welch Co. v. Erskine & Tulley (1988) 203 Cal. App. 3d 884, 893, 250 Cal. Rptr. 339* (contra)

District Court as erring in applying one-year statute of limitations, *Code Civ. Proc. § 340.6*, to corporate complaint against attorney charging him with corporate waste, mismanagement, and breach of fiduciary duty; correct statute as being general four-year statute of limitations, *Code Civ. Proc. § 343*. *Davis & Cox v. Summa Corp. (9th Cir. 1985) 751 F.2d 1507, 1520-1521*

Renaming of attorney as defendant in amended complaint, following dismissal of attorney from lawsuit without prejudice, as required to be within period of statute of limitations; amended complaint as not relating back to date of filing of original complaint for purposes of statute. *Troche v. Daley (1990) 217 Cal. App. 3d 403, 412, 266 Cal. Rptr. 34*

"Catchall" statute of limitation set forth in *Code Civ. Proc. § 343*, rather than *Code Civ. Proc. § 340.6*, as applicable in cause of action against attorney based on attorney's breach of fiduciary duties. *David Welch Co. v. Erskine & Tulley (1988) 203 Cal. App. 3d 884, 893, 250 Cal. Rptr. 339* ; *but see Stoll v. Superior Court (1992) 9 Cal. App. 4th 1362, 1366-1369, 12 Cal. Rptr. 2d 354* (contra)

Four-year limitation period of *Code Civ. Proc. § 340.6* as not barring attorney malpractice action when complaint was filed less than four years after the statute's effective date (January 1, 1978). *Johnson v. Haberman & Kassoy (1988) 201 Cal. App. 3d 1468, 1474, 247 Cal. Rptr. 614*

Four-year outside limit in *Code Civ. Proc. § 340.6* as restricting malpractice actions based on actual injury that occurred prior to January 1, 1978 (effective date of statute); actions based on pre-1978 injury brought after January 1, 1982, as generally barred, unless statutory tolling applicable. *Rubinstein v. Barnes (1987) 195 Cal. App. 3d 276, 279-282, 240 Cal. Rptr. 535*

One-year limitation period for attorney malpractice actions under *Code Civ. Proc. § 340.6(a)* as commencing to run only concerning those wrongful acts or omissions that plaintiff has or reasonably should have discovered, not as to other

related but separate wrongful acts or omissions. *McCann v. Welden (1984) 153 Cal. App. 3d 814, 819-822, 200 Cal. Rptr. 703*

Code Civ. Proc. § 340.6, providing for four-year limitation period with one-year discovery rule as operating prospectively; plaintiff as not barred from action for legal malpractice commenced many years after divorce action that attorney handled, but less than three years from effective date of statute and less than one year from date of discovery of facts constituting attorney's wrongful act or omission. *Krusesky v. Baugh (1982) 138 Cal. App. 3d 562, 566-568, 188 Cal. Rptr. 57*

Requirement of *Code Civ. Proc. § 340.6* that attorney malpractice suits commence within one year of discovery of alleged wrongful act or omission as applying to both breach of contract and tort malpractice actions. *Southland Mech. Constructors Corp. v. Nixen (1981) 119 Cal. App. 3d 417, 425-431, 173 Cal. Rptr. 917* (disapproved on other grounds in *Laird v. Blacker (1992) 2 Cal. 4th 606, 617, 7 Cal. Rptr. 2d 550, 828 P.2d 691*)

[7] Suspension of Corporate Powers

Corporate plaintiff as precluded from bringing malpractice suit during suspension of corporate powers for nonpayment of taxes under *Rev. & Tax. Code § 23301*; plaintiff's malpractice action as barred when plaintiff's corporate powers were suspended for entire duration of one-year limitation period. *ABA Recovery Servs., Inc. v. Konold (1988) 198 Cal. App. 3d 720, 724-725, 244 Cal. Rptr. 27*

[8] Unclean Hands

Attorney malpractice action, based on allegation that attorney led client to knowingly commit perjury in civil action, as barred under doctrine of unclean hands. *Blain v. Doctor's Co. (1990) 222 Cal. App. 3d 1048, 1063-1064, 272 Cal. Rptr. 250*

Legal Topics:

For related research and practice materials, see the following legal topics:
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7-76 California Forms of Pleading and Practice--Annotated § 76.305

AUTHOR: GEORGE M. LINDAHL

§ 76.305 Law Reviews

Note, *Legal Malpractice--Honest Error Defense (Davis v. Damrell), 31 Defense L.J. 73 (1982)*

Comment, *Attorney's Malpractice: The Judicial Preference Under the Statute of Limitations, Reconsidered,* 2 U.S.F.V. L. Rev. 174 (1973)

Legal Topics:

For related research and practice materials, see the following legal topics:
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7-76 California Forms of Pleading and Practice--Annotated §§ 76.306-76.319

AUTHOR: GEORGE M. LINDAHL

[Reserved]

§§ 76.306[Reserved]

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7-76 California Forms of Pleading and Practice--Annotated § 76.320

AUTHOR: GEORGE M. LINDAHL

§ 76.320 California Points and Authorities

For memoranda of points and authorities supporting and opposing motions for summary judgment on the ground that defendant owed no duty to an intended beneficiary of a will, see California Points and Authorities, Ch. 24, *Attorneys at Law* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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7-76 California Forms of Pleading and Practice--Annotated § 76.321

AUTHOR: GEORGE M. LINDAHL

§ 76.321 California Torts

For discussion of recovery of damages for negligent infliction of emotional distress, see California Torts, Ch. 5 (Matthew Bender)

For discussion of the cause of action for fraud or deceit, see California Torts, Ch. 40 (Matthew Bender)

For discussion of the causes of action for malicious prosection or abuse of process, see California Torts, Ch. 43 (Matthew Bender)

For discussion of the cause of action for intentional infliction of emotional distress, see California Torts, Ch. 44 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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7-76 California Forms of Pleading and Practice--Annotated § 76.322

AUTHOR: GEORGE M. LINDAHL

§ 76.322 State Statutes

Attorney's intentional deception of parties to litigation as misdemeanor. *Bus. & Prof. Code § 6128(a)*

Elements of actionable fraud or deceit. *Civ. Code §§ 1709, 1710*

Court order required to state cause of action against attorney for civil conspiracy with client. *Civ. Code § 1714.10*

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Forms of Pleading and Practice--Annotated

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Volume 7: Attorney Practice and Ethics thru Auctions and Auctioneers-Chs.72-79
Chapter 76 ATTORNEY PROFESSIONAL LIABILITY
PART III. RESEARCH GUIDE
B. Liability to Nonclients
1. Bases of Liability

7-76 California Forms of Pleading and Practice--Annotated § 76.323

AUTHOR: GEORGE M. LINDAHL

§ 76.323 Decisions

[1] Abuse of Process

Elements of cause of action are (1) employment of legal process for ulterior purpose, and (2) willful act in use of process not proper in regular conduct of proceedings. *Ion Equip. Corp. v. Nelson (1980) 110 Cal. App. 3d 868, 876, 168 Cal. Rptr. 361* ; *Clark Equip. Co. v. Wheat (1979) 92 Cal. App. 3d 503, 524, 154 Cal. Rptr. 874* ; *Christensen v. Younger (1975) 47 Cal. App. 3d 613, 617-618, 120 Cal. Rptr. 923*

[2] Assignment

Liability insurer precluded from proceeding as subrogee in insured's malpractice claim against insured's attorney, since subrogation in those instances violates public policy against assigning malpractice claims. *Fireman's Fund Ins. v. McDonald, Hecht & Sol. (1994) 30 Cal. App. 4th 1373, 1383-1384, 36 Cal. Rptr. 2d 424*

Cause of action for "constructive fraud," based on allegations of attorneys' inability and failure to accomplish their tasks using reasonable care and skill, is not assignable. *Kracht v. Perrin, Gartland & Doyle (1990) 219 Cal. App. 3d 1019, 1022-1023, 268 Cal. Rptr. 637*

Involuntary assignment of malpractice action pursuant to *Code Civ. Proc. § 708.510* is invalid. *Kracht v. Perrin, Gartland & Doyle (1990) 219 Cal. App. 3d 1019, 1025, 268 Cal. Rptr. 637*

Foreign assignment of malpractice claim is unenforceable, on public policy grounds, in California courts. *Kracht v. Perrin, Gartland & Doyle (1990) 219 Cal. App. 3d 1019, 1027-1028, 268 Cal. Rptr. 637*

Cause of action for attorney malpractice is not assignable. *Jackson v. Rogers & Wells (1989) 210 Cal. App. 3d 336, 341-344, 258 Cal. Rptr. 454*

Fraud cause of action against attorney arising from services provided during attorney-client relationship is generally not assignable. *Jackson v. Rogers & Wells (1989) 210 Cal. App. 3d 336, 345-349, 258 Cal. Rptr. 454*

[3] Civil Conspiracy

Denial of plaintiff's petition for leave to file complaint for conspiracy against defendant's attorneys on grounds plaintiff did not establish reasonable probability of prevailing is judgment on merits with res judicata effect in plaintiff's subsequent civil conspiracy action against same attorneys. *Castro v. Higaki (1994) 31 Cal. App. 4th 350, 356-359, 37 Cal. Rptr. 2d 84*

Elements of action for civil conspiracy are formation and operation of conspiracy and damage resulting to plaintiff from act or acts done in furtherance of common design. *Mox Inc. v. Woods (1927) 202 Cal. 675, 677, 262 P. 302* ; *Barney v. Aetna Cas. & Sur. Co. (1986) 185 Cal. App. 3d 966, 981, 230 Cal. Rptr. 215* ; *see also Parkinson Co. v. Building Trades Council (1908) 154 Cal. 581, 593, 98 P. 1027* (conspiracy defined)

[4] Duty to Third Persons

[a] In General

Law firms representing bond underwriter and city in municipal bond transaction related to development project may possibly owe duty to trustee bank when drafting offering documents such that law firms could be liable to indemnify trustee, even though bank was represented by separate counsel during earlier transaction. *Shawmut Bank, N.A. v. Kress Assocs. (9th Cir. 1994) 33 F.3d 1477, 1505*

Attorney representing wife in prosecuting wrongful death action stemming from drowning of child did not owe duty to client's husband, who was never party in wrongful death action and never consulted with wife's attorney, because husband and wife were separated and potential conflict of interest existed due to husband, but not wife, being present at time of drowning. *Hall v. Superior Court (2003) 108 Cal. App. 4th 706, 714, 133 Cal. Rptr. 2d 806*

Attorney as having duty to inform client's spouse of potential action for lack of consortium despite attorney's statements that attorney was representing client only. *Meighan v. Shore (1995) 34 Cal. App. 4th 1025, 1029, 1042-1043, 40 Cal. Rptr. 2d 744*

When conflict of interest necessitates that insurer pay for separate counsel for insurer and insured in defending action brought by third party, insured's counsel is liable to *insurer* for negligence, but only for violating statutory duties imposed on that attorney by *Civ. Code § 2860*. *Assurance Co. of Am. v. Haven (1995) 32 Cal. App. 4th 78, 83-84, 38 Cal. Rptr. 2d 25*

Attorney has no duty toward third party who was damaged because attorney's client relied on attorney's negligent advice regarding sale of stock, and is not liable to third party absent fraud or malice. *Goodman v. Kennedy (1976) 18 Cal. 3d 335, 344, 134 Cal. Rptr. 375, 556 P.2d 737*

Factors considered in determining whether attorney is subject to liability to persons other than clients for professional negligence. *Lucas v. Hamm (1961) 56 Cal. 2d 583, 588, 15 Cal. Rptr. 821, 364 P.2d 685*

Attorney representing county in proceeding to enforce child support for custodial parent owes no professional duty of

care to custodial parent. *Jager v. County of Alameda (1992) 8 Cal. App. 4th 294, 297, 10 Cal. Rptr. 2d 293*

Attorney for closely held corporation does not owe professional duty of care to nonclient minority shareholder. *Skarbrevik v. Cohen, England & Whitfield (1991) 231 Cal. App. 3d 692, 707, 282 Cal. Rptr. 627*

Scope of attorney's duty in representing client in criminal case does not include responsibility to client's family members, whom attorney does not represent, for emotional distress damages resulting from attorney's failure to perform competently on behalf of client. *Holliday v. Jones (1989) 215 Cal. App. 3d 102, 105, 264 Cal. Rptr. 448*

Attorney functioning as union agent in collective bargaining process has primary duty to protect collective interests of union, which may diverge from interests of individual union members; individual union member is only an indirect beneficiary of negotiated, enforced collective bargaining agreement. *Aragon v. Pappy, Kaplon, Vogel & Phillips (1989) 214 Cal. App. 3d 451, 464, 262 Cal. Rptr. 646*

Policy considerations generally shielding licensed attorneys from third-party suits does not immunize person from liability for unauthorized practice of law under *Code Civ. Proc. § 1029.8*. *McKay v. Longsworth (1989) 211 Cal. App. 3d 1592, 1596-1597, 260 Cal. Rptr. 250*

Attorney owes duty of care to client's mortgage broker when mortgage broker conditioned approval of client's loan on receipt of written verification that attorney explained loan to client, attorney was aware of this arrangement, and attorney drafted letter, addressed "to whom it may concern," stating that he had explained loan to client. *Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices (1989) 207 Cal. App. 3d 1277, 1284-1285, 255 Cal. Rptr. 483*

Attorney preparing franchise prospectus for franchisor owes duty towards prospective franchisees if attorney knows that prospectus will be shown to prospective franchisees and that information contained in prospectus will be used to induce the purchase of franchises. *Courtney v. Waring (1987) 191 Cal. App. 3d 1434, 1443-1444, 237 Cal. Rptr. 233*

Attorney breaches duty to third party's attorney when affirmative misrepresentation of fact is made directly to attorney for purpose of influencing third party on behalf of client of attorney who made misrepresentation. *Cicone v. URS Corp. (1986) 183 Cal. App. 3d 194, 210, 227 Cal. Rptr. 887*

Attorney representing buyer of real property does not owe duty of care to escrow agent concerning drafting and formation of escrow instructions. *St. Paul Title Co. v. Meier (1986) 181 Cal. App. 3d 948, 950-952, 226 Cal. Rptr. 538*

Attorney's liability to third persons not in privity depends on various factors, including extent to which transaction was intended to benefit third persons, foreseeability of harm, certainty that injury was suffered, and moral blame attached to attorney's conduct. *Morales v. Field, DeGoff, Huppert & MacGowan (1979) 99 Cal. App. 3d 307, 315, 160 Cal. Rptr. 239* ; *see also* *Goodman v. Kennedy (1976) 18 Cal. 3d 335, 342-343, 134 Cal. Rptr. 375, 556 P.2d 737*)

Lawyer who is sued by former client for professional negligence is not permitted to cross complain for equitable indemnity against second lawyer who was retained to extricate client from situation created by alleged negligence of first lawyer. *Gibson, Dunn & Crutcher v. Superior Court (1979) 94 Cal. App. 3d 347, 349, 156 Cal. Rptr. 326*

Attorney who procured attachment bond for plaintiff and who represented estate of plaintiff after plaintiff's death has no duty to bonding company to prosecute original action or to advise it of pending probate proceedings. *National Auto. & Cas. Ins. Co. v. Atkins (1975) 45 Cal. App. 3d 562, 564, 119 Cal. Rptr. 618*

Attorney representing collection agency in action for collection of debt is liable to creditor on debt for negligent failure to prosecute lawsuit diligently, even though creditor was not attorney's client but was only third party for whose benefit

client had employed attorney. *Donald v. Garry (1971) 19 Cal. App. 3d 769, 772, 97 Cal. Rptr. 191*

Attorney who gives advice solely in capacity as attorney is not liable to third party victims of client's torts when client acts on advice. *Daly v. Smith (1963) 220 Cal. App. 2d 592, 604, 33 Cal. Rptr. 920*

Potential heirs have no cause of action against attorneys who represented wife in divorce action and negligently permitted dissipation of wife's estate. *Haldane v. Freedman (1962) 204 Cal. App. 2d 475, 478-479, 22 Cal. Rptr. 445*

[b] Intended Will and Trust Beneficiaries

Attorney who negligently fails to fulfill client's testamentary intentions is liable in tort for violating duty of care, arising from attorney-client agreement, owed directly to intended beneficiaries. *Heyer v. Flaig (1969) 70 Cal. 2d 223, 226-227, 74 Cal. Rptr. 225, 449 P.2d 161*

Attorney who negligently drafts will that fails to provide estate plan that client intended has continuing duty to client's intended beneficiaries to advise client of defective will; such duty continues until attorney's negligence is made irremediable by client's death. *Heyer v. Flaig (1969) 70 Cal. 2d 223, 230, 74 Cal. Rptr. 225, 449 P.2d 161*

Trust beneficiaries state cause of action against former trustees' attorneys for breach of fiduciary duty when complaint alleges attorneys' active participation in former trustees' breach of trust, including active concealment, misrepresentations to the court, and self-dealing for personal financial gain. *Pierce v. Lyman (1991) 1 Cal. App. 4th 1093, 1106, 3 Cal. Rptr. 2d 236*

Attorney for administrator of estate does not owe duty to legatees of estate when attorney's retention was not for primary purpose of providing benefit to legatees. *Goldberg v. Frye (1990) 217 Cal. App. 3d 1258, 1267-1268, 266 Cal. Rptr. 483*

Attorney for trustee assumes relationship to beneficiary of trust akin to that between trustee and beneficiary, so that attorney of trustee owes duty to beneficiaries to disclose dual representation of trustee and of company to which trustee sought to execute loan guarantee. *Morales v. Field, DeGoff, Huppert & MacGowan (1979) 99 Cal. App. 3d 307, 316, 160 Cal. Rptr. 239*

[c] Interested Parties Adverse to Client

Attorney retained by client to obtain divorce from first spouse owes no duty of care to client's second spouse when attorney never agreed to perform legal services intended directly to benefit second spouse. *Burger v. Pond (1990) 224 Cal. App. 3d 597, 602-607, 273 Cal. Rptr. 709*

Attorney who has been forced to defend lawsuit precipitated by negligence of adverse party's attorney is not entitled to recover from negligent attorney attorney's fees and costs incurred in defending lawsuit in absence of showing that negligent attorney owed attorney duty of care; duty of care is generally not owed between adverse parties in litigation or between parties dealing in arms'-length transaction. *Sooy v. Peter (1990) 220 Cal. App. 3d 1305, 1309-1314, 270 Cal. Rptr. 151*

Attorney has duty to deal honestly and fairly with adverse parties and counsel. *Carney v. Rotkin, Schmerin & McIntyre (1988) 206 Cal. App. 3d 1513, 1525, 254 Cal. Rptr. 478*

Attorney's acceptance of document from adverse party as implicit agreement to act with due care; attorney's failure to prevent client's unauthorized seizure and recordation of document held in escrow is breach of duty when document was

entrusted to attorney by counsel for adverse party. *Wasmann v. Seidenberg (1988) 202 Cal. App. 3d 752, 756-757, 248 Cal. Rptr. 744* (court noted that allegations of complaint did not support cause of action for legal malpractice, but did support cause of action for negligence)

Attorney has no duty to protect interests of adverse party or of party with whom client deals at arms' length. *Schick v. Lerner (1987) 193 Cal. App. 3d 1321, 1330, 238 Cal. Rptr. 902*

Attorney representing client in transaction with unrepresented party owes no duty of care to unrepresented party, at least if attorney does not undertake to render legal advice to that party. *Fox v. Pollack (1986) 181 Cal. App. 3d 954, 959-962, 226 Cal. Rptr. 532*

Attorney representing seller of real property is not required to disclose known defects to buyer. *Heliotis v. Schuman (1986) 181 Cal. App. 3d 646, 650-651, 226 Cal. Rptr. 509*

[5] Emotional Distress

Nonclient is entitled to state cause of action against attorney for intentional infliction of emotional distress if elements of cause of action are alleged. *Kinnamon v. Staitman & Snyder (1977) 66 Cal. App. 3d 893, 895-896, 136 Cal. Rptr. 321* ; *but see Lerette v. Dean Witter Org., Inc. (1976) 60 Cal. App. 3d 573, 579, 131 Cal. Rptr. 592* (privilege afforded attorney by former *Civ. Code § 47(2)* (now *Civ. Code § 47(b)*) bars action for intentional infliction of emotional distress based on privileged statement)

Elements of prima facie case for tort of intentional infliction of emotional distress are (1) outrageous conduct by defendant; (2) defendant's intention of causing or reckless disregard of probability of causing emotional distress; (3) plaintiff's suffering severe or extreme emotional distress; and (4) actual and proximate causation of emotional distress by defendant's outrageous conduct. *Kinnamon v. Staitman & Snyder (1977) 66 Cal. App. 3d 893, 895-896, 136 Cal. Rptr. 321*

[6] Malicious Prosecution

In malicious prosecution suit, when evaluating whether probable cause existed for underlying legal action, court is required to take into account evolutionary potential of legal principles. *Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 886, 254 Cal. Rptr. 336, 765 P.2d 498*

Elements of cause of action for malicious prosecution are that prior action (1) was commenced by or at direction of defendant and was pursued to legal termination in plaintiff's favor; (2) was brought without probable cause; and (3) was initiated with malice. *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 50, 118 Cal. Rptr. 184, 529 P.2d 608* ; *Weaver v. Superior Court (1979) 95 Cal. App. 3d 166, 183-184, 156 Cal. Rptr. 745*

Finding of lack of probable cause such that malicious prosecution may be found is question of law. *Williams v. Coombs (1986) 179 Cal. App. 3d 626, 636-637, 224 Cal. Rptr. 865*

[7] Misrepresentation and Fraud

Attorney is liable to nonclient third party for negligent misrepresentation. *Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices (1989) 207 Cal. App. 3d 1277, 1284-1285, 255 Cal. Rptr. 483* (liability to client's mortgage broker); *Courtney v. Waring (1987) 191 Cal. App. 3d 1434, 1443-1444, 237 Cal. Rptr. 233* (liability to client's franchisees); *Cicone v. URS Corp. (1986) 183 Cal. App. 3d 194, 210, 227 Cal. Rptr. 887* (liability to other attorney for

misrepresentations made on behalf of client in connection with business transaction)

Elements of action against attorney for fraud and misrepresentation are (1) misrepresentation, (2) knowledge of falsity, (3) intent to defraud, (4) justifiable reliance, and (5) resulting damages, each pleaded with sufficient factual specificity to allow defendant to understand charges. *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz (1976) 57 Cal. App. 3d 104, 109, 128 Cal. Rptr. 901*

[8] Particular Errors and Omissions--Wills

Intended beneficiaries of will who lose testamentary rights because of negligent failure of attorney who drew up will to properly carry out testator's intent have cause of action to recover on tort theory for breach of duty owed directly by attorney to intended beneficiaries. *Heyer v. Flaig (1969) 70 Cal. 2d 223, 228, 74 Cal. Rptr. 225, 449 P.2d 161*

Contract between client and attorney for drafting of client's will is in part a contract for benefit of third parties, namely persons designated as beneficiaries in will. *Lucas v. Hamm (1961) 56 Cal. 2d 583, 591, 15 Cal. Rptr. 821, 364 P.2d 685*

When will-drafting attorney fails to fulfill obligations under contract with testator, intended beneficiaries of will, who lose their testamentary rights, are entitled to recover damages as third-party beneficiaries of contract and also on tort liability for breach of duty owed directly to beneficiaries. *Garcia v. Borelli (1982) 129 Cal. App. 3d 24, 32, 180 Cal. Rptr. 768*

Complaint attempting to allege negligence of attorney consisting of drafting valid will without instructions from testator and in ignorance of his wishes but failing to allege that will did not contain what testator intended at time he approved and executed it does not state cause of action based on negligence. *Hiemstra v. Huston (1970) 12 Cal. App. 3d 1043, 1046-1048, 91 Cal. Rptr. 269*

Legal Topics:

For related research and practice materials, see the following legal topics:
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7-76 California Forms of Pleading and Practice--Annotated § 76.324

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§ 76.324 Law Reviews

Comment, *Attorney Malpractice in California: The Liability of a Lawyer Who Drafts an Imprecise Contract or Will, 24 U.C.L.A. L. Rev. 422 (1976)*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityAttorneys

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AUTHOR: GEORGE M. LINDAHL

§ 76.325 Text References

Restatement (Second) of Torts, §§ 324A, 552

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7-76 California Forms of Pleading and Practice--Annotated §§ 76.326-76.339

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[Reserved]

§§ 76.326[Reserved]

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7-76 California Forms of Pleading and Practice--Annotated § 76.340

AUTHOR: GEORGE M. LINDAHL

§ 76.340 California Points and Authorities

For memoranda of points and authorities supporting and opposing motions for summary judgment on the issue of the statute of limitations, see California Points and Authorities, Ch. 24, *Attorneys at Law* (Matthew Bender)

For memoranda of points and authorities supporting and opposing motions for summary judgment on the ground that defendant owed no duty to an intended beneficiary of a will, see California Points and Authorities, Ch. 24, *Attorneys at Law* (Matthew Bender)

For memoranda of points and authorities related to the special defense that the action for malpractice is barred by the relevant statute of limitations, see California Points and Authorities, Ch. 143, *Limitation of Actions* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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7-76 California Forms of Pleading and Practice--Annotated § 76.341

AUTHOR: GEORGE M. LINDAHL

§ 76.341 California Torts

For discussion of the cause of action for fraud or deceit, see California Torts, Ch. 40 (Matthew Bender)

For discussion of the causes of action for malicious prosection or abuse of process, see California Torts, Ch. 43 (Matthew Bender)

For discussion of incapacities that toll running of statutes of limitation, see California Torts, Ch. 71 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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7-76 California Forms of Pleading and Practice--Annotated § 76.342

AUTHOR: GEORGE M. LINDAHL

§ 76.342 State Statutes

Litigation privilege for use against actions for negligent misrepresentations. *Civ. Code § 47(b)*

Two-year period of limitations for malicious prosecution and abuse of process actions. *Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)* (one-year period prior to 2003)

Four-year period of limitation for action on contract, obligation, or liability founded on instrument of writing. *Code Civ. Proc. § 337(1)*

Three-year period of limitation for fraud actions. *Code Civ. Proc. § 338(d)*

Two-year period of limitation for action on contract, obligation, or liability not founded on instrument of writing. *Code Civ. Proc. § 339(1)*

Statute of limitations for legal malpractice actions. *Code Civ. Proc. § 340.6*

Legal Topics:

For related research and practice materials, see the following legal topics:
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7-76 California Forms of Pleading and Practice--Annotated § 76.343

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§ 76.343 Decisions

[1] Litigation Privilege Under Civ. Code § 47(b)

Attorney threatening plaintiff with nonexistent arrest warrant in attempt to deceive plaintiff and gain advantage over her, in apparent violation of *Bus. & Prof. Code § 6128* (deceit of party is misdemeanor) as not privileged under *Civ. Code § 47(b)*. *Carney v. Rotkin, Schmerin & McIntyre (1988) 206 Cal. App. 3d 1513, 1522-1523, 254 Cal. Rptr. 478*

Otherwise privileged communication as not needing to have been made in "interest of justice" to qualify for protection under *Civ. Code § 47(b)*. *Silberg v. Anderson (1990) 50 Cal. 3d 205, 218-219, 266 Cal. Rptr. 638, 786 P. 2d 365*

Oral and written statements by defendant attorneys, made in underlying litigation in which attorneys represented insurance company, that insurance company was "financially as sound as a dollar," although false when made, as privileged pursuant to judicial proceedings privilege. *Portman v. George McDonald Law Corp. (1979) 99 Cal. App. 3d 988, 991, 160 Cal. Rptr. 505*

Threat of suit for securities law violations in letter sent before filing of action as privileged under former *Civ. Code § 47(2)* (now *Civ. Code § 47(b)*). *Lerette v. Dean Witter Org., Inc. (1976) 60 Cal. App. 3d 573, 576-579, 131 Cal. Rptr. 592*

Attorney's alleged negligent misrepresentation as absolutely privileged under *Civ. Code § 47(b)* if (1) made in connection with legal proceeding, (2) had some connection or logical relation to action, (3) made to achieve objects of litigation, and (4) involved litigants or other participants authorized by law. *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 825, 106 Cal. Rptr. 718* ; *see Tiedemann v. Superior Court (1978) 83 Cal. App. 3d 918, 924, 148 Cal. Rptr. 242* ; *Friedman v. Knecht (1967) 248 Cal. App. 2d 455, 460, 56 Cal. Rptr. 540*

[2] Statute of Limitations

[a] Abuse of Process Action

Limitations period in abuse of process action as accruing while proceedings at issue are in progress, since claim for abuse of process can be raised before termination of proceedings complained of, and even within proceedings in which wrongful process issued. *White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 347, 66 Cal. Rptr. 697, 438 P.2d 345* (claim for abuse of process based on excessive attachment properly raised as cross-complaint in action to recover money owed)

Cause of action for abuse of process as accruing, for statute of limitations purposes, when defendant's wrongful conduct actually injures plaintiff. *Kappel v. Bartlett (1988) 200 Cal. App. 3d 1457, 1467-1469, 246 Cal. Rptr. 815*

One-year period of limitations in former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 335.1* (two-year period beginning in 2003)) as applying to action for abuse of process. *Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 95, 53 Cal. Rptr. 706* ; *see also* *McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 590-591, 33 Cal. Rptr. 389* (period applies even when plaintiff claims only property damage)

[b] Fraud Action

Despite statutory provision that action for fraud does not accrue until aggrieved party has "discovered the facts constituting the fraud" [*see Code Civ. Proc. § 338(d)*], plaintiff as required to use reasonable diligence to discover true facts if he or she has reason to suspect fraud. *Sun'N Sand, Inc. v. United Cal. Bank (1978) 21 Cal. 3d 671, 701-702, 148 Cal. Rptr. 329, 582 P.2d 920* ; *Hobart v. Hobart Estate Co. (1945) 26 Cal. 2d 412, 437, 159 P.2d 958*

If plaintiff has no reason to suspect fraud, right of action as not accruing until actual discovery of facts constituting fraud. *Hobart v. Hobart Estate Co. (1945) 26 Cal. 2d 412, 439, 159 P.2d 958* ; *see also* *Snow v. A.H. Robins Co. (1985) 165 Cal. App. 3d 120, 131-135, 211 Cal. Rptr. 271*

Statutory limitations period for fraud actions as applying to action to vacate judgment obtained through fraud. *Zastrow v. Zastrow (1976) 61 Cal. App. 3d 710, 714, 132 Cal. Rptr. 536*

Statutory limitations period for fraud actions as applying to action for reformation of contract on ground of fraud. *Goodfellow v. Barritt (1933) 130 Cal. App. 548, 556-557, 20 P.2d 740*

[c] Malicious Prosecution Action

Period of limitation for filing action for malicious prosecution as being one year pursuant to former *Code Civ. Proc. § 340(3)* [*now see Code Civ. Proc. § 335.1* (two-year period beginning in 2003)]. *Rutherford v. Johnson (1967) 250 Cal. App. 2d 316, 319, 58 Cal. Rptr. 546*

Limitation period for malicious prosecution action as beginning to run on date that proceedings in prior action are dismissed or terminated. *Babb v. Superior Court (1971) 3 Cal. 3d 841, 846, 92 Cal. Rptr. 179, 479 P.2d 379*

If after entry of judgment in trial court, appeal is filed from underlying action that is alleged to be maliciously prosecuted, period of limitation as running from time of entry of judgment in trial court until notice of appeal is filed. *Gibbs v. Haight, Dickson, Brown & Bonesteel (1986) 183 Cal. App. 3d 716, 722, 228 Cal. Rptr. 398* (once notice of appeal is filed, appeals process as tolling period of limitation until appeal process is exhausted)

If action underlying malicious prosecution action involves appeal in federal appeals court, statute of limitations for malicious prosecution action as tolled until court of appeals issues mandate pursuant to *Fed. Rules App. Proc., Rule 41(a).* *Korody-Colyer Corp. v. General Motors Corp. (1989) 208 Cal. App. 3d 1148, 1152-1153, 256 Cal. Rptr. 658*

[d] Malpractice Action

Limitations period for malpractice action by intended will beneficiary as starting from date of testator's death, when negligent failure to perfect requested testamentary scheme becomes irremediable and impact of injury occurs. *Heyer v. Flaig (1969) 70 Cal. 2d 223, 230-231, 74 Cal. Rptr. 225, 449 P.2d 161* (decided before enactment of *Code Civ. Proc. § 340.6*, which now governs attorney malpractice actions)

[3] Unclean Hands

In malicious prosecution action, plaintiff insurance agent's failure to disclose critical evidence in original indemnity action, which evidence might have changed outcome of indemnity action, as supporting equitable defense of unclean hands raised by defendant insurer. *Pond v. Insurance Co. of N. Am. (1984) 151 Cal. App. 3d 280, 289-290, 198 Cal. Rptr. 517*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsIntentional TortsAbuse of ProcessGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsMalpractice & Professional LiabilityAttorneys

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Chapter 76 ATTORNEY PROFESSIONAL LIABILITY
PART III. RESEARCH GUIDE
B. Liability to Nonclients
2. Defenses

7-76 California Forms of Pleading and Practice--Annotated § 76.344

AUTHOR: GEORGE M. LINDAHL

§ 76.344 Text References

7 Am. Jur. 2d, *Attorneys at Law*, §§ 229, 232-236

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7-76 California Forms of Pleading and Practice--Annotated §§ 76.345-76.359

AUTHOR: GEORGE M. LINDAHL

[Reserved]

§§ 76.345[Reserved]

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7-76 California Forms of Pleading and Practice--Annotated § 76.360

AUTHOR: GEORGE M. LINDAHL

§ 76.360 Allegations of Agency Relationship Between Defendant Law Firm and Associated Counsel, Employee, or Other Agent

[1] FORM Allegations of Agency Relationship Between Defendant Law Firm and Associated Counsel, Employee, or Other Agent

[*In a complaint for malpractice, if a partnership or law corporation is sued as a defendant, allege capacity and principal place of business* (*or other venue*), *such as the alternatives that follow*.]

[*EITHER*]

Defendants _____ [*names*] are, and at all times herein mentioned were, partners engaged in the practice of law under the common name of _____ [*name of partnership*] (hereinafter called "Firm"), having their principal place of business at _____ [*address*], California, and are sued herein individually and by such common name.

[*OR*]

Defendant _____ [*name*] (hereinafter called "Firm") is, and at all times herein mentioned was, a professional corporation organized and existing under the laws of California, duly registered with the State Bar of California as a law corporation, with its principal place of business at _____ [*address*], California.

[*If both a law firm and an individual attorney are sued, allege agency or employee status of individual defendant as follows*.]

At all times herein mentioned defendant _____ (*name of negligent attorney*) was the agent and employee of defendant Firm and in doing the things herein alleged was acting within the scope of such agency.

[2] Use of Form

These allegations are for use in a complaint for malpractice to allege partnership or corporate status of a defendant law firm, and agency or employee status for individual members of the firm being sued. See*§ 76.381* for a general form of complaint for malpractice based on negligence.

[3] Allegations

If the negligent attorney's partners or law corporation is sued on the principle of respondeat superior, allegations should be made of such partnership or corporate capacity, along with the agency status of individual attorneys being sued [*see Blackmon v. Hale (1970) 1 Cal. 3d 548, 557, 83 Cal. Rptr. 194, 463 P.2d 418* (liability of partners); *Gudger v. Manton (1943) 21 Cal. 2d 537, 549, 134 P.2d 217* (liability of attorney for acts or omissions of negligent attorney employees)]. For a comprehensive discussion of these principles and related forms, see Ch. 160, *Corporations: Capacity* , Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties* .which includes discussion of limited liability partnerships), and Ch. 427, *Principal and Agent* .

PRACTICE TIP:

Naming Partners as Defendants. It is not essential that partners be named as defendants, however, because the partners or the firm's professional liability insurer will ultimately be required to satisfy any settlement or judgment in the legal malpractice action. Tactical considerations unique to each case should be carefully analyzed in deciding which, if any, of the defendants law firm's current or former partners should be sued. It is not unusual for a more effective and aggressive defense to be mounted in a legal malpractice case when partners are named individually and are thus more acutely interested in a favorable outcome of the case. Settlement prospects can also be affected by the inclusion of partners as defendants.

[4] Venue

For the purpose of establishing venue, the paragraphs allege the principal place of business of the partnership [*see Code Civ. Proc. §§ 395.2, 395.5*] or law corporation [*see Code Civ. Proc. § 395.5*]. The venue statutes [*Code Civ. Proc. §§ 392-404.8*] do not expressly provide for venue in legal malpractice cases. *Code Civ. Proc. §§ 395.2* and *395.5* appear applicable when a partnership or corporate defendant is sued [*see generally* Ch. 571, *Venue* .

[5] Cross References

For a related form, *see § 76.381*

[6] California Torts

For discussion of vicarious liability generally, see California Torts, Ch. 8 (Matthew Bender)

[7] State Statutes

Partner is agent of partnership. *Corp. Code § 16301(1)*

Joint and several liability of partners and partnership. *Corp. Code §§ 16305, 16306*

[8] Decisions

[a] Employees

Attorney is liable for wrongful conduct of attorneys, law clerks, paralegals, secretaries, detectives or other employees and agents acting in course and scope of employment. *see Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 663, 109 Cal. Rptr. 269*

[b] Partners and Associates

Attorney's liability for acts of law partners is governed by Uniform Partnership Act [*Corp. Code §§ 15001-15046*]. *Blackmon v. Hale (1970) 1 Cal. 3d 548, 557, 83 Cal. Rptr. 194, 463 P.2d 418*

Former law partner was jointly and severally liable with second attorney who subsequently diverted plaintiff's trust funds for his own use; former law partner, in his capacity of cotrustee, was liable with plaintiff's attorney who misappropriated plaintiff's money deposited in firm's trust account when plaintiff had not been consulted about the transfer. *Blackmon v. Hale (1970) 1 Cal. 3d 548, 556-561, 83 Cal. Rptr. 194, 463 P.2d 418*

Attorney who employs other attorneys is liable for their wrongful acts in same manner as principal is liable for agent's acts. *Gudger v. Manton (1943) 21 Cal. 2d 537, 549, 134 P.2d 217*

Finding of ostensible partnership is sufficient to impose vicarious liability for acts of attorneys with whom attorney is sharing office space or is otherwise associated in relationship that is not partnership. *Redman v. Walters (1979) 88 Cal. App. 3d 448, 455, 152 Cal. Rptr. 42*

Attorney is liable for partner's malicious prosecution when partnership was created after action alleged to have been malicious was filed, if some action was taken by partner after formation of partnership. *Lujan v. Gordon (1977) 70 Cal. App. 3d 260, 262-264, 138 Cal. Rptr. 654*

Attorney who substituted for original attorney is equally liable with original attorney for professional negligence in handling case when client consented to substitution, attorneys were to divide fee, if and when it was collected, and attorneys were each responsible to the client. *Floro v. Lawton (1960) 187 Cal. App. 2d 657, 671, 10 Cal. Rptr. 98*

[9] Law Reviews

Mallen, *Apparent Partnerships and Real Legal Malpractice Liability*, 55 Cal. St. B.J. 334 (August 1980)

Mallen, *The Fine Art of Delegation, Association and Referral*, 55 Cal. St. B.J. 510 (Dec. 1980)

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7-76 California Forms of Pleading and Practice--Annotated §§ 76.361-76.379

AUTHOR: GEORGE M. LINDAHL

[Reserved]

§§ 76.361[Reserved]

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2. Negligence Actions

7-76 California Forms of Pleading and Practice--Annotated § 76.380

AUTHOR: GEORGE M. LINDAHL

§ 76.380 Complaint for Equitable Indemnity--Attorney's Payment of Client's Judgment Against Attorney for Associated Attorney's Negligence

[1] FORM Complaint for Equitable Indemnity--Attorney's Payment of Client's Judgment Against Attorney for Associated Attorney's Negligence

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR IMPLIED EQUITABLE IN-
_____ [*name*],	)	DEMNITY
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Allege residence of negligent attorney as follows, if venue is to be based thereon*.] Defendant _____ [*name*] resides in _____ County, California.

[2. *Capacity of defendant law firm. See§ 76.360* .]

3. At all times herein mentioned defendant _____ [*name of negligent attorney*] was licensed to engage

in the practice of law in the State of California and was practicing law at _____ [*address*], California.

4. On or about _____ [*date*], plaintiff and defendant entered into _____ [a written *or* an oral] agreement providing that defendant would act as plaintiff's associated attorney for the purpose of representing _____ [*name of former client*] in _____ [*specify nature of legal services, e.g.,* prosecuting a claim against _____ (*describe party*) for personal injuries], and in commencing and prosecuting an action based on this claim. [A true and correct copy of the agreement is attached hereto as Exhibit A and made a part hereof by reference.]

5. On or about _____ [*date*], a judgment was entered in the action entitled _____ vs. _____, Case No. _____ in the _____ Court against plaintiff requiring him/her to pay the sum of $_____ to _____ [*name of former client*], plaintiff in the underlying action. This judgment was based _____ [entirely *or* partially] on defendant's wrongful act in _____ [*describe wrongful act of defendant that led to prior judgment against plaintiff, e.g.,* negligently failing to file the above-described complaint on behalf of _____ (*name of former client*) within the applicable statute of limitation)].

6. By reason of the foregoing, plaintiff is entitled to indemnity from defendant for _____ [all *or* part] of the aforesaid judgment, but defendant has not paid any part of this sum to plaintiff.

WHEREFORE, plaintiff prays judgment against defendant(s) [and each of them] as follows:

1. Indemnity from defendant in the sum of $_____;

2. Costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

This form is for use in an action by an attorney seeking full or partial indemnification from an associated attorney whose wrongful act led or contributed to a malpractice judgment against the plaintiff attorney in favor of a former client. The form may also be adapted for use as a cross-complaint against the associated attorney in the original action

against the attorney by the client, or as a complaint for declaratory relief for indemnity.

[3] Attorney's Fees

Under certain conditions, the successful plaintiff or cross-plaintiff in an action for implied indemnity may be awarded attorney's fees for defense or prosecution of the third-party action [*see Code Civ. Proc. § 1021.6*].

[4] Verification

Verification of this complaint is not required, but verification of the complaint requires the defendant to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446*] and precludes a general denial in superior court and in some limited civil cases [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers*

For the principles involved in implied indemnity actions generally, see Ch. 300, *Indemnity and Contribution* .

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

[6] California Torts

For a detailed discussion of indemnity generally, see California Torts, Ch. 74 (Matthew Bender)

[7] Decisions

Public policy considerations as precluding cross complaint for indemnity by attorney against subsequent attorney bringing legal malpractice action on behalf of client, even though subsequent attorney's alleged negligence occurred

concurrently with defendant's in course of representation of client and not with regard to malpractice action. *Lewis v. Purvin (1989) 208 Cal. App. 3d 1208, 1214-1217, 256 Cal. Rptr. 827*

Prohibition on cross complaints by defendant predecessor attorneys for equitable indemnity against successor attorneys as not inconsistent with or violative of right to contribution provided in *Civ. Code § 1432*. *Holland v. Thacher (1988) 199 Cal. App. 3d 924, 936, 245 Cal. Rptr. 247*

Court's refusal to allow attorney sued for attorney malpractice to cross complain against successor attorney for equitable indemnity as not denying attorney equal protection or due process. *Holland v. Thacher (1988) 199 Cal. App. 3d 924, 935, 245 Cal. Rptr. 247*

Attorney sued for malpractice by former client as barred from cross complaining for indemnity against successor attorney hired to assist client in limiting injury caused by original attorney; original attorney as having option, in lieu of seeking indemnity, of asserting successor attorney's negligence as affirmative defense. *Holland v. Thacher (1988) 199 Cal. App. 3d 924, 929-935, 245 Cal. Rptr. 247*

If two attorneys, not in privity, successively represented same client in prior action, first attorney sued for malpractice as prohibited by public policy from maintaining claim for equitable, or partial equitable, indemnity against second attorney on alleged ground that client's damages were actually caused or exacerbated by second attorney. *Goldfisher v. Superior Court (1982) 133 Cal. App. 3d 12, 21-23, 183 Cal. Rptr. 609*

Attorney sued by former client for malpractice as permitted to cross complain for partial indemnity against client's second attorney whose negligence as a matter of law contributed to client's loss. *Parker v. Morton (1981) 117 Cal. App. 3d 751, 755-767, 173 Cal. Rptr. 197*

Lawyer sued by former client for professional negligence as not permitted to cross complain for partial equitable indemnity against client's second lawyer who was retained to extricate client from situation created by alleged negligence of first lawyer; rule as applying whether or not person seeking indemnification was a lawyer. *Gibson, Dunn & Crutcher v. Superior Court (1979) 94 Cal. App. 3d 347, 349, 352, 156 Cal. Rptr. 326*

[8] Law Reviews

Braun, *Gibson, Dunn & Crutcher v. Superior Court Revisited: A Critical Analysis and Proposal Respecting an Attorney Malpractice Defendant's Right to Cross-Complain for Comparative Indemnity Against the Former Client's Present Attorney, 22 Santa Clara L. Rev. 1 (1982)*

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7-76 California Forms of Pleading and Practice--Annotated § 76.381

AUTHOR: GEORGE M. LINDAHL

§ 76.381 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--General Form

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	FOR MALPRACTICE
[and DOES 1 through _____,]	)	[Amount demanded _____ (exceeds
Defendant(s).	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Residence of negligent attorney*. *See§ 76.380, Paragraph 1*.]

[2. *Capacity and principal place of business of defendant law firm. See§ 76.360* .]

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend the complaint to allege their

true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that plaintiff's losses as herein alleged were proximately caused by such negligence.)]

[4. *If firm and individual attorney sued, agency or employee status of individual defendants. See§ 76.360* .]

[5. *Professional status of defendant*. *See§ 76.380, Paragraph 3*.]

6. On or about _____ [*date*], at _____ [*address*], California, plaintiff retained and employed defendant _____ [*name of negligent attorney*] [and defendant Firm] to represent plaintiff as plaintiff's attorney(s) at law in _____ [*describe services*]. At such time and place defendant(s) accepted such employment and agreed to perform such services for plaintiff.

[*EITHER*]

7. At all times thereafter defendant(s) [and each of them] failed to exercise reasonable care and skill in undertaking to perform such legal services for plaintiff.

[*OR*]

7. At all times thereafter defendant(s) [and each of them] failed to exercise reasonable care and skill in performing those legal skills for plaintiff, in that he/she _____ [*specify conduct that defendant(s) performed negligently, e.g.*, did not file plaintiff's lawsuit before the expiration of the applicable period of limitation].

[*CONTINUE*]

8. Had defendant(s) exercised proper care and skill in the foregoing matter, _____ [*specify benefit to plaintiff if attorney had used proper care*]. [*Add if malpractice is alleged against criminal defense attorney:* Plaintiff was actually innocent of the criminal charges brought against him/her.]

9. As a proximate result of such negligence _____ [*specify loss*], to plaintiff's damage in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant(s) [and each of them] as follows:

1. For damages in the sum of $_____.

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See§ 76.380.*]

[2] Use of Form

This complaint is for use in an action against an attorney for malpractice.

[3] Allegations

A complaint for legal malpractice alleges the following:

- Duty to plaintiff (Paragraphs 5, 6)

- Breach of duty, alleged either generally or with reference to specific acts or omissions (as discussed in the NOTE, *below*) (Paragraph 7)

- Proximate cause (Paragraphs 8, 9); and

- Loss suffered by plaintiff (Paragraph 9) [*see Budd v. Nixen (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433]* .

Negligence may be charged in general terms; that is, what was done being stated, it is sufficient to say that it was negligently done, without stating the particular omission that rendered the act negligent [*Modica v. Crist (1954) 129 Cal. App. 2d 144, 146, 276 P.2d 614]* .

NOTE:

General vs. Specific Allegation. The plaintiff bringing a legal malpractice action should weigh the tactical advantages of using a general allegation of malpractice with the potential risks involved with specifically alleging the particular omission(s) that rendered the defendant attorney's actions negligent. A general allegation of negligence will almost invariably withstand attack on demurrer as well as avoid the risk that a judge might limit the plaintiff's proof at trial to specific charging allegations in the complaint, despite a wealth of evidence and new contentions that surfaced after the complaint was filed. A general allegation is also usually less susceptible to a summary judgment/adjudication motion because the defendant will be unable to argue that the plaintiff has "narrowed" the issues by virtue of specific charging allegations in the complaint.

If the negligent attorney's partners or law corporation are sued on the principle of respondeat superior, allegations of such partnership or corporate capacity, together with an agency allegation, may be found in§ 76.360 [*see Blackmon v. Hale (1970) 1 Cal. 3d 548, 557, 83 Cal. Rptr. 194, 463 P.2d 418* (liability of partners); *Gudger v. Manton (1943) 21 Cal. 2d 537, 549, 134 P.2d 217* (liability of attorney for acts or omissions of negligent attorney employees)]. For purposes of establishing venue, the complaint alleges the residence of the negligent attorney (Paragraph 1) [*see Code Civ. Proc. § 395(a)*]. To allege the principal place of business of a partnership [*see Code Civ. Proc. §§ 395.2, 395.5*] or law corporation [*see Code Civ. Proc. § 395.5*], *see § 76.360*. It should be noted that the venue statutes [*Code Civ. Proc. §§ 392-404.8*] do not expressly provide for venue in legal malpractice cases. *Code Civ. Proc. § 395(a)* appears applicable when an individual attorney is sued, and *Code Civ. Proc. §§ 395.2* and *395.5* appear applicable when a partnership or corporate defendant is sued [*see generally* Ch. 571, *Venue* .

A fictitious name allegation (Paragraph 3) is included for use when defendants are sued whose names are unknown at the time the complaint is filed [*see Code Civ. Proc. § 474*].

NOTE:

Malpractice Against Criminal Defense Attorney. When the malpractice plaintiff was a criminal

defendant in the underlying action, the Supreme Court has held that the plaintiff must prove, by a preponderance of the evidence, his or her actual innocence of the criminal charges in order to recover in a civil malpractice action against his or her defense attorney [*Wiley v. County of San Diego (1998) 19 Cal. 4th 532, 545, 79 Cal. Rptr. 2d 672, 966 P.2d 983]* . Paragraph 8 contains an optional provision for use to allege actual innocence.

The Supreme Court has held that an individual convicted of a criminal offense must obtain reversal of the conviction, or other exoneration by postconviction relief, to establish actual innocence [*Coscia v. McKenna & Cuneo (2001) 25 Cal. 4th 1194, 1201, 108 Cal. Rptr. 2d 471, 25 P.3d 670]* . In cases in which innocence of the underlying criminal charges has already been established, those facts should also be included.

[4] Jurisdiction and Venue

In any limited civil case that is subject to *Civ. Code §§ 1812.10* and *2984.4*, plaintiff must state facts in the complaint, verified by his or her oath or the oath of his or her attorney, or in an affidavit (or declaration under penalty of perjury executed in California [*Code Civ. Proc. § 2015.5*]) of the plaintiff or of his or her attorney filed with the complaint, showing that the action has been commenced in the proper court for the trial of such action or proceeding, and showing that the action is or is not subject to the provisions of *Civ. Code § 1812.10* (Unruh Retail Installment Sales Act) and *Civ. Code § 2984.4* (Rees-Levering Motor Vehicle Sales Finance Act). When the affidavit (declaration) is filed with the complaint, a copy must be served with the summons. If such complaint or affidavit (declaration) is not so filed, unless the court on such terms as may be just permits the affidavit (declaration) to be filed after the complaint is filed, the action must be dismissed without prejudice [*Code Civ. Proc. § 396a*; *see also Civ. Code §§ 1812.10, 2984.4*; *see generally* Ch. 20, *Allegations Commonly Used* , and Ch. 500, *Sales and Secured Transactions* .

Jurisdiction of the subject matter of a legal malpractice action is based on the amount in controversy set forth in the complaint [*see Cal. Const. art. VI, § 10* (residual jurisdiction of superior court); *Code Civ. Proc. §§ 85, 86(a)(1)* (jurisdictional limit of $25,000 on limited civil cases)].

[5] Verification

Verification of this complaint is not required, but verification of the complaint requires the defendant to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446*] and precludes a general denial in superior court and in some limited civil cases [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[6] Copies

The following copies of this complaint should be prepared:

- Original to be filed with the court;
- One copy together with a copy of the summons to be served on each defendant;
- One copy for the office file;
- Other copies as desired.

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20,

Allegations Commonly Used

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For complaints for malpractice against dentists and doctors, see Ch. 209, *Dentists* , and Ch. 414, *Physicians: Medical Malpractice*

For discussion and forms relating to FAX service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For complaints for use in negligence actions generally, see Ch. 380, *Negligence*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

[8] California Points and Authorities

For memoranda of points and authorities related to this complaint, see California Points and Authorities, Ch. 24, *Attorneys at Law* (Matthew Bender)

[9] Decisions

Elements of cause of action for legal malpractice. *Budd v. Nixen (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433* ; *Sukoff v. Lemkin (1988) 202 Cal. App. 3d 740, 744, 249 Cal. Rptr. 42* ; *In re Easterbrook (1988) 200 Cal. App. 3d 1541, 1544, 244 Cal. Rptr. 652*

Cause of action based on professional negligence of attorney as not accruing until client knows, or should know, all material facts essential to show elements of cause of action. *Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 190, 98 Cal. Rptr. 837, 491 P.2d 421*

Attorney as not liable for delays in executing on judgment debtor's property resulting in loss of judgment lien when debtor owned no property subject to execution. *Siddall v. Haight (1901) 132 Cal. 320, 321-322, 64 P. 410*

Plaintiff as required to plead specific facts affording inference that attorney's negligence caused injury if pleaded facts of negligence and injury do not naturally give rise to inference of causation. *Blain v. Doctor's Co. (1990) 222 Cal. App. 3d 1048, 1066, 272 Cal. Rptr. 250*

Attorney malpractice action as requiring proof that underlying case was meritorious in addition to other elements of

duty, breach, proximate cause, and damages. *Harris v. Smith (1984) 157 Cal. App. 3d 100, 104, 203 Cal. Rptr. 541*

Pleading negligence in general terms as permissible in legal malpractice complaint. *Modica v. Crist (1954) 129 Cal. App. 2d 144, 146, 276 P.2d 614*

Complaint against attorney based on professional negligence as not required to allege it was sole cause of client's loss or to negative any other probable cause, but required, however, to allege attorney's negligence was proximate cause of loss. *Modica v. Crist (1954) 129 Cal. App. 2d 144, 147-148, 276 P.2d 614*

Necessity of pleading facts showing that proper performance of act by attorney would have resulted in benefit to plaintiff when complaint is based on negligent omission to perform act. *Feldesman v. McGovern (1941) 44 Cal. App. 2d 566, 568-569, 112 P.2d 645* (dictum)

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7-76 California Forms of Pleading and Practice--Annotated § 76.382

AUTHOR: GEORGE M. LINDAHL

§ 76.382 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--Failure to File Answer and Permitting Default to Be Taken Against Client

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--Failure to File Answer and Permitting Default to Be Taken Against Client

[*Caption. See§ 76.381* .]

Plaintiff alleges:

[1. *Residence of negligent attorney*. *See§ 76.380, Paragraph 1*.]

[2. *Capacity and principal place of business of law firm*. *See§ 76.360* .]

[3. *Fictitious name allegations, if appropriate*. *See§ 76.381, Paragraph 3*.]

[4. *Agency allegations, if appropriate*. *See§ 76.360* .]

[5. *Professional status of defendant*. *See§ 76.380, Paragraph 3*.]

6. On or about _____ [*date*], at _____ [*address*], California, plaintiff retained and employed defendant _____ [*name of attorney*] [and defendant Firm] to defend plaintiff in action filed in the _____ [*court, e.g.,* Superior Court of California, County of _____], entitled _____ [*name*] vs. _____ [*name*] and identified as No. _____, wherein plaintiff was named, and served on _____ [*date*], as a defendant therein. At such time and

place defendant(s) accepted such employment and agreed to represent plaintiff in defending such action.

7. Plaintiff had a meritorious and sufficient defense to such complaint and informed defendant _____ [*name of attorney*] of the facts comprising such defense within sufficient time for him/her to assert and maintain such defense by filing an appropriate answer or other responsive pleading.

8. Defendant(s) [and each of them] failed to exercise reasonable care and skill in representing plaintiff and in defending such action, and failed and neglected to file an answer or any responsive pleading within the time required by law and negligently permitted a default judgment to be entered against plaintiff.

9. Plaintiff is informed and believes and thereon alleges that if defendant(s) had exercised due care and skill in representing plaintiff, judgment would have been rendered in plaintiff's favor in such action.

10. As a proximate result of such negligence, a default judgment was entered against plaintiff on _____ [*date*] in the sum of $_____ as prayed for in such action.

11. _____ [*Allege other special damages, if any, e.g.,* On learning of the default judgment taken against plaintiff in such action, plaintiff immediately retained the services of another attorney to obtain relief from default. Plaintiff was advised by such attorney that relief could not be obtained. In obtaining such advice plaintiff incurred additional legal fees.]

12. As a proximate result of such negligence by defendant(s), plaintiff has been damaged.

[*Prayer. See§ 76.381* .]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See§ 76.380* .]

[2] Use of Form

This complaint is for use in a malpractice action based on an attorney's neglect in filing a responsive pleading and in permitting a default judgment to be entered against his or her client.

NOTE:

General vs. Specific Allegation. The plaintiff bringing a legal malpractice action should weigh the tactical advantages of using a general allegation of malpractice [*see § 76.381*] with the potential risks involved with specifically alleging the particular omission(s) that rendered the defendant attorney's actions negligent. A general allegation of negligence will almost invariably withstand attack on demurrer as well as avoid the risk that a judge might limit the plaintiff's proof at trial to specific charging allegations in the complaint, despite a wealth of evidence and new contentions that surfaced after the complaint was filed. A general allegation is also usually less susceptible to a summary judgment/adjudication motion because the defendant will be unable to argue that the plaintiff has "narrowed" the issues by virtue of specific charging allegations in the complaint.

[3] Decisions

In malpractice action based on attorney's failure to file timely responsive pleading, plaintiff as required to show that he or she would have had valid affirmative defense in underlying action. *United Cmty. Church v. Garcin (1991) 231 Cal. App. 3d 327, 334, 282 Cal. Rptr. 368*

[4] Cross References

For a related form, see *§ 76.381*

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PART IV. FORMS
A. Liability to Client
2. Negligence Actions

7-76 California Forms of Pleading and Practice--Annotated § 76.383

AUTHOR: GEORGE M. LINDAHL

§ 76.383 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--Failure to Commence Action Within Period of Limitation

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--Failure to Commence Action Within Period of Limitation

[*Caption. See§ 76.381*.]

Plaintiff alleges:

[1. *Residence of negligent attorney*. *See§ 76.380, Paragraph 1*.]

[2. *Capacity and principal place of business of law firm*. *See§ 76.360* .]

[3. *Fictitious name allegations, if appropriate*. *See§ 76.381, Paragraph 3*.]

[4. *Agency allegations, if appropriate*. *See§ 76.360* .]

[5. *Professional status of defendant*. *See§ 76.380, Paragraph 3*.]

6. On or about _____ [*date*], at _____ [*address*], California, plaintiff retained and employed defendant _____ [*name of attorney*] [and defendant Firm] to represent plaintiff in prosecuting a claim against _____ [*describe party*] for _____ [*nature of claim, e.g.,* personal injuries], and in commencing and prosecuting an action thereon. At such time and place defendant(s) accepted such employment and agreed to represent plaintiff.

7. Defendant _____ [*name of attorney*] failed to exercise reasonable care, skill and diligence in so representing plaintiff and negligently failed to commence such action within the period required by law and by the applicable statute of limitations.

8. Plaintiff is informed and believes and thereon alleges that such claim was at all times herein mentioned meritorious; that plaintiff would have recovered judgment on such claim; and that at all times herein mentioned the party against whom the claim existed was solvent with sufficient assets and property to satisfy a judgment in such amount.

9. As a proximate result of the negligence herein alleged plaintiff's cause of action is now barred and his/her claim rendered worthless, all to plaintiff's damage.

[*Prayer. See§ 76.381.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See§ 76.380.*]

[2] Use of Form

This complaint is for use in an action against an attorney for malpractice based on his or her failure to file an action within the period of the applicable statute of limitations, causing the action to become barred.

NOTE:

General vs. Specific Allegation. The plaintiff bringing a legal malpractice action should weigh the tactical advantages of using a general allegation of malpractice [*see also § 76.381*] with the potential risks involved with specifically alleging the particular omission(s) that rendered the defendant attorney's actions negligent. A general allegation of negligence will almost invariably withstand attack on demurrer as well as avoid the risk that a judge might limit the plaintiff's proof at trial to specific charging allegations in the complaint, despite a wealth of evidence and new contentions that surfaced after the complaint was filed. A general allegation is also usually less susceptible to a summary judgment/adjudication motion because the defendant will be unable to argue that the plaintiff has "narrowed" the issues by virtue of specific charging allegations in the complaint.

[3] Decisions

Attorney as not liable for failure to file action prior to expiration of statute of limitations if he or she ceased to represent client before statute ran on client's action. *Steketee v. Lintz, Williams & Rothberg (1985) 38 Cal. 3d 46, 57, 210 Cal. Rptr. 781, 694 P.2d 1153*

Failure to file action for client within period of limitation as professional negligence. *Shelly v. Hansen (1966) 244 Cal. App. 2d 210, 214-215, 53 Cal. Rptr. 20* ; *Hege v. Worthington, Park & Worthington (1962) 209 Cal. App. 2d 670, 678-679, 26 Cal. Rptr. 132*

Complaint based on attorney's professional negligence consisting in failure to commence client's lawsuit before it was

barred by statute of limitations as not required to allege conclusion that lawsuit would have been successful but, rather, as required to allege facts from which court could deduce that client would have recovered judgment. *Hege v. Worthington, Park & Worthington (1962) 209 Cal. App. 2d 670, 677, 26 Cal. Rptr. 132*

[4] Cross References

For a related form, see *§ 76.381*

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7-76 California Forms of Pleading and Practice--Annotated § 76.384

AUTHOR: GEORGE M. LINDAHL

§ 76.384 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--Failure to Bring Case to Trial Within Statutory Period

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--Failure to Bring Case to Trial Within Statutory Period

[*Caption. See§ 76.381.*]

Plaintiff alleges:

[1. *Residence of negligent attorney*. *See§ 76.380, Paragraph 1*.]

[2. *Capacity and principal place of business of law firm*. *See§ 76.360* .]

[3. *Fictitious name allegations, if appropriate*. *See§ 76.381, Paragraph 3*.]

[4. *Agency allegations, if appropriate*. *See§ 76.360* .]

[5. *Professional status of defendant*. *See§ 76.380, Paragraph 3*.]

6. On or about _____ [*date*], at _____ [*address*], California, plaintiff retained and employed defendant _____ [*name of attorney*] [and defendant Firm] to represent plaintiff in asserting a claim against _____ [*party against whom claim was sought*] for _____ [*describe nature of claim, e.g.,* personal injuries], and in commencing and prosecuting an action thereon. At such time and place defendant(s) accepted such employment and agreed to represent plaintiff.

7. Pursuant to such agreement and employment defendant _____ [*name of attorney*] filed a complaint for _____ [*specify, e.g.,* damages for personal injuries] on _____ [*date*] in the _____ [*court, e.g.,* Superior Court of California, County of _____] in an action entitled _____ [*name*] vs. _____ [*name*], No. _____, seeking damages.

8. Thereafter defendant(s) [and each of them] failed to exercise reasonable care and skill in representing plaintiff in such action and neglected to bring the action to trial within _____ [*e.g.,* five] years after the date on which it was filed, and permitted such action to be dismissed pursuant to *Sections 583.310-583.360 of the Code of Civil Procedure.*

9. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned plaintiff had a meritorious claim against the defendant in such action; that plaintiff would have obtained a judgment thereon for damages and for costs, had defendant(s) exercised reasonable care and diligence in prosecuting such action; and that the defendant in such action was at all times herein mentioned solvent with sufficient assets and property to satisfy such a judgment.

10. As a proximate result of such negligence such action was dismissed by order of the court entered on _____ [*date*], and plaintiff was barred from commencing a new action thereafter on such claim by the statute of limitations, all to plaintiff's damage.

[*Prayer. See§ 76.381* .]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See§ 76.380.*]

[2] Use of Form

This complaint is for use in a malpractice action against an attorney for his or her failure to bring an action to trial within the period prescribed by *Code Civ. Proc. §§ 583.310-583.360* and for permitting the action to be dismissed thereunder.

NOTE:

General vs. Specific Allegation. The plaintiff bringing a legal malpractice action should weigh the tactical advantages of using a general allegation of malpractice [*see § 76.381*] with the potential risks involved with specifically alleging the particular omission(s) that rendered the defendant attorney's actions negligent. A general allegation of negligence will almost invariably withstand attack on demurrer as well as avoid the risk that a judge might limit the plaintiff's proof at trial to specific charging allegations in the complaint, despite a wealth of evidence and new contentions that surfaced after the complaint was filed. A general allegation is also usually less susceptible to a summary judgment/adjudication motion because the defendant will be unable to argue that the plaintiff has "narrowed" the issues by virtue of specific charging allegations in the complaint.

[3] Decisions

Permitting action to be dismissed for lack of prosecution under former *Code Civ. Proc. § 583* [*now see Code Civ. Proc. §§ 583.310-583.360*] after statute of limitations has barred new action on claim as negligent malpractice. *Lally v. Kuster (1918) 177 Cal. 783, 785-791, 171 P. 961*

Measure of damages in action for malpractice based on failure to prosecute action and permitting it to be dismissed as amount that could have been recovered, less actual value, if any, of barred claim to client. *Lally v. Kuster (1918) 177 Cal. 783, 791, 171 P. 961*

Failure to appeal dismissal of action and failure to institute new action on barred claim after dismissal as not constituting valid defenses to negligent malpractice action based on attorney's failure to prosecute action. *Lally v. Kuster (1918) 177 Cal. 783, 790-791, 171 P. 961*

Complaint based on negligent failure to prosecute client's lawsuit as required to allege facts showing client has fulfilled all conditions precedent to right to commence such lawsuit. *Bayly v. Lee (1916) 174 Cal. 137, 139, 162 P. 96*

[4] Cross References

For a related form, see *§ 76.381*

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7-76 California Forms of Pleading and Practice--Annotated § 76.385

AUTHOR: GEORGE M. LINDAHL

§ 76.385 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--Failure to Offer Evidence in Support of Client's Cause of Action

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--Failure to Offer Evidence in Support of Client's Cause of Action

[*Caption. See§ 76.381*.]

Plaintiff alleges:

[1. *Residence of negligent attorney*. *See§ 76.380, Paragraph 1*.]

[2. *Capacity and principal place of business of law firm*. *See§ 76.360* .]

[3. *Fictitious name allegations, if appropriate*. *See§ 76.381, Paragraph 3*.]

[4. *Agency allegations, if appropriate*. *See§ 76.360* .]

[5. *Professional status of defendant*. *See§ 76.380, Paragraph 3*.]

6. On or about _____ [*date*], at _____ [*address*], California, plaintiff retained and employed defendant _____ [*name of attorney*] [and defendant Firm] to represent plaintiff in asserting a claim against _____ [*party against whom claim was sought*] for _____ [*nature of claim*], and in commencing and prosecuting an action thereon. At such time and place defendant(s) accepted such employment and agreed to represent plaintiff.

7. Pursuant to such agreement and employment defendant _____ [*name of attorney*] filed a complaint for _____ [*specify nature of action*] in the _____ [*court, e.g.,* Superior Court of California, County of _____] in an action entitled _____ [*name*] vs. _____ [*name*], No. _____, seeking damages.

8. Prior to trial of such action plaintiff informed defendant of the evidence available, consisting of _____ [*describe*], which would establish plaintiff's right to relief prayed for such action. At all times herein mentioned such evidence was available to be presented to the court at the trial of such action.

9. The action was tried on _____ [*date*].

10. Defendant _____ [*name of attorney*] failed to exercise reasonable care and skill in conducting the trial of the action and neglected to present available evidence that was competent and relevant to the issues therein, and that [, together with other evidence presented,] would have been sufficient to prove plaintiff's cause of action _____ [*specify applicable burden of proof, e.g.,* by a preponderance of the evidence].

11. Plaintiff is informed and believes and thereon alleges that had such evidence been presented to the court by defendant _____ [*name of attorney*] judgment would have been awarded to the plaintiff and that the defendant in such action at all times herein mentioned was solvent with sufficient assets and property to satisfy such judgment.

12. As a proximate result of the negligence herein alleged _____ [*specify result of trial, e.g.,* the court therein granted a nonsuit in favor of the defendant therein and] judgment was entered in favor of defendant and against plaintiff [awarding the defendant therein his/her costs of suit], all to plaintiff's loss and damage.

[*Prayer. See§ 76.381.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See§ 76.380.*]

[2] Use of Form

This complaint is for use in an action for malpractice based on an attorney's negligence in failing to present available evidence in the trial of an action.

NOTE:

General vs. Specific Allegation. The plaintiff bringing a legal malpractice action should weigh the tactical advantages of using a general allegation of malpractice [*see § 76.381*] with the potential risks involved with specifically alleging the particular omission(s) that rendered the defendant attorney's actions negligent. A general allegation of negligence will almost invariably withstand attack on demurrer as well as avoid the risk that a judge might limit the plaintiff's proof at trial to specific charging allegations in the complaint, despite a wealth of evidence and new contentions that surfaced after the complaint was filed. A general allegation is also usually less susceptible to a summary judgment/adjudication motion because the defendant will be unable to argue that the plaintiff has

"narrowed" the issues by virtue of specific charging allegations in the complaint.

[3] Cross References

For a related form, see *§ 76.381*

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7-76 California Forms of Pleading and Practice--Annotated § 76.386

AUTHOR: GEORGE M. LINDAHL

§ 76.386 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--Delay in Prosecuting Action to Judgment Until After Debtor Becomes Insolvent

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--Delay in Prosecuting Action to Judgment Until After Debtor Becomes Insolvent

[*Caption. See§ 76.381*.]

Plaintiff alleges:

[1. *Residence of negligent attorney*. *See§ 76.380, Paragraph 1*.]

[2. *Capacity and principal place of business of law firm*. *See§ 76.360* .]

[3. *Fictitious name allegations, if appropriate*. *See§ 76.381, Paragraph 3*.]

[4. *Agency allegations, if appropriate*. *See§ 76.360* .]

[5. *Professional status of defendant*. *See§ 76.380, Paragraph 3*.]

6. On or about _____ [*date*], at _____ [*address*], California, plaintiff retained and employed defendant _____ [*name of attorney*] [and defendant Firm] to represent plaintiff in asserting a claim against _____ [*party against who claim was sought*] for _____ [*nature of claim*], and in commencing and prosecuting an action thereon. At such time and place defendant(s) accepted such employment and agreed to represent plaintiff.

7. At all times prior to _____ [*date*], _____ [*name*], the defendant in such action, was solvent with sufficient assets and property to satisfy such claim.

8. During the period _____ [*date*] through _____ [*date*] and prior to his/her becoming insolvent, _____ [*name*], the defendant in such action, was experiencing serious financial difficulties of which defendant _____ [*name of attorney*] had full knowledge.

9. In spite of such knowledge, defendant _____ [*name of attorney*] failed to exercise reasonable care, skill, and diligence in commencing and prosecuting such action and _____ [*specify negligent acts and omissions, e.g.,* unreasonably delayed in serving process on the defendant therein until _____ (*date*), unreasonably delayed in bringing such action to trial until _____ (*date*), and unreasonably delayed in obtaining judgment against such defendant until _____ (*date*)].

10. If defendant _____ [*name of attorney*] had exercised reasonable care, skill, and diligence in prosecuting such action, plaintiff is informed and believes and thereon alleges that defendant could have obtained judgment for plaintiff prior to _____ [*date*].

11. Judgment was entered in such action on _____ [*date*] in favor of plaintiff and against _____ [*name*].

12. Prior to the date judgment was entered against _____ [*name*], and in favor of plaintiff, such defendant became insolvent.

13. As a proximate result of the delays and neglect by defendant _____ [*name of attorney*] and of the negligence herein alleged plaintiff is, and at all times since such judgment was rendered was, unable to collect such judgment or any part of it from _____ [*name*], the defendant therein, and such judgment is worthless, all to plaintiff's damage.

[*Prayer. See§ 76.381* .]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See§ 76.380* .]

[2] Use of Form

This complaint is for use in an action against an attorney for malpractice for delays in prosecuting an action to judgment until after the judgment debtor becomes insolvent.

NOTE:

General vs. Specific Allegation. The plaintiff bringing a legal malpractice action should weigh the tactical advantages of using a general allegation of malpractice [*see § 76.381*] with the potential risks involved with specifically alleging the particular omission(s) that rendered the defendant attorney's actions negligent. A general allegation of negligence will almost invariably withstand attack on demurrer as well as avoid the risk that a judge might limit the plaintiff's proof at trial to specific charging

allegations in the complaint, despite a wealth of evidence and new contentions that surfaced after the complaint was filed. A general allegation is also usually less susceptible to a summary judgment/adjudication motion because the defendant will be unable to argue that the plaintiff has "narrowed" the issues by virtue of specific charging allegations in the complaint.

[3] Cross References

For a related form, see *§ 76.381*

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7-76 California Forms of Pleading and Practice--Annotated § 76.387

AUTHOR: GEORGE M. LINDAHL

§ 76.387 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--Failure to File Appeal

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--Failure to File Appeal

[*Caption. See§ 76.381*.]

Plaintiff alleges:

[1. *Residence of negligent attorney*. *See§ 76.380, Paragraph 1*.]

[2. *Capacity and principal place of business of law firm*. *See§ 76.360* .]

[3. *Fictitious name allegations, if appropriate*. *See§ 76.381, Paragraph 3*.]

[4. *Agency allegations, if appropriate*. *See§ 76.360* .]

[5. *Professional status of defendant*. *See§ 76.380, Paragraph 3*.]

6. On or about _____ [*date*] at _____ [*address*], California, plaintiff retained and employed defendant _____ [*name of attorney*] [and defendant Firm] to represent plaintiff in filing and conducting an appeal from a judgment against plaintiff as defendant in an action in the _____ [*court, e.g.,* Superior Court of California, County of _____] entitled _____ [*name*] vs. _____ [*name*], No. _____. At such time and place defendant(s) [and each of them]

accepted such employment and agreed to perform such services for plaintiff.

7. Defendant _____ [*name of attorney*] failed to exercise reasonable care, skill, and diligence in filing such appeal and failed to file a notice of appeal within the time required by law, although ample time was available for him/her to do so.

8. Plaintiff is informed and believes and thereon alleges that such appeal was meritorious and that had defendant _____ [*name of attorney*] exercised reasonable care, skill, and diligence in filing and conducting such appeal, the judgment against plaintiff as defendant therein would have been reversed with directions that judgment be entered by the trial court for plaintiff as defendant therein.

9. As a proximate result of the negligence alleged herein, the judgment in such action against plaintiff as defendant therein [plus costs] has become final with no further recourse available to plaintiff but to pay such sum, all to plaintiff's damage.

[*Prayer. See§ 76.381* .]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See§ 76.380* .]

[2] Use of Form

This complaint is for use in an action against an attorney for malpractice in failing to file an appeal within the time afforded by law.

NOTE:

General vs. Specific Allegation. The plaintiff bringing a legal malpractice action should weigh the tactical advantages of using a general allegation of malpractice [*see § 76.381*] with the potential risks involved with specifically alleging the particular omission(s) that rendered the defendant attorney's actions negligent. A general allegation of negligence will almost invariably withstand attack on demurrer as well as avoid the risk that a judge might limit the plaintiff's proof at trial to specific charging allegations in the complaint, despite a wealth of evidence and new contentions that surfaced after the complaint was filed. A general allegation is also usually less susceptible to a summary judgment/adjudication motion because the defendant will be unable to argue that the plaintiff has "narrowed" the issues by virtue of specific charging allegations in the complaint.

[3] Decisions

Attorney who omits to take appeal that would not have been successful as not liable for malpractice. *Hays v. Ewing (1886) 70 Cal. 127, 128,11 P. 602*

Failure of attorney to take appeal that would have succeeded as liable for negligence. *Drais v. Hogan (1875) 50 Cal. 121, 127-128*

Failure of attorney to file timely appeal from judgment absent proof that appeal would have been successful as not liable for malpractice. *Kilmer v. Carter (1969) 274 Cal. App. 2d 81, 82, 78 Cal. Rptr. 800*

Trial court as having to decide in malpractice action whether appeal, if taken, would have resulted in reversal. *Pete v. Henderson (1954) 124 Cal. App. 2d 487, 491-492, 269 P.2d 78* ; *see also Croce v. Sanchez (1967) 256 Cal. App. 2d 680, 683-684, 64 Cal. Rptr. 448*

[4] Cross References

For a related form, see *§ 76.381*

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7-76 California Forms of Pleading and Practice--Annotated § 76.388

AUTHOR: GEORGE M. LINDAHL

§ 76.388 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--Negligent Advice to Client

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--Negligent Advice to Client

[*Caption. See§ 76.381*.]

Plaintiff alleges:

[1. *Residence of negligent attorney. See§ 76.380, Paragraph 1*.]

[2. *Capacity and principal place of business of law firm*. *See§ 76.360* .]

[3. *Fictitious name allegations, if appropriate*. *See§ 76.381, Paragraph 3*.]

[4. *Agency allegations, if appropriate*. *See§ 76.360* .]

[5. *Professional status of defendant*. *See§ 76.380, Paragraph 3*.]

6. On or about _____ [*date*], at _____ [*address*], California, plaintiff retained and employed defendant _____ [*name of attorney*] [and defendant Firm] to represent plaintiff in _____ [*specify*]. Defendant(s) [and each of them] accepted such employment and agreed to represent plaintiff.

7. In rendering legal services to plaintiff pursuant to such representation, defendant _____ [*name of attorney*] failed to exercise reasonable care and skill and negligently advised plaintiff _____ [*specify advice given*].

8. Plaintiff relied on such advice and in consequence thereof _____ [*specify acts taken or omitted on advice given*]. Plaintiff so acted only at the advice of defendant _____ [*name of attorney*] and would not have so acted without such advice.

9. As a proximate result of such negligence and advice, _____ [*specify loss*], all to plaintiff's damage.

[*Prayer. See§ 76.381.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See§ 76.380.*]

[2] Use of Form

This complaint is for use in an action against an attorney for malpractice based on his or her negligent advice to a client.

[3] Allegations

A complaint for legal malpractice based on negligent advice should allege (1) existence of the attorney/client relationship (Paragraph 6); (2) negligent advice given in the course of such relationship (Paragraph 7); (3) reliance on such advice by the client (Paragraph 8); and (4) loss and damage suffered by the client as a proximate result thereof (Paragraph 9) [*Modica v. Crist (1954) 129 Cal. App. 2d 144, 145-146, 276 P.2d 614* ; *cf. Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 529, 50 Cal. Rptr. 592* (client's reliance as not a fixed condition of recovery in legal malpractice cases)].

[4] Cross References

For a related form, see *§ 76.381*

[5] California Points and Authorities

For memoranda of points and authorities supporting and opposing motions for summary judgment relating to defendant's liability for mistake, see California Points and Authorities, Ch. 24, *Attorneys at Law* (Matthew Bender)

[6] Decisions

Relationship of attorney and client as established prima facie when party seeking legal advice consults attorney and secures such advice. *Perkins v. West Coast Lumber Co. (1900) 129 Cal. 427, 429, 62 P. 57*

Elements of cause of action for negligent advice in legal malpractice action. *Modica v. Crist (1954) 129 Cal. App. 2d*

144, 145-146, 276 P.2d 614

Client's reliance on attorney's advice as not to be regarded as fixed condition of recovery in legal malpractice action.
Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 529, 50 Cal. Rptr. 592

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Volume 7: Attorney Practice and Ethics thru Auctions and Auctioneers-Chs.72-79
Chapter 76 ATTORNEY PROFESSIONAL LIABILITY
PART IV. FORMS
A. Liability to Client
2. Negligence Actions

7-76 California Forms of Pleading and Practice--Annotated § 76.389

AUTHOR: GEORGE M. LINDAHL

§ 76.389 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--Negligent Handling of Workers' Compensation Claim

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--Negligent Handling of Workers' Compensation Claim

[*Caption. See§ 76.381*.]

Plaintiff alleges:

[1. *Residence of negligent attorney*. *See§ 76.380, Paragraph 1*.]

[2. *Capacity and principal place of business of law firm*. *See§ 76.360* .]

[3. *Fictitious name allegations, if appropriate*. *See§ 76.381, Paragraph 3*.]

[4. *Agency allegations, if appropriate*. *See§ 76.360* .]

[5. *Professional status of defendant*. *See§ 76.380, Paragraph 3*.]

6. On or about _____ [*date*] at _____ [*address*], California, plaintiff retained and employed defendant _____ [*name of attorney*] [and defendant Firm] to represent plaintiff in filing and prosecuting a claim for workers' compensation for compensable injuries sustained by plaintiff on _____ [*date*]. At such time and place defendant(s) [and each of them] accepted such employment and agreed to perform such services for plaintiff.

7. In conducting the agreed services defendant _____ [*name of attorney*] filed an Application for Adjudication of Claim with the Workers' Compensation Appeals Board on _____ [*date*], and thereafter negligently and carelessly prosecuted such claim in that he/she _____ [*specify acts and omissions*].

8. Plaintiff is informed and believes and thereon alleges that he/she had a meritorious claim for compensation and that had defendant exercised reasonable care, skill, and diligence in prosecuting such claim plaintiff would have received an award.

9. As a proximate result of such negligence plaintiff's claim is lost and plaintiff has no further recourse in obtaining compensation therefor, to plaintiff's damage.

[*Prayer. See§ 76.381* .]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See§ 76.380* .]

[2] Use of Form

This complaint is for use in an action against an attorney for negligence in prosecuting a claim for workers' compensation.

NOTE:

General vs. Specific Allegation. The plaintiff bringing a legal malpractice action should weigh the tactical advantages of using a general allegation of malpractice with the potential risks involved with specifically alleging the particular omission(s) that rendered the defendant attorney's actions negligent. A general allegation of the defendant's negligence in the handling of a workers' compensation matter (identified by its Workers' Compensation Appeal Board case number) will almost invariably withstand attack on demurrer as well as avoid the risk that a judge might limit the plaintiff's proof at trial to specific charging allegations in the complaint, despite a wealth of evidence and new contentions that surfaced after the complaint was filed. A general allegation is also usually less susceptible to a summary judgment/adjudication motion because the defendant will be unable to argue that the plaintiff has "narrowed" the issues by virtue of specific charging allegations in the complaint.

[3] Cross References

For a related form, see *§ 76.381*

[4] Decisions

Attorney who signs application for adjudication of workers' compensation claim and attorney who accepts referral to prosecute workers' compensation claim as having duty of care to advise on other available remedies such as third-party actions. *Nichols v. Keller (1993) 15 Cal. App. 4th 1672, 1687, 19 Cal. Rptr. 2d 601*

Attorney as not liable for malpractice in prosecuting workers' compensation claim when alleged negligence stems from lack of knowledge as to true state of law involving doubtful or debatable point. *Sprague v. Morgan (1960) 185 Cal. App. 2d 519, 523, 8 Cal. Rptr. 347*

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7-76 California Forms of Pleading and Practice--Annotated § 76.390

AUTHOR: GEORGE M. LINDAHL

§ 76.390 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--Negligence in Drafting Marital Settlement Agreement

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--Negligence in Drafting Marital Settlement Agreement

[*Caption. See§ 76.381*.]

Plaintiff alleges:

[1. *Residence of negligent attorney*. *See§ 76.380, Paragraph 1*.]

[2. *Capacity and principal place of business of law firm*. *See§ 76.360* .]

[3. *Fictitious name allegations, if appropriate*. *See§ 76.381, Paragraph 3*.]

[4. *Agency allegations, if appropriate*. *See§ 76.360* .]

[5. *Professional status of defendant*. *See§ 76.380, Paragraph 3*.]

6. On or about _____ [*date*] at _____ [*address*], California, plaintiff retained and employed defendant _____ [*name of attorney*] [and defendant Firm] to represent plaintiff in the dissolution of his/her marriage. At such time and place defendant(s) [and each of them] accepted such employment and agreed to perform such services for plaintiff.

7. Defendant _____ [*name of attorney*] prepared and advised plaintiff with regard to a marital settlement agreement, which agreement was signed by Plaintiff on _____ [*date*], and judgment was entered thereafter on the marital settlement agreement by the _____ [*court, e.g.,* Superior Court of California, County of _____] on _____ [*date*].

8. In rendering legal services to plaintiff pursuant to such representation, defendant _____ [*name of attorney*] failed to exercise reasonable care and skill in drafting [and executing] the marital settlement agreement in that defendant _____ [*specify acts or omissions constituting negligence, e.g.,* failed to adequately protect plaintiff's rights with respect to the division of community property].

9. Plaintiff is informed and believes and thereon alleges that had defendant(s) exercised proper care and skill in the drafting and execution of the marital settlement agreement, _____ [*specify benefit to plaintiff if attorney had used proper care*]. Plaintiff is also informed and believes and thereon alleges that plaintiff's _____ [husband *or* wife] had sufficient assets to have provided _____ [*specify benefit to plaintiff if attorney had used proper care, e.g.,* an adequate division of community property].

10. As a proximate result of such negligence _____ [*specify loss*], to plaintiff's damage.

[*Prayer. See§ 76.381* .]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See§ 76.380* .]

[2] Use of Form

This complaint is for use in an action against an attorney for negligence in drafting a marital settlement agreement, as, for example, when the attorney negligently fails to adequately protect the plaintiff's rights in community property [*see, e.g., Aloy v. Mash (1985) 38 Cal. 3d 413, 212 Cal. Rptr. 162, 696 P.2d 656* ; *Davis v. Damrell (1981) 119 Cal. App. 3d 883, 174 Cal. Rptr. 257]* .

[3] Cross References

For a related form, see *§ 76.381*

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7-76 California Forms of Pleading and Practice--Annotated § 76.391

AUTHOR: GEORGE M. LINDAHL

§ 76.391 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--Negligence in Administration of Will

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--Negligence in Administration of Will

[*Caption. See§ 76.381*.]

Plaintiff alleges:

[1. *Residence of negligent attorney*. *See§ 76.380, Paragraph 1*.]

[2. *Capacity and principal place of business of law firm*. *See§ 76.360* .]

[3. *Fictitious name allegations, if appropriate*. *See§ 76.381, Paragraph 3*.]

[4. *Agency allegations, if appropriate*. *See§ 76.360* .]

[5. *Professional status of defendant*. *See§ 76.380, Paragraph 3*.]

6. Plaintiff is the _____ [*specify relationship of plaintiff to decedent*] of _____ [*decedent*], who died on _____ [*date*].

7. On or about _____ [*date*] at _____ [*address*], California, defendant _____ [*name of attorney*] [and defendant Firm] undertook to represent plaintiff in the administration

of decedent's will. At such time and place defendant(s) [and each of them] accepted such employment and agreed to perform such services for plaintiff.

8. In rendering legal services to plaintiff pursuant to such representation, defendant _____ [*name of attorney*] failed to exercise reasonable care and skill in the administration of the decedent's will in that defendant _____ [*specify acts or omissions constituting negligence, e.g.,* made errors in preparing the estate tax return].

9. As a proximate result of such negligence _____ [*specify loss, e.g.,* the Internal Revenue Service has assessed a tax deficiency against Plaintiff], to plaintiff's damage.

10. Plaintiff is informed and believes and thereon alleges that had defendant(s) exercised proper care and skill in the administration of the decedent's will, _____ [*specify loss to plaintiff that would have been avoided, e.g.,* the Internal Revenue Service would not have assessed a tax deficiency against Plaintiff].

[*Prayer. See§ 76.381* .]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See§ 76.380* .]

[2] Use of Form

This complaint is for use in an action against an attorney for negligence in the administration of a will.

[3] Cross References

For a related form, see *§ 76.381*

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7-76 California Forms of Pleading and Practice--Annotated § 76.392

AUTHOR: GEORGE M. LINDAHL

§ 76.392 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--Failure to Perfect Security Interest

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Legal Malpractice Based on Negligence--Failure to Perfect Security Interest

[*Caption. See§ 76.381*.]

Plaintiff alleges:

[1. *Residence of negligent attorney*. *See§ 76.380, Paragraph 1*.]

[2. *Capacity and principal place of business of law firm*. *See§ 76.360* .]

[3. *Fictitious name allegations, if appropriate*. *See§ 76.381, Paragraph 3*.]

[4. *Agency allegations, if appropriate*. *See§ 76.360* .]

[5. *Professional status of defendant*. *See§ 76.380, Paragraph 3*.]

6. On or about _____ [*date*], at _____ [*address*], California, plaintiff retained and employed defendant _____ [*name of attorney*] [and defendant Firm] to represent plaintiff in a transaction wherein plaintiff loaned money in the sum of $_____ to a certain person, hereinafter called "the Debtor," repayment of which was to be secured by certain personal property owned by the Debtor. Defendant(s) [and each of them] accepted such employment and agreed to represent plaintiff in such transaction.

7. In the course of representing plaintiff, defendant _____ [*name of attorney*] prepared the necessary papers for the loan transaction, including _____ [*specify, e.g.*, a promissory note, security agreement, and financing statement]. Such papers were signed and executed by plaintiff and the Debtor and the loan funds in the sum of $_____ were delivered by plaintiff to the Debtor on _____ [*date*]. Defendant _____ [*name of attorney*] assured plaintiff at that time that he/she would take all necessary steps to perfect and complete plaintiff's security interest in the items of personal property specified in the security agreement and in the financing statement and that he/she would immediately cause the financing statement to be filed with the Secretary of State of California.

8. At all times herein mentioned, the personal property of the Debtor securing payment of plaintiff's loan to the Debtor was of a value exceeding $_____.

9. Defendant _____ [*name of attorney*] failed to exercise reasonable care, skill, and diligence in causing plaintiff's security interest in the personal property to become perfected and complete and negligently failed to cause the financing statement to be filed with the Secretary of State of California prior to _____ [*date*].

10. On or about _____ [*date*], the Debtor defaulted on the loan with a balance then due and unpaid in the sum of $_____.

11. On or about _____ [*date*], the Debtor was adjudged a bankrupt and plaintiff for the first time learned that plaintiff's security interest in the personal property of the Debtor was not perfected or valid as to the Debtor's other creditors. The Debtor was discharged of all financial obligations remaining unpaid after the bankruptcy proceedings including the balance alleged herein owed by the Debtor to plaintiff.

12. Had defendant _____ [*name of attorney*] exercised due care, skill, and diligence in causing plaintiff's security interest to be perfected and the financing statement to be duly filed, plaintiff would have recovered the full amount of the balance of the funds loaned to the Debtor in the sum of $_____ from the security.

13. As a proximate result of the negligence herein alleged, plaintiff was deprived of and lost his security interest, was not treated as a secured creditor of the Debtor in the bankruptcy proceedings, and only recovered the sum of $_____ from such bankruptcy proceedings, all to plaintiff's damage.

[*Prayer. See§ 76.381.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See§ 76.380.*]

[2] Use of Form

This complaint is for use in an action against an attorney for malpractice based on negligent failure to perfect a security interest in personal property.

[3] Cross References

For a related form, see *§ 76.381*

[4] State Statutes

Requirements and procedure for perfecting security interests in personal property. *Com. Code § 9301 et seq.*

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7-76 California Forms of Pleading and Practice--Annotated §§ 76.393-76.409

AUTHOR: GEORGE M. LINDAHL

[Reserved]

§§ 76.393[Reserved]

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3. Other Theories of Liability

7-76 California Forms of Pleading and Practice--Annotated § 76.410

AUTHOR: GEORGE M. LINDAHL

§ 76.410 General Complaint [Code Civ. Proc. § 425.10] for Attorney's Constructive Fraud

[1] FORM General Complaint [Code Civ. Proc. § 425.10] for Attorney's Constructive Fraud

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR
vs.	)	DAMAGES FOR
_____ [*name*],	)	CONSTRUCTIVE FRAUD
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Residence of defendant attorney*. *See§ 76.380, Paragraph 1*.]

[2. *Capacity and principal place of business of law firm*. *See§ 76.360* .]

[3. *Fictitious name allegations, if appropriate*. *See§ 76.381, Paragraph 3*.]

[4. *Agency allegations, if appropriate*. *See§ 76.360* .]

[5. *Professional status of defendant*. *See§ 76.380, Paragraph 3*.]

6. On or about _____ [*date*], at _____ [*address*], California, plaintiff retained and employed defendant _____ [*name of attorney*] [and defendant Firm] to represent plaintiff as plaintiff's attorney(s) at law as follows: _____ [*describe purpose of representation and services to be performed*]. At such time and place defendant(s) accepted such employment and agreed to perform the above-described services for plaintiff.

7. By virtue of the attorney-client relationship that existed between defendant(s) and plaintiff, defendant(s) owed to plaintiff a fiduciary duty, and by virtue of plaintiff's having placed confidence in the fidelity and integrity of defendant(s) and in entrusting defendant(s) with _____ [*specify subject matter of representation*], a confidential relationship existed at all times herein mentioned between plaintiff and defendant(s).

8. Despite having voluntarily accepted the trust and confidence of plaintiff with regard to _____ [*specify subject matter of representation*], and in violation of this relationship of trust and confidence, defendant(s) abused the trust and confidence of plaintiff by _____ [*specify nature of breach of fiduciary duty*].

9. Plaintiff in fact placed confidence and reliance in defendant(s) until on or about _____ [*date*], when, through _____ [*allege circumstances*], plaintiff discovered the true facts concerning _____ [*specify act constituting breach of fiduciary duty*], as alleged above. Plaintiff reasonably relied on the defendant(s) in view of their attorney-client relationship.

10. As a result of _____ [defendant's *or* defendants'] aforementioned breach of fiduciary duties to plaintiff, defendant(s) gained the following advantage: _____ [*specify advantage*].

[11. Defendant(s) performed the acts herein alleged with the intent to deceive and defraud plaintiff, and defendant(s) employed the following devices to conceal from plaintiff the fact that defendant(s): _____ (*specify acts of concealment*). Defendant(s) performed these acts with the intent to induce reliance by plaintiff in the continuing fidelity of defendant(s) as his/her attorney(s).]

12. As a proximate result of _____ [defendant's *or* defendants'] breach of fiduciary duties to plaintiff, _____ [*specify loss*], to plaintiff's damage.

[13. As a further proximate result of _____ (defendant's *or* defendants') negligence herein alleged, plaintiff incurred costs as attorney's fees to _____ (*describe nature of legal services necessitated as a result of negligence*).]

[14. In doing the acts herein alleged, defendant(s) acted with oppression, fraud, and malice, and plaintiff is entitled to exemplary damages.]

WHEREFORE, plaintiff prays judgment against defendant(s) [and each of them] as follows:

1. For damages.

[2. For exemplary damages.]

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See§ 76.380.*]

[2] Use of Form

This form is for use in an action for constructive fraud caused by a breach of fiduciary duty owed by the attorney to a client.

[3] Cross References

For a related form, see *§ 76.381*

[4] State Statutes

Requirements for action for constructive fraud. *Civ. Code § 1573*

[5] Decisions

Attorney as subject to liability for constructive fraud when attorney breaches fiduciary duty to client. *Cf. American Box & Drum Co. v. Harron (1941) 44 Cal. App. 2d 370, 378, 112 P.2d 332* (court found no evidence of intent to defraud necessary for imposition of constructive trust)

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7-76 California Forms of Pleading and Practice--Annotated § 76.411

AUTHOR: GEORGE M. LINDAHL

§ 76.411 Complaint [Code Civ. Proc. § 425.10] That Attorney Concurrently Represented Client With Interest Adverse to Plaintiff

[1] FORM Complaint [Code Civ. Proc. § 425.10] That Attorney Concurrently Represented Client With Interest Adverse to Plaintiff

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR
vs.	)	DAMAGES FOR DUAL REPRESENTATION OF
_____ [*name*],	)	ADVERSE INTERESTS
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Residence of defendant attorney*. *See§ 76.380, Paragraph 1*.]

[2. *Capacity and principal place of business of law firm*. *See§ 76.360* .]

[3. *Fictitious name allegations, if appropriate*. *See§ 76.381, Paragraph 3*.]

[4. *Agency allegations, if appropriate. See§ 76.360* .]

[5. *Professional status of defendant. See§ 76.380, Paragraph 3*.]

6. [*Allegation of attorney-client relationship. See§ 76.410, Paragraph 6*.]

7. At the same time that defendant was representing plaintiff in the aforementioned matter, defendant was also retained by _____ [*name of adverse client*] to _____ [*specify nature of legal representation of adverse client*] pursuant to _____ [an agreement dated _____ (*date*) *or* the employment of defendant as _____ (*specify, e.g.,* corporate counsel for _____ (*name of adverse client*))].

8. The legal interests of _____ [*name of adverse client*] and those of plaintiff were potentially adverse at the time of the dual representation in that _____ [*specify nature of potential conflict of interest*].

9. The legal interests of _____ [*name of adverse client*] and those of plaintiff came into actual conflict in the course of defendant's representation of plaintiff when _____ [*specify in detail nature and circumstances of actual conflict of interest, e.g.,* the injured party who had filed the personal injury action against plaintiff agreed to settle the lawsuit for $_____, which amount was within the policy limits of plaintiff's insurance coverage, but _____ (*name*), the insurer, instructed defendant not to accept any settlement over $_____, notwithstanding _____ (*specify facts and circumstances indicating advantageousness of settlement, e.g.,* the severity of the injured party's injuries and plaintiff's inculpatory statements in deposition)].

10. _____ [*Describe action taken by attorney in resolving conflict in favor of adverse client, e.g.,* Defendant followed the instructions of _____ (*name of adverse client*) not to accept the aforementioned settlement offer and assured plaintiff that this course was in plaintiff's best interests)].

[*EITHER, if dual representation was not disclosed to plaintiff*]

11. Defendant failed to disclose to plaintiff that he/she was representing _____ [*name of adverse client*] in the above-described matter at the same time that he/she was representing plaintiff and that the interests of _____ [*name of adverse client*] were potentially adverse to those of plaintiff.

[*OR, if less than full disclosure was made*]

11. Although defendant disclosed to plaintiff that he/she was representing _____ [*name of adverse client*] in the above-mentioned matter at the same time that he/she was representing plaintiff, defendant failed to disclose the areas of potential conflict between the legal interests of _____ [*name of adverse client*] and the interests of plaintiff and further failed to advise plaintiff of the possibility and desirability of seeking independent legal advice.

[*CONTINUE*]

12. _____ [*Describe subsequent failures to disclose and advise at various points of actual conflict in the course of defendant's representation of plaintiff*.]

13. As a proximate result of defendant's dual representation and breach of the duty of care and of fiduciary duties to plaintiff, plaintiff _____ [*specify loss, e.g.,* suffered a judgment against him/her in the aforementioned action, which is in excess of the insurance policy limits, and for which plaintiff is personally liable], all to plaintiff's damage.

[14. *Allegation of additional attorney's fees incurred, if appropriate. See§ 76.410, Paragraph 13.*]

[15. *Allegation supporting award of punitive damages, if appropriate. See§ 76.410, Paragraph 14.*]

[*Prayer. See§ 76.410* .]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See§ 76.380.*]

[2] Use of Form

This form is for use in an action alleging an attorney's breach of his or her fiduciary duties to the plaintiff by representing another client with interests adverse to those of the plaintiff during the period of defendant's representation of plaintiff.

[3] Cross References

For a related form, see *§ 76.381*

[4] Rules of Professional Conduct

Avoiding interests adverse to client. *Cal. Rules Prof. Conduct, Rule 3-300*

Avoiding representation of adverse interests. *Cal. Rules Prof. Conduct, Rule 3-310*

[5] Decisions

Attorney's assumption of positions that are adverse or antagonistic to client as violation of duty, absent free and intelligent consent given by client after full knowledge of facts and circumstances. *Anderson v. Eaton (1930) 211 Cal. 113, 116, 293 P. 788* ; *see also Betts v. Allstate Ins. Co. (1984) 154 Cal. App. 3d 688, 715, 201 Cal. Rptr. 528* ; *Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 901-902, 142 Cal. Rptr. 509*

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7-76 California Forms of Pleading and Practice--Annotated § 76.412

AUTHOR: GEORGE M. LINDAHL

§ 76.412 Complaint [Code Civ. Proc. § 425.10] That Attorney Breached Fiduciary Duty Owed to Former Client

[1] FORM Complaint [Code Civ. Proc. § 425.10] That Attorney Breached Fiduciary Duty Owed to Former Client

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR
vs.	)	DAMAGES FOR BREACH
_____ [*name*],	)	OF FIDUCIARY DUTY
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Residence of defendant attorney*. *See§ 76.380, Paragraph 1*.]

[2. *Capacity and principal place of business of law firm*. *See§ 76.360* .]

[3. *Fictitious name allegations, if appropriate*. *See§ 76.381, Paragraph 3*.]

[4. *Agency allegations, if appropriate*. *See§ 76.360* .]

[5. *Professional status of defendant. See§ 76.380, Paragraph 3.*]

6. [*Allegation of attorney-client relationship. See§ 76.410, Paragraph 6.*]

7. By virtue of the attorney-client relationship that existed between defendant(s) and plaintiff, and by virtue of plaintiff's having placed confidence in the fidelity and integrity of defendant(s) and in entrusting defendant(s) with _____ [*specify subject matter of representation*], a confidential relationship existed at all times herein mentioned between plaintiff and defendant(s) and defendant(s) owed to plaintiff a fiduciary duty even after the attorney-client relationship was terminated on _____ [*date*].

8. Despite having voluntarily accepted the trust and confidence of plaintiff with regard to _____ [*specify subject matter of representation*], and in violation of this relationship of trust and confidence, defendant(s) abused the trust and confidence of plaintiff after the termination of the attorney-client relationship by _____ [*specify nature of breach of fiduciary duty, e.g.*, using confidential information concerning _____ (*specify nature of information*) acquired during the defendant's representation of the plaintiff without plaintiff's consent].

9. As a result of _____ [defendant's *or* defendants'] aforementioned breach of fiduciary duties to plaintiff, defendant(s) gained the following advantage: _____ [*specify advantage*].

10. As a proximate result of _____ [defendant's *or* defendants'] breach of fiduciary duties owed to plaintiff after termination of the attorney-client relationship, _____ [*specify loss*], to plaintiff's damage.

[11. *Allegation of additional attorney's fees incurred, if appropriate. See§ 76.410, Paragraph 13.*]

[12. *Allegation supporting award of punitive damages, if appropriate. See§ 76.410, Paragraph 14.*]

[*Prayer. See§ 76.410* .]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See§ 76.380.*]

[2] Use of Form

This form is for use in an action against an attorney brought by a former client alleging that the attorney breached the fiduciary duties that an attorney owes to former clients even after the representation has been terminated.

This form alleges that the attorney breached a fiduciary duty by using confidential information acquired during a former attorney-client relationship with the plaintiff, to the detriment of the plaintiff [*see, e.g., David Welch Co. v. Erskine & Tulley (1988) 203 Cal. App. 3d 884, 891, 250 Cal. Rptr. 339]* . The fiduciary duties owed by an attorney to a client extend beyond the period of the actual attorney-client relationship. An attorney is not allowed to take any actions that would injure a former client in matters that are within the scope of the former representation, nor may the attorney use any information gained during the relationship against the former client [*Yorn v. Superior Court (1979) 90 Cal. App. 3d 669, 675, 153 Cal. Rptr. 295* ; *see People v. Thoi (1989) 213 Cal. App.3d 689, 699, 261 Cal. Rptr. 789]* .

[3] Cross References

For a related form, see *§ 76.381*

[4] Decisions

Attorney as not allowed to take any actions that would injure former client in matters within scope of former representation, nor as allowed to use any information gained during relationship against former client. *Yorn v. Superior Court (1979) 90 Cal. App. 3d 669, 675, 153 Cal. Rptr. 295* ; *see People v. Thoi (1989) 213 Cal. App.3d 689, 699, 261 Cal. Rptr. 789* ; *David Welch Co. v. Erskine & Tulley (1988) 203 Cal. App. 3d 884, 891, 250 Cal. Rptr. 339*

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Volume 7: Attorney Practice and Ethics thru Auctions and Auctioneers-Chs.72-79
Chapter 76 ATTORNEY PROFESSIONAL LIABILITY
PART IV. FORMS
A. Liability to Client
3. Other Theories of Liability

7-76 California Forms of Pleading and Practice--Annotated § 76.413

AUTHOR: GEORGE M. LINDAHL

§ 76.413 Complaint [Code Civ. Proc. § 425.10] by Former Client for Intentional Infliction of Emotional Distress

[1] FORM Complaint [Code Civ. Proc. § 425.10] by Former Client for Intentional Infliction of Emotional Distress

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR
vs.	)	DAMAGES FOR
_____ [*name*],	)	INTENTIONAL INFLICTION OF EMOTIONAL
Defendant(s).	)	DISTRESS
	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Residence of defendant attorney*. *See§ 76.380, Paragraph 1*.]

[2. *Capacity and principal place of business of law firm*. *See§ 76.360* .]

[3. *Fictitious name allegations, if appropriate*. *See§ 76.381, Paragraph 3*.]

[4. *Agency allegations, if appropriate. See§ 76.360* .]

[5. *Professional status of defendant. See§ 76.380, Paragraph 3*.]

6. [*Allegation of attorney-client relationship. See§ 76.410, Paragraph 6*.]

7. _____ [*Allege facts that constitute outrageous conduct that underlies cause of action, including facts detailing how outrageous conduct impacted adversely on attorney-client relationship.*]

8. The actions of defendant _____ [*name of attorney*] [and defendant law firm] were outrageous and intentional and done with malice and reckless disregard of the likelihood of causing the plaintiff to suffer severe emotional distress. _____ [*Describe circumstances known to defendant(s) at the time of the outrageous conduct that made plaintiff susceptible to severe emotional distress.*]

9. As a proximate result of the aforementioned outrageous acts of the defendant(s), plaintiff has suffered _____ [*specify emotional damage caused to plaintiff by defendant's outrageous acts*]. Additionally, as a proximate result of the aforementioned outrageous acts of the defendant(s), _____ [*specify additional damage caused to plaintiff by defendant's outrageous acts, e.g.*, plaintiff has been unable to work from the period of _____ (*date*), to _____ (*date*), resulting in a loss of wages].

10. As a proximate result of the aforementioned outrageous acts of the defendant(s), plaintiff has suffered general damages and special damages.

11. In doing the acts herein alleged, defendant(s) acted knowingly, intentionally, and maliciously, and plaintiff is entitled to exemplary damages.

WHEREFORE, plaintiff prays judgment against defendant(s) [and each of them] as follows:

1. For general damages.

2. For special damages.

3. For exemplary damages.

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See§ 76.380.*]

[2] Use of Form

This form is for use in an action for intentional infliction of emotional distress brought against an attorney by a former client for actions that occurred during the attorney's representation of the plaintiff.

PRACTICE TIP:

Emotional Distress Claim Considerations. Intentional infliction of emotional distress claims against lawyers are rarely legitimate. However, such claims are often thoughtlessly asserted with the apparent hope that they will enhance the plaintiff's leverage in settlement negotiations. In fact, they are often taken lightly by defendants and their insurers and frequently serve only to complicate settlement negotiations because these claims are not covered by malpractice insurance and can expose the plaintiff and plaintiff's counsel to a subsequent malicious prosecution action even when the plaintiff has an otherwise meritorious legal malpractice claim. Thus, it is better practice for the plaintiff not to pursue such a claim except in the unusual situation when the defendant attorney's conduct truly warrants it.

[3] Allegations

A complaint for intentional infliction of emotional distress must allege the following:

- Outrageous conduct by the defendant

- An intention on the part of the defendant to cause, or a reckless disregard of the probability of causing, emotional distress

- Severe emotional suffering on the part of the plaintiff, and

- An actual and proximate causal connection between the outrageous conduct and the emotional suffering [*McDaniel v. Gile (1991) 230 Cal. App. 3d 363, 372-374, 281 Cal. Rptr. 242* (sexual harassment of client and withholding of legal services when sexual advances rebuffed as outrageous conduct supporting claim for intentional infliction of emotional distress); *see also Agarwal v. Johnson (1979) 25 Cal. 3d 932, 946-947, 160 Cal. Rptr. 141, 603 P.2d 58* (examples of outrageous behavior sufficient to support claim for intentional infliction of emotional distress)].

[4] Cross References

For a related form, see *§ 76.381*

For discussion relating to an attorney's liability for intentional (or negligent) infliction of emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress*

[5] California Torts

For discussion of the cause of action for intentional infliction of emotional distress, see California Torts, Ch. 44 (Matthew Bender)

[6] Decisions

Damage to plaintiff that is solely economic as insufficient to support claim for emotional distress damages. *see Smith v. Superior Court (1992) 10 Cal. App. 4th 1033, 1040, 13 Cal. Rptr. 2d 133* (mere negligence does not support recovery for mental suffering when defendant's tortious conduct results in only economic injury)

Elements for recovery for intentional infliction of emotional distress. *McDaniel v. Gile (1991) 230 Cal. App. 3d 363, 372, 281 Cal. Rptr. 242*

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7-76 California Forms of Pleading and Practice--Annotated §§ 76.414-76.429

AUTHOR: GEORGE M. LINDAHL

[Reserved]

§§ 76.414[Reserved]

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7-76 California Forms of Pleading and Practice--Annotated § 76.430

AUTHOR: GEORGE M. LINDAHL

§ 76.430 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action Barred by Statute of Limitations

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action Barred by Statute of Limitations

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:
[*EITHER*]

The [_____ (*specify number of cause of cause of action, e.g.,* first)] cause of action alleged in the complaint herein is barred by the provisions of *Section 340.6 of the Code of Civil Procedure* in that the complaint herein was filed more than _____ [four years after the alleged date of *or* one year after plaintiff _____ (discovered *or,* through the use of reasonable diligence, should have discovered) the facts constituting] the alleged wrongful _____ [act *or* omission], and no facts are alleged to show that the period should be tolled as provided in *Section 340.6(a)(1)-(4) of the Code of Civil Procedure.*
[*OR, FOR ACTIONS AGAINST CRIMINAL DEFENSE ATTORNEYS*]

The [_____ (*specify number of cause of action, e.g., first*)] cause of action alleged in the complaint herein is barred by the provisions of *Section 340.6 of the Code of Civil Procedure* in that the complaint herein was filed more than two years after the plaintiff achieved postconviction exoneration in the form of a final judicial disposition of the criminal case upon which the cause of action is based, and no facts are alleged to show that the period should be tolled as provided in *Section 340.6(a)(1)-(4) of the Code of Civil Procedure.*

[2] Use of Form

This affirmative defense is for use in an answer to a complaint for legal malpractice when the cause of action is barred by *Code Civ. Proc. § 340.6,* governing the periods of limitation for actions brought against attorneys for wrongful acts

or omissions. For a discussion of *Code Civ. Proc. § 340.6*, see the discussion in the § 76.170[1].

[3] California Points and Authorities

For memoranda of points and authorities supporting and opposing motions for summary judgment on the issue of the statute of limitations, see California Points and Authorities, Ch. 24, *Attorneys at Law* (Matthew Bender)

[4] California Torts

For discussion of incapacities that toll running of statutes of limitation, see California Torts, Ch. 71 (Matthew Bender)

[5] State Statutes

Limitations on actions against attorneys for wrongful acts of omissions. *Code Civ. Proc. § 340.6*

Tolling of limitation period. *Code Civ. Proc. § 340.6(a)(1)-(4)*

Period of limitation as running from date of occurrence of future act of event when action based on written instrument, effective date of which depends on such act of event. *Code Civ. Proc. § 340.6(b)*

[6] Decisions

[a] Statute of Limitations--In General

Statute of limitations for legal malpractice as one year after plaintiff discovers or should have discovered facts constituting malpractice or four years from actual date of wrongful act, whichever occurs first. *Bell v. Hummel (1982) 136 Cal. App. 3d 1009, 1015, 186 Cal. Rptr. 688* (disapproved on other grounds in *Laird v. Blacker (1992) 2 Cal. 4th 606, 617, 7 Cal. Rptr. 2d 550, 828 P.2d 691*)

[b] Statute of Limitations--Discovery of Wrongful Act

[i] Actual Injury

Test for actual injury under *Code Civ. Proc. § 340.6* is whether plaintiff has sustained any damages compensable in legal action, other than one for actual fraud, against attorney for wrongful act or omission arising in performance of professional services, and inquiry is predominantly factual in nature. *Jordache Enters., Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal. 4th 739, 751, 763, 76 Cal. Rptr. 2d 749, 958 P.2d 1062* (overruling "bright-line" rulemaking approach of *ITT Small Bus. Fin. Corp. v. Niles (1994) 9 Cal. 4th 245, 36 Cal. Rptr. 2d 552, 885 P.2d 965*)

Actual injury sufficient to trigger limitations period in malpractice action as occurring on entry of adverse judgment or final order of dismissal in underlying action in which malpractice occurred. *Laird v. Blacker (1992) 2 Cal. 4th 606, 615, 7 Cal. Rptr. 2d 550, 828 P.2d 691* (appellate finality not required)

When attorney malpractice consists of not filing underlying action within applicable statute of limitations, actual injury as occurring when client's cause of action is proscribed. *Finlayson v. Sanbrook (1992) 10 Cal. App. 4th 1436, 1444, 13 Cal. Rptr. 2d 406*

In case alleging attorney's negligence in failing to properly advise physician regarding medical malpractice insurance, "actual harm" to plaintiff physician as occurring when plaintiff incurred attorney's fees in defending underlying medical malpractice action, not when action was settled. *Sirott v. Latts (1992) 6 Cal. App. 4th 923, 928-930, 8 Cal. Rptr. 2d 206*

In malpractice action based on attorney's failure in dissolution action to discover and obtain evidence of client's spouse's excess assets, actual injury as occurring on entry of judgment of dissolution when judgment failed to divide excess assets. *Worton v. Worton (1991) 234 Cal. App. 3d 1638, 1651-1652, 286 Cal. Rptr. 410*

In malpractice action based on attorney's alleged failure to introduce evidence that would have resulted in more favorable outcome in client's marital dissolution proceeding, actual harm, if any, as taking place no later than time of judgment of dissolution. *Kabbe v. Miller (1990) 226 Cal. App. 3d 93, 97, 275 Cal. Rptr. 893*

Dismissal of lawsuit due to attorney's negligence as constituting actual injury triggering limitations period. *Troche v. Daley (1990) 217 Cal. App. 3d 403, 410, 266 Cal. Rptr. 34*

Commencement of one-year limitation period concerning former attorney's misrepresentation of legal effect of stipulation provision as tolled under *Code Civ. Proc. § 340.6(a)(1)* until plaintiff suffered actual injury by seeking but failing to obtain court order giving effect to provision according to misrepresentation. *McCann v. Welden (1984) 153 Cal. App. 3d 814, 824, 200 Cal. Rptr. 703*

[ii] Continued Representation

If attorney leaves law firm and takes representation of particular client with him or her, statute of limitations does not continue to toll under continued representation exception on malpractice action client may have against attorney's former law firm or any other attorneys in that firm. *Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal. 4th 503, 505, 66 Cal. Rptr. 3d 52, 167 P.3d 666* (disapproving contrary conclusion of *Beane v. Paulsen (1993) 21 Cal. App. 4th 89, 26 Cal. Rptr. 2d 486*)

Determination of whether attorney's representation was continuing is objective one based on evidence of ongoing mutual relationship and whether activities had been taken to further that relationship. *Worthington v. Rusconi (1994) 29 Cal. App. 4th 1488, 1498, 35 Cal. Rptr. 2d 169*

Attorney-client relationship as terminated for purposes of *Code Civ. Proc. § 340.6* when no court or administrative tribunal retains jurisdiction over matter and nothing remains to be done with regard to proceedings in which legal representation was rendered. *Panattoni v. Superior Court (1988) 203 Cal. App. 3d 1092, 1097, 250 Cal. Rptr. 390*

Failure to formally withdraw as counsel "standing alone" as not constituting continued representation for purposes of tolling *Code Civ. Proc. § 340.6*; however, defendant attorneys as estopped from claiming that their representation of plaintiff did not continue when attorneys undertook to represent very parties they were hired by plaintiff to investigate, attorneys failed to obtain waiver from plaintiff, and attorneys did not formally terminate relationship with plaintiff. *Johnson v. Haberman & Kassoy (1988) 201 Cal. App. 3d 1468, 1475, 247 Cal. Rptr. 614*

Defendant's failure to withdraw formally as attorney of record, standing alone, as not tolling statute of limitations under *Code Civ. Proc. § 340.6(a)(2)*; period of limitation as commencing to run when attorney-client relationship terminates. *Shapero v. Fliegel (1987) 191 Cal. App. 3d 842, 846, 848-849, 236 Cal. Rptr. 696*

Because client may not be able to recognize negligence of his or her attorney and because confidential relationship normally exists between attorney and client, client's failure to discover facts constituting fraud or misrepresentation by

attorney as often excused until attorney-client relationship has been terminated. *Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 1166-1167, 217 Cal. Rptr. 89*

Tolling of statute of limitations while attorney is employed by client under *Code Civ. Proc. § 340.6(a)(2)* as applying to both one-year and four-year provisions of *Code Civ. Proc. § 340.6*. *Baright v. Willis (1984) 151 Cal. App. 3d 303, 310, 198 Cal. Rptr. 510*

Employment of attorney by client pursuant to retainer agreement as continuing to toll statute of limitations after cause of action that is subject of malpractice claim became barred by its own statute of limitations. *Baright v. Willis (1984) 151 Cal. App. 3d 303, 309, 198 Cal. Rptr. 510*

Attorney's status as pledgeholder under agreement for sale of business as not constituting continued representation under *Code Civ. Proc. § 340.6* for purposes of tolling statute of limitations for malpractice in setting up sale. *Von Rott v. Johnson (1983) 148 Cal. App. 3d. 608, 612-613, 196 Cal. Rptr. 55*

Unsettled matters tangential to case that are handled by attorney as manifestation of continuing representation under *Code Civ. Proc. § 340.6(a)(2)* so as to toll both the one-year and four-year provisions of statute of limitations. *Gurkewitz v. Haberman (1982) 137 Cal. App. 3d 328, 333-336, 187 Cal. Rptr. 14*

Statute of limitations for legal malpractice as tolled during time attorney continues to represent plaintiff regarding specific matter in which malpractice occurred. *Bell v. Hummel (1982) 136 Cal. App. 3d 1009, 1015, 186 Cal. Rptr. 688* (disapproved on other grounds in *Laird v. Blacker (1992) 2 Cal. 4th 606, 617, 7 Cal. Rptr. 2d 550, 828 P.2d 691*)

[iii] Discovery of Malpractice

Defendant in attorney malpractice action alleging plaintiff's action is barred under one-year limitations period of *Code Civ. Proc. § 340.6(a)* bears burden of proving when plaintiff discovered, or through use of reasonable diligence should have discovered, facts constituting alleged malpractice. *Samuels v. Mix (1999) 22 Cal. 4th 1, 8-9, 91 Cal. Rptr. 2d 273, 989 P.2d 701*

Crucial time for determining "date of discovery" as time when plaintiff discovered or should have discovered that his or her lawyers acted negligently. *Johnson v. Haberman & Kassoy (1988) 201 Cal. App. 3d 1468, 1476, 247 Cal. Rptr. 614*

Whether plaintiff reasonably should have discovered wrongful act or omission of attorney so as to trigger commencement of one-year limitation period under *Code Civ. Proc. § 340.6(a)* as depending on whether plaintiff had knowledge sufficient to put reasonable person on inquiry or had opportunity to learn of alleged malpractice from available sources. *McCann v. Welden (1984) 153 Cal. App. 3d 814, 822, 200 Cal. Rptr. 703*

Question of when plaintiff discovered or reasonably should have discovered attorney malpractice and suffered injury, within meaning of one-year limitation provision of *Code Civ. Proc. 340.6(a)*, as generally one of fact. *McCann v. Welden (1984) 153 Cal. App. 3d 814, 824, 200 Cal. Rptr. 703*

Degree of diligence required of plaintiff in ferreting out negligence for purposes of determining belated discovery of cause of action as diminished in case of professional relationship; malpractice plaintiff who sought professional advice regarding existence of cause of action as entitled to rely on advice received. *Baright v. Willis (1984) 151 Cal. App. 3d 303, 311, 198 Cal. Rptr. 510*

Statute of limitations as tolled by belated discovery of facts but not by belated discovery of legal theories. *McGee v.*

Weinberg (1979) 97 Cal. App. 3d 798, 803, 159 Cal. Rptr. 86

[iv] Legal Disability

Code Civ. Proc. § 340.6(a)(4), allowing tolling of period of limitation for legal disability that restricts ability to commence action, as intended to be interpreted in connection with general tolling provision for prisoners contained in former *Code Civ. Proc. § 352* (*now see Code Civ. Proc. § 352.1*), which defines legal disability as including time during which plaintiff is imprisoned on criminal charge. *Bledstein v. Superior Court (1984) 162 Cal. App. 3d 152, 166, 208 Cal. Rptr. 428*

Statute of limitations for malpractice action against criminal attorney as tolled during time plaintiff was imprisoned on criminal charges; plaintiff as not required to prove that incarceration actually made filing lawsuit against attorney impossible. *Bledstein v. Superior Court (1984) 162 Cal. App. 3d 152, 160-166, 208 Cal. Rptr. 428*

[v] Scope of Code Civ. Proc. § 340.6

Code Civ. Proc. § 340.6, rather than "catchall" statute of limitation set forth in *Code Civ. Proc. § 343*, as applicable in cause of action against attorney based on attorney's breach of fiduciary duties. *Stoll v. Superior Court (1992) 9 Cal. App. 4th 1362, 1366-1369, 12 Cal. Rptr. 2d 354* ; *but see David Welch Co. v. Erskine & Tulley (1988) 203 Cal. App. 3d 884, 893, 250 Cal. Rptr. 339* (contra)

Renaming of attorney as defendant in amended complaint, following dismissal of attorney from lawsuit without prejudice, as required to be within period of statute of limitations; amended complaint as not relating back to date of filing of original complaint for purposes of statute. *Troche v. Daley (1990) 217 Cal. App. 3d 403, 412, 266 Cal. Rptr. 34*

"Catchall" statute of limitation set forth in *Code Civ. Proc. § 343*, rather than *Code Civ. Proc. § 340.6*, as applicable in cause of action against attorney based on attorney's breach of fiduciary duties. *David Welch Co. v. Erskine & Tulley (1988) 203 Cal. App. 3d 884, 893, 250 Cal. Rptr. 339* ; *but see Stoll v. Superior Court (1992) 9 Cal. App. 4th 1362, 1366-1369, 12 Cal. Rptr. 2d 354* (contra)

Four-year limitation period of *Code Civ. Proc. § 340.6* as not barring attorney malpractice action when complaint was filed less than four years after the statute's effective date (January 1, 1978). *Johnson v. Haberman & Kassoy (1988) 201 Cal. App. 3d 1468, 1474, 247 Cal. Rptr. 614*

Four-year outside limit in *Code Civ. Proc. § 340.6* as restricting malpractice actions based on actual injury that occurred prior to January 1, 1978 (effective date of statute); actions based on pre-1978 injury brought after January 1, 1982, as generally barred, unless statutory tolling applicable. *Rubinstein v. Barnes (1987) 195 Cal. App. 3d 276, 279-282, 240 Cal. Rptr. 535*

District Court as erring in applying one-year statute of limitations, *Code Civ. Proc. § 340.6*, to corporate complaint against attorney charging him with corporate waste, mismanagement, and breach of fiduciary duty; correct statute as being general four-year statute of limitations, *Code Civ. Proc. § 343*. *Davis & Cox v. Summa Corp. (9th Cir. 1985) 751 F.2d 1507, 1520-1521*

One-year limitation period for attorney malpractice actions under *Code Civ. Proc. § 340.6(a)* as commencing to run only concerning those wrongful acts or omissions that plaintiff has or reasonably should have discovered, not as to other related but separate wrongful acts or omissions. *McCann v. Welden (1984) 153 Cal. App. 3d 814, 819-822, 200 Cal. Rptr. 703*

Code Civ. Proc. § 340.6, providing for four-year limitation period with one-year discovery rule as operating prospectively; plaintiff as not barred from action for legal malpractice commenced many years after divorce action that attorney handled, but less than three years from effective date of statute and less than one year from date of discovery of facts constituting attorney's wrongful act or omission. *Krusesky v. Baugh (1982) 138 Cal. App. 3d 562, 566-568, 188 Cal. Rptr. 57*

Requirement of *Code Civ. Proc. § 340.6* that attorney malpractice suits commence within one year of discovery of alleged wrongful act or omission as applying to both breach of contract and tort malpractice actions. *Southland Mech. Constructors Corp. v. Nixen (1981) 119 Cal. App. 3d 417, 425-431, 173 Cal. Rptr. 917 , disapproved on other grounds, Laird v. Blacker (1992) 2 Cal. 4th 606, 617, 7 Cal. Rptr. 2d 550, 828 P.2d 691*)

[vi] Suspension of Corporate Powers

Corporate plaintiff as precluded from bringing malpractice suit during suspension of corporate powers for nonpayment of taxes under *Rev. & Tax. Code § 23301*; plaintiff's malpractice action as barred when plaintiff's corporate powers were suspended for entire duration of one-year limitation period. *ABA Recovery Servs., Inc. v. Konold (1988) 198 Cal. App. 3d 720, 724-725, 244 Cal. Rptr. 27*

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7-76 California Forms of Pleading and Practice--Annotated § 76.431

AUTHOR: GEORGE M. LINDAHL

§ 76.431 Notice of Motion for Separate Trial of Special Defense

[1] FORM Notice of Motion for Separate Trial of Special Defense

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	NO. _____
Plaintiff,	MOTION AND NOTICE OF MOTION FOR SEPARATE TRIAL ON THE DEFENSE OF STATUTE OF LIMITATIONS
vs.	
_____ [*name*],	Hearing Date: _____
Defendant(s).	Time: _____
	Location: _____
	Judge: _____
	Documents Attached: _____
	Date Action Filed: _____
	[Trial Date: _____]

_____

To each party and his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], defendant _____ [*name of defendant*] will, and hereby does, move for an order pursuant to *Code of Civil Procedure Section 597* that this action proceed to trial on the special defense that the action is barred by the statute of limitations, before trial of any other issue in the case. The motion will be made on the ground that the limitations defense, if established, will constitute a bar to prosecution of this action.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum of points and authorities served and filed herewith, on the papers, records, and files herein, and on such oral and documentary evidence as may be presented at the hearing on the motion.
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

This form may be used by the defendant to move for a separate trial of the statute of limitation defense pursuant to *Code Civ. Proc. § 597*.

[3] Accompanying Documents

A notice of motion is usually accompanied by supporting affidavits or declarations under penalty of perjury [*see Code Civ. Proc. §§ 2009, 2015.5*]. The notice of motion must be accompanied by a supporting memorandum of points and authorities [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rules 3.1100, 3.1113(a)*].

[4] Cross References

For an example of a declaration related to this motion, see Ch. 190, *Depositions and Discovery* , and § 76.451

[5] California Points and Authorities

For memoranda of points and authorities related to this motion, see California Points and Authorities, Ch. 143, *Limitation of Actions* (Matthew Bender)

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7-76 California Forms of Pleading and Practice--Annotated § 76.432

AUTHOR: GEORGE M. LINDAHL

§ 76.432 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Comparative Negligence of Plaintiff

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Comparative Negligence of Plaintiff

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

Plaintiff failed to exercise reasonable care in protecting his/her own interests in the transactions alleged in the complaint herein in that _____ [*specify, e.g.,* plaintiff failed to follow defendant's instructions to appear for deposition in connection with his/her defense in the action entitled _____ (*title of underlying action*)] and the loss and damage allegedly sustained by him/her were proximately caused by his/her own comparative negligence.

[2] Use of Form

This affirmative defense, alleging negligence of the plaintiff, is for use in an answer to a complaint for legal malpractice.

[3] Cross References

See generally Ch. 380, *Negligence*

[4] California Torts

For detailed discussion of the plaintiff's negligence as a defense, see California Torts, Ch. 4 (Matthew Bender)

[5] Decisions

System of comparative negligence established. *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226*

Negligence of client as available defense to legal malpractice action. *Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 530, 50 Cal. Rptr. 592* ; *Theobald v. Byers (1961) 193 Cal. App. 2d 147, 150, 13 Cal. Rptr. 864*

[6] Law Reviews

Sanders, *Defenses to a Legal Malpractice Action, 23 Prac. Law. 51 (April 1977)*

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7-76 California Forms of Pleading and Practice--Annotated § 76.433

AUTHOR: GEORGE M. LINDAHL

§ 76.433 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Release

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Release

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

On or about _____ [*date*], plaintiff, for a valuable consideration, by a written instrument, a copy of which is attached hereto as Exhibit _____ and made a part hereof, released and forever discharged defendant from any and all liability to plaintiff for any and all claims of plaintiff against defendant arising out of _____ [*specify transaction or occurrence*], which is the subject matter of plaintiff's cause of action herein. The release included claims arising out of the aforesaid transaction that existed at the date of the execution of the release, or that might thereafter arise against the defendant for anything done by the defendant prior to the date of execution of the release in connection with the aforesaid transaction. At all times relevant to the negotiation and execution of the aforesaid release, plaintiff was represented by _____ [*name*], an attorney duly licensed to practice law in California[, and who also executed the aforesaid release].

[2] Use of Form

This affirmative defense, alleging the existence of a release, is for use in an answer to a complaint for legal malpractice.

[3] Cross References

For discussion and forms relating to releases generally, see Ch. 520, *Settlement and Release*

[4] Rules of Professional Conduct

Limitations on obtaining release from liability for malpractice. *Cal. Rules Prof. Conduct, Rule 3-400*

[5] Decisions

Mutual release executed voluntarily by client and attorney as complete defense to malpractice action. *Donnelly v. Ayer (1986) 183 Cal. App. 3d 978, 983, 228 Cal. Rptr. 764*

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7-76 California Forms of Pleading and Practice--Annotated § 76.434

AUTHOR: GEORGE M. LINDAHL

§ 76.434 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Comparative Fault of Successor Attorney

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Comparative Fault of Successor Attorney

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

Plaintiff's damages, if any, in this cause of action were proximately caused by _____ [*name of successor attorney*], the attorney who succeeded the defendant in the representation of plaintiff in the cause of action upon which the claim of malpractice against the defendant is based. The negligence of _____ [*name of successor attorney*] that proximately caused the plaintiff's damages, if any, consisted of: _____ [*specify negligent actions by successor attorney*]. Thus, the plaintiff's recovery, if any, from the defendant must be reduced in proportion to the amount of negligence attributable to _____ [*name of successor attorney*].

[2] Use of Form

This affirmative defense, alleging the comparative fault of the attorney who succeeded the defendant in representing the plaintiff in the action that formed the basis for the malpractice claim, is for use in an answer to a complaint for legal malpractice.

[3] Decisions

Attorney sued for malpractice as entitled to raise defense that negligence of successor attorney in underlying action contributed to damages caused by defendant attorney's negligence, if any. *Lewis v. Purvin (1989) 208 Cal. App. 3d 1208, 1217, 256 Cal. Rptr. 827*

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A. Liability to Client
4. Defenses

7-76 California Forms of Pleading and Practice--Annotated § 76.435

AUTHOR: GEORGE M. LINDAHL

§ 76.435 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action Barred by Doctrine of Unclean Hands

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action Barred by Doctrine of Unclean Hands

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

The plaintiff is not entitled to the relief requested in the complaint in this action because the plaintiff does not come to court with clean hands.

[2] Use of Form

This affirmative defense, alleging that the plaintiff's action is barred because the plaintiff comes to the action with unclean hands, is for use in an answer to a complaint for legal malpractice.

PRACTICE TIP:

General Affirmative Defense. A general "unclean hands" affirmative defense is preferable to one that specifies the facts giving rise to the defense. A specific affirmative defense is unnecessary and may only serve to limit the scope of the defense to the specific charging allegations regardless of more extensive supporting facts that develop later.

[3] Decisions

Attorney malpractice action, based on allegation that attorney led client to knowingly commit perjury in civil action, as barred under doctrine of unclean hands. *Blain v. Doctor's Co. (1990) 222 Cal. App. 3d 1048, 1063-1064, 272 Cal. Rptr. 250*

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7-76 California Forms of Pleading and Practice--Annotated §§ 76.436-76.449

AUTHOR: GEORGE M. LINDAHL

[Reserved]

§§ 76.436[Reserved]

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7-76 California Forms of Pleading and Practice--Annotated § 76.450

AUTHOR: GEORGE M. LINDAHL

§ 76.450 Complaint for Damages [Civ. Code § 3333] by Intended Beneficiary for Attorney's Negligent Preparation of a Testamentary Instrument--Failure to Include Provision for Post-Testamentary Marriage

[1] FORM Complaint for Damages [Civ. Code § 3333] by Intended Beneficiary for Attorney's Negligent Preparation of a Testamentary Instrument--Failure to Include Provision for Post-Testamentary Marriage

[*Caption. See§ 76.381*.]

Plaintiff alleges:

[1. *Residence of negligent attorney*. *See§ 76.380, Paragraph 1*.]

[2. *Capacity and principal place of business of law firm*. *See§ 76.360* .]

[3. *Fictitious name allegations, if appropriate*. *See§ 76.381, Paragraph 3*.]

[4. *Agency allegations, if appropriate*. *See§ 76.360* .]

[5. *Professional status of defendant*. *See§ 76.380, Paragraph 3*.]

6. On or about _____ [*date*], at _____ [*address*], California, _____ [*name of testator*], hereinafter called "the Decedent," engaged the legal services of defendant _____ [*name of attorney*] [and defendant Firm] to prepare his/her _____ [will *or* revocable trust].

7. The decedent instructed defendant _____ [*name of attorney*] that his/her intention was to leave all

of his/her estate to plaintiff.

8. Prior to preparing the Decedent's _____ [will *or* revocable trust], defendant _____ [*name of attorney*] knew that the Decedent _____ [*either* was engaged *or* intended] to become married. In spite of such knowledge, defendant _____ [*name of attorney*] negligently and carelessly failed to advise the Decedent of the consequences of a post-testamentary marriage and negligently and carelessly prepared the Decedent's _____ [will *or* revocable trust] and failed to include therein any provision as to the intended marriage.

9. On _____ [*date*], at _____ [*address*], California, the Decedent, at the instruction and advice of defendant _____ [*name of attorney*], executed his/her _____ [will *or* revocable trust] providing that all of his/her estate was to go to plaintiff, but failing to provide any mention of or provision for the Decedent's intended spouse. Defendant negligently and carelessly advised the Decedent that his/her testamentary intention of leaving his/her entire estate to plaintiff would be effected by such instrument in the form presented.

10. On or about _____ [*date*], after executing his/her _____ [will *or* revocable trust], the Decedent married _____ [*name*]. In spite of defendant's knowledge of such marriage, and at all times thereafter until _____ [*date of death*], defendant _____ [*name of attorney*] negligently and carelessly failed to advise the Decedent that as a result of such marriage his/her testamentary intentions to leave his/her entire estate to plaintiff would not be effective if his/her spouse should survive him/her, by virtue of *Section 21610 of the Probate Code*.

11. On _____ [*date*] the Decedent died and his/her aforementioned spouse survived him/her. At the time of such death, the Decedent left an estate valued at $_____.

12. As a proximate result of such negligence, the Decedent's _____ [will *or* revocable trust] herein described was ineffective in carrying out the Decedent's intention to leave his/her entire estate to plaintiff and plaintiff was only entitled thereunder to receive a portion of the estate valued at $_____, all to plaintiff's damage.

[*Prayer. See§ 76.381* .]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification. See§ 76.380* .]

[2] Use of Form

This complaint is for use in an action brought by a beneficiary against an attorney for negligence in failing to account for the effect of *Prob. Code §§ 21610-21612* in preparing a testamentary instrument and advising his or her client. Under *Prob. Code § 21610*, if a testator who dies on or after January 1, 1998, fails to provide in a testamentary instrument for his or her surviving spouse who married the testator after the execution of all decedent's testamentary instruments, the omitted spouse shall receive a share in the estate consisting of the following property in the estate: (1) the one-half of the the community property that belongs to the testator under *Prob. Code § 100* (disposition of community property on death); (2) the one-half of the quasi-community property that belongs to the testator under *Prob.*

Code § 101 (disposition of quasi-community property on death); and (3) a share of the separate property of the testator equal in value to that which the spouse would have received if the testator had died intestate, but in no event is the share to be more than one-half the value of the separate property in the estate [*Prob. Code §§ 21610* (application of prior law, former *Prob. Code § 6560*, if decedent died prior to January 1, 1998)]. However, the spouse does not receive a share of the estate under *Prob. Code § 21610* if any of the following facts is established [*Prob. Code § 21611*]:

- The testator's failure to provide for the spouse in decedent's testamentary instruments was intentional, and that intention appears from the decedent's testamentary instruments;

- The testator provided for the spouse by transfer outside decedent's testamentary instruments, and the intention that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or by other evidence; or

- The spouse made a valid agreement waiving the right to share in the testator's estate.

Prob. Code §§ 21610-21612, enacted in 1997 [Stats. 1997, ch. 724], apply the omitted spouse provisions for wills of former *Prob. Code §§ 6560-6562* to all of decedent's testamentary instruments, including revocable trusts [*Prob. Code §§ 21610-21612*].

[3] Cross References

For a related form, see *§ 76.381*

[4] California Points and Authorities

For memoranda of points and authorities supporting and opposing motions for summary judgment on the ground that defendant owed no duty to an intended beneficiary of a will, see California Points and Authorities, Ch. 24, *Attorneys at Law* (Matthew Bender)

[5] State Statutes

Effect of post-testamentary marriage on estate. *Prob. Code §§ 21610-21612*

[6] Decisions

Duty of attorney to act with due care as to interests of intended beneficiary of will as arising out of agreement to provide legal services to client of preparing will. *Heyer v. Flaig (1969) 70 Cal. 2d 223, 229, 74 Cal. Rptr. 225, 449 P.2d 161*

Duty of reasonably prudent attorney to appreciate consequences of post testamentary marriage, to advise testator of such consequences, and to use good judgment to avoid them if testator so desires. *Heyer v. Flaig (1969) 70 Cal. 2d 223, 229, 74 Cal. Rptr. 225, 449 P.2d 161*

Statute of limitations as commencing to run on death of testator as to cause of action by beneficiaries of will for negligent preparation of will. *Heyer v. Flaig (1969) 70 Cal. 2d 223, 230, 74 Cal. Rptr. 225, 449 P.2d 161*

Factors considered in determining whether attorney is subject to liability to persons other than clients for professional

negligence. *Lucas v. Hamm (1961) 56 Cal. 2d 583, 588, 15 Cal. Rptr. 821, 364 P.2d 685*

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7-76 California Forms of Pleading and Practice--Annotated § 76.451

AUTHOR: GEORGE M. LINDAHL

§ 76.451 Complaint for Damages [Civ. Code § 3333] by Intended Will Beneficiary for Attorney's Negligent Preparation of Will--Damages Suffered Pursuant to Settlement Under Impaired Will

[1] FORM Complaint for Damages [Civ. Code § 3333] by Intended Will Beneficiary for Attorney's Negligent Preparation of Will--Damages Suffered Pursuant to Settlement Under Impaired Will

[*Caption. See§ 76.381*.]

Plaintiff alleges:

[1. *Residence of negligent attorney*. *See§ 76.380, Paragraph 1*.]

[2. *Capacity and principal place of business of law firm*. *See§ 76.360* .]

[3. *Fictitious name allegations, if appropriate*. *See§ 76.381, Paragraph 3*.]

[4. *Agency allegations, if appropriate*. *See§ 76.360* .]

[5. *Professional status of defendant*. *See§ 76.380, Paragraph 3*.]

6. On or about _____ [*date*], at _____ [*address*], California, _____ [*name of testator*], hereinafter called "the Decedent," engaged the legal services of defendant _____ [*name of attorney*] [and defendant Firm] to prepare his/her Last Will and Testament.

7. The Decedent informed defendent _____ [*name of attorney*] that his/her assets exceeded the value

of $_____ and that it was his/her intention to transmit a specified portion of his/her estate incident to testamentary transfer to plaintiff.

8. Notwithstanding the Decendent's instructions, defendant _____ [*name of attorney*] negligently and carelessly prepared the Decedent's Last Will and Testament and included therein the following provisions relative to plaintiff's share: _____ [*set forth provisions of will*]. At all times herein mentioned such provisions were ineffective to transfer such portion of the Decedent's estate to plaintiff in that _____ [*specify defect*].

9. On _____ [*date*] the Decedent executed such Last Will and Testament at _____ [*address*], California, at which time and place defendant _____ [*name of attorney*] negligently and carelessly instructed and advised the Decedent in the execution thereof, and negligently and carelessly advised the Decedent that such Last Will and Testament, in the form presented, would effectively fulfill the Decedent's testamentary intentions as to disposition of the specified portion of the Decedent's estate to plaintiff, and negligently and carelessly failed to advise the Decedent that the provisions relative to plaintiff's share were legally ineffective to fulfill such testamentary intentions.

10. The Decedent died on _____ [*date*], leaving the aforementioned instrument as his/her Last Will and Testament which was admitted to probate on _____ [*date*] in the Superior Court of California, County of _____, in a proceeding entitled _____ [*specify*], No. _____.

11. Thereafter plaintiff was advised by _____ [*name of attorney*] that the provision was invalid and that plaintiff, although designated a beneficiary thereunder, would be deprived of the entire inheritance to which he/she would have been entitled had the said provision been valid, unless plaintiff agreed with _____ [*specify class or persons involved in settlement, e.g.,* the Decedent's heirs *or* the Decedent's surviving spouse *or named devisees*] to a compromise settlement whereunder plaintiff would receive a lesser inheritance than that provided by the testator pursuant to the terms and provisions of his/her Last Will and Testament.

12. Thereafter, and as the proximate result of the negligence of defendant _____ [*name of attorney*] as aforesaid, plaintiff did then enter into a settlement agreement, a true and correct copy of which is attached hereto as Exhibit "A" and made a part hereof, under the terms of which plaintiff agreed to accept a lesser share of the estate of the Decedent, thereby reducing his/her inheritance. The settlement agreement was thereafter executed by all necessary parties designated therein, offered in evidence in the probate proceedings, and, predicated thereon, the court duly made and entered its decree determining heirship in probate proceedings whereunder plaintiff received an aggregate inheritance of less than the sum which would have been received by plaintiff pursuant to the provision of the testamentary instruments had such provision been drafted in such a manner as to be valid, all to plaintiff's damage.

[*Prayer. See§ 76.381.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See§ 76.380.*]

[2] Use of Form

This complaint is for use in an action against an attorney for malpractice based on negligence in the preparation and execution of a will, in which the intended beneficiary is forced to compromise a claim and settle for less than the testator specified and intended.

[3] Cross References

For related forms, see *§§ 76.381, 76.450*

[4] Decisions

Intended beneficiaries of will who lose testamentary rights because of negligent failure of attorney who drew will to properly carry out testator's intent as having cause of action to recover on tort theory for breach of duty owed directly by attorney to intended beneficiaries. *Heyer v. Flaig (1969) 70 Cal. 2d 223, 228, 74 Cal. Rptr. 225, 449 P.2d 161*

Contract between client and attorney for drafting of client's will as being in part a contract for benefit of third parties, namely persons designated as beneficiaries in will. *Lucas v. Hamm (1961) 56 Cal. 2d 583, 591, 15 Cal. Rptr. 821, 364 P.2d 685*

When will-drafting attorney fails to fulfill obligations under contract with testator, intended beneficiaries of will, who lose their testamentary rights, as entitled to recover damages as third-party beneficiaries of contract and also on tort liability for breach of duty owed directly to beneficiaries. *Garcia v. Borelli (1982) 129 Cal. App. 3d 24, 32, 180 Cal. Rptr. 768*

Complaint attempting to allege negligence of attorney consisting of drafting *valid* will without instructions from testator and in ignorance of his wishes but failing to allege that will did not contain what testator intended at time he approved and executed it as not stating cause of action based on negligence. *Hiemstra v. Huston (1970) 12 Cal. App. 3d 1043, 1046-1048, 91 Cal. Rptr. 269*

[5] Law Reviews

Comment, *Attorney Malpractice in California: The Liability of a Lawyer Who Drafts an Imprecise Contract or Will, 24 U.C.L.A. L. Rev. 422 (1976)*

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7-76 California Forms of Pleading and Practice--Annotated § 76.452

AUTHOR: GEORGE M. LINDAHL

§ 76.452 Allegation in Complaint [Code Civ. Proc. § 425.10] That Transaction Between Defendant Attorney and Client Was Intended to Benefit Plaintiff

[1] FORM Allegation in Complaint [Code Civ. Proc. § 425.10] That Transaction Between Defendant Attorney and Client Was Intended to Benefit Plaintiff

The transaction between defendant _____ [*name of attorney*] and _____ [*name of client*] was specifically intended to _____ [affect *or* benefit] the plaintiff in that _____ [*specify facts showing transaction was intended to affect or benefit plaintiff, e.g.,* _____ (*name of client*) informed defendant that the purpose of the opinion letter regarding _____ (*specify subject matter of letter*) was for the purpose of inducing plaintiff to enter into an agreement with him/her to _____ (*nature of agreement*)].

[2] Use of Form

This form is for use in an action for attorney malpractice brought by a third party, other than an intended beneficiary of a will drafted by the attorney, to allege that the transaction between the defendant attorney and his or her client was intended to benefit or affect the plaintiff.

[3] California Points and Authorities

For memoranda of points and authorities and opposing motions for summary judgment on the grounds that defendant attorney owed no duty to a third party, see California Points and Authorities, Ch. 24, *Attorneys at Law* (Matthew Bender)

[4] Decisions

Factors considered in determining whether attorney is subject to liability to persons other than clients for professional negligence. *Lucas v. Hamm (1961) 56 Cal. 2d 583, 588, 15 Cal. Rptr. 821, 364 P.2d 685*

Attorney retained by client to obtain divorce from first spouse as owing no duty of care to client's second spouse when attorney never agreed to perform legal services intended directly to benefit second spouse. *Burger v. Pond (1990) 224 Cal. App. 3d 597, 602-607, 273 Cal. Rptr. 709*

Attorney preparing franchise prospectus for franchisor as owing duty towards prospective franchisees if attorney knows that prospectus will be shown to prospective franchisees and that information contained in prospectus will be used to induce the purchase of franchises. *Courtney v. Waring (1987) 191 Cal. App. 3d 1434, 1443-1444, 237 Cal. Rptr. 233*

Attorney representing buyer of real property as not owing duty of care to escrow agent concerning drafting and formation of escrow instructions. *St. Paul Title Co. v. Meier (1986) 181 Cal. App. 3d 948, 950-952, 226 Cal. Rptr. 538*

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7-76 California Forms of Pleading and Practice--Annotated § 76.453

AUTHOR: GEORGE M. LINDAHL

§ 76.453 Demurrer [Code Civ. Proc. § 430.10 et seq.] to Complaint [Code Civ. Proc. § 425.10] for Negligent Misrepresentation Brought by Third Party Involved in Arm's Length Transaction With Client

[1] FORM Demurrer [Code Civ. Proc. § 430.10 et seq.] to Complaint [Code Civ. Proc. § 425.10] for Negligent Misrepresentation Brought by Third Party Involved in Arm's Length Transaction With Client

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	DEMURRER TO
_____ [*name*],	)	COMPLAINT
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Defendant demurs to the complaint on the ground that it appears on the face of the complaint and from the record in the matter of _____ [*title of action*] that at all times relevant to this action, plaintiff was engaged in a business transaction with _____ [*name of client*], defendant's client, and the advice given by defendant to _____ [*name of client*], alleged by plaintiff to be a negligent misrepresentation, was not intended to benefit or affect plaintiff.

_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

This form may be used by a defendant in a malpractice action brought by a third party who dealt with the defendant's client in an arm's length transaction. The demurrer is based on the argument that, as a matter of law, no duty of care was owed to the plaintiff [*see* *Goodman v. Kennedy (1976) 18 Cal. 3d 335, 343-344, 134 Cal. Rptr. 375, 556 P.2d 737]* .

[3] Cross References

For demurrers generally and appropriate forms of demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

[4] California Points and Authorities

For memoranda of points and authorities and opposing motions for summary judgment on the grounds that defendant owed no duty to a third party, see California Points and Authorities, Ch. 24, *Attorneys at Law* (Matthew Bender)

[5] Decisions

Attorney as having no duty toward third party who was damaged because attorney's client relied on attorney's negligent advice regarding sale of stock, and as not liable to third party absent fraud or malice. *Goodman v. Kennedy (1976) 18 Cal. 3d 335, 344, 134 Cal. Rptr. 375, 556 P.2d 737*

Factors considered in determining whether attorney is subject to liability to persons other than clients for professional negligence. *Lucas v. Hamm (1961) 56 Cal. 2d 583, 588, 15 Cal. Rptr. 821, 364 P.2d 685*

Attorney as having no duty to protect interests of adverse party or of party with whom client deals at arms' length. *Schick v. Lerner (1987) 193 Cal. App. 3d 1321, 1330, 238 Cal. Rptr. 902*

Attorney preparing franchise prospectus for franchisor as owing duty towards prospective franchisees if attorney knows that prospectus will be shown to prospective franchisees and that information contained in prospectus will be used to induce the purchase of franchises. *Courtney v. Waring (1987) 191 Cal. App. 3d 1434, 1443-1444, 237 Cal. Rptr. 233*

Attorney as breaching duty to third party's attorney when affirmative misrepresentation of fact is made directly to attorney for purpose of influencing third party on behalf of client of attorney who made misrepresentation. *Cicone v. URS Corp. (1986) 183 Cal. App. 3d 194, 210, 227 Cal. Rptr. 887*

Attorney representing client in transaction with unrepresented party owes no duty of care to unrepresented party, at least if attorney does not undertake to render legal advice to that party. *Fox v. Pollack (1986) 181 Cal. App. 3d 954, 959-962, 226 Cal. Rptr. 532*

Attorney representing buyer of real property as not owing duty of care to escrow agent concerning drafting and formation of escrow instructions. *St. Paul Title Co. v. Meier (1986) 181 Cal. App. 3d 948, 950-952, 226 Cal. Rptr. 538*

Attorney representing seller of real property as not required to disclose known defects to buyer. *Heliotis v. Schuman*

(1986) 181 Cal. App. 3d 646, 650-651, 226 Cal. Rptr. 509

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7-76 California Forms of Pleading and Practice--Annotated § 76.454

AUTHOR: GEORGE M. LINDAHL

§ 76.454 Complaint [Code Civ. Proc. § 425.10] for Attorney's Malicious Prosecution of Civil Action

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Attorney's Malicious Prosecution of Civil Action

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR
_____ [*name*],	)	DAMAGES
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Residence of negligent attorney. See§ 76.380, Paragraph 1.*]

[2. *Capacity and principal place of business of law firm. See§ 76.360 .*]

[3. *Fictitious name allegations, if appropriate. See§ 76.381, Paragraph 3.*]

[4. *Agency allegations, if appropriate. See§ 76.360 .*]

[5. *Professional status of defendant*. *See§ 76.380, Paragraph 3*.]

6. On _____ [*date*], defendant _____ [*name of attorney*] instituted a civil action against plaintiff, as counsel of record for [defendant] _____ [*name of plaintiff in former action*] in the _____ Court of _____ County, California. The complaint claimed damages for _____ [*specify nature of cause of action*]. The action was entitled _____ vs. _____, No. _____.

[*EITHER, if judgment based on evidence was entered in favor of plaintiff*]

7. On _____ [*date*], a judgment in favor of plaintiff in this action was rendered by _____ [a jury *or* the trial judge] _____ [*specify basis for judgment, e.g.,* after a trial on the merits *or* pursuant to a motion for summary judgment]. This judgment was entered by the court on _____ [*date*][, and became final on _____ (*date*)].

[*OR, if underlying action was dismissed*]

7. On _____ [*date*], the above-mentioned action was dismissed _____[with prejudice *or* without prejudice] _____ [*specify basis for dismissal, e.g.*, pursuant to defendant's motion for voluntary dismissal *or* for failure to prosecute the action pursuant to *Section 583.310 of the Code of Civil Procedure*]. The _____ [Notice of Entry of Voluntary Dismissal was filed *or* Order of Dismissal was entered] on _____ [*date*].

[*CONTINUE*]

[*EITHER, if lack of probable cause is based on untenability of claim or failure to reasonably research the law*]

8. Defendant acted without probable cause in bringing the above-mentioned action against plaintiff because _____ [as a matter of law no reasonable attorney would regard as tenable the prosecution of the claim *or* he/she unreasonably neglected to research the law in making his/her determination to proceed against plaintiff in that _____ (*specify facts known to plaintiff constituting defendant attorney's neglect in researching the law*)].

[*OR, if lack of probable cause is based on knowledge of falsity of claim or failure to reasonably investigate the facts asserted to support the claim*]

8. Defendant acted without probable cause in bringing the above-mentioned action against plaintiff because the claims asserted against plaintiff were false and _____ [defendant knew of their falsity at the time he/she determined to proceed against plaintiff *or* defendant unreasonably neglected to investigate the facts in making his/her determination to proceed against plaintiff] in that _____ [*specify facts known to plaintiff, if any, constituting defendant attorney's knowledge of falsity of claim or failure to reasonably investigate the facts*].

[*CONTINUE*]

9. Defendant acted maliciously in bringing the above-mentioned action against plaintiff because _____ [*specify basis for asserting malice, e.g.,* defendant instituted proceedings against plaintiff knowing that the claims asserted against plaintiff were false *and/or* the proceedings were begun primarily because of hostility and ill will on the part of the defendant toward the plaintiff *and/or* the proceedings were initiated solely for the purpose of depriving the plaintiff of the beneficial use of his/her property *and/or* the proceedings were initiated for the purpose of forcing plaintiff to enter into a settlement with _____ (*name*), (codefendant in this action and) the plaintiff in the former action].

10. As a proximate result of the defendant's instituting the above-mentioned action against plaintiff, plaintiff has been damaged.

11. As a further proximate result of the action initiated by defendant, plaintiff incurred costs as attorney's fees in defending against the action and court costs.

[12. At all times herein mentioned, defendant knew that the claims asserted against plaintiff in the above-mentioned action were _____ (false *or* legally untenable). Notwithstanding this knowledge, defendant subjected plaintiff to cruel and unjust hardship in conscious disregard of plaintiff's rights in that _____ (*specify facts showing oppressive or cruel and unjust treatment by defendant, e.g.,* defendant abetted and encouraged his/her client, _____ (*name*), to file fabricated claims against plaintiff to coerce plaintiff into settling so that defendant could reap substantial profits as his/her contingency fee). These acts therefore justify the awarding of punitive damages.]

[*Prayer. See§ 76.410* .]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See§ 76.380.*]

[2] Use of Form

This form is for use as a complaint for malicious prosecution against the attorney who represented the former plaintiff in the underlying action. Note that in many cases the former plaintiff will be joined as a codefendant with the attorney.

PRACTICE TIP:

Naming Defendants. It is generally advisable for the plaintiff in a malicious prosecution action to name both the attorney and the former plaintiff in the underlying action as defendants in order to capitalize on any conflict that may exist between them and also to improve the prospects for satisfying any judgment, particularly when malicious prosecution liability cannot be covered by insurance as a matter of law [*see Ins. Code § 533*].

[3] Elements

To establish a cause of action for malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the

prior action was (1) commenced by or at the direction of the defendant and was pursued to a legal termination in favor of the plaintiff who was a defendant in the prior action, (2) brought without probable cause, and (3) initiated with malice [*see Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 50, 118 Cal. Rptr. 184, 529 P.2d 608* ; *Pond v. Insurance Co. of N. Am. (1984) 151 Cal. App. 3d 280, 288, 198 Cal. Rptr. 517]* .

[4] Cross References

For discussion of and forms for alleging a cause of action for malicious prosecution, see Ch. 357, *Malicious Prosecution and Abuse of Process*

[5] California Torts

For discussion of the cause of action for malicious prosecution, see California Torts, Ch. 43 (Matthew Bender)

[6] Decisions

In malicious prosecution suit, when evaluating whether probable cause existed for underlying legal action, court as required to take into account evolutionary potential of legal principles. *Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 886, 254 Cal. Rptr. 336, 765 P.2d 498*

Elements of cause of action as being that prior action (1) was commenced by or at direction of defendant and was pursued to legal termination in plaintiff's favor; (2) was brought without probable cause; and (3) was initiated with malice. *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 50, 118 Cal. Rptr. 184, 529 P.2d 608* ; *Pond v. Insurance Co. of N. Am. (1984) 151 Cal. App. 3d 280, 288, 198 Cal. Rptr. 517* ; *Weaver v. Superior Court (1979) 95 Cal. App. 3d 166, 183-184, 156 Cal. Rptr. 745*

Finding of lack of probable cause such that malicious prosecution may be found as question of law. *Williams v. Coombs (1986) 179 Cal. App. 3d 626, 636-637, 224 Cal. Rptr.865*

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Chapter 76 ATTORNEY PROFESSIONAL LIABILITY
PART IV. FORMS
B. Liability to Nonclients
1. Bases of Liability

7-76 California Forms of Pleading and Practice--Annotated § 76.455

AUTHOR: GEORGE M. LINDAHL

§ 76.455 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Abuse of Process

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Abuse of Process

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR
_____ [*name*],	)	DAMAGES (Abuse of Process)
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Residence of negligent attorney. See§ 76.380, Paragraph 1*.]

[2. *Capacity and principal place of business of law firm. See§ 76.360* .]

[3. *Fictitious name allegations, if appropriate. See§ 76.381, Paragraph 3*.]

[4. *Agency allegations, if appropriate. See§ 76.360* .]

[5. *Professional status of defendant. See§ 76.380, Paragraph 3.*]

6. On or about _____ [*date*], defendant _____, as attorney of record for _____ [*name of plaintiff or moving party in underlying proceeding*] _____ [*describe type of process that defendant obtained and used against plaintiff, e.g.,* filed a complaint *or* filed a request for admissions] pursuant to a civil action for _____ [*specify cause of action*] brought by defendant against plaintiff in the [*specify title of court*] Court of _____ County, California. The action was entitled _____ vs. _____, No. _____.

7. Defendant misused the _____ [*describe process*] by _____ [*state way in which process misused, e.g.,* willfully filing the complaint in the improper venue to discourage an appearance by plaintiff].

8. The ulterior motive and purpose of defendant in so misusing the process in the above-described manner was to obtain the following collateral advantage over the plaintiff: _____ [*describe collateral advantage sought by defendant, e.g.,* to force a default and obtain a default judgment pursuant to which plaintiff would be required to pay money disputed by plaintiff to be due defendant].

9. As a proximate result of defendant's above-described actions, plaintiff has suffered general damages.

[10. At all times mentioned herein, defendant _____ (*name of attorney*) acted willfully with the wrongful intention of injuring plaintiff and from an improper or evil motive amounting to malice in that _____ (*specify facts constituting malice*). Plaintiff is thus entitled to recover punitive damages from defendant.]

[*Prayer. See§ 76.410* .]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See§ 76.380.*]

[2] Use of Form

This form is a complaint for damages for use in an abuse of process action. With appropriate modification, this form may be used as a cross-complaint in the same action in which the abuse of process occurred [*see White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 347, 66 Cal. Rptr. 697, 438 P.2d 345* (claim for abuse of process based on excessive attachment properly raised as cross-complaint in action to recover money owed)].

[3] Elements

To establish a cause of action for abuse of process, a plaintiff must plead and prove (1) an ulterior purpose on the part of the defendant, and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings [*Barquis v. Merchants Collection Ass'n (1972) 7 Cal. 3d 94, 103-104, 101 Cal. Rptr. 745, 496 P.2d 817* ; *Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 465-466, 72 Cal. Rptr. 344, 446 P.2d 152]* . In an action for abuse of process, unlike in an action for malicious prosecution, it is unnecessary for the plaintiff to prove either that the proceeding has terminated in his or her favor or that it was obtained without probable cause or in the course of a proceeding begun without probable cause [*Clark Equip. Co. v. Wheat (1979) 92 Cal. App. 3d 503, 526, 154 Cal. Rptr.*

874] .

[4] Cross References

For discussion of and forms for alleging a cause of action for malicious prosecution, see Ch. 357, *Malicious Prosecution and Abuse of Process*

[5] California Torts

For discussion of the cause of action for abuse of process, see California Torts, Ch. 43 (Matthew Bender)

[6] Decisions

Elements of cause of action as being (1) employment of legal process for ulterior purpose, and (2) willful act in use of process not proper in regular conduct of proceedings. *Ion Equip. Corp. v. Nelson (1980) 110 Cal. App. 3d 868, 876, 168 Cal. Rptr. 361* ; *Clark Equip. Co. v. Wheat (1979) 92 Cal. App. 3d 503, 524, 154 Cal. Rptr. 874* ; *Christensen v. Younger (1975) 47 Cal. App. 3d 613, 617-618, 120 Cal. Rptr. 923*

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7-76 California Forms of Pleading and Practice--Annotated § 76.456

AUTHOR: GEORGE M. LINDAHL

§ 76.456 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] and Injunctive Relief [Civ. Code § 3422]--Abuse of Process Based on Wrongful Garnishment of Wages

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] and Injunctive Relief [Civ. Code § 3422]--Abuse of Process Based on Wrongful Garnishment of Wages

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR
vs.	)	DAMAGES AND
_____ [*name*],	)	INJUNCTIVE RELIEF
Defendant(s).	)	(Abuse of Process)
	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Residence of negligent attorney*. *See§ 76.380, Paragraph 1*.]

[2. *Capacity and principal place of business of law firm*. *See§ 76.360* .]

[3. *Fictitious name allegations, if appropriate. See§ 76.381, Paragraph 3.*]

[4. *Agency allegations, if appropriate. See§ 76.360* .]

[5. *Professional status of defendant. See§ 76.380, Paragraph 3.*]

6. Defendant _____ [*name*], as attorney for plaintiff in a prior action, obtained a judgment in the approximate amount of $_____ against plaintiff; the consideration for the debt that is the basis of that judgment is _____ [*specify consideration, e.g.,* attorney's fees due defendant herein]. The prior judgment is action No. _____ in the _____ [*specify*] Court, _____ County, California.

7. Thereafter, plaintiff called on defendant and offered to pay the amount of that prior judgment and costs at the rate of $_____ per _____ [*stipulate period*], which offer was rejected.

8. The defendant at all times mentioned herein has been aware that plaintiff is the head of a household, that he/she is the sole support of _____ [*number*] children living in the same house, and that all earnings of plaintiff are necessary for the support of plaintiff and dependent children and are exempt pursuant to *Code of Civil Procedure Section 706.051*. Despite this knowledge, defendant has caused a garnishment of plaintiff's wages to be made by execution on the prior judgment on or about _____ [*date*].

9. The garnishment was caused to be issued by defendant, despite such knowledge, with malice and the intent to cause plaintiff embarrassment with his/her employer, and to cause such a relationship with that employer as to wrongfully force plaintiff to pay that judgment out of the proceeds of his/her wages to avoid discharge from employment because of the harassment and inconvenience to the employer resulting from the garnishment.

10. As a proximate result of the conduct set forth above, plaintiff suffered mental distress and became highly nervous and unable to properly perform his/her duties at his/her place of employment, thus jeopardizing his/her job. Plaintiff has thereby been damaged in his/her place of employment.

11. In doing the aforementioned acts, the defendant acted maliciously, willfully, and with specific intent to damage plaintiff and endanger his/her employment. By reason thereof, plaintiff is entitled to exemplary and punitive damages.

12. Only $_____ of plaintiff's wages are subject to garnishment each week. Unless restrained by the court, each week defendant will attempt to garnish all of plaintiff's wages in an effort to collect the entire judgment of $_____. This will necessitate the repeated filing by plaintiff of exemption claims and thus cause plaintiff and plaintiff's employer further annoyance and harassment and, consequently, further endanger plaintiff's employment.

13. Plaintiff has no defense to these practices, has no adequate remedy at law, and would suffer permanent and unconscionable damages by their continuance unless the defendant is enjoined and restrained from continuing the practice of garnishing the wages of the head of a family for a debt not incurred for a necessary of life.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a temporary injunction staying garnishments during the pendency of this action until this matter is decided and for a temporary restraining order staying such garnishments until a hearing may be had on the application for such temporary injunction.

2. For a permanent injunction against defendant restraining him/her from garnishing by writ of exeution the wages due

defendant.

3. For general damages.

4. For punitive damages.

5. For costs of suit herein incurred.

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See§ 76.380.*]

[2] Use of Form

This form is for use if the plaintiff alleges abuse of process as a result of the defendant's garnishment of wages exempt under *Code Civ. Proc. 706.051*, and seeks to recover damages and to enjoin the defendant from continuing the practice.

[3] Cross References

For a related form, *see § 76.455*

For alleging second cause of action for unfair collection when collection agency is joined as defendant, see Ch. 357, *Malicious Prosecution and Abuse of Process*

[4] State Statutes

Injunctions. *Civ. Code §§ 3420-3423*

Exemption from garnishment of earnings necessary for support of judgment debtor and family. *Code Civ. Proc. § 706.051*

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7-76 California Forms of Pleading and Practice--Annotated § 76.457

AUTHOR: GEORGE M. LINDAHL

§ 76.457 Demurrer [Code Civ. Proc. § 430.10 et seq.]--Abuse of Process Claim--No Improper Use of Process Alleged

[1] FORM Demurrer [Code Civ. Proc. § 430.10 et seq.]--Abuse of Process Claim--No Improper Use of Process Alleged

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	GENERAL DEMURRER
_____ [*name*],	)	[Amount demanded _____ (exceeds
Defendant(s).	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Defendant demurs to the complaint on the ground that _____ [*designate cause of action or count number, e.g.,* the complaint *or* the First Cause of Action] does not state facts sufficient to constitute a cause of action because it fails to allege that _____ [*describe nature of process allegedly abused*] was used for an improper purpose.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Use of Form

This form is for use by a defendant to demur to a complaint for abuse of process when the objection that plaintiff has failed to state facts sufficient to constitute a cause of action appears on the face of the complaint or from matter of which the court is required to or may take judicial notice [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*]. This objection is based on the fact that plaintiff has failed to allege that the process in question was used for an improper purpose to obtain a collateral advantage over plaintiff [*see Golden v. Dungan (1971) 20 Cal. App. 3d 295, 301-302, 97 Cal. Rptr. 577]* . With appropriate modifications, the form may be used in response to a cross-complaint.

[3] Attachments

A notice of hearing and a memorandum of points and authorities in support of each ground of demurrer must be filed and served with a demurrer [*Cal. Rules of Ct., Rules 3.1113(a), 3.1320(c)*].

[4] Cross References

For a related form, see *§ 76.455*

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7-76 California Forms of Pleading and Practice--Annotated § 76.458

AUTHOR: GEORGE M. LINDAHL

§ 76.458 Demurrer [Code Civ. Proc. § 430.10 et seq.]--Abuse of Process Claim--No Action Taken Pursuant to Judicial Authority

[1] FORM Demurrer [Code Civ. Proc. § 430.10 et seq.]--Abuse of Process Claim--No Action Taken Pursuant to Judicial Authority

[*Caption. See§ 76.457.*]

Defendant demurs to the complaint on the ground that _____ [*designate cause of action or count number, e.g.*, the complaint *or* the First Cause of Action] does not state facts sufficient to constitute a cause of action because it fails to allege that defendant took any action pursuant to judicial authority.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

This form is for use by a defendant to object to a complaint for abuse of process when the objection that plaintiff has failed to state facts sufficient to constitute a cause of action appears on the face of the complaint or from matter of which the court is required to or may take judicial notice [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*]. This objection is based on the fact that the action complained of was not taken pursuant to judicial authority and thus was not "process" as contemplated by the tort of abuse of process [*see Meadows v. Bakersfield Sav. & Loan Ass'n (1967) 250 Cal. App. 2d 749, 753, 59 Cal. Rptr. 34]* . With appropriate modifications, the form may be used in response to a cross-complaint.

[3] Cross References

For related forms, see *§§ 76.455, 76.457*

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7-76 California Forms of Pleading and Practice--Annotated § 76.459

AUTHOR: GEORGE M. LINDAHL

§ 76.459 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Fraud and Deceit [Civ. Code § 1710] by Attorney--Nondisclosure

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Fraud and Deceit [Civ. Code § 1710] by Attorney--Nondisclosure

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR
_____ [*name*],	)	DAMAGES (Deceit)
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Residence of negligent attorney*. *See§ 76.380, Paragraph 1*.]

[2. *Capacity and principal place of business of law firm*. *See§ 76.360* .]

[3. *Fictitious name allegations, if appropriate*. *See§ 76.381, Paragraph 3*.]

[4. *Agency allegations, if appropriate. See§ 76.360* .]

[5. *Professional status of defendant. See§ 76.380, Paragraph 3*.]

6. _____ [*Allege facts concerning transaction as to which material facts were suppressed, e.g.,* On or about _____ (*date*), in connection with his/her representation of _____ (*name of client*) for the sale of _____ (*description of property*) owned by _____ (*name of client*), defendant met with plaintiff at the office of _____ (*name of client*) located at _____ (*address*) to discuss the details of a proposed purchase by plaintiff of the aforesaid property].

7. _____ [*Allege facts showing the suppression of a material fact by defendant attorney to plaintiff in connection with the above-described transaction, e.g.,* During that discussion defendant did not reveal to plaintiff the existence of a report that the foundation of the building on the aforesaid property had been seriously damaged by earth movement.]

8. At the time defendant failed to disclose the above-described facts to plaintiff, he/she knew that these facts existed and _____ [deliberately concealed them from plaintiff *and/or* further knew that these facts were not known to plaintiff and were not reasonably discoverable by plaintiff because _____ (*allege facts establishing that defendant knew plaintiff was not aware of suppressed facts and that they were not reasonably discoverable by plaintiff*)].

9. The suppression of the information that _____ [*specify nature of suppressed information*] was likely to mislead plaintiff and did in fact mislead plaintiff.

10. Defendant made the aforesaid representations and suppressed the aforesaid facts with the intent to induce plaintiff to _____ [*specify action that defendant intended to induce*] in reliance thereon.

11. Plaintiff, at the time these failures to disclose and suppressions of fact occurred, and at the time plaintiff took the actions herein alleged, was ignorant of the existence of the facts that defendant suppressed and failed to disclose. If plaintiff had been aware of the existence of the facts not disclosed by defendant, plaintiff would not have _____ [*specify actions taken by plaintiff in reliance on defendant*].

[12. _____ (*Allege facts showing plaintiff's reliance was justified if this is not apparent from the other facts already stated*).]

13. As a proximate result of defendant's fraud and deceit and the facts herein alleged, plaintiff was _____ [*allege facts showing allowable damages, e.g.,* induced to expend _____ (*number*) hours of his/her time and energy in an attempt to derive a profit from the use of the aforesaid equipment leased to plaintiff by _____ (*name*), defendant's client, but has received no profit or other compensation for his/her time and energy], by reason of which plaintiff has been damaged.

[14. _____ (*Allege attorney's fees if appropriate, e.g.,* As a further proximate result of defendant's fraud and deceit and the facts herein alleged, plaintiff occurred costs as attorney's fees in _____ (*describe nature of legal services necessitated as a result of defendant's fraud*)).]

[*EITHER, if fraud is alleged to be a basis for an award of exemplary damages*]

[15. Defendant intentionally concealed the aforesaid material fact(s) known to the defendant wth the intention of

thereby depriving the plaintiff of _____ (property *and/or* legal rights) (and causing _____ *specify other injury intended by defendant*), and plaintiff is entitled to punitive damages.]

[*AND/OR, if malice is alleged to be a basis for an award of exemplary damages*]

[15. In doing the acts herein alleged, defendant acted with malice in that his/her conduct was carried on with a conscious disregard of plaintiff's rights, and plaintiff is entitled to punitive damages.]

[*AND/OR, if oppression is alleged to be a basis for an award of exemplary damages*]

[15. In doing the acts herein alleged, defendant subjected plaintiff to cruel and unjust hardship in conscious disregard of plaintiff's rights, and plaintiff is entitled to punitive damages.]

[*CONTINUE*]

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages;

2. For damages for _____ [*specify*];

[3. For punitive damages;]

4. For costs of suit incurred herein; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See§ 76.380.*]

[2] Use of Form

This form is for use in an action for fraud and deceit by an attorney in which the actionable fraud alleged consists of the suppression of a material fact that the attorney was bound to disclose.

[3] California Torts

For discussion of the cause of action for fraud or deceit, see California Torts, Ch. 40 (Matthew Bender)

[4] State Statutes

Attorney's intentional deceit of parties to litigation as misdemeanor. *Bus. & Prof. Code § 6128(a)*

Elements of actionable fraud or deceit. *Civ. Code §§ 1709, 1710*

[5] Decisions

Attorney representing seller of real property as not required to disclose known defects to buyer. *Heliotis v. Schuman (1986) 181 Cal. App. 3d 646, 650-651, 226 Cal. Rptr. 509*

Elements of action against attorney for fraud and misrepresentation as being (1) misrepresentation, (2) knowledge of falsity, (3) intent to defraud, (4) justifiable reliance, and (5) resulting damages, each pleaded with sufficient factual specificity to allow defendant to understand charges. *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz (1976) 57 Cal. App. 3d 104, 109, 128 Cal. Rptr. 901*

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7-76 California Forms of Pleading and Practice--Annotated § 76.460

AUTHOR: GEORGE M. LINDAHL

§ 76.460 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Fraud and Deceit [Civ. Code § 1710] by Attorney--Misrepresentation of Law

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Fraud and Deceit [Civ. Code § 1710] by Attorney--Misrepresentation of Law

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR
_____ [*name*],	)	DAMAGES (Deceit)
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Residence of negligent attorney*. *See§ 76.380, Paragraph 1*.]

[2. *Capacity and principal place of business of law firm*. *See§ 76.360* .]

[3. *Fictitious name allegations, if appropriate*. *See§ 76.381, Paragraph 3*.]

[4. *Agency allegations, if appropriate. See§ 76.360* .]

[5. *Professional status of defendant. See§ 76.380, Paragraph 3*.]

6. _____ [*Allege facts concerning transaction as to which a misrepresentation of law was made by defendant, e.g.,* On or about _____ (*date*), at defendant's request, plaintiff met with defendant at his/her office located at _____ (*address*), to discuss _____ (*specify nature of transaction, e.g.,* a proposed lease of _____ (*nature of property to be leased*) from _____ (*name*), defendant's client)].

7. _____ [*Allege facts regarding misrepresentation of law made by defendant, e.g.,* At the above-mentioned meeting, defendant falsely represented to plaintiff that any sums paid by plaintiff to defendant's client, _____ (*name*), for the lease of the aforesaid property would be deductible from gross income pursuant to regulations promulgated by the Internal Revenue Service, with which defendant claimed to be familiar.]

8. Defendant made the aforesaid misrepresentation of law with the intent to induce plaintiff to _____ [*specify action that defendant intended to induce, e.g.,* enter into a long-term lease of the property] in reliance thereon.

9. Plaintiff has no education in the law, and had no prior experience with regard to _____ [*specify area of law*] as it relates to _____ [*specify nature of transaction about which misrepresentation was made*].

10. Plaintiff, at the time these misrepresentations were made, and at the time plaintiff took the actions herein alleged, was ignorant of the true nature of the law with regard to _____ [*specify*]. If plaintiff had been aware of the true nature of the law, plaintiff would not have _____ [*specify actions taken by plaintiff in reliance on defendant*].

[11. _____ (*Allege facts showing plaintiff's reliance was justified if this is not apparent from the other facts already stated*)].

[*Damages. See§ 76.459, Paragraphs 13-15.*]

[*Prayer for relief. See§ 76.459.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See§ 76.380.*]

[2] Use of Form

This form is for use in an action for fraud and deceit committed by an attorney in which the actionable fraud consists of a misrepresentation of law.

[3] Decisions

Attorney as liable to nonclient third party for negligent misrepresentation. *Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices (1989) 207 Cal. App. 3d 1277, 1284-1285, 255 Cal. Rptr. 483* (liability to client's mortgage

broker); *Courtney v. Waring (1987) 191 Cal. App. 3d 1434, 1443-1444, 237 Cal. Rptr. 233* (liability to client's franchisees); *Cicone v. URS Corp. (1986) 183 Cal. App. 3d 194, 210, 227 Cal. Rptr. 887* (liability to other attorney for misrepresentations made on behalf of client in connection with business transaction.)

[4] Cross References

For a related form, see *§§ 76.459*

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7-76 California Forms of Pleading and Practice--Annotated § 76.461

AUTHOR: GEORGE M. LINDAHL

§ 76.461 Allegation in Fraud Action [Civ. Code § 1710]--Excuse for Late Discovery of Fraud

[1] FORM Allegation in Fraud Action [Civ. Code § 1710]--Excuse for Late Discovery of Fraud

The plaintiff did not learn of the aforesaid facts constituting the defendant's fraud until _____ [*date*], when _____ [*describe circumstances under which plaintiff actually discovered the fraud*].

The plaintiff lacked the means of obtaining knowledge of the aforesaid fraudulent acts prior to the above date because _____ [*specify*].

[2] Use of Form

This form may be used by the plaintiff in a fraud action when it is apparent from the face of the pleading that the three-year statute of limitations [*see Code Civ. Proc. § 338(d)*] has run since the facts constituting fraud occurred, and the plaintiff claims that a late discovery exception excuses his or her failure to learn of the fraud within the statutory period.

[3] Reasonable Diligence Requirement

Despite the statutory provision that an action for fraud does not accrue until the aggrieved party has "discovered the facts constituting the fraud" [*see Code Civ. Proc. § 338(d)*], many cases qualify this rule by requiring that the plaintiff use reasonable diligence to discover the true facts if he or she has reason to suspect fraud [*see, e.g., Sun'N Sand, Inc. v. United Cal. Bank (1978) 21 Cal. 3d 671, 701-702, 148 Cal. Rptr. 329, 582 P.2d 920]* . For further discussion, see *§ 76.200[4]*.

[4] California Torts

For discussion of the cause of action for fraud or deceit, see California Torts, Ch. 40 (Matthew Bender)

[5] State Statutes

Three-year statute of limitations for bringing suit for fraud. *Code Civ. Proc. § 338(d)*

[6] Decisions

Plaintiff as required to use reasonable diligence to discover true facts if having reason to suspect fraud. *Sun'N Sand, Inc. v. United Cal. Bank (1978) 21 Cal. 3d 671, 701-702, 148 Cal. Rptr. 329, 582 P.2d 920* ; *Hobart v. Hobart Estate Co. (1945) 26 Cal. 2d 412, 437, 159 P.2d 958*

If plaintiff has no reason to suspect fraud, right of action as not accruing until actual discovery of facts constituting fraud. *Hobart v. Hobart Estate Co. (1945) 26 Cal. 2d 412, 439, 159 P.2d 958* ; *see also Snow v. A.H. Robins Co. (1985) 165 Cal. App. 3d 120, 131-135, 211 Cal. Rptr. 271*

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Chapter 76 ATTORNEY PROFESSIONAL LIABILITY
PART IV. FORMS
B. Liability to Nonclients
1. Bases of Liability

7-76 California Forms of Pleading and Practice--Annotated § 76.462

AUTHOR: GEORGE M. LINDAHL

§ 76.462 Petition and Supporting Declaration for Order Allowing Plaintiff to File Pleading Based on Attorney-Client Conspiracy [Civ. Code § 1714.10]

[1] FORM Petition and Supporting Declaration for Order Allowing Plaintiff to File Pleading Based on Attorney-Client Conspiracy [Civ. Code § 1714.10]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR ORDER ALLOWING PLAINTIFF
_____ [*name*],	)	TO FILE PLEADING AGAINST ATTORNEY
Petitioner,	)	BASED ON
vs.	)	ATTORNEY-CLIENT
_____ [*name*],	)	CONSPIRACY AND
Respondent.	)	SUPPORTING
	)	DECLARATION
	)	[*Civ. Code § 1714.10*]
	)	Date: _____
	)	Time: _____
		Location: _____

_____

Petitioner _____ [*name*] respectfully represents:

1. Petitioner _____ [*name*] seeks to file a _____ [*specify pleading, e.g.,* complaint] against _____ [*name of attorney defendant*], including a cause of action for civil conspiracy between _____ [*name of attorney defendant*] and his/her client _____ [*name of attorney's client*].

2. There is a reasonable probability that petitioner will prevail in the above-described action against _____ [*name of attorney defendant*] in that _____ [*set forth reasons why petitioner is likely to prevail in action against defendant for civil conspiracy*].

3. A copy of the proposed _____ [*specify pleading, e.g.,* complaint] is attached hereto as Exhibit A and made a part hereof.

WHEREFORE, petitioner prays for an order allowing petitioner to file the proposed _____ [*specify pleading, e.g.,* complaint] attached hereto.

_____ [*signature*]
_____ [*typed name*]
Petitioner
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner_____ [*name*]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*petitioning party*) *or other statement as appropriate*].

2. _____ [*Set forth with specificity the facts on which the attorney's liability is based*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form is for use by a petitioner to obtain judicial authorization to file a complaint or other pleading when the pleading includes a cause of action based on an alleged conspiracy between an attorney and that attorney's client [*see Civ. Code § 1714.10*].

[3] Attachments

The petition must be accompanied by the proposed pleading and supporting affidavits (or declarations under *Code Civ. Proc. § 2015.5*) stating the facts on which the attorney's liability is based [*Civ. Code § 1714.10*].

[4] Response

The court must order service of the petition on the party against whom the action is proposed to be filed and permit that party to submit opposing affidavits prior to making its determination [*Civ. Code § 1714.10*].

[5] Limitations Tolled

The filing of the petition, proposed pleading, and accompanying affidavits tolls the running of any applicable statute of limitations until the final determination of the matter by the court [*Civ. Code § 1714.10*].

[6] State Statutes

Court order required to file pleading alleging civil conspiracy between attorney and client. *Civ. Code § 1714.10*

Form for certifications made under penalty of perjury. *Code Civ. Proc. § 2015.5*

[7] Decisions

Elements of action for civil conspiracy as being formation and operation of conspiracy and damage resulting to plaintiff from act or acts done in furtherance of common design. *Mox Inc. v. Woods (1927) 202 Cal. 675, 677, 262 P. 302* ; *Barney v. Aetna Cas. & Sur. Co. (1986) 185 Cal. App. 3d 966, 981, 230 Cal. Rptr. 215*

Civil conspiracy defined as combination of two or more persons to accomplish by concerted action criminal or unlawful purpose or lawful purpose by criminal or unlawful means. *Parkinson Co. v. Building Trades Council (1908) 154 Cal. 581, 593, 98 P. 1027*

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7-76 California Forms of Pleading and Practice--Annotated §§ 76.463-76.479

AUTHOR: GEORGE M. LINDAHL

[Reserved]

§§ 76.463[Reserved]

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2. Defenses

7-76 California Forms of Pleading and Practice--Annotated § 76.480

AUTHOR: GEORGE M. LINDAHL

§ 76.480 Demurrer [Code Civ. Proc. § 430.10 et seq.] to Complaint [Code Civ. Proc. § 425.10] for Legal Malpractice--Actions Brought by Will Beneficiaries--Action Barred by Statute of Limitations

[1] FORM Demurrer [Code Civ. Proc. § 430.10 et seq.] to Complaint [Code Civ. Proc. § 425.10] for Legal Malpractice--Actions Brought by Will Beneficiaries--Action Barred by Statute of Limitations

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	DEMURRER TO
_____ [*name*],	)	COMPLAINT
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Defendant demurs to the complaint on the ground that it appears on the face of the complaint and from the record in the matter of _____ [*title of action*] that the action is barred by the statute of limitations in that the testator of the will that is the subject of the action died on _____ [*date*], and the action against defendant was not brought until _____ [*date*].

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Use of Form

This form may be used by a defendant in a malpractice action, brought by an intended beneficiary of a will drafted by the defendant, to demur to the complaint when it is apparent from the face of the complaint or from matter of which the court is required to or may take judicial notice [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*] that the action was instituted more than four years after the death of the testator [*see Code Civ. Proc. § 340.6(a)*].

[3] Attachments

A notice of hearing and a memorandum of points and authorities in support of each ground of demurrer must be filed and served with a demurrer [*Cal. Rules of Ct., Rules 3.1113(a), 3.1320(c)*].

[4] Cross References

For demurrers generally and appropriate forms of demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

[5] California Points and Authorities

For memoranda of points and authorities supporting and opposing motions for summary judgment on the issue of the statute of limitations, see California Points and Authorities, Ch. 24, *Attorneys at Law* (Matthew Bender)

For memoranda of points and authorities related to the special defense that the action for malpractice is barred by the relevant statute of limitations, see California Points and Authorities, Ch. 143, *Limitation of Actions* (Matthew Bender)

[6] State Statutes

Statute of limitations for legal malpractice actions. *Code Civ. Proc. § 340.6*

[7] Decisions

Limitations period for malpractice action by intended will beneficiary as starting from date of testator's death, when negligent failure to perfect requested testamentary scheme becomes irremediable and impact of injury occurs. *Heyer v. Flaig (1969) 70 Cal. 2d 223, 230-231, 74 Cal. Rptr. 225, 449 P.2d 161* (decided before enactment of *Code Civ. Proc. § 340.6*, which now governs attorney malpractice actions)

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7-76 California Forms of Pleading and Practice--Annotated § 76.481

AUTHOR: GEORGE M. LINDAHL

§ 76.481 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Malicious Prosecution Action--Waiver of Action by Request for Defense Costs Under Code Civ. Proc. § 1038

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Malicious Prosecution Action--Waiver of Action by Request for Defense Costs Under Code Civ. Proc. § 1038

AS A SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

Plaintiff waived his/her right to seek damages for malicious prosecution by requesting defense costs pursuant to *Section 1038 of the Code of Civil Procedure* on or about _____ [*date*], which costs were incurred in opposing a prior proceeding _____ [under the California Tort Claims Act, *Government Code Sections 810-996.6*, *or* for indemnity *or* for contribution] claimed by plaintiff to have been brought in bad faith and without reasonable cause.

[2] Use of Form

This form may be used by the defendant in a malicious prosecution action to assert the affirmative defense that, pursuant to *Code Civ. Proc. § 1038(c)*, the plaintiff waived his or her right to seek damages for malicious prosecution by requesting defense costs incurred in opposing a prior proceeding brought under the California Tort Claims Act [*see Gov. Code §§ 810-996.6*] or for indemnity or contribution in any civil action that the plaintiff claimed had been brought in bad faith and without reasonable cause.

[3] Cross References

For discussion of and forms for alleging a cause of action for malicious prosecution, see Ch. 357, *Malicious Prosecution and Abuse of Process*

[4] State Statutes

Waiver of right to seek damages for malicious prosecution. *Code Civ. Proc. § 1038(c)*

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7-76 California Forms of Pleading and Practice--Annotated § 76.482

AUTHOR: GEORGE M. LINDAHL

§ 76.482 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Malicious Prosecution Action--Action Barred by Defense of Unclean Hands

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Malicious Prosecution Action--Action Barred by Defense of Unclean Hands

AS A SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

The plaintiff is not entitled to the relief requested in the complaint in this action because the plaintiff does not come to court with clean hands. Specifically, _____ [*specify facts of plaintiff's wrongdoing that bar action*].

[2] Use of Form

This affirmative defense, alleging that the plaintiff's action is barred because the plaintiff comes to the action with unclean hands, is for use in an answer to a complaint for malicious prosection.

[3] Cross References

For discussion of and forms for alleging a cause of action for malicious prosecution, see Ch. 357, *Malicious Prosecution and Abuse of Process*

[4] Decisions

In malicious prosecution action, plaintiff insurance agent's failure to disclose critical evidence in original indemnity action, which evidence might have changed outcome of indemnity action, as supporting equitable defense of unclean

hands raised by defendant insurer. *Pond v. Insurance Co. of N. Am. (1984) 151 Cal. App. 3d 280, 289-290, 198 Cal. Rptr. 517*

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7-76 California Forms of Pleading and Practice--Annotated § 76.483

AUTHOR: GEORGE M. LINDAHL

§ 76.483 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Abuse of Process Action--Absolute Privilege Under Civ. Code § 47(b)

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Abuse of Process Action--Absolute Privilege Under Civ. Code § 47(b)

AS A SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

The _____ [use of the process that plaintiff claims was abused *or* the statement that plaintiff claims demonstrates the abuse of process] was a publication made in the course of the proceedings before the court and thus was absolutely privileged under *Section 47(b) of the Civil Code*.

[2] Use of Form

This form is for use by a defendant to allege that the use of process that plaintiff claims was abused was protected by the absolute privilege of *Civ. Code § 47(b)* for publications made in the course of judicial proceedings.

[3] Cross References

For discussion of and forms for alleging a cause of action for malicious prosecution, see Ch. 357, *Malicious Prosecution and Abuse of Process*

[4] State Statutes

Litigation privilege for use against actions for negligent misrepresentations. *Civ. Code § 47(b)*

[5] Decisions

Attorney threatening plaintiff with nonexistent arrest warrant in attempt to deceive plaintiff and gain advantage over her, in apparent violation of *Bus. & Prof. Code § 6128* (deceit of party is misdemeanor) as not privileged under *Civ. Code § 47(b)*. *Carney v. Rotkin, Schmerin & McIntyre (1988) 206 Cal. App. 3d 1513, 1522-1523, 254 Cal. Rptr. 478*

Oral and written statements by defendant attorneys, made in underlying litigation in which attorneys represented insurance company, that insurance company was "financially as sound as a dollar," although false when made, as privileged pursuant to judicial proceedings privilege. *Portman v. George McDonald Law Corp. (1979) 99 Cal. App. 3d 988, 991, 160 Cal. Rptr. 505*

Threat of suit for securities law violations in letter sent before filing of action as privileged under former *Civ. Code § 47(2)* (now *Civ. Code § 47(b)*). *Lerette v. Dean Witter Org., Inc. (1976) 60 Cal. App. 3d 573, 576-579, 131 Cal. Rptr. 592*

Elements of absolute judicial privilege under *Civ. Code § 47(b). see Tiedemann v. Superior Court (1978) 83 Cal. App. 3d 918, 924, 148 Cal. Rptr. 242* ; *Friedman v. Knecht (1967) 248 Cal. App. 2d 455, 460, 56 Cal. Rptr. 540*

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[4] Sale of Lots

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§ 77.22 Statute of Frauds

[1] Agreement Between Seller and Auctioneer

[2] Memorandum of Sale at Auction

[a] Auctioneer's Authority to Make

[b] Sale of Real Property

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§ 77.23 Enjoining Violations; Granting Restitution

§§ 77.24-77.29 [Reserved]

§ 77.30 Related Matthew Bender Publications

§ 77.31 State Statutes

[1] Agency

[2] Auction Sales of Goods

[3] Auctioneer

[4] Conversion

[5] Criminal Acts

[6] Limitation Periods

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§ 77.32 Decisions

[1] Auctioneer's Compensation

[2] Conversion

[3] Damages

[4] Fake Auction Sales

§ 77.33 Law Reviews

§§ 77.34-77.39 [Reserved]

§ 77.40 Complaint for Damages [Civ. Code § 3336] Based on Conversion--By Owner Against Auctioneer--Wrongful Auction Sale

[1] FORM

[2] Use of Form

[3] Allegations

[a] Defendant's Identity and Capacity

[b] Venue Facts

[c] Fictitiously Named Defendants

[d] Agency Allegation

[e] Plaintiff's Identity and Capacity

[f] Allegations for Conversion

[4] Verification

[5] Cross References

§ 77.41 Affirmative Defense to Owner's Conversion Complaint Against Auctioneer--Plaintiff Estopped to Assert Title

[1] FORM

[2] Use of Form

[3] Nature of Defense

[4] Cross References

§ 77.42 Complaint for Damages [Civ. Code § 3343] Based on Fraud [Civ. Code § 1709]--By Seller Against Auctioneer Buyer--Misrepresentation of Price Property Would Bring at Auction

[1] FORM

[2] Use of Form

[3] Allegations

[4] Measure of Damages

[5] Cross References

§ 77.43 Complaint for Restitution [Civ. Code § 1692] Based on Rescission of Auction Sale for Fraud [Civ. Code § 1689(b)(1)]--By Seller Against Buyer--Unlawful Agreement Not to Bid at Auction Sale

[1] FORM

[2] Use of Form

[3] Allegations

[4] Agreements by Bidders Not to Bid

[5] Cross References

§ 77.44 Complaint for Damages [Civ. Code § 3302] Based on Breach of Contract--By Seller Against Buyer--Failure to Pay Price of Property Bought at Auction

[1] FORM

[2] Use of Form

[3] Allegations

[4] Venue in Contract Actions

[5] Cross References

§§ 77.45through 77.49 [Reserved]

§ 77.50 Complaint for Damages [Civ. Code § 3281; Com. Code § 2714] Based on Breach of Warranty--By Buyer Against Seller--Warranty by Auctioneer [Civ. Code §§ 2323, 2362(3)]

[1] FORM

[2] Use of Form

[3] Auctioneer as Defendant

[4] Other Remedies Available to Buyer

[5] Allegations and Measure of Damages

[6] Cross References

§ 77.51 Complaint for Restitution [Civ. Code § 1692] Based on Rescission of Auction Sale for Fraud [Civ. Code § 1689(b)(1)] or Reformation Com. Code § 2328(4)]--By Buyer Against Seller and Auctioneer--Bidding By or On Behalf of Seller Without Notice

[1] FORM

[2] Use of Form

[3] Bases of Action

[a] Common Law

[b] Commercial Code

[4] Civil Code Remedy

[5] Allegations

[a] Basic Allegations

[b] Allegations for Punitive Damages

[c] Allegations for Rescission

[6] Price Reduction Example

[7] Jurisdiction and Venue

[8] Cross References

§ 77.52 Affirmative Defense to Complaint to Enforce Auction Sale--Bidding By or On Behalf of Seller Without

Notice [see Civ. Code § 1689(b)(1); Com. Code § 2328(4)]

[1] FORM

[2] Use of Form

[3] Nature of Defense

[4] Cross References

§§ 77.53-77.59 [Reserved]

§ 77.60 Complaint for Price of Goods Sold at Auction [Com. Code §§ 2328, 2709]--By Auctioneer Against Buyer

[1] FORM

[2] Use of Form

[3] Commercial Code Remedies

[4] Allegations

[5] Cross References

§ 77.61 Complaint for Damages [Civ. Code § 3302] Based on Breach of Contract--By Auctioneer Against Seller--For Compensation

[1] FORM

[2] Use of Form

[3] Allegation Regarding License and Bond

[4] Contract Allegations

[5] Cross References

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7-77 California Forms of Pleading and Practice--Annotated § 77.01

§ 77.01 Scope of Chapter

This chapter covers voluntary sales at auction. Other chapters in this publication that cover specific types of involuntary and voluntary auctions are listed in § 77.02.

This chapter discusses the general principles governing auctions [*see § 77.10* et seq.] and provides the following forms:

- A complaint damages for wrongful sale based on conversion [*see § 77.40*] and an affirmative defense based on estoppel to assert title [*see § 77.41*].

- A complaint damages for misrepresentation of the price property is expected to bring [*see § 77.42*].

- A complaint for restitution based on rescission for fraud because of an unlawful agreement not to bid at an auction [*see § 77.43*].

- A complaint by the seller against the buyer for damages for failure to pay for property bought at auction [*see § 77.44*].

- A complaint damages for breach of warranty [*see § 77.50*].

- A complaint for restitution based on rescission or reformation because of bidding by or on behalf of the seller without notice [*see § 77.51*] and an affirmative defense to such an action [*see § 77.52*].

- A complaint for by the auctioneer against the buyer for the price of goods sold [*see § 77.60*].

- A complaint for by the auctioneer against the seller for breach of contract [*see § 77.61*].

Legal Topics:

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

Contracts LawSales of GoodsAuction Sales

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§ 77.02 Cross References

Other chapters in this publication cover various specific types of involuntary sales that are required or allowed by law to be made at auction:

- For discussion and forms relating to enforcement of warehouseman's or carrier's liens, including by sale, see Ch. 213, *Documents of Title* , Pts. II and III

- For discussion and forms relating to sales of property under execution, see Ch. 254, *Executions and Enforcement of Judgments*

- For discussion of enforcement of a garageman's lien, see Ch. 274, *Garages and Gas Stations*

- For discussion and a form for notice of public auction of baggage or property to satisfy a judgment enforcing an innkeeper's lien, see Ch. 297, *Hotels and Motels*

- For forms relating to enforcement of various possessory liens by sale at auction, see *Ch. 342, Liens and Wage Preferences, § 342.10* et seq.

- For forms for notice of sale at public auction by referee, referee's return and report of sale at public auction, and other forms relating to enforcement of a judgment in a partition action by sale at auction, see *Ch. 397, Partition, § 397.80* et seq.

- For forms relating to enforcement of a creditor's security interest in property pledged as collateral, see Ch.503, *Sales: Secured Transactions*

- For forms relating to sale at auction pursuant to a power of sale in a deed of trust, see Ch. 555, *Trust Deeds and Real Property Mortgages*

Specific types of voluntary sales at auction are covered in the following chapters:

- For discussion and forms relating to bulk sales by auction, see *Ch. 270, Fraudulent Conveyances, § 270.100* et seq.

- For discussion and a form of notice of public auction of a tenant's abandoned property, see Ch. 332, *Landlord and Tenant: The Tenancy*

- For discussion and forms for notice of auction sales of lost and unclaimed property, see Ch. 355, *Lost and Unclaimed Property*

- For discussion and forms relating to auction sales by personal representatives of decedents' estates, see Ch. 455, *Probate: Sale of Estate Property* .

- For a discussion and forms relating to the law of agency, see Ch. 427, *Principal and Agent* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsDefaultForeclosure & RepossessionDisposition of Collateral

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[Reserved]

§§ 77.03[Reserved]

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7-77 California Forms of Pleading and Practice--Annotated § 77.10

§ 77.10 Governing Statutes

Bonding and other requirements for auctioneers and auctions of goods are governed by *Civ. Code § 1812.600 et seq.* Any waiver of those provisions is contrary to public policy, and is void and unenforceable [*Civ. Code § 1812.609*].

Conduct of auction sales of goods is also governed by *Com. Code § 2328*.

The statutory authority of an auctioneer is set out in *Civ. Code §§ 2362* and *2363*.

The practice of mock auctions is prohibited by *Penal Code § 535*.

Some statutes governing auction sales in particular circumstances are listed in the Research Guide, § 77.31.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Contract TermsSale by AuctionContracts LawSales of GoodsAuction Sales

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7-77 California Forms of Pleading and Practice--Annotated § 77.11

§ 77.11 Definitions

[1] "Auction"; "Goods"

"Auction" is defined by *Civ. Code § 1812.601(b)* as a sale transaction conducted by means of oral or written exchanges (which include exchanges made in person or through electronic media) between an auctioneer and the members of the auctioneer's audience, which exchanges consist of a series of invitations for offers for the purchase of goods made by the auctioneer and offers to purchase made by members of the audience and culminate in the acceptance by the auctioneer of the highest or most favorable offer made by a member of the participating audience. This statutory definition of auction does not include a sale of real estate or a sale in any sequence of real estate with personal property or fixtures or both in a unified sale pursuant to *Com. Code § 9604(a)(1)(B)* [*Civ. Code § 1812.601(b)*; for discussion of unified sales, see Ch. 503, *Sales: Secured Transactions*].

This definition of auction is consistent with prior case law, under which the auctioneer's putting up of the property is not an offer to sell the property (which the bidders can accept), but rather a solicitation of offers to purchase the property from those present [*Estate of Lynch (1923) 62 Cal. App. 687, 689-690, 217 P. 807* ; *10 Ops. Cal. Att'y Gen. 177, 178 (1947)]* .

"Goods" means any goods, wares, chattels, merchandise, or other personal property, including domestic animals and farm products [*Civ. Code § 1812.601(g)*; *cf. Com. Code §§ 2105(1), 9102(a)(44)* (for discussion, see *§ 77.22[2][c]*)].

More broadly, auction has been defined as a sale of property to the highest bidder, with freedom for competitive bidding. Although the phrase "public auction" is frequently used in statutes relating to auctions and auctioneers, at least one writer has questioned whether the word "public" adds anything to the force of the expression, since "auction" itself imports publicity. However, the terms "public auction" and "private auction" may be distinguished on the basis that any person may attend and bid at a public auction, whereas at a private auction only certain persons, or a certain class of persons, may attend and offer bids [*see* Black's Law Dictionary (4th ed)].

[2] "Auction Company"

"Auction company" means any person who arranges, manages, sponsors, advertises, accounts for the proceeds of, or

carries out auction sales at locations, including, but not limited to, any fixed location, including an auction barn, gallery place of business, sale barn, sale yard, sale pavilion, and the contiguous surroundings of each [*Civ. Code § 1812.601(c)*; *see Civ. Code § 1812.601(h)* (defining "person"; discussed under [4], *below*)].

[3] "Auctioneer"

"Auctioneer" means any individual who is engaged in, or who by advertising or otherwise holds himself or herself out as being available to engage in, the calling for, the recognition of, and the acceptance of, offers for the purchase of goods at an auction [*Civ. Code § 1812.601(d)*].

[4] "Employee"; "Employer"

"Employee" means an individual who works for an employer, is listed on the employer's payroll records, and is under the employer's control [*Civ. Code § 1812.601(e)*]. "Employer" means a person who employs an individual for wages or salary, lists the individual on the person's payroll records, and withholds legally required deductions and contributions [*Civ. Code § 1812.601(f)*; *see Civ. Code § 1812.601(h)* (defining "person" as individual, corporation, partnership, trust, including business trust, firm, association, organization, or any other form of business enterprise)].

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§ 77.12 Bonding Scheme Replaces Licensing

Between 1983 and July 30, 1993, auctioneers were regulated under a licensing scheme administered by the California Auctioneer Commission [*see* former *Bus. & Prof. Code § 5730 et seq.*], although there were also local licensing programs. On July 30, 1993, because of lack of funding for the Auctioneer Commissioner, former *Bus. & Prof. Code § 5730 et seq.* were suspended and became inoperative [Stats. 1993, ch. 255]. On October 11, 1993, former *Bus. & Prof. Code § 5730 et seq.* was repealed and replaced with a system set forth in *Civ. Code § 1812.600 et seq.* that does not provide for licensing, but sets forth statutory duties and violations and requires an auctioneer to maintain a $20,000 bond with the Secretary of State for the benefit of any person or persons damaged by the acts or omissions described in *Civ. Code § 1812.600(b)* [Stats. 1993, ch. 1170; for further discussion, *see § 77.13*].

In enacting Stats. 1993, ch. 1170, the Legislature intended to completely occupy the field of auctioneer licensing to preempt any local regulation affecting auctioneer licensing. Nevertheless, the fines authorized by *Civ. Code § 1812.600 et seq.* are to be paid to the county treasurer in the jurisdiction in which the fine or penalty is levied to be used exclusively for the benefit of the district attorney of that county [Stats. 1993, ch. 1170, § 4; *but see, e.g., Food & Agric. Code §§ 21731-21740, 21749, 21750* (licensing of public cattle salesyards)].

Civ. Code § 1812.600 et seq. only governs auction sales of personal property, not real property [*see Civ. Code § 1812.601(b)* (so defining auction)].

Legal Topics:

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

[1] Required as Condition of Doing Business

Before an auctioneer or auction company can conduct business, it must have a current surety bond in the amount of $20,000, issued by a surety company admitted to do business in California in favor of, and payable to, the people of the State of California for the benefit of any person or persons damaged by the acts or omissions described in *Civ. Code § 1812.600(b)* [*see* [2], *below*], and must have filed a copy of the bond with the Secretary of State [*Civ. Code § 1812.600(a), (b), (c)(1)*]. The surety must send written notice of the cancellation or termination of the bond to both the auctioneer or auction company and the Secretary of State 30 days prior to the cancellation or termination of the bond, identifying the bond and the date of cancellation or termination [*Civ. Code § 1812.600(c)(2)*]. An auctioneer or auction company that fails to obtain a new bond and file a copy of that bond with the Secretary of State by the effective date of the cancellation or termination of the former bond must cease to conduct any business unless and until a new bond is obtained and a copy of that bond is filed with the Secretary of State [*Civ. Code § 1812.600(c)(3)*].

Alternatively, the auctioneer or auction company may file a deposit in lieu of a bond as set forth in *Code Civ. Proc. § 995.710*[*Civ. Code § 1812.600(a), (d)*]. Any cash security in lieu of the surety bond formerly required and authorized by former *Bus. & Prof. Code § 5700 et seq.* must be transferred to, and maintained by, the Secretary of State [*Civ. Code § 1812.600(n)*].

[2] Beneficiaries

The bond is for the benefit of any person or persons damaged by any fraud, dishonesty, misstatement, misrepresentation, deceit, unlawful acts or omissions, or failure to provide the services of the auctioneer or auction company in performance of the auction by the auctioneer or auction company or its agents, representatives, or employees while acting within the scope of their employment [*Civ. Code § 1812.600(b)*; *see also Code Civ. Proc. § 995.850* (enforcement of bond)]. For discussion and forms for use in obtaining payment under the bond, see *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.40* et seq.

[3] Claims Against Deposit in Lieu of Bond

When a deposit is made in lieu of the bond, a person asserting a claim against the deposit establishes the claim by furnishing evidence to the Secretary of State of a money judgment entered by a court together with evidence that the claimant is a person described in *Civ. Code § 1812.600(b)* [*Civ. Code § 1812.600(d)(1)*]. Approval and payment of claims by the Secretary of State is done in accordance with *Civ. Code § 1812.600(e)-(k)*, which provides for approval of claims and accumulation of approved claims for payment by the Secretary of State every 240 days (beginning on the date of approval of the first claim) [*Civ. Code § 1812.600(f), (g)*]. If there are insufficient funds remaining in the deposit on the payment day, each approved claim is paid a pro rata share of the deposit [*Civ. Code § 1812.600(f)*].

A deposit made in lieu of the bond is not subject to attachment, garnishment, or execution with respect to an action or judgment against the auctioneer or auction company, other than as to that amount that is no longer needed or required for the purpose of *Civ. Code § 1812.600* which otherwise would be returned to the auctioneer or auction company by the Secretary of State [*Civ. Code § 1812.600(i)*].

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§ 77.14 Enforcement, Penalties, and Attorney's Fees

The Secretary of State enforces the provisions governing the filing and maintenance of bonds [*Civ. Code § 1812.600(p)*]. However, if an auctioneer fails to perform any of the duties specifically imposed on him or her by *Civ. Code § 1812.600 et seq.*, any person may maintain an action for enforcement of the duties or to recover a civil penalty in the amount of $1,000, or for both enforcement and recovery [*Civ. Code § 1812.600(l)*; *see also § 77.23, below*]. The prevailing plaintiff in an action under *Civ. Code § 1812.600(l)* is entitled to reasonable attorney's fees and costs, in addition to the civil penalties provided under *Civ. Code § 1812.600(e)* [*Civ. Code § 1812.600(m)*].

Except as otherwise provided by a specific provision of *Civ. Code § 1812.600 et seq.*, any person who violates any provision of *Civ. Code § 1812.600 et seq.* is guilty of a misdemeanor, which is punishable by a fine not exceeding $1,000, or by imprisonment in a county jail for not more than one year, or by both that fine and imprisonment. If a person is convicted of any violation of *Civ. Code § 1812.600 et seq.*, or of any crime related to the conduct of an auctioneer [*see, e.g., Penal Code §§ 436, 535*], the court may issue an injunction prohibiting that person from acting as an auctioneer or an auction company in California, in which case the court must inform the Secretary of State of that action [*Civ. Code § 1812.604*].

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§ 77.15 Auctioneer as Agent

An auctioneer is an agent for the transmission of property from the principal to another [*see Rogers v. Huie (1852) 2 Cal. 571, 573]* . The principal need not be the owner, but may be someone other than the owner, such as the holder of a mortgage [*see Williams v. Corker (1904) 144 Cal. 468, 470, 77 P. 1004* ; *see also* Civ. Code § 1861.608(d) (discussed under Auctioneer's Contract With Seller, Auctioneer, *below*)]. An auctioneer to whom the buyer has paid a deposit becomes a stakeholder for both buyer and seller, pending an examination of the seller's title [*Montgomery v. Pacific C.L. Bureau (1892) 94 Cal. 284, 290, 29 P. 640* (auction sale of real property); *see also Civ. Code § 1812.607(l), (m)* (discussed in *§ 77.20[3], below*)].

There is no statute expressly designating an auctioneer as an agent; however, in describing an auctioneer's authority to make warranties, *Civ. Code § 2362(3)* uses the language "in like manner with *other* agents to sell" (emphasis added). This language indicates that auctioneers are, at least, special agents [*see Civ. Code § 2297* ("An agent for a particular act or transaction is called a special agent.")].

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§ 77.16 Auctioneer's Liability for Acts of Its Agents, Employees

Every auctioneer who operates his or her own auction company as a sole proprietor, and every auction company, together with its owners, partners, and officers, that employs an auctioneer, is responsible for all violations committed by the auctioneer or by any company employee in the conduct of auction business. An auctioneer who is employed by an auctioneer or auction company is responsible for all violations of the title governing Auctioneers and Auction Companies (*Civ. Code § 1812.600 et seq.*) committed by him or her in the conduct of auction business [*Civ. Code § 1812.606*].

It is a violation of *Civ. Code § 1812.600 et seq.* for any auctioneer or auction company, or the company's owners, partners, and officers, to direct or knowingly permit any violation of that title by any auctioneer employed by or under contract with that auctioneer or auction company, or by any owner, partner, officer, agent, or employee of the auction company [*Civ. Code § 1812.606*; *see also* Civ. Code § 1861.608(e) (contract with employed auctioneer)].

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§ 77.17 Auctioneer's Statutory Authority

An auctioneer, in the absence of special authorization or usage to the contrary, has authority from the seller only as follows [*Civ. Code § 2362*]:

- To sell by public auction to the highest bidder.
- To sell for cash only, except such articles as are usually sold on credit at auction.
- To warrant, in like manner with other agents to sell, according to *Civ. Code § 2323*. Authority to sell personal property includes authority to warrant the title of the principal, and the quality and quantity of the property [*Civ. Code § 2323*].
- To prescribe reasonable rules and terms of sale [*see* Civ. Code § 1861.607(c),(k) (discussed in *§ 77.21[2], below*)].
- To deliver the thing sold, on payment of the price.
- To collect the price.
- To do whatever else is necessary, or proper and usual, in the ordinary course of business, for effecting these purposes.

An auctioneer has authority from a bidder at the auction, as well as from the seller, to bind both by memorandum of the contract, "as prescribed in the title on sale," which now refers to Division 2 of the Commercial Code [*Civ. Code § 2363*].

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§ 77.18 Statutory Standard for Auctioneer's Performance

In conducting the business of auctioneering, each auctioneer and auction company, and the company's owners, partners, officers, agents, and employees, are required to do all of the following [*Civ. Code § 1812.605*]:

- Follow all lawful requests of the owner or consignor of the goods being sold at auction with regard to the sale of those goods.

- Perform his or her duties so that the highest or most favorable offer made by a member of his or her audience is accepted, except to the extent that any item or sale is offered with reserve or subject to confirmation.

- Truthfully represent the goods to be auctioned.

- Otherwise perform his or her duties in accordance with California law.

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§ 77.19 Auctioneer's Contract With Seller

Before an auctioneer or auction company may sell goods at auction, the auctioneer or auction company must first entered into a written contract with the owner or consignor of the goods. The contract must set forth the terms and conditions on which the auctioneer or auction company accepts the goods for sale, and it is required to include all of the following [Civ. Code § 1812.608(d); *see also Civ. Code § 1812.606* (auctioneer or auction company responsible for acts of employees)]:

- The auctioneer's or auction company's name, trade or business name, business address, and business telephone number.

- An inventory of the item or items to be sold at auction.

- A description of the services to be provided and the agreed consideration for the services. This description must explicitly state which party will be responsible for advertising and other expenses.

- The approximate date or dates when the item or items will be sold at auction.

- A statement as to which party will be responsible for insuring the item or items against loss by theft, fire, or other means.

- A disclosure that the auctioneer or auction company has a bond on file with the Secretary of State.

Failure to enter into the required contract before selling goods at auction is a violation of the title governing auctioneers and auction companies (*Civ. Code § 1812.600 et seq.*) [*Civ. Code § 1812.608(d)*], as are failure to reduce to writing all amendments or addenda to the contract with an owner or consignor or an auctioneer [*Civ. Code § 1812.608(f)*], and failure to abide by the terms of any required written contract [*Civ. Code § 1812.608(g)*].

An auctioneer or auction company must also enter into a written contract with the auctioneer who is to conduct the auction before goods may be sold at auction without violating *Civ. Code § 1812.600 et seq.* [*see Civ. Code §*

1812.608(e)].

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§ 77.20 Auctioneer's Duties Regarding Records and Funds

[1] In General

Every auctioneer and auction company is required to keep and maintain, at the auctioneer's or auction company's address of record, complete and correct records and accounts pertaining to the auctioneer's or auction company's activity for a period of not less than two years. Those records are required to include all of the following [*Civ. Code § 1812.607(g)*]:

- The name and address of the owner or consignor and of any buyer of goods at any auction sale engaged in or conducted by the auctioneer or auction company.
- A description of the goods.
- The terms and conditions of the acceptance and sale of the goods.
- All written contracts with owners and consignors.
- Accounts of all moneys received and paid out, whether on the auctioneer's or auction company's own behalf or as agent, as a result of those activities.

Failure to keep the foregoing records is a violation of the title governing auctioneers and auction companies (*Civ. Code § 1812.600 et seq.*) [*Civ. Code § 1812.607(g)*].

Every auctioneer and auction company is required to maintain the funds of all owners, consignors, buyers, and other clients and customers, separate from his or her personal funds and accounts. Failure to segregate funds is a violation of *Civ. Code § 1812.600 et seq.* [*Civ. Code § 1812.607(j)*].

[2] Accounting and Payment of Proceeds to Seller

Within 30 working days after the sale transaction, an auctioneer or auction company must provide, or cause to be

provided, an account to the owner or consignor of all goods that are the subject of an auction engaged in or conducted by the auctioneer or auction company. Failure to provide this accounting is a violation of the title governing auctioneers and auction companies (*Civ. Code § 1812.600 et seq.*) [*Civ. Code § 1812.607(h)*].

Also within 30 working days after a sale transaction of goods, an auctioneer or auction company must pay or cause to be paid, all moneys and proceeds due to the owner or the consignor of all goods that were the subject of an auction engaged in or conducted by the auctioneer or auction company, unless delay is compelled by legal proceedings or the inability of the auctioneer or auction company, through no fault of his or her own, to transfer title to the goods or to comply with any provision of Civ. Code § 1812.600 et seq., the Commercial Code, the Code of Civil Procedure, or any other applicable provision of law. Failure to pay over proceeds as required is a violation of *Civ. Code § 1812.600 et seq.* [*Civ. Code § 1812.607(i)*]. A federal court interpreting the predecessor provision, former *Bus. & Prof. Code § 5775(m)*, held the provision to make the auctioneer only a debtor of the owner, not a bailee of the proceeds, reasoning that the auctioneer is not required to turn over the actual proceeds from the auctioned property, but only to remit the amount of the proceeds within 30 working days [U.S. v. Lawson (9th Cir. [Cal.] 1991) *925 F.2d 1207, 1209-1210* (use of proceeds to pay other consignors of auctioneer does not constitute conversion or theft of government property)].

[3] Return of Buyer's Deposit

Within two working days after an auction sale, an auctioneer or auction company must return the blank check or deposit of each buyer who purchased no goods at the sale. Failure to return a check or deposit is a violation of the title governing auctioneers and auction companies (*Civ. Code § 1812.600 et seq.*) [*Civ. Code § 1812.607(l)*].

If a buyer made a deposit that exceeds the cost of goods her or she purchased, the auctioneer or auction company is required, within 30 working days of any auction sale, to refund that portion of the deposit of each buyer that exceeds the cost of the goods purchased, unless delay is compelled by legal proceedings or the inability of the auctioneer or auction company, without fault, to transfer title to the goods or to comply with any provision of Civ. Code § 1812.600 et seq., the Commercial Code, the Code of Civil Procedure, or other applicable provisions of law, or unless the buyer violated the terms of a written agreement that he or she take possession of purchased goods within a specified period of time. Failure to return an excess deposit is a violation of *Civ. Code § 1812.600 et seq.* [*Civ. Code § 1812.607(m)*].

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§ 77.21 Conduct of Auction Sale

[1] Statutes Governing Common Types

An auction sale of goods is governed by *Com. Code § 2328, Civ. Code § 1812.600 et seq.*, and *Penal Code § 535* [*see Civ. Code § 1812.607(a)-(m)*; *Com. Code §§ 2102* (applicability of Division 2 of the Commercial Code), 2105(1) (definition of goods), 2107(1) (goods includes minerals to be severed from realty), 2107(2) (goods includes growing crops, timber, and other severable things); *cf. Civ. Code § 1812.601(g)* (Civil Code definition of "goods"); *see also Civ. Code § 658(4)* (emblements and severable things on realty are to be treated as goods for purpose of sale)]. Any waiver of the provisions of *Civ. Code § 1812.600 et seq.* is contrary to public policy, and is void and unenforceable [*Civ. Code § 1812.609*].

There is no statute governing auction sales of real property in general. However, bidding rules are established by statute for sales by a trustee under a power of sale in a deed of trust [*see Civ. Code § 2924h*]. Sales under execution, and sales that are required to be conducted in the manner of sales under execution (such as sales by receivers [*see Code Civ. Proc. § 568.5*]), are subject to some statutory regulation [*see Code Civ. Proc. §§ 701.510-701.830*]; but it is generally required simply that they "shall be made at auction to the highest bidder" [*see Code Civ. Proc. § 701.570(b)*].

The rules set out in *Com. Code § 2328* appear to conform to widely prevailing rules applicable to auctions generally, whether the property sold is real or personal, goods or not. By its statutory language, *Com. Code § 2328* applies only to sales of goods; but unless a statute or decision requires some other rules in a particular case, it seems safe to assume that the rules set out in *Com. Code § 2328*, may be applied in cases of sales of real property at auction.

[2] Required Announcements

An auctioneer, in an auction of goods, is required to post or distribute to the audience the terms, conditions, restrictions, and procedures whereby the goods will be sold at the auction, and to announce any changes to those terms, conditions, restrictions, and procedures prior to the beginning of the auction sale [*Civ. Code § 1812.607(c)*]. Immediately prior to offering any item for sale, the auctioneer must also disclose to the audience the existence and amount of any liens or other encumbrances on the item, unless the item is sold as free and clear. For the purposes of this provision, an item is "free and clear" if all liens and encumbrances on the item are to be paid prior to the transfer of title [*Civ. Code §*

1812.607(k); *see also Civ. Code §§ 2323, 2362(3)* (auctioneer's authority to warrant seller's title and the quality and quantity of property)].

Except in the case of a forced sale, if the seller has reserved the right to bid, or to have persons bid on his or her behalf, that fact must be announced to the audience [*see Civ. Code § 1812.608(h)(2)*; *Com. Code § 2328(4)*]. Presumably, an announcement of the seller's intent to bid on the goods, made before the auctioneer calls for bids, would constitute sufficient notice [*see Nevada National Leasing Co. v. Hereford (1984) 36 Cal. 3d 146, 151 n.5, 203 Cal. Rptr. 118, 680 P.2d 1077* (dictum)]. For discussion of buyer's remedies and a complaint for use, when there has been bidding by the seller or on the seller's behalf without prior announcement to the audience, see *§ 77.51*.

In the absence of special authorization or usage to the contrary, the auctioneer has authority from the seller to prescribe reasonable rules and terms of sale [*Civ. Code § 2362(4)*].

[3] Auction With or Without Reserve

An auction sale is with reserve unless the goods are in explicit terms put up without reserve. An auction with reserve is the normal procedure. In an auction with reserve, the auctioneer may withdraw the goods at any time until he or she announces completion of the sale [*Com. Code § 2328(3)*]. An announcement by the auctioneer at the outset of an auction that any property subject to liens will be sold only if bids on that property exceed the liens against the property is an auction with reserve [*In re El Camino Press (Bankr. C.D. Cal. 1983) 31 Bankr. 340, 343]* .

In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time [*Com. Code § 2328(3)*]. In either case (with or without reserve), a bidder may retract his or her bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid [*Com. Code § 2328(3)*; *see In re El Camino Press(Bankr. C.D. Cal. 1983) 31 Bankr. 340, 343* (bidder's right to withdraw bid)].

The crucial point for determining the nature of an auction is the putting up of the goods. Before the goods are actually put up, they may be withdrawn, regardless of whether the auction is advertised as one without reserve, without liability on the part of the auctioneer to the persons who are present. This is subject to any peculiar facts which might bring the case within the "firm offer" principle of *Com. Code § 2205*, but an offer to persons generally would require unmistakable language in order to fall within that section. The prior announcement of the nature of the auction either as with reserve or without reserve will, however, enter as an "explicit term" in the putting up of the goods, and conduct thereafter must be governed accordingly [*see* Uniform Commercial Code Comment 2 to *Com. Code § 2328*].

[4] Sale of Lots

In a sale by auction, if goods are put up in lots, then each lot is the subject of a separate sale [*Com. Code § 2328(1)*]. "Lot" means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract [*Com. Code § 2105(5)*; *see Flint v. Giguiere (1920) 50 Cal. App. 314, 320, 195 P. 85* (agreement to buy cattle at $1 per head, that did not specify number of head, as sale by lot and not subject to statute of frauds)].

[5] Putting Up Property; Bidding

The auctioneer's putting up of the property is not an offer to sell it which bidders can accept but a solicitation from those present of their offers to purchase the property, except in an auction without reserve, which constitutes the seller's voluntary relinquishment of the right to withdraw the property from sale and makes the putting up of the property in effect an offer to sell [*see Com. Code § 2328(3)* (with and without reserve); *Estate of Lynch (1923) 62 Cal. App. 687, 689-690, 217 P. 807* ; *10 Ops. Cal. Att'y Gen. 177, 178 (1947)]* . Bids made in response to the auctioneer's presentation

of an article for sale are offers to buy, which may be revoked by bidders prior to their acceptance the by auctioneer, and create no power of acceptance in bidders [*In re El Camino Press (Bankr. C.D. Cal. 1983) 31 Bankr. 340, 343]* .

[6] Completion of Sale and Passage of Title

A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in any other customary manner [*Com. Code § 2328(2)*; *Young v. Patterson (1908) 9 Cal. App. 469, 471, 99 P. 552]* . However, the fall of the hammer may not complete the sale if the sale is with reserve, in accordance with an announcement that property subject to liens will be sold only if bids on it exceed liens and that the sale is also conditioned on the secured parties' consent [*In re El Camino Press (Bankr. C.D. Cal. 1983) 31 Bankr. 340, 343]* . The foregoing interpretation of *Com. Code § 2328(2)* serves the Commercial Code's purpose of encouraging expansion of commercial practices rather than fettering the business community with artificial formalities [*In re El Camino Press (Bankr. C.D. Cal. 1983) 31 Bankr. 340, 344]* .

If a bid is made while the hammer is falling in acceptance of a prior bid, the auctioneer has discretion to either (a) reopen the bidding, or (b) declare the goods sold under the bid on which the hammer was falling [*Com. Code § 2328(2)*]. The recognition of a bid of this kind does not mean a closing in favor of that bidder, but only that the bid has been accepted as a continuation of the bidding. If recognized, that bid discharges the bid on which the hammer was falling when it was made [*see* Uniform Commercial Code Comment 1 to *Com. Code § 2328*].

Under the Commercial Code, the completion of an auction sale is not determinative of when title passes [*but see Gentillalli v. County of San Diego (1966) 240 Cal. App. 2d 456, 458, 49 Cal. Rptr. 705* (dicta, comparing result at tax sale under former *Rev. & Tax. Code § 2918, now Rev. & Tax. Code § 2960*)]. The Commercial Code abolished the concept of when title passes for the allocation of risk between buyer and seller, but provides that when the concept of title is material, and no other provision refers to the passage of title in a particular situation, the provisions of *Com. Code § 2401* control. Under *Com. Code § 2401*, title from auctions most often passes either under *Com. Code § 2401(2)*, when the goods are physically delivered to the buyer, or under *Com. Code § 2401(3)(a)*, when the documents of title are delivered [*In re Western States Wire Corp. (9th Cir. 1974) 490 F.2d 1065, 1068* (determined under California law, finding that title to vessel sold at auction had not passed to buyer prior to delivery of keys or certificate of ownership)]. Title passes at the time and place of contracting when the goods are already identified at the time of contracting, delivery is to be made without moving the goods, and no documents of title are to be delivered [*Com. Code § 2401(3)(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 77.22 Statute of Frauds

[1] Agreement Between Seller and Auctioneer

Two aspects of auction sales are affected by the statute of frauds: (1) the contract between the seller and the auctioneer and (2) the sales contract. With respect to the contract between the seller and the auctioneer, if real property is being sold, probably the agreement engaging the auctioneer has to be in writing. An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate, or to procure, introduce, or find a purchaser or seller of real estate, for compensation or a commission, is invalid unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his or her agent [*Civ. Code § 1624(a)(4)*]. Although there does not appear to be any reported case construing *Civ. Code § 1624(a)(4)* in the context of an auctioneer engaged to sell real property, that provision is not confined to those who make a business of buying and selling real estate for others, but includes every person who in any case comes within it [*Dolan v. O'Toole (1900) 129 Cal. 488, 490, 62 P. 92]* . It also applies to any person who aids or assists in the purchase or sale of real estate on a contract for compensation, either by commission or by salary, even if that person was not the sole and exclusive medium through which the purchase or sale was made [*Hooper v. Mayfield (1952) 114 Cal. App. 2d 802, 806, 251 P.2d 330]* .

Requiring the auctioneer's contract with the seller of real property to comply with *Civ. Code § 1624(a)(4)* serves the primary purpose of the statute of frauds, which is to protect real property owners against unfounded claims for compensation by brokers and agents [*see Pac. etc. Dev. Corp. v. Western Pac. R.R. Co. (1956) 47 Cal. 2d 62, 67, 301 P.2d 825* ; *but see Brand v. Mantor (1935) 6 Cal. App. 2d 126, 131, 44 P.2d 390* (broker estopped to assert statute of frauds when sued by seller for illicit profits in sale of real property)].

With respect to the contract between a seller of personal property and an auctioneer, written authority from the seller is not required to validate the contract, even if a sale of the property is invalid under an applicable statute of frauds [*see Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal. 2d 834, 838-839, 36 Cal. Rptr. 741, 389 P.2d 133* (holding "equal dignities" rule of *Civ. Code § 2309* inapplicable to actions based on contracts between principal and agent); *see also Craig v. Godfroy (1851) 1 Cal. 415, 416* (describing auctioneer as agent)]. However, failure to have a written contract is a violation of *Civ. Code § 1812.600 et seq.* [*Civ. Code § 1812.608(d)*].

[2] Memorandum of Sale at Auction

[a] Auctioneer's Authority to Make

The auctioneer's memorandum of the sale has been held to be a sufficient substitute for a contract reduced to writing and signed by the parties [*Craig v. Godfroy (1851) 1 Cal. 415, 415-416]* . In making the memorandum of sale, the auctioneer has authority to bind both buyer and seller [*see Civ. Code § 2363* (personal property)].

[b] Sale of Real Property

The contract or memorandum of sale must be in writing if the subject matter is real property, and even then, if it is signed by an agent whose authority is not in writing, it will be invalid [*Civ. Code § 1624(a)(3)*; *see People v. White (1856) 6 Cal. 75, 75* (sale of real property as void when no note or memorandum of sale was made by auctioneer and no writing existed between parties)]. For additional discussion and a general form of affirmative defense based on this statute of frauds, see Ch. 530, *Statute of Frauds* .

[c] Sale of Goods

If the subject matter of the auction sale is goods sold for a price of $500 or more, the contract is not enforceable by way of action or defense unless there is a writing sufficient to indicate that a contract of sale has been made between the parties and is signed by the party against whom enforcement is sought or his or her authorized agent [*see Com. Code § 2201(1)*]. "Goods" are all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than money in which the price is to be paid, investment securities, and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in *Com. Code § 2107* [*Com. Code § 2105(1)*; *cf. Civ. Code § 1812.601(g)* (Civil Code definition of goods, discussed in *§ 77.11[1]*]. There are some exceptions to the writing requirements of *Com. Code § 2201(1)* [*see also Com. Code § 2201(3)(a)* (specially manufactured goods)]:

- Between merchants, a written confirmation sent within a reasonable time will satisfy this statute of frauds unless the party receiving it objects in writing within 10 days after its receipt [*Com. Code § 2201(2)*].

- A contract is enforceable to the extent of the quantity of goods admitted if the party to be charged admits in his or her pleading, testimony, or otherwise in court that a contract was made [*Com. Code § 2201(3)(b)*].

- A contract for the sale of goods for which payment has been made and accepted or which have been received and accepted is enforceable [*Com. Code § 2201(3)(c)*].

In addition, if the auction sale is by lot, at a price of less than $500 per lot, this statute of frauds will not apply [*see Flint v. Giguiere (1920) 50 Cal. App. 314, 320, 195 P. 85* (agreement to buy cattle at $1 per head, that did not specify number of head, as sale by lot and not subject to statute of frauds)].

For additional discussion and a form of affirmative defense based on failure to comply with *Com. Code § 2201*, see Ch. 530, *Statute of Frauds* .

[d] Sale of Other Personal Property

If the subject matter of the auction sale is personal property other than goods [*see Com. Code § 2201*], securities [*see Com. Code § 8113*], or security agreements [*see Com. Code §§ 9201, 9203*], the contract is not enforceable by way of action or defense beyond $5,000 in amount or value of remedy unless there is a writing that (1) indicates a contract for sale has been made between the parties at a defined or stated price, (2) reasonably identifies the subject matter, and (3)

is signed by the party against whom enforcement is sought or his or her authorized agent [*Civ. Code § 1624.5*]. If the subject matter of the auction sale is a qualified financial contract [*see Civ. Code § 1624(b)(2)* (definition)], this statute of frauds may (or may not) apply, depending on the circumstances [*see Civ. Code § 1624.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 77.23 Enjoining Violations; Granting Restitution

If a person has engaged in, or is about to engage in any act that constitutes a violation of *Civ. Code § 1812.600 et seq.*, any person may file a petition in the superior court for the county in which that act occurred or is about to occur; and the superior court may issue an injunction or other appropriate order restraining the violative conduct. Proceedings under this section are governed by the provisions applicable to injunctions generally (*Code Civ. Proc. § 525 et seq.*), except that no undertaking is required [*Civ. Code § 1812.602*].

When a petition is filed by any person in the superior court for the county in which any person has engaged in any act that constitutes a violation of *Civ. Code § 1812.600 et seq.*, the court may order the person who committed the violation to make restitution to any person injured as a result of the violation [*Civ. Code § 1812.603(a)*; for a form for a complaint, *see § 77.51*].

The court may order any person against whom an injunction or restraining order, or an order requiring restitution, is directed, to reimburse the petitioner for expenses incurred in the investigation related to its petition [*Civ. Code § 1812.603(b)*]. These remedies are in addition to, and not a limitation on, the authority provided for in any other section of the Civil Code [*Civ. Code § 1812.603(c)*; *see also § 77.14*].

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[Reserved]

§§ 77.24[Reserved]

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§ 77.30 Related Matthew Bender Publications

For a basic form for an agreement for an auctioneer's services, see California Legal Forms, Ch. 86, *Agreements for Professional Services*, § 86.243

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§ 77.31 State Statutes

[1] Agency

Agency in general. *Civ. Code § 2295 et seq.*

Special agent defined. *Civ. Code § 2297*

Agent's authority to sell and convey personal property includes authority to warrant title of principal, quality and quantity of property. *Civ. Code § 2323*

Agent's authority to sell and convey real property includes authority to give usual covenants of warranty. *Civ. Code § 2324*

[2] Auction Sales of Goods

Conduct of auction of goods. *Civ. Code §§ 1812.607(a)-(c), (k), 1812.608(d)-(f), (h)-(k)*; *Com. Code § 2328*

Goods defined. *Civ. Code § 1812.601(g)*; *Com. Code § 2105(1)*

Division 2 of Commercial Code applies to transactions in goods. *Com. Code § 2102*

Goods includes growing crops to be severed from realty, timber, and minerals and other severable things. *Com. Code § 2107(1), (2)*

Real property is immovable (is not "goods"). *Civ. Code § 658*; *Com. Code § 2105(1)*

[3] Auctioneer

Bond required for auctioneer of goods. *Civ. Code § 1812.600*

Liability of auctioneer of goods for acts of partners, employees, owners, and principals. *Civ. Code § 1812.606*

Performance of duties by auctioneer of goods. *Civ. Code § 1812.605*

Statutory authority of auctioneer. *Civ. Code §§ 2362, 2363*

Auctioneer's duty to truthfully represent goods to be auctioned. *Civ. Code § 1812.605(c)*

Auctioneer's duty to announce prior to offering item for sale, extent and amount of liens or encumbrances on any item except one being sold free and clear of all liens and encumbrances. *Civ. Code § 1812.607(k)*

Auctioneer's statutory authority to make warranties. *Civ. Code §§ 2323, 2324, 2362(3)*

[4] Conversion

Statutory presumption of damages for conversion [*Civ. Code § 3336*] is not repelled by application of converted property to owner's benefit when defendant's possession is unlawful from inception. *Civ. Code § 3337*

[5] Criminal Acts

Misdemeanor violations of title governing auctioneers and auction companies (*Civ. Code § 1812.600 et seq.*). *Civ. Code §§ 1812.606-1812.608*

Remedies for misdemeanor violations of title governing auctioneers and auction companies (*Civ. Code § 1812.600 et seq.*). *Civ. Code §§ 1812.602-1812.604*

Acting unlawfully as auctioneer is misdemeanor. *Penal Code § 436*

Obtaining money or property by mock auction is an offense. *Penal Code § 535*

[6] Limitation Periods

Limitation of actions based on rescission of written and oral contracts. *Code Civ. Proc. §§ 337, 339*

Limitation period for action for damages based on conversion is three years. *Code Civ. Proc. § 338*

Limitation period for breach of contract claims. *Com. Code § 2725*

[7] Rescission

Grounds for rescission of contract, generally. *Civ. Code § 1689*

Rescinding party is required to give notice of rescission and to restore or offer to restore consideration; service of pleading in action based on rescission is deemed to be such notice or offer or both if not otherwise given. *Civ. Code §*

1691

Relief available on unilateral rescission. *Civ. Code § 1692*

Delay in giving notice or restoring or tendering restoration does not affect rescinding party's rights unless other party is substantially prejudiced. *Civ. Code § 1693*

Restitution is available to party injured by violation of title governing Auctioneers and Auction Companies (*Civ. Code § 1812.600 et seq.*). *Civ. Code § 1812.603*; *see Civ. Code § 1812.608(h)(2)* (violation involving seller's bids)

[8] Statute of Frauds

Statute of frauds in general. *Civ. Code § 1624*

Statute of frauds applicable to sales of personal property other than goods, securities, and security agreements. *Civ. Code § 1624.5*

Statute of frauds applicable to sales of goods. *Com. Code § 2201*

Legal Topics:

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

[1] Auctioneer's Compensation

Auctioneer is entitled to recover compensation. *Middleton et al. v. Findla (1864) 25 Cal. 76, 81*

Auctioneer is not guarantor of performance by buyer and as entitled to compensation although buyer defaults. *Benedict v. Wilson (1909) 10 Cal. App. 719, 721-722, 103 P. 350*

[2] Conversion

Liability of auctioneer for damages based on conversion arising from sale of stolen property. *Frank v. Repp & Mott (1945) 70 Cal. App. 2d 407, 409, 161 P.2d 279*

Pleading facts amounting to conversion on information and belief is sufficient to allege conversion. *Buxton v. International Indemnity Co. (1920) 47 Cal. App. 583, 590-591, 191 P. 84*

[3] Damages

Attorney's fees are not recoverable under *Civ. Code § 3336* (damages for conversion). *Viner v. Untrecht (1945) 26 Cal. 2d 261, 272, 158 P.2d 3*

Interest on damages for conversion begins to accrue at time of conversion. *Schmidt v. Nunan (1883) 63 Cal. 371, 374* ; *see also* *Berg v. Traeger (1930) 210 Cal. 323, 327, 292 P. 495* (if time of conversion uncertain, interest begins to accrue on latest possible date)

[4] Fake Auction Sales

Court is required sua sponte to refuse to give relief to any party to fake auction sale. *Haley v. Bloomquist (1928) 204 Cal. 253, 256-257, 268 P. 365*

Party to fake auction sale is not entitled to plead it in defense in derogation of rights of innocent third party. *California Breeders' etc. Co. v. Showers (1927) 86 Cal. App. 239, 243, 260 P. 955*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 77.33 Law Reviews

T.J. Schroepfer, *Allocating Spectrum Through the Use of Auctions, 14 Hastings Comm. & Ent. L.J. 35*-46 (1991)

Project, *A Comparison of California Sales Law and Article Two of the Uniform Commercial Code*, 10 UCLA L. Rev. 1087, 1173-1174 (1963) (discussing *Com. Code § 2328*)

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§§ 77.34[Reserved]

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§ 77.40 Complaint for Damages [Civ. Code § 3336] Based on Conversion--By Owner Against Auctioneer--Wrongful Auction Sale

[1] FORM Complaint for Damages [Civ. Code § 3336] Based on Conversion--By Owner Against Auctioneer--Wrongful Auction Sale

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Conversion)
through _____],	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name of auctioneer*] is, and at all times herein mentioned was, a California corporation with its principal place of business in _____ County, California [*or allege other capacity and residence*], and doing business as an auctioneer, and in that capacity conducted the auction out of which this action

arises.

[2. Defendant _____ (*state venue facts as appropriate, e.g.*, is a resident of _____ County, California).]

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOE I through DOE _____ and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to insert their true names when the same are ascertained. (Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants is responsible in some manner for the occurrences alleged below.)]

[4. At all times herein mentioned defendants DOES I through _____ were the agents, servants, and employees of their codefendants, and in doing the things hereinafter alleged were acting in the scope of their authority as such agents, servants, and employees, and with the permission and consent of their codefendants.]

5. On or about _____ [*date of auction sale*], plaintiff was, and plaintiff still is, _____ [the owner *or* entitled to the possession] of certain personal property, to wit: _____ [*describe particularly, e.g.*, an antique silver candelabrum stamped on the base with the hallmark of Paul Revere and the date "1780"].

6. On or about _____ [*date of auction sale*], the _____ [*e.g.*, candelabrum] had a value of $_____.

7. On or about _____ [*date of auction sale*], the _____ [*e.g.*, candelabrum] was in the possession of defendant, and on that date defendant sold it at auction at _____ [*location*], without plaintiff's consent, as a proximate result of which plaintiff has sustained injury through loss of the value of the _____[*e.g.*, candelabrum].

[8. Between the time of the wrongful sale of the _____ (*e.g.*, candelabrum) and the filing of this action, plaintiff _____ (*describe time and money properly expended in pursuit of converted property*), to plaintiff's further damage in the sum of $_____.]

[9. *Allege facts to support claim for exemplary and punitive damages, e.g.*, At the time of the wrongful sale of the _____ (*e.g.*, candelabrum), defendant was fully aware that the _____(*e.g.*, candelabrum) was the property of plaintiff and that plaintiff was entitled to the possession thereof, and notwithstanding that knowledge defendant wrongfully, maliciously, and with intent to injure plaintiff sold it as hereinabove alleged, by reason whereof plaintiff is entitled to exemplary and punitive damages.]

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages in the sum of $_____[*value of converted property at time of conversion*].

2. For interest thereon at the legal rate from and after _____ [*date of conversion*].

3. [For damages for time and money expended in pursuit of the _____ (*e.g.*, candelabrum) in the sum of $_____.]

4. [For interest thereon at the legal rate from and after _____ (*date of conversion*).]

5. [For exemplary and punitive damages.]

6. For costs of suit herein incurred.

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in this action. I have read this complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The complaint in [1], *above*, may be used by an owner of property to obtain damages based on conversion from an auctioneer, who sold plaintiff's property without plaintiff's consent [*Civ. Code § 3336*]. Unless there are facts to support a defense based on estoppel [*see § 77.41*], an auctioneer who sells property which his or her principal has no right to sell is liable to the owner for damages for conversion, even though the auctioneer may have acted in the good faith belief that the principal was the owner [*see Swim v. Wilson (1891) 90 Cal. 126, 130-131, 27 P. 33* ; *Rogers v. Huie (1851) 1 Cal. 429* (stolen property); *Development Co. v. Seaboard D.C. Corp. (1934) 1 Cal. 2d 121, 129, 34 P.2d 139* (auction sale of livestock subject to prior conditional sale contract under which plaintiff was seller retaining title as security)].

If the property is still in the auctioneer's possession, counsel may prefer an action for recovery of the property in which an alternative judgment for the value of the property and damages for detention may be had [*see Code Civ. Proc. § 667*]. For discussion and suitable forms of complaints, see Ch. 119, *Claim and Delivery* .

[3] Allegations

[a] Defendant's Identity and Capacity

If defendant is not a natural person, the complaint should allege defendant's identity as an existing entity against which the court's judgment will operate [*see Civ. Code § 1812.601(h)* (defining "person," discussed in *§ 77.11[4]*); *Tanner v. Best (1940) 40 Cal. App. 2d 442, 445, 104 P.2d 1084]* , such as a corporation, a partnership, an unincorporated association, or a governmental agency (Paragraph 1) [*see § 77.12*].

[b] Venue Facts

For purposes of venue, conversion is not considered an injury to person or property as provided in *Code Civ. Proc. § 395(a)*, which would provide for venue in the county where the conversion took place [*Spangenberg v. Spangenberg (1932) 123 Cal. App. 387, 391, 11 P.2d 408]* . Thus, venue is proper in the county of defendant's residence (if defendant is a person) [*see Code Civ. Proc. § 395(a)*; *Haurat v. Superior Court (1966) 241 Cal. App.2d 330, 333, 50 Cal. Rptr. 520]* or principal place of business [*see Code Civ. Proc. §§ 395.2, 395.5*].

[c] Fictitiously Named Defendants

When the plaintiff is ignorant of the name of a defendant, he or she must state that fact in the complaint, and that defendant may be designated in any pleading or proceeding by any name, and when his or her true name is discovered, the pleading or proceeding must be amended accordingly [*Code Civ. Proc. § 474*]. If plaintiff is ignorant of the name of a person he or she knows exists and against whom the plaintiff believes he or she has a cause of action, then Paragraph 3 should be inserted.

For discussion and alternative forms involving fictitiously named defendants, see Ch. 20, *Allegations Commonly Used* .

[d] Agency Allegation

Counsel may use the standard agency allegation of optional Paragraph 4, or particularize it for use when an employee, agent, or partner of an auctioneer or auction company has violated some provision of the title governing governing Auctioneers and Auction Companies (*Civ. Code § 1812.600 et seq.*). Every auctioneer and every auction company, together with its owners, partners, and officers, is responsible for all violations of *Civ. Code § 1812.600 et seq.* committed by employees, agent, and partners of the auctioneer or auction company [*see Civ. Code § 1812.606* (discussed in *§ 77.16*]. The conversion alleged in this complaint arguably constitutes a violation of *Civ. Code § 1812.605(d)*, which requires an auctioneer to perform his or her duties in accordance with California law.

[e] Plaintiff's Identity and Capacity

This complaint does not contain an allegation as to plaintiff's identity or capacity, but if plaintiff is not a natural person, then the complaint should allege plaintiff's identity as an existing legal entity entitled to come into court; and if plaintiff brings the action in a special capacity, then the complaint should allege this capacity to show that plaintiff is, if other facts are true, entitled to relief [*see Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6* (distinguishing standing and capacity to sue)].

[f] Allegations for Conversion

The allegations relating to conversion are:

- Plaintiff's interest in and right to possession of certain identified personal property (Paragraph 5) [*see Lowe v. Ozmun (1902) 137 Cal. 257, 260-261, 70 P. 87* ; *Igauye v. Howard (1952) 114 Cal. App. 2d 122, 127, 249 P.2d 558]* .

- The value of the property at the time of the conversion (Paragraph 6) [*see Civ. Code § 3336*; *United States Rubber Co. v. Union Bank & Trust Co. (1961) 194 Cal. App. 2d 703, 709, 15 Cal. Rptr. 385]* .

- Defendant's conversion and proximate injury to plaintiff (Paragraph 7) [*see Civ. Code § 3336*; *Jordan v. Talbot (1961) 55 Cal. 2d 597, 610, 12 Cal. Rptr. 488, 361 P.2d 20]* .

For discussion, alternative forms, including allegations that plaintiff demanded return of the item, which is necessary if defendant acquired the property lawfully, and a procedural checklist, see Ch. 150, *Conversion* .

General damages for conversion (Paragraph 6) are measured either by the value of the converted property at the time of the conversion, with the interest from that time (as in this complaint), or by an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable, and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted [*Civ. Code § 3336*; *see Wong v. Paine, Webber, Jackson & Curtis (1962) 208 Cal. App. 2d 17, 20-21, 24 Cal. Rptr. 821* (alternative measure of damages in *Civ. Code § 3336* for conversion (indemnification for loss) gives plaintiff the burden of proving unavoidability of loss)]. In addition, plaintiff may recover a fair compensation for the time and money properly expended in pursuit of the property (Paragraph 8) [*Civ. Code § 3336*] with interest, in the discretion of the jury [*see Civ. Code § 3288*; *see also Waterhouse-Wilcox Co. v. Betz & Mabrey (1925) 73 Cal. App. 236, 243, 238 P. 763* (interest properly awarded on damages for time and money spent in pursuit of property)]. The maximum legal rate of such interest is 10 percent per year [*see Cal. Const. art. XV, § 1*; *Code Civ. Proc. § 685.010(a)*; *see also Beverly Finance Co. v. American Casualty Co. (1969) 273 Cal. App. 2d 259, 265, 78 Cal. Rptr. 334]* .

Exemplary and punitive damages may be recovered in an action for damages based on conversion, given the requisite showing of malice, fraud, or oppression (Paragraph 9) [*Civ. Code § 3294*; *Haigler v. Donnelly (1941) 18 Cal. 2d 674, 681, 117 P.2d 331]* . No claim for exemplary damges may state an amount or amounts [*Civ. Code § 3295(e)*].

For further discussion, alternative forms for damage allegations, and the procedure for determining the amount of punitive damages being claimed, see Ch. 177, *Damages* .

[4] Verification

Verification of the complaint is not required [*see Code Civ. Proc. § 128.7(a)*], but verification of the complaint requires the defendant to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Cross References

For alternative allegations as to agency, capacity, and residence of parties, as well as fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms for verification, see Ch. 572, *Verification*

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7-77 California Forms of Pleading and Practice--Annotated § 77.41

§ 77.41 Affirmative Defense to Owner's Conversion Complaint Against Auctioneer--Plaintiff Estopped to Assert Title

[1] FORM Affirmative Defense to Owner's Conversion Complaint Against Auctioneer--Plaintiff Estopped to Assert Title

AS A [_____ (*if more than one, specify number, e.g.*, FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.*, SECOND) CAUSE OF ACTION], defendant alleges that:

Plaintiff is estopped to assert title to the _____[*describe property, e.g.*, candelabrum] which is the subject of the complaint because of the following:

1. Defendant received the _____ [*e.g.*, candelabrum] from _____ [*name of apparent owner, and any status that would clothe that person with apparent authority, e.g.*, a reputable dealer in antiques], who identified himself/herself to defendant as owner of the _____[*e.g.*, candelabrum], _____ [*continue with additional facts inducing defendant's reliance, e.g.*, and produced certificates of authenticity and provenance] and who engaged defendant to sell it at auction.

2. By transferring possession of the _____[*e.g.*, candelabrum] to _____ [*name of apparent owner*] [and placing it in the stream of commerce as for immediate sale] [_____ (*continue with other indicia of ownership, e.g.*, along with the certificates of authenticity and provenance)] plaintiff knowingly clothed _____ [*name of apparent owner*] with apparent authority in a way that defendant could, and reasonably did, rely on those indicia of ownership in agreeing to sell and selling the _____ [*e.g.*, candelabrum].

3. Defendant did not know [until after the _____(*e.g.*, candelabrum) had been sold and the proceeds had been paid over to _____ (*name of apparent owner*)] that _____ [*name of apparent owner*] was not the owner [and had _____ (*specify any acts of fraud or wrongdoing on the part of the apparent owner, e.g.*, fraudulently obtained possession of the _____(*e.g.*, candelabrum and

certificates) from plaintiff by misrepresenting his/her intention only to establish its value)].

4. Defendant accepted the _____ [*e.g.*, candelabrum] in the ordinary course of business and relied on the customary indicia of ownership. Defendant conducted the auction sale and accounted for the proceeds in the ordinary course of business and in accordance with custom.

[2] Use of Form

The defense in [1], *above*, may be pleaded by an auctioneer in answer to a complaint against him or her by the true owner for conversion if the plaintiff enabled defendant's principal to appear to be the owner of the property in question, and defendant acted in good faith on the principal's purported ownership [*see Jessup v. Cattle Center, Inc. (1968) 259 Cal. App. 2d 434, 436-437, 66 Cal. Rptr. 361]* .

[3] Nature of Defense

The general rule is that an auctioneer who sells stolen property at auction in good faith and without knowing that it is stolen, is nonetheless liable to the owner for the value of the property [*Jessup v. Cattle Center, Inc. (1968) 259 Cal. App. 2d 434, 436, 66 Cal. Rptr. 361]* . Similarly, an auctioneer who sells property on behalf of a principal who obtained the property from the owner by fraud and knows of the principal's fraud is liable to the owner [*Jessup v. Cattle Center, Inc. (1968) 259 Cal. App. 2d 434, 437, 66 Cal. Rptr. 361]* . Other jurisdictions have resorted to such doctrines as consent or waiver to protect an innocent auctioneer who sells without notice of the fraud of his or principal. In California, an innocent auctioneer may rely on the doctrine of equitable estoppel to deny recovery to the true owner if the auctioneer can establish the following [*Jessup v. Cattle Center, Inc. (1968) 259 Cal. App. 2d 434, 437, 66 Cal. Rptr. 361* ; *see also Civ. Code § 3543*; *Crestline Mobile Homes Mfg. Co. v. Pacific Finance Corp. (1960) 54 Cal. 2d 773, 778, 8 Cal. Rptr. 448, 356 P.2d 192* (criteria for estoppel in another context)]:

- That plaintiff/true owner knew the facts.
- That plaintiff/true owner intended that his or her conduct would be acted on, or acted in a manner that the defendant auctioneer could reasonably believe that the true owner intended his or her conduct to be acted on.
- That defendant auctioneer was ignorant of the true state of the facts.
- That defendant auctioneer relied on the conduct to his or her injury.

Jessup involved cattle that were consigned to defendant's auction yard with shipping orders and a brand inspector's certificate, which under *Food & Agric. Code § 16522(b)* was evidence of ownership. Those facts were known to both parties, and were held to establish the first requirement [*Jessup v. Cattle Center, Inc. (1968) 259 Cal. App. 2d 434, 438, 66 Cal. Rptr. 361]* . Plaintiff/true owner parted with possession (to its buyer, who had them delivered to the auction yard) in return for a draft that was payable at a later date, but which could not be paid when presented, a fact not known to either party. Because the true owner was in a better position than defendant to ascertain the true facts, the court held that the true owner had placed the cattle in the stream of commerce for immediate sale, and in doing so acted in a manner that the auctioneer could reasonably believe indicated the true owner intended its conduct to be acted on [*Jessup v. Cattle Center, Inc. (1968) 259 Cal. App. 2d 434, 438, 66 Cal. Rptr. 361]* .

Although the evidence was conflicting regarding defendant/auctioneer's ability to determine whether its principal's draft was good, there were findings by the trial judge that defendant acted in good faith and without culpable knowledge of the facts, so the third requirement was met [*Jessup v. Cattle Center, Inc. (1968) 259 Cal. App. 2d 434, 438-439, 66 Cal. Rptr. 361]* . The fourth requirement was met on the basis of evidence that defendant/auctioneer accepted the cattle

in the usual course of business, and in reliance on its principal's possession, the brand certificates, and the shipping orders, sold the cattle at auction, and paid the proceeds to its principal [*Jessup v. Cattle Center, Inc. (1968) 259 Cal. App. 2d 434, 439, 66 Cal. Rptr. 361]* .

[4] Cross References

For discussion of affirmative defenses and a general form of answer, see Ch. 26, *Answers*

For other defenses to an action for conversion, see Ch. 150, *Conversion*

Witkin, California Procedure, vol. 5, *Pleading*, §§ 1048, 1050 (4th ed. 1997)

Witkin, Summary of California Law, vol. 13, *Equity*, §§ 190-201 (10th ed. 2005)

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7-77 California Forms of Pleading and Practice--Annotated § 77.42

§ 77.42 Complaint for Damages [Civ. Code § 3343] Based on Fraud [Civ. Code § 1709]--By Seller Against Auctioneer Buyer--Misrepresentation of Price Property Would Bring at Auction

[1] FORM Complaint for Damages [Civ. Code § 3343] Based on Fraud [Civ. Code § 1709]--By Seller Against Auctioneer Buyer--Misrepresentation of Price Property Would Bring at Auction

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Fraud)
through _____], Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name of auctioneer*] is, and at all times herein mentioned was, a California corporation with its principal place of business in _____ County, California [*or allege other capacity and residence*], and doing business as an auctioneer.

[2. *Fictitious name allegation, if appropriate. See § 77.40[1], Paragraph 3.*]

3. On or about _____ [*date*], at _____ [*place, e.g.*, defendant's place of business], defendant represented to plaintiff that certain _____ [real *or* personal] property owned by plaintiff, to wit: _____[*describe*], could not reasonably be sold at auction for more than $_____, and that defendant was willing to buy the property from plaintiff for a price of $_____.

4. Defendant's representation was false. In fact, the property could reasonably have been sold at auction for at least $_____ [and was sold by defendant for that price on _____ (*date*)].

5. Defendant knew that his/her representation was false, and defendant made the representation with the intent to defraud plaintiff by inducing plaintiff to sell the property for an unreasonably low price.

6. Plaintiff believed defendant's representation and was ignorant that it was false. Plaintiff believed that defendant was possessed of greater and special knowledge regarding the auction business and the prices items would bring at auction sales. In reliance on defendant's representations, plaintiff was induced to, and did, sell the property in question to defendant for a price of $_____. If plaintiff had known the true facts, plaintiff would not have sold the property for such a low price.

7. In consequence of the sale of the property, on _____ [*date*], plaintiff delivered the property to defendant [along with a _____ (deed *or* bill of sale)]. To the date of commencement of this action, plaintiff has received from defendant, in payment of the price, the sum of $_____.

8. The actual value of the property at the time plaintiff parted with it was $_____.

9. As a proximate result of defendant's fraud, plaintiff has been damaged in the sum of $_____, which is the difference between the actual value of the property with which plaintiff parted and the sum which plaintiff received.

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____.

[2. For interest thereon at the legal rate from and after _____ (*date*).]

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 77.40[1].*]

[2] Use of Form

The complaint in [1], *above,* is for use by a plaintiff who was induced to sell property to an auctioneer, rather than have it put up for sale at auction, to obtain damages from the auctioneer based on fraud [*see Civ. Code § 1709*]. The form is loosely based on *Bedell Engineering Co. v. Rouse (1943) 57 Cal. App. 2d 734, 135 P.2d 404* , which involved the auctioneer's intentional misrepresentation of the price which the property would be likely to bring if sold at auction, a misrepresentation the auctioneer made in order to buy the property at a low price and reap profits on resale. Statutorily, an auctioneer has a duty to truthfully represent goods to be auctioned [*Civ. Code § 1812.605(c)*].

Alternatively, a person in plaintiff's position could seek rescission [*see Kaluzok v. Brisson (1946) 27 Cal. 2d 760, 763, 167 P.2d 481* ; *Campbell v. McClure (1986) 182 Cal. App. 3d 806, 811, 227 Cal. Rptr. 450]* . For discussion of application of the doctrine of election of remedies, see Ch. 269, *Fraud and Deceit* .

[3] Allegations

The allegations of a complaint for damages based on fraud in the sale or purchase of property are:

- Defendant's representation of a material fact (Paragraph 3) [*see Cooper v. Leslie Salt Co. (1969) 70 Cal. 2d 627, 636, 75 Cal. Rptr. 766, 451 P.2d 406* (facts constituting fraud must be specifically pleaded)].

- The falsity of the representation (Paragraph 4).

- Defendant's knowledge of the falsity (Paragraph 5).

- Defendant's intent to deceive (Paragraph 5) [*see Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 811, 94 Cal. Rptr. 796, 484 P.2d 964]* .

- Plaintiff's actual and justifiable reliance on the truth of the representation (Paragraph 6) [*see Gagne v. Bertran (1954) 43 Cal. 2d 481, 489, 275 P.2d 15* ; *Pacesetter Homes, Inc. v. Brodkin (1970) 5 Cal. App. 3d 206, 211, 85 Cal. Rptr. 39* (expression of opinion as actionable when expressed by party with superior knowledge to that of plaintiff)].

- Plaintiff's proximately resulting injury (Paragraphs 7-9) [*see Vogelsang v. Wolpert (1964) 227 Cal. App. 2d 102, 109-110, 38 Cal. Rptr. 440* ; *see also Civ. Code § 1710* (elements of actionable fraud)].

For alternative forms of allegations, see Ch. 269, *Fraud and Deceit* .

If partners, employees, or agents may have committed any of the acts alleged, counsel should incorporate the agency allegation in Paragraph 4 of § 77.40[1] [*see generally § 77.40*].

[4] Measure of Damages

The measure of damages for fraud in the sale or purchase of property (Paragraph 9) is specified in *Civ. Code § 3343* and is basically the difference between the actual value of that with which the defrauded person parted (Paragraph 8) and the actual value of that which he or she received (Paragraph 7) [*see Civ. Code § 3343(a)*; *see also Civ. Code § 1709* (liability of one who willfully deceives another for damages)]. In an appropriate case, the measure of damages may be broader [*see Civ. Code § 3343(a)(1)-(4)*; *Pat Rose Associates v. Coombe (1990) 225 Cal. App. 3d 9, 19-20, 275 Cal. Rptr. 1* (recovery of lost profits; disapproved on other grounds in *Adams v. Murakami (1991) 54 Cal. 3d 105, 115-116, 284 Cal. Rptr. 318, 813 P.2d 1348*)], but the defrauded person may not recover any amount measured by the

difference between the value of the property as represented and the actual value thereof [*see Civ. Code § 3343(b)(1)*; *but see Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 Cal. App. 3d 388, 432-433, 264 Cal. Rptr. 779* (allowing *Com. Code § 2721* "benefit of bargain" remedy to defrauded buyer)].

In every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury [*Civ. Code § 3288*; *see Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 Cal. App. 3d 388, 434, 264 Cal.Rptr. 779* ; *Pacific-Southern Mortgage Trust Co. v. Insurance Co. of North America (1985) 166 Cal. App. 3d 703, 716, 212 Cal. Rptr. 754]* . This complaint contains an optional prayer for interest, which may be included if the evidence can be expected to persuade the jury to award interest. Interest may be awarded in a fraud action [*Vogelsang v. Wolpert (1964) 227 Cal. App. 2d 102, 125, 38 Cal. Rptr. 440]* .

Exemplary and punitive damages may be awarded in an action for fraud, and may properly be awarded whether or not interest is awarded [*see Vogelsang v. Wolpert (1964) 227 Cal. App. 2d 102, 125, 38 Cal. Rptr. 440* ; *see also Civ. Code § 3294* (exemplary damages)]. This complaint does not contain an allegation of or a prayer for exemplary and punitive damages. If plaintiff wishes to claim such damages, an appropriate allegation and a prayer should be inserted into the complaint. For forms, see Ch. 177, *Damages* , Ch. 269, *Fraud and Deceit* , and Ch. 420, *Prayers* .

[5] Cross References

For alternative forms for use in an action for damages based on fraud (deceit), see Ch. 269, *Fraud and Deceit*

For forms of allegations respecting exemplary damages, see Ch. 177, *Damages* and Ch. 269, *Fraud and Deceit*

For additional discussion and cross references relating to complaints in general, see *§ 77.40[2]* et seq.

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§ 77.43 Complaint for Restitution [Civ. Code § 1692] Based on Rescission of Auction Sale for Fraud [Civ. Code § 1689(b)(1)]--By Seller Against Buyer--Unlawful Agreement Not to Bid at Auction Sale

[1] FORM Complaint for Restitution [Civ. Code § 1692] Based on Rescission of Auction Sale for Fraud [Civ. Code § 1689(b)(1)]--By Seller Against Buyer--Unlawful Agreement Not to Bid at Auction Sale

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

[*or other as appropriate*]

	)	
_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RESTITUTION
_____ [*name*], [and DOES I	)	[Amount demanded _____
through _____,] Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name of buyer*] is, and at all times herein mentioned was, a California corporation with its principal place of business in _____ County, California [*or allege other capacity and residence*].

[2. *Fictitious defendants, if appropriate. See § 77.40[1], Paragraph 3.*]

[3. *Agency allegation, if appropriate. See § 77.40[1], Paragraph 4.*]

4. On or about _____ [*date of auction sale*], at _____ [*place*], California, certain property then owned by plaintiff, to wit: _____ [*describe, e.g.*, inventory and equipment formerly used by plaintiff in operating a restaurant supply business under the name Crown Restaurant Supplies], was put up for sale at auction and was then and there sold to defendant, as highest bidder, for a price of $_____. The terms of the sale were as follows: _____ [*state terms*]. [A copy of the memorandum of sale executed by _____ (*name of auctioneer*), as auctioneer, is attached to this complaint marked Exhibit "A" and made a part hereof.]

5. On or about _____ [*date*], in consequence of the sale, plaintiff delivered the _____ [*e.g.*, inventory and equipment] to defendant. The property is now in the possession of defendant.

6. Defendant has _____ [paid *or* given] plaintiff _____ [*sum paid or other consideration given*] as _____ [partial *or* complete] payment of the price.

7. On or about _____ [*date*], plaintiff discovered that defendant became highest bidder at the sale as the result of an agreement between defendant and _____ [*name(s), if known, or* certain other persons present at the sale] by which those other persons agreed not to bid in competition with [each other or] defendant, for the purpose of purchasing the property for their mutual benefit, or of permitting defendant to purchase the property at an artificially depressed price.

[8. *EITHER, if plaintiff has given notice of rescission or has restored or offered to restore all consideration received, describe, e.g.*, On or about _____ (*date*), plaintiff notified defendant _____(*name of buyer*) of plaintiff's rescission of the sale and _____ (*either* restored to defendant *or* offered to restore to defendant the $_____ paid thus far by defendant to plaintiff under the contract on condition that defendant restore to plaintiff the _____ (*describe property, e.g.*, equipment).]

[8. *OR, if plaintiff has not given notice of rescission but has received something of value, so state, e.g.*,, Plaintiff intends service of the summons and complaint in this action to serve as notice of rescission of the auction sale and hereby offers to restore to defendant _____ (*name of buyer*) the $_____paid thus far by defendant to plaintiff under the contract on condition that defendant restore to plaintiff the _____ [*describe property, e.g.*, equipment.]

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

1. That this court declare that the auction sale and resultant contract are rescinded and that defendant(s) be ordered return to plaintiff the _____[*describe property, e.g.*, equipment].

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 77.40[4]*.]

[2] Use of Form

The complaint in [1], *above*, may be used by a seller of goods at auction to obtain restitution of the property sold when the auction price was artificially depressed as the result of an agreement between the buyer and other persons at the sale to stifle competition in bidding, if that agreement constitutes a fraud on the seller [*see Hammond v. Wallace (1890) 85 Cal. 522, 530-531, 24 P. 837* ; *Jenkins v. Frink (1866) 30 Cal. 586, 591-592* ; *see also Roberts v. Salot (1958) 166 Cal. App. 2d 294, 299, 333 P.2d 232* (sale under trust deed)]. As explained below, the seller's right to rescind the sale and have restitution probably is limited to cases of forced sales or voluntary sales in which the property is put up without reserve.

The form assumes a voluntary sale without reserve. If the sale was forced, plaintiff's attorney should allege the circumstances of the forced sale and the reasons why plaintiff was unable to assure a sale at a fair price by bidding himself or herself, most likely, lack of adequate funds with which to bid. For discussion and forms relating to judicial and execution sales generally, see Ch. 254, *Executions and Enforcement of Judgments* .

[3] Allegations

The allegations of a complaint for restitution based on unilateral rescission for cause are:

- The capacities and residences of the parties (Paragraphs 1 and 2) [*see Code Civ. Proc. § 395(a)* (gravamen of action for relief based on rescission as fraud, or transitory; proper venue as county of defendant's residence)].

- The existence and relevant terms of the contract (Paragraph 4) [*see California Trust Co. v. Gustason (1940) 15 Cal. 2d 268, 272, 101 P.2d 74]* , and, if the contract is for the sale of goods of a value of $500 or more, a written memorandum sufficient to satisfy the statute of frauds [*Com. Code § 2201(1)*].

- The extent to which the agreement is executed (Paragraphs 5, 6) [*see Civ. Code § 1692*].

- The ground for rescission (Paragraph 7) [*see Civ. Code § 1689(b)*].

If appropriate, allegations naming fictitious defendants and alleging an agency relationship between defendants, which are Paragraphs 3 and 4, respectively, of § 77.40[1], may be added as Paragraphs 2 and 3 of this complaint.

[4] Agreements by Bidders Not to Bid

An agreement between or among bidders at an auction sale to the effect that one or more of the parties will not bid is not necessarily illegal or fraudulent. For example, if several buyers unite to pool their funds and permit one of their group to bid on behalf of all, if the quantity of goods offered to a single bidder is more than any one wants to buy, the agreement not to bid is lawful [*Jenkins v. Frink (1866) 30 Cal. 586, 592-593]* . However, if the purpose of the agreement is to stifle competitive bidding and, through a lack of bidders, to depress the price below a fair market value for the property, then the agreement is void as being illegal [*Russell v. Soldinger (1976) 59 Cal. App. 3d 633, 641-642, 131 Cal. Rptr. 145* (probate sale, court found only inference was that agreement was to suppress price);

Jenkins v. Frink (1866) 30 Cal. 586, 591-592] and contrary to public policy [*Crawford v. Maddux (1893) 100 Cal. 222, 225, 34 P. 651* ; *Packard v. Bird (1870) 40 Cal. 378, 383]* .

Such an agreement has been held to be a fraud on the rights of the seller, making the sale voidable on the seller's rescission in a timely and proper manner [*Hammond v. Wallace (1890) 85 Cal. 522, 530-531, 24 P. 837* ; *see Jenkins v. Frink (1866) 30 Cal. 586, 592* ; *see also Roberts v. Salot (1958) 166 Cal. App. 2d 294, 299, 333 P.2d 232* (sale under trust deed)]. Additionally, a party to an agreement not to bid is unable to enforce an agreement against a buyer, and, as between them, the agreement is illegal, void, and and unenforceable [*Russell v. Soldinger (1976) 59 Cal. App. 3d 633, 641-642, 131 Cal. Rptr. 145]* .

In the case of a sale of property put up with reserve, the seller's power to withdraw the property before the sale has been completed [*see Com. Code § 2328(3)*] would seem an adequate protection against the property's selling for too low a price.

In forced sales, although the seller theoretically has the power to assure a sale at a fair price because he or she may bid [*see Com. Code § 2328(4)* (exempting forced sales from the prohibition against the seller bidding)], more likely, the seller (debtor) will not have adequate funds with which to make a good faith bid near the fair market value of the property. In that case, the debtor would be in the same situation as a voluntary seller who puts up goods without reserve: there would be no opportunity for self protection by bidding or by withdrawing the goods [*see Com. Code § 2328(3)*].

[5] Cross References

For additional discussion and cross references relating to complaints in general, see *§ 77.40[2]* et seq.

For discussion and forms relating to judicial and execution sales, see Ch. 254, *Executions and Enforcement of Judgments*

Witkin, California Procedure, vol. 8, *Enforcement of Judgment*, §§ 135-148 (4th ed. 1997)

Corbin on Contracts (1962), Pt. 8, Ch. 86, *Bargains to Defraud or Otherwise Injure Third Persons*, § 1468

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PART IV. FORMS

7-77 California Forms of Pleading and Practice--Annotated § 77.44

§ 77.44 Complaint for Damages [Civ. Code § 3302] Based on Breach of Contract--By Seller Against Buyer--Failure to Pay Price of Property Bought at Auction

[1] FORM Complaint for Damages [Civ. Code § 3302] Based on Breach of Contract--By Seller Against Buyer--Failure to Pay Price of Property Bought at Auction

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Breach of Contract)
[and DOES I through _____],	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. [*Identity and capacity of defendant buyer. See § 77.43[1], Paragraph 1.*]

[2. *Fictitious defendants, if appropriate. See § 77.40[1], Paragraph 3.*]

3. On or about _____ [*date*], at _____ [*place*], _____ County,

California, plaintiff put up for sale at auction certain property he/she then owned, to wit: _____ [*describe, e.g.*, a herd of registered holstein cattle consisting of 140 milk cows, 12 heifers between six months and one year old, and two bulls each two years old]. Plaintiff's contract with the auctioneer authorized plaintiff to collect the purchase price [except the initial deposit, which was to be collected by the auctioneer]. The terms of the sale were as follows: _____ [*state terms, e.g.*, $7,000 deposit, in the form of certified check was required to bid; the successful bidder was to pay the remainder of the purchase price within 30 days of delivery of the herd]. Before the sale was conducted, the terms were announced orally to the persons then and there in attendance.

4. At the time and place alleged above, the _____ [*e.g.*, herd of cattle] was sold to defendant, as highest bidder, for a price of $_____.

5. [*If property in question is real property or an interest therein (Civ. Code § 1624(c)); or if it is goods (see Com. Code § 2105(1)), and price is $500 or more (Com. Code § 2201(1)); or if it is personal property other than securities and security agreements, and price is more than $5,000 (Civ. Code § 1624.5(a), allege that sale contract was set out in writing, or that a note or memorandum of it was made, and that defendant or his agent signed it, e.g.,* Promptly after the sale was completed, the auctioneer wrote out a memorandum of the contract. The contents of the memorandum were _____ (*state contents, or attach a copy as an exhibit and insert*: as set out in the copy attached hereto as Exhibit "A" and made a part hereof). The memorandum was signed by the auctioneer as agent for plaintiff, as seller, and by defendant, as buyer.]

6. On or about _____ [*date*], in accordance with the terms of the sale, plaintiff tendered to defendant a duly executed _____ [*e.g.*, bill of sale] and _____[offered to place *or* placed] defendant in possession of the _____ [*e.g.*, herd of cattle.]. Plaintiff has performed all other conditions on his/her part to be performed _____ [*add if appropriate*: except _____ (*specify unperformed conditions*), performance of which is excused for the reason that _____ (*state reason*)].

7. On or about _____ [*date*], defendant failed to pay the [unpaid balance of the] price then due. To the date of commencement of this action, defendant has not paid any part of the price [except $_____].

8. At the time of the tender of the _____[*e.g.*, bill of sale] and _____ [offer to put defendant in *or* delivery of] possession of the _____ [*e.g.*, herd of cattle] as alleged above, the value of the herd of cattle was $_____. Plaintiff has been damaged by defendant's breach of contract as aforesaid in the sum of $_____.

[9. *Allege special damages, if any, e.g.*, Plaintiff has incurred expenses of $_____ for storage, feed, and maintenance of the property sold to defendant and will continue to incur those expenses at the rate of $_____ per month.]

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages in the sum of $_____.

2. For interest thereon at the _____ [rate of 10 percent per year *or* contract rate of _____ percent per year] from and after _____ [*date*].

3. [*Special damages, if any.*]

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 77.40[4]*.]

[2] Use of Form

The complaint in [1], *above,* is for use by a seller of property at auction to recover damages from a buyer who breached the contract of sale. Whether the seller or the auctioneer should bring the action depends on the terms of the contract between them [*see Civ. Code § 1812.608(d)* (violation of *Civ. Code § 1812.600 et seq.* for auctioneer to sell goods without first entering into contract with seller)]. In the absence of a contract or usage to the contrary, the auctioneer is authorized to collect the price [*Civ. Code § 2362(6)*]. Assuming the subject matter of the contact is goods, the seller will have the rights and remedies of a seller under Division 2 of the Commercial Code, which are discussed in *§ 77.60*, generally.

[3] Allegations

This form of complaint alleges:

- The capacity and residence of defendant (Paragraphs 1, 2) [*see Code Civ. Proc. § 395(a)* (discussed in [4], *below*].

- The date, place, terms, subject matter, and announcements at the auction (Paragraph 3) [*see Civ. Code § 1812.607(c)* (auctioneer as required to post or distribute terms prior to sale); *Civ. Code § 1812.607(k)* (required announcement regarding liens on property being auctioned)].

- The sale to defendant as the highest bidder (Paragraph 4);

- The execution of a memorandum sufficient to satisfy the statute of frauds (Paragraph 5) [*see Civ. Code § 2363* (auctioneer's authority to bind both seller and bidder by memorandum); *Craig v. Godfroy (1851) 1 Cal. 415, 415-416* (auctioneer's memorandum of sale as substitute for written contract of parties); *see* discussion in *§ 77.22[2]*].

- Plaintiff's performance (Paragraph 6).

- Defendant's breach (Paragraph 7).

- Damages as measured by *Com. Code § 2709(1)(a)* (Paragraph 8) [*see also § 77.60*].

- An optional allegation for incidental damages (Paragraph 9) [*Com. Code § 2710*].

The rate of interest on damages for breach of contract will be either the legal rate of 10 percent per year [*see Cal.*

Const., art. XV, § 1; *Code Civ. Proc. § 685.010(a)*], any legal rate of interest stipulated by contract, until the contract is superseded by a verdict or other new obligation [*see Civ. Code § 3289(a)*], or the rate of 10 percent per annum after a breach, if a contract entered into after January 1, 1986, does not stipulate a legal rate of interest [*see Civ. Code § 3289(b)*].

[4] Venue in Contract Actions

Unless the contract is one for the sale of goods intended primarily for personal, family, or household use or one governed by *Civ. Code § 1812.10* or *2984.4* [*see Code Civ. Proc. § 395(b)*], if a defendant has contracted to perform an obligation in a particular county, either that county or the county in which the contract was entered into or the county in which the defendant, or any defendant, resides at the time of the commencement of the action is the proper venue for an action on the contract. The county in which the obligation was incurred is deemed the county in which it is to be performed, unless there is a contract in writing to the contrary [*Code Civ. Proc. § 395(a)*].

[5] Cross References

For additional discussion and cross references relating to complaints in general, see *§ 77.40[2]* et seq.

For discussion and a form of complaint relating to an action by the auctioneer against the buyer for the price of goods sold, see *§ 77.60*

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7-77 California Forms of Pleading and Practice--Annotated §§ 77.45through 77.49

[Reserved]

§§ 77.45[Reserved]

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7-77 California Forms of Pleading and Practice--Annotated § 77.50

§ 77.50 Complaint for Damages [Civ. Code § 3281; Com. Code § 2714] Based on Breach of Warranty--By Buyer Against Seller--Warranty by Auctioneer [Civ. Code §§ 2323, 2362(3)]

[1] FORM Complaint for Damages [Civ. Code § 3281; Com. Code § 2714] Based on Breach of Warranty--By Buyer Against Seller--Warranty by Auctioneer [Civ. Code §§ 2323, 2362(3)]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Breach of Warranty)
through _____], Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name of seller*] is, and at all times herein mentioned was, a California corporation with its principal place of business in _____ County, California [*or allege other capacity and residence*].

2. [Defendant _____ (*name of auctioneer*) is, and at all times herein mentioned was, a California corporation with its principal place of business in _____ County, California (*or allege other capacity and residence*), and doing business as an auctioneer, and in that capacity conducted the auction out of which this action arises (*If venue is sought in county where auction was conducted, add:* in _____County, California).]

3. On or about _____ [*date*], at _____ [*place*], California, defendant [_____ (*name of seller*)] put up certain property, to wit: _____ [*describe, e.g.,* a herd of cattle], for sale at auction, and plaintiff then and there offered the highest bid and bought the property for a price of $_____. [A copy of the memorandum of sale executed by (defendant) _____ (*name of auctioneer*), as auctioneer, is attached to this complaint marked Exhibit "A" and incorporated by reference.] Defendant [_____ (*name of seller*)] subsequently _____ [*describe defendant's performance, e.g.,* caused the herd to be delivered to plaintiff along with a bill of sale].

4. In connection with the sale, [defendant] _____[*name of auctioneer*], the auctioneer at the sale, made certain representations, as defendant [_____ (*name of seller*)]'s agent, concerning _____ [defendant's title to *or* the quantity of *or* the quality of] the property, to wit: _____ [*describe representations, e.g.,* that the herd consisted of two hundred head, more or less]. These representations were made _____ [*describe how, e.g.,* both orally at the time of sale and in writing in a catalog distributed before the sale].

5. Plaintiff believed these representations to be true and relied on that belief in bidding on and buying the property. If plaintiff had known that the representations were not true, then plaintiff would not have bought the property for the price that plaintiff paid.

6. On or about _____ [*date*], plaintiff discovered that the property was not as represented, in that _____[*describe how property fails to conform to warranty, e.g.,* the herd consisted of only 53 head]. [*If property is goods, add:* Plaintiff immediately thereafter gave defendant [_____ (*name of seller*)] notice, as required by *Commercial Code Section 2607*.] [A copy of that written notice is attached to this complaint marked Exhibit "B" and incorporated herein by reference.]

7. If the property had been as represented, it would have had a fair market value of $_____.

8. The actual value of the property at the time plaintiff received it was $_____.

9. As a consequence of defendant [_____(*name of seller*)]'s breach of warranty hereinabove alleged, plaintiff has sustained damages in the sum of $_____.

[10. *Special damages, if any. See § 77.51[1], Paragraph 9.*]

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____.

2. For interest thereon at the legal rate from and after _____ [*date*].

3. [*Special damages, if any.*]

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 77.40[4].*]

[2] Use of Form

The complaint in [1], *above,* may be used by a buyer to obtain damages based on the failure of property bought at auction to conform to warranties made on behalf of the seller by the auctioneer [*Civ. Code § 3281*; *Com. Code § 2714*], who is the seller's agent for purposes of warranties with respect to the title of the principal and the quality and quantity of the property unless there is some agreement or usage to the contrary [*Civ. Code §§ 2323, 2362(3)*]. If an auctioneer is authorized to sell and convey real property, then that authority includes authority to give "the usual covenants of warranty" [*see Civ. Code § 2324*]. In addition, the seller may become bound by a warranty stated in his auctioneer's catalog if there is no agreement or understanding to the contrary [*see Dugan v. Phillips (1926) 77 Cal. App. 268, 275, 246 P. 566]* .

This action for breach of warranty is akin to an action in tort for fraud (deceit) but lacks the element of intent to deceive [*see § 77.42*]. An action for breach of warranty is appropriate if the buyer wants to affirm the sale contract and seek damages.

[3] Auctioneer as Defendant

The form provides optional allegations to join the auctioneer as defendant. The auctioneer may be joined as a defendant on the ground that he or she is liable for breach of warranty if he or she makes misrepresentations about the property [*see Spaulding v. O'Connor (1927) 87 Cal. App. 82, 84-85, 261 P. 766]* . An early case held the auctioneer liable for misrepresentation of the quantity of goods sold, on the ground that the buyer presumably relied on the representation and changed his position because of it, as where he made contracts for resale [*Burgoyne et al. v. Middleton et al. (1854) 4 Cal. 64, 66-67]* .

However, no breach of warranty claim arises from an auctioneer's sale of used machinery "as is" when title passed directly from seller to buyer and uncontradicted evidence of custom was that the term "as is" means that the auctioneer did not modify, alter, inspect or operate the item sold [*Brejcha v. Wilson Machinery, Inc. (1984) 160 Cal. App. 3d 630, 641, 206 Cal. Rptr. 688]* . Additionally, no cause of action for strict liability may be stated against an auctioneer of second-hand machinery when it is sold "as is" [*Brejcha v. Wilson Machinery, Inc. (1984) 160 Cal. App. 3d 630, 639, 206 Cal. Rptr. 688* ; *Tauber-Arons Auctioneers Co. v. Superior Court (1980) 101 Cal. App. 3d 268, 283-284, 161 Cal. Rptr. 789]* .

[4] Other Remedies Available to Buyer

If the auctioneer knowingly misrepresented the nature of any item, including, but not limited to, its age, authenticity, value, condition, or origin, the buyer may return the item to the auctioneer or auction company within five days after the date of the auction sale and receive a refund within 24 hours of return [*Civ. Code § 1812.608(i)*].

A buyer injured by nonconformity of goods purchased at auction also has other options under the Commercial Code. If the nonconformity is discovered before the buyer accepts the goods, or in time for the buyer to revoke acceptance, the buyer may cancel the contract and recover the purchase price, purchase substitute goods and recover damages [*see* Com. Code § 2711]. With respect to whether a sale of goods is accompanied by any express or implied warranties, the Commercial Code does not distinguish between a sale at auction and a sale by any other method [*see Com. Code §§ 2106(1)* ("sale" defined), 2312-2315 (warranties), together with Official Comments].

A buyer injured by a material misrepresentation concerning the goods may also rescind in accordance with *Civ. Code § 1689(b)(1)* [*see § 77.51*].

[5] Allegations and Measure of Damages

This complaint alleges:

- The capacities and residences of the defendants (Paragraphs 1, 2).

- The conduct of the auction sale and existence of a memorandum of sale (Paragraph 3) [*see Code Civ. Proc. § 395(a)* (venue); *Com. Code § 2201(1)* (statute of frauds if goods of value of $500 or more are involved); for discussion, *see 77.22[2]*].

- The representations and warranties (Paragraph 4).

- Plaintiff's reliance on the representations (Paragraph 5).

- Plaintiff's discovery of the breach of the warranty and issuance of notification (Paragraph 6) [*Com. Code § 2607(3)(A)*; *see Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116, 135-136, 87 Cal. Rptr. 3d 5* (buyer has burden of proving reasonable notice; question whether notice was properly given must be determined from particular circumstances, and when but one inference can be drawn from undisputed facts, issue may be determined as matter of law)].

If appropriate, allegations naming fictitious defendants and alleging an agency relationship between defendants, which are Paragraphs 3 and 4, respectively, of § 77.40[1], may be added between Paragraphs 2 and 3 of this complaint. It is not necessary to allege the agency relationship established by *Civ. Code §§ 2323, 2362(3)* [*see § 77.50[2]*].

A buyer who has accepted goods and given notification in accordance with *Com. Code § 2607(3)*, may recover as damages for nonconformity the loss resulting in the ordinary course of events from the seller's breach, as determined in any manner that is reasonable [*Com. Code § 2714(1)*].

The measure of damages for breach of warranty under the Commercial Code is the difference (Paragraph 9) at the time and place of acceptance between the value of the goods accepted (Paragraph 8) and the value they would have had if they had been as warranted (Paragraph 7), unless special circumstances show proximate damages of a different amount [*Com. Code § 2714(2)*]. The buyer may also recover incidental (Paragraph 10) and consequential damages [*Com. Code §§ 2714(3), 2715*]. Incidental damages include expenses reasonably incurred in inspection, receipt, transportation and care and custody of the goods (Paragraph 10) [*Com. Code § 2715(1)*]. Consequential damages in this context arise from the particular needs of the buyer of which the seller was aware at the time of contracting, and which could not be mitigated by cover or otherwise, as well as any injury to property or person resulting from the breach of warranty [*Com. Code § 2715(2)*].

[6] Cross References

For additional discussion and cross references relating to complaints in general, see *§ 77.40[2]* et seq.

For discussion and forms relating to warranties in the sale of goods, see Ch. 500, *Sales: Sales Under the Commercial Code* , and Ch. 502, *Sales: Warranties*

For discussion and forms relating to warranties in the sale of real property, see Ch. 569, *Vendor and Purchaser*

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§ 77.51 Complaint for Restitution [Civ. Code § 1692] Based on Rescission of Auction Sale for Fraud [Civ. Code § 1689(b)(1)] or Reformation Com. Code § 2328(4)]--By Buyer Against Seller and Auctioneer--Bidding By or On Behalf of Seller Without Notice

[1] FORM Complaint for Restitution [Civ. Code § 1692] Based on Rescission of Auction Sale for Fraud [Civ. Code § 1689(b)(1)] or Reformation Com. Code § 2328(4)]--By Buyer Against Seller and Auctioneer--Bidding By or On Behalf of Seller Without Notice

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RESTITUTION OR REFOR-
_____ [*name(s)*], Defendant(s).	)	MATION
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name of seller*] is, and at all times herein mentioned was, a California corporation with its principal place of business in _____ County, California [*or allege other capacity and residence*].

2. [Defendant _____ (*name of auctioneer*) is, and at all times herein mentioned was, a California corporation with its principal place of business in _____ County, California (*or allege other capacity and residence*), and doing business as an auctioneer, and in that capacity conducted the auction out of which this action arises (*If venue is sought in county where auction was conducted, add:* in _____ County, California).]

3. On or about _____ [*date*], at _____ [*place*], California, certain property then owned by defendant [_____ (*name of seller*)], to wit: _____ [*describe, e.g.,* a 1995 General Motors trailer and two John Deere backhoes], was put up for sale at auction and was then and there bought by plaintiff, as highest bidder, for a price of $_____ [*continue if multiple items were purchased, e.g.,* $10,000 for the trailer, and $6,100 and $8,600, respectively, for the backhoes]. The terms of the sale were as follows: _____ [*state terms*]. [A copy of the memorandum of sale executed by (defendant) _____ (*name of auctioneer*), as auctioneer, is attached to this complaint marked Exhibit "A" and incorporated herein by reference.]

4. _____ [*Describe extent to which item(s) have been delivered to plaintiff, e.g.,* On or about _____ (*date*), plaintiff took delivery of the trailer and backhoes].

5. _____ [*Describe extent of payment(s) made by plaintiff, e.g.,* Plaintiff paid a $7,000 down payment to (defendant) _____ (*name of auctioneer*) at the time of the auction and has since paid the balance of the $24,700 to defendant _____ (*name of seller*)].

6. On or about _____ [*date*], plaintiff discovered that defendant _____ [*name of seller*] had engaged in secret bidding for the sole purpose of increasing the bid on the item(s) sold by _____ [making *or* procuring] bids at the sale on defendant's own behalf, in competition with plaintiff's bids. No notice was given at the sale or before that defendant _____ [*name of seller*] reserved the right to so bid.

[7. *If auctioneer knew of the secret bidding, describe extent of auctioneer's knowledge and participation:* On or about _____ (*date*), plaintiff discovered that defendant _____ (*name of auctioneer*) knew of the secret bidding by seller (and on seller's behalf) and (agreed to allow and receive those bids and) knowingly allowed and received those bids without giving notice to plaintiff or the audience that defendant seller was bidding.]

[*EITHER, if plaintiff has given notice of rescission or has restored or offered to restore all consideration received*]

8. _____ [*Describe, e.g.,* On or about _____ (*date*), plaintiff notified defendant _____ (*name of seller*) of plaintiff's rescission of the sale and _____ (restored to defendant *or* offered to restore to defendant the _____ (*describe property, e.g.,* trailer and backhoes), on condition that defendant restore to plaintiff the $_____ paid thus far by plaintiff to defendant under the contract.]

[*OR, if plaintiff has not given notice of rescission but has received something of value*]

8. Plaintiff intends service of the summons and complaint in this action to serve as notice of rescission of the auction sale and hereby offers to restore to defendant _____ [*name of seller*] the _____ [*describe property, e.g.,* trailer and backhoes], on condition that defendant restore to plaintiff the $_____ paid thus far by plaintiff to defendant under the contract.

[*CONTINUE*]

[9. As a result of the purchase at auction of the goods described in this complaint and the secret bidding engaged in at that auction, plaintiff has incurred expenses in addition to the payment alleged above. Those expenses include, without limitation _____ (*describe additional expenses, e.g.,* inspection and vehicle license and registration fees, insurance, repair, and storage costs). Plaintiff has paid (or incurred) a total of $_____ for those expenses.]

[10. Defendant(s) intentionally and maliciously (agreed to engage in and) engaged in the secret bidding herein alleged, without giving notice to plaintiff or other bidders, and without any intention that those bids be accepted, but for the sole purpose of injuring plaintiff and artificially raising the price plaintiff had to pay for the goods. (Defendant _____ (*name of auctioneer*) knowingly allowed and received those bids with knowledge that their sole purpose was to artificially raise the price.)]

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

1. That this court declare that the auction sale and resultant contract are rescinded and that defendant(s) be ordered return to plaintiff the $_____ paid by plaintiff as/towards the purchase price with interest thereon at the legal rate from the date of rescission, or, in the alternative, that the contract be reformed by reduction of the purchase price to an amount equal to the last good faith bid plaintiff made before the first secret bid made by defendant seller or on his/her/its behalf and that defendant(s) be ordered to return to plaintiff the excess paid by plaintiff as/towards the purchase price with interest thereon.

2. For damages in that amount of $_____ with interest.

[3. For exemplary damages.]

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 77.40[4].*]

[2] Use of Form

The complaint in [1], *above,* is for use by a buyer who purchased goods at an auction at which, without notice to the buyer or the audience, bids were made by the seller or on the seller's behalf. This practice, sometimes referred to as "by-bidding," entitles the buyer to rescission and restitution [*see Civ. Code §§ 1689(b)(1), 1812.603, 1812.608(h)(2)*], or, in the alternative, to reform the sale contract by having the sale price reduced to the amount of the last good faith bid prior to the completion of the sale. However, this option does not apply in the case of a forced (*e.g.*, execution) sale [*Com. Code § 2328(4)*].

The auctioneer does not need to be made a party unless the buyer seeks restitution of consideration that the auctioneer has, or the auctioneer was culpable and the buyer seeks to recover damages from the auctioneer [*see Civ. Code §§ 1812.603, 1812.608(h)(2)*; *Com. Code § 2328(4)*; *but see Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 262-265, 73 P.2d 1163* (every party to contract to be rescinded must be joined in action)].

The form also contains an allegation for punitive damages, as approved in *Nevada National Leasing Co. v. Hereford (1984) 36 Cal. 3d 146, 203 Cal. Rptr. 118, 680 P.2d 1077* , which involved an agreement between the seller and the auctioneer that the owner would bid on the items to increase the price. No claim for exemplary damges may state an amount or amounts [*Civ. Code § 3295(e)*].

[3] Bases of Action

[a] Common Law

At common law, the employment by the seller of so-called "by-bidders" or "puffers" to bid at a sale by auction, without the knowledge of the buyer, and without an intention on the part of the bidder to buy, is a fraud against the public, and in particular, on the buyer, which entitles the buyer to rescind the purchase [*see Civ. Code § 1689(b)(1)*; *Haley v. Bloomquist (1928) 204 Cal. 253, 257, 268 P. 365* ; *Dealey v. East San Mateo Land Co. (1913) 21 Cal. App. 39, 41, 130 P. 1066]* .

[b] Commercial Code

Except in the case of a forced sale, if the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and no notice was given that the seller reserved the right for such bidding, the buyer has the option of either avoiding the sale or taking the goods at the price of the last good faith bid prior to the completion of the sale [*Com. Code § 2328(4)*; *see Nevada National Leasing Co. v. Hereford (1984) 36 Cal. 3d 146, 151-153, 203 Cal. Rptr. 118, 680 P.2d 1077* (sale by lessor/owner after repossessing goods from lessee was not forced sale)].

[4] Civil Code Remedy

As an alternative, the seller could file a petition for restitution in the superior court of the county in which the auction occurred [*Civ. Code § 1812.603*; for discussion, *see § 77.23*]. *Civ. Code § 1812.603* provides for restitution to any person injured by a violation of the title governing auctioneers and auction companies (*Civ. Code § 1812.600 et seq.*). It is a violation of *Civ. Code § 1812.600 et seq.* for an auctioneer to cause or allow anyone, usually the owner, consignor, or an agent of either, to bid solely for the purpose of increasing the bid without disclosing to the audience that the owner, consignor, or agent has reserved the right to so bid [*Civ. Code § 1812.608(h)(2)*].

[5] Allegations

[a] Basic Allegations

The allegations of a complaint for restitution based on unilateral rescission for cause are:

- The capacities and residences of the defendants (Paragraphs 1 and 2) [*see* discussion in [7], *below*].

- The existence and relevant terms of the contract (Paragraph 3) [*see California Trust Co. v. Gustason (1940) 15 Cal. 2d 268, 272, 101 P.2d 74]* , and, if the contract is for the sale of goods of a value of $500 or more, a written memorandum sufficient to satisfy the statute of frauds [*Com. Code § 2201(1)*; for discussion, *see § 77.22[2]*].

- What money or other thing is owing plaintiff as a consequence of the rescission (Paragraphs 4, 5) [*see Civ. Code § 1692*].

- The ground for rescission (Paragraph 6) [*see Civ. Code § 1689(b)*].

If appropriate, allegations naming fictitious defendants and alleging an agency relationship between defendants, which are Paragraphs 3 and 4, respectively, of § 77.40[1], may be added between Paragraphs 2 and 3 of this complaint.

If the auctioneer knew of the seller's bidding and plaintiff seeks restitution or damages from the auctioneer, optional Paragraph 7 should be used to allege the auctioneer's part in the transaction.

Optional Paragraph 9 is for use to allege any other damages plaintiff may need to be made whole [*see Civ. Code § 1692* (rescission and restitution)].

[b] Allegations for Punitive Damages

Optional Paragraph 10 is for use to allege the basis for an award of punitive damages [*see Nevada National Leasing Co. v. Hereford (1984) 36 Cal. 3d 146, 153, 203 Cal. Rptr. 118, 680 P.2d 1077]* . The Court in *Nevada National Leasing* found the record contained substantial evidence to establish malice in fact based on findings that the auctioneer and the seller conspired to fraudulently raise the prices by making secret fictitious bids and that their intent in making those bids was to defraud and injure the successful bidder, that seller's bids were made solely to raise the sales price, and that the seller had no intention of paying the purchase price if it was the successful bidder [*Nevada National Leasing Co. v. Hereford (1984) 36 Cal. 3d 146, 153, 203 Cal. Rptr. 118, 680 P.2d 1077]* .

No claim for punitive damages may state an amount or amounts [*Civ. Code § 3295(e)*].

[c] Allegations for Rescission

If plaintiff is seeking restitution rather than reformation, one of the alternative optional Paragraphs 8 should be used to allege the status of the unilateral rescission [*see Civ. Code § 1691*]. Subject to an exception discussed below, to effect a rescission a party to the contract must, promptly on discovering the facts which entitle him or her to rescind if he or she is free from duress, menace, undue influence, or disability, and is aware of his or her right to rescind, give notice to the party as to whom he or she rescinds and restore to the other party everything of value which he or has received from that party under the contract or offer to restore the same on condition that the other party do likewise, unless the latter is unable or positively refuses to do so. When notice of rescission has not otherwise been given or an offer to restore the benefits received under the contract has not otherwise been made, the service of a pleading in an action or proceeding that seeks relief based on rescission shall be deemed to be such notice or offer or both [*Civ. Code § 1691*].

An exception to the rule requiring notice is that when relief based on rescission is claimed in an action or proceeding, relief shall not be denied because of delay in giving notice of rescission unless that delay has been substantially prejudicial to the other party. A party who has received benefits by reason of a contract that is subject to rescission and who in an action or proceeding seeks relief based on rescission shall not be denied relief because of a delay in restoring or in tendering restoration of benefits before judgment unless that delay has been substantially prejudicial to the other party; but the court may make a tender of restoration a condition of its judgment [*Civ. Code § 1693*].

[6] Price Reduction Example

The award affirmed under *Com. Code § 2328(4)* in *Nevada National Leasing Co. v. Hereford (1984) 36 Cal. 3d 146, 150-151, 203 Cal. Rptr. 118, 680 P.2d 1077* was based on the difference between plaintiff/buyer's winning bids on each of the three items purchased and the last bid plaintiff made for each item before seller's sham bid on that item.

Plaintiff/buyer's last bids were $10,000, $6,100, and $8,600, respectively on the three items purchased. Plaintiff's last bids before seller's sham bids were $6,000, $3,500, and $500, respectively, thus, showing inflation of $4,000, $2,600, and $8,100 on each of the three items, for a total reduction of $14,700 [*Nevada National Leasing Co. v. Hereford (1984) 36 Cal. 3d 146, 150, 203 Cal. Rptr. 118, 680 P.2d 1077]* .

[7] Jurisdiction and Venue

The superior court has jurisdiction of the action [*see Cal. Const. art. VI, § 10*]. Actions to cancel or rescind a contract are limited civil cases when the relief is sought in connection with an action to recover money not exceeding $25,000, or property of a value not exceeding $25,000 paid or delivered under or in consideration of the contract. Actions to revise a contract are limited civil cases if the relief is sought in an action upon the contract if the action otherwise is a limited civil case [*Civ. Code § 86(a)(3)*]. In this regard, an action will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Code Civ. Proc. §§ 85(a), 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

An action for reformation of a contract is properly brought in the county in which any defendant resides at the commencement of the action [*Code Civ. Proc. § 395(a)*; *see also Code Civ. Proc. § 395.5* (action against corporation is properly brought in county of defendant's principal place of business)].

If the gravamen of the action for relief based on rescission is fraud, the action is considered transitory, and the proper venue is the county of defendant's residence [*Code Civ. Proc. § 395(a)*].

[8] Cross References

For additional discussion and cross references relating to complaints in general, see *§ 77.40[2]* et seq.

For discussion and forms for use in actions for reformation, see Ch. 488, *Reformation of Instruments*

For discussion and forms for use in actions for restitution and unilateral rescission, see Ch. 490, *Rescission and Restitution*

For discussion and forms relating to revocation of acceptance and rejection of goods under the Commercial Code, see Ch. 500, *Sales: Sales Under the Commercial Code*

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7-77 California Forms of Pleading and Practice--Annotated § 77.52

§ 77.52 Affirmative Defense to Complaint to Enforce Auction Sale--Bidding By or On Behalf of Seller Without Notice [*see* Civ. Code § 1689(b)(1); Com. Code § 2328(4)]

[1] FORM Affirmative Defense to Complaint to Enforce Auction Sale--Bidding By or On Behalf of Seller Without Notice [***see*** Civ. Code § 1689(b)(1); Com. Code § 2328(4)]

AS A [_____ (*if more than one, specify number, e.g.*, FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

The auction sale referred to in the complaint is a fraud on the public, against public policy, and cannot be the basis for the relief sought by plaintiff because defendant's winning bid and the resultant sale were artificially and fraudulently inflated by the auctioneer's acceptance of bids by plaintiff [and on plaintiff's behalf], which bids were made without notice that plaintiff reserved the right for such bids and for the sole purpose of creating artificial bidding competition, with no intention on the part of [either] plaintiff [or those bidding on plaintiff's behalf] to purchase the property at the prices bid. [Defendant is informed and believes and on such information and belief alleges that his/her last good faith bid before sham bids by or on behalf of plaintiff was in the amount of $_____.]

[2] Use of Form

The form in [1], *above,* is an affirmative defense that may be pleaded by a buyer in answer to a complaint by the seller to collect the purchase price. If the plaintiff in the main action is the auctioneer, the defense may be used, but this form will have to be modified to reflect that the seller, not the plaintiff, was doing the secret bidding, and whether the auctioneer knew of or agreed to the secret bidding [*see § 77.51*].

[3] Nature of Defense

The employment by the seller of so-called "by-bidders" or "puffers" to bid at a sale by auction, without the knowledge of the buyer, and without an intention on the part of the bidder to buy, is a fraud against the public, and in particular, on the buyer [*see Civ. Code § 1812.608(h)(2); Haley v. Bloomquist (1928) 204 Cal. 253, 257, 268 P. 365* ; *Dealey v. East San Mateo Land Co. (1913) 21 Cal. App. 39, 41, 130 P. 1066]* . A buyer who purchased property based on such an

artificially inflated bid has the option of either avoiding the sale or taking the goods at the price of the last good faith bid prior to the completion of the sale [*Com. Code § 2328(4)*; *see Nevada National Leasing Co. v. Hereford (1984) 36 Cal. 3d 146, 151-153, 203 Cal. Rptr. 118, 680 P.2d 1077]* . The optional language in this form assumes the buyer prefers to keep the goods, but seeks a reduction in price.

An agreement between the seller of property sold at auction and an auctioneer, by which the auctioneer is allowed to use by-bidders at the sale, is contrary to public policy as the perpetration of a fraud, and the auctioneer cannot recover compensation on the basis of such an agreement. Older cases denied the auctioneer any recovery whether or not any buyer exercised his or her or right to rescind a sale on the ground of the fraudulently inflated price [*see § 77.51*], and regardless of how or when the fraudulent nature of the agreement was brought to the attention of the court. The basis for the denial of relief is that the court will not allow itself to be used to settle a controversy arising from an agreement to perpetrate a fraud [*Dealey v. East San Mateo Land Co. (1913) 21 Cal. App. 39, 41-42, 130 P. 1066* (citing former *Civ. Code § 1797*, but noting that similar rule prevailed at common law)]. More recently, auctioneers who agreed to such secret bidding have been held liable for punitive damages [*see Nevada National Leasing Co. v. Hereford (1984) 36 Cal. 3d 146, 153, 203 Cal. Rptr. 118, 680 P.2d 1077* (discussed in *§ 77.51*)].

[4] Cross References

For additional discussion, see *§ 77.51[2]* et seq.

For discussion of affirmative defenses and a general form for an answer, see Ch. 26, *Answers*

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[Reserved]

§§ 77.53[Reserved]

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7-77 California Forms of Pleading and Practice--Annotated § 77.60

§ 77.60 Complaint for Price of Goods Sold at Auction [Com. Code §§ 2328, 2709]--By Auctioneer Against Buyer

[1] FORM Complaint for Price of Goods Sold at Auction [Com. Code §§ 2328, 2709]--By Auctioneer Against Buyer

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR PRICE OF GOODS SOLD AT AUCTION
_____ [*name*],	)	
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s)	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. At all relevant times mentioned in this complaint, plaintiff was doing business as an auctioneer at _____ [*street address, city, and county*], California, and had posted and maintained with the Secretary of State the _____ [bond *or* deposit in lieu of bond] required by *Civil Code Section 1812.600*.

2. Defendant is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence of defendant*].

[3. *Fictitious defendants, if appropriate. See § 77.40[1], Paragraph 3.*]

4. On or about _____ [*date*], at _____ [*city*], California, plaintiff and _____ [*owner of property sold at auction*] entered into a written contract under the terms of which _____ [*owner*] employed plaintiff as an auctioneer to conduct a public auction sale of _____ [*describe property sold at auction, e.g.,* a 1986 John Deere tractor with plow attachment]. A copy of the contract is attached as Exhibit "A" and incorporated by reference.

5. On or about _____ [*date*], at a public auction conducted by plaintiff, as auctioneer, at plaintiff's place of business, and pursuant to the contract, plaintiff sold the above-described property to defendant, who was the highest bidder, for $_____. [*If goods, as defined in Com. Code § 2105(1), were sold for more than $500, or if other personal property, not consisting of securities, was sold for more than $5,000, add:* Promptly after the sale was completed, plaintiff wrote out a memorandum of the sale, which was signed by plaintiff _____ (and defendant *or* for himself/herself and as agent of seller and of defendant, as buyer). A copy of the memorandum is attached as Exhibit "B" and incorporated by reference.]

[*EITHER*]

6. On or about _____ [*date*], plaintiff delivered _____ [the goods *or specify other documents of title or means of delivery, e.g.,* the certificate of ownership and keys to the tractor] to defendant.

[*OR*]

6. [*Plaintiff's tender and performance. See § 77.44[1], Paragraph 6.*]

[*CONTINUE*]

[7. Defendant wrongfully _____ (*specify defendant's breach, if any, in addition to nonpayment, e.g.,* refused to accept delivery of the goods).]

8. Plaintiff has duly demanded of defendant the sum of $_____ but defendant has failed, and continues to fail, to pay plaintiff that sum or any part of it.

[9. Plaintiff has made a reasonable effort to resell the goods described in Paragraph 4 at a reasonable price but has been unable to do so.]

[10. Circumstances reasonably indicate that any attempt by plaintiff to resell the goods described in Paragraph 4 would be impracticable in that _____ (*specify*).]

[11. Plaintiff has incurred expenses of $_____ for storage and maintenance of the property sold to defendant and will continue to incur storage expenses at the rate of $_____ per month.]

12. The market value of the goods at the time and place for tender was $_____. As a direct and proximate result of defendant's conduct, plaintiff has suffered damages in the sum of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____, with interest thereon at the legal rate from _____ [*date of sale*].

2. For incidental damages in the amount of $_____.

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 77.40[4]*.]

[2] Use of Form

The complaint in [1], *above,* is for use by an auctioneer to bring an action against the highest bidder when the defendant bidder failed to pay the price when it became due. Whether the seller or the auctioneer should bring the action depends on the terms of the contract between them [*see Civ. Code § 1812.608(d)* (violation of title governing Auctioneers and Auction Companies, *Civ. Code § 1812.600 et seq.*, for auctioneer to sell goods without first entering into contract with seller)]. In the absence of a contract or usage to the contrary, the auctioneer is authorized to collect the price [*Civ. Code § 2362(6)*; *see also Walter J. Warren Ins. Agency v. Surpur Timber Co. (1967) 250 Cal. App. 2d 99, 104, 58 Cal. Rptr. 143* (agent who is liable to principal for price of thing sold may institute action for price in own name)].

[3] Commercial Code Remedies

Under *Com. Code § 2709*, the measure of damages will be the contract price, less any amount recovered on resale. That measure of damages is applicable if (1) the goods have been accepted by the buyer, (2) the goods have been lost or damaged within a commercially reasonable time after risk of loss has passed to the buyer, or (3) the seller is unable after reasonable effort to resell the goods at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing [*see Com. Code § 2709(1),(2), see Civ. Code § 2362(6)*; *Com. Code § 2328*].

If the buyer has not accepted the goods and the auctioneer cannot or does not wish to attempt resale or prove that resale efforts are likely to be unavailing, the measure of damages is the difference between the market price at the time and place for tender and the unpaid contract price, together with any incidental damages, less expenses saved in consequence of the buyer's breach [*Com. Code § 2708(1)*; *see Com. Code § 2709(3)* (after buyer has wrongfully rejected or revoked acceptance of goods, has failed to make payment, or has repudiated, seller who is held not to be entitled to price under *Com. Code § 2709* will be awarded damages for nonacceptance under *Com. Code § 2708*)].

One who sues for the price under *Com. Code § 2709* must hold for the buyer any goods identified in the contract that are still in his or her control, except that if resale becomes possible, the plaintiff may resell the goods at any time prior to collection of the judgment. The net proceeds of resale must be credited to the buyer. Payment of the judgment entitles the buyer to any goods not resold [*Com. Code § 2709(2)*].

A "sale" consists in the passing of title from the seller to the buyer for a price [*Com. Code § 2106(1)*]. For further discussion concerning when an auction sale is complete and when title passes, see *§ 77.21*.

[4] Allegations

The form alleges the license and capacity of plaintiff auctioneer (Paragraph 1) [*see* former *Bus. & Prof. Code §§ 5730-5747, 5772.6*; *see also § 77.12*].

This form also alleges:

- The capacity and residence of the defendant (Paragraph 2) [*see Code Civ. Proc. § 395(a)* (venue for individual defendant), *Code Civ. Proc. § 395.5* (venue for corporate defendant); *see also § 77.44*].

- The formation of the contract between plaintiff and the seller (Paragraph 4) [*see Civ. Code § 1812.608(d)* (requirements of contract with seller)].

- The auction sale to defendant, and if necessary, the making of a memorandum sufficient to satisfy the statute of frauds (Paragraph 5) [*see Civ. Code §§ 1624.5(a), 2363* (sale of personal property other than goods for more than $5,000"--auctioneer's authority to sign memorandum of sale as agent of buyer and seller); *Com. Code § 2201* (goods); for discussion, *see § 77.22[2][a]*].

- Either plaintiff's delivery of the goods to defendant or plaintiff's tender, if necessary, and performance (alternative Paragraphs 6) [*see Com. Code § 2709(1)(a)* (accepted goods); *see also Walnut Creek Pipe Distributors, Inc. v. Gates Rubber Co. (1964) 228 Cal. App. 2d 810, 817-818, 39 Cal. Rptr. 767* (decided under former *Civ. Code § 1783(3)* (*now see Com. Code § 2709*), under which seller is required to establish tender, or waiver of tender, and ability to perform)].

- Any breach by the defendant in addition to the failure to pay for the goods (Paragraph 7).

- Plaintiff's demand and defendant's failure to pay (Paragraph 8).

- Plaintiff's attempts at resale (Paragraph 9) or that resale is likely to be commercially impracticable (Paragraph 10) [*see Com. Code § 2709(1)(b)*].

- The market value of the goods at the time and place for tender and plaintiff's damages (Paragraph 12).

Paragraph 12 is added in the event plaintiff is unable to prove all elements necessary to recover under *Com. Code § 2709*. Defendant is given credit for any resale proceeds and any payments under the contract [*see Com. Code §§ 2708, 2709(2)*; *see also* [2], *above*]. Optional Paragraph 3 alleges the existence of fictitious defendants, and optional Paragraph 11 alleges incidental damages [*see Com. Code §§ 2708(2), 2709(1)*]. If agency allegations are appropriate, incorporate § 77.40[1], Paragraph 4.

[5] Cross References

For additional discussion and cross references relating to complaints in general, see *§ 77.40[2]* et seq.

For discussion and forms relating to seller's remedies under Division 2 of the Commercial Code, see Ch. 500, *Sales:*

Sales Under the Commercial Code

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§ 77.61 Complaint for Damages [Civ. Code § 3302] Based on Breach of Contract--By Auctioneer Against Seller--For Compensation

[1] FORM Complaint for Damages [Civ. Code § 3302] Based on Breach of Contract--By Auctioneer Against Seller--For Compensation

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

[*or other as appropriate*]

	)	
_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Breach of Contract)
through _____], Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Plaintiff's capacity and compliance with bonding requirements. See § 77.60[1], Paragraph 1.*]

2. [*Identity and capacity of defendant. See § 77.50[1], Paragraph 1.*]

[3. *Fictitious defendants, if appropriate. See § 77.40[1], Paragraph 3.*]

4. On or about _____ [*date*], at _____ [*city*], California, plaintiff and defendant entered into a written contract under the terms of which defendant employed plaintiff as an auctioneer to conduct a public auction sale of _____ [*describe property sold at auction, e.g.*, a 1994 John Deere tractor with plow attachment]. Plaintiff agreed to act as auctioneer to sell that property. Defendant agreed to compensate plaintiff for those services. A copy of the contract is attached hereto marked Exhibit "A" and made a part hereof.

5. Pursuant to the contract, on or about _____[*date*], plaintiff conducted an auction sale at _____, California, in _____ County, and sold all of the property contemplated by the contract to be sold [except such as was properly withdrawn], for an aggregate price of $_____. Plaintiff has performed all of the obligations on his/her part to be performed under the contract [*continue if plaintiff, rather than defendant was to collect price*, including turning the proceeds of the sale over to defendant] [except _____ (*obligations that are excused, if any*), as to which plaintiff's performance has been excused because _____ (*reasons for excused performance*)].

6. On or about _____ [*date*], defendant breached the contract by failing to pay plaintiff any of the compensation due plaintiff [except $_____], and defendant has not since then paid any compensation to plaintiff [except $_____], and defendant has refused and continues to refuse to pay any compensation to plaintiff [other than that already paid].

7. The unpaid [balance of the] compensation due plaintiff pursuant to the contract is $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____.

2. For interest thereon at the _____ [rate of ten percent per year *or* contract rate of _____ percent per year] from and after _____ [*date*].

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 77.40[4].*]

[2] Use of Form

The complaint in [1], *above*, may be used by an auctioneer to obtain damages based on breach of contract from a seller who failed to pay the auctioneer the compensation due him or her.

[3] Allegation Regarding License and Bond

Under former *Bus. & Prof. Code §§ 5772.6, 5772.7* (repealed in 1993) [*see § 77.12*], an auctioneer could not recover compensation for services without alleging and proving that he or she was duly licensed at all times during the performance of the act or service. Without a license, the auctioneer was not entitled to receive any money or consideration in payment of an act or service that required a license. The current provisions (*Civ. Code § 1812.600 et seq.*) do not contain any specific requirements for maintenance of actions for compensation.

The current provision regulating the terms of the contract between the auctioneer and the seller require disclosure that the auctioneer or auction company has a bond on file with the Secretary of State [*Civ. Code § 1812.608(d)(6)*]. Presumably general principles of public policy would deny compensation to an auctioneer who was not in compliance with that section or the bonding requirements of *Civ. Code § 1812.600 et seq.*, discussed in *§ 77.13[1]*.

[4] Contract Allegations

The essential allegations of a complaint for damages based on breach of contract are:

- The existence of the contract (Paragraph 4) [*see Civ. Code § 1812.608(d)*, discussed in *§§ 77.19, 77.22[1]*].

- The performance of all conditions on plaintiff's part or an excuse for nonperformance (Paragraph 5).

- Defendant's breach (Paragraph 6).

- Plaintiff's consequent damage (Paragraph 7) [*Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377* ; *Lortz v. Connell (1969) 273 Cal. App. 2d 286, 290, 78 Cal. Rptr. 6]* .

The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon [*Civ. Code § 3302*]. The rate of interest will be either the legal rate of 10 percent per year [*see Cal. Const. art. XV, § 1*; *Code Civ. Proc. § 685.010(a)*], any legal rate of interest stipulated by contract, until the contract is superseded by a verdict or other new obligation [*see Civ. Code § 3289(a)*], or the rate of 10 percent per annum after a breach, if a contract entered into after January 1, 1986, does not stipulate a legal rate of interest [*see Civ. Code § 3289(b)*].

[5] Cross References

For additional discussion and cross references relating to complaints in general, see *§ 77.40[2]* et seq.

For discussion and forms relating to actions based on common counts, see Ch. 121, *Common Counts*

For discussion and forms relating to actions based on breach of contract generally, see Ch. 140, *Contracts*

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§ 80.syn Synopsis to Chapter 80: AUTOMOBILES: OVERVIEW

§ 80.01 Scope of Chapter and Volume

§ 80.02 Automobile Collision Cases

§ 80.03 Automobile Insurance

§ 80.04 Automobile Financing

§ 80.05 Automobile Warranties and Repairs

§ 80.06 Drivers' Licenses

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Chapter 80 AUTOMOBILES: OVERVIEW

8-80 California Forms of Pleading and Practice--Annotated § 80.01

§ 80.01 Scope of Chapter and Volume

This chapter briefly summarizes the contents of this volume, which contains legal background, research guides, checklists, and forms regarding automobile law.

The following topics are covered:

- Automobile collision issues [*see § 80.02*].
- Automobile insurance [*see § 80.03*].
- Automobile financing, including leasing [*see § 80.04*].
- Automobile warranties and repairs [*see § 80.05*].
- Administrative procedures of the Department of Motor Vehicles relating to the suspension, revocation, or cancellation of drivers' licenses [*see § 80.06*].

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Chapter 80 AUTOMOBILES: OVERVIEW

8-80 California Forms of Pleading and Practice--Annotated § 80.02

§ 80.02 Automobile Collision Cases

This volume covers the following aspects of automobile collision cases:

- The initial client interview [*see* Ch. 81, *Automobiles: Client Interview*].
    - Initial gathering of information and documents.
    - Factors in determining whether or not to represent a particular client.
- Attorney-client agreements, e.g., retainer agreements [*see* Ch. 81, *Automobiles: Client Interview*].
- Initial evidentiary considerations [*see* Ch. 81A, *Automobiles: Investigation*].
    - Timely preservation of evidence.
    - Preventing spoliation of evidence.
- Location and interviewing of witnesses [*see* Ch. 81A, *Automobiles: Investigation*].
- How to evaluate the worth of a case [*see* Ch. 81B, *Automobiles: Case Evaluation*].
- Insurance policies in automobile collision cases [*see* Ch. 81, *Automobiles: Client Interview* ; Ch. 81A, *Automobiles: Investigation* ; Ch. 86, *Automobiles: Pretrial Motions and Settlement Negotiations*].
    - Liability policies.
    - Homeowner policies.
    - Business policies.

- Case management [*see* Ch. 81B, *Automobiles: Case Evaluation*].
    - Establishing attorney-client communications.
    - Initial advice to the client regarding representation.
- Demand letters [*see* Ch. 81B, *Automobiles: Case Evaluation*].
    - Structure and type of demand letter.
    - Demand package, or settlement brochure.
- Negotiation and settlement factors and techniques [*see* Ch. 81B, *Automobiles: Case Evaluation* ; Ch. 86, *Automobiles: Pretrial Motions and Settlement Negotiations*].
- Causes of action in an automobile collision case, including elements and defenses [*see* Ch. 82, *Automobiles: Causes of Action*].
    - Negligence.
    - Negligent entrustment.
    - Negligent hiring and supervision.
    - Negligent infliction of emotional distress.
    - Loss of consortium.
    - Wrongful death.
    - Survival actions.
- Vicarious liability in automobile collision cases [*see* Ch. 82, *Automobiles: Causes of Action*].
    - Liability for minors.
    - Liability for employees.
    - Liability of owner, bailee, personal representative.
    - Partnerships.
    - Joint ventures.
- Factors concerning particular plaintiffs and particular defendants in automobile collision cases [*see* Ch. 82, *Automobiles: Causes of Action*].
    - Minors.
    - Owner-Passengers.

- Products liability with respect to automobiles [*see* Ch. 82, *Automobiles: Causes of Action*].
- Rules of the road [*see* Ch. 82, *Automobiles: Causes of Action*].
- Damages in automobile collision cases [*see* Ch. 82A, *Automobiles: Damages*].
    - Medical damages.
    - Lost wages.
    - Medi-Cal liens.
- Medical management of case [*see* Ch. 82A, *Automobiles: Damages*].
    - Assuring that injured plaintiff gets proper care.
    - Directing adequate log-keeping and documentation of injured plaintiff's progress and prognosis.
- Proposition 213, which limits recovery of noneconomic damages for such reasons as failing to have the required liability insurance [*see* Ch. 82A, *Automobiles: Damages* ; Ch. 92, *Automobiles: Drivers' Licenses*].
- Proposition 51, concerning several liability for noneconomic damages [*see* Ch. 82A, *Automobiles: Damages*].
- Complaints [*see* Ch. 83, *Automobiles: Bringing the Action*].
- Responsive pleadings [*see* Ch. 84, *Automobiles: Responding to the Action*].
- Discovery [*see* Ch. 85, *Automobiles: Discovery*].
    - Use of interrogatories, depositions, requests for admissions, requests for production, and examinations.
    - Perpetuation of evidence.
- Expert witnesses [*see* Ch. 85, *Automobiles: Discovery*].
    - Automobile reconstruction experts.
    - Biomechanical engineers.
    - Medical experts.
- Prelitigation considerations [*see* Ch. 86, *Automobiles: Pretrial Motions and Settlement Negotiations*].
    - Arbitration.

- Mediation.

- Common trial motions [*see* Ch. 86, *Automobiles: Pretrial Motions and Settlement Negotiations*].

- Settlement offers pursuant to *Code Civ. Proc. § 998* [*see* Ch. 86, *Automobiles: Pretrial Motions and Settlement Negotiations*].

- Trial preparation [*see* Ch. 87, *Automobiles: Trial*].

  - Trial notebooks.

  - Trial briefs.

- Trial of low-impact collision cases [*see* Ch. 87, *Automobiles: Trial*].

- Post-trial procedures [*see* Ch. 87A, *Automobiles: Post Trial*].

  - Post-trial motions.

  - Costs.

  - Collection.

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§ 80.03 Automobile Insurance

This volume covers the following aspects of automobile insurance law:

- Automobile insurance [*see* Ch. 88, *Automobiles: Automobile Insurance*].
    - Liability insurance.
    - Scope of coverage, including bodily injury and "use" of vehicle.
    - Cancellation.
    - Renewal.
    - Primary and excess coverage.
    - Automobile property insurance.
- Uninsured motorist laws and uninsured motorist claims [*see* Ch. 88A, *Automobiles: Uninsured Motorist Claims*].
    - Required coverage.
    - Damages.
    - Waiver of coverage.
    - Exclusions.
    - Setoffs from other insurance.

- Subrogation.
- Arbitration.

- Financial responsibility laws [*see* Ch. 82A, *Automobiles: Damages* ; Ch. 92, *Automobiles: Drivers' Licenses*].

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§ 80.04 Automobile Financing

This volume covers litigation that may arise in connection with the purchase or leasing of a vehicle:

- Actions involving conditional sales of motor vehicles [*see* Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act*], including
  - Transactions governed by Rees-Levering Act.
  - Transactions to which Rees-Levering Act does not apply.
  - Required formalities and disclosures.
  - Limitations on finance charges.
  - Delinquency charges.
  - Dishonored check charge.
  - Extension or deferral of payments.
  - Prepayment: Refund credit.
  - Restrictions on conditional sale contracts.
  - Addition of insurance or repair charges to contract.
  - Repossession, reale, and acceleration of maturity.
  - Buyer's remedies.

- Correction of statutory violation.
- Assignee liability.
- Attorney's fees and costs.
- Venue in action on contract subject to Rees-Levering Act.
- Criminal penalties.
- Servicemembers Civil Relief Act.

- Actions relating to motor vehicle lease contracts under the Vehicle Leasing Act [*Civ. Code § 2985.7 et seq.*] (referred to as the "Vehicle Leasing Act") [*see* Ch. 90, *Automobiles: Vehicle Leasing Act*].

- The federal Consumer Leasing Act of 1976 [*15 U.S.C. § 1667 et seq.*], a part of the Truth in Lending Act, and federal Regulation M [12 C.F.R.pt. 213], promulgated thereunder, to the extent they apply to motor vehicle leases [*see* Ch. 90, *Automobiles: Vehicle Leasing Act*].

- Unlawful vehicle subleasing as defined by *Penal Code § 570 et seq.* and the civil liability of a person who engages in unlawful vehicle subleasing as set forth in *Civ. Code § 3343.5* [*see* Ch. 90, *Automobiles: Vehicle Leasing Act*].

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§ 80.05 Automobile Warranties and Repairs

This volume covers litigation arising out of automotive repairs [*see* Ch. 91, *Automobiles: Actions Involving Defects and Repairs*]. Topics covered include the following:

- The Song-Beverly Consumer Warranty Act as it relates to automobiles, referred to as the "Lemon Law" [*see §§ 91.10 et seq., 91.60* et seq.].

- The bond required of automobile dealers and remanufacturers by *Veh. Code § 11710* [*see §§ 91.32, 91.70 -91.71*].

- Forms for recovery of damages to person and property arising from negligent repair of automobiles [*see §§ 91.80 -91.83*].

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§ 80.06 Drivers' Licenses

This volume covers the following aspects of proceedings by the Department of Motor Vehicles (DMV) relating to the suspension, revocation, or cancellation of drivers' licenses [*see* Ch. 92, *Automobiles: Drivers' Licenses*]:

- The DMV's general authority regulate the operation of motor vehicles on public highways by means of post-licensing proceedings to suspend, revoke, or cancel drivers' licenses.

- DMV proceedings to suspend, revoke, or cancel drivers' licenses, focusing on proceedings resulting from implied consent laws and administrative per se laws applicable to drivers suspected of unlawfully operating a motor vehicle under the influence of alcohol or drugs.

- Administrative and judicial review of DMV proceedings to suspend, revoke, or cancel drivers' licenses.

- DMV proceedings for the impoundment or forfeiture of motor vehicles operated unlawfully without a valid drivers' license.

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§ 81.01 Scope of Chapter

This chapter provides a discussion of the initial client interview process with respect to an automobile collision case. It includes the following topics:

- The purpose for the initial interview, with respect to both plaintiff and defense counsel.
- Underlying considerations during the course of fact-gathering.
- Facts that must be established.
- Factors affecting whether or not to accept the case.
- Attorney-client agreements.
- Initial advice to the client.
- Reports and claims that must be filed in a timely manner.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsTransportation TortsMotor VehiclesPersonal Vehicles

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[1] Related Chapters in This Volume

- For discussion and forms concerning investigation of an automobile case, see Ch. 81A, *Automobiles: Investigation* .

- For discussion and forms concerning evaluation of an automobile case, see Ch. 81B, *Automobiles: Case Evaluation* .

- For discussion and forms concerning causes of action in an automobile case, see Ch. 82, *Automobiles: Causes of Action* .

- For discussion and forms concerning damages, see Ch. 82A, *Automobiles: Damages* .

[2] Other Related Chapters

- For discussion and forms concerning the attorney-client relationship, see Ch. 72, *Attorney Practice and Ethics* .

- For discussion and forms concerning actions against common carriers for personal injuries and property damages or loss, see Ch. 109, *Carriers* .

- For discussion of MediCal liens, see Ch. 177, *Damages* .

- For discussion and forms relating to death actions generally, see Ch. 181, *Death and Survival Actions* .

- For discussion and forms concerning liability for collisions involving emergency vehicles, see Ch. 246, *Emergency Vehicles* .

- For discussion and forms concerning insurance generally, including actions for bad faith, see Ch. 308, *Insurance* .

- For discussion and forms relating to negligence generally, see Ch. 380, *Negligence* .

- For discussion and forms concerning actions by motorists for damages arising from the dangerous condition of a street or highway, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

- For discussion and forms concerning the liability of public entities and officers for negligence in the operation of motor vehicles, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

- For discussion and forms relating to warranties in sales contracts, see Ch. 502, *Sales: Warranties* .

- For discussion and forms concerning actions involving trucks and trailers, see Ch. 553, *Trucks* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsWrongful Death & Survival ActionsRemediesGeneral OverviewTortsProcedureAttorney-Client RelationshipTortsTransportation TortsGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityGeneral Overview

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§§ 81.03[Reserved]

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§ 81.10 Fact-Gathering Objective of Initial Interview

The general purpose of the initial interview with a potential client with respect to an automobile collision is to gather facts about the collision and the client's damages. The focus of the inquiry for the plaintiff's attorney differs from that of the defense attorney, as discussed below in *§§ 81.12* and *81.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-81 California Forms of Pleading and Practice--Annotated § 81.11

§ 81.11 Client's Referral Sources

While a potential plaintiff who was involved in an automobile collision may be referred to a particular attorney by many sources (e.g., a family attorney or a personal acquaintance), a defendant seeking representation has usually been referred to the attorney by his or her insurance company, after a claim has been made on the policy. However, the defense attorney may also be consulted by a client who is self-insured or even uninsured.

PRACTICE TIP:

Confirm Defense Costs in Writing if No Standard Reporting Procedures. Most defense automobile collision cases are referred by existing insurance company clients. Generally, these cases require the defense attorney to follow established reporting procedure. For other clients, or those without established practices, the attorney should discuss and confirm in writing the anticipated costs and steps necessary to defend the case. -- *Joe Devine, Editorial Consultant.*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsTransportation TortsMotor VehiclesPersonal VehiclesInsurance LawMotor Vehicle InsuranceObligationsDefense

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§ 81.12 Initial Role of Plaintiff's Counsel

At the initial client interview, the plaintiff's attorney generally focuses on gathering facts concerning the following:

- Details of the collision.
- The potential client's involvement in the collision, e.g., as driver, passenger, automobile owner, or pedestrian.
- Violation of any traffic or other laws by any parties involved in the collision.
- Whether a police report of the collision was filed.
- Whether required DMV reports were filed.
- Background information about the client, e.g., marital status and employment information.
- The client's injuries.
- The client's property damage.
- Any existing or potential injuries to client's spouse, including those supporting a loss of consortium claim.
- The client's insurance coverage, including automobile, health, homeowner's policies, and any other insurance policy that may cover the client, e.g., an employer's policy.
- Identity of the other parties and description of the other vehicles involved in the collision.
- Whether anyone involved in the collision was acting in the capacity of an agent or employee.

- Whether a government agency was involved in the collision.
- Insurance information concerning others involved in the collision.
- Identity of any witnesses to the collision, and the probable content of their potential testimony.
- Existence of any photographs or videotapes of the collision or its aftermath.

For a procedural checklist regarding a client interview, see *§ 81.50*. For a form of client questionnaire, see *§ 81.61*. For forms of requests for information, see *§ 81.63*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoveragePropertyGeneral OverviewTortsTransportation TortsGeneral OverviewTransportation LawPrivate VehiclesTraffic RegulationGeneral OverviewFamily LawMarital Duties & RightsCauses of ActionLoss of Consortium

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§ 81.13 Initial Role of Defendant's Counsel

By contrast to plaintiff's counsel, a defense attorney in an automobile collision case is usually consulted after plaintiff's counsel has filed suit. The defense counsel's focus is therefore directed to attacking the complaint. For a procedural checklist regarding a client interview, see *§ 81.51*.

Occasionally, a defense attorney is consulted for advice on case evaluation before suit is filed. The attorney may be asked for a written opinion, or simply his or her thoughts concerning various issues such as insurance coverage, evaluation of damages or liability, legal defenses, government regulations, ethical considerations, and costs of defense. Increasingly, defense attorneys are asked to participate in a mediation of a complicated claim, even before suit is filed.

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§ 81.14 Possible Causes of Action

[1] Negligence

[a] Elements

A cause of action for negligence requires the following showing [*Bogard v. Employers Casualty Co. (1985) 164 Cal. App. 3d 602, 618, 210 Cal. Rptr. 578]* :

- Legal duty of care.
- Breach of duty of care.
- Proximate or legal causation.
- Injury and damages.

For further discussion of a cause of action for negligence arising from automobile collisions, see Ch. 82, *Automobiles: Causes of Action* . For discussion and forms relating to negligence generally, see Ch. 380, *Negligence* .

[b] Statute of Limitations

The limitation period for an action alleging injury or death based on negligence is two years (prior to January 1, 2003, one year) [*Code Civ. Proc. § 335.1*; *see* former Code Civ. Proc. § 340(3); *see also Ch. 345, Limitation of Actions, § 345.14*]. The limitation period for an action alleging injury to personal property based on negligence is three years [*Code Civ. Proc. § 338(c)*].

Actions against public entities have special statute of limitations requirements. For discussion of these requirements, see *Ch. 82, Automobiles: Causes of Action, § 82.10[5][d][iii]*.

PRACTICE TIP:

Allowing Statute to Run May Avoid Cross-Complaint for Personal Injuries. In a case for property damage involving no claim of personal injury or wrongful death, it can be advantageous to wait until the one-year statute of limitations has expired to preclude an adverse party from bringing a cross-complaint for personal injury damages. -- *Joe Devine, Editorial Consultant.*

[c] Affirmative Defenses

Affirmative defenses to an action for negligence include the following:

- Comparative negligence [*see Li v. Yellow Cab Co. of California (1975) 13 Cal.3d 804, 828 829, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

- Express assumption of the risk [*see Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd. (1983) 147 Cal. App. 3d 309, 318, 195 Cal. Rptr. 90]* .

- Implied assumption of the risk [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 310, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

- Statute of limitations [*see Code Civ. Proc. §§ 335.1, 338(c)*].

[2] Negligent Entrustment

A person who knowingly or negligently entrusts an automobile in a defective condition to another, or negligently entrusts an automobile to an incompetent driver, is liable for injuries arising from operation of the automobile [*Merry v. Knudsen Creamery Co. (1949) 94 Cal. App. 2d 715, 721, 211 P.2d 905* ; *Perez v. G & W Chevrolet, Inc. (1969) 274 Cal. App. 2d 766, 767 768, 79 Cal. Rptr. 287 , cert. denied, 397 U.S. 974]* . For further discussion, see Ch. 82, *Automobiles: Causes of Action* .

[3] Negligent Hiring and Supervision by Employer

A cause of action for negligent hiring and supervision may lie against the employer of the driver of the other vehicle if the driver was acting within the scope of employment [*see, e.g., Doe v. Capital Cities (1996) 50 Cal. App. 4th 1038, 1055, 58 Cal. Rptr. 2d 122]* . For further discussion, see Ch. 82, *Automobiles: Causes of Action* .

[4] Wrongful Death and Survival Actions

[a] Wrongful Death

[i] Elements

A cause of action for wrongful death arises if the death of a person is caused by the wrongful act or neglect of another [*Code Civ. Proc. § 377.60*]. "Wrongful act" means a tortious act, including theories of recovery based on negligence, intentional wrongful conduct, and strict products liability [*Barrett v. Superior Court (1990) 222 Cal. App. 3d 1176, 1183, 1185, 1186, 272 Cal. Rptr. 304]* . The elements of a wrongful death action are the following [*Moxon v. County of Kern (1965) 233 Cal. App. 2d 393, 398 399, 43 Cal. Rptr. 481]* :

- The commission of a tortious act.

- Resulting death causing pecuniary loss to persons entitled to a cause of action under the wrongful death statute.

[ii] Standing to Assert Wrongful Death Action

A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by the following persons, or by the decedent's personal representative on their behalf [*Code Civ. Proc. § 377.60*]:

- The decedent's surviving spouse, children, and issue of deceased children, or, if there is not surviving issue of the decedent, the persons, including the surviving spouse, who would be entitled to the property of the decedent by intestate succession.

- The putative spouse, children of the putative spouse, stepchildren, or parents, if dependent on the decedent.

- A minor, if at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support.

[iii] Two-Year Statute of Limitations

The limitation period for death caused by the wrongful act or neglect of another is two years (prior to January 1, 2003, one year) [*Code Civ. Proc. § 335.1*; *see* former Code Civ. Proc. § 340(3); *see also Ch. 345, Limitation of Actions, § 345.14*]. For discussion and forms relating to death actions generally, see Ch. 181, *Death and Survival Actions* .

[b] Survival Actions

[i] Action on Behalf of Decedent for Economic Loss

An action on behalf of a decedent may be brought for economic loss [*see Code Civ. Proc. § 377.34*]. For further discussion, see Ch. 82, *Automobiles: Causes of Action* .

PRACTICE TIP:

Claims for Special Damages Must Be Alleged Within Six Months of Death. A survivorship action is specifically for recovery of economic loss such as medical bills incurred at collision scene and hospital before death. These special damages do survive, and must be alleged in a complaint within six months of the death. -- *Frederick Schenk, Editorial Consultant.*

[ii] Claim Must Be Brought Within Six Months After Person's Death

A survival action on behalf of a decedent may be brought within six months of the death, or within the limitation period that would have applied if the person had not died [*Code Civ. Proc. § 366.1*].

[5] Negligent Infliction of Emotional Distress

A close relative or loved one of the injured person who observed the collision may have a cause of action for negligent infliction of emotional distress pursuant to California case law [*see Thing v. La Chusa (1989) 48 Cal. 3d 644, 667 668, 257 Cal. Rptr. 865, 771 P.2d 814* ; *Dillon v. Legg (1968) 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912]* . This cause of action is separate from those brought by the injured plaintiff. For further discussion, see Ch. 82, *Automobiles: Causes of Action* . For discussion of negligent infliction of emotional distress generally, see Ch. 362, *Mental Suffering and Emotional Distress* .

[6] Loss of Consortium

[a] Elements

The loss of consortium is the loss of conjugal fellowship and sexual relations, including loss of the following [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 385, 405 408, 115 Cal. Rptr. 765, 525 P.2d 669]* :

- Support or service.
- Love and affection.
- Society and companionship.
- Sexual relations.
- Solace.

The elements for a cause of action for loss of consortium are as follows:

- Lawful marriage between the plaintiff and the injured person at the time of the injury [*Elden v. Sheldon (1988) 46 Cal. 3d 267, 279, 250 Cal. Rptr. 254, 758 P.2d 582]* .
- Tortious injury suffered by the nonplaintiff spouse [*Blain v. Doctor's Co. (1990) 222 Cal. App. 3d 1048, 1067, 272 Cal. Rptr. 250]* .
- Loss of consortium suffered by the plaintiff spouse [*see United Services Automoblie Assn. v. Warner (1976) 64 Cal. App. 3d 957, 964, 965, 135 Cal. Rptr. 34]* .
- Proximate causation of the loss by the defendant's wrongful act [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 385, 405 408, 115 Cal. Rptr. 765, 525 P.2d 669]* .

[b] Statute of Limitations

The limitation period for a loss of consortium action is two years (prior to January 1, 2003, one year) [*see Code Civ. Proc. § 335.1*; *Shelton v. Superior Court (1976) 56 Cal. App. 3d 66, 81, 128 Cal. Rptr. 454* ; *see also* former Code Civ. Proc. § 340(3); *Ch. 345, Limitation of Actions, § 345.14*].

[7] Products Liability

[a] Elements

A manufacturer is strictly liable in tort when an article it places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being [*Greenman v. Yuba Power Products, Inc. (1963) 59 Cal. 2d 57, 62, 63, 27 Cal. Rptr. 697, 377 P.2d 897]* . For further discussion of a cause of action for strict liability with respect to a defective automobile, see Ch. 82, *Automobiles: Causes of Action* . For discussion and forms relating to strict liability generally, see Ch. 460, *Products Liability* .

[b] Statute of Limitations

The limitation period for a cause of action for strict liability in tort is two years (prior to January 1, 2003, one year) [*see Code Civ. Proc. § 335.1*; *see also* former Code Civ. Proc. § 340(3); *Ch. 345, Limitation of Actions, § 345.14*].

[c] Affirmative Defenses

Affirmative defenses to a cause of action for strict liability include comparative fault and misuse of the product [*see Daly v. General MotorsCorp. (1978) 20 Cal. 3d 725, 730, 742, 144 Cal. Rptr. 380, 575 P.2d 1162 and Martinez v. Nichols Conveyor etc. Co., Inc. (1966) 243 Cal. App. 2d 795, 799, 52 Cal. Rptr. 842 , respectively*].

[8] Breach of Warranty in Sales Contract

[a] Elements

In an action for breach of warranty the plaintiff must show the following [*see* U.C.C. comment 13 to *Com. Code § 2314*]:

- The existence of the warranty.
- The breach of warranty.
- Proximate cause between the breach and the loss sustained.

For discussion and forms relating to warranties in sales contracts, see Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* , and Ch. 502, *Sales: Warranties* .

[b] Uniform Commercial Code

[i] Express Warranty

Under the Uniform Commercial Code, express warranties by the seller with respect to the sale of goods are created in the following ways [*Com. Code § 2313*]:

- Any affirmation of fact or promise made by the seller to the buyer that relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods conform to the affirmation or promise.
- Any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods conform to the description.
- Any sample or model that is made part of the basis of the bargain creates an express warranty that the whole of the goods conform to the sample or model.

[ii] Implied Warranty of Merchantability

Unless excluded or modified by *Com. Code § 2316*, a warranty that the goods are merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind [*Com. Code § 2314(1)*].

[iii] Statute of Limitations

The limitation period for an action for breach of warranty under the U.C.C. is four years [*Com. Code § 2725(1)*]. A breach of warranty usually occurs when tender of delivery is made [*see Com. Code § 2725(2)*].

[c] Song-Beverly Act

[i] Express Warranty

Under the Song-Beverly Act, an express warranty with respect to the sale of consumer goods means a written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good, or provide compensation if there is a failure in utility or performance [*Civ. Code § 1791.2(a)(1)*]. It also means in the case of any sample or model, that the whole of the good conforms to the sample or model [*Civ. Code § 1791.2(a)(2)*]. In addition, special rules apply to express warranties regarding new motor vehicles and to the manufacturer's inability to service or repair them to conform to the express warranties after a reasonable number of attempts [*see Civ. Code §§ 1793.2(d)(2), 1793.22, 1794(e)*].

[ii] Statute of Limitations

Actions under the Song-Beverly Act are governed by the four-year specific limitation period of *Com. Code § 2725* [*see Civ. Code § 1790.3*].

[d] Implied Warranty by Automobile Dealer

A statutorily implied warranty is contained in *Veh. Code § 24007* with respect to an automobile dealer's responsibility, which may not be waived or defeated by agreement of the parties.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsWrongful Death & Survival ActionsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsNegligenceActionsNegligent EntrustmentTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 81.15 Potential Defendants

Potential defendants with respect to an automobile collision include the following:

- Driver of the other vehicle.
- Owner of the other vehicle.
- Parents or guardian of a minor driver of the other vehicle.
- Employer of the driver of the other vehicle.
- Automobile manufacturer.
- Automobile distributor.
- Automobile dealer.
- Rental agency.
- Service garage.
- Automobile mechanic.
- Private property owner.
- Government agencies.
- Insurance companies [*see* Ch. 308, *Insurance* .].

PRACTICE TIP:

Include Parties Who Hire Independant Contractors as Potential Defendants. Consider as potential defendants those who hire independent contractors, such as taxicab companies, limousine services, and general contractors. Although often claiming to be independent and shielded from liability, facts may establish otherwise. -- *Joe Devine, Editorial Consultant.*

For further discussion of defendants, see Ch. 82, *Automobiles: Causes of Action* , and Ch. 83, *Automobiles: Bringing the Action* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 81.16 Damages

[1] Tort Damages

[a] Compensatory Damages

Tort damages include damages that will compensate the plaintiff for all the detriment, whether or not anticipated, that was proximately caused by the defendant [*Civ. Code § 3333*; *see generally* Ch. 177, *Damages*].

General damages in a tort action include compensation for the following:

- Pain, suffering, and inconvenience.
- Emotional distress.
- Loss of consortium.
- In wrongful death actions, loss of society and companionship.

Special damages in a tort action include compensation for the following:

- Medical expenses incurred.
- Future medical expenses.
- Loss of earnings.
- Loss of future earnings.
- Property damage.

- In wrongful death actions, funeral expenses.

[b] Punitive or Exemplary Damages

[i] Recovery of Punitive Damages

In an action for the breach of an obligation not arising from contract, when it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant [*Civ. Code § 3294(a)*; *see* generally Ch. 177, *Damages*].

[ii] Insurance Bad Faith Litigation

If an insured's insurance company wrongfully refuses to provide all the insurance benefits due the insured, or wrongfully delays in paying benefits, the insured may bring suit against the insurance company for bad faith conduct with respect to the insurance policy, that is, for breach of the covenant of good faith and fair dealing that is implied in every contract [*see Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 821, 157 Cal. Rptr. 482, 598 P.2d 452 , cert. denied, 445 U.S. 912, 100 S. Ct. 1271, 63 L. Ed. 2d 597 (1980)]* . Inasmuch as an insurance bad faith action, as opposed to a breach of contract action, sounds in tort, punitive damages may be available. For further discussion, see Ch. 308, *Insurance* .

[2] Contract Damages

Damages for breach of contract consist of compensation for all the detriment that was proximately caused, or that, in the ordinary course of things, would likely result from the breach [*Civ. Code § 3300*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesPunitive DamagesGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityGeneral OverviewTortsDamagesCompensatory DamagesGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 81.17 Limitations on Recovery of Damages for Automobile Collision: Proposition 213

[1] Limitations on Recovery of Damages Based on Driving Under Influence or Lack of Insurance

Proposition 213, adopted by initiative at the general election of 1996, provides that in any action to recover damages arising out of the operation or use of a motor vehicle, a person shall not recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages if any of the following applies, with the exception stated below [*Civ. Code § 3333.4(a)*]:

- The injured person was at the time of the accident operating the vehicle while under the influence of alcohol or drugs, and was convicted of that offense [*see Veh. Code §§ 23152, 23153*].

- The injured person was the owner of a vehicle involved in the accident, and the vehicle was not insured as required by the financial responsibility laws [*see Veh. Code § 16000 et seq.*; *see also Goodson v. Perfect Fit Enterprises, Inc. (1998) 67 Cal. App. 4th 508, 512-514, 79 Cal. Rptr. 2d 102]* .

- The injured person was the operator of a vehicle involved in the accident, and cannot establish his or her financial responsibility as required by the financial responsibility laws [*see Veh. Code § 16000 et seq.*].

The owner of an uninsured automobile within the meaning of the financial responsibility laws, may nevertheless recover the noneconomic losses listed above, if injured by a motorist who was driving under the influenceof alcohol or drugs, and who was convicted of that offense [*Civ. Code § 3333.4(c)*; *see Veh. Code §§ 23152, 23153*].

PRACTICE TIP:

Plaintiff's Burden to Establish Insurance Coverage. In *California, Civ. Code § 3333.4* places the burden on the owner or operator of a motor vehicle claiming injuries to establish financial responsibility. This usually requires the name and policy number of an applicable insurance policy sufficient to allow confirmation of financial responsibility requirements. If the claimant cannot establish this information, he or she is not entitled to recover general damages. -- *Joe Devine, Editorial Consultant.*

[2] Preclusion From Recovery of Damages for Negligence After Commission of Felony

Proposition 213 also provides that in any action for damages based on negligence, a person may not recover any damages if the plaintiff's injuries were in any way proximately caused by the plaintiff's commission of any felony, or immediate flight from a felony, and the plaintiff has been duly convicted of the felony [*Civ. Code § 3333.3*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesPain & SufferingGeneral OverviewTortsNegligenceDefensesGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 81.18 Attorney Fees

Attorney fees are recoverable as costs when authorized by any of the following [*Code Civ. Proc. § 1033.5(a)(10)*]:

- Contract.

- Statute [*see, e.g., Civ. Code § 1794(d),(e)* (action for recovery of damages by buyer with respect to breach of express warranty or service contract)].

- Law.

For a sample retainer and contingency fee agreement, see *§ 81.65*. For further discussion of fee agreements and sample forms, see *Ch. 72, Attorney Practice and Ethics, § 72.190* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 81.19 Determination to Accept or Reject Case

[1] Plaintiff

Factors relevant to a determination whether or not to represent a potential plaintiff in an automobile collision case include the following [*see also § 81.50[3]*]:

- The feasibility of litigation, including the following:
- The facts and legal issues of the case.
- Possible causes of action.
- Possible defendants and estimates of their financial worth.
- Strengths and weaknesses of available evidence.
- The existence of any conflict of interests [*see [3], below*].
- Calendaring and scheduling considerations, i.e., whether current caseload and court calendar allows adequate time for this case.

The primary consideration in evaluating a case should be whether or not the attorney can make a difference for the prospective client, i.e., whether the attorney can put the potential client in a better position than he or she would be in without the attorney's assistance. If the attorney takes the case on a contingency basis, the attorney should explain how the contingency fee is earned. The attorney should also explain to the potential client the various costs that will be incurred, and the role that both fees and costs plan in ultimately determining whether or not an attorney can make a difference in bringing about a successful resolution to the case.

PRACTICE TIP:

Conduct Preliminary Investigation to Determine Whether to Pursue the Case. An attorney should

conduct a thorough investigation of the liability, causation, and damages to the extent that current and past medical records are available. During the attorney's first consultation with the client, the attorney should explain that he or she will be conducting an investigation to determine whether or not the attorney believes that he or she can be of help, and that only after that investigative process is complete can the attorney determine whether or not and to what extent he or she can be of service. The attorney should have the client sign a retainer agreement before the preliminary investigation, but prior to filing a complaint, the attorney may withdraw without leave of court. -- *Frederick Schenk, Editorial Consultant.*

PRACTICE TIP: Uninsured Clients: Search for Alternative Sources of Insurance. An attorney consulted by a potential plaintiff who is apparently uninsured should check for coverage under all possible areas of insurance. For example, an uninsured driver may be an employee driving in the scope of employment for an insured employer. If the attorney cannot provide a better result for the potential client who was uninsured at the time of collision, then he or she should seriously consider whether or not to take the case. If the economic loss is significant and if the plaintiff can only be made whole through retaining counsel, then the attorney may well consider taking the case on a contingency basis. -- *Frederick Schenk, Editorial Consultant.*

PRACTICE TIP: Consider Rejecting Plaintiff's Case Under the Following Circumstances. No one factor should be considered alone when deciding whether to take a case or reject it. A combination of factors may tip the scales and make it financially unfeasible for the attorney to take the case. Rejection of a case should be considered if

- Neither plaintiff or defendant have insurance coverage. **NOTE:** If the damages are high enough, an asset search may be conducted to make sure the defendant does not have other assets.

- The property damage to the vehicle is minimal and the plaintiff has suffered only soft-tissue injuries.

- Plaintiff has previous injuries to the same part of the body with several prior claims. This usually applies to soft-tissue injury cases.

- Plaintiff's liability is high and injuries are minimal. The attorney must weigh the amount of liability that rests with the plaintiff, and the nature and extent of the plaintiff's injuries.

--*Dona E. Cohn, Editorial Consultant.*

[2] Defendant

[a] Cases Referred by Insurance Companies

Although insurance companies are generally a reliable source of business, occasionally defense attorneys may decline to accept these cases. For example, a conflict of interest may exist [*see also [3], below*].

PRACTICE TIP:

Defense Attorney's Evaluation of Potential Case. If the defense firm has previously represented a party adverse to the individual or company referred by the insurance client, the attorney should decline the case. If asked to represent multiple defendants, other potential conflicts may arise. If defending under a reservation of rights, the defense lawyer may be in conflict with the referring insurance company. The defense attorney should decline any case in which he or she does not possess the requisite time, resources, and experience. This includes making sure the client has approved work by associate attorneys

under appropriate supervision. -- *Joe Devine, Editorial Consultant.*

[b] Self-Insured Companies

Less sophisticated than insurance companies, self-insured companies generally assert more control over their agents and employees. Reputable self-insured clients may have as much claims-handling experience as solid insurance companies. Less experienced small companies may need more communication and attention to details by the defense attorney.

Relevant factors with respect to whether or not to accept these cases may include financial considerations, conflicts, and the handling of evidence.

[c] Uninsured Persons

Serious considerations arise with respect to representing a defendant who is uninsured.

PRACTICE TIP:

Individual Defendants Without Insurance at Financial Risk. Before accepting such a case, the defense attorney needs to conduct a careful interview with the potential client. The attorney must explore every potential insurance policy that could possible provide coverage. Attorney fees, court costs, discovery expenses, adverse judgments and their consequences must be fully discussed with the client. All documents and evidence necessary to evaluate the case should be brought to the interview. If the attorney accepts the case of an uninsured client, he or she should strongly consider requiring a retainer fee up front. A detailed written letter should be sent outlining what will, or will not be done on the case. -- *Joe Devine, Editorial Consultant.*

[3] Conflict of Interests

[a] General Professional Ethics Considerations

A consideration common to both plaintiff and defense attorneys in deciding whether to accept a case, is the existence of conflicting interests that would preclude representation, at least with respect to that particular case. Counsel should therefore consult the California Rules of Professional Conduct if there is a question in this regard. These rules are also *set forth in Ch. 72, Attorney Practice and Ethics, § 72.30* et seq.

For example, a State Bar member may not accept (or continue representation of) a client without providing written disclosures to the client when the member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter [*Cal. Rules Prof. Conduct, Rule 3-310(B)(1)*]. For forms of disclosure and informed consent, see *Ch. 72, Attorney Practice and Ethics, § 72.30* et seq.

In addition, an attorney is prohibited from representing multiple clients with potential or actual conflicting interests, and from simultaneously representing clients with adverse interests [*Cal. Rules Prof. Conduct, Rule 3-310(C)*].

[b] Insurer's Duty to Provide Independent Counsel for Insured

If an insurer that has a duty to defend under the policy reserves its rights concerning a disputed coverage issue, and counsel first retained by the insurer to defend the claim controls the resolution of the coverage issue, a conflict of interest may exist with respect to defending the insured. In that case, the insurer has a duty to provide independent counsel to the insured [*Civ. Code § 2860*]. For further discussion, see Ch. 308, *Insurance* . See also California Torts, Chs. 70, 82 (Matthew Bender).

[c] Dischargeability of DUI Judgment

If the defendant was driving under the influence, the judgment is not dischargeable in bankruptcy [*11 U.S.C. § 523(a)(9)*]. This creates a potential conflict of interest between the client and his or her insurance carrier.The carrier is liable for compensatory damages (e.g., bodily injury, property damage). If punitive damages are assessed against a client in a drunk-driving case, the carrier is not liable, and the defendant may not discharge the judgment. The conflict arises when the plaintiff offers to settle, but settlement is refused. The defendant may be entitled to independent counsel paid for by the defendant's carrier.

PRACTICE TIP:

Advise Defendant in Writing Potential Personal Liability for Punitive Damages. Plaintiff's counsel should advise the defense counsel in writing that the defendant may be liable personally for punitive damages. This issue may result in a conflict of interest for the defense attorney hired by the defendant's insurance company. -- *Frederick Schenk, Editorial Consultant.*

PRACTICE TIP: Defendant's Potential Liability for Punitive Damages Does Not Always Create Conflict. This issue may or may not present a real conflict for the insurance company's counsel. The insurance company's counsel may be able to effectively represent both the client's and the insurance company's interests. This type of case may have to go to trial. -- *Joe Devine, Editorial Consultant.*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCosts & Attorney FeesContingent FeesTortsNegligenceActionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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[Reserved]

§§ 81.20[Reserved]

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§ 81.30 Related Texts From LexisNexis

For discussion of automobile collision law generally, see Automobile Accident Law and Practice (Matthew Bender)

For discussion of tort law relating to automobile collisions generally, see California Torts, Ch. 20 (Matthew Bender)

For discussion of personal injury actions generally, see Personal Injury:Actions, Defenses, Damages (Matthew Bender)

For discussion of products liability law generally, see Products Liability (Matthew Bender)

For discussion of trial of collision cases generally, see Trial of Accident Cases (Matthew Bender)

For forms of contingent fee contracts for legal representation in damage claims, see California Legal Forms, Ch. 86, *Agreements for Professional Services* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 81.31 State Statutes

[1] Financial Responsibility Laws

Financial responsibility laws. *Veh. Code § 16000 et seq.*

"Reportable off-highway accident" defined for purposes of *Veh. Code § 16000(a)* requirements. *Veh. Code § 16000.1*

DMV required to suspend driving privilege 30 days after mailing notice of intent to suspend based on its receipt of accident report alleging noncompliance with financial responsibility statute, unless driver has, prior to that date, established proof of financial responsbility at time of accident with DMV. *Veh. Code § 16070(b)*

[2] Statutes of Limitations

Two-year limitation period for injury to person or wrongful death. *Code Civ. Proc. § 335.1*; *see* former Code Civ. Proc. § 340(3) (one-year period prior to 2003)

Four-year limitation period for breach of written contract. *Code Civ. Proc. § 337*

Three-year limitation period for injury to personal property. *Code Civ. Proc. § 338(c)*

Limitation periods for complaints against public entities after filing of claim. *Code Civ. Proc. § 342*; *Gov. Code § 945.6*

Survival action limitation period six-months following death of decedent. *Code Civ. Proc. § 366.1*

[3] Tort Claims Act

Tort Claims Act (claims and actions against public entities and public employees). *Gov. Code § 810 et seq.*

[4] Damages

Punitive damages. *Civ. Code § 3294*

Contract damages. *Civ. Code § 3300*

Compensatory damages. *Civ. Code § 3333*

[5] Limitations on Recovery of Damages Under Proposition 213

Prohibition against recovery of damages in negligence action by person whose injuries were caused by his or her commission of a felony of which he or she was convicted. *Civ. Code § 3333.3*

Prohibition against recovery of noneconomic damages by injured person who was owner of uninsured vehicle or uninsured driver for purposes of financial responsibility laws. *Civ. Code § 3333.4*

[6] Motor Vehicle Operation and Collision Reports

Report of collision to Highway Patrol or local police within 24 hours is prerequisite to uninsured motorist claim for personal injuries caused by unidentified owner or operator of motor vehicle. *Ins. Code § 11580.2(b)(2)*

Collision reports to DMV. *Veh. Code § 16000 et seq.*

Civil liability of owners and operators. *Veh. Code § 17000 et seq.*

Collision reports to Highway Patrol or local police agency. *Veh. Code § 20000 et seq.*

Traffic laws. *Veh. Code § 21000 et seq.*

Safety regulations. *Veh. Code § 34500 et seq.*

Traffic offenses. *Veh. Code § 40000.1 et seq.*

[7] Law Enforcement Records

Disclosure of information in California Highway Patrol or local police records under Public Records Act. *Gov. Code § 6254(f)*

Officers prohibited from including determination of fault in counter report, except under certain circumstances. *Veh. Code § 20015*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesPain & SufferingGeneral OverviewTortsNegligenceDefensesComparative NegligenceGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityGeneral

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§ 81.32 Decisions

[1] Comparative Negligence

The plaintiff's comparative negligence is an affirmative defense in an action for negligence. *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828 829, 119 Cal. Rptr. 858, 532 P.2d 1226*

[2] Bad Faith Insurance Litigation

An insurer is subject to a cause of action in tort brought by the insured for bad-faith refusal to pay benefits under the policy. *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 575, 108 Cal. Rptr. 480, 510 P.2d 1032*

[3] Reports to Department of Motor Vehicles

Use of accident report as evidence in license suspension hearing does not violate privilege against self-incrimination. *Fahlgren v. Department of Motor Vehicles (1986) 186 Cal. App. 3d 930, 937, 231 Cal. Rptr. 229*

Although reports required to be filed by drivers and passengers of vehicles involved in accidents resulting in death or serious bodily injury are privileged under *Veh. Code § 20012*, reports of accidents made by investigating officers are not privileged. *People v. Ansbro (1984) 153 Cal. App. 3d 273, 277, 200 Cal. Rptr. 210*

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesSelf-Incrimination PrivilegeGeneral OverviewTortsNegligenceDefensesComparative NegligenceGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 81.33 Internet References

Matthew Bender. This site includes links to Matthew Bender publications and Shepard's citation service. http://www.bender.com

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[Reserved]

§§ 81.34[Reserved]

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§ 81.50 Plaintiff's Checklist

[1] Pre-Interview Information From Client

☐ Advise client to provide all relevant documents and other materials in client's possession prior to interview, as follows [*see § 81.60*].

☐ Insurance policies

☐ Automobile policies of client.

NOTE:
Determine uninsured motorist/underinsured motorist coverage, and compliance with financial responsibility laws.

Failure to comply with Financial Responsibility Laws may limit recovery of noneconomic damages [*see § 81.17*].

☐ Other relevant automobile policies, e.g., of employer, of automobile owner (if other than client), of relative if client is covered.

☐ Health insurance policies

NOTE:
If case is accepted, lien holder must be notified of representation [*see* [3], *below*].

☐ Homeowners' or other personal insurance

- [ ] Umbrella policies
- [ ] Claims made on policies for this collision
- [ ] Employment records and earnings statements
- [ ] DMV records
  - [ ] Client's driving record
  - [ ] DMV Form SR-1, Traffic Accident Report
- [ ] Police reports
- [ ] Medical/Hospital records
- [ ] Medical/Hospital bills
- [ ] Automobile Repair bills
- [ ] Replacement vehicle rental and other costs
- [ ] Photographs of collision, including damaged vehicles and injuries
  - [ ] Photographs taken at or directly after time of collision
  - [ ] Photographic history of injuries
- [ ] Videotapes of collision, vehicles, injuries
- [ ] News reports of collision
  - [ ] Print journalism
  - [ ] Film footage

PRACTICE TIP:

Check Client's Access to Automobile Liability Insurance. If the potential plaintiff is injured as a result of an automobile collision, counsel must review the client's access to automobile liability

insurance. An injured driver cannot recover general noneconomic damages if they are not covered by a liability policy. Note that an owner's policy or resident relative insurance policy may cover the injured driver even though the injured driver does not have insurance of his or her own. --*Dona E. Cohn, Editorial Consultant.*

[2] Interview With Client

- ☐ Obtain general background information [*see § 81.61*].
  - ☐ Name, including aliases and former names
  - ☐ Home address and telephone number
  - ☐ Date and place of birth
  - ☐ Social Security number
  - ☐ Marital status
    - ☐ Name of spouse
    - ☐ Number and ages of children
- ☐ Employment information
  - ☐ Name of employer
  - ☐ Office address, telephone number, and office hours
  - ☐ Length of employment
  - ☐ Gross and net earnings

☐ Obtain details of automobile collision.

- ☐ Date, time, and place
- ☐ Names of other drivers and description of respective vehicles
  - ☐ Names of drivers

- ☐ Make, model, year, VIN number, license plate number of each respective vehicle
- ☐ If collision is hit-and-run and participants still unknown, provide all information available

NOTE:
Client must notify insurer within 30 days of collision to obtain uninsured motorist coverage.

- ☐ Brief description of collision
  - ☐ Description and illustration of collision
  - ☐ Approximate speed of vehicles involved
- ☐ Names of legal/registered owners of vehicles
- ☐ Names, addresses, and telephone numbers of each passenger in client's car, and relationship to client
- ☐ Damage to client's car
  - ☐ Description of damages
  - ☐ Loss-of-Use information
  - ☐ Costs of repair or replacement
- ☐ Police involvement
  - ☐ Collision report to police
    - ☐ Identity of person reporting collision
    - ☐ Date and time report made
  - ☐ Citations issued for traffic violations
  - ☐ Arrest reports connected with collision, and resulting criminal disposition
    - ☐ Driving under influence

- ☐ Alcohol/Drug test results
- ☐ Hit-and-run violation
- ☐ Other serious offenses

☐ Police disposition of vehicles

- ☐ Vehicles impounded
- ☐ Vehicles privately towed

☐ Obtain details of any collisions arising after collision in question.

☐ Obtain description of client's injuries.

- ☐ Types of injuries
- ☐ Continuation of injuries and prognosis
- ☐ Extent of emergency or other hospital treatment
- ☐ Name, address, and telephone number of physician
- ☐ History of previous collisions or injuries, including pre-existing injuries to the same part of the body as that injured in the collision
- ☐ Litigation status of all prior claims for injuries

☐ Ascertain whether the client has suffered any post-collision injuries, i.e., new and additional injuries, unrelated to the injuries sustained in the collision and subsequent to the collision.

PRACTICE TIP:

Consider Post-Collision Injuries as Recoverable Damages or Mitigating Factors. Information concerning post-collision injuries may be important for a number of reasons. For example, plaintiff may have suffered unrelated post-collision injuries that may affect his or her ability to engage in ordinary work or other gainful employment, which may mitigate economic loss. Nonrelated injuries may also affect the plaintiff's ability to enjoy the quality of life that he or she enjoyed prior to the original injury, thus mitigating the extent of damages otherwise recoverable.

On the other hand, post-collision damages may be recoverable. For example, a plaintiff who suffered lower-extremity injuries in the collision and consequently experienced difficulty walking, may have subsequently fallen down a flight of stairs or tripped, or otherwise injured another part of his or her body that was not injured in the collision. These additional damages may be recovered as a result of the subsequent injury because they arose out of the preexisting injury. -- *Frederick Schenk, Editorial Consultant.*

- ☐ Ascertain existence and extent of spouse's loss-of-consortium claim.
- ☐ Witnesses
  - ☐ Name, address, and telephone number of each witness
  - ☐ Relationship of each witness to client
- ☐ Insurance information
  - ☐ Name of insurance carriers, agents, and brokers for respective policies
  - ☐ Extent of policy coverage (determined from policies listed above)
  - ☐ Additional insurance coverage
    - ☐ Workers' compensation insurance: injuries incurred while on job and within scope of employment
    - ☐ Other applicable insurance
  - ☐ Insurance claims filed by client
    - ☐ Statements made by client to insurance agent
    - ☐ Status of claims
- ☐ Information concerning previously consulted attorneys
  - ☐ Determine whether client consulted with any other attorneys for representation concerning this collision.
  - ☐ Determine why any attorneys previously consulted were not retained, or why representation was terminated.

PRACTICE TIP:

Research Client's Prior Consultations With Other Attorneys. Information concerning prior consultations with other attorneys isimportant, because it may illuminate the client's expectations, or a problem with the case if representation was previously refused. --*Dona E. Cohn, Editorial Consultant.*

☐ Statements made to others

☐ Determine whether the client has given any written or recorded statements to anyone.

☐ Obtain names and addresses of persons who whom statements were given.

[3] Post-Interview Determination and Initial Advice

[a] Considerations Regarding Whether to Accept or Reject Case.

☐ Summarize the facts and legal issues of the case.

☐ Determine possible causes of action.

☐ Identify possible defendants and estimate their financial worth.

☐ Analyze strengths and weaknesses of available evidence.

☐ Determine feasibility of litigation.

☐ Determine whether any conflict of interests exist.

☐ Determine whether current caseload and court calendar allows adequate time for this case.

☐ If case is accepted, continue with the following steps.

[b] Execution of Documents After Accepting Case.

☐ Obtain client's signature on attorney-client documents.

☐ Retainer agreement [*see § 81.65*].

☐ Obtain hourly fee deposit if applicable.

☐ Contingency agreement [*see § 81.65*].

☐ Obtain client's signature on release forms

☐ Authorization for Release of Medical/Psychiatric Information [*see § 81.63[1], [2], below*]

☐ Authorization for Release of Employment Records [*see § 81.63[3], [5]*]

☐ Authorization for Release of Police Report [*see § 81.63[3], [4]*]

☐ Authorization for Release of Social Security Records [*see § 81.63[3], [6]*]

[c] Initial Advice to Client; Related Actions.

☐ Advise client to make necessary reports and claims that he or she has not already made.

☐ DMV Form SR-1, Traffic Accident Report [*see § 81.62*].

☐ Police reports

☐ Insurance claims on appropriate policies

☐ Advise client against making additional statements about case.

☐ Advise client to receive immediate proper medical treatment.

PRACTICE TIP:

Supervise Client's Medical Care. Counsel should supervise the client's medical care, especially in the first several weeks after taking case. Counsel should advise the client to receive immediate proper treatment, and fully communicate symptoms to his or her physician or other care provider. Assist the client in obtaining the appropriate medical care provider. Counsel may suggest a specialist when the client's condition warrants it. Treatment beyond the reasonable and necessary treatment for the client's injuries will not be recovered in the settlement or judgment. Also, excessive treatment may make a negative impression on the jury. --*Dona E. Cohn, Editorial Consultant.*

☐ If appropriate, notify health-care lien holders of representation by certified mail [*see* Ch. 177, *Damages*].

PRACTICE TIP:

Send a Notice to Health-Care Providers Along With Request for Production of Medical Records. The attorney must send a notice to health-care providers in the same document in which he or she requests production of medical records. That way, the medical provider or hospital that has provided the medical records cannot later deny that it was given notice of the third-party action, because it will already have provided medical records and bills in response to the authorization and notice.

In addition, before a case is settled, it is advisable to ask defense counsel and/or the insurance adjuster

whether or not it had received, under the Emergency Medical Care Act notice of a lien, and the amount claimed in the lien. That way, before settling the case, the attorney may avoid surprises and be able to determine whether there are any discrepancies between the amount the lienholder is claiming for reimbursement and the amount to which it claims to be entitled. -- *Frederick Schenk, Editorial Consultant.*

PRACTICE TIP: Attorney's Liability for Medical Liens. The attorney is liable for medical liens if he or she signs the lien, the provider is a public agency or entity, or the provider is MediCal or MediCare. The attorney is not required to reimburse the client's private automobile insurance carrier, but the client will still be required to reimburse the insurance carrier.

NOTE: Counsel does not have to reimburse the entire amount of the medical payments made by the company, and you can deduct whatever percentage you charged your client, and also a pro-rated share of the litigation costs.

Furthermore, if your client does not want you to reimburse his or her own insurance company, then advise the client in writing of the reimbursement requirement and ensure that the client understands that he or she will be personally responsible for the bill. --*Dona E. Cohn, Editorial Consultant.*

☐ File any required DMV reports on behalf of the client.

☐ DMV Form SR-1 Traffic Accident Report [*see § 81.62*].

☐ If liability is to be asserted against a state or local agency, present claim within 100 days after accrual of the cause of action [*see* Ch. 464, *Public Entities and Officers: California Tort Claims Act*].

☐ Contact the public agency involved and obtain the proper claims forms for timely filing.

☐ If liability is to be asserted against the estate of a deceased party involved in the collision, file claim within whichever of the following is later:

☐ Four months after first issuance of letters to the general personal representative; or

☐ Thirty days after giving notice of administration, if given within the time prescribed by *Prob. Code § 9051(a)* or *(b)* (notice to creditors) [*see* Ch. 454, *Probate: Claims Against the Estate*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesGeneral OverviewTortsDamagesCosts & Attorney FeesContingent FeesTortsNegligenceActionsGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageProof of Financial ResponsibilityTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-81 California Forms of Pleading and Practice--Annotated § 81.51

§ 81.51 Defendant's Checklist

[1] Interview With Client

- ☐ Obtain general background information [*see § 81.50[2]*].
- ☐ Ascertain which allegations in complaint are true and which are false.
- ☐ Obtain information, if any, necessary for alleging possible defenses.
  - ☐ Defenses to negligence action
    - ☐ Contributory negligence
    - ☐ Statute of limitations
  - ☐ Defenses to strict liability in tort
    - ☐ Comparative fault
    - ☐ Misuse of product
    - ☐ Statute of limitations
- ☐ Obtain information, if any, necessary for preparing cross-complaint.

☐ Cross-complaint for personal injuries or property damage suffered by defendant and caused by negligence of plaintiff, a codefendant, or by a third party.

☐ Cross-complaint for indemnity against a codefendant or third party.

[2] Post-Interview Determination and Initial Advice

☐ Make initial determination to accept or reject case.

☐ Determine whether any conflict of interests exist.

☐ Determine whether case requires time, resources, or experience beyond those available.

☐ If work will need to be performed by supervised associates, obtain client's advance approval.

☐ If potential client is uninsured, carefully evaluate appropriateness of accepting case [*see § 81.19[2]*].

☐ If case is accepted, continue with the following steps.

☐ Obtain client's signature on documents.

☐ Retainer agreement

☐ If client is uninsured, consider requiring advance retainer fee [*see § 81.19[2]*].

☐ Authorization for Release of Police Report [*see § 81.63[3], [4]*]

☐ Advise client to make necessary reports and claims that he or she has not already made.

☐ DMV Form SR-1, Traffic Accident Report [*see § 81.62*].

☐ Police reports

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesComparative NegligenceGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsNegligenceActionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal VehiclesCivil ProcedurePleading & PracticePleadingsComplaintsCross-Complaints

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[Reserved]

§§ 81.52[Reserved]

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8-81 California Forms of Pleading and Practice--Annotated § 81.60

§ 81.60 Letter to Client Requesting Documents Prior to Interview

[1] FORM

_____[*date*]

_____ [*Name of client*]
_____[*address*]
_____[*city and state*]

Re: Traffic collision of _____[*date*]

Dear _____[*name*]:

You are scheduled for an interview with _____[*name of attorney*] on _____[*date and time*]. Please bring all of the following documents in your possession to the interview.

1. All of the following insurance policies:

- Automobile insurance policies pertinent to this collision.
- Health insurance policies.
- Homeowners' or other personal insurance policies.
- Umbrella policies

2. MediCal and/or Medicare identification cards, if any.

3. Copies of any claims made on insurance policies for this collision, and copies of actions taken on those claims.

4. Employment records and earnings statements dating from _____[*date*].

5. Your DMV driving record.

6. A copy of any forms filed with the DMV with respect to this collision.

7. A copy of any police reports filed with respect to this collision.

8. Copies of any medical and hospital records regarding your injuries sustained during or immediately after this collision.

9. Copies of any medical and hospital records regarding any injuries or disorders sustained by your spouse directly or indirectly caused by this collision, or in reaction to your injuries sustained in this collision.

10. Copies of any court documents or other legal papers concerning litigation for any prior injuries.

11. All automobile repair invoices or estimates related to this collision.

12. All vehicle rental invoices and related transportation invoices for costs incurred because of this collision.

13. All photographs and videotapes taken of the collision or of damages or injuries caused by the collision.

14. All photographs and videotapes documenting the history of your injuries sustained in the collision.

15. All print copies or videotapes of any news coverage of the collision.

16. Court papers or other legal documents filed by any other attorneys that you have previously consulted about this collision, and any correspondence between you and any other attorneys that you have previously consulted about this collision.

If you have any questions concerning the documents we are requesting, please call this office. Thank you for your cooperation in this matter.

Very truly yours,_____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*name*]

[2] Use of Form

The form set out in *[1], above*, is for use to request a person scheduled for an initial client interview to bring documents necessary for preliminary determinations about the case. It assumes that the potential client would be the plaintiff, and was injured while driving a vehicle during the collision. The list of required documents may of course be modified to suit other potential plaintiffs, such as an automobile passenger or pedestrian. A defense attorney would request the client to bring documents served in the action.

For a procedural checklist of documents required by the plaintiff's attorney, see *§ 81.50[1]*. For a procedural checklist of information required from the defendant, see *§ 81.51*.

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§ 81.61 Client Questionnaire

[1] Client Questionnaire

[a] FORM Client Questionnaire

1. State your name, address, and telephone number (both residence and business), date of birth, social security number, and any other names by which you have ever been known, including maiden name.

Response: _____

2. Give any other addresses you have had for the past 10 years, including the dates for each such residence.

Response: _____

3. State your present spouse's name, birth date, place and date of marriage, and the name and address of all former spouses, if any. If a former marriage has been terminated by divorce, annulment, or death, give the former spouse's name and the date and the Court entering the decree, or the date of death.

Response: _____

4. Give the names, birth dates, and addresses of all children, whether natural or by adoption. If by adoption, so indicate.

Response: _____

5. With reference to your present occupation, state:

(a) The name and address of your employer and the date you were first so employed.Response:

_____

(b) A brief descriptions of your work.Response:

_____

(c) The name and address of your superior best qualified to testify as to the nature of your employment and the manner of your performance.Response:

_____

(d) Your rate of pay since the time you commenced this occupation and the method of determining it (e.g., hourly, weekly, monthly, commission, etc.)Response:

_____

(e) Answer questions (a) through (d), inclusive, for any other employment you have had during the past 10 years.Response:

_____

(f) Answer questions (a) and (b) for each employment your spouse has had in the last 10 years.Response:

_____

(g) The records you have to show your earnings over the past 10 years.Response:

_____

(h) Do you have available income tax returns for the past 10 years, showing your earnings during that time? If they are incomplete, please advise for which years you have them.Response:

_____

6. With reference to insurance please state:

(a) The name and local address of each insurance company with whom you carry any type of liability insurance protection (home, automobile, business, etc.), including the policy number and the effective dates, beginning and expiration, of each policy.Response:

_____

(b) The name and local address of each insurance company with whom you carry any type of umbrella or excess coverage, including the policy number and the effective dates, beginning and expiration, of each policy.Response:

_____

(c) List all insurance policies that provide for payments of your medical expenses (such as C.P.S., Blue Cross, Kaiser Hospital, Automobile Insurance Medical Pay Provisions, Union Insurance, etc.).Response:

_____

(i) With which of the foregoing companies have you made any claim for payment arising out of your present collision? Attach copies of claims if you have same.Response:

_____

(ii) Have you ever made any claim under any of the foregoing policies or under any other policy you may have had during your lifetime? If so, identify each claim and the policy under which it was made.Response:

_____

(iii) Retain a list of all payments made arising out of your present collision and, if at all possible, secure copies of all medical bills (doctors, hospital, x-rays, drugs, etc.) and physical therapy appliances for which such payments were made.Response:

_____

(iv) Have you had any difficulty in obtaining benefits you feel you are entitled to recover under these policies? If so, tell us the problem.Response:

_____

(v) Please do not make any written statements (including filling out forms) to your own insurance company without first sending them to us for our study. We will send them in to the insurance company for you after examining them.Response:

_____

(d) If you were the driver of the vehicle, but not the owner, provide, if available to you, the name of the vehicle owner's liability insurance carrier, and the number of the policy.Response:

_____

(e) If you are listed as a resident relative on the insurance policy of any relative of yours, provide, if available to you, the name of your relative's liability insurance carrier, and the number of the policy.Response:

_____

7. If you have ever made any claim orally or in writing, or filed any action or proceeding for personal injury, property damage, workmen's compensation, or other type of proceeding seeking damages, state:

(a) The date and nature of each such claim, how it arose (e.g., automobile collision, slip and fall), the name and address of any attorney who may have represented you, the name of the defendant (including the insurance company involved), and the final outcome.Response:

_____

(b) What part or parts of your body were injured as a result of the foregoing?Response:

_____

(c) What, if any, portions of your body that were injured in your present collision were injured in any way in the earlier collisions you have just described?Response:

_____

8. List all other illnesses or physical conditions for which you have ever received medical attention (excluding colds, influenza, and childhood diseases). Give the name and location of each hospital from which you received any treatment either as an in-patient or as an out-patient.

Response: _____

9. List all other injuries which you have ever sustained, regardless of when or how, and give the names and addresses of all doctors and hospitals from which you received treatment for such injuries.

Response: _____

10. List all other noninjury collisions in which you were involved. If automobile damage was involved, give the extent of the damage.

Response: _____

11. If you were ever in the armed services, please state the following:

(a) Branch of service, and dates of service.Response:

_____

(b) Serial number.Response:

_____

(c) Rank attained.Response:

_____

(d) Place of overseas service.Response:

_____

(e) Combat experience.Response:

_____

(f) Types of duty performed.Response:

_____

(g) Date and place of all medical care received and brief description of illness or injury.Response:

_____

(h) Type of discharge.Response:

_____

(i) Complete details of any and all claims made for service connected disability or benefits (such as V.A. Claim, Legion claim, pensions, etc.)Response:

_____

12. List the names and addresses of all witnesses to the events upon which your claim is based. If you do not know their names, but have some idea as to how we might locate them, so indicate.

Response: _____

13. If there was any property damage, either to automobile or otherwise, please attach copies of the repair bills or advise us in what other way the amount of the damage or cost of replacement, if totally destroyed, can be determined.

Response: _____

14. Have you ever talked with, personally or by telephone or correspondence, any insurance company or other claim representative relating to your collision? _____ If so,

(a) Did you sign a statement?Response:

_____ If so, and a copy was left with you, please return it with the answers to this questionnaire.

(b) Was the statement written down by the representative, regardless of whether or not you signed it?Response:

_____

(c) Was more than one person present at the interview (perhaps a shorthand reporter)?Response:

_____

(d) If there was correspondence, did you keep a copy of the correspondence?Response:

_____

15. One of the most important aspects of your injury is the effect it has had on you.

(a) If there is pain involved, state the portion of your body which is painful, and describe the severity and frequency of the attacks of pain. It would be well if you would make a note on a calendar or diary each time the painful episode occurs.Response:

_____

(b) When you find that your injury prevents you from engaging in any activity, whether part of your work or recreational, that you could do before, note the date and the nature of the activity interfered with. If it involved housework, such as cleaning or ironing, also note the particular type of activity.Response:

_____

(c) If possible, pay all of your bills, whether medical, hospital, or drug, etc., by check. When it is necessary that you take taxicabs, secure a receipt from the driver, if possible.Response:

_____

(d) Record the date of your first return to work, the degree of work you were then able to perform, and the date you were able to resume fully your former activities. Also advise us when the doctor indicates your treatment is coming to a close.Response:

_____

(e) State the names, addresses, telephone numbers, and relationships of all persons who have knowledge concerning the way in which your pain has caused you to limit your activities.Response:

_____

If there is not room enough for your answers to be put next to or below the questions, please write your answers on a separate sheet of paper together with the number of the question to which the answer refers.

16. Another possible important effect of your injuries is their affect, if any, on your spouse.

(a) As a result of your injuries arising from the collision, has the relationship between you and your spouse been injured in any way?Response:

_____

(b) Please describe in detail.Response:

_____ .

(c) Are there any medical records or insurance claims reflecting these injuries to your spouse?Response:

_____

17. If you have previously consulted an attorney with respect to this collision, please provide details of that consultation.

(a) Provide the attorney's name, address, telephone number, and fax number, if any.Response:

_____

(b) Provide the date or dates that you consulted with the attorney.Response:

_____

(c) Explain why you did not retain that attorney, or if you did retain retain that attorney, explain why the attorney did not continue to represent you.Response:

_____

[b] Use of Form

The form set out in *[a], above*, is for use to obtain detailed information from the client with respect to his or her automobile injury claim. It is illustrative of information required of a potential plaintiff, and may be modified to suit a client who is a defendant. This questionnaire is intended to supplement the information obtained during the initial interview with the client. It may be given to the client during the initial interview or mailed to him or her later with a cover letter, such as that in *[2], below*. Information in response to the questionnaire will give the attorney a basis for the preliminary investigation and discovery.

For a procedural checklist of information required by the plaintiff's attorney, see *§ 81.50[1], [2]*. For a procedural checklist of information required from the defendant, see *§ 81.51*.

[2] Letter to Client Forwarding Questionnaire

[a] FORM

_____[*date*]

_____ [*Name of client*]
_____[*address*]
_____[*city and state*]

Re: _____

Dear _____[*name*]:

We are enclosing a questionnaire in duplicate that we ask you to read carefully and complete to the best of your ability. One copy should be returned to us and the other retained by you. If any matters occur to you after you have returned our copy to us, please record them on your own copy and inform us of the additions.

Many of the matters in this questionnaire are necessarily personal. Please be assured that we will keep them in strictest confidence, except as their disclosure may become necessary during the handling of your case.

It may seem to you that we are unnecessarily probing into your medical background. The reason is simple. A personal injury claim lays bare all of the injured person's medical past. The defense will inquire fully into it. By briefing us fully in advance, you can help us forestall many of the problems we otherwise would meet. One of the greatest disasters than can befall a client is to deny the existence of a past injury, claim, or medical condition only to be confronted with proof to the contrary. Proper preparation of a case is possible only if we have been supplied with a complete medical and legal history of our client. We therefore ask that you give complete and detailed answers to all of the following questions. If you have some doubt as to the way the questions should be answered, we ask that you express this doubt in your answer.

In addition, we are asking questions concerning your relationship between you and your spouse with respect to your injuries arising from the collision, because your spouse may be able to assert a separate claim based on harm to the relationship resulting from the collision. As with all potential related claims, it is best to ascertain whether this claim exists at the beginning of our investigation into the case.

In cases of this kind, many months or even years may pass before your case is finally determined. Therefore there will be times when months go by without our contacting you directly. Please be assured that we have not forgotten you, but will contact you whenever there is any matter of interest to you. Please notify us immediately of any change of address and telephone number. We should always be able to reach you on short notice. Your questions or suggestions are welcome at any time, and you are always free to call on us.

Thank you for your cooperation in this matter.

Very truly yours,_____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*name*]

[b] Use of Form

The form set out in , *above*, is for use to forward the questionnaire in *[1]*, *above*, to the client in an automobile case.

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8-81 California Forms of Pleading and Practice--Annotated § 81.62

§ 81.62 Traffic Accident Report and Insurance Information (DMV Form SR-1 and SR-1A)

[1] FORM Traffic Accident Report and Insurance Information (DMV Form SR-1 and SR-1A)

Click here to view image.

[2] Use of Form

The form set out in *[1], above*, is a reproduction on Form SR-1 issued by the Department of Motor Vehicles, which is available at any DMV local office. This form must be filed with the DMV by the driver of a motor vehicle involved in a collision resulting in damage to the property of any one person in excess of $500 or in bodily injury or death of any person. It must be filed with 10 days after the collision. If the client has not yet filed the report, the attorney should advise him or her to do so immediately. The mailing address of the Department is the following:

Department of Motor Vehicles
Financial Responsibility
Mail Station J237
P.O. Box 942884
Sacramento, CA 94284-0884

Form SR-1 includes an attachment, SR-1A, California Insurance or Bond Information. The reporting party must fill this out with his or her insurance or bond information. The DMV may send the form to the insurance or surety company indicated for verification of insurance or bond information.

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§ 81.63 Requests for Records

[1] Authorization for Release of Medical Records

[a] FORM Authorization for Release of Medical Records

AUTHORIZATION FOR MEDICAL RECORDS

TO: _____[*name*]

RE: _____

This is to authorize any physician, hospital, medical attendant, or others to furnish the Law Offices of _____[*name*] or any of its representatives any and all information or opinions that they may request regarding my physical condition and treatment rendered for me, and to allow them to see or copy any X-rays or records that you may have regarding my condition or treatment. I have retained my attorneys to prosecute a claim against responsible persons for injuries sustained by me, and to that end I am requesting your full cooperation with my attorneys. I hereby waive any privilege I have to that information with respect to disclosure to my attorneys.

I am further requesting you not to disclose any information to any insurance adjuster or other persons without written authority from me (pursuant to privilege and confidential communications statutes). All prior authorization is hereby canceled.

_____ [*signature*]

_____ [*typed name*]

[b] Use of Form

The form set out in *[a], above*, is for use to authorize the client's physician to release medical records to the attorney. It is signed by the client and sent to the physician with a cover letter requesting the specific information needed [*see [3],*

below].

[2] Letter Requesting Medical Records

[a] FORM

_____[*date*]

_____ [*name of doctor*]
_____[*address*]
_____[*city and state*]

Re: _____

Dear _____ [*name of doctor*]:

This office represents _____ [*name of plaintiff*] in a claim against others for injuries sustained by _____ [*name of plaintiff*] as the result of a collision that occurred on _____[*date*].

Enclosed you will find an authorization for release of medical information, executed by _____ [*name of plaintiff*].

Pursuant to the authorization, we would appreciate the following at this time:

(1)_____ [*E.g.*, Your medical report, in triplicate, setting forth a detailed statement of the following:

(a)

_____ 's (*name of plaintiff*) history;

(b)

_____ 's (*name of plaintiff*) complaints;

(c) your findings;

(d) any interpretations of X-rays and other tests;

(e) your diagnosis;

(f) your treatment;

(g) your prognosis;

(h) future treatment and estimate of future medical expenses;

(i) nature, extent, dates, and estimated period of total and partial disability and of probable permanent results;

(j) nature and extent of any aggravation to any condition that preexisted the collision;

(k) description of those injuries and physical conditions that were the result of the collision and those that were not the result of the collision.]

2. _____ [*E.g.*, A photostatic copy of the complete hospital record of _____ (*name of plaintiff*).]

Please send us your separate bill for your expenses in obtaining the information requested above, and we will promptly remit payment [*or specify other*].

3. Please also forward to us, in triplicate, addressed to and chargeable to _____ [*name of plaintiff*], your separate itemized bill to date for the care and treatment you have rendered with respect to the injuries sustained as a result of the collision described above. Please also send us copies of any future billings addressed to and chargeable to _____ [*name of plaintiff*], for the care and treatment that you may render in the future.

Please do not furnish any information, records, or reports to anyone else without receiving prior written authorization from this office.

Thank you for your anticipated courtesy and cooperation in expediting the above request(s).

Very truly yours,_____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*name*]

[b] Use of Form

The form set out in *[a], above*, is for use to request medical records from the client's physician. An authorization signed by the client should be enclosed with the letter to permit release of the requested information [*see [1], above*].

[3] General Authorization for Release of Confidential Information

[a] FORM General Authorization for Release of Confidential Information

REQUEST FOR RECORDS/INFORMATION

TO: _____

RE: _____

You are hereby authorized to release and give to my attorneys, Law Offices of _____[*name*], or any representative thereof, any and all information or opinions that they may request covering and regarding: _____

I hereby waive any privilege I may have to this information with respect to its release to my attorneys.

Dated: _____.

_____ [signature]

_____ [*typed name*]

[b] Use of Form

The form set out in *[a], above*, is for use to obtain the client's consent to obtain the release confidential information by third parties. The request is signed by the client and set with a letter requesting specific records and information [*see [4]-[6], below*].

[4] Letter Requesting Police Report

[a] FORM

_____[*date*]

_____ [*California Highway Patrol or local police department*]
_____[*address*]
_____[*city and state*]

Re: Our client _____[*name*]

Date of collision _____
Location of collision _____
Vehicles involved: _____
Drivers involved: _____ [*name(s)*]
Owners involved: _____ [*name(s)*]

To the Custodian of Records:

Kindly provide the undersigned with a copy of the collision report specified above, including any supplemental reports and all diagrams and statements of witnesses. A check is enclosed in the sum of $_____ to cover charges.

[*EITHER*]

My client, _____[*name*], _____ [specify interest in information, e.g., was injured in the collision]. I am enclosing his/her written authorization for release of that information.

[*OR*]

I declare under penalty of perjury that I represent _____[*name*] and that he/she _____[*specify interest in information, e.g., was injured in the above-described collision*].

Executed on _____[*date*], at _____[*city*], California.

_____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*name*]

[b] Use of Form

The form set out in *[a], above*, is for use to request a copy of a police report. It must be accompanied by either a written authorization from the client for release of the report [*see [3], above*], or by a declaration under penalty of perjury that the attorney represents the injured party [*see Veh. Code § 20012*].

[5] Letter Requesting Employment Information

[a] FORM

_____[*date*]

_____ [*Name of employer*]
_____[*address*]
_____[*city and state*]

Re: _____[*name of employee*]

Dear _____[*name*]:

This office represents _____[*name of client*], one of your employees, in a claim against others for injuries and damages sustained in an automobile collision on _____[*date*].

Would you kindly furnish us the following information with respect to his/her employment:

(1) Date of employment.

(2) Job title and responsibilities.

(3) Working hours per week, including overtime.

(4) Absences from work since

_____ [date of collision].

(5) Dates and hours of sick leave and vacation time used following

_____ [*date of collision*].

(6) Earnings per

_____ [*e.g., month*].

(7) Benefits, such as group health insurance, 401K plans, matching company contributions, stock options.

(8) Fringe benefits, such as use of company automobile.

(9) Name of supervisor.

(10) Name of person having custody or personnel and employment records.

I am enclosing an authorization from _____[*name of client*], which permits you to provide me with the above information.

Your cooperation and assistance will be appreciated.

Very truly yours,_____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*name*]

[b] Use of Form

The form set out in *[a], above*, is for use to obtain specific information concerning a client's employment. The letter should be accompanied by the client's authorization for release of the information [*see [3], above*].

[6] Letter Requesting Social Security Records

[a] FORM

_____[*date*]

Social Security Administration
_____[*address*]
_____[*city and state*]

Re: _____[*name of client*]
Social Security Number: _____

To the Custodian of Records:

This law firm represents the above-named person in a claim against others for injuries and damages sustained in an automobile collision on _____[*date*]. He/she has signed an authorization form, enclosed with this letter, for the release of information needed for this purpose by our law firm.

We are requesting all information in your records pertaining to _____[*name of client*] with respect to the period of time from _____[*date*] to _____. [*date*] .

We are enclosing a stamped return envelope for your reply. We thank you for your anticipated cooperation in this matter.

Executed on _____[*date*], at _____[*city*], California.

_____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*name*]

[b] Use of Form

The form set out in *[a], above*, is for use to request a copy of the client's social security records. It must be accompanied by a written authorization from the client for release of the records [*see [3], above*]. Providing a stamped return envelope may expedite the procedure.

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PART V. FORMS

8-81 California Forms of Pleading and Practice--Annotated § 81.64

§ 81.64 Preliminary Information to Client After Retention

[1] Letter Advising Client of Litigation Procedure

[a] FORM

_____[*date*]

_____ [*name of client*]
_____[*address*]
_____[*city and state*]

Re: _____

Dear _____ [*name of client*]:

Having entered into an agreement to represent you in the prosecution and collection of your claim _____ [*describe claim, if desired*], I would like to advise you of the procedures that normally should be followed during the processing of your case:

(1) Investigation and court procedures:

A legal action is commenced by filing a complaint. The complaint is then served on the defendant(s) who must in turn respond by an appropriate pleading within the period allowed by law. The person making a claim for damages is usually referred to as "plaintiff" and the person against whom the claim is made is referred to as "defendant." Investigation by both sides will continue throughout the case. The parties and witnesses may be required to answer questions orally (by way of depositions) or in writing (by way of interrogatories). After the parties have completed their investigation, and if there can be no agreement as to settlement, your case will be set for trial. You will be kept fully informed periodically as the case proceeds. You should understand that it may take in excess of one year to effect a recovery. Do not become

alarmed if you do not hear from us for long periods of time, because we will not contact you unless there is something new to report.

(2) Report changes of address and telephone numbers:

If you move or are planning to go out of town, on vacation or otherwise, please let us know where you can be reached, and provide us with your new address and telephone number.

(3) Report changes in your physical condition:

You should notify this office periodically as to whether your physical condition has improved or worsened. Keep us informed as to the names, addresses, and telephone numbers of each doctor you visit, and inform us as to the nature of the medical treatments and medicines that have been prescribed and taken. Do not be afraid to see your doctor whenever necessary. Keep a day-by-day diary from the time of the collision and describe in the diary how your injury has restricted your daily living, fromthe time you get up from bed and dress at the beginning of your day to the time you go retire at the end of the day. Include any problems experienced during your sleeping hours. Describe in the diary each day, the pain or restricted movement you experienced in each part of your body, from the top of your head down to all parts of your body. Also describe in the diary the daily medications and medical treatments that you have taken. Keep track of the amount of additional time that it takes to complete tasks since you were injured.

(4) Report all evidence and subsequent occurrences:

Any evidence that comes into your possession should be transmitted to this office for safekeeping. If you remember any facts that you have not reported to us, make a note of them and report to us as soon as possible. Let us know the names, addresses, and telephone numbers of any witnesses subsequently discovered. Do not repair any damaged items, as it may be necessary to take photographs of the damage, and it may be advisable to use the damaged article as evidence for presentation in court. Keep all physical objects that might serve as evidence to support your claim of injuries and damages, such as wearing apparel at the time of the collision, splints, casts, braces, etc. All collisions, claims, and disabilities that you had prior to the collision of _____[*date*] should be disclosed to this office, because the defendant's insurance company has methods of discovering prior collisions, claims, and disabilities. We do not want your case to be jeopardized as a result of our not being alerted to those facts. These methods include the use of a nationwide organization that has compiled a list of most damage claims made by each person during his lifetime. Note that the defendants are also entitled to obtain copies of your past medical records.

(5) Keep evidence of all expenses:

You should maintain a separate itemized daily list of all your expenses and losses, including the following: doctors, nurses, hospitals, medicines, medical braces, splints, and other paraphernalia, repairs, travel expense, costs of hiring others to help around the house or business (including baby-sitters), etc. Pay any expenses by check and obtain written receipts (preferably two copies). Send or bring all canceled checks and receipts to this office. In addition, send two copies of any bills received to this office. You should also keep a record of the following: days off work, loss of pay or profits, sick leave used, travel time to and from doctors, hospitals, etc.

(6) Do not discuss case. Do not fill out forms. Do not sign anything:

Until you have first received our approval, do not discuss this case with any other person (including friends, family, neighbors, doctors, police, and your own insurance company); do not fill out any forms; and do not sign any papers. The defendant's insurance company may try to take movies or photographs of your daily activities with the hope of proving that you are exaggerating your claim as to your injuries and disabilities. They may also try to tape-record your conversations with others.

If anyone other than a representative from this office contacts or questions you with respect to your claim, tell the person to contact this office.

If anyone claims to represent this office, verify his or her representation by contacting this office before answering any questions.

(7) Other sources for payment of expenses:

You may be able to have your medical and other bills paid from other sources, as a result of the coverage afforded you under your own insurance policies (homeowners, automobile, etc.), medical plans and group benefits at your place of work, in which case you should initiate whatever action is necessary to obtain those payments.

(8) Read this letter periodically:

You should read this letter periodically, so that you do not forget about the various matters discussed above.

[(9) Self-addressed, stamped envelopes:

Enclosed are self-addressed, stamped envelopes for your use in reporting changes of address and any of the other information requested above.]

Your cooperation with respect to the above matters will be helpful in bringing you case to a successful conclusion. If you have any questions, please do not hesitate to call.

Very truly yours,_____ [signature of attorney]

[b] Use of Form

The form set out in *[a], above*, is for use to advise the client of the procedures undertaken in prosecuting a claim for damages. It should be sent to the client shortly after the attorney is retained.

[2] Letter Advising Client of Statutes of Limitations

[a] FORM

_____[*date*]

_____ [*Name of client*]
_____[*address*]
_____[*city and state*]

Re: _____

Dear _____[*name*]:

Unless a court action is commenced by filing a complaint not later than _____[*date*], the statute of limitations will bar any claim that you may have concerning the _____[*describe collision*] occurring

on _____[*date*].

In order to file a complaint it is necessary that we receive _____[*specify*].

If we have not received _____[*specify*] at least _____ _____[number] days before _____[*date*], we will not have sufficient time in which to make preparations and complete the steps necessary for filing, and therefore will assume that you have decided either to drop the matter or to obtain other counsel and, accordingly, we will close our file.

If you have any questions concerning this request, please call this office.

Very truly yours,_____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*name*]

[b] Use of Form

The form set out in *[a], above*, is for use to advise a client that his or her claim will be barred by the statute of limitations if certain information, documents, or other items necessary for preparation or filing of the complaint are not received in sufficient time to file the complaint. It should be sent well in advance of the date of expiration of the limitation period.

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§ 81.65 State Bar Sample Fee Agreement--Short Contingency Fee Agreement [Bus. & Prof. Code § 6147]

[1] FORM State Bar Sample Fee Agreement--Short Contingency Fee Agreement [Bus. & Prof. Code § 6147]

_____[*Name of law firm or attorney*]
_____[*address*]
_____ [*telephone number*]

_____[*date*]

ATTORNEY-CLIENT CONTINGENT FEE CONTRACT

This ATTORNEY-CLIENT CONTINGENT FEE CONTRACT (the "Agreement") is the written fee contract that California law requires lawyers to have with their clients. It is between _____[*name of law firm or attorney*] ("Attorney") and you, _____ [*name of client*] ("Client").

1.CONDITIONS. This Agreement will not take effect, and Attorney will have no obligation to provide legal services until Client returns a signed copy of this Agreement.

2.SCOPE AND DUTIES. Client is hiring Attorney to represent Client in the matter of your claims against _____[*name of party*], arising out of _____[*specify*], which occurred on or about _____[*date*]. Attorney will provide those legal services reasonably required to represent Client, and will take reasonable steps to inform Client of progress and to respond to Client's inquiries. Attorney will represent Client in any court action until a settlement or judgment, by arbitration or trial, is reached, and in connection with any appropriate posttrial motions.

After judgment Attorney will not represent Client on any appeal, or in any proceedings designed to execute on the judgment, without such additional compensation as Attorney and Client may agree on in a separate Agreement.

[3. INSURANCE DISCLOSURE. Attorney does not meet any of the criteria for errors and omissions (malpractice) coverage set forth in *Business and Professions Code Section 6147*.]

4.CLIENT'S DUTIES. Client agrees to be truthful with Attorney, to cooperate, to keep Attorney informed of developments, to abide by this Agreement, to pay bills for costs (if any) on time, and to keep Attorney informed of Client's address, telephone number, and whereabouts.

5.LEGAL FEES, COSTS, AND BILLING PRACTICES. Attorney will be compensated for legal services rendered only if a recovery is obtained for Client. If no recovery is obtained, Client will be obligated to pay only for costs, disbursements, and expenses, as described below.

The fees to be paid by Client to Attorney will be _____ percent (_____%) of the net recovery, (the term "net recovery" means the total of all amounts received by settlement, arbitration award, or judgment, *fromwhich will be subtracted* all unpaid costs and disbursements set forth in Paragraph _____ [6 *or* 7]).

In the event of discharge or withdrawal of Attorney as provided in Paragraph _____ [8 *or* 9], Client agrees that Attorney shall be entitled to be paid by Client, on payment of the settlement, arbitration award, or judgment in favor of Client, a reasonable fee for the legal services provided by Attorney to Client.

[*EITHER*]

6.NEGOTIABILITY OF FEES. The rates set forth above are not set by law, but are negotiable between Attorney and Client.

[*OR, if underlying action is for medical malpractice*]

6.NEGOTIABILITY OF FEES. The rates set forth in *Business and Professions Code Section 6146* are the maximum limits for a contingency fee agreement; the Attorney and Client may negotiate a lower rate.

[*CONTINUE*]

7.COSTS AND EXPENSES. All costs, disbursements, and litigation expenses are the responsibility of Client. Attorney will advance such costs and expenses. Client will reimburse attorney for such advance costs and expenses on settlement, arbitration award, or judgment. These items include, but are not limited to, court fees, service of process charges, photocopying services, notary fees, computer-assisted legal research, long distance telephone charges, messenger and delivery fees, postage, in-office photocopying at $_____ per page, facsimile charges, deposition costs, parking, mileage at $_____ per mile, investigation expenses, consultants' fees, expert witness fees, and other similar items. Client authorizes Attorney to incur all reasonable costs and to hire any investigators, consultants, or expert witnesses reasonably necessary in Attorney's judgment, unless one or both of the clauses below are initialed by the Attorney.

_____ Attorney shall obtain Client's consent before incurring any cost in excess of $_____.

_____ Attorney shall obtain Client's consent before retaining outside investigators, consultants, or expert witnesses.

8.RELATED BUT UNKNOWN MATTERS. Client represents that Client does not know of any related legal matters that would require legal services to be provided under this Agreement. Such related matters might include, among other things, claims for property damage, workers' compensation, disputes with a health care provider about the amount owed for their services, or claims for reimbursement (subrogation) by any insurance company for benefits paid under an insurance policy. If such matters arise later, Client agrees that this Agreement does not apply to any such related legal matters, and a separate Agreement for provision of services and payment for those services will be required if Client desires Attorney to perform that additional legal work.

9.DISCHARGE AND WITHDRAWAL. Client may discharge Attorney at any time, on written notice to us, and Attorney will immediately after receiving such notice cease to render additional services. Such a discharge does not, however, relieve Client of the obligation to pay any costs incurred prior to such termination, and Attorney has the right to recover from you the reasonable value of Attorney's legal services rendered from the effective date of the Agreement (Paragraph 13) to the date of discharge.

Attorney may withdraw from representation of Client (a) with Client's consent, (b) on court approval, or (c) if no court action has been filed, on reasonable notice to Client.

10. LIEN. Client hereby grants Attorney a lien on any and all claims or causes of action that are the subject of Attorney's representation under this Agreement. Attorney's lien will be for any sums owing to Attorney for any unpaid costs or attorneys fees under this Agreement. The lien will attach to any recovery Client may obtain, whether by arbitration award, judgment, settlement or otherwise.

11. CONCLUSION OF SERVICES. When Attorney's services conclude, other than by discharge or withdrawal, all unpaid charges will immediately become due and payable. After Attorney's services conclude, Attorney will, on client's request, deliver Client's file to Client, along with any client funds or property in Attorney's possession.

12. DISCLAIMER OF GUARANTEE. Nothing in this Agreement and nothing in Attorney's statements to Client will be construed as a promise or guarantee about the outcome of the Client's matter. Attorney makes no such promises or guarantees. There can be no assurance that Client will recover any sum or sums in this matter. Attorney's comments about the outcome of Client's matter are expressions of opinion only.

13. EFFECTIVE DATE. This Agreement will take effect when Client has performed the conditions stated in Paragraph 1, but its effective date will be retroactive to the date Attorney first performed services. The date at the beginning of this Agreement is for reference only. Even if this Agreement does not take effect, Client will be obligated to pay Attorney the reasonable value of any services Attorney may have performed for Client.

_____ [*name of law firm or attorney*]

By: _____ [*signature*]

_____ [*typed name*]

I/We have read and understood the foregoing terms and agree to them, as of the date _____[*name of law firm*] first provided services. If more than one party signs below, we agree to be liable jointly and severally for all obligations under this Agreement. By signing this Agreement, I/we acknowledge receipt of a fully executed duplicate of this Agreement.

Dated: _____.

_____ [*client's signature*]

Address: _____

_____

Telephone: _____

[2] Use of Form

The form set out in*[1], above*, is a short contingency fee agreement, for use in litigation matters in which the attorney will recover fees only if a specified contingency occurs. It is adopted from the Sample Written Fee Agreement Forms approved by the State Bar Board of Governors. The form is intended to satisfy the basic requirements of *Bus. & Prof. Code § 6147*.

The State Bar Sample forms are not mandatory, although contingency fee contracts must be in writing. The attorney must provide a duplicate copy of the contract at the time of execution to the client, or his or her guardian or representative [*Bus. & Prof. Code § 6147(a)*].

For a form of long agreement, for use in complex litigation, and for sample hourly and fixed-rate fee agreements for use in various situations, see *Ch. 72, Attorney Practice and Ethics, § 72.190* et seq.

PRACTICE TIP:

Include Clause Regarding Extent of Investigation in Retainer Agreement. The attorney should include a clause in the retainer agreement stating that the cost and type of investigation in the client's case will be determined by the attorney's professional judgment. --*Dona E. Cohn, Editorial Consultant*.

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Chapter 81A AUTOMOBILES: INVESTIGATION

8-81A California Forms of Pleading and Practice--Annotated 81A.syn

§ 81A.syn Synopsis to Chapter 81A: AUTOMOBILES: INVESTIGATION

§ 81A.01 Scope of Chapter

§ 81A.02 Cross References

[1] Related Chapters in This Volume

[2] Other Related Chapters

§§ 81A.03-81A.09 [Reserved]

§ 81A.10 Investigation of Factual Background of Case

[1] Plaintiff

[2] Defendant

§ 81A.11 Damages and Liability Issues

§ 81A.12 Locating and Interviewing Witnesses

§ 81A.13 Retaining Investigative Services

§ 81A.14 Preserving Evidence; Spoliation

§§ 81A.15-81A.19 [Reserved]

§ 81A.20 Related Texts From LEXIS Publishing

§ 81A.21 State Statutes

[1] Financial Responsibility Laws

[2] Recovery of Damages Barred Under Proposition 213

[3] Motor Vehicle Operation and Collision Reports

§ 81A.22 Internet References

§§ 81A.23-81A.29 [Reserved]

§ 81A.30 Plaintiff's Checklist

[1] Obtain Documents and Records

[2] Determine Whether Client Is Barred From Damages Recovery

[3] Compile Witness List and Conduct Interviews

[4] Take Photographs of Vehicles

[5] Preserve Evidence

§ 81A.31 Defendant's Checklist

[1] If Appropriate, Obtain Information for Cross-Complaint

[2] Obtain Information for Defense of Complaint

[a] Obtain Documents and Records

[b] Compile Witness List and Conduct Interviews

[c] Take Photographs of Vehicles if Necessary

[d] Preserve Evidence

[e] Surveillance of Plaintiff

§§ 81A.32-81A.39 [Reserved]

§ 81A.40 Registration Record Request and Notice to Vehicle Owner (DMV Form INF 70R/1)

[1] FORM

[2] Use of Form

§ 81A.41 Financial Responsibility Information Request (DMV Form SR-19C)

[1] FORM

[2] Use of Form

§ 81A.42 Request for Driver Record Information (DMV Form INF 70D/1)

[1] FORM

[2] Use of Form

§ 81A.43 Uninsured Motorist Certificate

[1] Request for Uninsured Motorist Certificate (DMV Form SR-19C)

[a] Form

[b] Use of Form

[2] Uninsured Motorist Certificate (DMV Form SR-19)

[a] FORM

[b] Use of Form

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§ 81A.01 Scope of Chapter

This chapter provides a discussion of the investigation of an automobile collision case. It includes the following topics:

- The general need for investigation of the factual background of the case, from both the plaintiff's and defendant's perspective [*see § 81A.10, 81A.11*].
- The need to locate and interview certain witnesses [*see § 81A.12*].
- The advisability of retaining investigative services [*see § 81A.13*].
- Documents and reports that must be obtained [*see § § 81A.10, 81A.14*].
- The need to preserve evidence [*see § 81A.14*].

The chapter provides checklists for both the plaintiff [*see § 81A.30*] and the defendant [*see § 81A.31*].

The chapter includes illustrations of the following DMV forms:

- Registration record request and notice to vehicle owner [*see § 81A.40*].
- Financial responsibility information request [*see § 81A.41*].
- Request for driver record information [*see § 81A.42*].
- Request for an uninsured motorist certificate [*see § 81A.43[1]*] and a certificate [*see § 81A.43[2]*].

Legal Topics:

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

TortsProcedureDiscoveryTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 81A.02 Cross References

[1] Related Chapters in This Volume

- For discussion and forms concerning causes of action in an automobile case, see Ch. 84, *Automobiles: Causes of Action* .

- For discussion and forms concerning discovery in automobile cases, see Ch. 88, *Automobiles: Discovery* .

- For discussion and forms concerning uninsured motorist claims, see Ch. 88A, *Automobiles: Uninsured Motorist Claims* .

[2] Other Related Chapters

- For discussion and forms concerning the liability of public entities and officers for negligence in the operation of motor vehicles, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

- For discussion of spoliation of evidence, see Ch. 190, *Depositions* .

Legal Topics:

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

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[Reserved]

§§ 81A.03[Reserved]

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PART II. PURPOSE AND SCOPE OF INVESTIGATION

8-81A California Forms of Pleading and Practice--Annotated § 81A.10

§ 81A.10 Investigation of Factual Background of Case

[1] Plaintiff

In the initial stages of representation, an attorney representing a plaintiff in an automobile case must ascertain sufficient factual information for the following purposes:

- To frame the complaint.
- To estimate the value of the case, including the scope of damages, and possible defenses to and weaknesses in the case [*see* Ch. 83].
- To reevaluate whether or not to proceed with litigation.

The plaintiff's attorney must therefore obtain documents and records, and conduct interviews pertaining to such matters as the collision itself, the client's medical condition, the client's financial condition, and relevant information about the other parties to the collision and witnesses [*see § 81A.30*].

PRACTICE TIP:

Investigate Client's Litigation and Driving Record. Inquiry should be made as to the client's litigation history, driving record, and any felonies. Also, were alcohol, drugs, or other factors involved? Was defendant driver on a business errand? Counsel should check the accident history at an intersection or roadway. Was weather a factor? Was the condition of the road a factor (e.g., construction, signing, need for safety measures, guardrails)? --*Frederick Schenk, Editorial Consultant.*

[2] Defendant

By contrast to plaintiff's counsel, a defense attorney in an automobile collision case is usually consulted after plaintiff's counsel has filed suit [*see § 81.13*]. After being retained, he or she therefore needs to conduct an investigation for the following purposes:

- To establish the basis for a cross-complaint, if appropriate.

- To frame all possible theories of defense, including affirmative defenses such as comparative negligence.

- To estimate the value of the case [*see* Ch. 83].

- To weigh the propriety and timing of a settlement offer [*see* Ch. 85].

PRACTICE TIP:

Defense Counsel Should Contact Defendant Promptly. The defense attorney should contact the client as soon as possible. Even ifthe case is referred by an insurance company, this is imperative. The defendant may possess necessary information regarding the facts, witnesses, physical evidence, etc. Defense counsel needs to determine if a cross-complaint should be filed. It is also advisable to call the plaintiff's attorney to determine if a possible settlement should be explored to save costs and expenses. -- *Joe Devine, Editorial Consultant.*

If the defendant is an individual asserting injury or damage in a cross-complaint, the defense attorney must obtain all the background information needed by the plaintiff's attorney [*see § 81A.30*]. If the defendant is not seeking damages in a cross-complaint, the defense attorney must obtain documents and records and conduct interviews pertaining to the defense to the complaint, including such matters as the collision itself, the conduct of all parties concerned, the insurance coverage of all parties, and the compliance of all parties with DMV requirements, especially financial responsibility laws [*see § 81A.31*].

PRACTICE TIP:

Defense Investigation Should Include the Following:

- Obtain defendant's version of the facts.

- Consider whether unnamed third parties may be liable.

- Determine whether defendant has a personal attorney.

- Obtain all information on available insurance policies.

- Obtain photographs of vehicle even if there is no damage.

- Get original copies of all prior investigation.

- Determine relationship of various defendants.

- Review complaint for proper service and possible demurrer.

- Estimate value of the case and costs of defense.

- Consider potential for early settlement.

-- *Joe Devine, Editorial Consultant.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewTortsProcedureDiscoveryTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-81A California Forms of Pleading and Practice--Annotated § 81A.11

§ 81A.11 Damages and Liability Issues

At the investigative stage, the plaintiff's attorney must focus on gathering sufficient information to frame a complaint that will include all relevant theories of liability and allege all appropriate damages [*see §§ 81.14, 81.16*]. If a public entity is involved, the plaintiff's attorney must uncover the necessary information early enough to file claims within the shortened limitations period of the Tort Claims Act [*Gov. Code § 810 et seq.*; *see* Ch. 86].

The defense attorney must investigate all aspects of liability and damages allegations sufficiently to defend the lawsuit and analyze settlement possibilities [*see* Ch. 85].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProcedureDiscoveryCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewTortsDamagesCompensatory DamagesGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-81A California Forms of Pleading and Practice--Annotated § 81A.12

§ 81A.12 Locating and Interviewing Witnesses

Attorneys in an automobile case should identify all potential witnesses to the collision, and determine the probable substance of their testimony. In addition, counsel should record a statement from a favorable witness to the collision.

PRACTICE TIP:

Investigator Should Record Statements From Favorable Witnesses. Plaintiff's counsel should record statements from favorable witnesses to preserve the recollections and the observations of someone who will assist in establishing liability. As time passes, so may the witness's recollection of events. For that reason, I do not recommend preserving an adverse witness's statement. With the passage of time and the fading of recollections, an adverse witness may not recall facts which may be contrary to those of a favorable witness, though his or her testimony may be refreshed by an earlier recorded statement supporting the liability issues.

Note that counsel and his or her investigator should look for possible weaknesses in an adverse witness's perception and perhaps record a statement so that it can be used to impeach the witness. For example, if an adverse witness says that he or she did not see the collision and only heard it, that point should be recorded in a statement so that the witness cannot come back later and change his or her story. --*Frederick Schenk, Editorial Consultant.*

An investigation of any potential witnesses should include a criminal background check for felony convictions, which may possibly be used for impeachment purposes [*Evid. Code § 788*].

PRACTICE TIP:

Arbitration Considerations. All statements of witnesses should be made under penalty of perjury for use at arbitration proceedings. --*Frederick Schenk, Editorial Consultant.*

PRACTICE TIP: Hire Investigator to Avoid Becoming Potential Witness. The defense attorney should refrain from personally taking scene or vehicle photographs, interviewing witnesses, or developing any investigation that could lead to possible evidence at trial. An investigator should be used for these purposes so that the attorney does not become a potential witness at trial. -- *Joe Devine,*

Editorial Consultant.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProcedureDiscoveryCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewEvidenceTestimonyLay WitnessesGeneral OverviewEvidenceCompetencyAttorneysTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-81A California Forms of Pleading and Practice--Annotated § 81A.13

§ 81A.13 Retaining Investigative Services

Depending on the size and complexity of the case, it may be advisable to retain an investigative service to obtain the following information:

- Corroboration or refutation of the extent and nature of the opposing party's injuries, i.e., the plaintiff's injuries pursuant to the complaint, or the defendant's injuries pursuant to a cross-complaint.
- Location of and background checks on witnesses.
- Organization status of opposing parties.

PRACTICE TIP:

Plaintiff's Considerations When Hiring Investigator. Money spent on investigation just may be the most cost-effective method of evaluating the true value of a case. As previously discussed, the plaintiff has an advantage of being the first to investigate the collision and interview witnesses. Counsel should take this and all advantages the case has to offer. This may lead to additional defendants or clients, or firms to share costs of litigation. This is not the area in which to pinch pennies. Time spent on a case that has difficulties could be a waste of your most precious commodity, *your time*.

Make sure the investigator that represents you (and your firm's reputation) is of the highest caliber. The investigator should be someone whom you trust completely. Get information from other lawyers who recommend the person or firm. Assign the task and make certain that the role you expect the investigator to fulfill is clear. Make certain that you get a written report of all work accomplished on the file. Schedule a review of the file for 1-3 weeks, i.e., when the investigation should be completed, or when the investigator has checked in to report progress or the contrary. --*Frederick Schenk, Editorial Consultant.*

PRACTICE TIP: Defense Counsel May Save Money Over the Long-Term by Hiring Investigator. In any case involving serious injury or claims for substantial damages, the appropriate cost of

investigators and expert witness is usually well worth the expense. In California, the slightest finding of negligence can subject the defendant to joint and several liability for all special damages suffered by the plaintiff even though the defendant is only liable for general damages in the percentage to which he or she is liable. -- *Joe Devine, Editorial Consultant.*

PRACTICE TIP: Inform Client That Extent of Investigation Is Determined by Counsel's Professional Judgment. The attorney should include a clause in the retainer agreement that the cost and type of investigation in the client's case will be determined by the attorney's professional judgment. --*Dona E. Cohn, Editorial Consultant.*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProcedureDiscoveryTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 81A.14 Preserving Evidence; Spoliation

Counsel should take measures to preserve evidence at this stage of the case. For example, counsel should retain any automobile part that was faulty at the time of the collision, and take measures to preserve its chain of custody [*see, e.g., Johnson v. United Services Automobile Assn. (1998) 67 Cal. App. 4th 626, 638, 79 Cal. Rptr. 2d 234]* .

It is important to examine and photograph the scene of the collision while it is still fresh. Some physical evidence, such as skid marks, may be distorted or disappear from exposure to elements or clean-up efforts. If the defendant has plans to repair or destroy a vehicle involved in the collision, or other property at the scene, the attorney should ask to photograph it first. For example, an actual piece of evidence, such as a bumper, may need to be examined by an expert. If necessary, the attorney should obtain a court order for this purpose.

To preserve evidence, plaintiff's counsel should gather the following information in the course of his or her investigation:

- A minimum of eight photographs of all sides of the vehicles;
- Close-up shots of the damage, specifically paint transfers from the defendant's vehicle;
- Examination and photographs of seatbelts to determine if evidence of stress is present;
- Photographs and measurements of all skidmarks (length of skidmarks can significantly change the speed calculations);
- Photographs of intrusion damage, with measurements of the intrusion, can help the reconstructionist prove or disprove opinions regarding speed;
- Examination of the windshield to check for hair, which could mean that the seatbelt was in use and failed, or was not in use; and

- When the driving history of the defendant is established, counsel should consider a canvas of his or her neighborhood for evidence of his or her dangerous driving habits.

PRACTICE TIP:

Send Notice of Intent to Conduct Examination on Evidence Out of Counsel's Control. Plaintiff's counsel, when first retained in a case in which a defective product or component may have caused injury that is out of the control of the plaintiff or unavailable to the plaintiff for inspection, should immediately send correspondence to the custodian of the product or component part, and demand that the product or component part be made available for inspection or at least preserved until such time as an expert is retained to inspect the product. Thus, by putting the custodian on notice, plaintiff's counsel has protected the client's interest and may be able to obtain sanctions, should spoliation occur before an inspection can take place. --*Frederick Schenk, Editorial Consultant.*

Although California courts have in the past allowed plaintiffs to bring tort actions for spoliation of evidence against parties who have intentionallyor negligently destroyed or suppressed evidence relevant to a civil action [*see, e.g., Gomez v. Acquistapace (1996) 50 Cal. App. 4th 740, 751-752, 57 Cal. Rptr. 2d 821* ; *Coca-Cola Bottling Co. v. Superior Court (1991) 233 Cal. App. 3d 1273, 1285-1287, 285 Cal. Rptr. 183, 286 Cal. Rptr. 855]* , subsequent opinions by the California Supreme Court and the court of appeal have held that there is no longer a tort remedy for spoliation of evidence [*see Temple Community Hospital v. Superior Court (1999) 20 Cal. 4th 464, 466, 84 Cal. Rptr. 2d 852, 976 P.2d 223* (third-party intentional spoliation); *Cedars-Sinai Medical Center v. Superior Court (1998) 18 Cal. 4th 1, 17-18, 74 Cal. Rptr. 2d 248, 954 P.2d 511* (first-party intentional spoliation); *Coprich v. Superior Court (2000) 80 Cal. App. 4th 1081, 1088-1090, 95 Cal. Rptr. 2d 884* (both first-party and third-party negligent spoliation)].

However, although a tort remedy for spoliation no longer exists, the courts have recognized that under the appropriate circumstances a contractual obligation to preserve evidence created by mutual agreement or promissory estoppel may still allow a plaintiff to pursue contractual remedies [*see Temple Community Hospital v. Superior Court (1999) 20 Cal. 4th 464, 477, 84 Cal. Rptr. 2d 852, 976 P.2d 223* ; *Coprich v. Superior Court (2000) 80 Cal. App. 4th 1081, 1091-1092, 95 Cal. Rptr. 2d 884]* .

In one case, for example, the court of appeal held that an insurance company had explicitly agreed to preserve an allegedly defective automobile tire after plaintiff had informed the company that the tire would be needed in a lawsuit against the manufacturer. Because plaintiff relied on the insurer's promise to preserve the tire, plaintiff had a cause of action based in contract against the insurance company when that company failed to preserve the tire [*Cooper v. State Farm Mutual Automobile Ins. Co. (2009) 177 Cal. App. 4th 876, 892-894, 99 Cal. Rptr. 3d 870*]. The court in that case also concluded that plaintiff had presented evidence sufficient to prove that the tire was in fact defective, and that this fact could have been proven in a suit against the manufacturer, to withstand the insurer's nonsuit [*Cooper v. State Farm Mutual Automobile Ins. Co. (2009) 177 Cal. App. 4th 876, 897-898, 99 Cal. Rptr. 3d 870*].

For a general discussion of spoliation and the effect of these opinions, *see* Ch. 195, *Discovery: Inspection of Tangible Evidence* .

PRACTICE TIP:

Inform Plaintiff's Counsel of Intent to Destroy Evidence. If you intend to destroy evidence such as a totaled vehicle, take photographs and consider writing a letter to all potentially interested parties offering inspection of the evidence for a reasonable period of time. If your expert has inspected the evidence you intend to destroy, be sure to make the evidence available for inspection by any interested party. -- *Joe Devine, Editorial Consultant.*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsGeneral OverviewTortsProcedureDiscoveryEvidenceRelevanceSpoliationTortsTransportation TortsMotor VehiclesPersonal Vehicles

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[Reserved]

§§ 81A.15[Reserved]

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§ 81A.20 Related Texts From LEXIS Publishing

For discussion of automobile collision law generally, see Automobile Accident Law and Practice (Matthew Bender)

For discussion of tort law relating to automobile collisions generally, see California Torts, ch. 20 (Matthew Bender)

For discussion of uninsured motorist law, see California Uninsured Motorist Law (LEXIS Publishing 6th ed.)

For discussion of trial of collision cases generally, see Trial of Accident Cases (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 81A.21 State Statutes

[1] Financial Responsibility Laws

Financial responsibility laws. *Veh. Code § 16000 et seq.*

Disclosure of DMV financial responsibility records pursuant to request of persons having proper interest in them. *Veh. Code § 16005(b)*

[2] Recovery of Damages Barred Under Proposition 213

Prohibition against recovery of damages in negligence action by person whose injuries were caused by his or her commission of a felony of which he or she was convicted. *Civ. Code § 3333.3*

Prohibition against recovery of noneconomic damages by injured person who was owner of uninsured vehicle or uninsured driver for purposes of financial responsibility laws. *Civ. Code § 3333.4*

[3] Motor Vehicle Operation and Collision Reports

Report of collision to Highway Patrol or local police within 24 hours is prerequisite to uninsured motorist claim for personal injuries caused by unidentified owner or operator of motor vehicle. *Ins. Code § 11580.2(b)(2)*

Collision reports to DMV. *Veh. Code § 16000 et seq.*

Civil liability of owners and operators. *Veh. Code § 17000 et seq.*

Collision reports to Highway Patrol or local police agency. *Veh. Code § 20000 et seq.*

Traffic laws. *Veh. Code § 21000 et seq.*

Safety regulations. *Veh. Code § 34500 et seq.*

Traffic offenses. *Veh. Code § 40000.1 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesVehicle RegistrationGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal VehiclesInsurance LawMotor Vehicle InsuranceCoverageGeneral Overview

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§ 81A.22 Internet References

Matthew Bender. This site includes links to Matthew Bender publications and Shepard's citation service. <http://www.bender.com>

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§§ 81A.23[Reserved]

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8-81A California Forms of Pleading and Practice--Annotated § 81A.30

§ 81A.30 Plaintiff's Checklist

[1] Obtain Documents and Records

☐ Obtain any of the following documents and records from the client that were not obtained during the interview and questionnaire process [*see § 81.50*].

☐ Insurance policies

☐ Automobile policies: examine the automobile policy closely for medical, collision, uninsured motorist, and public liability coverage.

☐ Health insurance policies

☐ Homeowners' or other personal insurance

☐ Umbrella policies

☐ Claims made on policies for this collision

☐ Employment records and earnings statements

☐ Medical/Hospital records

☐ Police reports

- ☐ Medical/Hospital bills
- ☐ Automobile Repair bills
- ☐ Replacement vehicle rental and other costs
- ☐ Photographs of collision, including damaged vehicles and injuries
  - ☐ Photographs taken at or directly after time of collision
  - ☐ Photographic history of injuries
- ☐ Videotapes of collision, vehicles, injuries
- ☐ News reports of collision
  - ☐ Print journalism
  - ☐ Film footage

☐ Obtain medical and hospital records of client showing his or her complete medical history from the date of birth, including his or her current physical condition.

☐ Obtain the following DMV records:

- ☐ Traffic Accident Report, if not previously obtained (DMV Form SR-1) [*see §§ 81.50*; *81.62[1]*].
- ☐ Legal and registered ownership of each vehicle involved in the collision (DMV Form INF 70R/1) [*see § 81A.40*].
- ☐ Evidence of compliance or noncompliance with financial responsibility laws by each party to the collision (DMV Form SR-19C, SR-19) [*see §§ 81A.41*; *81A.43*]
- ☐ Driver's license information, and record of citations and prior accidents with respect to each party to the collision (DMV Form INF 70D/1) [*see § 81A.42*].
- ☐ Uninsured motorist certificate (DMV Forms SR-19, SR-19C [*see §§ 81A.41*; *81A.43*].

☐ Obtain records regarding organization status, if any, of each party to the collision.

☐ Obtain corporate or partnership status from California Secretary of State.

☐ Obtain fictitious name information from recorder's office in appropriate county.

[2] Determine Whether Client Is Barred From Damages Recovery

☐ Determine whether the client may be barred from recovery of any damages with respect to a negligence cause of action on the following grounds [*Civ. Code § 3333.3*; *see § 81.17*]:

☐ Client's injuries were caused by his or her commission of a felony resulting in a conviction.

☐ Client's injuries were caused by his or her immediate flight from the commission of a felony resulting in a conviction.

☐ Determine whether the client may be barred from recovery of noneconomic damages on the following grounds [*Civ. Code § 3333.4*; *see § 81.17*]:

☐ At the time of the accident the client was driving the vehicle while under the influence of alcohol or drugs, and was convicted of that offense [*see Veh. Code §§ 23152, 23153*].

☐ The client was the owner of a vehicle involved in the accident, and the vehicle was not insured as required by the financial responsibility laws [*see Veh. Code § 16000 et seq.*].

☐ The client was driving a vehicle involved in the accident, and cannot establish his or her financial responsibility as required by the financial responsibility laws [*see Veh. Code § 16000 et seq.*].

NOTE:
A person who was driving while uninsured may nevertheless recover noneconomic damages if injured by someone who was driving under the influence of alcohol or drugs, and was convicted of that offense [*Civ. Code § 3333.4(c)*; *see Veh. Code §§ 23152, 23153*; *see also § 81.17*].

[3] Compile Witness List and Conduct Interviews

☐ Compile list of all known witnesses.

☐ Provide summary of probable testimony if called.

☐ Include addresses and telephone numbers if possible.

☐ Record statements from favorable witnesses to the collision.

PRACTICE TIP:

Avoid Helping Defense Counsel by Recording Statements of Adverse Witnesses. The reason that plaintiff's counsel would want to have a recorded statement from a favorable witness is to preserve the recollections and the observations of someone who will assist in establishing liability. With the passage of time and the fading of recollections, an adverse witness may not recall facts that may be contrary to those of a favorable witness, though his or her testimony may be refreshed by an earlier recorded statement supporting the liability issues. --*Frederick Schenk, Editorial Consultant.*

☐ Obtain records of felony convictions of each potential witness, including client if he or she is potential witness.

NOTE:

Except as otherwise provided in *Evid. Code § 788*, a witness may be cross-examined as to any felony convictions for purpose of impeachment [*Evid. Code § 788*].

[4] Take Photographs of Vehicles

☐ Take photographs of each automobile involved in the collision prior to repair, unless already provided [*see § 81.50[1]*]. If an adverse party will not permit his or her vehicle to be photographed, obtain a court order for that purpose.

[5] Preserve Evidence

☐ Take any necessary precautions to preserve evidence such as the following.

☐ Vehicle damage.

☐ Documents or property that might be lost or altered.

PRACTICE TIP:

Preserve Evidence That Helps Establish Liability. Certainly any material evidence that helps to establish liability, whether it be an automobile or its component parts, or a defective product and its component parts, must be preserved until such time as all experts have an opportunity to examine it adequately in order to establish liability and causation. Plaintiff's counsel may need to consider whether it is financially cost effective to purchase the product, such as an automobile, or maintain it in a storagefacility, as it may be needed for inspection over the course of the litigation and accessible to plaintiff's expert. --*Frederick Schenk, Editorial Consultant.*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProcedureDiscoveryTortsDamagesCompensatory DamagesGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-81A California Forms of Pleading and Practice--Annotated § 81A.31

§ 81A.31 Defendant's Checklist

[1] If Appropriate, Obtain Information for Cross-Complaint

☐ If the client has incurred damages or injuries in the collision, and counsel may file a cross-complaint on his or her behalf, obtain all the information sought in the plaintiff's checklist [*see § 81A.30*].

PRACTICE TIP:
Preparation of Cross-Complaint. Obtain all information necessary to file a cross-complaint to bring into the action unnamed third-party defendants as appropriate. Be sure to follow all claim-filing requirements when government entities are involved. -- *Joe Devine, Editorial Consultant.*

[2] Obtain Information for Defense of Complaint

[a] Obtain Documents and Records

☐ Obtain all available evidence of the collision.

- ☐ Photographs of collision, including damaged vehicles and injuries
- ☐ Photographs taken at or directly after time of collision
- ☐ Photographic history of injuries
- ☐ Videotapes of collision, vehicles, injuries

☐ News reports of collision

☐ Print journalism

☐ Film footage

☐ Obtain the following DMV records:

☐ Traffic Accident Report, if not previously obtained (DMV Form SR-1) [*see §§ 81.50*; *81.62[1]*].

☐ Legal and registered ownership of each vehicle involved in the collision (DMV Form INF 70R/1) [*see § 81A.40*].

☐ Evidence of compliance or noncompliance with financial responsibility laws by each party to the collision (DMV Form SR-19C, SR-19) [*see §§ 81A.41*; *81A.43*].

☐ Driver's license information, and record of citations and prior accidents with respect to each party to the collision (DMV Form INF 70D/1) [*see § 81A.42*]

☐ Uninsured motorist certificate (DMV Forms SR-19, SR-19C) [*see § 81A.43*].

☐ Obtain records regarding organization status, if any, of each party to the collision.

☐ Obtain corporate or partnership status from California Secretary of State.

☐ Obtain fictitious name information from recorder's office in appropriate county.

[b] Compile Witness List and Conduct Interviews

☐ Compile list of all known witnesses.

☐ Include addresses and telephone numbers if possible.

☐ Provide summary of probable testimony if called.

☐ Record a statement from a favorable witness to the collision.

☐ Obtain records of felony convictions of each potential witness, including client if he or she is potential witness.

NOTE:
Except as otherwise provided in *Evid. Code § 788*, a witness may be cross-examined as to any felony

convictions for purpose of impeachment [*Evid. Code § 788*].

PRACTICE TIP: Avoid Becoming Witness. The defense attorney should refrain from interviewing witnesses to avoid becoming a potential witness in the case. -- *Joe Devine, Editorial Consultant.*

[c] Take Photographs of Vehicles if Necessary

☐ Take photographs of each automobile involved in the collision prior to repair, unless already provided [*see § 81.50[1]*]. If an adverse party will not permit his or her vehicle to be photographed, obtain a court order for that purpose.

PRACTICE TIP:
Use Photographs to Establish Availability of Seatbelts. Take photographs of available seatbelts if there is any possibility the plaintiff will claim that none were available. This is especially true for common carrier defendants such as taxicab companies. -- *Joe Devine, Editorial Consultant.*

[d] Preserve Evidence

☐ Take any necessary precautions to preserve evidence such as the following.

☐ Vehicle damage.

☐ Documents or property that might be lost or altered.

PRACTICE TIP:
Notify Adverse Party of Intent to Destroy Evidence. Notify, in writing, all interested parties before destroying any evidence, giving those parties a fair opportunity to conduct their own inspection. -- *Joe Devine, Editorial Consultant.*

[e] Surveillance of Plaintiff

☐ Consider surveillance of the plaintiff to determine the extent of his or her injuries.

PRACTICE TIP:
Use Caution With Surveillance. If surveillance is discovered and it turns up no damaging information, it may be viewed by a trier of fact as a serious invasion of the plaintiff's privacy. In addition, the surveillance may not reveal anything, and the plaintiff may use the tape against you at trial, e.g., "The defendant spent all this money to try to prove that the plaintiff is not injured, but hours and hours of tape show that the plaintiff is not engaged in regular activities." Surveillance is best used, sparingly, immediately before trial, and after discovery is closed. -- *Joe Devine, Editorial Consultant.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral OverviewTortsProcedureDiscoveryInsurance LawMotor Vehicle InsuranceCoverageGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§§ 81A.32[Reserved]

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Chapter 81A AUTOMOBILES: INVESTIGATION
PART V. FORMS

8-81A California Forms of Pleading and Practice--Annotated § 81A.40

§ 81A.40 Registration Record Request and Notice to Vehicle Owner (DMV Form INF 70R/1)

[1] FORM Registration Record Request and Notice to Vehicle Owner (DMV Form INF 70R/1)

Click here to view image.

[2] Use of Form

The form set out in *[1], above*, is for use to obtain information from the registration records of the Department of Motor Vehicles. This form may be obtained without charge from your local DMV office. Many DMV forms are available on the DMV website at www.dmv.ca.gov. For forms not yet available on the website, call (916) 657-7669 for registration forms or (916) 657-6525 for driver license forms.

The party (or attorney) requesting the information must complete the form, then mail it to the address set forth below, with a check or money order to cover fees, and a stamped return envelope. The fees may also be prepaid with Motor Vehicle Stamps, which are available from the DMV. The DMV mails the Notice to Vehicle Owner to the owner of the vehicle for which information is being requested. Mail the completed request to the following address:

Department of Motor Vehicles
Public Operations--G199
P.O. Box 944247
Sacramento, CA 94244-2470

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8-81A California Forms of Pleading and Practice--Annotated § 81A.41

§ 81A.41 Financial Responsibility Information Request (DMV Form SR-19C)

[1] FORM Financial Responsibility Information Request (DMV Form SR-19C)

Click here to view image.

[2] Use of Form

The form set out in *[1], above*, is for use to obtain information from accident reports filed with the Department of Motor Vehicles [*see Veh. Code § 16005(b)*]. This form may be obtained without charge from your local DMV office. Many DMV forms are available on the DMV website at www.dmv.ca.gov. For forms not yet available on the website, call (916) 657-7669 for registration forms or (916) 657-6525 for driver license forms.

The party (or attorney) requesting the information must complete the upper portion of the form. One form (or a letter containing the substance of the request) should be used for each driver involved in the collision. Each request must be mailed to the DMV address set forth below, with a check or money order to cover DMV fees, and a stamped return envelope. The fees may also be prepaid with Motor Vehicle Stamps, which are available from the DMV. Mail the completed form to the following address:

Department of Motor Vehicles--Financial Responsibility
P.O. Box 942884
Mail Station J237
Sacramento, CA 94284-0884

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8-81A California Forms of Pleading and Practice--Annotated § 81A.42

§ 81A.42 Request for Driver Record Information (DMV Form INF 70D/1)

[1] FORM Request for Driver Record Information (DMV Form INF 70D/1)

Click here to view image.

[2] Use of Form

The form set out in *[1], above*, is for use to obtain driver record information from the Department of Motor Vehicles. This form may be obtained from your local DMV office. Also, many forms are now available on the DMV's website at www.dmv.ca.gov.

The party (or attorney) requesting the information must fill out the upper portion of the form. The request should not be folded or stapled. It must be mailed, with a check or money order and stamped return envelope, to the following address:

Department of Motor Vehicles
Public Operations--G199
P.O. Box 944247
Sacramento, CA 94244-2470

The information may be requested by letter, unless the information is requested on a continuous basis, in which case the DMV form must be used.

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8-81A California Forms of Pleading and Practice--Annotated § 81A.43

§ 81A.43 Uninsured Motorist Certificate

[1] Request for Uninsured Motorist Certificate (DMV Form SR-19C)

[a] Form Request for Uninsured Motorist Certificate (DMV Form SR-19C)

Click here to view image.

[b] Use of Form

The form set out in *[a], above*, is for use in requesting a certificate regarding an uninsured motorist from the Department of Motor Vehicles [*see* [2], *below*]. This form may be obtained from your local DMV office, or from the DMV website at www.dmv.ca.gov.

Mail the completed request to the following address:

Department of Motor Vehicles--Financial Responsibility
P.O. Box 942884
Mail Station J237
Sacramento, CA 94284-0884

The nonrefundable fee for each document requested is $20.

For discussion of uninsured motorist claims, see Ch. 88A, *Automobiles: Uninsured Motorist Claims* .

[2] Uninsured Motorist Certificate (DMV Form SR-19)

[a] FORM Uninsured Motorist Certificate (DMV Form SR-19)

UNINSURED MOTORIST CERTIFICATE

Pursuant to your request, the following information is provided under the Authority of *Section 16005 of the California*

Vehicle Code. It reflects the extent of the Department's records as of _____[*date*].

File number _____ [*file number for collision*], established as the result of the accident on or about _____[*date*], in or near _____[*site of collision*], shows no report or evidence that _____[*name of person who is subject of report*] was covered by an automobile liability policy, motor vehicle liability policy, or bond in effect at the time of the accident.

DEPARTMENT OF MOTOR VEHICLES

[b] Use of Form

The form set out in *[a], above*, is a reproduction of Department of Motor Vehicles Form SR-19, a letter that is generated by the DMV to establish whether or not the subject of the report was insured or covered by a bond at the time of the collision. This form is generated in response to a DMV form SR-19C request for an Uninsured Motorist Certificate [*see [1], above*, for an example of DMV form SR-19C]. When introduced as evidence, the certificate creates a rebuttable presumption that a motor vehicle was uninsured at the time of the collision [*see Ins. Code § 11580.4*].

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[a] Initial Damages Considerations

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[a] Liability

[b] Medical Summary/Injuries

[c] Medical Specials/Expenses

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[e] General Damages

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§ 81B.16 Settlement Considerations

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[1] Financial Responsibility Laws

[2] Recovery of Damages Barred Under Proposition 213

[3] Venue

§ 81B.32 Internet References

§§ 81B.33-81B.39 [Reserved]

§ 81B.40 Plaintiff's Checklist

[1] Examination of Insurance Policies

[2] Determination of Damages

[3] Venue Choices

[4] Jury Verdict Reports

[5] Case Management

§ 81B.41 Defendant's Checklist

[1] Evaluate Complaint

[2] Determine Extent of Defendant's Liability Coverage

[3] Jury Verdict Reports

[4] Settlement Offer

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§ 81B.50 Demand Letters

[1] Demand Letter--Example 1

[a] FORM

[b] Use of Form

[2] Demand Letter--Example 2

[a] FORM

[b] Use of Form

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§ 81B.01 Scope of Chapter

This chapter discusses the evaluation of an automobile collision case. It includes the following topics:

- General considerations with respect to evaluating the case, e.g., the types of damages involved, analysis of insurance coverage, limitations on recovery of damages pursuant to Proposition 213, and liability issues.

- Factors relevant to the framing of the complaint.

- Preliminary venue considerations, i.e., where the case may be brought [for further discussion of venue and jurisdiction, *see* Ch. 83, *Automobiles: Bringing the Action*].

- Management of the plaintiff's medical condition by the plaintiff's attorney.

- Preliminary settlement considerations.

- Demand letters and packages.

This chapter also includes examples of demand letters [*see § 81B.50*].

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§ 81B.02 Cross References

[1] Related Chapters in This Volume

- For discussion and forms concerning the investigation of an automobile case, see Ch. 81A, *Automobiles: Investigation* .

- For discussion of establishing venue and jurisdiction in an automobile case, see Ch. 83, *Automobiles: Bringing the Action* .

- For discussion and forms concerning discovery in automobile cases, see Ch. 85, *Automobiles: Discovery* .

[2] Other Related Chapters

- For discussion and forms concerning damages, see Ch. 177, *Damages* .

- For discussion and forms concerning insurance policies, see Ch. 308, *Insurance* .

- For discussion and forms concerning venue, see Ch. 571, *Venue* .

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[Reserved]

§§ 81B.03[Reserved]

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§ 81B.10 Purpose of Case Evaluation

[1] Plaintiff

In general, the plaintiff's attorney must evaluate an automobile collision case with the following purposes in mind:

- Reassessing the feasibility of initiating litigation [*see* Ch. 81, *Automobiles: Client Interview*].
- Framing the complaint, e.g., with respect to parties, causes of action, damages allegations.
- Determining the types and estimating the amount of damages.
- Considering any settlement offers made to the client prior to the filing of the complaint.

[2] Defendant

The defense attorney should carefully read the complaint as soon as possible and consider the following issues:

- Check the applicable statute of limitations.
- Jurisdiction of the court can determine legal issues and potential exposure. Consider the following aspects:
    - Federal v. state jurisdiction.
    - Whether or not action is a limited civil case.
    - Proper venue.
- Property damage claim Subrogation claim for the same damage?

- Proper service Motion to quash service?

- Make sure you obtain all pleadings filed, including amended complaints, substitutions of attorney, court orders, including status conferences and any order to show cause hearings, and identification of all attorneys representing each named party.

- Determine if an extension of time is required to respond to the complaint.

- Consider demurrer Are the allegations properly alleged?

- Contact defendant directly to determine if a cross-complaint should be filed.

- Call plaintiff's attorney to determine his or thoughts on liability and damages.

PRACTICE TIP:

Defense Counsel May Request Additional Time for Response. If you need additional time, request by telephone, and confirm in writing, that the plaintiff will not request entry of default and that defendant has the agreed-on extension to answer *or otherwise respond to the complaint.* There should be no misunderstanding that the response to the complaint may be something other than an answer. -- *Joe Devine, Editorial Consultant.*

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§ 81B.11 Plaintiff's Evaluation of Case

[1] Examination of Insurance Coverage

The plaintiff's attorney must carefully examine all relevant insurance policies to determine the application of exclusions and the extent of coverage, with particular attention to the following, when applicable [*see also* Ch. 81, *Automobiles: Client Interview*]:

- Medical payments.
- Liability.
- Property damage.
- Uninsured/Underinsured vehicle coverage.
- Resident relative coverage.
- Guest medical payments.
- Guest bodily injury coverage.
- Umbrella or excess policy coverage.

PRACTICE TIP:

Payment of Client's Medical Bills. Payment of medical bills while the case is pending often arises at this point. Keep in mind that the client may have medical payment benefits under the driver's insurance policy, even if the client was a passenger injured in the driver's car. Otherwise, the provider will have to be willing to accept a medical lien. --*Frederick Schenk, Editorial Consultant.*

[2] Damages

[a] Initial Damages Considerations

The plaintiff's attorney should analyze the client's damages with the following considerations in mind:

- Types of medical damages, e.g., long-term or short-term.
- Extent of economic damages [*see [c], below*].
- Limitations on recovery of damages, e.g., application of Proposition 213 [*see [d], below*].

For further discussion of damages in automobile cases, see Ch. 82A, *Automobiles: Damages* . For discussion of damages generally, see Ch. 177, *Damages* .

[b] Noneconomic Damages

If the plaintiff has suffered personal injury, the plaintiff's attorney must analyze medical and hospital reports to determine noneconomic damages. Medical damages should be classified by type, that is, injuries that cause long-term disability (e.g., brain damage), by contrast to less significant injuries (e.g., soft-tissue injury). For further discussion, see Ch. 85, *Automobiles: Damages* . For discussion and forms relating to obtaining hospital and medical reports, see Ch. 81, *Automobiles: Client Interview* .

PRACTICE TIP:
Medical Management of the Case. It is extremely important to advise the client in the early stages of the case to seek any necessary medical treatment and to chronicle all medical aspects of the case on a regular basis. For discussion of medical management of the case, see Ch. 82A, *Automobiles: Damages* .

[c] Economic Damages

Counsel should estimate plaintiff's economic damages, based on his or her employment records, loss of earnings to date, and estimated future impairment to earnings, if any. For further discussion, see Ch. 82A, *Automobiles: Damages* . For discussion and forms relating to obtaining employment records, see Ch. 81, *Automobiles: Client Interview* .

[d] Proposition 213 Considerations

[i] Recovery of Noneconomic Damages Barred

The plaintiff may be barred from recovery of noneconomic damages if one of the following circumstances occurred at the time of the accident [*Civ. Code § 3333.4*; *see also* Ch. 81, *Automobiles: Client Interview* ; Ch. 82A, *Automobiles: Damages*]:

- The plaintiff was driving a vehicle while under the influence of alcohol or drugs, and was convicted of that offense [*see Veh. Code §§ 23152, 23153*].
- The plaintiff owned a vehicle involved in the accident that was not insured as required by the financial responsibility laws [*see Veh. Code § 16000 et seq.*].
- The plaintiff was driving a vehicle involved in the accident, and cannot establish his or her financial responsibility as required by the financial responsibility laws [*see Veh. Code § 16000 et seq.*].

NOTE:
A person who was driving while uninsured may nevertheless recover noneconomic damages if injured by

someone who was driving under the influence of alcohol or drugs, and was convicted of that offense [*Civ. Code § 3333.4(c)*; *see Veh. Code §§ 23152, 23153*; *see also* Ch. 81, *Automobiles: Client Interview* , and Ch. 82A, *Automobiles: Damages*].

[ii] Recovery of All Damages Barred in Negligence Action

In a negligence action, the plaintiff may be barred from recovery of any damages on the following grounds [*Civ. Code § 3333.3*; *see* Ch. 81, *Automobiles: Client Interview* ; Ch. 82A, *Automobiles: Damages*]:

- The injuries were caused by his or her commission of a felony resulting in a conviction.

- The injuries were caused by his or her immediate flight from the commission of a felony resulting in a conviction.

[3] Liability

Issues of liability must be analyzed to determine the parties at fault, and ultimately to name the proper defendants in the complaint.

[4] Venue

Venue in a negligence action is based on the place of injury, or the residence of the individual defendant [*Code Civ. Proc. § 395*]. If the defendant is a corporation or partnership, venue is based on its principal place of business [*Code Civ. Proc. § 395.5*]. For further discussion, see Ch. 83, *Automobiles: Bringing the Action* .

PRACTICE TIP:

Choose Venue Favorable to Plaintiff. Look at the residence of *any* of the defendants, and choose the venue that is more favorable for the plaintiff. --*Dona E. Cohn, Editorial Consultant.*

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§ 81B.12 Defendant's Evaluation of Case

The defense attorney must review the complaint and all available documents and records to evaluate the case for purposes of responding to the complaint and determining the feasibility and timing of offering a settlement. To the extent possible at this stage, therefore, the attorney should consider the factors relevant to the plaintiff's attorney [*see § 81B.11*].

If the client is covered under an insurance policy for the collision, then the defense attorney must examine that policy to determine the application and limits of coverage.

CAUTION:
A defendant who is insured with respect to the collision may require counsel independent from that of his or her insurance company, if a conflict of interest exists between the insurance company and the insured client [*see Civ. Code § 2860*]. For further discussion, see Ch. 81, *Automobiles: Client Interview* . For a more comprehensive discussion and forms, see Ch. 308, *Insurance* . See also California Torts, chs. 70, 82 (Matthew Bender).

PRACTICE TIP: Carefully Review All Liability Policies When Representing a Defendant. An automobile liability policy may require an insurance company to provide a defense in a case such as assault and battery, if the incident arose from the use of a covered automobile. A commercial policy may provide coverage for a personal automobile accident, if it can be shown that the use of the automobile was necessary for job requirements. -- *Joe Devine, Editorial Consultant.*

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§ 81B.13 Jury Verdict Reports

Both plaintiff and defense counsel should consult jury verdict reports to learn of recent verdicts and settlements obtained in similar cases. These reports typically include the venue and general factual description of the case, i.e., the type of injury, and the amount of the verdict or settlement. Online services allow attorneys to conduct focused searches to find cases with similar facts in the same jurisdiction as their case.

For a searchable database of California specific jury verdict and settlement reports, visit http://www.lexis.com.

PRACTICE TIP:

Gather Information About Opponent. Jury verdict reporters and public records are helpful in finding out more about opponents, e.g., which experts have been used. In addition, expert witness databases are useful. -- *Joe Devine, Editorial Consultant.*

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§ 81B.14 Case Management

[1] Guidelines for Future Attorney-Client Communications

Both plaintiff and defense attorneys should inform the client of the method and probable frequency of attorney-client communications. For example, the client should understand that he or she is welcome to contact the attorney for progress reports on the case, but that the attorney will contact the client only for certain specified reasons [*see also § 81.64*].

[2] Admonition to Client Regarding Communications With Opposing Parties

Attorneys should of course advise clients not to communicate directly with opposing parties or their attorneys, and to report any attempts on the part of an opposing party to communicate directly with the client [*see also § 81.64*].

PRACTICE TIP:

Initial Advice to Insured Defendant. An insurance defense attorney should encourage the insured defendant to confirm with the insurance company that the attorney has been authorized and appointed to represent the defendant. The insured defendant should be advised to speak with no one other than the insurance company representative or the appointed attorney. -- *Joe Devine, Editorial Consultant.*

[3] Medical Management by Plaintiff's Attorney of Plaintiff's Condition

If the plaintiff suffers from an ongoing medical condition as a result of the collision, then the plaintiff's attorney must institute a medical-management plan, e.g., to obtain and document all necessary treatment for the plaintiff, and to advise the plaintiff not to aggravate the injuries or otherwise undermine the prosecution of the case. For further discussion, see Ch. 82A, *Automobiles: Damages* .

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§ 81B.15 Settlement Demand Brochure

[1] Overview of Settlement Demand Brochure

The initial approach to settlement is typically by letter to the defendant and its insurer stating plaintiff's analysis of the case and plaintiff's demand. This letter, called the "demand letter," often includes various supporting documents, photographs, and illustrations. The demand letter together with the supporting documentation is referred to as the "settlement brochure" or "settlement demand package."

Organization of the demand letter and supporting exhibits will vary depending on the facts of the case. See *[2], below*, for discussion of the organization of the settlement demand brochure.

The written demand should be followed by a meeting either in person or on the telephone at which time counsel can persuade the defense counsel or the adjuster of the merits of the demand.

[2] Organization of Settlement Demand Brochure

The settlement brochure should be organized for ease of reference by the insurance adjuster or defense attorney evaluating it. It should generally include a cover page, table of contents, and index tabs for all sections included.

The cover page should include the following items:

- Name of the case;
- Name of firm and plaintiff's counsel presenting the demand;
- Time limit demand; and
- The settlement amount that is being demanded.

PRACTICE TIP:

Clear Organization Assists Busy Adjusters in Evaluating Claims. Adjusters are very busy and the easier it is to get the information from the settlement package, the easier it is to evaluate. All exhibits should be tabbed and table of contents should list the exhibits. --*Dona Cohn, Editorial Consultant.*

The appearance of the demand brochure should be professional. The completed brochure should have a neat, clean cover with the name of the case and plaintiff's firm name printed on it.

[3] Time Limit Demand

Plaintiff's counsel should include the time the defendant has to respond to the settlement demand in the demand letter, or in the cover page, if one is included with the settlement brochure.

PRACTICE TIP:

Provide Adequate Time to Respond to Demand. A time limit in a settlement demand letter should always be within reason for the facts of the case. A short time-limit demand, without sufficient information to evaluate the case, is rarely successful. When confronted with a short-time demand, the defense attorney should request additional time to respond, if it is necessary to fairly evaluate the case. Additional time should be given to allow the responding party to confirm the facts alleged. A reasonable demand, supported by confirming documents, will encourage negotiations. In a case involving substantial damages, a longer period of time may be required to allow proper evaluation on both sides. --*Joe Devine, Editorial Consultant.*

PRACTICE TIP: Consider Not Including Time Limit Demand. Instead of a a time limit demand, plaintiff's counsel may just wish to state that he or she will call the adjuster in 10 days to discuss the possibility of an amicable resolution. This initial call to the adjuster reminds him or her of your claim. If the adjuster is not ready to discuss the claim, schedule a follow up call in one week and record this in the client's file.--*Dona Cohn, Editorial Consultant.*

[4] Organization of Demand Letter

The organization of the demand letter will vary depending on the facts of the case. Generally, a chronological order is the most clear way to structure the demand letter and supporting materials. A typical settlement demand letter might include sections on the following topics:

- Liability
- Medical Summary/Injuries
- Medical Specials
- Economic Loss/Lost Earning Capacity
- General Damages
- Pain and suffering
- Loss of enjoyment of life
- Itemized summary of damages

- Profile of Plaintiff/Lifestyle

PRACTICE TIP:

Organization Should Reflect Which Items Are "At Issue." The focus of the demand letter will depend on the main issues of the case. If liability is likely to be at issue, then that needs to be addressed first and foremost in the demand letter and settlement package materials. However, if liability is clear by way of the police report and is supported by photographs of the accident scene and vehicles and witness statements, then the fact that liability is established should be treated as a given, and the focus of the demand letter should be on other issues more likely to be in dispute, such as damages, both economic and general.

If the plaintiff has significant economic loss, I would want to make sure that the "economic loss" section is referenced early in the settlement package. I probably would not make it first in order, in that the physical injuries need to be fully described so as to support the finding of economic loss. --*Frederick Schenk, Editorial Consultant.*

[5] Specific Sections of Demand Letter

[a] Liability

This section should explain plaintiff's analysis of the collision and why defendant is liable. For examples of liability sections in demand letters, see the sample demand letter *forms in § 81B.50*.

Supporting documentation for the liability section may include the following items:

- Traffic Accident Report
- Photographs of the scene
- Statements from favorable witnesses

[b] Medical Summary/Injuries

This section should identify all of plaintiff's physical injuries resulting from the collision, and highlight any objective signs of injuries. It should also describe the medical treatment and vocational rehabilitation that plaintiff has received. For clarity, the demand letter should summarize plaintiff's physical injuries in chronological order.

Any supporting exhibits, such as medical records, should also be organized in chronological order and clearly referenced in the demand letter.

Supporting exhibits in the medical section might include the following items:

- Medical records showing diagnosis, e.g., X-Rays or physician's notes
- Medical treatment records
- Hospital records, including emergency room records, if applicable
- Medical illustrations
- Photographs of injuries (color copies, if available)

- Vocational rehabilitation records
- Plaintiff's journal describing medical condition, treatment and impact of injury on daily life
- Medical bills

If the injury has impacted plaintiff's ability to work, this should be emphasized in the medical summary. If plaintiff has undergone vocational rehabilitation therapy, related records should be included with reference to what employment plaintiff will be limited to as a result of the injury.

[c] Medical Specials/Expenses

Special damages in a tort action include compensation for medical expenses. The demand letter should have an itemized list of medical expenses incurred by plaintiff under the heading "Medical Specials" or "Medical Expenses."

Bills for plaintiff's medical expenses should be included as tabbed exhibits, arranged in chronological order.

For further discussion of damages in an automobile collision case, see Ch. 82A, *Automobiles: Damages* .

[d] Economic Loss/Lost Earning Capacity

Special damages in a tort action include compensation for economic losses and lost earnings flowing from the injury. The demand letter should include a section explaining all of the plaintiff's economic losses and lost future earning capacity.

This section may include the following items to support plaintiff's economic losses and lost earning capacity:

- Pay stubs
- Canceled checks and receipts for expenses incurred
- Vocational rehabilitation report
- Economist Report
- Statement of employer regarding plaintiff's work before and after injury

An economist report is very important if future lost earnings are alleged. The economist ties together the economic loss based on plaintiff's physical limitations, both temporary and permanent, along with the vocational rehabilitation report, and puts a final dollar figure on the present value of the past, current and future lost earning capacity of the plaintiff.

For further discussion of economic damages in an automobile collision case, see *Ch. 82A, Automobiles: Damages, § 82A.14*.

[e] General Damages

This section should state all of the damages that plaintiff has suffered as a result of the injury, and may include the following subcategories:

- Pain and suffering
- Loss of enjoyment of life
- Itemized summary of damages

PRACTICE TIP:

Itemization of Damages. Counsel does not have to itemize general damages and can just put an overall figure, but itemization of special damages is important. --*Dona Cohn, Editorial Consultant.*

Supporting exhibits might include the following items:

- Photographs of plaintiff before and after injury.
- Witness statements describing plaintiff's quality of life before and after injury.

PRACTICE TIP:

Use the Demand Letter to Humanize Plaintiff. The general damages section, or conclusion of the demand letter, should highlight how the accident and injuries affected the plaintiff and the plaintiff's family, if applicable. Find out from your client, in detail, how the accident and injuries affected his or her life, job, and social activities and then state it in the demand letter. The key is to let the adjuster know your client is something more than just a piece of paper on the adjuster's desk. Humanize the plaintiff as much as possible. --*Dona Cohn, Editorial Consultant.*

PRACTICE TIP: General Damages Supported by Photographs and Witness Statements: With regard to general damages, include "before" and "after" photographs along with deposition testimony, if available, of witnesses who have been able to articulate the changes in the plaintiff's physical demeanor and limitations. The use of photographs showing the plaintiff conducting a certain activity before, and description, either by way of photographs or by way of testimony, reflecting how he or she is now limited, is a very effective tool that can help support significant general damages for loss of enjoyment of life. --*Frederick Schenk, Editorial Consultant.*

For further discussion of damages in an automobile collision case, see Ch. 82A, *Automobiles: Damages* .

[f] Profile of Plaintiff/Lifestyle

Some settlement brochures contain a "Plaintiff Profile" section near the beginning of the settlement brochure. This section should provide an overview of plaintiff's social, educational, scholastic achievements, and potential for economic advancement. A profile can be particularly persuasive if plaintiff was exceptional in his or her achievements and the injuries were severe and plaintiff suffered permanent losses.

The profile section may include the following items:

- Photographs of plaintiff engaged in work or social activities.
- Records of scholastic achievement, e.g., degrees, honors certificates, scholarships, etc.
- Records of professional achievement, e.g., achievement awards given by employer.
- Statements of witnesses regarding plaintiff's life and future outlook before the injury.

A profile section is not always included in the settlement brochure and the exhibits above may also be included in support of the sections on economic loss or general damages, discussed in *[d]* and *[e], above.*

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§ 81B.16 Settlement Considerations

If a settlement offer has been made by the defendant prior to the filing of the complaint, the attorney representing the prospective plaintiff must evaluate the case to advise the client accordingly.

For further discussion of settlement and settlement offers made pursuant to *Code Civ. Proc. § 998*, see *Ch. 86, Automobiles: Pretrial Motions and Settlement Negotiations, § 86.12*.

PRACTICE TIP:

Call to Plaintiff's Counsel Can Help Defense Counsel Evaluate Settlement Options. The defendant's evaluation of the case isdependant on information provided by the plaintiff's attorney. Call the plaintiff's attorney to discuss the case, and obtain as much information as possible. Complaints are often filed to comply with a statute of limitation. Cases settled early save litigation expenses. -- *Joe Devine, Editorial Consultant.*

PRACTICE TIP: Plaintiff's Considerations After Sending Settlement Package to Adjuster. If the settlement package sent to the insurance adjuster did not result in a resolution, send the package to the defense counsel once he or she files his or her answer and follow-up with a "settlement call." Do not assume that the adjuster has sent your demand package to the defense attorney. If the case is suitable for alternative dispute resolution, suggest it to defense counsel after he or she has reviewed your demand package. --*Dona Cohn*.

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[Reserved]

§§ 81B.17[Reserved]

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8-81B California Forms of Pleading and Practice--Annotated § 81B.30

§ 81B.30 Related Texts From LEXIS Publishing

For discussion of automobile collision law generally, see Automobile Accident Law and Practice (Matthew Bender)

For discussion of tort law relating to automobile collisions generally, see California Torts, ch. 20 (Matthew Bender)

For discussion of tort law relating to insurance policies generally, see California Torts, chs. 81, 82 (Matthew Bender)

For discussion of uninsured motorist law, see California Uninsured Motorist Law (LEXIS Publishing 6th ed.)

For discussion of trial of collision cases generally, see Trial of Accident Cases (Matthew Bender)

For discussion of insurance law generally, see California Insurance Law & Practice (Matthew Bender)

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§ 81B.31 State Statutes

[1] Financial Responsibility Laws

Financial responsibility laws. *Veh. Code § 16000 et seq.*

Disclosure of DMV financial responsibility records pursuant to request of persons having proper interest in them. *Veh. Code § 16005(b)*

[2] Recovery of Damages Barred Under Proposition 213

Prohibition against recovery of damages in negligence action by person whose injuries were caused by his or her commission of a felony resulting in conviction. *Civ. Code § 3333.3*

Prohibition against recovery of noneconomic damages by injured person who was owner of uninsured vehicle or uninsured driver for purposes of financial responsibility laws. *Civ. Code § 3333.4*

[3] Venue

Venue in negligence action based on place of injury or residence of individual defendant. *Code Civ. Proc. § 395*

Venue based on principal place of business of defendant corporation or partnership. *Code Civ. Proc. § 395.5*

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§ 81B.32 Internet References

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§§ 81B.33[Reserved]

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§ 81B.40 Plaintiff's Checklist

[1] Examination of Insurance Policies

☐ Examine client's insurance policies and determine the scope of coverage, including the following, if relevant [*see §§ 81.50, 82.30*].

- ☐ Medical payments
- ☐ Liability
- ☐ Property damage
- ☐ Uninsured/Underinsured coverage
- ☐ Resident relative coverage
- ☐ Guest medical payments
- ☐ Guest bodily injury coverage
- ☐ Umbrella or excess policy coverage

[2] Determination of Damages

☐ Determine extent of damages [*see § 81B.11[2]*].

☐ Noneconomic damages

☐ Consult physician and hospital records to determine the extent of plaintiff's injuries, and prognosis for recovery.

☐ Determine type of medical damages, e.g., long-term disability by contrast to less significant temporary injury.

☐ Calculate medical damages.

☐ Economic damages

☐ Examine employment records.

☐ Estimate length of future impairment of earnings, if any.

☐ Calculate lost past and future earnings.

☐ Determine whether Proposition 213 limits or bars recovery of damages [*see § 81B.11[2][d]*].

[3] Venue Choices

☐ Determine where case may be filed [*see Code Civ. Proc. §§ 395, 395.5*; *see also* Ch. 83, *Automobiles: Bringing the Action*].

☐ County where injury occurred.

☐ County where any individual defendant resides.

☐ County where a defendant corporation or partnership has its principal place of business.

[4] Jury Verdict Reports

☐ Consult jury verdict reports [*see § 81B.13*].

☐ Compile list of verdict amounts for comparable cases in comparable venues.

[5] Case Management

☐ If not done previously, inform client of the following matters [*see § 81B.14*]:

- ☐ Method and probable frequency of future attorney-client communications.
- ☐ Caution against communications with opposing parties and attorneys.
- ☐ Caution against engaging in activities against medical advice.

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8-81B California Forms of Pleading and Practice--Annotated § 81B.41

§ 81B.41 Defendant's Checklist

[1] Evaluate Complaint

☐ Evaluate complaint with respect to allegations against client [*see § 81B.12*; *see also* Ch. 84, *Automobiles: Responding to the Action*].

☐ If appropriate, draft responsive pleadings [*see* Ch. 84, *Automobiles: Responding to the Action*].

PRACTICE TIP:
Insurer's Subrogation Rights. When defending a complaint alleging property damage, determine if an insurance company has subrogation rights to claim the same damages. The property damage may have been previously settled and released, or it may be the subject of another action pending. The defendant is not required to pay the same damages more than once. -- *Joe Devine, Editorial Consultant.*

[2] Determine Extent of Defendant's Liability Coverage

☐ Examine any liability policy that might cover the client for damages alleged in the complaint [*see § 81B.12*].

☐ Determine whether the client is covered with respect to the collision.

☐ Determine the limits of coverage.

PRACTICE TIP:
Potential Conflict Between Insured Client and Insurer. There is a potential conflict of interest when defending a client under an insurance company's reservation of rights. Remember that the attorney represents the defendant and not the insurance company. Fully inform the defendant on all aspects of the

case in writing, and always advocate for the insured, against the insurance company, on coverage issues.
-- *Joe Devine, Editorial Consultant.*

[3] Jury Verdict Reports

☐ Consult jury verdict reports and expert witness data bases [*see § 81B.13*].

[4] Settlement Offer

☐ Determine whether a settlement offer is advisable [*see § 81B.16*; *see also* Ch. 86, *Automobiles: Pretrial Motions and Settlement Negotiations*].

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§§ 81B.42[Reserved]

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PART V. FORMS

8-81B California Forms of Pleading and Practice--Annotated § 81B.50

§ 81B.50 Demand Letters

[1] Demand Letter--Example 1

[a] FORM

Re: Our Client: _____ [*name of plaintiff*]
Your Insured: _____ [*name of defendant*]
Policy No.: _____
Your Claim No.: _____

Dear _____ [*name of defense counsel or insurance adjuster handling claim*]:

The following demand is submitted for the purpose of settlement of the above claim in an attempt to avert having to file a lawsuit against your insured.

Demand: $ _____ [*state total amount of settlement demand*]

Liability

On July 1, 1998, at approximately 5:00 p.m., your client, _____ [*name of defendant*], was traveling north on Interstate 5 in the Number 2 lane. Traffic was congested and came to a stop. Our client, _____ [*name of plaintiff*], was completely stopped in the Number 2 lane at which time he heard the screeching of tires behind his pick-up truck. It was at that time that he looked over his right shoulder when he felt the force of the impact of your insured's vehicle on the rear of his vehicle. The force of the impact accelerated _____'s [*name of plaintiff*] pick-up truck forward approximately 8-10 feet. At the time of the collision, _____ [*name of plaintiff*] recalls hearing the crunching of metal and the breaking of glass. At the time of this incident, _____ [*name of plaintiff*] was restrained in a shoulder/lap belt harness.

_____ [*Name of plaintiff*] exited his vehicle and had a conversation with your insured. There were two young girls in the vehicle with your insured and they were upset and crying. One of the young girls had a red mark on her forehead. Your insured did not want to call the police, however, _____ [*name of plaintiff*] called the San Diego Police Department who in turn informed him to call the CHP. It was at this time that your client admitted to being responsible for this collision. The credible evidence will show that she was quoted at the collision site saying the following, "It is my fault. I have insurance. I have an appointment to get to. I will leave you my business card." At that time your insured left the scene and the CHP had not arrived. Mr. Jones then went to the California Highway Patrol office and filled out the attached report.

Liability in this matter is clear. _____ [*name of defendant*] was driving her vehicle, license plate _____ [*state license plate number*] in violation of *Vehicle Code § 22350*. In addition, your insured failed to keep a proper look out, which is the very essence of the standard of the care required in driving a motor vehicle. Additionally, your insured violated *Vehicle Code § 21703* which holds that a driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the roadway.

Despite wearing a seat belt restraint, the force of the impact, combined with the twisted position of _____'s [*name of plaintiff*] body, directly caused a severe and continuous injury discussed in more detail below.

It is clear under a myriad of theories of liability, _____ [*name of defendant*] will be found negligent per se. When a neutral trier of fact applies the credible testimony of the parties and the physical evidence, your insured will be found liable. In no way did _____ [*name of plaintiff*] contribute to the cause of this incident. I am enclosing for your review photographs that show the damage to the rear of _____'s [*name of plaintiff*] vehicle as well as estimates for the damage. It is my understanding that your insured's vehicle was likewise damaged and the transference of energy not only caused damage to the vehicles, but moved _____'s [*name of plaintiff*] full sized pick-up truck forward as previously mentioned.

Injuries

Immediately after the incident, _____ [*name of plaintiff*] felt the sensation of pain in his neck and low back, however, he was under the belief that the pain would gradually go away. However, the converse occurred. Approximately two to three days later as the pain was continuing, he actually started losing the range of motion in his neck. He was attending a 4th of July function and was unable to participate in any of the picnic activities that day. He had difficulty sleeping, and moving in and out of his bed. He treated with Dr. Jane Jones, a chiropractor who took x-rays and determined that he had an injury to his low back and neck. He treated conservatively from July 9 up to July 21, 1998. He then changed over to a second doctor, Dr. John Smith, who is a chiropractor and continues to treat him as of this writing. Dr. Smith saw him for conservative treatment from July 21, 1998, where he noticed decreased range of motion and problems in the low back and cervical region. He continued with therapy throughout August, September and slowly decreased his number of visits in October seeing the doctor on October 3, 7, 17, 22 and 28. He was slowly improving and saw Dr. Smith in November one time per month for follow-up and maintenance care.

Medical Specials

_____'s [*Name of plaintiff*] medical specials totalling $_____ are as follows:

Dr. Jane Jones $_____

Dr. John Smith $_____

Loss of Earnings

At the time of this incident, _____ [*name of plaintiff*] was an owner/operator of _____[*name of plaintiff's business*]. His occupation required him to do physical labor including installing drywall, repairing drywall, carrying drywall and doing job estimates. As you can see by the attached records, his doctor precluded him from working for two months. _____ [*name of plaintiff*] has an average monthly income of approximately _____[*amount of monthly income*]. He received this income in the form of a _____[*amount of plaintiff's monthly draw*] draw per month and did not take these draws for the months of August and September 1998. As a result of his physical limitations which were caused by the automobile crash of July 1, 1998, he lost approximately $_____[*amount of plaintiff's total lost income*] in income.

General Damages

Pain and Suffering

Since this collision, _____ [*name of plaintiff*] not only was precluded from participating in his work activities, but also was unable to do some of the social activities that he enjoyed prior to this incident. He had to limit his walking and jogging and did not participate in any activities such as bowling or doing work around his house. He took a trip to Colorado in August 1998. However, he could not participate in any of the planned family activities including mountain climbing and hiking. Also, the plane ride was extremely painful for him and he could not get comfortable in the plane. He had to use pillows and take a perscription pain medication. _____ [*name of plaintiff*] has been advised by his health care providers that this pain will wax and wane and that he is to continue with a maintenance of treatment once a month to continue the best result possible he has achieved as of this writing. _____ [*name of plaintiff*] has been told by his health care providers that he is more susceptible to injury in his low back and neck area as a result of the significant strain put on his body as a result of this crash.

Loss of Enjoyment of Life

California law provides that _____ [*name of plaintiff*] has the right to recover for loss of enjoyment of life. This covers all aspects of life from the mundane to the exciting. At this time _____ [*name of plaintiff*] is able to participate in many of the activities he enjoyed prior to sustaining this injury, however, he is now concerned about re-injuring his back and many times is hesitant to fully participate in such things as picnic volleyball, horse shoes or any of those types of activities where he could strain his back. He fears exerting his back for fear of further injury which would cause him future injury and pain.

In essence, the injuries _____ [*name of plaintiff*] sustained in this collision severely restricted his daily routine for at least the first five months following the incident. They continue to plague him in that he is more cautious in his daily activities and guards for the back condition that he sustained in this collision.

Loss of Income:	(_____ months $ _____ per month)	$_____
Medical Specials:	$_____	
Future Medicals:	(Per year)	$_____

Past Pain and Suffering:	(_____. $ _____ per mo.)	$_____ _____
Past Loss of Enjoyment of Life:	$_____	
Future Loss of Enjoyment of Life:	(5 years)	$_____ _____

_____ [*Name of plaintiff*] current age is _____ [*age of plaintiff*] with a life expectancy of _____[*state plaintiff's life remaining life expectancy, i.e., the average male or female life expectancy minus plaintiff's age*] additional years.

Therefore, in consideration of the foregoing facts, special damages and pain and suffering, _____ [*name of plaintiff*] has experienced as a result of this collision and continues to experience, demand is made in the amount of $_____[*state amount of plaintiff's total settlement demand*] to settle his matter.

Please contact me so that we may discuss the resolution of this matter. I remain,

Very truly yours,_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[b] Use of Form

The form set out in *[a], above*, is an example of a demand letter for damages resulting from an automobile collision. The organization and level of detail will vary depending on the facts of each case. For a less detailed example, see *[2], below*.

Supporting documentation, such as a traffic accident report, and medical records and receipts, should be included with the demand letter, if appropriate. For discussion of settlement brochures and the organization of demand letters, see *§ 81B.15*.

PRACTICE TIP:

Demand Letter Should Personalize Client. The demand letter should personalize your client as much as possible, as well as make it very easy for the claims adjuster to review. Categories dealing with liability, medical considerations, economic losses, and lifestyle are all important. The demand letter should detail how the accident and the injuries affected the client's personal and business life in as much detail as possible. It is best not to rely solely on the client's memory several months or years after the accident to get this information. Good continuous communication with your client throughout the treatment process will give you the best detailed information. *--Dona E. Cohn, Editorial Consultant.*

[2] Demand Letter--Example 2

[a] FORM

Re: Our Client: _____ [*name of plaintiff*]
Your Insured: _____ [*name of defendant*]
Policy No.: _____
Your Claim No.: _____

Dear _____ [*name of defense counsel or insurance adjuster handling claim*]:

As you are aware this office represents _____ [*name of plaintiff*] for injuries sustained in an incident on the above date. The following settlement demand is offered in an effort to settle this matter.

On May 5, 1998, _____ [*name of plaintiff*] was stopped at the limit line on the northbound SR163 off-ramp at Mesa College Drive at the red traffic light. When the light changed to green, both _____ [*name of plaintiff*] and the vehicle next to _____ [*name of plaintiff*] entered the intersection to make a left turn onto Mesa College Drive. Your insured, traveling east on Mesa College Drive, failed to stop at the red traffic light and proceeded to slam into the left side of _____'s [*name of plaintiff*] vehicle forcing her vehicle east and into the vehicle next to her.

_____ [*Name of plaintiff*] incurred a property damage loss of $_____[*state amount of property damage to vehicle*] to her _____[*identify make of vehicle*].

This is a clear case of liability involving a substantial impact. I am enclosing a copy of the traffic collision report for your review. Your insured was negligent in failing to stop for the red traffic light. He was also inattentive and driving at a speed too fast for the conditions.

Following the incident, _____ [*name of plaintiff*] suffered immediate neck and back pain, left side and rib pain and left thigh pain. She was seen by Dr. Jane Smith for examination and treatment. At the time of her initial examination with Dr. Smith, _____ [*name of plaintiff*] was experiencing neck and back pain and headaches. I have enclosed for your review copies of the medical records from Dr. Smith and the final medical report dated _____[*date*]. During her treatment, _____ [*name of plaintiff*] underwent manipulation treatment to help alleviate the pain. She completed treatment with Dr. Smith on _____[*date*].

_____ [*Name of plaintiff*] incurred medical specials with Dr. Smith in the amount of $_____[*amount of plaintiff's medical expenses*].

At the time of the incident, _____ [*name of plaintiff*] was working as a hostess at _____ [*place of employment*] Restaurant. _____ [*name of plaintiff*] continued to work during her recuperation because her financial obligations left her no choice, but suffered a great deal of pain on a daily basis. She did, however, have to stop participating in her usual activities, such as jazz, ballet, and dancing. Prolonged sitting and sleeping also caused her pain.

We would like to recommend a settlement in the amount of $_____ [*amount of plaintiff's total settlement amount*] as full and final settlement of this matter. I would appreciate your contacting me after you have had an opportunity to review the enclosed documents.

Thank you for you courtesy and cooperation.

Very truly yours,_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[b] Use of Form

The form set out in *[a], above*, is an example of a demand letter for damages resulting from an automobile collision. The organization and level of detail will very depending on the facts of each case. For discussion of settlement brochures and the organization of demand letters, see *§ 81B.15*.

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§ 82.syn Synopsis to Chapter 82: AUTOMOBILES: CAUSES OF ACTION

§ 82.01 Scope of Chapter

§ 82.02 Cross References

[1] Related Chapters in This Volume

[2] Other Related Chapters

[3] Related Forms of Complaint

[4] Other Related Coverage

§§ 82.03-82.09 [Reserved]

§ 82.10 Negligence

[1] Elements of Negligence Action

[a] Duty, Breach, Causation, Damages

[b] Standard of Care and Responsibility

[c] Automobile Operator's Duty of Care

[i] Duty to Avoid Collision

[ii] Duty to Stop After Collision

[A] Injury or Death

[B] Property Damage

[iii] Doctrine of Imminent Peril

[d] Duty of Care Between Drivers and Pedestrians

[i] Driver and Pedestrian May Rely on Each Other's Duty of Care

[ii] Driver Has Greater Responsibility to Exercise Caution

[iii] Doctrine of Sudden Peril

[iv] Right of Way

[A] General Rule: Right of Way Is Mutually Enjoyed Privilege

[B] Effect of Violation of Right-of-Way Statute

[C] Driver Must Yield to Pedestrian in or Near Crosswalk

[D] Pedestrian Must Exercise Due Care in or Near Crosswalk

[E] Right of Way Outside Crosswalk or Unmarked Intersection

[F] Right of Way on Roadway

[G] Right of Way on Roadway Outside Business or Residential District

[H] Pedestrian Has Limited Right to Walk on Highway

[I] Pedestrian Has Right of Way on Sidewalk

[J] Emergency Vehicles Have Right of Way

[v] Pedestrian's Duty and Standard of Care

[vi] Automobile Operator's Duty and Standard of Care

[A] Duty Toward Blind Pedestrian

[B] Duty Toward Workers in Street

[C] Duty Toward Child Pedestrians

[e] Duty of Care Between Automobile Operator and Real Property Owner

[f] Automobile Owner's Duty of Care

[i] Nondelegable Duty to Maintain Automobile

[ii] Removal of Seat Belts From Vehicle May Constitute Negligence

[g] Common Carriers' Duty of Care

[i] Standard of Care Owed by Carrier of Persons for Reward

[ii] Standard of Care Owed by Carrier of Persons Without Reward

[h] Manufacturer's Duty of Care

[i] Causation: Proving Liability in Negligence Actions

[i] Common Causation Issues in Automobile Cases

[ii] Simultaneous and Concurrent Acts of Negligence

[iii] Intervening Negligence of Third Party

[j] Damages

[i] Actual Legal Damage Required

[ii] Damage to Vehicle: Cost of Repair and Loss of Use

[iii] Damage to Real Property

[2] Doctrine of Res Ipsa Loquitur

[3] Minor Plaintiffs in Negligence Actions

[4] Selecting Defendants in Negligence Action

[a] Ascertaining Parties Involved in Collision

[b] Liability of Minors or Incompetent Persons

[5] Affirmative Defenses to Negligence Action

[a] Comparative Negligence

[i] Comparative Negligence Apportions Fault

[ii] Plaintiff's Failure to Use Seat Belts May Constitute Comparative Negligence

[b] Express Assumption of the Risk

[c] Implied Assumption of the Risk

[d] Statute of Limitations

[i] General Statutes

[ii] Actions by Minors and Incompetents

[iii] Actions against Public Entities

[6] Evidence in Negligence Actions

[a] Effect of Violation of Statute, Ordinance, Regulation on Negligence Action

[b] Effect of Violation of Speed Limit

[c] Plaintiff's Failure to Wear Seat Belts Creates No Presumption

[d] Possession or Lack of Driver's License Creates No Presumption

[e] Evidentiary Effect of Criminal Conviction

[f] Evidentiary Effect of Nolo Contendere Plea

[g] License Suspension or Revocation Inadmissible

§ 82.11 Negligent Entrustment

[1] Liability for Negligent Entrustment of Defective Automobile

[2] Liability for Negligent Entrustment of Automobile With Incompetent Driver

[3] Standard of Care of Person Entrusting Automobile

[4] Contrast With Respect to Permissive-User Liability

§ 82.12 Negligent Hiring and Supervision by Employer

[1] Negligent Hiring

[2] Negligent Supervision or Training of Employee

§ 82.13 Negligent Infliction of Emotional Distress: Bystander's Cause of Action

§ 82.14 Wrongful Death and Survival Actions

[1] Wrongful Death

[a] Elements

[b] Standing to Assert Wrongful Death Action

[c] Damages in Wrongful Death Action

[d] Two-Year Statute of Limitations

[2] Survival Actions

[a] Action on Behalf of Decedent

[b] Limitation Period: Six Months After Person's Death

§ 82.15 Loss of Consortium

[1] Elements

[2] Statute of Limitations

§ 82.16 Vicarious Liability

[1] Liability of Owner, Bailee, Personal Representative

[a] Liability Based on Express or Implied Permission

[i] Owner Responsible for Permissive Use

[A] Statutory Liability

[B] Extent of Liability

[C] Civ. Code § 1431.2 Inapplicable

[ii] Bailee Responsible for Permissive Use

[iii] Decedent's Representative Responsible for Permissive Use

[iv] Owner May Recover From Negligent Driver

[b] Limitation on Liability

[c] Exemplary Damages

[d] Definition of Owner

[e] Permission

[i] Proof of Permission

[ii] Limited Permission

[iii] Subpermittees

[iv] Co-Owners

[f] Community Property

[g] Vendor Under Conditional Sales Contract

[h] Lessor

[i] Lender

[j] Release of Owner's Liability

[i] Bona Fide Sale or Transfer

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Chapter 82 AUTOMOBILES: CAUSES OF ACTION
PART I. SCOPE

8-82 California Forms of Pleading and Practice--Annotated § 82.01

§ 82.01 Scope of Chapter

This chapter contains a discussion of the following causes of action and theories, with emphasis on the automobile collision case:

- Negligence.
- Negligent entrustment.
- Negligent hiring and supervision.
- Negligent infliction of emotional distress.
- Wrongful death.
- Survival actions.
- Products liability.
- Vicarious liability.

In addition, an appendix is provided containing rules of the road, for handy reference.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsWrongful BirthGeneral OverviewTortsVicarious LiabilityGeneral OverviewTortsNegligenceActionsNegligent EntrustmentTortsNegligenceActionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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[1] Related Chapters in This Volume

- For discussion and forms concerning the drafting of complaints in an automobile case, see Ch. 83, *Automobiles: Bringing the Action* .

- For discussion and forms concerning defenses to a complaint in an automobile case, see Ch. 84, *Automobiles: Responding to the Action* .

[2] Other Related Chapters

- For discussion and forms relating to the liability of common carriers, see Ch. 109, *Carriers* .

- For discussion and forms relating to statutory death actions, see Ch. 181, *Death and Survival Actions* .

- For discussion and forms relating to emergency vehicles generally, see Ch. 246, *Emergency Vehicles* .

- For discussion and forms relating to negligence generally, see Ch. 380, *Negligence* .

- For discussion and forms relating to causes of action involving minors generally, see Ch. 394, *Parent and Child* .

- For discussion and forms relating to causes of action involving general partnerships and third parties generally, see Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties* .

- For discussion and forms relating to causes of action involving limited partnerships and third parties generally, see Ch. 405, *Partnerships: Actions Between Limited Partners or Partnership and Third*

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- For discussion and forms relating to causes of action involving principals and agents generally, see Ch. 427, *Principal and Agent* .

- For discussion and forms concerning the liability of public entities and officers for negligence in the operation of motor vehicles, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

- For discussion and forms relating to vicarious liability generally, see Ch. 248, *Employers' Liability for Employee's Torts* .

- For discussion and forms relating to products liability generally, see Ch. 460, *Products Liability* .

- For discussion and forms relating to actions by employees against employers, see Ch. 577, *Workers' Compensation* .

[3] Related Forms of Complaint

- For forms of complaint that correspond to the causes of action discussed in this chapter, see Ch. 83, *Automobiles: Bringing the Action* .

[4] Other Related Coverage

- For discussion and forms of points and authorities relating to negligence see California Points and Authorities, ch. 165, *Negligence* .

- For discussion and forms of points and authorities relating to products liability, see California Points and Authorities, ch. 190, *Products Liability* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProducts LiabilityGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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[Reserved]

§§ 82.03[Reserved]

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Chapter 82 AUTOMOBILES: CAUSES OF ACTION
PART II. LEGAL BACKGROUND

8-82 California Forms of Pleading and Practice--Annotated § 82.10

§ 82.10 Negligence

[1] Elements of Negligence Action

[a] Duty, Breach, Causation, Damages

A cause of action for negligence requires the following showing *Bogard v. Employers Casualty Co. (1985) 164 Cal. App. 3d 602, 618, 210 Cal. Rptr. 578* :

- Legal duty of care.
- Breach of duty of care.
- Proximate or legal causation.
- Injury and damages.

For forms of complaint based on negligence, see *Ch. 83, Automobiles: Bringing the Action, § 83.60* et seq.

[b] Standard of Care and Responsibility

Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as one has, willfully or by want of ordinary care, brought the injury on himself or herself *Civ. Code § 1714(a)*. The standard of care to which one must conform is usually that of the ordinarily prudent or reasonable person under like circumstances. However, proper conduct of a reasonable person under particular situations may become settled by judicial decision or be prescribed by statute or ordinance [*Satterlee v. Orange Glenn School Dist. (1947) 29 Cal. 2d 581, 587, 177 P.2d 279* ; *see also Evid. Code § 669*].

[c] Automobile Operator's Duty of Care

[i] Duty to Avoid Collision

The operator of an automobile must anticipate that he or she may meet persons or vehicles at any point in the street, and that he or she must use that measure of care and caution attributable to a reasonably prudent person under similar circumstances to avoid a collision [*Reaugh v. Cudahy Packing Co. (1922) 189 Cal. 335, 340, 208 P. 125]* . An automobile driver has a duty to use ordinary care to avoid colliding with visible objects in front of him or her. A driver's failure to do so gives rise to an action for negligence when damage is proximately caused by breach of that duty [*see Heintz v. Southern Pac. Co. (1944) 63 Cal. App. 2d 699, 704, 147 P.2d 621]* .

[ii] Duty to Stop After Collision

[A] Injury or Death

The driver of any vehicle involved in an accident resulting in injury to or death of any person must immediately stop the vehicle at the scene of the accident. The driver must also render reasonable assistance to any person injured in the accident, including transporting, or making arrangements for transporting, the person to a physician, surgeon, or hospital for medical or surgical treatment if it is apparent that treatment is necessary or if transportation is requested by the injured person [*see Veh. Code §§ 20001(a), 20003(a)*; *see also* Part V, Appendix, *below*]. This requirement is merely a codification of the common-law objective of preventing further harm that the actor realizes or should realize threatens the injured person. The duty is imposed on a driver regardless of fault. A violation of this statute constitutes negligence as a matter of law, in the absence of a legally sufficient excuse of justification, and gives rise to civil liability if it is the proximate cause of further injury or death [*Karl v. C.A. Reed Lumber Co. (1969) 275 Cal. App. 2d 358, 361, 79 Cal. Rptr. 852]* .

The driver must also give his or her name, current residence address, the registration number of the vehicle he or she is driving, the name and current residence address of the owner, and, on request, must exhibit his or her driver's license, if available, to the person struck, to the driver or occupants of any vehicle with which he or she has collided, or to any traffic or police officer at the scene of the accident [*Veh. Code § 20003*]. A violation of *Veh. Code § 20003* is a misdemeanor [*Veh. Code § 40000.13*].

PRACTICE TIP:

Include Allegations of Failure to Stop in Complaint. If applicable, the plaintiff should include allegations of the defendant's failure to stop in the complaint, and inquire about it during discovery.--*Frederick Schenk, Editorial Consultant.*

[B] Property Damage

The driver of any vehicle involved in an accident resulting only in damage to any property, including vehicles, may move the vehicle, if possible, off the main lanes of the highway to a safe location within the immediate vicinity of the accident, unless doing so would create a traffic hazard or cause an injury to any person. Moving the vehicle in accordance with this provision does not affect the question of fault. The driver must also do either of the following [*Veh. Code § 20002(a)*]:

- Locate and notify the owner or person in charge of that property of the name and address of the driver and owner of the vehicle involved and, on locating the driver of any other vehicle involved or the owner or person in charge of any damaged property, on being requested, present his or her driver's license and vehicle registration. The information presented must include the current residence address of the driver and of the registered owner. If the registered owner of an involved vehicle is present at the scene, he or she must also, on request, present his or her driver's license information, if available, or other valid identification to the other involved parties.

- Leave in a conspicuous place on the vehicle or other property damaged a written notice giving the name and address of the driver and owner of the vehicle involved and a statement of the circumstances and without unnecessary delay notify the police department of the city where the collision occurred or, if the collision occurred in unincorporated territory, the local headquarters of the Department of the California Highway Patrol.

Veh. Code § 20002(a) applies when the damage is inflicted intentionally, or when it results from unintentional or negligent conduct [*People v. Laursen (1985) 175 Cal. App. 3d Supp. 1, 6, 7*]. *Veh. Code § 20002* also applies to injury to a domestic animal, which is property [*People v. Fimbres (1930) 107 Cal. App. 778, 780, 288 P. 19* ; *see also* Ch. 23, *Animals: Civil Liability*].

[iii] Doctrine of Imminent Peril

A person who without negligence on his or her part is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or herself or to others, is not expected nor required to use the same judgment and prudence that is required of him or her in the exercise of ordinary care in calmer and more deliberate moments [*Leo v. Dunham (1953) 41 Cal. 2d 712, 714, 264 P.2d 1]* . Whether a party is suddenly confronted with peril, or should have anticipated the peril, is ordinarily a question of fact when the evidence, if believed, would support the speculation [*Castro v. E.A. Irish, Contractor (1967) 249 Cal. App. 2d 390, 393, 57 Cal. Rptr. 477]* .

The doctrine is available to either plaintiff or defendant, or, in a proper case, to both, and usually is applied only when at least two courses of action are available after the danger is perceived [*Smith v. Johe (1957) 154 Cal. App. 2d 508, 511, 316 P.2d 688]* .

[d] Duty of Care Between Drivers and Pedestrians

[i] Driver and Pedestrian May Rely on Each Other's Duty of Care

Both pedestrians and motorists have an equal right to the use of the highway [*Tomey v. Dyson (1946) 76 Cal. App. 2d 212, 219, 172 P.2d 739]* . Both should exercise due care consistent with the situation confronting them [*Martinovic v. Ferry (1963) 222 Cal. App. 2d 30, 37, 34 Cal. Rptr. 692]* . Although it is the duty of both the driver of an automobile and a pedestrian using a public roadway to exercise ordinary care, that duty does not necessarily require the same amount of caution from each in particular circumstances or situations [*Cucinella v. Weston Biscuit Co. (1954) 42 Cal. 2d 71, 75-81, 265 P.2d 513]* .

The amount of care that must be exercised by a pedestrian or driver in looking for danger under particular circumstances, and whether or not particular acts were done or were sufficient to meet the standard of reasonable care under the circumstances, are usually questions of fact for the jury [*see* *Martinovic v. Ferry (1963) 222 Cal. App. 2d 30, 39, 34 Cal. Rptr. 692* ; *Biggar v. Carney (1960) 181 Cal. App. 2d 22, 28 29, 5 Cal. Rptr. 94]* .

Both pedestrians and drivers of motor vehicles may rely on the general rule of law that every person has a right to assume that every other person will obey the law, and in the absence of reasonable ground to think otherwise, it is not negligent for a pedestrian or a driver to assume that he or she is not exposed to danger resulting only from violation of law by the other [*Leo v. Dunham (1953) 41 Cal. 2d 712, 715, 264 P.2d 1]* .

[ii] Driver Has Greater Responsibility to Exercise Caution

Although both pedestrians and drivers are chargeable with the exercise of the same degree of care, that is, ordinary care, nevertheless, a driver operating an automobile is charged with a duty to use a greater degree of care than is the pedestrian, because the instrumentality the driver is propelling is capable of inflicting serious and fatal injuries on others

using the highway [*Biggar v. Carney (1960) 181 Cal. App. 2d 22, 29 30, 5 Cal. Rptr. 94]* . Whether expressed in terms of "degree," "standard," or "amount" of care, the care required in dealing with agencies that because of their power or momentum or other reason are liable to do great injury, is greater than that required under other circumstances [*Finney v. Neuman (1960) 186 Cal. App. 2d 463, 468, 9 Cal. Rptr. 331]* . The driver of a motor vehicle, therefore, when ordinarily careful, must to aware of being in charge of a machine capable of projecting any negligence of his own into serious consequences. His or her caution must be adequate to that responsibility as related to all the surrounding circumstances [*Cucinella v. Weston Biscuit Co. (1954) 42 Cal. 2d 71, 75 81, 265 P.2d 513]* .

The degree of caution required in the exercise of ordinary care depends on the danger that is apparent or should be apparent to a reasonably prudent person in the particular situation and circumstances involved [*Abney v. Coalwell (1962) 200 Cal. App. 2d 892, 896, 19 Cal. Rptr. 846]* . The degree of care must be in proportion to the danger to be avoided and the consequences reasonably to be anticipated [*see Tucker v. Lombardo (1956) 303 P.2d 1041]* .

[iii] Doctrine of Sudden Peril

When a pedestrian or driver, without negligence on his or her own part, is suddenly and unexpectedly confronted with peril from the actual presence or appearance of imminent danger to that person or others, he or she is not required to use the same judgment and prudence that is required in the exercise of ordinary care in calmer and more deliberate moments [*Leo v. Dunham (1953) 41 Cal. 2d 712, 714, 264 P.2d 1]* . Whether a pedestrian or driver has been confronted with sudden and imminent peril is usually a question of fact for the jury [*Leo v. Dunham (1953) 41 Cal. 2d 712, 715, 264 P.2d 1]* .

[iv] Right of Way

[A] General Rule: Right of Way Is Mutually Enjoyed Privilege

Right-of-way is the privilege of the immediate use of the highway [*Veh. Code § 525*]. However, neither the pedestrian nor the motorist has a superior right to use of the highway over the other. Even when the right-of-way is given by statute, if conditions so require it to avoid injury, the right-of-way must be yielded [*Francis v. City & County of San Francisco (1955) 44 Cal. 2d 335, 339, 282 P.2d 496]* . Although the duty to yield the right-of-way may call for a higher amount of care in particular circumstances, the real question of fact is whether the required care has been exercised, not merely whether or not the right-of-way has actually been yielded [*Biggar v. Carney (1960) 181 Cal. App. 2d 22, 28, 5 Cal. Rptr. 94]* .

[B] Effect of Violation of Right-of-Way Statute

Violation of a right-of-way statute, or a statute defining the rights and duties of pedestrians and motorists, is negligence as a matter of law absent reasonable excuse or justification for the conduct [*see Schmitt v. Henderson (1969) 1 Cal. 3d 460, 463, 82 Cal. Rptr. 502, 462 P.2d 30* ; *see also Evid. Code § 669*]. In addition, it must appear that violation of the statute was a proximately contributing cause of the injury [*Farole v. Eichman (1952) 39 Cal. 2d 822, 825, 249 P.2d 261* ; *see also Evid. Code § 669(a)(1)*].

It is unlawful for either pedestrians [*Veh. Code § 21461.5*] or drivers of motor vehicles [*Veh. Code § 21461*] to disobey official traffic control devices, signs, signals, or authorized local traffic ordinances, unless otherwise directed by a police or traffic officer, or when it is necessary for the purpose of avoiding a collision or in the case of other emergency [*Veh. Code § 21462*].

[C] Driver Must Yield to Pedestrian in or Near Crosswalk

The driver of a motor vehicle must yield the right-of-way to a pedestrian crossing the roadway within any marked crosswalk or within any marked or unmarked crosswalk at an intersection, except as otherwise provided in *Veh. Code*

§§ 21950-21969 [*Veh. Code § 21950(a)*]. The pedestrian's duty of due care for his or her own safety does not relieve the driver of a vehicle from the duty of exercising due care for the safety of any pedestrian within any marked crosswalk or within any unmarked crosswalk at an intersection [*Veh. Code § 21950(c)*; *see Veh. Code § 21950(c)*]. Failure of a driver to yield the right-of-way to a pedestrian in a crosswalk is negligence as a matter of law in the absence of reasonable excuse or justification [*Schmitt v. Henderson (1969) 1 Cal. 3d 460, 463, 82 Cal. Rptr. 502, 462 P.2d 30* ; *Novak v. Dewar (1961) 55 Cal. 2d 749, 752, 13 Cal. Rptr. 101, 361 P.2d 709]* .

A driver must ascertain the existence of the crosswalk and determine whether pedestrians are on it. If the driver's vision is obstructed, the driver must slacken his or her speed and place the car under such control that the driver can stop within the time and distance intervening between seeing the crosswalk and his or her arrival at the crosswalk [*Fischer v. Keen (1941) 43 Cal. App. 2d 244, 248 249, 110 P.2d 693]* .

Whenever any vehicle has stopped at any marked crosswalk or at any marked or unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway, the driver of any other vehicle approaching from the rear is prohibited from overtaking and passing the stopped vehicle [*Veh. Code § 21951*]. This statute does not apply to a bus stopped to discharge passengers who then enter the crosswalk [*Byrne v. City & County of San Francisco (1980) 113 Cal. App. 3d 731, 737-738, 170 Cal. Rptr. 302]* .

[D] Pedestrian Must Exercise Due Care in or Near Crosswalk

The provisions of *Veh. Code § 21950* create a preferential, not absolute right in favor of pedestrians in crosswalks, who are under a duty to exercise ordinary care, and may not assert the right of way in an intersection when it is unsafe to do so [*Byrne v. City & County of San Francisco (1980) 113 Cal. App. 3d 731, 740, 742, 170 Cal. Rptr. 302]* . No pedestrian may suddenly leave a curb or other place of safety and walk or run into the path of a vehicle that is so close as to constitute an immediate hazard. In addition, no pedestrian may unnecessarily stop or delay traffic while in a marked or unmarked crosswalk [*Veh. Code § 21950(b)*]. Pedestrians crossing at an intersection pursuant to a "Walk" signal or a green light must wait until cross traffic clears, by yielding the right-of-way to any vehicle lawfully within the intersection at the time the light or signal changed [*see Veh. Code § 21451(b)*; *Myers v. Carini (1968) 262 Cal. App. 2d 614, 616, 619, 68 Cal. Rptr. 800]* .

A pedestrian has a duty before entering a crosswalk to make a reasonably careful observation to ascertain traffic conditions to be encountered [*O'Brien v. Schellberg (1943) 59 Cal. App. 2d 764, 767 768, 140 P.2d 159]* . Furthermore, the fact that a pedestrian is within a crosswalk does not relieve him of the duty of exercising due care throughout his or her passage across the intersection [*see Veh. Code § 21950(b)*; *Figlia v. Wisner (1957)150 Cal. App. 2d 109, 112, 309 P.2d 832]* . A pedestrian is under a duty to be alert and continuously to exercise ordinary care, although he is not required to look at all times in all directions, to keep looking right and left or to the rear as he or she crosses the street [*Francis v. City & County of San Francisco (1955) 44 Cal. 2d 335, 340, 282 P.2d 496]* . Neither must a pedestrian look continuously in the direction from which danger of approaching vehicles is to be anticipated [*see Young v. Tassop (1941) 47 Cal. App. 2d 557, 564, 118 P.2d 371]* .

A pedestrian crossing at an intersection must pay more attention to traffic in his or her path, or approaching him from the side, than from the rear. A pedestrian may rely on drivers approaching from the rear to obey the law, until something occurs that places him or her on notice as a person of ordinary prudence, that the driver is endangering him or her by violating the law [*Schmitt v. Henderson (1969) 1 Cal. 3d 460, 465-466, 82 Cal. Rptr. 502, 462 P.2d 30]* . If a pedestrian, while one or two feet outside the crosswalk, is struck by a vehicle that passed through the crosswalk, the same rules apply as though the collision had occurred within the crosswalk [*Nicholas v. Leslie (1935) 7 Cal. App. 2d 590, 593-595, 46 P.2d 761]* .

[E] Right of Way Outside Crosswalk or Unmarked Intersection

Pedestrians crossing the roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection must yield the right-of-way to all vehicles on the roadway so near as to constitute an immediate hazard [*Veh. Code § 21954(a)*]. Pedestrians are prohibited from crossing the roadway between adjacent intersections controlled by traffic signals or officers at any place except in a crosswalk [*Veh. Code § 21955*]. Pedestrians may cross the roadway at a point between intersections where there is no crosswalk, when adjacent intersections are not controlled by traffic signals or officers, and crossing is not prohibited by local ordinance [*see Veh. Code §§ 21955, 21961*].

If a pedestrian tunnel or overhead crossing serves the place where a pedestrian is crossing the roadway, and the pedestrian crosses other than by means of the tunnel or overhead crossing, he or she must yield the right-of-way to all vehicles on the highway [*Veh. Code § 21953*].

Although the duty to yield the right-of-way imposed on the pedestrian by *Veh. Code § 21954(a)* calls for a higher degree of care while crossing the roadway outside of a crosswalk, the statute was not intended to grant to vehicles a monopoly over streets or highways. The real question of fact in such a case is not merely whether or not the right-of-way was actually yielded, but whether the required care has been exercised [*Biggar v. Carney (1960) 181 Cal. App. 2d 22, 28, 5 Cal. Rptr. 94]* .

The requirement that pedestrians not within a crosswalk yield the right-of-way to vehicles on the roadway does not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian on a roadway [*Veh. Code § 21954(a), (b)*]. The operator of a motor vehicle, to exercise reasonable prudence, must always maintain a vigilant watch for other persons and vehicles using the highway [*Biggar v. Carney (1960) 181 Cal. App. 2d 22, 27, 5 Cal. Rptr. 94]* .

A driver's duty of lookout and vigilance is increased when he or she has knowledge that a place, though unmarked as a crosswalk, is one frequently used by pedestrians for that purpose [*see Jacoby v. Johnson (1948) 84 Cal. App. 2d 271, 274-275, 190 P.2d 243]* . A driver, however, is not required to anticipate that a pedestrian behind a vehicle may suddenly run directly into the path of his or her car [*see Taylor v. Pacific Container Co. (1957) 148 Cal. App. 2d 505, 507-508, 306 P.2d 1049]* . In the absence of reasonable ground to think otherwise, the driver of a vehicle has a right to assume that in crossing the street in the middle of a block at a point not within a crosswalk, a pedestrian who sees or plainly could see an approaching vehicle will obey the law and yield the right-of-way [*see Leo v. Dunham (1953) 41 Cal. 2d 712, 715-716, 264 P.2d 1]* .

[F] Right of Way on Roadway

Every pedestrian on a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection, must yield the right-of-way to all vehicles on the roadway so near as to constitute an immediate hazard [*Veh. Code § 21954(a)*]. Although a pedestrian standing on or crossing a roadway outside of a crosswalk must yield the right-of-way to normal oncoming traffic, a motorist backing up on a highway does not have superior rights. A pedestrian has a right to assume that a driver will not move a stopped (or parked) vehicle forward or backward unless the driver can do so with reasonable safety [*Veh. Code § 22106*; *see Veh. Code § 21954* (yielding right of way)].

[G] Right of Way on Roadway Outside Business or Residential District

A pedestrian is prohibited from walking on any part of the roadway outside of a business or residence district except for the left-hand side of the roadway [*Veh. Code § 21956*]. A "roadway" is the portion of the highway "improved, designed, or ordinarily used for vehicular travel" [*Veh. Code § 530*]. *Veh. Code § 21956* applies to a pedestrian merely standing on the roadway outside of a business or residence district [*Fry v. Young (1968) 267 Cal. App. 2d 340, 349-350, 73 Cal. Rptr. 62]* . It does not however apply to a pedestrian standing while waiting to cross the street [*Catton v. Kerns (1932) 123 Cal. App. 94, 95-98, 10 P.2d 1036]* .

[H] Pedestrian Has Limited Right to Walk on Highway

Veh. Code § 21956, which requires pedestrians outside a business or residence district to walk on the left-hand side of the "roadway," does not apply to pedestrians standing or walking on a dirt, graveled, or paved shoulder of the highway, because the shoulder is not part of the roadway as that term is defined in *Veh. Code § 530* [*Rangel v. Badolato (1955) 133 Cal. App. 2d 254, 263-265, 284 P.2d 138]* . A "roadway" is the portion of the highway "improved, designed, or ordinarily used for vehicular travel" [*Veh. Code § 530*].

A pedestrian walking on the right hand side of the highway must exercise due care for his or her own safety under the circumstances. The law does not set arbitrary standards of due care for his own safety in that circumstance [*Rangel v. Badolato (1955) 133 Cal. App. 2d 254, 265-269, 284 P.2d 138]* . A pedestrian must exercise his or her faculties of sight and hearing whenever a reasonably prudent person would do so. Whether or not a pedestrian's conduct evidences a proper care for his or her own safety a pedestrian is walking on the right hand side of the highway, but he must exercise due care for his own safety under the circumstances is generally a question of fact for the jury [*Hudson v. Rainville (1956) 46 Cal. 2d 474, 478-479, 297 P.2d 434]* .

[I] Pedestrian Has Right of Way on Sidewalk

Except as expressly permitted pursuant to the Vehicle Code, including section 21114.5 (relating to operation of electric carts by persons who are disabled, over 50, or postal employees, among others), motor vehicles are prohibited on sidewalks except as necessary to enter or leave adjacent property [*Veh. Code § 21663*]. A driver, prior to driving over or on any sidewalk, must yield the right-of-way to any approaching pedestrian [*Veh. Code § 21952*]. A pedestrian, however, must exercise ordinary care for his or her own safety, and may not arbitrarily exercise the right to use of the sidewalk when it is unsafe to do so [*Wilcox v. Epstein (1944) 65 Cal. App. 2d 581, 582-583, 151 P.2d 156]* .

Failure of a driver to yield the right-of-way to pedestrians on sidewalks is negligence as a matter of law in the absence of reasonable excuse or justification [*see Leiner v. Eng-Skell Co. (1930) 104 Cal. App. 228, 231, 285 P. 905]* .

[J] Emergency Vehicles Have Right of Way

On the immediate approach of an authorized emergency vehicle sounding a siren and exhibiting a red light, except as otherwise directed by a traffic officer, the driver of every vehicle must drive to the right-hand edge or curb of the highway, clear of any intersection, and must stop and remain stopped until the emergency vehicle has passed, and all pedestrians on the highway must proceed to the nearest curb or place of safety and remain there until the authorized vehicle has passed [*Veh. Code § 21806*]. The granting of the right-of-way to authorized emergency vehicles does not, however, relieve the driver of the emergency vehicle from the duty of driving with due regard for the safety of all persons and property [*Veh. Code § 21807*].

[v] Pedestrian's Duty and Standard of Care

No general rule covers all factual circumstances with respect to the duty of care required of a pedestrian crossing a street. The degree of care required of a person for his or her own safety is always the same, that is, ordinary care, although in some circumstances the degree of care constituting the standard of ordinary care is greater than in others [*Lasater v. Oakland Scavenger Co. (1945) 71 Cal. App. 2d 217, 221, 162 P.2d 486]* .

A pedestrian with impaired faculties, such as impaired hearing, is held to the legal standard of ordinary care, that is, that care that persons of ordinary prudence exercise in the management of their own affairs. A pedestrian with impaired faculties is not held to a higher degree of care, but he or she is bound to use the care that a person of ordinary prudence with faculties so impaired would use in the same circumstances. Thus, the pedestrian may need to use his or her other faculties more alertly to reach the standard of ordinary care. The jury may be so instructed in a proper case [*Jones v.*

Bayley (1942) 49 Cal. App. 2d 647, 654, 122 P.2d 293] .

[vi] Automobile Operator's Duty and Standard of Care

[A] Duty Toward Blind Pedestrian

The driver of any vehicle approaching a totally or partially blind pedestrian who is carrying a predominately white cane or using a guide dog is required to yield the right-of-way and take all reasonably necessary precautions to avoid injuring the pedestrian [*Veh. Code § 21963*].

[B] Duty Toward Workers in Street

The driver of a motor vehicle has a duty to watch for laborers in the street and avoid running them down [*Woods v. Wisdom (1933) 133 Cal. App. 694, 696-697, 24 P.2d 863]* .

[C] Duty Toward Child Pedestrians

As a general rule, motorists must exercise greater care for the protection and safety of young children than for adult persons possessing normal and mature faculties. The conduct of children is unpredictable, and one operating a motor vehicle should anticipate their thoughtlessness and impulsiveness. The presence of children is in itself a warning requiring the exercise of care for their safety [*Jones v. Brown (1959) 176 Cal. App. 2d 184, 188, 1 Cal. Rptr. 267]* .

If the evidence shows that a driver has knowledge of the presence of children, the driver may be held to have been responsible although it appears that he or she did not see the injured child in time to prevent the injury [*Conroy v. Perez (1944) 64 Cal. App. 2d 217, 224, 148 P.2d 680]* . Ordinarily the question of whether a driver is required to look for the presence of children is one of fact for the jury, as is the question of whether that duty, once it arises, has been properly performed [*see Hilyar v. Union Ice Co. (1955) 45 Cal. 2d 30, 35 36, 38, 286 P.2d 21]* .

[e] Duty of Care Between Automobile Operator and Real Property Owner

An automobile operator may be liable for trespass if he or she causes an automobile to enter land in possession of another [*see Gallin v. Poulou (1956) 140 Cal. App. 2d 638, 642, 295 P.2d 958]* .

A possessor of land who creates or maintains on the land an excavation or other artificial condition so near an existing highway that he or she realizes, or should realize, that it involves an unreasonable risk to others accidentally brought into contact with it while traveling with reasonable care on the highway, is subject to liability for bodily harm caused to them. In determining whether the condition creates an unreasonable risk of bodily harm to persons lawfully traveling the highway, the determining factor is whether it is so placed that travelers may come in contact with it while carefully traveling the highway, for example, by being forced off the road by other traffic, by skidding on a slippery surface, or by a misstep while walking on a highway [*Carlton v. Pacific Coast Gasoline Co. (1952) 110 Cal. App. 2d 177, 184-185, 242 P.2d 391]* .

A landowner who planted eucalyptus trees alongside the highway created an artificial condition irrespective of whether the trees were harmful per se, or became harmful only because of the subsequent operation of natural forces. The possessor of that land is subject to liability for harm caused to others on the adjacent highway if he or she realizes or should realize that the trees involve an unreasonable risk of harm [*Coates v. Chinn (1958) 51 Cal. 2d 304, 308, 332 P.2d 289]* .

[f] Automobile Owner's Duty of Care

[i] Nondelegable Duty to Maintain Automobile

Pursuant to the Vehicle Code, specified persons have duties relating to maintenance and equipment of automobiles [*see Veh. Code §§ 24000-28081*]. Those persons who have a duty to provide specified safeguards or precautions for the safety of others, or who carry on an activity that threatens a grave risk of serious bodily harm unless the instrumentalities used are carefully maintained, and who employ an independent contractor to maintain the instrumentalities, are subject to the same liabilities for physical harm caused by the negligence of the contractor in maintaining the instrumentalities, as though the employer had himself or herself done the work of maintenance [*Maloney v. Rath (1968) 69 Cal. 2d 442, 447-448, 71 Cal. Rptr. 897, 445 P.2d 513]* .

To establish a defense to liability for damages caused by failure to meet this nondelegable duty, the defendant must establish not only that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law, but also that the failure was not owing to the negligence of any agent,whether employee or independent contractor, employed by him or her to inspect or repair the vehicle [*Clark v. Dziabas (1968) 69 Cal. 2d 449, 451, 71 Cal. Rptr. 901, 445 P.2d 517* (brake failure); *see Maloney v. Rath (1968) 69 Cal. 2d 442, 446 448, 71 Cal. Rptr. 897, 445 P.2d 513]* .

[ii] Removal of Seat Belts From Vehicle May Constitute Negligence

A triable issue of fact exists as to whether or not the owner of an automobile has breached his or her duty to exercise due care in operating and maintaining a vehicle by removing the seat belts, thus exposing passengers to increased danger. The fact that an accident is caused solely by the fault of a third party does not affect the driver's liability for removal of seat belts, because it is foreseeable that accidents will occur even when the driver is driving with due care [*Twohig v. Briner (1985) 168 Cal. App. 3d 1102, 1108-1109, 214 Cal. Rptr. 729]* .

Additionally, one court has opined that the owner's negligence is established as a matter of law if the passenger can prove that the owner, or someone else with the owner's consent, removed the seat belts. In that event, other triable issues of fact, including causation, the comparative negligence of the plaintiff, and damages, would remain [*see Twohig v. Briner (1985) 168 Cal. App. 3d 1102, 1108 n.5, 214 Cal. Rptr. 729]* .

[g] Common Carriers' Duty of Care

[i] Standard of Care Owed by Carrier of Persons for Reward

A common carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill [*Civ. Code § 2100*; *see Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal. 3d 780, 785 n.2, 221 Cal. Rptr. 840, 710 P.2d 907]* .

A common carrier of persons for reward must provide vehicles that are safe and fit for their intended purpose. Any default in this respect is not excused by any degree of care [*Civ. Code § 2101*]. For further discussion of actions against common carriers, see Ch. 109, *Carriers* .

[ii] Standard of Care Owed by Carrier of Persons Without Reward

Carriers without reward are subject to the same rules as employees without reward, except as far as otherwise provided in *Civ. Code § 2085 et seq.* [*Civ. Code § 2089*]. A carrier of persons without reward must use ordinary care and diligence for their safe carriage [*Civ. Code § 2096*]. However, a carrier without reward that has begun to perform the undertaking must complete it as though receiving a reward, unless the carrierrestores the person or thing carried to as favorable a position as before commencement of carriage [*Civ. Code § 2090*].

[h] Manufacturer's Duty of Care

A manufacturer must use reasonable care to design the product so as to make it safe for the use for which it is intended. In this connection, "reasonable care" depends on the facts of each case. It involves the balancing of the likelihood of harm to be expected from a machine with a given design, and the gravity of harm, if it happens, against the burden of the precaution that would avoid the harm. A manufacturer's duty of care extends to all persons within the range of potential danger from the product [*Pike v. Frank G. Hough Co. (1970) 2 Cal. 3d 465, 470, 473, 85 Cal. Rptr. 629, 467 P.2d 229]* .

An action lies against the manufacturer of an article that, if negligently made, is likely to produce injury to person or property, for damages resulting from an accident caused by the negligence, when the damages are confined to destruction or harm to the article itself. Holding that a manufacturer is liable for negligent construction of an article that causes an accident resulting in damage only to the article itself does not make the manufacturer a warrantor to the ultimate purchaser because negligence must still be proved. The article must be of such nature that, if negligently made, it is reasonably certain to produce harm to persons or property; an accident must have resulted; and the accident must be a casualty involving some violence or collision with external objects, rather that a mere marked deterioration [*Fentress v. Van Etta Motors (1958) 157 Cal. App. 2d Supp. 863*].

[i] Causation: Proving Liability in Negligence Actions

[i] Common Causation Issues in Automobile Cases

The most problematic element in a negligence action is causation, that is, proving that the injuries were caused by the defendant's negligence. Causation issues commonly raised in an automobile case include the following:

- The delay between the collision and the treatment for the injury.
- The date of onset of symptoms from the injury to the time of the collision.
- Insuring proper medical documentation of the injury and symptoms to the accident.
- Connecting the forces involved in the collision to the injuries sustained.

PRACTICE TIP:

Retain Necessary Experts When Causation Is at Issue. Not all cases have an issue of causation. When it does become an issue in a case,it is important that you retain the necessary experts. An accident reconstruction expert can develop information that can be used by a biomechanical expert. A biomechanical expert is usually used to describe and quantify the forces of the impact on the person's body during a collision. These two experts working together can determine the forces applied to the occupant of a vehicle during a collision, which is helpful for a jury to hear when determining causation. Further, these experts can be used to determine the cause of injuries when a seat belt issue is raised. Get an expert early in the case if it is economically feasible.

Your medical expert is a crucial witness in linking the injuries to the accident. The treating physician of the plaintiff is one of the most important experts. Speak to this expert during the treatment of your client, and determine if you will need a "retained" medical expert in addition to the plaintiff's treating physician. The medical expert, whether he or she is technically retained or is a treating physician, must address that it is a "medical probability," not just a possibility, that the injuries were caused by the collision. Expert testimony is almost always required to prove this issue of causation. With this in mind, your client must be sure to inform the treating physician of *all* of the symptoms and difficulties he or she is having as a result of the injuries sustained in the accident. This must be done *every time* the client has a medical appointment. The defendant always looks to gaps in treatment or lack of complaints in the medical

records to show that the plaintiff has not sustained injuries or the severity of injuries as alleged.-- *Dona E. Cohn, Editorial Consultant.*

[ii] Simultaneous and Concurrent Acts of Negligence

If an injury results from two separate and distinct acts of negligence by different persons operating and occurring simultaneously and concurrently, both are proximate causes and recovery is available against either or both of the responsible persons [*Salvetti v. Byrd (1963) 222 Cal. App.2d 418, 422, 35 Cal. Rptr. 185]* .

[iii] Intervening Negligence of Third Party

A person is responsible only for the natural, probable, reasonable, and proximate consequences of his or her acts. The causal connection between a plaintiff's injury and a defendant's negligent act is broken if [*Brooker v. El Encino Co. (1963) 216 Cal. App. 2d 598, 602, 31 Cal. Rptr. 24]* :

- The negligence of a third person, who had full control of the situation, intervened;
- The defendant could not have anticipated the intervention; and
- The plaintiff's injury resulted directly from the intervening, negligent acts of the third person.

For example, the theft of a car may constitute intervening negligence. Generally, in the absence of any unusual circumstances, or applicable state statute or municipal ordinance, one who leaves a motor vehicle unattended in a public place after taking proper precautions against its starting of its own accord, is not under further duty to make it impossible for the vehicle to be started through human interference [*Brooker v. El Encino Co. (1963) 216 Cal. App. 2d 598, 602-603, 31 Cal. Rptr. 24]* . This rule applies when a plaintiff was injured as the result of the negligent driving of a third person, who has stolen the defendant's car after the defendant left the car unlocked, unattended, with the key in the ignition [*Richards v. Stanley (1954) 43 Cal. 2d 60, 66, 271 P.2d 23]* . The rule is a defense to the bailee of the vehicle's owner, if the automobile is parked by the bailee on a private parking lot unattended, unlocked, with the key in the ignition [*see Brooker v. El Encino Co. (1963) 216 Cal. App. 2d 598, 602-603, 31 Cal. Rptr. 24* ; *May v. Nine Plus Properties, Inc. (2006) 143 Cal. App. 4th 1538, 1556, 50 Cal. Rptr. 3d 13* (car body shop not liable for leaving keys in ignition of its cars after thief stole car off of lot and injured police officer while fleeing arrest)] .

Whether or not there exist unusual or special circumstances sufficient to justify the conclusion that the foreseeable risk of harm imposed is unreasonable, and the vehicle owner or the person in charge of the vehicle therefore has a duty to third persons to refrain from subjecting them to the risk resulting from a stolen vehicle, is a question of fact [*Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 185, 203 Cal. Rptr. 626, 681 P.2d 893* ; *but see May v. Nine Plus Properties, Inc. (2006) 143 Cal. App. 4th 1538, 1555-1556, 50 Cal. Rptr. 3d 13* (faced with undisputed facts, question of whether auto body shop owed duty of care when leaving keys in ignition of cars was question of law for court)] . Factors that, when present, have been found to create a question of fact regarding whether or not a duty to third parties was created include the following [*Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 185-186, 203 Cal. Rptr. 626, 681 P.2d 893* (stolen half-loaded two-ton truck left unlocked overnight with keys in glove compartment in disreputable area; *see Carrera v. Maurice J. Sopp & Son (2009) 177 Cal. App. 4th 366, 381-383, 99 Cal. Rptr. 3d 268* (special circumstances rule applied when tow truck was stolen from truck service center lot located in high-crime area when key was left in ignition and lot's gate left open)]:

- The area in which the vehicle was parked, e.g., an area frequented by persons with little respect for the rights of others, and populated by alcoholics;
- The intent that the vehicle remain in the location for a relatively long period of time, e.g., overnight;

and

- The size of the vehicle, e.g., rendering it capable of inflicting more serious damage or injury if not properly controlled, and making safe operation more difficult.

[j] Damages

[i] Actual Legal Damage Required

Actual legal damage, that is, loss, harm, injury, detriment, or deterioration to the plaintiff, is an essential element of the negligence cause of action. The action will not lie for merely nominal or insubstantial injury [*Fields v. Napa Milling Co. (1958) 164 Cal. App. 2d 442, 447-448, 330 P.2d 459]* . For discussion of damages in an automobile case, see Ch. 85, *Automobiles: Damages* . See also Ch. 177, *Damages* .

[ii] Damage to Vehicle: Cost of Repair and Loss of Use

In an action for damages, on showing that the collision was due to the negligence of the driver of defendant's automobile, plaintiff is entitled to recover the reasonable cost of repairs to restore his or her vehicle to its former condition, plus the reasonable value of its loss of use while being repaired [*Pfingsten v. Westenhaver (1952) 39 Cal. 2d 12, 23, 244 P.2d 395]* .

When an automobile requires repair, the damages include the reasonable cost of repair, plus any actual depreciation caused by the injuries. If there is no dispute about the cost of the repairs, evidence of the decrease in sales price below the list price of that class of car at the time of the injury may be admissible. This comparison forms a proper measure of the depreciation damage in the absence of other evidence on the subject [*Brown v. Roland (1940) 40 Cal. App. 2d Supp. 825, 828*].

PRACTICE TIP:

Use Cost of Repair to Prove Severity of Impact. Plaintiff's counsel should always consider the cost of repair as a means of demonstrating the severity of the impact, especially if photographs of the damage to the vehicle are no longer available. This is true even if the defendant's insurance company has previously paid for the property loss.-- *Frederick Schenk, Editorial Consultant.*

Evidence showing a collision, damage, and the necessity of repairs to restore plaintiff's vehicle to its condition prior to the collision supports an inference that the repairs were made necessary by the collision [*Pfingsten v. Westenhaver (1952) 39 Cal. 2d 12, 21, 244 P.2d 395]* .

PRACTICE TIP:

Types of Evidence Used to Support Damage From Collision. Photographs are a must, especially if the vehicle is older and the repair estimate is low. One must also evaluate the damage to the frame of the automobile if the damage to the rear of the vehicle is not easily seen in a photograph of the vehicle. Further, it is important to take into account the type of vehicle when there is a rear-end collision and the bumper damage may not always reflect the force of the impact.-- *Dona E. Cohn, Editorial Consultant.*

[iii] Damage to Real Property

The amount of damages allowed for injury to realty is the value of the property prior to injury, unless the cost of restoration is less than that value, in which case the cost of repair is the proper measure of damages [*Charles v. Reuck (1960) 179 Cal. App. 2d 145, 147, 3 Cal. Rptr. 490]* . If the trespass is the proximate cause of discomfort, annoyance, and mental suffering stemming from fear for a person's safety or that of his or her family, those damages are recoverable whether or not the person has sustained physical injury [*Acadia, California, Ltd. v. Herbert (1960) 54*

Cal. 2d 328, 337, 5 Cal. Rptr. 686, 353 P.2d 294] .

[2] Doctrine of Res Ipsa Loquitur

The doctrine of res ipsa loquitur is applicable when the collision is of such a nature that it can be said, in the light of past experience, that it probably was the result of the negligence of someone, and that defendant was probably responsible. Alleging or proving specific acts of negligence does not deprive plaintiff of the applicability of the doctrine of res ipsa loquitur [*Borenkraut v. Whitten (1961) 56 Cal. 2d 538, 547-548, 15 Cal. Rptr. 635, 364 P.2d 467* ; *Freitas v. Peerless Stages, Inc. (1952) 108 Cal. App. 2d 749, 753-755, 239 P.2d 671* ; *see also Evid. Code § 646* (res ipsa loquitur instruction)].

Circumstances surrounding the occurrence of an automobile collision determine whether or not the doctrine of res ipsa loquitur should be applied unqualifiedly, as a matter of law, or conditionally as the facts may be resolved by the jury [*Getas v. Hook (1965) 236 Cal. App. 2d 705, 715, 46 Cal. Rptr. 249]* .

[3] Minor Plaintiffs in Negligence Actions

A minor may enforce his or her right by civil action, or other legal proceedings, in the same manner as a person of full age, except that a guardian must conduct the proceeding [*Fam. Code § 6601*; *see also* Ch. 367A, *Minors: Tort Actions*].

PRACTICE TIP:
Special Considerations for Minor Plaintiffs:

- **Guardian Ad Litem.** A minor must have a guardian ad litem appointed by the court. A Petition for Guardian Ad Litem should be filed at the time the complaint is filed, so that a summons can be issued by the clerk at the same time.

- **Statute of Limitations.** Even though the statute of limitations is one year after the minor reaches age 18 (except in public entity cases), it is important not to wait to file the complaint, because witnesses, medical providers, and parties may not be available after a long period of time, thus making it difficult to prove your case.

-- *Dona E. Cohn, Editorial Consultant.*

[4] Selecting Defendants in Negligence Action

[a] Ascertaining Parties Involved in Collision

In selecting defendants in a negligence action, counsel should consider the following parties, if applicable:

- The driver of the other vehicle.

- The owner of the other vehicle, whether an individual or corporation.

- Public entities.

- The manufacturer of the plaintiff's vehicle or of the other vehicle.

- Persons or entities vicariously liable [*see § 82.16*].

[b] Liability of Minors or Incompetent Persons

A minor, or person of unsound mind, of whatever degree, is civilly liable for a wrong done by him or her, but is not liable in exemplary damages unless at the time of the act he or she was capable of knowing that it was wrongful [*Fam. Code § 6600*; *Civ. Code § 41*]. The same duty is imposed by law on all licensed drivers and there is no distinction made as to ages [*Elliot v. Jensen (1960) 187 Cal. App. 2d 389, 394, 9 Cal. Rptr. 642* (trial court's failure to consider disparity in ages (18 and 55) of drivers involved in collision was not erroneous)].

[5] Affirmative Defenses to Negligence Action

[a] Comparative Negligence

[i] Comparative Negligence Apportions Fault

Pursuant to the defense of comparative negligence, responsibility and liability for damage is assigned in direct proportion to the negligence of each of the parties. Thus, in all actions for negligence resulting in injury to person or property, damages awarded are diminished in proportion to the amount of negligence attributable to the person recovering [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226]* . For further discussion, see Ch. 380, *Negligence* .

Comparative negligence applied in a case in which the plaintiff saw the defendant's car coming across the freeway, out of control, but did not brake until immediately before impact [*see Hargrave v. Winquist (1982) 134 Cal. App. 3d 916, 927-928, 185 Cal. Rptr. 30]* .

PRACTICE TIP:

Common Example of Comparative Negligence. A common instance of comparative negligence is the plaintiff's getting into a car with a known drunk driver. This may also be implied assumption of the risk.-- *Dona E. Cohn, Editorial Consultant.*

[ii] Plaintiff's Failure to Use Seat Belts May Constitute Comparative Negligence

A plaintiff's failure to use available seat belts may constitute negligence, and therefore reduce under comparative negligence principles, the damages he or she can recover from the defendant [*see Franklin v. Gibson (1982) 138 Cal. App. 3d 340, 342-343, 188 Cal. Rptr. 23]* .

The maintenance and use of seat belts in passenger motor vehicles is required by statute [*see Veh. Code § 27315(d)-(f)*]. This statute applies to any passenger vehicle or any motortruck or truck tractor, but not to a motorcycle. Effective May 1, 2000, it also applies to any farm labor vehicle, regardless of the date of certification under *Veh. Code § 31401*. Prior to this date, the statute applied to any farm labor vehicle first issued an inspection certificate under *Veh. Code § 31401* on or after October 1, 1999 [*Veh. Code § 27315(c)*].

Although evidence of a violation of a statute ordinarily creates a presumption of negligence under *Evid. Code § 669(a), Veh. Code § 27315(i)* expressly provides that in a civil action, a violation of *Veh. Code § 27315(d)-(f)* does not establish negligence as a matter of law or negligence per se for comparative fault purposes. However, negligence may be proven as a fact without regard to the violation [*Veh. Code § 27315(i)*; *see* [6], *below*].

To prevail on a "seat belt defense," a defendant must show the following [*Franklin v. Gibson (1982) 138 Cal. App. 3d 340, 342-343, 188 Cal. Rptr. 23]* :

- Whether or not, in the exercise of ordinary care, the plaintiff should have used the seat belt that was available to him or her; and

- Through expert testimony if necessary, what the consequences to the plaintiff would have been if he or she had been using a seat belt.

Expert testimony will usually be necessary to differentiate between injuries caused plaintiff by the collision and those caused him or her by the absence of seat belts [*see Franklin v. Gibson (1982) 138 Cal. App. 3d 340, 342-343, 188 Cal. Rptr. 23* ; *cf. McNeil v. Yellow Cab Co. (1978) 85 Cal. App. 3d 116, 118, 119 n.2, 147 Cal. Rptr. 733* (no expert testimony necessary to show that lack of seat belt caused injury to passenger who was propelled from back seat to front seat by force of collision; however, differentiation of injuries' causation may require expert testimony); *but see Lara v. Nevitt (2004) 123 Cal. App. 4th 454, 459-461, 19 Cal. Rptr. 3d 865* (lay evidence showing that use of restraining belts in truck's sleeper berth completely immobilizes user was sufficient to prove that all of passenger's injuries could have been prevented if available belts had been used)].

Presumably, the provision of *Veh. Code § 27315(i)* precluding the use of a violation to establish a presumption of negligence, but permitting proof of negligence as a fact, was intended to keep the law as it was established by case law. On the other hand, the existence of a statutory duty to maintain and use seat belts may affect the proof required to establish the defense by making it easier to persuade the trier of fact that, in the exercise of ordinary care, plaintiff would have worn a seat belt. Thus, the trial court may instruct the jury on the existence of the seat belt statute in appropriate cases, while allowing the jury to decide what weight, if any, to give the statute in determining the standard of reasonable care [*Housley v. Godinez (1992) 4 Cal. App. 4th 737, 747]* .

PRACTICE TIP:

Defendant's Burden on Use of Seat Belt. Defendant must have an expert testify that the injuries sustained by the plaintiff were caused or increased due to the failure to use a seat belt. If there is no expert testimony (that is, biomechanic), then plaintiff should bring a motion in limine to prevent the defendant from mentioning plaintiff's failure to use a seat belt. A medical-provider expert's testimony is not sufficient expert testimony on this issue.-- *Dona E. Cohn, Editorial Consultant.*

[b] Express Assumption of the Risk

Express assumption of the risk involves an agreement by the plaintiff to assume the risks of a particular activity, and to relieve the defendant from liability [*Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd. (1983) 147 Cal. App. 3d 309, 318, 195 Cal. Rptr. 90]* . For further discussion, see Ch. 380, *Negligence* .

[c] Implied Assumption of the Risk

The doctrine of assumption of the risk, in light of comparative fault principles, consists of two separate defenses: "primary assumption of the risk," and "secondary assumption of the risk." The defense of primary assumption of the risk may be raised when the defendant, by virtue of the nature of the activity and the parties' relationship to the activity, owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury. The doctrine operates as a complete bar to the plaintiff's recovery [*Knight v. Jewett (1992) 3 Cal. 4th 296, 309, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (lead opinion)]. Assumption of the risk is an absolute defense only if public policy dictates that the class of which the defendant is a member should owe no duty of care to the class of which the plaintiff is a member in relation to the activity in which they are involved. The inquiry begins and ends with the analysis of whether the defendant owed a duty to the plaintiff, after assessing factors such as those listed in *Rowland v. Christian* [*Harrold v. Rolling J Ranch (1993) 19 Cal. App. 4th 578, 584, 23 Cal. Rptr. 2d 671* ; *see Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561]* .

The defense of secondary assumption of the risk may be raised when the defendant owes a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty. In this situation, the

doctrine is merged into the comparative fault scheme, and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties [*Knight v. Jewett (1992) 3 Cal. 4th 296, 315, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *see* [b], *above*].

The question of the existence and scope of a defendant's duty of care, as affected by the plaintiff's implied assumption of the risk, is a legal question that depends on the nature of the activity in question, and on the parties' general relationship to the activity. It is an issue to be decided by the court, not by the jury [*Knight v. Jewett (1992) 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (lead opinion)].

For further discussion, see Ch. 380, *Negligence* .

PRACTICE TIP:

Getting in Car With Known Drunk Driver. This defense has been raised when a plaintiff has knowingly allowed an intoxicated driver to transport him or her. This is a secondary assumption of the risk since the plaintiff knows that the driver has breached his or her duty to drive safely, and gets into the car anyway, knowing that the driver is driving while under the influence.-- *Dona E. Cohn, Editorial Consultant.*

PRACTICE TIP: Unusual Circumstances Often Involve Implied Assumption of Risk. Consider an implied assumption of the risk defense in unusual cases involving automobiles. Parking in obviously dangerous areas such as railroad tracks, riding a bicycle without a helmet, playing in the street, testing experimental cars, street racing, or not supervising children can involve assumption of the risk.-- *Joe Devine, Editorial Consultant.*

[d] Statute of Limitations

[i] General Statutes

An affirmative defense that the complaint is time-barred should be raised if the complaint was filed after the following time periods:

- Two years (prior to January 1, 2003, one year) for an action alleging injury or death based on negligence [*Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)*; *see also Ch. 345, Limitation of Actions, § 345.14*].

- Three years, for an action alleging injury to personal property based on negligence [*Code Civ. Proc. § 338(c)*].

PRACTICE TIP:

Cases With Multiple Defendants. Always use the earliest date for your statute of limitations when you have multiple defendants.-- *Dona E. Cohn, Editorial Consultant.*

[ii] Actions by Minors and Incompetents

If a person entitled to bring an action is at the time the cause of action accrued, either under the age of majority or insane, the time of the disability is not part of the time limited for the commencement of the action [*Code Civ. Proc. § 352(a)*]. Therefore, the applicable statute of limitations begins to run after a minor reaches majority.

[iii] Actions against Public Entities

An action against a public entity on a cause of action for which a claim is required to be presented in accordance with

Gov. Code § 900 et seq. and *Gov. Code § 910 et seq.*, must be commenced within the time provided in *Gov. Code § 945.6*, set forth below [*Code Civ. Proc. § 342*].

Except as provided in *Gov. Code §§ 946.4* (applicable when failure to present claim does not bar suit) and 946.6 (petition for relief from § 946.4), and subject to *Gov. Code § 945.6(b)* (failure to present claim because of imprisonment), any suit brought against a public entity on a cause of action for which a claim is required to be presented in accordance with *Gov. Code §§ 900 et seq., 910 et seq.* must be commenced within the following time periods [*Gov. Code § 945.6(a)*; *see also Gov. Code § 945.6(b), (c)* (inability to commence suit because of imprisonment)]:

- If written notice is given in accordance with *Gov. Code § 913*, not later than six months after the date that the notice is personally delivered or deposited in the mail.

- If written notice is not given in accordance with *Gov. Code § 913*, within two years from the accrual of the cause of action. If the period within which the public entity is required to act is extended pursuant to *Gov. Code § 912.4(b)*, the period of the extension is not part of the time limited for the commencement of the action under this paragraph.

For further discussion of claims against public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[6] Evidence in Negligence Actions

[a] Effect of Violation of Statute, Ordinance, Regulation on Negligence Action

The failure of a person to exercise due care is presumed if his or her violation of a statute, ordinance, or regulation of a public entity proximately caused death or injury to a person or property of a kind that the law was designed to prevent, and the injured party was a member of the class sought to be protected by the law [*Evid. Code § 669(a)*]. This presumption may be rebutted by proof that the person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law [*Evid. Code § 669(b)(1)*].

Whether or not a violation of a statute or ordinance proximately contributed to an accident and whether the violation was excusable or justifiable are questions of fact, except when the court holds that reasonable men could draw but one inference from the facts [*Satterlee v. Orange Glenn School Dist. (1947) 29 Cal. 2d 581, 590, 177 P.2d 279]* .

The plaintiff has the burden of proving that the injury resulted from an occurrence that the statute was designed to prevent. This issue is one of law [*Ronald M. v. White (1980) 112 Cal. App. 3d 473, 477, 169 Cal. Rptr. 370]* .

[b] Effect of Violation of Speed Limit

In any civil action, proof of speed in excess of any prima facie limit declared in *Veh. Code § 22352* at a particular time and place does not establish negligence as a matter of law. The plaintiff must therefore establish as a fact that the operation of a vehicle at the excess speed constituted negligence [*see Veh. Code § 40831*].

PRACTICE TIP:

Use of Perception Reaction Time Test to Prove Causation. If feasible, retain an expert to do a perception reaction time test with the speed and the stopping distance of the collision to show that had the defendant been going the speed limit, then the collision would have been avoided. For the defendant, you may want to get this same information to show that even going the speed limit, the accident would have occurred, and the violation of the speed limit is irrelevant.-- *Dona E. Cohn, Editorial Consultant.*

[c] Plaintiff's Failure to Wear Seat Belts Creates No Presumption

A plaintiff's failure to wear a seat belt, in violation of *Veh. Code § 27315(d), (e),* or *(f),* does not establish negligence as a matter of law, or negligence per se for comparative fault purposes. Negligence may be proved as a fact, however, for comparative fault purposes [*Veh. Code § 27315(i)*; *see* [5], *above*].

[d] Possession or Lack of Driver's License Creates No Presumption

The possession of an operator's license does not establish a minimum standard of care in the operation of a vehicle. Driving without a license does not create a presumption of negligence, nor provide evidence of negligent operation of a vehicle. The licensing features of the Vehicle Code, while designed to promote safe driving, are devices for the more efficient enforcement of police regulations governing the use of highways [*Wysock v. Borchers Bros. (1951) 104 Cal. App. 2d 571, 583, 232 P.2d 531]* .

PRACTICE TIP:

Obtain Driving Records From DMV. Despite lack of presumption, it is nevertheless advisable to to request from the DMV copies of both plaintiff's and defendant's driving records, especially if there is a history of reckless driving or driving under the influence, if those issues are relevant to the case, or if there is a permissive-user issue involved that may help prove negligent entrustment.-- *Frederick Schenk, Editorial Consultant.*

[e] Evidentiary Effect of Criminal Conviction

A judgment of conviction for any violation of the Vehicle Code, or of any local ordinance relating to the operation of a motor vehicle, or a finding reported under *Veh. Code § 1816* (juvenile traffic offender) is not res judicata, and does not constitute a collateral estoppel of any issue determined there in any subsequent civil action [*Veh. Code § 40834*]. Evidence of a final judgment adjudging a person guilty of a crime punishable as a felony, however, is not made inadmissible by the hearsay rule [*see Evid. Code § 1200*] when offered in a civil action to prove any fact essential to the judgment, whether or not the judgment was based on a plea of nolo contendere [*Evid. Code § 1300*].

Evid. Code § 1300, while relaxing the rule with respect to felony convictions, continues the prohibition against the admission of a misdemeanor conviction to prove a fact inherent in the judgment of conviction [*Rousseau v. West Coast House Movers (1967) 256 Cal. App. 2d 878, 888, 64 Cal. Rptr. 655* (admission in evidence of three misdemeanor convictions for drunk driving, and instruction that revocation of driver's license could be inferred from it was erroneous); *but see Evid. Code §§ 1220-1340* (other exceptions to hearsay rule)].

[f] Evidentiary Effect of Nolo Contendere Plea

The legal effect of a plea of nolo contendere in an inferior court to a crime punishable as a felony is the same as that of a plea of guilty for all purposes. In cases other than those punishable as felonies, the plea of nolo contendere and any admissions required by the court during any inquiry it makes as to the voluntariness of, and factual basis for, the plea may not be used against the defendant as an admission in any civil suit based on or growing out of the act on which the criminal prosecution is based [*Penal Code § 1016(3)*].

[g] License Suspension or Revocation Inadmissible

No record of the suspension or revocation of the privilege to operate a motor vehicle by the Department of Motor Vehicles, nor any testimony of, or concerning, or produced at the hearing terminating in the suspension or revocation, shall be admissible as evidence in any court in any civil action [*Veh. Code § 40832*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceCausationProximate CauseGeneral OverviewTortsDamagesCompensatory DamagesGeneral OverviewTortsNegligenceStandards of CareSpecial CareChildrenTortsNegligenceActionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-82 California Forms of Pleading and Practice--Annotated § 82.11

§ 82.11 Negligent Entrustment

[1] Liability for Negligent Entrustment of Defective Automobile

A person who knowingly or negligently entrusts an automobile in a defective condition to another is liable for injuries arising from operation of the automobile [*Merry v. Knudsen Creamery Co. (1949) 94 Cal. App. 2d 715, 721, 211 P.2d 905]* . An owner who is aware, or reasonably should be aware, that his or her motor vehicle is defective, is subject to negligence liability on permitting the defective vehicle to be driven by another. Reasonable inspection of the vehicle is part of the owner's duty of care [*Yamaha Motor Corp. v. Paseman (1990) 219 Cal. App. 3d 958, 965, 268 Cal. Rptr. 514]* .

For a form of complaint for damages based on negligent entrustment, see *Ch. 83, Automobiles: Bringing the Action, § 83.110*. For allegations of specific types of negligent entrustment, for example, entrustment to an intoxicated person, see *§§ 83.112 -83.114*.

[2] Liability for Negligent Entrustment of Automobile With Incompetent Driver

A person who knowingly or negligently entrusts an automobile to an incompetent driver is liable for injuries arising from operation of the automobile [*Perez v. G & W Chevrolet, Inc. (1969) 274 Cal. App. 2d 766, 767-768, 79 Cal. Rptr. 287* ; *see also Blake v. Moore (1984) 162 Cal. App. 3d 700, 704-707, 208 Cal. Rptr. 703* (negligent entrustment to intoxicated person)]. Liability for negligent entrustment is based on a balancing of factors considered in negligence actions generally, such as [*Talbott v. Csakany (1988) 199 Cal. App. 3d 700, 705-706, 245 Cal. Rptr. 136]* :

- Foreseeability of harm, most importantly.
- Degree of certainty that plaintiff suffered injury.
- Closeness of connection between defendant's conduct and the injury suffered.
- Moral blame attached to the defendant's conduct.

- Policy of preventing future harm.
- Extent of burden to defendant and consequences to the community.
- Availability of insurance for the risk.

Liability under the theory of negligent entrustment is determined by general negligence principles, and is imposed on the vehicle owner or permitter because of his or her own independent negligence, rather than the negligence of the driver, when the plaintiff can prove that injury or death was proximately caused by the driver's incompetence [*Allen v. Toledo (1980) 109 Cal. App. 3d 415, 420-421, 167 Cal. Rptr. 270]* . However, although negligent entrustment is in theory an independent act of negligence, it is not actionable unless the driver caused some actual harm while driving negligently [*Jeld-Wen, Inc. v. Superior Court (2005) 131 Cal. App. 4th 853, 864, 869, 32 Cal. Rptr. 3d 351* ; *see CACI No. 724*]. Negligent entrustment may be based on implied, as well as express, permission [*see Fremont Comp. Ins. Co. v. Hartnett (1993) 19 Cal. App. 4th 669, 675-676, 23 Cal. Rptr. 2d 567]* .

This theory may apply to a car dealership with respect to entrusting its vehicle to an incompetent driver for a test drive, or selling a vehicle to an incompetent driver [*see, e.g., Hartford Accident & Indem. Co. v. Abdullah (1979) 94 Cal. App. 3d 81, 92, 156 Cal. Rptr. 254* (potential driver taking test drive)]. However, the dealership cannot be held liable unless it has actual knowledge of facts showing or suggesting the incompetence [*see Dodge Ctr. v. Superior Court (1988) 199 Cal. App. 3d 332, 341, 244 Cal. Rptr. 789* (sale to unlicensed driver)].

If a rental car company that is renting to a driver from another country checks for a valid driver's license and signature in accordance with *Veh. Code § 14608* [*see Veh. Code § 14608(a), (b)*], and if the driver does not appear to be mentally or physically impaired or show other signs of incompetence at the time the vehicle is rented [*see Osborn v. Hertz Corp. (1988) 205 Cal. App. 3d 703, 709, 252 Cal. Rptr. 613]* , then the rental car company has no further duty to provide the driver with a copy of California's rules of the road or otherwise determine whether the driver is familiar with those rules [*Lindstrom v. Hertz Corp. (2000) 81 Cal. App. 4th 644, 649-650, 96 Cal. Rptr. 2d 874]* .

In the context of a negligent entrustment claim made against an employer for injuries caused by an employee/driver, if the employer makes a pre-trial admission of liability for any negligence of the employee/ driver under respondeat superior principles, the negligent entrustment claim becomes moot, and the trial court may not admit evidence that the employer knew of the employee's prior accidents. This is so because the employer has already admitted to being liable for the employee's negligence and allowing evidence of the employee's poor driving history would only serve to prejudice the jury in violation of *Evid. Code § 1104*, which seeks to prevent showing that a party was negligent in a particular instance by offering evidence that the party had a tendency to be negligent in the past [*Jeld-Wen, Inc. v. Superior Court (2005) 131 Cal. App. 4th 853, 869-870, 32 Cal. Rptr. 3d 351]* .

For a form of complaint for damages based on negligent entrustment, see *Ch. 83, Automobiles: Bringing the Action, § 83.110*. For allegations of specific types of negligent entrustment, see *§§ 83.112 -83.114*.

[3] Standard of Care of Person Entrusting Automobile

The standard of care by which the conduct of the entruster is measured is the same standard applicable in negligence cases generally [*see § 82.10[1][b]*]. That is, the entruster must exercise the same care that an ordinarily prudent person would exercise under similar circumstances [*Owens v. Carmichael's U-Drive Autos, Inc. (1931) 116 Cal. App. 348, 350, 2 P.2d 580]* . A coowner of a vehicle may be liable for negligent entrustment of the vehicle to the other owner [*Mettelka v. Superior Court (1985) 173 Cal. App. 3d 1245, 1247-1250, 219 Cal. Rptr. 697]* .

[4] Contrast With Respect to Permissive-User Liability

An owner's liability for the negligent entrustment of an automobile is distinguishable from that with respect to a permissive user [*see Veh. Code § 17150*; *see also § 82.16[1][a]*]. Under the theory of negligent entrustment, liability is imposed on an automobile owner under common-law principles because of his or her own independent negligence. Under the permissive-user statute, the owner's liability arises by operation of the statute as the result of the driver's negligence without any negligence on the part of the owner [*Syah v. Johnson (1966) 247 Cal. App. 2d 534, 539, 55 Cal. Rptr. 741]* .

PRACTICE TIP:

No $15,000 Limit on Negligent Entrustment Liability. Liability for negligent entrustment also differs from liability pursuant to the permissive-user statute in that the permissive-user statute limits liability to $15,000 [*see § 82.16[1][b]*]. The negligent entrustment theory is designed to dissuade persons from negligently entrusting vehicles to known careless drivers. The permissive-user statute, however, does not require the owner's knowledge of the driver's propensity to be careless, and therefore limits the amount of recovery.-- *Frederick Schenk, Editorial Consultant.*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsNegligent EntrustmentTortsNegligenceStandards of CareReasonable CareReasonable PersonTortsNegligenceActionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-82 California Forms of Pleading and Practice--Annotated § 82.12

§ 82.12 Negligent Hiring and Supervision by Employer

[1] Negligent Hiring

If the driver of the other vehicle was acting in the scope of his or her employment, and was foreseeably negligent, e.g., a habitually reckless driver, the employer may possibly be liable on a theory of negligent hiring. Under this cause of action, an employer may be liable to a third party for the employer's negligence in hiring or retaining an employee who is incompetent or unfit, if the employee tortiously injures the third party. To state a claim for negligent hiring, a plaintiff must allege facts showing that the employer knew or should have known that an employee would act in a certain manner, and that the employee did in fact act in that manner [*Doe v. Capital Cities (1996) 50 Cal. App. 4th 1038, 1055, 58 Cal. Rptr. 2d 122]* . This theory of liability also applies to the selection of independent contractors [*see Holman v. State of California (1975) 53 Cal. App. 3d 317, 336, 124 Cal. Rptr. 773]* . For further discussion and forms, see Ch. 248, *Employer's Liability for Employee's Torts* .

[2] Negligent Supervision or Training of Employee

An employer may be liable for negligent failure to supervise its employees adequately [*City of Los Angeles v. Superior Court (1973) 33 Cal. App. 3d 778, 783]* . This theory may possibly apply to a case in which the driver of the other vehicle acted negligently because of inadequate employer supervision. For further discussion of this cause of action and related forms, see Ch. 248, *Employer's Liability for Employee's Torts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsNegligent Hiring & SupervisionElementsTortsNegligenceActionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 82.13 Negligent Infliction of Emotional Distress: Bystander's Cause of Action

Under certain circumstances, persons who are percipient witnesses, or bystanders, to injuries caused to third persons, may recover damages for emotional distress for witnessing the injury caused by the defendant's negligent conduct [*Thing v. La Chusa (1989) 48 Cal. 3d 644, 667-668, 257 Cal. Rptr. 865, 771 P.2d 814* ; *Dillon v. Legg (1968) 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912]* .

Negligent infliction of emotional distress to a percipient witness requires the following showing [*Thing v. La Chusa (1989) 48 Cal. 3d 644, 667-668, 257 Cal. Rptr. 865, 771 P.2d 814]* :

- The plaintiff is closely related to the injured victim, e.g., a relative living in the same household, parent, sibling, child, or grandparent.
- The plaintiff was present at the scene of the injury-producing event at the time when it occurs.
- The plaintiff then became aware that the event was causing injury to the victim.
- As a result, the plaintiff suffered serious emotional distress.

For further discussion and forms, see Ch. 362, *Mental Suffering and Emotional Distress* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsNegligent Infliction of Emotional DistressGeneral OverviewTortsNegligenceActionsNegligent Infliction of Emotional DistressPotential Plaintiffs

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8-82 California Forms of Pleading and Practice--Annotated § 82.14

§ 82.14 Wrongful Death and Survival Actions

[1] Wrongful Death

[a] Elements

A cause of action for wrongful death arises if the death of a person is caused by the wrongful act or neglect of another [*Code Civ. Proc. § 377.60*]. "Wrongful act" means a tortious act, including theories of recovery based on negligence, intentional wrongful conduct, and strict products liability [*Barrett v. Superior Court (1990) 222 Cal. App. 3d 1176, 1183, 1185-1186, 27 Cal. Rptr. 304]* . The elements of a wrongful death action are the following [*Moxon v. Kern County (1965) 233 Cal. App. 2d 393, 398-399, 43 Cal. Rptr. 481]* :

- The commission of a tortious act.

- Resulting death causing pecuniary loss to persons entitled to a cause of action under the wrongful death statute.

[b] Standing to Assert Wrongful Death Action

A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by the following persons, or by the decedent's personal representative on their behalf [*Code Civ. Proc. § 377.60*]:

- The decedent's surviving spouse, children, and issue of deceased children, or, if there is not surviving issue of the decedent, the persons, including the surviving spouse, who would be entitled to the property of the decedent by intestate succession.

- The putative spouse, children of the putative spouse, stepchildren, or parents, if dependent on the decedent.

- A minor, if at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support.

[c] Damages in Wrongful Death Action

Damages in a wrongful death may include such items as funeral and burial expenses, and pecuniary loss resulting from loss of society, comfort, attention, services, and support of decedent's spouse [*see Goodson v. Perfect Fit Enterprises, Inc. (1998) 67 Cal. App. 4th 508, 514-515, 79 Cal. Rptr. 2d 102* (automobile collision case)].

[d] Two-Year Statute of Limitations

The limitations period for death caused by the wrongful act or neglect of another is two years (prior to January 1, 2003, one year) [*Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)*; *see also Ch. 345, Limitation of Actions, § 345.14*]. For discussion and forms relating to death actions generally, see Ch. 181, *Death and Survival Actions* .

[2] Survival Actions

[a] Action on Behalf of Decedent

Generally, when a person dies before judgment, the damages recoverable by his or her personal representative or successor in interest are limited to loss or damages that the decedent sustained or incurred prior to death [*Code Civ. Proc. § 377.34*]. The damages recoverable in favor of a decedent do not include damages for pain, suffering, or disfigurement [*Code Civ. Proc. § 377.34*].

A survivorship action is specifically for recovery of economic loss such as medical bills incurred by the decedent. Damages recoverable in a survival action include medical expenses incurred at collision scene and hospital before death [*see Goodson v. Perfect Fit Enterprises, Inc. (1998) 67 Cal. App. 4th 508, 79 Cal. Rptr. 2d 102* (automobile collision case)]. These special damages do survive and must be alleged in a complaint within six months of the death.

For further discussion, see Ch. 181, *Death and Survival Actions* .

[b] Limitation Period: Six Months After Person's Death

A survival action on behalf of a decedent may be brought within six months of the death, or within the limitation period that would have applied if the person had not died [*Code Civ. Proc. § 366.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsWrongful Death & Survival ActionsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsWrongful Death & Survival ActionsPotential PlaintiffsTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 82.15 Loss of Consortium

[1] Elements

The loss of consortium is the loss of conjugal fellowship and sexual relations, including loss of the following [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 385, 405-408, 115 Cal. Rptr. 765, 525 P.2d 669]* :

- Support or service.
- Love and affection.
- Society and companionship.
- Sexual relations.
- Solace.

The elements for a cause of action for loss of consortium are as follows:

- Lawful marriage between the plaintiff and the injured person at the time of the injury [*Elden v. Sheldon (1988) 46 Cal. 3d 267, 279, 250 Cal. Rptr. 254, 758 P.2d 582]* .
- Tortious injury suffered by the nonplaintiff spouse [*Blain v. Doctor's Co. (1990) 222 Cal. App. 3d 1048, 1067, 272 Cal. Rptr. 250]* .
- Loss of consortium suffered by the plaintiff spouse [*see United Services Automobile Assn. v. Warner (1976) 64 Cal. App. 3d 957, 964-965, 135 Cal. Rptr. 34]* .
- Proximate causation of the loss by the defendant's wrongful act [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 385, 405-408, 115 Cal. Rptr. 765, 525 P.2d 669]* .

PRACTICE TIP:

This Claim May Not Stand Alone. Note that the loss of consortium claim is derivative and may not stand alone. Therefore, if the injured plaintiff settles his or her claim, the loss-of-consortium claim cannot proceed.-- *Dona E. Cohn, Editorial Consultant.*

[2] Statute of Limitations

The limitations period for a loss of consortium action is two years (prior to January 1, 2003, one year) [*see Code Civ. Proc. § 335.1*; *Shelton v. Superior Court (1976) 56 Cal. App. 3d 66, 81, 128 Cal. Rptr. 454* ; *see also* former *Code Civ. Proc. § 340(3)*; *Ch. 345, Limitation of Actions, § 345.14*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesConsortium DamagesGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 82.16 Vicarious Liability

[1] Liability of Owner, Bailee, Personal Representative

[a] Liability Based on Express or Implied Permission

[i] Owner Responsible for Permissive Use

[A] Statutory Liability

Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner [*Veh. Code § 17150*; *see also Fremont Comp. Ins. Co. v. Hartnett (1993) 19 Cal. App. 4th 669, 675-676, 23 Cal. Rptr. 2d 567* (implied permission)].

The legislative purpose in the enactment of statutes imposing liability on motor vehicle owners was to protect innocent third parties from the careless use of automobiles. This protection should be paramount to the rights of an owner who has permitted the use of his or her car by others even though the owner, personally, was not guilty of negligence. The statutes define the owner's liability in cases in which the principle of respondeat superior is inapplicable, to make the owner liable for the negligence of any person to whom he or she had expressly or impliedly given permission to operate the car. The legislation was plainly intended to enlarge the liability of the nonculpable owner of the motor vehicle for its operation on a public highway. The foundation of the statutory liability is the permission given to another to use an instrumentality that, if improperly used, is a danger and menace to the public [*Burgess v. Cahill (1945) 26 Cal. 2d 320, 323, 158 P.2d 393]* .

[B] Extent of Liability

A judgment against a negligent permissive driver does not extinguish the liability of a private owner under *Veh. Code § 17150* prior to satisfaction of the judgment, to the extent of the private owner's statutory liability [*Walker v. Belvedere (1993) 16 Cal. App. 4th 1663, 1669, 20 Cal. Rptr. 2d 773]* .

An owner may be held liable for the negligence of the operator under *Veh. Code § 17150* (liability of owners), even though the operator may be liable to the injured plaintiff for workmen's compensation only [*Baugh v. Rogers (1944) 24 Cal. 2d 200, 213, 148 P.2d 633* ; *see also* *Galvis v. Petito (1993) 13 Cal. App. 4th 551, 558-560, 16 Cal. Rptr. 2d 560* (*Baugh v. Rogers* survives enactment and amendment of *Veh. Code § 17150*)].

A rental car agency's conduct of parking cars in a negligently attended lot with keys in the ignition does not create a duty to control a thief [*Avis Rent A Car System, Inc. v. Superior Court (1993) 12 Cal. App. 4th 221, 233]* .

[C] Civ. Code § 1431.2 Inapplicable

The limitation of noneconomic damages under *Civ. Code § 1431.2* is inapplicable to *Veh. Code § 17150*, because imposition of liability on the owner of a vehicle is based on mere status as an owner, rather than any culpability of the owner [*Galvis v. Petito (1993) 13 Cal. App. 4th 551, 564-565, 16 Cal. Rptr. 2d 560* ; *Rashtian v. BRAC-BH, Inc. (1992) 9 Cal. App. 4th 1847, 1853-1854, 12 Cal. Rptr. 2d 411* ; for discussion of *Civ. Code § 1431.2*, *see* Ch. 82A, *Automobiles: Damages*].

[ii] Bailee Responsible for Permissive Use

If the bailee of an owner with the permission, express or implied, of the owner permits another to operate the motor vehicle, the bailee and the driver are both deemed operators of the vehicle within the meaning of *Veh. Code §§ 17152* and *17153*. Every bailee of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the bailee or otherwise, by any person using or operating the vehicle with the permission, express or implied, of the bailee [*Veh. Code § 17154*].

[iii] Decedent's Representative Responsible for Permissive Use

Every person who is a personal representative of a decedent who has control or possession of a motor vehicle subject to administration for the purpose of administration of an estate is, during the period of administration, or until the vehicle has been distributed under order of the court, or he or she has complied with the requirements of *Veh. Code § 5602(a)* and *(b)* (sale or transfer of vehicle), liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle by any person using or operating the same with the permission, express or implied, of the personal representative [*Veh. Code § 17159*].

[iv] Owner May Recover From Negligent Driver

The right of the owner of a vehicle to recover from the negligent operator, as created by *Veh. Code §§ 17153* (subrogation of owner) and *17154*, is an element of every contract of bailment of a motor vehicle [*Baugh v. Rogers (1944) 24 Cal. 2d 200, 215, 148 P.2d 633]* .

[b] Limitation on Liability

The liability of an owner, bailee of an owner, or personal representative of a decedent imposed by *Veh. Code §§ 17000-17463* and not arising through the relationship of principal and agent or master and servant is limited to the amount of $15,000 for the death of or injury to one person in any one accident and, subject to the limit as to one person, $30,000 for the death of or injury to more than one person in any one accident and $5,000 for damage to property of others in any one accident [*Veh. Code § 17151(a)*; *see* *Lindgren v. Baker Engineering Corp. (1988) 197 Cal. App. 3d 1351, 1354, 243 Cal. Rptr. 476* (owners' liability discharged by settlement between plaintiff and driver for $25,000, even though agreement reserved plaintiff's right to proceed against owners)].

[c] Exemplary Damages

An owner, bailee of an owner, or personal representative of a decedent is not liable under *Veh. Code §§ 17000-17463* for damages imposed for the sake of example and by way of punishing the operator of the vehicle [*Veh. Code § 17151(b)*].

Nothing in *Veh. Code § 17151(b)* shields an owner, bailee, or personal representative from liability for damages imposed for the sake of example and by way of punishing him for his or her own wrongful conduct [*Veh. Code § 17151(b)*].

Further, the limitation provided by *Veh. Code § 17151* does not apply if there is an independent basis for liability, such as an owner's negligence for the entrustment of an automobile with defective brakes to another, in which case the owner has breached the nondelegable duty to maintain the brakes [*Fremont Comp. Ins. Co. v. Hartnett (1993) 19 Cal. App. 4th 669, 675-676, 23 Cal. Rptr. 2d 567* ; *see § 82.11*].

[d] Definition of Owner

"Owner," pursuant to *Veh. Code § 460*, means a person having all incidents of ownership. Under *Civ. Code § 654*, ownership of a thing is the right of one or more persons to possess and use the thing to the exclusion of others. The law does not require that all incidents ownership be proved. Ownership is a question of fact to be determined by the jury under appropriate instructions of law [*Kaley v. Catalina Yachts (1986) 187 Cal. App. 3d 1187, 1201, 232 Cal. Rptr. 384]* .

[e] Permission

[i] Proof of Permission

Under *Veh. Code § 17150*, permission to drive the automobile of another must be affirmatively proved [*Scheff v. Roberts (1950) 35 Cal. 2d 10, 12, 215 P.2d 925]* . Express permission of an owner to operate an automobile would necessarily include prior knowledge of the intended use and an affirmative and active consent to it. Implied consent would indicate a sufferance of use or a passive permission deduced from a failure to object to a known past, present, or intended future use under circumstances in which the use should be anticipated. Knowledge of some act or intended act on the part of the user by the owner is required before consent to use may be implied [*Bradford v. Sargent (1933) 135 Cal. App. 324, 329-330, 27 P.2d 93]* .

Whether permission has been given and is present at the time of the collision is usually a question of fact [*Hobbs v. Transport Motor Co. (1943) 22 Cal. 2d 773, 778, 141 P.2d 738]* . Unless the evidence points to one conclusion only, the question of the existence of the requisite permission under *Veh. Code § 17150* is to be determined by the trier of fact on the facts and circumstances in evidence and the inferences reasonably drawn [*see Peterson v. Grieger, Inc. (1961) 57 Cal. 2d 43, 51, 17 Cal. Rptr. 828, 367 P.2d 420]* .

If the driver is an employee and the owner is the employer, a jury may infer that the vehicle was driven with the owner's permission, and the fact that the employer failed to monitor or adequately supervise how its vehicles were used may be used as evidence that the employer gave implied permission for use [*Taylor v. Roseville Toyota, Inc. (2006) 138 Cal. App. 4th 994, 1002-1003, 42 Cal. Rptr. 3d 68]* .

[ii] Limited Permission

When the permission is granted for a limited time, any use after the expiration of the period is without consent, and the owner is not liable, unless the circumstances justify an inference of implied consent. There is no fundamental ground of distinction between a limitation of time and oneof purpose or place, insofar as permission is concerned. A substantial

violation of either limitation terminates the original express consent and makes the subsequent use without permission [*Henrietta v. Evans (1938) 10 Cal. 2d 526, 528-529, 75 P.2d 1051]* . However, when restrictions by the owner as to time, purpose, or area are involved, the automobile owner's permission is considered terminated under *Veh. Code § 17150* only if there has been a substantial violation of those restrictions [*Peterson v. Grieger, Inc. (1961) 57 Cal. 2d 43, 54, 17 Cal. Rptr. 828, 367 P.2d 420* (owner liable when parking attendant took car to nearby lot rather than parking it in crowded lot that owner had entered); *see Henrietta v. Evans (1938) 10 Cal. 2d 526, 528-529, 75 P.2d 1051* (owner not liable when car was driven beyond specific destination)].

[iii] Subpermittees

For purposes of imputed liability under *Veh. Code § 17150*, an owner who entrusts a car to another invests him or her with the same authority to select an operator that the owner has in the first instance. The owner is thus liable for the negligent acts of a subpermittee even though the subpermittee operated the owner's vehicle with authorization only from the permittee [*Peterson v. Grieger, Inc. (1961) 57 Cal. 2d 43, 54, 17 Cal. Rptr. 828, 367 P.2d 420* (owner liable after entrusting automobile to parking lot attendant, who subsequently permitted unlicensed 17 year old boy to park it); *see Burgess v. Cahill (1945) 26 Cal. 2d 320, 325, 158 P.2d 393* (employer-owner liable when employee who had exclusive possession of vehicle was riding as passenger, and employee's wife was driving); *Souza v. Corti (1943) 22 Cal. 2d 454, 460-461, 139 P.2d 645* (father liable for negligence of son's friend, although son was forbidden to allow others to use it, because son had general use of car)].

This rule, however, may not apply to a rental car. A car rental company is not liable for injuries suffered by the driver of an automobile that had been rented by another person when the rental agreement explicitly provided that the renter did not have permission to let anyone else drive the car. By allowing another to drive the car under these circumstances, the renter acts outside the scope of permission given by the rental car company [*Marquez v. Enterprise Rent-A-Car (1997) 53 Cal. App. 4th 319, 323, 61 Cal. Rptr. 2d 557]* .

[iv] Co-Owners

Dual ownership of an automobile does not establish that the operation of the automobile by one co-owner was with the permission of the other. In the absence of other evidence on the issue, an inference normally would arise, on proof of co-ownership and the use of personal property by one co-owner, that the usage was lawful and with the consent of the absent co-owner, but this inference is not conclusive [*Krum v. Malloy (1943) 22 Cal. 2d 132, 135, 137 P.2d 18]* .

[f] Community Property

The presumptions created with respect to community property by *Civ. Code § 5110* regarding the acquisition of property by a married woman by an instrument in writing, do not apply in an action based on *Veh. Code § 17150* with respect to the acquisition of a motor vehicle by a married woman and her husband [*Veh. Code § 17150.5*].

[g] Vendor Under Conditional Sales Contract

If a motor vehicle is sold under a contract of conditional sale by which the title to the vehicle remains in the vendor, the vendor or its assignee is not deemed an owner within the provisions of *Veh. Code §§ 17000-17463*. The vendee or his or her assignee is deemed the owner notwithstanding the terms of the contract until the vendor or its assignee retake possession of the motor vehicle. A chattel mortgagee of a motor vehicle who is not in possession of the motor vehicle is not an owner within the provisions of *Veh. Code §§ 17000-17463* [*Veh. Code § 17156*].

"Conditional sale contract" means [*Civ. Code § 2981(a)*]:

- Any contract for the sale of a motor vehicle between a buyer and a seller, with or without accessories, under which possession is delivered to the buyer and either

- The title vests in the buyer thereafter only on the payment of all or a part of the price, or the performance of any other condition, or

- A lien on the property is to vest in the seller as security for the payment of part or all of the price, or for the performance of any other condition; or

- Any contract for the bailment or leasing of a motor vehicle between a buyer and a seller, with or without accessories, by which the bailee or lessee agrees to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the vehicle and its accessories, if any, at the time the contract is executed, and by which it is agreed that the bailee or lessee will become, or for no other or for a nominal consideration has the option of becoming, the owner of the vehicle on full compliance with the terms of the contract.

[h] Lessor

A lease of a vehicle in which the bailee or lessee agrees to pay as compensation a sum substantially equivalent to the value of the property, and is bound to become or has the option of becoming the owner of the vehicle, is a conditional sale. The legal owner in such a lease is not liable as an "owner" under *Veh. Code § 17150* [*Klein v. Leatherman (1969) 270 Cal. App. 2d 792, 793 794, 76 Cal. Rptr. 190* ; *cf. Estate of Gonzalez (1990)219 Cal. App. 3d 1598, 1603, 269 Cal. Rptr. 68* (lessor liable as owner when lease agreement stood alone and did not satisfy either prong of *Civ. Code § 2981(a)(2)* test, and lessor retained certain incidents of ownership)].

[i] Lender

A lender, by making individual loans for the purchase of vehicles, is not liable to a person injured by the borrower for the lender's failure to demand that the borrower have ability to respond in damages or to obtain third-party insurance [*Sutake v. Orange County Federal Credit Union (1986) 186 Cal. App. 3d 140, 145, 230 Cal. Rptr. 351* ; *Skerlec v. Wells Fargo Bank (1971) 18 Cal. App. 3d 1003, 1007, 96 Cal. Rptr. 434]* .

[j] Release of Owner's Liability

[i] Bona Fide Sale or Transfer

An owner who has made a bona fide sale or transfer of a vehicle and has delivered possession to a purchaser shall not by reason of any of the provisions of the Vehicle Code be deemed the owner of the vehicle so as to subject to civil or criminal liability for the subsequent parking, abandoning, or operation of the vehicle by another when the owner in addition to the foregoing has fulfilled either of the following requirements [*Veh. Code § 5602*]:

- When he or she has made proper endorsement and delivery of the certificate of ownership as provided in the Vehicle Code, or

- When he or she has delivered to the Department of Motor Vehicles or has placed in the United States mail, addressed to the department, either the notice provided in *Veh. Code §§ 4456(b)*, or appropriate documents and fees for registration of the vehicle pursuant to the sale or transfer.

A bona fide gift is a "bona fide transfer" within the meaning of *Veh. Code § 5602* [*Brown v. Fix (1978) 86 Cal. App. 3d 809, 812-814, 150 Cal. Rptr. 431]* .

For the purpose of imposing liability under *Veh. Code § 17150*, the transferor of an automobile continues to be an owner of the automobile unless he or she complies with the prerequisites for avoiding liability under *Veh. Code §*

5602(a) or *5602(b)* [*Enis v. Specialty Auto Sales (1978) 83 Cal. App. 3d 928, 936, 148 Cal. Rptr. 255]* .

[ii] Endorsement of Ownership Certificate

For a motor vehicle transferor properly to endorse the ownership certificate, thus passing title and avoiding future liability, the transferor must write his or her address on, and sign and date the certificate [*Veh. Code § 5753*; *see Veh. Code §§ 5600, 5602*]. Strict compliance with *Veh. Code § 5602* is required to enable a transferring owner to escape the liability imposed by *Veh. Code § 17150* on account of an accident occurring before notice of the transfer is received by the motor vehicle department. Thus, if a transferor failed to date the writing, he or she is liable as owner in regard to an accident that occurs before notice of the transfer is received by the department [*Nuss v. Pacht (1971) 22 Cal. App. 3d 553, 557, 99 Cal. Rptr. 460* ; *Laureano v. Christensen (1971) 18 Cal. App. 3d 515, 521, 95 Cal. Rptr. 872]* .

This rule of strict compliance, however, is not necessarily applicable if there was compliance, albeit late, with all of the terms of the statutes long prior to the accident that caused plaintiff's injuries [*Stoddart v. Peirce (1959) 53 Cal. 2d 105, 115-116, 123, 346 P.2d 774* (decided under former Veh. Code §§ 178, 402)].

[iii] Owner's or Dealer's Notice

An owner (or dealer or lessor-retailer) can escape liability under *Veh. Code § 17150* by compliance with *Veh. Code §§ 5900* and *5901*. *Veh. Code § 5900(a)* provides that whenever the owner of a vehicle registered under the Vehicle Code sells or transfers his or her title or interest in, and delivers the possession of the vehicle to another, the owner must, within five calendar days, notify the department of the sale or transfer giving the date, the name and address of the owner and of the transferee, and such description of the vehicle as may be required in the appropriate form provided for such purpose by the department. *Veh. Code § 5901(a)* provides that every dealer or lessor-retailer on transferring by sale, lease, or otherwise any vehicle, whether new or used, of a type subject to registration under the Vehicle Code, is required, not later than the end of the fifth calendar day thereafter (not counting the day of sale) to give written notice of the transfer to the DMV on an appropriate form provided by it [*Veh. Code § 5901(a)*; *see Durbin v. Fletcher (1985) 165 Cal. App. 3d 334, 346-348, 211 Cal. Rptr. 483* ; *see also Veh. Code § 6100 et seq.* (transfers through wholesale auctions)].

A sale is deemed completed and consummated, for the purpose of *Veh. Code § 5901*, when the purchaser of that vehicle has paid the purchase price, or, in lieu thereof, has signed a purchase contract or security agreement, and taken physical possession or delivery of that vehicle [*Veh. Code § 5901(d)*].

A dealer who has made a bona fide sale of the motor vehicle and delivered possession of it to a purchaser, is no longer subject to civil liability for automobile accidents occurring after the sale and delivery of possession if it timely mails or delivers the report of sale as provided by *Veh. Code § 5901* [*Brown v. Superior Court (1971) 15 Cal. App. 3d 187, 191, 93 Cal. Rptr. 33]* .

In an action to hold an owner or dealer liable under *Veh. Code § 17150* for failure to comply with the notice requirements set out in *Veh. Code § 5602*, a plaintiff must merely prove that at the time of the accident the owner remained the registered owner of the automobile, and that the DMV had not timely received a notice described in *Veh. Code § 5600(a)* or *5901(a)*. The owner or dealer has the burden of proving that the notices were timely mailed, because this is a fact peculiarly within the defendant's knowledge [*Enis v. Specialty Auto Sales (1978) 83 Cal. App. 3d 928, 938-939, 148 Cal. Rptr. 255]* .

A dealer that complies with *Veh. Code § 5901* is not liable under *Veh. Code § 17150* as owner, notwithstanding that the notice does not reach the department until after the accident.

If the dealer does not comply with *Veh. Code § 5901*, but a transferee notifies the DMV of the change of ownership

prior to the accident, and executes all documents necessary to place both legal and registered title in the transferee's name, the dealer is not liable for a subsequent accident as owner under *Veh. Code § 17150* [*Richie v. Tate Motors, Inc. (1971) 22 Cal. App. 3d 238, 244, 99 Cal. Rptr. 223]* .

[k] Joinder of Operator

In any action against an owner, bailee of an owner, or personal representative of a decedent on account of liability imposed by *Veh. Code § 17150* (liability of owner), *17154* (liability of bailee), or *17159* (liability of personal representative) for the negligent or wrongful act or omission of the operator of a vehicle, the operator shall be made a party defendant if service of process can be made in a manner sufficient to secure personal jurisdiction over the operator. On recovery of judgment, recourse shall first be had against the property of the operator so served [*Veh. Code § 17152*]. This last proviso is intended for the benefit of the owner. Not only may it be waived by him but it only applies if a judgment is recovered against both the operator and the owner [*Holland v. Kodimer (1938) 11 Cal. 2d 40, 44, 77 P.2d 843]* .

That the operator need not be made a defendant in all cases strongly indicates that the liability of the owner is primary, and is not dependent on whether or not the operator is made a defendant [*Holland v. Kodimer (1938) 11 Cal. 2d 40, 44, 77 P.2d 843* (construing *Veh. Code § 17152* regarding liability of operators)]. If the injured party has complied with *Veh. Code § 17152*, and has named the operator a defendant in the action and served him or her, the fact that no judgment is subsequently entered against the operator does not free the owner from the direct liability otherwise imposed by *Veh. Code § 17150* [*Holland v. Kodimer (1938) 11 Cal. 2d 40, 44, 77 P.2d 843]* .

[l] Subrogation of Owner

If there is recovery under *Veh. Code §§ 17000-17463* against an owner, bailee of an owner, or personal representative of a decedent, that person is subrogated to all the rights of the person injured or whose property has been injured, and may recover from the operator the total amount of any judgment and costs recovered against him or her [*Veh. Code § 17153*].

Application of this statute is not limited to cases in which the operator is not made a party. The right of contribution does not rest on the existence of a judgment against the operator in the same action, but applies when a recovery is had against the owner, and covers any judgment and costs recovered against the owner. When an operator is made a party to the action and no judgment is entered against him or her, this provision still gives the owner a right of subrogation and a right to recover from the operator the amount of any judgment entered against the owner. The owner may bring an independent action in the nature of an action for contribution [*Holland v. Kodimer (1938) 11 Cal. 2d 40, 44, 77 P.2d 843* ; *see also* Ch. 300, *Indemnity and Contribution*]. Under *Veh. Code § 17153*, the owner cannot bring into an action against him or her the persons responsible to him or her under the section. The owner's rights in this respect do not arise until judgment in favor of the person injured is given [*Dalton v. Baldwin (1944) 64 Cal. App. 2d 259, 262, 148 P.2d 665]* .

This statute does not entitle an automobile owner to recover attorney's fees incurred in owner's action to recoup, as the injured person's subrogee, the amount of judgment and costs assessed against the owner in an action based on owner's liability for imputed negligence [*Robinson v. Felch (1957) 155 Cal. App. 2d 842, 844 845, 318 P.2d 759]* .

[m] Settlement of Claim

When two or more persons are injured or killed in one accident, the owner, bailee of an owner, or personal representative of a decedent may settle and pay any bona fide claims for damages arising out of personal injuries or death, whether reduced by judgment or not. The payments shall diminish to the extent thereof that persons's total liability on account of the accident. Payments aggregating the full sum of $30,000 shall extinguish all liability of the

owner, bailee of an owner, or personal representative of a decedent for the death or personal injury arising out of the accident that exists pursuant to *Veh. Code §§ 17000-17463*, and did not arise through the negligent or wrongful act or omission of the owner, bailee of an owner, or personal representative of a decedent, nor through the relationship of principal and agent or master and servant [*Veh. Code § 17155*].

[2] Liability for Minors

[a] Parent or Person Having Custody

Any civil liability of a minor, whether licensed or not under the Vehicle Code, arising out of his or her driving a motor vehicle on a highway withthe express or implied permission of the parents, or person or guardian having custody of the minor, is imposed on the parents, person, or guardian. The parents, person, or guardian are jointly and severally liable with the minor for any damages proximately resulting from the negligent or wrongful act or omission of the minor in driving a motor vehicle [*Veh. Code § 17708*]. For the purposes of *Veh. Code §§ 17700-17714*, all persons under 18 years of age are minors [*Veh. Code § 17700*].

[b] Person Signing Minor's License Application

[i] Scope of Liability

[A] Signing Application Imposes Joint and Several Liability

Any civil liability of a minor arising out of his or her driving a motor vehicle on a highway during the minor's minority is imposed on the person who signed and verified the application of the minor for a license. That person shall be jointly and severally liable with the minor for any damages proximately resulting from the negligent or wrongful act or the omission of the minor in driving a motor vehicle. However, an employer signing the application shall be subject to these provisions only if an unrestricted driver's license has been issued to the minor pursuant to the employer's written authorization [*Veh. Code § 17707*].

[B] No Vicarious Liability When Minor Acting as Agent or Servant

The person signing a minor's application for a license is not liable under *Veh. Code §§ 17700-17714*, however, for a negligent or wrongful act or omission of the minor committed when the minor is acting as the agent or servant of any person [*Veh. Code § 17710*].

[C] Verified Application for Release From Liability

Any person who has signed and verified the application of a minor for a driver's license, or any employer who has authorized the issuance of a license to a minor and who desires to be relieved from the joint and several liability by reason of having signed and verified the application, may file a verified application with the department requesting that the license of the minor be canceled. The DMV shall cancel the license, and thereafter the person shall be relieved from the liability imposed under *Veh. Code §§ 17700-17714* by reason of having signed and verified the original application on account of any subsequent willful misconduct or negligent operation of a motor vehicle by the minor [*Veh. Code § 17711*].

[ii] Public Entity and Court Official Are Immune From Liability

No liability may be imposed under *Veh. Code § 17707* or *17708* on the state or county, or on a probation officer or child protective services workeracting as an officer of the court, for damages caused solely by the negligence or willful misconduct of a minor driver whose application for a driver's license was signed by the child protective services worker or probation officer while the minor was a dependent or ward of the court [*Veh. Code § 17707*].

[iii] Limitation on Damages

No person or group of persons collectively shall incur liability for a minor's negligent or wrongful act or omission under *Veh. Code §§ 17707, 17708* in any amount exceeding $15,000 for injury to or death of one person as the result of any one accident, or, subject to the limit as to one person, $30,000 for injury to or death of all persons as a result of any one accident, or $5,000 for damages to property of others as a result of any one accident [*Veh. Code § 17709(a)*].

Veh. Code § 17709 does not limit the liability of a licensed driver for his or her negligent supervision of an operator with a learner's permit [*Kostecky v. Henry (1980) 113 Cal. App. 3d 362, 370-371, 170 Cal. Rptr. 197]* .

[iv] Exemplary Damages

No person is liable under *Veh. Code § 17707* or *17708* for damages imposed for the sake of example and by way of punishing the minor. Nothing in *Veh. Code § 17709(b)* makes any person immune from liability for damages imposed for the sake of example and by way of punishing him for his own wrongful conduct [*Veh. Code § 17709(b)*].

[3] Employer and Employee

Liability may be imposed under *Veh. Code § 17150* on the owner of an automobile when the operator is the agent or employee of the owner. Liability may also be imposed on the principal or employer of a negligent operator under the doctrine of respondeat superior [*Vind v. Asamblea Apostolica, Christo Jesus (1957) 148 Cal. App. 2d 597, 602-604, 307 P.2d 85]* . Whether a person is an employee or independent contractor is ordinarily a question of fact [*see Brose v. Union-Tribune Publishing Co. (1986) 183 Cal. App. 3d 1079, 1081-1082, 228 Cal. Rptr. 620* (newspaper carrier collided with another car while delivering newspapers)].

Liability under respondeat superior is not dependent on ownership of the automobile by the principal or employer. It may arise even when the agent or employee is using his or her own automobile, providing the use is within the course and scope of the agency or employment. When the agent or employee is not acting within the course and scope of employment, the owner of the automobile may still be liable under *Veh. Code § 17150*. However, when liability is imposed under that section, it may not exceed the monetary limits specified in *Veh. Code § 17151* [*Bayless v. Mull (1942) 50 Cal. App. 2d 66, 71-72, 122 P.2d 608]* .

[4] Partnerships

[a] Liability of Partnership

When any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his or her partner, causes loss or injury to any person who is not a partner, the partnership is liable for it to the same extent as the partner so acting or omitting to act [*Corp. Code § 16305*].

A partnership is liable for injuries resulting from the willful misconduct of a copartner while he or she is engaged in the business of the partnership, if the action was within the scope of the wrongdoing partner's authority. The principle on which liability rests is the same as that applicable to the relation of principal and agent and employer and employee [*see Madsen v. Cawthorne (1938) 30 Cal. App. 2d 124, 125-126, 85 P.2d 909]* .

[b] Liability of General Partners

All general partners are liable jointly and severally for everything chargeable to the partnership under *Corp. Code § 16305* (liability of partnership for wrongs of partners) [*Corp. Code § 16306(a)*].

[c] Liability of Limited Partners

A limited partner is not liable as a general partner unless, in addition to the exercise of his or her rights and powers of a limited partner, the limited partner takes part in the control of the business [*Corp. Code § 15632(a)* (repealed effective Jan. 1, 2010); *Corp. Code § 15903.03(a)* (effective for limited partnerships formed on or after Jan. 1, 2008, for pre-existing limited partnerships electing to be governed by 2008 Act, and for all other limited partnerships on Jan. 1, 2010)]. This provision shall not be construed to affect the liability of a limited partner to third parties for the limited partner's participation in tortious conduct [*Corp. Code § 15632(a)* (repealed effective Jan. 1, 2010); *Corp. Code § 15903.03(a)* (effective for limited partnerships formed on or after Jan. 1, 2008, for pre-existing limited partnerships electing to be governed by 2008 Act, and for all other limited partnerships on Jan. 1, 2010)].

[5] Joint Ventures

All members of a joint venture may be held jointly liable for the injuries arising from the negligent conduct of one of the parties to the joint venture [*Hupfeld v. Wadley (1948) 89 Cal. App. 2d 171, 175, 200 P.2d 564]* . The relationship of joint venturers is that of a mutual agency, akin to a limited partnership: negligence of one joint venturer or of his or her employees acting in connection with the joint venture is imputed to the other joint venturers [*Leming v. Oilfields Trucking Co. (1955) 44 Cal. 2d 343, 350, 282 P.2d 23]* .

If the joint venturers are also co-owners of an automobile, the liability of the nonnegligent joint venturer is not limited to the statutory limit of liability of owners [*Veh. Code §§ 17150, 17151*]. Thus a plaintiff may have judgment for the full amount of his or her damages against a nonnegligent joint venturer who is also a co-owner of the automobile that struck the plaintiff provided that the automobile was being used at the time of the injury in the scope of the venture [*Knight v. Cook (1963) 212 Cal. App. 2d 613, 616, 28 Cal. Rptr. 273* (three persons who purchased automobile to transport themselves to and from their place of employment were joint venturers)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsVicarious LiabilityBaileesTortsVicarious LiabilityEmployersGeneral OverviewTransportation LawPrivate VehiclesVehicle RegistrationGeneral OverviewFamily LawFamily Relationships & TortsTort LiabilityChild TortsTortsTransportation TortsMotor VehiclesPersonal Vehicles

California Forms of Pleading and Practice--Annotated

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PART II. LEGAL BACKGROUND

8-82 California Forms of Pleading and Practice--Annotated § 82.17

§ 82.17 Products Liability: Strict Liability of Manufacturer and Retailer

[1] Strict Liability Doctrine

The strict liability of a manufacturer and retailer is established when the plaintiff proves that while using the instrumentality in a way it was intended to be used, he or she was injured as a result of a defect in design or manufacture of which plaintiff was not aware, and that made the vehicle unsafe for its intended use [*Gherna v. Ford Motor Co. (1966) 246 Cal. App. 2d 639, 649-650, 55 Cal. Rptr. 94]* . The rules of strict liability focus responsibility for defects, whether negligently or nonnegligently caused, on the manufacturer of the completed product. They apply even if the manufacturer delegated some part of the manufacture to a third party. The manufacturer of a completed product cannot escape liability by tracing the defect to a component part supplied by another [*Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 261, 37 Cal. Rptr. 896, 391 P.2d 168]* . This cause of action and related causes of action for products liability are discussed in Ch. 460, *Products Liability* .

[2] No Requirement of Privity

The doctrine of strict liability does not require any contractual relation or privity of contract. Therefore, in a cause of action for strict liability, the ultimate user or consumer need not have purchased the product, but may rather be a member of the final purchaser's family, or his or her employee or guest [*Barth v. B.F. Goodrich Tire Co. (1968) 265 Cal. App. 2d 228, 246, 71 Cal. Rptr. 306]* . Further, the doctrine applies even when the manufacturer has attempted to limit liability. Recovery by bystanders cannot be denied on the theory that no representation of safety was made to the bystander [*Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 587, 75 Cal. Rptr. 652, 451 P.2d 84]* .

[3] Awareness of Defects

In a products liability case based on the theory of strict liability, the plaintiff is not required to establish that he or she was not aware of the defect that caused the injury at the time of the accident. The policy underlying the doctrine of strict liability compels the conclusion that recovery should not be limited to cases involving latent defects [*Luque v. McLean (1972) 8 Cal. 3d 136, 139, 144-146, 104 Cal. Rptr. 443, 501 P.2d 1163]* .

[4] Warnings of Dangerous Propensities

A manufacturer and a dealer must give adequate warning to the ultimate users of the product of any dangerous propensity that it knows or should have known would result in the type of accident that occurred. A product, although faultlessly made, may nevertheless be deemed defective if it is unreasonably dangerous to place the product in the hands of a user without a suitable warning [*Barth v. B.F. Goodrich Tire Co. (1968) 265 Cal. App. 2d 228, 244-245, 71 Cal. Rptr. 306]* .

[5] Foreseeability

Strict liability is not imposed on a manufacturer for any injury resulting from a use of its product that was not reasonably foreseeable. Although a collision may not be the normal or intended use of a motor vehicle, vehicle manufacturers must take accidents into consideration as reasonably foreseeable occurrences involving their products. They may be deemed strictly liable for injuries resulting from defects in their products that would not have caused injury but for the occurrence of an accident [*Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 126, 104 Cal. Rptr. 433, 501 P.2d 1153]* .

[6] Damages

The doctrine of strict liability in tort permits recovery for physical injury to plaintiff's property, and personal injury to plaintiff [*Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 19, 45 Cal. Rptr. 17, 403 P.2d 145]* . However, defects in the quality of goods (loss of bargain) and economic losses, even when the loss of use of a vehicle causes loss of profits, are not recoverable from the manufacturer under this theory. These types of losses are related to the law of contracts governing commercial transactions [*Anthony v. Kelsey-Hayes Co. (1972) 25 Cal. App. 3d 442, 447-448, 102 Cal. Rptr. 113]* .

[7] Affirmative Defenses to Products Liability Action

[a] Comparative Fault

The principles of comparative fault apply to actions founded on strict liability [*Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 730, 742, 144 Cal. Rptr. 380, 575 P.2d 1162* ; *see § 82.10[5][a]*].

[b] Misuse of Product

Misuse of a product is a defense to an action based on strict liability in tort [*McCurter v. Norton Co. (1968) 263 Cal. App. 2d 402, 407, 69 Cal.Rptr. 493]* . Alteration of a product after sale may be a defense to strict liability [*Martinez v. Nichols Conveyor & Eng'r Co., Inc. (1966) 243 Cal. App. 2d 795, 799, 52 Cal. Rptr. 842]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsProducts LiabilityDuty to WarnTortsProducts LiabilityStrict LiabilityTortsDamagesCompensatory DamagesGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-82 California Forms of Pleading and Practice--Annotated §§ 82.18-82.29

[Reserved]

§§ 82.18[Reserved]

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PART III. RESEARCH GUIDE

8-82 California Forms of Pleading and Practice--Annotated § 82.30

§ 82.30 Related Texts From LexisNexis

For discussion of tort law relating to automobile collisions generally, see California Torts, ch. 20 (Matthew Bender)

For discussion of uninsured motorist law, see California Uninsured Motorist Law (Lexis Nexis 6th ed.)

For discussion of trial of collision cases generally, see Trial of Accident Cases (Matthew Bender)

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PART III. RESEARCH GUIDE

8-82 California Forms of Pleading and Practice--Annotated § 82.31

§ 82.31 State Statutes

[1] Negligence

Liability for negligence generally. *Civ. Code § 1714(a)*

Res ipsa loquitur instruction. *Evid. Code § 646*

Presumption of negligence for violation of statute or ordinance. *Evid. Code § 669*

[2] Motor Vehicle Operator's Duties and Liabilities

Liability of motor vehicle operator to passenger-owner. *Veh. Code § 17158*

Motorist's duty to stop after collision. *Veh. Code §§ 20001-20003*

[3] Minors

Liability of minor; civil actions. *Fam. Code § 6600*

Actions by minors. *Fam. Code § 6601*

Liability of person signing and verifying minor's application for license. *Veh. Code §§ 17707, 17709, 17710*

Liability of parents arising from minor's driving motor vehicle. *Veh. Code §§ 17708, 17709*

[4] Common Carriers

Duties of carriers of persons generally. *Civ. Code §§ 2096 et seq., 2180 et seq.*

[5] Vicarious Liability

Agency generally. *Civ. Code § 2295 et seq.*

Principal responsible to third person for negligence of agency. *Civ. Code § 2338*

Personal liability of agent for wrongful acts. *Civ. Code § 2343*

Liability of partnership for acts of partners. *Corp. Code § 16305*

Liability of general partners. *Corp. Code § 16306(a)*

Liability of limited partners. *Corp. Code § 15632* (repealed effective Jan. 1, 2010); *Corp. Code § 15903.03(a)* (effective for limited partnerships formed on or after Jan. 1, 2008, for pre-existing limited partnerships electing to be governed by 2008 Act, and for all other limited partnerships on Jan. 1, 2010)

Independent contractor defined under workers' compensation laws. *Lab. Code § 3353*

Liability of motor vehicle owner. *Veh. Code § 17150*

Limitation of liability of owner, bailee, and personal representative. *Veh. Code § 17151*

Liability of bailee of motor vehicle owner. *Veh. Code § 17154*

Liability for damages to streets, highways, or appurtenances. *Veh. Code § 17300(a)*

Liability for willful damage to or destruction of memorial sign placed by Department of Transportation. *Veh. Code § 17300(b)*

Liability for costs of removal of vehicle contents deposited on streets, highways, or appurtenances. *Veh. Code § 17300(c)*

Liability of owner for acts of permissive operator creating liability under *Veh. Code § 17300(a)-(c)*. *Veh. Code § 17300(d)*

[6] Negligent Entrustment

Prohibition against permitting employee to drive vehicle of class for which employee not licensed. *Veh. Code § 14606*

Prohibition against permitting unlicensed minor to drive. *Veh. Code § 14607*

Prohibition against renting vehicle to unlicensed driver. *Veh. Code § 14608*

Owner's responsibility to maintain vehicle. *Veh. Code § 40001*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsVicarious LiabilityBaileesTortsNegligenceActionsNegligent EntrustmentTortsNegligenceStandards of CareSpecial CareCommon CarriersFamily LawFamily Relationships & TortsTort LiabilityChild TortsTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-82 California Forms of Pleading and Practice--Annotated § 82.32

§ 82.32 Decisions

[1] Negligence

Implied assumption of risk. *Knight v. Jewett (1992) 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

In action based on negligent investigation of accident, officer's failure to comply with police department manual containing mandatory language relating to guidelines for accident investigations supported jury instruction on presumption of negligence under *Evid. Code § 669*. *Clemente v. State of California (1985) 40 Cal. 3d 202, 214-215, 219 Cal. Rptr. 445, 707 P.2d 818*

"Guest statute" (embodied in former and current versions of *Veh. Code § 17158*), which denies recovery to nonpaying guest or car owner against negligent driver of car in which guest or owner was riding as passenger, is unconstitutional because violates guarantees of equal protection. *Cooper v. Bray (1978) 21 Cal. 3d 841, 855, 148 Cal. Rptr. 148, 582 P.2d 604* ; *Brown v. Merlo (1973) 8 Cal. 3d 855, 882, 106 Cal. Rptr. 388, 506 P.2d 212*

Comparative negligence. *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226*

Weather and road conditions, passenger's consumption of alochol and failure to wear seat belt, and speed of passenger's vehicle were not supervening causes to defendant's negligence in causing collision, although comparative negligence could be found. *Hardison v. Bushnell (1993) 18 Cal. App. 4th 22, 26-29, 22 Cal. Rptr. 2d 106*

Nondealer who sells used automobile is under no common-law duty to install seat belts before sale of vehicle. *Krawitz v. Rusch (1989) 209 Cal. App. 3d 957, 965, 257 Cal. Rptr. 610*

To invoke seat belt defense, defendant required to prove (1) whether in exercise of ordinary care plaintiff should have used seat belt that was available to plaintiff; (2) consequence to plaintiff, had seat belts been used. *Von Beltz v. Stuntman, Inc. (1989) 207 Cal. App. 3d 1467, 1481, 255 Cal. Rptr. 755*

In action based on negligent entrustment brought by estate of person killed by habitual drunk driver against persons

who gave car to driver as wedding present, trial court properly sustained demurrer without leave to amend when causation allegation was too tenuous to support cause of action, by failing to allege that donee would not have had ready access to vehicle without gift from donor, and plaintiff acknowledged that it could not further amend its complaint. *Talbott v. Csakany (1988) 199 Cal. App. 3d 700, 705-706, 245 Cal. Rptr. 136*

Transmission is essential component of truck's braking system; under *Veh. Code § 26453*, every owner has nondelegable duty to maintain all brakes and component parts in good condition and in good working order. *Kaley v. Catalina Yachts (1986) 187 Cal. App. 3d 1187, 1201, 232 Cal. Rptr. 384*

Purpose of ordinance prohibiting parking next to yellow curb, except for loading and unloading for limited time, is not to provide safety to motorists and pedestrians by promoting unobstructed passage in curb lane, but rather to provide access for persons loading and unloading; thus, plaintiff, as passing bicyclist who swerved to avoid vehicle parked in violation of ordinance, was not person whom ordinance was designed to protect. *Capolungo v. Bondi (1986) 179 Cal. App. 3d 346, 351-354, 224 Cal. Rptr. 326*

When concurrent negligence of two parties proximately contributes to cause injury, neither is free from liability because of negligence of other. *Harris v. City of Compton (1985) 172 Cal. App. 3d 1, 10, 217 Cal. Rptr. 884*

Absent special circumstances putting automobile owner on notice that his or her car is likely to be stolen, and that thief is likely to be incompetent driver, owner of automobile who leaves key in ignition, with "for sale" sign on car, is not subject to liability for injuries caused to third persons when thief has accident. *Archer v. Sybert (1985) 167 Cal. App. 3d 722, 729, 213 Cal. Rptr. 486*

Express assumption of risk. *Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd. (1983) 147 Cal. App. 3d 309, 318, 195 Cal. Rptr. 90*

Absent some fact brought to his or her attention that would cause person of ordinary prudence to act otherwise, passenger in automobile has no duty to observe traffic conditions on highway, and his or her failure to do so, without more, does not support finding of comparative negligence. *Casey v. Russell (1982) 138 Cal. App. 3d 379, 386-387, 188 Cal. Rptr. 18*

Licensed driver teaching another to drive is under duty to exercise reasonable care in supervising and advising student. *Kostecky v. Henry (1980) 113 Cal. App. 3d 362, 372, 170 Cal. Rptr. 197*

Driver who negligently sheared off power line pole was liable for damages to compensate nearby manufacturer for burnt-out electric motor (caused by power surge when line pole went down), and for wages paid to employees idled by consequent power outage. *George A. Hormel & Co. v. Maez (1979) 92 Cal. App. 3d 963, 966-970, 155 Cal. Rptr. 337*

[2] Products Liability

Strict liability of manufacturer and retailer generally. *Gherna v. Ford Motor Co. (1966) 246 Cal. App. 2d 639, 649-650, 55 Cal. Rptr. 94*

Strict liability of manufacturer and retailer with respect to bystander. *Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 587, 75 Cal. Rptr. 652, 451 P.2d 84*

Legal Topics:

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

TortsNegligenceDefensesAssumption of RiskGeneral OverviewTortsProducts LiabilityGeneral OverviewTortsNegligenceProofViolations of LawOrdinancesTortsNegligenceActionsNegligent EntrustmentTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-82 California Forms of Pleading and Practice--Annotated § 82.33

§ 82.33 Internet References

Matthew Bender. This site includes links to Matthew Bender publications and Shepard's citation service. http://www.bender.com

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[Reserved]

§§ 82.34[Reserved]

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PART IV. PROCEDURAL CHECKLISTS

8-82 California Forms of Pleading and Practice--Annotated § 82.40

§ 82.40 Plaintiff's Checklist

[1] Negligence

☐ Determine persons or entities liable [*see § 82.10[4]*].

- ☐ Driver of other vehicle
- ☐ Manufacturer of automobile
- ☐ Retailer of automobile
- ☐ Service garage
- ☐ Automobile mechanic
- ☐ Public entity
- ☐ Municipality
- ☐ Common Carrier [*see § 82.10[1][g]*].

☐ Determine whether anyone is vicariously liable for any individually named defendants [*see § 82.16*].

☐ Owner of other vehicle

☐ Parents or custodian of minor driver

☐ Person who signed application for minor's driver's license

☐ Employer of driver

☐ Partnership

☐ Principal of agency

☐ Joint Venturers

[2] Negligent Entrustment

☐ Determine basis for negligent entrustment [*see Merry v. Knudsen Creamery Co. (1949) 94 Cal. App. 2d 715, 721, 211 P.2d 905* ; *see also § 82.11*].

☐ Owner of other vehicle entrusted defective automobile to another person.

☐ Owner of other vehicle entrusted automobile to incompetent driver.

☐ Establish causation [*see § 82.11*].

☐ Defective condition of automobile caused collision and damages.

☐ Driver's incompetence caused collision and damages.

[3] Negligent Hiring and Supervision by Employer

☐ Determine basis for negligent hiring [*see Doe v. Capital Cities (1996) 50 Cal. App. 4th 1038, 1055, 58 Cal. Rptr. 2d 122* ; *see also § 82.12*].

☐ Driver of other vehicle was employee acting within scope of employment.

☐ Employer hired or retained him or her, with actual or constructive knowledge of the employee's incompetence or unfitness.

☐ The driver's incompetence or unfitness caused the collision, resulting in injury or property damages to the plaintiff.

☐ Determine basis for negligent supervision [*see City of Los Angeles v. Superior Court (1973) 33 Cal. App. 3d 778, 783* ; *see also § 82.12*].

☐ Driver of other vehicle was employee acting within scope of employment.

☐ Employer negligently failed to supervise him or her.

☐ As a consequence of the negligent supervision, the employee's conduct caused the collision, resulting in injury or property damages to the plaintiff.

[4] Negligent Infliction of Emotional Distress: Bystander's Cause of Action

☐ Determine basis for negligent infliction of emotional distress [*see Thing v. La Chusa (1989) 48 Cal. 3d 644, 667-668, 257 Cal. Rptr. 865, 771 P.2d 814* ; *see also § 82.13*].

☐ Client is closely related to the injured victim, e.g., a relative living in the same household, parent, sibling, child, or grandparent.

☐ Client was present at the collision.

☐ The client was that the collision caused injury to the victim.

☐ The client suffered serious emotional distress resulting from witnessing the injury.

[5] Wrongful Death

☐ Determine whether client has standing [*see Code Civ. Proc. § 377.60*; *see also § 82.14[1]*].

☐ Client is the decedent's surviving spouse, child, and issue of a deceased child.

☐ There is no surviving issue of the decedent, and the client would be entitled to the property of the decedent by intestate succession.

☐ Client is the putative spouse, child of the putative spouse, stepchild, or parent, dependent on the decedent.

☐ Client is a minor who at the time of the decedent's death resided for the previous 180 days in the decedent's household, and was dependent on the decedent for one-half or more of his or her support.

[6] Survival Action

☐ Determine whether client has standing [*Code Civ. Proc. § 377.34*; *see also § 82.14[2]*].

☐ Client is personal representative of decedent.

☐ Client is successor in interest of decedent.

[7] Products Liability

☐ Determine basis for products liability action based on strict liability [*see Gherna v. Ford Motor Co. (1966) 246 Cal. App. 2d 639, 649-650, 55 Cal. Rptr. 94* ; *see also § 82.17*].

☐ Defect in manufacturing.

☐ Defect in design.

☐ Inadequate warning of danger.

☐ Determine defendants [*see § 82.17*].

☐ Manufacturer of automobile.

☐ Retailer of automobile.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsWrongful Death & Survival ActionsGeneral OverviewTortsProducts LiabilityGeneral OverviewTortsBusiness TortsNegligent Hiring & SupervisionGeneral OverviewTortsNegligenceActionsNegligent EntrustmentTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 82.41 Defendant's Checklist

[1] Negligence

☐ Determine applicable affirmative defenses [*see § 82.10[5]*].

- ☐ Comparative Negligence
- ☐ Assumption of the Risk
- ☐ Statute of Limitations

[2] Products Liability

☐ Determine applicable affirmative defenses [*see § 82.17[7]*].

- ☐ Comparative negligence
- ☐ Misuse of product
- ☐ Modification or alteration of product

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesAssumption of RiskGeneral OverviewTortsNegligenceDefensesComparative

NegligenceGeneral OverviewTortsProducts LiabilityGeneral OverviewTortsNegligenceGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§§ 82.42[Reserved]

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8-82 California Forms of Pleading and Practice--Annotated § 82.60

§ 82.60 Nature and Effect of Rules of the Road

[1] Rules of the Road Generally

Rules of road. *Veh. Code §§ 21000-23336*

Definition of traffic includes pedestrians, ridden animals, vehicles, street cars, and other conveyances, either singly or together, while using any highway for purposes of travel. *Veh. Code § 620*

Operation of vehicles on the highways. *Veh. Code §§ 21000-23336*

Vehicle defined as device by which any person or property may be propelled, moved, or drawn on highway, excepting device moved exclusively by human power or used exclusively on stationary rails or tracks. *Veh. Code § 670*

Highway and street defined as way or place of whatever nature, publicly maintained and open to use of public for purposes of vehicular travel. *Veh. Code §§ 360, 590*

Roadway defined as that portion of highway improved, designed or ordinarily used for vehicular travel. *Veh. Code § 530*

[2] Effect of Violation

Presumption of lack of due care based on violation of statute, ordinance, regulation. *Evid. Code § 669(a)*; for further discussion, see *California Torts, § 20.60[2]*

Violation of prima facie speed limit does not create presumption of negligence in civil action. *Veh. Code § 40831*; for further discussion, see *California Torts, § 20.63[4]*

Criminal conviction of any provision of Vehicle Code or of any municipal ordinance relating to operation of motor vehicle does not have any res judicata or collateral estoppel effect in subsequent civil action. *Veh. Code § 40834*

Local authorities may adopt rules and regulations by ordinance or resolution. *See Veh. Code § 21100*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceProofViolations of LawGeneral OverviewTransportation LawPrivate VehiclesTraffic RegulationGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-82 California Forms of Pleading and Practice--Annotated § 82.61

§ 82.61 Road Signs and Markings

[1] Authority to Install

Department of Transportation must place and maintain, or cause to be placed and maintained, appropriate signs, signals, and other traffic control devices with respect to highways under its jurisdiction. *Veh. Code § 21350*; see *California Torts, § 20.61[1]*

Department of Transportation may place and maintain signs, signals, or other traffic control devices necessary to indicate properly and to carry out Vehicle Code, or to warn or guide traffic on highways. *Veh. Code § 21350*

Department of Transportation may erect stop signs at certain railroad crossings. *Veh. Code § 21351.5*

Department of Transportation may erect stop signs at entrance to state highway, and may erect and maintain traffic control signal on state highway regulating turning of vehicles on highway, or use of specified lanes or portions of the highway. *Veh. Code § 21352*

Local authorities must place and maintain traffic control devices and signs. *Veh. Code §§ 21351-21351.7*

[2] Authorized Signs, Signals, and Traffic Control Devices

Erection and maintenance of traffic signs. *See Veh. Code §§ 21354-21374*

Stop signs. *Veh. Code §§ 21354-21355*

Yield signs. *Veh. Code § 21356*

Speed restriction signs. *Veh. Code §§ 21357-21359*

Street name signs. *Veh. Code § 21366*

Directional markings for tourists. *Veh. Code § 21374*

Other traffic control devices. *See Veh. Code §§ 21451-21460.5*

Department of Transportation must adopt rules and regulations prescribing uniform standards and specifications for all official traffic control devices. *Veh. Code § 21400*; 21 Cal. Code Reg. §§ 1409.1-1409.9

Permissible traffic control devices. *Veh. Code §§ 21374, 21401*

[3] Motorists' Duty to Obey Official Traffic Control Devices

Driver of vehicle required to obey official traffic signal. *Veh. Code § 21462*

Unlawful to disobey signs or signals, local traffic ordinance, or device regulating traffic and pedestrians on state highways. *Veh. Code § 21461(a)*

[4] Effect of Failure to Follow Signs or Devices

Failure to obey signs and signals unlawful. *Veh. Code § 21462*; for further discussion, see *California Torts, § 20.61*

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesTraffic RegulationGeneral OverviewGovernmentsPublic ImprovementsBridges & RoadsTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-82 California Forms of Pleading and Practice--Annotated § 82.62

§ 82.62 Starting a Vehicle

No person may start vehicle stopped, standing, or parked on highway until movement can be made with reasonable safety. *Veh. Code § 22106*; for further discussion, see *California Torts, § 20.62*

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8-82 California Forms of Pleading and Practice--Annotated § 82.63

§ 82.63 Speed

[1] Speed Limits Generally

Regulation of vehicle speed. *Veh. Code §§ 22348-22413*

Maximum speed limits applicable to given street or highway.

See *Veh. Code § 22352*; see also *Veh. Code §§ 22349, 22366* (maximum state speed limits not in contravention of federal funding requirements)

General duty of motorist not to drive at unsafe speed. *Veh. Code § 22350*

Specified maximum speed limit. *Veh. Code §§ 22349, 22366*

[2] Prima Facie Speed Limits

Prima facie speed limits generally: 15 and 20 miles per hour in specified areas. *Veh. Code § 22352*; for further discussion, see *California Torts, § 20.63*

Proof of violation of prima facie speed limits in *Veh. Code § 22352* does not establish negligence as matter of law. *Veh. Code § 40831*

Maximum highway speed limit: 65 miles per hour. *Veh. Code § 22349*; see *Veh. Code § 22356* (exceptions)

Prima facie speed limit for railway grade crossing. *Veh. Code § 22352(a)(1)(A)*

Prima facie speed limit for intersection of highway. *Veh. Code § 22352(a)(1)(B)*; see *Veh. Code § 365* (definition of intersection)

Prima facie speed limit for alley. *Veh. Code § 22352(a)(1)(C)*; see *Veh. Code § 110* (defining alley)

Prima facie speed limit for highway other than state highway in business or residence district. *Veh. Code § 22352(a)(2)(A)*; see *Veh. Code §§ 235*, (defining business district), 240 (determination whether or not highway is within business or residential district), 515 (defining residence district)

Prima facie speed limit for school premises. *Veh. Code § 22352(a)(2)(B)*

Prima facie speed limit on street adjacent to children's playground in public park. *Veh. Code §§ 22357, 22357.1*

Changes in prima facie limits by local authority. *Veh. Code § 22357 et seq.*

Changes in prima facie limits by State Department of Transportation. *Veh. Code § 22354 et seq.*

[3] Duty of Care Regarding Speed

Basic speed law: reasonable or prudent speed on highway. *Veh. Code § 22350*; for further discussion, see *California Torts, § 20.63*

Driving on highway at slow speed prohibited when reasonable movement of traffic impeded. *Veh. Code § 22400(a)*

Stopping vehicle on highway so as to impede reasonable movement of traffic prohibited. *Veh. Code § 22400(a)*

Basic speed law: driving on highway at excessive or unsafe speed prohibited. *Veh. Code § 22351(a)*

Speed contest prohibited. *Veh. Code § 23109*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceStandards of CareReasonable CareReasonable PersonTortsTransportation TortsMotor VehiclesPersonal VehiclesTransportation LawCommercial VehiclesTraffic Regulation

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8-82 California Forms of Pleading and Practice--Annotated § 82.64

§ 82.64 Driving on Right Side of Road

[1] General Rule and Exceptions

Vehicle must be driven on right side of roadway on all highways, with specified exceptions. *Veh. Code § 21650*

Exception when overtaking and passing another vehicle proceeding in same direction. *Veh. Code § 21650(a)*

Exception when making left turn. *Veh. Code § 21650(b)*

Exception when right half of roadway is closed to traffic because of construction or repair. *Veh. Code § 21650(c)*

Exception when roadway restricted to one-way traffic. *Veh. Code § 21650(d)*

Exception when roadway is too narrow. *Veh. Code § 21650(e)*

Exception when vehicle is necessarily traveling so slowly as to impede normal movement of traffic. *Veh. Code § 21650(f)*

When highway has been divided by intermittent barrier or dividing section that separates two or more opposing lanes of traffic, driver must drive to right of barrier or divider. See *Veh. Code § 21651(b)*; for further discussion, see *California Torts, § 20.64*

Vehicle proceeding on highway more slowly than normal traffic moving in same direction must be driven in right-hand lane or as close as practicable to right-hand edge or curb, except when overtaking and passing another vehicle proceeding in same direction or when preparing for left turn at intersection or into private road or driveway. *Veh. Code § 21654(a)*

On roadway that is divided into three lanes but is not one-way, vehicle may not be driven in extreme left-hand lane, nor in center lane; except when overtaking and passing another vehicle, to turn left, or when center lane is allocated

exclusively to traffic moving in same direction. *Veh. Code § 21659*

[2] Driving to Right of Double Solid Lines

Driving to left of double solid lines prohibited, with specified exceptions. *Veh. Code § 21460(a)*

Exception when line on driver's side is broken, and driver overtakes and passes other vehicles. *Veh. Code § 21460(b)(1)*

Exception when driving in designated two-way left turn lane as permitted by *Veh. Code § 21460.5*. *Veh. Code § 21460(b)(2)*

Double solid lines do not prevent driver from turning left across lines at any intersection or into or out of driveway, from making proper U-turn, or from complying with signs designating off-center traffic lanes (*Veh. Code § 21657*). *Veh. Code § 21460(c)*

[3] Passing

Drivers proceeding in opposite directions must pass each other to right; except when roadway has been divided into traffic lanes, each driver must give other at least one-half of main traveled portion of roadway whenever possible. *Veh. Code § 21660*

Driver of vehicle overtaking another vehicle proceeding in same direction must pass to left at safe distance without interfering with safe operation of overtaken vehicle, subject to specified exceptions. See *Veh. Code § 21750*

Passing on right when vehicle overtaken is making left turn. *Veh. Code § 21754(a)*

Passing on right on highway within business or residential district with sufficient width for two or more lines of moving vehicles in same direction. *Veh. Code § 21754(b)*

Passing on right on highway outside of business or residential district with two or more clearly marked lines for traffic in same direction. *Veh. Code § 21754(c)*

Passing on right on one-way street. *Veh. Code § 21754(d)*

Passing on right on highway divided into two roadways where traffic is restricted to one direction on each roadway. *Veh. Code § 21754(e)*

Except on one-way roadway, passing on left is prohibited on crest of grade or curve in highway where driver's view is obstructed. *Veh. Code § 21752(a)*

Except on one-way roadway, passing on left is prohibited when view is obstructed within 100 feet of bridge, viaduct, or tunnel. *Veh. Code § 21752(b)*

Except on one-way roadway, passing on left is prohibited within 100 feet of, or when traversing intersection or railroad grade crossing. *Veh. Code § 21752(c)*

Except on one-way highway, no vehicle may be driven to left side of center of roadway in overtaking and passing another vehicle proceeding in same direction unless left side is clearly visible and free of oncoming traffic. *Veh. Code § 21751*

Overtaking vehicle must return to right-hand side of roadway before coming within 100 feet of vehicle approaching from opposite direction. *Veh. Code § 21751*

Driver of motor vehicle may overtake and pass another vehicle on right only under safe conditions. *Veh. Code § 21755*

Except when passing on right is permitted, driver of overtaken vehicle must safely move to right-hand side of highway in favor of overtaking vehicle after audible signal or momentary flash of headlights by overtaking vehicle, and must not increase speed until completely passed, although driver need not drive on shoulder to allow other vehicle to pass. *Veh. Code § 21753*; for further discussion, see *California Torts, § 20.64* (Matthew Bender)

Passing streetcar, trolley, or bus. *Veh. Code §§ 21756-21757*

Passing animals. *Veh. Code § 21759*

Passing slow vehicle on grade outside of business or residential district. *Veh. Code § 21758*

Duty of care of driver of passing vehicle. *Veh. Code §§ 21750, 21751*; for further discussion, see *California Torts, § 20.64* (Matthew Bender)

Passing on right permitted only when safe. *Veh. Code § 21755*

[4] One-Way Streets

Authorities may designate highway, roadway, part of roadway, or specific lanes as one-way. *Veh. Code § 21657*

Vehicle need not be driven on right side of one-way roadway. *Veh. Code § 21650(d)*

Vehicle may pass on right on one-way roadway. *Veh. Code § 21754(d)*

Vehicle may pass inter-urban electric or street car on left on one-way roadway. *Veh. Code § 21757(b)*

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§ 82.65 Additional Driving Rules

[1] Mountain Driving

If width of roadway on grade is insufficient to permit approaching vehicles from opposition direction to pass, driver of vehicle descending grade must yield right-of-way to vehicle ascending grade, and if necessary must back up until vehicles can pass. *Veh. Code § 21661*

Driver traveling through defiles (narrow passes) or canyons, or on mountain highways, must hold vehicle under control at all times. *Veh. Code § 21662*

Driver traveling through defiles (narrow passes) or canyons, or on mountain highways, must drive as near to right-hand edge of roadway as is reasonably possible if roadway has no marked centerline. *Veh. Code § 21662(a)*

Driver traveling through defiles (narrow passes) or canyons, or on mountain highways, must sound horn when approaching any curve where view is obstructed within distance of 200 feet along highway, if roadway is too narrow to drive entirely to right of center. *Veh. Code § 21662(b)*

[2] Interference With Ability to Drive Safely

No person may drive vehicle when it is so loaded, or when there so many persons in front seat, as to obstruct driver's view to front or sides, or as to interfere with driver's control of vehicle. *Veh. Code § 21700*

No person, except driving instructor or examiner, may willfully interfere with driver or with mechanism of vehicle in manner that affects driver's control of vehicle. *Veh. Code § 21701*

Generally, one may not drive motor vehicle with any object or material placed, displayed, installed, affixed, or applied in or on vehicle that obstructs or reduces driver's clear view through windshield or side windows. *Veh. Code § 26708*; see *Veh. Code §§ 26708.2*, *26708.5* (exceptions)

Passengers permitted only in vehicles and parts of vehicles designed or intended for use of passengers, with specified

exceptions. See *Veh. Code § 21712*

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§ 82.66 Signaling

[1] Appropriate Signals

Signals required by *Veh. Code §§ 22100-22113* must be given by signal lamp if the vehicle is required to be, and is, equipped with them; they must be given by hand and arm signals if the vehicle is not required to be, and is not, equipped with them, or if required signal lamps are inoperable. See *Veh. Code § 22110*

Left turn signal--hand and arm extended horizontally beyond side of vehicle. *Veh. Code § 22111(a)*

Right turn--hand and arm extended upward beyond side of vehicle, except that bicyclist may extend right hand and arm horizontally to right side of bicycle. *Veh. Code § 22111(b)*

Stop or sudden decrease of speed signal--hand and arm extended downward beyond side of vehicle. *Veh. Code § 22111(c)*

Signal of intention to turn right or left must be given continuously during last 100 feet traveled by vehicle before turning. *Veh. Code § 22108*

[2] Requirement That Signals Be Given

Driver may not turn vehicle from direct course or move right or left on roadway until movement can be made with reasonable safety and appropriate signal given. *Veh. Code § 22107*; see *Veh. Code §§ 22100-22113* (required signals)

Driver may not stop or suddenly decrease speed without first giving appropriate signal to driver of any vehicle immediately to rear. *Veh. Code § 22109*; see *Veh. Code §§ 22100-22113* (required signals); for further discussion, see *California Torts, § 20.66* (Matthew Bender)

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§ 82.67 Turning

Driver may turn vehicle from direct course or move right or left on roadway only when safe, and on proper signal. *Veh. Code § 22107*; see *Veh. Code §§ 22100-22113* (required signals); *see also* discussion in *California Torts, § 20.67* (Matthew Bender)

Driver of vehicle intending to turn right on highway must stay to right-hand curb or edge of roadway, with specified exceptions. *Veh. Code § 22100*

Driver of vehicle intending to turn right on highway must turn as close as practicable to right-hand curb or edge of roadway, with specified exceptions. See *Veh. Code § 22100(a)*

Driver of vehicle intending to turn left must stay as close as practicable stay to left-hand edge of extreme left-hand lane or portion of roadway lawfully available to traffic moving in same direction, with specified exceptions. See *Veh. Code § 22100(b)*

Requirements and limitations for turns in intersection must be evidenced by signs or traffic control devices. See *Veh. Code § 22101(b), (c)*

U-turn defined as turning of vehicle on a highway to proceed in opposite direction, whether or not accomplished by one continuous movement. *Veh. Code § 665.5*

Unless sign prohibits U-turn, driver facing green light may make U-turn, yielding right-of-way to other traffic and to pedestrians lawfully within intersection or adjacent crosswalk. *Veh. Code § 21451(a)*

Driver facing left green arrow may make U-turn unless prohibited by sign. *Veh. Code § 21451(b)*

Driver must not make U-turn at intersection controlled by traffic signal or device except as permitted by statute, and then only from far left-hand lane that is lawfully available. *Veh. Code § 22100.5*

U-turn in business district prohibited, except at intersection or on divided highway where opening has been provided in accordance with *Veh. Code § 21651*. *Veh. Code § 22102*; see *Veh. Code §§ 235, 240* (definition of business district)

U-turn in residence district prohibited when any other vehicle is approaching from either direction within 200 feet, except at intersection when approaching vehicle is controlled by traffic control device. *Veh. Code § 22103*

U-turn in front of driveway entrance or approach to fire station prohibited; turning around in driveway entrance or approach to fire station prohibited. *Veh. Code § 22104*

U-turn on curve, or on approach to or near crest of grade prohibited when not visible to vehicle approaching from either direction within 200 feet. *Veh. Code § 22105*

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§ 82.68 Right-of-Way

[1] Definition

Right-of-way is privilege of immediate use of highway. *Veh. Code § 525*

[2] Intersections

Driver of vehicle approaching intersection must yield right-of-way to vehicle that has entered intersection from different highway. *Veh. Code § 21800(a)*

When two vehicles simultaneously enter intersection from different highways, driver of vehicle on left must yield right-of-way to driver of vehicle on his or her immediate right; but driver of vehicle on terminating highway must yield right-of-way to any vehicle on intersecting continuing highway. *Veh. Code § 21800(b)(1)* (also defining terminating highway); for further discussion, see *California Torts, § 20.68* (Matthew Bender)

Vehicle that enters intersection first has right-of-way. *Veh. Code § 21800(a)*

When vehicle approaches intersection with inoperative traffic control signals, driver must stop; driver may then proceed through intersection with caution when safe. *Veh. Code § 21800(d)(1)*

When two vehicles from different highways simultaneously enter intersection with inoperative traffic control signals, driver on left must yield right-of-way to vehicle on his or her immediate right; but driver of any vehicle on terminating highway must yield right-of-way to any vehicle on intersecting continuing highway. *Veh. Code § 21800(d)(2)*

Veh. Code § 21800 inapplicable to intersection controlled by traffic control signal or yield right-of-way sign, or to intersection controlled by stop signs from fewer than all directions, or when vehicles approach each other from opposite directions and driver of one vehicle turns left. *Veh. Code § 21800(e)*

When two vehicles from different highways simultaneously enter intersection controlled from all directions by stop signs, driver on left must yield right-of-way to vehicle on his or her immediate right. *Veh. Code § 21800(c)*

Right-of-way at intersection when all approaches do not have stop sign. See *Veh. Code § 21802*

Right-of-way at intersection controlled by yield right-of-way sign. See *Veh. Code § 21803*

[3] Crossing or Entering Highway

Right-of-way when entering or crossing highway from public or private property or alley. See *Veh. Code § 21804*; for further discussion, see *California Torts, § 20.68* (Matthew Bender)

Designation of intersection of highway as bridle path or equestrian crossing; driver of vehicle must yield right-of-way to horseback rider crossing roadway at equestrian crossing. See *Veh. Code § 21805*

[4] Emergency Vehicles

Right-of-way of authorized emergency vehicle. See *Veh. Code § 21806*

Driver of authorized emergency vehicle has duty to drive with due regard for safety of all persons and property. *Veh. Code § 21807*; for discussion of the immunity of operators of authorized emergency vehicles from liability under certain circumstances, see *California Torts, § 20.55[3]* (Matthew Bender)

[5] Turning

Right-of-way when vehicle intends to turn left or to complete U-turn on highway, or to turn left into public or private property or alley. See *Veh. Code § 21801*; for further discussion, see *California Torts, §§ 20.67, 20.68* (Matthew Bender)

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§ 82.69 Stopping

[1] Duties to Other Vehicles Generally

Driver may not stop or suddenly decrease speed on highway without first giving appropriate signal to driver of vehicle immediately to rear when there is opportunity to give signal. *Veh. Code § 22109*

Hand and arm signal; signal lamp. *Veh. Code § 22110*; *see also* discussion in *California Torts, § 20.66* (Matthew Bender)

Driver must not follow another vehicle more closely than is reasonable and prudent. *Veh. Code § 21703*

[2] Railroad Crossings

Driver of vehicle approaching stop sign at intersection or railroad grade crossing must stop at limit line, if marked, otherwise before entering crosswalk on near side of intersection or before crossing first track or entrance to railroad grade crossing; if no limit line or crosswalk, driver must stop at entrance to intersecting roadway. *Veh. Code § 22450(a)*

Stopping at railroad grade crossing during warning by mechanical signal device or flagman, or when approaching train or car is visible or emitting audible signal and is immediate hazard; prohibition against proceeding through closed railroad crossing gate. See *Veh. Code § 22451(a)*; see also *Veh. Code §§ 22452, 22452.5* (duties of drivers of certain vehicles regarding railroad grade crossing); for further discussion of duties of motorists at railroad crossings, see *California Torts, § 20.70* (Matthew Bender)

[3] School Buses

Duty to stop for stopped school bus with flashing red lights. *Veh. Code § 22454(a)*; see *Veh. Code § 27906* (required school bus signs)

No duty to stop when meeting or passing school bus that is on other highway of divided highway or multiple-lane highway (that is, highway having two or more lanes of travel in each direction). *Veh. Code § 22454(b)*

Requirement for passenger restraint system in purchased or leased school buses manufactured on or after January 1, 2002. *Veh. Code § 27316*

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§ 82.70 Parking

[1] No Parking in Specified Areas

No person may stop, park, or leave standing any vehicle whether attended or unattended, except when necessary to avoid conflict with other traffic or in compliance with directions of peace officer or official traffic control device, in any place specified by statute. *Veh. Code § 22500*

No parking within intersections, except adjacent to curbs as permitted by local ordinance. *Veh. Code § 22500(a)*

No parking on crosswalk, except that bus engaged as common carrier or taxicab may stop in unmarked crosswalk to load or unload passengers when authorized by local ordinance. *Veh. Code § 22500(b)*

No parking between safety zone and adjacent right-hand curb or within area between zone and curb as indicated by sign or red paint on curb. *Veh. Code § 22500(c)*

No parking within 15 feet of driveway entrance to fire station, except for fire department vehicles. *Veh. Code § 22500(d)*

No parking in front of public or private driveway, except that bus engaged as common carrier, schoolbus, or taxicab may stop to load or unload passengers when authorized by local ordinance. *Veh. Code § 22500(e)*

No parking on sidewalk, except electric carts when authorized by local ordinance. *Veh. Code § 22500(f)*; see *Veh. Code § 21114.5*

No parking alongside or opposite street or highway excavation or obstruction when to do so would obstruct traffic. *Veh. Code § 22500(g)*

No parking on roadway side of vehicle stopped, parked, or standing at curb or edge of highway. *Veh. Code § 22500(h)*

Except as provided under *Veh. Code § 22500.5* (permitting schoolbuses to stop to load or unload passengers at bus stops), no parking alongside curb space authorized for loading and unloading of passengers of bus engaged as common carrier in local transportation when indicated by sign or red paint on curb. *Veh. Code § 22500(i)*

No parking in tube or tunnel, except for authorized vehicles. *Veh. Code § 22500(j)*

No parking on bridge, except for authorized vehicles; parking may otherwise be expressly permitted; buses may stop under proper conditions. *Veh. Code § 22500(k)*

No parking in front of curb modified for wheelchair access. *Veh. Code § 22500(l)*

No parking or stopping in location designated as fire lane. *Veh. Code § 22500.1*

Stopping or temporary parking of disabled vehicle may be permitted when otherwise prohibited. See *Veh. Code § 22504(b)*

Parking on highways subject to regulation by Department of Transportation pursuant to posted signs. See *Veh. Code § 22505(a)*

No stopping, parking, or standing on freeway that has full control of access, and no crossings at grade, with specified exceptions. See *Veh. Code § 21718*

[2] Authority to Regulate Parking

Regulation of stopping, parking, standing on streets and highways for purpose of snow removal. See *Veh. Code § 22510*

Regulation of parking or standing within 100 feet of intersection. See *Veh. Code § 22507*

Regulation of stopping, standing, or parking on state highway. *Veh. Code § 22506*

Regulation of parking or standing on certain streets or highways between hours of 2 a.m. and 6 a.m. *Veh. Code § 22507.5(a)*

Regulation of parking for vehicles transporting hazardous materials. See *Veh. Code §§ 22507.5(a), 31303(a)*

Regulation of parking or standing on any residential street, of commercial vehicles weighing 10,000 pounds or more. *Veh. Code § 22507.5(a)*

Regulation of parking or standing on designated streets or highways for purpose of street sweeping. *Veh. Code § 22507.6*

Regulation requiring blocking of wheels on grade in excess of three percent in business or residence district. *Veh. Code § 22509*

[3] Duties of Driver of Parked Vehicle

Duty to set brakes and stop motor of unattended vehicle parked on highway. *Veh. Code § 22515(a)*; for discussion of liability of vehicle owner for injury or damage caused by car thief when owner violated this statute, see *California Torts, § 20.01[8]* (Matthew Bender); for discussion of liability for runaway vehicles, see *California Torts, § 20.71[3]* (Matthew Bender)

Person in control of vehicle must set brakes or block wheels of vehicle standing on highway to prevent movement. *Veh. Code § 22515(b)*

No person may leave locked vehicle standing with person locked inside who cannot readily escape. *Veh. Code § 22516*

Person prohibited from opening vehicle door into moving traffic unsafely. *Veh. Code § 22517*

[4] Duty to Illuminate Certain Vehicles Parked at Night

Vehicles at least 80 inches wide are required to carry specified warning lights or reflectors, and to use them when vehicle is disabled on or near roadway in darkness. *Veh. Code § 25300*; see *Veh. Code § 25100*

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§ 82.71 Backing

Backing vehicle on highway permitted only when safe. *Veh. Code § 22106*; for discussion of negligence in backing up a vehicle, see *California Torts, § 20.72* (Matthew Bender)

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§ 82.72 Towing

Requirements for attaching vehicles to each other. See *Veh. Code §§ 29000-29009*; for discussion of negligence in towing, see *California Torts, § 20.74* (Matthew Bender)

Requirements of safety chain or cable. See *Veh. Code § 29004*

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§ 82.73 Vehicles Other Than Automobiles

[1] Different Classes of Vehicles

Different classes of driver's licenses for different classes of vehicles. See *Veh. Code § 12804.9*

[2] Trucks

[a] Weight, Size, and Height Limitations

Size, weight, and loads of vehicles operated on highway. *Veh. Code §§ 35000-35796*

Total outside width of any vehicle or its load must not exceed 102 inches, except as otherwise provided in *Veh. Code §§ 35100-35111*. *Veh. Code § 35100(a)*; for further discussion, see *California Torts, § 20.75* (Matthew Bender)

No vehicle or load may exceed height of 14 feet measured from surface on which vehicle stands, except that double-deck bus may not exceed height of 14 feet, 3 inches. *Veh. Code § 35250*; see also *Veh. Code § 35252* (pilot car)

Manufactured home may be exempted from height limitations pursuant to permit. See *Veh. Code §§ 35780, 35790*

No vehicle may exceed length of 40 feet, with specified exceptions. See *Veh. Code § 35400(a), (b)*

No combination of vehicles coupled together, including attachments, may exceed total length of 65 feet, with specified exceptions. See *Veh. Code § 35401*

Combination of vehicles coupled together, including attachments, consisting of truck tractor, semitrailer, and semitrailer or trailer, may not exceed total length of 75 feet, if the length of neither the semitrailers nor the trailer in the combination of vehicles exceeds 28 feet 6 inches. *Veh. Code § 35401(b)*

Gross weight imposed on highway by wheels of any one axle must not exceed 20,000 pounds; gross weight on any one wheel, or wheels, supporting one end of an axle, and resting on roadway, must not exceed 10,500 pounds; exception for

vehicles carrying livestock. *Veh. Code § 35550*

Maximum weights that may be imposed on roadway by group of two or more consecutive axles. See *Veh. Code §§ 35551, 35551.5*

Miscellaneous maximum weights. See *Veh. Code §§ 35552-35555*

[b] Speed, Lane, Load Restrictions

Maximum truck speed. *Veh. Code § 22406(a)*; for further discussion, see *California Torts, § 20.75*

Motortruck or truck tractor with three or more axles, or motortruck or truck tractor drawing another vehicle must be driven in designed lane or right-hand lane, with specified exceptions. See *Veh. Code § 22348(c)*; see also *Veh. Code §§ 22406(a)* (specified vehicles), *21655* (designated lanes)

No vehicle may be driven or moved on highway unless so constructed, covered, or loaded as to prevent its contents from dropping, sifting, leaking,blowing, spilling, or otherwise escaping from it. *Veh. Code § 23114*; see *13 Cal. Code Reg. §§ 1300-1425*

[3] Requirements for Particular Vehicles

Red emergency reflectors required on certain vehicles. See *Veh. Code § 25300*

Requirements for vehicles transporting explosives. See *Veh. Code §§ 31600-31620*

Requirements for vehicles transporting hazardous materials. See *Veh. Code §§ 32000-32005*

Requirements for vehicles transporting radioactive materials. See *Veh. Code §§ 33000-33002*

Requirements for vehicles transporting flammable and combustible liquids. See *Veh. Code §§ 34000-34100*

[4] Bicycles

[a] Definitions

Bicycle defined as device on which any person may ride, propelled exclusively by human power by means of belt, chain, or gears, and having one or more wheels. *Veh. Code § 231*

Bicycle path or bike path defined as Class I bikeway. *Veh. Code § 231.5*

Bicycle path crossing defined. *Veh. Code § 231.6*

Motorized bicycle defined as two-wheeled or three-wheeled device having fully operative pedals for propulsion by human power, or having no pedals if powered solely by electrical energy, and automatic transmission and motor that produces fewer than two gross brake horsepower, and capable of maximum speed of not more than 30 miles per hour on level ground. *Veh. Code § 406*

[b] Rights and Duties of Bicycle Riders

Every person riding bicycle on highway has all rights and is subject to all provisions applicable to driver of vehicle under rules of road (*Veh. Code §§ 21000-23336*) and by *Veh. Code §§ 20000-20018, 39000-39011, 40000-41610*, and

42000-42277, except those provisions that by their very nature can have no application. *Veh. Code § 21200(a)*

Person operating bicycle on roadway at speed less than normal speed of traffic moving in same direction must ride as close as practicable to right-hand curb or edge of roadway, with specified exceptions. *Veh. Code § 21202(a)*

Bicycle operated on roadway or shoulder of highway must be operated in same direction as vehicles are required to be driven on roadway. *Veh. Code § 21650.1*

Person operating bicycle on roadway of highway, when highway carries traffic in one direction only and has two or more marked traffic lanes, may ride as near left-hand curb or edge as practicable. *Veh. Code § 21202(b)*

No person riding on bicycle or motorized bicycle may attach it or himself or herself to any streetcar or vehicle on roadway. *Veh. Code § 21203*

No person operating bicycle on highway may ride other than on or astride permanent and regular seat attached to bicycle, unless bicycle designed by manufacturer to be ridden without seat. *Veh. Code § 21204(a)*

No operator may allow person riding as passenger, and no person may ride as passenger, on bicycle on highway other than on or astride separate, attached seat. *Veh. Code § 21204(b)*

Seat for passenger 4 years old or younger or weighing 40 pounds or less must have adequate provision for retaining passenger in place and for protecting passenger from moving parts of bicycle. *Veh. Code § 21204(b)*

No person operating bicycle may carry any package, bundle, or article that prevents operator from keeping at least one hand on handlebars. *Veh. Code § 21205*

Person under 18 years of age (and passenger in restraining seat) must wear a properly fitted and fastened bicycle helmet when operating bicycle, or riding on bicycle as passenger, on street, bikeway, public bicycle path, or trail. *Veh. Code § 21212(a)*

Headlamps required. *Veh. Code § 21201(d)*

[c] Bicycle Lanes

Establishment of bicycle lanes. See *Sts. & Hy. Code §§ 24, 1720-1732*; *Veh. Code § 21207*

Use of bicycle lanes by bicycles. See *Veh. Code § 21208*

Use of bicycle lanes by motor vehicles and motorized bicycles restricted. See *Veh. Code § 21209*

[5] Motorcycles

Motorcycle defined as motor vehicle other than tractor having seat or saddle for use of rider, designed to travel on not more than three wheels in contact with ground (or four wheels with sidecar) *Veh. Code § 400*

Three-wheeled vehicle used by parking authorities is not motorcycle. *Veh. Code § 400(d)*

Motor-driven cycle is motorcycle with motor that displaces fewer than 150 cubic centimeters but is not motorized bicycle (*Veh. Code § 406*). *Veh. Code § 405*

One who operates motorcycle must possess class M1 license. *Veh. Code § 12804.9(b)(4)*

Regulation of motor-driven cycle, motorized bicycle, or motorized scooter on freeways. See *Veh. Code § 21960*

[6] Miscellaneous Vehicles

[a] Skateboards

Person under 18 years of age (and passenger) must wear properly fitted and fastened bicycle helmet while operating skateboard on street, bikeway, or trail. *Veh. Code § 21212(a)*

Regulation of use of skateboards on highways, sidewalks, or in roadways. See *Veh. Code § 21967*

No motorized skateboard may be propelled on any sidewalk, roadway, or any other part of highway, or on any bikeway, bicycle path or trail, equestrian trail, or hiking or recreational trail. *Veh. Code § 21968*

[b] Roller Skates

Regulation of roller skating on highway, sidewalk, or roadway. See *Veh. Code § 21969*

[c] Scooters

Person under 18 years of age (and passenger) must wear properly fitted and fastened bicycle helmet while operating motorized or nonmotorized scooter on street, bikeway, or trail. *Veh. Code § 21212(a)*

Regulation of motorized scooters. See *Veh. Code §§ 21220-21235*; see also *Veh. Code § 22411* (speed limit of 15 miles per hour for motorized scooters)

[d] Low-Speed Vehicles

Regulation of low-speed vehicles. See *Veh. Code §§ 21250-21266*; see also *Veh. Code § 385.5* (definition of low-speed vehicle as motor vehicle that has four wheels has gross weight of less than 3000 pounds, and can attain speed, in one mile, of more than 20 but no more than 25 miles per hour on paved level surface)

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCommercial VehiclesMaintenance & SafetyTransportation LawPrivate VehiclesTraffic RegulationGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 82A.02 Cross References

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[2] Punitive or Exemplary Damages

[a] Recovery of Punitive Damages

[b] Insurance Bad Faith Litigation

§ 82A.11 [Reserved]

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§ 82A.14 Economic Damages in Automobile Case

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[vi] Products Liability and Related Claims

[vii] Premises Liability Against Public and Private Defendants

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[ix] Inapplicability to Community Property Owner Having No Other Incidents of Ownership

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[2] Preclusion From Recovery of Damages for Negligence After Commission of Felony

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§ 82A.31 State Statutes

[1] Tort Damages

[2] Contract Damages

[3] Medi-Cal Liens

[4] Limitations on Recovery of Damages Under Proposition 213

[5] Several Liability for Noneconomic Damages

§ 82A.32 Decisions

[1] Compensatory Damages

[2] Punitive Damages

[3] Noneconomic Damages

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8-82A California Forms of Pleading and Practice--Annotated § 82A.01

§ 82A.01 Scope of Chapter

This chapter discusses damages available in an automobile collision case. It includes a general discussion of available tort and contract damages, and limitations on the recovery of damages under Proposition 213. It also includes discussion of medical damages, and management of the client's case with respect to medical treatment and proper documentation of his or her medical condition for use at trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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PART I. SCOPE

8-82A California Forms of Pleading and Practice--Annotated § 82A.02

§ 82A.02 Cross References

[1] Related Chapters in This Volume

- For discussion and forms concerning the request for the client's records, including medical and employment records, see Ch. 81, *Automobiles: Client Interview* .

- For discussion and forms concerning evaluation of an automobile case, see Ch. 81B, *Automobiles: Case Evaluation* .

- For discussion and forms concerning the drafting of complaints in an automobile case, see Ch. 83, *Automobiles: Bringing the Action* .

[2] Other Related Chapters

- For discussion and forms relating to costs and fees generally, see Ch. 174, *Costs and Attorney's Fees* .

- For discussion and forms relating to damages generally, and for discussion relating to Medi-Cal liens, see Ch. 177, *Damages* .

- For discussion and forms relating to damages recoverable for emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress* .

[3] Other Related Coverage

- For discussion and forms of points and authorities relating to damages generally, see California Points and Authorities, ch. 65, *Damages* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsTransportation TortsGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview

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[Reserved]

§§ 82A.03[Reserved]

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§ 82A.10 Tort Damages Generally

[1] Compensatory Damages

Tort damages include damages that will compensate the plaintiff for all the detriment, whether or not anticipated, that was proximately caused by the defendant [*Civ. Code § 3333*; *see generally* Ch. 177, *Damages*].

General damages in a tort action include compensation for the following:

- Pain, suffering, and inconvenience.
- Emotional distress.
- Loss of consortium.
- In wrongful death actions, loss of society and companionship.

Special damages in a tort action include compensation for the following:

- Medical expenses incurred.
- Future medical expenses.
- Loss of earnings.
- Loss of future earnings.
- Property damage.
- In wrongful death actions, funeral expenses.

PRACTICE TIP:

Property Damages. The most common damages in an automobile case are property damage and related expenses. Property damage is the lesser amount of either the cost of repair, diminution of value, or the fair market value less salvage. Related expenses can include loss of use of the vehicle, rental car expenses, and possibly loss of profits.

Property damage is usually reasonably objectively determined based on repair estimates, blue book evaluations, etc. If possible, settle property damage claims as soon as possible to avoid continuing expenses, such as loss of use claims and prejudgment interest on a sum certain.-- *Joe Devine, Editorial Consultant.*

PRACTICE TIP: Medical Management of Case. With regard to general damages arising out of physical injuries to the plaintiff's body, counsel should always be careful to make sure that one's clients are not being unnecessarily treated, but likewise should make sure that necessary treatment is being obtained [*see § 82A.13[4][a], below*].-- *Frederick Schenk, Editorial Consultant.*

PRACTICE TIP: Special Damages. Special damages should include medical expenses and nursing, vocational rehabilitation expenses, life-care plans, loss of earnings, loss of future earnings, loss of earning capacity, property damage, loss of use of the vehicle, expenses of household help or child-care, and all other incidental expenses. General damages include pain, suffering, and loss of companionship of a spouse.-- *Dona E. Cohn, Editorial Consultant.*

[2] Punitive or Exemplary Damages

[a] Recovery of Punitive Damages

In an action for the breach of an obligation not arising from contract, when it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant [*Civ. Code § 3294(a)*; *see generally* Ch. 177, *Damages*].

The California Supreme Court has held that punitive damages are recoverable from an intoxicated automobile driver, because a person who voluntarily drinks to the point of intoxication, knowing he or she must drive a motor vehicle, demonstrates such conscious and deliberate disregard of others that his or her conduct is willful or wanton [*Taylor v. Superior Court (1979) 24 Cal. 3d 890, 892, 157 Cal. Rptr. 693, 598 P.2d 854]* .

PRACTICE TIP:

Exemplary Damages. Exemplary damages should be alleged if the defendant was driving under the influence at the time of the accident, or is participating in particularly reckless driving (for example, racing) at the time of the collision.-- *Dona E. Cohn, Editorial Consultant.*

PRACTICE TIP: Defendant Personally Liable for Punitive Damages. Plaintiff's counsel should advise defense counsel in writing that the defendant may be personally liable for punitive damages.-- *Frederick Schenk, Editorial Consultant.*

[b] Insurance Bad Faith Litigation

If an insurance company wrongfully refuses to provide all the insurance benefits due the insured, or wrongfully delays in paying benefits, the insured may bring suit against the insurance company for bad faith conduct with respect to the insurance policy, that is, for breach of the covenant of good faith and fair dealing that is implied in every contract [*see Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 821, 157 Cal. Rptr. 482, 598 P.2d 452]* .

Inasmuch as an insurance bad faith action, as opposed to a breach of contract action, sounds in tort, punitive damages may be available. For further discussion, see Ch. 308, *Insurance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesMedical ExpensesTortsDamagesPunitive DamagesGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsGeneral OverviewTortsDamagesCompensatory DamagesGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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[Reserved]

§ 82A.11[Reserved]

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§ 82A.12 Contract Damages Generally

Damages for breach of contract consist of compensation for all the detriment that was proximately caused, or that, in the ordinary course of things, would likely result from the breach [*Civ. Code § 3300*].

Damages recoverable for breach of contract are limited to those that were actually contemplated by or within the reasonable contemplation of the parties at the time they entered into the contract [*Brandon & Tibbs v. George Kevorkian Accountancy Corp. (1990) 226 Cal. App. 3d 442, 457, 277 Cal. Rptr. 40]* .

Legal Topics:

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

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§ 82A.13 Medical Damages in Automobile Case

[1] Recoverable Medical Damages Generally

Past and future medical expenses are recoverable in a tort action [*see Melone v. Sierra Ry. Co. (1907) 151 Cal. 113, 115, 91 P. 522]* . Items for which expenses are commonly recoverable include the following:

- Treatment by physicians [*see Hoffman v. Southern Pacific Co. (1929) 101 Cal. App. 218, 229-230, 281 P. 681]* .
- Hospital care [*see Gimbel v. Laramie (1960) 181 Cal. App. 2d 77, 81-82, 5 Cal. Rptr. 88]* .
- Nursing care [*see Tomey v. Dyson (1946) 76 Cal. App. 2d 212, 221-222, 172 P.2d 739]* .
- Physical therapy [*see Augustus v. Shaffer (1959) 171 Cal. App. 2d 160, 170, 340 P.2d 37]* .
- Medical supplies, such as wheelchairs [*see Niles v. City of San Rafael (1974) 42 Cal. App. 3d 230, 242, 116 Cal. Rptr. 733]* .
- Restorative operations, such as plastic surgery [*see Johnston v. Long (1947) 30 Cal. 2d 54, 77, 181 P.2d 645]* .
- Prescription drugs [*see Niles v. City of San Rafael (1974) 42 Cal. App. 3d 230, 242, 116 Cal. Rptr. 733]* .
- Dental care [*see Niles v. City of San Rafael (1974) 42 Cal. App. 3d 230, 242, 116 Cal. Rptr. 733]* .
- Laboratory tests [*see Niles v. City of San Rafael (1974) 42 Cal. App. 3d 230, 242, 116 Cal. Rptr. 733]* .

The amount of recovery for past medical expenses is limited to the reasonable value of the medical care and services provided [*Dimmick v. Alvarez (1961) 196 Cal. App. 2d 211, 216, 16 Cal. Rptr. 308]* . An injured tort victim is entitled to be compensated for medical care and treatment that is reasonably certain to be necessary in the future as a result of the injury in question [*Niles v. City of San Rafael (1974) 42 Cal. App. 3d 230, 241-242, 116 Cal. Rptr. 733* ; *see Civ. Code § 3283* (damages may be awarded for detriment certain to result in future)].

PRACTICE TIP:

Reasonableness of Medical Expenses Often Disputed. Medical expenses are recoverable if they are reasonable and necessary. *BAJI 14.10* allows recovery for expenses reasonably required and actually given. The reasonableness of medical expenses is frequently disputed in automobile cases.

Insurance companies prefer detailed information regarding medical expenses, dates of treatment, diagnostic testing, medical diagnosis, recommendations, and prognosis.-- *Joe Devine, Editorial Consultant.*

PRACTICE TIP: Proving Reasonableness of Medical Expenses. The defense will invariably argue that treatment was not necessary and/or the cost of medical care was unreasonable. It is the plaintiff's burden to prove both the necessity and reasonableness of medical expenses. This can be done through your treating physician or an expert medical examiner. Often, the treating physician may not know the reasonable cost in the community for the treatment he or she rendered since his or her billing department usually handles those matters. Make sure that the doctor has obtained this information prior to his or her testimony.

In addition to proving the reasonableness and necessity of medical expenses, the plaintiff must prove that the injuries suffered were the direct result of the automobile collision. This can only be done through expert medical testimony. Failure to prove the relationship and causal connection of the injuries and the accident means the jury cannot award pain and suffering and other general damages.-- *Dona Cohn, Editorial Consultant.*

PRACTICE TIP: Records Requested From Plaintiff's Counsel. It is critical that plaintiff's counsel, in ordering medical records, not only order the hospital records, if appropriate, but also the billings of each physician who was involved in the care and treatment of the plaintiff. Often times, when ordering hospital bills, the records will not include all of the doctor's surgical expenses and anesthesiology charges. Those bills must be obtained to make sure that all medical expenses which have been incurred will be identified during formal discovery.-- *Frederick Schenk, Editorial Consultant.*

[2] Initial Assessment of Medical Injuries

The client's medical injuries should be assessed as soon as practicable. For discussion and forms relating to the initial assessment of injuries, see Ch. 81, *Automobiles: Client Interview* .

PRACTICE TIP:

Organize Medical Expenses in Chronological Order. Plaintiffs' attorneys should present medical expenses in a detailed chronological summary, including dates of treatment, whenever submitting a demand letter, or when responding to discovery. Defense attorneys and claims specialists will ultimately organize the medical expenses in such a fashion. An organized approach helps all parties and facilitates settlement.-- *Joe Devine, Editorial Consultant.*

[3] Medi-Cal Liens

If medical expenses of the injured tort victim have been paid by the Medi-Cal program, the state Director of Health

Services (the administrator of the Medi-Cal program) has a statutory first lien on any judgment against or settlement with the tortfeasor [*see Welf. & Inst. Code § 14124*]. In addition, California statutes provide that a health care provider that has rendered services to the victim, and who has received payment from Medi-Cal, has a second lien for all fees for services provided if the provider fully reimburses Medi-Cal for all fees received for the services [*see Welf. & Inst. Code §§ 14124.74(a), 14124.791*]. However, the California Supreme Court has ruled that federal restrictions on the right of a provider to recover from a patient preempt the California statutes that allow for a health care provider's lien, making any asserted lien under the state statutes invalid and unenforceable [*Olszewski v. Scripps Health (2003) 30 Cal. 4th 798, 819-821, 135 Cal. Rptr. 2d 1, 69 P.3d 927]* .

Notice must be given to Medi-Cal of any action or claim brought against the party responsible for the injury [*Welf. & Inst. Code § 14124.73*; *see* Ch. 81, *Automobiles: Client Interview*]. This obligation is imposed on the beneficiary and the attorney, if any [*Welf. & Inst. Code § 14124.79*].

See California Torts, Ch. 52, *Recovery for Medical Expenses and Economic Loss* (Matthew Bender), for discussion of this and other liens.

[4] Medical Management of Case

[a] Obtain Appropriate Medical Treatment

If the plaintiff suffers from an ongoing medical condition as a result of the collision, then the plaintiff's attorney must institute a medical-management plan--for example, to obtain and document all necessary treatment for the plaintiff and to advise the plaintiff not to aggravate the injuries or otherwise undermine the prosecution of the case.

PRACTICE TIP:

Obtaining Proper Medical Treatment. The attorney should assist the client in obtaining the appropriate medical care provider. The attorney may suggest a specialist when the client's condition warrants it. Treatment beyond what is reasonable and necessary for the client's injuries will not be recovered in the settlement or judgment. Also, excessive treatment may make a negative impression on the jury. It is important that the attorney avoid unnecessary costs by avoiding over-priced medical services.-- *Dona E. Cohn, Editorial Consultant.*

PRACTICE TIP: Medical Testing. If reasonable testing is recommended by the physician and the plaintiff refuses the testing, the lack of findings may negatively impact the ability of plaintiff to recover damages at a later time. However, a plaintiff should not undergo unnecessary testing merely because a lawsuit is involved, but should be mindful that the treating physician may not be willing to reach a diagnosis and state a prognosis unless full and complete testing is conducted, allowing the physician to best determine the nature of the patient's complaints.-- *Frederick Schenk, Editorial Consultant.*

PRACTICE TIP: Treating Physician May Need to Testify. When recommending a treating physician to the client, keep in mind that the physician may be called to testify. Do not recommend a physician whom you do not think would make a good witness at trial [*see also* Ch. 85, *Automobiles: Discovery*].-- *Dona E. Cohn, Joe Devine, Frederick Schenk, Editorial Consultants.*

[b] Attorney-Client Communications

Counsel should call his or her client on a regular basis to make sure that the client is keeping medical appointments and to keep track of his or her symptoms. Further, it is important to keep in frequent contact to make sure that the treatment being rendered is helping the client and that another alternative is not more suitable.

PRACTICE TIP:

Attorney-Client Communications. Frequent communication with the client during the first several weeks of the case is recommended to make sure the client is receiving adequate and appropriate treatment. Once the client has stabilized into a pattern of treatment, the attorney may reduce the calls to once a month while the case progresses, but should keep in regular contact.-- *Dona E. Cohn, Editorial Consultant.*

[c] Client-Physician Communications

Counsel should advise his or her client to fully communicate all symptoms to the physician or other care provider. The client should inform the treating physician of any and all difficulties he or she is experiencing, or limitations resulting from the injuries, for example, trouble sleeping, caring for children, performing chores, and/or working.

PRACTICE TIP:

Prompt Reporting of All Injuries. Counsel should admonish that all injuries arising out of the automobile collision are accurately and completely reported to the physician. Encourage the client to describe all of his or her symptoms to the treating physician, not just the most severe ones. For example, a client with severe neck pain may neglect to tell his or her physician that he or she is also experiencing leg pain, because it is less severe.

It does not help to have the client omit an injury that he or she later reports in deposition or interrogatories, but which was not completely and accurately reported to the physician during examination and treatment. There are occasions where low back pain or cervical pain can result in further and more serious disk injuries. If the patient neglected to report discomfort in the extremities and only reports it several months after the collision, then defense counsel will look with skepticism at the relationship between the extremity pain and the collision, casting doubt on the causal relationship.-- *Frederick Schenk, Editorial Consultant.*

PRACTICE TIP: Caution to Clients Against Prefacing Complaints With "My Attorney Said ..." Although the client should be completely forthcoming with his or her physician, the client should be advised not to preface discussions with the physician with statements such as, "my attorney said I should tell you about my leg pain." This will make it into the physician's notes, and create the impression that the reporting of the symptom originated with the attorney, not the client. Also, *never* write letters to doctors requesting exams--they are discoverable.-- *Frederick Schenk, Editorial Consultant.*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesMedical ExpensesTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 82A.14 Economic Damages in Automobile Case

[1] Nature of Economic Damages

Economic damages include property damage and related expenses, medical expenses, and lost income. It can also include such items as reasonably certain future medical expenses, and lost earnings and profits. Economic damages can be quite substantial when they include future expenses and lost income.

PRACTICE TIP:

Advice to Defendant. A defendant who is minimally liable is responsible for noneconomic damages only in proportion to his or her negligence. However, a minimally liable defendant is fully responsible, jointly and severally, for all economic damages. The minimally liable deep-pocket defendant may face substantial exposure to a claim involving future economic loss. Defense attorneys should be sure to advise their clients of the potential exposure in such cases.-- *Joe Devine, Editorial Consultant.*

[2] Lost Earnings

If, as a result of tortious conduct, a person is disabled or is impaired from attending to his or her usual occupation or pursuits of financial gain, damages flowing from this disability or impairment are recoverable [*Connolly v. Pre-Mixed Concrete Co. (1957) 49 Cal. 2d 483, 489, 319 P.2d 343]* . Damages for lost earnings include lost wages from employment [*Swanson v. Bogatin (1957) 149 Cal. App. 2d 755, 758, 308 P.2d 918]* . They also include economic benefits lost from a particular endeavor, such as a partnership [*Hoffmann v. Lane (1936) 11 Cal. App. 2d 655, 659, 54 P.2d 477]* .

PRACTICE TIP:

Proof of Loss. With regard to the economic loss, wage stubs, canceled checks and receipts are essential to help prove the income lost and the expenses incurred arising out of the automobile collision.-- *Frederick Schenk, Editorial Consultant.*

[3] Loss of Earning Capacity

An injured plaintiff may recover for the loss or impairment of his or her capacity to work and earn money. Loss of earning capacity is an element of general damages and can be inferred from the nature of the injury [*Connolly v. Pre-Mixed Concrete Co. (1957) 49 Cal. 2d 483, 489, 319 P.2d 343]* .

The following items, if lost by the plaintiff, may be included in the calculation of lost earning capacity:

- Employee benefits [*see Groat v. Walkup Drayage Co. (1936) 14 Cal. App. 2d 350, 358, 58 P.2d 200]* .

- Bonuses, tips, and commissions [*see Bonneau v. North Shore S. R. Co. (1907) 152 Cal. 406, 413-414, 93 P. 106]* .

- Raises and promotions [*see Jones & Laughlin Steel Corp. v. Pfeifer (1983) 462 U.S. 523, 782, 103 S. Ct. 2541, 76 L. Ed. 2d 768]* .

[4] Loss of Profits

A plaintiff may recover for loss of profits resulting from personal injuries sustained, in lieu of loss of earning capacity. Loss of profits, which do not always result from personal injury, are special damages and must be particularly alleged [*Shaw v. Southern P. R. Co. (1910) 157 Cal. 240, 242, 107 P. 108]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesLost IncomeGeneral OverviewTortsDamagesCompensatory DamagesMedical ExpensesTortsDamagesCompensatory DamagesProperty DamageGeneral OverviewTortsDamagesCompensatory DamagesLost IncomeEarning CapacityTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 82A.15 Limitations on Recovery of Damages for Automobile Collision: Proposition 213

[1] Limitations on Recovery of Damages Based on Driving Under Influence or Lack of Insurance

[a] Statutory Provisions

Proposition 213, adopted by initiative at the general election of 1996, provides that in any action to recover damages arising out of the operation or use of a motor vehicle, a person shall not recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages if any of the following applies, with the exception stated below [*Civ. Code § 3333.4(a)*]:

- The injured person was at the time of the accident operating the vehicle while under the influence of alcohol or drugs, and was convicted of that offense [*see Veh. Code §§ 23152, 23153*].

- The injured person was the owner of a vehicle involved in the accident, and the vehicle was not insured as required by the financial responsibility laws [*see Veh. Code § 16000 et seq.*].

- The injured person was the operator of a vehicle involved in the accident, and cannot establish his or her financial responsibility as required by the financial responsibility laws [*see Veh. Code § 16000 et seq.*].

The owner of an uninsured automobile within the meaning of the financial responsibility laws, may nevertheless recover the noneconomic losses listed above, if injured by a motorist who was driving under the influence of alcohol or drugs, and who was convicted of that offense [*Civ. Code § 3333.4(c)*; *see Veh. Code §§ 23152, 23153*]. However, the statutory language of this exception is clear: the exception only applies if the driver causing the injuries was *convicted* of violating the relevant Vehicle Code provisions. The exception does not apply if charges brought against the driver under *Veh. Code § 23152* or *§ 23153* were eventually dropped, regardless of whether evidence indicates that the driver had been drinking [*Nakamura v. Superior Court (2000) 83 Cal. App. 4th 825, 833, 100 Cal. Rptr. 2d 97]* .

PRACTICE TIP:

Claimant Must Prove Compliance With Proposition 213. In *California, Civ. Code § 3333.4* places

> the burden on the owner or operator of a motor vehicle claiming injuries to establish financial responsibility. This usually requires the name and policy number of an applicable insurance policy sufficient to allow confirmation of financial responsibility requirements. If the claimant cannot establish this information, he or she is not entitled to recover general damages.-- *Joe Devine, Editorial Consultant.*

[b] Constitutionality

Civ. Code § 3333.4 has been upheld as constitutional [*Quackenbush v. Superior Court (1997) 60 Cal. App. 4th 454, 465 467, 70 Cal. Rptr. 2d 271* (concerning bar against persons convicted of drunk driving from recovering noneconomic damages); *see also Honsickle v. Superior Court (1999) 69 Cal. App. 4th 756, 762, 82 Cal. Rptr. 2d 36* (concerning bar against uninsured motorist from recovering noneconomic damages)].

[c] Retroactivity

A California Court of Appeal has held that Proposition 213 applies with secondary retroactivity, which is defined as retroactivity that affects the *future* legal consequences of past transactions [*Honsickle v. Superior Court (1999) 69 Cal. App. 4th 756, 765, 82 Cal. Rptr. 2d 36]* . The court noted that Proposition 213 did not expressly state that it would be applied retroactively. It provided [*see Honsickle v. Superior Court (1999) 69 Cal. App. 4th 756, 765, 82 Cal. Rptr. 2d 36]* :

> This act shall be effective immediately upon its adoption by the voters. Its provisions shall apply to all actions in which the initial trial has not commenced prior to Jan. 1, 1997.

This type of retroactivity does not itself offend any law, including the United States and California Constitutions and their respective due process laws [*Honsickle v. Superior Court (1999) 69 Cal. App. 4th 756, 765, 82 Cal. Rptr. 2d 36]* .

Therefore, *Civ. Code § 3333.4(a)* applied retroactively to preclude recovery of noneconomic damages by an uninsured driver who had attempted but failed to purchase the required liability insurance, was injured due to the negligence of another, and filed an action to recover damages, all prior to the passage of Proposition 213 [*Honsickle v. Superior Court (1999) 69 Cal. App. 4th 756, 759, 82 Cal. Rptr. 2d 36]* .

[d] Application of Statutes

[i] Insured Driver of Uninsured Vehicle

If the driver of a vehicle is insured under an automobile liability policy covering his or her driving of that vehicle, then the vehicle is insured within the meaning of *Civ. Code § 3333.4* by reason of *Veh. Code §§ 16021* and *16020*, even if the owner is uninsured. Therefore, the restrictions of *Civ. Code § 3333.4* did not apply to a widower whose spouse was killed in an accident involving their vehicle for which they did not carry insurance, because the vehicle was driven by their daughter-in-law, who was insured [*Goodson v. Perfect Fit Enterprises, Inc. (1998) 67 Cal. App. 4th 508, 512-513, 79 Cal. Rptr. 2d 102]* .

[ii] Operation or Use of Nonmoving Vehicle

The "operation or use" of a motor vehicle for purposes of applying *Civ. Code § 3333.4* is not limited to instances in which the vehicle is actually moving or being driven at the precise time of the accident [*Harris v. Lammers (2000) 84 Cal. App. 4th 1072, 1077, 101 Cal. Rptr. 2d 361* ; *see Cabral v. Los Angeles Cty. Metro. Transp. Auth. (1998) 66 Cal. App. 4th 907, 914, 78 Cal. Rptr. 2d 385* (opening car door to enter or leave vehicle is part of operation of vehicle because it is necessary to driving of vehicle)]. In one case, for example, the statute applied to injuries caused to the owner of an uninsured vehicle by a driver who was pulling away from an adjacent parking space, even though the

uninsured vehicle owner was standing behind her vehicle handing balloons to her children, who were inside the vehicle, when she was injured [*Harris v. Lammers (2000) 84 Cal. App. 4th 1072, 1077, 101 Cal. Rptr. 2d 361]* .

[iii] Employee Driving Within Scope of Employment Need Not Establish Financial Responsibility

An employee involved in an accident while driving the employer's uninsured vehicle within the scope of employment, does not have to establish his or her own financial responsibility. Therefore, *Civ. Code § 3333.4* would not preclude the employee's recovery of general damages against the party at fault in a collision, if the employer's vehicle that he or she was driving was uninsured [*Montes v. Gibbens (1999) 71 Cal. App. 4th 982, 987-988, 84 Cal. Rptr. 2d 324]* . The rationale for this holding is based on several financial responsibility statutes and the underlying legislative intent of Proposition 213 [*Montes v. Gibbens (1999) 71 Cal. App. 4th 982, 987-988, 84 Cal. Rptr. 2d 324]* :

- Pursuant to *Veh. Code § 16028(d)(1)*, if the operator is driving a vehicle owned or leased by his or her employer, and is driving with the employer's permission, any citation issued for the operator's failure to provide evidence of financial responsibility "shall be issued to the employer rather than the driver, and the driver may sign the notice on behalf of the employer."

- Pursuant to *Veh. Code § 16030(a)*, to knowingly provide false evidence of financial responsibility to a peace officer or court clerk constitutes a misdemeanor.

- Pursuant to *Veh. Code § 16030(c)*, § 16030 does not apply to a driver who is driving a motor vehicle owned or leased by the employer of the driver and driven in the course of the driver's employment with the permission of the employer.

- The legislature intended to free the employee from the obligation of establishing financial responsibility while driving an employer's motor vehicle.

[iv] No "Good Faith" Exception

There is no exception in Proposition 213 for a driver or owner who attempts but fails to obtain the required insurance; that is, there is no "good faith" exception [*Honsickle v. Superior Court (1999) 69 Cal. App. 4th 756, 766, 82 Cal. Rptr. 2d 36]* . Therefore, *Civ. Code § 3333.4(a)* applied to preclude recovery of noneconomic damages by an uninsured driver who had attempted but failed to purchase the required liability insurance and was injured due to the negligence of another [*Honsickle v. Superior Court(1999) 69 Cal. App. 4th 756, 759, 82 Cal. Rptr. 2d 36* (also holding that statute applied retroactively to collision that occurred, and action that was filed, prior to passage of Prop. 213)]. Moreover, a related loss of consortium claim fails if it consists entirely of noneconomic damages [*Honsickle v. Superior Court (1999) 69 Cal. App. 4th 756, 766, 82 Cal. Rptr. 2d 36]* .

[v] Wrongful Death

Civ. Code § 3333.4, as enacted as part of Proposition 213, does not preclude a wrongful death plaintiff whose decedent was the uninsured operator of a motor vehicle involved in an accident from recovering damages for loss of care, comfort, and society [*Horwich v. Superior Court (1999) 21 Cal. 4th 272, 274-275, 87 Cal. Rptr. 2d 222, 980 P.2d 927]* . In *Horwich* the wrongful death plaintiffs were neither uninsured owners nor operators of a vehicle involved in the accident. The Supreme Court, although stating that they expressed no opinion on the question, noted that it would appear that an heir who was the uninsured owner or operator of the vehicle involved in the accident would be subject to the limitations of *Civ. Code § 3333.4* [*Horwich v. Superior Court (1999) 21 Cal. 4th 272, 278 n.5, 87 Cal. Rptr. 2d 222, 980 P.2d 927]* .

The rationale of the *Horwich* holding relied on the intent of Proposition 213, to prevent uninsured motorists from

recovering noneconomic losses while flouting the financial responsibility laws [*Horwich v. Superior Court (1999) 21 Cal. 4th 272, 278-280, 87 Cal. Rptr. 2d 222, 980 P.2d 927]* , and on the fact that under *Code Civ. Proc. § 377.60* a wrongful death action is not derivative, but is a new cause of action in favor of the heirs [*Horwich v. Superior Court (1999) 21 Cal. 4th 272, 283, 87 Cal. Rptr. 2d 222, 980 P.2d 927]* .

[vi] Products Liability and Related Claims

The limitation on damages imposed by *Civ. Code § 3333.4*, as enacted as part of Proposition 213, does not apply to preclude an uninsured owner or operator from recovering noneconomic damages in a products liability action for injuries caused by a design defect [*Hodges v. Superior Court (1999) 21 Cal. 4th 109, 111-112, 86 Cal. Rptr. 2d 884, 980 P.2d 433]* .

In *Hodges*, the Supreme Court found the phrase "any action to recover damages arising out of the operation or use of a motor vehicle" to be ambiguous [*Hodges v. Superior Court (1999) 21 Cal. 4th 109, 113, 86 Cal. Rptr. 2d 884, 980 P.2d 433]* . Thus, the Court analyzed the purpose of Proposition 213, finding that although it was intended to punish and deter drivers who did not comply with the financial responsibility laws, its primary aim was to limit insurance claims by uninsured motorists. This would restore balance to the system by restricting the amount recoverable by uninsured motorists, who do not contribute to the insurance pool [*Hodges v. Superior Court (1999) 21 Cal. 4th 109, 115-117, 86 Cal. Rptr.2d 884, 980 P.2d 433]* . The right to recover fully for injuries caused by a design defect has no bearing on fairness with respect to the financial responsibility laws. The Court did not consider it clear that anyone intended to protect manufacturers, who do not contribute to that insurance pool, from products liability claims [*Hodges v. Superior Court (1999) 21 Cal. 4th 109, 115, 86 Cal. Rptr. 2d 884, 980 P.2d 433]* .

Similarly, *Civ. Code § 3333.4* does not apply to claims for the negligent maintenance and operation of a helicopter that is used to transport an automobile accident victim to the hospital, if those claims are based on injuries or death caused by the helicopter's crashing while the automobile accident victim is on board. Under those circumstances, the injuries suffered in the helicopter crash do not have the necessary connection between the uninsured motorist's injury and his or her operation or use of the motor vehicle, and the helicopter owner's liability bears no relationship to the victim's lack of automobile insurance [*Anaya v. Superior Court (2002) 96 Cal. App. 4th 136, 141, 144, 116 Cal. Rptr. 2d 660]* .

[vii] Premises Liability Against Public and Private Defendants

In a case not involving a claim by an uninsured motorist against an insured motorist, the Supreme Court has held that *Civ. Code § 3333.4* prevents an uninsured motorist from recovering noneconomic damages from a public entity based on claims alleging nuisance and dangerous condition of property, if those claims involve the operation or use of a motor vehicle [*Day v. City of Fontana (2001) 25 Cal. 4th 268, 271, 105 Cal. Rptr. 2d 457, 19 P.3d 1196]* . The Court concluded that not only do those actions fall within the clear, unambiguous language of the statute, but construing the statute to cover those actions against a public entity comports with the initiative's declared intent to prevent people who fail to take personal financial responsibility from seeking unreasonable damages [*Day v. City of Fontana (2001) 25 Cal. 4th 268, 271, 276-277, 105 Cal. Rptr. 2d 457, 19 P.3d 1196]* . The Court also noted that public entities are among those directly affected by uninsured motorists, because they are often left to bear the cost of repairs to public property necessitated by an uninsured tortfeasor's acts and financial irresponsibility [*Day v. City of Fontana (2001) 25 Cal. 4th 268, 280-281, 105 Cal. Rptr. 2d 457, 19 P.3d 1196]* .

In a subsequent opinion applying the same rationale to a defendant that was a private party, the Supreme Court held that an uninsured motorcyclist whose tire caught on a three-inch lip on a bus pad could not recover noneconomic damages from the contractor responsible for maintaining the site of the accident, because the case clearly came within the plain language of the statute [*Allen v. Sully-Miller Contracting Co. (2002) 28 Cal. 4th 222, 227-228, 120 Cal. Rptr. 2d 795, 47 P.3d 639]* .

For a discussion of nuisance actions generally, see Ch. 391, *Nuisance* , and for a discussion of public entity liability for dangerous conditions of property, see Ch. 464, *Public Entities and Officers* . For a general discussion of premises liability against private parties, see Ch. 421, *Premises Liability* .

[viii] Inapplicability to Registered Owner Having No Other Incidents of Ownership

The "owner" of a vehicle, for purposes of applying Proposition 213's prohibition on noneconomic damages, is the person having all incidents of ownership, including legal title to the vehicle, and does not necessarily include all persons listed on the vehicle registration [*Savnik v. Hall (1999) 74 Cal. App. 4th 733, 740-742, 88 Cal. Rptr. 2d 417* (applying definition of "owner" in *Veh. Code § 460*)].

In one case involving an uninsured vehicle, for example, one plaintiff was not barred from recovering noneconomic damages under Proposition 213, even though she was listed on the vehicle registration along with her boyfriend, the other plaintiff. However, the plaintiff allowed to recover noneconomic damages had been listed on the registration by her boyfriend without her knowledge, had not contributed any funds to buy the vehicle, had her own separate vehicle, and never drove the vehicle involved in the accident [*Savnik v. Hall (1999) 74 Cal. App. 4th 733, 743, 88 Cal. Rptr. 2d 417]* .

[ix] Inapplicability to Community Property Owner Having No Other Incidents of Ownership

A plaintiff's community property interest in a vehicle does not necessarily equate to an ownership interest under the provisions of Proposition 213. In one case, a spouse injured while a passenger in her husband's vehicle was held not to be an owner for purposes of these provisions. The stipulated facts showed that she was unaware of her husband's purchase of the vehicle for work purposes, believed that the vehicle had simply been loaned to her husband, had never driven the vehicle or possessed its keys, first saw the vehicle a day or two before the accident, and first rode in the vehicle on the day of the accident. Under those facts, the court held that despite the fact that the vehicle was purchased with community funds, her unknowing community property interest was not sufficient to find her an owner under the statute [*Ieremia v. Hilmar Unified School Dist. (2008) 166 Cal. App. 4th 324, 332, 82 Cal. Rptr. 3d 658*].

[x] Right to Punitive Damages Unaffected

Although *Civ. Code § 3333.4(a)* prohibits recovery of non-pecuniary damages, this prohibition does not preclude the recovery of punitive damages. The statute prohibits recovery for noneconomic *losses*, such as pain, suffering, inconvenience, physical impairment, and disfigurement, for which a plaintiff might otherwise be compensated. Punitive damages, however, are triggered by the conduct and state of mind of the defendant and are designed to punish and deter. They are not intended to compensate for any loss suffered by the plaintiff [*Nakamura v. Superior Court (2000) 83 Cal. App. 4th 825, 834, 839, 100 Cal. Rptr. 2d 97]* .

[2] Preclusion From Recovery of Damages for Negligence After Commission of Felony

Proposition 213 also provides that in any action for damages based on negligence, a person may not recover any damages if the plaintiff's injuries were in any way proximately caused by the plaintiff's commission of any felony, or immediate flight from a felony, and the plaintiff has been duly convicted of the felony [*Civ. Code § 3333.3*]. However, this limitation on liability for damages applies only to conduct that is negligent. It does not apply to shield law enforcement personnel from potential liability for intentional torts based on the nonnegligent use of excessive force [*Jenkins v. County of Los Angeles (1999) 74 Cal. App. 4th 524, 534, 88 Cal. Rptr. 2d 149]* .

Like the provisions of *Civ. Code § 3333.4* [*see [1][b], above*], *Civ. Code § 3333.3* has been upheld against constitutional challenge [*Jenkins v. County of Los Angeles (1999) 74 Cal. App. 4th 524, 536-537, 88 Cal. Rptr. 2d 149]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesVehicular CrimesDriving Under the InfluenceGeneral OverviewTortsProducts LiabilityGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageProof of Financial ResponsibilityTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 82A.16 Several Liability for Noneconomic Damages: Proposition 51

In any action for personal injury, property damage, or wrongful death, based on principles of comparative fault, the liability of each defendant for noneconomic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount [*Civ. Code § 1431.2(a)*].

Economic damages for this purpose means objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment, and loss of business opportunities [*Civ. Code § 1431.2(b)(1)*]. Noneconomic damages are defined as subjective, nonmonetary losses, including but not limited to pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation [*Civ. Code § 1431.2(b)(2)*].

For further discussion of Proposition 51 requirements, see Ch. 300, *Indemnity and Contribution* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProcedureMultiple DefendantsJoint & Several LiabilityTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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[Reserved]

§§ 82A.17[Reserved]

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8-82A California Forms of Pleading and Practice--Annotated § 82A.30

§ 82A.30 Related Texts From LexisNexis

For discussion of tort law relating to damages generally, see California Torts, Ch. 50, *Damages, Costs, Attorneys' Fees, and Interest* (Matthew Bender)

For discussion of pain and suffering damages generally, see California Torts, Ch. 51, *Recovery for Pain and Suffering* (Matthew Bender)

For discussion of medical expenses and economic loss generally, see California Torts, Ch. 52, *Recovery for Medical Expenses and Economic Loss* (Matthew Bender)

For discussion of punitive damages generally, see California Torts, Ch. 54, *Punitive Damages* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesMedical ExpensesCivil ProcedureRemediesDamagesPunitive Damages

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Compensatory damages for commission of tort. *Civ. Code § 3333*

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[3] Medi-Cal Liens

Medi-Cal lien on judgment against or settlement with tortfeasor. *Welf. & Inst. Code § 14124*

[4] Limitations on Recovery of Damages Under Proposition 213

Preclusion from recovery of damages by plaintiff who committed felony. *Civ. Code § 3333.3*

Limitations on recovery of damages based on driving under influence or lack of insurance. *Civ. Code § 3333.4*

[5] Several Liability for Noneconomic Damages

Several liability of joint tortfeasors in action for personal injury, property damage, or wrongful death based on comparative fault principles. *Civ. Code § 1431.2*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesVehicular CrimesDriving Under the InfluenceGeneral OverviewTortsDamagesPunitive DamagesGeneral OverviewTortsDamagesCompensatory DamagesGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 82A.32 Decisions

[1] Compensatory Damages

Pain and suffering includes physical pain, fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror, or ordeal. *Capelouto v. Kaiser Foundation Hospitals (1972) 7 Cal. 3d 889, 892-893, 103 Cal. Rptr. 856, 500 P.2d 880*

Plaintiff may recover for loss of use of property whether property was injured or totally destroyed. *Reynolds v. Bank of America (1959) 53 Cal. 2d 49, 50-51, 345 P.2d 926*

[2] Punitive Damages

Punitive damages intended not to compensate injured party, but rather to punish tortfeasor whose wrongful action was intentional or malicious, and to deter tortfeasor and others from similar extreme conduct. *Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal. 3d 1379, 1387, 241 Cal. Rptr. 67, 743 P.2d 1323*

Punitive damages not recoverable unless actual damages are suffered. *Mother Cobb's Chicken Turnovers, Inc. v. Fox (1937) 10 Cal. 2d 203, 205, 73 P.2d 1185*

Punitive damages recoverable in addition to compensatory damages in action against insurer for breach of duty of good faith and fair dealing, if plaintiff has shown that defendant acted with oppression, fraud, or malice. *Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co. (1987) 189 Cal. App. 3d 1072, 1096-1097, 234 Cal. Rptr. 835*

[3] Noneconomic Damages

Civ. Code § 3333.4, which bars persons convicted of drunk driving from noneconomic damages for any injuries sustained at time of drunk driving and provides that insurers are not required to indemnify them for such losses, upheld

as constitutional. *Quackenbush v. Superior Court (1997) 60 Cal. App. 4th 454, 465-467, 70 Cal. Rptr. 2d 271*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesPunitive DamagesGeneral OverviewTortsDamagesCompensatory DamagesGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 82A.33 Internet References

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[b] Use of Form

§§ 83.82-83.99 [Reserved]

§ 83.100 Complaint for Damages to Personal Property Based on Negligence; By Property Owner; Against Automobile Owner [Veh. Code § 17150] and Operator; General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 83.101 Complaint for Damages to Real Property Based on Negligence; By Property Owner; Against Automobile Owner [Veh. Code § 17150] and Operator

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§§ 83.102-83.109 [Reserved]

§ 83.110 Complaint for Damages Based on Negligence; Against Sellers or Renters of Automobile and Incompetent Driver; Negligent Entrustment of Automobile

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 83.111 Allegation; Defective Automobile

[1] FORM

[2] Use of Form

§ 83.112 Allegation; Careless and Reckless Person

[1] FORM

[2] Use of Form

§ 83.113 Allegation; Intoxicated Person

[1] FORM

[2] Use of Form

§ 83.114 Allegation; Unlicensed and Inexperienced Person

[1] FORM

[2] Use of Form

§§ 83.115-83.119 [Reserved]

§ 83.120 Judicial Council Trial Court Pleading Form; Complaint for Damages for Personal Injury, Property Damage, Wrongful Death; With Motor Vehicle and General Negligence Cause of Action Attachments [Cal. Judicial Council Forms PLD-PI-001, PLD-PI-001(1), PLD-PI-001(2)]

[1] FORM

[2] Use of Form

[3] Allegations

[a] In General; Judicial Council Forms

[b] Motor Vehicle Cause of Action Attachment

[i] Heading

[ii] Date and Place of Collision (Paragraph MV-1)

[iii] Liability and Relationship of Defendants (Paragraph MV-2)

[A] In General

[B] Defendant Driver

[C] Defendant Employer

[D] Defendant Vehicle Owner

[E] Negligent Entrustment

[F] Agent or Employee

[G] Other Basis for Liability

[c] General Negligence Cause of Action Attachment

[i] In General

[ii] Heading

[iii] Date and Place of Incident

[iv] Reasons for Liability

[4] Verification

[5] Jurisdiction

[6] Venue

[7] Specifying Amount of Damages

[8] Cross References

§§ 83.121-83.129 [Reserved]

§ 83.130 Allegation; Ownership of Automobile and Permissive Use by Operator [Veh. Code § 17150]

[1] FORM

[2] Use of Form

[a] In General

[b] Vicarious Liability of Owner

§ 83.131 Allegation; Ownership of Automobile and Use By Operator With Permission of Bailee [Veh. Code § 17154]

[1] FORM

[2] Use of Form

[a] In General

[b] Vicarious Liability of Bailee

§ 83.132 Allegation; Use of Automobile By Operator With Permission of Personal Representative [Veh. Code §

17159]

[1] FORM

[2] Use of Form

[a] In General

[b] Vicarious Liability of Personal Representative

§ 83.133 Allegation; Use of Automobile By Minor With Permission of Parents or Guardian [Veh. Code § 17708]

[1] FORM

[2] Use of Form

[a] In General

[b] Vicarious Liability of Parent or Guardian

§ 83.134 Allegation; Signing and Verifying Application for License of Minor Driver [Veh. Code § 17707]

[1] FORM

[2] Use of Form

[a] In General

[b] Vicarious Liability of Signer

§ 83.135 Allegation; Agency [Civ. Code § 2338]

[1] FORM

[2] Use of Form

[a] In General

[b] Vicarious Liability of Principal of Agent

§ 83.136 Allegation; Subagency [Civ. Code § 2351]

[1] FORM

[2] Use of Form

[a] In General

[b] Vicarious Liability of Principal of Subagent

§ 83.137 Allegation; Authorization or Ratification of Act of Agent by Principal [Civ. Code § 2339]

[1] FORM

[2] Use of Form

§ 83.138 Allegation; Partnership [Corp. Code § 16305(a)]

[1] FORM

[2] Use of Form

[a] In General

[b] Vicarious Liability of Partnership

[c] Cross References

§ 83.139 Complaint in Subrogation; By Vehicle Owner as Subrogee of Third Person Injured By Vehicle [Veh. Code § 17153] Against Operator of Vehicle to Recover Amount of Judgment and Costs Previously Assessed Against Owner Based on Imputed Negligence [Veh. Code §§ 17150, 17151]

[1] FORM

[2] Use of Form

[3] Allegations

[a] In General

[b] When Right to Subrogation Arises

[c] Owner's Right to Indemnity

[d] Effect of Settlement With Negligent Operator

[4] Cross References

§§ 83.140-83.149 [Reserved]

§ 83.150 Complaint for Damages for Personal Injuries and Property Damage By Party Injured By Defective Automobile Based on Strict Liability of Automobile Manufacturer or Retailer; General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§§ 83.151-83.159 [Reserved]

§ 83.160 Allegation; Residence of Nonresident Motorist [Veh. Code § 17451]

[1] FORM

[2] Use of Form

[3] Cross References

§ 83.161 Allegation; Residence of Nonresident Automobile Owner and Agency of Driver [Veh. Code § 17451]

[1] FORM

[2] Use of Form

[3] Cross References

§ 83.162 Allegation; Residence of Nonresident Defendant With California Certificate of Ownership or Registration [Veh. Code § 17459]

[1] FORM

[2] Use of Form

[3] Cross References

§ 83.163 Allegation; Residence of Nonresident Defendant Accepting or Retaining California Driver's License [Veh. Code § 17460]

[1] FORM

[2] Use of Form

[3] Cross References

§ 83.164 Notice to Nonresident Defendant of Service of Summons and Complaint on Director of Department of Motor Vehicles [Veh. Code § 17455]

[1] FORM

[2] Use of Form

[3] Cross References

§ 83.165 Declaration of Service By Mail on Nonresident Defendant [Veh. Code § 17456]

[1] FORM

[2] Use of Form

[3] Cross References

§ 83.166 Declaration of Personal Service on Nonresident Defendant Outside California [Veh. Code § 17456]

[1] FORM

[2] Use of Form

[3] Cross References

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§ 83.01 Scope of Chapter

This chapter provides a guide for the plaintiff in bringing an action arising from an automobile collision. It includes discussion of the jurisdictional considerations in such suits, as well as potential defendants. The requirements of form for the complaint are discussed, and numerous illustrative forms are provided. The chapter also discusses issuance of the summons and service of process on the defendants, as well as the possibility of default judgment as to one or more defendants who fail to answer or otherwise defend. The chapter contains the following forms:

- Complaints by an owner, operator, or passenger in a vehicle alleging operator negligence [*see §§ 83.60 -83.66*].
- Complaints and allegations by a pedestrian alleging operator negligence [*see §§ 83.80* -83.85].
- Complaints by a property owner alleging operator negligence [*see §§ 83.100 -83.101*].
- Complaints and allegations of negligence of a nondriver owner or other third party [*see §§ 83.110 -83.114*].
- The Judicial Council form of complaint with motor vehicle cause of action attachment [*see § 83.120*].
- Complaints and allegations of vicarious liability [*see §§ 83.130 -83.139*].
- A complaint alleging products liability [*see § 83.150*].
- Allegations of residency [*see §§ 83.160 -83.163*].
- Notice, declaration of mailing, and declaration as to service of process on nonresident defendant [*see §§ 83.164 -83.166*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 83.02 Cross References

[1] Related Chapters in This Volume

- For discussion and forms giving an overview of a typical automobile collision case, see Ch. 80, *Automobiles: Overview* .

- For discussion and forms concerning interviewing the plaintiff, see Ch. 81, *Automobiles: Client Interview* .

- For discussion and forms concerning factual investigation of the case, see Ch. 81B, *Automobiles: Investigation* .

- For discussion and forms concerning monetary evaluation of the case, see Ch. 81B, *Automobiles: Case Evaluation* .

- For discussion and forms concerning the available causes of action in an automobile case, see Ch. 82, *Automobiles: Causes of Action* .

- For discussion and forms concerning the types and amount of damages available in an automobile case, see Ch. 82A, *Automobiles: Damages* .

- For discussion and forms concerning the drafting of answers and defenses in an automobile case, see Ch. 84, *Automobiles: Responding to the Action* .

- For discussion and forms concerning discovery in an automobile case, see Ch. 82A, *Automobiles: Discovery* .

- For discussion and forms concerning pretrial proceedings, and negotiation and settlement of automobile cases, see Ch. 86, *Automobiles: Pretrial Motions and Settlement Negotiations* .

[2] Other Related Chapters

- For discussion and forms relating to amended or supplemental pleadings, see Ch. 21, *Amended and Supplemental Pleadings* .

- For discussion and forms relating to complaints and cross complaints generally, see Ch. 123, *Complaints and Cross Complaints* .

- For discussion and forms relating to default and default judgment generally, see Ch. 205, *Defaults and Default Judgments* .

- For discussion and forms relating to emergency vehicles generally, see Ch. 246, *Emergency Vehicles* .

- For discussion and forms relating to jurisdiction generally, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter* .

- For discussion and forms relating to limited civil cases generally, see Ch. 345A, *Limited Civil Cases* .

- For discussion and forms relating to parties generally, see Ch. 395, *Parties* .

- For discussion and forms concerning the liability of public entities and officers for negligence in the operation of motor vehicles, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

- For discussion and forms relating to the summons and service of process generally, see Ch. 518, *Service of Summons and Papers* .

- For discussion and forms relating to verification of pleadings generally, see Ch. 572, *Verification* .

[3] Other Related Coverage

- For discussion and forms of points and authorities relating to cross complaints, see California Points and Authorities, Ch. 61, *Cross Complaints* (Matthew Bender).

- For discussion and forms of points and authorities relating to default judgments, see California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief from Judgments and Orders* (Matthew Bender).

- For discussion and forms of points and authorities relating to fictitious defendants, see California Points and Authorities, Ch. 104, *Fictitiously Named Defendants* (Matthew Bender).

- For discussion and forms of points and authorities relating to subject matter jurisdiction, see California Points and Authorities, Ch. 133, *Jurisdiction: Subject Matter Jurisdiction* (Matthew Bender).

- For discussion and forms of points and authorities relating to proper parties, see California Points and Authorities, Ch. 168, *Parties* (Matthew Bender).

- For discussion and forms relating to drafting complaints and cross complaints generally, see California Civil Actions, Pleading and Practice, Ch. 8, *Drafting the Complaint or Cross Complaint*

(Matthew Bender).

- For discussion and forms relating to drafting pleadings in actions based on personal injury, property damage, or wrongful death, see California Civil Actions, Pleading and Practice, Ch. 20, *Pleadings in Actions Based on Personal Injury, Property Damage and Wrongful Death* (Matthew Bender).

- For discussion and forms relating to personal jurisdiction and service of process, see California Civil Actions, Pleading and Practice, Ch. 26, *Acquiring Jurisdiction of the Parties; Service of Summons; Quashing Service and Inconvenient Forum* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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[Reserved]

§§ 83.03[Reserved]

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§ 83.10 Prefiling Claim Statutes In Actions Against Public Entities

The liability of a public entity arising from a tort such as an automobile collision is conditioned on the timely filing of a written claim in proper form [*Gov. Code §§ 905, 905.2*]. Except as provided in *Gov. Code §§ 946.4, 946.6*, no suit for money or damages may be brought against a public entity on a cause of action for which the Tort Claims Act requires that a claim be presented, unless a written claim has been presented to the public entity and has either been acted on, or been deemed to have been rejected by the governing body of the public entity [*Gov. Code § 945.4*]. Compliance with the claim requirement of *Gov. Code § 945.4* is, therefore, a condition precedent to an action against the public entity [*Williams v. Horvath (1976) 16 Cal. 3d 834, 838, 129 Cal. Rptr. 453, 548 P.2d 1125]* .

For a discussion of the procedure to be employed in pursuing the written claim and any subsequent civil action against a public entity, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural RequirementsTortsPublic Entity LiabilityLiabilityClaim PresentationGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview

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§ 83.11 Available Causes of Action

[1] In General

The plaintiff has an array of choices of causes of action arising from an automobile collision, but these claims can be grouped into three broad categories:

- Negligence actions, in which the negligence of the defendant provides the theory of liability;
- Vicarious liability actions, in which the defendant is liable for the negligence or other wrong of some third party; and
- Products liability actions, in which the seller or manufacturer of the vehicle is held strictly liable for a manufacturing or design defect therein.

These theories of liability are discussed in detail in Ch. 82, *Automobiles: Causes of Action* .

[2] Limitation of Damages Recoverable Under Proposition 213

Under Proposition 213, adopted by voters in 1996, the damages recoverable in automobile cases are limited if the plaintiff was not properly insured, was under the influence, or was in the act of committing a felony at the time of the collision [*Civ. Code § 3333.4*]. For specific discussion of Prop. 213, as well as a general discussion of the types and amount of damages available in an automobile case, see Ch. 82A, *Automobiles: Damages* .

[3] Statute of Limitations

In general, any action seeking recovery for personal injuries or death arising from an automobile collision case will be subject to a two-year (prior to January 1, 2003, one-year) statute of limitations [*Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)*; *see also Ch. 345, Limitation of Actions, § 345.14*]. If the action seeks only property damages, it is subject to a three year statute of limitations [*Code Civ. Proc. § 338*; see Ch. 345, *Limitation of Actions*]. A special tolling provision generally excludes any time the defendant is absent from the state in computing the running of the

limitations period [*Code Civ. Proc. § 351*; *see Ch. 345, Limitation of Actions, § 345.20[2]*].

In an automobile collision case, however, special provisions of the Vehicle Code override this tolling provision whenever the absentee can be served with process under the corresponding nonresident motorist statutes, unless the absentee cannot be located through the exercise of reasonable diligence [*Veh. Code § 17463*; *see Bigelow v. Smik (1970) 6 Cal. App. 3d 10, 14, 85 Cal. Rptr. 613* (limitations period not tolled by absence from state in any action under nonresident motorist statutes, including those not specifically enumerated in *§ 17463*)]. If a limitations defense is raised, the burden of proof is on the absentee defendant to show that he or she should have been located through the exercise of reasonable diligence [*Wurnitsch v. Nordvik (1971) 14 Cal. App. 3d 679, 688, 92 Cal Rptr. 518]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsNegligenceActionsGeneral OverviewTortsProducts LiabilityManufacturing DefectsTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 83.12 Potential Defendants

[1] Driver/Owner of Vehicle

In an action arising from an automobile collision, the most obvious defendant is the driver of the other vehicle. The driver will generally be named as a defendant in any action in which the driver's negligence is the basis of liability. A statutory negligence action against the other driver in an automobile collision is based on the statutory provision that everyone is responsible for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person [*Civ. Code § 1714(a)*; *see* Ch. 82, *Automobiles: Causes of Action*].

There may be some circumstances, however, in which the plaintiff may wish to omit the driver as a formal defendant for strategic reasons. Whether the driver should be joined depends on a number of considerations, including:

- The effect joinder might have on the trier of fact.

- The fact that exoneration of the driver as a defendant would automatically entail exoneration of any employer or principal under the theory of respondeat superior [*see, e.g., Campbell v. Security Pac. Nat'l. Bank (1976) 62 Cal. App. 3d 379, 386, 133 Cal. Rptr. 77* ; *see also* Ch. 82, *Automobiles: Causes of Action*].

- The financial solvency of the employee and whether or not the employee is independently insured.

- The employee's willingness, or lack thereof, to testify to the employee's own negligence if the employee is not named as a defendant.

The driver is most often the owner of the vehicle as well, but if the owner was not driving, the owner may also be a potential defendant if the owner may be held liable under some theory of vicarious liability, i.e., if the owner gave express or implied permission for the driver to operate the vehicle [*Veh. Code § 17150*; *see* Ch. 82, *Automobiles: Causes of Action*].

[2] Insurance Companies

In general, every owner or operator of a vehicle must be able to establish financial responsibility for any damages that may arise from the ownership or use of the vehicle, irrespective of fault [*Veh. Code § 16021*]. Though there are some exceptions, such financial responsibility is generally established through the purchase of liability insurance [*Veh. Code § 16021*]. Because the liability insurer generally is ultimately responsible under the insurance contract for any damages imposed on the owner or the driver, a plaintiff in an automobile collision will almost always wish to name the insurer as a codefendant. Whether named as a defendant or not, the insurance company will in fact be the party defending the suit on behalf of the owner or driver.

In the event that the defendant has broken the law and did not have the requisite liability insurance or other assurance of financial responsibility, the plaintiff may wish to proceed against his or her own insurance company to collect on any uninsured motorist coverage. Those claims are subject to special rules as to mandatory arbitration and are discussed in Ch. 88A, *Automobiles: Uninsured Motorist Claims* .

[3] Employer of Driver

If the defendant driver is an employee, the employer may be joined as a codefendant if: (1) the driver was acting within the course and scope of the employment at the time of the collision; or (2) the driver was operating a vehicle owned by the employer at the time of the collision [*see* Ch. 82, *Automobiles: Causes of Action*].

If the employer owns the vehicle, neither negligence nor use within the scope of employment by the employee operator is a condition to the liability of the employer, because mere ownership of the vehicle is sufficient for the imposition of liability [*Veh. Code § 17150*; *see* Ch. 82, *Automobiles: Causes of Action*]. When the employee, however, is not acting within the scope of employment, the employer-owner's liability is limited by *Veh. Code § 17151* [*Bayless v. Mull (1942) 50 Cal. App. 2d 66, 71-72, 122 P.2d 608* ; *see* Ch. 82, *Automobiles: Causes of Action*]. If, however, the employee was acting within the course and scope of the employment at the time of the collision,liability for the employee's negligence may be imposed on the employer under the doctrine of respondeat superior [*Vind v. Asamblea Apostolica, Christo Jesus (1957) 148 Cal. App. 2d 597, 602-604, 307 P.2d 85]* .

Finally, if the employer was negligent in its hiring practices, i.e., by hiring a demonstrably reckless driver, the employer may be held liable for its own negligence in this regard [*Doe v. Capital Cities (1996) 50 Cal. App. 4th 1038, 1055, 58 Cal. Rptr. 2d 122* ; *see* Ch. 82, *Automobiles: Causes of Action*].

For a general discussion of when an employer is liable for the tortious actions of employees, see Ch. 248, *Employer's Liability for Employee's Torts* .

[4] Manufacturer or Seller of Vehicle

If the plaintiff is alleging products liability as a basis for recovery, the manufacturer or seller of the vehicle should be joined as a defendant. A claim in products liability is appropriate when the plaintiff alleges that he or she was injured in the normal operation of the automobile as a result of a defect in the design or manufacture of the vehicle that made the vehicle unsafe for its intended use [*Gherna v. Ford Motor Co. (1966) 246 Cal. App. 2d 639, 649-650, 55 Cal. Rptr. 94* ; *see* Ch. 82, *Automobiles: Causes of Action*]. Claims in products liability are discussed in detail in Ch. 460, *Products Liability* .

[5] Doe Defendants

In some cases, the identity of one or more potentially liable defendants may be unknown to the plaintiff at the time the complaint is being drafted. In that event, the plaintiff may nevertheless draft and file the complaint by naming various fictitious or "John Doe" defendants, the actual names of whom will be substituted at a later stage of the proceedings [

Civ. Proc. Code § 474]. For discussion of fictitiously named defendants in general, see Ch. 395, *Parties* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceGeneral OverviewTortsVicarious LiabilityEmployersGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsProducts LiabilityManufacturing DefectsTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 83.13 Which Court to File In; Jurisdiction and Venue

[1] Subject Matter Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

If the amount of the demand is less than $5,000, jurisdiction over the action lies in the small claims court division of the superior court [*Code Civ. Proc. § 116.220(a)(1)*]. Effective January 1, 2006, the jurisdictional amount for small claims court in actions brought by natural persons is extended to $7,500, except for actions otherwise prohibited by *Code Civ. Proc. §§ 116.220(c)* or *116.231(a)* [*Code Civ. Proc. § 116.221*].

For further discussion of jurisdiction, see Ch. 324, *Jurisdiction: Subject Matter* .

[2] Venue

The general rule is that proper venue of an action lies in the county in which one or more of the defendants reside [*Code Civ. Proc. § 395(a)*; *see* Ch. 571, *Venue*]. In an automobile collision case, however, in which the action is for injury to person or personal property or for death from wrongful act or negligence, venue lies either [*Code Civ. Proc. § 395(a)*]:

- In a county in which one or more of the defendants reside; or
- In the county where the injury occurs.

Thus, a plaintiff involved in an automobile accident may file in the county in which the accident occurred, even if none of the defendants reside in that county.

If a defendant is a corporation or association, it may be sued "where the obligation or liability arises," or in the county of the principal place of business of the entity [*Code Civ. Proc. § 395.5*; *see* Ch. 571, *Venue*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureVenueIndividual DefendantsTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 83.14 Requirements for Complaint

[1] Required Contents

[a] In General

The Code of Civil Procedure requires simply that a complaint: (1) state, in ordinary and concise language, the facts constituting the cause of action; and (2) demand judgment for the relief to which the pleader claims to be entitled [*Code Civ. Proc. § 425.10*; *see* Ch. 123, *Complaints and Cross Complaints*].

[b] Factual Allegations

[i] Names, Capacities, and Residences of Parties

The names of the plaintiff or plaintiffs and of each defendant will be stated in the caption of the action. For discussion of the proper form and content of the caption, see Ch. 108, *Captions and Introductions* .

In general, the capacity and residence of the plaintiff need not be pleaded, unless the plaintiff is proceeding in a representative capacity or residenceallegations are necessary to establish proper venue [*see Code Civ. Proc. §§ 367, 369, 392-395.5*; *see* Ch. 123, *Complaints and Cross Complaints* , Ch. 395, *Parties*].

The capacity and residence of each defendant, however, should be affirmatively pleaded, since those allegations generally are necessary to establish jurisdiction over the action and the propriety of the chosen venue [*see Code Civ. Proc. §§ 392-395.5*; *see* Ch. 123, *Complaints and Cross Complaints* ; *see* Ch. 571, *Venue*]. If any fictitious "Doe" defendants are named [*see § 83.12[5], above*], such capacity and residence allegations obviously cannot be made; instead, the plaintiff should state that the names of those parties will be substituted at a later stage of the proceedings [*Civ. Proc. Code § 474*; *see* Ch. 395, *Parties*].

If the liability of any defendant is vicarious in nature, the complaint should so state and should allege the basis for that liability. Thus, if an employer is sued for a collision involving an employee, the employer should be identified as such. Similarly, if a principal is sued because of the acts of an agent, the complaint should identify the defendant as a

principal [*see* Ch. 497, *Principal and Agent*].

[ii] Ordinary and Concise Statement of the Claim

The facts establishing the cause of action should be set out in ordinary and concise language [*Code Civ. Proc. § 425.10(a)*; *see* Ch. 123, *Complaints and Cross Complaints*]. With respect to an automobile collision case, at least the following facts should be alleged:

- The year, make, model, and ownership of each vehicle involved in the collision;

- The circumstances in which each of these vehicles was being operated by or on behalf of each of the defendants, including employment or agency allegations;

- The time, date, and physical location of the collision;

- The defendants' negligence or other wrongful acts and the manner in which those acts caused the collision [*see* Ch. 380, *Negligence*]; and

- The fact and types of damages suffered by the plaintiff, including personal injury, property damage, other economic damages, and any noneconomic damages [*see* Ch. 177, *Damages*].

When properly identified, factual allegations in any pleading may be made on information and belief [*see* Ch. 123, *Complaints and Cross Complaints*].

For examples of automobile collision complaints setting out factual allegations of negligence, see *§§ 83.60 -83.66*.

[c] Demand for Judgment

A complaint must contain a demand for judgment for the relief to which the pleader claims to be entitled [*Code Civ. Proc. § 425.10(b)*; *see* Ch. 123,*Complaints and Cross Complaints*]. If the case is in the superior court and seeks damages for personal injury or wrongful death, the demand for judgment should not claim any particular amount as damages, unless the action is a "limited civil case"[*Code Civ. Proc. § 425.10(b)*]. If, however, the case does not seek relief for either personal injury or wrongful death, the demand for judgment should state the amount of damages sought by the pleader [*Code Civ. Proc. § 425.10(b)*].

[2] Requirements of Form

[a] In General

The California Rules of Court contain many provisions regulating the form and format of papers to be filed with the courts, including pleadings filed in the action [*see, e.g., Cal. Rules of Ct., Rules 2.100 et seq., 3.1110-3.1116*]. These rules regulate a wide variety of matters ranging from the size, pagination, and numbering of pages, the size and style of the type on those pages, as well as the uniquely Californian requirement of the use of recycled paper. For a complete discussion of these requirements of form as applicable to complaints and cross complaints, see Ch. 20, *Allegations Commonly Used* , Ch. 108, *Captions and Introductions* , Ch. 123, *Complaints and Cross Complaints* .

[b] Verification

[i] Not Required

In general, a complaint in an action, including any automobile collision case, need not be verified [*Code Civ. Proc. §§*

128.7(a), 446(a); *see* Ch. 123, *Complaints and Cross Complaints* ; Ch. 572, *Verification*].

[ii] Option of Verification Limits Defense Responses

Although verification of of a complaint in an automobile collision case is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified if the action is an unlimited civil case in the superior court [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

For a discussion as to how to exercise the option of verifying the complaint, see Ch. 572, *Verification* .

[3] Guardian ad Litem Petition for Minor or Incompetent Plaintiffs

If the plaintiff is a minor or incompetent person, a guardian ad litem petition must be filed with the complaint [*Code Civ. Proc. §§ 372* and *373*].

For forms of petition for appointment of guardian ad litem for a minor or incompetent person, see *Ch. 291, Guardians ad Litem, § 291.50* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 83.15 Summons

[1] In General; Issuance

After the plaintiff files the complaint and pays the requisite filing fees, the clerk of the court will issue summonses to be served on each defendant [*Code Civ. Proc. § 412.10*; *see* Ch. 518, *Service of Summons and Papers*]. The requisite content of the summons is set out specifically by *Code Civ. Proc. § 412.20*. For discussion of the summons, see Ch. 518, *Service of Summons and Papers* .

[2] Special Provision Required in Action Against Corporation or Association

As to each defendant in an automobile collision case that is a corporation or association, the summons must contain additional language stating that the individual served is being served as a representative of the corporation. If the person served on behalf of the corporation is also a defendant in an individual capacity, the summons must so state. Failure to include the required provision in the summons precludes entry of default or default judgment against the corporation or association [*Code Civ. Proc. § 412.30*; *see* Ch. 518, *Service of Summons and Papers*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 83.16 Service of Process

[1] In General; Procedural Due Process Requirement

Service of process is the method by which a court exercises personal jurisdiction over the defendants in an action [*see* Ch. 518, *Service of Summons and Papers*]. Any such exercise of personal jurisdiction, however, must not only be consistent with the state's requirements as to service of process, but must also be consistent with the federal constitution's guarantees of due process. Under federal law, a defendant must have some minimum contacts with the forum such that the exercise of jurisdiction over that defendant does not offend traditional notions of fair play and substantial justice [*International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)* ; *see* 16 Moore's Federal Practice, Ch. 108, *Territorial Jurisdiction; Jurisdiction Over Persons and Property* (Matthew Bender 3d ed.)].

[2] Amenability to Service of Process

[a] Resident Defendants

Service of process on resident defendants can never present any due process issues because residence within the jurisdiction is always a sufficient basis for the exercise of personal jurisdiction [*see* *Burnham v. Superior Court, 495 U.S. 604, 622, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990)* (mere presence within forum state is adequate basis for personal jurisdiction); 16 Moore's Federal Practice, Ch. 108, *Territorial Jurisdiction; Jurisdiction Over Persons and Property* (Matthew Bender 3d ed.)]. Under state statutes, residents who register or own vehicles within the state of California consent to service of process on any cause of action arising in the state from the ownership or operation of the owned or registered vehicle. This statutory consent extends to permit service of process outside the state, and continues even if the person ceases to be a California resident [*Veh. Code §§ 17459, 17460*; *see* *Ostrus v. Price (1978) 82 Cal. App. 3d 518, 524, 146 Cal. Rptr. 922* ; *Briggs v. Superior Court (1947) 81 Cal. App. 2d 240, 246-247, 183 P.2d 758* ; Ch. 518, *Service of Summons and Papers*].

[b] Nonresident Defendants

If a nonresident defendant is sued in a California state court on a claim arising from an automobile collision, due

process is satisfied so long as the collision occurred within California. Even if the nonresident had never been in California before and has never been in the state since, the commission of an allegedly tortious act within the jurisdiction generally is sufficient to subject the nonresident to suit in the forum [*Solot v. Linch (1956) 46 Cal. 2d 99, 104, 292 P.2d 887* ; *see* *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)* (defendant's sole contact with forum in making contract was sufficient to subject him to personal jurisdiction in litigation over the contract)].

Moreover, by statute, the operation or ownership by a nonresident of a vehicle operated within the state is consent to service of process in any action arising from the operation of the vehicle in the state, and is an irrevocable appointment of the California Director of Motor Vehicles as the nonresident's agent for such service [*Veh. Code § 17451*; *see* Ch. 518, *Service of Summons and Papers*]. The United States Supreme Court has upheld the constitutionality of these statutes that authorize service of process on nonresident motorists [*Hess v. Pawloski (1927) 274 U.S. 352, 356-357, 47 S. Ct. 632, 71 L. Ed. 1091]* .

[3] Methods of Service

[a] Under Vehicle Code

The Vehicle Code contains special provisions as to service of process in motor vehicle cases [*Veh. Code §§ 17450-17463*]. While the primary purpose of these provisions is to facilitate service of process on nonresidents, they are also applicable to residents or former residents of California who are absent from the jurisdiction when service is made [*Veh. Code § 17461*].

Service of process under *Veh. Code § 17454* is made by leaving one copy of the summons and complaint in the hands of the Director of Motor Vehicles at his or her office in Sacramento or by mailing the copy of the summons and complaint by certified or registered mail, addressee only, return receipt requested, to the office of the Director of Motor Vehicles in Sacramento. Service if effective as of the day the return receipt is received from the director's office. A fee of $2 for each defendant to be served must be paid to the Director at the time of service of the copy of the summons and complaint [*Veh. Code § 17454*].

After service has been made on the Director, either the plaintiff or the plaintiff's attorney must forthwith send by registered mail a notice of service and a copy of the summons and complaint to the defendant. Alternatively, personal service of the notice and a copy of the summons and complaint may be made in lieu of mailing [*Veh. Code § 17455*]. This method of service of process is complete when both the requisite service and notice to the defendant have been made [*Veh. Code § 17454*].

Service of process under this method is effective even if the defendant is outside the territorial limits of the United States [*Ben-Yehoshua v. Superior Court (1963) 214 Cal. App. 2d 719, 722, 29 Cal. Rptr. 775]* .

[b] Under Code of Civil Procedure

Whether the defendant is a resident or a nonresident, a plaintiff in a California automobile collision case may elect to eschew the special provisions of the Vehicle Code and serve process on the defendant under the general provisions of the Code of Civil Procedure [*see Code Civ. Proc. §§ 415.10-415.50*].

If the defendant is outside of *California, Code Civ. Proc. § 415.40* authorizes service in any manner provided by *Code Civ. Proc. §§ 415.10-415.50*, or by sending a copy of the summons and complaint to the defendant by first-class mail, postage prepaid, requiring a return receipt. Service by this form of mail is deemed complete on the 10th day after mailing [*Code Civ. Proc. § 415.40*].

For complete discussion of the methods of service under the Code of Civil Procedure, see Ch. 518, *Service of Summons and Papers* .

[4] Return and Proof of Service

If service of process is made under the general provisions of the Code of Civil Procedure, proof of service is likewise made under the corresponding provisions of *Code Civ. Proc. §§ 417.10-417.40* [*see* Ch. 518, *Service of Summons and Papers*].

If service of process is made under the special nonresident motorist statutes, the proper method of proof of service depends upon whether the required notice was given by mail or by personal service. If the notice was sent by mail, the plaintiff or plaintiff's attorney should file an affidavit (or declaration [*Code Civ. Proc. § 2015.5*] swearing to the mailing, together with the postal return receipt bearing the signature of the defendant. This affidavit and return receipt are to be appended to the summons and filed with the court within the time allowed for return of the summons [*Veh. Code § 17456*].

If notice was given to the defendant by personal service outside the state, proof of service is made by a return of service by the person or officer qualified to serve process in the jurisdiction in which service was effected. The return of service is to be appended to the summons and filed with the court within the time allowed for return of the summons [*Veh. Code § 17456*].

[5] Time Limit for Service

The summons and complaint must be served on the defendant within three years of commencement of the action [*Code Civ. Proc. § 583.210(a)*]. In computing this time, certain periods are excluded, including any time in which the defendant was not amenable to process, or was litigating the validity of service [*Code Civ. Proc. § 583.240*]. Failure to serve process within the required time mandates dismissal of the action [*Code Civ. Proc. § 583.250*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewTortsNegligenceGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 83.17 Default and Default Judgment

[1] In General

Generally, a defendant has 30 days to file an answer or other defense to the action [*e.g., Code Civ. Proc. § 430.40(a)*; *see Code Civ. Proc. § 412.20(a)(3)* (requiring summons to state that defendant has 30 days to respond)], though additional time may be available in certain circumstances [*see* Ch. 84, *Automobiles: Responding to the Action*]. If any defendant fails to answer or otherwise defend in the action within the allotted time, the plaintiff may file an application for the entry of default and default judgment against that defendant [*Code Civ. Proc. § 585*; *see* Ch. 205, *Defaults and Default Judgments*]. The application must be made in the form prescribed by the Judicial Council [*see § 83.17[2]*].

[2] Required Judicial Council Form

If a plaintiff applies for the entry of default and default judgment, the plaintiff must use the form promulgated for this purpose by the Judicial Council [*see Cal. Rules of Ct., Rule 1.31(b)*; *see also* Ch. 205, *Defaults and Default Judgments*]. A reduced reproduction of this form is found in Ch. 205, *Defaults and Default Judgments* . This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 83.18 Cross Complaints

After service of process on the defendants in an automobile collision case, the defendants will appear and answer the complaint. In addition, the defendants may file one or more cross complaints against each other, against one or more plaintiffs, or against additional parties to be brought into the action. Certain cross complaints against the plaintiffs may be compulsory [*see Code Civ. Proc. §§ 426.10-426.70, 428.10-428.80*; Ch. 123, *Complaints and Cross Complaints*]. When one or more plaintiffs is named as a defendant in a cross complaint, the plaintiff must also assert any compulsory cross complaints arising from the same transaction or occurrence, and may assert any permissive cross complaints as well [*see Code Civ. Proc. §§ 426.10-426.70, 428.10-428.80*; Ch. 123, *Complaints and Cross Complaints*].

Thus, for instance, if a driver and passenger in one vehicle sue the driver of another vehicle for negligence, the defendant may file an answer and cross complaint alleging the negligence of some other third party. That third party defendant may then file a cross complaint against the original plaintiffs, who may in turn answer and file cross complaints against the third party defendant.

Any party filing a cross complaint may join to that claim new parties and additional claims available to the pleader [*see Code Civ. Proc. §§ 428.20, 428.30*; Ch. 123, *Complaints and Cross Complaints*]. The cross complaint must be a separate document, and may not be incorporated into the answer [*see Code Civ. Proc. § 428.40*; Ch. 123, *Complaints and Cross Complaints*]. A cross complaint in response to a claim for relief must be filed either before or simultaneously with the answer to the pleading setting out the claim [*see Code Civ. Proc. § 428.50(a)*; Ch. 123, *Complaints and Cross Complaints*]. A cross complaint not in response to another pleading may be filed at any time before the court has set a trial date [*see Code Civ. Proc. § 428.50(b)*; Ch. 123, *Complaints and Cross Complaints*]. Any cross complaint filed after these deadlines may be filed only by leave of court [*see Code Civ. Proc. § 428.50(c)*; Ch. 123, *Complaints and Cross Complaints*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral OverviewTortsNegligenceGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§§ 83.19[Reserved]

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§ 83.30 Related Texts From LexisNexis

For a discussion of California rules of evidence, see California Courtroom Evidence (4th ed. LexisNexis)

For a pocket handbook on laying evidentiary foundations in California courts, see California Courtroom Foundations (LexisNexis)

For an in-depth desktop guide to California trial practice, see California Trial Handbook (3rd ed. LexisNexis)

For a pocket-size reference for making objections under the Federal Rules of Evidence and the California Evidence Code, see California Objections at Trial (LexisNexis)

For discussion of trial techniques, procedures, and tactics, see California Trial Techniques (LexisNexis)

For discussion of uninsured motorist law, see California Uninsured Motorist Law (6th ed. LexisNexis)

For discussion of trial of collision cases generally, see Trial of Accident Cases (Matthew Bender)

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§ 83.31 Federal Constitution

Due process required for service of process. *U.S. Const. amend. V, XIV*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 83.32 State Statutes

Jurisdiction in "limited civil case." *Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86*

Limitation of damages in certain cases. *Civ. Code § 3333.4*

Statute of limitations, personal injuries or death. *Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)* (statute prior to 2003)

Statute of limitations, property damage only. *Code Civ. Proc. § 338*

Statute of limitations not tolled by absence of motorist from jurisdiction when service of process could be made. *Veh. Code § 17463*

Fictitious or "John Doe" defendants. *Code Civ. Proc. § 474*

Jurisdiction of superior court. *Code Civ. Proc. § 410.10*

Proper venue of action. *Code Civ. Proc. § 395(a)*

Required contents of complaint. *Code Civ. Proc. § 425.10*

Verification of complaint. *Code Civ. Proc. §§ 128.7(a), 431.30(d), 446(a)*

Requisites of summons. *Code Civ. Proc. §§ 412.10-412.30*

Pleading requirements as to parties. *Code Civ. Proc. §§ 367, 369, 392-395.5*

Ownership or registration of vehicle in state as consent to service of process. *Veh. Code §§ 17459, 17460*

Nonresident's operation or ownership of vehicle in state as consent to service of process. *Veh. Code § 17451*

Special Vehicle Code provisions as to method of service of process on out-of-state defendant. *Veh. Code § 17454*

General provisions as to method of service of process. *Code Civ. Proc. §§ 415.10-415.50*

Special Vehicle Code provisions as to notice of service of process on out-of-state defendant. *Veh. Code § 17455*

Special Vehicle Code provisions as to proof of service of process on out-of-state defendant. *Veh. Code § 17456*

General provisions as to proof of service. *Code Civ. Proc. §§ 417.10-417.40*

Application for entry of default and default judgment. *Code Civ. Proc. § 585*

Cross complaints, generally. *Code Civ. Proc. §§ 426.10-426.70, 428.10-428.80*

Claim requirement as to public entities. *Gov. Code § 945.4*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessGeneral OverviewCivil ProceduresPretrial JudgmentsDefaultDefault JudgmentsGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsNegligenceActionsGeneral OverviewCivil ProceduresPretrial JudgmentsDefaultEntry of Default Judgments

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§ 83.33 California Rules of Court

Required form of complaint. *Cal. Rules of Ct., Rules 2.100 et seq., 3.1110-3.1116*

Required use of Judicial Council form for application for default or default judgment. *Cal. Rules of Ct., Rule 1.31(b)*

Legal Topics:

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8-83 California Forms of Pleading and Practice--Annotated § 83.34

§ 83.34 Decisions

[1] Generally

Compliance with claim requirement as condition precedent to suit against public entity. *Williams v. Horvath (1976) 16 Cal. 3d 834, 838, 129 Cal. Rptr. 453, 548 P.2d 1125*

Limitations period not tolled by absence from state in any action under nonresident motorist statutes. *Bigelow v. Smik (1970) 6 Cal. App. 3d 10, 14, 85 Cal. Rptr. 613*

Burden of proof on absentee defendant to show that he or she could have been located through exercise of reasonable diligence. *Wurnitsch v. Nordvik (1971) 14 Cal. App. 3d 679, 688, 92 Cal Rptr. 518*

Liability of employer limited by Vehicle Code when employee not acting within scope of employment. *Bayless v. Mull (1942) 50 Cal. App. 2d 66, 71-72, 122 P.2d 608*

Liability of employer for employee's negligence under respondeat superior. *Vind v. Asamblea Apostolica, Christo Jesus (1957) 148 Cal. App. 2d 597, 602-604, 307 P.2d 85*

Liability of employer for negligent hiring practices. *Doe v. Capital Cities (1996) 50 Cal. App. 4th 1038, 1055, 58 Cal. Rptr. 2d 122*

[2] Service of Process

Statutory consent to service of process outside of state. *Ostrus v. Price (1978) 82 Cal. App. 3d 518, 524, 146 Cal. Rptr. 922*

Commission of tortious act in forum as sufficient basis for personal jurisdiction. *Solot v. Linch (1956) 46 Cal. 2d 99, 104, 292 P.2d 887* ; *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)*

Validity of nonresident motorist statutes. *Hess v. Pawloski (1927) 274 U.S. 352, 356-357, 47 S. Ct. 632, 71 L. Ed. 1091*

Validity of service on defendant outside of *United States. Ben-Yehoshua v. Superior Court (1963) 214 Cal. App. 2d 719, 722, 29 Cal. Rptr. 775*

Due process requirements of service of process. *International Shoe Co. v. Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945)*

Presence in jurisdiction as basis for personal jurisdiction. *Burnham v. Superior Court, 495 U.S. 604, 622, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewTortsVicarious LiabilityEmployersGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsPublic Entity LiabilityLiabilityClaim PresentationContent & FormTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 83.35 Internet References

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§§ 83.36[Reserved]

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PART IV. PROCEDURAL CHECKLISTS

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§ 83.50 Plaintiff's Checklist

[1] Prelitigation Considerations

[a] Arbitration of Claim for Uninsured Motorist Coverage

☐ If client's insurer disputes uninsured motorist claim, initiate arbitration proceedings [*see* Ch. 88A, *Automobiles: Uninsured Motorist Claims*].

☐ No cause of action will accrue in favor of the insured on an uninsured motorist claim unless, within two years (one year prior to 2004) after the date of the accident [*Ins. Code § 11580.2(i)(1)*; *see* Ch. 88A, *Automobiles: Uninsured Motorist Claims*]:

☐ Suit has been filed against the uninsured motorist;

☐ agreement has been reached as to the amount due under the policy; or

☐ Formal arbitration proceedings have been initiated.

NOTE:

Arbitration proceedings may ensue between an insured client and his or her insurer prior to, or even in the absence of, filing a complaint against the uninsured motorist or any other party to the collision, and any award made is not res judicata in any court action against the uninsured motorist [*Ins. Code §§ 11580.2(f), 11580.5*; *see* Ch. 88A, *Automobiles: Uninsured Motorist Claims*].

Some practitioners advise filing suit first against the uninsured motorist for the purposes of obtaining discovery from the uninsured motorist (who is not a party to the arbitration) on such issues as his or her liability and lack of insurance, which are directly at issue in the arbitration proceeding [*see* California

Uninsured Motorist Law, Ch. 18, *Discovery in Arbitration* (LexisNexis)].

☐ If suit is brought against uninsured motorist or any other party to accident and counsel intends to pursue such suit, obtain written consent of client's insurer to any settlement or judgment in action.

☐ This consent is necessary for preserving the uninsured motorist claim and is for the protection of the insurer's subrogation rights against the other parties [*Ins. Code § 11580.2(c)(3)*].

[b] Tort Claim Against Public Entity

☐ If public entity is potential defendant, file written claim with governing body of entity.

☐ When a claim is required, no suit for money or damages may be brought against a public entity unless a written claim has been presented to the public entity and has either been acted on, or been deemed to have been rejected by the governing body of the public entity [*Gov. Code § 945.4*; *Williams v. Horvath (1976) 16 Cal. 3d 834, 838, 129 Cal. Rptr. 453, 548 P.2d 1125* (compliance with claim requirement is condition precedent to action against the public entity)].

☐ Exceptions:

☐ Public agency has incomplete or no statement on file in the Secretary of State's Roster of Public Agencies during 70 days immediately following accrual of cause of action [*Gov. Code § 946.4*].

☐ Court grants petition to file late claim [*Gov. Code § 946.6*].

☐ For discussion of claim procedures and subsequent actions against public entity, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[2] Litigation Considerations

[a] Prepare Complaint

☐ Causes of action against potential defendants include:

☐ Negligence.

☐ Vicarious liability.

☐ Products liability.

☐ For discussion of the potential theories of liability, see Ch. 82, *Automobiles: Causes*

of Action .

☐ Jurisdiction:

☐ If amount of damages sought exceeds $25,000, superior court.

☐ If amount of damages sought is $25,000 or less, superior court as limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)*].

☐ If amount of damages sought is $5,000 or less, or $7,500 or less if plaintiff is natural person, small claims division of superior court [*Code Civ. Proc. §§ 116.220(a)(1), 116.221*].

☐ Venue choices include [*Code Civ. Proc. §§ 395(a), 395.5*; *see* Ch. 571, *Venue*]:

☐ County in which one or more of the defendants reside.

☐ County in which a defendant corporation or association has its principal place of business.

☐ County in which injury occurred.

☐ Draft complaint according to applicable statutes and rules, including:

☐ Ordinary and concise statement of the facts constituting the cause of action, including at least:

☐ The year, make, model, and ownership of each vehicle involved in the collision.

☐ The circumstances in which each vehicle was being operated by or on behalf of each of the defendants, including employment or agency allegations.

☐ The time, date, and physical location of the collision.

☐ The defendants' negligence or other wrongful acts and the manner in which those acts caused the collision [*see* Ch. 380, *Negligence*].

☐ The fact and types of damages suffered by the plaintiff, including personal injury, property damage, other economic damages, and any noneconomic damages [*see* Ch. 177, *Damages*].

☐ Capacity and residence of the plaintiff or plaintiffs usually need not be pleaded, but the capacity and residence of each defendant should be affirmatively pleaded, because those allegations generally are necessary to establish jurisdiction over the action and the propriety of the chosen venue [*see § 83.14[b][i]*].

☐ Demand for judgment for the relief to which the pleader claims to be entitled.

☐ If the case is in the superior court and seeks damages for personal injury or wrongful death, do not claim any particular amount as damages in the demand for judgment, unless the action is a limited civil case. Otherwise, the demand for judgment must state the amount of damages sought [*Code Civ. Proc. § 425.10*].

☐ Required form.

☐ Follow California Rules of Court provisions regulating the form and format of papers [*see, e.g., Cal. Rules of Ct., Rules 2.100 et seq., 3.1110-3.1116*; *see also* Ch. 123, *Complaints and Cross Complaints*].

☐ Verify complaint, if desired.

☐ Consider whether to preclude defendant from filing a general denial and to require a verified answer by verifying the complaint in a superior court action that is not a limited civil case [*Code Civ. Proc. §§ 92(b), 431.30(d), 446*].

☐ Verification of the complaint will not require a defendant public entity or officer to verify its answer [*Code Civ. Proc. § 446*].

[b] Prefiling Settlement Offer

☐ Consider sending copy of complaint with letter to defendant's insurance carrier offering settlement.

NOTE:
Occasionally, a settlement offer is made prior to filing the complaint. This is most frequently done in smaller cases in which liability and damages are largely uncontroverted and a reasonable response is anticipated from the insurer. Settlement prior to filing can save filing fees and costs of service of process.

[c] File Complaint and Prepare Summons

☐ If no settlement, have clerk of court issue summons to be served on each defendant.

☐ After the plaintiff files the complaint and pays the requisite filing fees, the clerk of the court will issue summonses to be served on each defendant [*Code Civ. Proc. § 412.10*; *see Code Civ. Proc. § 412.20* (content of summons); *see also* Ch. 518, *Service of Summons and Papers*].

☐ If defendant is corporation or association, include required language as to whether individual is served in official capacity, individual capacity, or both.

☐ A summons issued to a corporation or association must state that the individual served is being served as a representative of the artificial entity. If the person served on behalf of the entity is also a defendant in an individual capacity, the summons must so state. Failure to include the required provision in the summons precludes entry of default or default judgment against the entity [*Code Civ. Proc. § 412.30*; *see* Ch. 518, *Service of Summons and Papers*].

☐ If the plaintiff is a minor or incompetent person, file a petition for appointment of a guardian ad litem with the complaint [*Code Civ. Proc. §§ 372, 373*; *see Ch. 291, Guardians ad Litem, § 291.50* et seq.].

[d] Serve Summons and Complaint

☐ Serve process on each defendant under either:

☐ The general provisions of the Civil Code [*see Code Civ. Proc. §§ 415.10-415.50*].

☐ Special provisions of the Vehicle Code applicable to motor vehicle cases [*Veh. Code §§ 17450-17463*].

☐ For discussion, see *§ 83.16[3]*. For a complete discussion of service of process, see Ch. 518, *Service of Summons and Papers* .

[e] Default

☐ If a defendant does not answer or otherwise respond to the complaint within the time permitted after service of the summons, apply for entry of default and default judgment [*see § 83.17*].

☐ For discussion and an illustration of the mandatory Judicial Council Form 982(a)(6), see Ch. 205, *Defaults and Default Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedureSettlementsGeneral OverviewInsurance LawMotor Vehicle InsuranceArbitrationCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-83 California Forms of Pleading and Practice--Annotated §§ 83.51-83.59

[Reserved]

§§ 83.51[Reserved]

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8-83 California Forms of Pleading and Practice--Annotated § 83.60

§ 83.60 Complaint for Property Damage and Damages for Personal Injuries Based on Negligence; By Automobile Owner-Operator; Against Automobile Owner-Operator; General Form

[1] FORM Complaint for Property Damage and Damages for Personal Injuries Based on Negligence; By Automobile Owner-Operator; Against Automobile Owner-Operator; General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Negligence)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant is a natural person who is, and at all times mentioned in this complaint was, a resident of _____ County, California.

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1 through _____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences

alleged in this complaint, and plaintiff's injuries as alleged were proximately caused by defendants' negligence.)]

3. At all times mentioned in this complaint, _____ [defendant _____ (*name*) *or* DOE _____ (*number*)] was the owner of a certain _____ [*year, make, model*] automobile, California License No. _____.

[*EITHER*]

[4. At all times mentioned in this complaint, _____ [defendant _____ (*name*) *or* DOE _____ (*number*)] was the agent and employee of defendant _____ [*name*] and was acting within the purpose and scopeof this agency and employment in performing the acts alleged in this complaint.]

[*OR*]

[4. At all times mentioned in this complaint, _____ [defendant _____ (*name*) *or* DOE _____ (*number*)] was driving and operating the _____ [*make*] automobile with the consent, permission, and knowledge of defendant _____ [*name*].]

[*CONTINUE*]

5. Plaintiff is, and at all times mentioned in this complaint was, the owner of a certain _____ [*year, make, model*] automobile, California License No. _____.

6. At all times mentioned in this complaint _____ [*identify first cross street*] and _____ [*identify second cross street*] were and are intersecting public streets and highways in _____ [*identify city or county*], California, and running in a _____ [*identify direction by compass point, e.g.,* northwesterly] direction and a _____ [*identify direction by compass point, e.g.,* southeasterly] direction, respectively.

7. On _____ [*date*], at or about the hour of _____ [*time*], plaintiff was operating the _____ [*make*] automobile on _____ [*identify street*] in a general _____ [*identify direction by compass point, e.g.,* northwesterly] direction approaching the intersection of _____ [*identify first cross street*] and _____ [*identify second cross street*].

8. On that date, and at that time and place, defendants, and each of them, so negligently [*add, if appropriate:* carelessly, recklessly, *and/or* unlawfully] entrusted, managed, maintained, drove, and operated the _____ [*make*] automobile on _____ [*identify street*] in a _____ [*identify direction by compass point, e.g.,* southeasterly] direction, so as to proximately cause it to collide with plaintiff's automobile and to proximately cause and hereinafter described injuries and damages to plaintiff.

9. As a proximate result of this negligence [*add, if appropriate:* carelessness, recklessness, *and/or* unlawfulness] of defendants and the resulting collision as previously alleged, plaintiff was injured in his/her health, strength, and activity, sustained injury to his/her body and shock and injury to his/her nervous system and person, and sustained the following personal injuries, among others: _____ [*describe plaintiff's injuries*], all of which injuries have caused and continue to cause plaintiff great mental, physical, and nervous pain and suffering. These injuries will result in some

permanent disability to plaintiff, all to his/her general damage.

[*EITHER*]

10. As a proximate result of the negligence [*add, if appropriate:* carelessness, recklessness, *and/or* unlawfulness] of defendants, and each of them, plaintiff necessarily employed physicians and surgeons for medicalexamination, treatment, and care of these injuries, and incurred medical and incidental expenses for the following:

[*LIST medical expenses and other incidental expenses associated with medical treatment, e.g.*]

(1) Services of physicians and surgeons

(2) Ambulance service

(3) Hospital services

(a) _____ *na* [*me*] Hospital

(b) _____ *na* [*me*] Hospital

(4) X-rays

(5) Practical nursing service

(6) Drugs and medicines

(7) _____ _____ _____ _ (Purchase *or* Rental) of wheelchair, crutches, or similar items

As a proximate result of the negligence of defendants, and each of them, plaintiff will incur further medical and incidental expenses for the care and treatment of these injuries, the exact amount of which is unknown at the present time.

[*OR*]

10. As a proximate result of the negligence [*add, if appropriate:* carelessness, recklessness, *and/or* unlawfulness] of defendants, and each of them, plaintiff necessarily employed physicians and surgeons for medical examination, treatment, and care of these injuries, and incurred medical and incidental expenses and will have to incur additional like expenses in the future, all in amounts presently unknown to him/her. Plaintiff therefore asks leave of court to prove that amount at the time of trial.

[*CONTINUE*]

11. As a proximate result of the negligence [*add, if appropriate:* carelessness, recklessness, *and/or* unlawfulness] of the defendants, and each of them, plaintiff was disabled and may be disabled in the future and thereby be prevented from attending to the duties of plaintiff's usual occupation. Plaintiff has therefore lost earnings and may continue to lose earnings in the future, all in amounts presently unknown to him. Plaintiff asks leave of court to prove that amount at the time of trial.

12. Immediately prior to and at the time of the collision plaintiff's _____ [*make*] automobile was in good mechanical condition. As a proximate result of the negligence and carelessness of the defendants, and each of them, plaintiff's vehicle was damaged; and plaintiff thereafter was denied the use of the vehicle, to plaintiff's future

damage, all in amounts which will be shown according to proof.

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings _____ according to proof;

4. For repairs to plaintiff's automobile [in the sum of $_____];

5. For loss of use of that automobile [in the sum of $_____];

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*].

_____
..... [*signature*]

[2] Use of Form

This form is a complaint for use in an action by an owner and operator of an automobile to recover property and personal injury damages sustained as the result of a collision caused by the negligence of another driver.

[3] Allegations

This complaint alleges:

- The capacity and residence of the defendants (Paragraph 1).
- Ownership of the vehicles involved in the collision (Paragraphs 3 and 5).
- Agency, employment, or permissive use if vicarious liability of a defendant is to be alleged (Optional

Paragraph 4) [for additional agency allegations, *see §§ 83.130 -83.139*].

- The date, time, place, and circumstances of the collision (Paragraphs 6, 7, and 8).
- Allegations of the plaintiff's damages (Paragraphs 9-14).

Negligence may be charged in general terms; it is sufficient to allege that the defendant negligently operated the vehicle, without alleging how or in what respect it was done [*see Brooks v. E. J. Willig Truck Transp. Co. (1953) 40 Cal. 2d 669, 680, 255 P.2d 802* ; *Wiley v. Cole (1921) 52 Cal. App. 617, 618, 199 P. 550]* .

It is essential to allege both automobile ownership (Paragraph 3) and permissive use by another (Paragraph 5) in order to state a cause of action against an owner who was not driving at the time of the collision under *Veh. Code § 17150* [*see Scheff v. Roberts (1950) 35 Cal. 2d 10, 12, 215 P.2d 925* ; *see also Krum v. Malloy (1943) 22 Cal. 2d 132, 134-135, 137 P.2d 18]* . For allegations of ownership and permissive use, see *§ 83.130*.

[4] Proposition 213 Considerations

Under Proposition 213, adopted by voters in 1996, the damages recoverable in automobile cases are limited if the plaintiff was not properly insured, was under the influence, or was in the act of committing a felony at the time of the collision [*Civ. Code § 3333.4*]. For specific discussion of Prop. 213, as well as a general discussion of the types and amount of damages available in an automobile case, see Ch. 82A, *Automobiles: Damages* .

[5] Verification

Verification of this complaint is not required [*Code Civ. Proc. §§ 128.7(a)* (repealed on January 1, 2006, unless later-enacted statute deletes or extends repeal date), 446(a); *see § 83.14[2][b]*]. In an unlimited civil case, however, the plaintiff may nevertheless consider verifying the complaint because verification requires the defendant to file a verified answer [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect of voluntary verification of the complaint, see *§ 83.14[2][b]*.

[6] Jurisdiction

The superior court will have jurisdiction of any action arising from an automobile collision. If the action is a limited civil case (amount in controversy, exclusive of interest, is $25,000 or less), the caption must state whether the demand exceeds or does not exceed $10,000, and the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

If the amount of the demand is less than $5000, jurisdiction over the action lies in the small claims court division of the superior court [*Code Civ. Proc. § 116.220(a)(1)*]. Effective January 1, 2006, the jurisdictional amount for small claims court in actions brought by natural persons is extended to $7,500, except for actions otherwise prohibited by *Code Civ. Proc. §§ 116.220(c)* or *116.231(a)* [*Code Civ. Proc. § 116.221*].

[7] Venue

In an action for injury to person or personal property or for death from wrongful act or negligence, venue lies either:

- In a county in which one or more of the defendants reside; or
- In the county where the injury occurs [*Code Civ. Proc. § 395(a)*].

Thus, a plaintiff involved in an automobile accident may file in the county in which the accident occurred, even if none

of the defendants reside in that county.

If a defendant is a corporation or association, it may be sued "where the obligation or liability arises," or in the county of the principal place of business of the entity [*Code Civ. Proc. § 395.5*; *see* Ch. 571, *Venue*].

For additional discussion of venue, see *§ 83.13[2]*.

[8] Specifying Amount of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

[9] Cross References

For alternative allegations of agency, employment, or permissive use sufficient to impose vicarious liability on a defendant, see *§§ 83.130 -83.139*

For alternative allegations as to capacity and residence of parties, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used* .

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions* .

For alternative forms of prayers, see Ch. 420, *Prayers* .

For points and authorities in support of and in opposition to a general demurrer to a complaint by an automobile owner-operator for damages based on negligence, see California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender).

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8-83 California Forms of Pleading and Practice--Annotated § 83.61

§ 83.61 Complaint for Property Damage and Damages for Personal Injuries Based on Negligence; By Automobile Owner-Operator; Against Automobile Owner-Operator; Short Form

[1] FORM Complaint for Property Damage and Damages for Personal Injuries Based on Negligence; By Automobile Owner-Operator; Against Automobile Owner-Operator; Short Form

[*Caption. See § 83.60[1].*]

Plaintiff alleges:

1. [*Capacity and residence of Defendant. See § 83.60[1], Paragraph 1.*]

2. [*Fictitious name allegations, if appropriate. See § 83.60[1], Paragraph 2.*]

3. _____ [*identify street*] and _____ [*identify street*] are public streets and highways in _____ County, California[, and intersect each other in that county and state].

4. On _____ [*date*], at or about the hour of _____ [*state time*], plaintiff owned and operated a certain _____ [*year, make, model*] automobile, California License No. _____, in a general [*compass point*] direction on _____ [*identify street*] at or near its intersection with _____ [*identify street*].

5. At the previously alleged time and place, defendant owned and negligently operated a certain _____ [*year, make, model*] automobile, California License No. _____, in a general _____ [*compass point*] direction on _____ [*identify street*], and, as a proximate result of that negligent operation, collided with plaintiff's automobile.

6. As a proximate result of the defendant's negligence and the resulting collision, plaintiff was rendered sick, sore, lame, and disabled, and was damaged.

7. As a further proximate result of the previously alleged negligence and collision, plaintiff has been and in the future will be required to obtain the services of physicians and to incur other medical expenses in an amount unknown to plaintiff at this time.

8. As a further proximate result of the previously alleged negligence and collision, plaintiff has been and will continue to be unable to work for an indefinite period of time in the future.

9. As a further proximate result of the previously alleged negligence and collision, plaintiff's automobile was damaged to such an extent that repairs were necessary [in the sum of $_____, which is the reasonable value of such repairs].

10. As a further proximate result of the previously alleged negligence and collision, plaintiff was deprived of the use of his/her automobile for a period of _____ [*number*] days and was damaged thereby [in the sum of $_____].

[*Prayer. See § 83.60[1]*.]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 83.60[1]*.]

[2] Use of Form

This form is an abbreviated form of a complaint for use in an action by an owner and operator of an automobile to recover property and personal injury damages sustained as the result of a collision caused by the negligence of another driver.

[3] Allegations

This complaint alleges:

- The capacity and residence of the defendants (Paragraph 1).
- Ownership of the vehicles involved in the collision (Paragraphs 4 and 5).
- The date, time, place, and circumstances of the collision (Paragraphs 3, 4, and 5).
- The plaintiff's damages (Paragraphs 6-10).

Negligence may be charged in general terms; it is sufficient to allege that the defendant negligently operated the vehicle, without alleging how or in what respect it was done [*see Brooks v. E. J. Willig Truck Transp. Co. (1953) 40 Cal. 2d 669, 680, 255 P.2d 802* ; *Wiley v. Cole (1921) 52 Cal. App. 617, 618, 199 P. 550]* .

[4] Cross References

For further discussion on the use of this form, including jurisdiction, venue, and Proposition 213 considerations, see *§ 83.60[4]* et seq.

For allegations of agency, employment, or permissive use sufficient to impose vicarious liability on a defendant, see *§§ 83.130 -83.139*.

For cross references with respect to captions, prayers, and allegations of capacity and residence of parties, fictitious name allegations, or agency allegations, see *§ 83.60[2]*.

For points and authorities in support of and in opposition to a general demurrer to a complaint by an automobile owner-operator for damages based on negligence, see California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender).

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8-83 California Forms of Pleading and Practice--Annotated § 83.62

§ 83.62 Complaint for Damages to and Loss of Use of Automobile Based on Negligence; By Automobile Owner-Operator; Against Owner and Operator

[1] FORM Complaint for Damages to and Loss of Use of Automobile Based on Negligence; By Automobile Owner-Operator; Against Owner and Operator

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____[*name*],	)	(Negligence)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of Defendant. See § 83.60[1], Paragraph 1.*]

2. [*Fictitious name allegations, if appropriate. See § 83.60[1], Paragraph 2.*]

3. At all times mentioned in this complaint defendant _____ [*name*] was the owner of a certain _____ [*year, make, model*] automobile, California License No. _____.

4. Plaintiff is, and at all times mentioned in this complaint was, the owner of a certain _____ [*year, make, model*] automobile, California License No. _____.

5. At all times mentioned in this complaint, _____ [*identify street*] and _____ [*identify street*] were public streets/highways intersecting in _____ [*city*], _____ County, California.

6. On _____ [*date*], at or about the hour of _____ [*state time*], defendants, and each of them, so negligently owned, operated, controlled, and maintained the _____ [*make*] automobile in _____ [*compass point*] direction on _____ [*identify street*], near its intersection with _____ [*identify street*] as to cause it to collide with the _____ [*make*] automobile owned and operated by plaintiff.

7. As a proximate result of the negligence of defendants, and each of them, plaintiff's automobile was damaged and had to be repaired at a cost of $_____, which is a reasonable value for the repairs to the _____ [*make*] automobile. [Plaintiff also seeks the sum of $_____ for depreciation in the value of his/her automobile caused by damage from the collision.]

8. As a further proximate result of the negligence of defendants, and each of them, plaintiff lost the use of his/her automobile for a period of _____ [*number*] days; the reasonable value of this loss of use of the automobile is the sum of $_____.

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

1. For general damages according to proof.

2. For repair to plaintiff's automobile in the sum of $_____.

3. For the loss of use of plaintiff's automobile in the sum of $_____.

4. For costs of suit incurred herein.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 83.60[1].*]

[2] Use of Form

This form is a complaint for use in an action by an owner and operator of an automobile to recover only the property damages sustained by the owner's vehicle as the result of a collision caused by the negligence of another owner and operator. If recovery of personal injury damages is sought as well, a different form must be used. See *§§ 83.60, 83.61*. For allegations of agency, employment, or permissive use sufficient to impose vicarious liability on a defendant that was not operating the vehicle, see *§§ 83.130 -83.139*.

[3] Allegations

This complaint alleges:

- The capacity and residence of the defendants (Paragraph 1).
- Ownership of the vehicles involved in the collision (Paragraphs 3 and 4).
- The date, time, place, and circumstances of the collision (Paragraphs 5 and 6).
- The plaintiff's damages (Paragraphs 7 and 8).

Negligence may be charged in general terms; it is sufficient to allege that the defendant negligently operated the vehicle, without alleging how or in what respect it was done [*see Brooks v. E. J. Willig Truck Transp. Co. (1953) 40 Cal. 2d 669, 680, 255 P.2d 802* ; *Wiley v. Cole (1921) 52 Cal. App. 617, 618, 199 P. 550]* . The plaintiff must plead and prove the reasonability of the amount paid for repairs to the vehicle [*Laubscher v. Blake (1935)7 Cal. App. 2d 376, 383, 46 P.2d 836]* . The defendant is also liable for any depreciation in the value of the car notwithstanding the fact of repair [*Brown v. Roland (1940) 104 P.2d 138* ; *Byrne v. Western Pipe & Steel Co. (1927) 81 Cal. App. 270, 274, 253 P. 776]* .

[4] Verification

Verification of this complaint is not required [*Code Civ. Proc. §§ 128.7(a), 446(a)*; *see § 83.14[2][b]*]. Although verification is optional, no advantage would be gained by doing so in a limited civil case, because verification of the answer is not required in such an action [*Code Civ. Proc. § 92(b)*]. For further discussion, see *§ 83.14[2][b]*.

[5] Jurisdiction

The superior court has jurisdiction of the action. Because the recovery of mere property damages will often be less than $25,000, the action will likely be a limited civil case. For further discussion of jurisdiction and caption requirements for limited civil cases, see *§ 83.60[6], above*.

[6] Specifying Amount of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

[7] Cross References

For further discussion on the use of this form, including venue, and Proposition 213 considerations, see *§ 83.60[4]* et seq.

For allegations of agency, employment, or permissive use sufficient to impose vicarious liability on a defendant, see *§§ 83.130 -83.139*.

For cross references with respect to captions, prayers, and allegations of capacity and residence of parties, fictitious name allegations, or agency allegations, see *§ 83.60[2]*.

For points and authorities in support of and in opposition to a general demurrer to a complaint by an automobile owner-operator for damagesbased on negligence, see California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender).

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8-83 California Forms of Pleading and Practice--Annotated § 83.63

§ 83.63 Complaint for Damages to and Loss of Use of Automobile Based on Negligence; By Nonoperator Owner; Against Operator

[1] FORM Complaint for Damages to and Loss of Use of Automobile Based on Negligence; By Nonoperator Owner; Against Operator

[*Caption. See § 83.62[1].*]

Plaintiff alleges:

1. [*Capacity and residence of Defendant. See § 83.60[1], Paragraph 1.*]

2. [*Fictitious name allegations, if appropriate. See § 83.60[1], Paragraph 2.*]

3. Plaintiff is, and at all times mentioned in this complaint was, the owner of a certain _____ [*year, make, model*] automobile, California License No. _____.

[EITHER, if alleging negligence of driver of other car]

4. On _____ [*date*], at or about the hour of _____ [*state time*], defendant _____ [*name*], who is the owner of a certain _____ [*year, make, model*] automobile, California License No. _____, negligently and carelessly drove and operated that vehicle on _____ [*identify street*], near its intersection with _____ [*identify street*] in that city and county so as to cause it to collide with the _____ [*make*] automobile owned by plaintiff and there being driven by _____ [*name*].

[OR, if alleging negligence of driver of plaintiff's car]

4. On _____ [*date*], at or about the hour of _____ [*state time*], defendant _____ [*name*] negligently and carelessly operated and controlled plaintiff's automobile so as to cause it to collide with the automobile driven by _____ [*name*] on _____ [*identify street*].

[CONTINUE]

5. As a proximate result of the negligence of the defendant, plaintiff's automobile was damaged and had to be repaired at a cost of $_____, which is a reasonable value for the repairs to the _____ [*make*] automobile. [Plaintiff also seeks the sum of $_____ for depreciation in the value of his/her automobile caused by damage from the collision.]

[*Prayer. See § 83.62[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 83.60[1].*]

[2] Use of Form

This form is a complaint for use by a nonoperator owner for property damage to his or her automobile and loss of use based on the negligence of a user of plaintiff's automobile or of a third party. For allegations of agency, employment, or permissive use sufficient to impose vicarious liability on a defendant that was not operating the vehicle, see *§§ 83.130 -83.139*.

[3] Allegations

This complaint alleges:

- The capacity and residence of the defendant (Paragraph 1).
- Plaintiff's ownership of the damaged vehicle (Paragraph 3).
- The date, time, place, and circumstances of the collision (Paragraphs 4 and 5).
- The plaintiff's damages (Paragraph 6).

Negligence may be charged in general terms; it is sufficient to allege that the defendant negligently operated the vehicle, without alleging how or in what respect it was done [*see Brooks v. E. J. Willig Truck Transp. Co. (1953) 40 Cal. 2d 669, 680, 255 P.2d 802* ; *Wiley v. Cole (1921) 52 Cal. App. 617, 618, 199 P. 550]* . The plaintiff must plead and prove the reasonability of the amount paid for repairs to the vehicle [*Laubscher v. Blake (1935) 7 Cal. App. 2d 376, 383, 46*

P.2d 836] . The defendant is also liable for any depreciation in the value of the car notwithstanding the fact of repair [*Brown v. Roland (1940) 104 P.2d 138* ; *Byrne v. Western Pipe & Steel Co. (1927) 81 Cal. App. 270, 274, 253 P. 776]* . Negligence of a permissive driver is not imputed to the owner when the driver is sued alone by the owner [*see Mason v. Russell (1958) 158 Cal. App. 2d 391, 393, 322 P.2d 486]* . Under the rules permitting joinder of defendants and claims, the owner may sue both the permissive user and a third party in the same complaint for damage to the automobile [*Lambert v. Southern Counties Gas Co. (1959) 52 Cal. 2d 347, 352, 354, 340 P.2d 608]* .

[4] Verification

Verification of this complaint is not required [*Code Civ. Proc. §§ 128.7(a), 446(a)*; *see § 83.14[2][b]*]. Although verification is optional, no advantage would be gained by doing so in a limited civil case, because verification of the answer is not required in such an action [*Code Civ. Proc. § 92(b)*].

[5] Jurisdiction

The superior court has jurisdiction of the action. Because the recovery of mere property damages will often be less than $25,000, the action will likely be a limited civil case. For further discussion of jurisdiction and caption requirements for limited civil cases, see *§ 83.60[6], above*.

[6] Specifying Amount of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

[7] Cross References

For further discussion on the use of this form, including venue, and Proposition 213 considerations, see *§ 83.60[4]* et seq.

For allegations of agency, employment, or permissive use sufficient to impose vicarious liability on a defendant, see *§§ 83.130 -83.139*.

For cross references with respect to captions, prayers, and allegations of capacity and residence of parties, fictitious name allegations, or agency allegations, see *§ 83.60[2]*.

For points and authorities in support of and in opposition to a general demurrer to a complaint by an automobile owner-operator for damages based on negligence, see California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender).

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a. Complaint by Owner, Operator, or Passenger in Vehicle

8-83 California Forms of Pleading and Practice--Annotated § 83.64

§ 83.64 Complaint for Damages for Personal Injuries Based on Negligence; By Passenger; Against Owner and Operator

[1] FORM Complaint for Damages for Personal Injuries Based on Negligence; By Passenger; Against Owner and Operator

[*Caption. See § 83.60[1].*]

Plaintiff alleges:

1. [*Capacity and residence of Defendant. See § 83.60[1], Paragraph 1.*]

2. [*Fictitious name allegations, if appropriate. See § 83.60[1], Paragraph 2.*]

3. _____ [*identify street*] and _____ [*identify street*] are public streets and highways in _____ County, California[, and intersect each other in that county and state].

4. At all times mentioned in this complaint, defendant _____ [*name*] was the owner of a certain _____ [*year, make, model*] automobile, California License No. _____.

[5. At all times mentioned in this complaint, defendant _____ (*name*) was the agent, servant and employee of defendant _____ (*name*) and was operating the _____ (*make*) automobile in the scope and course of that agency and employment and with the knowledge, consent, and permission of defendant _____ (*name*).]

6. On _____ [*date*], at or about the hour of _____ [*time*], plaintiff was a passenger

riding in the _____ [*make*] automobile which was at that time being operated by defendant _____ [*name*] in a general _____ [*compass point*] direction on _____ [*identify street*] near _____ [*identify nearest cross street*] in that city and county.

[EITHER, if alleging negligence only of owner and driver of car in which plaintiff was a passenger]

7. At that time and place, defendants _____ [*name*] and each of them, negligently and carelessly _____ [drove, *and/or* operated, *and/or* controlled, *and/or* maintained] the _____ [*make*] automobile so as to cause it to _____ [*describe collision, e.g.,* leave the street, overturn, and crash].

[OR, if alleging negligence of owners and operators of both vehicles involved in collision]

7. At all times mentioned in this complaint, defendant _____ [*name*] was the owner of a certain _____ [*year, make, model*] automobile, California License No. _____, and at that time and place was operating that _____ [*make*] vehicle in a general _____ [*compass point*] direction on _____ [*identify street*] near _____ [*identify nearest cross street*] in that city and county. At that time and place defendants, and each of them, negligently and carelessly _____ [drove, *and/or* operated, *and/or* controlled, *and/or* maintained] those vehicles that they collided with each otherproximately causing the injuries to the plaintiff alleged in the succeeding paragraphs.

[CONTINUE]

8. As a proximate result of this negligence of defendants, and each of them, and the resulting collision as previously alleged, plaintiff was injured in his/her health, strength, and activity, sustained injury to his/her body and shock and injury to his/her nervous system and person, and sustained the following personal injuries, among others: _____ [*describe plaintiff's injuries*], all of which injuries have caused and continue to cause plaintiff great mental, physical, and nervous pain and suffering. These injuries will result in some permanent disability to plaintiff, all to his/her general damage.

9. As a further proximate result of the previously alleged negligence and collision, plaintiff has been and in the future will be required to obtain the services of physicians and to incur other medical expenses in an amount unknown to plaintiff at this time.

10. At the time of the collision previously alleged, plaintiff was _____ [employed *or* employable] as a[n] _____ [*occupation*]. As a proximate result of the negligence of defendants, and each of them, and because of plaintiff's injuries, plaintiff has been, and will continue to be, prevented from working in this occupation. The amount of earnings which will be lost to plaintiff is unknown at this time.

WHEREFORE, plaintiff prays for a judgment against defendants, and each of them, as follows:

1. For general damages according to proof.

2. For all medical and incidental expenses according to proof.

3. For all loss of earnings according to proof.

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 83.60[1].*]

[2] Use of Form

This form is a complaint for use by a passenger in an automobile to recover for personal injuries resulting from the negligent use or operation of an automobile. The form may be used either to allege the negligence of the driver of the vehicle in which the plaintiff was a passenger, or the concurrent negligence of both drivers involved in the collision. For allegations of agency, employment, or permissive use sufficient to impose vicarious liability on a defendant that was not operating the vehicle, see *§§ 83.130 -83.139*.

[3] Allegations

This complaint alleges:

- The capacity and residence of the defendant (Paragraph 1).
- Defendant's ownership of the vehicle (Paragraph 4).
- Agency, employment, or permissive use if vicarious liability of a defendant is to be alleged (Optional Paragraph 5) [for additional allegations of agency, *see §§ 83.130 -83.139*].
- The plaintiff's status as a passenger in the vehicle (Paragraph 6).
- The date, time, place, and circumstances of the collision (Paragraphs 3, 6 and 7).
- The plaintiff's damages (Paragraphs 8, 9, and 10).

Negligence may be charged in general terms; it is sufficient to allege that the defendant negligently operated the vehicle, without alleging how or in what respect it was done [*see Brooks v. E. J. Willig Truck Transp. Co. (1953) 40 Cal. 2d 669, 680, 255 P.2d 802* ; *Wiley v. Cole (1921) 52 Cal. App. 617, 618, 199 P. 550]* . In general, a passenger in an automobile has no duty to observe traffic conditions so that the failure to do so cannot support a finding of contributory negligence [*Drust v. Drust (1980) 113 Cal. App. 3d 1, 7, 169 Cal. Rptr. 750* ; *see Hartlerode v. Edwardsen (1963) 219 Cal. App. 2d 517, 522, 33 Cal. Rptr. 346* (passenger who falls asleep does not assume risk of driver falling asleep)].

In general, the negligence of the driver of the vehicle is not imputed to a passenger in the vehicle [*Davenport v. Waite (1959) 175 Cal. App. 2d 623, 629-630, 346 P.2d 501* ; *cf. Glanville v. Cannick (1960) 182 Cal. App. 2d 514, 516-517, 6 Cal. Rptr. 175* (agency relationship may provide grounds for imputation of negligence)], though it is relevant to the issue of proximate cause [*McCown v. Berry Constr., Inc. (1970) 6 Cal. App. 3d 319, 322-323, 85 Cal. Rptr. 791]* .

[4] Cross References

For further discussion on the use of this form, including jurisdiction, venue, and Proposition 213 considerations, see *§ 83.60[4]* et seq.

For allegations of agency, employment, or permissive use sufficient to impose vicarious liability on a defendant, see *§§ 83.130 -83.139*.

For cross references with respect to captions, prayers, and allegations of capacity and residence of parties, fictitious name allegations, or agency allegations, see *§ 83.60[2]*.

For a complaint by an automobile passenger against a railroad resulting from a grade crossing accident, see Ch. 485, *Railroads* .

For points and authorities in support of and in opposition to a general demurrer to a complaint by an automobile owner-operator for damages based on negligence, see California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender).

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§ 83.65 Complaint for Damages for Personal Injuries Based on Negligence; By Owner-Passenger; Against Operator

[1] FORM Complaint for Damages for Personal Injuries Based on Negligence; By Owner-Passenger; Against Operator

[*Caption. See § 83.60[1].*]

Plaintiff alleges:

1. [*Capacity and residence of Defendant. See § 83.60[1], Paragraph 1.*]

2. [*Fictitious name allegations, if appropriate. See § 83.60[1], Paragraph 2.*]

3. _____ [*identify street*] and _____ [*identify street*] are public streets and highways in _____ County, California[, and intersect each other in that county and state].

4. At all times mentioned in this complaint, plaintiff was the owner of a certain _____ [*year, make, model*] automobile, California License No. _____.

5. On _____ [*date*], at or about the hour of _____ [*time*], defendant _____ [*name*] was driving and operating the plaintiff's automobile with the plaintiff as a passenger in a general _____ [*compass point*] direction on _____ [*identify street*] near _____ [*identify nearest cross street*] in that city and county.

6. At that time and place, defendant _____ [*name*] negligently and carelessly

_____ [drove, *and/or* operated, *and/or* controlled, *and/or* maintained] the plaintiff's automobile so as to cause it to _____ [*describe collision, e.g.,* leave the street, overturn, and crash].

7. As a proximate result of this negligence of defendant _____ [*name*] and the resulting collision as previously alleged, plaintiff was injured in his/her health, strength, and activity, sustained injury to his/her body and shock and injury to his/her nervous system and person, including, but not limited to the following personal injuries: _____ [*describe plaintiff's injuries*], all of which injuries have caused and continue to cause plaintiff great mental, physical, and nervous pain and suffering. These injuries will result in some permanent disability to plaintiff, all to his/her general damage.

8. As a further proximate result of the previously alleged negligence and collision, plaintiff has been and in the future will be required to obtain the services of physicians and to incur other medical expenses in an amount unknown to plaintiff at this time.

9. At the time of the collision previously alleged, plaintiff was _____ [employed *or* employable] as a[n] _____ [*occupation*]. As a proximate result of the negligence of defendant _____ [*name*], and because of plaintiff's injuries, plaintiff has been, and will continue to be, prevented from working in this occupation. The amount of earnings which will be lost to plaintiff is unknown at this time.

[*Prayer. See § 83.64[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 83.60[1].*]

[2] Use of Form

This form is a complaint for use by an owner-passenger of an automobile to recover for personal injuries resulting from the negligent use or operation of the vehicle by the driver. This cause of action was once limited by the so-called "guest statute" to situations involving willful misconduct or intoxication on the part of the driver; however, this statute was held unconstitutional [*see Cooper v. Bray (1978) 21 Cal. 3d 841, 855, 148 Cal. Rptr. 148, 582 P.2d 604* (*Veh. Code § 17158* violates equal protection guarantees)], and the cause of action may now be based on mere negligence. This complaint may be adapted to include a claim for damages to the automobile by inserting allegations and a prayer for such damages [*see § 83.63*].

[3] Allegations

This complaint alleges:

- The capacity and residence of the defendant (Paragraph 1).
- The plaintiff's ownership of the vehicle (Paragraph 4).
- The defendant's status as the driver and the plaintiff's status as a passenger in the vehicle (Paragraph 5).

- The date, time, place, and circumstances of the collision (Paragraphs 3, 5 and 6).

- The plaintiff's damages (Paragraphs 7, 8, and 9). Additional allegations and a prayer for relief may be added to insert a claim for property damages to the automobile [*see § 83.63*].

Negligence may be charged in general terms; it is sufficient to allege that the defendant negligently operated the vehicle, without alleging how or in what respect it was done [*see Brooks v. E. J. Willig Truck Transp. Co. (1953) 40 Cal. 2d 669, 680, 255 P.2d 802* ; *Wiley v. Cole (1921) 52 Cal. App. 617, 618, 199 P. 550]* . In general, a passenger in an automobile has no duty to observe traffic conditions so that the failure to do so cannot support a finding of contributory negligence [*Drust v. Drust (1980) 113 Cal. App. 3d 1, 7, 169 Cal. Rptr. 750* ; *see Hartlerode v. Edwardsen (1963) 219 Cal. App. 2d 517, 522, 33 Cal. Rptr. 346* (passenger who falls asleep does not assume risk of driver falling asleep)].

In general, the negligence of the driver of the vehicle is not imputed to a passenger in the vehicle [*Davenport v. Waite (1959) 175 Cal. App. 2d 623, 629-630, 346 P.2d 501* ; *cf. Glanville v. Cannick (1960) 182 Cal. App. 2d 514, 516-517, 6 Cal. Rptr. 175* (agency relationship may provide grounds for imputation of negligence)], though it is relevant to the issue of proximate cause [*McCown v. Berry Constr., Inc. (1970) 6 Cal. App. 3d 319, 322-323, 85 Cal. Rptr. 791]* .

[4] Cross References

For further discussion on the use of this form, including jurisdiction, venue, and Proposition 213 considerations, see *§ 83.60[4]* et seq.

For allegations of agency, employment, or permissive use sufficient to impose vicarious liability on a defendant, see *§§ 83.130 -83.139*.

For cross references with respect to captions, prayers, and allegations of capacity and residence of parties, fictitious name allegations, or agency allegations, see *§ 83.60[2]*.

For a complaint by an automobile passenger against a railroad resulting from a grade crossing accident, see Ch. 485, *Railroads* .

For points and authorities in support of and in opposition to a general demurrer to a complaint by an automobile owner-operator for damages based on negligence, see California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender).

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§ 83.66 Complaint for Damages Arising From Automobile Collision Involving Multiple Parties and Multiple Causes of Action; Illustrative Form

[1] FORM Complaint for Damages Arising From Automobile Collision Involving Multiple Parties and Multiple Causes of Action; Illustrative Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

MARY JONES, individually, and STAN KLEIN, as Personal Representative of JOSEPH LANE, deceased, Plaintiffs, vs. ALLIED ASSOCIATES, a partnership, WORLD MOTORS, INC., a corporation, CITY SALES, INC., a corporation, and DOES 1-10, inclusive, Defendants.	))))))	NO. _____ COMPLAINT FOR DAMAGES (Automobile Collision)

_____

FIRST CAUSE OF ACTION
Negligence
By Plaintiff Mary Jones
Against Defendants Allied Associates
and DOES 1-4, INCLUSIVE

Plaintiff Mary Jones alleges:

1. Plaintiff Mary Jones, hereinafter in this cause of action referred to as plaintiff, is, and at all times herein mentioned was, the owner of a certain 1991 Mach M automobile, California license number 2AAA000.

2. Defendant Allied Associates (hereinafter "Partnership"), is, and at all times herein mentioned was, a business partnership sued herein under the name by which it is known, with its principal office in Columbia County, California. At all times herein mentioned, defendant Partnership was the registered owner of a certain 1991 Atlantis automobile, California license number 2BBB111.

3. Plaintiff is ignorant of the true names and capacities of defendants sued hereunder as DOES 1-4, inclusive, and therefore sues these defendants by such fictitious names. These defendants, and each of them, are, and at all times herein mentioned were, members of and partners in defendant Partnership and are sued herein individually and joined as parties defendant in this action against defendant Partnership.

4. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned Peter Smith was the agent of defendant Partnership, and in doing the things hereinafter alleged was acting in the scope of such agency and with the permission and consent of defendant Partnership.

5. At all times herein mentioned, Orange Parkway was, and is, a public street and highway running in a generally north-south direction in Santa Maria County, California.

6. On or about April 23, 1991, at approximately 1:45 p.m., plaintiff was operating her above-described Mach M automobile in a northerly direction along and over Orange Parkway, and Peter Smith was operating the above-described Atlantis automobile herein described in a southerly direction along and over that parkway.

7. At that time and place Peter Smith so negligently operated the Atlantis automobile as to cause it to cross over the center divider strip into oncoming traffic and to collide head on with the automobile being driven by plaintiff.

8. As a proximate result of the defendant Partnership's negligence and the collision as herein alleged, plaintiff was hurt and injured in her health, strength, and activity, and sustained bodily injuries and shock and injury to her nervous system, all of which have caused, now cause, and will continue to cause her great physical and mental pain and suffering. Plaintiff is informed and believes and thereon alleges that these injuries will result in some permanent disability to her. Plaintiff has thereby been generally damaged.

9. As a further proximate result of defendant Partnership's negligence and the collision as herein alleged, and the injuries thereby sustained by plaintiff, plaintiff was, now is, and in the future will be required to obtain and to incur expenses for the services of physicians to examine, diagnose, prescribe, treat, and care for her and to incur other medical, hospital, and incidental expenses, all to her damage.

10. As a further proximate result of defendant Partnership's negligence and the collision as herein alleged, and the injuries thereby sustained by plaintiff, plaintiff has been unable to attend to her usual occupation and has thereby lost earnings. Plaintiff is informed and believes and thereon alleges that she will, as a proximate result of the negligence, collision, and injuries, continue to be unable to and prevented from attending to her usual occupation for an indefinite period in the future and will thereby sustain further loss of earnings.

11. As a further proximate result of defendant Partnership's negligence and the collision as herein alleged, plaintiff's Mach M automobile was damaged in the sum of $13,123.00.

12. As a further proximate result of defendant Partnership's negligence and the collision as herein alleged, and the damage to plaintiff's Mach Mautomobile, plaintiff was deprived of the use of the vehicle for a period of 17 days and

was thereby damaged in the amount of $35.00 a day for a total of $595.00.

13. As a further proximate result of defendant Partnership's negligence and the collision as herein alleged, clothing, personal effects, and jewelry owned and being worn by plaintiff were totally destroyed, all to her damage in the sum of $1,552.00.

WHEREFORE, plaintiff prays judgment as hereinafter set forth.

SECOND CAUSE OF ACTION
Strict Liability
By Plaintiff Mary Jones
Against Defendants World Motors, Inc., City Sales, Inc.,
and DOES 5-10, inclusive

Plaintiff Mary Jones alleges:

14. Plaintiff incorporates paragraphs 1, 2, 4, and 5, inclusive, of the First Cause of Action as though fully set forth herein.

15. Defendant World Motors, Inc. (hereinafter "Manufacturer"), is, and at all times herein mentioned was, a corporation, organized and existing under the laws of Delaware and engaged in the business of manufacturing and assembling automobiles for sale to members of the general public. Plaintiff is informed and believes and thereon alleges that defendant Manufacturer manufactured and assembled the above-described Atlantis automobile.

16. Defendant City Sales, Inc. (hereinafter "Retailer") is, and at all times herein mentioned was, a corporation organized and existing under the laws of California and engaged in the business of selling automobiles at retail to members of the general public. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned defendant Retailer was, and is, a distributor of Atlantis automobiles manufactured and assembled by defendant Manufacturer and that defendant Manufacturer sold the above-described Atlantis automobile to defendant Retailer for retail sale to the public, all in the ordinary course of business.

17. Plaintiff is ignorant of the true names and capacities of the defendants sued herein as DOES 5-10, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that these defendants are, and at all times herein mentioned were, manufacturers of automotive parts, that they designed and manufactured transmissions for installation in Atlantis automobiles, that they designed and manufactured the specific defective transmission hereinafter described, and that the transmission was installed in the above-described Atlantis automobile.

18. Defendants, and each of them, intended and knew that the transmission designed and manufactured by defendants DOES 5-10, inclusive, as herein alleged, was to be installed and incorporated into an Atlantis automobile manufactured and assembled by defendant Manufacturer and that the Atlantis automobile would be offered for sale to a member of the general public.

19. Defendants, and each of them, at all times herein mentioned, knew that the Atlantis automobiles, including the above-described Atlantis automobile, would be purchased by members of the general public from defendant Retailer and used without inspection for defects in them or in any of their component parts.

20. Plaintiff is informed and believes and thereon alleges that on or about March 23, 1991, Partnership purchased the above-described Atlantis automobile from defendant Retailer.

21. Plaintiff is informed and believes and thereon alleges that at the time of the purchase the Atlantis automobile was defective and unsafe for its intended purpose in that the transmission designed and manufactured by DOES 5-10, inclusive, installed and incorporated in the above-described Atlantis automobile by defendant Manufacturer, and sold to Partnership by defendant Retailer, was defectively designed, manufactured, and installed in such a way as to cause the gears in the transmission to lock whenever the automobile was driven at high speed.

22. On or about April 23, 1991, at approximately 1:45 p.m., plaintiff was operating her above-described Mach M automobile in a northerly direction along and over Orange Parkway, and Peter Smith was operating the above-described Atlantis automobile herein described in a southerly direction along and over that parkway.

23. At that time and place, as a proximate result of the defect herein alleged, the gears of the Atlantis automobile locked, causing the vehicle to go out of control, cross the divider strip into oncoming traffic, and collide head on with the vehicle being driven by plaintiff.

24. As a proximate result of the defect and the collision as herein alleged, plaintiff was hurt and injured in her health, strength, and activity, and sustained bodily injuries and shock and injury to her nervous system, all of which have caused, now cause, and will continue to cause her great physical and mental pain and suffering. Plaintiff is informed and believes and thereon alleges that these injuries will result in some permanent disability to her. Plaintiff has thereby been generally damaged.

25. As a further proximate result of the defect and collision as herein alleged, and the injuries sustained thereby by plaintiff, plaintiff has been, now is, and in the future will be required to obtain and to incur expenses for the services of physicians to examine, diagnose, prescribe, treat, and care for her, and to incur other medical, hospital, and incidental expenses, all to her damage.

26. As a further proximate result of the defect and collision as herein alleged, and the injuries sustained thereby by plaintiff, plaintiff has beenunable to attend to her usual occupation and has thereby lost earnings. Plaintiff is informed and believes and thereon alleges that she will, as a proximate result of the defect, collision, and injuries, continue to be unable to attend and prevented from attending to her usual occupation for an indefinite period in the future and will thereby sustain further loss of earnings.

27. As a further proximate result of the defect and collision as herein alleged, plaintiff's Mach M automobile was damaged in the sum of $13,123.00.

28. As a further proximate result of the defect and collision as herein alleged, and the damage to plaintiff's Mach M automobile, plaintiff was deprived of the use of her car for a period of 17 days and thereby damaged in the additional sum of $35.00 a day for a total of $595.00.

29. As a further proximate result of the defect and collision as herein alleged, clothing, personal effects, and jewelry owned and being worn by the plaintiff were totally destroyed, all to her damage in the sum of $1,552.00.

30. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned defendants Manufacturer and DOES 5-10, inclusive, knew that the transmissions designed and manufactured by defendants DOES 5-10, inclusive, and installed and incorporated into Atlantis automobiles by defendant Manufacturer, including the transmission installed in the above- described Atlantis automobile, as herein alleged, were defective in the particulars herein alleged and that they could not safely do the job for which they were intended.

31. Notwithstanding the full knowledge of these facts, defendants Manufacturer and DOES 5-10, inclusive, without any warning to purchasers or potential purchasers, and with intent of thereby depriving such purchasers of property or legal

rights or otherwise causing injury, concealed these facts from the purchasers of Atlantis automobiles; and in willful and conscious disregard of the safety of others, continued to manufacture and install the defective transmissions in Atlantis automobiles that they then sold, through defendant Retailer, to members of the general public, such acts constituting despicable conduct. In doing these things, these defendants, and each of them, were guilty of oppression, fraud, and malice, and plaintiff is therefore entitled to exemplary and punitive damages from each of them.

WHEREFORE, plaintiff prays judgment as hereinafter set forth.

THIRD CAUSE OF ACTION
Negligence (Survival Action)
By Plaintiff Stan Klein
Against Defendants Allied Associates
and DOES 1-4, inclusive

Plaintiff Stan Klein alleges:

32. Plaintiff Stan Klein, hereinafter in this cause of action referred to as plaintiff, is the duly appointed, qualified, and acting personal representative of Joseph Lane, deceased (hereinafter "decedent"), and brings this action in such capacity on behalf of decedent's estate.

33. Plaintiff Mary Jones, is, and at all times herein mentioned was, the owner of a certain 1991 Mach M automobile, California license number 2AAA000.

34. Plaintiff incorporates paragraphs 2-5, inclusive, of the First Cause of Action as though fully set forth herein.

35. On or about April 23, 1991, at approximately 1:45 p.m., Plaintiff Mary Jones was operating the above-described Mach M automobile in a northerly direction along and over Orange Parkway, Peter Smith was operating the above-described Atlantis automobile in a southerly direction along and over that parkway, and decedent was riding as a passenger in the Mach M automobile.

36. At that time and place Peter Smith so negligently operated the Atlantis automobile as to cause it to cross over the center divider strip into oncoming traffic and to collide head on with the vehicle in which decedent was riding as a passenger.

37. As a proximate result of defendant Partnership's negligence and the collision as herein alleged, decedent sustained fatal injuries from which he died on May 23, 1991.

38. As a further proximate result of defendant Partnership's negligence and the collision as herein alleged, and the injuries sustained thereby by decedent, decedent was required to, and did, obtain and incur expenses for the services of physicians to examine, diagnose, treat, and care for him and to incur other medical, hospital, and incidental expenses, all to his damage.

39. As a further proximate result of defendant Partnership's negligence and the collision as herein alleged, and the injuries sustained thereby by decedent, decedent was, between April 23, 1991, and the time of his death on May 23, 1991, thereby prevented from attending to his usual occupation and lost earnings during that time.

40. As a further proximate result of defendant Partnership's negligence and the collision as herein alleged, clothing, personal effects, and jewelry owned and being worn by the decedent were totally destroyed, all to his damage in the sum of $1,725.00.

WHEREFORE, plaintiff prays judgment as hereinafter set forth.

FOURTH CAUSE OF ACTION
Strict Liability (Survival Action)
By Plaintiff Stan Klein
Against Defendants World Motors, Inc., City Sales, Inc.,
and DOES 5-10, Inclusive

Plaintiff Stan Klein alleges:

41. Plaintiff Stan Klein incorporates paragraphs 2, 4, and 5 of the First Cause of Action, paragraphs 15-21, inclusive, of the Second Cause of Action, and paragraphs 32 and 33 of the Third Cause of Action as though fully set forth herein.

42. On or about April 23, 1991, at approximately 1:45 p.m., Plaintiff Mary Jones was operating her above-described Mach M automobile in a northerly direction along and over Orange Parkway, Peter Smith was operating the Atlantis automobile herein described in a southerly direction along and over that parkway, and decedent was riding as a passenger in the Mach M automobile.

43. At that time and place, as a proximate result of the defect as herein alleged, the gears of the Atlantis automobile locked, causing the vehicle to go out of control, cross the divider strip into oncoming traffic, and collide head on with the vehicle being driven by Plaintiff Mary Jones in which decedent was riding as a passenger.

44. As a proximate result of the defect and the collision as herein alleged, decedent sustained fatal injuries from which he died on May 23, 1991.

45. As a further proximate result of the defect, and the collision as herein alleged, and the injuries sustained thereby by decedent, decedent was required to, and did, obtain the services of physicians to examine, diagnose, treat, and care for him and to incur other medical, hospital, and incidental expenses, all to his damage.

46. As a further proximate result of the defect and the collision as herein alleged, and the injuries sustained thereby by decedent, decedent was, between April 23, 1991, and the time of his death on May 23, 1991, thereby prevented from attending to his usual occupation and lost earnings during that time.

47. As a further proximate result of the defect and the collision as herein alleged, clothing, personal effects, and jewelry owned and being worn by the decedent were totally destroyed, all to his damage in the sum of $1,725.00.

48. Plaintiff is informed and believes and thereon alleges that, at all times herein mentioned, defendants Manufacturer and DOES 5-10, inclusive, knew that the transmissions designed and manufactured by defendants DOES 5-10, inclusive, and installed and incorporated in Atlantis automobiles by defendant Manufacturer, including the transmission installed in the Atlantis automobile herein described, as herein alleged, were defective in the particulars herein alleged and that they could not safely do the job for which they were intended.

49. Notwithstanding the full knowledge of these facts, defendants Manufacturer and DOES 5-10, inclusive, without any warning to purchasers or potential purchasers, and with intent of thereby depriving such purchasers of property or legal rights or otherwise causing injury, concealed these facts from the purchasers of Atlantis automobiles; and, in willful and conscious disregard of the safety of others, continued to manufacture and install the defective transmissions in Atlantis automobiles that they then sold, through defendant Retailer, to members of the general public, such acts constituting despicable conduct. In doing these things, these defendants, and each of them, were guilty of oppression, fraud, and

malice, and plaintiff is therefore entitled to exemplary and punitive damages from each of them.

WHEREFORE, plaintiff prays judgment as hereinafter set forth.

FIFTH CAUSE OF ACTION
Negligence (Death Action)
By Plaintiff Stan Klein
Against Defendants Allied Associates
and DOES 1-4, Inclusive

Plaintiff Stan Klein alleges:

50. The persons listed below are entitled to bring an action for the wrongful death of Joseph Lane (hereinafter, "decedent") pursuant to *Code of Civil Procedure Section 377.60*, based on their relationship to decedent, as follows:

Names	Age	Relationship to Decedent
Linda M. Lane	30	wife
Todd S. Lane	8	son
Janet R. Lane	6	daughter
James B. Lane	4	son

51. Plaintiff Stan Klein is the duly appointed, qualified, and acting personal representative of the estate of decedent, and brings this action on behalf of all of the above-listed persons entitled to bring a cause of action for the wrongful death of decedent.

52. Plaintiff incorporates Paragraphs 2-5, inclusive, of the First Cause of Action and Paragraphs 33 and 35-37, inclusive, of the Third Cause of Action as though fully set forth herein.

53. Immediately prior to his death, decedent was 32 years of age, in good physical and mental condition, a faithful and dutiful husband to his wife and father to his children, and the sole support of his wife and children.

54. As a proximate result of defendant Partnership's negligence and the collision as herein alleged, and the death of the decedent thereby, the decedent's wife and children, and each of them, have been damaged in thatthey have been deprived of the decedent's society, comfort, protection, services, and support, and have thereby sustained pecuniary loss.

55. As a further proximate result of defendant Partnership's negligence, the collision, and the death of the decedent as herein alleged, decedent's wife, Linda M. Lane, has incurred funeral and burial expenses.

WHEREFORE, plaintiff prays judgment as hereinafter set forth.

SIXTH CAUSE OF ACTION
Strict Liability (Death Action)
By Plaintiff Stan Klein
Against Defendants World Motors, Inc., City Sales, Inc.,
and Does 5-10, Inclusive

Plaintiff Stan Klein alleges:

56. Plaintiff Stan Klein incorporates Paragraphs 2, 4, and 5 of the First Cause of Action, Paragraphs 15-21, inclusive, of the Second Cause of Action, Paragraphs 42-44, inclusive, of the Fourth Cause of Action, and Paragraphs 50, 51, and 53 of the Fifth Cause of Action as though fully set forth herein.

57. As a proximate result of the defect, collision, and death of the decedent as herein alleged, the decedent's wife and children, and each of them, have been damaged in that they have been deprived of the decedent's society, comfort, protection, services, and support, and have thereby sustained pecuniary loss.

58. As a further proximate result of the defect, collision, and death of the decedent as herein alleged, decedent's wife, Linda M. Lane, has incurred funeral and burial expenses.

WHEREFORE, plaintiffs pray judgment as follows:

1. For plaintiff Mary Jones and against all defendants on the First and Second Causes of Action for the following:

a. General damages;

b. Special damages for medical, hospital, and incidental expenses;

c. Lost earnings to date, together with future loss of earnings;

d. Damage to plaintiff's Mach M automobile in the sum of $13,123.00;

e. Loss of use of plaintiff's Mach M automobile in the sum of $595.00;

f. Loss of clothing, personal effects, and jewelry in the sum of $1,552.00.

2. For plaintiff Mary Jones on the Second Cause of Action, punitive and exemplary damages against each of the following named defendants: Manufacturer, and DOES 5-10, inclusive.

3. For plaintiff Stan Klein as personal representative of decedent's estate on the Third and Fourth Causes of Action against all defendants and each of them for the following:

a. Medical, hospital, and related expenses;

b. Lost earnings;

c. Loss of clothing, personal effects, and jewelry in the sum of $1,725.00.

4. For plaintiff Stan Klein as personal representative of decedent's estate on the Fourth Cause of Action, punitive and exemplary damages against each of the following named defendants: Manufacturer, and DOES 5-10, inclusive.

5. For plaintiff Stan Klein as personal representative of decedent's wife and children on the Fifth and Sixth Causes of Action against defendants and each of them for the following:

a. Damages for the loss of decedent's society, comfort, protection, services, and support;

b. Funeral and burial expenses incurred.

6. For both plaintiffs on all causes of action for the following:

a. Costs of suit incurred herein;

b. Such other and further relief as the court deems just.
Dated: May 19, 1992.

PEREZ, MARTIN & WONG
By _____ _____
CYNTHIA T. MARTIN
Attorneys for Plaintiffs

VERIFICATION

The undersigned, each for himself or herself, declares:

I am one of the plaintiffs in the above-entitled cause. I have read the foregoing complaint and know the contents thereof. With respect to the causes of action alleged by me, the same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____
MARY JONES

_____
STAN KLEIN

[2] Use of Form

This complaint is provided as an illustration of how a complaint may be drafted to allege multiple causes of action betweenmultiple parties in an automobile collision case. In using this form as a model to draft a complaint, counsel should make all appropriate modifications necessary to adapt the form to the particular needs of his or her case. Counsel should also make any modifications necessary to conform to applicable local rules.

[3] Allegations

[a] Content of Complaint Generally

This complaint alleges multiple causes of action against multiple defendants. In the complaint, two separate plaintiffs are named, one suing in an individual capacity, and the other in a representative capacity as the decedent's executor. The action is directed against multiple defendants: a partnership, a foreign corporation, a domestic corporation, and defendants sued under fictitious names.

Six causes of action are set forth, all arising from a single event: an automobile collision resulting in bodily injury to an owner-operator plaintiff, property damage to that plaintiff's automobile, and bodily injury and death to a passenger plaintiff. Thus, the First and Second Causes of action are brought by the owner-operator plaintiff, the Third and Fourth

Causes of Action are survival actions brought by the representative on behalf of the estate of the deceased passenger plaintiff, and the Fifth and Sixth Causes of Action are death actions brought by the representative on behalf of the decedent's wife and children [*see Code Civ. Proc. § 377.60*].

A complaint or cross complaint is required to contain a statement of facts constituting the cause of action in ordinary and concise language [*Code Civ. Proc. § 425.10(a)*]. The distinction between conclusions of law and ultimate facts is becoming less significant, especially in general negligence and personal injury cases [*see Perkins v. Superior Court (1981) 117 Cal. App. 3d 1, 6, 172 Cal. Rptr. 427* (complaint alleging defendant's state of mind upheld)].

Allegations may be made on information and belief. This form of pleading, although not expressly authorized by statute, is recognized by statute and is widely used and accepted [*see Code Civ. Proc. §§ 446(a), 431.30(d)*]. This form of pleading should not be used, however, to allege matters presumptively within plaintiff's knowledge or of which plaintiff is charged with constructive knowledge [*see Searcy v. Hemet Unified School Dist. (1986) 177 Cal. App. 3d 792, 802, 223 Cal. Rptr. 206* ; *Thompson v. Sutton (1942) 50 Cal. App. 2d 272, 279, 122 P.2d 975]* .

For further discussion regarding the content of complaints generally, see Ch. 123, *Complaints and Cross Complaints* .

[b] Format of Complaint Stating Multiple Causes of Action

When causes of action are separately stated, each separately stated cause of action must be separately numbered [*Cal. Rules of Ct., Rule 2.112(1)*]. For discussion of format requirements applicable to complaints generally, see Ch. 123, *Complaints and Cross Complaints* .

Local rules frequently impose additional requirements. For example, a number of courts require that all paragraphs in pleading must be consecutively numbered using Arabic numerals and that paragraph numbers should not be repeated notwithstanding the fact that paragraphs are in different causes of action. Some courts also have particular requirements as to identification of distinct causes of action, often requiring a particular method of designation of different claims, including: (1) the nature of the claim (i.e., breach of contract or fraud), (2) the particular plaintiffs asserting it, and (3) the particular defendants against whom it is asserted. Counsel should be sure to comply with any such local requirements as the failure to do so generally is a ground for striking the cause of action with leave to amend. Even in the absence of such local rules, it may be prudent to distinguish claims involving multiple causes of action between multiple parties in a like manner to avoid objections that the complaint is uncertain due to ambiguity [*see Code Civ. Proc. § 430.10(f)*].

[c] Negligence Claims

[i] First Cause of Action; Basic Negligence

The first cause of action alleges the following elements necessary to state a cause of action based on negligence:

- The partnership defendant owed a legal duty to use due care toward the plaintiff, based on plaintiff's ownership interest in her motor vehicle (Paragraph 1), defendant's ownership of the vehicle that injured plaintiff (Paragraph 2), the status of the highway on which the collision occurred as a public highway (Paragraph 5), and the operation by the plaintiff and defendant's employee of their motor vehicles on the public highway (Paragraphs 4 and 6). The duty arising from these facts is based on general negligence principles [*see Civ. Code §§ 1708, 1714(a)*; *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc. (1970) 1 Cal. 3d 586, 594, 83 Cal. Rptr. 418, 463 P.2d 770* (elements of negligence); *Lutz v. Schendel (1959) 175 Cal. App. 2d 140, 144, 345 P.2d 488* (general duty of motorists)] and on the doctrine of respondeat superior [*see Civ. Code § 2338*; *Hinman v. Westinghouse Elec. Co. (1970) 2 Cal. 3d 956, 959-963, 88 Cal. Rptr. 188, 471 P.2d 988]* . The duty of the DOE defendants I-IV arises out of their

capacity as partners of the partnership defendant (Paragraph 3). For a discussion of duty in the negligence context in automobile cases, see Ch. 82, *Automobiles: Causes of Action* . The employee-driver of the partnership vehicle, although named in the complaint, is not joined as a party defendant. For factors in making a determination of whether the driver should be joined in such a case, see *[e][i], below*.

- The partnership defendant breached its duty toward the plaintiff when the driver of its vehicle, who was its agent and employee acting in the course and scope of his employment, operated the vehicle negligently and caused it to collide with plaintiff's vehicle (Paragraphs 4 and 7) [*Vind v. Asamblea Apostolica, Christo Jesus (1957) 148 Cal. App. 2d 597, 602 604, 307 P.2d 85* ; *see United States Liab. Ins. Co. v. Haidinger-Hayes, Inc. (1970) 1 Cal. 3d 586, 594, 83 Cal. Rptr. 418, 463 P.2d 770* (elements of negligence)].

- The partnership's breach of duty was the proximate or legal cause of plaintiff's injury, resulting in general and special damages (Paragraphs 8-13) [*see United States Liab. Ins. Co. v. Haidinger-Hayes, Inc. (1970) 1 Cal. 3d 586, 594, 83 Cal. Rptr. 418, 463 P.2d 770* (elements of negligence)]. The amount of actual damages for personal injury is not stated in an unlimited civil case [*Code Civ. Proc. § 425.10(b)*].

For further discussion of general negligence principles and general forms of complaint for use in negligence actions, see Ch. 380, *Negligence* .

The cause of action incidentally alleges that the court is the proper venue for trial because the injury causing death occurred in its jurisdictional area (Paragraphs 5-7) [*Code Civ. Proc. § 395(a)*; *see § 83.60[7], above*].

[ii] Third Cause of Action; Survival

The third cause of action alleges the same basic elements of a negligence action that are discussed in *[i], above* (Paragraphs 33-40) [*see Treweek v. Howard (1895) 105 Cal. 434, 442, 39 P. 20* (regarding allegations of facts by incorporating by reference allegations in previous causes of action)]. In addition, it alleges the plaintiff's capacity, as personal representative, to bring the action on behalf of the deceased passenger's estate (Paragraph 32) [*see Code Civ. Proc. § 377.20(a), 377.34*].

For further discussion and forms regarding survival actions generally, see Ch. 181, *Death and Survival Actions* .

[iii] Fifth Cause of Action; Wrongful Death

The fifth cause of action alleges the same basic elements of a negligence action that are discussed in [i], *above* (Paragraphs 52-55) [*see Treweek v. Howard (1895) 105 Cal. 434, 442, 39 P. 20* (regarding allegations of facts by incorporating by reference allegations in previous causes of action)]. In addition, it states the following additional allegations necessary to state an action for wrongful death [*see Alvarez v. Wiley (1977) 71 Cal. App. 3d 599, 602-605, 139 Cal. Rptr. 550* (discussing nature of wrongful death action and comparing state and federal laws)]:

- The identification of persons entitled to bring an action for the wrongful death of the decedent (Paragraph 50) [*see Code Civ. Proc. § 377.60*].

- Plaintiff's capacity, as personal representative, to sue defendants on behalf of persons entitled to bring an action for wrongful death of decedent (Paragraph 51) [*see Code Civ. Proc. § 377.60*; *Mayerhoff v. Kaiser Foundation Health Plan, Inc. (1977) 71 Cal. App. 3d 803, 806, 138 Cal. Rptr. 319* (only one action by various persons entitled to sue permitted)].

- Detriment sustained by the persons entitled to a wrongful death action as a result of decedent's death (Paragraph 53).

- Damages, including special damages consisting of funeral and burial expenses incurred by the decedent's wife who is one of the entitled persons (Paragraphs 54, 55) [*see Code Civ. Proc. § 377.60*; *Koehl v. Carpenter (1920) 47 Cal. App. 642, 646, 191 P. 43]* .

For further discussion and forms regarding wrongful death actions generally, see Ch. 181, *Death and Survival Actions* .

[d] Strict Liability Claims

[i] Second Cause of Action

The second cause of action alleges the following elements necessary to state a cause of action based on strict liability:

- The manufacturer defendant, the retailer defendant, and DOE defendants placed an automobile on the market in the ordinary course of business (Paragraphs 15-18).

- Defendants knew the automobile was to be used without inspection for defects (Paragraph 19).

- The automobile was defective (Paragraph 21).

- The defective automobile was purchased and operated by defendant partnership and as a result of the defect, collided with plaintiff's automobile (Paragraphs 14, 20, 22, and 23) [*see Treweek v. Howard (1895) 105 Cal. 434, 442, 39 P. 20* (regarding allegations of facts by incorporating by reference allegations in previous causes of action)].

- As a proximate result, plaintiff sustained personal injuries and injuries to property resulting in general and special damages (Paragraphs 24-28) [*Greenman v. Yuba Power Products, Inc. (1963) 59 Cal. 2d 57, 62-63, 27 Cal. Rptr. 697, 377 P.2d 897* (elements of cause of action for products liability); *see Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 586, 75 Cal. Rptr. 652, 451 P.2d 84* (liability extends to innocent bystanders as well as to purchasers or users); *Lewis v. American Hoist & Derrick Co. (1971) 20 Cal. App. 3d 570, 586-588, 97 Cal. Rptr. 798* (retailer as well as manufacturer is liable for design, as opposed to manufacturing, defect); *see also Civ. Code § 3333*].

For further discussion of the elements of a cause of action based on products liability and general forms of complaint for use in such actions, see Ch. 460, *Products Liability* .

The cause of action also alleges a basis for recovery of punitive or exemplary damages (Paragraphs 30 and 31), which may be awarded whena defendant is guilty of oppression, fraud, or malice [*Civ. Code § 3294*; *see Ehrhardt v. Brunswick, Inc. (1986) 186 Cal. App. 3d 734, 741-742, 231 Cal. Rptr. 60* (punitive damages recoverable in products liability action when defendant was aware of probable dangerous consequences of its conduct and willfully and deliberately failed to avoid those consequences); *see also Civ. Code § 3295* (right of defendant to secure protective order requiring production of evidence of prima facie case of liability for punitive damages); Ch. 177, *Damages*].

The cause of action incidentally alleges that the court is the proper venue for trial because the injury causing death occurred in its jurisdictional area (Paragraphs 14, 22-24) [*Code Civ. Proc. § 395(a)*; *see § 83.60[7], above*].

[ii] Fourth Cause of Action; Survival

The fourth cause of action alleges the same basic elements of an action for products liability that are discussed in *[i], above* (Paragraphs 41-47) [*see Treweek v. Howard (1895) 105 Cal. 434, 442, 39 P. 20* (regarding allegations of facts by incorporating by reference allegations in previous causes of action)]. In addition, it alleges the plaintiff's capacity, as personal representative, to bring the action on behalf of the deceased passenger's estate (Paragraph 41) [*see Code Civ. Proc. §§ 377.20(a), 377.34, 377.41*]. It also alleges a basis for recovery of punitive damages [*see Code Civ. Proc. § 377.34* (permitting recovery of punitive damages which decedent would have been entitled to recover)].

For further discussion and forms regarding survival actions generally, see Ch. 181, *Death and Survival Actions* .

[iii] Sixth Cause of Action; Wrongful Death

The sixth cause of action alleges the same basic elements of an action for products liability that are discussed in [i], *above* (Paragraph 56) [*see Treweek v. Howard (1895) 105 Cal. 434, 442, 39 P. 20* (regarding allegations of facts by incorporating by reference allegations in previous causes of action)]. In addition, it states the additional allegations necessary to state an action for wrongful death that are discussed under [c][iii], *above* (Paragraphs 56-58). Note that although punitive damages may be recovered in favor of a decedent in a survival action, they are not recoverable by entitled persons in a wrongful death action [*see Ford Motor Co. v. Superior Court (1981) 120 Cal. App. 3d 748, 751 753, 175 Cal. Rptr. 39]* .

For further discussion and forms regarding wrongful death actions generally, see Ch. 181, *Death and Survival Actions* .

[e] Other Potential Defendants and Causes of Action

[i] Against Driver

In this form, the employee-driver of the partnership car is not joined as a party defendant, although the driver is named in the complaint. Since the complaint alleges that the driver negligently operated the vehicle so as to cause the collision, the driver is a tortfeasor and could be joined [*see Civ. Code §§ 1708, 1714*]. Whether the driver should be joined depends on a number of considerations, including:

- The effect joinder might have on the trier of fact.

- The fact that exoneration of the driver as a defendant would automatically entail exoneration of the partnership defendant under the theory of respondeat superior [*see, e.g., Campbell v. Security Pac. Nat. Bank (1976) 62 Cal. App. 3d 379, 386, 133 Cal. Rptr. 77* ; *see also* Ch. 82, *Automobiles: Causes of Action*].

- The financial solvency of the employee and whether or not the employee is independently insured.

- The employee's willingness, or lack thereof, to testify to the employee's own negligence if the employee is not named as a defendant.

[ii] Against Defendant Owner for Violation of Statutory Duty

If under the facts the applicability of the doctrine of respondeat superior is in doubt (e.g., the driver or other defendant disputes employment by the defendant owner or that the driver was acting within the course and scope of employment), counsel should consider including an action based on the owner's liability created by *Veh. Code § 17150*, either as an alternative to the first, third, and fifth causes of action or in addition to them. That code section makes every owner of a motor vehicle liable for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the

vehicle with the permission, express or implied, of the owner [*Veh. Code § 17150*; *see Glens Falls Ins. Co. v. Consolidated Freightways (1966) 242 Cal. App. 2d 774, 778, 51 Cal. Rptr. 789]* . For further discussion of liability under § 17150 and a form of complaint, see *§§ 83.130 -83.139*.

To state a cause of action under *§ 17150*, the first and third causes of action should allege that the driver was operating the vehicle with the permission of the defendant owner. In addition, the driver should be named and joined as a defendant and served with process. On recovery of a judgment, recourse would have to first be had against the property of the driver, and the defendant owner would be subrogated to the rights of the injured person, that is, the plaintiff, and could recover from the driver the total amount of the judgment and costs recovered against the owner [*Veh. Code §§ 17152, 17153*]. For further discussion of imposing vicarious liability on an owner of a vehicle under *§ 17150*, see Ch. 82, *Automobiles: Causes of Action* .

Lastly, plaintiff may want to consider whether the defendant owner may be directly liable to the plaintiff for the defendant's own negligence in, forexample, entrusting the vehicle to the person who drove it, or maintaining and repairing the vehicle. See Ch. 82, *Automobiles: Causes of Action* .

[iii] Against Designer, Manufacturer, and Retailer of Defendant's Vehicle

If the transmission was defectively designed by someone other than its manufacturers (DOES 5-10), plaintiffs may allege a separate cause of action against the designer based on negligence rather than on strict liability in tort [*see Swett v. Gribaldo, Jones & Associates (1974) 40 Cal. App. 3d 573, 575-576, 115 Cal. Rptr. 99* ; *Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 811, 110 Cal. Rptr. 543* (strict liability in tort does not apply to sellers of services as opposed to sellers of products)].

A plaintiff who is seeking damages for personal injuries or injuries to property based on a defective product also has the possible, alternative remedy of breach of warranty [*see Hauter v. Zogarts (1975) 14 Cal. 3d 104, 117-118, 120 Cal. Rptr. 681, 534 P.2d 377* ; for discussion of actions based on breach of warranty, see Ch. 500, *Sales and Secured Transactions*].

In addition, the named defendants in such cases may file and serve a cross complaint against the designer, whether or not the designer is joined as a defendant by the plaintiffs, for a declaration of their right, if any, to be indemnified in whole or in part by the designer for any judgment rendered in favor of plaintiffs against them [*see Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 325, 146 Cal. Rptr. 550, 579 P.2d 441* ; *American Motorcycle Assn. v. Superior Court (1978) 20 Cal. 3d 578, 583-584, 146 Cal. Rptr. 182, 578 P.2d 899]* . For a discussion and forms of cross complaints in products liability actions, see Ch. 460, *Products Liability* .

[iv] Against Individual Plaintiff

The personal representative and persons entitled to bring a wrongful death action based on the death of the deceased passenger of the individual plaintiff may also have a cause of action against the individual plaintiff based on the latter's negligent operation, maintenance, or repair of her vehicle if the facts warrant it. For a form of complaint for damages for personal injuries to a passenger resulting from the negligence of an automobile owner and operator, see *§ 83.64[1]*.

If the individual plaintiff at the time of the accident was acting in the capacity of an agent or employee, the principal or employer would be liable to the same extent as the individual under the doctrine of respondeat superior [*see Vind v. Asamblea Apostolica, Christo Jesus (1957) 148 Cal. App. 2d 597, 602-604, 307 P.2d 85* ; Ch. 82, *Automobiles: Causes of Action*].

If the passenger's personal representative and persons entitled to a wrongful death action assert such a cause of action, they should sue the individual plaintiff and all other defendants in a complaint filed separately from the individual

plaintiff's complaint. Of course, the separate actions might be consolidated for trial [*see Code Civ. Proc. § 1048(a)*; for discussion of the procedure relating to consolidation of causes, see Ch. 125, *Consolidation, Severance, and Coordination of Actions*].

[v] Against Designer, Manufacturer, and Retailer of Plaintiff's Vehicle

Apart from any negligence of the individual plaintiff, the passenger, or his personal representative and persons entitled to bring a wrongful death action, will also have a cause of action against the manufacturer, retailer, and others in the marketing chain of the individual plaintiff's automobile if any defect in that vehicle proximately caused or contributed to the accident [*see, e.g., Greenman v. Yuba Power Products, Inc. (1963) 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 377 P.2d 897]* . Alternatively, the passenger or passenger's personal representative may allege a cause of action for breach of warranty [*see Hauter v. Zogarts (1975) 14 Cal. 3d 104, 117-118, 120 Cal. Rptr. 681, 534 P.2d 377* ; for discussion of actions based on breach of warranty, see Ch. 500, *Sales and Secured Transactions*].

[vi] Against Public Entity Maintaining Highway

Plaintiff should also consider the possibility that a dangerous condition of the highways proximately contributed to the collision. In such cases, the plaintiff may wish to join the public entity responsible for that condition and set forth a cause of action against it on that ground [*see, e.g., Hilts v. County of Solano (1968) 265 Cal. App. 2d 161, 173-176, 71 Cal. Rptr. 275]* . However, before such an action may be maintained, a claim for the damages must have been presented to and rejected by the public entity and the presentation and rejection must be alleged in the complaint [*see § 83.10*]. For a discussion of the procedure as well as forms to be employed in pursuing the written claim and any subsequent civil action against a public entity, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[4] Cross References

For further discussion on the use of this form, including jurisdiction, venue, and Proposition 213 considerations, see *§ 83.60[4]* et seq.

For allegations of agency, employment, or permissive use sufficient to impose vicarious liability on a defendant, see *§§ 83.130 -83.139*.

For points and authorities in support of and in opposition to a general demurrer to a complaint by an automobile owner-operator for damages based on negligence, see California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender).

For alternative allegations as to agency, capacity, and residence of parties and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints generally, and for skeletal forms of complaint illustrating actions involving multiple parties and multiple causes of actions containing various counts, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to actions by a decedent's representative based on causes of action the decedent held prior to his or her death and to actions by entitled persons for the wrongful death of the decedent, see Ch. 181, *Death and Survival Actions*

For discussion and forms relating to subject matter jurisdiction, personal jurisdiction, and the doctrine of inconvenient forum, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For discussion and forms of complaint relating to actions against employers based on the theory of respondeat superior, see Ch. 249, *Employer's Liability for Employee's Torts*

For discussion and forms of complaint relating to negligence generally, see Ch. 380, *Negligence*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms of complaint relating to strict liability in tort generally, see Ch. 460, *Products Liability*

For discussion of claims and actions against public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

For discussion and a form of allegation for use in a complaint for damages for personal injuries based on breach of warranty, see Ch. 500, *Sales and Secured Transactions*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

California Forms of Pleading and Practice--Annotated

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Volume 8: Automobiles-Chs. 80-92
Chapter 83 AUTOMOBILES: BRINGING THE ACTION
PART V. FORMS
A. Negligence Actions
1. Negligence of Operator of Vehicle
a. Complaint by Owner, Operator, or Passenger in Vehicle

8-83 California Forms of Pleading and Practice--Annotated § 83.67

§ 83.67 Allegations: Descriptions of Scene and Incident

[1] Allegation; Rear-End Collision Causing Chain Reaction

[a] FORM Allegations: Descriptions of Scene and Incident--Allegation; Rear-End Collision Causing Chain Reaction

6. On or about _____ [*date*], plaintiff was the driver and owner of a _____ [*identify year and make of vehicle, e.g.*, 1996 Volkswagen] automobile and was travelling _____ [*compass point*] on _____ [*identify street*] at or near the intersection of _____ [*identify cross-street*] in _____ [*identify city or county*] in the State of California.

7. At all times herein mentioned, _____ [*identify street where collision occurred*] at or near the intersection of _____ [*identify cross-street*] in _____ [*identify city or county*], State of California, was an open and public street and highway.

8. At that time and place, defendants, _____ [*identify defendants*], did so negligently and carelessly own, operate, maintain, repair, manage, control and entrust the _____ [*identify vehicle*] automobile so as to cause it to strike the vehicle directly behind plaintiff's vehicle which then struck plaintiff's vehicle and thereby legally caused the injuries and damages to plaintiff described below.

[b] Use of Form

This form is a sample description of an incident involving a rear-end collision that caused a chain reaction. If appropriate to the facts of the case, a similar description of the scene and incident should be inserted into the complaint.

This paragraph may be substituted for the appropriate paragraphs of the general complaints *set out in § 83.60* et seq.

[2] Allegation; Bicycle Struck by Automobile in Bycicle Lane

[a] FORM Allegation; Bicycle Struck by Automobile in Bycicle Lane

6. At all times herein mentioned, _____ [*identify street where collision occurred*] at or near the intersection of _____ [*identify cross-street*] in _____ [*identify city or county*], State of California, was an open and public street and highway.

7. At all times herein mentioned, plaintiff _____ [*name*] was riding his/her bicycle _____ [*compass point*] on _____ [*identify street where collision occurred*] in the bicycle lane at or near the intersection of _____ [*identify cross-street*].

8. On or about _____ [*date*], the defendants, and each of them, did so carelessly and negligently entrust, operate, own, maintain, repair, manage and control said automobile so as to cause the same to strike plaintiff andhis/her bicycle, directly and proximately causing serious personal injuries to plaintiff.

[b] Use of Form

The allegation in form in *[a], above*, is to be used in a form of complaint by a bicyclist alleging that he/she was negligently struck by a vehicle while riding in a bycicle lane. In using this form as a model, counsel should make all appropriate modifications necessary to adapt the form to the particular facts of his or her case.

This allegation may be substituted for the appropriate paragraphs of the general complaints *set out in § 83.60* et seq.

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[Reserved]

§§ 83.68[Reserved]

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8-83 California Forms of Pleading and Practice--Annotated § 83.80

§ 83.80 Complaint for Damages for Personal Injuries and Property Damage Based on Negligence; By Pedestrian; Against Automobile Owner and Operator; General Form

[1] FORM Complaint for Damages for Personal Injuries and Property Damage Based on Negligence; By Pedestrian; Against Automobile Owner and Operator; General Form

[*Caption. See § 83.60[1].*]

Plaintiff alleges:

1. [*Capacity and residence of Defendant. See § 83.60[1], Paragraph 1.*]

2. [*Fictitious name allegations, if appropriate. See § 83.60[1], Paragraph 2.*]

3. At all times mentioned in this complaint, defendant was the owner of a certain _____ [*year, make, model*] automobile, California License No. _____.

[4. At all times mentioned in this complaint, defendant _____ (*name*) was the agent, servant and employee of defendant _____ (*name*) and was operating the _____ (*make*) automobile in the scope and course of that agency and employment and with the knowledge, consent, and permission of defendant _____ (*name*).]

5. _____ [*identify street*] and _____ [*identify street*] are public streets and highways in _____ County, California[, and intersect each other in that county and state].

6. On _____ [*date*], at or about the hour of _____ [*time*], plaintiff was a pedestrian

_____ [*describe plaintiff's actions or position, e.g.,* standing on the southeast corner of the intersection of Main Street and First Street in that city and county].

7. At that time and place, defendant[s, and each of them,] negligently and carelessly _____ [drove, *and/or* operated, *and/or* controlled, *and/or* maintained] the _____ [*make*] automobile in a general _____ [*compass point*] direction on _____ [*identify street*] so as to cause it to _____ [*describe circumstances of incident, e.g.,* strike the plaintiff, throwing him/her violently to the pavement].

8. As a proximate result of this negligence of defendant[s, and each of them], and the resulting incident as previously alleged, plaintiff was injured in his/her health, strength, and activity, sustained injury to his/her body and shock and injury to his/her nervous system and person, and sustained the following personal injuries, among others: _____ [*describe plaintiff's injuries*], all of which injuries have caused and continue to cause plaintiff great mental, physical, and nervous pain and suffering. These injuries will result in some permanent disability to plaintiff, all to his/her general damage.

9. As a further proximate result of the previously alleged negligence, plaintiff has been and in the future will be required to obtain the services of physicians and to incur other medical expenses in an amount unknown to plaintiff at this time.

10. As a further proximate result of the previously alleged negligence, plaintiff's clothing and _____ [*list other personal property damages in incident, e.g.,* briefcase, laptop computer, and cellular phone] were damaged or destroyed, necessitating repair or replacement of these items at a cost of $_____, which is a reasonable value for the repair or replacement of these items.

11. At the time of the incident previously alleged, plaintiff was _____ [employed *or* employable] as a[n] _____ [*occupation*]. As a proximate result of the negligence of defendant[s, and each of them], and because of plaintiff's injuries, plaintiff has been, and will continue to be, prevented from working in this occupation. The amount of earnings which will be lost to plaintiff is unknown at this time.

WHEREFORE, plaintiff prays for a judgment against defendant[s, and each of them,] as follows:

1. For general damages according to proof.

2. For all medical and incidental expenses according to proof.

3. For all loss of earnings according to proof.

4. For damages to personal property [in the sum of $_____].

5. For costs of suit herein incurred.

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 83.60[1].*]

[2] Use of Form

This form is a general form of complaint for use by a pedestrian against the owner and operator of an automobile to recover damages for personal injuries and property damage based on negligence of the operator. This form presumes that the plaintiff is an adult with capacity to sue. If the pedestrian was a child, this form will require alteration to show that the action is brought by a parent or guardian on behalf of the child. For discussion and forms relating to actions on behalf of minors, see Ch. 291, *Guardians ad Litem* ,, Ch. 367A, *Minors: Tort Actions* , *Ch. 394, Parent and Child* .

[3] Allegations

This complaint alleges:

- The capacity and residence of the defendant (Paragraph 1).
- Defendant's ownership of the vehicle (Paragraph 3).
- Agency, employment, or permissive use if vicarious liability of a defendant is to be alleged (Paragraph 4) [for additional allegations of agency, *see §§ 83.130 -83.139*].
- The plaintiff's status as a pedestrian on public roadways (Paragraphs 5 and 6).
- The date, time, place, and circumstances of the incident (Paragraphs 5 and 7).
- The plaintiff's damages (Paragraphs 8-11).

Negligence may be charged in general terms; it is sufficient to allege that the defendant negligently operated the vehicle, without alleging how or in what respect it was done [*see Brooks v. E. J. Willig Truck Transp. Co. (1953) 40 Cal. 2d 669, 680, 255 P.2d 802* ; *Wiley v. Cole (1921) 52 Cal. App. 617, 618, 199 P. 550]* .

[4] Cross References

For further discussion on the use of this form, including verification, jurisdiction, venue, and specifying amounts of damages, see *§ 83.60[5]* et seq.

For alternative allegations of the circumstances of the incident, see *§§ 83.81* -83.85.

For alternative allegation of agency, employment, or permissive use sufficient to impose vicarious liability on a defendant, see *§§ 83.130 -83.139*.

For alternative allegations as to capacity and residence of parties, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used* .

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions* .

For alternative forms of prayers, see Ch. 420, *Prayers* .

For points and authorities in support of and in opposition to a general demurrer to a complaint by an automobile owner-operator for damages based on negligence, see California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender).

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8-83 California Forms of Pleading and Practice--Annotated § 83.81

§ 83.81 Allegations: Descriptions of Incidents Involving Pedestrians

[1] Allegation; Pedestrian Crossing Street Outside Crosswalk [Veh. Code §§ 21954, 21955]

[a] FORM Allegations: Descriptions of Incidents Involving Pedestrians--Allegation; Pedestrian Crossing Street Outside Crosswalk [Veh. Code §§ 21954, 21955]

6. On _____ [*date*], at or about the hour of _____ [*time*], plaintiff was a pedestrian crossing _____ [*identify street*] near _____ [*identify nearest cross street*] in a general _____ [*compass point*] direction in that city and county.

[b] Use of Form

The allegation in *[a], above,* is for use by a pedestrian alleging his/her crossing of a street outside of any marked crosswalk. This paragraph may be substituted for paragraph 6 of the general complaint *set out in § 83.80[1]*.

Although jaywalking is generally prohibited [*Veh. Code § 21955*], and a pedestrian outside of a crosswalk must yield the right of way to motorists [*Veh. Code § 21954(a)*], jaywalking does not necessarily preclude recovery for the defendant's negligence because it does not relieve the driver of the duty of due care for pedestrians [*Veh. Code § 21954(b)*]. For further discussion of the duties of motorists and pedestrians, see Ch. 82, *Automobiles: Causes of Action*
.

[2] Allegation; Pedestrian in Crosswalk at Intersection [Veh. Code § 21950]

[a] FORM Allegation; Pedestrian in Crosswalk at Intersection [Veh. Code § 21950]

6. On _____ [*date*], at or about the hour of _____ [*time*], plaintiff was a pedestrian in a marked crosswalk at the intersection of _____ [*identify street*] and _____ [

identify cross street] walking in a _____ [*compass point, e.g.,* northerly] direction across _____ [*identify street*] from the _____ [*compass point, e.g.,* southwest] corner to the _____ [*compass point, e.g.,* northwest] of that intersection in that city and county.

[b] Use of Form

The allegation in [a], *above,* is for use by a pedestrian alleging his/her crossing of a street within a legally designated and marked crosswalk. This paragraph may be substituted for paragraph 6 of the general complaint *set out in § 83.80[1].*

In general, a driver must yield the right of way to a pedestrian within a crosswalk [*Veh. Code § 21950(a)*], and the failure to do so is negligence per se [Novak v. Dewar (1961) 55 Cal. 2d 749, 361 P. 2d 709]. However, the mere fact of the pedestrian's presence within the crosswalk does not absolve the pedestrian of the obligation to use due care in crossing [*Veh. Code § 21950(b)*].

For further discussion of the duties of motorists and pedestrians, see Ch. 82, *Automobiles: Causes of Action* .

[3] Allegation; Pedestrian Walking on Sidewalk [Veh. Code § 21952]; Automobile Jumping Curb

[a] FORM Allegation; Pedestrian Walking on Sidewalk [Veh. Code § 21952]; Automobile Jumping Curb

6. On _____ [*date*], at or about the hour of _____ [*time*], plaintiff was a pedestrian walking on the sidewalk on the _____ [*e.g.,* north] side of _____ [*identify street*] in a[n] _____ [*compass point, e.g.,* easterly] direction near _____ [*identify nearest cross street*] in that city and county.

7. At that time and place, defendant[s, and each of them,] negligently and carelessly _____ [drove, *and/or* operated, *and/or* controlled, *and/or* maintained] the _____ [*make*] automobile in a general _____ [*compass point*] direction on _____ [*identify street*] so as to cause it to jump the curb reserved for pedestrians on the _____ [*e.g.,* north] side of _____ [*identify street*] and to strike the plaintiff, throwing him/her violently to the pavement.

[b] Use of Form

The allegation in *[a], above,* is for use by a pedestrian alleging that he/she was walking on a public sidewalk when the defendant's car left the roadway and struck the plaintiff. These paragraphs may be substituted for paragraphs 6 and 7 of the general complaint *set out in § 83.80[1].*

A pedestrian enjoys the right of way on public sidewalks [*Veh. Code §§ 21950, 21952*], and failure of the driver to yield the right of way is negligence per se [*Leiner v. Eng-Skell Co. (1930) 104 Cal. App. 228, 231, 285 P. 905]* .

For further discussion of the duties of motorists and pedestrians, see Ch. 82, *Automobiles: Causes of Action* .

[4] Allegation; Pedestrian Walking on Sidewalk [Veh. Code § 21952]; Automobile Backing From Driveway [Veh. Code § 22106]

[a] FORM Allegation; Pedestrian Walking on Sidewalk [Veh. Code § 21952]; Automobile Backing From Driveway [Veh. Code § 22106]

6. On _____ [*date*], at or about the hour of _____ [*time*], plaintiff was a pedestrian walking on the sidewalk on the _____ [*e.g.,* north] side of _____ [*identify street*]

in a[n] _____ [*compass point, e.g.,* easterly] direction near _____ [*identify nearest cross street*] in that city and county.

7. At that time and place, defendant[s, and each of them,] negligently and carelessly _____ [drove, *and/or* operated, *and/or* controlled] the _____ [*make*] automobile in backing from the driveway at _____ [*identify address*] so that the vehicle struck the plaintiff, throwing him/her violently to the pavement.

[b] Use of Form

This allegation is for use by a pedestrian alleging that he/she was walking on a public sidewalk when the defendant's car struck the plaintiff while the defendant was backing from a private driveway. These paragraphs may be substituted for paragraphs 6 and 7 of the general complaint *set out in § 83.80[1]*.

A pedestrian enjoys the right of way on public sidewalks [*Veh. Code §§ 21950, 21952*], and failure of the driver to yield the right of way is negligence per se [*Leiner v. Eng-Skell Co. (1930) 104 Cal. App. 228, 231, 285 P. 905]* .

For further discussion of the duties of motorists and pedestrians, see Ch. 82, *Automobiles: Causes of Action* .

[5] Allegation; Worker on Highway [Veh. Code § 21053]

[a] FORM Allegation; Worker on Highway [Veh. Code § 21053]

6. On _____ [*date*], at or about the hour of _____ [*time*], plaintiff was on _____ [*identify street*] within the course and scope of his/her employment as a _____ [*identify plaintiff's position, e.g.,* member of the _____ county road maintenance crew] in that city and county.

[b] Use of Form

The allegation in *[a], above,* is for use by a plaintiff who was working in an official capacity on a highway or other public road when struck or otherwise injured due to the defendant's negligence.

This paragraph may be substituted for paragraph 6 of the general complaint *set out in § 83.80[1]*.

A worker on a public road cannot be expected to observe traffic conditions to the same extent as a general pedestrian, and so enjoys special protection under the law [*see Veh. Code § 21053*; *Jacobs v. Bozzani Motors, Ltd. (1952) 109 Cal. App. 2d 681, 684-685, 241 P. 2d 642* ; *Woods v. Wisdom (1933) 133 Cal. App. 694, 696-698, 24 P. 2d 863]* .

[6] Allegation; Pedestrian Performing Rescue on Highway Embankment

[a] FORM Allegation; Pedestrian Performing Rescue on Highway Embankment

6. On or about _____ [*date*], at about _____ [*time*], plaintiff was a rescuer walking on an embankment at or near _____ [*compass point, e.g.,* westbound] _____ [*identify the highway or freeway, e.g.,* Interstate 5], _____ [*describe location, e.g.,* North of Gilman Rd. exit].

7. On or about _____ [*date*], at about _____ [*time*], _____ [*defendant(s)*] was an operator of a certain vehicle which was _____ [*compass point, e.g.,* westbound] on _____ [*identify highway or street*] _____ [*describe location, e.g.,*

approaching the Gilman Rd. exit].

8. At that time and place, _____ [*identify defendants*], did so negligently and carelessly own, operate, maintain, repair, manage, control and entrust the _____ [*identify vehicle*] automobile so as to cause the same to leave the roadway, go over the embankment and strike plaintiff and thereby legally caused the injuries and damages to plaintiff described below.

[b] Use of Form

The allegation in *[a], above,* is for use by a pedestrian alleging that he/she was struck while performing a rescue on an embankment.

This allegation may be substituted for the appropriate paragraphs of the general complaint *set out in § 83.80[1]*.

[7] Allegation; Pedestrian Struck By Automobile After Exiting Bus

[a] FORM Allegation; Pedestrian Struck By Automobile After Exiting Bus

6. On or about _____ [*date*], at about _____ [*time*], plaintiff was a pedestrian, crossing _____ [*identify street*] after exiting off the bus at the bus stop at _____ [*describe location, e.g.*, the southeast corner of Jones Avenue and Orange Street in San Diego], State of California.

7. On or about _____ [*date*], at about _____ [*time*], _____ [*defendant(s)*] was an operator of a certain vehicle which was _____ [*compass point, e.g.*, westbound] on _____ [*identify highway or street*] _____ [*describe location, e.g.*, approaching the Orange Street].

8. At that time and place, the defendants, and each of them, did so carelessly and negligently entrust, operate, own, maintain, manage and control their automobile as to cause their vehicle to strike plaintiffs while crossing the street, directly and legally causing the serious personal injuries to plaintiff described below.

[b] Use of Form

The allegation in *[a], above,* is for use by a pedestrian alleging that he/she was struck while crossing a street after exiting a bus.

This allegation may be substituted for the appropriate paragraphs of the general complaint *set out in § 83.80[1]*.

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[Reserved]

§§ 83.82[Reserved]

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8-83 California Forms of Pleading and Practice--Annotated § 83.100

§ 83.100 Complaint for Damages to Personal Property Based on Negligence; By Property Owner; Against Automobile Owner [Veh. Code § 17150] and Operator; General Form

[1] FORM Complaint for Damages to Personal Property Based on Negligence; By Property Owner; Against Automobile Owner [Veh. Code § 17150] and Operator; General Form

[*Caption. See § 83.62[1].*]

Plaintiff alleges:

1. [*Capacity and residence of Defendant. See § 83.60[1], Paragraph 1.*]

2. [*Fictitious name allegations, if appropriate. See § 83.60[1], Paragraph 2.*]

3. At all times mentioned in this complaint, plaintiff was the owner of _____ [*describe personal property*].

4. Immediately prior to the incidents alleged in this complaint, this personal property of the plaintiff was of the reasonable value of $_____.

5. At all times mentioned in this complaint, defendant _____ [*name*] was the owner of a certain _____ [*year, make, model*] automobile, California License No. _____ [and defendant _____ (*name*) was the agent, servant and employee of defendant _____ (*name*) and was operating that automobile in the scope and course of that agency and employment, and with the knowledge, consent, and permission of defendant _____ (*name*)].

6. _____ [*Identify street*] and _____ [*identify street*] is a public street and highway in _____ County, California.

7. On _____ [*date*], at or about the hour of _____ [*time*], that personal property of the plaintiff was [*describe position or location of property in reference to street*].

8. At that time and place, defendant[s, and each of them,] negligently and carelessly _____ [drove, *and/or* operated, *and/or* controlled] the _____ [*make*] automobile along and on _____ [*identify street*] in a general _____ [*identify direction by compass point, e.g.,* southeasterly] direction, so as to proximately cause it to _____ [*describe collision, e.g.,* leave the road and collide with the plaintiff's personal property].

9. As a proximate result of the previously alleged negligence and the resulting collision, the plaintiff's personal property was _____ [*describe extent of damage to property, e.g.,* damaged, necessitating repair *or* destroyed, necessitating replacement] of this property at a cost of $_____, which is a reasonable value for [repair *or* replacement].

[10. *Allege further damages, if any, i.e., consequential damages arising from loss of use of property.*]

WHEREFORE, plaintiff prays for a judgment against defendant[s, and each of them,] as follows:

1. For damages to personal property [in the sum of $_____].

2. [*Allege further damages, if any*.]

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 83.60[1].*]

[2] Use of Form

This form is a general form of complaint for use by an owner of personal property to recover damages for negligent damage to or destruction of that property by an owner and operator of an automobile.

[3] Allegations

This complaint alleges:

- The capacity and residence of the defendant (Paragraph 1).
- Ownership and initial valuation of the personal property by the plaintiff (Paragraphs 3 and 4).
- Ownership of the vehicle by the defendant, and optionally, if vicarious liability of a defendant is to

be alleged, agency, employment, or permissive use (Paragraph 5) [for alternative allegations of agency, *see §§ 83.130 -83.139*].

- The location of the personal property at the time of the collision (Paragraphs 6 and 7).
- The date, time, place, and circumstances of the incident (Paragraphs 6 and 8).
- The plaintiff's damages (Paragraphs 9 and 10).

Negligence may be charged in general terms; it is sufficient to allege that the defendant negligently operated the vehicle, without alleging how or in what respect it was done [*see Brooks v. E. J. Willig Truck Transp. Co. (1953) 40 Cal. 2d 669, 680, 255 P.2d 802* ; *Wiley v. Cole (1921) 52 Cal. App. 617, 618, 199 P. 550]* .

[4] Cross References

For further discussion on the use of this form, including verification, jurisdiction, venue, and specifying amounts of damages, see *§ 83.60[5]* et seq.

For allegations of agency, employment, or permissive use sufficient to impose vicarious liability on a defendant, see *§§ 83.130 -83.139*.

For points and authorities in support of and in opposition to a general demurrer to a complaint by an automobile owner-operator for damages based on negligence, see California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender).

For cross references with respect to captions, prayers, and allegations of capacity and residence of parties, fictitious name allegations, or agency allegations, see *§ 83.60[2]*.

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8-83 California Forms of Pleading and Practice--Annotated § 83.101

§ 83.101 Complaint for Damages to Real Property Based on Negligence; By Property Owner; Against Automobile Owner [Veh. Code § 17150] and Operator

[1] FORM Complaint for Damages to Real Property Based on Negligence; By Property Owner; Against Automobile Owner [Veh. Code § 17150] and Operator

[*Caption. See § 83.62[1].*]

Plaintiff alleges:

1. [*Capacity and residence of Defendant. See § 83.60[1], Paragraph 1.*]

2. [*Fictitious name allegations, if appropriate. See § 83.60[1], Paragraph 2.*]

3. At all times mentioned in this complaint, plaintiff was the owner of real property situated at _____ [*give address or other legal description of location of real property*], in _____ [*city*], _____ County, California, on which was erected a _____ [*describe improvement, e.g.,* house].

4. At all times mentioned in this complaint, defendant _____ [*name*] was the owner of a certain _____ [*year, make, model*] automobile, California License No. _____ [and defendant _____ (*name*) was the agent, servant and employee of defendant _____ (*name*) and was operating that automobile in the scope and course of that agency and employment, and with the knowledge, consent, and permission of defendant _____ (*name*)].

5. On _____ [*date*], at or about the hour of _____ [*time*], defendant[s, and each of

them,] negligently and carelessly _____ [drove, *and/or* operated, *and/or* controlled] the _____ [*make*] automobile along and on _____ [*identify street*] adjacent to the plaintiff's premises so as to proximately cause it to leave the road and run into and on the premises of the plaintiff and to collide with plaintiff's _____ [*describe improvement, e.g.,* house].

6. As a proximate result of the previously alleged negligence and the resulting collision, the plaintiff's real property was _____ [*describe extent of damage to property, e.g.,* damaged, necessitating repair *or* destroyed, necessitating replacement] of this property at a cost of $_____, which is a reasonable value for _____ [repair *or* replacement].

[7. *Allege further damages, if any, i.e., loss of rental income, or other consequential damages.*]

[*Prayer. See § 83.100[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 83.60[1].*]

[2] Use of Form

This form is a general form of complaint for use by an owner of real property to recover damages for negligent damage to or destruction of that property by an owner and operator of an automobile.

[3] Allegations

This complaint alleges:

- The capacity and residence of the defendant (Paragraph 1).
- Ownership of the real property and improvements by the plaintiff (Paragraph 3).
- Ownership of the vehicle by the defendant and optionally, if vicarious liability of a defendant is to be alleged, agency, employment, or permissive use (Paragraph 4) [*see also §§ 83.130 -83.139* (agency allegations)].
- The date, time, place, and circumstances of the collision (Paragraph 5).
- The plaintiff's damages (Paragraphs 6 and 7).

Negligence may be charged in general terms; it is sufficient to allege that the defendant negligently operated the vehicle, without alleging how or in what respect it was done [*see Brooks v. E. J. Willig Truck Transp. Co. (1953) 40 Cal. 2d 669, 680, 255 P.2d 802* ; *Wiley v. Cole (1921) 52 Cal. App. 617, 618, 199 P. 550]* .

[4] Cross References

For further discussion on the use of this form, including verification, jurisdiction, venue, and specifying amounts of damages, see *§ 83.60[5]* et seq.

For allegations of agency, employment, or permissive use sufficient to impose vicarious liability on a defendant, see *§§ 83.130 -83.139*.

For points and authorities in support of and in opposition to a general demurrer to a complaint by an automobile owner-operator for damages based on negligence, see California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender).

For cross references with respect to captions, prayers, and allegations of capacity and residence of parties, fictitious name allegations, or agency allegations, see *§ 83.60[2]*.

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[Reserved]

§§ 83.102[Reserved]

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Volume 8: Automobiles-Chs. 80-92
Chapter 83 AUTOMOBILES: BRINGING THE ACTION
PART V. FORMS
A. Negligence Actions
2. Negligence of Nondriver Owner or Other Third Party

8-83 California Forms of Pleading and Practice--Annotated § 83.110

§ 83.110 Complaint for Damages Based on Negligence; Against Sellers or Renters of Automobile and Incompetent Driver; Negligent Entrustment of Automobile

[1] FORM Complaint for Damages Based on Negligence; Against Sellers or Renters of Automobile and Incompetent Driver; Negligent Entrustment of Automobile

[*Caption. See § 83.60[1].*]

Plaintiff alleges:

1. [*Capacity and residence of Defendant. See § 83.60[1], Paragraph 1.*]

2. [*Fictitious name allegations, if appropriate. See § 83.60[1], Paragraph 2.*]

3. At all times mentioned in this complaint, defendant _____ [*name*] was engaged in the business of renting/selling automobiles to the general public at _____ [*defendant's business address*], in _____ [*city*], _____ County, California.

[4. Defendant _____ (*name*) was the agent, servant and employee of defendant _____ (*name*) and at all times mentioned in this complaint was acting in the scope and course of that agency and employment, and with the knowledge, consent, and permission of defendant _____ (*name*)].

5. On _____ [*date*], defendant[s, and each of them,] rented/sold a certain _____ [*year, make, model*] automobile, California License No. _____, to _____ [*name of driver*] for the purpose of operating the automobile on the public streets and highways of California, and thereafter _____ [*name of driver*] did operate that vehicle with the knowledge, consent, and permission of

defendants _____ [*names*].

6. _____ [*Name of driver*] was incompetent and unfit to safely operate an automobile on the public streets and highways in that _____ [*specify driver's disability or infirmity using, if desired and if applicable, one of the allegations set out in § 83.112 et seq.*].

7. At the time defendants _____ [*names*] supplied and entrusted the automobile to _____ [*name of driver*], they knew, or in the exercise of reasonable care should have known, that _____ [*name of driver*] was an incompetent and unfit driver and would create an unreasonable risk of danger to persons and property on the public streets and highways.

8. _____ [*Identify street*] and _____ [*identify street*] are public streets and highways in _____ County, California[, and intersect each other in that county and state].

9. On _____ [*date*], at or about the hour of _____ [*time*], plaintiff was _____ [driving *or* a passenger in] a certain _____ [*year, make, model*] automobile, California License No. _____.

10. At that time and place, _____ [*name of driver*] negligently and carelessly _____ [drove, *and/or* operated, *and/or* controlled] the _____ [*make*] automobile along and on _____ [*identify street*] in a general _____ [*identify direction by compass point, e.g.,* southeasterly] direction, so as to proximately cause it to collide with the automobile [driven by *or* containing] the plaintiff.

11. As a proximate result of the negligence of both _____ [*name of driver*] and of the defendant[s, and each of them], as well as the resulting collision, plaintiff was injured in his/her health, strength, and activity, sustained injury to his/her body and shock and injury to his/her nervous system and person, and sustained the following personal injuries, among others: _____ [*describe plaintiff's injuries*], all of which injuries have caused and continue to cause plaintiff great mental, physical, and nervous pain and suffering. These injuries will result in some permanent disability to plaintiff, all to his/her general damage.

12. As a further proximate result of the previously alleged negligence, plaintiff has been and in the future will be required to obtain the services of physicians and to incur other medical expenses in an amount unknown to plaintiff at this time.

13. At the time of the collision previously alleged, plaintiff was _____ [employed *or* employable] as a[n] _____ [*occupation*]. As a proximate result of the negligence of defendant[s, and each of them], and because of plaintiff's injuries, plaintiff has been, and will continue to be, prevented from working in this occupation. The amount of earnings which will be lost to plaintiff is unknown at this time.

[14. *Allege further damages, if any, i.e., damages to automobile or other personal property, and/or loss of use of car*]

[*Prayer. See § 83.80[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 83.60[1].*]

[2] Use of Form

This form is a general form of complaint for use by a plaintiff injured as a proximate result of the negligence of an automobile owner, operator, or possessor in entrusting an incompetent person, through sale or rental, with a motor vehicle. Allegations of various kinds of incapacity that may be used in conjunction with this form are *set out in §§ 83.111 -83.114*.

[3] Allegations

This complaint alleges:

- The capacity and residence of the defendant (Paragraph 1).
- The business of the defendant in selling or renting automobiles to the public (Paragraph 3).
- Agency, employment, or permissive use if vicarious liability of a defendant is to be alleged (Paragraph 4) [for additional agency allegations, *see §§ 83.130 -83.139*].
- That the defendants knew or should have known that they sold or rented a particular automobile to an incompetent driver, and the reason for the driver's incompetence (Paragraphs 5-7) [for allegations as to particular grounds of incompetence, *see §§ 83.111 -83.114*].
- The date, time, place, and circumstances of the collision caused by the defendants' negligence (Paragraphs 8-101).
- The plaintiff's damages (Paragraphs 11-14).

Negligence may be charged in general terms; it is sufficient to allege that the defendant negligently operated the vehicle, without alleging how or in what respect it was done [*see Brooks v. E. J. Willig Truck Transp. Co. (1953) 40 Cal. 2d 669, 680, 255 P.2d 802 ; Wiley v. Cole (1921) 52 Cal. App. 617, 618, 199 P. 550]* .

In this form, the driver of the car is not joined as a party defendant, although the driver is named in the complaint. Because the complaint alleges that the driver negligently operated the vehicle so as to cause the collision, the driver is a tortfeasor and could be joined [*see Civ. Code §§ 1708, 1714*]. For discussion of considerations that enter into this decision, see *§ 83.12[1], 83.66[3][e][i]*.

[4] Cross References

For further discussion on the use of this form, including verification, jurisdiction, venue, and specifying amounts of damages, see *§ 83.60[5]* et seq.

For allegations of agency, employment, or permissive use sufficient to impose vicarious liability on a defendant, see *§§ 83.130 -83.139*.

For alternative allegations as to agency, capacity, and residence of parties and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For alternative forms of prayers, see Ch. 420, *Prayers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

For points and authorities in support of and in opposition to a general demurrer to a complaint by an automobile owner-operator for damages based on negligence, see California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender).

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8-83 California Forms of Pleading and Practice--Annotated § 83.111

§ 83.111 Allegation; Defective Automobile

[1] FORM Allegation; Defective Automobile

Defendant _____ [*name*] knew that the automobile was in a dangerous and defective condition and unfit to be operated on the public streets and highways in that _____ [*specify defective parts or systems*, *e.g.*, the brakes were not functioning properly], and defendant knowingly permitted the automobile so equipped to be placed and operated on the public streets and highways of California.

[2] Use of Form

This allegation is to be used in a complaint for negligence alleging negligent entrustment of a defective automobile to another. So long as the owner is negligent, the driver to whom the automobile is entrusted need not know of the defective condition [*Merry v. Knudsen Creamery Co. (1949) 94 Cal. App. 2d 715, 721, 211 P. 2d 905* ; *see* Ch. 82, *Automobiles: Causes of Action*]. This paragraph may be incorporated into the general complaint *set out in § 83.110[1]*, or if plaintiff is not the owner entrusted the vehicle.to an incompetent driver, this paragraph may be substituted for paragraphs 6 and 7 of that complaint.

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8-83 California Forms of Pleading and Practice--Annotated § 83.112

§ 83.112 Allegation; Careless and Reckless Person

[1] FORM Allegation; Careless and Reckless Person

At all times alleged in this complaint, _____ [*name of driver*] was a careless and reckless person in general and a careless and reckless driver of automobiles in particular. Although defendant _____ [*name*] knew or should have known that _____ [*name of driver*] was a careless and reckless driver, defendant _____ [*name*] nevertheless negligently permitted _____ [*name of driver*] to operate the _____ [*make*] automobile on the public roads and highways.

[2] Use of Form

This allegation is to be used in a complaint for negligence alleging negligent entrustment of an automobile to a careless and reckless driver. This paragraph may be substituted for Paragraph 6 of the general complaint *set out in § 83.110[1]*.

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8-83 California Forms of Pleading and Practice--Annotated § 83.113

§ 83.113 Allegation; Intoxicated Person

[1] FORM Allegation; Intoxicated Person

On _____ [*date*], at or about the hour of _____ [*time*], _____ [*name of driver*] was so intoxicated from the excessive use of alcoholic beverages that his mental and physical abilities were impaired in a manner that made him/her unfit and incompetent to operate a motor vehicle safely on the public roads and highways. At that time and place, defendant _____ [*name*] knew or should have known of _____ [*name of driver*]'s intoxication, yet nevertheless negligently permitted _____ [*name of driver*] to operate the _____ [*make*] automobile.

[2] Use of Form

This allegation is to be used in a complaint for negligence alleging negligent entrustment of an automobile to an intoxicated driver. This paragraph may be substituted for Paragraph 6 of the general complaint *set out in § 83.110[1]*.

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8-83 California Forms of Pleading and Practice--Annotated § 83.114

§ 83.114 Allegation; Unlicensed and Inexperienced Person

[1] FORM Allegation; Unlicensed and Inexperienced Person

On _____ [*date*], at or about the hour of _____ [*time*], _____ [*name of driver*] had no experience or training in driving a motor vehicle and did not have, nor had he/she ever had, a license to operate a motor vehicle. At that time and place, defendant _____ [*name*] knew or should have known that _____ [*name of driver*] was an unlicensed and inexperienced driver, yet nevertheless negligently permitted _____ [*name of driver*] to operate the _____ [*make*] automobile.

[2] Use of Form

This allegation is to be used in a complaint for negligence alleging negligent entrustment of an automobile to an inexperienced and unlicensed driver. This paragraph may be substituted for Paragraph 6 of the general complaint *set out in § 83.110[1]*.

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8-83 California Forms of Pleading and Practice--Annotated §§ 83.115-83.119

[Reserved]

§§ 83.115[Reserved]

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3. Judicial Council Forms

8-83 California Forms of Pleading and Practice--Annotated § 83.120

§ 83.120 Judicial Council Trial Court Pleading Form; Complaint for Damages for Personal Injury, Property Damage, Wrongful Death; With Motor Vehicle and General Negligence Cause of Action Attachments [Cal. Judicial Council Forms PLD-PI-001, PLD-PI-001(1), PLD-PI-001(2)]

[1] FORM Judicial Council Trial Court Pleading Form; Complaint for Damages for Personal Injury, Property Damage, Wrongful Death; With Motor Vehicle and General Negligence Cause of Action Attachments [Cal. Judicial Council Forms PLD-PI-001, PLD-PI-001(1), PLD-PI-001(2)]

Click here to view image.

[2] Use of Form

This form is the Judicial Council approved general complaint form for use in any action based on personal injury, property damage, and/or wrongful death [Cal. Judicial Council Form PLD-PI-001], combined with the motor vehicle cause of action attachment [Cal. Judicial Council Form PLD-PI-001(1)], and the general negligence cause of action attachment [Cal. Judicial Council Form PLD-PI-001(2)]. An additional page attachment related to the motor vehicle attachment is also included [Cal. Judicial Council Form MC-025]. The motor vehicle and general negligence attachment forms were approved by the Judicial Council for optional use, effective January 1, 1982, while the general complaint form was revised for use effective July 1, 2002. All forms underwent a nonsubstantive revision effective January 1, 2007.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Allegations

[a] In General; Judicial Council Forms

Code Civ. Proc. § 425.12 requires the Judicial Council to develop and approve official forms for use in California trial courts for any complaint, cross complaint, or answer in any action based on personal injury, property damage, or wrongful death. Use of these forms is optional.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. For general information relating to the use of Judicial Council complaint forms, see Ch. 123, *Complaints and Cross Complaints* .

The Judicial Council approved complaint form may be used in any action for damages for personal injury, property damage, or wrongful death. It must always be filed with one or more cause of action attachments, and the box in the caption before the appropriate cause of action--in this case, Motor Vehicle--should be checked [*see [b], below*]. The boxes for the type of damage suffered--in this example, property damage and personal injury--should also be checked. If counsel seeks exemplary damages in addition to compensatory damages, the Judicial Council approved exemplary damages attachment [Cal. Judicial Council Form PLD-PI-001(6)] mustalso be appended to the complaint and cause of action attachments. For an illustrative, filled-out form and Comments, see Ch. 177, *Damages* .

This complaint is accompanied by a filled-out version of the Motor Vehicle Cause of Action Attachment and a General Negligence Attachment in order to better illustrate the form. The fact scenario is a hypothetical one in which plaintiff Sally Parker was injured, and her car damaged, in an accident with a car driven by defendant Thomas Daly.

Ch. 380, *Negligence,* includes an illustration of this complaint with detailed instructions for filling it out. For additional information on filling out the form in a wrongful death action, see Ch. 181, *Death and Survival Actions* . For discussion and an example of the products liability cause of action attachment [Cal. Judicial Council Form PLD-PI-001(5)], see Ch. 460, *Products Liability* .

[b] Motor Vehicle Cause of Action Attachment

[i] Heading

The short title of the case, that is, the last names of the first plaintiff and first defendant separated by a "v." should be inserted at the top of the page, and the number of the motor vehicle cause of action should be inserted in the space provided under the short title. To the right should be typed the page number. The appropriate box should be checked to indicate whether this attachment is being asserted as a cause of action in a complaint or in a cross complaint. The plaintiff's name should be typed in the appropriate space above Paragraph MV-1.

[ii] Date and Place of Collision (Paragraph MV-1)

This paragraph already has standard allegations that defendants' acts were negligent and that they were the legal (proximate) cause of plaintiff's injuries and damages. Plaintiff merely needs to insert the date and location of the accident on the appropriate lines.

The form does not require that plaintiff plead any of the circumstances surrounding the accident or the specific acts of defendant(s) that plaintiff contends were negligent. Statutes require only that complaints and cross complaints contain a statement of the facts constituting the cause of action, in ordinary and concise language [*Code Civ. Proc. § 425.10(a)*]. If counsel determines that additional factual allegations are required in order to preclude opposition to the complaint by demurrer, this form illustrates how those allegations may be added on an additional page referenced under Paragraph MV-2.f [*see [iii][G], below*].

[iii] Liability and Relationship of Defendants (Paragraph MV-2)

[A] In General

This paragraph contains six subparts, which are to be used to make the necessary allegations to distinguish the alleged basis of liability of each defendant.

[B] Defendant Driver

This paragraph should be checked and the name of the defendant driver, when known, should be inserted in the appropriate space, unless, for some reason, the plaintiff has chosen not to name the driver as a defendant. For discussion of the factors involved in deciding whether the driver should be named as a defendant, see *§§ 83.12[1], 83.66[3][e][i]*. For forms of complaint naming the driver as a defendant, see *§§ 83.60 -83.66, 83.80* -83.85, *83.100 -83.101*.

It is suggested that, in this paragraph as well as the remaining paragraphs under MV-2., the box to the left of "Does" be checked and that a sufficient number be inserted to provide for the possibility of having to amend the complaint in the future pursuant to *Code Civ. Proc. § 474* (adding true name of unknown defendant) to include newly discovered persons who will also be named defendants. For further discussion of the use of fictitious name allegations, see Ch. 20, *Allegations Commonly Used* ; Ch. 123, *Complaints and Cross Complaints* .

[C] Defendant Employer

Vicarious liability may be imposed on the employer of a negligent driver under the doctrine of respondeat superior when the driver was operating the vehicle while in the course and scope of his or her employment [*Vind v. Asamblea Apostolica, Christo Jesus (1957) 148 Cal. App. 2d 597, 602 604, 307 P.2d 85* ; Ch. 82, *Automobiles: Causes of Action*]. Therefore, whenever there is a chance that the defendant driver was in the course of employment at the time of the accident, this box should be checked, the name of the employer, when known, inserted, the box to the left of "Does" checked, and numbers filled in the boxes to the right of "Does." For further discussion of the vicarious liability of an employer for an automobile accident involving an employee, see Ch. 82, *Automobiles: Causes of Action* . For forms of complaints and allegations of vicarious liability, see *§§ 83.130 -83.139*.

[D] Defendant Vehicle Owner

Every owner of a motor vehicle is liable, at least in part, for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle by any person using or operating the motor vehicle with the permission, express or implied, of the owner [*Veh. Code § 17150*; *see Veh. Code § 17151* (limitation of liability)]. Therefore,it is suggested that the box for Paragraph MV-2.c. be checked, the name of the owner, when known, inserted, the box to the left of "Does" checked, and numbers filled in the boxes to the right of "Does." For further discussion of the vicarious liability of a vehicle owner, see Ch. 82, *Automobiles: Causes of Action* . For forms of complaints and allegations of vicarious liability, see *§§ 83.130 -83.139*.

[E] Negligent Entrustment

A person who knowingly or negligently entrusts a vehicle in a defective condition to another or who knowingly or negligently entrusts a vehicle to an incompetent driver is liable for injuries arising from operation of the vehicle [*Merry v. Knudsen Creamery Co. (1949) 94 Cal. App. 2d 715, 721, 211 P. 2d 905* ; *see* Ch. 82, *Automobiles: Causes of Action*].

The liability of an owner for the negligent entrustment of his or her vehicle is distinguishable from the liability of an owner under the permissive use statute [*see § 83.120[3][b][iii][D]*]. Under the theory of negligent entrustment, liability is unlimited and is imposed on a vehicle owner under common law principles of negligence because he or she is independently negligent in entrusting a defective automobile to another or in entrustment of a vehicle to an incompetent driver. For further discussion of liability based on negligent entrustment, see Ch. 82, *Automobiles: Causes of Action* .

Therefore, Paragraph MV-2.d. should be checked whenever there is a possibility that the owner lent the vehicle in a defective condition or that the owner lent the vehicle to the driver knowing the driver was not competent to drive. The owner's name, when known, should be inserted, the box to the left of "Does" checked, and numbers filled in the boxes to the right of "Does." Even when no facts are known at the time of filing that justify this allegation, it is suggested this paragraph be alleged at least against Doe defendants to allow amendment of the complaint, even after the statute of limitations has run, should facts justifying this allegation be discovered.

[F] Agent or Employee

As discussed in *§ 83.120[3][b][iii][C]*, vicarious liability may be imposed on an employer or principle for the negligent driving of an employee or agent. Paragraph MV-2.e. is used to allege the name of the negligent agent or employee. If the agent or employee is not named as a defendant, the box may be left blank.

[G] Other Basis for Liability

This paragraph should be used to allege liability on bases other than those specifically set out elsewhere in Paragraph MV-2. For example, this paragraph would be used to allege statutory liability on the person who signed and verified the application of a minor for a license [*Veh. Code § 17707*; *see* Ch. 82, *Automobiles: Causes of Action*]. When such anallegation is to be made, the box to the right of MV-2.f. should be checked, the defendant's name inserted, and the allegations made either in the space provided or, when the space is not sufficient, on an attachment labeled MV-2.f. and typed in the format required by *Cal. Rules of Ct., Title 2, Div. 2, Ch. 1* [*Cal. Rules of Ct., Rule 1.45(c)*].

Paragraph MV-2.f. allows for "other reasons" for liability and does not expressly limit those reasons to other legal theories. It appears, therefore, that Paragraph MV-2.f. may be used to refer to additional facts on which liability may be based. Hence, Paragraph MV-2.f. of this form refers to an attachment that contains additional facts regarding the circumstances of the accident [*see § 83.120[3][b][ii]*].

In this form the attachment has been prepared on Cal. Judicial Council Form MC-025, an "Additional Page" that can be used to attach to any Judicial Council Form. The allegation added there is a general allegation directed to fictitiously named defendants.

[c] General Negligence Cause of Action Attachment

[i] In General

Many attorneys routinely include this additional cause of action in the event that general negligence is involved that is not specifically covered in the Motor Vehicle Cause of Action Attachment.

[ii] Heading

The short title of the case, that is, the last names of the first plaintiff and first defendant separated by a "v." should be inserted at the top of the page, and the number of the general negligence cause of action should be inserted in the space provided under the short title. To the right should be typed the page number. The appropriate box should be checked to indicate whether this attachment is being asserted as a cause of action in a complaint or in a cross complaint. The plaintiff's name should be typed in the appropriate space above Paragraph GN-1.

[iii] Date and Place of Incident

This paragraph already has standard allegations that defendants' acts were negligent and that they were the legal (proximate) cause of plaintiff's injuries and damages. Plaintiff merely needs to insert the date and location of the

incident that resulted in plaintiff's injuries.

[iv] Reasons for Liability

The form does not require that plaintiff plead any of the circumstances surrounding the accident or the specific acts of defendant(s) that plaintiff contends were negligent. Statutes require only that complaints and crosscomplaints contain a statement of the facts constituting the cause of action, in ordinary and concise language [*Code Civ. Proc. § 425.10(a)*]. In the filled-out example, the basic circumstances surrounding the automobile collision have been described. Other acts of general negligence not specifically related to the allegations in the Motor Vehicle Cause of Action Attachment could be alleged in this form.

[4] Verification

Verification of the complaint, is not required [*Code Civ. Proc. §§ 128.7(a), 446(a)*; *see § 83.14[2][b]*]. In an unlimited civil case however, the plaintiff may nevertheless consider verifying the complaint because verification requires the defendant to file a verified answer [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect of voluntary verification of the complaint, see *§ 83.14[2][b]*.

[5] Jurisdiction

The superior court generally has jurisdiction of any action arising from an automobile collision within the state. The action will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

If the amount of the demand is less than $5000, jurisdiction over the action lies in the small claims court division of the superior court [*Code Civ. Proc. § 116.220(a)(1)*]. Effective January 1, 2006, the jurisdictional amount for small claims court in actions brought by natural persons is extended to $7,500, except for actions otherwise prohibited by *Code Civ. Proc. §§ 116.220(c)* or *116.231(a)* [*Code Civ. Proc. § 116.221*].

[6] Venue

In an action for injury to person or personal property or for death from wrongful act or negligence, venue lies either:

- In a county in which one or more of the defendants reside; or
- In the county where the injury occurs [*Code Civ. Proc. § 395(a)*].

Thus, a plaintiff involved in an automobile accident may file in the county in which the accident occurred, even if none of the defendants reside in that county.

If a defendant is a corporation or association, it may be sued "where the obligation or liability arises," or in the county of the principal place ofbusiness of the entity [*Code Civ. Pro. § 395.5*; *see* Ch. 571, *Venue*]. Thus, paragraph 8 of this complaint alleges the proper bases of venue in the chosen court. For additional discussion of venue, see *§ 83.13[2]*.

[7] Specifying Amount of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For forms and procedures for use in requesting a statement of the specific amount sought, see Ch. 177, *Damages* .

[8] Cross References

For further discussion on the use of this form, including verification, jurisdiction, venue, and specifying amounts of damages, see *§ 83.60[5]* et seq.

For allegations of agency, employment, or permissive use sufficient to impose vicarious liability on a defendant, see *§§ 83.130 -83.139*

For alternative allegations as to agency, capacity, and residence of parties and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

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For points and authorities in support of and in opposition to a general demurrer to a complaint by an automobile owner-operator for damages based on negligence, see California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender)

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[Reserved]

§§ 83.121[Reserved]

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B. Vicarious Liability

8-83 California Forms of Pleading and Practice--Annotated § 83.130

§ 83.130 Allegation; Ownership of Automobile and Permissive Use by Operator [Veh. Code § 17150]

[1] FORM Allegation; Ownership of Automobile and Permissive Use by Operator [Veh. Code § 17150]

At all times mentioned in this complaint, defendant _____ [*name of owner*] was the owner of a certain _____ [*year, make, model*] automobile, California License No. _____.

On _____ [*date*], at or about the hour of _____ [*time*], defendant _____ [*name of driver*] was using, operating, and driving that vehicle with the permission, consent, and knowledge of defendant _____ [*name of owner*].

[2] Use of Form

[a] In General

This allegation is to be used in a complaint for damages arising from an automobile collision caused by operator negligence, when the operator is not the owner of the vehicle and the plaintiff intends to state a cause of action against both the owner and the operator. This allegation may be substituted in any of the previous forms in this chapter alleging operator negligence in order to impose vicarious liability on the owner defendant [*see §§ 83.60 -83.66, 83.80* -83.85, *83.100 -83.101*].

[b] Vicarious Liability of Owner

Every owner of a motor vehicle is liable, at least in part, for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle by any person using or operating the motor vehicle with the permission, express or implied, of the owner [*Veh. Code § 17150*; *see Veh. Code § 17151* (limitation of liability); Ch. 82, *Automobiles: Causes of Action*].

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8-83 California Forms of Pleading and Practice--Annotated § 83.131

§ 83.131 Allegation; Ownership of Automobile and Use By Operator With Permission of Bailee [Veh. Code § 17154]

[1] FORM Allegation; Ownership of Automobile and Use By Operator With Permission of Bailee [Veh. Code § 17154]

At all times mentioned in this complaint, defendant _____ [*name of owner*] was the owner of a certain _____ [*year, make, model*] automobile, California License No. _____.

On _____ [*date*], defendant _____ [*name of owner*], as bailor, entered in a[n] written/oral contract with defendant _____ [*name of bailee*], as bailee, for the purpose of _____ [*specify, e.g.*, storing the automobile]. That agreement and the relationship of the defendants as bailor and bailee existed at the time of the collision alleged in this complaint.

On _____ [*date*], at or about the hour of _____ [*time*], defendant _____ [*name of driver*] was using, operating, and driving the _____ [*make*] automobile with the permission, consent, and knowledge of defendant _____ [*name of bailee*]. The permission by defendant _____ [*name of bailee*] for defendant _____ [*name of driver*] to use, operate, and drive the automobile was with the permission of defendant _____ [*name of owner*].

[2] Use of Form

[a] In General

This allegation is to be used in a complaint for damages arising from an automobile collision caused by operator negligence, when the operator was using the vehicle with the permission of the bailee of the owner of the automobile. For example, this allegation would be appropriate if the car was garaged, and a garage attendant took the car out for routine maintenance. This allegation may be substituted in any of the previous forms in this chapter alleging operator negligence in order to impose vicarious liability on the bailee defendant [*see §§ 83.60 -83.66, 83.80* -83.85, *83.100*

-*83.101*].

[b] Vicarious Liability of Bailee

If the bailee of an owner, with the express or implied permission of the owner, permits another to operate the owner's vehicle, then the bailee and the driver are deemed by statute to be operators of the owner's vehicle [*Veh. Code §§ 17152*, *17153* (recourse against operator and subrogation of owner, respectively)]. Every bailee of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act of omission in the operation of the motor vehicle by any person using or operating the same with the express or implied permission of the bailee [*Veh. Code § 17154*; *see* Ch. 82, *Automobiles: Causes of Action*].

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8-83 California Forms of Pleading and Practice--Annotated § 83.132

§ 83.132 Allegation; Use of Automobile By Operator With Permission of Personal Representative [Veh. Code § 17159]

[1] FORM Allegation; Use of Automobile By Operator With Permission of Personal Representative [Veh. Code § 17159]

On _____ [*date*], defendant _____ [*name of personal representative*] was the personal representative of _____ [*name*], deceased, and as such had control and possession of a certain _____ [*year, make, model*] automobile, California License No. _____, which was property subject to administration of that decedent's estate. As of the date and time of the collision alleged in this complaint, the automobile had not been distributed under order of court, and defendant _____ [*name of personal representative*] had not complied with the requirements for transfer of vehicles under *§ 5602 of the Vehicle Code*.

On _____ [*date*], at or about the hour of _____ [*time*], defendant _____ [*name of driver*] was using, operating, and driving the _____ [*make*] automobile with the permission, consent, and knowledge of defendant _____ [*name of personal representative*].

[2] Use of Form

[a] In General

This allegation is to be used in a complaint for damages arising from an automobile collision caused by operator negligence, when the operator was using the vehicle with the permission of the personal representative of the deceased owner of the vehicle. This allegation may be substituted in any of the previous forms in this chapter alleging operator negligence in order to impose vicarious liability on the personal representative defendant [*see §§ 83.60 -83.66, 83.80* -83.85, *83.100 -83.101*].

[b] Vicarious Liability of Personal Representative

Every personal representative of a decedent who has control or possession of a motor vehicle subject to administration of the decedent's estate, during the period of such administration, or until the vehicle has been distributed under order of the court, or sold, transferred, or delivered under *Veh. Code § 5602*, is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission by any person using or operating the vehicle with the express or implied permission of the personal representative [*Veh. Code § 17159*; *see* Ch. 82, *Automobiles: Causes of Action*].

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8-83 California Forms of Pleading and Practice--Annotated § 83.133

§ 83.133 Allegation; Use of Automobile By Minor With Permission of Parents or Guardian [Veh. Code § 17708]

[1] FORM Allegation; Use of Automobile By Minor With Permission of Parents or Guardian [Veh. Code § 17708]

Defendant _____ [*name of minor*] is a minor child under the age of 18, whose parents are defendants _____ [*names of parents*].

On the date and at time of the collision alleged in this complaint, defendant _____ [*name of minor*] was using, operating, and driving a certain _____ [*year, make, model*] automobile, California License No. _____, with the permission, consent, and knowledge of defendants _____ [*names of parents*].

[2] Use of Form

[a] In General

This allegation is to be used in a complaint for damages arising from an automobile collision caused by operator negligence, when the operator was a minor child using the vehicle with the express or implied permission of his/her parents. This allegation may be substituted in any of the previous forms in this chapter alleging operator negligence in order to impose vicarious liability on the parent or guardian defendants [*see §§ 83.60 -83.66, 83.80* -83.85, *83.100 -83.101*].

[b] Vicarious Liability of Parent or Guardian

Any civil liability arising from a minor's operation of a motor vehicle with the express or implied permission of the minor's parents or guardian is imposed on the parents or guardian. The parents or guardian are jointly and severally liable with the minor for any damages proximately resulting from the negligent or wrongful act or omission of the minor in driving the vehicle [*Veh. Code § 17708*; *see* Ch. 82, *Automobiles: Causes of Action*]. For the purposes of *Veh. Code §§ 17700-17714*, all persons under 18 years of age are minors [*Veh. Code § 17700*].

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8-83 California Forms of Pleading and Practice--Annotated § 83.134

§ 83.134 Allegation; Signing and Verifying Application for License of Minor Driver [Veh. Code § 17707]

[1] FORM Allegation; Signing and Verifying Application for License of Minor Driver [Veh. Code § 17707]

Defendant _____ [*name of minor*] is a minor child under the age of 18 who is a licensed driver under California Drivers License No. _____. The application for that license was signed and verified by defendants _____ [*name*] and _____ [*name*].

On the date and at time of the collision alleged in this complaint, defendant _____ [*name of minor*] was using, operating, and driving a certain _____ [*year, make, model*] automobile, California License No. _____.

[2] Use of Form

[a] In General

This allegation is to be used in a complaint for damages arising from an automobile collision caused by operator negligence, when the operator was a minor child in possession of a valid driver's license signed and verified by the codefendants. This allegation may be substituted in any of the previous forms in this chapter alleging operator negligence in order to impose vicarious liability on the signing defendants [*see §§ 83.60 -83.66, 83.80* -83.85, *83.100 -83.101*].

[b] Vicarious Liability of Signer

Any civil liability arising from a licensed minor's operation of a motor vehicle is imposed on the persons who signed and verified the minor's driver's license application. The signers of the application are jointly and severally liable with the minor for any damages proximately caused by the negligent or wrongful act or omission of the minor. However, an employer signing the application is so liable only if an unrestricted driver's license has been issued to the minor pursuant to the employer's written authorization [*Veh. Code § 17707*; *see* Ch. 82, *Automobiles: Causes of Action*].

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8-83 California Forms of Pleading and Practice--Annotated § 83.135

§ 83.135 Allegation; Agency [Civ. Code § 2338]

[1] FORM Allegation; Agency [Civ. Code § 2338]

On the date and at time of the collision alleged in this complaint, defendant _____ [*name of agent*] was the agent of defendant _____ [*name of principal*] and was acting within the purpose and scope of this agency in performing the acts alleged in this complaint.

[2] Use of Form

[a] In General

This allegation is to be used in a complaint for damages arising from an automobile collision caused by operator negligence, when the operator was an agent and the plaintiff desires to name both the operator-agent and the principal as defendants. This allegation may be substituted in any of the previous forms in this chapter alleging operator negligence in order to impose vicarious liability on the additional defendant [*see §§ 83.60 -83.66, 83.80* -83.85, *83.100 -83.101*].

[b] Vicarious Liability of Principal of Agent

Unless required by law to employ a particular agent, a principal is responsible to third persons for the negligence of the agent in performing any acts within the course and scope of the agency [*Civ. Code § 2338* (liability of principal for torts of agent); *see* Ch. 82, *Automobiles: Causes of Action*].

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8-83 California Forms of Pleading and Practice--Annotated § 83.136

§ 83.136 Allegation; Subagency [Civ. Code § 2351]

[1] FORM Allegation; Subagency [Civ. Code § 2351]

On the date and at time of the collision alleged in this complaint, _____ [*name of agent*] was the agent of defendant _____ [*name of principal*], while defendant _____ [*name of subagent*] was the lawfully appointed subagent of _____ [*name of agent*]. The subagent was acting within the purpose and scope of this subagency in performing the acts alleged in this complaint.

[2] Use of Form

[a] In General

This allegation is to be used in a complaint for damages arising from an automobile collision caused by operator negligence, when the operator was a subagent and the plaintiff desires to name both the operator-subagent and the principal as defendants. This allegation may be substituted in any of the previous forms in this chapter alleging operator negligence in order to impose vicarious liability on the additional defendant [*see §§ 83.60 -83.66*, *83.80* -83.85, *83.100 -83.101*].

[b] Vicarious Liability of Principal of Subagent

A lawfully appointed subagent represents and binds the principal in like manner with the original agent and the original agent is not responsible to third persons for the acts of the subagent [*Civ. Code § 2351*]. Because the subagent binds the principal to the same extent as the agent, the principal is liable for torts of the subagent committed in the course and scope of the subagency [*Civ. Code § 2338*; *see § 83.135*; Ch. 82, *Automobiles: Causes of Action*].

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8-83 California Forms of Pleading and Practice--Annotated § 83.137

§ 83.137 Allegation; Authorization or Ratification of Act of Agent by Principal [Civ. Code § 2339]

[1] FORM Allegation; Authorization or Ratification of Act of Agent by Principal [Civ. Code § 2339]

On the date and at time of the collision alleged in this complaint, defendant _____ [*name of agent*] was the agent of defendant _____ [*name of principal*]. Defendant _____ [*name of principal*] _____ [authorized *or* ratified *or* both authorized and ratified] the actions of defendant _____ [*name of agent*] alleged in this complaint in that [*specify how principal authorized or ratified the agent's actions*].

[2] Use of Form

This allegation is to be used in a complaint for damages arising from an automobile collision caused by operator negligence, when the operator was an agent of a principal whose liability turns upon authorization or ratification of the alleged wrongful conduct of the agent [*see Civ. Code § 2339*; Ch. 82, *Automobiles: Causes of Action*]. This allegation may be substituted in any of the previous forms in this chapter alleging operator negligence in order to impose vicarious liability on the additional defendant [*see §§ 83.60 -83.66*, *83.80* -83.85, *83.100 -83.101*].

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8-83 California Forms of Pleading and Practice--Annotated § 83.138

§ 83.138 Allegation; Partnership [Corp. Code § 16305(a)]

[1] FORM Allegation; Partnership [Corp. Code § 16305(a)]

On the date and at time of the collision alleged in this complaint, defendant _____ [*name of partnership*] was a partnership organized and existing under the laws of California with its principal place of business in _____ County, California.

On the date and at time of the collision alleged in this complaint, defendant _____ [*name of partner*] was a partner of that partnership, and was acting _____ [in the ordinary course of the business of the partnership *or* with the authority of his/her partners] in performing the acts alleged in this complaint.

[2] Use of Form

[a] In General

This allegation is to be used in a complaint for damages arising from an automobile collision caused by operator negligence, when the operator was a member of a partnership and the plaintiff desires to name both the operator and the partnership as defendants. This allegation may be substituted in any of the previous forms in this chapter alleging operator negligence in order to impose vicarious liability on the partnership defendant [*see §§ 83.60 -83.66, 83.80* -83.85, *83.100 -83.101*].

[b] Vicarious Liability of Partnership

When a partner acting either in the ordinary course of the business of the partnership or with the authority of the partners commits any tort or incurs any other liability, the partnership is liable to the same extent as the partner [*Corp. Code § 16305(a)*]. All partners are liable jointly and severally for any liabilities of the partnership [*Corp. Code § 16306(a)*].

[c] Cross References

For discussion and forms relating to partnership liabilities, see Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties*

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8-83 California Forms of Pleading and Practice--Annotated § 83.139

§ 83.139 Complaint in Subrogation; By Vehicle Owner as Subrogee of Third Person Injured By Vehicle [Veh. Code § 17153] Against Operator of Vehicle to Recover Amount of Judgment and Costs Previously Assessed Against Owner Based on Imputed Negligence [Veh. Code §§ 17150, 17151]

[1] FORM Complaint in Subrogation; By Vehicle Owner as Subrogee of Third Person Injured By Vehicle [Veh. Code § 17153] Against Operator of Vehicle to Recover Amount of Judgment and Costs Previously Assessed Against Owner Based on Imputed Negligence [Veh. Code §§ 17150, 17151]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT IN SUBROGATION
_____ [*name*],	)	(Owner Against Driver of Motor Vehicle)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff is, and at all times mentioned in this complaint was, _____ [*specify capacity of plaintiff, e.g.,* a natural person *or* a corporation organized and existing under the laws of California] and the owner of a certain _____ [*year, make, model*] automobile, California License No. _____.

2. Defendant _____ [*name*] is a natural person who is, and at all times mentioned in this complaint was, a resident of _____ County, California. Defendant _____ [*name*] is _____ [*specify relationship of defendant to plaintiff, e.g.,* a client of plaintiff *or* a personal

acquaintance of plaintiff].

3. On _____ [*date*], at or about the hour of _____ [*time*], defendant _____ [*name of driver*] was using, operating, and driving the plaintiff's _____ [*make*] automobile to _____ [*specify driver's use of vehicle, e.g.,* run personal errands] along and on _____ [*identify street*] in a general _____ [*identify direction by compass point, e.g.,* southeasterly] direction in _____ [*city*], _____ County, California.

4. At that time and place, defendant _____ [*name*] negligently and carelessly _____ [drove, *and/or* operated, *and/or* controlled] the plaintiff's _____ [*make*] automobile so as to proximately cause it to collide with another automobile owned and operated by _____ [*name of third party*], who suffered [*specify damages, e.g.,* personal injury and property damages] as a proximate result of defendant's negligence.

5. _____ [*name of third party*] instituted an action, referred to in this complaint as the "third-party action," in the Court of _____ [*specify judicial district or county*], Case No. _____, to recover [*specify damages, e.g.,* personal injury and property damages]. This third-party action was brought against both defendant _____ [*name*] as the operator of the vehicle, and against plaintiff as the owner of the vehicle. A copy of the complaint in the third-party action is attached to this complaint as Exhibit A and incorporated by reference.

6. On _____ [*date*], a judgment in the amount of $_____ was entered in the third-party action in favor of _____ [*name of third party*] and against both plaintiff and defendant _____ [*name*]. This judgment became final on _____ [*date*] by _____ [*specify, e.g.,* expiration of the time for appeal]. A copy of this judgment in the third-party action is attached to this complaint as Exhibit B and incorporated by reference.

7. On _____ [*date*], plaintiff paid the amount of $_____ in full/partial satisfaction of the judgment in the third-party action. A copy of the [partial] satisfaction of judgment in the third-party action is attached to this complaint as Exhibit C and incorporated by reference.

8. By reason of the judgment and plaintiff's [partial] satisfaction of judgment in the third-party action, plaintiff is subrogated to all rights of _____ [*name of third party*] [to the extent of the payment made] and is entitled to recover from defendant the sum of $_____, which is the amount paid by the plaintiff in full/partial satisfaction of the judgment in the third-party action.

WHEREFORE, plaintiff prays for a judgment against defendant as follows:

1. For the sum of $_____, the amount paid by the plaintiff in full/partial satisfaction of the judgment in the third-party action, together with interest at the legal rate from _____ [*date of plaintiff's payment to this party*].

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 83.60[1].*]

[2] Use of Form

This form is a general form of complaint for use by the owner of a motor vehicle who has been held vicariously liable for damages causedby a negligent operator to recover through subrogation the amount of the judgment paid by the owner to some third party [*Veh. Code § 17153*]. For a full discussion of the doctrine of subrogation, see Ch. 536, *Subrogation* . For discussion of subrogation in the automobile collision context, see Ch. 82, *Automobiles: Causes of Action* .

[3] Allegations

[a] In General

The complaint alleges:

- The plaintiff's legal capacity and status as the owner of the motor vehicle involved (Paragraph 1).
- The defendant's capacity and his or her relationship to plaintiff (Paragraph 2).
- The date, time, and place of the defendant's operation of the vehicle (Paragraph 3).
- The defendant's negligent operation of the vehicle and the resulting collision and damage to the third party (Paragraph 4).
- The filing of the third-party action against plaintiff and defendant (Paragraph 5).
- The judgment in that third-party action (Paragraph 6).
- The plaintiff's full or partial payment of the judgment in that third-party action [*see Veh. Code § 17151* (monetary limitation of owner's vicarious liability in certain circumstances)] (Paragraph 7).
- The plaintiff's subrogation to the rights of the third party against the defendant [*see Veh. Code § 17153*; *[b], [c] below*] (Paragraph 8).

[b] When Right to Subrogation Arises

The negligent operator is subject to unlimited liability for his or her own negligence. Recourse by the injured party must first be had against the operator if possible. If the injured party obtains payment from the owner on a judgment, the owner is subrogated to the injured party's rights against the operator to the extent of the payment made [*Veh. Code § 17153*; *see Kemp v. Barnett (1976) 62 Cal. App. 3d 245, 249, 132 Cal. Rptr. 823* ; Ch. 82, *Automobiles: Causes of Action*].

The owner's right to subrogation does not arise, however, until after a judgment has been rendered in favor of the injured third party [*Metro U.S. Services, Inc. v. City of Los Angeles (1979) 96 Cal. App. 3d 678, 685, 158 Cal. Rptr. 207* ; Ch. 82, *Automobiles: Causes of Action*].

Whether the owner may file, in the original action by the injured third party, a cross complaint seeking a declaration of its subrogation rights against the operator is a controversial question. Older authority precludes such a cross complaint, on the theory that the claim does not arise until judgment is entered in favor of the third party [*see Dalton v. Baldwin*

(1944) 64 Cal. App. 2d 259, 262-263, 148 P.2d 665] . More recent authority permits the conditional claim, relying on the fact that such a claim serves the interests of judicial economy [*see Metro U.S. Services, Inc. v. City of Los Angeles (1979) 96 Cal. App. 3d 678, 685, 158 Cal. Rptr. 207* (noting issue, but declining to address it as unnecessary to decision in case)].

[c] Owner's Right to Indemnity

Because the owner has no right to subrogation prior to the entry of judgment, the remedy of subrogation is plainly inadequate when the owner settles the third party's claim and no judgment is entered. The statutory remedy of subrogation is therefore not exclusive and, in such a case, the owner may recover the amount of the settlement from the negligent operator under the doctrine of implied or equitable indemnity [*see Metro U.S. Services, Inc. v. City of Los Angeles (1979) 96 Cal. App. 3d 678, 685, 158 Cal. Rptr. 207* ; *Jenne v. Wheeler (1974) 118 Cal. Rptr. 471* ; Ch. 82, *Automobiles: Causes of Action*].

[d] Effect of Settlement With Negligent Operator

The owner's liability is secondary, while the operator's liability is primary. Hence, any settlement between the injured third party and the negligent operator operates to discharge pro tanto the owner's liability under *Veh. Code §§ 17150, 17151* [*see Fenley v. Kristoffersen (1979) 94 Cal. App. 3d 139, 141, 156 Cal. Rptr. 187* (settlement by operator in full amount of owner's statutory liability discharges owner entirely)]. However, any settlement by the owner of the third party's claim discharges the operator from liability to the injured party only to extent of the payment made [*Kemp v. Barnett (1976) 62 Cal. App. 3d 245, 249-250, 132 Cal. Rptr. 823]* .

[4] Cross References

For further discussion on the use of this form, including verification, jurisdiction, venue, and specifying amounts of damages, see *§ 83.60[5]* et seq.

For allegations of agency, employment, or permissive use sufficient to impose vicarious liability on a defendant, see *§§ 83.130 -83.139*.

For alternative allegations as to agency, capacity, and residence of parties and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms of prayers, see Ch. 420, *Prayers*

For alternative forms of verification, see Ch. 572, *Verification*

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[Reserved]

§§ 83.140[Reserved]

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8-83 California Forms of Pleading and Practice--Annotated § 83.150

§ 83.150 Complaint for Damages for Personal Injuries and Property Damage By Party Injured By Defective Automobile Based on Strict Liability of Automobile Manufacturer or Retailer; General Form

[1] FORM Complaint for Damages for Personal Injuries and Property Damage By Party Injured By Defective Automobile Based on Strict Liability of Automobile Manufacturer or Retailer; General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	(PRODUCTS LIABILITY)
Defendants.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name of manufacturer*] was and is a corporation organized under the laws of _____ [*specify state*], with its principle place of business in _____ [*specify city and/or county and state*], and is engaged in the business of manufacturing automobiles.

2. Defendant _____ [*name of retailer*] was and is a corporation organized and existing under the laws of the state of California, with its principle place of business in _____ [*specify city and/or county*], California, and is engaged in the business of distributing, buying, and selling automobiles to the general public.

3. [*Fictitious name allegations, if appropriate. See § 83.60[1], Paragraph 2.*]

4. Defendant _____ [*name of manufacturer*], designed, manufactured, and assembled a certain _____ [*year, make, model*].

5. On or about _____ [*date*], defendant _____ [*name of retailer*] sold and delivered that same _____ [*make*] automobile to _____ [*name of purchaser*].

6. Defendants and each of them manufactured and sold the _____ [*make*] automobile with the intent that it be used as a passenger vehicle on public roadways.

7. Defendants and each of them knew that the _____ [*make*] automobile would be purchased and used without inspection for defects by the purchaser or user.

8. The _____ [*make*] automobile was unsafe for its intended use as a passenger vehicle by reason of the following defect in its _____ [design *or* manufacture *or* design and manufacture]: _____ [*specify the design and/or manufacturing defect present in the defective part or system*].

9. Plaintiff was not aware of these defects in the _____ [*make*] automobile at any time prior to the resulting failure of the product and the injuries alleged in this complaint.

10. On _____ [*date*], at or about the hour of _____ [*time*], plaintiff was using, operating, and driving the _____ [*make*] automobile for its intended use as a passenger vehicle along and on _____ [*identify street*] near its intersection with _____ [*identify nearest cross street*] in a general _____ [*identify direction by compass point, e.g.,* southeasterly] direction in _____ [*city*], _____ County, California, when the _____ [*identify defective part or system*] failed, causing the vehicle to [*describe incident and collision, e.g.,* accelerate suddenly and collide with other vehicles].

11. As a proximate result of the previously alleged defects in the _____ [*make*] automobile and of the collision resulting from those defects, plaintiff was injured in his/her health, strength, and activity, sustained injury to his/her body and shock and injury to his/her nervous system and person, and sustained the following personal injuries, among others: _____ [*describe plaintiff's injuries*], all of which injuries have caused and continue to cause plaintiff great mental, physical, and nervous pain and suffering. These injuries will result in some permanent disability to plaintiff, all to his/her general damage.

12. As a further proximate result of the previously alleged defects in the _____ [*make*] automobile and of the collision resulting from those defects, plaintiff has been and in the future will be required to obtain the services of physicians and to incur other medical expenses in an amount unknown to plaintiff at this time.

13. At the time of the collision previously alleged, plaintiff was _____ [employed *or* employable] as a[n] _____ [*occupation*]. As a further proximate result of the previously alleged defects in the _____ [*make*] automobile and of the collision and injuries resulting from those defects, plaintiff has been, and will continue to be, prevented from working in this occupation. The amount of earnings which will be lost to plaintiff is unknown at this time.

[14. *Allege further damages, if any, i.e., repair or replacement of vehicle if owned by plaintiff*].

[*Prayer. See § 83.80[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 83.60[1].*]

[2] Use of Form

This form is a general form of complaint for use by a plaintiff injured in the operation of an automobile for stating products liability causes of action against the manufacturer and seller of the vehicle. A claim in products liability is appropriate when the plaintiff alleges that he or she was injured in the normal operation of the automobile as a result of a defect in the design or manufacture of the vehicle that made the vehicle unsafe for its intended use [*Gherna v. Ford Motor Co. (1966) 246 Cal. App. 2d 639, 649-650, 55 Cal. Rptr. 94* ; *see* Ch. 82, *Automobiles: Causes of Action*]. Claims in products liability are discussed in detail in Ch. 460, *Products Liability* .

[3] Allegations

This complaint alleges:

- The defendants' legal capacities as, respectively, a manufacturer and seller of motor vehicles (Paragraphs 1 and 2).
- That the defendants manufactured and sold the vehicle driven by the plaintiff (Paragraphs 4 and 5).
- That the defendants intended the vehicle to be used as a passenger vehicle without inspection by purchasers (Paragraphs 6 and 7).
- The defect in the design or manufacture of the vehicle (Paragraph 8).
- The circumstances of the collision and that it was caused by the design or manufacturing defect (Paragraph 10).
- The plaintiff's damages (Paragraphs 11-14).

The complaint is based on the complaint in *Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 134-135, 104 Cal. Rptr. 433, 501 P. 2d 1153* , in which the court held that the plaintiff need not plead or prove that the defect in the product made it unreasonably dangerous. See Ch. 82, *Automobiles: Causes of Action* ; Ch. 460, *Products Liability* .

[4] Cross References

For further discussion on the use of this form, including verification, jurisdiction, venue, and specifying amounts of damages, see *§ 83.60[5]* et seq.

For alternative allegations as to capacity and residence of parties, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used* .

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions* .

For alternative forms of prayers, see Ch. 420, *Prayers* .

For discussion and forms as to claims in products liability, see Ch. 460, *Products Liability* .

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[Reserved]

§§ 83.151[Reserved]

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8-83 California Forms of Pleading and Practice--Annotated § 83.160

§ 83.160 Allegation; Residence of Nonresident Motorist [Veh. Code § 17451]

[1] FORM Allegation; Residence of Nonresident Motorist [Veh. Code § 17451]

Defendant _____ [*name*] is a natural person who is, and at all times mentioned in this complaint was, a resident of _____ [*specify state*], and not a resident of the state of California. On _____ [*date*], at or about the hour of _____ [*time*], defendant _____ [*name*] was using, operating, and driving the automobile later described in this complaint on the public streets and highways of the state of California when the collision later described in this complaint occurred. By so using, operating, and driving the vehicle, defendant _____ [*name*] appointed under *Vehicle Code section 17451* the Director of the Department of Motor Vehicles as his/her true and lawful attorney for service of process in any action arising out of that use or operation.

[2] Use of Form

This allegation is for use in a complaint for damages arising from an automobile collision to plead the basis for exercising personal jurisdiction over an operator involved in the collision who is a nonresident of the state of California. This allegation may be substituted in any of the previous forms in this chapter when a defendant is a nonresident [*see, e.g., § 83.60[1]*, Paragraph 1].

The commission of an allegedly tortious act within California is sufficient to subject the nonresident defendant to suit in the state [*Solot v. Linch (1956) 46 Cal. 2d 99, 104, 292 P.2d 887]* . By statute, the operation or ownership by a nonresident of a vehicle operated within the state is consent to service of process in any action arising from the operation of the vehicle in the state, and is an irrevocable appointment of the California Director of Motor Vehicles as the nonresident's agent for such service [*Veh. Code § 17451*].

[3] Cross References

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers* .

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8-83 California Forms of Pleading and Practice--Annotated § 83.161

§ 83.161 Allegation; Residence of Nonresident Automobile Owner and Agency of Driver [Veh. Code § 17451]

[1] FORM Allegation; Residence of Nonresident Automobile Owner and Agency of Driver [Veh. Code § 17451]

Defendant _____ [*name*] is a natural person who is, and at all times mentioned in this complaint was, a resident of _____ [*specify state*], and not a resident of the state of California. Defendant _____ [*name*] is the owner of the automobile later described in this complaint. _____ [*name of driver*] is an agent of defendant _____ [*name*] who, at all times alleged in this complaint, was acting within the course and scope of that agency. On _____ [*date*], at or about the hour of _____ [*time*], _____ [*name of driver*] was using, operating, and driving defendant's automobile on the public streets and highways of the state of California when the collision later described in this complaint occurred. Through the actions of _____ [*name of driver*] in using, operating, and driving the defendant's vehicle, defendant _____ [*name*] appointed under *Vehicle Code section 17451* the Director of the Department of Motor Vehicles as his/her true and lawful attorney for service of process in any action arising out of that use or operation.

[2] Use of Form

This allegation is for use in a complaint for damages arising from an automobile collision when an agent of a nonresident principal was involved in the collision and the plaintiff wishes to assert a claim against the nonresident principal. This allegation may be substituted in any of the previous forms in this chapter when a defendant is a nonresident [*see, e.g., § 83.60[1],* Paragraph 1].

The commission of an allegedly tortious act within California is sufficient to subject the nonresident defendant to suit in the state [*Solot v. Linch (1956) 46 Cal. 2d 99, 104, 292 P.2d 887]* . This is true whether the act was performed personally or by an agent. By statute, the operation or ownership by a nonresident of a vehicle operated within the state is consent to service of process in any action arising from the operation of the vehicle in the state, and is an irrevocable appointment of the California Director of Motor Vehicles as the nonresident's agent for such service [*Veh. Code § 17451*].

[3] Cross References

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers* .

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8-83 California Forms of Pleading and Practice--Annotated § 83.162

§ 83.162 Allegation; Residence of Nonresident Defendant With California Certificate of Ownership or Registration [Veh. Code § 17459]

[1] FORM Allegation; Residence of Nonresident Defendant With California Certificate of Ownership or Registration [Veh. Code § 17459]

Defendant _____ [*name*] is a natural person who is now a resident of _____ [*specify state*]. On _____ [*date*], the date of the collision later alleged in this complaint, defendant was a resident of the state of California and had been issued by the state of California a [renewal of a] certificate of ownership/registration of the motor vehicle involved in the collision. Because the defendant held a certificate of ownership/registration of the vehicle on the date of the collision, defendant appointed under *Vehicle Code section 17459* the Director of the Department of Motor Vehicles as his/her true and lawful attorney for service of process in any action arising out of the ownership or operation of the vehicle.

[2] Use of Form

This allegation is for use in a complaint for damages arising from an automobile collision to plead the nonresidence of a defendant who was formerly a California resident and who, at that time, accepted a certificate of ownership or registration of the vehicle involved in the collision. This allegation may be substituted in any of the previous forms in this chapter when a defendant is a nonresident [*see, e.g., § 83.60[1]*, Paragraph 1].

Residents who register or own vehicles within the state of California consent to service of process on any cause of action arising in the state from the ownership or operation of the owned or registered vehicle. This statutory consent extends to permit service of process outside the state, and continues even if the person ceases to be a California resident [*Veh. Code §§ 17459, 17460*; *see Ostrus v. Price (1978) 82 Cal. App. 3d 518, 524, 146 Cal. Rptr. 922* ; *Briggs v. Superior Court (1947) 81 Cal. App. 2d 240, 246-247, 183 P.2d 758]* .

[3] Cross References

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers* .

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8-83 California Forms of Pleading and Practice--Annotated § 83.163

§ 83.163 Allegation; Residence of Nonresident Defendant Accepting or Retaining California Driver's License [Veh. Code § 17460]

[1] FORM Allegation; Residence of Nonresident Defendant Accepting or Retaining California Driver's License [Veh. Code § 17460]

Defendant _____ [*name*] is a natural person who is now a resident of _____ [*specify state*]. On _____ [*date*], the date of the collision later alleged in this complaint, defendant was a resident of the state of California and had accepted [and retained] a driver's license issued by the state of California. Because the defendant was driving the vehicle and held a California driver's license on the date of the collision later alleged in this complaint, defendant appointed under *Vehicle Code section 17460* the Director of the Department of Motor Vehicles as his/her true and lawful attorney for service of process in any action arising out of the operation of the vehicle.

[2] Use of Form

This allegation is for use in a complaint for damages arising from an automobile collision to plead the nonresidence of a defendant who was formerly a California resident and who, at that time, accepted or retained a California driver's license. This allegation may be substituted in any of the previous forms in this chapter when a defendant is a nonresident [*see, e.g., § 83.60[1]*, Paragraph 1].

Residents who hold a driver's license issued by the state of California consent to service of process on any cause of action arising in the state from the person's operation of any vehicle. This statutory consent extends to permit service of process outside the state, and continues even if the person ceases to be a California resident [*Veh. Code § 17460*].

[3] Cross References

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers* .

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8-83 California Forms of Pleading and Practice--Annotated § 83.164

§ 83.164 Notice to Nonresident Defendant of Service of Summons and Complaint on Director of Department of Motor Vehicles [Veh. Code § 17455]

[1] FORM Notice to Nonresident Defendant of Service of Summons and Complaint on Director of Department of Motor Vehicles [Veh. Code § 17455]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF SERVICE OF SUMMONS AND
Defendant.	)	COMPLAINT
	)	
	)	

_____

To: _____ [*name*], a nonresident defendant:

NOTICE IS HEREBY GIVEN that because you are a nonresident of the state of California and a defendant in the above entitled action, plaintiff has, under the provisions of *Vehicle Code sections 17450-17463*, served a copy of the attached summons and complaint on the Director of the Department of Motor Vehicles of the State of California, together with the required fee of $2.00, on _____ [*date*]. You have sixty days in which to appear and respond in this action.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

This form is a form of notice to be used in giving the required statutory notice to a nonresident defendant of service of the summons and complaint on the Director of the Department of Motor Vehicles. This notice is to be given to the defendant either by registered mail or by personal service on the defendant outside of California [*Veh. Code §§ 17454, 17455*]. If notice is given by registered mail, a declaration of mailing as *set forth in § 83.165* should be filed. If notice is given by personal service on the defendant outside of California, a declaration attesting to that service as *set forth in § 83.166* should be filed.

[3] Cross References

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers* .

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8-83 California Forms of Pleading and Practice--Annotated § 83.165

§ 83.165 Declaration of Service By Mail on Nonresident Defendant [Veh. Code § 17456]

[1] FORM Declaration of Service By Mail on Nonresident Defendant [Veh. Code § 17456]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DECLARATION OF MAILING
Defendant.	)	
	)	
	)	

_____

I, _____ [*name*], declare:

I am _____ [the plaintiff *or* counsel for the plaintiff] in the above entitled action, and my residence/business address is _____ [*state mailing address*].

Defendant _____ [*name*] in the above entitled action is not a resident of California but instead is a resident of _____ [*specify state*].

On _____ [*date*], _____ [I *or name*] deposited in the United States mail in _____ [*specify place of mailing, e.g.,* Sacramento], California, a copy of the summons and complaint in the above-entitled action, along with a notice of service of that summons and complaint on the Director of the Department of Motor Vehicles, enclosed in a postage prepaid, sealed envelope, registered mail, return receipt requested, addressed to defendant _____ [*name*] at _____ [*defendant's mailing address*]. The

return receipt of the United States Postal Service, bearing the signature of _____ [defendant *or* an agent of the defendant], is attached to this declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].

_____ [*signature*]
[Attorney for] Plaintiff

[2] Use of Form

This form is a form of declaration for use to swear to or affirm the mailing of notice and a copy of the summons and complaint to a nonresident defendant under *Veh. Code § 17456*. For a form for the notice itself, see *§ 83.164*.

[3] Cross References

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers* .

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8-83 California Forms of Pleading and Practice--Annotated § 83.166

§ 83.166 Declaration of Personal Service on Nonresident Defendant Outside California [Veh. Code § 17456]

[1] FORM Declaration of Personal Service on Nonresident Defendant Outside California [Veh. Code § 17456]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DECLARATION OF SERVICE
Defendant.	)	
	)	
	)	

_____

I, _____ [*name*], declare:

I am authorized and qualified under the laws of the state of _____ to serve process within _____ [*specify city or county in which service was made*].

I served one copy of the summons and complaint in the above entitled action, along with a notice of service of that summons and complaint on the Director of the Department of Motor Vehicles, on defendant _____ [*name*] at _____ [*specify place of service, e.g.,* defendant's residence at _____ (*street address*)], by personally handing the summons, complaint, and notice to defendant _____ [*name*] on _____ [*date*].

I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].

_____ [*signature*]

[2] Use of Form

This form is a form of declaration for use to swear to or affirm personal service of notice and a copy of the summons and complaint on a nonresident defendant under *Veh. Code § 17456*. For a form for the notice itself, see *§ 83.164*. Any person authorized to serve process in the jurisdiction may execute and file the declaration.

[3] Cross References

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers* .

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8-84 California Forms of Pleading and Practice--Annotated 84.syn

§ 84.syn Synopsis to Chapter 84: AUTOMOBILES: RESPONDING TO THE ACTION

§ 84.01 Scope of Chapter

§ 84.02 Cross References

[1] Related Chapters in This Volume

[2] Other Related Chapters

[3] Other Related Coverage

§§ 84.03-84.09 [Reserved]

§ 84.10 Receipt of Referral or Assignment From Insurer

§ 84.11 Client Interview and Investigation

§ 84.12 Deadlines

§ 84.13 Case Evaluation; Contact With Insurance Carrier

§§ 84.14-84.19 [Reserved]

§ 84.20 Motion to Quash Service of Process

§ 84.21 Motion to Consolidate

§ 84.22 Motion for Transfer or Change of Venue

§ 84.23 Removal to Federal Court

§§ 84.24-84.29 [Reserved]

§ 84.30 Demurrer or Answer

[1] Time to Demur or Answer

[2] Extension of Time

[3] Distinction Between Demurrer and Answer

[4] Inclusion of Affirmative Defenses in Answer

[a] In General; Pleading Required

[b] Plaintiff's Negligence

[i] Contributory Negligence

[A] Recovery Not Barred; Comparative Fault

[B] Negligence Per Se

[ii] Imputed Negligence

[c] Negligence of Passenger or Other Third Party

[d] Assumption of Risk

[e] Imminent Peril or Sudden Emergency

[f] Unavoidable Accident

[g] Intervening Cause

[h] Proposition 213; Limitation of Damages

[5] Verification of Answer

§ 84.31 Cross Complaints

[1] Claims Against Plaintiff

[2] Claims Against Codefendants or Third Parties

§§ 84.32-84.39 [Reserved]

§ 84.40 Discovery

§ 84.41 Conferences

§ 84.42 Settlement Offers

§§ 84.43-84.49 [Reserved]

§ 84.50 Related Texts From LexisNexis

§ 84.51 State Statutes

§ 84.52 Decisions

§ 84.53 Internet References

§§ 84.54-84.59 [Reserved]

§ 84.60 Answer to Unverified Complaint--With Punitive Damage Defense--Sample Form

[1] FORM

[2] Use of Form

§ 84.61 Affirmative Defense; Comparative Negligence of Plaintiff Driver; General Form

[1] FORM

[2] Use of Form

[a] In General

[b] Effect of Plaintiff's Negligence

[3] Cross References

§ 84.62 Affirmative Defense; Comparative Negligence; Plaintiff Pedestrian

[1] FORM

[2] Use of Form

[3] Cross References

§ 84.63 Affirmative Defense; Imputed Comparative Negligence; General Form

[1] FORM

[2] Use of Form

[3] Cross References

§ 84.64 Affirmative Defense; Comparative Negligence of Plaintiff Passenger; Alleging Specific Acts

[1] FORM

[2] Use of Form

[a] In General

[b] Effect of Plaintiff's Negligence

[3] Cross References

§ 84.65 Affirmative Defense; Secondary Assumption of Risk by Passenger; Alleging Specific Acts

[1] FORM

[2] Use of Form

[a] In General

[b] Effect of Secondary Assumption of Risk

[3] Cross References

§ 84.66 Affirmative Defense; Primary Assumption of Risk; Alleging Specific Acts

[1] FORM

[2] Use of Form

[a] In General

[b] Effect of Primary Assumption of Risk

[3] Cross References

§ 84.67 Affirmative Defense; Imminent Peril or Emergency

[1] FORM

[2] Use of Form

[3] Cross References

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PART I. SCOPE

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§ 84.01 Scope of Chapter

This chapter provides a guide for the defendant in an action arising from an automobile collision. It includes discussion of strategic and practical considerations prior to responding to the action. The chapter discusses potential responses to the suit, including those both related to and unrelated to the merits of the action. Potential affirmative defenses are discussed. The chapter also discusses the possibility of seeking relief from a co-defendant through assertion of a cross complaint. Finally, some postanswer considerations are discussed. The chapter contains the following forms:

- A sample form of answer to an unverified complaint[*see § 84.60*].
- Affirmative defenses alleging the contributory negligence of the plaintiff[*see §§ 84.61 -84.64*].
- Affirmative defenses alleging assumption of risk by the plaintiff[*see § 84.65, 84.66*].
- Affirmative defense alleging imminent peril[*see § 84.67*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesAssumption of RiskGeneral OverviewTortsNegligenceDefensesContributory NegligenceGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal VehiclesCivil ProcedurePleading & PracticePleadingsAnswers

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§ 84.02 Cross References

[1] Related Chapters in This Volume

- For discussion and forms giving an overview of a typical automobile collision case, *see* Ch. 80, *Automobiles: Overview* .

- For discussion and forms concerning interviewing the defendant, *see* Ch. 81, *Automobiles: Client Interview* .

- For discussion and forms concerning factual investigation of the case, *see* Ch. 81A, *Automobiles: Investigation* .

- For discussion and forms concerning monetary evaluation of the case, *see* Ch. 81B, *Automobiles: Case Evaluation* .

- For discussion of available causes of action in an automobile case, see Ch. 82, *Automobiles: Causes of Action* , and for forms of complaints, see Ch. 83 *Automobiles: Bringing the Action* .

- For discussion and forms concerning the types and amount of damages available in an automobile case, see Ch. 82A, *Automobiles: Damages* .

- For discussion and forms concerning the drafting of complaints and cross complaints in an automobile case, see Ch. 83, *Automobiles: Bringing the Action* .

- For discussion and forms concerning discovery in an automobile case, *see* Ch. 85, *Automobiles: Discovery* .

- For discussion and forms concerning pretrial proceedings, and negotiation and settlement of automobile cases, *see* Ch. 86, *Automobiles: Pretrial Motions and Settlement Negotiations* .

[2] Other Related Chapters

- For discussion and forms relating to amended or supplemental pleadings, see Ch. 21, *Amended and Supplemental Pleadings* .

- For discussion and forms relating to answers generally, see Ch. 26, *Answers* .

- For discussion and forms relating to complaints and cross complaints generally, see Ch. 123, *Complaints and Cross Complaints* .

- For discussion and forms relating to demurrers and other preanswer motions generally, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 375, *Motions to Strike: Pleadings* , and Ch. 376, *Motions to Strike: Anti-SLAPP* .

- For discussion and forms relating to jurisdiction generally, see Ch. 323, *Jurisdiction: Personal Jurisdiction* , and Ch. 324, *Jurisdiction: Subject Matter* .

- For discussion and forms concerning the liability of public entities and officers for negligence in the operation of motor vehicles, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

- For discussion and forms relating to verification of pleadings generally, see Ch. 572, *Verification* .

[3] Other Related Coverage

- For discussion and forms of points and authorities relating to cross complaints, *see* California points and authorities, Ch. 61, *Cross Complaints* (Matthew Bender).

- For discussion and forms of points and authorities relating to default judgments, *see* California points and authorities, Ch. 70, *Defaults, Default Judgments, and Relief from Judgments and Orders* (Matthew Bender).

- For discussion and forms of points and authorities relating to demurrers and motions for judgment, *see* California points and authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

- For discussion and forms of points and authorities relating to subject matter jurisdiction, *see* California points and authorities, Ch. 133, *Jurisdiction: Subject Matter Jurisdiction* (Matthew Bender).

- For discussion and forms of points and authorities relating to proper parties, *see* California Points and Authorities, Ch. 168, *Parties* (Matthew Bender).

- For discussion and forms relating to drafting cross complaints generally, *see* California Civil Actions,Pleading and Practice, Ch. 8, *Drafting the Complaint or Cross Complaint* (Matthew Bender).

- For discussion and forms relating to drafting the answer generally, *see* California Civil Actions,Pleading and Practice, Ch. 9, *Drafting the Answer* (Matthew Bender).

- For discussion and forms relating to demurrers generally, *see* California Civil Actions,Pleading and Practice, Ch. 10, *Objecting to a Pleading by Demurrer* (Matthew Bender).

- For discussion and forms relating to drafting pleadings in actions based on personal injury, property damage, or wrongful death, *see* California Civil Actions,Pleading and Practice, Ch. 20, *Pleadings in Actions Based on Personal Injury, Property Damage and Wrongful Death* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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[Reserved]

§§ 84.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Considerations Prior to Responding to Action

8-84 California Forms of Pleading and Practice--Annotated § 84.10

§ 84.10 Receipt of Referral or Assignment From Insurer

Defense counsel handling automobile collision cases generally obtain their clients by referral from an insurance company[*see* Ch. 80, *Automobiles: Overview*]. If, however, an attorney is approached by a party that is or might be a defendant in an automobile collision case, the attorney should be sure to inquire as to the party's insurance status. If the person is insured, the attorney should contact the carrier immediately and advise the company of the controversy. If the action has been commenced, the attorney should demand that the carrier defend the action, as the failure to do so is often a waiver of coverage under the policy[*see* Ch. 81, *Automobiles: Client Interview*]. If an insured has a preexisting relationship with an attorney, however, the insurance carrier may very well be willing to assign the insured's case to that attorney.

Once the case has been assigned or referred to the attorney, that attorney must consider whether the interests of the insured and the insurance company are potentially in conflict. If, for instance, the damages might be in excess of the limits of the policy, the insured could be exposed to personal liability on the claim[*see* Ch. 308, *Insurance*]. If this or any other potential conflict is noted, advise the insured in writing. The possibility of obtaining separate counsel might be mentioned, if appropriate.

When a referral is obtained from an insurance company, the defendant usually will not know the attorney. A phone call to the defendant, followed by or in conjunction with a letter of representation, should be made to introduce counsel to the defendant.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-84 California Forms of Pleading and Practice--Annotated § 84.11

§ 84.11 Client Interview and Investigation

As soon as possible after the case is assigned or referred from the insurance company, the attorney should conduct an investigation into the facts of the case. This investigation generally begins with a review of the file as referred or assigned by the insurer. If the insurer has done its job, the company's adjusters and investigators will have already compiled reports of much of the essential factual information for the case. These reports should be carefully reviewed to ensure that they are comprehensive, including questions as to personal information, insurance information, factual details and evidence as to the collision. After reviewing these reports, defense counsel should interview the defendant to fill in any gaps or ambiguities, as well as to ascertain whether or not process was properly served on the defendant. An interview of the defendant may also be necessary to ascertain the viability of defenses such as the statute oflimitations or contributory negligence, or to gather information for a potential cross complaint[*see* Ch. 81, *Automobiles: Client Interview*].

Factual materials in the hands of persons other than the defendant should then be sought, including any police reports, photos, or news reports of the collision. An investigator may be hired to take statements from any witnesses to the collision. The criminal records, driving records, and insurance coverage of each driver should be investigated. Medical records of any injured party should be obtained. For a complete discussion of factual investigation in an automobile collision case, see Ch. 81A, *Automobiles: Investigation* . Much of this material should be included in the file as referred from the insurance company, but again counsel should verify this. Any missing material might be obtained by mere request, but some will probably require formal discovery. For a discussion of discovery in an automobile collision case, see Ch. 85, *Automobiles: Discovery* .

PRACTICE TIP:

Hiring Investigators. Any necessary investigation should be conducted by a professional investigator, not by counsel. If the attorney were to investigate personally, he or she could potentially be a witness at trial.--*By Joe Devine*

Legal Topics:

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

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8-84 California Forms of Pleading and Practice--Annotated § 84.12

§ 84.12 Deadlines

When, as is generally the case, a referral of an automobile collision case occurs after the action is commenced, time will be of the essence. If process has already been served on the defendant, an attorney may have only a few days before a demurrer or answer to the complaint must be filed[*see § 84.30[1]* (discussing time to answer or demur)].

An attorney should also be aware of the statute of limitations, both as a possible defense to the plaintiff's claim[*see* Ch. 345, *Limitation of Actions*], and as it might affect the assertion of any cross complaint by the defendant in the action.

Legal Topics:

For related research and practice materials, see the following legal topics:
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8-84 California Forms of Pleading and Practice--Annotated § 84.13

§ 84.13 Case Evaluation; Contact With Insurance Carrier

Once counsel has investigated the facts of the case and the legal issues involved, an evaluation of the chances for success of each side can begin, considering both the probability of success on the issue of liability, and the potential exposure in damages if the plaintiff should win. Whether the case raises any unusual legal issues should also be considered, as should the scope and cost of discovery and trial if the case proceeds to that stage. These factors should all be taken into account in determining the value of the case, which, from the defense standpoint can be roughly defined as the maximum amount the defense would be willing to pay to settle the action[*see* Ch. 81B, *Automobiles: Case Evaluation*]. In this regard, it should be noted that if the damages might be in excess of the limits of the insurance policy, the insured defendant could be exposed to personal liability on the claim. This possibility requires the insurance company and counsel to act in good faith in negotiating or settling the claim within policy limits[*see* Ch. 308, *Insurance*].

This evaluation of the case by defense counsel is generally passed onto the insurance company, which uses the assessment in determining whether to settle and for how much, and for setting a budget for discovery and litigation in the case. Though an insurance company has its own risk assessment division, the opinion of the attorney carries substantial weight in making these decisions.

Legal Topics:

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

§§ 84.14[Reserved]

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8-84 California Forms of Pleading and Practice--Annotated § 84.20

§ 84.20 Motion to Quash Service of Process

Once the defendant has been served with process, defense counsel should contact the client and determine whether process was adequate, whether service of process was properly made, and whether the defendant is subject to personal jurisdiction in the court from which the process issued[*see* Ch. 83, *Automobiles: Bringing the Action* (discussing process, service of process, and personal jurisdiction in automobile collision cases); *see generally* Ch. 518, *Service of Summons and Papers*].

If process was not properly made, a notice of motion to quash service may be served and filed at any time prior to the expiration of the time to file an answer[*Code Civ. Proc. § 418.10*; *see generally* Ch. 518, *Service of Summons and Papers*].

It should be noted that in the event of a failure of process or of service of process, the plaintiff will almost always be permitted an opportunity to correct the error. If, however, the court lacks personal jurisdiction over the defendant, the action must be dismissed as to that defendant[*see generally* Ch. 323, *Jurisdiction: Personal* ; Ch. 518, *Service of Summons and Papers*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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8-84 California Forms of Pleading and Practice--Annotated § 84.21

§ 84.21 Motion to Consolidate

Defense counsel should consider whether other actions are pending that are related to the defendant's case, such as other cases concerning the same collision. If so, a motion to consolidate the actions may be appropriate[*Code Civ. Proc. § 1048(a)*; *see generally* Ch. 125, *Consolidation, Severance and Coordination of Actions*]. The mere presence of related cases does not indicate that a consolidation motion is warranted. Whether to make such a motion turns on a balancing of many factors. For discussion of these factors, see Ch. 125, *Consolidation, Severance and Coordination of Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConsolidation of ActionsInsurance LawMotor Vehicle InsuranceGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-84 California Forms of Pleading and Practice--Annotated § 84.22

§ 84.22 Motion for Transfer or Change of Venue

The general rule is that proper venue of an action lies in the county in which one or more of the defendants reside[*Code Civ. Proc. § 395(a)*; *see* Ch. 571, *Venue*]. In an automobile collision case, however, in which the action is for injury to person or personal property or for death from wrongful act or negligence, venue lies either: (1) in a county in which one or more of the defendants reside; or (2) in the county where the injury occurs[*Code Civ. Proc. § 395(a)*]. If a defendant is a corporation or association, it may be sued "where the obligation or liability arises," or in the county of the principal place of business of the entity[*Code Civ. Proc. § 395.5*; *see* Ch. 571, *Venue*]. If the automobile collision resulted in damage to real property, venue lies in a county in which some part of the real property is situated[*Code Civ. Proc. § 392(a)(1)*].

If the plaintiff has chosen to lay venue in an improper court under these rules, a notice of motion to transfer venue may be served and filed at any time prior to the expiration of the time to file an answer. If the plaintiff's venue choice was improper, the court must transfer venue when the defendant's motion is timely. If, however, the defendant fails to make the motion, the defect in venue is waived and the case may proceed in the court chosen by the plaintiff[*Code Civ. Proc. § 396b*; *see* Ch. 571, *Venue*].

Even if the plaintiff's choice of venue was proper, the defendant may nevertheless seek a change of venue if: (1) there is reason to believe that an impartial trial cannot be obtained in the chosen venue; (2) the convenience of witnesses and the ends of justice would be served by the change; or (3) no judge in the chosen venue is qualified to preside over the case[*Code Civ. Proc. § 397*; *see* Ch. 571, *Venue*]. There is no express limitation on when a motion seeking a change of venue must be made, but as a practical matter, the longer a defendant waits to make the motion, the less likely it is to be granted[*see generally* Ch. 571, *Venue*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral OverviewTortsNegligenceActionsGeneral

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8-84 California Forms of Pleading and Practice--Annotated § 84.23

§ 84.23 Removal to Federal Court

If no defendant is a citizen of the state of California, but the plaintiff is a California citizen, the defendants may be able to remove the action to federal court based on diversity jurisdiction, provided that the amount in controversy is in excess of the jurisdictional minimum of $75,000[*28 U.S.C.S. §§ 1332, 1441(b)*]. If, however, the California plaintiff joins any one California defendant in the action, complete diversity is lacking and removal is not permitted, unless the removing defendants can prove that joinder of the California defendant was fraudulent and made solely for the purpose of defeating federal jurisdiction. Similarly, if the plaintiff is not a California citizen, California defendants do not have a right of removal from their own state courts, even in the presence of a basis for diversity jurisdiction[*28 U.S.C.S. § 1441(b)*; *see generally* 15 Moore's Federal Practice, Ch. 106, *Removal* (Matthew Bender 3d ed.)].

In certain instances, such as when a defendant is a federal official, there may be a basis for removal even in the absence of diversity [*28 U.S.C.S. § 1442*; *see generally* 15 Moore's Federal Practice, Ch. 106, *Removal* (Matthew Bender 3d ed.)]. There may even be circumstances in which the plaintiff's case will present a federal question[*28 U.S.C.S. § 1331*], though actions arising from automobile collisions rarely present such claims.

For discussion of the time for and the procedure for seeking removal of an action to federal court, see 15 Moore's Federal Practice, Ch. 106, *Removal* (Matthew Bender 3d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral OverviewTortsNegligenceActionsGeneral OverviewCivil ProcedureRemovalBasisDiversity of CitizenshipTortsTransportation TortsMotor VehiclesPersonal Vehicles

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[Reserved]

§§ 84.24[Reserved]

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8-84 California Forms of Pleading and Practice--Annotated § 84.30

§ 84.30 Demurrer or Answer

[1] Time to Demur or Answer

Generally, a defendant has 30 days to file an answer, a demurrer, or some other defense to the action[*e.g., Code Civ. Proc. § 430.40(a)*; *see Code Civ. Proc. § 412.20(a)(3)* (requiring summons to state that defendant has 30 days to respond)]. However, the Vehicle Code contains special provisions as to service of process on nonresident defendants in motor vehicle cases[*Veh. Code §§ 17450-17463*]. If service is effected outside of California under any of these special provisions, the defendant has 60 days from the date of service to plead or otherwise respond to the action[*Veh. Code § 17462*]. Failure to plead or defend within the allotted time exposes the defendant to the possibility of the entry of default and default judgment[*Code Civ. Proc. § 585*; *see* Ch. 205, *Defaults and Default Judgments*].

[2] Extension of Time

If the time to answer, demur, or otherwise defend is about to expire, counsel may seek an extension of time, either from the court[*Code Civ. Proc. § 473(a)(1)*], or by stipulation of the parties. When the time to plead has already expired, the court nevertheless has discretion to permit a late answer[*Code Civ. Proc. § 473(a)(1)*], even if that requires setting aside an entry of default or default judgment[*Code Civ. Proc. § 473(b)*].

If an extension of time is agreed to by stipulation with the plaintiff's attorney, the stipulation should be in writing, and it should make clear that the extension applies to any available response to the complaint. Thatis, the stipulation should not state that it is an extension of time "to answer," as this might be read to preclude demurrer or available preanswer motions.

[3] Distinction Between Demurrer and Answer

A demurrer is appropriate to raise any objection to a complaint that appears on the face of the pleading or from matters of which the court may take judicial notice[*Code Civ. Proc. § 430.30(a)*]. Absence of subject matter jurisdiction or personal jurisdiction are perhaps the most common objections raised by demurrer, but so long as the objection appears

on the face of the pleading, it may be raised by demurrer[*see* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*].

Any other ground for objection to a complaint, i.e., an objection that does not appear on the face of the complaint, may be raised by answer[*Code Civ. Proc. § 430.30(b)*]. In general, affirmative defenses are raised by answer, not by demurrer[*see* Ch. 26, *Answers*]. If, as is often the case, a defendant wishes to object to a complaint both by demurrer and by answer, the defendant may do both at the same time[*Code Civ. Proc. §§ 430.30(c), 472a(a)*].

An answer must also contain a general or specific denial of each of the material allegations of the complaint[*Code Civ. Proc. § 431.30(b)(1)*]. Failure to deny a material allegation is an implicit admission of the allegation for the purposes of the action[*Code Civ. Proc. § 431.20(a)*].

[4] Inclusion of Affirmative Defenses in Answer

[a] In General; Pleading Required

A statement of any new matter not raised in the complaint that constitutes a defense to the action must be raised in the answer[*Code Civ. Proc. § 431.30(b)(2)*; *Crabbe v. Mammoth Channel Gold Mining Co. (1914) 168 Cal. 500, 505, 143 P. 714* (failure to plead contributory negligence); *Travis v. Southern Pac. Co. (1962) 210 Cal. App. 2d 410, 427, 26 Cal. Rptr. 700* (pleading of contributory negligence not sufficient as pleading of imputed negligence)]. If an available affirmative defense is omitted from the answer, it may be asserted through an amendment of the answer, either as of course[*Code Civ. Proc. § 472*], or with leave of court[*Code Civ. Proc. § 473(a)*]. Each affirmative defense is to be separately stated and must refer to the cause of action to which it is a defense[*Code Civ. Proc. § 431.30(g)*]. An affirmative defense not pleaded by the defendant may nevertheless be addressed if pleaded by the plaintiff or tried by consent[*Hoffman v. Southern Pac. Co. (1927) 84 Cal. App. 337, 346, 258 P. 397* (contributory negligence)]. For discussion and forms relating to amended pleadings, see Ch. 21, *Amended and Supplemental Pleadings* .

PRACTICE TIP:

Avoid Unnecessary Factual Detail. Be careful not to go into unnecessary factual detail in the pleadings. The party on whose behalf the pleading was filed is subject to cross examination on those allegations, even if the pleading is unverified [*see Staples v. Hoefke (1987) 189 Cal. App. 3d 1397, 1412, 235 Cal. Rptr. 165* ; *Cseri v. D'Amore (1965) 232 Cal. App. 2d 622, 627-628, 43 Cal. Rptr. 36* ; *Dolinar v. Pedone (1944) 63 Cal. App. 2d 169, 176-177, 146 P.2d 237 .--Joe Devine, Editorial Consultant*.

[b] Plaintiff's Negligence

[i] Contributory Negligence

[A] Recovery Not Barred; Comparative Fault

Perhaps the most common affirmative defense asserted in an automobile collision case is that of the plaintiff's negligence, i.e., that the collision was in whole or in part the fault of the plaintiff. The contributory negligence of the plaintiff and proximate causation of the collision must be pleaded and proved in the same manner as any claim of negligence[*Crabbe v. Mammoth Channel Gold Mining Co. (1914) 168 Cal. 500, 505, 143 P. 714* ; *see* Ch. 380, *Negligence*]. If the defendant wishes to allege the plaintiff's negligence not only as a defense, but also as an affirmative claim for relief, the defendant must file a cross complaint against the plaintiff[*see § 84.31*].

Contributory negligence of the plaintiff does not bar recovery entirely; instead, the negligence of the defendant is compared to that of the plaintiff, and the amount of the recovery is reduced in proportion to the parties' relative degree of fault. This is known as the comparative negligence system. In all actions for negligence resulting in injury to person

or property, the damages awarded are diminished in proportion to the amount of negligence attributable to the person recovering[*Li v. Yellow Cab Co. (1975) 13 Cal. 3d. 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226* ; *see* Ch. 82A, *Automobiles: Damages* ; Ch. 177, *Damages*].

For forms of affirmative defense pleading comparative negligence, see *§§ 84.61 -84.64*.

For further discussion of comparative negligence and Proposition 51 requirements, see *Ch. 300, Indemnity and Contribution, § 300.60* et seq.

[B] Negligence Per Se

In some instances, the comparative negligence of the plaintiff may be proved as a matter of law by showing that the plaintiff's violation of the Vehicle Code or local ordinances regulating conduct was a proximate cause of the collision[*Evid. Code § 669(a)* (presumption that one who violatesstatute fails to exercise due care); *see* Ch. 82, *Automobiles: Causes of Action*].

There are two important statutory exceptions to the negligence per se doctrine: (1) speeding; and (2) the failure to wear or maintain seat belts. In either case, a violation does not demonstrate negligence, but such negligence may still be proven as a fact without regard to the violation[*Veh. Code §§ 27315(i), 40831*]. Conversely, the mere fact of observance of the speed limit does not preclude a finding that a vehicle was operated negligently because of excessive speed[*Grasso v. Cunial (1951) 106 Cal. App. 2d 294, 301, 235 P.2d 32]* .

[ii] Imputed Negligence

In situations in which the negligence of the operator of the vehicle would be imputed to another for purposes of liability, such as agency, partnership, or respondeat superior[*see* Ch. 82, *Automobiles: Causes of Action*], any negligence of the operator is also imputed to a plaintiff for the purposes of contributory negligence. Thus, for instance, if an employer sues for damage done to a company vehicle in a collision, any negligence of its employee in driving the vehicle would be imputed to the plaintiff-employer under the doctrine of respondeat superior, provided the employee was acting within the scope and course of the employment at the time of the collision[*see* *Glanville v. Cannick (1960) 182 Cal. App. 2d 514, 517, 6 Cal Rptr. 175* (driver's negligence imputed to plaintiff when relationship of agency or master and servant exists)].

The negligence of the driver, however, is not generally imputed to a plaintiff-passenger in the vehicle[*Arthur v. Santa Monica Dairy Co. (1960) 183 Cal. App. 2d 483, 487, 6 Cal. Rptr. 808]* , unless there is some relationship between the two in which the passenger has the right to exercise management and control over the vehicle[*Glanville v. Cannick (1960) 182 Cal. App. 2d 514, 517, 6 Cal Rptr. 175* (driver's negligence imputed to passenger when relationship of agency or master and servant exists)]. A mere family relationship is not a sufficient basis for imputation of a driver's contributory negligence to a passenger[*Jones v. Reith (1958) 166 Cal. App. 2d 220, 229, 333 P.2d 226]* . If the plaintiff-passenger was negligent in his or her own conduct, that negligence may be pleaded and proved irrespective of, or in addition to, any negligence of the driver[*see* *Taylor v. Rosiak (1965) 236 Cal. App. 2d 68, 78, 45 Cal. Rptr. 759* (entering or remaining in car with intoxicated driver can be negligence if passenger knew or should have known of intoxication)].

Imputation of contributory negligence to the plaintiff is an affirmative defense that must be specifically pleaded, and an allegation of the plaintiff's own contributory negligence is not sufficient to plead imputed negligence of another[*Travis v. Southern Pac. Co. (1962) 210 Cal. App. 2d 410, 427, 26 Cal. Rptr. 700]* .

[c] Negligence of Passenger or Other Third Party

A defendant may also wish to allege that the collision was proximately caused by the negligence of a passenger in either the plaintiff's or the defendant's vehicle, or by some other third person not presently a party, such as a pedestrian or the driver of another vehicle. Although the negligence of an absentee may be considered by the court in apportioning fault, it generally is a better practice to bring the absentee in by cross complaint[*see § 84.31*]. Even if the absentee is judgment proof, making him/her a party in the action allows greater opportunities for developing a case through discovery.

As a practical matter, unless the passenger or other third party who might be negligent has some special relationship with the plaintiff, he/she is likely to be named as a defendant. In that event, that person's negligence may be asserted in the answer and, if desired, the defendant may file a cross complaint against the codefendant for affirmative relief[*see § 84.31*].

If the negligence of the passenger or third party is alleged to be primary, *i.e.*, the sole proximate cause of the plaintiff's injuries, the defendant may raise an intervening cause defense[*see [g], below*].

[d] Assumption of Risk

The doctrine of assumption of the risk can be broken down into two separate defenses, one of which has been subsumed within the comparative negligence system and therefore no longer acts as a complete bar to the plaintiff's recovery[*see [b][i][A], above*; *see generally* Ch. 380, *Negligence*].

The first of the two defenses is "primary assumption of the risk," which may be raised when the defendant, by virtue of the nature of the activity and the parties' relationship to the activity, owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury. When this defense is proven, there is no legal duty on the part of the defendant, and therefore no possibility of recovery by the plaintiff. Primary assumption of the risk is accordingly an absolute defense to a negligence claim[*Knight v. Jewett (1992) 3 Cal. 4th 296, 309, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *see* Ch. 380, *Negligence*].

The defense of primary assumption of the risk is applicable only when public policy dictates that the class of which the defendant is a member should owe no duty of care to the class of which the plaintiff is a member in relation to the activity in which they are involved. The inquiry begins and ends with the question of whether the defendant owed a duty to the plaintiff[*Harrold v. Rolling J Ranch (1993) 19 Cal. App. 4th 578, 584, 23 Cal. Rptr. 2d 671* ; *see Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* (listing factors to be considered in determining existence of duty)].

Primary assumption of the risk is most often implied in law, but it may be express as well, such as when the plaintiff signs a contract or release relieving the defendant of liability[*Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd. (1983) 147 Cal. App.3d 309, 318, 195 Cal. Rptr. 90]* . When the defense of primary assumption of risk is raised, the question of whether the defendant owed any duty to the plaintiff is a legal one for the court, and the jury plays no role[*Knight v. Jewett (1992) 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

The second of the two defenses is "secondary assumption of the risk," which may be raised when the defendant owes a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty. In this situation, the defense is simply another way of alleging the plaintiff's contributory negligence. Accordingly, when secondary assumption of the risk is alleged, the defense is merged into the comparative negligence scheme and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties[*Knight v. Jewett (1992) 3 Cal. 4th 296, 315, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

In general, assumption of the risk is an affirmative defense that must be pleaded in the answer, though it may be raised by demurrer if the facts constituting the defense appear on the face of the complaint[*Johnson v. Pacifica (1970) 4 Cal. App. 3d 82, 88, 84 Cal. Rptr. 246]* . For forms of affirmative defense pleading assumption of risk, see *§§ 84.65*, and

84.66.

[e] Imminent Peril or Sudden Emergency

The imminent peril or sudden emergency rule provides that a person suddenly confronted with an unexpected, imminent danger that is not a product of the person's negligence is not required to exercise the same amount of care as one who acts after careful deliberation[*Leo v. Dunham (1953) 41 Cal. 2d 712, 714, 264 P.2d 1* ; *Balthrop v. Atchison, Topeka & Santa Fe R.R. (1959) 167 Cal. App. 2d 437, 446, 334 P.2d 1041]* . Perhaps the most common usage of the rule is to show an excuse for a violation of a statute or ordinance that might otherwise provide a basis for a finding of negligence per se[*Miller v. Jensen (1955) 137 Cal. App. 2d 251, 256, 290 P.2d 52* (overruled on other grounds in *Alarid v. Vanier (1958) 50 Cal.2d 617, 622-624, 327 P.2d 897*)]. The correct test in determining liability in an emergency situation is whether the defendant showed that he or she did what might reasonably be expected of a person of ordinary prudence acting under similar circumstances who desired to comply with the law[*Alarid v. Vanier (1958) 50 Cal.2d 617, 622-624, 327 P.2d 897]* .

In order for the imminent peril rule to be applicable, there must be an unexpected, imminent danger, and the necessity of making an immediate choice between two or more alternative courses of action[*Givens v. Southern Pac. Co. (1961) 194 Cal. App. 2d 39, 45-46, 14 Cal. Rptr. 736]* . In these circumstances, the selection of any of the alternatives will not be found to be negligent so long as the selection is one a reasonable person might have made[*Balthrop v. Atchison, Topeka & Santa Fe R.R. (1959) 167 Cal. App. 2d 437, 446, 334 P.2d 1041]* . The unexpected, imminent danger encountered must also be entirely free of any negligence of the defendant [*Carley v. Zeigler (1958) 156 Cal. App. 2d 643, 645, 320 P.2d 165]* . A common example is a child or other pedestrian suddenly appearing in the roadway, causing the driver to swerve to avoid the person and instead hitting another vehicle.

Once the issue of imminent peril is raised, the question of its applicability in the action is generally one for the trier of fact[*Castro v. E.A. Irish, Contractor (1967) 249 Cal. App. 2d 390, 393, 57 Cal. Rptr. 477]* .

For a form of affirmative defense pleading imminent peril, see *§ 84.67*.

[f] Unavoidable Accident

At one time, the defense of unavoidable accident was often asserted by a defendant charged with negligence. This "defense" alleged that either the defendant was not negligent, or that the collision was unavoidable despite defendant's negligence. In reality, these allegations are, respectively, merely a denial of the defendant's negligence, or the denial of proximate causation of the collision. As such, they are mere denials of essential components of the plaintiff's case, not an affirmative defense relying on new allegations. Thus, labelling the allegations as an affirmative defense is a misnomer[*see* *Butigan v. Yellow Cab Co. (1958) 49 Cal. 2d 652, 658-660, 320 P.2d 500* ; Ch. 82, *Automobiles: Causes of Action*]. Even if erroneously labelled as an affirmative defense, however, the allegations are sufficient to put in issue the defendant's negligence and the issue of causation.

[g] Intervening Cause

The causal connection between a plaintiff's injury and a defendant's negligent act may be broken when[*Brooker v. El Encino Co. (1963) 216 Cal. App. 2d 598, 602, 31 Cal Rptr. 24* ; *see* Ch. 82, *Automobiles: Causes of Action*]:

- There is an intervening willful or negligent act of a third party who had full control of the situation;
- The defendant could not have anticipated the intervening act; and
- The plaintiff's injury results from the intervening act.

In the context of automobile collision cases, the classic example of an intervening act is the stolen car. Though a defendant may be negligent in failing to lock a car and leaving the keys in the ignition, the intervening act of the thief in stealing the car breaks the causal connection between that negligence and any injuries that may result from the thief's involvement in a collision [*Richards v. Stanley (1954) 43 Cal. 2d 60, 66, 271 P.2d 23*]. The intervening act defense is also available to a bailee if the vehicle is stolen from the bailee's lot[*Brooker v. El Encino Co. (1963) 216 Cal. App. 2d 598, 602-603, 31 Cal Rptr. 24]* .

For further discussion of the intervening act defense, see Ch. 380, *Negligence* .

[h] Proposition 213; Limitation of Damages

Under Proposition 213, adopted by voters in 1996, the damages recoverable in automobile cases are limited if the plaintiff was not properly insured, was under the influence, or was in the act of committing a felony at the time of the collision[*Civ. Code § 3333.4*]. For specific discussion of Prop. 213, as well as a general discussion of the types and amount of damages available in an automobile case, see *Ch. 82A, Automobiles: Damages, § 82A.15*.

[5] Verification of Answer

If the plaintiff in an unlimited civil case has verified the complaint, the defendant (1) must file a verified answer, and (2) is precluded from answering by general denial, but must deny the allegations of the complaint positively or according to the defendant's information and belief[*Code Civ. Proc. § 431.30(d)*; *see* Ch. 26, *Answers* ; Ch. 572, *Verification*]. In limited civil cases, however, the answer need not be verified, even if the complaint is verified, except when the action is a claim assigned to a third party for collection[*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewTortsNegligenceActionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsTransportation TortsMotor VehiclesPersonal VehiclesCivil ProceduresPleading & PracticePleadingsAnswers

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§ 84.31 Cross Complaints

[1] Claims Against Plaintiff

If the defense is alleging any negligence on the part of the plaintiff, or might have any other claim for affirmative relief against the plaintiff, counsel should consider filing and serving a cross complaint against the plaintiff. Any claim for damages from the plaintiff's negligence in causing the collision, or any other claim arising from the same transaction or occurrence set forth in the plaintiff's complaint is a compulsory claim that must be presented by cross complaint or is barred in any subsequent action[*Code Civ. Proc. § 426.30(a)*; *see* Ch. 123, *Complaints and Cross Complaints*].

The defendant may also assert any claim that the defendant has against the plaintiff by way of cross complaint[*Code Civ. Proc. § 428.10(a)*]. These permissive cross complaint claims may be joined with or brought separately from any compulsory cross complaint claims[*Code Civ. Proc. § 428.30*].

A cross complaint must be a separate document and may not be included in the answer[*Code Civ. Proc. § 428.40*]. A cross complaint against the plaintiff may be served on the plaintiff's attorney[*Code Civ. Proc. § 428.60(2)*]. The defendant should file the cross complaint before or in conjunction with the answer to the complaint, because any cross complaint filed later than that requires leave of court[*Code Civ. Proc. § 428.50*].

For further discussion and forms of cross complaints, see Ch. 123, *Complaints and Cross Complaints*

[2] Claims Against Codefendants or Third Parties

A cross complaint is also the proper vehicle for bringing any claims arising from the same transaction or occurrence that the defendant may have against any party other than the plaintiff, including codefendants or persons that are not yet parties in the action[*Code Civ. Proc. § 428.10(b)*]. If the cross defendant is not already a party to the action, service of process on the cross defendant is necessary to bring him/her into the action[*Code Civ. Proc. § 428.60(1)*]. If the cross defendant is a codefendant, it may be served on the defendant's attorney[*Code Civ. Proc. § 428.60(2)*].

If a codefendant serves and files a cross complaint, the defendant served must bring any compulsory cross complaint claims arising from the same transaction or occurrence set forth in the cross complaint. The defendant should file the cross complaint before or in conjunction with the answer to the cross complaint, because any cross complaint filed later than that requires leave of court[*Code Civ. Proc. § 428.50*].

If the third party to be brought in is a public entity, the defendant should be sure to comply with the statutory prerequisite of notice and demand on the entity before filing a cross complaint. Except as provided in *Gov. Code §§ 946.4, 946.6*, no suit for money or damages may be brought against a public entity on a cause of action for which the Tort Claims Act requires that a claim be presented, unless a written claim has been presented to the public entity and has either been acted on, or been deemed to have been rejected by the governing body of the public entity[*Gov. Code § 945.4*]. Compliance with the claim requirement of *Gov. Code § 945.4* is, therefore, a condition precedent to an action against the public entity[*Williams v. Horvath (1976) 16 Cal. 3d 834, 838, 129 Cal. Rptr. 453, 548 P.2d 1125]* .

For a discussion of the procedure to be employed in pursuing the written claim and any subsequent civil action against a public entity, *see* Ch. 464, *Public Entities and Officers: California Tort Claims Acts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§§ 84.32[Reserved]

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§ 84.40 Discovery

The type and scope of discovery that should be conducted in an automobile collision case is necessarily case-specific, but some generalizations can be made. Discovery by the defendant usually consists of at least interrogatories to the plaintiff and a deposition of the plaintiff. If personal injury damages are alleged, a medical examination of the plaintiff may also be advisable. Accident reconstruction specialists or other types of expert witnesses may also be warranted under the circumstances. For further discussion and forms as to discovery in automobile collision cases, see Ch. 85, *Automobiles: Discovery* .

Although usually the bulk of discovery is conducted after the pleadings have closed, certain forms of discovery may be available to the defendant to assist in formulating its answer or other response to the complaint [*see* Ch. 85, *Automobiles: Discovery*].

Legal Topics:

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

The California rules of court mandate various pretrial conferences. For example, case management review of all civil cases is required, with certain express exemptions. The review must take place within 180 days after the filing of the complaint and will generally take place at a case management conference [*Cal. Rules of Ct., Rules 3.721, 3.722(a)*]. Parties are required to submit a Case Management Statement fifteen days before the date scheduled for the conference or review [*Cal. Rules of Ct., Rule 3.725(a)*]. If the case is a "short cause"--that is, one expected to consume less than five hours of trial time--it may be exempt from certain required conferences, such as the case management conference [*Cal. Rules of Ct., Rule 3.735*]. If the case is a "long cause," certain conferences are generally mandatory. For instance, the case management conference is mandatory. In that conference, parties must address the following issues [*Cal. Rules of Ct., Rule 3.727*]:

- Whether there are any related cases;

- Whether all parties named in the complaint or cross-complaint have been served, have appeared, or have been dismissed;

- Whether any additional parties may be added or the pleadings may be amended;

- If the case is a limited civil case, whether the economic litigation procedures under *Code Civ. Proc. § 90 et seq.* will apply or whether the party intends to bring a motion to exempt the case from these procedures;

- Whether any other matters (for example, the bankruptcy of a party) may affect the court's jurisdiction or processing of the case;

- Whether the parties have stipulated to, or the case should be referred to, judicial arbitration or any other form of alternative dispute resolution (ADR) and, if so, the date by which the ADR must be completed;

- Whether an early settlement conference should be scheduled and, if so, on what date;
- Whether discovery has been completed and, if not, the date by which it will be completed;
- What discovery issues are anticipated;
- Whether the case should be bifurcated or a hearing should be set for a motion to bifurcate under *Code Civ. Proc. § 598*;
- Whether there are any cross-complaints that are not ready to be set for trial and, if so, whether they should be severed;
- Whether the case is entitled to any statutory preference and, if so, the statute granting the preference;
- Whether a jury trial is demanded, and, if so, the identity of each party requesting a jury trial;
- If the trial date has not been previously set, the date by which the case will be ready for trial and the available trial dates;
- The estimated length of trial;
- The nature of the injuries;
- The amount of damages, including any special or punitive damages;
- Any additional relief sought;
- Whether there are any insurance coverage issues that may affect the resolution of the case; and
- Any other matters that should be considered by the court or addressed in its case management order.

For discussion and forms relating to pretrial conferences, see Ch. 425, *Pretrial Proceedings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 84.42 Settlement Offers

At any time more than 10 days before the trial date, the defendant may make a written settlement offer. If not accepted within 30 days or before trial, the offer is deemed withdrawn. If the offer is not accepted, and the plaintiff fails to obtain a more favorable judgment, the plaintiff not only cannot recover costs incurred after the offer, but must also pay the defendant's costs incurred after the offer. Those costs are deducted from any judgment recovered by the plaintiff, and if the costs exceed the damage award for the plaintiff, judgment is entered for the defendant for the difference [*Code Civ. Proc. § 998*]. For discussion and forms relating to offers of judgment, see Ch. 520, *Settlement and Release* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 84.50 Related Texts From LexisNexis

For discussion of trial of collision cases generally, see Trial of Accident Cases (Matthew Bender)

For a discussion California rules of evidence, see California Courtroom Evidence (4th ed. LexisNexis)

For a pocket handbook on laying evidentiary foundations in California courts, see California Courtroom Foundations (LexisNexis)

For an in-depth desktop guide to California trial practice, see California Trial Handbook (3rd ed. LexisNexis)

For a pocket-size reference for making objections under the Federal Rules of Evidence and the California Evidence Code, see California Objections at Trial (LexisNexis)

For discussion of trial techniques, procedures, and tactics, see California Trial Techniques (LexisNexis)

For discussion of uninsured motorist law, see California Uninsured Motorist Law (6th ed. LexisNexis)

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§ 84.51 State Statutes

Statute of limitations, property damage only. *Code Civ. Proc. § 338*

Statute of limitations, personal injuries or death. *Code Civ. Proc. § 340*

Statute of limitations not tolled by absence of motorist from jurisdiction when service of process could be made. *Veh. Code § 17463*

Jurisdiction of superior court. *Code Civ. Proc. § 410.10*

Proper venue of action. *Code Civ. Proc. § 395(a)*

Motions to transfer or change venue. *Code Civ. Proc. §§ 396b, 397*

Application for entry of default and default judgment. *Code Civ. Proc. § 585*

Time for filing motion to quash service. *Code Civ. Proc. § 418.10*

Consolidation of actions. *Code Civ. Proc. § 1048(a)*

Time to file an answer, demurrer, or other defense to action. *Code Civ. Proc. §§ 412.20(a), 430.40(a)*

Time to file an answer, demurrer, or other defense to action when service of process is made on nonresident under Vehicle Code. *Veh. Code § 17462*

Extension of time to answer, demur, or defend. *Code Civ. Proc. § 473(a)*

Objection that appears on face of complaint raised by demurrer. *Code Civ. Proc. § 430.30(a)*

Objection that does not appear on face of complaint raised by answer. *Code Civ. Proc. § 430.30(b)*

Answer as containing denials of allegations in complaint. *Code Civ. Proc. § 431.30*

Assertion of affirmative defenses in answer. *Code Civ. Proc. § 431.30(b)(2)*

Assertion of omitted affirmative defense. *Code Civ. Proc. §§ 472, 473(a)*

Violation of speeding and seat belt laws are not negligence per se. *Veh. Code §§ 27315(i), 40831*

Verification of answer. *Code Civ. Proc. §§ 92(b), 431.30(d)*

Compulsory cross complaints. *Code Civ. Proc. § 426.30(a)*

Permissive cross complaints. *Code Civ. Proc. § 428.10(a)*

Cross complaint must be separate document. *Code Civ. Proc. § 428.40*

Time for filing cross complaint. *Code Civ. Proc. § 428.50*

Cross complaints against new parties. *Code Civ. Proc. § 428.10(b)*

Legal Topics:

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

Obligation to plead contributory negligence as affirmative defense. *Crabbe v. Mammoth Channel Gold Mining Co. (1914) 168 Cal. 500, 505, 143 P. 714*

Pleading of contributory negligence not sufficient as pleading of imputed negligence. *Travis v. Southern Pac. Co. (1962) 210 Cal. App. 2d 410, 427, 26 Cal. Rptr. 700*

Unpleaded affirmative defense tried by consent. *Hoffman v. Southern Pac. Co. (1927) 84 Cal. App. 337, 346, 258 P. 397*

Comparative negligence system. *Li v. Yellow Cab Co. (1975) 13 Cal. 3d. 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226*

Observance of speed limit law as not precluding finding of negligence based on excessive speed. *Grasso v. Cunial (1951) 106 Cal. App. 2d 294, 301, 235 P.2d 32*

Negligence of driver not generally imputed to plaintiff-passenger in vehicle. *Arthur v. Santa Monica Dairy Co. (1960) 183 Cal. App. 2d 483, 487, 6 Cal. Rptr. 808*

Driver's negligence imputed to plaintiff when relationship of agency or master and servant exists. *Glanville v. Cannick (1960) 182 Cal. App. 2d 514, 517, 6 Cal Rptr. 175*

Family relationship not sufficient basis for imputation of a driver's contributory negligence to passenger. *Jones v. Reith (1958) 166 Cal. App. 2d 220, 229, 333 P.2d 226*

Assumption of risk as total or partial defense to negligence claim. *Knight v. Jewett (1992) 3 Cal. 4th 296, 309, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

Imminent peril as lessening duty of care. *Leo v. Dunham (1953) 41 Cal. 2d 712, 714, 264 P.2d 1* ; *Balthrop v. Atchison, Topeka & Santa Fe R.R. (1959) 167 Cal. App. 2d 437, 446, 334 P.2d 1041*

Unavoidable accident as denial of negligence or causation, not affirmative defense. *Butigan v. Yellow Cab Co. (1958) 49 Cal. 2d 652, 658-660, 320 P.2d 500*

Intervening act of tortfeasor as affirmative defense. *Brooker v. El Encino Co. (1963) 216 Cal. App. 2d 598, 602, 31 Cal Rptr. 24*

Theft of car as affirmative defense to negligence claim. *Richards v. Stanley (1954) 43 Cal. 2d 60, 66, 271 P.2d 23*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsNegligenceDefensesContributory NegligenceGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 84.53 Internet References

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§ 84.60 Answer to Unverified Complaint--With Punitive Damage Defense--Sample Form

[1] FORM Answer to Unverified Complaint--With Punitive Damage Defense--Sample Form
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs. _____ [*name*],	)	ANSWER TO UNVERIFIED COMPLAINT
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

COMES NOW the Defendant, _____ [*name*], for himself/herself alone and no other Defendant in answer to the Plaintiff's Unverified Complaint, admits, denies, and alleges as follows:

1. Under the provisions of *California Code of Civil Procedure Section 431.30*, this answering Defendant denies each and every, all and singular, generally and specifically, all the allegations of the Plaintiff's Complaint, and the whole thereof, and further denies that the Plaintiff was damaged in any sum or sums, or at all, as alleged therein.

FIRST AFFIRMATIVE DEFENSE

2. This answering Defendant states and alleges that the Plaintiff was negligent and careless in and about the matters complained of in said Complaint, and that said negligence and carelessness legally contributed to the damages

complained of, if any there were.

SECOND AFFIRMATIVE DEFENSE

3. This answering Defendant alleges that the action complained of was caused by the negligence of the Plaintiff, and the verdict of the jury in favor of the Plaintiff, if any, which may be rendered in the case, should be reduced by the percentage of the Plaintiff's negligence which contributed to the accident and damage complained of.

THIRD AFFIRMATIVE DEFENSE

4. This answering Defendant alleges that the Plaintiff failed to state facts sufficient to constitute a cause of action against the answering Defendant and is barred by *Code of Civil Procedure Section 340(3)*.

FOURTH AFFIRMATIVE DEFENSE

5. This answering Defendant alleges that the damages complained of herein by Plaintiff, if any, were caused by acts and omissions of others than the answering Defendant.

FIFTH AFFIRMATIVE DEFENSE

6. Plaintiff's Complaint to the extent that it seeks exemplary or punitive damages violates Defendant's right to procedural due process under the *Fourteenth Amendment of the United States Constitution*, and the Constitution of the State of California, and therefore fails to state a cause of action upon which either punitive or exemplary damages can be awarded.

SIXTH AFFIRMATIVE DEFENSE

7. Plaintiff's Complaint, to the extent that it seeks exemplary or punitive damages violates Defendant's right to protection from "excessive fines" as provided in the *Eighth Amendment of the United States Constitution* and the Constitution of the State of California, and further violates the Defendant's right to substantive due process as provided in the *Fifth* and *Fourteenth Amendments of the United States Constitution* and the Constitution of the State of California, and therefore fails to state a cause of action supporting the punitive or exemplary damages claimed.

SEVENTH AFFIRMATIVE DEFENSE

8. This answering Defendant alleges that Plaintiff's Complaint, to the extent that it seeks exemplary or punitive damages, violates defendant's right to procedural due process under the *Fourteenth Amendment of the United States Constitution*, and the Constitution of the State of California, and therefore fails to state a cause of action upon which either punitive or exemplary damages can be awarded.

EIGHTH AFFIRMATIVE DEFENSE

9. This answering Defendant alleges that Plaintiff's complaint, to the extent that it seeks punitive or exemplary damages,

fails to state a cause of action supporting punitive or exemplary damages as required by *California Civil Code Section 3294*.

WHEREFORE, Defendant prays:

1. That Plaintiff take nothing;

2. For costs of suit herein; and

3. For such other and further relief as the Court deems just and proper.

Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Use of Form

This form is an example of a completed form of answer including a general denial, and various specific affirmative defenses, including plaintiff's comparative negligence. Paragraphs six through nine include affirmative defenses to the plaintiff's claim for exemplary or punitive damages.

This form is an example of an answer for use in a simple action involving only one plaintiff and one defendant. In actions involving multiple parties, greater specificity is required in the affirmative defense headings [*see Cal. Rules of Court, Rule 2.112*]. For further discussion of the specific requirements for answers, see Ch. 26, *Answers* .

PRACTICE TIP:

Avoid Unnecessary Factual Detail. Be careful not to go into unnecessary factual detail in the pleadings. The party on whose behalf the pleading was filed is subject to cross examination on those allegations, even if the pleading is unverified [*see Staples v. Hoefke (1987) 189 Cal. App. 3d 1397, 1412, 235 Cal. Rptr. 165* ; *Cseri v. D'Amore (1965) 232 Cal. App. 2d 622, 627-628, 43 Cal. Rptr. 36* ; *Dolinar v. Pedone (1944) 63 Cal. App. 2d 169, 176-177, 146 P.2d 237 .--Joe Devine, Editorial Consultant*.

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8-84 California Forms of Pleading and Practice--Annotated § 84.61

§ 84.61 Affirmative Defense; Comparative Negligence of Plaintiff Driver; General Form

[1] FORM Affirmative Defense; Comparative Negligence of Plaintiff Driver; General Form

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

The collision between plaintiff's automobile and defendant's automobile, as alleged in plaintiff's complaint, and any injuries and damages that the plaintiff may have suffered in that collision, were in whole or in part proximately caused by the plaintiff's careless, reckless, and negligent operation of his/her vehicle prior to and at the time of the collision.

[2] Use of Form

[a] In General

The form in *[1], above,* is for use in alleging in general terms the defense of plaintiff's negligence in operation of the vehicle involved in the collision. In general, negligence may be charged in general terms[*see Brooks v. E. J. Willig Truck Transp. Co. (1953) 40 Cal. 2d 669, 680, 255 P.2d 802* ; *Wiley v. Cole (1921) 52 Cal. App. 617, 618, 199 P. 550]* . Though the facts on which the defense is based must be pleaded, the defendant may rely on the facts as pleaded by the plaintiff[*Singer v. Superior Court (1960) 54 Cal. 2d 318, 323, 5 Cal. Rptr. 697, 353 P.2d 305]* .

Assumption of risk or imputed comparative negligence must be separately and affirmatively pleaded. Forms alleging those defenses are *set out in §§ 84.63, 84.65,* and *84.66*.

[b] Effect of Plaintiff's Negligence

Negligence on the part of the plaintiff does not bar recovery entirely; instead, the negligence of the defendant is compared to that of the plaintiff, and the amount of the recovery is reduced in proportion to the parties' relative degree of fault[*Li v. Yellow Cab Co. (1975) 13 Cal. 3d. 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226* ; *see* Ch. 82A, *Automobiles: Damages* ; Ch. 177, *Damages*].

For further discussion of comparative negligence and Proposition 51 requirements, see *Ch. 300, Indemnity and Contribution, § 300.60* et seq.

[3] Cross References

For discussion of the necessity of pleading affirmative defenses, see *§ 84.30[4][a]*

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

For discussion and forms relating to the duty of care required of automobile users, see Ch. 82, *Automobiles: Causes of Action*

For discussion and forms relating to negligence generally, see Ch. 380, *Negligence*

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8-84 California Forms of Pleading and Practice--Annotated § 84.62

§ 84.62 Affirmative Defense; Comparative Negligence; Plaintiff Pedestrian

[1] FORM Affirmative Defense; Comparative Negligence; Plaintiff Pedestrian

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. Prior to and at the time of the collision alleged in the plaintiff's complaint, plaintiff was careless, reckless, and negligent in that he/she _____ [*specify act or manner of negligence, e.g.,* entered the roadway while attempting to cross _____ (*identify street*) without keeping a proper lookout and observing traffic conditions], causing the defendant's automobile to strike the plaintiff.

2. This carelessness and negligence of plaintiff proximately caused and contributed to both the collision and any injuries and damages that the plaintiff may have suffered in that collision.

[2] Use of Form

The form in *[1], above,* is for use by a defendant-driver in stating an affirmative defense of comparative negligence of a plaintiff who was a pedestrian at the time of the collision. If the facts on which the defense of comparative negligence do not appear in the allegations as pleaded by the plaintiff, the defendant must state those facts affirmatively[*see Singer v. Superior Court (1960) 54 Cal. 2d 318, 323, 5 Cal. Rptr. 697, 353 P.2d 305]* .

Assumption of risk or imputed comparative negligence must be separately and affirmatively pleaded. Forms alleging those defenses are *set out in §§ 84.63, 84.65,* and *84.66*.

[3] Cross References

For discussion of the effect of plaintiff's negligence, see *§ 84.61[2[b]*.

For discussion of the necessity of pleading affirmative defenses, see *§ 84.30[4][a]*

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

For discussion relating to the reciprocal duties of care required of automobile users and pedestrians, see Ch. 82, *Automobiles: Causes of Action* , and for forms of complaints, see Ch. 83 *Automobiles: Bringing the Action*

For discussion and forms relating to negligence generally, see Ch. 380, *Negligence*

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8-84 California Forms of Pleading and Practice--Annotated § 84.63

§ 84.63 Affirmative Defense; Imputed Comparative Negligence; General Form

[1] FORM Affirmative Defense; Imputed Comparative Negligence; General Form

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. Prior to and at the time of the collision alleged in the plaintiff's complaint, _____[*name of driver*] was the operator of the vehicle _____ [*specify, e.g.,* in which the plaintiff was a passenger, *or* owned by the plaintiff].

2. _____[*name of driver*] is an agent/employee of plaintiff, who at all times alleged in the complaint and in this answer and affirmative defense was acting within the course and scope of that agency/employment. Therefore, plaintiff had the right to exercise management and control of the vehicle driven by _____[*name of driver*] at the time of the collision.

3. Prior to and at the time of the collision, _____[*name of driver*] carelessly, recklessly, and negligently operated the vehicle _____ [*specify, e.g.,*in which the plaintiff was a passenger, *or* owned by the plaintiff], causing it to collide with the defendant's vehicle. This negligence of _____[*name of driver*] proximately caused and contributed to both the collision and any injuries and damages that the plaintiff may have suffered in that collision.

4. Because of the agency/employment relationship existing between _____[*name of driver*] and plaintiff at the time of the collision, the contributory negligence of _____[*name of driver*] should be and is imputed to plaintiff.

[2] Use of Form

The form in *[1], above*, is for use by a defendant in stating an affirmative defense of imputed comparative negligence against a plaintiff who was either a passenger in or an owner of a vehicle driven by an allegedly negligent operator. The

form includes the two most common scenarios for imputation of negligence, agency and employment. Other bases could be alleged by small changes in Paragraphs 2 and 4.

The allegations of comparative negligence are made in general terms[*see Brooks v. E. J. Willig Truck Transp. Co. (1953) 40 Cal. 2d 669, 680, 255 P.2d 802 ; see also Singer v. Superior Court (1960) 54 Cal. 2d 318, 323, 5 Cal. Rptr. 697, 353 P.2d 305* (though facts on which defense of contributory negligence is based must be pleaded, defendant may rely on facts as pleaded by plaintiff)].

Assumption of risk must be separately and affirmatively pleaded. Forms alleging that defense are *set out in § 84.65, 84.66*.

[3] Cross References

For discussion of the effect of plaintiff's negligence, see *§ 84.61*[2[b].

For discussion of the necessity of pleading affirmative defenses, see *§ 84.30[4][a]*

For discussion of imputation of the driver's negligence to the plaintiff, see *§ 84.30[4][b][ii]*

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

For discussion relating to the duty of care required of automobile users, see Ch. 82, *Automobiles: Causes of Action* , and for forms of complaints, see Ch. 83 *Automobiles: Bringing the Action*

For discussion and forms relating to negligence generally, see Ch. 380, *Negligence*

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8-84 California Forms of Pleading and Practice--Annotated § 84.64

§ 84.64 Affirmative Defense; Comparative Negligence of Plaintiff Passenger; Alleging Specific Acts

[1] FORM Affirmative Defense; Comparative Negligence of Plaintiff Passenger; Alleging Specific Acts

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. Prior to and at the time of the collision alleged in the plaintiff's complaint, plaintiff was a passenger in _____ [defendant's vehicle *or* a vehicle driven by _____ (*name*)].

2. Prior to and at the time of the collision alleged in the plaintiff's complaint, plaintiff was careless, reckless, and negligent in that he/she _____ [*specify act or manner of negligence, e.g.,* entered into the vehicle driven by _____ (defendant *or* _____[*name*]) and chose to remain in the vehicle despite the obvious intoxication of the driver and the careless, reckless, and negligent operation of the vehicle by the driver, *or* interfered with the operation of the vehicle driven by _____ (defendant *or* _____[*name*]) by grabbing the steering wheel and forcing the vehicle out of the driver's intended path of operation].

3. This carelessness and negligence of plaintiff proximately caused and contributed to both the collision and any injuries and damages that the plaintiff may have suffered in that collision.

[2] Use of Form

[a] In General

The form in *[1], above,* is for use by a defendant in stating an affirmative defense of comparative negligence against a plaintiff who was a passenger in either the defendant's vehicle or the vehicle driven by the other driver. The form alleges the passenger's own negligence as a defense.

If the defendant wishes to plead the imputation of the driver's negligence to the plaintiff-passenger, the *form in § 84.63*

should be used.

[b] Effect of Plaintiff's Negligence

Negligence on the part of the plaintiff does not bar recovery entirely; instead, the negligence of the defendant is compared to that of the plaintiff, and the amount of the recovery is reduced in proportion to the parties' relative degree of fault[*Li v. Yellow Cab Co. (1975) 13 Cal. 3d. 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226* ; *see* Ch. 82A, *Automobiles: Damages* ; Ch. 177, *Damages*].

For further discussion of comparative negligence and Proposition 51 requirements, see *Ch. 300, Indemnity and Contribution, § 300.60* et seq.

[3] Cross References

For discussion of the effect of plaintiff's negligence, see *§ 84.61*[2[b].

For discussion of the necessity of pleading affirmative defenses, see *§ 84.30[4][a]*.

For discussion and forms relating to answers generally, see Ch. 26, *Answers* .

For discussion relating to the duty of care required of automobile users, see Ch. 82, *Automobiles: Causes of Action* , and for forms of complaints, see Ch. 83 *Automobiles: Bringing the Action* .

For discussion and forms relating to negligence generally, see Ch. 380, *Negligence* .

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8-84 California Forms of Pleading and Practice--Annotated § 84.65

§ 84.65 Affirmative Defense; Secondary Assumption of Risk by Passenger; Alleging Specific Acts

[1] FORM Affirmative Defense; Secondary Assumption of Risk by Passenger; Alleging Specific Acts

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. Prior to and at the time of the collision alleged in the plaintiff's complaint, plaintiff was a passenger in defendant's vehicle.

2. Prior to and at the time of the collision, plaintiff knowingly and voluntarily encountered a known risk of harm from the defendant's breach of duty, if any, in that plaintiff _____ [*describe acts of plaintiff that constitute assumption of risk by plaintiff passenger, e.g.,* agreed to ride in defendant's vehicle despite a warning from the defendant that the brakes were malfunctioning and were subject to failure at any time].

3. The collision and any injuries and damages that the plaintiff may have suffered in that collision were proximately caused, in whole or in part, by the plaintiff's voluntary secondary assumption of risk.

[2] Use of Form

[a] In General

The form in *[1], above,* is for use by a defendant in stating an affirmative defense of secondary assumption of the risk against a plaintiff passenger who was riding in the defendant's vehicle at the time of the collision. Assumption of risk is distinguishable from contributory negligence so that pleading contributory negligence does not raise the defense of assumption of the risk[*Fonseca v. Orange (1972) 28 Cal. App. 3d 361, 368-369, 104 Cal. Rptr. 566]* .

[b] Effect of Secondary Assumption of Risk

The defense of secondary assumption of the risk may be raised when the defendant owes a duty of care to the plaintiff,

but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty. In this situation, the defense is merged into the comparative negligence scheme and the trier of fact may consider both the defendant's negligence and the plaintiff's voluntary decision to encounter the risk of that negligence in apportioning the relative responsibility of the parties[*Knight v. Jewett (1992) 3 Cal. 4th 296, 315, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

[3] Cross References

For discussion of the necessity of pleading affirmative defenses, see *§ 84.30[4][a]*

For discussion of assumption of risk as an affirmative defense, see *§ 84.30[4][d]*

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

For discussion relating to the duty of care required of automobile users, see Ch. 82, *Automobiles: Causes of Action* , and for forms of complaints, see Ch. 83 *Automobiles: Bringing the Action*

For discussion and forms relating to negligence generally, see Ch. 380, *Negligence*

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8-84 California Forms of Pleading and Practice--Annotated § 84.66

§ 84.66 Affirmative Defense; Primary Assumption of Risk; Alleging Specific Acts

[1] FORM Affirmative Defense; Primary Assumption of Risk; Alleging Specific Acts

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

[*EITHER, if primary assumption of risk is implied*]

1. Prior to and at the time of the collision alleged in the plaintiff's complaint, the plaintiff and the defendant were _____ [*specify activity involved when collision occurred, e.g.,* fellow competitors in a racing event sanctioned by _____ (*entity organizing event*)].

2. By virtue of the nature of this activity, and the parties' relationship to this activity, public policy dictates that the defendant owed no duty to the plaintiff to protect him/her from the particular risk of harm that caused the injury.

[*OR, if primary assumption of risk is express*]

1. Prior to and at the time of the collision alleged in the plaintiff's complaint, plaintiff expressly agreed to assume the risk of engaging in _____ [*specify activity involved when collision occurred, e.g.,* driving off-road vehicles] and relieved the defendant of any potential liability for injuries that might result from this activity. [*Add, if applicable,* The written _____ (contract, *or* release, *or other signed writing*) proving the plaintiff's express agreement is attached to this [answer and] affirmative defense as Exhibit A and incorporated by reference.

2. By virtue of this express agreement, the defendant owed no duty to the plaintiff to protect him/her from the particular risk of harm that caused the injury.

[*CONTINUE*]

3. The collision and any injuries and damages that the plaintiff may have suffered in that collision were proximately caused, in whole or in part, by the plaintiff's primary assumption of risk, barring any recovery by the plaintiff.

[2] Use of Form

[a] In General

The form in *[1], above*, is for use by a defendant in stating an affirmative defense of primary assumption of the risk. Assumption of risk is distinguishable from contributory negligence so that pleading contributorynegligence does not raise the defense of assumption of the risk[*Fonseca v. Orange (1972) 28 Cal. App. 3d 361, 368-369, 104 Cal. Rptr. 566]* .

[b] Effect of Primary Assumption of Risk

The defense of primary assumption of the risk may be raised when the defendant, by virtue of the nature of the activity and the parties' relationship to the activity, owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury. When this defense is proven, there is no legal duty on the part of the defendant, and therefore no possibility of recovery by the plaintiff. Primary assumption of the risk is accordingly an absolute defense to a negligence claim[*Knight v. Jewett (1992) 3 Cal. 4th 296, 309, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *see* Ch. 380, *Negligence*].

Primary assumption of the risk is most often implied in law, but it may be express as well, such as when the plaintiff signs a contract or release relieving the defendant of liability[*Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd. (1983) 147 Cal. App.3d 309, 318, 195 Cal. Rptr. 90]* . When the defense of primary assumption of risk is raised, the question of whether the defendant owed any duty to the plaintiff is a legal one for the court, and the jury plays no role[*Knight v. Jewett (1992) 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

[3] Cross References

For discussion of the necessity of pleading affirmative defenses, see *§ 84.30[4][a]*

For discussion of assumption of risk as an affirmative defense, see *§ 84.30[4][d]*

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

For discussion relating to the duty of care required of automobile users, see Ch. 82, *Automobiles: Causes of Action* , and for forms of complaints, see Ch. 83 *Automobiles: Bringing the Action*

For discussion and forms relating to negligence generally, see Ch. 380, *Negligence*

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8-84 California Forms of Pleading and Practice--Annotated § 84.67

§ 84.67 Affirmative Defense; Imminent Peril or Emergency

[1] FORM Affirmative Defense; Imminent Peril or Emergency

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. Prior to and at the time of the collision alleged in the plaintiff's complaint, defendant was confronted with an unexpected and unanticipated emergency, that was not the result of any negligence of the defendant, and that placed defendant in a position of imminent peril and danger. This emergency occurred when _____ [*describe imminent peril or danger, e.g.,* an unidentified child suddenly and without warning jumped into the street directly in the path of defendant's vehicle].

2. In order to avoid _____ [*specify, e.g.,* hitting and potentially killing the child], defendant _____ [*describe course of action taken in response to emergency, e.g.,* applied the brakes and swerved abruptly to the left], where the plaintiff's vehicle and the defendant's vehicle then collided.

3. Because of the emergency and imminent peril in which the defendant was placed, the action taken by the defendant was reasonable and prudent under the circumstances and was not a breach of any duty toward the plaintiff or any other person and was not negligent in any respect.

4. The collision, and any injuries and damages that the plaintiff may have suffered in that collision, were not proximately caused by any negligence of the defendant, but were instead a natural result of the defendant's response to the emergency and imminent peril.

[2] Use of Form

The form in *[1], above,* is for use by a defendant in stating an affirmative defense of emergency or imminent peril. The imminent peril or sudden emergency rule provides that a person suddenly confronted with an unexpected, imminent danger that is not a product of the person's negligence is not required to exercise the same amount of care as one who

acts after careful deliberation[*Leo v. Dunham (1953) 41 Cal. 2d 712, 714, 264 P.2d 1* ; *Balthrop v. Atchison, Topeka & Santa Fe R.R. (1959) 167 Cal. App. 2d 437, 446, 334 P.2d 1041]* . Perhaps the most common usage of the affirmative defense is to show an excuse for a violation of a statute or ordinance that might otherwise provide a basis for a finding of negligence per se[*Miller v. Jensen (1955) 137 Cal. App. 2d 251, 256, 290 P.2d 52* (overruled on other grounds in *Alarid v. Vanier (1958) 50 Cal.2d 617, 622-624, 327 P.2d 897*)].

The unexpected, imminent danger encountered must be entirely free of any negligence of the defendant [*Carley v. Zeigler (1958) 156 Cal. App. 2d 643, 645, 320 P.2d 165]* . Once the issue of imminent peril is raised, the question of its applicability in the action is generally one for the trier of fact[*Castro v. E.A. Irish, Contractor (1967) 249 Cal. App. 2d 390, 393, 57 Cal. Rptr. 477]* .

[3] Cross References

For discussion of the necessity of pleading affirmative defenses, see *§ 84.30[4][a]*

For discussion of imminent peril or emergency as an affirmative defense, see *§ 84.30[4][e]*

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

For discussion relating to the duty of care required of automobile users, see Ch. 82, *Automobiles: Causes of Action* , and for forms of complaints, see Ch. 83 *Automobiles: Bringing the Action*

For discussion and forms relating to negligence generally, see Ch. 380, *Negligence*

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Chapter 85 AUTOMOBILES: DISCOVERY

8-85 California Forms of Pleading and Practice--Annotated 85.syn

§ 85.syn Synopsis to Chapter 85: AUTOMOBILES: DISCOVERY

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§ 85.02 Cross References

[1] Related Chapters in This Volume

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[3] Other Related Coverage

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[b] Propounding Interrogatories

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[c] Responding to Interrogatories

[d] Use of Interrogatories in Automobile Cases

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[a] Party's Right to Depositions

[b] Deposition of Nonparty

[c] Deposition of Party

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[e] Use of Depositions in Automobile Cases

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[3] Requests for Admission

[a] Requests for Admissions

[b] Plaintiff's Requests for Admission

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[d] Response to Requests for Admissions

[e] Use of Requests for Admissions in Automobile Cases

[4] Inspection of Documents and Tangible Things

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[a] Exchange of Witness Lists

[b] Exchange of Expert Witness Reports and Writings

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[1] Need for Automobile Collision Reconstruction

[2] Biomechanical Engineers

[3] Automobile Recording Devices

§ 85.14 Perpetuation of Testimony and Evidence

§§ 85.15-85.29 [Reserved]

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[1] Interrogatories

[2] Depositions

[3] Requests for Admission

[4] Inspection of Documents

[5] Mental and Physical Examinations

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§ 85.40 Interrogatories

[1] Propounding Party's Checklist

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§ 85.43 Demand for Inspection and Production of Documents and Tangible Things

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§ 85.44 Physical Examination of Plaintiff Alleging Personal Injuries

[1] Defendant's Checklist

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§ 85.45 Demand for Exchange of Information Concerning Expert Witnesses

[1] Checklist of Party Demanding Exchange

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§§ 85.46-85.59 [Reserved]

§ 85.60 Written Interrogatories [Code Civ. Proc. § 2030.010 et seq.]--Judicial Council Form Interrogatories [Code Civ. Proc. § 2033.710 et seq.]--General Form

[1] FORM

[2] Use of Form

§ 85.61 Compelling Attendance at Deposition

[1] Notice of Deposition to Defendant [Code Civ. Proc. § 2025.220(a)]

[a] FORM

[b] Use of Form

[c] Cross References

[2] Defendant's Motion to Compel Plaintiff's Attendance at Deposition [Code Civ. Proc. § 2025.480]

[a] FORM

[b] Use of Form

[c] Cross References

§ 85.62 Request for Admissions [Code Civ. Proc. § 2033.010 et seq.]

[1] FORM

[2] Use of Form

§ 85.63 Request for Production of Documents [Code Civ. Proc. § 2031.010 et seq.]

[1] FORM

[2] Use of Form

§ 85.64 Notice of Demand for Permission to Inspect, Test, and Photograph [Code Civ. Proc. § 2031.010 et seq.]

[1] FORM

[2] Use of Form

§ 85.65 Physical Examination of Plaintiff

[1] Demand for Initial Physical Examination of Plaintiff [Code Civ. Proc. § 2032.220]

[a] FORM

[b] Use of Form

[2] Response Agreeing to Demand [Code Civ. Proc. § 2032.230]

[a] FORM

[b] Use of Form

[3] Response Objecting to Demand [Code Civ. Proc. § 2032.230]

[a] FORM

[b] Use of Form

§ 85.66 Disclosure of Expert Witnesses

[1] Designation of Expert Witnesses [Code Civ. Proc. § 2034.210(a)]

[a] FORM

[b] Use of Form

[2] Expert Witness Declaration [Code Civ. Proc. §§ 2034.210(b), 2034.260(c)]

[a] FORM

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Chapter 85 AUTOMOBILES: DISCOVERY
PART I. SCOPE

8-85 California Forms of Pleading and Practice--Annotated § 85.01

§ 85.01 Scope of Chapter

This chapter provides a discussion of various methods of discovery for use in automobile cases: interrogatories, depositions, requests for admission, inspection of documents, and physical or mental examination of a party.

It includes a discussion of the types of expert witnesses that may be helpful in an automobile case; and procedure for demanding an exchange of information relating to expert witnesses.

It also includes a discussion of perpetuation of testimony and evidence.

This chapter includes the following forms:

- Written interrogatories to plaintiff [*see 85.60[1]*] and a response to interrogatories [*see 85.60[2]*].
- Notice of deposition to defendant [*see 85.61[1]*] and defendant's motion to compel plaintiff's attendance at deposition [*see 85.61[2]*].
- Request for admission [*see 85.62*].
- Request for production of documents [*see 85.63*].
- Demand for initial physical examination of plaintiff [*see 85.64[2]*] and responses agreeing [*see 85.64[2]*] and objecting [*see 85.64[3]*] to the demand.
- Notice of demand for permission to inspect, test, and photograph [*see 85.65*].
- Designation of expert witnesses [*see 85.66[1]*] and an expert witness declaration [*see 85.66[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryTortsTransportation TortsMotor VehiclesPersonal Vehicles

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Chapter 85 AUTOMOBILES: DISCOVERY
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8-85 California Forms of Pleading and Practice--Annotated § 85.02

§ 85.02 Cross References

[1] Related Chapters in This Volume

- For discussion relating to investigation of automobile cases, see Ch. 81A, *Automobiles: Investigation* .

- For discussion relating to pretrial proceedings in automobile cases, see Ch. 86, *Automobiles: Pretrial Motions and Settlement Negotiations* .

[2] Other Related Chapters

- For discussion relating to depositions generally, see Ch. 193, *Discovery: Depositions* .

- For discussion relating to interrogatories generally, see Ch. 194, *Discovery: Interrogatories* .

- For discussion relating to production of tangible things generally, see Ch. 195, *Discovery: Inspection of Tangible Evidence* .

- For discussion relating to requests for admissions generally, see Ch. 196, *Discovery: Requests for Admissions* .

- For discussion relating to physical and mental examinations generally, see Ch. 197, *Discovery: Physical and Mental Examinations* .

- For discussion relating to expert witnesses, see Ch. 198, *Discovery: Exchange of Expert Witness Information* .

[3] Other Related Coverage

- For discussion of discovery practice, see California Deposition and Discovery Practice (Matthew

Bender).

- For discussion of automobile collision reconstruction, see Forensic Accident Investigation: Motor Vehicles (LexisNexis); Motor Vehicle Accident Reconstruction and Cause Analysis (LexisNexis); Scientific Automobile Accident Reconstruction (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryTortsTransportation TortsMotor VehiclesPersonal Vehicles

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Volume 8: Automobiles-Chs. 80-92
Chapter 85 AUTOMOBILES: DISCOVERY
PART I. SCOPE

8-85 California Forms of Pleading and Practice--Annotated §§ 85.03-85.09

[Reserved]

§§ 85.03[Reserved]

California Forms of Pleading and Practice--Annotated

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Volume 8: Automobiles-Chs. 80-92
Chapter 85 AUTOMOBILES: DISCOVERY
PART II. LEGAL BACKGROUND

8-85 California Forms of Pleading and Practice--Annotated § 85.10

§ 85.10 Information From Opposing Party

[1] Interrogatories

[a] Interrogatories May Be Propounded by Any Party

Any party may obtain discovery within the scope delimited by *Code Civ. Proc. § 2017.010 et seq.*, and subject to the restrictions set forth in *Code Civ. Proc. § 2019.010 et seq.*, by propounding to any other party to the action written interrogatories to be answered under oath [*Code Civ. Proc. § 2030.010(a)*]. Interrogatories with subparts are not permitted in most limited civil cases [*see Code Civ. Proc. § 94(a)*; for further discussion of discovery in limited civil cases, *see* Ch. 190, *Discovery: Scope, Regulation, and Timing* ; Ch. 194, *Discovery: Interrogatories* ; and Ch. 345A, *Limited Civil Cases*].

[b] Propounding Interrogatories

[i] Plaintiff

A plaintiff may propound interrogatories to a party without leave of court at any time that is 10 days after the service of the summons on or appearance by that party, whichever occurs first [*Code Civ. Proc. § 2030.020(b)*; for a sample form of interrogatories, *see § 85.60*].

On motion with or without notice, the court, for good cause shown, may grant leave to a plaintiff to propound interrogatories at an earlier time [*Code Civ. Proc. § 2030.020(d)*; for forms of application and order, see Ch. 194, *Discovery: Interrogatories*].

[ii] Defendant

A defendant may propound interrogatories to a party to the action without leave of court at any time [*Code Civ. Proc. § 2030.020(a)*].

[c] Responding to Interrogatories

Interrogatories require the responding party to search for responsive information. Judicial Council approved form interrogatories generally cover details on basic information for automobile cases [for sample Judicial Council form interrogatories, *see* Ch. 194, *Discovery: Interrogatories*]. Verified and complete responses include information such as names and addresses of witnesses, employers, and medical providers, as well as dates of treatment and claimed special damages. They can also provide detailed information on prior injuries and other claims.

Response to interrogatories must be made in accordance with *Code Civ. Proc. § 2030.210 et seq.* Protective orders with respect to interrogatories may be sought in accordance with *Code Civ. Proc. § 2030.090*. The general effect of an answer to an interrogatory is to bind immediately and conclusively the answering party to the facts set forth in the reply [*Coy v. Superior Court (1962) 58 Cal. 2d 210, 219, 23 Cal. Rptr. 393, 373 P.2d 457]* .

PRACTICE TIP:

Responses Must Be Full and Complete. Most attorneys prefer to obtain answers to interrogatories before engaging in other discovery. The responding party is obligated to search his or her records and provide detailed information. The requesting party is entitled to full and complete responses. A motion to compel discovery should be used whenever responses are incomplete, or include statements such as, "I don't remember." --*Joe Devine, Editorial Consultant.*

[d] Use of Interrogatories in Automobile Cases

Interrogatories usually provide insurance information and policy limits that counsel does not have early in the case. Further, they can provide information on whether the responding party is claiming that a third party is liable for the accident, and allow counsel the opportunity to bring in all necessary parties prior to the deposition. For these reasons, it can be advantageous to send interrogatories before taking depositions.

However, interrogatories are not very helpful if counsel does not know what to ask, or the specific documents needed from the other party. In such a case, a deposition can be used to discover what specific information counsel will require the other party to provide. After the deposition, specific interrogatories and requests for documents can be used to obtain the necessary information.

PRACTICE TIP:

Use of Deposition Before Interrogatories. Interrogatories are not very helpful if you do not know what to ask, or what documents you may need. In such a case, a deposition can be used to discover what specific information you will require a party to provide. After the deposition, specific interrogatories and requests for documents can be used to obtain the necessary information. --*Joe Devine, Editorial Consultant.*

Expense and Relative Usefulness of Deposition. While some attorneys may prefer to take depositions before serving interrogatories, consider the expense incurred in learning basic information about the defendant at the expense of having that information transcribed by a court reporter. Some very basic information is more economically obtained by way of interrogatories and typically preliminary information can be obtained which will help focus on issues which are related tothe discovery obtained by way of interrogatory but require more in depth detailed cross-examination.

Done properly, interrogatories serve a unique role in helping to ferret out information which may not be readily accessible to the parties, such as insurance policy numbers, insurance policy limits, names, addresses, phone numbers of other witnesses, as well as other information which may have been obtained by defense counsel but which the parties need to provide in formal discovery. On the other hand, when properly conducted, depositions should be designed to lock in the defendant's observations

surrounding the collision. They allow counsel to obtain information that does not require the input of the defense lawyer or the defense lawyer's staff.--*Frederick Schenk, Editorial Consultant.*

[2] Depositions

[a] Party's Right to Depositions

Any party may obtain discovery within the scope delimited by *Code Civ. Proc. § 2017.010 et seq.*, and subject to the restrictions set forth in *Code Civ. Proc. § 2019.010 et seq.*, by taking in California the oral deposition of any person, including any party to the action. The person deposed may be a natural person, an organization such as a public or private corporation, a partnership, an association, or a governmental agency [*Code Civ. Proc. § 2025.010*; *see Code Civ. Proc. § 94(b), (c)* (additional limitations in limited civil cases); *see also § 85.61* for a Notice of Deposition to Defendant, and a Motion to Compel Plaintiff's Attendance at a Deposition; *see generally* Ch. 193, *Discovery: Depositions*].

[b] Deposition of Nonparty

Except as provided in *Code Civ. Proc. § 2025.280(a)*, the process by which a nonparty is required to provide discovery is a deposition subpoena [*see Code Civ. Proc. § 2020.010 et seq.*]. For discussion of procedures with respect to a deposition subpoena and illustrations of the Judicial Council form of deposition subpoena, see Ch. 193, *Discovery: Depositions* .

[c] Deposition of Party

The deposition of a party may be taken on proper service of a deposition notice [*see Code Civ. Proc. § 2025.210 et seq.*, effective July 1, 2005)]. The requirements of a deposition notice are set forth in *Code Civ. Proc. § 2025.220(a)* [for a form of notice of deposition, *see § 85.61[1]*].

[d] Protective Order

Before, during, or after a deposition, any party, any deponent, or any other affected natural person or organization may promptly move for a protective order [*see Code Civ. Proc. § 2025.420*].

For discussion and forms of protective orders, see Ch. 193, *Discovery: Depositions* .

[e] Use of Depositions in Automobile Cases

[i] "Lock In" Observations of Collision

Generally, more detailed information may be obtained in depositions than in interrogatories. If counsel sent interrogatories prior to taking depositions, counsel should use the deposition to follow up on any questions raised by the interrogatories, and get information on the adverse party's observations surrounding the collision. Detailed follow-up questions allow the attorney to "lock in" a party's position on any issue.

PRACTICE TIP:

Opportunity to Observe Credibility of Adverse Witness. Depositions are extremely important to ascertain the credibility and presentation of the deponent. You will be able to evaluate the deponent's ability to present his or her testimony at the time of trial. Further, you can get more detailed information at the deposition than in interrogatories and sometimes the deponent's attorney has not properly prepared his or her client and valuable information may be obtained.--*Dona E. Cohn, Editorial Consultant.*

Opportunity to Educate Adverse Party. A deposition allows an attorney to ask leading questions of an adverse party. This gives the attorney the opportunity to educate the adverse party, to some extent, on the attorney's impression of the case. If the attorney focuses questions on a particular issue, the witness may realize that his or her evidence on an issue is not convincing. This can backfire on a defense attorney if the plaintiff prepares far better for trial than for the deposition. For example, the most common claim withdrawn by a plaintiff after a deposition is the loss of income by a self-employed plaintiff who realizes that the defense attorney will not accept the claim without solid documentary support, which the plaintiff is unable, or reluctant, to provide before trial. Therefore, a defense attorney would not want such a plaintiff to produce solid evidence at trial that the defense attorney was not aware of at the deposition. --*Joe Devine, Editorial Consultant.*

Requests to Draw Diagram of Accident in Deposition. Attorneys frequently object when their clients are asked in a deposition to draw a diagram to illustrate the accident. This objection is without merit under a recent California Supreme Court decision. The discovery statutes require that a party cooperate in non-verbal communications and can be compelled to draw a diagram if requested [*see Emerson Electric Company v. Superior Court (Grayson), (1997) 16 Cal. 4th 1101, 1111-1112, 68 Cal. Rptr. 2d 883*]. --*Joe Devine, Editorial Consultant*.

[ii] Requests for Documents

A deposition notice may include a request to produce documents at the deposition. However, unlike interrogatories, the deponent does not otherwise have to search his or her records, or remember anything.

PRACTICE TIP:

Income Tax Returns. Income tax returns are privileged and cannot be obtained without a stipulation. However, it is permissible to ask in a deposition (1) if tax returns were filed, (2) where copies of those returns are located, (3) what tax forms were filed, (4) and whether the tax returns will be voluntarily produced [*Sav-on Drugs, Inc. v. Superior Court of Los Angeles (1975) 15 Cal. 3d 1, 123 Cal. Rptr. 283, 538 P. 2nd 739] . --Joe Devine, Editorial Consultant.*

[3] Requests for Admission

[a] Requests for Admissions

Any party may obtain discovery within the scope delimited by *Code Civ. Proc. § 2017.010 et seq.*, and subject to the restrictions set forth in *Code Civ. Proc. § 2019.010 et seq.*, by a written request that any other party to the action admit the genuineness of specified documents, or the truth of specified matters of fact, opinion relating to fact, or application of law to fact. A request for admissions may relate to a matter that is in controversy between the parties [*Code Civ. Proc. § 2033.010*]. Requirements for requests for admissions are set forth in *Code Civ. Proc. § 2033.030 et seq.* [*see generally* Ch. 196, *Discovery: Requests for Admissions*].

[b] Plaintiff's Requests for Admission

A plaintiff may make requests for admissions by a party without leave of court at any time that is 10 days after the service of the summons on, or appearance by that party, whichever occurs first. On motion with or without notice, the court, for good cause shown, may grant leave to a plaintiff to make requests for admissions at an earlier time [*Code Civ. Proc. § 2033.020(b), (d)*]. For a plaintiff's Request for Admission form, see *§ 85.62*.

[c] Defendant's Requests for Admission

A defendant may make requests for admissions by a party without leave of court at any time [*Code Civ. Proc. §*

2033.020(a)].

[d] Response to Requests for Admissions

The party to whom requests for admissions have been directed must respond in writing under oath separately to each requested admission, or set forth an objection to the particular request [*Code Civ. Proc. § 2033.210(a), (b)*]. Requirements for responses are set forth in *Code Civ. Proc. § 2033.210 et seq.* Protective orders with respect to a request for admission may be sought in accordance with *Code Civ. Proc. § 2033.080*.

[e] Use of Requests for Admissions in Automobile Cases

A carefully crafted Request for Admission should be considered at the beginning of the discovery process to narrow the issues and to focus attention away from matters that are not in dispute and for which an expert need not be obtained.

Although requests for admissions are frequently made for disputed issues such as the reasonableness of plaintiff's medical expenses, or nonnegligence, these facts are seldom admitted. However, the advantage to requesting admissions on disputed issues is that a party may be awarded costs and fees for proving at trial a fact that should have been admitted [*see Code Civ. Proc. § 2033.420*].

PRACTICE TIP:

Admissions Versus Settlement Demand. Requesting admissions on disputed issues such as reasonableness of medical expenses, or nonnegligence of a party are rarely useful. Although a party can be awarded costs for proving at trial a fact which should have been admitted, a statutory demand for settlement accomplishes the same purpose [for discussion of settlement demands, *see Ch. 81B, Automobiles: Case Evaluation, § 81B.15*]. *--Joe Devine, Editorial Consultant.*

[4] Inspection of Documents and Tangible Things

[a] Demand for Inspection of Documents and Tangible Things

Any party may obtain discovery within the scope delimited by *Code Civ. Proc. § 2017.010 et seq.*, and subject to the restrictions set forth in *Code Civ. Proc. § 2019.010 et seq.*, by inspecting , copying, testing, or sampling documents, tangible things, land or other property, and electronically stored information in the possession, custody, or control of any other party to the action [*Code Civ. Proc. § 2031.010(a)*]. Requirements for the demand for production of such items for inspection, copying, testing, or sampling are set forth in *Code Civ. Proc. §§ 2031.010-2031.040*. Provisions for supplemental demands are set forth in *Code Civ. Proc. § 2031.050* [*see generally* Ch. 195, *Discovery: Inspection of Tangible Evidence*].

For a sample form requesting production of documents, see *§ 85.63*. For a sample form for use in demanding inspection of property, such as the vehicle involved in the collision, see *§ 85.64*.

[b] Response to Demand for Production of Documents or Tangible Things

The party to whom a demand for inspection, copying, testing, or sampling of documents, tangible things, land or other property, or electronically stored information has been directed must respond separately to each item (or category of item) by stating the following [*Code Civ. Proc. § 2031.210(a)*]:

- The party will comply with the particular demand by the date set under *Code Civ. Proc. § 2031.030(c)(2)*;

- The party lacks the ability to comply with the demand as it pertains to a particular item or category

of item; or

- The party objects to the particular demand.

Requirements for responses are set forth in *Code Civ. Proc. §§ 2031.210-2031.260*. Protective orders with respect to a demand for production may be sought in accordance with *Code Civ. Proc. § 2031.060*.

[c] Types of Documents Produced in Automobile Cases

The most common types of documents produced in automobile cases include:

- Insurance policies.
- Photographs of vehicles, injuries, and the scene of the accident.
- Police reports.
- Vehicle repair estimates.
- Witness statements.
- Medical records and bills.
- Documents reflecting lost income.
- Reports of expert witnesses.

PRACTICE TIP:

Income Tax Returns. Income tax returns are privileged and not discoverable. However, if income tax returns support a claim for lost income, consider waiving the objection and producing the income tax returns. If you do not produce the documents in response to a request during discovery, you may be precluded from introducing tax returns at trial. --*Joe Devine, Editorial Consultant.*

PRACTICE TIP: Examination of Original Documents. Sometimes it is extremely important to look at the original documents that are produced by a party to determine if any alterations or changes were made. This is especially true if you are asking for logbooks, invoices and receipts. Sometimes information, such as dates, have been changed and the changes cannot be detected in a copy.--*Dona E. Cohn, Editorial Consultant.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-85 California Forms of Pleading and Practice--Annotated § 85.11

§ 85.11 Physical and Mental Examinations

[1] Physical and Mental Examination of Party

Any party may obtain discovery within the scope delimited by *Code Civ. Proc. § 2017.010 et seq.*, and subject to the restrictions set forth in *Code Civ. Proc. § 2019.010 et seq.*, by means of a physical or mental examination of the following persons, in any action in which the mental or physical condition (including the blood group) of that party or other person is in controversy [*Code Civ. Proc. § 2032.020(a)*]:

- A party to the action.
- An agent of any party.
- A natural person in the custody or under the legal control of a party.

PRACTICE TIP:

Counsel's Right to Attend Examinations. The plaintiff's attorney has a right to be present during a defense physical medical examination. However, the attorney has no right to be present during a defense mental examination. And there is no right to record the mental examination [*Vinson v. Superior Court (1987) 43 Cal. 3d 833, 844-845, 239 Cal Rptr. 292* ; *Edwards v. Superior Court (1976) 16 Cal. 3d 905, 910, 130 Cal. Rptr. 14]* . *--Joe Devine, Editorial Consultant.*

[2] Physical Examination of Plaintiff Seeking Recovery for Personal Injuries

In any case in which a plaintiff (or cross-complainant) is seeking recovery for personal injuries, any defendant (or cross-defendant) may demand one physical examination of the plaintiff (or cross-complainant), on the following conditions [*Code Civ. Proc. § 2032.220(a)*; *see § 85.64*]:

- The examination does not include any diagnostic test or procedure that is painful, protracted, or intrusive.

- The examination is conducted within 75 miles of the residence of the examinee.

The defendant may make this demand without leave of court after that defendant has been served or has appeared in the action, whichever occurs first [*Code Civ. Proc. § 2032.220(b)*].

[3] Use of Examinations in Automobile Cases

An independent medical examination should be used in any case involving significant injuries with ongoing complaints. A defendant is entitled to one medical examination without a court order.

PRACTICE TIP:

Defense Perspective on Use of Medical Examinations. In a complex case involving several different medical disciplines or a changing medical condition, consider a motion for more than one medical examination if you can show good cause.

Medical examinations are expensive. In a small soft-tissue injury case with no ongoing complaints, a medical records review report may suffice in lieu of an examination.

A medical examination is always preferred over a records review. However, increasingly insurance companies are reluctant to allow the expense of an examination when it is more cost-effective simply to have a physician render a report based on a review of the records. At trial, the nonexamining defense doctor will be subject to the argument that the treating physician is in a far better position to comment on the medical issues than someone who has never met the plaintiff. --*Joe Devine, Editorial Consultant.*

PRACTICE TIP: Plaintiff's Preparation for Defense Medical Examination. Plaintiff's counsel must prepare his or her client for the defense medical examination. Objections should be timely made in writing to any diagnostic testing such as X-rays or other intrusive testing. The plaintiff should be made aware that he or she is to talk about his or her medical condition only and not discuss the liability issues of the case. Note that plaintiff's attorney has the right to be present during the examination and/or the examination can be recorded.--*Dona E. Cohn, Editorial Consultant.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical ExaminationsTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-85 California Forms of Pleading and Practice--Annotated § 85.12

§ 85.12 Expert Witnesses

[1] Exchange of Information Relating to Experts

[a] Exchange of Witness Lists

Any party may demand a mutual simultaneous exchange by all parties of a list containing the name and address of any natural person, including one who is a party, whose oral or deposition testimony in the form of an expert opinion any party expects to offer in evidence at the trial [*Code Civ. Proc. § 2034.210(a)*; *see § 85.66[1]*,].

[b] Exchange of Expert Witness Reports and Writings

Any party may include a demand for the mutual and simultaneous production for inspection and copying of all discoverable reports and writings, if any, made by any expert in the course of preparing his or her opinion, when the expert is a party or an employee of a party, or has been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action [*Code Civ. Proc. § 2034.210(b), (c)*].

[c] Expert Witness Declaration Must Fully Disclose General Substance of Testimony

The California Supreme Court has held that a trial court may preclude an expert witness from testifying at trial on a subject whose general substance was not previously described in an expert witness declaration. Under *Code Civ. Proc. § 2034.300*, a party who unreasonably fails to submit an expert witness declaration that fully complies with the content requirements of *Code Civ. Proc. § 2034.260(c)*, including the requirement that the declaration contain a "brief narrative statement of the general substance of the testimony that the expert is excepted to give," is subject to the sanction of exclusion from evidence of the expert opinion of that witness [*Bonds v. Roy (1999) 20 Cal. 4th 140, 148-149, 83 Cal. Rptr. 2d 289, 973 P.2d 66* ; *see § 85.66[2]*].

PRACTICE TIP:

Disclose Treating Physician as Expert. Recent case law is not clear on whether treating physician is a "retained" expert. If he or she is "retained," and you have not disclosed him or her properly, then the treating physician's opinion and costs cannot come in, possibly seriously undermining your case.

Therefore, disclose the treating physician or expert as a possible witness, even if he or she is not retained. If the witness is not retained, specify that fact. Disclose everything about which a nonretained expert might possibly testify and all information required under *Code Civ. Proc. § 2034*, as if the physician were retained. *Dona E. Cohn, Editorial Consultant.*

PRACTICE TIP: Caveat. A nonretained witness can be called in for deposition without the other side having to pay for his or her time, as if he or she were a retained expert. --*Joe Devine, Editorial Consultant.*

[2] Strategic Use of Experts

[a] Communication With Experts

Counsel should meet with any prospective expert witness in person early in the case to provide information to the expert, and also to evaluate whether the expert will present well in front of a jury. This meeting should occur well in advance of counsel's disclosure of expert witnesses, or it will be too late to get a more favorable witness.

PRACTICE TIP:

Communication with Expert. Personally meet with the expert witness, and go over all relevant materials with him or her shortly before the expert's deposition is taken. In addition, provide your expert with copies of all relevant expert depositions.

Remember that communications with disclosed experts are not privileged. Do not send your expert anything in writing that you do not want to reveal to the other party. The adverse attorney can ask your expert what was discussed during each of your conversations with him or her. --*Joe Devine, Editorial Consultant.*

PRACTICE TIP: Cooperative Experts Crucial. Make sure that any expert witness that is retained and disclosed for trial is cooperative and available for deposition and trial testimony. Well qualified medical doctors may resent being cross-examined and brought into litigation. Try to use experts who will present well in front of a jury. --*Joe Devine, Editorial Consultant.*

[b] Use of Medical Experts

Medical experts are usually necessary to prove that the plaintiff's injuries were the direct result of the automobile collision. They may also testify on the reasonableness and necessity of medical treatment.

PRACTICE TIP:

Physicians. Not every medical practitioner involved in a case need be called to testify. A primary care physician who has examined and diagnosed a patient may be all that is needed to testify to the medical issues. An involved and qualified physician can testify as to diagnostic studies and treatment rendered; it may not be necessary to call each provider. However, if a particular specialist is involved, the witness must be appropriately qualified. --*Joe Devine, Editorial Consultant.*

PRACTICE TIP: Neurologists/Psychiatrists. Neurologists and psychiatrists are certified by the same board. Although there is some overlap in these disciplines, they are not the same. A physician can be certified as a neurologist, psychiatrist, or both. Be careful in this area to be certain that experts have appropriate qualifications for their opinions. --*Joe Devine, Editorial Consultant.*

[c] Use of Economists

Economists are usually required to establish future lost earnings. An economist will evaluate the plaintiff's physical limitations, with the vocational rehabilitation report, and put a final dollar figure on the present value of the past, current and future loss of earning capacity.

PRACTICE TIP:

Economists, Defense Perspective. No one can predict the future. Future lost earnings must be reasonably certain. It is not hard to find examples in which the performance of a security did not meet the forward-looking prospectus. Read the *Wall Street Journal* on the morning before you cross examine any economist. --*Joe Devine, Editorial Consultant.*

[d] Nondisclosed Consulting Experts

Consulting experts can be used without disclosing them to the adverse party. These experts assist the attorney in understanding complex issues and in preparing for trial, including cross examination of adverse expert witnesses.

[3] Controlling Costs

Expert witnesses are expensive. Experts should be consulted, retained, or disclosed only when necessary for a particular case. The adverse party may depose all experts disclosed. When deciding which experts to depose, counsel should first consider the costs.

[4] Finding an Expert

Experts need to present as good witnesses. The best source for an attorney is a referral from a respected colleague. Counsel should therefore consult other attorneys. In addition, there are many publications that list experts by discipline, *e.g.*, California Lawyers Directory of Attorneys (Daily Journal Corporation).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryTortsNegligenceGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 85.13 Automobile Collision Reconstruction

[1] Need for Automobile Collision Reconstruction

Automobile collision reconstruction experts are usually physicists. They rely on factual information to calculate speed, distances, time, crush forces, and G forces. Information is generally obtained from police reports, which may include such items as evidence of skidmarks, distances, traffic lights, and statements of witnesses. They also use photographs, specifications of vehicles, and repair estimates. Frequently, they inspect the scene of the accident, take measurements, and conduct line-of-sight studies to determine visibility. Most of these people are experienced expert witnesses. They can be very useful in any case in which there is factual evidence.

Automobile collision reconstruction may be required in the following circumstances:

- In automobile/pedestrian cases.
- If issues of visibility exist--for example, because of lighting or obstacles.
- If there is a need to determine speed, traffic controls, or right of way.

PRACTICE TIP:

Testimony of Reconstruction Experts. Do not allow reconstruction experts to testify in cases in which there is insufficient information to formulate opinions requiring their skills. For instance, they should not be allowed to opine who had a red light based only on deposition testimony, photographs, and repair estimates. Also, do not let them testify, without proper qualifications, as to the G forces or body mechanics of a plaintiff. --*Joe Devine, Editorial Consultant.*

[2] Biomechanical Engineers

Biomechanical engineers are often used as expert witnesses in conjunction with automobile collision reconstructionists. Expert biomechanical engineers are trained in the mechanics and movement of the human body, and testify as to the forces on the body and the relationship to the injuries claimed.

PRACTICE TIP:

Joint Consultation With Accident Reconstructionist. The areas of accident reconstruction and biomechanical engineering are separate and distinct from one another. A true accident reconstructionist is one who can help determine the speed of vehicles at time of impact, time distance analysis, and ultimately provide opinions concerning how the collision occurred and the role each party played in bringing about the collision. A biomechanical engineer can help determine what happened to the occupants of the vehicle before, during and after the collision, and may also help in determining the nature and extent of injuries that might be expected to result from the type of collision which occurred. Both experts may need to rely on one another in helping to assess their opinions and should be consulted jointly in the case.--*Frederick Schenk, Editorial Consultant.*

[3] Automobile Recording Devices

Some newer model cars are built with recording devices, sometimes referred to as "event data recorders" or "sensing and diagnostic modules," that can retrieve data about the vehicle after an accident. These automobile "black boxes" may record how fast and in which direction a vehicle was traveling, store a history of where the vehicle traveled, record steering and brake performance, including whether brakes were even applied, record whether the driver was wearing a seat belt, and transmit information concerning an accident in which the motor vehicle has been involved to a central communications system at the time that the accident occurs [*see Veh. Code § 9951(b)*].

For motor vehicles manufactured after June 30, 2004, none of the data described above that is recorded on an automobile recording device may be downloaded or retrieved by anyone other than the registered owner of the vehicle, unless one of the following applies [*Veh. Code § 9951(c), (f)*]:

- The registered owner of the motor vehicle consents to the retrieval of the information.

- A court with jurisdiction orders the information to be retrieved.

- The information is retrieved for the purpose of improving motor vehicle safety, including for medical research concerning the human body's reaction to motor vehicle accidents, and the identity of the registered owner or driver is not disclosed in connection with that retrieved data (the disclosure of the vehicle identification number (VIN) does not constitute the disclosure of the identity of the registered owner or driver).

- The data is retrieved by a licensed new motor vehicle dealer, or by an automotive technician as defined in *Bus. & Prof. Code § 9880.1*, for the purpose of diagnosing, servicing, or repairing the motor vehicle.

A person authorized to download or otherwise retrieve data from a recording device for the purpose of improving motor vehicle safety is prohibited from releasing that data, except to share the data among the motor vehicle safety and medical research communities to advance motor vehicle safety, and only if the identity of the registered owner or driver is not disclosed [*Veh. Code § 9951(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 85.14 Perpetuation of Testimony and Evidence

If a complaint cannot be filed immediately, counsel should maintain an ancillary proceeding under *Code Civ. Proc. § 2035.010 et seq.* to perpetuate testimony, and obtain a court order authorizing the following:

- Oral and written depositions of any material witness whose testimony might be lost prior to the due course of ordinary discovery, e.g., any witness who is leaving the state, or is in danger of death or incapacity.

- Inspection, for copying or photographing, of any documents or property that might become lost or altered.

- Physical and mental examinations of a potential party when appropriate.

Legal Topics:

For related research and practice materials, see the following legal topics:
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8-85 California Forms of Pleading and Practice--Annotated §§ 85.15-85.29

[Reserved]

§§ 85.15[Reserved]

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8-85 California Forms of Pleading and Practice--Annotated § 85.30

§ 85.30 Related Texts From LexisNexis

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Motor Vehicle Accident Reconstruction and Cause Analysis (LexisNexis)

Scientific Automobile Accident Reconstruction (Matthew Bender)

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8-85 California Forms of Pleading and Practice--Annotated § 85.31

§ 85.31 State Statutes

[1] Interrogatories

Interrogatories. *Code Civ. Proc. § 2030.010 et seq.*

[2] Depositions

Depositions. *Code Civ. Proc. §§ 2020.010 et seq., 2025.010 et seq.*

[3] Requests for Admission

Requests for admission. *Code Civ. Proc. § 2033.010 et seq.*

[4] Inspection of Documents

Demand for production of documents for inspection. *Code Civ. Proc. § 2031.010 et seq.*

[5] Mental and Physical Examinations

Mental and physical examination of party. *Code Civ. Proc. § 2032.010 et seq.*

[6] Expert Witnesses

Demand for exchange of expert witness lists. *Code Civ. Proc. § 2034.010 et seq.*

[7] Perpetuation of Testimony and Evidence

Proceedings for perpetuation of testimony and evidence. *Code Civ. Proc. § 2035.010 et seq.*

[8] Service of Documents

Notice, filing, service of papers. *Code Civ. Proc. § 1010 et seq.*

Proof of service. *Code Civ. Proc. § 1013a*

Service by mail. *Code Civ. Proc. §§ 1013, 1013a, 2019(e)*

[9] Time Limits on Discovery

Time limits on discovery. *Code Civ. Proc. § 2024.010 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-85 California Forms of Pleading and Practice--Annotated § 85.32

§ 85.32 California Rules of Court

Applicability of law and motion rules (*Cal. Rules of Ct., Rules 3.1100 et seq.*) in all trial courts. *Cal. Rules of Ct., Rule 3.1100*

Format of discovery requests. *Cal. Rules of Ct., Rule 3.1000 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal VehiclesGovernmentsCourtsRule Application & Interpretation

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8-85 California Forms of Pleading and Practice--Annotated § 85.33

§ 85.33 Internet References

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[Reserved]

§§ 85.34[Reserved]

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8-85 California Forms of Pleading and Practice--Annotated § 85.40

§ 85.40 Interrogatories

[1] Propounding Party's Checklist

☐ Preparation of interrogatories

☐ Follow the format set out in *Code Civ. Proc. § 2030.060* [*see § 85.60*; for discussion of additional interrogatories, *see* Ch. 194, *Discovery: Interrogatories*].

☐ Address the interrogatories to the party who is to respond to them, not to an officer, agent, or employee of the party [*see Mowry v. Superior Court (1962) 202 Cal. App. 2d 229, 233-235, 20 Cal. Rptr. 698* , disapproved on other grounds in *San Diego Professional Ass'n v. Superior Court (1962) 58 Cal. 2d 194, 203-204, 23 Cal. Rptr. 384, 373 P.2d 448]* .

☐ Service of interrogatories

☐ Prepare proof of service [*see Code Civ. Proc. § 1013a*; *see also* Ch. 518, *Service of Summons and Papers*].

☐ Serve the party to whom the interrogatories are directed [*see Code Civ. Proc. § 2030.080(a)*].

☐ Serve all other parties who have appeared [*see Code Civ. Proc. § 2030.080(b)*], unless:

☐ The court has eliminated that requirement [*see Code Civ. Proc. § 2030.080(b)*]; or

☐ They have signed a waiver [*see Code Civ. Proc. § 2030.080*].

☐ Simultaneously serve endorsed-filed copies of any related orders, e.g., an order shortening the time for service [*see Code Civ. Proc. § 2030.020*].

☐ Retention and filing of interrogatories

☐ Retain original interrogatories, with the original proof of service affixed, and the original of the response until six months after final disposition of the action [*see Code Civ. Proc. § 2030.280(b)*].

☐ After retention for the period described above, the documents may be destroyed unless the court, on motion of any partyand for good cause shown, orders that they be preserved for a longer period [*see Code Civ. Proc. § 2030.280(b)*].

[2] Responding Party's Checklist

☐ Preparing responses

☐ Prepare responses to interrogatories in accordance with the format set forth in *Code Civ. Proc. § 2030.210 et seq.*].

☐ Obtain the signature of the party to whom the interrogatories are directed. The signature must be made under oath, unless the response contains only objections [*Code Civ. Proc. § 2030.250(a)*; *see* Ch. 572, *Verification*].

☐ Service of responses

☐ Serve the original of the response on the propounding party [*see Code Civ. Proc. § 2030.260*], following the procedure for serving interrogatories [x-ref].

☐ Unless there is a stipulation or order shortening or extending time, responses to interrogatories must be served within 30 days after service of the interrogatories [*Code Civ. Proc. § 2030.260(a)*].

☐ If the interrogatories were served by mail, the 30-day response period is extended as follows [*see Code Civ. Proc. § 1013(a)*; *Code Civ. Proc. § 2016.050*]:

☐ Five days if the address is within California.

☐ Ten days if the address is outside California but within the United States.

☐ Twenty days if the address is outside the United States.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewTortsNegligenceGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-85 California Forms of Pleading and Practice--Annotated § 85.41

§ 85.41 Deposition Notice

[1] Checklist of Party Taking Deposition

☐ Stipulation

☐ Obtain agreement of other parties, by telephone or letter to their attorneys, regarding the following [*Code Civ. Proc. § 2016.030*]:

☐ Person before whom deposition is to be taken.

☐ Time or place of deposition.

☐ Notice.

☐ Manner of taking deposition.

☐ Prepare written stipulation setting forth agreed terms [*see* generally Ch. 533, *Stipulations*].

☐ Submit original stipulation to all counsel involved for their signatures.

☐ Sign stipulation on behalf of party seeking deposition.

☐ Send copies of signed stipulation to all counsel for their files.

☐ Notice

☐ If deponent is a natural person, unless the court orders otherwise, set deposition to take place either [*Code Civ. Proc. §§ 2025.250(a), 2025.260*); *see generally* Ch. 193, *Discovery: Depositions*]:

☐ Within 75 miles of deponent's residence; or

☐ Within county in which action is pending, and within 150 miles of deponent's residence.

☐ If deponent is an organization that is party to action, set deposition to take place either [*see Code Civ. Proc. § 2025.250(b)*]:

☐ Within 75 miles of organization's principal executive or business office in California; or

☐ Within in county in which action is pending, and within 150 miles of principal executive or business office.

☐ If deponent is an organization that is not party to action, set deposition to take place either [*see Code Civ. Proc. § 2025.250(c)*]:

☐ If the organization has designated a principal executive or business office in California, then within 75 miles of that address, unless the organization consents to a more distant place.

☐ If the organization has not designated a principal executive or business office in California, then within county in which action is pending, or within 75 miles of any of its executive or business offices in California.

☐ Schedule oral deposition at least 10 days after service of notice of deposition, or 15, 20, or 30 days if deposition notice is served by mail [*see Code Civ. Proc. § 1013(a)*; *Code Civ. Proc. §§ 2016.050, 2025.270(a)*].

☐ A nonparty must be served with a deposition subpoena [*see Code Civ. Proc. §§ 2020.010 et seq., 2025.280(b)*); *see also* Ch. 193, *Discovery: Depositions*].

☐ Prepare notice of taking deposition of a party. The notice must include the following information:

☐ Address, date, and time of deposition [*Code Civ. Proc. § 2025.220(a)(1), (2)*].

☐ List of all parties or attorneys for parties on whom notice is being served, unless list is provided on accompanying proof of service [*Code Civ. Proc. § 2025.240(a)*].

☐ Name of each deponent, and address and telephone numbers, if known, of any nonparty deponent. If information is not known, provide a general description of nonparty deponent [*Code Civ. Proc. § 2025.220(a)(3)*].

☐ If deponent is not natural person, description of matters to be examined [*Code Civ. Proc. § 2025.230*].

☐ Specification of materials or category of materials to be produced by deponent [*Code Civ. Proc. § 2025.220(a)(4)*].

☐ Any intention to record testimony by audiotape or videotape in addition to stenographic method [*Code Civ. Proc. §§ 2025.220(a)(5), 2025.330*].

☐ Any intention to record testimony by stenographic method through instant visual display of testimony [*Code Civ. Proc. §§ 2025.220(a)(5), 2025.330*].

☐ If so, a copy of deposition notice must be given to deposition officer [*Code Civ. Proc. § 2025.220(a)(5)*].

☐ Any intention to reserve right to use videotape of deposition of physician or other expert witness at trial [*Code Civ. Proc. §§ 2025.220(a)(6), 2025.620(d)*].

☐ Service

☐ Serve notice on every party who has appeared in action [*Code Civ. Proc. § 2025.240(a)*].

☐ Prepare proof of service, including proof of service for any orders served with notice [*Code Civ. Proc. § 1013a*; *see* Ch. 518, *Service of Summons and Papers*].

☐ If not included in notice of deposition, list in proof of service all parties or attorneys for parties on whom deposition notice is served [*Code Civ. Proc. § 2025.240(a)*].

☐ Filing of papers

☐ Keep original of deposition notice and proof of service until six months after final disposition of case. Do not file deposition notice with court, unless offered as relevant to court proceedings or ordered filed for good cause [*see Cal. Rules of Ct., Rule 3.250(a)(3), (b)*].

[2] Checklist of Person Responding to Deposition Notice

☐ Stay of deposition before deposition begins

☐ If appropriate, serve objections to deposition notice; and move to quash deposition notice and stay taking of deposition [*see Code Civ. Proc. § 2025.410*].

☐ If appropriate, seek order staying taking of deposition; simultaneously move for protective order [*see Code Civ. Proc. §§ 2025.270, 2025.420*].

☐ Responses when deposition held

☐ If deposition is not stayed, the deponent must attend and testify as directed in the deposition notice or be subject to sanctions [*see Code Civ. Proc. § 2025.450*].

☐ If appropriate, demand that deposition officer suspend taking of testimony during deposition; and move for protective order [*Code Civ. Proc. §§ 2025.420, 2025.470*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsTortsNegligenceGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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PART IV. PROCEDURAL CHECKLISTS

8-85 California Forms of Pleading and Practice--Annotated § 85.42

§ 85.42 Requests for Admissions

[1] Requesting Party's Checklist

☐ Prepare requests for admissions and proof of service [*see generally* Ch. 196, *Discovery: Requests for Admissions*].

☐ The requests must follow the format set out in *Code Civ. Proc. § 2033.060*.

☐ Attach copies of any documents that are the subject of the requests. If an admission of genuineness of documents is sought, attach copies of the documents to the request [*CodeCiv. Proc. § 2033.060(g)*].

☐ Prepare proof of service [*see Code Civ. Proc. § 1013a*; *see* Ch. 518, *Service of Summons and Papers*].

☐ Serve requests for admissions.

☐ Serve requests for admissions, with copies of any relevant documents, in the manner provided by *Code Civ. Proc. § 1010 et seq.* [*see Code Civ. Proc. § 2033.070*; *see* Ch. 158, *Service of Summons and Papers*].

☐ Serve the party to whom they are directed [*see Code Civ. Proc. § 2033.070*].

☐ Serve copies of requests on all parties to the action who have appeared [*see Code Civ. Proc. § 2033.070*].

☐ Simultaneously serve endorsed-filed copies of any related orders.

[2] Responding Party's Checklist

☐ If appropriate, seek a protective order [*see Code Civ. Proc. § 2033.080*; Ch. 195, *Discovery: Inspection of Tangible Evidence*].

☐ If request for admission of genuineness of document has been made, responding party may request that original documents be made available for inspection [*see Code Civ. Proc. § 2033.060(g)*].

☐ Prepare written responses, in the format set forth in *Code Civ. Proc. § 2033.210 et seq.*, as follows [*Code Civ. Proc. § 2033.220(b)*]:

☐ Admitting the request in whole or in part, either as expressed in request itself or as reasonably and clearly qualified by responding party [*Code Civ. Proc. § 2033.220(b)(1)*].

☐ Denying so much of the matter as is untrue [*Code Civ. Proc. § 2033.220(b)(2)*].

☐ Specifying so much of the matter as to the truth of which the respondent lacks sufficient information or knowledge [*Code Civ. Proc. § 2033.220(b)(3)*].

☐ Respondent must also state that reasonable inquiry has been made, and that the information known or readily obtainable is insufficient to enable that party to admit the matter [*Code Civ. Proc. § 2033.220(c)*].

☐ Stating objections [*see Code Civ. Proc. §§ 2033.030-2033.060, 2033.210*].

☐ The responding party must sign the response under oath, unless the response contains only objections [*Code Civ. Proc. § 2033.240(a)*].

☐ Service of responses

☐ Unless there is a stipulation or order extending time for response, a party must respond within 30 days of the date of service of requests [*see Code Civ. Proc. § 2033.250(a)*].

☐ If request was served by mail, the 30-day response period is extended five days if address is within California, 10 days if address is outside California but within United States, or 20 days if address is outside United States [*see Code Civ. Proc. § 1013(a)*; *Code Civ. Proc. § 2016.050*].

☐ Serve the original responses on the requesting party. In addition, serve all parties to the action with a copy [*see Code Civ. Proc. § 2033.250(a)*].

☐ The procedure for serving responses to requests for admissions is the same as that for serving the requests for admissions [*see § 85.42[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewTortsNegligenceGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-85 California Forms of Pleading and Practice--Annotated § 85.43

§ 85.43 Demand for Inspection and Production of Documents and Tangible Things

[1] Demanding Party's Checklist

☐ Prepare demand for production and inspection, copying, photographing, testing, and/or sampling documents, tangible things, land or other property, or electronically stored information [*see Code Civ. Proc. § 2031.010 et seq.*; for a Notice of Demand for Permission to Inspect, Test and Photograph, *see § 85.64*; *see generally* Ch. 195, *Discovery: Inspection of Tangible Evidence*].

☐ Prepare proof of service of the demand [*see Code Civ. Proc. § 1013a*; *Code Civ. Proc. § 2031.290(b)*].

☐ Serve demand and proof of service on party to whom it is directed, and copies of demand and proof of service on all parties who have appeared in action [*see Code Civ. Proc. § 2031.040*].

☐ Retain the original of the demand, with the original proof of service affixed, and the original of the response until six months after final disposition of the action. The documents may then be destroyed unless the court, on motion of any party and for good cause shown, orders that they be preserved for longer period [*see Code Civ. Proc. § 2031.290(b)*].

[2] Responding Party's Checklist

☐ Respond to the demand by stating the following if appropriate [*see Code Civ. Proc. § 2031.220*]:

☐ State compliance with demand [*see Code Civ. Proc. § 2031.210(a)(1)*].

☐ Assert inability to comply with demand [*see Code Civ. Proc. § 2031.210(a)(2)*].

☐ Affirm that a diligent search and reasonable inquiry has been made in an effort to comply.

☐ Specify whether the item sought has never existed, has never been in respondent's custody, is no longer in respondent's custody, or has been destroyed, lost, misplaced, or stolen.

☐ Set forth name and address of any natural person or organization known or believed to have possession, custody, or control of the item.

☐ Object to the demand in whole or in part [*see Code Civ. Proc. § 2031.210(a)(3)*].

☐ Identify with particularity any document (or other thing) to which an objection is made.

☐ Set forth clearly the extent of, and the specific ground for the objection.

☐ Specific the application of any privilege.

☐ Specifically assert any work product privilege.

☐ Prepare proof of service of response [*see Code Civ. Proc. § 1013a*; *Code Civ. Proc. § 2031.290(b)*; Ch. 158, *Service of Summons and Papers*].

☐ Service of papers

☐ Serve original response on demanding party and copies of response of all other parties who have appeared in the action [*see Code Civ. Proc. § 2031.260*].

☐ Serve documents within 30 days from date of service of demand, unless court has shortened or extended time [*see Code Civ. Proc. § 2031.260*; *see also Code Civ. Proc. § 1013(a)*; *Code Civ. Proc. § 2016.050*(service by mail)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionTortsNegligenceGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-85 California Forms of Pleading and Practice--Annotated § 85.44

§ 85.44 Physical Examination of Plaintiff Alleging Personal Injuries

[1] Defendant's Checklist

☐ Arrange date of examination with physician [*see Code Civ. Proc. § 2032.220(d)*].

☐ The date of the plaintiff's examination must be at least 30 days after service of demand, unless court shortened time pursuant to motion [*see Code Civ. Proc. § 2032.220(d)*; *see also Code Civ. Proc. § 1013(a)*; *Code Civ. Proc. § 2016.050* (service by mail)].

☐ Prepare documents.

☐ Set forth time, place, manner, conditions, scope, and nature of examination [*see Code Civ. Proc. § 2032.220(c)*].

☐ Set forth identity and specialty, if any, of physician who will perform examination [*see Code Civ. Proc. § 2032.220(c)*].

☐ Serve demand.

☐ Prepare proof of service [*see Code Civ. Proc. § 1013a*; Ch. 518, *Service of Summons and Papers*].

☐ Serve copies of the demand and proof of service on plaintiff and all parties who have appeared in the action [*see Code Civ. Proc. § 2032.220(e)*; *see also Code Civ. Proc.*

§ 1010 et seq., Ch. 518, *Service of Summons and Papers*].

☐ Retention of documents

☐ Retain original demand, with original proof of service affixed, and original response until final disposition of action [*see Code Civ. Proc. § 2032.260(b)*].

☐ The original may be destroyed after final disposition of action, unless the court, on motion of any party and for good cause shown, orders that originals be preserved for longer period [*see Code Civ. Proc. § 2032.260(b)*].

[2] Plaintiff's Checklist

☐ Prepare written response to demand, stating the following if appropriate [*see Code Civ. Proc. § 2032.230(a)*]:

☐ Examinee will comply with the demand as stated [*see § 85.64[2]*].

☐ Examinee will comply with the demand as specifically modified by him or her.

☐ Examinee refuses, for reasons specified, to submit to the examination [*see § 85.64[3]*].

☐ Serve response.

☐ Prepare proof of service [*see Code Civ. Proc. § 1013a, see also* Ch. 518, *Service of Summons and Papers*].

☐ Serve papers within 20 days after service of demand, unless court has shortened or extended time on filing of motion [*see Code Civ. Proc. § 2032.230(b)*; *see also Code Civ. Proc. § 1010 et seq.*; Ch. 518, *Service of Summons and Papers*].

☐ Serve original response on defendant [*see Code Civ. Proc. § 2032.230(b)*; *see also Code Civ. Proc. § 1010 et seq.*; Ch. 518, *Service of Summons and Papers*].

☐ Serve copies of response to all parties who have appeared in action [*see Code Civ. Proc. § 2032.230(b)*; *see also Code Civ. Proc. § 1010 et seq.*; Ch. 518, *Service of Summons and Papers*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsTortsNegligenceGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-85 California Forms of Pleading and Practice--Annotated § 85.45

§ 85.45 Demand for Exchange of Information Concerning Expert Witnesses

[1] Checklist of Party Demanding Exchange

☐ Establish date for exchange of expert witness information.

☐ The date of exchange must be 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date, unless the court, on motion and a showing of good cause, orders an earlier or later date [*see Code Civ. Proc. § 2034.230(b)*].

☐ Prepare written demand for exchange of list of expert witnesses, or for exchange of expert's report or writing, including the following information [*see Code Civ. Proc. § 2034.230*; *see also Code Civ. Proc. § 2034.210* (information demanded, such as witness list)].

☐ Below title of the case, identify party making the demand.

☐ State that the demand is make pursuant to *Code Civ. Proc. § 2034.010 et seq.*.

☐ Specify the date for the exchange.

☐ Service

☐ Serve the demand on all parties who have appeared in the action [*see Code Civ. Proc. § 2034.240*].

[2] Checklist of Responding Party

☐ If appropriate, move for protective order [*see Code Civ. Proc. § 2034.250*].

☐ If not moving for protective order, prepare response setting forth either of the following [*see Code Civ. Proc. § 2034.260(b)*; *see § 85.64*]:

☐ List setting forth name and address of any person whose expert opinion that party expects to offer in evidence at trial [*see § 85.66*].

☐ Statement that responding party does not presently intend to offer testimony of any expert witness.

☐ If witness is one described in *Code Civ. Proc. § 2034.210(b)*, include expert witness declaration [*see Code Civ. Proc. § 2034.260(c)*; *see also Code Civ. Proc. § 2034.210(b)*].

☐ If demand was for production of expert's reports and writings, obtain all discoverable reports and writings for the exchange [*Code Civ. Proc. § 2034.270*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryTortsNegligenceGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-85 California Forms of Pleading and Practice--Annotated §§ 85.46-85.59

[Reserved]

§§ 85.46[Reserved]

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PART V. FORMS

8-85 California Forms of Pleading and Practice--Annotated § 85.60

§ 85.60 Written Interrogatories [Code Civ. Proc. § 2030.010 et seq.]--Judicial Council Form Interrogatories [Code Civ. Proc. § 2033.710 et seq.]--General Form

[1] FORM Written Interrogatories [Code Civ. Proc. § 2030.010 et seq.]--Judicial Council Form Interrogatories [Code Civ. Proc. § 2033.710 et seq.]--General Form

Click here to view image.

[2] Use of Form

This form is a reproduction of the Judicial Council's form interrogatories for use in any civil action in superior court based on personal injury, property damage, wrongful death, or fraud. Use of this form is optional [*Code Civ. Proc. § 2033.740(a)*; *see also* Section 2(a) of the form itself]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Drafted interrogatories may be used in lieu of or in addition to the Judicial Council's form interrogatories. However, interrogatories other than the Judicial Council's form interrogatories may not contain subparts and are subject to other limitations [*Code Civ. Proc. § 2030.060(f)*; *see* Ch. 190, *Depositions and Discovery*].

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8-85 California Forms of Pleading and Practice--Annotated § 85.61

§ 85.61 Compelling Attendance at Deposition

[1] Notice of Deposition to Defendant [Code Civ. Proc. § 2025.220(a)]

[a] FORM Notice of Deposition to Defendant [Code Civ. Proc. § 2025(d)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff, vs. _____ [*name*],	)	NO. _____
Defendant.	)	NOTICE OF DEPOSITION TO DEFENDANT
	)	
	)	

_____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, at _____[*time*], on _____[*date*], at _____[*address*], telephone number _____[*number*], Plaintiff, _____[*name*], by and through his/her attorneys, will take the deposition of Defendant, _____[*name*], upon oral examination, the deposition to continue from day to day until completed, Sundays and holidays excepted.

If an interpreter will be required for any or all of the deposition, please notify Plaintiff's counsel immediately of the language spoken by the deponent.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[b] Use of Form

This form is used to notify the defendant of a deposition. The deposition of a party may be taken on proper service of a deposition notice [*see Code Civ. Proc. § 2025.210 et seq.*]. The requirements of a deposition notice are set forth in *Code Civ. Proc. §§ 2025.220, 2025.230*. This form illustrates a notice to defendant, but can be modified for use to notify any party deponent.

[c] Cross References

For additional forms of notice of deposition, forms for compelling attendance, and illustrations of forms of deposition subpoena directed at nonparties, see Ch. 193, *Discovery: Depositions*

[2] Defendant's Motion to Compel Plaintiff's Attendance at Deposition [Code Civ. Proc. § 2025.480]

[a] FORM Defendant's Motion to Compel Plaintiff's Attendance at Deposition [Code Civ. Proc. § 2025(o)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	))))))))))	NO. _____ NOTICE OF MOTION AND MOTION FOR ORDER COMPELLING ATTENDANCE AT DEPOSITION, AND FOR SANCTIONS, SUPPORTING DECLARATION OF _____ (*name*), AND MEMORANDUM OF POINTS AND AUTHORITIES [Telephone Appearance] Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

_____

To each plaintiff named above, and to the attorney of record for each such party:

NOTICE IS HEREBY GIVEN that, on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division)_____ of] this court, located at _____[*street address*], _____[*city*], _____ [*identify party, e.g.,* defendant] _____[*name*] will, and hereby does, move for an order compelling the attendance of Plaintiff, _____[*name*] at deposition, and for an order granting the moving party sanctions against Plaintiff, _____[*name*] and his/her attorney, _____[*name*]. The

motion will be made on the grounds that the Defendant is entitled to take Plaintiff's deposition pursuant to *California Code of Civil Procedure Section 2025.010*. This motion is made on the further ground that Plaintiff _____[*name*] has failed to attend his/her properly noticed deposition, and has refused to pay charges incurred for the court reporter.

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s)*] and the memorandum of points and authorities served and filed herewith, on the records and fileherein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTUAL BACKGROUND
[*Add memorandum of points and authorities setting forth factual background supporting motion*]
II. STATUTORY AUTHORITY

California Code of Civil Procedure Section 2025.010 provides for oral Depositions of a party:

"Any party may obtain discovery ... by taking in California the oral deposition of any person, including any party to the action ..."

California Code of Civil Procedure Section 2025.480(f) provides for sanctions where a party fails to submit to a properly noticed deposition:

"The court shall impose a monetary sanction under ... any party, person, or attorney who unsuccessfully makes or opposes a motion to compel answer or production, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust."
III. SANCTIONS ARE APPROPRIATE

Plaintiff, _____[*name*], has failed to attend his/her properly notice Depositions. Defendant has incurred reasonable attorneys fees and costs as the result of Plaintiff's failure to attend his/her properly noticed Depositions. This request for sanctions is based on the fact that the failure to submit to this discovery was willful, in the sense that Plaintiff understood his/her obligation, had the ability to comply, and failed to comply [*Fred Howland Co. v. Superior Court of Los Angeles County (1966) 244 Cal. App. 2d 605, 610-611, 53 Cal. Rptr. 341]* . Finally, there is no substantial justification or other circumstances which make the imposition of sanctions unjust.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____[*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for Defendant _____ (*name*)].

2. Defendant, _____[*name*], is seeking an Order from this Court compelling Plaintiff, _____[*name*], to participate in discovery.

3. On _____[*date*], _____[*attorney for defendant, or firm name*] properly noticed Plaintiff, _____[*name*], Deposition to be taken on _____[*date*]. A true and correct copy of the Notice of Deposition is attached hereto as Exhibit "A".

4. Subsequently, the deposition was rescheduled at Plaintiff's attorney's request. A true and correct copy of _____[*name of plaintiff's attorney*]'s, _____[*date of correspondence from plaintiff's attorney*] correspondence is attached hereto as Exhibit "B."

5. The deposition was subsequently rescheduled to be taken on _____ [*date*]. A true and correct copy of _____'s _____ [*name of defendant's attorney*], _____ [*date of correspondence from defendant's attorney*] correspondence is attached hereto to Exhibit "C."

6.On _____[*date*], Plaintiff and his/her attorneys failed to appear for the properly noticed Deposition.

7.On _____[*date*], _____[*name of defendant's attorney*], requested that Plaintiff pay the "no show" fee of $_____[*amount of fee*], and informed Plaintiff's attorneys that if the "no show" fee was not paid within 10 days of the date of the letter, that a Motion to Compel with a Request for Costs and Sanctions would be forthcoming. A true and correct copy of the _____[*date*] correspondence is attached hereto as Exhibit "E."

8.A true and correct copy of the "no show" bill in the amount of $_____[*amount of fee*] is attached hereto as Exhibit "F."

9.Defendant, _____[*name*], bases his/her request for sanctions in the amount of $_____[*amount of sanctions*] on the following: _____[*itemize fees*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

_____ [*typed name*]

[b] Use of Form

This form contains a motion to compel the plaintiff's attendance at a deposition, a memorandum of points and authorities, andsupporting declaration [*Code Civ. Proc. § 2025.480*]. It illustrates the defendant's motion to compel the plaintiff to attend a deposition, but may be modified to fit the facts of the case.

A memorandum of points and authorities must be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For general discussion and forms, see Ch. 417, *Points and Authorities* .

[c] Cross References

For additional forms for compelling attendance and compelling a deponent to respond, see Ch. 193, *Discovery: Depositions*

For discussion of law and motion procedure in general, see Ch. 372, *Motions and Orders*

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Volume 8: Automobiles-Chs. 80-92
Chapter 85 AUTOMOBILES: DISCOVERY
PART V. FORMS

8-85 California Forms of Pleading and Practice--Annotated § 85.62

§ 85.62 Request for Admissions [Code Civ. Proc. § 2033.010 et seq.]

[1] FORM Request for Admissions [California Code of Civil Procedure Section 2033.010]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff, vs. _____ [*name*],	)	NO. _____
Defendant.	)	REQUEST FOR ADMISSIONS
	)	
	)	

_____

TO DEFENDANT AND HIS/HER ATTORNEY OF RECORD:

Pursuant to *California Code of Civil Procedure Section 2033.010 et seq.*, you are hereby requested to admit the truth of the following facts or assertions. For each response that is not a full and complete admission of the truth of the statement asserted, you are required to respond pursuant to the requirements of Judicial Form Interrogatory 17.1, accompanying this request for admissions. Your response is due within thirty days from the date of service of this request for admissions.

DEFINITION

1. The subject ACCIDENT refers to the accident described in Plaintiff's Complaint which is the subject matter of this action.

2. YOU refers to the responding party set forth above.

YOU ARE REQUESTED TO ADMIT THAT:

1. YOU are 100 per cent at fault for the subject accident.

2. YOU caused the subject ACCIDENT which occurred on _____[*site of collision*] in _____[*city*], _____[*county*], State of California.

3. At the time of the subject ACCIDENT, YOU were operating a _____[*identify vehicle*].

4. No other person or party in any way caused or contributed to the subject ACCIDENT.

5. Plaintiff _____'s [*name*] medical care and treatment following the subject accident was reasonable and necessary.

6. Plaintiff _____'s [*name*] expenses incurred for medical care and treatment following the subject accident was reasonable and necessary.

7. Plaintiff _____'s _____[*name*] medical care and treatment following the subject ACCIDENT was the result of injuries caused by the subject ACCIDENT.

8. Plaintiff _____[*name*] suffered damages and injuries as the sole, and primary active negligence of defendant _____[*name*].

9. Plaintiff _____[*name*] used reasonable care and diligence to mitigate and minimize Plaintiff's damages.

10. Plaintiff _____[*name*] was not comparatively negligent.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[2] Use of Form

This form may be used by the plaintiff to request certain factual admissions by the defendant. While this form requests that the defendant admit to the specified matters of fact, a request for admission may also request that the party admit the genuineness of specified documents, opinion relating to fact, or application of law to fact.

This form is served with interrogatories. The example includes a clause requiring the defendant to respond pursuant to the requirements of Judicial Council Form Interrogatory 17.1, with regard to any non-admitted statement. That interrogatory appears in Judicial Council Form FI-120, which is illustrated and discussed in Ch. 194, *Discovery: Interrogatories* .

If this form is served with interrogatories drafted by the attorney [*see § 85.60*], rather than the Judicial Council form, this form should be modified to so reflect.

Requirements for requests for admissions are set forth in *Code Civ. Proc. §§ 2033.030-2033.070* [*see generally* Ch. 196, *Discovery: Requests for Admissions*].

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8-85 California Forms of Pleading and Practice--Annotated § 85.63

§ 85.63 Request for Production of Documents [Code Civ. Proc. § 2031.010 et seq.]

[1] FORM Request for Production of Documents [Code Civ. Proc. § 2031]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff, vs. _____ [*name*],	)	NO. _____
Defendant.	)	PLAINTIFF'S REQUEST FOR PRODUCTION OF
	)	DOCUMENTS, SET ONE
	)	

_____

PROPOUNDING PARTY: Plaintiff

RESPONDING PARTY: Defendant

SET NUMBER: One

YOU ARE HEREBY REQUESTED under *California Code of Civil Procedure Section 2031.010* to provide this propounding party with a list and identifying description of all documents, papers, books, accounts, letters, photographs, objects or other tangible things specified hereto, in your possession or control.

YOU ARE ALSO HEREBY REQUESTED under *California Code of Civil Procedure Section 2031.010*, to produce for inspection and copying, the documents identified in your written response. The documents shall be produced and sent to _____[*firm address*] within 35 days from the date of the mailing of this request.

The documents described above are currently in the possession, custody or control of Defendant or his/her attorney, and

are not privileged, and are relevant and germane to the subject lawsuit, or are reasonably calculated to lead to the discovery of admissible evidence in this action.

If you refuse to produce any document requested on the grounds that it is privileged, or on any other ground, you are directed to identify such document by its title, date, author, the identity of each person or entity to whom the original or a copy was sent, its substance and the identity of each person who has custody of it so that this requesting party and/or a court of competent jurisdiction can determine the extent of said privilege.

DEFINITION

1.The term "accident" refers to the accident described in Plaintiff's Complaint which is the subject matter of this action.

2.The terms "documents" and "records" include writings as defined in *California Evidence Code Section 250*.

PRODUCTION OF DOCUMENTS

1.The declaration page and/or face sheet that lists the insurance policy and the limits of coverage on the vehicle driven by the insured and/or any insurance policy to which there is coverage for the subject accident.

2.Any and all photographs of the vehicles involved in the accident.

3.Any and all photographs of the accident scene depicting any place, object, or individual involved in the accident.

4.Any and all written or recorded statements relating to the accident of the parties regarding the subject accident.

5.Any and all repair bills or estimates concerning damage to any vehicles involved in the accident.

6.Any and all documents evidencing ownership of the vehicle driven by the Defendant.

7.Any and all witness statements or statements of the plaintiff regarding the subject accident.

8.All police reports regarding the accident.

DATED: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[2] Use of Form

This form is used to request the production of documents by the defendant [*see Code Civ. Proc. § 2031.010 et seq.*]. For discussion of the discovery of documents, see *§ 85.10[4]*.

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8-85 California Forms of Pleading and Practice--Annotated § 85.64

§ 85.64 Notice of Demand for Permission to Inspect, Test, and Photograph [Code Civ. Proc. § 2031.010 et seq.]

[1] FORM Notice of Demand for Permission to Inspect, Test, and Photograph [Code Civ. Proc. § 2031.010 et seq.]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff, vs. _____ [*name*],	)	NO. _____
Defendant.	)	NOTICE OF DEMAND FOR PERMISSION TO IN-
	)	SPECT, TEST AND PHOTOGRAPH
	)	[*Code Civ. Proc. § 2031.010 et seq.*]

_____

REQUESTING PARTY: _____ [Plaintiff *or* Defendant], _____[*name*]

RESPONDING PARTY: _____ [Plaintiff *or* Defendant], _____[*name*]

_____ [Plaintiff *or* Defendant] demands permission to inspect, test and/or photograph the _____ [*describe make of vehicle, e.g.,* 1997 Honda Accord], License # _____ involved in the accident on _____[*date*].

_____[*Plaintiff or Defendant*] requests that the inspection on the above-mentioned property take place on _____[*date*], at _____[*time*].

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*Plaintiff or Defendant*]

[2] Use of Form

This form may be used to obtain permission to inspect, test and/or photograph tangible things in the adverse party's property, such as the vehicle involved in the collision. For discussion related to the production of documents and other tangible things, see *§ 85.10[4]*.

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8-85 California Forms of Pleading and Practice--Annotated § 85.65

§ 85.65 Physical Examination of Plaintiff

[1] Demand for Initial Physical Examination of Plaintiff [Code Civ. Proc. § 2032.220]

[a] FORM Demand for Initial Physical Examination of Plaintiff [Code Civ. Proc. § 2032.220]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff, vs. _____ [*name*],	)	NO. _____
Defendant.	)	DEMAND FOR INITIAL PHYSICAL EXAMINA-
	)	TION OF PLAINTIFF SEEKING DAMAGES FOR
	)	PERSONAL INJURIES
		[*Code Civ. Proc. § 2032.220*]

_____

Defendant _____[*name*] hereby demands, pursuant to *Code of Civil Procedure Section 2032.220*, that plaintiff _____[*name*] present himself/herself on _____[*date*], at _____[*time*], at the offices of Dr. _____ [*name, and specialty, if any, of examiner*] at _____[*address*] and then and there submit to a physical examination to be conducted by Dr. _____[*name*] to determine _____ [*specify condition in question, e.g.,* the extent and nature of any skeletal, muscular, soft tissue, or nerve damage or injury to, or abnormality of, plaintiff's neck, arms, shoulders, and back, including, in particular, any loss of normal range of motion].

The nature, scope, conditions, and manner of the examination are to be as follows:

[*SPECIFY, in as many separately numbered subparagraphs as necessary, the nature, manner, scope, and conditions of the examination demanded, for example*.]

1.The examining _____ [*specialty of examiner, e.g.*, physician] may ask, and _____ [*name of plaintiff*] shall answer, questions relating to the nature and extent of the injuries alleged to have been sustained in the accident that is the subject matter of this action; present symptoms and conditions; medical history, including the manner in which the injuries were incurred; prior injuries and diseases; and _____'s [*name of plaintiff*] occupational history. There shall be no inquiry, other than isnecessary for purposes of diagnosis and evaluation of the injuries, symptoms, and conditions, into the conduct, events, or circumstances alleged to have produced or contributed to the happening of the accident.

2.The examining _____ [*specialty of examiner, e.g.*, physician] may use, and _____ [*name of plaintiff*] shall cooperate in the use of, accepted diagnostic instruments, tests, manipulations, and techniques, including the making of X-ray pictures of _____'s [*name of plaintiff*] _____ [*specify limited area of body to be x-rayed, e.g.*, left shoulder, arm, and hand] and _____[*specify other procedures such as electroencephalography, myography, electrocardiography, etc., if appropriate*].

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[b] Use of Form

This form is a demand for a physical examination of a plaintiff who is seeking damages for physical injuries [*see § 85.11*; *see also Code Civ. Proc. § 2032.220*; *see generally* Ch. 197, *Discovery: Physical and Mental Examinations*].

[2] Response Agreeing to Demand [Code Civ. Proc. § 2032.230]

[a] FORM Response Agreeing to Demand [Code Civ. Proc. § 2032.230]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff, vs. _____ [*name*],	)	NO. _____
Defendant.	)	PLAINTIFF'S RESPONSE TO DEMAND FOR INI-
	)	TIAL PHYSICAL EXAMINATION
	)	[*Code Civ. Proc. § 2032.230*]

_____

To defendant _____[*name*]:

[*EITHER*]

In response to defendant _____'s [*name of defendant*] demand of _____[*date*], that

plaintiff _____[*name*] submit to a physical examination, plaintiff states that he/she will comply with the demand _____ [as stated *or* with the following modifications: _____ (*specify, e.g.*, he/she will not submit to the X rays because they are duplicative of the one's taken on _____ (*date*), by _____ (*name*) and made available to defendant (for duplication) on _____ (*date*). For plaintiff to submit to additional X rays at this time would subject plaintiff to unnecessary risk)].

[*OR*]

In response to defendant _____'s [*name of defendant*] demand of _____[*date*], that plaintiff _____[*name*] submit to a physical examination, plaintiff states that he/she refuses to comply with the demand because _____ [*specify reasons for refusal, e.g.*, he/she has already been examined at the demand of defendant _____ (*name*)].

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[b] Use of Form

This form is a response for use by a plaintiff in a personal injury action agreeing to comply with defendant's demand to submit to amedical examination [*see § 85.11*; *see also Code Civ. Proc. § 2032.230*]. The plaintiff may respond that he or she will comply with the demand as stated, or will comply with the demand as modified, or to specify reasons for refusing to comply [*Code Civ. Proc. § 2032.230(a)*]. If the defendant believes the modification or refusal to comply is unwarranted, he or she may move for an order compelling compliance after he or she has first made a reasonable and good faith attempt to informally resolve the matter [*Code Civ. Proc. §§ 2016.040, 2032.250(a)*; for forms to compel compliance, *see* Ch. 197, *Discovery: Physical and Mental Examinations*].

[3] Response Objecting to Demand [Code Civ. Proc. § 2032.230]

[a] FORM Response Objecting to Demand [Code Civ. Proc. § 2032.230]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff, vs. _____ [*name*],	)	NO. _____
Defendant.	)	PLAINTIFF'S OBJECTION TO DEFENDANT'S
	)	DEMAND FOR PHYSICAL EXAMINATION
	)	

_____

TO DEFENDANTS _____ [*name(s)*] AND THEIR ATTORNEY OF RECORD:

Pursuant to *Code of Civil Procedure Section 2032.220(a)*, the physical examination is to be conducted at a location

within 75 miles of the residence of the examinee. Plaintiff, _____[*name*] objects to the demand to submit to a physical examination in San Diego which is in excess of 75 miles from plaintiff's residence.

DATED: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[b] Use of Form

This form is a sample of plaintiff's objection to defendant's demand to submit to a medical examination [*see § 85.11*; *see also Code Civ. Proc. §§ 2032.220(a), 2032.230(a)*]. The basis for the objection in this illustration is the travel distance. The grounds for objection may be modified to fit the facts of the case.

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8-85 California Forms of Pleading and Practice--Annotated § 85.66

§ 85.66 Disclosure of Expert Witnesses

[1] Designation of Expert Witnesses [Code Civ. Proc. § 2034.210(a)]

[a] FORM Designation of Expert Witnesses [Code Civ. Proc. § 2034.210(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff, vs. _____ [*name*],	)	NO. _____
Defendant.	)	DESIGNATION OF EXPERT WITNESSES
	)	
	)	

_____

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

Plaintiff submits the following list of expert witnesses who may be called at the time of trial. Plaintiff hereby reserves the right to modify the within list by adding or deleting names or subject matter as necessitated by evaluation or re-evaluation of facts between now and the time of trial, as well as evaluation or re-evaluation of the contentions and opinions of defendants made in answer to pending interrogatories and/or the contentions and opinions of defendants' experts as they may be expressed in the future. Subject to the above qualifications, plaintiff elects the following expert witnesses: _____[*list names and addresses of plaintiff's experts*]

DATED: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[b] Use of Form

This form is for designation of expert witnesses. It should be provided in response to a demand for an exchange of expert witness information [*see Code Civ. Proc. § 2034.210(a)*; *see also § 85.12[1]*]. This form should be submitted with the expert witness declaration form, set forth in *§ 85.66[2]*.

[2] Expert Witness Declaration [Code Civ. Proc. §§ 2034.210(b), 2034.260(c)]

[a] FORM Expert Witness Declaration [Code Civ. Proc. §§ 2034.210(b), 2034.260(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff, vs. _____ [*name*],	)	NO. _____
Defendant.	)	EXPERT WITNESS DECLARATION
	)	
	)	

_____

I, _____[*name of demanding party's attorney*], declare:

1._____[*Name of expert*] [*if expert is a party, specify status, e.g.:*, defendant in the above-entitled action,] is qualified to testify as an expert in the field of _____[*specify area of expertise*] on the basis of his/her _____ [*list degrees, experience, and any other basis for qualification as an expert*].

2.The general substance of the testimony that _____ [*name of expert*] is expected to give is that _____[*set forth brief narrative statement of general substance of testimony*].

[*REPEAT, in successively numbered paragraphs, setting forth the qualifications and general substance of the expected testimony for each expert witness, then CONTINUE*]

3._____ [*Name(s) of expert(s)*] has/have agreed to testify at the trial.

4._____ [*Name(s) of expert(s)*] will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning any opinion and its basis.

5.The hourly fee(s) of _____ [*name of expert or* each expert] for providing deposition testimony and for consulting with the retaining attorney is/are as follows:

Name	Fee
_____	_____

_____
_____ _____
_____
_____ _____
_____

6.The daily fee(s) of _____ [*name of expert or* each expert] for providing deposition testimony and for consulting with the retaining attorney is/are as follows:

Name	Fee
_____	_____
_____	_____
_____	_____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

_____ [*typed name*]

[b] Use of Form

This form of declaration is for use by any party to respond to a demand for the exchange of information concerning expert witnesses. It is used when the responding party is the expert or has employed or retained an expert for the purpose of forming and expressing an opinion in anticipation of the litigation, or in preparation for the trial of the action [*see Code Civ. Proc. §§ 2034.210(b), 2034.260(c)*].

The declaration must be made under penalty of perjury. It must be signed only by the attorney for the party designating the expert, or by that party if that party has no attorney [*Code Civ. Proc. § 2034.260(c)*].

[c] Contents of Declaration

The expert witness declaration must include the following items [*Code Civ. Proc. § 2034.260(c)*]:

- A brief narrative statement of the qualifications of each expert.
- A brief narrative statement of the general substance of the testimony that the expert is expected to give.
- A representation that the expert has agreed to testify at the trial.

- A representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial.

- A statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney.

An expert's testimony may be excluded as to any matter not included in the narrative statement describing the substance of the testimony thatexpert is expected to give [*see Bonds v. Roy (1999) 20 Cal. 4th 140, 142-143, 145-146, 149, 83 Cal. Rptr. 2d 289, 973 P.2d 66* ; *see also § 85.12[1][c]*].

PRACTICE TIP:

Disclose Treating Physician as a "Retained" Expert. If the treating physician is "retained," and you have not disclosed him or her properly, then the treating physician's opinion and costs cannot come in, possibly seriously undermining your case. Therefore, disclose the treating physician or expert as a possible witness, even if he or she is not retained. If the witness is not retained, specify that fact. Disclose everything about which a nonretained expert might possibly testify and all information required under *Code Civ. Proc. § 2034.210 et seq.*, as if the physician were retained. *Dona E. Cohn, Editorial Consultant.*

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Volume 8: Automobiles-Chs. 80-92
Chapter 86 AUTOMOBILES: PRETRIAL MOTIONS AND SETTLEMENT NEGOTIATIONS

8-86 California Forms of Pleading and Practice--Annotated 86.syn

§ 86.syn Synopsis to Chapter 86: AUTOMOBILES: PRETRIAL MOTIONS AND SETTLEMENT NEGOTIATIONS

§ 86.01 Scope of Chapter

§ 86.02 Cross References

[1] Related Chapters in This Volume

[2] Other Related Chapters

§§ 86.03--86.09 [Reserved]

§ 86.10 Prelitigation Considerations

[1] Policy Limits

[2] Demand Letter

[3] Arbitration

[4] Mediation

[5] Negotiations in Automobile Cases

§ 86.11 Motions and Demurrers by Defendant

[1] Motion to Quash Service of Summons

[2] Motion to Set Aside Default

[3] Summary Judgment Motion

[4] Motion to Dismiss

[5] Motions to Strike

[6] Demurrer to Complaint

[7] Motions in Limine

§ 86.12 Settlement

[1] Initial Settlement Demand

[2] Settlement Offer Pursuant to Code Civ. Proc. § 998

[a] Offer to Compromise Under Code Civ. Proc. § 998

[i] Offer Ten Days Prior to Trial or Arbitration

[ii] Acceptance of Offer

[iii] Rejection of Offer

[A] Offer Not Accepted Is Withdrawn

[B] Offer Made by Defendant

[C] Offer Made by Plaintiff

[b] Effect of Plaintiff's Offer on Prejudgment Interest in Personal Injury Action: Civ. Code § 3291

[3] Settlement With Fewer Than All Tortfeasors

[a] Effect on Defendants

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§§ 86.13--86.29 [Reserved]

§ 86.30 Related Texts From Lexis/Nexis

§ 86.31 State Statutes

[1] Summary Judgment

[2] Dismissal

[3] Motion to Strike

[4] Demurrer

[5] Settlement

§ 86.32 Internet References

§§ 86.33--86.39 [Reserved]

§ 86.40 Plaintiff's Checklist

[1] Settlement Offer to Defendant

[2] Acceptance of Defendant's Settlement Offer

§ 86.41 Defendant's Checklist

[1] Settlement Offer to Plaintiff

[2] Acceptance of Plaintiff's Settlement Offer

§§ 86.42--86.49 [Reserved]

§ 86.50 Settlement Pursuant to Code Civ. Proc. § 998

[1] Offer to Compromise Before Commencement of Trial Pursuant to Code Civ. Proc. § 998

[a] FORM

[b] Use of Form

[c] Cross References

[2] Notice of Acceptance of Offer Made Pursuant to Code Civ. Proc. § 998

[a] FORM

[b] Use of Form

§ 86.51 Settlement Agreement and Release

[1] FORM

[2] Use of Form

[3] Cross References

§ 86.52 Motions in Limine

[1] Exclusion of Medical Bills and Medical Records Absent Proper Foundation

[a] FORM

[b] Use of Form

[c] Cross References

[2] Exclusion of Evidence of Liability Insurance

[a] FORM

[b] Use of Form

[c] Cross References

[3] Exclusion of Named Expert Witnesses

[a] FORM

[b] Use of Form

[c] Cross References

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§ 86.01 Scope of Chapter

This chapter discusses several prelitigation aspects of an automobile case, including insurance policy limits, the prospective plaintiff's demand letter to defendants, negotiation considerations, and mediation and arbitration [*see § 86.10*]. It also discusses some common trial motions [*see § 86.11*], and settlement offers under *Code Civ. Proc. § 998*[*see § 86.12*]. The Research Guide [*see § 86.30* et seq.] collects relevant law and references.

The chapter includes Procedural Checklists for both the plaintiff [*see § 86.40*] and defendant [*see § 86.41*].

The chapter provides the following forms:

- *Code Civ. Proc. § 998* settlement offer [*see § 86.50[1]*] and a notice of acceptance of an offer [*see § 86.50[2]*].
- Settlement and release offer [*see § 86.51*].
- Motions in limine for the following:
  - Exclusion of medical bills and medical records absent proper foundation [*see § 86.52[1]*].
  - Exclusion of evidence of liability insurance [*see § 86.52[2]*].
  - Exclusion of named expert witnesses [*see § 86.52[3]*].

Legal Topics:

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

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8-86 California Forms of Pleading and Practice--Annotated § 86.02

§ 86.02 Cross References

[1] Related Chapters in This Volume

- For discussion and forms concerning evaluation of an automobile case, see Ch. 81B, *Automobiles: Case Evaluation* .

- For discussion and forms concerning discovery in an automobile case, see Ch. 85, *Automobiles: Discovery* .

- For discussion and forms concerning trial of an automobile case, see Ch. 87, *Automobiles: Trial* .

[2] Other Related Chapters

- For discussion and forms relating to mediation, see Ch. 31, *Mediation* .

- For discussion and forms relating to contractual arbitration, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* , through Ch. 34, *Contractual Arbitration: Judicial Review* .

- For discussion and forms relating to judicial arbitration, see Ch. 36, *Judicial Arbitration* .

- For discussion and forms relating to demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

- For discussion and forms relating to dismissal, see Ch. 212, *Dismissal* .

- For discussion and forms relating to the effect of good faith settlements, see Ch. 300, *Indemnity and Contribution* .

- For discussion and forms relating to motions in limine, see Ch. 373, *Motions in Limine* .

- For discussion and forms relating to motions to strike, see Ch. 375, *Motions to Strike: Pleadings* , and Ch. 376, *Motions to Strike: Anti-SLAPP*

- For discussion and forms relating to settlements, see Ch. 520, *Settlement and Release* .

- For discussion and forms relating to summary judgment, see Ch. 537, *Summary Judgment* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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[Reserved]

§§ 86.03[Reserved]

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8-86 California Forms of Pleading and Practice--Annotated § 86.10

§ 86.10 Prelitigation Considerations

[1] Policy Limits

An important factor in the prelitigation analysis of an automobile case is the amount of policy limits of the automobile insurance. Often claims adjusters will not disclose the limits, even though the policy amounts are discoverable in litigation.

PRACTICE TIP:

Significant-Injury Case. If you have a significant-injury case, then call the adjuster and let him or her know that fact, and ask if it is a minimal policy. If the adjuster will not give this information, send a letter saying that you may recommend a policy limits settlement, but must have confirmation in writing of the limits.--*Dona E. Cohn, Editorial Consultant.*

[2] Demand Letter

The initial approach to settlement is typically the transmittal of a demand letter package to the defendant and its insurer. For further discussion, see Ch. 81B, *Automobiles: Case Evaluation* .

[3] Arbitration

Contractual arbitration is governed by *Code Civ. Proc. §§ 1280-1294.2*. For further discussion, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

Judicial arbitration is governed by *Code Civ. Proc. §§ 1141.10-1141.31*, *Cal. Rules of Ct., Rule 3.810 et seq.*, and local court rules. For further discussion, see Ch. 36, *Judicial Arbitration* .

[4] Mediation

Mediation is the process through which a neutral person or persons facilitate communication between disputants to assist them in reaching a mutually acceptable agreement [*Evid. Code § 1115(a)*]. For further discussion, see Ch. 31,

Mediation .

PRACTICE TIP:

Mediation for Smaller Cases. Mediation is a good option for smaller cases in which you have a client who "presents well" (i.e., is sympathetic, articulate, and credible). Adjusters like it because it is a freeopportunity to talk with the client, and ask a lot of questions. Cases often settle in these situations. However, make sure that you are meeting with someone with the authority to settle. If the adjuster does not have authority, then don't attend the mediation. Cost is split 50/50, but if the case settles, the insurance company will usually pay the entire cost of mediation.--*Dona E. Cohn, Editorial Consultant.*

[5] Negotiations in Automobile Cases

Negotiations in an automobile case require thorough preparation and a confident ability to present the case. The attorney must be familiar with the strengths and recognize the weaknesses in the case, and communicate his or her position with confidence. The attorney has an obligation to convey to his or her client every demand or offer of settlement.

PRACTICE TIP:

Maintain Reasoned Analysis in Negotiations and Communicate Offers to Client. It is best not to react emotionally to the attorney who communicates offers or demands that you consider to be inadequate. Convey every such negotiation communication to the client, and respond to the attorney with a reasoned argument based on your authority. Declarations of your trial accomplishments, or threats to try the case should be implied but never expressed. Most cases settle, and should, if there is objective and reasoned analysis on both sides.--*Joe Devine, Editorial Consultant.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewTortsProcedureSettlementsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsInsurance LawMotor Vehicle InsuranceArbitrationTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 86.11 Motions and Demurrers by Defendant

[1] Motion to Quash Service of Summons

Defense attorneys should carefully review the pleadings for any defects and make sure that the summons and complaint have been properly served. If not, a motion to quash service of summons may be appropriate [*see Code Civ. Proc. § 418.10(a)(1)*]. For further discussion and forms related to personal jurisdiction, see Ch. 323, *Jurisdiction: Personal* .

[2] Motion to Set Aside Default

If default, or default judgment has been entered, counsel should request that the plaintiff's attorney stipulate to set aside default or judgment. If counsel cannot obtain such a stipulation, he or she should immediately file a motion to set aside the default [*see Code Civ. Proc. § 473(b)*]. For further discussion and forms related to proceedings to set aside default or default judgment, see Ch. 323, *Jurisdiction: Personal* .

[3] Summary Judgment Motion

Any party may move for summary judgment in any action or proceeding if the party contends that the action has no merit or that there is no defense to the action or proceeding [*Code Civ. Proc. § 437c(a)*]. For discussion of summary judgment generally, see Ch. 537, *Summary Judgment* .

PRACTICE TIP:

Defense Perspective Regarding Punitive Damages. If punitive damages are alleged in the complaint, the defendant is personally exposed, and there is no insurance coverage under California law. Do everything possible to eliminate these allegations by demurrer, motion for judgment on the pleadings, and summary judgment. If they still exist, present the issue again by motions in limine before the trial judge. Fully advise the defendant in writing as to the potential exposure.--*Joe Devine, Editorial Consultant.*

[4] Motion to Dismiss

A motion to dismiss may be based on the following grounds:

- Untimely service of the complaint [*see Code Civ. Proc. § 583.250*].
- Delay in bringing action to trial [*Code Civ. Proc. § 583.360*].
- Delay in prosecution [*see Code Civ. Proc. §§ 583.410, 583.420*].

For discussion of dismissal motions generally, see Ch. 212, *Dismissal* .

[5] Motions to Strike

A court may, on a motion made pursuant to *Code Civ. Proc. § 435*, or at any time in its discretion, and on terms it deems proper [*Code Civ. Proc. § 436*]:

- Strike out any irrelevant, false, or improper matter in any pleading; or
- Strike out all or any part of any pleading not drawn or filed in conformity with the laws of California, a court rule, or an order of the court.

For discussion of motions to strike generally, see Ch. 375, *Motions to Strike: Pleadings* , and Ch. 376, *Motions to Strike: Anti-SLAPP* .

[6] Demurrer to Complaint

When any ground for objection to a complaint, cross-complaint, or answer appears on the face of that pleading, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading [*Code Civ. Proc. § 430.30(a)*].

The grounds for demurrer relevant to an automobile case are as follows [*Code Civ. Proc. § 430.10*]:

- The court has no jurisdiction of the subject of the cause of action alleged in the pleading.
- The person who filed the pleading does not have the legal capacity to sue.
- There is another action pending between the same parties on the same cause of action.
- There is a defect or misjoinder of parties.
- The pleading does not state facts sufficient to constitute a cause of action.
- The pleading is uncertain, e.g., ambiguous or unintelligible.
- In an action founded on a contract, it cannot be ascertained from the pleading whether the contract is written, oral, or implied by conduct.

For discussion of demurrers generally, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

PRACTICE TIP:

Technical Defects. As California courts have adopted notice pleading, demurrers on grounds of

technical defects are not often cost-effective. Leave to amend a technically defective complaint is liberally granted. A demurrer is most often successful when challenging a defective complaint for the following:

- Statute of limitations.
- Punitive damage claims improperly drafted.
- Clear mistakes on the face of the complaint (lack of jurisdiction, venue)

Joe Devine, Editorial Consultant.

PRACTICE TIP: Pending Action. If another action has been filed regarding the same damages, such as a subrogation claim for property damage by the plaintiff's insurance company, call the attorneys involved to obtain a stipulation as to what damages each claimant is entitled. If this cannot be worked out, a demurrer on the ground that another action is pending may be appropriate.--*Joe Devine, Editorial Consultant.*

PRACTICE TIP: Defense Perspective Regarding Punitive Damages. If punitive damages are alleged in the complaint, the defendant is personally exposed, and there is no insurance coverage under California law. Do everything possible to eliminate these allegations by demurrer, motion for judgment on the pleadings, and summary judgment. If they still exist, present the issue again by motions in limine before the trial judge. Fully advise the defendant in writing as to the potential exposure.--*Joe Devine, Editorial Consultant.*

[7] Motions in Limine

Motions in limine are useful in an automobile case to decide issues such as the following:

- To exclude particular evidence unless supported by a proper foundation [*see § 86.52[1]*].
- To exclude evidence of the existence of liability insurance [*see § 86.52[2]*].
- To exclude certain expert testimony for failure to comply with disclosure requirements [*see § 86.52[3]*].
- To eliminate punitive damages claims.

PRACTICE TIP:
Defendant's Exposure to Punitive Damages. If punitive damages are alleged in the complaint, the defendant is personally exposed, and there is no insurance coverage under California law. If the allegations survive demurrer and a defense motion for summary judgment, present the issue again by motions in limine before the trial judge. Fully advise the defendant in writing as to the potential exposure.--*Joe Devine, Editorial Consultant.*

For discussion of motions in limine generally, see Ch. 372, *Motions in Limine* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProceduresSummary JudgmentGeneral OverviewTortsProceduresSettlementsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-86 California Forms of Pleading and Practice--Annotated § 86.12

§ 86.12 Settlement

[1] Initial Settlement Demand

The initial approach to settlement is typically by letter to the defendant and its insurer stating plaintiff's analysis of the case and plaintiff's demand. This letter, called the "demand letter," often includes various supporting documents, photographs, and illustrations. For discussion of demand letters and sample forms, see *Ch. 81B, Automobiles: Case Evaluation, § 81B.15*.

PRACTICE TIP:

"Settlement Days." Many insurance companies have special days on which you can meet with someone with the authority to try to reach a settlement. This procedure works well for smaller cases that are not worth the expense of litigation, if your claims adjuster is not giving you what you want. Find out from your claims adjuster whether the company offers this service. Sometimes they are offered only a few times per year, but even if the next settlement day is several months off, this may be the best way to achieve a favorable result for the client.--*Dona E. Cohn, Editorial Consultant.*

[2] Settlement Offer Pursuant to Code Civ. Proc. § 998

[a] Offer to Compromise Under Code Civ. Proc. § 998

[i] Offer Ten Days Prior to Trial or Arbitration

Not fewer than 10 days prior to commencement of trial or arbitration (as provided in *Code Civ. Proc. § 1281* or *1295*) of a dispute to be resolved by arbitration, any party may serve an offer in writing on any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time [*Code Civ. Proc. § 998(b)*].

PRACTICE TIP:

Plaintiff's Perspective. Before making a Section 998 demand to allow judgment to be taken, while it is preferable to have the Section 998 offer served as early as possible in order to maximize the ability to

recover as much costs as possible, it also wise to make sure that the defendants have adequate information so as to evaluate the file and to be able to accept the entry of judgment for the amount offered. As such, concurrent with or prior to the Section 998 offer being made, plaintiff's counsel should ensure that discovery is complied with; that medical records have been produced if requested, and that liability has been reasonably established. By taking these steps, plaintiff's counsel can better ensure the enforcement of the Section 998 provisions at the conclusion of the trial.

It is also important to make sure that counsel has the client's approval in writing before making the offer to compromise. One might consider making the offer to compromise for a sum slightly less than what one believes a jury might award. For example, if counsel believes that a jury might award $20,000, then one may consider making the Section 998 demand for $19,999 in order to beat the expected verdict and thus trigger the benefits of Section 998.--*Frederick Schenk, Editorial Consultant.*

[ii] Acceptance of Offer

Effective January 1, 2006, a written offer must include a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. Any acceptance of the offer, whether made on the document containing the offer or on a separate document of acceptance, must be in writing and signed by counsel for the accepting party or, if that party is not represented by counsel, signed by the accepting party [*Code Civ. Proc. § 998(b)*].

If the offer is accepted, the offer with proof of acceptance shall be filed, and the clerk or the judge shall enter judgment accordingly. In the case of arbitration, the offer with proof of acceptance shall be filed with the arbitrator (or arbitrators), who shall promptly render an award accordingly[*Code Civ. Proc. § 998(b)(1)*]. Any judgment or award entered pursuant to Section 998 is deemed to be a compromise settlement [*Code Civ. Proc. § 998(f)*].

[iii] Rejection of Offer

[A] Offer Not Accepted Is Withdrawn

If the offer is not accepted prior to trial or arbitration, or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence in the trial or arbitration [*Code Civ. Proc. § 998(b)(2)*]. A trial or arbitration is deemed to be commenced at the beginning of the opening statement of the plaintiff or counsel, and if there is no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence [*Code Civ. Proc. § 998(b)(3)*].

[B] Offer Made by Defendant

If an offer made by a defendant is not accepted, and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover its postoffer costs, and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding (other than an eminent domain action), the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in preparation for trial or arbitration and/or during trial or arbitration of the case by the defendant [*Code Civ. Proc. § 998(c)(1)*]. Postoffer costs are excluded from the calculation with respect to whether the judgment was more favorable than the rejected offer [*Code Civ. Proc. § 998(c)(2)(A)*].

If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the costs under Section 998, from the time of the offer, shall be deducted from any damages awarded in favor of the plaintiff. If the costs awarded under Section 998 exceed the amount of the damages awarded to the plaintiff, the net amount shall be awarded to the defendant, and judgment or award shall be entered accordingly [*Code Civ. Proc. § 998(e)*].

PRACTICE TIP:

Seriously Consider Defense Offer and Consequences of Rejection. Insurance companies are quite experienced at evaluating cases. The defense attorney will often present a statutory 998 offer of settlement. They are usually in a far better position than a plaintiff to pay the increased costs of a "missed" 998. If the insurance company prevails, it will often seek to recover these penalty costs. Any 998 statutory offer or demand for settlement should be reasonable and considered seriously for the consequences.--*Joe Devine, Editorial Consultant.*

[C] Offer Made by Plaintiff

If an offer made by a plaintiff is not accepted, and the defendant fails to obtain a more favorable judgment or award in any action or proceeding (other than an eminent domain action), the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover post-offer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in preparation for trial or arbitration and/or during trial or arbitration of the case by the plaintiff, in addition to plaintiff's costs [*Code Civ. Proc. § 998(d)*].

PRACTICE TIP:

Potential Benefits of Early Demand. If you are successful at trial in obtaining an award higher than a demand that you made under *Code Civ. Proc. § 998*, then the court will probably allow you to recover your expert witness costs, in addition to the standard statutory costs. This is very important, and an excellent reason to present a 998 demand early in the litigation. Furthermore, you will obtain interest on all money awarded if the award exceeds the 998 demand.--*Dona E. Cohn, Editorial Consultant.*

[b] Effect of Plaintiff's Offer on Prejudgment Interest in Personal Injury Action: Civ. Code § 3291

In any action brought to recover damages for personal injury sustained by any person resulting from or occasioned by the tort of any other person, corporation, association, or partnership, whether by negligence or by willful intent of the other person or entity named above, and whether the injury was fatal or otherwise, it is lawful for the plaintiff in the complaint to claim interest on the damages alleged as provided in *Civ. Code § 3291*[*Civ. Code § 3291*].

If the plaintiff makes an offer pursuant to *Code Civ. Proc. § 998*, that the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment bears interest at the legal rate of ten percent per annum. The interest is calculated from the date of the plaintiff's first Section 998 offer that is exceeded by the judgment. Interest accrues until the satisfaction of judgment [*Civ. Code § 3291*]. If multiple defendants are found liable at trial and each rejected a *Code Civ. Proc. § 998* settlement offer that was less than the judgment ultimately imposed against him or her, the 10 percent prejudgment interest award is imposed only once on the entire judgment under *Civ. Code § 3291*. It is not imposed separately against each defendant on the full amount of the total judgment, as the latter approach would result in a windfall of interest to the plaintiff [*Cadlo v. Metalclad Insulation Corp. (2009) 172 Cal. App. 4th 1040, 1046-1047, 91 Cal. Rptr. 3d 653*].

This provision does not apply to a public entity, or to a public employee for an act or omission within the scope of employment. Neither a public entity nor a public employee shall be liable, directly or indirectly, to any person for any interest imposed by this provision [*Civ. Code § 3291*].

[3] Settlement With Fewer Than All Tortfeasors

[a] Effect on Defendants

If a settlement is entered into in good faith between the plaintiff and one or more, but fewer than all, tortfeasors claimed to be liable for the same tort or coobligors mutually subject to contribution rights, it has the following effects [*see Code Civ. Proc. § 877*]:

- It does not discharge any other party from liability to the plaintiff unless its terms so provide.

- It reduces the claims against other parties in the amount stipulated in the settlement or in the amount of consideration paid for it, whichever is greater.

- It discharges the settling defendant from all liability for any "contribution" to any other parties.

Code Civ. Proc. § 877 does not apply to coobligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves [*Code Civ. Proc. § 877(c)*].

For further discussion of the effect of settlements, see Ch. 300, *Indemnity and Contribution* .

[b] Interaction With Proposition 51

The effect of a settlement on the liabilities of nonsettling defendants and on indemnity an contribution rights are affected by the Fair Responsibility Act of 1986 (Proposition 51), which abolished the rule of joint and several liability for certain "noneconomic" damages [*Civ. Code § 1431.1 et seq.*]. For discussion of this and related issues, see Ch. 300, *Indemnity and Contribution* ,, and California Torts, Ch. 74, *Resolving Multiparty Tort Litigation* , (Matthew Bender). For discussion of Proposition 51 with respect to damages recoverable in automobile cases, see Ch. 82A, *Automobiles: Damages* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProcedureSettlementsOffersCivil ProcedureSettlementsOffers of JudgmentAcceptancesCivil ProcedureSettlementsOffers of JudgmentMaking of OffersCivil ProcedureRemediesJudgment InterestPrejudgment InterestTortsTransportation TortsMotor VehiclesPersonal Vehicles

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[Reserved]

§§ 86.13[Reserved]

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§ 86.30 Related Texts From Lexis/Nexis

For discussion of the effect of Proposition 51 on settlements in multiparty litigation, see California Torts, Ch. 74, *Resolving Multiparty Tort Litigation* (Matthew Bender)

For discussion of uninsured motorist law, see California Uninsured Motorist Law (6th ed. Lexis/Nexis)

For discussion of trial of collision cases generally, see Trial of Accident Cases (Matthew Bender)

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§ 86.31 State Statutes

[1] Summary Judgment

Summary judgment motion. *Code Civ. Proc. § 437c*

[2] Dismissal

Dismissal for untimely service of the complaint. *Code Civ. Proc. § 583.250*

Dismissal for delay in bringing action to trial. *Code Civ. Proc. § 583.360*

Dismissal for delay in prosecution. *Code Civ. Proc. §§ 583.410, 583.420*

[3] Motion to Strike

Procedure for motion to strike. *Code Civ. Proc. § 435*

Grounds for motion to strike. *Code Civ. Proc. § 436*

Requirements for asserting motion to strike. *Code Civ. Proc. § 437*

[4] Demurrer

Grounds for demurrer. *Code Civ. Proc. § 430.10*

Demurrer to complaint. *Code Civ. Proc. § 430.30*

Timing of demurrer. *Code Civ. Proc. § 430.40(a)*

[5] Settlement

Effect of settlement on nonsettling defendants under Fair Responsibility Act of 1986. *Civ. Code § 1431.1 et seq.*

Settlement with fewer than all tortfeasors. *Code Civ. Proc. § 877*

Settlement offer prior to trial. *Code Civ. Proc. § 998*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultFailure to Pursue the CauseCivil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSettlementsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 86.32 Internet References

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[Reserved]

§§ 86.33[Reserved]

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Volume 8: Automobiles-Chs. 80-92
Chapter 86 AUTOMOBILES: PRETRIAL MOTIONS AND SETTLEMENT NEGOTIATIONS
PART IV. PROCEDURAL CHECKLISTS

8-86 California Forms of Pleading and Practice--Annotated § 86.40

§ 86.40 Plaintiff's Checklist

[1] Settlement Offer to Defendant

☐ Draft and serve offer to compromise under *Code Civ. Proc. § 998*.

☐ Draft offer to compromise [*see Code Civ. Proc. § 998*; for a form, *see § 86.50[1]*].

☐ Serve offer on defendant not fewer than ten days prior to commencement of trial or arbitration (under *Code Civ. Proc. § 1281* or *1295*)[*Code Civ. Proc. § 998(b)*].

[2] Acceptance of Defendant's Settlement Offer

☐ Draft notice of acceptance of offer to compromise under *Code Civ. Proc. § 998* [for a form, *see § 86.50[2]*].

☐ File offer and acceptance of offer with court or arbitrator [*Code Civ. Proc. § 998(b)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProcedureSettlementsGeneral OverviewTortsProcedureSettlementsOffersCivil ProcedureSettlementsOffers of JudgmentAcceptancesCivil ProcedureSettlementsOffers of JudgmentMaking of OffersTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-86 California Forms of Pleading and Practice--Annotated § 86.41

§ 86.41 Defendant's Checklist

[1] Settlement Offer to Plaintiff

☐ Draft and serve offer to compromise under *Code Civ. Proc. § 998*.

☐ Draft offer to compromise [*see Code Civ. Proc. § 998*; for a form, *see § 86.50[1]*].

☐ Serve offer on plaintiff not fewer than ten days prior to commencement of trial or arbitration (under *Code Civ. Proc. § 1281* or *1295*)[*Code Civ. Proc. § 998(b)*].

[2] Acceptance of Plaintiff's Settlement Offer

☐ Draft notice of acceptance of offer to compromise under *Code Civ. Proc. § 998* [for a form, *see § 86.50[2]*].

☐ File offer and acceptance of offer with court or arbitrator [*Code Civ. Proc. § 998(b)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProcedureSettlementsGeneral OverviewTortsProcedureSettlementsOffersCivil ProcedureSettlementsOffers of JudgmentAcceptancesCivil ProcedureSettlementsOffers of JudgmentMaking of OffersTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-86 California Forms of Pleading and Practice--Annotated §§ 86.42--86.49

[Reserved]

§§ 86.42[Reserved]

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Chapter 86 AUTOMOBILES: PRETRIAL MOTIONS AND SETTLEMENT NEGOTIATIONS
PART V. FORMS

8-86 California Forms of Pleading and Practice--Annotated § 86.50

§ 86.50 Settlement Pursuant to Code Civ. Proc. § 998

[1] Offer to Compromise Before Commencement of Trial Pursuant to Code Civ. Proc. § 998

[a] FORM Offer to Compromise Before Commencement of Trial Pursuant to Code Civ. Proc. § 998

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], Defendant.	)	OFFER TO COMPROMISE UNDER CODE CIV.
	)	PROC. § 998
	)	

_____

TO: DEFENDANTS _____ AND DOES 1 THROUGH 10

PLEASE TAKE NOTICE that plaintiff _____ [*name*] hereby offers to compromise this litigation for a total sum of $_____ [*amount of settlement offer*] pursuant to the provisions of *Code of Civil Procedure Section 998*; however, this offer to compromise and acceptance thereof is conditioned upon the following:

1. That the offer to compromise is for _____ [*specify*] and that each side is to bear its own costs.

Please be advised that pursuant to *Code of Civil Procedure Section 998*, if the plaintiff obtains a verdict in an amount greater than this offer, the court may compel the respective defendants to pay plaintiff's costs from the time of the offer, and the court has discretionary authority to order the defendants to pay the plaintiff's costs from the date of the filing of the complaint and a reasonable sum to cover the costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either the preparation or trial of the case.

Please be advised that pursuant to *Civil Code Section 3291*, if the plaintiffs obtain a more favorable judgment than the offer set forth herein, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of this offer until the satisfaction of judgment.

This offer to compromise may be accepted in the form of a letter directed to the office of _____ [*attorney for plaintiff*].
DATED: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[b] Use of Form

This form is an example of a form used to communicate an offer of compromise to the opposing party under *Code Civ. Proc. § 998*. It may be modified for use by either plaintiff or defendant.

This form should be accompanied by a notice of acceptance [*see § 86.50[2]*]. The offeror may also request that the offeree prepare the acceptance form, with either party filing the offer with proof of acceptance to obtain a judgment. Alternatively, the acceptance provision may be combined with this form.

The offer should be signed by the offeror and the offeror's attorney, to avoid problems concerning the attorney's authority to compromise a claim for the client [*see Code Civ. Proc. § 283*].

An offer to compromise must be served not fewer than ten days prior to commencement of trial or arbitration (under *Code Civ. Proc. § 1281* or *1295*)[*Code Civ. Proc. § 998(b)*]. It may be served on the party or attorney by personal service, substituted service, or mail [*Code Civ. Proc. § 1010 et seq.*].

[c] Cross References

For further discussion, see *§ 86.12[1]*.

For additonal discussion alternative forms, see Ch. 520, *Settlemenet and Release*

[2] Notice of Acceptance of Offer Made Pursuant to Code Civ. Proc. § 998

[a] FORM Notice of Acceptance of Offer Made Pursuant to Code Civ. Proc. § 998

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], Defendant.	)	NOTICE OF ACCEPTANCE OF OFFER TO COM-
	)	PROMISE
	)	

TO _____ [*name and designation of party, e.g.,* JOHN RAE, DEFENDANT], AND TO _____ [*name*], HIS/HER ATTORNEY OF RECORD:

[*EITHER, for plaintiff's acceptance of offer to compromise*]

NOTICE IS HEREBY GIVEN that plaintiff, _____ [*name*], accepts the offer made by defendant to have judgment taken against defendant and for plaintiff, _____ [*name*], in the above-entitled action for the sum of $_____, _____ [each party to bear his/her own costs (and attorney's fees) *or* plus taxable costs incurred to date of judgment] [, and according to the additional terms and conditions as follow: _____ (*specify*)].

[*OR, for defendant's acceptance of offer to compromise*]

NOTICE IS HEREBY GIVEN that defendant, _____ [*name*], accepts the offer made by plaintiff to have judgment taken for plaintiff and against defendant, _____ [*name*], in the above-entitled action for the sum of $_____, _____ [each party to bear his/her own costs (and attorney's fees) *or* plus taxable costs incurred to date of judgment] [, and according to the additional terms and conditions as follow: _____ (*specify*)].
Dated: _____.

_____ [*signature*]

_____ [Plaintiff *or* Defendant]

_____ [*signature*]

Attorney for _____ [Plaintiff *or* Defendant]

[b] Use of Form

This form is for use to accept an offer of compromise pursuant to *Code Civ. Proc. § 998* [for a form of offer, *see § 86.50[1]*].

Although an acceptance form such as the one drafted here may still be used, effective January 1, 2006, a written offer must itself include a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. Any acceptance of the offer, whether made on the document containing the offer or on a separate document of acceptance, must be in writing and signed by counsel for the accepting party or, if that party is not represented by counsel, signed by the accepting party [*Code Civ. Proc. § 998(b)*].

The offer with proof of acceptance must be filed with the court, or in the case of an arbitration, with the arbitrator [*Code Civ. Proc. § 998(b)(1)*].

An offer to compromise under Section 998 must be accepted prior to trial or arbitration, or within 30 days after it is made, whichever occurs first, or else it is deemed withdrawn, and cannot be given in evidence at trial or arbitration [*see Code Civ. Proc. § 998(b)(2)*].

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PART V. FORMS

8-86 California Forms of Pleading and Practice--Annotated § 86.51

§ 86.51 Settlement Agreement and Release

[1] FORM Settlement Agreement and Release

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], Defendant.	)	SETTLEMENT AGREEMENT AND RELEASE
	)	
	)	

_____

THIS SETTLEMENT AGREEMENT AND RELEASE ("Settlement Agreement") is entered into between _____ [*name of plaintiff*] (hereinafter "Plaintiff"), by and through _____ [*name of defendant*] (hereinafter "Defendant"), and _____ [*name of insurer*] (hereinafter "Insurer").

RECITALS

A. On or about the Plaintiff filed a Complaint against the Defendant in _____ [*city*], County of _____ [*county*], State of California, (Court Action No. _____), which Complaint

arose out of certain alleged negligent acts or omissions by the Defendant. In the Complaint, the Plaintiff sought to recover monetary damages as a result of that incident that occurred on at or near _____ [*identify site of collision*] in _____ [*city*], California, which resulted in personal injury and/or physical injury to the Plaintiff.

B. The Insurer is the liability insurer of the Defendant and as such would be obligated to pay any judgment and/or settlement obtained against the Defendant which is covered by its policy.

C. The parties desire to enter into this Settlement Agreement in order to provide for certain payments in full settlement and discharge of all claims which are or might have been the subject of the Complaint, upon the terms and conditions set forth herein.

AGREEMENT

The parties hereto agree as follows:

1. Release and Discharge

In consideration of Insurer's agreement to make the payments called for herein, the Plaintiff completely releases and forever discharge the Defendant, of and from any and all past, present or future claims, demands, obligations, actions, causes of action, rights, damages, costs, loss of services, expenses and compensation which the Plaintiff now has, or which may hereafter accrue or otherwise be acquired by plaintiff, on account of, or in any way growing out of, or which are the subject of, the Complaint and all related to pleadings, including any and all known claims for bodily and personal injuries to the Plaintiff which have resulted or may result from the alleged acts or omissions of the Defendant.

2. Payments

In consideration of the release set forth above, Insurer on behalf of Defendant hereby agrees to make the following payments:

A.	Payments at Time of Settlement:	$ _____.00
B.	Periodic Payments:	
	1. Deferred Lump Sums:	
	a.	$ _____.00 [*list payments*]
		_____
		$ _____.00 [*total amount of deferred lump sum payments*]

All sums set forth above constitute damages on account of personal injury or sickness within the meaning of *Section 104(a)(2) of the Internal Revenue Code of 1986*, as amended.

3. Plaintiff's Right to Payments

Insurer shall not be required to segregate nor set aside any of its assets to fund the payments to Plaintiff required herein, it being understood that Plaintiff's rights shall be no greater than those of a general creditor of Insurer. Said payments cannot be accelerated, deferred, increased or decreased by Plaintiff and no part of the payments called for herein or any

assets of Insurer are to be subject to execution or other legal process for any obligation of Plaintiff, nor shall Plaintiff have the power to sell or mortgage or encumber same, or any part thereof, nor anticipate the same, or any part thereof, by assignment or otherwise.

4. Qualified Assignment

The parties hereto acknowledge and agree that Insurer is making a "qualified assignment" within the meaning of *Section 130(c) of the Internal Revenue Code of 1986*, as amended, to (hereinafter "Assignee") of Insurer's liability to make the periodic payments required herein. Such assignment shall be accepted by Plaintiff without right of rejection and shall completely release and discharge Insurer from such obligations hereunder as are assigned to Assignee. Plaintiff recognizes that, upon such an assignment, Assignee shall be the sole obligor with respect to the obligations assigned, and that all other releases that pertain to the liability of Defendant and Insurer shall thereupon become final, irrevocable and absolute.

On the liability to make the periodic payments being assigned by way of a "qualified assignment":

A. The periodic payments from Assignee cannot be accelerated, deferred, increased or decreased by Plaintiff;

B. Assignee does not provide to Plaintiff rights against Assignee that are greater than those of a general creditor; and

C. Assignee's obligation for payment of the periodic payments is no greater than the obligation of the person originally liable (whether by suit or agreement) for payment and from whom the obligation was assigned.

5. Funding of Periodic Payments

Insurer and/or Assignee is funding the liability to make periodic payments through the purchase of an annuity policy from Insurer and/or Assignee shall be the owner of the annuity policy and shall have all rights of ownership. Insurer and/or Assignee may have the annuity carrier mail payments directly to Plaintiff. Plaintiff shall be responsible for maintaining the currency of the proper mailing address and mortality information.

6. Attorney's Fees

Each party hereto shall bear all attorney's fees and costs arising from the actions of its own counsel in connection with the Complaint, this Settlement Agreement and the matters and documents referred to herein, the filing of a Dismissal of the Complaint, and all related matters.

7. General Release

The Plaintiff hereby acknowledged and agrees that the Release set forth in paragraph 1 hereof is a general release and she/he further expressly waives and assumes the risk of any and all claims for damages which exist as of this date but of which the Plaintiff does not know or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise, and which if known, would materially affect Plaintiff's decision to enter into this Settlement Agreement. The Plaintiff further agrees that she/he has accepted payment of the sums specified herein as a complete compromise of matters involving disputed issues of law and fact and she/he assumes the risk that the facts or law may be otherwise than she/he believes. It is understood and agreed by the parties that this settlement is a compromise of a doubtful and disputed claim, and the payments are not to be construed as an admission of liability on the part of the Defendant, by whom liability is expressly denied.

8. Delivery of Dismissal With Prejudice

Counsel for the Plaintiff shall deliver to counsel for the Defendant, or counsel for the Insurer, an executed Dismissal with Prejudice of the civil action described in recital A above. The Plaintiff has authorized Plaintiff's attorneys to execute this Dismissal with Prejudice on his/her behalf and hereby authorizes counsel for the Defendant or counsel for the Insurer to file said Dismissal with Prejudice with the Court and enter it as a matter of record.

9. Warranty of Capacity to Execute Agreement

The Plaintiff represents and warrants that no other person or entity has or has had any interest in the claims, demands, obligations, or causes of action referred to in this Settlement Agreement, except as otherwise set forth herein, and that he/she has not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations, or causes of action referred to in this Settlement Agreement.

10. Entire Agreement and Successors in Interest

This Settlement Agreement contains the entire agreement between the Plaintiff, the Defendant and the Insurer with regard to the matters set forth herein and shall be binding upon and inure to the benefit of the executors, administrators, personal representatives, heirs, successors and assigns of each.

11. Representation of Comprehension of Document

In entering into this Settlement Agreement, the Plaintiff represents that he/she has relied upon the legal advice of his/her attorneys, who are the attorneys of his/her own choice and that the terms of this Settlement Agreement have been completely read and explained to him/her by his/her attorneys, and that those terms are fully understood and voluntarily accepted by him/her.

12. Governing Law

This Settlement Agreement shall be construed and interpreted in accordance with the laws of the State of California. The undersigned Plaintiff does hereby waive any and all rights based upon the provisions of *Section 1542 of the Civil Code* of the State of California, which reads as follows:

"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THIS RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR."

13. Additional Documents

All parties agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to give full force and effect to the basic terms and intent of this Settlement Agreement.

14. Effectiveness

This Settlement Agreement shall become effective on execution.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

Plaintiff

Dated: _____.

_____ Insurer

By: _____ [*signature*]

_____ [*typed name*]

The foregoing release was explained to said Plaintiff and executed in accordance with our directions and advice.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

State of California, County of _____

On _____ [*date*], before me, the undersigned, a Notary Public and for said State, personally appeared:

_____ [*name of person executing document*],

known to me to be the person(s) who(se) name(s) subscribed to the within instrument, and acknowledged to me that he executed the same.

WITNESS my hand and official seal.

[2] Use of Form

This form is a an example of a settlement agreement and release of claims for use in an automobile case.

[3] Cross References

For discussion, see *§ 86.12*

For discussion and additional forms relating to settlement and releases generally, see Ch. 520, *Settlement and Release*

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PART V. FORMS

8-86 California Forms of Pleading and Practice--Annotated § 86.52

§ 86.52 Motions in Limine

[1] Exclusion of Medical Bills and Medical Records Absent Proper Foundation

[a] FORM Exclusion of Medical Bills and Medical Records Absent Proper Foundation

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], Defendant.	)	MOTION IN LIMINE; ORDER (MEDICAL BILLS
	)	AND RECORDS)
	)	

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Comes now defendant _____ [*name*] in the above-entitled case, and before the trial and selection of jury, moves the couirt in limine, to instruct the plaintiff's counsel to refrain from any attempt to introduce medical records and bills into evidence without laying a proper foundation.

This request is made on the basis that such evidence is hearsay, improper, inadmissible and irrelevant. The request is made pursuant to the authority of *California Evidence Code Section 1271*.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

ORDER

The MOTION IN LIMINE of defendant having been considered, and good cause appearing therefore:

IT IS ORDERED that plaintiff and plaintiff's counsel be and are hereby ordered to refrain from any attempt to introduce medical records and bills without laying a proper foundation.

IT IS FURTHER ORDERED that this order shall be in effect from the commencement of voir dire to the rendering of a verdict and shall be in effect at all times when any juror or jurors are in the courtroom.
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[b] Use of Form

This form is a motion in limine and order to exclude evidence of medical records and bills unless the plaintiff lays a proper foundation [*see Evid. Code § 1271* (admissibility of writings)].

[c] Cross References

For discussion and forms relating to motions in limine generally, see Ch. 373, *Motions in Limine*

[2] Exclusion of Evidence of Liability Insurance

[a] FORM Exclusion of Evidence of Liability Insurance

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*], Plaintiff,)
vs.) NO. _____

_____ [*name*], Defendant.	)	MOTION IN LIMINE; ORDER (INSURANCE)
	)	
	)	

_____

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Comes now defendant _____ [*name*] in the above-entitled case, and before the trial and the selection of jury, moves the court in limine, to instruct plaintiff's counsel to refrain from any attempt to inject insurance by question, suggestion or argument, and further to instruct and admonish any parties or witnesses to refrain from injection by suggestion, argument or answer, the existence of liability insurance.

This request is made on the basis that such evidence is improper, inadmissible and irrelevant [*Evidence Code Section 1155*].
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

ORDER

The MOTION IN LIMINE of defendants having been considered, and good cause appearing therefore:

IT IS ORDERED that plaintiff's counsel and all witnesses called by plaintiff be and are hereby ordered to refrain from any attempt to inject the existence of liability insurance by question, suggestion, argument or testimony.

IT IS FURTHER ORDERED that plaintiff's counsel is hereby ordered to instruct and admonish all parties and witnesses called by plaintiff's counsel to refrain from such injection of insurance by suggestion, argument or answer.

IT IS FURTHER ORDERED that this order shall be in effet from the commencement of voire dire to the rendering of a verdict and shall be in effect at all times when any juror or jurors are in the courtroom.
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[b] Use of Form

This form is a motion in limine and order to exclude evidence of liability insurance.

Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is inadmissible to prove negligence or other wrongdoing [*see Evid. Code § 1155*].

[c] Cross References

For discussion and forms relating to motions in limine generally, see Ch. 373, *Motions in Limine*

[3] Exclusion of Named Expert Witnesses

[a] FORM Exclusion of Named Expert Witnesses

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], Defendant.	)	MOTION IN LIMINE; ORDER (EXCLUSION OF
	)	PLAINTIFFS' EXPERTS)
	)	

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Comes now defendant _____ [*name*] in the above-entitled case, and before the trial and selection of jury, moves the court in limine, to instruct plaintiff's counsel to refrain from any attempt to solicit the testimony or opinion of _____ [*name of expert*] or any other expert called by plaintiff, by question, suggestion or argument, and further to instruct and admonish any parties or witnesses to refrain from injection by suggestion, argument or answer the existence of any opinion of plaintiff's experts.

This request is made on the basis that such testimony is improper, inadmissible and irrelevant. This request is made on the further grounds that plaintiff has completely failed to comply with *California Code of Civil Procedure Section 2034.260*.

This request is made on the further grounds that the probative value of any such testimony is substantially outweighed by a substantial danger of undue prejudice and of misleading the jury since the plaintiff did not comply with *California Code of Civil Procedure Section 2034.260* in that they have not disclosed experts under *California Code of Civil Procedure Section 2034.210*.

Further, defendant has not taken the deposition of any of plaintiff's experts since there was no disclosure of experts by the plaintiff. Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant

ORDER

The MOTION IN LIMINE of defendants having been considered, and good cause appearing therefore,

IT IS ORDERED that plaintiff and plaintiff's counsel are hereby ordered to refrain from any attempt to inject the opinion of any plaintiff's expert witnesses by question, suggestion, argument or testimony.

IT IS FURTHER ORDERED that plaintiff's counsel is hereby ordered to instruct and admonish any expert witnesses called by plaintiff's counsel to refrain from such suggestion, argument or answer.

IT IS FURTHER ORDERED that this order shall be in effect from the commencement of voir dire to the rendering of a verdict and shall be in effect at all times when any juror or jurors are in the courtroom. Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[b] Use of Form

This form is a motion in limine and order to exclude particular expert witness testimony, for failure to comply with witness disclosure requirements [*see Code Civ. Proc. § 2034.260*; *see also* Ch. 85, *Automobiles: Discovery*].

[c] Cross References

For discussion and forms relating to motions in limine generally, see Ch. 373, *Motions in Limine*

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Chapter 87 AUTOMOBILES: TRIAL

8-87 California Forms of Pleading and Practice--Annotated 87.syn

§ 87.syn Synopsis to Chapter 87: AUTOMOBILES: TRIAL

§ 87.01 Scope of Chapter

§ 87.02 Cross References

[1] Related Chapters in This Volume

[2] Other Related Chapters

§§ 87.03-87.09 [Reserved]

§ 87.10 Trial Preparation

[1] Jury or Court Trial

[2] Trial Notebook

[3] Trial Brief

[4] Witness List

§ 87.11 Trial

[1] Case Management

[2] Notice of Trial

[3] Trial Objection List

[4] Common Trial Motions

§ 87.12 Trial of Low-Impact Collision Cases: Plaintiff's Perspective

§§ 87.13-87.29 [Reserved]

§ 87.30 Related Texts From LexisNexis

§ 87.31 State Statutes

[1] Jury Trials

[2] Court Trials

[3] Notice of Trial

[4] Evidence

[5] Trial Motions

§ 87.32 California Rules of Court

§ 87.33 Decisions

§ 87.34 Internet References

§§ 87.35-87.49 [Reserved]

§ 87.50 Case Management Statement

§ 87.51 Order of Trial Proceedings

§ 87.52 Trial Motions

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Chapter 87 AUTOMOBILES: TRIAL
PART I. SCOPE

8-87 California Forms of Pleading and Practice--Annotated § 87.01

§ 87.01 Scope of Chapter

This chapter discusses trial preparation for an automobile case, including economic and other considerations in such a case.

It also discusses tactical and practical aspects of preparing for trial, including the need for a trial brief and trial notebook.

In addition, this chapter discusses the general procedure for trying an automobile case, including a notice of trial, the order of presentation, evidentiary considerations, and common trial motions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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PART I. SCOPE

8-87 California Forms of Pleading and Practice--Annotated § 87.02

§ 87.02 Cross References

[1] Related Chapters in This Volume

- For discussion and forms concerning discovery in automobile cases, including exchange of expert witness lists, see Ch. 85, *Automobiles: Discovery* .

- For discussion and forms concerning the drafting of complaints in an automobile case, see Ch. 83, *Automobiles: Bringing the Action* .

- For discussion and forms concerning defenses to a complaint in an automobile case, see Ch. 84, *Automobiles: Responding to the Action* .

[2] Other Related Chapters

- For discussion and forms concerning trials, see Ch. 551, *Trial* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresTrialsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal VehiclesCivil ProceduresDiscoveryMethodsExpert Witness Discovery

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[Reserved]

§§ 87.03[Reserved]

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Volume 8: Automobiles-Chs. 80-92
Chapter 87 AUTOMOBILES: TRIAL
PART II. LEGAL BACKGROUND

8-87 California Forms of Pleading and Practice--Annotated § 87.10

§ 87.10 Trial Preparation

[1] Jury or Court Trial

Most automobile accident cases involve disputed issues of fact. Both parties generally request and prefer a jury trial. Jury trials are expensive, although the costs are recoverable to the prevailing party.

PRACTICE TIP:

Timely Payment of Fees and Client Consent for Waiver. Jury fees must be paid 25 days before the trial date, or the right to jury trial is deemed waived. Always demand and pay the fees on time. These are recoverable costs.

Waiving the jury should only be done with full consent of the client, and after consideration to the consequences. Waive the jury only after you know who will be assigned as the trial judge, and are satisfied that he or she would be preferable to a jury. If you waive the right to a jury trial, you are far less likely to succeed in a post-trial motion to obtain a new trial or a judgment notwithstanding the verdict. --*Joe Devine, Editorial Consultant.*

PRACTICE TIP: Consider Waiver for Small Cases. If you decide to waive a jury trial, you should get your client's consent in writing. If your case has a small value, under $15,000, I would suggest waiving a jury due to economic feasibility or, since the party requesting a jury trial picks up the fees, let the defendant decide and pick up the fees if defendant opts for a jury trial. Some courts also allow you to waive a court reporter and not have a record of the proceedings. This must also allow be with your client's consent, after you have fully explained the difficulty of having any type of appeal without a record of the proceedings. --*Dona Cohn, Editorial Consultant.*

For discussion of jury trials, see Ch. 322, *Juries and Jury Selection* .

[2] Trial Notebook

A trial notebook is an organizational tool used by the attorney to prepare for trial. It should be organized

chronologically, including the following items:

- Pretrial motions.
- Voir dire.
- Opening statements.
- Evidence (witnesses and documents included).
- Closing arguments.
- Post-trial motions.

PRACTICE TIP:

Contents of Notebook. A well-organized trial notebook includes frequently used notations on evidence, procedures, and other matters that may come up during the course of the trial. -- *Joe Devine, Editorial Consultant.*

PRACTICE TIP: Structure of Trial Notebook. I organize my trial notebook in the order that I will present my case to the court and the jury. I have a completely separate notebook for all motions and research that I plan on presenting to the court. --*Dona Cohn, Editorial Consultant.*

[3] Trial Brief

A trial brief is similar to a settlement conference statement. It gives the trial judge information regarding the parties' respective theories of the case. The brief should usually (1) contain a summary of the case, (2) outline the facts counsel expects to prove (and a statement and rebuttal of the adverse party's factual contentions), and (3) set forth the legal arguments with proper citations to appropriate authorities. A trial brief should also include any motions in limine, or other disputes, expected to arise during the course of the trial.

Since the effect of the brief on the judge may depend on when it is submitted, counsel should deliver the brief to him or her as early as possible. The chambers conference with judge and counsel present, which is held immediately before trial in many courts, provides a good opportunity for personally delivering the brief to the judge. In other courts, counsel might ascertain from the judge's courtroom clerk the best time and manner for delivering the trial brief.

[4] Witness List

A written list of all potential witnesses in the trial is a courtesy usually requested by the trial judge in every case [*see* Ch. 85, *Automobiles: Discovery* , for discussion of exchange of expert witness lists].

PRACTICE TIP:

Include Every Potential Witness. Include in the witness list every witness who might possibly be called, so the judge can ask prospective jurors if they have heard of any potential witnesses. -- *Joe Devine, Editorial Consultant.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 87.11 Trial

[1] Case Management

All civil cases, with certain exceptions, require case management review. The review must take place within 180 days after the filing of the complaintand will generally take place at a case management conference [*Cal. Rules of Ct., Rules 3.721, 3.722(a)*]. The rules regarding At-Issue Memorandums were repealed in 2002. Parties are required to submit a Case Management Statement fifteen days before the date scheduled for the conference or review [*Cal. Rules of Ct., Rule 3.725(a)*]. This standard statewide form is mandatory. It replaces all local case management, status conference, at-issue, or other similar statements previously used. The fifteen-day period is provided so that courts will have sufficient time to review all statements submitted and, if appropriate, issue orders and notify parties that they need not appear in particular cases.

[2] Notice of Trial

If notice of trial is not served by the court clerk, a party may serve notice by mail 15 days or more before the trial date [*Code Civ. Proc. § 594(b)*; *see* Ch. 551, *Trial*].

[3] Trial Objection List

A detailed sheet describing common trial objections, including hearsay and exceptions, and document foundation, is very helpful at trial [*see* Ch. 551, *Trial*].

PRACTICE TIP:

Keep List for Ready Reference. Have the objection sheet in front of you as you consider possible trial objections. Always object on the record to any matter that may be improper, to preserve the issue for appeal. -- *Joe Devine, Editorial Consultant.*

[4] Common Trial Motions

Common trial motions include the following:

- Motion for continuance [*see Code Civ. Proc. §§ 595-595.4*; *see also* Ch. 136, *Continuances*].

- Motion for judgment on the pleadings [*see* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*].

- Motion for judgment of nonsuit [*see Code Civ. Proc. § 581c(a)*; *see also* Ch. 389, *Nonsuit and Motions for Judgment*].

- Motion for judgment [*see Code Civ. Proc. § 631.8*; *see also* Ch. 389, *Nonsuit and Motions for Judgment*].

- Motion for mistrial [*see Estate of Bartholomae (1968) 261 Cal. App. 2d 839, 842, 68 Cal. Rptr. 332* ; *see also* Ch. 551, *Trial*].

- Motion to amend the pleadings to conform to proof [*see Code Civ. Proc. §§ 469, 473(a)(1), 576*; *see also* Ch. 21, *Amended and Supplemental Pleadings*].

- Motion for directed verdict [*see Code Civ. Proc. § 630*; *see also* Ch. 326A, *Jury Verdicts*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersContinuancesCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial JudgmentsNonsuitsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawDirected VerdictsTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 87.12 Trial of Low-Impact Collision Cases: Plaintiff's Perspective

In a low-impact collision, an attorney must focus on the differences in the client before and after the collision. Often there is little property damage in a low-impact collision, but the victim of a low-impact collision may nevertheless be injured. Lay witness may be helpful on these cases. For example, if the client's employer can describe what someone was like before the collision and afterward, this evidence can be very persuasive. In addition, family members make good witnesses regarding the plaintiff's condition. For example, a family member may describe what the plaintiff was able to do before and after the collision. Photographs can also be effective.

The defense will likely bring in experts to testify about the lack of injury in low-impact cases. However, these experts will often not have examined the plaintiff, which can hurt the expert's credibility and consequently the defendant's case at trial.

Legal Topics:

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

§§ 87.13[Reserved]

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8-87 California Forms of Pleading and Practice--Annotated § 87.30

§ 87.30 Related Texts From LexisNexis

Johnson, California Trial Guide (Matthew Bender)

California Civil Actions: Pleading And Practice (Matthew Bender)

Player, Clifford, Perschbacher, California Trial Techniques (LexisNexis)

Automobile Accident Law and Practice (Matthew Bender)

Scientific Automobile Accident Reconstruction (Matthew Bender)

Houts, Lawyer's Guide to Medical Proof (Matthew Bender)

Courtroom Medicine Series: The Neck (Matthew Bender)

Courtroom Medicine Series: The Low Back (Matthew Bender)

Courtroom Medicine Series: The Knee and Its Related Structures (Matthew Bender)

M. Houts, R. Baselt & R. Cravey, Courtroom Toxicology (Matthew Bender)

R. Erwin, Defense of Drunk Driving Cases, Criminal/Civil (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 87.31 State Statutes

[1] Jury Trials

Jury selection. *Code Civ. Proc. § 190 et seq.*; Cal. Rules of Ct., App., Div. I, § 8

Jury instructions. *Code Civ. Proc. §§ 607a-609, 612.5*

Demand for, waiver of jury trial. *Code Civ. Proc. § 631*

Order of proceedings. *Code Civ. Proc. §§ 607, 631.7*

Province of jury and court. *Evid. Code §§ 310-312*

[2] Court Trials

Trial by court. *Code Civ. Proc. § 631 et seq.*

[3] Notice of Trial

Notice of trial. *Code Civ. Proc. § 594*

[4] Evidence

Admission, exclusion, weight of evidence. *Evid. Code § 350 et seq.*

Burden of proof. *Evid. Code § 500 et seq.*

Presumptions and inferences. *Evid. Code § 600 et seq.*

Hearsay. *Evid. Code § 1200 et seq.*

[5] Trial Motions

Motion to amend pleadings to conform to proof. *Code Civ. Proc. §§ 469, 473(a)(1), 576*

Motion for continuance. *Code Civ. Proc. §§ 595-595.4*

Motion for nonsuit. *Code Civ. Proc. § 581c(a)*

Motion for directed verdict. *Code Civ. Proc. § 630*

Motion for judgment. *Code Civ. Proc. § 631.8*

Legal Topics:

For related research and practice materials, see the following legal topics:
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8-87 California Forms of Pleading and Practice--Annotated § 87.32

§ 87.32 California Rules of Court

Case management conferences and Case Management Statement. *Cal. Rules of Ct., Rule 3.720 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase Management

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8-87 California Forms of Pleading and Practice--Annotated § 87.33

§ 87.33 Decisions

Evidence that litigant was involved in prior accident inadmissible when its only purported relevance is to show propensity for negligent acts, thus enhancing probability of negligence on occasion alleged. *Downing v. Barrett Mobile Home Transport, Inc. (1974) 38 Cal. App. 3d 519, 524, 113 Cal. Rptr. 277*

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceRelevancePrior Acts, Crimes & WrongsTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 87.34 Internet References

Matthew Bender. This site includes links to Matthew Bender publications and Shepard's citation service. http://www.bender.com

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§§ 87.35[Reserved]

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§ 87.50 Case Management Statement

☐ Parties must use the mandatory Case Management Statement (Form CM-110), which is available at www.courtinfo.ca.gov/forms,, and complete all applicable items on the form. In lieu of each party filing a separate case management statement, any two or more parties may file a joint statement [*Cal. Rules of Ct., Rule 3.725(b)*; *see also* Ch. 551, *Trial*]. The following information must be included:

☐ The title and number of the case.

☐ The nature of the case.

☐ A statement that all essential parties have been served with process or have appeared, and that the case is at issue as to those parties.

☐ Whether the case is entitled to legal preference, and if so, a citation to the section of the code or statute granting the preference.

☐ Whether a jury is demanded.

☐ The time estimated for the trial.

☐ The names, addresses, and telephone numbers of the attorneys for the parties, or of parties appearing without counsel.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 87.51 Order of Trial Proceedings

- ☐ Organize the trial in the following sequence [*see* Ch. 551, *Trial*]:
  - ☐ Opening statement.
  - ☐ Proposed jury instructions based on the pleadings.
  - ☐ Production of evidence.
  - ☐ Rebuttal of evidence.
  - ☐ Proposed jury instructions based on evidence.
  - ☐ Argument.
  - ☐ Jury Instructions.
  - ☐ Special verdicts and special findings.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-87 California Forms of Pleading and Practice--Annotated § 87.52

§ 87.52 Trial Motions

☐ Assert motions when appropriate:

☐ Motion for continuance [*see Code Civ. Proc. §§ 595-595.4*; *see also* Ch. 136, *Continuances*].

☐ Motion for judgment of nonsuit [*see Code Civ. Proc. § 581c(a)*; *see also* Ch. 389, *Nonsuit and Motions for Judgment*].

☐ Motion for judgment on the pleadings [*see* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*].

☐ Motion for judgment [*see Code Civ. Proc. § 631.8*; *see also* Ch. 389, *Nonsuit and Motions for Judgment*].

☐ Motion for mistrial [*see Estate of Bartholomae (1968) 261 Cal. App. 2d 839, 842, 68 Cal. Rptr. 332* ; *see also* Ch. 551, *Trial*].

☐ Motion to amend the pleadings to conform to proof [*see Code Civ. Proc. §§ 469, 473(a)(1), 576*; *see also* Ch. 21, *Amended and Supplemental Pleadings*].

☐ Motion for directed verdict [*see Code Civ. Proc. § 630*; *see also* Ch. 326A, *Jury Verdicts*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedurePretrial JudgmentsNonsuitsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to EvidenceTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-87A California Forms of Pleading and Practice--Annotated 87A.syn

§ 87A.syn Synopsis to Chapter 87A: AUTOMOBILES: POST TRIAL

§ 87A.01 Scope of Chapter

§ 87A.02 Cross References

[1] Related Chapters in This Volume

[2] Other Related Chapters

§§ 87A.03-87A.09 [Reserved]

§ 87A.10 Motion to Stay Enforcement of Judgment

§ 87A.11 Common Post-Trial Motions

§ 87A.12 Judgment

[1] Entry of Judgment

[a] Jury Trial

[b] Court Trial

[2] Notice of Entry of Judgment

§ 87A.13 Costs

[1] Prevailing Party Entitled to Costs

[2] Recoverable Items

[3] Memorandum of Costs

[a] Filing Requirements for Memorandum of Costs

[b] Motion to Strike or Tax Costs

§ 87A.14 Collection

[1] Judgment Enforceable on Entry

[2] Ten-Year Limitation on Enforcement

[3] Asset Search

§ 87A.15 Bankruptcy

§§ 87A.16-87A.29 [Reserved]

§ 87A.30 Related Texts From LEXIS Publishing

§ 87A.31 State Statutes

[1] Motion to Stay Enforcement of Judgment

[2] Post-Trial Motions

[3] Judgment

[4] Costs

[5] Collection

§ 87A.32 Internet References

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§ 87A.01 Scope of Chapter

This chapter discusses post-trial procedures and considerations related to a automobile case, including common post-trial motions, entry and enforcement of judgment, and recovery of costs.

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8-87A California Forms of Pleading and Practice--Annotated § 87A.02

§ 87A.02 Cross References

[1] Related Chapters in This Volume

- For discussion and forms concerning trial of automobile cases, see Ch. 87, *Automobiles: Trial* .

- For discussion and forms concerning administrative ramifications of a judgment in an automobile collision case, see Ch. 92, *Automobiles: Drivers' Licenses* .

[2] Other Related Chapters

- For discussion and forms relating to costs and attorney's fees, Ch. 174, *Costs and Attorney's Fees* .

- For discussion and forms relating to judgments generally, see Ch. 318, *Judgments* .

- For discussion and forms relating to jury verdicts, see Ch. 326A, *Jury Verdicts* .

- For discussion and forms relating to a motion for judgment notwithstanding the verdict, see Ch. 371, *Motions After Trial, § 37.30* et seq.

- For discussion and forms relating to a motion for new trial, see *Ch. 371, Motions After Trial, § 371.60* et seq.

- For discussion and forms relating to a motion to set aside and vacate judgment, see *Ch. 371, Motions After Trial, § 371.90* et seq.

- For discussion and forms concerning trials generally, see Ch. 551, *Trial* .

Legal Topics:

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

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[Reserved]

§§ 87A.03[Reserved]

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§ 87A.10 Motion to Stay Enforcement of Judgment

The trial court may, in its discretion, stay the enforcement of a judgment or order if the judgment debtor has another action pending on a disputed claim against the judgment creditor [*Code Civ. Proc. § 918.5(a)*; *see* Ch. 318, *Judgments*].

In exercising its discretion, the court must consider all of the following [*Code Civ. Proc. § 918.5(b)*]:

- The likelihood of the judgment debtor prevailing in the other action.

- The amount of the judgment of the judgment creditor, as compared to the amount of the probable recovery of the judgment debtor in the action on the disputed claim.

- The financial ability of the judgment creditor to satisfy the judgment if a judgment is rendered against the judgment creditor in the action on the disputed claim.

For a form of application for a stay that may be modified to request a stay under *Section 918.5*, see Ch. 254, *Executions and Enforcement of Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsTransportation TortsMotor VehiclesPersonal VehiclesCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral Overview

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§ 87A.11 Common Post-Trial Motions

Common post-trial motions include the following:

- Motion for judgment notwithstanding the verdict [*see Code Civ. Proc. § 629*].
- Motion for new trial [*see Code Civ. Proc. § 655 et seq.*].
- Motion to set aside and vacate the judgment [*see Code Civ. Proc. §§ 663, 663a*].

For discussion, checklists and forms relating to each of these motions, see Ch. 371, *Motions After Trial* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateTortsTransportation TortsMotor VehiclesPersonal VehiclesCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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§ 87A.12 Judgment

[1] Entry of Judgment

[a] Jury Trial

After trial by jury, judgment must be entered by the clerk, in conformity to the verdict within 24 hours after the rendition of the verdict, whether or not a motion for judgment notwithstanding the verdict is pending, unless the court orders the case to be reserved for argument or further consideration, or grants a stay of proceedings [*Code Civ. Proc. § 664*; *see § 87A.11*].

[b] Court Trial

After trial by the court, judgment must be entered by the clerk, in conformity to the decision of the court, immediately on the filing of the decision. In no case is a judgment effectual for any purpose until entered [*Code Civ. Proc. § 664*; *see* Ch. 318, *Judgments*].

[2] Notice of Entry of Judgment

The party submitting an order or judgment for entry must prepare and mail a copy of the notice of entry of judgment to all parties who have appeared in the action, and must file with the court the original notice of entry of judgment, together with the proof of service by mail. This requirements does not apply to a small claims action, or an action in which the prevailing party is not represented by counsel [*Code Civ. Proc. § 664.5(a)*].

For discussion of this requirement and a form of notice, see Ch. 318, *Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 87A.13 Costs

[1] Prevailing Party Entitled to Costs

Except as otherwise provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding [*Code Civ. Proc. § 1032(b)*].

[2] Recoverable Items

The following items are allowable as costs under *Code Civ. Proc. § 1032* [*Code Civ. Proc. § 1033.5(a)*; *see Code Civ. Proc. § 1033.5(b)* (items not allowable as costs)]:

- Filing, motion, and jury fees.

- Juror food and lodging while they are kept together during trial and after the jury retires for deliberation.

- Taking, videotaping, and transcribing necessary depositions, including an original and one copy of those taken by the claimant and one copy of depositions taken by the party against whom costs are allowed, and travel expenses to attend deposition.

- Service of process by a public officer, registered process server, or other means [*see Code Civ. Proc. § 1033.5(a)(4)* (recoverable costs when service is by public officer, registered process server, publication, other means)].

- Expenses of attachment, including keeper's fees.

- Premiums on necessary surety bond.

- Ordinary witness fees pursuant to *Gov. Code § 68093*.

- Fees of expert witnesses ordered by the court.
- Transcripts of court proceedings ordered by the court.
- Attorney fees, when authorized by contract, statute, or law.
- Court reporters' fees as established by statute.
- Models and blow-ups of exhibits and photocopies of exhibits, if they were reasonably helpful to aid the trier of fact.
- Other items required to be awarded pursuant to statute as incident to prevailing in the action.

For further discussion, see Ch. 174, *Costs and Attorney's Fees* .

[3] Memorandum of Costs

[a] Filing Requirements for Memorandum of Costs

A party must file a memorandum of costs to recover allowable prejudgment costs [*Code Civ. Proc. § 1034(a)*; *see also Code Civ. Proc. § 1032(c)* (stipulation of parties)].

A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment or dismissal by the clerk under *Code Civ. Proc. § 664.5*, or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first [*Cal. Rules of Ct., Rule 3.1700(a)(1)*].

The memorandum of costs must be verified by a statement of the party, attorney, or agent that to the best of his or her knowledge, the items of cost are correct and were necessarily incurred in the case [*Cal. Rules of Ct., Rule 3.1700(a)(1)*For futher discussion, a procedural checklist, and forms, see Ch. 174, *Costs and Attorney's Fees* .

[b] Motion to Strike or Tax Costs

Any notice motion to strike or to tax costs must be served and filed 15 days after service of the cost memorandum. If the cost memorandum was served by mail, the period is extended as provided in *Code Civ. Proc. § 1013* [*see Cal. Rules of Ct., Rule 3.1700(b)(1)*].

For futher discussion, a procedural checklist, and forms, see Ch. 174, *Costs and Attorney's Fees* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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8-87A California Forms of Pleading and Practice--Annotated § 87A.14

§ 87A.14 Collection

[1] Judgment Enforceable on Entry

Except as otherwise provided by statute or in the judgment, a judgment is enforceable under Code Civ. Proc. § 683.101 et seq. on entry [*Code Civ. Proc. § 683.010*].

[2] Ten-Year Limitation on Enforcement

Except as otherwise provided by statute, on the expiration of 10 years after the date of entry of a money judgment [*Code Civ. Proc. § 683.020*; *see also Code Civ. Proc. § 683.110 et seq.* (renewal of judgment on proper application)],

- The judgment may not be enforced.
- All enforcement procedures pursuant to the judgment or to a writ or order issued pursuant to the judgment must cease.
- Any lien created by an enforcement procedure pursuant to the judgment is extinguished.

[3] Asset Search

In attempting to collect an unsatisfied judgment, it may be helpful to conduct an asset search.

PRACTICE TIP:
Decision for the Client. The decision whether or not to go to the expense of conducting an asset search should be left to the client.--*Dona E. Cohn, Editorial Consultant.*

PRACTICE TIP: Inadvisable Because of Dischargeable Nature of Debt. An asset search is usually inadvisable, because the judgment is generally dischargeable in bankruptcy.--*Frederick Schenk, Editorial Consultant.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 87A.15 Bankruptcy

In any case in which there is a reasonable possibility that a judgment may be entered that cannot be satisfied, the client should be fully advised in writing. Bankruptcy is a specialized area of the law, and a competent attorney who handles those matters should be consulted.

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[Reserved]

§§ 87A.16[Reserved]

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8-87A California Forms of Pleading and Practice--Annotated § 87A.30

§ 87A.30 Related Texts From LEXIS Publishing

Johnson, California Trial Guide (Matthew Bender)

California Civil Actions: Pleading And Practice (Matthew Bender)

Player, Clifford, Perschbacher, California Trial Techniques (LEXIS Publishing)

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8-87A California Forms of Pleading and Practice--Annotated § 87A.31

§ 87A.31 State Statutes

[1] Motion to Stay Enforcement of Judgment

Grounds for stay of enforcement of judgment. *Code Civ. Proc. § 918.5*

[2] Post-Trial Motions

Motion for judgment notwithstanding verdict. *Code Civ. Proc. § 629*

Motion for new trial. *Code Civ. Proc. § 655 et seq.*

Motion to set aside and vacate judgment. *Code Civ. Proc. §§ 663, 663a*

[3] Judgment

Entry of judgment. *Code Civ. Proc. § 664*

Notice of entry of judgment. *Code Civ. Proc. § 664.5(a)*

[4] Costs

Costs recoverable as matter of right by prevailing party. *Code Civ. Proc. § 1032(b)*

Recoverable items of costs. *Code Civ. Proc. § 1033.5(a)*

[5] Collection

Ten-year limitation on enforceability. *Code Civ. Proc. § 683.020*

Renewal of judgment on application. *Code Civ. Proc. § 683.110 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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8-87A California Forms of Pleading and Practice--Annotated § 87A.32

§ 87A.32 Internet References

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Legal Topics:

For related research and practice materials, see the following legal topics:
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8-88 California Forms of Pleading and Practice--Annotated 88.syn

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[7] Effect of Insurer's Duty to Investigate Insurability on Right to Rescind or Cancel Policy

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[5] When Insured Is Owner, Tenant, or Lessee of Premises Where Loading or Unloading Occurred

[a] Premises Policy Is Primary

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[7] Excess Coverage Limitations When Primary Coverage Invalid

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[11] Situations Outside Scope of Statute

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[2] Use of Form

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[6] Cross References

§ 88.42 Allegations for Complaint for Declaratory Relief

[1] Conclusive Presumption of Excess Coverage Applies--Insured Is Engaged in Business of Selling, Repairing, Servicing, Delivering, Testing, Road-Testing, Parking, or Storing Motor Vehicles

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[b] Use of Form

[2] Conclusive Presumption of Excess Coverage Applies--Insured Engaged in Business of Renting or Leasing Motor Vehicle

[a] FORM

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[a] FORM

[b] Use of Form

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8-88 California Forms of Pleading and Practice--Annotated § 88.01

§ 88.01 Scope of Chapter

This chapter discusses automobile insurance policies and covered claims, including the following:

- The nature of automobile insurance.
- Required and optional provisions pursuant to statute.
- Common coverage and exclusion provisions.
- Presumptions regarding excess and primary coverage when multiple policies cover one accident.
- Cancellation and nonrenewal policy provisions and notice requirements.

The chapter provides the following forms:

- Complaint by an insured against an insurance company for breach of the implied covenant of good faith and fair dealing [*see § 88.40*].
- Complaint by one insurer against another for declaratory relief regarding primary and excess coverage [*see § 88.41*] and allegations for use in that form supporting the presumption that excess coverage applies because
    - The insured is engaged in the business of selling, repairing, servicing, delivering, testing, road-testing, parking, or storing motor vehicles [*see § 88.42[1]*].
    - The insured is engaged in the business of renting or leasing motor vehicles [*see § 88.42[2]*].
    - The insured is the owner, tenant, or lessee of premises on which loading or unloading

occurred [*see § 88.42[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCancellation & RenewalGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageGeneral OverviewInsurance LawMotor Vehicle InsuranceStacking ProvisionsGeneral OverviewInsurance LawMotor Vehicle InsuranceExclusionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 88.02 Cross References

[1] Related Chapters in This Volume

- For discussion and forms concerning uninsured motorist coverage, see Ch. 88A, *Automobiles: Uninsured Motorist Claims* .

- For discussion and forms concerning administrative ramifications of a judgment in an automobile collision case, see Ch. 92, *Automobiles: Drivers' Licenses* .

[2] Other Related Chapters

- For discussion and forms regarding breach of contract generally, see Ch. 140, *Contracts* .

- For discussion and forms relating to costs and attorney's fees, Ch. 174, *Costs and Attorney's Fees*.

- For discussion and forms regarding indemnity generally, see Ch. 300, *Indemnity and Contribution* .

- For discussion of insurance generally, see Ch. 308, *Insurance* .

- For discussion and forms relating to judgments generally, see Ch. 318, *Judgments* .

- For discussion and forms relating to jury verdicts, see Ch. 326A, *Jury Verdicts* .

- For discussion and forms relating to a motion for judgment notwithstanding the verdict, see *Ch. 371, Motions After Trial, § 371.30* et seq.

- For discussion and forms relating to a motion for new trial, see *Ch. 371, Motions After Trial, § 371.60* et seq.

- For discussion and forms relating to a motion to set aside and vacate judgment, see *Ch. 371, Motions*

After Trial, § 371.90 et seq.

- For discussion and forms regarding subrogation generally, see Ch. 536, *Subrogation* .

- For discussion and forms concerning trials generally, see Ch. 551, *Trial* .

- For discussion and forms regarding workers' compensation generally, see Ch. 577, *Workers' Compensation* .

[3] Other Related Coverage

- For memoranda of points and authorities regarding insurance generally, see Ch. 120, California Points and Authorities , *Insurance* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsVerdictsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsInsurance LawMotor Vehicle InsuranceCoverageUninsured MotoristsGeneral OverviewWorkers' Compensation & SSDIGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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[Reserved]

§§ 88.03[Reserved]

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8-88 California Forms of Pleading and Practice--Annotated § 88.10

§ 88.10 Automobile Insurance Defined

Automobile insurance is a class of insurance, pursuant to *Ins. Code § 100(16)*. It includes insurance of automobile owners, users, dealers, or others having insurable interests against hazards incident to ownership, maintenance, operation, and use of automobiles, other than loss resulting from accident or physical injury, fatal or nonfatal, to any natural person [*Ins. Code § 116*].

Automobile insurance also includes any contract of warranty, guaranty, or suretyship that promises service, maintenance, parts, replacement, repair, money, or any other indemnity in the event of loss of or damage to a motor vehicle or any part of it from any cause, including loss of or damage to or loss of use of the motor vehicle by reason of depreciation, deterioration, wear and tear, use, obsolescence, or breakage, if made by a warrantor, surety, or guarantor that is doing an insurance business. A person is deemed to be doing an insurance business if the making of or proposing to make the contracts or other insurance contracts is done as a vocation and not as merely incidental to any other legitimate business or activity. The doing or proposing to do any business in substance equivalent to an insurance business described in the provisions of *Ins. Code § 116* in a manner designed to evade those provisions is the doing of an insurance business [*Ins. Code § 116*; *see Ins. Code § 19* (definition of person)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGuaranty ContractsTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 88.11 Financial Responsibility Laws

Since 1975, California drivers have been required to carry insurance or maintain some form of financial responsibility to protect others from their own possible negligence [*see Veh. Code § 16020(a)*]. The Financial Responsibility Laws, which govern that requirement, are discussed in Ch. 92, *Automobiles: Drivers' Licenses* .

Due to Proposition 213, a plaintiff's recovery of damages may be limited if he or she is an "uninsured motorist" under the Financial Responsibility Laws. Generally, an uninsured motorist can not recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages if, among other conditions, either of the following applies [*Civ. Code § 3333.4(a)*]:

- The injured person was the owner of a vehicle involved in the accident, and the vehicle was not insured as required by the financial responsibility laws [*see Veh. Code § 16000 et seq.*].

- The injured person was the operator of a vehicle involved in the accident, and cannot establish his or her financial responsibility as required by the financial responsibility laws [*see Veh. Code § 16000 et seq.*].

For additional discussion of *Civ. Code § 3333.4(a)*; *see Ch. 82A, Automobiles: Damages, § 82A.15*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoverageUninsured MotoristsGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-88 California Forms of Pleading and Practice--Annotated § 88.12

§ 88.12 Motor Vehicle Liability Insurance Compared With Automobile Liability Insurance

[1] Motor Vehicle Liability Insurance Distinguished From Automobile Liability Insurance

California law distinguishes between automobile liability insurance policies and motor vehicle liability policies. An automobile insurance policy is defined by *Ins. Code § 11580.1*, which lists the provisions that an automobile insurance policy must contain [*see § 88.14*]. *Veh. Code § 16450 et seq.* govern motor vehicle liability policies, which are expressly exempted from the requirements of *Ins. Code § 11580.1* [*Ins. Code § 11580.05*; *see Empire Fire & Marine Ins. Co. v. Bell (1997) 55 Cal. App. 4th 1410, 1416, 64 Cal. Rptr. 2d 749]* .

There are two major differences between an automobile liability insurance policy and a motor vehicle liability insurance policy. First, owners of commercial passenger vehicles must maintain proof of financial responsibility at all times, which means that a certificate of insurance must be provided to the Department of Motor Vehicles at the time the policy is issued [*Veh. Code § 16450*]. By contrast, owners of noncommercial vehicles do not need to prove financial responsibility until after the driver has been in an accident [*Veh. Code §§ 16050-16057*].

Second, a motor vehicle policy must cover all vehicles registered to or operated by the named insured, whereas an automobile policy may exclude coverage for particular vehicles or particular drivers [*Veh. Code §§ 16450-16452* (motor vehicle policies); *Ins. Code §§ 11580.1(c)(8)* (vehicle exclusion), 11580.1(d)(1) (driver exclusion)].

[2] Owners of Commercial Passenger Vehicles Must Carry Motor Vehicle Liability Insurance

Owners of commercial passenger vehicles, including ambulances, must maintain motor vehicle liability insurance policies, unless they are self-insured or post a bond or cash deposit [*Veh. Code § 16500*; *see Empire Fire & Marine Ins. Co. v. Bell (1997) 55 Cal. App. 4th 1410, 1416, 64 Cal. Rptr. 2d 749]* . Owners of noncommercial vehicles may maintain either an automobile or a motor vehicle liability insurance policy [*Veh. Code § 16054*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageGeneral OverviewInsurance LawMotor Vehicle

InsuranceCoverageCompulsory CoverageRental VehiclesInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageMotor CarriersTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 88.13 Incorporation of Statutes Into Policies

If insurance coverage is required by state or local law as a condition to doing business, the statutory provisions creating that requirement are incorporated into the insurance contract. Moreover, any provisions of the insurance contract that conflict with the pertinent statute are nullified and superseded by the statute [*Samson v. Transamerica Ins. Co. (1981) 30 Cal. 3d 220, 231, 178 Cal. Rptr. 343, 636 P. 2d 32* ; *Empire Fire & Marine Ins. Co. v. Bell (1997) 55 Cal. App. 4th 1410, 1420, 64 Cal. Rptr. 2d 749]* .

Thus, for example, when a local ordinance required 15 days' notice to the county prior to cancellation or modification of liability insurance for ambulance operators, a modification excluding a driver from coverage was ineffective in the absence of notice [*see* *Empire Fire & Marine Ins. Co. v. Bell (1997) 55 Cal. App. 4th 1410, 1420-1424, 64 Cal. Rptr. 2d 749]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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8-88 California Forms of Pleading and Practice--Annotated § 88.14

§ 88.14 Automobile Liability Insurance

[1] Required Provisions in Certain Policies

[a] Applicable Insurance Policies

A policy of automobile liability insurance described in *Veh. Code § 16054*, covering liability arising out of the ownership, maintenance, or use of any motor vehicle, must contain the provisions set forth in *Ins. Code § 11580.1(b)*. None of the requirements of *Ins. Code § 11580.1(b)*, however, apply to the insurance afforded under a policy to the extent that the insurance exceeds the limits specified in *Veh. Code § 16056(a)*, or if the policy contains an underlying insurance requirement, or provides for a retained limit of self-insurance, equal to or greater than the limits specified in *Veh. Code § 16056(a)* [*Ins. Code § 11580.1(a)*].

The provisions of *Ins. Code § 11580.1* do not apply to those policies to which *Veh. Code § 16450 et seq.* apply [*Ins. Code § 11580.05*]. *Veh. Code § 16450 et seq.* prescribe the requirements for a motor vehicle liability policy, which is required for commercial passenger vehicles [*see Empire Fire & Marine Ins. Co. v. Bell (1997) 55 Cal. App. 4th 1410, 1416 & n.7*].

[b] Required Provisions

Every policy of automobile liability insurance to which *Ins. Code § 11580.1(a)* applies must contain all of the following provisions:

- Coverage limits not less than the limits specified in *Veh. Code § 16056(a)* [*Ins. Code § 11580.1(b)(1)*].

- Designation by explicit description of, or appropriate reference to, the motor vehicles or class of motor vehicles to which coverage is specifically granted [*Ins. Code § 11580.1(b)(2)*].

- Designation by explicit description of the purposes for which coverage for the motor vehicles is specifically excluded [*Ins. Code § 11580.1(b)(3)*].

- Provision affording insurance to the named insured with respect to any owned or leased motor vehicle covered by the policy, and to the same extent that insurance is afforded to the named insured, to any other person using that motor vehicle, provided the use is by the named insured or with his or her permission, express or implied, and within the scope of that permission, except that (i) with regard to insurance afforded for the loading or unloading of any such motor vehicle, the insurance may be limited to apply only to the named insured, a relative of the named insured who is a resident of the named insured's household, a lessee or bailee of the motor vehicle, or an employee of any such person; and (ii) the insurance afforded to any person other than the named insured need not apply to (A) any employee with respect to bodily injury sustained by a fellow employee injured in the scope and course of his or her employment, or (B) any person, or his or her agent or employee, employed or otherwise engaged in the business of selling, repairing, servicing, delivering, testing, road-testing, parking, or storing automobiles with respect to any accident arising out of the maintenance or use of a motor vehicle in connection with those activities [*Ins. Code § 11580.1(b)(4)*; *see Ins. Code § 11580.1(g)*; *see also* [7], *below*]. For purposes of the uninsured motorist coverage requirements, "owned motor vehicle" includes all motor vehicles described and rated in the policy [*Ins. Code § 11580.1(b)(4)*]. "Leased motor vehicle" means a motor vehicle leased or rented by a lessor licensed to lease motor vehicles under a written contract for a period of six months or longer [*Ins. Code § 11580.06(i)*].

Every policy of automobile liability insurance, as described in *Veh. Code § 16054*, must provide liability coverage for replacement of a child passenger restraint system that was in use by a child during an accident for which liability coverage under the policy is applicable due to the liability of an insured [*Ins. Code § 11580.011(b)*].

[2] Optional Exclusions Generally

The insurance afforded by policy of automobile liability insurance under *Ins. Code § 11580.1(a)*, including the insurer's obligation to defend, may, by appropriate policy provision, be made inapplicable to any or all of the following:

- Liability assumed by the insured (defined as only that insured under the policy against whom the particular claim is made or suit brought) under contract [*Ins. Code § 11580.1(c)(1)*].

- Liability for bodily injury or property damage caused intentionally by, or at the direction of the insured (defined as only that insured under the policy against whom the particular claim is made or suit brought) [*Ins. Code § 11580.1(c)(2)*; *see Ins. Code § 533* (prohibiting coverage of liability for insured's willful act)].

- Liability imposed on or assumed by the insured (defined as only that insured under the policy against whom the particular claim is made or suit brought) under any workers' compensation law [*Ins. Code § 11580.1(c)(3)*].

- Liability for bodily injury to any employee of the insured (defined as only that insured under the policy against whom the particular claim is made or suit brought) arising out of and in the course of his or her employment [*Ins. Code § 11580.1(c)(4)*].

- Liability for bodily injury to an insured, or liability for bodily injury to an insured whenever the ultimate benefits of that indemnification accrue directly or indirectly to an insured, who is defined as any insured under the policy, including those persons who would have otherwise been included within the policy's definition of an insured but, by agreement, are subject to the limitations of *Ins. Code § 11580.1(d)(1)* (exclusion of named individual) [*Ins. Code § 11580.1(c)(5)*; *see* [3], *below*].

- Liability for damage to property owned, rented to, transported by, or in the charge of an insured, who is defined as any insured under the policy, including those persons who would have otherwise been included within the policy's definition of an insured but, by agreement, are subject to the limitations of *Ins. Code § 11580.1(d)(1)* (exclusion of named individual). A motor vehicle operated by an insured is considered to be property in the charge of an insured [*Ins. Code § 11580.1(c)(6)*].

- Liability for any bodily injury or property damage with respect to which insurance is or can be afforded under a nuclear energy liability policy [*Ins. Code § 11580.1(c)(7)*].

- Any motor vehicle or class of motor vehicles, as described or designated in the policy, with respect to which coverage is explicitly excluded, in whole or in part [*Ins. Code § 11580.1(c)(8)*].

These provisions are in addition to any exclusion provided in *Ins. Code § 11580.1(b)(3)* [*Ins. Code § 11580.1(c)*].

[3] Exclusion of Person Designated by Name

[a] Agreement for Exclusion

The insurer and any named insured may, by the terms of any policy of automobile liability insurance to which *Ins. Code § 11580.1(a)* applies, or by a separate writing relating to it, agree to either or both of the limitations provided in *Ins. Code § 11580.1(d)(1)* and *(2)*. The agreement is binding on every insured to whom the policy applies, and on every third-party claimant, notwithstanding the provisions of Veh. Code §§ 11580.1(b)(4), *16450-16457*, or *17150-17159* [*Ins. Code § 11580.1(d)*; for discussion of *Ins. Code § 11580.1(d)(2)*, *see* [4], *below*].

Pursuant to *Ins. Code § 11580.1(d)(1)*, the agreement may provide that coverage and the insurer's obligation to defend under the policy do not apply or accrue to the benefit of any insured or any third-party claimant while any motor vehicle is being used or operated by a natural person or persons designated by name. This agreement applies to all coverage provided by that policy, and it is sufficient to comply with the requirements of *Ins. Code § 11580.2(a)(2)* to delete coverage if a motor vehicle is operated by a natural person or persons designated by name. These limitations apply to any use or operation of a motor vehicle, including the negligent or alleged negligent entrustment of a motor vehicle to the designated person or persons.

[b] Effective Date of Agreement

An agreement made by the insurer and any named insured more than 60 days following the inception of the policy excluding a designated person by name is effective from the date of the agreement and is, with the signature of a named insured, conclusive evidence of the validity of the agreement [*Ins. Code § 11580.1(d)(1)*]. The agreement remains in force so long as the policy remains in force, and applies to any continuation, renewal, or replacement of the policy by the named insured, or to the reinstatement of the policy within 30 days of any lapse [*Ins. Code § 11580.1(d)(1)*].

[c] Obligation to Defend Named Insured

The insurer has an obligation to defend the named insured when all of the following apply to the designated natural person [*Ins. Code § 11580.1(d)(1)*]:

- He or she is a resident of the same household as the named insured.

- As a result of operating the insured motor vehicle of the named insured, he or she is jointly sued with the named insured.

- He or she is an insured under a separate automobile liability insurance policy issued to him or her as

a named insured, which policy does not provide a defense to the named insured.

[4] Restriction of Coverage to Named Insured in Vehicle Business

The insurer and any named insured may, by the terms of any policy of automobile liability insurance to which *Ins. Code § 11580.1(a)* applies, or by a separate writing relating to it, agree as to either or both of the limitations provided in *Ins. Code § 11580.1(d)(1)* and *(2)*. The agreement binds every insured to whom the policy applies and every third-party claimant, notwithstanding the provisions of *Ins. Code § 11580.1(b)(4)*, *Veh. Code §§ 16450-16457*, or *Veh. Code §§ 17150-17159* [*Ins. Code § 11580.1(d)*; for discussion of *Ins. Code § 11580.1(d)(1)*, *see* [3], *above*].

Pursuant to *Ins. Code § 11580.1(d)(2)*, the agreement may provide that, with regard to a policy issued to a named insured engaged in the business of leasing vehicles, for those vehicles leased for a term in excess of six months, or selling, repairing, servicing, delivering, testing, road-testing, parking, or storing automobiles, coverage does not apply to any person other than the named insured or his or her agent or employee, except to the extent that the limits of liability of any other valid and collectible insurance available to that person are not equal to the limits of liability specified in *Veh. Code § 16056(a)*.

If the policy is issued to a named insured engaged in the business of leasing vehicles, which business includes the lease of vehicles for a term in excess of six months, and the lessor includes in the lease automobile liability insurance, the terms and limits of which are not otherwise specified in the lease, the named insured must incorporate a provision in each vehicle lease contract advising the lessee of the provisions of *Ins. Code § 11580.1(d)*, and the fact that this limitation is applicable except as otherwise provided by statute or federal law.

[5] Inapplicability of Provisions to Other Types of Policies

Nothing in *Ins. Code § 11580.1* or in *Veh. Code §§ 16054* or *16450* is construed to constitute a homeowner's policy, personal and residence liability policy, personal and farm liability policy, general liability policy, comprehensive personal liability policy, manufacturers' and contractors' policy, premises liability policy, special multiperil policy, or any policy or endorsement in which automobile liability coverage is offered as incidental to some other basic coverage as an "automobile liability policy" within the meaning of *Veh. Code § 16054* or as a "motor vehicle liability policy" within the meaning of *Veh. Code § 16450*.

Nor does any provision of *Ins. Code § 11580.1* apply to a policy that provides insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle in the Republic of Mexico issued or delivered in California by a nonadmitted Mexican insurer, notwithstanding that the policy may provide automobile or motor vehicle liability coverage on insured premises or the ways immediately adjoining [*Ins. Code § 11580.1(e)*].

[6] Prohibition of Exclusion Regarding Charitable Organization

Ins. Code § 11580.1(f) provides restrictions on the exclusion of coverage regarding volunteer services performed for nonprofit charitable organization or governmental agency.

[7] Provisions Regarding Republic of Mexico

A Mexican nonadmitted insurer and any named insured may, by the terms of any policy of automobile insurance for use solely in the Republic of Mexico to which *Ins. Code § 11580.1(a)* applies, or by a separate writing relating to it, agree to the limitation that coverage under the policy does not apply to any person riding in or occupying a vehicle owned by the insured or driven by another person with the permission of the insured, notwithstanding the provisions of *Ins. Code § 11580.1(b)(4)*, or *Veh. Code §§ 16450-16457* or *17150-17159*. The agreement is binding on every insured to whom the policy applies and on any third-party claimant [*Ins. Code § 11580.1(g)*].

No policy of automobile insurance that provides insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle solely in the Republic of Mexico issued by a nonadmitted Mexican insurance company is subject to, or provides coverage for, those coverages provided in *Ins. Code § 11580.2* [*Ins. Code § 11580.1(h)*; *see* Ch. 88A, *Automobiles: Uninsured Motorist Claims*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageGeneral OverviewInsurance LawMotor Vehicle InsuranceExclusionsGeneral OverviewInsurance LawMotor Vehicle InsuranceExclusionsIntentional ActsTortsTransportation TortsMotor VehiclesPersonal Vehicles

California Forms of Pleading and Practice--Annotated

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Chapter 88 AUTOMOBILES: AUTOMOBILE INSURANCE
PART II. LEGAL BACKGROUND

8-88 California Forms of Pleading and Practice--Annotated § 88.15

§ 88.15 Scope of Automobile Insurance Coverage

[1] General Scope of Automobile Insurance Coverage

The scope of coverage in automobile insurance policies generally is governed by the insuring clause, which defines the insurer's broad promise to pay. A standard insuring clause provides the following [*see State Farm Mut. Auto. Ins. Co. v. Partridge (1973) 10 Cal. 3d 94, 98 n.4, 109 Cal. Rptr. 811, 514 P.2d 123]* :

> [The insurer] agrees [t]o pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of (a) bodily injury sustained by other persons caused by accident arising out of the ownership, maintenance or use, including loading or unloading, of the owned motor vehicle.

[2] Coverage for Bodily Injury

The insuring clause of most automobile policies specifically promises to pay damages the insured will become liable to pay as a result of "bodily injury." Bodily injury is defined in most policies pursuant to *Ins. Code § 11580.06(c)*, which deems bodily injury to "include sickness or disease, including death therefrom." This language is important because it gives the insured protection against wrongful death claims as well as personal injury lawsuits.

The term "bodily injury" is germane not only to the scope of the insuring promise, but also to a number of exclusions in which that term is used, especially the exclusions for bodily injury to an insured or for bodily injury caused intentionally by the insured. In one case involving a boat insurance policy that did not specifically define "bodily injury," the court held that an exclusion for bodily injury sustained by any member of the named insured's household would be narrowly construed to refer only to nonfatal injuries. Thus, the exclusion did not preclude coverage for wrongful death [*see Mid-Century Ins. Co. v. Hauck (1973) 35 Cal. App. 3d 293, 295-296, 110 Cal. Rptr. 707* (noting that exclusionary clauses are interpreted narrowly against insurer)].

[3] Coverage for Accidents

The standard automobile insurance policy covers the insured for damages he or she becomes legally obligated to pay

that are "caused by accident." Occasionally, questions arise about the nature of "accidents" [*see, e.g., United Servs. Auto. Ass'n v. Baggett (1989) 209 Cal. App. 3d 1387, 1392-1396, 258 Cal. Rptr. 52* (when insured driver struck plaintiff's automobile from behind and third vehicle struck insured's vehicle, pushing it into the plaintiff while insured and plaintiff were talking, only one "accident" occurred)].

As in the case of other types of liability policies, there can be a question of coverage under automobile insurance policies when the negligence and the resulting injury occur at different times. In the context of automobile insurance, this question can arise in the form of allegations that negligent repair or maintenance of a vehicle resulted in a subsequent injury. The issue, in effect, is whether the "accident" took place at the time of the negligent conduct or at the time the injury occurred. The prevailing rule is that an "accident" occurs at the time the injury occurred, not at the time the wrongful act was committed [*Maples v. Aetna Cas. & Surety Co. (1978) 83 Cal. App. 3d 641, 646-650, 148 Cal. Rptr. 80* ; *see also State Farm Mut. Auto. Ins. Co. v. Longden (1987) 197 Cal. App. 3d 226, 231, 242 Cal. Rptr. 726* ("accident" occurred when brakes failed, not when insured negligently maintained vehicle); *contra, e.g., Sylla v. United States Fid. & Guar. Co. (1976) 54 Cal. App. 3d 895, 900-902, 127 Cal. Rptr. 38]* .

[4] Coverage Arising Out of "Use" of Vehicle

[a] Definition of "Use"

The insuring phrase of almost all automobile insurance policies provides insurance for losses arising out of the "use" of the automobile. Much litigation has arisen regarding the meaning of "use." Within the meaning of the Insurance Code provisions governing automobile insurance policies, "use" of a motor vehicle means only operating, maintaining, loading, or unloading a motor vehicle [*Ins. Code § 11580.06(g)*]. Thus, for example, entrustment of a vehicle to others does not constitute "use" of the vehicle within the meaning of the statute [*Ohio Farmers Ins. Co. v. Quin (1988) 198 Cal. App. 3d 1338, 1348-1349, 244 Cal. Rptr. 359]* .

The California Supreme Court has found that even a "slight" causal connection to the use of the vehicle is enough to establish coverage [*State Farm Mut. Auto. Ins. Co. v. Partridge (1973) 10 Cal. 3d 94, 101 n.8, 109 Cal. Rptr. 811, 514 P.2d 123]* . For example, the "operation or use" of a motor vehicle includes the act of opening the door of a parked vehicle in order to exit [*Cabral v. Los Angeles County Metro. Transp. Auth. (1998) 66 Cal. App. 4th 907, 914, 78 Cal. Rptr. 2d 385]* .

An intervening cause of the accident, however, may break the causal connection [*see, e.g., Farmers Ins. Exch. v. Reed (1988) 200 Cal. App. 3d 1230, 1233-1235, 248 Cal. Rptr. 11* (injuries suffered by intoxicated woman who was struck by car as she walked home from bar did not arise out of her husband's "use" of his insured vehicle, based on his taking keys to his vehicle from her, and leaving her at bar without transportation); *see also Mullins v. Mayflower Ins. Co. (1992) 9 Cal. App. 4th 416, 420-421, 11 Cal. Rptr. 2d 635* (no coverage for vehicle passenger struck and killed by another car while walking on highway shoulder to call for assistance with flat tire)].

[b] Predominating Cause or Substantial Factor Test

Cases subsequent to the California Supreme Court's decision in *State Farm Mut. Auto. Ins. Co. v. Partridge (1973) 10 Cal. 3d 94, 109 Cal. Rptr. 811, 514 P.2d 123* [*see § 88.15[4][a]*] have largely opted for the test requiring that "use" of the vehicle be a "predominating cause" or a "substantial factor" in causing the injury, that is, the predominating cause/substantial factor test [*see State Farm Mut. Auto. Ins. Co. v. Grisham (2004) 122 Cal. App. 4th 563, 566, 18 Cal. Rptr. 3d 809* ; *see, e.g., California Auto. Ins. Co. v. Hogan (2003) 112 Cal. App. 4th 1292, 1297-1298, 5 Cal. Rptr. 3d 761* ; *American Nat'l Prop. & Cas. Co. v. Julie R. (1999) 76 Cal. App. 4th 134, 140, 90 Cal. Rptr. 2d 119* ; *Rowe v. Farmers Ins. Exch. (1992) 7 Cal. App. 4th 964, 970-972, 9 Cal. Rptr. 2d 314* ; *but see State Farm Mut. Auto. Ins. Co. v. Davis (9th Cir. 1991) 937 F.2d 1415, 1419 n.3*]. Consequently, a mere "but for" link is insufficient. To hold otherwise would convert auto liability policies into general liability policies [*State Farm Mut. Auto. Ins. Co. v. Grisham (2004)*

122 Cal. App. 4th 563, 566, 18 Cal. Rptr. 3d 809 ; *see Acceptance Ins. Co. v. Syufy Enters. (1999) 69 Cal. App. 4th 321, 327-328, 81 Cal. Rptr. 2d 557]* .

Under the predominating cause/substantial factor test, the use of the vehicle must contribute in some way to the injury beyond merely serving as the situs of the injury. Something involving the vehicle's operation, movement, or maintenance, or its loading or unloading, must be a contributing cause [*State Farm Mut. Auto. Ins. Co. v. Grisham (2004) 122 Cal. App. 4th 563, 566-567, 18 Cal. Rptr. 3d 809* ; *Kramer v. State Farm Fire & Cas. Co. (1999) 76 Cal. App. 4th 332, 338-339, 90 Cal. Rptr. 2d 301* ; *Peters v. Firemen's Ins. Co. (1998) 67 Cal. App. 4th 808, 812-813, 79 Cal. Rptr. 2d 326* ; *see Ins. Code § 11580.06(g)* ("use" as applied to motor vehicle means only operating, maintaining, loading, or unloading motor vehicle)].

Therefore, in a case in which the insured's dog jumped from the unattended camper shell of the insured's pickup truck and bit a pedestrian some 25 yards from the truck, the injury did not result from the use of the truck because it did not result from or in the course of the truck's being operated, moved, maintained, loaded, or unloaded [*State Farm Mut. Auto. Ins. Co. v. Grisham (2004) 122 Cal. App. 4th 563, 568, 18 Cal. Rptr. 3d 809]* .

[c] Loading and Unloading

Coverage for the loading and unloading of automobiles is included in California automobile insurance policies, either expressly by policy language or by judicial construction of the insuring clause's guarantee of coverage for "use" of the vehicle [*see International Bus. Machs. Corp. v. Truck Ins. Exch. (1970) 2 Cal. 3d 1026, 1031, n.6, 89 Cal. Rptr. 615, 474 P.2d 431* ; *Truck Ins. Exch. v. Webb (1967) 256 Cal. App. 2d 140, 144-145, 63 Cal. Rptr. 791]* . The difficulty in this area generally lies in determining what constitutes "loading" and "unloading" for purposes of this coverage.

California adheres to the "complete operations" test for determining the scope of coverage for loading and unloading activities. Under that liberal rule, the loading or unloading of a vehicle embraces all operations required in any specific situation to effect a completed delivery of an article. The "complete operations" rule often provides coverage for delivering objects as well as unloading them [*see Entz v. Fid. & Cas. Co. (1966) 64 Cal. 2d 379, 382, 50 Cal. Rptr. 190, 412 P.2d 382]* .

[5] Persons Insured

[a] Named Insured

A person who purchases an insurance policy, and whose name appears on the declaration sheets, is the "named insured." There may be more than one named insured, as when two spouses purchase a policy together. Inasmuch as a named insured is entitled to the highest level of coverage, it is desirable to be able to claim coverage under a policy as a named insured [*see, e.g., Giovanna v. Vigilant Ins. Co. (1984) 156 Cal. App. 3d 368, 371, 202 Cal. Rptr. 364* (stepdaughter not named insured even though listed as "occasional operator" of vehicle)].

[b] Permissive Users

The California Supreme Court has held that an insurer's failure to cover permissive users of the named insured's automobile is a violation of public policy [*Wildman v. Government Employees' Ins. Co. (1957) 48 Cal. 2d 31, 39, 307 P.2d 359* (construing former *Veh. Code §§ 415*, 402; *now see Veh. Code §§ 16451, 17150*, respectively)]. Subsequently, the legislature enacted *Ins. Code § 11580.1(b)(4)*, requiring provisions extending coverage to permissive users [*see § 88.14[1]*].

Permissive-user coverage is not required, however, if the policy contains an underlying insurance requirement, or provides for a retained limit of self-insurance, equal to or greater than the limits set forth in *Veh. Code § 16056(a)* [*Ins. Code § 11580.1(a)*]. If a self-insurer wishes to omit permissive-user coverage, it must comply with the following

requirements [*Alderson v. Insurance Co. of N. Am. (1990) 223 Cal. App. 3d 397, 410, 273 Cal. Rptr. 7]* :

- Meet the statutory requirements for self-insurance [*see Veh. Code §§ 16052, 16053*; *see also 13 Cal. Code Reg. §§ 100.50, 100.90*];

- Agree to maintain the self-insurer status for the duration of the policy;

- Afford insurance coverage to its permissive users equal to statutory limits [*see Veh. Code § 16056(a)*]; and

- Expressly state in the policy that the policy provides for a retained limit of self-insurance with at least the minimum statutory limits.

The insured cannot ratify the nonpermitted use of a vehicle after an accident so as to impose liability on the insurer [*Allied Mut. Ins. Co. v. Webb (2001) 91 Cal. App. 4th 1190, 1194-1196, 111 Cal. Rptr. 2d 426]* .

A provision purporting to limit liability coverage for permissive users in an "E-Z Reader Car Policy" was unenforceable because it was not conspicuous, plain, or clear. The provision sought to limit liability coverage with respect to permissive users to the minimum amounts required by the Financial Responsibility Law, and it was located in an endorsement containing unrelated provisions on the 24th page of a 39-page policy [*see Haynes v. Farmers Ins. Exch. (2004) 32 Cal. 4th 1198, 1206-1212, 13 Cal. Rptr. 3d 68, 89 P.3d 381* ("burying" limitation among other provisions rendered it inconspicuous and potentially confusing to average lay reader)].

[6] Vehicles Insured

[a] Owned and Newly Acquired Vehicles

The term "owner," as applied to motor vehicles, is commonly understood to designate the person in whom title is vested either as legal or equitable owner or as registered owner [*Bohannon v. Aetna Cas.& Sur.Co.(1985) 166 Cal. App. 3d 1172, 1176, 212 Cal. Rptr. 848]* . Thus, for the purpose of determining liability insurance coverage, there may be several owners of an automobile [*see Allstate Ins. Co. v. Chinn (1969) 271 Cal. App. 2d 274, 278, 76 Cal. Rptr. 264]* .

For example, a person who purchases an automobile but fails to register the car is still an "owner" because he or she is the buyer in possession, even though the seller is still an "owner" because of the buyer's failure to comply with the DMV registration requirements [*Allstate Ins. Co. v. Chinn (1969) 271 Cal. App. 2d 274, 279, 76 Cal. Rptr. 264]* .

If the insured transferred title by executing the required DMV documents prior to the loss, the insured would not be the owner for purposes of collecting benefits under the policy [*see Liberty Mut. Fire Ins. Co. v. McKenzie (2001) 88 Cal. App. 4th 681, 688-689, 105 Cal. Rptr. 2d 910]* . However, if an attempted transfer is invalid, the DMV records of a change in ownership are not necessarily conclusive. Authority defining the owner as the holder of record title presupposes a valid registration of transfer of title [*see Veh. Code § 460*]. If warranted by the specific facts, a court will look behind the transfer to determine the true owner [*Liberty Mut. Fire Ins. Co. v. McKenzie (2001) 88 Cal. App. 4th 681, 688-689, 105 Cal. Rptr. 2d 910]* . For example, an insured who kept his premiums current transferred title of the vehicle named in the policy to a deceased relative, purportedly to hide his assets from creditors, a month before the reported loss. The insurer was not entitled to summary judgment on the question of coverage, because the transfer to a deceased person had no legal effect, and therefore a triable issue of fact remained regarding the insured's ownership [*Liberty Mut. Fire Ins. Co. v. McKenzie (2001) 88 Cal. App. 4th 681, 688-689, 105 Cal. Rptr. 2d 910]* . The insured's wrongful intent did not necessarily mean that the insurer could avoid its contractual obligations, if the insured otherwise remained the owner of the vehicle within the meaning of the policy [*Liberty Mut. Fire Ins. Co. v. McKenzie (2001) 88 Cal. App. 4th 681, 688, 105 Cal. Rptr. 2d 910]* .

The determination of whether or not a vehicle is "owned" under the terms of a policy depends on whether the purchaser assumes the indicia of ownership, possession and control, rather than on the enforceability of the sales contract by which the purchaser obtained possession [*Allstate Ins. Co. v. Chinn (1969) 271 Cal. App. 2d 274, 279, 76 Cal. Rptr. 264]* . Thus, a purchaser is the owner of a vehicle, for the purpose of determining coverage under a nonowned automobile provision, even though the sale may be void because the purchaser is not a licensed driver at the time of the purchase [*Allstate Ins. Co. v. Thompson (1988) 206 Cal. App. 3d 933, 938-940, 254 Cal. Rptr. 84]* .

Most policies provide coverage for "newly acquired vehicles." If the insured complies with the notice requirements specified in the policy (usually a 30-day notice period), additional vehicles purchased after the policy is initially taken out will be covered if (1) the new vehicle replaces an old vehicle, or (2) the company insures all vehicles owned by the named insured at the time the new vehicle is acquired and delivered to the named insured. The courts have tended to be generous about finding coverage under the newly acquired vehicles provisions of the policy if the newer vehicle replaces an older vehicle that is not operable [*see, e.g.,* *Patterson v. Insurance Co. of N. Am. (1970) 6 Cal. App. 3d 310, 316, 85 Cal. Rptr. 665* ; *Hames Ready Mix, Inc. v. Transit Cas. Co. (1968) 260 Cal. App. 2d 173, 174 175, 66 Cal. Rptr. 898]* .

[b] Nonowned Automobiles

In addition to covering the insured's own vehicle, the policy will generally also cover the named insured when driving a "nonowned vehicle." Coverage for nonowned vehicles is, however, subject to numerous conditions. First, it is available only to a restricted class of users. Thus the "persons insured" section of a policy will generally cover as insureds only the following [*see, e.g.,* *State Farm Mut. Auto. Ins. Co. v. Eastman (1984) 158 Cal. App. 3d 562, 567, 204 Cal. Rptr. 827]* :

- The named insured;
- The relatives of the named insured, provided the relative uses the nonowned automobile with the permission of the owner; or
- Any other person or organization vicariously liable through the named insured or the relative.

In one case, the policy stated that if the vehicle is "registered to" a listed driver, it is not a nonowned automobile for which coverage is provided. In that case, the vehicle in question was registered to a listed driver who was the husband of the insured. The vehicle therefore was not a nonowned automobile for purposes of coverage for a negligence action against the insured's son, who was driving a vehicle owned by his grandfather and registered to his grandfather, his father (the husband listed as a driver in the relevant policy), and his sister. The insured's son, who was the subject of the liability claim, knew that the vehicle he was driving had been registered in that manner to avoid probate and smog requirements. After the injured party settled with the insurer of the vehicle owner (the grandfather), the injured party attempted to recover also from the insurer of the driver's mother, based on her policy covering a different vehicle. Because the vehicle involved in the collision was registered to a person named as a driver in the mother's policy, her policy did not cover liability for her son's negligence committed while driving the other vehicle. The court in this case also held that the term "registered to" did not exclusively mean "registered to" the actual owner of the vehicle; the policy was unambiguous in that respect [*Nava v. Mercury Cas. Co. (2004) 118 Cal. App. 4th 803, 805-807, 13 Cal. Rptr. 3d 816]* .

[c] Regular Use Exclusion Regarding Nonowned Automobiles

The policy definition of a nonowned automobile generally also has a limiting effect on the scope of coverage. With some variations from policy to policy, that definition generally reads as follows [*see, e.g.,* *State Farm Mut. Auto. Ins.*

Co. v. Eastman (1984) 158 Cal. App. 3d 562, 568 n.3, 204 Cal. Rptr. 827] :

> "Nonowned automobile" means an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile.

The term "regular use" has been held not to be vague or ambiguous [*Interinsurance Exch. v. Smith (1983) 148 Cal. App. 3d 1128, 1133, 196 Cal. Rptr. 456]* . In determining whether or not a vehicle has been furnished for the regular use of the named insured or his or her relatives, the courts have defined regular use as a "principal use, as distinguished from a casual or incidental use" [*Kindred v. Pacific Auto. Ins. Co. (1938) 10 Cal. 2d 463, 465, 75 P.2d 69]* . Other elements that have been considered in the determination include time, place, and manner of use, purpose or type of use, and the nature and character of the restrictions on the use [*Highlands Ins. Co. v. Universal Underwriters Ins. Co. (1979) 92 Cal. App. 3d 171, 175, 154 Cal. Rptr. 683]* .

Generally, the issue presents a question of fact, although an interpretation of the relevant policy language is, of course, also involved [*see, e.g.,* *Allstate Ins. Co. v. Thompson (1988) 206 Cal. App. 3d 933, 254 Cal. Rptr. 84* (finding regular use); *Interinsurance Exch. v. Smith (1983) 148 Cal. App. 3d 1128, 1132, 196 Cal. Rptr. 456* (not finding regular use)]. The fact that an insured is unlicensed does not render the vehicle unavailable for the insured's use [*Allstate Ins. Co. v. Thompson (1988) 206 Cal. App. 3d 933, 940-941, 254 Cal. Rptr. 84]* .

[d] Coverage of Temporary Substitute Automobiles

Policies generally cover the insured when using a "temporary substitute automobile." That term is usually defined as follows:

> "[T]emporary substitute automobile" means any automobile or trailer not owned by the named insured while temporarily used as a substitute for the owned automobile or trailer when withdrawn from normal use because of its breakdown, loss, or destruction.

Courts are reluctant to find temporary substitute coverage when the insured uses another automobile as a matter of convenience rather than of necessity [*see, e.g.,* *State Farm Mut. Auto. Ins. Co. v. O'Brien (1975) 14 Cal. 3d 96, 98-100, 120 Cal. Rptr. 692, 534 P.2d 388* (insured used substitute automobile to avoid refueling insured vehicle)]. If the owned vehicle has mechanical problems, however, coverage will probably exist, sometimes even when the vehicle is not totally incapable of being driven [*see* *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co. (1970) 9 Cal. App. 3d 508, 518-519, 88 Cal. Rptr. 246]* .

[e] Definition of "Automobile" or "Motor Vehicle"

An automobile is "any self-propelled motor vehicle, with neither more nor less than four wheels, designed for use principally upon streets and highways and subject to motor vehicle registration under the laws of this state" [*Ins. Code § 11580.06(d)*]. This definition is much more restricted than the generic term "motor vehicle," which is defined to mean "any vehicle designed for use principally upon streets and highways and subject to motor vehicle registration under the laws of this state" [*Ins. Code § 11580.06(a)*].

In many cases, the determining language will be that of the policy, rather than the statutory definitions. Several decisions have refused to extend coverage to six-wheeled vehicles, such as vans, when the policy definition of an automobile specifically required four wheels [*see* *S & H Ins. Co. v. California State Auto. Assn. Inter-Ins. Bureau (1983) 139 Cal. App. 3d 509, 513, 516, 188 Cal. Rptr. 722]* .

In interpreting whether a dune buggy is an automobile, the significant factor has been whether the dune buggy is manufactured with the intent that it be used on public roads [*see* *Farmers Ins. Group v. Koberg (1982) 129 Cal. App. 3d 1033, 1036, 181 Cal. Rptr. 494]* .

[7] "Per Person" and "Per Occurrence" Limits

Generally the policy contains two different limits: the "per person" limit and the "per occurrence" limit. The lowest permissible coverage is $15,000 per person and $30,000 per occurrence, which is inclusive of the "per person" limits [*Veh. Code § 16056*].

With respect to per-person limits, California courts have consistently followed the principle that if one person was injured or killed in the accident or occurrence, the single-injury limit applies, regardless of the number of persons damaged as a result of that injury [*see, e.g., Mercury Ins. Co. v. Ayala (2004) 116 Cal. App. 4th 1198, 1203, 11 Cal. Rptr. 3d 158* ; *United Servs. Auto. Ass'n v. Warner (1976) 64 Cal. App. 3d 957, 963, 135 Cal. Rptr. 34]* . Therefore, the per-person limit applied in a case in which the injured person's spouse claimed loss of consortium [*Mercury Ins. Co. v. Ayala (2004) 116 Cal. App. 4th 1198, 1202-1205, 11 Cal. Rptr. 3d 158]* . However, whether the per-person or per-occurrence limit applies generally to claims for loss of consortium is an unsettled issue [*see, e.g., Abellon v. Hartford Ins. Co. (1985) 167 Cal. App. 3d 21, 212 Cal. Rptr. 852* ; *see generally* Ch. 354, *Loss of Consortium*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceVehicle UsePermissive UsersGeneral OverviewInsurance LawMotor Vehicle InsuranceExclusionsRegular UseInsurance LawMotor Vehicle InsuranceVehicle OwnershipNonowned VehiclesInsurance LawMotor Vehicle InsuranceVehicle OwnershipCoverage to Drive Other CarsTortsTransportation TortsMotor VehiclesPersonal Vehicles

California Forms of Pleading and Practice--Annotated

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Chapter 88 AUTOMOBILES: AUTOMOBILE INSURANCE
PART II. LEGAL BACKGROUND

8-88 California Forms of Pleading and Practice--Annotated § 88.16

§ 88.16 Cancellation and Nonrenewal of Automobile Policies

[1] Grounds for Cancellation

[a] Proposition 103

Ins. Code § 1861.03(c)(1), which was enacted as part of Proposition 103 (adopted in the November 8, 1988, general election), provides that notwithstanding any other provision of law, a notice of cancellation of an automobile insurance policy is effective only if based on one or more of the following reasons [*Ins. Code § 1861.03(c)(1)*]:

- Nonpayment of premium;
- Fraud or material misrepresentation affecting the policy or the insured; and
- A substantial increase in the hazard insured against.

[b] Proposition 103 Reconciled With Ins. Code § 661

Prior to adoption of *Ins. Code § 1861.03(c)(1)*, the permissible grounds for cancellation of an automobile insurance policy were stated in *Ins. Code § 661*. However, *Ins. Code § 661* applies only to cancellations, not nonrenewals. Inasmuch as *Ins. Code § 1861.03(c)(1)* prevails over *Ins. Code § 661* to the extent of any inconsistency, the exact extent to which the latter section remains valid is not entirely clear. In general, the grounds for cancellation stated in *Ins. Code § 661* are similar to those stated in *Ins. Code § 1861.03(c)(1)*, specifically the following [*Ins. Code § 661(a)(1)-(3)*]:

- Nonpayment of premium;
- Suspension or revocation of the driver's license or vehicle registration of the named insured or any other operator who resides in the same household or customarily operates an automobile insured under the policy, during the policy period or 180 days immediately preceding the policy's effective date; or
- Discovery of fraud by the named insured in pursuing a claim under the policy, provided the insurer

does not rescind the policy.

In 1994, the legislature amended *Ins. Code § 661* [*see* Stats. 1994, ch. 992] to add the following as a fourth ground [*Ins. Code § 661(a)(4)*]:

> Discovery of a misrepresentation of any of the following information concerning the named insured or any resident of the same household who customarily operates an automobile insured under the policy: (a) safety record; (b) annual miles driven in prior years; (c) number of years of driving experience; (d) record of automobile insurance claims; or (e) any other factor found by the Commissioner of Insurance to have a substantial relationship to the loss.

The amendment provides that any insured who negligently misrepresents any of the above information may avoid cancellation by providing corrected information within 20 days and paying the difference in premiums, if any [*Ins. Code § 661(a)(4)*]. The 1994 amendment also indicates that the legislature apparently believes that *Ins. Code § 661* has some measure of continuing viability. Since material misrepresentation is also a ground for cancellation under Proposition 103 [*see Ins. Code § 1861(c)(1)*], the amendment does not appear to be inherently inconsistent with the initiative measure, although its language relating to material misrepresentation is far more detailed [*see Ins. Code § 661(a)(4)*].

Moreover, in 1999 the legislature amended *Ins. Code § 661* to add as a fifth ground: a substantial increase in the hazard insured against [*Ins. Code § 661(a)(5)*].

In addition to listing specific grounds for cancellation, *Ins. Code § 661* provides for a 60-day grace period after issuance of coverage, during which the insurer can cancel the policy without regard to the grounds stated in that section [*see Ins. Code § 661(b)*]. The California Supreme Court, in a much-cited footnote, has stated in dicta that Proposition 103 eliminated this 60-day grace period [*see Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal. 3d 805, 826 n. 19, 258 Cal. Rptr. 161, 771 P.2d 1247]* . It is generally assumed that this exception to the cancellation requirements is now invalid. Interestingly, however, the legislature retained this 60-day grace period in the statute when *Ins. Code § 661* was amended in 1994 [*see* Stats. 1994, ch. 992; *see also Adams v. Explorer Ins. Co. (2003) 107 Cal. App. 4th 438, 448, 450, 132 Cal. Rptr. 2d 24]* .

In one case, a notice of cancellation for nonpayment of premiums pursuant to *Ins. Code § 661* was effective with respect to a collision occurring during the policy lapse and one day prior to the insurer's receipt of a late reinstatement premium payment. The reinstatement payment reached the insurer 24 days after the insurer had prepared the cancellation memorandum, nine days after the reinstatement deadline, and one day after the collision [*Adams v. Explorer Ins. Co. (2003) 107 Cal. App. 4th 438, 448, 450, 132 Cal. Rptr. 2d 24* (vehicle added to policy after notice of cancellation issued, but before cancellation became effective].

[c] Commercial Automobile Insurance Policies

Commercial automobile insurance policies are subject to a completely different set of cancellation requirements, which are contained in *Ins. Code § 676.2*, and are far more expansive than those specified in either *Ins. Code § 661* or Proposition 103 [*see Ins. Code § 676.2(b)(1)-(8)*; *see also Ins. Code § 675.5(b)* (what constitutes "commercial insurance"), (d)(4) (exception for private automobile insurance described in *Ins. Code § 660*)].

It has been held that the cancellation provisions applicable to commercial insurance, unlike those applicable to individual automobile insurance policies [*see Ins. Code § 661*, discussed *above*], are not preempted by Proposition 103, and remain in full force and effect [*National Indem. Co. v. Garamendi (1991) 233 Cal. App. 3d 392, 406, 284 Cal. Rptr. 278.]*

[2] Notice of Cancellation

[a] Notice Requirements Generally

Under *Ins. Code § 662*, no notice of cancellation is effective unless mailed or delivered by the insurer to the named insured, lienholder, or holder of an additional interest, at least 20 days prior to the effective date of cancellation, unless the cancellation is for nonpayment of premium, in which case the insurer must give at least 10 days' notice, accompanied by the reason for cancellation. *Ins. Code § 662* still refers specifically to *Ins. Code § 661*, rather than the requirements specified in Proposition 103 [*see Ins. Code § 1861.03(c)(1)*, discussed in [1], *above*].

A cancellation notice for nonpayment of premium sent prior to the date on which the premium was due violates *Ins. Code § 662* and therefore is ineffective to cancel the policy. Policyholders are entitled to a 10-day period after default before the insurer can effectively cancel the policy [*Mackey v. Bristol W. Ins. Servs. of Cal. (2003) 105 Cal. App. 4th 1247, 1265-1266, 130 Cal. Rptr. 2d 536]* .

If the insurer does not provide the reason for cancellation in the notice itself, the notice must state or be accompanied by a statement that, on written request of the named insured, mailed or delivered to the insurer no fewer than 15 days prior to the effective date of cancellation, the insurer will specify the reason for the cancellation [*Ins. Code § 662*]. Absent compliance with the advance notice provisions, the policy stays in force [*National Auto. & Cas. Ins. Co. v. California Cas. Ins. Co. (1983) 139 Cal. App. 3d 336, 341, 188 Cal. Rptr. 670]* .

[b] Commercial Vehicle Insurance Policies

Cancellation notice requirements for commercial vehicle insurance policies are contained in *Ins. Code § 677.2*. They differ from those discussed above [*see, e.g., Ins. Code § 677.2(c)* (requiring at least 30 days notice prior to effective date of cancellation)].

[3] Grounds for Nonrenewal

[a] Nonpayment; Fraud; Hazard Increase

Notwithstanding any other provision of law, a notice of nonrenewal of an automobile insurance policy is effective only if based on one or more of the following reasons [*Ins. Code § 1861.03(c)(1)*]:

- Nonpayment of premium.
- Fraud or material misrepresentation affecting the policy or the insured.
- A substantial increase in the hazard insured against.

[b] Failure to Pay Automobile Club Membership Fee

Ins. Code § 1861.03(c) does not prevent a reciprocal insurer, organized before November 8, 1988, by a certified motor club holding a certificate of authority, that requires club membership as a condition precedent to applying for insurance from issuing an effective notice of nonrenewal based solely on the failure of the insured to maintain membership in the motor club.

[c] Failure to Pay Group Membership Fee

Ins. Code § 1861.03(c) does not prevent an insurer that issues private passenger automobile coverage to members of groups in existence before November 8, 1988 (whether membership, franchise, or otherwise), and to nonmembers of

groups, from issuing an effective notice of nonrenewal for coverage provided to the insured as a member of the group based solely on the failure of the insured to maintain that membership if the insurer offers to renew the coverage to the insured on a nongroup basis, or to transfer the coverage to an affiliated insurer [*Ins. Code § 1861.03(c)(2)*; *see Ins. Code § 1861.03(c)(2)(A)-(C)* (conditions applicable to membership); *see also Ins. Code §§ 12160-12170* (certificate of authority for motor clubs)].

[d] Commercial Vehicle Insurance Policies

Ins. Code § 1861.03(c)(1) is inapplicable to commercial vehicle liability insurance policies [*National Indemnity Co. v. Garamendi (1991) 233 Cal. App. 3d 392, 406, 284 Cal. Rptr. 278]* . Nonrenewal requirements for commercial vehicle policies, as with cancellation requirements, differ from those applicable to individual automobile insurance policies [*see Ins. Code § 676(c)*].

[4] Notice of Nonrenewal

[a] Requirements for Nonrenewal

At least 20 days prior to policy expiration, an insurer must deliver to the named insured, or mail to the named insured at the address shown in the policy, either of the following [*Ins. Code § 663*]:

- A written or verbal offer of renewal of the policy contingent on payment of premium as stated in the offer; or

- A notice of nonrenewal of the policy, which contains or is accompanied by a statement that on written request by the named insured, the insurer will notify the insured in writing, within 20 days of the request, the reason or reasons for the nonrenewal. The request must be made not later than one month following the expiration of the policy period.

[b] Effect of Noncompliance With Requirements

[i] Policy Remains in Effect

If the insurer fails to give the named insured either an offer of renewal or notice of nonrenewal as required, the existing policy, with no change in its terms and conditions, remains in effect for 30 days from the date that either the offer to renew or the notice of nonrenewal is delivered or mailed to the named insured. The insurer must provide a notice to that effect to the named insured with the policy or the notice of renewal or nonrenewal. The policy terminates on the effective date of any other replacement or succeeding automobile insurance policy procured by the insured, or the insured's agent broker, with respect to any automobile designated in both policies, notwithstanding the failure of an insurer to comply with *Ins. Code § 663* [*Ins. Code § 663(c)*].

The insurer is not required to notify the named insured, or any other insured, of nonrenewal of the policy if the insurer has mailed or delivered a notice of expiration or cancellation, on or prior to the 20th day preceding expiration of the policy period [*Ins. Code § 663(d)*].

[ii] Criminal Penalties for Insurer's Noncompliance

Violation of *Ins. Code § 663* subjects an insurer to criminal penalties [*see Ins. Code § 669*].

[5] Required Policy Provisions With Respect to Cancellation and Renewal

[a] Limits of Coverage Generally

Automobile liability insurance policies must contain a notice stating the limits of future coverage [*Ins. Code § 11580.09(a)*; *see Ins. Code § 11580.09(b)(1)* (definition of automobile liability policy)]. The "limits of future coverage" are the specified reasons for which the insurer may cancel or refuse to renew the policy or increase the premium for the same coverage [*Ins. Code § 11580.09(b)(2)*].

The notice must be prominently displayed on the first page of the policy, or in related documents that are provided to the policyholder [*Ins. Code § 11580.09(a)*]. "Notice" means the specific reasons for cancellation, nonrenewal, or increased premiums, or a clear and concise reference to the exact location of the information in the policy or related documents [*Ins. Code § 11580.09(b)(3)*].

[b] Provisions Regarding Cancellation

Ins. Code § 11580.09(c) provides that for purposes of notice of cancellation, the insurer must list the grounds for a valid notice of cancellation as specified in *Ins. Code § 661*. As *discussed under § 88.16[1]*, above, *Ins. Code § 1861.03(c)*, adopted as part of Proposition 103, now takes precedence over *Ins. Code § 661* by specifying the only effective grounds for cancellation of automobile insurance policies.

Until this statutory inconsistency is rectified, compliance with *Ins. Code § 11580.09(c)* probably is best achieved by listing the grounds for a valid notice of cancellation as specified in *Ins. Code § 1861.03(c)*.

[c] Provisions Regarding Nonrenewal

With respect to nonrenewal, *Ins. Code § 11580.09(d)* lists the permissible grounds for nonrenewal (or premium increase) that must be included in the notice if they are applicable. *Ins. Code § 11580.09(e)* requires a statement that some nonrenewals and premium increases may result from reasons not specified in *Ins. Code § 11580.09(d)* that are both lawful and not unfairly discriminatory.

Ins. Code § 11580.09(d) and *(e)*, however, conflict with *Ins. Code § 1861.03(c)*, which limits the permissible grounds for nonrenewal to those specifically enumerated in *Ins. Code § 1861.03* itself [*see* [3], *above*]. Until this statutory inconsistency is rectified, compliance with *Ins. Code § 11580.09(d)* and *(e)* (as with the conflict regarding cancellation provisions discussed above) is probably best achieved by listing the grounds for a valid notice of nonrenewal as specified in *Ins. Code § 1861.03(c)*.

[6] Exercise of Insured's Cancellation Rights by Lender

When an insured assigns his or her cancellation rights to a lender in connection with a loan agreement under which the premium payments are advanced by the lender (e.g., a finance agreement covering the purchase of a motor vehicle), and the insured defaults on its payment obligations to the lender, the lender may exercise its cancellation rights in the manner provided in *Ins. Code § 673*. To exercise the right of cancellation, the lender must mail both the insurer and the insured a five-day precancellation notice [*Ins. Code § 673(c)*], followed by a subsequent confirmation of cancellation within five days following the effective date of cancellation [*Ins. Code § 673(e)*].

The burden of sending these notices is on the lender rather than the insurer. The insurer is not liable if it fails independently to notify the insured of the cancellation when the lender failed to do so, or the insured failed to receive the lender's notice [*Holland v. Sterling Cas. Ins. Co. (1994) 25 Cal. App. 4th 1059, 1063-1064, 30 Cal. Rptr. 2d 809* (insurer did not breach covenant of good faith and fair dealing by canceling policy without notifying insured, after receiving lender's request to do so); *see Ins. Code § 673(i)*].

[7] Effect of Insurer's Duty to Investigate Insurability on Right to Rescind or Cancel Policy

An insurer has an obligation to investigate the insurability of a new driver to preserve its right to rescission based on misrepresentations of the insured. For example, a driver may have an undisclosed physical or mental disability that renders the driver uninsurable, or the driver may not meet the insurer's underwriting criteria based on his or her driving record [*Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 681, 79 Cal. Rptr. 106, 456 P.2d 674* ; *United States Auto. Ass'n v. Pegos (2003) 107 Cal. App. 4th 392, 398, 131 Cal. Rptr. 2d 866* ; *see also Philadelphia Indem. Ins. Co. v. Findley (9th Cir. 2005) 395 F.3d 1046* (certifying question of whether duty of insurer to investigate insurability of insured applies to automobile liability insurer that issues excess liability insurance policy in context of car transaction)].

An automobile liability insurer that fails to make a reasonable investigation of the insurability of an insured within a reasonable time after issuance of the policy loses its right to rescind, as opposed to its right to cancel, the policy. If an insurer in this situation has not timely rescinded an automobile liability policy prior to an accident in which the insured negligently injures a third person, the policy necessarily remains in effect at least through the time of the accident, and the insurer cannot subsequently rescind, but can only cancel, the policy [*Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 681, 79 Cal. Rptr. 106, 456 P.2d 674* ; *United States Auto. Ass'n v. Pegos (2003) 107 Cal. App. 4th 392, 397-398, 131 Cal. Rptr. 2d 866]* .

This rule applies to the addition of a vehicle to an existing policy [*United States Auto. Ass'n v. Pegos (2003) 107 Cal. App. 4th 392, 398, 131 Cal. Rptr. 2d 866]* . A new vehicle may have special features that render it uninsurable by a particular insurance company. For example, the engine may be too big, or the vehicle may not be "street legal." Also, the vehicle may be used for unacceptable purposes, such as a taxicab or race car. In this sense, adding a new car is similar to adding a new driver to the policy. It requires the insurer to conduct a reasonable investigation within a reasonable period of time [*see* *United States Auto. Ass'n v. Pegos (2003) 107 Cal. App. 4th 392, 398-399, 131 Cal. Rptr. 2d 866]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCancellation & RenewalStatutory RequirementsInsurance LawMotor Vehicle InsuranceCancellation & RenewalNotice RequirementsGeneral OverviewInsurance LawMotor Vehicle InsuranceCancellation & RenewalNonpayment of PremiumsInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageMotor CarriersTortsTransportation TortsMotor VehiclesPersonal Vehicles

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PART II. LEGAL BACKGROUND

8-88 California Forms of Pleading and Practice--Annotated § 88.17

§ 88.17 Primary and Excess Coverage Under Multiple Policies

[1] Coverage in General

Apportionment of liability for a loss when multiple automobile insurance policies apply, is subject to the rules set forth in *Ins. Code § 11580.9* in situations under which those rules are applicable. For purposes of *Ins. Code § 11580.9*, "automobile insurance policy" includes standard auto insurance policies, and also includes a certificate of self-insurance issued pursuant to *Veh. Code § 16053*, a deposit of cash made pursuant to *Veh. Code § 16054.2*, a bond pursuant to *Veh. Code § 16054* or a report of governmental ownership or lease under *Veh. Code § 16051* [*Ins. Code § 11580.9(h)*; *see Grand Rent A Car Corp. v. 20th Century Ins. Co. (1994) 25 Cal. App. 4th 1242, 1250-1252* ; for discussion of Financial Responsibility Laws, *see* Ch. 92, *Automobiles: Drivers' Licenses*].

Ins. Code § 11580.9, however, does not establish or provide the basis for any other form of liability regarding a self-insurer or other person or entity holding, issuing, or establishing any form of security described in its provisions [*Ins. Code § 11580.9(i)*]. *Ins. Code § 11580.9*, when applicable, conclusively determines the rules in California [*Mission Ins. Co. v. Hartford Accident & Indem. Co. (1984) 160 Cal. App. 3d 97, 101, 206 Cal. Rptr. 383]* .

[2] When Insured Is in Business of Selling Vehicles or Related Activities

[a] Operator of Motor Vehicle Determines Primary Coverage

When two or more policies affording valid and collectible automobile liability insurance apply to the same motor vehicle in an occurrence out of which a liability loss arises, and one policy affords coverage to a named insured engaged in the business of selling, repairing, servicing, delivering, testing, road-testing, parking, or storing motor vehicles, then both of the following are conclusively presumed:

- If, at the time of loss, the motor vehicle is operated by any person engaged in any of those businesses, or by his or her employee or agent, the insurance afforded by the policy issued to the person engaged in the business is primary, and the insurance afforded by the other policy is excess [*Ins. Code § 11580.9(a)(1)*].

- If, at the time of loss, the motor vehicle is operated by any person other than as described in *Ins. Code § 11580.9(a)(1)*, the insurance afforded by the policy issued to any person engaged in any of those businesses is excess over all other insurance available to the operator as a named insured or otherwise [*Ins. Code § 11580.9(a)(2)*].

[b] Determining Priority Among Coinsurers

The priority among coinsurers under *Ins. Code § 11580.9(a)* is made on the basis of who was operating the motor vehicle at the time of the accident that caused the insurable loss. The term "operator," as used in the statute, must include within its meaning the driver of the vehicle.

Thus, in a situation in which a vehicle involved in an accident was driven with the permission of the owner, primary liability attaches to the policy under which the permissive user is afforded coverage as a named insured, and the insurance afforded by any other policy, including that of the owner, is excess [*Zurich-Am. Ins. Co. v. Liberty Mut. Ins. Co. (1978) 85 Cal. App. 3d 481, 487, 149 Cal. Rptr. 472* (result not affected because owner was engaged in one of enumerated automotive businesses)].

For a form of allegations for use by an insurer to allege that its insured is engaged in the business of selling, repairing, servicing, delivering, testing, road-testing, parking, or storing motor vehicles, and therefore that its policy is conclusively presumed to be excess over all other available insurance, *see § 88.42*. Those allegations may be inserted in § 88.41, which is a form of complaint of declaratory relief for use by one insurer against another to seek a judicial determination regarding excess and primary coverage.

[3] When Insured Is in Business of Renting or Leasing Vehicles

[a] Short Term Leases of Passenger Vehicles

[i] Lessor's Policy Is Primary

When two or more policies affording valid and collectible liability insurance apply to the same motor vehicle in an occurrence out of which a liability loss arises, it is conclusively presumed that the insurance afforded by that policy in which the motor vehicle is described or rated as an owned automobile is primary, and the insurance afforded by any other policy or policies is excess [*Ins. Code § 11580.9(d)*; *Mercury Casualty Co. v. Hertz Corp. (1997) 59 Cal. App. 4th 414, 420, 69 Cal. Rptr. 2d 9* ; *Enterprise Rent-A-Car Co. v. Workmen's Auto Ins. Co. (1997) 58 Cal. App. 4th 1543, 1549-1550, 68 Cal. Rptr. 2d 725]* . Under this rule, a car rental agency's insurer normally provides primary coverage for injuries arising out of the operation of the agency's vehicle [*see Grand Rent-A-Car Corp. v. 20th Century Ins. Co. (1994) 25 Cal. App. 4th 1242, 1249-1251*].

"Liability insurance" includes uninsured motorist coverage. One court, in a case of first impression, found that "liability loss" within the meaning of *Ins. Code § 11580.9(d)* includes uninsured motorist coverage [*State Farm Mut. Auto. Ins. Co. v. Progressive Marathon Ins. Co. (2007) 148 Cal. App. 4th Supp. 1, 8-9, 12-13, 55 Cal. Rptr. 3d 478* (finding, however, that both policies did not apply to same vehicle)].

[ii] Alternatives to Liability Insurance

Rather than purchasing liability policies, car rental agencies may choose to comply with the financial responsibility law by obtaining a certificate of self-insurance [*see Veh. Code § 16053*] or by depositing cash with the California Department of Motor Vehicles [*see Veh. Code § 16054.2(a)*]. Although a certificate of self-insurance or cash deposit is considered a liability insurance policy, it is unlikely to describe or rate the automobiles owned and leased by the lessor. If the certificate of self-insurance or cash deposit does describe or rate the leased automobile as an owned automobile, the lessor is the primary insurer [*Mercury Cas. Co. v. Hertz Corp. (1997) 59 Cal. App. 4th 414, 421, 69 Cal. Rptr. 2d*

9 (relying on *Interinsurance Exch. v. Spectrum Inv. Corp. (1989) 209 Cal. App. 3d 1243, 1255, 258 Cal. Rptr. 43]* .

If the certificate of self-insurance or deposit does not describe or rate the leased automobile, the lessor is the primary insurer only if the rental agreement itself expressly states that the lessor will provide liability insurance to the driver. In that case, the rental agreement, together with the certificate of self-insurance or certificate of deposit, constitutes a liability policy that describes the leased automobile as an owned automobile [*Mercury Casualty Co. v. Hertz Corp. (1997) 59 Cal. App. 4th 414, 422-423, 69 Cal. Rptr. 2d 9* (citing *Grand Rent-A-Car Corp. v. 20th Century Ins. Co. (1994) 25 Cal. App. 4th 1242, 1251-1252*)].

However, if the lessor's certificate of self-insurance or deposit does not describe or rate the leased automobile and the rental agreement does not provide liability protection for the driver, the driver's own liability insurance is primary [*Mercury Cas. Co. v. Hertz Corp. (1997) 59 Cal. App. 4th 414, 422-423, 69 Cal. Rptr. 2d 9* ; *Enterprise Rent-A-Car Co. v. Workmen's Auto Ins. Co. (1997) 58 Cal. App. 4th 1543, 1550, 68 Cal. Rptr. 2d 725]* .

[4] Commercial Vehicles and Long-Term Leases

[a] Lessee's Policy Is Primary

If the vehicle in question is leased without an operator and either (1) qualifies as a commercial vehicle or (2) has been leased for a term of six months or longer [*Ins. Code § 11580.9(b)*], the coverage afforded by the lessor's policy to a person other than the named insured (or an agent or employee) is excess over any other insurance applicable to the same loss covering the person as a named insured or as an additional insured under a policy with limits at least equal to the minimum financial responsibility requirements [*Ins. Code § 11580.9(b)*; *Mission Ins. Co. v. Hartford Accident & Indem. Co. (1984) 160 Cal. App. 3d 97, 100-101, 206 Cal. Rptr. 383* ; *see also Veh. Code § 16056* (financial responsibility requirements)]. A "commercial vehicle" is defined as a type of vehicle subject to registration or identification under the laws of California and either: (1) used or maintained for the transportation of persons for hire, compensation, or profit; or (2) designed, used, or maintained primarily for the transportation of property [*Ins. Code § 11580.9(b)(1)*].

For a form of allegations for use by an insurer to allege that its insured is engaged in the business of renting or leasing motor vehicles without operators within the meaning of that statute, and therefore that its policy is conclusively presumed to be excess over all other available insurance, see *§ 88.42*. Those allegations may be inserted in § 88.41, which is a form of complaint of declaratory relief for use by one insurer against another to seek a judicial determination regarding excess and primary coverage.

[b] Purpose of Shifting Risk

The purpose of the exception for commercial vehicles and long-term leases is to insure that coverage reflects the realities of the transaction in question. If a passenger vehicle is leased or rented for fewer than six months, the economic benefit and the risk of ownership remains with the lessor, and the lessor's policy is primary. If a passenger vehicle is leased for a term exceeding six months, the ownership risk shifts to the lessee, and the insurance policy issued to the owner/lessor becomes excess [*Transport Indem. Co. v. Alo (1981) 118 Cal. App. 3d 143, 147, 172 Cal. Rptr. 394]* .

In the commercial context, the rationale for shifting the risk of damage from the owner's policy to a commercial lessee's policy under *Ins. Code § 11580.9(b)* is that the profitmaking lessee will be able to absorb the expense of the policy as a cost of doing business [*Transport Indem. Co. v. Alo (1981) 118 Cal. App. 3d 143, 147-148, 172 Cal. Rptr. 394]* . For that reason, even if the commercial lessor engages only in the "casual" leasing of vehicles, *Ins. Code § 11580.9(b)* applies [*Mission Ins. Co. v. Hartford Accident & Indem. Co. (1984) 160 Cal. App. 3d 97, 100-101, 206 Cal. Rptr. 383]* .

[c] Inapplicability Regarding Nonprofit Organizations

Ins. Code § 11580.9(b) is inapplicable to the rental of a commercial vehicle by an insured who was engaged in the business of renting commercial vehicles, without drivers, to a nonprofit organization for fund-raising purposes and for no consideration [*Transport Indemnity Co. v. Alo (1981) 118 Cal. App. 3d 143, 148, 172 Cal. Rptr. 394]* .

[5] When Insured Is Owner, Tenant, or Lessee of Premises Where Loading or Unloading Occurred

[a] Premises Policy Is Primary

When two or more policies are applicable to the same loss arising out of the loading or unloading of a motor vehicle, and one or more of the policies is issued to the owner, tenant, or lessee of the premises on which the loading or unloading occurs, it is conclusively presumed that the insurance afforded by the policy covering the motor vehicle is not primary, notwithstanding anything to the contrary in any endorsement required by law to be placed on the policy. Rather, the motor vehicle policy is excess over all other valid and collectible insurance applicable to the same loss with limits up to the financial responsibility requirements specified in *Veh. Code § 16056* [*Ins. Code § 11580.9(c)*; for discussion of the Financial Responsibility Law, *see* Ch. 92, *Automobiles: Drivers' Licenses*].

For a form for use by an insurer to allege that its policy provides excess coverage only, on the ground that the insured under another policy covering the accident was the owner, tenant, or lessee of the premises on which the unloading or unloading that gave rise to the accident occurred, see *§ 88.42*. Those allegations may be inserted in § 88.41, which is a form of complaint of declaratory relief for use by one insurer against another to seek a judicial determination regarding excess and primary coverage.

[b] No Concurrent Coverage

In the event described above, the two or more policies are not construed as providing concurrent coverage. Only the insurance afforded by the policy or policies covering the premises on which the loading or unloading occurs is primary, and the policy (or policies) covers as an additional insured with respect to the loading or unloading operations all employees of the owner, tenant, or lessee while acting in the course and scope of their employment [*Ins. Code § 11580.9(c)*].

[c] Rule Applies if Multiple Policies Cover Same Insured for Same Loss

The presumption discussed in this section assigns priorities among insurance coverage only if two or more insurance policies cover the same insured for the same loss [*see Ins. Code § 11580.9(c)*]. It does not apply when policies cover independent tortfeasors insured under their own policies [*Charmac, Inc. v. Aetna Cas. & Sur. Co. (1991) 233 Cal. App. 3d 660, 663-669, 284 Cal. Rptr. 635]* .

[6] When Vehicle Is Described or Rated as Owned Automobile

When two or more policies affording valid and collectible liability insurance apply to the same motor vehicle or vehicles in an occurrence out of which a liability loss arises, it is conclusively presumed that the insurance afforded by that policy in which the motor vehicle is described or rated as an owned automobile is primary, and the insurance afforded by any other policy or policies is excess, except as provided in *Ins. Code § 11580.9(a)-(c)* [*Ins. Code § 11580.9(d)*; *Transport Indem. Co. v. Royal Ins. Co. (1987) 189 Cal. App. 3d 250, 255-256, 234 Cal. Rptr. 516]* . *Ins. Code § 11580.9(d)* is not limited to automobile liability insurance policies. In determining whether *Ins. Code § 11580.9* applies, the deciding factor is not the type of policy involved, but whether it affords valid and collectible liability insurance that applies to the motor vehicle involved in the accident [*Scottsdale Ins. Co. v. State Farm Mut. Auto. Ins. Co. (2005) 130 Cal. App. 4th 890, 902-903, 30 Cal. Rptr. 3d 606]* .

A description or rating, in common sense understanding, means a particularization of the vehicle. For example, a

tractor/trailer rig is treated as a single vehicle under *Ins. Code § 11580.9(d)*. If parties agreed that the tractor was scheduled as an owned vehicle in one policy and that the trailer was scheduled as an owned vehicle in another policy, it is conclusively presumed that each insurance policy is primary. If each policy has the same limit for bodily injury liability, each insurer has an equal obligation to contribute to the loss [*Wilshire Ins. Co. v. Sentry Select Ins. Co. (2004) 124 Cal. App. 4th 27, 35, 21 Cal. Rptr. 3d 60]* .

Well-established rules govern the determination of whether an insurance policy provides primary or excess coverage and the determination of the priority of liability of policies not governed by *Ins. Code § 11580.9* [*Scottsdale Ins. Co. v. State Farm Mut. Auto. Ins. Co. (2005) 130 Cal. App. 4th 890, 904, 30 Cal. Rptr. 3d 606* ; *see* Ch. 308, *Insurance* ,, § 190 et seq.].

For a form of complaint for use by one insurer against another to seek a declaration that its policy provides excess coverage only, on the ground that the vehicle involved was described or rated as an "owned automobile" in the other policy, see *§ 88.41, below*.

[7] Excess Coverage Limitations When Primary Coverage Invalid

Any insurance policy that applies as excess coverage under the terms of *Ins. Code § 11580.9*(a)-(d) may provide that, with respect to any primary policy or to any loss as to which the primary insurance is not valid and collectible in whole or in part, the excess policy applies only to the extent necessary to provide the insured with the minimum coverage limits ($15,000/$30,000) specified in *Veh. Code § 16056* [*Ins. Code § 11580.9(e)*; for discussion of *Veh. Code § 16056*, *see* Ch. 92, *Automobiles: Drivers' Licenses*].

[8] Modification of Presumptions by Written Agreement

The presumptions stated in *Ins. Code § 11580.9(a)-(d)* may be modified or amended only by written agreement signed by all insurers who have issued a policy or policies applicable to a loss described under those provisions, and all named insureds under the policies [*Ins. Code § 11580.9(f)*; *Wilshire Ins. Co. v. Sentry Select Ins. Co. (2004) 124 Cal. App. 4th 27, 35, 21 Cal. Rptr. 3d 60]* .

[9] Allocation of Defense Costs

When two or more personal policies affording liability insurance apply to the same motor vehicle in an occurrence out of which a loss arises, and one automobile liability policy is primary and one or more of the policies are excess, each insurer is required to pay for the cost of defense in proportion to the percentage of total damages paid by that insurer [*Ins. Code § 11580.9(g)(1)*]. "Defense costs" means reasonable attorneys' fees and expenses, investigation expenses, expert witness fees, and costs allowable under *Code Civ. Proc. § 1033.5* [*Ins. Code § 11580.9(g)(2)*].

When this rule applies, liability for defense costs is based solely on the amount each insurer ultimately contributes to the total payment of damages [*see Ins. Code § 11580.9(g)(1)*]. The amount actually expended by each insurer in defending the claim is irrelevant, as is the question of whether a higher percentage of the total defense costs are more properly allocable to a particular policy. Thus, for example, an excess insurer that expends substantial sums in a successful effort to avoid an excess judgment apparently can compel the primary insurer to reimburse it for all its costs, since it ended up paying nothing in damages.

[10] Coverage of Power Unit and Attached Trailer

Notwithstanding *Ins. Code § 11580.9(b)*, if two or more policies affording valid and collectible automobile liability insurance apply to a power unit and an attached trailer (or trailers) in an occurrence out of which a liability loss arises, and if one policy affords coverage to a named insured in the business of a trucker, then the following is conclusively presumed. If at the time of loss, the power unit is being operated by any person in the business of a trucker, the

insurance afforded by the policy to the person engaged in the business of a trucker is primary for both the power unit and the trailer or trailers, and the insurance afforded by the other policy is excess. A trucker is defined as any person or organization engaged in the business of transporting property by auto for hire [*Ins. Code § 11580.9(h)*].

[11] Situations Outside Scope of Statute

[a] Multiple Excess Insurers

Ins. Code § 11580.9 does not address all issues that can arise with respect to apportionment of liability among multiple policies covering the same risk. For example, it does not deal with apportionment of costs among excess insurers when more than one policy provides excess coverage [*see CSE Ins. Group v. Northbrook Prop. & Cas. Co. (1994) 23 Cal. App. 4th 1839, 1844, 29 Cal. Rptr. 2d 120* (noting that statutory solution is not complete)].

[b] Conflicting Liability Allocation Clauses

Automobile insurance policies typically contain clauses that address the manner in which liability will be allocated when more than one policy covers the same risk. One type of clause, sometimes referred to as a "pro rata" clause, provides for a pro rata allocation of liability. Another type of clause, known as an "excess" clause, provides that the policy will be excess over any other valid and collectible insurance. An even more restrictive clause, known as an "escape clause," provides that the insurer is not liable for any loss that is covered by insurance.

Often, the terms of two or more policies will conflict. For example, if two policies contain "excess" clauses, it is impossible to reconcile them in a manner that will permit both to be given effect. Similarly, if one policy contains an "escape" or "excess" clause and the other contains a "pro rata" clause, one or the other must prevail.

Escape clauses and, to a lesser extent, excess clauses, are not favored in California [*CSE Ins. Group v. Northbrook Prop. & Cas. Co. (1994) 23 Cal. App. 4th 1839, 1845, 29 Cal. Rptr. 2d 120* ; *Continental Cas. Co. v. Pacific Indem. Co. (1982) 134 Cal. App. 3d 389, 396, 184 Cal. Rptr. 583]* . Thus, when two policies contain conflicting escape clauses or excess clauses, liability will be prorated [*Continental Cas. Co. v. Pacific Indem. Co. (1982) 134 Cal. App. 3d 389, 397, 184 Cal. Rptr. 583* (excess clause); *Peerless Cas. Co. v. Continental Cas. Co. (1956) 144 Cal. App. 2d 617, 621-623, 301 P.2d 602* (escape clause); *but see Employers Reinsurance Corp. v. Mission Equities Corp. (1977) 74 Cal. App. 3d 826, 831, 141 Cal. Rptr. 727* (escape clause disallowed; policy containing escape clause held primary)]. Similarly, when one policy contains an "excess" clause and the other provides for a proration of liability, the "pro rata" clause will prevail and liability will be prorated [*CSE Ins. Group v. Northbrook Prop. & Cas. Co. (1994) 23 Cal. App. 4th 1839, 1845-1846, 29 Cal. Rptr. 2d 120]* .

[c] Umbrella Policy and Primary Policy Providing Excess Coverage

A different situation from the potentially conflicting clauses described above, is presented when an occurrence is covered by both an umbrella policy that provides only excess insurance and a primary policy which, by operation of a contingency clause, in essence becomes an excess policy. In this situation, the umbrella policy is treated as excess over the primary policy, despite the contingency clause, and the liability is not prorated [*Continental Ins. Co. v. Lexington Ins. Co. (1997) 55 Cal. App. 4th 637, 646-647, 64 Cal. Rptr. 2d 116]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceVehicle OwnershipGeneral OverviewInsurance LawMotor Vehicle InsuranceStacking ProvisionsMultiple PremiumsInsurance LawMotor Vehicle InsuranceStacking ProvisionsFleet PoliciesInsurance LawMotor Vehicle InsuranceVehicle OwnershipLeases & Rental VehiclesTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 88.18 Coverage Under Homeowner's Policies for Automobile Accidents

To avoid overlapping coverage between automobile and homeowner's policies, most homeowners' policies contain an exclusion for automobile-related injuries. The exclusion generally echoes verbatim the insuring clause of the automobile policy [*see State Farm Mut. Auto. Ins. Co. v. Partridge (1973) 10 Cal. 3d 94, 99 n.6, 109 Cal. Rptr. 811, 514 P.2d 123]* . For further discussion, see *Ch. 308, Insurance, § 308.10* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceHomeowners InsuranceGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 88.19 Automobile Property Insurance

[1] Coverage Under Automobile Property Insurance

Automobile property insurance indemnifies the insured against loss or damage to the insured vehicle, and may be classified as "collision" or "upset" insurance on the one hand, and "comprehensive" on the other. These types of insurance should be contrasted with liability coverage, which indemnifies the insured for liability to a third party (whether bodily injury or property damage) for which the insured becomes legally responsible. For further discussion of this type of insurance, see California Insurance Law And Practice, Ch. 50 (Matthew Bender).

[2] Collision Coverage

Collision coverage is one of the two types of primary property coverage afforded under automobile policies. Some policies have included coverage of this type under a "collision or upset" clause. A vehicle is deemed to have suffered an "upset" once it loses equilibrium and the overturning process has commenced and proceeded beyond the power of those in charge of the vehicle to stop its progress [*see Espree v. Western Pioneer Ins. Co. (1958) 159 Cal. App. 2d Supp. 875, 877*].

Every policy that provides automobile collision coverage or automobile physical damage coverage, as described in *Ins. Code § 660*, must include a child passenger restraint system within the definition of covered property, if the child passenger restraint system was in use by a child during an accident [*Ins. Code § 11580.011(d)*].

[3] Comprehensive Coverage

Comprehensive automobile coverage normally extends to all property damage to an automobile (owned or nonowned) that is attributable to a cause other than collision. A typical comprehensive coverage provision requires the insurer [*see, e.g., Sackett v. Farmers Ins. Exch. (1965) 237 Cal. App. 2d Supp. 899, 901*]:

> [t]o pay for loss to the described automobile or a non-owned automobile caused by any accidental means except collision of the automobile with another object, or upset of the automobile, less, for each separate loss, the deductible amount, if any, stated in the declarations applicable to this coverage.

> Breakage of glass and loss caused by missiles, falling objects, fire, theft, explosion, earthquake, windstorm, hail, water, flood, vandalism, malicious mischief, riot or civil commotion, shall not be deemed loss caused by collision or upset.

Most comprehensive coverage provisions are drafted in a manner that extends coverage to all accidental loss or damage to the covered vehicle. This type of coverage is, therefore, very broad and usually applies to any property damage to the insured vehicle, provided that the cause of that damage does not fall within one of the coverage exclusions specified in the policy. For example, when a covered automobile was damaged when a gas station attendant failed to refasten a radiator cap properly and the water in the radiator boiled over, a court found that comprehensive coverage applied, rejecting the insurer's contention that the damage resulted from an excluded "mechanical breakdown and failure" [*see Sackett v. Farmers Ins. Exchange (1965) 237 Cal. App. 2d Supp. 899, 901*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 88.20 Med-Pay Coverage

"Med-pay" is first-party, no-fault medical payment insurance coverage in an automobile policy in case of an accident [*see* 21st *Century Ins. Co. v. Superior Court (2009) 47 Cal. 4th 511, 515, 98 Cal. Rptr. 3d 516, 213 P.3d 972*]. Med-pay insurers must seek recovery for personal injury claims through contractual reimbursement rights against their insureds, because they are not allowed to assert subrogation claims directly against third-party tortfeasors. This rule is based on the premise that personal injury claims are not assignable, and therefore a med-pay insurer generally has no right to sue the tortfeasor directly and has no standing to intervene. If insureds must reimburse their insurers once they recover from the tortfeasors, they are prevented from receiving double recovery and the financial responsibility for their loss is placed on the tortfeasor. Med-pay insurance contracts typically contain provisions that grant the insurer a right of reimbursement for certain payments that the third party who caused the insured's losses makes to the insured. These provisions are often interchangeably referred to as reimbursement or subrogation provisions, depending on the context [21st *Century Ins. Co. v. Superior Court (2009) 47 Cal. 4th 511, 518, 98 Cal. Rptr. 3d 516, 213 P.3d 972*].

In *21st Century Ins. Co. v. Superior Court*, the California Supreme Court held that the made-whole rule does not bar an automobile insurer from seeking reimbursement for med-pay proceeds that it paid the insured, subject to a deduction under the common-fund theory for its share of attorney's fees that the insured expended to obtain payment from the tortfeasor [21st *Century Ins. Co. v. Superior Court (2009) 47 Cal. 4th 511, 518 n.3, 98 Cal. Rptr. 3d 516, 213 P.3d 972* ; *see also* 21st *Century Ins. Co. v. Superior Court (2009) 47 Cal. 4th 511, 515, 533-535, 98 Cal. Rptr. 3d 516, 213 P.3d 972* (conc. opn. of Werdegar, J.)]. The specific issue of the appropriate calculation of the insured's recovery under the made-whole rule is one of first impression [21st *Century Ins. Co. v. Superior Court (2009) 47 Cal. 4th 511, 521, 98 Cal. Rptr. 3d 516, 213 P.3d 972*]. In that case, the insured was injured in an automobile accident with a third party. The insurer paid her $1,000 under her med-pay coverage. She then pursued a claim against the third party, settling for $6,000 in total damages and incurring attorney's fees of approximately $2,000. The insurer requested that she repay the $1,000 it had paid her. She paid the insurer $600, after subtracting one-sixth of the total attorney's fees ($400) from the $1,000 she had received. The insurer accepted that amount in full satisfaction of its reimbursement claim. Under the policy, she was required to reimburse the insurer for monies recovered from a third person that duplicated her recovery under the policy. That is, insureds are entitled to be made whole from the insurance proceeds and tort recovery, but are not entitled to a double recovery. In a writ proceeding in an ensuing class action, the California Supreme Court considered whether the made-whole rule includes liability for all the attorney's fees an insured must pay to obtain

medical payment compensation (med-pay) from a third-party tortfeasor. The Court noted that the issue "arises at the intersection of two well-settled legal doctrines: (1) the made-whole rule, whereby a third party recovery must make the insured whole before he or she is obligated to reimburse the insurance company, and (2) the 'common fund' doctrine, whereby a party that benefits from another person's expenditure of attorney fees is required to bear a proportionate share (but not all) of that expenditure" [*see* 21st *Century Ins. Co. v. Superior Court (2009) 47 Cal. 4th 511, 515-516, 98 Cal. Rptr. 3d 516, 213 P.3d 972*].

In *21st Century Ins. Co.*, a class-action suit filed by the insured against the insurer alleging statutory violations, conversion, unjust enrichment, and declaratory relief, the insured asserted that the insurer could not lawfully require any reimbursement under its policy terms because she had not been made whole by the settlement and med-pay benefits, that is, her attorney's fees of $2,000 were included as part of her made-whole recovery. According to the insurer, the insured's interpretation of the made-whole rule conflicted with the common-fund doctrine. The insurer asserted that California law includes no attorney's fees in the made-whole calculation, and that reimbursement for fees is separately determined under an equitable apportionment rule known as the common-fund doctrine and its requirement that an insurer pay a pro rata portion of attorney's fees once the insured recovers damages [*see* 21st *Century Ins. Co. v. Superior Court (2009) 47 Cal. 4th 511, 516-517, 98 Cal. Rptr. 3d 516, 213 P.3d 972*]. The Court discussed the nature of med-pay coverage with respect to subrogation and reimbursement principles, then discussed the made-whole rule [21st *Century Ins. Co. v. Superior Court (2009) 47 Cal. 4th 511, 518, 98 Cal. Rptr. 3d 516, 213 P.3d 972*].

The made-whole rule precludes an insurer from recovering any third-party funds paid to the insured until the insured has been fully compensated for his or her injuries. California courts recognize a made-whole rule when the tortfeasor cannot not pay his or her entire debt to the insured, typically because of underinsurance. The Court noted that no California court has held that an insured was not made whole because he or she had to bear the attorney's fees incurred in recovering damages not covered by the insurance contract. The made-whole rule extends to med-pay reimbursement claims. Under the pro rata rule, as derived from the equitable common-fund doctrine (which originated in the class action context), each party bears attorney's fees in proportion to its share of the recovery. Under pro rata sharing, the insurer pays all the attorney's fees attributable to recovering the med-pay expenses for which it seeks reimbursement, while the insured (like any other litigant) pays fees incurred in pursuing recovery for additional damages. The rule provides a separate and independent limitation on an insurer's reimbursement rights [21st *Century Ins. Co. v. Superior Court (2009) 47 Cal. 4th 511, 519-520, 98 Cal. Rptr. 3d 516, 213 P.3d 972* ; *see* Ch. 120, Class Actions; Ch. 174, Costs and Attorney's Fees].

After discussing the development of the common-fund theory in California, the relevant authority on recovery under the made-whole rule, and applications of that rule in other states and in federal court, the California Supreme Court concluded that the insurer stated the better case. The automobile liability insurance company has not been paid to bear responsibility for the entire amount of attorney's fees the insured needed to spend to recover damages. Instead, a pro rata apportionment rule for attorney's fees better allocates responsibility for attorney's fees between the insured and the insurer. The insured did not claim that the insurer's $1,000 med-pay payment was insufficient to discharge its obligations under the med-pay policy limit, nor that $400 was less than the insurer's pro rata share of the litigation costs. By accepting the $600 as full reimbursement (and contributing $400 to her attorney's fees), the insurer properly discharged its obligation to pay its pro rata share of attorney's fees, and ensured that the insured was made whole [21st *Century Ins. Co. v. Superior Court (2009) 47 Cal. 4th 511, 527-528, 98 Cal. Rptr. 3d 516, 213 P.3d 972*].

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[Reserved]

§§ 88.21[Reserved]

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§ 88.30 Related Texts From LexisNexis

California Insurance Law And Practice, Ch. 50 (Matthew Bender)

Levy, Golden & Sacks, California Torts, Chs. 80- 82 (Matthew Bender)

Clifford, California Uninsured Motorist Law (6th ed. LexisNexis)

Shernoff, Gage & Levine, Insurance Bad Faith Litigation (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityGeneral Overview

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§ 88.31 State Statutes

[1] Automobile Insurance Generally

Automobile class of insurance. *Ins. Code § 100(16)*

Automobile insurance defined. *Ins. Code § 116*

Scope of automobile insurance. *Ins. Code § 116*

Requirement for providing cost estimates of lowest priced personal automobile insurance policy. *Ins. Code § 672*

Automobile insurance rate reductions. *Ins. Code § 1861.01*

Automobile insurance rates and premiums. *Ins. Code § 1861.02*

Disclosure requirements regarding issuance or renewal of motor vehicle liability policies. *Ins. Code § 11580.15*

California Automobile Assigned Risk Plan. *Ins. Code §§ 11620-11627*

[2] Financial Responsibility

Requirement that insurer issuing policies of motor vehicle liability insurance file certificate of proof of financial responsibility under *Veh. Code §§ 16431* and *16432*. *Ins. Code § 655*

[3] Denial of Insurance

Requirement for written explanation of reason for denial of application for insurance. *Ins. Code § 657*

Prohibition against denying comprehensive or collision coverage based on age of automobile. *Ins. Code § 671*

[4] Cancellation or Nonrenewal

Cancellation of or nonrenewal of automobile insurance. *Ins. Code §§ 660-669.5*

Grounds for cancellation or nonrenewal of automobile insurance policy. *Ins. Code § 1861.03(c)*

[5] Fraud and Crime

Insurance Frauds Prevention Act. *Ins. Code § 1871 et seq.*

Criminal penalty for presenting false claims regarding motor vehicle. *Ins. Code § 1871.1(a)(4)*

[6] Liability Coverage

Actions on policies containing liability provisions. *Ins. Code §§ 11580-11588*

Liability insurer's review of and compensation for bills submitted for defense of insured. *Ins. Code § 11580.02*

Automobile liability insurance provisions. *Ins. Code § 11580.1*

Requirement for coverage of replacement of child passenger restraint system in automobile liability insurance. Ins. Code § 11580.11

[7] Excess and Primary Coverage

Multiple policies; excess and primary coverage. *Ins. Code § 11580.9*

Legal Topics:

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

[1] Coverage

Whether policy provides permissive user coverage equal to that for named insured is determined by whether permissive user received everything under policy to which named insured would have been entitled. *Nationwide Ins. Co. v. Hunley (9th Cir. 1990) 915 F.2d 557, 559*

Policy amendment that would have precluded loss-of-consortium claim because "per person" limits had already been tendered, was ineffective because insured had inadequate notice of amendment; ambiguous language in original policy controlled, and was interpreted against insurer, providing separate coverage for loss-of-consortium claim. *Allstate Ins. Co. v. Fibus (9th Cir. 1988) 855 F.2d 660, 662-663*

Provision purporting to limit coverage for permissive users in "E-Z Reader Car Policy" was unenforceable because it was not conspicuous, plain, or clear. *Haynes v. Farmers Ins. Exch. (2004) 32 Cal. 4th 1198, 1206-1212, 13 Cal. Rptr. 3d 68, 89 P.3d 381*

Under comprehensive automobile liability policy, higher coverage provided was applicable to accident when policy was ambiguous with respect to basic coverage and exclusions regarding particular accident. *Universal Underwriters Ins. Co. v. Gewirtz (1971) 5 Cal. 3d 246, 250-253, 95 Cal. Rptr. 617, 486 P.2d 145*

"Repair Satisfaction Vehicle Program Physical Damages Only Policy," limiting coverage to 80 percent of repair bill if vehicle is repaired by shop not on insurer's list of approved shops, does not violate *Ins. Code § 758(5)*, which prohibits insurer from requiring automobile to be repaired at specific dealer; statute does not require 100 percent coverage of reasonable repair costs irrespective of where vehicle is taken, and does not prohibit two tiers of coverage. *Maystruk v. Infinity Ins. Co. (2009) 175 Cal. App. 4th 881, 888, 96 Cal. Rptr. 3d 494*

"Garage operations" coverage in policy issued to used-car seller applied if insured legally must pay damages because of bodily injury or property damages, when damage is caused by accident that results from "garage operations" involving ownership, maintenance, or use of covered automobiles. *Spangle v. Farmers Ins. Exch. (2008) 166 Cal. App. 4th 560,*

569-570, 82 Cal. Rptr. 3d 763

Significant criterion for coverage under "garage operations" policy is whether vehicle involved is an insured vehicle under policy, and not the nature of its use when accident occurred. *Spangle v. Farmers Ins. Exch. (2008) 166 Cal. App. 4th 560, 569-570, 82 Cal. Rptr. 3d 763*

Business automobile policy covering bodily injury caused by accident and resulting from ownership, maintenance, or use of covered auto, did not cover injuries to passenger raped by driver after he drove her to his apartment then convinced her to accompany him inside; relationship between "use" of insured shuttle and the rape inside driver's apartment was too attenuated to trigger insurer's duty to defend or indemnify. *R.A. Stuchbery & Others Syndicate 1096 v. Redland Ins. Co. (2007) 154 Cal. App. 4th 796, 805, 66 Cal. Rptr. 3d 80*

Automobile med-pay insurance provides first-party coverage on no-fault basis for relatively low policy limits at relatively low premiums; coverage is primarily designed to provide additional source of funds for medical expenses for injured automobile occupants without burdens of fault-based payment system. *Progressive W. Ins. Co. v. Superior Court (2005) 135 Cal. App. 4th 263, 269-270, 37 Cal. Rptr. 3d 434* ; *Nager v. Allstate Ins. Co. (2000) 83 Cal. App. 4th 284, 291, 99 Cal. Rptr. 2d 348*

Uninsured motorist, who was driving his own car purportedly on company business when accident occurred, was not covered under employer's automobile policy that excluded employees using their own cars from definition of "protected persons" or "permitted users." *Vargas v. Athena Assurance Co. (2001) 95 Cal. App. 4th 461, 465-466, 115 Cal. Rptr. 2d 426*

Insurer's implementation of automobile med-pay provision (covering only medical expenses actually incurred by insured requiring that medical expenses be both reasonable and necessary, further defining "unreasonable med-pay expenses," and reserving insurer's right to contest med-pay expenses pending documentation regarding their reasonableness and necessity) did not incur tort liability for bad faith regarding chiropractic bills because insurer paid part of submitted claims, but questioned claims for treatment after certain point. *Nager v. Allstate Ins. Co. (2000) 83 Cal. App. 4th 284, 290-293, 99 Cal. Rptr. 2d 348*

Although policy excluded coverage for bodily injury to a resident relative of an insured, insurer breached its duty to defend permissive user who was sued by his mother-in-law for injuries resulting from an auto accident caused by the permissive user, when insurer had evidence suggesting that permissive user did not reside with the mother-in-law; evidence created a potential for coverage and triggered the duty to defend, even though the jury ultimately found that the two parties did reside together. *Amato v. Mercury Cas. Co. (1993) 18 Cal. App. 4th 1784, 1789, 23 Cal. Rptr. 2d 73*

Looking to plain meaning of policy and applying common sense, when insurance policy states that $300,000 per occurrence liability limit is subject to $100,000 per person liability limit, no single person is permitted to recover more than $100,000. *Nationwide Mut. Ins. Co. v. Devlin (1992) 11 Cal. App. 4th 81, 82* , 13 Cal. Rtpr. 795

"Additional insured automobile," defined as "automobile not owned by or available for regular use to you, a relative or any resident of the same household in which you reside," does not include automobile owned by insured, but not specifically described in policy, when it is being driven by relative or resident of same household. *Lasam v. Interinsurance Exch. (1991) 229 Cal. App. 3d 508, 513, 280 Cal. Rptr. 214*

Driver of truck owned by insured was not permissive user as matter of law, based on deposition testimony of insured, constituting admission against interest, that he categorically prohibited driver from using that vehicle or any of his other vehicles. *Sandoval v. Mercury Ins. Group (1991) 229 Cal. App. 3d 1, 10-12, 278 Cal. Rptr. 533*

In policy that neither explicitly covered liability for wrongful death actions, nor defined "bodily injury," coverage regarding accident in which one person was injured and one killed, provided limits applicable to "each person" for each accident victim; heirs of deceased entitled to "each person" limits applicable to deceased, not larger recover under limits applicable to "each accident." *United Services Auto. Assn. v. Lilly (1990) 217 Cal. App. 3d 1396, 1400-1402, 266 Cal. Rptr. 691*

Ins. Code § 11580.1(b)(4) (requiring provision covering permissive users) apples only to automobile and motor vehicle liability insurance policies, and therefore is inapplicable to cash deposit made to satisfy financial responsibility requirements. *Interinsurance Exch. v. Spectrum Inv. Corp. (1989) 209 Cal. App. 3d 1243, 1257-1258, 258 Cal. Rptr. 43*

Under automobile collision policy providing that liability for loss could not exceed actual cash value of damaged property, and giving insurer option to pay money or repair vehicle, when insurer repairs vehicle, insured not entitled to recover for diminution in value due to status as wrecked carabsent specific language providing that coverage. *Ray v. Farmers Ins. Exch. (1988) 200 Cal. App. 3d 1411, 1417-1418, 246 Cal. Rptr. 593*

Insurer has duty to defend third-party action when insured's automobile was driven by person entrusted with automobile by insured's son, who was specifically excluded from coverage; public policy requires coverage of permissive users. *Ohio Farmers Ins. Co. v. Quin (1988) 198 Cal. App. 3d 1338, 1344-1351, 244 Cal. Rptr. 359* (interpreting 1982 version of *Ins. Code § 11580.1(d)(1)* in declaratory relief action)

In action arising from accident when named insured's relative drove pickup truck for allegedly personal use, "private passenger automobile" did not include "utility automobile" under policy that defines "relative" as insured only with respect to "private passenger automobile," and separately defines "utility automobile" as "automobile of truck type not used for business or commercial purpose." *National Auto. & Cas. Ins. Co. v. Contreras (1987) 193 Cal. App. 3d 831, 837-842, 238 Cal. Rptr. 627*

Any ambiguity or uncertainty in insurance policy is resolved against insurer. *California State Auto. Assn. Inter-Ins. Bureau v. Superior Court (1986) 177 Cal. App. 3d 855, 858-861, 223 Cal. Rptr. 246*

Policy provision, requiring permission of vehicle owner as condition of coverage, applied only to relative of owner of vehicle and not to named insured. *State Farm Mut. Auto. Ins. Co. v. Eastman (1984) 158 Cal. App. 3d 562, 567-571, 204 Cal. Rptr. 827*

Policy limiting coverage to injury caused by reason of accident to vehicle does not cover injury occurring during loading of vehicle. *Garcia v. Trans Pac. Life Ins. Co. (1984) 156 Cal. App. 3d 900, 907, 203 Cal. Rptr. 325*

Addition of "occasional drivers" to policy does not expand policy definition of "named insured" to extend coverage to otherwise excluded accident. *Giovanna v. Vigilant Ins. Co. (1984) 156 Cal. App. 3d 368, 371, 202 Cal. Rptr. 364*

Insurance coverage in force after policy expired and before notice of cancellation required by *Ins. Code §§ 662, 663,* although insured had died before policy expired, so that another person who used automobile and was eligible as "additional insured" under policy was entitled to recover. *National Auto. & Cas. Ins. Co. v. California Cas. Ins. Co. (1983) 139 Cal. App. 3d 336, 341, 188 Cal. Rptr. 670*

Comprehensive liability policy including personal automobile liability endorsement and insuring permissive users of owned automobiles, in which "automobile" includes trailer, covered accident in which owned trailer was being towed by nonowned pickup truck insured by another company that also covered permissive users, when driver of truck, who was permissive user of truck and trailer, negligently made left turn and truck (but not trailer) was struck by motorcycle. *Smith v. Travelers Indem. Co. (1973) 32 Cal. App. 3d 1010, 1013-1016, 108 Cal. Rptr. 643*

[2] Assigned Risk Plan

State-provided procedure to satisfy duty under Assigned Risk Plan; regulatory structure does not constitute delegation of legislative authority to private insurance industry, because it does not empower industry to initiate orenact rules that have legal force. *King v. Meese (1987) 43 Cal. 3d 1217, 1231, 1234, 240 Cal. Rptr. 829, 743 P.2d 889*

[3] Definitions

Highway shooting by insured, while passenger was in his vehicle, involved "use" of vehicle under automobile policy. *State Farm Mut. Auto. Ins. Co. v. Davis (9th Cir. 1991) 937 F.2d 1415, 1419-1422*

Forklift designed for use principally off public roads is not automobile within meaning of automobile insurance policy. *Home Indem. Co. v. King (1983) 34 Cal. 3d 803, 814, 195 Cal. Rptr. 686, 670 P.2d 340*

"Temporary" does not designate any fixed period of time; antonym of "permanent." *State Farm Mut. Auto. Ins. Co. v. Johnston (1973) 9 Cal. 3d 270, 273, 107 Cal. Rptr. 149, 507 P.2d 1357* (construing term used in phrase "temporary substitute automobile" in automobile liability policy)

Forklift registered with DMV and operated on public highways within radius of five miles is automobile within contemplation of insurance policy. *Argonaut Ins. Co. v. Transp. Indem. Co. (1972) 6 Cal. 3d 496, 509, 99 Cal. Rptr. 617, 492 P.2d 673*

In commercial auto policy issued to hauling company that included "Trucker Coverage Form," providing coverage for liability arising out of property damage or bodily injury resulting from use of covered "auto" that is a "trailer" connected to another covered auto that is a power unit, and that covered owner from whom insured "hired" a covered auto as additional insured, company that insured engaged as independent contractor for hauling services (whose trailer was involved in accident) was not owner from whom insured "hired" covered auto that is a trailer. American Int'l Underwriters Ins. Co. v. American Guarantee and Liability Ins. Co. (2010) 181 Cal. App. 4th 616, 631, -- Cal. Rptr. 3d --

Person in cherry picker attached to insured truck was not "insured" because he was not operating, and therefore not "using," insured truck within meaning of *Ins. Code § 11580.06(g)*; "operated by" or "when operating" is conclusively presumed to describe conduct of person sitting immediately behind steering controls of motor vehicle; definition of "operated by" or "when operating" applies to all various forms of "operate" contained within article applying to automobile liability insurance. *Scottsdale Ins. Co. v. State Farm Mut. Auto. Ins. Co. (2005) 130 Cal. App. 4th 890, 899-902, 30 Cal. Rptr. 3d 606*

Shipper that directed loading of truck on its premises was not "borrower" of truck, and therefore not "insured," because it did not have possession or custody of truck, nor use of truck for its own purposes, to exclusion of owner; sine qua non of borrowing vehicle is exercise of dominion and control over vehicle, whether through use of vehicle in pursuit of one's own purposes or through possession and custody of vehicle. *City of Los Angeles v. Allianz Ins. Co. (2004) 125 Cal. App. 4th 287, 295-296, 22 Cal. Rptr. 3d 716*

Water truck with permanently attached spraying equipment is not "auto" for purpose of auto exclusion in commercial general liability policy. *American Star Ins. Co. v. Insurance Co. of W. (1991) 232 Cal. App. 3d 1320, 1323-1327, 284 Cal. Rptr. 45*

[4] Exclusions

Requirement that exclusionary clause be conspicuous, plain, and clear is independent of insured's expectations. 20th *Century Ins. Co. v. Liberty Mut. Ins. Co. (9th Cir. 1992) 965 F.2d 747, 753-754*

Automobile liability insurance policy providing coverage to "named insured," defined in policy to include named individual and spouse if resident of same household and excluding coverage of liability for bodily injury to "any insured," as not covering bodily injuries to wife of named individual sustained while she was passenger in insured vehicle. *Cal. State Auto. Ass'n Inter-Ins. Bureau v. Warwick (1976) 17 Cal. 3d 190, 192-195, 130 Cal. Rptr. 520, 550 P.2d 1056* ; *Schwalbe v. Jones (1976) 16 Cal. 3d 514, 521-523, 128 Cal. Rptr. 321, 546 P.2d 1033* ; *cf. State Farm Mut. Auto. Ins. Co. v. Jacober (1973) 10 Cal. 3d 193, 110 Cal. Rptr. 1, 514 P.2d 953*

In automobile insurance policy providing for $100,000 limit per person, inconspicuous exclusionary language located not in liability section, but rather at end of policy among numerous miscellaneous and unrelated provisions, limiting per-person liability to statutorily required minimums ($15,000 per person) if permissive user was driving, was not enforceable because exclusionary provision must be sufficiently conspicuous to inform the average layperson of the limitations on permissive user coverage. *Thompson v. Mercury Cas. Co. (2000) 84 Cal. App. 4th 90, 98, 100 Cal. Rptr. 2d 596* (exclusionary provision construed against insurer)

Disputed limitation in automobile policy was inconspicuous and unclear due to failure to meet requirement of (1) conspicuous placement in policy, and (2) understandability to the average layperson; summary judgment in declaratory action reversed. *Jauregui v. Mid-Century Ins. Co. (1991) 1 Cal. App. 4th 1544, 1549-1550, 3 Cal. Rptr. 2d 21*

Policy excluding coverage for insured's use of nonowned vehicles when used by person who reasonably believes that he or she is entitled to do so, does not violate *Ins. Code § 11580.1*; insurer that extends coverage beyond statutory minimums is permitted to tailor additional coverage by drafting applicable exclusions without violating *Ins. Code § 11580.1*. *Canadian Ins. Co. v. Ehrlich (1991) 229 Cal. App. 3d 383, 391, 280 Cal. Rptr. 141*

Signature of husband, as named insured in automobile liability policy, sufficient to bind wife to terms of agreement excluding couple's son from coverage. *Allstate Ins. Co. v. Superior Court (1987) 190 Cal. App. 3d 242, 246, 235 Cal. Rptr. 353*

For purposes of policy exclusion of vehicles (other than covered vehicles) owned by insured, insured is owner of vehicle that he had given to his daughter and had requested insurer to delete as covered vehicle, but had not transferred to daughter by DMV registration before accident. *Bohannon v. Aetna Cas. & Sur. Co. (1985) 166 Cal. App. 3d 1172, 1174-1177, 212 Cal. Rptr. 848*

[5] Attorneys' Fees and Costs of Suit

Made-whole rule does not bar automobile insurer from seeking reimbursement for med-pay proceeds that it paid to insured, subject to deduction under common-fund theory for its share of attorney's fees that insured expended to obtain payment from tortfeasor. 21st *Century Ins. Co. v. Superior Court (2009) 47 Cal. 4th 511, 518, 98 Cal. Rptr. 3d 516, 213 P.3d 972* ; see also 21st *Century Ins. Co. v. Superior Court (2009) 47 Cal. 4th 511, 515, 533-535, 98 Cal. Rptr. 3d 516, 213 P.3d 972* (conc. opn. of Werdegar, J.)

Release given by plaintiff accident victim to tortfeasor's insurer barred plaintiff's subsequent action against insurer for bad faith, breach of contract, and fraud based on insurer's refusal to pay costs of suit and attorneys' fees awarded under *Code Civ. Proc. § 1021.4* (award of fees against defendant convicted of a felony), when plaintiff agreed not to execute on any judgment or potential claim arising out of tortfeasor-insured's conduct and nothing in the agreement gave or reserved to plaintiff any right to recover additional money from the insurer. *Vaillette v. Fireman's Fund Ins. Co.*

(1993) 18 Cal. App. 4th 680, 686, 22 Cal. Rptr. 2d 807

[6] Cancellation of Policy

Protected interests and notice requirements of named insured and lienholder are separate; policy can be canceled as to one, but remain in effect as toother. *Mackey v. Bristol W. Ins. Servs. of Cal. (2003) 105 Cal. App. 4th 1247, 1267, 130 Cal. Rptr. 2d 536*

Acknowledgment of receipt of premiums in policy is conclusive evidence of payment, precluding insurer from canceling policy for nonpayment. *Drinnon v. Oliver (1972) 24 Cal. App. 3d 571, 580, 101 Cal. Rptr. 120*

[7] Renewal of Policy

Mandatory renewal provision of *Ins. Code § 1861.03(c)* inapplicable to insurers withdrawing from California market pursuant to *Ins. Code §§ 1070-1076*. *Travelers Indem. Co. v. Gillespie (1990) 50 Cal. 3d 82, 92-102, 266 Cal. Rptr. 117, 785 P.2d 500*

[8] Proposition 103

No private right of action exists for violation of *Ins. Code § 1861.02* (limiting factors that insurer can consider in determining insurance rates), which is within exclusive jurisdiction of *Insurance Commissioner*. *Farmers Ins. Exch. v. Superior Court (2006) 137 Cal. App. 4th 842, 856, 40 Cal. Rptr. 3d 653* (distinguishing *Donabedian v. Mercury Ins. Co. (2004) 116 Cal. App. 4th 968, 977, 11 Cal. Rptr. 3d 45*)

Proposition 103 (*Ins. Code § 1861.02*) permits person to maintain civil action under Unfair Competition Law (*Bus. & Prof. Code § 17200 et seq.*) if complaint alleges that insurer used applicant's absence of prior insurance, in and of itself, in determining premiums, discount for good driving, or insurability. *Donabedian v. Mercury Ins. Co. (2004) 116 Cal. App. 4th 968, 977, 11 Cal. Rptr. 3d 45*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoverageGeneral OverviewInsurance LawMotor Vehicle InsuranceExclusionsGeneral OverviewInsurance LawMotor Vehicle InsuranceCancellation & RenewalNotice RequirementsGeneral OverviewInsurance LawMotor Vehicle InsuranceCancellation & RenewalNonpayment of PremiumsTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 88.33 Text References

Witkin, Summary of California Law, Vol. 2, § 14 et seq. (10th ed.2005)

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Chapter 88 AUTOMOBILES: AUTOMOBILE INSURANCE
PART IV. FORMS

8-88 California Forms of Pleading and Practice--Annotated § 88.40

§ 88.40 Complaint by Insured Against Insurance Company for Damages for Breach of Contract and for Tort Damages for Breach of the Implied Covenant of Good Faith and Fair Dealing--Automobile Liability Policy

[1] FORM Complaint by Insured Against Insurance Company for Damages for Breach of Contract and for Tort Damages for Breach of the Implied Covenant of Good Faith and Fair Dealing--Automobile Liability Policy

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Breach of Insurance Contract; Breach of Implied
[and DOES 1 through _____,]	)	Covenant of Good Faith and Fair Dealing)
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. At all times mentioned in this complaint, defendant was, and is, a corporation organized and existing under the laws of _____[*state or foreign country*] [, with its principal place of business in this state situated in _____ County,] and authorized to transact, and transacting, business in California as an automobile liability insurer [*or other allegation of capacity and authority as appropriate*].

[2. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon

alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences alleged in this complaint, and that plaintiff's damages as herein alleged were proximately caused by those defendants.)]

[3. At all times mentioned in this complaint, defendants DOES 1-_____ were the agents, servants, and employees of their codefendants, and in doing the things hereinafter alleged were acting in the scope of their authority as agents, servants, and employees, and with the permission and consent of their codefendants.]

[4. At all times mentioned in this complaint, defendant _____ (*name*) was the agent of defendant insurer _____ (*name*), and (in doing the things alleged below,) was acting in the scope of the agency and with the permission and consent of his/her codefendant.]

5. At all times mentioned in this complaint, plaintiff _____ [was the owner *or* was a part owner or had a security interest in] a certain _____ [*describe year, make, model*] automobile, California license number _____, referred to below as "the automobile."

6. On or about _____ [*date*], [in consideration of the payment of _____ (an annual *or* a semiannual *or* a monthly *or* a weekly *or specify other terms of payment*) premium of $_____, made by _____ (*name of person securing issuance of policy*),] defendant, by its duly authorized agents, executed and delivered to plaintiff in _____[*city, county, and state*], its policy of insurance bearing number _____, referred to below as "the policy." The policy by its terms was effective from _____[*time*], on _____ [*date*], to _____[*time*], on _____ [*date*]. [A copy of the policy is attached as Exhibit "A" and made a part hereof.]

7. The policy at all times mentioned in this complaint provided the following coverage(s): _____

[*RECITE paragraphs in policy setting forth coverage relied on, for example:*]

"COVERAGE A Bodily injury liability. To pay, on behalf of the insured, all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile."

[*OR*]

"COVERAGE B Property damage liability. To pay, on behalf of the insured, all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile."

[*OR*]

"COVERAGE C Medical payments. To pay all reasonable expenses incurred within one year from date of accident for necessary medical, surgical, ambulance, hospital, professional nursing and funeral services, to or for each person who sustains bodily injury, sickness or disease, caused by accident, while in or upon, entering or alighting from the automobile if the automobile is being used by the named insured or with his permission."

[*OR*]

"COVERAGE D Comprehensive loss of or damage to the automobile, except by collision or upset. To pay for any direct and accidental loss of or damage to the automobile, hereinafter called loss, except loss caused by collision of the automobile with another object or by upset of the automobile or by collision of the automobile with a vehicle to which it is attached. Breakage of glass and loss caused by missiles, failing objects, fire, theft, explosion, earthquake, windstorm, hail, water, flood, vandalism, riot or civil commotion shall not be deemed loss caused by collision or upset."

[*OR*]

"COVERAGE E Collision or upset. To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile, but only for the amount of each loss in excess of the deductible amount, if any, stated in the declarations as applicable hereto."

[*OR*]

"COVERAGE F Fire, lightning and transportation. To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by (a) fire or lightning, (b) smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment serving the premises in which the automobile is located, or (c) the standing, sinking, burning, collision or derailment of any conveyance in or on which the automobile is being transported on land or on water."

[*OR*]

"COVERAGE G Theft. To pay for loss of or damage to the automobile, hereinafter called loss, caused by theft, larceny, robbery or pilferage."

[*OR*]

"COVERAGE H Windstorm, earthquake, explosion, hail or water. To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by windstorm, hail, earthquake, explosion, external discharge or leakage of water, except loss resulting from rain, snow or sleet."

[*OR*]

"COVERAGE I Additional coverage. To pay for direct and accidental loss or damage to the automobile, hereinafter called loss, caused by windstorm, hail earthquake, explosion, riot or civil commotion, or the forced landing or failing of any aircraft or of its parts or equipment, flood or rising waters, external discharge or leakage of water except loss resulting, from rain, snow or sleet."

[*OR*]

"COVERAGE J or K Uninsured motorist. To pay all sums which the insured shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death, resulting therefrom, hereinafter called bodily injury, sustained by the insured, caused by accident and arising out

of the ownership, maintenance or use of such uninsured automobile; provided for the purpose of this coverage, determination as to whether the insured is legally entitled to recover such damages and, if so, the amount thereof, shall be made by agreement between the insured and the company, or, if they fail to agree, by arbitration."]

[*CONTINUE*]

8. On or about _____ [*date*], while the policy was in full force and effect, _____ [*specify covered loss, e.g.,* the automobile was damaged by collision with an unknown vehicle or object while legally parked and locked during the evening hours in front of plaintiff's residence located at _____ (*street address and city*), California. A copy of the police report initiated by plaintiff and on file with _____ (*name and address of law enforcement agency issuing the report*) regarding the occurrence is attached as Exhibit "B" and made a part hereof].

9. _____ [*Allege damages, e.g.,* As a proximate result of the collision, the automobile was damaged to such an extent that it was irreparable. The fair market value of the automobile at the time and place of the collision was $_____].

10. Plaintiff gave defendant notice of the loss on or about _____ [*date*] and proof of loss on or about _____ [*date*], and has otherwise performed all the terms and conditions of the policy on his/her part to be performed.

11. On or about _____ [*date*], defendant _____ [*set forth facts regarding defendant insurer's failure to pay benefits, e.g.,* denied hat the value of the loss was in the amount and to the extent submitted by plaintiff, and stated that it would tender to plaintiff the amount of $500 in full satisfaction of the claim, for costs of repair to the automobile. Defendant failed and refused, and continues to fail and refuse, to pay to plaintiff the fair market value of the automobile as of the time and place of the collision, or to provide plaintiff with a suitable replacement vehicle whose value is equal to that of the automobile,] and there is now due and owing from defendant to plaintiff the sum of $_____.

[12. _____ (*Allege any acts by defendant that would constitute a breach of the implied covenant of good faith and fair dealing, e.g.,* Prior to defendant's denial of payment of benefits under the policy in the amount requested, and at all relevant times, defendant failed to undertake an adequate investigation of the claim. Specifically, following defendant's initial denial of the claim, on _____ (*date*), plaintiff submitted to defendant a document containing a list of the names and professional qualifications of automobile mechanics, and their statements of opinion that the automobile was irreparable, or "totaled" (, a copy of which is attached as Exhibit "C" and made a part hereof), but defendant failed and refused to contact those persons, to investigate in any way the technical information in the documents, or to solicit facts necessary to support an informed evaluation. Instead, defendant issued a denial stating that the automobile was reparable, and failed to refute the information provided by plaintiff, or to specify the reasons in support of its conclusion.)].

13. As a proximate result of defendant's failure and refusal to _____ [pay to or reimburse] plaintiff as herein alleged, plaintiff has been damaged in the sum of $_____[*amount of loss*], together with interest on that sum at the legal rate from and after _____[*date defendant denied coverage or cost of repair was paid or payment was due under terms of policy*].

[14. _____ (*Allege any personal or other injuries and damages proximately caused by defendant's tortious conduct, e.g.,* emotional-distress damages.)]

[15. The acts of defendant alleged in Paragraph 12 were done intentionally, maliciously, (and) oppressively (, and with

the intent of defrauding plaintiff). Plaintiff is therefore entitled to exemplary or punitive damages.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____[*amount of benefit payable under policy*], with interest thereon at the legal rate [from and after _____ (*date*), until paid];

[2. For general damages in the sum of $_____;]

[3. _____ (*Allege amount of special damages suffered, if any*);]

[4. For exemplary damages;]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*typed name*]

VERIFICATION

I, _____[*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of complaint is for use by an insured in an action against the insurer to recover policy benefits that the insurer has failed and refused to pay [*see Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 573-574, 108 Cal. Rptr. 480, 510 P.2d 1032* ; *Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377]* .

[3] Pleading

An action on an insurance policy is an action on contract. The essential elements required to be pleaded in an action for damages for breach of contract are as follows [*Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377]* :

- The contract.

- Plaintiff's performance or excuse for nonperformance.
- Defendant's breach.
- Resulting damages to plaintiff.

An allegation of a loss covered by the contract must be included, because it is only when a loss occurs that the duty to pay, as evidenced by the insurance contract, arises [*see Blasingame v. Home Ins. Co. (1888) 75 Cal. 633, 635, 17 P. 925]* .

It is also common to allege the insurer's capacity as a corporation, unincorporated association, or other, its authority to issue insurance policies of the class involved in the action, and, if venue is to be based on the location of defendant insurer's place of business, the county in California in which its principle place of business is situated [*see Code Civ. Proc. §§ 395.2, 395.5*].

If the policy is in writing, as is usually the case, its execution may be pleaded in any of the following ways [*see Evans v. Holly Corp. (1971) 15 Cal. App. 3d 1020, 1023, 93 Cal. Rptr. 712* (legal effect of policy alleged); *see also* Ch. 140, *Contracts*]:

- Pleading the policy *in haec verba*;
- Attaching a copy as an exhibit and incorporating it by a reference; or
- Pleading its legal effect.

[4] Allegations

This form of complaint alleges the following:

- The defendant's capacity as a California corporation, its authority to issue automobile liability insurance, and the location of its principal place of business in California (Paragraph 1) [*see Code Civ. Proc. §§ 395.2, 395.5*; *see also* [3], *above*].
- The plaintiff's ownership or security interest in the automobile involved in the insured loss (Paragraph 5).
- The issuance of the policy by defendant (Paragraph 6) [*see Civ. Code § 1614* (consideration presumed when policy is in writing, obviating need to specifically allege consideration)].
- The specific risk or loss covered by the policy (Paragraph 7) [*see Ins. Code § 11580.1* (mandatory and optional provisions in automobile liability policy)].
- The occurrence of a loss covered by the policy (Paragraph 8) [*see Blasingame v. Home Ins. Co. (1888) 75 Cal. 633, 635, 17 P. 925]* .
- The amount of damages incurred, resulting from the loss insured under the policy (Paragraph 9).
- Plaintiff's performance of all conditions required to be performed and plaintiff's demand for performance by the defendant (Paragraph 10).

- Defendant's refusal to perform, that is, defendant's breach of contract (Paragraph 11).

- Plaintiff's damages proximately caused by defendant's breach, that is, plaintiff's loss of the policy benefits and interest on that amount (Paragraph 13) [*see Civ. Code §§ 3300* (compensatory damages generally), 3302 (damages for breach of obligation to pay money)].

Optional Paragraphs 2 and 3 are for use, respectively, to allege fictitious defendants generally and to specify certain fictitious defendants acting in an agency or employment capacity [*see Code Civ. Proc. § 474*].

Optional Paragraph 4 is for use to allege a named defendant as an agent of the defendant insurer [*see Civ. Code §§ 2295-2357* (agency generally)].

Optional Paragraph 12 is for use if plaintiff wishes to allege facts regarding defendant's tortious breach of the contract, in support of the award of exemplary or punitive damages [*see, e.g., Egan v. Mutual of Omaha Ins. Co. (1979) 157 Cal. Rptr. 482, 598 P.2d 452* (nonautomobile insurance case in which insurer's failure thoroughly to investigate foundation of its denial of medical benefits under first-party policy supported cause of action for breach of implied covenant of good faith and fair dealing)].

Optional Paragraph 14 is for use if plaintiff wishes to allege compensatory damages caused by defendant's tortious conduct [*see Civ. Code § 3333*; *see, e.g., Egan v. Mutual of Omaha Ins. Co. (1979) 157 Cal. Rptr. 482, 598 P.2d 452* (insured entitled to emotional-distress damages proximately caused by insurer's bad faith breach of duty of good faith and fair dealing)].

Optional Paragraph 15 is for use if plaintiff wishes to allege entitlement to exemplary damages based on defendant's tortious conduct [*see Civ.Code § 3294* (punitive damages generally)]. No claim for punitive damages may state an amount sought [*Civ. Code § 3295(e)*; *Code Civ. Proc. § 425.10(b)*].

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*, verification will require any answer to be verified also, if the action is an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[6] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

Venue of actions against corporations and associations is governed by *Code Civ. Proc. §§ 395.2, 395.5*. For forms of allegations showing proper venue, see Ch. 571, *Venue* .

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to Fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For additional discussion and other forms of complaint based on breach of the covenant of good faith, see Ch. 308, *Insurance*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For alternative forms of verification, see Ch. 572, *Verification*

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Volume 8: Automobiles-Chs. 80-92
Chapter 88 AUTOMOBILES: AUTOMOBILE INSURANCE
PART IV. FORMS

8-88 California Forms of Pleading and Practice--Annotated § 88.41

§ 88.41 Complaint by One Insurer Against Another Insurer for Declaratory Relief--To Secure Judicial Declaration Regarding Primary and Excess Coverage Under Two or More Liability Policies--Policy Describing Vehicle as Owned Provides Primary Coverage

[1] FORM Complaint by One Insurer Against Another Insurer for Declaratory Relief--To Secure Judicial Declaration Regarding Primary and Excess Coverage Under Two or More Liability Policies--Policy Describing Vehicle as Owned Provides Primary Coverage

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiffs,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DECLARATORY RELIEF
	)	(Primary and Excess Insurance Coverage)
[and DOES 1 through _____,]	)	[*Ins. Code § 11580.9*]
	)	
Defendants.	)	
	)	
	)	

Plaintiff alleges:

1. Plaintiff _____[*name*], referred to below as "plaintiff insurer," is, and at all times herein mentioned was, _____ [a corporation organized and existing under the laws of _____ (*state or foreign country*) and authorized to transact, and transacting, business in California as an insurance company *or other allegation of capacity and authority as appropriate*].

2. On or about _____ [*date*], plaintiff insurer issued to plaintiff _____[*name*], hereinafter referred to as "plaintiff insured," an automobile liability insurance policy, number _____, referred to below as "plaintiffs' policy," insuring plaintiff insured against damages caused by _____ [*specify, e.g.,* bodily injury] resulting from _____ [*specify, e.g.,* the operation of an automobile]. Plaintiffs' policy provides that "the insurance under this policy with respect to loss arising out of _____ [*specify, e.g.,* the use of any nonowned automobile] shall be excess insurance over any other valid and collectible insurance."

[3. *If plaintiffs' policy covered a business operation, add:* Plaintiff insured, at all times herein mentioned, was engaged in business as _____ (*specify*) at _____ (*address*).]

4. Defendant _____[*name*], referred to below as "defendant insurer," is, and at all times herein mentioned was, _____ [a corporation organized and existing under the laws of _____ (*state or foreign country*) and authorized to transact, and transacting, business in California as an insurance company with its principal place of business in this state situated in _____ County *or other allegation of capacity, authority, and place of business as appropriate*].

5. On or about _____ [*date*], defendant insurer issued to defendant _____[*name*], referred to below as "defendant insured," an automobile liability insurance policy, number _____, referred to below as "defendants' policy," which insured defendant insured against damages caused by _____ [*specify, e.g.,* bodily injury] resulting from _____ [*specify, e.g.,* the operation of any owned automobile and specifically described, among others, a certain _____ (*describe year, make, model*) owned by defendant insured, hereinafter referred to as "the automobile," and provided coverage for persons using the automobiles with defendant insured's permission]. This policy also contained an endorsement making it excess coverage if there were any other valid and collectible insurance applicable to the insurable event.

[6. *If defendants' policy covered a business operation, add:* Defendant insured, at all times herein mentioned, was engaged in business as _____ (*specify*) at _____ (*address*).]

7. On or about _____[*date*], while both policies were in full force and effect, _____ [*specify facts giving rise to liability, e.g.,* defendant insured loaned the automobile to plaintiff insured for his/her personal use, for no consideration, for a period of one week. During that period of time, on _____ (*date*), plaintiff insured, while operating the automobile, was involved in an accident, hereinafter referred to as "the accident," with one _____ (*name*), a pedestrian, hereinafter referred to as "the injured person," who thereafter made claim against plaintiff insured and defendant insured for damages for injuries sustained in the accident].

8. An actual controversy between plaintiffs and defendants now exists regarding their rights and duties under their respective policies.

9. Plaintiffs contend, with respect to liability for the accident, that the automobile is an "owned automobile" under defendants' policy, within the meaning of *Insurance Code Section 11580.9(d)*, and therefore that a conclusive presumption exists that the insurance afforded by defendants' policy is primary and the insurance afforded by plaintiffs' policy is excess.

10. Defendants contend, with respect to liability for the accident, that their policy provides excess coverage only, and that plaintiffs' policy provides primary coverage[, on the ground that _____ (*specify, e.g.,* the automobile is a commercial vehicle, and the plaintiff's insured is a named insured in the policy issued by plaintiff and is engaged in the business of renting or leasing vehicles without operators, making the presumption of *Insurance Code Section 11580.9(b)* applicable to this case].

11. A judicial determination as to which policy provides primary coverage and which provides excess coverage is necessary and appropriate, so that plaintiff and defendant insurers can ascertain their rights and duties with respect to the injured person [and to the defense of their respective insureds should an action be filed by the injured person].

WHEREFORE, plaintiffs pray judgment as follows:

1. That the rights and duties of the parties under their respective policies in the premises be declared;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiffs

VERIFICATION

I, _____[*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by one insurer against another, both of whose policies cover the same insurable event, to seek a declaration that its policy provides excess coverage only, on the ground that the vehicle involved was described or rated as an "owned automobile" in the defendant insured's policy [*see Code Civ. Proc. § 1060*; *Ins. Code § 11580.9(d)*].

[3] Allegations

This form of complaint alleges the following:

- The plaintiff insurer's capacity and authority to issue automobile liability insurance, and the location of its principal place of business in California (Paragraph 1).

- The issuance of an automobile liability policy by the plaintiff insurer to the plaintiff insured and the relevant policy terms (Paragraph 2).

- The defendant insurer's capacity and authority to issue automobile liability insurance, and the

location of its principal place of business in California (Paragraph 4).

- The issuance of an automobile liability policy by the defendant insurer to the defendant insured, and the relevant policy terms (Paragraph 5).

- A description of the incident giving rise to liability (Paragraph 7).

- The existence of a controversy between plaintiffs and defendants (Paragraph 8) [*Code Civ. Proc. § 1060*].

- A statement regarding plaintiffs' contention that their policy provides only excess coverage (Paragraph 9) [*see Code Civ. Proc. § 1060*; *Ins. Code § 11580.9(d)*].

- A statement regarding defendants' contention that their policy provides only excess coverage (Paragraph 10) [*see Code Civ. Proc. § 1060*; *Ins. Code § 11580.9(d)*].

- A statement that a judicial determination is required so that plaintiff and defendant insurers can ascertain their rights and duties (Paragraph 11) [*see Code Civ. Proc. § 1060*].

Optional Paragraphs 3 and 6 are for use to allege that the plaintiff insured or defendant insured, respectively, is engaged in a particular type of business.

[4] Verification

Verification of this complaint is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction

This action for declaratory relief must be brought in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 85, 86, 580(b)(4), 1060*; *see Code Civ. Proc. § 86(a)(7)(A)* (restricted extent to which declaratory relief may be maintained as limited civil case)].

The action could, however, be brought by way of a cross complaint as to a right of indemnity with respect to the relief demanded in the complaint or a cross complaint in an action or proceeding that is otherwise a limited civil case [*see Code Civ. Proc. § 86(a)(7)(A)*]. This form may be adapted for that purpose.

[6] Cross References

For additional cross references relating to complaints generally, see *§ 88.40[7]*.

For discussion and general forms relating to declaratory relief; see Ch. 182, *Declaratory Relief*

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§ 88.42 Allegations for Complaint for Declaratory Relief

[1] Conclusive Presumption of Excess Coverage Applies--Insured Is Engaged in Business of Selling, Repairing, Servicing, Delivering, Testing, Road-Testing, Parking, or Storing Motor Vehicles

[a] FORM Allegation: Conclusive Presumption of Excess Coverage Applies--Insured Is Engaged in Business of Selling, Repairing, Servicing, Delivering, Testing, Road-Testing, Parking, or Storing Motor Vehicles

1. Plaintiff insured, at all times herein mentioned, was engaged in the business of _____ [selling *or* repairing *or* servicing *or* delivering *or* testing *or* road-testing *or* parking *or* storing] motor vehicles at _____[*address*].

2. Plaintiffs contend that their policy is conclusively presumed to provide excess coverage only, and that defendants' policy provides primary coverage, pursuant to *Insurance Code Section 11580.9(a)(2)*.

[b] Use of Form

These allegations are for use in a complaint seeking declaratory relief when two or more automobile liability insurance policies afford valid and collectible coverage for the same motor vehicle, and the insurers that issued those policies dispute which policy provides excess and which provides primary coverage. The allegations are for use by an insurer that wishes to invoke *Ins. Code § 11580.9(a)(2)*, to allege that its insured is engaged in the business of selling, repairing, servicing, delivering, testing, road-testing, parking, or storing motor vehicles, and therefore that its policy is conclusively presumed to be excess over all other available insurance.

The paragraphs in this form may be substituted for Paragraphs 3 and 9 in the complaint provided in § 88.41. For discussion of *Ins. Code § 11580.9(a)*, see *§ 88.17[2]*.

[2] Conclusive Presumption of Excess Coverage Applies--Insured Engaged in Business of Renting or Leasing Motor Vehicle

[a] FORM Allegation: Conclusive Presumption of Excess Coverage Applies--Insured Engaged in Business of

Renting or Leasing Motor Vehicle

1. Plaintiff insured, at all times herein mentioned, was engaged in the business of _____ [renting *or* leasing] motor vehicles without operators at _____[*address*].

2. Plaintiffs contend that _____ [the automobile is a "commercial vehicle" within the meaning of *Vehicle Code Section 260(a) or* at the time of the loss, the automobile was leased to defendant insured for a term of _____ (*specify term of six months or longer, e.g.,* one year)].

3. Plaintiffs therefore contend that their policy is conclusively presumed to provide excess coverage only, and that defendants' policy provides primary coverage, pursuant to *Insurance Code Section 11580.9(b)*.

[b] Use of Form

The form of allegations in [a], *above*, is for use in a complaint seeking declaratory relief when two or more automobile liability insurance policies afford valid and collectible coverage for the same motor vehicle, and the insurers that issued those policies dispute which policy provides excess and which provides primary coverage. The allegations are for use by an insurer that wishes to invoke *Ins. Code § 11580.9(b)* to allege that its insured is engaged in the business of renting or leasing motor vehicles without operators within the meaning of that statute, and therefore that its policy is conclusively presumed to be excess over all other available insurance.

This form may be substituted for Paragraphs 3 and 9 in the complaint provided in § 88.41. For discussion of *Ins. Code § 11580.9(b)*, see *§ 88.17[4]*.

[3] Conclusive Presumption of Excess Coverage Applies--Insured Is Owner, Tenant, or Lessee of Premises on Which Loading or Unloading Occurred

[a] FORM Allegation: Conclusive Presumption of Excess Coverage Applies--Insured Is Owner, Tenant, or Lessee of Premises on Which Loading or Unloading Occurred

1. Plaintiffs contend that defendant insured _____[*name*] is the _____ [owner *or* tenant *or* lessee] of the premises on which the _____ [loading *or* unloading] of the motor vehicle occurred.

2. Plaintiffs therefore contend that their policy is conclusively presumed to provide excess coverage only, and that defendants' policy provides primary coverage, pursuant to *Insurance Code Section 11580.9(c)*.

[b] Use of Form

This form of allegations is for use in a complaint seeking declaratory relief when two or more automobile liability insurance policies afford valid and collectible coverage for the same motor vehicle, and the insurers that issued those policies dispute which policy provides excess and which provides primary coverage. The allegations are for use by an insurer that wishes to invoke *Ins. Code § 11580.9(c)* to allege that the defendant insured was the owner, tenant, or lessee of the premises on which the unloading or unloading that gave rise to the accident occurred, and therefore that its policy is conclusively presumed to be excess, and that of the defendants' to be primary.

This form may be substituted for Paragraph 9 in the complaint provided in § 88.41. For discussion of *Ins. Code § 11580.9(c)*, see *§ 88.17[5]*.

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Chapter 88A AUTOMOBILES: UNINSURED MOTORIST CLAIMS

8-88A California Forms of Pleading and Practice--Annotated 88A.syn

§ 88A.syn Synopsis to Chapter 88A: AUTOMOBILES: UNINSURED MOTORIST CLAIMS

§ 88A.01 Scope of Chapter

§ 88A.02 Cross References

[1] Related Chapters in This Volume

[2] Other Related Chapters

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§ 88A.10 Uninsured Motorist Coverage for Bodily Injury or Wrongful Death

[1] Required Coverage

[2] Exemptions From Coverage Requirement

[a] Mexican Insurance

[b] Nonowned Vehicles

[c] Excess or Umbrella Policies

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[b] Named Insured

[c] Insured

[d] Insured Motor Vehicle

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[ii] Unknown Owner or Operator; Nonconsenting Owner

[iii] Insolvent Insurer

[iv] Insolvent Self-Insurer

[v] Vehicle Not in Compliance With Financial Responsibility Law

[vi] Exclusions From Definition

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[1] Punitive Damages Not Recoverable Based on Uninsured Motorist's Conduct

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§ 88A.17 Insurance Proceeds Not Collateral Source as to Recovery From Joint Tortfeasors

§ 88A.18 Subrogation

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§ 88A.20 Consolidation of Arbitration Proceeding With Third-Party Action

§ 88A.21 Statute of Limitations

[1] Accrual of Cause of Action

[2] Limitations Statute Applied to Underinsured Motorist Claims

[3] Insolvency of Tortfeasor's Insurer; Collision Outside California

[4] Notification of Limitation Period

§ 88A.22 Insured's Notice to Insurer of Action Against Uninsured Motorist

§ 88A.23 Underinsured Motorist Coverage for Bodily Injury

[1] Controlling Statutes

[2] Definitions

[a] Insured Motor Vehicle

[b] Underinsured Motor Vehicle

[3] Required Coverage

[4] Applicability of Coverage

[a] Bodily Injury Caused by Underinsured Motor Vehicle

[b] Other Policy Limits Must Be Exhausted

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[a] Amount Paid by Person Liable for Injury

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[c] Contributions by All Tortfeasors to All Insureds Calculated

[6] Insured's Notice to Insurer of Action Against Underinsured Motorist

§ 88A.24 Uninsured Motorist Coverage for Property Damage

[1] Coverage Requirements

[2] Definitions

[a] Property Damage

[b] Insured Motor Vehicle

[c] Uninsured Motor Vehicle

[3] Subrogation

[4] Notification of Limitation Period

§ 88A.25 Covenant of Good Faith and Fair Dealing

[1] Insurer's Breach of Covenant of Good Faith and Fair Dealing

[2] Punitive Damages

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§§ 88A.26-88A.39 [Reserved]

§ 88A.40 Related Texts From LexisNexis

§ 88A.41 State Statutes

[1] Uninsured Motorist Coverage

[2] Financial Responsibility Law

[3] Arbitration

§ 88A.42 Decisions

[1] Uninsured Motorist Coverage

[2] Damages Recoverable by Uninsured Motorists

[3] Subrogation

[4] Statute of Limitations

[5] Arbitration

[6] Underinsured Motorist Coverage

§ 88A.43 Internet References

§§ 88A.44-88A.59 [Reserved]

§ 88A.60 Statement of Claim for Uninsured Motorist Benefits for Injuries Caused by Unknown Owner or Operator of Motor Vehicle [Ins Code § 11580.2(b)(2)]

[1] FORM

[2] Use of Form

§ 88A.61 Complaint in Subrogation by Insurer as Subrogee of Its Insured [Ins. Code § 11580.2(g)]--Against Uninsured Motorist to Recover Amount Paid to Insured Under Uninsured Motorist Endorsement or Coverage

[1] FORM

[2] Use of Form

[3] Allegations

[4] Specification of Damages

[5] Jurisdiction

[6] Potential Defendants

[7] Statute of Limitations

[8] Cross References

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PART I. SCOPE

8-88A California Forms of Pleading and Practice--Annotated § 88A.01

§ 88A.01 Scope of Chapter

This chapter discusses uninsured and underinsured motorist claims, including the following topics:

- Definitions and application of uninsured motorist law.
- Definitions and application of underinsured motorist law.
- Subrogation with respect to insurers providing uninsured motorist coverage.
- Arbitration of disputes involving uninsured motorist coverage.

The chapter provides forms of statement of claim for uninsured motorist benefits [*see § 88A.60*] and of complaint in subrogation by an insurer against the uninsured motorist to recover the amount paid to its insured under uninsured motorist coverage [*see § 88A.61*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoverageUnderinsured MotoristsGeneral OverviewInsurance LawMotor Vehicle InsuranceArbitrationInsurance LawMotor Vehicle InsuranceCoverageUnderinsured MotoristsSubrogationInsurance LawMotor Vehicle InsuranceCoverageUninsured MotoristsSubrogationTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 88A.02 Cross References

[1] Related Chapters in This Volume

- For discussion concerning evaluation of an automobile case, see Ch. 81B, *Automobiles: Case Evaluation* .

- For discussion and forms concerning damages recoverable in an automobile case, see Ch. 82A, *Automobiles: Damages* .

- For discussion of automobile insurance, see Ch. 88, *Automobiles: Automobile Insurance* .

[2] Other Related Chapters

- For discussion of procedure, forms, and rules regarding arbitration required under *Ins. Code § 11580.2(f)*, see Ch. 32, *Contractual Arbitration: Agreement and Compelling Arbitration* .

- For discussion relating to damages generally, see Ch. 177, *Damages* .

- For discussion relating to an insured's cause of action against the insurer for breach of the implied covenant of good faith and fair dealing under the insurance contract, see Ch. 308, *Insurance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceGeneral OverviewTortsDamagesCompensatory DamagesGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageUninsured MotoristsSubrogationTortsTransportation TortsMotor VehiclesPersonal VehiclesInsurance LawMotor Vehicle InsuranceArbitration

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[Reserved]

§§ 88A.03[Reserved]

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§ 88A.10 Uninsured Motorist Coverage for Bodily Injury or Wrongful Death

[1] Required Coverage

No policy of bodily injury liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be issued or delivered in California to the owner or operator of a motor vehicle, or shall be issued or delivered by any insurer licensed in California on any motor vehicle then principally used or principally garaged in California, unless the policy contains, or has added to it by endorsement, a provision with coverage limits at least equal to the limits specified in *Ins. Code § 11580.2(m)*, and in no case less than the financial-responsibility requirements specified in *Veh. Code § 16056*, insuring the insured (and the insured's heirs or legal representative) for all sums within the limits that he, she, or they, as the case may be, shall be legally entitled to recover as damages for bodily injury or wrongful death from the owner or operator of an uninsured motor vehicle [*Ins. Code § 11580.2(a)(1)*].

[2] Exemptions From Coverage Requirement

[a] Mexican Insurance

The requirements set forth in *§ 88A.10[1]* do not apply to policies that provide insurance in the Republic of Mexico issued or delivered in California by nonadmitted Mexican insurers [*Ins. Code § 11580.2(a)(1)*].

[b] Nonowned Vehicles

A policy is excluded from the application of *Ins. Code § 11580.2* if the only coverage with respect to the use of any motor vehicle is limited to the contingent liability arising out of the use of nonowned motor vehicles [*Ins. Code § 11580.2(a)(1)*].

[c] Excess or Umbrella Policies

A policy is excluded from the application of *Ins. Code § 11580.2* if the automobile liability coverage is provided only on an excess or umbrella basis [*Ins. Code § 11580.2(a)(1)*].

[d] Nonautomobile Policies

Nothing in *Ins. Code § 11580.2* requires that uninsured motorist coverage be offered or provided in any homeowner policy, personal and residents' liability policy, comprehensive personal liability policy, manufacturers' and contractors' policy, premises liability policy, special multiperil policy, or any other policy or endorsement in which automobile liability coverage is offered as incidental to some other basic coverage, notwithstanding that the policy may provide automobile or motor vehicle liability coverage on insured premises or the ways immediately adjoining [*Ins. Code § 11580.2(a)(1)*].

Personal liability umbrella policies may provide bodily injury liability insurance in the automotive liability context [*see California Capital Ins. Co. v. Nielsen (2007) 153 Cal. App. 4th 1221, 1225, 64 Cal. Rptr. 3d 50]* . When an owner and an operator of an otherwise uninsured motor vehicle have bodily injury liability insurance coverage under a personal liability umbrella policy that covers the ownership and use of that vehicle in the accident at issue, that vehicle cannot be considered an uninsured motor vehicle triggering payment under the injured person's uninsured motorist provision [*California Capital Ins. Co. v. Nielsen (2007) 153 Cal. App. 4th 1221, 1225, 64 Cal. Rptr. 3d 50]* .

[3] Minimum Financial Responsibility Limits

The minimum financial responsibility limits of a policy or bond are as follows [*Veh. Code § 16056*; *see* Ch. 88, *Automobiles: Automobile Insurance*]:

- $15,000 for injury to or death of one person in one accident.
- $30,000 for injury to or death of two or more persons in one accident.
- $5,000 for injury to or destruction of property of others in any one accident.

Coverage provided under an uninsured motorist endorsement or coverage must be offered with coverage limits equal to the limits of liability for bodily injury in the underlying policy of insurance, but is not required to be offered with limits in excess of $30,000 because of bodily injury to or death of one person in any one accident, or $60,000 because of bodily injury to or death of two or more persons in any one accident [*Ins. Code § 11580.2(m)*].

[4] Definitions

[a] Bodily Injury

As used in *Ins. Code § 11580.2(a)*, "bodily injury" includes sickness or disease, including consequent death [*Ins. Code § 11580.2(b)*].

[b] Named Insured

As used in *Ins. Code § 11580.2(a)*, "named insured" means only the individual or organization named in the declarations of the policy of motor vehicle bodily injury liability insurance referred to in *Ins. Code § 11580.2(a)* [*Ins. Code § 11580.2(b)*].

[c] Insured

If the named insured is an individual, "insured," as used in *Ins. Code § 11580.2(a)*, means the named insured and the spouse of the named insured and, while residents of the same household, relatives of either while occupants of a motor vehicle or otherwise, heirs and any other person while in, on, entering into, or alighting from an insured motor vehicle and any person with respect to damages he or she is entitled to recover for care or loss of services because of bodily

injury to which the policy provisions or endorsement apply [*Ins. Code § 11580.2(b)*].

If the named insured is an entity other than an individual, "insured," as used in *Ins. Code § 11580.2(a)*, means any person while in, on, entering into, or alighting from an insured motor vehicle and any person with respect to damages he or she is entitled to recover for care or loss of services because of bodily injury to which the policy provisions or endorsement apply. As used in *Ins. Code § 11580.2(b)*, "individual" does not include persons doing business as corporations, partnerships, or associations [*Ins. Code § 11580.2(b)*].

[d] Insured Motor Vehicle

As used in *Ins. Code § 11580.2(b)*, "insured motor vehicle" means the motor vehicle described in the underlying insurance policy of which the uninsured motorist endorsement or coverage is a part, a temporary substitute automobile for which liability coverage is provided in the policy or a newly acquired automobile for which liability coverage is provided in the policy if the motor vehicle is used by the named insured or with his or her permission or consent, express or implied, and any other automobile not owned by or furnished for the regular use of the named insured or any resident of the same household, or by a natural person or persons for whom coverage has been deleted in accordance with *Ins. Code § 11580.2(a)*, while being operated by the named insured or his or her spouse if a resident of the same household. "Insured motor vehicle," however, does not include any automobile while used as a public or livery conveyance [*Ins. Code § 11580.2(b)*; *see Ins. Code § 11580.2(b)* (exclusion from definition of "public or livery conveyance"); *but see Ins. Code § 11586* (uninsured motorist coverage mandatory for Southern California Rapid Transit District)].

[e] Uninsured Motor Vehicle

[i] No Insurance Coverage

As used in *Ins. Code § 11580.2*, "uninsured motor vehicle" means a motor vehicle with respect to the ownership, maintenance, or use of which there is no bodily injury liability insurance or bond applicable at the time of the accident, or there is applicable insurance or bond but the company writing the insurance or bond denies coverage thereunder or refuses to admit coverage thereunder except conditionally or with reservation, or an "underinsured motor vehicle" as defined in *Ins. Code § 11580.2(p)* [*Ins. Code § 11580.2(b)*].

[ii] Unknown Owner or Operator; Nonconsenting Owner

"Uninsured motor vehicle" also means a motor vehicle used without the permission of the owner thereof if there is no bodily injury liability insurance or bond applicable at the time of the accident with respect to the owner or operator thereof, or the owner or operator thereof be unknown, provided that, with respect to an uninsured motor vehicle whose owner or operator is unknown [*Ins. Code § 11580.2(b)*]:

- The bodily injury has arisen out of physical contact of that automobile with the insured or with an automobile which the insured is occupying;

- The insured or someone on his or her behalf has done the following:

  - Reported the accident within 24 hours to the police department of the city where the accident occurred, or, if the accident occurred in unincorporated territory, then either to the sheriff of the county where the accident occurred or to the local headquarters of the California Highway Patrol, and

  - Filed with the insurer within 30 days thereafter a statement under oath that the insured or his or her legal representative has (or the insured's heirs have) a cause of action

arising out of the accident for damages against a person or persons whose identity is unascertainable and set forth facts in support thereof.

These conditions of physical contact, report to the police, and statement filed with the insurer were designed to curb fraud, collusion, and other abuses arising from claims that phantom cars had caused accidents that had actually resulted solely from the carelessness of the insured [*Pham v. Allstate Ins. Co. (1988) 206 Cal. App. 3d 1193, 1196, 254 Cal. Rptr. 152* ; *Inter-Insurance Exch. v. Lopez (1965) 238 Cal. App. 2d 441, 443, 47 Cal. Rptr. 834]* . However, the 30-day provision for filing a statement under oath cannot be asserted to defeat recovery under the policy unless there is prejudice to the insurer, and the insurer has the burden of showing prejudice [*Hanover Ins. Co. v. Carroll (1966) 241 Cal. App. 2d 558, 566, 568, 50 Cal. Rptr. 704]* .

[iii] Insolvent Insurer

"Uninsured motor vehicle" also means an insured motor vehicle when the liability insurer thereof is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency [*Ins. Code § 11580.2(b)*; *see Ins. Code § 11580.2(j)* (providing statute of limitations rule applicable to accident in foreign jurisdiction when party's insurer becomes insolvent)]. Inability to pay a claim "because of insolvency" means actual insolvency precipitating nonpayment of a claim within a year, regardless of whether any court or insurance commissioner took the formal step of ordering the insurer into liquidation [*Romano v. Mercury Ins. Co. (2005) 128 Cal. App. 4th 1333, 1337, 1340-1347, 27 Cal. Rptr. 3d 784* ; *see Ins. Code § 985(a)* (definition of insolvency)].

An insurer's solvency protection is applicable only to accidents occurring during a policy period in which its insured's motor vehicle coverage is in effect when the liability insurer of the tortfeasor becomes insolvent within one year of the accident [*Ins. Code § 11580.2(b)*].

In the event of payment to any person under the coverage required by *Ins. Code § 11580.2* and subject to the terms and conditions of the coverage, the insurer making the payment is, to the extent thereof, entitled to any proceeds that may be recoverable from the assets of the insolvent insurer through any settlement or judgment of the person against the insolvent insurer [*Ins. Code § 11580.2(b)*].

[iv] Insolvent Self-Insurer

"Uninsured motor vehicle" also means a motor vehicle when a self-insurer becomes insolvent and is adjudicated bankrupt [*Interinsurance Exch. v. Garcia (1984) 160 Cal. App. 3d 419, 423, 206 Cal. Rptr. 621* ; *see Ins. Code § 11580.2(b)*]. Therefore, an uninsured motorist carrier is protected from liability for uninsured motorist coverage if the insolvency of the self-insurer does not occur within one year from the date of the accident [*Interinsurance Exch. v. Garcia (1984) 160 Cal. App. 3d 419, 425 n.5, 206 Cal. Rptr. 621]* .

[v] Vehicle Not in Compliance With Financial Responsibility Law

Nothing in *Ins. Code § 11580.2* is intended to exclude from the definition of an uninsured motor vehicle any motorcycle or private passenger type four-wheel-drive motor vehicle if that vehicle was subject to and failed to comply with the California Financial Responsibility Law (*Veh. Code § 16000 et seq.*) [*Ins. Code § 11580.2(b)*].

[vi] Exclusions From Definition

"Uninsured motor vehicle" does not include the following [*Ins. Code § 11580.2(b)*]:

- A motor vehicle owned or operated by the named insured or any resident of the same household or self-insured within the meaning of the California Financial Responsibility Law (*Veh. Code § 16000 et seq.*), in which the motor vehicle is registered, or which is owned by the United States of America,

Canada, a state or political subdivision of any such government or an agency of any of these entities.

- A land motor vehicle or trailer while located for use as a residence or premises and not as a vehicle.

- Any equipment or vehicle designed or modified for use primarily off public roads, except while actually on public roads.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoverageUninsured MotoristsGeneral OverviewTortsWrongful Death & Survival ActionsGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageUnderinsured MotoristsGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageProof of Financial ResponsibilityTortsTransportation TortsMotor VehiclesPersonal Vehicles

California Forms of Pleading and Practice--Annotated

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Volume 8: Automobiles-Chs. 80-92
Chapter 88A AUTOMOBILES: UNINSURED MOTORIST CLAIMS
PART II. LEGAL BACKGROUND

8-88A California Forms of Pleading and Practice--Annotated § 88A.11

§ 88A.11 Damages With Respect to Uninsured Motorists

[1] Punitive Damages Not Recoverable Based on Uninsured Motorist's Conduct

Punitive damages based on the conduct of an uninsured motorist are not recoverable under uninsured motorist coverage. The purpose of uninsured motorist coverage and the purpose of recovery of punitive damages differ. Uninsured motorist coverage is designed to guarantee reimbursement to an insured motorist for injuries inflicted by a financially irresponsible motorist without automobile liability coverage, whereas punitive damages are meant to punish an intentional wrongdoer [*California State Auto. Ass'n Inter-Ins. Bureau v. Carter (1985) 164 Cal. App. 3d 257, 261, 263, 210 Cal. Rptr. 140]* .

Public policy would be thwarted, and the purpose of the uninsured motorist statute would not be met, if punitive damages could be recovered from the insurer based on the conduct of the uninsured motorist [*California State Auto. Ass'n Inter-Ins. Bureau v. Carter (1985) 164 Cal. App. 3d 257, 261, 263, 210 Cal. Rptr. 140]* .

[2] Proposition 213: Recovery of Noneconomic Damages Precluded

[a] Uninsured Motorist Limited to Recovery of Economic Damages

Proposition 213, adopted by initiative at the general election of 1996, provides that in any action to recover damages arising out of the operation or use of a motor vehicle, a person shall not recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damages if, among other conditions, either of the following applies [*Civ. Code § 3333.4(a)*]:

- The injured person was the owner of a vehicle involved in the accident, and the vehicle was not insured as required by the financial responsibility laws [*see Veh. Code § 16000 et seq.*].

- The injured person was the operator of a vehicle involved in the accident, and cannot establish his or her financial responsibility as required by the financial responsibility laws [*see Veh. Code § 16000 et seq.*].

An appellate court has held that the preclusion of noneconomic damages under *Civil Code § 3333.4(a)* does not extend to the recovery of punitive damages, which may be recoverable by uninsured motorists in a properly stated case [*Nakamura v. Superior Court (2000) 83 Cal. App. 4th 825, 839, 100 Cal. Rptr. 2d 97* (affirming trial court's denial of defendant's motion to strike claim for punitive damages, but not addressing merits of case); *see Ch. 82A, Automobiles: Damages, § 82A.15*].

For further discussion of *Section 3333.4*, see *Ch. 82A, Automobiles: Damages, § 82A.15*.

[b] Purpose of Statute

Limiting a plaintiff's damages arising out of a collision for which he or she could have obtained insurance encourages him or her to obtain insurance. The initiative also seeks to restore balance to the justice system. Limiting an uninsured motorist's damages to economic losses tends to equalize the litigation benefits for insured plaintiffs suing uninsured defendants an uninsured plaintiffs suing insured defendants [*see Cabral v. Los Angeles County Metro. Transp. Auth. (1998) 66 Cal. App. 4th 907, 915, 78 Cal. Rptr. 2d 385]* .

[c] Financial Responsibility May Be Met by Owner's or Driver's Liability Insurance

The requirements of the Financial Responsibility Law are set forth in *Veh. Code § 16000 et seq.* [*see* Ch. 88, *Automobiles: Automobile Insurance*]. *Veh. Code § 16000 et seq.* does not in so many words require that a motor vehicle be "insured." Rather, the statutes impose a requirement of financial responsibility for injuries caused by motor vehicle operation. That requirement is found in *Veh. Code § 16021*. The financial responsibility laws (specifically *Veh. Code § 16000.7*) define an "uninsured motor vehicle" as "a motor vehicle for which financial responsibility as provided in *Veh. Code § 16021* was not in effect at the time of the accident" [*Goodson v. Perfect Fit Enters., Inc. (1998) 67 Cal. App. 4th 508, 512, 79 Cal. Rptr. 2d 102]* .

Financial responsibility for the vehicle is established, and the vehicle is insured as required by the Financial Responsibility Laws, if the owner *or* the driver has insurance that covers the driver for his or her operation of the vehicle involved in an accident. Although the vehicle owner generally will satisfy these requirements by personally maintaining insurance for the vehicle, *Veh. Code § 16021* provides that financial responsibility is established so long as the driver is covered, under either the owner's automobile policy or the driver's own policy [*Goodson v. Perfect Fit Enters., Inc. (1998) 67 Cal. App. 4th 508, 513-514, 79 Cal. Rptr. 2d 102* (fact that owner failed to carry proof of insurance in vehicle under *Veh. Code § 16020* was irrelevant; *Civ. Code § 3333.4* refers to establishing proof of insurance under *Veh. Code § 16020*, not carrying proof of insurance)].

[d] Application of Statute

[i] Operation of Vehicle Includes All Aspects of Causing Vehicle to Function

For purposes of applying *Civ. Code § 3333.4*, "operate" means to cause to function. A person operates a motor vehicle when the person causes it to function in the manner for which the automobile is fitted. "Use" means to employ, put into action or service, or utilize [*Cabral v. Los Angeles County Metro. Transp. Auth. (1998) 66 Cal. App. 4th 907, 913, 78 Cal. Rptr. 2d 385]* .

An uninsured motorist who is injured while exiting the vehicle is injured while "operating" the vehicle within the meaning of *Civ. Code § 3333.4(a)*, and is therefore limited to recovering only economic damages from the tortfeasor [*Cabral v. Los Angeles County Metro. Transp. Auth. (1998) 66 Cal. App. 4th 907, 915, 78 Cal. Rptr. 2d 385]* . When a person drives the car, parks it, turns off the engine, and opens the car door to exit, that person operates the car. The act of opening the car door to exit is part of the operation of the automobile, because opening the door to enter or exit the vehicle is necessary to the driving of the vehicle [*Cabral v. Los Angeles County Metro. Transp. Auth. (1998) 66 Cal. App. 4th 907, 914, 78 Cal. Rptr. 2d 385]* .

[ii] Premises Liability

Civil Code § 3333.4 bars an uninsured motorist from recovering noneconomic losses in a premises liability action against a private entity that maintained control over a public roadway, if the motorist's injuries were sustained in a single-vehicle accident involving the uninsured vehicle and were caused by the private entity's negligent creation or maintenance of a dangerous road condition [*Allen v. Sully-Miller Contracting Co. (2002) 28 Cal. 4th 222, 227-231, 120 Cal. Rptr. 2d 795]* . For example, in one case, the plaintiff's motorcycle crashed after its tire caught on the elevated lip of a bus pad on public property. A construction company had retained responsibility for providing traffic control at the bus pad, which entailed the installation and maintenance of road barriers and delineators to warn motorists and others of ditches and uneven road surfaces. In the plaintiff's action against public and private entities, including the construction company, the California Supreme Court held that the claim against the construction company fell squarely within the terms of *Civil Code § 3333.4* for the following reasons [*Allen v. Sully-Miller Contracting Co. (2002) 28 Cal. 4th 222, 227-228, 120 Cal. Rptr. 2d 795]* :

- The plaintiff did not have liability insurance on the motorcycle at the time of the accident;

- The action sought damages that occurred when the tire of the uninsured motorcycle that the plaintiff was operating caught on an uneven street surface, causing the motorcycle to fall; and

- The factual circumstances of the case raised no ambiguity or uncertainty as to the application of the statute, which precludes recovery of noneconomic damages "in any action to recover damages arising out of the operation or use of a motor vehicle," if the injured person was not insured as the owner or operator of the vehicle involved in the accident.

For discussion of the application of *Civil Code § 3333.4* to an uninsured motorist's suit for premises liability against a public entity, see *§ 88A.11[2][g]*.

[e] Limitations Inapplicable to Product Liability Action Against Automobile Manufacturer

In *Hodges v. Superior Court (1999) 21 Cal. 4th 109, 86 Cal. Rptr. 2d 884, 980 P.2d 433* , the California Supreme Court held that a product liability claim against an automobile manufacturer falls outside the scope of *Civ. Code § 3333.4*. An uninsured motorist who sues an automobile manufacturer under product liability theories for damages incurred while driving in violation of the California financial responsibility laws is therefore not precluded from obtaining the noneconomic damages otherwise barred by this statute [*Hodges v. Superior Court (1999) 21 Cal. 4th 109, 112-113, 86 Cal. Rptr. 2d 884, 980 P.2d 433]* .

In *Hodges*, the plaintiff, who had no car insurance himself, borrowed an uninsured Ford Mustang. When the car stalled on the freeway, it was hit from behind at high speed. The gas tank, located in the trunk, ruptured, and gasoline vapor entered the passenger compartment, causing an explosion. The driver's seat then collapsed, delaying the plaintiff's exit from the car, and his resulting injuries included significant burns. The Supreme Court stated that the statute was primarily intended to limit awards against insured drivers. The Court drew support for its conclusion from ballot arguments in favor of the initiative, including the following [*Hodges v. Superior Court (1999) 21 Cal. 4th 109, 115-118, 86 Cal. Rptr. 2d 884, 980 P.2d 433]* :

- The initiative was aimed principally at providing balance for those who obey the financial responsibility laws, not benefiting manufacturers whose design and manufacturing processes are not subject to those laws.

- The express goal of the initiative statute was restoring balance to the system, not simple retribution.

- The initiative was intended to punish and deter scofflaws.

[f] Limitations Inapplicable to Wrongful Death Plaintiff Who Neither Owned Nor Drove Uninsured Vehicle

In *Horwich v. Superior Court (1999) 21 Cal. 4th 272, 87 Cal. Rptr. 2d 222, 980 P.2d 927* , the California Supreme Court held that *Civ. Code § 3333.4* does not preclude a wrongful death plaintiff whose decedent was the uninsured operator of a motor vehicle involved in an accident from recovering damages for loss of care, comfort, and society, if the plaintiff was not an uninsured owner or operator of the vehicle [*Horwich v. Superior Court (1999) 21 Cal. 4th 272, 287, 87 Cal. Rptr. 2d 222, 980 P.2d 927]* . The Court considered whether "a person," within the meaning of *Civ. Code § 3333.4(a)*, means any person who brings a cause of action "arising out of the operation or use of a motor vehicle" [*see § 88A.11[2][a]*]. After noting that both "a person" and the "injured person" are subject to different interpretations, the Court determined that the limitation on the recovery of pecuniary damages by "a person" operates against only a plaintiff who is the uninsured owner or operator of a vehicle involved in the accident [*Horwich v. Superior Court (1999) 21 Cal. 4th 272, 287, 87 Cal. Rptr. 2d 222, 980 P.2d 927]* .

A wrongful death plaintiff who is neither the uninsured owner nor operator of a vehicle involved in the accident cannot be one who has failed to take personal responsibility, because the law imposes no obligation on him or her. Nor are wrongful death plaintiffs mentioned in the text of the proposition as subject to its restrictions [*Horwich v. Superior Court (1999) 21 Cal. 4th 272, 278, 87 Cal. Rptr. 2d 222, 980 P.2d 927]* . The Court noted that ballot arguments in favor of the initiative indicated that it was substantially aimed at punishing persons who would otherwise recover fully from insured drivers without themselves obeying the financial responsibility law [*Horwich v. Superior Court (1999) 21 Cal. 4th 272, 279-281, 87 Cal. Rptr. 2d 222, 980 P.2d 927* ; *see also Hodges v. Superior Court (1999) 21 Cal. 4th 109, 115-116, 86 Cal. Rptr. 2d 884, 980 P.2d 433* ; *see generally § 88A.11[2][e]*]. Logically, wrongful death plaintiffs who are neither the uninsured owner nor operator of the vehicle involved in an accident were not targeted because they do not contribute to this perceived unfairness, nor are they in a position to rectify it [*Horwich v. Superior Court (1999) 21 Cal. 4th 272, 282, 87 Cal. Rptr. 2d 222, 980 P.2d 927]* .

Moreover, although a wrongful death plaintiff generally is subject to any defenses that the defendant could assert against the decedent, this rule is not absolute. Instead, *Code Civ. Proc. § 377.60* creates a new cause of action in favor of the heirs as beneficiaries, based on their own independent pecuniary injury suffered due to the loss of a relative, and distinct from any the decedent might have maintained if he or she had survived [*Horwich v. Superior Court (1999) 21 Cal. 4th 272, 283, 87 Cal. Rptr. 2d 222, 980 P.2d 927]* . In wrongful death actions involving a statutory defense that could have been asserted against the decedent, courts have considered the matter one of statutory construction. The more reasonable interpretation of *Civ. Code § 3333.4*, in light of the electorate's objective, precludes its application under these circumstances [*Horwich v. Superior Court (1999) 21 Cal. 4th 272, 286-287, 87 Cal. Rptr. 2d 222, 980 P.2d 927]* .

[g] Public Entity Defendants

In one case, the California Supreme Court held that *Civil Code § 3333.4* limits an uninsured motorist's recovery of noneconomic damages from a public entity in a suit for nuisance and dangerous condition of public property arising from a vehicle accident. The uninsured motorist in that case sued, in addition to the other driver and the owner of adjacent private property, two public entities (a city and a county), alleging that vegetation obstructed the intersection on public property where the accident occurred [*Day v. City of Fontana (2001) 25 Cal. 4th 268, 271-277, 105 Cal. Rptr. 2d 457, 19 P.3d 1196]* .

However, a court of appeal decision in another case found the statute inapplicable because the plaintiff did not assert any property-related theory of liability against the public entity that related to public roads and highways. In that case, a child riding in a car owned and driven by her uninsured (and unlicensed) parent was injured when that car collided with a city-owned truck. The child was air-lifted from the scene of the accident by a city-owned helicopter, which crashed,

killing the child. The child's parents sued the city in two capacities: (1) as the owner and operator of the truck (based on negligent training and operating); and (2) as the owner and operator of the helicopter (based on its negligent maintenance and operation). The court of appeal held that the death did not "arise out of" the collision within the meaning of *Section 3333.4* with respect to the *helicopter* crash. The statute did apply, however, with regard to the city's liability (if any) as the owner of the truck and the employer of the truck driver [*Anaya v. Superior Court (2002) 96 Cal. App. 4th 136, 139-143, 116 Cal. Rptr. 2d 660]* .

The court stated that by contrast to *Day v. City of Fontana*, the plaintiff's helicopter-related theories did not include any property-related theories of liability concerning the city's roads and highways. Therefore, there was an insufficient connection between the plaintiff's injury (the child's death) and the plaintiff's operation and use of the uninsured vehicle (the car that collided with the truck) to implicate *§ 3333.4* [*Anaya v. Superior Court (2002) 96 Cal. App. 4th 136, 144, 116 Cal. Rptr. 2d 660]* .

For discussion of the application of *Civil Code § 3333.4* to a premises liability action against a private entity, see *§ 88A.11[2][d][ii]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoverageUninsured MotoristsGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingGeneral OverviewTortsWrongful Death & Survival ActionsGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageProof of Financial ResponsibilityTortsTransportation TortsMotor VehiclesPersonal Vehicles

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Volume 8: Automobiles-Chs. 80-92
Chapter 88A AUTOMOBILES: UNINSURED MOTORIST CLAIMS
PART II. LEGAL BACKGROUND

8-88A California Forms of Pleading and Practice--Annotated § 88A.12

§ 88A.12 Waiver of Coverage

[1] Deletion or Reduction of Statutory Coverage

The insurer and any named insured, prior to or subsequent to the issuance or renewal of a policy, may, by agreement in writing, in the form specified in *Ins. Code § 11580.2(a)(2)* or *(3)*, delete the provision covering damage caused by an uninsured motor vehicle completely, or delete the coverage when a motor vehicle is operated by a natural person or persons designated by name, or agree to provide the coverage in an amount less than that required by *Ins. Code § 11580.2(m)*, but not less than the financial responsibility requirements specified in *Veh. Code § 16056* [*Ins. Code § 11580.2(a)(1)*].

Ins. Code § 11580.2(a)(1) by its terms must be applied to the entire policy, which necessarily includes all of the vehicles insured on one policy [*Smith v. State Farm Mut. Auto. Ins. Co. (2001) 93 Cal. App. 4th 700, 713, 113 Cal. Rptr. 2d 399]* . If an insured chooses to insure multiple vehicles in a single policy, then the option to include or waive uninsured motorist coverage pertains to all vehicles covered under that policy [*Smith v. State Farm Mut. Auto. Ins. Co. (2001) 93 Cal. App. 4th 700, 716, 113 Cal. Rptr. 2d 399]* . An insurer is not required to issue separate policies to an insured seeking coverage for multiple vehicles [*see Smith v. State Farm Mut. Auto. Ins. Co. (2001) 93 Cal. App. 4th 700, 716-717, 113 Cal. Rptr. 2d 399]* . An insured who wishes to waive uninsured motorist coverage as to fewer than all insured vehicles must obtain a separate policy for each vehicle, and must therefore patronize an insurer that is willing to provide separate policies [*see Smith v. State Farm Mut. Auto. Ins. Co. (2001) 93 Cal. App. 4th 700, 713, 113 Cal. Rptr. 2d 399]* .

Consequently, neither of the following practices is unlawful or actionable: (1) an insurer's requiring all vehicles to be covered by one policy and requiring the insured to choose whether or not to include uninsured motorist coverage as to all vehicles or none; or (2) an insurer's refusing to offer to insure multiple vehicles under separate policies [*see Smith v. State Farm Mut. Auto. Ins. Co. (2001) 93 Cal. App. 4th 700, 713-724, 113 Cal. Rptr. 2d 399* (remand of class action case asserting violations of conspiracy to violate *Bus. & Prof. Code §§ 16700 et seq., 17200 et seq.* by insurers of multiple vehicles in separate policies; if trial court finds exhaustion of administrative remedies, plaintiffs may amend complaint to include allegations that they paid for unneeded uninsured motorist coverage)].

Any of these agreements by any named insured or agreement for the amount of coverage is binding on every insured to whom the policy or endorsement provisions apply while the policy is in force, and continues to be binding with respect to any continuation or renewal of the policy or with respect to any other policy that extends, changes, supersedes, or replaces the policy issued to the named insured by the same insurer, or with respect to reinstatement of the policy within 30 days of any lapse of the policy [*Ins. Code § 11580.2(a)(1)*].

[2] Agreement to Delete Coverage

[a] Required Language of Agreement

The agreement specified in *Ins. Code § 11580.2(a)(1)* to delete the provision covering damage caused by an uninsured motor vehicle completely, or to delete the coverage when a motor vehicle is operated by a natural person or persons designated by name must be in the following form [*Ins. Code § 11580.2(a)(2)*]:

> The California Insurance Code requires an insurer to provide uninsured motorists coverage in each bodily injury liability insurance policy it issues covering liability arising out of the ownership, maintenance, or use of a motor vehicle. Those provisions also permit the insurer and the applicant to delete the coverage completely or to delete the coverage when a motor vehicle is operated by a natural person or persons designated by name. Uninsured motorists coverage insures the insured, his or her heirs, or legal representatives for all sums within the limits established by law, that the person or those persons are legally entitled to recover as damages for bodily injury, including any resulting sickness, disease, or death, to the insured from the owner or operator of an uninsured motor vehicle not owned or operated by the insured or a resident of the same household. An uninsured motor vehicle includes an underinsured motor vehicle as defined in *Insurance Code § 11580.2(p)*.

[b] Insurer's Relief From Liability

The execution of the agreement relieves the insurer of liability under *Ins. Code § 11580.2* while the agreement remains in effect [*Ins. Code § 11580.2(a)(2)*].

[c] Waiver Binding on Permissive Users

The waiver of uninsured motorist coverage is binding on all named insureds under the policy, even when waived by only one named insured. Furthermore, it is irrelevant that the policy is later reissued in the name of named insured who did not agree to the waiver [*Craft v. State Farm Mut. Auto. Ins. Co. (1993) 14 Cal. App. 4th 1284, 1293, 18 Cal. Rptr. 2d 293]* . The waiver is also binding on permissive users of a named insured's vehicle [*Lapp v. Transp. Indem. Co. (1985) 164 Cal. App. 3d 161, 163 164, 210 Cal. Rptr. 135]* .

[d] Additional Provisions

The agreement may contain additional statements not in derogation of or in conflict with the foregoing [*Ins. Code § 11580.2(a)(2)*]. Additional statements clearly expressing the mutual intent of the insured and insurer to delete the coverage are probably essential to the agreement, because the statutory form of agreement *set forth in § 88A.12[2][a]* does not contain any expression of waiver or deletion. It is more in the nature of a notice to the insured of the character of uninsured motorist coverage and of the permissibility of its deletion, than of an agreement to delete. An agreement deleting uninsured motorist coverage is in the nature of an agreement to exclude from coverage something that would otherwise be included as a matter of law; an exclusionary clause must be conspicuous, plain, and clear [*Kincer v. Reserve Ins. Co. (1970) 11 Cal. App. 3d 714, 720, 90 Cal. Rptr. 94]* .

[e] Deletion Must Conform to Statutory Language

By providing a specific means of deletion of uninsured motorist coverage, the Legislature intended to limit the manner in which the deletion may be accomplished to that specifically provided. An insurer's attempt to exclude such coverage can be effected only if there has been strict compliance with the provision of the law permitting the exclusion. Only an agreement in writing that amounts to an effective waiver of uninsured motorist coverage by the insured will exclude it from a liability policy for which the insured makes an application [*Dufresne v. Elite Ins. Co. (1972) 26 Cal. App. 3d 916, 922, 103 Cal. Rptr. 347]* .

In a case of first impression, the California court of appeal has held that if an agreement does not contain the prescribed statutory language, the insufficiency does not create a conclusive presumption of no waiver. Rather, the insufficiency is only prima facie evidence of an ineffective waiver of coverage. The resulting presumption is subject to rebuttal by evidence of an intentional relinquishment of a known right after knowledge of the facts [*Hartman v. Progressive Cas. Ins. Co. (1988) 204 Cal. App. 3d 1073, 1076-1081, 251 Cal. Rptr. 714]* .

[f] Effect of Failure to Obtain Waiver

When an insurer fails to obtain a written waiver of uninsured motorist coverage, the automobile insurance policy is construed by operation of law to provide uninsured motorist benefits in an amount equal to the bodily injury liability limits of the policy up to but not exceeding $30,000 per person and $60,000 per accident [*Enterprise Ins. Co. v. Mulleague (1987) 196 Cal. App. 3d 528, 536, 241 Cal. Rptr. 846* (construing *Ins. Code § 11580.2(a)(1),(m)*)].

[3] Agreement to Reduce Coverage

[a] Required Language of Agreement

The agreement specified in *Ins. Code § 11580.2(a)(1)* to provide coverage in an amount less than that required by *Ins. Code § 11580.2(m)* must be in the following form [*Ins. Code § 11580.2(a)(3)*]:

> The California Insurance Code requires an insurer to provide uninsured motorists coverage in each bodily injury liability insurance policy it issues covering liability arising out of the ownership, maintenance, or use of a motor vehicle. Those provisions also permit the insurer and the applicant to agree to provide the coverage in an amount less than that required by *Insurance Code § 11580.2(m)*, but not less than the financial responsibility requirements. Uninsured motorists coverage insures the insured, his or her heirs, or legal representatives for all sums within the limits established by law, that the person (or persons) is legally entitled to recover as damages for bodily injury, including any resulting sickness, disease, or death, to the insured from the owner or operator of an uninsured motor vehicle not owned or operated by the insured or a resident of the same household. An uninsured motor vehicle includes an underinsured motor vehicle as defined in *Insurance Code § 11580.2(p)*.

[b] Additional Statements

The agreement to provide reduced coverage may contain additional statements not in derogation of or in conflict with *Ins. Code § 11580.2(a)(3)*. However, it is presumed that an application for a policy of bodily injury liability insurance containing uninsured motorist coverage in an amount less than that required by *Ins. Code § 11580.2(m)*, signed by the named insured and approved by the insurer, with a policy effective date after January 1, 1985, is a valid agreement with regard to the amount of uninsured motorist coverage to be provided [*Ins. Code § 11580.2(a)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoverageUninsured MotoristsGeneral OverviewInsurance LawMotor Vehicle InsuranceVehicle UsePermissive UsersGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageUninsured

MotoristsRejection of CoverageTortsTransportation TortsMotor VehiclesPersonal Vehicles

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8-88A California Forms of Pleading and Practice--Annotated § 88A.13

§ 88A.13 Exclusions From Coverage

The insurance coverage provided for in *Ins. Code § 11580.2* does not apply either as primary or as excess coverage to the following:

- To property damages sustained by the insured [*Ins. Code § 11580.2(c)(1)*].

- To bodily injury of the insured while in, on, entering into, or alighting from a motor vehicle other than the described motor vehicle if the owner thereof has insurance similar to that provided in *Ins. Code § 11580.2* [*Ins. Code § 11580.2(c)(2)*; *see Calfarm Ins. Co. v. Wolf (2001) 86 Cal. App. 4th 811, 816-818, 103 Cal. Rptr. 2d 584* ("similar" means similar amount, not type, of coverage); *Planet Ins. Co. v. United Servs. Auto. Ass'n (1994) 23 Cal. App. 4th 1256, 1260-1261, 29 Cal. Rptr. 2d 100* ; *Interinsurance Exch. v. Alcivar (1979) 95 Cal. App. 3d 252, 257, 156 Cal. Rptr. 914* (exclusion applicable even though benefits received from similar insurance did not fully compensate insured)].

- To bodily injury of the insured with respect to which the insured or his or her representative, without the written consent of the insurer, makes any settlement with or prosecutes to judgment any action against any person who may be legally liable therefor [*Ins. Code § 11580.2(c)(3)*; *but see Hartford Fire Ins. Co. v. Macri (1992) 4 Cal. 4th 318, 332, 14 Cal. Rptr. 2d 813, 842 P.2d 112* (this exclusion inapplicable to underinsured motorist coverage)].

- In any instance in which it would inure directly or indirectly to the benefit of any workers' compensation carrier or to any person qualified as a self-insurer under any workers' compensation law, or directly to the benefit of the United States, or any state or any political subdivision thereof [*Ins. Code § 11580.2(c)(4)*].

- To establish proof of financial responsibility as provided in *Veh. Code § 16054 (a),(b),* and *(c)* [*Ins. Code § 11580.2(c)(5)* (*now see Veh. Code § 16054(a),* which includes subsections (1), (2), (3) (formerly designated (a), (b), (c)), as well as additional section (4))].

- To bodily injury of the insured while occupying a motor vehicle owned by an insured or leased to an insured under a written contract for a period of six months or longer, unless the occupied vehicle is an insured motor vehicle. "Motor vehicle" as used in this paragraph means any self-propelled vehicle [*Ins. Code § 11580.2(c)(6)*].

- To bodily injury of the insured when struck by a vehicle owned by an insured, unless the insured's vehicle is being operated, or caused to be operated, without the insured's consent, in connection with criminal activity that has been documented in a police report and that the insured is not a party to [*Ins. Code § 11580.2(c)(7)*].

- To bodily injury of the insured while occupying a motor vehicle rented or leased to the insured for public or livery purposes [*Ins. Code § 11580.2(c)(8)*].

With respect to policies with coverage in force prior to January 1, 1991 (including coverage in force prior to that date that is renewed), this coverage need not be included when the only coverage with respect to the use of any motor vehicle is limited to the contingent liability arising out of the use of nonowned motor vehicles [*see* former *Ins. Code § 11580.2(a)(1)* (prior to 1990 amendment); *see also* Stats. 1990, ch. 682, § 2 (applying amendment deleting that clause prospectively only)]. However, with respect to policies offered, issued, or delivered on or after January 1, 1991, that exception does not apply [*see Ins. Code § 11580.2(a)(1)* as amended by 1990 legislation, deleting that clause; *see also* Stats. 1990, ch. 682, § 2 (applying amendment deleting that clause prospectively only)]. In addition, a policy is excluded from application of *Ins. Code § 11580.2* if the automobile liability coverage is provided only on an excess or umbrella basis [*Ins. Code § 11580.2(a)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoverageUninsured MotoristsGeneral OverviewWorkers' Compensation & SSDIThird Party ActionsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 88A.14 Stacking Prohibited

Subject to *Ins. Code § 11580.2(c)(2)*, the policy or endorsement may provide that if the insured has insurance available to him or her under more than one uninsured motorist coverage provision, any damages shall not be deemed to exceed the higher of the applicable limits of the respective coverages, and the damages shall be prorated between the applicable coverages as the limits of each coverage bears to the total of the limits [*Ins. Code § 11580.2(d)*; *see Wagner v. State Farm Mut. Auto. Ins. Co. (1985) 40 Cal. 3d 460, 465-469, 709 P.2d 462]* .

Although an uninsured motorist insurance policy is not required to include the proration method of *Ins. Code § 11580.2(d)*, if it does so, the provision must be given effect. If one policy contains a proration clause and another policy contains only an excess clause, the policy with the proration clause must be given deference [*Allstate Ins. Co. v. Mercury Ins. Co. (2007) 154 Cal. App. 4th 1253, 1260, 65 Cal. Rptr. 3d 451]* .

Regardless of the number of vehicles involved, whether insured or not, the persons covered, claims made, premiums paid, or the number of premiums shown on the policy, in no event shall the limit of liability for two or more motor vehicles or two or more policies be added together, combined, or stacked to determine the limit of insurance coverage available to injured persons [*Ins. Code § 11580.2(q)*].

The nonstacking rule reflects a policy choice by the California Legislature that, unless expressly rejected, all persons insured under a California policy should have a minimum level of uninsured motorist coverage. Insureds are not precluded from purchasing additional insurance if they choose to do so [*California Cas. Indem. Exch. v. Pettis (1987) 193 Cal. App. 3d 1597, 1607 n.6, 239 Cal. Rptr. 205* (finding nonstacking policy based on *Ins. Code § 11580.2(c)(2),(d)*, construing accident that occurred prior to enactment of *Ins. Code § 11580.2(q)*, and noting that that subsection reinforced policy)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoverageUninsured MotoristsStacking ProvisionsInsurance LawMotor Vehicle InsuranceStacking ProvisionsAntistacking ClausesValidityTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 88A.15 Setoffs Regarding Other Insurance

[1] Policy Provisions

The policy or endorsement may provide that, if the insured has a valid and collectible automobile medical payment insurance available to him or her, the damages that the insured is entitled to recover from the owner or operator of an uninsured motor vehicle are reduced for purposes of uninsured motorist coverage by the amounts paid or due to be paid under the automobile medical payment insurance [*Ins. Code § 11580.2(e)*]. In the absence of a specific provision in the policy, however, the insurer is not entitled to a setoff for the medical benefits paid to the insured under medical payment insurance [*Cannizzo v. Guarantee Ins. Co. (1966) 245 Cal. App. 2d 70, 73-74, 53 Cal. Rptr. 657]* .

[2] Statutory Reimbursement Provisions

An insured entitled to recovery under the uninsured motorist endorsement or coverage shall be reimbursed within the conditions stated in *Ins. Code § 11580.2* without being required to sign any release or waiver of rights to which he or she may be entitled under any other insurance coverage applicable; nor shall payment under *Ins. Code § 11580.2* to the insured be delayed or made contingent on the decisions as to the liability or distribution of loss costs under other bodily injury liability insurance or any bond applicable to the accident [*Ins. Code § 11580.2(h)*].

[3] Sources of Setoffs and Reductions

Any loss payable under the terms of the uninsured motorist endorsement or coverage to or for any person may be reduced by the following [*Ins. Code § 11580.2(h)*]:

- The amount paid and the present value of all amounts payable to him or her or to his or her executor, administrator, heirs, or legal representative under any workers' compensation law, exclusive of nonoccupational disability benefits [*Ins. Code § 11580.2(h)(1)*; *see* *Rankin v. West Am. Ins. Co. (1978) 84 Cal. App. 3d 829, 836, 149 Cal. Rptr. 57]* ;

- The amount the insured is entitled to recover from any other person insured under the underlying liability insurance policy of which the uninsured motorist endorsement or coverage is a part, including

> any amounts tendered to the insured as advance payment on behalf of the other person by the insurer providing the underlying liability insurance [*Ins. Code § 11580.2(h)(2)*].

Under *Ins. Code § 11580.2(h)(2)*, if a passenger is injured by the concurrent negligence of the driver and a third party, the passenger's recovery under the driver's uninsured motorist policy reduces the passenger's recovery based on a claim for bodily injury by the passenger against the driver under the same policy [*see Criterion Ins. Co. v. Welish (1985) 167 Cal. App. 3d 62, 66-70, 212 Cal. Rptr. 882]* .

[4] Subrogation Compared

Counsel should note the distinction between subrogation pursuant to *Ins. Code § 11580.2(g)* and a setoff pursuant to *Ins. Code § 11580.2(h)(2)*. Although the insurer in *Security Nat'l Ins. Co. v. Hand (1973) 31 Cal. App. 3d 227, 231, 107 Cal. Rptr. 439* , discussed in *§ 88A.18*, was obligated to pay uninsured motorist limits even though bodily injury payments had been paid to the insured, and the insurer was not entitled to subrogation against the bodily injury proceeds, in *Hand*, two different carriers provided the uninsured motorist coverage and the bodily injury coverage in two separate policies. When the uninsured motorist endorsement or coverage is provided in a single policy by a single carrier, setoff is allowed [*Criterion Ins. Co. v. Welish (1985) 167 Cal. App. 3d 62, 68-70, 212 Cal. Rptr. 882]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 88A.16 Reduction of Uninsured Motorist's Judgment or Settlement

[1] Uninsured Motorist Claim of Insured Arising From Same Accident

When an uninsured owner or operator has obtained a judgment against, or agreed to a settlement with the owner or operator of an insured motor vehicle based on the negligence of the insured owner or operator, the amount of the judgment or settlement payable by the insured or his or her insurer is reduced by the amount paid or payable to the insured owner or operator or occupants of the insured motor vehicles (or their heirs or legal representatives) from coverage provided by an uninsured motorist endorsement when the claim of the insured, the owner, or occupants of the insured motor vehicle and the uninsured motorist arise out of the same accident. If the insured or his or her insurer becomes entitled to a reduction, the reduction shall not exceed the amount of the settlement or judgment awarded the uninsured owner or operator [*Veh. Code § 17200*].

The payment of any settlement with an uninsured owner or operator, or the payment of any final judgment for damages obtained by an uninsured owner or operator in a civil action against an insured owner or operator shall not be made until the claims of the owner, the operator, or the occupants of the insured motor vehicle, if any (or their heirs or legal representatives), for benefits under the uninsured motorist endorsement are settled by the insurer and the claimants under the uninsured motorist endorsement or are determined by the arbitrator in arbitration proceedings conducted pursuant to *Ins. Code § 11580.2* [*Veh. Code § 17201*].

[2] Appellate Court Declares Statute Unconstitutional

A California court of appeal has held that *Veh. Code § 17200* is unconstitutional on the ground that it violates the due process guarantees under *U.S. Const. amend. XIV*, and *Cal. Const. art. I, § 7* [*Bennett v. Bodily (1989) 211 Cal. App. 3d 133, 143, 259 Cal. Rptr. 199]* . The court found *Veh. Code § 17200* lacking the essential due process guarantee of notice, in that the reduction required by the statute appears to be automatic and can be obtained by the insured, or the insurer subrogated to the insured's rights, without asserting a defense, such as comparative negligence, against the uninsured motorist, or filing a cross complaint for the insured's injuries arising out of the same accident in the uninsured's action against the insured [*Bennett v. Bodily (1989) 211 Cal. App. 3d 133, 142-143, 259 Cal. Rptr. 199]* .

The court further found that *Veh. Code § 17200* fails to provide any procedure to protect the injured uninsured

motorist's interest in the settlement or judgment, because it reduces the uninsured's recovery without the uninsured's participation in the determination of the amount due. Moreover, it destroys the res judicata or collateral estoppel effect of a final judgment resulting from the uninsured's action against the insured, which ordinarily would preclude the insured and insurer from belatedly raising issues of the uninsured's liability [*Bennett v. Bodily (1989) 211 Cal. App. 3d 133, 142, 259 Cal. Rptr. 199]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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8-88A California Forms of Pleading and Practice--Annotated § 88A.17

§ 88A.17 Insurance Proceeds Not Collateral Source as to Recovery From Joint Tortfeasors

Uninsured motorist proceeds do not represent a collateral source in the event the insured subsequently recovers a judgment against other tortfeasors whose negligence was concurrent with that of the uninsured motorist. In such a case, the proceeds are paid out not because of the negligence of the defendants, in which case the proceeds would represent a collateral source, but because of the concurrent negligence attributable to the uninsured motorist. Therefore, the defendants are entitled to have the amount of the insurance proceeds set off against the judgment entered against them [*Waite v. Godfrey (1980) 106 Cal. App. 3d 760, 766-776, 163 Cal. Rptr. 881]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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8-88A California Forms of Pleading and Practice--Annotated § 88A.18

§ 88A.18 Subrogation

The insurer paying a claim under an uninsured motorist endorsement or coverage is entitled to be subrogated to the rights of the insured to whom the claim was paid against any person legally liable for the injury or death to the extent that payment was made. The action to enforce subrogation rights may be brought within three years from the date that payment was made [*Ins. Code § 11580.2(g)*; *see* § 88A.63]. That limitations period was found to be constitutional, on the ground that it bears a rational relationship to the stated purpose of permitting insurers, required to write insurance based on the risk of their insureds' being injured by uninsured drivers, to seek reimbursement from those drivers. The three-year limitation period of *Ins. Code § 11580.2(g)* protects the subrogation rights of the insurer from being barred before they actually accrue [*West Am. Ins. Co. v. Chalk (1989) 213 Cal. App. 3d 825, 831, 261 Cal. Rptr. 837]* .

Ins. Code § 11580.2(g) does not defeat an injured insured's right to uninsured motorist coverage in a multicar collision case involving insured and uninsured tortfeasors even though the injured insured (with the consent of his or her uninsured motorist carrier) settles a portion of the claim with the insured tortfeasor for the limits of the insured tortfeasor's insurance coverage, when the full loss exceeds both the amount of the settlement and the amount of the uninsured motorist coverage [*Security Nat'l Ins. Co. v. Hand (1973) 31 Cal. App. 3d 227, 231, 107 Cal. Rptr. 439]* .

For discussion and forms regarding subrogation generally, see Ch. 536, *Subrogation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoverageUninsured MotoristsSubrogationTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 88A.19 Arbitration

[1] When Arbitration Is Required

The policy or an endorsement added thereto must provide that the determination as to whether the insured shall be legally entitled to recover damages, and if so entitled, the amount thereof shall be made by agreement between the insured and the insurer or, in the event of disagreement, by arbitration conducted by a single neutral arbitrator [*Ins. Code § 11580.2(f)*].

The procedural rules governing arbitration generally are set forth in *Code Civ. Proc. §§ 1280-1294.2*. For discussion of procedure, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* , through Ch. 34, *Contractual Arbitration: Judicial Review* .

[2] Trial de Novo Provision Invalid

Appellate court decisions have held that a policy provision allowing a procedure for trial de novo following an arbitration award under *Ins. Code § 11580.2(f)* is invalid, because the policy provision contravenes the statutory requirement for binding arbitration [*United Servs. Auto. Ass'n v. Superior Court (1990) 221 Cal. App. 3d 79, 83, 270 Cal. Rptr. 376* ; *Chrisman v. Superior Court (1987) 191 Cal. App. 3d 1465, 1469, 236 Cal. Rptr. 703]* . Therefore, neither the insured nor insurer may enforce a policy provision of this type [*United Servs. Auto. Ass'n v. Superior Court (1990) 221 Cal. App. 3d 79, 83, 270 Cal. Rptr. 376* (attempted enforcement by insured); *Chrisman v. Superior Court (1987) 191 Cal. App. 3d 1465, 1469, 236 Cal. Rptr. 703* (attempted enforcement by insurer)].

A contract provision permitting a trial de novo on the issue of damages following an arbitration award is not enforceable, because *Ins. Code § 11580.2(f)* impliedly provides that the arbitration award is binding between the insured and the insurer. To allow a contractual provision to the contrary would thwart the public policy behind the mandatory arbitration requirements of the statute [*Goulart v. Crum & Forster Pers. Ins. Co. (1990) 222 Cal. App. 3d 527, 529-530, 271 Cal. Rptr. 627* (insured seeking to enforce contractual provision); *Chrisman v. Superior Court (1987) 191 Cal. App. 3d 1465, 1469, 236 Cal. Rptr. 703* (insurer seeking to enforce contractual provision)].

[3] Scope of Arbitration

[a] Arbitration Mandated Only for Insurer-Insured Disputes

Arbitration is mandated only for insurer-insured disputes [*see Ins. Code § 11580.2(f)*]. Consequently, for example, in an interpleader cause of action joining all parties entitled to benefits, in which the insurer has interpleaded the full limits of coverage, and has been discharged from the case, arbitration is not mandated between insureds to determine pro rata distribution of the policy proceeds [*Mayflower Ins. Co. v. Pellegrino (1989) 212 Cal. App. 3d 1326, 1330-1331, 261 Cal. Rptr. 224]* .

If *Ins. Code § 11580.2(f)* provides a broader obligation to arbitrate disputes concerning uninsured motorist coverage than does a particular insurance policy provision, the statute controls [*State Farm Mut. Auto. Ins. Co. v. Guleserian (1972) 28 Cal. App. 3d 397, 400, 104 Cal. Rptr. 683]* .

[b] Arbitration Agreements Construed Broadly

Arbitration submission agreements are usually construed as broadly as possible so that differences between the parties may be resolved quickly and economically. Under the rule of broad construction, the arbitrator is authorized to decide which questions need to be determined, and to determine those questions to resolve the controversy [*Felner v. Meritplan Ins. Co. (1970) 6 Cal. App. 3d 540, 546, 86 Cal. Rptr. 178* ; *see Code Civ. Proc. §§ 1280(c), 1283.4*].

[c] Language of Arbitration Clause and Conduct of Parties Control

The California Supreme Court has held that the scope of arbitration depends on the language of the arbitration clause and the conduct of the parties in submitting issues to arbitration [*Freeman v. State Farm Mut. Auto. Ins. Co. (1975) 14 Cal. 3d 473, 480-481, 121 Cal. Rptr. 477, 535 P.2d 341* ; *see Felner v. Meritplan Ins. Co. (1970) 6 Cal. App. 3d 540, 546-547, 86 Cal. Rptr. 178* (prior appellate decision explaining difficulty of determining scope of arbitration without Supreme Court guidance)].

If the language of the policy provision is that of *Ins. Code § 11580.2(f)*, only two issues are required to be submitted to arbitration [*Freeman v. State Farm Mut. Auto. Ins. Co. (1975) 14 Cal. 3d 473, 480, 121 Cal. Rptr. 477, 535 P.2d 341* ; *Furlough v. Transamerica Ins. Co. (1988) 203 Cal. App. 3d 40, 45, 249 Cal. Rptr. 703* ; *see Bouton v. USAA Casualty Ins. Co. (2008) 43 Cal. 4th 1190, 1193, 78 Cal. Rptr. 3d 519, 186 P.3d 1*]:

- Whether or not the insured is entitled to recover against the uninsured motorist.
- If so, the amount of the damages.

The scope of arbitration under *Ins. Code § 11580.2(f)* includes the determination whether a default judgment obtained by the insured against the underinsured tortfeasor binds the insurer. The California Supreme Court held that this issue is subject to arbitration under the statute because *Ins. Code § 11580.2(f)* requires an insured and the insurer to arbitrate the tortfeasor's liability and damages owed to the insured; and the binding nature of a default judgment obtained against that tortfeasor falls squarely within those questions of liability and damages statutorily subject to arbitration. The question whether an insurer is bound by a default judgment is subsumed within the arbitrable issues of liability and damages [*Bouton v. USAA Casualty Ins. Co. (2008) 43 Cal. 4th 1190, 1201-1202, 78 Cal. Rptr. 3d 519, 186 P.3d 1*].

If the policy is limited to the statutory language, other issues, such as coverage or the amount of money the insurance company is obligated to pay the insured, are not arbitrable [*Furlough v. Transamerica Ins. Co. (1988) 203 Cal. App. 3d 40, 45, 249 Cal. Rptr. 703* (coverage and amount owed by insurer); *Hartford Accident & Indem. Co. v. Jackson (1983) 150 Cal. App. 3d 111, 114, 197 Cal. Rptr. 477* (coverage)]. Similarly, if the insurer has paid the uninsured motorist limits of its policy, neither of the two matters listed above can be at issue in the case, and there remains no controversy to be arbitrated--such as, for example, determining the total dollar amount value of the case as possibly

relevant to a suit against the insurer for bad faith in settling the uninsured motorist claim [*State Farm Mut. Auto. Ins. Co. v. Superior Court (2004) 123 Cal. App. 4th 1424, 1431-1435, 20 Cal. Rptr. 3d 850]* .

The courts will not infer a voluntary submission of a nonstatutory issue in the absence of a clear showing that the parties so intended, either by actual litigation or argument of the issue or by some other unambiguous conduct [*Furlough v. Transamerica Ins. Co. (1988) 203 Cal. App. 3d 40, 45-46, 249 Cal. Rptr. 703]* .

If the policy language is broader than that required by *Ins. Code § 11580.2(f)*, the arbitration of additional issues may be required [*see, e.g.,* *Freeman v. State Farm Mut. Auto. Ins. Co. (1975) 14 Cal. 3d 473, 481, 121 Cal. Rptr. 477, 535 P.2d 341* ; *Hartford Accident & Indem. Co. v. Jackson (1983) 150 Cal. App. 3d 111, 114, 197 Cal. Rptr. 477]* . For example, when a policy provided that the arbitrators would "hear and determine the question or questions so in dispute" if the parties did "not agree on the amount payable" under the policy, the arbitrator was empowered to decide the issue of whether or not there was contact between the other vehicle and the insured vehicle as required by *Ins. Code § 11580.2(b)(1)* [*Orpustan v. State Farm Mut. Auto. Ins. Co. (1972) 7 Cal. 3d 988, 991-992, 103 Cal. Rptr. 919, 500 P.2d 1119* ; *see also* *Freeman v. State Farm Mut. Auto. Ins. Co. (1975) 14 Cal. 3d 473, 482, 121 Cal. Rptr. 477, 535 P.2d 341* (holding in *Orpustan* was based on policy language rather than statutory language)].

[d] Waiver by Failure to Object

Additionally, a dispute that would otherwise not be subject to arbitration may be decided by the arbitrator or arbitrators if the party that could object to the submission fails to do so and thereby waives the right to object [*see* *Felner v. Meritplan Ins. Co. (1970) 6 Cal. App. 3d 540, 544, 86 Cal. Rptr. 178]* .

[e] Issues Not Arbitrable

[i] Applicability of Statutory Limitation Period

The applicability of the two-year (one-year prior to 2004) statutory time limit of *Ins. Code § 11580.2(i)* [*see § 88A.21*] is not subject to determination by the arbitrator [*Freeman v. State Farm Mut. Auto. Ins. Co. (1975) 14 Cal. 3d 473, 482-483, 121 Cal. Rptr. 477, 535 P.2d 341]* .

[ii] Fraudulent Policy Application

The issue whether an insurance policy containing an uninsured motorist clause was obtained by fraudulent representations by the insured is not within the scope of arbitrable issues, absent a special agreement between the parties enlarging the scope of arbitration to include it. If the arbitrator decides that issue without the consent of both parties, the award may be vacated and the insurer may be required to litigate the issue in an appropriate court proceeding [*see National Indem. Co. v. Superior Court (1972) 27 Cal. App. 3d 345, 349-350, 103 Cal. Rptr. 606]* .

[iii] Insolvency of Tortfeasor's Insurer

When the existence of uninsured motorist coverage is based on insolvency of the tortfeasor's insurer, the issue of insolvency must be determined by the court before the issues of the tortfeasor's liability and the insured's damages can be arbitrated [*State Farm Mut. Auto. Ins. Co. v. Superior Court (1994) 23 Cal. App. 4th 1297, 1304, 28 Cal. Rptr. 2d 711* ; *see Ins. Code § 11580.2(b)*].

[iv] Status of Claimant as Insured Under Policy

The California Supreme Court in *Bouton v. USAA Casualty Ins. Co.*, has held that determining whether a claimant is insured under an uninsured motorist provision is not a question of the underinsured tortfeasor's liability or damages owed to the insured, and is therefore not subject to arbitration under *Ins. Code § 11580.2(f)*. A court, not an arbitrator,

must determine whether a person is insured under a particular policy. Questions of coverage, that is, whether the claimant is insured and therefore entitled to take advantage of the protection provided by the policy at issue, must be resolved before an arbitrator reaches the two arbitrable questions pursuant to *Ins. Code § 11580.2(f)* [*Bouton v. USAA Casualty Ins. Co. (2008) 43 Cal. 4th 1190, 1201, 78 Cal. Rptr. 3d 519, 186 P.3d 1* ; *see Freeman v. State Farm. Mut. Auto. Ins. Co. (1975) 14 Cal. 3d 473, 480, 121 Cal. Rptr. 477, 535 P.2d 341* ; *see also § 88A.19[3][c]*].

On remand from the California Supreme Court in *Bouton v. USAA Casualty Ins. Co.*, the appellate court reconsidered the petitioner's claim against the insurer to compel arbitration under the automobile policy issued to his sister. Although the petitioner believed that the trial court had determined, in denying his petition, that he was not an insured under the policy, the appellate court found that the trial court did not decide that question [*see Bouton v. USAA Casualty Ins. Co. (2008) 167 Cal. App. 4th 412, 423, 84 Cal. Rptr. 3d 152* ; *see also Bouton v. USAA Casualty Ins. Co. (2008) 43 Cal. 4th 1190, 78 Cal. Rptr. 3d 519, 186 P.3d 1*]. Noting that it was a question of first impression, the court held that a factual question that is preliminary or predicate to contractual or statutory arbitration (including whether the petitioner is an insured with standing to enforce an arbitration provision), can be decided by a trial court either in the proceedings on a petition to compel arbitration or in a separate action for declaratory relief [*Bouton v. USAA Casualty Ins. Co. (2008) 167 Cal. App. 4th 412, 423-426, 84 Cal. Rptr. 3d 152*]. If decided in a declaratory relief action, a finding that the plaintiff is an insured would be res judicata on that issue, and would expedite the proceedings on the subsequent petition to compel arbitration [*see Bouton v. USAA Casualty Ins. Co. (2008) 167 Cal. App. 4th 412, 426, 84 Cal. Rptr. 3d 152*]. Because under *Bouton v. USAA Casualty Ins. Co.*, a trial court must decide whether the petitioner is an insured under the policy entitled to enforce the arbitration provision in the automobile policy, the trial court in effect must determine whether he has standing, as an insured, to enforce the arbitration provision [*Bouton v. USAA Casualty Ins. Co. (2008) 167 Cal. App. 4th 412, 425-426, 84 Cal. Rptr. 3d 152*]. In this case, the trial court should have made that determination in the proceedings on the petition to compel arbitration, although if the petitioner had instead filed a declaratory relief action, the trial court could properly address and decide that question and render the appropriate declaratory relief [*see Bouton v. USAA Casualty Ins. Co. (2008) 167 Cal. App. 4th 412, 426, 84 Cal. Rptr. 3d 152*].

[3A] Cost-Shifting Provisions Under Code Civ. Proc. § 998

The California Supreme Court has held that *Code Civ. Proc. § 998* applies to uninsured motorist arbitrations conducted pursuant to *Ins. Code § 11580.2*. An uninsured motorist arbitration pursuant to *Ins. Code § 11580.2* is an "arbitration" within the meaning of *Code Civ. Proc. § 998* and subject to that statute's cost-shifting provisions [*Pilimai v. Farmers Ins. Exch. Co. (2006) 39 Cal. 4th 133, 142, 45 Cal. Rptr. 3d 760, 137 P.3d 939* ; *see* Ch. 520, *Settlement and Release*]. These costs may include deposition and exhibit preparation expenses [*Pilimai v. Farmers Ins. Exch. Co. (2006) 39 Cal. 4th 133, 151, 45 Cal. Rptr. 3d 760, 137 P.3d 939]* .

The "maximum liability" provision of *Ins. Code § 11580.2(p)(4)* does not preclude an award of costs pursuant to *Code Civ. Proc. § 998*, even if the costs, in addition to the damages award, would exceed the insurance policy's maximum coverage [*Pilimai v. Farmers Ins. Exch. Co. (2006) 39 Cal. 4th 133, 145, 45 Cal. Rptr. 3d 760, 137 P.3d 939* ; *see § 88A.23[5][a]*].

[3B] Prejudgment Interest

Prejudgment interest under *Civ. Code § 3291* is not available in an action that is not an action for "personal injury" within the meaning of that statute. Therefore, prejudgment interest under that statute is not available in a contract action brought by an insured against an insurer [*Pilimai v. Farmers Ins. Exch. Co. (2006) 39 Cal. 4th 133, 145-147, 45 Cal. Rptr. 3d 760, 137 P.3d 939* ; *see* Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* ; Ch. 86, *Automobiles: Pretrial Motions and Settlement Negotiations* ; Ch. 177, *Damages*].

An "action brought to recover damages for personal injury sustained by any person resulting from or occasioned by the tort of any other person" within the meaning of *Civ. Code § 3291* must be a personal injury action sounding in tort, and

does not include an action for breach of an insurance contract [*Pilimai v. Farmers Ins. Exch. Co. (2006) 39 Cal. 4th 133, 147, 45 Cal. Rptr. 3d 760, 137 P.3d 939]* .

[4] Court's Correction of Arbitration Award

Subject to the requirements for correcting an award (pursuant to *Code Civ. Proc. § 1286.8*), unless it vacates the award under *Code Civ. Proc. § 1286.2*, the court shall correct an award and confirm it as correct if it determines the following [*Code Civ. Proc. § 1286.6*]:

- There was an evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award;

- The arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision on the controversy submitted; or

- The award is imperfect in a matter of form, not affecting the merits of the controversy.

Consequently, an arbitration award that embraces matters outside the agreement and not submitted to the arbitrator is subject to modification under *Code Civ. Proc. § 1286.6(b)* [*Furlough v. Transamerica Ins. Co. (1988) 203 Cal. App. 3d 40, 46, 249 Cal. Rptr. 703]* . For example, if the arbitrator determines issues of coverage and the amount of money the insurer is obligated to pay the insured, under a policy provision that essentially restates the statutory language regarding the scope of arbitration, a court petitioned to confirm the award may determine those issues of coverage and the extent of the insurer's obligation [*Furlough v. Transamerica Ins. Co. (1988) 203 Cal. App. 3d 40, 45-47, 249 Cal. Rptr. 703]* .

[5] Court Proceeding to Compel Arbitration

[a] Court's Power to Compel Arbitration

In a court proceeding to compel arbitration under the arbitration statutes [*Code Civ. Proc. § 1280 et seq.*], the court has limited jurisdiction as set forth in *Code Civ. Proc. § 1281.2*. On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate the controversy, the court shall order the petitioner and the respondent to arbitrate the controversy unless it determines the following [*Code Civ. Proc. § 1281.2*]:

- The right to compel arbitration has been waived by the petitioner;

- Grounds exist for the revocation of the agreement; or

- A party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact [*see § 88A.19[5][e]*].

[b] Pending Court Action or Special Proceeding

For the purpose of determining whether a party to the agreement is also a party to related court action [*see § 88A.19[5][a]*], a pending court action or special proceeding includes an action or proceeding initiated by the party refusing to arbitrate after the petition to compel arbitration has been filed, but on or before the date of the hearing on the petition [*Code Civ. Proc. § 1281.2*].

[c] Written Agreement to Arbitrate

If the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate the controversy may not be refused on the ground that the petitioner's contentions lack substantive merit [*Code Civ. Proc. § 1281.2*].

[d] Delaying Arbitration Pending Resolution of Related Litigation Between Parties

If the court determines that there are other issues between the petitioner and the respondent that are not subject to arbitration and that are the subject of a pending action or special proceeding between the petitioner and the respondent and that a determination of the issues may make the arbitration unnecessary, the court may delay its order to arbitrate until the determination of the other issues or until such earlier time as the court specifies [*Code Civ. Proc. § 1281.2*].

[e] Pending Court Action

If the court determines that a party to the arbitration is also a party to litigation in a pending court action or special proceeding with a third party under *Code Civ. Proc. § 1281.2(c)*, the court may do the following [*Code Civ. Proc. § 1281.2*]:

- Refuse to enforce the arbitration agreement and order intervention or joinder of all parties in a single action or special proceeding;

- Order intervention or joinder as to all or only certain issues;

- Order arbitration among the parties who have agreed to arbitration and stay the pending court action or special proceeding pending the outcome of the arbitration proceeding; or

- Stay arbitration pending the outcome of the court action or special proceeding.

Note that a trial court has the authority to consolidate a contractual arbitration proceeding between an insurer and an insured as to uninsured motorist coverage in the insured's pending action against third parties [*Mercury Ins. Group v. Superior Court (1998) 19 Cal. 4th 332, 350-351, 79 Cal. Rptr. 2d 308, 965 P.2d 1178* ; *see § 88A.20*].

[f] Waiver to Right to Compel Arbitration

Under *Code Civ. Proc. § 1281.2*, waiver of the right to compel arbitration is a preliminary question that should be decided by the trial court considering a petition to compel arbitration. In an uninsured motorist case, a valid release of the bodily injury claim signed by the insured constitutes a waiver of the right to compel arbitration. The court, rather than the arbitrator, has jurisdiction to determine the validity and effect of such a release prior to arbitration [*Gustafson v. State Farm Mut. Auto. Ins. Co. (1973) 31 Cal. App. 3d 361, 365, 107 Cal. Rptr. 243* ; *Commercial Ins. Co. v. Copeland (1967) 248 Cal. App. 2d 561, 565, 56 Cal. Rptr. 794]* .

[6] Effect of Arbitration Award or Judgment Affirming Award

[a] Arbitration Award Has Effect of Written Contract

Generally, an arbitration award that has not been confirmed or vacated has the same force and effect as a contract in writing between the parties to the arbitration [*Code Civ. Proc. § 1287.6*].

[b] Arbitration Award Has No Res Judicata or Collateral Estoppel Effect

No award made in an arbitration proceeding instituted pursuant to *Ins. Code § 11580.2* is deemed to be res judicata or collateral estoppel in any court action that may be pending or brought by the insured against the owner or operator of an

uninsured motor vehicle [*Ins. Code § 11580.5*].

An award or a judgment confirming an award is not conclusive on any party in any action or proceeding between the insured, the insured's insurer, legal representative, or heirs and the uninsured motorist to recover damages arising out of the accident on which the award is based [*Ins. Code § 11580.2(f)*].

[7] Workers' Compensation Benefits

If the insured has or may have rights to benefits, other than nonoccupational disability benefits, under any workers' compensation law, the arbitrator may not proceed with the arbitration until the insured's physical condition is stationary and ratable. In those cases in which the insured claims a permanent disability, the claim must, unless good cause be shown, be adjudicated by award or settled by compromise and release before the arbitration may proceed. Any demand or petition for arbitration must contain a declaration under penalty of perjury, stating whether the following apply [*Ins. Code § 11580.2(f)*; for a form, *see Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.92*]:

- The insured has a workers' compensation claim;

- The claim has proceeded to findings and award or settlement on all issues reasonably contemplated to be determined in that claim; and

- If not, what reasons amounting to good cause are grounds for the arbitration to proceed immediately.

When a covered occurrence occurs during the course and scope of an insured's employment, the insurer is not necessarily obligated to pay uninsured motorist benefits during the pendency of the insured's workers' compensation claim. Therefore, the insurer does not necessarily breach its duty of good faith and fair dealing by delaying payment pending the outcome of the workers' compensation claim. Whether or not such a delay in payment is permissible depends on the scope of the policy's arbitration clause [*Rangel v. Interinsurance Exch. (1992) 4 Cal. 4th 1, 10-13, 17, 14 Cal. Rptr. 2d 783, 842 P.2d 82* ; *see* Ch. 308, *Insurance*].

[8] Issuance of Subpoenas

The arbitration is deemed to be a proceeding. The hearing before the arbitrator is deemed to be the trial of an issue therein for purposes of issuance of a subpoena by an attorney of a party to the arbitration under *Code Civ. Proc. § 1985* [*Ins. Code § 11580.2(f)*; *see* Ch. 535, *Subpoena*].

[9] Discovery

[a] Code of Civil Procedure Applies

The provisions of the Civil Discovery Act [*Code Civ. Proc. § 2016.010 et seq.*] apply to determinations under *Ins. Code § 11580.2(f)*. All rights, remedies, obligations, liabilities, and procedures set forth in those statutes are available to both the insured and the insurer at any time after the accident, both before and after the commencement of arbitration, if any, with the following limitations [*Ins. Code § 11580.2(f)*]:

- Whenever *Code Civ. Proc. § 2016.010 et seq.* refers to the court in which the actionis pending, or provision is made for application to the court or obtaining leave of court or approval by the court, the court having jurisdiction for the purposes of *Ins. Code § 11580.2(f)* is the superior court for any county that is a proper county for the filing of a suit for bodily injury arising out of the accident, against the uninsured motorist, or any county specified in the policy, or an endorsement added thereto, as a proper county for arbitration or action thereon.

- Any proper court to which application is first made by either the insured or the insurer for any discovery or other relief or remedy under *Code Civ. Proc. § 2016.010 et seq.* is thereafter the only court to which either of the parties may make any applications under those statutes with respect to the same accident, subject, however, to the right of the court to grant a change of venue after a hearing on notice on any of the grounds on which change of venue might be granted in an action filed in the superior court.

- A deposition pursuant to *Code Civ. Proc. § 2025.010 et seq.* regarding oral depositions may be taken without leave of court, except that leave of court, granted with or without notice and for good cause shown, must be obtained if the notice of the taking of the deposition is served by either party within 20 days after the accident.

- *Code Civ. Proc. § 2025.280(a)*, which provides for waiver of objection in certain circumstances on a party's failure to serve a timely response, does not apply to *Ins. Code § 11580.2(f)*.

- Interrogatories under *Code Civ. Proc. § 2030.010 et seq.* and requests for admission under *Code Civ. Proc. § 2033.010 et seq.* may be served by either the insured or the insurer on the other at any time more than 20 days after the accident without leave of court.

For discussion and forms relating to discovery in automobile cases, see Ch. 85, *Automobiles: Discovery* . For procedure and forms for use in discovery matters generally, see Ch. 190, *Depositions and Discovery* .

[b] Insured and Insurer Are Deemed Parties for Deposition Purposes

Ins. Code § 11580.2(f) also states that the insured and the insurer are deemed to be parties for purposes of *Code Civ. Proc. § 2025.260*, which provides a procedure for obtaining a court order requiring certain deponents (including a party) to attend a deposition more than 150 miles from their residences.

[c] Discovery in Pending Actions Not Limited

Nothing in *Ins. Code § 11580.2* limits the rights of any party to discovery in any action pending or that may be pending in any court [*Ins. Code § 11580.2(f)(7)*].

[10] Insured's Failure to Provide Wage and Medical Information

If an insured has failed to provide an insurer with wage loss information or medical treatment record releases within 15 days of the insurer's request, or has failed to submit to a medical examination arranged by the insurer within 20 days of the insurer's request, the insurer may, at any time prior to 30 days before the actual arbitration proceedings commence, request, and the insured shall furnish, wage loss information or medical treatment record releases. If requested, the insured must furnish the information or releases. The insurer may also require the insured, except during periods of hospitalization, to make himself or herself available for a medical examination [*Ins. Code § 11580.2(o)*].

The wage loss information or medical treatment record releases must be submitted by the insured within 10 days of request. The medical examination must be arranged by the insurer no sooner than 10 days after request, unless the insured agrees to an earlier examination date, and not later than 20 days after the request. If the insured fails to comply with these requirements, the actual arbitration proceedings must be stayed for at least 30 days following compliance by the insured. The proceedings must be scheduled as soon as practicable following expiration of the 30-day period [*Ins. Code § 11580.2(o)*].

[11] Award on Minor's Claim Constitutes Compromise

When an insured entitled to recovery under uninsured motorist coverage is a minor, an arbitration award on the claim is

deemed to be a compromise, and is governed by *Prob. Code §§ 3300-3803* [*Ins. Code § 11580.3*; *see* Ch. 367A, *Minors: Tort Actions*]. The court may disapprove the award only on the grounds specified in *Code Civ. Proc. § 1286.2* [*Ins. Code § 11580.3*; *see* Ch. 34, *Contractual Arbitration: Judicial Review*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 88A.20 Consolidation of Arbitration Proceeding With Third-Party Action

The California Supreme Court has held that a trial court has the authority to consolidate a contractual arbitration proceeding between an insurer and an insured as to uninsured motorist coverage in the insured's pending action against third parties. Stated in other words, a trial court has the authority to join the insurer as a defendant as to uninsured motorist coverage issues for all purposes, including trial, in order to avoid conflicting rulings on a common issue of law or fact [*Mercury Ins. Group v. Superior Court (1998) 19 Cal. 4th 332, 350-351, 79 Cal. Rptr. 2d 308, 965 P.2d 1178* ; *see also Prudential Prop. & Cas. Ins. Co. v. Superior Court (1995) 36 Cal. App. 4th 275, 278-279]* .

The Court stated that a general right to contractual arbitration of uninsured motorist coverage issues generally resulting in a binding and final decision does not amount to an absolute prohibition against the resolution of those questions by any other means in any other manner. In the case of uninsured motorist coverage, in the absence of a petition to compel contractual arbitration, there is no requirement that uninsured motorist coverage issues may be resolved only by means of contractual arbitration, or at least only by means of some kind of arbitration resulting in a binding and final decision. Nothing bars the insurer and the insured from choosing to litigate; nothing prevents diversion to judicial arbitration. Even in the presence of a petition to compel contractual arbitration, there is no requirement that these questions may be resolved only by those means. Although the contractual arbitration law generally mandates a trial court to compel arbitration, it does not always do so. It broadly applies to all contractual arbitration, whether freely chosen by the parties or imposed on them by law, including the uninsured motorist coverage law [*Mercury Ins. Group v. Superior Court (1998) 19 Cal. 4th 332, 346-347, 79 Cal. Rptr. 2d 308, 965 P.2d 1178]* .

The Supreme Court noted that the general right to contractual arbitration of uninsured motorist coverage issues generally resulting in a binding and final decision is a right, but nothing more. It may be revoked by rescission, or lost by a party's waiver. Moreover, it may not apply if there is an issue of law or fact common to the arbitration, and a pending action or proceeding with a third party, which may result in conflicting rulings [*Mercury Ins. Group v. Superior Court (1998) 19 Cal. 4th 332, 348, 79 Cal. Rptr. 2d 308, 965 P.2d 1178]* .

Legal Topics:

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

Civil ProcedureParties Joinder General OverviewCivil ProcedurePretrial MattersConsolidation of ActionsInsurance LawMotor Vehicle InsuranceCoverageUninsured MotoristsGeneral OverviewInsurance LawMotor Vehicle InsuranceArbitrationTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 88A.21 Statute of Limitations

[1] Accrual of Cause of Action

No cause of action accrues to the insured under any policy or endorsement provision issued pursuant to *Ins. Code § 11580.2* unless one of thefollowing actions have been taken within two years (one year prior to 2004) after the date of the accident [*Ins. Code § 11580.2(i)*; *Bullard v. California State Auto. Ass'n (2005) 129 Cal. App. 4th 211, 219, 28 Cal. Rptr. 3d 225* (amendment changing one year to two years not retroactive)]:

- Suit for bodily injury has been filed against the uninsured motorist in a court of competent jurisdiction.
- Agreement concerning the amount due under the policy has been concluded.
- The insured has formally instituted arbitration proceedings.

A cause of action to compel arbitration of an uninsured motorist insurance claim does not accrue, and the statue of limitations does not begin to run, until one party has refused to submit to arbitration [*Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1041-1042, 9 Cal. Rptr. 2d 381, 831 P.2d 821]* . The statute of limitations for an action to compel arbitration based on a written agreement to arbitrate is four years, which is the statute of limitations for actions on a written contract [*Spear v. California State Automobile Ass'n (1992) 2 Cal. 4th 1035, 1040, 9 Cal. Rptr. 2d 381, 831 P.2d 821* ; *see Code Civ. Proc. § 337*].

The insolvency of the insured's insurance carrier does not abrogate the insured's duty to preserve the cause of action against the uninsured motorist, as required by *Ins. Code § 11580.2(i)* [*Kortmeyer v. California Ins. Guarantee Ass'n (1992) 9 Cal. App. 4th 1285, 1292, 12 Cal. Rptr. 2d 71]* .

[2] Limitations Statute Applied to Underinsured Motorist Claims

Ins. Code § 11580.2(i) applies to underinsured as well as uninsured motorist claims [*Arrasmith v. State Farm Ins. Co. (1994) 24 Cal. App. 4th 12, 15-17, 29 Cal. Rptr. 2d 53* (motion to compel arbitration properly denied when demand was

not filed within statutory one-year period)].

[3] Insolvency of Tortfeasor's Insurer; Collision Outside California

Notwithstanding *Ins. Code § 11580.2(b)* and *Ins. Code § 11580.2(i)*, in the event the accident occurs in any other state or foreign jurisdiction to which coverage is extended under the policy and the insurer of the tortfeasor becomes insolvent, any action authorized pursuant to the provisions of *Ins. Code § 11580.2* may be maintained within three months of the insolvency of the tortfeasor's insurer, but in no event later than the pertinent period of limitation of the jurisdiction in which the accident occurred [*Ins. Code § 11580.2(j)*].

[4] Notification of Limitation Period

Notwithstanding *Ins. Code § 11580.2(i)*, any insurer whose insured has made a claim that is pending under his or her uninsured motorist coverage must, at least 30 days before the expiration of the applicable statute of limitations, notify its insured in writing of the statute of limitations applicable to the injury or death. This statutory 30-day notice is all that is required of the insurer. After giving the 30-day notice, an insurer has no further duty to notify an insured that the insured's conduct and communications are insufficient to protect the insured's rights [*Arrasmith v. State Farm. Ins. Co. (1994) 24 Cal. App. 4th 12, 21, 29 Cal. Rptr. 2d 53* (insurer was not estopped from asserting noncompliance by its failure to inform insured that insured's acts were insufficient to preserve arbitration rights)].

Failure of the insurer to provide the written notice operates to toll any applicable statute of limitations or other time limitation for a period of 30 days from the date the written notice is actually given. The notice is not required if the insurer has received notice that the insured is represented by an attorney [*Ins. Code § 11580.2(k)*; *Juarez v. 21st Century Ins. Co. (2003) 105 Cal. App. 4th 371, 376, 129 Cal. Rptr. 2d 418* (*Ins. Code § 11580.2(k)* prevails over unequivocal notice requirements of *10 Cal. Code Reg. § 2695.4*)]. Oral notice is insufficient [*Pugh v. State Farm Ins. Cos. (1991) 227 Cal. App. 3d 816, 822-823, 278 Cal. Rptr. 149]* .

Ins. Code § 11580.2(k) has been interpreted as tolling the four-year statutory period in which the insured must file the petition for arbitration pursuant to *Code Civ. Proc. § 337* [*Gefrich v. State Farm Mut. Auto. Ins. Co. (1980) 109 Cal. App. 3d 500, 503-504, 166 Cal. Rptr. 516]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoverageUninsured MotoristsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsInsurance LawMotor Vehicle InsuranceCoverageUninsured MotoristsNotice RequirementsTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 88A.22 Insured's Notice to Insurer of Action Against Uninsured Motorist

If a suit for bodily injury has been filed against an uninsured motorist, written notice of the suit must be provided to the plaintiff's insurer within a reasonable time after the insured knew or should have known of the uninsured status of the motorist, but in no event is that notice required before two years (one year prior to 2004) after the date of the accrual of the cause of action on which the claim is based. Failure of the insured (or his or her representative) to give notice is not a basis for denial of the uninsured motorist benefits in the absence of proof of prejudice by the insurer [*Ins. Code § 11580.23(a)* (abrogating court decisions to the contrary)].

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§ 88A.23 Underinsured Motorist Coverage for Bodily Injury

[1] Controlling Statutes

Ins. Code § 11580.2(p) applies only when bodily injury is caused by an underinsured motor vehicle. The provisions of *Ins. Code § 11580.2(p)* control if they conflict with the provisions of *Ins. Code § 11580.2(a)-(o)* [*Ins. Code § 11580.2(p)*; *see § 88A.10[4][a]* (definition of bodily injury)].

[2] Definitions

[a] Insured Motor Vehicle

An "insured motor vehicle" under *Ins. Code § 11580.2(p)* is a motor vehicle about which one of the following descriptions applies [*Ins. Code § 11580.2(p)(1)*]:

- It is insured under a motor vehicle liability policy or automobile liability insurance policy.
- It is self-insured.
- A cash deposit or bond has been posted for it to satisfy a financial responsibility law.

[b] Underinsured Motor Vehicle

An "underinsured motor vehicle" for purposes of *Ins. Code § 11580.2(p)* is an insured motor vehicle that is insured for an amount less than the uninsured motorist limits carried on the motor vehicle of the injured person [*Ins. Code § 11580.2(p)(2)*].

In this context, the total applicable coverage under the liable person's policy, rather than the portion of policy proceeds available to any particular claimant, controls [*see Lopez v. Allstate Ins. Co (1993) 14 Cal. App. 4th 1835, 1839, 18 Cal. Rptr. 2d 463]* . In the event of multiple claimants, the liable person's policy limits may equal or exceed one claimant's policy limits, but when those limits are paid out among several claimants, the amount actually received by a particular

claimant may be less than that claimant's own policy limits. In this situation, the claimant is not entitled to recover under his or her underinsured coverage. Under the statutory definition, it is irrelevant that the available coverage, after being divided between several claimants, is less than the claimant's own limits [*Lopez v. Allstate Ins. Co (1993) 14 Cal. App. 4th 1835, 1839, 18 Cal. Rptr. 2d 463]* .

In one case, the tortfeasor's policy covered liability "with combined single limits in the amount of $100,000 for all bodily injury and property damage caused by any single accident." The injured person's policy included underinsured motorist benefits up to $100,000 for bodily injury sustained by any one person in a single accident. The injured person's damages were less than $100,000 for bodily injury, but totaled $100,000 for both bodily injury and property damages. The tortfeasor is not an underinsured motorist with respect to the injured person, and the underinsured coverage of the injured person's policy is not triggered in that circumstance [*Explorer Ins. Co. v. Gonzalez (2008) 164 Cal. App. 4th 1258, 1260-1261, 1264, 79 Cal. Rptr. 3d 893*]. The appellate court reasoned that the tortfeasor's policy covered damages for bodily injury up to $100,000 if there is no property damage, such as if the tortfeasor hit a pedestrian rather than another car, as occurred in this case. Thus, the tortfeasor's policy was not for an amount less than the $100,000 bodily injury coverage of the underinsured motorist provision in the injured person's policy. In other words, the comparison in coverage is based on the potential for recovery, not what is actually recovered in a particular case. Because the amount of the potential coverage was equal, the insured's vehicle was not underinsured within the meaning of *Ins. Code § 11580.2* and the injured person's insurance policy [*Explorer Ins. Co. v. Gonzalez (2008) 164 Cal. App. 4th 1258, 1260-1261, 1264, 79 Cal. Rptr. 3d 893*].

[3] Required Coverage

Underinsured motorist coverage must be included in all policies of bodily injury liability insurance providing uninsured motorist coverage that are issued or renewed on or after July 1, 1985 [*Ins. Code § 11580.2(p)(7)*].

Underinsured motorist coverage must be offered with limits equal to the liability limits for the insured's uninsured motorist limits in the underlying policy, and may be offered with limits in excess of the uninsured motorist coverage. For the purposes of *Ins. Code § 11580.2*, uninsured and underinsured motorist coverage must be offered as a single coverage. An insurer, however, may offer coverage for damages for bodily injury or wrongful death from the owner or operator of an underinsured motor vehicle, at greater limits than an uninsured motor vehicle [*Ins. Code § 11580.2(n)*].

The insurer and the insurance agent have no duty to advise the insured to carry uninsured motorist insurance in an amount greater than the statutory minimum. Their duty is limited to calling a customer's attention to the availability of statutory provisions regarding uninsured motorist coverage, and to see that the policy complies with the statute, unless expressly told to omit that coverage [*Pabitzky v. Frager (1985) 164 Cal. App. 3d 401, 402-403, 210 Cal. Rptr. 426]* .

[4] Applicability of Coverage

[a] Bodily Injury Caused by Underinsured Motor Vehicle

Underinsured motorist coverage applies only when bodily injury (defined in *Ins. Code § 11580.2(b)*) is caused by an underinsured motor vehicle [*Ins.Code § 11580.2(p)*]. The provisions of *Ins. Code § 11580.2(p)* prevail if they conflict with *Ins. Code § 11580.2(a)-(o)* [*Ins. Code § 11580.2(p)*; *see, e.g.,* *Hartford Fire Ins. Co. v. Macri (1992) 4 Cal. 4th 318, 322, 332, 14 Cal. Rptr. 2d 813, 842 P.2d 112* ("consent to settle" requirement of *Ins. Code § 11580.2(c)(3)* inapplicable to underinsured motorist claim provisions of *Ins. Code § 11580.2(p)(3)*)].

[b] Other Policy Limits Must Be Exhausted

Underinsured motorist coverage does not apply to any bodily injury until the limits of bodily injury liability policies applicable to all insured motor vehicles causing the injury have been exhausted by payment of judgments or settlements, and proof of the payment is submitted to the insurer providing the underinsured motorist coverage [*Ins. Code §*

11580.2(p)(3)].

In a case of first impression, an appellate court considered whether *Ins. Code § 11580.2(p)(3)* and the corresponding exhaustion clause in a policy prohibit an insured from settling with an underinsured party for less than the underinsured party's full policy limits, even if the insured agrees to credit those full policy limits against any benefits paid by the insured's underinsurance carrier. The court held that the plain language of *§ 11580.2(p)(3)* requires *actual payment* of the underinsured party's policy limits before underinsurance coverage can be invoked [*Farmers Ins. Exch. v. Hurley (1999) 76 Cal. App. 4th 797, 801-807, 90 Cal. Rptr. 2d 697]* .

[5] Setoffs and Reimbursements

[a] Amount Paid by Person Liable for Injury

When bodily injury is caused by one or more motor vehicles, whether insured, underinsured, or uninsured, the maximum liability of the insurer providing the underinsured motorist coverage will not exceed the insured's underinsured motorist coverage limits, less the amount paid to the insured by or for any person or organization that may be held legally liable for the injury [*Ins. Code § 11580.2(p)(4)*]. An insurer paying a claim under *Ins. Code § 11580.2(p)* is entitled to reimbursement or credit in the amount received by the insured from the owner or operator of the underinsured motor vehicle or the insurer of that owner or operator [*Ins. Code § 11580.2(p)(5)*].

The "maximum liability" provision of *Ins. Code § 11580.2(p)(4)* does not preclude an award of costs pursuant to *Code Civ. Proc. § 998*, even if the costs, in addition to the damages award, would exceed the insurance policy's maximum coverage [*Pilimai v. Farmers Ins. Exch. Co. (2006) 39 Cal. 4th 133, 145, 45 Cal. Rptr. 3d 760, 137 P.3d 939* ; *see § 88A.19[3A]*].

[b] Amount Paid by Other Insurance Coverage

In addition to the setoffs discussed in *§ 88A.23[5][a]*, the setoff provisions specifically applicable to uninsured motorist coverage under *Ins. Code § 11580.2(h)* also apply to underinsured motorist coverage [*Viking Ins. Co. v. State Farm Mut. Auto. Ins. Co. (1993) 17 Cal. App. 4th 540, 552, 554, 21 Cal. Rptr. 2d 590* ; *Rudd v. California Cas. Gen. Ins. Co. (1990) 268 Cal. Rptr. 624* ; *see § 88A.15*]. For example, a setoff of an amount paid under workers' compensation insurance applies to underinsured motorist coverage [*Rudd v. California Cas. Gen. Ins. Co. (1990) 219 Cal. App. 3d 948, 954, 268 Cal. Rptr. 624* ; *see Ins. Code § 11580.2(h)(1)*].

[c] Contributions by All Tortfeasors to All Insureds Calculated

An insurer that provides underinsured motorist benefits pays only the difference between the policy limits and all contributions by all tortfeasors to all insureds, whether the insureds are made whole or not. Consequently, underinsured motorist coverage is not the equivalent of full excess coverage [*Malone v. Nationwide Mut. Ins. Co. (1989) 215 Cal. App. 3d 275, 277-279, 263 Cal. Rptr. 499]* .

If an insured suffers separate injuries arising from the same occurrence, and files an underinsured motorist claim for one of the injuries, an insurer that pays the policy limit under a single-limit coverage for the one occurrence is entitled to credit for third-party contributions not only for the filed claim, but also for the remaining injuries arising out of the same incident [*Malone v. Nationwide Mut. Ins. Co. (1989) 215 Cal. App. 3d 275, 279, 263 Cal. Rptr. 499]* . Similarly, a carrier faced with underinsured motorist claims by several insureds arising from one accident may offset from the amount it owes one of the insureds the amount that the underinsured motorist's insurer paid to the other insureds under the underinsured motorist's "per accident" limits. This result assumes that the terms of the policy providing the underinsured motorist coverage permit the insurer to take such an offset [*Viking Ins. Co. v. State Farm Mut. Auto. Ins. Co. (1993) 17 Cal. App. 4th 540, 552, 554, 21 Cal. Rptr. 2d 590]* .

[6] Insured's Notice to Insurer of Action Against Underinsured Motorist

If the insured brings an action against the owner or operator of an underinsured motor vehicle, he or she must forthwith give the insurer providing the underinsured motorist coverage a copy of the complaint by personal service or certified mail. All pleadings and depositions must be made available for copying, or copies must be furnished the insurer, at the insurer's expense, within a reasonable time [*Ins. Code § 11580.2(p)(6)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoverageUnderinsured MotoristsLiens & SetoffsInsurance LawMotor Vehicle InsuranceCoverageUnderinsured MotoristsMandatory CoverageInsurance LawMotor Vehicle InsuranceCoverageUnderinsured MotoristsNotice RequirementsTortsTransportation TortsMotor VehiclesPersonal Vehicles

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§ 88A.24 Uninsured Motorist Coverage for Property Damage

[1] Coverage Requirements

No policy of bodily injury liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle may be issued or delivered in California to the owner or operator of a motor vehicle, or issued or delivered by any insurer licensed in California on any motor vehicle then principally used or principally garaged in California, unless a named insured has been offered the following coverage:

- When the motor vehicle liability insurance policy includes collision coverage under *Ins. Code § 660(d)*, coverage that provides that the deductible amount, if any, to be paid by the named insured under the collision coverage is payable by the insurer in the event of collision involving a vehicle owned by the named insured and insured under the policy, and an uninsured motor vehicle [*Ins. Code § 11580.26(a)(1)*; *see Ins. Code § 11580.26(b)* (payment)].

- When the policy of motor vehicle liability insurance does not include collision coverage under *Ins. Code § 660(d)*, coverage for property damage to the insured motor vehicle, but not including personal property contained therein, caused by the owner or operator of an uninsured motor vehicle [*Ins. Code § 11580.26(a)(2)*; *see Ins. Code § 11580.26(b)* (payment), *(d)* (para. 2; collision coverage apportionment)].

This coverage is not required if a named insured has agreed to delete it pursuant to *Ins. Code § 11580.2* [*Ins. Code § 11580.26(a)*; *see § 88A.12*; *see also Ins. Code § 11580.26(c)* (waiver regarding use of vehicle by designated persons)]. Moreover, the requirement for coverage does not apply to a policy that provides insurance in the Republic of Mexico issued or delivered in California by nonadmitted Mexican insurers, or to a policy insuring a commercial vehicle under *Veh. Code § 260* [*Ins. Code § 11580.26(a)*].

Every policy of automobile liability insurance that provides uninsured motorist property damage coverage, as described in *Ins. Code § 11580.26(a)(2)*, must provide coverage for replacement of a child passenger restraint system, if that restraint system was in use by a child during an accident for which uninsured motorist property damage coverage under the policy is applicable due to the liability of an uninsured motorist [*Ins. Code § 11580.011(c)*].

Insurance Code § 11580.26(b) provides in part that no cause of action exists against either the insured or insurer from exercising the right to request arbitration of a claim under *Insurance Code § 11580.2* or *11580.26*. This provision is a grant of immunity for the decision to arbitrate an uninsured motorist claim. It does not create a broad immunity that permits an insurer to avoid bad-faith liability arising from its prearbitration handling of an uninsured motorist claim simply by requesting arbitration [Brehm v. 21st *Century Ins. Co. (2008) 166 Cal. App. 4th 1225, 1244-1245, 83 Cal. Rptr. 3d 410*].

[2] Definitions

[a] Property Damage

"Property damage" means payment for loss or damage to the insured motor vehicle resulting from collision, not to exceed its actual cash value or $3,500, whichever is less, for which loss or damage the insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle. It does not include compensation for loss of use of the motor vehicle [*Ins. Code § 11580.26(a)(2)*].

[b] Insured Motor Vehicle

"Insured motor vehicle" means the motor vehicle described in the underlying insurance policy to which the uninsured motorist property damage coverage or endorsement applies [*Ins. Code § 11580.26(a)(2)*].

[c] Uninsured Motor Vehicle

"Uninsured motor vehicle" means any motor vehicle with respect to the ownership, maintenance, or use of which the following applies [*Ins. Code § 11580.26(e)*]:

- There is no property damage liability insurance or bond applicable at the time of the accident.

- There is applicable insurance or bond, but the company writing the insurance or bond denies coverage under it, or refuses to admit coverage under it, except conditionally or with reservation.

- A motor vehicle used without the permission of its owner, if there is no property damage liability insurance or bond applicable at the time of the accident with respect to its owner or operator.

- An insured motor vehicle when its liability insurer is unable to make payment with respect to the legal liability of its insured within the specified limits because of insolvency.

An insurer's solvency protection applies only when the accident occurred during a valid policy period, and the tortfeasor's liability insurer became insolvent within one year of the accident [*see Ins. Code § 11580.26(e)* (right of uninsured motorist coverage insurer to proceeds recovered from insolvent insurer)].

"Uninsured motor vehicle" does not include the following [*Ins. Code § 11580.26(e)*]:

- A motor vehicle that has at least the minimum property damage liability limits required under *Veh. Code § 16056*, even when those limits are insufficient to compensate for all property damage caused by the vehicle's owner or operator.

- A motor vehicle owned or operated by any insured or any resident of the named insured's household or self-insured within the meaning of the financial responsibility provisions of the state in which the motor vehicle is registered.

- A motor vehicle that is owned by the United States of America, Canada, a state or political subdivision of any government, or an agency of any of the foregoing.

- A land motor vehicle or trailer operated on rails or crawler treads or while located for use as a residence for premises and not as a vehicle, or a farm-type tractor or equipment designed for use principally off public roads, except while actually on public roads.

[3] Subrogation

An insurer paying a claim under any coverage required by *Ins. Code § 11580.26* is entitled to be subrogated to the rights of the insured to whom the claim was paid against any person legally liable for the damage to the insured motor vehicle to the extent that payment was made [*Ins. Code § 11580.26(d)*]. The action may be brought within three years from the date that payment was made pursuant to *Ins. Code § 11580.26* [*Ins. Code § 11580.26(d)*].

[4] Notification of Limitation Period

Any insurer whose insured has made a claim that is pending under either coverage provided in *Ins. Code § 11580.26(a)(1)* and *(2)* must, at least 30 days before the expiration of the applicable statute of limitations, notify its insured in writing of the statute of limitations applicable to the property damage. The insurer's failure to provide the written notice operates to toll any applicable statute of limitations until 30 days after the date the written notice is actually given. The notice is not required if the insurer has received notice that the insured is represented by an attorney [*Ins. Code § 11580.26(g)*].

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§ 88A.25 Covenant of Good Faith and Fair Dealing

[1] Insurer's Breach of Covenant of Good Faith and Fair Dealing

The covenant of good faith and fair dealing, implied by law in every insurance policy, requires an insurer to deal in good faith and fairly with its insured in handling an insured's claim for uninsured motorist coverage. When an insurer willfully, deliberately, and in bad faith withholds payment of an uninsured motorist claim knowing the claim to be completely valid, and forces its insured both to arbitrate the claim knowing that it has no defenses and to judicially enforce the arbitration award, that conduct is unconscionable and constitutes a tortious breach of contract [*Richardson v. Employers Liab. Assurance Corp. (1972) 25 Cal. App. 3d 232, 239, 102 Cal. Rptr. 547 , disapproved on other grounds, Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 580-581 n.10, 108 Cal. Rptr. 480, 510 P.2d 1032]* .

While an insurance company has no obligation under the implied covenant of good faith and fair dealing to pay every claim its insured makes, the insurer cannot deny the claim without fully investigating the grounds for its denial. To protect its insured's contractual interest in security and peace of mind, it is essential that an insurer fully inquire into possible bases that might support the insured's claim before denying it. By the same token, denial of a claim on a basis unfounded in the facts known to the insurer, or contradicted by those facts, may be deemed unreasonable. A trier of fact may find that an insurer acted unreasonably if the insurer ignores evidence available to it which supports the claim. The insurer may not just focus on those facts which justify denial of the claim [Wilson v. 21st *Century Ins. Co. (2007) 42 Cal. 4th 713, 720, 68 Cal. Rptr. 3d 746, 171 P.3d 1082*].

The California Supreme Court held that an insurer that refused to provide underinsured motorist benefits to its insured, who was injured in an automobile accident by an underinsured drunk driver, unreasonably failed to investigate the insured's claim for benefits based on spinal injuries resulting from the accident. The insurer asserted without investigating that the injuries were the result of a preexisting condition and that the insured's pain was due to "soft tissue" injuries, although medical examinations refuted those assertions [Wilson v. 21st *Century Ins. Co. (2007) 42 Cal. 4th 713, 721, 68 Cal. Rptr. 3d 746, 171 P.3d 1082*]. The Court stated that a jury could reasonably find that nothing in the material the claims examiner had received justified its conclusions. The claims examiner had no basis for his contrary conclusion that a causative link between the accident and the insured's injuries was "unlikely." Nor was there any apparent medical basis for the claims examiner's assertion that the insured had a preexisting condition [Wilson v.

21st *Century Ins. Co. (2007) 42 Cal. 4th 713, 722, 68 Cal. Rptr. 3d 746, 171 P.3d 1082*]. Although the insurer was not obliged to accept the examining physician's opinion without scrutiny or investigation, to the extent it had good faith doubts, it would have been within its rights to investigate the basis for the claim by asking the physician to reexamine or further explain his findings, having a physician review all the submitted medical records and offer an opinion, or, if necessary, having its insured examined by other physicians (as it later did). What it could not do, consistent with the implied covenant of good faith and fair dealing, was ignore the physician's conclusions without any attempt at adequate investigation, and reach contrary conclusions lacking any discernable medical foundation [Wilson v. 21st *Century Ins. Co. (2007) 42 Cal. 4th 713, 722, 68 Cal. Rptr. 3d 746, 171 P.3d 1082*]. In reversing summary judgment for the insurer, the Court found the existence of sufficient evidence for a jury to find that the insurer's decision was prompted not by an honest mistake, bad judgment, or negligence, but rather by a conscious and deliberate act, "which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement" [Wilson v. 21st *Century Ins. Co. (2007) 42 Cal. 4th 713, 726, 68 Cal. Rptr. 3d 746, 171 P.3d 1082*].

An insured under an automobile policy cannot state a bad faith claim against the insurer for "failure to settle" based on a genuine dispute between the insured and insurer regarding the amount of uninsured/underinsured motorist benefits due under the policy. An insurer's tort liability for failure to accept a reasonable settlement offer can arise only with respect to third party, or liability, coverage [*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club (2007) 146 Cal. App. 4th 831, 836, 53 Cal. Rptr. 3d 245* ; *see Ch. 308, § 308.123*]. An insurer's obligations under the implied covenant of good faith and fair dealing with respect to first party coverage include a duty not to withhold unreasonably benefits due under the policy. In a first party case, the withholding of benefits due under the policy is not unreasonable if there was a genuine dispute between the insurer and the insured as to coverage or the amount of payment due [*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club (2007) 146 Cal. App. 4th 831, 837, 53 Cal. Rptr. 3d 245* ; *see Ch. 308, § 308.24*].

Neither the right to arbitrate under *Ins. Code § 11580.2* nor the prohibition under *Ins. Code § 11580.26(b)* against a cause of action for exercising the right to arbitrate, bars a bad-faith claim against the insurer with regard to its prearbitration conduct in the handling of an uninsured or underinsured motorist claim [Brehm v. 21st *Century Ins. Co. (2008) 166 Cal. App. 4th 1225, 1242-1245, 83 Cal. Rptr. 3d 410* ; *see § 88A.24[1]*]. Although an insurer has an absolute right to demand arbitration, it also has an implied obligation honestly to assess the insured's claim, and to make a reasonable effort to resolve any dispute as to the amount of the insured's damages before invoking the right to arbitrate [Brehm v. 21st *Century Ins. Co. (2008) 166 Cal. App. 4th 1225, 1242, 83 Cal. Rptr. 3d 410*].

[2] Punitive Damages

When properly established under *Civ. Code § 3294*, punitive damages may be awarded in a case brought by an insured against an insurer providing uninsured motorist coverage [*Richardson v. Employers Liab. Assurance Corp. (1972) 25 Cal. App. 3d 232, 244-246, 102 Cal. Rptr. 547* , *disapproved on other grounds,* *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 580-581 n. 10, 108 Cal. Rptr. 480, 510 P.2d 1032]* .

[3] Emotional Distress

As in other bad faith actions, the plaintiff must prove economic loss in order to recover damages for emotional distress. However, once economic loss is established, the plaintiff may recover damages for emotional distress caused by the insurer's bad faith without showing any causal link between the economic loss and the emotional distress [*Clayton v. United Servs. Auto. Ass'n (1997) 54 Cal. App. 4th 1158, 1160-1162, 63 Cal. Rptr. 2d 419* (declining to follow *Blake v. Aetna Life Ins. Co. (1979) 99 Cal. App. 3d 901, 925, 160 Cal. Rptr. 528* insofar as it holds that emotional distress must arise from financial deprivation arising from claim)].

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[Reserved]

§§ 88A.26[Reserved]

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§ 88A.40 Related Texts From LexisNexis

For discussion of uninsured motorist coverage generally, see California Insurance Law And Practice, Ch. 50, *Automobile Insurance* (Matthew Bender)

For discussion of uninsured motorist law, see California Uninsured Motorist Law (LexisNexis 6th ed.)

For discussion of uninsured motorist coverage generally, see California Torts, Ch. 81, *Types of Insurance Policies* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoverageUninsured MotoristsGeneral Overview

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§ 88A.41 State Statutes

[1] Uninsured Motorist Coverage

Requirement for coverage of replacement of child passenger restraint system in uninsured motorist insurance property damage coverage. *Ins. Code § 11580.011(c)*

Uninsured motorist coverage. *Ins. Code § 11580.2*

Certificate of Department of Motor Vehicles regarding no evidence of insurance or bond; rebuttable presumption that vehicle was uninsured. *Ins. Code § 11580.4*; *Veh. Code § 16020*

Mandatory uninsured motorist coverage for Southern California Rapid Transit District. *Ins. Code § 11586*

Reduction of judgment or settlement in favor of uninsured motorist against insured or insurer. *Veh. Code § 17200*

Insured's claims required to be settled prior to payment of settlement or judgment to uninsured motorist. *Veh. Code § 17201*

[2] Financial Responsibility Law

Financial Responsibility Law. *Veh. Code §§ 16000-16560*

[3] Arbitration

Arbitration generally. *Code Civ. Proc. §§ 1280-1294.2*

Arbitration of uninsured motorist claim. *Ins. Code §§ 11580.2, 11580.5*

Arbitration of minor's uninsured motorist claim. *Ins. Code § 11580.3*; *Prob. Code §§ 3300-3803*

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§ 88A.42 Decisions

[1] Uninsured Motorist Coverage

Provisions of *Ins. Code § 11580.2* are deemed part of every uninsured and underinsured motorist policy. *Quintano v. Mercury Cas. Co. (1995) 11 Cal. 4th 1049, 1053, 48 Cal. Rptr. 2d 1, 906 P.2d 1057* ; *Atlantic Mut. Ins. Co. v. Ruiz (2004) 123 Cal. App. 4th 1197, 1210-1211, 20 Cal. Rptr. 3d 628*

Exemption from uninsured motorist coverage for bodily injury of insured while in or upon or while entering into or alighting from vehicle other than described motor vehicle, if owner has insurance similar to that provided in *Ins. Code § 11580.2(c)(2)*, was inapplicable to motorcycle that was permissively self-insured. *Daun v. USAA Cas. Ins. Co. (2005) 125 Cal. App. 4th 599, 607-608, 23 Cal. Rptr. 3d 44*

Policy exclusion eliminating uninsured motorist (UM) and underinsured motorist (UIM) coverage, if insured or family member is operator of any self-propelled vehicle with fewer than four wheels that is not insured for that coverage under policy, is unenforceable as against public policy because it impermissibly narrows scope of UM and UIM coverage required by *Ins. Code § 11580.2*; *Daun v. USAA Cas. Ins. Co. (2005) 125 Cal. App. 4th 599, 608-610, 23 Cal. Rptr. 3d 44*

Ins. Code § 11580.2(c)(2) and *(d)*, read together, require that "similar" insurance invoking exclusion mean similar in amount, not type. *Calfarm Ins. Co. v. Wolf (2001) 86 Cal. App. 4th 811, 816-818, 103 Cal. Rptr. 2d 584* (insured's higher limits applied)

Insured under automobile policy with uninsured motorist benefits, who filed claim asserting that she was raped by uninsured driver of car in which she was riding, did not establish sufficient causal connection between "use" of car and injury; assailant's parking his car next to fence so that passenger door could not open did not establish use of car that was substantial factor in this injury, and manner of operating vehicle did not contribute directly to injury. *American Nat'l Prop. & Cas. Co. v. Julie R. (1999) 76 Cal. App. 4th 134, 140-141, 90 Cal. Rptr. 2d 119*

Policy excluding coverage regarding bodily injury sustained by person if injured person was occupying nonowned

vehicle that is insured for "this coverage," construed to refer to "uninsured motorist coverage with the limits contained in the policy in which the language is used," not merely to any uninsured motorist coverage. *Mid-Century Ins. Co. v. Gardner (1992) 9 Cal. App. 4th 1205, 1218, 11 Cal. Rptr. 2d 918* ; *Hefner v. Farmers Ins. Exch. (1989) 211 Cal. App. 3d 1527, 1534-1535, 260 Cal. Rptr. 221*

Policy purchased in California for coverage for foreign travel not subject to state's mandatory uninsured motorist coverage; policy neither "issued or delivered" in state nor issued to cover a "motor vehicle then principally used or principally garaged" in state. *Ahern v. Dillenback (1991) 1 Cal. App. 4th 36, 47*

Policy providing coverage when tortfeasor's insurer becomes insolvent, without stating time limit, did not incorporate one-year limitation of *Ins. Code § 11580.2(b)(2)*, which defines "uninsured motor vehicle" to include vehicle for which liability insurance has been obtained, but insurer has become insolvent, and limits effect to insolvency incurred within one year of accident. *Utah Prop. & Cas. Ins. Guar. Ass'n v. United States Auto. Ass'n (1991) 230 Cal. App. 3d 1010, 1021, 281 Cal. Rptr. 917*

Motorcycle did not constitute temporary substitute "auto" within meaning of uninsured motorist clause. *Royal Indem. Co. v. Rolofson (1989) 213 Cal. App. 3d 373, 376, 261 Cal. Rptr. 720*

[2] Damages Recoverable by Uninsured Motorists

Civil Code § 3333.4 bars uninsured motorist from recovering noneconomic losses in premises liability action against private entity that maintained control over public roadway, if injuries sustained in single-vehicle accident involving uninsured vehicle and caused by defendant's negligent creation or maintenance of dangerous road condition. *Allen v. Sully-Miller Contracting Co. (2002) 28 Cal. 4th 222, 227-231, 120 Cal. Rptr. 2d 795*

Civil Code § 3333.4 limits recovery of noneconomic damages by uninsured motorist from public entity in suit arising from vehicle accident caused by dangerous condition of public property. *Day v. City of Fontana (2001) 25 Cal. 4th 268, 271-277, 105 Cal. Rptr. 2d 457, 19 P.3d 1196*

Civil Code § 3333.4 does not preclude wrongful death plaintiff whose decedent was uninsured operator of motor vehicle from recovering damages for loss of care, comfort, and society, if plaintiff was not uninsured owner or operator of vehicle. *Horwich v. Superior Court (1999) 21 Cal. 4th 272, 287, 87 Cal. Rptr. 2d 222, 980 P.2d 927*

Product liability claim against automobile manufacturer falls outside scope of *Civil Code § 3333.4*. *Hodges v. Superior Court (1999) 21 Cal. 4th 109, 112-113, 86 Cal. Rptr. 2d 884, 980 P.2d 433*

Federal disability and state unemployment benefits may not be offset against payment of uninsured motorist claim by California Insurance Guarantee Association. *Cole v. California Ins. Guarantee Ass'n (2004) 122 Cal. App. 4th 552, 560, 18 Cal. Rptr. 3d 801*

[3] Subrogation

Insurer in role as subrogee under *Ins. Code § 11580.2(g)* has no greater rights than those possessed by its insured, and subject to same defenses. *Liberty Mut. Ins. Co. v. Fales (1973) 8 Cal. 3d 712, 717, 106 Cal. Rptr. 21, 505 P.2d 213*

Right of subrogation against governmental agency included within *Ins. Code § 11580.2(g)*, governing insurer's right of subrogation against any person causing injury. *Allstate Ins. Co. v. County of Alameda (1973) 33 Cal. App. 3d 418, 421, 109 Cal. Rptr. 53*

If two or more persons, one of whom is an uninsured motorist, proximately cause injury to an insured, and insurer pays insured under uninsured motorist provisions of its policy, insurer is subrogated to insured's rights against both uninsured motorist and all others legally liable for injury whether insured or not. *Mills v. Farmers Ins. Exch. (1964) 231 Cal. App. 2d 124, 127-129, 41 Cal. Rptr. 650* ; *see Ins. Code § 11580.2(g)*

[4] Statute of Limitations

Purpose of extended limitation period accorded insurer by *Ins. Code § 11580.2(g)* is to protect subrogation rights provided by that section. *Liberty Mut. Ins. Co. v. Fales (1973) 8 Cal. 3d 712, 716, 106 Cal. Rptr. 21, 505 P.2d 213*

Insurer not entitled to rely on defense of statute of limitations as to cross-claim for personal injuries when insurer files action as subrogee against uninsured motorist more than one year from date of accident. *Liberty Mut. Ins. Co. v. Fales (1973) 8 Cal. 3d 712, 717, 106 Cal. Rptr. 21, 505 P.2d 213*

[5] Arbitration

Ins. Code § 11580.2(f) requires arbitration of determination whether default judgment obtained by insured against underinsured tortfeasor binds insurer. *Bouton v. USAA Casualty Ins. Co. (2008) 43 Cal. 4th 1190, 1201, 78 Cal. Rptr. 3d 519*

Ins. Code § 11580.2(f) does not require arbitration of determination whether a claimant is insured under particular uninsured motorist provision. *Bouton v. USAA Casualty Ins. Co. (2008) 43 Cal. 4th 1190, 1201-1202, 78 Cal. Rptr. 3d 519*

Code Civ. Proc. § 998 applies to uninsured motorist arbitrations conducted pursuant to *Ins. Code § 11580.2*. *Pilimai v. Farmers Ins. Exch. Co. (2006) 39 Cal. 4th 133, 142, 45 Cal. Rptr. 3d 760, 137 P.3d 939*

Trial court has authority to consolidate contractual arbitration proceeding between an insurer and an insured as to uninsured motorist coverage in insured's pending action against third parties. *Mercury Ins. Group v. Superior Court (1998) 19 Cal. 4th 332, 350-351, 79 Cal. Rptr. 2d 308, 965 P.2d 1178*

Arbitration pursuant to *Ins. Code § 11580.2* is a form of contractual arbitration governed by California Arbitration Act (CAA); once dispute is submitted to arbitration, CAA contemplates only limited, if any, judicial involvement. *Briggs v. Resolution Remedies (2008) 168 Cal. App. 4th 1395, 1400, 86 Cal. Rptr. 3d 396*

When claim under uninsured motorist coverage is based on insolvency of tortfeasor's insurer, issue of insolvency must be determined by court before issues of liability and damages can be arbitrated. *State Farm Mut. Auto. Ins. Co. v. Superior Court (1994) 23 Cal. App. 4th 1297, 1304, 28 Cal. Rptr. 2d 711*

Under policy providing that in event of disagreement, "a written demand for arbitration" is required to "formally institute arbitration proceedings," lack of written demand within one year of accident constitutes waiver of insured's right to compel arbitration, notwithstanding allegation of oral demand within one-year limitation period. *Mayflower Ins. Co. v. Pellegrino (1989) 212 Cal. App. 3d 1326, 1337, 261 Cal. Rptr. 224*

Following reduction of arbitration award by trial court, insured who accepts reduced amount in satisfaction of judgment does not waive right to appeal if insured would have been entitled to benefits that he or she accepted even in event of reversal, under exception to general rule barring appeal after voluntary acceptance of benefits. *Furlough v. Transamerica Ins. Co. (1988) 203 Cal. App. 3d 40, 44, 249 Cal. Rptr. 703*

Pursuant to *Ins. Code § 11580.3* and clause in insurance policy, issues relating to amount of compensation to which insured actually entitled are subject to arbitration. *Enterprise Ins. Co. v. Mulleague (1987) 196 Cal. App. 3d 528, 540, 241 Cal. Rptr. 846*

Ins. Code § 11580.3 limits judicial power to disapprove uninsured motorists' arbitration award to minor to grounds enumerated in *Code Civ. Proc. § 1286.2*. *National Auto. & Cas. Ins. Co. v. Superior Court (1986) 184 Cal. App. 3d 948, 953, 229 Cal. Rptr. 366*

Claimant in uninsured motorist coverage disputes in nonjudicial arbitration not required under Code Civ. Proc. § 2033(d), Ins. Code § 11580.2(f), or American Arbitration Association rules, to wait until insurer enters formal appearance before serving discovery in manner provided by statutes and rules. *Workman v. Superior Court (1986) 176 Cal. App. 3d 493, 500-501, 222 Cal. Rptr. 69*

Right to arbitrate dispute under uninsured motorist provisions of automobile liability insurance policy waived by voluntary submission of dispute for decision by court. *California State Auto. Ass'n v. Blanford (1970) 4 Cal. App. 3d 186, 189, 84 Cal. Rptr. 333*

[6] Underinsured Motorist Coverage

Underinsured motorist coverage not triggered when tortfeasor's policy limits were equal to rather than less than insured's underinsured motorist limits. *Elwood v. Aid Ins. Co. (9th Cir. 1989) 880 F.2d 204, 207-208*

Driver of rear-ended vehicle owned by employer was initially unhurt, but got out of vehicle, walked 200 feet to van that had also been hit to discover the occupant's condition and exchange information, and was then struck by underinsured motorist in third vehicle; injured driver was "upon" the van and therefore qualified as "insured" for purpose of insurance covering van; injured driver was positioned immediately adjacent to van for reasons essentially related to insured vehicle and its use on highway and was attempting to speak to van's driver regarding multi-vehicle accident that had just occurred and had just helped injured passenger get out of van. *Atlantic Mut. Ins. Co. v. Ruiz (2004) 123 Cal. App. 4th 1197, 1210-1211, 20 Cal. Rptr. 3d 628*

Driver of rear-ended vehicle owned by employer was initially unhurt, but got out of vehicle, walked 200 feet to van that had also been hit to discover the occupant's condition and exchange information, and was then struck by underinsured motorist in third vehicle; injured driver was not "upon" his employer's vehicle, and was therefore not "insured" within meaning of employer's underinsured motorist insurance endorsement, because he was neither named insured nor person "in, upon, getting in, on, out or off" that vehicle. *Atlantic Mut. Ins. Co. v. Ruiz (2004) 123 Cal. App. 4th 1197, 1214, 20 Cal. Rptr. 3d 628*

Under policy providing with respect to uninsured motorist coverage, that any amounts otherwise payable for damages be reduced by sums paid by or on behalf of persons legally responsible, and with respect to underinsured motorist coverage, that limit of liability is reduced by all sums paid by or on behalf of persons legally responsible, insured who is injured by both underinsured and uninsured motor vehicle may recover no more than limits of his or her underinsured motorist coverage reduced by amount paid on behalf of underinsured motorist, pursuant to Veh. Code § 11580.2(p)(4). *Holcomb v. Hartford Cas. Ins. Co. (1991) 230 Cal. App. 3d 1000, 1006, 281 Cal. Rptr. 651*

Tortfeasor considered underinsured motorist only if liability limits are less than victim's underinsured limits. *Schwieterman v. Mercury Cas. Co. (1991) 229 Cal. App. 3d 1044, 1046-1048, 280 Cal. Rptr. 804*

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§ 88A.60 Statement of Claim for Uninsured Motorist Benefits for Injuries Caused by Unknown Owner or Operator of Motor Vehicle [Ins Code § 11580.2(b)(2)]

[1] FORM Statement of Claim for Uninsured Motorist Benefits for Injuries Caused by Unknown Owner or Operator of Motor Vehicle [Ins Code § 11580.2(b)(2)]

STATEMENT OF CLAIM

I, _____[*name*], say:

_____[*Set forth facts relevant to the cause of action and the accident and showing that the insured suffered personal injuries caused by an unknown owner or operator of a motor vehicle.*]

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on _____[*date*], at _____[*city*], California.

_____ [*signature*]

[2] Use of Form

This form is for use to notify the insurer of a claim for uninsured motorist benefits based on injuries caused by an unknown owner or operator of a motor vehicle. The statement is filed with the insurer within 30 days after the accident [*Ins. Code § 11580.2(b)(2)*].

The statement must show that the insured or his or her legal representative has (or that the insured's heirs have) a cause of action arising out of an accident for damages against a person or persons whose identity is unascertainable. It must set forth supporting facts [*Ins. Code § 11580.2(b)(2)*].

The statement must be under oath [*Ins. Code § 11580.2(b)(2)*]. A declaration under penalty of perjury may be used in lieu of a statement under oath [*Code Civ. Proc. § 2015.5*]. For forms of statements under oath, see Ch. 392, *Oath and*

Affirmation .

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§ 88A.61 Complaint in Subrogation by Insurer as Subrogee of Its Insured [Ins. Code § 11580.2(g)]--Against Uninsured Motorist to Recover Amount Paid to Insured Under Uninsured Motorist Endorsement or Coverage

[1] FORM Complaint in Subrogation by Insurer as Subrogee of Its Insured [Ins. Code § 11580.2(g)]--Against Uninsured Motorist to Recover Amount Paid to Insured Under Uninsured Motorist Endorsement or Coverage

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
a _____ [*e.g.*, California Corporation]	)	NO. _____
	)	COMPLAINT IN SUBROGATION (Negligence)
Plaintiff, vs. _____ [*name*],	)	[Amount demanded _____ (exceeds
Defendant.	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff is, and at all times mentioned in this complaint was, _____ [a corporation organized and existing under the laws of _____ (*state or foreign country*) and authorized to transact, and transacting, business in California as a liability insurer *or other allegation of capacity and authority as appropriate*].

2. _____[*name*], ("the insured") is, and at all times mentioned in this complaint was the owner of a certain _____[*specify year, make, and model of vehicle*], _____ [*specify state, e.g.*, California] license number _____[*specify*] ("the insured automobile").

3. At all times mentioned in this complaint, the insured was insured by plaintiff under a _____ [*e.g.*, Motor Vehicle Liability Policy] ("the policy") covering the insured automobile and, among other things, insuring the

insured for all sums within the limits specified by the policy which the insured shall be legally entitled to recover as damages for bodily injury or wrongful death from the owner or operator of an uninsured motor vehicle. [A copy of the policy is attached as Exhibit A and made a part hereof.]

4. At all times mentioned in this complaint, defendant was the owner of a certain _____[*specify year, make, and model of vehicle*], _____ [*specify state, e.g.,* California] license number _____[*specify*] ("the uninsured automobile").

5. _____ [At *or* Plaintiff is informed and believes and thereon alleges that at] all times mentioned in this complaint, _____ [*identify location of accident, e.g.,* _____ (*street*) and _____ (*street*) were and are public thoroughfares in _____ (*city and/or county*), California, running in a general _____ (*compass point*) and _____ (*compass point*) direction, respectively.

6. _____ [On *or* Plaintiff is informed and believes and thereon alleges that, on] or about _____[*date*], the insured was driving the insured automobile _____ [*e.g.,* on and along _____ (*street*) in a general _____ (*compass point*) direction at or near its intersection with _____ (*street*)].

7. _____ [On *or* Plaintiff is informed and believes and thereon alleges that, on] the same date, defendant was driving the uninsured automobile _____ [*e.g.,* on and along _____ (*street*) in a general _____ (*compass point*) direction at or near its intersection with _____ (*street*)].

8. _____ [At *or* Plaintiff is informed and believes and thereon alleges that at] that time and place, defendant so negligently operated, controlled, serviced, maintained, and repaired the uninsured automobile as to cause it to collide with the insured automobile.

9. _____ [As *or* Plaintiff is informed and believes and thereon alleges that as] a proximate result of defendant's negligence and the collision, as alleged above, the insured sustained _____ [*specify injuries and damages, e.g.,* severe bodily injuries and shock and injury to his/her nervous system, all of which caused, now cause, and will continue to cause him/her great physical and mental pain and suffering; plaintiff is informed and believes and thereon alleges that these injuries will result in some permanent disability to the insured. The insured thereby suffered general damages].

10. _____ [*Allege any medical or related expenses incurred, e.g.,* As a further proximate result of the defendant's negligence, the collision, and the insured's injuries, as alleged above, the insured has been required to incur and will continue to incur obligations for doctor, hospital, medical, and related expenses, all to his/her further damage.]

11. _____ [*Allege any lost wages, e.g.,* At the time of the collision above referred to, the insured was gainfully employed as a _____ (*specify*) and was earning an average monthly income in excess of $_____. As a further proximate result of defendant's negligence and the collision referred to above, the insured was prevented from attending to his/her usual occupation from _____[*date*], through _____[*date*], all to his/her further damage.]

12. On or about _____[*date*], _____ [plaintiff and the insured by written agreement made a determination *or* a determination was made by arbitration] that the insured shall be legally entitled to recover damages in the sum of $_____.

13. On or about _____[*date*], plaintiff paid the insured the sum of $_____ in

accordance with this determination and thereby became subrogated to all of the rights, and entitled to enforce all of the remedies, of the insured against defendant to the extent of the payment made.

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____ paid by plaintiff to the insured and for interest thereon at the legal rate from and after _____ [*date of payment*];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____[*name*], declare:

I am an officer, to wit: _____ [*specify title, e.g.,* President] of _____[*specify name of corporation*], a corporation organized and existing under the laws of _____[*specify state*]. _____[*Name of corporation*] is the _____ [*specify party, e.g.,* plaintiff] in the above-entitled ac tion, and I have been authorized to make this verification on its behalf.

I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form is for use by a liability insurer as the subrogee of its insured (subrogor) to recover from an uninsured motorist (obligor) the amount that the insurer paid to its insured under the uninsured motorist coverage provisions in an insurance policy issued by the insurer [*see Ins. Code § 11580.2(g)*].

A motor vehicle liability insurer paying a claim under an uninsured motorist endorsement or coverage is entitled to be subrogated to the rights of the insured to whom the payment was made against any person legally liable for the injury or death to the extent of the payment made [*Ins. Code § 11580.2(g)*].

Any other person, whether insured or not, who is legally liable for the injuries to the insured may be joined as a defendant in this action, and this form may be modified to include other defendants [*see § 88A.61[6]*]. In that situation, however, if the insurer paid the full amount of uninsured motorist insurance provided by its policy and it only partially

indemnified the insured for his or her injuries, the insurer may wish to have the action prosecuted in the name of the insured so as not to prejudice the insured's right to recover judgment for the full amount of damages sustained [*see, e.g., Mills v. Farmers Ins. Exch. (1964) 231 Cal. App. 2d 124, 126, 41 Cal. Rptr. 650]* .

[3] Allegations

A complaint in subrogation must allege not only the relationship between the subrogee and subrogor that obligated the subrogee to make the payment it did, but must also allege all the elements of the subrogor's cause of action against the obligor as well [*see, e.g., Campan v. Molle (1899) 124 Cal. 415, 416-417, 57 P. 208* ; *Iusi v. City Title Ins. Co. (1963) 213 Cal. App. 2d 582, 586, 28 Cal. Rptr. 893]* .

If the obligor is not liable to the subrogor, the subrogee cannot recover. For example, if it is found in the case of an alleged liability based on negligence, that the subrogor's loss or harm was not caused by defendant's negligence, the subrogee cannot prevail [*see Breese v. Price (1981) 29 Cal. 3d 923, 930, 176 Cal. Rptr. 791, 633 P.2d 987* ; *Mendenhall v. Curtis (1980) 102 Cal. App. 3d 786, 792, 162 Cal. Rptr. 569]* .

Thus, this complaint alleges the following:

- The plaintiff's legal capacity and authority to engage in the insurance business as a liability insurer (Paragraph 1).
- The identity of the subrogor (Paragraph 2).
- The existence of insurance covering the subrogor's loss (Paragraph 3).
- The identity of the defendant obligor (Paragraph 4).
- The essential elements of the insured's cause of action against the uninsured motorist [*see Civ. Code §§ 3281, 3282, 3333*]:
    - Duty (Paragraphs 5-7).
    - Breach of duty (negligence) (Paragraph 8).
    - Proximate causation, injuries.
    - Damages (Paragraphs 9-11).
- The manner in which the amount to be paid to the insured by plaintiff under the uninsured motorist provisions of its policy was determined (Paragraph 12).
- Payment by the plaintiff to the insured and plaintiff's right to subrogation (Paragraph 13) [*see Ins. Code § 11580.2(g)*; *Iusi v. City Title Ins. Co. (1963) 213 Cal. App. 2d 582, 587, 28 Cal. Rptr. 893* (allegation of payment by subrogee required)].

For discussion and forms of complaints in automobile collision cases that may be helpful in alleging the insured's underlying cause of action, see Ch. 83, *Automobiles: Bringing the Action* .

[4] Specification of Damages

The amounts claimed as damages must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[6] Potential Defendants

Ins. Code § 11580.2(g) does not restrict the insurer's action in subrogation to a suit against the uninsured motorist. If two or more persons, one of whom is an uninsured motorist, proximately cause injury to an insured and the insurer pays the insured under the uninsured motorist provisions of its policy, the insurer is subrogated to the insured's rights against both the uninsured motorist and allothers legally liable for the injury whether insured or not [*see Mills v. Farmers Ins. Exch. (1964) 231 Cal. App. 2d 124, 127-129, 41 Cal. Rptr. 650]* .

[7] Statute of Limitations

An insurer that has paid a claim under the uninsured motorist provisions of a policy issued by it is authorized to bring the action against any person legally liable for the injury within three years from the date that the payment was made [*Ins. Code § 11580.2(g)*].

The purpose of this extended period of limitation is to protect the subrogation rights of the insurer where the statute of limitations on the subrogor's cause of action might expire before the subrogee's cause of action arises [*Liberty Mut. Ins. Co. v. Fales (1973) 8 Cal. 3d 712, 716-717, 106 Cal. Rptr. 21, 505 P.2d 213]* .

In any such action, the insurer may not, however, rely on the statute of limitations applicable to any action the obligor may have arising out of the accident to cut off the obligor's right to seek affirmative relief by a cross complaint [*Liberty Mut. Ins. Co. v. Fales (1973) 8 Cal. 3d 712, 717, 106 Cal. Rptr. 21, 505 P.2d 213]* .

[8] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For discussion and forms of complaints in automobile collision cases, see Ch. 83, *Automobiles: Bringing the Action*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages* ,

For discussion and forms relating to Fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For discussion and forms of complaints in negligence cases generally, see Ch. 380, *Negligence*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For discussion and additional forms relating to the doctrine of subrogation, see Ch. 536, *Subrogation*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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Chapter 89 AUTOMOBILES: SALES AND FINANCING UNDER THE REES-LEVERING ACT

8-89 California Forms of Pleading and Practice--Annotated 89.syn

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[2] Use of Form

[3] Allegations

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PART I. SCOPE

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§ 89.01 Scope of Chapter

This chapter discusses actions involving conditional sales of motor vehicles under the Rees-Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 2981 et seq.*] ("Rees-Levering Act"). The discussion covers definitions and coverage of the Act [*see §§ 89.10 -89.13*], required formalities and disclosures [*see § 89.14*], regulation of finance charges and other aspects of the contract [*see §§ 89.14 -89.21*], repossession [*see § 89.22*], the buyer's remedies [*see §§ 89.23 -89.27*], and related criminal penalties [*see § 89.28*]. The chapter also discusses the effect of the Servicemembers Civil Relief Act [*see § 89.29*]. This chapter includes the following forms for use by buyers:

- Complaint for restitution of consideration based on rescission of a contract that violates the Rees-Levering Act [*see § 89.60*].

- Declaration of proper venue to be filed with the complaint in all actions on contracts subject to the Rees-Levering Act [*see § 89.61*].

- Complaint for restitution based on rescission of a contract when the buyer is unable to obtain third-party financing [*see § 89.64*].

- Complaint for damages for conversion based on seller's denial of the right to reinstate the contract after repossession of the vehicle [*see § 89.62*].

- Complaint for a refund of unearned finance charges and statutory penalties for a seller's violation of the prepayment provisions of the act [*see § 89.63*].

- Complaint for restitution of down payment when the contract was never executed [*see § 89.65*].

This chapter also includes the following forms for use by a seller or holder of a conditional sales contract:

- Affirmative defenses to an action for violation of the act if the violation was either:

- The result of a bona fide error in computation [*see § 89.70*], or
- Corrected by the seller or holder pursuant to *Civ. Code § 2984* [*see § 89.71*].

- Complaint for deficiency judgment after sale of a repossessed vehicle [*see § 89.80*].

A Research Guide, collecting statutes, decisions, and other references, is also included [*see § 89.40*].

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§ 89.02 Cross References

- For discussion and forms relating to the federal Truth in Lending Act, Regulation Z (*12 C.F.R. § 226.1 et seq.*), and the disclosures required by them, and to installment sales generally, see Ch. 501, *Sales: Retail Installment Sales* .

- For discussion of the Unruh Act (*Civ. Code § 1801 et seq.*), which is applicable only to retail installment contracts for services, not sales [*Civ. Code § 1802.2*], and related forms, see Ch. 501, *Sales: Retail Installment Sales* .

- For detailed discussion of the requirements of the Rees-Levering Act in connection with motor vehicle sales transactions, and forms for use in such transactions, see California Legal Forms, Ch. 47, *Automotive Financing and Vehicle Leasing* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsInstallment ContractsBanking LawConsumer ProtectionTruth in LendingGeneral Overview

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[Reserved]

§§ 89.03[Reserved]

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§ 89.10 Governing Law

Sales of motor vehicles under conditional sale contracts [*see Civ. Code § 2981(a)* and discussion in *§ 89.12*] are governed under California law by the Rees-Levering Act [*Civ. Code § 2981 et seq.*]. Sales of motor vehicles required to be registered under the Vehicle Code are specifically excluded from coverage by the Unruh Retail Installment Sales Act [*Civ. Code § 1801 et seq.*], which governs retail installment sales generally [*see Civ. Code § 1802.1* (definition of "goods")].

Damages for conversion are governed by *Civ. Code § 3336*.

Sales of motor vehicles under conditional sales contracts may also be governed by the federal Truth in Lending Act [*15 U.S.C. § 1601 et seq.*] and regulations (referred to as Regulation Z) promulgated thereunder [*12 C.F.R. § 226.1 et seq.*]. The federal act governs a conditional sale contract if it imposes a finance charge or provides for payment in more than four installments [*see 15 U.S.C. § 1602(e)-(g)*]. For a discussion and forms relating to the Truth in Lending Act, see Ch. 501, *Sales: Retail Installment Sales* .

Notwithstanding any provision of the Rees-Levering Act to the contrary, any information required to be disclosed under the act may be disclosed in any manner, method, or terminology required or permitted by Regulation Z as in effect at the time the disclosure is made, except that information permitted by *12 C.F.R. § 226.18(c)(2)*, provided that all requirements and limitations set forth in *Civ. Code § 2982(a)* are satisfied, and nothing in the Rees-Levering Act may be deemed to prohibit the disclosure of additional information required or permitted under Regulation Z [*Civ. Code § 2982(m)*]. Moreover, every conditional sale contract subject to the Rees-Levering Act must contain the disclosures required by Regulation Z, whether or not Regulation Z applies to the transaction [*Civ. Code § 2982*].

If the buyer is in military service or entered military service after the obligation was incurred, the Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*] will limit the rate of interest and the creditor's rights to enforce the obligation [*see* discussion in *§ 89.29*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionGeneral OverviewTortsIntentional TortsConversionGeneral OverviewTransportation LawPrivate VehiclesGeneral OverviewBanking LawConsumer ProtectionState LawGeneral OverviewContracts LawTypes of ContractsInstallment Contracts

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§ 89.11 Nature and Purpose of Rees-Levering Act

The Rees-Levering Act is a comprehensive statute enacted for the protection of motor vehicle purchasers. The act contains disclosure requirements that are designed to protect the buyer from excessive charges by requiring full disclosure of all items of cost [*Story v. Gateway Chevrolet Co. (1965) 237 Cal. App. 2d 705, 709, 47 Cal. Rptr. 267* ; *see Civ. Code § 2982(a)* and discussion in *§ 89.14*]. It contains substantive provisions that:

- Establish maximum permissible finance and other charges [*see Civ. Code §§ 2982(i), (j), 2982.3, 2982.8* and discussion in *§§ 89.15, 89.16,* and *89.18[2]*].

- Restrict the types of provisions that may be contained in and security interests that may be created by conditional sale contracts [*see Civ. Code §§ 2982.1, 2983.7, 2984.2* and discussion in *§ 89.20*].

- Give the buyer a right to prepay a contract without penalty [*see Civ. Code § 2982(l)* and discussion in *§ 89.19*].

- Regulate the repossession and resale of vehicles by the seller or holder [*see Civ. Code §§ 2983.2, 2983.3* and discussion in *§ 89.22*].

- Provide the buyer certain remedies [*see Civ. Code §§ 2982.7, 2982.9, 2983, 2983.1* and discussion in *§ 89.23*].

- Establish criminal penalties for persons who willfully violate the act [*see Civ. Code § 2983.6* and discussion in *§ 89.28*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 89.12 Transactions Governed by Rees-Levering Act

[1] In General

The Rees-Levering Act applies to all conditional sale contracts between a buyer and any person engaged in the business of selling or leasing under conditional sale contracts motor vehicles which are required to be registered under the Vehicle Code and are bought primarily for personal or family purposes. The act does not apply to vehicles bought primarily for business or commercial purposes or to mobile homes, as defined in *Health & Safety Code § 18008*, which are sold on or after July 1, 1981 [*see Civ. Code § 2981(b)-(d), (k)*]. Nor does it apply to a trailer sold in conjunction with a vessel when the trailer comes within the definition of "goods" under *Civ. Code § 1802.1* ("trailer" defined for this purpose as vehicle designed solely for transporting vessels) [*Civ. Code § 2981(k)*].

[2] "Conditional Sale Contract" Defined

The Rees-Levering Act defines "conditional sale contract" as [*Civ. Code § 2981(a)*]:

- Any contract between a buyer and a seller for the sale of a motor vehicle, with or without accessories, under which possession is delivered to the buyer and either:
  - The title vests in the buyer thereafter only on the payment of all or a part of the price, or on the performance of any other condition, or
  - A lien on the property is to vest in the seller as security for the payment of part or all of the price, or for the performance of any other condition; or
- Any contract between a buyer and a seller for the bailment of a motor vehicle, with or without accessories, by which the bailee or lessee agrees to pay, as compensation for use, a sum substantially equivalent to or in excess of the aggregate value of the vehicle and its accessories, if any, at the time the contract is executed, and by which it is agreed that the bailee or lessee will become, or for no other consideration or for a nominal consideration has the option of becoming, the owner of the vehicle on full compliance with the terms of the contract.

[3] True Lease Distinguished

When a lessee agrees to pay an amount substantially less than the value of the automobile, the contract is considered a true lease that is not subject to the Rees-Levering Act but that must comply with the Vehicle Leasing Act [*Civ. Code § 2985.7 et seq.*; *see* discussion in *§ 89.13[2]*]. For purposes of the Rees-Levering Act, a contract for the bailment or lease of a motor vehicle, with or without accessories, that establishes the maximum amount for which the bailee or lessee could be held liable at the end of the lease or bailment period, or on earlier termination, by reference to the value of the vehicle at that time is *not* a contract by which the bailee or lessee will become, or for no other consideration or for a nominal consideration has the option of becoming, the owner of the vehicle [*Civ. Code § 2981.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 89.13 Transactions to Which Rees-Levering Act Does Not Apply

[1] Loans by Supervised Financial Institutions

[a] Loans Negotiated Independently by Buyer

The provisions of the Rees-Levering Act do not apply to loans, or the security for loans, between a purchaser of a motor vehicle and a supervised financial organization, other than the seller of the motor vehicle, when all or a portion of the loan is used in connection with the purchase of a motor vehicle. A "supervised financial organization" is a person organized, chartered, or holding a license or authorization certificate under a law of California or the United States to make loans and subject to supervision of an official or agency of California or the United States [*Civ. Code § 2982.5(a)*; *see Civ. Code § 2981(d)* (definition of "person")].

This exemption from the Rees-Levering Act provided by *Civ. Code § 2982.5(a)* applies only to loans that are the result of independent, private negotiations between the buyer and the lender. If the seller of the motor vehicle assists the buyer in arranging the third-party loan, the entire transaction is subject to the Rees-Levering Act, and both the seller and the lender must comply with its provisions [*Hernandez v. Atlantic Finance Co. (1980) 105 Cal. App. 3d 65, 75-80, 164 Cal. Rptr. 279* ; *see Civ. Code § 2982.5(a)*; *but see Civ. Code § 2982.5(d)*, discussed in *[c], below*].

[b] Seller-Assisted Financing of Down Payment or Other Partial Payment

The Rees-Levering Act does not prohibit a seller from assisting a buyer in obtaining third-party financing of all or a part of the down payment or other payment, provided that the seller complies with the disclosure requirements of *Civ. Code § 2982.5(b), (c)* in connection with the loan [*see Hernandez v. Atlantic Finance Co. (1980) 105 Cal. App. 3d 65, 76-77, 164 Cal. Rptr. 279]* . The seller may not provide any security or other guarantee of payment on the loan or receive any commission or other remuneration for assisting the buyer in obtaining the loan. If the buyer obligates himself or herself to purchase or receives possession of the motor vehicle before securing the loan, and if, on appropriate application, the buyer is unable to secure the loan on the conditions stated in the conditional sale contract, the conditional sale contract or purchase order is deemed rescinded and all consideration must be returned by the respective parties without demand [*Civ. Code § 2982.5(b)*].

Civ. Code § 2982.5(b) governs only "side" or "pick-up" loans, which involve both a conditional sale contract and a loan from a third party. In *Kunert v. Mission Financial Services Corp.* [*Kunert v. Mission Fin. Servs. Corp. (2003) 110 Cal. App. 4th 242, 1 Cal. Rptr. 3d 589]* , which concerned such a transaction, the buyers alleged that the lender's payment of a "dealer reserve" (a portion of the finance charges due under the contract assigned to a lender) was an improper commission under *Civ. Code § 2982.5(b)*. The court held that payment of the dealer reserve did not violate the Act, and was not unlawful under other statutory provisions governing unfair business practices [*Kunert v. Mission Fin. Servs. Corp. (2003) 110 Cal. App. 4th 242, 252-254, 1 Cal. Rptr. 3d 589* (although plaintiffs asserted violation of *Civ. Code § 2982.5(b)*, allegations were premised on theory that transaction constituted single seller-assisted loan; transaction, therefore, did not fall within provisions of *Civ. Code § 2982.5(b)*].

[c] Seller-Assisted Loans for Full Purchase Price

Although *Hernandez v. Atlantic Finance Co. (1980) 105 Cal. App. 3d 65, 75-80, 164 Cal. Rptr. 279* , discussed in *[a], above*, held that the exemption under *Civ. Code § 2982.5(a)* does not apply to a seller assisting a buyer in arranging a third-party loan, *Civ. Code § 2982.5(d)* provides a separate exemption from the provisions of the Rees-Levering Act for a seller assisting a buyer in obtaining a loan from any third party to be used to pay for all or any part of the purchase price of a motor vehicle. This exemption does not apply to state or federally chartered banks or to savings and loan associations, and will not be construed to affect existing law regarding a seller's assisting a buyer to obtain a loan from a bank or savings and loan association or any loan obtained by the buyer from those lenders [*Civ. Code § 2982.5(d)*]. *Civ. Code §§ 2982.5(d)(1)-(6)* imposes various limitations on the financing that may be obtained by the buyer from a third party with the assistance of the seller, including the following:

- Limitations on the use of liens on real property as security for loans [*see Civ. Code § 2982.5(d)(1), (2)*].

- The provisions of *Civ. Code §§ 2983.2, 2983.3*, and *2984.4* apply to the loan, but do not authorize the lender or the lender's successor in interest to charge for any costs, fees, or expenses or to obtain any other benefit which the lender is prohibited from charging or obtaining under any regulatory law applicable to the lender, except that *Civ. Code §§ 2983.2* and *2983.3* do not apply to a loan made by a licensed finance lender (formerly referred to as personal property brokers and consumer finance lenders) [*Civ. Code § 2982.5(d)(3)*; *Fin. Code § 22000 et seq.* (Finance Lenders Law); *see Fin. Code § 22002* (who is governed by Finance Lenders Law)].

- Claims and defenses that the buyer could assert against the seller may be asserted against the lender or the lender's successor, up to the amount of the loan [*see Civ. Code § 2982.5(d)(4)*].

- Certain items are required to be set forth in the loan agreement [*see Civ. Code § 2982.5(d)(5)*].

- Any waiver by the buyer of the provisions of *Civ. Code § 2982.5* is void and unenforceable [*Civ. Code § 2982.5(d)(6)*].

With respect to the second item enumerated above, licensed finance lenders (formerly referred to as personal property brokers and consumer finance lenders) are already subject to Financial Code sections that govern reinstatement, redemption, repossession, and resale pursuant to those loans and that provide the borrower with substantially the same rights as *Civ. Code §§ 2983.2* and *2983.3* [*compare Fin. Code §§ 22202(f), 22328, 22329* (Finance Lenders Law) *with Civ. Code §§ 2983.2, 2983.3*].

[2] True Leases

The Rees-Levering Act explicitly applies to certain transactions that are in the form of leases, but are conditional sales

in practical effect [*see Civ. Code § 2981(a)(2)* and discussion in *§ 89.12[2], [3], above*; *see also Thomas v. Wright (1971) 21 Cal. App. 3d 921, 926-927, 98 Cal. Rptr. 874]* . If, however, a lease provides for total payments amounting to substantially less than the value of the automobile, or if the lessee is not subject to a detriment or liability for unforeseen depreciation, then the transaction is deemed a true lease and the act does not apply [*Thomas v. Wright (1971) 21 Cal. App. 3d 921, 926, 98 Cal. Rptr. 874]* .

Vehicle leases which are not governed by the Rees-Levering Act are governed by the Vehicle Leasing Act [*Civ. Code § 2985.7 et seq.*]. For a discussion and forms relating to the Vehicle Leasing Act, see Ch. 90, *Automobiles: Vehicle Leasing Act* .

[3] Cash Sales

The Rees-Levering Act does not apply to "cash sales" in which a down payment is made and the balance of the purchase price is to be paid prior to delivery of the vehicle [*see Shapiro v. Ogle (1972) 28 Cal. App. 3d 261, 266-267, 104 Cal. Rptr. 553]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 89.14 Required Formalities and Disclosures

[1] Single Written Document Required

Every conditional sale contract for the sale of a motor vehicle must be in writing and, if printed, must be printed in type no smaller than 6-point. The contract must be a single document, containing all of the agreements of the buyer and seller with respect to the total cost and terms of payment for the motor vehicle, including any promissory notes or any other evidences of indebtedness [*Civ. Code § 2981.9*].

[2] Execution and Delivery of Copy of Document

Prior to the execution of a conditional sale contract on or after July 1, 2006, the seller must provide to the buyer, and obtain the buyer's signature on, a written disclosure that sets forth the following information [*Civ. Code § 2982.2(a)*; see *Civ. Code § 2982.2(e)* (requirements do not apply to sale of motorcycle or off-highway vehicle)]:

- A description and the price of each item sold, if the contract includes a charge for the item, for each item in the following categories [*Civ. Code § 2982.2(a)(1)*]:
    - A service contract [*see Civ. Code § 2981(p)* (definition)].
    - An insurance product.
    - A debt cancellation agreement.
    - A theft deterrent device [*see Civ. Code § 2981(r)* (definition)].
    - A surface protection product [*see Civ. Code § 2981(q)* (definition)].
    - A vehicle contract cancellation option agreement [*see Veh. Code § 11713.21*].
- The sum of all of the foregoing charges disclosed, labeled "total" [*Civ. Code § 2982.2(a)(2)*].

- The amount that would be computed under the contract as the regular installment payment if charges for the foregoing items disclosed were not included in the contract, which must be labeled "Installment Payment EXCLUDING Listed Items" [*Civ. Code § 2982.2(a)(3)*].

- The amount that would be computed under the contract as the regular installment payment if charges for the foregoing items disclosed were included in the contract, which must be labeled "Installment Payment INCLUDING Listed Items" [*Civ. Code § 2982.2(a)(4)*].

The disclosures must be in at least 10-point type and be contained in a document that is separate from the conditional sale contract and a purchase order [*Civ. Code § 2982.2(b)*].

The conditional sale contract must be signed by the buyer or the buyer's authorized representative and by the seller or its authorized representative. An exact copy of the contract must be furnished to the buyer by the seller at the time the contract is signed. Under the Rees-Levering Act, the motor vehicle may not be delivered until the seller delivers to the buyer a fully executed copy of the conditional sale contract or purchase order along with a copy of any vehicle purchase proposal and credit statement which the buyer has signed during the contract negotiations at the requirement or request of the seller. The seller may not have the buyer sign a contract that contains blank spaces to be filled in after the contract has been signed [*Civ. Code § 2981.9*].

[3] Acknowledgment of Delivery; Presumptions

Any acknowledgment by the buyer of delivery of copies of the signed contract documents must be printed or written in size equal to at least 10-point bold type. If the acknowledgment is contained in the contract, it must appear directly above the space reserved for the buyer's signature [*Civ. Code § 2984.3*].

A written acknowledgment by the buyer that conforms to the above requirements gives rise to a rebuttable presumption of delivery in any action or proceeding by or against a third party who acquired an interest in the contract without knowledge that the copies were not delivered. The presumption that copies of the documents were furnished as required by the Rees-Levering Act is conclusive in favor of the third party if that third party either [*Civ. Code § 2984.3*]:

- Furnishes the buyer copies of the documents; or

- Sends the buyer a notice containing the items set forth in *Civ. Code § 2982(a)(1)-(8)* [*see* discussion in *§ 89.14[4]*] stating that the buyer must notify the third party within 30 days if copies of those documents were not furnished, and the third party receives no such notification.

[4] Contents of Contract

[a] General Provisions

Every conditional sale contract subject to the Rees-Levering Act must contain the disclosures required by Regulation Z, whether or not Regulation Z applies to the transaction. For a discussion of the specific disclosures required by Regulation Z, see Ch. 501, *Sales: Retail Installment Sales* . In addition, to the extent applicable, the contract must contain the other disclosures and notices required by, and must satisfy the requirements and limitations of, *Civ. Code § 2982*. The disclosures required by *Civ. Code § 2982(a)* may be itemized or subtotaled to a greater extent than required by that subdivision; however, they must be made together in the sequence set forth in *Civ. Code § 2982(a)*. All other disclosures and notices may appear in the contract in any locations or sequence and may be combined or interspersed with other provisions of the contract [*Civ. Code § 2982* (1st paragraph)].

The contract must contain the following disclosures, as applicable, which must be labeled "itemization of the amount financed" [*Civ. Code § 2982(a)*]:

(1) Specified amounts that would be charged in a cash sale (see the separate lists of cash-sale items, below, following this list).

(2) Amounts paid to public officials for vehicle license, registration, transfer, titling, and California tire fees [*see Pub. Res. Code § 42885* (tire fees); *see also Bermudez v. Fulton Auto Depot, LLC (2009) 179 Cal. App. 4th 1318, 1324-1326, 102 Cal. Rptr. 3d 413* (because Vehicle Code implicitly allows dealer to estimate vehicle license fee, small discrepancy between estimated amount and actual fee is not violation of Rees-Levering Act)].

(3) The aggregate amount of premiums agreed, on execution of the contract, to be paid for policies of insurance included in the contract, excluding the amount of any insurance premium included in the finance charge.

(4) The amount of the state fee for issuance of a certificate of compliance, noncompliance, exemption, or waiver pursuant to any applicable pollution control statute.

(5) A subtotal representing the sum of the foregoing item

(6) The amount of the buyer's down payment itemized to show the following:

(a) The agreed value of the property being traded in.

(b) The prior credit or lease balance, if any, owing on the property being traded in.

(c) The net agreed value of the property being traded in, which is the difference between the amounts disclosed in Items 6(a) and (b), *above*; and if the prior credit or lease balance of the property being traded in exceeds the agreed value of the property, a negative number must be stated.

(d) The amount of any portion of the down payment to be deferred until not later than the due date of the second regularly scheduled installment under the contract and which is not subject to a finance charge.

(e) The amount of any manufacturer's rebate applied or to be applied to the down payment.

(f) The remaining amount paid or to be paid by the buyer as a down payment.

(g) The total down payment. If the sum of Items (c) through (f), *above*, is not negative, that sum must be stated as the total down payment, and no amount may be stated as the prior credit or lease balance under Item 1. If the sum of items (c) through (f), *above*, is less than zero, then that sum, expressed as a positive number, must be stated as the prior credit or lease balance under Item 1, and zero must be stated as thetotal down payment, which must be labeled "total down payment" and must contain a descriptor indicating that if the total down payment is a negative number, a zero is required to be disclosed as the total down payment and a reference made that the remainder will be included in the disclosure required pursuant to Item 1.

(7) The amount of any administrative finance charge, labeled "prepaid finance charge."

(8) The difference between Item 5 and the sum of Items 6 and 7, labeled "amount financed."

The cash-sale amounts referenced in the first item of the foregoing list are the following. Items marked with an asterisk (*) are required only on or after July 1, 2006 [*see* Stats. 2005, ch. 128, §§ 3, 12]:

(1) The cash price [*see Civ. Code § 2981(e)* (definition)], exclusive of the following amounts that must be separately stated (see other items below):

- Document preparation fees.
- Business partnership automation fees.*
- Taxes imposed on the sale.
- Pollution control certification fees.
- Prior credit or lease balance on property being traded in.
- The amount charged for a service contract.
- The amount charged for a theft deterrent system.*
- The amount charged for a surface protection product.*
- The amount charged for an optional debt cancellation agreement.*
- The amount charged for a contract cancellation option agreement.*

(2) The fee to be retained by the seller for document preparation.

(3) The fee charged by the seller for certifying that the motor vehicle complies with applicable pollution control requirements.

(4) A charge for a theft deterrent device [*see Civ. Code § 2981(r)* (definition)].*

(5) A charge for a surface protection product [*see Civ. Code § 2981(q)* (definition)].*

(6) Taxes imposed on the sale.

(7) The amount of any optional business partnership automation fee to register or transfer the vehicle, which must be labeled "Optional DMV Electronic Filing Fee."

(8) The amount charged for a service contract [*see Civ. Code § 2981(p)* (definition)].

(9) The prior credit or lease balance remaining on property being traded in, as required in Item 6 of the list preceding this one, which mustbe labeled "prior credit or lease balance (see downpayment and trade-in calculation)."

(10) Any charge for an optional debt cancellation agreement.

(11) Any charge for a used vehicle contract cancellation option agreement [*see Veh. Code § 11713.21*].*

(12) The total cash price, which is the sum of Items (1) through (11), *above*.

The disclosures described in Items 4, 5, and 11, *above*, are not required on contracts involving the sale of a motorcycle [*see Veh. Code § 400* (definition)], or on contracts involving the sale of an off-highway motor vehicle that is subject to identification under *Veh. Code § 38010*, and the amounts of those charges, if any, are not required to be reflected in the total price under Item 12, *above* [*Civ. Code § 2982(a)(1)(M)*].

No particular terminology is required to disclose the foregoing items, except as expressly provided [*Civ. Code § 2982(b)*].

If payment of all or a portion of the down payment is to be deferred, the deferred payment must be reflected in the payment schedule disclosed pursuant to Regulation Z [*Civ. Code § 2982(c)*]. If the down payment includes property being traded in, the contract must contain a brief description of that property [*Civ. Code § 2982(d)*].

The contract must also contain the names and addresses of all persons to whom the notice required under *Civ. Code § 2983.2* (relating to sales of repossessed vehicles) and permitted under *Civ. Code §§ 2983.5* (relating to assignee liability) and 2984 (relating to corrections of statutory violations) is to be sent [*Civ. Code § 2982(e)*].

[b] Disclosures Regarding Prepayment

If the contract includes a finance charge determined on the precomputed basis [*see Civ. Code § 2981(o)* and discussion in *§ 89.15[2][b], below*], the contract must identify the method of computing the unearned portion of the finance charge in the event the buyer's obligation is prepaid in full. The contract must also state the amount or method of computation of any charge that may be deducted from the amount of any unearned finance charge before it is credited to the obligation or refunded to the buyer. The method of computing the unearned portion of the finance charge must be sufficiently identified with reference to the actuarial method if the computation will be under that method. The method of computing the unearned portion of the finance charge must be sufficiently identified with reference to the Rule of 78's, the sum of the digits, or the sum of the periodic time balances method in all other cases, and those references will be deemed to be equivalent for disclosure purposes [*Civ. Code § 2982(f)(1)*].

If the contract includes a finance charge that is determined on the simple-interest basis [*Civ. Code § 2981(n)* and discussion in *§ 89.15[2][a], below*] but provides for a minimum finance charge in the event of prepayment in full, the contract must contain a statement of that fact and the amount of the minimum finance charge or its method of computation [*Civ. Code § 2982(f)(2)*].

[c] New or Used Vehicle Disclosure

Every contract must disclose on its face, in a box outlined in red, whether the vehicle is "new" or "used" as those terms are defined in *Veh. Code §§ 430* and *665*, respectively [*Civ. Code § 2982(q)*].

[d] Notices Required in Contract

In addition to the items *discussed under § 89.14[4][a] -[c], above,* every conditional sale contract must include a notice to the buyer advising the buyer not to sign the contract before reading it or if it contains any blank spaces. This notice must also inform the buyer of his or her rights to a completely filled-in copy of the contract and to prepay the amount

owed in full at any time and obtain a refund of the unearned finance charge, and warn the buyer of the consequences of any default in the performance of the obligations of the contract. For all contracts entered into after October 1, 1982, this notice must be printed in at least 10-point boldface type [*Civ. Code § 2982(g)(1)*]. The exact wording of the required notice is set forth in *Civ. Code § 2982(g)*. The wording depends on whether the finance charge is computed on the simple-interest or precomputed interest basis.

The contract must also contain a statutory notice in at least 8-point boldface type indicating that the buyer should try to resolve any sales-related complaints with the seller, and that complaints concerning unfair or deceptive practices or methods by the seller may be referred to the city attorney, the district attorney, or the Department of Motor Vehicles at a specified address. The statutory notice also informs the buyer that after the contract is signed, the seller may not change the financing or payment terms without the buyer's written consent, and that the buyer does not have to consent to any change. This notice must be acknowledged by the buyer's signature [*Civ. Code § 2982(h)*].

The contract also must contain the following notice [*Civ. Code § 2982(r)*]:

> "California law does not provide for a 'cooling-off' or other cancellation period for vehicle sales. Therefore, you cannot later cancel this contract simply because you change your mind, decide the vehicle costs too much, or wish you had acquired a different vehicle. After you sign below, you may only cancel this contract with the agreement of the seller or for legal cause, such as fraud."

On or after July 1, 2006, this notice must further state [*Civ. Code § 2982(r)*; *see Veh. Code § 11713.21*] (cancellation option requirement):

> "However, California law does require a seller to offer a 2-day contract cancellation option on used vehicles with a purchase price of less than $40,000, subject to certain statutory conditions. This contract cancellation option requirementdoes not apply to the sale of a recreational vehicle, a motorcycle, or an off- highway motor vehicle subject to identification under California law. See the vehicle contract cancellation option agreement for details."

The text of the notice must be in at least 10-point bold type; the heading for the notice (also specified by statute) must be in at least 12-point bold type, and the notice, circumscribed by a line in the manner indicated in the statute, must appear immediately above the contract signature line [*Civ. Code § 2982(r)*; *see Veh. Code § 11713.21* (cancellation option requirement)].

Finally, the contract must contain a statutory notice regarding public liability or property damage insurance. This notice must be signed or initialed by the buyer [*Civ. Code § 2984.1*].

[5] Notice to Cosigners

If the creditor obtains the signature of more than one person, other than persons married to each other, on a conditional sales contract as defined in *Civ. Code § 2981*, the creditor is required to deliver a notice, in English and Spanish in at least 10-point type, to each person who does not in fact receive any of the money, property, or services which are the subject matter of the contract, before the cosigner becomes obligated on the contract [*Civ. Code §§ 1799.90(a)(3), 1799.91(a)*; *see Civ. Code § 1799.90 et seq.*]. The exact wording of the notice is set forth in *Civ. Code § 1799.91(a)*, and other requirements regarding the notice are set forth in *Civ. Code §§ 1799.91(b)-1799.93*. For a discussion of these requirements and for a form relating to the required cosigner liability notice, see Ch. 501, *Sales: Retail Installment Sales*
.

[6] Translation Requirements for Contracts Negotiated in Languages Other than English

If a language other than English is the primary language used for negotiations with a consumer, the consumer may have

to be provided with a translation of the contract documents, and some notices, in that other language. For contracts entered into prior to July 1, 2004, this requirement applied only to contracts negotiated primarily in Spanish. For contracts entered into on and after July 1, 2004, it applies to contracts negotiated primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean [*see Civ. Code § 1632*].

Generally, any person engaged in a trade or business who negotiates primarily in the other language, orally or in writing, in the course of entering into a contract or agreement subject to the Rees-Levering Act, must deliver to the buyer, before he or she executes the contract or agreement, a translation of the contract or agreement in the other language, which includes a translation of every term and condition in that contract or agreement [*Civ. Code § 1632(a)(1)* (operative January 1 until July 1, 2004); *Civ. Code § 1632(b)(1)* (operative July 1, 2004)]. However, this is not required (and related requirements do not apply) if the buyer negotiates using his or her own interpreter who is fluent and literate in both English and the other language and who is not employed or furnished by the seller [*Civ. Code § 1632(g)* (operative January 1 until July 1, 2004); *Civ. Code § 1632(h)* (operative July 1, 2004)]. Noncompliance with the requirements would be a ground for rescission of the contract or agreement by the buyer [*Civ. Code § 1632(j)* (operative January 1 until July 1, 2004); *Civ. Code § 1632(k)* (operative July 1, 2004)]. For further discussion of *Civ. Code § 1632*, see Ch. 127, *Consumer Contracts and Loans* .

[7] Retention of Copies of Documents

The seller must maintain the following documents for at least seven years or the length of the conditional sales contract, whichever is longer [*Civ. Code § 2984.5(a)*]:

- A copy of the buyer's conditional sales contract.

- Any documents on which the seller relied to determine the buyer's creditworthiness, including (but not limited to) any consumer credit report [*see Civ. Code § 1785.3* (definition)] or any other document containing the buyer's credit score [*see Civ. Code § 1785.15*.1 (definition); Ch. 129, *Consumer Credit Reporting*].

- A copy of the terms of sale, assignment, or transfer, if the conditional sales contract is sold, assigned, or otherwise transferred.

A seller who unlawfully fails to comply with a court order to produce any of those documents is liable for a civil penalty of $5,000 per violation in an action brought by the attorney general for a civil penalty of $5,000, in addition to all rights and remedies that are otherwise available under law [*Civ. Code § 2984.5(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionGeneral OverviewTransportation LawPrivate VehiclesGeneral OverviewContracts LawSales of GoodsForm, Formation & ReadjustmentGeneral OverviewBanking LawConsumer ProtectionState LawGeneral OverviewContracts LawTypes of ContractsInstallment Contracts

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§ 89.15 Limitations on Finance Charges

[1] Definition of Finance Charge

Under the Rees-Levering Act, "finance charge" has the meaning set forth for that term in *12 C.F.R. § 226.4* [*Civ. Code § 2981(i)*]. *12 C.F.R. § 226.4* defines the finance charge as the cost of consumer credit as a dollar amount. The term includes any charge payable directly or indirectly by the consumer and imposed directly by the creditor as an incident to or a condition of the extension of credit, but does not include any charge of a type payable in a comparable cash transaction [*12 C.F.R. § 226.4(a)*]. Examples of specific charges which are included and excluded from the computation of the finance charge are set forth in *12 C.F.R. § 226.4(b)-(f)*. For a further discussion of the components of the finance charge under Regulation Z, see Ch. 501, *Sales: Retail Installment Sales* .

Under the Rees-Levering Act, the term finance charge does not include the following [*Civ. Code § 2981(i)*]:

- Delinquency charges or collection costs permitted by *Civ. Code § 2982(k)*.
- Extension or deferral agreement charges permitted by *Civ. Code § 2982.3*.
- Amounts for insurance, repairs to or preservation of the motor vehicle, or preservation of the security interest therein advanced by the holder under the terms of the contract.

[2] Methods of Determining Finance Charge

[a] Simple-Interest Basis

Under the Rees-Levering Act, the finance charge may be computed by either the simple-interest basis or the precomputed basis.

The simple-interest basis is the determination of a finance charge by applying a constant rate to the unpaid balance as it changes from time to time, calculated either (1) on the basis of a 365-day year and actual days elapsed, or (2) for contracts entered into prior to January 1, 1988, on the basis of a 360-day year consisting of 12 months of 30 days each

and on the assumption that all payments will be received by the seller on their respective due dates [*Civ. Code § 2981(n)*].

All contracts entered into between a buyer and a seller on or after January 1, 1983, must provide for calculation of the finance charge on the simple-interest basis if the date on which the final installment is due, according to the original terms of the contract, is more than 62 months after the date of the contract [*Civ. Code § 2981.7*].

[b] Precomputed Basis

The precomputed basis is the determination of the finance charge by multiplying the original unpaid balance of the contract by a rate, then multiplying that product by the number of payment periods elapsing between the date of the contract and the date of the last scheduled payment [*Civ. Code § 2981(o)*].

[3] Maximum Dollar Amount of Finance Charge

Except for contracts in which the all or a portion of the finance charge is determined by the simple interest basis and the amount financed disclosed pursuant to *Civ. Code § 2982(a)(8)* is more than $2,500, the dollar amount of the disclosed finance charge may not exceed the greatest of the following [*Civ. Code § 2982(j)(1)*]:

- Either (1) 1/2 percent on so much of the unpaid balance as does not exceed $225, 11/6 percent on so much of the unpaid balance in excess of $225 as does not exceed $900, 5/6 of 1 percent on so much of the unpaid balance in excess of $900 as does not exceed $2,500; or (2) 1 one percent of the entire unpaid balance, multiplied in either case by the number of months (including any fraction of a month exceeding 15 days) elapsing between the date of the contract and the due date of the last installment;

- If the finance charge is determined by the precomputed basis, $25; or

- If all or part of the finance charge is determined by the simple-interest basis: (1) $25, if the unpaid balance does not exceed $1,000, (2) $50, if the unpaid balance exceeds $1,000 but does not exceed $2,000, or (3) $75, if the unpaid balance exceeds $2,000.

The holder of the contract may not charge, collect, or receive a finance charge which exceeds the disclosed finance charge, except to the extent [*Civ. Code § 2982(j)(2)*]:

- Caused by the holder's receipt of one or more payments under a contract which provides for determination of the finance charge or a portion thereof on the 365-day basis at a time or times other than as originally scheduled, whether or not the parties enter into an agreement pursuant to *Civ. Code § 2982.3* (relating to extension or deferral of payments);

- Permitted by *12 C.F.R. § 226.17(c)(2)-(4)*; or

- Permitted by *Civ. Code § 2982.8* (relating to the maintenance of insurance on the vehicle).

When a contract provides for unequal or irregular payments, or for payments on other than a monthly basis, the maximum finance charge will be at the effective rate provided for in *Civ. Code § 2982(j)(1)*, having due regard for the schedule of installments [*Civ. Code § 2982(j)(4)*].

Legal Topics:

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

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§ 89.16 Delinquency Charge

The contract may provide that for each installment in default for 10 days or more the buyer must pay a delinquency charge (late fee). The amount of the charge may not exceed a total of 5 percent of the delinquent installment. A delinquency charge may be collected only once on any installment regardless of the period it remains in default, and payments received on time by the seller under an extension or deferral agreement may not be subject to a delinquency charge, unless the charge is permitted by *Civ. Code § 2982.3* (discussed in *§ 89.18*). The contract also may provide for the charge of reasonable collection costs and fees in the event of delinquency [*Civ. Code § 2982(k)*].

A court of appeal has concluded that a creditor does not violate the prohibition against charging more than one late fee per delinquent installment [*see Civ. Code § 2982(k)* (late fee "may be collected only once on any installment regardless of the period during which it remains in default")] by charging successive late fees for successive late payments (as long as the contract allows it). For example, as the court explained, when the creditor receives a payment on time in April but allocates it to March because the March payment was missed, for which a late fee was imposed, the result of allocating the payment to March is that the March payment is no longer delinquent but the April payment becomes missed, which triggers a new late fee for the month of April. Thus the consumer is not charged more than one late fee for the missed March payment; rather, only one late fee is imposed for the payment missed in March, and another late fee is imposed for the payment missed in April [*Davis v. Ford Motor Credit Co. (2009) 179 Cal. App. 4th 581, 584, 101 Cal. Rptr. 3d 697]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 89.17 Dishonored Check Charge

The seller or holder may charge and collect a fee not to exceed $15 for the return by a depository institution of a dishonored check, negotiable order of withdrawal, or share draft issued in connection with the contract if the contract so provides or if the contract contains a generalized statement that the buyer may be liable for collection costs incurred in connection with the contract [*Civ. Code § 2982(p)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 89.18 Extension or Deferral of Payments

[1] Extension Agreement

The holder of a conditional sale contract, on agreement with the buyer, may extend the scheduled due date or defer payment of all or any part of any scheduled installment or installments payable thereunder. No charge may be made for any extension or deferral unless the agreement for the extension or deferral is in writing and signed by both parties [*Civ. Code § 2982.3(a)*]. However, the seller or holder, as an adjunct to or to assist in efforts to collect one or more delinquent installments on the contract, may advise one or more obligors on the contract, either in writing or orally, that the due date for one or more installments under the contract will be extended without charge, other than any applicable late charge provided for in the contract [*Civ. Code § 2982.3(a)*].

[2] Maximum Amount of Extension or Deferral Charge

The charge for any extension or deferral made pursuant to an extension or deferral agreement may not exceed the amount specified in *Civ. Code § 2982.3(b), (c)* (amount of maximum charge dependent on whether finance charge is computed on precomputed or simple-interest basis).

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 89.19 Prepayment; Refund Credit

Notwithstanding any contract provision to the contrary, the buyer may prepay the entire indebtedness under the contract at any time before maturity, without penalty. The amount required to prepay the contract in full, as set forth in *Civ. Code § 2982(l)(1), (2)*, depends on whether the finance charge is determined on the precomputed basis or the simple-interest basis. If the finance charge is determined on the precomputed basis, the buyer is entitled to a refund credit in the amount of the unearned finance charge, as provided in *Civ. Code § 2982(l)(1)* [*see Civ. Code § 2982(l)*].

Legal Topics:

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§ 89.20 Restrictions on Conditional Sale Contracts

[1] Prohibited Means of Inducing Contract

It is unlawful for a seller to induce or attempt to induce any person to enter into a contract that is subject to the Rees-Levering Act by offering a rebate, discount, commission, or other consideration that is contingent on the happening of a future event or on the buyer's selling or giving information or assistance leading to a sale by the seller of the same or related goods [*Civ. Code § 2982.1*].

[2] Prohibited Contract Provisions

No conditional sale contract may contain any provision by which [*Civ. Code § 2983.7*]:

- The buyer agrees not to assert against the seller a claim or defense arising out of the sale or agrees not to assert against an assignee such a claim or defense.

- A power of attorney is given to confess judgment in California, or an assignment of wages is given. The giving of an assignment of wages in a separate instrument pursuant to *Lab. Code § 300* is not prohibited.

- The buyer waives any right of action against the seller or holder of the contract, or other person acting on the seller's or holder's behalf, for any illegal act committed in the collection of payments under the contract or in the repossession of the motor vehicle.

- The buyer executes a power of attorney appointing the seller or holder of the contract, or other person acting on the seller's or holder's behalf, as the buyer's agent in the collection of payments under the contract or in the repossession of the motor vehicle.

- The buyer relieves the seller from liability for any legal remedies that the buyer may have against the seller under the contract or under any separate instrument executed in connection with the contract.

- The seller or holder of the contract is given the right to commence an action on a contract under the provisions of the Rees-Levering Act in a county other than the county in which the contract was in fact signed by the buyer, the county in which the buyer resides at the commencement of the action, the county in which the buyer residedat the time the contract was entered into, or the county in which the motor vehicle purchased under the contract is permanently garaged.

[3] Lien Provisions

A conditional sale contract, or agreement between a seller and buyer made in connection with such a contract, may not provide for the inclusion of title to or a lien on any property other than [*Civ. Code § 2984.2(a)*]:

- The motor vehicle that is the subject matter of the sale, including any replacement of that motor vehicle, or accessories, accessions, or replacement of those accessories or accessions, or their proceeds.

- The proceeds of any insurance policies covering the motor vehicle that are required by the seller or the returned premiums of any such policies if the premiums for such policies are included in the amount financed.

- The proceeds of any credit insurance policies that the buyer purchases in connection with the motor vehicle conditional sale contract or the returned premiums of any such policies if the premiums for the policies are included in the amount financed.

- The proceeds and returned price of any service contract if the cost of the contract is included in the amount financed.

The restrictions in *Civ. Code § 2984.2(a)* on what property the seller may have title to or a lien on do not apply to any agreement that meets the requirements of *Civ. Code § 2982.5(b)* (relating to seller-arranged third-party loans) and otherwise complies with the Rees-Levering Act, nor do they apply to a secured transaction involving a mobile home sold prior to July 1, 1981 [*Civ. Code § 2984.2(b)*]. Any contract provision that violates *Civ. Code § 2984.2* is void [*Civ. Code § 2984.2(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 89.21 Addition of Insurance or Repair Charges to Contract

[1] Insurance Charges

[a] When Insurance Charges Are Authorized

If a buyer obligated under the terms of a conditional sale contract to maintain insurance on the vehicle fails to do so or requests that the holder maintain insurance, any amounts advanced by the holder to procure that insurance may be subject to a finance charge from the date of advance [*Civ. Code § 2982.8(a)*].

If, after 10 days from the date the holder gave or mailed the notice set forth in *[b], below*, the buyer has neither paid the amounts advanced in full nor notified the holder of his or her choice of the amortization options, the holder must fully amortize the amounts advanced on a secured basis during the term of the insurance [*Civ. Code § 2982.8(b)*].

[b] Buyer's Options for Method of Repayment

Money advanced for insurance may be secured as provided in the contract and as permitted by *Civ. Code § 2984.2* [*see* discussion in *§ 89.20[3], above*] if the holder notifies the buyer in writing of his or her option to repay those amounts in any one of the methods set forth in *Civ. Code § 2982.8(b)*, which provides for:

- Repayment in full within 10 days from the date of the giving or mailing of the notice;

- Full amortization during the term of the insurance;

- If offered by the holder, full amortization after the term of the conditional sale contract, payable in installments that do not exceed the average payment allocable to a monthly period under the contract;

- If offered by the holder, a combination of the second and third listed methods, above, so that there is some amortization during the term of the insurance, with the remainder of the amortization being accomplished after the term of the conditional sale contract, to be payable in installments that do not exceed the average payment allocable to a monthly period under the contract; or

- Any other amortization plan offered by the holder.

If the buyer neither pays in full the amounts advanced nor notifies the holder in writing of his or her choice regarding amortization options before the expiration of 10 days from the date of giving or mailing the notice by the holder, the holder may amortize the amounts advanced on a secured basis pursuant to the second listed method, or if offered by the holder as an option to the buyer, the third or fourth listed method.

The notice refered to above must state the amounts advanced by the holder and, with respect to each amortization plan, the amount of the additional finance charge, the sum of the amounts advanced and the additional finance charge, the number of installments required, the amount of each installment, and the date for payment of the installments [*Civ. Code § 2982.8(c)*]. The notice must also contain the following statement in contrasting red print in at least eight-point bold type [*Civ. Code § 2982.8(c)*]:

> **"WARNING -- IT IS YOUR RESPONSIBILITY UNDER CALIFORNIA LAW TO OBTAIN LIABILITY INSURANCE OR BE SUBJECT TO PENALTIES FOR VIOLATING SECTION 16020 OF THE VEHICLE CODE, WHICH MAY INCLUDE LOSS OF LICENSE OR A FINE. THE INSURANCE ACQUIRED BY THE LIENHOLDER DOES NOT PROVIDE LIABILITY COVERAGE AND DOES NOT SATISFY YOUR RESPONSIBILITY UNDER CALIFORNIA LAW."**

[2] Repair Charges

If, because of the buyer's default after execution of the contract, the holder advances money for repairs to or preservation of the motor vehicleor preservation of the holder's security interest therein, the advances may be subject to a finance charge from the date of advance and may be secured as permitted by *Civ. Code § 2984.2* [*Civ. Code § 2982.8(d)*].

[3] Maximum Insurance and Repair Charges Permitted

The maximum rate of finance charge that may be imposed on amounts advanced by the holder, subsequent to the execution of the contract, for insurance, repairs to or preservation of the motor vehicle, or preservation of the holder's security interest therein may not exceed the annual percentage rate disclosed pursuant to *Civ. Code § 2982* [*Civ. Code § 2982.8(e)*; *see* discussions in *§ 89.14[4]* and *§ 89.15*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoveragePropertyGeneral OverviewTransportation LawPrivate VehiclesGeneral OverviewContracts LawSales of GoodsForm, Formation & ReadjustmentGeneral OverviewBanking LawConsumer ProtectionState LawGeneral OverviewContracts LawTypes of ContractsInstallment Contracts

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§ 89.22 Repossession, Resale, and Acceleration of Maturity

[1] Permitted on Buyer's Default

The seller or holder may accelerate the maturity of any part or all of the amount due under a contract subject to the Rees-Levering Act or repossess the motor vehicle only if the buyer defaults on his or her obligations under the contract [*see Civ. Code § 2983.3(a)*].

An automobile dealer's repossession of a motor vehicle from a buyer constitutes a conversion unless the repossession is legally privileged. A dealer not holding a security interest [*Com. Code §§ 1201(b)(35), 2401*] in a sold vehicle is not the legal owner [*Veh. Code § 370*] and is unable to repossess it [*English v. Ralph Williams Ford (1971) 17 Cal. App. 3d 1038, 1046-1047, 95 Cal. Rptr. 501* ; *see also Veh. Code § 28*].

A person acting as a dealer, who was not licensed as a dealer as required by *Veh. Code § 11700 et seq.*, may not enforce any security interest or bring or maintain any action in law or equity to recover any money or property or obtain other relief from the purchaser of a vehicle in connection with a transaction in which the person was, at the time at the transaction, required to be licensed as a dealer [*Veh. Code § 11711.3*].

[2] Notices of Intent to Sell Repossessed Vehicle

[a] Rees-Levering Notice Requirements

Except when the motor vehicle has been seized by a public entity as described in *Civ. Code § 2983.3(b)(6)* (discussed under *[3], below*), notwithstanding any contract provision to the contrary, the seller or holder must give at least 15 days written notice of intent to dispose of a repossessed or surrendered motor vehicle to all persons liable on the contract. The notice must be personally served or sent by certified mail, return receipt requested, or by first-class mail, postage prepaid, to the last known address of each of these persons. If those persons are married to each other and, according to the most recent records of the seller or holder of the contract, reside at the same address, one notice addressed to both persons at that address is sufficient [*Civ. Code § 2983.2(a)*]. Unless the notice is given within 60 days of repossession and sets forth all of the information required by *Civ. Code § 2983.2(a)(1)-(9)*, the seller cannot recover a deficiency judgment [*Civ. Code § 2983.2(a)*].

To some extent *Civ. Code § 2983.3(a)* is ambiguous in describing the requirements for the content of the notice. For example, the notice is required to state "all the conditions precedent" to the buyer exercising the right to have the contract reinstated [*Civ. Code § 2983.3(a)(2)*]. The phrase "all the conditions precedent" does not, in itself, provide insight as to precisely what information regarding reinstatement must be provided. In a case in which a finance company, as holder of the contract, interpreted that phrase as requiring only general information, the requirement was construed by a court of appeal to mean that the seller or holder of the contract must provide sufficient information to defaulting buyers to "enable them to determine precisely what they must do in order to reinstate their contracts, including stating the amounts due, to whom they are due, the addresses and/or contact information for those parties, and any other specific actions the buyer must take" [*Juarez v. Arcadia Fin., Ltd. (2007) 152 Cal. App. 4th 889, 61 Cal. Rptr. 3d 382]* . Thus, a failure to interpret and apply an ambiguous requirement generously so as to afford fair and reasonable protection to buyers could amount to a violation of the Rees-Levering Act.

A violation of the Rees-Levering Act could make the seller or holder of the contract liable on a claim under *Bus. & Prof. Code § 17200 et seq.*, the unfair competition law. Moreover, an action based on such a claim could qualify as a class action. For example, in *Lewis v. Robinson Ford Sales, Inc.*, the core factual issue was whether the cash price of a vehicle being purchased included an over-allowance for a trade-in or leased vehicle, without adequate written disclosure. The resulting legal question to be resolved was whether this failure to disclose negative equity on a standard form contract violated Rees-Levering Act as a matter of statutory interpretation and contract construction. In this situation, the record supported the conclusion that plaintiff's proposed class definition was workable in light of common issues, because plaintiff's theory was that the mandatory disclosure required by the Rees-Levering Act regarding the purchase price of the subject vehicle is analogous to a strict liability provision, and individualized proof of reliance or financial harm to each affected customer therefore is not required for liability [*Lewis v. Robinson Ford Sales, Inc. (2007) 156 Cal. App. 4th 359, 370, 67 Cal. Rptr. 3d 347*]. For discussion of actions under the unfair competition law, see *Ch. 565, Unfair Competition, § 565.30* et seq.

[b] Commercial Code Notice Requirements

Notwithstanding *Civ. Code § 2983.2* [*see [a], above*] or any other provision of law, no deficiency judgment will lie in any event after any sale or other disposition of a motor vehicle unless the court has determined that the sale or other disposition was in conformity with the provisions of the Rees-Levering Act and the relevant provisions of Division 9 of the Commercial Code, including *Com. Code §§ 9610-9615* and *9626*. The determination may be made on an affidavit unless the court requires a hearing in the particular case [*Civ. Code § 2983.8(b)*; *see Bank of America v. Lallana (1998) 19 Cal. 4th 203, 208-210, 77 Cal. Rptr. 2d 910, 960 P.2d 1133* (secured creditor gave proper notice under Rees-Levering Act but failed to give debtor proper notice of public sale pursuant to former *Com. Code § 9504(3)* and so was precluded from obtaining deficiency judgment)].

Under those Commercial Code provisions, in the case of a consumer transaction, the debtor or any secondary obligor is liable for any deficiency only if (1) notice of the disposition of the collateral was duly given to the debtor and any secondary obligor [*see Com. Code §§ 9611-9614* (notice requirements)] and (2) the collection, enforcement, disposition, and acceptance by the secured party were conducted in good faith and in a commercially reasonable manner [*Com. Code § 9626(b)(2)(B), (C)*]. In any other case, if the debtor has placed in issue the secured party's compliance with notice requirements, then unless the secured party proves compliance, the debtor or any secondary obligor has only limited liability for any deficiency [*see Com. Code § 9626(a)*]. For further discussion, see Ch. 503, *Sales: Secured Transactions* .

For a complaint for a deficiency judgment alleging compliance with the notice requirements of both the Rees-Levering Act and Division 9 of the Commercial Code, see *§ 89.80*.

[c] Financial Code Notice Requirements

The Financial Code similarly requires that, despite any contract provision to the contrary, the finance lender ("licensee") must give at least 15 days written notice of intent to dispose of a repossessed or surrendered vehicle to all persons liable on the loan. The notice must be personally served or sent by certified mail, return receipt requested, or by first-class mail, postage prepaid, to the last known address of each of those persons. Except as otherwise provided in *Civ. Code § 2983.8*, those persons are liable for any deficiency after dispossession of the repossessed or surrendered vehicle only if notice is given within 60 days of repossession orsurrender and sets forth all information required by statute [*Fin. Code § 22328(b)*].

For a further discussion and a notice of intent to sell a repossessed vehicle, see California Legal Forms, Ch. 47, *Automotive Financing and Vehicle Leasing* (Matthew Bender).

[3] Requirements for Acceleration During 15-Day Notice Period

The seller or holder may not accelerate the maturity of any part or all of the contract prior to the expiration of 15 days from the date of the giving or mailing of the notice of intent to sell, discussed in *[2][a], above* [*see Civ. Code § 2983.2(a)(2)*; *Fin. Code § 22329(b)* (loans made by licensee under Finance Lenders Law)] unless the seller or holder reasonably and in good faith determines that any of the following are true [*Civ. Code § 2983.3(b)*]:

- The buyer or any other person liable on the contract by omission or commission intentionally provided false or misleading material information on his or her credit application.

- The buyer or any other person liable on the contract, or any permissive user in possession of the motor vehicle, concealed the motor vehicle or removed it from the state in order to avoid repossession.

- The buyer, any other person liable on the contract, or any permissive user in possession of the motor vehicle, has committed or threatens to commit acts of destruction, or failed to take care of the motor vehicle in a reasonable manner, so that the motor vehicle has become substantially impaired in value, or the buyer, any other person liable on the contract, or any nonoccasional permissive user in possession of the motor vehicle, has failed to take care of the motor vehicle in a reasonable manner, so that the motor vehicle may become substantially impaired in value.

- The buyer or any other person liable on the contract has committed, attempted to commit, or threatened to commit criminal acts of violence or bodily harm against an agent, employee, or officer of the seller or holder in connection with the seller's or holder's repossession of, or attempt to repossess, the motor vehicle.

- The buyer has knowingly used the motor vehicle, or has knowingly permitted it to be used, in connection with the commission of a criminal offense, other than an infraction, as a consequence of which the motor vehicle has been seized by a federal, state, or local agency or authority.

- The motor vehicle has been seized pursuant to *8 U.S.C. § 1324(b)*, *21 U.S.C. § 881*, *8 C.F.R. §§ 274.1-274.20*, *28 C.F.R. §§ 9.1-9.9*, or other federal, state, or local law, including regulations, and pursuant to that other law, the seizing authority, as a precondition to the return of the motor vehicle to the seller or holder, prohibits the return of the motor vehicle to the buyer or other person liable on the contract or any third person claiming the vehicle by or through them or otherwise effects or requires the termination of the property rights in the motor vehicle of the buyer or other person liable on the contract or claimants by or through them.

In the case of a contract or loan made by a licensed finance lender, the last three listed situations and the actions of a

permissive user referred to in the second and third listed situations, above, do not constitute grounds for denial of the right of reinstatement [*Fin. Code § 22329(c)*].

[4] Buyer's Right to Reinstate After Default

[a] When and in Whom Right Arises

If, after the buyer defaults on a contract, the seller or holder repossesses or voluntarily accepts surrender of the motor vehicle, any person liable on the contract has the right to reinstate the contract unless the seller or holder reasonably and in good faith determines that any of the things listed in *Civ. Code § 2983.3(b)(1)-(6)* (and set forth in *[3], above*) are true, or unless the seller or holder makes a good faith determination that the default is so substantial as to be incurable [*see Civ. Code §§ 2983.2(a)(2)*, 2893.3(d)(4); *Fin. Code § 22329(c), (e)(4)* (loans made by licensee under Finance Lenders Law)].

The right to reinstate the contract extends until the expiration of 15 days from the date the notice of intent to sell, discussed in *[2][a], above*, is mailed or given [*see Civ. Code § 2983.2(a)(2)*; *Fin. Code § 22329(c)* (loans made by licensee under Finance Lenders Law)]. The reinstatement period must be extended for 10 days if the buyer is entitled to reinstatement and makes a written request for the extension. The notice discussed in *[2][a], above*, must include a form for requesting an extension of the reinstatement period [*Civ. Code § 2983.2(a)(3), (6)*].

[b] Limit on Right to Reinstate

Exercise of the right to reinstate the contract is limited to once in any 12-month period and twice during the term of the contract [*Civ. Code § 2983.3(c)*; *Fin. Code § 22329(d)*].

[c] Manner of Reinstatement

The means by which the buyer may cure his or her default and thereby reinstate the contract depend on the nature of the default, as follows [*Civ. Code § 2983.3(d)*; *Fin. Code § 22329(e)*]:

- If the default is the result of the buyer's failure to make any payment due under the contract, the buyer or any other person liable on the contract must make the defaulted payments and pay any applicable delinquency charges.

- If the default is the result of the buyer's failure to keep and maintain the motor vehicle free from all encumbrances and liens of every kind, the buyer or any other person liable on the contract must either satisfy all such encumbrances and liens or, in the event the seller or holder has already done so, reimburse the seller or holder for all reasonable costs and expenses incurred.

- If the default is the result of the buyer's failure to keep and maintain insurance on the motor vehicle, the buyer or any other person liable on the contract must either obtain the insurance or, in the event the seller or holder has already done so, reimburse the seller or holder for premiums paid and all reasonable costs and expenses, including, but not limited to, any finance charge in connection with the premium permitted by *Civ. Code § 2982.8*, incurred.

- If the default is the result of the buyer's failure to perform any other obligation under the contract, the buyer or any other person liable under the contract must either cure the default or, if the seller or holder has performed the obligation, reimburse the seller or holder for all reasonable costs and expenses incurred. The buyer may not reinstate the contract if the seller or holder has made a good-faith determination that the default is so substantial as to be incurable.

In all the above cases, the buyer or any other person liable on the contract must reimburse the seller or holder for all reasonable and necessary collection and repossession costs and fees incurred, including attorney's fees and legal expenses incurred in retaking and holding the vehicle [*Civ. Code § 2983.3(d)(5)*]. Reimbursement by a borrower or other person liable on a loan made by a finance lender (licensee) is limited to (1) actual fees, in an amount not exceeding the amount specified by statute, paid in connection with the vehicle's repossession by a licensed repossession agency and (2) actual and necessary fees, in the amount specified by statute, paid to a licensee in conformity with *Gov. Code §§ 26751, 41612* [*Fin. Code § 22329(e)(5)*; *see Fin. Code § 22202(f)* (maximum fee amounts permitted to be reimbursed)].

[d] Consequences of Denial of Right to Reinstate

If the seller or holder denies the right to reinstatement under *Civ. Code § 2983.3(b)* or *(d)(4)*, the seller or holder has the burden of proving that the denial was justified in that it was reasonable and made in good faith. If the seller or holder fails to sustain the burden of proof, the seller or holder may not recover a deficiency; however, it will not be presumed that the buyer is entitled to damages by reason of the failure of the seller to sustain the burden of proof [*Civ. Code § 2983.3(e)*]. Similar provisions apply to prevent a deficiency if the loan is made by a licensed finance lender (formerly referred to as personal property brokers and consumer finance lenders), but those provisions do not specify that the failure of the seller or holder to sustain the burden of proof will not be presumed to entitle the buyer to damages [*Fin. Code § 22329(f)*].

The forfeiture of the right to a deficiency judgment is not the only penalty suffered by a seller who denies the right of reinstatement. A seller who denies the right to reinstate after repossession is liable to the buyer for conversion. If the seller refused to advise the buyer of the amount necessary to reinstate the contract, the buyer can bring the conversion action without tendering the amount owed [*Cerra v. Blackstone (1985) 172 Cal. App. 3d 604, 607-610, 218 Cal. Rptr. 15* (construing *Civ. Code §§ 2983.2* and *2983.3* to allow greater penalties on uncooperative sellers than simply a loss of the right to a deficiency judgment, and overruling *Zeff v. Harvey Smith Oldsmobile Co. (1957) 154 Cal. App. 2d 1, 4, 315 P.2d 371* , which was decided under prior law)]. For a buyer's complaint for damages for conversion, see *§ 89.62*.

[5] Accounting After Disposition of Repossessed Vehicle

The seller or holder must provide a written accounting regarding the disposition to any person liable on the contract within 45 days after that person's written request, if the request is made within one year after the disposition, unless the accounting is automatically provided to the buyer within 45 days after the disposition of a repossessed motor vehicle [*Civ. Code § 2983.2(b)*; *Fin. Code § 22328(c)*].

[6] Return of Surplus After Disposition of Repossessed Vehicle

In all sales of repossessed vehicles that result in a surplus, the seller or holder must furnish an accounting [*see* discussion under *[5], above*] whether or not it is requested by the buyer. The surplus must be returned to the buyer within 45 days after the sale is conducted [*Civ. Code § 2983.2(c)*; *Fin. Code § 22328(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesGeneral OverviewContracts LawSecured TransactionsDefaultForeclosure & RepossessionGeneral OverviewBanking LawConsumer ProtectionState LawGeneral OverviewContracts LawTypes of ContractsInstallment Contracts

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§ 89.23 Buyer's Remedies

[1] Refund of Down Payment

Any down payment made by a buyer to a seller pending execution of a conditional sale contract must be refunded to the buyer if the contract is not executed [*Civ. Code § 2982.7(a)*]. For a complaint for return of the down payment when the contract was never executed, see *§ 89.65*.

[2] Motor Vehicle Left as Down Payment

In the event of breach by the seller of a conditional sale contract under which the buyer has left his or her motor vehicle with the seller as down payment, if the vehicle is not for any reason returned to the buyer, the buyer may recover from the seller either the fair market value of the vehicle left as down payment, or its value as stated in the contract, whichever is greater. The recovery must be tendered to the buyer within five business days after the breach [*Civ. Code § 2982.7(b)*]. This remedy is nonexclusive and cumulative and does not preclude the buyer from pursuing any other remedy that he or she may have under the law [*Civ. Code § 2982.7(c)*].

[3] Rescission Based on Buyer's Inability to Obtain Third-Party Financing

If a buyer becomes obligated to purchase or receive possession of a motor vehicle under a contract or purchase order, the seller knows that the buyer intends to obtain financing from a third party without the seller's assistance, and the buyer is later unable to obtain that financing, the contract or purchase order must be deemed rescinded, and all consideration must be returned by the respective parties without demand [*Civ. Code § 2982.9*].

[4] Buyer's Election to Rescind for Uncorrected Violation of Act

[a] Rescission Against Seller

If the seller violates any provision of *Civ. Code § 2981.9* or *2982(a), (j)*, or *(k)* (governing contract disclosures, finance charges, and delinquency charges, and discussed in *§§ 89.14[4]*, *89.15*, and *89.16*, respectively), except as a result of an accidental or bona fide error in computation, the conditional sale contract is not enforceable, except by a bona fide

purchaser, assignee, or pledgee for value [*see [b], below*], until after the violation is corrected in accordance with *Civ. Code § 2984* [*Civ. Code § 2983*; *see* discussion regarding correction of violations at *§ 89.24*].

When a contract is not enforceable because of one of those violations, the buyer may either retain the vehicle and continue the contract in force or, if he or she does so with reasonable diligence, rescind the contract and return the motor vehicle [*Civ. Code § 2983.1*; *Katsaros v. O.E. Saugstad Co. (1961) 197 Cal. App. 2d 745, 748-749, 17 Cal. Rptr. 453* (holding that similarly worded provisions of former *Civ. Code § 2982(e)* required that buyer return vehicle to seller as prerequisite to bringing action to recover amount paid under the contract)].

[b] Rescission Against Holder

If a holder acquires a conditional sale contract without actual knowledge that the seller has violated *Civ. Code § 2981.9* or *Civ. Code § 2982(a), (j),* or *(k)* (governing contract disclosures, finance charges, and delinquency charges, and discussed in *§§ 89.14[4]*, *89.15*, and *89.16*, respectively), the contract is valid and enforceable by the holder. However, unless the violation is corrected as provided by *Civ. Code § 2984* (discussed in *§ 89.24*), the buyer is excused from the payment of the unpaid finance charge [*Civ. Code § 2983.1*].

If a holder acquires the conditional sale contract with knowledge of the violations by the seller, the contract is not enforceable except by a bona fide purchaser, assignee, or pledgee for value, unless the violation is corrected as provided in *Civ. Code § 2984*. If the violation is not corrected, the buyer may recover the amount specified in *Civ. Code § 2983* from the person to whom payment was made [*Civ. Code § 2983.1*; *see* discussion in *[c], below*].

When a contract is not enforceable because of uncorrected violations, the buyer may either retain the vehicle and continue the contract in force or, if he or she does so with reasonable diligence, rescind the contract and return the motor vehicle [*Civ. Code § 2983.1*; *Katsaros v. O.E. Saugstad Co. (1961) 197 Cal. App. 2d 745, 748-749, 17 Cal. Rptr. 453* (holding that similarly worded provisions of former *Civ. Code § 2982(e)* required that buyer return vehicle to seller as prerequisite to bringing action to recover amount paid under the contract)].

[c] Amount Recoverable on Rescission

If the buyer elects to rescind the contract and return the vehicle, he or she may recover from the seller the total amount paid pursuant to the contract by the buyer to the seller or to the seller's assignee [*Civ. Code §§ 2983, 2983.1*]. The value of the motor vehicle returned is credited as restitution by the buyer, without any decrease which results from the passage of time in the cash price of the motor vehicle as it appears on the conditional sale contract [*Civ. Code § 2983.1*]. In addition, if the amount paid consists of property traded in as all or part of the down payment, the buyer may recover either the agreed cash value of the property as it appears in the conditional sale contract or the fair market value of the property at the time the contract is made, whichever is greater [*Civ. Code § 2983*].

[5] Violation of Prepayment Provision

If the seller or holder of a conditional sale contract, except as the result of an accidental or bona fide error of computation, violates any provision of *Civ. Code § 2982(l)* (relating to prepayment of conditional sale contracts and refund credits and discussed in *§ 89.19, above*), the buyer may recover from that person three times the amount of any finance charge paid [*Civ. Code § 2983.1*].

[6] Punitive Damages

In an action for the breach of an obligation not arising from contract, when the defendant has been guilty of oppression, fraud, or malice [*see Civ. Code § 3294(c)* (definitions of "malice," "oppression," and "fraud")], the plaintiff may recover exemplary and punitive damages in addition to actual damages [*Civ. Code § 3294(a)*]. When a defendant's conduct in violating the provisions of the Rees-Levering Act shows evidence of fraud, oppression, or malice, an award of punitive

damages may be proper [*see* *Story v. Gateway Chevrolet Co. (1965) 237 Cal. App. 2d 705, 710-711, 47 Cal. Rptr. 267]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesGeneral OverviewContracts LawRemediesPunitive DamagesContracts LawRemediesRescission & RedhibitionGeneral OverviewBanking LawConsumer ProtectionState LawGeneral OverviewContracts LawTypes of ContractsInstallment Contracts

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§ 89.24 Correction of Statutory Violation

[1] Manner and Consequence of Correction

The holder may correct any failure to comply with any provision of the Rees-Levering Act by mailing or delivering a corrected copy of the contract to the buyer and either crediting against the indebtedness or returning to the buyer any amount improperly collected by the holder from the buyer. A willful violation may not be corrected, however, unless it appears on the face of the contract. A correction which will increase the amount of the contract balance or of any installment as it appears on the conditional sale contract is not effective unless the buyer agrees to the correction in writing [*Civ. Code § 2984*].

A violation corrected as described in the preceding paragraph may not be the basis of any recovery by the buyer or affect the enforceability of the contract by the holder and is not deemed to be a substantive change in the agreement of the parties [*Civ. Code § 2984*; *see also Civ. Code §§ 2983, 2983.1* (buyer's right to rescind contract for uncorrected violation, discussed in *§ 89.23[4]*)]. For an affirmative defense based on correction of a violation, see *§ 89.71*.

[2] Time Limits for Correction

If a violation of the Rees-Levering Act, whether willful or not, appears on the face of the conditional sale contract, the seller or holder must correct the violation within 30 days of the execution of the contract or within 20 days after the initial sale, assignment, or pledge of the contract, whichever is later. If the buyer notifies the holder in writing of any violation, it must be corrected within 10 days of the notice [*Civ. Code § 2984*]. The Rees-Levering Act sets no time limit for correction of a nonwillful violation that does not appear on the face of the contract, unless the buyer has given written notice of the violation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsBanking LawConsumer ProtectionState LawGeneral OverviewContracts LawTypes of ContractsInstallment Contracts

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§ 89.25 Assignee Liability

An assignee of the seller's right is subject to all equities and defenses of the buyer against the seller, notwithstanding any agreement to the contrary. However, the assignee's liability may not exceed the amount of the debt owing to the assignee at the time of the assignment [*Civ. Code § 2983.5(a)*]. The assignee has recourse against the seller to the extent of any liability incurred by the assignee pursuant to *Civ. Code § 2983.5*, regardless of whether the assignment was with or without recourse [*Civ. Code § 2983.5(b)*].

In consideration of the assignment of a conditional sale contract, on or after July 1, 2006, the seller may not receive or accept from the assignee any payment or credit based on any amount collected or received, or to be collected or received, under the contract as a finance charge except to the extent the payment or credit does not exceed the amount that would be computed in accordance with Regulation Z, whether or not Regulation Z applies to the contract, as the contract's finance charge using, for the purposes of the computation, an annual percentage rate equal to either (1) 2.5 percent for a contract having an original scheduled term of 60 monthly payments or less or (2) 2 percent for a contract having an original scheduled term of more than 60 monthly payments [*Civ. Code § 2982.10(a)*]. This does not apply, however, in any of the following circumstances [*Civ. Code § 2982.10(b)*]:

- An assignment that is with full recourse or under other terms requiring the seller to bear the entire risk of the buyer's financial performance.

- An assignment that is more than six months following the date of the conditional sale contract.

- Isolated instances resulting from bona fide errors that would otherwise constitute a violation of *Civ. Code § 2982.10(a)*, if the seller maintains reasonable procedures to guard against any errors and promptly, on notice of the error, remits to the assignee any consideration received in excess of that permitted by *Civ. Code § 2982.10(a)*.

- The assignment of a conditional sale contract involving the sale of a motorcycle, as defined in *Veh. Code § 400*.

- The assignment of a conditional sale contract involving the sale of an off-highway motor vehicle that is subject to identification under *Veh. Code § 38010*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesGeneral OverviewBanking LawConsumer ProtectionState LawGeneral OverviewContracts LawTypes of ContractsInstallment ContractsContracts LawSecured TransactionsInstallment ContractsAssignmentsContracts LawThird PartiesDelegation of Performance

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§ 89.26 Attorney's Fees and Costs

Reasonable attorney's fees and costs must be awarded to the prevailing party in any action on a contract or purchase order subject to the provisions of the Rees-Levering Act, regardless of whether the action is instituted by the seller, the holder, or the buyer [*Civ. Code § 2983.4*; *see Graciano v. Robinson Ford Sales, Inc. (2006) 144 Cal. App. 4th 140, 149-164, 50 Cal. Rptr. 3d 273* (how to determine which party has prevailed, and how to compute amount of fees to which that party is entitled); *Damian v. Tamondong (1998) 65 Cal. App. 4th 1115, 1129-1130, 77 Cal. Rptr. 2d 262* (defendant in deficiency action brought under Rees-Levering Act can be "prevailing party" for purposes of awarding attorney fees when, prior to trial, plaintiff has voluntarily dismissed underlying contract-based action without prejudice)]. For an award of attorney's fees to be deemed proper, the action need only involve a contract that is subject to the Rees-Levering Act; it need not be an action to enforce the provisions of the contract itself or of the act. Thus, attorney's fees may be awarded in an action to rescind a conditional sale contract subject to the Rees-Levering Act for breach of warranty or for fraud [*see Leaf v. Phil Rauch, Inc. (1975) 47 Cal. App. 3d 371, 377-379, 120 Cal. Rptr. 749* ; *Cobian v. Ordonez (1980) 163 Cal. Rptr. 126]* . On the other hand, even if there is a conditional sales contract subject to the Rees-Levering Act, an award of attorney's fees and costs under *Civ. Code § 2983.4* is not authorized to the prevailing party when there is no breach of duty under the Rees-Levering Act [*Brown v. West Covina Toyota (1994) 26 Cal. App. 4th 555, 565-566, 32 Cal. Rptr. 2d 85* ; *disapproved on other grounds in Murillo v. Fleetwood Enterprises, Inc. (1998) 17 Cal. 4th 985, 73 Cal. Rptr. 2d 682, 953 P.2d 858* (disapproving *Brown* to the extent it holds that *Civ. Code § 1794(d)* constitutes an "express" exception to general rule permitting a prevailing party, including a prevailing defendant, to recoup its costs of litigation)].

ILLUSTRATION:

Bar on Award After Voluntary Dismissal Is Not Imported Into *Civil Code Section 2983.4*. Plaintiff, the nominee of seller's assignee under a conditional sales contract subject to the Rees-Levering Act, brought an action for deficiency judgment after the assignee had repossessed and resold the vehicle. The contract had a one-sided attorney's fees clause, which authorized an award of attorney's fees *only* for seller (or its assignees) after buyer's default. Buyer's attorney spent approximately 54 hours defending the deficiency action, which plaintiff voluntarily dismissed without prejudice on the eve of trial. Defendant buyer thereafter moved for attorney's fees and costs under *Civ. Code § 2983.4* and *Code Civ. Proc. § 1033.5(a)(10)(B), (c)(5)*. The court denied the motion, adopting plaintiff's argument that the prohibition

> contained in *Civ. Code § 1717(b)(2)* applied to preclude an award of attorney's fees after a voluntary dismissal. Was that denial correct? No. The Legislature had several opportunities to make uniform the attorney fees provisions in *Civ. Code §§ 1717, 1811.1* (Unruh), and *2983.4* and never did. In line with rejection by other courts of attempts to import the *section 1717(b)(2)* definition of "prevailing party" into other statutes which provide for a fee award to the prevailing party, the court of appeal found it would undermine the Legislature's primary purpose in enacting *Civ. Code § 2983.4* to apply *Civ. Code § 1717(b)(2)* in a case initiated by an automobile dealer or its assignee. Whether a defendant buyer is the prevailing party after voluntary dismissal is a matter within the discretion of the trial court, which may involve questions of fact and is to be determined using a pragmatic approach [*Damian v. Tamondong (1998) 65 Cal. App. 4th 1115, 1123-1130, 77 Cal. Rptr. 2d 262]* .

If the defendant alleges in the answer that he or she tendered to the plaintiff the full amount to which plaintiff was entitled, and thereupon deposits in court the amount so tendered, and the allegation is subsequently found to be true, then the defendant is deemed to be the prevailing party [*Civ. Code § 2983.4*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewTransportation LawPrivate VehiclesGeneral OverviewBanking LawConsumer ProtectionState LawGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewContracts LawTypes of ContractsInstallment Contracts

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§ 89.27 Venue in Action on Contract Subject to Rees-Levering Act

[1] Where Action Is Proper

An action on a contract or purchase order under the provisions of the Rees-Levering Act must be tried in the county in which one of the following occurs or occurred [*Civ. Code § 2984.4(a)*]:

- The contract or purchase order was in fact signed by the buyer.
- The buyer resided at the time the contract or purchase order was entered into.
- The buyer resides at the commencement of the action.
- The motor vehicle purchased pursuant to the contract or purchase order is permanently garaged.

In any action involving multiple claims or causes of action, venue is proper in any of the above counties as long as there is at least one claim or cause of action arising from a contract subject to the provisions of the Rees-Levering Act [*Civ. Code § 2984.4(a)*].

[2] Affidavit Required

In any action on a contract or purchase order subject to the Rees-Levering Act, the plaintiff must either [*Civ. Code § 2984.4(c)*; *Code Civ. Proc. § 396a(a)*]:

- File concurrently with the complaint an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) stating facts showing that the action has been commenced in a county which is proper for trial of the action under *Civ. Code § 2984.4* [*see § 89.61*] or
- State these facts in a verified complaint [*see § 89.60*].

If the plaintiff fails to do so, no further proceedings may occur and the court must dismiss the action without prejudice,

on its own motion or on the motion of any party [*Civ. Code § 2984.4(c)*; *Code Civ. Proc. § 396a(a)*]. For an affidavit and further discussion of the venue provisions of the Rees-Levering Act, see *§ 89.61[1], [3] -[6]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueIndividual DefendantsTransportation LawPrivate VehiclesGeneral OverviewBanking LawConsumer ProtectionState LawGeneral OverviewContracts LawTypes of ContractsInstallment Contracts

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§ 89.28 Criminal Penalties

Any person who willfully violates any provision of the Rees-Levering Act is guilty of a misdemeanor [*Civ. Code § 2983.6*]. Persons convicted of a misdemeanor may be imprisoned in a county jail for a period not exceeding six months or fined an amount specified by statute, or both [*Penal Code § 19*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesGeneral OverviewBanking LawConsumer ProtectionState LawGeneral OverviewContracts LawTypes of ContractsInstallment ContractsCriminal Law & ProcedureSentencingFines

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§ 89.29 Debt Relief for Persons on Active Military Service

[1] In General

The federal Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*] provides for the temporary suspension of various legal proceedings, obligations, and liabilities for persons in military service [*see 50 U.S.C. App. § 502* (purpose of statute)]. The statute is applicable to all members of the uniformed services [*see 10 U.S.C. § 101(a)(5)* (definition)] during periods of military service [*see 50 U.S.C. § 511(1)-(3)*] and, in many cases, for 90 days after termination of a member's period of military service. The California counterpart to the federal legislation [*Mil. & Vet. Code § 400 et seq.*] is designed to fill certain gaps in the federal law in the wake of the events of September 11, 2001. The latter statute, many provisions of which are virtually identical to their federal counterparts, is designed to apply to military reservists and National Guard members who are called to active military service under specified circumstances and, in many cases, for limited periods of time [*see Mil. & Vet. Code § 400*].

These statutes can have important effects on automobile sales and financing arrangements for persons in military service. If the buyer entered military service after the obligation was incurred, or is a reservist or National Guard member who was called to active duty after entering into the obligation, these statutes will limit the rate of interest that can be charged while the buyer is on active military service [*see 50 U.S.C. App. § 527*; *Mil. & Vet. Code § 405*; *see also [2], below*], and significantly restrict the creditor's rights to enforce the obligation during that time [*see [3], [4], below*]. In addition, statutes of limitation are tolled during the period of active military service [*50 U.S.C. App. § 526*; *Mil. & Vet. Code § 404(a)*].

For more detailed discussion of the relief available under these statutes, the manner in which such relief can be requested, and the persons who qualify for relief, see *§ Ch. 501, Sales: Retail Installment Contracts, §§ 501.60 et seq., 501.300*.

[2] Interest Rate Ceiling

No obligation or liability bearing interest at a rate in excess of 6 percent per year incurred by a service member before that person's entry into service can bear interest during any part of the period of military service at a rate in excess of 6 percent per year unless, in the opinion of the court, on application by the obligee, the ability of the service member to

pay interest on that obligation or liability at a rate in excess of 6 percent per year is not materially affected by reason of that service, in which case the court may make whatever order is in its opinion just. "Interest" includes service charges, renewal charges, fees, or any other charges, except bona fide charges for insurance, in respect of any obligation or liability [*50 U.S.C. App. § 527(d)*; *Mil. & Vet. Code § 405*]. For additional discussion, and an affirmative defense against enforcement of an obligation bearing interest at a rate in excess of 6 percent, see *Ch. 501, Sales: Retail Installment Sales, § 501.302*.

[3] Rescission or Termination of Installment Contract; Repossession

Under both the Servicemembers Civil Relief Act and the comparable California legislation, after a service member enters military service, a contract by the service member for either the purchase of real or personal property (including a motor vehicle) or the lease or bailment of such property may not be rescinded or terminated for a breach of terms of the contract occurring before or during that person's military service, nor may the property be repossessed for such a breach without a court order [*50 U.S.C. App. § 532(a)*; *Mil. & Vet. Code § 407(a)*]. This relief applies only to a contract for which a deposit or installment has been paid by the servicemember before the servicemember enters military service [*50 U.S.C. App. § 532(b), Mil. & Vet. Code § 407(a)*]. This provision is designed to protect military service members against repossession, forfeiture of deposits and payments, and termination of installment contracts while they are in active military service. It compels the holder of the obligation to institute a court proceeding before any of these actions can be taken. In such an action, the court may order the repayment of all or part of any prior installments or deposits as a condition of terminating the contract and resuming possession. Instead the court may, on its own motion, or must on application by the service member when the service member's ability to comply with the contract is materially affected by military service, stay the proceedings for a period of time as, in the opinion of the court, justice and equity require; or the court may make other disposition as is equitable to preserve the interests of all parties [*50 U.S.C. App. § 532(c)*; *see Mil. & Vet. Code § 407(b)*].

There are criminal penalties for repossessing or attempting to repossess property in violation of these requirements. Violators are guilty of a misdemeanor [*50 U.S.C. App. § 532(b)(1)*; *Mil. & Vet. Code § 407(c)*]. In addition, repossession in violation of these provisions amounts to conversion [*Luke v. Mercantile Acceptance Corp. (1952) 111 Cal. App. 2d 431, 436-437, 244 P.2d 764]* .

For additional discussion of these requirements and a form for an application (motion) for a stay of proceedings on the ground that a person is on active military service, see *Ch. 501, Sales: Retail Installment Sales, § 501.303*.

[4] Enforcement of Security Interests

The federal Servicemembers Civil Relief Act and the comparable California law provisions also limit the enforcement of security interests in real or personal property. These protections are available only with respect to an obligation on real or personal property owned by a service member (1) that originated before the period of the service member's military service and (2) for which the service member is still obligated and (3) that is secured by a mortgage, trust deed, or other security in the nature of a mortgage [*50 U.S.C. App. § 533(a)*; *see Mil. & Vet. Code § 408(a)*]. Security agreements covering goods (such as motor vehicles) under Division 9 of the Commercial Code evidently are "in the nature of a mortgage" in this context.

A sale, foreclosure, or seizure of property for a breach of an obligation described above is not valid if made during, or within 90 days after, the period of the service member's military service, except if made either on a court order granted before the sale, foreclosure, or seizure, with a return made and approved by the court, or pursuant to an enforceable waiver agreement [*50 U.S.C. App. § 533(c)*; *Mil. & Vet. Code § 408(c)* ("pursuant to an agreement between the parties"); *see also 50 U.S.C. § 517* (waiver agreement)]. Violators are guilty of a misdemeanor [*50 U.S.C. App. § 533(d)(1)*; *Mil. & Vet. Code § 408(d)*].

In an action filed during, or within 90 days after, a service member's period of military service to enforce an obligation described above, the court may, after a hearing and on its own motion, or must, on application by a service member, when the service member's ability to comply with the obligation is materially affected by military service, either stay the proceedings for a period of time as justice and equity require or adjust the obligation to preserve the interests of all parties [*50 U.S.C. App. § 533(b)*; *see Mil. & Vet. Code § 408(b)*].

Secured transactions are discussed in detail in Ch. 503, *Sales: Secured Transactions* . For additional discussion of these requirements and a form for an application (motion) for a stay of enforcement of a security interest on the ground that a person is on active military service, see *Ch. 503, Sales: Secured Transactions, § 503.113*.

[5] General Relief from Contracts and Obligations

Debt relief of a more general nature is also available to qualifying military service members under *50 U.S.C. App. § 591* or *Mil. & Vet. Code § 409.3*, the general relief provisions of the federal and California statutes. In the case of contracts (such as motor vehicle purchase and financing contracts) not involving real property, these statutes basically authorize courts to grant a stay or extension of any obligation for a period equal to the period of military service [*see 50 U.S.C. App. § 591(b)*; *Mil. & Vet. Code § 409.3(a)*]. Relief under this provision is available only for pre-existing obligations; not those entered into during the period of military service. For detailed discussion of the general relief provisions of these statutes, and forms for seeking relief under these provisions, see *Ch. 501, Sales: Retail Installment Sales, § 501.300*.

[6] Late Charges and Other Penalties; Extension or Denial of Credit

When a court has granted a stay of the obligation, no fine or penalty may accrue during the period the terms and conditions of the stay are complied with by reason of failure to comply with the terms or conditions of the obligation in respect of which the stay was granted [*50 U.S.C. App. § 591(2)*; *Mil. & Vet. Code § 409.3(b)*]. This restriction extends to late charges that otherwise would be due on the obligation.

It is unlawful for any lender, creditor, credit reporting agency, or other person to take specified retaliatory actions relating to the extension or denial of credit, or the creditworthiness of a service member solely because the service member applied for or received a stay, postponement, or suspension in the payment of any tax, fine, penalty, insurance premium, or other civil obligation or liability [*see 50 U.S.C. App. § 518*; *Mil. & Vet. Code § 401(a)*]. For more detailed discussion of the anti-retaliation provisions of these statutes, and a form for a complaint against a party who has violated these prohibitions, see *Ch. 129, Consumer Credit Reporting, § 129.150*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesGeneral OverviewMilitary & Veterans LawServicemembersGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral OverviewBanking LawConsumer ProtectionState LawGeneral OverviewContracts LawTypes of ContractsInstallment Contracts

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§ 89.30 Claims Payable From Consumer Recovery Fund

[1] Consumer Motor Vehicle Recovery Corporation

The Consumer Motor Vehicle Recovery Corporation is a state-mandated, dealer-financed nonprofit mutual benefit corporation, the purpose of which is to maintain a recovery fund for providing payments to consumers on eligible claims [*Veh. Code §§ 4456.3, 12201(a),(b)*; *see generally Veh. Code § 12200 et seq.*]. A dealer may not charge or collect any separate fee or charge from a consumer to recoup any fee paid by the dealer to support the recovery corporation [*Veh. Code § 12201(c)*].

Both licensed dealers and licensed lessor-retailers are subject to *Veh. Code § 12200 et seq.* [*see Veh. Code § 12200(d)*], and "dealer" in this discussion includes a lessor-retailer as appropriate.

The operation of the recovery corporation is subject to examination and review by the Attorney General [*Veh. Code § 12213*; *see generally Veh. Code §§ 12214-12216*].

[2] Consumer's Claim

[a] Application for Payment of Claim

After January 1, 2009, a consumer may file an application with the recovery corporation for the payment of the consumer's eligible claim if the dealer or lessor-retailer against whom the claim is asserted has ceased selling and leasing motor vehicles to the general public or has become subject to a petition in bankruptcy [*Veh. Code §§ 12200(a), (c), 12204(a)*].

A consumer in this context is a person who either [*Veh. Code § 12200(b)*]:

- Purchased or leased, or became obligated to purchase or lease, a motor vehicle to be used primarily for personal, family, or household purposes, from a dealer or lessor-retailer licensed under the Vehicle Code; or

- Consigned for sale a motor vehicle that was used primarily for personal, family, or household purposes, to a dealer licensed under the Vehicle Code.

The recovery corporation is required to develop a notice fully explaining a consumer's right to make a claim for payment from the recovery fund, an application form, and an explanation of how to complete the application. The notice, application, and explanation must be in English and Spanish and must be provided to a person on request [*Veh. Code § 12205*]. A statute prescribes the content of the application and requires certain supporting evidence [*Veh. Code § 12204(b)-(g)*]. The recovery corporation may require reasonable additional information designed to facilitate the payment of eligible claims [*Veh. Code § 12204(h)*].

[b] Limitation Period for Submitting Claim

For any claim accruing after 2008, the consumer's application must be filed within one year of the date on which the dealer or lessor-retailer ceased selling or leasing motor vehicles to the general public or became subject to a petition in bankruptcy. For a claim accruing before 2009, the filing period is 18 months instead of one year [*Veh. Code § 12204(i)*]. A claim accruing before July 2, 2008, is not eligible for any payment pursuant to *Veh. Code § 12200 et seq.* [*Veh. Code § 12200(c)*].

[c] Eligible Claims

An eligible claim for payment by the recovery corporation is an unsatisfied claim for economic loss, not barred by the statutes of limitation, that accrued after July 1, 2008, as a result of the failure of a dealer or lessor-retailer licensed under the Vehicle Code to do any of the following [*Veh. Code § 12200(c)*]:

- Remit license or registration fees received or contractually obligated to be paid from a consumer to the Department of Motor Vehicles;

- Pay to the legal owner of a vehicle that was transferred as a trade-in by a consumer to the dealer or lessor-retailer the amount necessary to discharge the prior credit balance owed to the legal owner;

- Pay to the lessor of a vehicle, transferred as a trade-in by a consumer to the dealer or lessor-retailer, the amount the dealer or lessor-retailer agreed to pay to the lessor, if the vehicle was registered in accordance with *Veh. Code § 4453.5*; or

- Pay the amount specified in a consignment agreement to a consumer after the sale of a consigned vehicle.

[d] Maximum Allowable Payment

If the recovery corporation pays the claim, the amount of the payment may not exceed $35,000 for a transaction [*Veh. Code § 12208*].

[e] Procedure After Submission of Claim

Within 30 days of receiving an application, the recovery corporation must notify the consumer, in writing, that the application is complete or, if the application is incomplete, what additional information is required [*Veh. Code § 12206(a)*].

The recovery corporation must pay or deny the claim within 60 days after it notifies the consumer that the application is complete. A claim will be deemed granted unless the directors of the recovery corporation affirmatively vote to deny the claim [*Veh. Code § 12206(b)(1)*]. The recovery corporation, for good cause, may extend the 60-day period not more

than an additional 90 days, to investigate the accuracy of the application or evidence submitted by the dealer or lessor-retailer [*Veh. Code § 12206(b)(2)*].

[f] Denial of Claim

If the recovery corporation denies the claim, it must notify the consumer in writing of the denial, stating the legal and factual bases for the denial, and of the consumer's right to contest the denial in writing within 60 days or any longer period permitted by the recovery corporation. The subsequent procedure is as follows [*Veh. Code § 12209*]:

- If the consumer does not contest the denial within 60 days or an additional period reasonably requested by the consumer, the decision is final.

- The recovery corporation must act on the consumer's objection within 30 days.

- If the claim remains denied in whole or in part, the consumer may seek review in the superior court of any of the following counties in which the Attorney General maintains an office: Sacramento, San Francisco, Los Angeles, or San Diego.

- Judicial review is limited to the written record before the recovery corporation and any relevant evidence that could not have been previously presented to the recovery corporation despite the consumer's reasonable diligence.

- The superior court must affirm the decision of the recovery corporation if it is supported by substantial evidence.

[g] Consumer's Civil Action or Pursuit of Other Remedy

Nothing in *Veh. Code § 12200 et seq.* may be construed to require a consumer to bring a civil action to obtain recovery, file a bankruptcy claim, or file a crime report with a law enforcement agency, in order to obtain payment of an eligible claim submitted to the recovery corporation [*Veh. Code § 12204(b)(2)*].

Nothing in *Veh. Code § 12200 et seq.* is intended to limit or restrict actions, remedies, penalties, or procedures otherwise available pursuant to any other provision of law [*Veh. Code § 12217*].

After the consumer receives payment of a claim from the recovery corporation, the consumer may not seek to recover the paid amount from the dealer's bond required by *Veh. Code § 11710*. However, that does not affect any other rights the consumer may have as provided in *Veh. Code § 12217* [*Veh. Code § 12210(e)*].

[3] Dealer's Rights and Liabilities

[a] Notice to Dealer

Within 15 days of receiving a complete application by a consumer, the recovery corporation must serve a copy of the complete application and a prescribed notice on the dealer or lessor-retailer that is the subject of the claim [*Veh. Code § 12207*]. Within 15 days of paying or rejecting a claim, the recovery corporation must serve the dealer or lessor-retailer that is the subject of the claim with notice of the recovery corporation's disposition of the claim [*Veh. Code § 12210(d)*].

[b] Effect of Payment of Allowed Claim

Immediately on payment of a claim, the recovery corporation is subrogated to all of the consumer's rights against the dealer or lessor-retailer to the extent of the amount of the payment [*Veh. Code § 12210(a)*]. The recovery corporation

may bring an action to recover the amount of the payment plus interest at the rate of 10 percent per annum and will be entitled to recover costs and reasonable attorney's fees [*Veh. Code § 12210(b)*].

Within 10 days of paying the claim, the recovery corporation must inform the Department of Motor Vehicles of the payment of the claim, the amount of the payment, and the name and address of the dealer or lessor-retailer that is the subject of the claim. On request by the DMV, the recovery corporation must provide the Department with a copy of the claim application and other documents received by the recovery corporation in connection with the claim [*Veh. Code § 12210(c)*].

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§ 89.31 Alternative to Consumer Recovery Fund

In 2009 the Legislature observed that the Department of Motor Vehicles projected that the funding then available for the Consumer Recovery Fund (CRF) [*see § 89.30*] would not be sufficient to meet all of the demands expected to be made on it by car buyers with legitimate complaints. Even if sufficient funds could have been available, there would have been no authority to provide restitution from the CRF for consumers' losses involving prepaid products, warranties, or services, in the wake of dealer insolvencies, or to restore the credit of consumers whose credit was harmed by dealer insolvencies, or to compensate consumers for lost jobs, lost income, or other damages that consumers could suffer from lacking transportation after vehicles were repossessed because auto dealers failed to pay off liens as promised when dealers took vehicles in trade that were subject to liens [2009 Stats., ch. 556, § 2(h)]. The Legislature enacted *Veh. Code § 11709.4* as a means of dealing with those problems.

When a dealer purchases or obtains a vehicle in trade in a retail sale or lease transaction and the vehicle is subject to a prior credit or lease balance, all of the following apply [*Veh. Code § 11709.4(a)*].

- If the dealer agreed to pay a specified amount on the prior credit or lease balance owing on the vehicle purchased or obtained in trade, and the agreement to pay the specified amount is contained in a written agreement documenting the transaction, the dealer must tender the agreed amount as provided in the written agreement to the lessor registered in accordance with *Veh. Code § 4453.5*, or to the legal owner reflected on the ownership certificate, or to the designee of that lessor or legal owner of the vehicle purchased or obtained in trade, within 21 calendar days of purchasing or obtaining the vehicle in trade [*Veh. Code § 11709.4(a)(1)*].

- If the dealer agreed to pay a specified amount on the prior credit or lease balance owing on the vehicle purchased or obtained in trade, and the agreement to pay the specified amount is contained in a written agreement documenting the transaction, the dealer must tender the agreed amount as provided in the written agreement to the lessor registered in accordance with *Veh. Code § 4453.5*, or to the legal owner reflected on the ownership certificate, or to the designee of that lessor or legal owner of the vehicle purchased or obtained in trade, within 21 calendar days of purchasing or obtaining the vehicle in trade [*Veh. Code § 11709.4(a)(1)*].

- If the dealer did not set forth an agreement regarding payment of a prior credit or lease balance owed on the vehicle purchased or obtained in trade, in a written agreement documenting the transaction, the dealer must tender to the lessor registered in accordance with *Veh. Code § 4453.5*, or to the legal owner reflected on the ownership certificate, or to the designee of that lessor or legal owner of the vehicle purchased or obtained in trade, an amount necessary to discharge the prior credit or lease balance owing on the vehicle purchased or obtained in trade, within 21 calendar days of purchasing or obtaining the vehicle in trade [*Veh. Code § 11709.4(a)(2)*].

- The time period specified above, in either case, may be shortened if the dealer and consumer agree, in writing, to a shorter time period [*Veh. Code § 11709.4(a)(3)*].

- A dealer may not sell, consign for sale, or transfer any ownership interest in the vehicle purchased or obtained in trade until an amount necessary to discharge the prior credit or lease balance owing on the vehicle has been tendered to the lessor registered in accordance with *Veh. Code § 4453.5*, or to the legal owner reflected on the ownership certificate, or to the designee of that lessor or legal owner of the vehicle purchased or obtained in trade [*Veh. Code § 11709.4(a)(4)*].

A dealer does not violate *Veh. Code § 11709.4* if the dealer reasonably and in good faith gives notice of rescission of the contract promptly, but no later than 21 days after the date on which the vehicle was purchased or obtained in trade, and the contract thereafter is rescinded on any of the grounds in *Civ. Code § 1689* [*Veh. Code § 11709.4(b)*]

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[Reserved]

§§ 89.32[Reserved]

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§ 89.40 Related Matthew Bender Publications

For memoranda relating to the Rees-Levering Act, see California Points and Authorities, Ch. 206, *Sales* (Matthew Bender)

For discussion and forms relating to the Rees-Levering Act, see California Legal Forms, Ch. 47, *Automotive Financing and Vehicle Leasing* (Matthew Bender)

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§ 89.41 Federal Statutes

Truth in Lending Act. *15 U.S.C. § 1601 et seq.*

Servicemembers Civil Relief Act. *50 U.S.C. App. § 501 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Military & Veterans LawServicemembersGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral Overview

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8-89 California Forms of Pleading and Practice--Annotated § 89.42

§ 89.42 Federal Regulations

Truth in Lending Regulations (Regulation Z). *12 C.F.R. § 226.1 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionTruth in LendingGeneral Overview

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8-89 California Forms of Pleading and Practice--Annotated § 89.43

§ 89.43 State Statutes

[1] Actions and Liability

[a] Generally

Attorney's fees and costs. *Civ. Code § 2983.4*

Venue in action on contract subject to Rees-Levering Act. *Civ. Code § 2984.4*

Requirement of filing of affidavit or declaration of proper venue concurrently with filing of complaint. *Civ. Code § 2984.4*; *Code Civ. Proc. § 396a*

[b] Buyer's Remedies

Refund of payment made by buyer pending execution of conditional sale contract in event contract is not executed. *Civ. Code § 2982.7(a)*

Buyer's right to recover value of motor vehicle left as down payment in event of seller's breach of conditional sale contract. *Civ. Code § 2982.7(b), (c)*

Rescission of contract if buyer is unable to obtain third-party financing. *Civ. Code § 2982.9*

Contract violating *Civ. Code § 2981.9*, or *2982(a), (j)*, or *(k)* (governing contract disclosures, finance charges, and delinquency charges) is unenforceable; buyer may recover amount paid under contract. *Civ. Code § 2983*

Liability of and enforceability of contract by holder when seller has violated *Civ. Code § 2981.9*, or *2982(a), (j)*, or *(k)* (governing contract disclosures, finance charges, and delinquency charges). *Civ. Code § 2983.1*

Statutory penalty of three times amount of finance charge paid by buyer when seller or holder violates *Civ. Code § 2982(l)* (relating to prepayment of conditional sale contracts). *Civ. Code § 2983.1*

Assignee liability. *Civ. Code § 2983.5*

Deferment of payments on automobile debt subject to Rees-Levering Act, without penalties or added interest, while debtor is serving as member of U.S. military reserve or California national guard on active duty after February 9, 2005, as part of Iraq and Afghanistan conflicts. *Mil. & Vet. Code § 800 et seq.*

[c] Seller's Defenses

Exceptions for accidental or bona fide errors on computation. *Civ. Code §§ 2983, 2983.1*

Correction of failure to comply with Rees-Levering Act. *Civ. Code § 2984*

[2] Disclosures and Formalities

Notice to cosigner of liability on consumer credit contract. *Civ. Code § 1799.90 et seq.*

Execution, delivery, and required contents of conditional sale contract. *Civ. Code §§ 2981.9, 2982(a)*

Required notice regarding buyer's complaints about seller's unfair or deceptive practices or methods. *Civ. Code § 2982(h)*

Information required to be disclosed under Rees-Levering Act may be disclosed in any manner required or permitted by Regulation Z. *Civ. Code § 2982(m)*

Required notice informing buyer that there is no "cooling off" or other cancellation period for vehicle sales. *Civ. Code § 2982(r)*

Buyer must sign separate written financial disclosure document prior to execution of contract. *Civ. Code § 2982.2*

Required notice as to public liability and property damage insurance. *Civ. Code § 2984.1*

Acknowledgment of delivery of copy of contract; presumptions created thereby. *Civ. Code § 2984.3*

[3] Finance and Other Charges

Finance charges on contracts entered into on or after January 1, 1983, must be calculated on simple-interest basis if due date of final installment is more than 62 months after date of contract. *Civ. Code § 2981.7*

Contracts may not provide for finance charge determined in part by precomputed basis and in part by simple-interest basis. *Civ. Code § 2981.8*

Maximum permissible finance charges. *Civ. Code § 2982(j)*

Delinquency charges permitted. *Civ. Code § 2982(k)*

Charges for extension or deferral of payments. *Civ. Code § 2982.3*

Addition to contract balance of amounts advanced by holder for insurance, repairs to or preservation of motor vehicle, or preservation of holder's security interest therein. *Civ. Code § 2982.8*

Used vehicle contract cancellation option requirement and limit on charge to buyer. *Veh. Code § 11713.21*

[4] General Provisions

Definitions under Rees-Levering Act. *Civ. Code § 2981*

Provisions of Rees-Levering Act are not applicable to loan, or security therefor, between buyer and supervised financial organization other than seller. *Civ. Code § 2982.5(a)*

Restrictions on seller's assisting buyer in arranging third-party financing for part or all of down payment or any other payment on conditional sale contract. *Civ. Code § 2982.5(b), (c)*

Consideration for assignment of contract must conform to standards referenced to Regulation Z, even if Regulation Z does not apply. *Civ. Code § 2982.10*

Reinstatement, redemption, repossession, and resale, when loan is made by licensed finance lender, are governed not by *Civ. Code §§ 2983.2, 2983.3,* but by *Fin. Code § 22000 et seq.* (Finance Lenders Law). *Civ. Code §§ 2982.5(d)(3), 2983.2(d), 2983.3(f)*

Person acting as dealer without being duly licensed may not enforce any security interest or bring or maintain any action in law or equity to recover any money or property or obtain other relief from purchaser of vehicle in connection with transaction for which dealer license was required. *Veh. Code § 11711.3*

Criminal penalties for willful violations of Rees-Levering Act. *Civ. Code § 2983.6*

Restrictions on persons other than licensed dealers and registered owners selling or offering vehicles for sale. *Veh. Code §§ 12120, 12121*

[5] Prepayment

Buyer's right to prepay entire indebtedness in full without penalty and thereby obtain refund of unearned finance charge. *Civ. Code § 2982(l)*

[6] Repossession, Resale, and Acceleration of Maturity

Requirement of notice of intention to sell repossessed vehicle. *Civ. Code §§ 2983.2, 2983.8*; *Fin. Code § 22328(b)*

Accounting after disposition of repossessed vehicle. *Civ. Code § 2983.2(b), (c)*; *Fin. Code § 22328(c), (d)*

Restrictions on acceleration of maturity and repossession of vehicle; buyer's right to reinstate contract after default. *Civ. Code § 2983.3*; *Fin. Code § 22329*

[7] Restrictions on Conditional Sales Contracts

Inducing contract by offering rebate, discount, etc. contingent on happening of future event is prohibited. *Civ. Code § 2982.1*

Prohibited provisions in motor vehicle conditional sale contracts. *Civ. Code § 2983.7*

Restrictions on lien provisions in conditional sale contracts. *Civ. Code § 2984.2*

Suspension of certain civil obligations and liabilities of national guard and military reserve members during qualifying periods of military service after September 11, 2001. *Mil. & Vet. Code § 400 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral OverviewBanking LawConsumer ProtectionState LawGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewContracts LawTypes of ContractsInstallment Contracts

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8-89 California Forms of Pleading and Practice--Annotated § 89.44

§ 89.44 Decisions

[1] Attorney's Fees

Civ. Code § 1717(b)(2) is not imported into *Civ. Code § 2983.4*; whether defendant buyer is prevailing party after plaintiff/lender's voluntary dismissal is within discretion of trial court and is to be determined using a pragmatic approach. *Damian v. Tamondong (1998) 65 Cal. App. 4th 1115, 1123-1130, 77 Cal. Rptr. 2d 262*

Award of attorney's fees under *Civ. Code § 2983.4* is proper when action is on contract subject to Rees-Levering Act; *Civ. Code § 2983.4* does not require that action be one to enforce that contract. *Cobian v. Ordonez (1980) 163 Cal. Rptr. 126*

Prevailing party in action on contract subject to Rees-Levering Act is not to be denied attorney's fees solely because that party is represented by federally funded legal aid attorneys. *Winters v. Security Pacific Nat. Bank (1975) 49 Cal. App. 3d 510, 515-516, 122 Cal. Rptr. 619*

Action to rescind conditional sale contract for breach of warranty is action "on a contract" subject to the Rees-Levering Act; thus, prevailing party is entitled to reasonable attorney's fees under *Civ. Code § 2983.4*. *Leaf v. Phil Rauch, Inc. (1975) 47 Cal. App. 3d 371, 377-379, 120 Cal. Rptr. 749*

[2] Bona Fide Error

Trial court's refusal to consider defendant's evidence that finance overcharge was result of accidental or bona fide error of calculation was proper when defendant failed to plead such error as affirmative defense under *Civ. Code § 2983*. *Cobian v. Ordonez (1980) 103 Cal. App. 3d Supp. 22, 28 , 163 Cal. Rptr. 126*

[3] Punitive Damages

Award of punitive damages is proper when defendant was guilty of oppression and malice in violating various provisions of *Rees-Levering Act. Story v. Gateway Chevrolet Co. (1965) 237 Cal. App. 2d 705, 710-711, 47 Cal. Rptr. 267*

[4] Purpose of Rees-Levering Act

Purpose of disclosure requirements of *Civ. Code § 2982* is to protect purchasers of motor vehicles against excessive charges by requiring full disclosure of all items of costs. *Story v. Gateway Chevrolet Co. (1965) 237 Cal. App. 2d 705, 709, 47 Cal. Rptr. 267*

[5] Repossession, Reinstatement, Acceleration of Maturity, and Resale

To obtain deficiency judgment, secured creditor that sold defaulting debtor's repossessed car was required to comply with all provisions of Rees-Levering Act as well as relevant provisions in former Division 9 of Commercial Code (particularly former *Com. Code § 9504(3)* concerning notice of intent to dispose of collateral). *Bank of America v. Lallana (1998) 19 Cal. 4th 203, 210, 77 Cal. Rptr. 2d 910, 960 P.2d 1133*

Buyer who has been refused right of reinstatement after repossession has cause of action for conversion; if seller has not advised buyer of amount necessary to reinstate, buyer may commence conversion action without tendering balance owed. *Cerra v. Blackstone (1985) 172 Cal. App. 3d 604, 607-610, 218 Cal. Rptr. 15* (overruling *Zeff v. Harvey Smith Oldsmobile Co. (1957) 154 Cal. App. 2d 1, 4, 315 P.2d 371* , which was decided under prior law)

[6] Transactions Governed by Rees-Levering Act

Transaction in which dealer assists purchaser of vehicle by preparing loan paperwork and taking it to lending institution constitutes seller-assisted loan within authority of Rees-Levering Act. *Eldorado Bank v. Lytle (1983) 195 Cal. Rptr. 499*

Exemption from provisions of Rees-Levering Act provided by *Civ. Code § 2982.5(a)* for loans between buyer and supervised financial organizations is applicable only when loan is result of independent private negotiation between buyer and lender and not when third-party loan is arranged with seller's assistance. *Hernandez v. Atlantic Finance Co. (1980) 105 Cal. App. 3d 65, 77-80, 164 Cal. Rptr. 279*

Rees-Levering Act is applicable to certain transactions which are in form of lease, but are actually conditional sales; act is inapplicable when lease provides for total payments amounting to substantially less than value of automobile, or if lessee is not subject to detriment or liability for unforeseen depreciation. *Thomas v. Wright (1971) 21 Cal. App. 3d 921, 926-927, 98 Cal. Rptr. 874*

[7] Disclosures and Formalities

Seller's practice of inflating agreed value of trade-in vehicle in order to hide credit buyer's negative equity--that is, to hide fact that buyer owed more on pre-existing contract for trade-in vehicle than it was worth--and likewise inflating disclosed cash price so as to absorb phantom value added to trade-in vehicle, was in violation of *Civ. Code § 2982(a)(1)* and *(6)* requirements for disclosures as to cash price and trade-in value; injunction properly prohibited seller from including over-allowances on trade-in vehicles in cash price of vehicles being purchased in credit transactions. *Thompson v. 10,000 RV Sales, Inc. (2005) 130 Cal. App. 4th 950, 970, 974, 978, 31 Cal. Rptr. 3d 18*

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesGeneral OverviewContracts LawRemediesPunitive DamagesBanking LawConsumer ProtectionState LawGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewContracts LawTypes of ContractsInstallment Contracts

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§ 89.45 Attorney General Opinions

Installment sale of off-highway vehicle required to be registered or identified under Vehicle Code is subject to Rees-Levering Act; exempt vehicles are subject to Unruh Act (*Civ. Code § 1801 et seq.*). *71 Ops. Cal. Att'y Gen. 167 (1988)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 89.46 Law Reviews

Comment, "The Automobile Deficiency Balance in California: A Lender's Perspective of the Rees-Levering Motor Vehicle Sales and Finance Act," *11 Glendale L. Rev. 143 (1992)*

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[Reserved]

§§ 89.47[Reserved]

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PART IV. FORMS
A. Buyers' Forms

8-89 California Forms of Pleading and Practice--Annotated § 89.60

§ 89.60 Complaint for Restitution and Rescission of Conditional Sale Contract Based on Violation of Disclosure Requirements or Finance or Delinquency Charge Limitations [Civ. Code §§ 2983, 2983.1, 2983.4]--By Buyer of Motor Vehicle Against Seller or Holder

[1] FORM Complaint for Restitution and Rescission of Conditional Sale Contract Based on Violation of Disclosure Requirements or Finance or Delinquency Charge Limitations [Civ. Code §§ 2983, 2983.1, 2983.4]--By Buyer of Motor Vehicle Against Seller or Holder

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RESTITUTION,
_____ [*name*(*s*)],	)	COSTS, AND ATTORNEY'S FEES
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence of plaintiff*].

2. Defendant _____ [*name of seller*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California, with its principal office for the transaction of business in _____ County, California [*or allege other capacity and residence of defendant*], and _____ [authorized *or* licensed] to engage, and engaging, in business as a _____

[seller *or* lessor] of motor vehicles under conditional sale contracts.

[3. *If seller-assisted loan transaction is involved, add:* Defendant _____ (*name of lender*) is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California, with its principal office for the transaction of business in _____ County, California (*or allege other capacity and residence of defendant*) and _____ (authorized *or* licensed) to engage, and engaging, in business as a _____ (*specify, e.g.*, bank *or* finance company).]

[4. *If seller or lender has assigned the contract or note, and plaintiff needs to recover consideration from the assignee, add:* Defendant _____ (*name of assignee*) is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California, with its principal office for the transaction of business in _____ County, California (*or allege other capacity and residence of defendant*) and _____ (authorized *or* licensed) to engage, and engaging, in business as a _____ (*specify, e.g.*, bank *or* finance company).]

[*EITHER, if seller financed transaction under conditional sales contract*]

5. On or about _____ [*date*], in _____ [*city*], _____ County, California, plaintiff and defendant _____ [*name of seller*] entered into a written conditional sale contract, under which _____ [defendant agreed to sell and plaintiff agreed to buy *or* defendant agreed to lease to plaintiff] a _____ [*year and make of vehicle*] automobile. Pursuant to the contract, plaintiff received possession of the automobile on or about _____ [*date*], and _____ [*describe terms of contract which make it a conditional sale contract under Civ. Code § 2981(a), e.g.*, title was to remain in defendant until plaintiff had performed all conditions of the contract *or* defendant was given a lien on the automobile as security for the payment of the balance of the purchase price *or* plaintiff agreed to pay as compensation for lease of the automobile the sum of $_____, which is _____ (substantially equal to *or* in excess of) the aggregate value of the automobile and its accessories, and for _____ (no other *or* nominal) consideration has the option of becoming the owner of the automobile on full compliance with the terms of the contract]. Plaintiff _____ [purchased *or* leased] the automobile primarily for personal or family purposes. The contract was, and is, subject to the Rees-Levering Motor Vehicle Sales and Finance Act, *Civil Code Sections 2981-2984.4*. A copy of the contract is attached as Exhibit A and incorporated by reference.

[*OR, if seller assisted financing from lender who is defendant*]

5. On or about _____ [*date*], in _____ [*city*], _____ County, California, plaintiff and defendant _____ [*name of seller*] entered into a written contract, under which defendant agreed to sell and plaintiff agreed to buy a _____ [*year and make of vehicle*] automobile for the sum of $_____. A copy of the sale contract is attached as Exhibit A and incorporated by reference. In order to facilitate the sale of the above-described vehicle, defendant _____ [*name of seller*] arranged for plaintiff to obtain financing from defendant _____ [*name of lender*], by _____ [*specify manner in which execution of loan contract was arranged or assisted by seller, e.g.*, calling defendant _____ (*name of lender*) and stating that plaintiff wished to purchase an automobile from defendant _____ (*name of seller*), but needed to take out a loan to finance the transaction. Thereafter, an agent of defendant _____ (*name of seller*) drove plaintiff to defendant _____'s (*name of lender*) place of business and waited while plaintiff executed the loan contract]. As a result of defendant _____'s [*name of seller*] efforts, plaintiff and defendant _____ [*name of lender*] entered into a contract by which defendant agreed to lend plaintiff the sum of $_____ for the purchase of the above-described vehicle, and plaintiff agreed to repay this sum, plus a

finance charge. The loan contract further provided that _____ [*describe terms of contract which make it a conditional sale contract under Civ. Code § 2981(a), e.g.*, title was to be held by defendant _____ (*name of lender*) until plaintiff performed all conditions of the contract *or* defendant _____ (*name of lender*) was given a lien on the automobile as security for the payment of the loan balance]. A copy of the loan contract is attached Exhibit B and incorporated by reference. Plaintiff purchased the above-described automobile primarily for personal or family purposes. The above-described contracts were, and are, subject to the Rees-Levering Motor Vehicle Sales and Finance Act, *Civil Code Sections 2981-2984.4*.

[*CONTINUE*]

[6. *If the seller or lender has assigned the contract or note to a third party, add:* (Plaintiff is informed and believes and thereon alleges that) (O)n or about _____ [*date*], defendant _____ (*name of seller or lender*) assigned his/her/its rights under the above-described conditional sale contract to defendant _____ (*name of assignee*).]

7. Defendant(s) _____ [*name(s*)] [, and each of them,] violated *Civil Code Section 2982* _____ [(a) *or* (j) *or* (k)] in connection with the above-described conditional sale contract in that _____ [*allege facts showing a violation by seller of Civ. Code § 2982(a), (j), or (k), e.g.*, the contract does not disclose the dollar amount of the finance charge imposed by the contract *or* the contract provides for payment by plaintiff of a finance charge in the amount of $_____ over the period between _____ (*date*), and _____ (*date*), which exceeds the maximum finance charge permitted by law].

[8. *If seller or lender assigned the contract, allege that assignee was not a bona fide purchaser for value, e.g.*, Plaintiff is informed and believes and thereon alleges that defendant _____ (*name of assignee*) acquired the conditional sale contract with actual knowledge of the above-alleged violation(s) of Civil Code Section(s) _____ [*specify sections violated, as in previous paragraphs*] by defendant _____ (*name of seller or lender*).]

9. Pursuant to the _____ [conditional sale contract *or* sale and loan contracts], plaintiff has paid the sum of $_____ to defendant _____ [*name of seller*] [and the further sum of $_____ to defendant _____ (*name of lender or assignee*)]. [*If plaintiff traded in property as part of the down payment, add:* Plaintiff has also traded in _____ (*describe trade--in property*) as _____ (all *or* part) of the down payment under the contract. At the time the contract was entered into, the property traded in had a fair market value of $_____ and an agreed cash value of $_____, as appears in the attached contract.]

10. _____ [*Allege rescission of contract by plaintiff and offer to restore purchased vehicle to defendant, e.g.*, On or about _____ (*date*), plaintiff gave written notice to defendant(s) _____ (*name of seller and, if appropriate, of lender and/or assignee*) of rescission of the conditional sale contract (and loan contract), attached as Exhibit(s) A (and B), on the ground that it/they violated *Civil Code Section 2982* _____ ((a) *or* (j) *or* (k)). A copy of the notice of rescission is attached as Exhibit C and incorporated by reference. In that notice of rescission, plaintiff offered to restore to defendant _____ (*name of seller*) the motor vehicle purchased under the conditional sale contract on condition that defendant(s) (and each of them) likewise return to plaintiff the consideration furnished by plaintiff under the contract. Defendant(s)(, and each of them,) has/have failed and refused, and continues to fail and refuse, to return the consideration (or any part thereof) furnished by plaintiff].

[11. *If appropriate, allege:* (On or about _____ (*date*), plaintiff notified defendant(s)

_____ (*name(s)*)(, and each of them), in writing, of the violations(s) of Civil Code Section(s) _____ (*specify sections violated, as in previous paragraphs*) alleged above. A copy of the notice is attached as Exhibit D and incorporated by reference.) Defendant(s) (, and each of them,) _____ (has *or* have) failed and refused to correct the above-alleged violation(s) _____ (within 10 days of the written notice (of rescission) by plaintiff *or* within 30 days after the execution of the contract *or* within 20 days after the assignment of the contract to defendant _____ (*name of assignee*)), as required by *Civil Code Section 2984*.]

12. Because of the foregoing violation(s) of *Civil Code Section 2982* _____ [(a) *or* (j) *or* (k)], the above-described _____ [conditional sale contract *or* sale and loan contracts] _____ [is *or* are] unenforceable. Plaintiff is therefore entitled to recover from defendant(s) _____ [*name(s) of seller and, if appropriate, of lender*][, and each of them,] the total amount(s) paid by plaintiff pursuant to the contract(s), as alleged above [, and from defendant _____ (*name of assignee*) the sum of $_____, the amount paid to him/her/it after the contract was assigned].

[13. *If punitive damages are appropriate, add:* (Plaintiff is informed and believes and thereon alleges that) (D)efendant(s) committed the violations of Civil Code Section(s) _____ (*specify sections violated, as in previous paragraphs*) herein alleged in conscious disregard of the rights of plaintiff (and others) and were guilty of _____ (malice *and/or* oppression *and/or* fraud), in that _____ (*specify malicious, oppressive, or fraudulent conduct*). The conduct of defendant(s) warrants an assessment of punitive damages in an amount appropriate to punish defendant(s) and deter others from engaging in similar wrongful conduct.]

14. Under *Civil Code Section 2983.4*, plaintiff is entitled to reasonable attorney's fees and costs incurred and to be incurred in this action, in an amount to be determined by the court.

WHEREFORE, plaintiff prays judgment against defendant(s) [, and each of them,] as follows:

1. For the sum of $_____ [*include total amount paid by plaintiff, including, if appropriate, amount that is the greater of the estimated cash value or fair market value of trade-in*] [from defendant(s) _____ (*name(s) of seller and, if appropriate, of lender*)] [, and each of them].

[2. For the sum of $_____ from defendant _____ (*name of assignee*).]

[3. For exemplary and punitive damages.]

4. For reasonable attorney's fees in an amount to be determined by the court.

5. For costs of suit herein incurred.

6. For other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The complaint in *[1], above*, is for use by a buyer in an action for rescission and restitution to recover the amount paid by that buyer to the seller (and to any lender or assignee) under a conditional sale contract that is unenforceable because it violates the disclosure requirements of *Civ. Code § 2982(a)* or the finance or delinquency charge limitations of *Civ. Code § 2982(j)* or *(k)* [*see Civ. Code §§ 2983, 2983.1*, discussed in *§ 89.23[4]*]. *Civ. Code §§ 2983, 2983.1* also entitle the buyer to rescind for a violation of *Civ. Code § 2981.9*, relating to execution and delivery of the contract, and discussed in *§ 89.14[1]* and *[2]*]. The allegations of the complaint may also be modified for use by the buyer in an answer and cross complaint when the seller brings an action to recover amounts allegedly due under the contract.

If the failure to disclose certain information in a conditional sale contract also constitutes a violation of the federal Truth in Lending Act [*15 U.S.C. § 1601 et seq.*], the form should be combined with a cause of action under the federal act. For a discussion and forms relating to the Truth in Lending Act, see Ch. 501, *Sales: Retail Installment Sales* .

[3] Allegations

The complaint in *[1], above* alleges the following:

- The capacity and residence of the parties (Paragraphs 1-4).

- The execution of a conditional sale contract or seller-assisted loan contract that is subject to the Rees-Levering Act (Paragraph 5) [*see Civ. Code § 2981(a), (k)*; *Hernandez v. Atlantic Finance Co. (1980) 105 Cal. App. 3d 65, 75-80, 164 Cal. Rptr. 279* ; *see also Civ. Code § 2982.5(d)* (apparently limiting effect of *Hernandez* regarding seller-assisted financing)].

- If appropriate, the assignment of the contract by the seller or lender (Paragraph 6).

- The violation by defendant(s) of *Civ. Code § 2982(a), (j)*, or *(k)* (Paragraph 7) [*Civ. Code § 2983*].

- If contract was assigned, actual knowledge by the assignee of the violation(s) (Paragraph 8) [*see Civ. Code § 2983.1*].

- The amount paid by plaintiff under the contract and the value of any property traded in by plaintiff as all or part of the down payment (Paragraph 9) [*see Civ. Code §§ 2983, 2983.1*].

- Plaintiff's rescission of the contract and offer to restore to defendant seller the automobile purchased under the contract (Paragraph 10) [*see Civ. Code §§ 2983, 2983.1*; *Katsaros v. O.E. Saugstad Co. (1961) 197 Cal. App. 2d 745, 749, 17 Cal. Rptr. 453* (surrender of motor vehicle is prerequisite to recovery of amount paid under conditional sale contract that violates *Civ. Code § 2982*)].

- Defendant's(s') failure to correct the error in accordance with *Civ. Code § 2984* (Paragraph 11) [*see Civ. Code § 2983* and discussion in *[4], below*].

- Plaintiff's right to recover the consideration furnished under the contract (Paragraph 12) [*Civ. Code §§ 2983, 2983.1*].

- If appropriate, plaintiff's right to punitive damages (Paragraph 13) [*see Civ. Code § 3294(a)*; *Story v. Gateway Chevrolet Co. (1965) 237 Cal. App. 2d 705, 710-711, 47 Cal. Rptr. 267]* .

- Plaintiff's right to attorney's fees and costs (Paragraph 14) [*Civ. Code § 2983.4*; *see § 89.26*].

[4] Failure to Correct Error

The Rees-Levering Act does not clearly indicate whether or not correction of a statutory violation under *Civ. Code § 2984* is an affirmative defense that the defendant seller must plead and prove, or whether failure to correct is a matter that the plaintiff buyer must plead and prove as part of his or her cause of action. *Civ. Code §§ 2983* and *2983.1* appear to make the buyer's recovery contingent on the failure of the seller or assignee to correct, thus implying that the buyer must plead this in the complaint [*see* Paragraph 11].

Nevertheless, although there is no reported decision directly on point, one court has held that the existence of bona fide error, which is another limitation on seller and holder liability contained in *Civ. Code §§ 2983* and *2983.1*, is a matter of affirmative defense which the defendant seller must plead and prove [*Cobian v. Ordonez (1980) 163 Cal. Rptr. 126* ; *see* discussion in *§ 89.70[3]*]. Reasoning by analogy, a court might hold that correction of statutory violation is also an affirmative defense that the seller or holder must plead and prove. For an affirmative defense based on correction of a statutory violation pursuant to *Civ. Code § 2984*, see *§ 89.71[1]*.

[5] Verification or Accompanying Affidavit Required

This complaint need not be verified unless the plaintiff, in lieu of concurrently filing a separate affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) showing that the action is being commenced in a proper place for the trial of the action [for a form, *see § 89.61*], alleges facts in the complaint showing that the action has been filed in a proper place for trial of the action under *Civ. Code § 2984.4* [*see Civ. Code § 2984.4(c)*; *Code Civ. Proc. § 396a(a)*].

Although verification of this complaint ordinarily is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[6] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "immediately below the character of the action or proceeding")].

An action on a contract or purchase order under the provisions of the Rees-Levering Act must be tried in the county in which one of the following occurs or occurred [*Civ. Code § 2984.4(a)*]:

- The contract or purchase order was in fact signed by the buyer.
- The buyer resided at the time the contract or purchase order was entered into.
- The buyer resides at the commencement of the action.
- The motor vehicle purchased pursuant to the contract or purchase order is permanently garaged.

In any action involving multiple claims or causes of action, venue is proper in any of the above counties as long as there is at least one claim or cause of action arising from a contract subject to the provisions of the Rees-Levering Act [*Civ. Code § 2984.4(a)*].

[7] Serving Defendant Retailer That Has Moved Its Place of Business

A lessor-retailer of automobiles who has closed its business without informing the Department of Motor Vehicles of another address where service of process may be made can be served by registered mail at its former place of business [*Veh. Code § 11610(c)*]. A dealer, manufacturer, remanufacturer, distributor, or transporter of automobiles who has closed its business without informing the DMV of another address where service of process may be made can be served by registered mail at its former place of business or at any other address of record [*Veh. Code § 11712(c)*]. A currently or previously licensed automobile salesperson who has not informed the DMV of his or her current address may be served by registered mail at his or her last residence address filed with the DMV [*Veh. Code § 11812(d)*].

[8] Cross References

For alternative allegations as to capacity and residence of parties, see Ch. 20, *Allegations Commonly Used*

For discussion and forms relating to jurisdiction, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For discussion and forms relating to the federal Truth in Lending Act, see Ch. 501, *Sales: Retail Installment Sales*

For alternative forms for prayers and verification, see Ch. 420, *Prayers* and Ch. 572, *Verification* , respectively

For discussion and forms relating to rescission generally, see Ch. 490, *Rescission and Restitution*

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8-89 California Forms of Pleading and Practice--Annotated § 89.61

§ 89.61 Declaration of Proper Venue to Be Filed With Complaint in Action Based on Conditional Sale Contract [Civ. Code § 2984.4; Code Civ. Proc. § 396a]

[1] FORM Declaration of Proper Venue to Be Filed With Complaint in Action Based on Conditional Sale Contract [Civ. Code § 2984.4; Code Civ. Proc. § 396a]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DECLARATION OF _____ [*name*]
Defendant.	)	
	)	
	)	

_____

I, _____ [*name*], declare:

1. I am the plaintiff in the above-entitled action, which is based on a conditional sale contract, subject to the provisions of *Civil Code Section 2984.4*.

2. _____ [*Set forth facts showing that action is being commenced in a county in which the contract was in fact signed by the buyer, in which the buyer resided at the time the contract was entered into, in which the buyer resides at the commencement of the action, or in which the motor vehicle purchased pursuant to the contract is permanently garaged*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in *[1], above*, is a declaration of proper venue for an action on a contract or purchase order subject to the provisions of the Rees-Levering Act. It is required to be filed concurrently with the complaint in that action [*see Civ. Code § 2984.4(c)*; *Code Civ. Proc. § 396a(a)*; for a form in this type of complaint, *see § 89.60*].

[3] Venue

An action on a contract or purchase order under the provisions of the Rees-Levering Act must be tried in the county in which one of the following occurred or occurs [*Civ. Code § 2984.4(a)*]:

- The contract or purchase order was in fact signed by the buyer.
- The buyer resided at the time the contract or purchase order was entered into.
- The buyer resides at the commencement of the action.
- The motor vehicle purchased pursuant to the contract or purchase order is permanently garaged.

In any action involving multiple claims or causes of action, venue is proper in the foregoing counties if at least one claim or cause of action arises from a contract subject to the Rees-Levering Act [*Civ. Code § 2984.4(a)*].

[4] Filing of Affidavit or Declaration Required

In any action subject to the provisions of the Rees-Levering Act, the plaintiff must file with the complaint an affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) stating facts showing that the action has been commenced in a county that is proper under *Civ. Code § 2984.4* [*see [3], above*]. In lieu of filing a separate affidavit or declaration, the plaintiff may allege these facts in a verified complaint, but may not allege them on information and belief. If an affidavit or declaration is filed with the complaint, a copy of the affidavit or declaration must be served with the summons [*Civ. Code § 2984.4(c)*; *Code Civ. Proc. § 396a(a)*].

[5] Consequences of Failure to File Affidavit

If a plaintiff fails to file the affidavit or declaration or state facts showing proper venue in a verified complaint as required by *Civ. Code § 2984.4*, no further proceedings may occur and the court must, on its own motion or the motion of any party, dismiss the action without prejudice. The court may, however, on terms that are just, permit the affidavit or declaration to be filed subsequent to the filing of the complaint. In that case, a copy of the affidavit or declaration must be served on the defendant, and the time to answer or otherwise plead commences at the time of that service [*Civ. Code § 2984.4(c)*; *Code Civ. Proc. § 396a(a)*].

[6] Commencement of Action in Improper Court

If it appears from the complaint, affidavit, or declaration that any limited civil case subject to *Civ. Code § 2984.4* has been commenced in a court which is not proper for the trial of the action under *Civ. Code § 2984.4(a)*, the court in which the action has been commenced must transfer it to a proper court, on its own motion or on motion of the defendant unless the defendant consents, in writing or in open court, to keeping the action in the court in which it was

commenced. If the defendant consents in open court, the consent must be entered in the minutes or docket of the court. Notwithstanding *Civ. Code § 2983.7(f)* (contract may not allow seller to commence action in county other than one specified in statute), discussedin *§ 89.20[2]*, that consent may be given by a defendant who is represented by counsel at the time the consent is given [*Code Civ. Proc. § 396a(b)*].

If an action is ordered transferred under the above provisions and summons has been served prior to the filing of the action in the new court, the time for any defendant so served who has not appeared in the action to answer or otherwise plead commences at service on that defendant of written notice of the filing in the court to which the action was transferred [*Code Civ. Proc. § 396a(c)*].

[7] Cross References

For forms for affidavits, see Ch. 15, *Affidavits, Certificates, and Declarations*

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8-89 California Forms of Pleading and Practice--Annotated § 89.62

§ 89.62 Complaint for Damages for Conversion Based on Denial of Right to Reinstate Conditional Sales Contract After Repossession [Civ. Code § 2983.3(b)-(e)]

[1] FORM Complaint for Damages for Conversion Based on Denial of Right to Reinstate Conditional Sales Contract After Repossession [Civ. Code § 2983.3(b)-(e)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Conversion)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

[1. *If joined with causes of action on the contract, capacity and residence of plaintiff. See § 89.60[1], Paragraph 1.*]

2. [*Defendant's capacity and residence. See § 89.60[1], Paragraph 2 or 3, and/or 4.*]

3. [*Execution of conditional sale contract or seller-assisted loan subject to the Rees-Levering Act. See § 89.60[1], Paragraph 5.*]

[4. *Assignment of contract by seller, if appropriate. See § 89.60[1], Paragraph 6.*]

5. [*Payments made by plaintiff under the contract and/or loan. See § 89.60[1], Paragraph 9.*]

6. Plaintiff failed to _____ [*describe default, e.g.,* make _____ (the installment payment due _____, (*date*) *or* the _____ (*number of payments missed*) installment payments due from _____, (*date*) through _____ (*date*)].

7. On _____ [*date*], defendant took the motor vehicle from plaintiff's possession.

[*EITHER, if plaintiff has not been informed of the amount necessary to reinstate the contract or loan*]

8. On or about _____ [*date*], _____ [plaintiff *or* _____ (*name and capacity of cosigner or other person liable on the contract/loan*)] demanded that defendant advise him/her of the amount required to be paid [or any other act required to be done] to reinstate the _____ [contract *or* loan] in order that plaintiff might exercise his/her right to reinstatement under *Civil Code Section 2983.3*. [A copy of the written demand for notification of the amount necessary to reinstate is attached as Exhibit B and incorporated by reference.]

9. Defendant has failed and refused, and continues to fail and refuse, to advise plaintiff [or _____ (*name of other person who demanded to know amount necessary to reinstate*)] of the amount that must be paid or any other act that must be done to reinstate the _____ [contract *or* loan] as required by *Civil Code Sections 2983.2* and *2983.3*. Plaintiff is entitled to reinstate the _____ [contract *or* loan] because none of the exceptions described in *Civil Code Section 2983.3(b)* or *(d)(4)* apply, and plaintiff's default consists only of _____ [*specify, e.g.,* the failure to pay money].

[*OR, if defendant has refused to accept or credit tender of the amount necessary to reinstate*]

8. On _____ [*date*], defendant notified plaintiff [in writing] that the sum of $_____ [plus additional delinquency charges of $_____ (per _____ (*specify interval, e.g.,* week) from and after _____ (*date*),)] would be necessary to reinstate the _____ [contract *or* loan].

9. On _____ [*date*], plaintiff _____ [*describe tender, e. g.,* delivered to defendant's place of business during normal business hours a certified check for $_____] to reinstate the _____ [contract *or* loan].

10. Defendant has failed and refused, and continues to fail and refuse, to [accept that check or] apply the check to reinstatement of plaintiff's _____ [contract *or* loan] as required by *Civil Code Sections 2983.2* and *2983.3*. Plaintiff is entitled to reinstate the _____ [contract *or* loan] because none of the exceptions described in *Civil Code Section 2983.3(b)* or *(d)(4)* apply, and plaintiff's default consists only of _____ [*specify, e.g.,* the failure to pay money]. [On _____ (*date*), defendant returned the check to plaintiff.]

[*CONTINUE*]

11. On or about _____ (*date*), plaintiff [returned the check to defendant and] demanded that defendant [apply the check to reinstate the _____ (contract *or* loan) and] immediately return the motor vehicle to plaintiff. Defendant failed and refused, and continues to fail and refuse, [to apply the check to reinstate the _____ (contract *or* loan) and] to return the motor vehicle to plaintiff and has converted the motor vehicle to his/her/its own use. [A copy of plaintiff's written demand for return of the motor vehicle is attached as Exhibit _____ (B *or* C) and incorporated by reference.] [A copy of defendant's written refusal to return the

motor vehicle is attached as Exhibit _____ (C *or* D) and incorporated by reference.]

12. At all times from and after _____ [*date defendant refused to notify plaintiff of balance owed or date plaintiff tendered reinstatement*], plaintiff was, and still is, entitled to possession of the motor vehicle.

[*EITHER, if seeking damages based on value of the vehicle plus interest from date of conversion*]

13. On or about _____ [*date*], the motor vehicle had a value of $_____.

[*OR, if seeking alternative damages for natural, foreseeable, and proximately caused losses*]

13. As a proximate result of defendant's conversion, plaintiff _____ [*allege injuries suffered that are the natural, reasonable, and proximate results of the conversion*], all to plaintiff's damage in the sum of $_____.

[*CONTINUE*]

[14. Between the time of defendant's conversion of the motor vehicle to his/her/its own use and the filing of this action, plaintiff _____ (*describe time and money expended in pursuit of the vehicle*), all to plaintiffs further damages in the sum of $_____.]

[15. *Allege basis for punitive damages, if appropriate. See § 89.60[1], Paragraph 13.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

[*EITHER*]

1. For the value of the vehicle in the sum of $_____;

2. For interest at the legal rate on the foregoing sum pursuant to *Civil Code Section 3336*, from and after _____ [*date*];

[*OR*]

1. For damages for the proximate and foreseeable loss resulting from defendant's conversion, the sum of $_____;

[*CONTINUE*]

[3. For damages for the time and money properly expended in pursuit of the converted property;]

[4. For punitive and exemplary damages;]

5. For costs of suit incurred herein;

6. For other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 89.60[1], [5], and [6]*.]

[2] Use of Form

The complaint in *[1], above*, is for use by a buyer of a vehicle under a conditional sale contract or seller-assisted loan subject to the Rees-Levering Act to bring an action for damages for conversion when the vehicle has been repossessed, the buyer has been denied the right to reinstate the contract or loan, and the vehicle has not been returned to the buyer [*see Civ. Code §§ 2983.2, 2983.3(b)-(d), 3336*].

Note that a buyer is entitled to reinstate only once in any 12-month period and only twice during the term of the contract [*Civ. Code § 2983.3(c)*].

This complaint assumes a situation in which the only default consists of the failure to make timely payments of principal and interest, but it may be modified to cover other types of default [*see Civ. Code § 2983.3(d)(2)-(5)* (manner of reinstatement of defaults other than payment of installment); *but see Civ. Code § 2983.3(b)(1)-(6), (d)(4)* (situations in which buyer may and may not be entitled to reinstate); for discussion, *see § 89.22[4]*]. The right of a buyer denied reinstatement to sue for damages for conversion was established in *Cerra v. Blackstone (1985) 172 Cal. App. 3d 604, 607-610, 218 Cal. Rptr. 15* .

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[3] Allegations

The complaint in *[1], above*, alleges the following:

- The capacity and residence of defendant (Paragraphs 2, 4).
- Formation of a conditional sale or loan contract subject to the Rees-Levering Act and plaintiff's part performance under it (Paragraphs 3, 5).
- Plaintiff's default (Paragraph 6).
- Defendant's repossession of the vehicle (Paragraph 7).
- Either:
    - Defendant's failure to notify plaintiff of the amount necessary to reinstate and that

plaintiff has the right to reinstate (first alternative Paragraphs 8 and 9) [*see Cerra v. Blackstone (1985) 172 Cal. App. 3d 604, 607-610, 218 Cal. Rptr. 15* (if seller refused to advise buyer of amount necessary to reinstate contract, buyer can bring conversion action without tendering amount owed)]; or

- Defendant's notification, and plaintiff's tender, of the amount necessary to reinstate and defendant's refusal to accept or apply the amount tendered, and that plaintiff has the right to reinstate (second alternative Paragraphs 8 and 9 and Paragraph 10) [*see Civ. Code § 2983.3(b)(1)-(6), (d)(4)* (situations in which buyer may not be entitled to reinstate), discussed in *§ 89.22[3]* and *[4]*].

- Plaintiff's demand for return of the vehicle (Paragraph 11) [*see Flennaugh v. Heinrich (1948) 89 Cal. App. 2d 214, 222, 200 P.2d 580* (allegation of demand for return of possession is necessary when defendant originally acquired possession lawfully)].

- Plaintiff's entitlement to possession (Paragraph 12).

- The detriment and damages suffered by plaintiff (Paragraphs 13-15) [*see Civ. Code §§ 3294* (punitive damages), 3336 (measure of damages for conversion); *Franklin v. Municipal Court (1972) 26 Cal. App. 3d 884, 901, 103 Cal. Rptr. 354* (plaintiff's interest in property, conversion, and damages are allegations necessary to state cause of action for conversion); *Ferraro v. Pacific Fin. Corp. (1970) 8 Cal. App. 3d 339, 351, 87 Cal. Rptr. 226* (punitive damages are available for conversion)].

[4] Alternative Measure of Damages

If the vehicle is used by plaintiff to carry on his or her business, the extent to which business losses occasioned by the conversion are recoverable is unclear. Ordinarily, lost prospective profits are recoverable under the *Civ. Code § 3336* alternative measure of damages [*Myers v. Stephens (1965) 233 Cal. App. 2d 104, 119-123, 43 Cal. Rptr. 420]* , but the Rees-Levering Act applies only to vehicles purchased primarily for personal or family purposes and not to vehicles bought for use primarily for business or commercial purposes [*Civ. Code § 2981(k)*; *San Jose Autocar White Co. v. Williamson (1967) 249 Cal. App. 2d 619, 621-622, 57 Cal. Rptr. 692]* .

[5] Verification or Accompanying Affidavit Required

If the complaint in *[1], above*, is used as a cause of action in a complaint that includes a cause on action on the contract, either the complaint must be verified and contain allegations to show that the action is commenced in the proper place under *Civ. Code § 2984.4(a)*, or a declaration under penalty of perjury showing the action to be commenced in the proper place [for declaration form, *see § 89.61*] must be filed concurrently with the filing of the complaint [*Civ. Code § 2984.4(c)*; *Code Civ. Proc. § 396a(a)*].

[6] Venue

Venue for conversion actions lies in the county of defendant's residence [*see Code Civ. Proc. § 395(a)*; *Haurat v. Superior Court (1966) 241 Cal. App. 2d 330, 333, 50 Cal. Rptr. 520]* . If the complaint in *[1], above*, is used as a single count or cause of action in a complaint that includes a count on the contract, venue will lie in any of the places set forth in *Civ. Code § 2984.4(a)*, discussed in *§ 89.27* and *§ 89.61[3] -[6]* [*Civ. Code § 2984.4(a)*].

[7] Burden of Proof

To obtain a deficiency, a seller or holder who has denied the right to reinstatement under *Civ. Code § 2983.3(b)* or *(d)(4)* has the burden of proving that the denial was justified in that it was reasonable and made in good faith. However,

in a conversion action, the fact that a seller or holder fails to meet that burden of proof does not create a presumption that the buyer is entitled to damages [*Civ. Code § 2983.3(e)*].

[8] Cross References

For discussion and forms regarding conversion actions, see Ch. 150, *Conversion*

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§ 89.63 Complaint for Refund of Unearned Finance Charge After Buyer's Prepayment [Civ. Code § 2982(l)], Statutory Penalties [Civ. Code § 2983.1], and Attorney's Fees [Civ. Code § 2983.4]--By Buyer of Motor Vehicle Against Seller or Holder

[1] FORM Complaint for Refund of Unearned Finance Charge After Buyer's Prepayment [Civ. Code § 2982(l)], Statutory Penalties [Civ. Code § 2983.1], and Attorney's Fees [Civ. Code § 2983.4]--By Buyer of Motor Vehicle Against Seller or Holder

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RESTITUTION, STATUTORY
_____ [*name*],	)	PENALTIES, COSTS, AND ATTORNEY'S FEES
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Plaintiff's capacity and residence. See § 89.60[1], Paragraph 1.*]

2. [*Defendant's capacity and residence. See § 89.60[1], Paragraph 2 or 3, and/or 4.*]

3. [*Execution of conditional sale contract or seller-assisted loan subject to the Rees-Levering Act. See § 89.60[1], Paragraph 5.*]

[4. *Assignment of contract by seller, if appropriate. See § 89.60[1], Paragraph 6.*]

5. On or about _____ [*date*], _____ [*describe means by which the indebtedness was liquidated prior to maturity, e.g.*, plaintiff paid to defendant _____ [*name*] the sum of $_____, an amount equal to the entire outstanding indebtedness on the conditional sale contract as of that date].

6. Under *Civil Code Section 2982(l)*, plaintiff was, and is, entitled to a refund of the unearned portion of the finance charge imposed on and paid by plaintiff pursuant to the above-described conditional sale contract. The amount of the refund due is $_____, computed as follows: _____ [*specify manner of calculating refund credit*]. Defendant _____ [*name*] has failed and refused, and continues to fail and refuse, to refund to plaintiff the unearned portion of the finance charge, as computed above, and by doing so has violated *Civil Code Section 2982(l)*.

7. Pursuant to the above-described conditional sale contract, plaintiff has paid to defendant _____ [*name*] the sum of $_____ in finance charges.

8. Under *Civil Code Section 2983.1*, plaintiff is entitled to recover from defendant _____ [*name*] the sum of $_____, which is three times the amount of the finance charges paid by plaintiff to defendant under the conditional sale contract.

[9. *Plaintiff's right to punitive damages, if appropriate. See § 89.60[1], Paragraph 13.*]

10. [*Plaintiff's right to attorney's fees and costs. See § 89.60[1], Paragraph 14.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____, which is the amount of the unearned finance charges that defendant should have refunded to plaintiff.

2. For the sum of $_____, which is three times the finance charge paid by plaintiff.

[3. For exemplary and punitive damages.]

4. For reasonable attorney's fees in an amount to be determined by the court.

5. For costs of suit herein incurred.

6. For other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 89.60[1], [5], and [6].*]

[2] Use of Form

The complaint in *[1], above*, is for use by the buyer in an action to recover for a seller's violations of the provisions of *Civ. Code § 2982(l)*, which entitles the buyer to a refund of the unearned portion of a prepaid finance charge when the indebtedness under a conditional sale contract is liquidated prior to maturity, either by prepayment, refinancing, or surrender or repossession of the motor vehicle. This complaint is for recovery of both:

- The unrefunded unearned portion of the finance charge [*see Civ. Code § 2982(l)*], and

- The statutory penalty for non-accidental violations of *Civ. Code § 2982(l)* [*Civ. Code § 2983.1*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[3] Allegations

The complaint in *[1], above*, alleges the following:

- The liquidation prior to maturity of the indebtedness evidenced by the conditional sale contract (Paragrah 5) [*see Civ. Code § 2982(l)(5)*].

- Plaintiff's right to a refund of the unearned portion of the finance charge and defendant's failure to make that refund (Paragraph 6) [*Civ. Code § 2982(l)*].

- The amount of finance charge paid by plaintiff under the contract (Paragraph 7).

- Plaintiff's right to recover from defendant three times the amount of the finance charge paid by plaintiff (Paragraph 8) [*Civ. Code § 2983.1*].

[4] Verification or Accompanying Affidavit Required

An affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) showing that the action is being commenced in a proper place for the trial of the action must be filed concurrently with the complaint, unless the complaint is verified and shows that the action is commenced in a proper place for trial under *Civ. Code § 2984.4* [*Civ. Code § 2984.4(c)*; *Code Civ. Proc. § 396a(a)*; for a declaration form, *see § 89.61*].

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§ 89.64 Complaint for Restitution Based on Rescission of Conditional Sale Contract for Buyer's Failure to Obtain Third-Party Financing [Civ. Code §§ 2982.9, 2983.4]

[1] FORM Complaint for Restitution Based on Rescission of Conditional Sale Contract for Buyer's Failure to Obtain Third-Party Financing [Civ. Code §§ 2982.9, 2983.4]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RESTITUTION,
_____ [*name*],	)	COSTS, AND ATTORNEY'S FEES
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Plaintiff's capacity and residence. See § 89.60[1], Paragraph 1.*]

2. [*Defendant's capacity and residence. See § 89.60[1], Paragraph 2.*]

3. [*Execution of conditional sale contract subject to the Rees-Levering Act. See § 89.60[1], First Alternative Paragraph 5.*]

4. At the time the above-described conditional sale contract was entered into, plaintiff intended to obtain financing for purchase of the automobile from a third party, _____ [*name*]. [Plaintiff is informed and believes and

thereon alleges that] [D]efendant _____ [*name*] knew at the time the contract was entered into that plaintiff intended to obtain financing from this third party without defendant's assistance.

5. Thereafter, plaintiff was unable to obtain financing from the third party, _____ [*name*], despite diligent efforts to do so [, because _____ (*explain*)].

6. Pursuant to the above-described conditional sale contract, plaintiff has made payments to defendant _____ [*name*] in the amount of $_____. [*If appropriate, allege other consideration furnished by plaintiff, such as trade-in property, e.g.,* Plaintiff has also traded in _____ (*describe trade--in property*) as _____ (all *or* part) of the down payment under the contract. At the time the contract was entered into, the property traded in had a fair market value of $_____ and an agreed cash value of $_____, as appears in the attached contract.]

7. Because of plaintiff's inability to obtain the third-party financing described above, the conditional sale contract described herein is rescinded pursuant to *Civil Code Section 2982.9*, and plaintiff is entitled to recover from defendant the sum of $_____, which is the total amount paid by plaintiff to defendant under the contract.

[8. *If possession of the vehicle was delivered to plaintiff, allege notice to defendant of rescission and offer to restore vehicle, e.g.,* On or about _____ (*date*), plaintiff notified defendant _____ (*name*) in writing, by certified mail, return receipt requested, that plaintiff was unable to obtain the above-described third-party financing and that the contract was rescinded, pursuant to *Civil Code Section 2982.9*, and offered to restore to defendant the automobile purchased under the contract, on the condition that defendant likewise restore to plaintiff the amount paid by plaintiff to defendant pursuant to the contract. Copies of the notice and return receipt are attached as Exhibit B and incorporated by reference. Defendant has failed and refused, and continues to fail and refuse, to return to plaintiff all or any part of the amount paid by plaintiff under the contract].

9. [*Plaintiff's right to attorney's fees and costs. See § 89.60[1], Paragraph 14.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____.

2. For reasonable attorney's fees in an amount to be determined by the court.

3. For costs of suit herein incurred.

4. For other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 89.60[1], [5], and [6].*]

[2] Use of Form

The complaint in *[1], above*, is for use by a buyer in an action to recover any payments made pursuant to a conditional sale contract that has been rescinded because of the buyer's inability to obtain third-party financing [*see Civ. Code §*

2982.9 and discussion in *§ 89.23[3]*]. When a buyer becomes obligated to purchase a motor vehicle under a contract and the seller knows that the buyer intends to obtain financing from a third party, the contract must be deemed rescinded if the buyer is thereafter unable to obtain that financing, and all consideration furnished pursuant to the contract must be returned by each party without demand [*Civ. Code § 2982.9*].

With appropriate modifications, the allegations of this complaint may be used in a buyer's answer and cross complaint when the seller has brought an action to recover amounts allegedly due under the contract.

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[3] Allegations

The complaint in *[1], above*, alleges the following:

- Defendant's knowledge that plaintiff intended to obtain third-party financing without defendant's assistance (Paragraph 4) [*Civ. Code § 2982.9*].

- Plaintiff's inability to obtain that financing (Paragraph 5) [*Civ. Code § 2982.9*].

- The amount of payments made (or other consideration given) by plaintiff (Paragraph 6).

- The rescission of the contract and plaintiff's right to restitution of the consideration given (Paragraph 7) [*Civ. Code § 2982.9*].

- That plantiff has given defendant notice of the rescission, and has made an offer to restore the automobile (if it is in plaintiff's possession) to defendant on condition that defendant return the consideration furnished by plaintiff; and that defendant has failed do so (Paragraph 8) [*see Civ. Code § 1691*].

[4] Verification or Accompanying Affidavit Required

An affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) showing that the action is being commenced in a proper place for the trial of the action must be filed concurrently with the complaint, unless the complaint is verified and shows that the action is commenced in a proper place for trial under *Civ. Code § 2984.4(a)* [*Civ. Code § 2984.4(c)*; *Code Civ. Proc. § 396a(a)*; for a declaration form, *see § 89.61*].

[5] Cross Reference

For discussion and forms relating to rescission generally, see Ch. 490, *Rescission and Restitution*

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8-89 California Forms of Pleading and Practice--Annotated § 89.65

§ 89.65 Complaint for Restitution of Down Payment and Attorney's Fees When Conditional Sale Contract Was Never Executed [Civ. Code § 2982.7(a)]

[1] FORM Complaint for Restitution of Down Payment and Attorney's Fees When Conditional Sale Contract Was Never Executed [Civ. Code § 2982.7(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RESTITUTION,
_____ [*name*],	)	COSTS, AND ATTORNEY'S FEES
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of plaintiff. See § 89.60[1], Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 89.60[1], Paragraph 2.*]

3. On or about _____ [*date*], plaintiff went to defendant _____ [*name*]'s place of business in _____ [*city*], _____ County, California, to purchase an automobile under a conditional sale contract subject to the Rees-Levering Motor Vehicle Sales and Finance Act, *Civil Code Sections 2981-2984.4*. In contemplation of the execution of that contract, on or about _____ [*date*], plaintiff paid to defendant _____ [*name*] $_____ as _____ [down payment

or earnest money *or other type of payment, as appropriate*].

4. The contemplated conditional sale contract was not and never has been executed.

5. Under *Civil Code Section 2982.7(a)*, plaintiff is entitled to recover $_____ from defendant _____ [*name*], which is the sum of payments made to defendant _____ [*name*] in contemplation of the execution of a conditional sale contract.

[6. *If appropriate, add:* On or about _____ (*date*), (and on numerous occasions thereafter,) plaintiff requested that defendant _____ [*name*] refund to plaintiff the above-mentioned sum of $_____. Defendant _____ [*name*] has failed and refused, and continues to fail and refuse, to refund all or any part of this sum to plaintiff.]

7. [*Plaintiff's right to attorney's fees and costs. See § 89.60[1], Paragraph 14.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____.

2. For reasonable attorney's fees in an amount to be determined by the court.

3. For costs of suit herein incurred.

4. For other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 89.60[1], [5], and [6].*]

[2] Use of Form

The complaint in *[1], above*, is for use in an action by a buyer to recover the amount of any payments made to the seller pending the execution of a conditional sale contract that was never executed. The seller's failure to return the amount of these payments is a violation of the Rees-Levering Act [*see Civ. Code § 2982.7(a)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[3] Allegations

The complaint in *[1], above*, alleges:

- That payment was made by plaintiff to defendant in contemplation of the purchase of a motor vehicle under a conditional sale contract (Paragraph 3).

- That the contract was never executed (Paragraph 4).

- Plaintiff's right to a refund of the amount paid (Paragraph 5) [*Civ. Code § 2982.7*].

- If appropriate, plaintiff's demand for, and defendant's failure or refusal to make, the refund (Paragraph 6).

[4] Verification or Accompanying Affidavit Required

An affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) showing that the action is being commenced in a proper place for the trial of the action must be filed concurrently with the complaint, unless the complaint is verified and shows that the action is commenced in a proper place for trial under *Civ. Code § 2984.4(a)* [*Civ. Code § 2984.4(c)*; *Code Civ. Proc. § 396a(a)*; for a declaration form, *see § 89.61*].

[5] Cross References

For discussion and forms relating to rescission generally, see Ch. 490, *Rescission and Restitution*

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[Reserved]

§§ 89.66[Reserved]

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8-89 California Forms of Pleading and Practice--Annotated § 89.70

§ 89.70 Affirmative Defense to Buyer's Action for Violation of Rees-Levering Act--Violation Was Result of Accidental or Bona Fide Error in Computation [Civ. Code §§ 2983, 2983.1]

[1] FORM Affirmative Defense to Buyer's Action for Violation of Rees-Levering Act--Violation Was Result of Accidental or Bona Fide Error in Computation [Civ. Code §§ 2983, 2983.1]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

The violation of *Civil Code Section 2982* _____ [(a) *or* (j) *or* (k) *or* (l)] complained of herein was the result of an accidental and bona fide error of computation in that _____ [*allege facts showing that alleged statutory violation was the result of an accidental or bona fide error in computation, e.g.,* defendant's sales manager inadvertently entered incorrect figures for the amount financed into his/ her desk calculator when computing the amount of the finance charge on the conditional sale contract involved herein, resulting in defendant erroneously charging plaintiff a finance charge in excess of the maximum amount permitted by *Civil Code Section 2982(j)*].

[2] Use of Form

The affirmative defense in *[a], above,* is for use by a seller in an action by a buyer for recovery of amounts paid under a contract that violates the provisions of *Civ. Code § 2982(a), (j),* or *(k)* (governing disclosures, finance charges, and delinquency charges) [*Civ. Code § 2983*; *see § 89.60*] or for statutory penalties for the seller's or holder's violation of the provisions of *Civ. Code § 2982(l),* regarding prepayment of contracts [*Civ. Code § 2983.1*; *see § 89.63*]. It alleges that the violation complained of was the result of an accidental and bona fide error of computation [*see Civ. Code §§ 2983, 2983.1*].

[3] Bona Fide Error as Affirmative Defense

Violations of *Civ. Code § 2982(a), (j), (k),* or *(l)* that are the result of an accidental or bona fide error in computation do not render a conditional sale contract unenforceable or give rise to liability for statutory penalties [*see Civ. Code §§*

2983, *2983.1*]. *Civ. Code §§ 2983* and *2983.1* do not clearly indicate whether bona fide error is an affirmative defense which the defendant seller must plead and prove or whether lack of bona fide error is an element of the buyer's cause of action. One court has held that the existence of a bona fide error of computation is an affirmative defense which the defendant must plead and prove in order to avoid liability. In that case, the court reasoned that because only the seller of the automobile would know how the finance charge was calculated, it is fair that the seller have the burden of pleading and proving that any erroneous calculation was the result of a bona fide error [*Cobian v. Ordonez (1980) 163 Cal. Rptr. 126]* .

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8-89 California Forms of Pleading and Practice--Annotated § 89.71

§ 89.71 Affirmative Defense to Buyer's Action for Violation of Rees-Levering Act--Correction of Statutory Violation by Seller or Holder [Civ. Code § 2984]

[1] FORM Affirmative Defense to Buyer's Action for Violation of Rees-Levering Act--Correction of Statutory Violation by Seller or Holder [Civ. Code § 2984]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

The violation of Civil Code Section(s) _____ [*specify*] complained of was corrected by defendant in accordance with *Civil Code Section 2984* as follows: _____ [*allege facts showing correction of statutory violation as permitted by Civ. Code § 2984, e.g.,* On or about _____ (*date*), defendant received written notice from plaintiff of the violation of Civil Code Section(s) _____ (*specify*) complained of herein. On _____ (*date*), within 10 days after receipt of that notice, (_____ (*if the violation appears on the face of the contract, add whichever of the following is applicable; if both are applicable, add whichever is later:* and within 30 days after the execution of the contract *or* and within 20 days after the contract was assigned to defendant)), defendant corrected the violation complained of by mailing to plaintiff a copy of the corrected contract, together with a notice that all amounts improperly collected from plaintiff as a result of that violation _____ (had been *or* would be) immediately credited against the indebtedness under the contract. A copy of the corrected contract and notice are attached as Exhibit A and incorporated by reference. _____ (The correction described above did not increase the amount of the contract balance or of any installment as that amount appears on the conditional sale contract *or* Although the correction described above increased the amount of the _____ (contract balance *or* installment due _____ (*date*), as shown on the conditional sale contract, plaintiff concurred in that correction in writing on or about _____ (*date*). Plaintiff's concurrence is attached as Exhibit B and incorporated by reference)].

[2] Use of Form

The affirmative defense in *[1]*, *above*, is for use by a seller in an action by the buyer to enforce liability for violations of the Rees-Levering Act [*see, e.g., §§ 89.60, 89.63*]. It alleges that the defendant corrected the violations complained of as permitted by *Civ. Code § 2984*. Violations which are so corrected may not be the basis of any recovery by the buyer and do not affect the enforceability of the contract [*Civ. Code § 2984*; *see* discussion in *§ 89.24*].

[3] Time Limits for Correction of Error

If the violation appears on the face of the contract, it must be corrected within 30 days of the execution of the contract or within 20 days after the sale, assignment, or pledge of the contract, whichever occurs later. The 20-day period commences with the initial sale, assignment, or pledge of the contract. A willful violation may be corrected only if it appears on the face of the contract [*Civ. Code § 2984*].

Civ. Code § 2984 does not set forth any time limit for correction of nonwillful violations which do not appear on the face contract, except that any violation must be corrected within 10 days after receipt of notice of the violation from the buyer [*see Civ. Code § 2984*]. Thus, it would seem that if the violation does not appear on the face of the contract and if the buyer fails to notify the seller or holder of the violation prior to filing the suit, the seller or holder may still correct the violation if he or she does so within 10 days after the complaint is served on the seller or holder.

[4] Correction of Violation as Affirmative Defense

The Rees-Levering Act does not clearly indicate whether correction of a statutory violation under *Civ. Code § 2984* is an affirmative defense which the defendant seller must plead and prove or whether failure to correct is an element of the buyer's cause of action. *Civ. Code §§ 2983* and *2983.1* appear to make the buyer's recovery contingent on the seller's failure to correct, thus implying that the plaintiff buyer must plead and prove this as part of his or her cause of action. Although there are no reported decisions on this point, one court has held that the existence of a bona fide error, which is another limitation on liability set forth in *Civ. Code §§ 2983* and *2983.1*, is a matter of affirmative defense which the defendant seller must plead and prove [*Cobian v. Ordonez (1980) 163 Cal. Rptr. 126* ; *see* discussion in *§ 89.70[3]*]. Reasoning by analogy, a court would probably hold that correction of a statutory violation is also an affirmative defense which the seller must plead and prove.

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[Reserved]

§§ 89.72[Reserved]

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8-89 California Forms of Pleading and Practice--Annotated § 89.80

§ 89.80 Complaint for Deficiency Judgment [Civ. Code § 2983.2; Com. Code § 9504(2)] and Attorney's Fees [Civ. Code § 2983.4]

[1] FORM Complaint for Deficiency Judgment [Civ. Code § 2983.2; Com. Code § 9504(2)] and Attorney's Fees [Civ. Code § 2983.4]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DEFICIENCY JUDGMENT
_____ [*name*],	)	AND ATTORNEY'S FEES
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California, with its principal office for the transaction of business in _____ County, California

[*or allege other capacity and residence of plaintiff*], and _____ [authorized *or* licensed] to engage, and engaging in, business as _____ [*specify, e.g.*, a retail automobile sales dealer].

2. Defendant is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence of defendant*].

3. On or about _____ [*date*], in _____ [*city*], _____ County, California, [plaintiff] _____ [*name of seller*] and defendant entered into a written conditional sale contract by the terms of which [plaintiff] _____ [*name of seller*] agreed to sell and defendant agreed to buy a _____ [*year and make of motor vehicle*] automobile. Pursuant to the contract, possession of that vehicle was delivered to defendant on _____ (*date*), and _____ [*allege security arrangement, e.g.*, title was to remain in (plaintiff) _____ (*name of seller*) until defendant had performed all conditions of the contract *or* (plaintiff) _____ (*name of seller*) was given a lien as security for _____ (the payment of _____ [all *or* a part] of the price *or* allege contemplated performance of any other condition)]. A copy of the contract is attached as Exhibit A and incorporated by reference. The above-described contract was, and is, subject to the provisions of the Rees-Levering Motor Vehicle Sales and Finance Act, *Civil Code Sections 2981-2984.4*.

[4. On _____ (*date*), _____ (*name of seller*) assigned his/her/its rights under the above-described conditional sale contract to plaintiff _____ (*name of holder*).]

5. Plaintiff has performed all conditions required to be performed on his/her/its part under the above-described conditional sale contract.

6. Defendant _____ [*allege default and acceleration of all or part of amount due as provided in contract, e.g.*, failed to make installment payments due and payable under the contract as follows: _____ (*specify installments on which defendant defaulted*), resulting in a total default in the amount of $_____ on _____ (*date*)].

7. On or about _____ (*date*), plaintiff repossessed the automobile pursuant to the above-described contract.

8. On or about_____ [*date within 60 days of repossession*], plaintiff gave defendant 15 days written notice of his/her/its intention to sell the repossessed automobile. That notice was given pursuant to *Civil Code Section 2983.2(a)*, notifying defendant _____ [that there was no right of reinstatement and the reason(s) why there was no right of reinstatement *or* of his/her rights to redeem the automobile and to reinstate the contract within the time prescribed by *Civil Code Section 2983.2(a)*]. A copy of the notice is attached as Exhibit B and incorporated by reference.

[*EITHER*]

9. Defendant did not, within 15 days after the above-described notice was given, [or at any other time,] exercise his/her right to reinstate the contract.

[*OR*]

9. Defendant attempted to reinstate the above-described conditional sale contract by _____ [*specify manner of attempted reinstatement*]. Defendant's attempted reinstatement was invalid because it failed to comply with

Civil Code Section 2983.3(d) in that _____ [*specify, e.g.*, defendant failed to pay the delinquency charges applicable to the late payment, as required by paragraph (1) of that subdivision].

[*OR*]

9. Pursuant to *Civil Code Section 2983.3(b)*, defendant has no right to reinstate the above-described conditional sale contract, because the plaintiff has determined reasonably and in good faith that _____ [*specify reason for denying right of reinstatement, e.g.*, defendant has failed to take care of the motor vehicle in a reasonable manner, so that the motor vehicle may become substantially impaired in value] in that _____ [*allege facts showing reasonableness of plaintiff's determination*].

[*OR*]

9. Defendant has no right to reinstate the above-described conditional sale contract because plaintiff determined reasonably and in good faith that the defendant's default is so substantial as to be incurable in that _____ [*specify*].

[*OR*]

9. Pursuant to *Civil Code Section 2983.3(c)*, defendant has exhausted his/her right to reinstate the above-described contract because _____ [defendant exercised his/her right to reinstate the contract on _____ (*date*), within the 12 months prior to _____ (*date*), *or* defendant has previously exercised his right to reinstate the contract twice during the term of the contract, on _____ (*date*), and on _____ (*date*)].

[*CONTINUE*]

[10. On _____ (*date*), (following expiration of defendant's right to reinstate the above-described contract,) plaintiff exercised his/her/its right pursuant to the terms of the contract's acceleration clause to declare the entire indebtedness due and payable. Plaintiff demanded payment from defendant of the entire indebtedness, in the amount of $_____, computed as follows: _____ (*specify*). Defendant failed to make payment of the amount of $_____ as demanded to redeem the automobile.]

[*EITHER, if automobile was sold at private sale*]

11. Plaintiff sold the above-mentioned automobile at a private sale. The sale was conducted in good faith and in a commercially reasonable manner. The automobile was sold for the amount of $_____, and the purchaser was _____ [*name*].

[*OR, if automobile was sold at public sale*]

11. Plaintiff sold the above-mentioned automobile at a public sale. The sale was conducted in good faith and in a commercially reasonable manner. The locale for the sale was [the _____ (county *or* place) specified in the security agreement *or, if no county or place was specified in the security agreement:* not specified in the security

agreement, and the sale was held _____ (in the county in which the automobile was located *or* in the county in which defendant had his/her _____ [residence *or* chief place of business] *or* in the county in which plaintiff had _____ [his/her residence *or* a place of business], defendant not having a residence or chief place of business within California *or* at _____ [*if automobile was located outside California or removed from California, specify locality*], the location outside California where the automobile was located.)] [The sale was postponed from time to time by public announcement at the time and place last scheduled for the sale.] The automobile was sold for the amount of $_____, and the purchaser was _____ [*name*].

[*CONTINUE*]

12. On _____ [*date*] plaintiff sent a notice of disposition to defendant _____ [and to _____ (*names of any secondary obligors*); *if collateral is other than consumer goods, add if appropriate:* and to _____(*names of other persons described in Com. Code § 9611(c)(3)*)]. The notice was sent as provided in *Commercial Code Section 1201(37)*.

[*If defendant's purchase of automobile was not a consumer goods transaction, and notice of disposition was given in statutory format:*]

13. The notice referred to in the preceding paragraph conformed to the statutory form set out in *Commercial Code Section 9613*.

[*OR, if defendant's purchase of automobile was not a consumer goods transaction, and notice of disposition was given in statutory format:*]

13. The notice referred to in the preceding paragraph conformed to the statutory form set out in *Commercial Code Section 9614*.

[*Or, if notice of disposition did not follow statutory format:]*

13. The notice referred to in the preceding paragraph described defendant as the debtor and plaintiff as the secured party. It described the above-mentioned automobile as the collateral that was the subject of the intended disposition. It stated the method of intended disposition. It stated that defendant was entitled to an accounting of the unpaid indebtedness and stated the charge for an accounting. It stated the _____ [time and place of the public disposition described above *or* the time after which the disposition was to be made]. [*If defendant's purchase of automobile was a consumer goods transaction, add:* The notice included a description of the liability for a deficiency of each person to whom the notice was sent. It included a telephone number from which the amount that must be paid to plaintiff to redeem the collateral was available. It included a _____ (telephone number *or* mailing address) from which additional information concerning the disposition and the obligation secured was available.]

[*CONTINUE*]

14. The contract balance under the contract attached as Exhibit A is $_____, delinquency charges are $_____, collection or repossession fees and charges are $_____, and expenses of sale are $_____, resulting in an indebtedness of defendant to plaintiff in the sum of $_____. [Credit for unearned finance charges is $_____ and credit for canceled insurance is $_____. The resulting net indebtedness of defendant to plaintiff is the amount of $_____.] After applying the sale proceeds in the amount of $_____ to the net

indebtedness, there remained, and now remains, a deficiency due and owing from defendant to plaintiff in the amount of $_____. Defendant has failed and refused, and continues to fail and refuse, to pay this amount to plaintiff.

15. Under *Civil Code Section 2983.4*, plaintiff is entitled to reasonable attorney's fees and costs incurred and to be incurred in this action on the contract, in an amount to be determined by the court.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____.

2. For reasonable attorney's fees in an amount to be determined by the court.

3. For costs of suit herein incurred.

4. For other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 89.60[1], [5], and [6]*.]

[2] Use of Form

The complaint in *[1], above*, is for use by the seller to bring an action to recover any deficiency following the seller's repossession and sale of a motor vehicle pursuant to a conditional sale contract [*see Civ. Code §§ 2983.2, 2983.3*].

In a limited civil case, the caption must state that the case is a limited civil case [*Code Civ. Proc. § 422.30(b)*; *see Code Civ. Proc. §§ 85, 86* (defining limited civil case, discussed in *§ 89.60[6]*)].

[3] Allegations

The complaint alleges the following:

- The capacity and residence of plaintiff and defendant (Paragraphs 1, 2).
- The execution of a conditional sale contract [*see Civ. Code § 2981(a)*] subject to the Rees-Levering Act (Paragraph 3).
- If appropriate, the seller's assignment of the contract to plaintiff (Paragraph 4).
- The performance by plaintiff of all conditions precedent (Paragraph 5).
- The defendant's default and plaintiff's repossession of the motor vehicle (Paragraphs 6, 7) [*Civ. Code § 2983.3(a)*].
- That defendant was given notice of plaintiff's intent to sell the repossessed motor vehicle and of whether or not defendant has the right to reinstate the contract (Paragraph 8) [*Civ. Code § 2983.2(a)*; *see*

Civ. Code § 2983.3(b)-(d)].

- Defendant's failure or lack of right to redeem the automobile and reinstate the contract (alternative Paragraphs 9) [*see Civ. Code §§ 2983.2(a), 2983.3*; *Fin. Code § 22329*; *see § 89.22[3],[4]*].

- If appropriate, plaintiff's exercise of any contract right to accelerate the maturity of the entire indebtedness (Paragraph 10) [*see Civ. Code § 2983.3(a), (b)*; *Fin. Code § 22329(b), (c)*].

- Plaintiff's sale of the repossessed vehicle (alternative Paragraphs 11).

- That plaintiff complied with all relevant notice provisions of Division 9 of the California Commercial Code (Paragraphs 12-13) [*see Civ. Code § 2983.8*; *Com. Code §§ 9611-9614*; for discussion, *see* Ch. 503, *Sales: Secured Transactions*].

- The existence of a deficiency after sale for which defendant is liable (Paragraph 14).

- Plaintiff's right to attorney's fees and costs (Paragraph 15) [*Civ. Code § 2983.4*].

It is essential to allege that the plaintiff was duly licensed as a dealer. A person acting as a dealer, who was not licensed as a dealer as required by *Veh. Code § 11700 et seq.*, may not enforce any security interest or bring or maintain any action in law or equity to recover any money or property or obtain other relief from the purchaser of a vehicle in connection with a transaction in which the person was, at the time at the transaction, required to be licensed as a dealer [*Veh. Code § 11711.3*].

[4] Loans by Licensed Finance Lenders

This form may be modified for use when the contract or loan was made by a licensed finance lender [*see Fin. Code § 22000 et seq.* (Finance Lender Law)], by making the following changes:

- Modify Paragraphs 1 and 3 accordingly. In Paragraph 3, this includes deleting the last sentence [*see Civ. Code § 2982.5(a), (d)(3)*].

- Change the references to *Civ. Code § 2983.2(a)* in Paragraph 8 to *Fin. Code § 22328(b)*.

- Change the reference to *Civ. Code § 2983.3(d)* in the second alternative Paragraph 9 to *Fin. Code § 22329(e)*.

- Change the reference to *Civ. Code § 2983.3(b)* in the third alternative Paragraph 9 to *Fin. Code § 22329(c)*. There are six reasons for denial of reinstatement in *Civ. Code § 2983.3(b)*; there are three reasons in *Fin. Code § 22329(c)* [*see* discussion in *§ 89.22[3],[4]*].

- Change the reference to *Civ. Code § 2983.3(c)* in the fifth alternative Paragraph 9 to *Fin. Code § 22329(d)*.

- Either delete Paragraph 16, or change it to refer to an attorney's fee provision in the contract [*see Civ. Code § 1717*].

The requirements of the Finance Lenders Law are matters of fundamental public policy that cannot be waived by an agreement between the parties. Thus, for example, the Finance Lenders Law may not be circumvented by a choice-of-law provision, by which another state's law is chosen, in a loan agreement subject to the Law [*Brack v.*

Omni Loan Co., Ltd. (2008) 164 Cal. App. 4th 1312, 1326, 1329, 80 Cal. Rptr. 3d 275].

[5] Verification or Accompanying Affidavit Required

An affidavit (or declaration under penalty of perjury under *Code Civ. Proc. § 2015.5*) showing that the action is being commenced in a proper place for the trial of the action must be filed concurrently with the complaint, unless the complaint is verified and shows that the action is commenced in a proper place for trial under *Civ. Code § 2984.4(a)* [*Civ. Code § 2984.4(c)*; *Code Civ. Proc. § 396a(a)*; for a declaration form, *see § 89.61*].

[6] Buyer's Liability for Deficiency Judgment

[a] In General

If the buyer defaults in the performance of his or her obligations under a conditional sale contract, the seller or holder may repossess the vehicle, sell it in a commercially reasonable manner, and apply the proceeds of the resale to the reasonable expenses of repossession and sale and the satisfaction of the indebtedness under the contract [*Civ. Code § 2983.2(a)*; *see Civ. Code § 2981(a)* (definition of "conditional sale contract")]. If the proceeds of the sale are inadequate to satisfy the indebtedness plus the repossession and resale expenses, the buyer is liable for the deficiency [*see Com. Code § 9615(d)(2)*]. For discussion, see *§ 89.22*.

[b] Notice Requirements Imposed by Rees-Levering Act

Except when the motor vehicle has been seized by a public entity as described in *Civ. Code § 2983.3(b)(6)*, the buyer is not liable for the deficiency unless the seller or holder gives the buyer (and any other persons liable on the contract) 15 days written notice of his or her intention to sell the repossessed vehicle. This notice must be given within 60 days after repossession of the vehicle and must contain the information and notices set forth in *Civ. Code § 2983.2(a)(1)-(9)* (or *Fin. Code § 22328(b)(1)-(8)* in the case of a licensed finance lender), including notice to the buyer of his or her right to redeem the automobile and reinstate the contract within 15 days of the giving of notice [*Civ. Code § 2983.2(a)*; *Fin. Code § 22328(b)*; *see Civ. Code § 2983.3(b)-(d)* and discussion in *§ 89.22[2][a], [c]*].

[c] Notice Requirements Imposed by Commercial Code

To obtain a deficiency judgment, a secured creditor who sells a defaulting debtor's repossessed car must comply not only with all the provisions of the Rees-Levering Act, but also with any relevant provisions in Division 9 of the Commercial Code [*Bank of America v. Lallana (1998) 19 Cal. 4th 203, 210, 77 Cal. Rptr. 2d 910, 960 P.2d 1133]* . In *Bank of America v. Lallana*, the debtor's car was sold at a public auction, which the California Supreme Court concluded was a public sale. The Court determined that the secured creditor gave proper notice pursuant to the Rees-Levering Act but because it failed to give the debtor proper notice of a public sale pursuant to former *Com. Code § 9504(3)* (notice of both the time and place of sale), it was precluded from obtaining a deficiency judgment [*Bank of America v. Lallana (1998) 19 Cal. 4th 203, 214-215, 77 Cal. Rptr. 2d 910, 960 P.2d 1133]* . For discussion, see *§ 89.22[2][b]*.

[7] Limitations on Acceleration of Maturity and Repossession

The seller or holder may not accelerate the maturity of all or any part of the amount due under a conditional sale contract or repossess the motor vehicle bought thereunder unless the buyer defaults in the performance of any of his or her obligations under the contract [*Civ. Code § 2983.3(a)*; *Fin. Code § 22329(b)*]. Except under limited circumstances, the seller or holder also may not accelerate the maturity of all or any part of the indebtedness after repossession prior to the expiration of the buyer's right to reinstate the contract [*see Civ. Code § 2983.3(b)*; *Fin. Code § 22329(c)*]. For a more detailed discussion of the buyer's right to reinstate a conditional sale contract after default, see *§ 89.22[3],[4]*.

[8] Burden of Proof

In an action by the seller or holder for a deficiency after the seller or holder has denied the right or reinstatement on the grounds set forth in *Civ. Code § 2983.3(b)(1)-(6)* or *(d)(4)* (or *Fin. Code § 22329(c)(1)-(3), (e)(4)*), the seller or holder has the burden of proof that the denial was justified in that it was reasonable and in good faith [*Civ. Code § 2983.3(e)*; *Fin. Code § 22329(f)*].

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§ 90.01 Scope of Chapter

This chapter discusses actions relating to motor vehicle lease contracts under the Vehicle Leasing Act [*Civ. Code § 2985.7 et seq.*]. This chapter also discusses the federal Consumer Leasing Act of 1976 [*15 U.S.C. § 1667 et seq.*], a part of the Truth in Lending Act, and federal Regulation M [12 C.F.R. Part 213], promulgated thereunder, to the extent they apply to motor vehicle leases. The discussion covers definitions and the scope of the Vehicle Leasing Act [*see §§ 90.10 -90.12*], advertising [*see § 90.13*], regulation of the lease contract [*see §§ 90.14, 90.15*], termination of the lease [*see §§ 90.16 -90.19*], the lessee's and lessor's remedies [*see §§ 90.20 -90.22*], and related criminal remedies [*see § 90.23*].

This chapter does *not* discuss Division 10 of the Commercial Code [*Com. Code § 10101 et seq.*], which governs personal property leases first effective between the parties on or after January 1, 1990, and extensions or renewals of earlier leases if the parties so agree [*see Com. Code § 10600* (transition provision)], although Division 10 may apply to an automobile lease also subject to the Vehicle Leasing Act [*Com. Code § 10104(a)(3)*]. Division 10 is addressed in Ch. 413, *Personal Property Leases* .

This chapter also discusses unlawful vehicle subleasing as defined by *Penal Code § 570 et seq.* and the civil liability of a person who engages in unlawful vehicle subleasing as set forth in *Civ. Code § 3343.5* [*see § 90.24*].

This chapter includes the following forms:

- A lessee's complaint for damages and statutory penalties based on violations of the formality and disclosure requirements of the act and/or of the rules restricting lessees' liability for vehicle depreciation [*see § 90.40*];

- A lessee's complaint for restitution based on the lessee's rescission of a lease contract when the lessor has willfully violated the formality and disclosure requirements [*see § 90.41*];

- A lessee's complaint for restitution of an advance payment made pending execution of a lease contract which was never executed [*see § 90.42*].

- Lessor's affirmative defenses to complaints under the act based on the following:
  - Correction of the violation within 15 days after its discovery [*see § 90.50*].
  - An unintentional violation that was the result of a bona fide error [*see § 90.51*].
  - An act or omission done or made in good-faith conformity with federal law [*see § 90.52*].
- Lessor's demurrer to a lessee's complaint under the Vehicle Leasing Act, based on the ground that the action is barred by the lessee's previous filing of a federal civil action arising from the same facts [*see § 90.60*].

A Research Guide collecting statutes, decisions and other references is also included [*see § 90.30* et seq.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesGeneral OverviewBanking LawConsumer ProtectionConsumer LeasingGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral OverviewContracts LawTypes of ContractsLease AgreementsGeneral Overview

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§ 90.02 Cross References

- Passenger vehicle rentals for terms of 30 days or less [*see Civ. Code § 1936*] are discussed in *Ch. 93, Bailments, § 93.100* et seq.

- For a discussion of the general law governing contracts and bailments of personal property, see Ch. 140, *Contracts* , and Ch. 93, *Bailments* , respectively.

- For discussion and forms relating to personal property leases governed by Division 10 of the Commercial Code [*Com. Code § 10101 et seq.*], see Ch. 413, *Personal Property Leases* .

- For a discussion and forms relating to the Truth in Lending Act generally, see Ch. 501, *Sales: Retail Installment Sales* .

- For detailed discussion of theVehicle Leasing Act in connection with motor vehicle lease transactions, and forms for use in such transactions, see California Legal Forms, Ch. 47, *Automotive Financing and Vehicle Leasing* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesGeneral OverviewContracts LawTypes of ContractsInstallment ContractsContracts LawTypes of ContractsBailmentsBanking LawConsumer ProtectionTruth in LendingGeneral OverviewContracts LawTypes of ContractsLease AgreementsGeneral Overview

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[Reserved]

§§ 90.03[Reserved]

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§ 90.10 Governing Law

[1] Vehicle Leasing Act

Agreements for the lease of motor vehicles by consumers are governed by the Vehicle Leasing Act [*Civ. Code § 2985.7 et seq.*]. In addition, the Department of Motor Vehicles is explicitly authorized to adopt and enforce rules and regulations for the purpose of carrying out the provisions of the Vehicle Leasing Act [*Civ. Code § 2989.6*].

Motor vehicle lease contracts that are not governed by the provisions of the Vehicle Leasing Act are governed by the general law governing contracts and bailments.

Division 10 of the Commercial Code [*Com. Code § 10101 et seq.*], which governs personal property leases first effective between the parties on or after January 1, 1990, and extensions or renewals of earlier leases if the parties so agree [*see Com. Code § 10600* (transition provision)] may apply to a particular vehicle lease [*Com. Code § 10104(a)(3)*]. For discussion and forms relating to Division 10, see Ch. 413, *Personal Property Leases* .

[2] Federal Consumer Leasing Act

Motor vehicle lease contracts are also subject to the federal Consumer Leasing Act of 1976 [*15 U.S.C. § 1667 et seq.*], a part of the Truth in Lending Act. In 1981, federal Regulation M [12 C.F.R. Part 213], governing consumer leasing, was promulgated.

The federal Consumer Leasing Act does not annul, alter, affect, or exempt any person subject to its provisions from complying with any state law concerning consumer leases, except to the extent that any state law is inconsistent with any provision of the federal law, and then only to the extent of the inconsistency. The Federal Reserve Board is authorized to determine if any state law is inconsistent with the federal law, but may not determine that a state law is inconsistent if it finds that the state law gives greater protection and benefit to the consumer than does the federal law [*15 U.S.C. § 1667e(a)*]. At the time this chapter was written the board had not made a determination concerning the effect of the federal Consumer Leasing Act on the Vehicle Leasing Act.

[3] Servicemembers Civil Relief Act

If the lessee entered military service after the obligation was incurred, the Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*] will limit the fees charged and the lessor's rights to enforce the obligation [*see 50 U.S.C. App. §§ 511, 514, 516* (definitions and persons protected)]. The Servicemembers Civil Relief Act is discussed in *Ch. 89, Automobiles: Sales and Financing Under the Rees-Levering Act, § 89.29*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 90.11 Nature and Purpose of Leasing Acts

The Vehicle Leasing Act contains numerous provisions intended to protect the consumer lessee by requiring full disclosure of all items of cost in a lease transaction [*see Civ. Code §§ 2985.8, 2986.4* and discussion at *§ 90.14*]. The act also contains substantive restrictions on lessors and lease contracts, designed to curtail various unfair and deceptive practices [*see Civ. Code §§ 2986.3, 2986.5, 2986.6, 2986.12, 2988, 2989.2, 2989.4* and discussion at *§ 90.15*]. The act provides lessees with remedies for violations of the act [*see Civ. Code §§ 2986.13, 2988.5, 2988.7* and discussion at *§ 90.20*] and imposes criminal penalties on persons who willfully violate its provisions [*see Civ. Code § 2989.8*].

The federal Consumer Leasing Act of 1976 [*15 U.S.C. § 1667 et seq.*] is primarily a disclosure law. Its purposes are [*see 12 C.F.R. Part 213.1(b)*]:

- To ensure that consumers are provided with meaningful disclosures that enable them to compare lease terms with other leases and with credit transactions.
- To limit the amount of balloon payments.
- To provide for accurate disclosure of lease terms in advertising.

The Consumer Leasing Act contains disclosure requirements substantially similar to those imposed by the Vehicle Leasing Act [*see 15 U.S.C. §§ 1667a, 1667c*] and restricts lessee liability for depreciation of the leased property and for penalties or other charges for delinquency, default, or early termination of the contract [*see 15 U.S.C. § 1667b*]. The federal act does not, however, contain any other substantive limitations on lease contracts, such as those set forth in the Vehicle Leasing Act.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 90.12 Transactions Governed

[1] Vehicle Leasing Act and Relevant Definitions

[a] "Lease Contract"

The Vehicle Leasing Act applies to all lease contracts. Under the act, "lease contract" is defined as any contract for or in contemplation of the lease or bailment for use of a motor vehicle, and the purchase of incidental services, by a natural person for a term exceeding four months, primarily for personal, family, or household purposes. The act applies whether or not it is agreed that the lessee bears the risk of the motor vehicle's depreciation [*Civ. Code § 2985.7(d)*].

The act does not apply to the lease of a motor vehicle for agricultural, business, or commercial purposes, or to a government or a governmental agency or instrumentality [*see Civ. Code § 2985.7(d)*].

[b] "Motor Vehicle"

A "motor vehicle" is defined as any vehicle required to be registered under the Vehicle Code, except a trailer that is sold in conjunction with a vessel [*Civ. Code § 2985.7(a)*].

[c] "Lessor"; "Bailor"

A "lessor" includes a "bailor" and is defined as an individual, partnership, corporation, limited liability company, estate, trust, cooperative, association, or any other legal entity that is engaged in the business of leasing, offering to lease, or arranging the lease of a motor vehicle under a lease contract [*Civ. Code § 2985.7(b)*]. Under the Vehicle Leasing Act, an assignee may be considered a "lessor" only if the assignee has a substantial involvement in the lease transaction. Some greater involvement in the negotiations of the lease itself, rather than simply approving the creditworthiness of the lessee, is required to constitute "substantial involvement" [*Bescos v. Bank of America (2003) 105 Cal. App. 4th 378, 390-391, 129 Cal. Rptr. 2d 423* (assignee bank that financed lease but was not agent of dealer in lease transaction was not responsible as lessor for misrepresentations made by dealer that were unknown to lender and not apparent on face of lease)].

A person acting as a lessor-retailer, but who was not licensed as a lessor-retailer as required by *Veh. Code § 11600 et seq.*, may not enforce any security interest or bring or maintain any action in law or equity to recover any money or property or obtain other relief from the lessee of a vehicle in connection with a transaction in which the person, at the time at the transaction, was required to be licensed as a lessor-retailer [*Veh. Code § 11711.3*].

[d] Leasing Act Does Not Govern Conditional Sale Contracts

The act applies only to leases of motor vehicles and not to conditional sales, which are governed by the Rees-Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 2981 et seq.*; *see* Ch 89, *Automobiles: Sales and Financing Under the Rees-Levering Act*]. The Rees-Levering Act applies to agreements which are in the form of a lease but are actually conditional sales [*see Civ. Code §§ 2981(a), 2981.5*]. The Vehicle Leasing Act expressly provides that it does not apply to any transaction that is regulated by the Rees-Levering Act [*Civ. Code § 2990*].

[2] Consumer Leasing Act

[a] "Consumer Lease"

The federal Consumer Leasing Act of 1976 [*15 U.S.C. § 1667 et seq.*] applies to all consumer leases. To be defined as a "consumer lease" under the act and Regulation M [*see 12 C.F.R. § 213.2(e)*], the lease must be *all* of the following [*15 U.S.C. § 1667(1)*]:

- A contract;
- In the form of a lease or bailment;
- For the use of personal property;
- Entered into by a natural person;
- For a period exceeding four months;
- For a total contractual obligation not exceeding $25,000; and
- Primarily for personal, family, or household purposes.

The Consumer Leasing Act applies whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease, unless the lease is one that meets the definition of a credit sale in Regulation Z [*15 U.S.C. § 1667(1)*; *12 C.F.R. § 213.2(e)*; *see 12 C.F.R. § 213.2(e)(2)*]. A credit sale under Regulation Z includes a lease (unless terminable without penalty at any time by the consumer) under which total payments are equal to or greater than the value of the vehicle and the option to purchase may be exercised without additional consideration, or for a nominal consideration [*12 C.F.R. § 226.2(a)(16)*]. If the vehicle lease is a credit sale, the closed-end credit requirements of Regulation Z, rather than Regulation M, will apply [*see 12 C.F.R. §§ 226.2(a)(10), 226.18*].

Like the California act, the federal law and regulation do not apply to a lease for agricultural, business, or commercial purposes, or a lease to an organization, a government, or a governmental agency or instrumentality [*15 U.S.C. § 1667(1)*; *see 12 C.F.R. § 213.2(e)(2)*].

[b] "Lessor"

The federal act applies to lessors who are regularly engaged in leasing, offering to lease, or arranging to lease under a consumer lease [*15 U.S.C. § 1667(3)*; *see 12 C.F.R. § 213.2(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 90.13 Solicitations or Advertisements for Leases

[1] Vehicle Leasing Act Trigger Terms

Any solicitation to enter into a lease contract that includes (1) the amount of any payment; (2) a statement of any capitalized cost reduction or other payment required before or at consummation or by delivery, if deliveryoccurs after consummation; or (3) a statement that no capitalized cost reduction or other payment is required before or at consummation or by delivery, if delivery occurs after consummation, must also clearly and conspicuously state all of the following items [*Civ. Code § 2985.71(a), (b)*]:

- All of the disclosures prescribed by Regulation M, set forth in the manner required or permitted by Regulation M, whether or not Regulation M applies to the transaction [*see 12 C.F.R. § 213.7(d)* (Regulation M disclosures, discussed in *[2], below*)].

- The mileage limit after which mileage charges may accrue and the charge per mile for mileage in excess of the stated mileage limit.

- The statement "Plus tax and license" or a substantially similar statement, if amounts due for use tax, license fees, and registration fees are not included in the payments.

A failure to comply with the foregoing requirements will not affect the validity of the leasing contract [*Civ. Code § 2985.71(d)*].

[2] Consumer Leasing Act and Regulation M Trigger Terms

No advertisement to aid, promote, or assist directly or indirectly any consumer lease contract may state (1) the amount of any payment; (2) the number of required payments; or (3) that any or no down payment is required at inception of the lease unless the advertisement also clearly and conspicuously states each of the following items of information that is applicable [*15 U.S.C. § 1667c(a)*; *12 C.F.R. § 213.7(d)*; *see also 12 C.F.R. § 213.7(e), (f)* (alternative methods of compliance)]:

- That the transaction advertised is a lease.

- The amount of any payment required prior to or at the inception or consummation of the lease, or by delivery, if delivery occurs after consummation, or that no such payment is required if that is the case.

- The number, amounts, due dates or periods of scheduled payments, and the total of payments under the lease.

- A statement of whether or not a security deposit is required.

- If the lessee will be liable for such a differential, a statement that the lessee will be liable for the differential, if any, between the anticipated fair market value of the leased property (residual value) and its appraised actual value at the termination of the lease (realized value).

- A statement of the method or amount of determining any other liabilities the lease imposes on the lessee at the end of the term and whether or not the lessee has the option to purchase the leased property and at what price and time.

[3] Other Provisions Related to Advertising

No solicitation to aid, promote, or assist directly or indirectly any lease contract may state that a specific lease of any motor vehicle at specific amounts or terms is available unless the lessor usually and customarily leases or will lease that motor vehicle at those amounts or terms [*Civ. Code § 2985.71(c)*; *12 C.F.R. § 213.7(a)* (lease of any property)].

No owner or employee of any entity, other than the lessor, that serves as a medium in which a lease solicitation appears or through which a lease solicitation is disseminated, will be liable for failure to comply with the solicitation requirements [*15 U.S.C. § 1667c(b)*; *Civ. Code § 2985.71(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionConsumer LeasingGeneral OverviewTransportation LawPrivate VehiclesGeneral OverviewBanking LawConsumer ProtectionConsumer LeasingDisclosureContracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 8: Automobiles-Chs. 80-92
Chapter 90 AUTOMOBILES: VEHICLE LEASING ACT
PART II. LEGAL BACKGROUND

8-90 California Forms of Pleading and Practice--Annotated § 90.14

§ 90.14 Required Formalities and Disclosures for Lease Contracts

[1] Single Written Document Required

Every lease contract must be in writing. The print portion of the contract must be printed in at least eight-point type and must contain in a single document all of the agreements of the lessor and lessee with respect to the obligations of each party [*Civ. Code § 2985.8(a)*; *see Kroupa v. Sunrise Ford (1999) 77 Cal. App. 4th 835, 843-844, 92 Cal. Rptr. 2d 42* (finding violation of *Civ. Code § 2985.8(a)* when there was a single transaction involving two trade-ins and new truck lease but no single document containing "all the agreements" regarding parties' obligations)]. Regulation M requires certain disclosure information to be segregated and presented in a manner substantially similar to the applicable model form set forth in Appendix A to the regulation [*12 C.F.R. § 213.3(a)(2)*].

After 2001, a prospective assignee that provides a lessor under a lease contract with a preprinted form for use as a lease contract must design the form so as to provide on its face sufficient space for the lessor to include all disclosures and itemizations required pursuant to *Civ. Code § 2985.8* [*see [4], below*]. The form must also contain on its face a separate blank space no smaller than 7.5 square inches for the lessor and lessee to memorialize trade-in, turn-in, and other individualized agreements [*Civ. Code § 2992*].

[2] Execution and Delivery of Copy of Lease

The lease contract must be signed by the lessor and lessee, or their authorized representatives, and an exact copy of the fully executed lease contract must be provided to the lessee at the time of signing [*Civ. Code § 2985.8(g)*]. No motor vehicle may be delivered under a lease contract until the lessor provides to the lessee a fully executed copy of the lease contract [*Civ. Code § 2985.8(h)*]. The lessor must not obtain the signature of the lessee to a contract when it contains blank spaces to be filled in after it has been signed [*Civ. Code § 2985.8(i)*].

[3] Acknowledgment of Delivery; Presumptions

Any acknowledgment by the lessee of delivery of a copy of a lease contract or purchase order, and any vehicle lease proposal and credit statementwhich the lessor has required or requested the lessee to sign during the contract negotiations, and which the lessee has signed, must be printed or written in size equal to at least 10-point bold type. If

the acknowledgment is contained in the contract, it must appear directly above the space reserved for the lessee's signature [*Civ. Code § 2986.4*].

An acknowledgment that conforms to the above requirements gives rise to a rebuttable presumption of delivery in any action or proceeding by or against a third party who acquired an interest in the contract without knowledge that the copies were not delivered. The presumption that copies of the documents were furnished to the lessee as required by the Vehicle Leasing Act is conclusive in favor of the third party if the third party either:

- Furnishes the lessee copies of the documents; or

- Sends the lessee a notice containing the items set forth in *Civ. Code § 2985.8(c)* [*see* discussion in *[4], below*], stating that the lessee must notify the third party in writing within 30 days if no copies were furnished, and the third party receives no notification [*Civ. Code § 2986.4*].

[4] Required Contents

[a] In General

The Consumer Leasing Act and Regulation M impose disclosure requirements [*see 15 U.S.C. § 1667a*; *12 C.F.R. §§ 213.3, 213.4*; *see also Civ. Code § 2985.7(e)* (Regulation M defined)]. A state law that is similar in purpose, scope, intent, or effect to the Consumer Leasing Act is not inconsistent with it or Regulation M, and therefore is not preempted by the Consumer Leasing Act or Regulation M, if the lessor can comply with the state law without violating Regulation M [*see 12 C.F.R. § 213.9(a)*].

At the top of the lease contract, a title containing the words "LEASE CONTRACT" or "LEASE AGREEMENT" must appear in at least 12-point bold type [*Civ. Code § 2985.8(b)*].

After 2001, the following documents and agreements are *not* required to be contained in a lease contract [*Civ. Code § 2985.9*]:

- An "express warranty," as that term is defined in *Civ. Code § 1791.2(a)(1)*, whether it relates to the sale or lease of a consumer good.

- Titling and transfer documents used to register, title, or transfer ownership of vehicles described in the lease contract with government registration authorities.

- Insurance policies, service contracts, and optional debt cancellation agreements.

- Documents that memorialize the sale or lease of goods or services, relating to the leased vehicle, between the provider of those goods or services and lessee that are included in the gross capitalized cost of the lease and separately itemized in the "Itemization of Gross Capitalized Cost."

[b] Primary Relevant Terms

Every lease contract must disclose all of the following [*Civ. Code § 2985.8(c)*]:

- All of the information prescribed by Regulation M, set forth in the manner required or permitted by Regulation M, whether or not Regulation M applies to the transaction [*see [c]* and *[d], below*].

- A separate statement, labeled "Itemization of Gross Capitalized Cost" and circumscribed by a line,

that appears immediately following or directly adjacent to the disclosures required to be segregated by Regulation M and includes all of the following [*Civ. Code § 2985.8(c)(2)*; *see* Stats. 2001 ch. 287, § 5 (requirements below apply to leases entered into after 2001); *see also* former *Civ. Code § 2985.8(c)(2)*, as added by Cal. Stats. 1997 ch. 800, § 7 (requirements for leases entered into before 2002)]:

- The agreed-on value of the vehicle as equipped at the time of signing the lease.

- The agreed-on value and a description of each accessory and item of optional equipment the lessor agrees to add to the vehicle after signing the lease.

- The premium for each policy of insurance.

- The amount charged for each service contract.

- Any charge for an optional debt cancellation agreement.

- Any outstanding prior credit or lease balance.

- An itemization by type and agreed-on value of each good or service included in the gross capitalized cost [*see [c], below*] other than those items included in the disclosures required in the six items above.

- The vehicle identification number of the leased vehicle.

- A brief description of each vehicle or other property being traded in and the agreed-on value of it, if the amount due at the time of signing the lease or on delivery is paid in whole or in part with a net trade-in allowance or the "Itemization of Gross Capitalized Cost" includes any portion of the outstanding prior credit or lease balance from the trade-in property.

- The fee, if any, to be retained by the lessor for document preparation. This fee must not exceed $45 and must not be represented as a governmental fee.

- The amount of any optional business partnership automation fee to register or transfer the vehicle, which must be labeled "Optional DMV Electronic Filing Fee."

[c] Segregated Regulation M Disclosures

Regulation M requires the following disclosures to be segregated from other disclosures, and limited to only directly related information, under headings, content, and format substantially similar to the applicable model form in Appendix A of the regulation [*12 C.F.R. § 213.3(a)(2)*]:

- The amount due at consummation or by delivery if delivery occurs after consummation, itemized by type and amount, including refundable security deposit, advance monthly or other periodic payment, and capitalized cost reduction, with itemization of how each amount will be paid, by type and amount, including any net trade-in allowance, rebates, noncash credits, and cash payments [*12 C.F.R. § 213.4(b)*].

- The number, amount, and due dates or periods of payments scheduled under the lease, and the total amount of the periodic payments [*12 C.F.R. § 213.4(c)*; *see 15 U.S.C. § 1667a(9)* (same required disclosure)].

- The total amount of other charges payable to the lessor, itemized by type and amount, that are not included in the periodic payments, including the amount of any liability the lease imposes on the lessee at the end of the lease term, except that any potential difference between the residual and realized value (which must be disclosed pursuant to *12 C.F.R. § 213.4(k)*) is not part of the segregated disclosures [*12 C.F.R. § 213.4(d)*].

- The total amount of payments with a description such as "the amount you will have paid by the end of the lease." This amount is the sum of the amount due at lease signing (less any refundable amounts), the total amount of any periodic payments (less any portion of the periodic payment paid at lease signing), and any other charges under the three previously enumerated items. If it is an open-end lease, this disclosure must contain the statement such as "You will owe an additional amount if the actual value of the vehicle is less than the residual value" [*12 C.F.R. § 213.4(e)*].

- A mathematical progression of how the scheduled periodic payment is derived, which must contain the following [*12 C.F.R. § 213.4(f)*]:

  - Gross capitalized cost, including the agreed on value of the vehicle, a statement such as "the agreed upon value of the vehicle [state the amount] and any items you pay for over the lease term (such as service contracts, insurance, and any outstanding prior credit or lease balance)" along with a statement of the lessee's option to receive a separate written itemization of the gross capitalized cost. If requested by the lessee, that itemization must be provided before consummation.

  - Capitalized cost reduction, with a description such as "the amount of any net trade-in allowance, rebate, noncash credit, or cash you pay that reduces the gross capitalized cost."

  - The adjusted capitalized cost, with a description such as "the amount used in calculating your base [periodic] payment."

  - The residual value, with a description such as "the value of the vehicle at the end of the lease used in calculating your base [periodic] payment."

  - Depreciation and any amortized amounts, which is the difference between the adjusted capitalized cost and the residual value, with a description such as "the amount charged for the vehicle's decline in value through normal use and for any other items paid over the lease term."

  - The rent charge, with a description such as "the amount charged in addition to the depreciation and any amortized amounts." This amount is the difference between the total of the base periodic payments over the lease term minus the depreciation and any amortized amounts.

  - The total of base periodic payments, with a description such as "depreciation and any amortized amounts plus the rent charge."

  - The lease payments, with a description such as "the number of payments in your lease."

  - The base periodic payment, which is the total of the base periodic payments divided by the number of payment periods in the lease.

- An itemization of any other charges that are part of the periodic payment.

- The total periodic payment, that is, the sum of the base periodic payment and any other charges that are part of the periodic payment.

- An early termination notice substantially similar to the following: "Early Termination. You may have to pay a substantial charge if you end this lease early. *The charge may be up to several thousand dollars*. The actual charge will depend on when the lease is terminated. The earlier you end the lease, the greater the charge is likely to be." [*12 C.F.R. § 213.4(g)(2)*].

- A notice regarding wear and use substantially similar to the following: "Excessive Wear and Use. You may be charged for excessive wear based on our standards for normal use." This notice must also specify the amount or method for determining any charge for excessive mileage [*12 C.F.R. § 213.4(h)(3)*].

- A statement of whether or not the lessee has the option to purchase the leased property and, if that option is at the end of the lease term, the purchase price [*12 C.F.R. § 213.4(i)(1)*].

- A statement referencing the nonsegregated disclosures informing the lessee to refer to the lease documents for additional information on early termination, purchase options and maintenance responsibilities, warranties, late and default charges, insurance, and any security interests, if applicable [*12 C.F.R. § 213.4(j)*].

- If the lessee is liable at the end of the lease term for the difference between the residual value of the leased property and its realized value, the rent and other charges paid by the lessee and required by the lessor as an incident to the lease transaction, with a description such as "the total amount of rent and other charges imposed in connection with your lease [state the amount]" [*12 C.F.R. § 213.4(m)(1)*].

[d] Nonsegregated Regulation M Disclosures

Regulation M requires the following disclosures to be made, but they are not to be set off or segregated [*see 12 C.F.R. § 213.3(a)(2)*; *see also 63 FR 52110* et seq. (latest model forms, issued on September 29, 1998)]:

- A brief description of the leased property sufficient to identify it to the lessee and lessor [*12 C.F.R. § 213.4(a)*].

- A statement of the conditions under which the lessee or the lessor may terminate the lease prior to the end of the lease term; and the amount or a description of the method for determining the amount of any penalty or other charge for early termination, which must be reasonable [*12 C.F.R. § 213.4(g)(1)*].

- A statement specifying whether the lessee or the lessor is responsible for maintaining or servicing the leased property together with a brief description of the responsibility [*12 C.F.R. § 213.4(h)(1)*].

- A statement of the lessor's standards for wear and use (if any), which must be reasonable [*12 C.F.R. § 213.4(h)(2)*].

- A statement of whether or not the lessee has the option to purchase the leased property and, if that option is exerciseable prior to the end of the lease term, the purchase price or method for determining the price and when the lessee may exercise this option [*12 C.F.R. § 213.4(i)(2)*].

- A statement of the lessee's liability, if any, at early termination or at the end of the lease term for the difference between the residual value of the leased property and its realized value [*12 C.F.R. § 213.4(k)*].

- If the lessee's liability at early termination or at the end of the lease term is based on the realized value of the property, a statement that the lessee may obtain, at his or her own expense, a professional appraisal by an independent third party (agreed to by the lessor and the lessee) of the value that could be realized at sale of the leased property. That appraisal is binding on the parties [*12 C.F.R. § 213.4(l)*].

- If the lessee is liable at the end of the lease term for the difference between the residual value of the leased property and its realized value, a statement about the rebuttable presumption and other terms of *15 U.S.C. § 1667b(a)* (discussed in *§ 90.15[5][b], below*), including the fact that the lessor cannot collect any excess unless the lessor brings a successful action and pays the lessee's reasonable attorney's fees, or unless the excess of the residual value over the realized value is due to unreasonable or excessive wear or use of the property (in which case the rebuttable presumption does not apply) [*12 C.F.R. § 213.4(m)(2)*].

- If the lessee is liable at the end of the lease term for the difference between the residual value of the leased property and its realized value, a statement that the lessee and the lessor are permitted, after termination of the lease, to make any mutually agreeable final adjustment regarding excess liability [*12 C.F.R. § 213.4(m)(3)*].

- The total dollar amount for all official and license fees, registration, title, or taxes required to be paid in connection with the lease [*12 C.F.R. § 213.4(n)*].

- A brief identification of any insurance in connection with the lease including, if the insurance is provided by or paid through the lessor, the types and amounts of coverage and the cost to the lessee, or, if the lessee must obtain the insurance, the type and amounts of coverage required by the lessee [*12 C.F.R. § 213.4(o)*].

- A statement identifying all express warranties and guarantees from the manufacturer or lessor with respect to the leased property that will apply to the lessee [*12 C.F.R. § 213.4(p)*].

- The amount or method of determining the amount of any penalty or other charge for delinquency, default, or late payments, which must be reasonable [*12 C.F.R. § 213.4(q)*].

- A description of any security interest, other than a security deposit disclosed under *12 C.F.R. § 213.4(b)* (the first item enumerated in [c], *above*), held or to be retained by the lessor, and a clear identification of the property interest to which the security interest relates [*12 C.F.R. § 213.4(r)*].

- If a lessor provides a percentage rate in an advertisement or in documents evidencing the lease transaction, a notice stating that "this percentage may not measure the overall cost of financing this lease" must accompany the rate disclosure. The lessor may not use the term "annual percentage rate," "annual lease rate," or any equivalent term [*12 C.F.R. § 213.4(s)*].

[e] [Reserved]

[f] Notices Above Space for Lessee's Signature

Every lease contract must contain, in at least eight-point bold type, above the space provided for the lessee's signature

and circumscribed by a line, the following notice [*Civ. Code § 2985.8(d)*]:

> **"(1) Do not sign this lease before you read it or if it contains any blank spaces to be filled in; (2) You are entitled to a completely filled in copy of this lease; (3) Warning--Unless a charge is included in this lease for public liability or property damage insurance, payment for that coverage is not provided by this lease."**

[g] Notice of No Cooling Off Period

Every lease contract must contain, in at least eight-point bold type, on the first page of the contract and circumscribed by a line, the following notice [*Civ. Code § 2985.8(e)*]:

> **"THERE IS NO COOLING OFF PERIOD. California law does not provide for a 'cooling off' or other cancellation period for vehicle leases. Therefore, you cannot later cancel this lease simply because you change your mind, decided the vehicle costs too much, or wish you had acquired a different vehicle. You may cancel this lease only with the agreement of the lessor or for legal cause, such as fraud."**

[h] Notice of Right to Return Vehicle

Every lease contract must contain, in at least eight-point bold type, the following notice [*Civ. Code § 2985.8(f)*]:

> **"You have the right to return the vehicle, and receive a refund of any payments made if the credit application is not approved, unless nonapproval results from an incomplete application or from incorrect information provided by you."**

[i] Notice of "GAP" Liability

If the lease contract contains a provision that holds the lessee liable for the difference between (1) the adjusted capitalized cost disclosed in the lease contract reduced by the amounts described in *Civ. Code § 2987(b)(5)(A)* (set forth in the last enumerated item at *§ 90.16[4]*) and (2) the settlement proceeds of the lessee's required insurance and deductible in the event of theft or damage to the vehicle that results in a total loss, the lease contract must contain the following notice in at least eight-point boldface type on the first page of the contract [*Civ. Code § 2985.8(j)*]:

> **"GAP LIABILITY NOTICE. In the event of theft or damage to the vehicle that results in a total loss, there may be a GAP between the amount due upon early termination and the proceeds of your insurance settlement and deductible. THIS LEASE PROVIDES THAT YOU ARE LIABLE FOR THE GAP AMOUNT. Optional coverage for the GAP amount may be offered for an additional price."**

[5] Translation Requirements

If a language other than English is the primary language used for negotiations with a consumer, the consumer may have to be provided with a translation of the contract documents, and some notices, in that other language. For contracts entered into prior to July 1, 2004, this requirement applies only to contracts negotiated primarily in Spanish. On and after July 1, 2004, it applies to contracts negotiated primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean [*see Civ. Code § 1632*].

Generally, any person engaged in a trade or business who negotiates primarily in the other language, orally or in writing, in the course of entering into a contract or agreement subject to the Vehicle Leasing Act, must deliver to the lessee, before he or she executes the contract or agreement, a translation of the contract or agreement in the other

language, which includes a translation of every term and condition in that contract or agreement [*Civ. Code § 1632(a)(1)* (operative January 1 until July 1, 2004); *Civ. Code § 1632(b)(1)* (operative July 1, 2004)]. However, this is not required (and related foreign-language requirements do not apply) if the lessee negotiates using his or her own interpreter who is fluent and literate in both English and the other language and who is not employed or furnished by the lessor [*Civ. Code § 1632(g)* (operative January 1 until July 1, 2004); *Civ. Code § 1632(h)* (operative July 1, 2004)]. Noncompliance with the foreign-language requirements would be a ground for rescission of the contract or agreement by the lessee [*Civ. Code § 1632(j)* (operative January 1 until July 1, 2004); *Civ. Code § 1632(k)* (operative July 1, 2004)]. For more detailed discussion of *Civ. Code § 1632*, see Ch. 127, *Consumer Contracts and Loans* .

Regulation M allows a non-English-language translation of the disclosures to be given in any language, provided that they are made available in English at the customer's request [*12 C.F.R. § 213.3(a)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesGeneral OverviewContracts LawFormationGeneral OverviewBanking LawConsumer ProtectionConsumer LeasingDisclosureContracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral Overview

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§ 90.15 Restrictions on Lease Contracts

[1] Prohibited Contract Provisions

No lease contract may contain any provision by which any of the following may be effected [*Civ. Code § 2986.3*]:

- A power of attorney is given to confess judgment in California, or an assignment of wages is given. However, the giving of an assignment of wages in a separate instrument pursuant to *Lab. Code § 300* is not prohibited. For a discussion of *Lab. Code § 300* and complaints for use when an employer fails to pay wages that have been assigned, see*Ch. 250, Employment Law: Wage and Hour Disputes, §§ 250.20, 250.65*.

- The lessee waives any right of action, against the lessor or holder of the contract or other person acting on his or her behalf, for any illegal act committed in the collection of payments under the contract or in the repossession of the motor vehicle.

- The lessee relieves the lessor from liability for any legal remedies that the lessee may have against the lessor under the contract or any separate instruments executed in connection with the contract.

- The lessor or holder of the contract is given the right to commence action on a contract under the provisions of the Vehicle Leasing Act in a county other than the county in which the contract was in fact signed by the lessee, the county in which the lessee resides at the commencement of the action, the county in which the lessee resided at the time the contract was entered into, or the county in which the leased motor vehicle is permanently garaged.

[2] Lien Provisions

No agreement made in connection with a lease contract may provide for the inclusion of title to, or a lien on, any personal or real property other than the motor vehicle which is the subject of the lease contract, any accessories for that vehicle, or any special and auxiliary equipment used in connection with that vehicle, as security for the payment of the contract obligations. Any agreement which so provides is unenforceable. This restriction does not apply to a security

deposit, advance payment of rent, or other cash prepayment [*Civ. Code § 2986.6*].

[3] Inducement to Enter Contract

It is unlawful for any lessor to induce or attempt to induce any person to enter into a contract subject to the Vehicle Leasing Act by offering a rebate, discount, commission, or other consideration on the condition that the lessee give information or assistance for the purpose of enabling a lessor to either sell or lease a motor vehicle to another [*Civ. Code § 2986.12*].

[4] Meeting Equipment Requirements

No person may lease a used motor vehicle for operation on California highways if the vehicle does not meet all of the equipment requirements of *Veh. Code § 24000 et seq.* This does not apply, however, to an extension or subsequent lease of the same motor vehicle to the same lessee [*Civ. Code § 2986.5(a)*].

[5] Depreciation Liability

[a] Vehicle Leasing Act Provision

If the lessee is to bear the risk of the motor vehicle's depreciation, and the lessee's liability on expiration of a consumer lease is based on the estimated residual value of the motor vehicle, the estimated residual value must be a reasonable approximation of the anticipated actual fair market value of the motor vehicle on expiration of the lease. There is a rebuttable presumption that the estimated residual value is unreasonable to the extent that it exceeds the actual residual value by more than three times the average monthly payment under the lease. This presumption does not apply to the extent that the excess of estimated over actual residual value is due either to physical damage to the motor vehicle beyond reasonable wear and use or to excessive use, and the lease may set standards for such wear and use if the standards are not unreasonable [*Civ. Code § 2988(b)*]. For purposes of these provisions, "fair market value" is the value that the motor vehicle would have if sold in a commercially reasonable manner in its customary market [*Civ. Code § 2988(c)*].

Civ. Code § 2988 was enacted to protect consumers who enter into lease contracts in which the lessee is to bear the risk of the motor vehicle's depreciation. It is intended to provide relief to the consumer when an ostensibly inexpensive lease contract establishes an excessively low levelof periodic payment which results, conversely, in an excessive liability at the expiration of the lease term because the lessor did not act in good faith, either in estimating a residual value of the motor vehicle or in establishing a rate of periodic payment that did not bear a reasonable relation to the reasonably expected depreciation of the motor vehicle during the lease term. Under *Civ. Code § 2988*, the lessor has the obligation to act in good faith and to come forward with competent evidence showing that the estimated residual value was so determined under the circumstances existing at the inception of the lease contract [*Civ. Code § 2988(a)*].

[b] Federal Provision Compared

The federal Consumer Leasing Act contains a similar provision and presumption. The federal act further provides that:

> "[t]here shall be a rebuttable presumption that the lessor's estimated residual value is not in good faith to the extent that the estimated residual value exceeds the actual residual value by more than three times the average payment allocable to a monthly period under the lease and such lessor shall not collect from the lessee the amount of such excess liability on expiration of a consumer lease unless the lessor brings a successful action with respect to such excess liability" [*15 U.S.C. § 1667b(a)*].

Counsel should note that the statutory language quoted above is ambiguous and no reported decision has clarified the ambiguity. The language may be interpreted as precluding the lessor from collecting any amount for excess depreciation

if the estimated residual value exceeds the actual residual value of the vehicle by more than three times the average monthly payment under the lease, unless the lessor brings a successful action to determine that the original estimate was reasonable. Alternatively, the language may be interpreted as only precluding the lessor from collecting that portion of the difference between the estimated residual value and actual residual value that exceeds three times the average monthly payment under the contract, unless the lessor brings such an action. In any case, if the lessor brings such an action, he or she must pay the lessee's reasonable attorney's fees. A willing lessee also may make a "mutually agreeable final adjustment with respect to such excess residual liability" provided the agreement is reached after termination of the lease [*15 U.S.C. § 1667b(a)*; *12 C.F.R. § 213.4(m)(2), (3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 90.16 Early Termination of Lease

[1] Lessee's Statutory Right

A lessee under a lease contract entered into after 1997 has a statutory right to terminate the lease contract at any time before the scheduled expiration date specified in the lease contract [*Civ. Code § 2987(a), (i)*].

[2] Lessor's Statutory Obligations

In the event of an early termination, the lessor or holder of the lease contract must credit any security deposit or advance rental payment held by the lessor or holder of the lease contract against the lessee's liability under the lease contract as limited by *Civ. Code § 2987* [*see [3]* and *[4], below*]. The portion of a security deposit or advance rental payment, if any, remaining after the lessee's liability under the lease contract, as so limited, has been satisfied must be returned to the lessee within 30 days of the satisfaction of the obligation [*Civ. Code § 2987(e)*].

If the lessee terminates the lease contract, voluntarily returns possession of the vehicle to the lessor, and timely pays all sums required under the lease contract as limited by *Civ. Code § 2987*, the lessor or holder must not provide any adverse information concerning the early termination to any consumer credit reporting agency [*Civ. Code § 2987(g)*].

The Rule of 78 must not be used to compute accrued rent charges [*Civ. Code § 2987(h)*].

[3] Limitation on Selling Price When Lessee Buys or Trades Vehicle

If, before the scheduled expiration date specified in the lease contract, the lessee terminates the lease and purchases the vehicle or trades in the vehicle in connection with the purchase or lease of another vehicle, the selling price of the leased vehicle, exclusive of taxes and other charges incidental to the sale, must not exceed the sum of the following, and the lessee is relieved of any further liability under the lease contract [*Civ. Code § 2987(f)*]:

- All unpaid periodic lease payments that have accrued up to the date of termination.
- All other amounts due and unpaid by the lessee under the lease contract, other than excess wear and

mileage charges and unpaid periodic lease payments.

- Any charges, however denominated, that the lessor or holder of the lease contract may assess in connection with termination of the lease contract and the acquisition of the vehicle, not to exceed in the aggregate the amount of a reasonable purchase option fee, if any, disclosed in the lease contract and assessed on the scheduled termination of the lease contract.

- The adjusted capitalized cost disclosed in the lease contract less all depreciation and other amortized amounts accrued through the date of early termination, calculated in accordance with the constant yield or other generally accepted actuarial method [*see Civ. Code § 2985.7(f)* (constant yield method defined)].

[4] Limitation on Lessee's Liability in Other Cases

In case of early termination of the lease, other than in connection with the lessee's purchase of the vehicle or its trade in towards the purchase or lease of another vehicle (as discussed in *[3], above*), the lessee's liability must not exceed the sum of the following [*Civ. Code § 2987(b), (f)*]:

- All unpaid periodic lease payments that have accrued up to the date of termination [*Civ. Code § 2987(b)(1)*].

- All other amounts due and unpaid by the lessee under the lease contract, other than excess wear and mileage charges and unpaid periodic lease payments [*Civ. Code § 2987(b)(2)*].

- Any charges, however denominated, that the lessor or holder of the lease contract may assess in connection with termination not to exceed in the aggregate the amount of a reasonable disposition fee, if any, disclosed in the lease contract and assessed on termination of the lease contract [*Civ. Code § 2987(b)(3)*].

- In the event of the lessee's default, reasonable fees paid by the lessor or holder for reconditioning of the leased vehicle and reasonable and necessary fees paid by the lessor or holder, if any, in connection with the repossession and storage of the leased vehicle [*Civ. Code § 2987(b)(4)*].

- The difference, if any, between the adjusted capitalized cost disclosed in the lease contract and the sum of (A) all depreciation and other amortized amounts accrued through the date of early termination, calculated in accordance with the constant-yield or other generally accepted actuarial method, and (B) the realized value of the vehicle as provided in *Civ. Code § 2987(c)* (set forth in *[5], below*) [*Civ. Code § 2987(b)(5)*].

[5] Determination of Realized Value

Unless the early termination is in connection with the lessee's purchase of the vehicle or its trade in towards the purchase or lease of another vehicle (as discussed in *[3], above*), and subject to *Civ. Code § 2987(d)* (discussed in *[6], below*), the realized value of the vehicle used to compute the lessee's liability under *Civ. Code § 2987(b)(5)* [*see* last enumerated item set forth *[4], above*] on early termination of the lease must be whichever of the following applies [*Civ. Code § 2987(c), (f)*]:

- If the lessee maintains insurance on the leased vehicle as required in the lease contract, and the vehicle is a total loss as a result of theft or damage: the amount of any applicable insurance deductible owed by the lessee and the proceeds of the settlement of the insurance claim, unless a higher amount is agreed to by the holder of the lease contract [*Civ. Code § 2987(c)(1)*].

- If the lessee elects to have an appraisal conducted as provided in Regulation M: the value determined on appraisal [*Civ. Code § 2987(c)(2)*; *see 12 C.F.R. § 213.4(l)* (Regulation M right to appraisal)].

- If the holder of the lease contract or lessor elects to retain ownership of the vehicle for use or to lease to a subsequent lessee: the wholesale value of the vehicle as specified in the current edition of a recognized used vehicle value guide customarily used by California motor vehicle dealers to value vehicles in California, including, but not limited to, the Kelley Blue Book Auto Market Report and the N.A.D.A. Official Used Car Guide [*Civ. Code § 2987(c)(3)*].

- Under all other circumstances, either the price paid for the vehicle on disposition or any other amount established by the lessor or the lease contract, whichever is higher [*Civ. Code § 2987(c)(4)*].

[6] Lessor's or Holder's Disposition of Vehicle

[a] Lessor's or Holder's Duties

The lessor or holder of the lease contract must act in good faith and in a commercially reasonable manner in connection with the disposition of the vehicle [*Civ. Code § 2987(d)(1)*]. In addition, any disposition of the vehicle must be preceded by a notice, which must be in writing and be given by the holder of the contract to each lessee and guarantor at least 10 days in advance of any disposition or the date by which the value of the vehicle will be determined pursuant to *Civ. Code § 2987(c)(3)* [*see* third enumerated item in *[5], above*]. The notice must be personally served or must be sent by certified mail, return receipt requested, or first-class mail, postage prepaid, directed to the last known address of each lessee and guarantor. A single notice to married persons is sufficient if the lease holder's most recent records indicate that they reside at the same address. The last known address of each lessee and guarantor is presumed to be the address stated in the lease contract or guaranty for each lessee and guarantor unless the lessee or guarantor notifies the holder of the lease contract of a change of address. The notice must contain the following information [*Civ. Code § 2987(d)(2)*]:

- The time and place of any public sale, the time on or after which a private sale or other intended disposition is to be made, or the date by which the value of the vehicle will be determined pursuant to *Civ. Code § 2987(c)(3)*, which is the third enumerated item in *[5], above* [*Civ. Code § 2987(d)(2)(B)(i)*].

- An itemization of all amounts claimed under *Civ. Code § 2987(b)(1)-(4)*, which are the first through fourth items enumerated in *[4], above* [*Civ. Code § 2987(d)(2)(B)(ii)*].

- The amount of the difference between the adjusted capitalized cost and the sum of all depreciation and other amortized amounts paid through the date of early termination as provided in *Civ. Code § 2987(b)(5)*, which is the last item enumerated in *[4], above* [*Civ. Code § 2987(d)(2)(B)(iii)*].

- The total of the amounts required to be set forth in the two preceding items, identified as the "Gross Early Termination Amount" [*Civ. Code § 2987(d)(2)(B)(iv)*].

- One of the following statements, whichever is applicable [*Civ. Code § 2987(d)(2)(B)(v)*]:

  - To be inserted when the realized value will be determined pursuant to *Civ. Code § 2987(c)(3)* [*see* third item enumerated in *[5], above*]:

    "The amount you owe for early termination will be no more than the difference between the Gross Early Termination Amount stated above and (1) the appraised value of the vehicle or (2) if there is no appraisal, the wholesale value specified in a recognized

used vehicle value guide. You have the right to get a professional appraisal to establish the value of the vehicle for the purpose of figuring how much you owe on the lease. If you want an appraisal, you will have to arrange for it to be completed at least three days before the scheduled valuation date. The appraiser has to be an independent person acceptable to the holder of the lease. You will have to pay for the appraiser. The appraised value will be considered final and binding on you and the holder of the lease."

- To be inserted in all other circumstances:

"The amount you owe for early termination will be no more than the difference between the Gross Early Termination Amount stated above and (1) the appraised value of the vehicle or (2) if there is no appraisal, either the price received for the vehicle upon disposition or a greater amount established by the lessor or the lease contract. You have the right to get a professional appraisal to establish the value of the vehicle for the purpose of figuring how much you owe on the lease. If you want an appraisal, you will have to arrange for it to be completed at least three days before the scheduled sale date of the vehicle. The appraiser has to be an independent person acceptable to the holder of the lease. You will have to pay for the appraiser. The appraised value will be considered final and binding on you and the holder of the lease."

[b] Lessee's Liability

The lessee generally has no liability under *Civ. Code § 2987(b)* [*see [4], above*] if the lessor or holder of the lease contract does not comply with the requirements set forth in *[a], above*. However, the lessee may be liable in spite of noncompliance by the lessor or holder, when all of the following conditions are satisfied [*Civ. Code § 2987(d)(3)*]:

- Noncompliance was the result of a bona fide error in stating an amount required to be disclosed pursuant to *Civ. Code § 2987(d)(2)(B)(ii), (iii),* or *(iv),* which are items two through four in the list of required contents of the notice enumerated in *[a], above*.

- The holder of the lease gives the lessee written notice of the error within 30 days after discovering the error and before (1) an action is filed to recover the amount claimed to be owed or (2) written notice of the error is received by the holder of the lease from the lessee.

- The lessee is liable for the lesser of the originally claimed amount or the correct amount.

- The holder of the lease refunds any amount collected in excess of the amount described in the preceding item, within 10 days after notice of the error is given. "Bona fide error" means an error that was not intentional and occurred notwithstanding the maintenance of procedures reasonably adapted to avoid that error. Examples of a bona fide error include clerical errors, computation errors, errors due to unintentionally improper computer programming or data entry, and printing errors. Bona fide errors do not include an error of legal judgment with respect to a lessor's or lease contract holder's obligations under *Civ. Code § 2987*.

These rules do not apply, however, when the lessee maintains insurance on the leased vehicle as required in the lease contract and the vehicle is declared a total loss by the insurer as a result of theft or damage [*Civ. Code § 2987(d)(4)*].

Legal Topics:

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

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§ 90.17 Sale of Vehicle on Termination of Lease

If the lessee is to bear the risk of the motor vehicle's depreciation on the scheduled expiration of the lease contract, then when the lessor is disposing of the vehicle or obtaining cash bids for the purpose of setting the fair market value of the vehicle, the lessor must act in a commercially reasonable manner and in the customary market for that vehicle [*Civ. Code § 2989.2(a)*]. In addition, notwithstanding any contract provision to the contrary, the holder of the contract must give the lessee and guarantor at least 10 days written notice of intent to sell the vehicle, unless the lessor and the lessee have agreed in writing to the amount of the lessee's liability under the lease contract after the lessee has returned the motor vehicle to the lessor or the lessee has satisfied the lease contract obligations by payment to the lessor. The notice must be personally served or sent by certified mail, return receipt requested, to the address of the lessee shown on the contract, unless the lessee has notified the lessor in writing of a different address. The notice must set forth separately any charges or amounts due and state that the lessee will be liable for the difference between the liability imposed on the lessee at the expiration of the lease term and the actual cash value of the motor vehicle when sold. The notice must also state that the lessee has the right to submit a cash bid for the purchase of the vehicle [*Civ. Code § 2989.2(b)*].

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§ 90.18 Refund of Advance Payment

Any payment made by a lessee to a lessor pending the execution of a lease contract must be refunded to the lessee in the event the lease contract is not executed [*Civ. Code § 2986.13(a)*]. For a complaint for use in seeking return of the vehicle in this situation, see *§ 90.42[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 90.19 Return of Trade-in Vehicle

If the lessor breaches the lease contract after the lessee has left his or her motor vehicle with the lessor as a trade-in down payment, and the lessor does not return the motor vehicle to the lessee, the lessee may recover from the lessor whichever of the following is greater [*Civ. Code § 2986.13(b)*]:

- The fair market value of the motor vehicle left as a down payment.
- The value of that motor vehicle as stated in the lease contract.

The recovery must be tendered to the lessee within five business days after the breach [*Civ. Code § 2986.13(b)*]. The buyer's remedies stated above are nonexclusive and cumulative and do not preclude the lessee from pursuing any other legal remedy that he or she may have [*Civ. Code § 2986.13(c)*].

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§ 90.20 Lessee's Remedies

[1] Civil Liability under Vehicle Leasing Act

[a] Damages and Penalties Recoverable

Except as otherwise provided by *Civ. Code § 2988.5*, any lessor who fails to comply with any requirement imposed under *Civ. Code §§ 2985.8* (formalities and disclosures) or 2988 (depreciation and calculation of estimated residual value) is liable to the lessee in an amount equal to the sum of [*Civ. Code § 2988.5(a)*]:

- Any actual damages sustained by the lessee as a result of the failure to comply; and

- In the case of an individual action, a statutory penalty equal to 25 percent of the total amount of the monthly payments under the lease; the amount of this penalty must not be less than $100 nor greater than $1,000. In the case of a class action, the amount of the penalty is to be determined by the court, except that no minimum recovery is applicable to each member of the class, and the total recovery in the class action may not exceed the lesser of $500,000 or 1 percent of the lessor's net worth; and

- The costs of the action, together with reasonable attorney's fees as determined by the court.

In determining the amount of award in any class action, the court must consider, among other relevant factors, the following [*Civ. Code § 2988.5(b)*]]:

- The amount of any actual damages sustained,

- The frequency and persistence of the lessor's failure to comply,

- The resources of the lessor,

- The number of persons adversely affected, and

- The extent to which the lessor's failure to comply was intentional.

A person may not offset any amount for which a lessor is potentially liable to that person under the statutory 25 percent penalty provision discussed above [*see Civ. Code § 2988.5(a)(2)*] against any amount that person owes the lessor, unless the amount of the lessor's liability to that person has been determined by judgment of a court of competent jurisdiction in an action to which that person was a party [*Civ. Code § 2988.5(f)*; *15 U.S.C. § 1640(h)*].

[b] Action Against Original Lessor's Assignee

Except as otherwise specified in the Vehicle Leasing Act, any civil action for a violation of the Act that may be brought against the original lessor in any lease transaction also may be maintained against any subsequent assignee of the original lessor if the violation from which the alleged liability arose is apparent on the face of the instrument. The assignee is not liable if the assignment was involuntary [*Civ. Code § 2988.5(e)*; *see Bescos v. Bank of America (2003) 105 Cal. App. 4th 378, 391, 129 Cal. Rptr. 2d 423* (assignee bank that financed lease but was not agent of dealer in lease transaction was not responsible as lessor for misrepresentations made by dealer that were unknown to lender and not apparent on face of lease)].

An assignee is subject to all equities and defenses of the lessee against the lessor, notwithstanding an agreement to the contrary, but the assignee's liability may not exceed the amount of the obligation owing to the assignee at the time of the assignment. The assignee has recourse against the lessor to the extent of any liability incurred by the assignee regardless of whether the assignment was with or without recourse [*Civ. Code § 2986.10*].

[2] Identical Recovery Available under Consumer Leasing Act

Any lessor who fails to comply, with respect to any person, with any requirement imposed under *15 U.S.C. § 1667a* (disclosure requirements) or *1667b* (lessee liability for depreciation at end of lease) is liable to that person as provided in *15 U.S.C. § 1640* (civil liability for violations of Truth in Lending Act) [*15 U.S.C. § 1667d(a)*]. The civil liability provisions of *15 U.S.C. § 1640(a)*, insofar as they pertain to consumer leases, are similar to the civil liability provisions of *Civ. Code § 2988.5(a)*, discussed in *§ 90.20[1][a]*. A lessee who files an action under the federal act may not thereafter file an action under the Vehicle Leasing Act if the federal action was based on facts giving rise to a similar cause of action under the Vehicle Leasing Act [*see Civ. Code § 2989* and discussion in *§ 90.21[1]*; *see also § 90.60*].

A lessor who fails to comply with *15 U.S.C. § 1667c* (restrictions on consumer lease advertising) is also liable as provided in *15 U.S.C. § 1640* to any person who suffers actual damage as a result of the failure to comply [*15 U.S.C. § 1667d(b)*].

An action under *15 U.S.C. §§ 1640(a)* or *1667d* for violations of the Consumer Leasing Act may be brought in any United States district court or in any other court of competent jurisdiction [*15 U.S.C. §§ 1640(e), 1667d(c)*].

For a discussion and forms relating to actions under *15 U.S.C. § 1640*, see Ch. 501, *Sales: Retail Installment Sales* .

[3] Multiple Failure to Disclose

The multiple failure to disclose information required to be disclosed under the Vehicle Leasing Act or the Consumer Leasing Act in connection with a single lease transaction entitles the person injured to only a single recovery under *Civ. Code § 2988.5* or *15 U.S.C. § 1640(a)*. A continued failure to disclose after a recovery has been granted gives rise to the right to additional recoveries [*Civ. Code § 2988.5(h)*; *15 U.S.C. § 1640(g)*].

[4] Rescission

If the lessor fails to comply with *Civ. Code § 2985.8* (formalities and disclosures), the lessee, as an alternative to an

action under *Civ. Code § 2988.5*, discussed in *[1][a], above*, may rescind the contract if the failure to comply was willful, or if correction would increase the amount of the contract balance. The contract cannot be rescinded if the lessor waives collection of the increased amount [*Civ. Code § 2988.7*].

[5] Statute of Limitations

Actions alleging a failure to comply with the requirements of the Vehicle Leasing Act or the federal Consumer Leasing Act must be brought within one year of the termination of the lease contract [*Civ. Code § 2988.5(i)*; *15 U.S.C. § 1667d(c)*].

Legal Topics:

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§ 90.21 Lessor's Statutory Defenses

[1] Federal Suit Bars State Action

No civil action may be filed against a lessor under the Vehicle Leasing Act if a federal civil action has been previously filed based on facts that give rise to a similar cause of action under the Vehicle Leasing Act [*Civ. Code § 2989*].

[2] Correction of Error

A lessor is not liable under *Civ. Code § 2988.5* if the lessor, within 15 days after discovery of an error, and prior to the institution of an action under that section or the receipt of written notice of the error, notifies the concerned person of the error and makes whatever adjustments are necessary to ensure that the person will not be required to pay any amount in excess of that which should have been correctly disclosed [*Civ. Code § 2988.5(c)*]. For an affirmative defense based on timely correction of an error, see *§ 90.50*].

The federal provision is similar, except that it [*15 U.S.C. § 1640(b)*]:

- Specifically applies to assignees as well as original lessors.
- Provides for correction within 60 days of discovery or notice, instead of 15 days.
- The adjustment must assure that the lessee will not be required to pay an amount in excess of the amount that was actually disclosed.

[3] Bona Fide Error

A lessor may not be held liable in any action brought under *Civ. Code § 2988.5* for a violation of the Vehicle Leasing Act if the lessor shows by a preponderance of the evidence that the violation was unintentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid any such error [*Civ. Code § 2988.5(d)*; *see 15 U.S.C. § 1640(c)* (providing lessor and assignee same defense to action under *15 U.S.C. § 1640* for violations of Consumer Leasing Act)]. For an affirmative defense based on unintentional and bona fide error, see *§*

90.51.

The federal law additionally provides that examples of bona fide errors include, but are not limited to clerical, calculation, computer malfunction and programming, and printing errors but that an error of legal judgment with respect to a person's obligations under the act is not a bona fide error [*15 U.S.C. § 1640(c)*].

[4] Act Done in Conformity With Federal Law

A lessor is not liable under *Civ. Code § 2988.5* for any act done or omitted in good-faith conformity with any rule, regulation, or interpretation of federal law, even if the rule, regulation, or interpretation relied on is later amended, rescinded, or determined by judicial or other authority to be invalid for any reason [*Civ. Code § 2988.5(g)*; *see 15 U.S.C. § 1640(f)* (providing similar defense to lessor in action under *15 U.S.C. § 1640* for violations of Consumer Leasing Act)]. For an affirmative defense based on the alleged wrongful act having been done or omitted in good faith conformity with federal law, see *§ 90.52*.

Legal Topics:

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§ 90.22 Attorney's Fees and Costs

Reasonable attorney's fees and costs must be awarded to the prevailing party in any action on a lease contract subject to the Vehicle Leasing Act,regardless of whether the action is instituted by the lessor, assignee, or lessee. If the defendant alleges in the answer that he or she tendered to the plaintiff the full amount to which the plaintiff was entitled (in other words, when the defendant concedes owing money but disputes the amount), deposits in court for the plaintiff the amount so tendered, and the allegation is found to be true, the defendant is deemed to be the prevailing party [*Civ. Code § 2988.9*; *see Civ. Code § 2988.5(a)(3)* (attorney's fees and costs are part of measure of recovery in action by lessee against lessor under *Civ. Code § 2988.5* for violations of Vehicle Leasing Act)]. The second sentence of *Civ. Code § 2988.9* providing for defendant's tender of the amount claimed to be due to plaintiff does not *require* tender and deposit as prerequisites for an attorney's fee award in addition to the "prevailing party" requirement of the statute's first sentence. Rather, the second sentence merely describes one way in which a defendant will be declared a prevailing party [*Hart v. Autowest Dodge (2007) 147 Cal. App. 4th 1258, 1262, 55 Cal. Rptr. 3d 249* ("[i]t would be nonsensical to require a defendant who has done nothing wrong to tender, deposit, and prove an amount to which plaintiff is 'entitled' in order to recover attorney's fees.")].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 90.23 Criminal Penalties

Any person who knowingly and willfully violates any provision of the Vehicle Leasing Act is guilty of a misdemeanor [*Civ. Code § 2989.8*].

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§ 90.24 Unlawful Vehicle Subleasing

[1] Defined

A person engages in unlawful motor vehicle subleasing when all of the following conditions are satisfied [*Penal Code § 571(a)*]:

- The motor vehicle is subject to a lease, conditional sale contract, or security agreement, the terms of which prohibit the transfer or assignment of any right or interest in the motor vehicle or under the lease, conditional sale contract, or security agreement.

- The person is not a party to the lease, conditional sale contract, or security agreement.

- The person transfers or assigns, or purports to transfer or assign, any right or interest in the motor vehicle or under the lease, conditional sale contract, or security agreement to any person who is not a party to the lease contract, conditional sale contract,or security agreement.

- The person performs such an assignment without obtaining, before the transfer or assignment, or purported transfer or assignment, written consent to the transfer or assignment from the motor vehicle lessor, seller, or secured party.

- The person receives compensation or some other consideration for the transfer or assignment, or purported transfer or assignment.

A person engages in unlawful motor vehicle subleasing when the person is not a party to the lease contract, conditional sales contract, or security agreement and assists, causes, or arranges an actual or purported transfer or assignment as described above [*Penal Code § 571(b)*]. Although *Penal Code § 571(b)* prohibits a nonparty from assisting in "an actual or purported transfer or assignment" as described in *Penal Code § 571(a)*, it does not say that the person making the transfer must be a nonparty. Thus, a person who facilitates the making of unlawful subleases between the original transferee (who was a party to the original lease) and a third-partysublessee can be found guilty under the statute [

People v. Carter (1994) 30 Cal. App. 4th 775, 781, 37 Cal. Rptr. 2d 59] .

The actual or purported transfer or assignment, or the assisting, causing, or arranging of an actual or purported transfer or assignment, of any right or interest in the motor vehicle or under a lease, conditional sale contract, or security agreement, by an individual who is a party to the lease, conditional sale contract, or security agreement is not unlawful motor vehicle subleasing [*Penal Code § 572(a)*]. *Penal Code §§ 570-574* do not affect the enforceability of any provision of any lease, conditional sale contract, security agreement, or direct loan agreement by any party to such an agreement [*Penal Code § 572(b)*].

[2] Related Definitions

[a] "Buyer"

"Buyer" means the person who buys or hires a motor vehicle under a conditional sale contract [*Civ. Code §§ 2981(c), 3343.5(c)(1)*; *Penal Code § 574(a)*].

[b] "Conditional Sale Contract"

"Conditional sale contract" has the meaning set forth in *Civ. Code § 2981(a)* (discussed in *Ch. 89, Automobiles: Sales and Financing Under the Rees-Levering Act, § 89.12[2]*), except that contrary to *Civ. Code § 2981(k)*, "conditional sale contract" includes any contract for the sale or bailment of a motor vehicle between a buyer and a seller primarily for business or commercial purposes [*Civ. Code § 3343.5(c)(2)*; *Penal Code § 574(b)*].

[c] "Direct Loan Agreement"

"Direct loan agreement" means an agreement between a lender and a purchaser by which the lender has advanced funds pursuant to a loan secured by the motor vehicle that the purchaser has purchased [*Civ. Code § 3343.5(c)(3)*; *Penal Code § 574(c)*].

[d] "Lease Contract"

"Lease contract" means a lease contract between a lessor and lessee as this term and these parties are defined in *Civ. Code § 2985.7* (discussed in *§ 90.12[1][a]*), except that contrary to *Civ. Code § 2985.7(d)*, "lease contract" includes a lease for business or commercial purposes [*Civ. Code § 3343.5(c)(4)*; *Penal Code § 574(d)*].

[e] "Motor Vehicle"

"Motor vehicle" means any vehicle required to be registered under the Vehicle Code [*Civ. Code § 3343.5(c)(5)*; *Penal Code § 574(e)*].

[f] "Person"

"Person" means an individual, company, firm, association, partnership, trust, corporation, limited liability company, or other legal entity [*Civ. Code § 3343.5(c)(6)*; *Penal Code § 574(f)*].

[g] "Purchaser"

"Purchaser" means a person who takes by purchase [*Civ. Code § 3343.5(c)(7)*; *Penal Code § 574(g)*; *see Com. Code § 1201(b)(30)*].

[h] "Security Interest," "Security Agreement," and "Secured Party"

"Security interest," "security agreement," and "secured party" have the meanings set forth in the Commercial Code [*Civ. Code § 3343.5(c)(8)*; *Penal Code § 574(h)*; *see Com. Code §§ 1201(b)(35), 9102(a)(72), (73)*]. For discussion, see Ch. 503, *Sales: Secured Transactions* .

[i] "Seller"

"Seller" means a person in the business of selling or leasing motor vehicles under conditional sale contracts, and includes the present holder of the conditional sale contract [*Civ. Code §§ 2981(b), 3343.5(c)(9)*; *Penal Code § 574(i)*].

[3] Civil Liability

Any of the following persons who suffers any damage proximately resulting from any act or acts of unlawful motor vehicle subleasing described in *Penal Code § 570 et seq.*, may bring an action against the person who has engaged in those acts [*Civ. Code § 3343.5(a)*]:

- A seller or other secured party under a conditional sale contract or a security agreement.
- A lender under a direct loan agreement.
- A lessor under a lease contract.
- A buyer under a conditional sale contract.
- A purchaser under a direct loan agreement, an agreement that provides for a security interest, or an agreement that is equivalent to these types of agreements.
- A lessee under a lease contract.
- An actual or purported transferee or assignee of any right or interest of a buyer, a purchaser, or a lessee.

The court, in an action under *Civ. Code § 3343.5(a)*, may award actual damages, equitable relief including, but not limited to, an injunction and restitution of money and property, punitive damages, reasonable attorney's fees and costs, and any other relief that the court deems proper [*Civ. Code § 3343.5(b)*]. The rights and remedies provided in *Civ. Code § 3343.5* are in addition to any other rights and remedies provided by law [*Civ. Code § 3343.5(d)*].

An act of unlawful subleasing is also a misdemeanor [*see Penal Code § 570*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesGeneral OverviewBanking LawConsumer ProtectionConsumer LeasingLiabilityContracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesSubleases

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PART II. LEGAL BACKGROUND

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[Reserved]

§§ 90.25[Reserved]

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PART III. RESEARCH GUIDE

8-90 California Forms of Pleading and Practice--Annotated § 90.30

§ 90.30 Related Matthew Bender Publications

For discussion, transaction guide, and forms relating to vehicle leases, see California Legal Forms, Ch. 47, *Automotive Financing and Vehicle Leasing* (Matthew Bender)

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8-90 California Forms of Pleading and Practice--Annotated § 90.31

§ 90.31 Federal Statutes

Consumer Leasing Act of 1976. *15 U.S.C. § 1667 et seq.*

Definitions under Consumer Leasing Act. *15 U.S.C. § 1667*

Consumer lease disclosures. *15 U.S.C. § 1667a*

Lessee's liability on expiration or termination of lease if determined by estimated residual value of property; presumptions. *15 U.S.C. § 1667b*

Restrictions on consumer lease advertising. *15 U.S.C. § 1667c*

Civil liability of lessors. *15 U.S.C. § 1667d*

Effect of Consumer Leasing Act on state laws. *15 U.S.C. § 1667e*

Authority of Federal Reserve Board to issue regulations and model forms; any lessor using model forms is deemed to be in compliance of disclosure requirements to which that form relates. *15 U.S.C. § 1667f*

Servicemembers Civil Relief Act. *50 U.S.C. App. § 501 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesGeneral OverviewMilitary & Veterans LawServicemembersGeneral OverviewBanking LawConsumer ProtectionConsumer LeasingLiabilityBanking LawConsumer ProtectionConsumer LeasingDisclosureContracts LawTypes of ContractsLease AgreementsPersonalty LeasesSubleases

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8-90 California Forms of Pleading and Practice--Annotated § 90.32

§ 90.32 Federal Regulations

Regulation M: Consumer Leasing. 12 C.F.R. Part 213

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8-90 California Forms of Pleading and Practice--Annotated § 90.33

§ 90.33 State Statutes

[1] General Provisions

Vehicle Leasing Act. *Civ. Code § 2985.7 et seq.*

Definitions under Vehicle Leasing Act. *Civ. Code § 2985.7*

Investigation of consumer complaints by Department of Motor Vehicles; production of records. *Civ. Code § 2989.5*

Department of Motor Vehicles is authorized to issue and enforce regulations implementing Vehicle Leasing Act. *Civ. Code § 2989.6*

Criminal penalties for willful violations. *Civ. Code § 2989.8*

Vehicle Leasing Act is not applicable to any transaction regulated by the Rees-Levering Motor Vehicles Sales and Finance Act (*Civ. Code § 2981 et seq.*). *Civ. Code § 2990*

Suspension of certain civil obligations and liabilities of National Guard and military reserve members during qualifying periods of military service after September 11, 2001. *Mil. & Vet. Code § 400 et seq.*

Person acting as lessor-retailer without being duly licensed may not enforce any security interest or bring or maintain any action in law or equity torecover any money or property or obtain other relief from lessee of vehicle in connection with transaction for which lessor-retailer license was required. *Veh. Code § 11711.3*

[2] Disclosure Requirements and Formalities

Contents of lease contract solicitations. *Civ. Code § 2985.71*

Formalities and disclosures required in lease contracts. *Civ. Code § 2985.8*

Acknowledgment of delivery of copy of contract; presumptions. *Civ. Code § 2986.4*

[3] Lessee's Remedies

Assignee of lessor's rights is subject to equities and defenses of lessee against lessor; assignee has recourse against lessor to extent of any liability, regardless of whether assignment was with or without recourse. *Civ. Code § 2986.10*

Lessor is required to refund any payment made by lessee pending execution of lease contract if contract is not executed. *Civ. Code § 2986.13*

Lessor's civil liability for violations of *Civ. Code § 2985.8* (disclosure requirements) or 2988 (restrictions on lessee liability for depreciation); defenses to liability. *Civ. Code § 2988.5(a), (b)*

Assignee is liable for violations appearing on face of lease contract. *Civ. Code § 2988.5(e)*

Prohibition against offset of claims when amount of lessor's liability is not judicially determined. *Civ. Code § 2988.5(f)*

Multiple failure to disclose gives rise to only single recovery. *Civ. Code § 2988.5(h)*

One-year statute of limitations for actions alleging violation of Vehicle Leasing Act. *Civ. Code § 2988.5(i)*

Rescission of lease contract is lessee's alternative to action under *Civ. Code § 2988.5* if violation was willful or correction will increase amount of contract balance. *Civ. Code § 2988.7*

Attorney's fees and costs are to be awarded to prevailing party in action on lease contract subject to Vehicle Leasing Act. *Civ. Code § 2988.9*

Deferment of payments on vehicle lease, without penalties or added interest, while debtor is serving as member of U.S. military reserve or California national guard on active duty after February 9, 2005, as part of Iraq and Afghanistan conflicts. *Mil. & Vet. Code § 800 et seq.*

Right of active-duty military service member to use equal-payments plan for discharging debt due under vehicle lease that was terminated pursuant to federal Servicemembers Civil Relief Act. *Mil. & Vet. Code § 826*

[4] Lessor's Defenses

Lessor not liable if he or she makes timely correction of error. *Civ. Code § 2988.5(c)*

Lessor not liable if violation is result of bona fide error. *Civ. Code § 2988.5(d)*

Lessor not liable for any act done or omitted in good-faith compliance with federal rule, regulation, or interpretation. *Civ. Code § 2988.5(g)*

Civil action under Vehicle Leasing Act against lessor is barred by previous filing of federal civil action based on facts giving rise to similar cause of action under act. *Civ. Code § 2989*

[5] Restrictions on Lessors and Lease Contracts

Provisions prohibited in lease contracts. *Civ. Code § 2986.3*

Leased used motor vehicles are required to meet equipment requirements of *Veh. Code § 24000 et seq. Civ. Code § 2986.5(a)*

Lessor required to return excess amount paid by lessee for licensing or transfer of title of motor vehicle leased. *Civ. Code § 2986.5(b)*

Lessor prohibited from inducing or attempting to induce any person to enter into lease contract by offering rebate, discount, etc., contingent on lessee giving information or assistance for purpose of enabling lessor to lease or sell a vehicle to another. *Civ. Code § 2986.12*

Restrictions on lessee's liability for depreciation of motor vehicle on termination of lease contract. *Civ. Code § 2988*

Lessor's obligations when selling or obtaining bids for vehicle on termination of lease; notice to lessee required. *Civ. Code § 2989.2*

Prohibited acts. *Civ. Code § 2989.4*

Action for damages for unlawful motor vehicle subleasing, as defined in *Penal Code §§ 571, 572, 574. Civ. Code § 3343.5*

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesGeneral OverviewMilitary & Veterans LawServicemembersGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsBanking LawConsumer ProtectionConsumer LeasingLiabilityBanking LawConsumer ProtectionConsumer LeasingDisclosure

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8-90 California Forms of Pleading and Practice--Annotated § 90.34

§ 90.34 Decisions

[1] Consumer Leasing Act

Class action by lessees who had not terminated their leases early was properly enjoined based on settlement of prior class action (of which they received notice as potential class members and from which they did not opt out) alleging improper disclosure and unreasonableness of early termination fees; although plaintiffs in second action may not have had ripe claims as to reasonableness of early termination fees, those claims were closely enough related to disclosure claims that both could be resolved in settlement of first action. *Williams v. General Elec. Capital Auto Lease, Inc. (7th Cir. 1998) 159 F.3d 266, 274*

Lessee who had not terminated lease early could not state claim that early termination charges were unreasonable and violated *15 U.S.C. § 1667b(b)*, but could state claim that disclosure of those charges did not comply with requirements of *15 U.S.C. § 1667a*. *Highsmith v. Chrysler Credit Corp. (7th Cir. 1994) 18 F.3d 434, 437-440*

[2] Vehicle Leasing Act

Assignee bank which financed lease but was not agent of dealer in lease transaction was not responsible as lessor for misrepresentations made by dealer that were unknown to lender and not apparent on face of lease; summary judgment for bank affirmed because appellant failed to show that triable issue of material fact existed that bank's liability was greater than that of assignee in lease transaction, with insufficient facts to establish bank's substantial involvement in lease transaction. *Bescos v. Bank of America (2003) 105 Cal. App. 4th 378, 391, 129 Cal. Rptr. 2d 423*

Violation of *Civ. Code § 2985.8(a)* found when there was a single transaction involving two trade-ins and new truck lease but no single document containing "all the agreements" regarding parties' obligations. *Kroupa v. Sunrise Ford (1999) 77 Cal. App. 4th 835, 843-844, 92 Cal. Rptr. 2d 42*

Department of Motor Vehicles and New Motor Vehicle Board have authority under *Veh. Code § 11713* to regulate misleading vehicle lease advertising by automobile dealers. *Toyota of Visalia, Inc. v. Department of Motor Vehicles*

(1984) 155 Cal. App. 3d 315, 329, 202 Cal. Rptr. 190

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewTransportation LawPrivate VehiclesGeneral OverviewMilitary & Veterans LawServicemembersGeneral OverviewBanking LawConsumer ProtectionConsumer LeasingDisclosure

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§ 90.35 Law Reviews

Rojc & Juffernbruch, *State Law Response to the New Regulation M, 53 Bus. Law. 1027 (May 1998)*

Huber & Hudson, *Road Testing the New Regulation M, 53 Bus. Law. 1011 (May 1998)*

Jaworski, *Car Leasing Developments: A Road Map for Bankers, 114 Banking L.J. 726 (Spring 1997)*

Gelb & Cubita, *An Overview of State Automobile Leasing Legislation, 52 Bus. Law. 1087 (May 1997)*

Hudson & Ryan, *At Long Last, the Final Rule on Regulation M, 52 Bus. Law. 1077 (May 1997)*

Rojc & Juffernbruch, *Impact of New Reg M on State Motor Vehicle Leasing Disclosure Laws, 52 Bus. Law. 1101 (May 1997)*

Hudson, *Consumer Leasing and Personal Property Financing Developments: Early Termination Provisions in Automobile Leasing Contracts, 48 Bus. Law. 1151 (May 1993)*

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[Reserved]

§§ 90.36[Reserved]

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PART IV. FORMS
A. Lessee's Forms

8-90 California Forms of Pleading and Practice--Annotated § 90.40

§ 90.40 Complaint for Damages, Statutory Penalty, Costs, and Attorney's Fees for Lessor's Violation of Motor Vehicle of Disclosure Requirements or Depreciation Liability Restrictions [Civ. Code § 2988.5(a); 15 U.S.C. §§ 1640(a), 1667d(a)]

[1] FORM Complaint for Damages, Statutory Penalty, Costs, and Attorney's Fees for Lessor's Violation of Motor Vehicle of Disclosure Requirements or Depreciation Liability Restrictions [Civ. Code § 2988.5(a); 15 U.S.C. §§ 1640(a), 1667d(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES, STATUTORY
_____ [*name(s)*], Defendant(s).	)	PENALTY, COSTS, AND ATTORNEY'S FEES
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST COUNT

(Violation of Vehicle Leasing Act)

1. Plaintiff, a natural person, is, and at all times herein mentioned was, a resident of _____ County,

California.

2. Defendant _____ [*name of lessor or assignee*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California, with its principal office for the transaction of business in _____ County, California [*or allege other capacity and residence of defendant*], and _____ [authorized *or* licensed] to engage, and engaging, in the business of leasing motor vehicles under lease contracts.

[3. *If Paragraph 2. was used to allege capacity of defendant lessor and assignee is additional defendant, add:* Defendant _____ (*name of assignee*) is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California, with its principal office for the transaction of business in _____ County, California (*or allege other capacity and residence of defendant assignee*), and _____ (authorized *or* licensed) to engage, and engaging, in the business of _____ (*specify, e.g.,* banking).]

4. On or about _____ [*date*], in _____ [*city*], _____ County, California, plaintiff and [defendant] [_____ (*name of lessor*)] entered into a written lease contract, under which _____ [defendant *and/or name of lessor*] agreed to lease to plaintiff a _____ [*year and make of vehicle*] automobile for a term exceeding four months. Plaintiff leased the automobile for use primarily for personal, family, or household purposes. The contract was, and is, subject to the provisions of the Vehicle Leasing Act (*Civil Code Section 2985.7 et seq.*). A copy of the contract is attached as Exhibit A and incorporated by reference.

[5. *If the original lessor has assigned the contract to a third party, add:* Plaintiff is informed and believes and thereon alleges that on or about _____ (*date*), (defendant) _____ (*name of lessor*) assigned his/her/its rights under the above-mentioned lease contract to (defendant _____ (*name of assignee*)].

6. [Defendant] _____ [*name of lessor*] violated Civil Code Sections(s) _____ [2985.8 *or* 2988 *or both*] in connection with the above-mentioned lease contract in that _____ [*allege facts showing a violation by lessor of Civ. Code § 2985.8 and/or 2988, e.g.,* (defendant) _____ (*name of lessor*) failed to provide plaintiff with a fully executed copy of the contract at the time it was signed by plaintiff and (defendant) _____ (*name of lessor*) *or* the contract failed to disclose the amount or the method of determining the amount of any liability to be imposed on plaintiff at the expiration of the lease term *or* the estimated residual value of the automobile, as disclosed in the contract, does not reasonably approximate the anticipated actual fair market value of the automobile at the expiration of the lease (in that the difference between the estimated residual value of the automobile, as disclosed in the lease contract, and the actual residual value of the automobile at the completion of the lease is more than three times the average monthly payment under the lease contract)]. [*If defendant is an assignee of the lessor, add:* The above-described violation(s) of Section(s) _____ (*2985.8 or 2988 or both*) _____ (is *or* are) apparent on the face of the lease contract.]

7. Because of the above-described violation(s) of Civil Code Section(s) _____ [*2985.8 or 2988 or both*], plaintiff has suffered actual damages in the amount of $_____, as follows: _____ [*specify nature of damages*].

8. Because of the foregoing violation(s) of Civil Code Section(s) _____ [2985.8 *or* 2988 *or both*], plaintiff is entitled to recover from the defendant(s) _____ [*name*(*s*)] the sum of $_____ [*amount not less than $100, nor more than $1,000*], which is _____ [25 percent of $_____, the total amount of monthly payments under the lease contract described above *or* the _____ (maximum *or* minimum) amount permitted to be recovered under *Civil Code Section 2988.5(a)(2)*].

9. Under *Civil Code Section 2988.5(a)(3)*, plaintiff is entitled to reasonable attorney's fees and costs incurred and to be incurred in this action, in an amount to be determined by the court.

SECOND COUNT
(Violation of Federal Consumer Leasing Act)

10. Plaintiff realleges and incorporates here by reference each and every allegation contained in his/her/its First Count set forth herein.

11. Defendant _____ [*name of lessor*] is regularly engaged in the business of leasing, offering to lease, or arranging to lease personal property under a consumer lease, and is subject to the provisions of the Federal Consumer Leasing Act of 1976 (Title *15, United States Code, Section 1667 et seq.*).

12. Plaintiff's total contractual obligation under the lease contract described in the First Count, above, is $_____ [*amount not exceeding $25,000*].

13. Defendant(s) _____ [*name(s*)] violated Title 15, United States Code, Section(s) _____ [*1667a or 1667b or both*] in connection with the lease contract described above in that _____ [*allege facts showing violation(s), as in Paragraph 6 of First Count*].

14. Because of the violations(s) of Title 15, United States Code, Section(s) _____ [*1667a or 1667b or both*], described above, plaintiff has suffered actual damages in the amount of $_____ in that _____ [*specify nature of damages*].

15. Because of the foregoing violation(s) of Title 15, United States Code, Section(s) _____ [*1667a or 1667b or both*], plaintiff is entitled to recover from defendant(s) the sum of $_____ [*amount not less than $100 nor more than $1,000*], which is _____ [25 percent of $_____ the total amount of monthly payments under the lease contract described above *or* the _____ (maximum *or* minimum) amount permitted to be recovered under Title *15, United States Code, Section 1640(a)(2)* and *Section 1667d(a)*].

16. Under Title *15, United States Code, Section 1640(a)(3)*, plaintiff is entitled to reasonable attorney's fees and costs incurred and to be incurred in bringing this action, in an amount to be determined by the court.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For damages in the sum of $_____.

2. For the sum of $_____, which is 25 percent of the total amount of monthly payments under the lease contract described above.

3. For reasonable attorney's fees in an amount to be determined by the court.

4. For costs of suit herein incurred.

5. For other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This complaint is for use in an action by a lessee of a motor vehicle to recover damages, statutory penalties, and attorney's fees for violations by the lessor of the provisions of *Civ. Code § 2985.8* and *15 U.S.C. § 1667a* (formalities and disclosures of lease contracts) or *Civ. Code § 2988* or 15 U.S.C. § 1667b (restrictions on lessee's liability for depreciation of motor vehicle) [*see Civ. Code § 2988.5*; *15 U.S.C. §§ 1640, 1667d*, discussed in *§ 90.20[1], [2]*]. With appropriate modification, this form may also be used by the lessee as a cross complaint in an action by the lessor to recover amounts due under the lease contract.

Both the original lessor and it assignee are liable under *Civ. Code §§ 2986.10(a), 2988.5(e)* if the violation from which the alleged liability arose is apparent on the face of the instrument [*see Bescos v. Bank of America (2003) 105 Cal. App. 4th 378, 391, 129 Cal. Rptr. 2d 423* (assignee bank which financed lease but was not agent of dealer in lease transaction was not responsible as lessor for misrepresentations made by dealer that were unknown to lender and not apparent on face of lease)]. However, an assignee's liability cannot exceed the amount of the obligation owing at the time of the assignment [*Civ. Code § 2986.10(a); see § 90.20[1][b]*]. Therefore, in most cases it will not be necessary to name both the lessor and the assignee as defendants.

As an alternative to bringing an action under *Civ. Code § 2988.5*, the lessee may rescind the contract pursuant to *Civ. Code § 2988.7* (discussed in *§ 90.20[4]*) if the lessor's violation is willful or if correction of the violation will increase the amount of the contract balance. The lessee maythereafter bring an action for restitution based on the rescission [*see § 90.41*].

[3] Allegations

The first count of this complaint alleges the following:

- The capacity and residence of plaintiff and defendant(s) (Paragraphs 1-3);

- The execution of a lease contract that is subject to the Vehicle Leasing Act (Paragraph 4) [*see Civ. Code § 2985.7(d)*];

- If appropriate, the assignment of the lease contract by the lessor (Paragraph 5);

- Defendant's violation of *Civ. Code § 2985.8* and/or *Civ. Code § 2988* (Paragraph 6) [*see Civ. Code § 2988.5(a)*; *see, e.g., Kroupa v. Sunrise Ford (1999) 77 Cal. App. 4th 835, 843-844, 92 Cal. Rptr. 2d 42* (finding violation of *§ 2985.8(a)* when there was a single transaction involving two trade-ins and new truck lease but no single document containing "all the agreements" regarding parties' obligations)];

- The amount, if any, of plaintiff's actual damages (Paragraph 7) [*see Civ. Code § 2988.5(a)(1)*];

- Plaintiff's right to recover the statutory penalty of 25 percent of the total amount of monthly payments under the contract (Paragraph 8) [*see Civ. Code § 2988.5(a)(2)*]; and

- Plaintiff's right to recover attorney's fees and costs (Paragraph 9) [*see Civ. Code § 2988.5(a)(3)*; *see also Civ. Code § 2988.9* (prevailing party's right to attorney's fees in any action on contract subject to Vehicle Leasing Act)].

The second count incorporates by reference the allegations of the first count (Paragraph 10) and adds the following allegations:

- That defendant is regularly engaged in leasing that is subject to the federal Consumer Leasing Act of 1976 (Paragraph 11) [*see 15 U.S.C. § 1667(3)* (defining "lessor")];

- That the lessee's total obligation under the lease contract does not exceed $25,000 (Paragraph 12) [*15 U.S.C. § 1667(1)*];

- Defendants' violation(s) of *15 U.S.C. § 1667a* and/*or 1667b* (Paragraph 13) [*15 U.S.C. § 1667d(a)*];

- The amount of actual damages resulting from the violation(s) (Paragraph 14) [*15 U.S.C. §§ 1640(a)*, 1st sentence, cl. (1), 1667d(a)];

- Plaintiff's right to recover the statutory penalty of 25 percent of the total monthly payments under the lease contract (Paragraph 15) [*15 U.S.C. §§ 1640(a)*, 1st sentence, cl. (2)(A)(ii), 1667d(a)]; and

- Plaintiff's right to reasonable attorney's fees and costs (Paragraph 16) [*15 U.S.C. §§ 1640(a)*, 1st sentence, cl. (3), 1667d(a)].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified, if the action is an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Statute of Limitations

Any action alleging a failure to comply with the requirements of the Vehicle Leasing Act or the federal Consumer Leasing Act must be brought within one year of the termination of the lease contract [*Civ. Code § 2988.5(i)*; *15 U.S.C. § 1667d(c)*].

[6] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

The Vehicle Leasing Act does not contain explicit venue provisions for actions brought by lessees [*compare Civ. Code § 2986.3(d)* (prohibiting lessor from inserting provision in lease contract that gives lessor or holder right to commence action on lease contract in other than certain counties), set forth in last item enumerated in *§ 90.15[1]*]. Therefore, the general venue provisions in *Code Civ. Proc. § 392 et seq.* apply to actions by the lessee. Under those provisions, the action being one arising from the (offer or) provision of goods, services, loans, or extensions of credit intended primarily for personal, family or household use (other than an obligation described in *Civ. Code § 1812.10* or *2984.4*), venue is proper in the following counties [*Code Civ. Proc. § 395(b)*; *Fontaine v. Superior Court (CashCall, Inc.) (2009) 175 Cal. App. 4th 830, 838-840, 96 Cal. Rptr. 3d 607* (statute applies to action by consumer plaintiff, as well as to action against consumer, and if any defendant in consumer's action is individual, that is irrelevant to application of statute)]]:

- The county in which the lessee in fact signed the contract;
- The county in which the lessee resided at the time the contract was entered into; or
- The county in which the lessee resides at the commencement of the action.

Any waiver of *Code Civ. Proc. § 395(b)* is void and unenforceable [*Code Civ. Proc. § 395(c)*]. For further discussion, see Ch. 571, *Venue* .

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to Fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For allegations showing proper venue, see Ch. 571, *Venue* .

For alternative forms for verification, see Ch. 572, *Verification*

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8-90 California Forms of Pleading and Practice--Annotated § 90.41

§ 90.41 Complaint for Restitution, Costs, and Attorney's Fees Based on Rescission of Lease Contract for Lessor's Willful Violation of Disclosure Requirements [Civ. Code § 2988.7]

[1] FORM Complaint for Restitution, Costs, and Attorney's Fees Based on Rescission of Lease Contract for Lessor's Willful Violation of Disclosure Requirements [Civ. Code § 2988.7]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RESTITUTION, COSTS, AND ATTORNEY'S FEES
_____ [*name*] Defendant.	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. [*Plaintiff's residence and capacity. See § 90.40[1], First Count, Paragraph 1.*]

2. [*Defendant's (s') residence and capacity. See § 90.40[1], First Count, Paragraph 2. and/or 3.*]

3. [*Execution of lease contract subject to Vehicle Leasing Act. See § 90.40[1], First Count, Paragraph 4.*]

[4. *If appropriate, assignment of the contract by the original lessor. See § 90.40[1], First Count, Paragraph 5.*]

5. [*Violation by defendant of Civ. Code § 2985.8. See § 90.40[1], First Count, Paragraph 6.*]

[*EITHER*]

6. Plaintiff is informed and believes and thereon alleges that the foregoing violations(s) of *Civil Code Section 2985.8* by defendant _____ [*name*] _____ [was *or* were] willful.

[*OR*]

6. Any correction by defendant _____ [*name*] of the foregoing violation(s) of *Civil Code Section 2985.8* will increase the amount of the balance due under the above-described lease contract.

[*CONTINUE*]

7. Because of the foregoing [willful] violation(s) of *Civil Code Section 2985.8* by defendant _____ [*name*], plaintiff is entitled to rescind the lease contract described above.

8. _____ [*Allege notice to defendant of rescission and offer to restore vehicle or other consideration furnished, e.g.*, Plaintiff intends service of summons and this complaint to serve as notice of rescission of the lease contract described above, and hereby offers to restore all consideration furnished by defendant under the lease contract, including possession of the automobile described above, on condition that defendant restore to plaintiff the sum of $_____, which is the total amount of advance payments and other consideration furnished by plaintiff pursuant to the lease contract described above *or* On or about _____ (*date*), plaintiff notified defendant _____ (*name*) in writing that the lease contract was rescinded by plaintiff because of the foregoing (willful) violation(s) of *Civil Code Section 2985.8*. A copy of the notice of rescission is attached as Exhibit B and incorporated by reference. Thereafter, on _____ (*date*), plaintiff _____ (restored *or* offered to restore) to defendant's possession the automobile leased pursuant to the lease contract and requested that defendant refund to plaintiff the sum of $_____, which is the total amount of advance payments and other consideration furnished by plaintiff to defendant pursuant to the lease contract. Defendant _____ (*name*) has failed and refused, and continues to fail and refuse, to return this sum, or any part of it, to plaintiff].

9. Under *Civil Code Section 2988.9*, plaintiff is entitled to recover reasonable attorney's fees and costs incurred and to be incurred in this action in an amount to be determined by the court.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____.

2. For reasonable attorney's fees in an amount to be determined by the court.

3. For costs of suit herein incurred.

4. For other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 90.40[1], [4].*]

[2] Use of Form

The complaint in *[1], above*, is for use in an action brought by the lessee of a motor vehicle against the lessor for restitution of consideration and attorney's fees when the lessee has rescinded the lease contract because of the lessor's violation of *Civ. Code § 2985.8* (formalities and disclosures of lease contracts). Under the Vehicle Leasing Act, if the lessor's violation was willful or if correction of the violation would increase the amount of the contract balance, and the lessor does not waive the right to collect that increased amount, the lessee may rescind the contract, as an alternative to bringing an action under *Civ. Code § 2988.5*; [*see Civ. Code § 2988.7* (discussed in *§ 90.20[4*]); *Civ. Code § 2988.9* (prevailing party's right to attorney's fees, discussed in *§ 90.22*)].

The allegations of the complaint may be modified for use in a lessee's answer and cross complaint to an action by the lessor to recover amounts allegedly due under the lease contract.

[3] Allegations

The complaint alleges:

- Either that the defendant's violation of *Civ. Code § 2985.8* was willful, or that correction of the violation would increase the amount of the contract balance (Paragraph 6) [*Civ. Code § 2988.7*].

- Plaintiff's right to rescind the contract (Paragraph 7) [*Civ. Code § 2988.7*].

- Plaintiff's giving of notice to defendant of rescission and return of (or offer to return) consideration and request for refund of consideration (Paragraph 8) [*see Civ. Code § 1691*].

- Plaintiff's right to attorney's fees and costs (Paragraph 9) [*Civ. Code § 2988.9*].

[4] Cross References

For additional discussion and cross references relating to complaints under the Vehicle Leasing Act, see *§ 90.40[2]* et seq.

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8-90 California Forms of Pleading and Practice--Annotated § 90.42

§ 90.42 Complaint for Restitution of Advance Payment, Costs, and Attorney's Fees When Lease Contract Was Never Executed [Civ. Code § 2986.13]

[1] FORM Complaint for Restitution of Advance Payment, Costs, and Attorney's Fees When Lease Contract Was Never Executed [Civ. Code § 2986.13]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

	)	
_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RESTITUTION, COSTS, AND
_____ [*name*], Defendant.	)	ATTORNEY'S FEES
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of plaintiff. See § 90.40[1], First Count, Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 90.40[1], First Count, Paragraph 2.*]

3. On or about _____ (*date*), plaintiff went to defendant _____'s [*name*]'s place of business in _____ [*city*], _____ County, California, for the purpose of leasing an automobile from defendant under a lease contract. In contemplation of the execution of a lease contract, on or about _____ (*date*), plaintiff paid to defendant _____ [*name*] the sum of $_____, as _____ [advance payment *or* earnest money *or other as appropriate*].

4. The contemplated lease contract was never executed.

5. Under *Civil Code Section 2986.13*, plaintiff is entitled to recover from defendant _____ [*name*] the sum of $_____, which is the amount paid to defendant _____ [*name*] in contemplation of the execution of a lease contract.

[6. *If appropriate, add:* On or about _____ (*date*), (and on numerous occasions thereafter,) plaintiff requested that defendant _____ (*name*) refund to plaintiff the above-mentioned sum of $_____. Defendant _____ (*name*) has failed and refused, and continues to fail and refuse, to refund all or any part of this sum to plaintiff].

7. [*Plaintiff's right to attorney's fees and costs. See § 90.40[1], First Count, Paragraph 9.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____.

2. For reasonable attorney's fees in an amount to be determined by the court.

3. For costs of suit herein incurred.

4. For other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 90.40[1], [4]* .]

[2] Use of Form

The complaint in *[1], above*, is for use in an action by the prospective lessee of a motor vehicle to recover the amount of any payments that were made to the lessor in anticipation of the execution of a lease contract that ultimately was never executed. In the event that no contract is not executed, the prospective lessee is entitled to a refund of those payments [*Civ. Code § 2986.13*; for discussion, *see § 90.18*)].

[3] Allegations

The complaint alleges:

- That payment was made by plaintiff to defendant in contemplation of the leasing of a motor vehicle

from defendant under a lease contract (Paragraph 3).

- That the contract was never executed (Paragraph 4).

- Plaintiff's right to a refund of the amounts he or she paid the lessor (Paragraph 5) [*Civ. Code § 2986.13*].

- If appropriate, plaintiff's demand for that refund and defendant's failure or refusal to make the refund (Paragraph 6).

[4] Cross References

For additional discussion and cross references relating to complaints under the Vehicle Leasing Act, see *§ 90.40[2]* et seq.

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[Reserved]

§§ 90.43[Reserved]

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8-90 California Forms of Pleading and Practice--Annotated § 90.50

§ 90.50 Lessor's Affirmative Defense to Lessee's Action for Violation of Civ. Code § 2985.8 or 2988--Correction of Error Within 15 Days After Discovery [Civ. Code § 2988.5(c)]

[1] FORM Lessor's Affirmative Defense to Lessee's Action for Violation of Civ. Code § 2985.8 or 2988--Correction of Error Within 15 Days After Discovery [Civ. Code § 2988.5(c)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

The violation(s) of Civil Code Section(s) _____[2985.8 *or* 2988 *or both*] complained of by plaintiff _____ [was *or* were] corrected by this defendant in accordance with *Civil Code Section 2988.5(c)* as follows: _____ [*allege facts showing correction of statutory violation by defendant within 15 days after discovery, e.g.,* On or about _____ (date), defendant discovered the error complained of herein and, within 15 days after discovering that error and prior to the commencement of this action or receipt of written notice of the error from plaintiff, defendant corrected the error, notified plaintiff of the correction, and made adjustments in the appropriate account(s) so that plaintiff would not be required to pay an amount in excess of that which should properly have been disclosed. A copy of the notice of correction mailed to plaintiff is attached as Exhibit A and incorporated by reference].

[2] Use of Form

The affirmative defense in *[a], above*, for use by a lessor in an action by the lessee to recover damages, statutory penalties, and attorney's fees for violations of *Civ. Code § 2985.8* (formalities and disclosures required in lease contracts) or *2988* (restrictions on lessee's liability for motor vehicle depreciation), discussed in *§ 90.14* and *§ 90.15[5][a]*, respectively. The defense alleges that the lessor corrected the violation complained of within 15 days after discovery of that error, as permitted by *Civ. Code § 2988.5(c)*. A lessor who makes the required correction may not be held liable in an action brought under *Civ. Code § 2988.5* [*Civ. Code § 2988.5(c)*; compare *15 U.S.C. § 1640(b)* (federal defense provision)]. Both the California and federal defense provisions are discussed in *§ 90.21[2]*.

This affirmative defense may be used in the lessor's answer to the complaint in *§ 90.40*.

For discussion of answers and forms illustrating the format of answers, see Ch. 26, *Answers* .

[3] Effect of Notice of Error or Commencement of Action by Lessee

In order to avoid liability under *Civ. Code § 2988.5*, the lessor must correct the error, notify the lessee of the correction, and make adjustments in the appropriate account before the lessee commences an action under *Civ. Code § 2988.5* or the lessor receives written notice of the error [*see Civ. Code § 2988.5(c)*]. For discussion, see *§ 90.21[2]*.

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8-90 California Forms of Pleading and Practice--Annotated § 90.51

§ 90.51 Lessor's Affirmative Defense to Lessee's Action for Violation of Civ. Code § 2985.8 or 2988--Violation Was Unintentional and Result of Bona Fide Error [Civ. Code § 2988.5(d)]

[1] FORM Lessor's Affirmative Defense to Lessee's Action for Violation of Civ. Code § 2985.8 or 2988--Violation Was Unintentional and Result of Bona Fide Error [Civ. Code § 2988.5(d)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

The violation(s) of Civil Code Section(s) _____[*2985.8 or 2988 or both*] complained of by plaintiff _____ [was *or* were] not intentional and resulted from a bona fide error, notwithstanding the maintenance by this defendant of procedures reasonably adopted to avoid those errors, in that _____ [*allege facts showing that violation resulted from bona fide error and that reasonable procedures for avoiding those errors were maintained*].

[2] Use of Form

The affirmative defense in *[a], above*, is for use by a lessor in an action by the lessee to recover damages, statutory penalties, and attorney's fees for violations of *Civ. Code § 2985.8* (formalities and disclosures required in lease contracts) or *2988* (restrictions on lessee's liability for motor vehicle depreciation). It alleges that the violation complained of was unintentional and resulted from a bona fide error notwithstanding defendant's maintenance of procedures reasonably adopted to avoid those errors. A lessor who proves this allegation by a preponderance of the evidence may not be held liable in an action brought by the lessee under *Civ. Code § 2988.5* [*see Civ. Code § 2988.5(d)*; for discussion, *see, § 90.21[3]*].

This affirmative defense may be used in the lessor's answer to the complaint in *§ 90.40*.

For discussion of answers and forms illustrating the format of answers, see Ch. 26, *Answers* .

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8-90 California Forms of Pleading and Practice--Annotated § 90.52

§ 90.52 Lessor's Affirmative Defense to Lessee's Action for Violation of Civ. Code § 2985.8 or 2988--Good-Faith Compliance With Federal Law [Civ. Code § 2988.5(g)]

[1] FORM Lessor's Affirmative Defense to Lessee's Action for Violation of Civ. Code § 2985.8 or 2988--Good-Faith Compliance With Federal Law [Civ. Code § 2988.5(g)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

The _____ [act *or* omission] by this defendant complained of by plaintiff was _____ [done *or* made] in good-faith conformity with _____ [*specify the rule, regulation, or interpretation of federal law relied on by defendant in doing or omitting the act complained of*].

[2] Use of Form

The affirmative defense in *[a], above*, is for use by a lessor in an action by the lessee to recover damages, statutory penalties, and attorney's fees for violations of *Civ. Code § 2985.8* (formalities and disclosures required in lease contracts) or *2988* (restrictions on lessee's liability for motor vehicle depreciation). It alleges that the act or omission complained of was done or made in good-faith conformity with a rule, regulation, or interpretation of federal law. No liability may be imposed on a lessor under *Civ. Code § 2988.5* for such an act or omission [*see Civ. Code § 2988.5(g)*; for discussion, *see § 90.21[4]*].

This affirmative defense may be used in the lessor's answer to the complaint *set forth in § 90.40*.

For discussion of answers and forms illustrating the format of answers, see Ch. 26, *Answers* .

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[Reserved]

§§ 90.53[Reserved]

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8-90 California Forms of Pleading and Practice--Annotated § 90.60

§ 90.60 Demurrer to Lessee's Action for Violation of Vehicle Leasing Act When Federal Suit Based on Same Facts Had Been Previously Filed [Civ. Code § 2989]

[1] FORM Demurrer to Lessee's Action for Violation of Vehicle Leasing Act When Federal Suit Based on Same Facts Had Been Previously Filed [Civ. Code § 2989]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DEMURRER OF DEFEND-
vs.	)	ANT_____ TO COMPLAINT
_____ [*name*],	)	_____ AND NOTICE OF HEAR-
Defendant.	)	ING
	)	[LIMITED CIVIL CASE]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

Defendant demurs to the complaint herein on the following ground:

Plaintiff has previously filed another civil action, entitled _____ vs. _____, in the _____ [*name of court*], No. _____, under the provisions of _____ [*specify provision of federal law that is basis for previously filed federal action, e.g.,* the federal Consumer Leasing Act,

Title *15, United States Code, Sections 1640*, 1677d]. That action was based on the same facts as those alleged in the complaint herein and gave rise to a cause of action under federal law similar to the cause of action under the Vehicle Leasing Act alleged herein. A copy of the complaint in the prior action is attached as Exhibit A and incorporated by reference.

Defendant files and serves herewith a request that the court take judicial notice of the filing of the prior action described above and the contents of the complaint filed therein, pursuant to *Evidence Code Sections 452* and *453*.

NOTICE IS HEREBY GIVEN that this demurrer has been set for hearing on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] the above-entitled court, located at _____ [*address*], in _____ [*city*], California.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

The demurrer in *[1], above*, is for use by the defendant lessor of a motor vehicle to object to a complaint filed against it by the lessee for violations of the Vehicle Leasing Act when the plaintiff has previously filed a federal civil action based on facts that give rise to the action under the Vehicle Leasing Act [*see Civ. Code § 2989* (discussed in *§ 90.21[1]*); *see also Code Civ. Proc. § 430.30(a)* (demurrer when ground for objection arises from matter of which judicial notice must or may be taken)]. If appropriate, this demurrer may be submitted in opposition to the complaints *set forth in §§ 90.40 -90.42*.

The defendant is required to serve and file a notice of hearing with the demurrer [*Cal. Rules of Ct., Rule 3.1320(c), (d)*]. The notice may be included in the demurrer as shown in the form in [1], above. A memorandum in support of the demurrer is not required. However, the court may construe the absence of a supporting memorandum as an admission that the demurrer is not meritorious and cause for overruling it, and as a waiver of all grounds not supported [see *Cal. Rules of Ct., Rules 3.1113(a), 3.1320*]. Any request for judicial notice must be made in a separate document listing the specific items for which notice is requested [*Cal. Rules of Ct., Rule 3.1113(l)*]; and additional requirements apply for discretionary judicial notice [*see Evid. Code §§ 452-453*; *Cal. Rules of Ct., Rule 3.1306(c)*]. For discussion and forms, see Ch. 321, *Judicial Notice* , and Ch. 417, *Points and Authorities* .

Although only general demurrers, not special demurrers, may be filed in limited civil cases [*Code Civ. Proc. § 92(a), (c)*], if all the facts necessary to show that the action is barred are within the complaint or subject to judicial notice, a trial court may sustain a general demurrer [*see Carroll v. Puritan Leasing Co. (1978) 77 Cal. App. 3d 481, 485, 143 Cal. Rptr. 772* (affirming dismissal after failure to amend)].

[3] Establishing Ground of Demurrer by Judicial Notice

When any ground for objection to a complaint appears on the face of the complaint, or from any matter of which the court is required or permitted to take judicial notice, the objection on that ground should be taken by a demurrer to the action, rather than by an answer [*see Code Civ. Proc. § 430.30(a), (b)*]. Because the ground stated in this demurrer does not ordinarily appear on the face of the complaint, counsel for the defendant must request the court to take judicial notice of the filing of the previous federal action. When the ground of demurrer is based on a matter of which the court may take judicial notice pursuant to *Evid. Code §§ 452* and *453*, the matter must be specified in the demurrer or in the

supporting memorandum in order to invoke judicial notice [*Code Civ. Proc. § 430.70*], but the actual request for judicial notice must be made in a separatedocument listing the specific items for which notice is requested [*Cal. Rules of Ct., Rules 3.1113(l)*].

Judicial notice may be taken of the records of any court of California and of any court of record of the United States or any other state of the United States [*Evid. Code § 452(d)*]. The trial court must take judicial notice of those records if a party requests it and both [*see Evid. Code § 453*]:

- Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable the adverse party to prepare to meet the request; and

- Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

A party requesting judicial notice must also provide the court and each party with a copy of the material of which judicial notice is sought [*Cal. Rules of Ct., Rule 3.1306(c)*].

[4] Cross References

For discussion and forms relating to demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

For discussion and forms relating to judicial notice, see Ch. 321, *Judicial Notice*

For discussion and forms relating to points and authorities, see Ch. 417, *Points and Authorities*

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§ 91.syn Synopsis to Chapter 91: AUTOMOBILES: ACTIONS INVOLVING DEFECTS AND REPAIRS

§ 91.01 Scope of Chapter

§ 91.02 Cross References

§§ 91.03-91.09 [Reserved]

§ 91.10 Governing Law

§ 91.11 Application of Song-Beverly Act and Relationship to Other Laws

[1] Remedies Cumulative Rather than Exclusive

[2] Relationship Between Song-Beverly Act and Commercial Code

[3] Application to New Vehicles Limited to Vehicles Bought in California

§ 91.12 Definitions

[1] New Motor Vehicle

[2] Nonconformity

§ 91.13 Definitions and Scope of Warranties

[1] Express Warranty

[a] Express Warranty Under Song-Beverly Act

[b] Commercial Code Definition of Express Warranty

[c] Express Warranty With Respect to Used Consumer Goods

[2] Implied Warranty of Fitness

[a] Warranty of Fitness Implied Under Song-Beverly Act

[b] Warranty of Fitness Implied Under Commercial Code

[c] Warranty of Fitness Implied by Lease of Chattel

[3] Implied Warranty of Merchantability

[a] Warranty of Merchantability Implied Under Song-Beverly Act

[b] Warranty of Merchantability Implied in Commercial Code

[c] Implied Warranty of Merchantability of Used Consumer Goods

[4] "As Is" and Other Permitted Limitations or Disclaimer of Warranties

[a] Limitation of Implied Warranties Under Song-Beverly Act

[b] Limitation of Implied Warranties Under Commercial Code

[5] Warranty Implied by Vehicle Code § 24007

[6] Warrantor's False Representation That Defects Have Been Corrected

§ 91.14 Service Contract in Lieu of Express Warranty

[1] Required Elements of Service Contract

[2] Cancellation of Service Contract by Purchaser

[a] Cancellation Within 60 Days of Receipt of Contract

[b] Cancellation More Than 60 Days After Receipt of Contract

§ 91.15 Inability to Repair New Motor Vehicle to Conform to Express Warranty

[1] Buyer's Election on Failure to Repair to Conform to Express Warranty

[2] Replacement

[3] Restitution

[4] Formula for Reduction of Value for Buyer's Use

[5] "Gag Clauses" Prohibited as Condition of Reacquisition

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§ 91.01 Scope of Chapter

This chapter discusses and contains forms relating to actions by automobile owners against automobile manufacturers, dealers, and repair facilities arising out of defects in or repairs to automobiles. The following specific areas are covered:

- The Song-Beverly Consumer Warranty Act as it relates to automobiles, commonly referred to as the "lemon law," [*see §§ 91.10* et seq. (discussion), *91.60 et seq.* (forms)].

- The bond required of automobile dealers and remanufacturers by *Veh. Code § 11710* [*see §§ 91.32* (discussion), *91.70*, *91.71* (forms)].

- Forms for recovery of damages to person and property arising from negligent repair of automobiles [*see §§ 91.80 -91.83*].

A Research Guide, collecting statutes, decisions, and other references, is also included. [*see § 91.40* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionVehicle WarrantiesLemon LawsAntitrust & Trade LawConsumer ProtectionVehicle WarrantiesExpress WarrantiesAntitrust & Trade LawConsumer ProtectionVehicle WarrantiesGeneral Overview

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§ 91.02 Cross References

For additional discussion and forms relating to actions for damages resulting from accidents caused by negligent servicing or repair of an automobile, see Ch. 274, *Garages and Gas Stations* . That chapter also covers garageman's liens.

For discussion and forms relating to the warranty provisions of the Commercial Code and the Magnuson-Moss Act [*15 U.S.C. § 2301 et seq.*] and additional coverage of the Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*], including its application to goods other than motor vehicles, see Ch. 502, *Sales: Warranties* .

For discussion of general principles relating to the liability producers and sellers of defective goods, together with forms for bringing and defending a products liability action, see Ch. 460, *Products Liability* .

Other related discussion and forms cover the following topics:

- For recovery of an automobile by its owner, see Ch. 119, *Claim and Delivery* .
- For consumers' rights, see Ch. 127, *Consumer Contracts and Loans* , Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* , and Ch. 129, *Consumer Credit Reporting* .
- For actions to recover of damages for conversion, see 150, *Conversion*.
- For tort and contract damages, see Ch. 177, *Damages* .
- For actions for fraud, see Ch. 269, *Fraud and Deceit* .
- For actions for negligence and related defenses, see Ch. 380, *Negligence* .
- For restitution based on rescission of contract and defenses to such actions, see Ch. 490, *Rescission and Restitution* .

- For coverage of the Unruh Act [*Civ. Code § 1801 et seq.*], which governs retail installment contracts for sales of vehicles required to be registered under the Vehicle Code [*see Veh. Code § 4000 et seq.*], unless those contracts for the sale or lease of vehicles are governed by either the Rees-Levering Motor Vehicle Sales and Finance Act [*see Civ. Code § 2981(a), (p)* (defining "conditional sale contract" and "service contract" under Rees-Levering Act)] or the Vehicle Leasing Act [*Civ. Code § 1802.1*; *see Civ. Code § 2985.7(d)* (defining "lease contract")], and related forms, see Ch. 502, *Sales: Retail Installment Sales* .

- For discussion and forms relating to the Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*], see Ch. 504, *Sales: Consumers Legal Remedies Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsProducts LiabilityGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral OverviewTortsNegligenceActionsGeneral OverviewContracts LawTypes of ContractsInstallment Contracts

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[Reserved]

§§ 91.03[Reserved]

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§ 91.10 Governing Law

Consumer warranty protection is governed by the Song-Beverly Consumer Warranty Act (*Civ. Code § 1790 et seq.*). Within that Act, *Civ. Code § 1793.22*, which sets forth the administrative remedies a purchaser must exhaust before going to court to recover for breach of an express warranty made in connection with the sale of a new motor vehicle, is known and may be cited as the Tanner Consumer Protection Act. *Civ. Code § 1793.22* is more commonly referred to as the "lemon law" and establishes a presumptive breach of express warranties based on the repair history of a new motor vehicle [*see § 91.16*; *see also Civ. Code §§ 1793.23* (lemon law buybacks), *1793.24* (disclosure requirements)]. The presumption is rebuttable and affects the burden of proof [*Civ. Code § 1793.22(b)*].

Commercial sales contracts are regulated by *Com. Code §§ 2201 et seq.*, and *2301 et seq.*

The responsibility of a dealer or other person selling motor vehicles is delineated by *Veh. Code §§ 24007-24007.6*.

The statutes providing for rescission and relief based on rescission are *Civ. Code §§ 1565 et seq.*, *1688 et seq.*, and *3300*.

Licensing and regulation of automobile repair dealers is governed by the Automotive Repair Act [*Bus. & Prof. Code § 9880 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCommercial VehiclesGeneral OverviewTransportation LawPrivate VehiclesVehicle RegistrationGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral OverviewAntitrust & Trade LawConsumer ProtectionVehicle WarrantiesLemon LawsContracts LawTypes of ContractsInstallment Contracts

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§ 91.11 Application of Song-Beverly Act and Relationship to Other Laws

[1] Remedies Cumulative Rather than Exclusive

The remedies provided by the Song-Beverly Consumer Warranty Act are cumulative and must not be construed as restricting any remedy that is otherwise available. In particular, they must not be construed to supplant the provisions of the Unfair Practices Act (*Bus. & Prof. Code § 17000 et seq.*) [*Civ. Code § 1790.4*]. In fact, *Civ. Code § 1794(b)* (discussed in *§ 91.18[1] -[3]*), specifically incorporates the remedies set forth in *Com. Code §§ 2711-2715*.

[2] Relationship Between Song-Beverly Act and Commercial Code

The provisions of Song-Beverly Consumer Warranty Act do not affect the rights and obligations of parties determined by reference to the Commercial Code, except that if the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of the Song-Beverly Consumer Warranty Act, the provisions of the Song-Beverly Consumer Warranty Act prevail [*Civ. Code § 1790.3*].

The Song-Beverly Act has been described as supplementing rather than superseding the provisions of the Commercial Code, by broadening a consumer's remedies to include costs, attorney's fees, and civil penalties. [*Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 213, 285 Cal. Rptr. 717]* . However, the legislative intent behind the Act also has been said to limit damages available under the Act to those available under *Com. Code §§ 2711-2715*, although that statement was made in the context of denying recovery for emotional distress and "loss of use" damages in the absence any out-of-pocket loss [*see Bishop v. Hyundai Motor America (1996) 44 Cal. App. 4th 750, 755, 52 Cal. Rptr. 2d 134* (citing Sen. Com. On Judiciary, Analysis of Assem. Bill No. 3560 (1981-1982 Reg. Sess.))].

[3] Application to New Vehicles Limited to Vehicles Bought in California

Insofar as the Song-Beverly Consumer Warranty Act applies to new motor vehicles [*see Civ. Code §§ 1793.2(d)(2), 1793.22*], the Act is limited in application to vehicles that were bought in California [*Cummins, Inc. v. Superior Court (2005) 36 Cal. 4th 478, 483, 493, 30 Cal. Rptr. 3d 823, 115 P.3d 98]* . Thus, the Act was held inapplicable to a new vehicle that a California resident had bought in Idaho and that could not be repaired after repeated attempts at the

manufacturer's authorized repair facility in California [*Cummins, Inc. v. Superior Court (2005) 36 Cal. 4th 478, 483, 493, 30 Cal. Rptr. 3d 823, 115 P.3d 98]* .

However, notwithstanding any other provision of law, the Song-Beverly Act applies to a purchase in the United States of a new motor vehicle [*see Civ. Code § 1793.22(e)(2)* (definition); *see also § 502.43[5][b]*] with a manufacturer's express warranty by a member of the U.S. armed forces [*see Civ. Code § 1791(t)* (definition)], regardless of the state in which the vehicle is purchased or registered, if both of the following conditions apply [*Civ. Code § 1795.8*]:

- The service member purchases the vehicle with the manufacturer's express warranty from a manufacturer that sells motor vehicles in California or from an agent or representative of that manufacturer; and

- The service member was stationed in or a resident of California at the time he or she purchased the vehicle or at the time he or she filed an action pursuant to the Song-Beverly Act.

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCommercial VehiclesGeneral OverviewAntitrust & Trade LawConsumer ProtectionVehicle WarrantiesLemon LawsCommercial Law (UCC)Sales (Article 2)WarrantiesGeneral Overview

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§ 91.12 Definitions

[1] New Motor Vehicle

For purposes of *Civ. Code §§ 1793.2(d)* and *1793.22*, "new motor vehicle" is defined as a new motor vehicle that is bought or used primarily for personal, family, or household purposes. "New motor vehicle" also means a new motor vehicle with a gross vehicle weight under 10,000 pounds that is bought or used for business purposes by a person, including a partnership, limited liability company, corporation, association, or any other legal entity, to which not more than five motor vehicles are registered in California, provided that at least one motor vehicle must be registered to that person in California [*Park City Services, Inc. v. Ford Motor Co. (2006) 144 Cal. App. 4th 295, 306-309, 50 Cal. Rptr. 3d 373]* . "New motor vehicle" includes the chassis, chassis cab, and that portion of a motor home devoted to its propulsion, but does not include any portion designed, used, or maintained primarily for human habitation, a dealer-owned vehicle, and a demonstrator or other motor vehicle sold with a manufacturer's new car warranty. "New motor vehicle" does not include a motorcycle or a motor vehicle that is not registered under the Vehicle Code because it is to be operated or used exclusively off the highways. A "demonstrator" is a vehicle assigned by a dealer for the purpose of demonstrating the qualities and characteristics common to vehicles of the same or similar model and type [*Civ. Code § 1793.22(e)(2)*]. As discussed in *§ 91.11[3]*, insofar as the Song-Beverly Consumer Warranty Act applies to new motor vehicles, it is limited in application to vehicles that were bought in California [*Cummins, Inc. v. Superior Court (2005) 36 Cal. 4th 478, 483, 493, 30 Cal. Rptr. 3d 823, 115 P.3d 98]* .

"New motor vehicle" within the meaning of *Civ. Code § 1793.22(e)(2)* has also been held to include cars sold with a balance remaining on the manufacturer's new motor vehicle warranty. These cars are included within the definition of "new motor vehicle" as separate category of new motor vehicles, not as part of the subcategory of demonstrator cars [*Jensen v. BMW of North America, Inc. (1995) 35 Cal. App. 4th 112, 123, 126, 41 Cal. Rptr. 2d 295]* .

A new motor vehicle is "consumer goods" within the meaning of the Song-Beverly Act, which defines "consumer goods" to mean any new product, or any part of a new product, that is used, bought, or leased for use primarily for personal, family, or household purposes, except for clothing and consumables [*Civ. Code § 1791(a)*]. Thus, although the coach portion of a motor home is not included in definition of "new motor vehicle" for purposes of *Civ. Code §*

1793.2(d)(2) (the replace-or-refund provision applicable to new motor vehicles), motor home coaches *are* included within the general definition of "consumer goods," and therefore are covered by *Civ. Code § 1793.2(d)(1)*, the Act's "replace-or-refund" provision of general application [*National R.V., Inc. v. Foreman (1995) 34 Cal. App. 4th 1072, 1078-1079, 40 Cal. Rptr. 2d 672]* .

[2] Nonconformity

"Nonconformity" means a nonconformity that substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee [*Civ. Code § 1793.22(e)(1)*]. Whether an impairment is "substantial" [*see Civ. Code § 1793.22(e)(1)*] is determined by an objective test, based on what a reasonable person would understand to be a defect [*Lundy v. Ford Motor Company (2001) 87 Cal. App. 4th 472, 478-479, 104 Cal. Rptr. 2d 545]* . A jury instruction defining the term "substantially" to mean that "the nonconformity was not imaginary and actually impaired the use, value, or safety of the vehicle," has been held to constitute prejudicial error [*Lundy v. Ford Motor Company (2001) 87 Cal. App. 4th 472, 478-479, 104 Cal. Rptr. 2d 545* (trial court's definition effectively wrote the term out of the statutory requirement)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionVehicle WarrantiesLemon LawsCommercial Law (UCC)Sales (Article 2)WarrantiesGeneral Overview

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8-91 California Forms of Pleading and Practice--Annotated § 91.13

§ 91.13 Definitions and Scope of Warranties

[1] Express Warranty

[a] Express Warranty Under Song-Beverly Act

An "express warranty" for purposes of the Song-Beverly Act is a written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance [*Civ. Code § 1791.2(a)(1)*]. The Act applies to new motor vehicle manufacturers who make express warranties. There is no requirement of privity [*see Jensen v. BMW of North America, Inc. (1995) 35 Cal. App. 4th 112, 127-128, 41 Cal. Rptr. 2d 295* (manufacturer liable when dealer stated that buyer would receive 36,000-mile warranty on top of miles already on car and gave buyer copy of manufacturer's warranty)].

It is not necessary to the creation of an express warranty that formal words such as "warrant" or "guarantee" be used, but if those words are used an express warranty is created. An affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty [*Civ. Code § 1791.2(b)*].

Statements or representations such as expressions of general policy concerning customer satisfaction which are not subject to any limitation do not create an express warranty [*Civ. Code § 1791.2(c)*].

If express warranties are made by persons other than the manufacturer of goods, the obligations of the person making those warranties are the same as those imposed on the manufacturer under The Song-Beverly Consumer Warranty Act [*Civ. Code § 1795*].

[b] Commercial Code Definition of Express Warranty

Under the Commercial Code, express warranties by the seller are created in the following ways [*Com. Code § 2313(1)*]:

- Any affirmation of fact or promise made by the seller to the buyer that relates to the goods and

becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise.

- Any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

- Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods will conform to the sample or model.

It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee," or that the seller have a specific intention to make a warranty, but an affirmation merely of the value of the goods, or a statement purporting to be merely the seller's opinion or commendation of the goods, does not create a warranty [*Com. Code § 2313(2)*].

[c] Express Warranty With Respect to Used Consumer Goods

Notwithstanding *Civ. Code § 1791(a)*, which defines "consumer goods" to mean "new" goods, if a distributor or retail seller of used consumer goods makes express warranties with respect to used goods that are sold in California, the obligation of that distributor or retail seller is generally the same as that imposed on the manufacturer under the Song-Beverly Consumer Warranty Act [*Civ. Code § 1795.5*]. A written service contract covering a used vehicle, under which the dealer "undertakes to preserve or maintain the utility or performance" of the vehicle, has been held to be an express warranty under *Civ. Code § 1795.5*, even though the consumer was required to pay additional consideration for the promised services [*Reveles v. Toyota By the Bay (1997) 57 Cal. App. 4th 1139, 1155-1158, 67 Cal. Rptr. 2d 543]* .

An express warranty made by a dealer with respect to a used vehicle can also impose liability on the manufacturer consistent with the manufacturer's express warranties for new motor vehicles. There is no requirement of privity between the manufacturer and the buyer of the used vehicle. Thus, when a dealer told the buyer of a used vehicle that the buyer would receive a 36,000-mile warranty on top of the miles already on the car, and gave the buyer a copy of the manufacturer's warranty, the Song-Beverly Act and the manufacturer's obligations with respect to new motor vehicle express warranties applied [*Jensen v. BMW of North America, Inc. (1995) 35 Cal. App. 4th 112, 127-128, 41 Cal. Rptr. 2d 295]* .

[2] Implied Warranty of Fitness

[a] Warranty of Fitness Implied Under Song-Beverly Act

Every sale of consumer goods that are sold at retail in California by a manufacturer, retailer, or distributor, who has reason to know at the time of the retail sale that the goods are required for a particular purpose and that the buyer is relying on the manufacturer's, retailer's, or distributor's skill or judgment to select or furnish suitable goods, is accompanied by an implied warranty that the goods are fit for that purpose [*Civ. Code §§ 1792.1, 1792.2*].

"Implied warranty of fitness" means that when the manufacturer, retailer, or distributor has reason to know any particular purpose for which the consumer goods are required, and further, that the buyer is relying on the skill and judgment of the seller to select and furnish suitable goods, then there is an implied warranty that the goods are fit for that purpose [*Civ. Code § 1791.1(b)*].

Civ. Code § 1795.5(c), discussed in *§ 91.13[3][c]*, establishes the duration of any implied warranty of fitness with respect to used consumer goods sold in California.

[b] Warranty of Fitness Implied Under Commercial Code

When the seller at the time of contracting has reason to know any particular purpose for which the goods are required, and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is an implied warranty that the goods will be fit for that purpose [*Com. Code § 2315*], unless that warranty is excluded or modified under *Com. Code § 2316*.

With certain exceptions, privity between the parties is a necessary element to recovery for a breach of an implied warranty of fitness for the buyer's use [*Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116, 138, 87 Cal. Rptr. 3d 5*]. For discussion, see *Ch. 502, Sales: Warranties, § 502.24[7]*.

[c] Warranty of Fitness Implied by Lease of Chattel

The implied warranties applicable in bailment contracts are analogous to those applicable in sales transactions. *Civ. Code § 1955* (duties of bailor) contains a statutory declaration of the obligations of a lessor of personalty and is an expression of the duty of a bailor in terms of an implied warranty of the fitness of the chattel for the use intended, but it is not an absolute warranty, making the bailor an insurer or guarantor [*Holmes Packaging Mach. Corp. v. Bingham (1967) 252 Cal. App. 2d 862, 868-869, 873, 60 Cal. Rptr. 769]* .

The sole remedy for a breach of warranty provided for in *Civ. Code § 1955* is that contained in *Civ. Code § 1957*, which provides that if a lessor fails to fulfill his or her obligations, as prescribed by *Civ. Code § 1955*, the lessee, after giving the lessor notice to do so, if this notice can conveniently be given, is permitted to expend any reasonable amount necessary to make good the lessor's default and to recover that amount from the lessor [*Civ. Code § 1957*; *Holmes Packaging Mach. Corp. v. Bingham (1967) 252 Cal. App. 2d 862, 869, 60 Cal. Rptr. 769]* .

[3] Implied Warranty of Merchantability

[a] Warranty of Merchantability Implied Under Song-Beverly Act

Unless disclaimed in the manner prescribed by *Civ. Code § 1790 et seq.* [*see Civ. Code § 1792.3* (permitted disclaimer, discussed in *§ 91.13[4][a]*)], every sale of consumer goods that are sold at retail is required to be accompanied by the manufacturer's implied warranty that the goods are merchantable [*Civ. Code § 1792*]. The retail seller has a right of indemnity against the manufacturer in the amount of any liability under *Civ. Code § 1792*.

"Implied warranty of merchantability" means that the consumer goods meet each of the following criteria [*Civ. Code § 1791.1(a)*; *see Mocek v. Alfa Leisure, Inc. (2003) 114 Cal. App. 4th 402, 406-408, 7 Cal. Rptr. 3d 546* (giving overview of implied warranty of merchantability and holding that when implied warranty is breached, buyer is not required to give seller opportunity to repair before rescission); *see also § 91.18*]:

- They pass without objection in the trade under the contract description.
- They are fit for the ordinary purposes for which those goods are used.
- They are adequately contained, packaged, and labeled.
- They conform to the promises or affirmation of fact made on the container or label.

[b] Warranty of Merchantability Implied in Commercial Code

Unless excluded or modified by *Com. Code § 2316* (exclusion or modification of warranties), a warranty that the goods are be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind [*Com. Code § 2314(1)*]. To be merchantable, goods must at least pass without objection in the trade under the contract description, and be fit for the ordinary purposes for which those goods are used [*Com. Code § 2314(2)*]. Unless

excluded or modified [*see Com. Code § 2316* (discussed in *§ 91.13[4][b]*)], other implied warranties may arise from course of dealing or usage of trade [*Com. Code § 2314(3)*].

[c] Implied Warranty of Merchantability of Used Consumer Goods

The duration of the implied warranty of merchantability and, when present, the implied warranty of fitness with respect to used consumer goods sold in California, when the sale is accompanied by an express warranty, is coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable, but in no event will these implied warranties have a duration of less than 30 days or more than three months following the sale of used consumer goods to a retail buyer. If no duration for an express warranty is stated with respect to the goods, or parts of the goods, the duration of the implied warranties is three months [*Civ. Code § 1795.5(c)*].

[4] "As Is" and Other Permitted Limitations or Disclaimer of Warranties

[a] Limitation of Implied Warranties Under Song-Beverly Act

Any waiver of the provisions of the Song-Beverly Consumer Warranty Act by a buyer of consumer goods, except as expressly provided in the Act, is deemed contrary to public policy and is unenforceable and void [*Civ. Code § 1790.1*].

No implied warranty of merchantability and, when applicable, no implied warranty of fitness may be waived, except in the case of a sale of consumer goods on an "as is" or "with all faults" basis when the provisions of the Song-Beverly Consumer Warranty Act affecting "as is" or "with all faults" sales are strictly complied with [*Civ. Code § 1792.3*]. A sale "as is" or "with all faults" means that the manufacturer, distributor, and retailer disclaim all implied warranties that would otherwise attach to the sale of consumer goods [*Civ. Code § 1791.3*].

[b] Limitation of Implied Warranties Under Commercial Code

Subject to *Com. Code § 2316(3)*, to exclude or modify the implied warranty of merchantability or any part of it, the language must mention merchantability and, in the case of a writing, be conspicuous. To exclude or modify any implied warranty of fitness, the exclusion must be in writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states for example that "There are no warranties which extend beyond the description on the face hereof" [*Com. Code § 2316(2)*].

Notwithstanding *Com. Code § 2316(2)*, implied warranties can be modified or excluded in the following ways [*Com. Code § 2316(3), (4)*]:

- Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implies warranty.

- When the buyer, before entering into the contract, has examined the goods or the sample or the model as fully as he or she desired, or has refused to examine the goods, there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him or her [*see Intrastate Credit Service, Inc. v. Pervo Paint Co. (1965) 236 Cal. App. 2d 547, 552, 46 Cal. Rptr. 182* (article sold as used and subject to inspection at time of sale)].

- An implied warranty can be excluded or modified by course of dealing or course of performance or usage of trade.

- Remedies for breach of warranty can be limited in accordance with Division 2 of the Commercial

Code on liquidation or limitation of damages and on contractual modification of remedy (*Com. Code §§ 2718, 2719*).

The seller may disclaim statutory implied warranties of quality, provided the buyer has knowledge or is chargeable with notice of the disclaimer before the bargain is complete [*Holmes Packaging Mach. Corp. v. Bingham (1967) 252 Cal. App. 2d 862, 875, 60 Cal. Rptr. 769]* . Further, a provision that the buyer takes the article in the condition in which it is, or "as is," prevents representations of the seller, although relied on by the buyer, from constituting express or implied warranties [*Intrastate Credit Service, Inc. v. Pervo Paint Co. (1965) 236 Cal. App. 2d 547, 552, 46 Cal. Rptr. 182]* .

[5] Warranty Implied by Vehicle Code § 24007

No dealer or person holding a retail seller's permit may sell a new or used vehicle that is not in compliance with the Vehicle Code and regulations adopted pursuant to the Vehicle Code, unless the vehicle is sold to another dealer, sold for the purpose of being wrecked or dismantled, or sold exclusively for off-highway use [*Veh. Code § 24007(a)(1)*]. This prohibition does not apply to any vehicle sold by either [*Veh. Code § 24007(a)(2)*]:

- A dismantler after being reported for dismantling pursuant to *Veh. Code § 11520*, or

- A salvage pool after obtaining a salvage certificate pursuant to *Veh. Code § 11515* or a nonrepairable vehicle certificate issued pursuant to *Veh. Code § 11515.2*.

The exception in *Veh. Code § 24007* for "vehicles sold to another dealer" relieves a dealer-seller from any liability to a consumer for negligence, breach of implied warranty, or strict liability and shifts to the dealer-purchaser the full responsibility for the condition of the vehicle at the time it is sold to the consuming public [*Fruehauf Corp. v. Lakeside Chevrolet Co. (1981) 117 Cal. App. 3d 783, 789, 173 Cal. Rptr. 55]* .

Veh. Code § 24007 is designed to protect the general public as well as purchasers. It constitutes an implied-in-law term of every sales contract to which it is applicable; it may not be waived or defeated by agreement of the parties, such as a "merger" or "as is" clause. It is applicable to every defendant who sells used automobiles for ordinary purposes and imposes on each such seller a contractual obligation to put all equipment required by statute or regulation, for example, brakes, in good condition and working order by making any repairs that he or she knows are necessary or that a reasonable inspection would shown to be necessary [*Mulder v. Casho (1964) 61 Cal. 2d 633, 637, 39 Cal. Rptr. 705, 394 P.2d 545* ; *see also Munchow v. Kraszewski (1976) 56 Cal. App. 3d 831, 835-836, 128 Cal. Rptr. 762]* .

Although a used car dealer does not insure the safety of a car the dealer sells, and is under no duty to disassemble the car to examine its parts, the dealer must make a reasonable inspection for defects which would make the car a menace on the highways [*Benton v. Sloss (1952) 38 Cal. 2d 399, 404, 240 P.2d 575]* . This duty extends not only to a prospective buyer, but also to third persons who can reasonably be expected to be in the vicinity of the probable use of the automobile [*Benton v. Sloss (1952) 38 Cal. 2d 399, 406, 240 P.2d 575]* . For an allegation of a violation of *Veh. Code § 24007* and another statute or regulation requiring compliance pursuant to *Veh. Code § 24007*, see *§ 91.62*.

[6] Warrantor's False Representation That Defects Have Been Corrected

A warrantor who repeatedly fails to correct a defect as promised is liable for the breach of that promise as a breach of warranty [*Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 14, 45 Cal. Rptr. 17, 403 P.2d 145]* . However, if the warrantor represents that certain defects have been repaired when they have not been, an action for the tort of deceit is proper, and the appropriate measure of damages is defined by *Civ. Code §§ 1709* and *3333*, including general damages for mental distress and suffering [*Sprague v. Frank J. Sanders Lincoln Mercury, Inc. (1981) 120 Cal. App. 3d 412, 417, 174 Cal. Rptr. 608]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentModification, Rescission & WaiverAntitrust & Trade LawConsumer ProtectionVehicle WarrantiesLemon LawsCommercial Law (UCC)Sales (Article 2)WarrantiesExpress WarrantiesCommercial Law (UCC)Sales (Article 2)WarrantiesMerchantability

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§ 91.14 Service Contract in Lieu of Express Warranty

[1] Required Elements of Service Contract

A service contract may be sold in addition to or in lieu of an express warranty. However, the contract must fully and conspicuously disclose its terms in simple and readily understood language [*Civ. Code § 1794.4(a)*]. No service contract covering any motor vehicle purchased for use in California may be offered for sale or be sold unless all of the following elements exist [*Civ. Code § 1794.41(a)*]:

- The contract must contain the disclosures specified in *Civ. Code § 1794.4* and must disclose, in the manner described in that section, the buyer's cancellation and refund rights provided by *Civ. Code § 1794.41*.

- The contract must be available for inspection by the buyer prior to purchase and either the contract, or a brochure that specifically describes the terms, conditions, and exclusions of the contract and the provisions of *Civ. Code § 1794.41* relating to contract delivery, cancellation, and refund, shall be delivered to the buyer at or before the time of purchase of the contract. Within 60 days after the date of purchase, the contract itself must be delivered to the buyer.

- The contract is applicable only to items, costs, and time periods not covered by the express warranty. However, a service contract may run concurrently with or overlap an express warranty if (A) the contract covers items or costs not covered by the express warranty, or (B) the contract provides relief to the purchaser not available under the express warranty, such as automatic replacement of a product when the express warranty provides only for repair.

- The contract must be cancelable by the purchaser under the conditions set forth in *[2], below*

[2] Cancellation of Service Contract by Purchaser

[a] Cancellation Within 60 Days of Receipt of Contract

Unless the contract provides for a longer period, within the first 60 days after receipt of the contract, or within the first 30 days after receipt of the contract with respect to a contract covering a used motor vehicle without manufacturer warranties, the full amount paid must be refunded by the seller to the purchaser if the purchaser provides a written notice of cancellation to the person specified in the contract, and if no claims have been made against the contract. If a claim has been made against the contract within the first 60 days after receipt of the contract, or within the first 30 days after receipt of the contract with respect to a used motor vehicle without manufacturer warranties, the seller must make a pro rata refund, based on either elapsed time or an objective measure such as mileage, at the seller's option as indicated in the contract, to the purchaser if the purchaser provides a written notice of cancellation to the person specified in the contract [*Civ. Code § 1794.41(a)(4)(A)*].

If the purchase of the service contract was financed, the seller may make the refund payable to the purchaser or assignee, or the lender of record, or both [*Civ. Code § 1794.41(a)(4)(C)*].

[b] Cancellation More Than 60 Days After Receipt of Contract

Unless the contract provides for a longer period for obtaining a full refund, after the first 60 days after receipt of the contract, or after the first 30 days after receipt of the contract with respect to a contract covering a used motor vehicle without manufacturer warranties, the seller must make a pro rata refund based on either elapsed time or on an objective measure such as mileage, at the seller's option as indicated in the contract, to the purchaser if the purchaser provides a written notice of cancellation to the person specified in the contract. In addition, the seller may assess a cancellation or administrative fee, not to exceed 10 percent of the price of the service contract or $25, whichever is less [*Civ. Code § 1794.41(a)(4)(B)*].

If the purchase of the service contract was financed, the seller may make the refund payable to the purchaser or assignee, or the lender of record, or both [*Civ. Code § 1794.41(a)(4)(C)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesGeneral OverviewContracts LawTypes of ContractsPersonal Service AgreementsContracts LawContract Conditions & ProvisionsExpress WarrantiesAntitrust & Trade LawConsumer ProtectionVehicle WarrantiesExpress WarrantiesCommercial Law (UCC)Sales (Article 2)WarrantiesExpress Warranties

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§ 91.15 Inability to Repair New Motor Vehicle to Conform to Express Warranty

[1] Buyer's Election on Failure to Repair to Conform to Express Warranty

If the manufacturer or its representative in California is unable to service or repair a new motor vehicle, as defined in *Civ. Code § 1793.22(e)(2)* [*see § 91.12[1]*], to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer must either [*Civ. Code § 1793.2(d)(2)*]:

- Promptly replace the new motor vehicle in accordance with *Civ. Code § 1793.2(d)(2)(A)*; or
- Promptly make restitution to the buyer in accordance with *Civ. Code § 1793.2(d)(2)(B)*.

The buyer must be free to elect restitution in lieu of replacement, and in no event can the manufacturer require the buyer to accept a replacement vehicle [*Civ. Code § 1793.2(d)(2)*]. Under common law principles, reasonable continued use of the motor vehicle, as a matter of law, does not prevent the buyer from asserting these remedies under the Song-Beverly Act [*Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 897-898, 263 Cal. Rptr. 64* (plaintiff continued to drive car for 28,000 miles before returning it to dealership)], but under *Civ. Code § 1793.2(d)(2)(C)*, discussed in *[4], below*, the manufacturer is entitled to credit for the value of the buyer's use prior to repair or replacement.

Because the phrase "reasonable number of attempts" is written in plural, the statute does not require the manufacturer to make restitution or replacement after only one opportunity to repair [*Silvio v. Ford Motor Company (2003) 109 Cal. App. 4th 1205, 1207-1208, 135 Cal. Rptr. 2d 846]* .

In a suit against a manufacturer under *Civ. Code § 1793.2*, the plaintiff is *not* required to show that the manufacturer had at least one opportunity to repair motor vehicle if the dealer was required by the warranty to repair the vehicle but failed to do so within a reasonable period of time or within a reasonable number of attempts [*Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 888-889, 263 Cal. Rptr. 64]* . For a complaint for use in pursuing the buyer's remedies, see *§ 91.64[1]*.

[2] Replacement

In the case of replacement, the manufacturer must replace the buyer's vehicle with a new motor vehicle substantially identical to the vehicle replaced. The replacement vehicle must be accompanied by all express and implied warranties that normally accompany new motor vehicles of that specific kind. The manufacturer must also pay for or to the buyer the amount of any sales or use tax, license fees, registration fees, and other official fees that the buyer is obligated to pay in connection with the replacement, plus any incidental damages to which the buyer is entitled under *Civ. Code § 1794*, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer [*Civ. Code § 1793.2(d)(2)(A)*; *see Bishop v. Hyundai Motor America (1996) 44 Cal. App. 4th 750, 757-758, 52 Cal. Rptr. 2d 134* (decided under *Civ. Code § 1793.2(d)(2)(B)*, barring recovery for "loss of use" when no replacement vehicle was rented)]. However, a buyer is liable to a manufacturer that replaces a new motor vehicle pursuant to *Civ. Code § 1793.2(d)(2)(A)* for an amount directly attributable to use by the buyer of the replaced vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or to its authorized service and repair facility for correction of the problem that gave rise to the nonconformity [*Civ. Code § 1793.2(d)(2)(C)*].

[3] Restitution

In the case of restitution, the manufacturer must make restitution in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer and including any collateral charges such as sales tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under *Civ. Code § 1794*, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer [*Civ. Code § 1793.2(d)(2)(B)*]. "The actual price paid or payable by the buyer" includes paid finance charges [*Mitchell v. Blue Bird Body Co. (2000) 80 Cal. App. 4th 32, 35-39, 95 Cal. Rptr. 2d 81* (although *Civ. Code § 1793.2(d)(2)(B)* does not expressly allow recovery of paid finance charges, reasonable construction is that Legislature intended to allow buyers to recover entire amount actually expended for new motor vehicle less any expenses expressly excluded by statute)]. Damages for loss of use for a period in which the buyer did not have a replacement vehicle, are not recoverable under *Civ. Code § 1794* [*Bishop v. Hyundai Motor America (1996) 44 Cal. App. 4th 750, 757-758, 52 Cal. Rptr. 2d 134* (construing *Com. Code § 2715*, consequential damages provision, to conform to *Civ. Code § 1793.2(d)(2)(B)*)]. When restitution is made pursuant to *Civ. Code § 1793.2(d)(2)(B)*, the amount to be paid by the manufacturer to the buyer may be reduced by the manufacturer by that amount directly attributable to use by the buyer prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or to its authorized service and repair facility for correction of the problem that gave rise to the nonconformity [*Civ. Code § 1793.2(d)(2)(C)*].

[4] Formula for Reduction of Value for Buyer's Use

The amount directly attributable to use by the buyer is determined by multiplying the actual price of the new motor vehicle paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, by a fraction having as its denominator 120,000 and having as its numerator the number of miles traveled by the new motor vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor or to its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. Nothing in this paragraph in any way limits the rights or remedies available to the buyer under any other law [*Civ. Code § 1793.2(d)(2)(C)*].

[5] "Gag Clauses" Prohibited as Condition of Reacquisition

A manufacturer, importer, distributor, dealer, or lienholder who reacquires, or assists a dealer or lienholder in reacquiring, a motor vehicle, whether by judgment, decree, arbitration award, settlement agreement, or voluntary agreement, is prohibited from doing either of the following [*Civ. Code § 1793.26(a)*]:

- Requiring, as a condition of reacquisition, that a buyer or lessee who is a California resident agree not to disclose the problems he or she experienced with the vehicle or the nonfinancial terms of the

reacquisition; or

- Including in any release or other agreement, whether prepared by the manufacturer, importer, distributor, dealer, or lienholder, for signature by the lessee or buyer, a confidentiality clause, gag clause, or similar clause prohibiting the buyer or lessee from disclosing information to anyone about the problems with the vehicle or the nonfinancial terms of the reacquisition.

Any confidentiality clause, gag clause, or similar clause in a release or other agreement in violation of *Civ. Code § 1793.26* is void as against California public policy [*Civ. Code § 1793.26(b)*]. Nothing in *Civ. Code § 1793.26* is intended to prevent any confidentiality clause, gag clause, or similar clause regarding the financial terms of the reacquisition of the vehicle [*Civ. Code § 1793.26(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesGeneral OverviewContracts LawContract Conditions & ProvisionsExpress WarrantiesAntitrust & Trade LawConsumer ProtectionVehicle WarrantiesLemon LawsAntitrust & Trade LawConsumer ProtectionVehicle WarrantiesExpress WarrantiesCommercial Law (UCC)Sales (Article 2)WarrantiesExpress Warranties

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§ 91.16 Presumption Regarding Reasonable Attempts to Repair New Motor Vehicle

[1] Presumption of What Constitutes Reasonable Attempts to Repair

It will be presumed that a reasonable number of attempts have been made to conform a new motor vehicle (as defined at *§ 91.12[1]*), to the applicable express warranties if, within 18 months from delivery to the buyer or 18,000 miles on the vehicle's odometer, whichever occurs first, one or more of the following occurs [*Civ. Code § 1793.22(b)*]:

- The same nonconformity results in a condition that is likely to cause death or serious bodily injury if the vehicle is driven, and the nonconformity has been subject to repair two or more times by the manufacturer or its agents, and the buyer or lessee has at least once directly notified the manufacturer of the need for the repair of the nonconformity.

- The same nonconformity has been subject to repair four or more times by the manufacturer or its agents, and the buyer has at least once directly notified the manufacturer of the need for the repair of the nonconformity.

- The vehicle is out of service by reason of repair of nonconformities by the manufacturer or its agents for a cumulative total of more than 30 calendar days since delivery of the vehicle to the buyer.

The 30-day limit can be extended only if repairs cannot be performed due to conditions beyond the control of the manufacturer or its agents. The buyer is required to notify the manufacturer directly as noted above only if the manufacturer has clearly and conspicuously disclosed to the buyer, with the warranty or the owner's manual, the provisions of *Civ. Code §§ 1793.2(d)* and *1793.22*, including the requirement that the buyer must notify the manufacturer directly. The notification, if required, is to be sent to the address, if any, specified clearly and conspicuously by the manufacturer in the warranty or owner's manual [*Civ. Code § 1793.22(b)*].

This presumption is a rebuttable presumption affecting the burden of proof, and it may be asserted by the buyer in any civil action, including an action in small claims court, or other formal or informal proceeding [*Civ. Code § 1793.22(b)*].

Once this presumption is activated, the plaintiff need not establish that defendant's failure to repair the vehicle after a reasonable number of attempts was caused by conditions within that defendant's control [*Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 890, 263 Cal. Rptr. 64]* .

[2] Presumption Is Not Applicable Until After Resort to Dispute Resolution Process

If a qualified third-party dispute resolution process exists and the buyer receives timely notification in writing of the availability of that process with a description of its operation and effect, the buyer may not assert the presumption in *Civ. Code § 1793.22(b)* until after the buyer has initially resorted to the process. Notification of the availability of the dispute resolution process is not timely if the buyer suffers any prejudice resulting from any delay in giving the notification. If a qualified third-party dispute resolution process does not exist, if the buyer is dissatisfied with the third-party decision, or if the manufacturer or its agent neglects to promptly fulfill the terms of the third-party decision after that decision is accepted by the buyer, the buyer may assert the presumption provided in *Civ. Code § 1793.22(b)* in an action to enforce the buyer's rights under *Civ. Code § 1793.2(d)*. The findings and decision of the dispute resolution process are admissible in evidence in the action without further foundation [*Civ. Code § 1793.22(c)*].

[3] Limitation Period Tolled During Dispute Resolution Process

Any period of limitation of actions under any federal or California laws with respect to any person is extended for a period equal to the number of days between the date a complaint is filed with a third-party dispute resolution process and the date of its decision or the date before which the manufacturer or its agent is required by the decision to fulfill its terms, whichever occurs later [*Civ. Code § 1793.22(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewTransportation LawPrivate VehiclesGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsAntitrust & Trade LawConsumer ProtectionVehicle WarrantiesLemon LawsAntitrust & Trade LawConsumer ProtectionVehicle WarrantiesExpress Warranties

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§ 91.17 Qualified Third Party Dispute Resolution Process

[1] Attributes of Qualified Third Party Dispute Resolution Process

The Department of Consumer Affairs has a program to certify, decertify, and monitor third-party dispute resolution processes and to assist owners or lessees of new motor vehicles who have complaints regarding the operation of a third-party dispute resolution process [*Bus. & Prof. Code § 472 et seq.*; *see [2], below*].

A qualified third-party dispute resolution process is one that does all of the following [*Civ. Code § 1793.22(d)*]:

- Complies with the minimum requirements of the Federal Trade Commission for informal dispute settlement procedures as set forth in *16 C.F.R. § 703.1 et seq.* as those regulations read on January 1, 1987.

- Renders decisions that are binding on the manufacturer if the buyer elects to accept the decision.

- Prescribes a reasonable time, not to exceed 30 days after the decision is accepted by the buyer, within which the manufacturer or its agent must fulfill the terms of its decision.

- Provides arbitrators who are assigned to decide disputes with copies of, and instruction in, the provisions of the FTC's regulations at *16 C.F.R. § 703.1 et seq.* as those regulations read on January 1, 1987, Division 2 of the Commercial Code (*Com. Code § 2101 et seq.*), and the Song-Beverly Consumer Warranty Act (*Civ. Code § 1790 et seq.*).

- Requires the manufacturer, when the process orders, to replace the motor vehicle or to make restitution in accordance with *Civ. Code § 1793.2(d)(2)*.

- Provides, at the request of the arbitrator or a majority of the arbitration panel, for an inspection and written report on the condition of a nonconforming motor vehicle at no cost to the buyer, by an

automobile expert who is independent of the manufacturer.

- Takes into account in rendering decisions all legal and equitable factors, including but not limited to the written warranty, the rights and remedies conferred by the regulations of the FTC (*16 C.F.R. § 703.1 et seq.*, as those regulations read on January 1, 1987), by Division 2 of the Commercial Code (*Com. Code § 2101 et seq.*), by the Song-Beverly Consumer Warranty Act (*Civ. Code § 1790 et seq.*), and by any other equitable considerations appropriate to the circumstances. The process need not consider or provide remedies in the form of awards of punitive damages or multiple damages under *Civ. Code § 1794(c)*, of attorney's fees under *Civ. Code § 1794(d)*, or of consequential damages other than as provided in *Civ. Code § 1794(a)* and *(b)* (including but not limited to reasonable repair, towing, and rental car costs actually incurred by the buyer);

- Requires that no arbitrator deciding a dispute may be a party to the dispute and that no other person, including an employee, agent, or dealer for the manufacturer, may be allowed to participate substantively in the merits of any dispute with the arbitrator unless the buyer is also allowed to participate. Nothing in this provision prohibits any member of an arbitration board from deciding a dispute.

- Obtains and maintains certification by the Department of Consumer Affairs pursuant to *Bus. & Prof. Code § 472 et seq.*

[2] Assistance Available From Department of Consumer Affairs

The Department of Consumer Affairs now monitors the dispute resolution process as part of its Arbitration Certification Program at 401 S. Street, Suite 201, Sacramento, CA 95814, telephone (916) 323-3406 or (800) 952-5210. Advice about preparing a case and the names and addresses of all certified dispute resolution programs are available from the DCA, and can be accessed on the Internet at http://www.dca.ca.gov/acp. That website advises that the forms for initiating a complaint should be found in the owner's manual provided with the vehicle. The publication "Lemon-Aid for New Car Buyers" can be obtained from DCA Publications, 401 S. Street, Suite 100, Sacramento CA. 95814, telephone (916) 323-7239.

[3] Prevents Assessment of Section 1794(e) Civil Penalty Against Manufacturer

A manufacturer that maintains a qualified third-party dispute resolution process that substantially complies with *Civ. Code § 1793.22* is not liable for the civil penalty provided by *Civ. Code § 1794(e)* [*Civ. Code § 1794(e)(2)*]. For other instances in which that penalty cannot be imposed, see *§ 91.18[8]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewTransportation LawPrivate VehiclesGeneral OverviewAntitrust & Trade LawConsumer ProtectionVehicle WarrantiesLemon Laws

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§ 91.18 Damages for Breach of Warranty or Failure to Replace or Make Restitution

[1] In General

Any buyer of consumer goods who is damaged by a failure to comply with any obligation under the Song-Beverly Consumer Warranty Act or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief [*Civ. Code § 1794(a)*; *see* *Mocek v. Alfa Leisure, Inc. (2003) 114 Cal. App. 4th 402, 406-408, 7 Cal. Rptr. 3d 546* (holding that buyer is not required to give seller opportunity to repair before rescinding when implied warranty of merchantability is breached, and affirming judgment in amount of purchase price plus interest upon return of defective travel trailer)]. Despite America's "love affair with the automobile," this does not include damages for emotional distress [*Bishop v. Hyundai Motor America (1996) 44 Cal. App. 4th 750, 757-758, 52 Cal. Rptr. 2d 134* ; *Kwan v. Mercedes Benz of North America, Inc. (1994) 23 Cal. App. 4th 174, 187-192, 28 Cal. Rptr. 2d 371]* . The measure of the buyer's damages in an action under *Civ. Code § 1794* includes the rights of replacement or reimbursement as set forth in *Civ. Code § 1793.2(d)* and the following [*Civ. Code § 1794(b)*]:

- If the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, *Com. Code §§ 2711, 2712,* and *2713* apply [*see [2], below*].

- If the buyer has accepted the goods, *Com. Code §§ 2714* and *2715* apply, and the measure of damages also includes the cost of repairs necessary to make the goods conform [*see [3], below*].

A buyer who prevails in an action under *Civ. Code § 1794* is entitled to reasonable attorney's fees and costs [*Civ. Code § 1794(d)*; *see* [6], *below*].

Except as otherwise provided in *Civ. Code § 1794(e)(2)-(5)* (discussed in *[8], below*), if the buyer of a new motor vehicle establishes a violation of *Civ. Code § 1793.2(d)(2)* (failure to repair or replace vehicle to conform to express warranty, discussed in *§ 91.15*), the buyer is entitled to recover damages and reasonable attorney's fees and costs, and may recover a civil penalty of up to two times the amount of damages [*Civ. Code § 1794(e)(1)*; *see, e.g.,* *Oregel v. American Isuzu Motors, Inc. (2001) 90 Cal. App. 4th 1094, 1104-1105, 109 Cal. Rptr. 2d 583* (substantial evidence

supported jury's finding that oil leak was nonconformity impairing use and value, that manufacturer was unable to fix leak after reasonable number of attempts, and that manufacturer willfully violated its obligation to repurchase and should pay civil penalty equal to amount of damage award)]. This penalty has been held not to be impermissibly vague as to the standard to be used by a jury in considering whether to impose sanctions [*Suman v. Superior Court (1995) 39 Cal. App. 4th 1309, 1318-1321, 46 Cal. Rptr. 2d 507]* . There is also a penalty for willful failure to comply with any obligation under the Song-Beverly Consumer Warranty Act or under an implied or express warranty or service contract [*see Civ. Code § 1794(c)*, discussed in *[7], below*]. That penalty applies whether the product involved is a new motor vehicle or other consumer good [*see Suman v. Superior Court (1995) 39 Cal. App. 4th 1309, 1317-1318, 46 Cal. Rptr. 2d 507]* .

For a complaint for use in pursuing the buyer's remedies, see *§ 91.64[1]*. For additional discussion of the general provisions of *Civ. Code § 1794(a)-(d)*, and complaints and allegations for use in pursuing the buyer's remedies whether or not a motor vehicle is involved, see Ch. 502, *Sales: Warranties* .

[2] Commercial Code Remedies Applicable on Revocation

In addition to the rights of replacement or reimbursement as set forth in *Civ. Code § 1793.2(d)* (discussed in *§ 91.15*), a buyer who has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, is entitled to the remedies set forth in the *Com. Code §§ 2711-2713* [*Civ. Code § 1794(b)(1)*], which include the following:

- Recovery of any portion of the purchase price already paid [*Com. Code § 2711(1)*]. The buyer has a security interest in goods in his or her possession or control for any payments made and expenses including transportation, care, and may hold those goods for resale [*Com. Code § 2711(3)*].

- Damages for nondelivery, which is the market price as established in accordance with *Com. Code § 2713* [*Com. Code § 2711(1)(b)*].

- Incidental and consequential damages less expenses saved in consequence of seller's breach [*Com. Code § 2712(2)*; *see Com. Code § 2715* (consequential and incidental damages, discussed in *[3], below*)].

Although "cover" is also available as an element of damages under the Commercial Code [*Com. Code §§ 2711(1)(a), 2712(1)*], "cover" is relevant only in context of commercial transactions and so would not be applicable to transaction within Song-Beverly Act [*see Bishop v. Hyundai Motor America (1996) 44 Cal. App. 4th 750, 756, 52 Cal. Rptr. 2d 134]* . Failure to cover does not bar the buyer from other remedies [*Com. Code § 2712(3)*].

[3] Commercial Code Remedies Applicable if Buyer Retains Vehicle

In addition to the rights of replacement or reimbursement as set forth in *Civ. Code § 1793.2(d)* (discussed in *§ 91.15*), when a buyer has accepted the goods, *Com. Code §§ 2714, 2715* apply and the measure of damages includes the cost of repairs necessary to make the goods conform [*Civ. Code § 1794(b)(2)*], which include the following:

- Provided the buyer has accepted goods and given notification [*Com. Code § 2607(3)*], as damages for any nonconformity of tender, the loss resulting from seller's breach in the ordinary course of events as determined in any manner that is reasonable [*Com. Code § 2714(1)*].

- Damages for breach of warranty, which is the difference at the time and place of contracting between the value of the goods accepted and the value they would have had if they had been as warranted unless special circumstances show proximate damage of a different amount [*Com. Code § 2714(2)*].

- In a proper case, any incidental and consequential damage under *Com. Code § 2715*, which include injury to person or property resulting from breach of warranty [*Com. Code §§ 2714(3), 2715(2)(b)*].

Incidental damages resulting from seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, and commercially reasonable charges, expenses, or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach [*Com. Code § 2715(1)*].

Consequential damages resulting from seller's breach include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise [*Com. Code § 2715(2)(a)*].

[4] Commercial Code Provisions Applicable for Breach of Implied Warranty

Any buyer of consumer goods injured by a breach of the implied warranty of merchantability and if applicable, by a breach of the implied warranty of fitness, has the remedies provided in *Com. Code § 2601 et seq.* and *Com. Code § 2701 et seq.*, and, in any action brought under those provisions, *Civ. Code § 1794* of the Song-Beverly Consumer Warranty Act applies [*Civ. Code § 1791.1(d)*].

[5] Civil Code Measure of Damages for Breach of Contract Compared

For the breach of an obligation arising from contract, the measure of damages, except when otherwise expressly provided in the Civil Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused, or which, in the ordinary course of things, would be likely to result [*Civ. Code § 3300*].

[6] Costs, Expenses, and Attorney's Fees

A buyer who prevails in an action under *Civ. Code § 1794*, will be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended, determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of the action [*Civ. Code § 1794(d)*]. Expert witness fees are included within the terms "costs and expenses" [*Jensen v. BMW of North America, Inc. (1995) 35 Cal. App. 4th 112, 137-138, 41 Cal. Rptr. 2d 295]* . A plaintiff seeking an award of attorney's fees under *Civ. Code § 1794(d)* must show that the fees incurred were "allowable," "reasonably necessary to the conduct of the litigation," and "reasonable in amount". The trial court need not indicate how it arrives at the amount of an attorney's fee award [*Levy v. Toyota Motor Sales, U.S.A., Inc. (1992) 4 Cal. App. 4th 807, 816, 5 Cal. Rptr. 2d 770* (affirming $30,000 attorney's fee award for judgment of $22,619--$17,619 plus $5,000 civil penalty--based on breach of express warranty to repair faulty brakes)].

ILLUSTRATION:

Plain Meaning of "Reasonably Incurred." An attorney for a buyer who prevailed in an action under the Song-Beverly Consumer Warranty Act had increased his rates over years since the case was begun, although the buyer was billed and liable only for fees at the hourly rate set at the beginning of the litigation. The question was whether fees at the increasing rate "reasonably incurred" for purposes of an award under *Civ. Code § 1794(d)*. The court answered this question in the negative. Attorney's fees at the higher rates were not "incurred" by the prevailing buyer and thus, could not be awarded at those higher rates [*Nightingale v. Hyundai Motor America (1994) 31 Cal. App. 4th 99, 104-105, 37 Cal. Rptr. 2d 149]* .

Although *Civ. Code § 1794(d)* mentions only "prevailing buyers," it has been held, after reconciling it with *Code Civ. Proc. 1032(b)*, under which prevailing defendants are entitled to costs, to apply to allow defendant sellers who prevail

to recover their costs and expert witness fees as prevailing parties under the Song-Beverly Consumer Warranty Act [*Murillo v. Fleetwood Enterprises, Inc. (1998) 17 Cal. 4th 985, 999, 73 Cal. Rptr. 2d 682, 953 P.2d 858]* .

[7] Civil Penalty for Willful Failure to Comply With Act

[a] In General

If the buyer establishes that the failure to comply with any obligation under the Song-Beverly Consumer Warranty Act or under an express warranty or service contract was willful, the judgment may include, in addition to the amounts recovered under *Civ. Code § 1794(a)*, a civil penalty which shall not exceed two times the amount of actual damages. This subdivision does not apply in the following cases [*Civ. Code § 1794(c)*; *Suman v. BMW of North America, Inc. (1994) 23 Cal. App. 4th 1, 9-10, 28 Cal. Rptr. 2d 133]* :

- In any class action under *Code Civ. Proc. § 382* or under *Civ. Code § 1781* (Consumer Legal Remedies Act).

- With respect to a claim based solely on a breach of an implied warranty.

As discussed in *[8], below*, a buyer who recovers this civil penalty may not also recover the civil penalty provided for by *Civ. Code § 1794(e)* for the same violation [*Civ. Code § 1794(e)(5)*] although either penalty provision may be applied to a new motor vehicle warranty [*Jernigan v. Ford Motor Co. (1994) 24 Cal. App. 4th 488, 492, 29 Cal. Rptr. 2d 348]* .

[b] Determining Whether Conduct Was Willful

"Willful" within the meaning of *Civ. Code § 1794(c)* requires that the manufacturer knew of its obligations under the Act but intentionally declined to fulfill them. "Willful" does not include a moral component. Thus, jury instructions using words such as "blameworthy" and "reckless disregard of consumer's rights" are error [*Schreidel v. American Honda Motor Co. (1995) 34 Cal. App. 4th 1242, 1249-1250, 40 Cal. Rptr. 2d 576* ; *Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 894, 263 Cal. Rptr. 64]* , as are instructions that make no mention of defendant's knowledge of its obligations under the Act, and that describe willful as meaning merely that "the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: that defendant knows what it is doing and intends to do it" [*see* *Bishop v. Hyundai Motor America (1996) 44 Cal. App. 4th 750, 759, 52 Cal. Rptr. 2d 134* ; *Kwan v. Mercedes Benz of North America, Inc. (1994) 23 Cal. App. 4th 174, 180-187, 28 Cal. Rptr. 2d 371]* . Unfortunately, for the defendant in one case, the foregoing erroneous instruction was coupled with a correct instruction regarding defendant's knowledge of its obligations under the Act (*see below*), and counsel waived the error by failing to object to it, so the penalty award was upheld [*Bishop v. Hyundai Motor America (1996) 44 Cal. App. 4th 750, 759-760, 52 Cal. Rptr. 2d 134]* .

A manufacturer's failure to refund or replace a defective automobile is not "willful" under *Civ. Code § 1794(c)* if its failure to replace or refund was the result of a reasonable and good faith belief that facts imposing the statutory obligation were not present [*Schreidel v. American Honda Motor Co. (1995) 34 Cal. App. 4th 1242, 1249-1250, 40 Cal. Rptr. 2d 576* ; *Kwan v. Mercedes Benz of North America, Inc. (1994) 23 Cal. App. 4th 174, 185, 28 Cal. Rptr. 2d 371]* .

ILLUSTRATION:

Instruction Regarding Willful Nature of Defendant's Conduct. Plaintiff took the car to the dealership for repairs eight times between December 1989 and August 1990 and stopped using the car in September 1990. Only defendant's zone manager had authority to offer refund or replacement. Defendant had no written guidelines as to when a reasonable number of attempts had been made to repair a vehicle. As a matter of practice the zone manager never agreed to a replacement or refund when he received a

demand letter from an attorney, but tried to negotiate repair. The zone manager drove the car in late July, 1990, heard none of the sounds complained of and thought the body repairs were excellent. A "gurgling" problem and others continued, and the car was returned to the dealership for additional attempts to address them. The zone manager testified he never discussed any problems other than the gurgling with plaintiff's attorney. Although the zone manager had access to the dealership's service file, he never examined it and never asked his subordinates to determine how many times the car had been in for service or how many days it had been in the shop. The question was whether this evidence of defendant's failure to investigate the repair history of the car, despite the availability of that information mean that defendant was not entitled to an instruction presenting the issue of good faith factual dispute of mistake. The court held that it did not. While the court of appeal agreed that a decision made by a defendant without the use of reasonably available information germane to that decision would not be a reasonable, good faith decision, it said the defense evidence did not go to the number of repair attempts, but to whether they were successful and whether plaintiff was in fact seeking rescission. Thus, defendant was entitled to an instruction presenting the question whether the zone manager, in the summer and autumn of 1990 reasonably and in good faith believed no refund was necessary either because plaintiff wished to keep the car or because all nonconformities had been repaired [*Kwan v. Mercedes Benz of North America, Inc. (1994) 23 Cal. App. 4th 174, 186, 28 Cal. Rptr. 2d 371]* .

[8] Penalty for Nonwillful Failure to Repair or Replace New Motor Vehicle

Except as otherwise provided in *Civ. Code § 1794(e)(2)-(5)* (discussed below), if the buyer of a new motor vehicle establishes a violation of *Civ. Code § 1793.2(d)(2)* (failure to repair or replace new motor vehicle to conform to express warranty, discussed in *§ 91.15*) the buyer shall recover damages and reasonable attorney's fees and costs, and may recover a civil penalty of up to two times the amount of damages [*Civ. Code § 1794(e)(1)*]. This penalty does not require the buyer to show that the manufacturer's failure to comply with a new motor vehicle warranty obligation was willful, applies only to new motor vehicles, and has been held not to be impermissibly vague as to the standard to be used by a jury in considering whether to impose sanctions [*Suman v. Superior Court (1995) 39 Cal. App. 4th 1309, 1315-1316, 1321-1322, 46 Cal. Rptr. 2d 507]* . Its purpose has been described as a "carrot" (whereas the penalty of *Civ. Code § 1794(c)* is the stick) to encourage the use of alternative dispute resolution so that courts will only be used as a last resort by consumer's of new motor vehicles [*Suman v. Superior Court (1995) 39 Cal. App. 4th 1309, 1317-1318, 46 Cal. Rptr. 2d 507]* .

The manufacturer is not liable for this civil penalty in the following situations:

- If the manufacturer maintains a qualified third-party dispute resolution process that substantially complies with *Civ. Code § 1793.22* [*Civ. Code § 1794(e)(2)*].

- If, after the occurrence of the events giving rise to the presumption established in *Civ. Code § 1793.22(b)*, the buyer fails to serve on the manufacturer a written notice requesting that the manufacturer comply with *Civ. Code § 1793.2(d)(2)* [*Civ. Code § 1794(e)(3)*]; or

- If, after the occurrence of the events giving rise to the presumption established in *Civ. Code § 1793.22(b)*, the buyer does serve on the manufacturer a written notice requesting that the manufacturer comply with *Civ. Code § 1793.2(d)(2)* within 30 days of the service of notice, and the manufacturer does comply within 30 days of the service of that notice [*Civ. Code § 1794(e)(4)*].

- A buyer who recovers a civil penalty under *Civ. Code § 1794(c)* may not also recover a civil penalty under *Civ. Code § 1794(e)* for the same violation [*Civ. Code § 1794(e)(5)*].

In instructing a jury regarding the penalty of *Civ. Code § 1794(e)*, the jury should be informed of the following [

Suman v. Superior Court (1995) 39 Cal. App. 4th 1309, 1322-1323, 46 Cal. Rptr. 2d 507] :

- The purpose of the penalty, which is that it is authorized as a means of encouraging manufacturers to resolve their disputes with consumers outside litigation; that is, if defendant had maintained a third party dispute resolution process for its customers, it would not be subject to penalty.

- That whether or not to impose the penalty is within the jury's sound discretion, which should be exercised without prejudice or passion.

- That the jury's exercise of discretion should be based on the evidence presented to them or any recitation of established facts presented to them.

- That if the jury chooses to impose a penalty, it may be up to two times the amount of damages awarded to plaintiff.

- That the penalty would be paid by defendant.

- That there is no definite or required method of determining the penalty, nor is the opinion of a witness required as to the amount of the penalty.

- That it is not necessary that the defendant acted willfully, but that the jury may take into consideration the nature of the defendant's conduct including the extent to which the defendant did or did not act reasonably or in good faith in (1) failing to honor plaintiff's demand for replacement of the defective vehicle or restitution and (2) failing to establish a third party dispute resolution process that could have resolved the matter without litigation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesRestitutionTransportation LawPrivate VehiclesGeneral OverviewAntitrust & Trade LawConsumer ProtectionVehicle WarrantiesLemon Laws

California Forms of Pleading and Practice--Annotated

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Chapter 91 AUTOMOBILES: ACTIONS INVOLVING DEFECTS AND REPAIRS
PART II. LEGAL BACKGROUND
A. Song-Beverly Consumer Warranty Act; California "Lemon Law"

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§ 91.19 Resale or Lease of Replaced Vehicle

[1] General Disclosure Requirements

Except as provided in *Civ. Code § 1793.22(f)(2)*, no person may sell (either at wholesale or retail), lease, or transfer a motor vehicle transferred by a buyer or lessee to a manufacturer pursuant to *Civ. Code § 1793.2(d)(2)* or to a similar statute of any other state, unless the nature of the nonconformity experienced by the original buyer or lessee is clearly and conspicuously disclosed to the prospective buyer, lessee, or transferee, the nonconformity is corrected, and the manufacturer warrants to the new buyer, lessee, or transferee in writing for a period of one year that the motor vehicle is free of that nonconformity [*Civ. Code § 1793.22(f)(1)*]. The Automotive Consumer Notification Act imposes specific disclosure requirements [*see Civ. Code §§ 1793.23, 1793.24*].

Except for the requirement that the nature of the nonconformity be disclosed to the transferee, *Civ. Code § 1793.22(f)(1)* does not apply to the transfer of a motor vehicle to an educational institution if the purpose of the transfer is to make the motor vehicle available for use in automotive repair courses [*Civ. Code § 1793.22(f)(2)*].

[2] Ownership Certificate and Decal

When a vehicle registered in California is reacquired by the manufacturer or dealer pursuant to *Civ. Code § 1793.2(d)(2)*, the manufacturer is required to request the Department of Motor Vehicles to inscribe the ownership certificate ("pink slip") with the notation "Lemon Law Buyback," and affix a decal to the vehicle in accordance with *Veh. Code § 11713.12* [*Civ. Code § 1793.23(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesGeneral OverviewAntitrust & Trade LawConsumer ProtectionVehicle WarrantiesLemon Laws

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[Reserved]

§§ 91.20[Reserved]

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§ 91.30 Tort Remedies for Automobile Defects

[1] Negligence

This discussion of negligence is not intended to be exhaustive, but only to aid the reader in determining whether a cause of action for negligence will exist in addition to or instead of one for breach of warranty, and which cause of action is likely to be easier to establish. For detailed discussion of negligence in the context of products liability and related forms, see Ch. 380, *Negligence* , and Ch. 460, *Products Liability* . See also *[2][b], [e]-[h], below*, discussing aspects of products liability that are equally applicable to actions in negligence and in strict liability.

If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, and there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully [*Kalash v. Los Angeles Ladder Co. (1934) 1 Cal. 2d 229, 231-233, 34 P.2d 481* (accepting the rule laid down in *MacPherson v. Buick Motor Co. (1916) 217 N.Y. 382, 111 N.E. 1050, 1053-1055)]* .

A manufacturer must use reasonable care to design a product so as to make it safe for the use for which it is intended. "Reasonable care" depends on the facts of each case, but in all cases it involves balancing the likelihood of harm to be expected from a machine with a given design and the gravity of that harm against the burden of the precaution that would avoid the harm. A manufacturer's duty of care extends to all persons within the range of potential danger from the product [*Pike v. Frank G. Hough Co. (1970) 2 Cal. 3d 465, 470, 473, 85 Cal. Rptr. 629, 467 P.2d 229]* . While a manufacturer is held liable for physical injuries caused by defects in manufactured products if the manufactured goods do not match a standard of safety defined in terms of conditions that create unreasonable risks of harm, the manufacturer cannot be held liable for the level of performance of its products in the consumer's business, unless the manufacturer agrees that the product was designed to meet the consumer's demands [*Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 18, 45 Cal. Rptr. 17, 403 P.2d 145]* .

Contracts exempting one from liability for his or her own negligence are not necessarily invalid, if they do not affect the public interest. An exculpatory clause must be strictly construed and interpreted to give effect to the intent of parties. A

clause in a sales contract waiving all other conditions or liabilities arising by law or otherwise whether or not occasioned by seller's negligence has been held to limit not only contractual warranty liability but also tort liability, for active as well as passive negligence [*Delta Air Lines, Inc. v. Douglas Aircraft Co. (1965) 238 Cal. App. 2d 95, 100-102, 47 Cal. Rptr. 518]* .

[2] Strict Liability

[a] In General

This discussion of strict liability is not intended to be exhaustive, but only to aid the reader in determining whether a cause of action for strict liability will exist in addition to or instead of one for breach of warranty, and which of these two causes of action is likely to be easier to establish. For detailed discussion of strict liability and related forms, see Ch. 460, *Products Liability* .

The strict liability of a manufacturer and its retailer is established when the plaintiff proves that he or she was injured while using the instrumentality in a way it was intended to be used as a result of a defect in design or manufacture of which plaintiff was not aware and that made the vehicle unsafe for its intended use. This doctrine of strict liability applies to physical harm to person or property [*Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 406, 185 Cal. Rptr. 654, 650 P.2d 1171 , cert. denied, 459 U.S. 1190 (1983)* ; *Luque v. McLean (1972) 8 Cal. 3d 136, 141, 104 Cal. Rptr. 443, 501 P.2d 1163* ; *Greenman v. Yuba Power Products, Inc. (1963) 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 377 P.2d 897* ; *Gherna v. Ford Motor Co. (1966) 246 Cal. App. 2d 639, 649-650, 55 Cal. Rptr. 94]* . The rules of strict liability place responsibility for defects, whether negligently or nonnegligently caused, on the manufacturer of the completed product. These rules apply regardless of what part of the manufacturing process the manufacturer chooses to delegate to third parties. A manufacturer of a completed product cannot escape liability by tracing the defect to a component part supplied by another [*Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 261, 37 Cal. Rptr. 896, 391 P.2d 168* ; *see Springmeyer v. Ford Motor Co. (1998) 60 Cal. App. 4th 1541, 1562, 71 Cal. Rptr. 2d 190]* . The rules defining and governing warranties were developed to meet the needs of commercial transactions and are not properly applicable to govern a manufacturer's liability to those injured by its defective products unless those rules also serve the purposes for which that liability is imposed [*Greenman v. Yuba Power Products, Inc. (1963) 59 Cal. 2d 57, 63, 27 Cal. Rptr. 697, 377 P.2d 897]* .

The doctrine of strict liability in tort also applies to a lessor of personalty if that lessor is in the business of leasing in the same general sense that the seller of personalty is found to be in the business of manufacturing or retailing [*Price v. Shell Oil Co. (1970) 2 Cal. 3d 245, 254, 85 Cal. Rptr. 178, 466 P.2d 722]* .

[b] No Requirement of Privity

Because the doctrine of strict liability does not require any contractual relation or privity of contract, it is not necessary that the ultimate user or consumer have purchased the product at all; he or she may be a member of the family of the final purchaser, or his or her employee or guest [*Barth v. B.F. Goodrich Tire Co. (1968) 265 Cal. App. 2d 228, 246, 71 Cal. Rptr. 306]* . Further, because the doctrine applies even if the manufacturer has attempted to limit liability, the doctrine may not be limited to deny recovery to bystanders on the theory that no representation of safety is made to the bystander [*Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 586, 75 Cal. Rptr. 652, 451 P.2d 84]* .

[c] Awareness of Defects

In a products liability case based on the theory of strict liability, the plaintiff is not required to establish that he or she was not aware of the defect that caused the injury at the time of the accident [*Luque v. McLean (1972) 8 Cal. 3d 136, 139, 144-146, 104 Cal. Rptr. 443, 501 P.2d 1163]* . The policy underlying the doctrine of strict liability compels the conclusion that recovery should not be limited to cases involving latent defects [*Luque v. McLean (1972) 8 Cal. 3d 136, 145, 104 Cal. Rptr. 443, 501 P.2d 1163]* .

[d] Warnings of Dangerous Propensities

A manufacturer, as well as a dealer, must give adequate warning to the ultimate users of the product of any dangerous propensity that it knows or should have known would result in the type of accident that occurred. A product, although faultlessly made, may nevertheless be deemed defective if it is unreasonably dangerous to place the product in the hands of a user without a suitable warning [*Barth v. B.F. Goodrich Tire Co. (1968) 265 Cal. App. 2d 228, 244-245, 71 Cal. Rptr. 306]* .

[e] Foreseeability

Strict liability is not imposed on a manufacturer for an injury resulting from a use of its product that was not reasonably foreseeable [*Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 126, 104 Cal. Rptr. 433, 501 P.2d 1153]* . Although a collision may not be the normal or intended use of a motor vehicle, vehicle manufacturers must take accidents into consideration as reasonably foreseeable occurrences involving their products and they may be deemed strictly liable for injuries resulting from defects in their products which would not have caused injury but for the occurrence of an accident [*Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 126, 104 Cal. Rptr. 433, 501 P.2d 1153]* .

[f] Res Ipsa Loquitur

In products liability cases prior to the development of the rules of strict liability, plaintiffs employed the doctrine of res ipsa loquitur, which dispensed with proof of the defect. If the necessary elements were established, the jury would be told to draw an inference of negligent causation on the part of the defendant. These rules have not changed with the advent of the doctrine of strict liability, and provided all requirements are met, a plaintiff is still entitled to the res ipsa loquitur inference of negligence [*Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 385-387, 93 Cal. Rptr. 769, 482 P.2d 681* (plaintiff was not required to elect whether to proceed on theory of strict liability or negligence)].

[g] Damages

The doctrine of strict liability in tort permits recovery for physical injury to plaintiff's property, as well as personal injury to plaintiff [*Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 19, 45 Cal. Rptr. 17, 403 P.2d 145]* . However, defects in the quality of goods (loss of bargain) and economic losses, even when the loss of use of a vehicle causes loss of profits, are not recoverable from the manufacturer under the theory of strict liability; these types of losses are relegated to the law of contracts governing commercial transactions, *i.e.*, when defendant is in privity with plaintiff [*Anthony v. Kelsey-Hayes Co. (1972) 25 Cal. App. 3d 442, 446-448, 102 Cal. Rptr. 113]* .

[h] Assumption of Risk Merged Into Doctrine of Comparative Fault

The principles of comparative fault, announced in *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226* , apply to actions founded on strict products liability [*Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 730, 742, 144 Cal. Rptr. 380, 575 P.2d 1162]* . In strict products liability actions, the separate defense of assumption of the risk, to the extent that it is a form of contributory negligence, has been merged into comparative fault and is abolished as a bar to plaintiff's recovery. Thus, in either a strict products liability or negligence action, a plaintiff's recovery will be reduced in proportion to the amount of comparative fault attributable to him or her [*Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 738, 144 Cal. Rptr. 380, 575 P.2d 1162* ; *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 829, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

For a plaintiff's negligence to amount to a defense to strict liability, the plaintiff must have voluntarily and unreasonably chosen to encounter a known danger. Thus, the plaintiff would have to be aware of the defect and danger, and still proceed unreasonably to use product. Defendant has the burden of establishing this defense [*Luque v. McLean (1972) 8 Cal. 3d 136, 145-146, 104 Cal. Rptr. 443, 501 P.2d 1163* ; *Sperling v. Hatch (1970) 10 Cal. App. 3d 54, 61, 88 Cal. Rptr. 704]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsProducts LiabilityStrict LiabilityTransportation LawPrivate VehiclesGeneral OverviewTortsNegligenceStandards of CareReasonable CareReasonable PersonTortsNegligenceProofRes Ipsa LoquiturEvidentiary Effect

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§ 91.31 Unsafe Conditions in Absence of Accident, Injury, or Property Damage

Although a cause of action for breach of express warranty will exist while the defect is still latent or before any accident, injury, or property damage has been sustained [*see Anthony v. General Motors Corp. (1973) 33 Cal. App. 3d 699, 704-705, 109 Cal. Rptr. 254* (express warranty regarding weight limit tires would safely carry)], no cause of action for breach of the implied warranty of merchantability arises due to a latent defect. For example, a claim that a sport utility vehicle's high center of gravity, narrow tread width, and light weight combine to create an unacceptable risk of roll-over accident when driven under reasonably anticipated and foreseeable driving conditions does not state a cause of action for breach of implied warranty [*American Suzuki Motor Corp. v, Superior Court (1995) 37 Cal. App. 4th 1291, 1295 n.2, 1298-1299, 44 Cal. Rptr. 2d 526* (nor was any claim for breach of warranty of fitness stated because plaintiffs did not identify any particular purpose, other than providing transportation, for which the vehicles were obtained)]. Similarly, one who has not suffered any personal injury or property damage cannot state a cause of action for strict liability [*Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 18, 45 Cal. Rptr. 17, 403 P.2d 145]* .

Consumers who fear for their safety may petition the National Highway Transportation Safety Administration for a defect investigation by filing a petition with the Secretary of Transportation requesting the commencement of a proceeding to determine whether a recall order should be issued [*see 49 U.S.C. §§ 30118, 30120, 30162*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesGeneral OverviewContracts LawContract Conditions & ProvisionsExpress WarrantiesContracts LawContract Conditions & ProvisionsImplied WarrantiesMerchantability

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8-91 California Forms of Pleading and Practice--Annotated § 91.32

§ 91.32 Dealer's and Remanufacturer's Bond

[1] Bonding Requirement

Before any dealer's or remanufacturer's license is issued or renewed, the applicant must procure and file with the Department of Motor Vehicles a bond executed by an admitted surety insurer, conditioned that the applicant not practice any fraud or make any fraudulent representation that will cause a monetary loss to a purchaser, seller, financing agency, or governmental agency [*Veh. Code § 11710(a)*]. A dealer's bond must be in the amount of $50,000, except that for a dealer who deals exclusively in motorcycles or all-terrain vehicles or a dealer who sells vehicles on a wholesale basis only and sells fewer than 25 vehicles per year, the bond must be in the amount of $10,000 [*Veh. Code §§ 11710(b), 11710.1*]. A remanufacturer's bond must be in the amount of $50,000 [*Veh. Code § 11710(b)*].

Liability under the bond is to remain at full value. If the amount of liability under the bond is decreased, or there is a final court judgment outstanding for which the dealer or remanufacturer and sureties are liable, the dealer's or remanufacturer's license is automatically suspended. To reinstate the license and special plates, the licensee must either file an additional bond, restore the bond on file to the original amount, or terminate the outstanding judgment for which the dealer or remanufacturer and sureties are liable [*Veh. Code § 11710(c)*].

[2] Action Against Dealer and Surety on Bond

Veh. Code § 11711(a) authorizes a civil action against a dealer, the salesperson, and the surety on the dealer's bond, in an amount not to exceed the value of the vehicle purchased from or sold to a dealer, by any person who suffers damage because of any of the following:

- Fraud practiced by the dealer or his or her salesperson in which the injured person has a written instrument containing provisions and guarantees he or she believes have been violated [*see Krebs v. Travelers Indem. Co. (1961) 192 Cal. App. 2d 83, 85, 13 Cal. Rptr. 352* (plaintiff must have writing furnished by licensee containing stipulated provisions and guarantees that plaintiff believes have been violated by licensee in order to recover for loss or damage by reason of any fraud practiced on him or her or fraudulent representation made to him or her by licensed bonded dealer)].

- Violation of Division 3 of the Vehicle Code (*Veh. Code § 4000 et seq.*), relating to registration of vehicles and certificates of title.

- When the person is not paid for a vehicle sold to and purchased by a dealer.

ILLUSTRATION:

Claimant Who Has Released Dealer May Not Recover Against Surety. Claimants did not want to hold the dealer liable and only wanted to collect from the surety. After they obtained a default judgment against the dealer, they took an assignment from the dealer of the dealer's supposed claim against the surety and released the dealer. When the surety would not pay the claimants, the claimants and the dealer sued the surety for breach of the covenant of good faith and fair dealing. The issue was whether the claimants had any right to recover from the surety. The court said that they did not. As of the date of the assignment, the surety had no further liability to the claimants on the bond. Thus, its refusal to pay them was not bad faith [*Schmitt v. Insurance Co. of North America (1991) 230 Cal. App. 3d 245, 259, 262, 281 Cal. Rptr. 261]* .

If the state has a claim against the dealer under *Veh. Code § 11711(b)*, it will be satisfied first and is entitled to preference over claims under *Veh. Code § 11711(a)* [*Veh. Code § 11711(d)*]. The claims of persons under *Veh. Code § 11711(a)* who are not licensees are to be satisfied first and are entitled to preference over all other claims under *Veh. Code § 11711(a)* [*Veh. Code § 11711(e)*].

The Bond and Undertaking Law (*Code Civ. Proc. § 995.010 et seq.*) applies to bonds given pursuant to California statute, except to the extent the statute prescribes a different rule or is inconsistent [*Code Civ. Proc. § 995.020(a)*]. Actions on bonds are governed by *Code Civ. Proc. § 996.430*. For a complaint by an injured member of the public on the bond, see *§ 91.70*. For discussion and other forms relating to statutory bonds and deposits in lieu of bond, see *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.40* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicensesTransportation LawPrivate VehiclesGeneral OverviewContracts LawTypes of ContractsGuaranty Contracts

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§ 91.33 Automotive Repair Act

[1] Overview of Act

Licensing and regulation of automotive repair dealers are governed by the Automotive Repair Act (*Bus. & Prof. Code § 9880 et seq.*) [*see Bus. & Prof. Code § 9880.1* (definitions)]. In the Department of Consumer Affairs there is a Bureau of Automotive Repair under the supervision and control of a director [*Bus. & Prof. Code § 9882*]. The director, on his or her own initiative or in response to complaints, investigates on a continuous basis and gathers evidence of violations of the Act and of any regulation adopted pursuant to the Act, by any automotive repair dealer or automotive technician, whether registered or not, and by any employee, partner, officer, or member of any automotive repair dealer. The director establishes procedures for accepting complaints from the public against any dealer or automotive technician and may suggest measures that, in the director's judgment, would compensate for any damages suffered as a result of an alleged violation of the Act [*Bus. & Prof. Code § 9882.5*]. Although the Act does not authorize civil actions for violations of its provisions, neither does it prohibit a civil action against an automotive repair dealer by an individual [*Bus. & Prof. Code § 9884.18*].

The Automotive Repair Act requirements regarding written estimates and invoices [*Bus. & Prof. Code § 9884.9*] are discussed in Ch. 274, *Garages and Gas Stations* , which contains complaints for recovery of damages for injuries caused by negligent repairs, a complaint for use by a repairer, and forms of defenses. In this chapter, see *§§ 91.80 -91.83* for complaints and allegations for recovery of damages from a repairer or service station for negligent or misrepresented repairs.

An automotive repairer who retains possession of an automobile, claiming a lien for repairs that the customer never authorized or for which no written estimate was given, is liable for return of the vehicle, conversion, actual damages, and possibly punitive damages [*Harris v. Dixon Cadillac Co. (1982) 132 Cal. App. 3d 485, 489-493, 183 Cal. Rptr. 299* ; *see Zhadan v. Downtown Los Angeles Motor Distributors, Inc. (1979) 100 Cal. App. 3d 821, 831, 834-839, 161 Cal. Rptr. 225* (approving punitive damages of $90,000 on compensatory damages of $5,260); *see also* Ch. 150, *Conversion*].

[2] Insurance Coverage for Repairs

[a] Requirement for Vehicle to Be Repaired at Specified Dealer

No insurer may require that an automobile be repaired at a specific automotive repair dealer, as defined in the Automotive Repair Act [*Ins. Code § 758.5(a)*; *see Bus. & Prof. Code § 9880.1* (definition)].

No insurer may suggest or recommend that an automobile be repaired at a specific automotive repair dealer unless a referral is expressly requested by the claimant or the claimant has been informed in writing of the right to select the automotive repair dealer [*Ins. Code § 758.5(b)(1)*]. "Claimant"in *Ins. Code § 758.5* means either a first party claimant or insured or a third party claimant who asserts a right of recovery for automotive repairs under an insurance policy [*Ins. Code § 758.5(e)*]. An insurer may provide the claimant with specific truthful and nondeceptive information regarding the services and benefits available to the claimant during the claims process. This may include, but is not limited to, information about the repair warranties offered, the type of replacement parts to be used, the anticipated time to repair the damaged vehicle, and the quality of the workmanship available to the claimant [*Ins. Code § 758.5(b)(2)*; *see* 2009 Stats., ch. 387, § 1; *Ins. Code § 758.5(g)* (in civil action, this provision applies only if action is filed on or after January 1, 2010)].

After the claimant has chosen an automotive repair dealer, the insurer must not suggest or recommend that the claimant select a different automotive repair dealer, unless a referral is expressly requested by the claimant or except as to information of the kind authorized by *Ins. Code § 758.5(b)(2)*, discussed above [*Ins. Code § 758.5(c)*].

If an insurer's recommendation of an automotive repair dealer is accepted by the claimant, the insurer must cause the damaged vehicle to be restored to its condition prior to the loss at no additional cost to the claimant other than as stated in the policy or as is otherwise allowed by law. If the recommendation of an automotive repair dealer is done orally, and if the oral recommendation is accepted by the claimant, the insurer must provide the information contained in this paragraph, as noted in the statement below, to the claimant at the time the recommendation is made. The insurer must mail or provide the notice within five calendar days from the acceptance of the recommendation. The written notice must include the following statement plainly printed in no less than 10 point type in a separate and free-standing document [*Ins. Code § 758.5(b)(3)*; *see* 2009 Stats., ch. 387, § 1; *Ins. Code § 758.5(g)* (in civil action, requirement for separate and free-standing document and requirement to include fourth sentence of notice, beginning "we recommend," apply only if action is filed on or after January 1, 2010)]: "WE ARE PROHIBITED BY LAW FROM REQUIRING THAT REPAIRS BE DONE AT A SPECIFIC AUTOMOTIVE REPAIR DEALER. YOU ARE ENTITLED TO SELECT THE AUTO BODY REPAIR SHOP TO REPAIR DAMAGE COVERED BY US. WE HAVE RECOMMENDED AN AUTOMOTIVE REPAIR DEALER THAT WILL REPAIR YOUR DAMAGED VEHICLE. WE RECOMMEND YOU CONTACT ANY OTHER AUTOMOTIVE REPAIR DEALER YOU ARE CONSIDERING TO CLARIFY ANY QUESTIONS YOU MAY HAVE REGARDING SERVICES AND BENEFITS. IF YOU AGREE TO USE OUR RECOMMENDED AUTOMOTIVE REPAIR DEALER, WE WILL CAUSE THE DAMAGED VEHICLE TO BE RESTORED TO ITS CONDITION PRIOR TO THE LOSS AT NO ADDITIONAL COST TO YOU OTHER THAN AS STATED IN THE INSURANCE POLICY OR AS OTHERWISE ALLOWED BY LAW. IF YOU EXPERIENCE A PROBLEM WITH THE REPAIR OF YOUR VEHICLE, PLEASE CONTACT US IMMEDIATELY FOR ASSISTANCE."

Any insurer that, by the insurance contract, suggests or recommends that an automobile be repaired at a particular automotive repair dealer must prominently disclose the contractual provision in writing to the insured at the time the insurance is applied for and at the time the claim is acknowledged by the insurer. If the claimant elects to have the vehicle repaired at the shop of his or her choice, the insurer must not limit or discount the reasonable repair costs based on charges that would have been incurred had the vehicle been repaired by the insurer's chosen shop [*Ins. Code § 758.5(d)*]. However, this does not require the insurer to pay 100 percent of the reasonable repair costs irrespective of where the vehicle is taken. The insurer is required to pay 100 percent of the repair costs only when the insured accepts the insurer's recommendation to take the vehicle to a specific shop [*Ins. Code § 758.5(b)(3)*]. An insurance policy may lawfully provide two tiers of coverage, such as 100 percent coverage for reasonable costs at a shop selected by the

insurer, but only 80 percent coverage for reasonable costs at a shop selected by the insured [*Maystruk v. Infinity Ins. Co. (2009) 175 Cal. App. 4th 881, 883, 888, 96 Cal. Rptr. 3d 494*].

[b] Requirement for Repair Shop to Pay for Rental Vehicle

It is unlawful for an insurer to require an auto body repair shop registered pursuant to *Bus. & Prof. Code §§ 9884* and *9889.52*, as a condition of participation in the insurer's direct repair program, to pay for the cost of an insured's rental vehicle that is replacing an insured vehicle damaged in an accident, or to pay for the towing charges of the insured with respect to that accident. However, the insurer and the auto body repair shop may agree in writing to terms and conditions under which the rental vehicle charges become the responsibility of the auto body repair shop when the shop fails to complete work within the agreed time for repair of the damaged vehicle [*Ins. Code § 758(a)*].

A registered auto body repair shop that is denied participation in an insurer's direct repair program may report a denial to the Department of Insurance, which must maintain a record of all those denials for the purposes of gathering market conduct information. An insurer, on the request of the department, must disclose the fact that a denial was made [*Ins. Code § 758(b)*].

Any insurer that conducts an auto body repair labor-rate survey to determine and set a specified prevailing auto body rate in a specific geographic area must report the results of that survey to the department, which must make the information available on request. The survey information must include the names and addresses of the auto body repair shops and the total number of shops surveyed [*Ins. Code § 758(c)*].

Legal Topics:

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

§§ 91.34[Reserved]

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§ 91.40 Related Matthew Bender Publications

For interrogatories for use in actions involving automobile doors, hood ornaments, rentals, seats, tires, and windows, see Bender' s Forms Of Discovery, vol. 2, *Automobiles* (Matthew Bender)

For interrogatories for use in actions to recover possession of specific personal property and money damages resulting either from wrongful taking of that property, wrongful detention of it, or both, see Bender' s Forms Of Discovery, vol. 3B, *Claim and Delivery (Replevin)* (Matthew Bender)

For interrogatories for use in actions for breach of warranty, see Bender' s Forms Of Discovery, vol. 3C, *Contracts*; vol. 9, *Sales* (Matthew Bender)

For interrogatories concerning elements and computation of damages in personal injury and property damage actions, see Bender' s Forms Of Discovery, vol. 4, *Damages* (Matthew Bender)

For plaintiff's interrogatories to defendant for negligent repair, service, or storage of motor vehicles, see Bender' s Forms Of Discovery, vol. 9, *Service Stations* (Matthew Bender)

For interrogatories in actions involving injuries resulting from alleged defect in manufactured product, or failure to warn of dangerous nature of products, see Bender' s Forms Of Discovery, vol. 8A, *Products Liability* (Matthew Bender)

For memoranda of points and authorities related to questions of the adequacy of damages awarded, see California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

For memoranda of points and authorities related to complaints for fraud and relief based on rescission due to vitiation of consent, see California Points and Authorities, Ch. 92, *Duress, Menace, Undue Influence, Fraud, and Mistake* (Matthew Bender)

For memoranda of points and authorities related to opposition to and support of foreclosure of mechanic's lien, see

California Points and Authorities, Ch. 152, *Mechanics' Liens* (Matthew Bender)

For memoranda of points and authorities related to support of and opposition to demurrers to complaints to recover damages based on negligence, see California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender)

For memoranda of points and authorities related to liability of manufacturer or supplier of personal property for personal injuries or physical damage to property caused by defects in their product, see California Points and Authorities, Ch. 190, *Products Liability* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewTortsProducts LiabilityGeneral OverviewTortsDamagesCompensatory DamagesGeneral OverviewTortsNegligenceGeneral OverviewTransportation LawPrivate VehiclesGeneral Overview

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§ 91.41 Federal Statutes

Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. *15 U.S.C. § 2301 et seq.*

Petitions to National Highway Transportation Safety Administration for defect investigation to determine whether recall order should be issued. *49 U.S.C. §§ 30118, 30120, 30162*

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesGeneral OverviewAntitrust & Trade LawConsumer ProtectionMagnuson-Moss Warranty ActGeneral Overview

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§ 91.42 State Statutes

[1] Commercial Code Warranties

Express warranties by affirmation, promise, description, or sample. *Com. Code § 2313*

Implied warranty of merchantability; usage of trade. *Com. Code § 2314*

Implied warranty of fitness for particular purpose. *Com. Code § 2315*

Exclusion or modification of warranties. *Com. Code § 2316*

[2] Equipment

Manufacturer's responsibility for safety defects. *Veh. Code § 9975*

Equipment of vehicles. *Veh. Code § 24000 et seq.*

When federal motor vehicle safety standard has been adopted pursuant federal law [*49 U.S.C. § 30101 et seq.*], to dealer may not sell or offer to sell any vehicle to which that standard applies unless vehicle conforms to standard and has manufacturer's certification so stating. *Veh. Code § 24011*

Distribution or sale of previously deployed air bag is misdemeanor. *Veh. Code § 27317*

Greene-Harmer Motor Vehicle Damage Control Act. *Veh. Code § 34700 et seq.*

[3] Manufacturers, Retailers, Salespersons

Issuance of licenses and certificates to manufacturers, transporters, and dealers. *Veh. Code § 11700 et seq.*

Suspension or revocation of the licenses issued to dealers, transporters, manufacturers, and others. *Veh. Code § 11705*

Bond required of automobile dealers ($10,000) and manufacturers ($25,000) prior to licensing to indemnify against fraud that causes loss to purchaser, seller, financing agency, or government agency. *Veh. Code § 11710*

Fraud and other violations of law by automobile dealers and salesmen. *Veh. Code § 11711*

Manufacturers, transporters, dealers, and salesmen--illegal acts. *Veh. Code § 11713 et seq.*

Authority to issue, refuse, suspend, revoke, or cancel license or temporary permit issued to vehicle salesman. *Veh. Code § 11804 et seq.*

Responsibility of dealer or other person selling motor vehicle. *Veh. Code § 24007 et seq.*

Responsibility of vehicle renter. *Veh. Code § 24010*

[4] Repair

Automotive Repair Act. *Bus. & Prof. Code § 9880 et seq.*

Definitions used in Automotive Repair Act. *Bus. & Prof. Code § 9880.1*

Director must establish procedures for accepting complaints from public against any dealer or automotive technician and may suggest measures that would compensate for any damages suffered as result of alleged violation of Act. *Bus. & Prof. Code § 9882.5*

Act does not prohibit individual from bringing civil action against automotive repair dealer. *Bus. & Prof. Code § 9884.18*

Insurer is prohibited by law from requiring that repairs be done at specific automotive repair dealer. Ins. Code § 785.5

Insurers may not engage in "capping"; that is, may not offer or pay amount that is unrelated to methodology, used in determining paint and materials charges, that is accepted by automobile repair shops and insurers. *Ins. Code § 758.6*

[5] Song-Beverly Consumer Warranty Act

[a] General Provisions

Title of act. *Civ. Code § 1790*

Waiver by buyer unenforceable and void. *Civ. Code § 1790.1*

Severability of provisions. *Civ. Code § 1790.2*

Provisions prevail over Commercial Code. *Civ. Code § 1790.3*

Remedies are cumulative and not restrictive of remedies otherwise available. *Civ. Code § 1790.4*

Obligation of warrantor other than manufacturer. *Civ. Code § 1795*

[b] Definitions

"Consumer goods," "buyer," "manufacturer," "distributor," "retail seller," and "consumables." *Civ. Code § 1791*

"New motor vehicle." *Civ. Code § 1793.22(e)(2)*

"Nonconformity." *Civ. Code § 1793.22(e)(1)*

[c] Definitions and Scope of Warranties

"Implied warranty of merchantability" and "implied warranty of fitness." *Civ. Code § 1791.1*

"Express warranty." *Civ. Code § 1791.2*

Sale "as is" or "with all faults." *Civ. Code § 1791.3*

Implied warranty of merchantability accompanies every sale or consignment. *Civ. Code § 1792*

Implied warranty of fitness accompanies goods required for particular purpose. *Civ. Code § 1792.1*

Waiver of implied warranty of merchantability. *Civ. Code § 1792.3*

Sale of goods "as is" or "with all faults." *Civ. Code §§ 1792.4, 1792.5*

Right to make express warranties. *Civ. Code § 1793*

Warranties must be in readily understood language, clearly identify party making express warranties, and conform to federal standards. *Civ. Code § 1793.1(a)(1)*

Distributor's or retail seller's warranties with respect to used consumer goods. *Civ. Code § 1795.5*

[d] Manufacturer's Obligations

Statutory statement must be contained in, or attached to, every work order or repair invoice for warranty repairs or service. *Civ. Code § 1793.1(a)(2)*

Manufacturer that sells consumer goods in California for which it makes express warranty must maintain service and repair facilities within *California. Civ. Code §§ 1793.1(e), 1793.2*

Alternatives when manufacturer does not maintain service and repair facilities in *California. Civ. Code §§ 1793.2(a)(1)(B), 1793.3, 1793.4, 1793.5*

Manufacturer's duties when product cannot be repaired to conform to express warranties. *Civ. Code § 1793.2(d)*

Service contracts allowed; required provisions of service contracts. *Civ. Code §§ 1794.4, 1794.41*

Manufacturer that makes express warranties is not precluded from making suggestions of service and repair. *Civ. Code § 1794.5*

Applicability of Act to components of air conditioning system, but not to system as a whole if system becomes fixed part of structure. *Civ. Code § 1795.1*

[e] Recovery by Buyer, Retail Seller, or Serviceman

Presumptions regarding attempts to repair to conform to express warranties; requirements for asserting presumption. *Civ. Code § 1793.22(b)*

Action for damages by buyer. *Civ. Code § 1794*

Action for damages by retail seller or independent service provider. *Civ. Code § 1794.1*

Buyer has no remedy under Act for defect caused by unauthorized use of product. *Civ. Code § 1794.3*

[6] Unruh Act

Unruh Act, governing retail installment contracts. *Civ. Code § 1801 et seq.*

Unruh Act does not apply to any vehicle required to be registered under Vehicle Code [*see Veh. Code § 4000 et seq.*], or any goods sold or leased with vehicle if sold under contract governed by Rees-Levering Motor Vehicle Sales and Finance Act [*see Civ. Code § 2981(a)* ("conditional sale contract" as defined by that Act)] or leased under contract governed by the Vehicle Leasing Act [*see Civ. Code § 2985.7* (definition of "lease contract" under Vehicle Leasing Act)]. *Civ. Code § 1802.1*

"Goods" under Unruh Act include trailer designed solely for transporting vessel and sold with vessel (as defined in *Veh. Code § 9840(a)*) unless transaction is exempted under *Civ. Code § 1801.4. Civ. Code § 1802.1*

"Services" under Unruh Act (*Civ. Code § 1801 et seq.*) include repair of motor vehicles, except for service contracts as defined by *Civ. Code § 2981(p)* ("service contract" as defined by Rees-Levering Motor Vehicle Sales and Finance Act) sold in conjunction with sale or lease of vehicle. *Civ. Code § 1802.2*

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesGeneral OverviewContracts LawTypes of ContractsPersonal Service AgreementsAntitrust & Trade LawConsumer ProtectionVehicle WarrantiesLemon LawsAntitrust & Trade LawConsumer ProtectionVehicle WarrantiesExpress WarrantiesCommercial Law (UCC)Sales (Article 2)WarrantiesFitness

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§ 91.43 Federal Regulations

Magnuson-Moss warranty regulations. *16 C.F.R. § 700.1 et seq.*

Equipment standards for new automobiles adopted pursuant to National Traffic and Motor Vehicle Safety Act of 1966. *49 C.F.R. § 571.1 et seq.*

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§ 91.44 Decisions

[1] Commercial Code Warranties

[a] In General

Manufacturer that warranted truck to be free from defects in material and workmanship under normal use and service was liable for retail buyer's loss of profits and for refund of money paid on truck. *Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 16, 45 Cal. Rptr. 17, 403 P.2d 145*

Question of fact existed as to whether express warranty had been made to class of purchasers as a whole when defendant manufacturer for many years conducted national advertising of its various products and each truck sold had plate attached to it which made reference to user's manual furnished to each purchaser, and counsel for defendant admitted that plate and manual constituted warranty that wheels, if loaded within limits set forth therein, were safe and adequate for those loads. *Anthony v. General Motors Corp. (1973) 33 Cal. App. 3d 699, 706-707, 109 Cal. Rptr. 254*

[b] Disclaimers

Rule that exculpatory clause in negligence cases are void as against public policy if they affect public interest does not extend to disclaimer of statutory warranties involving only exculpation from contractual liability. *Holmes Packaging Mach. Corp. v. Bingham (1967) 252 Cal. App. 2d 862, 875, 60 Cal. Rptr. 769*

Seller may disclaim statutory implied warranties of quality, provided buyer has knowledge or is chargeable with notice of disclaimer before bargain is complete. *Holmes Packaging Mach. Corp. v. Bingham (1967) 252 Cal. App. 2d 862, 875, 60 Cal. Rptr. 769*

Attempts to escape liability for warranties by disclaimers made on or after delivery of goods by means of language on invoice, receipt, or similar notice is ineffective unless buyer assents or is charged with knowledge of nonwarranty. *Klein v. Asgrow Seed Co. (1966) 246 Cal. App. 2d 87, 97, 54 Cal. Rptr. 609*

Provision that buyer takes article in condition in which it is, or "as is," prevents representations of seller, even though relied on by buyer, from constituting express or implied warranties. *Intrastate Credit Service, Inc. v. Pervo Paint Co. (1965) 236 Cal. App. 2d 547, 552, 46 Cal. Rptr. 182*

[c] Implied Warranties

Party relying on implied warranty has burden of proving that there was a warranty by showing existence of each of constituent elements of warranty. *Holmes Packaging Mach. Corp. v. Bingham (1967) 252 Cal. App. 2d 862, 873, 60 Cal. Rptr. 769*

Implied warranty that goods be fit for purpose for which they are furnished is not to be implied in sale or bailment unless buyer or bailee relies on seller's or bailor's skill or judgment in furnishing goods. *Holmes Packaging Mach. Corp. v. Bingham (1967) 252 Cal. App. 2d 862, 873, 60 Cal. Rptr. 769*

Implied warranties are created by operation of law and not from agreement in fact of parties, but they will not be created contrary to manifest intention of parties. *Intrastate Credit Service, Inc. v. Pervo Paint Co. (1965) 236 Cal. App. 2d 547, 550, 46 Cal. Rptr. 182*

[d] Privity Requirements

When grinding wheel was manufactured, sold, and purchased to be used on power-driven high speed rotating motor, defendant manufacturer knew it would be dangerous if defectively made or if operated at speeds beyond its maximum capabilities, and its ingredients were secret and known only to defendant, wheel was dangerous instrumentality if it contained latent defects or if improperly used, and in view of modern industrial usage, employees were considered member of industrial "family" of employer and had sufficient privity to manufacturer to be covered by warranties made to purchaser-employer. *Peterson v. Lamb Rubber Co. (1960) 54 Cal. 2d 339, 347, 5 Cal. Rptr. 863, 353 P.2d 575*

Privity of contract is required in action for breach of either express or implied warranty; no privity exists between original seller and subsequent purchaser who is in no way party to original sale. *Burr v. Sherwin Williams Co. (1954) 42 Cal. 2d 682, 695-696, 268 P.2d 1041*

With certain exceptions, privity between parties is necessary to recovery on breach of implied warranty of fitness for buyer's use; demurrer was properly sustained in action for breach of implied warranty when lack of privity between plaintiff and defendant was disclosed on face of complaint. *Anthony v. Kelsey-Hayes Co. (1972) 25 Cal. App. 3d 442, 448, 102 Cal. Rptr. 113*

Privity of contract is required for implied warranty liability as to most manufactured products, although modern trend is to modify strictness of requirement in some situations. *Gottsdanker v. Cutter Laboratories (1960) 182 Cal. App. 2d 602, 606, 6 Cal. Rptr. 320*

[e] Used Goods

On sale of designated, specific article sold as secondhand, no implied warranty as to its quality or fitness for purpose intended arises, at least when it is subject to inspection at time of sale. *Intrastate Credit Service, Inc. v. Pervo Paint Co. (1965) 236 Cal. App. 2d 547, 553, 46 Cal. Rptr. 182*

[2] Song-Beverly Consumer Warranty Act

[a] Attorney's Fees, Costs, and Expenses

Although *Civ. Code § 1794(d)* mentions only "prevailing buyers," it allows defendant sellers who prevail to recover their costs and expert witness fees in an action under *Song-Beverly Consumer Warranty Act. Murillo v. Fleetwood Enterprises, Inc. (1998) 17 Cal. 4th 985, 993-999, 73 Cal. Rptr. 2d 682, 953 P.2d 858*

Buyer of new motor vehicle may recover paid finance charges from manufacturer when electing refund remedy; paid finance charges are part of "the actual price paid or payable by the buyer" under *Civ. Code § 1793.2(d)(2)(B). Mitchell v. Blue Bird Body Co. (2000) 80 Cal. App. 4th 32, 35-39, 95 Cal. Rptr. 2d 81*

Expert witness fees are included within the terms "costs and expenses" in *Civ. Code § 1794(d). Jensen v. BMW of North America, Inc. (1995) 35 Cal. App. 4th 112, 137-138, 41 Cal. Rptr. 2d 295*

Attorney's fees were not "incurred" by prevailing buyer at rates that increased over years since case was begun, and thus could not be awarded at higher rates, when buyer was billed and liable only for fees at hourly rate set at beginning of litigation. *Nightingale v. Hyundai Motor America (1994) 31 Cal. App. 4th 99, 104-105*

Once basic attorney's fee award is made under *Civ. Code § 1794(d)*, court of appeal may conclude that it was intended to compensate counsel for all services, including those relating to motion to tax costs. *Levy v. Toyota Motor Sales, U.S.A., Inc. (1992) 4 Cal. App. 4th 807, 817, 5 Cal. Rptr. 2d 770*

Attorney's fee awards under *Civ. Code § 1794(d)* is calculated in accordance with usual practices; award does not have to be calculated under "private attorney general" theory of *Code Civ. Proc. § 1021.5*; although Act is designed to protect public interest, not every action brought under it will meet "private attorney general" criteria. *Levy v. Toyota Motor Sales, U.S.A., Inc. (1992) 4 Cal. App. 4th 807, 814, 5 Cal. Rptr. 2d 770*

Under *Civ. Code § 1794(d)*, defendants can be charged only for costs reasonably incurred by plaintiff in commencing and prosecuting suit against them and cannot be charged for service of process on defendant that settled. *Levy v. Toyota Motor Sales, U.S.A., Inc. (1992) 4 Cal. App. 4th 807, 813, 5 Cal. Rptr. 2d 770*

[b] Damages

Punitive damages for deliberate violation of lemon law could be three times actual damages, considering that statutory penalty for "willful" violation of Song-Beverly Act is two times actual damages. *Johnson v. Ford Motor Co. (2005) 135 Cal. App. 4th 137, 148-150, 37 Cal. Rptr. 3d 283* (punitive damages of 10 times actual damages was reasonable in view of reprehensibility of defendant's scheme to evade lemon law and state's strong interest in punishing such conduct)

Damages are not recoverable for emotional distress. *Bishop v. Hyundai Motor America (1996) 44 Cal. App. 4th 750, 758, 52 Cal. Rptr. 2d 134* ; *Kwan v. Mercedes Benz of North America, Inc. (1994) 23 Cal. App. 4th 174, 187-192, 28 Cal. Rptr. 2d 371*

[c] Evidence

Testimony of plaintiff's expert was neither speculative nor inadmissible because he did not disassemble car; expert had driven and examined car, observed and experienced problem complained of, both in plaintiffs car and many others. *Schreidel v. American Honda Motor Co. (1995) 34 Cal. App. 4th 1242, 1251-1253, 40 Cal. Rptr. 2d 576*

[d] Penalties

Trial court properly exercised discretion in admitting evidence of postfiling settlement offers by defendant, but not their amounts, which it excluded under *Evid. Code § 352* to show defendant's state of mind regarding its belief it was obligated to comply with *Song-Beverly Act. Bishop v. Hyundai Motor America (1996) 44 Cal. App. 4th 750, 760, 52 Cal. Rptr. 2d 134*

Penalty of *Civ. Code § 1794(c)* (willful violation of Act) applies whether product involved is new motor vehicle or other consumer good. *Suman v. Superior Court (1995) 39 Cal. App. 4th 1309, 1317-1318, 46 Cal. Rptr. 2d 507*

Factors to be addressed In instructing jury regarding penalty of *Civ. Code § 1794(e)*. *Suman v. Superior Court (1995) 39 Cal. App. 4th 1309, 1322-1323, 46 Cal. Rptr. 2d 507*

Imposition of penalty under *Civ. Code § 1794(c)* is subject to same four-year limitation period as primary action under *Civ. Code § 1794*; one-year limitation of *Code Civ. Proc. § 340(a)* applies only to mandatory penalties. *Jensen v. BMW of North America, Inc. (1995) 35 Cal. App. 4th 112, 132-134, 41 Cal. Rptr. 2d 295*

Manufacturer's failure to refund or replace defective automobile is not "willful" under *Civ. Code § 1794(c)* if it reasonably and in good faith believed facts did not call for refund or replacement. *Schreidel v. American Honda Motor Co. (1995) 34 Cal. App. 4th 1242, 1249-1250, 40 Cal. Rptr. 2d 576* ; *Kwan v. Mercedes Benz of North America, Inc. (1994) 23 Cal. App. 4th 174, 185, 28 Cal. Rptr. 2d 371*

Penalty under *Civ. Code § 1794(c)* was supported by substantial evidence when defendant's authorized dealers were never able to duplicate problem, though independent service station observed problem and reported it to them; service record showed dealers attributed problem to customer's ulterior motive, defendant did not offer to repair problem until it viewed videotape from plaintiff's expert two days before arbitration hearing and never offered to replace car or make restitution. *Schreidel v. American Honda Motor Co. (1995) 34 Cal. App. 4th 1242, 1253-1255, 40 Cal. Rptr. 2d 576*

Both *Civ. Code § 1794(c)* and *(e)* are applicable to actions regarding new motor vehicles, although penalty may be assessed only under one subdivision for same violation. *Jernigan v. Ford Motor Co. (1994) 24 Cal. App. 4th 488, 492, 29 Cal. Rptr. 2d 348*

Punitive damages cannot be imposed in addition to penalty of *Civ. Code § 1794*. *Troensegaard v. Silvercrest Industries, Inc. (1985) 175 Cal. App. 3d 218, 226-228, 220 Cal. Rptr. 712*

[e] Warranties

In action against auto manufacturer for breach of implied warranty of merchantability under Song-Beverly Consumer Warranty Act, trial court properly instructed jury by defining fitness-for-ordinary-purpose requirement in terms of vehicle that is "in safe condition and substantially free of defects"; defendant requested instruction that vehicle was unfit only if it did not provide transportation, but that would have been an unjustified dilution of implied warranty of merchantability: merely because vehicle provides transportation from point A to point B, it does not necessarily conform to fitness-for-ordinary-purpose requirement of implied warranty of merchantability. *Isip v. Mercedes-Benz USA, LLC (2007) 155 Cal. App. 4th 19, 27, 65 Cal. Rptr. 3d 695* ("[a] vehicle that smells, lurches, clanks, and emits smoke over an extended period of time is not fit for its intended purpose")

Although different rule may apply when express warranty is breached, there is no requirement that seller be given opportunity to repair when implied warranty of merchantability is breached. *Mocek v. Alfa Leisure, Inc. (2003) 114 Cal. App. 4th 402, 406-408, 7 Cal. Rptr. 3d 546*

Written service contract covering used vehicle, under which dealer "undertakes to preserve or maintain the utility or performance" of vehicle, is express warranty under *Civ. Code § 1795.5*, even if consumer was required to pay additional consideration for service contract. *Reveles v. Toyota By the Bay (1997) 57 Cal. App. 4th 1139, 1155-1158, 67 Cal. Rptr. 2d 543*

Song-Beverly Act applies to new motor vehicle manufacturers who make express warranties; there is no requirement of privity. *Jensen v. BMW of North America, Inc. (1995) 35 Cal. App. 4th 112, 127-128, 41 Cal. Rptr. 2d 295*

Express warranty made by dealer with respect to used vehicle that buyer would receive a 36,000-mile warranty on top of miles already on car imposes liability on manufacturer consistent with manufacturer's express warranties for new motor vehicles. *Jensen v. BMW of North America, Inc. (1995) 35 Cal. App. 4th 112, 127-128, 41 Cal. Rptr. 2d 295*

[3] Violation of Statute as Tort

Liability for fraud may be based on so-called vehicle dealer bond furnished pursuant to *Veh. Code § 11711(a)* (fraud and other violations). *American Air Equipment, Inc. v. Pacific Employers Ins. Co. (1974) 37 Cal. App. 3d 322, 325-327, 112 Cal. Rptr. 366*

Notwithstanding written agreement stating that no representation as to authenticity of mileage shown on odometer of car sold was being made, defendant dealer's statutory violation in altering odometer with intent to reduce mileage indicated [*Veh. Code § 28051*] constituted tort. *Laczko v. Jules Meyers, Inc. (1969) 276 Cal. App. 2d 293, 295, 80 Cal. Rptr. 798* ; *see also Munchow v. Kraszewski (1976) 56 Cal. App. 3d 831, 835-836, 128 Cal. Rptr. 762*

Violation of statutory duty to another is tort and violation of statute embodying public policy is generally actionable, even though no specific civil remedy is provided in statute itself; any injured member of public for whose benefit statute was enacted may bring action. *Laczko v. Jules Meyers, Inc. (1969) 276 Cal. App. 2d 293, 295, 80 Cal. Rptr. 798*

[4] Warranty Implied by Vehicle Code Section 24007

Veh. Code § 24007 (dealer's responsibility in sale of vehicle) is designed to protect general public as well as purchasers, and constitutes implied-in-law term of every sales contract to which it is applicable, which may not be waived or defeated by agreement of parties, such as standard "as is" or merger clause. *Mulder v. Casho (1964) 61 Cal. 2d 633, 637, 39 Cal. Rptr. 705, 394 P.2d 545*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesPunitive DamagesGeneral OverviewTransportation LawPrivate VehiclesGeneral OverviewAntitrust & Trade LawConsumer ProtectionVehicle WarrantiesLemon LawsAntitrust & Trade LawConsumer ProtectionVehicle WarrantiesExpress WarrantiesCommercial Law (UCC)Sales (Article 2)WarrantiesFitness

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PART III. RESEARCH GUIDE

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§ 91.45 Law Reviews

McMurry, *Making Lemonade out of the Auto Industry's Lemons*, 34 Trial 48 (Fall 1998)

Mann & Holdych, *When Lemons Are Better Than Lemonade: The Case Against Mandatory Used Car Warranties, 15 Yale L. & Pol'y Rev. 1 (1996)*

Reitz, *What You Should Know About State "Lemon Laws," 34 Prac. Law. 83 (April 1988)*

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§ 91.46 Text References

Witkin, California Procedure, vol. 3, *Actions*, §§ 474-509, 586-606; vol. 4, *Pleading*, §§ 502-513 (4th ed. 1996)

Witkin, Summary of California Law, vol. 4, *Sales*, §§ 51-101, 198-209, 235-260, 314-325 (10th ed. 2005)

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[Reserved]

§§ 91.47[Reserved]

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PART IV. FORMS
A. Warranties

8-91 California Forms of Pleading and Practice--Annotated § 91.60

§ 91.60 Complaint for Damages for Breach of Warranty [Code Civ. Proc. § 1794; Com. Code §§ 2711, 2714]--By Purchaser of Automobile Against Automobile Dealer

[1] FORM Complaint for Damages for Breach of Warranty [Code Civ. Proc. § 1794; Com. Code §§ 2711, 2714]--By Purchaser of Automobile Against Automobile Dealer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	[Amount demanded _____
[and DOES I-_____, inclusive,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

1. Plaintiff, a natural person, is, and at all times herein mentioned was, a resident of _____ County, California.

2. Defendant _____ [*name of retailer*] was and is a corporation organized and existing under the laws of the State of California with its principal place of business in _____ County, California [*or allege other capacity and residence of defendant*], and _____ [authorized *or* licensed] to engage, and engaging in the business of distributing, buying, and selling _____ [*make*] automobiles to the general public [, including selling automobiles under conditional sale contracts].

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I through _____, inclusive, and, therefore, sues these defendants by those fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of such fictitiously named defendants is responsible in some manner for the injuries hereinafter alleged.)].

4. On or about _____ [*date*], [in _____ (*city*)], _____ County, California], plaintiff [entered into a contact to purchase and] purchased from defendant _____ [*name of seller*] a certain _____ [*year, make, model*] automobile. [Plaintiff purchased the automobile for use primarily for personal, family, or household purposes. Thus, the contract was, and is, subject to the Song-Beverly Consumer Warranty Act (*Civil Code Section 1790 et seq.*).] A copy of the contract is attached as Exhibit A and incorporated by reference.

5. Before Plaintiff _____ [entered into the contract *or* purchased the automobile] as set forth in Paragraph 4, above, defendant, through its agents and employees, expressly and impliedly warranted and represented that the automobile was free from defects and in all respects safe for use in the manner for which it was designed, manufactured, and sold, and warranted that the _____ [*make*] automobile was of merchantable quality and fit for the purpose intended, namely _____ [*specify alleged intended purpose*].

6. Plaintiff relied on these warranties and representations of defendant and on defendant's skill and judgment in the purchase of _____ [*make*] automobile; on or about _____ [*date*], plaintiff discovered that the automobile was defective and not safe for reasonable operation and notified defendant of those facts.

7. The aforementioned automobile was in fact unmerchantable and unfit to be operated, in that certain component parts, namely _____ [*specify defective parts*] were defectively _____ [manufactured *or* designed *or* assembled *or* distributed *or specify a combination of the preceding alternatives*], and, as a proximate result of that defective _____ [manufacture *or* design *or* assembly *or* distribution *or specify a combination of the preceding alternatives*], the automobile was, in fact, unfit for use and was of unmerchantable quality.

8. The value of the automobile, at the time of the delivery to plaintiff, was $_____ and, if the representations and warranties of defendant had been true, the value of the automobile would have been $_____.

[*EITHER*]

9. By reason of the acts and events described above, plaintiff has sustained damages in the sum of $_____ [*difference between actual value of automobile and value it would have had if it had been as warranted*].

[*OR*]

9. By reason of the acts and events described above, plaintiff has sustained damages as follows: _____ [*set out circumstances showing proximate damages of amount different from difference between actual value of automobile and value it would have had if it had been as warranted*].

[*CONTINUE*]

[10. *Allege any incidental and consequential damages.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ as damages.

2. For [reasonable attorney's fees and] costs of suit herein incurred.

3. For other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I _____ [*name*] am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The complaint in *[1], above*, is for use in an action against a seller by a purchaser for damages for breach of warranty. If the contract is for the sale and purchase of a motor vehicle, or any part of a motor vehicle, which is to be used or bought primarily for personal, family, or household purposes, the Song-Beverly Consumer Warranty Act (*Civ. Code § 1790 et seq.*) governs [*see Civ. Code § 1790.3* (when Song-Beverly Act prevails over Commercial Code, discussed in *§ 91.11[2*]); *see also Civ. Code §§ 1790.3, 1792, 1792.1* (when implied warranties of merchantibility and fitness accompany sale of consumer good under Song-Beverly Consumer Warranty Act, discussed in *§ 91.13[2][a]* and *[3][a]*, respectively)]. That act incorporates provisions of the Commercial Code [*see Civ. Code §§ 1791.1(d), 1794*; *Com. Code § 2714(2)* (measure of damages for breach of warranty, discussed in *§ 91.18*)].

The form contains only allegations against the retail seller. For a complaint for use against the manufacturer, see *§ 91.64[1]*.

[3] Allegations

The complaint in *[1], above*, alleges the following:

- The capacities, residence, and place of business of plaintiff and defendant(s) (Paragraphs 1-3). For discussion regarding which of these allegations may be necessary to establish venue, *see [6], below*. If the sale was pursuant to a conditional sales contract or the Rees-Levering Motor Vehicle Sales and

Finance Act [*Civ. Code § 2981 et seq.*] is otherwise applicable include the bracketed allegation to that effect at the end of Paragraph 2 [*see also § 91.61[2]*].

- Plaintiff's purchase of the automobile from defendant, including the description of that automobile and, if necessary to establish venue, the place where the plaintiff signed the contract [*see Code Civ. Proc. § 395(b)* (regarding venue, discussed in *§ 91.60[6*]) *Anthony v. Kelsey-Hayes Co. (1972) 25 Cal. App. 3d 442, 448, 102 Cal. Rptr. 113* (in action for breach of implied warranty, demurrer is sustainable if lack of privity between plaintiff and defendant is disclosed on face of complaint)], as well as optional allegations that the transaction and action are governed by the Song-Beverly Consumer Warranty Act (Paragraph 4) [*Civ. Code § 1790 et seq.*]. For additional optional allegations that the transaction and action are subject to the Rees-Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 2981 et seq.*], see *§ 91.61[1]*, Paragraph 4, and *§ 91.61[2]*.

- That defendant made the warranties (Paragraph 5) and plaintiff relied on those warranties (Paragraph 6) [*see Holmes Packaging Mach. Corp. v. Bingham (1967) 252 Cal. App. 2d 862, 873, 60 Cal. Rptr. 769* (party relying on implied warranty has burden of proving that there was one by showing existence of each constituent element of warranty)].

- That the automobile failed to conform to the warranties (Paragraph 7).

- The value of the automobile at the time of delivery to plaintiff, and the value that automobile would have had if the warranties had been true (Paragraph 8) [*Com. Code § 2714(2)* (measure of damages for breach of warranty)].

- Whichever measure of damages plaintiff prefers (alternative Paragraphs 8) [*Com. Code § 2714(2)* (unless special circumstances show proximate damage of a different amount than difference at the time and place of contracting between the value of the goods accepted and the value they would have had if they had been as warranted)].

- Any incidental and/or consequential damages (Paragraph 9) [*Com. Code §§ 2714(3), 2715*].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Limitation Period

The four-year period of *Com. Code § 2725* governs actions under the Song-Beverly Act. Under *Com. Code § 2725(2)*, when a warranty explicitly extends to future performance of the goods, the discovery rule applies to the accrual of the cause of action and the commencement of the limitation period [*Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 215-219, 285 Cal. Rptr. 717* ; *see Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116, 131-133, 87 Cal. Rptr. 3d 5* (seller's promise that product would work for 50,000 cycles did not fall within future-performance exception in *Com. Code § 2725(2)* because it did not specify date or time in future, nor did it pertain to time period that could be determined by reference to external source, and buyer could have discovered defect at any time without waiting for completion of 50,000 cycles; additionally, both parties were large and sophisticated companies and could have drafted their agreement to explicitly state duration of warranty so as to ensure that limitation

period would extend beyond four years, if that had been their intent); *Carrau v. Marvin Lumber and Cedar Co. (2001) 93 Cal. App. 4th 281, 290-292, 112 Cal. Rptr. 2d 869* (generalized assertions in advertisements and literature do not rise to level of warranty explicitly extending to "future performance"; plaintiff thus did not meet exception to four-year limitation period)]. The ordinary limitation period for breach of a written contract, and for rescission of a written contract, is also four years [*Code Civ. Proc. § 337(1), (3)*].

[6] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

The Song-Beverly Consumer Warranty Act does not contain explicit venue provisions. Therefore, the general venue provisions in *Code Civ. Proc. § 392 et seq.* apply [*see, e.g., Code Civ. Proc. § 395(b)* (venue is proper in county where defendant has contracted to perform obligation, in which contract was signed, or in which defendant resides at commencement of action)]. Under those provisions, if the action arises from the (offer or) provision of goods, services, loans or extensions of credit intended primarily for personal, family or household use (other than an obligation described in *Civil Code § 1812.10* or *2984.4*), venue is proper in the following counties [*Code Civ. Proc. § 395(b)*; *Fontaine v. Superior Court (CashCall, Inc.) (2009) 175 Cal. App. 4th 830, 838-840, 96 Cal. Rptr. 3d 607* (statute applies to action by consumer plaintiff, as well as to action against consumer, and if any defendant in consumer's action is individual, that is irrelevant to application of statute)]::

- The county in which the buyer signed the contract;
- The county in which the buyer resided at the time the contract was entered into; or
- The county in which the buyer resides at the commencement of the action.

Any waiver of *Code Civ. Proc. § 395(b)* is void and unenforceable [*Code Civ. Proc. § 395(c)*]. For further discussion, see Ch. 571, *Venue* .

[7] Cross References

The Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*], which is discussed in Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* , regulates the finance aspects of automobile sales

The Unruh Act (*Civ. Code § 1801 et seq.*), which applies to retail installment contracts [*Civ. Code § 1802.1*], is addressed in Ch. 501, *Sales: Retail Installment Sales*

For complaints and allegations against a manufacturer for breach of express warranty, and alternative complaints for warranties in general, see Ch. 502, *Sales: Warranties*

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to Fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue* .

For alternative forms for verification, see Ch. 572, *Verification*

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Chapter 91 AUTOMOBILES: ACTIONS INVOLVING DEFECTS AND REPAIRS
PART IV. FORMS
A. Warranties

8-91 California Forms of Pleading and Practice--Annotated § 91.61

§ 91.61 Complaint By Purchaser of Automobile Against Automobile Dealer for Relief Based on Rescission [Civ. Code § 1692] Because of Breach of Warranty [Com. Code § 2711]

[1] FORM Complaint By Purchaser of Automobile Against Automobile Dealer for Relief Based on Rescission [Civ. Code § 1692] Because of Breach of Warranty [Com. Code § 2711]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RELIEF BASED ON RESCIS-
_____ [*name(s)*],	)	SION
[and DOES I-_____ , inclusive,]	)	[Amount demanded _____ (exceeds *or* does not ex-
Defendant(s)	)	ceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

[1. *Capacity and residence of plaintiff. See § 91.60[1], Paragraph 1.*]

[2. *Capacity and residence of defendant. See § 91.60[1], Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 91.60[1], Paragraph 3.*]

4. On or about _____ [*date*], in _____ [*city*], _____ County, California, plaintiff entered into a certain written conditional sales contract with defendant _____ [*name of dealer*], under the terms of which plaintiff agreed to purchase and defendant _____ [*name of dealer*] agreed to sell that certain _____ [*year, make, model*] automobile, motor no. _____. [Pursuant to the contract, plaintiff received possession of the automobile on or about _____ (*date*), and _____ (*describe terms of contract that make it a conditional sale contract under Civ. Code § 2981(a), e.g.*, title was to remain in defendant until plaintiff had performed all conditions of the contract *or* defendant was given a lien on the automobile as security for the payment of the balance of the purchase price. Plaintiff purchased the automobile primarily for personal or family(, or household) purposes. The contract was, and is, subject to the Rees-Levering Motor Vehicle Sales and Finance Act (*Civil Code Sections 2981 et seq.*) and to the provisions of the Song-Beverly Consumer Warranty Act (*Civil Code Section 1790 et seq.*). A copy of the contract is attached as Exhibit A and incorporated by reference.]

5. At that time and place, defendant _____ [*name of dealer*] impliedly warranted that the automobile was of merchantable quality and fit for the purpose intended; specifically, to be driven and operated.

6. The automobile was not fit to be operated in that certain component parts of the automobile, namely, _____ [*designate defective parts*], were defectively manufactured, designed, and assembled, and as a proximate result of that defective manufacture, design, and assembly, the automobile was unfit to be driven and operated, and was of unmerchantable quality.

7. As a proximate result of the breach of warranty by defendant _____ [*name of dealer*], plaintiff offered to return the automobile to defendant, and gave notice to defendant of defendant's breach of warranty and of plaintiff's intention to rescind this contract, demanding that defendant return to plaintiff the consideration paid under the conditional sales contract, or that the automobile be replaced by one which was fit for the purpose intended and which was of merchantable quality. Despite this tender and demand, defendant _____ [*name of dealer*] refused, and continues to refuse, to return the consideration paid under the conditional sales contract, or to replace the automobile.

8. Plaintiff paid to defendant _____ [*name of dealer*] under the conditional sales contract the following consideration:

Date	Amount
_____	_____
_____	_____
_____	_____

The total amount paid to _____ [*name of dealer*] under the conditional sales contract is the sum of $_____, including late charges.

9. By reason of defendant's failure to restore the consideration paid by plaintiff, plaintiff has been damaged in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ with interest thereon at the rate of _____ percent per annum from _____ [*date*].

2. For costs of suit herein incurred.

3. For other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 91.60[1] and [4]*.]

[2] Use of Form

The complaint in *[1], above*, is for use by a buyer for relief based on rescission of a contract for conditional sale of an automobile after there has been a breach of warranty [*see Civ. Code §§ 1689, 1691* (grounds and requirements for rescission); *Com. Code § 2711* (recovery of purchase price paid and incidentals after revocation)]. If the contract is for the conditional sale and purchase of a motor vehicle, or any part of it, that is to be used or bought primarily for personal, family, or household purposes, the Song-Beverly Consumer Warranty Act (*Civ. Code § 1790 et seq.*) governs [*see Civ. Code § 1790.3* (when Song-Beverly Act prevails over Commercial Code, discussed in *§ 91.11[2*]), *Civ. Code §§ 1792, 1792.1* (when implied warranties of merchantibility and fitness accompany sale of consumer goods under Song-Beverly Consumer Warranty Act, discussed in *§ 91.13[2][a]* and *[3][a]*, respectively)]. That Act incorporates provisions of the Commercial Code [*see Civ. Code §§ 1791.1(d), 1794*, discussed in *§ 91.18*)].

This form contains only allegations against the retail seller. For a complaint for use against the manufacturer, see *§ 91.64[1]*.

Jurisdiction, venue, and the applicable statute of limitations are discussed in *§ 91.61[5]* and *[6]*. However, if the action is also subject to the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*), which it will be if the seller is engaged in the business of selling or leasing under conditional sale contracts motor vehicles that are required to be registered under the Vehicle Code and are bought primarily for personal or family purposes [*see Civ. Code § 2981(b),(d),(k)*; *Leaf v. Phil Rauch, Inc. (1975) 47 Cal. App. 3d 371, 378-379, 120 Cal. Rptr. 749* (action to rescind conditional sale contract for breach of warranty is action "on a contract" subject to the Rees-Levering Act)], venue will be governed by *Civ. Code § 2984.4(a)*. In the latter case, either the complaint must be verified, or the plaintiff must file an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) with the complaint showing that the action has been commenced in the proper court for trial of the action or proceeding, and that the action is subject to *Civ. Code § 2984.4* [*Civ. Code § 2984.4(a)*; *Code Civ. Proc. § 396a(a)*]. The Rees-Levering Motor Vehicle Sales and Finance Act is addressed in Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* :

- Transactions governed by the Rees-Levering Act are discussed in *§ 89.11*.

- Venue under the Rees-Levering Act is discussed in *§ 89.27*.

- A declaration required by *Civ. Code § 2984.4(c)* and *Code Civ. Proc. § 396a(a)* is provided in *§ 89.61*.

[3] Allegations

The complaint in *§ 91.61[1], above* , alleges the following:

- That plaintiff purchased the automobile from defendant, including the description of that automobile and, if necessary to establish venue, the place where the plaintiff signed the contract [*see Code Civ. Proc. § 395(b)* (regarding venue, discussed in *§ 91.60[6]*); *see also § 91.61[2]*], as well as optional allegations establishing that the transaction and action are governed by the Song-Beverly Consumer Warranty Act (*Civ. Code § 1790 et seq.*) and are subject to the Rees-Levering Act (*Civ. Code § 2981 et seq.*) (Paragraph 4) [*see also § 91.61[2], above*].

- That defendant made the warranties (Paragraph 5).

- That the automobile failed to conform to the warranties (Paragraph 6).

- That plaintiff gave notice of rescission and offered to return the automobile and plaintiff's demand for return by defendant of consideration paid (Paragraph 7) [*see Com. Code § 2607(3)(A)* (required notice of breach of warranty); *Com. Code § 2711* (recovery on revocation); *see also Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116, 135-136, 87 Cal. Rptr. 3d 5* (buyer has burden of proving reasonable notice; question whether notice was properly given must be determined from particular circumstances, and when but one inference can be drawn from undisputed facts, issue may be determined as matter of law)].

- The amounts paid by plaintiff (Paragraph 8).

- Plaintiff's damage because of defendant's failure to return that sum (Paragraph 9) [*Com. Code § 2711(1)*].

[4] Cross References

See generally, Ch. 490, *Rescission and Restitution*

For alternative complaints for relief after a breach of warranty, see Ch. 502, *Sales: Warranties* .

For additional discussion and cross references relating to complaints in general, see *§ 91.60[2]* et seq.

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8-91 California Forms of Pleading and Practice--Annotated § 91.62

§ 91.62 Allegation of Failure to Comply With Vehicle Code Provisions or Department of Motor Vehicle Regulations [Veh. Code § 24007]

[1] FORM Allegation of Failure to Comply With Vehicle Code Provisions or Department of Motor Vehicle Regulations [Veh. Code § 24007]

Plaintiff alleges that defendant sold to plaintiff the _____ [*year, make, and model*] automobile in violation of _____ [*specify Vehicle Code section or Department of Motor Vehicles regulation, e.g., Vehicle Code Section 26301.5*], which governs the _____ [*specify, e.g.,* equipment of passenger vehicles with an emergency brake system], as required by *Vehicle Code Section 24007*.

[2] Use of Form

The *form in § 91.62[1],* alleges of a violation of a statutory or regulatory duty under *Veh. Code § 24007,* as discussed in *§ 91.13[5]* [*see, e.g., Veh. Code § 24000 et seq.* (vehicle equipment generally); *Veh. Code § 26301 et seq.* (brake requirements)], and is for use with complaints alleging negligence or breach of warranty. When the action is for negligence, the negligence of the prospective purchaser of the car does not relieve the dealer from liability for an accident that results from the absence of adequate brakes, because the likelihood of negligent operation of a vehicle is one of the hazards that a dealer can reasonably foresee [*Benton v. Sloss (1952) 38 Cal. 2d 399, 405, 240 P.2d 575]* .

[3] Cross References

For alternative complaints for damages from an accident caused by negligent repair or servicing by a garage, see Ch. 274, *Garages and Gas Stations*

For discussion of air pollution generally, and emission standards, see Ch. 418, *Pollution and Environmental Matters*

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8-91 California Forms of Pleading and Practice--Annotated § 91.63

§ 91.63 Complaint By Purchaser of Automobile Against Automobile Dealer for Damages Based on Fraud for Unlawful Alteration of Odometer [Veh. Code § 28051]

[1] FORM Complaint By Purchaser of Automobile Against Automobile Dealer for Damages Based on Fraud for Unlawful Alteration of Odometer [Veh. Code § 28051]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	[Amount demanded _____
[and DOES I-_____, inclusive,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s)	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 91.60[1], Paragraph 2.*]

[2. *Fictitious name allegation, if appropriate. See § 91.60[1], Paragraph 3.*]

3. On _____ [*date*], plaintiff purchased a _____ [*year, make, model*] automobile from defendant _____ [*name*] for the total purchase price of $_____. A copy of the sale contract is attached as Exhibit "A" and incorporated by reference.

4. At the time of the purchase of the automobile, on or about _____ [*date*], and on several occasions prior thereto during the negotiations, defendant, through its agents and employees, represented to plaintiff, among other things, that the automobile had been driven only _____ [*number*] miles and had plaintiff look at the odometer to confirm that mileage. The odometer showed that the car had in fact been driven but _____ [*number*] miles.

5. Plaintiff is informed and believes and thereon alleges that the odometer had in fact been manipulated by defendant through its agents and employees to show the mileage alleged in Paragraph 4, and that the automobile had in fact been driven _____ [*number*] miles prior to its sale to plaintiff.

6. Plaintiff is informed and believes and thereon alleges that at the time defendant made the foregoing representations with respect to mileage, it knew the representations were false, that the car had in fact been driven substantially in excess of _____ [*number*] miles, and that the odometer had been set back in violation of the provisions of *Vehicle Code Section 28051*. Defendant made these representations with the intent to induce plaintiff to purchase the car.

7. At the time these representations were made, plaintiff was ignorant of their falsity but believed them to be true. In reliance thereon, plaintiff was induced to purchase and did, in fact, purchase the _____ [*make*] automobile, which he/she would not have done had he/she known the facts, specifically, that the odometer had been set back and that the car had been driven substantially in excess of _____ [*number*] miles.

8. On or about _____ [*date*], plaintiff for the first time learned that these representations were false, that the _____ [*make*] automobile in fact had been driven in excess of _____ [*number*] miles at the time defendant _____ [*name*] purchased it from its prior owner, and that the odometer had been set back prior to inspection of the car by plaintiff.

9. By reason of the facts alleged, plaintiff has been damaged in the sum of $ _____.

10. [Plaintiff is informed and believes and thereon alleges that] (I)n committing the acts described in this complaint, defendant[(s), and each of them,] acted in conscious disregard of the rights of plaintiff(s) and others and were guilty of _____ [malice *and/or* oppression *and/or* fraud] in that _____ [*specify acts constituting malice, oppression, or fraud, e.g.,* Defendant intentionally set the odometer back and concealed the true mileage driven by the automobile with intent to sell that automobile for more than it was worth, and thus to deprive plaintiff or another member of the public of money.] The conduct of defendant(s) warrants an assessment of punitive damages in an amount appropriate to punish defendant(s) and deter others from engaging in similar wrongful conduct.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $ _____ compensatory damages.

2. For exemplary and punitive damages.

3. For costs of suit incurred herein.

4. For other and further relief as the court deems proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 91.60[1] and [4].*]

[2] Source of Form

The form in *[1], above,* is based on the complaint filed in *Laczko v. Jules Meyers, Inc. (1969) 276 Cal. App. 2d 293, 80 Cal. Rptr. 798* . The contract of the parties in *Laczko* provided that no salesperson had any authority to make any changes in the agreement, that defendants made no representation as to the authenticity of the mileage as shown on the odometer, and that the car was sold "as is." The contract was attached to and incorporated by reference in the complaint, and on that basis, the trial court sustained the demurrer. However, the appellate court found it unnecessary to address the issue of parole evidence or the statute of frauds [*see Mulder v. Casho (1964) 61 Cal. 2d 633, 637, 39 Cal. Rptr. 705, 394 P.2d 545* , discussed in *§ 91.13[5]*], but predicated its reversal on the ground that the setting back of the odometer was a violation of *Veh. Code § 28051* and, ipso facto, a tort. "Violation of a statutory duty to another may therefore be a tort and violation of a statute embodying a public policy is generally actionable even though no specific civil remedy is provided in the statute itself. Any injured member of the public for whose benefit the statute was enacted may bring the action" [*Laczko v. Jules Meyers, Inc. (1969) 276 Cal. App. 2d 293, 295, 80 Cal. Rptr. 798* ; *but see Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal. 3d 287, 304, 250 Cal. Rptr. 116, 758 P.2d 58* (no cause of action arises against an insurer who commits one of the acts listed in *Ins. Code § 790.03(h)*)].

[3] Use of Form

The complaint in *[1], above,* is for use by an automobile purchaser against a dealer for damages resulting from the unlawful alteration of the odometer in violation of *Veh. Code § 28051* [*see § 91.13[5]*; *see also Civ. Code §§ 1709, 1710* (recovery of damages for deceit and elements of actionable fraud)].

[4] Allegations

The complaint in *[1], above* alleges the following:

- That plaintiff purchased the automobile from defendant, and the description of the automobile (Paragraph 3).

- That representations were made regarding the number of miles the automobile had been driven, and that the same representations were implied by the odometer setting (Paragraph 4) [*see Civ. Code § 1710(1)* and *(2)*].

- On information and belief, that defendant, itself or through its agents, had set the odometer back in violation of *Veh. Code § 28051* (Paragraph 5).

- Also on information and belief, that defendant knew the representations as to mileage were false, and made them with intent to indue plaintiff to purchase the automobile (Paragraph 6) [*see Civ. Code § 1711* (one who intends to defraud the public or any particular class is deemed to have intended to defraud every individual in that class who is actually defrauded)].

- That plaintiff did not know the representations were false, but relied on them and purchased the automobile, which plaintiff would not have done has he or she known the true facts (Paragraph 7).

- That plaintiff discovered the true mileage, and the date of that discovery (Paragraph 8) [*see Code Civ. Proc. § 338(d)* (discussed in *[5*], *below,* limitation period runs from discovery of facts constituting fraud)].

- Damages suffered as a result of the false odometer setting (Paragraph 9) [*see Civ. Code § 3343* (damages for fraud equal difference between what purchaser parted with and value of thing received plus sums expended in reliance or fraud and loss of use actually caused by fraud)].

- That defendant's actions were done with malice, oppression and intent to defraud sufficient to justify imposition of punitive damages (Paragraph 10) [*see Civ. Code § 3294(a), (c)(3)* (when punitive damages may be awarded; definition of fraud)].

[5] Limitation Period

The three-year period of *Code Civ. Proc. § 338(d)* governs actions for fraud. An action for fraud accrues when the aggrieved party discovers the facts constituting the fraud [*Code Civ. Proc. § 338(d)*].

[6] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

Venue is proper in the county where the defendant, or one of them, resides at the commencement of the action [*Code Civ. Proc. § 395(a), (c)*].

[7] Alternative Theories

In addition to an action for damages based on fraud, as alleged, or an action for damages based on violation of a statute as found by the court, plaintiff might have sought recovery of consideration and damages by rescission and an action for restitution and damages [*see Civ. Code § 1688 et seq.* and Ch. 490, *Rescission and Restitution*]. The facts might also have warranted an action for reformation of the sales agreement and for damages for breach of the agreement as reformed [*see Civ. Code § 3399 et seq.* and Ch. 488, *Reformation of Instruments*].

[8] Cross References

For alternative complaints alleging the tort of fraud, see Ch. 269, *Fraud and Deceit*

For additional discussion and cross references relating to complaints in general, see *§ 91.60[2]* et seq.

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8-91 California Forms of Pleading and Practice--Annotated § 91.64

§ 91.64 Complaint for Damages (and Civil Penalty) for Violation of Song-Beverly Consumer Warranty Act [Civ. Code § 1793.2] and (Willful) Breach of Express Warranty [Com. Code §§ 2711-2715]--By Buyer of New Automobile Against Manufacturer--Application of "Lemon Law" Presumption [Civ. Code § 1793.22]

[1] FORM Complaint for Damages (and Civil Penalty) for Violation of Song-Beverly Consumer Warranty Act [Civ. Code § 1793.2] and (Willful) Breach of Express Warranty [Com. Code §§ 2711-2715]--By Buyer of New Automobile Against Manufacturer--Application of "Lemon Law" Presumption [Civ. Code § 1793.22]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES [AND CIVIL PEN-
_____ [*names*],	)	ALTY]
Defendants.	)	(Song-Beverly Consumer Warranty Act)
	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
		(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. [*Capacity and residence of plaintiff. See § 91.60[1], Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 91.60[1], Paragraph 2.*]

3. [*Fictitious name allegations, if appropriate. See § 91.60[1], Paragraph 3.*]

4. On or about _____ [*date*], at _____ [*city*], California, plaintiff purchased from _____ [*name of seller*], an automobile dealer, for the sum of $_____ (exclusive of tax and licensing fees), a _____ [*specify make and model*] automobile, vehicle identification number _____ (hereinafter referred to as "the automobile"), manufactured by defendant. The automobile was a new motor vehicle within the meaning of *Civil Code Section 1793.22(e)(2)* at the time plaintiff purchased it. A copy of the contract between plaintiff and _____ [*name of seller*] for sale of the automobile is attached to this complaint as Exhibit A and incorporated by reference.

5. Plaintiff _____ [bought the automobile primarily for personal, family, or household purposes *or* has not more than five motor vehicles registered in California and bought the automobile primarily for business purposes, and the automobile has a gross vehicle weight under 10,000 pounds].

6. Defendant appended to the automobile an express written warranty _____ [*specify, e.g.,* undertaking to preserve and maintain the utility and performance of the automobile and/or provide compensation in the event of a failure in utility or performance]. A copy of defendant's warranty as attached to this complaint as Exhibit B and incorporated by reference.

7. On or about _____ [*date*], plaintiff discovered that the automobile _____ [*specify problem constituting breach of warranty, e.g.,* exhibited a failure in utility and performance in that it would not normally start, and when it did start, it emitted sparks from the starter mechanism, causing fires or threats of fire, approximately one in every three times it started]. [*If appropriate, add:* This problem resulted in a condition that was likely to cause death or serious bodily injury if the automobile was driven.] Plaintiff delivered the automobile to defendant's authorized repair facility at _____ [*specify location(s)*], for the purposes of having this problem corrected, and has directly notified defendant in writing, with full particulars, in the manner prescribed for such notice in the owner's manual for the automobile, of the need for repair of the automobile to cure the automobile's nonconformity with defendant's express warranty. [A copy of plaintiff's notice to defendant is attached to this complaint as Exhibit C and incorporated by reference.]

[*If plaintiff is relying on presumption that a reasonable number of attempts have been made under Civ. Code § 1793.22(b)(1), which applies when defect is likely to cause death or serious bodily injury if the vehicle is driven:*]

8. The automobile was subjected to repair by defendant's representative at least two or more times in attempts to correct the problem referred to in Paragraph 7 of this complaint and to conform the automobile to the applicable express warranty. All of these attempts occurred within the earlier of 18 months from the initial delivery of the automobile to plaintiff or 18,000 miles on the odometer. These attempts were unsuccessful in that the automobile _____ [*describe continuing nonconformity, e.g.,* still failed to start normally, as described above].

[*Or, if plaintiff is relying on presumption that a reasonable number of attempts have been made under Civ. Code § 1793.22(b)(2), which applies when defect is not likely to cause death or serious injury if vehicle is driven:*]

8. The automobile was subjected to repair by defendant's representative at least four or more times in attempts to correct the problem referred to in Paragraph 7 of this complaint and to conform the automobile to the applicable express warranty. All of these attempts occurred within the earlier of 18 months from the initial delivery of the automobile to plaintiff or 18,000 miles on the odometer. These attempts were unsuccessful in that the automobile _____ [*describe continuing nonconformity, e.g.,* still failed to start normally, as described above].

[*Or, if plaintiff is relying on presumption under Civ. Code § 1793.22(b)(3), use the following, which may be combined in appropriate cases with allegations supporting presumptions under Civ. Code § 1793.22(b)(1) or (b)(2), above:*]

8. The automobile was subjected to repair by defendant's representative a reasonable number of times in attempts to

correct the problem referred to in Paragraph 7 of this complaint and to conform the automobile to the applicable express warranty. These attempts were unsuccessful in that the automobile _____ [*describe continuing nonconformity, e.g.,* still failed to start normally, as described above]. The automobile has been out of service by reason of repair of nonconformities by defendant or defendant's agents for a cumulative total of more than 30 calendar days since delivery of the automobile to plaintiff, all of which time out of service occurred within the earlier of 18 months from the initial delivery of the automobile to plaintiff or 18,000 miles on the odometer.

[*Or, if plaintiff is not relying on any of the preceding presumptions, use the following:*]

8. The automobile was subjected to repair by defendant's representative a reasonable number of times in attempts to correct the problem referred to in Paragraph 7 of this complaint and to conform the automobile to the applicable express warranty. These attempts were unsuccessful in that the automobile _____ [*describe continuing nonconformity, e.g.,* still failed to start normally, as described above].

[*CONTINUE*]

9. After the unsuccessful attempts at repair, plaintiff demanded that defendant replace the automobile in accordance with *Civil Code Section 1793.2(d)(2)(A)* or make restitution to plaintiff in accordance with *Civil Code Section 1793.2(d)(2)(B)*. Defendant has failed and refused, and continues to fail and refuse, to replace the automobile or make restitution. As a result, plaintiff has been damaged in the amount of $_____.

10. As a further proximate result of defendant's failure to comply with its obligations to plaintiff, plaintiff has been required to incur attorney's fees and litigation costs.

[11. As a further proximate result of defendant's failure to comply with its obligations to plaintiff, _____ (*allege facts showing additional and incidental damages, e.g.,* plaintiff was unable to use the automobile for a period of _____ months and was forced to expend sums for a temporary replacement during that period), to plaintiff's further damage in the sum of $_____.]

[12. Defendant willfully violated the Song-Beverly Consumer Warranty Act and breached the express warranty made in the sale to plaintiff in that _____ (*describe willful violation*).]

WHEREFORE, plaintiff prays judgment as follows:

1. For actual damages in the sum of $_____;

[2. For a civil penalty of two times the amount of actual damages;]

3. For reasonable attorney's fees in the sum of $_____;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 91.60[1], [4].*]

[2] Use of Form

The complaint in *[1], above,* is for use in a buyer's action against an automobile manufacturer that has violated the provisions of the California "Lemon Law"--or, stated more precisely, against an automobile manufacturer that has breached its obligations under the Song-Beverly Consumer Warranty Act by failing to promptly replace a new automobile or reimburse (make restitution to) the buyer after having made a reasonable number of attempts to conform the automobile to the manufacturer's express warranty and failed to do so [*see Civ. Code § 1793.2(b)-(d)*; *see also Civ. Code § 1793.22(e)(2)* (defining new motor vehicle for purpose of "Lemon Law")]. A manufacturer has a duty to replace a product that cannot be made to conform to an express warranty after a reasonable number of attempts, or to make restitution to the buyer [*Civ. Code § 1793.2(d)(2)*].

[3] Allegations

The complaint in *[1], above,* alleges the following:

- Capacity, residence, and fictitious name allegations, as applicable [Paragraphs 1-3].

- That defendant purchased a new motor vehicle (as defined by the Song-Beverly Consumer Warranty Act [*see Civ. Code § 1793.22(e)(2)*]), manufactured by defendant, from an automobile dealer in California [Paragraph 4; *see [4], below*].

- That plaintiff either (1) bought the automobile primarily for personal, family, or household purposes, or (2) does not have more than five motor vehicles registered in California and bought the automobile primarily for business purposes, and the automobile has a gross vehicle weight under 10,000 pounds [Paragraph 5]. Plaintiff must satisfy one of these requirements in order to qualify for the benefit of the Lemon Law provisions [*see Civ. Code § 1793.22(e)(2)* (definition of "new motor vehicle" for purposes of Act); *see [4], below*].

- That defendant provided an express warranty relating to the vehicle [Paragraph 6].

- That plaintiff discovered a condition constituting a breach of warranty, delivered the automobile to defendant's representative for repairs, and directly notified the defendant in writing of the need to repair the automobile to cure the breach of warranty [Paragraph 7]. Note that the requirement of direct notice to the manufacturer is a prerequisite to application of the Lemon Law provisions creating presumptions that a reasonable number of attempts have been made to correct the breach of warranty [*see Civ. Code §§ 1793.22(a)(1),(2),(3)*; *see also [6], below*]. An optional allegation in Paragraph 7 alleges that the condition was likely to cause death or serious injury if the vehicle was driven. This allegation should be included if the plaintiff is relying on the presumption relating to such dangerous conditions [*see Civ. Code § 1793.22(a)(1)*; *see [6], below*].

- That defendant's representatives made a reasonable number of attempts to repair the motor vehicle to conform it to the warrant and were unable to do so [Paragraph 8; *see Civ. Code § 1793.2(d)(1)*; *see [5], below*]. Optional versions of Paragraph 8 allege facts to support application of one or more of the statutory presumptions that a reasonable number of attempts have been made [*see Civ. Code §§ 1793.22(a)(1),(2),(3)*; *see [6], below*].

- That plaintiff demanded replacement of the automobile or restitution of the purchase money [*see Civ.*

Code § 1793.2(d)(2)], but the manufacturer failed to replace the automobile or reimburse the money [Paragraph 9].

- The plaintiff incurred attorney's fees and litigation costs [Paragraph 10; *see [7], below*].

- Optional allegation of incidental and consequential damages should be alleged [Paragraph 11]. In the case of new motor vehicles, those damages are specified in *Civ. Code § 1793.2(d)(2)(A)-(C)* (discussed in *§ 91.15[2]*) and include expenses for repair, towing, and rental costs. *Civ. Code § 1793.2(d)(2)(C)* contains a formula for determining the offsetting value of the use of the automobile by the buyer before discovery of the nonconformity.

A willful violation should be alleged (Paragraph 12). An additional penalty can be recovered for a willful violation [*see [7], below*].

[4] Definition of "New Motor Vehicle"

For purposes of the Lemon Law provisions, "new motor vehicle" means either of the following [*Civ. Code § 1793.22(e)(2)*]:

- A new motor vehicle that is bought or used primarily for personal, family, or household purposes.

- A new motor vehicle with a gross vehicle weight under 10,000 pounds that is bought or used primarily for business purposes by a person, including a partnership, limited liability company, corporation, association, or any other legal entity, to which not more than five motor vehicles are registered in California, provided that at least one motor vehicle must be registered to that person in California [*Park City Services, Inc. v. Ford Motor Co. (2006) 144 Cal. App. 4th 295, 306-309, 50 Cal. Rptr. 3d 373]* .

"New motor vehicle" includes the chassis, chassis cab, and that portion of a motor home devoted to its propulsion, but does not include any portion designed, used, or maintained primarily for human habitation, a dealer-owned vehicle and a "demonstrator" or other motor vehicle sold with a manufacturer's new car warranty, but does not include a motorcycle or a motor vehicle which is not registered under the Vehicle Code because it is to be operated or used exclusively off the highways. A "demonstrator" is a vehicle assigned by a dealer for the purpose of demonstrating qualities and characteristics common to vehicles of the same or similar model and type [*Civ. Code § 1793.22(e)(2)*].

Insofar as the Song-Beverly Consumer Warranty Act applies to new motor vehicles [*see Civ. Code §§ 1793.2(d)(2), 1793.22*], the Act is limited in application to vehicles that were bought in California [*Cummins, Inc. v. Superior Court (2005) 36 Cal. 4th 478, 483, 493, 30 Cal. Rptr. 3d 823, 115 P.3d 98* ; *see § 91.11[3*]].

[5] Obligation to Replace or Repair Defective Vehicle

If an automobile manufacturer or its California representative is unable to service or repair a new motor vehicle to conform to the applicable express warranties after a "reasonable number of attempts," the manufacturer must either promptly replace the new motor vehicle or promptly make restitution to the buyer [*Civ. Code § 1793.2(d)(2)*]. Because the phrase "reasonable number of attempts" is written in plural, the statute does not require the manufacturer to make restitution or replacement after only one opportunity to repair [*Silvio v. Ford Motor Company (2003) 109 Cal. App. 4th 1205, 1207-1208, 135 Cal. Rptr. 2d 846]* . The buyer may elect restitution in lieu of replacement, and cannot be required to accept a replacement vehicle [*Civ. Code § 1793.2(d)(2)*].

When the manufacturer replaces the vehicle, it must replace the buyer's vehicle with a new motor vehicle substantially

identical to the vehicle replaced. The replacement vehicle must be accompanied by all express and implied warranties that normally accompany new motor vehicles of that specific kind. The manufacturer also must pay the amount of any sales or use tax, license fees, registration fees, and other official fees that the buyer is obligated to pay in connection with the replacement, plus any incidental damages to which the buyer is entitled under *Civ. Code § 1794*, including but not limited to reasonable repair, towing, and rental car costs actually incurred by the buyer [*Civ. Code § 1793.2(d)(2)(A)*].

When the manufacturer makes restitution to the buyer, it must be in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer, and including any collateral charges such as sales tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under *Civ. Code § 1794*, including but not limited to reasonable repair, towing, and rental car costs actually incurred by the buyer [*Civ. Code § 1793.2(d)(2)(B)*].

When the manufacturer replaces the new motor vehicle, the buyer will only be liable to pay the manufacturer an amount directly attributable to use by the buyer of the replaced vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. When the manufacturer makes restitution, the amount to be paid by the manufacturer to the buyer may be reduced by the manufacturer by the amount directly attributable to use by the buyer prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. The amount directly attributable to use by the buyer will be determined by multiplying the actual price of the new motor vehicle paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, by a fraction having as its denominator 120,000 and as its numerator the number of miles traveled by the new motor vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity [*Civ. Code § 1793.2(d)(2)(B)*].

[6] Reasonable Number of Attempts to Repair Vehicle

Civ. Code § 1793.22(b) establishes three statutory presumptions that a reasonable number of attempts have been made to conform a new motor vehicle to the express warranties. Under *Civ. Code § 1793.22(b)*, it will be presumed that a reasonable number of attempts have been made to conform a new motor vehicle to the applicable express warranties if, within 18 months from delivery to the buyer, or 18,000 miles on the odometer of the vehicle, whichever occurs first, one or more of the following occurs [*Civ. Code § 1793.22(b)*]:

- The same nonconformity results in a condition that is likely to cause death of serious bodily injury if the vehicle is driven, the nonconformity has been subject to repair two or more times by the manufacturer or its agents, and the buyer or lessee has at least once directly notified the manufacturer of the need for repair of the nonconformity [*Civ. Code § 1793.22(b)(1)*; *see* first alternative Paragaph 8 of the form in *[1], above*].

- The same nonconformity has been subject to repair four or more times by the manufacturer or its agents and the buyer has at least once directly notified the manufacturer of the need for the repair of the nonconformity [*Civ. Code § 1793.22(b)(2)*; *see* second alternative Paragaph 8 of the form in *[1], above*].

- The vehicle is out of service by reason of repair of nonconformities by the manufacturer or its agents for a cumulative total of more than 30 calendar days since delivery of the vehicle to the buyer. The 30-day limit can be extended only if repairs cannot be performed due to conditions beyond the control of the manufacturer or its agents [*Civ. Code § 1793.22(b)(3)*; *see* third alternative Paragaph 8 of the form in *[1], above*].

The buyer is required to notify the manufacturer directly pursuant to the first two presumptions above only if the manufacturer has clearly and conspicuously disclosed to the buyer, with the warranty or the owner's manual, the provisions of *Civ. Code § 1793.2(d)*, including the requirement that the buyer must notify the manufacturer directly [*Civ. Code § 1793.22(b)(3)*].

These presumptions are rebuttable presumptions affecting the burden of proof, and may be asserted by the buyer in any civil action, including an action in small claims court, or other formal or informal proceeding [*Civ. Code § 1793.22(b)(3)*]. If a qualified third-party dispute resolution process exists, and the buyer receives timely notification in writing of the availability of that qualified third-party dispute resolution process, with a description of its operation and effect, the buyer may not assert the above presumptions until after the buyer has initially resorted to the qualified third-party dispute resolution process [*Civ. Code § 1793.22(c)*; *see Civ. Code § 1793.22(d)* (meaning of "qualified third-party dispute resolution process")].

Nothing in *Civ. Code § 1793.2(d)(2)* appears to *require* a buyer to rely on one or more of the above presumptions in order to establish that a reasonable number of attempts have been made to repair a nonconforming vehicle. Thus, a buyer conceivably could establish that a reasonable number of attempts had been made even if none of the presumptions noted above were applicable. However, it appears that a buyer who did not rely on one of the presumptions noted above would then have the burden of proving that the number of attempts made to repair the vehicle was in fact reasonable [*see, e.g., Silvio v. Ford Motor Company (2003) 109 Cal. App. 4th 1205, 1207-1208, 135 Cal. Rptr. 2d 846* (because phrase "reasonable number of attempts" is written in plural, statute does not require manufacturer to make restitution or replacement after only one opportunity to repair)]. A related feature worth noting is that the requirements relating to notice to the manufacturer and use of a qualified dispute resolution process, as discussed above, are all conditions to the buyer's ability to take advantage of the presumptions discussed above, as established by *Civ. Code § 1793.22, not* to the basic right to replacement or restitution as established by *Civ. Code § 1793.2(d)(2)*. This suggests that in some cases, a buyer who did not satisfy these conditions for the application of the presumption might still be able to prevail, although such a buyer would face a greater burden of proof in order to do so. The fourth alternative version of Paragraph 8 of the form in *[1], above*, is designed for use if the plaintiff is attempting to show that a reasonable number of attempts were made to repair the vehicle without regard to the statutory presumptions discussed above.

[7] Nonconformity

"Nonconformity" means a nonconformity that substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee [*Civ. Code § 1793.22(e)(1)*]. Whether an impairment is "substantial" [*see Civ. Code § 1793.22(e)(1)*] is determined by an objective test, based on what a reasonable person would understand to be a defect [*Lundy v. Ford Motor Company (2001) 87 Cal. App. 4th 472, 478-479, 104 Cal. Rptr. 2d 545]* . A jury instruction defining the term "substantially" to mean that "the nonconformity was not imaginary and actually impaired the use, value, or safety of the vehicle," has been held to constitute prejudicial error [*Lundy v. Ford Motor Company (2001) 87 Cal. App. 4th 472, 478-479, 104 Cal. Rptr. 2d 545* (trial court's definition effectively wrote the term out of the statutory requirement)].

[8] Attorney's Fees and Costs; Civil Penalty

A prevailing buyer is entitled to costs and attorney's fees [*Civ. Code § 1794(d)*]. The buyer also is entitled to a civil penalty for the manufacturer's willful failure to comply with its obligations [*Civ. Code § 1794(c)*; *see § 91.18[7]*]. The civil penalty may be up to twice the amount of actual damages [*Civ. Code § 1794(e)*; *see Suman v. Superior Court (1996) 39 Cal. App. 4th 1309, 1321, 46 Cal. Rptr. 2d 507* (penalty provision in *Civ. Code § 1794(e)* is not impermissibly vague as to standard to be used by jury considering whether to impose penalty; precise and lengthy standards are not necessary for instructing jury on imposition of penalty); *see also Oregel v. American Isuzu Motors, Inc. (2001) 90 Cal. App. 4th 1094, 1104-1105, 109 Cal. Rptr. 2d 583* (substantial evidence supported jury's finding that oil leak was nonconformity impairing use and value, that manufacturer was unable to fix leak after reasonable number

of attempts, and that manufacturer willfully violated its obligation to repurchase and should pay civil penalty equal to amount of damage award)].

The defendant also may recover costs and expert witness fees as a prevailing party under the Song-Beverly Consumer Warranty Act. Although *Civ. Code § 1794(d)* mentions only prevailing buyers, it can be reconciled with *Civ. Code § 1032(b)* under which prevailing defendants are entitled to costs [*Murillo v. Fleetwood Enterprises (1998) 17 Cal. 4th 985, 999, 73 Cal. Rptr. 2d 682, 953 P.2d 858]* .

[9] Cross References

For additional discussion and cross references relating to complaints in general, see *§ 91.60[2]* et seq.

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Chapter 91 AUTOMOBILES: ACTIONS INVOLVING DEFECTS AND REPAIRS
PART IV. FORMS
A. Warranties

8-91 California Forms of Pleading and Practice--Annotated §§ 91.65-91.69

[Reserved]

§§ 91.65[Reserved]

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Chapter 91 AUTOMOBILES: ACTIONS INVOLVING DEFECTS AND REPAIRS
PART IV. FORMS
B. Complaints on Dealer's or Remanufacturer's Bond

8-91 California Forms of Pleading and Practice--Annotated § 91.70

§ 91.70 Complaint for Enforcement of Liability of Surety [Code Civ. Proc. § 996.430] on Automobile Dealer's or Remanufacturer's Statutory Bond [Veh. Code §§ 11710, 11711]

[1] FORM Complaint for Enforcement of Liability of Surety [Code Civ. Proc. § 996.430] on Automobile Dealer's or Remanufacturer's Statutory Bond [Veh. Code §§ 11710, 11711]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO ENFORCE LIABILITY ON
_____ [*names*],	)	_____ [DEALER'S *or* REMANU-
[and DOES I through _____,]	)	FACTURER'S]
Defendants.	)	BOND
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is now, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of _____ [*specify state*], authorized to engage and engaged in the surety insurance business in the State of California with its principal place of business located at _____ [*street address and if any, city*], _____ County, California.

2. Defendant _____ [*name*] is now, and at all times herein mentioned was, _____ [*specify status, e.g.* a corporation duly organized and existing under and by virtue of the laws of the State of

_____ (*specify state*),] licensed to engage and engaged in the business of an _____ [automobile dealer *or* remanufacturer] in the State of California with its principal place of business located at _____ [*street address and if any, city*], _____ County, California.

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is liable on the bond herein described.]

[4. (Plaintiff is informed and believes and thereon alleges that) [A]t all times herein mentioned, defendant _____ (*name*) was the agent (and employee) of defendant _____ (*name*), and (in doing the things hereinafter alleged,) was acting within the course and scope of that agency (and employment) and with permission and consent of his/her codefendant.]

5. On or about _____ [*date*], defendant _____ [*name of dealer or remanufacturer who is principal on bond*], as principal, and defendant _____ [*name of surety*], as surety, duly executed a bond in the sum of _____ [$10,000 *or* $25,000], conditioned on the fact that defendant _____ [*name of principal*] would not practice any fraud or make any fraudulent representation which would cause a monetary loss to a purchaser, seller, financing agency, or governmental agency. [A copy of the bond is attached as Exhibit A and incorporated by reference *or* The bond provides "_____" (*set forth terms of bond in full*)].

6. At all times herein mentioned, the bond was in full force and effect.

[*EITHER*]

7. On or about _____ [*date*], _____ [*name of principal or of principal's salesman*] breached the conditions of the bond by _____ [*specify acts constituting fraud or fraudulent representation causing monetary loss or damage*]. Plaintiff has possession of a written instrument furnished by defendant _____ [*name of principal*] containing stipulated provisions and guarantees that have been violated by defendant _____ [*name of principal or of principal's salesman*].

[*OR*]

7. On or about _____ [*date*], _____ [*name of principal or of principal's salesman*] breached the conditions of the bond by _____ [*specify acts in violation of a provision within Division 3 of the Vehicle Code (Veh. Code § 4000 et seq.)*], in violation of the provisions of Vehicle Code Section _____.

[*OR*]

7. On or about _____ [*date*], _____ [*name of principal*] breached the conditions of the bond by not paying plaintiff for a _____ [*describe vehicle sold, e.g.*, 1961 Chevrolet Impala, License No. _____, Vehicle Identification No. _____] sold to and purchased by _____ [*name of principal*].

[*CONTINUE*]

8. By reason of defendant _____'s [*name of principal or of principal's salesman*] _____ [fraudulent act *or* fraudulent representation *or* violation of Vehicle Code Section _____ *or* failure to pay plaintiff for the vehicle] in breach of the condition of the bond, plaintiff has _____ [*specify damage incurred by plaintiff*], all to his/her damage in the sum of $_____.

WHEREFORE, plaintiff prays for judgment against the defendants and each of them, as follows:

1. For damages in the amount of $_____.

2. For costs; and

3. For other and further relief the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 91.60[1] and [4].*]

[2] Use of Form

The complaint in *[1], above*, is for use by any person who has suffered loss or damage due to fraud on or fraudulent representation made to that person by a licensed dealer or remanufacturer to bring an action on the dealer's or remanufacturer's bond. This form also may be used when the fraudulent act or representation was made by one of the dealer's or remanufacturer's sales personnel acting for the dealer or remanufacturer, on the dealer's or remanufacturer's behalf, or within the scope of the salesperson's employment. It may be used when the plaintiff suffered damage due to a violation of any provision of Division 3 of the Vehicle Code (*Veh. Code § 4000 et seq.*) by the dealer, remanufacturer, or their salespeople, or when the plaintiff was not paid for a vehicle sold to and purchased by a dealer or remanufacturer [*see Veh. Code §§ 11711(a)*; *see* discussion at *§ 91.32[2]*].

The principal and the sureties must be joined as parties to the action [*Code Civ. Proc. § 996.430(a)*; *see Code Civ. Proc. § 995.020* (applicability of Bond and Undertaking Law)].

Although *Veh. Code § 11711* does not specifically authorize an action on a remanufacturer's bond, since *Veh. Code § 11710* was amended to provide for a remanufacturer's bond, it appears that *Veh. Code § 11711* would also authorize an action on that bond. At any rate, as a statutory bond, action on it would also appear be authorized by *Code Civ. Proc. § 996.430* [*see Code Civ. Proc. § 995.020* (applicability of Bond and Undertaking Law)].

[3] Allegations

The complaint in *[1], above* alleges the following:

- The capacity and place of business of defendant surety (Paragraph 1) [*Code Civ. Proc. § 996.430(a)* (both surety and principal must be joined in action on bond)].

- The capacity and place of business of defendant automobile dealer or remanufacturer (Paragraph 2) [

Code Civ. Proc. § 996.430(a) (both surety and principal must be joined in action on bond)].

- Any fictitiously named defendants (Paragraph 3).

- Any agency relationship between defendants (Paragraph 4) [*see Veh. Code § 11711(a)* (acts against which bond indemnifies include those of salespersons acting within scope of their employment)].

- The issuance of the bond, its amount, and the date of issuance (Paragraph 5) [*see Veh. Code § 11710(a)* (requirement of bond)].

- That the bond was in effect at the time of the acts complained of (Paragraph 6).

- That defendant dealer or remanufacturer (or a salesperson of one of them) committed an act of the type the bond indemnifies against (alternative Paragraphs 7) [*see Veh. Code § 11711(a)*, discussed in *§ 91.32[2]*].

- Plaintiff's damages (Paragraph 8).

[4] Limitation Period

The three-year period of *Code Civ. Proc. § 338(d)* governs actions for fraud. An action for fraud accrues when the aggrieved party discovers the facts consitituting the fraud [*Code Civ. Proc. § 338(d)*]. An action on a bond is governed by the four-year limitation period of *Code Civ. Proc. § 337*.

[5] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

Venue for an action to enforce a bond is proper in any court of competent jurisdiction, and the amount of damage claimed in the action, not the amount of the bond, determines the jurisdictional classification of the case [*Code Civ. Proc. § 996.430(b)*]. A cause of action on a bond may be transferred and assigned as other causes of action. [*Code Civ. Proc. § 996.430(c)*].

[6] Service on Director of Department of Motor Vehicles

The Director of the Department of Motor Vehicles is agent for service of process of an in action based on any violation of the terms or provisions of the Vehicle Code or of a condition of a dealer's or remanufacturer's bond. When the dealer or remanufacturer cannot be served after due diligence,the summons and complaint may be served on the Director of the Department of Motor Vehicles in the manner and for the fees set forth in *Veh. Code § 11710(d)*.

[7] Cross References

For alternative allegations of defendant's status and other commonly used allegations, see Ch. 20, *Allegations*

Commonly Used

For discussion and other forms relating to statutory bonds and deposits in lieu of bond, see *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.40* et seq.

For additional discussion and cross references relating to complaints in general, see *§ 91.60[2]* et seq.

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B. Complaints on Dealer's or Remanufacturer's Bond

8-91 California Forms of Pleading and Practice--Annotated § 91.71

§ 91.71 Complaint in Interpleader by Surety Against Claimants on Automobile Dealer's or Remanufacturer's Statutory Bond [Veh. Code § 11710]

[1] FORM Complaint in Interpleader by Surety Against Claimants on Automobile Dealer's or Remanufacturer's Statutory Bond [Veh. Code § 11710]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT IN INTERPLEADER
_____ [*names*],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendants.	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

1. At all times herein mentioned plaintiff _____ [*name of surety*] was, and now is, a corporation duly organized and existing under the laws of the State of _____ [*specify state*], authorized to engage and engaged in the surety insurance business in the State of California, with its principal place of business at _____ [*street address and, if any, city*], _____ County, California.

2. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California, residing at _____ [*street address and if any, city*]; defendant _____ [*name*] is, and at all times herein mentioned was, a resident of

_____ County, California, residing at _____ [*street address and if any, city*] [*continue to allege any additional defendants claiming against the bond*].

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by those fictitious names. Plaintiff will amend this complaint to allege their true names and capacites when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is making or has a claim on the bond herein described which is conflicting with the claims of other defendants herein and which may subject plaintiff to vexatious litigation with respect to the bond.]

4. At all times herein mentioned, _____ [*name of dealer or remanufacturer*] was duly licensed as an automobile _____ [dealer *or* remanufacturer] under the laws of the State of California and[, doing business under the name _____ (*specify fictitious name*),] maintained and operated _____ [a place *or* places] of business in _____ County, California.

5. On or about _____ [*date*], plaintiff, as surety, and _____ [*name of dealer or remanufacturer*], as principal, made, executed, and delivered a certain automobile _____ [dealer's *or* remanufacturer's] bond in favor of the people of the State of California, in the sum of _____ [$50,000 *or* $10,000], that was conditioned as required by *Vehicle Code Section 11710* of the State of California. The bond was in effect from _____ [*date*], until _____ [*date*], when it was canceled.

6. By the provisions of the bond, plaintiff's liability as surety shall not exceed the sum of _____ [$10,000 *or* $25,000].

7. Defendants, and each of them, assert claims against plaintiff on the bond for loss or damage claimed to have been suffered by them on account of acts of _____ [*name of dealer or remanufacturer*], during the period the bond was in effect; the claims so asserted aggregate to a sum in excess of _____ [$50,000 *or* $10,000].

8. Plaintiff cannot ascertain _____ [the validity of the defendants' claims *or* what part of the amount of plaintiff's obligation should be paid to each defendant *or both if appropriate*]. Because of these multiple and potentially conflicting claims, plaintiff is in doubt as to which of the defendants[, if any,] plaintiff may be required to satisfy and what proportion of the total amount of plaintiff's penalty on the bond should be equitably distributed between the defendants, if the total number of valid claims exceeds the total amount of plaintiff's obligation.

9. Because of defendants' claims, plaintiff will suffer irreparable injury, possibly will be subject to judgments in excess of the penalty of its bond, and will be subjected to a multiplicity of actions and extensive litigation unless the defendants are required to interplead in this action and are restrained from instituting any other proceedings against plaintiff.

[10. Plaintiff, at the time of filing this complaint, has deposited with the clerk of this Court the sum of _____ ($50,000 *or* $10,000), which is the total amount of the penalty of the bond.]

11. Plaintiff has incurred an obligation to pay reasonable attorney's fees and costs in this action.

WHEREFORE, plaintiff prays judgment as follows:

1. That defendants, and each of them, be ordered to interplead and litigate their respective rights against _____ [*name of dealer or remanufacturer*] and their rights to the amounts of money that plaintiff may be obligated to pay the defendants, and each of them, under the bond;

2. That defendants, and each of them, be enjoined from taking any action against plaintiff by reason of its

_____ [dealer's *or* remanufacturer's] bond, except to come into this action, and set up their respective claims against the bond;

3. That [on delivering _____ ($50,000 *or* $10,000) to the clerk of this Court,] plaintiff be discharged from all liability to any of the defendants with respect to the bond;

4. For reasonable attorney's fees and costs, to be paid out of the fund represented by the penalty of the bond, as the Court may direct; and

5. For other and further relief the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 91.60[1] and [4].*]

[2] Use of Form

The complaint in [1], *above*, may be used by the surety on an automobile dealer's or remanufacturer's statutory bond [*Veh. Code § 11710*] to require all claimants on the bond to interplead in the action so that the liability of the surety on the bond can be adjudicated in one action [*Code Civ. Proc. § 386(b)*]. A dealer's bond must be in the amount of $50,000, except that for a dealer who deals exclusively in motorcycles or all-terrain vehicles or a dealer who sells vehicles on a wholesale basis only and sells fewer than 25 vehicles per year, the bond must be in the amount of $10,000 [*Veh. Code §§ 11710(b), 11710.1*]. A remanufacturer's bond must be in the amount of $50,000 [*Veh. Code § 11710(b)*].

Attorney's fees and costs may be allowed to the plaintiff in interpleader out of the amount in dispute that is deposited with the court [*see Code Civ. Proc. § 386.6*].

[3] Allegations

The complaint in *[1], above* alleges the following:

- The capacity and place of business of plaintiff surety (Paragraph 1).
- The capacity and residence of each claimant against the bond (Paragraph 2, repeated as many times as there are claimants).
- Any fictitiously named defendants, and that each claims against the bond (Paragraph 3).
- The dealer or remanufacturer's name and place of business (Paragraph 4) [*see Veh. Code § 11710(a)* (bond)].
- The issuance of the bond, the parties to the bond, its amount, the date of issuance, and the time it remained in effect (Paragraph 5).
- The maximum amount for which plaintiff can be liable under the bond (assuming it was furnished in the statutory amount) (Paragraph 6) [*see Veh. Code § 11710(b)* (amounts of bond required)].

- That each defendant claims against the bond, and that their claims aggregate a sum in excess of the amount of the bond (Paragraph 7).

- That plaintiff cannot determine, on its own, to whom the bond amount should be paid, or in what amounts (Paragraph 8) [*see Veh. Code § 11711(d), (e)* (order in which claims under *Veh. Code § 11711(a), (b)* are to be satisfied)].

- Plaintiff's need to interplead the amount of the bond (Paragraph 9).

- If appropriate, that plaintiff will be depositing the amount of the bond with the clerk of the court at the time it files the complaint (Paragraph 10) [*see Code Civ. Proc. § 386(c)*].

- That plaintiff has incurred attorney's fees (Paragraph 11) [*see Code Civ. Proc. § 386.6*].

[4] Verification of Complaint Seeking Temporary Restraining Order

A court may restrain all claimants named in an interpleader action from instituting or further prosecuting any other action on their claims during the pendency of the interpleader action [*Code Civ. Proc. § 386(f)*]. A complaint seeking a temporary restraining order or preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan G. Co. v. San Juan R. etc. Assn. (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* . For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 314, *Interpleader* , and Ch. 303, *Injunctions* .

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[6] Asserting Interpleader by Cross Complaint

If the surety has been made a defendant in an action brought on one or more of the claimants, the surety may file a cross complaint ininterpleader. If counsel modifies the form in *[1], above*, for use as a cross complaint, the cross complaint must be verified [*Code Civ. Proc. § 386(b)*].

[7] Cross References

For alternative allegations of defendant's capacity, see Ch. 20, *Allegations Commonly Used*

For further discussion and alternative and additional forms relating to interpleader, see Ch. 314, *Interpleader*

For discussion and other forms relating to statutory bonds and deposits in lieu of bond, see Ch. 538, *Suretyship, Bonds,*

and Undertakings

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PART IV. FORMS
B. Complaints on Dealer's or Remanufacturer's Bond

8-91 California Forms of Pleading and Practice--Annotated §§ 91.72-91.79

[Reserved]

§§ 91.72[Reserved]

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C. Negligent or Misrepresented Repair

8-91 California Forms of Pleading and Practice--Annotated § 91.80

§ 91.80 Complaint By Owner of Automobile Against Automobile Repair Shop for Damages Caused by Negligent Repair [Civ. Code §§ 1714(a), 3333]--General Form

[1] FORM Complaint By Owner of Automobile Against Automobile Repair Shop for Damages Caused by Negligent Repair [Civ. Code §§ 1714(a), 3333]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	[Amount demanded _____
[and DOES I-_____, inclusive,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times mentioned herein was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a resident of *or* a corporation organized and existing under the laws of the State of _____ with its principal place of business at _____ (*street address and town*) in] _____ County, California, and _____ [authorized *or* licensed] to engage, and engaging in the business of servicing, repairing, and maintaining automobiles for the general public.

[2. *Fictitious name allegation, if appropriate. See § 91.60[1], Paragraph 3.*]

3. On or about _____ [*date*], defendants, and each of them, undertook to _____ [*specify type of automotive service, e.g.*, replace the tires] of a certain _____ [*year, make, model*] automobile owned by plaintiff.

4. Defendants and their agents, servants, and employees, and each of them, negligently and carelessly _____ [*e.g.*, replaced the tires of that automobile] so that, unknown to plaintiff, the automobile was in a dangerous and unsafe condition.

5. Thereafter, on or about _____ [*date*], plaintiff was driving and operating his/her/its automobile along and on _____, [*street*] near _____ [*location*] in _____ [*city*], California when as a proximate result of the negligence of defendants, and each of them, _____ [*specify failure of automotive service, e.g.*, the left front tire came off the automobile] causing the automobile to _____ [*describe accident, e.g.*, run off the road and overturn] causing the injuries and damages alleged below.

6. As a proximate result of the negligence of the defendant[s, and each of them], plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervous system and person. All of these injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that these injuries will result in some permanent disability to him/her.] As a result of these injuries, plaintiff has suffered general damages.

7. As a further proximate result of the negligence of the defendant[s, and each of them], plaintiff has incurred and will continue to incur medical and related expenses.

8. As a further proximate result of the negligence of the defendant[s, and each of them], plaintiff was prevented from performing his/her usual occupation as a _____ [*specify occupation*] _____ [for a period of _____ (*specify period*) *or* from the date of his/her injury to the date of the filing of this complaint] and has thereby lost earnings.

9. As a further proximate result of the negligence of the defendant[s, and each of them], [and the collision resulting therefrom,] plaintiff's automobile was _____ [*describe damage, e.g.*, destroyed beyond repair, to plaintiff's damage in the sum of $ _____ *or* damaged. Plaintiff _____ (has expended *or* will be required to expend) $ _____, for repair of the damaged automobile].

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages.

2. For medical and related expenses according to proof.

3. For lost earnings, past and future.

4. For repairs to plaintiff's property [in the sum of $_____].

5. For costs of suit herein incurred.

6. For other and further relief the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 91.60[1] and [4].*]

[2] Use of Form

The complaint in *[1], above*, is for use by an automobile owner to recover damages for both personal injury and property damage from a repair shop that negligently repaired or maintained plaintiff's automobile [*see Civ. Code §§ 1714(a), 3333*; *see also Veh. Code § 12002* (defective vehicle parts)]. The facts used as hypothetical illustration in the form involve negligent replacement of tires [*see Spolter v. Four-Wheel Brake Serv. Co. (1950) 99 Cal. App. 2d 690, 695, 222 P.2d 307* (jurors from their common experience could draw inference that new tire mounted on wheel from two to three weeks before accident would in meantime with reasonable probability not have to be replaced)]. For a form containing allegations relating to negligent over-inflation of tires, see *§ 91.81*.

[3] Allegations

The complaint in *[1], above* alleges the following:

- Defendant's capacity and licensure under the Automotive Repair Act [*Bus. & Prof. Code § 9880 et seq.*], and that defendant was in the business of repairing or maintaining automobiles (Paragraph 1).

- Plaintiff's ownership of the vehicle (Paragraph 3) [*see Veh.Code § 460* (defining owner)].

- That defendant undertook to repair the vehicle, and the date and type of repair (Paragraph 3).

- That defendant repaired the vehicle so negligently that it was dangerous to drive, and that plaintiff was unaware of the danger (Paragraph 4) [*see Dunn v. Shamoon (1940) 37 Cal. App. 2d 486, 489-490, 99 P.2d 1113* (owner has duty to make reasonable inspection of repairs to his or her vehicle)].

- The date and description of the accident that happened and that it was proximately caused by the negligent repair (Paragraph 5) [*see Civ. Code § 1714(a)* (defining negligence); *see also Burr v. Sherwin Williams Co. (1954) 42 Cal. 2d 682, 687-688, 268 P.2d 1041* (fact that accident occurs after defendant relinquishes control of instrumentality that causes accident does not bar application of res ipsa loquitur doctrine provided there is evidence that instrumentality was not improperly handled nor its condition otherwise changed after defendant relinquished control); *Cline v. Lund (1973) 31 Cal. App. 3d 755, 762-763, 107 Cal. Rptr. 629* (although res ipsa loquitur does not apply unless balance of probabilities in favor of negligence can be found, doctrine applies when cause of injury is mystery, if there is reasonable and logical inference that defendant was negligent and that defendant's negligence caused injury)].

- Plaintiff's damages, and that each was proximately caused by defendant's negligence [*see Civ.Code § 3333* (damages recoverable for negligence)]: general damages for physical injury; pain and suffering (Paragraph 6); medical expenses (Paragraph 7); loss of earnings (Paragraph 8); and property damage to the automobile (Paragraph 9).

[4] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see *Ch. 177, Damages, § 177.40* et seq., and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[5] Limitation Period

The three-year period of *Code Civ. Proc. § 338(c)* governs actions for injury to personal property, but an action for personal injury caused by negligence is subject to a two-year limitation period [*Code Civ. Proc. § 335.1*].

[6] Venue

Venue for an action arising out of defendant's negligence is proper in the county where the injury occurred or where the defendant, or one of them, resides at the commencement of the action [*Code Civ. Proc. § 395(a), (c)*]. For discussion of jurisdiction and limited civil cases, see *§ 91.63[6]*.

[7] Cross References

For forms for use in alleging damages in tort actions, see Ch. 177, *Damages*

For additional forms for use in actions involving damages resulting from accidents caused by negligent servicing or repair of automobile, see Ch. 274, *Garages and Gas Stations*

For discussion of negligence and related forms, see Ch. 380, *Negligence* ,

For additional discussion and cross references relating to complaints in general, see *§ 91.60[2]* et seq.

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8-91 California Forms of Pleading and Practice--Annotated § 91.81

§ 91.81 Allegations--Negligent Over-Inflation of Tires

[1] FORM Allegations--Negligent Over-Inflation of Tires

1. Defendant was at all times herein mentioned engaged in the business of operating gasoline service stations, selling gasoline products, and providing related services, including tire repairs, air pressure, and other service, particularly at the service station located at _____ [*street address*], in _____ [*city*], California.

2. On _____ [*date*], at or about _____ [*time*], plaintiff purchased gasoline and air pressure service from the defendant's employee at defendant's gas station at the location set forth in Paragraph 1. and instructed defendant's employee to check the tire pressure on the _____ [*make*] automobile owned by plaintiff for _____ [*e.g.*, "30 pounds pressure"]; defendant, acting through its employee, negligently and carelessly inflated the tires on plaintiff's automobile of plaintiff far in excess of _____ [*e.g.*, 30 pounds pressure], without plaintiff's knowledge.

3. Thereafter, on _____ [*date*], at or about _____ [*time*], while plaintiff was driving, and operating his/her automobile, on _____ [*street*], near _____ [*street*], the automobile was caused to skid off the road, throw plaintiff out of the automobile, collide with another automobile and thereby severely injure plaintiff, and damage plaintiff's automobile, all by reason of the grossly over-inflated tires.

[2] Use of Form

The allegations in *[1], above*, are for use by an automobile owner to recover damages for both personal injury and property damage from a repair shop that negligently over-inflated a tire on plaintiff's automobile [*see Civ. Code §§ 1714(a), 3333*; *see also §§ 91.62[2] -[3], 91.80[2] -[7]*]. In particular, those allegations may be used in place of Paragraphs 3., 4., and 5. of the complaint in *§ 91.80[1]* and the portion of Paragraph 1 of that complaint that describes defendant's business.

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8-91 California Forms of Pleading and Practice--Annotated § 91.82

§ 91.82 Complaint for Damages Caused by Negligent Operation and Repair or Maintenance [Civ. Code. §§ 1714(a), 3333] By Automobile Driver Against Automobile Repair Shop and Another Automobile Driver

[1] FORM Complaint for Damages Caused by Negligent Operation and Repair or Maintenance [Civ. Code. §§ 1714(a), 3333] By Automobile Driver Against Automobile Repair Shop and Another Automobile Driver

[*Caption. See § 91.80[1].*]

Plaintiff alleges:

1. [*Capacity and residence of corporate defendant. See § 91.80[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 91.60[1], Paragraph 3.*]

3. At all times hereinafter mentioned, defendant _____ [*name of individual defendant*] was the owner of a certain _____ [*year, make, model*] automobile bearing the _____ [*state, e.g.,* California] license plate _____ [*specify*].

4. For a period of time prior to _____ [*date*], defendant _____ [*name*], by and through its agents, servants, and employees, and particularly the employees of the _____ [garage *or* service station] operated by the defendant under the name and style of _____ [*name*], at _____ [*address*] undertook to repair and maintain in safe operating condition the vehicle owned by defendant _____ [*name*].

5. The agents, servants, and employees of defendant _____ [*name*] negligently and carelessly maintained and repaired the _____ [*designate part repaired, e.g.,* brakes] on the _____ [*make*] automobile so that those brakes were in a dangerous, defective, and unsafe condition on the date hereinafter mentioned.

6. At all times herein mentioned, the intersection of _____ [*street*] and _____ [*street*], _____ [*city*], California was and is a public thoroughfare, and all acts and events hereinafter mentioned occurred at that location.

7. On or about _____ [*date*], plaintiff was driving a _____ [*make*] automobile in a generally _____ [*compass point*] direction along and on _____ [*street*], and had reached a point at or near _____ [*street*]; at that time and place defendant _____ [*name*] was driving and operating his/her automobile in a generally _____ [*compass point*] direction along and on _____ [*street*].

8. At that time and place defendants _____ [*names*], and each of them, so carelessly, negligently, and unskillfully maintained, managed, controlled, and drove the _____ [*make*] automobile as to collide with the plaintiff's automobile with such great force and violence as to injure plaintiff and damage his/her automobile as hereinafter alleged.

9. As a proximate result of the negligence of the defendant[s, and each of them], plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervous system and person. All of these injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that these injuries will result in some permanent disability to him/her.] As a result of these injuries, plaintiff has suffered general damages [in the amount of $_____].

10. As a further proximate result of the negligence of the defendant[s, and each of them], plaintiff has incurred [and will continue to incur] medical and related expenses. [The full amount of these expenses is not known to plaintiff at this time, and plaintiff will move to amend this complaint to state the amoun of these expenses when the amount becomes know to him/her, or on proof of the amount.]

11. As a further proximate result of the negligence of the defendant[s, and each of them], plaintiff was prevented from performing his/her usual occupation as a _____ [*specify occupation*] _____ [for a period of _____ (*specify period*) *or* from the date of his/her injury to the date of the filing of this complaint] and has thereby lost earnings [_____ in the sum of *or* in an as yet ascertained amount].

12. As a further proximate result of the negligence of the defendant[s, and each of them], [and the collision resulting therefrom,] plaintiff's automobile was _____ [*describe damage, e.g.,* destroyed beyond repair, to plaintiff's damage in the sum of $_____ *or* damaged. Plaintiff _____ (has expended *or* will be required to expend) $_____, for repair of the damaged automobile].

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages [in the sum of $_____].

2. For medical and related expenses according to proof.

3. For lost earnings, past and future, according to proof.

4. For repairs to plaintiff's property [in the sum of $_____].

5. For costs of suit herein incurred.

6. For other and further relief the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 91.60[1] and [4].*]

[2] Use of Form

The complaint in *[1], above*, is for use by an automobile driver in an action against a repair shop for damages caused by the negligent repair or maintenance of another's automobile, and against the driver of the negligently repaired automobile for negligence in its operation [*see Civ. Code §§ 1714(a), 3333*; *see also §§ 91.62[2], [3], 91.80[2] -[7]*].

[3] Allegations

The complaint in *[1], above* alleges the following:

- Defendant's ownership of the other vehicle involved in the accident (Paragraph 3).

- Defendant's maintenance and repair of the other defendant's vehicle and the dates of that maintenance and repair (Paragraph 4).

- That defendant repaired and maintained the other defendant's vehicle so negligently that it was dangerous to drive (Paragraph 5).

- A description of the intersection where the accident occurred (Paragraph 6).

- When, where, what, and in what direction plaintiff and defendant were driving at the time of the accident (Paragraph 7) [*see Veh. Code § 305* (defining driver)].

- The date and description of the accident, and that it was caused by the negligent maintenance, driving, and control of defendants (Paragraph 8).

- Plaintiff's damages, and that each element of those damages was proximately caused by defendant's negligence [*see Civ. Code § 3333* (damages recoverable for negligence)]: general damages for physical injury; pain and suffering (Paragraph 9); medical expenses (Paragraph 10); loss of earnings (Paragraph 11); and property damage to the automobile (Paragraph 12).

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8-91 California Forms of Pleading and Practice--Annotated § 91.83

§ 91.83 Allegation--Repairer Misrepresented Repairs [Civ. Code. § 1711]

[1] FORM Allegation--Repairer Misrepresented Repairs [Civ. Code. § 1711]

1. On or about _____ [*date*], plaintiff delivered a certain _____ [*year, make, model*] automobile to defendant and instructed defendant to carefully inspect that automobile and to repair _____ [*specify particular repairs requested*].

2. Thereafter, on or about _____ [*date*], defendant negligently informed plaintiff that the automobile had been thoroughly inspected and checked and that _____ [no repairs, adjustments, or replacements were necessary *or* the _____ (*specify repairs*) had been made], when in fact the automobile had not been repaired or inspected and was in a dangerous and unsafe condition which was known or by the exercise of reasonable care could have been known by defendant.

3. Plaintiff relied on these representations and on the skill and judgment of defendant and on or about _____ [*date*], _____ [*describe proximately caused accident and injuries*].

[2] Use of Form

The allegations in *[1], above,* allege that an automobile repairer made negligent misrepresentations regarding automobile repairs, and are for use in conjunction with complaints alleging negligence or breach of warranty [for forms of complaints, *see, e.g., §§ 91.60* (breach of warranty), *91.80* (negligence); *see also § 91.13[6]*; *Reeder v. Hoag (1958) 158 Cal. App. 2d 41, 44, 321 P.2d 793]* .

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[2] DMV Hearings and Judicial Review

[3] Access to DMV Records

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§ 92.22 Suspension and Revocation Distinguished

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§ 92.24 Mandatory and Discretionary Suspension or Revocation Distinguished

§ 92.25 Mandatory Suspension or Revocation of License

[1] Conviction for Specified Offenses

[2] Commercial Driving Privileges

[3] Violation of Implied Consent or Administrative Per Se Laws

[a] Failure to Complete Chemical Test Successfully

[b] By Persons Under 21 and Minors

[4] Accident by Driver With Prior Manslaughter Conviction

[5] Failure to Appear or Pay Fine

[6] Failure to Comply With Court Order

[7] Payment of Certain Fines, Fees, and Penalties With Dishonored Check

§ 92.26 Discretionary Suspension or Revocation of License

[1] Applicable Circumstances

[a] Grounds Exist That Would Permit Refusal

[b] Violation of License Restrictions

[c] Conviction for Specified Offenses

[d] Failure to Surrender Erroneous License

[e] Failure to Submit to Reexamination

[f] Determination That Safety Requires Action

[2] Duration of Suspension

[a] When Not Specifically Prescribed

[b] When Termination Is Dependent on Licensee

[c] When Suspension Is Based on Physical or Mental Condition

[3] Probation

§ 92.27 Suspension or Revocation of Certificate

§ 92.28 Investigation

[1] Bases for Investigation

[a] Broad Authority

[b] Determining Negligent Driver by Violation of Point Count

[c] Provisional License Program for Minors

[2] Reexamination

[3] Notice of Proposed Action and Opportunity to Be Heard

[4] Alternative Immediate Suspension

§ 92.29 Suspension or Revocation as Not Affected by Court Action

§ 92.30 Surrender of License Certificate

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§ 92.40 Implied Consent Law in General

[1] Background and Purpose

[2] Summary of Departmental Action

[3] Tests Permitted

[a] Testing for Alcoholic Content of Blood

[b] Testing for Drug Content of Blood

[4] Driver's Right to Request Testing

§ 92.41 Constitutional Questions

[1] Due Process and Equal Protection

[2] No Right to Remain Silent

[3] Not a Bill of Attainder

§ 92.42 Warnings to Be Given Driver

[1] Warning of Consequences of Refusing to Test

[2] Warning of No Right to Counsel

[3] Warning of Choice of Tests

[a] Arrestee May Choose

[b] Warning of Limited Choice at Facility

[c] Warning That Breath Sample Cannot Be Retained

[d] Warning That Driver Must Submit to Additional Testing

§ 92.43 Suspension or Revocation for Refusal to Take Test

[1] Notice of Order

[2] Effective Date

[3] Seizure of License and Issuance of Temporary License

[4] Peace Officer's Sworn Report

[5] Length of Suspension or Revocation

[a] Mandatory Periods Imposed

[b] Compared With Administrative Per Se Suspension

[6] Effect of Existing Suspension or Revocation

§ 92.44 Internal Review of Record

§ 92.45 Right to Administrative Hearing

§ 92.46 Administrative Hearing Procedure

[1] Applicable Law

[2] Request for Hearing

[3] Stay of Suspension or Revocation

[4] Location of Hearing

§ 92.47 Issues Determined at Hearing

[1] Specifically Limited

[2] Reasonable Cause to Believe Person Violated DUI Statutes

[a] Reasonable Cause

[b] Preliminary Alcohol Screening Test

[3] Arrest

[a] Arrest Must Be Lawful

[b] Effect of Prior Unlawful Arrest Determination

[4] Refusal to Complete Tests

[a] Driver's Response Determinative

[b] Exemption from Blood Testing

[c] Incapacity Is Not Withdrawal of Consent

[i] Establishing Incapacity

[ii] Self-Induced Condition Does Not Excuse

[d] Improper Testing

[i] Technical Deficiency

[ii] Test Must Be Administered at Officer's Direction

[iii] Person Administering Blood Test Must Be Qualified

[iv] Driver Has Right to Privacy

[e] Inadequate Warning Causing Refusal

[f] Refusal to Choose Test Is Not Refusal to Submit

[g] Ambiguous Refusal Requires Clarification

[h] Qualified Consent Is Deemed Refusal

[i] Delayed Consent Is Refusal

[j] Refusal Is Not Overcome by Later Agreement

[k] Refusal Is Not Overcome by Subsequent Guilty Plea

[5] Warning of Consequences of Refusing to Test

§ 92.48 Evidence at Hearing

[1] Broader Evidence Than Under Internal Review

[2] Arresting Officer's Statement

[a] Admissibility

[b] Statement as Prima Facie Evidence

§ 92.49 Notice of Determination After Hearing

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§ 92.51 Department Review of Hearing Decision

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§ 92.53 Petition for Judicial Review

[1] Time to File

[2] Proper Court

[3] Petition Will Not Stay Suspension or Revocation

[4] Review Limited to Hearing Record

[5] Issues to Be Determined by Court

[6] Standard of Review

[7] Effect of Judicial Review on Subsequent Criminal Prosecution

§ 92.54 Restoration of Driving Privilege

§§ 92.55-92.59 [Reserved]

§ 92.60 Administrative Per Se Law in General

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[2] Summary of Departmental Action

§ 92.61 Constitutional Questions

§ 92.62 Immediate Suspension for Driving Under the Influence

[1] Unlawful Blood Alcohol Content

[2] Notice of Order of Suspension

[a] Service

[b] Content

[c] Seizure of License and Issuance of Temporary License

[3] Effective Date of Order of Suspension

[4] Length of Suspension

[a] Dependent on Previous Seven Years

[b] Four-Month Suspension

[c] One-Year Suspension

[d] Concurrent Periods Based on Same Occurrence

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PART I. SCOPE

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§ 92.01 Scope of Chapter

This chapter discusses post-licensing control of motor vehicle drivers by the California Department of Motor Vehicles.

Discussion in Part II includes the following:

- Subpart A [*see § 92.10* et seq.], discussing basic definitions applicable to the administrative control of drivers as well as the State's general authority to regulate driving.

- Subpart B, discussing action by the Department of Motor Vehicles, including revocation, suspension, and cancellation of the driver's license generally [*see § 92.20* et seq.], and, more particularly, suspension and revocation under the implied consent law [*see § 92.40* et seq.], the administrative per se law [*see § 92.60* et seq.], and the financial responsibility law [*see § 92.90* et seq.].

- Subpart C [*see § 92.100* et seq.], discussing general administrative review procedures applicable to actions by the Department of Motor Vehicles.

- Subpart D [*see § 92.120* et seq.], discussing judicial review of actions by the Department of Motor Vehicles.

- Subpart E [*see § 92.130* et seq.], discussing impoundment and forfeiture provisions for vehicles driven by unlicensed, suspended, or revoked drivers.

Forms in Part IV include the following:

- A form for requesting an administrative hearing [*see § 92.170*].

- Forms for petitioning a court for writ of mandate to review action taken by the Department of Motor Vehicles [*see §§ 92.180, 92.181*].

- A form for filing a claim opposing a vehicle forfeiture [*see § 92.190*].

Part III provides a Research Guide [*see § 92.150* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageOperator License SuspensionsInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageProof of Financial ResponsibilityTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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- For discussion and forms relating to review by writ of mandate generally, see Ch. 358, *Mandate and Prohibition* .

- For discussion and forms relating to agency adjudications generally, and judicial review of those adjudications by writ of administrative mandate, see respectively Ch. 473, *Public Agency Adjudication* , et seq., and Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamus

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[Reserved]

§§ 92.03[Reserved]

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PART II. LEGAL BACKGROUND
A. State's Authority to Control Drivers

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§ 92.10 Governing Law

[1] Statutes and Regulations Governing Driver Licensing

Drivers' licenses are governed by Division 6 of the Vehicle Code [*Veh. Code § 12500 et seq.*]. Financial responsibility laws containing provisions for suspension of a driver's license are set out in the first three chapters of Division 7 of the Vehicle Code [*see Veh. Code § 16000 et seq.*]. Provisions for cancellation of a minor's license because of failure of proof of financial responsibility generally are set out in Chapter 2 of Division 9 of the Vehicle Code [*Veh. Code § 17700 et seq.*].

Regulations of the Department of Motor Vehicles generally are contained in Title 13 of the California Code of Regulations.

[2] DMV Hearings and Judicial Review

The Administrative Procedure Act (*Gov. Code § 11340 et seq.*), insofar as it is applicable, governs all matters in a hearing that are not otherwise specifically addressed under *Veh. Code § 14100 et seq.* [*Veh. Code § 14112*]. For detailed discussion of the APA, see Ch. 470, *Overview of Public Administrative Law* , et seq. For detailed discussion of APA provisions governing agency adjudications, see Ch. 473, *Public Agency Adjudications* , et seq.

Judicial review of administrative orders, such as for suspension or revocation of a driver's license, are governed by *Code Civ. Proc. § 1084 et seq.*, covering mandate in general, and by *Code Civ. Proc. § 1094.5*, covering "administrative" mandate in particular, and by *Code Civ. Proc. § 1107 et seq.*, covering extraordinary writs generally. Judicial review of an order of suspension or revocation of a person's driving privilege after a hearing under *Veh. Code § 13558* (implied consent and administrative per se laws) is governed by *Veh. Code § 13559*. For detailed discussion of judicial review of agency adjudications generally, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

Award of attorney's fees in a civil action to review an administrative determination, when it is shown that the determination was the result of arbitrary or capricious action, is governed by *Gov. Code § 800*.

[3] Access to DMV Records

Inspection of DMV records is governed generally by the California Public Records Act [*Gov. Code § 6250 et seq.*; for detailed discussion of these provisions, see Ch. 470C, *Public Records Act*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawGovernmental InformationFreedom of InformationDisclosure RequirementsGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageOperator License SuspensionsInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageProof of Financial ResponsibilityTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.11 Definitions

[1] Driver's License

The term "driver's license" refers to a valid license to drive the type of motor vehicle or combination of vehicles for which a person is licensed under the Vehicle Code or by a foreign jurisdiction [*Veh. Code § 310*; *see also Veh. Code §§ 325* (foreign jurisdiction defined), 415 (motor vehicle defined), 470 (person defined), 670 (vehicle defined)].

The usual meaning of "license" is permission or authority to do a particular thing or exercise a particular privilege [*Galvan v. Superior Court (1969) 70 Cal. 2d 851, 856, 76 Cal. Rptr. 642, 452 P.2d 930]* . It may be said that the granting of a license to engage in an activity subject to regulation under the state's police power is merely the state's means to regulate and restrict the pursuit of the activity for the public good [*Rosenblatt v. Cal. St. Bd. of Pharmacy (1945) 69 Cal. App. 2d 69, 74, 158 P.2d 199* (pharmacist's license)].

A provisional driver's license is one issued to drivers under the age of 18. These are more restrictive than those issued to older drivers. Some of the restrictions include the following [*Veh. Code § 12814.6*]:

- Six month instruction permit period before applying for a provisional driver's license.

- Fifty hours supervised driving practice, including 10 hours at night, before applying for a provisional driver's license.

- For the first 12 months after receiving the provisional driving license, unless accompanied and supervised by a licensed driver who is a parent or guardian, or who is a licensed driver 25 or older, or a licensed driving instructor, neither drive between 11 p.m. and 5 a.m. nor transport passengers under 20 years of age.

In the Vehicle Code, "license" is used to denote both the permission to drive and also the certificate, commonly called a driver's license, evidencing that permission has been duly given [*compare Veh. Code § 12800 with Veh. Code §*

23157(f)].

[2] Drive

The meaning of "drive," which is used in the statutory definition of "driver's license" (*see* [1], *above*), is not given in the Vehicle Code, and apparently no court has construed it in the context of that definition. The ordinary meaning of "drive" with reference to a motor vehicle is "to operate the mechanism and controls and direct the course of" the vehicle or, intransitively, "to operate a vehicle" [Webster's Ninth New Collegiate Dictionary (1988); *Estate of Richartz (1955) 45 Cal. 2d 292, 294, 288 P.2d 857* (statutory words should be given ordinary meanings unless Legislature otherwise clearly intended or indicated); *see also Panopulos v. Maderis (1956) 47 Cal. 2d 337, 342, 303 P.2d 738* (equating "driving" with being "in actual physical control of a vehicle," the words of former Veh. Code § 69 which defined "driver")].

For discussion of whether a finding that a person was actually driving for purposes of determining whether an officer had reasonable cause to believe that the person was driving under the influence, see *§ 92.47[2][a]*.

[3] Department

In this chapter, "Department" refers to the Department of Motor Vehicles, a department in the Business, Transportation, and Housing Agency of the state government [*see Veh. Code § 1500*]. The word has this meaning generally in the Vehicle Code, but in some sections it means the California Highway Patrol [*see Veh. Code § 290*].

For a listing outlining state agencies generally and showing the Department in relation to other agencies, see Ch. 470, *Overview of Public Administrative Law* .

[4] Other Terms

The Vehicle Code contains definitions of many other terms [*see Veh. Code § 105 et seq.*]. Some of the more important or more frequently used terms include: drug [*Veh. Code § 312*], foreign jurisdiction [*Veh. Code § 325*], highway [*Veh. Code § 360*; *see Veh. Code §§ 590-592*], motor vehicle [*Veh. Code § 415*], nonresident [*Veh. Code § 435*], original driver's license [*Veh. Code § 455*], person [*Veh. Code § 470*], and vehicle [*Veh. Code § 670*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.12 State's Authority to Regulate Driving

[1] Derives From Police Power

The state has authority to control, directly or through its agencies, the use of the public highways for all purposes [*Santa Barbara v. More (1917) 175 Cal. 6, 11-12, 164 P. 895]* . The operation of a motor vehicle in a public place is a privilege subject to reasonable regulation, under the state's police power, in the interest of the public safety and welfare [*see Watson v. Division of Motor Vehicles (1931) 212 Cal. 279, 283, 298 P. 481]* . The Supreme Court has stated that the area of driving is particularly appropriate for extensive legislative regulation, and the state's traditionally broad authority to enact any measure that reasonably relates to public health or safety under its police power operates with full force in this domain [*Burg v. Municipal Court (1983) 35 Cal. 3d 257, 266, 198 Cal. Rptr. 145, 673 P.2d 732]* .

[2] Authority of Department

The Director of Motor Vehicles of the State of California is the chief executive officer of the Department [*see Veh. Code § 1504*], and he or she is required to administer and enforce the provisions of the Vehicle Code relating to the Department [*Veh. Code § 1650*]. The Department is an administrative agency of legislative origin [*see Veh. Code § 1500*], and it derives all of its authority from the Legislature. That authority includes driver licensing, which is exclusive, and post-licensing regulation, which is shared with the courts.

The Department is authorized to control drivers by taking the following six kinds of action:

(1) Refusing to issue or renew a license [*see Veh. Code § 12805 et seq.*].

(2) Cancelling a license [*see Veh. Code §§ 13100* (definition), *17704* (failure of financial responsibility by minor), *17711* (release from liability of signator of minor's application for license), *17712* (death of signator of minor's application for license)].

(3) Suspending a license [*see Veh. Code §§ 13352(a)(1)-(3)* (conviction for driving under influence or engaging in speed contest), *13353(a)(1)* (refusal to submit to test), *13353.2* (administrative per se

suspension for driving under influence), *13357* (theft of vehicle), *13359* (grounds authorizing refusal to issue license), *13360*-13362 (violation of license restriction; failure to stop, reckless driving conviction, or manslaughter conviction; failure to surrender erroneously issued license, respectively), *13365* (failure to appear or pay fine), *13801* (refusal to submit to reexamination), *16070* (failure to prove financial responsibility), *16370* (failure to satisfy judgment for damages), *16374* (same), *16381* (default in payments on judgment), *16484* (inadequate proof of financial responsibility)].

(4) Revoking a license [*see Veh. Code §§ 13202* (conviction of controlled substances offense), *13350* (conviction for hit and run, felony in commission of which motor vehicle was used, reckless driving causing bodily injury), *13352(d)* (conviction in other state for driving under influence), *13353(a)(2), (3)* (refusal to submit to test), *13357* (theft of vehicle), *13359* (grounds authorizing refusal to issue license), *13360* (violation of license restriction), *13365* (failure to appear or pay fine)].

(5) Placing restrictions on a license [*see Veh. Code §§ 12812* (condition of probation for holder of class C or M license), *12813* (restrictions with respect to special mechanical devices or other restrictions to ensure safe operation)].

(6) Imposing probation in lieu of discretionary suspension or revocation [*see Veh. Code § 14250*].

The imposition of probation is always discretionary [*see Veh. Code §§ 15* ("may" as permissive), *14250* (Department "may in lieu of suspension or revocation place the person on probation"); *see also* discussion in *§ 92.26[3]*]. Regarding other actions, the Department in some cases has discretion whether to take action and in other cases is required to act, depending on the facts and the language of the applicable Vehicle Code section [*see Veh. Code § 15* ("shall" as mandatory, "may" as permissive)].

The Department's authority to regulate driving includes the authority to suspend or revoke or impose probation on a nonresident's privilege to drive in California, in the same manner and to the same extent as respects a resident driver [*see Veh. Code § 13552*]. It also includes the authority to control the driving privileges of unlicensed persons [*see Veh. Code § 13553*]. As a practical matter, however, such persons are controlled by the courts through criminal prosecutions for driving without a license.

[3] Constitutional Limits on Authority

Once a driver's license is issued, its continued possession may become essential in the pursuit of a livelihood [*Rios v. Cozens (1972) 7 Cal. 3d 792 , cert. granted and remanded, 410 U.S. 425 , decision on remand, 9 Cal. 3d 454*]. Thus, suspension, revocation, cancellation, and the imposition of probation or restrictions as to existing licenses involve state action that adjudicates important interests of the licensees. Licenses may not, therefore, be taken away without procedural due process [*see Bell v. Burson (1971) 402 U.S. 535, 539, 91 S. Ct. 1586, 29 L. Ed. 2d 90* ; *see also Rios v. Cozens (1972) 7 Cal. 3d 792, 795-799 , cert. granted and remanded, 410 U.S. 425 , decision on remand, 9 Cal. 3d 454* ; *Mackey v. Montrym (1979) 443 U.S. 1, 10, 99 S. Ct. 2612, 61 L. Ed. 2d 321* ; *Cinquegrani v. Department of Motor Vehicles (2008) 163 Cal. App. 4th 741, 750, 77 Cal. Rptr. 3d 816* ; *Smith v. Department of Motor Vehicles (1986) 179 Cal. App. 3d 368, 373 n.2, 224 Cal. Rptr. 543* (right to retain driver's license, once issued, is fundamental right for purposes of standard of judicial review of administrative decision to suspend or revoke)].

Although the privileges conferred by a driver's license are an important property right, they are not, however, so fundamental a right as to trigger strict scrutiny analysis [*King v. Meese (1987) 43 Cal. 3d 1217, 1228, 240 Cal. Rptr. 829, 743 P.2d 889* ; for detailed discussion of due process as it relates to administrative actions generally, see Ch. 470A, *Due Process Restrictions on Public Agencies*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewGovernmentsState & Territorial GovernmentsPolice PowerTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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8-92 California Forms of Pleading and Practice--Annotated § 92.20

§ 92.20 Basic Licensing Law

The basic licensing law of California is that no person may drive a motor vehicle on a highway unless the person then holds a driver's license issued under the Vehicle Code, unless the person is expressly exempted under the code [*Veh. Code § 12500(a)-(c)*; *see Veh. Code §§ 12501-12505* (exempt persons); *People v. Spence (2005) 125 Cal. App. 4th 710, 723-724, 23 Cal. Rptr. 3d 92* (Section 12500 does not require knowledge that license is suspended)]. Further, no person may drive a motor vehicle or combination of vehicles that is not of a type for which the person is licensed [*Veh. Code § 12500(d)*].

In addition, no person may drive a motor vehicle on a highway when the person's driving privilege is suspended or revoked when the person has knowledge of such suspension or revocation. Knowledge of suspension or revocation is presumed if the Department has given notice to such person of the suspension or revocation. The presumption is a presumption affecting the burden of proof [*see Veh. Code §§ 14601-14601.5*].

Legal Topics:

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§ 92.21 Cancellation of License

When used in reference to a driver's license, "cancellation" means that a driver's license certificate is terminated without prejudice and must be surrendered. Cancellation may be made only when specifically authorized by the Vehicle Code [*see, e.g., Veh. Code §§ 17704, 17711, 17712* (termination of adult's consent for minor's license)], when application is made for a license to operate vehicles of a higher class, or when a license has been issued through error or voluntarily surrendered to the Department. Any person whose license has been cancelled may immediately apply for a license [*Veh. Code § 13100*].

Legal Topics:

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§ 92.22 Suspension and Revocation Distinguished

When used in reference to a driver's license, "suspension" means that a person's privilege to drive a motor vehicle is temporarily withdrawn [*Veh. Code § 13102*]. "Revocation" means that a person's privilege to drive a motor vehicle is terminated, and a new driver's license may be obtained after the period of revocation [*Veh. Code § 13101*]. As a practical matter, the distinction is that a license under suspension remains valid but not usable. If it is not expired when the suspension ends, the surrendered license certificate will be returned to the licensee. When a license is revoked, the effect is the same as expiration: the license ceases to exist. When the revocation is ended, the person may apply for a new license as in the case of the original application.

Legal Topics:

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§ 92.23 Suspension or Revocation of License Issued to Person Under 21

Generally, for purposes of suspension or revocation of any driver's license issued to a minor, the Department has no authority to provide any lighter penalty than would be given to an adult under similar circumstances [*Veh. Code § 13367*].

Effective January 1, 1994, persons under 21 years of age and minors (persons under 18) are subject to special provisions of the implied consent and administrative per se laws, under which their driving privileges may be suspended or revoked for driving a motor vehicle while under the influence of alcohol [*see Veh. Code §§ 13353, 13353.2, 13382, 13388, 13390, 23136*]. These provisions may apply in situations in which a driver under the age of 21 years has a blood-alcohol concentration of 0.01 percent or greater, as measured by a preliminary alcohol screening test or other chemical test [*see Veh. Code §§ 13353.2(a)(2), 23136*].

This standard is significantly more restrictive than that applicable to adult drivers 21 years of age of older (*i.e.*, blood-alcohol content of 0.08 percent or greater). The new provisions are intended to address the problem of drunk drivers under the legal age for purchasing or possessing alcoholic beverages [*see* Stats. 1993, ch 899, § 1]. For further discussion, see *§ 92.80* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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8-92 California Forms of Pleading and Practice--Annotated § 92.24

§ 92.24 Mandatory and Discretionary Suspension or Revocation Distinguished

A chief distinguishing characteristic of mandatory suspension or revocation is that, generally, a person is not entitled to a hearing in any case in which action by the Department is made mandatory by the Vehicle Code [*see Veh. Code § 14101(a)*]. There are exceptions in which a right to hearing is specifically granted, however [*see, e.g., Veh. Code §§ 13353.1(d)* (driving under influence; persons under age 21), *13558(a)* (implied consent and administrative per se laws), *13954* (accident caused by driver under influence with prior vehicular manslaughter conviction); *see also § 92.25*]. For discussion of the procedures for a hearing based on action by the Department generally, see *§ 92.100* et seq.

In addition, whenever the Department has discretionary authority to suspend or revoke a person's driving privilege, the Department may in lieu of suspension or revocation place the person on probation [*see Veh. Code § 14250*].

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8-92 California Forms of Pleading and Practice--Annotated § 92.25

§ 92.25 Mandatory Suspension or Revocation of License

[1] Conviction for Specified Offenses

On receipt of a duly certified abstract of the record of any court showing that a person has been convicted of certain crimes or offenses, the Department is required to immediately revoke, or in certain cases suspend, the person's driving privilege [*see Veh. Code §§ 13202.3, 13350, 13351, 13351.5, 13352, 13352.3, 13352.6, 13355, 13357*].

Those crimes or offenses are:

- Failure to stop and render assistance after being involved in an accident resulting in injury or death [*see Veh. Code § 13350(a)(1)*].
- Use of a motor vehicle in commission of a felony [*see Veh. Code § 13350(a)(2)*].
- Reckless driving causing bodily injury [*see Veh. Code § 13350(a)(3)*].
- Manslaughter resulting from the operation of a motor vehicle [*see Veh. Code § 13351(a)(1)*].
- Multiple convictions of failure to stop after an accident and reckless driving [*see Veh. Code § 13351(a)(2)*].
- Gross vehicular manslaughter while under the influence or flight from pursuing officer causing serious injury [*see Veh. Code § 13351(a)(3)*].
- Driving while under the influence [*see Veh. Code § 13352(a)(1)-(7)*].
- Engaging in speed contests or exhibition of speed [*see Veh. Code § 13352(a)(8), (9)*].

- Conviction of juvenile for driving while under the influence [*see Veh. Code § 13352.3*].

- Conviction of person who is 18 years or older of violation of *Veh. Code § 23140* (operation of vehicle by person under 21 years, whose blood alcohol is 0.05 percent or more, by weight) [*Veh. Code § 13352.6*].

- Driving in excess of 100 miles per hour [*see Veh. Code § 13355*].

- Theft of motor vehicle [*see Veh. Code § 13357*].

- Assault with a deadly weapon in violation of *Penal Code § 245*, when the court finds that a vehicle constituted the deadly weapon or instrument used to commit the offense [*see Veh Code § 13351.5(a)*].

Veh. Code § 13352.3(a), above, relating to revocation of the license of a person under the age of 18 for driving under the influence, has been interpreted to mean that the violation, not the conviction, must have occurred while the person was under the age of 18 [*Mayo v. Department of Motor Vehicles (1987) 193 Cal. App. 3d 406, 410, 238 Cal. Rptr. 465]* .

The statutes governing mandatory suspension or revocation also state, when applicable, a period of time after which the person may apply for reinstatement, and any conditions required for that reinstatement [*see Veh. Code §§ 13202.3, 13350, 13351, 13351.5, 13352, 13352.3, 13355*].

Generally, whenever the Vehicle Code requires the Department to suspend or revoke a person's driving privilege because of a conviction of a Vehicle Code violation, the suspension or revocation begins on a plea, finding, or verdict of guilty [*Veh. Code § 13366*].

Department action to revoke or suspend the driving privilege requires sufficient, admissible evidence of the conviction. The Department's action is triggered by its receipt of a duly certified abstract of the record of any court showing the appropriate conviction [*see Veh. Code § 13352(a)*; *Draeger v. Reed (1999) 69 Cal. App. 4th 1511, 1522-1523, 82 Cal. Rptr. 2d 378* (traffic citation is properly included in record of conviction as charging document, but standing alone is insufficient; police report may not be considered); *see also Brierton v. Dept. of Motor Vehicles (2006) 140 Cal. App. 4th 427, 435-436, 44 Cal. Rptr. 3d 480* (DMV's mandatory suspension does not violate the separation of powers doctrine)].

[2] Commercial Driving Privileges

If the Vehicle Code requires the Department to suspend or revoke a person's driving privilege because of a conviction under *Veh. Code §§ 23152* or *23153* (driving under the influence) or *Veh. Code § 23109(a)* (speed contests), and the violation occurred in a "commercial motor vehicle" (defined in *Veh. Code § 15210*), the revocation and suspension provisions of *Veh. Code § 13352* apply to noncommercial driving privileges, while the commercial driving privileges are governed by *Veh. Code § 15300* (requiring revocation of commercial driving privileges for specified offenses), and *Veh. Code § 15302* (revocation for life on more than one conviction for specified offenses) [*see Veh. Code § 13352(a)*]. The holder of a commercial driver's license who was operating a commercial motor vehicle at the time of a violation that resulted in a suspension or revocation of the person's noncommercial driving privilege under *Veh. C. § 13352* is not eligible for the restricted driver's license authorized under *Veh. C. § 13352(a)(3) to (7)* [*Veh. C. § 13352(g)*]. One court has held that the one-year commercial license disqualification imposed by *Veh. Code § 15300(a)(1)* requires a conviction of driving under the influence under *Veh. Code § 23152(a)* when the offense was committed while operating a commercial motor vehicle [*Hamilton v. Gourley (2002) 103 Cal. App. 4th 351, 359, 126 Cal. Rptr. 2d 652]* . Thus, the court held that the Department lacked jurisdiction to impose the one-year suspension prescribed by *Veh. Code §*

15300(a)(1), based on a conviction under *Veh. Code § 23152(b)* (driving a vehicle with a.08 percent blood alcohol concentration), where that offense lacks the element that the driver be "under the influence" of alcohol at the time of the violation [*Hamilton v. Gourley (2002) 103 Cal. App. 4th 351, 360-362, 126 Cal. Rptr. 2d 652]* .

[3] Violation of Implied Consent or Administrative Per Se Laws

[a] Failure to Complete Chemical Test Successfully

Under implied consent law, the Department is required to suspend or revoke a person's privilege to operate a motor vehicle if the person refuses an officer's request to submit to, or fails to complete, a chemical test as specified [*see Veh. Code §§ 13353, 23612*]. Under the administrative per se law, the Department must immediately suspend the privilege of any person to operate a motor vehicle if the person was driving with an unlawful blood alcohol level [*see Veh. Code §§ 13353.2, 13382(a)*].

Under both administrative acts, notice of the order of suspension or revocation is served on a person by the arresting officer, acting on behalf of the Department [*see Veh. Code §§ 13382(a), 23612(e)*]. The period of the suspension or revocation is generally determined by reference to any prior convictions that the person may have [*see Veh. Code §§ 13353(a), (b), 13353.1, 13353.3(b), 13382(a), 23612(e)*]. If certain conditions are satisfied the effective dates of action taken by the Department may run consecutively under an order by a sentencing court [*see Veh. Code § 13354*].

Although suspension or revocation is mandatory under these statutes, the Vehicle Code expressly provides for administrative review by hearing [*see Veh. Code § 13558*].

For further discussion of the implied consent and administrative per se laws, see *§ 92.40 et seq. and § 92.60* et seq., respectively.

[b] By Persons Under 21 and Minors

Special provisions of the implied consent law govern minors (persons under 18 years of age), and special provisions of the administrative per se law govern persons under the age of 21 years. Essentially, these provide different standards for determining unlawful alcohol intoxication as compared to drivers who are 21 years of age or older, e.g.:

- A driver under the age of 21 years who has 0.05 percent or more, by weight, of alcohol in his or her blood [*see Veh. Code §§ 13353, 23140*].

- A driver under the age of 21 years who has blood-alcohol concentration of 0.01 percent or greater as measured by a preliminary alcohol screening test or other chemical test [*see Veh. Code §§ 13353.2(a)(2), 23136*].

For further discussion, see *§ 92.80* et seq.

[4] Accident by Driver With Prior Manslaughter Conviction

Notwithstanding any other provision of the Vehicle Code, the Department immediately must suspend or revoke the driving privilege of any person who the Department has reasonable cause to believe was in some manner involved in an accident while operating a motor vehicle under the following circumstances at the time of the accident [*Veh. Code § 13954(a)*]:

- The person had an unlawful percentage, by weight, of alcohol in his or her blood.

- He or she proximately caused the accident as a result of any act prohibited, or the neglect of any duty

imposed, by law.

- The accident occurred within five years of the date of a violation of *Penal Code § 192(c)(3)* (vehicular manslaughter in violation of drunk driving statute while committing an unlawful act) which resulted in a conviction.

The period of suspension or revocation depends on which of the drunk driving statutes (*Veh. Code § 23152* or *23153*) the person is convicted under, and the existence of prior convictions [*see Veh. Code § 13954(c), (d)*].

The Department must immediately notify the person in writing of the action taken [*Veh. Code § 13954(e)*].

Although the administrative action under this section is mandatory, the section expressly provides for administrative review by hearing. On the person's written request and within 15 days from the date of receipt of that request, the Department must grant the person an opportunity for a hearing in the same manner and under the same conditions as provided under *Veh. Code § 14100 et seq.* [*Veh. Code § 13954(e)*].

The scope of the hearing covers whether the peace officer had reasonable cause to believe the person had been driving a motor vehicle in violation of drunk driving statutes *Veh. Code § 23152* or *23153*; whether the driver had been placed under lawful arrest; and whether a chemical test of the person's blood, breath, or urine indicated that the blood alcohol level wasan unlawful percentage, by weight, at the time of testing [*Veh. Code § 13954(e)*].

[5] Failure to Appear or Pay Fine

If the Department receives notification that a person has violated *Veh. Code § 40508* (willful failure to appear as promised or to pay fine), the Department must suspend the person's driving privilege as specified [*see Veh. Code § 13365(a)(1),(2)*]. The suspension continues until the suspended person's driving record does not contain any notification of the violation [*see Veh. Code § 13365(b)*].

[6] Failure to Comply With Court Order

If the Department receives notice from a magistrate or a clerk of the court pursuant to *Veh. Code § 40509, 40509.1*, or *40509.5* that a person has willfully failed to comply with a court order issued for a Vehicle Code violation other than failure to appear or failure to pay a fine or, pursuant to *Veh. Code § 40509.1*, for a code violation other than failure to attend traffic violator school, the Department must suspend that person's driving privilege [*Veh. Code §§ 13365.5, 40509.5(f)*]. The requirement does not apply to specified code violations reported under *Veh. Code § 1803(b)* [*Veh. Code §§ 13365.5(b), 40509.5(f)*].

The magistrate or clerk of the court is not required to provide the Department with notice of compliance, except in cases when a person is charged with a violation of *Veh. Code §§ 23152* or *23153* or *Penal Code §§ 191.5* or *192(c)(3)* relating to vehicular manslaughter or driving under the influence of drugs or alcohol. In those cases, notice to the Department is mandatory [*Veh. Code §§ 40509(a), 40509.1, 40509.5(c), (f)*]. However, if a notice is received under these provisions, the Department must suspend the driving privileges of the person involved [*Veh. Code § 13365.5*].

The suspension is effective 45 days after the Department notifies the person of the suspension action [*Veh. Code §§ 13365.5(a)*, 40905.5(f)] or, if notice is provided under Veh. Code §§ 40905 or 40905.5, until the end of any stay of suspension [Veh. Code § 40905.5(f)]. The suspension continues until the person complies with the underlying order or, if the notice has been on file for five years or more (or in cases under *Veh. Code §§ 23152* or *23153* or *Penal Code §§ 191.5* or *192(c)(3)* involving vehicular manslaughter or driving under the influence of drugs or alcohol, 10 years or more), until the Department, in its discretion, removes the notice from its records [*Veh. Code §§ 12808(c), 13365.5(a)*].

[7] Payment of Certain Fines, Fees, and Penalties With Dishonored Check

The Department must suspend a person's driving privilege on receipt of notice that a bank or financial institution has dishonored a check that the person presented to the Department in payment of either of the following [*Veh. Code § 13364*]:

- A fine that resulted from an outstanding violation pursuant to *Veh. Code. § 40508* (wilful failure to appear as promised or to pay fine).

- A fine that resulted from a suspension for violation of *Veh. Code § 40508* (wilful failure to appear as promised or to pay fine) or a court order issued under *Veh. Code § 13365* (payment of fine in installments or in a specified time).

If any personal check is offered in payment of fines described in the instances described, *above*, and is returned for any reason, the related notice issued pursuant to *Veh. Code §§ 40509* or *40509.5* must be restored to the person's record [*Veh. Code § 13364(e)*].

The suspension is effective 30 days after the Department mails written notice of the intent to suspend by certified mail and remains in effect until payment of the delinquent fines, fees, and penalties and until the person's driving record no longer includes a notice of a court order issued under *Veh. Code § 42003(a)* or a notice of a violation of *Veh. Code § 40508(a)* or *(b)* [*Veh. Code § 13364(b), (c)*]. However, a license suspended under these provisions must be reinstated immediately, and the fees and penalties waived, on submission of proof acceptable to the Department that the check in question was erroneously dishonored [*Veh. Code § 13364(f)*].

Legal Topics:

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§ 92.26 Discretionary Suspension or Revocation of License

[1] Applicable Circumstances

[a] Grounds Exist That Would Permit Refusal

The Department may suspend or revoke the privilege of any person to operate a motor vehicle on any of the grounds that authorize the refusal to issue a license [*Veh. Code § 13359*; *see Veh. Code §§ 12805, 12807, 12809*].

[b] Violation of License Restrictions

On receiving satisfactory evidence of any violation of the restrictions of a driver's license, the Department may suspend or revoke the license [*Veh. Code § 13360*].

[c] Conviction for Specified Offenses

The Department may suspend the privilege of any person to operate a motor vehicle on receipt of a duly certified abstract of the record of any court showing that the person has been convicted of any of the following crimes or offenses:

- Failure to comply with the requirements of *Veh. Code § 20002* in the event of an accident resulting in damage to property only [*Veh. Code § 13361(a)*].

- A second or subsequent conviction of reckless driving [*Veh. Code § 13361(b)*].

- Manslaughter resulting from the operation of a motor vehicle as provided in *Penal Code § 192(c)(2)* [*Veh. Code § 13361(c)*].

In addition, the Department may, in its discretion, except as provided in *Veh. Code § 15000 et seq.* (Driver License

Compact), suspend or revoke the privilege of any resident or nonresident to drive a motor vehicle in California on receiving notice of the conviction of the person in a state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or the Dominion of Canada of an offense therein that, if committed in California, would be grounds for the suspension or revocation of the privilege to operate a motor vehicle [*Veh. Code § 13363(a)*].

[d] Failure to Surrender Erroneous License

The Department may require a licensee to surrender any driver's license that has been issued erroneously, contains any erroneous or false statement, or does not contain any notation required by law or by the Department. In the event a licensee does not surrender the license on proper demand, the Department may suspend the licensee's privilege to operate a motor vehicle. The suspension continues until the correction of the license by the Department or until issuance of another license or temporary license in lieu of thereof [*Veh. Code § 13362*].

[e] Failure to Submit to Reexamination

If a licensee refuses or fails to submit to reexamination, as required by the Department after notice, the Department may peremptorily suspend the driving privilege of the person until such time as the licensee shall have submitted to the reexamination. The suspension is effective on notice [*Veh. Code § 13801*]. For discussion relating to reexamination generally, see *§ 92.28[2]*.

[f] Determination That Safety Requires Action

In the event the Department determines on investigation or reexamination that the safety of the person subject to the investigation or reexamination or other person on the highways require such action, the Department is required to forthwith and without hearing suspend or revoke the privilege of the person to operate a motor vehicle or impose reasonable terms and conditions of probation that is to be relative to the safe operation of a motor vehicle [*see Veh. Code § 13953*]. For discussion relating to investigation and reexamination, see *§ 92.28*.

[2] Duration of Suspension

[a] When Not Specifically Prescribed

Unless otherwise specifically provided for in *Veh. Code § 13100 et seq.*, governing suspension or revocation of licenses, no suspension of a license by the Department may be for a longer period than six months. An exception applies, however, with regard to those cases in which a discretionary revocation would otherwise be authorized under *Veh. Code § 13100 et seq.*; in such cases the Department may suspend a license for a maximum period of 12 months [*Veh. Code § 13556(a)*].

[b] When Termination Is Dependent on Licensee

Any discretionary suspension, the ending of which depends on an action by the person suspended and which has been in effect for eight years, may be ended at the Department's election [*Veh. Code § 13556(b)*].

[c] When Suspension Is Based on Physical or Mental Condition

A suspension based on a physical or mental condition continues until evidence satisfactory to the Department establishes that the cause for which the action was taken has been removed or no longer renders the person incapable of operating a motor vehicle safely [*Veh. Code § 13556(c)*].

[3] Probation

Whenever the Department has discretionary authority by any Vehicle Code provision to suspend or revoke the privilege of a person to operate a motor vehicle, the Department may in lieu of suspension or revocation place the person on probation. The terms of the probation may include a suspension as a condition of probation, issuing a probationary license with such reasonable terms and conditions as deemed by the Department to be appropriate [*Veh. Code § 14250*]. The Department, as a condition of probation, may require the person to attend, for a period not to exceed 24 hours, an authorized driver education and training program [*Veh. Code § 14250.5*]. The Department may terminate or modify the terms or conditions of a probation order whenever good cause appears therefor [*Veh. Code § 14251*]. It may also, on receiving satisfactory evidence of a violation of any probation terms or conditions imposed under the Vehicle Code, withdraw the probationary license and order suspension or revocation of the privilege to operate a motor vehicle [*Veh. Code § 14252*].

Legal Topics:

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§ 92.27 Suspension or Revocation of Certificate

The Vehicle Code provides various circumstances for the Department to revoke, suspend, or cancel certificates or endorsements relating to specified occupations [*see Veh. Code § 13369 et seq.*].

Those certificates or endorsements include: passenger transport vehicle [*see Veh. Code § 13369*]; hazardous materials [*see Veh. Code § 13369*]; school bus [*see Veh. Code §§ 13369-13371*]; school pupil activity bus [*see Veh. Code §§ 13369-13371*]; youth bus [*see Veh. Code §§ 13369-13371*]; general public paratransit vehicle [*see Veh. Code §§ 13369-13371*]; farm labor vehicle [*see Veh. Code § 13369*]; vehicle used for the transportation of developmentally disabled persons [*see Veh. Code § 13369*]; ambulance driver [*see Veh. Code §§ 13372-13374*]; and tow truck driver [*see Veh. Code § 13377*].

The right to an administrative hearing to review the Department's decision in a particular case would appear to be similar to that governing action on a driver's license. Thus, if the action is mandatory, the person would not be entitled to a hearing unless otherwise provided [*see Veh. Code § 14101*; *see also Veh. Code §§ 13371* (hearing relating to school bus, school pupil activity bus, youth bus, certificate for vehicle used for transportation of developmentally disabled persons, and general public paratransit vehicle certificates), *13376* (same), *13374* (hearing relating to ambulance driver certificate), *13378* (hearing relating to tow truck certificate)]. On the other hand, if the Department's action is discretionary, it appears that review by hearing is available [*see Veh. Code §§ 13950, 13951, 14100(a)*; *see also Veh. Code § 310* (definition of "driver's license" is valid license to drive type of motor vehicle for which a person is licensed under Vehicle Code; hence definition appears to include certificates and endorsements thereto)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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8-92 California Forms of Pleading and Practice--Annotated § 92.28

§ 92.28 Investigation

[1] Bases for Investigation

[a] Broad Authority

The Department has broad authority to conduct an investigation to determine whether a driver's license should be or must be suspended or revoked (or whether probation should be imposed instead) [*see Veh. Code § 13800*]. An investigation may be commenced whenever the Department receives information or discovers from its records that a ground for action probably exists. Six kinds of information are listed in *Veh. Code § 13800*. It is not clear from the language of the statute whether the list is exclusive or whether other circumstances would permit the Department to conduct an investigation. The circumstances listed are as follows [*Veh. Code § 13800*]:

(1) A driver has been involved in any accident causing death or personal injury or serious damage to property. This information usually reaches the Department through official channels, such as police reports and driver accident reports [*see Veh. Code § 16000* (discussed in Subdivision 5 (*see § 92.90* et seq.) of this Subpart].

(2) The licensee has been involved in three or more accidents within a period of 12 consecutive months. This information is usually brought to the Department's attention by its computer.

(3) The person, within three consecutive years:

(a) Has committed three or more offenses that have resulted in convictions involving the consumption of an alcoholic beverage or drug, or both, while operating a motor vehicle [*see Veh. Code § 13800(c)* (setting forth partial list of offenses)].

(b) Has been involved in three or more accidents in which the accident reports show that the person was driving and had consumed alcoholic beverages or drugs, or both.

(c) Had any combination of three or more of those offenses and accidents. The Department might be informed of this information from abstracts of conviction records, in the case of the convictions, and through its own computer, in the case of the frequency of reported accidents.

(4) The licensee is a reckless, negligent, or incompetent driver of a motor vehicle. A source of this information may be the driver's family and friends, who may report the driver's consistent inability to drive safely. The cause may be, for example, advanced age or chronic illness. Another source of such information may be conservatorship proceedings. The superior court in some counties have routinely sent the Department copies of its orders in such cases.

(5) The licensee has permitted an unlawful or fraudulent use of his or her driver's license. The Department, apparently, investigates uses of a license certificate which are unlawful or fraudulent under the Penal Code, as well as uses which are unlawful under the Vehicle Code.

(6) Any ground exists for which a license might be refused [*see Veh. Code § 12805 et seq.*; *see also Veh. Code § 13359* (Department may suspend or revoke on grounds that authorize refusal)]. This is the broadest category [*see Veh. Code §§ 13359, 12805-12809*]. The receipt by the Department of an abstract of the record of conviction of any offense involving the use or possession of narcotic controlled substances under *Health & Safety Code § 11000 et seq.* is a sufficient basis for an investigation by the Department to determine whether grounds exist for which a license might be refused [*Veh. Code § 13800(f)*].

[b] Determining Negligent Driver by Violation of Point Count

As discussed in [a], *above*, the Department may conduct an investigation to determine whether the privilege of any person to operate a motor vehicle should be suspended or revoked, or to impose probation, on receiving information that a licensee is a negligent driver [*Veh. Code § 13800(d)*]. A driver may be prima facie presumed to be a negligent operator of a motor vehicle under a schedule of "points" to be assigned to drivers for various traffic convictions [*see Veh. Code § 12810.5(a)*]. The Department has referred to this program as the "Negligent Operator Treatment System" or "NOTES."

Veh. Code § 12810.5 provides that, with an exception relating to certain classes of drivers discussed *below*, a person whose driving record shows a violation point count of four or more points in 12 months, six or more points in 24 months, or eight or more points in 36 months, shall be prima facie presumed to be a negligent operator of a motor vehicle. Application of the presumption in individual cases is qualified by the proviso that the Department is required to give due consideration to the amount of use or mileage traveled by the driver in question [*Veh. Code § 12810.5(a)*].

An exception under the schedule of points entitles certain classes of drivers to a higher point count. If a person is a class A, or class B licensed driver who is presumed to be a negligent operator under *Veh. Code § 12810.5(a)*, discussed *above*, and who requests and appears at a hearing and is found to have a driving record violation point count of six or more points in 12 months, eight or more points in 24 months, or 10 or more points in 36 months, then he or she will be presumed to be a prima facie negligent operator [*Veh. Code § 12810.5(b)(1)*; *see Veh. Code § 12804.9* (establishing A, B, C, and M classes of licenses)].

The foregoing higher point count does not, however, apply to persons holding licenses in the above classes who are certified drivers or operators of a school bus or school pupil activity vehicle [*Veh. Code § 12517*], farm labor vehicle [*Veh. Code § 12519*], youth bus [*Veh. Code § 12523*], or general public paratransit vehicle [*Veh. Code § 12523.5*], or if the driver holds an endorsement to operate a 10-passenger transportation vehicle or certain hazardous waste vehicles [

Veh. Code § 15278(a)(2), (4); *see Veh. Code § 12810.5(b)(1)*].

In addition, the higher point count would not apply if the Department reasonably determines that four or more points in 12 months, six or more points in 24 months, or eight or more points in 36 months are attributable to the driver's operation of a vehicle requiring only a class C license, and not requiring a certificate or endorsement, or a class M license [*Veh. Code § 12810.5(b)(1)*].

For the purpose of *Veh. Code § 12810.5(b)(1)*, each point assigned under *Veh. Code § 12810* is valued at one and one-half times the value otherwise required by under that section for each violation reasonably determined by the Department to be attributable to the driver's operation of a vehicle requiring a class A or class B license, or requiring a certificate or endorsement described above [*Veh. Code § 12810.5(b)(2)*].

In addition, the Department may require a negligent operator whose driving privilege is suspended or revoked pursuant to *Veh. Code § 12810.5* to submit proof of financial responsibility as defined in *Veh. Code § 16430*. The proof of financial responsibility must be filed on or before the date of reinstatement following the suspension or revocation and must be maintained with the department for three years following that date of reinstatement [*Veh. Code § 12810.5(c)*; for discussion of proof of financial responsibility generally, *see § 92.90* et seq.].

[c] Provisional License Program for Minors

Comparable to the Negligent Operator Treatment System, discussed in [b], *above*, the Department administers a provisional licensing program that applies to persons under 18 years of age. Under that program, the Department must take specified action when a driver's record shows a violation in excess of a designated point count [*see Veh. Code § 12814.6(e)*; *Essayli v. Department of Motor Vehicles (2005) 131 Cal. App. 4th 1251, 1255-1258, 32 Cal. Rptr. 3d 609* (minor driver properly assessed two points on driving record based on speeding violation and related automobile accident)].

[2] Reexamination

In addition to an investigation (*see* [1], *above*), the Department may require a reexamination of the licensee [*Veh. Code § 13801*]. The Department must give 10 days' written notice of the time and place of the reexamination. If the licensee refuses or fails to submit to the reexamination, the Department may peremptorily suspend the driving privilege of the person until such time as the licensee has submitted to reexamination. The suspension is effective on notice [*Veh. Code § 13801*].

[3] Notice of Proposed Action and Opportunity to Be Heard

Whenever the Department, after investigation or reexamination, proposes to revoke or suspend a person's driving privilege, or proposes to impose terms of probation on the privilege, the Department must give him or her notice and an opportunity to be heard before taking the action. The notice of proposed action and opportunity to be heard follows the Department's determination that any of the grounds for reexamination are true, or that the safety of the person investigated or reexamined, or other persons on the highways, requires that action [*Veh. Code § 13950*].

Whenever the Department proposes to refuse to issue or renew a driver's license, it must similarly notify the applicant of that fact and give him or her an opportunity to be heard [*Veh. Code § 13951*].

The notice must contain a statement setting forth the proposed action and the grounds therefor, and must notify the person of his or her right to a hearing as provided in *Veh. Code § 14100 et seq.* [for discussion, *see § 92.100* et seq.]. Otherwise, the Department, at the time it gives notice of its intention to act may set the date of hearing, giving 10 days' notice thereof [*Veh. Code § 13952*].

[4] Alternative Immediate Suspension

As an alternative to the procedure under *Veh. Code §§ 13950-13952*, in the event the Department determines on investigation or reexamination that the safety of the person subject to investigation or reexamination or other persons on the highways require such action, the Department must forthwith and without hearing suspend or revoke the privilege of the person to operate a motor vehicle or impose reasonable terms and conditions of probation that are to be relative to the safe operation of a motor vehicle [*Veh. Code § 13953*].

Generally, no order of suspension or revocation or the imposition of terms or conditions of probation may become effective until 30 days after the Department gives written notice thereof to the person affected. An exception applies, however, when, in the Department's opinion, the mental or physical condition of the person requires immediate action for the safety of the driver or other persons on the highways. In such a case, the Department has the authority to make the order effective immediately on the giving of notice [*Veh. Code § 13953*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.29 Suspension or Revocation as Not Affected by Court Action

A termination of probation and dismissal of charges pursuant to *Penal Code § 1203.4* (fulfillment of probation conditions or best interest of justice is served) or a dismissal of charges pursuant to *Penal Code § 1203.4a* (rehabilitation of misdemeanant) does not affect any revocation or suspension of the privilege of the person convicted to drive a motor vehicle under *Veh. Code §§ 13100-13559*. The person's prior conviction is required to be considered a conviction for the purpose of revoking, suspending, or otherwise limiting such privilege on the ground of two or more convictions [*Veh. Code § 13555*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 92.30 Surrender of License Certificate

Whenever a person is convicted of any offense for which the Vehicle Code makes suspension or revocation by the Department mandatory, the court in which the conviction is had must require the person convicted to surrender his or her license certificate to the court. The court thereafter sends the license certificate to the Department [*see Veh. Code § 13550*].

Whenever the Department suspends or revokes a driver's license, the action covers all licenses issued to the person, and all license certificates must be surrendered to the Department or, under *Veh. Code §§ 13382*, *13388*, or *23612*, to a peace officer on behalf of the Department, unless previously surrendered to a court [*Veh. Code § 13551(a)*]. A cancelled license certificate must also be surrendered [*Veh. Code § 13551(a)*].

Legal Topics:

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

§§ 92.31[Reserved]

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§ 92.40 Implied Consent Law in General

[1] Background and Purpose

In 1966, the Legislature enacted the implied consent statute [former *Veh. Code § 13353* (*now see Veh. Code §§ 13353, 13558, 23612*)] to fulfill the need for "a fair, efficient and accurate system of detection and prevention of drunken driving" [*Kesler v. Department of Motor Vehicles (1969) 1 Cal. 3d 74, 77, 81 Cal. Rptr. 348, 459 P.2d 900]* .

The law is intended to obtain the best evidence of blood alcohol content at the time of arrest by means of securing the civil cooperation of all persons privileged to drive [*Troppman v. Valverde (2007) 40 Cal. 4th 1121, 1133, 57 Cal. Rptr. 3d 306, 156 P.3d 328* ; *Smith v. Department of Motor Vehicles (1986) 179 Cal. App. 3d 368, 374, 224 Cal. Rptr. 543]* . Its ultimate purpose is to inhibit intoxicated persons from driving on the highways [*Troppman v. Valverde (2007) 40 Cal. 4th 1121, 1133, 57 Cal. Rptr. 3d 306, 156 P.3d 328* ; *Molenda v. Department of Motor Vehicles (2009) 172 Cal. App. 4th 974, 993, 91 Cal. Rptr. 3d 792* (discussing admissibility of blood test results); *People v. Ryan (1981) 116 Cal. App. 3d 168, 182, 171 Cal. Rptr. 854]* . The implied consent statute does not require evidence that actual driving occurred immediately prior to the arrest for driving under the influence [*Troppman v. Valverde (2007) 40 Cal. 4th 1121, 1125-1126, 57 Cal. Rptr. 3d 306, 156 P.3d 328]* .

Before the enactment of the statute, courts held that when a person has been lawfully arrested for drunk driving, the police, utilizing appropriate medical procedures, may forcibly remove a blood sample from the driver without his or her consent [*Hernandez v. Department of Motor Vehicles (1981) 30 Cal. 3d 70, 77, 177 Cal. Rptr. 566, 634 P.2d 917* ; *see also Mercer v. Department of Motor Vehicles (1991) 53 Cal. 3d 753, 758-759, 280 Cal. Rptr. 745, 809 P.2d 404* (noting that regardless whether terms of implied consent statute are met, forcible, warrantless chemical testing may occur)]. Despite the legality of such a coercive procedure, the Legislature recognized that such an episode "remains an unpleasant, undignified and undesirable one" [*Hernandez v. Department of Motor Vehicles (1981) 30 Cal. 3d 70, 77, 177 Cal. Rptr. 566, 634 P.2d 917]* .

In enacting *Veh. Code § 13353*, the Legislature sought to obviate these consequences for the driver and avoid the

possible violence that could erupt "if forcible tests were made on a recalcitrant and belligerent inebriate," while at the same time preserving the state's strong interest in obtaining the best evidence of the driver's blood alcohol content at the time of the arrest. Thus, the Legislature devised an additional or alternative method of compelling a person arrested for drunk driving to submit to a test for intoxication by providing that the person will lose his or her license for a specified period if the person refuses to submit an intoxication test [*see Hernandez v. Department of Motor Vehicles (1981) 30 Cal. 3d 70, 77, 177 Cal. Rptr. 566, 634 P.2d 917]* . The effect of the legislation, according to the Supreme Court, is to equip peace officers with an instrument of enforcement not involving physical compulsion [*see Hernandez v. Department of Motor Vehicles (1981) 30 Cal. 3d 70, 77, 177 Cal. Rptr. 566, 634 P.2d 917* ; *see also Mercer v. Department of Motor Vehicles (1991) 53 Cal. 3d 753, 760-761, 280 Cal. Rptr. 745, 809 P.2d 404* (citing R. Erwin, Defense Of Drunk Driving Cases, Ch. 33 (Matthew Bender), Court contrasted California implied consent law with similar but less restrictive laws in other states)].

Effective July 1, 1990, the Legislature enacted the administrative per se law to provide law enforcement with another powerful means to summarily and administratively remove suspected intoxicated drivers from the highways [*see Veh. Code §§ 13353.2, 13382, 13558*]. Similarly, effective January 1, 1994, the Legislature enacted provisions to both the implied consent law and the administrative per se law designed to remove from the highways suspected intoxicated drivers who are under the legal "drinking age" of 21 years or older [*see Veh. Code §§ 13388, 13390, 23136*]. For further discussion of the administrative per se law and the provisions governing drivers under 21 years of age, see *§ 92.60* et seq. and § 92.80 et seq., respectively.

[2] Summary of Departmental Action

A person who drives a motor vehicle in California is deemed to have given consent to chemical testing for the purpose of determining the alcoholic or drug content of his or her blood [*Veh. Code § 23612(a)(1)*; *see Veh. Code § 13384* (Department may not issue or renew license unless person gives written consent to specified tests); *see Troppman v. Valverde (2007) 40 Cal. 4th 1121, 1125-1126, 57 Cal. Rptr. 3d 306, 156 P.3d 328* (statute does not require evidence that actual driving occurred immediately prior to arrest for driving under the influence); *Serenko v. Bright (1968) 263 Cal. App. 2d 682, 687, 70 Cal. Rptr. 1* (implied consent arises from act of driving rather than act of obtaining license)].

If a peace officer has reasonable cause to believe that a person was driving a motor vehicle in violation of the statutes that prohibit driving under the influence of drugs or alcohol, and has lawfully arrested the person, the officer may request that the person submit to a chemical test for the purpose of determining the alcohol content of the person's blood [*see Veh. Code §§ 13353(a), 23612(a)(1)*]. The officer's request is to be accompanied by certain warnings, including a warning of the consequences of refusing to submit to the test [*see Veh. Code § 23612(a)(1)*; *see also § 92.42*]. If the person refuses to submit to the test, the officer, acting on behalf of the Department, serves the person with a notice of order of suspension or revocation, and seizes all the person's driver's licenses issued by the state of California [*Veh. Code §§ 13353(a), 23612(f)*]. The notice includes an endorsement that functions as a temporary license [*Veh. Code §§ 13353(b), 23612(f)*; *Hildebrand v. Department of Motor Vehicles (2007) 152 Cal. App. 4th 1562, 1573, 62 Cal. Rptr. 3d 234]* . For further discussion, see *§ 92.43*.

The officer forwards the driver's license certificate with a sworn report to the Department and the Department is required to review the record to determine whether the suspension or revocation should be sustained [*see Veh. Code § 13557*; *see also § 92.44*]. In addition, the person may request review by an administrative hearing that is authorized to receive sworn testimony [*see Veh. Code § 13558*; *see also § 92.45*]. Unless the order of suspension or revocation is rescinded, it becomes effective 30 days from the date the person was served with the notice [*see Veh. Code § 13353(a)(3)(C)* (before July 1, 1993, order became effective 45 days from date of service); *see also § 92.43[2]*].

[3] Tests Permitted

[a] Testing for Alcoholic Content of Blood

A person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or breath for the purpose of determining the alcoholic content of his or her blood [*Veh. Code § 23612(a)(1)(A)*].

If a blood or breath test is not available, the person must submit to the remaining test in order to determine the percent, by weight, of alcohol in the person's blood [*Veh. Code § 23612(d)(2)*].

If both the blood and breath tests are unavailable, the person is deemed to have given his or her consent to chemical testing of his or her urine and must submit to a urine test [*Veh. Code § 23612(a)(1)(A), (d)(2)*].

[b] Testing for Drug Content of Blood

A person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or urine for the purpose of determining the drug content of his or her blood [*Veh. Code § 23612(a)(1)(B)*].

[4] Driver's Right to Request Testing

Although most of the provisions under the implied consent law relate to a person's refusal to submit to chemical testing, a person lawfully arrested for any offense allegedly committed while the person was driving a motor vehicle in violation of *Veh. Code §§ 23140, 23152* or *23153* (driving while under influence of alcohol or drugs) may himself or herself request the arresting officer to have a chemical test made of the arrested person's blood or breath for the purpose of determining the alcoholic content of his or her blood [*Veh. Code § 23612(d)(1)*]. If so requested, the arresting officer is required to have the test performed [*Veh. Code § 23612(d)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 92.41 Constitutional Questions

[1] Due Process and Equal Protection

As discussed in *§ 92.12[3]*, licenses may not be taken away without procedural due process [*Bell v. Burson (1971) 402 U.S. 535, 539, 91 S. Ct. 1586, 29 L. Ed. 2d 90]* . The implied consent statute has withstood the challenge, however, that it violates federal and state due process by suspending licenses without a factual determination that the person was actually intoxicated [*see Spurlock v. Department of Motor Vehicles (1969) 1 Cal. App. 3d 821, 829-830, 82 Cal. Rptr. 42]* .

In addition, the fact that *Veh. Code § 13353* does not include an exception for cases in which a driver's license is essential to the maintenance of his or her employment and livelihood does not constitute a denial of equal protection [*see Pepin v. Department of Motor Vehicles (1969) 275 Cal. App. 2d 9, 11, 79 Cal. Rptr. 657]* .

[2] No Right to Remain Silent

The *Fifth Amendment* right to remain silent does not protect a licensee in refusing to state whether he or she will submit to a test under *Veh. Code § 23612*. Further, there is no *First Amendment* right to remain silent in the face of a request that a licensee submit to a test [*Fallis v. Dept. of Motor Vehicles (1968) 264 Cal. App. 2d 373, 382, 70 Cal. Rptr. 595]* .

In addition, *Veh. Code § 23577*, which requires a period of confinement in the county jail if a person convicted of driving while under the influence of alcohol or drugs is also found to have willfully refused to take a blood, breath, or urine test, does not violate a driver's privilege against self-incrimination [*Quintana v. Municipal Court (1987) 192 Cal. App. 3d 361, 365-366, 237 Cal. Rptr. 397]* .

[3] Not a Bill of Attainder

Veh. Code § 23612 does not constitute a bill of attainder since it does not apply to a certain individual or narrowly

defined group but to all licensed drivers, the suspension of a license is civil in nature and does not constitute punishment for a crime, and the suspension proceedings are protected with administrative and judicial safeguards [*Westmoreland v. Chapman (1968) 268 Cal. App. 2d 1, 5, 74 Cal. Rptr. 363* (decided under prior version of *Veh. Code § 13353*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessSelf-Incrimination PrivilegeConstitutional LawEqual ProtectionGeneral OverviewCriminal Law & ProcedureCriminal OffensesVehicular CrimesDriving Under the InfluenceBlood Alcohol & Field SobrietyImplied ConsentGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.42 Warnings to Be Given Driver

[1] Warning of Consequences of Refusing to Test

The person arrested must be told that his or her failure to submit to the required chemical testing, or to complete the required chemical testing, will result in a fine and mandatory imprisonment if the person is convicted of a violation of *Veh. Code §§ 23152* or *23153* (driving while under the influence of alcohol or drugs), and will also result in one of the following [*Veh. Code § 23612(a)(1)*]:

(1) The suspension of the person's driving privilege for a period of one year.

(2) The revocation of his or her driving privilege for a period of two years if the refusal occurs within seven years of a separate violation of one of the following:

(a) *Veh. Code § 23103* (reckless driving) as specified in *Veh. Code § 23103.5* (regarding pleas).

(b) *Veh. Code §§ 23152* or *23153* (driving under influence).

(c) *Veh. Code § 23140* (person under age 21 driving under influence).

(d) *Penal Code §§ 191.5* (gross vehicular manslaughter while intoxicated) or *192(c)(3)* (vehicular manslaughter while intoxicated), which resulted in a conviction.

(e) If the person's privilege to operate a motor vehicle has been suspended or revoked pursuant to *Veh. Code §§ 13353, 13353.1*, or *13353.2* for an offense that occurred on a separate occasion.

(3) The revocation of the person's privilege to operate a motor vehicle for a period of three years if the refusal occurs within seven years of two or more separate violations of:

(a) *Veh. Code § 23103* as specified in *Veh. Code § 23103.5*.

(b) *Veh. Code §§ 23140, 23152*, or *23153*.

(c) *Penal Code § 191.5* or *Penal Code § 192(c)(3)*, or any combination thereof, that resulted in convictions.

(d) If the person's privilege to operate a motor vehicle has been suspended or revoked two or more times under *Veh. Code §§ 13353, 13353.1*, or *13353.2* for offenses that occurred on separate occasions.

(e) If there is any combination of those convictions or administrative suspensions or revocations.

The officer must also advise the arrested person that, in the event of refusal to submit to a test or tests, the refusal may be used against him or her in a court of law [*Veh. Code § 23612(a)(4)*].

For discussion of the effect of giving an inadequate warning of the consequences of refusing to test, see *§ 92.47[4][e]*.

[2] Warning of No Right to Counsel

The person arrested must be advised by the officer that he or she does not have the right to have an attorney present before stating whether he or she will submit to a test or tests, before deciding which test to take, or during administration of the test chosen [*Veh. Code § 23612(a)(4)*].

The right to counsel as an incident to the protection of the *Fifth Amendment* right to remain silent does not apply to the giving of a statement that one will or will not submit to a blood alcohol test, since the making of such a statement is not a testimonial communication and the refusal to take the test has not been declared a crime or punishable as such. Neither the denial of the opportunity for advice of counsel before stating whether one will submit to a test and before deciding which test to take, nor the denial of the opportunity to have counsel present while the test is administered, violates any constitutional right [*Fallis v. Dept. of Motor Vehicles (1968) 264 Cal. App. 2d 373, 383-384, 70 Cal. Rptr. 595* ; *Ent v. Department of Motor Vehicles (1968) 265 Cal. App. 2d 936, 939, 71 Cal. Rptr. 726* (holding, on basis of foregoing statement in *Fallis* case, driver not entitled to advice of counsel in choosing which test to take); *see also Rust v. Department of Motor Vehicles (1968) 267 Cal. App. 2d 545, 547, 73 Cal. Rptr. 366* (officer who warns driver of *Miranda* right to counsel as required also to state right is not applicable to taking blood alcohol test under former *Veh. Code § 13353*)].

When it becomes apparent that the arrested person is confused, and the person's response to questions asked him or her concerning his or her willingness to take a chemical test clearly indicates that the person is asserting a right to counsel which he or she has been told only moments before that he or she is free to assert, then it is incumbent on the officer to make an explanation [*West v. Department of Motor Vehicles (1969) 275 Cal. App. 2d 908, 910, 80 Cal. Rptr. 385]* . Fairness, as well as the provisions of *Veh. Code § 23612*, requires the officer to make it as clear as the arrested person's condition will permit that he or she is not entitled to have an attorney present [*Plumb v. Department of Motor Vehicles (1969) 1 Cal. App. 3d 256, 262, 81 Cal. Rptr. 639]* .

[3] Warning of Choice of Tests

[a] Arrestee May Choose

If the person is lawfully arrested for driving under the influence of an alcoholic beverage, the person arrested has the choice of whether the test will be of his or her blood or breath, and he or she must be advised by the officer that he or she has that choice. If the person arrested either is incapable or states that he or she is incapable of completing the chosen test, then the person must submit to the remaining test [*Veh. Code § 23612(a)(2)(A)*].

If both the blood and breath tests are unavailable, the person is deemed to have given his or her consent to chemical testing of his or her urine and must submit to a urine test [*Veh. Code § 23612(a)(2)(A), (d)(2)*].

Although the arrestee is given the right to choose among the three tests, the person is not given the further right to specify when the test that he or she has chosen may be administered [*Buchanan v. Department of Motor Vehicles (1979) 100 Cal. App. 3d 293, 298, 160 Cal. Rptr. 557]* .

If the person is lawfully arrested for driving under the influence of a drug or the combined influence of an alcoholic beverage and a drug, that personalso has the choice of whether or not the test will be of his or her blood, breath, or urine, and the person must be advised by the officer that he or she has that choice [*Veh. Code § 23612(a)(2)(B)*]. If he or she chooses to submit to a breath test, however, the person may also be requested to submit to a blood or urine test [*Veh. Code § 23612(a)(2)(C)*; *see* discussion in [d], *below*].

A person is neither expressly nor by necessary implication permitted to insist that all three tests provided for in *Veh. Code § 23612* be administered to him or her at the state's expense [*Kesler v. Department of Motor Vehicles (1969) 1 Cal. 3d 74, 77, 81 Cal. Rptr. 348, 459 P.2d 900]* .

The person must also be advised that the blood or urine sample may be tested by either party in any criminal prosecution. The failure of either party to perform this test places no duty on the opposing party to perform the test, nor does it affect the admissibility of any other evidence of the alcoholic content of the blood of the person arrested [*Veh. Code § 23614(c)*].

[b] Warning of Limited Choice at Facility

If the person is lawfully arrested for an offense allegedly committed in violation of *Veh. Code §§ 23140*, *23152*, or *23153* (driving while under influence of alcohol and/or drugs), and because of the need for medical treatment, the person is first transported to a medical facility where it is not feasible to administer a particular test of, or to obtain a particular sample of, the person's blood, breath, or urine, the person has the choice of those tests that are available at the facility to which that person has been transported. In this event, the officer must advise the person which tests are available at the medical facility and that the person's choice is limited to those tests that are available [*Veh. Code § 23612(a)(3)*].

Failure of the officer to advise a person that a particular test is not available at a medical facility, however, will not excuse a refusal to submit to any test unless the officer's misinformation is determined to have a causal effect on the refusal [*Vann v. Meese (1986) 186 Cal. App. 3d 1070, 1073, 231 Cal. Rptr. 247]* .

[c] Warning That Breath Sample Cannot Be Retained

In addition to the requirements of *Veh. Code § 23612*, a person who chooses to submit to a breath test must be advised before or after the test that the breath testing equipment does not retain any sample of the breath, and that no breath sample will be available after the test that could be analyzed later by the person or any other person [*Veh. Code § 23614(a)*]. These requirements have been held to be statutory only; there are no due process or fundamental fairness violations when the state fails to preserve a breath sample for independent testing, and there is no constitutional duty to

advise a suspect that the breath test is not preservable [*In re Cheryl S. (1987) 189 Cal. App. 3d 1240, 1242, 235 Cal. Rptr. 42]* .

The person must also be advised that, because no breath sample is retained, he or she will be given an opportunity to provide a blood or urine sample that will be retained at no cost to the person, so that there will be something retained that may be subsequently analyzed for the alcoholic content of the person's blood. If the person completes a breath test, and wishes to provide a blood or urine sample to be retained, the sample is to be collected and retained in the same manner as if the person had chosen a blood or urine test initially [*Veh. Code § 23614(b)*].

[d] Warning That Driver Must Submit to Additional Testing

An officer may request a person who chooses to submit to a breath test to also submit to a blood or urine test if the officer has reasonable cause to believe that the person was driving under the influence of a drug or the combined influence of an alcoholic beverage and a drug and if the officer has a clear indication that a blood or urine test will reveal evidence of the person being under the influence. The officer must state in his or her report the facts on which that belief and that clear indication are based [*Veh. Code § 23612(a)(2)(C)*].

The person has the choice of submitting to and completing a blood or urine test, and must be advised by the officer that he or she is required to submit to an additional test and that he or she may choose a test of either blood or urine. If the person arrested either is incapable or states that he or she is incapable of completing either chosen test, the person will then have the choice of submitting to and completing the other remaining test. The person must be advised by the officer that he or she has that choice [*Veh. Code § 23612(a)(2)(C)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessSelf-Incrimination PrivilegeConstitutional LawBill of RightsFundamental RightsCriminal ProcessAssistance of CounselCriminal Law & ProcedureCriminal OffensesVehicular CrimesDriving Under the InfluenceBlood Alcohol & Field SobrietyImplied ConsentWarning RequirementsTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.43 Suspension or Revocation for Refusal to Take Test

[1] Notice of Order

If the person who has been arrested for a violation of *Veh. Code §§ 23140, 23152*, or *23153* (driving under the influence of alcohol or drug) refuses or fails to complete a chemical test or tests, or requests that a blood or urine test be taken, the peace officer, acting on behalf of the Department, is required to serve the notice of the order of suspension of the person's privilege to operate motor vehicle personally on the arrested person. The notice must be on a form provided by the Department [*Veh. Code § 23612(e)*].

If the notice of the order of suspension has not been served by the peace officer under *Veh. Code § 23612*, the Department is required to immediately notify the person in writing of the action taken [*Veh. Code § 13353(c)*].

The peace officer who serves the notice, or the Department, if applicable, also must provide, if the officer or Department, as the case may be, determines that it is necessary to do so, the person with the appropriate non-English notice developed pursuant to *Veh. Code § 14100(d)* [*Veh. Code § 13353(c)*].

[2] Effective Date

The suspension or revocation does not become effective until 30 days after the giving of the written notice of suspension, or until the end of any stay of the suspension or revocation, as provided for in *Veh. Code § 13558* [*Veh. Code § 13353(a)(3)(C)*]. For discussion relating to stay of suspension, see *§ 92.46[3]*. For discussion relating to issuance of the notice of the order of suspension, see [1], *above*.

[3] Seizure of License and Issuance of Temporary License

If the peace officer serves the notice, he or she is required to take possession of any California driver's license and issue, on behalf of the Department, a temporary license, that is valid for 30 days from its date of issuance [*Veh. Code § 23612(f)*]. The temporary license is an endorsement on the notice of the order of suspension [*Veh. Code § 23612(f)*].

[4] Peace Officer's Sworn Report

The arresting officer must prepare a sworn statement under *Veh. Code § 13380* on a form furnished or approved by the Department [*Veh. Code § 13353(a)(3)(C)*]. The report consists of a statement that the officer had reasonable cause to believe that the person had been driving a motor vehicle in violation of *Veh. Code §§ 23136, 23140, 23152*, or *23153*, and that the person had refused to submit to, or did not complete, the test or tests after a request by the officer [*Veh. Code § 13353(a)*; *see Veh. Code § 13353.1*].

The peace officer must immediately forward to the Department a sworn report of all information relevant to the enforcement action, including: information that adequately identifies the arrested person, a statement of the officer's grounds for belief that the person violated those sections, a report of the circumstances constituting a refusal to submit to or complete the chemical testing pursuant to *Veh. Code §§ 13388* or *23612*, a copy of any notice to appear under which the person was released from custody, and, if immediately available, a copy of the complaint filed with the court [*Veh. Code § 13380(a)*].

The sworn statement of the arresting officer must contain not just legal conclusions but the necessary facts that will constitute sufficient evidence to support those conclusions [*Grundy v. Gourley (2003) 110 Cal. App. 4th 20, 24, 1 Cal. Rptr. 3d 104* (officer's sworn report contained sufficient facts to support probable cause); *Solovij v. Gourley (2001) 87 Cal. App. 4th 1229, 1233, 105 Cal. Rptr. 2d 278]* . There is a split of opinion over whether the arresting officer's unsworn report may be considered by a DMV hearing officer [*see Dibble v. Gourley (2002) 103 Cal. App. 4th 496, 501, 126 Cal. Rptr. 2d 709* (unsworn statements may not be used); *Solovij v. Gourley (2001) 87 Cal. App. 4th 1229, 1234, 105 Cal. Rptr. 2d 278* (unsworn statements may not be used); *MacDonald v. Gourley (2002) 102 Cal. App.4th 568, 572, 580-582, 125 Cal. Rptr. 2d 607* , *review granted* (unsworn statements may be used)]. However, an unsworn report by the non arresting officer may properly be considered by the DMV hearing officer because: (i) the applicable statutes do not make certification of a nonarresting officer's report a condition of admissibility in the hearing; (ii) the report falls within the public employee records exception to the hearsay rule; and (iii) the admission recounted comes within the party admission exception to the rule [*Lake v. Reed (1997) 16 Cal. 4th 448, 462, 65 Cal. Rptr. 2d 860, 940 P.2d 311]* . A driver facing license suspension following arrest for driving under the influence may not seek discovery of confidential peace officer personnel records pursuant to *Pitchess v. Superior Court (1974) 11 Cal. 3d 531, 113 Cal. Rptr. 897, 522 P.2d 305* [*Brown v. Valverde (2010) 183 Cal. App. 4th 1531, 1547-1559, 108 Cal. Rptr. 3d 429]* .

[5] Length of Suspension or Revocation

[a] Mandatory Periods Imposed

On receipt of the officer's sworn statement the Department must do one of the following [*Veh. Code § 13353(a)*]:

(1) Suspend the person's driving privilege to operate a motor vehicle for a period of one year.

(2) Revoke the person's privilege to operate a motor vehicle for a period of two years if the refusal occurred within seven years of one of the following:

(a) A separate violation of *Veh. Code § 23103* (reckless driving) as specified in *Veh. Code §§ 23103.5* (regarding pleas), *23140* (person under age 21 driving while intoxicated), *23152* or *23153* (driving while intoxicated), or a separate violation of *Penal Code §§ 191.5* (gross vehicular manslaughter while intoxicated) or *192(c)(3)* (vehicular manslaughter while intoxicated), that resulted in a conviction.

(b) A suspension or revocation of the person's privilege to operate a motor vehicle pursuant to *Veh. Code § 13353* (failure or refusal to submit to blood alcohol test) or

13353.2 (unlawful blood alcohol level during actual physical control of vehicle) for an offense that occurred on a separate occasion.

(3) Revoke the person's privilege to operate a motor vehicle for a period of three years if the refusal occurred within seven years of one of the following:

(a) Two or more separate violations of *Veh. Code § 23103* as specified in *Veh. Code § 23103.5*, or of *Veh. Code § 23140*, *23152*, or *23153*, or *Penal Code § 191.5* or *192(c)(3)*, or any combination thereof, that resulted in convictions.

(b) Two or more suspensions or revocations of the person's privilege to operate a motor vehicle pursuant to *Veh. Code § 13353* or *13353.2* for offenses that occurred on separate occasions.

(c) Any combination of two or more of those convictions or administrative suspensions or revocations.

[b] Compared With Administrative Per Se Suspension

Under some circumstances, the length of suspension or revocation for refusing to complete a chemical test is greater than had the person complied with the testing requirement and failed. For example, the minimum period of suspension under the implied consent law for refusing to take a chemical test is one year, while the minimum period of suspension under the administrative per se law when the person has taken the chemical test and the results of the test show that the person had an unlawful blood alcohol content is four months [*compare Veh. Code § 13353(a) with Veh. Code § 13353.3(b)(1)* (discussed in *§ 92.62[4]*)]. Thus, it appears that the implied consent statute is designed to secure cooperation with chemical testing by providing an incentive for taking the chemical test [*see Smith v. Department of Motor Vehicles (1986) 179 Cal. App. 3d 368, 374, 224 Cal. Rptr. 543* ; *see also* discussion under § 92.40[1]].

[6] Effect of Existing Suspension or Revocation

Generally, whenever the Vehicle Code requires the Department to suspend or revoke a person's driving privilege because of a conviction of a Vehicle Code violation, the suspension or revocation begins on a plea, finding, or verdict of guilty [*Veh. Code § 13366*]. If certain conditions are satisfied, however, the effective dates of action taken by the Department may run consecutively under an order by a sentencing court [*see Veh. Code § 13354*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesVehicular CrimesDriving Under the InfluenceBlood Alcohol & Field SobrietyImplied ConsentWarning RequirementsTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.44 Internal Review of Record

On receipt of the officer's sworn statement, the Department is required to review the record [*Veh. Code §§ 13353(c), 13353.1(c), 13557(a)*; *see also Veh. Code § 13380* (discussed under § 92.43[4], relating to contents of sworn arrest report)]. The Department is required to consider the sworn report and any other evidence accompanying the report [*Veh. Code 13557(a)*].

On review, the Department is required to sustain the order of suspension or revocation made under *Veh. Code § 13553* or *13353.1* if the Department determines, by a preponderance of the evidence, all of the following facts [*Veh. Code § 13557(b)(1)*; *see also Veh. Code §§ 13353(c), 13353.1*]:

- The peace officer had reasonable cause to believe that the person had been driving a motor vehicle in violation of *Veh. Code § 23136, 23140, 23152,* or *23153*.

- The person was placed under arrest (or was lawfully detained under *Veh. Code § 23136*).

- The person refused or failed to complete the chemical test or tests after being requested by a peace officer.

- Except for the persons described in *Veh. Code § 23612* who are incapable of refusing, the person had been told that his or her privilege to operate a motor vehicle would be suspended or revoked if he or she refused to submit to, and complete, the required testing.

If the Department determines, by a preponderance of the evidence, that any of the facts stated above were not proven, the Department is required to rescind the order of suspension or revocation and return or reissue the person's driver's license under *Veh. Code § 13551* [*Veh. Code § 13557(b)(1)*].

The Department is required to make the determination on administrative review before the effective date of the order of

suspension or revocation [*Veh. Code § 13557(c)*]. A person may request and be granted a hearing under *Veh. Code § 13558*, however, without first receiving the results of the administrative review under *Veh. Code § 13557* [*Veh. Code § 13557(e)*]. After receiving a request for a hearing under *Veh. Code § 13558*, the Department is not required to conduct an administrative review of the same matter under *Veh. Code § 13357* [*Veh. Code § 13357(e)*].

The determination of the Department on administrative review is final unless a hearing is requested under *Veh. Code § 13558* [*Veh. Code § 13557(b)(1)*; *see* discussion under § 92.46[2]].

A request for an administrative review does not stay the suspension or revocation of a person's driving privilege. If the Department is unable to make a determination on administrative review within the time limit stated in *Veh. Code § 13557(c)*, the Department is required to stay the effective date of the order of suspension pending the determination and, if the person's driver's license has been taken by the peace officer under *Veh. Code § 13382*, *13388*, or *23612*, the Department is required to notify the person before the expiration date of the temporary permit issued under those sections, or the expiration of any previous extension issued under *Veh. Code § 13357(d)*, in a form that permits the person to establish to any peace officer that his or her driving privilege is not suspended or revoked [*Veh. Code § 13357(d)*].

A determination of facts by the Department under *Veh. Code § 13357* has no collateral estoppel effect on a subsequent criminal prosecution and does not preclude litigation of those same facts in the criminal proceeding [*Veh. Code § 13557(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsScopeGeneral OverviewCriminal Law & ProcedureCriminal OffensesVehicular CrimesDriving Under the InfluenceBlood Alcohol & Field SobrietyImplied ConsentWarning RequirementsTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.45 Right to Administrative Hearing

Any person, who has received a notice of an order of suspension or revocation of his or her privilege to operate a motor vehicle under *Veh. Code § 13353, 13353.1, 13353.2, 13382, 13388*, or *23612*, or a notice pursuant to *Veh. Code § 13557* may request a hearing on the matter [*Veh. Code § 13558(a)*; *see Dyer v. Department of Motor Vehicles (2008) 163 Cal. App. 4th 161, 167-168, 77 Cal. Rptr. 3d 138*]. If a person fails to request a hearing, he or she fails to exhaust administrative remedies and is precluded from seeking judicial review [*Marquez v. Gourley (2002) 102 Cal. App. 4th 710, 712, 125 Cal. Rptr. 2d 784]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 92.46 Administrative Hearing Procedure

[1] Applicable Law

The procedures relating to an administrative hearing to review an order of suspension or revocation by the Department under the implied consent law are governed under three statutory schemes [*see Veh. Code §§ 13558(a), 14112*].

Veh. Code § 13558 governs the request for a hearing, the location of the hearing, the issues to be determined at the hearing, the time within which the hearing must be held, a stay in the event the Department delays holding the hearing or rendering its decision, notice of determination and right of judicial review, and the effect of the determination on a subsequent criminal prosecution [*see Veh. Code § 13558*]. These aspects are discussed in [2]-[4], *below*, and §§ 92.47-92.53.

Veh. Code § 14100 et seq. provides the procedure relating to hearings to review actions affecting driver's licenses generally. These provisions govern a hearing for review of an order suspending or revoking a driver's license under the implied consent law, except as otherwise provided in *Veh. Code § 13558* [*Veh. Code § 13558(a)*]. *Veh. Code § 14100 et seq.* governssuch aspects as: waiver of a hearing [*Veh. Code § 14103*], notice of hearing [*Veh. Code § 14104*], appointment of the hearing officer or board and recording of the hearing [*Veh. Code § 14104.2*], issuance of subpoenas [*Veh. Code § 14104.5*], certain evidentiary matters that may be considered [*Veh. Code § 14104.7*], request for administrative review of the hearing [*Veh. Code § 14105.5*], reopening the case, and application of the Administrative Procedure Act (*Gov. Code § 11500 et seq.*)]. For discussion of these aspects, see *§ 92.100* et seq.

All matters relating to administrative review of the suspension or revocation order that are not covered under *Veh. Code §§ 13558, 14100 et seq.*, are governed by the Administrative Procedure Act (*Gov. Code § 11500 et seq.*) [*see Veh. Code § 14112*]. For discussion of relevant aspects of the Act, see *§ 92.100* et seq.

The foregoing statutory scheme also applies to an administrative hearing for a suspension under *Veh. Code § 13353.2*, the administrative per se law, and *Veh. Code § 13388*, regarding administrative suspension for persons under 21 years

of age. For further discussion of those provisions, see *§ 92.60* et seq. and § 92.80 et seq.

[2] Request for Hearing

A person may request and be granted a hearing under *Veh. Code § 13558* without first receiving the results of an administrative review under *Veh. Code § 13557* [*Veh. Code § 13557(e)*; *see* discussion under § 92.44].

Veh. Code § 13558(b) provides that if "the person wishes to have a hearing before the effective date of the order of suspension or revocation," the request for a hearing must be made within 10 days of the receipt of the notice of the order of suspension or revocation [*Veh. Code § 13558(b)*; *see also Veh. Code § 14100* (providing for demand of hearing)]. Although this provision seems to imply that a person might request a hearing *after* the effective date of the order of suspension or revocation, *Veh. Code § 14103* provides that the failure to respond to a notice under *Veh. Code § 14100 et seq.* within 10 days is a *waiver* of the right to a hearing, and the Department may take action without a hearing. Notice under *Veh. Code § 13353* is a notice under *Veh. Code § 14100 et seq.* [*see Veh. Code § 14100(a)*]. Thus, it appears that notwithstanding the statement in *Veh. Code § 13558(b)* quoted *above*, the request should be made within 10 days of receiving notice of suspension or revocation. Otherwise, the failure to make the request within that time may be deemed a waiver of the right to a hearing. The Department has the authority, however, to reopen a matter when a person has failed to respond within the 10-day period [*Veh. Code § 14103*]. In any case, until clarification by statute, regulation, or court opinion, it is recommended that the request be made within the 10-day period. For a form of written request for a hearing or to reopen a question, see *§ 92.170*.

[3] Stay of Suspension or Revocation

A request for an administrative hearing does not stay the suspension or revocation of a person's privilege to operate a motor vehicle [*Veh. Code § 13558(e)*].

If the Department does not conduct an administrative hearing and make a determination after an administrative hearing within the time limit in *Veh. Code § 13558(d)*, the Department is required to stay the effective date of the order of suspension or revocation pending the determination [*Veh. Code § 13558(e)*].

Under *Veh. Code § 13558(d)*, the Department is required to hold the administrative hearing before the effective date of the order of suspension or revocation if the request for the hearing is postmarked or received by the Department on or before 10 days after the person's receipt of the service of the notice of the order of suspension or revocation pursuant to *Veh. Code § 13353.2*, *13382*, *13388*, or *23612*. Although these latter provisions refer only to administrative per se action, it appears that the stay under *Veh. Code § 13558(e)* would also apply to implied consent suspension or revocation since both laws are addressed in that subsection [*cf. Veh. Code § 13557(d)*].

If the person's driver's license has been taken by the peace officer pursuant to *Veh. Code § 13382*, *13388*, or *23612*, the Department must notify the person of the stay before the expiration date of the temporary permit issued pursuant to *Veh. Code § 13382*, *13388*, or *23612*, or the expiration date of any previous extension issued pursuant to *Veh. Code § 13558(e)*. The notification must be in a form that permits him or her to establish to any peace officer that his or her privilege to operate a motor vehicle is not suspended or revoked. The foregoing is conditioned, however, on the fact that the person is otherwise eligible [*Veh. Code § 13558(e)*].

[4] Location of Hearing

The hearing is to be held at a place designated by the Department as close as practicable to the place where the arrest occurred, unless the parties agree to a different location [*Veh. Code § 13558(b)*; *see Veh. Code § 14104*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingGeneral OverviewAdministrative LawAgency AdjudicationHearingsRight to HearingStatutory RightAdministrative LawAgency AdjudicationHearingsRight to HearingWaiverTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.47 Issues Determined at Hearing

[1] Specifically Limited

For the purposes of a hearing on an order of suspension or revocation pursuant to *Veh. Code § 13353*, the only issues at the hearing are those facts listed in *Veh. Code § 13557(b)(1)* [*Veh. Code § 13558(c)(1)*; *see discussion under § 92.44*]. Various issues relating to those facts are discussed in [2]-[5], *below*.

The delegation of authority to the Department to make findings of fact pertinent to the issues under former *Veh. Code § 13353* [*now see Veh. Code § 13558*], and in particular to determine whether or not the arresting officer had reasonable cause to believe that the arrested person had been driving a motor vehicle while under the influence of intoxicating liquor, does not constitute a denial of due process [*see Finley v. Orr (1968) 262 Cal. App. 2d 656, 666, 69 Cal. Rptr. 137]* .

[2] Reasonable Cause to Believe Person Violated DUI Statutes

[a] Reasonable Cause

An issue to be determined at a hearing under *Veh. Code § 13558* is whether the peace officer had reasonable cause to believe that the person had been driving a motor vehicle in violation of *Veh. Code § 23136, 23140, 23152* or *23153* [*Veh. Code §§ 13557(b)(1)(A), 13558(c)(1)*].

"Reasonable cause" has been interpreted to be the substantial equivalent of the term "probable cause" [*see People v. Pease (1966) 242 Cal. App. 2d 442, 445, 51 Cal. Rptr. 448* ; *see also Veh. Code § 23612(h)* (preliminary alcohol screening test that indicates presence or concentration of alcohol based on breath sample to establish reasonable cause to believe person was driving under influence of alcohol is field sobriety test and may be used by officer as further investigative tool); discussed under [b], *below*].

The implied consent statute applies broadly and generally to the motoring public (i.e., those who take advantage of the

public streets, roads, and highways to operate a motor vehicle), and does not require evidence that actual driving occurred immediately prior to the arrest for driving under the influence [*Troppman v. Valverde (2007) 40 Cal. 4th 1121, 1133]*.

For further discussion of probable cause for arrest, and related constitutional restraints, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Chs. 11, 145 (Matthew Bender).

[b] Preliminary Alcohol Screening Test

A preliminary alcohol screening test (equipment used for such test commonly referred to as "PAS device") that indicates the presence or concentration of alcohol based on a breath sample in order to establish reasonable cause to believe the person was driving a vehicle in violation of *Veh. Code §§ 23140, 23152*, or *23153* is a field sobriety test that may be used by an officer as a further investigative tool [*Veh. Code § 23612(h)*; *see Roze v. Department of Motor Vehicles (2006) 141 Cal. App. 4th 1176, 1184-1190, 46 Cal. Rptr. 3d 829* (PAS test results admissible in evidence but may not be given much weight)].

If the officer decides to use a preliminary alcohol screening test, the officer must advise the person that he or she is requesting that person to take a preliminary alcohol screening test to assist the officer in determiningif that person is under the influence of alcohol or drugs or a combination of alcohol and drugs. The person's obligation to submit to a blood, breath, or urine test, as required by *Veh. Code § 23612*, for the purpose of determining the alcohol or drug content of that person's blood, is not satisfied by the person submitting to a preliminary alcohol screen test. The officer is required to advise the person of that fact and of the person's right to refuse to take the preliminary alcohol screening test [*Veh. Code § 23612(i)*; *see Roze v. Dept. of Motor Vehicles (2006) 141 Cal. App. 4th 1176, 1187-1188, 46 Cal. Rptr. 3d 829* (officer did not conduct PAS test in way to be used as proof of actual blood alcohol concentration; therefore not given substantial weight)].

However, the result of a preliminary alcohol screening test or chemical test (or the refusal to take or failure to complete one of these tests) is the statutory basis for a violation of Veh. Code §§ 13888 (driving while intoxicated; driver under 21 years of age), *23136* [*see Veh. Code §§ 13388, 13390, 23136*; for further discussion, *see § 92.80* et seq.].

[3] Arrest

[a] Arrest Must Be Lawful

An issue to be determined at a hearing under *Veh. Code § 13558* is whether the person suspected of driving a motor vehicle in violation of *Veh. Code § 23140, 23152*, or *23153* was placed under arrest [*Veh. Code §§ 13557(b)(1)(B), 13558(c)(1)*]. The testing must be incident to a lawful arrest under those provisions [*Veh. Code § 23612(a)(1)*]. If the arrest was not lawful, the person arrested is not subject to license suspension or revocation under *Veh. Code §§ 13353* and *23612* [*see Mercer v. Department of Motor Vehicles (1991) 53 Cal. 3d 753, 760, 280 Cal. Rptr. 745, 809 P.2d 404* ; *Dyer v. Department of Motor Vehicles (2008) 163 Cal. App. 4th 161, 168, 77 Cal. Rptr. 3d 138* ; *Music v. Department of Motor Vehicles (1990) 221 Cal. App. 3d 841, 847, 270 Cal. Rptr. 692]* .

For further discussion of what constitutes a lawful arrest generally, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Chs. 11 and 145 (Matthew Bender).

When the hearing under *Veh. Code § 13558* involves a violation of *Veh. Code § 23137*, the preliminary alcohol screening test or chemical test or the request to take one of those tests must be incident to a lawful detention of a person under 21 years of age who is suspected of driving a motor vehicle while intoxicated [*see Veh. Code §§ 13557(b)(1)(B), 23136(c)(2)*; for further discussion, *see § 92.80* et seq.].

[b] Effect of Prior Unlawful Arrest Determination

When an arrest has been determined to be unlawful in a criminal proceeding, for example in a hearing under *Penal Code § 1538.5* the Department is collaterally estopped from making a contrary finding on the issue of the unlawfulness of the arrest in a proceeding under *Veh. Code § 13353* [*see Zapata v. Department of Motor Vehicles (1991) 2 Cal. App. 4th 108, 113, 2 Cal. Rptr. 2d 855* ; *Buttimer v. Alexis (1983) 146 Cal. App. 3d 754, 758 n.1, 194 Cal. Rptr. 603]* .

In *Buttimer v. Alexis (1983) 146 Cal. App. 3d 754, 759-762, 194 Cal. Rptr. 603* , the court held that as long as the issue necessarily decided in the previous proceeding is identical to the one that is sought to be relitigated, the previous proceeding resulted in a final judgment on the merits, and the party against whom collateral estoppel is asserted was a party or was in privity with the party at the previous proceeding, the elements for the application of the collateral estoppel doctrine are met [*Buttimer v. Alexis (1983) 146 Cal. App. 3d 754, 758 n.1, 194 Cal. Rptr. 603* ; *see Lucido v. Superior Court (1990) 51 Cal. 3d 335, 341, 272 Cal. Rptr. 767, 795 P.2d 1223* ; *People v. Sims (1982) 32 Cal. 3d 468, 484, 186 Cal. Rptr. 77, 651 P.2d 321* ; *see also* Ch. 491, *Res Judicata*].

There is a split of authority regarding whether privity exists between the Department and a district attorney's office [*compare Zapata v. Department of Motor Vehicles (1991) 2 Cal. App. 4th 108, 114-115, 2 Cal. Rptr. 2d 855* (First Appellate District; holding that privity exists and criticizing *Pawlowski, below*, as incorrect); *Buttimer v. Alexis (1983) 146 Cal. App. 3d 754, 760, 194 Cal. Rptr. 603 (Third Appellate District; same)* ; *Shackelton v. Department of Motor Vehicles (1975) 46 Cal. App. 3d 327, 331, 119 Cal. Rptr. 921 (Second Appellate District, Division Four; same) with Pawlowski v. Pierce (1988) 202 Cal. App. 3d 692, 698, 249 Cal. Rptr. 49* (Second Appellate District, Division One; "no close association of entities representing state's interests"); *Lofthouse v. Department of Motor Vehicles (1981) 124 Cal. App. 3d 730, 738, 177 Cal. Rptr. 601* (Second Appellate District, Division Two; dicta, stating that *Shackelton* court erred)].

For discussion of collateral estoppel effect of hearing on subsequent criminal prosecution, see *§ 92.53[7]*.

[4] Refusal to Complete Tests

[a] Driver's Response Determinative

An issue to be determined at a hearing under *Veh. Code § 13558* is whether the person suspected of driving a motor vehicle in violation of *Veh. Code § 23136, 23140, 23152* or *23153* refused or failed to complete the required test or tests after being requested by a peace officer [*Veh. Code §§ 13557(b)(1)(C), 13558(c)(1)*].

If the requirements of *Veh. Code § 13353* are otherwise met, then regardless of the degree of a driver's voluntary intoxication or lack of understanding resulting from it, when he or she refuses or otherwise manifests an unwillingness to take the required test, he or she is subject to the license suspension or revocation provisions of that section [*see Bush v. Bright (1968) 264 Cal. App. 2d 788, 793, 71 Cal. Rptr. 123]* .

In determining whether an arrested driver's conduct amounts to a refusal to submit to a test under *Veh. Code § 13353*, the court looks not to the state of mind of the arrested driver, but to the fair meaning to be given the driver's response to the demand that he or she submit to a chemical test [*Payne v. Department of Motor Vehicles (1991) 235 Cal. App. 3d 1514, 1518, 1 Cal. Rptr. 2d 528]* .

Even though no physical resistance is offered, the proclamation by a person that he or she is taking the test under protest has been held to be an unequivocal refusal to submit to a test [*see Barrie v. Alexis (1984) 151 Cal. App. 3d 1157, 1161, 199 Cal. Rptr. 258* ; *see also Payne v. Department of Motor Vehicles (1991) 235 Cal. App. 3d 1514, 1518, 1 Cal. Rptr. 2d 528]* .

A person's inability to complete a test, such as a failure to produce urine for initial voiding of bladder during urine test,

requires the person to select and complete one of the two remaining intoxication tests. The refusal to submit to such other tests constitutes a violation of the person's obligation under the implied consent law [*Hildebrand v. Department of Motor Vehicles (2007) 152 Cal. App. 4th 1562, 1573-1574, 62 Cal. Rptr. 3d 234* ; *Kessler v. Department of Motor Vehicles (1992) 9 Cal. App. 4th 1134, 1139, 12 Cal. Rptr. 2d 46]* .

[b] Exemption from Blood Testing

A person who is afflicted with hemophilia is exempt from the blood test required by *Veh. Code § 23612* [*Veh. Code § 23612(b)*].

A person who is afflicted with a heart condition and is using an anticoagulant under the direction of a physician and surgeon is exempt from the blood test required by *Veh. Code § 23612* [*Veh. Code § 23612(c)*].

In such cases, the person must elect to submit to one of the remaining tests, and failure to do so will be construed as a refusal to consent [*see* *Carrey v. Department of Motor Vehicles (1986) 183 Cal. App. 3d 1265, 1271, 228 Cal. Rptr. 705]* .

[c] Incapacity Is Not Withdrawal of Consent

[i] Establishing Incapacity

The statutory scheme expressly permits a driver to prove incapacity to refuse, leaving his or her implied consent intact [*Hughey v. Department of Motor Vehicles (1991) 235 Cal. App. 3d 752, 761-762, 1 Cal. Rptr. 2d 115]* . A driver is excluded from the requirement of voluntary submission if he or she is incapable of understanding the requirements and consequences of the test. Implicit in this exclusion is a requirement that the driver's refusal is rational and disclosed under the circumstances of the facts presented. In all other situations, refusal to voluntarily submit to the test, and its completion, automatically results in the loss of the driver's license [*Eilinger v. Department of Motor Vehicles (1983) 143 Cal. App. 3d 748, 751, 192 Cal. Rptr. 187]* .

As discussed in [a], *above*, the determining factor is not the state of the suspect driver's mind, but the fair meaning to be given to his or her response to the demand that the driver submit to the chemical test [*Department of Motor Vehicles (1971) 14 Cal. App. 3d 982, 986, 92 Cal. Rptr. 579]* . For example, when a driver's express "refusal" to take a chemical test was accompanied by a comment that the arresting officer later testified had "made no sense," a finder of fact could well have found that it was not reasonable for the arresting officer to consider the driver's response to be a refusal [*see* *Hughey v. Department of Motor Vehicles (1991) 235 Cal. App. 3d 752, 761, 1 Cal. Rptr. 2d 115]* .

A driver is not precluded from showing that he or she should be deemed not to have refused to submit due to a medical condition unrelated to alcohol use [*compare* *Hughey v. Department of Motor Vehicles (1991) 235 Cal. App. 3d 752, 760, 1 Cal. Rptr. 2d 115* (driver with head injuries held not to have refused test) *with* *Plunkett v. Alexis (1982) 136 Cal. App. 3d 370, 374, 186 Cal. Rptr. 261* (driver's pain from accident injuries did not preclude finding of refusal)]. The mere assertion by a licensee that he or she was suffering from some malady that prevented the licensee from submitting to a chemical test of his or blood, however, is no excuse for a refusal [*Fallis v. Dept. of Motor Vehicles (1968) 264 Cal. App. 2d 373, 382-383, 70 Cal. Rptr. 595]* .

A person who is unconscious or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn his or her consent, and a test or tests may be administered whether or not the person is told that his or her failure to submit to, or the noncompletion of, the test will result in the suspension or revocation of his or her privilege to operate a motor vehicle [*Veh. Code § 23612(a)(5)*].

A person who is dead is deemed not to have withdrawn his or her consent, and a test or tests may be administered at the

direction of a peace officer [*Veh. Code § 23612(a)(5)*].

[ii] Self-Induced Condition Does Not Excuse

A self-induced condition rendering the driver incapable of understanding and refusing to submit to a test, particularly if the condition results from alcohol, does not excuse failure to take a test [*see Hughey v. Department of Motor Vehicles (1991) 235 Cal. App. 3d 752, 759-760, 1 Cal. Rptr. 2d 115* ; *Bush v. Bright (1968) 264 Cal. App. 2d 788, 792, 71 Cal. Rptr. 123* (contrary result would frustrate purpose of Legislature)].

There also is no impaired judgment defense in an implied consent case when the impairment is caused *in part* by the voluntary consumption of alcohol [*McDonnell v. Department of Motor Vehicles (1975) 45 Cal. App. 3d 653, 662-663, 119 Cal. Rptr. 804* (court rejected impaired judgment defense when driver suffered from reactive hypoglycemia due to unexpected synergistic effect of allergy medicine and alcohol)].

[d] Improper Testing

[i] Technical Deficiency

If one or two of the three tests provided for in *Veh. Code § 23612* is objectionable to the driver because of a valid technical deficiency, then he or she must, if demand to take the test is properly made, point out the deficiency that has caused him or her to refuse the preferred test. The objection must be made with clearness sufficient to permit the officer or officers to decide on the validity of the protest and, if it is reasonable to do so, to take steps to meet the objection [*Wegner v. Department of Motor Vehicles (1969) 271 Cal. App. 2d 838, 841, 76 Cal. Rptr. 920* (decided under prior version of *Veh. Code § 13353*)].

[ii] Test Must Be Administered at Officer's Direction

The test must be administered at the direction of a peace officer having reasonable cause to believe that the person was driving a motor vehicle in violation of *Veh. Code § 23140, 23152* or *23153* [*Veh. Code § 23612(a)(1)*]. The arresting officer may, however, delegate administration of the test to another officer [*Lee v. Department of Motor Vehicles (1983) 142 Cal. App. 3d 275, 281, 283, 191 Cal. Rptr. 23]* .

[iii] Person Administering Blood Test Must Be Qualified

Only a licensed physician and surgeon, registered nurse, licensed vocational nurse, duly licensed clinical laboratory technologist or clinical laboratory bioanalyst, unlicensed laboratory personnel regulated under *Bus. & Prof. Code §§ 1242, 1242.5*, and *1246*, or certified paramedic acting at the request of a peace officer may withdraw blood for the purpose of determining the alcoholic content therein. A certified paramedic may not withdraw blood for this purpose unless authorized by his or her employer to do so [*Veh. Code § 23158(a)* (also providing that limitation as not applying to taking breath specimens)].

If an arrestee expresses hesitation about the technician's qualifications or identity, some form of assurance must be given to the arrestee. The simplest method is to produce some form of identification, although circumstances may warrant other methods of assurance. The mere presence of an officer with the technician acting at the officer's direction is not, however, sufficient comfort if there is no indication the officer had any peculiar knowledge of the technician's identity or qualifications [*Ross v. Department of Motor Vehicles (1990) 219 Cal. App. 3d 398, 402-403 n.2, 268 Cal. Rptr. 102]* .

[iv] Driver Has Right to Privacy

If the test given under *Veh. Code § 23612* is a chemical test of urine, the person tested must be given such privacy in the

taking of the urine specimen as will insure the accuracy of the specimen and, at the same time, maintain the dignity of the individual involved [*Veh. Code § 23158(e)*; *see* *Quesada v. Orr (1971) 14 Cal. App. 3d 866, 870, 92 Cal. Rptr. 640* (facts showed compliance with statute)].

[e] Inadequate Warning Causing Refusal

A function of a trial court when reviewing an order that suspends or revokes a license, is to determine whether the driver was in fact misled by inaccurate advice, and whether his or her refusal to submit to a test was a result of that inaccurate advice [*Decker v. Department of Motor Vehicles (1972) 6 Cal. 3d 903, 907, 101 Cal. Rptr. 387, 495 P.2d 1307* (warning of consequences of refusal); *see* *Vann v. Meese (1986) 186 Cal. App. 3d 1070, 1073, 231 Cal. Rptr. 247* (dicta implying that misinformation regarding available tests may excuse refusal when it has causal effect on refusal); *Plumb v. Department of Motor Vehicles (1969) 1 Cal. App. 3d 256, 261-262, 81 Cal. Rptr. 639* (court reversed judgment denying driver's petition for writ of mandate to compel Department to set aside its decision suspending driver's license; Department required to determine whether driver was misled; implicit in warning requirement is further requirement that driver must be fairly warned)].

If the driver refuses to take a chemical test because he or she has not received the advice of an attorney, the driver must communicate this fact to the arresting officer at the time [*see* *Thompson v. Department of Motor Vehicles (1980) 107 Cal. App. 3d 354, 362-363, 165 Cal. Rptr. 626* (construing *Department of Motor Vehicles (1971) 14 Cal. App. 3d 982, 986, 92 Cal. Rptr. 579* , and *Lampman v. Department of Motor Vehicles (1972) 28 Cal. App. 3d 922, 927, 105 Cal. Rptr. 101*)]. If the driver's refusal, however, was a result of an inadequate warning, that is, the driver was not aware that his or her refusal would result in an automatic suspension, then it is the officer's responsibility to take measures to ensure that the statutory warning is effectively communicated [*Thompson v. Department of Motor Vehicles (1980) 107 Cal. App. 3d 354, 363, 165 Cal. Rptr. 626* (decided under prior law; *now see Veh. Code § 23612*)].

For further discussion of effect of an inadequate warning of the consequences of refusing to submit to chemical testing, see discussion in [5], *below*.

[f] Refusal to Choose Test Is Not Refusal to Submit

A person's willingness to take any test administered to him or her but refusal to select a particular test is not a refusal to submit to or complete a test within the meaning of *Veh. Code § 23612* [*James v. Dept. of Motor Vehicles (1968) 267 Cal. App. 2d 750, 754, 73 Cal. Rptr. 452* ; *see* *Kesler v. Department of Motor Vehicles (1969) 1 Cal. 3d 74, 78, 81 Cal. Rptr. 348, 459 P.2d 900* (dictum approving holding in *James* case)].

[g] Ambiguous Refusal Requires Clarification

An explanation by the arresting officer of a driver's rights and obligations under the implied consent law is necessary if something less than an outright refusal to submit to a test (*e.g.*, a demand for counsel) is to be construed as a refusal. The determining factor is not the state of the suspect driver's mind; rather, it is the fair meaning of his or her response to the demand that he or she submit to a chemical test [*see* *Department of Motor Vehicles (1971) 14 Cal. App. 3d 982, 986-987, 92 Cal. Rptr. 579]* .

[h] Qualified Consent Is Deemed Refusal

A conditional consent to a chemical test constitutes a refusal to submit within the meaning of *Veh. Code § 13353* [*Payne v. Department of Motor Vehicles (1991) 235 Cal. App. 3d 1514, 1518, 1 Cal. Rptr. 2d 528]* . Any equivocal refusal may be interpreted as a refusal [*Fallis v. Dept. of Motor Vehicles (1968) 264 Cal. App. 2d 373, 382-383, 70 Cal. Rptr. 595* (dictum); *see* *Carrey v. Department of Motor Vehicles (1986) 183 Cal. App. 3d 1265, 1271, 228 Cal. Rptr. 705* (consent to submit to blood test, but refusal to sign hospital blood test consent form and refusal to submit to one of two remaining tests, construed as refusal to consent)].

A licensee may not qualify his or her consent to submit to a test by insisting that the test be administered by or in the presence of his or her own physician. Such a qualified consent is in fact a refusal to take the test. When the arresting officer does not cause, by a confusing warning as to the driver's rights, a misconception on the part of the driver that he or she is entitled to have his or her own physician administer a blood alcohol test, the officer is not required to correct that misconception; and a refusal to take a blood alcohol test arising from it may be treated as a refusal within the meaning of *Veh. Code § 13353(a)* [*see Beales v. Dept. of Motor Vehicles (1969) 271 Cal. App. 2d 594, 595-596, 76 Cal. Rptr. 662]* .

A person's insistence on taking all three tests provided for in *Veh. Code § 23612*, rather than only one, constitutes nothing more than a conditional consent to a test, that must be deemed to be a refusal to submit to a test within the meaning of that section [*Kesler v. Department of Motor Vehicles (1969) 1 Cal. 3d 74, 77, 81 Cal. Rptr. 348, 459 P.2d 900]* .

[i] Delayed Consent Is Refusal

The provision in *Veh. Code § 23612(a)(1)* that the testing must be incidental to a lawful arrest and administered at the direction of, and when ordered by, a peace officer who has reasonable cause to believe that the person was driving a motor vehicle in violation of *Veh. Code § 23140, 23152* or *23153* (driving while under the influence of alcohol or drugs), and the references in *Veh. Code § 23612(d)* to the arresting officer, imply that the decision of the arresting officer whether to request a test, and the suspect's response to the request, should not be delayed [*Veh. Code § 23612(a)(1)*; *see Webb v. Miller (1986) 187 Cal. App. 3d 619, 624, 627, 232 Cal. Rptr. 50* (constructive refusal followed 30 minutes later by unconditional consent and demand for test)].

[j] Refusal Is Not Overcome by Later Agreement

Once the person arrested has refused to take one of the tests required by *Veh. Code § 23612*, he or she may not avoid the license suspension mandated by the statute by later agreeing to take a specified test [*Morgan v. Department of Motor Vehicles (1983) 148 Cal. App. 3d 165, 170, 195 Cal. Rptr. 707* (decided before legislation moving implied consent provision to *Veh. Code § 23612(a)*); *see also Webb v. Miller (1986) 187 Cal. App. 3d 619, 624, 627, 232 Cal. Rptr. 50* ; *Zidell v. Bright (1968) 264 Cal. App. 2d 867, 870, 71 Cal. Rptr. 111* (refusal followed 30 or 45 minutes later by consent and demand for test)]. The fact that a blood sample is ultimately obtained and the blood alcohol test is completed does not preclude a finding that the arrestee refused to submit to a chemical test [*Morgan v. Department of Motor Vehicles (1983) 148 Cal. App. 3d 165, 171, 195 Cal. Rptr. 707* (decided before legislation moving implied consent provision to *Veh. Code § 23612(a)*)].

[k] Refusal Is Not Overcome by Subsequent Guilty Plea

It is neither relevant nor material to the application of *Veh. Code § 23612* whether the person arrested subsequently pleads guilty or not. At the time the person arrested refuses the chemical test, there is no assurance that on arraignment he or she will plead guilty. The arrestee has no power to avoid retroactively, by a guilty plea, the consequences of his or her earlier refusal to cooperate [*see Serenko v. Bright (1968) 263 Cal. App. 2d 682, 688, 70 Cal. Rptr. 1]* .

[5] Warning of Consequences of Refusing to Test

An issue to be determined at a hearing under *Veh. Code § 13558* is whether the person suspected of driving a motor vehicle in violation of *Veh. Code § 23136, 23140, 23152* or *23153* had been told that his or her privilege to operate a motor vehicle would be suspended or revoked if he or she refused to submit to, and complete, the required testing [*Veh. Code § 13558(c)(1)*; *see Veh. Code § 13557(b)(1)(D)*]. This requirement does not apply to cases relating to persons described in *Veh. Code § 23612* who are incapable of refusing [*Veh. Code §§ 13557(b)(1)(D), 13558(c)(1)*].

Veh. Code § 23612(a)(1)(D) expressly requires that the driver who is arrested for driving under the influence of alcohol or drugs be warned of the consequences of his or her failure to submit to, or the failure to complete, the required testing. Under the Department's internal review of the record, if the Department determines, by a preponderance of the evidence that the person was not told of the consequence of suspension or revocation for refusal to submit to testing, the Department must rescind the order of suspension or revocation [*see Veh. Code § 13557(b)(1)(D)*]. Thus, it appears that if the omission was established at the hearing, the hearing officer or board should order rescission of the suspension or revocation order.

Further, the warning must be proper [*see Giomi v. Department of Motor Vehicles (1971) 15 Cal. App. 3d 905, 906, 93 Cal. Rptr. 613]* . As mentioned in [4][e], *above*, an inaccurate warning regarding the consequences of a refusal to submit to testing can taint the refusal if there is a causal relationship between the warning and the refusal [*see Decker v. Department of Motor Vehicles (1972) 6 Cal. 3d 903, 907, 101 Cal. Rptr. 387, 495 P.2d 1307]* .

A warning that a driver's license "could" be suspended if he failed to take one of the tests has been held to be insufficient and to amount to no warning at all because it reduces the admonition to one of bare possibility rather than strong likelihood that the adverse result would follow [*see Decker v. Department of Motor Vehicles (1972) 6 Cal. 3d 903, 906-907, 101 Cal. Rptr. 387, 495 P.2d 1307* ; *Giomi v. Department of Motor Vehicles (1971) 15 Cal. App. 3d 905, 906-907, 93 Cal. Rptr. 613* ; *see also Thompson v. Department of Motor Vehicles (1980) 107 Cal. App. 3d 354, 358-361, 165 Cal. Rptr. 626]* . The fact that a driver is warned that a six-month suspension could be imposed, but is not warned about the longer suspension imposed when prior convictions exist, precludes only the longer suspension and does not affect the six-month suspension [*Daly v. Department of Motor Vehicles (1986) 187 Cal. App. 3d 257, 262, 232 Cal. Rptr. 7]* .

On the other hand, a warning that if a driver did not submit to one of the three tests required, then his driver's license "would probably be suspended" by the Department has been held to comply with that section's requirement of a warning regarding the consequences of refusal to take or complete a test [*see Janusch v. Department of Motor Vehicles (1969) 276 Cal. App. 2d 193, 196, 80 Cal. Rptr. 726* (petitioner also warned he "would lose" his license)].

Similarly, a warning that "if you don't submit to the test, chances are that you will lose your license" has been held to comply with the requirement that a person be warned regarding the consequences of refusal to take or complete a test [*see Smith v. Department of Motor Vehicles (1969) 1 Cal. App. 3d 499, 503, 81 Cal. Rptr. 800* (petitioner also warned, "A refusal will result in the suspension of your driving privilege for a period of six months")].

Although the officer must also advise the arrested person that, in the event of refusal to submit to a test or tests, the refusal may be used against him or her in a court of law [*Veh. Code § 23612(a)(4)*], this advisement relates to a criminal proceeding, not an administrative proceeding. Thus, a failure to give the advisement does not preclude the administrative suspension of a driver's license [*Sanchez v. Alexis (1982) 131 Cal. App. 3d 709, 716, 182 Cal. Rptr. 593* (decided before legislation moving implied consent provision to *Veh. Code § 23612(a)*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCriminal Law & ProcedureCriminal OffensesVehicular CrimesDriving Under the InfluenceBlood Alcohol & Field SobrietyImplied ConsentWarning RequirementsCriminal Law & ProcedureArrestsWarrantless ArrestTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.48 Evidence at Hearing

[1] Broader Evidence Than Under Internal Review

Any evidence at the hearing is not limited to the evidence presented at the administrative review under *Veh. Code § 13557* [*Veh. Code § 13558(b)*; *see also Veh. Code § 14104.7* (providing for sworn testimony and various reports at hearing)]. It appears that the internal administrative review is limited to review of the "record" consisting at least of the peace officer's report and accompanying documents [*see Veh. Code §§ 13353(c), 13557(a)*], and probably the Department's official records containing accident reports, license applications, abstracts of convictions, and similar materials. For discussion of the Department's review under *Veh. Code § 13557*, see *§ 92.44*.

[2] Arresting Officer's Statement

[a] Admissibility

The arresting officer's sworn statement duly filed with the Department under *Veh. Code § 13353(a)* is an official record of the Department within the meaning of former *Veh. Code § 14108* [*now see Veh. Code § 14104.7*]; and as such, it is entitled to consideration at a hearing before the Department, even though it is hearsay. The driver is entitled to produce evidence controverting the statement and can call the arresting officer as a witness at the hearing [*Fankhauser v. Orr (1968) 268 Cal. App. 2d 418, 423, 74 Cal. Rptr. 61* ; *see Veh. Code § 14104* (at hearing Department must consider its official records, among other records and reports)]. However, a driver facing license suspension following arrest for driving under the influence may not seek discovery of confidential peace officer personnel records pursuant to *Pitchess v. Superior Court (1974) 11 Cal. 3d 531, 113 Cal. Rptr. 897, 522 P.2d 305* [*Brown v. Valverde (2010) 183 Cal. App. 4th 1531, 1547-1559, 108 Cal. Rptr. 3d 429]* .

[b] Statement as Prima Facie Evidence

The sworn statement of the arresting officer provided for by *Veh. Code § 13353*, on which the summary suspension is based, is sufficient prima facie evidence at a hearing of any matter as to which there is no conflicting evidence. If the

sworn statement is properly admitted into evidence under the public employee's records exception to the hearsay rule of *Evid. Code § 1280*, the statement can be sufficient even at a contested hearing [*see Hildebrand v. Department of Motor Vehicles (2007) 152 Cal. App. 4th 1562, 1570-1572, 62 Cal. Rptr. 3d 234* ; *Snelgrove v. Department of Motor Vehicles (1987) 194 Cal. App. 3d 1364, 1374-1376, 240 Cal. Rptr. 281* ; *but see Fallis v. Dept. of Motor Vehicles (1968) 264 Cal. App. 2d 373, 379, 70 Cal. Rptr. 595* (officer's conclusion in sworn statement that reasonable cause existed was not alone sufficient to overcome evidence to the contrary)].

The use of the sworn statement does not violate due process requirements, because the licensee may still confront and cross examine the officer if he or she obtains a subpoena at his or her own expense [*Snelgrove v. Department of Motor Vehicles (1987) 194 Cal. App. 3d 1364, 1376-1377, 240 Cal. Rptr. 281* ; *Burkhart v. Department of Motor Vehicles (1981) 124 Cal. App. 3d 99, 113, 177 Cal. Rptr. 175]* .

If the licensee desires to secure the testimony of the arresting officer, it is the licensee's burden to secure the officer's attendance. Even when the officer fails to appear after being served with a subpoena by the Department, or after the Department has given less formal assurances to the licensee that the officer will be present, the licensee must ask for a continuance to secure the officer's attendance, or any objection to the officer's nonappearance is waived [*Scott v. Pierce (1990) 221 Cal. App. 3d 654, 657, 271 Cal. Rptr. 9]* . There is no obligation on the part of the referee conducting the hearing to offer the licensee a continuance. Furthermore, when a continuance is sought, its grant or denial is within the referee's discretion, the exercise of which will likely depend on whether the licensee reasonably relied on the Department's subpoena or assurances [*Scott v. Pierce (1990) 221 Cal. App. 3d 654, 657, 271 Cal. Rptr. 9* ; *see Bussard v. Department of Motor Vehicles (2008) 164 Cal. App. 4th 858, 864-865, 79 Cal. Rptr. 3d 414* (factors that influence granting or denying continuance are so varied that broad discretion allowed); *Veh. Code § 14112*; *Gov. Code § 11524*].

For further discussion of evidence that is admissible at a hearing on the Department's action affecting a driver's license generally, see *§ 92.100* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 92.49 Notice of Determination After Hearing

The Department is required to give written notice of its determination under *Veh. Code § 14105*. If the Department determines, on a hearing of the matter, to suspend or revoke the person's privilege to operate a motor vehicle, notwithstanding the term of any temporary license issued under *Veh. Code § 13382* or *23612*, the temporary license must be revoked and the suspension or revocation of the person's privilege to operate a motor vehicle becomes effective five days after notice is given. If the Department sustains the order of suspension or revocation, the Department must include notice that the person has a right to review by the court under *Veh. Code § 13559* [*Veh. Code § 13558(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 92.50 Effect of Hearing on Subsequent Criminal Prosecution

A determination of facts by the Department on a hearing under *Veh. Code § 13358* has no collateral estoppel effect on a subsequent criminal prosecution and does not preclude litigation of those same facts in the criminal proceeding [*Veh. Code § 13358(g)*]. For collateral estoppel effect of prior unlawful arrest determination, see *§ 92.47[3][b]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 92.51 Department Review of Hearing Decision

Within 15 days of the effective date of the decision, the person subject to a hearing may request a review of the decision [*Veh. Code § 14105.5(a)*]. For further discussion, see *§ 92.108*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 92.52 Request to Reopen Case

Following the mailing of the notice of the Department's decision under *Veh. Code § 14105.5, discussed under § 92.51*, the Department, at its own option or on the request of the person whose privilege of driving is in question, may reopen the question, take further evidence, or change or set aside any order previously made [*Veh. Code § 14106*]. For further discussion, see *§ 92.109*. For a form of request to reopen a question, see *§ 92.170*.

Legal Topics:

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§ 92.53 Petition for Judicial Review

[1] Time to File

Notwithstanding *Veh. Code § 14400* or *14401* (governing review of Department orders), within 30 days of the issuance of the notice of determination of the Department sustaining an order of suspension or revocation of the person's driving privilege after the hearing under *Veh. Code § 13558*, the person may file a petition for review of the order [*Veh. Code § 13559(a)*]. For a form of petition for judicial review, see *§ 92.181*.

If a person has received a final, adverse decision by the Department without a hearing under *Veh. Code § 13558*, it appears that judicial review would be governed by the administrative mandate provisions under *Code Civ. Proc. § 1094.5* [*see Coombs v. Pierce (1991) 1 Cal. App. 4th 568, 575, 2 Cal. Rptr. 2d 249* (discussed in [6], *below*)]. If a person fails to request a hearing under *Veh. Code § 13558*, he or she fails to exhaust administrative remedies and is precluded from seeking judicial review [*Marquez v. Gourley (2002) 102 Cal. App. 4th 710, 712, 125 Cal. Rptr. 2d 784]* . For further discussion of judicial review under *Code Civ. Proc. § 1094.5*, see *§ 92.120* et seq.).

[2] Proper Court

The petition for review must be filed in the court of competent jurisdiction in the person's county of residence [*Veh. Code § 13559(a)*]. This provision for filing a petition in the driver's county of residence is not a jurisdictional requirement. Therefore, although the DMV may, on timely motion, obtain a transfer of a petition that the driver filed in the wrong county (*Code Civ. Proc. § 396b*), it may not obtain a dismissal of the petition [*Lipari v. Department of Motor Vehicles (1993) 16 Cal. App. 4th 667, 671, 20 Cal. Rptr. 2d 246]* .

[3] Petition Will Not Stay Suspension or Revocation

The filing of a petition for judicial review will not stay the order of suspension or revocation [*Veh. Code § 13559(a)*].

[4] Review Limited to Hearing Record

The review will be on the record at the hearing and the court is not permitted to consider other evidence [*Veh. Code § 13559(a)*].

[5] Issues to Be Determined by Court

If the court finds that the Department exceeded its constitutional or statutory authority, made an erroneous interpretation of the law, acted in an arbitrary and capricious manner, or made a determination that is not supported by the evidence in the record, the court may order the Department to rescind the order of suspension or revocation and return the person's license or reissue a new license to the person [*Veh. Code § 13559(a)*].

[6] Standard of Review

Regardless of how it is labeled, either as a "petition for writ of mandate" or "petition for review," a petition challenging an administrative order based on the implied consent and administrative per se statutory scheme is heard by a court pursuant to the provisions of *Veh. Code § 13559*. If that section clashes with the more generalized provisions of the administrative mandate statute [*see Code Civ. Proc. § 1094.5*], the specialized provisions of *Veh. Code § 13559* control. If *Veh. Code § 13559* is silent on some particular procedure, the general provisions for administrative mandate apply [*Coombs v. Pierce (1991) 1 Cal. App. 4th 568, 575, 2 Cal. Rptr. 2d 249]* .

For further discussion of judicial review under *Code Civ. Proc. § 1094.5*, see *§ 92.120* et seq.

[7] Effect of Judicial Review on Subsequent Criminal Prosecution

A finding by the court after a review under *Veh. Code § 13559* has no collateral estoppel effect on a subsequent criminal prosecution and does not preclude litigation of those same facts in the criminal proceeding [*Veh. Code § 13559(b)*].

Legal Topics:

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§ 92.54 Restoration of Driving Privilege

Generally, the driving privilege cannot be restored, and no restricted or hardship permit to operate a motor vehicle may be issued to a person *during* the suspension or revocation period specified in *Veh. Code § 13353, 13353.1*, or *13353.3* [*Veh. Code § 13353.4(a)*].

However, exceptions apply if the person has not previously been convicted of certain violations [*see Veh. Code § 13353.4(a)*; *see also Veh. Code § 13353.6(a)* (allowing restricted commercial driver's license); *Veh. Code § 13353.7* (allowing restricted driver's license if person enrolls in prescribed education and counseling or treatment programs); *Veh. Code § 13353.8* (allowing restricted license for person under 21 years of age with critical need to drive when license is suspended under *Veh. Code § 23136(a)*].

Further, any fees due under *Veh. Code § 14905* (costs of administration of suspension or revocation programs and California Highway Patrol overtime compensation for attendance at administrative hearings) must be paid before a driver's license may be issued, reissued, or returned to a person after suspension or revocation of the person's driving privilege [*Veh. Code § 14905(a)*]. This requirement does not apply, however, to a suspension or revocation that is set aside by the Department or a court [*Veh. Code § 14905(b)*].

Legal Topics:

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

§§ 92.55[Reserved]

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§ 92.60 Administrative Per Se Law in General

[1] Background and Purpose

Before 1990, the actual act of suspending or revoking the license of a driver who was driving under the influence of a drug or alcohol was generally carried out by the Department when it received a duly certified abstract of judgment from a court [*see Robertson v. Department of Motor Vehicles (1992) 7 Cal. App. 4th 938, 941, 9 Cal. Rptr. 2d 319]* . An exception was suspension under the implied consent statutes [*see Veh. Code §§ 13353, 23612* (discussed in Subdivision 2 (*see § 92.40* et seq.) of this Subpart)].

In 1990, another series of provisions was added to the drunk driving statutes, principal among which was *Veh. Code § 13353.2*. The purpose of the legislation was to provide safety for all persons using the highways of California by quickly suspending the driving privilege of those persons who have shown themselves to be safety hazards by driving with an excessive concentration of alcohol in their bodies [Stats. 1989, ch. 1460, § 1; *Robertson v. Department of Motor Vehicles (1992) 7 Cal. App. 4th 938, 948, 9 Cal. Rptr. 2d 319]* .

Veh. Code § 13353.2 mandates that the Department "immediately" suspend the driving privilege of anyone who is found to have operated a vehicle while his or her blood alcohol level was at an unlawful percentage. Under this statutory scheme, once a driver is stopped by a police officer and arrested for drunk driving on the basis of blood alcohol findings, the Department is required to immediately serve notice on the driver that his or her driver's license is administratively suspended. Thus, no longer is license suspension dependent on the ultimate criminal conviction of the driver [*Robertson v. Department of Motor Vehicles (1992) 7 Cal. App. 4th 938, 941, 9 Cal. Rptr. 2d 319* (also holding no conflict between *Veh. Code § 13353.3(b)(2)*, governing p eriod of suspension under administrative per se law, and *Veh. Code § 23542(b)*, providing for conditional probation with restricted license)].

Similar statutes, commonly known as "administrative per se" laws, have been enacted in several states [*see Peretto v. Department of Motor Vehicles (1991) 235 Cal. App. 3d 449, 452, 1 Cal. Rptr. 2d 392]* .

Effective January 1, 1994, the administrative per se laws were further amended to apply more restrictive provisions to drivers under 21 of age, i.e., under the legal "drinking age." For discussion of these provisions, see *§ 92.80* et seq.

[2] Summary of Departmental Action

If chemical tests show that a person arrested for a drunk driving offense has the prohibited blood alcohol level, the arresting officer or the Department must serve that person with a notice of order of suspension, effective 30 days from the date of service [*Veh. Code §§ 13353.2(b), 13353.3(a), 13382(a)*]. That notice must include the reason and statutory grounds for the suspension, the right to request an administrative hearing, and the date when a request must be made to receive a determination before the effective date of the suspension, among other information [*Veh. Code §§ 13353.2(b), (c), 13353.3(a), 13382(a)*; *Peretto v. Department of Motor Vehicles (1991) 235 Cal. App. 3d 449, 452-453, 1 Cal. Rptr. 2d 392]* . The notice includes an endorsement that functions as a temporary license [*Veh. Code § 13382(a)*].

If no hearing is requested, the suspension becomes effective on the date specified in the notice, after the Department determines the facts on the basis of the officer's report [*Veh. Code §§ 13353.2(a), (d), 13353.3(a), 13557(a)*; *Peretto v. Department of Motor Vehicles (1991) 235 Cal. App. 3d 449, 453, 1 Cal. Rptr. 2d 392]* .

For discussion of the administrative procedures for suspending or delaying the issuance of driver's licenses of persons under 21 years of age, based on lawful detention and the results of a blood alcohol screening test (or refusal to take or failure to take that test), see *§ 92.80* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 92.61 Constitutional Questions

In enacting the administrative per se laws, the Legislature contemplated two processes: one involving court proceedings and criminal in nature, the other involving administrative proceedings and civil in nature. The processes are, for the most part, intended to operate independently of each other and to provide for different dispositions [*Robertson v. Department of Motor Vehicles (1992) 7 Cal. App. 4th 938, 947, 9 Cal. Rptr. 2d 319]* . Based on this distinction, the state does not violate due process or the proscription against double punishment by imposing both criminal and civil penalties for the same act or omission [*Fearn v. Zolin (1992) 9 Cal. App. 4th 1756, 1762, 12 Cal. Rptr. 2d 314]* .

The administrative per se law, providing for different periods of suspension for commercial and noncommercial drivers is rationally related to a legitimate legislative purpose and does not violate the *equal protection clauses* of the state or federal constitutions [*Peretto v. Department of Motor Vehicles (1991) 235 Cal. App. 3d 449, 459, 1 Cal. Rptr. 2d 392* ; *see Murphy v. Pierce (1991) 1 Cal. App. 4th 690, 696, 2 Cal. Rptr. 2d 18]* .

Legal Topics:

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§ 92.62 Immediate Suspension for Driving Under the Influence

[1] Unlawful Blood Alcohol Content

It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle [*Veh. Code §§ 13353.2(a), 23152(b), 23153(b)*; *see also Rehman v. Department of Motor Vehicles (2009) 178 Cal. App. 4th 581, 586, 100 Cal. Rptr. 3d 510* (0.04 percent for commercial vehicle)].

If a person was driving a motor vehicle when he or she had an unlawful blood alcohol content, the Department is required to immediately suspend his or her privilege to operate a motor vehicle [*Veh. Code § 13353.2(a)*].

A different standard for measuring unlawful intoxication applies with respect to drivers under the age of the 21. For further discussion, see *§ 92.80* et seq.

[2] Notice of Order of Suspension

[a] Service

The notice of the order of suspension under *Veh. Code § 13353.2* must be served on the person by a peace officer pursuant to *Veh. Code § 13382* or *13388* [*Veh. Code § 13353.2(b)*]. Under *Veh. Code § 13382*, the person is first arrested for a violation of the statutes that prohibit driving under the influence. After the arrest, a chemical test is conducted (assuming the person has not refused to submit to chemical testing under *Veh. Code § 13353*, as discussed in Subdivision 2 (*see § 92.40* et seq.) of this Subpart). If the chemical test results show that the person has an unlawful blood alcohol content, the peace officer, acting on behalf of the Department, must personally serve the order on the arrested person [*Veh. Code § 13382*].

[b] Content

The notice must specify clearly the reason and statutory grounds for the suspension, the effective date of the suspension,

the right of the person to request an administrative hearing, the procedure for requesting an administrative hearing, and the date by which a request for an administrative hearing must be made in order to receive a determination before the effective date of the suspension [*Veh. Code § 13353.2(c)*].

[c] Seizure of License and Issuance of Temporary License

If the peace officer serves the notice of order of suspension, the peace officer is required to take possession of any driver's license issued by California that is held by the person. When the officer takes possession of a valid driver's license, the officer must issue a temporary driver's license. The temporary driver's license is an endorsement on the notice of the order of suspension and is to be valid for 30 days from the date of arrest [*Veh. Code § 13382(b)*].

[3] Effective Date of Order of Suspension

An order of suspension of a person's privilege to operate a motor vehicle pursuant to *Veh. Code § 13353.2* becomes effective 30 days after the person is served with the notice under *Veh. Code § 13353.2, 13382(b)*, or *13388(b)* [*Veh. Code § 13353(a)*].

[4] Length of Suspension

[a] Dependent on Previous Seven Years

The length of the suspension depends on whether there are certain prior convictions or administrative determinations within seven years of the occasion in question [*see Veh. Code § 13353.3(b), (c)*; *see also Veh. Code § 13353.6* (commercial license)]. For a general comparison with the length of suspension under the implied consent law, see *§ 92.43[5][b]*.

[b] Four-Month Suspension

Except as provided in *Veh. Code § 13353.6* (relating to suspension of commercial license), if the person *has not* been convicted of a separate violation of any of the offenses specified below, or has not been administratively determined to have committed any of the following acts, within seven years of the occasion in question, the person's privilege to operate a motor vehicle must be suspended for four months [*see Veh. Code § 13353.3(b)(1)*].

The specified offenses or occurrences are the following [*see Veh. Code § 13353.3(b)(1)*]:

- Conviction of reckless driving under *Veh. Code § 23103* as specified in *Veh. Code § 23103.5* (pleas of guilty or nolo contendere to reckless driving charge in satisfaction or as substitute for original charge of driving under influence).

- Conviction of driving under the influence of a drug or alcohol under *Veh. Code § 23152* or *23153*.

- Conviction of gross vehicular manslaughter while under the influence under *Penal Code § 191.5*.

- Conviction of committing an unlawful act while under the influence under *Penal Code § 192(c)(3)*.

- Administrative determination that the person refused chemical testing pursuant to *Veh. Code § 13353* (implied consent law, discussed in Subdivision 2 (*see § 92.40* et seq.) of this Subpart).

- Administrative determination that the person was driving with an excessive concentration of alcohol pursuant to *Veh. Code § 13353.2* on a separate occasion.

- Conviction of driving while under the age of 21 years with 0.05 percent or more, by weight, of alcohol in his or her blood under *Veh. Code § 23140*.

- Administrative determination that the person was under 21 years of age and refused a preliminary alcohol screening test pursuant to *Veh. Code § 13353.1*.

[c] One-Year Suspension

If the person *has* been convicted of a separate violation of any of the offenses, or has been administratively determined to have committed any of the acts, set forth in *Veh. Code § 13353.3(b)(1)* (discussed in [b], *above*), within seven years of the occasion in question, the person's privilege to operate a motor vehicle must be suspended for one year [*see Veh. Code § 13353.3(b)(2)*].

[d] Concurrent Periods Based on Same Occurrence

If a person's privilege to operate a motor vehicle is suspended under the administrative per se statute, and he or she also is convicted of a violation of *Veh. Code § 23140* (person under age 21 with prohibited blood-alcohol level) or *Veh. Code § 23152* or *23153* (driving under the influence) arising out of the same occurrence, both the suspension under the administrative per se law, and the suspension or revocation ordered on the conviction must be imposed [*see Veh. Code § 13353.3(c)*]. The periods of suspension or revocation under these circumstances, however, are to run concurrently, and the total period of suspension or revocation may not exceed the longer of the two suspension or revocation periods [*Veh. Code § 13353.3(c)*]. This provision does not affect suspensions or revocations under the implied consent law pursuant to *Veh. Code § 13353* or *13354* for refusal of chemical testing [*Veh. Code § 13353.3(c)*] (*see discussion under § 92.43[5][b]*).

For the purpose of the concurrent running of the suspension or revocation period, a conviction for violating the statutes that prohibit driving under the influence includes a violation described in *Veh. Code § 23620*, relating to vessels and vehicular manslaughter [*see Veh. Code § 13353.3(c)*].

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§ 92.63 Collateral Testing

[1] Available at Driver's Own Expense

The person tested may, at his or her own expense, have a physician, registered nurse, licensed vocational nurse, duly licensed clinical laboratory technologist or clinical laboratory bioanalyst, unlicensed laboratory personnel regulated under *Bus. & Prof. Code §§ 1242, 1242.5*, and *1246*, or any other person of his or her own choosing administer a test, in addition to any administered at the direction of a peace officer, for the purpose of determining the amount of alcohol in his blood at the time alleged as shown by chemical analysis of his or her blood, breath, or urine. The failure or inability to obtain an additional test by a person will not preclude the admissibility in evidence of the test taken at the direction of a peace officer [*Veh. Code § 23158(b)*].

[2] Advice of Availability Not Required

Veh. Code § 23612 does not purport to require the arresting officer to advise a driver that an additional test is available at his or her own expense. Principles of due process or equity also do not require it. All that due process requires is an opportunity for a person to obtain a timely sampling of his or her blood in the manner required by law [*Kesler v. Department of Motor Vehicles (1969) 1 Cal. 3d 74, 78-79, 81 Cal. Rptr. 348, 459 P.2d 900]* .

[3] Department's Consideration Not Required

The Department is not required to consider the results of a blood test made after arrest by a person's own physician. The test is not a substitute for the test required by *Veh. Code § 23612* to be taken on arrest [*see Funke v. Department of Motor Vehicles (1969) 1 Cal. App. 3d 449, 453, 81 Cal. Rptr. 662]* .

[4] No Due Process Right to Breath Sample

The requirements of *Veh. Code § 23614* that a person electing a breath test must be told that the breath testing equipment does not retain a sample of the breath have been held to be statutory only. Hence, there are no due process or

fundamental fairness violations when the state fails to preserve a breath sample for independent testing, and there is no constitutional duty to advise a suspect that the breath test is not preservable [*In re Cheryl S. (1987) 189 Cal. App. 3d 1240, 1242, 235 Cal. Rptr. 42]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 92.64 Right to Discover Information Concerning Test

On the request of the person tested, full information concerning the test taken at the direction of the peace officer must be made available to person tested or to his or her attorney [*Veh. Code § 23158(c)*].

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§ 92.65 Internal Review of Record

The Department is required to make a determination of the facts in *Veh. Code § 13353.2(a)*. The determination is made on the basis of the report of a peace officer submitted pursuant to *Veh. Code § 13380*, and any other evidence accompanying the report [*Veh. Code §§ 13353.2(d), 13557(a)*].

The Department is required to sustain the order of suspension or revocation in a review of a determination made under *Veh. Code § 13353.2* if the Department determines by the preponderance of the evidence the facts under (1) and (2), and the facts under either (3), (4), or (5), *below* [*Veh. Code § 13557(b)(2)*]:

> (1) That the peace officer had reasonable cause to believe that the person had been driving a motor vehicle in violation of *Veh. Code §§ 23136, 23140, 23152* or *23153*.
>
> (2) That the person was placed under arrest (or, under *Veh. Code § 23136*, the person was lawfully detained).
>
> (3) That the person was driving a motor vehicle when the person had 0.08 percent or more, by weight, of alcohol in his or her blood.
>
> (4) That the person was driving a motor vehicle when the person was under 21 years of age and had 0.05 percent or more, by weight, of alcohol in his or her blood.
>
> (5) That the person was under 21 years of age and had a blood-alcohol concentration of 0.01 percent or more, as measured by a preliminary alcohol screening test or other chemical test.

If the Department determines that any of those facts were not proven by the preponderance of the evidence, the Department must rescind the order of suspension or revocation and, provided that the person is otherwise eligible, return or reissue the person's driver's license pursuant to *Veh. Code § 13551*. For persons over 21 years of age,

determination of the Department on administrative review is final unless a hearing is requested pursuant to *Veh. Code § 13558* [*Veh. Code § 13557(b)(2)*]. For persons under 21 years of age, the determination of the Department is final unless a hearing pursuant to *Veh. Code § 13558* is requested within 10 days of the determination [*Veh. Code § 13557(b)(2)*].

For the purposes of the administrative per se law, an arrest, valid when made, remains a valid arrest for purposes of license suspension, even though the driver is subsequently released from custody without appearing before a magistrate for the issuance of a complaint (pursuant to *Penal Code § 849(c)*) [*Armondo v. Department of Motor Vehicles (1993) 15 Cal. App. 4th 1174, 1179, 19 Cal. Rptr. 2d 399]* . This procedure results in a "disappearing lawful arrest," in that the arrest is retroactively deemed a detention only [*see Penal Code § 849(b)*]. The purpose of the reclassification of the driver's custody under the Penal Code (to prevent hiring discrimination against persons arrested but not charged with crimes) is different from that underlying the administrative-per-se scheme (to remove drunk drivers from the highway quickly, while providing drivers administrative review and hearing procedures) [*Armondo v. Department of Motor Vehicles (1993) 15 Cal. App. 4th 1174, 1177-1179, 19 Cal. Rptr. 2d 399]* . The result of a contrary rule would be that no license suspension would be valid unless the driver were also brought before a magistrate and criminally charged [*Armondo v. Department of Motor Vehicles (1993) 15 Cal. App. 4th 1174, 1179, 19 Cal. Rptr. 2d 399]* .

For further discussion of review under *Veh. Code § 13557*, including such matters as when the Department is required to make a determination, stay of suspension, and effect of the determination on a subsequent criminal trial, see *§ 92.44*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 92.66 Administrative Hearing Procedure

Except for the issues to be determined (*see § 92.67*), the hearing procedures are the same as those that govern an administrative hearing to review an order of suspension or revocation under the implied consent law [*see Veh. Code § 13558*]. Thus, *Veh. Code § 13558* provides for request for a hearing, the location of the hearing, the time within which the hearing must be held, stay of the license suspension in the event the Department delays holding the hearing or rendering its decision, notice of determination and right of judicial review, and the effect of the determination on a subsequent criminal prosecution [*see Veh. Code § 13558*]. For further discussion of these procedures, see *§ 92.46[1]*.

In addition, as under the implied consent law, *Veh. Code § 14100 et seq.* (general procedure relating to hearings to review actions affecting driver's licenses generally), applies to hearings under the administrative per se law. For discussion of these aspects, see *§ 92.100* et seq. Finally, all matters relating to administrative review of the suspension or revocation order that are not covered under *Veh. Code §§ 13558, 14100 et seq.*, are likewise governed by the Administrative Procedure Act (*Gov. Code § 11500 et seq.*) [*see Veh. Code § 14112*]. For discussion of relevant aspects of the Act, see *§ 92.100* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewCriminal Law & ProcedureCriminal OffensesVehicular CrimesDriving Under the InfluenceBlood Alcohol & Field SobrietyImplied ConsentGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.67 Issues Determined at Hearing

For the purposes of a hearing on an order of suspension pursuant to *Veh. Code § 13353.2*, the only issues at the hearing are those facts listed in *Veh. Code § 13557(b)(2)* [*Veh. Code § 13558(c)(2)*; *see* discussion under § 92.65]. Various evidentiary matters relating to the issue of whether the person was driving with unlawful blood alcohol content are discussed under § 92.68[1].

For a discussion relating to the issues of whether the officer had reasonable cause to believe the person was driving in violation of *Veh. Code § 23152* or *23153* and whether the person was placed under lawful arrest, see *§ 92.47[2]* and *[3]*, respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 92.68 Evidence at Hearing

[1] Dependent on Test Used

The Department has the evidentiary burden of justifying its order of suspension [*Coombs v. Pierce (1991) 1 Cal. App. 4th 568, 576* , citing *Daniels v. Department of Motor Vehicles (1983) 33 Cal. 3d 532, 536, 189 Cal. Rptr. 512, 658 P.2d 1313]* .

The form of evidence that the Department will offer in support of its action will depend on the test used to determine that the person was driving with an unlawful blood alcohol content. If the person submitted to a breath test, the results of the test would be available immediately and stated in the officer's sworn statement or report [*see, e.g., Davenport v. Department of Motor Vehicles (1992) 6 Cal. App. 4th 133, 140, 7 Cal. Rptr. 2d 818* ; *see also Veh. Code § 13380*; *Santos v. Department of Motor Vehicles (1992) 5 Cal. App. 4th 537, 548 n.7, 7 Cal. Rptr. 2d 10* (report must contain results of breath test)]. The Department may also submit an intoxilyzer print out showing the results of the breath test [*see, e.g., Bell v. Department of Motor Vehicles (1992) 11 Cal. App. 4th 304, 308, 13 Cal. Rptr. 2d 830* ; *Burge v. Department of Motor Vehicles (1992) 5 Cal. App. 4th 384, 388, 7 Cal. Rptr. 2d 5]* .

If the person submitted to a blood or urine test, the report would not contain the results of a blood or urine test because these tests are not performed by the officer at the time of the arrest [*see Santos v. Department of Motor Vehicles (1992) 5 Cal. App. 4th 537, 548 n.7, 7 Cal. Rptr. 2d 10]* . The results of the test would be contained in a report by the forensic laboratory that conducted the test [*see, e.g., Santos v. Department of Motor Vehicles (1992) 5 Cal. App. 4th 537, 542, 7 Cal. Rptr. 2d 10]* .

For discussion of issues relating to admission of evidence in an administrative hearing generally, see *§ 92.100* et seq.

[2] Foundational Requirements

In general, the foundational requirements for establishing the reliability of test results consist of a showing of all of the following [*Molenda v. Department of Motor Vehicles (2009) 172 Cal. App. 4th 974, 1001-1005, 91 Cal. Rptr. 3d 792*

; *Davenport v. Department of Motor Vehicles (1992) 6 Cal. App. 4th 133, 140, 7 Cal. Rptr. 2d 818* ; *People v. Adams (1976) 59 Cal. App. 3d 559, 561, 131 Cal. Rptr. 190]* :

- The apparatus utilized was in proper working order.
- The test used was properly administered.
- The operator was competent and qualified.

Law enforcement agencies and their officers and employees have an official duty under *Health & Safety Code § 100715*, and related regulations, to perform blood alcohol analyses by methods devised to assure reliability [*see Health & Safety Code § 100715*; *17 Cal. Code Reg. § 1215 et seq.*].

Compliance with the foregoing regulations establishes both a foundation for admission of test results into evidence in any proceeding and a basis for finding that such results are legally sufficient evidence to support the requisite findings in such proceeding [*Davenport v. Department of Motor Vehicles (1992) 6 Cal. App. 4th 133, 142-143, 7 Cal. Rptr. 2d 818* ; *see Shannon v. Gourley (2002) 103 Cal. App. 4th 60, 126 Cal. Rptr. 2d 327* (test performed by trainee satisfied presumption requirements)].

The presumption contained in *Evid. Code § 664*, however, places the burden on the licensee to establish that the test *did not comply* with the foregoing requirements [*Roze v. Department of Motor Vehicles (2006) 141 Cal. App. 4th 1176, 1183, 46 Cal. Rptr. 3d 829* ; *Davenport v. Department of Motor Vehicles (1992) 6 Cal. App. 4th 133, 140, 7 Cal. Rptr. 2d 818* ; *see* discussion in [4], *below*].

The presumption does not apply when the person who conducted the test was not among those authorized to perform forensic alcohol analyses. Thus, a test conducted by a "criminalist," rather than by a forensic alcohol supervisor, forensic alcohol analyst, or forensic alcohol analyst trainee working under the supervision of a forensic alcohol supervisor or forensic alcohol analyst, as required by *17 Cal. Code Reg. § 1216(a)(1)* is not presumed valid [*Furman v. Department of Motor Vehicles (2002) 100 Cal. App. 4th 416, 422-423, 122 Cal. Rptr. 2d 520]* .

[3] *Kelly-Frye* Foundation Is Inapplicable

The traditional *Kelly-Frye* test, known also as the *Kelly* test [*see People v. Kelly (1976) 17 Cal. 3d 24, 130 Cal. Rptr. 144, 549 P.2d 1240* ; *see also People v. Leahy (1994) 8 Cal.4th 587, 599, 34 Cal. Rptr. 2d 663, 882 P.2d 321* (reaffirming *Kelly* rule and declining to follow broader rule used in federal courts)], requiring foundational evidence regarding the general acceptance of a new scientific method of proof, is inapplicable to the well-accepted methods of testing blood alcohol [*Burge v. Department of Motor Vehicles (1992) 5 Cal. App. 4th 384, 389, 7 Cal. Rptr. 2d 5* ; *but see People v. Leahy (1994) 8 Cal. 4th 587, 604, 34 Cal. Rptr. 2d 663, 882 P.2d 321* (*Kelly* rule does apply to field sobriety test known as horizontal gaze nystagmus (HGN) test)].

[4] Presumption That Official Duty Was Regularly Performed

[a] Presumption Affects Burden of Proof

It is presumed that official duty has been regularly performed [*Evid. Code § 664*]. The presumption applies generally to police officers [*Morgenstern v. Department of Motor Vehicles (2003) 111 Cal. App. 4th 366, 374, 4 Cal.Rptr. 3d 46* (presumption applies even if officer failed to sign breath test operator's sworn certification); *Davenport v. Department of Motor Vehicles (1992) 6 Cal. App. 4th 133, 141, 7 Cal. Rptr.2d 818* (noting that presumption does not apply to issue of lawfulness of warrantless arrest)]. This presumption supplies sufficient indicia of the trustworthiness of blood alcohol results to justify reliance on such results to support a license suspension, subject to a showing that the test was not

performed in compliance with statutory requirements [*Imachi v. Department of Motor Vehicles (1992) 2 Cal. App. 4th 809, 816-817, 3 Cal. Rptr. 2d 478]* . Thus, the foundational evidence described in [2], *above*, is not required in the absence of evidence that the test was not properly performed [*see Santos v. Department of Motor Vehicles (1992) 5 Cal. App. 4th 537, 547, 7 Cal. Rptr. 2d 10* ; *see also Davenport v. Department of Motor Vehicles (1992) 6 Cal. App. 4th 133, 143, 7 Cal. Rptr. 2d 818]* .

However, the presumption does not apply when the person who conducted the test was not among those authorized to perform forensic alcohol analyses. Thus, a test conducted by a "criminalist," rather than by a forensic alcohol supervisor, forensic alcohol analyst, or forensic alcohol analyst trainee working under the supervision of a forensic alcohol supervisor or forensic alcohol analyst, as required by *17 Cal Code Reg. § 1216(a)(1)*, was not presumed valid [*Furman v. Department of Motor Vehicles (2002) 100 Cal. App. 4th 416, 422-423, 122 Cal. Rptr. 2d 520* ; *see Shannon v. Gourley (2002) 103 Cal. App. 4th 60, 126 Cal. Rptr. 2d 327* (test performed by trainee satisfied presumption requirements)].

If it is established that all matters in the report are the direct observations and within the personal knowledge of the reporting officer, the report, including the results of blood tests administered by the officer, constitutes sufficient evidence to support findings justifying suspension of the licensee's driving privilege [*Davenport v. Department of Motor Vehicles (1992) 6 Cal. App. 4th 133, 143, 7 Cal. Rptr. 2d 818]* .

Similarly, the actual written report of a blood test performed by a licensed forensic laboratory on behalf of a law enforcement agency would fall within the presumption of duty regularly performed [*Santos v. Department of Motor Vehicles (1992) 5 Cal. App. 4th 537, 547, 7 Cal. Rptr. 2d 10* ; *see also Petricka v. Department of Motor Vehicles (2001) 89 Cal. App. 4th 1341, 1348, 107 Cal. Rptr. 2d 909]* .

The presumption affects the burden of proof. The presumption, therefore, effectively places on the licensee, against whom the sworn report is offered, the burden of proof as to the nonexistence of the foundational trustworthiness of the report as a whole, and in particular, the nonexistence of the foundational reliability of the tests on which the report is based [*Roze v. Department of Motor Vehicles (2006) 141 Cal. App. 4th 1176, 1183, 46 Cal. Rptr. 3d 829* ; *Davenport v. Department of Motor Vehicles (1992) 6 Cal. App. 4th 133, 143, 7 Cal. Rptr. 2d 818* ; *see* [2], *above*)].

Put another way, an officer's statement relating firsthand observations shifts the foundational method-of-preparation burden, requiring the licensee to show that the officer failed in his or her duty to observe and correctly report the events described in the statement [*Santos v. Department of Motor Vehicles (1992) 5 Cal. App. 4th 537, 547* ; *see Manriquez v. Gourley (2003) 105 Cal. App. 4th 1227, 1233, 130 Cal. Rptr. 2d 209* (officer not required to focus on driver for 15 minutes)]. Or, when the record of the test result is from a forensic laboratory, the presumption of duty regularly performed shifts the burden to the licensee to show that the report was not properly prepared [*Santos v. Department of Motor Vehicles (1992) 5 Cal. App. 4th 537, 547, 7 Cal. Rptr. 2d 10]* .

[b] Rebutting Presumption

As mentioned in [a], *above*, the licensee has the burden of rebutting the presumption favoring the reliability of blood alcohol tests [*see Davenport v. Department of Motor Vehicles (1992) 6 Cal. App. 4th 133, 140-143, 7 Cal. Rptr. 2d 818]* .

The presumption has been rebutted by establishing that the testing apparatus or the forensic laboratory did not comply with licensing requirements. In such cases the Department is required to show that it complied with each of the traditional foundational requirements, discussed in [2], *above*, in order to sustain the suspension [*see Molenda v. Department of Motor Vehicles (2009) 172 Cal. App. 4th 974, 1001-1005, 91 Cal. Rptr. 3d 792 (PAS test)* ; *Coombs v. Pierce (1991) 1 Cal. App. 4th 568, 576, 2 Cal. Rptr. 2d 249* (breath test); *Santos v. Department of Motor Vehicles (1992) 5 Cal. App. 4th 537, 549, 7 Cal. Rptr. 2d 10* (blood test)].

The operator of the test may be subpoenaed to testify regarding the manner in which the test was given [*see McKinney Department of Motor Vehicles (1992) 5 Cal. App. 4th 519, 525, 7 Cal. Rptr. 2d 18* (citing *Veh. Code § 23158(c)*)]. The DMV's refusal to enforce a licensee's subpoena for the test operator's attendance at the hearing may deny the licensee his or her constitutional and statutory rights to confront and cross examine his or her accuser [*Fitzpatrick v. Department of Motor Vehicles (1993) 13 Cal. App. 4th 1771, 1776-1778, 17 Cal. Rptr. 2d 110]* . This may be so, for example, when the licensee's refusal to submit to a test is an issue at the hearing, and the opportunity to impeach an absent law enforcement officer's hearsay testimony regarding probable cause and the interaction between the officer and the licensee would be the licensee's only chance to defeat a license suspension [*Fitzpatrick v. Department of Motor Vehicles (1993) 13 Cal. App. 4th 1771, 1777, 17 Cal. Rptr. 2d 110]* .

[5] Official Records Exception to Hearsay Rule

Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter stated [*Evid. Code § 1200(a)*]. Since evidence of the licensee's blood alcohol content is typically in the form of a peace officer's sworn report, in the case of a breath test, or a report by a forensic laboratory, in the case of a blood or urine test, such evidence is hearsay [*see Santos v. Department of Motor Vehicles (1992) 5 Cal. App. 4th 537, 546, 7 Cal. Rptr. 2d 10* ; *Imachi v. Department of Motor Vehicles (1992) 2 Cal. App. 4th 809, 816-817, 3 Cal. Rptr. 2d 478]* .

Under the Administrative Procedures Act (*Gov. Code § 11500 et seq.*), hearsay evidence may be used for the purpose of supplementing or explaining other evidence but is not sufficient in itself to support a finding unless it would be admissible over objection in civil cases [*Gov. Code § 11513(d)*]. The hearsay statement of a public employee such as the statement of a police officer or the tester's written report of the results of a blood alcohol test, is admissible at the hearing, and is sufficient in and of itself to support a finding, if it meets the criteria of a public employee business record [*Evid. Code § 1280*; *Burge v. Department of Motor Vehicles (1992) 5 Cal. App. 4th 384, 388, 7 Cal. Rptr. 2d 5* ; *see Hildebrand v. Department of Motor Vehicles (2007) 152 Cal. App. 4th 1562, 1570-1572, 62 Cal. Rptr. 3d 234* ; *Wilson v. Zolin (1992) 9 Cal. App. 4th 1104, 1108, 11 Cal. Rptr. 2d 870* (officer's sworn statement stating first-hand knowledge of breath test result qualifies under public record exception despite fact that report was not furnished by licensed forensic laboratory); *but see Molenda v. Department of Motor Vehicles (2009) 172 Cal. App. 4th 974, 989-990, 91 Cal. Rptr. 3d 792* (blood test results not admissible when report not prepared at or near time of test)].

The criteria for admissibility under the public employee business record exception are the following [*Evid. Code § 1280*]:

- That the statement be made by and within the scope of duty of a public employee at or near the time of the act, condition, or event.

- That the sources of information and method and time of preparation are such as to indicate the statement's trustworthiness.

For example, in *Lake v. Reed,* the Supreme Court held that a police officer's unsworn report, containing both admission by defendant that he was driving car at time of arrest for driving while intoxicated, as well as witness statements that defendant was driving while intoxicated, was admissible under *Gov. Code § 11513(c)* in driver's license suspension hearing under "administrative per se" procedure for purposes of showing that defendant was driving at the time of arrest [*Lake v. Reed (1997) 16 Cal. 4th 448, 460-461, 65 Cal. Rptr. 2d 860, 940 P. 2d 311]* . The police officer's report fit under public employee hearsay exception, and the driver's admission fit under party admission exception. The other witness statements were admissible to supplement the statements admitted under hearsay exceptions, and the evidence presented was sufficient to prove that defendant was driving at the time of the arrest [*Lake v. Reed (1997) 16 Cal. 4th 448, 461-462, 65 Cal. Rptr. 2d 860, 940 P.2d 311]* . Further, an unsworn and uncertified blood or urine forensic

laboratory report showing the blood alcohol level of a driver arrested for driving while intoxicated was held to be admissible under *Gov. Code § 11513(c)*, as within the public employees exception to the hearsay rule [*Lake v. Reed (1997) 16 Cal. 4th 448, 466-467, 65 Cal. Rptr. 2d 860, 940 P.2d 311]* .

Public employee business records are admissible in civil actions only to the extent that they report the employee's firsthand knowledge [*Burge v. Department of Motor Vehicles (1992) 5 Cal. App. 4th 384, 389, 7 Cal. Rptr. 2d 5]* . For example, an officer's sworn statement that he or she saw the test *results* and was accurately reporting them cannot attest to the accuracy of the test results themselves or to the propriety of the procedures employed in obtaining them if the test was not performed by the officer and therefore was not within his or her personal knowledge [*Imachi v. Department of Motor Vehicles (1992) 2 Cal. App. 4th 809, 815, 3 Cal. Rptr. 2d 478]* .

In addition, with respect to the requirement that a writing be made "at or near the time of the act, condition, or event," how soon a writing must be made after the act or event is a matter of degree and calls for the exercise of reasonable judgment. Whether an entry made subsequent to an event has been made within a sufficient time to render it within the hearsay exception depends upon whether the time span between the event and the entry was so great as to suggest a danger of inaccuracy by lapse of memory [*Miyamoto v. DMV (2009) 176 Cal. App. 4th 1210, 1219, 98 Cal. Rptr. 3d 459* ; *see also Lee v. Valverde (2009) 178 Cal. App. 4th 1069, 1076-1080, 100 Cal. Rptr. 3d 867* (laboratory report admissible when blood work analyzed at or near time of being drawn, but computer printout dated later)].

[6] Presumption of Intoxication at Time of Driving

In any prosecution under *Veh. Code § 23152*, prohibiting a person from driving with an unlawful blood alcohol content, it is a rebuttable presumption that the person had an unlawful content at the time of driving the vehicle if he or she had an unlawful blood content at the time of the performance of a chemical test within three hours after driving [*Veh. Code § 23152(b)*]. Although this provision is expressly applicable to criminal proceedings and does not mention other forums, the presumption applies to Department hearings as well [*see Komizu v. Gourley (2002) 103 Cal. App. 4th 1001, 1008, 127 Cal. Rptr. 2d 229* ; *Burge v. Department of Motor Vehicles (1992) 5 Cal. App. 4th 384, 391, 7 Cal. Rptr. 2d 5* ; *see also McKinney v. Department of Motor Vehicles (1992) 5 Cal. App. 4th 519, 523-524, 7 Cal. Rptr. 2d 18* (report stating that officer had reasonable cause to believe that driver was "arrested" for driving under influence at specified time, instead of stating that there was reasonable cause to believe person was "driving" under influence at the time, was not fatal when taken together with inferences and deductions from facts submitted)]. To trigger this presumption, it is incumbent on the DMV to establish that the test was taken within three hours of driving [*Komizu v. Gourley (2002) 103 Cal. App. 4th 1001, 1008-1010, 127 Cal. Rptr. 2d 229* ; *Yordamlis v. Zolin (1992) 11 Cal. App. 4th 655, 660-662, 14 Cal. Rptr. 2d 225]* .

Legal Topics:

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§ 92.69 Review of Determination

The methods of review following a hearing reviewing an order of suspension under the administrative per se suspension law are the same as those that apply after a hearing on an implied consent suspension or revocation. Thus, the person subject to the hearing may request a Departmental review of the decision [*see Veh. Code § 14105.5(a)*]. After notice of a decision following such a review, the person may request that the Department reopen the question [*see Veh. Code § 14106*]. He or she may also file a petition for judicial review after issuance of the notice of determination of the Department sustaining an order of suspension or revocation of the person's driving privilege after the hearing [*Veh. Code § 13559(a)*]. For further discussion of these methods of review, see *§ 92.40* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 92.70 Renewed Right to Request Administrative Review

If criminal charges under *Veh. Code § 23152* or *23153* (driving under influence) are not filed for lack of evidence or dropped for insufficiency of evidence, a person whose license was suspended under the administrative per se law has a renewed right to request an administrative hearing before the Department. That request must be made within one year from the date of arrest under *Veh. Code § 23152* or *23153* [*Veh. Code § 13353.2(e)*].

The Department must provide to the person seeking review, and the hearing officer must consider at the hearing, details regarding the defective or lacking evidence and the reason the evidence was found to be defective or lacking. If applicable, the hearing officer must also consider reasons stated on the record by the judge who dismissed the charges [*Veh. Code § 13353.2(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 92.71 Reinstatement of License Following Acquittal

If a person is acquitted of criminal charges related to a determination under *Veh. Code § 13353.2(a)* that the person was driving with an unlawful blood-alcohol content or concentration, the Department must immediately reinstate the person's privilege to operate a motor vehicle if the Department has suspended it administratively under the administrative per se law [*Veh. Code § 13353.2(e)*]. An acquittal for these purposes means a ruling representing a judicial determination in the person's favor either that the person was not driving the motor vehicle or did not have the prohibited blood-alcohol level [*Gikas v. Zolin (1993) 6 Cal. 4th 841, 855-857, 25 Cal. Rptr. 2d 500, 863 P.2d 745* (dismissal after successful suppression motion finding that arrest was illegal does not constitute "acquittal" for purposes of *Veh. Code § 13353.2(e)*); *see also Agresti v. Department of Motor Vehicles (1992) 5 Cal. App. 4th 599, 607, 7 Cal. Rptr. 2d 353* ("dismissal" does not constitute "acquittal" for purposes of *Veh. Code § 13353.2(e)*); *Claxton v. Zolin (1992) 8 Cal. App. 4th 553, 562, 10 Cal. Rptr. 2d 319* (not-guilty ruling, regardless of whether judge's ruling was based on adversarial litigation or factual stipulation of parties, constitutes "acquittal")].

The reinstatement requirement applies even though the licensee is convicted of alcohol-related reckless driving [*Helmandollar v. Department of Motor Vehicles (1992) 7 Cal. App. 4th 52, 56-57, 9 Cal. Rptr. 2d 155* (stating that *Veh. Code § 13353.2(a)* does not mandate suspension of driving privileges for anyone convicted of "driving under the influence" but for driving with unlawful blood alcohol content)].

The DMV does not have a mandatory duty to reinstate a person's driver's license suspended pursuant to *Vehicle Code § 13353* if that person is later found factually innocent of a criminal charge of willfully refusing to take a chemical test [*Burnstine v. Department of Motor Vehicles (1996) 51 Cal. App. 4th 1428, 1431, 60 Cal. Rptr. 2d 89]* .

The Department is required to immediately return or reissue for the remaining term any driver's license that has been taken from the person pursuant to *Veh. Code § 13382* or otherwise. No fee may be imposed under *Veh. Code § 14905* for the return or reissuing of a driver's license under these circumstances [*Veh. Code § 13353.2(e), (f)*].

Legal Topics:

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

§§ 92.72[Reserved]

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§ 92.80 Applicable Laws

[1] Background and Purpose

The Legislature enacted provisions effective January 1, 1994, that were specifically aimed at closing a "loophole" in the implied consent and administrative per se laws, with regard to penalties for those who drive under the influence of alcohol even though they are under 21 years of age, and hence, under the legal "drinking age" (i.e., under the legal age for purchasing or possessing alcoholic beverages) [*see Veh. Code §§ 13352.3, 13353, 13353.2, 23136*; *see* Stats. 1993, ch. 899, § 1]. It was the intent of the Legislature to prohibit a person under 21 years of age (including a minor under 18 years of age) from driving a motor vehicle for one year if that person drove with a blood-alcohol concentration of 0.01 percent or greater, as measured by a preliminary alcohol screening test [Stats. 1993, ch. 899, § 1(b), (d); *see Bobus v. Department of Motor Vehicles (2004) 125 Cal. App. 4th 680, 685, 23 Cal. Rptr. 3d 168* (primary goal of *Veh. Code § 23136* was to enhance public safety, and, indirectly, to discourage minors from consuming alcoholic beverages)].

For example, the administrative per se laws require the Department to suspend a driver's license when he or she is under 21 years of age and is found with a blood-alcohol concentration of 0.01 percent or greater, as measured by a preliminary alcohol screening test or other chemical test [*see Veh Code § 13353.2(a)*]. This is a more restrictive standard than the 0.08 blood-alcohol content standard that applies to adults 21 years of age or older [*see Veh Code § 13353.2(a)* and discussion under § 92.62]. These provisions are discussed under § 92.81.

[2] Implied Consent Laws Applicable to Persons Under 21

A person under the age of 21 years who drives a motor vehicle is deemed to have given his or her consent to a preliminary alcohol screening test or other chemical test for the purpose of determining the presence of alcohol in the person, if lawfully detained for violating the prohibition against driving a vehicle with a blood-alcohol concentration of 0.01 percent or greater [*Veh. Code § 23136(a), (c)(1)*].

For discussion of the implied consent law generally, see *§ 92.40* et seq.

Legal Topics:

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8-92 California Forms of Pleading and Practice--Annotated § 92.81

§ 92.81 Administrative Per Se Laws Applicable to Drivers Under 21

[1] Automatic Suspension

It is unlawful for a person under the age of 21 years to drive a vehicle when he or she has a blood-alcohol concentration of 0.01 percent or greater, as measured by a preliminary alcohol screening test or other chemical test [*Veh. Code § 23136(a)*]. A violation of *Veh. Code § 23136(a)* is not, however, an infraction or a public offense, but subjects the driver to civil penalties under the Department's administrative procedures [*see Veh. Code § 13390*].

Thus, the administrative per se law now requires that the Department immediately suspend the driving privileges of any person under 21 who was lawfully detained under *Veh. Code § 13388* and was found to have operated a motor vehicle in violation of *Veh. Code § 23136(a)*, that is, who was driving with a blood-alcohol concentration of 0.01 percent or greater as measured by a preliminary alcohol screening test or other chemical test [*Veh. Code § 13353.2(a)*; *cf. Veh. Code § 23612(h)* (preliminary alcohol screening test is field sobriety test)].

Driving privileges must be suspended for one year *at minimum* when there is an administrative determination that the driver violated *Veh. Code § 23136* or refused chemical testing pursuant to *Veh. Code § 13353.1* [*Veh. Code § 13353.3(b)(3)*].

The Department must also suspend the driver's license if that person is lawfully detained and refuses to take or fails to complete the preliminary alcohol screening test when requested to do so [*Veh. Code § 13388(b)*].

For discussion of the administrative per se laws generally, see *§ 92.60* et seq.

[2] Preliminary Alcohol Screening Test Defined

For the purposes of *Veh. Code § 23136 et seq.*, a preliminary alcohol screening test device is an instrument designed to measure the presence of alcohol in a person based on a breath sample [*Veh. Code § 13388(c)*].

[3] Lawful Detention and Request to Administer Preliminary Alcohol Screening Test

Any person under 21 who drives a motor vehicle in California is deemed to have given consent to a preliminary alcohol screening test or other chemical test for the purpose of determining the presence of alcohol if that person if lawfully detained for a violation of *Veh. Code § 23136* [*Veh. Code § 23136(c)(1)*; *see also Veh. Code § 13384* (Department may not issue or renew driver's license unless person consents to preliminary alcohol screening test or other chemical test pursuant to *Veh. Code § 23136*)].

If a peace officer has reasonable cause to believe that a person under 21 years of age was driving a motor vehicle in violation of *Veh. Code § 23136*, and has lawfully detained the person, the officer is required to request that the person submit to a preliminary alcohol screening test for the purpose of determining that person's blood-alcohol concentration, if such a test is immediately available. If a preliminary alcohol screening test device is not immediately available, the officer may request the person to submit to chemical testing of his or her blood, breath, or urine, conducted pursuant to *Veh. Code § 23612* [*Veh. Code § 13388(a)*; *see also Veh. Code § 23136(c)(2)*]. This request must be accompanied by a warning that, if the person fails to submit to or fails to complete the alcohol screening test or other chemical test, his or her driving privileges will be suspended for one year to three years, as provided in Veh. Code § 13553.1 [*Veh. Code § 23136(c)(3)*].

[4] Notice of Order of Suspension

If the person refuses to take or fails to complete the preliminary alcohol screening test, or refuses to take or fails to complete a chemical test if the preliminary alcohol device is not available, or if either the preliminary alcohol screening test or chemical test reveals a blood-alcohol concentration of 0.01 percent or greater, the officer, acting on behalf of the Department, must do the following [*Veh. Code § 13388(b)*]:

- Serve the person with a notice of an order of suspension of his or her driving privileges.

- Take possession of the person's California driver's license, if any, and issue a temporary driver's license by endorsing the notice of order of suspension. A temporary driver's license issued in this manner is valid for 30 days from the date of issuance or until receipt of the order of suspension from the Department, whichever occurs first.

- Immediately forward a copy of the completed notice of order of suspension form, and the person's driver's license, if any, to the Department with the report required by *Veh. Code § 13380*. For the purpose of this section, "immediately" means on or before the end of the fifth ordinary business day after the notice of order of suspension was served.

The order of suspension issued under *Veh. Code § 13388* is also governed by the applicable provisions of the general administrative per se law [*see Veh. Code § 13353.2(b)*]. For a full discussion of these provisions, see *§ 92.60* et seq.

[5] Peace Officer's Sworn Report

A peace officer who serves a notice of an order of suspension under *Veh. Code § 13388* must immediately forward to the Department a sworn report of all information relevant to the enforcement action, including a statement of the officer's grounds for belief that the person violated *Veh. Code § 23136* and a report of any results of tests conducted on the person or the circumstances constituting the person's refusal to submit to or complete the tests [*see Veh. Code § 13380*].

[6] Procedure on Driver's Refusal to Take or Failure to Complete Alcohol Screening Test

Veh. Code § 13353.1 sets forth steps that the peace officer and the Department must take when a person subject to *Veh. Code § 13388* refuses to take or fails to complete the preliminary alcohol screening test. The peace officer must serve the notice of order of suspension personally pursuant to *Veh. Code § 13388* [*Veh. Code § 13353.1(b)*]. Otherwise, the Department must immediately notify the person in writing of the action taken. In either case, if it is appropriate, the officer or the Department must provide a non-English notice developed under *Veh. Code § 14100(d)* [*Veh. Code § 13353.1(b)*].

On receipt of the peace officer's sworn statement submitted pursuant to *Veh. Code § 13380*, the Department must review the record and do one of the following [Veh. Code § 13553.1(a)]:

(1) Suspend the person's driving privilege for one year.

(2) Revoke the person's driving privilege for two years, if the refusal was within seven years of either of the following:

(a) Another violation of *Veh. Code § 23136(a)* that resulted in a finding or a conviction of specified sections.

(b) A suspension or revocation of the person's driving privilege pursuant to *Veh. Code § 13355*, *13353.2*, or *23136(a)* for an offense that occurred on a separate occasion.

(3) Revoke the person's driving privilege for three years, if the refusal was within seven years of any of the following:

(a) Two or more other violations of *Veh. Code § 23136(a)* that resulted in a finding or a conviction of specified sections.

(b) Two or more suspensions or revocations of the person's driving privilege pursuant to *Veh. Code § 23136(a)*, *13353*, or *13353.2* for offenses that occurred on separate occasions.

(c) Any combination of two or more of the foregoing convictions or administrative suspensions or revocations.

The Department's review of the record must consider all of the following issues [*Veh. Code § 13353.1(c)*]:

- Whether the peace officer had reasonable cause to believe the person had been driving a motor vehicle in violation of *Veh. Code § 23136*.

- Whether the person was lawfully detained.

- Whether the person refused to submit, or did not complete, the test after being requested to do so by the peace officer.

[7] Request for Administrative Hearing

A person whose driving privileges are suspended for refusal to take or failure to complete a preliminary alcohol screening test under *Veh. Code § 13388* may request an administrative hearing under *Veh. Code § 13558* [*Veh. Code § 13353.1(d)*]. However, this request does not stay the order of suspension except as provided in *Veh. Code § 13558(e)* [*Veh. Code § 13353.1(d)*]. These administrative hearing procedures are also available to review an order of suspension

or revocation under the administrative per se law and implied consent law [*see Veh. Code § 13558*]. For further discussion see *§ 92.40* et seq. and § 92.60 et seq.

[8] Petition for Review Based on Critical Need to Drive

A person whose driving privileges have been suspended under *Veh. Code § 23136(a)* may petition the Department for review. On review, the Department may modify its original order of suspension and impose restrictions instead if the person has a "critical need to drive" as defined in *Veh. Code § 12513* [*Veh. Code § 13353.8*].

[9] Notice to Driver's License Applicants

The Department must provide specified information regarding the provisions of *Veh. Code § 23136 et seq.* to any person under 21 years of age before issuing that person a driver's license or permit [*Veh. Code § 12802.5*]. In turn, applicants must consent to required chemical tests to determine alcohol or drug content of blood levels if lawfully arrested or detained under drunk driving laws [*see Veh. Code § 13384*].

[10] Procedures Applicable to Minors

With certain exceptions, the Department must immediately revoke the driving privilege of a person on receipt of an abstract of court record or juvenile court record or report showing that the person was convicted of violating *Veh. Code § 23152* or *23153*, relating to driving under the influence of alcohol or drugs, while under 18 years of age [*Veh. Code § 13352.3(a)*]. This requirement also applies to out-of-state convictions [*see Veh. Code §§ 13352(d), 13367*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesVehicular CrimesDriving Under the InfluenceBlood Alcohol & Field SobrietyImplied ConsentGeneral OverviewCriminal Law & ProcedureJuvenile OffendersCriminal OffensesAlcohol & Tobacco OffensesTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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[Reserved]

§§ 92.82[Reserved]

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5. Financial Responsibility Law

8-92 California Forms of Pleading and Practice--Annotated § 92.90

§ 92.90 Financial Responsibility Laws in General

[1] Background and Purpose

Before 1975, the financial responsibility laws contained in former *Veh. Code § 16000 et seq.* presupposed the likelihood of negligent or willfully improper motor vehicle operation [*see* Stats. 1974, ch. 1409, § 1]. In the case of *Rios*, the Supreme Court held that since operation of the sanctions made that presupposition, the sanctions could not be constitutionally imposed without granting the right to notice and hearing on the issue of fault-related vehicle operation to the owner or operator [*Rios v. Cozens (1972) 7 Cal. 3d 792, 797-799 , cert. granted and remanded, 410 U.S. 425 , on remand, 9 Cal. 3d 454*].

As a consequence of *Rios*, the Legislature suspended operation of some of the financial responsibility sanctions. Operative January 1, 1975, the Legislature enacted a new *Veh. Code § 16000 et seq.*, together with amendments to certain provisions in the Insurance Code, that require those who own or operate motor vehicles on the streets and highways of California to show evidence that they are financially capable of providing monetary protection to those suffering injury to their person or property by reason of the ownership or use of such vehicles, without regard to negligence, liability, carelessness, or culpability. It deemed such capability a concurrent responsibility of ownership or operation [*see* Stats. 1974, ch. 1409, § 1].

Thus, the Legislature adopted provisions requiring those who own or operate motor vehicles to show evidence of such financial capability by certain prescribed methods, including the filing of proof of financial responsibility whenever a driver is involved in an accident involving bodily injury or property damage in excess of a specified amount, regardless of fault [*see* Stats. 1974, ch. 1409, § 1; *Veh. Code § 16021*].

The law was held to be constitutional in light of the Legislature's declaration that the purpose of the law was not so much to deter negligent drivers, but rather to ensure that everyone, negligent or not, was able to compensate for any harm they caused while driving [*see* Stats. 1974, ch. 1409, § 1; *King v. Meese (1987) 43 Cal. 3d 1217, 1220-1221, 240 Cal. Rptr. 829, 743 P.2d 889* (citing *Anacker v. Sillas (1976) 65 Cal. App. 3d 416, 421-422, 135 Cal. Rptr. 537*)].

[2] Summary of Departmental Action

The Department is required to suspend a person's driver's license when he or she has violated certain provisions in the financial responsibility laws.

In general, those laws may be classified as follows:

- Suspension because a driver has failed to make an accident report [*see Veh. Code § 16004*, discussed under § 92.91].

- Suspension because a driver has failed to prove that he or she was financially responsible at the time of an automobile accident [*see Veh. Code § 16070*, discussed under § 92.92].

- Suspension because a judgment debtor has failed to satisfy a judgment relating to an automobile accident within a specified time [*see Veh. Code § 16370*; discussed under § 92.93].

- General financial responsibility laws, applicable under various Vehicle Code provisions, that require a person to demonstrate evidence of financial responsibility before the Department may act; for example, as a condition to the reinstatement of a suspended or revoked license, or when requested by an examining officer prior to conducting a performance test [*see Veh. Code § 16430 et seq.* (discussed under § 92.94), *see also Veh. Code § 16431(b)*].

- Financial responsibility laws applicable to commercial vehicles [*see Veh. Code § 16500 et seq.*; discussed under § 92.95].

[3] Definitions

[a] Ability to Respond in Damages

"Ability to respond in damages" means financial responsibility [*Veh. Code § 102*]. Most provisions of the Vehicle Code have, however, now been revised to use the phrase "financial responsibility" instead.

[b] Driver, Owner, Registered Owner

The various financial responsibility laws use the terms "driver," "owner," and "registered owner" without defining them. Apparently, therefore, the definitions of those terms given in *Veh. Code §§ 305, 460*, and *505*, respectively, govern the use of them in the financial responsibility laws [*see Veh. Code § 100*].

[c] Reportable Off-Highway Accident

For purposes of the financial responsibility laws, a "reportable off-highway accident" means an accident that includes all of the following [*Veh. Code § 16000.1(a)*]:

- Occurs off the street or highway.

- Involves a vehicle that is subject to registration under the Vehicle Code.

- Results in damages to the property of any one person in excess of $750 or in bodily injury or in the death of any person.

A "reportable off-highway accident" does not include any accident that occurs off-highway in which damage occurs

only to the property of the driver or owner of the motor vehicle and no bodily injury or death of a person occurs [*Veh. Code § 16000.1(b)*].

[d] Uninsured Motor Vehicle

As used in the financial responsibility laws under *Veh. Code § 16000 et seq.*, an "uninsured motor vehicle" is a motor vehicle for which financial responsibility as provided in *Veh. Code § 16021* was not in effect at the time of the accident [*Veh. Code § 16000.7*].

[4] Reports Under Financial Responsibility Law

[a] Confidentiality

Except as provided for certain information mentioned in [b], *below*, all reports and supplemental reports required by the compulsory financial responsibility laws in *Veh. Code § 16000 et seq.*, including insurance information forms, are for the confidential use of the Department and any other state department requiring the information. The reports also are without prejudice to the individual making the report [*Veh. Code § 16005(a)*].

[b] Disclosure of Information

On request, the Department is required to disclose the following information from reports made under the compulsory financial responsibility laws [*Veh. Code § 16005(a)*]:

- The names and addresses of persons involved in the accident.
- The registration numbers and descriptions of vehicles involved in the accident.
- The date, time, and location of the accident.
- Any suspension action taken by the Department.
- The names and addresses of insurers.

The information specified in *Veh. Code § 16005(a)*, listed *above*, may be given to any person having a proper interest therein, including the following [*Veh. Code § 16005(b)*]:

- The driver or drivers involved, or the employer, parent, or legal guardian thereof.
- The authorized representative of any person involved in the accident.
- Any person injured in the accident.
- The owners of vehicles or property damaged in the accident.
- Any law enforcement agency.
- Any court of competent jurisdiction.

Legal Topics:

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

Insurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageOperator License SuspensionsInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageProof of Financial ResponsibilityTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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8-92 California Forms of Pleading and Practice--Annotated § 92.91

§ 92.91 Suspension for Failure to Make Accident Report

[1] Duty to Make Report

The driver of a motor vehicle that is involved in any manner in an accident originating from the operation of a motor vehicle on any street or highway is required to report the accident to the Department within 10 days after the accident, if the accident resulted in property damage to any person of more than $750, or bodily injury or death [*Veh. Code § 16000(a)*]. This requirement also applies to any reportable off-highway accident defined in *Veh. Code § 16000.1* [*Veh. Code § 16000(a)*; *see* definition under § 92.90[3][c]; *Garcia v. Superior Court (2006) 137 Cal. App. 4th 342, 347, 39 Cal. Rptr. 3d 902]* . In a case of a driverless runaway vehicle, the registered owner of the vehicle must make a report [*see Veh. Code § 16001*].

The report must be made on a form approved by the Department, and submitted to the Department's Sacramento office [*Veh. Code § 16000(a)*].

If the driver is not the owner and is physically not capable of making the report, the owner is required to make the report as soon as he or she learns of the accident [*Veh. Code § 16003*]. The report must be in writing, but there is no express requirement that the owner's report be on an approved form [*see Veh. Code § 16003*].

If the driver was using an employer's vehicle at the time of the accident, the driver must report the accident to his or her employer within five days. The employer, unless self insured or covered by a liability insurance policy or surety bond establishing financial responsibility, must make the report, on a form approved by the Department, within 10 days [*Veh. Code § 16002*].

[2] Exception for Government-Owned Vehicle

A report is not required if the motor vehicle involved in the accident was owned or leased by or under the direction of the United States, the State of California, or another state, or a local agency [*see Veh. Code § 16000(b)*].

[3] Suspension Is Mandatory

The Department is required to suspend the driver's license of any person who fails, refuses, or neglects to make a report of an accident as requiredin *Veh. Code § 16000 et seq.*, governing compulsory financial responsibility [*Veh. Code § 16004(a)*]. However, if none of the parties involved in an accident has reported the accident to the Department within one year following the date of the accident, the Department is not required to file a report on the accident and the driver's license suspension requirements of *Veh. Code § 16004* and *Veh. Code § 16070* do not apply [*Veh. Code § 16000(c)*].

[4] Duration of Suspension

The suspension will remain in effect until terminated by receipt of the report of the accident or evidence that financial responsibility is in effect [*Veh. Code § 16004(b)*]. The Department charges a fee for reinstatement of the license [*see Veh. Code § 14904(a)*].

[5] Effect of Suspension Under Other Provisions

A person's driving privilege may not be suspended under *Veh. Code § 16004* and a suspension that has been imposed and is in effect under *Veh. Code § 16004* must be terminated if the driving privilege is suspended under *Veh. Code § 16370* (suspension for failure to satisfy judgment) or 16381 (suspension for judgment debtor's failure to pay required installment) as the result of a judgment arising out of the same accident for which the accident report is required [*Veh. Code § 16004(c)*].

The Department may suspend or reimpose the suspension of the driving privilege under *Veh. Code § 16004* if the suspension under *Veh. Code § 16370* or *16381* is later set aside for a reason other than that the person has satisfied the judgment in full or to the extent provided in *Veh. Code § 16250 et seq.* and has given proof of financial responsibility as provided in *Veh. Code § 16430 et seq.* [*Veh. Code § 16004(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageOperator License SuspensionsInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageProof of Financial ResponsibilityTransportation LawPrivate VehiclesOperator LicensesGeneral OverviewTransportation LawPrivate VehiclesTraffic RegulationGeneral Overview

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§ 92.92 Suspension for Failure to Maintain Financial Responsibility

[1] Duty to Maintain Financial Responsibility

Every driver and every owner of a motor vehicle is required at all times to be able to establish financial responsibility under *Veh. Code § 16021*, and must at all times carry in the vehicle evidence of the form of financial responsibility in effect for the vehicle [*Veh. Code § 16020(a)*].

Forms of financial responsibility under *Veh. Code § 16021*, and the evidence for those forms is discussed under [2], *below*.

[2] Forms and Evidence of Financial Responsibility

[a] Establishing

Under *Veh. Code § 16021*, financial responsibility of the driver or owner is established if the driver or owner of the vehicle involved in an accident in which a report is required under *Veh. Code § 16000* is one of the following [*Veh. Code § 16021*]:

- A self-insurer under the financial responsibility statutes.

- An insured or obligee under a form of insurance or bond that complies with the requirements of the financial responsibility statutes and that covers the driver for the vehicle involved in the accident.

- The United States of America, the State of California, or any municipality, subdivision, or lawful agent of these entities.

- A depositor in compliance with *Veh. Code § 16054.2(a)*.

- An obligee under a policy issued by a charitable risk pool that complies with *Veh. Code § 16054.2(b)*.

- A person who has complied with the requirements authorized by the Department by any other manner that effectuates the purposes of the compulsory financial responsibility laws contained in *Veh. Code § 16000 et seq.*

In addition, in order to establish proof of financial responsibility every driver or employer involved in an accident that requires reporting under *Veh. Code § 16000*, must establish to the satisfaction of the Department that the provisions of *Veh. Code §§ 16050-16057* are applicable to his or her responsibilities arising out of the accident [*Veh. Code § 16050*].

Veh. Code § 16021 provides an exclusive list of the authorized methods of establishing financial responsibility. Thus, the mere existence of personal assets does not satisfy any of the exclusive provisions of the statute. Furthermore, the Department does not authorize any procedure whereby retroactive proof of personal assets may be presented to satisfy the statute [*Ruttenberg v. Department of Motor Vehicles (1987) 194 Cal. App. 3d 1277, 1284, 240 Cal. Rptr. 249]* .

Pertinent aspects of the foregoing forms of financial responsibility, and required proof and evidence of those forms are discussed in [b]-[e], *below*.

[b] Liability Policy or Bond

[i] Requirements

Proof of financial responsibility of a driver or employer involved in an accident may be established by filing with the Department satisfactory evidence of one of the following [*Veh. Code §§ 16050, 16054(a)*]:

- That the owner had an automobile liability policy, a motor vehicle liability policy, or bond in effect at the time of the accident with respect to the driver or the motor vehicle involved in the accident, unless it is established that at the time of the accident the motor vehicle was being operated without the owner's permission, express or implied, or was parked by a driver who had been operating the vehicle without permission.

- That the driver of the motor vehicle involved in the accident, if he or she was not the owner of the motor vehicle, had in effect at the time of the accident an automobile liability policy or bond with respect to his or her operation of the motor vehicle not owned by him or her.

- That such liability as may arise from the driver's operation of the motor vehicle involved in the accident is, in the judgment of the department, covered by some form of liability insurance or bond.

- That the owner or driver, if he or she is involved in an accident while operating a vehicle of less than four wheels, had in effect at the time of the accident with respect to the driver or vehicle a liability policy or bond that meets the requirements of *Veh. Code § 16056*.

Any automobile liability policy or bond referred to above must comply with the requirements of *Veh. Code § 16056*, discussed *below*, and *Ins. Code §§ 11580, 11580.011, 11580.1, 11580.2*. The policy or bond need not contain provisions other than those required by those sections and is not governed by *Veh. Code § 16430 et seq.*, discussed in *§ 92.94* [*Veh. Code § 16054(b)*].

No policy or bond is effective under *Veh. Code § 16054*, unless issued by an insurance company or surety company admitted to do business in this state by the Insurance Commissioner, except as provided in *Veh. Code § 16056(b)*,

relating to insurers of vehicles registered elsewhere [*Veh. Code § 16056(a)*].

A policy or bond is not effective under *Veh. Code § 16054* unless the policy or bond is subject to certain limits relating to bodily injury or death and property damage [*Veh. Code § 16056(a)*].

If the accident has resulted in bodily injury or death, the policy or bond is not effective unless it is subject to a limit, exclusive of interest and costs, of not less than $15,000 because of bodily injury to or death of one person in any one accident. Further, subject to the $15,000 limit for one person, the policy or bond is not effective unless it is subject to a limit of not less than $30,000 because of bodily injury to or death of two or more persons in any one accident [*Veh. Code § 16056(a)*]. In addition, if the accident has resulted in injury to, or destruction of property, the policy or bond is not effective unless it is subject to a limit of not less than $5,000 because of injury to or destruction of property of others in any one accident [*Veh. Code § 16056(a)*].

The low cost automobile insurance policies described in *Ins. Code § 11629.71*, however, are effective under section *16054*, even though the limits of those policies are less than the above limits [*see Veh. Code § 16056.1(a)* (bodily injury limits of $10,000 per person, $20,000 per accident, and property damage limit of $3,000)].

A nonresident driver whose driving privilege has been suspended or revoked based on an action that requires proof of financial responsibility may, in lieu of providing a certificate of insurance from a company admittedto do business in California, provide a written certificate of proof of financial responsibility that is satisfactory to the Department, covers the operation of a vehicle in California, meets the liability requirements of *Veh. Code § 16056*, and is from a company that is admitted to do business in that person's state of residence [*Veh. Code § 16056(c)*].

[ii] Consequence If Policy or Bond Is Not in Effect

On receipt of notice of an accident from the Department, the insurance company or surety company named in the notice is required to notify the Department within such time and in such manner as the Department may require whenever the policy or bond was not in effect at the time of the accident [*Veh. Code § 16057*]. In the event of notice to the Department by the company that coverage was not in effect, then the policy or bond does not operate to establish proof as provided for by *Veh. Code § 16054* [*Veh. Code § 16055*].

[iii] Evidence of Liability Policy or Bond

For purposes of *Veh. Code § 16020* (requiring that drivers and owners of motor vehicles carry evidence of approved form of financial responsibility in effect for vehicle; *see discussion under § 92.92*), the term "evidence of financial responsibility" means the following [*Veh. Code § 16020(b)*]:

- A form issued by an insurance company or charitable risk pool, as specified by the Department under *Veh. Code § 4000.37*.

- If the owner is self-insured, the certificate of self-insurance or the assignment of deposit letter issued by the Department [*see* [c][iii], *below*].

- An insurance covering note or binder, as specified in *Ins. Code § 382* or *382.5*.

- A showing that the vehicle is owned or leased by, or under the direction of, the United States or any public entity, as defined by *Gov. Code § 811.2*.

The evidence may be obtained by a law enforcement officer and court personnel from the electronic reporting system established by the Department [*Veh. Code § 16020(c)*].

The owner of a vehicle, who has a liability insurance policy with respect to the vehicle, must, on request, furnish insurance information to a person who, while operating the vehicle with the owner's permission, is involved in a reportable accident with the insured vehicle, or to the Department whenever the Department is required to establish whether the permitted driver meets the financial responsibility requirements of *Veh. Code § 16020* [*Veh. Code § 16050.5*].

[c] Self Insurer

[i] Requirements

Proof of financial responsibility of a driver or employer involved in an accident may be established if the owner of the motor vehicle involved in the accident was a self-insurer. Any person in whose name more than 25 motor vehicles are registered may qualify as a self-insurer by obtaining a certificate of self-insurance issued by the Department as provided in *Veh. Code §§ 16050-16057* [*Veh. Code § 16052*].

The Department may in its discretion, on application, issue a certificate of self-insurance when it is satisfied that the applicant in whose name more than 25 motor vehicles are registered is possessed and will continue to be possessed of ability to pay judgments obtained against him or her in amounts at least equal to the amounts provided in *Veh. Code § 16056* [*Veh. Code § 16053(a)*; *see* discussion in [b][i], *above*].

The certificate may be issued authorizing the applicant to act as a self-insurer for either property damage or bodily injury or both [*Veh. Code § 16053(a)*].

Any person duly qualified under the laws or ordinances of any city or county to act as self-insurer and then acting as such, may on filing with the Department satisfactory evidence thereof, along with the application as may be required by the Department, be entitled to receive a certificate of self-insurance [*Veh. Code § 16053(a)*].

[ii] Cancellation of Certificate

On not less than five days' notice and a hearing pursuant to the notice, the Department may on reasonable grounds cancel a certificate of self-insurance [*Veh. Code § 16053(b)*].

Failure to pay any judgment within 30 days after the judgment has become final and has not been stayed or satisfied constitutes a reasonable ground for the cancellation of a certificate of self-insurance [*Veh. Code § 16053(b)*].

[iii] Evidence of Self-Insurance

For purposes of *Veh. Code § 16020* (*see* [1], *above*), the term "evidence of financial responsibility" means a certificate of self-insurance issued by the Department [*Veh. Code § 16020(b)(2)*].

[d] Depositor

[i] Requirement

For purposes of *Veh. Code § 16020*, discussed in [1], *above*, the term "evidence of financial responsibility" means the assignment of deposit letter issued by the Department [*Veh. Code § 16020(b)(2)*].

[Ii] Evidence of Deposit

For purposes of *Veh. Code § 16020*, discussed in [1], *above*, the term "evidence of financial responsibility" means the

deposit number issued by the Department [*Veh. Code § 16020(b)(2)*].

[e] Obligee Under Policy Issued by Charitable Risk Pool

Proof of financial responsibility may also be established by providing evidence of a liability policy covering the operation of the vehicle that is issued by a charitable risk pool operating under *Corp. Code § 5005.1*. The registered owner of the vehicle must be a nonprofit, tax exempt organization, as specified, and the policy must be subject to the specified limits [*see Veh. Code § 16054.2*].

[f] Other Forms of Financial Responsibility

Proof of financial responsibility may also be established by any other manner authorized by the Department that effectuates the purpose of *Veh. Code § 16000* et seq., governing compulsory financial responsibility [*Veh. Code § 16054.2(b)*].

[3] Exchange of Information After Accident

Every driver involved in the accident is required, unless rendered incapable, to exchange with any other driver or property owner involved in the accident and present at the scene, all of the following information [*Veh. Code § 16025(a)*]:

- Driver's name and current residence address, driver's license number, vehicle identification number, and current residence address of registered owner.

- Evidence of financial responsibility, as specified in *Veh. Code § 16020* (*see* discussion in [1], *above*), including the name and address of the insurance company and the number of the insurance policy, if the financial responsibility is a form of insurance.

Any person failing to comply with all of the requirements of *Veh. Code § 16025* is guilty of an infraction punishable by a fine not to exceed a specified amount [*Veh. Code § 16025(b)*].

[4] Mandatory Suspension for Failure to Maintain Financial Responsibility

[a] Applicable to Driver and Owner

Whenever a driver involved in an accident described in *Veh. Code § 16000* [*see § 92.91[1]*] fails to provide evidence of financial responsibility as required by *Veh. Code § 16020* at the time of the accident, the Department must suspend the privilege of the driver or owner to drive a motor vehicle [*Veh. Code § 16070(a)*].

The Department's authority to suspend a license for failure to prove financial responsibility extends to the driving privilege of a nonresident [*see Veh. Code § 16070(a)*].

Veh. Code § 16070(a) uses the language "suspend the privilege of the driver or owner to drive a motor vehicle." This language suggests that either the driver's or the owner's license is to be suspended, but not both. However, it is apparent in the plan of *Veh. Code §§ 16000-16075* that the Legislature intended to direct suspension of both the driver's and owner's licenses, when the driver is not the owner. When the driver is not the owner, it is also apparent that each must prove financial responsibility, and that proof by one would not inure to the benefit of the other so as to prevent suspension of both person's licenses. This is clear from the requirement in *Veh. Code § 16020* that both the driver and the owner of a motor vehicle must maintain financial responsibility.

[b] Occupational Driving Excepted

The privilege of a person employed for the purpose of driving a motor vehicle for compensation, whose occupation requires the use of a motor vehicle in the course of his or her employment, to drive a motor vehicle not registered in his or her name and in the course of his or her employment is not subject to suspension under *Veh. Code § 16000 et seq.*, even though his or her privilege to drive has been otherwise suspended under those sections [*Veh. Code § 16073*].

[c] Notice of Intent to Suspend

Whenever the Department receives an accident report pursuant to *Veh. Code §§ 16070-16075* that alleges that one of the drivers involved in the accident was not in compliance with *Veh. Code § 16020* at the time of the accident, the Department must immediately mail to that driver a notice of intent to suspend the license of that driver [*Veh. Code § 16070(b)*].

[d] Effective Date of Suspension

The Department must suspend the driver's license 30 days after mailing the notice unless the driver has, before then, established proof of financial responsibility at the time of the accident, as specified in V eh. Code § 16021, with the Department [*Veh. Code § 16070(b)*].

The suspension notice must notify the driver of the action taken and the right to a hearing under *Veh. Code § 16075* [*Veh. Code § 16070(b)*].

[e] [Reserved]

[f] Period of Suspension

The suspension of the driving privilege of a person as provided in *Veh. Code § 16070*, discussed under [a], *above*, may not be terminated until one year has elapsed from the date of actual commencement of the suspension and until the person files proof of financial responsibility as provided in *Veh. Code § 16430 et seq.*, discussed under § 92.94 [*Veh. Code § 16072(a)*].

[g] Effect of Suspension on Judgment Arising Out of Accident

If a suspension has been imposed under *Veh. Code § 16070* and one year has elapsed from the date the suspension actually commenced, that suspension must be terminated if the driving privilege is suspended under *Veh. Code § 16370* or *16381* as the result of a judgment arising out of the accident for which proof of financial responsibility was required to be established [*Veh. Code § 16072(b)*].

The Department may reimpose the suspension of the driving privilege of a person under *Veh. Code § 16070* if the suspension under *Veh. Code § 16370* or *16381* is later set aside for a reason other than that the person has satisfied the judgment in full or to the extent provided in *Veh. Code § 16250 et seq.* and has given proof of ability to respond in damages as provided *Veh. Code § 16430 et seq.*, discussed under § 92.94 [*Veh. Code § 16072(b)*].

[5] Restricted License in Lieu of Suspension

[a] Department's Discretion to Grant Restriction

Although the Department has a mandatory duty to suspend a person's driving privilege whenever the driver fails to prove the existence of financial responsibility at the time of an accident [*see Veh. Code § 16070*], the Department has discretion to order that a restriction be placed on the person's license in lieu of suspending his or her driving privilege pursuant to *Veh. Code § 16072*. The Department may, on application, if the person files and thereafter maintains proof

of financial responsibility as provided in *Veh. Code § 16072* and pays a penalty fee to the Department of a specified amount, restrict the person's driving privilege to certain situations discussed in [b]-[d], *below* [*Veh. Code § 16072(a)*].

The restriction remains in effect for the period of suspension required by *Veh. Code § 16072* [*see* discussion in [4][f], *above*], so long as proof of financial responsibility is maintained [*Veh. Code § 16072(a)*].

[b] Driving Relating to Employment

A person may be granted a restriction on his or her license that limits his or her driving privilege to necessary travel to and from the person's place of employment, in lieu of suspension for failing to prove financial responsibility after an accident [*Veh. Code § 16072(a)(1)*]. In addition, the person's driving privilege may be restricted to driving that is required in his or her course of employment, when driving a motor vehicle is necessary in order to perform the duties of the person's primary employment [*Veh. Code § 16072(a)(2)*]. For discussion of conditions for such restrictions, see discussion in [a], *above*.

[c] Driving Required to Transport Child to School

A person may be granted a restriction on his or her license that limits his or her driving privilege to necessary travel to transport a minor dependent in that person's immediate family to and from an institute of primary or secondary instruction, if the chief administrative officer or principal of the educational institution certifies in writing to the Department that the minor dependent is enrolled in the educational institution and no form of public transportation or school bus is available between the applicant's place of residence and the educational institution [*Veh. Code § 16072(a)(3)*]. For discussion of conditions for such restrictions, see [a], *above*.

[d] Prolonged and Repetitive Medical Treatment

On application and payment of specified fees, the Department may issue a restricted license to an applicant with serious health problems, or to an applicant with an immediate family member with serious health problems, when the applicant's privilege to drive is otherwise suspended under the financial responsibility provisions of *Veh. Code § 16000 et seq.* [*Veh. Code § 16077(a)*]. The restricted license may be issued to enable the applicant to drive a motor vehicle for the purpose of receiving medical or mental health treatments of a prolonged and repetitive nature for the applicant or the member of the applicant's immediate family with serious health problems [*Veh. Code § 16077(a)*].

To receive this restricted license, the applicant must file and maintain proof of financial responsibility on file with the Department pursuant to *Veh. Code § 16021*, and there must be no other suitable means of transportation available [*Veh. Code § 16077(a)*].

The application for a restricted license must set forth the nature of the health problem, the nature of the treatments, the duration and location of the treatments, and the schedule for visits. The applicant must submit documentation signed by the treating physician and surgeon or licensed psychotherapist, as defined in *Evid. Code § 1010(a), (b), (c),* and *(e),* as necessary to assist the Department in its decision to grant or deny the restricted license [*Veh. Code § 16077(b)*].

If the Department determines that an investigation regarding the applicant's fitness to operate a motor vehicle is warranted, it may conduct one in the manner provided in *Veh. Code § 13801 et seq.* [*Veh. Code § 16077(b)*].

In reviewing the application, the Department must give due consideration to the circumstances set forth in the application and must be guided by principles of fairness and humanity [*Veh. Code § 16077(c)*].

[6] Reinstatement of Suspension

After a suspension of the driving privilege of a person as provided in *Veh. Code § 16070*, a suspension must be

reinstated if the person fails to maintain proof of financial responsibility for three years [*Veh. Code § 16072(a)*].

[7] Correction of Errors by Department

Whenever the Department has taken any action or has failed to take any action under *Veh. Code § 16000 et seq.* as a result of having received erroneous information or having received no information, the Department is required to take appropriate action to carry out the purposes and effects of those statutes on receiving correct information [*Veh. Code § 16074*].

[8] Hearing

[a] Right to Hearing

The suspension provisions of *Veh. Code §§ 16070-16078* do not apply to a driver or owner until 30 days after the Department sends to the driver or owner notice of its intent to suspend his or her driving privilege, pursuant to *Veh. Code § 16070(b)*, and advises the driver or owner of his or her right to a hearing [*Veh. Code § 16075(a)*].

[b] Request for Hearing

[i] Time Limit

If the driver or owner receiving the notice of intent to suspend wishes to have a hearing, the request for a hearing must be made in writing to the Department within 10 days of the receipt of the notice. Failure to respond to a notice of intent within 10 days of receipt of the notice is a waiver of the person's right to a hearing [*Veh. Code § 16075(b)*].

[ii] Request Does Not Stay Suspension

A request for a hearing does not stay the suspension of a person's driving privilege. If the Department does not conduct a hearing and make a determination pursuant thereto within the time limit provided in *Veh. Code § 16070(b)*, the Department must stay the effective date of the order of suspension pending a determination [*Veh. Code § 16075(d)*].

[c] Time Limit to Hold Hearing

If the driver or owner makes a timely request for a hearing, the Department must hold the hearing before the effective date of the suspension [*Veh. Code § 16075(c)*].

[d] Location

The hearing provided for by *Veh. Code § 16075* must be held in the county of residence of the person requesting the hearing [*Veh. Code § 16075(e)*].

[e] Procedure

The hearing must be conducted pursuant to *Veh. Code § 14100 et seq.*, governing administrative hearing procedures in review of action by the Department affecting driver's licenses [*Veh. Code § 16075(e)*]. For further discussion, see *§ 92.100* et seq.

[f] Issues to Be Determined

The purpose of the hearing is to determine the applicability of *Veh. Code § 16000 et seq.*, governing compulsory financial responsibility, to the driver or owner, including a determination of the following issues [*Veh. Code § 16075(c)*]:

- Whether the accident has resulted in property damage in excess of $750, or bodily injury, or death.

- Whether the driver or owner has established financial responsibility, as provided in *Veh. Code §§ 16050-16057* [*see* discussion in [2][a], *above*], was in effect at the time of the accident.

[g] Decision

The Department must render its decision within 15 days after conclusion of the hearing [*Veh. Code § 16075(f)*].

[9] Review of Decision

Since the hearing must be conducted pursuant to the general administrative hearing procedures contained in *Veh. Code § 14100 et seq.*, it appears that a decision rendered after the hearing would also be subject to the methods of review stated under those provisions [*see Veh. Code § 16075(e)* (discussed in [8][e], *above*)]. Thus, it appears that the person subject to the hearing may request a Departmental review of the decision [*see Veh. Code § 14105.5(a)*]. After notice of a decision following such a review, the person may request that the Department reopen the question [*see Veh. Code § 14106*]. He or she may also file a petition for judicial review after issuance of the notice of determination of the Department sustaining an order of suspension or revocation of the person's driving privilege after the hearing [*Veh. Code §§ 14400-14401*]. For further discussion of these methods of review, see *§ 92.100* et seq. § 92.120 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationReview of Initial DecisionsAdministrative LawJudicial ReviewGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageOperator License SuspensionsInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageProof of Financial ResponsibilityTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.93 Suspension for Failure to Satisfy Judgment

[1] Definitions

Regarding the provisions of *Veh. Code § 16370 et seq.*, governing enforcement of a driver's obligation as a judgment debtor to pay a judgment, two important terms are defined by statute:

- "Judgment" means a final judgment of any court of competent jurisdiction in California or any other state or of any court of the United States against a person as defendant on a "cause of action" [*Veh. Code § 16250*].

- "Cause of action" means any cause of action for damage to property in excess of $750 or for damages in any amount on account of bodily injury or death of any person resulting from the operation by the defendant or any other person of any motor vehicle on a highway in this state, except a cause of action based on statutory liability by reason of signing the application of a minor for a driver's license [*Veh. Code § 16251*; *see Veh. Code §§ 17700-17714* (signing application of minor; civil liability)].

[2] Bases for Suspension

[a] Failure to Satisfy Judgment

The Department is required to suspend the license of a person on receiving a copy of a judgment (or a certified copy of the docket entries in an action resulting in a judgment for damages), and a certificate of facts relative to the judgment, on a form provided by the Department, indicating that the person has failed for a period of 30 days to satisfy a judgment, as defined, rendered against him or her [*Veh. Code § 16370*; *see also Veh. Code §§ 16250, 16251* (defining "judgment"), discussed in [1], *above*]. The documents must be accompanied by a filing fee not to exceed $20 to pay for processing the documents and issuing the suspension order [*Veh. Code § 16370.7*].

The clerk of a court, or the judge of a court that has no clerk, must, subject to *Veh. Code § 16373(b)*, issue on the

request of a judgment creditor a certified copy of any judgment or a certified copy of the docket entries in an action resulting in a judgment for damages, and a certificate of facts relative to the judgment on a form provided by the Department [*Veh. Code § 16373(a)*].

The judgment creditor may pay the required fees and request the documents specified in *Veh. Code § 16373(a)*, on the expiration of 30 days after the judgment has become final, if the judgment has not been stayed or satisfied within the amounts specified in *Veh. Code § 16250-16381* as shown by the records of the court. The court must determine the required fees, which must be commensurate with the cost incurred by the court in carrying out *Veh. Code § 16373* [*Veh. Code § 16373(b)*].

[b] Default in Installment Payment

There is provision in *Veh. Code §§ 16379-16381* for the case of a judgment debtor whom the court has allowed to pay a judgment in installments. A default in installment payments will result in suspension of the driver's license until the judgment is satisfied to the extent provided in *Veh. Code § 16377* [*see Veh. Code § 16381*].

[c] Small Claims Judgment

If a small claims court judgment in the amount of $750 or less against the driver of a motor vehicle arising from a motor vehicle accident occurring on a California highway remains unsatisfied for more than 90 days after the judgment becomes final, the judgment creditor may file with the Department of Motor Vehicles a notice stating that the judgment has not been satisfied [*Code Civ. Proc. § 116.880(a)*]. The Department must suspend the privilege of any person to operate a motor vehicle for 90 days, as specified in *Code Civ. Proc. § 116.880* [*Veh. Code § 16370.5*; *see Code Civ. Proc. § 116.880(c)*]. For further discussion of this procedure, see Ch. 526, *Small Claims* .

[d] Judgment Against Nonresident

If the person against whom judgment is rendered is a nonresident, and the person fails within the prescribed time to satisfy the judgment in full or to the extent specified in *Veh. Code §§ 16250-16381*, all privileges of operating a motor vehicle in California given to the person under the Vehicle Code must be suspended while the judgment remains in effect and unsatisfied and until the nonresident gives proof of his or her financial responsibility in the manner and to the extent provided in *Veh. Code § 16430 et seq.*, discussed under § 92.92[2][a], for accidents occurring after the date of the giving of proof [*Veh. Code § 16376*].

The Department must forward a certified copy of the judgment of a court of record or a certified copy of the docket of a court not of record to the appropriate officer in charge of the licensing of drivers in the state of which the person is a resident [*Veh. Code § 16376*].

[e] Later Judgment on Prior Accident Without Proof

Whenever, after a judgment is satisfied and proof of financial responsibility is given, another judgment is rendered against the same person on account of any accident occurring before the proof was given, and the person fails to satisfy the latter judgment within the amounts specified in *Veh. Code § 16377* within 15 days after the judgment becomes final, the Department is required again to suspend the driver's license of the judgment debtor until the latter judgment is satisfied to the extent provided in *Veh. Code § 16377* [*Veh. Code § 16374*]. There will again be a fee for reinstatement of the license [*see Veh. Code § 14904(a)*].

[3] Duration of Suspension

The suspension remains in effect, and no license may be issued to the judgment debtor, until he or she gives proof of financial responsibility as provided in *Veh. Code § 16430 et seq.* [*see* discussion under § 92.94], and until the judgment

is either satisfied in full or to the extent provided in *Veh. Code §§ 16250-16381*, subject to the exemption provided in *Veh. Code § 16375* (when the person files an affidavit stating that he or she was insured) [*Veh. Code § 16371*]. The Department charges a fee for reinstatement of the license [*see Veh. Code § 14904(a)*].

[4] Relief From Suspension by Affidavit of Insurance

Any person whose driver's license has been suspended, or is about to be suspended or become subject to suspension under the statutes governing suspension because of an unsatisfied judgment, may relieve himself or herself from the effect of the judgment by filing with the Department an affidavit showing insurance coverage [*see Veh. Code § 16375*].

Specifically, the affidavit must state [*Veh. Code § 16375*]:

- That at the time of the accident on which the judgment has been rendered the person was insured.
- That the insurer is liable to pay such judgment.
- The reason, if known, why the insurance company has not paid the judgment.

The driver must also file the original policy of insurance or a certified copy thereof, if available, and such other documents as the Department may require to show that the loss, injury, or damage for which the judgment was rendered, was covered by the policy of insurance [*Veh. Code § 16375*].

If the Department is satisfied from such papers that the insurer was authorized to issue the policy of insurance in California at the time of issuing the policy and that such insurer is liable to pay such judgment, at least to the extent and for the amounts provided in *Veh. Code § 16250 et seq.*, the Department may not suspend the license, or if already suspended, must reinstate it [*Veh. Code § 16375*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageJudgmentsInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageOperator License SuspensionsInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageProof of Financial ResponsibilityTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.94 Proof of Financial Responsibility Required for Specified Acts

[1] Registration and Applications

In order for the Department to undertake certain activities, various provisions of the Vehicle Code require that the person requesting the action submit proof of financial responsibility. Except for the specific provisions governing proof of financial responsibility after a motor vehicle accident under *Veh. Code § 16054* [*see Veh. Code § 16054(b)*; *see also* discussion under § 92.92)], proof of financial responsibility, when required by the Vehicle Code, is governed by *Veh. Code § 16430* [*see Veh. Code § 16430*].

The activities that require such proof include the following:

- Registration of certain vehicles [*see Veh. Code § 6854* (registration of foreign commercial vehicle whose licensing jurisdiction does not grant reciprocal privileges to California owners)].

- Application for driver's license [*see Veh. Code §§ 12504(b)(2)* (nonresident minor), 12804.9 (examining officer may request to see proof)].

- Application for reinstatement of license or for restricted license:

  - Reinstatement of license of negligent operator whose privilege has been suspended or revoked [*see Veh. Code § 12810.5*].

  - Reinstatement of minor's license suspended or revoked under provisional licensing program) [*see Veh. Code § 12814(d)*].

  - Reinstatement of revoked license [*see Veh. Code §§ 13350(c), 13351*].

- Reinstatement of minor's license suspended for drunk driving conviction [*see Veh. Code § 13352.3(b)*].

- Reinstatement after suspension or revocation for implied consent or administrative per se violations [*see Veh. Code § 13353.4(b)*].

- Restricted license after administrative per se suspension for participation in program [*see Veh. Code § 13353.7*].

- Discretionary suspension based on specified circumstances [*see Veh. Code § 13361*].

- Reinstatement after suspension based on specified circumstances [*see Veh. Code § 13954*].

- Reinstatement after suspension for unsatisfied judgment [*see Veh. Code § 16371*].

[2] Proof Requirements

Proof of financial responsibility when required by the Vehicle Code means proof of financial responsibility resulting from the ownership or operation of a motor vehicle and arising by reason of personal injury to, or death of, any one person, of at least $15,000, and, subject to the limit of $15,000 for each person injured or killed, of at least $30,000 for the injury to, or the death of, two or more persons in any one accident, and for damages to property (in excess of $750), of at least $5,000 resulting from any one accident. Proof of financial responsibility may be given in any manner authorized in *Veh. Code § 16430 et seq.* [*Veh. Code § 16430*].

[3] Methods of Proof

[a] Certificate of Insurance

[i] Issued by Authorized Carrier

Proof of financial responsibility may be given by a written certificate of any insurance carrier duly authorized to do business within the state, stating that it has issued to or for the benefit of the person named in the certificate a motor vehicle liability policy as defined in *Veh. Code § 16450*, an automobile liability policy as defined in *Veh. Code § 16054*, or any other liability policy issued for vehicles with less than four wheels that meets the requirements of *Veh. Code § 16056* (minimum policy limits) [*Veh. Code § 16431(a)*].

A resident of another state may provide proof of financial responsibility when required to do so under the Vehicle Code from a company authorized to do business in that person's state of residence, if that proof is satisfactory to the Department, covers the operation of a vehicle in California, and meets the minimum coverage requirements of *Veh. Code § 16056*. If the person becomes a California resident during the period he or she is required to maintain proof of financial responsibility with the Department, the Department may not issue or return a driver's license to that person until he or she files a written certificate [*see Veh. Code § 16431(a)*] that meets the minimum coverage requirements specified in *Veh. Code § 16056* and covers the period during which the person is required to maintain proof of financial responsibility [*Veh. Code § 16431(d)*].

Except for certain cases involving reinstatement of driving privileges (*see* discussion in [ii], *below*), certificates issued under any of these policies satisfy the proof of financial responsibility requirements under *Veh. Code § 16430 et seq.*, and the Department is required to accept them [*Veh. Code § 16431(a)*]. An insurance carrier is not required to certify that there is coverage broader than that provided by the actual policy issued by the carrier [*Veh. Code § 16431(a)*].

[ii] Coverage of All Registered Vehicles Owned

The Department must require that a person whose driver's license has been revoked, suspended, or restricted under specified Vehicle Code sections provide, as proof of financial responsibility, a certificate (or certificates) that covers all motor vehicles registered to the person before reinstatement of his or her driver's license [*Veh. Code § 16431(b)*]. The requirement does not apply, however, to vehicles in storage if the current license plates and registration cards are surrendered to the Department in Sacramento [*Veh. Code § 16431(c)*].

Proof of coverage of all vehicles owned must be provided for reinstatement under the following sections [*Veh. Code § 16431(b)*]:

- *Veh. Code § 13350* (conviction for failure to stop when involved in injury accident, use of motor vehicle in commission of felony, reckless driving causing injury).
- *Veh. Code § 13351* (conviction for vehicular manslaughter, reckless driving, or hit-and-run causing injury or death).
- *Veh. Code § 13352* (conviction for driving while intoxicated or under influence of drugs or for engaging in speed contest).
- *Veh. Code § 13353* (failure or refusal to submit to intoxication tests).
- *Veh. Code §§ 13353.2, 13353.3* (driving with unlawful blood alcohol level).
- *Veh. Code § 13353.6* (commercial driver with unlawful blood alcohol level).
- *Veh. Code § 13353.7* (restricted license).
- *Veh. Code § 16370, 16370.5* (failure to satisfy judgment).

[b] Other Methods of Proof

Proof need not be made by a certificate of insurance. Alternative methods are by furnishing a bond [*Veh. Code § 16434*], a deposit of $35,000 in cash [*Veh. Code § 16435*], or a certificate of self-insurance [*Veh. Code § 16436*].

The Department cannot cancel the bond of individual sureties given pursuant to *Veh. Code § 16434* or return a deposit of cash given pursuant to *Veh. Code § 16435* if any action for damages arising out of a motor vehicle accident is pending against a driver, or if any judgment in such an action remains unsatisfied [*Veh. Code § 16480(b)*].

[4] Relief From Proof Requirement

The Department has authority to relieve a person of the requirements of filing proof of financial responsibility in certain cases, such as after the passage of three years from the date when such proof was required [*Veh. Code § 16480(a)(2)*; *see Veh. Code § 16482(b)*].

The other cases in which the Department may relieve a driver of the burden of giving proof are the following [*see Veh. Code § 16480(a)(1), (3), (4)*]:

- When the law no longer requires it.

- When the driver has died.

- When the driver has become permanently incapacitated and surrendered his or her license certificate for cancellation.

[5] Mandatory Suspension When Evidence of Proof Becomes Unsatisfactory

Failure of proof of ability to respond in damages is a ground for mandatory suspension of the driver's license until adequate proof is filed [*Veh. Code § 16484*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageCertificates of InsuranceInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageOperator License SuspensionsInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageProof of Financial ResponsibilityTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.95 Proof of Financial Responsibility for Commercial Vehicles

[1] Requirement

Every owner of a vehicle used in the transportation of passengers for hire, including taxicabs, when the operation of the vehicle is not subject to regulation by the Public Utilities Commission, is required to maintain, whenever he or she may be engaged in conducting those operations, proof of financial responsibility resulting from the ownership or operation of the vehicle and arising by reason of personal injury to, or death of any person, or for damages to property [*Veh. Code § 16500*]. The amounts of proof are governed by *Veh. Code § 16500*. The types of commercial vehicles for which proof is required, and the authorized methods of proof, are governed by *Veh. Code § 16500.5*.

[2] Mandatory Suspension of Registration

If an owner uses, or with his or her consent permits the use of, any vehicle used in the transportation of person or property in the conduct of a business, without maintaining proof of financial responsibility as required by *Veh. Code § 16500 et seq.*, the Department is required to suspend the registration of all vehicles used for such transportation immediately on receipt of a duly certified abstract of the court in which the person was convicted [*Veh. Code §§ 16502, 16503*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageMotor CarriersInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageOperator License SuspensionsInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageProof of Financial ResponsibilityTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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[Reserved]

§§ 92.96[Reserved]

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§ 92.100 Administrative Hearing Procedure in General

The statutes governing the right to a hearing and the procedures for conducting a hearing relating to Department action affecting a person's driving privilege are generally contained in *Veh. Code § 14100 et seq.* There are, in addition, statutes governing specific aspects of the administrative control of drivers that affect the right to a hearing [*see, e.g., Veh. Code § 13558(c)(1)* (limiting scope of hearing on order of suspension or revocation under implied consent and administrative per se law; for discussion, *see § 92.20* et seq.)]. All matters in a hearing not covered by the Vehicle Code sections governing driver's licenses [*see Veh. Code § 13800 et seq.*] are governed, as far as applicable, by the Administrative Procedure Act (*Gov. Code § 11500 et seq.*) [*Veh. Code § 14112*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationHearingsRight to HearingStatutory RightTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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8-92 California Forms of Pleading and Practice--Annotated § 92.101

§ 92.101 Right to Hearing

[1] Action Subject to Judicial Review

The Vehicle Code provisions governing a person's right to a hearing should be interpreted in the light of case law establishing basic guidelines for administrative hearing procedures.

If an administrative agency is charged by law with the duty of issuing licenses on specified terms and conditions, the agency becomes a quasi-judicial body for determining the facts and exercising sound and reasonable discretion in the performance of its duty. Because the agency is only a quasi-judicial body in its investigation and determination of the merits of applications for licenses in conformity with the provisions of a statute, its hearings may be somewhat informal and need not conform in all respects to the solemnity of a court proceeding. Nevertheless, the law does contemplate a fair and impartial hearing of an application for a license with an opportunity for the applicant to present competent evidence for the consideration of the agency [*see Fascination, Inc. v. Hoover (1952) 39 Cal. 2d 260, 269, 246 P.2d 656* (quoting court of appeal in case involving issuance of license by board of supervisors)], unless a statute expressly provides to the contrary [*see Ratliff v. Lampton (1948) 32 Cal. 2d 226, 230* (Department cannot revoke license for cause without hearing unless statute expressly provides otherwise); *see also Fascination, Inc. v. Hoover (1952) 39 Cal. 2d 260, 269-271, 246 P.2d 656* (citing *Ratliff* and other cases; holding agency must normally give hearing to applicant for issuance of license)].

If an administrative agency has the authority to deprive a person of a license for cause and to make the quasi-judicial determination that cause exists, the person has the right to notice and a prior opportunity to be heard before the agency deprives him or her of the license, unless there is a clear showing of legislative intent to dispense with that right [*see Ratliff v. Lampton (1948) 32 Cal. 2d 226, 230, 195 P.2d 792* ; *see also McCullough v. Terzian (1970) 2 Cal. 3d 647, 657, 87 Cal. Rptr. 195, 470 P.2d 4* (explaining rule of *Ratliff* case); *Fascination, Inc. v. Hoover (1952) 39 Cal. 2d 260, 271, 246 P.2d 656* (citing *Ratliff* case and many others)].

In general, however, action without a prior hearing does not violate due process if it is subject to judicial review and is reasonably justified by a compelling public interest [*see Escobedo v. California (1950) 35 Cal. 2d 870, 876, 222 P.2d*

1 (overruled on different point in *Rios v. Cozens (1972) 7 Cal. 3d 792, 799* , *cert. granted and remanded, 410 U.S. 425* , *on remand, 9 Cal. 3d 454*]. Also, it appears that when the Department's action is based on a conviction or a record of convictions, mandatory suspension or revocation without a prior hearing does not violate due process because the facts have already been determined in a criminal proceeding [*see Ratliff v. Lampton (1948) 32 Cal. 2d 226, 227, 195 P.2d 792* (dictum); *see also DiGenova v. State Board of Education (1955) 45 Cal. 2d 255, 260, 288 P.2d 862* (summary revocation of teacher's license based on conviction)].

For further discussion of agency authority regarding licensing generally, see Ch. 471B, *Licensing by Public Agencies* .

[2] Mandatory Action

The Vehicle Code provides that a person is not entitled to a hearing in any case in which action by the Department is made mandatory by the Vehicle Code [*Veh. Code § 14101(a)*]. This general exclusion is qualified by several sections that both make action by the Department mandatory, and also grant a right to hearing by the person affected [*see, e.g., Veh. Code §§ 13353.1(d)* (driving under influence--persons under 21), *13558(a)* (implied consent and administrative per se laws), *13954* (accident caused by driver under influence with prior vehicular manslaughter conviction), *16070* (failure to prove existence of financial responsibility after accident); *see also Civ. Code § 3534* (particular expressions qualify those that are general)].

[3] Discretionary Action

When the Department proposes to withhold, suspend, or revoke a driver's license on discretionary grounds, the Department is required to notify the applicant or licensee [*see Veh. Code §§ 13950, 13951, 14100, 14101(a)*]. The notice must contain a statement setting forth the proposed action and the grounds for the action and notify the person of his or her right to a hearing. In the alternative, the Department, at the time it gives notice of its intention to act, may set the date of hearing, giving the person 10 days notice thereof [*Veh. Code § 13952*; *see Veh. Code § 14100(c)-(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.102 Demand for Hearing

Whenever the Department has given notice, or has taken or proposes to take action under *Veh. Code § 13353*, *13353.2*, *13950-13952*, or *13953*, the person receiving the notice or subject to the action may, within 10 days, demand a hearing [*Veh. Code § 14100(a)*]. For a general form of request for hearing, see *§ 92.170*.

A person is not entitled to a hearing if he or she has previously been given an opportunity with appropriate notice for a hearing and failed to request a hearing within the time specified by law [*Veh. Code §§ 14100(a), 14101(b)*].

A demand for a hearing does not stay the Department action for which the notice is given [*Veh. Code § 14100(a)*; *but see Veh. Code § 13558* (Department required to stay effective date of suspension or revocation order under implied consent and administrative per se laws pending determination if it does not conduct hearing and make determination within specified time)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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8-92 California Forms of Pleading and Practice--Annotated § 92.103

§ 92.103 Waiver of Right to Hearing

Failure to respond to a notice given under *Veh. Code § 13800 et seq.* within 10 days is a waiver of the right to a hearing [*Veh. Code § 14103*; *see also Veh. Code § 14101(b)* (no entitlement to hearing if person fails to make timely request after receiving notice)]. In the event of a failure to respond, the Department may take action without a hearing or may, on request of the person whose privilege of driving is in question, or at its own option, reopen the question, take evidence, change or set aside any order previously made, or grant a hearing [*Veh. Code § 14103*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingWaiverTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.104 Time and Place of Hearing

If the Department grants a hearing as provided under *Veh. Code § 13800 et seq.*, it is required to fix a time and place for the hearing [*Veh. Code § 14104*; *see Veh. Code §§ 13558(b)* (under implied consent and administrative per se laws, including administrative suspension of persons under 21 years old, hearing to be held as close as practicable to place of arrest, unless parties agree to another location), *16075(e)* (under financial responsibility law, hearing to be held in county of residence of person requesting hearing)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewCriminal Law & ProcedureCriminal OffensesVehicular CrimesDriving Under the InfluenceBlood Alcohol & Field SobrietyImplied ConsentGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageOperator License SuspensionsTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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8-92 California Forms of Pleading and Practice--Annotated § 92.105

§ 92.105 Notice of Hearing

If the Department grants a hearing as provided under *Veh. Code § 13800 et seq.*, it is required to give 10 days' notice of the hearing to the applicant or licensee [*Veh. Code § 14104*]. The notice of hearing must also include a statement of the discovery rights of the applicant or licensee to review the Department's records prior to the hearing [*Veh. Code § 14104*]. In addition, the notice of hearing must inform applicants of their right to an interpreter at the hearing [*Gov. Code § 11435.60*; *see Leal v. Gourley (2002) 100 Cal. App. 4th 963, 967-969, 123 Cal. Rptr. 2d 220* (notice if right to interpreter required but lack of notice was harmless error when the applicant was previously informed of this right)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewCriminal Law & ProcedureCriminal OffensesVehicular CrimesDriving Under the InfluenceBlood Alcohol & Field SobrietyImplied ConsentGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageOperator License SuspensionsTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.106 Attendance of Witnesses and Production of Evidence

Before a hearing has commenced, the Department, or the hearing officer or hearing board, is required to issue subpoenas or subpoenas duces tecum, or both, at the request of any party, for attendance of witnesses or production of documents at the hearing. After the hearing has commenced, the Department, if it is hearing the case, or the hearing officer sitting alone, or the hearing board, may issue subpoenas or subpoenas duces tecum, or both [*Veh. Code § 14104.5(a)*; *see Bussard v. Department of Motor Vehicles (2008) 164 Cal. App. 4th 858, 865-866, 79 Cal. Rptr. 3d 414* (DMV hearing officer has reasonable flexibility to issue subpoenas after hearing has commenced)]. Subpoenas and subpoenas duces tecum issued in conjunction with the hearings may be served by first-class mail [*Veh. Code § 14104.5(b)*].

The Vehicle Code does not provide for depositions of witnesses. Under the Administrative Procedure Act (*Gov. Code § 11500 et seq.*), depositions may be used in lieu of a witness's testifying at the hearing [*see Gov. Code § 11511*; *see also discussion under § 92.107[2]*, for applicability of Administrative Procedure Act]. For discussion and forms for use in procuring deposition testimony under the Administrative Procedure Act, see Ch. 473B, *Discovery in Agency Adjudications* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 92.107 Conduct of Hearing

[1] Prior Law Governing Informal and Formal Hearing

Under prior law, a person could demand an informal or formal hearing relating to the suspension or revocation of his or her driver's license by the Department [*see* former *Veh. Code § 14102 et seq.*]. Effective February 13, 1991, however, the Legislature repealed those provisions and provided for a hearing according to a prescribed procedure, as described in [2]-[6], *below* [*see Veh. Code § 14104 et seq.*].

[2] Matters Governed by Administrative Procedure Act

All matters in a hearing not covered by the Vehicle Code sections governing driver's licenses (*see Veh. Code § 13800 et seq.*) are governed, as far as applicable, by the Administrative Procedure Act (*Gov. Code § 11500 et seq.*) [*Veh. Code § 14112*].

Apparently the operative word in *Veh. Code § 14112* is "in," but it has been equated by at least one court with "relating to" a hearing [*see Serenko v. Bright (1968) 263 Cal. App. 2d 682, 690, 70 Cal. Rptr. 1* (dictum)], which is broader than "in" a hearing.

The court in the *Serenko* case, *above*, remarked but did not hold that the Vehicle Code resolves all of the following questions, to which the Administrative Procedure Act is consequently said to be inapplicable: how hearings are initiated, where hearings are held, who shall conduct hearings, what evidence is admissible, how decisions are made, when decisions take effect, and to what extent the Department has continuing jurisdiction [*see Serenko v. Bright (1968) 263 Cal. App. 2d 682, 689, 70 Cal. Rptr. 1]* .

There are, however, a number of other matters that are not covered by the Vehicle Code but provided for in the Administrative Procedure Act. The discussion in [3]-[6], *below*, relating to the various aspects of a hearing, refers to relevant provisions under the Act when applicable. For further discussion of hearing procedure under the Administrative Procedure Act generally, see Ch. 473, *Public Agency Adjudication* , et seq.

[3] Hearing Officer

[a] Under Prior Law

The practice of the Department under the former law providing for formal hearings was that the hearing was usually conducted by a single senior Driver Improvement Analyst. The hearing officer could be challenged for bias at the time of the hearing, and the Department usually replaced a challenged officer with a different Driver Improvement Analyst. In addition, the practice of the Department under the former formal hearing proceedings was that decisions by a board regarding findings and procedures were resolved in favor of the person in question unless there was unanimity.

[b] Department Employee Appointed by Director

Any hearing is to be conducted by the director or by a hearing officer or hearing board appointed by the director from officers or employees of the Department [*Veh. Code § 14104.2(a)*].

The officers and employees of the Department who may be appointed by the director to conduct departmental hearings are not required to have any higher qualifications than the director, who is not required to be an attorney and as to whom no particular qualifications are delineated in the Vehicle Code, except for the requirement that the hearing be conducted by the director or by a hearing officer or hearing board appointed by him or her from officers or employees of the department [*see Veh. Code § 14104.2(a)*; *Serenko v. Bright (1968) 263 Cal. App. 2d 682, 690, 70 Cal. Rptr. 1* (decided under prior law providing for "formal hearings")].

The Vehicle Code does not provide for disqualification of hearing officers. The Administrative Procedure Act provides for grounds for disqualification that include bias, prejudice, interest, or receiving ex parte communications [*see Gov. Code §§ 11425.40, 11430.60, 11512(c)*]. For discussion of the grounds and procedure for disqualifying an administrative law judge under the Administrative Procedure Act, see Ch. 473E, *Public Administrative Law Judges* .

[4] Evidence

[a] Admissibility Based on Relevance

The scope of admissible evidence is set forth under *Veh. Code § 14104.7*, and discussed in [b]-[e], *below*. Under the Administrative Procedure Act, any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of such evidence over objection in civil actions [*Gov. Code § 11513(c)*]. Since *Veh. Code § 14104.7* does not purport to govern exclusively questions of evidence at a hearing, it is arguable that *Gov. Code § 11513(c)* supplements the Vehicle Code provision.

For discussion of evidence issues applicable under the Administrative Procedure Act generally, see Ch. 473F, *Agency Adjudication Hearings* .

At the hearing the applicant or licensee should present as full a case as possible, because if the record of the hearing should disclose to a court (subsequently petitioned to review it) that the petitioner intentionally presented a "skeleton" case in the hearing for the obvious purpose of transferring the controversy to the court, that fact should weigh heavily against the endeavor to invoke the equity powers of the court on petitioner's behalf in the mandamus proceeding [*see Dare v. Bd. of Medical Examiners (1943) 21 Cal. 2d 790, 799, 136 P.2d 304]* .

[b] Admissibility of Hearsay

Under the Administrative Procedure Act, hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but is not sufficient in itself to support a finding unless it would be admissible over objection in civil

actions [*see Gov. Code § 11513(d)*; *Hildebrand v. Department of Motor Vehicles (2007) 152 Cal. App. 4th 1562, 1569-1572, 62 Cal. Rptr. 3d 234]* .

[c] Documentary Evidence

At any hearing, the Department is required to consider its official records and may receive sworn testimony. At the hearing, or subsequent to the hearing with the consent of the applicant or licensee, any or all of the following may be submitted as evidence concerning any fact relating to the ability of the applicant or licensee to safely operate a motor vehicle [*Veh. Code § 14104.7*]:

- Reports of attending or examining physicians and surgeons.

- Reports of special investigators appointed by the Department to investigate and report on any facts relating to the ability of the person to operate a vehicle safely.

- Properly authenticated reports of hospital records, excerpts from expert testimony received by the Department or a hearing board on similar issues of scientific fact in other cases, and the prior decision of the director on those issues.

Under the Act, a person has the right "to introduce exhibits," a much broader right than to present documentary evidence [*see Gov. Code § 11513(b)*].

A delay by a laboratory, in not sending to DMV chemical tests results within 15 calendar days from arrest as required by *Veh. Code § 23612(g)*, does not preclude the test results from being admitted into evidence at a DMV license suspension hearing [*Spitze v. Zolin (1996) 48 Cal. App. 4th 1920, 1924, 56 Cal. Rptr. 2d 573]* . While *Veh. Code § 23612(g)(2)* provides that the DMV may receive or retrieve evidence of a licensee's blood-alcohol test results directly from a government forensic lab database and that such evidence is the best available evidence of the test results, the statute does not preclude the opponent of the evidence from challenging the document or other record on other exclusionary grounds, including hearsay [*Molenda v. Department of Motor Vehicles (2009) 172 Cal. App. 4th 974, 997, 91 Cal. Rptr. 3d 792* (blood test results not admissible when report not prepared at or near time of test)].

A driver facing license suspension following arrest for driving under the influence may not seek discovery of confidential peace officer personnel records pursuant to *Pitchess v. Superior Court (1974) 11 Cal. 3d 531, 113 Cal. Rptr. 897, 522 P.2d 305* [*Brown v. Valverde (2010) 183 Cal. App. 4th 1531, 1547-1559, 108 Cal. Rptr. 3d 429]* .

[d] Testimonial Evidence

At any hearing, the Department is required to receive sworn testimony [*Veh. Code § 14104.7*].

The Vehicle Code does not regulate the use of hearsay, which could, arguably, be admitted under *Veh. Code § 14104.7* as "sworn testimony." The Administrative Procedure Act does allow for use of hearsay evidence for specified purposes [*see Gov. Code § 11513(d)*; *see also* discussion in [b], *above*].

The Vehicle Code does not expressly provide for examination, cross examination, and impeachment of witnesses, or rebuttal of evidence. These matters are guaranteed, however, under the Administrative Procedure Act [*see Gov. Code § 11513(b)*].

In addition, the Vehicle Code does not provide that the person whose license is in question may be compelled to testify, but *Gov. Code § 11513(b)* under the Act provides that if a respondent does not testify on his or her own behalf he or she may be called and examined as if under cross examination. If this provision is applicable to hearings before the

Department, then so is the provision that the rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing [*Gov. Code § 11513(e)*]. The rules of privilege [*Evid. Code § 900 et seq.*] apply in all hearings in which, pursuant to law, testimony can be compelled to be given [*see Evid. Code § 901*], except as otherwise provided by statute [*Evid. Code § 910*].

Finally, under the Administrative Procedure Act, a party may be precluded from cross examining witnesses by following a procedure provided for in *Gov. Code § 11514*, but no such procedural device is provided for in the Vehicle Code.

[e] Official Notice

Under the Administrative Procedure Act, an agency may take official notice of technical or scientific matter within the agency's special field, and of any fact that may be judicially noticed by the courts of California [*see Gov. Code § 11515*], but the Vehicle Code does not similarly provide for official notice by the Department of such facts.

[5] Record of Proceedings

The entire proceedings at any hearing may be recorded by a phonographic recorder or by mechanical, electronic, or other means capable of reproduction or transcription [*Veh. Code § 14104.2(b)*].

[6] Decision

[a] Findings and Notice of Decision

At the conclusion of a hearing, the hearing officer or hearing board is required to make findings and render a decision on behalf of the Department and is to notify the person involved. Notice of the decision is to include a statement of the person's right to a review. The decision takes effect as stated in the notice, but not less than four nor more than 15 days after the notice is mailed [*Veh. Code § 14105*].

The basic purposes of findings are [*see Swars v. Council of City of Vallejo (1949) 33 Cal. 2d 867, 871, 206 P.2d 355* (dictum)]:

- To aid the court in determining whether there is sufficient evidence to support them.

- To enable the court to examine the decision of the administrative agency in order to determine whether it is based on a proper principle.

- To inform the parties of the reasons for the administrative action, to aid them in deciding whether other proceedings should be begun and, if so, on what grounds.

Administrative findings must conform to the statutes governing the particular agency, but they need not be stated with the formality required in judicial proceedings [*see Swars v. Council of City of Vallejo (1949) 33 Cal. 2d 867, 872-873, 206 P.2d 355* (dictum)].

The fact that certain action is taken by an administrative agency may raise a presumption that the necessary facts were found by the agency to exist. Administrative findings may be general as long as they satisfy the dual requirements of making intelligent review by the courts possible and informing the parties of the basis for the administrative action [*see Swars v. Council of City of Vallejo (1949) 33 Cal. 2d 867, 872, 206 P.2d 355* (dictum)].

[b] Modification to Correct Mistakes or Clerical Errors

The decision under *Veh. Code § 14105(a)* may be modified at any time after issuance to correct mistakes or clerical errors [*Veh. Code § 14105(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceAdmissibilityHearsayAdministrative LawAgency AdjudicationPresiding OfficersDuties & PowersTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.108 Departmental Review

The person subject to a hearing may request a review of the decision taken under *Veh. Code § 14105*, discussed under § 92.107[6], within 15 days of the effective date of the decision [*Veh. Code § 14105.5(a)*]. On receipt of a request for review, the Department is required to stay the action pending a decision on review, unless the hearing followed an action under *Veh. Code §§ 13353, 13353.2* (implied consent or administrative per se laws), or 13953 (immediate action required for safety of driver or other persons on highways). The review must include an examination of the hearing report, documentary evidence, and findings. The hearing officer or hearing board conducting the original hearing may not participate in the review process [*Veh. Code § 14105.5(b)*].

Following the review, a written notice of the Department's decision must be mailed to the person involved. If the action has been stayed pending review, the Department's decision takes effect as stated in the notice, but not less than four nor more than 15 days after the notice is mailed [*Veh. Code § 14105.5(c)*].

The decision on review may be modified at any time after issuance to correct mistakes or clerical errors [*Veh. Code § 14105.5(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationReview of Initial DecisionsCriminal Law & ProcedureCriminal OffensesVehicular CrimesDriving Under the InfluenceBlood Alcohol & Field SobrietyImplied ConsentGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.109 Request to Reopen Case

Following the mailing of the notice of the Department's decision under *Veh. Code § 14105.5*, discussed under § 92.108, the Department, at its own option or at the request of the person whose privilege of driving is in question, may reopen the question, take further evidence, or change or set aside any order previously made [*Veh. Code § 14106*; *see § 92.170*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 92.110 Notice of Right to Judicial Review

On final completion of all administrative appeals, the person whose driving privilege was refused, canceled, suspended, placed on probation, or revoked must be given written notice by the Department of his or her right to a review by a court pursuant to *Veh. Code § 14401(a)*, which requires that any action for review must be commenced within 90 days from the date order was noticed [*Veh. Code § 14401(b)*].

For discussion of procedures relating to judicial review of the Department's action generally, see *§ 92.120* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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[Reserved]

§§ 92.111[Reserved]

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§ 92.120 Judicial Review in General

The Vehicle Code provides that nothing in the Code may be deemed to prev ent a review or other action as may be permitted by the Constitution and laws of the state by a court of competent jurisdiction of any order of the Department refusing, canceling, suspending, or revoking the privilege of a person to operate a motor vehicle [*Veh. Code § 14400*]. Thus, review under *Code Civ. Proc. § 1094.5*, commonly known as "administrative mandate," would be available after a hearing under *Veh. Code § 14100 et seq.* [*see Code Civ. Proc. § 1094.5(a)*; discussed under § 92.121]. For further discussion and forms relating to administrative mandate generally, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

Review under a general writ of mandate may also be available in cases in which administrative mandate is not appropriate [*see Code Civ. Proc. § 1085*, discussed under § 92.123].

There may, in addition, be opportunity for redress in an action in federal court based on a violation of the person's civil rights [*see Hornsby v. Allen (5th Cir. 1964) 326 F.2d 605, 610-612* , discussed under § 92.124].

Legal Topics:

For related research and practice materials, see the following legal topics:
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8-92 California Forms of Pleading and Practice--Annotated § 92.121

§ 92.121 Review by Administrative Mandate Proceeding

[1] Conditions for Review Generally

Review governed by *Code Civ. Proc. § 1094.5* is available when certain conditions specified in the statute are met [*Keeler v. Superior Court (1956) 46 Cal. 2d 596, 599, 297 P.2d 967]* . Those conditions are [*see Code Civ. Proc. § 1094.5(a)*]:

- A final decision has been made.
- The decision was made by an administrative agency having discretionary authority to make findings of fact in support of the decision.
- The agency was required by law to hold a hearing.
- Evidence was required by law to be compiled at the hearing in support of the agency's findings of fact.

The conditions appear to be satisfied in the case of a hearing under *Veh. Code § 14100 et seq.* [*see Cameron v. Cozens (1973) 30 Cal. App. 3d 887, 889, 106 Cal. Rptr. 537* (decided under former *Veh. Code § 13353*, which referred to hearing conducted under *Veh. Code § 14100 et seq.*; court stated that proper approach for judicial review is administrative mandate under *Code Civ. Proc. § 1094.5*)]. Further, as mentioned under § 92.120, the Vehicle Code may not be construed to limit otherwise applicable judicial review [*see Veh. Code § 14400*].

The question whether a hearing is required to be given may sometimes be hard to decide. In a case in which the law does not require a hearing [*see, e.g., Veh. Code § 14101(a)* (no hearing when action made mandatory by Vehicle Code)], it appears that the case may not be reviewed under administrative mandate, but may be reviewable under ordinary mandate [*see Taylor Bus Service, Inc. v. San Diego Bd. of Education (1987) 195 Cal. App. 3d 1331, 1339, 241 Cal. Rptr. 379* ; *see also* discussion under § 92.123].

[2] Review in Implied Consent/Administrative Per Se Cases

After a hearing under *Veh. Code § 13558*, relating to an order of suspension or revocation based either on a refusal to complete a chemical test or a results from a test disclosing an unlawful blood alcohol concentration, a person may file a "petition for judicial review" [*Veh. Code § 13559*]. Although *Veh. Code § 13559* does not expressly refer to *Code Civ. Proc. § 1094.5*, the standard and scope of review in such cases are consistent with those governing proceedings for writ of administrative mandate [*see Coombs v. Pierce (1991) 1 Cal. App. 4th 568, 575-576, 2 Cal. Rptr. 2d 249]* . For further discussion of judicial review under *Veh. Code § 13559*, see *§ 92.40* et seq.

[3] Exhaustion of Administrative Remedies

The purpose of administrative mandate is to have the court inquire into the validity of a "final administrative order" [*Code Civ. Proc. § 1094.5(a)*]. The important word is "final." It signifies the emphasis which courts have traditionally and consistently placed on exhaustion of administrative remedies as a condition to maintaining a mandate proceeding.

The failure to exhaust administrative remedies is a jurisdictional defect [*see Morton v. Superior Court (1970) 9 Cal. App. 3d 977, 981, 88 Cal. Rptr. 533* (dictum reporting rule)]. The fact that the agency in question has consistently decided similar cases against persons in the petitioner's position does not excuse a failure to seek relief through administrative remedies before applying to the court [*Gantner & Mattern Co. v. California E. Com. (1941) 17 Cal. 2d 314, 317-318, 109 P.2d 932]* .

For further discussion of the requirement of exhaustion of administrative remedies as a condition to judicial relief generally, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , and Ch. 474A, *Timing of Judicial Review of Agency Decisions* .

[4] Notice of Right to Judicial Review

On final completion of all administrative appeals, the person whose driving privilege was refused, canceled, placed on probation, suspended, or revoked must be given written notice by the Department of his or her right to judicial review [*Veh. Code § 14401(b)*]. Thus, it appears that such notice must advise the person of his or her right to review through administrative mandate proceedings.

[5] Statute of Limitations

Any action brought in a court of competent jurisdiction to review any order of the Department refusing, canceling, placing on probation, suspending, or revoking the privilege of a person to operate a motor vehicle must be commenced within 90 days from the date the order is noticed [*Veh. Code § 14401(a)*].

[6] Record on Review

When a licensee files a petition for judicial review, the "review shall be on the record of the hearing" [*Veh. Code § 13559*]. The burden of supplying that record is on the licensee [*Code Civ. Proc., § 1094.5(a)*; *Elizabeth D. v. Zolin (1993) 21 Cal. App. 4th 347, 355, 25 Cal. Rptr. 2d 852]* . However, the licensee can satisfy that burden through making a proper request on the DMV to prepare and certify the record [*Hothem v. City and County of San Francisco (1986) 186 Cal. App. 3d 702, 705, 231 Cal. Rptr. 70]* .

Since the DMV records and transcribes the hearing [*Veh. Code § 14104.2*] as well as maintains sole custody of the recordings and other evidence, it has a duty to maintain an adequate record [*Hothem v. City and County of San Francisco (1986) 186 Cal. App. 3d 702, 705, 231 Cal. Rptr. 70]* . If the DMV does not maintain an adequate record it may choose to set aside the order, reconstruct the record, prepare a summary of the facts, or hold a new hearing [*Hothem v. City and County of San Francisco (1986) 186 Cal. App. 3d 702, 705, 231 Cal. Rptr. 70* ; *Chavez v. Civil*

Service Com. (1978) 86 Cal. App. 3d 324, 332, 150 Cal. Rptr. 197] . On the other hand, if it fails to maintain an adequate record and then refuses to assist the petitioner in compiling a new record, including financially, the "agency can be foreclosed from disputing petitioner's statement of fact" or the court may simply dismiss the order of suspension [*Woodard v. Personnel Commission (1979) 89 Cal. App. 3d 552, 561, 152 Cal. Rptr. 658* ; *Frase v. Gourley (2000) 85 Cal. App. 4th 762, 766, 102 Cal. Rptr. 2d 432]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewCivil ProcedureJusticiabilityExhaustion of RemediesAdministrative RemediesCivil ProcedureRemediesWritsCommon Law WritsMandamusCriminal Law & ProcedureCriminal OffensesVehicular CrimesDriving Under the InfluenceBlood Alcohol & Field SobrietyImplied ConsentGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.122 Scope of Review Under Administrative Mandate

[1] Scope of Inquiry

When reviewing an administrative order pursuant to *Code Civ. Proc. § 1094.5*, a court's inquiry is generally limited to the following three issues [*Code Civ. Proc. § 1094.5(b)*]:

- Whether or not the agency's proceeding was within its jurisdiction.
- Whether or not the petitioner received a fair hearing.
- Whether or not the agency abused its discretion to the petitioner's prejudice.

In addition to the discussion provided in [2]-[4] *below*, these issues are given further treatment in Ch. 474B, *Standards in Reviewing Agency Decisions* .

If a hearing should have been held but was not, in a case when the petitioner did all that he or she was required to do in order to obtain a hearing, the scope of the court's review will be limited to determining that a hearing should have been held; and the remedy in such a case is a writ setting aside the order and remanding the case to the Department for a hearing [*see Code Civ. Proc. § 1094.5(e)*; *Fascination, Inc. v. Hoover (1952) 39 Cal. 2d 260, 265, 268, 246 P.2d 656]* . If the petitioner failed to take all required steps in order to obtain a hearing, he or she has failed to exhaust his or her administrative remedies, and a writ will be denied [*see, e.g., Veh. Code § 14103* (failure to respond to notice given under *Veh. Code § 14100 et seq.* within prescribed time is waiver of right to hearing); *see also* discussion under § 92.121[3]].

[2] Whether Department Had Jurisdiction

Under *Code Civ. Proc. § 1094.5*, a court must determine whether or not the agency's proceeding was within its jurisdiction [*Code Civ. Proc. § 1094.5(b)*]. It appears that the nature of an agency's jurisdiction may be compared, by analogy, to jurisdiction of the courts. Thus, the Department, as an agency, must have jurisdiction in its fundamental

sense. That is, the Department must have authority over the subject matter and over the person [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288-290, 109 P.2d 942* (relating to jurisdiction of courts)]. The Department has exclusive authority to issue or withhold a driver's license and comprehensive authority, which is shared with the courts and is, therefore, not exclusive, to take away a driver's license [*see Veh. Code §§ 12500 et seq.* (relating to issuance of licenses), *13200* et seq. (suspension or revocation by court), *13350* et seq. (suspension or revocation by Department)].

In addition, even when the Department has jurisdiction in the fundamental sense, it must not act in excess of its jurisdiction. In other words, the Department must not exceed its power to act in a particular manner, or to give other than certain kinds of relief, or to act at all without the occurrence of certain procedural prerequisites [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288-290, 109 P.2d 942]* . Speaking generally, any acts that exceed the defined power of the Department in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed and followed under the doctrine of stare decisis, are in excess of jurisdiction [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 291, 109 P.2d 942]* .

[3] Whether There Was Fair Hearing

Fairness, that is, procedural due process, requires that a person be informed of the evidence against him or her, that the person have an opportunity to test, refute, or explain it, and that the Department's decision be made in light of the evidence introduced at the hearing, not on the basis of "outside" information which, because it was not presented at the hearing, could not be controverted [*see English v. City of Long Beach (1950) 35 Cal. 2d 155, 158-159, 217 P.2d 22]* . It appears that a failure to hold a hearing, inadequate notice, and unreasonably restrictive or liberal application of rules of evidence would contribute to the denial of a fair hearing.

It should be noted that even though a hearing was not "fair," relief will be denied unless the unfairness was prejudicial [*see Code Civ. Proc. §§ 475, 1109*].

Another aspect of a fair hearing includes the absence of prejudice or bias [*see Thompson v. City of Long Beach (1953) 41 Cal. 2d 235, 243, 259 P.2d 649]* . The test under procedural due process of the ability of an interested administrative body to act is whether, in light of particular facts, experience teaches that the probability of actual bias on the part of a decision maker is too high to be constitutionally tolerable [*see Mennig v. City Council (1978) 86 Cal. App. 3d 341, 350, 150 Cal. Rptr. 207]* .

[4] Whether There Was Prejudicial Abuse of Discretion

[a] Establishing Abuse of Discretion

Abuse of discretion is established if the Department had not proceeded in a manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence [*Code Civ. Proc. § 1094.5(b)*]. Each of these issues is discussed in [b]-[d], *below*.

[b] Department Action Was Unlawful

The Department has abused its discretion if it is determined that the Department has not proceeded in a manner required by law [*Code Civ. Proc. § 1094.5(b)*]. It appears that a failure to proceed as required by law may appropriately be charged if the agency did not follow proper procedure, or took action that it was not authorized to take, or that its action was based on an improper ground. Examples of such action include: receipt of incompetent evidence [*see Schoenen v. Board of Medical Exrs. (1966) 245 Cal. App. 2d 909, 914, 54 Cal. Rptr. 364]* ; failure to consider a proper defense or make findings respecting it [*see Boren v. State Personnel Board (1951) 37 Cal. 2d 634, 640, 234 P.2d 981]* ; failure to follow spirit of law despite literal compliance [*see Walsh v. Kirby (1974) 13 Cal. 3d 95, 103-106, 118 Cal. Rptr. 1, 529 P.2d 33]* ; and failure to recognize and act on the implications of the law's explicit requirements [*see No Oil, Inc.*

v. City of Los Angeles (1974) 13 Cal. 3d 68, 79-86, 118 Cal. Rptr. 34, 529 P.2d 66] .

[c] Decision Was Not Supported by Findings

On the conclusion of a hearing, the hearing officer or hearing board is required to make findings and render a decision on behalf of the Department [*Veh. Code § 14105*]. Since the language of the statute clearly requires the Department to make findings, the findings must be made in a formal manner [*see Webb v. State Personnel Board (1971) 16 Cal. App. 3d 542, 548, 94 Cal. Rptr. 115]* .

Findings must be legally relevant to support agency action [*see J. L. Thomas, Inc. v. County of Los Angeles (1991) 232 Cal. App. 3d 916, 927-929, 283 Cal. Rptr. 815]* . Findings must also be set forth with sufficient clarity to be understandable [*see In re Sturm (1974) 11 Cal. 3d 258, 272, 113 Cal. Rptr. 361, 521 P.2d 97]* .

A failure to make proper findings in support of an administrative decision is an abuse of discretion of constitutional dimensions, because the failure is tantamount to a denial of due process [*see In re Sturm (1974) 11 Cal. 3d 258, 267, 113 Cal. Rptr. 361, 521 P.2d 97* ; *but see Webb v. State Personnel Board (1971) 16 Cal. App. 3d 542, 548, 94 Cal. Rptr. 115* (no reversible error in lack of findings when evidence clearly shows that findings must necessarily be against petitioner)].

[d] Findings Were Not Supported by Evidence

[i] Standard of Review

Two tests are prescribed for use when it is claimed that the evidence does not support the findings [*see Code Civ. Proc. § 1094.5(c)*]. The two tests are commonly called the "independent judgment" test and the "substantial evidence" test.

In cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court determines whether the findings are supported by the weight of the evidence [*see Code Civ. Proc. § 1094.5(c)*]. This involves what is in effect a retrial, but there is no formal presentation of evidence as in a normal trial (with a possible exception under *Code Civ. Proc. § 1094.5(e)*, regarding evidence that was unavailable at the time of the initial administrative hearing). The "retrial" is conducted on the record of evidence that was presented to the agency [*see Berlinghieri v. Department of Motor Vehicles (1983) 33 Cal. 3d 392, 395, 398, 188 Cal. Rptr. 891, 657 P.2d 383* ; *see Bixby v. Pierno (1971) 4 Cal. 3d 130, 143, 93 Cal. Rptr. 234, 481 P.2d 242* ; *Ocheltree v. Gourley (2002) 102 Cal. App. 4th 1013, 1017, 126 Cal. Rptr. 2d 77* (trial court erred in ruling on petition without reviewing record)].

It is the petitioner's burden, not that of the agency, to provide a record of the administrative proceedings that will allow sufficient and effective review by the court, since it is the burden of the petitioner to demonstrate a prejudicial abuse of discretion. Such a record is sufficient if it provides the reviewing court with a basis for the affirmance or reversal of the order or decision, and establishes where in the proceedings the administrative agency abused its discretion. The record must accurately represent the administrative proceedings, provide the reviewing court with an understanding of what occurred below, and enable the court to undertake an independent judicial review of the administrative decision [*Elizabeth D. v. Zolin (1993) 21 Cal. App. 4th 347, 355, 25 Cal. Rptr. 2d 852* (trial court erred in not reviewing sufficient portion of record before ruling on petition)].

Substantial evidence is evidence of ponderable legal significance, reasonable in nature, credible, and solid value [*People v. Bassett (1968) 69 Cal. 2d 122, 138-139, 70 Cal. Rptr. 193, 443 P.2d 777* ; *Pennel v. Pond Union School Dist. (1973) 29 Cal. App. 3d 832, 837 n.2, 105 Cal. Rptr. 817]* . Under this test, the court may not reweigh the evidence and must resolve reasonable doubts in favor of the administrative decision [*Security Environmental Systems, Inc. v. South Coast Air Quality Management Dist. (1991) 229 Cal. App. 3d 110, 132, 280 Cal. Rptr. 108* ; *see Taylor Bus Service, Inc. v. San Diego Bd. of Education (1987) 195 Cal. App. 3d 1331, 1340, 241 Cal. Rptr. 379]* .

The appropriate circumstances for applying these tests are discussed in [ii] and [iii], respectively, *below*.

[ii] Independent Judgment Standard

The cases in which the independent judgment test is used are those in which the agency action substantially affects a vested fundamental right, which is determined in each case according to the facts [*see Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 32, 112 Cal. Rptr. 805, 520 P.2d 29* ; *Bixby v. Pierno (1971) 4 Cal. 3d 130, 144, 93 Cal. Rptr. 234, 481 P.2d 242]* .

In cases involving drivers' licenses, the test would be applied when the Department's action substantially affects an existing license [*see Berlinghieri v. Department of Motor Vehicles (1983) 33 Cal. 3d 392, 398, 188 Cal. Rptr. 891, 657 P.2d 383* (suspension or revocation of license under "implied consent" law of *Veh. Code § 13353*); *Rios v. Cozens (1972) 7 Cal. 3d 792, 796* , *cert. granted and remanded, 410 U.S. 425* , *on remand, 9 Cal. 3d 454* (continued possession of existing driver's license as fundamental right); *Bixby v. Pierno (1971) 4 Cal. 3d 130, 139, 146, 93 Cal. Rptr. 234, 481 P.2d 242* (right held by virtue of existing license as vested); *see also Thompson v. Department of Motor Vehicles (1980) 107 Cal. App. 3d 354, 357 n.1, 165 Cal. Rptr. 626* (independent judgment applies because Department is a state-level agency of legislative origin, and suspension proceedings affect vested right)]. Such action by the Department would be suspension, revocation, or imposition of probation. It appears that such action may also include restrictions if the restrictions are not imposed in connection with issuance of the license. It appears that it would also include cancellation.

[iii] Substantial Evidence Standard

In all cases not described in [ii], *above*, the court determines whether the findings are supported "by substantial evidence in the light of the whole record" [*see Code Civ. Proc. § 1094.5(c)*]. With respect to a case involving a driver's license, this test would be applied when the Department has refused to issue a license [*see Bixby v. Pierno (1971) 4 Cal. 3d 130, 137, 93 Cal. Rptr. 234, 481 P.2d 242* (attempt to obtain license as not involving vested fundamental right)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 92.123 Review by Ordinary Mandate Proceeding

[1] Compel Performance of Legal Duty

As discussed under § 92.122, administrative mandate under *Code Civ. Proc. § 1094.5* cannot be granted unless certain statutorily required conditions are met. Although a writ of administrative mandate may not be available because a case does not satisfy those requirements, a writ of ordinary mandate may be available [*see Taylor Bus Service, Inc. v. SanDiego Bd. of Education (1987) 195 Cal. App. 3d 1331, 1339, 241 Cal. Rptr. 379]* .

An ordinary mandate proceeding under *Code Civ. Proc. § 1085* is a method of compelling the performance of a legal, usually ministerial duty, whereas the purpose of an administrative mandate proceeding is to review the final adjudicative action of an administrative body [*see Vernon Fire Fighters Assn. v. City of Vernon (1980) 107 Cal. App. 3d 802, 808, 810, 165 Cal. Rptr. 908]* .

"Legislative" or "quasi-legislative" action, typically reviewable by traditional mandate, is action based on facts that help the tribunal determine the content of law and of policy and exercise its judgment or discretion in determining what course of action to take [*Joint Council of Interns & Residents v. Board of Supervisors (1989) 210 Cal. App. 3d 1202, 1209-1210, 258 Cal. Rptr. 762]* .

To obtain a writ of mandate, the petitioner must generally show a duty on the part of the respondent, the petitioner's beneficial interest in compelling the performance of that duty, and the inadequacy of other legal remedies [*see Code Civ. Proc. §§ 1085, 1086*].

In a mandate action arising under *Code Civ. Proc. § 1085,* judicial review is limited to an examination of the proceedings before the agency to determine whether the agency's actions have been arbitrary or capricious, entirely lacking in evidentiary support, or whether it failed to follow proper procedures or failed to give notice as required by law [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 34 n.2, 112 Cal. Rptr. 805, 520 P.2d 29* ; *Taylor Bus Service, Inc. v. San Diego Bd. of Education (1987) 195 Cal. App. 3d 1331, 1340, 241 Cal. Rptr. 379]* . In determining whether evidentiary support is present in a traditional mandate action, the applicable

standard of review is the substantial evidence test [*Taylor Bus Service, Inc. v. San Diego Bd. of Education (1987) 195 Cal. App. 3d 1331, 1340, 241 Cal. Rptr. 379]* .

For further discussion of ordinary mandate proceedings generally, see Ch. 358, *Mandate and Prohibition* .

[2] Invalid Prior Conviction

In a mandate proceeding to review the Department's action taken on the basis of a driver's record of convictions, the court is bound by a prior determination that an earlier conviction was invalid. Since a prior conviction cannot be used for the purpose of suspending a driver's license if it is invalid, it is proper for the superior court to order reinstatement of a driver's license that was suspended by the Department on the basis of a record of convictions that included the invalid conviction [*Hasson v. Cozens (1970) 1 Cal. 3d 576, 579-580, 83 Cal. Rptr. 161, 463 P.2d 385]* .

The Department generally has a mandatory duty to suspend or revoke a person's privilege to operate a motor vehicle on receipt of an abstract of a court's record of conviction and the person usually is not granted a right to a hearing [*see e.g., Veh. Code § 13350*]. A writ of administrative mandate would therefore not be available [*see Code Civ. Proc. § 1094.5(a)*; *Veh. Code § 14101(a)*]. It appears, however, that a person may seek a writ of ordinary mandate for review of such cases [*see Taylor Bus Service, Inc. v. San Diego Bd. of Education (1987) 195 Cal. App. 3d 1331, 1339, 241 Cal. Rptr. 379]* .

When the Department of Motor Vehicles suspends a license on conviction of driving under the influence, and the driver seeks to challenge the suspension on the ground that the conviction is unconstitutional, the driver may not initially seek a writ of mandate against the Department, but must first successfully challenge the conviction in the court in which it was rendered, or in a mandate proceeding directed at the rendering court, or in a criminal proceeding in which the conviction was alleged as a prior offense [*Larsen v. Department of Motor Vehicles (1995) 12 Cal. 4th 278, 284-288, 48 Cal. Rptr. 2d 151, 906 P.2d 1306]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 92.124 Redress by Federal Civil Rights Action

The Fifth Circuit Court of Appeals has held that a complaint alleging facts that show denial, under color of state law, of an application for a license in a manner that does not meet constitutional standards of due process and equal protection states a cause of action under *28 U.S.C. § 1343(a)(3)*, in a case involving a retail liquor dealer. *28 U.S.C. § 1343(a)(3)* provides that the United States district courts have original jurisdiction of any civil action authorized by law to be commenced by any person to redress the deprivation, under color of state law, statute, ordinance, regulation, custom, or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States [*see Hornsby v. Allen (5th Cir. 1964) 326 F.2d 605, 610-612* ; *see also Atlanta Bowling Center, Inc. v. Allen (5th Cir. 1968) 389 F.2d 713, 714-716* (explaining *Hornsby* case)].

The law authorizing such a civil action is *42 U.S.C. § 1983*, which provides that every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress [*42 U.S.C. § 1983*].

The proceeding selected by the plaintiff-appellant in the *Hornsby* case, discussed *above*, was a declaratory relief action under *28 U.S.C. § 2201*. Under that section, in a case of actual controversy within its jurisdiction, except with respect to federal taxes, any court of the United States, on the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

The complaint in the *Hornsby* case, *above*, alleged that although the plaintiff had met all of the requirements and qualifications prescribed for the holder of a retail liquor dealer's license, the application was denied without a reason therefor, and also that the application was denied pursuant to a practice, not authorized or sanctioned by law, of denying application where one or both of the city aldermen for the ward where the business was to be located had objection.

In light of the *Hornsby* case, *above*, it would appear that an unsuccessful applicant for a driver's license, or a licensee

whose license is threatened or withdrawn, has a means of redress in the federal courts, at least for ascertaining whether the manner in which the determination of eligibility or fitness was or is made accords with constitutional standards of due process and equal protection [*Hornsby v. Allen (5th Cir. 1964) 326 F.2d 605, 612]* .

For discussion and a form of complaint for bringing an action in United States district court for damages and injunction for deprivation of civil rights under *42 U.S.C. §§ 1983, 1988*, see Ch. 112, *Civil Rights: Government-Funded Programs and Activities* .

Legal Topics:

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

§§ 92.125[Reserved]

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1. Impoundment

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§ 92.130 When Impoundment Is Proper

A motor vehicle is subject to impoundment if the driver is unlicensed or the driver's license is suspended or revoked. Further, the vehicle is subject to forfeiture as a nuisance if the driver is the registered owner of the vehicle and has a previous misdemeanor conviction for being unlicensed, suspended, or revoked [*Veh. Code § 14607.6*; for discussion, *see § 92.140* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 92.131 Impoundment by Peace Officer

[1] Failure to Produce Valid License

If the driver of a motor vehicle is unable to produce a valid driver's license on the demand of a peace officer enforcing the provisions of the Vehicle Code, the vehicle must be impounded, regardless of ownership, unless the officer is reasonably able, by other means, to verify that the driver is properly licensed. If the driver claims to be properly licensed, the officer must attempt to verify the license status before impounding the vehicle [*Veh. Code § 14607.6(c)(1)*]. The officer may not impound the vehicle if the driver's license expired within the previous 30 days and the driver would otherwise have been properly licensed [*Veh. Code § 14607.6(c)(2)*]. As used in *Veh. Code § 14607.6*, "days" means workdays not including weekends and holidays [*Veh. Code § 14607.6(o)*]. If the driver has a valid license but the license is for a class of vehicle other than the vehicle operated by the driver, the vehicle may not be impounded [*Veh. Code § 14607.6(s)*].

A peace officer may not stop a vehicle for the sole reason of determining whether the driver is properly licensed [*Veh. Code § 14607.6(b)*]. The impoundment and forfeiture provisions do not apply to vehicles subject to *Veh. Code §§ 14608* and *14609* if there has been compliance with the procedures in those sections [*Veh. Code § 14607.6(t)*].

[2] Vehicles Driven by Employees

The officer may exercise discretion regarding the impounding of a vehicle if the driver is an employee driving a vehicle registered to the employer in the course of employment. The officer also may exercise discretion if [*Veh. Code § 14607.6(c)(3)*]:

- The driver is an employee of, or otherwise controlled by, a bona fide business establishment.

- It reasonably appears that an owner, or agent of the owner, of the vehicle relinquished possession of the vehicle to the business establishment solely for servicing or parking of the vehicle or other reasonably similar situations.

- The vehicle was not to be driven except as directly necessary to accomplish that business purpose.

In this event, the officer may release and not impound the vehicle if the vehicle can be returned to or retrieved by the business establishment or a registered owner [*Veh. Code § 14607.6(c)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesVehicle RegistrationGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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8-92 California Forms of Pleading and Practice--Annotated § 92.132

§ 92.132 Release from Impoundment

[1] Actions of Driver

An impounded vehicle must be released if the vehicle is not subject to forfeiture because the driver is not the registered owner of the vehicle or does not have a specified prior conviction [*Veh. Code § 14607.6(c)(5)*; for discussion, *see § 92.140* et seq.].

An impounded vehicle must be released if the driver is a registered owner of the vehicle and the driver presents to the impounding agency, within three days of the impoundment, his or her valid California driver's license, including a valid temporary license or permit. A vehicle impounded pursuant to *Veh. Code § 14607.6(c)(3)*, relating to an officer's discretion in impounding a vehicle driven by an employee, must be released to a registered owner whether or not the driver presents a valid driver's license. The release of an impounded vehicle must be to a registered owner of record at the time of the impoundment, or an agent of that owner authorized in writing, on payment of towing and storage charges related to the impoundment and any administrative charges authorized by *Veh. Code § 22850.5*, providing that the person claiming the vehicle is properly licensed and the vehicle is properly registered [*Veh. Code § 14607.6(d)(1)*].

Towing and storage charges for vehicles impounded under these provisions may not exceed the normal rates for other vehicle towing and storage conducted by the impounding agency in the normal course of business [*Veh. Code § 14607.6(p)*].

[2] Community Property Interest in Vehicle

If at the time of impoundment there is a community property interest in the vehicle owned by a person other than the driver, and the vehicle is the only vehicle available to the driver's immediate family that may be operated with a class C driver's license, the vehicle may be released to a registered owner or the community property interest owner when [*Veh. Code § 14607.6(d)(2)*]:

- Release of the vehicle is requested by the registered owner or community property interest owner

and the owner of the community property interest submits proof of that interest.

- The registered owner or community property interest owner submits proof that he or she is properly licensed and the vehicle is properly registered.

- All towing and storage charges and any administrative charges authorized by *Veh. Code § 22850.5* are paid.

- If the driver requests release of the vehicle, the registered owner or community property interest owner signs a stipulated vehicle release agreement in consideration for the nonforfeiture of the vehicle. However, the vehicle may not be released if the driving record of a registered owner indicates that a prior stipulated vehicle release agreement was signed by that person [*Veh. Code § 14607.6(d)(5)*].

A stipulated vehicle release agreement must provide for the consent of the signator to the automatic future forfeiture and transfer of title to the state of any vehicle registered to the signator if the vehicle is driven by a driver whose license is suspended or revoked or who is unlicensed. The agreement is effective for only as long as it is noted on a driving record maintained by the Department under *Vehicle Code § 1806.1* [*Veh. Code § 14607.6(d)(3)*]. The stipulated vehicle release agreement must be reported by the impounding agency to the Department within 10 days after the agreement is signed [*Veh. Code § 14607.6(d)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesForfeituresGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyTransportation LawPrivate VehiclesVehicle RegistrationGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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8-92 California Forms of Pleading and Practice--Annotated § 92.133

§ 92.133 Notification of Legal and Registered Owners

The impounding agency must ascertain from the Department the names and addresses of all legal and registered owners of an impounded vehicle, if the vehicle has not been redeemed pursuant to *Veh. Code § 14607.6(d)* or has not otherwise been released. The impounding agency must, within two days of impoundment, send a notice by certified mail to all legal and registered owners of the vehicle to the addresses obtained from the Department, informing them that the vehicle is subject to forfeiture and will be sold or otherwise disposed of pursuant to *Veh. Code § 14607.6*. The notice must include instructions for filing a claim with the district attorney, the time limits for filing a claim, and the legal owner's right to conduct the sale. Such a notice need not be sent to any registered owner who was personally served at the time of the impoundment with a notice containing all of the required information, but legal owners, if any, must be sent the notice [*Veh. Code § 14607.6(e)(1), (2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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8-92 California Forms of Pleading and Practice--Annotated § 92.134

§ 92.134 Owner's Losses Due to Impoundment or Forfeiture

Any owner of a vehicle who suffers any loss due to the impoundment or forfeiture of any vehicle under *Veh. Code § 14607.6* may recover the amount of the loss from the unlicensed, suspended, or revoked driver. A registered owner may recover damages for loss of use of a vehicle from a business establishment if possession of the vehicle was tendered to the business establishment in good faith and if the cause of the impoundment of the vehicle was an unlicensed driver employed or otherwise directed by the business establishment [*Veh. Code § 14607.6(m)*].

If notice was not sent to the legal owner in two working days, the impounding agency may not charge the legal owner for more than 15-days' impoundment when the legal owner redeems the impounded vehicle [*Veh. Code § 14607.6(e)(2)*; for discussion, *see § 92.133*]. No processing charges may be imposed on a legal owner who redeems an impounded vehicle within 15 days of impoundment [*Veh. Code § 14607.6(e)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesForfeituresGeneral OverviewTortsDamagesCompensatory DamagesProperty DamageLoss of UseTransportation LawPrivate VehiclesVehicle RegistrationGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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8-92 California Forms of Pleading and Practice--Annotated § 92.135

§ 92.135 Contesting Validity of Impoundment at Poststorage Hearing

A legal or registered owner of an impounded vehicle is entitled, on request to the impounding agency, to a poststorage hearing to determine the validity of the storage. The owner's request for a poststorage hearing must be made within ten days after the impoundment, except that where personal service was provided under *Veh. Code § 14607.6(e)(2)* and no mailed notice is required, the owner must make the request within three days after impoundment [*Veh. Code § 14607.6(n)(1)*].

The poststorage hearing must be conducted not later than two days after it was requested. The impounding agency may authorize its own officer or employee to conduct the hearing, except that the hearing officer may not be the same officer who directed storage of the vehicle. Failure of either the legal or registered owner to request a hearing as provided in *Veh. Code § 14607.6(e)(1)*, or failure of the owner to attend a scheduled hearing, satisfies the poststorage hearing requirement [*Veh. Code § 14607.6(n)(2)*].

If it is determined that the driver had a valid driver's license at the time of the impoundment, the agency employing the person who directed the storage is responsible for the costs incurred for towing and storage [*Veh. Code § 14607.6(n)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewTransportation LawPrivate VehiclesVehicle RegistrationGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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[Reserved]

§§ 92.136[Reserved]

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8-92 California Forms of Pleading and Practice--Annotated § 92.140

§ 92.140 When Forfeiture Is Proper

A motor vehicle is subject to forfeiture as a nuisance when all of the following occur [*Veh. Code § 14607.6(a)*]:

- The driver is the registered owner of the vehicle.
- The driver is unlicensed or the driver's license is suspended or revoked.
- The driver has a previous misdemeanor conviction for a violation of *Vehicle Code §§ 12500, 14601, 14601.1, 14601.2, 14601.3, 14601.4,* or *14601.5*.

A trial court has discretion to deny a petition for forfeiture on a showing that the driver obtained valid license after impoundment of the vehicle [*People v. One 1986 Cadillac DeVille (1999) 70 Cal. App. 4th 157, 162*].

If the driver is not the registered owner of the vehicle or does not have a specified previous conviction, the vehicle is not subject to forfeiture and must be released [*Veh. Code § 14607.6(c)(5)*].

When the impounded vehicle has not been redeemed or released, the impounding agency must notify the legal and registered owners of the vehicle that the vehicle is subject to forfeiture and must provide instructions for filing a claim [*Veh. Code § 14607.6(e)(1), (2)*; *see* discussion in *§ 92.133*].

For a form for filing a claim opposing the forfeiture, see *§ 92.190*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesForfeituresGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesNuisancesGeneral OverviewTransportation LawPrivate VehiclesVehicle RegistrationGeneral

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8-92 California Forms of Pleading and Practice--Annotated § 92.141

§ 92.141 Forfeiture Proceedings When Owner Does Not File Claim

If no claims to the impounded vehicle are filed and served within 15 days after the mailing of the notices or within five days of personal service of notices, the district attorney must prepare a written declaration of forfeiture of the vehicle to the state, and the vehicle must be sold. Such a written declaration provides good and sufficient title to the forfeited vehicle. A copy of the written declaration must be provided, on request, to any owner who was given notice. A claim filed but later withdrawn is deemed not to have been filed [*Veh. Code §§ 14607.6(e)(3), 14607.6(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesForfeituresGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesNuisancesGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsTransportation LawPrivate VehiclesVehicle RegistrationGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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8-92 California Forms of Pleading and Practice--Annotated § 92.142

§ 92.142 Forfeiture Proceedings When Owner Files Claim

If a claim to the impounded vehicle is timely filed and served within 15 days after the mailing of the notices or within five days of personal service of notices, the district attorney must file a petition for forfeiture with the appropriate court within ten days of receipt of the claim [*see* § 92.191]. The district attorney must establish an expedited hearing date in accordance with instructions from the court, and the court must hear the matter without delay. The claimant must pay a court filing fee of $100, but a prevailing claimant must be reimbursed for the fee by the impounding agency. To the extent practicable, the civil and criminal cases must be heard at the same time in an expedited, consolidated proceeding [*Veh. Code § 14607.6(e)(4)*].

In the civil case, the burden of proof is on the prosecuting agency by a preponderance of the evidence. All questions that may arise shall be decided, and all other proceedings shall be conducted, as in an ordinary civil action. A judgment of forfeiture does not require, as a condition precedent, the conviction of a defendant of an offense that made the vehicle subject to forfeiture. The filing of a claim within the specified time limits is a jurisdictional prerequisite for the action [*Veh. Code § 14607.6(e)(5)*]. On the issuance of an order of forfeiture by the court, the vehicle must be sold [*Veh. Code § 14607.6(f)*].

On commission of the act that gave rise to the forfeiture, all right, tile, and interest in the vehicle vests in the state [*Veh. Code § 14607.6(e)(6)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesForfeituresHearingsEvidenceProcedural ConsiderationsBurdens of ProofPreponderance of EvidenceGovernmentsLegislationStatutes of LimitationsTime LimitationsTransportation LawPrivate VehiclesVehicle RegistrationGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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8-92 California Forms of Pleading and Practice--Annotated § 92.143

§ 92.143 Stolen or Unidentifiable Vehicles

If the impounding agency determines that the vehicle had been stolen, it may not be sold. A stolen vehicle may be claimed by the registered owner at any time after impoundment, providing the vehicle registration is current and the registered owner has no outstanding traffic violations or parking penalties on his or her driving record or on the registration record of any vehicle registered to the owner. If the identity of the legal or registered owner of the impounded vehicle cannot be reasonably ascertained, the vehicle may be sold [*Veh. Code § 14607.6(l)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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8-92 California Forms of Pleading and Practice--Annotated § 92.144

§ 92.144 Sale of Forfeited Vehicle

A specified legal owner, or its agent, may take possession and conduct the sale of the forfeited vehicle. The legal owner must be a motor vehicle dealer, bank, credit union, acceptance corporation, or other licensed financial institution legally operating in California [*Veh. Code § 14607.6(g)*]. The agent of the legal owner must either be licensed, or exempt from licensure, under *Bus. & Prof. Code § 7500 et seq.* [*Veh. Code §§ 14607.6(v)*].

The legal owner or agent must notify the impounding agency of its intent to conduct the sale within 15 days of the mailing of notice to it by the impounding agency. The notice may be presented in person, by certified mail, by facsimile transmission, or by electronic mail [*Veh. Code § 14607.6(g)*].

The sale may be conducted at the time, in the manner, and on the notice usually given for the sale of repossessed or surrendered vehicles [*Veh. Code § 14607.6(g)*].

If the legal owner or agent of the owner does not notify the agency impounding the vehicle of its intent to conduct the sale as provided in *Veh. Code § 14607.6(g)*, the agency must offer the forfeited vehicle for sale at public auction within 60 days of receiving title to the vehicle. Low-value vehicles, or vehicles not of the type that can readily be sold to the public generally, must be conveyed to a licensed dismantler or donated to an eleemosynary institution [*Veh. Code §§ 14607.6(g), 14607.6(k)*].

The proceeds of a sale of a forfeited vehicle must be disposed of according to the priorities established in *Veh. Code § 14607.6(i)*. The person conducting the sale must disburse the proceeds pursuant to those priorities and must provide a written accounting regarding the disposition to the impounding agency and, on request, to any person entitled to or claiming a share of the proceeds, within 15 days after the sale is conducted [*Veh. Code § 14607.6(j)*].

Legal Topics:

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

Civil ProcedureRemediesForfeituresGeneral OverviewTransportation LawPrivate VehiclesVehicle RegistrationGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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8-92 California Forms of Pleading and Practice--Annotated §§ 92.145-92.149

[Reserved]

§§ 92.145[Reserved]

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8-92 California Forms of Pleading and Practice--Annotated § 92.150

§ 92.150 Related Matthew Bender Publications

For memoranda of points and authorities relating to motions and demurrers in mandate proceeding for review of administrative order, see California Points and Authorities, Ch. 195, *Public Administrative Law* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamus

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§ 92.151 Federal Statutes

U.S. district courts have original jurisdiction of civil rights action. *28 U.S.C. § 1343(a)(3)*

Federal court has authority to give declaratory relief in case of actual controversy within its jurisdiction. *28 U.S.C. § 2201*

Civil liability for deprivation of civil rights under color of state law. *42 U.S.C. § 1983*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityCase or Controversy RequirementsActual DisputesCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral OverviewCivil Rights LawSection 1983 ActionsGeneral Overview

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8-92 California Forms of Pleading and Practice--Annotated § 92.152

§ 92.152 State Statutes

[1] Definitions

Signature defined. *Veh. Code § 17*

Definitions in Vehicle Code generally. *Veh. Code § 105 et seq.*

Department defined. *Veh. Code § 290*

Driver defined. *Veh. Code § 305*

Driver's license defined. *Veh. Code § 310*

Drug defined. *Veh. Code § 312*

Foreign jurisdiction defined. *Veh. Code § 325*

Highway defined. *Veh. Code §§ 360, 590-592* (includes street)

Motor vehicle defined. *Veh. Code § 415*

Nonresident defined. *Veh. Code § 435*

Original driver's license defined. *Veh. Code § 455*

Person defined. *Veh. Code § 470*

Vehicle defined. *Veh. Code § 670*

Cancellation defined. *Veh. Code § 13100*

Revocation defined. *Veh. Code § 13101*

Suspension defined. *Veh. Code § 13102*

Conviction defined for purposes of *Veh. Code § 12500 et seq.*, governing drivers' licenses. *Veh. Code § 13103*

Conviction of juvenile defined for purposes of *Veh. Code § 13100 et seq.*, governing suspension and revocation of drivers' licenses. *Veh. Code § 13105*

Conviction defined for purposes of Driver License Compact (*Veh. Code § 15000 et seq.*). *Veh. Code § 15021(c)*

Definitions used under commercial motor vehicle safety program. *Veh. Code § 15210*

Judgment defined for purposes of *Veh. Code § 16250 et seq.*, governing suspension following unsatisfied judgment and proof of ability to respond in damages. *Veh. Code § 16250*

Cause of action defined for purposes of *Veh. Code § 16250 et seq.*, governing suspension following unsatisfied judgment and proof of ability to respond in damages. *Veh. Code § 16251*

Proof of financial responsibility defined for purposes of financial responsibility law. *Veh. Code § 16430*

Minor defined for purposes of *Veh. Code § 17700 et seq.*, relating to civil liability of persons signing applications of minors. *Veh. Code § 17700*

[2] Cancellation of License

Discretionary cancellation when license issued erroneously or voluntarily surrendered. *Veh. Code § 13100*

Mandatory cancellation of minor's license for failure of proof of ability to respond in damages. *Veh. Code § 17704*

Issuance of restricted license to minor when employer signs and verifies application. *Veh. Code § 17706*

Mandatory cancellation of minor's license on request of person who signed and verified application. *Veh. Code § 17711*

Mandatory cancellation of minor's license in certain cases. *Veh. Code § 17712*

[3] Department Procedures

Administrative Procedure Act. *Gov. Code § 11500 et seq.*

Notices, reports, statements, and records must be written in English. *Veh. Code § 9*

Method of giving notice. *Veh. Code § 22*

When notice complete. *Veh. Code § 23*

Proof of notice. *Veh. Code § 24*

Department of Motor Vehicles is department in Business, Transportation, and Housing Agency. *Veh. Code § 1500*

Director of Motor Vehicles is civil executive officer of Department. *Veh. Code § 1504*

Director of Motor Vehicles is authorized to administer provisions of Vehicle Code relating to Department. *Veh. Code § 1650*

Department Director may adopt and enforce rules and regulations in accordance with Administrative Procedure Act [*see Gov. Code § 11370 et seq.*]. *Veh. Code § 1651*

Suspension and revocation procedures. *Veh. Code § 13550 et seq.*

When license is suspended, revoked, or canceled, license certificate must be surrendered. *Veh. Code § 13551*

Investigation and hearing. *Veh. Code § 13800 et seq.*

Investigations by Department. *Veh. Code § 13800*

Reexamination by Department. *Veh. Code § 13801*

Special consideration in conducting investigation. *Veh. Code § 13802*

When notice of action or proposed action required. *Veh. Code §§ 13950, 13951*

Contents of notice of hearing. *Veh. Code § 13952*

Alternative procedure instead of notice and prior hearing. *Veh. Code § 13953*

Hearing. *Veh. Code § 14100 et seq.*

Entitlement to demand and receive hearing. *Veh. Code § 14100(a)*

No entitlement to hearing. *Veh. Code § 14101*

Conduct of hearing. *Veh. Code §§ 14104.2-14105*

Evidence at hearing. *Veh. Code § 14104.7*

Findings and decision after hearing. *Veh. Code § 14105*

Effective date of decision. *Veh. Code § 14105*

Reopening case on hearing. *Veh. Code § 14106*

Hearing procedure not otherwise provided for in Vehicle Code. *Veh. Code § 14112*

[4] Financial Responsibility

Duty to make accident reports. *Veh. Code § 16000 et seq.*

Department's authority to suspend license for failure to make accident report. *Veh. Code § 16004*

Owner must make accident report in certain cases. *Veh. Code §§ 16001, 16003*

Driver's duty to report accident to employer; employer's duty to make accident report. *Veh. Code § 16002*

Requirement to maintain financial responsibility. *Veh. Code § 16020 et seq.*

Establishment of financial responsibility. *Veh. Code § 16021*

Proof of financial responsibility. *Veh. Code § 16050 et seq.*

Department's authority to suspend license for failure to have or maintain financial responsibility. *Veh. Code § 16070 et seq.*

Procedure for suspension for noncompliance with financial responsibility law. *Veh. Code § 16075*

Suspensions following unsatisfied judgments. *Veh. Code § 16250 et seq.*

Proof of financial responsibility. *Veh. Code § 16430 et seq.*

Proof of ability to respond in damages through certificate of liability insurance. *Veh. Code § 16431 et seq.*

Proof of ability to respond in damages through furnishing bond, deposit of cash, and certificate of self-insurance. *Veh. Code § 16434 et seq.*

Acceptable insurance coverage for proof of financial responsibility. *Veh. Code § 16450 et seq.*

Relief from requirement of giving proof of ability to respond in damages. *Veh. Code § 16480*

[5] Judicial Review of Departmental Action

Minor party must appear by guardian ad litem. *Code Civ. Proc. § 372*

Court must ignore nonprejudicial error when reviewing Departmental action pursuant to *Code Civ. Proc. § 1094.5*. *Code Civ. Proc. §§ 475, 1109*

Mandate proceedings generally. *Code Civ. Proc. § 1084 et seq.*

Petitioner for writ of mandate must be "beneficially interested" in issuance of writ. *Code Civ. Proc. § 1086*

Scope of review by writ of administrative mandate. *Code Civ. Proc. § 1094.5*

Successful petitioner in mandate proceeding may recover attorney's fees up to $7,500 if agency action was arbitrary or capricious. *Gov. Code § 800*

Service of civil process against director and Department. *Veh. Code § 24.5*

Judicial review of Department's orders. *Veh. Code §§ 14400, 14401*

Limitation period for filing petition for writ of mandate to review Departmental action is 90 days from date of notice. *Veh. Code § 14401(a)*

[6] Probation

Department may authorize to impose probation in lieu of discretionary suspension or revocation. *Veh. Code § 14250*

Driver training is part of probation. *Veh. Code § 14250.5*

Termination or modification of probation. *Veh. Code § 14251*

Withdrawal of probationary license. *Veh. Code § 14252*

Termination of probation. *Veh. Code § 14253*

Youthful Drunk Driver Visitation Program. *Veh. Code § 23509 et seq.*

[7] Reinstatement of License

Department must restore or reissue license suspended by court for longer than authorized period. *Veh. Code § 13203*

Condition of renewal of license revoked under *Veh. Code § 13350*. *Veh. Code § 13351*

Successful completion of driving-under-the-influence program is condition of reinstatement of driving privilege of person 18 years or older for conviction of violation of *Veh. Code § 23140* (person under 21 years whose blood alcohol is 0.05 percent). *Veh. Code § 13352.6*

Effective date of suspension or revocation based on conviction. *Veh. Code § 13366*

Department may require driver training as condition for reinstatement of suspended or revoked license. *Veh. Code § 13368*

Termination of probation and dismissal of charges under *Penal Code §§ 1203.4* and *1203.4a* does not affect revocation or suspension. *Veh. Code § 13555*

Six-month limitation on suspension unless otherwise specifically provided; 12-month suspension authorized when discretionary revocation would be authorized under *Veh. Code § 12500* et seq. *Veh. Code § 13556(a)*

Termination of discretionary suspension. *Veh. Code § 13556(b)*

Fee for reinstatement. *Veh. Code §§ 14904(a), 14907*

Period of suspension for failure to satisfy judgment under *Veh. Code § 16370*. *Veh. Code §§ 16371, 16375*

Satisfaction of judgment for purpose of ending suspension under *Veh. Code § 16370*. *Veh. Code § 16377*

[8] Restrictions on License

Discretionary restriction to driving vehicle in course of employment when driver presumptively negligent under *Veh. Code § 12810.5*. *Veh. Code § 12812*

Discretionary authority to restrict driver's license for good cause. *Veh. Code § 12813*

[9] Suspension and Revocation of License

Department may adopt regulations specifying, in addition to any cause provided by statute, circumstances that are grounds for suspension or revocation of various vehicle certificates. *Veh. Code § 12806.5*

Suspension or revocation of licenses. *Veh. Code § 13100 et seq.*

Suspension or revocation by court. *Veh. Code § 13200 et seq.*

Mandatory revocation on order of court for conviction of certain offenses involving controlled substances. *Veh. Code § 13202*

Mandatory suspension of license on court order for persons between ages of 13 and 21 years convicted of offenses involving controlled substances or alcohol. *Veh. Code § 13202.5*

Suspension, restriction, or delay of driving privilege for conviction of vandalism by defacing property or affixing graffiti. *Veh. Code § 13202.6*

Suspension by court for "road rage" assault. *Veh. Code §§ 13210, 13351.8*

Suspension and revocation by Department. *Veh. Code § 13350 et seq.*

Mandatory revocation for conviction for hit-and-run accident resulting in injury or death, for reckless driving, and for most felonies in which motor vehicle was used. *Veh. Code § 13350*

Mandatory revocation for conviction for vehicular manslaughter and multiple convictions of misdemeanor hit-and-run and reckless driving. *Veh. Code § 13351*

Mandatory suspension or revocation for conviction of drunk driving, driving by drug addict, or engaging in speed contest. *Veh. Code § 13352*

Mandatory suspension or refusal to restore driving privilege for failure to submit proof of completion of driving-under-the-influence program ordered as condition of probation for conviction of driving under influence. *Veh. Code § 13352.4*

Mandatory suspension or revocation for failure to submit to or complete alcohol test (implied consent law). *Veh. Code §§ 13353, 23612*

Mandatory immediate suspension when driver is under age 21 years and has unlawful blood-alcohol concentration of 0.01 percent or more. *Veh. Code § 23136 et seq.*

Mandatory immediate suspension for unlawful blood alcohol content (administrative per se law). *Veh. Code §§ 13353.2, 13382*

Mandatory suspension of license on second conviction for driving over 100 miles per hour. *Veh. Code § 13355*

Revocation or suspension for theft of vehicle. *Veh. Code § 13357*

Mandatory revocation of license for any ground that would be basis for refusal to issue. *Veh. Code § 13359*

Department may suspend or revoke license for violation of restrictions. *Veh. Code § 13360*

Department may suspend license for misdemeanor hit-and-run, reckless driving, or manslaughter. *Veh. Code § 13361*

Department may suspend license for failure to surrender license certificate on demand. *Veh. Code § 13362*

Department may suspend or revoke license for violation of written promise to appear. *Veh. Code § 13365*

Mandatory suspension or revocation of license of intoxicated person involved in accident within five years of date of violation of *Penal Code § 192(c)(3)*; procedure and hearing requirements. *Veh. Code § 13954*

Mandatory action for certain convictions in other state which is party to Driver License Compact (*Veh. Code § 15000 et seq.*). *Veh. Code § 15023*

Mandatory suspension for failure to file accident report as required by *Veh. Code § 16000 et seq.* *Veh. Code § 16004*

Mandatory suspension for failure to establish financial responsibility at time of accident. *Veh. Code § 16070*

Mandatory suspension based on out-of-state suspension for failure to comply with financial responsibility laws of other state. *Veh. Code § 16071*

Mandatory suspension for failure to satisfy judgment arising from traffic accident. *Veh. Code § 16370*

Suspension for failure to satisfy small claims court judgment resulting from motor vehicle accident. *Veh. Code § 16370.5*; *Code Civ. Proc. § 116.870*

Filing fee for processing documents and issuing suspension order for failure to satisfy judgment arising from motor vehicle accident. *Veh. Code § 16370.7*

Mandatory suspension for failure to satisfy judgment arising from traffic accident when previous judgment satisfied, proof of financial responsibility given, and proof fails as to second judgment. *Veh. Code § 16374*

Mandatory suspension for failure to pay installments on judgment arising from traffic accident. *Veh. Code § 16381*

Person required to maintain proof of financial responsibility is forbidden to drive any motor vehicle not covered by certificate of proof. *Veh. Code § 16457*

Mandatory suspension for failure of proof of financial responsibility filed pursuant to financial responsibility law. *Veh. Code § 16484*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewCriminal Law & ProcedureCriminal OffensesVehicular CrimesDriving Under the InfluenceBlood Alcohol & Field SobrietyImplied ConsentGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageOperator License SuspensionsInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageProof of Financial ResponsibilityTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.153 Administrative Regulations

State Department of Health Services forensic alcohol and breath alcohol analysis regulations. *17 Cal. Code Reg. § 1215 et seq.*

Requirements for licensing of forensic alcohol laboratories. *17 Cal. Code Reg. §§ 1216-1217.8*

Methods of forensic alcohol analysis. *17 Cal. Code Reg. §§ 1220-1221.5*

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For related research and practice materials, see the following legal topics:
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§ 92.154 California Rules of Court

Request for stay of suspension of driving license must be accompanied by copy of petitioner's driving record. *Cal. Rules of Ct., Rule 3.1142*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.155 Decisions

[1] Administrative Hearing

[a] General Rules

Person is entitled to notice and prior hearing when administrative agency has authority to deprive person of license for cause and to make quasi judicial determination, unless there is clear legislative intent to dispense with notice and prior hearing. *McCullough v. Terzian (1970) 2 Cal. 3d 647, 657, 87 Cal. Rptr. 195, 470 P.2d 4*

Once DMV establishes prima facie case, driver must produce affirmative evidence of the nonexistence of the presumed facts sufficient to shift the burden of proof back to the DMV. The licensee must show, through cross-examination of officer or by introducing affirmative evidence, that official standards were not observed. Once showing is made, the burden shifts to DMV to prove that test was reliable despite violation. *Roze v. Department of Motor Vehicles (2006) 141 Cal. App. 4th 1176, 1183, 46 Cal. Rptr. 3d 829*

The rebuttable presumption under *Evid. Code § 664* applies even if officer failed to sign breath test operator's sworn certification. *Morgenstern v. Department of Motor Vehicles (2003) 111 Cal. App. 4th 366, 374, 4 Cal. Rptr. 3d 46*

There is rebuttable presumption under *Evid. Code § 664* that official duty has been regularly performed; once DMV presents competent evidence in form of documents contemplated in statutory scheme to establish its prima facie case, licensee must produce competent affirmative evidence of nonexistence of presumed facts sufficient to shift burden of proof back to the DMV. *Baker v. Gourley (2000) 81 Cal. App. 4th 1167, 1172* (licensee failed to meet burden of proving nonexistence of foundational trustworthiness of BA report, by offering expert testimony that integrity of blood sample was compromised when its seal had been cut some six days before it was tested)

Failure to object to admission of hearsay in hearing before Department is waiver of objection, whether person represented by counsel or not. *August v. Department of Motor Vehicles (1968) 264 Cal. App. 2d 52, 64, 70 Cal. Rptr. 172* (dictum)

Hearing procedure specified in *Veh. Code §§ 14100-14112* provides for initiation of hearing, time and place, who shall conduct hearing, admissible evidence, decision process, time decision shall take effect, and question of continuing jurisdiction. *Serenko v. Bright (1968) 263 Cal. App. 2d 682, 689, 70 Cal. Rptr. 1*

Director of Department and officers or employees appointed to conduct hearings need not be lawyers or learned in law. *Serenko v. Bright (1968) 263 Cal. App. 2d 682, 690-691, 70 Cal. Rptr. 1*

[b] Subpoenas

Person whose driver's license was suspended following formal administrative hearing was not deprived of fair hearing based on inability to pay witness fee to patrol officer served with subpoena who refused to appear. *Nick v. Department of Motor Vehicles (1993) 12 Cal. App. 4th 1407, 1412-1417, 16 Cal. Rptr. 2d 305*

[c] Under Administrative Per Se Law

Officer's report stating that witness watched driver try to drive her damaged car after she was involved in early morning accident and that driver had bloodshot and watery eyes and smelled of alcohol was sufficient to support probable cause to arrest driver. *Grundy v. Gourley (2003) 110 Cal. App. 4th 20, 24, 1 Cal. Rptr. 3d 104*

Deputy's statement to arresting officer that driver had been weaving, contained in arresting officer's report that was received in evidence, was competent evidence supporting finding that arresting officer had reasonable cause to believe that motorist was driving under influence; deputy's statement was not inadmissible hearsay, since it was not admitted to prove truth of matter. *Cantrell v. Zolin (1994) 23 Cal. App. 4th 128, 132-134, 28 Cal. Rptr. 2d 238*

Motorist's admission of driving, contained in police officer's report, was admissible competent evidence under hearsay exception for public employee records; evidence that motorist had prohibited blood-alcohol level at time of driving was substantial, notwithstanding lack of direct evidence of driving, when chemical test was administered within two hours of time officer received radio call to respond to traffic accident, allowing inference that chemical test was administered within three hours of driving. *Jackson v. Department of Motor Vehicles (1994) 22 Cal. App. 4th 730, 736-741, 27 Cal. Rptr. 2d 712*

Department has evidentiary burden of justifying order of suspension. *Coombs v. Pierce (1991) 1 Cal. App. 4th 568, 576, 2 Cal. Rptr. 2d 249*

[d] Under Financial Responsibility Law

"SR-1" report required by *Veh. Code § 16000* is hearsay evidence in suspension hearing, and is insufficient by itself to support suspension. *Daniels v. Department of Motor Vehicles (1983) 33 Cal. 3d 532, 541, 189 Cal. Rptr. 512, 658 P.2d 1313* ; *Himelspach v. Department of Motor Vehicles (1983) 33 Cal. 3d 542, 543, 189 Cal. Rptr. 518, 658 P.2d 1319*

Use of licensee's own "SR-1" report during license suspension hearing is not violative of privilege against self-incrimination. *Fahlgren v. Department of Motor Vehicles (1986) 186 Cal. App. 3d 930, 937, 231 Cal. Rptr. 229*

[e] Under Implied Consent Law

Implied consent statute applies broadly and generally to motoring public (i.e., those who take advantage of the public

streets, roads, and highways to operate a motor vehicle), and does not require evidence that actual driving occurred immediately prior to arrest for driving under influence. *Troppman v. Valverde (2007) 40 Cal. 4th 1121, 1125-1126, 57 Cal. Rptr. 3d 306, 156 P.3d 328*

Person subject to hearing concerning suspension of license who wishes to contest matters contained in sobriety or arrest report is entitled to have arresting officer produce report or to have hearing continued so that report can be produced under subpoena duces tecum. *Noll v. Department of Motor Vehicles (1969) 274 Cal. App. 2d 281, 286, 79 Cal. Rptr. 236* (dictum)

Request for continuance of hearing under former *Veh. Code § 13353* does not terminate stay of suspension when continuance is necessary because Department's witness failed to produce documents material to his testimony. *Noll v. Department of Motor Vehicles (1969) 274 Cal. App. 2d 281, 286, 79 Cal. Rptr. 236* (dictum)

Arresting officer's sworn statement filed with Department pursuant to former *Veh. Code § 13353* is official record of Department within meaning of former *Veh. Code § 14108* and is admissible at either informal or formal hearing. *Fankhauser v. Orr (1968) 268 Cal. App. 2d 418, 422-423, 74 Cal. Rptr. 61*

Arrest report and supplemental report are evidence of any fact required by *Veh. Code § 13353* except when there is contrary evidence. *Fallis v. Dept. of Motor Vehicles (1968) 264 Cal. App. 2d 373, 379-385, 70 Cal. Rptr. 595*

Officer's sworn statement is prima facie evidence of matters therein stated but, insofar as it concludes that arresting officer had reasonable cause, statement is insufficient to overcome contrary evidence. *Fallis v. Dept. of Motor Vehicles (1968) 264 Cal. App. 2d 373, 379, 70 Cal. Rptr. 595*

Possible error in admitting hearsay evidence at hearing under *Veh. Code § 13353* is cured by testimony of person who was subject of hearing, which provided sufficient evidence to support findings. *Goss v. Dept. of Motor Vehicles (1968) 264 Cal. App. 2d 268, 269-270, 70 Cal. Rptr. 447*

Evidentiary rules in Administrative Procedure Act (*Gov. Code § 11513*) provide procedural format for hearing on revocation or suspensions of license. *Goss v. Dept. of Motor Vehicles (1968) 264 Cal. App. 2d 268, 270, 70 Cal. Rptr. 447*

Sworn statement of arresting officer is prima facie evidence in informal hearing when received without objection and without request to cross examine officer. *August v. Department of Motor Vehicles (1968) 264 Cal. App. 2d 52, 62, 70 Cal. Rptr. 172*

Testimony of person who is subject of license suspension or revocation hearing supplements evidence produced by *Department. August v. Department of Motor Vehicles (1968) 264 Cal. App. 2d 52, 66, 70 Cal. Rptr. 172*

Hearing procedures for license suspension or revocation hearing are specified in *Veh. Code § 14100 et seq.* rather than Administrative Procedure Act (*Gov. Code § 11500 et seq.*), except regarding matters not covered by Vehicle Code provisions. *Serenko v. Bright (1968) 263 Cal. App. 2d 682, 689, 70 Cal. Rptr. 1*

Administrative procedures that Legislature has provided with respect to proceeding to suspend or revoke license constitute fair trial before impartial tribunal. *Finley v. Orr (1968) 262 Cal. App. 2d 656, 666, 69 Cal. Rptr. 137* (facts held to show petitioner had fair trial before impartial tribunal)

[2] Administrative Per Se Law

[a] Process

Although a notice of hearing must inform applicants of their right to an interpreter at hearing pursuant to *Gov. Code § 11435.60*, lack of notice was harmless error where applicant was informed of his right to an interpreter when he was arrested for driving under the influence and was issued a notice of suspension/revocation of his license by the arresting officer. *Leal v. Gourley (2002) 100 Cal. App. 4th 963, 967-969, 123 Cal. Rptr. 2d 220*

State does not violate due process principles or proscription against double punishment by imposing both criminal and civil penalties for same act or omission under administrative per se laws. *Fearn v. Zolin (1992) 9 Cal. App. 4th 1756, 1762, 12 Cal. Rptr. 2d 314*

Two processes are contemplated in enacting administrative per se laws: one involving court proceedings is criminal in nature, other involving administrative proceedings is civil in nature; processes are intended to operate independently of each other and to provide for different dispositions. *Robertson v. Department of Motor Vehicles (1992) 7 Cal. App. 4th 938, 947, 9 Cal. Rptr. 2d 319*

Administrative per se legislation is means to provide safety for all persons using California highways by quickly suspending driving privilege of those persons who have shown themselves to be safety hazards by driving with excessive concentration of alcohol in their bodies. *Robertson v. Department of Motor Vehicles (1992) 7 Cal. App. 4th 938, 948, 9 Cal. Rptr. 2d 319*

License suspension is no longer dependent on ultimate conviction of driver. *Robertson v. Department of Motor Vehicles (1992) 7 Cal. App. 4th 938, 941, 9 Cal. Rptr. 2d 319*

Provision in administrative per se law for different periods of suspension for commercial and noncommercial drivers is rationally related to legitimate legislative purpose and does not violate *equal protection clauses* of state or federal constitutions. *Peretto v. Department of Motor Vehicles (1991) 235 Cal. App. 3d 449, 459, 1 Cal. Rptr. 2d 392*

[b] Reinstatement of License Following Acquittal

"Acquittal" for purposes of *Veh. Code § 13353.2(e)* means ruling representing judicial determination in person's favor either that person was not driving or did not have prohibited blood-alcohol level; dismissal after successful suppression motion based on illegal arrest does not constitute "acquittal." *Gikas v. Zolin (1993) 6 Cal. 4th 841, 855-857, 25 Cal. Rptr. 2d 500, 863 P.2d 745*

Dismissal of charge of violating *Veh. Code § 23152(b)* (driving with prohibited blood-alcohol level) pursuant to plea bargain does not constitute acquittal of that charge requiring reinstatement of license; defendant's conviction of alcohol-related reckless driving, followed by dismissal of *Veh. Code § 23152(b)* charge, is not resolution of charge on its merits, as is case if not-guilty finding is made by trial court as part of plea bargain. *Mosier v. Department of Motor Vehicles (1993) 18 Cal. App. 4th 420, 425, 22 Cal. Rptr. 2d 249*

Trial court properly denied plaintiff's petition for writ of mandamus to order DMV to delete its records regarding suspension of plaintiff's license under administrative per se law after related criminal charges were *dismissed*; mandamus action is proper for defendant who does not appeal administrative ruling but is acquitted at trial; *Veh. Code § 13353.2(e)* requires *acquittal*, which involves factual determination in favor of defendant. *Snow v. Department of Motor Vehicles (1993) 17 Cal. App. 4th 230, 232-233, 21 Cal. Rptr. 2d 68*

[3] Definitions

[a] Accident

"Accident" does not preclude deliberate act if act is unexpected from perspective of person acted upon, within meaning of *Veh. Code § 40300.5*, which allows peace officer to arrest, without warrant, person who is "involved in a traffic accident" and is believed to be under influence. *McNabb v. Department of Motor Vehicles (1993) 20 Cal. App. 4th 832, 838-839, 24 Cal. Rptr. 2d 641*

[b] Conviction

Jury verdict of guilt is equivalent of conviction. *Cozens v. Superior Court (1973) 31 Cal. App. 3d 441, 444, 107 Cal. Rptr. 408* (dictum)

Forfeiture of bail is a conviction under *Veh. Code § 13103* (defining conviction) regardless of what happens after forfeiture. *Powers v. Department of Motor Vehicles (1970) 6 Cal. App. 3d 702, 705-706, 86 Cal. Rptr. 62* (dictum)

[c] Driver and Driving

Implied consent statute applies broadly and generally to motoring public (i.e., those who take advantage of the public streets, roads, and highways to operate a motor vehicle), and does not require evidence that actual driving occurred immediately prior to arrest for driving under influence. *Troppman v. Valverde (2007) 40 Cal. 4th 1121, 1125-1126, 57 Cal. Rptr. 3d 306, 156 P.3d 328*

"Driving" means being "in actual physical control of a vehicle." *Panopulos v. Maderis (1956) 47 Cal. 2d 337, 342, 303 P.2d 738* (construing Veh. Code § 69 defining "driver")

Person who struck passing bicyclist by opening vehicle door is included within definition of "driver" for purposes of *Veh. Code § 16070(a)* financial responsibility requirement. *Adler v. Department of Motor Vehicles (1991) 228 Cal. App. 3d 252, 258-259, 279 Cal. Rptr. 28*

[d] License

"License" is permission or authority to do particular thing or exercise particular privilege. *Galvan v. Superior Court (1969) 70 Cal. 2d 851, 856, 76 Cal. Rptr. 642, 452 P.2d 930*

[4] Department's Authority

[a] As Delegated

Police power of state includes regulation of driving in public places. *Hendrick v. Maryland (1915) 235 U.S. 610, 622, 35 S. Ct. 140, 59 L. Ed. 385* ; *Watson v. Division of Motor Vehicles (1931) 212 Cal. 279, 283, 298 P. 481* ; *Santa Barbara v. More (1917) 175 Cal. 6, 11-12, 164 P. 895*

Department's denial of request for reinstatement of driver's license, which had been revoked for four years because of multiple drunk driving convictions, is mandatory when driver had not completed approved one-year alcohol rehabilitation program, notwithstanding driver completed unapproved one-year program after sentencing court, in violation of *Veh. Code § 13352(a)(7)*, failed to advise him of need to complete approved program for reinstatement. *McDaniel v. Department of Motor Vehicles (1994) 22 Cal. App. 4th 76, 79-81, 27 Cal. Rptr. 2d 149*

Although trial court failed to advise defendant of 18-month suspension under *Veh. Code § 13352*, Department was

without authority to perform, and writ of mandamus was not issuable to compel performance of, plea bargain providing for 90-day restriction on license, because of Department's mandatory duty under *Veh. Code § 13352* to suspend or to revoke license. *Corley v. Department of Motor Vehicles (1990) 222 Cal. App. 3d 72, 78, 271 Cal. Rptr. 406*

Veh. Code § 13352.5 does not deprive Department of power to suspend or revoke driving privilege of individual convicted of drunk driving while participating in court-ordered treatment program (*Health & Safety Code §§ 11837-11838.2*) for earlier offense. *Kisielius v. Department of Motor Vehicles (1981) 117 Cal. App. 3d 966, 970, 173 Cal. Rptr. 113*

Propriety of suspension or revocation under *Veh. Code § 13352* is not dependent on character of criminal penalty that might be imposed for conviction therein specified. *Henry v. Department of Motor Vehicles (1972) 25 Cal. App. 3d 649, 654, 102 Cal. Rptr. 36*

Operation of *Penal Code § 17(b)* providing for misdemeanor status for certain felonies has no application to license suspension or revocation based on convictions. *Henry v. Department of Motor Vehicles (1972) 25 Cal. App. 3d 649, 652-655, 102 Cal. Rptr. 36*

Reference in *Veh. Code § 13352* to receipt of duly certified abstract of record of any court showing that person has been convicted does not contemplate different treatment when misdemeanor sentence imposed (pursuant to *Penal Code § 17(b)(5)*) than when felony sentence imposed. *Henry v. Department of Motor Vehicles (1972) 25 Cal. App. 3d 649, 653-654, 102 Cal. Rptr. 36*

[b] Constitutionality

A driver's license cannot be suspended without due process of law. Once a license issues, an administrative decision to suspend or revoke it affects a fundamental right. *Cinquegrani v. Department of Motor Vehicles (2008) 163 Cal. App. 4th 741, 750, 77 Cal. Rptr. 3d 816*

Exclusionary rule inapplicable to DMV administrative proceedings. *Park v. Valverde (2007) 152 Cal. App. 4th 877, 881-887, 61 Cal. Rptr. 3d 895*

DMV's mandatory suspension of license upon conviction for driving under the influence does not violate the separation of powers doctrine. *Brierton v. Dept. of Motor Vehicles (2006) 140 Cal. App. 4th 427, 435-436, 44 Cal. Rptr. 3d 480*

Veh. Code § 1806, regarding DMV "in-house" printouts of accident reports, which department uses in negligent operator program and investigations, is constitutional, in that printouts are releasable only to DMV employees, law enforcement agencies, and some government entities; statute does notattach "badge of infamy" to driver subject to license suspension for failure to report accident. *Kruger v. Department of Motor Vehicles (1993) 13 Cal. App. 4th 541, 549, 16 Cal. Rptr. 2d 584*

DMV requirement of accident reports, and use of report form against licensee for purposes of license suspension, does not violate person's constitutional privilege against self-incrimination. *Kruger v. Department of Motor Vehicles (1993) 13 Cal. App. 4th 541, 548, 16 Cal. Rptr. 2d 584*

State power to terminate person's driving privilege is limited by constitutional requirement of due process. *Bell v. Burson (1971) 402 U.S. 535, 539, 91 S. Ct. 1586, 29 L. Ed. 2d 90* ; *Rios v. Cozens (1972) 7 Cal. 3d 792, 795-799 , cert. granted and remanded, 410 U.S. 425 , on remand, 9 Cal. 3d 454*

Veh. Code §§ 13800-13802 do not delegate authority to Department to designate what are violations, to set penalties,

and to impose penalties; those sections are not unconstitutional under separation-of-powers doctrine in *California Constitution. Beamon v. Dept. of Motor Vehicles (1960) 180 Cal. App. 2d 200, 206-209, 4 Cal. Rptr. 396* (construing former *Veh. Code § 314* on which present *Veh. Code §§ 13800-13802* are based)

[c] Immediate Action

Alternative notice and hearing procedure in *Veh. Code § 13953* is equally applicable when safety calls for disciplinary measure and situation requires immediate action. *Hough v. McCarthy (1960) 54 Cal. 2d 273, 285, 5 Cal. Rptr. 668, 353 P.2d 276*

Alternative procedure of *Veh. Code § 13953* makes prior hearing unnecessary when safety of persons on highways requires immediate suspension of drunk drivers' licenses. *Hough v. McCarthy (1960) 54 Cal. 2d 273, 285, 5 Cal. Rptr. 668, 353 P.2d 276*

[d] Presumption of Negligence

Department's authority to suspend or revoke license is conferred by *Veh. Code §§ 12809(e)* and *13359*, but not by *Veh. Code § 12810*, which merely sets forth statutory presumption that person is negligent driver. *Kriesel v. McCarthy (1963) 214 Cal. App. 2d 69, 72-73, 29 Cal. Rptr. 256*

Department's proceeding pursuant to *Veh. Code §§ 12809(e), 12810*, and *13359* (revocation of license of presumptively negligent driver) is in accord with due process since judicial review is specifically provided for in *Veh. Code § 14400*. *Kriesel v. McCarthy (1963) 214 Cal. App. 2d 69, 72-73, 29 Cal. Rptr. 256* (driver in fact had review)

[e] Prior Convictions

DMV properly suspended license of recent California resident on discovery of two drunk-driving offenses in foreign state, pursuant to former *Veh. Code § 13352(a)(3)*, which mandated license suspension for drivers convicted of two DUI's within seven years; foreign state provided forum to seek probationary conditions sufficient to entitle licensee to obtain restricted license, although licensee did not avail herself of it. *Moomjian v. Zolin (1993) 12 Cal. App. 4th 1606, 1613, 16 Cal. Rptr. 2d 335*

Amendments to *Veh. Code §§ 13352* and *13352.5*, requiring revocation of license even if offenders participated in alcohol rehabilitation program, which under pre-amendment version of statutes operated to prevent license revocation, do not apply retroactively to limited group of offenders whose third offense occurred before effective date of amendments, but whose convictions occurred thereafter. *Fox v. Alexis (1985) 38 Cal. 3d 621, 627-630, 214 Cal. Rptr. 132, 699 P.2d 309*

Veh. Code § 13352 mandates that license of driver convicted of second drunk driving offense within five years be suspended. *Pollack v. Department of Motor Vehicles (1985) 38 Cal. 3d 367, 377, 211 Cal. Rptr. 748, 696 P.2d 141*

Veh. Code § 13352 does not require pleading and proof of prior conviction in second criminal proceeding as prerequisite to license suspension; rather, it provides that on second drunk driving offense in five years, license of offender may be suspended, whether or not prior offense was proven in second trial. *Pollack v. Department of Motor Vehicles (1985) 38 Cal. 3d 367, 372-377, 211 Cal. Rptr. 748, 696 P.2d 141*

Prior invalid conviction as not applicable for purpose of suspending driver's license on basis of record of convictions. *Hasson v. Cozens (1970) 1 Cal. 3d 576, 580, 83 Cal. Rptr. 161, 463 P.2d 385* (dictum); *Mitchell v. Orr (1969) 268*

Cal. App. 2d 813, 815, 74 Cal. Rptr. 407 (dictum)

Veh. Code § 13352(a)(5) imposes duty on Department of Motor Vehicles to suspend or revoke license of driver convicted of three drunk driving offenses within specified period (now seven years); fact that criminal court sentenced driver pursuant to former *Veh. Code § 23165* (*now see Veh. Code § 23540*, relating to one prior conviction) rather than former *Veh. Code § 23170* (*now see Veh. Code § 23546*, relating to two prior convictions) because two of the three convictions had occurred simultaneously was irrelevant to Department's legislatively mandated duty to revoke based on existence of three separate convictions. *Vary v. Forrest (1988) 201 Cal. App. 3d 1506, 1513, 247 Cal. Rptr. 873*

Department is not bound to recognize court's merely striking prior conviction from record without having determined that it was invalid. *Nicolino v. Cozens (1973) 33 Cal. App. 3d 1024, 1026, 109 Cal. Rptr. 498*

Department is without authority to ignore court determination that prior conviction is invalid or to base action on invalidated conviction. *Mitchell v. Orr (1969) 268 Cal. App. 2d 813, 816-818, 74 Cal. Rptr. 407*

Department is not precluded from acting under *Veh. Code § 13352* (suspension or revocation for conviction of drunk driving) because court rendering conviction did not also adjudicate how many prior convictions defendant had; Department's authority to make independent determination of driver's prior convictions is constitutional. *Cook v. Bright (1962) 208 Cal. App. 2d 98, 101-102, 25 Cal. Rptr. 116*

[f] Suspension Without Prior Hearing

Suspension of driver's license without prior hearing but subject to subsequent judicial review does not violate due process if reasonably justified bycompelling public interest. *Orr v. Superior Court (1969) 71 Cal. 2d 220, 224, 77 Cal. Rptr. 816, 454 P.2d 712* ; *Escobedo v. California (1950) 35 Cal. 2d 870, 876, 222 P.2d 1* (both overruled on different points in *Rios v. Cozens (1972) 7 Cal. 3d 792, 799 , cert. granted and remanded, 410 U.S. 425 , on remand, 9 Cal. 3d 454*)

Mandatory suspension or revocation without prior hearing, based on conviction or record of conviction, does not violate due process because facts have already been determined in criminal proceeding. *DiGenova v. State Board of Education (1955) 45 Cal. 2d 255, 260, 288 P.2d 862* (summary revocation of teacher's license based on conviction upheld); *Ratliff v. Lampton (1948) 32 Cal. 2d 226, 227, 195 P.2d 792* (dictum)

Veh. Code § 13352(a)(5), which provides for suspension of driver's license for three years without hearing for person who suffers three drunk driving convictions within specified period (now seven years), does not violate due process when facts giving rise to application of *Veh. Code § 13352(a)(5)* have already been judicially established by proof beyond reasonable doubt. *Paterson v. Department of Motor Vehicles (1985) 171 Cal. App. 3d 1126, 1129, 217 Cal. Rptr. 881*

License revocation by Department under *Veh. Code § 13365* because of violations of written promise to appear in court, without affording licensee opportunity for hearing beyond court appearances directed by summons on traffic citations, is not denial of due process of law. *People v. Bailey (1982) 133 Cal. App. 3d Supp. 12, 16*

[5] Financial Responsibility Law

Bond issued by "surety company authorized to do business in this state," under *Veh. Code § 16056(a)* means "admitted surety insurer," and includes corporate insurer to which Insurance Commissioner has issued certificate of authority to transact surety insurance in California. *California Financial Responsibility Co. v. Pierce (1991) 226 Cal. App. 3d 1663, 1668*

Driver's operation of another's motor vehicle with knowledge that driver is unable to meet demands of financial responsibility law is at driver's own peril, notwithstanding "good faith" reliance on another to fulfill driver's own mandatory obligation. *Dowell v. Department of Motor Vehicles (1990) 220 Cal. App. 3d 1567, 1570, 270 Cal. Rptr. 240*

[6] Implied Consent Law

[a] As Written

Arresting officer may properly delegate administration of test to another officer. *Webb v. Miller (1986) 187 Cal. App. 3d 619, 628, 232 Cal. Rptr. 50* ; *Lee v. Department of Motor Vehicles (1983) 142 Cal. App. 3d 275, 281, 283, 191 Cal. Rptr. 23*

Recommendation of judge receiving plea in criminal prosecution that license not be suspended does not prevent Department from suspending license under *Veh. Code § 13353*. *August v. Department of Motor Vehicles (1968) 264 Cal. App. 2d 52, 67, 70 Cal. Rptr. 172*

Suspension of driver's license under *Veh. Code § 13353* is mandatory rather than discretionary when person refuses to take blood alcohol test. *Serenko v. Bright (1968) 263 Cal. App. 2d 682, 688, 70 Cal. Rptr. 1* (dictum)

Act of driving, not obtaining license, is act from which implied consent flows under former *Veh. Code § 13353* (*now see Veh. Code § 23157*); that section covers all drivers, whether licensed in California, another state, or not at all. *Serenko v. Bright (1968) 263 Cal. App. 2d 682, 687, 70 Cal. Rptr. 1*

[b] Constitutional Questions

[i] Answered in Favor of Validity

Highway sobriety checkpoint program does not violate *Fourth Amendment* prohibition against unlawful searches and seizures when degree of subjective intrusion to and potential for generating fear and surprise in law-abiding motorists is limited by fact that checkpoints are selected pursuant to guidelines, and uniformed officers stop every vehicle. *Michigan State Police v. Sitz (1990) 496 U.S. 444, 453-455, 110 S. Ct. 2481, 110 L. Ed. 2d 412, 422-423*

Analysis of effectiveness of proposed checkpoint program in advancing public interest is satisfied when checkpoint program involved neither random stops nor complete absence of empirical data indicating that stops would be effective means of promoting roadway safety. *Michigan State Police v. Sitz (1990) 496 U.S. 444, 453-455, 110 S. Ct. 2481, 110 L. Ed. 2d 412, 422-423*

Former *Veh. Code § 13353* (*now see Veh. Code § 23612*) bears reasonable relation to preservation of safety on California highways and does not violate "substantive due process." *Hernandez v. Department of Motor Vehicles (1981) 30 Cal. 3d 70, 74, 177 Cal. Rptr. 566, 634 P.2d 917*

License suspension after imposition of 48-hour refusal enhancement under former *Veh. Code § 23159(a)(2)* (*now see Veh. Code § 23577(a)(2)*) does not violate *Double Jeopardy Clause*; suspension is not punishment. *Ellis v. Pierce (1991) 230 Cal. App. 3d 1557, 1559, 1562, 282 Cal. Rptr. 93*

Summary suspension of license under *Veh. Code § 13353* on sworn statement of arresting officer is not denial of due process because licensee entitled to hearing on request. *Funke v. Department of Motor Vehicles (1969) 1 Cal. App. 3d*

449, 455-456, 81 Cal. Rptr. 662

Failure of *Veh. Code § 13353* to provide exception for "employment-livelihood" cases is not denial of equal protection. *Pepin v. Department of Motor Vehicles (1969) 275 Cal. App. 2d 9, 11, 79 Cal. Rptr. 657*

Requirement that licensee state whether he or she will submit to test under former *Veh. Code § 13353* (*now see Veh. Code § 23612*) does not violate privilege against self-incrimination. *Fallis v. Dept. of Motor Vehicles (1968) 264 Cal. App. 2d 373, 380, 70 Cal. Rptr. 595*

Denial of opportunity for advice of counsel before stating whether one will submit to test and before deciding which test to take, and denial of opportunity to have counsel present while test is administered, is not denial of any constitutional right. *Fallis v. Dept. of Motor Vehicles (1968) 264 Cal. App. 2d 373, 383-384, 70 Cal. Rptr. 595* ; *see Reirdon v. Director of Dep't of Motor Vehicles (1968) 266 Cal. App. 2d 808, 810, 72 Cal. Rptr. 614* ; *Ent v. Department of Motor Vehicles (1968) 265 Cal. App. 2d 936, 939, 71 Cal. Rptr. 726*

Proper enforcement of former *Veh. Code § 13353* (*now see Veh. Code § 23612*) does not entail any unconstitutional restriction on right of free speech. *Fallis v. Dept. of Motor Vehicles (1968) 264 Cal. App. 2d 373, 380-382, 70 Cal. Rptr. 595*

Provision for subsequent hearing or review after summary suspension under *Veh. Code § 13353* meets demands of due process, even though no such hearing or review is requested. *August v. Department of Motor Vehicles (1968) 264 Cal. App. 2d 52, 62, 70 Cal. Rptr. 172* ; *but see Rios v. Cozens (1972) 7 Cal. 3d 792, 799 , cert. granted and remanded, 410 U.S. 425 , on remand, 9 Cal. 3d 454* (contrary holding with respect to suspension for failure to post security after accident as required by financial responsibility law (*Veh. Code § 16000 et seq.*))

Delegation to Department of authority to make findings of fact pertinent to issues arising under *Veh. Code § 13353* is not denial of due process. *Finley v. Orr (1968) 262 Cal. App. 2d 656, 666, 69 Cal. Rptr. 137*

[ii] Choice of Tests

Arrestee's choice is limited to those tests that are both feasible and available when arrestee is incapable or states he or she is incapable of performing any chosen test, or if it is necessary to transport arrestee to medical facility for treatment, and it is not feasible to administer particular test. *Smith v. Department of Motor Vehicles (1986) 179 Cal. App. 3d 368, 374, 224 Cal. Rptr. 543*

Failure of arresting officer to advise arrested person that he or she has choice of tests does not violate any constitutionally protected interest and, in absence of express statutory provision to contrary, does not make breathalyzer test results obtained through such statutory violation inadmissible in prosecution for drunk driving. *People v. Brannon (1973) 32 Cal. App. 3d 971, 975, 108 Cal. Rptr. 620*

[iii] Refusal to Take Test

Suspension of license under *Veh. Code § 13353* for refusal to take blood alcohol test is not denial of equal protection of law to persons who refuse. *Walker v. Department of Motor Vehicles (1969) 274 Cal. App. 2d 793, 796, 79 Cal. Rptr. 433*

Person requested to submit to test under former *Veh. Code § 13353* has no constitutional right to refuse and, therefore, admission in evidence, at hearing pursuant to that section, of fact that person did not submit to test does not violate privilege against self-incrimination. *Finley v. Orr (1968) 262 Cal. App. 2d 656, 663, 69 Cal. Rptr. 137* (suggesting but

not holding result would be same whether refusal to submit was verbal or nonverbal)

[c] Discovery

Person faced with suspension of license for refusal to submit to test under former *Veh. Code § 13353* (*now see Veh. Code § 23612*) is entitled todiscover contents of reports concerning his or her arrest. *Noll v. Department of Motor Vehicles (1969) 274 Cal. App. 2d 281, 286, 79 Cal. Rptr. 236* (dictum)

[d] Effect of Criminal Proceedings on Administrative Proceeding

Dismissal of criminal prosecution for lack of jurisdiction has no res judicata or collateral estoppel effect on subsequent administrative disciplinary proceeding by Department to suspend arrestee's license. *Lofthouse v. Department of Motor Vehicles (1981) 124 Cal. App. 3d 730, 736-737, 177 Cal. Rptr. 601*

Conviction for misdemeanor drunk driving does not preclude imposition of sanctions under *Veh. Code § 13353* (suspension of license for refusal to submit to chemical test for intoxication). *Covington v. Department of Motor Vehicles (1980) 102 Cal. App. 3d 54, 60, 162 Cal. Rptr. 150*

[e] Incomplete Test

Officer did not conduct PAS test in way to be used as proof of actual blood alcohol concentration; therefore not given substantial weight. *Roze v. Dept. of Motor Vehicles (2006) 141 Cal. App. 4th 1176, 1187-1188, 46 Cal. Rptr. 3d 829*

"Continuous observation" of driver for purposes of *17 Cal. Code Reg. § 1219.3* could be done by more than one person successively. *Taxara v. Gutierrez (2003) 114 Cal. App. 4th 945, 950-951, 8 Cal. Rptr. 3d 172*

"Continuous observation" of driver for 15 minutes under *17 Cal. Code Reg. § 1219.3* did not mean officer observing driver had to be a certified intoxilyzer operator. *Hernandez v. Gutierrez (2003) 114 Cal. App. 4th 168, 173-176, 7 Cal. Rptr. 3d 307*

"Continuous observation" of driver for purposes of *17 Cal. Code Reg. § 1219.3* did not mean an officer had to keep his eyes focused on the driver for uninterrupted 15-minute period; court interpreted regulation with reference to its purpose, which was to determine whether the driver had smoked, ingested food or drink, or suffered physical symptoms that would adversely affect the test results. *Manriquez v. Gourley (2003) 105 Cal. App. 4th 1227, 1235-1236, 130 Cal. Rptr. 2d 209*

Compliance with implied consent law (*Veh. Code § 23612*) consists of completing, not merely attempting, one of three blood alcohol tests; completion of urine test under *17 Cal. Code Reg § 1219.2* requires arrestee to urinate twice. *Miles v. Alexis (1981) 118 Cal. App. 3d 555, 559-560, 173 Cal. Rptr. 473*

Test is not complete until evidence of reliability of results is reasonably obtained; when driver refused to give third breath sample after first two samples produced results with greater than 0.02 difference, suspension of license is mandatory under *Veh. Code § 13353(a)*. *Hasiwar v. Sillas (1981) 118 Cal. App. 3d 295, 298-299, 173 Cal. Rptr. 358*

After choosing blood test, driver's refusal to sign hospital consent form for blood test does not render him "incapable of completing" test within meaning of former *Veh. Code § 13353* (*now see Veh. Code § 23612*). *Butler v. Department of Motor Vehicles (1981) 115 Cal. App. 3d 913, 916, 171 Cal. Rptr. 525*

[f] Lawful Arrest

Driver was "lawfully arrested" under former *Veh. Code § 13353* (*now see Veh. Code § 23612*) when arresting officer was called to scene of misdemeanor offense by another peace officer who witnessed offense. *Freeman v. Dept. of Motor Vehicles (1969) 70 Cal. 2d 235, 236-237, 74 Cal. Rptr. 259, 449 P.2d 195*

Fact that the arresting officer was driving an unmarked vehicle did not render the subsequent arrest unlawful. *Dyer v. Department of Motor Vehicles (2008) 163 Cal. App. 4th 161, 169-170, 77 Cal. Rptr. 3d 138*

Driver was "involved in a traffic accident" and lawfully arrested under *Veh. Code § 40300.5*, when driver intentionally made contact with and pushed other vehicles away from his driveway; "accident" does not preclude deliberate act if act is unexpected from perspective of person acted upon. *McNabb v. Department of Motor Vehicles (1993) 20 Cal. App. 4th 832, 837-839, 24 Cal. Rptr. 2d 641*

Lawful arrest based on probable cause to believe that person arrested was driving motor vehicle under influence of alcohol is essential condition to application of former *Veh. Code § 13353* (*now see Veh. Code § 23612*); use of hearsay evidence of citizen informants that person arrested was driving car is sufficient to establish probable cause. *Mueller v. Department of Motor Vehicles (1985) 163 Cal. App. 3d 681, 684-686, 210 Cal. Rptr. 14*

Former *Veh. Code § 13353* (*now see Veh. Code § 23612*) does not require officer to specifically inform arrestee that he or she is being "arrested." *Ormonde v. Department of Motor Vehicles (1981) 117 Cal. App. 3d 889, 893, 173 Cal. Rptr. 79*

Suspension of driver's license under *Veh. Code § 13353* for failure to submit to chemical test following lawful arrest is appropriate despite fact that driver subsequently obtained certificate under *Penal Code § 849.5* describing "arrest" as "detention." *Behan v. Alexis (1981) 116 Cal. App. 3d 403, 406-407, 172 Cal. Rptr. 132*

[g] Legislative Purpose

Implied consent statute has dual legislative purpose: to obtain the best evidence of blood alcohol content while ensuring cooperation of the person arrested, and to inhibit driving under the influence. *Troppman v. Valverde (2007) 40 Cal. 4th 1121, 1133, 57 Cal. Rptr. 3d 306, 156 P.3d 328*

Legislative purpose underlying former *Veh. Code § 13353* (*now see Veh. Code § 23612*) is to provide method of compelling person arrested for drunk driving to submit to test for intoxication, additionally or alternatively to forcible removal of blood sample. *People v. Superior Court (1972) 6 Cal. 3d 757, 764-765, 100 Cal. Rptr. 281, 493 P.2d 1145* (dictum; decided before 1985 legislation moving implied consent provision to *Veh. Code § 23157(a)*)

Purposes of former *Veh. Code § 13353* (*now see Veh. Code § 23612*) is to obtain best evidence of blood alcohol content at time of arrest of person reasonably believed to be driving while intoxicated and to inhibit intoxicated persons from driving. *Kesler v. Department of Motor Vehicles (1969) 1 Cal. 3d 74, 77, 81 Cal. Rptr. 348, 459 P.2d 900*

The immediate purposes of the implied consent law are to obtain the best evidence of blood alcohol content at the time of the arrest of a person who is reasonably believed to be driving while intoxicated before the evidence becomes unavailable due to the passage of time, and to provide incentive for voluntary submission to chemical tests thereby eliminating the potential for violence inherent in forcible testing. *Molenda v. Department of Motor Vehicles (2009) 172 Cal. App. 4th 974, 993, 91 Cal. Rptr. 3d 792*

Primary goal of *Veh. Code § 23136* was to enhance public safety, and, indirectly, to discourage minors from consuming alcoholic beverages. *Bobus v. Department of Motor Vehicles (2004) 125 Cal. App. 4th 680, 685, 23 Cal. Rptr. 3d 168*

[h] Refusal to Submit to Test

[i] Acts Equivalent to Refusal

Arrestee's insistence, while handcuffed at testing site, that he be allowed to look at card in his wallet before deciding which test to take is tantamount to refusal to take test; "reasonable condition" standard is unworkable and against public policy. *Webb v. Miller (1986) 187 Cal. App. 3d 619, 624, 627, 232 Cal. Rptr. 50*

Refusal to sign hospital blood test consent form after agreeing to submit to blood test, and refusal thereafter to submit to one of two remaining chemical tests constitutes refusal to submit to test within meaning of former *Veh. Code § 13353* (*now see Veh. Code § 23612*). *Carrey v. Department of Motor Vehicles (1986) 183 Cal. App. 3d 1265, 1271, 228 Cal. Rptr. 705*

Refusal to take test without first consulting attorney and subsequent refusal to roll up sleeve for drawing of blood sample constitutes refusal within meaning of former *Veh. Code § 13353* (*now see Veh. Code § 23612*); driver's allegation that he changed his mind immediately before drawing of blood and fact that blood sample ultimately obtained and test completed is not relevant. *Cole v. Department of Motor Vehicles (1983) 139 Cal. App. 3d 870, 873-875, 189 Cal. Rptr. 249*

Reply to arresting officer's request to take another test after failing to complete one, that "I'm not even going to give you an answer" is tantamount to refusal to submit to test within meaning of former *Veh. Code § 13353* (*now see Veh. Code § 23612*). *Cahall v. Department of Motor Vehicles (1971) 16 Cal. App. 3d 491, 496-498, 94 Cal. Rptr. 182*

Refusal to choose and complete second test after failing to complete first chosen (urine) test through professed physical inability arising from excessive modesty constitutes refusal within meaning of former *Veh. Code § 13353* (*now see Veh. Code § 23612*) and justifies suspension. *Quesada v. Orr (1971) 14 Cal. App. 3d 866, 870-871, 92 Cal. Rptr. 640*

Claim of failure of memory as to whether person refused to take test does not constitute evidence of refusal. *August v. Department of Motor Vehicles (1968) 264 Cal. App. 2d 52, 66, 70 Cal. Rptr. 172*

[ii] Advisement That Refusal Used in Court

Requirement that officer advise arrested person that refusal to submit to test may be used against him or her in court of law relates to criminal proceeding, not administrative proceeding, and thus, failure to give advisement does not preclude administrative suspension of driver's license. *Sanchez v. Alexis (1982) 131 Cal. App. 3d 709, 716, 182 Cal. Rptr. 593*

[iii] Application of Rule

Defendant's argument that admonitions required by former *Veh. Code §§ 23157, 23157.5* (*now see Veh. Code § 23612*) were misleading and confusing was issue of law; therefore, conclusions of trial court were not binding on reviewing court. *Blitzstein v. Department of Motor Vehicles (1988) 199 Cal. App. 3d 138, 141-142, 244 Cal. Rptr. 624*

Admonitions required by former *Veh. Code §§ 23157, 23157.5* (*now see Veh. Code §§ 23612, 23614*), relating to penalties for refusal to submit to test, are not inherently misleading and confusing; suspension of license is proper when defendant made no claim that officer's conduct or additional statements confused him. *Blitzstein v. Department of*

Motor Vehicles (1988) 199 Cal. App. 3d 138, 142, 244 Cal. Rptr. 624

Driver is subject to suspension of license when evidence established that he refused to take breath or blood tests after purposely dropping last available container for urine test into urinal, thereby contaminating container. *Reyes v. Department of Motor Vehicles (1984) 162 Cal. App. 3d 66, 67-69, 208 Cal. Rptr. 372*

Once arrested driver refuses to submit to test, officer is not required to reoffer opportunity to take test; initial refusal is sufficient basis for license suspension. *Dunlap v. Department of Motor Vehicles (1984) 156 Cal. App. 3d 279, 283, 202 Cal. Rptr. 729*

Refusal to agree to test required by former *Veh. Code § 13353* (*now see Veh. Code § 23612*) is sufficient in itself to support license suspension; fact that test was taken without resistance within 10 minutes is irrelevant. *Barrie v. Alexis (1984) 151 Cal. App. 3d 1157, 1161-1163, 199 Cal. Rptr. 258*

Refusal to submit to test under former *Veh. Code § 13353* (*now see Veh. Code § 23612*) is not ameliorated by eventual submission to and completion of test. *Morgan v. Department of Motor Vehicles (1983) 148 Cal. App. 3d 165, 170, 195 Cal. Rptr. 707*

Question whether driver "refused" test within meaning of former *Veh. Code § 13353* (*now see Veh. Code § 23612*) as issue of fact. *Cahall v. Department of Motor Vehicles (1971) 16 Cal. App. 3d 491, 497, 94 Cal. Rptr. 182* (dictum); *Funke v. Department of Motor Vehicles (1969) 1 Cal. App. 3d 449, 453, 81 Cal. Rptr. 662* (dictum); *Walker v. Department of Motor Vehicles (1969) 274 Cal. App. 2d 793, 799, 79 Cal. Rptr. 433*

Determining factor, when issue is whether person refused to submit to blood alcohol test, is not state of mind when he or she made or failed to make response to request but fair meaning of response to request. *Department of Motor Vehicles (1971) 14 Cal. App. 3d 982, 986, 92 Cal. Rptr. 579*

Withholding permission for arrested person to make telephone call within three-hour period prescribed by *Penal Code § 851.5* has no bearing on refusal to submit to blood alcohol test under former *Veh. Code § 13353* (*now see Veh. Code § 23612*), even though such withholding may have been unlawful. *Lacy v. Orr (1969) 276 Cal. App. 2d 198, 205, 81 Cal. Rptr. 276*

Person who refused to take blood alcohol test without first seeing attorney and whom officer had warned, before requesting test, of *Miranda* rights, is entitled, on seeking writ of mandate for review and vacation of Department's order of suspension, to hearing on question whether refusal arose from misunderstanding of *Miranda* warning. *Kingston v. Dept. of Motor Vehicles (1969) 271 Cal. App. 2d 549, 554, 76 Cal. Rptr. 614*

Refusal or other manifestation of unwillingness to take test required by former *Veh. Code § 13353* (*now see Veh. Code § 23612*), regardless of degree of voluntary intoxication or lack of understanding resulting therefrom, subjects person to license suspension under that section. *Bush v. Bright (1968) 264 Cal. App. 2d 788, 793, 71 Cal. Rptr. 123*

Refusal to submit to test is not required to be "intelligent" in order to be basis for suspension of driver's license. *Bush v. Bright (1968) 264 Cal. App. 2d 788, 791, 71 Cal. Rptr. 123*

Subsequent plea of guilty to drunk driving charge does not affect consequences of earlier refusal to take blood alcohol test. *Serenko v. Bright (1968) 263 Cal. App. 2d 682, 688, 70 Cal. Rptr. 1*

[iv] Effect of Later Consent

Refusal to submit to test is not vitiated by consent, 30 or 45 minutes later; officer is not required to administer test to person who changes mind after such interval. *Webb v. Miller (1986) 187 Cal. App. 3d 619, 624, 232 Cal. Rptr. 50* ; *Zidell v. Bright (1968) 264 Cal. App. 2d 867, 869-870, 71 Cal. Rptr. 111*

Initial refusal to submit to test is not affected by fact that sample was eventually obtained. *Morgan v. Department of Motor Vehicles (1983) 148 Cal. App. 3d 165, 170, 195 Cal. Rptr. 707*

[v] Effect of Silence

Motorist's silence in face of police officer's repeated requests that he submit to chemical test and that he choose test to determine alcohol content of his blood constitutes refusal to submit to chemical test. *Buchanan v. Department of Motor Vehicles (1979) 100 Cal. App. 3d 293, 299, 160 Cal. Rptr. 557*

Arresting officer is not required to try to administer one test in order to determine whether arrested person's silence in face of requests to submit to and to choose test amounts to refusal in fact. *Lampman v. Department of Motor Vehicles (1972) 28 Cal. App. 3d 922, 927, 105 Cal. Rptr. 101*

Silence of arrested person in face of repeated requests to submit to blood alcohol test and to choose test constitutes failure to submit to test. *Lampman v. Department of Motor Vehicles (1972) 28 Cal. App. 3d 922, 926, 105 Cal. Rptr. 101*

[vi] Excuse

Undisclosed, irrational fear of police, is self-induced condition, not excusing driver from refusal to take chemical test; only lack of understanding due to no fault of driver as excuses refusal. *Eilinger v. Department of Motor Vehicles (1983) 143 Cal. App. 3d 748, 751-752, 192 Cal. Rptr. 187*

Person on whom demand is made to submit to blood alcohol test is required to point out deficiency, on which he or she refuses to take chosen test, with clearness sufficient to permit officer to decide on validity of protest and to take steps to meet objection if reasonable to do so. *Wegner v. Department of Motor Vehicles (1969) 271 Cal. App. 2d 838, 841, 76 Cal. Rptr. 920*

General objection to taking of blood sample, that technician's hands and fingernails were dirty, is insufficient basis for refusal to submit to taking of blood sample, when person did not object that he or she feared needle was likely to be dirty. *Wegner v. Department of Motor Vehicles (1969) 271 Cal. App. 2d 838, 840-841, 76 Cal. Rptr. 920*

[vii] Refusal to Choose Test

Indication of willingness to take blood alcohol test but refusal to choose which one does not constitute refusal to take test; arrested person is not required to select particular test. *Kesler v. Department of Motor Vehicles (1969) 1 Cal. 3d 74, 78, 81 Cal. Rptr. 348, 459 P.2d 900* (approving result in *James v. Dept. of Motor Vehicles (1968) 267 Cal. App. 2d 750, 73 Cal. Rptr. 452*)

[i] Stipulation That Test Was Taken

Collateral estoppel is inapplicable to estop Department from later revoking person's license, when factual stipulation in underlying criminal action that person took and completed chemical test was not necessary to judgment of conviction

following negotiated plea of guilty to driving under influence of alcohol. *Betyar v. Pierce (1988) 205 Cal. App. 3d 1250, 1252, 1255, 252 Cal. Rptr. 907*

[j] Warnings

[i] Generally

Proper focus for determining adequacy of warning is manner in which warning was given rather than on driver's receipt of warning. *Plunkett v. Alexis (1982) 136 Cal. App. 3d 370, 373-374, 186 Cal. Rptr. 261*

Arresting officer gave proper warning when injured driver indicated that he understood officer, officer read admonition twice and repeated it once informally, and driver refused to take test and indicated that he understood consequences of failure to take test. *Plunkett v. Alexis (1982) 136 Cal. App. 3d 370, 373, 374, 186 Cal. Rptr. 261*

Advisement that driver "could" lose license for refusal to submit to chemical test was defective, but of no consequence when specific and adequate warning also given. *Ormonde v. Department of Motor Vehicles (1981) 117 Cal. App. 3d 889, 893, 173 Cal. Rptr. 79*

Question whether driver was given statutory warning is issue of fact. *Walker v. Department of Motor Vehicles (1969) 274 Cal. App. 2d 793, 799, 79 Cal. Rptr. 433*

Arresting officer is presumed to have performed duty to warn arrested person as required. *August v. Department of Motor Vehicles (1968) 264 Cal. App. 2d 52, 65, 70 Cal. Rptr. 172*

[ii] Insufficient Warnings

Qualification of statutorily required warning, without explanation, defeats evident purpose of statute and misleads driver concerning legal realities of situation. *Decker v. Department of Motor Vehicles (1972) 6 Cal. 3d 903, 907, 101 Cal. Rptr. 387, 495 P.2d 1307*

Warning that if person refuses to take blood alcohol test his or her driver's license "could" be suspended for six months fails to correspond to statutory language and misrepresents legal significance of refusal to take test, and therefore, setting aside Department's order of suspension is justified. *Decker v. Department of Motor Vehicles (1972) 6 Cal. 3d 903, 905-906, 101 Cal. Rptr. 387, 495 P.2d 1307* ; *Giomi v. Department of Motor Vehicles (1971) 15 Cal. App. 3d 905, 906-907, 93 Cal. Rptr. 613*

Fact that driver was warned that refusal to submit to test could result in six-month suspension of license when he was actually subject to one-year suspension based on prior drunk driving conviction does not require vacation of six-month suspension imposed on him. *Daly v. Department of Motor Vehicles (1986) 187 Cal. App. 3d 257, 262, 232 Cal. Rptr. 7*

Explanation that warning, given in terms of former *Veh. Code § 13353* (*now see Veh. Code § 23612*), meant "if you don't submit to the test, chances are you will lose your license" does not vitiate compliance with that section. *Smith v. Department of Motor Vehicles (1969) 1 Cal. App. 3d 499, 502-503, 81 Cal. Rptr. 800*

Warning that if person did not submit to blood alcohol test "his driver's license would probably be suspended" and, after one refusal and second request, "he would lose his license" is in compliance with requirements of statute. *Janusch v. Department of Motor Vehicles (1969) 276 Cal. App. 2d 193, 196-197, 80 Cal. Rptr. 726*

[iii] Right to Counsel

Language in former *Veh. Code § 13353* (*now see Veh. Code § 23612*), "such person shall be told" of effect of failure to comply with that section's demands, implicitly requires that possibly-about-to-be-accused driver be fairly warned and that it should be made as clear as accused's condition will permit that he or she is not entitled to have attorney present. *Plumb v. Department of Motor Vehicles (1969) 1 Cal. App. 3d 256, 261-262, 81 Cal. Rptr. 639* (decided before 1985 legislation moving implied consent provisions of *Veh. Code § 13353* to *Veh. Code § 23157(a)*)

Arresting officer is required to explain nonapplicability of *Miranda* rights to blood alcohol test when arrested person apparently is confused and person's responses to questions asked concerning willingness to take test clearly indicate that he or she is asserting right he or she has moments earlier been told he or she is free to assert. *West v. Department of Motor Vehicles (1969) 275 Cal. App. 2d 908, 910, 80 Cal. Rptr. 385*

Arresting officer is required to qualify *Miranda* warning of right to counsel by stating it is inapplicable to blood alcohol test. *Rust v. Department of Motor Vehicles (1968) 267 Cal. App. 2d 545, 547, 73 Cal. Rptr. 366* (judgment granting peremptory writ of mandate vacating order of suspension affirmed); *but see Walker v. Department of Motor Vehicles (1969) 274 Cal. App. 2d 793, 799, 79 Cal. Rptr. 433* (such qualification merely advisable, not required)

[iv] Warnings Not Required

Arresting officer is not required to advise arrested person that additional tests may be taken at his or her own expense. *Kesler v. Department of Motor Vehicles (1969) 1 Cal. 3d 74, 78-79, 81 Cal. Rptr. 348, 459 P.2d 900*

Driver's license was properly suspended for failure to submit to chemical drunk-driving test even without admonishment when driver's uncooperative behavior prevented admonishment and led officer to conclude that driver refused test; to have required officer to wait until driver was ready to listen would be inconsistent with intent to have test conducted as quickly as possible. *Morphew v. Department of Motor Vehicles (1982) 137 Cal. App. 3d 738, 743-744, 188 Cal. Rptr. 126*

Arresting officer is not required to warn that constitutional right to be silent for purposes of self-incrimination does not include right to be silent for purposes of driver licensing when blood alcohol test is sought. *Lampman v. Department of Motor Vehicles (1972) 28 Cal. App. 3d 922, 928, 105 Cal. Rptr. 101*

Explicit warning that *Miranda* rights do not apply to taking blood alcohol test vitiates claim of confusion about rights that led to apparent refusal to take test. *Cahall v. Department of Motor Vehicles (1971) 16 Cal. App. 3d 491, 497, 94 Cal. Rptr. 182*

Arresting officer is not required to clarify rights when there is no evidence of confusion, and apparent confusion is not demonstrated and is not apparent to officer. *Cahall v. Department of Motor Vehicles (1971) 16 Cal. App. 3d 491, 497, 94 Cal. Rptr. 182*

Provision for supplemental test does not require that person be advised of right to have such supplemental test made. *Lacy v. Orr (1969) 276 Cal. App. 2d 198, 203-204, 81 Cal. Rptr. 276*

Arresting officer is not required to correct arrested person's misconception that he or she is not entitled to have his or her own physician make blood alcohol test, when officer did not create misconception by confusing warnings. *Beales v. Dept. of Motor Vehicles (1969) 271 Cal. App. 2d 594, 596, 76 Cal. Rptr. 662*

Arresting officer is not required to advise person whom he or she requests to take blood alcohol test that licensed technician is authorized to take blood specimen. *Westmoreland v. Chapman (1968) 268 Cal. App. 2d 1, 5-6, 74 Cal. Rptr. 363*

[7] Minors

Veh. Code § 13352.3 is constitutional because it bears rational relationship to legitimate goal of reducing fatal and injury traffic accidents involving youthful intoxicated drivers. *In re Arthur W. (1985) 171 Cal. App. 3d 179, 191, 217 Cal. Rptr. 183*

[8] Review

Evidence not presented at administrative hearing is not considered on judicial review unless it is newly discovered, i.e., could not have been produced at administrative hearing. *Armondo v. Department of Motor Vehicles (1993) 15 Cal. App. 4th 1174, 1180, 19 Cal. Rptr. 2d 399*

In mandate proceeding under *Code Civ. Proc. § 1094.5* regarding suspension of license under administrative per se order based on drunk driving, trial court uses independent judgment to determine whether weight of evidence supported administrative decision. *Yordamlis v. Zolin (1992) 11 Cal. App. 4th 655, 659, 14 Cal. Rptr. 2d 225*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewCriminal Law & ProcedureCriminal OffensesVehicular CrimesDriving Under the InfluenceBlood Alcohol & Field SobrietyImplied ConsentGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageOperator License SuspensionsInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageProof of Financial ResponsibilityTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.156 Attorney General Opinions

California peace officer lawfully uses breath testing device to determine existence, but not concentration, of ethyl alcohol in person's blood prior to arrest. *72 Ops. Cal. Att'y Gen. 226 (1989)*

Members of United States Armed Forces on active duty are required to have California driver's license only if California residents. *67 Ops. Cal. Att'y Gen. 313 (1984)*

Department of Motor Vehicles is required to file and make readily ascertainable all accident reports on involved individual's record even though individual was not cited for violation of Vehicle Code. 61 Ops. Cal. Att'y Gen. 295 (1978)

Implied consent law applies to juveniles; parental permission for juvenile to submit to another test is unnecessary; failure to select and complete required test is refusal resulting in suspension regardless of fact that failure was based on parent's advice or instructions. *54 Ops. Cal. Att'y Gen. 248 (1971)*

County (or city, when offense is violation of city ordinance) is financially responsible for providing tests prescribed for arrests under *Veh. Code §§ 13353* and *13354*, except when otherwise provided in city charter or by other authority; city is responsible when by agreement or accepted practice city has assumed all expenses for arrest by other than county officer, prior to arrestee's transfer to sheriff's custody. *53 Ops. Cal. Att'y Gen. 113, 114 (1970)* (decided before 1985 legislation moving implied consent provision of *Veh. Code § 13353* to *Veh. Code § 23157(a)*, and renumbering *Veh. Code § 13354* to *Veh. Code § 23158*)

Lawful arrest occurred when officer making arrest for misdemeanor drunk driving arrived at scene after accident and suspect was identified by eyewitness as driver. *52 Ops. Cal. Att'y Gen. 250 (1969)*

Legal Topics:

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

Criminal Law & ProcedureCriminal OffensesVehicular CrimesDriving Under the InfluenceBlood Alcohol & Field SobrietyImplied ConsentGeneral OverviewCriminal Law & ProcedureArrestsWarrantless ArrestGovernmentsLocal GovernmentsClaims By & AgainstMilitary & Veterans LawServicemembersGeneral OverviewTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.157 Law Reviews

Pacheco, *Admin Per Se for the Practitioner*, *24 Pac. L.J. 461 (1993)*

Note, *"Shed Thou No Blood": The Forcible Removal of Blood Samples From Drunk Driving Suspects*, *60 S. Cal. L. Rev. 1115 (1987)*

Comment, *The Admissibility of Refusals in Drunk Driving Prosecutions: A Violation of the Fifth Amendment* , 10 Pac. L.J. 141 (1979)

Comment, *The Right to Counsel Under California's Implied Consent Statute*, *9 U. West L.A. L. Rev. 73 (1977)*

Comment, *Financial Responsibility Laws in Constitutional Perspective*, *61 Cal. L. Rev. 1072 (1973)*

Darby, *Under the Influence: Right of the Person Arrested to a Chemical Test for Alcohol in the Blood*, 47 State B.J. 112-117, 139 (1972)

Note, *California Financial Responsibility Laws--A Judicial Interpretation*, *20 Hastings L.J. 1273 (1969)*

Karabian, *California's Implied Consent Statute: An Examination and Evaluation*, *1 Loy. L.A.L. Rev. 23 (1968)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessSelf-Incrimination PrivilegeCriminal Law & ProcedureCriminal OffensesVehicular CrimesDriving Under the InfluenceBlood Alcohol & Field SobrietyImplied ConsentGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageOperator License SuspensionsInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageProof of Financial ResponsibilityTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 92.158 Text References

California Administrative Mandamus (Cal. C.E.B. 2d ed. 1989)

California Administrative Hearing Practice (Cal. C.E.B. 2d ed. 1997)

Witkin, California Procedure, vol. 8, *Extraordinary Writs*, §§ 1-30, 72-222, 257-331 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawJudicial ReviewRemediesMandamus

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8-92 California Forms of Pleading and Practice--Annotated § 92.159

§ 92.159 Internet References

California Code of Regulations. Pursuant to *Gov. Code §§ 11340.1(b), 11344*, requiring the OAL to make the California Code of Regulations available on the Internet free of charge, this site includes the full text of the CCR. http://ccr.oal.ca.gov

California Courts. This site includes: general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most Court of Appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes: text of constitution, codes, and statutes (including complete text of Vehicle Code and Administrative Procedure Act); and information concerning pending legislation. http://www.leginfo.ca.gov

Department of Motor Vehicles. This site includes: field office listings and general information. http://ccr.oal.ca.gov

Matthew Bender. This site includes: links to Matthew Bender publications and Shepard's citation service. http://www.dmv.ca.gov

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesOperator LicensesGeneral Overview

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[Reserved]

§§ 92.160[Reserved]

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PART IV. FORMS
A. Request for Departmental Action

8-92 California Forms of Pleading and Practice--Annotated § 92.170

§ 92.170 Request for Hearing or Reopening of Question in Driver's License Proceeding Before Department of Motor Vehicles

[1] FORM Request for Hearing or Reopening of Question in Driver's License Proceeding Before Department of Motor Vehicles

To: Department of Motor Vehicles

_____[*Set forth address of appropriate local driver safety office*]

Re: _____ [*complete name*]

_____ [*address*]

[Driver's License No. _____]

[*EITHER, if Department proposes action*]

On _____[*date*], the above-named _____ [applicant *or* licensee] received a _____ [*specify, e.g.,* Notice of Proposed Action, Grounds Therefor, and of Opportunity to be Heard] showing that the Department proposes to _____ [*specify, e.g.,* suspend the above-named person's driving privilege] pursuant to Section _____ of the Vehicle Code.

[*OR, if Department has given notice of action taken*]

On _____[*date*], the above-named _____ [applicant *or* licensee] received a _____ [*specify, e.g.,* notice of an order of suspension] showing that the Department has _____ [*specify action taken, e.g.,* suspended his/her privilege to operate a motor vehicle,] pursuant to Section _____ of the Vehicle Code.

[*CONTINUE*]

On behalf of _____[*name*], I request that the Department _____ [schedule a hearing *or* reopen the question or take further evidence *or* change/set aside the order made on _____ (*date*)]. [The ground on which this request for reopening the case is based is _____ (*state grounds for reopening case, e.g.,* that the licensee has discovered new evidence that establishes that at no time was he/she driving a motor vehicle with an unlawful percent by weight of alcohol in his/her blood).]

[I further request that the hearing be held at _____ (*preferred place*).]

Until further notice from me [or from _____ (*name*)] to the contrary, please send all further communications, except orders for suspension, revocation, or probation, to me.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form of letter in [1], *above*, illustrates a request for a hearing or for reopening a case in a Department of Motor Vehicles proceeding involving a driver's license. The letter should clearly show the complete name (to avoid confusion arising from similar names) and address, and the driver's license number if there is one, of the person affected by the Department's action.

If the request is for reopening a case, the letter should state that fact and the grounds on which the request is based. The letter of request should state specifically the facts constituting the ground [*see Veh. Code § 14106*]. For further discussion, see *§§ 92.52, 92.109*.

[3] Submission to Local Driver Safety Office

Requests for hearing are processed by local driver safety offices, rather than the Department's state office in Sacramento. Thus, counsel should contact the Department, through any of its local field offices, to obtain the address of the appropriate driver safety office [*see also* http://www.dmv.ca.gov (Dept. of Motor Vehicles Internet site, including listing of field offices)].

[4] Telephonic Request and Hearing

As an alternative to this written request for hearing, the Department has adopted a procedure to request a hearing by telephone. In addition, a driver may request that the hearing be conducted by telephone. Since procedures among the various local driver safety offices may vary, counsel should contact the appropriate office for applicable procedures.

[5] Time Limit for Request

Generally, a request for a hearing must be made within 10 days after notice [*see Veh. Code §§ 14100(a), 14103*]. Failure to observe this time limit may be treated by the Department as a waiver, but the request should be made even if the 10-day period has passed because the Department has discretion in such cases [*see Veh. Code § 14103*].

In cases in which a person has received a notice of an order of suspension or revocation of his or her driving privilege under *Veh. Code §§ 13353, 13353.1, 13353.2, 13382, 13388, 23612*, or a notice under *Veh. Code § 13557* (relating to unlawful blood alcohol level and refusal or failure to complete a blood alcohol test), the person may request a hearing on the matter pursuant to *Veh. Code § 14100 et seq.*, except as otherwise provided in *Veh. Code § 13558* [*Veh. Code § 13558(a)*]. If the person wishes to have a hearing before the effective date of the order of suspension or revocation, the request for a hearing must be made within 10 days of the receipt of the notice of the order of suspension [*Veh. Code § 13558(b)*].

[6] Request for Preferred Hearing Location

The form provides an optional request for a preferred site. In cases in which the application is made based on action under *Veh. Code §§ 13353, 13353.2, 13382, 13388, 13557*, or *23612*, the hearing is required to be held at a place designated by the Department as close as practicable to the place where the arrest occurred, unless the parties agree to a different location [*Veh. Code § 13558(b)*].

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PART IV. FORMS
A. Request for Departmental Action

8-92 California Forms of Pleading and Practice--Annotated §§ 92.171-92.179

[Reserved]

§§ 92.171[Reserved]

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PART IV. FORMS
B. Judicial Review of Departmental Action

8-92 California Forms of Pleading and Practice--Annotated § 92.180

§ 92.180 Petition for Writ of Mandate to Review Action by Department of Motor Vehicles in Driver's License Proceeding--General Form

[1] FORM Petition for Writ of Mandate to Review Action by Department of Motor Vehicles in Driver's License Proceeding--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*], Petitioner,	)	NO. _____
vs.	)	PETITION FOR WRIT OF MANDATE
_____ [*name*], Department of Motor Vehicles, Respondent.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____

Petitioner alleges:

1. Respondent Director of Motor Vehicles is the chief Executive officer of the Department of Motor Vehicles ("the Department"), which is a department in the Business and Transportation Agency of the State of California.

2. Under Vehicle Code Section(s) _____[*specify appropriate section(s)*], the Department has discretion to determine _____ [*state relevant facts, e.g.,* whether a person is qualified to receive a driver's license and whether a qualified person has met all requirements of the law for issuance of a driver's license].

3. Under Vehicle Code Section _____ [13950 *or* 13951], the Department is required to give notice and an opportunity to be heard whenever the Department proposes to _____ [suspend *or* revoke *or* refuse to issue] a driver's license. Under *Vehicle Code Sections 14100* and *14101*, the Department is required to grant a hearing on request when the Department has given notice pursuant to Vehicle Code Section _____[*specify*], except when the action in question is made mandatory by the Vehicle Code or the person receiving the notice has previously had an opportunity for a hearing.

4. Under *Vehicle Code Section 14104.7*, evidence is required to be taken at the hearing referred to in Paragraph 3.

5. On _____[*date*], petitioner received a notice from the Department stating that the Department proposed to _____[*specify proposed action*]. [On _____ (*date*), petitioner requested a hearing to contest the Department's proposed action.]

6. On _____[*date*], a hearing was held, which petitioner attended. [Petitioner was represented at the hearing by _____ (*name*), his/her counsel.]

7. On _____[*date*], after the hearing, petitioner received the Department's order of _____[*date*], _____ [*state effect of order, e.g.,* suspending petitioner's driver's license] on the ground that _____ [*specify ground set forth in Department's order*)].

[8. On _____ (*date*), petitioner sent to the Department a written request to reopen the case. The basis for petitioner's request, which petitioner stated in the request, was _____ (*specify*). On _____ (*date*), the Department _____ (refused to reopen the case *or* reopened the case by giving petitioner an interview for the purpose of _____ (*specify, e.g.,* presenting further evidence) but thereafter refused to reverse or modify the order of _____ (*date*)).]

9. The Department's order _____ [*describe effect of order, e.g.,* suspending petitioner's driver's license] is invalid for the following reasons:

a. _____ [*List separately each ground on which petitioner claims the order is invalid, e.g.,* The _____ (Director *or* hearing officer *or* hearing board) found that _____ (*state all findings*). Under the Vehicle Code, the Department does not have authority to _____ (*identify action taken, e.g.,* suspend a license) on the basis of any of the facts set out in the findings.]

[*Add additional grounds as warranted, e.g.*]

[b. At the hearing petitioner tried to offer evidence to show that _____ (*specify facts provable by evidence in question*). This evidence was in the form of _____ (*specify, e.g.,* a certified abstract of the record of the _____ Court of _____ [*state jurisdiction*]). The hearing _____ (officer *or* board) ruled that this evidence was not admissible, and it was not received.]

[c. The _____ (Director *or* hearing officer *or* board) found that _____ (*state all findings*). The evidence received at the hearing does not support these findings, as petitioner alleges more particularly hereinafter.]

[*CONTINUE*]

10. _____ [A verbatim transcript of the record of the hearing, containing the evidence received, is

attached hereto as Exhibit "A" and made a part hereof *or* The substance of the evidence received at the hearing is as follows: _____ (*state substance of evidence*).] [The evidence does not support the findings for the following reasons: _____ (*specify*).] [Petitioner objected at the hearing to the following evidence, on the grounds indicated, but in each instance petitioner's objection was not sustained, and the evidence was received: _____ (*identify evidence, e.g.*, the testimony of _____ (*name*), which was offered to show _____ (*specify*), and that was objected to on the ground that _____ (*specify*)).]

[11. Petitioner has the following relevant evidence that was not presented at the hearing: _____ (*describe completely*). This evidence could not be produced at the hearing because _____ (*specify why, in the exercise of reasonable diligence, petitioner could not produce evidence*). Petitioner was not able to present this evidence to the Department after the order of _____ (*date*) was issued because _____ (*specify why, in the exercise of reasonable diligence, petitioner could not produce evidence on the Department's reopening the case*). This evidence tends to show that _____ (*state what evidence will prove*).]

12. Petitioner meets all of the qualifications for a driver's license of Class _____ [*specify class applied for; see Veh. Code § 12804.9*] specified in the Vehicle Code. Petitioner duly applied on _____[*date*], for a driver's license of that class, in compliance with the provisions of the Vehicle Code and the regulations of the Department governing such an application.

[13. As an incident of bringing and maintaining this proceeding, petitioner has become and is obligated personally to pay to his/her counsel, _____ (*name*), attorney's fees in the sum of $_____).]

14. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law in that _____ [*specify, e.g.*, petitioner has no means other than this proceeding by which he/she can compel the Department to reverse its decision and reinstate petitioner's driving privilege].

WHEREFORE, petitioner prays judgment as follows:

1. For an alternative writ of mandate directing respondent to set aside the Department's order of _____[*date*], _____ [and to reconsider whether petitioner is entitled to receive a driver's license as applied for *or* and to reinstate petitioner's driver's license as it existed before the order was issued], or in the alternative to show cause why a peremptory writ of mandate to the same effect should not be issued;

2. For a peremptory writ of mandate to the same effect as the alternative writ except for the order to show cause;

[3. For reasonable attorney's fees, in addition to any other relief granted or other costs awarded;]

4. For costs of suit herein incurred[, including $_____ for preparation of the Departmental record]; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____[*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form of petition for writ of mandate in [1], *above*, may be used to obtain review by the superior court of an order of the Department of Motor Vehicles refusing to issue a license or suspending or revoking a license, or otherwise controlling a person's privilege to drive, when the order was made as the result of a proceeding in which by law a hearing was required to be given, evidence was required to be taken, and discretion was vested in the Department to determine the relevant facts [*see Code Civ. Proc. § 1094.5(a)*].

A mandate proceeding involves other papers and pleadings, that may include an alternative writ of mandate, a demurrer to the petition, a return, a demurrer to the return, a replication by the petitioner, a judgment, and a peremptory writ of mandate. In addition, the petitioner may move the court for an order permitting filing of the petition before service [*see Code Civ. Proc. § 1107*; discussed in [11], *below*].

For further discussion relating to administrative mandate proceedings to review the Department's order affecting a driver's license, see *§ 92.120* et seq. For further discussion relating to the procedure to be followed in a mandate proceeding for review of an administrative agency's order generally, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq. For additional forms of petition for use in obtaining review of agency proceedings in general, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[3] Jurisdiction

The Supreme Court, the court of appeal, and the superior court have concurrent jurisdiction to hear an original proceeding for a writ of mandate [*see Cal. Const., art. VI, § 10*]. As a matter of policy, however, the higher courts normally refuse to exercise their original jurisdiction when the proceeding could be heard by a lower court [*see Cohen v. Superior Court (1968) 267 Cal. App. 2d 268, 270-271, 72 Cal. Rptr. 814* (reporting and explaining policy)]. The petition should therefore be filed in the superior court [*see Cal. Rules of Ct., Rule 8.486(a)* (petition filed in reviewing court but which may be filed in lower court as required to state circumstances making issuance of writ by reviewing court proper); *Roma Macaroni Factory v. Giambastiani (1933) 219 Cal. 435, 436-437, 27 P.2d 371]* .

[4] Venue

[a] Civil Action Rules Are Applicable

Neither the Vehicle Code nor the part of the Code of Civil Procedure relating to mandate proceedings [*Code Civ. Proc.*

§§ 1084-1097 (mandate particularly), *1107-1110b* (extraordinary writs generally and mandate particularly)] expressly provides for venue in mandate proceedings; therefore, the venue rules applicable to civil actions generally would apply [*see Code Civ. Proc. § 1109*].

Subject to the power of the court to transfer actions and proceedings as provided in *Code Civ. Proc. § 392 et seq.*, the county in which the cause, or some part of it, arose is the proper county for the trial of an action against a public officer, or person especially appointed to execute duties of a public officer, for an act done by the officer or person in virtue of the office, or against a person who, by the officer's command or in the officer's aid, does anything touching the duties of the officer [*Code Civ. Proc. § 393(1)(b)*]. The Director of Motor Vehicles is a public officer and denial of a license, or revocation or suspension, or the imposition of probation, is an act done by the director in virtue of his or her office [*see Veh. Code § 1650* (director as authorized to administer provisions of Vehicle Code relating to Department)].

[b] Liberal Construction Favors Petitioner

The application of *Code Civ. Proc. § 393(1)(b)* to a case involving a driver's license is problematical because it will not usually be clear what county is "the county in which the cause, or some part thereof, arose" [*Code Civ. Proc. § 393(1)(b)*]. The underlying purpose of statutory provisions as to venue for actions against state agencies is to afford to the citizen a forum that is not so distant and remote that access to it is difficult and expensive. It is the Legislature's policy to afford to a person adversely affected by the rulings of public agencies a forum for the resolution of disputes that is as convenient and inexpensive as possible. To that end, statutory provisions as to venue should be liberally construed in favor of the private litigant [*Regents of University of California v. Superior Court (1970) 3 Cal. 3d 529, 536, 541, 91 Cal. Rptr. 57, 476 P.2d 457]* .

[5] Allegations

The allegations in the petition must state facts showing the following:

- Discretion to determine certain relevant facts is vested in the Department (Paragraph 2) [*see Code Civ. Proc. § 1094.5(a)*].

- By law a hearing is required to be held for the purpose of determining those facts (Paragraph 3) [*see Code Civ. Proc. § 1094.5(a)*].

- Evidence is required to be taken at the hearing (Paragraph 4) [*see Code Civ. Proc. § 1094.5(a)*].

- A final administrative order was made as a result of the hearing and the determination of those facts (Paragraphs 5-8) [*see Code Civ. Proc. § 1094.5(a)*].

- The order is invalid [*Code Civ. Proc. § 1094.5(a)*] because of one of the following defects (Paragraph 9) [*see Code Civ. Proc. § 1094.5(b)*]:

  - The Department proceeded without or in excess of jurisdiction.

  - The petitioner was denied a fair trial.

  - The Department abused its discretion through one of the following:
    - The Department did not proceed in the manner required by law.

    - The Department's order was not supported by the findings resulting from the administrative hearing.

- The Department's findings were not supported by the evidence.

- The petitioner is beneficially interested in issuance of the writ of mandate (Paragraph 12) [*Code Civ. Proc. § 1086*].

- The petitioner has exhausted administrative remedies (Paragraphs 5-8) [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 291-296, 109 P.2d 942]* .

- The petitioner has no plain, speedy, and adequate remedy in the ordinary course of the law (Paragraph 14) [*Code Civ. Proc. § 1086*].

If it is contended that the findings are not supported by the evidence, the petition must also allege the substance of the evidence or, alternatively and if there is a record of the evidence, that the record is attached as an exhibit and incorporated by reference (Paragraph 10).

If there is relevant evidence that, in the exercise of reasonable diligence, the petitioner could not have produced at the hearing, and that was not produced, the petition should allege the substance of the evidence together with facts showing that it could not have been produced at the hearing in the exercise of reasonable diligence (Paragraph 11) [*Code Civ. Proc. § 1094.5(e)*].

For further discussion of pleading requirements for a petition for writ of mandate to review an administrative decision, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[6] Alleging That Findings Not Supported by Evidence

The petition need not refer to the evidence unless the petitioner's complaint relates to an evidentiary matter. Failure of the evidence to supportthe Department's findings [*see Code Civ. Proc. § 1094.5(b)*] is a commonly alleged ground for attacking the administrative decision. In such a case, the petition must either have attached to it, as an exhibit, a complete transcript of all of the evidence on which the Department acted or, at the minimum, allege the substance of all of the evidence received at the hearing (Paragraph 10) [*see Faulkner v. Cal. Toll Bridge Authority (1953) 40 Cal. 2d 317, 330-331, 253 P.2d 659]* .

Because the limitation period for filing a petition is only 90 days [*see Veh. Code § 14401(a)*], a transcript might be unavailable. There is some difference of opinion whether a transcript should be attached, some practitioners preferring to allege the substance of the evidence instead. However, because all of the evidence, not just the evidence favorable to the petitioner, must be considered by the court, it is better practice to attach a transcript if available [*see Bennett v. Brady (1936) 17 Cal. App. 2d 114, 116, 61 P.2d 530* (petition alleging only favorable evidence as demurrable); *see also Thompson v. City of Long Beach (1953) 41 Cal. 2d 235, 241, 259 P.2d 649* ; *Thayer v. Board of Osteopathic Examiners (1958) 157 Cal. App. 2d 4, 8, 320 P.2d 28* (both relating to case in which "substantial evidence" test applies)].

[7] Alleging Petitioner's Beneficial Interest

[a] Facts Must Appear in Petition

The requirement that the petitioner be "beneficially interested" in issuance of the writ [*see Code Civ. Proc. § 1086*] reflects the general rule established by case law that a writ of mandate will not be issued if it would be of no benefit to the applicant, or if the right sought to be enforced is merely abstract and is not attended by any substantial benefit to the applicant [*see Spotton v. Superior Court (1918) 177 Cal. 719, 720, 171 P. 801* ; *Gay v. Torrance (1904) 145 Cal. 144, 147-148, 78 P. 540* ; *Boyne v. Ryan (1893) 100 Cal. 265, 267, 34 P. 707]* . It must appear from the petition that a

right or interest of the petitioner will be protected or subserved by issuance of the writ (Paragraph 12) [*see Ellis v. Workman (1904) 144 Cal. 113, 115, 77 P. 822]* .

[b] Facts Specific to License

In a case in which an existing license has been taken away or the full enjoyment of it has been restricted, the beneficial interest of the licensee (petitioner) is clear. No additional facts need to be alleged to establish a beneficial interest. If the Department has refused to issue a license, however, it will be necessary to allege facts showing that the petitioner is actually qualified to receive a license as applied for and that all application requirements were complied with [*see Hippen v. Ford (1900) 129 Cal. 315, 316, 61 P. 929* (petitioner seeking writ to compel issuance of liquor license as required to prove that all necessary steps to qualify were taken)].

An allegation that the petitioner is qualified to receive the license applied for and that he or she duly applied for it should be sufficient [*see Babcock v. Goodrich (1874) 47 Cal. 488, 512* (allegation in petition for writ of mandate that certain orders "were duly given and made" by board of supervisors as sufficient allegation of board's jurisdiction to make them); *Hippen v. Ford (1900) 129 Cal. 315, 316, 61 P. 929* (conceding sufficiency of allegation that petitioner duly complied with all laws, rules, ordinances, and regulations of municipality and performed all and every requirement necessary thereunder for issuance of liquor license)].

[8] Attorney's Fees

In a civil action to review an administrative determination of "any administrative proceeding," the court may award to a prevailing complainant reasonable attorney's fees computed at $100 per hour, not to exceed $7,500 if the administrative determination resulted from "arbitrary or capricious action or conduct by a public entity or an officer thereof in his or her official capacity" [*Gov. Code § 800*].

When a petitioner in a mandate proceeding for review of an administrative determination wishes to claim attorney's fees under *Gov. Code § 800,* he or she must in some fashion present to the court an allegation either that the "arbitrary or capricious action" referred to in that statute has taken place on the part of some person or that the petitioner is in fact personally obligated to pay attorney's fees to his or her counsel in a specified sum [*Rutherford v. Board of Trustees (1974) 37 Cal. App. 3d 775, 781-782, 112 Cal. Rptr. 560]* . If agency action was sufficiently "arbitrary or capricious" to warrant an award of attorney's fees, this should be apparent in the specific allegations in the petition. To be sure that a claim for attorney's fees under *Gov. Code § 800* is properly presented to the court, the petitioner should include an allegation that he or she is personally obligated to pay attorney's fees (Paragraph 13).

One court of appeal has noted that *Gov. Code § 800* applies to the review of a determination in any administrative "proceeding," as distinguished from the more limited "hearing" [*Forrest v. Trustees of Cal. State University & Colleges (1984) 160 Cal. App. 3d 357, 368, 206 Cal. Rptr. 595]* . Another court, however, has held that some sort of administrative hearing, although not necessarily a formal hearing, is required to trigger the fee-shifting provisions of this statute [*see, e.g., Gustafson v. Zolin (1997) 57 Cal. App. 4th 1361, 1367, 67 Cal. Rptr. 2d 645* ("everyday determinations" are not sufficient; declining to follow *Forrest* to the extent that case suggests that any administrative decision might qualify for attorney fees on appeal under section 800)].

ILLUSTRATION:

Exchange of Letters Between Attorney and Driver Safety Officer Not "Determination." The DMV suspended petitioner's driver's license after determining that he had been arrested for driving with a blood-alcohol level of 0.08 percent or more. After a criminal trial, the petitioner was found "not guilty" on the.08 percent charge. The petitioner's attorney sent a letter to the DMV requesting that the suspension be lifted and enclosed a copy of a municipal court minute order showing the not-guilty finding. A driver safety officer from the DMV responded, in a letter to the petitioner's attorney, that the

suspension could not be lifted on submittal of the minute order and requested additional documentation. The attorney did not submit any additional documentation to the DMV, but filed a petition for writ of mandate instead. The trial court granted the writ and also awarded attorney fees of $1,185 to the petitioner under section 800. The court of appeal in *Gustafson* reversed this award, holding that the driver safety officer's letter to the petitioner did not constitute a "determination of [an] administrative proceeding" for which attorney fees could be awarded under *Gov. Code § 800*. The court stated that this "exchange of letters was a simple, routine communication between an attorney and an administrative official, not a process presenting an issue for hearing and disposition" [*see Gustafson v. Zolin (1997) 57 Cal. App. 4th 1361, 1367, 67 Cal. Rptr. 2d 645* (DMV acknowledged that petitioner could have requested DMV administrative hearing regarding acquittal claim)].

For further discussion concerning attorney's fees under *Gov. Code § 800*, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[9] Costs

[a] Request Must Be Explicit

The prayer should contain an explicit request for costs, which are recoverable under *Code Civ. Proc. § 1095* in an original proceeding for a writ of mandate [*Gould v. Moss (1910) 158 Cal. 548, 549, 111 P. 925]* . Costs are not recoverable unless specifically awarded in the judgment, costs being a matter of the court's discretion rather than a matter of right [*see Gould v. Moss (1910) 158 Cal. 548, 549, 111 P. 925]* . Respondent, if successful, may also recover his or her costs, if the court specifically awards costs, despite the reference in *Code Civ. Proc. § 1095* to "the applicant" without a corresponding reference to the respondent [*Union Trust Co. v. Superior Court (1939) 13 Cal. 2d 541, 543-544, 90 P.2d 582]* .

[b] Costs of Preparing Record

If the petitioner has incurred the expense of preparing all or any part of the record, the prayer should contain a request for costs "including (a specified amount) for preparation of the record." Such an expense is specifically recoverable as a cost by the prevailing party, if he or she bore the expense [*see Code Civ. Proc. § 1094.5(a)*; *Moran v. Board of Medical Examiners (1948) 32 Cal. 2d 301, 315, 196 P.2d 20]* .

The expense of preparing all or any part of the record is a taxable cost under *Code Civ. Proc. § 1094.5(a)* whether the record has been prepared for a mandate proceeding or for an administrative proceeding by which the petitioner seeks to exhaust his or her administrative remedies [*Ralph's Chrysler-Plymouth v. New Car Dealers Policy & Appeals Bd. (1973) 8 Cal. 3d 792, 796, 106 Cal. Rptr. 169, 505 P.2d 1009]* .

Except when otherwise prescribed by statute, the cost of preparing the record must be borne by the petitioner. When the petitioner has obtained a waiver of fees pursuant to *Gov. Code §§ 68630-68641* and *Cal. Rules of Ct., Rule 3.50 et seq.*, and when the transcript is necessary to a proper review of the administrative proceedings, the cost of preparing the transcript must be borne by the respondent [*Code Civ. Proc. § 1094.5(a)*]. For discussion of waiving court fees because of a person's financial condition, see *Ch. 174, Costs and Attorney's Fees, § 174.110* et seq.

[10] Request for Stay of Departmental Order

The petitioner may also move for an order staying the operation of the Department's order [*Code Civ. Proc. § 1094.5(g)*]. A request for a stay of a suspension of a driving license must be accompanied by a copy of the petitioner's driving record from the Department of Motor Vehicles [*Cal. Rules of Ct., Rule 3.1142*]. For a form of petition including a request for an order staying operation of an administrative order, a related order to show cause, and a stay order, see *Ch. 474C, Procedures in Reviewing Agency Decisions, §§ 474C.90, 474C.99,* and *474C.100*.

[11] Service of Petition

The petition must be served before it is filed [*Code Civ. Proc. § 1107*]. All civil process in actions against the director and the Department (and all subpoenas for the production of Departmental records) must be served on the director or the director's appointed representatives at the Department's headquarters [*Veh. Code § 24.5*].

[12] Other Pleadings and Papers

The procedure to be followed in a mandate proceeding for review of an administrative agency's order are set out in Ch. 474C, *Procedures in Reviewing Agency Decisions* . See that chapter for discussion and relating to alternative writ, peremptory writ, replication, statement of decision, judgment, and various associated orders.

[13] Verification

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Proof of service on each respondent and real party in interest of a copy of a petition that seeks an alternative writ must accompany the petition when it is offered for filing except when, in its discretion and for good cause, the court has granted the application for the writ ex parte [Code Civ. Proc. § 1107; for a discussion of serving the petition, *see* Ch. 358, *Mandate and Prohibition*]. Points and authorities also customarily accompany a petition filed in a superior court, although they do not appear to be expressly required by statute. When no alternative writ is sought, proof of service of a copy of the petition need not accompany the application, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

[14] Cross References

For discussion and forms for use when the licensee or applicant is a minor or a conservatee, see Ch. 20, *Allegations Commonly Used* (allegations in petition for writ of mandate concerning minority and guardianship or conservatorship); Ch. 108, *Captions and Introductions*; and Ch. 291, *Guardians ad Litem*

For discussion and forms for use in civil appeals generally, including an appeal of the judgment in a mandate proceeding for review of an administrative order, see Ch. 40, *Appeal: An Overview* , et seq.

For discussion and forms relating to mandate proceedings generally, see Ch. 358, *Mandate and Prohibition*

For discussion of procedures generally in mandate proceedings for review of administrative decisions, and suitable forms for adaptation for use in a proceeding to review the Department's actions, see Ch. 474C, *Procedures in Reviewing Agency Decisions*

For forms of points and authorities for use in mandate proceedings generally, see California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender)

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Chapter 92 AUTOMOBILES: DRIVERS' LICENSES
PART IV. FORMS
B. Judicial Review of Departmental Action

8-92 California Forms of Pleading and Practice--Annotated § 92.181

§ 92.181 Petition for Writ of Mandate to Review Action by Department of Motor Vehicles in Driver's License Proceeding--Order of Suspension or Revocation Under Implied Consent or Administrative Per Se Law

[1] FORM Petition for Writ of Mandate to Review Action by Department of Motor Vehicles in Driver's License Proceeding--Order of Suspension or Revocation Under Implied Consent or Administrative Per Se Law

[*Caption. See § 92.180[1].*]

Petitioner alleges:

1. [*Identity of respondent Director of Motor Vehicles. See § 92.180[1], Paragraph 1.*]

2. Under Vehicle Code Section _____ [13558(c)(1) *or* 13558(c)(2)], the Department has discretion to determine _____ [*state relevant facts, e.g.,* whether petitioner was driving a motor vehicle when he/she had 0.08 percent or more, by weight, of alcohol in his/her blood].

3. Under *Vehicle Code Section 13558(b),* the Department is required to grant a hearing on request when the Department has given notice pursuant to *Vehicle Code Section 13558(a).*

4. [*Requirement that Department take evidence. See § 92.180[1], Paragraph 4.*]

5. On _____[*date*], petitioner was notified by _____ [the Department *or* (*name of peace officer or other official*), acting on behalf of the Department,] that petitioner's license was being _____ [suspended *or* revoked] under Vehicle Code Section _____[*specify*]. On _____[*date*], petitioner requested a hearing to contest the Department's action.

6. [*Date and conduct of hearing. See § 92.180[1], Paragraph 6.*]

7. On _____[*date*], after the hearing, petitioner received notice of the Department's determination sustaining its order of _____[*date*], _____ [suspending *or* revoking] petitioner's driver's license on the ground that _____ [*specify ground, e.g.,* petitioner was driving a motor vehicle when he/she had 0.08 percent or more, by weight, of alcohol in his/her blood].

[8. *Request to reopen hearing and Department response. See § 92.180[1], Paragraph 8.*]

9. The Department's order _____ [suspending *or* revoking] petitioner's driver's license is invalid because _____ [*list separately each ground under Veh. Code § 13559 on which petitioner claims the order is invalid, e.g.,* the _____ (Director *or* hearing officer *or* hearing board) made a determination that is not supported by the evidence in the record. The determination is erroneous for the reason that _____ (*describe error, e.g.,* the Department determined that petitioner's blood alcohol content was 0.13 percent at the time of driving when the report of the _____(*identify test, e.g.,* blood test) failed to indicate the time the sample was drawn].

[10. _____ (*State additional grounds under Veh. Code § 13559 as warranted*)].

[11. *Attachment of transcript of record of hearing. See § 92.180[1], Paragraph 10.*]

[12. *Evidence presented at hearing. See § 92.180[1], Paragraph 10.*]

[13. *Relevant evidence not produced at hearing. See § 92.180[1], Paragraph 11.*]

[14. *Attorney's fees See § 92.180[1], Paragraph 13.*]

15. [*Lack of plain, speedy, or adequate remedy at law. See § 92.180[1], Paragraph 14.*]

WHEREFORE, petitioner prays for judgment as follows:

[1. *If alternative writ procedure is used:* For an alternative writ of mandate directing respondent to rescind the Department's order of _____ (*date*), and _____ (return the license *or* issue a new license) to petitioner, or in the alternative to show cause why a peremptory writ of mandate to the same effect should not be issued;]

2. For a peremptory writ of mandate _____ [to the same effect as the alternative writ except for the order to show cause *or set out terms at length as in Paragraph 1 of this prayer, omitting words relating to order to show cause*];

[3. For reasonable attorney's fees, in addition to any other relief granted or other costs awarded;]

4. For costs of suit herein incurred[, including $_____ for preparation of the Departmental record];

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 92.180[1]* .]

[2] Use of Form

The form of petition for writ of mandate in [1], *above*, is for use to obtain review by the superior court of an order by the Department suspending or revoking a license after a *Veh. Code § 13558* hearing based on the implied consent or administrative per se law [*see Veh. Code §§ 13353*, *13353.2*, *13382*, or *23612*].

The form may be adapted for review of an order of suspension when the Department suspends or delays issuance of a driver's license under *Veh. Code § 23136* et seq. (administrative suspension for persons under 21 years of age) after a hearing authorized by *Veh. Code §§ 13353.1(d)*, *13558*. For instance, the relevant facts in paragraph 2 might address whether petitioner was under 21 years and was driving a vehicle when he or she had an blood-alcohol concentration of 0.01 percent or greater, as measured by a preliminary alcohol screening test [*see Veh. Code § 13353.1(d)*].

For further discussion of judicial review of an order of suspension or revocation under the implied consent or administrative per se law or under the administrative suspension law for persons under 21, see *§ 92.40 et seq., § 92.60 et seq., and § 92.80* et seq.

For additional discussion and cross references, see *§ 92.180[2]* et seq.

[3] Allegations

[a] Set Forth in Form

This form of petition alleges:

- The Department's discretion to determine specified facts (Paragraph 2) [*see Code Civ. Proc. § 1094.5(a)*; *Veh. Code § 13558(c)*].

- The requirement under *Veh. Code § 13558(b)* that the Department grant a hearing (Paragraph 3) [*see Code Civ. Proc. § 1094.5(a)*].

- The Department's notification of suspension or revocation of petitioner's driver's license under the implied consent or administrative per se laws and petitioner's request for a hearing on the Department's action (Paragraph 5) [*see Veh. Code §§ 13382*, *13553*, 13553.2, *13558*, or *14103*].

- The petitioner's receipt of notice of the Department's determination sustaining the Department's order (Paragraph 7) [*see Veh. Code § 13558(f)*].

- The grounds of invalidity of the order (Paragraph 9) [*see Veh. Code § 13559*].

Additional facts of petitioner's beneficial interest [*Code Civ. Proc. § 1086*], and exhaustion of administrative remedies [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 291-296, 109 P.2d 942]* , appear from the allegations of the petition as a whole, and it is not necessary to set them out in separate allegations.

[b] Incorporated by Reference

The petition also incorporates by reference allegations from § 92.180 regarding:

- The identity of the Director of Motor Vehicles as respondent.
- The requirement that evidence be taken at the hearing.
- The date and conduct of the hearing.
- Any request to reopen the proceeding and the Department's response.
- Attachment of transcript of record of hearing (if appropriate) or an allegation regarding the substance of the evidence presented at the hearing.
- Relevant evidence not produced at hearing.
- The basis for an award of attorney's fees under *Gov. Code § 800*, and lack of plain, speedy, and adequate remedy in the ordinary course of the law.

[4] Time to File Petition

Notwithstanding *Veh. Code § 14400* or *14401* (which generally govern petitions for writ of mandate to review orders by the Department), the foregoing petition must be filed within 30 days after the issuance of the notice of determination of the Department sustaining an order of suspension or revocation of the person's privilege to operate a motor vehicle following a hearing under *Veh. Code § 13558* [*Veh. Code § 13559(a)*].

[5] Proper Court

The person may file a petition for judicial review of the order in the court of competent jurisdiction in the person's county of residence [*Veh. Code § 13559(a)*].

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[Reserved]

§§ 92.182[Reserved]

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PART IV. FORMS
C. Forfeiture of Vehicles

8-92 California Forms of Pleading and Practice--Annotated § 92.190

§ 92.190 Claim Opposing Forfeiture of Vehicle--Judicial Council Form [MC-201]

[1] FORM Claim Opposing Forfeiture of Vehicle--Judicial Council Form [MC-201]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustration of the Judicial Council form that may be used by a claimant to oppose forfeiture of a vehicle under *Veh. Code § 14607.6* [Judicial Council Form MC-201]. Use of the form is optional.

Section 14607.6 provides for the forfeiture of a vehicle driven by its registered owner who is unlicensed or whose license has been suspended or revoked and who has a prior conviction for any one of several specified Vehicle Code violations [*Veh. Code § 14607.6*; for discussion, *see § 92.140* et seq.].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents of Form

The form has been filled in to illustrate how it might be used to oppose the forfeiture. The box for costs of suit in paragraph 6 has been checked, since the claimant will be entitled to reimbursement for the court filing fee (of $100) if he or she prevails [*Veh. Code § 14607.6(e)(4)*].

[4] Time Limits

To be timely, the claimant must file and serve the claim opposing forfeiture within 15 days after notice of impoundment was mailed to him or her, or within 5 days of being personally served with the notice [*Veh. Code § 14607.6(e)(4)*]. The district attorney will then have 10 days after receipt of the claim to file a petition for forfeiture with the appropriate

court [*Veh. Code § 14607.6(e)(4)*]. For further discussion, see *§ 92.140* et seq.

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[d] Statute of Limitations

§ 93.211 Complaint to Recover Possession of Personal Property or Its Value and for Damages for Wrongful Detention [Civ. Code §§ 3379, 3380; Code Civ. Proc. § 667]--By Depositor Against Depositary and Third Party--Failure to Redeliver on Demand [Civ. Code § 1822]--Depositary and Third Party Detaining Possession

[1] FORM

[2] Use of Form

[3] Cross References

§ 93.212 Complaint for Damages [Civ. Code § 3336] for Conversion--By Depositor Against Depositary--Failure to

Redeliver Personal Property on Demand [Civ. Code § 1822]--Property Left to Be Repaired

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

[5] Decisions

[a] Damages

[b] Demand for Return of Property

[c] Nature of Action

[d] Statute of Limitations

§ 93.213 Allegation--Damages for Loss of Use

[1] FORM

[2] Use of Form

[3] Cross References

§ 93.214 Complaint for Damages [Civ. Code §§ 1836, 3300] for Breach of Contract of Bailment--By Depositor Against Depositary--Depositary Wrongfully Using Thing Deposited [Civ. Code § 1835]

[1] FORM

[2] Use of Form

[3] California Legal Forms

[4] State Statutes

[5] Decisions

[6] Cross References

§ 93.215 Complaint for Damages [Civ. Code § 3333] Based on Negligence [Civ. Code §§ 1714(a), 1852]--By Depositor Against Depositary--Articles Placed for Storage [Civ. Code § 1851]

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

[5] Decisions

§ 93.216 Complaint for Damages [Civ. Code §§ 3300, 3333, 3336] Based on Conversion, Negligence [Civ. Code §§ 1714(a), 1852], and Breach of Bailment Contract--By Depositor Against Depositary--Department Store Losing Plaintiff Shopper's Personal Property [Civ. Code § 1822]

[1] FORM

[2] Use of Form

[3] Contract Damages

[4] Specification of Damages

[5] Decisions

[6] Cross References

§ 93.217 Complaint for Damages [Civ. Code §§ 3300, 3333] Based on Negligence [Civ. Code §§ 1714(a), 1852] and Breach of Bailment Contract--By Customer-Depositor Against Proprietor of Athletic Facility as Depositary--Loss of Personal Property Deposited [Civ. Code § 1851].

[1] FORM

[2] Use of Form

[3] Cross References

[4] Decisions

§ 93.218 Complaint for Damages [Civ. Code § 3333] Based on Gross Negligence [Civ. Code §§ 1714(a), 1846]--By Depositor Against Gratuitous Depositary [Civ. Code § 1844]--Object Destroyed

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

§ 93.219 Affirmative Defense--Property Withheld From Plaintiff Depositor to Enforce Repairman's Lien [Civ. Code § 3051]

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

[5] Decisions

§ 93.220 Affirmative Defense--Property Lost or Destroyed Without Fault of Depositary

[1] FORM

[2] Use of Form

[3] Cross References

§ 93.221 Complaint for Damages [Civ. Code § 3300] for Breach of Bailment Contract--By Repairman-Depositary Against Owner-Depositor of Personal Property--Owner Wrongfully Obtained Property From Repairman as Lienholder Without Paying Agreed Compensation [Civ. Code § 1822]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

§§ 93.222-93.239 [Reserved]

§ 93.240 Complaint for Damages [Civ. Code § 3333] Based on Slight Negligence [Civ. Code § 1886]--By Lender Against Borrower--Wrecked Automobile

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

[5] Decisions

§ 93.241 Complaint for Damages Caused by Concealed Defects in Thing Lent [Civ. Code §§ 1884, 1893]--By Borrower Against Lender

[1] FORM

[2] Use of Form

[3] Cross References

§§ 93.242-93.259 [Reserved]

§ 93.260 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 1955]--By Third Party Against Bailors--Defective Scaffold

[1] FORM

[2] Use of Form

[3] Verification

[4] Cross References

[5] State Statutes

[6] Decisions

§ 93.261 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 1955]--By Third Party Against Hirer (Bailee) and Letter (Bailor)--Defect in Bailed Chattel--Plaintiff Injured When Loading Horse Into Defective Horse Trailer

[1] FORM

[2] Use of Form

[3] Cross References

[4] Decisions

§§ 93.262-93.279 [Reserved]

§ 93.280 Complaint for Declaratory Relief [Code Civ. Proc. § 1060] Regarding Rights and Duties of Parties to Passenger Vehicle Rental Agreement--By Renter Against Rental Company [Civ. Code § 1936(q)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Venue

[5] Additional Relief

[6] Cross References

[7] State Statutes

§ 93.281 Complaint for Declaratory Relief [Code Civ. Proc. § 1060] Regarding Rights and Duties of Parties to Passenger Vehicle Rental Agreement--By Business Renter Against Rental Company [Civ. Code § 1936.05]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Unbundled Charges in Business Rental

[5] Definitions

[a] Qualified Business Rental

[b] Business Program Sponsor

[c] Business Program

[d] Business Renter

[6] State Statutes

[7] Cross References

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9-93 California Forms of Pleading and Practice--Annotated § 93.01

§ 93.01 Scope of Chapter

This chapter discusses, and contains forms for use in, actions involving deposits of personal property. It includes:

- Complaints by depositors to recover possession of property deposited [*see §§ 93.210, 93.211*].

- Complaints by depositors to recover damages for injury to the property during the deposit [*see §§ 93.212 -93.218*].

- Affirmative defenses to those actions [*see §§ 93.219, 93.220*].

- A complaint by a depositary against a depositor who reclaimed the property without paying agreed compensation [*see § 93.221*].

This chapter also discusses and contains forms for use in actions involving the loaning for use of personal property. It includes complaints:

- By a lender against a borrower for damages for injury to the thing lent [*see § 93.240*].

- By a borrower against a lender for damages caused by concealed defects in the thing lent [*see § 93.241*].

This chapter also discusses actions by third parties arising out of bailments. It includes forms of complaints for personal injuries by a third party against the parties to a hiring [*see §§ 93.260, 93.261*].

This chapter also discusses principally the provisions of *Civ. Code § 1936*, which establishes certain requirements and prohibitions regarding advertising, disclosures, and terms for the rental of passenger vehicles, including related collision damage waivers. This chapter also discusses the provisions of *Civ. Code § 1936.05*, creating an exception to the general requirements of *Civ. Code § 1936* when a passenger car rental is covered by a commercial arrangement between the rental company and the renter's employer, and the provisions of *Civ. Code § 1936.1*, requiring a particular disclosure

when a 15-passenger van is rented. This chapter includes a form for a complaint for declaratory relief for use by a vehicle renter to resolve differing contentions regarding his or her liability under *Civ. Code § 1936* or the particular rental agreement of the parties [*see § 93.280*], as well as a complaint by a business renter based on a violation of *Civ. Code § 1936.05* [*see § 93.281*].

The term of the hiring governed by *Civ. Code § 1936* is any period less than 30 days [*see Civ. Code § 1936(a)(2)* (defining "renter")]. For discussion of vehicle leases for longer periods generally exceeding four months, and the California Vehicle Leasing Act [*Civ. Code § 2985.7 et seq.*], see Ch. 90, *Automobiles: Vehicle Leasing Act* .

A rental company's liability for negligent entrustment and imposition of vicarious liability on a rental company are discussed in *Ch. 82, Automobiles: Causes of Action, §§ 82.11* and *82.16*, respectively.

Although a rental agreement for a passenger vehicle is a lease as defined by *Com. Code § 10103(a)(10)*, and is thus subject to Division 10 of the Commercial Code as well as *Civ. Code § 1936*, Division 10 provides that in cases of conflict between Division 10 and consumer protection laws, the consumer protection law governs [*Com. Code §§ 10102, 10104(a)(3), (b)*]. Division 10 provisions are not discussed in this chapter, because they are more general and less consumer-protective than *Civ. Code § 1936*. In the event that *Civ. Code § 1936* does not address a particular issue, however, counsel should consult Ch. 413, *Personal Property Leases*, for discussion of Division 10 and related forms.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailments

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§ 93.02 Cross References

For discussion and forms relating to the rights and obligations created by documents of title, including warehouse receipts, see Ch. 213, *Documents of Title*

For a complaint by a guest for loss of personal property deposited in a hotel vault and discussion of innkeepers' liens, see Ch. 297, *Hotels and Motels*

For alternative forms and discussion involving lost property, see Ch. 355, *Lost and Unclaimed Property*

For discussion and forms for use in actions by automobile owners against negligent operators, see Ch. 82, *Automobiles: Causes of Action* , and Ch. 83, *Automobiles: Bringing the Action*

For discussion of the liability of a nonoperator-owner of an automobile for injury to a third person, see *Ch. 82, Automobiles: Causes of Action, §§ 82.11* and *82.16*

For discussion and forms relating to the claims of a third party to title and right to possession of tangible or intangible personal property levied on in an action, see Ch. 254, *Executions and Enforcement of Judgments*

For discussion and forms regarding application of strict liability principles to commercial bailors of personal property, see Ch. 460, *Products Liability*

For discussion and forms concerning liability relating to automobiles, see Ch. 82, *Automobiles: Causes of Action*

For discussion and forms relating to damages in contract actions generally, see Ch. 177, *Damages*

For discussion and forms relating to declaratory relief action, see Ch. 182, *Declaratory Relief*

For discussion and form relating to injunctive relief, see Ch. 303, *Injunctions*

For discussion and forms relating to automobile insurance and to defenses to coverage, see Ch. 308, *Insurance*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailmentsInsurance LawMotor Vehicle InsuranceVehicle OwnershipNonowned VehiclesTortsTransportation TortsMotor VehiclesPersonal Vehicles

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[Reserved]

§§ 93.03[Reserved]

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§ 93.10 Governing Statutes

The statutes governing bailments are *Civ. Code §§ 1813-1858.3* (deposits), *1884-1896* (loans for use or bailment), *1925-1935* (hiring in general), 1936-1936.1 (passenger vehicle rentals), and *1955 et seq*. (hiring of personal property).

Specified personal property leases first effective between the parties on or after January 1, 1990, are governed by *Com. Code § 10101 et seq.* [*see Com. Code § 10600* (transition provision)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailments

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§ 93.11 Definitions

A bailment is generally defined as the delivery of a thing to another for some special purpose or object, on contract, express or implied, to be held in conformity with the objects or purposes of delivery [*Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 850, 88 Cal. Rptr. 39* ; *Greenberg Bros., Inc. v. Ernest W. Hahn, Inc. (1966) 246 Cal. App. 2d 529, 531, 54 Cal. Rptr. 770* ; *H.S. Crocker Co., Inc. v. McFaddin (1957) 148 Cal. App. 2d 639, 643, 307 P.2d 429]* .

A "bailor" is a party who bails or delivers goods to another, in the contract of bailment. A "bailee" is one to whom goods are bailed, the party to whom personal property is delivered under a contract of bailment [Black's Law Dictionary (7th ed. 1999) at 136, 137].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailments

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§ 93.12 Bailment as Contract

[1] In General

The general rule that the assent of both parties is necessary before a contract, either express or implied in fact, can come into existence is applicable to the ordinary case of a contract of bailment [*H.S. Crocker Co., Inc. v. McFaddin (1957) 148 Cal. App. 2d 639, 644, 307 P.2d 429]* . No bailment can be implied if it appears it was the intention of the parties as derived from their relationship to each other and from the circumstances of the case that the property was to be held by the party in possession in some capacity other than as a bailee [*H.S. Crocker Co., Inc. v. McFaddin (1957) 148 Cal. App. 2d 639, 644, 307 P.2d 429]* .

[2] Termination

Regardless of its expressed terms, any contract of bailment may be terminated at any time by the mutual consent of the parties [*Rackliff v. Coronet Constr. Co. (1958) 157 Cal. App. 2d 419, 424, 321 P.2d 50]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsImplied-in-Fact Contracts

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§ 93.13 Acceptance of Duties by Bailee

The duties and responsibilities of a bailee cannot be thrust on a person without his or her knowledge or consent, or against his or her protest, and the bailee is required to have voluntarily assumed custody and possession of the property in question [*Gordon H. Ball, Inc. v. Parreira (1963) 214 Cal. App. 2d 697, 703, 29 Cal. Rptr. 679* ; *H.S. Crocker Co., Inc. v. McFaddin (1957) 148 Cal. App. 2d 639, 644, 307 P.2d 429* ; *see, e.g., Sackett v. Public Storage Mgmt. (1990) 222 Cal. App. 3d 1088, 1089, 1092-1093, 272 Cal. Rptr. 284]* . That the acceptance of the bailee be actual is not required; one that is constructive or implied is sufficient, as when a person comes into actual possession and control of a chattel fortuitously or by mistake, or takes possession of goods left rightfully in place by their owner, and removes them to another place. Knowingly taking property into possession or control is ordinarily sufficient to establish an implied bailment, but in order to have that result, delivery is required to be made for the purpose of creating a bailment. Acceptance is not inferred unless there is something to show notice or knowledge on the part of an alleged bailee that goods are in fact in his or her possession, and that they are the property of the bailor [*Gordon H. Ball, Inc. v. Parreira (1963) 214 Cal. App. 2d 697, 703-704, 29 Cal. Rptr. 679]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 93.14 Bailee's Duties and Liabilities Regarding Third-Party Claims

When a professional bailee is presented with reasonably compelling evidence demonstrating a third party is entitled to possession of the property held by the bailee, the bailee must investigate the third-party claim. At a minimum, the bailee should ask the bailor whether the property may be released to the third party. If the bailor consents, the bailee should release the property to the third party. If the bailee is unable to obtain the bailor's consent, the bailee should file an interpleader action to adjudicate the third party's claim of possession. The bailee is ordinarily entitled to attorney's fees and costs in an interpleader action [*Messerall v. Fulwider (1988) 199 Cal. App. 3d 1324, 1327, 245 Cal. Rptr. 548* ; *see* Ch. 314, *Interpleader*]. The bailee cannot disregard the third party's claim, and if he or she does, and redelivers to the bailor, the bailee is responsible to the adverse claimant in conversion if that claim proves to be a just one [*Messerall v. Fulwider (1988) 199 Cal. App. 3d 1324, 1331, 245 Cal. Rptr. 548* ; *see* Ch. 150, *Conversion*].

If the bailee does not surrender possession to a third-party claimant who then brings a conversion action, the bailee must show that he or she had a right to possession of the property to successfully defeat that party's claim. Even when the bailee has a right to possession of the property due to a lien on it for storage or other charges, that lien will be sufficient to deny the owner's right to possession only until it is redeemed. When presented with an offer to pay outstanding charges made by a party claiming ownership, by which the lien would be redeemed, the bailee is entitled to retain the property for a reasonable time to allow investigation of that party's claim [*Messerall v. Fulwider (1988) 199 Cal. App. 3d 1324, 1330-1331, 245 Cal. Rptr. 548* ; *see Civ. Code §§ 2903, 2905*; *see generally* Ch. 342, *Liens and Wage Preferences*]. Whether or not the bailee has a lien on the property, the bailee may require a third-party claimant to provide proof of his or her claim. For example, a third-party claimant provided reasonably compelling proof when he submitted to the bailee a registration certificate in his name, a statement executed under penalty of perjury asserting his right to immediate possession, and a copy of the security agreement on which that right was founded. However, if the bailee undertakes no investigation at all, but insists on a court order establishing the third-party claimant's right to possession, that will be seen as an unjustified refusal to deliver possession, and the bailee will be liable for conversion [*Messerall v. Fulwider (1988) 199 Cal. App. 3d 1324, 1332, 245 Cal. Rptr. 548]* .

If the bailee surrenders possession to a third-party claimant, the bailee is relieved from all liability to the bailor, if the bailee proves that, without collusion for the purpose of obtaining an advantage, the bailee delivered the goods to a

third-party claimant, and that the third party is indeed the one rightfully entitled to them [*Messerall v. Fulwider (1988) 199 Cal. App. 3d 1324, 1331, 245 Cal. Rptr. 548]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewTortsIntentional TortsConversionGeneral OverviewTortsVicarious LiabilityBailees

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[Reserved]

§§ 93.15[Reserved]

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9-93 California Forms of Pleading and Practice--Annotated § 93.30

§ 93.30 Governing Statutes

The laws regulating deposits are set forth in *Civ. Code §§ 1813-1858.3*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailments

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9-93 California Forms of Pleading and Practice--Annotated § 93.31

§ 93.31 Definitions

A deposit may be for safekeeping or for exchange [*Civ. Code § 1813*]. The person giving is called the depositor, and the person receiving is called the depositary [*Civ. Code § 1814*]. However, courts applying *Civ. Code § 1813 et seq.* often use the common law terms--bailment, bailor, and bailee--instead of deposit, depositor, and depositary [*Gebert v. Yank (1985) 172 Cal. App. 3d 544, 551, 218 Cal. Rptr. 585]* . A deposit for safekeeping is one in which the depositary is bound to return the identical thing deposited [*Civ. Code § 1817*]. A deposit for exchange is one in which the depositary is only bound to return a thing corresponding in kind to that which is deposited [*Civ. Code § 1818*].

A deposit also may be voluntary or involuntary [*Civ. Code § 1813*]. A voluntary deposit is made by the depositor's giving to the depositary, with the latter's consent, the possession of personal property to keep for the benefit of the depositor or of a third person [*Civ. Code § 1814*]. An involuntary deposit is made either:

- By the accidental leaving or placing of personal property in the possession of any person, without negligence on the part of its owner [*Civ. Code § 1815(a)*];

- In cases of fire, shipwreck, inundation, insurrection, riot, or like extraordinary emergencies, by the owner of personal property committing it, out of necessity, to the care of any person [*Civ. Code § 1815(b)*];

- By the delivery to, or pick up by, and the holding of, a stray live animal by any person, or public or private entity [*Civ. Code § 1815(c)*]; or

- By the abandonment or leaving of a live animal, as proscribed by *Penal Code § 597.1* (providing a penalty for keeping an animal without proper care), in or about any premises or real property that the tenant or owner vacated on, or immediately preceding, the termination of a lease or other rental agreement or foreclosure of the property [*Civ. Code § 1815(d)*].

The person or private entity with whom a thing is involuntarily deposited is bound to take charge of it, if able to do so [

Civ. Code § 1816(a)].

Any person or private entity with whom a live animal is deposited in the manner described in *Civ. Code § 1815(d)* must immediately notify animal control officials for the purpose of retrieving the animal pursuant to *Penal Code § 597.1*. No new or additional civil or criminal liability is imposed on a depositary who complies with that requirement. Animal control officers who respond are entitled to exercise the right afforded them pursuant to *Penal Code § 597.1* to secure a lien for the purpose of recovering the costs of attempting to rescue the animal. A public agency or shelter where an abandoned animal is involuntarily deposited is bound to take charge of it, as provided in *Penal Code § 597.1*. The person in possession of the abandoned animal is subject to all local ordinances and state laws that govern the proper care and treatment of such an animal. The person or private entity that notifies animal control officials to retrieve the animal, or the successor property owner, will not be considered the keeper of the animal or the agent of the animal's owner as those terms are used in *Penal Code § 597.1* [*Civ. Code § 1816(b)-(e)*].

Civ. Code §§ 1815 and *1816* presuppose the express or implicit acceptance of the personal property involved, in order to make the depositary liable for its care. The adjective "involuntary" qualifying the word "deposit" in *Civ. Code §§ 1815* and *1816* indicates the assumption that the deposit is involuntarily made rather than involuntarily received [*Gordon H. Ball, Inc. v. Parreira (1963) 214 Cal. App. 2d 697, 702, 29 Cal. Rptr. 679]* . For instance, the owner of a self-storage facility did not become an involuntary bailee of the property stored in a leased unit by placing a lock on the leased unit after it had been vandalized, then immediately notifying the occupant in writing to inspect the unit for stolen items and to replace the lock with one of the occupant's locks, as was required by the lease agreement. The owner's actions were not consistent with consent to the duties of an involuntary bailee but instead were consistent with the terms of the lease agreement. Thus, the owner had no liability for subsequent theft of items from the unit [*Sackett v. Public Storage Mgmt. (1990) 222 Cal. App. 3d 1088, 1089, 1092-1093, 272 Cal. Rptr. 284]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsVicarious LiabilityBaileesContracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsLease AgreementsGeneral Overview

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§ 93.32 Deposits for Keeping

[1] Duties of Depositor

A depositor must indemnify the depositary [*Civ. Code § 1833*]:

- For all damage caused to the depositary by the defects or vices of the thing deposited; and
- For all expenses necessarily incurred by the depositary about the thing, other than such expenses as are involved in the nature of the undertaking.

[2] Service Performed by Depositary

Insofar as any service is rendered by a depositary, or required from a depositary, the depositary's duties and liabilities are prescribed by *Civ. Code § 2019 et seq.* (services and employment) [*Civ. Code § 1839*].

[3] Duties of Depositary

[a] In General

A depositary may not use the thing deposited, or permit it to be used, for any purpose, without the consent of the depositor. The depositary may not, if it is purposely fastened by the depositor, open it without the consent of the latter, except in case of necessity [*Civ. Code § 1835*]. If a thing is lost or injured during its deposit, and the depositary refuses to inform the depositor of the circumstances under which the loss or injury occurred, as far as the depositary has information concerning them, or willfully misrepresents the circumstances to the depositor, the depositary is presumed to have willfully or by gross negligence permitted the loss or injury to occur [*Civ. Code § 1838*].

If a thing deposited is in actual danger of perishing before instructions can be obtained from the depositor, the depositary may sell it for the best price obtainable, and retain the proceeds as a deposit, giving immediate notice of the proceedings to the depositor [*Civ. Code § 1837*].

[b] To Redeliver

[i] One Owner

A depositary must deliver the thing to the person for whose benefit it was deposited, on demand, whether the deposit was made for a specified time or not, unless the depositary has a lien on the thing deposited, or has been forbidden or prevented from doing so by the real owner, or by the act of the law, and has given the notice required in *Civ. Code § 1825* [*Civ. Code § 1822*; *see § 93.32[3][c]*]. A depositary is not bound to deliver a thing deposited without demand, even when the deposit is made for a specified time [*Civ. Code § 1823*]. A depositary must deliver the thing deposited at the depositary's residence or place of business, as may be most convenient for the depositary [*Civ. Code § 1824*].

[ii] Two or More Owners

If a thing deposited is owned jointly or in common by persons who cannot agree on the manner of its delivery, the depositary may deliver to each a proper share, if it can be done without injury to the thing [*Civ. Code § 1827*].

When a deposit is made in the name of two or more persons, deliverable or payable to either or to their survivor or survivors, the deposit or any part, or increase, may be delivered or paid to either of the persons, or to the survivor or survivors, in due course of business [*Civ. Code § 1828*].

[c] Notice of Adverse Interest

A depositary must give prompt notice, to the person for whose benefit the deposit was made, of any proceedings taken adversely to that person's interest in the thing deposited, which may tend to excuse the depositary from delivering the thing [*Civ. Code § 1825*].

A depositary who believes that the thing deposited is wrongfully detained from its true owner, may give that person notice of the deposit; and if within a reasonable time afterwards that person does not claim it, and sufficiently establish a right to it, and indemnify the depositary against the claim of the depositor, the depositary is exonerated from liability to the person to whom the notice was given, on returning the thing to the depositor, or assuming, in good faith, a new obligation and changing position in respect to the thing, to the depositary's prejudice [*Civ. Code § 1826*].

[4] Liability of Depositary

A depositary is liable for any damage happening to the thing deposited, during the depositary's wrongful use of it, unless the damage must inevitably have happened even though the property had not been thus used [*Civ. Code § 1836*]. The liability of a depositary for negligence cannot exceed the amount that the depositary is informed by the depositor, or has reason to suppose, the thing deposited to be worth [*Civ. Code § 1840*]. *Civ. Code § 1840* has no application when the value of goods bailed is not disclosed by the owner or when the bailee has no reason to suppose that they have any special value. Under these circumstances, the measure of damages is the actual value of the goods [*Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 855, 88 Cal. Rptr. 39* ; *Greer v. Los Angeles Athletic Club (1927) 84 Cal. App. 272, 281, 258 P. 155* ; *but see Homan v. Burkhart (1930) 108 Cal. App. 363, 368, 291 P. 624]* .

Although loss of profits is the proper element of damages in respect of the breach of certain contracts when there is a showing of reasonable probability of profits, there is no such assumption in respect to bailments. *Civ. Code § 1840* provides the measure of damages [*Greenberg Bros., Inc. v. Ernest W. Hahn, Inc. (1966) 246 Cal. App. 2d 529, 533-534, 54 Cal. Rptr. 770]* .

Legal Topics:

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

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§ 93.33 Gratuitous Deposits

A gratuitous deposit is a deposit for which the depositary receives no consideration beyond the mere possession of the thing deposited [*Civ. Code § 1844*]. An involuntary deposit is gratuitous, the depositary being entitled to no reward. However, an involuntary depositary of any live animal may accept advertised rewards or rewards freely offered by the owner of the animal [*Civ. Code § 1845*].

A gratuitous depositary must use at least slight care for the preservation of the thing deposited [*Civ. Code § 1846(a)*]. A gratuitous depositary of a living animal must provide the animal with necessary and prompt veterinary care, adequate nutrition and water, and shelter, and must treat it humanely and, if the animal has any identification, make reasonable attempts to notify the owner of the animal's location. Any gratuitous depositary that does not have sufficient resources or desire to provide that care must promptly turn the animal over to an appropriate care facility [*Civ. Code § 1846(b)*]. If the gratuitous depositary of a living animal is a public pound, shelter operated by a society for the prevention of cruelty to animals, or humane shelter, the depositary must comply with all other requirements of the Food and Agricultural Code regarding the impounding of live animals [*Civ. Code § 1846(c)*].

The duties of a gratuitous depositary cease when the depositary restores the thing deposited to its owner, or gives reasonable notice to the owner to remove it and the owner fails to do so within a reasonable time. An involuntary depositary on account of emergency [*see Civ. Code § 1815(b)*], however, may not give notice until the emergency that gave rise to the deposit is past. Moreover, the power to give notice so as to relieve the depositary of duties is not exercisable by a public pound, a shelter operated by a society for the prevention of cruelty to animals, or a humane shelter, with respect to the involuntary deposit of a live animal. On the contrary, the duty to provide care, as required by *Civ. Code § 1846*, continues until the public pound or private shelter is lawfully relieved of responsibility for the animal [*Civ. Code § 1847*].

However, a deposit, otherwise gratuitous, which is a mere incident to the conduct of a business from which the depositary derives profits (such as where made to induce a purchase), is considered sufficient to give rise to the same duty of reasonable care on the part of the depositary as in the situation of the ordinary bailment for hire [*Tierstein v. Licht (1959) 174 Cal. App. 2d 835, 842, 345 P.2d 341* ; *see also Greenberg Bros., Inc. v. Ernest W. Hahn, Inc. (1966)*

246 Cal. App. 2d 529, 532, 54 Cal. Rptr. 770 ; *Homan v. Burkhart (1930) 108 Cal. App. 363, 366, 291 P. 624* ; *Greer v. Los Angeles Athletic Club (1927) 84 Cal. App. 272, 283, 258 P. 155* (athletic club and member as guest in its clubhouse)].

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§ 93.34 Storage (Deposits for Hire)

A deposit that is not gratuitous is called storage. The depositary in this case is called a depositary for hire [*Civ. Code § 1851*]. A depositary for hire must use at least ordinary care for the preservation of the thing deposited [*Civ. Code § 1852*].

In an action for breach of a contract of deposit for hire, the plaintiff must establish the existence of the deposit and the defendant's failure to redeliver the thing deposited. If the defendant is relying on the defense that the loss or damage to the thing deposited occurred despite his or her use of ordinary care, he or she has the burden of showing freedom from fault [*Gebert v. Yank (1985) 172 Cal. App. 3d 544, 551-553, 218 Cal. Rptr. 585]* . Thus, one court of appeal held that when the plaintiff had pleaded alternative causes of action for negligence and for breach of the deposit contract, it was not inconsistent for the jury to find for defendant on the negligence cause of action but against the defendant on the contract cause of action, because in the negligence cause of action the evidence supported the conclusion that the plaintiff had not established the defendant's negligence, whereas in the contract cause of action the same evidence supported the conclusion that the defendant had not established his freedom from fault [*Gebert v. Yank (1985) 172 Cal. App. 3d 544, 554, 218 Cal. Rptr. 585]* .

In the absence of an agreement as to the length of time during which a deposit is to continue, it may be terminated by the depositor at any time, and by the depositary on reasonable notice [*Civ. Code § 1854*]. Notwithstanding an agreement respecting the length of time during which a deposit is to continue, it may be terminated by the depositor on paying all that would become due to the depositary in case of the deposit so continuing [*Civ. Code § 1855*].

A depositary for hire has a lien for storage charges and for advances and insurance incurred at the request of the bailor, and for money necessarily expended in and about the care, preservation, and keeping of the property stored, and also has a lien for money advanced at the request of the bailor, to discharge a prior lien, and for the expenses of a sale when default has been made in satisfying a valid lien. The rights of the depositary for hire to this lien are regulated by *Civ. Code §§ 2872 et seq.* (liens) [*Civ. Code § 1856*].

If from any cause other than want of ordinary care and diligence, a depositary for hire is unable to deliver perishable

property, baggage, or luggage received for storage, or to collect charges for storage the depositary may cause the property to be sold, in open market, to satisfy a lien for storage. However, no property except perishable property is to be sold on which storage charges are not due and unpaid for one year at the time of the sale [*Civ. Code § 1857*].

Legal Topics:

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§ 93.35 Deposits of Animals

A depositary of living animals must provide the animals with necessary and prompt veterinary care, nutrition, and shelter, and treat them kindly. Any depositary that fails to perform these duties may be liable for civil damages as provided by law [*Civ. Code § 1834*]. It is the policy of the state that no adoptable animal should be euthanized if it can be adopted into a suitable home. An adoptable animal is only an animal eight weeks of age or older that, at or after the time the animal was impounded or otherwise taken into possession, manifested no sign of a behavioral or temperamental defect that could pose a health or safety risk or otherwise make the animal unsuitable for placement as a pet and manifested no sign of disease, injury, or congenital or hereditary condition that adversely affects the health of the animal or that is likely to adversely affect the animal's health in the future [*Civ. Code § 1834.4(a)*]. Further, it is the policy of the state that no treatable animal should be euthanized. However, this policy, by itself, may not be the basis of liability for damages regarding euthanasia. A treatable animal is any animal that is not adoptable but could become adoptable with reasonable efforts [*Civ. Code § 1834.4(b)*].

Notwithstanding any other provision of law, whenever any animal is delivered to any veterinarian, dog kennel, cat kennel, pet grooming parlor, animal hospital, or any other animal care facility pursuant to written or oral agreement, and the owner of the animal does not pick up the animal within 14 calendar days after the day the animal was due to be picked up, the animal may be deemed to be abandoned. The person into whose custody the animal was placed for care must first try for a period of not less than 10 days to find a new owner for the animal, and, if unable to place the animal with a new owner, must thereafter humanely destroy the animal so abandoned [*Civ. Code § 1834.5*].

If an animal so abandoned was left with a veterinarian or with a facility that has a veterinarian, and a new owner cannot be found, the veterinarian must humanely destroy the animal [*Civ. Code § 1834.5*].

There must be a notice posted in a conspicuous place, or in conspicuous type in a written receipt given, to warn each person depositing an animal at such animal care facilities of these statutory provisions [*Civ. Code § 1834.5*].

An abandoned animal, as described above, must not be used for scientific, or any other type of experimentation, nor may an abandoned animal be turned over to a pound or animal regulation department of a public agency [*Civ. Code §*

1834.6]. For further discussion of the injury to and conversion of animals, see Ch. 23, *Animals: Civil Liability* .

In the absence of a different agreement or usage, a depositary for hire is entitled to one week's hire for the sustenance and shelter of living animals during any fraction of a week, and to half a month's hire for the storage of any other property during any fraction of a half month [*Civ. Code § 1853*].

The duty of ordinary care and burden of proof imposed on depositories for hire was applied in the case of a bloodstock agent who received thoroughbred horses for the purpose of sale. The court rejected the argument that different rules should be adopted with respect to deposits of animals, reasoning that the legislature was the proper forum to effect such a change [*Gebert v. Yank (1985) 172 Cal. App. 3d 544, 553, 218 Cal. Rptr. 585]* .

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§ 93.36 Deposits for Repair, Alteration, Sale

[1] In General

A depositary entrusted with merchandise for the purpose of repair is deemed a depositary for hire and is not liable for loss or injury resulting without negligence on his part [*Gordon H. Ball, Inc. v. Parreira (1963) 214 Cal. App. 2d 697, 703, 29 Cal. Rptr. 679* ; *Travelers Fire Ins. Co. v. Brock & Co. (1938) 30 Cal. App. 2d 112, 114, 85 P.2d 905]* .

Under the law regulating these deposits [*Civ. Code § 1858*]:

- "Customer" means a natural person who deals with a depositary;

- "Depositary" means a person who in the ordinary course of business regularly receives property from customers for the purpose of repair or alteration; and

- "Property" means personal property used for or intended for personal, family, or household purposes, but does not include any motor vehicle within the meaning of *Veh. Code § 415* (motor vehicle defined).

Every depositary is required, on accepting property from a customer, to present the customer with a written receipt that includes a statement, if it is the case, that the deposited property is not insured or protected to the amount of the actual cash value by the depositary against loss occasioned by theft, fire, and vandalism while the property remains with the depositary [*Civ. Code § 1858.1*]. Every depositary who fails to furnish this receipt, or a statement as required under *Civ. Code § 1858.1*, or who makes any misrepresentation in the receipt, is strictly liable to the customer for any loss occasioned by theft, fire, or vandalism while the property remains with the depositary and must forfeit any lien or other right to hold the property arising from services rendered in holding, repairing, altering, or selling the property. When liability is imposed on a depositary under this rule it is to be deemed as having been imposed for the commission of a willful act for the purposes of *Ins. Code § 533* (willful act of insured; negligence) [*Civ. Code § 1858.2*].

If the depositary by insurance or by self-insurance does protect property deposited by customers for loss or damage

occasioned by theft, fire, or vandalism while the property remains with the depositary, the depositary need not make or deliver to the customer any notice of the fact [*Civ. Code § 1858.3*].

[2] Repairman's Lien

If the legal possessor of property brings it to a repairman who repairs it at the possessor's request, the repairman has a lien under *Civ. Code § 3051* (artisan and service lien on personalty for labor, storage, repair, or protection) [*Goodman v. Anglo-Cal. Trust Co. (1923) 62 Cal. App. 702, 704, 217 P. 1078* ; *but see Hackett v. California Laundry (1935) 7 Cal. App. 2d Supp. 757, 45 P.2d 833* (launderer's lien requires ownership by bailor for enforcement)]. Unlike other depositaries, a depositary who has a lien on the thing deposited is not required to deliver it on demand [*Civ. Code § 1822*].

The lien is dependent on possession of the property by the lien claimant and terminates when possession is voluntarily relinquished. It is not revived on regaining possession except in those instances when property is released to its owner on agreement that the lien is to be revived when possession is returned to the lien claimant [*Jess H. Young & Son, Inc. v. Victory Tool & Die Co. (1961) 189 Cal. App. 2d 824, 827-828, 11 Cal. Rptr. 516]* .

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§ 93.37 Keepers of Residences

The liability of an innkeeper, hotel keeper, operator of a licensed hospital, rest home, or sanitarium, furnished apartment house keeper, furnished bungalow court keeper, boarding house or lodging house keeper, for losses of or injuries to personal property, is that of a depositary for hire. There are dollar limits, specified in *Civ. Code § 1859*, for maximum liability in the aggregate, maximum liability for each trunk, valise, traveling bag, box, bundle, or package, and the contents, and on maximum liability for all other personal property of any kind, unless the depositary has consented in writing with the owner to assume a greater liability [*Civ. Code § 1859*].

If an innkeeper, hotel keeper, operator of a licensed hospital, rest home or sanitarium, boarding house or lodging house keeper, keeps a fireproof safe and gives notice to a guest, patient, boarder, or lodger, either personally or by putting up a printed notice in a prominent place in the office or the room occupied by the guest, patient, boarder, or lodger, that the keeper or operator keeps a safe and will not be liable for money, jewelry, documents, furs, fur coats, and fur garments, or other articles of unusual value and small compass, unless placed in the safe, then the keeper or operator is not liable for any loss of or injury to those articles not deposited to be placed in the safe, except insofar as the keeper's or operator's own acts contributed to the loss or injury, nor in any case for more than the sum specified in *Civ. Code § 1860* for any or all of the property of any individual guest, patient, boarder, or lodger, unless the keeper or operator has given a receipt in writing to the guest, patient, boarder, or lodger [*Civ. Code § 1860*].

A receipt, as used in *Civ. Code § 1860* is nothing more in its common use than the bare acknowledgement of having received something. A writing is a receipt as a matter of law if all parties considered it to be a receipt [*see Greer v. Los Angeles Athletic Club (1927) 84 Cal. App. 272, 275-276, 258 P. 155]* . If the depositor has deposited goods of unusual value, however, the receipt must be a reflection on the part of the depositary of an awareness of the unusual value of the deposit in order for there to be liability greater than the specified sum under *Civ. Code § 1860* [*see Providence Wash. Ins. Co. v. Hotel Marysville (1943) 60 Cal. App. 2d 338, 346-348, 140 P.2d 698]* . For a discussion of the liability of an innkeeper and innkeeper's liens, see Ch. 297, *Hotels and Motels* .

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§ 93.38 Parking Lots

[1] Bailee's Standard of Care

If the parking lot operator charges a fee and the vehicle and keys are left with the attendant, a bailment for hire arises, and the parking lot operator must exercise reasonable care to preserve the vehicle against loss or damage [*Beetson v. Hollywood Athletic Club (1930) 109 Cal. App. 715, 718, 293 P. 821* (citing *Civ. Code §§ 1851, 1852*)].

[2] Liability of Bailee

If, while in the possession of the bailee, the vehicle is injured or lost as a result of the bailee's failure to exercise reasonable care, the bailee for hire will be liable for negligence. In such a case, it is not enough for the bailee to show that the property was stolen, lost, or destroyed. Rather, to avoid liability, the bailee must show that the loss occurred without the bailee's negligence [*Downey v. Martin Aircraft Serv. (1950) 96 Cal. App. 2d 94, 99-100, 214 P.2d 581]* . If the bailee delivers possession of the automobile to one other than the owner, or person entitled to its possession, the bailee is liable for conversion, even though the bailee acted innocently and by mistake [*see Byer v. Canadian Bank of Commerce (1937) 8 Cal. 2d 297, 299, 65 P.2d 67* (involving bonds deposited with bank)].

[3] Gratuitous Bailment

A bailee who receives no consideration beyond the mere possession of the vehicle is a gratuitous bailee [*see Civ. Code § 1844*]. Such a bailee must use at least slight care for the preservation of the deposited vehicle [*Civ. Code § 1846*].

[4] License Distinguished

If the driver parks a vehicle in a lot, locks the doors, carries away the keys, is given no parking ticket, and may remove the vehicle at will, the driver has merely a license to park the vehicle in the lot, and the parking lot operator is a licensor. As such, the parking lot operator assumes no responsibility for the safekeeping of the vehicle and is generally not liable for its damage or theft [*Porter v. Los Angeles Turf Club (1940) 40 Cal. App. 2d Supp. 840, 841-842 , 105 P.2d 956]* .

[5] Return of Vehicle to Intoxicated Bailor

A bailee has no duty to withhold automobiles from intoxicated bailors [*Knighten v. Sam's Parking Valet (1988) 206 Cal. App. 3d 69, 73, 253 Cal. Rptr. 365]* . There is no special relationship between the bailee and the potential victim that would give rise to that duty. Nor would it be appropriate to impose such a duty on bailees when police officers who temporarily detain drunk drivers are not liable for allowing them to continue driving [*Knighten v. Sam's Parking Valet (1988) 206 Cal. App. 3d 69, 74, 253 Cal. Rptr. 365]* .

In returning a thing to the bailor, a bailee does not entrust it. Thus, a bailee is not liable for negligent entrustment based on the return of a vehicle to an obviously inebriated bailor [*Knighten v. Sam's Parking Valet (1988) 206 Cal. App. 3d 69, 75, 253 Cal. Rptr. 365]* . This holding is not based on a bailee's obligation to return the vehicle to the customer, because under these circumstances, a bailee could lawfully refuse to return a vehicle to a bailor who was not fit to drive. Any citizen has the right to interfere with an attempt to commit a crime, which drunk driving obviously is [*Veh. Code § 23152(a)*; *Knighten v. Sam's Parking Valet (1988) 206 Cal. App. 3d 69, 75-76, 253 Cal. Rptr. 365* ; *see Gov. Code § 13970* (immunity to persons whose direct action prevents commission of crime against person or property of another)]. The court was unwilling to impose a duty to withhold the vehicle based on a bailee's right to do so because the imposition of civil liability in these circumstances would lead to unforeseeable consequences and because it would be inconsistent with the public policy expressed in *Bus. & Prof. Code § 25602(c)* that the consumption of alcoholic beverages is the proximate cause of injuries inflicted by an intoxicated person [*Knighten v. Sam's Parking Valet (1988) 206 Cal. App. 3d 69, 76, 253 Cal. Rptr. 365]* .

[6] Contractual Limitation of Liability

While the operator of a parking lot may limit liability by a contract entered into at the time the vehicle is deposited with the operator, the contract, if printed, must conform to certain formal requisites prescribed by *Civ. Code § 1630* in order to be binding. Thus, unless (1) the contract provisions are printed in type no smaller than prescribed, (2) the words "This contract limits our liability--read it" appear at the top of the contract in capital letters of at least a prescribed size, and (3) a copy of the contract printed in large type is conspicuously posted at each entrance to the parking lot, the attempt of the parking lot operator to limit liability will be ineffectual [*California State Automobile Assn. Inter-Insurance Bureau v. Barrett Garages, Inc. (1967) 257 Cal. App. 2d 71, 79-81, 64 Cal. Rptr. 699]* .

Moreover, the mere delivery of the contract of bailment or claim check does not, as a matter of law, create a contract embodying the matter printed on it. It is a question of fact in each case as to whether there was the necessary consent by the bailor to be bound by these contractual provisions. In other words, to impose liability it must be determined that a prudent person, acting reasonably, would have read the exculpatory provisions in question [*California State Automobile Assn. Inter-Insurance Bureau v. Barrett Garages, Inc. (1967) 257 Cal. App. 2d 71, 79, 64 Cal. Rptr. 699]* .

The provisions of any contract of bailment for parking or storage of an automobile may not exempt the bailee from liability for the theft of any automobile when it is parked or stored with the bailee and the keys are required to be left in the automobile [*Civ. Code § 1630.5*].

Legal Topics:

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§ 93.39 Finder as Depositary for Owner

Any person who finds a thing lost is not bound to take charge of it unless the person is otherwise required to do so by contract or law; but on taking charge of it, that person becomes a depositary for the owner, with the rights and obligations of a depositary for hire. Any person or any public or private entity that finds and takes possession of any money, goods, things in action, or other personal property, or saves any domestic animal from harm, neglect, drowning, or starvation, must, within a reasonable time, inform the owner, if known, and make restitution without compensation, except a reasonable charge for saving and taking care of the property. Any person who takes possession of a live domestic animal must provide for humane treatment of the animal [*Civ. Code § 2080*].

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[Reserved]

§§ 93.40[Reserved]

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§ 93.60 Governing Statutes

Loans for use are governed by *Civ. Code § 1884 et seq.*

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§ 93.61 Definitions

A loan for use is a contract by which one gives to another the temporary possession and use of personal property, and the latter agrees to return the same thing to the former at a future time, without reward for its use [*Civ. Code § 1884*]. Thus, loans of $20 bills by the chief executive officer of a company for its use in automated teller machines (ATMs) it operated could not be a "loan for use" because the bills were clearly intended to become the property of the customers who used the ATMs [*see Credit Managers' Assn. v. Brubaker (1991) 233 Cal. App. 3d 1587, 1592-1593, 285 Cal. Rptr. 417* (also disqualified as loan for use because chief executive officer charged company interest)]. A loan for use does not transfer the title to the thing; and all its increase during the period of the loan belongs to the lender [*Civ. Code § 1885*].

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§ 93.62 Duties of Borrower

[1] Care

A borrower for use must use great care for the preservation in safety and in good condition of the thing lent [*Civ. Code § 1886*]. A borrower for use is bound to have and to exercise such skill in the care of the thing lent as the borrower causes the lender to believe the borrower to possess [*Civ. Code § 1888*].

[2] Repair and Other Expenses

The borrower must repair all deteriorations or injuries to the thing lent, which are occasioned by the borrower's negligence, however slight [*Civ. Code § 1889*].

The borrower must also bear all other expenses during the loan, except those that are necessarily incurred by the borrower to preserve the thing lent from unexpected and unusual injury. For these latter expenses the borrower is entitled to compensation for the lender, who may, however, exonerate himself or herself by surrendering the thing to the borrower [*Civ. Code § 1892*].

[3] Permissible Uses; Third Parties

The borrower may use the thing only for such purposes as the lender might reasonably anticipate at the time of lending [*Civ. Code § 1890*]. The borrower must not part with it to a third person, without the consent of the lender [*Civ. Code § 1891*].

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§ 93.63 Obligations of Lender

[1] Liability for Defects

The lender of a thing for use must indemnify the borrower for damages caused by defects or vices in it, which the lender knew at the time of lending, and concealed from the borrower [*Civ. Code § 1893*].

[2] Inspection and Repair

In the absence of a special agreement, the lender is under no duty or obligation to inspect or repair property while it is in the possession of the borrower, and if there is a contract to repair on notice that repairs are necessary, the duty to repair does not arise until notice is given [*Dickson v. Southern Cal. Edison Co. (1955) 136 Cal. App. 2d 85, 88, 288 P.2d 310]* .

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9-93 California Forms of Pleading and Practice--Annotated § 93.64

§ 93.64 Return

A thing lent for a specified time or purpose is to be returned to the lender without demand as soon as the time has expired or the purposes has been accomplished [*Civ. Code § 1895*]. If the lender demands return of the thing before the expiration of the agreed period, the borrower is required to return it. However, if on faith of the agreement the borrower has made such arrangements that a return of the thing before the period agreed on would cause the borrower loss, exceeding the benefit derived by the borrower from the loan, the lender must indemnify the borrower for the loss, if the lender compels the return, and the borrower has not in any manner violated his or her duty [*Civ. Code § 1894*].

When no time or purpose is specified, a thing borrowed is required to be returned on demand [*Civ. Code § 1895*].

The borrower of a thing must return it to the lender, at the place contemplated by the parties at the time of lending; or if no particular place was contemplated, then at the place where it was at that time [*Civ. Code § 1896*].

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[Reserved]

§§ 93.65[Reserved]

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9-93 California Forms of Pleading and Practice--Annotated § 93.80

§ 93.80 Bailor's Liability

[1] In General

The bailor of a chattel alleged to have caused injury is liable when there has been a breach of the bailor's duty running in favor of the injured person. Privity of contract is not required. Thus, the bailor may be liable for injury to a third person caused by an article that, if negligently manufactured or entrusted to a third party, is reasonably certain to place life and limb in peril [*Di Muro v. Masterson Trusafe Steel Scaffold Co. (1961) 193 Cal. App. 2d 784, 790, 14 Cal. Rptr. 551* ; *Zucker v. Passetti Trucking Co. (1961) 191 Cal. App. 2d 260, 265, 12 Cal. Rptr. 692* (negligently maintained vehicle)].

[2] Loan of Automobile

The common law rule that a bailor of an object is not responsible for negligence of the bailee has been changed by *Veh. Code § 17150 et seq.*, which impose liability on the nonnegligent letter of an automobile for the negligence of an operator to whom he or she has entrusted possession and control of his or her vehicle [*Baugh v. Rogers (1944) 24 Cal. 2d 200, 208-209, 148 P.2d 633]* .

For a discussion of the liability of an automobile owner for the negligence of an operator under *Veh. Code § 17150 et seq.* and under the doctrine of negligent entrustment, see *Ch. 82, Automobiles: Causes of Action, §§ 82.11* and *82.16*.

[3] Strict Liability

The doctrine of strict liability in tort is applicable to professional or commercial bailors of personal property in the same manner as it is applicable to the sellers of that property [*Price v. Shell Oil Co. (1970) 2 Cal. 3d 245, 250, 253-254, 85 Cal. Rptr. 178, 466 P.2d 722]* . This doctrine has been extended to third party bystanders [*Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 586, 75 Cal. Rptr. 652, 451 P.2d 84]* .

Legal Topics:

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[Reserved]

§§ 93.81[Reserved]

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§ 93.100 Governing Statutes

The rental of passenger vehicles generally is governed by *Civ. Code § 1936*. The legislation that enacted *Civ. Code § 1936* provides that if any provision of *Civ. Code § 1936* or any application of *Civ. Code § 1936* to any person or circumstance is held unconstitutional, the remainder of *Civ. Code § 1936* and the application of its provisions to other persons and circumstances will not be affected thereby [Stats. 1988, ch. 1523, § 2].

In addition to the general statute:

- *Civ. Code § 1936.05* creates an exception in order to facilitate commercial arrangements between rental companies and businesses (which are outside the purview of consumer protection) [*see § 93.106[4]*].

- *Civ. Code § 1936.1* imposes a disclosure requirement for renting a 15-passenger van [*see § 93.108*].

Civ. Code §§ 1936.01 and *1936.015* concern the practice of passing through to customers, by separately stated charges, a car rental company's costs attributable to airport concession fees, tourism commission assessments, and a temporary increase in the vehicle license fee [*see § 93.106[5]*]. Each of those code sections is subject to becoming inoperative on the occurrence of a specified event [*see § 93.106[5][a]*].

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9-93 California Forms of Pleading and Practice--Annotated § 93.101

§ 93.101 Definitions

[1] Rental Company

The term "rental company" means any person or entity in the business of renting passenger vehicles to the public [*Civ. Code § 1936(a)(1)*]. A company that rents trucks that are not passenger vehicles as defined in *Civ. Code § 1936* is not a "rental company" for purposes of that section [*Aron v. U-Haul Co. of California (2006) 143 Cal. App. 4th 796, 804, 49 Cal. Rptr. 3d 555]* .

[2] Renter

The term "renter" means any person in any manner obligated under a contract for the lease or hire of a passenger vehicle from a rental company for a period of less than 30 days [*Civ. Code § 1936(a)(2)*].

[3] Authorized Driver

The term "authorized driver" means [*Civ. Code § 1936(a)(3)*]:

- The renter;
- The renter's spouse if that person is a licensed driver and satisfies the rental company's minimum age requirement;
- The renter's employer or coworker if they are engaged in a business activity with the renter, are licensed drivers, and satisfy the rental company's minimum age requirement; and
- Any person expressly listed by the rental company on the renter's contract as an authorized driver.

[4] Customer Facility Charge

The term "customer facility charge" means a fee required by an airport to be collected by a rental company from a renter, when the fee is intended to finance, design, and construct consolidated airport car rental facilities or to finance, design, construct, and provide common use transportation systems that move passengers between airport terminals and those consolidated car rental facilities [*Civ. Code § 1936(a)(4)(A)*].

[5] Damage Waiver

The term "damage waiver" means a rental company's agreement not to hold a renter liable for all or any portion of any damage or loss related to the rented vehicle, any loss of use of the rented vehicle, or any storage, impound, towing, or administrative charges [*Civ. Code § 1936(a)(5)*].

[6] Electronic Surveillance Technology

The term "electronic surveillance technology" means a technological method or system used to observe, monitor, or collect information, including telematics, global positioning system (GPS), wireless technology, or location-based technologies. The term does not include event-data recorders (EDR), sensing and diagnostic modules (SDM), or other systems that are used either (1) for the purpose of identifying, diagnosing, or monitoring functions related to the potential need to repair, service, or perform maintenance on the rental vehicle, or (2) as part of the vehicle's airbag sensing and diagnostic system in order to capture safety systems-related data for retrieval after a crash has occurred or in the event that the collision sensors are activated to prepare the decision-making computer to make the determination to deploy or not to deploy the airbag [*Civ. Code § 1936(a)(6)*].

[7] Estimated Time for Replacement

The phrase "estimated time for replacement" means the number of hours of labor, or fraction thereof, needed to replace damaged vehicle parts as set forth in collision damage estimating guides generally used in the vehicle repair business and commonly known as "crash books" [*Civ. Code § 1936(a)(7)*].

[8] Estimated Time for Repair

The phrase "estimated time for repair" means a good faith estimate of the reasonable number of hours of labor, or fraction thereof, needed to repair damaged vehicle parts [*Civ. Code § 1936(a)(8)*].

[9] Passenger Vehicle

The term "passenger vehicle" means a passenger vehicle as defined in *Veh. Code § 465* [*Civ. Code § 1936(a)(10)*].

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9-93 California Forms of Pleading and Practice--Annotated § 93.102

§ 93.102 Maximum Liability of Renter

[1] In General

Except as limited by *Civ. Code § 1936(c)* [*see § 93.102[3]*], a rental company and a renter may agree that the renter will be responsible for no more than all of the following [*Civ. Code § 1936(b)*]:

- Physical or mechanical damage to the rented vehicle up to its fair market value, as determined in the customary market for the sale of that vehicle, resulting from collision regardless of the cause of the damage;

- Loss due to theft of the rented vehicle up to its fair market value, as determined in the customary market for the sale of that vehicle, provided that the rental company establishes by clear and convincing evidence that the renter or the authorized driver failed to exercise ordinary care while in possession of the vehicle;

- Physical damage to the rented vehicle up to its fair market value, as determined in the customary market for the sale of that vehicle, resulting from vandalism occurring after, or in connection with, the theft of the rented vehicle; however, the renter has no liability for any damage due to vandalism if the renter would have no liability for theft, as described immediately above;

- Physical damage to the rented vehicle up to a total of $500 resulting from vandalism unrelated to the theft of the rented vehicle;

- Actual charges for towing, storage, and impound fees paid by the rental company if the renter is liable for damage or loss; and

- An administrative charge that includes the cost of appraisal and all other costs and expenses incident to the damage, loss, repair, or replacement of the rented vehicle, and that is limited as described in *Civ.*

Code § 1936(c)(6) [*see § 93.102[3][e]*].

[2] Liability for Theft

The renter is presumed to have no liability for any loss from theft if both of the following conditions are satisfied [*Civ. Code § 1936(b)(2)*]:

- An authorized driver has possession of the ignition key furnished by the rental company, or an authorized driver establishes that the ignition key furnished by the rental company was not in the vehicle at the time of the theft.

- An authorized driver files an official report of the theft with the police or other law enforcement agency within 24 hours of learning of the theft and reasonably cooperates with the rental company and the police or other law enforcement agency in providing information concerning the theft.

This presumption is a presumption affecting the burden of proof, which the rental company may rebut by establishing that an authorized driver committed, or aided and abetted the commission of, the theft [*Civ. Code § 1936(b)(2)*].

When a vehicle rental company brings an action against a renter to recover for loss due to theft, it must do so in the county where the renter resides, or, if the renter does not reside in California, in the jurisdiction where the renter resides [*Civ. Code § 1936(r)*].

[3] Liability for Damages to Rented Vehicle

[a] Components

The total amount of the renter's liability to the rental company resulting from damage to the rented vehicle may not exceed the sum of the following [*see Civ. Code § 1936(c)*]:

- The estimated costs of replacement parts;

- The estimated costs of labor necessary to repair and replace damaged parts;

- Towing, storage, and impound fees actually paid by the rental company [*Civ. Code § 1936(c)(5)*]; and

- An administrative fee limited as described in *Civ. Code § 1936(c)(6)*.

A claim against a renter resulting from damage or loss, excluding loss of use, to a rental vehicle must be reasonably and rationally related to the actual loss incurred. A rental company must mitigate damages when possible, and may not assert or collect any claim for physical damage that exceeds the actual costs of the repairs performed or the estimated cost of repairs, if the rental company chooses not to repair the vehicle, including all discounts and price reductions. If the vehicle is a total-loss vehicle, the claim must not exceed the total-loss vehicle value established in accordance with procedures that are customarily used by insurance companies when paying claims on total-loss vehicles, less the proceeds from salvaging the vehicle, if those proceeds are retained by the rental company [*Civ. Code § 1936(d)(3)*].

If insurance coverage exists under the renter's applicable personal or business insurance policy, and the coverage is confirmed during regular business hours, the renter may require that the rental company submit any claims to the renter's applicable personal or business insurance carrier. The rental company must not make any written or oral representations that it will not present claims or negotiate with the renter's insurance carrier. Confirmation of coverage

includes telephone confirmation from insurance company representatives during regular business hours. On the renter's request and after confirmation of coverage, the amount of claim must be resolved between the insurance carrier and the rental company. The renter will remain responsible for payment to the rental company for any loss sustained that the renter's applicable personal or business insurance policy does not cover [*Civ. Code § 1936(d)(4)*].

[b] Calculating Cost of Replacement Parts

In calculating the estimated cost that the rental company would have to pay to replace damaged vehicle parts, all discounts and price reductions or adjustments that are, or will be, received by the rental company must be subtracted from the estimate to the extent not already incorporated in the estimate or otherwise promptly credited or refunded to the renter [*Civ. Code § 1936(c)(1)*].

[c] Calculating Cost of Labor to Replace Damaged Parts

The estimated cost of labor to replace damaged vehicle parts may not exceed the product of (1) the rate for labor usually paid by the rental company to replace vehicle parts of the type that were damaged, and (2) the estimated time for replacement [*Civ. Code § 1936(c)(2)*]. Again, all discounts and price reductions or adjustments that are, or will be, received by the rental company must be subtracted from the estimate to the extent not already incorporated in the estimate or otherwise promptly credited or refunded to the renter [*Civ. Code § 1936(c)(2)*].

[d] Calculating Cost of Labor to Repair Damaged Parts

The estimated cost of labor to repair damaged vehicle parts may not exceed the lesser of the following [*Civ. Code § 1936(c)(3)(A)*]:

- The product of the rate for labor usually paid by the rental company to repair vehicle parts of the type that were damaged and the estimated time for repair; or

- The sum of the estimated labor and parts costs determined under *Civ. Code § 1936(c)(1)* and *(2)* [*see § 93.102[3][b], [c]*] to replace the same vehicle parts.

In estimating the cost of labor to repair damaged vehicle parts, all discounts and price reductions or adjustments that are, or will be, received by the rental company must be subtracted from the estimate to the extent not already incorporated in the estimate or otherwise promptly credited or refunded to the renter [*Civ. Code § 1936(c)(3)(B)*].

For the purpose of converting the estimated time for repair into the same unit of time in which the rental rate is expressed, a day is deemed to consist of eight hours [*Civ. Code § 1936(c)(4)*].

[e] Maximum Administrative Charge

No administrative charge [*see Civ. Code § 1936(b)(6)*] may be imposed if the total estimated cost of parts and labor is $100 or less. Otherwise, the administrative charge described in *Civ. Code § 1936(b)(6)* may not exceed the amounts specified in *Civ. Code § 1936(c)(6)*, depending on the total estimated cost for parts and labor.

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§ 93.103 Maximum Liability of Authorized Driver

An authorized driver's liability to the rental company, if any, for damage occurring during the authorized driver's operation of the rented vehicle may not exceed the amount of the renter's liability under *Civ. Code § 1936(c)* (*see § 93.102[3]*) [*Civ. Code § 1936(d)(1)*]. Nor may a rental company recover from the renter and another authorized driver an amount exceeding the renter's liability under *Civ. Code § 1936(c)* [*Civ. Code § 1936(d)(2)*]. A rental company may not recover from the renter or other authorized driver for any item described in *Civ. Code § 1936(b)* (*see § 93.102[1]*) to the extent that the rental company obtains recovery from any other person [*Civ. Code § 1936(d)(5)*].

Civ. Code § 1936(d)(5) applies only to the maximum liability of a renter or other authorized driver to the rental company resulting from damage to the rented vehicle. It does not apply to the liability of any other person [*Civ. Code § 1936(d)(6)*].

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§ 93.104 Damage Waivers

[1] Provisions Deemed Included

Except as provided in *Civ. Code § 1936(f)* [*see § 93.104[2]*], every damage waiver must provide or, if not expressly stated in writing, be deemed to provide that the renter has no liability for any damage, loss, loss of use, or any cost or expense incident thereto [*Civ. Code § 1936(e)(1)*; *see Civ. Code § 1936(a)(4)* (defining damage waiver)]. Except as provided in *Civ. Code § 1936(f)*, every limitation, exception, or exclusion to any damage waiver is void and unenforceable [*Civ. Code § 1936(e)(2)*].

[2] Permitted Exclusions From Damage Waiver

A rental company may provide in the rental contract that a damage waiver does not apply to damage or loss that results from an authorized driver's: (1) intentional, willful, wanton, or reckless conduct; (2) operation of the vehicle under the influence of drugs or alcohol in violation of *Veh. Code § 23152*; (3) towing or pushing anything; or (4) operation of the vehicle on an unpaved road if the damage or loss is a direct result of the road or driving conditions [*Civ. Code § 1936(f)(1)*].

A rental company also may provide in the rental contract that a damage waiver does not apply to damage or loss that occurs while the vehicle is (1) used for commercial hire, (2) used in connection with conduct that could be properly charged as a felony, (3) involved in a speed test or contest or in driver training activity, (4) operated by a person other than an authorized driver, or (5) operated outside of the United States [*Civ. Code § 1936(f)(2)*].

Additionally, a rental company may provide in the rental contract that a damage waiver does not apply if any authorized driver (1) provided fraudulent information to the rental company, or (2) provided false information and the rental company would not have rented the vehicle if it had instead received true information [*Civ. Code § 1936(f)(3)*].

[3] Required Disclosures in Connection With Damage Waiver

A rental company that offers or provides a damage waiver for any consideration in addition to the rental rate must

clearly and conspicuously disclose the following information in the rental contract or holder in which the contract is placed and also disclose this information in signs posted at the place, such as the counter, where the renter signs the rental contract. For renters who are enrolled in the rental company's membership program, the information must be disclosed in a sign posted in a location clearly visible to those renters as they enter the location where their reserved rental cars are parked or near the exit of the bus or other conveyance that transports the enrollee to a reserved car [*Civ. Code § 1936(g)(1)*; *see Civ. Code § 1936(g)(3)* (example of notice satisfying requirements of *Civ. Code § 1936(g)(1)*)]:

- The nature of the renter's liability; for example, liability for all collision damage regardless of cause [*see Civ. Code § 1936(b)(1)*; *see also § 93.102[1]*].

- The extent of the renter's liability, for example, liability for damage or loss up to a specified amount [*see Civ. Code § 1936(b)*; *see also § 93.102[1]*].

- That the renter's personal insurance policy or the credit card used to pay for the car rental transaction may provide coverage for all or a portion of the renter's potential liability.

- That the renter should consult with his or her insurer to determine the scope of insurance coverage, including the amount of the deductible, if any, for which the renter is obligated.

- That the renter may purchase an optional damage waiver to cover all liability, subject to whatever exceptions the rental company expressly lists that are permitted under *Civ. Code § 1936(f)* [*see § 93.104[2]*].

- The range of charges for the damage waiver.

In addition, a rental company that offers or provides a damage waiver must orally disclose to all renters, except those who are participants in the rental company's membership program, that the damage waiver may be duplicative of coverage that the customer maintains under his or her own policy of motor vehicle insurance. The renter's receipt of the oral disclosure must be demonstrated through the renter's acknowledging receipt of the oral disclosure near that part of the contract where the renter indicates, by the renter's own initials, his or her acceptance or declination of the damage waiver. Adjacent to that same part, the contract must also state that the damage waiver is optional. Further, the contract for these renters must include a clear and conspicuous written disclosure that the damage waiver may be duplicative of coverage that the customer maintains under his or her own policy of motor vehicle insurance [*Civ. Code § 1936(g)(2)*].

"Membership program" means a service offered by a rental company that permits customers to bypass the rental counter and go directly to the car previously reserved. A membership program must meet all of the following requirements [*Civ. Code § 1936(a)(9)*]:

- The renter must initiate enrollment by completing an application on which the renter can specify a preference for type of vehicle and acceptance or declination of optional services.

- The rental company must fully disclose, before the enrollee's first rental as a participant in the program, all terms and conditions of the rental agreement as well as all required disclosures.

- The renter may terminate enrollment at any time.

- The rental company must fully explain to the renter that designated preferences, as well as acceptance or declination of optional services, may be changed by the renter at any time for the next and future rentals.

- An employee designated to receive the form specified in *Civ. Code § 1936(t)(1)(C)* must be present at the lot where the renter takes possession of the car, to receive any change in the rental agreement from the renter.

If the designated employee is actually present at the required location, a rental company's disclosure requirements will be met for renters who are enrolled in the rental company's membership program if the three conditions listed below are satisfied [*Civ. Code § 1936(t)(1), (2)*]:

- Before the enrollee's first rental as a participant in the program, the renter must receive, in writing: (1) all the disclosures required by *Civ. Code § 1936(g)(1)*, including the terms and conditions of the rental agreement then in effect; and (2) a web site address, as well as a contact number or address, where the enrollee can learn of any changes to the rental agreement or to the laws of California governing rental agreements since the effective date of the rental company's most recent restatement of the rental agreement and distribution of that restatement to its members [*Civ. Code § 1936(t)(1)(A)*].

- At the commencement of each rental period, the renter must be provided, on the rental record or the folder in which it is inserted, with a printed notice stating that he or she had either previously selected or declined an optional damage waiver and that the renter has the right to change preferences [*Civ. Code § 1936(t)(1)(B)*].

- At the commencement of each rental period, the rental company must provide, on the rearview mirror, a hanger on which a statement is printed, in a box, in at least 12-point boldface type, notifying the renter that the collision damage waiver offered by the rental company may be duplicative of coverage that the customer maintains under his or her own auto insurance policy. If it is not feasible to hang the statement from the rearview mirror, it must be hung from the steering wheel. The hanger must provide the renter a box to initial if he or she (not his or her employer) has previously accepted or declined the collision damage waiver and now wishes to change his or her decision to accept or decline the collision damage waiver. Specified language must be used. The hanger must also provide a box for the enrollee to indicate whether this change applies to this rental transaction only or to all future rental transactions. The hanger must also notify the renter that he or she may make such a change, before leaving the lot, by returning the form to an employee designated to receive the form who is present at the lot where the renter takes possession of the car, to receive any change in the rental agreement from the renter [*Civ. Code § 1936(t)(1)(C)*].

Satisfaction of the above conditions, however, does not relieve the rental company from the duty to make disclosures that are required to be made within the text of a contract or holder in which the contract is placed, or to be made in or on an advertisement containing a rental rate, or to be made in a telephonic, in-person, or computer-transmitted quotation or reservation. [*Civ. Code § 1936(t)(1), (2)*].

[4] Maximum Fee for Damage Waiver

Notwithstanding any other provision of law, a rental company may sell damage waivers but may not charge more than the fee specified by statute per full or partial 24-hour rental day for damage waiver [*Civ. Code § 1936(h), (i)*].

[5] Required Damage Waiver References in Advertisements

A rental company that disseminates an advertisement in California containing a rental rate must include in that advertisement a clearly readable statement of the charge for the damage waiver and a statement that the damage waiver is optional [*Civ. Code § 1936(j)*].

[6] Purchase of Damage Waiver May Not Be Required or Coerced

A rental company may not require the purchase of a damage waiver, optional insurance, or any other optional good or service [*Civ. Code § 1936(k)(1)*].

A rental company must not engage in any unfair, deceptive, or coercive conduct to induce a renter to purchase damage waiver, optional insurance, or any other optional good or service, including conduct such as, but not limited to, refusing to honor the renter's reservation, limiting the availability of vehicles, requiring a deposit, or debiting or blocking the renter's credit card account for a sum equivalent to a deposit if the renter declines to purchase damage waiver, optional insurance, or any other optional good or service [*Civ. Code § 1936(k)(2)*].

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§ 93.105 Prohibited Methods of Satisfying Damage Claims

In the absence of express permission granted by the renter subsequent to damage to, or loss of, the vehicle, a rental company may not seek to recover any portion of any claim arising out of damage to, or loss of, the rented vehicle by processing a credit card charge or causing any debit or block to be placed on the renter's credit card account [*Civ. Code § 1936(l)(1)*]. A rental company may not engage in any unfair, deceptive, or coercive tactics in attempting to recover or in recovering on any claim arising out of damage to, or loss of, the rented vehicle [*Civ. Code § 1936(l)(2)*].

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§ 93.106 Fees and Charges

[1] Required Format and Permitted Charges

As long as *Civ. Code § 1936.01* or *Civ. Code § 1936.015* is operative [*see § 93.106[5][a]*], the requirements of *Civ. Code § 1936(n)* discussed below will be superseded to some extent by requirements discussed in *§ 93.106[5]* [*see Civ. Code §§ 1936.01(b), 1936.015(b)*].

A rental company may only advertise, quote, and charge a rental rate that includes the entire amount except taxes, a customer facility charge, if any, and a mileage charge, if any, that a renter must pay to hire or lease the vehicle for the period of time to which the rental rate applies [*Civ. Code § 1936(n)(1)*].

In addition to the rental rate, taxes, customer facility charges, if any, and mileage charge, if any, a rental company may charge for an item or service provided in connection with a particular rental transaction if the renter could have avoided incurring the charge by choosing not to obtain or use the optional item or service [*Civ. Code § 1936(n)(2)*; *see also Civ. Code § 1936(k)(1)* (options may not be required; *see § 93.104[6]*]. A rental company also may impose an additional charge based on reasonable age criteria established by the rental company. Items and services for which the rental company may impose an additional charge, include, but are not limited to the following [*Civ. Code § 1936(n)(2)*]:

- Optional insurance and accessories requested by the renter;

- Service charges incidental to the renter's optional return of the vehicle to a location other than the location where the vehicle was hired or leased; and

- Charges for refueling the vehicle at the conclusion of the rental transaction in the event that the renter did not return the vehicle with as much fuel as was in the fuel tank at the beginning of the rental [*see Schnall v. Hertz Corp. (2000) 78 Cal. App. 4th 1144, 1162, 1170, 93 Cal. Rptr. 2d 439* (*Civ. Code § 1936(m)(2)* provided rental car company with safe harbor against claim that amount of fuel service charge was unfair within meaning of Unfair Competition Law (UCL), but did not provide safe harbor

against allegations that it confused and misled customers in violation of unfair and fraud prongs of UCL); *see also Bus. & Prof. Code § 13800* (rental vehicle's fuel gauge installed by manufacturer may be used in rental transaction by rental company to calculate optional charge for fueling)].

If a rental company states a rental rate in print advertisement or in a telephonic, in-person, or computer-transmitted quotation, the rental company must clearly disclose in that advertisement or quotation the terms of any mileage conditions relating to the advertised or quoted rental rate, including, but not limited to, to the extent applicable, the amount of mileage and gas charges, the number of miles for which no charges will be imposed, and a description of geographic driving limitations within the United States and Canada [*Civ. Code § 1936(n)(4)*].

[2] Customer Facility Charges

A customer facility charge may be collected by a rental company under the following circumstances [*Civ. Code § 1936(m)(1)*]:

- Collection of the fee by the rental company is required by an airport operated by a city, a county, a city and county, a joint powers authority, or a special district.

- The fee is calculated on a per-contract basis.

- The fee is a user fee, not a tax imposed on real property or an incidence of property ownership under Cal. Const. art. XIIID.

- Except in the case described below, the fee is $10 per contract.

- If the fee imposed by the airport is for both a consolidated rental car facility and a common use transportation system, the fee collected from customers of on-airport rental car companies is $10, but the fee imposed on customers of off-airport rental car companies who are transported on the common use transportation system is proportional to the costs of the common use transportation system only. The fee is uniformly applied to each class of on-airport or off-airport customers, provided the airport requires off-airport customers to use the common use transportation system.

- Revenues collected from the fee do not exceed the reasonable costs of financing, designing, constructing, or operating the facility or services and may not be used for any other purpose.

- The fee is separately identified on the rental agreement.

Notwithstanding any other provision of law, the fees collected, or any other law whereby a local agency operating an airport requires a rental car company to collect a facility financing fee from its customers, are not subject to sales, use, or transaction taxes [*Civ. Code § 1936(m)(2)*].

As long as *Civ. Code § 1936.01* or *Civ. Code § 1936.015* is operative [*see § 93.106[5][a]*], the requirements of *Civ. Code § 1936(n)* discussed below will be superseded to some extent by requirements discussed in *§ 93.106[5]* [*see Civ. Code §§ 1936.01(b), 1936.015(b)*].

When a rental rate is stated in an advertisement, quotation, or reservation in connection with a car rental at an airport where a customer facility charge is imposed, the rental company must clearly disclose the existence and amount of the customer facility charge. Advertisements include radio, television, other electronic media, and print advertisements. Quotations and reservations include those that are telephonic, in-person, and computer-transmitted. If the rate advertisement is intended to include transactions at more than one airport imposing a customer facility charge, a range

of fees may be stated in the advertisement. However, all rate advertisements that include car rentals at airport destinations must clearly and conspicuously include a toll-free telephone number whereby a customer can be told the specific amount of the customer facility charge for which the customer will be obligated [*Civ. Code § 1936(n)(5)(A)*].

If any person or entity other than a rental car company, including a passenger carrier or a seller of travel services, advertises or quotes a rate for a car rental at an airport where a customer facility charge is imposed, that person or entity, provided they are provided with information about the existence and amount of the fee, to the extent not specifically prohibited by federal law, must clearly disclose the existence and amount of the fee in any telephonic, in-person, or computer-transmitted quotation at the time of making an initial quotation of a rental rate and at the time of making a reservation of a rental car. If a rental car company provides the person or entity with rate and customer facility charge information, the rental car company is not responsible for the failure of that person or entity to comply with this requirement when quoting or confirming a rate to a third person or entity [*Civ. Code § 1936(n)(5)(B)*].

[3] Prohibited Charges

As long as *Civ. Code § 1936.01* or *Civ. Code § 1936.015* is operative [*see § 93.106[5][a]*], the requirements of *Civ. Code § 1936(n)* discussed below will be superseded to some extent by requirements discussed in *§ 93.106[5]* [*see Civ. Code §§ 1936.01(b), 1936.015(b)*].

A rental company may not charge in addition to the rental rate, taxes, a customer facility charge, if any, and a mileage charge, if any, any fee that must be paid by the renter as a condition of hiring or leasing the vehicle, such as, but not limited to, required fuel or airport surcharges other than customer facility charges, nor any fee for transporting the renter to the location where the rented vehicle will be delivered to the renter [*Civ. Code § 1936(n)(1)*]. If a rental company delivers a vehicle to a renter at a location other than the location where the rental company normally carries on its business, the rental company may not charge the renter any amount for the rental for the period before the delivery of the vehicle. If a rental company picks up a rented vehicle from a renter at a location other than the location where the rental company normally carries on its business, the rental company may not charge the renter any amount for the rental for the period after the renter notifies the rental company to pick up the vehicle [*Civ. Code § 1936(n)(6)*].

A rental company also may not charge any fee for authorized drivers in addition to the rental charge for an individual renter [*Civ. Code § 1936(n)(3)*].

[4] Pass-Through Pursuant to Commercial Arrangement

When a car rental company and a corporation or some other business entity have made a contract that establishes a discounted rental rate for employees and certain others associated with the business, that rate, by the consent of both parties, usually is to be supplemented through additional charges (such as airport concession fees, vehicle license fees, rental car surcharges, and stadium construction fees) that are imposed on the rental company or its customers. *Civ. Code § 1936.05* permits the financial arrangements mutually agreed to by the parties in these commercial contracts to be implemented in California, by permitting the pass-through of those kinds of charges to the business entity--something that *Civ. Code § 1936* would not permit. This flexibility allows the rental company to grant certain benefits that the business desires, in exchange for other charges.

Notwithstanding any provision to the contrary contained in *Civ. Code § 1936(n)(1)*, a car-rental company, in connection with the "qualified business rental" of a passenger vehicle to a "business renter" of a "business program sponsor" under the sponsor's "business program," may separately quote (by telephone, in person, or by computer transmission) additional charges (that is, charges other than a per-period base rental rate established by the business program) for the rental if, at the time the quote is provided, the person receiving the quote is also provided a good faith estimate of the total of all charges for the entire rental [*see Civ. Code § 1936.05(a)* (definitions); *see also* Comments to *see § 93.281*]. The estimate may exclude mileage charges and charges for optional items and services that cannot be determined before

completing the reservation based on the information provided by the renter [*Civ. Code § 1936.05(b)(1)*]. The rental company also may separately impose additional charges for the rental if the rental contract, or another document provided to the business renter at the time and place the rental commences, clearly and conspicuously discloses the total of all charges for the entire rental, exclusive of charges that cannot be determined at the time the rental commences [*Civ. Code § 1936.05(b)(2)*].

A renter may bring an action against a rental company for the recovery of damages and appropriate equitable relief for a violation of *Civ. Code § 1936.05*. The prevailing party is entitled to recover reasonable attorney's fees and costs [*Civ. Code § 1936.05(c)*]. For a form of complaint, *see § 93.281*.

Any waiver of any of the provisions of *Civ. Code § 1936.05* is void and unenforceable as contrary to public policy [*Civ. Code § 1936.05(d)*].

Nothing in *Civ. Code § 1936.05* is intended to mean that the rental company is not required to comply with the requirements of *Civ. Code § 1936(n)(2)-(6)* [*Civ. Code § 1936.05(e)*].

[5] Separately Stated Charges for Certain Rental Company Costs

[a] Superseded Statutory Provisions

As long as *Civ. Code § 1936.01* or *Civ. Code § 1936.015* is operative, the requirements discussed in *§ 93.106[5][b] -[h]* will supersede to some extent the requirements of *Civ. Code § 1936(n)* discussed in *§ 93.106[1] -[3]*. As between those two code sections, as long as both are operative, section 1936.015 supersedes section 1936.01 [*see Civ. Code §§ 1936.01(b), 1936.015(b)*].

Civ. Code § 1936.01 concerns separately stated charges for recoupment of a rental company's payments to cover airport concession fees and tourism commission assessments established by the California Travel and Tourism Commission [*see Civ. Code § 1936.01(a)(1), (3)*]. The section became operative March 31, 2007 [*see Civ. Code § 1936.01(e)*; *see also 10 Cal. Code Reg. § 5350 et seq.* (tourism commission assessments on passenger rental car industry)] and remains operative at least through a yet undetermined date in 2013 [*see 10 Cal. Code Reg. § 5358.1*].

Civ. Code § 1936.015 concerns a separately stated charge for recoupment of a rental company's payments to meet a temporary increase in the vehicle license fee [*see Rev. & Tax. Code §§ 10751, 10752*] as that fee existed on January 1, 2009 [*Civ. Code §§ 1936.015(a)(1)*]. References in § 93.106[5][b]-[h] to the "vehicle license fee increment" mean the amount by which the vehicle license fee exceeds 0.65 percent of the value of the vehicle, after being increased (to 1 percent), effective May 19, 2009 [*see Civ. Code § 1936.015(a)(2), (e)*; *Rev. & Tax. Code §§ 10752, 10752.1, 10752.2*]. The section became operative February 20, 2009 (but had no practical effect until May 19, 2009), and remains operative as long as the vehicle license fee exceeds 0.65 percent of the value of the vehicle [*Civ. Code § 1936.015(e)(1)*].

[b] Amounts to Be Separately Stated

A rental company may advertise only a rental rate that includes the entire amount that a renter must pay to hire or lease the vehicle for the period to which the rental rate applies, excepting any taxes, vehicle license fee increment, customer facility charge, or mileage charge [*Civ. Code §§ 1936.01(b)(1), 1936.015(b)(1)*]. The vehicle license fee increment must be separately charged, clearly stated, and prorated at one three hundred sixty fifth of the increment in the annual vehicle license fee actually paid on the particular vehicle being rented for each full or partial 24 hour rental day the vehicle is rented. The total of all vehicle license fee increments charged to renters must not exceed the increment in the annual vehicle license fee actually paid for the particular vehicle rented [*Civ. Code § 1936.015(a)(2)*].

When providing a quote [*see Civ. Code § 1936.01(a)(2)* (definition)], or imposing charges for a rental, the rental

company may separately state the rental rate, taxes, vehicle license fee increment, customer facility charge, airport concession fee, tourism commission assessment, and mileage charge that a renter must pay to hire or lease the vehicle for the period to which the rental rate applies. The rental company may not charge any fee in addition to the rental rate, taxes, vehicle license fee increment, customer facility charge, airport concession fee, tourism commission assessment, or mileage charge, that the renter must pay as a condition of hiring or leasing the vehicle, such as, but not limited to, required fuel or airport surcharges other than customer facility charges and airport concession fees [*Civ. Code §§ 1936.01(b)(2), 1936.015(b)(2)*].

[c] Disclosure of Certain Amounts

If customer facility charges [*see Civ. Code § 1946(m)*; § 93.106[2] , airport concession fees, or tourism commission assessments are imposed, the rental company must do each of the following [*Civ. Code §§ 1936.01(b)(3), 1936.015(b)(3)*].

- At the time a quote is given [*see Civ. Code § 1936.01(a)(2)* (definition of quote)], the rental company must provide the person receiving the quote with a good faith estimate of the rental rate, taxes, vehicle license fee increment, customer facility charge, airport concession fee, and tourism commission assessment, as well as the total charges for the entire rental. The total charges, if provided on a website, must be displayed in a typeface at least as large as any rental rate disclosed on that page and must be provided on a page that the person receiving the quote may reach by following links through no more than two website pages, including the page on which the rental rate is first provided. The good faith estimate may exclude mileage charges and charges for optional items that cannot be determined prior to completing the reservation based on the information provided by the person [*Civ. Code §§ 1936.01(b)(3)(A), 1936.015(b)(3)(A)*].

- The rental company must provide, to each person (other than a person within the rental company) who offers quotes to actual or prospective customers, access to information about the vehicle license fee increment, customer facility charges, airport concession fees, and tourism commission assessments, as well as access to information about when those charges apply. Any person providing quotes to actual or prospective customers for the hire or lease of a vehicle from a rental company must provide the quotes in the manner described above [*Civ. Code §§ 1936.01(b)(3)(c), 1936.015(b)(3)(C)*].

- At the time and place the rental commences, the rental company must clearly and conspicuously disclose in the rental contract (or the portion of it) that is provided to the renter, the following: the total of the rental rate, taxes, vehicle license fee increment, customer facility charge, airport concession fee, and tourism commission assessment, for the entire rental, exclusive of charges that cannot be determined at the time the rental commences. Charges imposed must be no more than the amount of the quote provided in a confirmed reservation, unless the person changes the terms of the rental contract after making the reservation [*Civ. Code §§ 1936.01(b)(3)(B), 1936.015(b)(3)(B)*].

[d] Charges Added at Renter's or Company's Option

A rental company may charge for (in addition to the rental rate, taxes, vehicle license fee increment, customer facility charges, airport concession fees, tourism commission assessments, and mileage charges) an item or service provided in connection with a particular rental transaction, if the renter could have avoided incurring the charge by choosing not to obtain or use the optional item or service. Such items and services, for which the rental company may impose an additional charge, include, but are not limited to, optional insurance and accessories requested by the renter, service charges incidental to the renter's optional return of the vehicle to a location other than the location where the vehicle was hired or leased, and charges for refueling the vehicle at the conclusion of the rental transaction in the event that the renter did not return the vehicle with as much fuel as was in the fuel tank at the beginning of the rental. A rental

company also may impose an additional charge based on reasonable age criteria established by the rental company [*Civ. Code §§ 1936.01(b)(4), 1936.015(b)(4)*].

[e] Prohibition of Charge for Additional Driver

A rental company may not charge any fee for authorized drivers in addition to the rental charge for an individual renter [*Civ. Code §§ 1936.01(b)(5), 1936.015(b)(5)*].

[f] Disclosure of Mileage Limitations

If a rental company states a rental rate in a print advertisement, a telephone quote, an in person quote, or a computer transmitted quote [*see Civ. Code § 1936.01(a)(2)* (definition of quote)], then the rental company must clearly disclose in that advertisement or quote the terms of any mileage conditions relating to the rental rate disclosed in the advertisement or quote, including, but not limited to (to the extent applicable), the amount of mileage charges and gas charges, the number of miles for which no charges will be imposed, and a description of geographic driving limitations within the United States and Canada [*Civ. Code §§ 1936.01(b)(6), 1936.015(b)(6)*].

[g] Rental Rates at Airports

When a rental rate is stated in an advertisement in connection with a car rental at an airport where a customer facility charge is imposed, the rental company must clearly disclose the existence and amount of the customer facility charge. (Advertisements include radio, television, other electronic media, and print advertisements.) If the rental rate advertisement is intended to include transactions at more than one airport imposing a customer facility charge, then a range of charges may be stated in the advertisement. However, all rental rate advertisements that include car rentals at airport destinations must clearly and conspicuously include a toll free telephone number that a customer can use to know the specific amount of the customer facility charge for which the customer will be obligated [*Civ. Code §§ 1936.01(b)(7)(A), 1936.015(b)(7)(A)*].

If any person or entity other than a rental company (including a passenger carrier or a seller of travel services) advertises a rental rate for a car rental at an airport where a customer facility charge is imposed, and that person or entity has information about the existence and amount of the charge not specifically prohibited by federal law, then that person or entity must clearly disclose the existence and amount of the charge. If a rental company provides the person or entity with rental rate information and customer facility charge information, then the rental company is not responsible for the failure of that person or entity to comply with that requirement [*Civ. Code §§ 1936.01(b)(7)(B), 1936.015(b)(7)(B)*].

[h] Off-Premises Delivery to Customer or Return of Rented Vehicle by Customer

If a rental company delivers a vehicle to a renter at a location other than the location where the rental company normally carries on its business, the rental company may not charge the renter any amount for the rental for the period before the delivery of the vehicle. If a rental company picks up a rented vehicle from a renter at a location other than the location where the rental company normally carries on its business, the rental company may not charge the renter any amount for the rental for the period after the renter notifies the rental company to pick up the vehicle [*Civ. Code §§ 1936.01(b)(8), 1936.015(b)(8)*].

Except as otherwise permitted pursuant to the customer facility charge, a rental company may not separately charge, in addition to the rental rate, a fee for transporting the renter to the location where the rented vehicle will be delivered to the renter [*Civ. Code §§ 1936.01(b)(9), 1936.015(b)(9)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-93 California Forms of Pleading and Practice--Annotated § 93.107

§ 93.107 Electronic Surveillance Technology

[1] Restriction on Use

A rental company may not use, access, or obtain any information relating to the renter's use of the rental vehicle that was obtained using electronic surveillance technology [*see § 93.101[6]* for definition], except in specified circumstances [*Civ. Code § 1936(o)*; *§ 93.107[2]*].

A rental company may not use electronic surveillance technology to track a renter in order to impose fines or surcharges relating to the renter's use of the rental vehicle [*Civ. Code § 1936(p)*].

[2] Location of Missing Vehicle

A rental company may use, access, or obtain any information relating to the renter's use of the rental vehicle that was obtained using electronic surveillance technology when the equipment is used by the rental company only for the purpose of locating a stolen, abandoned, or missing rental vehicle after one of the following [*Civ. Code § 1936(o)(1)(A)*]:

- The renter or law enforcement has informed the rental company that the vehicle has been stolen or abandoned or is missing.

- The rental vehicle has not been returned following one week after the contracted return date, or one week following the end of an extension of that return date.

- The rental company discovers the rental vehicle has been stolen or abandoned, and, if stolen, the company has reported the vehicle stolen to law enforcement by filing a stolen vehicle report unless law enforcement has already informed the rental company that the vehicle has been stolen or abandoned or is missing.

If electronic surveillance technology is activated for any such purpose, the rental company must maintain a record, in

either electronic or written form, of information relevant to the activation of the technology. That information must include the rental agreement, including the return date, and the date and time the electronic surveillance technology was activated. The record also must include, if relevant, a record of any written or other communication with the renter, including communications regarding extensions of the rental, police reports, or other written communication with law enforcement officials. The record must be maintained for a period of at least 12 months from the time the record is created and must be made available on the renter's request. The rental company must maintain and furnish any explanatory codes necessary to read the record. The rental company is not required to maintain a record if electronic surveillance technology is activated to recover a rental vehicle that is stolen or missing at a time other than during a rental period [*Civ. Code § 1936(o)(1)(B)*].

[3] Request From Law Enforcement

A rental company may use, access, or obtain any information relating to the renter's use of the rental vehicle that was obtained using electronic surveillance technology in response to a specific request from law enforcement pursuant to a subpoena or search warrant [*Civ. Code § 1936(o)(2)*].

[4] Navigation Assistance to Driver

A rental company may equip rental vehicles with GPS-based technology that provides navigation assistance to the occupants of the rental vehicle if the rental company does not use, access, or obtain any information relating to the renter's use of the rental vehicle that was obtained using that technology, except for the purposes of discovering or repairing a defect in the technology, and the information may then be used only for that purpose [*Civ. Code § 1936(o)(3)*].

[5] Remote Locking and Unlocking

A rental company may equip rental vehicles with electronic surveillance technology that allows for the remote locking or unlocking of the vehicle at the request of the renter, if the rental company does not use, access, or obtain any information relating to the renter's use of the rental vehicle that was obtained using that technology, except as necessary to lock or unlock the vehicle [*Civ. Code § 1936(o)(4)*].

[6] Roadside Assistance

A rental company may equip rental vehicles with electronic surveillance technology that allows the company to provide roadside assistance, such as towing, flat tire, or fuel services, at the request of the renter, if the rental company does not use, access or obtain any information relating to the renter's use of the rental vehicle that was obtained using that technology, except as necessary to provide the requested roadside assistance [*Civ. Code § 1936(o)(5)*].

[7] Vehicle-Return Information

A rental company may obtain, access, or use information from electronic surveillance technology for the sole purpose of determining the date and time the vehicle is returned to the rental company, the total mileage driven, and the vehicle fuel level of the returned vehicle. This rule applies only after the renter has returned the vehicle to the rental company, and the information may only be used for the specified purpose [*Civ. Code § 1936(o)(6)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 93.108 Warning to Renter of 15-Passenger Van

A rental company must provide a renter of a 15-passenger van with a copy of the National Highway Traffic Safety Administration's consumer advisory for 15-passenger vans titled "Reducing the Risk of Rollover Crashes" (as updated from time to time). The renter must acknowledge receipt of that copy by signing an acknowledgment of receipt on the rental agreement or on an attached form [*Civ. Code § 1936.1(a)(1)*]. If the van is being rented for a business purpose or use, the rental company must also state on the same document that only an employee with the proper licensing may drive the vehicle; the renter must acknowledge the receipt of that warning in the same manner [*Civ. Code § 1936.1(a)(2)*].

A "15-passenger van" is any van manufactured to accommodate 15 passengers including the driver (regardless of whether that van has been altered to accommodate fewer than 15 passengers), other than a 15-passenger van with dual rear wheels that has a gross weight rating of not less than 11,500 pounds [*Civ. Code § 1936.1(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-93 California Forms of Pleading and Practice--Annotated § 93.109

§ 93.109 Action by Renter

A renter may bring an action against a rental company for the recovery of damages and appropriate equitable relief for a violation of *Civ. Code § 1936*. The prevailing party is entitled to recover reasonable attorneys' fees and costs [*Civ. Code § 1936(q)*]. For a complaint for declaratory relief by a vehicle renter to resolve differing contentions regarding his or her liability under *Civ. Code § 1936* or the particular rental agreement of the parties, *see § 93.280*.

A violation of *Civ. Code § 1936* may also be one of the practices prohibited by *Civ. Code § 1770*. *Civ. Code § 1770* is part of the Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*). For discussion and forms relating to the Consumer Legal Remedies Act, see Ch. 504, *Sales: Consumers Legal Remedies Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-93 California Forms of Pleading and Practice--Annotated § 93.110

§ 93.110 Waiver Unenforceable

Any waiver of any of the provisions of *Civ. Code § 1936* is void and unenforceable as contrary to public policy [*Civ. Code § 1936(s)*].

Legal Topics:

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

§§ 93.111[Reserved]

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A. Deposits

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§ 93.130 State Statutes

[1] Nature and Kinds of Deposits

[a] In General

Kinds of deposits. *Civ. Code § 1813*

Voluntary deposit defined. *Civ. Code § 1814*

Involuntary deposit defined. *Civ. Code § 1815*

Deposit for keeping defined. *Civ. Code § 1817*

Deposit for exchange defined. *Civ. Code § 1818*

[b] Deposit of Animals

Depositary of animals is required to feed and shelter. *Civ. Code § 1834*

When animal deposited with animal care facility is deemed abandoned. *Civ. Code § 1834.5*

[c] Deposits for Hire

Deposit for hire and storage defined. *Civ. Code § 1851*

Depositary for hire is required to use ordinary care. *Civ. Code § 1852*

Compensation for depositary for hire of animals. *Civ. Code § 1853*

When deposit for hire terminates. *Civ. Code § 1854*

Depositor is permitted to prematurely terminate deposit for hire. *Civ. Code § 1855*

Depositary for hire has lien for charges. *Civ. Code § 1856*

Depositary for hire's lien for charges on perishables, luggage, or baggage is permitted to be satisfied through sale. *Civ. Code § 1857*

Deposits for repair, alteration, or sale. *Civ. Code §§ 1858-1858.3*

[d] Gratuitous Deposits

Gratuitous deposit defined. *Civ. Code § 1844*

Involuntary deposit is gratuitous. *Civ. Code § 1845*

Gratuitous depositary is required to use slight care. *Civ. Code § 1846*

When duties of gratuitous depositary cease. *Civ. Code § 1847*

[2] Obligations of Depositary

[a] In General

Depositary is bound to take charge of thing deposited. *Civ. Code § 1816*

Depositary is required to redeliver thing deposited to depositor on demand. *Civ. Code § 1822*

Depositary is not bound to deliver thing deposited to depositor without demand. *Civ. Code § 1823*

Depositary is required to deliver thing deposited at his residence or place of business. *Civ. Code § 1824*

Depositary is required to give notice to depositor of any proceeding taken adversely to depositor's interest in thing deposited. *Civ. Code § 1825*

Depositor is required to indemnify depositary for damage or expense caused by thing deposited. *Civ. Code § 1833*

Depositary is liable for damage to thing deposited during depositary's wrongful use thereof. *Civ. Code § 1836*

Depositary refusing to explain loss to depositor is grossly negligent. *Civ. Code § 1838*

Liability of depositary for negligence may not exceed value of deposit. *Civ. Code § 1840*

[b] Permissible Activities by Depositary

Depositary is permitted to give notice to true owner of goods wrongfully deposited. *Civ. Code § 1826*

Depositary is permitted to deliver thing deposited to its joint depositors. *Civ. Code § 1827*

Deposit in name of two or more persons is permitted to be delivered by depositary to either person or survivor. *Civ. Code § 1828*

Depositary is not permitted to use thing deposited without consent. *Civ. Code § 1835*

Depositary is permitted to sell perishable deposit for salvage. *Civ. Code § 1837*

[3] Parking Lots

Requirements for binding contract of bailment of motor vehicle in parking lot. *Civ. Code § 1630*

Contract of bailment for motor vehicle in parking lot is ineffective when exempting bailee from liability for theft of vehicle if contract requires bailor to leave keys. *Civ. Code § 1630.5*

[4] Repairman's Lien

Artisan and service lien on personalty for labor, storage, repair, or protection. *Civ. Code § 3051*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailmentsTransportation LawPrivate VehiclesGeneral OverviewGovernmentsAgriculture & FoodAnimal ProtectionContracts LawSecured TransactionsPerfection & PriorityPriorityLiens

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PART III. RESEARCH GUIDE
A. Deposits

9-93 California Forms of Pleading and Practice--Annotated § 93.131

§ 93.131 Decisions

[1] Acceptance Under Contract of Deposit

[a] In General

Acceptance of duties and responsibilities of depositary is permitted to be constructive or implied. *Gordon H. Ball, Inc. v. Parreira (1963) 214 Cal. App. 2d 697, 703-704, 29 Cal. Rptr. 679*

Acceptance of duties and responsibilities of bailment by depositary is not inferred unless there is something to show notice or knowledge on part of alleged depositary that goods are in fact in his possession and that they are property of bailor. *Gordon H. Ball, Inc. v. Parreira (1963) 214 Cal. App. 2d 697, 703-704, 29 Cal. Rptr. 679*

Civ. Code §§ 1815 and *1816* (relating to involuntary deposit) presuppose express or implied acceptance of personal property involved in order to make depositary liable for its care; adjective "involuntary" qualifying word "deposit" in *Civ. Code §§ 1815* and *1816* involves assumption that deposit is involuntarily made rather than involuntarily received. *Gordon H. Ball, Inc. v. Parreira (1963) 214 Cal. App. 2d 697, 702, 29 Cal. Rptr. 679*

Duties and responsibilities of depositary may not be thrust on person without person's knowledge or consent, or against person's protest, and depositary is required to have voluntarily assumed custody and possession of property in question. *Gordon H. Ball, Inc. v. Parreira (1963) 214 Cal. App. 2d 697, 703, 29 Cal. Rptr. 679* ; *H.S. Crocker Co., Inc. v. McFaddin (1957) 148 Cal. App. 2d 639, 644, 307 P.2d 429*

[b] Innkeeper's Receipt for Deposited Property

Receipt as used in *Civ. Code § 1860* (money or valuables as deposited with innkeeper; receipts therefor) is nothing more in its common use than bare acknowledgment of having received something; writing is receipt as matter of law when all parties involved considered it to be receipt. *Greer v. Los Angeles Athletic Club (1927) 84 Cal. App. 272,*

275-276, 258 P. 155 ; *but see Providence Wash. Ins. Co. v. Hotel Marysville (1943) 60 Cal. App. 2d 338, 346-347, 140 P.2d 698* (brass checks did not constitute receipts in writing for articles of unusual value, within contemplation of *Civ. Code § 1860*)

[2] Conversion by Depositary

Misdelivery by one entrusted with property of another constitutes conversion of it even though he or she acted innocently and by mistake, even in the case of a gratuitous depositary. *Byer v. Canadian Bank of Commerce (1937) 8 Cal. 2d 297, 299, 301, 65 P.2d 67*

Conversion exists when depositary of personal property refuses to redeliver it to depositor in accordance with terms of contract. *Grosso v. Monfalcone, Inc. (1936) 13 Cal. App. 2d 405, 409-410, 56 P.2d 1266*

Requirements for depositor bringing cause of action for conversion against depositary refusing to redeliver property to depositor. *Grosso v. Monfalcone, Inc. (1936) 13 Cal. App. 2d 405, 409-410, 56 P.2d 1266*

[3] Depositary's Failure to Return Deposit

Proof of deposit and subsequent refusal of defendant depositary, on demand, to make delivery according to contract cast on defendant burden of explaining refusal and lack of negligence where property was lost or destroyed. *U Drive, & Tour, Ltd. v. System Auto Parks, Ltd. (1937) 28 Cal. App. 2d Supp. 782, 784-785* , *71 P.2d 354* , *overruled on other grounds, Gardner v. Downtown Porsche Audi (1986) 180 Cal. App. 3d 713, 225 Cal. Rptr. 757* ; see *Chatterton v. Boone (1947) 81 Cal. App. 2d 943, 945, 185 P.2d 610* ; *Travelers Fire Ins. Co. v. Brock & Co. (1938) 30 Cal. App. 2d 112, 114, 85 P.2d 905* ; *Wolfe v. Willard H. George, Inc. (1930) 110 Cal. App. 532, 535, 294 P. 436*

[4] Deposits for Hire

[a] In General

Plaintiff delivering rings to defendant for purpose of having them reset is bailor for mutual benefit creating deposit for hire [*Civ. Code § 1851*] since plaintiff was to receive new ring fabricated with stones from rings she delivered to defendant and defendant was to receive consideration for having work performed. *Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 850, 88 Cal. Rptr. 39*

Deposit which is mere incident to conduct of business from which depositary derives profits is deposit for mutual benefit, although depositary receives no compensation for deposit as such [see *Civ. Code § 1851*]. *Greenberg Bros., Inc. v. Ernest W. Hahn, Inc. (1966) 246 Cal. App. 2d 529, 532, 54 Cal. Rptr. 770* ; *Homan v. Burkhart (1930) 108 Cal. App. 363, 366, 291 P. 624* ; *Greer v. Los Angeles Athletic Club (1927) 84 Cal. App. 272, 283, 258 P. 155* (athletic club and member as guest in its clubhouse)

Bailee entrusted with merchandise for purpose of repair is deemed depositary for hire. *Travelers Fire Ins. Co. v. Brock & Co. (1938) 30 Cal. App. 2d 112, 114, 85 P.2d 905*

[b] Duties and Responsibilities of Depositary

Depositary for hire is chargeable only with ordinary care and diligence in safeguarding depositor's property and is liable only when he or she has been guilty of some negligence. *Southern Pac. Co. v. Schmidt Dredge Co. (1897) 118 Cal. 368, 378, 50 P. 650* ; *Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 850-851, 88 Cal. Rptr. 39* ;

Greenberg Bros., Inc. v. Ernest W. Hahn, Inc. (1966) 246 Cal. App. 2d 529, 533, 54 Cal. Rptr. 770 ; *Gordon H. Ball, Inc. v. Parreira (1963) 214 Cal. App. 2d 697, 704, 29 Cal. Rptr. 679* ; *Awalt v. Mercer, Fraser Co. (1955) 130 Cal. App. 2d 853, 859, 279 P.2d 1001* [see *Civ. Code §§ 1928, 1929*]; *Travelers Fire Ins. Co. v. Brock & Co. (1938) 30 Cal. App. 2d 112, 114, 85 P.2d 905*

In bailment for hire contract, bailee is liable for loss or damage to goods left in his or her possession when loss or damage results from bailee's lack of ordinary care; bailee has burden of establishing his or her use of ordinary care once bailor has established fact of bailment. *Gebert v. Yank (1985) 172 Cal. App. 3d 544, 551-555, 218 Cal. Rptr. 585*

Depositary, if bailment is for mutual benefit of depositor and depositary, is not insurer of chattel entrusted to depositary and is not liable, in absence of negligence, for loss resulting from robbery, burglary, or theft. *Greenberg Bros., Inc. v. Ernest W. Hahn, Inc. (1966) 246 Cal. App. 2d 529, 533, 54 Cal. Rptr. 770* ; *Travelers Fire Ins. Co. v. Brock & Co. (1938) 30 Cal. App. 2d 112, 114, 85 P.2d 905* ; *Homan v. Burkhart (1930) 108 Cal. App. 363, 366, 291 P. 624*

Deposit, otherwise gratuitous, if made to induce purchase, is considered sufficient to give rise to same duty of reasonable care on part of depositary as ordinary bailment for hire. *Tierstein v. Licht (1959) 174 Cal. App. 2d 835, 842, 345 P.2d 341* ; see also *Chatterton v. Boone (1947) 81 Cal. App. 2d 943, 946, 185 P.2d 610*

Depositary for repairs does not wrongfully assume control in placing bailed article with another for repairs unless bailment agreement expressly or impliedly requires bailee to perform labor personally. *Travelers Fire Ins. Co. v. Brock & Co. (1938) 30 Cal. App. 2d 112, 114, 85 P.2d 905*

[5] Gratuitous Deposits

Gratuitous depositary is liable only for gross negligence during his possession. *Roselip v. Raisch (1946) 73 Cal. App. 2d 125, 133, 166 P.2d 340*

Only duty that gratuitous bailor owes to either bailee or third persons is to warn them of actually known defects that render chattel dangerous for purpose for which it is ordinarily used. *Tierstein v. Licht (1959) 174 Cal. App. 2d 835, 842, 345 P.2d 341*

[6] Limit of Liability of Depositary

Civ. Code § 1840 (limit of liability of depositary) has no application when value of goods bailed is not disclosed by owner or when bailee has no reason to suppose that they have any special value; under these circumstances, measure of damages is actual value of goods. *Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 855, 88 Cal. Rptr. 39* ; *Greer v. Los Angeles Athletic Club (1927) 84 Cal. App. 272, 281, 258 P. 155* ; but see *Homan v. Burkhart (1930) 108 Cal. App. 363, 368, 291 P. 624*

Civ. Code § 1840 (limit of liability of depositary) provides measure of damages in bailment contracts, and loss of profits is not recoverable. *Greenberg Bros., Inc. v. Ernest W. Hahn, Inc. (1966) 246 Cal. App. 2d 529, 533-534, 54 Cal. Rptr. 770*

[7] Parking Lots

Owner of car who pays parking fee, locks car, leaves it on parking lot, retains keys, and reserves possession at all times, having right to remove car at will, is mere licensee and creates no contract of bailment. *Porter v. Los Angeles Turf Club (1940) 40 Cal. App. 2d Supp. 840, 842 , 105 P.2d 956*

Prima facie proof of bailment and failure to redeliver car in suit for conversion casts burden on bailee to explain refusal to redeliver car according to contract. *U Drive & Tour, Ltd. v. System Auto Parks, Ltd. (1937) 28 Cal. App. 2d Supp. 782, 71 P.2d 354 , overruled on other grounds, Gardner v. Downtown Porsche Audi (1986) 180 Cal. App. 3d 713, 225 Cal. Rptr. 757*

In action in which bailor's car was stolen from bailee's parking lot, bailor was entitled to recover expenses for renting another car during period he or she was deprived of use but not entitled to recover cost of taxicab hire. *Beetson v. Hollywood Athletic Club (1930) 109 Cal. App. 715, 723-724, 293 P. 821*

Parking lot operator is not insurer of contents of vehicle and is liable only for negligent loss thereof. *Homan v. Burkhart (1930) 108 Cal. App. 363, 366, 291 P. 624*

[8] Repairman's Lien

One who holds possession of personal property while claiming lien on it is normally depositary. *Gordon H. Ball, Inc. v. Parreira (1963) 214 Cal. App. 2d 697, 703, 29 Cal. Rptr. 679*

Repairman has lien under *Civ. Code § 3051* (artisan and service lien on personalty for labor, storage, repair, or protection) if party was legal possessor of property brought to repairman and repairs were there made by repairman at party's request. *Goodman v. Anglo-Cal. Trust Co. (1923) 62 Cal. App. 702, 704, 217 P. 1078*

Subcontractor is not permitted to assert lien; lien [*Civ. Code § 3051*] is required to be asserted by party with whom owner has contracted. *Goodman v. Anglo-Cal. Trust Co. (1923) 62 Cal. App. 702, 705, 217 P. 1078*

Lien created by *Civ. Code § 3051* (repair and service lien) is dependent on possession of property by lien claimant and terminates when possession is voluntarily relinquished and not revived on regaining possession except in those instances when property is released to its owner on agreement that lien is to be revived when possession is returned to lien claimant [*see Civ. Code § 2913*]. *Jess H. Young & Son, Inc. v. Victory Tool & Die Co. (1961) 189 Cal. App. 2d 824, 827-828, 11 Cal. Rptr. 516*

Possessory lien of improver and repairer of chattel is superior to lien of preexisting chattel mortgage under *Civ. Code §§ 3051* and *3052* (service lien on personalty; enforcement by sale). *Mortgage Sec. Co. v. Pfaffmann (1917) 177 Cal. 109, 113, 169 P. 1033* ; see *Civ. Code 3067 et seq.* for liens on automobiles

Conduct excusing tender of payment by obligor to repairman also amounts to waiver of repairman's lien. *Enfield v. Hoffman Motor Co. (1953) 117 Cal. App. 2d 800, 807, 257 P.2d 458*

Lienholder who refuses on proper demand to deliver property waives the lien if refusal is based on ground inconsistent with that lien. *Enfield v. Hoffman Motor Co. (1953) 117 Cal. App. 2d 800, 807, 257 P.2d 458*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailmentsTortsIntentional TortsConversionGeneral OverviewTortsNegligenceActionsNegligent EntrustmentTortsNegligenceStandards of CareReasonable CareReasonable PersonContracts LawSecured TransactionsPerfection & PriorityPriorityLiens

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9-93 California Forms of Pleading and Practice--Annotated § 93.132

§ 93.132 Law Reviews

Baker, *The Unclaimed Personal Property Problem: A Legislative Proposal, 19 Stan. L. Rev. 619 (1967)*

Note, *Presumption of Negligence of Parking Lot Owner for Damage to Parked Car, 14 Stan. L. Rev. 200 (1961)*

Note, *Personal Property --Bailments-- Burden of Proof--Destruction of Goods While in Bailee's Possession, 23 S. Cal. L. Rev. 409 (1950)*

Note, *Bailments--What Constitutes Slightest Degree of Duty on Bailee--Liability of Lessee Toward Personal Property of Prior Lessee Left on Premises, 20 S. Cal. L. Rev. 91 (1946)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsBailments

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§ 93.133 Text References

Witkin, Summary of California Law, Vol. 4, *Personal Property*, §§ 132-138, 141-148 (9th ed. 1990)

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[Reserved]

§§ 93.134[Reserved]

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B. Loans for Use

9-93 California Forms of Pleading and Practice--Annotated § 93.150

§ 93.150 State Statutes

[1] Nature of Contract

Loan for use defined. *Civ. Code § 1884*

Loan for use does not transfer title to thing. *Civ. Code § 1885*

Thing lent for specified term is required to be returned to lender without demand. *Civ. Code § 1895*

Place where borrower must return thing borrowed. *Civ. Code § 1896*

[2] Rights and Obligations of Borrower

Borrower for use is required to use great care. *Civ. Code § 1886*

Borrower for use is bound to have and exercise such skill in care of thing lent as borrower causes lender to believe borrower to possess. *Civ. Code § 1888*

Borrower for use is required to repair all deteriorations in thing lent occasioned by borrower's negligence. *Civ. Code § 1889*

Borrower for use is permitted to use thing borrowed only for such purposes as lender might reasonably have anticipated at time of lending. *Civ. Code § 1890*

Borrower of thing for use is not permitted to give custody of it to third person. *Civ. Code § 1891*

Borrower for use is required to bear all upkeep expenses. *Civ. Code § 1892*

[3] Rights and Obligations of Lender

Lender of thing for use is required to indemnify borrower for damages caused by defects of which lender was aware and concealed. *Civ. Code § 1893*

When lender of thing for use may demand its return. *Civ. Code § 1894*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailments

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§ 93.151 Decisions

Agreement to provide helicopter and pilot at specified rate per hour provides for remuneration and therefore is not loan for use pursuant to *Civ. Code § 1884*. *Northbrook Excess & Surplus Ins. Co. v. Coastal Rescue Sys. Corp. (1986) 182 Cal. App. 3d 763, 770, 227 Cal. Rptr. 639*

Loan contract is created when owner of automobile gives possession of it, with permission to operate it, to another person. *Baugh v. Rogers (1944) 24 Cal. 2d 200, 214, 148 P.2d 633*

Lender is entitled, and borrower is bound, to carry out purpose of loan within terms expressly or impliedly agreed on by parties, and borrower who departs from those terms is liable to lender for any loss or damage in respect of thing lent which occurs as result, irrespective of any want of due care, in absence of any ratification on part of lender. *Sperisen v. Heynemann (1957) 149 Cal. App. 2d 228, 231, 308 P.2d 436*

Lender is under no duty or obligation to inspect or repair property while it is in possession of borrower, and if there is contract to repair on notice that repairs are necessary, duty to repair does not arise until notice is given. *Dickson v. Southern Cal. Edison Co. (1955) 136 Cal. App. 2d 85, 88, 288 P.2d 310*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailments

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[Reserved]

§§ 93.152[Reserved]

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C. Actions by Third Parties

9-93 California Forms of Pleading and Practice--Annotated § 93.170

§ 93.170 Decisions

Bailor for hire or mutual benefit has duty to bailee and to third persons not only to warn of actually known defects, but also to use reasonable care to make examination of chattel before letting it, in order to make certain it was fit for intended use. *Tierstein v. Licht (1959) 174 Cal. App. 2d 835, 840-841, 345 P.2d 341*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailmentsTortsVicarious LiabilityBailees

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9-93 California Forms of Pleading and Practice--Annotated § 93.171

§ 93.171 Text References

Witkin, Summary of California Law, Vol. 4, *Personal Property*, §§ 160-163 (9th ed. 1987)

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[Reserved]

§§ 93.172[Reserved]

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D. Rental of Passenger Vehicles

9-93 California Forms of Pleading and Practice--Annotated § 93.190

§ 93.190 California Legal Forms

For an automobile rental agreement under *Civ. Code § 1936*, plus forms of a closed-end or open-end vehicle lease for longer terms, see California Legal Forms, Ch. 53, *Personal Property Leasing* (Matthew Bender)

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9-93 California Forms of Pleading and Practice--Annotated § 93.191

§ 93.191 State Statutes

Disclosures in sale of collision damage waivers. *Civ. Code § 1936(g)*

Definitions relating to passenger vehicle rentals. *Civ. Code § 1936(a)*

Liability of renter of passenger vehicle. *Civ. Code § 1936(b), (c)*

Liability of authorized driver of rented passenger vehicle. *Civ. Code § 1936(c), (d)*

Collision damage waivers sold by passenger vehicle rental company. *Civ. Code § 1936(e)-(k)*

Prohibited methods of passenger vehicle rental company's satisfying damage claims. *Civ. Code § 1936(k), (l)*

Permitted and prohibited charges of passenger vehicle rental company; required format. *Civ. Code § 1936(n)*

Restrictions on rental company's use of electronic surveillance technology. *Civ. Code § 1936(o), (p)*

Separately quoted and imposed charges are permissible in commercial car rental arrangement. *Civ. Code § 1936.05*

Action by renter of passenger vehicle against rental company. *Civ. Code § 1936(q)*

Waiver of provisions of *Civ. Code § 1936* is unenforceable. *Civ. Code § 1936(s)*

Warning to renter of 15-passenger van. *Civ. Code § 1936.1*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailmentsTransportation LawCommercial VehiclesGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageGeneral OverviewTortsTransportation TortsGeneral Overview

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[Reserved]

§§ 93.192[Reserved]

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PART IV. FORMS
A. Deposits

9-93 California Forms of Pleading and Practice--Annotated § 93.210

§ 93.210 Complaint to Recover Possession of Personal Property or Its Value and for Damages for Wrongful Detention [Civ. Code §§ 3379, 3380; Code Civ. Proc. § 667]--By Depositor Against Depositary [Civ. Code § 1814]--Failure to Redeliver on Demand [Civ. Code § 1822]--General Form

[1] FORM Complaint to Recover Possession of Personal Property or Its Value and for Damages for Wrongful Detention [Civ. Code §§ 3379, 3380; Code Civ. Proc. § 667]--By Depositor Against Depositary [Civ. Code § 1814]--Failure to Redeliver on Demand [Civ. Code § 1822]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO RECOVER POSSESSION OF
_____ [*name*],	)	PERSONAL PROPERTY AND FOR DAMAGES
Defendant.	)	(Wrongful Detention)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, a corporation organized and existing under the laws of California with its principal place of business in _____ County, California [*or allege other capacity and residence*].

[2. Plaintiff is ignorant of the true names and capacities of defendant sued herein as DOES 1 through _____, and therefore sues these defendants by these fictitious names. Plaintiff will amend this

complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of those fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by the acts or omissions of each of them.)]

[3. At all times herein mentioned _____ [*names*] were the agents, servants, and employees of defendant, and in doing the things hereinafter alleged were acting in the scope of their authority as agents, servants, and employees with the permission and consent of defendant.]

4. Plaintiff is, and at all times herein mentioned was, the _____ [*describe plaintiff as owner or holder of property interest*] and entitled to the immediate and exclusive possession of the personal property described and valued as follows:

Description	Value
_____	_____
_____	_____
_____	_____
Total Value	$_____

5. On or about _____ [*date*], plaintiff deposited with defendant the aforementioned personal property by _____ [*describe how plaintiff deposited the property, e.g.*, entrusting it to defendant's employees while shopping in defendant's store]. At the end of that period defendant failed to return the property to plaintiff. Plaintiff then demanded that defendant return the property to plaintiff, but that demand was refused by defendant, and defendant continues to withhold possession of the property.

6. _____ [*Allege damages caused by wrongful detention, if any.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For possession of the personal property or its value in the sum of $_____ in case delivery thereof cannot be had.

[2. For damages caused by wrongful detention *or* For interest on the sum of $_____ at _____ percent per annum from _____ (*date*).]

3. For cost of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION [*Code Civ. Proc. §§ 446, 2015.5*]

I, _____ [*name*], am the plaintiff in the above entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This complaint is for use in an action by a depositor against a depositary to obtain possession of personal property.

The complaint alleges plaintiff's right to immediate and exclusive possession of the property (Paragraph 4) [*see Sperisen v. Heynemann (1957) 149 Cal. App. 2d 228, 230, 308 P.2d 436]* , defendant's possession of the property (Paragraph 5) [*see Helmick v. Ritchie (1958) 158 Cal. App. 2d 776, 778-779, 323 P.2d 584]* , and plaintiff's demand for return of the property and defendant's refusal (Paragraph 5) [*see Gordon H. Ball, Inc. v. Parreira (1963) 214 Cal. App. 2d 697, 704, 29 Cal. Rptr. 679* ; *Downey v. Martin Aircraft Serv. (1950) 96 Cal. App. 2d 94, 100, 214 P.2d 581]* .

To permit an alternative judgment for the value of the property in the event possession cannot be obtained, the complaint contains an allegation of such value (Paragraph 4) [*see Code Civ. Proc. §§ 627, 667*]. Any damages caused by the wrongful detention of the property (Paragraph 6) are also recoverable under *Code Civ. Proc. § 667*.

[3] Alternative Theory of Recovery

In an action by a depositor against a depositary for the depositary's failure to redeliver the bailed object on demand, a prima facie showing of a conversion is also made by proof of a bailment and a subsequent refusal by the depositary to make delivery according to contract. If the depositor's action is strictly one of conversion, or is a contract action for failure to redeliver property, the depositary is required to justify the depositary's failure to return the bailed property [*U Drive & Tour, Ltd. v. System Auto Parks, Ltd. (1937) 28 Cal. App. 2d Supp. 782, 71 P.2d 354* , *overruled on other grounds, Gardner v. Downtown Porsche Audi (1986) 180 Cal. App. 3d 713, 225 Cal. Rptr. 757* ; *see also Chatterton v. Boone (1947) 81 Cal. App. 2d 943, 945, 185 P.2d 610* ; *Travelers Fire Ins. Co. v. Brock & Co. (1938) 30 Cal. App. 2d 112, 114, 85 P.2d 905* ; *Wolfe v. Willard H. George, Inc. (1930) 110 Cal. App. 532, 535, 294 P. 436]* . For a complaint based on the theory of conversion, *see § 93.212*.

[4] Interest on Damages

A plaintiff may recover interest on damages certain or capable of being made certain when the right to recover those damages is vested in plaintiff on a particular day. Interest is computed from that day [*see Civ. Code § 3287(a)*]. The allegation of recovery of damages for wrongful detention would, however, preclude the recovery of interest. The depositor then may recover damages for the wrongful detention of the property when the amount of damages exceeds the interest on the value of the property, inasmuch as the latter measure then would not furnish adequate compensation for the wrongful detention [*Guerin v. Kirst (1949) 33 Cal. 2d 402, 414, 202 P.2d 10* ; *Helmick v. Ritchie (1958) 158 Cal. App. 2d 776, 778-779, 323 P.2d 584]* .

[5] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

Venue of an action to obtain possession of personal property is not specifically provided for and would generally be governed by that part of *Code Civ. Proc. § 395(a)* which states that "[e]xcept as otherwise provided by law and subject to the power of the court to transfer actions or proceedings as provided in this title, the superior court in the county where the defendants or some of them reside at the commencement of the action is the proper court for the trial of the action." If, in addition to seeking possession of property, an action seeks recovery for injury to the property, either the county where the injury occurs or the county in which the defendants, or some of them, reside at the commencement of the action, is the proper county for trial of the action [*Code Civ. Proc. § 395(a)*; *see Spangenberg v. Spangenberg (1932) 123 Cal. App. 387, 391, 11 P.2d 408* (phrase "injury to ... property" in *Code Civ. Proc. § 395(a)* is limited to physical injury)]. If the action arises from a bailment primarily for personal, family or household use, the superior court in the county where the plaintiff in fact signed the contract, or where the plaintiff resided at the time the contract was entered into, or where the plaintiff resides at the commencement of the action, is the proper court for the trial of the action [*Code Civ. Proc. § 395(b)*; *Fontaine v. Superior Court (CashCall, Inc.) (2009) 175 Cal. App. 4th 830, 838-840, 96 Cal. Rptr. 3d 607* (statute applies to action by consumer plaintiff, as well as to action against consumer, and if any defendant in consumer's action is individual, that is irrelevant to application of statute)]. If defendant is a corporation or association it may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs, or where the principal place of business of the corporation or association is situated [*Code Civ. Proc. §§ 395.2, 395.5*].

[6] Order to Compel Delivery

If it is established at trial that defendant is not the owner of the property and that plaintiff is entitled to its immediate possession, the court may compel defendant specifically to deliver the property to plaintiff [*Civ. Code § 3380*].

[7] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[8] Cross References

For alternative allegations as to agency, capacity, and residence of parties and for fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative complaints for use in actions to obtain possession of personal property, see Ch. 119, *Claim and Delivery*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal*, and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms for verification, see Ch. 572, *Verification*

[9] State Statutes

Action for possession of personalty and damages for retention. *Code Civ. Proc. § 667*

Right to interest when damages are in amount certain or capable of being made certain by calculation. *Civ. Code § 3287(a)*

Order to compel delivery of personal property. *Civ. Code § 3380*

Recovery of costs. *Code Civ. Proc. § 1032*

Venue. *Code Civ. Proc. §§ 395(a), (b), 395.2, 395.5*

[10] Decisions

[a] Burden of Proof

Sufficient prima facie showing of liability is made under pleadings in case by proof of bailment and subsequent failure of bailee to make delivery of property on demand; burden is on defendant to explain the failure by showing that property was stolen or otherwise disposed of by others without negligence on defendant's part. *Gordon H. Ball, Inc. v. Parreira (1963) 214 Cal. App. 2d 697, 704, 29 Cal. Rptr. 679* ; *Downey v. Martin Aircraft Serv. (1950) 96 Cal. App. 2d 94, 98-100, 214 P.2d 581*

[b] Damages

Owner of property is allowed to estimate its worth whether or not he or she has any special knowledge of values; credit and weight to be given that evidence and its effect, as well as resolution of conflicts between testimony of owner as to value and that of expert witness, are for trier of fact [*see Evid. Code § 800*]. *Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 853, 88 Cal. Rptr. 39*

Depositor in claim and delivery action is permitted to recover damages for wrongful detention of property when

amount exceeds interest on value of property, inasmuch as latter measure does not furnish adequate compensation for wrongful detention; both are not recoverable. *Guerin v. Kirst (1949) 33 Cal. 2d 402, 414, 202 P.2d 10* ; *Helmick v. Ritchie (1958) 158 Cal. App. 2d 776, 778-779, 323 P.2d 584*

Measure of damages in action for wrongful detention of personal property is reasonable rental value during wrongful detention. *Crampton v. Clark (1934) 137 Cal. App. 392, 395, 30 P.2d 584*

Plaintiffs were entitled to compensation for salary paid to employees during week their business was closed due to loss of property. *Ruzanoff v. Retailers Credit Ass'n (1929) 97 Cal. App. 682, 687, 276 P. 156*

Plaintiffs were entitled to compensation for usable value of property of which plaintiffs were deprived, regardless of whether they hired other property to take its place or not. *Ruzanoff v. Retailers Credit Ass'n (1929) 97 Cal. App. 682, 687, 276 P. 156*

[c] Depositor's Possessory Interest Sufficient

Depositor is not required to be owner of deposited property, and is permitted to maintain action against third person based on possessory interest if that interest is good as against all but true owner. *Sperisen v. Heynemann (1957) 149 Cal. App. 2d 228, 230, 308 P.2d 436*

[d] Statute of Limitations

Statute of limitations does not begin to run against person coming into possession of chattels permissively as bailee until it appears to owner that the holding was adverse. *Estate of Rathgeb (1899) 125 Cal. 302, 306-307, 57 P. 1010* ; *Niiya v. Goto (1960) 181 Cal. App. 2d 682, 688, 5 Cal. Rptr. 642*

Statute of limitations is tolled until owner demands personal property and is refused possession of it where the property is legally taken. *Niiya v. Goto (1960) 181 Cal. App. 2d 682, 688, 5 Cal. Rptr. 642*

Statute of limitations begins to run at time of refusal where illegal taking consists of refusal by party in possession to surrender property on demand. *Niiya v. Goto (1960) 181 Cal. App. 2d 682, 688, 5 Cal. Rptr. 642*

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9-93 California Forms of Pleading and Practice--Annotated § 93.211

§ 93.211 Complaint to Recover Possession of Personal Property or Its Value and for Damages for Wrongful Detention [Civ. Code §§ 3379, 3380; Code Civ. Proc. § 667]--By Depositor Against Depositary and Third Party--Failure to Redeliver on Demand [Civ. Code § 1822]--Depositary and Third Party Detaining Possession

[1] FORM Complaint to Recover Possession of Personal Property or Its Value and for Damages for Wrongful Detention [Civ. Code §§ 3379, 3380; Code Civ. Proc. § 667]--By Depositor Against Depositary and Third Party--Failure to Redeliver on Demand [Civ. Code § 1822]--Depositary and Third Party Detaining Possession

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO RECOVER POSSESSION OF
_____ [*names*],	)	PERSONAL PROPERTY AND FOR DAMAGES
Defendants.	)	(Wrongful Detention)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a corporation organized and existing under the laws of California with its principal place of business in _____ County, California [*or allege other capacity and residence*].

2. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence*].

[3. *Fictitious name allegation, if appropriate. See § 93.210, Paragraph 2.*]

4. On or about _____ [*date*], plaintiff was the owner of certain personal property described as follows: _____ [*description*].

5. On or about _____ [*date*], this property was in the possession, custody, and control of defendant _____ [*name of depositary*].

6. On or about _____ [*date*], and thereafter, plaintiff made demand on defendant _____ [*name of depositary*] for the return of the property, which demand was ignored and refused, ever since which date defendant has wrongfully refused to deliver back to plaintiff the property, and has ever since then wrongfully detained the same, to the damage of the plaintiff in the amount of $_____ [*amount of value of detained property*].

7. Plaintiff is informed and believes and thereon alleges that _____ [*name of depositary*] has attempted to sell an interest in the property to defendant _____ [*name of third party*], and that that defendant joins with defendant _____ [*name of depositary*] in detaining possession of the property without the consent of plaintiff.

[8. *Allegation of damages for loss of use. See § 93.213* .]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For possession of the personal property or its value in the sum of $_____ in case delivery thereof cannot be had.

2. For damages for loss of use incurred to date in the sum of $_____ and for each day hereafter until judgment is rendered for plaintiff, at the rate of $_____ per day.

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 93.210.*]

[2] Use of Form

This complaint is for use in actions to obtain possession of personal property by a depositor against a depositary and a third party.

The complaint alleges plaintiff's right to immediate and exclusive possession of the property (Paragraph 4) [*see Sperisen v. Heynemann (1957) 149 Cal. App. 2d 228, 230, 308 P.2d 436]* , defendants' possession of the property (Paragraph 5) [*see Helmick v. Ritchie (1958) 158 Cal. App. 2d 776, 778-779, 323 P.2d 584]* , and plaintiff's demand for return of the property and defendants' refusal (Paragraph 6) [*see Gordon H. Ball, Inc. v. Parreira (1963) 214 Cal. App. 2d 697, 704, 29 Cal. Rptr. 679* ; *Downey v. Martin Aircraft Serv. (1950) 96 Cal. App. 2d 94, 100, 214 P.2d 581]* .

To permit an alternative judgment for the value of the property in the event possession cannot be obtained, the complaint contains an allegation of such value (Paragraph 6) [*see Code Civ. Proc. §§ 627, 667*]. It also contains an allegation of damages caused by the loss of use of the property (Paragraph 8), recoverable under *Code Civ. Proc. § 667*.

[3] Cross References

For a related form, *see § 93.210*

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9-93 California Forms of Pleading and Practice--Annotated § 93.212

§ 93.212 Complaint for Damages [Civ. Code § 3336] for Conversion--By Depositor Against Depositary--Failure to Redeliver Personal Property on Demand [Civ. Code § 1822]--Property Left to Be Repaired

[1] FORM Complaint for Damages [Civ. Code § 3336] for Conversion--By Depositor Against Depositary--Failure to Redeliver Personal Property on Demand [Civ. Code § 1822]--Property Left to Be Repaired

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Conversion)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Capacity and residence of defendant. See § 93.211, Paragraph 2.*]

[2. *Fictitious name allegation, if appropriate. See § 93.210, Paragraph 2.*]

3. During all of the times herein mentioned, plaintiff was the owner of a _____ [*name of object*] of the reasonable value of $_____.

4. On or about _____ [*date*], plaintiff delivered the _____ [*name of object*] into the

custody and possession of defendant for the purpose of having it repaired.

5. Defendant took possession of the property and orally agreed to make the necessary repairs and to redeliver it to plaintiff when the repairs were completed.

6. Although plaintiff has made demand therefor, and has tendered to defendant _____ [the agreed amount *or the reasonable value*] for the repair work defendant has failed and refused to redeliver the _____ [*name of object*] to plaintiff, and has converted the same to defendant's own use, all to plaintiff's damage in the sum of $_____.

7. Plaintiff has heretofore made demand for payment of the damages from defendant, but no part thereof has been paid.

[8. Between the time of defendant's refusal to redeliver the _____ (*name of object*) and the filing of this action, plaintiff _____ (*describe time and money properly expended in pursuit of the converted property*), all to plaintiff's further damage in the sum of $_____.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the value of the property converted in the sum of $_____.

2. For interest at _____ percent on the foregoing sum from and after _____ [*date*].

[3. For damages for time and money expended in pursuit of the converted property in the sum of $_____.]

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 93.210.*]

[2] Use of Form

This complaint is for the recovery of damages for conversion by a depositor against a depositary through the failure to redeliver personal property on demand where the property has been left to be repaired.

The complaint alleges plaintiff's right to possession of certain identified personal property, the value of the property (Paragraph 3) [see *United States Rubber Co. v. Union Bank & Trust Co. (1961) 194 Cal. App. 2d 703, 709, 15 Cal. Rptr. 385]* , and defendant's conversion (Paragraph 6) [*see Grosso v. Monfalcone, Inc. (1936) 13 Cal. App. 2d 405, 409-410, 56 P.2d 1266]* .

Exemplary damages may be recovered in a conversion action, given the required showing of malice, fraud, or oppression [*Civ. Code § 3294*]. If the facts justify such an award, counsel will insert appropriate allegations as

Paragraph 9 in this form. For forms for those allegations, see Ch. 177, *Damages* .

[3] Cross References

For a related form, *see § 93.210*

For alternative complaints for recovery on the theory of conversion, see Ch. 150, *Conversion*

[4] State Statutes

Wrongful conversion of personalty. *Civ. Code § 3336*

[5] Decisions

[a] Damages

Evidence of cost of property through testimony of owner as to its cost and value is admissible to prove value at time and place of conversion. *Shook v. Beals (1950) 96 Cal. App. 2d 963, 973-974, 217 P.2d 56* ; *Chatterton v. Boone (1947) 81 Cal. App. 2d 943, 948, 185 P.2d 610*

Measure of damages, in suit for unlawful conversion of personal property, is value of property at time of conversion, with interest from that time, or amount sufficient to indemnify party injured for loss which is natural, reasonable, and proximate result of wrongful act complained of and which proper degree of prudence on injured party's part would not have averted, together with fair compensation for time and money expended in pursuit of property [*Civ. Code § 3336*]. *Chatterton v. Boone (1947) 81 Cal. App. 2d 943, 947, 185 P.2d 610*

[b] Demand for Return of Property

Demand by plaintiff for return of property is unnecessary when by act of conversion defendant has put it out of defendant's power to redeliver property in controversy or has evinced defendant's determination to refuse redeliver. *Downey v. Martin Aircraft Serv. (1950) 96 Cal. App. 2d 94, 100, 214 P.2d 581*

Proof of demand for return of property is useless and not required where answer of defendant denies plaintiff's right to possession thereof. *Ruzanoff v. Retailers Credit Ass'n (1929) 97 Cal. App. 682, 685, 276 P. 156*

[c] Nature of Action

Gist of action for conversion is wrongful interference with owner's right of dominion and possession of owner's property. *Chatterton v. Boone (1947) 81 Cal. App. 2d 943, 946, 185 P.2d 610*

Mere good faith of bailee in refusing to deliver goods to owner, on demand, is no defense to action of trover. *Chatterton v. Boone (1947) 81 Cal. App. 2d 943, 946, 185 P.2d 610*

Period of time and circumstances which will constitute conversion of property wrongfully withheld from owner are largely questions of fact for determination of court or jury. *Wolfe v. Willard H. George, Inc. (1930) 110 Cal. App. 532, 536, 294 P. 436*

[d] Statute of Limitations

Statute of limitations begins to run at time bailee is shown to have done some act implying exercise or assumption of title, or of dominion over property, or some act inconsistent with plaintiff's right of ownership, or in repudiation of that right. *Niiya v. Goto (1960) 181 Cal. App. 2d 682, 690, 5 Cal. Rptr. 642*

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9-93 California Forms of Pleading and Practice--Annotated § 93.213

§ 93.213 Allegation--Damages for Loss of Use

[1] FORM Allegation--Damages for Loss of Use

During the wrongful detention of the aforementioned personal property, and as a result of that wrongful detention, plaintiff has suffered the loss of the use and enjoyment of that personal property, the reasonable value of which use is approximately $_____ per day, and thus has suffered damages to date in the amount of $_____.

[2] Use of Form

This allegation of loss of use is to be used either in complaints for conversion or complaints for the recovery of the possession of personal property by a depositor against a depositary where there has been a failure to redeliver the property on demand. Recovery of damages for loss of use may be obtained where the amount thereof exceeds the amount recoverable as interest under *Civ. Code § 3287(a)* [*Guerin v. Kirst (1949) 33 Cal. 2d 402, 414, 202 P.2d 10* ; *Helmick v. Ritchie (1958) 158 Cal. App. 2d 776, 778-779, 323 P.2d 584]* .

Damages for loss of use are not warranted when there is no evidence that the plaintiff had been deprived of any use that he or she otherwise would have made of the property during the time of its wrongful detention [*Metz v. Soares (2006) 142 Cal. App. 4th 1250, 1258, 48 Cal. Rptr. 3d 743]* . For example, it was held in one case that the trial court correctly instructed the jury that to receive damages for loss of use, plaintiff would have to prove loss of use for a specified time due to the fault of the defendant. The plaintiff in that case failed to meet this burden because he did not prove use of the car in question at any ascertainable time for five years before he entrusted it to defendant, and did not prove that he had even wanted to use the car during the four years it sat in defendant's shop [*Metz v. Soares (2006) 142 Cal. App. 4th 1250, 1258, 48 Cal. Rptr. 3d 743]* .

[3] Cross References

For related forms, *see §§ 93.210, 93.212*

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9-93 California Forms of Pleading and Practice--Annotated § 93.214

§ 93.214 Complaint for Damages [Civ. Code §§ 1836, 3300] for Breach of Contract of Bailment--By Depositor Against Depositary--Depositary Wrongfully Using Thing Deposited [Civ. Code § 1835]

[1] FORM Complaint for Damages [Civ. Code §§ 1836, 3300] for Breach of Contract of Bailment--By Depositor Against Depositary--Depositary Wrongfully Using Thing Deposited [Civ. Code § 1835]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Breach of Contract)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Capacity and residence of defendant. See § 93.211, Paragraph 2.*]

[2. *Fictitious name allegation, if appropriate. See § 93.210, Paragraph 2.*]

3. Prior to _____ [*date*], plaintiff had in his/her possession and under his/her control a _____ [*item of personal property, e.g.*, carved jade lamp] valued in excess of $_____.

4. On or about _____ [*date*], the _____ [*item of personal property*], then in perfect

condition was delivered by plaintiff to defendant for the sole purpose and on the express oral agreement of defendant that it was to be exhibited by defendant to a _____ [client *or* customer] of defendant in _____ [*location*], as a possible purchaser.

5. Defendant instead of exhibiting the object to defendant's _____ [client *or* customer] in _____ [*location*] took it to _____ [*location*] for exhibition and to be sold at retail. After numerous demands had been made by plaintiff on defendant, the _____ [*item of personal property*] was returned to plaintiff.

6. While the _____ [*item of personal property*] was in the possession of and under the control of defendant and being exhibited contrary to the terms of the bailment it was broken and damaged; the reasonable cost of repairing it is the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For compensatory damages in the sum of $_____.

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 93.210.*]

[2] Use of Form

This complaint is for use by a depositor against a depositary for the recovery of damages for the breach of the contract of bailment where the depositary has wrongfully used the thing deposited.

[3] California Legal Forms

For notice by bailee to bailor of loss or injury to property deposited and declaration by bailor of value of property deposited, see California Legal Forms, Ch. 102, *Bailments* (Matthew Bender)

[4] State Statutes

Use of deposit by depositary only with consent of depositor. *Civ. Code § 1835*

Liability of depositary for damage to thing deposited. *Civ. Code § 1836*

[5] Decisions

Bailee of every bailment contract (lucrative or not) is liable to bailor for any loss or damage in respect of thing bailed which occurs as result of any departure by bailee from terms expressly or impliedly agreed on by parties, irrespective of any want of due care by bailee, in absence of any ratification on part of bailor. *Sperisen v. Heynemann (1957) 149 Cal. App. 2d 228, 231, 308 P.2d 436*

[6] Cross References

For a related form, *see § 93.210*

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9-93 California Forms of Pleading and Practice--Annotated § 93.215

§ 93.215 Complaint for Damages [Civ. Code § 3333] Based on Negligence [Civ. Code §§ 1714(a), 1852]--By Depositor Against Depositary--Articles Placed for Storage [Civ. Code § 1851]

[1] FORM Complaint for Damages [Civ. Code § 3333] Based on Negligence [Civ. Code §§ 1714(a), 1852]--By Depositor Against Depositary--Articles Placed for Storage [Civ. Code § 1851]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Negligence)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Capacity and residence of defendant. See § 93.211, Paragraph 2.*]

[2. *Fictitious name allegation, if appropriate. See § 93.210, Paragraph 2.*]

3. At all times herein mentioned defendant _____ [*name*] was and is doing business as _____ [*type of business, e.g.,* operator of a parking lot], with defendant's place of business located at _____ [*street address*], _____ [*city*], California.

4. On or about _____ [*date*], plaintiff placed his/her _____ [*article of personal property, e.g.*, automobile] in the _____ [*place of business*] of defendant for storage, pursuant to an oral agreement by which plaintiff agreed to pay defendant $_____ per month for the storage.

5. The reasonable market value of the _____ [*article of personal property*] was at all times herein mentioned [and is] the sum of $_____.

6. Defendant so negligently stored the _____ [*article of personal property*] that the same was allowed to _____ [*manner in which defendant's negligence caused damage to article stored*].

7. As a proximate result of the negligence of defendant, and the resulting damages to plaintiff's _____ [*article of personal property*], plaintiff was obliged to incur bills in the sum of $_____ for the repair of the _____ [*article of personal property*] which is the reasonable cost of the repairs, all to plaintiff's damage in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For cost of repairs to plaintiff's property in the sum of $_____.

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 93.210.*]

[2] Use of Form

This complaint is for use in an action for damages based on negligence brought by a depositor against a depositary for hire where an article placed in storage has been damaged. The burden of proving that the deposited property was lost or damaged without fault is on the defendant-depositary, regardless of whether plaintiff-depositor frames the complaint on a negligence or breach of contract theory [*Downey v. Martin Aircraft Serv. (1950) 96 Cal. App. 2d 94, 98-99, 214 P.2d 581]* .

[3] Cross References

For related forms, *see §§ 93.210, 93.212*

For alternative damage allegations, see Ch. 177, *Damages*

For alternative forms and discussion relating to negligence, see Ch. 380, *Negligence*

[4] State Statutes

General liability for negligence. *Civ. Code § 1714(a)*

Storage is deposit for hire. *Civ. Code § 1851*

Duty of care required of depositary for hire. *Civ. Code § 1852*

[5] Decisions

Trial court is permissibly allowed to award damages in amount of value of replacement for new parts of object damaged through carelessness of bailee where ample evidence existing that object is unable to be repaired satisfactorily. *Awalt v. Mercer, Fraser Co. (1955) 130 Cal. App. 2d 853, 858-859, 279 P.2d 1001*

Complaint alleging bailment, and that in violation of bailment agreement to return crane in good condition appellant neglected it, and through its negligence, carelessness, and ill use, crane was damaged, creates prima facie case, if proven, which could be defended against by showing that damage occurred without negligence on part of bailee. *Awalt v. Mercer, Fraser Co. (1955) 130 Cal. App. 2d 853, 858, 279 P.2d 1001*

Whether bailee has exercised due care is question of fact for jury or court, if sitting without jury, except in cases where but one reasonable inference can be drawn from undisputed facts. *Shook v. Beals (1950) 96 Cal. App. 2d 963, 973, 217 P.2d 56* ; *Homan v. Burkhart (1930) 108 Cal. App. 363, 367, 291 P. 624*

Transaction where defendant's employee accepted automobile for parking, asked and received from driver sum of money as fee, and gave to driver portion of parking ticket bearing identifying number constitutes bailment for hire. *U Drive & Tour, Ltd., v. System Auto Parks (1937) 28 Cal. App. 2d Supp. 782, 71 P.2d 354 , overruled on other grounds, Gardner v. Downtown Porsche Audi (1986) 180 Cal. App. 3d 713, 225 Cal. Rptr. 757*

No demand for return of bailor's property is necessary before action for its negligent loss is commenced because demand for its return would be fruitless. *Grosso v. Monfalcone, Inc. (1936) 13 Cal. App. 2d 405, 410, 56 P.2d 1266*

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9-93 California Forms of Pleading and Practice--Annotated § 93.216

§ 93.216 Complaint for Damages [Civ. Code §§ 3300, 3333, 3336] Based on Conversion, Negligence [Civ. Code §§ 1714(a), 1852], and Breach of Bailment Contract--By Depositor Against Depositary--Department Store Losing Plaintiff Shopper's Personal Property [Civ. Code § 1822]

[1] FORM Complaint for Damages [Civ. Code §§ 3300, 3333, 3336] Based on Conversion, Negligence [Civ. Code §§ 1714(a), 1852], and Breach of Bailment Contract--By Depositor Against Depositary--Department Store Losing Plaintiff Shopper's Personal Property [Civ. Code § 1822]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Conversion, Negligence, and Breach of Contract)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST COUNT

[1. *Capacity and residence of defendant. See § 93.211, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 93.210, Paragraph 2.*]

[3. At all times herein mentioned _____ (*names of defendant depositary's employees*) were the agents of defendant and in doing the things hereinafter alleged were acting in the scope of such agency and with the permission and consent of their employer.]

4. At all times herein mentioned plaintiff was the owner of a _____ [*article of personal property lost, e.g.*, a diamond pin] of the reasonable value of $_____.

5. At all times herein mentioned, plaintiff was in lawful possession of the _____ [*e.g.*, diamond pin] and was entitled to possession thereof.

6. On or about _____ [*date*], at the premises of _____ [*name of defendant depositary*], in _____ [*city*], _____ County, California, defendant depositary's employees wrongfully took, converted, removed, and misplaced the _____ [*e.g.*, diamond pin] of plaintiff. The taking was without the consent or permission, express or implied, of plaintiff, and although plaintiff has made demand therefor of defendant, defendant has failed to return or deliver the _____ [*e.g.*, diamond pin] as a proximate result of which _____ [*allege injuries for the loss which are the natural, reasonable, and proximate result of the conversion and which a proper degree of prudence on plaintiff's part would not have averted*], all to plaintiff's damage in the sum of $_____.

7. Plaintiff has heretofore made demand for payment of damages from defendant, but no part thereof has been paid.

[8. Between the time of defendant's conversion of the above mentioned _____ (*e.g.*, diamond pin) to its own use and the filing of this action, plaintiff _____ (*describe time and money properly spent in pursuit of the converted property*), all to plaintiff's further damage in the sum of $_____.]

SECOND COUNT

1. Plaintiff incorporates Paragraphs 1 through 5 of the First Count as though set forth fully herein.

2. On or about _____ [*date*], at the premises of defendant, in _____ [*city*], _____ County, California, defendant's employees carelessly and negligently took, removed, and misplaced the _____ [*e.g.*, diamond pin] of plaintiff. Defendant's employees so carelessly and negligently conducted themselves with respect to the _____ [*e.g.*, pin], and so negligently and carelessly took charge and custody of the _____ [*e.g.*, pin], that as a proximate result of their negligence and the negligence and carelessness of defendant, it was lost [and stolen], all to plaintiff's damage in the sum of $_____.

THIRD COUNT

1. Plaintiff incorporates Paragraphs 1 through 5 of the First Count as though set forth fully herein.

2. On or about _____ [*date*], plaintiff, who was at the time and place herein mentioned a customer of defendant, delivered for a consideration the _____ [*e.g.*, diamond pin] into the custody and possession of defendant. Defendant was to safely and securely keep the _____ [*e.g.*, pin] and redeliver it to plaintiff when so requested, which defendant then and there promised and undertook to do.

3. Although plaintiff has made demand therefor, defendant has failed to deliver to plaintiff the _____ [

e.g., pin], all to plaintiff's damage in the sum of $_____.

4. Plaintiff has heretofore made demand to defendant for payment of these damages from defendant, but no part thereof has been paid.

[5. At the time plaintiff deposited the _____ (*e.g.*, diamond pin) it was made known to defendant-depositary's employees that it was a _____ (*specify how object deposited directly affected the self-esteem or tender feelings of plaintiff, e.g.*, cherished memento of plaintiff's dead husband).]

[6. As a proximate result of the loss of the _____ (*e.g.*, diamond pin), plaintiff was injured in _____ (his *or* her) health, strength, and activity, sustaining bodily injuries and shock and injury to _____ (his *or* her) nervous system, which have caused and will cause great mental and physical pain and suffering, all to _____ (his *or* her) damage.]

7. [*Allegation of damages for loss of use. See § 93.213.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

On the First Count:

1. For the value of the property converted in the sum of $_____.

2. For interest at _____ percent on the foregoing sum, pursuant to *Section 3336 of the Civil Code*, from and after _____ [*date*].

[3. For damages for time and money expended in pursuit of the converted property in the sum of $_____.]

On the Second Count:

4. For general damages according to proof.

On the Third Count:

5. For compensatory damages in the sum of $_____.

[6. For damages for physical and mental pain and suffering according to proof.]

[7. For damages caused by the loss of use of the property in the sum of $_____.]

On all counts:

8. For costs of suit herein incurred.

9. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 93.210.*]

[2] Use of Form

This complaint is for use in the recovery of damages by a depositor against a depositary based on theories of conversion, negligence, and breach of the bailment contract where a department store and its employees have lost a depositor-shopper's personal property.

[3] Contract Damages

Whenever the terms of a contract relate to matters which directly concern the comfort, happiness, or personal welfare of one of the parties, or the subject matter of which directly affects or moves the affection, self-esteem, or tender feelings of that party, the party may recover damages for physical suffering or illness proximately caused by its breach. In its application, this rule permits recovery of damages for mental suffering [*Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 851, 88 Cal. Rptr. 39]* . Where the facts warrant such recovery, Paragraphs 5 and 6 should be included in the Third Count, along with the relevant prayers in the prayer for relief.

[4] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(a)(2)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(a)(2)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[5] Decisions

Jury is entitled to include in damages recoverable for loss of rings by reason of defendant bailee's breach of bailment contract damages for physical suffering or illness proximately resulting from such loss, in addition to damages sustained because of actual loss. *Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 852, 88 Cal. Rptr. 39*

Burden is on plaintiff to prove making of valid contract of bailment between parties, delivery of property to bailee under contract, and acceptance by bailee when existence of contract of bailment is in issue. *H.S. Crocker Co., Inc. v. McFaddin (1957) 148 Cal. App. 2d 639, 647, 307 P.2d 429*

Retailer implicitly invites public to enter store and do business, and retailer must exercise reasonable care for protection of property that customer properly brings there and necessarily lays aside while doing business pursuant to invitation. *Fuller v. I. Magnin & Co. (1951) 104 Cal. App. 2d 517, 522, 232 P.2d 36* (notice that articles of special value are

present as essential for recovery of their full value)

Theft of goods after termination of bailment furnishes no excuse for unwarranted and wrongful delay in restoring property to owner after adequate demand. *Wolfe v. Willard H. George, Inc. (1930) 110 Cal. App. 532, 536, 294 P. 436*

[6] Cross References

For related forms, *see §§ 93.210, 93.212, 93.214, 93.215*

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9-93 California Forms of Pleading and Practice--Annotated § 93.217

§ 93.217 Complaint for Damages [Civ. Code §§ 3300, 3333] Based on Negligence [Civ. Code §§ 1714(a), 1852] and Breach of Bailment Contract--By Customer-Depositor Against Proprietor of Athletic Facility as Depositary--Loss of Personal Property Deposited [Civ. Code § 1851].

[1] FORM Complaint for Damages [Civ. Code §§ 3300, 3333] Based on Negligence [Civ. Code §§ 1714(a), 1852] and Breach of Bailment Contract--By Customer-Depositor Against Proprietor of Athletic Facility as Depositary--Loss of Personal Property Deposited [Civ. Code § 1851].

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Negligence and Breach of Contract)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Capacity and residence of defendant. See § 93.210, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 93.210, Paragraph 2.*]

3. At all times herein mentioned, defendant _____ [*name*] was engaged in operating a _____ [*athletic facility, e.g.*, swimming pool] at _____ [*street address*], _____ [*city*], _____ County, California, to which the general public was invited for

the purpose of _____ [*e.g.*, swimming] on payment of a fee to defendant; as part of the service rendered for this consideration, defendant undertook to safely keep, and promptly return on demand, valuables and other items of personal property deposited by patrons.

4. On or about _____ [*date*], at approximately _____ [*time*], on payment of this fee, plaintiff entered defendant's premises and, preparatory to utilizing defendant's facilities, plaintiff deposited with defendant the following items of personal property: _____ [*describe*], of a reasonable total value in the sum of $_____.

5. After approximately _____ [*number*] hours from that time, plaintiff demanded the return of the items; defendant refused, and continues to refuse, to deliver the items to plaintiff [and has informed plaintiff that the items have been lost and cannot be found].

6. Defendant did not exercise ordinary care for the preservation of the items of personal property deposited by plaintiff, in that _____ [*optional specification of negligence, e.g.*, defendant delivered the items to a person other than plaintiff without requiring any form of identification].

7. As a proximate result of the negligence of defendant as herein alleged, plaintiff has sustained damage in the sum of $_____, which is the reasonable total value of the items of personal property deposited with defendant.

[*Prayer. See § 93.214.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 93.210.*]

[2] Use of Form

This complaint is for use in an action for damages based on negligence and a breach of the bailment contract by a customer-depositor against a proprietor of an athletic facility as a depositary for the loss of personal property deposited.

[3] Cross References

For related forms, *see §§ 93.210, 93.214 -93.217*

For a general discussion of tort actions (including complaints and defenses) involving athletics, see Ch. 273, *Games, Sports and Athletics*

[4] Decisions

Defendant bailee is required to justify failure to redeliver property to plaintiff, including lack of negligence, in order to rebut prima facie case of plaintiff on showing of bailment and subsequent refusal of defendant to make recovery on demand according to terms of contract., *U Drive & Tour, Ltd., v. System Auto Parks, Ltd. (1937) 28 Cal. App. 2d Supp. 782, 71 P.2d 354* , *overruled on other grounds,* *Gardner v. Downtown Porsche Audi (1986) 180 Cal. App. 3d 713, 225 Cal. Rptr. 757* ; see also *Chatterton v. Boone (1947) 81 Cal. App. 2d 943, 945, 185 P.2d 610* ; *Travelers Fire Ins. Co. v. Brock & Co. (1938) 30 Cal. App. 2d 112, 114, 85 P.2d 905* ; *Wolfe v. Willard H. George, Inc. (1930) 110 Cal. App. 532, 535, 294 P. 436*

Defendant bailee is under duty to exercise same care in handling property of paying guests, regardless of differences in prices charged them. *Clark v. Burns Hammam Baths (1925) 71 Cal. App. 571, 574-575, 236 P. 152*

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9-93 California Forms of Pleading and Practice--Annotated § 93.218

§ 93.218 Complaint for Damages [Civ. Code § 3333] Based on Gross Negligence [Civ. Code §§ 1714(a), 1846]--By Depositor Against Gratuitous Depositary [Civ. Code § 1844]--Object Destroyed

[1] FORM Complaint for Damages [Civ. Code § 3333] Based on Gross Negligence [Civ. Code §§ 1714(a), 1846]--By Depositor Against Gratuitous Depositary [Civ. Code § 1844]--Object Destroyed

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Gross Negligence)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, a resident of _____ County, California [*or other capacity and residence of defendant*].

2. [*Fictitious name allegation, if appropriate. See § 93.210, Paragraph 2.*]

3. Plaintiff is, and at all times herein mentioned was, the _____ [*describe plaintiff as owner or holder of property interest*] and entitled to the immediate and exclusive possession of the _____ [*name of object*].

4. On or about _____ [*date*], plaintiff left a _____ [*name of object*] with defendant _____ [*name*], at _____ [*street address*] _____ [*city*], California, for safekeeping.

5. [*Where deposit was involuntary, insert the following allegation:* The circumstances under which plaintiff left the _____ (*name of object*) with defendant were as follows: _____ (*describe emergency situation, e.g., fire, flood, riot, etc., contemplated by Civ. Code § 1815(b)).*]

6. Defendant received no consideration for the safekeeping of the _____ [*name of object*] beyond the mere possession of it.

7. On or about _____ [*date*], while the _____ [*name of object*] was in defendant's possession it was destroyed by reason of the gross negligence of defendant in _____ [*manner in which defendant was grossly negligent, e.g.*, leaving the object exposed to a heavy rainstorm when with no difficulty defendant could have placed it in a place of shelter].

8. The reasonable value of the _____ [*name of object*] at the time of its destruction was $_____. Because of the gross negligence of defendant as herein alleged, and the destruction of the object so caused thereby, plaintiff has been damaged in the sum of $_____.

[*Prayer. See § 93.214.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 93.210.*]

[2] Use of Form

This complaint is for use in an action for the recovery of damages based on gross negligence brought by a depositor against a gratuitous depositary where the object deposited has been destroyed.

[3] State Statutes

Gratuitous deposits. *Civ. Code § 1844 et seq.*

[4] Decisions

Gratuitous bailee is liable only for gross negligence during bailee's possession. *Roselip v. Raisch (1946) 73 Cal. App. 2d 125, 133, 166 P.2d 340*

[5] Cross References

For a related form, *see § 93.215*

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9-93 California Forms of Pleading and Practice--Annotated § 93.219

§ 93.219 Affirmative Defense--Property Withheld From Plaintiff Depositor to Enforce Repairman's Lien [Civ. Code § 3051]

[1] FORM Affirmative Defense--Property Withheld From Plaintiff Depositor to Enforce Repairman's Lien [Civ. Code § 3051]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

1. On or about _____ [*date*], plaintiff brought the _____ [*name of object*] to the repair shop operated by defendant and at that time and place plaintiff ordered certain work and labor to be performed and certain materials to be furnished in repairing the _____ [*name of object*]; the work, labor, and materials are set forth in the copy of the repair order attached as Exhibit A and incorporated by reference.

2. On or about _____ [*date*], defendant presented to plaintiff a demand for $_____ for the work, as set forth in Exhibit A herein, which is a reasonable sum for the work, labor, and materials, and plaintiff has failed and refused to pay that bill.

3. Defendant claims a lien on _____ [*name of object*] in the amount of $_____ for the repairs made at the request of plaintiff.

[2] Use of Form

This affirmative defense is for use in an answer to a complaint by a depositor based on the depositary's failure to redeliver the object deposited. A depositary is not required to deliver property deposited on demand when the depositary has a lien on the property [*Civ. Code § 1822*]. For a more complete discussion, see § 93.96.

[3] Cross References

For related forms, *see §§ 93.210, 93.212*

For discussion and general forms for answers, see Ch. 26, *Answers*

For discussion and forms relating to liens, see Ch. 342, *Liens and Wage Preferences*

[4] State Statutes

Depositary's obligation to deliver on demand. *Civ. Code § 1822*

Repairman's lien. *Civ. Code § 3051*

Notice requirements as to repairman's lien. *Civ. Code § 3051a*

[5] Decisions

Manufacturer has lien on objects manufactured on land of another while manufacturer retains possession of them. *Douglass v. McFarland (1892) 92 Cal. 656, 657-658, 28 P. 687*

One who renders services in digging nursery stock on land is entitled to possessory lien under *Civ. Code § 3051* (service and repair lien). *Kirkman Corp. v. Owens (1944) 62 Cal. App. 2d 193, 199-201, 144 P.2d 405*

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9-93 California Forms of Pleading and Practice--Annotated § 93.220

§ 93.220 Affirmative Defense--Property Lost or Destroyed Without Fault of Depositary

[1] FORM Affirmative Defense--Property Lost or Destroyed Without Fault of Depositary

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

[If the _____ (*name of object*) was deposited with defendant,] [D]efendant used all due care and diligence for the care and preservation thereof and its _____ [loss *or* destruction] was caused without any fault or breach of duty on the part of defendant.

[2] Use of Form

This affirmative defense is for use in an answer to a complaint by a depositor for the recovery of damages for the loss or destruction of personal property allegedly deposited with a depositary where the depositary asserts that the loss or destruction of the deposited object was not caused by any fault or breach of duty on the depositary's part. The burden of proving that the deposited property was lost or damaged without fault is on the defendant-depositary, regardless of whether plaintiff-depositor frames the complaint on a negligence or breach of contract theory [*Downey v. Martin Aircraft Serv. (1950) 96 Cal. App. 2d 94, 98-99, 214 P.2d 581]* .

[3] Cross References

For related forms, *see §§ 93.210, 93.215*

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9-93 California Forms of Pleading and Practice--Annotated § 93.221

§ 93.221 Complaint for Damages [Civ. Code § 3300] for Breach of Bailment Contract--By Repairman-Depositary Against Owner-Depositor of Personal Property--Owner Wrongfully Obtained Property From Repairman as Lienholder Without Paying Agreed Compensation [Civ. Code § 1822]

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Bailment Contract--By Repairman-Depositary Against Owner-Depositor of Personal Property--Owner Wrongfully Obtained Property From Repairman as Lienholder Without Paying Agreed Compensation [Civ. Code § 1822]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Breach of Bailment Contract)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 93.218, Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 93.210, Paragraph 2.*]

3. Plaintiff is now, and at all times herein mentioned has been, entitled to the immediate and exclusive possession of the personal property described as follows: _____ [*describe*].

4. On _____ [*date*], and prior thereto plaintiff was in possession and control of the personal property and engaged in work on the same at the oral request of defendant.

5. Plaintiff performed the work on the personal property of defendant, as requested.

6. Plaintiff was and is entitled to a lien on the property for the services performed thereon at the request of defendant.

7. On _____ [*date*], defendant, with force and violence and without the consent of plaintiff and against plaintiff's will, wrongfully and unlawfully seized and took the personal property from plaintiff and refused to redeliver same to plaintiff on plaintiff's demand therefor.

8. The _____ [reasonable value *or* agreed price] for the services performed by plaintiff in repairing the personal property is $_____, but defendant refused, and continues to refuse, despite repeated demands therefor by plaintiff, to pay plaintiff this amount, all to plaintiff's damage in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages in the sum of $_____.

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 93.210.*]

CAUTION:

In a case that is subject to *Code Civ. Proc. § 395(b)* (consumer obligations for goods, services, loans, or extensions of credit intended primarily for personal, family, or household use), facts showing that the action has been commenced in the proper court for the trial of the action or proceeding must be set forth in the complaint, verified by the oath of the plaintiff or of the plaintiff's attorney, or in an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) of the plaintiff or of the plaintiff's attorney filed with the complaint. When the affidavit or declaration is filed with the complaint, a copy of it must be served with the summons. If the complaint, affidavit, or declaration is not so filed, unless the court permits a later filing of the affidavit or declaration, the action must be dismissed without prejudice [*Code Civ. Proc. § 396a(a)*; *see* Ch. 20, *Allegations Commonly Used*].

[2] Use of Form

This complaint is for use in an action to recover damages for a breach of the contract of bailment by a

repairmen-depositary against the owner-depositor of personal property when the owner has wrongfully obtained the property from the repairman-depositary without paying the agreed compensation.

[3] State Statutes

Depositary having lien on thing deposited is not required to deliver to person for whose benefit it was deposited. *Civ. Code § 1822*

[4] Decisions

Action in claim and delivery is also permissibly maintained by one who holds property by virtue of lien if the property is wrongfully taken from that person. *International Airports, Inc. v. Finn (1955) 132 Cal. App. 2d 293, 297, 282 P.2d 102*

Repairman has lien under *Civ. Code § 3051* (artisan and service lien on personalty for labor, storage, repair, or protection) when party bringing property to lienholder was legal possessor of that property and repairs were made at that party's request. *Goodman v. Anglo-Cal. Trust Co. (1923) 62 Cal. App. 702, 704, 217 P. 1078*

[5] Cross References

For related forms, *see §§ 93.210, 93.219*

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[Reserved]

§§ 93.222[Reserved]

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B. Loans for Use

9-93 California Forms of Pleading and Practice--Annotated § 93.240

§ 93.240 Complaint for Damages [Civ. Code § 3333] Based on Slight Negligence [Civ. Code § 1886]--By Lender Against Borrower--Wrecked Automobile

[1] FORM Complaint for Damages [Civ. Code § 3333] Based on Slight Negligence [Civ. Code § 1886]--By Lender Against Borrower--Wrecked Automobile

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Negligence)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Capacity and residence of defendant. See § 93.218, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 93.210, Paragraph 2.*]

3. At all the times herein mentioned plaintiff was the owner of a _____ [*year, make, model*] automobile bearing _____ [*state*] License No. _____, of the value of $_____.

4. On _____ [*date*], plaintiff orally agreed to loan the automobile to defendant and defendant received the same from plaintiff, without paying or expecting to pay or incurring any liability to pay any compensation to plaintiff for the use thereof, and defendant thereby undertook to care for the automobile and return it to plaintiff.

5. While the automobile was in the exclusive possession of defendant, defendant so carelessly and negligently drove and operated the automobile [at an excessive, illegal, and dangerous rate of speed and] without having the same under proper control that it _____ [*describe accident, e.g.*, ran off the highway on which it was being operated, overturned, caught fire, and was totally destroyed].

6. Thereafter and on or about _____ [*date*], plaintiff duly demanded of defendant that defendant return the automobile to plaintiff, but defendant failed and refused, and still fails and refuses, to return the automobile to plaintiff after that demand.

7. As a result of the foregoing, plaintiff has been damaged in the sum of $_____.

[*Prayer. See § 93.214.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired, See § 93.210.*]

[2] Use of Form

This complaint is for use in an action by a lender against a borrower for damages based on slight negligence when the borrower has wrecked the lender's automobile.

[3] Cross References

For related forms, *see §§ 93.210, 93.215*

For alternative forms and discussion involving automobiles, see Ch. 82, *Automobiles: Causes of Action*

[4] State Statutes

Loans for use. *Civ. Code § 1884 et seq.*

[5] Decisions

Contract of bailment is created when owner of automobile gives possession of it, with permission to operate it, to another person. *Baugh v. Rogers (1944) 24 Cal. 2d 200, 214, 148 P.2d 633*

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B. Loans for Use

9-93 California Forms of Pleading and Practice--Annotated § 93.241

§ 93.241 Complaint for Damages Caused by Concealed Defects in Thing Lent [Civ. Code §§ 1884, 1893]--By Borrower Against Lender

[1] FORM Complaint for Damages Caused by Concealed Defects in Thing Lent [Civ. Code §§ 1884, 1893]--By Borrower Against Lender

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Concealed Defects in Thing Lent)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. [*Capacity and residence of defendant. See § 93.218, Paragraph 1.*]

[2. [*Fictitious name allegation, if appropriate. See § 93.210, Paragraph 2.*]

3. On _____ [*date*] at _____ County, California, defendant had possession of the _____ [*subject of loan*].

4. On that date at that place plaintiff and defendant entered into _____ [an oral *or* a written] agreement whereby defendant agreed to give plaintiff temporary possession and use of the _____ [*subject of loan*] for the purpose of _____ [*type of use intended*], without charge or reward. Plaintiff agreed to return the _____ [*subject of loan*] to defendant _____ [within a reasonable time *or* on _____ [*date*], without reward for that possession and use.

5. The _____ [*subject of loan*] was defective in that _____ [*specify nature of defect*]. The defect was not apparent to plaintiff on inspection. Defendant at the time well knew that the _____ [*subject of loan*] was defective in the respects herein alleged, and was in fact not fit or safe to use as _____ [*contemplated use*], and that the defect was not apparent on inspection. Defendant concealed his/her knowledge of this defect from plaintiff.

6. Pursuant to the agreement plaintiff borrowed _____ the [*subject of loan*] and thereafter began using it as _____ [*contemplated use*].

7. Because of the defective condition of the _____ [*subject of loan*], while plaintiff was so using it as _____ [*specify use*], it _____ [*type of defective performance or breakdown causing damage to plaintiff*].

8. As a result of the _____ [*type of defective performance, etc.*], _____ [*type of damage resulting*], to plaintiff's damage in the sum of $_____.

[*Prayer. See § 93.214.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 93.210.*]

[2] Use of Form

This complaint is for use in action by a borrower against a lender for the recovery of damages caused by a concealed defect in the thing lent. This is a statutory cause of action. Under *Civ. Code § 1893*, the lender of a thing for use must indemnify the borrower for damages caused by defects or vices in the thing, of which the lender knew at the time of the lending, and concealed from the borrower [*Civ. Code § 1893*].

[3] Cross References

For related forms, *see §§ 93.210, 93.240*

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9-93 California Forms of Pleading and Practice--Annotated §§ 93.242-93.259

[Reserved]

§§ 93.242[Reserved]

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9-93 California Forms of Pleading and Practice--Annotated § 93.260

§ 93.260 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 1955]--By Third Party Against Bailors--Defective Scaffold

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 1955]--By Third Party Against Bailors--Defective Scaffold

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR PERSONAL
_____ [*names*],	)	INJURIES
[and DOES 1 through _____,	)	(Negligence)
inclusive,]	)	[Amount demanded _____
Defendants.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

[1. *Capacity and residence of defendants. See § 93.211, Paragraphs 1 and 2.*]

[2. *Fictitious name allegation, if appropriate. See § 93.210, Paragraph 2.*]

3. On _____ [*date*], plaintiff was a _____ [*specify, e.g.,* painter] employed by _____ [*name*], and was directed and instructed by him/her to perform certain duties as a _____ [*specify, e.g.,* painter] at the premises at _____ [*street address*],

_____ [*city*], California.

4. On or within a few days prior to _____ [*date*], defendants, and each of them, carelessly and negligently constructed and erected an unsafe, defective, and dangerous scaffold or rolling stage. Plaintiff was ignorant of all those facts.

5. Among other things, defendants did not install, provide, or furnish any hand rails or guard rails with or on the open sides or ends of the scaffold or rolling stage to protect plaintiff or other employees working thereon from the danger of falling.

6. On or immediately prior to _____ [*date*], defendants, for valuable consideration, did lease, rent, hire, and deliver possession of the scaffold or rolling stage to plaintiff's employer. Defendants then knew of the dangerous and unsafe condition thereof, and likewise knew that plaintiff's employer leased, rented, hired, and took possession of the scaffold or rolling stage for the purpose of using and furnishing the same to plaintiff and other employees and instructing and directing the employees to perform certain painting duties while standing on the elevated platform of the scaffold or rolling stage. On _____ [*date*], plaintiff's employer directed and instructed him/her to go on the elevated platform of the scaffold or rolling stage and perform certain painting duties thereon. Plaintiff did go on the elevated platform of the scaffold or rolling stage and commenced and undertook to perform his/her duties as a painter thereon.

7. While plaintiff was so engaged and was necessarily giving close attention to his/her _____ [*specify, e.g.*, painting] work and duties, and as a proximate result of the unsafe, defective, and dangerous condition of the scaffold or rolling stage, and of the complete lack of any hand rails or guard rails on the open sides or ends thereof, plaintiff fell from the elevated platform of the scaffold or rolling stage to the concrete floor below.

8. As a proximate result of this fall and of the acts and omissions of the defendants, and each of them, plaintiff sustained the following injuries: _____ [*describe*]. Plaintiff still continues to suffer the effects of the injuries and is informed and believes and on that ground alleges that he/she will have permanent disability as a result thereof and will continue for an indefinite period to suffer pain and discomfort as a result thereof.

9. As a proximate result of this fall, of the acts and omissions of defendants, and of the injuries suffered by plaintiff, plaintiff was compelled to and did hire physicians and surgeons to examine, treat, and care for him/her and incurred medical and incidental expenses.

10. As a proximate result of this fall and of the acts and omissions of defendants alleged above, plaintiff was prevented from attending to his/her usual occupation as a _____ [*specify, e.g.*, painter], and plaintiff is informed and believes and thereon alleges that he/she will thereby be prevented from attending to his/her usual occupation for a period in the future.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages according to proof;

2. For damages for past and future medical expenses according to proof;

3. For damages for past and future loss of earnings according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 93.210.*]

[2] Use of Form

This general complaint is for use by a third party against bailors for damages for personal injuries caused by the negligence of the bailors in letting a defective scaffold.

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(a)(2)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought, regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[3] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[4] Cross References

For a related form, *see § 93.210*

For forms and discussion involving strict liability in tort as to innocent bystanders, see Ch. 460, *Products Liability*

For forms and discussion involving worker's compensation, see Ch. 577, *Workers' Compensation*

[5] State Statutes

Duties of bailor. *Civ. Code § 1955*

[6] Decisions

Bailor for hire of chattel is required to use reasonable care to make examination of chattel before letting it, in order to make certain that it is fit for intended use. *Zucker v. Passetti Trucking Co. (1961) 191 Cal. App. 2d 260, 265, 12 Cal. Rptr. 692*

One who furnishes defective facilities is permissibly held liable to employee working for third party. *Dickson v. Southern Cal. Edison Co. (1955) 136 Cal. App. 2d 85, 87, 288 P.2d 310*

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9-93 California Forms of Pleading and Practice--Annotated § 93.261

§ 93.261 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 1955]--By Third Party Against Hirer (Bailee) and Letter (Bailor)--Defect in Bailed Chattel--Plaintiff Injured When Loading Horse Into Defective Horse Trailer

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 1955]--By Third Party Against Hirer (Bailee) and Letter (Bailor)--Defect in Bailed Chattel--Plaintiff Injured When Loading Horse Into Defective Horse Trailer

[*Caption. See § 93.260.*]

Plaintiff alleges:

[1. *Capacity and residence of defendants. See § 93.211, Paragraphs 1, 2.*]

[2. *Fictitious name allegation, if appropriate. See § 93.210, Paragraph 2.*]

3. On _____ [*date*], defendant _____ [*name of letter*] was the owner of a certain horse trailer bearing California License No. _____.

4. Prior to that date defendant _____ [*name of letter*] loaned, bailed, and delivered the possession and control of the horse trailer to defendant _____ [*name of hirer*] for use as a vehicle on which to load and transport horses. The loan, bailment, and delivery was made by defendant _____ [*name of letter*], with the intent to sell the trailer to defendant _____ [*name of hirer*] and as an inducement to him/her to buy the same.

5. On _____ [*date*], defendant _____ [*name of hirer*] requested plaintiff's help in loading a horse into and on the trailer.

6. Then and there plaintiff and defendant _____ [*name of hirer*] proceeded to load the horse into and on the trailer.

7. The trailer and its chains, rings, and other attachments for holding and fastening horses were in a worn, weakened, dilapidated, and defective condition, and were then unsafe and dangerous for use in loading and transporting horses. Defendants and each of them knew, or would have known by making a reasonable inspection thereof, of the unsafe and dangerous condition of the trailer. Defendants failed and neglected to keep and maintain the trailer in a fit condition for use in loading and transporting horses thereon; failed and neglected to warn or advise plaintiff of the unsafe and dangerous condition of the trailer; and negligently and carelessly requested and invited plaintiff to use the trailer on the implied representations of each of the defendants that the trailer was in a safe and fit condition to load the horse thereon and was a safe place to work, which representations were false and untrue.

8. As a proximate result of the negligence and carelessness of defendants, and each of them, a metal tie ring failed and gave way, and a chain attached thereto and to the horse became detached, loose, and pulled away from the frame of the trailer. As a proximate result thereof, plaintiff was _____ [*describe injuries*] and suffered physical and mental shock and pain, bruises, and great mental suffering, all to plaintiff's damage.

9. By reason of the foregoing, plaintiff has been, and will permanently be, hampered, handicapped, and restricted in practicing his/her profession and has suffered a loss of earning capacity, all to plaintiff's further damage.

10. [*Medical expenses. See § 93.260, Paragraph 9.*]

[*Prayer. See § 93.260.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 93.210.*]

[2] Use of Form

This complaint is for use by a third party against the hirer (bailee) and letter (bailor) for damages for personal injuries caused by the negligence of both parties in the bailment and use of a defective horse trailer.

[3] Cross References

For related forms, *see §§ 93.210, 93.260*

For discussion and forms relating to the injury of animals and injuries caused by animals, see Ch. 23, *Animals: Civil Liability* , and Ch. 24, *Animals: Liens*

[4] Decisions

Bailment, otherwise gratuitous, when made to induce purchase, was considered sufficient to give rise to same duty of reasonable care on part of bailor as ordinary bailment for hire. *Tierstein v. Licht (1959) 174 Cal. App. 2d 835, 842, 345 P.2d 341*

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[Reserved]

§§ 93.262[Reserved]

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D. Rental Of Passenger Vehicles

9-93 California Forms of Pleading and Practice--Annotated § 93.280

§ 93.280 Complaint for Declaratory Relief [Code Civ. Proc. § 1060] Regarding Rights and Duties of Parties to Passenger Vehicle Rental Agreement--By Renter Against Rental Company [Civ. Code § 1936(q)]

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. § 1060] Regarding Rights and Duties of Parties to Passenger Vehicle Rental Agreement--By Renter Against Rental Company [Civ. Code § 1936(q)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DECLARATORY RELIEF RE-
[and DOES 1 through _____,]	)	LATING TO PASSENGER VEHICLE RENTAL
Defendant(s).	)	AGREEMENT
	)	
	)	

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California, with its principal place of business in _____ County, California [*or allege other capacity and residence*], and engaged in the business of renting passenger vehicles to the public.

[2. *Fictitious name allegation, if appropriate. See § 93.210, Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 93.210, Paragraph 3.*]

4. On _____ [*date*], in _____ [*specify locality*], California, plaintiff and defendant entered into an agreement, a copy of which is attached as Exhibit "A" and incorporated by reference, for the rental of a _____ [*specify type of car, e.g.,* 2005 Eagle station wagon, California vehicle registration number RENTCO 3].

[5. Under the terms of the agreement, _____ (*specify any terms relevant to the conflict at issue, e.g.,* plaintiff is not liable for loss due to theft of the rented vehicle unless he/she failed to exercise ordinary care while he/she was in possession of the vehicle).]

6. At approximately _____ [*time*] on _____ [*date*], _____ [*state facts of incident that gave rise to controversy, e.g.,* when the rented vehicle was parked in the parking lot of the Sleep Eze Motel on Route 1 in Santa Cruz, California, and while plaintiff had the ignition keys in plaintiff's possession in the motel room, person or persons unknown stole the rented vehicle. Plaintiff did not discover that the rented vehicle had been stolen until approximately 7:30 A.M. the next morning. Plaintiff immediately notified the local police and defendant of the theft and has cooperated with the local police and sheriff's department and with defendant in providing information concerning the theft].

7. An actual controversy has arisen and now exists between plaintiff and defendant concerning their respective rights and duties in that plaintiff contends that _____ [*state plaintiff's contentions, e.g.,* he/she exercised ordinary care while in possession of the vehicle, and he/she is in no way liable to defendant for any loss or damage sustained by it on account of the theft of the rented vehicle], whereas defendant disputes plaintiff's contention and contends that _____ [*state defendant's contentions, e. g.,* plaintiff aided and abetted the thief by leaving the right rear door of the rented vehicle unlocked and is therefore liable to defendant for the market value of the vehicle].

8. Plaintiff desires a judicial determination of his/her rights and duties, and a declaration that _____ [*specify, e.g.,* he/she is not liable to defendant in any manner or for any amount on account of the theft].

9. A judicial determination is necessary and appropriate at this time under the circumstances in order that plaintiff may ascertain his/her rights and duties [under the rental agreement]. [_____ (*Specify additional financial or other burden being caused to plaintiff by the unsettled state of affairs, e.g.,* If plaintiff is liable, plaintiff must notify his/her own insurer as soon as possible and is in danger of having his/her insurer deny coverage because of the lapse of time occurring between the date of the theft and the time of a determination of whether plaintiff is liable).]

WHEREFORE, plaintiff prays for judgment as follows:

1. For a declaration that _____ [*state determination the court is requested to render, e.g.,* he/she is in no way liable to defendant for any loss or damage sustained by it on account of the theft of the rented vehicle];

2. For his/her reasonable attorney's fees;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 93.210.*]

[2] Use of Form

This form is for use by a renter of a passenger vehicle to obtain declaratory relief against the rental company [*see Civ. Code § 1936(q)* (cause of action for damages and appropriate equitable relief); *Code Civ. Proc. § 1060* (declaratory relief)].

This complaint may be modified for use by any other authorized driver by inclusion of an appropriate allegation setting forth that plaintiff's status as an authorized driver [*see Civ. Code § 1936(a)(3)* (*see § 93.101[3]*); *see also Civ. Code § 1936(d)* (*see § 93.103*)].

[3] Allegations

This form alleges:

- Defendant's capacity, residence, and status as a passenger vehicle rental company (Paragraph 1) [*see Civ. Code § 1936(a)(1)*].
- The rental agreement between the parties and the vehicle to which it relates (Paragraph 4).
- The incident giving rise the controversy (Paragraph 6).
- The existence of the controversy and respective contentions of the parties (Paragraph 7).
- The declaration desired by plaintiff (Paragraph 8).
- An allegation that such a declaration is necessary and appropriate at this time (Paragraph 9).

Financial or other burdens indicative of the necessity for immediate determination should also be alleged (Paragraph 9) [*Code Civ. Proc. § 1060*; *see* Ch. 182, *Declaratory Relief*].

The example used in the form relates to a controversy regarding interpretation of statutory language. If the controversy involves interpretation or application of contract language, optional Paragraph 5 should be used to specify the contract provision that is the basis of the dispute.

[4] Venue

This form bases venue on defendant's residence [*see Code Civ. Proc. § 392 et seq.*], but venue may also be proper at other places--for instance, in the county in which the contract was signed [*see Code Civ. Proc. § 395(a)*].

An action by the rental company against the renter for loss due to theft of the vehicle must be filed in the county where the renter resides, or, if the renter does not reside in California, in the jurisdiction where the renter resides [*Civ. Code § 1936(p)*].

[5] Additional Relief

Additional allegations or causes of action may be added to seek recovery of damages [*see Civ. Code § 1936(q)*; *see also* Ch. 177, *Damages*] or injunctive relief [*see* Ch. 303, *Injunctions*].

[6] Cross References

For a related form, *see § 93.210*

For discussion and forms for use in consumer-related class actions, see Ch. 120, *Class Actions* , and Ch. 504, *Sales: Consumers Legal Remedies Act*

[7] State Statutes

Disclosures in sale of collision damage waivers. *Civ. Code § 1936(g)*

Passenger vehicle rentals. *Civ. Code §§ 1936-1936.1*

Declaratory relief. *Code Civ. Proc. § 1060 et seq.*

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9-93 California Forms of Pleading and Practice--Annotated § 93.281

§ 93.281 Complaint for Declaratory Relief [Code Civ. Proc. § 1060] Regarding Rights and Duties of Parties to Passenger Vehicle Rental Agreement--By Business Renter Against Rental Company [Civ. Code § 1936.05]

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. § 1060] Regarding Rights and Duties of Parties to Passenger Vehicle Rental Agreement--By Business Renter Against Rental Company [Civ. Code § 1936.05]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*Caption. See § 93.280.*]

Plaintiff alleges:

[1. *Capacity and residence of defendant. See § 93.280, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 93.210, Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 93.210, Paragraph 3.*]

[4. *Making of rental agreement. See § 93.280, Paragraph 4.*]

5. _____ [*State facts showing that plaintiff was "business renter" and rental was "qualified business rental" under statute, e.g.,* At all times mentioned herein, plaintiff was an employee of BigBizCo, a California corporation. At the time of making the rental agreement, a contract between defendant and BigBizCo established the per-period base rental rate, and other material terms relating to additional charges, on which defendant would rent passenger vehicles to employees of BigBizCo who presented a coded authorization card at the time of making a rental agreement. Plaintiff duly presented such a card. Plaintiff's rental agreement with defendant was a qualified business

rental under *Civil Code Section 1936.05*].

6. _____ [*State facts showing statutory violation, e.g.,* Plaintiff made the rental agreement in reliance on a statement by defendant's representative that the estimated total charges for the rental period would be $_____, including all separately stated charges described on the rental agreement (Exhibit "A"). In fact, on plaintiff's returning the rented vehicle, defendant's representative computed total charges of $_____, which is almost twice the estimated amount].

7. An actual controversy has arisen and now exists between plaintiff and defendant concerning their respective rights and duties in that plaintiff contends that _____ [*state plaintiff's contentions, e.g.,* the amount estimated by defendant's representative was not a good faith estimate of the total charges, and therefore defendant was in violation of *Civil Code Section 1936.05,* and defendant ought to credit the difference between the estimated amount and the actual amount of total charges to plaintiff's credit card account], whereas defendant disputes plaintiff's contention and contends that _____ [*state defendant's contentions, e.g.,* no violation of *Civil Code Section 1936.05* occurred because the estimated amount was clearly identified as only an estimate and because the actual amount of total charges included charges that could not be determined at the time of making the rental agreement].

8. Plaintiff desires a judicial determination of the parties' rights and duties, and a declaration that _____ [*specify, e.g.,* plaintiff is not liable to defendant for any amount in excess of the estimated total charges].

9. A judicial determination is necessary and appropriate at this time under the circumstances in order that plaintiff may ascertain the parties' rights and duties.

WHEREFORE, plaintiff prays for judgment as follows:

1. For a declaration that _____ [*state determination court is requested to render, e.g.,* plaintiff is not liable to defendant for any amount in excess of the estimated total charges];

2. For his/her reasonable attorney's fees;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 93.210.*]

[2] Use of Form

This form is for use by a business renter of a passenger vehicle to obtain declaratory relief against the rental company for a violation of *Civ. Code § 1936.05,* which permits the unbundling of charges for a business rental if specified

requirements are met [*see Civ. Code § 1936.05(c)* (cause of action for damages and appropriate equitable relief); *Code Civ. Proc. § 1060* (declaratory relief)].

[3] Allegations

This form alleges:

- Defendant's capacity, residence, and status as a passenger vehicle rental company (Paragraph 1).
- The rental agreement between the parties and the vehicle to which it relates (Paragraph 4).
- Fact showing that the case is subject to *Civ. Code § 1936.05* (Paragraph 5).
- The statutory violation giving rise to the controversy (Paragraph 6).
- The existence of the controversy and respective contentions of the parties (Paragraph 7).
- The declaration desired by plaintiff (Paragraph 8).
- An allegation that such a declaration is necessary and appropriate at this time (Paragraph 9).

[4] Unbundled Charges in Business Rental

A car-rental company may, in connection with the qualified business rental of a passenger vehicle to a business renter of a business program sponsor under the sponsor's business program, do both of the following:

- Separately quote additional charges for the rental if, at the time the quote is provided, the person receiving the quote is also provided a good faith estimate of the total of all charges for the entire rental [*Civ. Code § 1936.05(b)(1)*].
- Separately impose additional charges for the rental if the rental contract, or another document provided to the business renter at the time and place the rental commences, clearly and conspicuously discloses the total of all charges for the entire rental, exclusive of charges that cannot be determined at the time the rental commences [*Civ. Code § 1936.05(b)(2)*].

The estimate may exclude mileage charges and charges for optional items and services that cannot be determined before completing the reservation based on the information provided by the renter [*Civ. Code § 1936.05(b)(1)*].

A renter may bring an action against a rental company for the recovery of damages and appropriate equitable relief for a violation of *Civ. Code § 1936.05*. The prevailing party is entitled to recover reasonable attorney's fees and costs [*Civ. Code § 1936.05(c)*].

For further discussion, see *§ 93.106[4]*.

[5] Definitions

[a] Qualified Business Rental

"Qualified business rental" under a business program established for a business program sponsor by a rental company means the rental of a passenger vehicle under the business program if either of the following conditions is satisfied [*Civ. Code § 1936.05(a)(5)*]:

- In the 12-month period ending on the date of the rental or in the calendar year immediately preceding the year in which the rental occurs, the rentals under all business programs established by the rental company for the business program sponsor and its affiliates produced gross rental revenues in excess of $25,000.

- The rental company in good faith estimates that rentals under all the business programs established by the rental company for the business program sponsor and its affiliates will produce gross rental revenues in excess of $25,000 in the 12-month period commencing with the date of the rental or in the calendar year in which the rental occurs.

The rental company has the burden of establishing by objectively verifiable evidence that the rental was a qualified business rental [*Civ. Code § 1936.05(a)(5)*].

[b] Business Program Sponsor

"Business program sponsor" means a legal entity, other than a natural person, that is a corporation, limited liability company, or partnership [*Civ. Code § 1936.05(a)(3)*].

[c] Business Program

"Business program" means either of the following [*Civ. Code § 1936.05(a)(2)*]:

- A contract between a rental company and a business program sponsor that has established the per-period base rental rate, and any other material terms relating to additional charges, on which the rental company will rent passenger vehicles to persons authorized by the sponsor.

- A plan, program, or other arrangement established by a rental company at the request of, or with the consent of, a business program sponsor under which the rental company offers to rent passenger vehicles to persons authorized by the sponsor at per-period base rental rates, and any other material terms relating to additional charges, that are not the same as those generally offered by the rental company to the public.

[d] Business Renter

"Business renter" means, for any business program sponsor, a person who is authorized by the sponsor, through the use of an identifying number or program name or code, to enter into a rental contract under the sponsor's business program [*Civ. Code § 1936.05(a)(4)*].

In no case does the term "business renter" include a person renting as any of the following [*Civ. Code § 1936.05(a)(4)*]:

- A nonemployee member of a not-for-profit organization.

- The purchaser of a voucher or other prepaid rental arrangement from a person, including a tour operator, engaged in the business of reselling those vouchers or prepaid rental arrangements to the general public.

- An individual whose car rental is eligible for reimbursement in whole or in part as a result of the individual's being insured or being provided coverage under a policy of insurance issued by an insurance company.

- An individual whose car rental is eligible for reimbursement in whole or in part as a result of the individual's purchasing passenger vehicle repair services from a person licensed to perform such services.

[6] State Statutes

Passenger vehicle rentals by business renters. *Civ. Code § 1936.05*

[7] Cross References

For related forms, *see §§ 93.210, 93.280*

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Volume 9: Bailments thru Boats and Boating-Chs. 93-100
Chapter 94 BANKRUPTCY

9-94 California Forms of Pleading and Practice--Annotated 94.syn

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[1] FORM

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[1] FORM

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Reviewed by John A. Vos n*

FOOTNOTES:
(n47)Footnote *.
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PART I. SCOPE

9-94 California Forms of Pleading and Practice--Annotated § 94.01

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§ 94.01 Scope of Chapter

This chapter provides an overview of federal bankruptcy law to an attorney dealing with a California state court matter who is confronted by a federal bankruptcy issue. Typical issues include determining the dischargeability of a debt, seeking an abstention, withdrawal, or removal action, or seeking relief from the Bankruptcy Code's stay of a pending state court action. This chapter is not intended as a guide for filing a petition in bankruptcy, or a guide for use in representing a creditor in a bankruptcy proceeding [*see § 94.02*].

The Legal Background provides an overview of federal bankruptcy law, focusing on the following:

- Actions related to the dischargeability of debts;
- Abstention, withdrawal, and removal actions; and
- The effect of the bankruptcy stay of creditor actions and the proceeding to obtain relief from the stay.

The Legal Background also provides significant definitions under the Bankruptcy Code, as well as a summary of the various types of bankruptcy proceedings.

The forms include state and federal forms relating to these types of actions, including forms related to lien avoidance on exempt property [*§ 94.80 et seq.*], forms pertaining to relief from the bankruptcy stay [*§ 94.100 et seq.*], forms relating to removal of an action from state court to federal bankruptcy court [*§ 94.110 et seq.*], a form for moving for abstention [*§ 94.112*], and forms for use in determining the dischargeability of a debt [*§ 94.120 et seq.*]

Legal Topics:

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

Bankruptcy LawDischarge & DischargeabilityGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysGeneral OverviewBankruptcy LawCase AdministrationCommencementAbstention

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9-94 California Forms of Pleading and Practice--Annotated § 94.02

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§ 94.02 Cross References

For detailed coverage of bankruptcy actions, see Collier on Bankruptcy (15th edition) (Matthew Bender) and related publications in the Collier Bankruptcy series.

For points and authorities related to federal bankruptcy actions, see California Points and Authorities, Ch. 30, *Bankruptcy* (Matthew Bender).

For creditors' agreements and related forms, see California Legal Forms, Ch. 78, *Creditors' Agreements: Nonbankruptcy Alternatives* (Matthew Bender).

For coverage of insolvency actions under California law, see Ch. 307, *Insolvency* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor Relations

California Forms of Pleading and Practice--Annotated

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Chapter 94 BANKRUPTCY
PART I. SCOPE

9-94 California Forms of Pleading and Practice--Annotated §§ 94.03-94.09

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[Reserved]

§§ 94.03[Reserved]

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Volume 9: Bailments thru Boats and Boating-Chs. 93-100
Chapter 94 BANKRUPTCY
PART II. LEGAL BACKGROUND
A. Governing Law and Definitions

9-94 California Forms of Pleading and Practice--Annotated § 94.10

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§ 94.10 Applicable Law in Bankruptcy Cases

[1] Bankruptcy Code and Related Federal Law

Bankruptcy cases are governed largely by the following:

- The Bankruptcy Code: Title 11 of the United States Code [*see* U.S. *Const. art. I, § 8, Cl. 4* (authority to adopt uniform federal bankruptcy law)].

- Bankruptcy Rules and Forms: The Federal Rules of Bankruptcy Procedure and Official Forms, promulgated by the Supreme Court, Judicial Conference of the United States, pursuant to *28 U.S.C. § 2075*.

- Local Bankruptcy Rules and Forms: Local rules must be consistent with the Bankruptcy Rules and Forms and may not prohibit or limit the use of the Official Forms [*Fed. R. Bankr. P., Rule 9029*]. Local bankruptcy rules may require the use of local forms.

NOTE:
This chapter incorporates changes made by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [Pub. L. No. 109-8, 119 Stat. 23], which made substantial changes to the Bankruptcy Code and other bankruptcy-related statutes, effective October 17, 2005 (or earlier, in a few cases) [Pub. L. No. 109-8, § 1501(a), (b)(2), 119 Stat. 23]. Some of the significant changes in bankruptcy law affecting individuals are:

- Introduction of measures intended to prevent abusive filing by individuals.

- Suppression of selected abusive creditor practices.

- Enhancement of the survivability of debts for family support.

- Increased protection for retirement savings, education savings, and personal information.

- Regulation of businesses offering debt-relief services.

- Extension of nondischargeability for drunk-driving debts, to cover also debts for personal injury arising from piloting a boat or an airplane while intoxicated.

In general, these changes apply to bankruptcy cases filed after October 17, 2005, while cases filed before that date are governed by the former bankruptcy law [Pub. L. No. 109-8, § 1501(b)(1), 119 Stat. 23]. Attorneys using this chapter with respect to a bankruptcy case filed before October 17, 2005, should verify that the relevant discussion in this chapter is applicable to these earlier cases. For example, § 94.30[3][a] contains discussion of the expanded exceptions and limitations to the general rule governing stay of other proceedings that were introduced by the 2005 legislation.

Bankruptcy cases are also governed by a significant body of case law. There are several levels of case precedent:

- United States Supreme Court precedent, which binds all courts located within the United States [*see In re Rheuban (Bankr. C.D. Cal. 1991) 24 Collier Bankr. Cas. 2d 2077, 2082, 128 B.R. 551, 554, 21 Bankr. Ct. Dec. 1357]* .

- Federal circuit court of appeals precedent, which binds all bankruptcy courts and district courts within the specific federal circuit [*see In re Rheuban (Bankr. C.D. Cal. 1991) 24 Collier Bankr. Cas. 2d 2077, 2082, 128 B.R. 551, 555, 21 Bankr. Ct. Dec. 1357]* .

- Bankruptcy appellate panel precedent, which does not bind federal district courts within the federal circuit within which the panel sits [*Bank of Maui v. Estate Analysis (9th Cir. 1990) 904 F.2d 470, 472* ; *In re S.F. Drake Hotel Assocs. (N.D. Cal. 1992) 147 B.R. 538, 539]* . The binding effect of B.A.P. decisions on bankruptcy courts within the Ninth Circuit is somewhat unclear [*see Coyne v. Westinghouse Credit Corp. (Bankr. C.D. Cal. 1993) 149 B.R. 614, 619* (B.A.P. decisions binding on bankruptcy courts); *but see In re Junes (Bankr. D. Or. 1987) 17 Collier Bankr. Cas. 2d 1243, 1245, 76 B.R. 795, 797 , aff'd, 99 B.R. 978 (9th Cir. 1989)* (B.A.P. decisions not binding)].

- Federal district court precedent, which generally is considered nonbinding on other federal district judges or bankruptcy judges in a multi-judge district [*see In re Rheuban (Bankr. C.D. Cal. 1991) 24 Collier Bankr. Cas. 2d 2077, 2082-2083, 128 B.R. 551, 555, 21 Bankr. Ct. Dec. 1357* ; *In re Windsor Communications Group (Bankr. E.D. Pa. 1986) 15 Collier Bankr. Cas. 2d 1180, 1188-1189, 67 B.R. 692, 698-700]* . Note, however, that judges of the same district court customarily follow a previous decision of a fellow judge on the same question except in unusual or exceptional circumstances [*Buna v. Pac. Far E. Line, Inc. (N.D. Cal. 1977) 441 F. Supp. 1360, 1365]* .

- Bankruptcy court precedent, which generally is considered nonbinding on other district judges or bankruptcy judges in a multi-judge district.

- State case law precedent, which may be persuasive when bankruptcy law refers to state law--for example, in the area of exemptions from the bankruptcy estate [*see, e.g., Rousey v. Jacoway (2005) 544 U.S. 320, 325-326, 125 S. Ct. 1561, 161 L. Ed. 2d 563* (reaffirming dictum in 1992 opinion and holding

that tax-qualified IRA can be exempted from bankruptcy estate pursuant to *11 U.S.C. § 522(d)(10)(E)*); *Farrar v. McKown (In re McKown) (9th Cir. 2000) 203 F.3d 1188, 1190* (tax-qualified IRA can be selected for exemption under *Code Civ. Proc. § 703.140(b)(10)(E)* because that statute tracks *11 U.S.C. § 522(d)(10)(E)*)].

In addition, jurisdictional doctrines in federal case law may be applicable. For instance, in the Ninth Circuit (as in at least five other circuits), a party must first obtain leave of the bankruptcy court before initiating an action in another forum against a bankruptcy trustee, or another officer appointed by the bankruptcy court, for acts done in that officer's official capacity [*Beck v. Fort James Corp. (In re Crown Vantage, Inc.) (9th Cir. 2005) 421 F.3d 963, 970-971* ; *but see 28 U.S.C. § 959(a)* (limited exception to this rule, respecting trustee's day-to-day operation of debtor's business)]. This rule is an extension of the *Barton* doctrine--which holds that before suit can be brought against a receiver, "leave of the court by which he was appointed must be obtained," thus limiting the subject matter jurisdiction of any other court [*see* *Barton v. Barbour (1881) 104 U.S. 126, 127, 26 L. Ed. 672]* --to the bankruptcy context.

[2] Preemption of State Law

The Bankruptcy Code preempts all state laws that conflict with the Code [*National Collection Agency, Inc. v. Trahan (9th Cir. 1980) 624 F.2d 906, 907]* . States may not pass or enforce laws to interfere with or complement the Bankruptcy Code or to provide additional or auxiliary regulations [*International Shoe Co. v. Pinkus (1929) 278 U.S. 261, 263-265, 49 S. Ct. 108, 73 L. Ed. 318]* . Preemption even extends to a creditor's tort claims for malicious prosecution and abuse of process against a bankrupt debtor and the debtor's lawyer who started an adversary proceeding in bankruptcy court against the creditor [*Saks v. Parilla, Hubbard & Militzok (1998) 67 Cal. App. 4th 565, 574, 79 Cal. Rptr. 2d 120* ; *Pauletto v. Reliance Ins. Co. (1998) 64 Cal. App. 4th 597, 605-606, 75 Cal. Rptr. 2d 334* ; *accord Ross v. Universal Studios Credit Union (2002) 95 Cal. App. 4th 537, 539, 115 Cal. Rptr. 2d 712* ; *but see* *Satten v. Webb (2002) 99 Cal. App. 4th 365, 383-386, 121 Cal. Rptr. 2d 234, 249-250* (cases disallowing malicious prosecution state court actions have involved underlying proceedings that were authorized bankruptcy proceedings, that is, authorized by federal law in bankruptcy area; but if underlying proceeding is not of that type, as when it is common law fraud or tort action, preemption is not required)].

The test of a state law's invalidity includes consideration of its impact, if any, to frustrate the objectives of the Bankruptcy Code or to deny debtors the benefits of the Code [*see* *In re Anchorage Int'l Inn, Inc. (9th Cir. 1983) 718 F.2d 1446, 1449-1452* ; *In re Leslie (9th Cir. 1975) 520 F.2d 761, 762* (trustee takes escrow proceeds free of creditors' liens under state law)].

One significant area in which state law is expressly permitted to apply is in the determination of exemptions, or property that may be exempted from the bankruptcy estate [*11 U.S.C. § 522*]. There are many other areas in which substantive state law applies in bankruptcy; for example, property rights are adjudicated under state law, since the Bankruptcy Code has no independent property rights provisions.

[3] Bankruptcy Reform Acts

The amendments made by the Bankruptcy Reform Act of 1994, effective October 22, 1994, generally do not apply to cases commenced under the Bankruptcy Code before that date [Pub. L. No. 103-394, § 702(b)(1); *but see* Pub. L. No. 103-394, § 702(b)(2) (exceptions)].

The amendments made by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, enacted April 20, 2005, generally take effect 180 days after the date of enactment and do not apply to cases commenced under the Bankruptcy Code before that effective date [Pub. L. No. 109-8, § 1501(a), (b)(1)]. Certain amendments limiting the use of bankruptcy (for the purpose of preventing abuse) apply to cases commenced on or after the date of enactment [*see* Pub. L. No. 109-8, § 1501(a), (b)(2)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawExemptionsState LawGeneral OverviewBankruptcy LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsFederal Common LawPreemption

California Forms of Pleading and Practice--Annotated

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Volume 9: Bailments thru Boats and Boating-Chs. 93-100
Chapter 94 BANKRUPTCY
PART II. LEGAL BACKGROUND
A. Governing Law and Definitions

9-94 California Forms of Pleading and Practice--Annotated § 94.11

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§ 94.11 Significant Bankruptcy Code Definitions

[1] "After Notice and Hearing"

"After notice and hearing" means notice and an *opportunity* for a hearing, not notice and an *actual* hearing. No hearing is required if no party in interest requests one after having received notice, or if the court authorizes action when there is not time for a hearing, as when sale or disposition of perishable collateral is involved [*11 U.S.C. § 102(1)*].

Notices given in bankruptcy cases must conform to the detailed requirements set forth in *11 U.S.C. § 342*. Under 2005 amendments, a creditor may designate an address to be used by all bankruptcy courts. If notice is not given to that address, then notice is not effective until brought to the attention of the creditor [*11 U.S.C. § 342(f), (g)*].

[2] "Claim"

"Claim" means either of the following [*11 U.S.C. § 101(5)*]:

- A right to payment, whether or not that right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

- A right to an equitable remedy for breach of performance if that breach givers rise to a right to payment, whether or not that right to an equitable remedy is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

[3] "Community Claim"

A "community claim" is one that arose before the commencement of the case and for which community property of the debtor or the debtor's spouse is liable, even if no community property actually exists at the commencement of the case [

11 U.S.C. §§ 101(7), 541(a)(2)].

[4] "Creditor"

A "creditor" is an entity that has one of the following [*11 U.S.C. § 101(10)*; *see 11 U.S.C. §§ 301, 302(a)*]:

- A claim against the debtor that arose at or before the time of the order for relief concerning the debtor (which is the same time as the filing of the petition in a voluntary case).
- A claim against the estate arising under any of the following code sections:
  - *11 U.S.C. § 348(d)* (conversion of case).
  - *11 U.S.C. § 502(f)* (involuntary case).
  - *11 U.S.C. § 502(g)* (rejection of executory lease or contract).
  - *11 U.S.C. § 502(h)* (recovery of property including avoidances of preferential transfers and setoffs).
  - *11 U.S.C. § 502(i)* (post-petition tax claims).
- A community claim.

[5] "Debt" and "Consumer Debt"

"Debt" means liability on a claim [*11 U.S.C. § 101(12)*]. A "consumer debt" is a debt incurred by an individual primarily for a personal, family, or household purpose [*11 U.S.C. § 101(8)*].

A restitution obligation imposed as a condition of probation in a state criminal proceeding is a "debt" under *11 U.S.C. § 101(12)* [*Pennsylvania Dep't of Pub. Welfare v. Davenport (1990) 495 U.S. 552, 564, 110 S. Ct. 2126, 109 L. Ed. 2d 588* ; *but see 11 U.S.C. § 1328(a)(4)* (debt for restitution, or criminal fine, included in sentence for debtor's commission of crime is not dischargeable)]. The state, not the crime victim, is the holder of the claim represented by the restitution order [*In re Heincy (Bankr. S.D. Cal. 1986) 14 Collier Bankr. Cas. 2d 870, 874-875, 58 B.R. 930, 934-935* , *rev'd on other grounds, 858 F.2d 548 (9th Cir. 1988)*].

[6] "Debtor"

A "debtor" is a person (that is, an individual, partnership, or corporation) or a municipality concerning which a case has been commenced under the Bankruptcy Code [*11 U.S.C. § 101(13)*; *see 11 U.S.C. § 101(41)* (defining "person")].

[7] "Debtor in Possession"

In a Chapter 11 case, "debtor in possession" means the debtor, except when a trustee has qualified under *11 U.S.C. § 322* [*11 U.S.C. § 1101(1)*]. Normally in a Chapter 11 case, no trustee will be appointed, and the debtor in possession will continue to operate the business as "debtor in possession" [*see 11 U.S.C. § 1108*]. A trustee may be appointed, however, in the event of fraud or mismanagement by the debtor in possession or when it is in the best interest of creditors, equity security holders, and other interests of the estate [*11 U.S.C. § 1104(a)*; *see 11 U.S.C. § 1104(e)* (when United States trustee is required to move for appointment of trustee)].

A debtor in possession has substantially the same the rights, powers, and duties as a trustee [*see 11 U.S.C. §§ 1107(a),*

1203; *see also 11 U.S.C. § 1116* (duties of trustee or debtor in possession in small business cases)].

[8] "Order for Relief"

In a bankruptcy case initiated voluntarily by a debtor, the order for relief is the filed bankruptcy petition [*11 U.S.C. §§ 102(6), 301(b), 302(a)*].

In an involuntary case commenced against a debtor by petitioning creditors, the order for relief is an order entered by the court, after the creditor's petition is filed [*see 11 U.S.C. § 303(h)*].

[9] "Proceeding" or "Case"

The term "bankruptcy case" is used to refer to the entire legal action in bankruptcy initiated by the filing of the bankruptcy petition. The term "proceeding," in contrast, is used to refer to any subaction within the case, including adversary proceedings that may raise a disputed or litigated matter (for example, a motion for relief from the bankruptcy stay or a complaint to determine nondischargeability).

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawDebtor Benefits & DutiesGeneral OverviewBankruptcy LawCase AdministrationGeneral OverviewBankruptcy LawClaimsGeneral OverviewBankruptcy LawPractice & ProceedingsGeneral OverviewBankruptcy LawCase AdministrationNotice

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PART II. LEGAL BACKGROUND
A. Governing Law and Definitions

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[Reserved]

§§ 94.12[Reserved]

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Chapter 94 BANKRUPTCY
PART II. LEGAL BACKGROUND
B. Debtor's Remedies

9-94 California Forms of Pleading and Practice--Annotated § 94.20

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§ 94.20 Overview of Debtor Remedies Under the Bankruptcy Code

[1] Summary of Available Remedies: Chapters 7, 11, 12, 13

The Bankruptcy Code provides the following specific remedies, which are commonly referred to by the code chapter numbers in which they are set out:

- Under Chapter 7 [*11 U.S.C. § 701 et seq.*]: liquidation and distribution of a debtor's current non-exempt assets [*see* [3], *below*].

- Under Chapter 11 [*11 U.S.C. § 1101 et seq.*]: reorganization of a debtor [*see* [5], *below*].

- Under Chapter 12 [*11 U.S.C. § 1201 et seq.*]: debt adjustment for a family farmer with a regular annual income or a family fisherman with a regular annual income [*see* [6], *below*].

- Under Chapter 13 [*11 U.S.C. § 1301 et seq.*]: debt adjustment for individuals with a regular income [*see* [4], *below*].

Although each remedy has distinct features, they are all designed to provide an honest debtor with a new start, unhampered by preexisting debt [*see Perez v. Campbell (1971) 402 U.S. 637, 648, 91 S. Ct. 1704, 29 L. Ed. 2d 233]* , and to provide a ratable distribution among creditors of the debtor's assets, affording creditors an opportunity to realize on the debtor's indebtedness [*see Reading Co. v. Brown (1968) 391 U.S. 471, 476-477, 88 S. Ct. 1759, 20 L. Ed. 2d 751]* .

PRACTICE TIP:
Under the 2005 amendments to the Bankruptcy Code there are numerous time traps for the unwary, and several new hoops for the debtor to jump through. For example, if the debtor fails timely to provide a

copy of the current tax return, the case is subject to automatic dismissal, unless the debtor demonstrates that the failure to do so was due to circumstances beyond the debtor's control [*11 U.S.C. § 521(e)(2)*]. Similarly, a debtor is not entitled to a discharge under Chapter 13 if he or she is delinquent in any post-petition domestic support obligation [*11 U.S.C. § 1328(a)*]. Attorneys handling bankruptcy matters should be prepared to help the client make sure that every hoop is jumped through, so that the debtor obtains a discharge. *Commentary by John A. Vos.*

[2] General Provisions Restricting Availability of Bankruptcy Remedies

[a] Debtor's Residence, Domicile, or Place of Business

A debtor must be one of the following in order to file under any chapter of the Bankruptcy Code [*11 U.S.C. § 109(a)*]:

- A person who resides in the United States.
- A person who has a domicile in the United States.
- A person who has property in the United States.
- A person who has a place of business in the United States.
- A municipality.

For purposes of the foregoing, a "person" is an individual, partnership, or corporation, but not a governmental unit [*11 U.S.C. § 101(41)*].

[b] Recent Prior Filing by Debtor

No individual may be a debtor under any chapter of the Bankruptcy Code if he or she was a debtor in a bankruptcy case within the preceding 180 days and either of the following occurred [*11 U.S.C. § 109(g)*]:

- The court dismissed the prior case for the debtor's willful failure to abide by orders of the court, or to appear before the court in proper prosecution of the case.
- The debtor requested and obtained a voluntary dismissal of the prior case after a creditor requested relief from the bankruptcy stay of creditor action.

The restriction under *11 U.S.C. § 109(g)* covers two or more individuals who act as one for a common illegal purpose, such as family members who file multiple successive actions to obtain the benefit of a stay, without any intent to make repayments or reorganize. In such cases, a prior dismissed case brought by one individual may be imputed to the individual making the new filing [*see In re Kinney (Bankr. C.D. Cal. 1985) 13 Collier Bankr. Cas. 2d 957, 51 B.R. 840, 846* (construing similar predecessor statute)].

[c] Prerequisite Credit Counseling

Generally, an individual may not be a debtor under the Bankruptcy Code unless the individual, during the 180-day period preceding the date the individual filed the petition, has received from an approved nonprofit budget and credit counseling agency [*see 11 U.S.C. § 111(a)*] an individual or group briefing (including a briefing conducted by telephone or on the internet) that outlined the opportunities for available credit counseling and assisted the individual in performing a related budget analysis [*11 U.S.C. § 109(h)(1)*]. There are exceptions for debtors without reasonable access to such services, debtors who are unable to obtain such services after reasonable effort, and debtors in exigent

circumstances (incapacity, disability, or active military duty in a military combat zone) [*see 11 U.S.C. § 109(h)(2)-(4)*].

[3] Chapter 7: Liquidation

[a] Nature of Chapter 7 Remedy

Chapter 7 permits an individual debtor to obtain a discharge of debts. The bankruptcy trustee liquidates the debtor's nonexempt assets and distributes the proceeds to the creditors. If the debtor complies with the conditions for receiving a Chapter 7 discharge, the debtor thereafter obtains a discharge of his or her obligation to pay any remaining debt that was included in the petition and that is not otherwise nondischargeable [*see 11 U.S.C. §§ 507, 704, 726, 727*].

[b] Persons Who May Proceed Under Chapter 7

Chapter 7, the most widely used of the bankruptcy remedies, may be used by the following [*see 11 U.S.C. §§ 101(41), 109(b)*]:

- Any individual (including an individual filing jointly with his or her spouse [*see 11 U.S.C. § 302*]).

- Partnerships and corporations, except railroads, insurance companies, and most financial institutions.

The 2005 amendments to the Bankruptcy Code add a "means test" to the eligibility criteria to file under Chapter 7. If the debtor has primarily consumer debts [*see § 94.11[5*]; *see also 11 U.S.C. § 101(8)*], then the debtor is subject to the means test. The means test, in simplified form, is as follows [*see 11 U.S.C. § 707(b)(2)*]:

- Compute the debtor's total income during the six months ending on the last day of the month before the month of filing. The Bankruptcy Code does not define "income" in this context [*see 11 U.S.C. § 101* (definitions)], but the applicable statute does state that it is income "from all sources" and "without regard to whether such income is taxable income" [*11 U.S.C. § 101(10A)(A)*], and the total is to be adjusted as follows [*11 U.S.C. § 101(10A)(B)*]:

  - Include any amount paid by any entity other than the debtor (or, in a joint case, the debtor and the debtor's spouse) on a regular basis for the household expenses of the debtor or the debtor's dependents (and, in a joint case, the debtor's spouse if not otherwise a dependent); and

  - Exclude benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism or domestic terrorism [*see 18 U.S.C. § 2331* (definitions)] on account of their status as victims of such terrorism.

  The phrase "without regard to whether such income is taxable income" reflects the judgment of Congress that the Internal Revenue Code's method of determining taxable income does not apply to the Bankruptcy Code's method of computing income in this context [*Blausey v. U.S. Trustee (9th Cir. 2009) 552 F.3d 1124, 2009 U.S. App. LEXIS 1299, at *20* (private disability insurance benefits are to be included in income for purpose of applying Bankruptcy Code's means test)].

- Divide by 6 to determine the applicable monthly income.

- If the result is less than the applicable median California income (based on Census Bureau figures), the debtor is eligible to file and to obtain a simple Chapter 7 discharge.

- If the result is more than the applicable median California income, then the "means test" must be performed as to the debtor's expenses: subtract standardized monthly expenses (based on IRS allowances), allowable actual monthly expenses (based on IRS allowances), hypothetical Chapter 13 costs (10 percent), secured debt, and priority debt according to a statutory calculation.

- Under the first prong of the means test, if the result is more than $166.66 per month ($10,000 statutory maximum divided by 60 months), abuse is presumed [*see 11 U.S.C. § 707(b)(2)(A)(i)(II)*].

- Under the second prong of the means test, if the result is less than $166.66 per month but is more than $6,000 in the aggregate over 60 months and is enough to pay a dividend of at least 25 percent to an unsecured claim, then abuse is presumed [*see 11 U.S.C. § 707(b)(2)(A)(i)(I)*].

- If the result does not exceed either of the above amounts, then the debtor is eligible to file and obtain a simple Chapter 7 discharge.

- However, if the result does exceed either of the above amounts, the only way to remain in Chapter 7 is to rebut the presumption of abuse by showing special circumstances. If the bankruptcy court agrees, the debtor is eligible to file and obtain a Chapter 7 discharge. If the court disagrees, it may then dismiss the case [*see 11 U.S.C. § 707(b)(1)*].

PRACTICE TIP:

11 U.S.C. § 707(b)(4)(A) specifically permits the court to award sanctions under *Fed. Rules Bank. Proc., Rule 9011* (dealing with frivolous claims), including attorney's fees and costs, against debtor's attorneys who violate Rule 9011 in filing bankruptcy claims. The definitions in the means test, and the application of the test, are uncharted territory. It will take several years for the courts to sort out the rules and establish precedents in this new area. For example, the courts will have to decide how to interpret the means-test rule that the debtor's "monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the IRS for the area in which the debtor resides" [*11 U.S.C. § 707(b)(2)(A)(ii)(I)*; *see, e.g.*, Ransom v. MBNA Am. Bank, N.A. (In re Ransom) (9th Cir. 2009) 577 F.3d 1026, 1030 (National Standards and Local Standards referenced in § 707(b)(2)(A)(ii)(I) are in IRS's Financial Analysis Handbook, which is contained in IRS's Internal Revenue Manual; courts have disagreed on what expenses can be allowed under those standards; Ninth Circuit holds, contrary to other courts' conclusions, that debtor cannot claim expense for "ownership costs" of car that debtor owns free and clear); *In re Egebjerg (9th Cir. 2009) 574 F.3d 1045, 1047* (in case of first impression, debtor's repayment of 401(k) loan did not constitute "monthly payment on account of secured debts" and was not in IRS-specified category of "Other Necessary Expenses" that can be deducted from debtor's monthly income for purposes of computing debtor's disposable monthly income under means test)]. In general, it is expected that debtors' attorneys who perform an accurate means test analysis prior to filing and present a good faith argument for allowable expenses or special circumstances without having to amend the schedules will avoid the risk of such sanctions. *Commentary by John A. Vos.*

[c] Discharge of Debts Under Chapter 7

[i] Who May Obtain Discharge

Although Chapter 7 cases are not limited to individuals, only individuals may obtain a Chapter 7 discharge [*11 U.S.C. § 727(a)(1)*].

[ii] Scope of Discharge

After discharge, a Chapter 7 debtor is discharged from all of the following [*11 U.S.C. § 727(b)*]:

- All debts arising before the petition was filed, except nondischargeable debts under *11 U.S.C. § 523*.

- Liability for claims determined to be pre-petition claims under *11 U.S.C. § 502*.

Post-petition attorney's fee awards against the debtor are not discharged when the debtor, after filing the petition, voluntarily commences litigation or voluntarily continues to pursue litigation that had been commenced before the petition was filed. In such circumstances, the debtor may be held personally liable for attorney's fees and costs that result to the other party from that litigation [*Boeing N. Am., Inc. v. Ybarra (In re Ybarra) (9th Cir. 2005) 424 F.3d 1018, 1024]* .

[iii] Restrictions When Debtor Has Received Prior Discharge

A debtor proceeding under Chapter 7 may not obtain a discharge if he or she has been granted a discharge in a prior Chapter 7, 11, 12, or 13 case that was commenced within eight years of the date the present petition was filed [*11 U.S.C. § 727(a)(8), (9)*]. If, however, the prior case was for debt adjustment under Chapter 12 or 13, this restriction does not apply when payments under the debt adjustment plan totaled at least one of the following [*11 U.S.C. § 727(a)(9)*]:

- 100 percent of allowed unsecured claims.

- 70 percent of allowed unsecured claims, when the plan was proposed by the debtor in good faith, and the plan was debtor's best effort.

[iv] Other Restrictions on Chapter 7 Discharge

A Chapter 7 discharge may be denied if:

- The debtor is not an individual [*11 U.S.C. § 727(a)(1)*].

- The debtor has engaged in fraudulent conduct in connection with the bankruptcy case [*11 U.S.C. § 727(a)(2)-(4)*; *see, e.g., In re Caneva (9th Cir. 2008) 547 F.3d 1082, 1088-1089* (when debtor owns and controls numerous business entities and engages in substantial financial transactions, complete absence of recorded information related to those entities and transactions establishes prima facie violation of *11 U.S.C. § 727(a)(3)*; when debtor transfers substantial amount of money to third party, failure to keep any documentation evidencing terms of transfer or fact that payment actually took place also establishes prima facie violation of that statute); *Bernard v. Sheaffer (In re Bernard) (9th Cir. 1996) 96 F.3d 1279, 1283* (discharge denied based on debtors' withdrawals from money market and deposit accounts with admitted intent to hinder creditors' attempts to attach accounts)].

- The debtor has failed to explain asset losses or deficiencies [*11 U.S.C. § 727(a)(5)*].

- The debtor has disobeyed orders of the court or failed to respond to questions approved by the court [*11 U.S.C. § 727(a)(6)*].

- The debtor has waived discharge [*11 U.S.C. § 727(a)(10)*].

- The debtor did any of the acts listed in *11 U.S.C. § 727(a)(2)-(6)* on or within one year before the

date of the filing of the petition, or during the case, in connection with another case, under the Bankruptcy Code or under the former Bankruptcy Act, concerning an insider [*11 U.S.C. § 727(a)(7)*].

- After filing the petition, the debtor failed to complete a prescribed instructional course concerning personal financial management [*11 U.S.C. § 727(a)(11)*; *see 11 U.S.C. § 111* (course requirement)].

- The court, after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, finds that there is reasonable cause to believe that (1) the limitation on a homestead exemption in *11 U.S.C. § 522(q)(1)* may be applicable to the debtor and (2) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in *11 U.S.C. § 522(q)(1)(A)* or liable for a debt of the kind described in *11 U.S.C. § 522(q)(1)(B)* (resulting from various crimes and intentional or willful misconduct) [*11 U.S.C. § 727(a)(12)*].

- The debtor fails to file a tax return that comes due during a case [*see 11 U.S.C. § 521(e)(2)*].

[d] Stay of Creditor Actions Against Debtor

An important element of relief under Chapter 7, and all other chapters of the Bankruptcy Code, is the stay of creditor actions against the debtor and most property of the debtor, this stay usually begins immediately when the petition is filed and continues until the case is closed, the time the case is dismissed, the time a discharge is granted or denied, or at such a time as the court, after notice and a hearing, may terminate, annul, modify, or condition it [*see 11 U.S.C. § 362*]. For discussion, see *§ 94.30*.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [Pub. L. No. 109-8, 119 Stat. 23], created numerous exceptions to the stay. For discussion of these exceptions, see *§ 94.30[3][a]*.

[4] Chapter 13: Debt Adjustment for Individuals

[a] Nature of Chapter 13 Remedy

Chapter 13 allows an individual with regular income to obtain a discharge of certain debts by completing an approved plan for adjustment of debts. Most Chapter 13 plans use future disposable income as a key funding source. Other possible funding sources may include contributions by third parties and liquidation of assets [*see 11 U.S.C. § 1322*]. A Chapter 13 debtor receives a discharge only after either he or she has completed the reorganization plan or has been excused from total completion [*see 11 U.S.C. § 1328*].

[b] Persons Who May Proceed Under Chapter 13

The eligibility requirement of Chapter 13 is more restrictive than Chapter 7 or Chapter 11 [*see* [3][b], *above*, [5][b], *below*]. To proceed under Chapter 13, a debtor must satisfy the following requirements [*11 U.S.C. § 109(e)*]:

- The debtor must be an individual with a regular income, that is, an income sufficiently stable and regular to enable an individual to make payments under a Chapter 13 plan [*see 11 U.S.C. § 101(30)*].

- The debtor must not be a commodity broker [*see 11 U.S.C. § 101(6)* (definition)] or a stockbroker [*see 11 U.S.C. § 101(53A)* (definition); *In re Berry (Bankr. N.D. Ohio 1982) 7 Collier Bankr. Cas. 2d 270, 22 B.R. 950, 951-953* (individual employed as account executive of stock brokerage firm is not "stockbroker" and is eligible for Chapter 13 relief)].

- The debtor must owe noncontingent, liquidated, unsecured debts of less than $307,675 on the date the petition is filed [*see Scovis v. Henrichsen (In re Scovis) (9th Cir. 2001) 249 F.3d 975, 982* (debts

exceeded the statutory ceiling fixed by *11 U.S.C. § 109(e)*; "eligibility ... should normally be determined by the debtor's originally filed schedules, checking only to see if the schedules were made in good faith")].

- The debtor owes noncontingent, liquidated, secured debts of less than $922,675 on the date the petition is filed. "Noncontingent" means that the duty to pay presently exists and does not come into existence only after a future event occurs [*see In re Fostvedt (9th Cir. 1987) 823 F.2d 305, 307* ; *In re Wilson (Bankr. E.D.N.Y. 1981) 3 Collier Bankr. Cas. 2d 912, 9 B.R. 723, 724-725]* .

Although the conventional interpretation of "secured" might cover any debt for which the creditor has a security interest in the debtor's property, the Bankruptcy Code makes clear that in a Chapter 13 case, the status of a conventional secured debt (or secured claim, from the creditor's point of view) depends on the valuation of the collateral: "An allowed claim of a creditor secured by a lien on property in which the estate has an interest ... is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property ... and is an unsecured claim to the extent that the value of such creditor's interest ... is less than the amount of such allowed claim" [*11 U.S.C. § 506(a)(1)*]. In other words, a debt secured by a mortgage, for instance, is not a "secured claim" (or secured debt) to the extent that it exceeds the value of the property that secures it. Under the Bankruptcy Code, "secured claim" is thus a term of art, and not every claim (debt) that is secured by a lien on property will be considered a "secured claim" (secured debt) [*Zimmer v. PSB Lending Corp. (In re Zimmer) (9th Cir. 2002) 313 F.3d 1220, 1223* (creditor, whose claim was secured by second deed of trust on debtor's residence, was holder of unsecured claim for purposes of Chapter 13, because first-lien claim exceeded value of underlying property; therefore, in accord with *11 U.S.C. § 1322(b)(2)*, rights of second-lien creditor could be modified under Chapter 13 plan)].

[c] Debtor's Retention of Assets

Unless the confirmed plan or the order confirming the plan provides otherwise, a Chapter 13 debtor retains title to and possession of his or her property [*11 U.S.C. §§ 1306(b), 1327(b), (c)*]. Whereas a Chapter 7 debtor engaged in business must ordinarily turn the business over to the trustee for liquidation, a Chapter 13 debtor engaged in business may continue to operate it unless the court orders otherwise [*11 U.S.C. §§ 721, 1304(b)*].

[d] Curing Defaults Under Chapter 13 Plan

A debtor's Chapter 13 plan may provide for the cure of any default [*11 U.S.C. § 1322(b)(3)*], including the cure, within a reasonable time, of a default on a claim on which the last payment is due after the final date for payment under the plan [*11 U.S.C. § 1322(b)(5)*]. However, a debtor may not use *11 U.S.C. § 506(a)(1)* [*see § 94.20[4][i]*] in combination with *11 U.S.C. § 1322(b)(5)* to reduce the secured claim and repay it over a period longer than the plan term [*Enewally v. Washington Mut. Bank (In re Enewally) (9th Cir. 2004) 368 F.3d 1165, 1172*].

If a default occurs before the petition was filed and results in acceleration of the entire outstanding debt, the cure of that default may provide for "de-acceleration" of the debt [*In re Clark (7th Cir. 1984) 738 F.2d 869, 874* ; *In re Taddeo (2d Cir. 1982) 685 F.2d 24, 28]* . In this respect, *11 U.S.C. § 1322(b)(5)* preempts *Civ. Code § 2924c(a)(1)* (setting out the requirements and time period for reinstating an accelerated debt secured by real property), and allows confirmation of a Chapter 13 plan that cures any pre-petition accelerated delinquencies [*see In re Nelson (B.A.P. 9th Cir. 1985) 14 Collier Bankr. Cas. 2d 700, 59 B.R. 417, 419*].

[e] Classification of Creditors Under Chapter 13 Plan

As long as there is no unfair discrimination, a Chapter 13 debtor may create different classes of creditors and propose different levels of payment to each class [*see In re Haag (Bankr. D. Or. 1980) 2 Collier Bankr. Cas. 2d 144, 145, 3 B.R. 649, 650-651, 6 Bankr. Ct. Dec. 367* (full payment of spousal support obligation versus 25 percent payments to all

other unsecured creditors is permissible difference in treatment)]. Consumer debts on which there is a co-debtor may be treated differently from other unsecured claims [*11 U.S.C. § 1322(b)(1)*].

[f] Discharge of Debts Under Chapter 13

[i] Discharge on Completion of Plan

As soon as practicable after the debtor completes all payments under a Chapter 13 plan, the court generally is required to grant a discharge [*11 U.S.C. § 1328(a)*; *but see 11 U.S.C. § 1328(f)-(h)* (possible exceptions)] of all debts provided for by that plan or disallowed under *11 U.S.C. § 502*, except the following [*11 U.S.C. § 1328(a)*]:

- Debts provided for under *11 U.S.C. § 1322(b)(5)* (debts on which the last payment is due after the date the final payment under the plan is due);

- Debts of a kind specified in *11 U.S.C. § 507(a)(8)(C)* (a tax required to be collected or withheld and for which the debtor is liable in whatever capacity);

- Debts specified as nondischargeable by *11 U.S.C. § 523(a)(1)(B), (C), (2)*-(5), (8), and (9) [*see § 94.53*];

- Debts for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime; and

- Debts for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual [*see Waag v. Permann (In re Waag) (B.A.P. 9th Cir. 2009) 418 B.R. 373, 378, 381* (statute does not differentiate between judgment entered before petition is filed and one entered after petition is filed; therefore, prepetition judgment is not prerequisite to prevailing on nondischargeability claim under this provision)].

PRACTICE TIP:
Under Chapter 13, a debt for restitution or damages awarded in a civil action as a result of "willful or malicious injury" causing "personal injury to an individual or the death of an individual" is not dischargeable [*11 U.S.C. § 1328(a)(4)*]. Under Chapter 7, a debt for "willful and malicious injury ... to another entity or to the property of another entity" is not dischargeable [*11 U.S.C. §§ 523(a)(6), 727(b)*]. These are significant differences: whether the injury is "willful *or* malicious" or is "willful *and* malicious," whether the injury is to a person or is to property, and whether or not the debt arises from an award in a civil action [*Waag v. Permann (In re Waag) (B.A.P. 9th Cir. 2009) 418 B.R. 373, 2009 Bankr. LEXIS 3418, at *8*]. Depending on the facts of the client's case, if a debt for personal injury is involved, it could be strategically more advantageous to file under Chapter 13 rather than Chapter 7. *Commentary by John A. Vos*.

[ii] Discharge When Plan Not Completed

In limited circumstances, a Chapter 13 debtor may obtain a "hardship" discharge; that is, a discharge notwithstanding the debtor's failure to the complete the plan [*see 11 U.S.C. § 1328(b)*]. A hardship discharge is less broad than a discharge after completion of the plan: it discharges only unsecured debts that were provided for by the plan or disallowed under *11 U.S.C. § 502*, and it excludes the following [*11 U.S.C. § 1328(b), (c)*]:

- Unsecured debts provided for under *11 U.S.C. § 1322(b)(5)*; that is, debts on which the last payment is due after the date on which the final payment under the plan is due.

- All unsecured debts specified as nondischargeable by *11 U.S.C. § 523(a)*.

[g] Stay of Creditor Actions Against Debtor and Co-Debtor

The filing of a bankruptcy case under Chapter 13 automatically stays creditor actions against the debtor and most property of the debtor, as it does under Chapter 7 and other chapters of the Bankruptcy Code [*see 11 U.S.C. § 362*; *see also §§ 94.20[3][d], 94.30* et seq.]. In a Chapter 13 case, unlike Chapter 7 and Chapter 11 cases, the bankruptcy stay also applies to consumer debt actions by a creditor against an individual who is a co-debtor of the Chapter 13 debtor [*see 11 U.S.C. § 1301*]. Thus, a business partner is not protected from business claims arising out of the joint operation of a partnership while one of the partners is in Chapter 13.

Furthermore, unlike Chapter 7 cases, property acquired by a Chapter 13 debtor after filing the petition is property of the estate, thus enjoying protection of the bankruptcy stay [*see 11 U.S.C. §§ 362(a), 1306(a)*].

[5] Chapter 11: Reorganization

[a] Reorganization Under Chapter 11 as Alternative to Chapter 7 or 13

Chapter 11 provides a court supervised procedure whereby the debtor can achieve immediate relief from actions by unsecured creditors and limited immediate relief from secured creditors, and then can reorganize itself through the medium of a plan that may be approved by the court if consented to by the appropriate number of voting creditors or if qualifying for confirmation without such a vote [*see 11 U.S.C. §§ 1121-1129*].

Reorganization permits the debtor to satisfy creditor claims in a broad array of ways, including sale of estate property, merger or consolidation of the debtor with one or more persons, distribution of estate property to secured creditors, or transfer of estate property to a separate entity [*see 11 U.S.C. § 1123(a)(5)*].

A brief summary of Chapter 11 is given in § 94.20[5][b]-[h].

[b] Persons Who May Proceed Under Chapter 11

[i] Partnerships and Corporations

Chapter 11 is broadly available to business entities. It may be used by the following entities [*11 U.S.C. § 109(d)*]:

- Any that are entitled to use Chapter 7, except a stockbroker or commodity broker [*see § 94.20[3][b]*].

- A railroad (which may not use Chapter 7).

- An uninsured state member bank [*see 11 U.S.C. § 101(54A)* (definition)], or a corporation organized under Section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to Section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991.

Chapter 11 is used most often by business debtors, as opposed to individuals. It is used particularly by partnerships and corporations, for example, because these entities may not obtain a discharge of debts under Chapter 7 [*see § 94.20[3][c][i]*]. However, a partnership or corporation may not obtain a discharge under Chapter 11 if the plan provides for the liquidation of all or substantially all of the property of the estate, the debtor does not engage in business after consummation of the plan, and the debtor would be denied a discharge under Chapter 7 if the case were adjudicated

under that chapter [*11 U.S.C. § 1141(d)(3)*; *see Torrington Livestock Cattle Co. v. Berg (In re Berg) (B.A.P. 10th Cir. 2010) 423 B.R. 671, 2010 Bankr. LEXIS 524, at *14* (all three elements of section 1141(d)(3) must be established before Chapter 11 debtor's discharge may be denied; Chapter 11 discharge cannot be denied solely on ground that debtor would have been denied discharge under Chapter 7); *see also § 94.20[5][g]*].

[ii] Individuals

Although designed for business entities, Chapter 11 is not expressly so limited, and may be used by individuals whether or not engaged inbusiness [*Toibb v. Radloff (1991) 501 U.S. 157, 161-165, 111 S. Ct. 2197, 115 L. Ed. 2d 145]* . It may be used by any individual except a stockbroker or commodity broker [*see 11 U.S.C. § 109(d)*].

A Chapter 11 case may be commenced voluntarily by the debtor, or involuntarily by certain creditors [*see 11 U.S.C. §§ 301(a), 303*].

An individual debtor in Chapter 11, like all other individual debtors under the 2005 amendments to the Bankruptcy Code, must complete a credit counseling session before filing and a financial management (budgeting) class after filing as a condition to obtaining a discharge [*11 U.S.C. §§ 109(h)(1), 521(b)*; added by Pub. L. 109-8, § 109; *see § 94.20[2][c]*].

[c] Debtor's Retention of Assets

[i] Role of Debtor as Trustee

In most Chapter 11 cases the debtor retains possession of all of the assets of the estate, as a "debtor in possession" [*11 U.S.C. § 1101(1)*; *see also § 94.11[7]*]. The debtor-in-possession has the rights, duties, and powers of a Chapter 11 trustee [*11 U.S.C. § 1107(a)*]. The duties of a trustee are set forth in *11 U.S.C. § 1106*. The debtor-in-possession, and its managing personnel, if it is not an individual entity, are subject to the fiduciary requirements imposed on court appointed trustees by statute, local rule, or by the United States trustee.

Thus, subject to compliance with the terms of the statute, a debtor in possession may [*see 11 U.S.C. §§ 704, 1106*]:

- Manage the debtor's business.
- Employ professionals.
- Use, sell, or lease property of the estate.
- Obtain credit in compliance with *11 U.S.C. § 364*.
- Assume or reject executory contracts in compliance with *11 U.S.C. § 365* [*see Agarwal v. Pomona Valley Med. Group, Inc. (2007), 476 F.3d 665* . 669-670 (bankruptcy court should apply business judgment rule to evaluate debtor-in-possession's rejection decision, that is, court should presume that debtor-in-possession acted prudently, on informed basis, in good faith, and in honest belief that rejection was in best interests of bankruptcy estate)].
- Exercise the trustee's avoidance powers.

In addition, the debtor must attend and submit to an examination, file necessary lists and schedules, and file a reorganization plan under *11 U.S.C. § 1121* or, in the alternative, file a report with the court concerning why the debtor will not file a plan [*see 11 U.S.C. § 1106(a)(5)*]. Furthermore, if there is a claim against the debtor for domestic support

[*see 11 U.S.C. § 101(14A)* (definition)], the debtor must give the holder of the claim a prescribed notice and could be required to give an additional notice to the state child-support enforcement agency [*see 11 U.S.C. § 1106(a)(8), (c)*].

A debtor in possession has the exclusive right to file a plan within 120 days (or, in a small business case, 180 days) after the date of the order for relief, or within such other period of time as the court may fix [*see 11 U.S.C. § 1121(b), (e)*].

[ii] Appointment of Separate Trustee or Examiner

The court may order the appointment of a trustee to manage the debtor if there is cause, such as the debtor's fraud, dishonesty, incompetence, or gross mismanagement, or if appointment of a trustee is in the interests of creditors, equity security holders, and other interests of the estate [*11 U.S.C. § 1104(a)*]. The United States trustee must move for the appointment of a trustee if there are reasonable grounds to suspect that current members of the governing body of the debtor, the debtor's chief executive or chief financial officer, or members of the governing body who selected the debtor's chief executive or chief financial officer, participated in actual fraud, dishonesty, or criminal conduct in the management of the debtor or the debtor's public financial reporting [*11 U.S.C. § 1104(e)*].

On the request of a party made within 30 days after the court orders appointment of a trustee, the United States trustee must convene a meeting of creditors to elect one disinterested person to serve as trustee [*11 U.S.C. § 1104(b)(1)*; *see 11 U.S.C. § 702(a)-(c)* (manner of election)].

Alternatively, if the court does not order the appointment of a trustee, it may order the appointment of an examiner to investigate the debtor when this appointment is in the interests of creditors, equity security holders, and other interests of the estate, or if the debtor's fixed, liquidated, unsecured debts exceed $5 million, excluding those debts for goods, services, or taxes, or owing to an insider [*11 U.S.C. § 1104(c)*].

[d] Creditors' Committee

As soon as is practicable after the order for relief, the United States trustee appoints a creditors' committee, representing unsecured creditors [*11 U.S.C. § 1102*]. Typically, the committee consists of persons willing to serve who hold the seven largest unsecured claims or, in the alternative, of members of a committee organized by creditors before the commencement of the Chapter 11 case [*11 U.S.C. § 1102(b)(1), (2)*]. In the latter situation, the United States trustee has broad discretion to assure that the committee was fairly chosen and is representative of the claimants. Additional committees representing creditors or equity security holders may be appointed when separate representation is considered desirable.

On request of a party in interest and after notice and a hearing, the court may order the United States trustee to change the membership of the committee [*11 U.S.C. § 1102(a)(4)*].

On the request of a party in interest in a case in which the debtor is a small business debtor and for cause, the court may order that a committee of creditors not be appointed [*11 U.S.C. § 1102(a)(3)*].

[e] Reorganization Plan

A Chapter 11 reorganization plan must do all of the following [*11 U.S.C. § 1123(a)*]:

- Designate classes of claims and interests.
- Specify classes that are not impaired.
- Specify the treatment of impaired classes.

- Provide the same treatment for claims or interests in a particular class unless a holder agrees to a less favorable treatment for a particular claim.

- Provide adequate means for the plan's implementation.

- Provide for the inclusion in the debtor's charter of a provision prohibiting the issuance of nonvoting equity securities.

- Contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan.

- When the debtor is an individual, provide for the payment to creditors under the plan of all or such portion of earnings from personal services performed by the debtor after the commencement of the case, or other future income of the debtor, as is necessary for the execution of the plan.

A Chapter 11 reorganization plan may make other specified provisions [*see 11 U.S.C. § 1123(b)*].

[f] Approval and Confirmation of Plan

[i] Submission of Plan to Court and Creditors

Before soliciting acceptance or rejection of the plan, the debtor must obtain court approval of, and then transmit to holders of claims and interests, a disclosure statement containing sufficient information to enable the holders to "make an informed judgment about the plan" [*11 U.S.C. § 1125(a)(1)*]. The holders of claims and interests then vote on the plan; however, no acceptances are necessary from the holders of claims or interests that are not impaired by the plan [*11 U.S.C. §§ 1126(f), 1129(a)(8)*].

The bankruptcy court, at any time during the pendency of the Chapter 11 case, may dismiss it or convert it to one under Chapter 7 [*see 11 U.S.C. § 1112(b)*; *see also Shulkin Hutton, Inc. v. Treiger (In re Owens) (9th Cir. 2008) -- F.3d --, 2008 U.S. App. LEXIS 26947, at *4* (when deciding between dismissal and conversion under *11 U.S.C. § 1112(b)*, court must consider interests of all creditors, not just interest of person seeking dismissal or conversion)]. The debtor may obtain an order converting the case as a matter of right, unless the debtor is not the debtor in possession, the case was originally commenced as an involuntary case under Chapter 11, or the case was converted to a Chapter 11 other than by the debtor's request [*see 11 U.S.C. § 1112(a)*]. Other parties in interest, the United States trustee, or the bankruptcy administrator may obtain this relief for cause after a court hearing on notice [*see 11 U.S.C. § 1112(b)*; *see, e.g., Pioneer Liquidating Corp. v. United States Trustee (In re Consolidated Pioneer Mortg. Entities) (9th Cir. 2001) 264 F.3d 803, 807-809]* .

[ii] Confirmation Requirements

The court may confirm a Chapter 11 plan only if the following conditions are satisfied:

- The plan and its proponent must comply with the applicable provisions of the Bankruptcy Code [*11 U.S.C. § 1129(a)(1), (2)*].

- The plan must be proposed in good faith and not by unlawful means [*11 U.S.C. § 1129(a)(3)*].

- Any payment made or promised for services rendered or for costs and expenses incurred in

connection with the case or the plan must be approved by or must be subject to approval by the court [*11 U.S.C. § 1129(a)(4)*].

- The identity and affiliation of proposed directors, officers, or voting trustees, as well as the identity of an affiliate of the debtor participating in a joint plan or a successor to the debtor under the plan, must be disclosed. The proposed appointments of directors, officers, or voting trustees must be consistent with both the interest of creditors and equity security holders and with public policy. In addition, the proponent of the plan must disclose the identity of any "insider" of the debtor that will be employed or retained by the reorganize d debtor and the nature of compensation which will be paid to that person [*11 U.S.C. § 1129(a)(5)*].

- If the debtor is subject to governmental regulation and the plan proposes to alter rates over which a regulatory commission has jurisdiction, the commission must have approved those rates, or any proposed rate change must be conditioned on the approval [*11 U.S.C. § 1129(a)(6)*].

- With respect to each impaired class, the class must unanimously accept the plan or the class must receive under the plan at least what the class would receive in a liquidation under Chapter 7. If, however, the class exercises an election under *11 U.S.C. § 1111(b)(2)*, the class must receive property with a present value equal to the value of the secured claims of the class [*11 U.S.C. § 1129(a)(7)*].

- Each class that is not unimpaired must accept the plan [*11 U.S.C. § 1129(a)(8)*].

- Unless the holder of a priority claim agrees to less favorable terms, administrative claims entitled to priority must be paid in cash on the effective date of the plan; employee claims, pension benefit claims, and consumer claims entitled to priority must be either paid in cash on the effective date of the plan or must be paid in full over time according to terms acceptable to the requisite majority of the particular class; tax and customs claims entitled to priority must be paid in full but payments in respect of such claims may be extended over a period not to exceed six years from the date of assessment of such claims, so long as the present value of the payments as of the effective dateof the plan equals or exceeds the amount of those claims [*11 U.S.C. § 1129(a)(9)*].

- If a class is impaired under the plan, at least one impaired class of claims must accept the plan [*11 U.S.C. § 1129(a)(10)*].

- It must be unlikely that confirmation of the plan would be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such a liquidation or reorganization is proposed in the plan [*11 U.S.C. § 1129(a)(11)*; *see Sherman v. Harbin (In re Harbin) (9th Cir. 2007) 486 F.3d 510, 517-519* (bankruptcy court considering feasibility of plan of reorganization must evaluate possible effect of debtor's ongoing civil case with potential creditor, whether that litigation is pending at trial level or on appeal)].

- Either the quarterly fees based on disbursements for the quarter must have been paid or the plan must make satisfactory provision for the payment of such fees [*11 U.S.C. § 1129(a)(12)*].

- To the extent that the debtor is required to continue paying retiree benefits under its original agreement or as it may have been modified pursuant to *11 U.S.C. § 1114*, the plan must carry forward the obligation for the balance of the time for which the debtor is so obligated [*11 U.S.C. § 1129(a)(13)*].

- If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor must have paid all amounts payable under the order or statute for that obligation

that first become payable after the date of the filing of the petition [*11 U.S.C. § 1129(a)(14)*].

- In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan, either [*11 U.S.C. § 1129(a)(15)*]:

  - The value, as of the effective date of the plan, of the property to be distributed under the plan on account of the claim must be not less than the amount of the claim; or

  - The value of the property to be distributed under the plan must be not less than the projected disposable income of the debtor [*see 11 U.S.C. § 1325(b)(2)* (definition)] to be received during the five-year period beginning on the date the first payment is due under the plan, or during the period for which the plan provides payments, whichever period is longer.

- All transfers of property of the plan must be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust [*11 U.S.C. § 1129(a)(16)*].

[iii] Confirmation Without Required Acceptances

Notwithstanding the requirements in *11 U.S.C. § 1129(a)* [*see § 94.20[5][f][ii]*] concerning votes of creditors, it is possible for the court to confirm a plan under the "cramdown" provisions contained in *11 U.S.C. § 1129(b)*.

At least one class of claims impaired under the plan must accept the plan by the requisite votes, and there must be excluded for this purpose any acceptances of the plan by any insiders [*11 U.S.C. § 1129(a)(10)*; *but see Barakat v. Life Ins. Co. of Va. (In re Barakat) (9th Cir. 1996) 99 F.3d 1520, 1524-1526* (bankruptcy court did not err in denying plan confirmation for lack of assent of impaired noninsider class of creditors when sole purpose of debtor's separate classification of unsecured deficiency claim was to obtain acceptance of plan)]. But for this requirement, votes of creditors may be disregarded if the plan provides, with respect to each class, treatment of the type set forth in *11 U.S.C. § 1129(b)(2)(A), (B),* or *(C)* (respecting secured claims, unsecured claims, and claims of interest holders, that is, shareholders or other equity holders).

Secured creditors may be "crammed down" only if one of three specified conditions is met [*see 11 U.S.C. § 1129(b)(2)(A)*].

[g] Discharge on Confirmation of Plan

Debts that are dischargeable under Chapter 11 become discharged on the confirmation of the plan [*see 11 U.S.C. § 1141(d)(1)*]. The scope of dischargeable debts in a Chapter 11 case is similar to that under Chapter 7; that is, a discharge under Chapter 11 does not discharge a debtor who is an individual from any debt excepted from discharge under *11 U.S.C. § 523* [*11 U.S.C. § 1141(d)(2)*]. However, while under Chapter 7 a discharge covers pre-petition debts [*see 11 U.S.C. § 727(b)*], under Chapter 11 the discharge covers debts that arose before the date of confirmation of the plan [*see 11 U.S.C. § 1141(d)(1)*; *e.g., Zimmerman, Rosenfeld, Gersh & Leeds v. Larson (2005) 131 Cal. App. 4th 1466, 1486-1487, 33 Cal. Rptr. 3d 111* (post-petition debt for attorney's fees was discharged in Chapter 11 case)] (subject to certain exceptions in either case).

Unlike a Chapter 13 discharge, which is effective only after substantial consummation of the plan [*11 U.S.C. §§ 1325-1328*], a Chapter 11 discharge is entered on confirmation of the plan [*11 U.S.C. § 1141(a)*; *but see 11 U.S.C. § 1141(d)(3)-(6)* (possible exceptions)]. Even if the Chapter 11 plan is not ultimately consummated, the discharge remains effective.

An order confirming a Chapter 11 plan may be revoked on request of a party in interest at any time within 180 days after the date of entry of the confirmation order, after notice of a hearing, if it is determined that the confirmation was procured by fraud [*11 U.S.C. § 1144*].

[h] Stay of Creditor Actions Against Debtor

The filing of a petition under Chapter 11 automatically stays a creditor action against the debtor and most property of the debtor, as is the case under Chapter 7 [*see 11 U.S.C. § 362*; *see also § 94.20[3][d]*]. For further discussion, see *§ 94.30* et seq.

[6] Chapter 12: Debt Adjustment for Family Farmers and Family Fishermen

[a] Nature of Chapter 12 Remedy

Chapter 12, available to a family farmer with a regular annual income or a family fisherman with a regular annual income, is similar in many respects to Chapter 13. A Chapter 12 case envisions an extension or composition plan in which debts are paid primarily out of future income, under the protection of the court. The debtor is allowed to retain existing assets, as well as employment or going-concern value of the farm or fishing business, pending completion of a repayment plan.

[b] Who May Proceed Under Chapter 12

Chapter 12 is designed specifically for a family-farmer debtor with a regular annual income or a family-fisherman debtor with a regular annual income [*see 11 U.S.C. § 109(f)*; *see also 11 U.S.C. § 101(19), (19B)* (defining "family farmer with regular annual income" and "family fisherman with regular annual income")].

For an individual to qualify as a family farmer, a specific test must be met [*see 11 U.S.C. § 101(18)*]. For an individual to qualify as a family fisherman, a similar test must be met [*see 11 U.S.C. § 101(19A)*].

For a corporation or partnership to qualify as a family farmer or family fisherman, a different test must be met [*see 11 U.S.C. § 101(18)(B), (19A)(B)*]. A corporation cannot be considered a family farmer or family fisherman if any of its stock is traded publicly [*11 U.S.C. § 101(18)(B)(iii), (19A)(B)(ii)(III)*].

[c] Commencement of Case

A Chapter 12 case is commenced in the same manner as a Chapter 7 liquidation, by the filing of a petition [*see 11 U.S.C. § 301(a)*]. A Chapter 12 case, however, may only be commenced voluntarily. There are no involuntary Chapter 12 cases [*see 11 U.S.C. § 303*].

[d] Plan

In a Chapter 12 case, the debtor files a plan no later than 90 days after the order for relief, or within such further time as the court may order [*11 U.S.C. § 1221*]. Typically, a Chapter 12 plan provides for the satisfaction of all or a portion of the debts, using the debtor's future income, and, in some cases, a portion of the debtor's assets.

The plan must provide for all of the following:

- The submission of all or a portion of future earnings to the supervision and control of the Chapter 12 trustee [*11 U.S.C. § 1222(a)(1)*].

- The full payment of *11 U.S.C. § 507* priority claims [*11 U.S.C. § 1222(a)(2)*], with some exceptions [*11 U.S.C. § 1222(a)(2), (4)*].

- The same treatment for each claim or interest within a particular class, unless a particular holder agrees to less favorable treatment [*11 U.S.C. § 1222(a)(3)*].

The plan may include additional specified provisions [*see 11 U.S.C. § 1222(b)*].

[e] Confirmation

After a Chapter 12 plan is filed, the court must hold a hearing on confirmation. Any party in interest, the trustee, or the United States trustee may object to confirmation of the plan. Other than for cause, the hearing must be concluded within 45 days after the plan is filed [*11 U.S.C. § 1224*].

The plan must be confirmed if all of the following conditions are met:

- The plan complies with the provisions of Chapter 12 and all other applicable provisions in the Bankruptcy Code [*11 U.S.C. § 1225(a)(1)*].

- All required fees and charges have been paid, and the plan has been proposed in good faith [*11 U.S.C. § 1225(a)(2), (3)*].

- The plan is in the best interest of creditors--that is, creditors will receive at least an amount equal to what they would have received if the debtor were liquidated under Chapter 7 [*11 U.S.C. § 1225(a)(4)*].

- Secured creditors either accept the plan, retain their liens and receive a distribution that, as of the effective date of the plan, is equal to the allowed amount of the secured claim, or receive from the debtor surrender of the property [*11 U.S.C. § 1225(a)(5)*].

- The debtor will be able to make all payments under the plan and to comply with the plan [*11 U.S.C. § 1225(a)(6)*].

- The debtor has paid all amounts that are required to be paid under a domestic support obligation and that first become payable after the date of the filing of the petition, if the debtor is required by a judicial or administrative order, or by statute, to pay the domestic support obligation [*11 U.S.C. § 1225(a)(7)*].

If a trustee or an unsecured creditor objects to the plan, the court may not approve the plan unless, as of the effective date of the plan, either [*11 U.S.C. § 1225(b)(1)*]:

- The objecting claimant is to be fully paid;

- In the three-year period (or any longer period the court approves under *11 U.S.C. § 1222(c)*) beginning on the date the first payment is due under the plan, all of the debtor's projected disposable income will be devoted to the plan; or

- In the three-year period (or any longer period the court approves under *11 U.S.C. § 1222(c)*) beginning on the date the first distribution is due under the plan, the value of the property to be distributed under the plan is not less than the debtor's projected disposable income for that period.

[f] Stay

In a Chapter 12 case, the filing of the petition operates as an automatic stay on virtually all actions against the debtor or against estate property, and also operates as a stay on virtually all actions against individual co-debtors to collect a consumer debt owed by the debtor [*11 U.S.C. §§ 362, 1201*]. For further discussion, see *§ 94.30* et seq.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [Pub. L. No. 109-8, 119 Stat. 23] created numerous exceptions to the stay. For discussion of these exceptions, see *§ 94.30[3][a]*.

[g] Discharge

On completion of the plan, the debtor is entitled to receive a discharge [*11 U.S.C. § 1228(a)*; *but see 11 U.S.C. § 1228(f)* (possible exception if debtor is subject to *11 U.S.C. § 522(q)(1)*); *see also 11 U.S.C. § 1228(d)* (revocation of discharge)] of all debts provided for by the plan, except the following [*11 U.S.C. § 1228(a)*]:

- Long-term debts.
- Debts that the debtor has satisfied or will satisfy with estate property under *11 U.S.C. § 1222(b)(9)*.
- Debts that are nondischargeable under *11 U.S.C. § 523(a)* [*see § 94.53*].

A Chapter 12 debtor unable to complete the plan may receive a hardship discharge if the debtor's failure is due to circumstances for which the debtor should not justly be held accountable, provided that creditors have received at least as much as they would have received in a Chapter 7 liquidation, and modification of the plan is not practicable [*see 11 U.S.C. § 1228(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawLiquidationsGeneral OverviewBankruptcy LawReorganizationsGeneral OverviewBankruptcy LawFarming & Fishing DebtorsGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 9: Bailments thru Boats and Boating-Chs. 93-100
Chapter 94 BANKRUPTCY
PART II. LEGAL BACKGROUND
B. Debtor's Remedies

9-94 California Forms of Pleading and Practice--Annotated §§ 94.21-94.29

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[Reserved]

§§ 94.21[Reserved]

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Volume 9: Bailments thru Boats and Boating-Chs. 93-100
Chapter 94 BANKRUPTCY
PART II. LEGAL BACKGROUND
C. Relief From Stay

9-94 California Forms of Pleading and Practice--Annotated § 94.30

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§ 94.30 Stay of Proceedings Against Debtor on Filing of Bankruptcy Petition

[1] Imposition of Stay

[a] Automatic Application in Most Cases

The filing of a bankruptcy petition usually operates to stay automatically certain creditor actions and proceedings [*11 U.S.C. § 362(a)*; *see* [2], *below*]. There is an exception, intended to suppress the bad faith use of bankruptcy by individuals [*see 11 U.S.C. § 362(c)(4)*; *[4][a], below*].

The purpose of this stay is to protect the assets of the estate, so that they may eventually be distributed to creditors. For the debtor, the practical effect of the stay is that, generally, creditor harassment, collection efforts, and lawsuits on debts must cease--excepting acts and proceedings that specifically are allowed by the Bankruptcy Code. In fact, numerous acts and proceedings by creditors (and others) are not subject to the stay [*11 U.S.C. § 362(b)*; *see* [3], *below*].

For discussion of moving for relief from the bankruptcy stay, see *§ 94.33*.

[b] Unavailability to Certain Small-Business Debtors

The stay does not apply automatically in a case in which any of the following conditions exists [*11 U.S.C. § 362(n)(1)*]:

- The debtor is a debtor in a small business case pending at the time the petition is filed.

- The debtor was a debtor in a small business case that was dismissed for any reason by an order that became final in the two-year period ending on the date of the order for relief entered with respect to the petition.

- The debtor was a debtor in a small business case in which a plan was confirmed in the two-year period ending on the date of the order for relief entered with respect to the petition.

- The debtor acquired substantially all of the assets or business of a small-business debtor described in one of the foregoing items and does not establish by a preponderance of the evidence that the acquisition was made in good faith and not for the purpose of evading *11 U.S.C. § 362(n)(1)*.

This conditional withholding of the automatic protection of a stay is intended to target small business debtors that engage in an abusive practice called serial filing. Therefore, in an involuntary case in which one of the above conditions exists, the stay nevertheless will be imposed as usual if the case involves no collusion by the debtor with creditors [*11 U.S.C. § 362(n)(2)(A)*]. In a voluntary case in which one of the foregoing conditions exists, the stay will be imposed as usual if the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed, and if it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable period of time [*11 U.S.C. § 362(n)(2)(B)*].

[2] Acts and Proceedings That Are Stayed

[a] Civil Proceedings on Pre-Petition Claims

Filing a bankruptcy petition operates against all creditors to stay the commencement or continuation of any civil action or proceeding against the debtor that either (1) could have been or was commenced before the commencement of the bankruptcy case or (2) is to recover a claim against the debtor that arose before the commencement of the bankruptcy case [*11 U.S.C. § 362(a)(1)*; *see Eskanos & Adler, P.C. v. Leetien (9th Cir. 2002)309 F.3d 1210, 1215* (creditor has "affirmative duty to discontinue post-petition collection actions")], including some proceedings before the U.S. Tax Court [*11 U.S.C. § 362(a)(8)*].

PRACTICE TIP:

Dismissal of Creditor's Pending Action. The stay may work in a creditor's favor by preventing dismissal of the creditor's pending action against the debtor. A California appellate court has held that a trial court has no power to dismiss the creditor's case, and that any purported dismissal would be void, on the ground that *11 U.S.C. § 362(a)* "creates an automatic stay of all judicial proceedings against the debtor" [*Sindler v. Brennan (2003) 105 Cal. App. 4th 1350, 1353, 129 Cal. Rptr. 2d 888]* . (The stay is not automatic in every case, however [*see 11 U.S.C. § 362(c)(4)*; *[4][a], below*].)

[b] Enforcement of Pre-Petition Judgment or Lien Rights

Filing a bankruptcy petition operates against all creditors to stay the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the bankruptcy case [*11 U.S.C. § 362(a)(2)*].

Filing a bankruptcy petition operates against all creditors to stay any act to create, perfect, or enforce any lien against property of the debtor, to the extent that the lien secures a claim that arose before the commencement of the case [*11 U.S.C. § 362(a)(5)*; *see, e.g., In re Marriage of Sprague & Spiegel-Sprague (2003) 105 Cal. App. 4th 215, 219-220, 129 Cal. Rptr. 2d 261* (stay is violated by state court's determination of nondischargeability of debt for attorney's fees in dissolution proceeding, even if it is done indirectly by characterizing that debt as liability in nature of alimony, maintenance, or support--which is nondischargeable--since state court does not have concurrent jurisdiction to determine scope and applicability of stay with respect to core bankruptcy proceeding)].

[c] Attempts at Collection on Pre-Petition Claims

Filing a bankruptcy petition operates against all creditors to stay attempts at collection on pre-petition claims [*11 U.S.C.*

§ 362(a)(3), (4), (6)]. This includes an attempt to set off a pre-petition debt owing to the debtor against a claim against the debtor [*11 U.S.C. § 362(a)(7)*].

PRACTICE TIP:

Collecting Attorney's Fees. The stay would prevent an attorney's attempt to collect fees owed under a deferred payment arrangement in connection with pre-petition services in the bankruptcy proceedings [*see, e.g., American Law Ctr., P.C. v. Stanley (In re Jastrem) (9th Cir. 2001) 253 F.3d 438, 441-442* ; *see also Sanchez v. Gordon (In re Sanchez) (9th Cir. 2001) 241 F.3d 1148, 1150-1151* (reasonable fee for post-petition services is nondischargeable debt and may be collected in course of bankruptcy proceedings without violating stay)].

[3] Acts and Proceedings Not Stayed

[a] Exceptions and Limitations to Stay--In General

Under specified circumstances, the Bankruptcy Code provides exceptions and limitations to the general rule imposing a stay, the most significant of which are noted in the subsections below. Under the 1995 amendments to the Bankruptcy Code [Pub. L. No. 109-8, 119 Stat. 23], effective October 17, 2005, a number of new exceptions to the stay were created, including exceptions for the following:

- Specified family law proceedings, including proceedings for the following [*11 U.S.C. § 362(b)(2)(A)-(D), (E), (G)*; *see § 94.30[3][f], [g], below*]:
  - Child custody or visitation.
  - Dissolution of marriage, except division of estate property.
  - Domestic violence.
  - Collection of support from either the debtor or the estate.
- Proceedings relating to license restriction [*11 U.S.C. § 362(b)(2)(D)*; *see § 94.30[3][s], below*].
- Proceedings for interception of a tax refund [*11 U.S.C. § 362(b)(2)(F)*; *see § 94.30[3][e], below*].
- Proceedings for repayment of loan made from a pension plan [*11 U.S.C. § 362(b)(19)*; *see § 94.30[3][i], below*].
- Proceedings for violation of an in rem order [*11 U.S.C. § 362(d)(4)*; *see §§ 94.30[3][j], below, 94.33[2][d]*].
- Proceedings to enforce a lien on real property if the debtor is not eligible due to the 180-day bar for voluntary dismissal with stay relief pending [*see 11 U.S.C. § 109(g)*] or the case was filed in violation of a bar issued in a previous case [*11 U.S.C. § 362(b)(20)*; *see § 94.30[3][j], below*].
- Eviction proceeding involving residential premises when there is a pre-petition judgment [*11 U.S.C. § 362(b)(22)*; see *§ 94.30[3]*[*l*], *below*].
- Eviction involving residential property if illegal use of a controlled substance is alleged [*11 U.S.C. § 362(b)(23)*; *see § 94.30[3][m], below*].

- Any transfer not avoidable under *11 U.S.C. §§ 544* and *549* (certain unsecured voidable claims; postpetition transfers) [*11 U.S.C. § 362(b)(24)*].

- Setoff of income tax refund [*11 U.S.C. § 362(b)(26)*; *see § 94.30[3][e], below*].

Moreover, the 2005 amendments generally limit the automatic stay in several significant respects:

- There is no stay at all if two cases were filed within one year, except after notice and hearing if a party in interest moves to impose a stay [*11 U.S.C. § 362(c)(4)*; *see § 94.30[4][a]*].

- The stay expires 30 days after filing if a prior case was pending within one year prior to the filing, unless the prior case was dismissed pursuant to *11 U.S.C. § 707(b)*. However, the stay can be extended by a timely motion [*11 U.S.C. § 362(c)(3)*; *see § 94.30[4][b]*].

- In a single asset real estate case, the court must grant relief from the stay unless a plan with reasonable chance for success is filed within 90 days after the date of the entry of the order granting relief [*11 U.S.C. § 362(d)(3)*; *see § 94.33[2][c]*].

- The stay is terminated with personal respect to property as to which the debtor is required to file a statement of intentions (as in the case of a car loan) [*see 11 U.S.C. § 521(a)(2)*] if the debtor fails to file the statement of intentions, unless the trustee files an appropriate and timely motion [*11 U.S.C. § 362(h)(1)*; *see § 94.30[4][d]*].

[b] Judicial Proceedings Unrelated to Money or Property

A bankruptcy proceeding does not terminate, merely by virtue of its maintenance, an action already pending in a nonbankruptcy court to which the bankrupt is a party [*Connell v. Walker (1934) 291 U.S. 1, 5, 54 S. Ct. 257, 78 L. Ed. 613]* .

[c] Bankruptcy Court Proceedings

Filing a nondischargeability action in the bankruptcy court when the bankruptcy case is pending [*see §§ 94.54, 94.121*] does not violate the stay [*see, e.g., Rein v. Providian Fin. Corp. (9th Cir. 2001) 270 F.3d 895, 904-905]* .

[d] Proceedings Under Police Powers

Filing a bankruptcy petition does not operate as a stay of the following:

- The commencement or continuation of a criminal proceeding against the debtor [*11 U.S.C. § 362(b)(1)*].

- In specified instances [*see 11 U.S.C. § 362(a)(1)-(3), (6)*], commencement or continuation of an action or proceeding by a governmental unit, or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, to enforce the governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce the governmental unit's or organization's police or regulatory power [*11 U.S.C. § 362(b)(4)*].

[e] Tax-Related Proceedings

Filing a bankruptcy petition does not operate as a stay of the following tax-related proceedings:

- An audit by a governmental unit to determine tax liability [*11 U.S.C. § 362(b)(9)(A)*].

- Issuance to the debtor of a notice of tax deficiency by a governmental unit [*11 U.S.C. § 362(b)(9)(B)*].

- A demand for tax returns [*11 U.S.C. § 362(b)(9)(C)*].

- An assessment for any tax, and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment cannot take effect unless the tax is a debt of the debtor that will not be discharged in the case and the property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor) [*11 U.S.C. § 362(b)(9)(D)*].

- Creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if the tax or assessment comes due after the date of the filing of the petition [*11 U.S.C. § 362(b)(18)*].

- The interception of a tax refund, as specified in the Social Security Act [*42 U.S.C. §§ 664, 666(a)(3)*] or under an analogous state law [*11 U.S.C. § 362(b)(2)(F)*].

Filing a bankruptcy petition also does not operate as a stay of a setoff of an income tax refund, under applicable nonbankruptcy law, by a governmental unit with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection [*see 11 U.S.C. § 361*] for the secured claim of the taxing authority in the setoff [*11 U.S.C. § 362(b)(26)*; *Gould v. United States (In re Gould) (9th Cir. 2010) -- F.3d --, 2010 U.S. App. LEXIS 7977, at *1-*2* (for cases filed after Oct. 17, 2005, this statute permits IRS to set off pre-petition income tax overpayment against pre-petition income tax liability without seeking relief from automatic stay); *see 11 U.S.C. § 506(a)* (method for determining extent to which claim is secured)].

[f] Family Law Proceedings

Filing a bankruptcy petition does not operate as a stay of the commencement or continuation of any of the following civil actions or proceedings [*11 U.S.C. § 362(b)(2)(A)*]:

- Actions for the establishment of paternity.

- Actions for the establishment or modification of an order for domestic support obligations.

- Actions concerning child custody or visitation.

- Actions for the dissolution of a marriage, except to the extent that such a proceeding seeks to determine the division of property that is property of the estate.

- Actions regarding domestic violence.

[g] Enforcement of Support Obligations

In connection with the enforcement of a family support obligation, filing a bankruptcy petition also does not operate as a stay of, or with respect to, the following [*11 U.S.C. § 362(b)(2)(B)-(G)*]:

- Collection of a domestic support obligation from property that is not property of the estate.

- Withholding of income that is property of the estate or property of the debtor, for payment of a domestic support obligation under a judicial or administrative order or a statute.

- Reporting of overdue support owed by a parent to any consumer reporting agency [*see 42 U.S.C. § 666(a)(7)*].

- Interception of a tax refund [*see 42 U.S.C. §§ 664, 666(a)(3)*] or under an analogous state law.

- Enforcement of a medical obligation [*see 42 U.S.C. § 601 et seq.*].

[h] Exercise of Investment-Contract Rights

Filing a bankruptcy petition does not operate as a stay of the following setoffs:

- Setoff by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency in connection with specified types of contracts or margin accounts [*11 U.S.C. § 362(b)(6)*].

- Setoff by a repurchase agreement participant based on a mutual claim for a margin payment or settlement payment [*11 U.S.C. § 362(b)(7)*].

- Setoff pursuant to a swap agreement [*11 U.S.C. § 362(b)(17)*; *see 11 U.S.C. § 101(53B)* (definition)].

Moreover, the exercise of these setoff rights that are not subject to the stay cannot be stayed by any order of a court or administrative agency in any proceeding under the Bankruptcy Code [*11 U.S.C. § 362(o)*].

Filing a bankruptcy petition also does not operate as a stay of the setoff by a master netting agreement participant of a mutual debt and claim under or in connection with one or more master netting agreements [*see 11 U.S.C. §§ 101(38A), (38B), 561* (definitions; contractual right to terminate, liquidate, accelerate, or offset under a master netting agreement and across contracts)] or any contract or agreement subject to such agreements that constitutes the setoff of a claim against the debtor for any payment or other transfer of property due from the debtor under or in connection with such agreements, or any contract or agreement subject to such agreements against any payment due to the debtor from the master netting agreement participant under or in connection with such agreements, or any contract or agreement subject to such agreements, or against cash, securities, or other property held by, pledged to, under the control of, or due from the master netting agreement participant to margin, guarantee, secure, or settle such agreements or any contract or agreement subject to such agreements, to the extent that the participant is eligible to exercise setoff rights under *11 U.S.C. § 362(b)(6), (7),* or *(17)* for each individual contract covered by the master netting agreement in issue [*11 U.S.C. § 362(b)(27)*]. Moreover, the exercise of these setoff rights not subject to the stay cannot be stayed by any order of a court or administrative agency in any proceeding under the Bankruptcy Code [*11 U.S.C. § 362(o)*].

[i] Repayment of Loan From Qualified Retirement Plan

Filing a bankruptcy petition does not operate as a stay of the withholding of income from the debtor's wages and the

collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other tax-qualified plan [*see I.R.C. §§ 401, 403, 408, 408A, 414, 457, 501(c)*], that is sponsored by the debtor's employer, or an affiliate, successor, or predecessor of the debtor's employer, to the extent that the amounts withheld and collected are used solely for payments relating to either of the following [*11 U.S.C. § 362(b)(19)*]:

- A loan from a plan under Section 408(b)(1) of the Employee Retirement Income Security Act of 1974 [*see 29 U.S.C. § 1108(b)(1)*] or is subject to *I.R.C. § 72(p)* (each of which permits a loan, on specified terms, from a retirement plan to a participant or beneficiary).

- A loan from a thrift savings plan that satisfies the requirements of *5 U.S.C. § 8433(g)* (which relates to loans from a retirement plan for federal civil-service employees).

Nothing in *11 U.S.C. § 362(b)(19)* may be construed to provide that any loan made under a governmental plan under *I.R.C. § 414(d)* or a contract or account under *I.R.C. § 403(b)* constitutes a claim or a debt under the Bankruptcy Code [*11 U.S.C. § 362(b)(19)*].

[j] Enforcement of Real Property Lien or Security Interest

Filing a bankruptcy petition does not operate as a stay of any act to enforce any lien against or security interest in real property if either [*11 U.S.C. § 362(b)(21)*]:

- The debtor is ineligible under *11 U.S.C. § 109(g)* to be a debtor in a bankruptcy case [*see § 94.20[2][b]*].

- The bankruptcy petition was filed in violation of a bankruptcy court order in a prior bankruptcy case prohibiting the debtor from being a debtor in another bankruptcy case.

Filing a bankruptcy petition also does not operate as a stay of any act to enforce any lien against or security interest in real property following entry of a relief order under *11 U.S.C. § 362(d)(4)* [*see § 94.33[2]*] in favor of the creditor as to the real property in any prior bankruptcy case, for a period of two years after the date of entry of that order, except that the debtor, in a subsequent bankruptcy case, may move for relief from that order based on changed circumstances or for other good cause shown, after notice and a hearing [*11 U.S.C. § 362(b)(20)*].

[k] Proceedings Related to Security Interests in Property

Filing a bankruptcy petition does not operate as a stay of the following acts:

- Any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to perfection under *11 U.S.C. § 546(b)* or to the extent that the act is accomplished within the period provided by *11 U.S.C. § 547(e)(2)(A)* [*11 U.S.C. § 362(b)(3)*].

- Foreclosure by HUD of an insured mortgage or deed of trust on property consisting of five or more living units [*11 U.S.C. § 362(b)(8)*].

- Postponement of a foreclosure sale under a mortgage or deed of trust [*see Knapp v. Doherty (2004) 123 Cal. App. 4th 76, 82 n.2, 20 Cal. Rptr. 3d 1, 5 n.2*].

[l] Enforcement of Pre-Petition Judgment Evicting Debtor From Residential Tenancy

The filing of a bankruptcy petition generally does not stay the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against the debtor, involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor obtained a judgment for possession of the property against the debtor before the date on which the bankruptcy petition was filed [*11 U.S.C. § 362(b)(22)*].

However, the debtor may obtain a grace period of 30 days after the bankruptcy petition is filed by filing, along with the petition, a certification under penalty of perjury stating both of the following [*11 U.S.C. § 362(l)(1)*]:

- That under the applicable nonbankruptcy law, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession after judgment for possession was entered; and

- That the debtor or an adult dependent of the debtor has deposited with the clerk of the court any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

Thereafter, if the debtor or an adult dependent of the debtor files with the court and serves on the lessor, within the 30-day period after the bankruptcy petition is filed, an additional certification under penalty of perjury that the debtor or adult dependent has cured the entire monetary default that gave rise to the judgment, the judgment will be stayed unless the lessor objects and the court upholds the objection [*11 U.S.C. § 362(l)(2), (3)*].

The lessor may object to any certification filed by the debtor by filing the objection with the court and serving it on the debtor. The court then must hold a hearing within 10 days after the objection is filed and served [*11 U.S.C. § 362(l)(3)(A)*]. If the court upholds the lessor's objection, no further stay is granted and the lessor may complete the process to recover full possession of the property [*11 U.S.C. § 362(l)(3)(B)(i)*].

Note that if the debtor indicates on the bankruptcy petition that there was a judgment for possession of the residential rental property in which the debtor resides and does *not* file a certification as described above, there is no 30-day grace period and the lessor can immediately complete the process to recover full possession of the property [*11 U.S.C. § 362(l)(4)(A)*].

In any case, when a lessor obtains a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement, the debtor must so indicate on the bankruptcy petition and must provide the name and address of the lessor that obtained that pre-petition judgment on the petition and on any certification subsequently filed [*11 U.S.C. § 362(l)(5)(A)*].

The form of certification filed with the petition must provide for the debtor to certify, and the debtor must certify, both of the following [*11 U.S.C. § 362(l)(5)(B)*]:

- Whether a judgment for possession of residential rental housing in which the debtor resides has been obtained against the debtor before the date of the filing of the petition.

- Whether the debtor is claiming that under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment of possession was entered, and has made the appropriate deposit with the court.

[m] Eviction of Debtor From Residential Tenancy for Cause

Filing a bankruptcy petition does not operate as a stay of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of the

property or the illegal use of controlled substances on the property, but only if the lessor files with the court, and serves on the debtor, a certification under penalty of perjury that the eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered the property or illegally used a controlled substance, or allowed it to be used, on the property [*11 U.S.C. § 362(b)(23)*]. If the lessor files such a certification, the debtor then has 15 days within which to file and serve an objection to the truth or legal sufficiency of the lessor's certification. If the debtor files an objection, the court must hold a hearing within 10 days after the objection is filed and served to determine if the situation giving rise to the lessor's certification existed or has been remedied [*11 U.S.C. § 362(m)(2)*]. If the debtor can demonstrate to the court's satisfaction that the situation did not exist or has been remedied, the lessor's action will be stayed [*11 U.S.C. § 362(m)(2)(C)*]. Conversely, if the debtor cannot demonstrate to the court's satisfaction that the situation did not exist or has been remedied, the lessor may proceed with the eviction [*11 U.S.C. § 362(m)(2)(D)(i)*].

[n] Eviction of Debtor From Nonresidential Tenancy

Filing a bankruptcy petition also does not operate as a stay of the acts of a lessor of nonresidential property to obtain possession if the lease has expired by its terms before the commencement of or during the case [*11 U.S.C. § 362(b)(10)*].

[o] Banking Transactions

Filing a bankruptcy petition does not operate as a stay of the following acts:

- Presenting a negotiable instrument for payment, giving notice of dishonor of a negotiable instrument, and protesting notice of dishonor of a negotiable instrument [*11 U.S.C. § 362(b)(11)*].

- A financial institution's administrative freeze of the debtor's deposit account pending determination of the institution's right of setoff [*11 U.S.C. §§ 542(b), 553*; *In re Edgins (B.A.P. 9th Cir. 1984) 36 B.R. 480, 483*].

[p] Stock Exchange or Association Proceedings

Filing a bankruptcy petition does not operate as a stay of any of the following [*11 U.S.C. § 362(b)(25)*]:

- The commencement or continuation of an investigation or action by a securities self-regulatory organization to enforce the organization's regulatory power.

- The enforcement of an order or decision, other than for monetary sanctions, obtained in an action by a securities self-regulatory organization to enforce the organization's regulatory power.

- Any act taken by a securities self-regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements.

A securities self-regulatory organization is either of the following [*11 U.S.C. § 101(48A)*]:

- A securities association registered with the Securities and Exchange Commission under Section 15A of the Securities Exchange Act of 1934 [*see 15 U.S.C. § 78o-3*], such as the Financial Industry Regulatory Authority (formerly known as the National Association of Securities Dealers).

- A national securities exchange registered with the Securities and Exchange Commission under Section 6 of the Securities Exchange Act of 1934 [*see 15 U.S.C. § 78f*], such as the New York Stock

Exchange.

[q] Transfers That Are Not Avoidable

Filing a bankruptcy petition does not operate as a stay of any transfer that is not avoidable by the trustee under *11 U.S.C. §§ 544* and *549* (relating to avoidance of both pre-petition transfers and post-petition transfers) [*11 U.S.C. § 362(b)(24)*].

If a transfer is avoidable under *11 U.S.C. §§ 544* and *549*, it is not necessarily therefore subject to the automatic stay. For instance, under *11 U.S.C. § 549*, the trustee can avoid certain unauthorized transfers of property initiated by the debtor, yet the Ninth Circuit has concluded that the automatic stay does not apply to transfers initiated by the debtor [*Schwartz v. United States (In re Schwartz) (9th Cir. 1992) 954 F.2d 569, 574* ; *see Irwin Mortg. Co. v. Tippett (In re Tippett) (B.A.P. 9th Cir. 2006) 338 B.R. 82, 89* (that conclusion became law of circuit when *Schwartz* was decided)]. (It appears that the Ninth Circuit's rationale supporting that conclusion in *Schwartz* was not invalidated by amendments of *11 U.S.C. § 362* made by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [Pub. L. No. 109-8].)

[r] Exclusion of Debtor From Federal Benefit Programs

Filing a bankruptcy petition does not operate as a stay of the following:

- Any action by a guaranty agency [*see 20 U.S.C. § 1085(j)* (definition)] or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (federal educational and student assistance programs) [*11 U.S.C. § 362(b)(16)*; *see 20 U.S.C. § 1001 et seq.*].

- The exclusion of the debtor by the Secretary of Health and Human Services from participation in the Medicare program or any other Federal health care program [*see 42 U.S.C. § 1320a-7b(f)*] under Title XI [*see 42 U.S.C. § 1302 et seq.*] or Title XVIII [*see 42 U.S.C. § 1395 et seq.*] of the Social Security Act [*11 U.S.C. § 362(b)(28)*].

[s] Proceedings Related to License or Similar Status

Filing a bankruptcy petition does not operate as a stay of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under state law [*11 U.S.C. § 362(b)(2)(D)*; *see 42 U.S.C. § 666(a)(16)*].

Filing a bankruptcy petition also does not operate as a stay of the following acts:

- Any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution [*11 U.S.C. § 362(b)(14)*].

- Any action by a state licensing body regarding the licensure of the debtor as an educational institution [*11 U.S.C. § 362(b)(15)*].

- Disciplinary proceedings against a member of the State Bar of California [*Cooper v. State Bar (1987) 43 Cal. 3d 1016, 1024-1026, 239 Cal. Rptr. 709, 741 P.2d 206]* .

[4] Duration of Stay

[a] Beginning Date

Usually the stay automatically begins on the filing of the bankruptcy petition [*11 U.S.C. § 362(a)*].

PRACTICE TIP:

Chapter 7 Case. Typically, a stay in Chapter 7 remains in effect for six months or less from the date of commencement of the Chapter 7 case.

If a single or joint case is filed by or against a debtor who is an individual, and if two or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under *11 U.S.C. § 707(b)*, then the stay will not go into effect automatically on the filing of the later case [*11 U.S.C. § 362(c)(4)(A)(i)*]. On request of a party in interest, the court must promptly enter an order confirming that no stay is in effect [*11 U.S.C. § 362(c)(4)(A)(ii), (j)*].

If, within 30 days after the filing of the later case, a party in interest requests, the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed [*11 U.S.C. § 362(c)(4)(B)*]. The stay is effective on the date of the entry of the order allowing the stay to go into effect [*11 U.S.C. § 362(c)(4)(C)*].

In ruling on a motion for the stay to take effect, the court must presume that the case was filed not in good faith (but the presumption may be rebutted by clear and convincing evidence to the contrary) as to all creditors in any of the following circumstances [*11 U.S.C. § 362(c)(4)(D)(i)*]:

- Two or more previous bankruptcy cases in which the individual was a debtor were pending within the one-year period.

- A previous bankruptcy case in which the individual was a debtor was dismissed within the one-year period after the debtor either:

  - Failed to file or amend the petition or other documents as required by the Bankruptcy Code or the court without substantial excuse (but mere inadvertence or negligence will not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

  - Failed to provide adequate protection as ordered by the court; or

  - Failed to perform the terms of a plan confirmed by the court.

- There has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous bankruptcy case, or any other reason to conclude that the later case will not be concluded with a discharge (if it is a case under chapter 7) or with a confirmed plan that will be fully performed (if it is a case under chapter 11 or 13).

The court likewise must entertain that presumption as to any creditor that commenced an action under *11 U.S.C. § 362(d)* after obtaining relief from the stay [*see § 94.33*] in a previous case in which the individual was a debtor if, as of the date of dismissal of that case, the creditor's action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to the creditor's action [*11 U.S.C. § 362(c)(4)(D)(ii)*].

For discussion of the rules governing termination of a stay when a single or joint case is filed by or against debtor who is an individual in a case under Chapter 7, 11, or 13, and a single or joint case of the debtor was pending within the preceding one-year period but was dismissed [*see 11 U.S.C. § 362(c)(3)*], see *§ 94.30[4][b]*.

[b] Ending Date--Stay Against Property-Related Acts

Ordinarily, and unless a creditor seeks relief from the stay [*see § 94.33*], the stay of an act against estate property continues until the property is no longer property of the estate [*11 U.S.C. § 362(c)(1)*; *see* § 94.3[4][d] for discussion of how personal property may cease to be part of an individual debtor's estate].

If a single or joint case is filed by or against a debtor who is an individual in a case under Chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding one-year period but was dismissed, other than a case refiled under a chapter other than Chapter 7 after dismissal under *11 U.S.C. § 707(b)*, then the stay with respect to any action taken with respect to a debt or property securing a debt or with respect to any lease will terminate with respect to the debtor on the 30th day after the filing of the later case [*11 U.S.C. § 362(c)(3)(A)*]. On request of a party in interest, the court must issue an order confirming that the stay has been terminated [*11 U.S.C. § 362(j)*].

PRACTICE TIP:

The stay expires 30 days after filing if a prior case was pending within one year prior to the filing, unless the prior was case dismissed under *11 U.S.C. § 707(b)* [*11 U.S.C. § 362(c)(3)(A)*; *see above*] or unless the stay is extended by timely motion [*11 U.S.C. § 362(c)(3)(B)*; *see below*]. Thus, in the circumstance of an abusive or serial filer, it may be more expedient simply to wait the 30 days and then proceed against the asset (e.g., evict the tenant or repossess the collateral) than it would be to file a motion for relief from the stay and wait out the time for obtaining relief from the stay after notice and a hearing before the bankruptcy court. *Commentary by John A. Vos.*

On the motion of a party in interest for continuation of the stay and on notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed [*11 U.S.C. § 362(c)(3)(B)*].

In ruling on a motion for the stay to take effect, the court generally must presume that the case was not filed in good faith (but the presumption may be rebutted by clear and convincing evidence to the contrary) as to all creditors in any of the following circumstances [*11 U.S.C. § 362(c)(3)(C)(i)*]:

- More than one previous case under any of Chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding one-year period.

- A previous case under any of Chapters 7, 11, and 13 in which the individual was a debtor was dismissed within that one-year period, after the debtor either:

  - Failed to file or amend the petition or other documents as required by the Bankruptcy Code or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

  - Failed to provide adequate protection as ordered by the court; or

  - Failed to perform the terms of a plan confirmed by the court.

- There has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under Chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded with a discharge (if it is a case under Chapter 7) or with a confirmed plan that will be fully performed (if it is a case under Chapter 11 or 13).

The court generally must likewise entertain the same presumption as to any creditor that commenced an action under *11 U.S.C. § 362(d)* after obtaining relief from the stay [*see § 94.33*] in a previous case in which the individual was a debtor if, as of the date of dismissal of that case, the creditor's action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to the creditor's action [*11 U.S.C. § 362(c)(3)(C)(ii)*].

However, if a case commenced under Chapter 7, Chapter 11, or Chapter 13 was dismissed because of the creation of a debt repayment plan, then for purposes of *11 U.S.C. § 362(c)(3)*, discussed above, any subsequent case commenced by the debtor under any one those chapters cannot be presumed to be filed not in good faith [*11 U.S.C. § 362(i)*].

[c] Ending Date--Stay Against Other Acts

Ordinarily, and unless a creditor seeks relief from the stay [*see § 94.33*], the stay of any act other than an act against estate property, including acts against the debtor, continues until the earliest of the following times [*11 U.S.C. § 362(c)(2)*]:

- The time the case is closed;
- The time the case is dismissed; or
- In an individual's case under Chapter 7, or in a case under Chapter 11, 12, or 13, the time a discharge is granted or denied.

[d] How Personal Property May Cease to Be Part of Individual Debtor's Estate

If the debtor is an individual, the stay is terminated with respect to personal property of the estate or of the debtor, which either secures in whole or in part a claim or is subject to an unexpired lease, and thereupon the personal property is no longer property of the estate, if the debtor, within a specified 30-day period [*see 11 U.S.C. § 521(a)(2)*], fails to take two steps [*11 U.S.C. § 362(h)(1)*]:

- The debtor fails to file a timely statement of intention, required under *11 U.S.C. § 521(a)(2)*, with respect to that personal property, indicating in the statement that the debtor will either:
  - Surrender the personal property;
  - Redeem the personal property [*see 11 U.S.C. § 722*];
  - Enter into a reaffirmation agreement [*see 11 U.S.C. § 524(c)*] applicable to the debt secured by the personal property; or
  - Assume the unexpired lease [*see 11 U.S.C. § 365(p)*] if the trustee does not do so.
- The debtor fails to take the action specified in the statement, in a timely manner, as the statement may be amended before expiration of the period for taking action--except when the statement specifies the debtor's intention to reaffirm the debt on the original contract terms, and the creditor refuses to agree to the reaffirmation on those terms.

The above rule does not apply, however, if the court determines, on the motion of the trustee filed before the expiration of the specified 30-day period [*see 11 U.S.C. § 521(a)(2)*], after notice and a hearing, that the personal property is of consequential value or benefit to the estate, and the court orders appropriate adequate protection of the creditor's interest

and orders the debtor to deliver any collateral in the debtor's possession to the trustee. If the court does not make such a determination, the stay will terminate on the conclusion of the hearing on the motion [*11 U.S.C. § 362(h)(2)*].

PRACTICE TIP:

"Ride-Through" for Individual Debtors With Car Loans. The purpose of the 2005 amendments that created *11 U.S.C. §§ 521(a)(2)* and *362(h)*, referenced above, was to curtail individual debtors' access to a practice that became known as "ride-through" because it mainly enabled debtors to keep their debt-encumbered cars by simply continuing to make payments, subject only to the risk of repossession by the creditor in the event of default but not subject to liability for a deficiency [*see generally Dumont v. Ford Motor Credit Co. (In re Dumont) (9th Cir. 2009) 581 F.3d 1104, 1107-1112* (description of ride-through, comparison of pre-2005 law affecting ride-through with pertinent Bankruptcy Code provisions as amended by Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, and conclusion as to Congressional intent)]. Ride-through can still be achieved, perhaps, if the debtor takes the necessary first step of attempting to make a reaffirmation agreement, and if the creditor (or the bankruptcy court) then rejects that option. It appears that in such a situation, the debtor could keep the car--it would no longer be part of the estate--provided the debtor continued to make payments pursuant to the loan agreement (since otherwise the creditor could repossess it), while the risk of deficiency liability in the event of a default would be covered by the stay order and eventually by the discharge injunction. The Ninth Circuit notes that bankruptcy courts in other circuits have occasionally allowed ride-through in this scenario, although the law on ride-through remains unclear in the Ninth Circuit [*Dumont v. Ford Motor Credit Co. (In re Dumont) (9th Cir. 2009) 581 F.3d 1104, 1112-1113*].

[5] Effect of Stay on Limitation Periods

[a] Possible Extension Under Bankruptcy Code

With respect to limitation periods for actions against the debtor on nondischarged claims, a limitation period that has not already expired before the filing of the bankruptcy petition will expire on the later of the following times [*11 U.S.C. § 108(c)*]:

- The ordinary time for expiration, plus any suspensions found in nonbankruptcy law.
- 30 days after notice of termination or expiration of the stay.

[b] Application to California Law

Code Civ. Proc. § 356 extends an applicable statute of limitation during the pendency of the bankruptcy stay [*Eistrat v. Cekada (1958) 50 Cal. 2d 289, 291-292, 324 P.2d 881* ; *Schumacher v. Worcester (1997) 55 Cal. App. 4th 376, 380, 64 Cal. Rptr. 2d 1]* . That statute does not apply to other kinds of statutory time limits, however. For instance, the automatic stay would not toll the statutory three-month period for reinstatement of a mortgage after a notice of default [*see Civ. Code § 2924(a)(2)*], although that period is subject to a limited extension pursuant to *11 U.S.C. § 108(b)* [*Napue v. Gor-Mey West, Inc. (1985) 175 Cal. App. 3d 608, 615-619, 220 Cal. Rptr. 799]* .

A judgment creditor under California law ordinarily is entitled to renew the judgment every 10 years, and the judgment becomes unenforceable if it is not renewed [*Code Civ. Proc. § 683.020*]. When a 10-year expiration date would fall during a bankruptcy stay, the effect of *11 U.S.C. § 108(c)* is to extend the life of the judgment (until 30 days after notice of the termination or expiration of the stay), for purposes of the presenting and allowing of a claim against the estate on the basis of the judgment [*Spirtos v. Moreno (In re Spirtos) (9th Cir. 2000) 221 F.3d 1079, 1081-1082]* . In other words, the creditor would not be required to renew the judgment in order to prove a claim, and nonrenewal of the judgment could not be a ground for disallowance of a claim based on it. Whether the bankruptcy stay would preclude renewal of the judgment is another issue.

An action on a judgment must be commenced within 10 years after the judgment becomes final [*see Code Civ. Proc. §§ 337.5, 683.050*]. If the judgment debtor files a bankruptcy petition so that the bankruptcy stay period overlaps or falls within that 10-year limitation period, then the limitation period is extended for as long as the bankruptcy stay provision [*see 11 U.S.C. § 362(a)(1)*] precludes the commencement of judicial proceedings against the debtor within that 10-year period [*Kertesz v. Ostrovsky (2004) 115 Cal. App. 4th 369, 378, 8 Cal. Rptr. 3d 907* (citing both *11 U.S.C. § 108(c)* and *Code Civ. Proc. § 356*); *see* § 4.30[4]].

The bankruptcy stay does not toll any limitation period affecting an action by the debtor [*Shorr v. Kind (1991) 1 Cal. App. 4th 249, 254-255, 2 Cal. Rptr. 2d 192* ; *Danielson v. ITT Indus. Credit Co. (1988) 199 Cal. App. 3d 645, 652-653, 245 Cal. Rptr. 126]* . However, in some cases the bankruptcy stay could extend the period in which the debtor must file a notice of appeal [*see ECC Construction, Inc. v. Oak Park Calabasas Homeowners Assn. (2004) 118 Cal. App. 4th 1031, 1040, 13 Cal. Rptr. 3d 580* (*11 U.S.C. § 108(c)(2)* "applies to provide a 30-day extension of the time in which a trial court may rule on a motion for new trial, if the ... stay is in effect while the motion is pending"; therefore, period for debtor to file notice of appeal after denial of motion for new trial is extended)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysCoverageExceptionsNonresidential LeasesBankruptcy LawCase AdministrationAdministrative PowersStaysCoverageExceptionsAlimony, Maintenance & SupportBankruptcy LawCase AdministrationAdministrative PowersStaysCoverageExceptionsGovernment Lien EnforcementBankruptcy LawCase AdministrationAdministrative PowersStaysCoverageExceptionsPerfection of Property InterestsBankruptcy LawCase AdministrationAdministrative PowersStaysCoverageGeneral Overview

California Forms of Pleading and Practice--Annotated

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Chapter 94 BANKRUPTCY
PART II. LEGAL BACKGROUND
C. Relief From Stay

9-94 California Forms of Pleading and Practice--Annotated § 94.31

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§ 94.31 Stay of Proceedings Against Certain Co-Debtors in Chapter 13 Case

After the filing of the petition under Chapter 13, or the issuance of an order converting a case to a Chapter 13, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any other individual who is liable on the debt together with the debtor or who secured the debt, unless one of the following conditions is satisfied:

- The other individual became liable on or secured the debt in the ordinary course of that individual's business [*11 U.S.C. § 1301(a)(1)*]. Thus, the stay against a co-debtor does not apply to a commercial debt, as opposed to one undertaken for personal, family, household, or other consumer purposes [*see In re SFW, Inc. (Bankr. S.D. Cal. 1988) 18 Collier Bankr. Cas. 2d 584, 83 B.R. 27, 31-32* (applying similar provision, *11 U.S.C. § 1201*, in Chapter 12 case: collection from guarantors of commercial loan, to corporate family-farmer debtor of which they were shareholders, was not stayed)].

- The Chapter 13 case is closed, dismissed, or converted to a case under Chapter 7 or 11 [*11 U.S.C. § 1301(a)(2)*].

The creditor in a Chapter 13 case may present a negotiable instrument, however, and give notice of the dishonor of such an instrument [*11 U.S.C. § 1301(b)*].

For discussion of availability of relief from the stay when there is an actual co-debtor who received the consideration for the claim held by the creditor, see *§ 94.34*.

Legal Topics:

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

Bankruptcy LawIndividuals With Regular IncomeGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysCodebtor Stays

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9-94 California Forms of Pleading and Practice--Annotated § 94.32

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§ 94.32 Violation of Stay by Creditor

[1] Liability for Damages for Willful Violation

[a] General Rule

A creditor that willfully violates a stay may be liable for any actual damages, including costs and attorney's fees, and, in appropriate circumstances, may also be liable for punitive damages [*11 U.S.C. § 362(k)(1)*; *see In re Zartun (Bankr. 9th Cir. 1983) 8 Collier Bankr. Cas. 2d 1103, 30 B.R. 543, 546* (decided under prior law; imposing contempt sanction sufficient to restore the status quo before the violation)]. The statute allows any "individual"--not only the debtor, but also another creditor (whose interest in the estate could be diminished or otherwise harmed by a violation of the bankruptcy stay)--to recover damages. By limiting the availability of damages to individuals, Congress signaled a special interest in redressing harms that are unique to human beings [*Dawson v. Washington Mut. Bank (In re Dawson) (9th Cir. 2004) 390 F.3d 1139, 1146* (applying former *11 U.S.C. § 362(h)*)].

One such harm is emotional distress, which can afflict individuals but not organizations. The "actual damages" that may be recovered by an individual who is injured by a willful violation of the bankruptcy stay include damages for emotional distress. A claim for emotional distress damages is available if the individual provides clear evidence to establish that significant harm occurred as a result of the violation. To be entitled to damages for emotional distress under *11 U.S.C. § 362(k)(1)*, an individual must (1) suffer significant harm, (2) clearly establish the significant harm, and (3) demonstrate a causal connection between that significant harm and the violation of the bankruptcy stay (as distinct, for instance, from the anxiety and pressures inherent in the bankruptcy process) [*Dawson v. Washington Mut. Bank (In re Dawson) (9th Cir. 2004) 390 F.3d 1139, 1146, 1148-1149* (applying former *11 U.S.C. § 362(h)*)].

The statutory reference to "actual damages, including costs and attorneys' fees" [*11 U.S.C. § 362(k)(1)*] means compensation for the debtor's injury resulting from the stay violation. The damages, costs, and fees that can be recovered are limited to amounts that are properly allocable to efforts to enforce the automatic stay and to prevent

enforcement of court orders in violation of the stay. If the debtor sues to recover those amounts after making those efforts, the debtor is not entitled to an award of attorney's fees in connection with that later action [*Sternberg v. Johnston (9th Cir. 2009) 582 F.3d 1114, 1122-1124*].

Although a Chapter 7 trustee is not an "individual" entitled to recover attorney's fees as damages for purposes of *11 U.S.C. § 362(k)(1)*, a trustee can recover damages in the form of costs and attorney's fees under *11 U.S.C. § 105(a)* as a sanction for ordinary civil contempt [*Havelock v. Taxel (In re Pace) (9th Cir. 1995) 67 F.3d 187, 192-194* (applying former *11 U.S.C. § 362(h)*)].

[b] What Constitutes "Willful" Violation

A "willful violation" does not require a specific intent to violate the bankruptcy stay. Damages can be awarded on findings that the creditor knew of the bankruptcy stay and that the creditor's actions that violated the stay were intentional. Whether the creditor believed in good faith that it had a right to the property is not relevant to whether the act was "willful" or whether compensation must be awarded [*In re Bloom (9th Cir. 1989) 875 F.2d 224, 227* ; *In re Abrams (Bankr. 9th Cir. 1991) 25 Collier Bankr. Cas. 2d 15, 127 B.R. 239, 243]* . Moreover, ordinarily the creditor will be presumed to know about the automatic stay when the creditor knows facts that would enable a reasonable person in the creditor's position to obtain confirmation that the bankruptcy case has been commenced [*see, e.g., Morris v. Peralta (Bankr. 9th Cir. 2004) 317 B.R. 381, 389* (creditor received case name and docket number in debtor's first response to creditor's request for case information, and creditor could have confirmed filing of case by making telephone call to court)]. (This presumption might not be appropriate in a case commenced in bad faith by an individual debtor [*see 11 U.S.C. § 362(c)(4)*; *§ 94.30[4][a]*].)

PRACTICE TIP:

Under the 2005 amendments, a creditor may designate an address to be used by all bankruptcy courts. If notice is not given to that address, then notice is not effective until brought to the attention of the creditor [*11 U.S.C. § 342(f), (g)*; Pub. L. 109-8, § 315]. This provision serves to protect an innocent creditor who acts in good faith and without valid notice from liability for the damages that can flow from willful violation of a stay.

[c] Awarding Punitive Damages

The standard for imposition of punitive damages has not been specifically defined in the Ninth Circuit. Courts are traditionally reluctant, however, to grant punitive damages without some showing of reckless or callous disregard for the law or the rights of others, and *11 U.S.C. § 362(k)(1)* limits an award of punitive damages to "appropriate circumstances" [*In re Bloom (9th Cir. 1989) 875 F.2d 224, 228* (applying former *11 U.S.C. § 362(h)*)].

[d] Recovery Limited to Actual Damages

If a willful violation is based on an action taken in the good faith belief that *11 U.S.C. § 362(h)* applies to the debtor--in other words, a good faith belief that in an individual case, the stay was terminated as to personal property securing a claim or subject to an unexpired lease, and the property therefore was no longer property of the estate [*see § 94.30[4][d]*]--then the recovery under *11 U.S.C. § 362(k)(1)* [*see § 94.32[1][a] -[c]*] against the person, estate, trust, governmental unit, or U.S. trustee that took the action will be limited to actual damages [*11 U.S.C. § 362(k)(2)*].

[2] Foreclosure in Violation of Stay May Be Avoided

The trustee or the debtor generally may avoid a post-petition foreclosure sale conducted in violation of the stay. A post-petition foreclosure sale conducted in violation of the stay will not be set aside, however, if it was to a good-faith purchaser for present fair value who had no notice of the bankruptcy case, unless the property was purchased after a copy or notice of the bankruptcy petition was recorded in the county in which the property is situated and was sold [*11*

U.S.C. § 549(a), (c)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysRemediesInvalidity of Improper ActionsBankruptcy LawCase AdministrationAdministrative PowersStaysRemediesContemptBankruptcy LawCase AdministrationAdministrative PowersStaysRemediesDamages

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§ 94.33 Obtaining Relief From Bankruptcy Stay

[1] Relief on Noticed Motion; Types of Relief

On the request of a party in interest, after notice and a hearing, the court may grant relief from the bankruptcy stay by any of the following actions [*11 U.S.C. § 362(d)*]:

- Termination.
- Annulment.
- Modification.
- Conditioning the stay on provision of adequate protection to the creditor.

For forms related to relief from the stay, see *§ 94.100* et seq.

[2] Grounds for Relief

[a] Cause; Lack of Adequate Protection

An order granting limited relief from an automatic stay to allow a creditor to proceed to judgment in a pending state-court action is effective only as to those claims actually pending in the state court at the time the order modifying the stay is issued, or that were expressly brought to the attention of the bankruptcy court during the relief-from-stay proceedings [*In re Wardrobe (9th Cir. 2009) 559 F.3d 932, 937*].

PRACTICE TIP:

Avoiding Stay Violation After Relief. In the event that a previously unforeseen cause of action becomes apparent during a trial proceeding pursuant to an order granting relief from the automatic stay, numerous avenues of relief are available to a creditor to ensure that any resulting judgment does not violate the scope of the order. A creditor could petition the bankruptcy court for relief that is broad enough to encompass the cause of action, or could seek an order from the bankruptcy court clarifying the relief-from-stay order. If a judgment has been entered on a cause of action that was not pending at the time the relief was granted, the creditor could seek retroactive relief from the stay that is broad enough to encompass the judgment [*In re Wardrobe (9th Cir. 2009) 559 F.3d 932, 937*].

The court may grant relief from the bankruptcy stay if the court finds cause, including the lack of adequate protection of the creditor's interest [*11 U.S.C. § 362(d)(1)*]. The following are some statutory examples of "adequate protection" [*11 U.S.C. § 361*]:

- Periodic cash payments equal, at least, to the amount by which the value of the creditor's interest in the collateral is depreciating.

- Replacement liens in assets that are not encumbered or in which the existing liens are less than the value of the creditor's interest in the property's value.

- Any other method of providing the secured creditor with the indubitable equivalent of the creditor's interest in the estate's property.

In Chapter 12 cases, similar but specially modified definitions of adequate protection apply instead of the foregoing provisions [*see 11 U.S.C. § 1205*]. The following are examples of "inadequate protection" that may constitute cause for relief from the stay:

- Lack of insurance covering the property.

- Unpaid property taxes.

- Deterioration of the property or collateral.

[b] Debtor Lacks Equity

The court may grant relief from the bankruptcy stay under *11 U.S.C. § 362(d)(2)* with respect to a stay of an act against property if the court finds that the debtor has no equity in the property and the property is not necessary to an effective reorganization of the debtor [*11 U.S.C. § 362(d)(2)*; *see United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd. (1988) 484 U.S. 365, 375-376, 108 S. Ct. 626, 98 L. Ed. 2d 740, 751]* . The creditor must prove both of those facts [*see In re Miller (Bankr. S.D. Ind. 1981) 13 B.R. 110, 118* ; *In re McAloon (Bankr. E.D. Pa. 1980) 1 B.R. 766, 767-768, 1 Collier Bankr. Cas. 2d 306, 309, 5 Bankr. Ct. Dec. 1207*].

Relief under *11 U.S.C. § 362(d)(2)* is clearly is available in Chapter 11 cases when both requirements of *11 U.S.C. § 362(d)(2)* are met [*see, e.g., Stewart v. Gurley (9th Cir. 1984) 745 F.2d 1194, 1195]* . Courts are in conflict, however, as to whether relief under *11 U.S.C. § 362(d)(2)* can be allowed in Chapter 7 and Chapter 13 cases.

Some courts have held or suggested that relief under *11 U.S.C. § 362(d)(2)* is not available at all in a Chapter 13 or Chapter 7 case. The reasoning is that because *11 U.S.C. § 362(d)(2)* refers to "reorganization," this provision is intended to apply only in Chapter 11 cases, which are the only cases involving a "reorganization" [*see In re Fischer (Bankr. D. Alaska 1992) 136 B.R. 819, 825* (noting that the Ninth Circuit has not faced issue of applicability in Chapter 13); *Brown Transp. Truckload v. Humboldt Express (Bankr. N.D. Ga. 1990) 23 Collier Bankr. Cas. 2d 1221, 1227, 118 B.R.*

889, 894, 20 Bankr. Ct. Dec. 1599 (noting in dictum that *11 U.S.C. § 362(d)(2)* offers no relief to Chapter 7 debtor); *In re Feimster (Bankr. N.D. Ga. 1979) 1 Collier Bankr. Cas. 2d 956, 959-960, 3 B.R. 11, 14, 6 Bankr. Ct. Dec. 131* (*11 U.S.C. § 362(d)(2)* unavailable to Chapter 13 debtor)].

Other courts have construed "reorganization" to include a debt adjustment plan, and have thus concluded that relief may be granted under *11 U.S.C. § 362(d)(2)* in a Chapter 13 case [*see In re Scott (Bankr. E.D. Okla. 1990) 121 B.R. 605, 607, 21 Bankr. Ct. Dec. 82* ; *In re Kehm (Bankr. E.D. Pa. 1988) 19 Collier Bankr. Cas. 2d 815, 820, 90 B.R. 117, 122-123]* . In a Chapter 13 case, however, some courts have noted that relief under *11 U.S.C. § 362(d)(2)* rarely will be granted with respect to a debtor's principal residence, since saving the debtor's home is usually essential to an effective Chapter 13 "reorganization" [*see In re Elmore (Bankr. C.D. Cal. 1988) 94 B.R. 670, 677-678* ; *In re Artishon (Bankr. D. Minn. 1984) 39 B.R. 890, 893]* . Others are reluctant to grant relief under *11 U.S.C. § 362(d)(2)* with respect to *any* property, because it would be at odds with the Chapter 13 plan providing for cure of default [*In re Evans (Bankr. 9th Cir. 1983) 30 B.R. 530, 531-532]* .

Still another view is that relief under *11 U.S.C. § 362(d)(2)* is available in Chapter 7 cases and may be granted simply on a showing of the debtor's lack of equity. Under this view, which was followed by a Bankruptcy Appellate Panel in the Ninth Circuit, it is only in a Chapter 11 case that a creditor seeking relief must also show that the property in question is not necessary for effective reorganization, because it is only in this situation that a reorganization is involved. A creditor seeking relief in a Chapter 7 case may disregard this requirement since it is satisfied as a matter of law [*see In re Preuss (Bankr. 9th Cir. 1981) 15 B.R. 896, 897, 8 Bankr. Ct. Dec. 563]* . This same reasoning has been applied in a Chapter 13 case [*see In re Branch (Bankr. E.D.N.Y. 1981) 10 B.R. 227, 229, 7 Bankr. Ct. Dec. 540* (only lack of equity need be proved in Chapter 13 case to obtain relief under *11 U.S.C. § 362(d)(2)*)].

[c] Single-Asset Real Estate Case

With respect to a stay of an act against property in a single-asset real estate case, the court may grant relief to a creditor whose claim is secured by an interest in the real estate, unless, not later than the date that is the later of either (1) 90 days after the entry of the order for relief, or (2) 30 days after the court determines that the debtor is subject to this statutory rule, either [*11 U.S.C. § 362(d)(3)*]:

- The debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time.

- The debtor has commenced monthly payments, and:

  - The payments may, in the debtor's sole discretion, notwithstanding *11 U.S.C. § 363(c)(2)*, be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by the real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

  - The payments are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate.

[d] Claim Secured by Real Estate in Ordinary Case

With respect to a stay of an act against real property in an ordinary case, the court may grant relief to a creditor whose claim is secured by an interest in the real property if the court finds that the filing of the petition was part of a scheme to delay, hinder, and defraud creditors that involved either of the following [*11 U.S.C. § 362(d)(4)*]:

- Transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval.

- Multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable state law governing notices of interests or liens in real property, the order for relief will be binding in any other bankruptcy case purporting to affect that real property and filed not later than two years after the date of the entry of the order by the court, except that a debtor in a subsequent bankruptcy case may move for relief from the order based on changed circumstances or for good cause shown, after notice and a hearing. Any federal, state, or local governmental unit that accepts notices of interests or liens in real property must accept any certified copy of the order for relief for indexing and recording [*11 U.S.C. § 362(d)*].

[3] Burden of Proof on Motion for Relief

Once the party seeking relief from the stay has made a prima facie showing of grounds for relief, the debtor or party opposing the relief generally has the burden of proof on all issues except the extent of the debtor's equity in the property [*11 U.S.C. § 362(g)*]. If, however, the debtor or trustee is relying on an equity cushion as adequate protection, the debtor or trustee also has the burden of proving that equity [*In re Gauvin (Bankr. 9th Cir. 1982) 8 Collier Bankr. Cas. 2d 359, 361, 24 B.R. 578, 580, 10 Bankr. Ct. Dec. 219]* .

[4] Preparing and Serving the Moving Papers

Local rules should be consulted to determine particular requirements concerning the preparation, filing, and service of moving papers [*see § 94.100* (form for notice of motion)].

PRACTICE TIP:

Sending Notice of Motion. *Fed. R. Bankr. P., Rule 4001* requires service of the motion on all creditors in a Chapter 11 case. On request and for a nominal fee, the court clerk's office will provide a list of creditors in the form of preprinted, gummed mailing labels. *Commentary by John A. Vos.*

Most courts require the use of a pre-printed form known as the Relief From Stay Cover Sheet, which summarizes the facts for the court. Counsel should check with the clerk's office or web site where the hearing will be held to verify local practice and to obtain a copy of the form.

[5] Hearing Procedure

A motion for relief from the bankruptcy stay is essentially an expedited contested matter [*see Fed. R. Bankr. P., Rule 4001(a)(1)*]. There must be a hearing within 30 days after the request for relief. If this initial hearing is a preliminary evidentiary hearing, the final hearing must be concluded within 30 days after the conclusion of the preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time the court finds is required by compelling circumstances [*11 U.S.C. § 362(e)(1)*; *Fed. R. Bankr. P., Rule 4001(a)(2)*].

The court may order the stay continued until the conclusion of the final hearing, and must do so if there is a reasonable likelihood that the party opposing relief from stay will prevail at the conclusion of the final hearing [*11 U.S.C. § 362(e)(1)*].

If any of the hearing deadlines are missed, the stay automatically terminates with respect to the moving party, unless the court has ordered the stay continued until the conclusion of the final hearing or the moving party has waived the time limitations [*11 U.S.C. § 362(e)(1)*; *see, e.g., In re Herrera (Bankr. 9th Cir. 1982) 23 B.R. 796, 797, 10 Bankr. Ct. Dec. 79]* .

PRACTICE TIP:

Combining Motions. The time for notice of the hearing on motion for relief from stay is shorter than for a regular motion in Bankruptcy Court, but only for this motion alone. Generally, the relief from stay calendar dates are separate from the court's regular law and motion hearing dates. However, if a motion for relief from stay is combined with a motion for any other relief (such as for abstention), an expedited hearing is not available. *Commentary by John A. Vos*.

Notwithstanding the above, in a case under Chapter 7, Chapter 11, or Chapter 13 in which the debtor is an individual, the stay will automatically terminate on the date that is 60 days after a request for relief is made by a party in interest, unless the court renders a final decision during the 60-day period beginning on the date of the request, or unless the 60-day period is extended either by agreement of all parties in interest or by the court for a specific period of time that the court finds is required for good cause, as described in findings made by the court [*11 U.S.C. § 362(e)(2)*].

[6] Ex Parte Relief or Relief by Stipulation

As an alternative to the hearing procedure outlined above, the court may grant relief without a hearing on request of a party in interest on a showing that the relief is necessary to prevent irreparable damage to an interest in property [*11 U.S.C. § 362(f)*].

In addition, the parties may seek court approval of an agreement for relief from the stay [*see Fed. R. Bankr. P., Rule 4001(d)*]. Note, however, that a stipulation allowing relief from the stay must be noticed to creditors before approval. Therefore, it may take the creditor longer to obtain relief by stipulation than by noticed motion.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysEquityBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysMiscellaneous GroundsBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysProceduresBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysCause

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9-94 California Forms of Pleading and Practice--Annotated § 94.34

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§ 94.34 Obtaining Relief From Automatic Stay Against Co-Debtor in Chapter 13 Case

On request of a party in interest and after notice and a hearing, the court may grant relief to the creditor from the stay of actions against the co-debtor of a Chapter 13 debtor [*11 U.S.C. § 1301(c)*; *see § 94.31*]. The court may grant relief if any of the following circumstances exist:

- As between the debtor and the co-debtor, the co-debtor received the consideration for the claim held by the creditor [*11 U.S.C. § 1301(c)(1)*].

- The plan filed by the debtor proposes not to pay the claim [*11 U.S.C. § 1301(c)(2)*]. Thus, the court may grant relief from the stay to the extent that the plan does not provide for full payment of the debt [*In re Bradley (5th Cir. 1983) 705 F.2d 1409, 1412-1413* ; *In re Jacobsen (Bankr. 9th Cir. 1982) 6 Collier Bankr. Cas. 2d 970, 972, 20 B.R. 648, 650, 9 Bankr. Ct. Dec. 162]* .

- The creditor's interest would be irreparably harmed by the continuation of the stay [*11 U.S.C. § 1301(c)(3)*].

When a creditor requests relief from the co-debtor stay on the grounds that the plan does not propose to pay the debt, the stay automatically terminates 20 days after the filing of the creditor's request unless the debtor or the co-debtor files and serves written objections to the proposed action [*11 U.S.C. § 1301(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysCodebtor StaysBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysCause

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9-94 California Forms of Pleading and Practice--Annotated §§ 94.35-94.39

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[Reserved]

§§ 94.35[Reserved]

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9-94 California Forms of Pleading and Practice--Annotated § 94.40

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§ 94.40 Abstention or Withdrawal of Jurisdiction

[1] Grounds for Abstention

The district court may abstain from hearing a proceeding arising under the Bankruptcy Code or related to a bankruptcy case in the interests of justice or comity or respect for state courts or law [*28 U.S.C. § 1334(c)(1)*; *see 11 U.S.C. § 305* (dismissal or suspension of bankruptcy case)].

Abstention is required in a related proceeding, on timely motion of a party, if all of the following apply [*28 U.S.C. § 1334(c)(2)*]:

- The related proceeding is based on a state law claim or state law cause of action.
- The only basis for federal court jurisdiction over the related proceeding is that it is related to the bankruptcy case.
- The related proceeding is commenced and can be timely adjudicated in the state court.

Mandatory abstention does not apply to noncore personal injury tort and wrongful death proceedings that are to be tried either in the district court in which the bankruptcy case is pending or in the district in which the claim arose, as decided by the district court in which the bankruptcy case is pending [*28 U.S.C. § 157(b)(4), (5)*].

PRACTICE TIP:
Generally, bankruptcy courts are unwilling to try a noncore proceeding in which a party is entitled by right to a jury trial. Therefore, whether one insists upon or waives a right to trial by jury may steer the case away from, or toward, resolution of the matter in a bankruptcy court as opposed to some other forum. *Commentary by John A. Vos.*

[2] Motion for Abstention

Unless a district judge orders otherwise, the bankruptcy judge hears the abstention motion and files a report and recommendation for disposition of the motion, a copy of which is served on the parties to the proceeding [*Fed. R. Bankr. P., Rule 5011(b)*].

Within 10 days of service, a party may serve and file written objections, and arrange for the transcription of the record [*Fed. R. Bankr. P., Rules 5011(b), 9033(b)*]. The bankruptcy judge may extend the time for filing objections for cause for an additional 20 days [*Fed. R. Bankr. P., Rule 9033(c)*].

The district judge must make a de novo review on the record or, after additional evidence, of any portion of the bankruptcy judge's findings or conclusions to which objection is made. The district judge may accept, reject, or modify the proposed findings and conclusions, receive further evidence, or recommit the matter to the bankruptcy judge with instructions [*Fed. R. Bankr. P., Rules 5011(b), 9033(d)*].

Neither the motion nor a decision on the motion for abstention gives relief from the bankruptcy stay of *11 U.S.C. § 362* [*28 U.S.C. § 1334(c)(2)*]. To proceed against property of the bankruptcy estate, a party or affected entity must additionally seek relief from the stay [*see § 94.33*].

A motion for abstention does not stay the administration of or any proceeding in the case. However, the bankruptcy judge may stay the proceedings pending disposition of the motion, on terms and conditions that are proper [*Fed. R. Bankr. P., Rule 5011(c)*].

For a form for a motion for abstention, see *§ 94.112*.

[3] Withdrawal of Reference

"Withdrawal" refers to a district court's power to withdraw from a bankruptcy court a bankruptcy case or related matter originally referred to the bankruptcy court.

A motion for withdrawal of a case or proceeding is heard by a district judge [*Fed. R. Bankr. P., Rule 5011(a)*]. A motion for withdrawal of reference generally is considered timely if it is made before the time for filing responsive pleadings on the matter or motion sought to be withdrawn [*see, e.g, In re Baldwin-United Corp. (Bankr. S.D. Ohio 1984) 47 B.R. 898, 900* , (seeking removal of debtor's motion to dispose of asset)].

If the resolution of whether the matter should be withdrawn from the bankruptcy court involves federal laws regulating organizations or activities affecting interstate commerce, withdrawal on timely motion is mandatory [*28 U.S.C. § 157(d*); *see Tom Carter v. Lummis (C.D. Cal. 1984) 11 Collier Bankr. Cas. 2d 1216, 1221, 44 B.R. 605, 609, 12 Bankr. Ct. Dec. 536]* .

A motion for withdrawal does not stay the administration of or any proceeding in the case. However, the bankruptcy judge may stay the proceedings pending disposition of the motion, on terms and conditions that are proper [*Fed. R. Bankr. P., Rule 5011(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationCommencementAbstentionBankruptcy LawPractice & ProceedingsJurisdictionNoncore ProceedingsBankruptcy LawPractice & ProceedingsJurisdictionFederal District Courts

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9-94 California Forms of Pleading and Practice--Annotated § 94.41

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§ 94.41 Removal of Related State Court Proceedings to Bankruptcy Court

A party may remove any claim or cause of action in a civil action to the bankruptcy court for the district in which the civil action is pending, if that district court has jurisdiction over the claim or cause of action under *28 U.S.C. § 1334* [*28 U.S.C. § 1452(a)*].

The following actions may not be removed [*28 U.S.C. § 1452(a)*]:

- Proceedings before the United States Tax Court.

- Civil actions commenced by a government unit to enforce the governmental unit's police or regulatory power.

Removal is accomplished by filing a notice of removal with the clerk of the district court and a copy of the notice with the clerk of the court from which the action is removed [*Fed. R. Bankr. P., Rule 9027(a)(1), (c)*; *see §§ 94.110, 94.111* (request for and notice of removal)]. The state court action being removed is likely to be stayed by *11 U.S.C. § 362* [*see § 94.30*]. A notice of removal generally must be filed within 30 days after entry of an order terminating the stay with respect to the claim or cause of action or 30 days after service of summons or filing of the initial pleading [*see Fed. R. Bankr. P., Rule 9027(a)(2), (3)*].

The court to which the claim or cause of action is removed may remand the claim or cause of action on any equitable ground [*28 U.S.C. § 1452(b)*]. An order remanding a claim or cause of action, or a decision not to remand, is not reviewable by the Court of Appeals or Supreme Court [*28 U.S.C. § 1452(b)*; *but see In re Borelli (N.D. Cal. 1991) 132 B.R. 648, 651* (remand decision by bankruptcy court is reviewable by district court)].

Once a state court action has been removed to a bankruptcy court, the state court has no jurisdiction, even if removal

was improper, until the bankruptcy court remands [*see In re Princess Louise Corp. (Bankr. C.D. Cal. 1987) 17 Collier Bankr. Cas. 2d 663, 669-670, 77 B.R. 766, 772, 16 Bankr. Ct. Dec. 416]* .

Unless the district court orders otherwise, motions for remand are heard by the bankruptcy judge, who files a report and recommendations for review by the district court [*Fed. R. Bankr. P., Rule 9027(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawPractice & ProceedingsJurisdictionRemoval

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9-94 California Forms of Pleading and Practice--Annotated §§ 94.42-94.49

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[Reserved]

§§ 94.42[Reserved]

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9-94 California Forms of Pleading and Practice--Annotated § 94.50

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§ 94.50 Governing Law

Discharges in Chapter 7, 11, 12, and 13 bankruptcies are governed by *11 U.S.C. §§ 727*, *1141(d)*, *1228*, and *1328*, respectively. The effect of discharge is set forth in *11 U.S.C. § 524*. Exceptions to discharge are enumerated in *11 U.S.C. §§ 523(a)*, *(b)*, *1141(d)(2)*-(6), 1228, and 1328. Jurisdiction to determine dischargeability is governed by *11 U.S.C. § 523(c)*, *28 U.S.C. §§ 157(a)*, *(b)(2)(I)*, *1334*, and *1452*, and *Fed. R. Bankr. P., Rule 4007*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawDischarge & DischargeabilityGeneral Overview

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9-94 California Forms of Pleading and Practice--Annotated § 94.51

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§ 94.51 Effect of Discharge in Bankruptcy

[1] Debtor Is Released From Liability for Debts

A discharge under the Bankruptcy Code releases the debtor from personal liability for (1) all of the debtor's pre-petition debts that are properly listed in the appropriate bankruptcy schedules and (2) all allowed claims [*11 U.S.C. § 727(b)*].

[2] Judgments on Discharged Debts Are Voided

A discharge under the Bankruptcy Code voids any judgment obtained at any time, to the extent that the judgment is a determination of the personal liability of the debtor with respect to any discharged debt, whether or not discharge of the debt is waived [*11 U.S.C. § 524(a)(1)*; *see generally Lone Star Security & Video, Inc. v. Gurrola (In re Gurrola) (Bankr. 9th Cir. 2005) 328 B.R. 158, 164* (effect of statute is to void judgments obtained before, during, and after bankruptcy and to nullify all putative waivers of specific debts, including both express waivers and waivers by conduct)].

[3] Attempts to Collect Discharged Debts Are Enjoined

A discharge under the Bankruptcy Code operates to permanently enjoin the commencement or continuation of an action, the employment of process, or an act to collect, recover, or offset any discharged debt as a personal liability of the debtor [*11 U.S.C. § 524(a)(2)*]. However, the discharge does not operate as an injunction against an act by a creditor that is the holder of a secured claim if the following conditions are satisfied [*11 U.S.C. § 524(j)*]:

- The creditor retains a security interest in real property that is the principal residence of the debtor.
- The creditor acts in the ordinary course of business between the creditor and the debtor.

- The creditor does nothing more than seek or obtain periodic payments associated with a valid security interest in lieu of pursuing in rem relief to enforce the lien.

The willful failure of a creditor to credit payments received under a confirmed plan--unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan)--is a violation of the injunction under *11 U.S.C. § 524(a)(2)* if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor [*11 U.S.C. § 524(i)*].

[4] Proceeding Against Post-Petition Community Property Is Enjoined

A discharge under the Bankruptcy Code operates to permanently enjoin the commencement or continuation of an action or attempts to collect allowable community claims in any way from community property acquired after the filing of the petition. However, those community claims excepted from discharge or that were or would have been excepted from discharge had the debtor's spouse filed bankruptcy with or after the debtor are not enjoined. This protection also is denied if the debtor's spouse has been denied a discharge in a case commenced within six years of the filing of debtor's petition [*11 U.S.C. § 524(a)(3)*]. This provision has the effect of allowing the "sins" of either spouse to be visited on the community property interests of both [*11 U.S.C. §§ 524(b), 541(a)(2)*; *see* 3 Collier on Bankruptcy, 15th ed., § 524.01[2] (Matthew Bender)].

PRACTICE TIP:

Allowable Community Claims. Because discharge in bankruptcy can protect the interests of both spouses when only one spouse files, counsel should be careful to check whether grounds to contest discharge of the non-filing spouse exist. Failure to timely file a challenge to the discharge of the non-filing spouse in the filing spouse's proceeding usually prevents recovery at a later time from the non-filing spouse [*11 U.S.C. § 524(a)(3)*]. *Commentary by John A. Vos*.

[5] Co-Debtors and Guarantors Remain Liable

Except as it concerns the discharge of community claims, the discharge of the debtor does not affect co-debtors or guarantors on the same debt [*11 U.S.C. § 524(e)*; *see Underhill v. Royal (9th Cir. 1985) 769 F.2d 1426, 1432* (bankruptcy court lacks power, even with consent of debtor and other creditors, to release co-debtors)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawDischarge & DischargeabilityEffects of DischargeGeneral OverviewBankruptcy LawDischarge & DischargeabilityEffects of DischargeThird PartiesBankruptcy LawDischarge & DischargeabilityEffects of DischargeProtection

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§ 94.52 Dischargeability

[1] In General

The types of debts that remain undischarged differ depending on the chapter, and in a Chapter 12 or 13 case, depending on whether the plan was completed or the debtor obtained a hardship discharge despite failure to complete payments under the plan. In addition, discharge operates only with respect to personal liability, so liens remain enforceable after discharge unless they are avoided by one of several provisions [*11 U.S.C. §§ 101(12)* ("debt" defined), 506(d)(2) (lien is not lost by secured creditor's failure to file proof of claim), 522(c) (specified debts are enforceable from exempt property after discharge), 524(a)(2) (effect of discharge), 727(b) (discharge of unsecured debts and allowed claims); *see 11 U.S.C. § 522(f)* (debtor's power to avoid certain liens impairing exemptions)].

Completion of a mandatory financial management class is required to obtain a discharge [*11 U.S.C. §§ 727(a)(11), 1328(g)(1)*]. No time limit for the debtor's completion of the financial management class is stated in the statute, however.

[2] Discharge in Chapter 7 Cases

A discharge under Chapter 7 discharges an individual debtor from all debts that arose before the date of the filing of the petition in bankruptcy, except any debt of the type specified as nondischargeable by *11 U.S.C. § 523(a)* [*11 U.S.C. § 727(b)*; *see § 94.20[3][c]*].

Only an individual may be discharged from debt in a Chapter 7 case [*11 U.S.C. § 727(a)(1)*; *see NLRB v. Better Bldg. Supply Corp. (9th Cir. 1988) 837 F.2d 377, 379* (corporate debt not dischargeable in Chapter 7 and survives against corporation or alter ego that resumes operations)].

[3] Discharge in Chapter 11 Cases

The provisions of a confirmed plan bind all creditors whether their claims are impaired by the plan or they accepted the plan [*11 U.S.C. § 1141(a)*].

Except as otherwise provided for in the plan, or the order confirming it, the confirmation of a plan in a Chapter 11 case generally discharges the debtor from all debts that arose before the date of the confirmation and debts of the types specified in the following code sections [*11 U.S.C. § 1141(d)(1)*; *see § 94.20[5][g]*]:

- *11 U.S.C. § 502(g)*, relating to claims arising from rejection of executory contracts after a petition has been filed.

- *11 U.S.C. § 502(h)*, relating to claims arising from the recovery of property after a petition has been filed.

- *11 U.S.C. § 502(i)*, relating to claims for taxes arising after a petition has been filed.

However, for an individual debtor, a debt is not discharged in a Chapter 11 case if it is excepted from discharge under *11 U.S.C. § 523(a)* [*11 U.S.C. § 1141(d)(2)*]; and for a corporation, certain debts arising from fraud are not discharged [*see 11 U.S.C. § 1141(d)(6)*].

Confirmation of a Chapter 11 plan also does not discharge a debtor if (1) the plan provided for liquidation or all or substantially all of the property of the estate; (2) the debtor does not engage in business after consummation of the plan; and (3) the debtor would be denied a discharge under *11 U.S.C. § 727(a)* if the case were brought under Chapter 7 [*11 U.S.C. § 11* U.S.C. § 1141(d)(3); *see Torrington Livestock Cattle Co. v. Berg (In re Berg) (B.A.P. 10th Cir. 2010) 423 B.R. 671, 2010 Bankr. LEXIS 524, at *14* (all three elements of section 1141(d)(3) must be established before Chapter 11 debtor's discharge may be denied; Chapter 11 discharge cannot be denied solely on ground that debtor would have been denied discharge under Chapter 7)].

The court may approve a written waiver of discharge executed by a debtor in a Chapter 11 case [*11 U.S.C. § 1141(d)(4)*].

In a case in which the debtor is an individual, confirmation of the plan generally does not discharge any debt provided for in the plan until the court grants a discharge, after notice and a hearing [*see 11 U.S.C. § 1141(d)(5)*].

[4] Discharge in Chapter 12 Cases

A Chapter 12 discharge does not discharge debts specified in *11 U.S.C. § 523(a)* [*11 U.S.C. § 1228(a), (c)*; *see* discussion in *§ 94.53*]. If the debtor completed all payments under a Chapter 12 plan other than those provided for under *11 U.S.C. § 1222(b)(5)* (debts on which the last payment is due after the date on which the final payment under the plan is due) or *11 U.S.C. § 1222(b)(9)* (revesting), the order of discharge discharges the debtor from all debts provided for by the plan allowed under *11 U.S.C. § 503* or disallowed under *11 U.S.C. § 502*, except any debt specified as nondischargeable by *11 U.S.C. § 523(a)* and those provided for in *11 U.S.C. § 1222(b)(5)* and *(9)* [*11 U.S.C. § 1228(a)*; *see § 94.20[6][g]*].

A hardship discharge under *11 U.S.C. § 1228(b)* discharges the debtor from all unsecured debts provided for by the plan or disallowed under *11 U.S.C. § 502*, except debts specified as nondischargeable by *11 U.S.C. § 523(a)* [*see § 94.53*] and those provided for in *11 U.S.C. § 1222(b)(5)* and *(9)* [*11 U.S.C. § 1228(c)*].

The court may approve a written waiver of discharge executed by a debtor in a Chapter 12 case [*see 11 U.S.C. § 1228(a)*].

[5] Discharge in Chapter 13 Cases

As soon as practicable after the debtor completes all payments under a Chapter 13 plan, the court generally is required to grant a discharge [*11 U.S.C. § 1328(a)*; *but see 11 U.S.C. § 1328(f)-(h)* (possible exceptions)] of all debts provided for by that plan or disallowed under *11 U.S.C. § 502*, except the following [*11 U.S.C. § 1328(a)*]:

- Debts provided for under *11 U.S.C. § 1322(b)(5)* (debts on which the last payment is due after the date the final payment under the plan is due).

- Debts of a kind specified in *11 U.S.C. § 507(a)(8)(C)* (a tax required to be collected or withheld and for which the debtor is liable in whatever capacity).

- Debts specified as nondischargeable by *11 U.S.C. § 523(a)(1)(B), (C), (2)*-(5), (8), and (9) [*see § 94.53*].

- Debts for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime.

- Debts for restitution, or damages, awarded in a civil action against the debtor as a result of willful or malicious injury by the debtor that caused personal injury to an individual or the death of an individual [*see Waag v. Permann (In re Waag) (B.A.P. 9th Cir. 2009) 418 B.R. 373, 2009 Bankr. LEXIS 3418, at *9, *18* (statute does not differentiate between judgment entered before petition is filed and one entered after petition is filed; therefore, prepetition judgment is not prerequisite to prevailing on nondischargeability claim under this provision)].

The amendment making a restitution debt to a crime victim nondischargeable in a Chapter 13 case was intended to abrogate *Pennsylvania Dep't of Pub. Welfare v. Davenport (1990) 495 U.S. 552, 564, 110 S. Ct. 2126, 109 L. Ed. 2d 588, 600* ; see *11 U.S.C. § 1328(a)(3)* (debt for restitution, or criminal time, included in a sentence on debtor's conviction of a crime is nondischargeable) [*see* H.R. Rep. No. 681(I), 101st Cong., 2d Sess. (1990)]; thus it implicitly abrogated *People v. Goulart (1990) 224 Cal. App. 3d 71, 85, 273 Cal. Rptr. 477* .

A hardship discharge under *11 U.S.C. § 1328(b)* discharges the debtor from all unsecured debts provided for by the plan or disallowed under *11 U.S.C. § 502*, except any debt specified as nondischargeable by *11 U.S.C. § 523(a)* and debts provided for in *11 U.S.C. § 1322(b)(5)* [*11 U.S.C. § 1328(c)*].

The court may approve a written waiver of discharge executed by a debtor in a Chapter 13 case [*see 11 U.S.C. § 1328(a)*].

No discharge is allowed under Chapter 13 if the debtor had received a discharge under Chapters 7, 11, or 12 within four years preceding the date of the order for relief under Chapter 13 [*11 U.S.C. § 1328(f)(1)*], or a previous discharge under Ch 13 within two years from the date of the order [*11 U.S.C. § 1328(f)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawDischarge & DischargeabilityReorganizationsBankruptcy LawDischarge & DischargeabilityIndividuals With Regular IncomeBankruptcy LawDischarge & DischargeabilityLiquidationsEligible Debts

California Forms of Pleading and Practice--Annotated

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Chapter 94 BANKRUPTCY
PART II. LEGAL BACKGROUND
E. Action and Proceedings to Determine Dischargeability of Debt

9-94 California Forms of Pleading and Practice--Annotated § 94.53

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§ 94.53 Nondischargeable Debts

[1] Special Debts

There are two distinct issues to consider in the dischargeability analysis: first, the existence of the debt, which is subject to the applicable state statute of limitations; and second, the nature of that debt, which controls whether it is nondischargeable [*Banks v. Gill Distrib. Ctrs., Inc. (In re Banks) (9th Cir. 2001) 263 F.3d 862, 868]* . The Bankruptcy Code enumerates the types of debts that are nondischargeable, listed below. Of these, the following types are special because Congress reserved exclusively to the Bankruptcy Court the power to determine their dischargeability, and they are subject to a shortened period of limitations of actions [*see 11 U.S.C. § 523(c)(1)*]:

- Debts arising from common law fraud [*11 U.S.C. § 523(a)(2)*].
- Debts arising from fraud or defalcation in a fiduciary capacity [*11 U.S.C. § 523(a)(4)*].
- Debts arising from willful and malicious injuries [*11 U.S.C. § 523(a)(6)*].

Prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [Pub. L. No. 109-8; *see § 94.10[3]*], the same was true also for debts, other than for domestic support, arising from a marital settlement agreement or judgment [*see 11 U.S.C. § 523(a)(15)* (such debts are nondischargeable)].

[2] Other Debts of Individual

[a] Uniform Rule on Nondischargeability

A discharge in any type of bankruptcy proceeding, whether under Chapter 7 [*see 11 U.S.C. § 727*], Chapter 11 [*see 11 U.S.C. § 1141*], Chapter 12 [*see 11 U.S.C. § 1228(a), (b)*], or Chapter 13 [*see 11 U.S.C. § 1328*], does not discharge an

individual debtor from the types of debts discussed in [b]-[r], *below*.

[b] Unscheduled Debts

A discharge in any type of bankruptcy proceeding does not discharge an individual debtor from debts not listed on schedules filed in the bankruptcy proceeding [*11 U.S.C. § 523(a)(3)*; *see generally Staffer v. Predovich (In re Staffer) (9th Cir. 2002) 306 F.3d 967, 971-973* (creditor's action may be filed at any time, under *Fed. R. Bankr. P., Rule 4007(b)*, but is subject to defense of laches)]. However, the Ninth Circuit has held that when the underlying bankruptcy case was a no-asset case, the failure to schedule and notice a creditor may result in discharge of that debt. This is like a "no harm, no foul" rule: had the creditor been notified, it would have received nothing anyway [*Beezley v. California Land Title Co. (9th Cir. 1992) 994 F.2d 1433]* .

[c] Debts Not Discharged in Previous Bankruptcies

A discharge in any type of bankruptcy proceeding does not discharge an individual debtor from debts that were or could have been listed or scheduled by the debtor in a previous case under the Bankruptcy Code or the former Bankruptcy Act concerning the debtor, in which the debtor waived discharge or was denied a discharge other than on the basis of the six-year rule [*11 U.S.C. § 523(a)(10)*].

[d] Delinquent Taxes and Related Liabilities

A discharge in any type of bankruptcy proceeding does not discharge an individual debtor from debts for taxes or customs duties that are entitled to priority in payment in bankruptcy [*see 11 U.S.C. § 507(a)(8)*], or with respect to which a return, if required, was not filed or was filed after the date on which it was due (including any extensions) and after two years before the date of the filing of the petition, or that the debtor willfully attempted to evade or defeat or with respect to which the debtor made a fraudulent return [*11 U.S.C. § 523(a)(1)*; *see generally Savaria v. United States (In re Savaria) (B.A.P. 9th Cir. 2004) 317 B.R. 395, 396* (discharge exception for tax debt based on late return applies to post-petition filing of late return for pre-petition taxes); *United States v. Hatton (In re Hatton) (9th Cir. 2000) 220 F.3d 1057, 1060-1061* (substitute return prepared by IRS after debtor failed to file normal return did not constitute return filed by debtor; debtor's execution and partial performance of installment payment agreement for delinquent taxes could not transform substituted return into return filed by debtor)]. Also not dischargeable are liabilities incurred to pay taxes to the United States or any governmental unit other than the United States, which would be nondischargeable [*11 U.S.C. § 523(a)(14), (14A)*].

The term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). The term includes a return prepared pursuant to *I.R.C. § 6020(a)* (that is, one prepared by the IRS with the taxpayer's cooperation) or a similar state or local law as well as a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal; but the term does not include a return made pursuant to *I.R.C. § 6020(b)* (that is, one prepared by the IRS without the taxpayer's cooperation) or a similar state or local law [*11 U.S.C. § 523(a)*].

PRACTICE TIP:

State Tax Liability. A debtor's failure to notify the Franchise Tax Board that the IRS reassessed the debtor's federal income tax liability is not equivalent to a failure to file a tax return; thus it would not render nondischargeable any California tax liability arising from the reassessment [*see California Franchise Tax Bd. v. Jackson (In re Jackson) (9th Cir. 1999) 184 F.3d 1046, 1050-1052*]. *Commentary by Publisher's Editorial Staff.*

[e] Fines and Penalties

A discharge in any type of bankruptcy proceeding does not discharge an individual debtor from debts for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit that is not compensation for actual pecuniary loss. In

the case of a tax penalty, the penalty is not dischargeable if the tax is not dischargeable or if the penalty was imposed on an event or transaction that occurred within the three years before the date of the filing of the petition [*11 U.S.C. § 523(a)(7)*].

Also not discharged is any debt incurred to pay fines or penalties imposed under Federal election law [*11 U.S.C. § 523(a)(14B)*].

[f] Restitution to Crime Victims

A discharge in any type of bankruptcy proceeding does not discharge an individual debtor from debts for any payment of an order of restitution issued under Title 18 of the United States Code (concerning crimes) [*11 U.S.C. § 523(a)(13)*].

[g] Common Law Fraud

A discharge in any type of bankruptcy proceeding does not discharge an individual debtor from debts for money, property, services or an extension, renewal, or refinancing of credit to the extent obtained by a written statement respecting the debtor's or an insider's financial condition that is materially false, on which the creditor to whom the debtor is liable reasonably relied and which the debtor caused to be made or published with intent to deceive [*11 U.S.C. § 523(a)(2)(B)*]. Also not discharged are debts for money, property, services or an extension, renewal, or refinancing of credit obtained by false pretenses or representations, or actual fraud, other than a statement respecting the debtor's or insider's financial condition [*11 U.S.C. § 523(a)(2)(A)*; *but see § 94.53[4][a]*]. This "fraud exception" encompasses any liability arising from money, property, and other sources, that is fraudulently obtained, including treble damages, attorney's fees, and costs [*Cohen v. De La Cruz (1998) 523 U.S. 213, 223, 118 S. Ct. 1212, 140 L. Ed. 2d 341* .

PRACTICE TIP:

Presumption of Nondischargeability--Luxury Goods and Cash Advances. For purposes of *11 U.S.C. § 523(a)(2)(A)*, there is a presumption of nondischargeability for (1) consumer debts owed to a single creditor and aggregating more than $500 for luxury goods or services incurred by an individual debtor on or within 90 days before the order for relief, and (2) cash advances aggregating more than $750 that are extensions of consumer credit under an open end credit plan obtained by an individual debtor on or within 70 days before the order for relief [*11 U.S.C. § 523(a)(2)(C)(i)*]. "Luxury goods and services" do not include those reasonably acquired for the support or maintenance of the debtor and his or her dependents [*11 U.S.C. § 523(a)(2)(C)(ii)(II)*]. *Commentary by Publisher's Editorial Staff*.

[h] Fiduciary Fraud; Embezzlement; Larceny

A discharge in any type of bankruptcy proceeding does not discharge an individual debtor from debts created by the debtor's fraud or defalcation while acting in a fiduciary capacity, by embezzlement, or by larceny [*11 U.S.C. § 523(a)(4)*; *see 11 U.S.C. § 523(e)* (any institution-affiliated party of depository institution or insured credit union is considered to be acting in fiduciary capacity); *but see § 94.53[4][a]*].

For purposes of *11 U.S.C. § 523(a)(4)* as it relates to a debt created by larceny, a bankruptcy court is not bound by the state law definition of larceny, but rather may follow federal common law, which defines larceny as a felonious taking of another's personal property with intent to convert it or deprive the owner of it [*In re Ormsby (9th Cir. 2010) 591 F.3d 1199, 1205* , *citing* Collier on Bankruptcy, 15th ed., § 523.10[2] (Matthew Bender)]. In finding that the debtor committed larceny, the bankruptcy court may look solely to the fact that a state court adjudged the debtor liable for damages (whence arose the debt that the debtor seeks to have discharged) based on conduct conforming to the federal common law definition of larceny [*In re Ormsby (9th Cir. 2010) 591 F.3d 1199, 1205-1206* (Nevada court adjudged debtor liable for misappropriation and conversion of trade secret property and found, in connection with awarding punitive damages, that debtor had acted maliciously because his conduct was willful, wanton, and reckless)], but only if the bankruptcy court's reliance on the state court judgment comports with the state's issue-preclusion rules [*In re*

Ormsby (9th Cir. 2010) 591 F.3d 1199, 1205 (bankruptcy court was bound to apply issue-preclusion rules of Nevada law--which are identical to issue-preclusion rules of California law)].

[i] Fraud or Malfeasance by Officer of Depository Institution

A discharge in any type of bankruptcy proceeding does not discharge an individual debtor from debts provided in any final judgment, unreviewable order, or consent order or decree entered in any court of the United States or of any state, issued by a federal depository institution's regulatory agency, or contained in any settlement agreement entered into by the debtor, arising from any act of fraud or defalcation while acting in a fiduciary capacity committed with respect to any depository institution or insured credit union [*11 U.S.C. § 523(a)(11)*; *see 11 U.S.C. § 523(e)* (any institution-affiliated party of depository institution or insured credit union is considered to be acting in fiduciary capacity)]. Also nondischargeable are liabilities for malicious or reckless failure to fulfill any commitment by the debtor to a federal depository institution's regulatory agency to maintain the capital of an insured depository institution, except that this does not extend to any such commitment that otherwise would be terminated due to an act of that agency [*11 U.S.C. § 523(a)(12)*].

[j] Securities Fraud

A discharge in any type of bankruptcy proceeding does not discharge an individual debtor from debts for violating any of the federal securities laws (as that term is defined in *15 U.S.C. § 78C(a)(47)*), any of the state securities laws, or any regulation or order issued under a federal or state securities law, or for common law fraud, deceit, or manipulation in connection with the purchase or sale of any security, provided, in either case, that the debt resulted (before, on, or after the date the petition was filed) from a judgment, order, consent order, or decree entered in a federal or state judicial or administrative proceeding, or from a settlement agreement entered into by the debtor, or from a court or administrative order for damages, fine, penalty, citation, restitutionary payment, disgorgement payment, attorney's fee, cost, or other payment owed by the debtor [*11 U.S.C. § 523(a)(19)*; *see* Pub. L. No. 109-8, § 1404(b) (amendment adding reference to "before, on, or after" date petition was filed is effective beginning July 30, 2002, which is effective date of Sarbanes-Oxley Act)].

[k] Domestic Support

Notwithstanding any other provision of the Bankruptcy Code, a discharge in any type of bankruptcy proceeding does not discharge an individual debtor from debts for domestic support [*11 U.S.C. § 523(a)(5)*] that accrue before, on, or after the date of the order for relief in the bankruptcy case, including interest that accrues on any such debt as provided under applicable nonbankruptcy law, if the following four conditions are satisfied [*11 U.S.C. § 101(14A)*]:

- The debt is owed to or recoverable by either (1) a spouse, former spouse, or child of the debtor or such a child's parent, legal guardian, or responsible relative; or (2) a governmental unit [*see, e.g., In re Marriage of Henderson (1990) 225 Cal. App. 3d 531, 533-534, 275 Cal. Rptr. 226* (decided under former *11 U.S.C. § 523(a)(18)*: support obligation that debtor has been ordered to pay to county is nondischargeable)].

- The debt is in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of the debtor's spouse, former spouse, or child, or of the other parent of the debtor's child, without regard to whether the debt is expressly so designated.

- The debt is established or subject to establishment before, on, or after the date of the order for relief in the bankruptcy case by reason of applicable provisions of either:

    - A separation agreement, divorce decree, or property settlement agreement;

- An order of a court of record; or

- A determination made in accordance with applicable nonbankruptcy law by a governmental unit.

- The debt is not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the debtor's spouse, former spouse, or child, or the other parent, legal guardian, or responsible relative of the debtor's child, for the purpose of collecting the debt.

A debt is not one for domestic support if, even though designated as alimony, maintenance, or support, it is not actually in the nature of alimony, maintenance, or support [*see Shaver v. Shaver (9th Cir. 1984) 736 F.2d 1314, 1316-1317* (federal law determines nature of obligation to former spouse; needs of former spouse will be significant factor)].

[l] Nonsupport Debts From Family Law Proceedings

A discharge in any type of bankruptcy proceeding does not discharge an individual debtor from debts to the debtor's spouse, former spouse, or child, other than debts for domestic support [*see § 94.53[2][k]*], that are incurred by the debtor in the course of a separation or divorce or in connection with a separation agreement, divorce decree, or other court order [*11 U.S.C. § 523(a)(15)*].

[m] Willful and Malicious Injuries

A discharge in any type of bankruptcy proceeding does not discharge an individual debtor from debts for willful and malicious injuries by the debtor to another entity or to the property of another entity [*11 U.S.C. § 523(a)(6)*; *but see § 94.53[4][a]*]. For additional discussion of what constitutes "willful and malicious" injury in this context, see *§ 94.55[8]*.

[n] Drunk Driving or Drunk Piloting Injuries

A discharge in any type of bankruptcy proceeding does not discharge an individual debtor from debts for death or personal injury caused by the debtor's operation of a motor vehicle, vessel, or aircraft if that operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance [*11 U.S.C. § 523(a)(9)*].

[o] Student Loans and Benefits

A discharge in any type of bankruptcy proceeding does not discharge an individual debtor from any of the following types of debts, unless excepting such a debt from discharge would impose an undue hardship on the debtor and the debtor's dependents [*11 U.S.C. § 523(a)(8)*; *see § 94.53[4][b]*]:

- An educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution [*see, e.g., McKay v. Ingleson (9th Cir. 2009) 558 F.3d 888, 889-890* (this category encompassed student's agreement with university, by which student was permitted to defer payment of charges for tuition, activity fees, housing, and food service, until end of semester for which charges were imposed)].

- An obligation to repay funds received as an educational benefit, scholarship, or stipend.

- Any other educational loan that is a qualified education loan [*see I.R.C. § 221(d)(1)* (definition)], incurred by a debtor who is an individual.

The former rule allowed discharge of student loans once a specified period of time had passed (at first five years, later

extended to seven years in 1991) after the loan became due; a showing of undue hardship was required only for discharge within the specified period. This rule was eliminated by 1998 legislation [Pub. L. 105-244, § 971, 112 Stat. 1581]. Under current law, a student loan is never dischargeable unless the court determines otherwise [*11 U.S.C. § 523(a)(8)*, discussed *above*; *see also § 94.55[9]* (hardship)].

[p] Condominium or Cooperative Housing Fees

A discharge in any type of bankruptcy proceeding does not discharge an individual debtor from debts for fees and assessments that become due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in the unit, the corporation, or the lot. Not excepted from discharge is any debt of a debtor for a membership association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case [*11 U.S.C. § 523(a)(16)*].

[q] Court Fees and Costs Imposed on Prisoner

A discharge in any type of bankruptcy proceeding does not discharge an individual debtor from debts for fees imposed on a prisoner by any court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such a filing, regardless of an assertion of poverty by the debtor under *28 U.S.C. § 1915(b)* or *(f)* (or a similar nonfederal law), or the debtor's status as a prisoner, as defined in *28 U.S.C. § 1915(h)* (or a similar nonfederal law) [*11 U.S.C. § 523(a)(17)*].

[r] Loans From Retirement Savings Plans

A discharge in any type of bankruptcy proceeding does not discharge an individual debtor from debts for owed to a pension, profit-sharing, stock bonus, or other plan established under *I.R.C. §§ 401, 403, 408, 408A, 414, 457*, or *501(c)*, under either [*11 U.S.C. § 523(a)(18)*]:

- A loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 [*see 29 U.S.C. § 1108(b)(1)*] or is subject to *I.R.C. § 72(p)* (each of which permits a loan, on specified terms, from a retirement plan to a participant or beneficiary).

- A loan from a thrift savings plan that satisfies the requirements of *5 U.S.C. § 8433(g)* (which relates to loans from a retirement plan for federal civil service employees).

Nothing in *11 U.S.C. § 523(a)(18)* may be construed to provide that any loan made under a governmental plan under *I.R.C. § 414(d)* or a contract or account under *I.R.C. § 403(b)* constitutes a claim or a debt under the Bankruptcy Code [*11 U.S.C. § 523(a)(18)*].

[3] Liens

Discharge operates only with respect to personal liability, so liens remain enforceable after discharge unless they are avoided by one of several provisions [*11 U.S.C. §§ 101(12)* ("debt" defined), 506(d)(2) (lien is not lost by secured creditor's failure to file proof of claim), 522(c) (specified debts are enforceable from exempt property after discharge), 524(a)(2) (effect of discharge), 727(b) (discharge of unsecured debts and allowed claims); *see 11 U.S.C. § 522(f)* (debtor's power to avoid certain liens impairing exemptions); *Johnson v. Home State Bank (1991) 501 U.S. 78, 86-87, 111 S. Ct. 2150, 115 L. Ed. 2d 66* (creditor's right to foreclose that remains after discharge of debtor's personal liability on debt in Chapter 7 case is includable in Chapter 13 plan)].

For forms related to avoidance of liens, and opposition to avoidance of liens, see *§ 94.80* et seq.

PRACTICE TIP:

Creditors and debtors both should be alert to the possibility that a purported lien is not valid because of the creditor's failure to adhere to procedural requirements. Moreover, because of the injunctive effect of the automatic stay [*see § 94.30[1], [2]*] and the discharge [*see § 94.51[2], [3]*], the creditor could be precluded from taking advantage of any statutory provision for nunc pro tunc (retroactive) amendment of a deficient instrument underlying the claimed lien. For instance, a recorded abstract of judgment is not sufficient to create a valid lien if the creditor omits the last four digits of the debtor's social security number and/or driver's license number (and does not state that a missing number is unknown) on the abstract [*see Keele v. Reich (1985) 169 Cal. App. 3d 1129, 1132, 215 Cal. Rptr. 756]* , because the last four digits of each of those numbers (or a statement that the number is unknown) must appear on an abstract of judgment [*Code Civ. Proc. § 674(a)(6)*; *see Civ. Code § 1798.89(a)* (unless otherwise required to do so by state or federal law, no person, entity, or government agency may present for recording or filing with county recorder any document that is required by any provision of law to be open to public if that record was created on or after January 1, 2010, and displays more than last four digits of social security number)]. While the governing statute authorizes the creditor to record an amendment of the abstract so as to cure such a deficiency nunc pro tunc [*Code Civ. Proc. § 674(b)*], and the explicit legislative purpose of the statute is to enable the creditor to avoid having an inadvertently invalid lien [Stats. 1988, ch. 1411, § 2], the creditor nevertheless is precluded from recording such an amendment once the debtor has filed a bankruptcy petition and after the debt in question has been discharged [Alcove Inv., Inc. v. Conceicao (In re Conceicao) (Bankr. 9th Cir. 2005) *331 B.R. 885]* .

[4] Additional Action Required

[a] By Creditor

Even though the categories of debts listed under § 94.53[1] and [2] are termed nondischargeable, debts in those categories [*see 11 U.S.C. § 523(a)(2), (4), (6)*] will be discharged unless the creditor takes affirmative action and files an adversary complaint within the required time period to have the bankruptcy court determine the dischargeability of the debt [*11 U.S.C. § 523(c)(1)*; *see Fed. R. Bankr. P., Rule 4007(c), (e)*]. For discussion of the procedural and timing requirements for complaints to determine dischargeability of these types of debts, see *§ 94.52*. For a form for a complaint to determine dischargeability, see *§ 94.121*. For a form for an application to reopen a case to file a complaint to determine dischargeability, see *§ 94.120*.

[b] By Debtor

The primary instances in which a debtor would be likely to bring a complaint to determine dischargeability would involve a debt for taxes [*see 11 U.S.C. § 523(a)(1)*; § 94.53[2][d]] or educational loans [*see 11 U.S.C. § 523(a)(8)*; § 94.53[2][o]].

The debtor may wish to have a determination made that certain types of taxes are discharged by the bankruptcy. These are taxes such as personal income taxes, but not sales taxes that (1) have been due for at least three years (measured from April 15, the tax year return due date); (2) were filed on time; (3) were accurate; (4) were honest, and for which 240 days has elapsed since the date of assessment.

With respect to educational loans, unless the debtor establishes entitlement to a hardship discharge, the loan will be nondischargeable [*11 U.S.C. § 523(a)(8)*]. For discussion of the criteria for hardship discharges of student loans, see *§ 94.55[9]*.

[c] Issue Preclusion

A general common law rule, as applied in the bankruptcy context, is that if a particular debt is determined to be

nondischargeable in a valid and final judgment by a court with jurisdiction and from which there was an opportunity to appeal, then the debt is always nondischargeable on the basis determined in the judgment [*Moncur v. Agricredit Acceptance Co. (In re Moncur) (Bankr. 9th Cir. 2005) 328 B.R. 183, 186*].

The Bankruptcy Code creates some exceptions to the applicability of this rule, however. Notwithstanding *11 U.S.C. § 523(a),* a debt that was excepted from discharge under *11 U.S.C. § 523(a)(1), (3),* or *(8)*--namely, a debt that was excepted as being for a tax or customs duty, or because it was not duly listed or scheduled so as to permit the timely filing of a proof of claim, or as being for an educational benefit [*see § 94.53[2][b], [d], [o]*]--in a prior bankruptcy case concerning the debtor, is dischargeable in a current bankruptcy case unless, by the terms of *11 U.S.C. § 523(a),* that debt is not dischargeable in the current case [*11 U.S.C. § 523(b)*]. (The statute also applies this rule to debts of the same kinds that were excepted in cases under the former Bankruptcy Act and described in former provisions of that act and two other acts; however, application of the rule to those debts has become practically insignificant with the passage of time, since those acts and provisions all were repealed before 1982.)

Therefore, unless *11 U.S.C. § 523(b)* requires a different result, once a debt has been duly adjudged to be nondischargeable, the creditor is not obliged to litigate the issue in any subsequent proceeding [*Moncur v. Agricredit Acceptance Co. (In re Moncur) (Bankr. 9th Cir. 2005) 328 B.R. 183, 187* (in Chapter 7 case that was commenced soon after conclusion of debtors' Chapter 12 case, creditors were not required "to refresh their nondischargeable status with a timely adversary proceeding in the second bankruptcy in order to preserve the claim- and issue-preclusive effects" of valid and final judgment entered in first bankruptcy case, "the precise question having been [previously] litigated and decided")].

In addition, if the debt is one described in *11 U.S.C. § 523(a)(2), (4),* or *(6),* the statutory mandate for the bankruptcy court to determine whether it is nondischargeable [*see 11 U.S.C. § 523(c)(1)*; § 94.53[1]] neither requires nor permits the court in a subsequent bankruptcy proceeding to adjudicate the issue again after nondischargeability of the debt has once been duly adjudged in a prior bankruptcy proceeding [*Moncur v. Agricredit Acceptance Co. (In re Moncur) (Bankr. 9th Cir. 2005) 328 B.R. 183, 189-191*].

See further discussion of the preclusive effects of prior judgments in *§ 94.55[3]*.

[5] Alternative Remedies if Significant Debts Nondischargeable

Because discharging past indebtedness and obtaining a new financial start in life are major goals for a debtor when filing bankruptcy, if one substantial obligation or a sizable portion of the debtor's total outstanding indebtedness is nondischargeable or secured by an unavoidable lien, counsel should consider a remedy other than Chapter 7, such as Chapter 13 [*see, e.g., Johnson v. Home State Bank (1991) 501 U.S. 78, 86-87, 111 S. Ct. 2150, 115 L. Ed. 2d 66, 76-77* (creditor's right to foreclose that remains after discharge of debtor's personal liability on debt in Chapter 7 case is includable in Chapter 13 plan)]. Chapter 13 also is preferred because the types of debts discharged under Chapter 13 are broader. For example, fraud debts and willful and malicious claims are dischargeable under Chapter 13, but not under Chapter 7. This is usually more important to a debtor than whether a property lien will be affected, because most bankrupts do not own real property [*see § 94.52[2], [5]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsUnscheduled DebtsBankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsMalicious & Reckless BehaviorBankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsStudent LoansBankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsEmbezzlement & FraudBankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsAlimony, Divorce Settlements & Support

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9-94 California Forms of Pleading and Practice--Annotated § 94.54

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§ 94.54 Action to Determine Dischargeability of Debt

[1] Debts Subject to Exclusive Bankruptcy Court Jurisdiction

[a] In General

The bankruptcy court has exclusive jurisdiction to determine the dischargeability of the following types of special liabilities [*see 11 U.S.C. § 523(c)(1)*]:

- Debts arising from common law fraud [*11 U.S.C. § 523(a)(2)*].
- Debts arising from fraud or defalcation in a fiduciary capacity [*11 U.S.C. § 523(a)(4)*].
- Debts arising from willful and malicious injuries [*11 U.S.C. § 523(a)(6)*].

Unless the creditor seeks a determination of dischargeability in the bankruptcy court within a 60-day window [*see § 94.54[1][b], below*], those types of liabilities are discharged [*11 U.S.C. § 523(c)(1)*; *28 U.S.C. §§ 157(a), (b)(2)(I), 1334, 1452(a)*; *see § 94.53*; *but see 11 U.S.C. § 523(c)(2)* (exception for depository institution receiver not appointed in time)].

Prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [Pub. L. No. 109-8; *see § 94.10[3]*], the same was true also for debts, other than for domestic support, arising from a marital settlement agreement or judgment [*see 11 U.S.C. § 523(a)(15)* (such debts are nondischargeable)].

[b] Time for Filing Complaint Subject to Exclusive Bankruptcy Court Jurisdiction

Except in the Chapter 13 situation described in the next paragraph, in any case under Chapter 7, 11, 12, or 13, the

creditor must file a complaint to determine dischargeability of a debt not later than 60 days after the first date set for the meeting of creditors. The bankruptcy court, on motion of a party in interest, may extend the time if the motion for extension is made within the original time period. The bankruptcy court must give creditors at least 30 days' notice of the time for filing complaints to determine dischargeability [*Fed. R. Bankr. P., Rule 4007(c)*; *see In re Gordon (9th Cir. 1993) 988 F.2d 1000, 1001* (time begins to run from date first set for meeting of creditors even if meeting is continued, rescheduled, or otherwise delayed)]. Unless an application on the categories of debts set forth in *11 U.S.C. § 523(a)(2), (4)*, and *(6)* is timely filed, they will be discharged [*11 U.S.C. § 523(c)(1)*]. State courts lack authority to adjudicate the adequacy of the notice received by a creditor; only a bankruptcy court can grant relief on the ground of inadequate notice [*McGhan v. Rutz (In re McGhan) (9th Cir. 2002) 288 F.3d 1172, 1180]* .

In a Chapter 13 case, when the debtor moves for a hardship discharge [*see 11 U.S.C. § 1328(b)*; § 94.20[4][f][ii]], the court will enter an order fixing the time to file a complaint to determine the dischargeability of any debt arising from willful and malicious injury [*see 11 U.S.C. § 523(a)(6)*] and must give no less than 30 days' notice of the time fixed to all creditors. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed for filing a complaint. The motion must be filed before the time has expired [*Fed. R. Bankr. P., Rule 4007(d)*].

If a creditor's nondischargeability complaint were dismissed in a Chapter 11 proceeding solely because of being filed too late, that dismissal would not create a res judicata bar to the filing of a new nondischargeability complaint following conversion of the case to a Chapter 7 proceeding [*Classic Auto Refinishing, Inc. v. Marino (In re Marino) (9th Cir. 1999) 181 F.3d 1142, 1146]* .

For a complaint to determine dischargeability of a debt, see *§ 94.121*. For an application to reopen a case to file a complaint to determine dischargeability, see *§ 94.120*.

[c] Costs and Attorney's Fees

There is no general right to recover attorney's fees under the Bankruptcy Code [*Renfrow v. Draper (In re Renfrow) (9th Cir. 2000) 232 F.3d 688, 693*]. A claim for attorney's fees based on a contract allocating attorney's fees is allowable in bankruptcy to the extent that the contract is enforceable under substantive, nonbankruptcy law (that is, under state law generally), except insofar as the Bankruptcy Code provides otherwise [*Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co. (2007) 549 U.S. 443, 127 S. Ct. 1199, 1204, 167 L. Ed. 2d 178* ; *SNTL Corp. v. Centre Ins. Co. (In re SNTL Corp.) (9th Cir. 2009) 571 F.3d 826, 845* (unsecured creditor's claim may include attorney's fees incurred post-petition but arising from preexisting contract); *see 11 U.S.C. § 502(b)* (bases on which claims must be disallowed)]. The Ninth Circuit's so-called *Fobian* rule, which dictates that attorney's fees are not recoverable in bankruptcy for litigating issues peculiar to bankruptcy law, has no support in the Bankruptcy Code. Therefore, after March 20, 2007, a court may not disallow a claim for attorney's fees on the ground that the claimed fees were incurred in litigating issues of bankruptcy law [*Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co. (2007) 549 U.S. 443, 127 S. Ct. 1199, 1205, 167 L. Ed. 2d 178 , overruling In re Fobian (9th Cir. 1991) 951 F.2d 1149, 1153]* . On the other hand, the court must disallow a claim for attorney's fees insofar as the claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law, for a reason other than that the claim is contingent or unmatured [*11 U.S.C. § 502(b)(1)*]. In other words, the claim would be subject to any defense that the debtor could have interposed if sued on the claim, in the absence of bankruptcy proceedings [*Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co. (2007) 549 U.S. 443, 127 S. Ct. 1199, 1204, 167 L. Ed. 2d 178*].

If a creditor requests a determination of dischargeability of a consumer debt under *11 U.S.C. § 523(a)(2)* (fraudulent debt), and the debt is discharged, the bankruptcy court will grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceedings if the court finds that the position of the creditor was not substantially justified, except that the court may not award costs and fees if special circumstances would make the award unjust [*11 U.S.C. § 523(d)*]. An award of attorney's fees is reviewable for abuse of discretion [*First Card v. Hunt (In re Hunt) (9th Cir. 2001) 238 F.3d 1098, 1101]* .

Attorney's fees also may be awarded in connection with sanctions. Under *Fed. Rules Bank. Proc., Rule 9011*, by presenting (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper to the court, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. The attorney or unrepresented party further warrants that the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law, and that any allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and that the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief [*Fed. Rules Bank. Proc., Rule 9011(b)*]. Sanctions may be imposed for violation of this requirement, either on motion by another party or on the court's own initiative. Sanctions may include, if warranted for effective deterrence, an order directing payment to the moving party of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion [*Fed. Rules Bank. Proc., Rule 9011(c)*]. *11 U.S.C. § 707(b)(4)(A)* specifically permits the court to award sanctions (including attorney's fees) under *Fed. Rules Bank. Proc. Rule 9011* against debtor's attorneys who violate Rule 9011 in filing bankruptcy claims under Chapter 7, including attorneys who file Chapter 7 claims without regard to the "means test" imposed by the 2005 amendments to that chapter [*see 11 U.S.C. § 707(b)(2)* (means test), discussed in *§ 94.20[3][b]*].

[2] Debts Subject to Concurrent Jurisdiction

[a] In General

Both the bankruptcy courts and the state courts have concurrent jurisdiction to determine dischargeability of debts made nondischargeable by the following code sections [*28 U.S.C. §§ 157(b)(1), (2)(I), 1334(b)*; *In re Aldrich (Bankr. 9th Cir. 1983) 9 Collier Bankr. Cas. 2d 1073, 34 B.R. 776, 779-780* ; *In re Marriage of Henderson (1990) 225 Cal. App. 3d 531, 534, 275 Cal. Rptr. 226* ; *see 11 U.S.C. § 523(c)* (debts for which bankruptcy court determination of dischargeability is required)]:

- *11 U.S.C. § 523(a)(1)*, relating to debts for taxes.
- *11 U.S.C. § 523(a)(3)*, relating to unscheduled debts or debts not timely or properly scheduled).
- *11 U.S.C. § 523(a)(7)*, relating to debts for government fines and penalties).
- *11 U.S.C. § 523(a)(8)*, relating to debts for student loans or educational benefit overpayments.
- *11 U.S.C. § 523(a)(9)*, relating to debts for death or injury caused by unlawfully operating a motor vehicle, vessel, or aircraft while intoxicated.
- *11 U.S.C. § 523(a)(10)*, relating to debts that could have been or were listed in a prior bankruptcy in which discharge was either waived or denied.
- *11 U.S.C. § 523(a)(11)*, relating to debts for fraud or defalcation when acting in fiduciary capacity with respect to a depository institution or an insured credit union.
- *11 U.S.C. § 523(a)(12)*, relating to debts for reckless or malicious failure to fulfill a commitment to maintain the capital of an insured depository institution.

The characterization of payments under a judgment of dissolution of marriage as being for domestic support [*see 11 U.S.C. § 101(14A)* (definition)]--nondischargeable under *11 U.S.C. § 523(a)(5)*--is frequently contested in state court. Because California courts have not always acknowledged their jurisdiction to characterize or determine dischargeability of payments claimed as support, either spouse may wish to foreclose the issue by bringing an adversary proceeding in the bankruptcy court [*see In re Marriage of Williams (1984) 157 Cal. App. 3d 1215, 1221-1224, 203 Cal. Rptr. 909]* .

Generally the only other time the debtor would wish to initiate a proceeding to determine dischargeability would be in the bankruptcy court to qualify a student loan for discharge. This is the only type of debt on which the debtor has the burden to prove dischargeability [*In re Norman (Bankr. S.D. Cal. 1982) 25 B.R. 545, 548, 9 Bankr. Ct. Dec. 1417, 1419-1420* ; *see § 94.55[9]*]. In addition, later complications may be avoided by having the order of discharge specifically refer to the student loan.

[b] Time for Filing Complaint or Reopening Case Subject to Concurrent Jurisdiction

Complaints to determine dischargeability over which both the bankruptcy courts and state courts have jurisdiction may be filed by the debtor or any creditor at any time [*see Fed. R. Bankr. P., Rule 4007(b)*]. The issue may be raised by filing a complaint to determine dischargeability in the bankruptcy case, or the creditor may wait until the bankruptcy case is closed and proceed with a civil action in state court [In re Marriage of Henderson *(1990) 225 Cal. App. 3d 531, 534, 275 Cal. Rptr. 226* ; *see also § 94.56*].

For a complaint to determine dischargeability of a debt, see *§ 94.121*. For an affirmative defense for use in an action based on a claim that was discharged in a bankruptcy case, see *§ 94.122*. For an affirmative defense for use in an action based on a debt that was not scheduled, and therefore was not discharged, in a bankruptcy case, see *§ 94.123*.

Alternatively, the bankruptcy case may be reopened without payment of a filing fee to obtain a determination of dischargeability [*28 U.S.C. §§ 157(b)(1), (2)(I), 1334(b)*; *Fed. R. Bankr. P., Rule 4007(a), (b)*; *In re Aldrich (Bankr. 9th Cir. 1983) 9 Collier Bankr. Cas. 2d 1073, 34 B.R. 776, 779-780]* . For an application to reopen a bankruptcy case in order to file a complaint to determine dischargeability of a debt, see *§ 94.120*.

[c] Costs and Attorney's Fees

Although generally there is no right to an award of attorney's fees in bankruptcy proceedings [*see Heritage Ford v. Baroff (In re Baroff) (9th Cir. 1997) 105 F.3d 439, 441* ; *§ 94.54[1][c]*], the bankruptcy court has power to award fees in some cases when state law issues are litigated. For instance, if a divorce decree provides for the payment of attorney's fees, and state law issues are litigated in the bankruptcy proceedings, then attorney's fees are available, but only to the extent that they were incurred litigating the state law issues [*Renfrow v. Draper (9th Cir. 2000) 232 F.3d 688, 694]* .

As discussed in *§ 94.54[1][c]*, attorney's fees also can be awarded in appropriate cases as sanctions for filing frivolous or meritless litigation [*Fed. Rules Bank. Proc., Rule 9011(c)*].

[3] No Right to Jury Trial

The parties have no *Seventh Amendment* right to a jury trial, because an action to determine the dischargeability of a debt is equitable in nature [*American Express Travel Related Servs. Co. v. Hashemi (In re Hashemi) (9th Cir. 1996) 104 F.3d 1122, 1124* (noting without deciding, however, that creditor's claim to recover amount of debt, if presented in bankruptcy court, would be subject to *Seventh Amendment* jury trial guaranty)].

Legal Topics:

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

Bankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsMalicious & Reckless BehaviorBankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsEmbezzlement & FraudBankruptcy LawPractice & ProceedingsJurisdictionNoncore ProceedingsBankruptcy LawPractice & ProceedingsJurisdictionFederal District CourtsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral Overview

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§ 94.55 Standards and Burdens of Proof

[1] Burden Generally on Creditor

In any determination of dischargeability, the debt or judgment is required to be viewed in the light most favorable to the debtor, and exceptions to discharge are narrowly construed [*see, e.g., In re Riso (9th Cir. 1992)978 F.2d 1151, 1154* (exception for willful and malicious injury to property as not including nontortious breach of contract)]. The burden of proving facts essential to establish nondischargeability is on the creditor [*Hill v. Smith (1923) 260 U.S. 592, 595, 43 S. Ct. 219, 67 L. Ed. 419* ; *Gleason v. Thaw (1915) 236 U.S. 558, 560-561, 35 S. Ct. 287, 59 L. Ed. 717* ; *In re Houtman (9th Cir. 1978) 568 F.2d 651, 656* ; *see § 94.122[2*] (shifting burdens regarding proper and timely scheduling of a claim)]. Characterization of an obligation to a former spouse is determined in accordance with federal law [*Shaver v. Shaver (9th Cir. 1984) 736 F.2d 1314]* .

[2] Distinction Between Proving Claim and Establishing Nondischargeability

There is a distinction between the standard of proof a creditor must satisfy in order to establish a claim and the standard to establish the nondischargeability of the claim. The validity of the creditor's claim is determined by rules of state law. However, the issue of nondischargeability is a matter of federal law. The distinction becomes important in cases in which state law requires a clear and convincing standard to establish a fraud claim, for instance. To establish the nondischargeability of a debt based on such a claim, or any type of debt enumerated in *11 U.S.C. § 523(a)*, the creditor is required to meet only with the preponderance of the evidence standard [*Grogan v. Garner (1991) 498 U.S. 279, 286-287, 111 S. Ct. 654, 112 L. Ed. 2d 755]* .

[3] Res Judicata and Collateral Estoppel

In determining whether a judgment is nondischargeable, the bankruptcy court can give collateral estoppel effect to those elements of the claim that are identical to the elements required for nondischargeability and that were actually litigated

and determined in the prior action [*Grogan v. Garner (1991) 498 U.S. 279, 284-285, 111 S. Ct. 654, 112 L. Ed. 2d 755* (abrogating cases that barred application of collateral estoppel to debts for which bankruptcy court had exclusive jurisdiction to determine dischargeability, which includes fraud, fiduciary defalcation, embezzlement, larceny, and willful and malicious injury; thus abrogating *In re Houtman (9th Cir. 1978) 568 F.2d 651, 654-656)* ; *Gayden v. Nourbakhsh (In re Nourbakhsh) (9th Cir. 1995) 67 F.3d 798, 801* (bankruptcy court must give collateral estoppel effect to prior state court judgment); *but see In re Daley (9th Cir. 1985) 776 F.2d 834, 837-839* (doctrine not applied to state court judgment based on stipulation)].

In determining whether a party should be estopped from relitigating an issue decided in a prior state court action, the bankruptcy court must look to California's law of collateral estoppel [*Diamond v. Kolcum (In re Diamond) (9th Cir. 2002) 285 F.3d 822, 828-829* (creditors were entitled to summary judgment of nondischargeability under *11 U.S.C. § 523(a)(2)(A)* and *(6)* based on collateral estoppel effect of state-court judgment); *Baldwin v. Kilpatrick (In re Baldwin) (9th Cir. 2001) 249 F.3d 912, 918-920* (issues implicated by *11 U.S.C. § 523(a)(6)* were actually litigated in California intentional-tort suit, therefore judgment had collateral estoppel effect under California law); *Gayden v. Nourbakhsh (In re Nourbakhsh) (9th Cir. 1995) 67 F.3d 798, 800]* .

Issues that were actually litigated and necessarily decided in the course of obtaining an arbitration award that was confirmed as a judgment by a California court are eligible for issue-preclusive effect under California law; therefore, issue preclusion may be applied in subsequent bankruptcy nondischargeability litigation [*Khaligh v. Hadaegh (In re Khaligh) (Bankr. 9th Cir. 2006) 338 B.R. 817, 831-832]* .

When the judgment against the debtor is based solely on the debtor's "deemed admissions" in a case that the debtor started but then made no further attempt to pursue, the issues embraced by the judgment cannot be treated as "actually litigated" [*United States IRS v. Palmer (In re Palmer) (9th Cir. 2000) 207 F.3d 566, 568*].

PRACTICE TIP:

Counsel for a debtor should be careful before assuming that filing for bankruptcy will "clean up" pending state court litigation, as a default judgment in the state court may be nondischargeable as to the debtor in the subsequent bankruptcy filing. *Commentary by John A. Vos.*

[4] Misrepresentation and Fraud

[a] General Rule of Nondischargeability

A discharge under any applicable chapter of the Bankruptcy Code does not discharge an individual debtor from any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent that it was obtained by false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition [*11 U.S.C. § 523(a)(2)(A)*]. In short, the statute prevents the discharge of "all liability arising from fraud" [*Cohen v. De La Cruz (1998) 523 U.S. 213, 223, 118 S. Ct. 1212, 140 L. Ed. 2d 341* (phrase "to the extent obtained by" in *11 U.S.C. § 523(a)(2)(A)* modifies "money, property, services, or ... credit"--not "any debt"--so that exception encompasses "any debt ... for money, property, [etc.], to the extent [that the money, property, etc., is] obtained by" fraud; phrase thereby makes clear that share of money, property, or whatever, so obtained gives rise to nondischargeable debt)].

[b] Elements of Actual Fraud

A creditor must establish the following elements of actual fraud under the standard referred to in § 94.55[4][a] [*Apte v. Japra (In re Apte) (9th Cir. 1996) 96 F.3d 1319, 1322]* :

- The debtor made a representation.

- The debtor knew at the time the representation was false.

- The debtor made the representation with the intention and purpose of deceiving the creditor [*see, e.g., Citibank (S.D.), N.A. v. Eashai (In re Eashai) (9th Cir. 1996) 87 F.3d 1082, 1087-1088* (12 factors to be considered in determining debtor's intent); *see also Anastas v. American Sav. Bank (In re Anastas) (9th Cir. 1996) 94 F.3d 1280, 1286* (in case involving credit card debt, inquiry must focus solely on whether debtor maliciously and in bad faith incurred credit card debt with intention of petitioning for bankruptcy and avoiding debt)]. (Moral turpitude is not required [*Cowen v. Kennedy (In re Kennedy) (9th Cir. 1997) 108 F.3d 1015, 1018]* .)

- The creditor justifiably relied on the representation.

- The creditor sustained damage as the proximate result of the representation.

There is no requirement to show that the debtor received some benefit from the fraud [*Muegler v. Bening (9th Cir. 2005) 413 F.3d 980, 984]* .

The second requirement (knowledge) is met if the representation was recklessly made without knowing of its truth or falsity [*In re Houtman (9th Cir. 1978) 568 F.2d 651, 656* ; *In re Kurdoghlian (B.A.P. 9th Cir. 1983) 8 Collier Bankr. Cas. 2d 1175, 30 B.R. 500, 502, 11 Bankr. Ct. Dec. 125* (debt incurred through checks drawn on insufficient funds when debtor knew or should have known the balance was insufficient--$46,000 drawn on $5,000 balance--held nondischargeable)].

Although the statute does not state what degree of reliance is necessary (the fourth requirement), the United States Supreme Court has held that the creditor's reliance need only be justifiable, not reasonable [*Field v. Mans (1995) 516 U.S. 59, 74-75, 116 S. Ct. 437, 133 L. Ed. 2d 351]* . In determining whether a creditor's reliance is justifiable, a court must examine all of the circumstances surrounding the particular transaction, including the creditor's knowledge and experience, and consider the subjective effect of those circumstances on the creditor [*In re Kirsh (9th Cir. 1992) 973 F.2d 1454, 1457-1461* (creditor's reliance was not justifiable)]. A creditor may be justified in relying on a representation of fact even though the creditor could have ascertained the falsity of the representation by making an investigation. While a creditor cannot blindly rely, a creditor's mere negligence in failing to discover an intentional misrepresentation is no defense to a claim of fraud [*Apte v. Japra (In re Apte) (9th Cir. 1996) 96 F.3d 1319, 1322-1324* (creditor's reliance was justifiable)].

With respect to the requirement of proximate cause (the fifth requirement), the bankruptcy court is not required to "divine what might have happened" if the fraud had not occurred; it is enough that the creditor had options available that the creditor did not exercise as a result of the fraud [*Cossu v. Jefferson Pilot Sec. Corp. (In re Cossu) (9th Cir. 2005) 410 F.3d 591, 597 n.4*].

[c] False Statements of Financial Condition

A discharge under any applicable chapter of the Bankruptcy Code also does not discharge an individual debtor from any debt for money, property, services, or an extension, renewal, or refinancing of credit, to the extent that it was obtained by use of a statement in writing [*11 U.S.C. § 523(a)(2)(B)*]:

- That is materially false;

- Respecting the debtor's or an insider's financial condition;

- On which the creditor to whom the debtor is liable for the money, property, services, or credit

reasonably relied; and

- That the debtor caused to be made or published with intent to deceive.

The Ninth Circuit adds a fifth element: that the creditor sustained damage as the proximate result of the representation [*In re Siriani (9th Cir. 1992) 967 F.2d 302, 304-306* ; *see In re Candland (9th Cir. 1997) 90 F.3d 1466, 1469]* .

"Material" misrepresentations are substantial inaccuracies of the type that would generally affect a lender's or guarantor's decision. To except a debt from discharge, the creditor must show not only that the statements are inaccurate, but also that they contain important and substantial untruths [*In re Candland (9th Cir. 1997) 90 F.3d 1466, 1470* ("Certainly, in this case, significant misrepresentations of financial condition--of the order of several hundred thousand dollars--are of the type which would generally affect a lender's or guarantor's decision. The misrepresentations are, therefore, material.")]. The requirement of a materially false disclosure may be satisfied by silence or nondisclosure in the face of a duty to disclose [*In re Haddad (B.A.P. 9th Cir. 1982) 6 Collier Bankr. Cas. 2d 1145, 21 B.R. 421, 423, 9 Bankr. Ct. Dec. 371* , *aff'd, 703 F.2d 575 (9th Cir. 1983)*].

The third requirement, that "the creditor to whom the debtor is liable for the money, property, services, or credit" must have reasonably relied on the false representation, should not be construed as meaning that, in the case of a subsequent assignment of that creditor's claim, there must also be proof of reliance by the assignee holding the claim at the time of the bankruptcy. Reliance by the assignee is not required, if the original creditor reasonably relied on the false representation: the assignee can stand in the shoes of the original creditor and assert nondischargeability under *11 U.S.C. § 523(a)(2)(B)* [*Boyajian v. New Falls Corp. (In re Boyajian) (9th Cir. 2009) 564 F.3d 1088, 1091*].

With respect to the element of the creditor's reliance, *11 U.S.C. § 523(a)(2)(B)* explicitly states that "reasonable reliance" is the appropriate standard--a standard that "courts can apply without additional help"--when misrepresentations are made in written statements of financial condition [*In re Candland (9th Cir. 1996) 90 F.3d 1466, 1471]* . On the other hand, *11 U.S.C. § 523(a)(2)(A)* does not provide a reliance standard; therefore, the Ninth Circuit and the Supreme Court created a "justifiable reliance" test for cases involving misrepresentations other than those respecting the debtor's financial condition [*see Field v. Mans (1995) 516 U.S. 59, 74-75, 116 S. Ct. 437, 133 L. Ed. 2d 351* ; *In re Kirsh (9th Cir. 1992) 973 F.2d 1454, 1460]* .

To prove proximate cause in the context of *11 U.S.C. § 523(a)(2)(B)*, a creditor must show that it had valuable collection remedies at the time it made or agreed to renew its commitment to the debtor and that those remedies later became worthless [*In re Siriani (9th Cir. 1992) 967 F.2d 302, 305-306]* . However, the creditor need not show that it would have exercised those remedies in a sufficiently timely fashion to collect the debt [*In re Siriani (9th Cir. 1992) 967 F.2d 302, 305-306* (diligence requirement would cause courts to indulge in too much speculation)].

[d] Dischargeability of Punitive Damages for Fraud Debts

As the fraud exception to dischargeability [*see 11 U.S.C. § 523(a)(2)(A)*] encompasses any liability arising from money, property, and other sources, that was fraudulently obtained by the debtor, including treble damages, attorney's fees, "and other relief that may exceed the value obtained by the debtor" [*Cohen v. De La Cruz (1998) 523 U.S. 213, 223, 118 S. Ct. 1212, 140 L. Ed. 2d 341*], it follows that punitive damages based on fraud would also be nondischargeable.

[5] Debts Not Properly or Timely Scheduled

[a] In General

To be scheduled properly, a claim must include the name and address of the creditor, a description of the claim, and a statement of the amount owing [*see 11 U.S.C. § 521(a)(1)*; *Fed. R. Bankr. P., Rule 1007*]. Whether a deficiency or

mistake in any of these components is fatal to discharge is a question of fact in each case based on whether the listing was unambiguous enough to give the creditor notice and whether the mistake was made despite the best efforts of the debtor to discover the true name or address [*see Kreitlein v. Ferger (1915) 238 U.S. 21, 29-34, 35 S. Ct. 685, 59 L. Ed. 1184* ; *Van Denburgh v. Goodfellow (1941) 19 Cal. 2d 217, 222, 120 P.2d 20* ; *see also* Collier on Bankruptcy (15th ed.), § 523.13 (Matthew Bender)]. When an obligation has been transferred, scheduling it under the name of the original creditor is not sufficient if the debtor knew or should have known of the transfer and could have obtained the name of the present owner [*Ismay v. Tyler (1959) 169 Cal. App. 2d Supp. 883, 886, 169 Cal. App. 2d Supp. 883, 337 P.2d 257*].

To be timely scheduled, a claim of the type enumerated in *11 U.S.C. § 523(a)(2), (4),* or *(6)* must be scheduled soon enough to allow the creditor to timely file both a proof of claim and a complaint to determine dischargeability of the debt [*11 U.S.C. § 523(a)(3)(B)*]. Any other type of claim need only be properly scheduled early enough for the creditor to file a timely proof of claim [*11 U.S.C. § 523(a)(3)(A)*].

What is sufficient notice may vary with special facts, but generally the creditor must receive notice or actual knowledge of the case within a reasonable time to file complaints to determine dischargeability. In some cases this time may be as short as 30 days [*In re Dewalt (9th Cir. 1992) 961 F.2d 848, 851* ; *see Fed. R. Bankr. P., Rule 4007(c)*]. A creditor does not have sufficient notice if all it has time to do is file a request for an extension [*In re Dewalt (9th Cir. 1992) 961 F.2d 848, 850]* . However, a creditor who learns of a bankruptcy filing has a duty to inquire about the deadlines [*In re Dewalt (9th Cir. 1992) 961 F.2d 848, 851 n.3* ; *In re Price (9th Cir. 1989) 871 F.2d 97, 99* ; *see 11 U.S.C. § 523(a)(3)(B)* (only requires unscheduled creditor to have actual knowledge of case)]. *Dewalt* held that seven days notice insufficient for an improperly scheduled creditor, but said in dicta that the reasonable notice period could never exceed 80 days because that is what a creditor would ordinarily receive (20 days notice of the creditors' meeting plus 60 days after that) [*In re Dewalt (9th Cir. 1992) 961 F.2d 848, 851]* . Thirty days notice might be insufficient for a truly unsophisticated creditor, not represented by counsel, that receives only the sketchiest notice of the filing of the case [*In re Dewalt (9th Cir. 1992) 961 F.2d 848, 851]* . Less than 30 days notice might be sufficient for a creditor that has enough advance knowledge of the bar date to file a complaint or request an extension and purposefully chooses to lie in wait rather than present its claim [*In re Dewalt (9th Cir. 1992) 961 F.2d 848, 851]* .

[b] Actual Notice and "No-Asset" Cases

A claim not properly or timely listed will nevertheless be discharged if the creditor had notice or actual knowledge of the bankruptcy in time to file a proof of claim and, if necessary, a request for determination of dischargeability [*11 U.S.C. § 523(a)(3)*]. For example, if actual notice of a bankruptcy proceeding is provided to a creditor's attorney in time for the attorney to file an objection to discharge or a timely motion for an extension of time, the notice is adequate, even if the debtor failed to list the creditor on the petition for bankruptcy [*In re Price (9th Cir. 1989) 871 F.2d 97, 99]* . However, an argument can be made that failure to schedule or provide notice to a creditor operates to make that creditor's claim against the debtor never dischargeable if the claim is one of the special debts [*see 11 U.S.C. § 523(a)(2), (4), (6)*] for which a complaint to determine dischargeability of the debt must be filed exclusively in the bankruptcy court within 60 days from the first meeting of creditors [*Fed. R. Bankr. P., Rule 4007(c)*; *see §§ 94.53[1], 94.54[1][a]*].

In a no-asset case, in which the creditors receive a "no dividend notice" telling them that there is no need to file claims because there are no assets for distribution, no time for filing claims is set. Thus, a creditor cannot be prejudiced by not being notified of the time to file claims and a debtor will be allowed to amend its schedules to include the previously omitted creditor, after reopening the case if necessary, as long as there is no showing that the omission was intentional or part of a fraudulent scheme. This has the effect of discharging the debt [*see, e.g., In re Rosinski (6th Cir. 1985) 759 F.2d 539, 542* ; *In re Stark (7th Cir. 1983) 717 F.2d 322, 324* ; *In re Walendy (Bankr. C.D. Cal. 1990) 23 Collier Bankr. Cas. 2d 1228, 1231-1232, 118 B.R. 774, 776* ; *In re Hendricks (Bankr. C.D. Cal. 1988) 87 B.R. 114, 116* ; *In re Rayson (Bankr. C.D. Cal. 1984) 10 Collier Bankr. Cas. 2d 1426, 1427-1428, 39 B.R. 597, 598]* .

Some ambiguity may remain in the Ninth Circuit regarding such "no-asset" cases. Only the Bankruptcy Appellate Panel has addressed the issue, but the case involved the anomalous situation in which a time for filing claims had been set in a no-asset case. In *In re Laczko*, the B.A.P. affirmed a bankruptcy court judgment in favor of a creditor that held the debt nondischargeable for failure to have been timely scheduled [*In re Laczko (B.A.P. 9th Cir. 1984) 10 Collier Bankr. Cas. 2d 530, 37 B.R. 676, 679* , *aff'd, 772 F.2d 912*]. The B.A.P. adhered to rules of strict construction, saying the debtors had not brought themselves within any exception to *11 U.S.C. § 523(a)(3)*, and distinguished *In re Stark* [*In re Stark (7th Cir. 1983) 717 F.2d 322, 324]* , cited *above*, because in that case the "no dividend" notice had been sent to creditors [*In re Laczko (B.A.P. 9th Cir. 1984) 10 Collier Bankr. Cas. 2d 530, 37 B.R. 676, 678-679* , *aff'd, 772 F.2d 912*]. *In re Walendy*, also cited *above*, characterized *Laczko* as implying that it would follow *Stark* when a "no dividend" notice has been given [*In re Walendy (Bankr. C.D. Cal. 1990) 23 Collier Bankr. Cas. 2d 1228, 118 B.R. 774, 776]* . For an analysis of some of these issues, see the concurring opinion in *Beezley v. California Land Title Co.* [*Beezley v. California Land Title Co. (9th Cir. 1992) 994 F.2d 1433, 1434* et seq.], which is extremely critical of *Stark*.

[6] Embezzlement

Embezzlement in the context of nondischargeability is the fraudulent appropriation of property by a person to whom it has been entrusted or into whose hands it has lawfully come. It requires the following three elements [*In re Littleton (9th Cir. 1991) 942 F.2d 551]* :

- Property rightfully in the possession of a nonowner;
- The nonowner's appropriation of the property to a use other than that for which it was entrusted; and
- Circumstances indicating fraud, including intent to defraud.

[7] Fiduciary Defalcation

To be nondischargeable under *11 U.S.C. § 523(a)(4)*, liability founded on fiduciary defalcation must arise from a fiduciary relationship that predated the act creating liability. A resulting or constructive trust, or one implied in law, generally will be insufficient to constitute a fiduciary relationship [*Ragsdale v. Haller (9th Cir. 1986) 780 F.2d 794, 796-797* ; *In re Pedrazzini (9th Cir. 1981) 644 F.2d 756, 758-759* ; *see, e.g., In re Teichman (9th Cir. 1985) 774 F.2d 1395, 1398-1400* (husband's obligation to pay wife 43 percent of military pension payments was not express trust, only constructive trust, and thus pre-petition arrearages were dischargeable and not within fiduciary defalcation exception); *In re Cooper (B.A.P. 9th Cir. 1982) 30 B.R. 484, 489* (state court judgment imposing resulting trust on surviving joint tenant who spent joint account funds was dischargeable); *but see Banks v. Gill Distrib. Ctrs., Inc. (In re Banks) (9th Cir. 2001) 263 F.3d 862, 871* (when attorney "placed his client's funds into his trust account, he became his client's fiduciary" even though no express trust existed in traditional sense)].

Fiduciary relationships imposed by statute may cause the debtor to be considered a fiduciary under *11 U.S.C. § 523(a)(4)*. In general, a statutory fiduciary is considered a fiduciary under that provision if the statute in question does all of the following [*Blyler v. Hemmeter (In re Hemmeter) (9th Cir. 2001) 242 F.3d 1186, 1190* (ERISA satisfies traditional requirements for statutory fiduciary to qualify as fiduciary under *11 U.S.C. § 523(a)(4)*)]:

- Defines the trust res;
- Identifies the fiduciary's fund-management duties; and
- Imposes obligations on the fiduciary before the alleged wrongdoing.

Although the meaning of "fiduciary" is determined under federal law for purposes of *11 U.S.C. § 523(a)(4)*, state law

determines when a trust in the strict sense occurs [*Ragsdale v. Haller (9th Cir. 1986) 780 F.2d 794, 796]* . Because California case law makes all partners trustees over assets of partnership, California partners are fiduciaries within the meaning of *11 U.S.C. § 523(a)(4)* [*Ragsdale v. Haller (9th Cir. 1986) 780 F.2d 794, 796-797]* .

The creditor has the burden initially to prove that the debtor was a fiduciary to whom funds were entrusted [*see generally § 94.55[1]*]. Once that is proved, the debtor has the burden to account fully for all funds received for the creditor's benefit, by persuading the trier of fact that he or she complied with his or her fiduciary duties with respect to all questioned transactions. In other words, the debtor then has the burden to disprove defalcation; the creditor is not required to prove it [*Otto v. Niles (In re Niles) (9th Cir. 1997) 106 F.3d 1456, 1462]* .

When the requisite fiduciary relationship exists, as through an express trust, the debtor's defalcation need not have been intentional to be nondischargeable; even an "innocent" defalcation will be nondischargeable [*In re Gonzales (B.A.P. 9th Cir. 1982) 22 B.R. 58, 59, 9 Bankr. Ct. Dec. 447* (construction disbursement agreement was express trust)].

[8] Willful and Malicious Injury

[a] Standard for Nondischargeability

A line of cases based on *Tinker v. Colwell* [*Tinker v. Colwell (1904) 193 U.S. 473, 485-489, 24 S. Ct. 505, 48 L. Ed. 754]* defined "willful and malicious" as used in *11 U.S.C. § 523(a)(6)* to require nothing more than an intentional act done with reckless disregard of the consequences. Although the statutory language has not changed, the legislative history of the 1978 amendments specifically overruled the reckless disregard standard [*In re Cecchini (9th Cir. 1986) 780 F.2d 1440, 1443]* .

In *Kawaauhau v. Geiger* [*Kawaauhau v. Geiger (1998) 523 U.S. 57, 62-63, 118 S. Ct. 974, 977, 140 L. Ed. 2d 90]* , the United States Supreme Court clarified the *Tinker* opinion. Nondischargeability requires a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury. *Tinker*, which involved the tort of criminal conversation, was construed to place that tort solidly within the traditional intentional tort category, and its holding was so limited. The Court in *Kawaauhau* concluded that *Tinker* "provides no warrant for departure from the current statutory instruction that, to be nondischargeable, the judgment debt must be 'for willful and malicious injury.' " Debts arising from recklessly or negligently inflicted injuries do not fall within *11 U.S.C. § 523(a)(6)* [*Kawaauhau v. Geiger (1998) 523 U.S. 57, 63, 118 S. Ct. 974 140 L. Ed. 2d 90]* . Rather, the willful injury requirement is met when, and only when, it is shown either that the debtor had a subjective motive to inflict the injury or that the debtor believed that injury was substantially certain to occur as a result of his or her conduct [*Petralia v. Jercich (In re Jercich) (9th Cir. 2001) 238 F.3d 1202, 1208* ; *see Carrillo v. Su (In re Su) (9th Cir. 2002) 290 F.3d 1140, 1145 n.3*]. The debtor's state of mind (knowledge) can be proved by circumstantial evidence, however [*Carrillo v. Su (In re Su) (9th Cir. 2002) 290 F.3d 1140, 1146 n.6*].

Whether an injury was "willful" for purposes of *11 U.S.C. § 523(a)(6)* cannot necessarily be determined by reference to a finding that the injury was willful in a different context. For instance, liability for willful infringement of copyright [*see 17 U.S.C. § 504(c)(2)*] can be based on merely reckless behavior, instead of intentional behavior. Injuries resulting from recklessness are not sufficient to be considered willful injuries under the Bankruptcy Code and are therefore insufficient to merit an exemption to dischargeability [*Barboza v. New Form, Inc. (9th Cir. 2008) 545 F.3d 702, 707-708* (granting of summary judgment motion in favor of nondischargeability was reversible error because it was based on prior judgment for willful copyright infringement, without regard to whether "willful" aspect of infringement might have been reckless instead of intentional)].

The statute refers to "willful and malicious" injury; thus, there are two requirements: the injury must be willful (see above) and it must also be malicious. A malicious injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) without just cause or excuse. The malicious-injury requirement is separate from the

willful-injury requirement [*Barboza v. New Form, Inc. (9th Cir. 2008) 545 F.3d 702, 706* (bankruptcy court's failure to make separate determination as to malicious-injury requirement was reversible error); *see In re Ormsby (9th Cir. 2010) 591 F.3d 1199, 1206-1207* (debtor's conduct was both willful and malicious, and debt was not dischargeable)].

PRACTICE TIP:

Under Chapter 13, a debt for restitution or damages awarded in a civil action as a result of "willful or malicious injury" causing "personal injury to an individual or the death of an individual" is not dischargeable [*11 U.S.C. § 1328(a)(4)*]. Under Chapter 7, a debt for "willful and malicious injury ... to another entity or to the property of another entity" is not dischargeable [*11 U.S.C. §§ 523(a)(6), 727(b)*]. These are significant differences: whether the injury is "willful *or* malicious" or is "willful *and* malicious," whether the injury is to a person or is to property, and whether or not the debt arises from an award in a civil action [*Waag v. Permann (In re Waag) (B.A.P. 9th Cir. 2009) 418 B.R. 373, 2009 Bankr. LEXIS 3418, at *8*]. Depending on the facts of the client's case, if a debt for personal injury is involved, it could be strategically more advantageous to file under Chapter 13 rather than Chapter 7. *Commentary by John A. Vos.*

[b] Conversion

When a judgment establishing the debtor's liability for conversion is the basis for a claim of nondischargeability under *11 U.S.C. § 523(a)(6)*, the judgment does not, without more, establish that the debt arising out of that judgment is nondischargeable [*Peklar v. Ikerd (In re Peklar) (9th Cir. 2001) 260 F.3d 1035, 1039]* . The mere intentional nature of the conversion is insufficient to satisfy the requirement that the creditor must strictly prove subjective intent to injure [*Thiara v. Spycher Bros. (In re Thiara) (9th Cir. BAP 2002) 285 B.R. 420, 432*].

[c] Intentional Breach of Contract

A willful and malicious injury does not include a simple breach of contract, even if committed intentionally. Debts that are nondischargeable under *11 U.S.C. § 523(a)(6)* are debts relating solely to tortious liabilities. An intentional breach of contract cannot give rise to nondischargeability under *11 U.S.C. § 523(a)(6)* unless it is accompanied by conduct that constitutes a tort under state law [*Lockerby v. Sierra (9th Cir. 2008) 535 F.3d 1038, 1040*].

[9] Student Loans

Under current (post-1998) law [*see below*], student loans are nondischargeable unless nondischargeability would impose an "undue hardship" on the debtor and the debtor's dependents [*11 U.S.C. § 523(a)(8)*]. Neither the Bankruptcy Code nor the legislative history of *11 U.S.C. § 523(a)(8)* defines "undue hardship" for purposes of determining the debtor's entitlement to a hardship discharge. The Ninth Circuit has adopted a three-part test--known as the "*Brunner* test"--for undue hardship [*see United Student Aid Funds v. Pena (In re Pena) (9th Cir. 1998) 155 F.3d 1108, 1111* ; *Brunner v. New York State Higher Educ. Servs. Corp. (2d Cir. 1987) 831 F.2d 395, 396]* :

- The debtor must establish an inability to maintain a "minimal" standard of living for self and dependents, based on current income and expenses, if forced to repay the loans.

- The debtor must show that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans. This part of the *Brunner* test considers whether there is a likelihood that the debtor's financial situation will improve sufficiently to permit the debtor to repay the loans [*see Educational Credit Mgmt. Corp. v. Nys (In re Nys) (9th Cir. 2006) 446 F.3d 938, 945-947* (meaning of "additional circumstances" in *Brunner* test)]. The focus is on currently existing circumstances and what those circumstances show with regard to the debtor's future financial situation. A relevant condition that existed when the debtor obtained the educational loan may be considered if it persists, and the debtor is not required to show a worsening or exacerbation [

Educational Credit Mgmt. Corp. v. Mason (In re Mason) (9th Cir. 2006) 464 F.3d 878, 883-884] .

- The debtor must have made good faith efforts to repay the loans. Good faith is measured by the debtor's efforts to obtain employment, maximize income, and minimize expenses, as well as the debtor's effort, or lack of effort, to negotiate a repayment plan [*Educational Credit Mgmt. Corp. v. Mason (In re Mason) (9th Cir. 2006) 464 F.3d 878, 884* (debtor failed to demonstrate good faith)].

Because the hardship discharge is an exception to the normal rule of nondischargeability, the burden of proving entitlement to a hardship discharge is on the debtor [*In re Norman (Bankr. S.D. Cal. 1982) 25 B.R. 545, 548, 9 Bankr. Ct. Dec. 1417]* . The debtor must satisfy all three parts of the *Brunner* test to have the student loans discharged [*see Saxman v. Educ. Credit Mgmt. BJR Corp. (In re Saxman) (9th Cir. 2003) 325 F.3d 1168, 1173]* . The court could conclude that although repayment of the full amount of the loans would impose an undue hardship on the debtor, repayment of some lesser amount would not; and the court may grant a partial discharge [*see, e.g.*, *Educational Credit Mgmt. Corp. v. Mason (In re Mason) (B.A.P. 9th Cir. 2004) 315 B.R. 554, 563-565 , rev'd on other grounds, 464 F.3d 878 (2006)]* . See *§ 94.121* for a complaint to determine the dischargeability of a debt, which can be modified for use by a debtor.

PRACTICE TIP:

The debtor usually will want to have a hardship determination early in the bankruptcy process, particularly when (as in many cases) the burden of repaying a large student loan debt is what drives the debtor to bankruptcy. The creditor naturally will want to avoid a hardship determination. In a Chapter 13 case, this tension can produce a ripeness issue when the debtor applies for a hardship determination soon after the commencement of a confirmed repayment plan. The Ninth Circuit's opinion in *Educational Credit Mgmt. Corp. v. Coleman (In re Coleman) (9th Cir. 2009) 560 F.3d 1000* (bankruptcy court could properly consider debtor's application for hardship determination, which debtor filed less than one year after confirmation of five-year Chapter 13 plan) provides guidance to debtors needing a favorable resolution of such a ripeness issue. The court noted that although a speedy hardship determination would be obtainable in a Chapter 7 case, there are practical impediments that normally would make the Chapter 7 option untenable for a student loan debtor.

Counsel should note that the former statute required a showing of undue hardship only during a specified period of years (at first five years, later extended to seven years in 1991) after the loan became due. Upon the expiration of that period, the debt became dischargeable under the former rule, and no showing of undue hardship thereafter was necessary. This rule was eliminated by 1998 legislation [Pub. L. 105-244, § 971, 112 Stat. 1581], which replaced the former time period with the current rule that a student loan is *never* dischargeable unless the court determines otherwise [*11 U.S.C. § 523(a)(8)*; *see also § 94.53[2][n]*].

PRACTICE TIP:

A student loan debt cannot be discharged by way of a Chapter 13 plan without a determination on the undue-hardship issue, even if the creditor fails to object to the proposed plan after receiving notice of it. A plan that proposes to discharge a student loan debt without a determination of undue hardship violates *11 U.S.C. §§ 1328(a)(2)* and *523(a)(8)*. The bankruptcy court has the authority and the obligation to direct the debtor to conform the plan to the requirements of those code sections. An adversary hearing need not be held; the debtor and creditor may stipulate to the underlying facts of undue hardship, and the creditor may waive service of summons and the complaint. But the bankruptcy court must make an independent determination of undue hardship before the plan is confirmed, even if the creditor fails to object to the plan or fails to appear in the adversary proceeding [*United Student Aid Funds, Inc. v. Espinosa (2010) -- U.S. --, 130 S. Ct. 1367, 176 L. Ed. 2d 158, 173-174 , disapproving contrary holding in Espinosa v. United Student Aid Funds, Inc. (9th Cir. 2008) 545 F.3d 1113]* .

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Chapter 94 BANKRUPTCY
PART II. LEGAL BACKGROUND
E. Action and Proceedings to Determine Dischargeability of Debt

9-94 California Forms of Pleading and Practice--Annotated § 94.56

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§ 94.56 Injunction Against Enforcing Discharged Debt

[1] Effect of Discharge

11 U.S.C. § 524(a) voids all judgments on discharged debts, whether obtained before or after the order of discharge and whether or not discharge is waived. It also provides for a perpetual injunction prohibiting creditors from any act to collect discharged debts (except by enforcement of unavoided liens). This section was enacted to discourage creditors from harassing or threatening debtors until they reaffirmed, and from bringing post-discharge state court actions that the debtor often could not afford to defend or in which the debtor, not understanding that it was necessary to affirmatively plead a defense, would allow his or her default to be taken [H.R. Rep. No. 1502, 91st Cong., 2d Sess. (1970); *see 11 U.S.C. § 524(c), (d)* (only reaffirmation agreements entered into before discharge and approved by bank ruptcy court are valid); *but see 11 U.S.C. § 524(f)* (validating voluntary repayment by debtor)].

A creditor may have dischargeability determined in the bankruptcy court even after discharge, as long as the debt is not of the type described in *11 U.S.C. § 523(a)(2), (4)*-(6), and (c), or if it was not properly or timely scheduled. The stay of *11 U.S.C. § 524(a)*, however, unlike the stay of *11 U.S.C. § 362* [*see § 94.30*], cannot be lifted during the pendency of the bankruptcy case to allow the creditor to proceed with a state court action [*In re Aldrich (B.A.P. 9th Cir. 1983) 9 Collier Bankr. Cas. 2d 1073, 1076-1078, 1080, 34 B.R. 776, 780*]. Thus, a creditor who proceeds with a state court action does so at his or her peril, and should be quite sure that there is a bona fide dispute regarding the dischargeability of the debt sought to be collected in the state court action [*see Hurley v. Bredehorn (1996) 44 Cal. App. 4th 1700, 1705-1706, 52 Cal. Rptr. 2d 615* (creditors granted 60 days to secure modification of discharge order in bankruptcy court allowing state court action to proceed)].

[2] Civil Contempt and Sanctions for Violation of Injunction

11 U.S.C. § 524(a)(2), which enjoins the commencement or continuation of enforcement or collection actions for a discharged debt, is a basis for civil contempt and the imposition of sanctions. The sanctions have been designed to

compensate the debtor for costs and fees in defending the state court action and in applying to the bankruptcy court for injunctive relief and/or sanctions [*Espinosa v. United Student Aid Funds, Inc. (9th Cir. 2008) 545 F.3d 1113, 1120* (discharge injunction precludes creditor, on pain of contempt, from taking any actions to enforce discharged debt); *ZiLOG, Inc. v. Corning (In re ZiLOG, Inc.) (9th Cir. 2007) 450 F.3d 996, 1007* (person who *knowingly* violates discharge injunction can be held in contempt); *Walls v. Wells Fargo Bank (9th Cir. 2002) 276 F.3d 502, 507* (compensatory civil contempt allows aggrieved debtor to obtain compensatory damages, attorney's fees, and offending creditor's compliance with discharge injunction; contempt proceeding is debtor's only remedy); *In re Wagner (Bankr. C.D. Cal. 1988) 87 B.R. 612, 617* ("remedial damages are appropriate whenever" violation takes place)].

[3] Enforcement Against Co-Debtors Not Enjoined

Except for certain property acquired after commencement of a case on account of community claims, discharge of a debt does not affect the liability of any other entity on, or the property of any other entity for, that debt [*11 U.S.C. § 524(e)*]. Thus, discharge does not affect co-debtors or guarantors, and a creditor is not prevented from enforcing the debt against co-debtors [*In re American Hardwoods (9th Cir. 1989) 885 F.2d 621, 625-626* ; *Underhill v. Royal (9th Cir. 1985) 769 F.2d 1426, 1432]* . For example, once a debtor has been discharged from a debt after completion of his or her Chapter 13 plan, the creditor may pursue the co-debtor for the balance due, if any, on the original debt.

The injunction created by a married debtor's discharge does not protect pre-bankruptcy community property that was never made a part of the bankruptcy estate. While the married debtor is discharged from personal liability on a pre-bankruptcy community debt, the nondebtor spouse remains personally liable for that debt, and the pre-bankruptcy community property may be looked to for payment [*Sanwa Bank Cal. v. Chang (2001) 87 Cal. App. 4th 1314, 1319, 105 Cal. Rptr. 2d 330]* .

An action against a discharged debtor to fix the liability of the debtor's insurers is permitted under *11 U.S.C. § 524* [*Forsyth v. Jones (1997) 57 Cal. App. 4th 776, 780, 67 Cal. Rptr. 2d 357* (also observing, but not deciding, that while debtor could not be liable for deductible under insurance policy, insurer would be liable up to coverage limit minus deductible, and declining to consider effect of policy provision asserted to make insurer's liability depend on insured's payment of deductible); *see Ortiz v. Workers' Comp. Appeals Bd. (1992) 4 Cal. App. 4th 392, 398, 5 Cal. Rptr. 2d 484* (dictum)].

PRACTICE TIP:

Note that *11 U.S.C. §§ 1201* and *1301* provide for a co-debtor stay. Thus, when faced with a situation in which one spouse has filed for protection under Chapter 12 or Chapter 13, the attorney should be careful not to proceed against the other spouse who likely is protected during the period of the bankruptcy case by those sections. *Commentary by John A. Vos.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawDischarge & DischargeabilityGeneral OverviewCivil ProcedureRemediesInjunctionsContemptBankruptcy LawDischarge & DischargeabilityEffects of DischargeProtection

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Chapter 94 BANKRUPTCY
PART II. LEGAL BACKGROUND
E. Action and Proceedings to Determine Dischargeability of Debt

9-94 California Forms of Pleading and Practice--Annotated § 94.57

AUTHOR: Reviewed by John A. Vos Mr. Vos is a member of the State Bar of California and maintains a practice in San Rafael, California. Mr. Vos practices in the area of bankruptcy, representing creditors, debtors, and trustees.

§ 94.57 Entry of Judgment on Nondischargeable Debt

The bankruptcy court has jurisdiction to enter a money judgment on a disputed state law claim in the course of making a determination that a debt is nondischargeable [*Cowen v. Kennedy (In re Kennedy) (9th Cir. 1997) 108 F.3d 1015, 1016]* .

The fact that a debt was already reduced to judgment when the bankruptcy court acquired *in rem* jurisdiction of the debtor's property and personal jurisdiction of the debtor does not deprive the bankruptcy court of its subject matter jurisdiction to enter its own judgment on the debt, or of any of the court's statutory power [*see 11 U.S.C. § 105(a)*] and equitable power to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code [*Sasson v. Sokoloff (In re Sasson) (9th Cir. 2005) 424 F.3d 864, 870, 874* ("Thus, as a matter of law, a prior judgment [on a debt] does not preclude a bankruptcy court from exercising its power to determine how best to enforce its own [non]dischargeability order. [P] The bankruptcy court here, therefore, had the authority to enter a money judgment in conjunction with its nondischargeability order.")].

However, because the entry of a money judgment on a nondischargeable debt would be an exercise of equitable jurisdiction, the court's choice of that method to enforce its nondischargeability order is subject to review for abuse of discretion [*Sasson v. Sokoloff (In re Sasson) (9th Cir. 2005) 424 F.3d 864, 874-875* (no abuse of discretion because court acted to counter debtor's pre-bankruptcy maneuvers that caused original judgment debt to become practically uncollectible after entry of state-court judgment)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsGeneral OverviewBankruptcy LawPractice & ProceedingsAdversary ProceedingsJudgments & Remedies

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E. Action and Proceedings to Determine Dischargeability of Debt

9-94 California Forms of Pleading and Practice--Annotated §§ 94.58-94.69

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[Reserved]

§§ 94.58[Reserved]

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9-94 California Forms of Pleading and Practice--Annotated § 94.70

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§ 94.70 Related Matthew Bender Publications

For general coverage of bankruptcy law, see Collier on Bankruptcy 15th ed. (Matthew Bender)

For in-depth substantive analysis of the Bankruptcy Code, see Collier Bankruptcy Manual 3d ed. (Matthew Bender)

For a procedural guide to bankruptcy actions, including cases, see Collier Bankruptcy Practice Guide (Matthew Bender)

For forms used in bankruptcy actions, see Collier Forms Manual (Matthew Bender)

For creditor's agreements and related forms, see California Legal Forms, Ch. 78, *Creditor's Agreements: Nonbankruptcy Alternatives* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor Relations

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9-94 California Forms of Pleading and Practice--Annotated § 94.71

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§ 94.71 Federal Constitution

Authority to adopt Bankruptcy Code. U.S. Const. art. I, § 8, Cl. 4

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9-94 California Forms of Pleading and Practice--Annotated § 94.72

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§ 94.72 Federal Statutes

Definitions. *11 U.S.C. § 101*

Rules of construction. *11 U.S.C. § 102*

Applicability of chapters. *11 U.S.C. § 103*

Dismissal or suspension of bankruptcy case. *11 U.S.C. § 305*

Reopening case for cause. *11 U.S.C. § 350(b)*

Stay of actions against debtor. *11 U.S.C. § 362*

Relief from bankruptcy stay. *11 U.S.C. § 362(d)*

Bankruptcy court is empowered to determine amount and legality of tax unless issue was contested in pre-petition administrative or judicial case or period allowed for contest of property tax has expired. *11 U.S.C. § 505(a)*

Exclusive jurisdiction of bankruptcy court to determine dischargeability of debts enumerated at *11 U.S.C. § 523(a)(2), (4)*-(6) (fraud, fiduciary defalcation, embezzlement, larceny, family law judgments including marital settlement agreements, and willful or malicious injury). *11 U.S.C. § 523(c)*; *28 U.S.C. §§ 157(b)(1), (2)(I), 1334*

Determination of exemptions, or property that may be exempted from the bankruptcy estate, under state law. *11 U.S.C. § 522*

Avoiding lien on exempt property. *11 U.S.C. § 522(f)*

Exceptions to discharge. *11 U.S.C. § 523*

Chapter 7: Liquidation and distribution of person's current assets. *11 U.S.C. § 701 et seq.*

Chapter 11: Reorganization. *11 U.S.C. § 1101 et seq.*

Order confirming Chapter 11 plan of individual discharges all dischargeable debts except to extent provided for by plan. *11 U.S.C. § 1141(d)(1), (2)*

Order confirming Chapter 11 plan of debtor other than individual does not discharge dischargeable debts if plan is liquidating and debtor does not engage in business after consummation of plan. *11 U.S.C. § 1141(d)(3)*

Chapter 12: Debt adjustment for family farmers and family fishermen. *11 U.S.C. § 1201 et seq.*

Chapter 13: Debt adjustment for individuals with regular income. *11 U.S.C. § 1301 et seq.*

Organization of bankruptcy courts and appointment of bankruptcy judges. *28 U.S.C. § 151 et seq.*

United States trustees. *28 U.S.C. §§ 581 et seq., 604, 959*

Jurisdiction, venue, and removal in bankruptcy proceedings. *28 U.S.C. §§ 1334, 1408 et seq., 1452*

Fees. *28 U.S.C. § 1930* and Appendix

Authority to promulgate Federal Rules of Bankruptcy Procedure and Forms. *28 U.S.C. § 2075*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysCodebtor StaysBankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewBankruptcy LawExemptionsGeneral OverviewBankruptcy LawPractice & ProceedingsJurisdictionGeneral OverviewBankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsEmbezzlement & Fraud

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9-94 California Forms of Pleading and Practice--Annotated § 94.73

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§ 94.73 Federal Bankruptcy Rules

Relief from bankruptcy stay. *Fed. R. Bankr. P., Rule 4001*

Request for relief from bankruptcy stay is contested matter. *Fed. R. Bankr. P., Rules 4001(a), 9014*

Debtor or creditor permitted to file application with bankruptcy court for determination of dischargeability of any debt. *Fed. R. Bankr. P., Rule 4007(a)*

Case may be reopened without additional filing fee at any time to determine dischargeability other than under *11 U.S.C. § 523(c). Fed. R. Bankr. P., Rule 4007(b)*

Complaint to determine dischargeability under *11 U.S.C. § 523(c)* must be filed within 60 days of first date set for meeting of creditors, except that on motion by Chapter 13 debtor for hardship discharge under *11 U.S.C. § 1328(b)*, court must enter order providing not less than 30 days' notice to creditors, fixing time for filing complaint to determine dischargeability of debts under *11 U.S.C. § 523(a)(6)* (willful and malicious injury). *Fed. R. Bankr. P., Rule 4007(c), (d)*

Complaint to determine discharge is adversary proceeding. *Fed. R. Bankr. P., Rules 4007(e), 7001(6)*

Case may be reopened on motion of debtor or other party. *Fed. R. Bankr. P., Rule 5010*

Motion for abstention. *Fed. R. Bankr. P., Rules 5011, 9033*

Default in bankruptcy cases. *Fed. R. Bankr. P., Rule 7055*

Notice of removal. *Fed. R. Bankr. P., Rule 9027*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawDischarge & DischargeabilityGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysGeneral OverviewBankruptcy LawCase AdministrationCommencementAbstentionBankruptcy LawCase AdministrationFiling FeesBankruptcy LawPractice & ProceedingsJurisdictionRemoval

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9-94 California Forms of Pleading and Practice--Annotated § 94.74

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§ 94.74 Decisions

[1] Burdens of Proof; Res Judicata

Certified copy of order of discharge is prima facie defense against collection of debt that existed on date bankruptcy petition was filed. *Kreitlein v. Ferger (1915) 238 U.S. 21, 26, 35 S. Ct. 685, 59 L. Ed. 1184*

Confirmed Chapter 13 plan providing for discharge of post-petition interest on student loan debt (even though post-petition interest actually was not dischargeable under Bankruptcy Code) was res judicata as to all issues that could have or should have been litigated at confirmation hearing, including discharge of post-petition interest; therefore, creditor could not raise its first objection after confirmation became final, and could not collect post-petition interest. *Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee) (9th Cir. 1999) 193 F.3d 1083, 1085-1086*

Final bankruptcy court order is entitled to res judicata effect in California court until reversed on appeal or modified or set aside in court of rendition. *Martin v. Martin (1970) 2 Cal. 3d 752, 758-764, 87 Cal. Rptr. 526, 470 P.2d 662*

[2] Chapter 11: Effect of Confirmed Plan

Even if *11 U.S.C. § 1141(a)* binds creditors with respect to claims that arose before confirmation, income tax returns must be filed (and related taxes paid) for periods after confirmation. *Holywell Corp. v. Smith (1992) 503 U.S. 47, 58, 112 S. Ct. 1021, 117 L. Ed. 2d 196, 207*

[3] Effect of Bankruptcy Proceeding

Bankruptcy proceeding does not, merely by virtue of its maintenance, terminate action already pending in

nonbankruptcy court, to which the bankrupt is party. *Connell v. Walker (1934) 291 U.S. 1, 5, 54 S. Ct. 257, 78 L. Ed. 613*

Bankruptcy Code did not preempt California bona fide purchaser statute as it applied to transaction in which Chapter 7 debtor, acting without trustee's authorization, sold debtor's home to purchaser who had neither actual nor constructive knowledge of bankruptcy proceeding; also applicable was established proposition that automatic stay triggered by filing of bankruptcy petition does not void transfers of estate property initiated by debtor; therefore, trustee was not entitled to recover property into estate. *Burkart v. Coleman (In re Tippett) (9th Cir. 2008) 542 F.3d 684, 686*

Discharge injunction [*11 U.S.C. § 524(a)(2)*] is validly applied to foreign creditor who submits to jurisdiction of bankruptcy court by filing proof of claim against Chapter 7 debtor. *Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon) (9th Cir. 1998) 153 F.3d 991, 997* .

Code Civ. Proc. § 356 extends applicable statute of limitation during pendency of bankruptcy stay. *Eistrat v. Cekada (1958) 50 Cal. 2d 289, 291-292, 324 P.2d 881*

State court may only stay action that is pending against defendant when defendant files bankruptcy petition; it has no power to dismiss action. *Traweek v. Finley, Kumble, etc. Myerson & Casey (1991) 235 Cal. App. 3d 1128, 1135, 1 Cal. Rptr. 2d 185*

[4] Jurisdiction

11 U.S.C. § 505(a)(1) grants U.S. district courts subject matter jurisdiction to review tax treatment of debtor's partnership items, notwithstanding requirement of Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) that tax treatment of partnership items ordinarily must be determined at partnership level. *Central Valley Ag Enters. v. United States (9th Cir. 2008) 531 F.3d 750, 753*

11 U.S.C. § 505, permitting bankruptcy court to determine certain tax liabilities of debtors, does not grant jurisdiction in case of partnership debtors to determine tax liability of nondebtor partners for partnership's activities. *American Principals Leasing Corp. v. United States (9th Cir. 1990) 904 F.2d 477, 480-481*

Sixty-day time limit of *Fed. R. Bankr. P., Rule 4007(c)* for filing complaints to determine dischargeability of debts is procedural, not substantive rule, and does not abridge substantive rights under *11 U.S.C. § 523*; motion for extension of time under *Fed. R. Bankr. P., Rule 9006(b)* must be made before 60-day period has expired, although some courts have allowed extension when late filing was result of plaintiff's good faith reliance on bankruptcy court's erroneous statement or action. *In re Hill (9th Cir. 1987) 811 F.2d 484, 486-487*

When state court judgment established amount of arrearages, bankruptcy court has jurisdiction only to determine nature and dischargeability of debt, not amount owing. *In re Comer (9th Cir. 1984) 723 F.2d 737, 740*

Election in prior state court action to proceed on contract grounds does not prohibit bankruptcy court determination of nondischargeability under *11 U.S.C. § 523(a)(2)*. *In re Gross (9th Cir. 1981) 654 F.2d 602, 604*

[5] Nondischargeable Debts

[a] Alimony, Maintenance, or Support Claims

Absent parent who owes money to county for child support payments is not entitled to discharge any portion of that Title IV-D debt, including any portion that may have accumulated before entry of court order. *County of Santa Cruz v.*

Cervantes (In re Cervantes) (9th Cir. 2000) 219 F.3d 955, 958 ; *Leibowitz v. County of Orange (In re Leibowitz) (9th Cir. 2000) 217 F.3d 799, 800*

Debtor/mother's court-apportioned share of fees and expenses for professional services arising from child custody proceeding, which involved false allegation of father's sexual abuse, was debt falling within child support discharge exception, and father and guardian ad litem were entitled to priority in debtor's Chapter 13 plan. *Beaupied v. Chang (In re Chang) (9th Cir. 1998) 163 F.3d 1138, 1141-1142*

Couple's election to extend support payments beyond remarriage not in conflict with intent to provide spousal support under California law, and debtor's obligation was nondischargeable as spousal support. *Friedkin v. Sternberg (In re Sternberg) (9th Cir. 1996) 85 F.3d 1400, 1406-1407*

Allowing modification of alimony based on discharge of property settlement. *Siragusa v. Siragusa (In re Siragusa) (9th Cir. 1994) 27 F.3d 406, 408*

Obligation to pay spouse percentage of pension is not support or maintenance and dischargeable; however, payments accruing after filing of petition are nondischargeable post-petition debts. *In re Teichman (9th Cir. 1985) 774 F.2d 1395, 1398-1400*

In determining whether obligation is support, court is not bound by designation in marital settlement agreement although provisions of agreement, including other sections entitled "support," are entitled to great weight; significant factors include whether other provisions are designated as for support, and whether payment in question terminates on specific date or event. *Stout v. Prussel (9th Cir. 1982) 691 F.2d 859, 861*

Attorney's fees payable by debtor in dissolution to spouse's attorney are in nature of support and are not dischargeable. *Jones v. Tyson (9th Cir. 1975) 518 F.2d 678, 680-681*

"Palimony" judgment is dischargeable debt that is not included under *11 U.S.C. § 523(a)(5)* as nondischargeable domestic support debt. *In re Doyle (B.A.P. 9th Cir. 1986) 16 Collier Bankr. Cas. 2d 761, 70 B.R. 106, 107-109, 15 Bankr. Ct. Dec. 700*

Attorney's and psychiatrist's fees incurred in custody dispute for benefit of nonbankrupt spouse and child of debtor, but payable only by bankrupt spouse, do not constitute support when nonbankrupt spouse had no liability for fees and therefore as dischargeable. *In re Linn (B.A.P. 9th Cir. 1984) 10 Collier Bankr. Cas. 2d 1049, 38 B.R. 762, 763, 12 Bankr. Ct. Dec. 24*

Attorney of one spouse has standing to file complaint to determine dischargeability of fees that court had ordered paid by other (bankrupt) spouse; order that fees be paid by nonincurring spouse is not assignment; fees not dischargeable if found to be support. *In re Gwinn (B.A.P. 9th Cir. 1982) 6 Collier Bankr. Cas. 2d 1114, 20 B.R. 233, 235*

Support obligation that debtor has been ordered to pay to county is nondischargeable. *In re Marriage of Henderson (1990) 225 Cal. App. 3d 531, 533-534, 275 Cal. Rptr. 226*

Fact that payments under settlement are nonmodifiable is not determinative of whether obligation is dischargeable. *Myhers v. Myhers (1970) 6 Cal. App. 3d 855, 858, 86 Cal. Rptr. 356*

Provision for periodic payments in settlement of property rights may provide that payments will cease on death or remarriage of spouse without transforming payments into nature of alimony, which is nondischargeable in bankruptcy. *Yarus v. Yarus (1960) 178 Cal. App. 2d 190, 201, 3 Cal. Rptr. 50*

[b] Debts Not Properly or Timely Scheduled

Debtor's failure to list creditor in no-assets, no-bar-date Chapter 7 bankruptcy (which prevents creditor's receiving notice of proceedings) does not justify revocation of discharge. *White v. Nielsen (In re Nielsen) (9th Cir. 2004) 383 F.3d 922, 925*

Giving notice of bankruptcy proceedings to creditor's attorney is insufficient in absence of showing that attorney was in fact agent of creditor; notice given to attorney who had represented creditor in suit against debtor is insufficient when notice was given after judgment in that suit had been entered. *Mizrahi v. Miscione (1967) 252 Cal. App. 2d 673, 677-678, 60 Cal. Rptr. 680*

Claim of creditor listed under wrong name is not discharged. *United States Credit Bureau v. Claus (1947) 79 Cal. App. 2d 85, 88-89, 179 P.2d 36*

Designation of city of residence without street and number is sufficient for discharge when debtor diligently attempted to discover full address. *Dill v. Hamilton (1946) 73 Cal. App. 2d 881, 884-886, 167 P.2d 497*

Listing of creditor in schedule without address is insufficient for discharge. *Marlenee v. Warkentin (1945) 71 Cal. App. 2d 177, 179-180, 162 P.2d 321*

[c] Fiduciary Defalcation

Taking funds from joint tenancy bank account under good faith belief of entitlement creates resulting trust, but debt is neither fiduciary defalcation nor willful or malicious injury, so debt is dischargeable. *In re Cooper (B.A.P. 9th Cir. 1982) 30 B.R. 484, 489*

[d] Fines, Penalties, and Forfeitures

Attorney disciplinary costs imposed by California State Bar Court pursuant to *Bus. & Prof. Code § 6086.10*, as amended in 2003 by addition of subdivision (e) specifying that those costs are penalties, are excepted from discharge in bankruptcy pursuant to *11 U.S.C. § 523(a)(7)*. *State Bar v. Findley (In re Findley) (9th Cir. 2010) 593 F.3d 1048, 1053-1054* , *distinguishing State Bar v. Taggert (In re Taggert) (9th Cir. 2001) 249 F.3d 987* (holding that disciplinary costs were dischargeable, based on legislative intent inferrable from *Bus. & Prof. Code § 6086.10* as it existed before 2003 amendment)

Sanction for contempt of court imposed by bankruptcy court on nonparty (such as sole shareholder of bankrupt corporation) could be nondischargeable under *11 U.S.C. § 523(a)(7)*, but court has no power to adjudicate and decree nondischargeability of debt for sanction at time of imposing it because contemnor is not then in court as bankruptcy petitioner. *Hansbrough v. Birdsell (In re Hercules Enters.) (9th Cir. 2004) 387 F.3d 1024, 1029*

State and federal restitution orders are nondischargeable fines, penalties, or forfeitures. *In re Soderling (9th Cir. 1993) 998 F.2d 730, 732*

Fine for failure to appear on traffic violation is dischargeable in Chapter 13, although not in Chapter 7. *In re Young (Bankr. S.D. Cal. 1980) 3 Collier Bankr. Cas. 2d 145, 10 B.R. 17, 18-19*

[e] Fraud

If claim arising under *11 U.S.C. § 550* (because of trustee's recovery of property after avoidance of transfer such as preferential payment by debtor to creditor) is determined to be nondischargeable under *11 U.S.C. § 502(h)* (claim arising from recovery of property under section 550 shall be determined as if such claim had arisen before date of filing of petition), and nondischargeability is based on *11 U.S.C. § 523(a)(4)* because of embezzlement or similar act, then *11 U.S.C. § 523* permits that reinstated claim to be pursued against debtor personally. *Busseto Foods, Inc. v. Laizure (In re Laizure) (9th Cir. 2008) 548 F.3d 693, 697-698*

Because debt of unlicensed contractor that is liable for disgorgement of compensation under *Bus. & Prof. Code § 7031(b)* (unlicensed contractor is strictly liable for "all compensation paid to the unlicensed contractor for performance of any act or contract") did not arise or flow from contractor's fraudulent conduct, whether or not contractor falsely represented that contractor was licensed, that debt is not subject to *11 U.S.C. § 523(a)(2)(A)* and therefore is dischargeable. *Ghomeshi v. Sabban (In re Sabban) (B.A.P. 9th Cir. 2008) 384 B.R. 1, 7 , aff'd, 600 F.3d 1219, 2010 U.S. App. LEXIS 7538 (2010)*

Claim that debt is not dischargeable because of debtor's misrepresentation requires creditor's reliance on misrepresentation to be justifiable; relying on debtors' representations rather than obtaining a title report on property used as security for loan is not justifiable because the lender's administrator was both an experienced business attorney who knew obtaining a title report was standard practice and also a close personal friend of the debtors who knew that the debtors were in serious financial difficulties. *In re Kirsh (9th Cir. 1992) 973 F.2d 1454, 1457-1461* (disapproving language in *In re Siriani (9th Cir. 1992) 967 F.2d 302, 304* , suggesting that standard is "reasonable reliance")

Lender's fraud claim based on misrepresentations relating to validity of accounts receivable that secured loan is nondischargeable and not barred by *Code Civ. Proc. § 580a* after foreclosure of debtor's residence, mortgage on which was taken is additional security one year after initial advance. *In re Franklin (9th Cir. 1991) 922 F.2d 536, 543*

Debtor, who was accountant and who fraudulently induced creditors to make loans to third party, is closely enough related to third party to benefit from infusion of capital represented by loans to render debt nondischargeable under *11 U.S.C. § 523(a)(2)*. *In re Ashley (9th. Cir. 1990) 903 F.2d 599, 604*

[f] Restitution

Restitution imposed by state criminal court as part of criminal sentence is nondischargeable debt under *11 U.S.C. § 523(a)(7)* in Chapter 7 case. *Kelly v. Robinson (1986) 479 U.S. 36, 50-53, 107 S. Ct. 353, 93 L. Ed. 2d 216*

[g] Taxes

Chapter 13 debtor's California income tax liability was discharged after completion of plan because petition had scheduled Franchise Tax Board as creditor (with estimation of amount owed), and FTB duly received notice of creditors' meeting and of bar date for government claims, in compliance with applicable statutory requirements for notice, yet in spite of receiving constitutionally adequate notice of its right to obtain payment, FTB ignored notice and did not file proof of claim. *Joye v. Franchise Tax Bd. (In re Joye) (9th Cir. 2009) 578 F.3d 1070, 1079-1081*

Creditor's claim by governmental entity cannot have priority as "excise tax" [*11 U.S.C. § 507(a)(8)(E)(ii)*] unless claim is for involuntary pecuniary burden, regardless of name, laid on individuals or property, which was imposed by, or under authority of, legislature for public purposes, including purposes of defraying expenses of government or undertakings authorized by it, and which was imposed under police or taxing power of state; but even if that test is met, government's claim will not have priority if any creditor similarly situated to government can be hypothesized under relevant statute, or if pecuniary obligation was not universally applicable to similarly situated entities, or if private

creditors with like claims would be disadvantaged by according priority treatment to government's claim. *Cal. Self-Insurers Sec. Fund v. Lorber Indus. (In re Lorber Indus.) (9th Cir. 2009) 564 F.3d 1098, 1101* (claim for reimbursement of worker's compensation benefits that California Self-Insurers' Security Fund paid to bankrupt company's employees was not entitled to priority as excise tax because there could have been private creditors similarly situated to government)

For purposes of determining dischargeability of California income taxes [*see 11 U.S.C. §§ 507(a)(8)(A)(ii), 523(a)(1)(A)* (not dischargeable if assessed within 240 days before date petition was filed)], taxes are assessed on date notice of proposed additional tax becomes final, that is, 60 days after mailing, if no protest is filed [*see* former *Rev. & Tax. Code § 18590* (*now Rev. & Tax. Code § 19041*)]. *In re King (9th Cir. 1992) 961 F.2d 1423, 1427*

To establish nondischargeability based on tax fraud [*see 11 U.S.C. § 523(a)(1)(C)*], IRS is required to prove statutory civil fraud under *I.R.C. § 6653(b)*; criminal fraud conviction under *I.R.C. § 7206* does not establish all elements of civil fraud, but debtor's unqualified concession at trial does. *McKay v. United States (9th Cir. 1992) 957 F.2d 689, 691-692*

Penalties imposed with respect to transaction or event that occurred before three years before filing of petition [*11 U.S.C. § 523(a)(7)(B)*] are dischargeable, even if taxes were not dischargeable based on tax-fraud exception [*11 U.S.C. § 523(a)(1)(C)*]. *McKay v. United States (9th Cir. 1992) 957 F.2d 689, 693-694*

Claim of title insurer for taxes it paid is dischargeable; taxes not entitled to priority are dischargeable. *In re Kisich (B.A.P. 9th Cir. 1983) 28 B.R. 401, 403*

[h] Willful and Malicious Injury

Claim for attorney's fees, wrongly withheld in breach of fee-splitting agreement, could not be treated as nondischargeable under *11 U.S.C. § 523(a)(6)* if attorney did not have lien under California law (in which case, claim was simply unsecured and dischargeable); attorney basing claim on contract to represent minor could not have lien unless contract was approved by court pursuant to *Fam. Code § 6602*. *Del Bino v. Bailey (In re Bailey) (9th Cir. 1999) 197 F.3d 997, 1000-1002*

Breach of contractual right of first refusal is not the type of willful and malicious property damage that is a nondischargeable debt under *11 U.S.C. § 523(a)(6)*; exceptions to discharge are strictly construed so that statute applies to intentional breaches of contract only if accompanied by malicious and willful tortious conduct. *In re Riso (9th Cir. 1992) 978 F.2d 1151, 1154*

Damages for intentional cutting of neighbor's tree is nondischargeable, including proper exemplary damages. *In re Glazer (B.A.P. 9th Cir. 1982) 25 B.R. 329, 330*

[6] Nondischargeable Orders

State court order requiring debtor to convey property does not involve right to payment, and thus is neither "debt" nor "claim" and is enforceable in state court after debtor's general discharge in bankruptcy. *Rayan v. Dykeman (1990) 224 Cal. App. 3d 1629, 1635-1636, 274 Cal. Rptr. 672* ; *cf. Ohio v. Kovacs (1985) 469 U.S. 274, 278-283, 105 S. Ct. 705, 83 L. Ed. 2d 649* (injunction to clean up hazardous waste site that had been reduced to monetary obligation is dischargeable debt)

[7] Preemption of State Law

Transfer of security interest is "perfected" under *11 U.S.C. § 547(c)(3)(B)* on date secured party has completed steps necessary to perfect its interest, so that creditor may invoke enabling-loan exception only by satisfying state law perfection requirements within period provided by that federal statute. *Fidelity Fin. Servs., Inc. v. Fink (1998) 522 U.S. 211, 212, 118 S. Ct. 651, 652, 139 L. Ed. 2d 571*

States may not pass or enforce laws to interfere with or complement Bankruptcy Code or to provide additional or auxiliary regulations. *International Shoe Co. v. Pinkus (1929) 278 U.S. 261, 263-265, 49 S. Ct. 108, 73 L. Ed. 318*

Bus. & Prof. Code § 10233.2, which, under limited circumstances, permits perfection of security interests without possession of notes and trust deeds that were assigned as security, can apply to protect security interests of investors in bankrupt company. *Nielson v. Chang (In re First T.D. & Inv. Inc.) (9th Cir. 2001) 253 F.3d 520, 531*

Decision of state administrative law judge regarding scope of bankruptcy stay does not preclude bankruptcy court's independent review. *Contractors' License Bd. v. Dunbar (In re Dunbar) (9th Cir. 2001) 245 F.3d 1058, 1062-1063*

Federal courts are not bound by state court modifications of bankruptcy stay, but bankruptcy stay does not enjoin state criminal prosecutions. *Gruntz v. County of Los Angeles (In re Gruntz) (9th Cir. 2000) 202 F.3d 1074, 1087*

Bankruptcy Code preempts all state laws that conflict with *Code. National Collection Agency, Inc. v. Trahan (9th Cir. 1980) 624 F.2d 906, 907*

[8] Timely Filing of Complaint to Determine Dischargeability

Fed. R. Bankr. P., Rule 4004 (grant or denial of discharge), prescribing time for filing complaint objecting to discharge, is not jurisdictional; debtor forfeits right to rely on Rule 4004 if debtor does not raise rule's time limitation before bankruptcy court reaches merits of creditor's objection to discharge. *Kontrick v. Ryan (2004) 540 U.S. 443, 447, 124 S. Ct. 906, 157 L. Ed. 2d 867*

What is excusable neglect is equitable determination, taking account of all relevant circumstances surrounding party's omission. *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. P'ship (1993) 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed. 2d 74*

Holidays that are recognized by California courts as judicial holidays will not be counted in determining time for filing complaint under *Fed. R. Bankr. P., Rule 4004*. *Dwyer v. Duffy (In re Dwyer) (9th Cir. 2005) 426 F.3d 1041, 1044* (day after Thanksgiving is California judicial holiday)

Excusable neglect standard of *Fed. R. Bankr. P., Rule 9006(b)*, articulated by Supreme Court in *Pioneer Investment* case, *above*, applies to 120-day service period prescribed by *Fed. R. Civ. P., Rule 4(m)*. *Oyama v. Sheehan (In re Sheehan) (9th Cir. 2001) 253 F.3d 507, 513-514*

When creditor's nondischargeability complaint was dismissed in Chapter 11 proceeding solely because it was filed too late, that dismissal did not create res judicata bar to filing of new nondischargeability complaint following conversion of case to Chapter 7 proceeding. *Classic Auto Refinishing, Inc. v. Marino (In re Marino) (9th Cir. 1999) 181 F.3d 1142, 1146*

Motion for relief from stay is not complaint to determine dischargeability for purpose of limitation periods. *In re Kennerley (9th Cir. 1993) 995 F.2d 145, 146*

Order granting partial relief from stay does not extend time for filing nondischargeability complaint. *In re Kennerley*

(9th Cir. 1993) 995 F.2d 145, 147

Fed. R. Bankr. P.4004(a) and *4007(c)*, leave court no discretion in setting time for filing complaints to determine dischargeability or, absent motion, in extending time for filing; but court has equitable power to allow complaint filed before second bar date when creditor received notice setting forth second date from court to which case was transferred. *In re Anwiler (9th Cir. 1992) 958 F.2d 925, 927-930*

Liberal standard is used to determine "excusable neglect" to allow late filing of complaint to determine dischargeability of debt; factors considered include prejudice to debtor, delay in administration of case, creditor's good faith, whether delay was beyond creditor's control, and that creditor should not suffer for counsel's mistake. *In re Magouirk (9th Cir. 1982) 693 F.2d 948, 950-951*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawReorganizationsGeneral OverviewBankruptcy LawDischarge & DischargeabilityGeneral OverviewBankruptcy LawPractice & ProceedingsJurisdictionGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataCivil ProcedureFederal & State InterrelationshipsFederal Common LawPreemption

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PART III. RESEARCH GUIDE

9-94 California Forms of Pleading and Practice--Annotated § 94.75

AUTHOR: Reviewed by John A. Vos Mr. Vos is a member of the State Bar of California and maintains a practice in San Rafael, California. Mr. Vos practices in the area of bankruptcy, representing creditors, debtors, and trustees.

§ 94.75 Law Reviews

Cieri & Morgan, *Licensing Intellectual Property and Technology From the Financially-Troubled or Startup Company: Prebankruptcy Strategies to Minimize the Risk in a Licensee's Intellectual Property and Technology Investment, 55 Bus. Law. 1649 (Aug. 2000)*

Good & Wyman, *Representing Consumer Debtors: Fiduciary Duties of Counsel*, 45(2) Prac. Law. 27 (Mar. 1999)

Marks, *Anything You Can Do, I Can Do Better: Why a Debtor Should File Under Chapter 7 Rather Than Chapter 13*, 45(1) Prac. Law. 85 (Jan. 1999)

Note, *Property Transfers Under Section 727 of the Bankruptcy Code: Defining the Moment of Transfer, 72 S. Cal. L. Rev. 1179 (May 1999)*

Note, *First-to-File, Last-in-Line: After Jones v. Haskett, Creditors Dragged Into Bankruptcy Lose the State Law Race of the Diligent, 33 U.S.F. L. Rev. 285 (Winter 1999)*

Duca, *The Interaction Between Mechanic's Lien Law and the Bankruptcy Code, 53 Bus. Law. 1283 (Aug. 1998)*

Godshall & Gilhuly, *The Involuntary Bankruptcy Petition: The World's Worst Debt Collection Device? 53 Bus. Law. 1315 (Aug. 1998)*

Kupetz, *The Bankruptcy Code Is Part of Every Contract: Minimizing the Impact of Chapter 11 on the Non-Debtor's Bargain, 54 Bus. Law. 55 (Nov. 1998)*

Vilaplana, *A Pre-Pack Bankruptcy Primer*, 44(2) Prac. Law. 33 (Mar. 1998)

Jackson, *Bringing Bankruptcies to Foil Foreclosures,* 43(1) Prac. Law. 19 (Jan. 1997)

Camp, *Bound by the BAP: The Stare Decisis Effects of BAP Decisions, 34 San Diego L. Rev. 1643 (Fall 1997)*

Cohen, *Bankruptcy and Limited Liability Entities (Part 1),* 42(3) Prac. Law. 61 (April 1996)

Cohen, *Bankruptcy and Limited Liability Entities (Part 2),* 42(4) Prac. Law. 77 (June 1996)

McClain & Haley, *Should the Judgment Debtor File for Bankruptcy?* 42(1) Prac. Law. 59 (Jan. 1996)

Miles, *Bankruptcy Relief From Secured Tax Liens,* 42(3) Prac. Law. 35 (Apr. 1996)

Miles, *Discharging Tax Liability in Bankruptcy,* 42(2) Prac. Law. 41 (Mar. 1996)

Reed, *Successor Liability and Bankruptcy Sales, 51 Bus. Law. 653 (May 1996)*

Atlas, *Mediation in Bankruptcy Cases (Part 1),* 41(6) Prac. Law. 39 (Sept. 1995)

Reece & Ashby, *Pre-Bankruptcy Foreclosures After BFP,* 41(1) Prac. Law. 59 (Jan. 1995)

Reilly, *Valuation of Intangible Assets in Bankruptcy,* 41(5) Prac. Law. 41 (July 1995)

Sheinfeld, *Small Business and Single Asset Real Estate Bankruptcies,* 41(6) Prac. Law. 17 (Sept. 1995)

Taggart, *An Introduction to the Bankruptcy Reform Act of 1994,* 41(2) Prac. Law. 55 (Mar. 1995)

Comment, *Environmental Claims in Bankruptcy: It's a Question of Priorities, 32 San Diego L. Rev. 221 (Winter 1995)*

Comment, *Determining Insider Status Under Bankruptcy Code Section 547(b)(4)(B): When "I Resign" May Not Be Enough to Terminate Insider Status, 41 UCLA L. Rev. 1541 (Aug. 1994)*

Glassman, *Third-Party Injunctions in Partnership Bankruptcy Cases, 49 Bus. Law. 1081 (May 1994)*

Starr, *Benefits of Bankruptcy for the Insolvent Tax Debto* r, 28 Bev. Hills B. Ass'n. J. 34 (Winter 1994)

Byrne, *Escrows and Bankruptcy, 48 Bus. Law 761 (Feb. 1993)*

Carlson, *Postpetition Security Interests Under the Bankruptcy Code, 48 Bus. Law 483 (Feb. 1993)*

Donahue & Edwards, *The Treatment of Assignments of Rents in Bankruptcy: Emerging Issues Relating to Perfection, Cash Collateral, and Plan Confirmation, 48 Bus. Law 633 (Feb. 1993)*

Lieb, *Vultures Beware: Risks of Purchasing Claims Against a Chapter 11 Debtor, 48 Bus. Law. 915 (May 1993)*

Moore, *Entertainment Bankruptcies: The Copyright Act Meets the Bankruptcy Code, 48 Bus. Law. 567 (Feb. 1993)*

Bradley & Rosenzweig, *The Untenable Case for Chapter 11, 101 Yale L.J. 1043 (Mar. 1992)*

Gilbert & Streeter, *Film Industry Bankruptcy: Securing the Right to Payment Before It Happens,* 26 Bev. Hills B. Ass'n

J. 175 (Fall 1992)

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawReorganizationsGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewLegal EthicsClient RelationsEffective RepresentationBankruptcy LawCase AdministrationAdministrative PowersStaysRemediesInvalidity of Improper ActionsBankruptcy LawCase AdministrationAdministrative PowersStaysCoverageLiens

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9-94 California Forms of Pleading and Practice--Annotated §§ 94.76-94.79

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[Reserved]

§§ 94.76[Reserved]

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9-94 California Forms of Pleading and Practice--Annotated § 94.80

AUTHOR: Reviewed by John A. Vos Mr. Vos is a member of the State Bar of California and maintains a practice in San Rafael, California. Mr. Vos practices in the area of bankruptcy, representing creditors, debtors, and trustees.

§ 94.80 Application for Ex Parte Order Reopening Case to File Lien Avoidance Action

[1] FORM Application for Ex Parte Order Reopening Case to File Lien Avoidance Action

UNITED STATES BANKRUPTCY COURT
_____ DISTRICT OF CALIFORNIA

	)	
In re _____ [*name(s)*],	)	Case No. _____
Debtor(s).	)	Chapter _____
	)	

_____

EX PARTE APPLICATION FOR ORDER TO REOPEN CASE

To: The Honorable _____, United States Bankruptcy Judge.

The application of _____ [*names*], by _____ [*name*], their attorney, respectfully represents:

1. An order for relief under Chapter 7 of the United States Code was entered pursuant to a voluntary petition filed by the

Debtors on _____ [*date*], and a discharge was entered on _____ [*date*].

2. At the time of filing their schedules, Debtors listed _____ [*name*] as an unsecured creditor, unaware that any litigation had been commenced, which resulted in a pre-petition judgment lien against Debtors' real property.

3. Within the past week Debtors first became aware that the lien exists.

4. There is less than $50,000 equity in the property and has been since the petition date; the lien impairs Debtors' homestead and is avoidable.

[5. Because the reopening of the case will not affect property of the Chapter 7 estate, it is not necessary that a Chapter 7 Trustee be appointed.]

WHEREFORE, Debtors pray for an order directing that their base case be reopened so that a lien avoidance action may be filed to remove _____ [*name*]'s lien from their home.
Dated: _____.

_____ [*signature*]
Attorney for Applicant
_____ [*address*]
_____ [*telephone*]

[2] Use of Form

The form in [1], *above*, is an ex parte application to reopen a case. It is for use by a debtor to reopen a closed bankruptcy case in order to file a lien avoidance action relating to the debtor's real property [*see Culver, LLC v. Chiu (In re Chiu) (9th Cir. 2002) 304 F.3d 905, 908* (debtor could reopen to avoid lien that impaired debtor's homestead exemption); *In re Dodge (E.D. Cal. 1992) 138 B.R. 602, 607]* . This application is considered a motion and may be served on the debtor and, if known, the debtor's attorney [*Fed. R. Bankr. P., Rules 5010, 9013*]. Because the reopening of a bankruptcy case is a simple mechanical device and the merits of the case are not considered at this point [*see In re Daniels (9th Cir. 1983) 34 B.R. 782, 784]* , the motion to reopen made be made ex parte, and in that case, need not be served on the other parties [*Fed. R. Bankr. P., Rule 9013*; *see In re Schreiber (2d Cir. 1928) 23 F.2d 428, 430 , cert. denied, 277 U.S. 593, 48 S. Ct. 529, 72 L. Ed. 1005 (1928)]* .

There is no time limit for reopening a case to determine the dischargeability of a debt of the types enumerated at *11 U.S.C. § 523(a)*, and no filing fee is required [*Fed. R. Bankr. P., Rules 4007(b), 5010*; Advisory Committee Notes to Rule 5010]. However, an undue and inordinate delay may result in refusal to reopen a case [*see Hull v. Powell (9th Cir. 1962) 309 F.2d 3, 4-5* (23-year delay excessive)].

Optional paragraph 5 is provided to direct the court not to reappoint a trustee.

For a form for an order reopening a case, see *§ 94.81*.

PRACTICE TIP:

All bankruptcy courts are now paperless. Any practitioner who anticipates filing more than an occasional pleading in any bankruptcy court would be prudent to contact the clerk of the court for a login and password, and to take the brief training class. *Commentary by John A. Vos.*

[3] Caption

The caption must include the name of the court, the title of the case, the bankruptcy docket number, and a brief

designation of the character of the paper [*Fed. R. Bankr. P., Rule 9004(b)*]. This form may use the short form caption, containing merely the name of the debtor or joint debtors [*see* Advisory Committee Note to Official Form 16B].

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§ 94.81 Order Reopening Case

[1] FORM Order Reopening Case

UNITED STATES BANKRUPTCY COURT
_____ DISTRICT OF CALIFORNIA

	)	
In re _____ [*name(s)*],	)	Case No. _____
Debtor(s).	)	Chapter _____
	)	

_____

ORDER GRANTING EX PARTE APPLICATION FOR ORDER
REOPENING CASE

On reading the ex parte application presented by the Debtor this date and good cause appearing, now therefore,

IT IS ORDERED that:

1. Debtor's base case is reopened; and

2. No trustee need be appointed.
Dated: _____.

_____ [*signature*]
United States Bankruptcy Judge

[2] Use of Form

The form in [1], *above*, is an order granting an applicant's motion to reopen a bankruptcy case. A case may be reopened on motion of the debtor or any other interested party [*Fed. R. Bankr. P., Rule 5010*; *see 11 U.S.C. § 350(b)*].

For a form for an application to reopen a bankruptcy case, see *§ 94.80*.

[3] Caption

The caption must include the name of the court, the title of the case, the bankruptcy docket number, and a brief designation of the character of the paper [*Fed. R. Bankr. P., Rule 9004(b)*]. This form may use the short form caption, containing merely the name of the debtor or joint debtors [*see* Advisory Committee Note to Official Form 16B].

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9-94 California Forms of Pleading and Practice--Annotated § 94.82

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§ 94.82 Notice of Motion to Avoid Lien, Motion, and Notice of Opportunity to Be Heard

[1] FORM Notice of Motion to Avoid Lien, Motion, and Notice of Opportunity to Be Heard

UNITED STATES BANKRUPTCY COURT
_____ DISTRICT OF CALIFORNIA

	)	
	)	Base Case No. _____
In re _____ [*name(s)*],	)	Chapter _____
Debtor(s).	)	A/L No.: _____
	)	

_____

NOTICE OF MOTION TO AVOID LIEN, MOTION, AND NOTICE
OF OPPORTUNITY TO BE HEARD

TO: _____ [*name and address of creditor*]

PLEASE TAKE NOTICE that the Debtor _____ [*name*] will make application to the court without further notice to you for an order avoiding your purported nonpurchase money lien in real property of the Debtor.

Debtor is informed and believes and thereon alleges that the lien arises by virtue of an abstract of judgment recorded _____ [*date*] as _____ [*name*] County Recorder's Document _____ [*number*].

That property is exempt property and properly the subject of an avoidance motion in accordance with _____ [*specify, e.g.,* Section 522(f)(2)] of Title 11 of the United States Code]. This property is commonly known as follows: _____ [*specify, e.g.,* All the Debtor's right, title, and interest in 123 Pearl Street, Alameda, California *or* the homestead proceeds of sale of 123 Pearl Street, Alameda, California *or* exempt household furniture and furnishings of the Debtor]. The basis for the claim of exemption is that the Debtor scheduled, and the court allowed by operation of law [or will allow], that property to be exempt as the Debtor's homestead under *California Code of Civil Procedure Section 704.710 et seq.*

An application for a court order avoiding your lien shall be presented to the court not earlier than 35 days from the date hereof.

MOTION TO AVOID LIEN

1. Debtor filed this Chapter 7 case on _____ [*date*].

2. This motion is brought pursuant to Title *11, United States Code, Section 522(f)(1)*, and *Federal Rules of Bankruptcy Procedure, Rule 4003(d)*, to avoid judicial lien(s) on Debtor's residence located at _____ [*address*], California.

3. On or about _____ [*date*], Judgment Creditor _____ [*name*], caused to be recorded an abstract of judgment with the _____ [*name*] County Recorder, as instrument number _____ [*number*].

4. Debtor is entitled to a $75,000 homestead exemption. He/She owes a total of approximately $_____, secured by two deeds of trust on the aforementioned property. These two liens are ahead of the abstract of _____ [*name*].

5. The value of the Debtor's residence is approximately $_____, and after deducting costs of sale of $_____ [at 10 percent], the loan secured by the deeds of trust, the Debtor has no net equity in the property above and beyond the homestead exemption.

6. The aforementioned abstract of judgment is a judicial lien impairing the Debtor's homestead exemption under *California Code of Civil Procedure Section 704.730*.

7. Pursuant to Title *11, United States Code, Section 522(f)(1)*, the Debtor may avoid the fixing of the lien to the extent that the lien impairs an exemption to which the Debtor is entitled.

8. Debtor so moves.

NOTICE OF OPPORTUNITY TO BE HEARD

No response is required of you under *Federal Rules of Bankruptcy Procedure, Rule 9014*. However, if you fail to file and serve responsive papers with the Clerk of the Court and with Debtor's counsel, the matter will proceed by default without a formal hearing and the application likely will be granted. If you request a hearing, then it will be heard at the

hour of _____ [*time*] before the United States Bankruptcy Court located at _____ [*address*], California.
Dated: _____.

_____ [*signature*]
Attorney for Movant
_____ [*address*]
_____ [*telephone*]

[2] Use of Form

The form in [1], *above*, is a notice of motion, motion, and notice of opportunity to be heard in a lien avoidance action [*see Fed. R. Bankr. P., Rule 4003(d)*]. This form is prepared by the debtor, filed with the court, and sent to the creditors and other lienholders to afford them an opportunity to respond [*Fed. R. Bankr. P., Rule 9014*].

For an application for default on motion to avoid a lien, see *§ 94.84*. For orders avoiding liens, see *§§ 94.85*, *94.86*.

[3] Avoiding Liens

A debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that the lien impairs an exemption to which the debtor would have been entitled under *11 U.S.C. § 522*, if the lien is a judicial lien (except one securing a nondischargeable debt for support) or a nonposessory, nonpurchase-money security interest in specified personal property [*11 U.S.C. § 522(f)(1)*]. A judicial lien to secure a bona fide debt for a domestic support obligation [*see 11 U.S.C. § 101(14A)* (definition)] cannot be avoided [*see 11 U.S.C. § 547(c)(7)*].

[4] Caption

The caption must include the name of the court, the title of the case, the bankruptcy docket number, and a brief designation of the character of the paper [*Fed. R. Bankr. P., Rule 9004(b)*]. This form may use the short form caption, containing merely the name of the debtor or joint debtors [*see* Advisory Committee Note to Official Form 16B].

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9-94 California Forms of Pleading and Practice--Annotated § 94.83

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§ 94.83 Opposition to Motion to Avoid Lien

[1] FORM Opposition to Motion to Avoid Lien

UNITED STATES BANKRUPTCY COURT
_____ DISTRICT OF CALIFORNIA

	)	
	)	Base Case No. _____
In re _____ [*name(s)*],	)	Chapter _____
Debtor(s).	)	A/L No.: _____
	)	

_____

OPPOSITION TO MOTION TO AVOID LIEN

CREDITOR comes now and opposes the motion to avoid lien on the grounds that:

_____ [*Specify ground(s) for opposition, e.g.,*

1. The motion is not supported by competent evidence.

2. There is insufficient evidence of the amount and nature of liens ahead of this Creditor.

3. The lien was a consensual lien.

4. The lien arises by virtue of a judgment issued by the Family Law Court in favor of claimant (attach copy).

5. The property sought to be exempt is not exempt because _____ (*state ground, e.g.,* A debtor can have only one homestead at any given time)].
Dated: _____.

_____ [*signature*]
Attorney for Creditor
_____ [*address*]
_____ [*telephone*]

[2] Use of Form

The form in [1], *above*, is an opposition to a debtor's motion to avoid a lien on exempt property. It is used by a creditor in an effort to ensure that the creditor's lien will remain in effect [*11 U.S.C. § 522(c)(2)*; *see 11 U.S.C. § 522(f)* (avoiding lien)].

In contested matters not otherwise governed, relief is requested by motion, and reasonable notice and opportunity for hearing must be afforded the party against whom relief is sought [*Fed. R. Bankr. P., Rule 9014*]. This opposition is filed in response to the debtor's motion to avoid a lien [*see § 94.82*]. A creditor may object to the debtor's motion by challenging the validity of the exemption asserted to be impaired by the lien [*Fed. R. Bankr. P., Rule 4003(d)*].

PRACTICE TIP:
All bankruptcy courts are now paperless. Any practitioner who anticipates filing more than an occasional pleading in any bankruptcy court would be prudent to contact the clerk of the court for a login and password, and to take the brief training class. *Commentary by John A. Vos.*

[3] Caption

The caption must include the name of the court, the title of the case, the bankruptcy docket number, and a brief designation of the character of the paper [*Fed. R. Bankr. P., Rule 9004(b)*]. This form may use the short form caption, containing merely the name of the debtor or joint debtors [*see* Advisory Committee Note to Official Form 16B].

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AUTHOR: Reviewed by John A. Vos Mr. Vos is a member of the State Bar of California and maintains a practice in San Rafael, California. Mr. Vos practices in the area of bankruptcy, representing creditors, debtors, and trustees.

§ 94.84 Application for Default on Motion to Avoid Lien

[1] FORM Application for Default on Motion to Avoid Lien

UNITED STATES BANKRUPTCY COURT
_____ DISTRICT OF CALIFORNIA

	)	
	)	Base Case No. _____
In re _____ [*name(s)*],	)	Chapter _____
Debtor(s).	)	A/L No.: _____
	)	

_____

APPLICATION FOR DEFAULT ON MOTION TO AVOID LIEN

Debtor comes now and makes application for an order avoiding the purported nonpurchase money lien of _____ [*name of creditor*] in exempt _____ [real *or* personal] property of the Debtor.

The basis for this application is that the lien impairs an exemption of the Debtor allowed by Title *11, United States Code, Section 522(f)*. All of the Debtor's interest in the _____ [real *or* personal] property commonly

known as _____ [*specify, e.g.,* 123 Pearl Street, Alameda, California], was determined to be, and is, exempt.

_____ [*Name of creditor*] _____ [recorded on _____ (*date*) as _____ (*name*) County Recorder's Number _____ an abstract of judgment against the Debtor *or* holds a nonpurchase money lien in personal goods of the Debtor, generally described as follows: _____ (*describe*)].

Notice of opportunity for hearing was provided to the Creditor _____ [*name*] on _____ [*date*] [*add if applicable:*, a copy of which is attached]; no request for hearing has been made or received from that Creditor.

WHEREFORE, the Debtor prays that this court issue an order avoiding lien as to that nonpurchase money involuntary judicial lien affecting exempt real property of the Debtor.

Dated: _____

_____ [*signature*]
Attorney for Debtor
_____ [*address*]
_____ [*telephone*]

[2] Use of Form

The form in [1], *above*, is an application for default on motion to avoid a lien on exempt property. It is used by a debtor to request an order avoiding a lien, when the debtor has moved for such an order an no opposition was filed by the creditor in question [*11 U.S.C. § 522(f)*; *see Fed. R. Bankr. P., Rule 9013* (request for order on motion)]. For a motion to avoid a lien, see *§ 94.82*.

In contested matters not otherwise governed, relief is requested by motion, and reasonable notice and opportunity for hearing must be afforded the party against whom relief is sought [*Fed. R. Bankr. P., Rule 9014*]. This application is filed by the debtor in response to the creditor's failure to respond to the creditor's previously filed motion to avoid lien [*see § 94.82*].

For two forms for orders avoiding lien, see *§§ 94.85*, *94.86*.

[3] Judgment on Default

Bankruptcy law provides that *Fed. R. Civ. P., Rule 55*, concerning default, applies to adversary proceedings [*Fed. R. Bankr. P., Rule 7055*]. Rule 55 provides that when a party against whom judgment is sought fails to plead or otherwise defend, the clerk of the court may enter the party's default [*Fed. R. Civ. P., Rule 55(a)*; *see Civic Ctr. Square v. Ford (In re Roxford Foods) (9th Cir. 1993) 12 F.3d 875, 879]* .

This application requests an entry of default when a creditor has failed to respond to the debtor's motion to avoid lien [*see § 94.82*].

For a form for a judgment by default, see Procedural Form B 261.

[4] Caption

The caption must include the name of the court, the title of the case, the bankruptcy docket number, and a brief

designation of the character of the paper [*Fed. R. Bankr. P., Rule 9004(b)*]. This form may use the short form caption, containing merely the name of the debtor or joint debtors [*see* Advisory Committee Note to Official Form 16B].

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Volume 9: Bailments thru Boats and Boating-Chs. 93-100
Chapter 94 BANKRUPTCY
PART IV. FORMS
A. Lien Avoidance

9-94 California Forms of Pleading and Practice--Annotated § 94.85

AUTHOR: Reviewed by John A. Vos Mr. Vos is a member of the State Bar of California and maintains a practice in San Rafael, California. Mr. Vos practices in the area of bankruptcy, representing creditors, debtors, and trustees.

§ 94.85 Order Avoiding Lien in Real Property

[1] FORM Order Avoiding Lien in Real Property

UNITED STATES BANKRUPTCY COURT
_____ DISTRICT OF CALIFORNIA

	)	
	)	Base Case No. _____
In re _____ *name(s)*],	)	Chapter _____
Debtor(s).	)	A/L No.: _____
	)	

_____

ORDER AVOIDING LIEN

On reading the application presented to the court this date, it appearing that notice of opportunity for hearing having been given to the Creditor and no hearing was requested, it appearing that the security interest claimed is an avoidable nonpurchase money lien that impairs an allowable exemption of the Debtor, and good cause appearing,

NOW, THEREFORE,

IT IS ORDERED, ADJUDGED and DECREED that:

The abstract of judgment recorded _____ [*date*], by _____ [*name*] as _____ [*name*] County Recorder's Number _____ is avoided and of no effect as to the Debtor's interest in real property commonly known as _____ [*address*], California; and

IT IS FURTHER ORDERED that the above-referenced abstract is void as to any property acquired by the Debtor post-petition.

Dated: _____

_____ [*signature*]
United States Bankruptcy Judge

[2] Use of Form

The form in [1], *above*, is an order avoiding a judicial lien that would impair the debtor's exemption in real property [*see 11 U.S.C. § 522(f)(1)(A)*]. It is prepared by the debtor for presentation to the court, when a creditor has failed to respond to a previous motion to avoid lien, and should be filed with the application for default on motion to avoid lien [*see Fed. R. Bankr. P., Rule 7055*; *Fed. R. Civ. P., Rule 55*].

For an application for default on motion to avoid lien, see *§ 94.84*. For an order avoiding lien in personal property, see *§ 94.86*.

[3] Caption

The caption must include the name of the court, the title of the case, the bankruptcy docket number, and a brief designation of the character of the paper [*Fed. R. Bankr. P., Rule 9004(b)*]. This form may use the short form caption, containing merely the name of the debtor or joint debtors [*see* Advisory Committee Note to Official Form 16B].

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A. Lien Avoidance

9-94 California Forms of Pleading and Practice--Annotated § 94.86

AUTHOR: Reviewed by John A. Vos Mr. Vos is a member of the State Bar of California and maintains a practice in San Rafael, California. Mr. Vos practices in the area of bankruptcy, representing creditors, debtors, and trustees.

§ 94.86 Order Avoiding Lien in Personal Property

[1] FORM Order Avoiding Lien in Personal Property

UNITED STATES BANKRUPTCY COURT
_____ DISTRICT OF CALIFORNIA

	)	
	)	Base Case No. _____
In re _____ [*name(s)*],	)	Chapter _____
Debtor(s).	)	A/L No.: _____
	)	

_____

ORDER AVOIDING LIEN

On reading the application presented to the court this date, it appearing that notice of opportunity for hearing having been given to the Creditor and no hearing was requested, it appearing that the security interest claimed is an avoidable nonpurchase money lien that impairs an allowable exemption of the Debtor, and good cause appearing,

NOW, THEREFORE,

IT IS ORDERED, ADJUDGED and DECREED that:

The purported lien of _____ [*name of creditor*] in nonpurchase money household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, jewelry, if any, that are held primarily for the personal, family, or household use of the Debtor or a dependent of the Debtor, and the similar lien in nonpurchase money implements, professional books, and tools of the trade of the Debtor, is entirely avoided, and is of no effect whatsoever.

Dated: _____

_____ [*signature*]
United States Bankruptcy Judge

[2] Use of Form

The form in [1], *above*, is an order avoiding a lien on personal property [*see 11 U.S.C. § 522(f)(1)(B)*]. It is prepared by the debtor for presentation to the court, when a creditor has failed to respond to a previous motion to avoid lien, and should be filed with the application for default on motion to avoid lien [*see Fed. R. Bankr. P., Rule 7055*; *Fed. R. Civ. P., Rule 55*].

For an application for default on motion to avoid lien, see *§ 94.84*. For an order avoiding lien in real property, see *§ 94.85*.

[3] Caption

The caption must include the name of the court, the title of the case, the bankruptcy docket number, and a brief designation of the character of the paper [*Fed. R. Bankr. P., Rule 9004(b)*]. This form may use the short form caption, containing merely the name of the debtor or joint debtors [*see* Advisory Committee Note to Official Form 16B].

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Chapter 94 BANKRUPTCY
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A. Lien Avoidance

9-94 California Forms of Pleading and Practice--Annotated §§ 94.87-94.99

AUTHOR: Reviewed by John A. Vos Mr. Vos is a member of the State Bar of California and maintains a practice in San Rafael, California. Mr. Vos practices in the area of bankruptcy, representing creditors, debtors, and trustees.

[Reserved]

§§ 94.87[Reserved]

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Chapter 94 BANKRUPTCY
PART IV. FORMS
B. Relief From Bankruptcy Stay

9-94 California Forms of Pleading and Practice--Annotated § 94.100

AUTHOR: Reviewed by John A. Vos Mr. Vos is a member of the State Bar of California and maintains a practice in San Rafael, California. Mr. Vos practices in the area of bankruptcy, representing creditors, debtors, and trustees.

§ 94.100 Motion for Relief From Bankruptcy Stay

[1] FORM Motion for Relief From Bankruptcy Stay

	)	
In re _____ [*name(s)*],	)	Base Case No. _____
Debtor(s).	)	Chapter _____
	)	

_____

MOTION FOR RELIEF FROM BANKRUPTCY STAY,
SUPPORTING DECLARATION OF _____ [*name*], AND
MEMORANDUM OF POINTS AND AUTHORITIES

TO _____ [*name*], THE DEBTOR, _____ [*name*], HIS/HER/ITS ATTORNEY OF RECORD, AND _____ [*name*], THE TRUSTEE:

_____ [*Name*], hereafter Creditor, requests an order for relief from the stay under *Section 362(a) of Title 11 of the United States Code* as to the debtor herein [and the trustee] to permit Creditor to _____ [*describe proposed action, e.g.*, exercise its rights under its note and deed of trust], described below, by foreclosing on the real property described below and encumbered by the deed of trust].

This motion is made and based on this notice of motion, on the attached memorandum of points and authorities and declaration(s), and on the following facts and circumstances:

1. Creditor, is, and at all times herein mentioned, was _____ [*specify, e.g.,* a federal savings and loan association, organized and existing under the laws of the United States, authorized to do and doing business in California, with an office in Los Angeles].

2. _____ [*Name of debtor*] is the Debtor in this case, which was commenced on _____ [*date*] under Chapter _____ of Title 11 of the United States Code.

3. _____ [*Name*] is the duly appointed and acting trustee of the above-entitled estate.

4. This Court has jurisdiction over this proceeding under Title *28 of the United States Code, Sections 157(a), (b)(2)(G)* and *1334(a)* and (e) and _____ [*specify applicable general reference order, e.g.,* General Order No. 266 of the United States District Court for the Central District of California]. This is a "core proceeding" under Title *28 of the United States Code, Section 157(b)(2)(G)*. This is the proper Court for commencement and prosecution of this proceeding under Title *28 of the United States Code, Section 1409(a),*

[*STATE, in as many paragraphs as necessary, the grounds for relief under 11 U.S.C. § 362. For example, Paragraphs 5 through 14, below, illustrate a fact situation in which a secured creditor seeks relief from the stay to proceed with a foreclosure sale of real property in debtor's possession, on the ground that debtor has no equity in the property and the property is not necessary to an effective reorganization.*]

5. Creditor is the holder of a secured claim against Debtor for the sum of $_____. The claim is evidenced by a promissory note, in the original principal amount of $_____, made, executed, and delivered by Debtor to Creditor on or about _____ [*date*] for valuable consideration in the form of a loan. A true and correct copy of that note is attached as Exhibit "1" to the declaration of Creditor's officer, _____ [*name*]. The note requires Debtor to make monthly payments of $_____, of interest and principal, on the first day of each month, commencing on _____ [*date*] and continuing until _____ [*date*]. The note also provides Creditor with the option to declare all sums due and payable immediately in the event that Debtor fails to make payments required by the note.

6. On or about _____ [*date*], to secure its obligations under the promissory note, Debtor made, executed, and delivered to _____ [*creditor*] a deed of trust and assignment of rents that granted Creditor a lien, to the extent of all sums due under the promissory note, on that certain real property, hereafter the subject property, commonly known as _____ [*address*] and legally described in the deed of trust, a true and correct copy of which is attached as Exhibit "2" to the declaration of Creditor's officer, _____ [*name*]. That deed of trust was recorded on _____ [*date*] as Instrument No. _____ in the Official Records, _____ County Recorder's Office. That deed of trust provides, among other things, that in the event that Debtor defaults in the payment of any installment due under the note, Creditor has the option to declare all sums due under the note immediately due and payable and to commence foreclosure proceedings to sell the subject property at public or private sale as provided by law.

7. Debtor has continued in possession of the subject property. The subject property _____ [is not being used in the operation of Debtor's business *or* is not necessary to the Debtor's reorganization].

8. Debtor has failed to make the payment due on _____ [*date*] or any payment due thereafter, and is therefore in default under the terms of the note.

9. Creditor has exercised its option to declare all sums due under the note and deed of trust immediately due and payable and has made demand on Debtor for repayment of all sums due. On _____ [*date*], Creditor recorded notice of default. Debtor, however, has refused and continues to refuse to pay any part of the amount owed.

There is now due and payable the principal sum of $_____ plus interest accrued to _____ [*date*] of $_____. Interest continues to accrue according to the terms of the note at the rate of _____ percent per annum, which amounts to $_____ per day.

10. The note and deed of trust also provide for payment by Debtor of reasonable attorney's fees, trustee's fees, and other costs incurred by Creditor in collecting the sums owing under the note and deed of trust. Creditor has been required by debtor's actions to retain legal counsel and incur other costs and expenses.

11. As of _____ [*date*], the estimated fair market value of the subject property was $_____. That value is based on an appraisal, a true and correct copy of which is attached as Exhibit "10" to the declaration of the appraiser, _____ [*name*].

12. In addition to Creditor's lien, the subject property is subject to the following other encumbrances:

a. A deed of trust in favor of _____ [*name*], securing an original obligation of $_____, plus accrued interest and costs, recorded on _____ [*date*] as Instrument No. _____ in the Official Records, _____ County Recorder's Office.

b. A lien in favor of the United States Treasury Department, Internal Revenue Service, for assessments for unpaid withholding and Social Security taxes, penalties, and interest, perfected, notice of which was recorded on _____ [*date*] as Instrument No. _____ in the Official Records, _____ County Recorder's Office.

13. The total of all encumbrances of record against the subject property, including accrued interest, costs, and attorney's fees, and estimated costs of sale exceed the fair market value of the real property. After deducting the aforementioned liens and costs, there is no equity remaining in the property for the benefit of the Debtor or the estate.

14. _____ [No reorganization plan is involved in this case, and therefore the subject property is not necessary to an effective reorganization of Debtor *or* Debtor _____ (is not using the site in its current operations *or* has alternative arrangements available to it) and therefore the property is not necessary to the reorganization of Debtor].

[*CONTINUE*]

WHEREFORE, Creditor prays for an order providing for the following:

1. Termination of the stay under *Section 362(a) of Title 11 of the United States Code* with regard to Creditor, so that Creditor may take measures necessary _____ [*specify, e.g.,* to protect its security interest in the subject property under the note and deed of trust, including the following:

a. Conducting a private sale of the subject property under the deed of trust as permitted by law.

b. Commencement and prosecution of an unlawful detainer proceeding against Debtor, in the event that Debtor refuses to surrender possession after the private sale].

2. That the order be binding on all parties and their heirs, successors, assigns, including the trustee in the above-entitled case and any subsequent assignee or transferee of the debtor.

3. That the order be effective with regard to any subsequent filings on the part of the Debtor under the Bankruptcy

Code.

[PURSUANT TO BANKRUPTCY RULE 112(2)(d) OF THE UNITED STATES BANKRUPTCY COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, ANY PARTY WISHING TO OPPOSE THIS MOTION MUST FILE AND SERVE A FORMAL RESPONSE WITH THE COURT AND MAIL A COPY TO THE ATTORNEYS FOR THE MOVING PARTY NOT LESS THAN FIVE (5) DAYS PRIOR TO THE HEARING ON THIS MOTION.]

Dated:_____

_____ [*signature*]
Attorney for _____ [*moving party*]

[*ADD supporting declaration(s) showing facts sufficient to establish grounds for relief from stay under 11 U.S.C. § 362, e.g.,* The following declarations by a bank officer and appraiser, respectively, show that certain real property is subject to a creditor's lien, that the debtor has no equity in the property, and the property is not needed for effective reorganization.]

SUPPORTING DECLARATION OF SAVINGS AND LOAN
OFFICER _____ [*name*]

1. I, _____ [*name*], am an operations officer of _____ Savings Association, hereafter Creditor, charged with supervision of the foreclosure department. In that capacity, I am custodian of the records and files of Creditor relating to the loan to _____ [*name*], hereafter Debtor, and am familiar with the facts and circumstances regarding it.

2. Creditor's loan to Debtor originated on _____ [*date*], in the original principal amount of $_____, and is evidenced by a promissory note made, executed, and delivered by Debtor to Creditor. A true and correct copy of that note is attached to this declaration as Exhibit "1." Under the note, Debtor promised to make monthly payments of $_____, which include principal and interest at the rate of _____ percent per year. Payments are due on the first of each month. The note also provided for a late charge of $75 on each payment that was not paid during the 15-day grace period following the due date. Debtor has made no payments since _____ [*date*], and thus is in default under the note.

3. Simultaneously with the execution of the note and the disbursement of the loan proceeds, and to secure its obligations under the promissory note, Debtor made, executed, and delivered to Creditor a deed of trust and assignment of rents that granted the Creditor a lien, to the extent of all sums due under the note, on that certain real property, hereafter the subject property, commonly known as _____ [*address*] and legally described in the deed of trust, a true and correct copy of which is attached to this declaration as Exhibit "2." The deed of trust was recorded on _____ [*date*] as Instrument No. _____ in the Official Records, _____ County Recorder's Office.

4. The deed of trust provides, among other things, that in the event Debtor defaults in the payment of any installment due under the note, Creditor has the option to declare all sums due under the note immediately due and payable and to commence foreclosure proceedings to sell the subject property at public or private sale as provided by law.

5. Creditor exercised its option to declare all sums due under the note and deed of trust immediately due and payable and has made demand on debtor for repayment of all sums due. The notice of default was recorded on _____ [*date*]. A true and correct copy of that notice is attached as Exhibit "3" to this declaration. There

is now due and payable the principal sum of $_____ plus interest accrued to _____ [*date*] of $_____. Interest continues to accrue according to the terms of the note at the rate of _____ percent per annum, which amounts to $_____ per day.

6. The note and deed of trust also provide for payment by Debtor of reasonable attorney's fees, trustee's fees, and other costs incurred by Creditor in collecting the sums owing under the note and deed of trust. Creditor has been required by Debtor's actions to retain legal counsel and incur other costs and expenses.

7. As part of my examination of whether the Debtor had any equity in the property, I asked the other lienholders to provide me with statements of the current amounts owing to them secured by their respective liens. Letters received from _____ [*name*] and _____ [*name*] are attached to this declaration as Exhibits "4" and "5," respectively. These letters indicate that the balances secured by their liens are as follows:

a. $_____, secured by a deed of trust in favor of _____ [*name*] securing an original obligation of $_____, recorded on _____ [*date*] as Instrument No. _____ in the Official Records, _____ County Recorder's Office, a true and correct copy of which is attached to this declaration as Exhibit "4-A."

b. $_____, secured by a lien in favor of the United States Treasury Department, Internal Revenue Service, for assessments for unpaid withholding and Social Security taxes, penalties, and interest, perfected by notice recorded on _____ [*date*] as Instrument No. _____ in the Official Records, _____ County Recorder's Office, a true and correct copy of which is attached to this declaration as Exhibit "5-A."

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*title*]

SUPPORTING DECLARATION OF APPRAISER
_____ [*name*]

1. I, _____ [*name*], am a State Certified Real Estate Appraiser.

2. On _____ [*date*], I was asked by _____ [*name*], Operations Officer of Savings Association, to make an appraisal of the real property commonly known as _____ [*address of property*]. That property consists of a single family residence, with attached garage, and a pool. It is located on a parcel of approximately.8 acres. A true and correct copy of that appraisal report is attached to this declaration as Exhibit "10." It reflects a value, as of _____ [*date*], of $_____.

3. The report indicates the comparable properties I used in establishing that value. The reason the value of the subject property is lower than most of the comparables is that there is serious water damage in most of the upstairs bedrooms that will deteriorate into dry rot if not corrected soon. Pictures of the interior damage have been included as an appendix to the appraisal report. Also, there is erosion on the left side of the driveway, which condition, if allowed to remain uncorrected, will most likely undermine the driveway.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*title*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting grant of relief from stay under 11 U.S.C. § 362 based on the facts shown in the supporting declaration(s).*]

[2] Use of Form

The form in [1], *above*, is a motion by a plaintiff requesting that the bankruptcy stay of a pending state civil action be removed so that the moving party may proceed with the state court proceeding regarding a deed of trust [*11 U.S.C. § 362(d)*; *see § 94.33*]. Filing a petition in bankruptcy operates ordinarily as a stay of various creditor actions and proceedings [*11 U.S.C. § 362(a)*; *see § 94.30*].

The types of relief available are discussed in *§ 94.33[1]*. The grounds for relief are discussed in *§ 94.33[2]*.

PRACTICE TIP:
Most if not all courts now require, in addition to the pleadings, the use of a "Relief from Stay Cover Sheet," which summarizes for the court the basis of the motion. That form is available from the clerk's office of the district where the motion is to be filed. Clerk's offices make the form available for downloading from the clerk's web site. *Commentary by John A. Vos.*

Local rules should be consulted to determine particular requirements concerning the preparation, filing, and service of moving papers.

[3] Caption

The caption must include the name of the court, the title of the case, the bankruptcy docket number, and a brief designation of the character of the paper [*Fed. R. Bankr. P., Rule 9004(b)*]. This form may use the short form caption, containing merely the name of the debtor or joint debtors [*see* Advisory Committee Note to Official Form 16B].

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Chapter 94 BANKRUPTCY
PART IV. FORMS
B. Relief From Bankruptcy Stay

9-94 California Forms of Pleading and Practice--Annotated § 94.101

AUTHOR: Reviewed by John A. Vos Mr. Vos is a member of the State Bar of California and maintains a practice in San Rafael, California. Mr. Vos practices in the area of bankruptcy, representing creditors, debtors, and trustees.

§ 94.101 Motion for Relief From Bankruptcy Stay (Nunc Pro Tunc)

[1] FORM Motion for Relief From Bankruptcy Stay (Nunc Pro Tunc)

	)	
In re _____ [*name(s)*],	)	Base Case No. _____
Debtor(s).	)	Chapter _____
	)	

_____

MOTION FOR RELIEF FROM BANKRUPTCY STAY (NUNC PRO TUNC)

TO _____ [*name*], THE DEBTOR, _____ [*name*], HIS/HER/ITS ATTORNEY OF RECORD, AND _____ [*name*], THE TRUSTEE:

COMES NOW the Moving Party _____ [*name*], and moves the court for *nunc pro tunc* relief from the stay under *Section 362(a) of Title 11 of the United States Code* to allow the Moving Party to continue prosecution of a state court cross-complaint against the Debtor _____ [*name*] ("Debtor") to recover any available insurance proceeds. Relief from the stay should be granted for cause. This motion is made and based on this notice of motion and on the attached supporting memorandum.

This motion is brought pursuant to Title *11, United States Code, Sections 361* and *362*, and *Federal Rules of Bankruptcy Procedure, Rules 4001* and *9014*.

WHEREAS, the Moving Party respectfully requests that this Court make and enter an order that the stay of Title *11, United States Code, Section 362* is vacated *nunc pro tunc* to:

1. Permit Moving Party's commencement and prosecution of the cross-complaint to judgment against the Debtor, including, but not limited to, the prior filing and service of the cross-complaint, amending the cross-complaint, participating in discovery, participating in motions and trial, and participating in all appropriate appears; and

2. Permit the Moving Party to recover insurance proceeds under any insurance policy or policies applicable in any way to the issues and claims raised in the cross-complaint.
Dated: _____.

_____ [*signature*]
Attorney for Movant
_____ [*address*]
_____ [*telephone*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting grant of relief from stay under 11 U.S.C. § 362 based on the facts shown in the supporting declaration(s).*]

[2] Use of Form

The form in [1], *above*, is a motion *nunc pro tunc* for relief from the bankruptcy stay of a pending state civil action [*11 U.S.C. § 362(d)*; *see § 94.33*]. This form is for use by a plaintiff to request that the bankruptcy stay of the pending action be removed so that the moving party may proceed with a state court proceeding regarding insurance. Filing a petition in bankruptcy operates ordinarily as an stay of various creditor actions and proceedings [*11 U.S.C. § 362(a)*; *see § 94.30*].

For an order vacating the bankruptcy stay, see *§ 94.102*. For further coverage of relief from the bankruptcy stay, see *§ 94.100[2] -[6]*.

PRACTICE TIP:
Most if not all courts now require, in addition to the pleadings, the use of a "Relief from Stay Cover Sheet," which summarizes for the court the basis of the motion. That form is available from the clerk's office of the district where the motion is to be filed. Clerk's offices make the form available for downloading from the clerk's web site. *Commentary by John A. Vos.*

[3] Caption

The caption must include the name of the court, the title of the case, the bankruptcy docket number, and a brief designation of the character of the paper [*Fed. R. Bankr. P., Rule 9004(b)*]. This form may use the short form caption, containing merely the name of the debtor or joint debtors [*see* Advisory Committee Note to Official Form 16B].

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B. Relief From Bankruptcy Stay

9-94 California Forms of Pleading and Practice--Annotated § 94.102

AUTHOR: Reviewed by John A. Vos Mr. Vos is a member of the State Bar of California and maintains a practice in San Rafael, California. Mr. Vos practices in the area of bankruptcy, representing creditors, debtors, and trustees.

§ 94.102 Order Vacating Stay Nunc Pro Tunc

[1] FORM Order Vacating Stay Nunc Pro Tunc

	)	
In re _____ [*name(s)*],	)	Base Case No. _____
Debtor(s).	)	Chapter _____
	)	

_____

ORDER VACATING STAY NUNC PRO TUNC

TO _____ [*name*], THE DEBTOR, _____ [*name*], HIS/HER/ITS ATTORNEY OF RECORD, AND _____ [*name*], THE TRUSTEE:

CREDITOR ("Moving Party") brought a motion for *nunc pro tunc* relief from the stay in order to continue its prosecution in _____ [*name*] County Superior Court Case Number _____ of the cross-complaint for _____ [*specify, e.g.,* contractual indemnity and declaratory relief] ("cross-complaint") filed on or about _____ [*date*]. The motion came on regularly for hearing before this court on _____ [*date*], after notice was duly given as required by law.

The court having reviewed that motion and the papers on file herein, having considered all arguments and pleadings, being fully advised thereby, appearance by counsel having been noted on the record, and good cause appearing for the granting of the motion:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

The stay under Title *11, United States Code, Section 362* is vacated *nunc pro tunc* to _____ [*specify, e.g.,* permit the Moving Party's commencement and prosecution of the cross-complaint to judgment against the Debtor _____ (*name*), doing business as _____ (*name*), including, but not limited to, the prior filing and service of the cross-complaint, amending the cross-complaint, participating in discovery, participating in motions and trial, and participating in all appropriate appeals in order only to permit the Moving Party to recover insurance proceeds under any insurance policy or policies applicable in any way to the issues and claims raised in the cross-complaint].
Dated: _____.

_____ [*signature*]
United States Bankruptcy Judge

[2] Use of Form

The form in [1], *above*, is an order vacating the bankruptcy stay of a pending state action. This form is for use by the court to order that the bankruptcy stay of a pending state action be removed so that the moving party may proceed with the state court proceeding regarding insurance. This order provides for relief from stay *nunc pro tunc* to give validity to a prior filing and service of a state court complaint [*see*; *11 U.S.C. § 362(a)*; *see also §§ 94.30, 94.33*].

This form should be prepared by the plaintiff and submitted to the court with the motion for relief from the bankruptcy stay [*see § 94.101*].

For discussion of moving for relief from the bankruptcy stay, see *§ 94.100[2] -[8]*.

PRACTICE TIP:
Most if not all courts now require, in addition to the pleadings, the use of a "Relief from Stay Cover Sheet," which summarizes for the court the basis of the motion. That form is available from the clerk's office of the district where the motion is to be filed. Clerk's offices make the form available for downloading from the clerk's web site. *Commentary by John A. Vos.*

[3] Type of Relief and Grounds for Relief

On the request of a party in interest, after notice and a hearing, a court may grant relief from the bankruptcy stay by terminating, annulling, modifying, or conditioning the stay [*11 U.S.C. § 362(d)*]. This form provides that the stay is vacated.

To grant relief from the bankruptcy stay, the court must find that there is (1) cause, (2) lack of equity in property, or (3) a reorganization plan or payment being made with regard to single-asset real estate [*11 U.S.C. § 362(d)*].

For further discussion, see *§ 94.33*.

[4] Caption

The caption must include the name of the court, the title of the case, the bankruptcy docket number, and a brief designation of the character of the paper [*Fed. R. Bankr. P., Rule 9004(b)*]. This form may use the short form caption, containing merely the name of the debtor or joint debtors [*see* Advisory Committee Note to Official Form 16B].

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PART IV. FORMS
B. Relief From Bankruptcy Stay

9-94 California Forms of Pleading and Practice--Annotated §§ 94.103-94.109

AUTHOR: Reviewed by John A. Vos Mr. Vos is a member of the State Bar of California and maintains a practice in San Rafael, California. Mr. Vos practices in the area of bankruptcy, representing creditors, debtors, and trustees.

[Reserved]

§§ 94.103[Reserved]

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PART IV. FORMS
C. Abstention and Removal Actions

9-94 California Forms of Pleading and Practice--Annotated § 94.110

AUTHOR: Reviewed by John A. Vos Mr. Vos is a member of the State Bar of California and maintains a practice in San Rafael, California. Mr. Vos practices in the area of bankruptcy, representing creditors, debtors, and trustees.

§ 94.110 Notice of Removal of State Court Action

[1] FORM Notice of Removal of State Court Action

UNITED STATES BANKRUPTCY COURT
_____ DISTRICT OF CALIFORNIA

In re _____ [*name(s)*],	)	
Debtor(s).	)	
_____ [*name*],	)	Case No. _____
Plaintiff,	)	Chapter _____
vs.	)	A/P No.: _____
_____ [*name*],	)	
Defendant.	)	
	)	
	)	

_____

NOTICE OF REMOVAL OF STATE COURT ACTION
(Removed from _____ County Superior Court,
Action No. _____)

To: The Honorable _____, United States Bankruptcy Judge.

Pursuant to Title *28, United States Code, Section 1452(a)*, and *Federal Rules of Bankruptcy Procedure, Rule 9027*, Debtor makes application for removal of a civil action entitled _____ [*name of action*], Action No. _____ (the "Civil Action"), now pending in the Superior Court for the State of California in and for the County of _____. This removal is based on the following facts:

1. _____ [*Name of movant*] is a _____ [*specify status in state action, e.g.*, plaintiff] in the Civil Action.

2. The United States Bankruptcy Court in this district has jurisdiction over the Civil Action under Title *28, United States Code, Sections 157(a)*, and *1334(b)*. Jurisdiction exists under Title *28, United States Code, Section 1334(b)* because the Civil Action is related to a bankruptcy case pending in this district as _____ [*name of case*], Case No. _____.

3. The Civil Action is related to the bankruptcy case because _____ [*specify, e.g.*, the Debtor is a party to all of the claims or causes of action that are removed pursuant to this notice].

4. On removal of the Civil Action, the proceeding will be a _____ [core proceeding with the meaning of Title *28, United States Code, Section 157(b)(1), (2) or* non-core proceeding with the meaning of Title *28, United States Code, Section 157(b)(1)*].

[5. Notwithstanding the fact that this proceeding will constitute a non-core proceeding on removal, _____ (*removing party*) consents to entry of all final orders or judgment by the Bankruptcy Court as permitted by Title *28, United States Code, Section 157(c)(2) or* _____ (*Removing party*) does not consent to entry of any final orders or judgment by the Bankruptcy Court in this proceeding. Rather, _____ (*removing party*) requested that this proceeding be treated as a non-core proceeding pursuant to Title *28, United States Code, Section 157(c)(1)*.]

6. True and correct copies of all process and pleadings filed and served in the Civil Action are attached to this notice.
Dated: _____.

_____ [*signature*]
Attorney for Applicant
_____ [*address*]
_____ [*telephone*]

[2] Use of Form

The form in [1], *above*, is a request for and notice of removal of a state court action to the Bankruptcy Court. It is used by a debtor to remove a state court action that involves a claim against the debtor into the federal Bankruptcy Court [*28 U.S.C. § 1452(a)*; *see* [3], *below* (grounds for removal)].

Optional Paragraph 5 is for use if the proceeding is a non-core proceeding [*see 28 U.S.C. § 157(c)*].

For a notice of removal to file with the affected state court, see *§ 94.111*.

PRACTICE TIP:

All bankruptcy courts are now paperless. Any practitioner who anticipates filing more than an occasional pleading in any bankruptcy court would be prudent to contact the clerk of the court for a login and password, and to take the brief training class. *Commentary by John A. Vos.*

[3] Grounds for Removal

A party may remove any claim or cause of action in a civil action to the bankruptcy court for the district in which the civil action is pending, if that district court has jurisdiction over the claim or cause of action under *28 U.S.C. § 1334* [*28 U.S.C. § 1452(a)*].

Proceedings before the United States Tax Court and civil actions commenced by a government unit to enforce its police or regulatory power may not be removed [*28 U.S.C. § 1452(a)*].

[4] Procedure for Removal

Removal is accomplished by filing a notice of removal (this form) with the clerk of the district court and a copy of the notice with the clerk of the court from which the action is removed [*Fed. R. Bankr. P., Rule 9027(a)(1), (c)*]. The state court action being removed is likely to be stayed by *11 U.S.C. § 362* [*see § 94.30*]. A notice of removal generally must be filed within 30 days after entry of an order terminating the stay with respect to the claim or cause of action or 30 days after service of summons or filing of the initial pleading [*see Fed. R. Bankr. P., Rule 9027(a)(2), (3)*].

[5] Caption

The caption must include the name of the court, the title of the case, the bankruptcy docket number, and a brief designation of the character of the paper [*Fed. R. Bankr. P., Rule 9004(b)*]. This form may use the short form caption, containing merely the name of the debtor or joint debtors [*see* Advisory Committee Note to Official Form 16B].

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9-94 California Forms of Pleading and Practice--Annotated § 94.111

AUTHOR: Reviewed by John A. Vos Mr. Vos is a member of the State Bar of California and maintains a practice in San Rafael, California. Mr. Vos practices in the area of bankruptcy, representing creditors, debtors, and trustees.

§ 94.111 Notice of Filing Removal Action

[1] FORM Notice of Filing Removal Action

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name of creditor*],	)	
Plaintiff,	)	No. _____
vs.	)	NOTICE OF FILING
_____ [*name of debtor*],	)	REMOVAL OF STATE
Defendant.	)	COURT ACTION
	)	
	)	

_____

To: The Honorable Judge of the Superior Court of the State of California in and for the County of _____, the Clerk of the Court, and All Parties in this Civil Action:

PLEASE TAKE NOTICE that on _____ [*date*], _____ [*removing party*] filed a notice removing this civil action to the United States Bankruptcy Court for the _____ District of California. A true and correct of the Notice of Removal of State Court Action filed in the bankruptcy court is attached to this notice. *Federal Rules of Bankruptcy Procedure, Rule 9027* provides that removal of the claims and causes of action is effective on filing the notice of removal in the state court action, and that the parties shall proceed no further in the

state court unless and until the claim or cause of action is remanded.
Dated: _____.

_____ [*signature*]
Attorney for Defendant
_____ [*address*]
_____ [*telephone*]

[2] Use of Form

The form in [1], *above*, is a notice of removal of a state court action to federal Bankruptcy Court. It is used by a debtor who is a defendant in a state court action to give notice to the state court that the action is being removed to federal Bankruptcy Court [*see 28 U.S.C. § 1452(a)*]. The request for removal filed with the Bankruptcy Court [*see § 94.110*] should be attached to this form when it is filed.

Promptly after filing the notice of removal with the Bankruptcy Court, the removing party must file a copy of the notice with the clerk of the court from which the case is removed [*Fed. R. Bankr. P., Rule 9027(c)*].

For a request for and notice of removal of state court action to file with the Bankruptcy Court, see *§ 94.110*.

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9-94 California Forms of Pleading and Practice--Annotated § 94.112

AUTHOR: Reviewed by John A. Vos Mr. Vos is a member of the State Bar of California and maintains a practice in San Rafael, California. Mr. Vos practices in the area of bankruptcy, representing creditors, debtors, and trustees.

§ 94.112 Motion to Dismiss or Suspend

[1] FORM Motion to Dismiss or Suspend

UNITED STATES BANKRUPTCY COURT
_____ DISTRICT OF CALIFORNIA

	)	
	)	Case No. _____
In re _____ [*name*],	)	Chapter _____
Debtor	)	A/P No.: _____
	)	

_____

MOTION TO _____ [DISMISS *or* SUSPEND]

COMES NOW, _____ [*name of creditor*], a creditor in the above titled case, and moves the court for an order of _____ [dismissal *or* suspension] pursuant to Title *11, United States Code, Section 305*. Creditor makes the following representations in support of the motion:

1. On or about _____ [*date*], an involuntary petition for relief under Chapter _____

was filed against the Debtor in this action. Creditor is an unsecured creditor of the Debtor.

2. This court should _____ [dismiss *or* suspend proceedings in] this case because _____ [*specify, e.g.,* the issues can better be considered in a pending state court action addressing many of the same issues].

3. The interest of Creditors would be better served by _____ [dismissal *or* suspension of all proceedings in] this case.

WHEREFOR, Creditor respectfully requests that the court _____ [dismiss *or* suspend all proceedings in] the above referenced bankruptcy case and further requests that the court grant Creditor such other and further relief as the court deems just and proper.
Dated: _____.

_____ [*signature*]
Attorney for Creditor
_____ [*address*]
_____ [*telephone*]

[2] Use of Form

The form in [1], *above*, is a motion to dismiss the case or suspend proceedings in the case (sometimes called a motion to abstain). It is prepared by a creditor and presented to the bankruptcy court to request that the court abstain from hearing a bankruptcy case or a particular proceeding in such a case [*11 U.S.C. § 305*; *see* [3], [4], *below*].

[3] Grounds for Abstention

After notice and hearing, a court may abstain from hearing a proceeding arising under the Bankruptcy Code or related to a bankruptcy case in the interests of justice or comity or respect for state courts or law [*28 U.S.C. § 1334(c)(1)*; *see 11 U.S.C. § 305* (dismissal or suspension of bankruptcy case)].

Abstention is mandatory in a related proceeding, on timely motion of a party, if of the following exist [*28 U.S.C. § 1334(c)(2)*]:

- The related proceeding is based on a state law claim or state law cause of action;
- The only basis for federal court jurisdiction over the related proceeding is that it is related to the bankruptcy case; and
- The related proceeding is commenced and can be timely adjudicated in the state court.

Mandatory abstention is unavailable for certain noncore personal injury tort and wrongful death proceedings in the same district as the bankruptcy case [*see 28 U.S.C. § 157(b)(4), (5)*].

[4] Moving for Abstention

On timely motion, and after notice and opportunity for hearing, a court may dismiss a bankruptcy case or suspend proceedings in a bankruptcy case [*11 U.S.C. § 305(a)*; *28 U.S.C. § 1334(c)*]. Unless a district judge orders otherwise, the bankruptcy judge hears the motion and files a report and recommendation for disposition of the motion [*Fed. R. Bankr. P., Rule 5011(b)*]. Within 10 days of service (20 days in some cases), a party may serve and file written objections [*Fed. R. Bankr. P., Rules 5011(b), 9033(b), (c)*].

Neither the motion nor a decision on the motion gives relief from the stay of *11 U.S.C. § 362* [*28 U.S.C. § 1334(c)(2)*]. To proceed against property of the bankruptcy estate, a party or affected entity must additionally seek relief from the stay [*see § 94.33*].

A motion for abstention does not stay the administration of or any proceeding in the case. However, the bankruptcy judge may stay the proceedings pending disposition of the motion, on terms and conditions that are proper [*Fed. R. Bankr. P., Rule 5011(c)*].

[5] Caption

The caption must include the name of the court, the title of the case, the bankruptcy docket number, and a brief designation of the character of the paper [*Fed. R. Bankr. P., Rule 9004(b)*]. This form may use the short form caption, containing merely the name of the debtor or joint debtors [*see* Advisory Committee Note to Official Form 16B].

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9-94 California Forms of Pleading and Practice--Annotated §§ 94.113-94.119

AUTHOR: Reviewed by John A. Vos Mr. Vos is a member of the State Bar of California and maintains a practice in San Rafael, California. Mr. Vos practices in the area of bankruptcy, representing creditors, debtors, and trustees.

[Reserved]

§§ 94.113[Reserved]

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PART IV. FORMS
D. Determining Dischargeability of Debts

9-94 California Forms of Pleading and Practice--Annotated § 94.120

AUTHOR: Reviewed by John A. Vos Mr. Vos is a member of the State Bar of California and maintains a practice in San Rafael, California. Mr. Vos practices in the area of bankruptcy, representing creditors, debtors, and trustees.

§ 94.120 Application for Order Reopening Case to File Complaint to Determine Dischargeability of Debt

[1] FORM Application for Order Reopening Case to File Complaint to Determine Dischargeability of Debt

UNITED STATES BANKRUPTCY COURT
_____ DISTRICT OF CALIFORNIA

	)	
	)	Case No. _____
In re _____ [*name(s)*],	)	Chapter _____
Debtor(s).	)	APPLICATION FOR ORDER
	)	TO REOPEN CASE
	)	

_____

To: The Honorable _____, United States Bankruptcy Judge.

The application of _____ [*name*], by _____ [*name*], his/her/its attorney, respectfully represents:

That he/she/it is [a Creditor of] the Debtor herein. That this case has been closed pursuant to *Federal Rules of Bankruptcy Procedure, Rule 5009,* and the trustee has been discharged. Applicant desires to file a complaint to

determine dischargeability of a debt pursuant to *Federal Rules of Bankruptcy Procedure, Rule 4007(a)*.

WHEREFORE, applicant prays for an order directing that this case be reopened and the applicant have such order and further relief as is just.
Dated: _____.

_____ [*signature*]
Attorney for Applicant
_____ [*address*]
_____ [*telephone*]

[2] Use of Form

The form in [1], *above*, is an application to reopen a case. It is for use by a debtor or creditor to reopen a closed bankruptcy case in order to file a complaint to determine dischargeability of a specific debt. This application is considered a motion and must be served on the debtor and, if known, the debtor's attorney [*Fed. R. Bankr. P., Rules 5010, 9013*].

There is no time limit for reopening a case to determine the dischargeability of a debt of the types enumerated at *11 U.S.C. § 523(a)*, and no filing fee is required [*Fed. R. Bankr. P., Rules 4007(b), 5010*; Advisory Committee Notes to Rule 5010]. However, an undue and inordinate delay may result in refusal to reopen a case [*see Hull v. Powell (9th Cir. 1962) 309 F.2d 3, 4-5* (23-year delay excessive)].

For a form for an order reopening a case, see *§ 94.81*. For a form for an ex parte application to reopen a case to pursue a lien avoidance action, see *§ 94.80*.

[3] Caption

The caption must include the name of the court, the title of the case, the bankruptcy docket number, and a brief designation of the character of the paper [*Fed. R. Bankr. P., Rule 9004(b)*]. This form may use the short form caption, containing merely the name of the debtor or joint debtors [*see* Advisory Committee Note to Official Form 16B].

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D. Determining Dischargeability of Debts

9-94 California Forms of Pleading and Practice--Annotated § 94.121

AUTHOR: Reviewed by John A. Vos Mr. Vos is a member of the State Bar of California and maintains a practice in San Rafael, California. Mr. Vos practices in the area of bankruptcy, representing creditors, debtors, and trustees.

§ 94.121 Complaint by Creditor to Determine Dischargeability of Debt

[1] FORM Complaint by Creditor to Determine Dischargeability of Debt

UNITED STATES BANKRUPTCY COURT
_____ DISTRICT OF CALIFORNIA

In re _____ [*name*],	)	
Debtor	)	
_____ [*name*],	)	Case No. _____
Plaintiff,	)	Chapter _____
vs.	)	Adv. Proc. No. _____
_____ [*name*],	)	
Defendant.	)	
	)	
	)	

_____

COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

_____ [*Name*], plaintiff herein, alleges:

1. This is an adversary proceeding to determine dischargeability of a debt.

2. This adversary proceeding is brought in connection with Defendant's Case No. _____ under Chapter _____ [7 *or* 11 *or* 12 *or* 13] of Title 11 of the United States Code [now pending in this court]. This court has jurisdiction over this proceeding under [Title *11 of the United States Code, Section 523(c)* and] Title 28 of the United States Code, Section[s *157(b)* and] *1334*. This adversary proceeding is a "core proceeding" as provided in Title 11 of the United States Code, Section 157(b)(2)(I).

3. Defendant [is an individual and] _____ [has been discharged *or* seeks discharge] herein under Title 11 of the United States Code, Section _____ *[727 or 1141 or 1228 or 1328(a) or 1328(b)]*.

4. _____ [*State the nature of the debt claimed as nondischargeable, e.g.,* At all material times from and after _____(*date*), Defendant held in his/her/its possession _____shares of _____ (*name of corporation*) common stock, evidenced by certificate number _____ in the name of Plaintiff. Plaintiff had endorsed the certificate to defendant as security for a loan from Defendant to Plaintiff with a final maturity date of _____ (*date*). Plaintiff repaid that loan in full on _____ (*specify date before maturity date*), and thereafter discovered that Defendant had sold the above-described shares, collected the proceeds, and willfully and maliciously converted those proceeds to his/her/its own use].

5. The debt of Defendant to Plaintiff for this conversion is nondischargeable under *Section 523(a)* _____ [*specify subsection, e.g.,* (6)] of Title 11 of the United States Code.

[6. Plaintiff is entitled to reasonable attorney's fees pursuant to _____ (*specify, e.g.,* the provisions of the note) and has incurred reasonable attorney's fees of $_____ in prosecuting this claim.]

WHEREFORE, plaintiff prays:

1. That this court make a determination that the indebtedness of Defendant to Plaintiff is nondischargeable;

[2. That this court determine the remaining issues and render a judgment for Plaintiff for the amount of its debt;]

3. For interest[, attorney's fees,] and costs; and

4. For such other and further relief as to the court seems proper.
Dated: _____.

_____ [*signature*]
Attorney for Applicant
_____ [*address*]
_____ [*telephone*]

[2] Use of Form

The form in [1], *above*, is an adversary complaint for use by a creditor to initiate an adversary proceeding in the bankruptcy court to determine the dischargeability of a specific debt [*see Fed. R. Bankr. P., Rules 4007, 7008(a)*; *see also § 94.50* et seq.].

[3] Caption

A proceeding to determine dischargeability of a debt commenced by a complaint filed under *Fed. R. Bankr. P., Rule 4007* is governed by the rules regarding adversary proceedings [*Fed. R. Bankr. P., Rule 4007(e)*]. All captions in adversary proceedings must conform substantially to Official Form 16C [*Fed. R. Bankr. P., Rule 7010*]. The caption in this form is patterned on Official Form 16C. Most district courts also have their own caption requirements for adversary proceedings. Counsel should check with the local bankruptcy clerk to determine what local requirements apply.

[4] Contents of Complaint

Fed. R. Bankr. P., Rule 7008(a) requires that the allegation of jurisdiction contain a reference to the name, number, and chapter of the bankruptcy case to which the complaint relates, and to the district and division in which it is pending. In an adversary proceeding before a bankruptcy judge, the complaint is required to contain a statement that the proceeding is a core proceeding (Paragraph 2) [*Fed. R. Bankr. P., Rule 7008(a)*; *see 28 U.S.C. § 157(b)(2)(I)*].

Although a complaint to determine dischargeability under *11 U.S.C. § 523(c)* must be filed before it has been determined that the debtor will be discharged, the court need not determine the question of discharge of the specific debt until it has been determined that the debtor is entitled to discharge. Before that time, the question of dischargeability of the specific debt is not ripe (Paragraph 3). The complaint sets forth facts that bring the debt within the requirements for nondischargeability (Paragraph 4), and specifies the subsection of *11 U.S.C. § 523(a)* that applies (Paragraph 5) [*see § 94.53*].

If there has already been a state court judgment rendered on the debt, Paragraph 2 of the prayer should be omitted [*In re Comer (9th Cir. 1984) 723 F.2d 737, 740]* .

The complaint must be signed by the plaintiff's attorney [*Fed. R. Bankr. P., Rule 9011(a)*].

[5] Format

Most district courts have their own forms for adversary proceedings, as well as requirements with respect to cover sheets, number of copies, and transmission of records from nonbankruptcy courts. Thus, counsel should check with the local bankruptcy clerk to determine what local requirements apply.

[6] Time for Filing and Fees

Fed. R. Bankr. P., Rule 4007(b)-(d) governs the time for commencing actions under *11 U.S.C. § 523(a)* and *(c)*. For further discussion, see *§ 94.54[1][b], [2][b]*.

There is a $350 filing fee for an adversary complaint [*28 U.S.C. § 1914(a)*].

PRACTICE TIP:

All bankruptcy courts are now paperless. Any practitioner who anticipates filing more than an occasional pleading in any bankruptcy court would be prudent to contact the clerk of the court for a login and password, and to take the brief training class. *Commentary by John A. Vos.*

[7] Procedure and Service

Fed. R. Bankr. P., Rules 7002-7071 adopt *Fed. R. Civ. P., Rules 3-5, 7-10, 12-23, 25-42, 52, 54-56, 62-64*, and *67-71*, with some modifications, for use in adversary proceedings in bankruptcy courts. The adversary proceeding is commenced by the filing and service of a summons and complaint [*Fed. R. Bankr. P., Rule 7003*, adopting *Fed. R. Civ. P., Rule 3*]. Service of summons may be made by any of the methods set forth in Fed. R. Civ. P., Rule 4, or any other method set forth in *Fed. R. Bankr. P., Rule 7004* [*Fed. R. Bankr. P., Rule 7004*]. The clerk will set a trial date on

issuance of the summons. Usually service is made on both the defendant and his or her attorney. Service by first-class mail, postage prepaid (an approved method), but service by that method, and some others, must be made (deposited in the mail) within 10 days of the issuance of the summons [*Fed. R. Bankr. P., Rules 7004(a), (e), 9006(e)*].

PRACTICE TIP:

Service of Process by Mail. Service of process may be completed merely by mailing a copy of the summons, complaint, and other documents required by local rule, if any, to the debtor [*Fed. R. Bankr. P., Rule 7004(b)*]. Personal service is not required [*Fed. R. Bankr. P., Rule 7004(a)*]. If the defendant is the debtor represented by an attorney in the underlying bankruptcy case, *Fed. R. Bankr. P., Rule 7004(b)(9)* requires that a copy also be mailed to the debtor's counsel. *Commentary by John A. Vos*.

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9-94 California Forms of Pleading and Practice--Annotated § 94.122

AUTHOR: Reviewed by John A. Vos Mr. Vos is a member of the State Bar of California and maintains a practice in San Rafael, California. Mr. Vos practices in the area of bankruptcy, representing creditors, debtors, and trustees.

§ 94.122 Affirmative Defense in Action by Creditor Against Debtor--Discharge in Bankruptcy

[1] FORM Affirmative Defense in Action by Creditor Against Debtor--Discharge in Bankruptcy

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], Defendant alleges:

1. On _____ [*date*], _____ [Defendant filed a voluntary petition in bankruptcy *or* an order for relief was entered against Defendant in an involuntary bankruptcy case] under Chapter _____ of Title 11 of the United States Code in the United States Bankruptcy Court for the _____ District of _____ [, _____ Division]. That case was entitled "In re _____ [*name of defendant*], Debtor," and numbered _____(hereinafter "the bankruptcy case").

2. On _____ [*date*], an _____ [order of discharge *or in a Chapter 11,* order confirming plan], a certified copy of which is attached hereto, marked Exhibit "A," and incorporated herein by reference, was duly entered in the bankruptcy case. By the terms of the order and in accordance with Title *11 of the United States Code, Section 524(a),* Defendant was released from all personal liability for his/her dischargeable debts; any judgment at any time obtained in any court other than the Bankruptcy Court was voided as a determination of the personal liability of the Defendant with respect to all dischargeable debts [*in a Chapter 7, an individual's Chapter 11, a Chapter 12, or a hardship discharge in a Chapter 13 add:,* unless determined to be nondischargeable under Title *11 of the United States Code, Section 523(c)*]; and Plaintiff, among others, was enjoined from the commencement or continuation of any action, the employment of process, or any act to collect, recover, or offset any such debt as the personal liability of Defendant, whether or not discharge of the debt is waived.

[3. Plaintiff, who was a creditor at the time of the commencement of the bankruptcy case, had _____ (notice *or* actual knowledge) of the case in that _____ (*state facts showing plaintiff's notice or knowledge of proceedings*).]

[4. The Bankruptcy Court had exclusive jurisdiction under Title *11 of the United States Code, Section 523(c)* to determine the dischargeability of the debt sued on herein. Plaintiff failed to seek a timely determination of dischargeability of the debt sued on herein in the Bankruptcy Court; thus the order of discharge discharged the debt sued on herein.]

[5. On _____ (*date*), _____ (Plaintiff *or* Defendant) filed in the United States Bankruptcy Court for the _____ District of _____(, _____ Division), a complaint for the determination of the dischargeability of the debt sued on herein by Plaintiff. On _____(*date*), after a hearing on the merits, the bankruptcy judge made and entered an order determining that this debt was dischargeable. (That order is now final, and no appeal therefrom has been taken.) A copy of the order is attached as Exhibit "B" and incorporated herein by reference.]

[2] Use of Form

The form in [1], *above*, is an affirmative defense for use by a defendant who has been discharged in bankruptcy to defend against an action (state or federal) by a creditor to collect a debt. The grounds for the affirmatiave defense is that the claim in question was discharged in the bankruptcy case.

Before 1970, the affirmative defense had to be pleaded or it was waived [*Davison v. Anderson (1954) 271 P.2d 233* ; *but see Robinson v. Early (1967) 248 Cal. App. 2d 19, 24-25, 56 Cal. Rptr. 183* (discussing plaintiff's burden of proof after default in context of quashing writ of execution)]. Since the 1970 amendments to the Code, under *11 U.S.C. § 524(a)*, an order of discharge serves both to void any judgment on a dischargeable debt, whether obtained before or after the discharge, and to enjoin post-discharge acts by a creditor to collect or attempt to collect a dischargeable debt [*but see 11 U.S.C. § 524(f)* (voluntary repayment by debtor as not prohibited)]. Pleading the affirmative defense is still necessary, however, if dischargeability of the debt in question has yet to be determined [3 Collier on Bankruptcy, 15th Ed., § 523.13 (Matthew Bender)]. Thus, to the extent that it has not yet been resolved whether the debt is dischargeable--for instance, if there remains a question regarding whether the debt was properly scheduled or whether an obligation is in the nature of domestic support--the defendant should still plead affirmatively his or her discharge in bankruptcy and put in issue the determination of dischargeability.

Optional Paragraph 4 is for use if the bankruptcy was a Chapter 7, an individual's Chapter 11, a Chapter 12, or hardship discharge under Chapter 13, the obligation sued on is of the type enumerated at *11 U.S.C. § 523(a)(2), (4)*, or *(6)*, and no complaint to determine discharge was brought in the bankruptcy case in a timely manner. Optional Paragraph 5 is for use if a complaint to determine dischargeability was resolved in defendant's favor in the bankruptcy court.

[3] Certified Copy of Discharge Order as Prima Facie Defense

A certified copy of an order of discharge is a prima facie defense to any action to collect a debt existing at the commencement of the bankruptcy case. A creditor relying on the debtor's failure to properly or timely schedule the claim has the burden of establishing that failure. Once that failure is established, the debtor has the burden to show that the creditor nevertheless had actual notice of the case [*Hill v. Smith (1923) 260 U.S. 592, 595,43 S. Ct. 219, 67 L. Ed. 419* ; *Kreitlein v. Ferger (1915) 238 U.S. 21, 26, 35 S. Ct. 685, 59 L. Ed. 1184* ; *Mizrahi v. Miscione (1967) 252 Cal. App. 2d 673, 676, 60 Cal. Rptr. 680]* . A defendant who knows the claim was not properly or timely scheduled may wish to include Optional Paragraph 3.

[4] Removal to Federal District Court

Either party may remove the action to the district court for the district in which the state action is pending, if that district has or had jurisdiction of the bankruptcy case [*28 U.S.C. § 1452(a)*; *see 28 U.S.C. § 1334* (bankruptcy jurisdiction)]. The court to which the action has been removed may remand on any equitable ground [*28 U.S.C. § 1452(b)*]. For further discussion of removal actions, see *§ 94.41*. For forms related to removal, see *§ 94.110* et seq.

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Volume 9: Bailments thru Boats and Boating-Chs. 93-100
Chapter 94 BANKRUPTCY
PART IV. FORMS
D. Determining Dischargeability of Debts

9-94 California Forms of Pleading and Practice--Annotated § 94.123

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§ 94.123 Affirmative Defense in Action by Creditor Against Debtor--Laches as to Unscheduled Claim

[1] FORM Affirmative Defense in Action Brought by Creditor Against Debtor--Laches as to Unscheduled Claim

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], Defendant alleges:

1. Plaintiff has delayed an unreasonable period of time in bringing this action in that _____ [*specify length of delay, state when plaintiff first became aware of bankruptcy and when plaintiff commenced this action, and describe plaintiff's behavior during interim*].

2. Plaintiff's delay in bringing this action has prejudiced defendant in that _____ [*describe how delay has prejudiced defendant*].

[2] Use of Form

The form in [1], *above*, is an affirmative defense for use by a defendant who has been discharged in bankruptcy to defend against an action based on a debt that was not scheduled, and therefore was not discharged, in that bankruptcy case. The defense is based on laches. (Laches may be considered as a ground for demurrer if the facts are apparent on the face of the complaint [*Kleinclaus v. Dutard (1905) 147 Cal. 245, 250, 81 P. 516]* . For further discussion and forms relating to demurrers generally, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

The Ninth Circuit holds that the doctrine of laches applies to nondischargeability complaints brought under *11 U.S.C. § 523(a)(3)(B)* (a discharge under Chapter 7 does not cover unlisted, unscheduled debts) and *Fed. R. Bankr. P., Rule 4007(b)* [*Beaty v. Selinger (In re Beaty) (9th Cir. 2002) 306 F.3d 914, 922-926]* . In *11 U.S.C. § 523(a)(3)(B)* the Bankruptcy Code creates a nondischargeability action for creditors that were neither listed nor scheduled and had no

notice or actual knowledge of the case in time to permit the timely filing of a proof of claim or a timely request for a determination of dischargeability. Rule 4007(b), which governs the timing of the commencement of actions by unscheduled creditors, allows the complaint to be filed "at any time."

While laches is available as a defense, courts are required "to be especially solicitous to [creditors] when laches is invoked, and to refuse to bar an action without a particularized showing of demonstrable prejudicial delay. Just as there is a strong presumption that a delay is reasonable for purposes of laches when a specified statutory limitations period has not yet lapsed, there should be a similar presumption in [these] cases." The debtor must make a heightened showing of "extraordinary circumstances" and set forth a "compelling reason why the [creditor's] action should be barred" [*Beaty v. Selinger (In re Beaty) (9th Cir. 2002) 306 F.3d 914, 926]* .

As a general rule, the affirmative defense of laches requires proof of both of the following [*Kansas v. Colorado (1995) 514 U.S. 673, 687, 115 S. Ct. 1733, 131 L. Ed. 2d 759* ; *Costello v. United States (1961) 365 U.S. 265, 282, 81 S. Ct. 534, 5 L. Ed. 2d 551]* :

- Lack of diligence by the plaintiff against whom the defense is asserted; and
- Prejudice resulting to the defendant.

The first element of laches requires an examination both of the length of the delay between the time when the creditor became aware of the bankruptcy discharge and the filing of the nondischargeability action, and also of the circumstances surrounding that delay, including the creditor's behavior during the interim period [*Beaty v. Selinger (In re Beaty) (9th Cir. 2002) 306 F.3d 914, 927]* . With respect to the second element, generic claims of prejudice will not suffice for a laches defense in any case and would be particularly insufficient in a case in which a heightened showing of extraordinary circumstances and demonstrable prejudice is required [*Beaty v. Selinger (In re Beaty) (9th Cir. 2002) 306 F.3d 914, 928* (citing as examples of generic claims, asserted by debtor in this case: debtor would be deprived of finality of discharge, debtor faced attorney's fees that otherwise might not have arisen, and there might be some witnesses or documentary evidence that will be unavailable because of passage of time)].

California Forms of Pleading and Practice--Annotated

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Volume 9: Bailments thru Boats and Boating-Chs. 93-100
Chapter 95 BANKS, DEPOSITS, AND CHECKS

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9-95 California Forms of Pleading and Practice--Annotated § 95.01

§ 95.01 Scope of Chapter

This chapter discusses the organization, regulatory environment, and some powers of state and federal banks and savings and loan associations; venue for actions against national banks; and service of process on banking institutions.

This chapter includes allegations of the capacity and principal place of business of a national bank [*see § 95.410*] and of the capacity and principal place of business of a state bank [*see § 95.411*]. It also includes allegations of the capacity and principal place of business of a state savings and law association [*see § 95.412*] and of the capacity and principal place of business of a federal savings bank [*see § 95.413*]. Finally, it includes a complaint for a stockholder's derivative action against a state-chartered savings and loan association [*see § 95.414*].

This chapter also discusses the relationships and obligations arising from the various types of deposits with financial institutions, focusing on the federal Expedited Funds Availability Act (*12 U.S.C. § 4001 et seq.*), the California Delayed Withdrawal Provisions (*Fin. Code § 866 et seq.*), and the California Multiple-Party Accounts Law (*Prob. Code § 5100 et seq.*). Check collection and handling are discussed in *§ 95.310* et seq.

This chapter also includes the following forms:

- A complaint against a financial institution to recover the amount of a deposit [*see § 95.430*].

- A complaint for damages for failing to make deposited funds available for withdrawal within the required time [*see § 95.431*].

- A declaration and notice of adverse claim to funds deposited in a bank or savings account [*see § 95.432*].

- A complaint in interpleader by a bank to determine rights of adverse claimants [*see § 95.433*].

- A complaint for fraud and deceit by a creditor against a bank and its employee to recover damages for misrepresentation and suppression of facts surrounding the solvency of a debtor [*see § 95.434*].

- A complaint and an allegation for recovery of funds improperly subjected to setoff [§§ 95.435, 95.436].

Within this chapter "bank" means a person engaged in the business of banking, including a savings bank, savings and loan association, credit union, or trust company [*Com. Code § 4105(1)*].

This chapter also discusses the rights and responsibilities of financial institutions to their customers as drawers and payees of checks with regard to the collection and payment of checks under Division 4 of the California Commercial Code (*Com. Code § 4101 et seq.*). This chapter also discusses the regulation of check-cashing businesses under *Civ. Code § 1789.30 et seq.*

Checks are negotiable instruments within the meaning of *Com. Code § 3104*, so checks are governed also by Division 3 (*Com. Code § 3101 et seq.*), which is discussed in Ch. 385, *Negotiable Instruments* . In particular, see Ch. 385, *Negotiable Instruments* , for discussion of *Com. Code § 3110*, which determines to whom a check is payable. Selected provisions of Division 3 that relate to one's rights against a financial institution on particular checks are addressed in this part rather than in Ch. 385, *Negotiable Instruments*.

Forms in this chapter relating to Division 3 include a complaint for use by a payee whose endorsement was forged against the collecting bank that paid the forger [*see § 95.461*; *see Com. Code § 3420*]; a complaint by a represented person against a bank that took a check from his or her representative in circumstances giving notice of breach of fiduciary duty [*see § 95.463*; *see Com. Code § 3307*]; a declaration of loss of teller's, cashier's, or certified check and notice of claim [*see § 95.464*; *see Com. Code § 3312(b)*]; and a notice of potential damages likely to be caused by a bank's wrongful refusal to pay a teller's, cashier's, or certified check [*see § 95.465*; *see Com. Code § 3411*].

Division 4 is the basis for complaints against a bank for improper payment of a check [*see § 95.450*], for wrongful dishonor of a check [*see § 95.456*], and for payment of a check contrary to a stop-payment order [*see § 95.459*], as well as for forms of allegations for use with those complaints [§§ 95.457, 95.458] and forms of affirmative defenses for use by a bank in those actions [*see §§ 95.451 -95.455*]. A complaint for declaratory relief is also included for use by a drawee bank to determine its claim of subrogation after payment of a check the drawer claims was not properly payable check [*see § 95.460*].

For forms for use in actions by and between the parties to checks *other than banks*, see Ch. 385, *Negotiable Instruments* .

This chapter also discusses rights, duties, obligations, and liabilities arising in connection with funds transfers between banks and banking customers under Division 11 of the Commercial Code [*see Com. Code § 11101 et seq.*; § 95.340 et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsGeneral DepositsBanking LawDepository InstitutionsCustomer-Bank RelationsGeneral OverviewCivil ProcedureVenueIndividual DefendantsCommercial Law (UCC)Bank Deposits & Collections (Article 4)CollectionsGeneral OverviewCommercial Law (UCC)Bank Deposits & Collections (Article 4)Customer-Bank RelationsPayor Bank DutiesGeneral Overview

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9-95 California Forms of Pleading and Practice--Annotated § 95.02

§ 95.02 Cross References

For discussion and forms relating to corporations generally, including capacity, issuance of shares, corporate records and reports, shareholders' rights, and derivative actions, see Ch. 160, *Corporations: Capacity* , and Ch. 162, *Corporations: Issuance of Shares* .

For a complaint by a depositor against a bank for money had and received, see Ch. 121, *Common Counts* .

For forms to establish or contest the joint tenancy nature of title to property, see Ch. 316, *Joint Tenancy and Tenancy in Common* .

For forms relating to the liability of a principal for the torts of his agent, see Ch. 427, *Principal and Agent* .

For forms for use in actions involving the parties to a check or note, see Ch. 385, *Negotiable Instruments* .

For forms relating to the liability of a principal for the torts of his or her agent, see Ch. 427, *Principal and Agent* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityGeneral OverviewBusiness & Corporate LawCorporationsGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)General OverviewReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipTenancies in Common

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[Reserved]

§§ 95.03[Reserved]

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1. Scope and Governing Law

9-95 California Forms of Pleading and Practice--Annotated § 95.10

§ 95.10 Governing Law

California Banking Law, which is Division 1 of the Financial Code (*Fin. Code § 99 et seq.*), and regulations (*10 Cal. Code Reg. § 1.1 et seq.*) govern operations of state-chartered banks. Federally chartered banks are governed by various federal laws and regulations that are beyond the scope of this chapter, including the National Banking Act (*12 U.S.C. § 21 et seq.*).

California Savings Association Law, which is Division 2 of the Financial Code (*Fin. Code § 5000 et seq.*), and regulations (*10 Cal. Code Reg. § 100.100 et seq.*) govern operations of state-chartered savings associations.

Banks and savings associations are also both subject to all provisions of law applicable to corporations generally, including the General Corporation Law (*Corp. Code § 100 et seq.*), except that, if any provision of the general corporation law is inconsistent with any provision of the Banking Law or the Savings Association Law, or any regulation or order issued thereunder, the provisions of the Banking Law or Savings Association Law prevail [*Fin. Code §§ 101(b)* (banks), 6500(a) (savings and loan associations)].

Banks, savings associations, and credit unions and industrial loan companies that formerly were regulated by the Department of State Banking, Department of Savings and Loan, and Department of Corporations, respectively, are regulated by the Department of Financial Institutions, headed by the Commissioner of Financial Institutions [*see* Stats. 1996, ch. 1064, § 1].

Various federal laws and regulations, most notably the Federal Deposit Insurance Act (*12 U.S.C. § 1811 et seq.*) and regulations promulgated thereunder, that are beyond the scope of this chapter also govern specified operations of state-chartered banks and savings associations; branches of foreign banks and savings associations operating in California; and branches, agencies, subsidiaries, and affiliates of federally chartered or insured banks or savings associations operating in California [*see generally § 95.100* et seq.].

Release of demand deposit funds, including NOW accounts, is governed by *Fin. Code §§ 40500, 40501* [*see § 95.291*].

The California Right to Financial Privacy Act (*Gov. Code § 7460 et seq.*) governs access to customers' financial records by California agencies.

The California Consumer Contract Awareness Act of 1990 (*Civ. Code § 1799.200 et seq.*) governs contracts and guaranties and imposes requirements for providing copies to the consumer or guarantor. Any waiver of the provisions of that law is contrary to public policy, and is void and unenforceable [*Civ. Code § 1799.207*].

Possible preemption of state wrongful discharge claims by employees of national banks and insured savings and loan associations are governed by *12 U.S.C. § 24* para. 5 and *12 C.F.R. § 563.39(b)*, respectively.

Multiparty accounts are governed by *Prob. Code § 5100 et seq.*, which is discussed in *§ 95.270*, and in Ch. 316, *Joint Tenancy and Tenancy in Common*, and Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawGeneral OverviewBanking LawDepository InstitutionsState Savings AssociationsCivil ProcedureFederal & State InterrelationshipsFederal Common LawPreemption

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[Reserved]

§§ 95.11[Reserved]

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2. California Right to Financial Privacy Act

9-95 California Forms of Pleading and Practice--Annotated § 95.30

§ 95.30 Right to Financial Privacy Act

[1] Purposes

The California Right to Financial Privacy Act (*Gov. Code § 7460 et seq.*; hereinafter, "Privacy Act") was enacted to establish procedures and policies to govern the relationship between financial institutions and government agencies in a way that ensures citizens' constitutional rights, specifically to clarify and protect the confidential relationship between financial institutions and their customers and to balance a citizen's right of privacy with the governmental interest in obtaining information for specific purposes [*Gov. Code § 7461*].

[2] Applicability and Definitions

The Privacy Act applies to all financial institutions operating in California: state and national banks, state and federal savings and loan associations, trust companies, industrial loan companies, and state and federal credit unions [*Gov. Code § 7465(a)*]. It does not apply to a title insurer while the insurer is engaging in the conduct of the "business of title insurance" [*see Ins. Code § 12340.3*], an underwritten title company, or an escrow company [*Gov. Code § 7465(a)*]. The "financial records" protected by the Privacy Act are any original or any copy of any record or document held by a financial institution pertaining to a customer of the financial institution [*Gov. Code § 7465(b)*]. The customer can be an individual, partnership, corporation, limited liability company, association, trust, or any other legal entity who has transacted business with or has used the services of the financial institution or for whom a financial institution has acted as a fiduciary [*Gov. Code § 7465(c), (d)*].

The Privacy Act applies to "state agencies," which means state offices, officers, departments, divisions, bureaus, boards, commissions, and other state agencies, including the Legislature [*Gov. Code § 7465(e)*]. The Privacy Act also applies to "local agencies" such as counties; cities, whether general law or chartered; cities and counties; school districts; municipal corporations; districts; political subdivisions or boards, commissions, or agencies thereof; or other local public agencies [*Gov. Code § 7465(f)*]. All "supervisory agencies" must abide by the Privacy Act, including the following [*Gov. Code § 7465(g)*]:

- The Department of Financial Institutions;
- State Controller;
- Administrator of Local Agency Security;
- Department of Real Estate; and
- Department of Insurance.

The Privacy Act pertains to investigations by any of the agencies including, but not limited to, any inquiry by a peace officer, sheriff, or district attorney or any inquiry to determine whether there has been a violation of any law enforceable by imprisonment, fine, or monetary liability [*Gov. Code § 7465(h)*].

The term "subpoena" includes subpoena duces tecum [*Gov. Code § 7465(i)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral Overview

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9-95 California Forms of Pleading and Practice--Annotated § 95.31

§ 95.31 Conditions for Disclosure of Financial Records to State and Local Agencies

[1] In General

Except as provided in *Gov. Code § 7480* (discussed in *§ 95.37[1]*), no officer, employee, or agent of a state or local agency or department may request or receive copies of, or the information contained in, a customer's financial records from a financial institution unless the financial records are described with particularity and are consistent with the scope and requirements of the investigation giving rise to the request [*Gov. Code § 7470(a)*]. Further, the information can only be disclosed if one of the following additional requirements is met [*Gov. Code § 7470(a)*]:

- The customer authorized disclosure to the officer, employee, or agent of the state or local agency or department of the agency in accordance with *Gov. Code § 7473*;

- The disclosure is in response to an administrative subpoena or summons that meets the requirements of *Gov. Code § 7474*;

- The disclosure is in response to a search warrant that meets the requirements of *Gov. Code § 7475*; or

- The disclosure is in response to a judicial subpoena or subpoena duces tecum that meets the requirements of *Gov. Code § 7476*.

Nothing in *Gov. Code §§ 7470* or *7473-7476* requires a financial institution to inquire or determine that the agency seeking disclosure has complied with the requirements set forth in those sections so long as the customer authorization, administrative subpoena or summons, search warrant, or judicial subpoena or order served on or delivered to a financial institution shows compliance on its face [*Gov. Code § 7470(b)*].

[2] Record of Disclosures and Access to Customers

The financial institution must maintain a record of all examinations or disclosures of financial records for a period of five years. That record must show the following [*Gov. Code § 7470(c)*]:

- The identity of the person examining the financial records;
- The state or local agency or department the examiner represents; and
- A copy of the customer authorization, subpoena, summons, or search warrant providing for the examination or disclosure, or a copy of the certification received pursuant to *Gov. Code § 7480(b)* (discussed in *§ 95.37[3]*).

The financial records obtained by the state or local agency or office must be made available to the customer within five days of request, during normal business hours, for review by the customer at the office or branch at which the customer's account was located when examined or disclosed. The financial institution may charge the customer a reasonable fee for furnishing the records and may require payment at the time the customer requests to see the records [*see Gov. Code § 7470(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 95.32 Requests in Connection With Investigation of Customer

[1] Limitations on Disclosure

If the director, officer, employee, or agent of the financial institution knows or has reasonable cause to believe that financial records or information are being requested in connection with a civil or criminal investigation of the customer, whether or not an investigation is being conducted pursuant to formal judicial or administrative proceedings, the financial institution or its director, officer, employee, or agent cannot provide or authorize another to provide to an officer, employee, or agent of a state or local agency or department any financial records, copies of financial records, or information contained in financial records, except in accordance with the following [*Gov. Code § 7471(a)*]:

- *Penal Code § 14160 et seq.* (currency transactions of more than $10,000);
- *Gov. Code § 7473* (customer authorization);
- *Gov. Code § 7474* (administrative subpoena or summons);
- *Gov. Code § 7475* (search warrant); or
- *Gov. Code § 7476* (judicial subpoena or subpoena duces tecum).

Gov. Code § 7471 does not prohibit disclosure of the financial records of a customer or the information contained in a customer's financial records incidental to a transaction in the normal course of business of the financial institution if the director, officer, employee, or agent of the financial institution making or authorizing the disclosure has no reasonable cause to believe that the financial records or the information contained in the financial records being disclosed will be used by a state or local agency or department in connection with an investigation of the customer, whether or not an investigation is being conducted pursuant to formal judicial or administrative proceedings [*Gov. Code § 7471(b)*].

A financial institution that refuses to disclose a customer's financial records, copies of a customer's financial records, or the information contained in a customer's financial records in good faith reliance on the prohibitions of *Gov. Code § 7471(a)*, or discloses the financial records of a customer, or copies of a customer's records or the information contained in a customer's records, in reliance in good faith on *Gov. Code § 7470(c)* or *(d)* [*discussed in §§ 95.31[2], 95.37[1]*], or *Penal Code § 14164* (concerning records of customers' currency transactions exceeding $10,000), is not liable to its customer, a state or local agency, or any other person for any loss or damage caused in whole or in part by that refusal or disclosure [*Gov. Code § 7471(d)*].

[2] Suspected Violations of Law

Gov. Code § 7471 does not preclude a financial institution, in its discretion, from initiating contact with, and thereafter communicating with and disclosing customer financial records to, appropriate state or local agencies concerning suspected violation of any law [*Gov. Code § 7471(c)*; *see also § 95.37[3]*]. This provision is referred to in some cases as the "bank-as-victim" exception. If the financial institution is not neutral by reason of the fact that it is, or suspects it might be, the victim of suspected wrongdoing, the depositor's right of privacy will not prevail [*Burrows v. Superior Court (1974) 13 Cal. 3d 238, 245, 118 Cal. Rptr. 166, 529 P.2d 590* ; *People v. Hole (1983) 139 Cal. App. 3d 431, 438, 188 Cal. Rptr. 693* ; *see also Gov. Code § 7480(f)* (*see § 95.37*)].

For example, if a bank notices that a depositor who is an employee of a corporate depositor has made unauthorized transfers of funds from the corporate account to the employee's personal account, the bank is entitled under *Gov. Code § 7471(c)* to notify the corporate depositor. After the corporate depositor contacts the police, no warrant or subpoena is necessary for the bank to provide police with the employee's account records [*People v. Nece (1984) 160 Cal. App. 3d 285, 291-292, 206 Cal. Rptr. 552]* .

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§ 95.33 Customer Authorization of Disclosures

[1] Form of Authorization

A customer may authorize disclosure under *Gov. Code § 7470(a)(1)* if the agency seeking disclosure furnishes the financial institution with a statement signed and dated by the customer that does all the following [*Gov. Code § 7473(a)*]:

- Authorizes disclosure of information regarding a period set forth in the authorization statement;
- Specifies the name of the agency or department to which disclosure is authorized and, if applicable, the statutory purpose for which the information is to be obtained; and
- Identifies the financial records that are authorized to be disclosed.

A financial institution cannot require this authorization as a condition of the customer's doing business with it [*Gov. Code § 7473(b)*].

The authorization form provided to a customer by an officer, employee, or agent of a state or local agency seeking customer authorization for disclosure of the customer financial records must include written notification that the customer has the right at any time to revoke the authorization, except when the authorization is required by statute [*Gov. Code § 7473(c)*].

[2] Notification of Receipt or Examination of Records

An agency or department examining a customer's financial records of a customer pursuant to the customer's written authorization must notify the customer in writing within 30 days of the receipt of the records. The notification requirements may be extended for two additional 30-day periods, however, by application to a court in the county in which the records are located, on a showing of good cause to believe that a disclosure to the customer would impede the

investigation. Thereafter, by application to a court on a showing of extreme necessity for nondisclosure, the notification requirements may be extended for three additional 30-day periods. At the end of that period or periods, the agency or department must inform the customer that he or she has the right to make a written request as to the reason for the examination. The notice must specify the financial records that were examined and, if the customer requests, the reason for the examination [*Gov. Code § 7473(d)(1)*].

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§ 95.34 Administrative Subpoena or Summons

[1] Requirements

To obtain a customer's financial records by administrative subpoena or summons otherwise authorized by law, officers and employees of state and local agencies must comply with the following requirements [*Gov. Code § 7474(a)*]:

- The entity seeking disclosure must serve a copy of the subpoena or summons on the customer in accordance with *Code Civ. Proc. § 413.10 et seq.*;

- The subpoena or summons must include the name of the agency or department in whose name the summons or subpoena is issued and the statutory purpose for which the information is being obtained; and

- The entity seeking disclosure cannot obtain the records until and unless 10 days have passed since service of the summons or subpoena and the customer has not moved to quash the subpoena or summons.

Unless a court orders otherwise, a financial institution may notify its customer of receipt of an administrative subpoena or summons [*Gov. Code § 7474(c)*].

[2] Petition to Modify Notice Period

The Attorney General, the Commissioner of Corporations, and any district attorney investigating a violation of antitrust law authorized by *Bus. & Prof. Code § 16759* may petition a court in the county where the records are located to waive or shorten the service and 10-day notice requirements if he or she can show that a law subject to the jurisdiction of that agency has been or is about to be violated [*Gov. Code § 7474(b)(1)*]. If the petition is granted by the court, the petitioning agency must notify the customer in writing of the examination within a period determined by the court, but not to exceed 60 days after the agency's receipt of any of the customer's financial records, copies, or information. The

notice must specify what records were examined [*Gov. Code § 7474(b)(3)*]. On renewed petition, the time for notification can be extended another 30 days on a showing of good cause to believe that notification would impede the investigation. Thereafter, by application to a court, on a showing of extreme necessity for continued nondisclosure, the notification requirements may be extended for three additional 30-day periods [*Gov. Code § 7474(b)(3)*].

[3] Motion to Quash

If a customer files a motion to quash an administrative subpoena or summons, the motion must receive priority on the court calendar and must be heard within 10 days from the date of filing [*Gov. Code § 7474(d)*]. For discussion of administrative subpoenas, see Ch. 471, *Investigations by Public Agencies* . For discussion and forms of motion to quash service of summons in judicial proceedings, see Ch. 323, *Jurisdiction: Personal* . For discussion and forms of motion to quash or modify judicial subpoenas, see Ch. 535, *Subpoena* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 95.35 Search Warrant

Officers of a state or local agency may obtain financial records under *Gov. Code § 7470(a)(3)* only if a search warrant is obtained in accordance with *Penal Code § 1523 et seq.* [*Gov. Code § 7475*].

The financial records may be examined as soon as the warrant is served on the financial institution. Unless a court orders otherwise based on a finding that notification would impede the investigation, a financial institution may notify its customer of receipt of a search warrant [*Gov. Code § 7475*].

The financial institution must make the customer's records available to the officer, employee, or agent of the state or local agency or department within 10 days after service of the warrant on it, unless the institution makes a written showing to the court within the 10-day period that it cannot reasonably make the records available within that period [*Gov. Code § 7475*].

For further discussion of administrative search warrants, see Ch. 471, *Investigations by Public Agencies* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 95.36 Judicial Subpoena or Subpoena Duces Tecum

Officers and employees of state and local agencies may obtain financial records under a judicial subpoena or subpoena duces tecum issued and served on the customer and the financial institution in accordance with *Code Civ. Proc. § 1985 et seq.* If the customer has not been served by the time the records are to be produced, the court must, on good cause shown, make a finding of due diligence on the part of the agency before turning any records over to it [*Gov. Code § 7476(a)(1)*].

The agency must wait 10 days after serving the subpoena before it receives the financial records or information to allow the customer to move to quash. However, the 10-day period can be shortened on a showing of good cause [*Gov. Code § 7476(a)(2)*]. If the customer moves to quash and is unsuccessful, the records may be provided to the agency [*Gov. Code § 7476(a)(3)*].

A deputy district attorney, deputy attorney general, or other person authorized to present evidence to a grand jury in a criminal investigation before a grand jury, or scheduled to be presented to a grand jury, may obtain financial records for return to the grand jury pursuant to a judicial subpoena duces tecum, on a written showing to a judge of the superior court that there exists a reasonable inference that a crime within the jurisdiction of the grand jury has been committed and that the financial records sought are reasonably necessary to the jury's investigation of that crime, provided the subpoena is personally signed and issued by a judge of the superior court [*Gov. Code § 7476(b)(1)*], and one of three conditions is satisfied for the customer's reasonable protection [*see Gov. Code § 7476(b)(1)(A)-(C)*].

For discussion of procedures and forms applicable generally to subpoenas of consumer financial records, see Ch. 535, *Subpoena* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 95.37 Authorized Exceptions

[1] Financial Institution as Victim

Except as provided in Gov. Code *§ 7480, Gov. Code* § 7470 is not intended to preclude a state or local law enforcement agency from initiating contact with a financial institution if there is reason to believe that the financial institution is the victim of a crime. After contact by an enforcement agency, if the financial institution believes it is a victim of a crime, it may in its discretion disclose relevant financial records pursuant to *Gov. Code § 7471(c)* (discussed in *§ 95.32[2]*) [*Gov. Code § 7470(d)*]. *Gov. Code §§ 7470(d)* and *7471(c)* are often considered together, depending on whether the financial institution or the enforcement agency initiates the contact or investigation. When a person attempts to pass a check drawn on insufficient funds in violation of *Penal Code § 476a*, the drawee bank is a "victim of the crime" for purposes of these exceptions whether or not it suffers any financial loss [*People v. Hole (1983) 139 Cal. App. 3d 431, 438, 188 Cal. Rptr. 693]* .

[2] Information Not Identifiable With Customer

The financial institution can release any financial information that is not identifiable with a customer [*Gov. Code § 7480(a)*].

[3] Inquiry Regarding Check Fraud

When a police or sheriff's department or district attorney in California certifies to a bank, credit union, or savings association in writing that a crime report has been filed that involves the alleged fraudulent use of drafts, checks, access cards, or other orders drawn on a bank, credit union, or savings association in, or doing business in, California, the police or sheriff's department or district attorney or, when investigating the financial abuse of an elder or dependent adult, a county adult protective services office or long-term care ombudsman may request that the bank, credit union, or savings association furnish a statement setting forth the following information with respect to a customer account specified by the police or sheriff's department or district attorney, for a period 30 days preceding, and up to 30 days following, the date of occurrence of the alleged illegal act involving the account [*Gov. Code § 7480(b), (c)*]:

- The number of items dishonored.

- The number of items paid that created overdrafts.

- The dollar volume of the dishonored items and items paid that created overdrafts and a statement explaining any credit arrangement between the bank, credit union, or savings association and customer to pay overdrafts.

- The dates and amounts of deposits and debits and the account balances on those dates.

- A copy of the signature card, including the signatures and any addresses appearing on a customer's signature card.

- The date the account was opened and, if applicable, the date the account was closed.

- Surveillance photographs and video recordings of persons accessing the crime victim's financial account via an automated teller machine (ATM) or from within the financial institution, for dates on which illegal acts involving the account were alleged to have occurred, if the financial institution possesses such a photograph or video recording [*but see Gov. Code § 7480(b)(7)(B), (c)(7)(B)* (certain statutory civil immunities are not affected by this requirement)].

If the bank, credit union, or savings association furnishes to the requesting person copies of complete account statements prepared in the regular course of business, that will be deemed to be in compliance with the first four requirements above [*Gov. Code § 7480(b)(8), (c)(8)*].

The bank, credit union, or savings association must furnish the requested information, provided, if it is not a California financial institution, the consent of the account holder has been obtained [*Gov. Code § 7480(b), (c)*]. Consent of the account holder will be given if an account holder provides to the financial institution, and to the person or entity seeking disclosure, a signed and dated statement containing all of the following [*Gov. Code § 7480(d)*]:

- Authorization of the disclosure for the period specified above.

- The name of the agency or department to which disclosure is authorized and, if applicable, the statutory purpose for which the information is to be obtained.

- A description of the financial records that are authorized to be disclosed.

[4] Limited Reply to Inquiry by Specially Authorized Person

The financial institution may reveal (to certain specified law enforcement, supervisory, and taxing agencies) whether a customer has an account at that office and its number [*Gov. Code § 7480(e)*]. Financial institutions may also disclose to taxing authorities information required for auditing the financial institution and the amount of any security interest the financial institution has in any asset of the customer [*Gov. Code § 7480(g)-(i)*].

[5] Disclosure to Supervisory Agency

Disclosure may be made to certain supervisory agencies if related solely to the agency's supervisory functions [*Gov. Code § 7480(f)*].

[6] Limited Reply to Inquiry by EDD

Disclosure may be made to the Employment Development Department of the amount of any security interest a financial institution has in a specified asset of a customer if the department's inquiry is directed to the branch or office where the interest is held [*Gov. Code § 7480(j)*].

[7] Reply to Inquiry Regarding Construction Loan Disbursements

A financial institution that is a construction lender, as defined in *Civ. Code § 3087*, may disclose to the Registrar of Contractors information concerning the making of progress payments to a prime contractor requestedby the registrar in connection with an investigation under *Bus. & Prof. Code § 7108.5* [*Gov. Code § 7480(k)*].

[8] Inquiries Regarding Person Owing Child Support Obligation

A request by the Franchise Tax Board for information from a financial institution will be treated in the same manner and to the same extent as a request for information from a local child support agency referring to a support order pursuant to *Fam. Code § 17400*, for purposes of Government Code provisions pertaining to government access to financial records [*Rev. & Tax. Code § 19271(b)(3)(C)*]. The financial institution must provide the following [*Gov. Code § 7480(l)*]:

- Names of each owner of any account identified by number in the request; and

- Each account maintained by the person named in the request at the branch to which the request is delivered and, if the institution's computer capabilities allow, at all its California branches.

For each account disclosed, the institution must disclose the account number, the current balance, the street address of the branch where the account is maintained, and the name and address of any other persons listed as an owner [*Gov. Code § 7480(l)*].

The request may prohibit the financial institution from disclosing the request or the response to the account holder or any other person, except employees involved in responding to the request and auditors, attorneys, and regulatory authorities who need to know in order to perform their duties. Disclosure may also be made when required by legal process [*Gov. Code § 7480(l)*].

A local child support agency may make this type of request only if it has received at least one of the following types of physical evidence [*Gov. Code § 7480(l)*]:

- Any of the following, dated within the last three years: Form 599; Form 1099; a bank statement; a check; a bank passbook; a deposit slip; a copy of a federal or state income tax return; a debit or credit advice; correspondence that identifies the child support obligor by name, the bank, and the account number; correspondence that identifies the child support obligor by name, the bank, and the banking services related to the obligor's account; or an asset identification report from a federal agency.

- A sworn declaration from the custodial parent during the 12 months immediately preceding the request stating that the person named in the request has had or may have had an account at an office or branch of the financial institution to which the request is made.

The local child support agency may use the information obtained in response to the request only for purposes that are directly connected within the administration of the duties of the local child support agency pursuant to *Fam. Code § 17400* [*Gov. Code § 7480(l)*].

For further discussion of enforcement of child support orders, see Ch. 394, *Parent and Child* .

[9] Interstate Child Support Enforcement

On receipt of an administrative subpoena on the current federally approved interstate child support enforcement form, as approved by the federal Office of Management and Budget, a financial institution must provide the information or documents requested by the administrative subpoena [*Gov. Code § 7480(m)(1)*].

The administrative subpoena must refer to the current federal Office of Management and Budget control number and be signed by a person who states that he or she is an authorized agent of a state or county agency responsible for implementing the child support enforcement program set forth *42 U.S.C. § 651 et seq.* A financial institution may rely on the statements made in the subpoena and has no duty to inquire into the truth of any statement in the subpoena [*Gov. Code § 7480(m)(2)*].

If the person who signs the administrative subpoena directs a financial institution in writing not to disclose either the subpoena or its response to any owner of an account covered by the subpoena, the financial institution must not disclose the subpoena or its response to the owner [*Gov. Code § 7480(m)(3)*].

The financial institution and its officers, employees, and agents are not liable to any person for (1) duly disclosing information or providing documents in response to the subpoena, (2) failing to notify any owner of an account covered by the subpoena, (3) duly complying with a request not to disclose the subpoena or disclosure, or (4) failing to discover any account owned by the person named in the subpoena pursuant to a computerized search of the records of the financial institution [*Gov. Code § 7480(m)(4)*].

[10] Money Laundering Investigation

A financial institution may disseminate financial information and records pursuant to an order by a judge on a written ex parte application by a peace officer showing specific and articulatable facts that there are reasonable grounds to believe that the records and information sought are relevant and material to an ongoing investigation of a felony violation of *Penal Code § 186.10* (a money laundering scheme) or of any felony subject to the enhancement set forth in *Penal Code § 186.11* (enhanced penalty for two or more fraud- or embezzlement-related crimes) [*Gov. Code § 7480(n)(3)*].

The ex parte application must specify with particularity the records to be produced, which must be only those of individuals who are the subjects of the criminal investigation [*Gov. Code § 7480(n)(3)(A)*].

The ex parte application and any subsequent judicial order must be open to the public as a judicial record unless ordered sealed by the court, for a period of 60 days. The sealing of these records may be extended for 60-day periods on a showing to the court that it is necessary for the continuance of the investigation, and 60-day extensions may continue for up to one year or until termination of the investigation of the individual or individuals, whichever is sooner [*Gov. Code § 7480(n)(3)(B)*].

The records ordered to be produced must be returned to the peace officer applicant or a designee within a reasonable period after service of the order on the financial institution [*Gov. Code § 7480(n)(3)(C)*].

The financial institution may, but is not required to, notify a customer of the receipt of the order for production of records, unless a court orders the financial institution to withhold notification to the customer on a finding that the notice would impede the investigation. When a court has made an order to withhold notification to the customer, the peace officer or law enforcement agency that obtained the financial information must notify the customer by delivering

a copy of the ex parte order to the customer within 10 days of the termination of the investigation [*Gov. Code § 7480(n)(3)(D), (E)*].

No financial institution, nor any officer, employee, or agent of a financial institution, is liable to any person for disclosing information in response to an order as described above or complying with an order not to disclose to the customer either the order for records or information or the dissemination of information pursuant to the order [*Gov. Code § 7480(n)(4)(B), (C)*].

[11] Guardianship or Conservatorship Account or Safe Deposit

A financial institution may disseminate financial information and records in compliance with the requirements of *Prob. Code §§ 2892* and *2893* [*Gov. Code § 7480(n)(1), (2)*]. Those sections require a financial institution to send certain information to the supervising court after a guardian or conservator opens or changes the name to an account or safe deposit box in the financial institution. The financial institution and its officers, employees, and agents are not liable to any person for disclosing information to the supervising court in that case [*Gov. Code § 7480(n)(4)(A)*].

[12] Identity Theft Investigation

A financial institution that is a credit card issuer may disclose financial information and records to a peace officer [*see Penal Code § 830.1* (definition)] pursuant to *Civ. Code § 1748.95(a)(1)*, in the case of a credit card obtained in consequence of identity theft, provided the financial institution has first complied with the requirements of *Civ. Code § 1748.95(a)(2), (b)* (concerning notification to the victim of the identity theft) [*Gov. Code § 7480(o)(1)*].

A financial institution that is a state or federally regulated bank, savings association, savings bank, or credit union, or a subsidiary of any of those [*see Fin. Code § 4000(a)(9)* (definition)], may disclose financial information and records to a peace officer [*see Penal Code § 830.1* (definition)] pursuant to *Fin. Code § 4002(a)(1)*, in the case of any application submitted in consequence of identity theft, provided the financial institution has first complied with the requirements of *Fin. Code § 4002(a)(2), (b)* (concerning notification to the victim of the identity theft) [*Gov. Code § 7480(o)(2)*].

A financial institution that is a finance lender engaged in the business of making consumer loans may disclose financial information and records to a peace officer [*see Penal Code § 830.1* (definition)] pursuant to *Fin. Code § 22470(a)(1)*, in the case of any application submitted in consequence of identity theft, provided the financial institution has first complied with the requirements of *Fin. Code § 22470(a)(2), (b)* (concerning notification to the victim of the identity theft) [*Gov. Code § 7480(o)(3)*].

[13] Death of Beneficiary of Public Retirement System

When the Governing Board of the Public Employees' Retirement System or the State Teachers' Retirement System, or the retirement board of a retirement system established under the County Employees Retirement Law of 1937, certifies in writing to a financial institution that a benefit recipient has died and that transfers to the benefit recipient's account at the financial institution from the retirement system occurred after the benefit recipient's date of death, the financial institution must furnish to the retirement system the name and address of any co-owner, co-signer, or any other person who had access to the funds in the account following the date of the benefit recipient's death or, if the account has been closed, the name and address of the person who closed the account [*Gov. Code § 7480(p), (q)*]. (When applying this rule in the case of a county employee's retirement benefits, substitute the term "retired member or beneficiary of a retired member" for "benefit recipient.")

[14] State Tax Refund Directly Deposited in Error

When the Franchise Tax Board certifies in writing to a financial institution that (1) a taxpayer filed a tax return that authorized a direct-deposit refund with an incorrect financial institution account or routing number that resulted in all or

a portion of the refund not being received, directly or indirectly, by the taxpayer, (2) the direct deposit refund was not returned to the Franchise Tax Board, and (3) the refund was deposited directly on a specified date into the account of an account holder of the financial institution who was not entitled to receive the refund, the financial institution must furnish to the Franchise Tax Board the name and address of any coowner, cosigner, or any other person who had access to the funds in the account following the date of direct-deposit refund or, if the account has been closed, must furnish the name and address of the person who closed the account [*Gov. Code § 7480(r)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 95.38 Criminal Penalty for Violation

Intentional violation of the Privacy Act, or inducing or attempting to induce another to violate the Privacy Act, is a misdemeanor subject to imprisonment for up to one year and fines of up to $5,000, or both [*Gov. Code § 7485(a), (b)*].

Legal Topics:

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§ 95.39 Sanctions for Frivolous Attempt to Quash

The court has discretion to impose civil sanctions otherwise authorized by law against a customer who files a motion to quash, if the court finds the motion to be without reasonable grounds [*Gov. Code § 7485(c)*]. For discussion of the general power of the court to award sanctions for frivolous actions or delaying tactics, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral OverviewCivil ProcedureSanctionsBaseless FilingsGeneral Overview

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§ 95.40 Attorney's Fees and Costs

In a successful action to enforce liability for a violation of the Privacy Act, the customer may recover costs plus reasonable attorney's fees [*Gov. Code § 7486*; *see generally* Ch. 174, *Costs and Attorney's Fees*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

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§ 95.41 Injunctive Relief

A customer aggrieved by a violation or threatened by a potential violation of the Privacy Act may obtain injunctive relief. A customer who obtains injunctive relief also may recover costs and attorney's fees as determined by the court [*Gov. Code § 7487*; *see generally* Ch. 303, *Injunctions*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-95 California Forms of Pleading and Practice--Annotated § 95.42

§ 95.42 Statute of Limitations

Actions under the Privacy Act must be commenced within three years after the date on which the violation occurred [*Gov. Code § 7488*].

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For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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9-95 California Forms of Pleading and Practice--Annotated § 95.43

§ 95.43 Evidence

Evidence obtained in violation of the Privacy Act is inadmissible in any proceeding except a proceeding to enforce the provisions of the act [*Gov. Code § 7489*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral OverviewEvidenceProcedural ConsiderationsObjections & Offers of ProofObjections

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§ 95.44 Waiver

Subject to numerous exceptions set out in specific code sections, no waiver by a customer of any of the rights created by the Privacy Act is valid, whether oral or written, or with or without consideration [*Gov. Code § 7490*].

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§ 95.45 Credit Reports Not Precluded

The Privacy Act does not prevent state or local agencies from obtaining a credit report or consumer credit report from anyone other than a financial institution [*Gov. Code § 7493*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingConsumer ReportsBanking LawConsumer ProtectionState LawGeneral Overview

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[Reserved]

§§ 95.46[Reserved]

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9-95 California Forms of Pleading and Practice--Annotated § 95.60

§ 95.60 General Requirement That Consumer Receive Copy of Contract

The California Consumer Contract Awareness Act of 1990 (*Civ. Code § 1799.200 et seq.*) requires that, whenever a natural person signs specified written consumer contracts prepared by the seller, the seller must deliver a copy of the contract to the consumer at the time the contract is signed, if it is signed at the seller's place of business [*Civ. Code § 1799.202(a)*; *see also Civ. Code § 1799.201(a), (b)* (defining "consumer" and "consumer contract")]. If the contract is not signed by the consumer at the seller's place of business and the seller has not provided the consumer with a copy of the contract that the consumer is instructed to keep, the seller must mail or deliver a copy of the contact to the consumer within 10 calendar days after the seller receives the signed contract [*Civ. Code § 1799.202(a)*]. Any waiver of the provisions of the California Consumer Contract Awareness Act of 1990 is contrary to public policy, and is void and unenforceable [*Civ. Code § 1799.207*].

The following consumer contracts are governed by the Consumer Contract Awareness Act of 1990 [*Civ. Code § 1799.201(b)*; *see also Civ. Code § 1799.203* (contracts not governed by or deemed in compliance with Act)]:

- Contracts for the sale or lease of goods or services that are purchased or leased primarily for personal, family, or household purposes; or

- Contracts for extension of credit, the proceeds of which are used primarily for personal, family, or household purposes.

The term "services" as used in the act means work, labor, and services, including depository services and other banking services [*Civ. Code § 1799.201(i)*].

For discussion of the act as applied to consumer contract guarantees, see Ch. 538, *Suretyship, Bonds and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationBanking LawConsumer ProtectionState LawGeneral Overview

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9-95 California Forms of Pleading and Practice--Annotated § 95.61

§ 95.61 Exception if Writing Delivered or Not Prepared by Seller

A financial institution that is a seller need not deliver to the consumer, pursuant to *Civ. Code § 1799.202(a)*, any writing that the consumer contract incorporates by reference if either (1) that writing was previously delivered or mailed to the consumer or (2) that writing was not prepared by the seller [*Civ. Code § 1799.202(b)*].

"Financial institution" as used in the act means any commercial bank, trust company, savings and loan association, credit union, industrial loan company, insurance company, or person engaged in the business of lending money [*Civ. Code § 1799.201(j)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 95.62 Signature Card Agreements

If the consumer contract (1) is wholly or partly contained on a card or other writing that is used to identify the consumer in connection with a deposit account, safe deposit box, safekeeping agreement, or other service offered by a financial institution and (2) contains information particular to the consumer's account, box, or other arrangement that, if known by a third party, could be used by the third party to cause loss to the consumer or financial institution, the copy of the contract furnished to the consumer need not contain the consumer's signature or any of the identifying information particular to the consumer's account, box, or other arrangement. For purposes of this subdivision, a document that includes the same terms as those contained in the consumer contract are deemed to be a copy [*Civ. Code § 1799.202(c)*].

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9-95 California Forms of Pleading and Practice--Annotated § 95.63

§ 95.63 Safe Deposit and Safekeeping Agreements

A bank or trust company engaged in renting safe deposit boxes or receiving personal property for safekeeping and storage on its banking premises must deliver a copy of any safe deposit rental agreement or personal property safekeeping and storage agreement prepared by it and signed by its customer to that customer [*Fin. Code § 757(b)*]. If the agreement is signed at a place of business of the bank or trust company, it must be delivered to the customer at the time he or she signs it. If the agreement is not signed at a place of business of the bank or trust company, the bank or trust company must mail or deliver a copy of the contact to the customer within 10 calendar days after the bank or trust company receives the contract. The contract must not contain any blank spaces to be filled in after the customer signs the contract [*Fin. Code § 757(b)*].

If more than one consumer or customer has signed a consumer contract, safe deposit rental agreement, or personal property safekeeping and storage agreement, the seller, bank, or trust company may comply by mailing or delivering the copy to any one of the consumers who reside at the same address. A copy must also be mailed or delivered to any other consumer who has signed the contract and who does not reside at the same address [*Civ. Code § 1799.204*; *Fin. Code § 757(b)*; *but see Civ. Code § 1799.202(c)* (*discussed in § 95.62*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-95 California Forms of Pleading and Practice--Annotated § 95.64

§ 95.64 Consumer Credit Applications

An application for credit is not considered a consumer contract for purposes of *Civ. Code § 1799.201(b)* even if it contains incidental provisions, such as the consumer's consent to a credit review, a certification of the accuracy of the information furnished, or the consumer's agreement to the terms that will be furnished to the consumer pursuant to *Civ. Code § 1799.200 et seq.* This exclusion from the definition of consumer contract does not affect the enforceability of any incidental provision contained in the credit application [*Civ. Code § 1799.201(b)*].

If the consumer makes a written request, a seller or financial institution, within a reasonable time after receipt of the request, must mail a copy of the consumer's completed consumer credit application to the consumer at the address indicated on the request. That copy may, but need not, contain any information completed or added by the seller or financial institution. The seller or financial institution may specify the address to which these requests may be sent, may charge the consumer a reasonable copying fee, and is not obligated to provide the copy until the fee is paid [*Civ. Code § 1799.202(d)*].

By making a written request for a copy of the completed credit application, the consumer is conclusively deemed to have waived any action against the seller or financial institution, as well as against its employees or agents, on any theory, at law or in equity, arising directly or indirectly out of the mailing or other delivery of the copy, including any information added to the application by the seller or financial institution and included in the copy [*Civ. Code § 1799.202(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-95 California Forms of Pleading and Practice--Annotated § 95.65

§ 95.65 Liability; Evidence for Rescission

A seller, bank, or trust company that fails to comply with *Civ. Code § 1799.202* or *Fin. Code § 757(b)* is liable to the consumer for any actual damages suffered by the consumer as a result of that failure. This remedy is nonexclusive and is in addition to any other remedies or penalties available under other laws of California [*Civ. Code § 1799.205(a)*; *Fin. Code § 757(b)*].

Failure to comply with *Civ. Code § 1799.202* does not create an independent basis for rescission, but is admissible to establish a basis for the rescission of the contract otherwise authorized by law [*Civ. Code § 1799.205(b)*].

Legal Topics:

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

§§ 95.66[Reserved]

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4. Discharge of Officers or Employees of Financial Institutions

9-95 California Forms of Pleading and Practice--Annotated § 95.80

§ 95.80 Discharge of Bank Officers

[1] Dismissal at Pleasure of Directors

The directors of a national bank may dismiss officers at their pleasure [*12 U.S.C. § 24* para. 5]. The purpose of the "at-pleasure" provision is to ensure the fiscal integrity of national banks and to instill public confidence in those financial institutions. Thus, rights of officers of national banking associations that conflict with the right of the board of directors to dismiss them at their pleasure are preempted by *12 U.S.C. § 24* para. 5 whether those rights arise by virtue of an agreement or are imposed by state law and whether framed as contractual or tortious causes of action [*Aalgaard v. Merchants Nat. Bank, Inc. (1990) 224 Cal. App. 3d 674, 692-695, 274 Cal. Rptr. 81* (*12 U.S.C. § 24* para. 5 held to preempt California's age discrimination law); *Kozlowsky v. Westminster Nat. Bank (1970) 6 Cal. App. 3d 593, 596-597, 86 Cal. Rptr. 52]* . "Other officers" within meaning of *12 U.S.C. § 24* includes vice presidents serving as branch managers in positions created by the bank's board who had authority to bind the bank in substantial transactions with third parties [*Wells Fargo Bank v. Superior Court (1991) 53 Cal. 3d 1082, 1091, 282 Cal. Rptr. 841, 811 P.2d 1025]* .

However, when an employee asserted that his or her position as "vice-president" was not vested with any of the duties or responsibilities normally associated with such a position, the bank was required to show that the employee was "an officer" of the bank pursuant to the criteria set forth in *Wells Fargo Bank v. Superior Court* [*Wells Fargo Bank v. Superior Court (1991) 53 Cal.3d 1082, 282 Cal. Rptr. 841, 811 P.2d 1025*], in to obtain summary judgment on preemption grounds under *12 U.S.C. § 24* [*Ramanathan v. Bank of Am. (2007) 155 Cal. App. 4th 1017, 1021, 66 Cal. Rptr. 3d 471*].

For a form for an affirmative defense for use by a national bank to assert this preemption, as well as general discussion and forms relating to wrongful termination, see Ch. 249, *Employment Law: Termination and Discipline* .

[2] Liability if Dismissal Not Made or Approved by Directors

12 U.S.C. § 24 para. 5 does not preempt state law causes of action for wrongful termination unless the officer was

dismissed by the bank's board of directors itself or the dismissal was approved or ratified by the board. Initial approval of a discharge may take place by action of a committee of board members who have been specifically authorized by the entire board to take that action, but the initial approval must nonetheless be ratified by prompt and proper action of the entire board. If full board action is not taken, the bank may not rely on the at-pleasure provisions of *12 U.S.C. § 24* as a defense to a wrongful discharge action [*Wells Fargo Bank v. Superior Court (1991) 53 Cal. 3d 1082, 1103, 282 Cal. Rptr. 841, 811 P.2d 1025]* .

[3] Liability if Dismissal Not in Bank's Best Interests

12 U.S.C. § 24 para. 5 does not shield a director from liability for interference, or conspiracy to interfere, with economic relationships if his or her actions in initiating or causing the officer's employment to be terminated were not undertaken in the best interest of the bank [*see Aalgaard v. Merchants Nat. Bank, Inc. (1990) 224 Cal. App. 3d 674, 683-686, 274 Cal. Rptr. 81* (summary judgment for defendants held proper)]. Thus, if a director acts wantonly, maliciously, without justification, and not for protection of his or her legitimate interests as director, he or she may be liable for wrongful termination or breach of employment contract [*Kozlowsky v. Westminster Nat. Bank (1970) 6 Cal. App. 3d 593, 600, 86 Cal. Rptr. 52]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawDirectors & OfficersGeneral OverviewBanking LawDirectors & OfficersQualifications & RemovalsLabor & Employment LawEmployment RelationshipsEmployment ContractsBreach

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§ 95.81 Discharge of Savings and Loan Officers and Employees

Employment contracts entered into by insured savings and loan associations must allow the association's board of directors to terminate an officer's or employee's employment at any time. A termination other than for cause, however, does not prejudice the officer's or employee's right to compensation or other benefits. Termination for cause includes termination because of the officer's or employee's personal dishonesty, incompetence, willful misconduct, breach of fiduciary duty involving personal profit, intentional failure to perform stated duties, willful violation of any law, rule, or regulations (other than traffic violations or similar offenses) or of a final cease and desist order, or material breach of any provision of the contract [*12 C.F.R. § 563.39(b)(1)*]. *12 C.F.R. § 563.39* is enforced by the Office of Thrift Supervision and applicable to all insured savings and loans assocations.

California cases hold that state court claims of former savings and loan association employees are not preempted by *12 C.F.R. § 563.39* [*Thomka v. Financial Corp. (1993) 15 Cal. App. 4th 877, 887, 19 Cal. Rptr. 2d 382* ; *Honig v. Financial Corp. of America (1992) 6 Cal. App. 4th 960, 964-965, 7 Cal. Rptr. 2d 922* ; *Hall v. Great Western Bank (1991) 231 Cal. App. 3d 713, 722, 282 Cal. Rptr. 640]* . Although *Hall* relied on the fact that *12 C.F.R. § 563.39* does not contain the "at pleasure" language found in the banking law, *Honig* and *Hall* involved employees who were clearly pursuing legal activities, and the actions against them could not be considered to have been undertaken "for cause." *Honig* involved a suit filed as a preventative measure by an employee who feared termination. *Honig* alleged harassment in retaliation for plaintiff's refusal to use illegal means of marketing "jumbo" certificates. *Hall* was a wrongful termination action by an employee allegedly fired for pursuing a valid partial unemployment claim.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawDirectors & OfficersQualifications & Removals

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§§ 95.82[Reserved]

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9-95 California Forms of Pleading and Practice--Annotated § 95.100

§ 95.100 Governing Law

[1] In General

Banks, savings associations, and credit unions and industrial loan companies, which before July 1, 1997, were regulated by the Department of State Banking, Department of Savings and Loan, and Department of Corporations, respectively, are now regulated by the Department of Financial Institutions, headed by the Commissioner of Financial Institutions [*see* Stats. 1996, ch. 1064, § 1].

[2] Banks

California Banking Law (*Fin. Code § 99 et seq.*) and Regulations of California's Superintendent of Banks (*10 Cal. Code Reg. §§ 1.1 et seq.*) govern operations of state-chartered banks.

Acquisition of a California bank by a foreign-bank holding company, which is defined to include a foreign bank [*see Fin. Code § 3753(a)*], is governed by *Fin. Code § 3750 et seq.* Federally chartered banks are governed by various federal laws and regulations that are beyond the scope of this chapter, including the National Banking Act (*12 U.S.C. § 21 et seq.*).

Federal law provides that national banks "shall, for the purposes of all ... actions by or against them, be deemed citizens of the States in which they are respectively located" (apart from a few exceptional cases, such as a lawsuit against a bank by the United States, or an action to wind up the affairs of a bank) [*28 U.S.C. § 1348*]. This provision governs diversity jurisdiction and means that a national bank (1) is a citizen of the state in which its main office is located, as set forth in its articles of association, and (2) is not a citizen of any other state in which it has established a branch [*Wachovia Bank, N.A. v. Schmidt (2006) 546 U.S. 303, 318, 126 S. Ct. 941, 163 L. Ed. 2d 797]* .

Venue for actions against national banks under Federal Deposit Insurance Corporation receivership is prescribed by *12 U.S.C. § 94*, and changes of venue are regulated by *Code Civ. Proc. § 397*. Service of summons on banking corporations in California is governed by *Code Civ. Proc. § 416.10(c)*.

[3] Savings Associations

California Savings Association Law (*Fin. Code § 5000 et seq.*) and regulations of the Savings and Loan Commissioner (*10 Cal. Code Reg. § 100.100 et seq.*) govern operations of state-chartered savings associations.

Federal savings associations and federal savings banks are chartered, regulated, and supervised by the Office of Thrift Supervision (hereinafter, sometimes, "OTS"), a bureau of the Department of the Treasury, in accordance with the Home Owners' Loan Act (*12 U.S.C. § 1461 et seq.*), although their activities as members of the regional Federal Home Loan Banks are still governed by the Federal Home Loan Bank Act (*12 U.S.C. § 1421 et seq.*, as amended by Pub. L. No. 101-73) [*see* Pub. L. No. 101-73, §§ 401-512, 701-725].

Conduct of savings association business in California by a foreign savings association is governed by *Fin. Code § 10000 et seq.*

[4] Corporation Law Applicable to Both

Banks and savings associations, including foreign associations doing business in California with approval of the Savings and Loan Commissioner, have all the powers and privileges of, and are subject to all provisions of law applicable to, corporations generally, including the General Corporation Law (*Corp. Code § 100 et seq.*) [*see, e.g., FDIC v. Castetter (9th Cir. 1999) 184 F.3d 1040, 1044-1046* (application of business judgment rule codified in *Corp. Code § 309* to directors of federally-insured national bank)]. If any provision of the general corporation law is inconsistent with any provision of the Banking Law or the Savings Association Law or with any regulation or order issued thereunder, the provisions of the Banking Law or Savings Association Law prevail [*Fin. Code §§ 101(b)* (banks), *6500(a)* (savings and loan associations)].

[5] Insurance of Accounts

Insurance of bank and savings association accounts is governed by the Federal Deposit Insurance Act (*12 U.S.C. § 1811 et seq.*) and relatedregulations of the Federal Deposit Insurance Corporation (12 C.F.R. § 303 et seq.; hereinafter, sometimes, "FDIC") and the Office of Thrift Supervision (*12 C.F.R. § 500.1 et seq.*). Prior to doing business in California, a state-chartered association must obtain and maintain, and a foreign savings association doing business in California as defined in *Fin. Code § 10000(c)* must maintain, insurance of its accounts by the Federal Deposit Insurance Corporation [*Fin. Code § 5606(a)*]. Thus, both state-chartered and federally chartered savings and loan associations operating in California are subject to all applicable regulations of the FDIC and the Office of Thrift Supervision. The California Savings and Loan Commissioner can enforce those regulations, and all other federal statutes and regulations, as they apply to associations [*Fin. Code § 5606(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawDepository InstitutionsFederal Savings AssociationsBanking LawDepository InstitutionsState Savings AssociationsBanking LawFederal Deposit Insurance CorporationDeposit InsuranceBanking LawFederal Reserve SystemMember BanksBanking LawNational BanksGeneral Overview

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[Reserved]

§§ 95.101[Reserved]

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2. Institutions Defined or Described

9-95 California Forms of Pleading and Practice--Annotated § 95.120

§ 95.120 California Banks

[1] Banking Business

"Bank" as used in California Banking Law [*Fin. Code § 99 et seq.*] means any incorporated banking institution that has been incorporated to conduct the business of commercial or industrial banking or a trust business. The soliciting, receiving, or accepting of money or its equivalent for deposit as a regular business is considered doing a commercial banking business, whether deposits are subject to check or evidenced by a certificate of deposit, a passbook, a note, a receipt, or other writing. These provisions do not apply to or include money or its equivalent left in escrow or left with an agent pending investment in real estate or securities for or on account of the agent's principal. It is unlawful for any corporation, partnership, firm, or individual to engage in or transact a banking business in California except by means of a corporation duly organized for that purpose [*Fin. Code § 102*].

It is unlawful for any person, corporation, limited liability company, partnership, firm, or any other form of business entity allowed by law, to engage in or transact commercial banking business, industrial banking business, or trust business within California except by means of a corporation duly organized for that purpose [*Fin. Code § 107.5*].

[2] Formation

When authorized by the Commissioner of Financial Institutions as provided in *Fin. Code § 350 et seq.* (organization of banks), a corporation may be formed by one or more persons in accordance with the laws of California for the purpose of conducting a commercial banking business or a trust business, or both. The qualification requirements of the Corporate Securities Law of 1968 will not apply to the offer and sale of securities issued by and representing an interest in or a direct obligation of a bank or trust company incorporated under the laws of California if the securities are offered and sold pursuant to the commissioner's authorization [*see Fin. Code § 691*] or the securities are exempt from authorization pursuant to *Fin. Code § 691.1* or by a regulation or order of the commissioner [*Fin. Code § 350*].

A bank may not be a close corporation as defined in *Corp. Code § 158* [*Fin. Code § 351*].

[3] Service of Process

If a corporation is a bank, a summons may be served by delivering a copy of the summons and complaint to one of the following persons [*Code Civ. Proc. § 416.10(a)-(c)*]:

- The person designated as agent for service of process as specified by any provisions of *Corp. Code § 202*, *1502* (domestic corporations), *2105*, or *2107* (foreign corporations);

- The president, chief executive officer, or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a controller or chief financial officer, a general manager, or a person authorized by the corporation to receive service of process; or

- A cashier or assistant cashier.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawFederal Reserve SystemMember BanksCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsService Upon Agents

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9-95 California Forms of Pleading and Practice--Annotated § 95.121

§ 95.121 Banks and Trust Companies

Banks are divided into three classes [*Fin. Code § 103*]:

- Commercial banks;
- Industrial banks; and
- Trust companies.

A commercial bank is a corporation organized for the purpose of engaging in the commercial banking business [*Fin. Code § 105*]. The commercial banking business includes, but is not limited to, the business of soliciting, receiving, or accepting of money or its equivalent on deposit as a regular business, whether the deposit is made subject to check or is evidenced by a certificate of deposit, a passbook, a note, a receipt, or other writing, except money or its equivalent left in escrow or left with an agent pending investment in real estate or securities for, or on account of, his or her principal. In addition, to be engaged in the commercial banking business means to lend money on the security of real or personal property or without security; to discount or deal in bills, notes, or other commercial paper; to buy and sell for the account of customers, and, if eligible for investment, for the bank's own account, securities, gold and silver bullion, foreign coins, and bills of exchange; and generally to transact a commercial banking business [*Fin. Code § 105.2*].

An industrial bank is a corporation organized for the purpose of engaging in the industrial banking business [*Fin. Code § 105.5*]. The industrial banking business includes the making of loans and acceptance of deposits, including deposits evidenced by investment or thrift certificates, but excluding demand deposits [*Fin. Code § 105.7*].

A trust company is a corporation or a commercial or industrial bank that is authorized to engage in the trust business [*Fin. Code § 107*; *see Fin. Code § 1500 et seq.* (regulation of trust companies)]. For discussion of a banks' responsibilities when acting as trustee of a private or charitable trust, see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* . For discussion of banks' powers to operate trust departments and their responsibilities in offering

trust department services, see Banking Law, Chs. 34, 96 and 97 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawDepository InstitutionsGeneral OverviewBanking LawDepository InstitutionsCommercial BanksEstate, Gift & Trust LawTrustsGeneral Overview

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9-95 California Forms of Pleading and Practice--Annotated § 95.122

§ 95.122 National Banking Associations

National banking associations may be formed under *12 U.S.C. §§ 21-35* of the National Banking Act (*12 U.S.C. § 21 et seq.*). Associations carrying on the business of banking under the National Banking Act may be formed by five or more natural persons. Articles of association are required and must specify in general terms the object for which the association is formed. The articles may contain any other provisions, not inconsistent with law, that the association may see fit to adopt for the regulation of its business and the conduct of its affairs. The articles are signed by the persons uniting to form the association, and a copy is forwarded to the Comptroller of the Currency to be filed and preserved in that office [*12 U.S.C. § 21*].

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9-95 California Forms of Pleading and Practice--Annotated § 95.123

§ 95.123 Savings Association or Association

[1] Definitions

An "association" or "savings association" within the meaning of the California Savings Association Law (*Fin. Code § 5000 et seq.*) is a mutual or stock savings association, savings and loan association, or savings bank subject to the Savings Association Law, but excludes a federal association [*Fin. Code § 5102(a)*].

[2] Mutual Association

A mutual association is one type of association that may be formed under the California Savings Association Law. A mutual association is one whose articles of incorporation do not authorize issuance of capital stock [*Fin. Code § 5109*]. Mutual associations do not have stockholders but have "members." A member is any person holding a savings account of a mutual association [*Fin. Code § 5110*].

Each member of a mutual association is entitled to cast one vote for each $100, or fraction thereof, of the withdrawal value of his or her savings account or accounts [*Fin. Code § 6003*]. Any number of members present at a regular or special meeting of the members constitutes a quorum. A majority of all votes cast at any meeting of members determines any question, unless otherwise specified in the Savings Association Law [*Fin. Code § 6006*].

Members of a mutual association are not responsible for any losses of the association. Savings accounts are not subject to assessment, and savings account holders are not liable to creditors of the association for any unpaid installment on the association's account [*Fin. Code § 6603*; *see In re Pacific Coast Bldg. Loan Assn. (1940) 15 Cal. 2d 134, 142, 99 P.2d 251* (construing former §§ 5.01, 7.07 of the 1931 Building and Loan Association Act)].

A mutual association may issue mutual capital certificates in accordance with regulations of the commissioner [*Fin. Code § 5623*]. Mutual capital certificates are certificates evidencing an investment in a mutual association [*Fin. Code § 5111*].

A mutual association may amend its articles of incorporation to issue stock [*Fin. Code § 5621*]. A mutual association may also reorganize as a mutual holding company of a reorganized stock association [*Fin. Code §§ 5860-5868*].

[3] Stock Association

A stock association is one type of association that may be formed under the California Savings Association Law. A stock association's articles of incorporation authorize the issuance of capital stock [*Fin. Code § 5121*].

Stock associations may issue shares of common stock and preferred stock, with or without par value. The common and preferred stock may be divided into classes and the classes into series [*Fin. Code § 5620(a)*]. If a stock association had withdrawable shares outstanding on January 1, 1984, that association may continue to issue savings accounts in that form, and the holders of these accounts have the same rights as they had before the current version of *Fin. Code § 5620* came into effect [*Fin. Code § 5620(b)*].

Anyone who holds one or more shares of any class of capital stock of a capital stock association is a "stockholder" [*Fin. Code § 5122*].

[4] Savings Bank

A savings bank is another style of association that may be formed pursuant to the California Savings Association Law [*Fin. Code § 5117*].

[5] Federal Association

A "federal association" within the meaning of the California Savings Association Law is a savings and loan association or federal savings bank that is chartered by the Office of Thrift Supervision under *12 U.S.C. § 1464* [*Fin. Code § 5102(b)*; *see Fin. Code § 5102(a)* (federal association excluded from definition of "association" and "savings association")]. Prior to 1990, federal associations were charted by the Federal Home Loan Bank Board [*see* Pub. L. No. 101-73 (Financial Institutions Reform, Recovery, and Enforcement Act of 1989, or "FIRREA")].

A federal association and the holders of stock, shares, share accounts, savings accounts, and certificate accounts issued by any federal association have all the rights, powers, and privileges, and are entitled to the same exemptions and immunities, granted respectively to associations organized under the laws of California and to the holders of their stock, membership accounts, and savings accounts [*Fin. Code § 8500(a)*; *see also Corp. Code § 204*; *Fin. Code § 8501* (limitation on liability of directors); Ch. 167, *Corporations: Directors and Management*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawDepository InstitutionsFederal Savings AssociationsBanking LawDepository InstitutionsState Savings AssociationsBanking LawRegulatory AgenciesU.S. Office of Thrift Supervision

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9-95 California Forms of Pleading and Practice--Annotated § 95.124

§ 95.124 Foreign Association

[1] In General

For purposes of *Fin. Code § 10000 et seq.*, a foreign savings association is an insured institution other than a California savings association and other than a federal association [*Fin. Code § 10000(c)*; *see Fin. Code § 10000(d)* (defining "insured institution")]. For purposes of *Fin. Code § 10000 et seq.*, a California savings association means either (1) an association [*see Fin. Code § 5102(a)*, discussed in *§ 95.123[5]*] or (2) a foreign association or its successor that was licensed to do the business of an association in California on September 15, 1935 [*Fin. Code § 10000(a)*]. Except as provided by regulation, the California Savings Association Law (*Fin. Code § 5000 et seq.*) applies to a foreign savings association or its holding company as if business conducted in California were that of a California savings association [*Fin. Code § 10006*].

[2] Right to Operate in California

A foreign association may not conduct any business of an association within California, and no foreign savings association or foreign holding company may acquire control of a California savings association, without the written approval of the Commissioner [*Fin. Code §§ 10001*, *10003*; *but see Fin. Code § 10002* (applicable after January 1, 1991; *discussed in § 95.124[3]*)]. A foreign association is not considered to be doing business in California by doing any of the activities specified in *Corp. Code § 191(d)*, including the following [*Corp. Code § 191(d)*; *Fin. Code § 10005(a)*]:

- Acquisition, ownership, and enforcement of loans if carried on from outside California;

- Physical inspection and appraisal of real or personal property securing loans if the officer or employee making inspection is not resident of and does not maintain a place of business in California;

- Engaging of a corporation, firm, or association qualified to do business in California to make collections, service loans, and physical inspections and appraisals;

- Acquisition and retention of title to real or personal property pending orderly sale or other disposition; and

- Advertising or soliciting of savings accounts in California by a federally insured foreign savings association through the mail, radio, television, magazines, newspapers, or any other media that are published or circulated within California, except through or as a result of telemarketing, provided that the advertising or solicitation as a whole is accurate and does not create a misleading impression even though statements considered separately are literally accurate. A federally insured foreign savings association may not sell, take or solicit savings accounts through telemarketing by use of the telephone or telephone transceiving equipment, or through the use of an automatic dial-announcing device as defined in *Pub. Util. Code § 2871*.

The offering by a registered broker-dealer of, or the placement by a registered broker-dealer of a customer's funds into, a savings account at a federally insured foreign savings association chartered under the laws of a state in which broker-dealers make available savings accounts of California associations is not considered doing business in California, provided that the following conditions are satisfied [*Fin. Code § 10005(b)*]:

- Any advertising, offering material, or solicitation as a whole is accurate and does not create a misleading impression even though statements considered separately are literally accurate; and

- The savings accounts of the federally insured foreign savings association are rated "investment grade" by either Standard & Poor's Corporation or Moody's Investors Service, Inc. based on the foreign savings association's ability to repay the savings accounts independent of federal deposit insurance benefits.

The commissioner may obtain an injunction or may take any other action necessary to prevent any person from unlawfully doing any business of an association in California [*Fin. Code § 10001(d)*].

[3] Acquisition of California Association

Notwithstanding *Fin. Code § 10001*, and subject to *Fin. Code § 10003*, since January 1, 1991, foreign savings associations may conduct the business of an association in California or may acquire control of a California savings association, and a foreign holding company may acquire control of a California savings association, after obtaining prior written approval of the commissioner pursuant to *Fin. Code § 10003*. Approval will only be given if the jurisdiction in which the foreign savings association is incorporated or the foreign holding company has its principal place of deposits grants reciprocal rights to California savings associations or their holding companies [*Fin. Code § 10002*]. Except as provided by regulation, *Fin. Code § 5000 et seq.* apply to a foreign savings association or its holding company as if business conducted in California were that of a California savings association [*Fin. Code § 10002*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawDepository InstitutionsGeneral OverviewBanking LawInternational BankingForeign Banks in the United StatesBanking LawInternational BankingForeign Operations of U.S. Banks

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9-95 California Forms of Pleading and Practice--Annotated § 95.125

§ 95.125 Savings and Loan Holding Companies

[1] Definitions

A "savings and loan holding company" within the meaning of California Savings Association Law (*Fin. Code § 5000 et seq.*) is any person that, directly or indirectly or acting in concert with one or more other persons, does either of the following [*Fin. Code § 5800(a)*]:

- Owns, controls, or holds with power to vote, or holds proxies to vote one of the following:
  - 25 percent or more of the outstanding voting capital stock of any capital stock association or savings and loan holding company or 25 percent or more of the total number of votes or proxies of votes eligible to be cast by the members of any mutual association located in California, if the association or savings and loan holding company has fewer than 500 stockholders or members, or
  - 10 percent or more of the outstanding voting capital stock of any capital stock association or savings and loan holding company or 10 percent or more of the total number of votes or proxies of votes eligible to be cast by the members of any mutual association located in California, if the association or savings and loan holding company has at least 500 stockholders or members; or
- Controls in any manner, whether by holding proxies or otherwise, the election of a majority of the directors of any association or savings and loan holding company located in California.

Notwithstanding *Fin. Code § 5800(a)*, an individual or group of individuals will not be deemed to be a "savings and loan holding company" solely because an individual or group of individuals solicits, holds, or votes proxies in an association if, at the time of receiving the proxies, the individual or group of individuals serve as directors of the

association and solicited or received the proxies pursuant to authorization by the board of directors of the association [*Fin. Code § 5800(b)*].

[2] Approval Process

To become a savings and loan holding company, a completed application must be approved by the commissioner, unless the transaction is one exempted by the commissioner [*Fin. Code § 5801*]. After the commissioner has approved or denied the application, any person aggrieved by the decision may request a hearing by filing a written request with the commissioner within 30 days of the decision. The commissioner must hold a public hearing on the merits of the request and affirm, modify, or reverse the decision [*Fin. Code § 5803(a)*; *but see Fin. Code § 5866* (*Fin. Code §§ 5801-5803* are inapplicable to reorganization of mutual association to mutual holding company of reorganized stock association pursuant to *Fin. Code §§ 5860-5868*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank Holding CompaniesRegulationBanking LawDepository InstitutionsState Savings Associations

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[Reserved]

§§ 95.126[Reserved]

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9-95 California Forms of Pleading and Practice--Annotated § 95.140

§ 95.140 Action Against National Bank

[1] Jurisdiction and Venue

Except for actions by banking regulators or against them, which must be brought in federal district court, national banking associations are deemed citizens of the states in which they are located [*28 U.S.C. § 1348*]. This means that a national bank (1) is a citizen of the state in which its main office is located, as set forth in its articles of association, and (2) is not a citizen of any other state in which it has established a branch [*Wachovia Bank, N.A. v. Schmidt (2006) 546 U.S. 303, 316-318, 126 S. Ct. 941*]. *28 U.S.C. § 1348* confers general jurisdiction over an action by or against a national bank on state courts [*First Nat. Bank v. Superior Court (1966) 240 Cal. App. 2d 109, 110, 49 Cal. Rptr. 358]* . No jurisdiction is conferred on a federal district court merely because the action is by or against a corporation that was incorporated by or under an act of Congress, unless the United States owns more than half of its capital stock [*28 U.S.C. § 1349*; *see also § 95.410[5][b]* (cases regarding state court jurisdiction over national banks)].

An action or proceeding against a national banking association for which the Federal Deposit Insurance Corporation has been apppointed receiver, or against the FDIC as receiver, must be brought in the district or territorial court of the United States in the district in which the association's principal place of business is located. In the event any state, county, or municipal court has jurisdiction over such an action or proceeding, venue is also in that court in the county or city in which the association's principal place of business is located [*12 U.S.C. § 94*].

Venue is also proper in the county in which a contract is made or is to be performed, in which the obligation or liability arises or the breach occurs, or in which the bank's principal place of business is situated [*Code Civ. Proc. § 395.5*].

For discussion and forms relating to changes of venue generally, see Ch. 571, *Venue* .

[2] Limitations on Provisional Remedies or Execution Before Final Judgment

No attachment, injunction, or execution may be issued against any national banking association or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court [*12 U.S.C. § 91*].

"Final judgment" as used in *12 U.S.C. § 91* means a judgment on the merits that is no longer subject to examination on appeal, either because of disposition on appeal and conclusion of the appellate process or because of the passage, without action, of the time for seeking appellate review [*U.S. v. Lemaire (5th Cir. 1987) 826 F.2d 387, 390 , cert. denied, 485 U.S. 960 (1990)]* .

There is a split of authority regarding whether *12 U.S.C. § 91* prohibits the recording of an abstract of judgment prior to completion of the appellate process [*see U.S. v. Federal Deposit Ins. Corp. (5th Cir. 1989) 881 F.2d 207, 209-210* (recording prohibited); *U.S. v. Theos (D. Colo. 1989) 709 F. Supp 1007, 1009-1010* (recording not prohibited)]. A California court of appeal has opined in dicta that the argument prohibiting recordation of an abstract is more persuasive [*Jewell v. Bank of America (1990) 220 Cal. App. 3d 934, 938 n.6, 269 Cal. Rptr. 671]* . Nevertheless, *Jewel* affirmed a decision requiring a national bank to post an appeal bond because it held that the law was unsettled at the time, bond was more expedient, and necessity does not require a party to pursue an alternative remedy.

Some California cases have held that *12 U.S.C. § 91prevents* issuance of an injunction against a national bank [*see, e.g., Crocker Nat. Bank v. Superior Court (1977) 68 Cal. App. 3d 863, 870-872, 136 Cal. Rptr. 481* ; *Kemple v. Security First Nat. Bank (1967) 249 Cal. App. 2d 719, 721, 57 Cal. Rptr. 838]* . These cases, however, have been partially abrogated by *Third Nat'l Bank v. Impac, Ltd. (1977) 432 U.S. 312, 97 S. Ct. 2307, 53 L. Ed. 2d 368* , which held that *12 U.S.C. § 91* only applies to prejudgement seizure of bank property by creditors of the bank. The prohibition does not apply to an action by a debtor of national bank who seeks a preliminary injunction to protect his or her own property from foreclosure [*Third Nat'l Bank v. Impac, Ltd. (1977) 432 U.S. 312, 324, 97 S. Ct. 2307, 53 L. Ed. 2d 368* ; *Garfinkle v. Superior Court (1978) 21 Cal. 3d 268, 274 n.5, 146 Cal. Rptr. 208, 578 P.2d 925]* .

Crocker involved a dispute regarding a contract under which one party's obligations were guaranteed by a letter of credit issued by the bank. Unlike some letter of credit arrangements, the letter of credit in *Crocker* was not secured by a "special deposit." If Crocker was required to make payments pursuant to the letter of credit, it would be required to use its own funds. In addition, if the bank did not honor the letter of credit, funds of the bank on deposit in a Turkish bank would likely be seized to offset the obligation. Thus, the situation involved potential impairment of the bank's assets and efficiency, which brought the situation within the prohibition [*Crocker Nat. Bank v. Superior Court (1977) 68 Cal. App. 3d 863, 870-872, 136 Cal. Rptr. 481]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawNational BanksGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureVenueCorporationsCivil ProcedureRemediesPrejudgment RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesGeneral Overview

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9-95 California Forms of Pleading and Practice--Annotated §§ 95.141-95.159

[Reserved]

§§ 95.141[Reserved]

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9-95 California Forms of Pleading and Practice--Annotated § 95.160

§ 95.160 Right of Members or Shareholders to Inspect Records

[1] General Scope and Purpose

A stockholder or member, or group of stockholders or members, who holds of record $100,000 in voting shares or 1 percent of outstanding voting shares, and has been a holder of record of those voting shares for at least six months before making the written demand, may inspect the following [*Fin. Code § 6050(a)*]:

- The register of stockholders or members;
- The books of account; and
- The minutes of an association.

The inspection may be made at any reasonable time during usual business hours after the stockholder or member has made written demand for for inspection. Inspection may be made only for a proper purpose reasonably related to the stockholder's or member's interest [*Fin. Code § 6050(a)*].

Notwithstanding this right of inspection, no stockholder or member, or group of stockholders or members, has the right to inspect or make extracts of any portion of any register, book, or minutes of an association from which any of the following information can be reasonably constructed [*Fin. Code § 6050(b)*]:

- A list of depositors in or borrowers from the association;
- The addresses of depositors or borrowers from the association; or
- Individual deposit or loan balances or records.

Savings account holders who are neither stockholders, members, nor directors of an association have no right of inspection under *Fin. Code § 6050* [*Fin. Code § 6050(d)*].

For a general form of petition for writ of mandate to compel inspection of corporate records that may be adapted for use by stockholders or members of an association, see Ch. 165, *Corporations: Corporate Records and Reports*

[2] Inspection of Subsidiary's Records

The right of inspection extends to the records of each subsidiary of an association and includes the right to make extracts [*Fin. Code § 6050(a)*]. However, this right of inspection does not extend to allow shareholders of a state savings and loan association's parent holding company to inspect the association's records. Further, they cannot inspect the records under the general corporate inspection rights of *Corp. Code § 1600 et seq.* because allowing them rights under that section would frustrate legislative intent [*Feldman v. San Mateo Financial Corp. (1990) 226 Cal. App. 3d 543, 547-549, 276 Cal. Rptr. 285]* .

[3] Director's Right to Inspect

A director of an association has the right at any reasonable time to inspect all books, records, documents of every kind, and the physical properties of that association. The inspection may be made in person or by an agent or attorney, and the right of inspection includes the right to make extracts. In the case of foreign associations the right of inspection extends only to books, records, documents, and property located in California [*Fin. Code § 6050(c)*; *see Diller v. Flynn (1964) 226 Cal. App. 2d 449, 452, 38 Cal. Rptr. 229* (form of copying may be subject to discretion of court)].

For a general form of petition for writ of mandate to compel inspection of corporate records that may be adapted for use by directors of an association, see Ch. 165, *Corporations: Corporate Records and Reports* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawDepository InstitutionsState Savings AssociationsBanking LawDirectors & OfficersGeneral OverviewBusiness & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsInspection RightsDirectorsBusiness & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsInspection RightsShareholders

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9-95 California Forms of Pleading and Practice--Annotated § 95.161

§ 95.161 Derivative Actions

A stockholder or member of an association may institute or maintain an action in the right of the association if all the following conditions exist [*Fin. Code § 6052(b)*]:

- The plaintiff alleges in the complaint that the plaintiff was a registered stockholder or member at the time of the transaction or any part of it or that the stock or membership devolved on the plaintiff by operation of law from a holder who was a holder at the time of the transaction or any part of it;

- The plaintiff alleges in the complaint with particularity the efforts of the plaintiff to secure from the board of directors the desired action, and alleges further that the plaintiff has either informed the association or its board of directors in writing of the ultimate facts of each cause of action against each defendant director or delivered to the association or its board of directors a true copy of the complaint that plaintiff proposes to file and the reasons for the plaintiff's failure to obtain the desired action or the reasons for not making an effort to secure the desired action from the association; and

- The commissioner has determined, after a hearing on at least 20 days' written notice to the association and each of its directors, that the action is proposed in good faith and that there is a reasonable probability that the prosecution of the action will benefit the association and its stockholders or members.

No action may be instituted or maintained in the right of any association by any savings account holder who is not a stockholder or member of the association [*Fin. Code § 6052(a)*].

For a form for use in a derivative action, *see § 95.414*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawDepository InstitutionsState Savings AssociationsCivil ProcedureClass ActionsDerivative ActionsGeneral Overview

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9-95 California Forms of Pleading and Practice--Annotated §§ 95.162-95.179

[Reserved]

§§ 95.162[Reserved]

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1. Scope and Governing Law

9-95 California Forms of Pleading and Practice--Annotated § 95.180

§ 95.180 Governing Law

Bank deposits are governed by *Fin. Code §§ 850-874, 40500, 40501*. The procedures for asserting adverse third-party claims are set forth in *Fin. Code §§ 952* (bank deposits) and 6661 (savings account). Savings operations generally, such as provisions governing the opening of accounts, savings liability, and information that must be maintained by associations, are set forth in *Fin. Code § 6600 et seq.*

The length of time within which the proceeds of a deposited item, usually a check, must be allowed to be withdrawn are governed by the federal Expedited Funds Availability Act (*12 U.S.C. § 4001 et seq.*) and regulations promulgated under it (12 C.F.R. Part 229, also known as "Regulation CC"), and by *Fin. Code §§ 866, 867* and regulations promulgated thereunder (*10 Cal. Code. Reg. § 10.190400 et seq.*). The federal Expedited Funds Availability Act and related regulations supersede inconsistent state law and regulations, including the Commercial Code as in effect in any state [*12 U.S.C. § 4007(b)*; *12 C.F.R. § 229.41*], except any state law or regulation in effect on September 1, 1989, that establishes a shorter maximum hold period for a given category of deposit than the period allowed under federal law [*12 U.S.C. § 4007(a)*; *12 C.F.R. § 229.20*; 12 C.F.R. § 229, Appendix E, Commentary to § 229.20]. The preemptive scope of the Act and the relevant portions of Regulation CC, however, is quite narrow. Only state laws that establish different timing or disclosure requirements than the Act or otherwise directly conflict with it face preemption. Congress expressed no desire to preempt state laws or causes of action that supplement, rather than contradict, the Act. Therefore, in a case in which a bank deposited a wire transfer to the wrong account, neither the plaintiff's negligence nor intentional and negligent misrepresentation claims were preempted, as those claims involved elements beyond the scope of the Act [*Mihai Beffa v. Bank of the West (1998) 152 F.3d 1174, 1177-1178]* .

On and after July 1, 1990, multiparty accounts in existence on that date or established after that date are governed by *Prob. Code § 5100 et seq.* [*Prob. Code § 5205*].

On and after July 1, 1991, consumer contracts are governed by the Consumer Contract Awareness Act of 1990 (*Civ. Code § 1799.200 et seq.*) and *Fin. Code § 757*, which are discussed in *§ 95.60* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsCertificates of Deposit & Savings AccountsBanking LawBank ActivitiesBank AccountsDeposit AccountsGeneral DepositsBanking LawBank ActivitiesBank AccountsDeposit AccountsLiabilityBanking LawBank ActivitiesBank AccountsDeposit AccountsSpecial DepositsBanking LawDepository InstitutionsCommercial Banks

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[Reserved]

§§ 95.181[Reserved]

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9-95 California Forms of Pleading and Practice--Annotated § 95.200

§ 95.200 Types of Deposits

[1] "General" and "Special"

Bank deposits are classified as "general" or "special." In the case of a general deposit, the funds become a part of the bank's assets and may be used in conducting its banking business [*Bank of America Assn. v. California Bk. (1933) 218 Cal. 261, 273-274, 22 P.2d 704]* . On the other hand, a special deposit is one that the bank has no right to use in its banking business. A special deposit is created when the financial institution acts as escrow or agent or trustee [*Bank of America Assn. v. California Bk. (1933) 218 Cal. 261, 274, 22 P.2d 704* ; *cf. Com. Code § 4201* (agency relationship created when check is deposited for collection; discussed in *§ 95.310* et seq.)].

A deposit is deemed general unless there is some agreement or understanding that it should be special, or there are circumstances that give the nature of a special deposit to the particular transaction [*Bank of America v. Board of Supervisors (1949) 93 Cal. App. 2d 75, 79-80, 208 P.2d 772]* .

Some affirmative act of acceptance on the bank's part is necessary for a "bank deposit" to be created [*Vilner v. Crocker National Bank (1979) 89 Cal. App. 3d 732, 736-737, 152 Cal. Rptr. 850]* . The most common act of acceptance is accepting of an item, usually a check, for deposit for collection [*see Com. Code § 4201 et seq.* (duties of collecting bank with regard to checks; discussed in *§ 95.310* et seq.)].

[2] "Demand" or "Time"

Deposits are also characterized as demand deposits [*see 12 C.F.R. § 204.2(b)*], savings deposits [*see 12 C.F.R. § 204.2(d)*], and time deposits [*see 12 C.F.R. § 204.2(c)*] to distinguish their relative accessibility to the depositor and the reserve requirements to which they are subject [*see* 12 C.F.R. Part 204 ("Regulation D")].

Legal Topics:

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

Banking LawBank ActivitiesBank AccountsDeposit AccountsCertificates of Deposit & Savings AccountsBanking LawBank ActivitiesBank AccountsDeposit AccountsGeneral DepositsBanking LawBank ActivitiesBank AccountsDeposit AccountsSpecial DepositsBanking LawDepository InstitutionsCommercial Banks

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9-95 California Forms of Pleading and Practice--Annotated § 95.201

§ 95.201 Bank-Depositor Relationship

[1] General Depositor as Creditor

The relationship of a bank with its depositor arising out of a general deposit is that of debtor and creditor, respectively. The deposit creates a debt payable by the bank on demand [*Union Tool Co. v. Farmers etc. Nat. Bk. (1923) 192 Cal. 40, 53, 218 P. 424* ; *Lee v. Bank of America (1990) 218 Cal. App. 3d 914, 919-920, 267 Cal. Rptr. 387]* . Title to deposited funds passes immediately to the bank, which may use them for its own purpose and does not become trustee [*Lee v. Bank of America (1990) 218 Cal. App. 3d 914, 919-920, 267 Cal. Rptr. 387]* .

Although the bank-depositor relationship has been characterized as having some of the elements of public interest and quasi-fiduciary responsibility [*see* *Commercial Cotton Co. v. United California Bank (1985) 163 Cal. App. 3d 511, 516, 209 Cal. Rptr. 551]* , the depositor-bank relationship is not a special relationship warranting tort liability for breach of the covenant of good faith and fair dealing [*Copesky v. Superior Court (1991) 229 Cal. App. 3d 678, 694, 280 Cal. Rptr. 338* (same court reversing its holding in *Commercial Cotton Co.* in light of *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 682-700, 254 Cal. Rptr. 211, 765 P.2d 373*)]. For further discussion relating to breach of the implied covenant of good faith and fair dealing, *see* Ch. 140, *Contracts* .

On the other hand, the bank owes various statutory duties of care to the depositor under Division 4 of the Commercial Code [*see § 95.310* et seq.] as well as common law duties of care. Unless displaced by the particular provisions of the Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause, supplement its provisions [*Com. Code § 1103(b)*]. Thus, in the absence of a particular contrary provision in the Commercial Code, nothing bars a depositor from bringing an action against a bank based on, for example, negligent misrepresentation or negligence [*Holcomb v. Wells Fargo Bank (2007) 155 Cal. App. 4th 490, 497-499, 66 Cal. Rptr. 3d 142* (complaint adequately pleaded negligent misrepresentation in alleging bank branch manager's assurance that deposited check had "cleared" and depositor could draw against those funds, even though manager had information that deposited check had in fact been returned by drawee bank because of insufficient funds:

"There is nothing in the [Commercial] [C]ode prohibiting a claim based on a depositor's detrimental reliance on a[n informed] bank employee's incorrect statements.")].

[2] Special Deposit Arising From Agency or Trust

Some special accounts involve a principal and agent relationship or a trust relationship, or both, between the bank and the depositor. For instance, a "custodial agency account," in which a customer deposits securities with the bank for purchase and sale under a letter of instructions, creates a special deposit with aspects of both trust and agency relationships [*Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 859-861, 251 Cal. Rptr. 530]* . In *Van de Kamp,* however, the letter of instructions did not provide that the cash proceeds be held in trust or as a special deposit. Thus, once the securities were sold and the proceeds collected, the agency relationship ended and the cash proceeds remaining on deposit became general deposits that the bank could use and from which use it could profit. No duties of agent or trustee were violated by the use and profit because those relationships did not extend to the cash proceeds [*Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 860-862, 251 Cal. Rptr. 530]* . Similarly, the bank had no duty to disclose its use of the custodianship cash [*Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 861, 251 Cal. Rptr. 530]* .

On a special deposit, the bank assumes the functions of a custodian, though it need not keep the deposited funds separate or apart in specie from other funds, absent a clearly expressed intent that they be so kept [*Bank of America v. California Bank (1933) 218 Cal. 261, 273, 22 P.2d 704]* .

[3] Bank as Bailee of Items Deposited in Night Depository Service

Under a typical night depository service contract between a bank and a customer using that service, their relationship does not become one of depositary-holder of deposit, or debtor-creditor, until the bank has counted the money "logged it into the account" (or provisionally credited the item and coded it for collection and routing to the payor bank or any clearinghouse used by both of them). The placing of a bag of money (or checks and money) into the night depository makes the depositor a bailor and the bank a bailee [*Vilner v. Crocker National Bank (1979) 89 Cal. App. 3d 732, 736-737, 152 Cal. Rptr. 850]* . As bailee, the bank is required to use ordinary care to prevent loss to the customer. If a bag of money disappears after being placed in a night depository, it is presumed that the disappearance was the result of the bank's negligence. A prima facie case of negligence is made out by the bank/bailee's failure to return the items. The customer does not have to explain the loss. On failure to return the items bailed, which is part of a bailee's statutory duty under *Civ. Code § 1822,* the bank is liable unless and until it can show that it was not at fault [*Vilner v. Crocker National Bank (1979) 89 Cal. App. 3d 732, 737-738, 152 Cal. Rptr. 850]* . For discussion of and forms for use in actions by bailors against bailees who fail to preserve the bailed goods, see Ch. 93, *Bailments* .

A provision in a night depository service contract exculpating the bank from liability except for gross negligence or for willful misconduct is in most cases unenforceable insofar as the bank relies on it to avoid liability for a mysterious disappearance of money placed in a night depository [*see, e.g.,* *Vilner v. Crocker National Bank (1979) 89 Cal. App. 3d 732, 735-736, 152 Cal. Rptr. 850* ; *see Civ. Code § 1668*]. Under Division 4 of the Commercial Code, an exculpatory clause by which a bank attempts to disclaim responsibility for its lack of good faith or failure to exercise ordinary care in its collection of items deposited with it is void [*see Com. Code § 4103(a)* (discussed in *§ 95.310* et seq.)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawDepository InstitutionsCommercial BanksBanking LawDepository InstitutionsCustomer-Bank RelationsGeneral OverviewBanking LawDepository InstitutionsCustomer-Bank RelationsFiduciary RelationshipsBanking LawDepository InstitutionsCustomer-Bank RelationsOther Relationships

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9-95 California Forms of Pleading and Practice--Annotated §§ 95.202-95.219

[Reserved]

§§ 95.202[Reserved]

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9-95 California Forms of Pleading and Practice--Annotated § 95.220

§ 95.220 Expedited Funds Availability Act Supersedes Conflicting State Law

The federal Expedited Funds Availability Act (*12 U.S.C. § 4001 et seq.*) governs hold periods on deposits made after August 31, 1988. It supersedes state law and regulations, including the Commercial Code as in effect in any state [*12 U.S.C. § 4007(b)*], except any state law or regulation in effect on September 1, 1989, that establishes a shorter maximum hold period for a given category of deposit than the period allowed under federal law [*see, e.g., 10 Cal. Code Reg § 10.190402(a), (b),* discussed under *§ 95.231[10][b]*]. The preemptive scope of the Act and the relevant portions of Regulation CC, however, is quite narrow. Only state laws that establish different timing or disclosure requirements than the Act or otherwise directly conflict with it face preemption. Congress expressed no desire to preempt state laws or causes of action that supplement, rather than contradict, the Act. Therefore, in a case in which a bank deposited a wire transfer to the wrong account, neither the plaintiff's negligence nor intentional and negligent misrepresentation claims were preempted, as those claims involved elements that were beyond the scope of the Act [*Mihai Beffa v. Bank of the West (1998) 152 F.3d 1174, 1177-1178]* .

Any state law or regulation that provides a shorter maximum hold period than the federal law or regulations supersedes the federal law as applied to deposits in all federally insured depository institutions to which the superseding state law or regulation applies that are located in that state [*12 U.S.C. § 4007(a)*; *12 C.F.R. § 229.20*; 12 C.F.R. § 229, Appendix E, Commentary to *§ 229.20*].

The disclosure requirements and hold periods established by *Fin. Code § 866 et seq.* and regulations issued in accordance with those sections are not entirely superseded by the federal Expedited Funds Availability Act [12 C.F.R. § 229, Appendix E, Commentary to *§ 229.20(c)*; 12 C.F.R. § 229, Appendix F, Preemption Determinations, California]. The California provisions remain in effect as to some savings accounts, some share accounts, and savings accounts subject to automatic transfers. The definition of "deposit account" in *Fin. Code § 866(b)* is broader than the definition of "account" under the federal Act and regulations [*see 12 U.S.C. § 4001(1)*; *12 C.F.R. § 229.2(a),* discussed under *§ 95.222[1]*]. Although neither the California nor federal law applies to time deposits, the federal law excludes from its purview savings deposits or accounts described in *12 C.F.R. § 204.2(d)(2),* namely savings accounts and "money market accounts" from which up to six automatic or preauthorized transfers and withdrawals may be made each month [

see 12 C.F.R. § 204.2(d)(2)]. The California law and regulations are discussed under *§ 95.231[1]*.

There are also instances in which the regulations of the California Superintendent of Banks as applied to demand deposit and transaction accounts establish shorter maximum hold periods than the federal law and regulations, and therefore supersede federal law for insured banks in California. These instances usually involve items drawn on another California depository institution, but one that is in a different check processing region than the depositary bank [*see, e.g., 10 Cal. Code Reg § 10.190402(a)*]. Throughout the following discussion, whenever the California regulation provides a shorter hold period, the California citation will be given after the federal one, and will be followed by a parenthetical note regarding the California maximum period.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawDepository InstitutionsCommercial BanksBanking LawFederal Reserve SystemExpedited Funds Availability ActCivil ProcedureFederal & State InterrelationshipsFederal Common LawPreemption

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9-95 California Forms of Pleading and Practice--Annotated § 95.221

§ 95.221 Depository Institutions Required to Comply

[1] Banks

The federal Expedited Funds Availability Act applies to deposits made to almost every conceivable type of organization that accepts deposits [*see 12 U.S.C. § 4001(12)* (defining "depository institution" to include all institutions listed in *12 U.S.C. § 461(b)(1)(A)(i)-(vi)*)]. It applies to deposits made to any bank, savings bank, mutual savings bank, trust company, industrial loan company, or any other institution in the business of receiving deposits, whether organized under federal law or state law. Also included within the definition of depository institution are an office, agency, or branch of a foreign bank located in the United States [*12 U.S.C. § 4001(12)*; *see 12 U.S.C. §§ 461(b)(1)(A)(i)-(iii), 1813, 1815*].

As used in this discussion, the term "bank" refers to all types of depository institutions that are subject to the Act.

[2] Credit Unions

The term "depository institution" as defined by the federal Expedited Funds Availability Act includes any national credit union; credit unions organized and operated according to the laws of any state, district, territory, or possession of the United States, the Panama Canal Zone, or the Commonwealth of Puerto Rico; and credit unions operating under the jurisdiction of the Department of Defense [*12 U.S.C. § 4001(12)*; *see 12 U.S.C. §§ 461(b)(1)(A)(iv), 1752, 1781*].

[3] Savings and Loan Associations and Other Thrift Associations

The term "depository institution" as defined by the federal Expedited Funds Availability Act includes any federal-chartered or state-chartered savings and loan association, building and loan association, homestead association, cooperative bank, insurance company, or savings bank, as well as any such institution organized under the laws of any territory or possession of the United States [*12 U.S.C. § 4001(12)*; *see 12 U.S.C. §§ 461(b)(1)(A)(v), (vi), 1422, 1813-1815*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-95 California Forms of Pleading and Practice--Annotated § 95.222

§ 95.222 Definitions

[1] Account

The federal Expedited Funds Availability Act defines "account" as a demand deposit or other similar transaction account at a depository institution [*12 U.S.C. § 4001(1)*]. The related regulation specifies types of accounts that are considered transaction accounts, namely accounts from which the depositor is permitted to make transfers or withdrawals by negotiable or transferable instrument, payment order of withdrawal, telephone transfer, electronic payment, or other similar means for the purpose of making payments or transfers to third persons or others, or from which the account holder may make third-party payments at an automated teller machine (hereinafter "ATM"), remote service unit, or other electronic device, including by debit card [*12 C.F.R. § 229.2(a)*; *see 12 C.F.R. § 204.2(a)(1)(i), (e)* (defining deposit and transaction account)]. However, the term account does not include savings deposits or accounts described in *12 C.F.R. § 204.2(d)(2)* [*see § 95.220*], even though those accounts permit third-party transfers [*12 C.F.R. § 229.2(a)*]. An account may be in the form of (1) a demand deposit account, (2) a negotiable order of withdrawal account, (3) a share draft account, (4) an automatic transfer account, or (5) any other transaction account described in 12 C.F.R. § 204.2(e) that is not a time or savings deposit under *12 C.F.R. § 204.2(d)(2)*. Accounts held by other depository institutions are not accounts [*12 C.F.R. § 229.2(a)*].

[2] Banking Day

The term "banking day" means that part of any business day on which an office of a depository institution is open to the public for carrying on substantially all of its banking functions [*12 C.F.R. § 229.2(f)*]. This definition provides for a branch-by-branch determination. The fact that one branch is open to the public on a given day does not mean that day is a banking day for other branches of the same institution [12 C.F.R. § 229, Appendix E, Commentary to *§ 229.2(f)*].

[3] Business Day

The term "business day" means a calendar day other than a Saturday, Sunday, or legal holiday [*12 U.S.C. § 4001(3)*]. The Federal Reserve holidays, and thus holidays for purposes of the Expedited Funds Availability Act, are January 1,

the third Monday in January, the third Monday in February, the last Monday in May, July 4, the first Monday in September, the second Monday in October, November 11, the fourth Thursday in November, and December 25. If January 1, July 4, November 11, or December 25 fall on a Sunday, the next Monday is not a business day [*12 C.F.R. § 229.2(g)*].

[4] Cash

The term "cash" means United States coins and currency, including Federal Reserve notes [*12 U.S.C. § 4001(4)*; *12 C.F.R. § 229.2(h)*].

[5] Check

A "check" is (1) a negotiable demand draft drawn on or payable through or at an office of a depository institution located in the United States; (2) a negotiable demand draft drawn on the United States Treasury, a Federal Reserve Bank, or a Federal Home Loan Bank; (3) a demand draft drawn on a state government or unit of general local government that is not payable through or at a bank; (4) a United States Postal Service money order; or (5) a traveler's check drawn on or payable through a bank. A draft may be a check even though it is described on its face by another term, such as money order. The term "check" is limited to drafts payable in United States money [*12 U.S.C. § 4001(7)*; *12 C.F.R. § 229.2(k)*]. The definitions of the particular types of checks that are subject to next-day availability are set forth under § 95.224[3].

[6] Electronic Payment and Wire Transfer

The Expedited Funds Availability Act only refers to wire transfers [*see 12 U.S.C. § 4001(25)*], but the regulations use the terms "electronic payment" and "wire transfer." An electronic payment is a wire transfer or a credit transfer from an automated clearinghouse (hereinafter "ACH") [*12 C.F.R. § 229.2(p)*].

A wire transfer is an unconditional order to a depository institution to pay a fixed or determinable amount of money to a beneficiary on the order's receipt or on a day stated in the order, which is transmitted by electronic or other means over the Federal Reserve Communications System or other similar networks, between banks, or on a bank's books. The term "wire transfer" does not include an electronic fund transfer as defined in the Electronic Fund Transfer Act [*12 C.F.R. § 229.2(ll)*; *see 15 U.S.C. § 1693a(6)*]. Credits for credit card and debit card transactions are not wire transfers [12 C.F.R. § 229, Appendix E, Commentary to *§ 229.2(ll)*].

Note that, although an ACH credit transfer is both an electronic payment under Expedited Funds Availability Act and an electronic fund transfer under the Electronic Fund Transfer Act, ACH debit transfers are not electronic payments under Expedited Funds Availability Act. Point-of-sale transactions are not considered electronic payments unless effected by means of an ACH credit transfer or wire transfer [12 C.F.R. § 229, Appendix E, Commentary to *§ 229.2(p)*].

[7] Automated Teller Machines

ATMs are classified as either "nonproprietary" or "proprietary." A "nonproprietary ATM" is an automated teller machine that is not a proprietary ATM [*12 U.S.C. § 4001(18)*; *12 C.F.R. § 229.2(x)*]. A "proprietary ATM" is an automated teller machine that is (1) owned or operated by, or operated exclusively for, the depository institution; (2) located on the premises, including the outside wall, of the depository institution (regardless of whether the ATM is owned or operated by that depository institution); or (3) located within 50 feet of the depository institution's premises and not identified as being owned or operated by another entity. If more than one depository institution meets the owned or operated criteria, the ATM is considered proprietary to the depository institution that operates it [*12 U.S.C. § 4001(16)*; *12 C.F.R. § 229.2(aa)*; 12 C.F.R. § 229, Appendix E, Commentary to *§ 229.2(aa)*]. For purposes of this definition, the depository institution that puts the checks deposited into the ATM into the forward collection stream is the depository institution that operates the ATM [12 C.F.R. § 229, Appendix E, Commentary to *§ 229.2(aa)*]. If a

network ATM is operated by a franchisee depository institution, it is proprietary to that depository [*see* 12 C.F.R. § 229, Appendix E, Commentary to *§ 229.2(aa)*].

Some ATMs may not be proprietary to any depository institution, or to more than one institution. An ATM that is jointly owned by depository institutions but is serviced by a nondepository contractor is proprietary to the owners [12 C.F.R. § 229, Appendix E, Commentary to *§ 229.2(aa)*].

If the depository institution uses a longer hold period for deposits to nonproprietary ATMs than it uses for deposits to proprietary ATMs, its disclosure statement must contain a description of how the customer can differentiate between a proprietary and a nonproprietary ATM [*12 C.F.R. § 229.16(b)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawFederal Reserve SystemExpedited Funds Availability Act

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§ 95.223 Decreasing Maximum Hold Periods

The Federal Reserve Board must decrease the hold periods to as short a time as possible and equal to the time period achievable under the improved check clearing system for a receiving depository institution to reasonably expect to learn of the dishonor of most checks within each catagory [*12 U.S.C. § 4002(d)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawFederal Reserve SystemExpedited Funds Availability Act

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9-95 California Forms of Pleading and Practice--Annotated § 95.224

§ 95.224 Next-Day Availability

[1] Cash Deposits

Under *Com. Code § 4215(f)*, a deposit of money becomes available for withdrawal at the beginning of the bank's first business day after receipt of the deposit. This right to withdraw, however, is subject to applicable law stating a time for availability of funds and any right of a bank to apply a deposit to a depositor's obligation [*Com. Code § 4213(f)*]. Under Regulation CC, cash deposits qualify for next-day availability only if they are made in person to an employee of the depositary institution; otherwise they need not be made available for withdrawal until the second business day after the banking day of deposit [*12 U.S.C. § 4002(a)(1)(A)*; *12 C.F.R. § 229.10(a)*]. Because the Commercial Code language is arguably broader than the language under Regulation CC, *Com. Code § 4215(f)*supersedes *12 U.S.C. § 4002(a)(1)(A)* and 12 C.F.R. § 229.10(a), and cash deposits, even if not made in person to an employee of the depositary institution, must be available for withdrawal on the opening of business on the next business day after deposit [*see 12 U.S.C. § 4007*; 12 C.F.R. 229, Appendix F, Preemption Determinations].

Com. Code § 4103(a) provides that *Com. Code § 4215(f)* (or any part of Division 4) may be varied by an agreement between the depositary bank and its customer. However, no such agreement may vary the Regulation CC funds availability requirements in *12 C.F.R. § 229.10(a)* [12 C.F.R. 229, Appendix F, Preemption Determinations].

[2] Deposits Other Than Cash

Unless an exception applies [*see § 95.226*], funds deposited in the following noncash forms must be made available for withdrawal on the business day after the banking day of deposit or receipt [*12 U.S.C. § 4002(a)*; *12 C.F.R. § 229.10*]:

- Funds received by an electronic payment for deposit to an account at the receiving institution. An electronic payment is received when the depositary institution receiving the payment has received (1) information on the account and amount to be credited, and (2) payment in actually and finally collected funds [*12 U.S.C. § 4002(a)(1)(B)*; *12 C.F.R. § 229.10(b)(1), (2)*].

- The lesser of $100 or the aggregate deposited on any one banking day to all accounts of the customer by check or checks of a type not otherwise required to be available for withdrawal on the next business day [*12 U.S.C. § 4002(a)(2)(D)*; *12 C.F.R. § 229.10(c)(1)(vii)*].

- A check drawn on the United States Treasury and deposited in an account held by a payee of the check [*12 U.S.C. § 4002(a)(2)(A)*; *12 C.F.R. § 229.10(c)(1)(i)*; *see* 12 C.F.R. § 229, Appendix E, Commentary to *§ 229.10(c)* (Treasury checks have routing number beginning with "0000")].

- A check drawn on a Federal Reserve Bank or Federal Home Loan Bank or a United States Postal Service money order when the check or money order was deposited, in person, to an employee of the depositary institution in an account held by a payee of the check or money order [*12 C.F.R. § 229.10(c)(1)(ii), (iii)*]. If the check or money order was deposited to an account of the payee but the deposit was not made in person to an employee of the depositary institution, the funds must be made available for withdrawal no later than the second business day after the banking day of deposit [*12 C.F.R. § 229.10(c)(2)*].

- A check drawn by a state or by a unit of general local government, deposited (1) in an account held by a payee of the check; (2) in a receiving institution located in the state that issued the check, or in the same state as the unit of general local government that issued the check; (3) in person to an employee of the receiving depositary institution; and (4) with a special deposit slip or deposit envelope, if one is required by the receiving depositary institution, indicating that the check is one of this type [*12 U.S.C. § 4002(a)(2)(B), (C)*; *12 C.F.R. § 229.10(c)(1)(iv), (3)*]. If the check would qualify for next-day availability under this provision except for the fact that it was not deposited in person to an employee of the depositary institution, the funds must be available on the second business day after the banking day of deposit [*12 C.F.R. § 229.10(c)(1)(iv), (2)*].

- A cashier's check, certified check, or teller's check that is deposited (a) in an account held by a payee of the check; (b) in person to an employee of the depositary institution; and (c) with a special deposit slip or envelope, if one is required by the receiving depositary institution, indicating that the check is one of these types [*12 U.S.C. § 4002(a)(2)(F)*; *12 C.F.R. § 229.10(c)(1)(v), (3)*; *see 12 U.S.C. § 4001(5), (6), (11), (22)* (definitions)]. If the check would qualify for next-day availability under this provision except for the fact that it was not deposited in person to an employee of the depositary institution, the funds must be available on the second business day after the banking day of deposit [*12 C.F.R. § 229.10(c)(1)(v), (2)*].

- A check drawn on another or the same branch of the institution to which it is deposited (hereinafter "on-us" items) if both branches are located in the same state or in the same check-processing region [*12 U.S.C. § 4002(a)(2)(E)*; *12 C.F.R. § 229.10(c)(1)(vi)*; *see § 95.225[2]*].

If the depositary institution requires special deposit slips or envelopes in order to give next-day availability, the institution must provide them to its customers or inform the customers how the special deposit slips or envelopes can be obtained. The special deposit slips and envelopes must be reasonably available [*12 C.F.R. § 229.10(c)(3)(ii)*].

[3] Check Definitions Relating to Next-Day Availability

A "cashier's check" is any check that is (1) drawn on a depository institution, (2) signed by an officer or employee of that institution on behalf of that institution as drawer, (3) a direct obligation of that institution, and (4) provided to a customer of the depository institution or acquired from the institution for remittance purposes [*12 U.S.C. § 4001(5)*; *12 C.F.R. § 229.2(i)*]. The fourth criteria of a cashier's check is intended to exclude checks that a bank draws on itself for other purposes, such as to pay its vendors or employees, and checks issued by the bank in connection with a payment

service, such as a payroll or bill-paying service [12 C.F.R. § 229, Appendix E, Commentary to *§ 229.2(i)*].

A "certified check" is any check with respect to which the drawee bank certifies by signature, on the check, of an officer or other authorized employee either that (1) the signature of the drawer on the check is genuine and the depository institution has set aside funds that are equal to the amount of the check and will be used to pay that check, or (2) the drawee will pay the check on presentment [*12 U.S.C. § 4001(6)*; *12 C.F.R. § 229.2(j)*].

A "teller's check" is any check provided to a customer of a bank, or acquired from a bank for remittance purposes, that is drawn by a bank and drawn on, or payable through or at, another bank [*12 U.S.C. § 4001(22)*; *12 C.F.R. § 229.2(gg)*]. Although in most instances under Regulation CC, the term "bank" and "depository institution" are synonymous, in this case, the definition of "teller's check" excludes checks drawn by a nonbank on a nonbank even if they are payable at or through a bank [12 C.F.R. § 229, Appendix E, Commentary to *§ 229.2(gg)*]. As with cashier's checks, the definition of a teller's check explicitly excludes checks used by the bank to pay employees or vendors and checks issued by the bank in connection with a payment service, such as a payroll or bill-paying service [12 C.F.R. § 229, Appendix E, Commentary to *§ 229.2(gg)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsGeneral OverviewBanking LawBank ActivitiesElectronic BankingFund TransfersBanking LawBank ActivitiesElectronic BankingFund Transfer SystemsBanking LawFederal Reserve SystemExpedited Funds Availability Act

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9-95 California Forms of Pleading and Practice--Annotated § 95.225

§ 95.225 Maximum Hold Periods

[1] General Guidelines

Funds deposited at a branch or ATM on or after September 1, 1990, must be available for withdrawal by the depositor no later than the start of the business day [*12 U.S.C. § 4006(b)*] indicated in the following chart after the banking day of deposit [*12 U.S.C. § 4002(b)*; *12 C.F.R. § 229.12*; *see 12 U.S.C. § 4001(3)*; *12 C.F.R. § 229.2(g)* (defining business day); *see also 12 U.S.C. § 4006(a)*; *12 C.F.R. § 229.19(a)(5)* (deposit made after cut-off hour or close of business as deemed made on next business day)]. Note that the Federal Reserve Board must reduce the maximum hold period whenever studies show that the actual clearing times for a majority of any category of check are shorter than the legal maximum [*see 12 U.S.C. § 4002(d)(1)*]. Reductions to the permanent schedule are published in Appendix B-2 to 12 C.F.R. § 229. Appendix B-2, as adopted in May 1988, does not require any reduction for checks processed through the San Francisco or Los Angeles regions.

Type of Check n1	Business Day After Business Day of Deposit on Which Funds Must Be Available for Withdrawal[1]
1. Local; checks drawn on U.S. Treasury and Postal Service money orders that do not meet criteria for next-day availability; checks drawn on U.S. Treasury and deposited to nonproprietary ATM	$100 on 1st business day [12 U.S.C. § 4002(a)(2)(D); 12 C.F.R. § 229.10(c)(1)(vii)]; remainder for payment of ordinary checks on second business day [12 U.S.C. § 4002(b)(1); 12 C.F.R. § 229.12(b), (d)]; additional cash withdrawal: $400 by 5 P.M. on second business day [12 U.S.C. § 4002(b)(3)(B); 12 C.F.R. § 229.12(b), (d)]; remainder for cash withdrawals[4] on third business day [12 U.S.C. § 4002(b)(3)(A); 12 C.F.R. § 229.12(b), (d)]
2. Nonlocal n2	$100 n*** on first business day [12 U.S.C. § 4002(a)(2)(D), (b)(3)(C); 12 C.F.R. § 229.10(c)(1)(vii)];

remainder for payment of ordinary checks on fifth business day [12 U.S.C. § 4002(b)(2); 12 C.F.R. § 229.12(c)(1), (d)]; additional cash withdrawal: n***$400 by 5 P.M. on fifth business day [12 U.S.C. § 4002(b)(3)(B); 12 C.F.R. § 229.12(d)]; cash withdrawal[4] of any remainder on sixth business day [12 U.S.C. § 4002(b)(3)(A); 12 C.F.R. § 229.12(c), (d); *cf.* 10 Cal. Code Reg. § 10.190402(b), discussed under § 95.231[10][b] (fourth business day availability)]

[2] Identifying Local Checks and Clearinghouse Associations

A "local check" is one payable by or at a local paying bank, or a check payable by a nonbank payor and payable through a local paying bank [*12 C.F.R. § 229.2(r)*]. A local paying bank is one that is located in the same check processing region as the physical location of the branch or proprietary ATM of the depositary bank in which the check was deposited [*12 C.F.R. § 229.2(s)(1)*]. A paying bank is also considered local if it is physically located in the same check processing region as both the branch of the depositary bank at which the account is held and the nonproprietary ATM at which the check is deposited [*12 C.F.R. § 229.2(s)(2)*; *see 12 U.S.C. § 4001(13), (20)*]. A check processing region is the geographic area served by a Federal Reserve Bank for purposes of its check clearing activities [*12 U.S.C. § 4001(9)*; *12 C.F.R. § 229.2(m)*]. California is in the Twelfth Federal Reserve District and encompasses two check processing regions [*see* 12 C.F.R. § 229, Appendix A].

The check processing center used by the institution on which a check is drawn or through which it is payable can be identified by the first four digits of its nine-digit routing number. The routing number takes two forms. It appears in a nine-digit form encoded along the bottom of the check, and is also generally printed as a fraction in the upper right-hand corner of the check. In the fractional form, the first four digits of the routing number comprise the denominator. The routing numbers used for California processing regions are 1210-1213 and 1220-1224, or if the originating institution is a credit union, a savings and loan association, or other thrift institution, 3210-3213 and 3220-3224. The first two digits show the Federal Reserve District and type of originating institution. The third digit shows the Federal Reserve Office within the district. The first three digits 121 and 321 indicate processing in the San Francisco region and the first three digits 122 and 322 indicate processing through the Los Angeles region. These three digits indicate whether or not the check is local. If the originating institution and the branch or ATM at which the check is deposited are in the territory served by the same Federal Reserve Office, the check is local [*12 U.S.C. § 4001(13), (20)*; 12 C.F.R. § 229, Appendix A]. The fourth digit shows the clearing arrangements used by the originating institution [12 C.F.R. § 229, Appendix A].

A "clearinghouse association" is an arrangement by which three or more participants exchange checks on a local basis, including an entire metropolitan area, without using the check processing facilities of the Federal Reserve System [*12 U.S.C. § 4001(8)*; *12 C.F.R. § 229.2(l)*]. California is one of the few places where a single clearinghouse association operates in different metropolitan areas. Each of those exchanges is considered a separate clearinghouse [12 C.F.R. § 229, Appendix E, Commentary to *§ 229.2(l)*]. A clearinghouse association may include arrangements using the premises of a Federal Reserve Bank, but it does not include the handling of checks for forward collection or return by a Federal Reserve Bank [*12 C.F.R. § 229.2(l)*]. Several clearinghouses meet at Reserve Banks to exchange checks among their members [12 C.F.R. § 229, Appendix E, Commentary to *§ 229.2(l)*].

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FOOTNOTES:

(n1)Footnote 1. Deposits made in Alaska, Hawaii, Puerto Rico, or the United States Virgin Islands in a form that does not require next-day availability are subject to a one-day extension of the maximum hold periods if drawn on an institution in another state [12 C.F.R. § 229.12(e)].

(n2)Footnote 2. Except for checks drawn on the United States Treasury and Postal Service money orders, other items that did not qualify for next-day or second-day availability are characterized as local or nonlocal depending on the check clearing region in which they are payable [12 C.F.R. § 229.12(b)(2)-(4), (c)(1)(ii); 12 C.F.R. § 229, Appendix E, Commentary to § 229.12].

(n3)Footnote ***. [3] This $100 must be available for either cash withdrawal or check writing purposes at the start of the next business day [*see* 12 C.F.R. § 229, Appendix E, Commentary to § 229.10].

(n4)Footnote ***. [4] 12 C.F.R. § 229.12(d) refers to availability for withdrawal by cash or similar means, including electronic payments, issuance of certified, cashier's, or teller's checks, or other irrevocable commitments to pay, but does not include granting of credit to a bank that presents a check to the depositary institution for payment. The $400 is not increased if funds deposited by both local and nonlocal checks become available for withdrawal under this provision in a single business day [12 U.S.C. § 4002(b)(3)(B)].

Note that some "California non-local" items that would otherwise be subject to fifth-day availability must be available for withdrawal on the fourth business day after deposit in accordance with the regulations of the California Superintendent of Banks [10 Cal. Code Reg. § 10.190402(b)]. The California regulations are set forth under § 95.231[10][b].

Note also that deposits at nonproprietary ATMs are not subject to a separate schedule, nor are local checks divided into separate categories depending on whether the depositary and paying institution are participants in the same clearinghouse association [*see* 12 U.S.C. § 4001(17), (20); 12 C.F.R. § 229.2(o), (z) (defining paying and depositary institutions), discussed under § 95.225[2]].

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§ 95.226 Exceptions

[1] New Accounts

The regular maximum hold periods [*see 12 U.S.C. § 4002(b), (c), (e)(1), (2)*; *12 C.F.R. § 229.12, discussed under § 95.225[1]*] do not apply for the first 30 calendar days after a new account is established [*12 U.S.C. § 4003(a)(2)*; *12 C.F.R. § 229.13(a)(1)(iii)*]. Nor do the next-day availability provisions for the first $100 of checks or for "on-us" items apply for the first 30 days [*12 C.F.R. § 229.13(a)(1)(iii)*]. An account is not considered a new account if each customer on the account has had another account at the depositary institution for at least 30 calendar days, within 30 calendar days before the account is established [*12 C.F.R. § 229.13(a)(2)*].

Even if the account is a new account, next-business-day or second-business-day availability is required for deposits made or received in the form of cash or electronic payment and for the first $5,000 of funds deposited on any one banking day in the form of United States Postal Service money order, or of a check drawn on the United States Treasury or on a Federal Reserve or Federal Home Loan Bank; of a cashier's, certified, teller's or traveler's check; or of a government check that is described in *12 U.S.C. § 4002(a)(2)(A)-(C)* or 12 C.F.R. § 229.10(c)(1)(i)-(v) (*see* items (3)-(6) under *§ 95.224[2]*) [*12 U.S.C. § 4003(a)(1), (3)*; *12 C.F.R. § 229.13(a)(1)* and 12 C.F.R. § 229, Appendix E, Commentary to *§ 229.13(a)* (for purposes of *12 C.F.R. § 229.13(a)(1)*, *12 C.F.R. § 229.10(c)(1)(v)* includes traveler's checks)]. Any remainder of funds deposited in those forms of check need not be made available until the ninth business day after the banking day of deposit [*12 U.S.C. § 4003(a)(3)*; *12 C.F.R. § 229.13(a)(1)(ii)*].

[2] Large Deposits

The regular maximum hold periods [*see § 95.225*] do not apply, and may be extended for a reasonable period, to the excess over $5,000 of the aggregate amount of deposits by one or more checks in any one banking day [*12 U.S.C. § 4003(b)(1)*; *12 C.F.R. § 229.13(b), (h)(1)*]. The $5,000 limitation applies to the aggregate deposits to all accounts of a customer with multiple accounts even if the customer is not the sole holder of the accounts and not all of the holders of the accounts are the same [*12 C.F.R. § 229.13(b)*].

If a depository bank invokes this exception to the maximum hold period, it must make the funds available for withdrawal not later than a reasonable period after the day the funds would have been required to be made available had the check been subject to *12 C.F.R. § 229.12* [*12 C.F.R. § 229.13(h)(2)*].

Pursuant to *12 C.F.R. § 229.13(h)(4)*, a reasonable extension of the hold period that would otherwise apply would be up to one business day for checks deposited in a branch of the depository bank and drawn on the same or another branch of the same bank if both branches are located in the same state or the same check-processing region [*see 12 C.F.R. § 229.10(c)(1)(vi)*], up to five business days for local and certain other checks [*see 12 C.F.R. §§ 229.12(b), 229.13(h)(2)*], and up to six business days for nonlocal checks [*see 12 C.F.R. §§ 229.12(c), 229.13(h)(2)*].

[3] Checks Returned Unpaid and Redeposited

The regular maximum hold periods [*see discussion under § 95.225*] do not apply, and may be extended for a reasonable period, to a check that has been returned unpaid and redeposited by the customer or the bank [*12 U.S.C. § 4003(b)(2); 12 C.F.R. § 229.13(c)*]. This exception does not apply if the indicated reason for the return was a missing endorsement that was supplied before redeposit, or the fact that the check was postdated, as long as it was not postdated at the time of the redeposit [*12 C.F.R. § 229.13(c)*].

If a depository bank invokes this exception to the maximum hold period, it must make the funds available for withdrawal not later than a reasonable period after the day the funds would have been required to be made available had the check been subject to *12 C.F.R. § 229.12* [*12 C.F.R. § 229.13(h)(1), (2)*].

Pursuant to *12 C.F.R. § 229.13(h)(4)*, a reasonable extension of the hold period that would otherwise apply would be up to one business day for checks deposited in a branch of the depository bank and drawn on the same or another branch of the same bank if both branches are located in the same state or the same check-processing region [*see 12 C.F.R. § 229.10(c)(1)(vi)*], up to five business days for local and certain other checks [*see 12 C.F.R. §§ 229.12(b), 229.13(h)(2)*], and up to six business days for nonlocal checks [*see 12 C.F.R. §§ 229.12(c), 229.13(h)(2)*].

[4] Repeated Overdrafts

If any account or combination of accounts of a customer has been repeatedly overdrawn, the regular maximum hold periods [*see § 95.225*] do not apply to any of the accounts for a period of six months after the last overdraft [*12 U.S.C. § 4003(b)(3)*; *12 C.F.R. § 229.13(d)*]. An account is repeatedly overdrawn if (1) on six or more banking days within the preceding six months, the account balance is negative, or would have become negative if checks or other charges to the account had been paid, or (2) on two or more banking days within the preceding six months, the account balance is negative, or would have become negative in the amount of $5,000 or more, if checks or other charges to the account had been paid [*12 C.F.R. § 229.13(d)*].

If a depository bank invokes this exception to the maximum hold period, it must make the funds available for withdrawal not later than a reasonable period after the day the funds would have been required to be made available had the check been subject to *12 C.F.R. § 229.12* [*12 C.F.R. § 229.13(h)(1), (2)*].

Pursuant to *12 C.F.R. § 229.13(h)(4)*, a reasonable extension of the hold period that would otherwise apply would be up to one business day for checks deposited in a branch of the depository bank and drawn on the same or another branch of the same bank if both branches are located in the same state or the same check-processing region [*see 12 C.F.R. § 229.10(c)(1)(vi)*], up to five business days for local and certain other checks [*see 12 C.F.R. §§ 229.12(b), 229.13(h)(2)*], and up to six business days for nonlocal checks [*see 12 C.F.R. §§ 229.12(c), 229.13(h)(2)*].

[5] Reasonable Cause to Doubt Collectibility

Neither the regular maximum hold periods [*see 12 U.S.C. § 4002(b), (c), (e)(1)-(3)*; *12 C.F.R. § 229.12*, discussed under *§ 95.225[1]*] nor the next-business-day or second-business-day availability requirements for cashier's, certified, and teller's checks, or checks drawn on a Federal Reserve Bank or a Federal Home Loan Bank, apply to any check that the receiving depositary institution has reasonable cause to believe is uncollectible from the paying institution [*12 U.S.C. § 4003(c)(1)*; *12 C.F.R. § 229.13(e)(1)*]. Reasonable cause requires the existence of facts that would cause a well-grounded belief in the mind of a reasonable person and cannot be based on the fact that the check is of a particular class or is deposited by a particular class of persons [*12 U.S.C. § 4003(c)(1)*; *12 C.F.R. § 229.13(e)(1), (2)*]. The reason for the believed uncollectibility must be stated in the notice required by *12 U.S.C. § 4003(f)* and 12 C.F.R. § 229.13(g) [*12 U.S.C. § 4003(c)(1)*; *12 C.F.R. § 229.13(e)(1)*; *see § 95.226[7]*].

If a depository bank invokes this exception to the maximum hold period, it must make the funds available for withdrawal not later than a reasonable period after the day the funds would have been required to be made available had the check been subject to *12 C.F.R. § 229.12* [*12 C.F.R. §§ 229.13(h)(1), (2)*].

Pursuant to *12 C.F.R. § 229.13(h)(4)*, a reasonable extension of the hold period that would otherwise apply would be up to one business day for checks deposited in a branch of the depository bank and drawn on the same or another branch of the same bank if both branches are located in the same state or the same check-processing region [*see 12 C.F.R. § 229.10(c)(1)(vi)*], up to five business days for local and certain other checks [*see 12 C.F.R. §§ 229.12(b), 229.13(h)(2)*], and up to six business days for nonlocal checks [*see 12 C.F.R. §§ 229.12(c), 229.13(h)(2)*].

A receiving depositary institution that invokes this exception to extend the time funds become available for withdrawal and does not furnish the depositor with written notice at the time of deposit may not assess any fees for any subsequent overdrafts (including the use of a line of credit), return of checks, or other debits to the account if (1) the overdraft or return of the check would not have occurred except for the fact that the deposited funds were delayed under this exception, and (2) the check was finally paid by the paying institution [*12 C.F.R. § 229.13(e)(2)*]. However, the receiving depositary institution may assess an overdraft or returned check charge if it includes a notice concerning those fees in the notice required by *12 U.S.C. § 4003(f)* and *12 C.F.R. § 229.13(g)* and, when required, refunds the fee at the customer's request. The overdraft and returned check notice must state that the customer may be entitled to a refund of overdraft or returned-check fees that are assessed if the check subject to this exception is paid, and must explain how to obtain the refund [*12 C.F.R. § 229.13(e)(2)*].

[6] Emergency Conditions

The regular maximum hold periods [*see 12 U.S.C. § 4002(b), (c), (e)*; *12 C.F.R. § 229.12*, discussed under *§ 95.225[1]*] do not apply to funds deposited by check in any depositary institution that is experiencing any interruption of communications, computer, or other equipment facilities; a suspension of payments from another depository institution; war; or any emergency beyond its control, if the receiving depositary institution exercises as much diligence as the circumstances require [*12 U.S.C. § 4003(d)*; *12 C.F.R. § 229.13(f)*]. If a depository bank invokes this exception to the maximum hold period, it must make the funds available for withdrawal not later than a reasonable period after the day the funds would have been required to be made available had the check been subject to *12 C.F.R. § 229.12* [*12 C.F.R. § 229.13(h)(1)*].

Pursuant to *12 C.F.R. § 229.13(h)(4)*, a reasonable extension of the hold period that would otherwise apply would be up to one business day for checks deposited in a branch of the depository bank and drawn on the same or another branch of the same bank if both branches are located in the same state or the same check-processing region [*see 12 C.F.R. § 229.10(c)(1)(vi)*], up to five business days for local and certain other checks [*see 12 C.F.R. §§ 229.12(b), 229.13(h)(2)*], and up to six business days for nonlocal checks [*see 12 C.F.R. §§ 229.12(c), 229.13(h)(2)*].

[7] Notice of Extension of Hold Period

[a] Required Contents

If any exception other than the new account exception is invoked to extend the maximum hold period otherwise applicable, the depositary institution must notify the customer in writing. The notice must include the account number of the customer, the date of the deposit, the amount of the deposit that is being delayed, the reason the exception was invoked, and the period within which the funds will be available for withdrawal [*12 U.S.C. § 4003(f)(1)*; *12 C.F.R. § 229.13(g)(1)(i)*].

[b] Timing of Notice of Extension

If the deposit is made in person to an employee of the depositary institution, the notice must be given to the depositor, in writing, at the time of deposit [*12 U.S.C. § 4003(f)(2)*; *12 C.F.R. § 229.13(g)(1)(ii)(A)*]. In the case of other deposits, or if a deposit was made in person but the facts giving rise to the exception did not become known to the depositary institution until after the deposit was made, the notice must be mailed or delivered to the customer as soon as practicable, but not later than the first business day following the day on which the facts become known to the depositary institution or on which the deposit was made, whichever is later [*12 U.S.C. § 4003(f)(2)(B), (C), (3)*; *12 C.F.R. § 229.13(g)(1)(ii)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 95.227 Required Disclosure of Hold Policy

[1] Initial and General

A depository institution must provide written notice of its policy regarding availability of deposited funds for withdrawal before a person opens an account [*12 U.S.C. § 4004(a)*; *see 12 U.S.C. § 4004(f)*; *12 C.F.R. § 229.17(a)*; *see also 12 C.F.R. § 229.16* (contents of disclosures)].

All preprinted deposit slips must contain a notice that deposited checks may not be available for immediate withdrawal [*12 U.S.C. § 4004(b)*; *12 C.F.R. § 229.18(a)*]. The notice must also be posted in a conspicuous place at any location at which deposits are accepted, including on automated teller machines, and must be made available to any person on request [*12 U.S.C. § 4004(c)(3), (d)*; *12 C.F.R. § 229.18(b)-(d)*].

[2] Off-Premises ATM

A depositary institution that operates an off-premises ATM from which deposits are removed not more than two times each week must disclose at or on the ATM the days on which deposits made at that ATM will be considered received [*12 C.F.R. § 229.18(c)(2)*].

[3] Changes in Hold Policy

Whenever an institution's hold policy changes, the institution must send its customers written notice at least 30 days before implementing any change that extends the length of time before which funds are made available for withdrawal. Any change that expedites the availability of funds must be disclosed not later than 30 days after implementation [*12 U.S.C. § 4004(c)(2)*; *12 C.F.R. § 229.18(e)*].

Legal Topics:

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

Banking LawFederal Reserve SystemExpedited Funds Availability Act

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§ 95.228 Administrative Enforcement

Compliance with the requirements imposed by the federal Expedited Funds Availability Act and regulations promulgated thereunder is enforced by the boards and entities as listed in *12 U.S.C. § 4009(a)* and *(c)(1)* [*see 12 C.F.R. § 229.3(a), (c)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawFederal Reserve SystemExpedited Funds Availability Act

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§ 95.229 Civil Liability

[1] Individual Action

Any depository institution that fails to comply with any requirement imposed by the federal Expedited Funds Availability Act (*12 U.S.C. § 4001 et seq.*) and regulations promulgated under it (12 C.F.R. Parts 210 and 229), or with any provision of state law that supersedes any provision of *12 C.F.R. §§ 229.10-229.21*, with respect to any person other than another depository institution is liable to that person in an amount equal to the actual damage sustained by that person as a result of the failure to comply, plus an additional amount between $100 and $1,000 as allowed by the court [*12 U.S.C. § 4010(a)(1), (2)(A)*; *12 C.F.R. § 229.21(a)(1), (2)(i)*]. *12 U.S.C. § 4010(a)*and 12 C.F.R. § 229.21 do not apply to actions that arise under *12 C.F.R. § 229.30 et seq.* (interbank responsibilities regarding collection of checks).

The regulation, but not *12 U.S.C. § 4010(a)*, excludes liability for wrongful dishonor [*12 C.F.R. § 229.21(f)*]. For a form of complaint for damages under *12 U.S.C. § 4010(a)* and 12 C.F.R. § 229.21, *see § 95.431*.

[2] Attorney's Fees

In the case of a successful action to enforce liability under *12 U.S.C. § 4010* and 12 C.F.R. § 229.21, the prevailing party is entitled to costs and reasonable attorney's fees as determined by the court [*12 U.S.C. § 4010(a)(3)*; *12 C.F.R. § 229.21(a)(3)*; *see generally* Ch. 174, *Costs and Attorney's Fees*].

[3] Class Action

In a class action under *12 U.S.C. § 4010(a)*, actual damages, costs, and attorney's fees are recoverable as they would be in an individual action [*12 U.S.C. § 4010(a)(1), (3)*; *12 C.F.R. § 229.21(a)(1), (3)*]. With regard to the additional amount allowed by the court, there is no minimum recovery on the amount awarded to each member of the class, but the total recovery in any class action or series of class actions arising out of the same failure to comply by the same institution shall not exceed the lesser of $500,000 or 1 percent of the net worth of the depository institution [*12 U.S.C. §*

4010(a)(2)(B); *12 C.F.R. § 229.21(a)(2)(ii)*].

In determining the amount of any award in any class action, the court must consider, along with other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance, the resources of the depository institution, the number of persons adversely affected, and the extent to which the failure of compliance was intentional [*12 U.S.C. § 4010(b)*; *12 C.F.R. § 229.21(b)*].

For discussion and forms relating to class actions generally in California courts, see Ch. 120, *Class Actions* .

[4] Defense of Bona Fide Error or Reliance on Board Ruling

A depository institution is not liable for failing to comply with any requirement imposed by the federal Expedited Funds Availability Act or regulations promulgated thereunder if that institution demonstrates by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adapted to avoid any such error [*12 U.S.C. § 4010(c)(1)*; *12 C.F.R. § 229.21(c)(1)*]. Examples of bona fide errors include clerical errors, calculation errors, computer malfunction and programming, and printing errors. However, an error of legal judgment with respect to a depository institution's obligation under *12 U.S.C. § 4001 et seq.* is not a bona fide error [*12 U.S.C. § 4010(c)(2)*; *12 C.F.R. § 229.21(c)(2)*].

No civil liability is imposed by *12 U.S.C. § 4010* or 12 C.F.R. § 229.21 for any act done or omitted in good faith in conformity with any rule, regulation, or interpretation of a rule of regulation by the Board of Governors of the Federal Reserve System. This immunity applies even if the rule, regulation, or interpretation was amended, rescinded, or determined by judicial or other authority to be invalid for any reason after the act or omission occurred [*12 U.S.C. § 4010(e)*; *12 C.F.R. § 229.21(e)*]. The Commentary in Appendix E to 12 C.F.R. Part 229 is an interpretation by the Board within the meaning of *12 U.S.C. § 4010(e)* [12 C.F.R. § 229, Appendix E, Commentary, opening paragraphs].

[5] Jurisdiction and Statute of Limitations

Federal court subject-matter jurisdiction under *12 U.S.C. § 4010(a)*, *(d)*, and *(f)* is not confined to suits initiated by bank customers against banks. The Act also provides for federal court jurisdiction in cases initiated by one bank against another bank [*Bank One Chicago, N.A. v. Midwest B & T (1996) 516 U.S. 264, 116 S. Ct. 637, 133 L. Ed. 2d 635]* .

An action under *12 U.S.C. § 4010* may be brought in United States district court or in any other court of competent jurisdiction within one year after the date of the occurrence of the violation involved [*12 U.S.C. § 4010(d)*; *12 C.F.R. § 229.21(d)*; *see, e.g., Mihai Beffa v. Bank of the West (1998) 152 F.3d 1174, 1176-1177* (even if statute of limitations is tolled until plaintiff receives notice of violation, complaint was untimely because once plaintiff knew foreign wire transfer was not credited to his account, he chose to blame foreign bank rather than track it through his own bank)]. For discussion of jurisdiction in California courts, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter* . For discussion of jurisdiction in federal courts, and procedures for removal and remand, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

[6] Records Retention

A depository institution must retain evidence of compliance with *12 C.F.R. §§ 229.10-229.21* for not less than two years [*12 C.F.R. § 229.21(g)(1)*]. If the institution has notice of an investigation or proceeding by the agency charged with monitoring its compliance or has been served notice of an action filed under *12 C.F.R. § 229.21*, it must retain the records relating to the action or proceeding until final disposition of the matter, unless an earlier time is allowed by order of the agency or court [*12 C.F.R. § 229.21(g)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawFederal Reserve SystemExpedited Funds Availability ActCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 95.230 Miscellaneous Provision

[1] When Deposits Are Considered Made

Funds deposited at a staffed facility or an ATM are considered deposited when they are received at the staffed facility or ATM [*12 C.F.R. § 229.19(a)(1)*]. Funds mailed to a depositary institution are considered deposited on the day they are received by the depositary institution [*12 C.F.R. § 229.19(a)(2)*]. Funds deposited at a night depository, lock box, or similar facility are considered deposited on the day on which the deposit is removed from the facility and is available for processing by the depositary institution [*12 C.F.R. § 229.19(a)(3)*].

Funds deposited at an ATM that is not on or within 50 feet of the premises of the depositary institution are considered deposited on the day the funds are removed from the ATM, if funds are normally removed from the ATM not more than two times each week [*12 C.F.R. § 229.19(a)(4)*; *see 12 C.F.R. § 229.18(c)(2)* (disclosure of removal times on ATM, discussed under *§ 95.227[2]*)].

Funds may be considered deposited on the next banking day if they are deposited on a day that is not a banking day for the depositary institution or if they are deposited after any cut-off hour established by the depositary institution. Cut-off hours after 2 p.m., or after noon (12 p.m.) in the case of deposits at ATMs or off-premises facilities, are permissible [*12 U.S.C. § 4006(a)*; *12 C.F.R. § 229.19(a)(5)*].

[2] Interest

A depositary institution must begin to accrue interest on funds deposited to an interest-bearing account no later than the business day on which it receives credit for the funds [*12 U.S.C. § 4005(a)*; *12 C.F.R. § 229.14(a)*; *see also 12 C.F.R. § 229.19(d)* (use of calculated availability for interest accrual on nonconsumer accounts)]. No institution is required to pay interest or dividends on funds deposited by a check that is returned unpaid [*12 U.S.C. § 4005(c)*; *12 C.F.R. § 229.14(c)*].

A credit union does not have to begin to accrue interest or dividends on funds deposited by check when it receives

credit if it begins to accrue interest on all deposited funds, including cash, at some later time and if its accrual policy is disclosed in the notices required by *12 U.S.C. § 4004(a)* and (c) (discussed under *§ 95.227*) [*12 U.S.C. §§ 4004(e), 4005(b)(2)*; *12 C.F.R. § 229.14(b)*; *see 12 C.F.R. § 229.16(d)* (contents of notice)].

[3] Prohibition on Freezing Other Funds

The federal Expedited Funds Availability Act provides that when a check is deposited and the funds represented by that check are not yet available for withdrawal, a depository institution cannot freeze any other funds in an account that are otherwise available for withdrawal solely because those deposited funds are not yet available for withdrawal [*12 U.S.C. § 4006(d)*]. The relevant regulation, however, provides that, when a check, other than a check drawn on that institution and cashed over the counter, is accepted for deposit or cashed, a hold can be placed on any funds of the customer at that institution up to the amount of that check as long as the funds are made available for withdrawal within the times specified in the availability schedules [*12 C.F.R. § 229.19(e)*; 12 C.F.R. § 229, Appendix E, Commentary to *§ 229.19(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 95.231 California Delayed Withdrawal Provisions

[1] Mostly Superseded by Federal Expedited Funds Availability Act

The California law governing delayed availability of deposited funds [*Fin. Code § 866 et seq.*] applies to the same types of depository institutions as does the federal Expedited Funds Availability Act (*12 U.S.C. § 4001 et seq.*)--banks, savings banks, savings and loan associations, and credit unions, to name the primary ones [*12 U.S.C. § 4001(12)*; *Fin. Code § 866(a)*; *see* discussion under *§ 95.221*]. For deposits made after August 31, 1988, federal law and regulations supersede state law except any state law or regulation in effect on September 1, 1989, that establishes a shorter maximum hold period for a given category of check than the period allowed under federal law [*12 U.S.C. § 4007*; *12 C.F.R. § 229.20*, discussed in *§ 95.220*]. The regulations of the California Superintendent of Banks (*10 Cal. Code Reg. §§ 10.190400-10.190402*), effective October 7, 1988, adopt the federal hold periods of Regulation CC in all instances except the six (or, after September 1, 1990, two) categories of California non-local checks described under *§ 95.231[10][b]* [*see 10 Cal. Code Reg. § 10.190402*]. Similarly, the regulations of the California Savings and Loan Commissioner, effective October 12, 1988, do not provide for any shorter hold periods, but adopt the hold periods established by Regulation CC for items deposited to transactions accounts [*10 Cal. Code Reg. § 106.201*; *see also* 10 Cal. Code Reg. § 6.200(b) (conforming definition of item to Regulation CC definition of check)].

Fin. Code § 866 et seq. and the California Banking Regulations contain a broader definition of the term "deposit account" than do the federal law and Regulation CC. The California law and regulations apply not only to transaction (that is, checking) accounts, but also to savings deposits subject to automatic transfers, share draft accounts (other than those on which checks or negotiable orders of withdrawal may be written), and savings deposits and share accounts that are not "transaction accounts" other than time deposits [*Fin. Code § 866(b)*; *10 Cal. Code Reg. § 10.190401(c)*; *see also* 12 C.F.R. § 229, Appendix E, Commentary to *§ 229.20* (federal preemption)]. Although the definition of account under *Fin. Code § 867(c)* (*see § 95.231[11]*), governing the availability of deposits in form of cashier's checks, teller's checks, certified checks, and their equivalents, is the same as that in 12 U.S.C. § 400(1) (*see § 95.222[1]*), the Board of Governors of the Federal Reserve System has taken the position that the two-day availability requirement of *Fin. Code § 867* supersedes the federal Expedited Funds Availability Act and Regulation CC when applied to cashier's checks or

teller's checks issued other than for remittance purposes [12 C.F.R. 229, Appendix F, Preemption Determinations, California].

Four different sets of California regulations establish the maximum availability periods for California depository institutions: *10 Cal. Code Reg. §§ 10.190400-10.190402* (banks); *10 Cal. Code Reg. §§ 106.200-106.202* (savings and loan associations); *10 Cal. Code Reg. § 901* (credit unions); and *10 Cal. Code Reg. § 1101* (industrial loan companies). Only the regulations of the Superintendent of Banks and the regulations of the Savings and Loan Commissioner are discussed in this chapter.

[2] Accounts Defined

For purposes of *Fin. Code § 866 et seq.* and related regulations, the term "deposit account" means an account in a depository institution on which the account holder is permitted to make withdrawals from time to time in person by negotiable or transferable instrument, payment orders of withdrawal, telephone transfers, or other similar items for the purpose of making payments or transfers to third persons or others. The term includes demand deposits, negotiable order of withdrawal draft accounts, savings deposits subject to automatic transfers, share draft accounts, and all savings deposits and share accounts other than time deposits [*Fin. Code § 866(b)*].

"Deposit account" is defined by the banking regulations to mean an "account" as defined in Regulation CC (*12 C.F.R. § 229.2(a)*) and any savings deposit account other than a time deposit account [*10 Cal. Code Reg. § 10.190401(c)*]. A "savings deposit" is defined by the banking regulations to have the same meaning as provided in *12 C.F.R. § 204.2(d)* [*10 Cal. Code Reg. § 10.190401(i)*].

The Savings and Loan Commissioner's regulation defines "non-transaction account" as a savings deposit, including a regular savings account, an automatic transfer account, a money market deposit account, or any savings deposit described in *12 C.F.R. § 204.2(d)* [*10 Cal. Code Reg. § 106.200(c)*].

[3] Disclosure and Notice Requirements

California Fin. Code § 866.2 requires disclosures that are different from those required by Regulation CC, and, therefore, is preempted to the extent that it applies to "accounts" as defined in Regulation CC [*see 12 U.S.C. § 4007* (preemption)]. However, *Fin. Code § 866.2* continues to apply to savings accounts and other accounts not governed by Regulation CC disclosure requirements [12 C.F.R. § 229, Appendix F, Preemption Determinations, California].

Before opening a deposit account, a depository institution, as defined by *Fin. Code § 866*, must provide a written disclosure to the potential customer of its general policy with respect to when a customer may withdraw funds deposited by check or similar instrument into the customer's deposit account [*Fin. Code § 866.2(a)*]. The depository institution must also furnish its customers with individual notice, which may be on preprinted deposit slips or on envelopes for automatic teller machine deposits, bearing a conspicuous summary statement of its general policy with respect to when a customer may withdraw funds deposited by check or similar instrument into the customer's deposit account. In the case of a particular deposit by check or similar instrument into a deposit account for which funds may not be immediately available for withdrawal, the depository institution must provide specific notice of the time after which the customer may withdraw the funds [*Fin. Code § 866.2(b)*].

[4] Computing Interest

For the purposes of computing the amount of interest or dividends payable with respect to an interest-bearing account, a depository institution must not delay beginning to compute interest on funds deposited by check or similar instrument to the account beyond the date on which that depository institution receives provisional credit on the check or similar instrument. However, the payment of interest is not required if the check or similar instrument is returned unpaid [*Fin.*

Code § 866.3].

[5] Depository Institution's Liability for Failure to Comply

Except as otherwise provided in *Fin. Code § 866.4*, any depository institution that fails to comply with any requirement imposed under *Fin. Code § 866 et seq.* is liable to the aggrieved party in an amount equal to the sum of any actual damage sustained by the person as a result of the failure and, in the case of an individual action, an additional amount as the court may allow that is not less than $50 or greater than $500. In any successful individual or class action to enforce a depository institution's liability under *Fin. Code § 866.4*, the recovery includes costs of the action together with a reasonable attorney's fee as determined by the court [*Fin. Code § 866.4*].

[6] Amount of Class Action Recovery

In a class action, the recovery is the amount that the court may allow, except that as to each member of the class no minimum recovery is applicable and the total recovery in any class action or series of class actions arising out of the same failure to comply by the same depository institution may not be more than the lesser of $500,000 or 1 percent of the net worth of the depository institution [*Fin. Code § 866.4*]. In determining the amount of award in any class action, the court considers, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance, the resources of the depository institution, the number of persons adversely affected, and the extent to which the failure of compliance was intentional [*Fin. Code § 866.4*]. For discussion and forms relating to class actions generally, see Ch. 120, *Class Actions* .

[7] Time and Place for Bringing Action

An action under *Fin. Code § 866.4* may be brought in any court of competent jurisdiction within one year from the date of the occurrence of the violation [*Fin. Code § 866.4*]. For discussion of jurisdiction, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter* . For discussion of venue, see Ch. 571, *Venue* .

[8] Limitations on Liability

A depository institution may not be held liable in any action brought under *Fin. Code § 866.4* for violating *Fin. Code § 866 et seq.* if the violation was not intentional and resulted from a bona fide error despite the maintenance of procedures reasonably adapted to avoid any such error. Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programming, and printing errors. However, an error of legal judgment with respect to a person's obligations under *Fin. Code § 866 et seq.* does not constitute a bona fide error [*Fin. Code § 866.4*].

No provision of *Fin. Code § 866.4* imposing any liability applies to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Federal Reserve Board, or in conformity with any interpretation or approval by an official or employee of the Federal Reserve Board duly authorized by the board to issue interpretations or approvals under such procedures as the board may prescribe, notwithstanding that, after any act or omission has occurred, the rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason [*Fin. Code § 866.4*].

[9] Regulations Defining "Reasonable Time"

The Commissioner of Financial Institutions is required to issue administrative regulations pursuant to *Com. Code § 4215* to define a reasonable time for permitting customers to draw on items received for deposit in the customers' accounts. Public policy in California provides retail banking customers with the right to withdraw against items deposited with any depository institution located in California within a reasonable period of time [*Fin. Code § 866.5*].

In accordance with *Fin. Code § 866.5*, the Commissioner of Financial Institutions promulgates regulations that must be

reviewed annually to establish a reasonable period of time within which a depository institution must permit a customer to draw as a matter of right on an item that has been received for deposit in the customer's account [*Fin. Code § 866.6*]. In determining what constitutes a reasonable period of time, the Commissioner must consider the following factors: (a) the actual time for processing and transporting between the depository and payer institutions, (b) the fastest air transport time between depository and payer institutions to be used for purposes of setting the reasonable time for transport, and (c) the most expeditious route and means for processing of returned items [*Fin. Code § 866.6*].

The Commissioner is authorized to issue regulations that provide for a different period of time for withdrawal as a matter of right against deposited items if there has been a determination that the application of the regulations adopted under *Fin. Code § 866 et seq.* would result in unsafe or unsound practices by a depository institution subject to the regulatory jurisdiction of the respective state regulatory agency [*Fin. Code § 866.9*].

[10] Regulations of Superintendent of Banks

[a] Miscellaneous Definitions

For purposes of *10 Cal. Code Reg. §§ 10.190400-10.190402*, "depositary bank" means any California state commercial or national bank or any California branch office of a foreign (other nation) bank [*10 Cal. Code Reg. § 10.190401(d)*; *see Fin. Code § 102 et seq.* (defining types of banks)].

For purposes of *10 Cal. Code Reg. § 10.190400-10.190402*, the terms "banking day" and "business day" have the same meanings as provided in *12 C.F.R. § 229.2(f)* and *(g)*, respectively (discussed under *§ 95.222[3]*) [*10 Cal. Code Reg. § 10.190401(a), (b)*]. "Item" is defined by the California regulation to mean "check" as defined in *12 C.F.R. § 229.2(k)* (discussed under *§ 95.222[5]*) [*10 Cal. Code Reg. § 10.190401(e)*].

The term "1210 bank" is defined by the California regulations as a bank with a federal reserve routing symbol of 1210 [*10 Cal. Code Reg. § 10.190401(f)*]; and "1220 bank" is a bank with a federal reserve routing symbol of 1220 [*10 Cal. Code Reg. § 10.190401(g)*]. A "thrift institution" under the California regulations means a savings and loan association, savings bank, or credit union [*10 Cal. Code Reg. § 10.190401(j)*].

[b] Maximum Hold Periods Under California Banking Regulations

Except as otherwise provided in *10 Cal. Code Reg. § 10.190402(a)* and *(b)*, a depositary bank must make funds deposited into a deposit account by an item available for withdrawal as provided in Regulation CC. The hold schedules provided in Regulation CC and in *10 Cal. Code Reg. § 10.190402(a)* and *(b)* must be the reasonable time for the collection and return of an item and the reasonable time by which a depositary bank must permit a depositor to draw on an item deposited into a deposit account [*10 Cal. Code Reg. § 10.190402*].

On or after September 1, 1990, items drawn and deposited as described below into accounts governed by the regulations of the Superintendent of Banks must be available for withdrawal not later than the business day specified below after the banking day on which the deposit was made [*10 Cal. Code Reg. § 10.190402(b)*]:

- Fourth business day in the case of an item drawn on a 1220 bank [*see § 95.231[10][a]*] or a paying bank located in the portion of California served by the Los Angeles Branch of the Federal Reserve Bank of San Francisco, and deposited into an account at a 1210 bank [*10 Cal. Code Reg. § 10.190402(b)(1)*].

- Fourth business day in the case of an item drawn on a 1210 bank [*see § 95.231[10][a]*], or on a paying bank located in the portion of California served by the Head Office of the Federal Reserve Bank of San Francisco, and deposited into an account at a 1220 bank [*10 Cal. Code Reg. § 10.190402(b)(2)*].

September 1, 1990, is also the date the federal schedule went into effect [*see § 95.225*]. However, unless feasibility studies lead to shortening of the federal hold periods, the above categories of items are subject to a shorter hold period under the California regulation than under Regulation CC and thus supersede the federal hold periods [*see 12 U.S.C. §§ 4002(d)(1), 4007*; *see also 12 C.F.R. § 229.20* (shorter state periods supersede federal)].

[c] Maximum Hold Periods Under California Savings and Loan Regulations

The California regulations adopt the hold periods established by Regulation CC for items deposited to nontransactions accounts [*10 Cal. Code Reg. § 106.201*; *see also 10 Cal. Code Reg. § 106.200(b)* (conforming definition of item to Regulation CC definition of check)]. Those regulations also provide that disclosures by a savings and loan association or savings bank concerning nontransaction accounts in accordance with those required by Regulation CC for transaction accounts are deemed to comply with *Fin. Code § 866.2* [*10 Cal. Code Reg. § 106.202*].

[11] Depository Checks

The Board of Governors of the Federal Reserve System has taken the position that the two-day availability requirement of *Fin. Code § 867* supersedes the federal Expedited Funds Availability Act and Regulation CC when applied to cashier's checks or teller's checks issued other than for remittance purposes [12 C.F.R. Part 229, Appendix F, Preemption Determinations, California]. Regulation CC limits its definition of cashier's checks and teller's checks to those that are provided to a customer of the issuing depository institution, or acquired from the depository institution, for remittance purposes, while the *Fin. Code § 867(c)(3)* and *(7)* definitions contain no such limitation. Conceivably a check issued by a bank to pay its employee or vendor would fall within the definition of cashier's check or teller's check found in *Fin. Code § 867*, but not within the Regulation CC definition [*see 12 C.F.R. § 229.2(i)* and *(gg)*, respectively; 12 C.F.R. § 229, Appendix E, Commentary to *§ 229.2(i)* and *(gg)*, discussed under *§ 95.224[3]*].

Although its application is extremely limited, *Fin. Code § 867(a)* provides that the first $5,000 of funds representing proceeds of depository checks, as defined below, deposited in any given day into a demand deposit or other similar transaction account must be available to the depositor on the second business day after the business day of deposit [*Fin. Code § 867(a)*; *see Fin. Code § 867(c)(1)*; *see also* Stats. 1987 ch. 1150, § 2 (account as not including investment thrift certificate accounts of industrial loan companies)]. Depository checks are cashier's checks, certified checks, teller's checks, or any functional equivalent as determined by the Board of Governors of the Federal Reserve System or the Commissioner of Financial Institutions with a face amount of $5,000 or less and drawn on a bank, savings bank, or insured credit union as defined in *12 U.S.C. §§ 461(b)(1)(A)(i)-(iv), 1752* (federal credit union), 1813 [*Fin. Code § 867(a)(5), (c)(3)-(6)*]. The check must be endorsed only by the person to whom it was issued, and must be deposited in a depository institution that is staffed by individuals employed by that institution [*Fin. Code § 867(a)(1), (2)*]. The check must be deposited with a special deposit slip that indicates that it is a cashier's check, certified check, teller's check, or other depository check [*Fin. Code § 867(a)(3)*]. The customer who deposits the depository check must have maintained an account with the receiving depository institution for 60 days or more [*Fin. Code § 867(a)(4)*].

The proceeds of a depository check do not have to be made available within two business days if the receiving depository institution reasonably believes the check is uncollectible from the originating institution. "Reasonable cause to believe" requires the existence of facts that would cause a well-grounded belief in the mind of a reasonable person. These reasons include, but are not limited to, a belief that (1) the drawer or drawee of the depository check has been or will imminently the subject of an order for relief in bankruptcy or placed in receivership, or (2) the depository check may be involved in a fraud or in a scheme commonly known as "kiting." If the receiving depository institution elects to invoke this exception, it must so notify the drawer and the drawee no later than the close of the next business day following deposit of the check [*Fin. Code § 867(b)*].

Except for the specific circumstances and checks described in Fin. Code *§ 867, Fin. Code* § 867 is not intended to restrict or preempt the regulatory authority of the Commissioner of Financial Institutions [*Fin. Code § 867(d)*]. In the

event of a suspension or modification of any similar provision in the federal Expedited Funds Availability Act, the effect of *Fin. Code § 867* must be similarly suspended or modified [*Fin. Code § 867(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesElectronic BankingFund TransfersBanking LawFederal Reserve SystemExpedited Funds Availability ActCivil ProcedureFederal & State InterrelationshipsFederal Common LawPreemptionCivil ProcedureClass ActionsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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[Reserved]

§§ 95.232[Reserved]

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9-95 California Forms of Pleading and Practice--Annotated § 95.250

§ 95.250 Opening and Increasing Savings Accounts

Savings accounts may be opened for cash or, subject to any limitations or restrictions in regulations issued by the commissioner, for property in which the association is authorized to invest. In the absence of fraud in the transaction, the property's value taken in payment, as determined by the association's board of directors, is conclusive [*Fin. Code § 6602*; *see Fin. Code § 6150(a)* (association's business directed by board of directors elected by members or stockholders)].

Account holders may make additions to their savings accounts in amounts and at times they elect, except as limited by the association or by state or federal law or regulations [*Fin. Code § 6601*].

An association may not, directly or indirectly, for the opening or increasing of any savings account, give, sell, dispose of, or permit the giving, selling, or disposition of, anything having a cost or value in excess of the amount authorized by the Savings and Loan Commissioner by regulation [*Fin. Code § 6653(a)*]. Notwithstanding *Fin. Code § 6653(a)*, the commissioner is authorized to impose, by regulation, restrictions on associations, relating to the distribution and advertising of giveaways, equivalent to those imposed on federal association doing business in California [*Fin. Code § 6653(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsCertificates of Deposit & Savings Accounts

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9-95 California Forms of Pleading and Practice--Annotated § 95.251

§ 95.251 Evidence of Savings Account

Except for savings accounts issued in marketable or bearer form, savings accounts must be represented only by the account of each savings account holder on the books of the association. These accounts or any interest in the accounts are transferable only on the books of the association on proper written application and acceptance by the association of the transferee as a holder. The terms of transfer must be approved by the association's board of directors [*Fin. Code § 6651*].

If evidence of an account is lost or destroyed, an association may issue new evidence of an account in the name of the holder of record. This will only be done if the savings account holder of record, as shown by the association's books, or the holder's legal representative, files an affidavit to the effect that the evidence of account has been lost or destroyed, and that the account has not been pledged or assigned in whole or in part [*Fin. Code § 6652(a)*]. The new evidence of account may state that it is issued in lieu of the one lost or destroyed. It may also state that the association is not liable for the loss or destruction of the account's original evidence [*Fin. Code § 6652(b)*]. In addition, the association may require an indemnification or a bond in an amount it deems sufficient to indemnify the association against any loss that might result from the issuance of a new evidence of account under *Fin. Code § 6652* [*Fin. Code § 6652(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsCertificates of Deposit & Savings Accounts

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9-95 California Forms of Pleading and Practice--Annotated § 95.252

§ 95.252 Interest--Rates and Computation

An association may issue savings accounts earning interest at different rates of return. The annual rate of return paid on a savings account may either be fixed at the time the account is issued or may vary on any basis specified at the time the account is accepted [*Fin. Code § 7050*]. An association may classify its savings accounts on any basis including, but not limited to, character, amount, or duration of the account, regularity of additions, or location of origin of the account [*Fin. Code § 7051*]. Except for accounts that are classified according to a specified contractual time or notice period, interest is based on the withdrawal value of each savings account at the beginning of the accounting period, plus additions made during the period (less amounts previously withdrawn and noticed for withdrawal, which for interest purposes will be deducted from the latest previous additions) computed at the rate for the time the funds have been invested, determined as provided in *Fin. Code § 7053* [*Fin. Code § 7052*]. The date of investment in a savings account will generally be the date the association actually receives the account or an addition to the account. However, the association may determine that accounts, in one or more classifications, or additions received by the association on or before a date not later than the 20th day of the month (unless the day determined is not a business day, in which case it may be the next succeeding business day) will receive interest as if invested on the first day of the month in which the payments were received [*Fin. Code § 7053(a)*]. If the association makes a determination under *Fin. Code § 7053(a)* it also must determine that payments received after the determination date will either receive interest as if invested on the first day the next succeeding month, or receive interest from the date of actual receipt by the association, except as provided by *Fin. Code § 866.3* [*Fin. Code § 7053(b)*; *see Fin. Code § 866.3* (no interest required on provisional credit for deposited item later returned unpaid)].

The association's directors must determine the method of calculating the amount of any interest on any savings account classification as provided in *Fin. Code § 7050 et seq.* as well as the time or times when the interest is to be paid or credited [*Fin. Code § 7055*]. The board of directors, by resolution, may also determine any of the following [*Fin. Code § 7054*]:

- That interest will not be paid on designated types of savings accounts from which withdrawals may be made on demand or by negotiable and transferable order or authorization;

- That an association may establish minimum balance requirements for savings accounts to be eligible for distribution of interest; and

- That, subject to applicable maximum regulatory limitations, an association may pay interest on a savings account at a rate or anticipated rate of return determined at the time that the account is accepted.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsCertificates of Deposit & Savings Accounts

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9-95 California Forms of Pleading and Practice--Annotated § 95.253

§ 95.253 Withdrawals From Savings Accounts

Notwithstanding any other provision of law, but subject to *Fin. Code § 7100(b)*, an association may permit the owner of a deposit or account to make withdrawals by negotiable or transferable instruments for the purpose of making transfers to third parties [*Fin. Code § 7100(a)*]. *Fin. Code § 7100(b)* provides that with regard to deposits or accounts on which interest or dividends are paid, *Fin. Code § 7100(a)* applies only to the deposits or accounts that consist solely of funds in which the entire beneficial interest is held by one or more individuals or by an organization that is operated primarily for religious, philanthropic, charitable, educational, or other similar purposes and that is not operated for profit [*Fin. Code § 7100(b)*]. Notwithstanding any other provision of law, an association may provide for the automatic transfer of funds at the account holder's direction [*Fin. Code § 7100(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsCertificates of Deposit & Savings Accounts

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9-95 California Forms of Pleading and Practice--Annotated § 95.254

§ 95.254 Married Persons and Minors

[1] In General

An association or federal association may issue savings accounts to any married person or minor as the sole and absolute owner of the account, receive payments by or for the owner, pay withdrawals, accept pledges to the association, and act in any other manner with regard to the accounts on the order of a married person or minor. A married person or minor may establish a trust under *I.R.C. §§ 401* and *408*, as amended, and an association or federal association may issue savings accounts to the trust [*Fin. Code § 6750*]. Any payment or delivery of rights to a married person, to any minor, or to a trust established by or for a married person, or a minor, or a receipt or acquittance signed by a married person or by a minor who holds a savings account, will be a sufficient release of the association or federal association for any payment made or delivery of rights to the married person or minor [*Fin. Code § 6751*; *but see Prob. Code § 5401* et seq. (financial institutions' liability for payments made from multiple-party accounts, discussed in *§ 95.270[9]*)].

In the case of a minor, the receipt, acquittance, pledge, or other action required by the association to be taken by the minor will be binding on the minor with like effect as if the minor were of full age and legal capacity [*Fin. Code § 6752(a)*]. Except under *Fin. Code § 6752(c)* (death of minor), the minor's parent or guardian has no power to attach or transfer any savings account issued to or in the minor's name. However, a parent or guardian of a minor, 13 or less, may require, by written notice delivered to the office where the account is maintained, that the signatures of both the minor and the parent or guardian be required for withdrawals from the account [*Fin. Code § 6752(b)*]. In the event of a minor's death, the receipt or acquittance of either parent, guardian, or foster parent of the minor is a sufficient discharge of the association or federal association for any sums not exceeding in the aggregate $2,500 unless the minor has given written notice to the association to accept the signature of the parent, guardian, or foster parent to withdraw a greater amount [*Fin. Code § 6752(c)*].

[2] Accounts of Incompetents

If an association or federal association has not received written notice and is not on actual notice that the savings

account holder has been adjudicated incompetent, it may pay or deliver funds to the account holder in accordance with the provisions of the savings account contract, and the receipt or acquittance of the holder is sufficient release of that association for the payment or delivery [*Fin. Code § 6900*].

[3] Accounts of Deceased Nonresidents

When a savings account is held in any association or federal association by a person who dies while domiciled in a sister state or foreign nation, the account, together with additions and interest, or any part of it, is exempt from taxation otherwise imposed by California [*Fin. Code § 6950(a)*]. The account, together with additions and interest, or any part of it, must be paid to the sister-state personal representative or other claimant under the Probate Code, provided that the personal representative or other claimant has furnished the association or federal association with all the documents required under applicable provisions of the Probate Code and evidence of ownership of the account, if any, issued under *Fin. Code § 6652* [*Fin. Code § 6950(b)*]. On payment or delivery to the personal representative or other claimant after receiving the documents specified in *Fin. Code § 6950(b)*, the association or federal association is released and discharged to the same extent as if the payment or delivery had been made to a legally qualified local personal representative, and is not required to account for the application or disposition of the property [*Fin. Code § 6950(c)*]. An action at law or in equity may not be maintained against an association for payment made in accordance with *Fin. Code §§ 6950-6951* [*Fin. Code § 6951*].

[4] Redemption

Whenever funds are on hand for the purpose of redemption, an association has the right to redeem by lot or otherwise, as the board of directors may determine, all or any part of any of its savings accounts on an interest date. The accounts are redeemed by giving 30 days' written notice to each affected account holder. Notice is sent by registered mail addressed to the holder's last address as recorded on the books of the association [*Fin. Code § 7150*]. The redemption price of savings accounts redeemed is the full value of the account redeemed, as determined by the board of directors, but is not less than the withdrawal value [*Fin. Code § 7152*].

Except with the prior consent of the commissioner, an association may not redeem any of its savings accounts when the association is in an impaired condition and when it has any applications for withdrawal that have been on file more than 14 days and have not been reached for payment [*Fin. Code § 7151*].

If the notice of redemption under *Fin. Code § 7150* has been given and if on or before the redemption date the funds necessary for the redemption have been set aside and continue to be available for the redemption, interest on the accounts to be redeemed will cease to accrue from the interest date specified as the redemption date. All rights with respect to such accounts will also terminate after the redemption date, except the right of the account holder of record to receive the redemption price without interest [*Fin. Code § 7153*]. All certificates of ownership evidencing former savings accounts that have been called for redemption must be tendered for payment within the time limit specified in *Code Civ. Proc. § 1513(a)(2)* for escheat of unclaimed funds [*Fin. Code § 7154(a)*]. Savings accounts that are not tendered for payment escheat to the state as provided in the Unclaimed Property Law (*Code Civ. Proc. § 1500 et seq.*) [*Fin. Code § 7154(b)*].

[5] Liability of Members

[a] General Limitation

Members of a mutual association are not responsible for any losses of the association. Savings accounts are not subject to assessment, and savings account holders are not liable to creditors of the association for any unpaid installment on the association's account [*Fin. Code § 6603*; *see In re Pacific Coast Bldg. Loan Assn. (1940) 15 Cal. 2d 134, 141-142, 99 P.2d 251* (construing former sections of the 1931 Building and Loan Association Act)].

[b] Savings Liability

An association's liability for savings deposits consists only of the aggregate amount of its savings accounts, plus interest earned or credited to the accounts, less redemption and withdrawal payments [*Fin. Code §§ 5118, 6600*; for further general discussion, *see Banking Law, Ch. 9, Bank Accounts, §§ 9.06, 9.11* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsCertificates of Deposit & Savings AccountsBanking LawDepository InstitutionsGeneral OverviewContracts LawFormationCapacity of PartiesAgeContracts LawFormationCapacity of PartiesMental CapacityFamily LawMarital Duties & RightsProperty RightsGeneral Overview

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[Reserved]

§§ 95.255[Reserved]

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5. Multiple-Party And Fiduciary Accounts

9-95 California Forms of Pleading and Practice--Annotated § 95.270

§ 95.270 Multiple-Party Accounts Law

[1] Accounts to Which Law Applies

The most common types of multiple-party accounts in state and federal banks, savings and loan associations, credit unions, and similar organizations and industrial loan companies are governed by the California Multiple-Party Accounts Law (*Prob. Code § 5100 et seq.*) [*see Prob. Code § 5128* (defining "financial institution")]. "Account" within the meaning of the law means a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account, and other like arrangement [*Prob. Code § 5122(a)*]. Joint accounts, P.O.D. accounts, and Totten trust accounts are "multiple-party accounts" within the meaning of the California Multiple-Party Accounts Law [*Prob. Code § 5132*; *see § 95.270[5][a]*].

[2] Accounts Governed by Other Law

The following types of accounts are excluded from the purview of the California Multiple-Party Accounts Law [*Prob. Code § 5122(b)*]:

- An account established for deposit of funds of a partnership, joint venture, or other association for business purposes;

- An account controlled by one or more persons as the duly authorized agent or trustee for a corporation, unincorporated association, or charitable or civic organization;

- A regular fiduciary or trust account maintained in connection with a relationship that is established other than by the deposit agreement; and

- An account established for the deposit of funds of the estate of a ward, conservatee, or decedent.

[3] Accounts in Savings Association

An account in an association or federal association that is a multiple-party account is governed by the Multiple-Party Accounts Law [*Fin. Code § 6800*]. However, the Financial Code includes certain provisions applicable only to these types of accounts.

Specifically, no association or federal association that pays any survivor in accordance with the Multiple-Party Accounts Law may, because of that payment, become liable for any estate, inheritance, or succession taxes due to the state [*Fin. Code § 6804*; *see also Fin. Code § 6855* (discussed *§ 95.271[2]*)].

In addition, the pledge or hypothecation to any association or federal association of all or part of a multiple-party account as defined in *Prob. Code § 5132*, signed by one or more of the tenants, whether minor or adult, on whose signature or signatures withdrawals may be made from the account, is a valid pledge unless the terms of the particular account specifically provide otherwise [*Fin. Code § 6805*]. Transfer to the association or federal association of a pledged or hypothecated portion of a multiple-party account does not operate to sever or terminate all or any part of that account [*Fin. Code § 6805*].

[4] Testamentary Formalities Not Necessary

Any transfers resulting from the application of *Prob. Code § 5302* are effective by reason of the account contracts involved and are not to be considered as testamentary. The right of a surviving party to a joint account [*see Prob. Code § 5302(a)*], of a beneficiary [*see Prob. Code § 5302(c)*], or of a P.O.D. payee [*see Prob. Code § 5302(b)*] to the sums on deposit on the death of a party to a multiple-party account may not be denied, abridged, or affected because that right has not been created by a writing executed in accordance with the laws of California prescribing the requirements to effect a valid testamentary disposition of property [*Prob. Code § 5304*; *but see Prob. Code § 5600 et seq.* (certain transfers to former spouse will fail)].

[5] Definitions

[a] Joint, Community Property, and Tenancy-in-Common Accounts

"Joint account" means an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship [*Prob. Code § 5130*].

For purposes of resolving controversies between parties to an account and whether the signature card, passbook, contract, or other instrument evidencing the account was executed before, on, or after July 1, 1990, words in substantially the following form create a joint account [*Prob. Code §§ 5201, 5203(a)(1)*]: "This account or certificate is owned by the named parties. On the death of any of them, ownership passes to the survivor(s)."

For the purposes of *Prob. Code § 5301 et seq.*, except to the extent the terms of the account or deposit agreement expressly provide otherwise, if the parties to an account are married to each other and the account is expressly described in the account agreement as a "community property" account, the ownership of the account during lifetime and after the death of a spouse is governed by the law governing community property generally [*Prob. Code § 5307*].

Words in substantially the following form create a joint account of husband and wife with right of survivorship [*Prob. Code § 5203(a)(4)*]: "This account or certificate is owned by the named parties, who are husband and wife, and is presumed to be their community property. On the death of either of them, ownership passes to the survivor." A community property account of spouses would use words substantially similar to these [*Prob. Code § 5203(a)(5)*]: "This account or certificate is the community property of the named parties who are husband and wife. The ownership during lifetime and after the death of a spouse is determined by the law applicable to community property generally and may be affected by a will."

For purposes of resolving controversies between parties to the account, words in substantially the following form create a tenancy-in-common account [*Prob. Code §§ 5201, 5203(a)(6)*]: "This account or certificate is owned by the named parties as tenants in common. On the death of any party, the ownership interest of that party passes to the named pay-on-death payee(s) of that party or, if none, to the estate of that party."

[b] P.O.D., P.O.D. Account, and P.O.D. Payee

"P.O.D." means pay on death [*Prob. Code § 5139*]. A "P.O.D. account" is an account payable on request to one person during the person's lifetime and on the person's death to one or more P.O.D. payees [*Prob. Code § 5140(a)*]. A "P.O.D. account" may also be an account payable on request to one or more persons during their lifetimes and on the death of all of them to one or more P.O.D. payees [*Prob. Code § 5140(b)*].

A "P.O.D. payee" is a person designated on a P.O.D. account as one to whom the account is payable on request after the death of one or more persons [*Prob. Code § 5142*]. A P.O.D. payee is a party to an account, in the sense of having a present right to payment from the account by reason of being a P.O.D. payee, only after the account becomes payable to that payee by reason of surviving all persons named as original payees [*Prob. Code § 5136(a), (b)*].

For purposes of resolving controversies between parties to the account and P.O.D. payees, and whether the signature card, passbook, contract, or other instrument evidencing the account was executed before, on, or after July 1, 1990, words in substantially the following form create a P.O.D. account with a single party [*Prob. Code §§ 5201, 5203(a)(2)*]: "This account or certificate is owned by the named party. On the death of that party, ownership passes to the named pay-on-death payee(s)." Words in substantially the following form create a P.O.D. account with multiple parties [*Prob.Code § 5203(a)(3)*]: "This account or certificate is owned by the named parties. On the death of any of them, ownership passes to the survivor(s). On the death of all of them, ownership passes to the named pay-on-death payee(s)."

[c] Totten Trust Account and Beneficiary

A "Totten trust account" means an account in the name of one or more parties as trustee for one or more beneficiaries when the relationship is established by the form of the account and the deposit agreement with the financial institution, and there is no subject of the trust other than the sums on deposit in the account [*Prob. Code § 80*]. Totten trust accounts are discussed more fully in Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

A "beneficiary" means a person named in a Totten trust account as one for whom a party to the account is named as trustee [*Prob. Code § 5126*]. A beneficiary of a Totten trust account is not a party to the account and has no present right to payment from the account by reason of being a beneficiary, until he or she survives all persons named as trustees [*Prob. Code § 5136(a), (c)*].

[d] Agent

"Agent" means a person who has a present right, subject to request, to payment from an account as an attorney in fact under a power of attorney [*Prob. Code § 5124*].

[e] Net Contribution

"Net contribution" of a party to an account as of any given time is the sum of all of the following [*Prob. Code § 5134(a)*]:

- All deposits to the account made by or for the party, less all withdrawals made by or for the party that have not been paid to or applied to the use of any other party;

- A pro rata share of any interest or dividends earned, whether or not included in the current balance; and

- Any proceeds of deposit life insurance added to the account by reason of the death of the party whose net contribution is in question.

In the absence of proof otherwise, only parties who have a present right of withdrawal are considered as having a net contribution [*Prob. Code § 5134(b)(1)*], and the net contribution of each of the parties having a present right of withdrawal is deemed to be an equal amount [*Prob. Code § 5134(b)(2)*].

This definition is for use in determining ownership interests in an account as between the parties to an account, and not as between the parties and the financial institution [*Prob. Code § 5134(c)*].

[f] Party

"Party" means a person who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account other than as an agent [*Prob. Code § 5136(a)*]. For discussion of when a P.O.D. payee becomes a party, see *§ 95.270[5][b]*. For discussion of when a Totten trust beneficiary becomes a party, see *§ 95.270[5][c]*.

[g] Payment of Sums on Deposit

"Payment" of sums on deposit includes all of the following [*Prob. Code § 5138*]:

- A withdrawal, including payment on check or other directive of a party.

- A pledge of sums on deposit.

- A set-off, reduction, or other disposition of all or part of an account pursuant to a pledge.

[h] Sums on Deposit

"Sums on deposit" means both (a) the balance payable on an account, including interest and dividends earned, whether or not included in the current balance, and (b) any life insurance proceeds added to the account by reason of the death of a party [*Prob. Code § 5150*].

[i] Withdrawal

"Withdrawal" includes payment to a third person pursuant to a check or other directive of a party or an agent [*Prob. Code § 5152*].

[6] Ownership While All Parties Are Living

[a] In General

During the lifetime of all parties, an account belongs to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent [*Prob. Code § 5301(a)*; *see Prob. Code §§ 5134* ("net contribution" defined), 5150 ("sums on deposit" defined); *see also Lee v. Yang (2003) 111 Cal. App. 4th 481, 490-494, 3 Cal. Rptr. 3d 819* (boyfriend had no right to reimbursement of funds disproportionate to contributions which were withdrawn by girlfriend from account to which she was added as signatory; due to her unrestricted right to withdraw and apply funds, ownership of any withdrawn funds passed to her by way of gift)].

In the case of a P.O.D. account or a Totten trust account, the P.O.D. payee or beneficiary has no rights to the sums on deposit during the lifetime of any party, unless there is clear and convincing evidence of a different intent [*Prob. Code §§ 5301(b)* (P.O.D.), 5301(c) (Totten trust)]. If there is an irrevocable trust, the account belongs beneficially to the beneficiary [*Prob. Code § 5301(c)*].

[b] Ownership of Community Property Accounts

Unless the account or deposit agreement expressly provides otherwise, if the parties to an account are married to each other and the account is expressly described in the account agreement as a "community property" account, the ownership of the account during lifetime and after the death of a spouse is governed by the law governing community property generally [*Prob. Code § 5307*]. For a discussion of the laws of community property generally, see Ch. 122, *Community Property* .

Notwithstanding *Prob. Code §§ 5301-5303*, if parties to an account are married to each other, whether or not they are so described in the deposit agreement, their net contribution to the account is presumed to be and remain their community property [*Prob. Code § 5305(a)*]. Except as provided in *Prob. Code § 5305(b)* and *(c)*, a multiple-party account created with community property funds does not in any way alter community property rights [*Prob. Code § 5305(d)*].

Notwithstanding *Fam. Code §§ 2581* and *2640*, the presumption established by *Prob. Code § 5305* is a presumption affecting the burden of proof and may be rebutted by proof of either of the following [*Prob. Code § 5305(b)*]:

- The sums on deposit that are claimed to be separate property can be traced from separate property unless it is proved that the married persons made a written agreement that expressed their clear intent that those sums be their community property; or

- The married persons made a written agreement, separate from the deposit agreement, that expressly provided that the sums on deposit, claimed not to be community property, were not to be community property.

Except as provided in *Prob. Code § 5307*, a right of survivorship arising from the express terms of the account or under *Prob. Code § 5302*, a beneficiary designation in a Totten trust account, or a P.O.D. payee designation may not be changed by will [*Prob. Code § 5305(c)*].

[c] Changes in Account Terms

During the lifetime of a party, the terms of the account may be changed as provided in *Prob. Code § 5303(b)* to eliminate or to add rights of survivorship. Withdrawal of funds from the account by a party with a present right of withdrawal during the lifetime of a party also eliminates rights of survivorship on the death of that party with respect to the funds withdrawn [*Prob. Code § 5303(c)*].

Once established, the terms of a multiple-party account can be changed only by any of the following methods [*Prob. Code § 5303(b)*]:

- Closing the account and reopening it under different terms;

- Presenting to the financial institution a modification agreement that is signed by all parties with a present right of withdrawal (if the financial institution has a form for this purpose, it may require use of the form);

- If the provisions of the terms of the account or deposit agreement provide a method of modification

of the terms of the account, complying with those provisions; or

- As provided in *Prob. Code § 5405(c)* (discussed under *§ 95.270[9][f]*).

Thus, a party who has a unilateral right of withdrawal can eliminate survivorship rights by closing out the account having survivorship rights and opening a new account without survivorship rights [*see* 1990 Law Rev. Comm. Comment to *Prob. Code § 5303*]. *Prob. Code § 5303* permits a decedent unilaterally to sever joint tenancy accounts if the decedent had the unilateral right of withdrawal from those accounts. Withdrawal of the funds from the accounts will not, however, change the other rights of the parties to the moneys withdrawn, for instance the rights accruing under *Prob. Code §§ 5301* and *5305* [*see* 1990 Law Rev. Comm. Comment to *Prob. Code § 5303*].

[7] Ownership After Death of Party

[a] Determined by Terms of Account

The provisions of *Prob. Code § 5302* regarding rights of survivorship are determined by the form of the account at the death of a party [*Prob. Code § 5303(a)*; *but see Prob. Code § 5600 et seq.* (certain transfers to former spouse will fail)]. A right of survivorship arising from the express terms of the account or under *Prob. Code § 5302*, a beneficiary designation in a Totten trust account, or a P.O.D. payee designation cannot be changed by will [*Prob. Code § 5302(e)*].

[b] Death of Party to Joint Account

Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent. If there are two or more surviving parties, their respective ownerships during lifetime are in proportion to their previous ownership interests under *Prob. Code § 5301*, augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before the decedent's death. The right of survivorship continues between the surviving parties [*Prob. Code § 5302(a)*; *but see Prob. Code § 5600 et seq.* (certain transfers to former spouse will fail)]. Joint accounts are discussed in more detail in Ch. 316, *Joint Tenancy and Tenancy in Common* .

[c] Death of Party to P.O.D. Account

If the account is a P.O.D. account with two or more parties, on the death of one of them, the rights to any sums remaining on deposit are governed by *Prob. Code § 5302(a)* (discussed under *§ 95.270[7][b]*) [*Prob. Code § 5302(b)(1)*], subject to *Prob. Code § 5600 et seq.* (certain transfers to former spouse will fail).

On death of the sole or surviving party to a P.O.D. account, any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to the survivor of them if one or more die before the party [*Prob. Code § 5302(b)(2)(A)*]. If two or more P.O.D. payees survive, any sums remaining on deposit belong to them in equal and undivided shares unless the terms of the account or deposit agreement expressly provide for different shares [*Prob. Code § 5302(b)(2)(B)*]. If two or more P.O.D. payees survive, there is no right of survivorship in the event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them [*Prob. Code § 5302(b)(2)(C)*].

[d] Death of Totten Trustee

On death of one of two or more trustees to a Totten trust account, the rights to any sums remaining on deposit are governed by *Prob. Code § 5302(a)* (discussed under *§ 95.270[7][b]*) [*Prob. Code § 5302(c)(1)*], subject to *Prob. Code § 5600 et seq.* (certain transfers to former spouse will fail).

On death of the sole or surviving trustee of a Totten trust account, any sums remaining on deposit belong to the person

or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear and convincing evidence of a different intent [*Prob. Code § 5302(c)(2)(A)*]. If two or more beneficiaries survive, any sums remaining on deposit belong to them in equal and undivided shares unless the terms of the account or deposit agreement expressly provide for different shares [*Prob. Code § 5302(c)(2)(B)*]. If two or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them [*Prob. Code § 5302(c)(2)(C)*; *see also* Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts*].

[e] Death of Party to Tenancy-in-Common Account

If an account is expressly described in the deposit agreement as a "tenancy in common" account, no right of survivorship arises from the terms of the account or under *Prob. Code § 5302* unless the terms of the account or deposit agreement expressly provide for survivorship [*Prob. Code § 5306*]. The death of a party to a tenancy-in-common account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of the decedent's estate [*Prob. Code § 5302(d)*; *but see Prob. Code § 5600 et seq.* (certain transfers to former spouse will fail)].

[8] Special Power of Attorney on Multiple-Party Accounts

[a] Creation

In addition to a power of attorney otherwise authorized by law, a special power of attorney is authorized under *Prob. Code § 5204* to apply to one or more accounts at a financial institution or to one or more contracts with a financial institution concerning safe deposit services. For the purposes of *Prob. Code § 5204*, "account" includes checking accounts, savings accounts, certificates of deposit, savings certificates, and any other depository relationship with the financial institution [*Prob. Code § 5204(a)*]. Nothing in *Prob. Code § 5204* limits the use or effect of any other form of power of attorney for transactions with a financial institution [*Prob. Code § 5204(j)*]. Powers of attorney generally are discussed in Ch. 427, *Principal and Agent* .

The special power of attorney under *Prob. Code § 5204* must (1) be in writing, (2) be signed by the person or persons giving the power of attorney, and (3) explicitly identify the attorney or attorneys in fact, the financial institution, and the accounts or contracts subject to the power [*Prob. Code § 5204(b)*].

The special power of attorney must contain language in substantially the following form [Prob. Code § 5104(c)]:

WARNING

TO PERSON EXECUTING THIS DOCUMENT: This is an important legal document. It creates a power of attorney that provides the person you designate as your attorney in fact with the broad powers it sets forth. You have the right to terminate this power of attorney. If there is anything about this form that you do not understand, you should ask a lawyer to explain it to you.

In addition to this language, special powers of attorney that are or may be durable must also contain substantially the following language [Prob. Code § 5104(d)]:

These powers of attorney shall continue even if you later become disabled or incapacitated.

The attorney in fact under a power of attorney pursuant to *Prob. Code § 5204* may also be designated as a P.O.D. payee [*Prob. Code § 5204(l)*].

[b] Duration

A power of attorney granted under *Prob. Code § 5204* endures as between the grantor and grantee of the power until the occurrence of the earliest of the following events [*Prob. Code § 5204(e)*]:

- Revocation by the grantor of the power;
- Termination of the account;
- Death of the grantor of the power; or
- In the case of a nondurable power of attorney, appointment of a guardian or conservator of the estate of the grantor of the power.

[c] Payments by Financial Institution Pursuant to Power

A financial institution may rely in good faith on the validity of a power of attorney granted under *Prob. Code § 5204* and is not liable to the principal or any other person for doing so if (1) the power of attorney is on file with the financial institution and the transaction is made by the attorney in fact named in the power of attorney, (2) the power of attorney appears on its face to be valid, and (3) the financial institution has convincing evidence of the identity of the person signing the power of attorney as principal [*Prob. Code § 5204(f)*]. In this context, "convincing evidence" requires both of the following [*Prob. Code § 5204(g)*]:

- Reasonable reliance on a document that satisfies the requirements of *Prob. Code § 4751* (convincing evidence for purposes of declarations of witnesses for durable powers of attorney for health care); and
- The absence of any information, evidence, or other circumstances that would lead a reasonable person to believe that the person signing the power of attorney as principal is not the individual he or she claims to be.

The protection provided by *Prob. Code § 5204(f)* does not extend to payments made after written notice is received by the financial institution of termination of the power under *Prob. Code § 5204(e)* if the financial institution has had a reasonable time to act on the notice [*Prob. Code § 5204(h)*; *see Prob. Code § 5146* (absent account terms to contrary, receipt of notice as receipt at branch or office where account is carried)]. No other notice or any other information shown to have been available to the financial institution affects its right to the protection provided by this subdivision [*Prob. Code § 5204(h)*].

Nothing in *Prob. Code § 5204* creates any implication that a financial institution is liable for acting in reliance on a power of attorney under circumstances in which the requirements of *Prob. Code § 5204(f)* are not satisfied. Nothing in *Prob. Code § 5204* affects any immunity that may otherwise exist apart from *Prob. Code § 5204* [*Prob. Code § 5204(k)*].

[d] Duties and Liabilities of Attorney in Fact

The attorney in fact acting under the power of attorney granted under *Prob. Code § 5204* must maintain any books or records that will permit an accounting of the acts of the attorney in fact if an accounting is requested by a legal representative of the grantor of the power [*Prob. Code § 5204(i)*].

The attorney in fact acting under a power of attorney granted in accordance with *Prob. Code § 5204* is liable for any disbursement other than a disbursement to or for the benefit of the grantor of the power, unless the grantor has authorized the disbursement in writing [*Prob. Code § 5204(j)*].

[e] Applicability of Power of Attorney Law

With the exception of *Prob. Code § 4130* (controlling authority if principal grants inconsistent authority) and *Prob. Code § 4900 et seq.* (judicial proceedings), the Power of Attorney Law [*Prob. Code § 4000 et seq.*] does not apply to special powers of attorney under *Prob. Code § 5204* [*Prob. Code § 5204(m)*].

[9] Financial Institutions' Rights and Duties

[a] Payments From Account

Prob. Code § 5301 et seq. concerning beneficial ownership as between parties, or as between parties and P.O.D. payees or beneficiaries of multiple-party accounts, are relevant only to controversies between those persons and their creditors and other successors, and have no bearing on the power of withdrawal of those persons as determined by the terms of account contracts [*Prob. Code § 5201(a)*; *see, e.g., Lee v. Yang (2003) 111 Cal. App. 4th 481, 489-490, 3 Cal. Rptr. 3d 819* (girlfriend had right to withdraw funds from account opened by boyfriend who had added her as signer; boyfriend failed to establish oral agreement restricting that right)]. *Prob. Code § 5201(a)* simply shields the financial institution from any liability for paying a sum out of a multiple-party account to a person who is a party to the account, when the sum paid is more than the recipient's beneficial interest in the account funds. Whether such a person is a party to the account is governed by *Prob. Code § 5303*, except to the extent that the terms of the account contract override the provisions of *Prob. Code § 5303*. *Prob. Code § 5201* does not deprive a legitimate account holder of recourse against the financial institution if it permits a person to withdraw funds from a multiple party account when the person is not a proper party to the account pursuant to *Prob. Code § 5303* and the account contract [*Stevens v. Tri Counties Bank (2009) 177 Cal. App. 4th 236, 239, 99 Cal. Rptr. 3d 188]* .

Prob. Code § 5401 et seq. govern the liability of financial institutions who make payments pursuant to that chapter [*Prob. Code § 5201(b)*]. Financial institutions may make payments from any multiple-party account on request and according to its terms, to any one or more of the parties or agents [*Prob. Code § 5401(a)*]. Thus, if the terms of the account or deposit agreement require the signatures of more than one of the parties to a multiple-party account during their lifetimes or of more than one of the survivors after the death of any one of them on any check, check endorsement, receipt, notice of withdrawal, request for withdrawal, or withdrawal order, the financial institution must pay the sums on deposit only in accordance with those terms. However, those terms do not limit the right of the sole survivor or of all of the survivors to receive the sums on deposit [*Prob. Code § 5401(b)*].

Although decided before *Prob. Code § 5401* applied to multiple-party accounts at savings and loan associations, one case has held that a statement on the passbook or certificate that its presentation will be required for withdrawal is for the protection of, and waivable by, the financial institution. The account agreement at issue allowed withdrawal on the signature of one joint tenant, so the nonwithdrawing joint tenants had no cause of action against the financial institution for allowing withdrawals by another joint tenant without requiring presentation of the passbook or certificate [*Beizer v. Financial Savings & Loan Assn. (1985) 172 Cal. App. 3d 133, 136-139, 218 Cal. Rptr. 143]* .

The financial institution may have additional obligations imposed by Division 3 or 4 of the Commercial Code relating to checks, as discussed in *§ 95.310* et seq.

[b] Specific Manners of Payment

Unless the financial institution has received a court order restraining payment, payment made on request and according to the account terms pursuant to *Prob. Code § 5401* or in one of the following manners discharges the financial institution from all claims for amounts so paid, whether or not the payment is consistent with the beneficial ownership of the account as between parties, P.O.D. payees, or beneficiaries, or their successors [*Prob. Code § 5405(a), (b)*]:

(1) In the case of a joint account, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded. Payment may not be made to the personal representative or heirs of a deceased party unless proof of death is presented to the financial institution showing that the decedent was the last surviving party or unless there is no right of survivorship under *Prob. Code § 5302* [*Prob. Code § 5402*; *see also* Ch. 316, *Joint Tenancy and Tenancy in Common*].

(2) In the case of a P.O.D. account, to any original party to the account, or to the P.O.D. payee or the personal representative or heirs of a deceased P.O.D. payee if he, she, or they present the financial institution with proof of death showing that the P.O.D. payee survived all persons named as original payees. Payment may be made to the personal representative or heirs of a deceased original payee if he, she, or they present the financial institution with proof of death showing that the deceased original payee was the survivor of all other persons named on the account either as an original payee or as P.O.D. payee [*Prob. Code § 5403*].

(3) In the case of a Totten trust account, to any trustee. Unless the financial institution has received written notice that the beneficiary has a vested interest not dependent on surviving the trustee, payment may be made to the personal representative or heirs of a deceased trustee if he, she, or they present the financial institution proof of death showing that the deceased trustee was the survivor of all other persons named on the account either as trustee or beneficiary. Payment may be made to a beneficiary or beneficiaries or the personal representative or heirs of a beneficiary or beneficiaries if proof of death is presented to the financial institution showing that the beneficiary or beneficiaries survived all persons named as trustees [*Prob. Code § 5404*; *see also* Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts*].

[c] No Duty to Determine Source or Application of Funds or Parties' Net Contributions

A financial institution is not required to inquire regarding the source of funds received for deposit to a multiple-party account, or to inquire about the proposed application of any sum withdrawn from an account, for purposes of establishing net contributions [*Prob. Code § 5401(c)(1)*]. A financial institution is not required to determine any party's net contribution or to limit withdrawals or any other use of an account based on the net contribution of any party, whether or not the financial institution has actual knowledge of each party's contribution [*Prob. Code § 5401(c)(2), (3)*].

[d] Right to Levy and Setoff Against All Funds

All funds in an account, unless otherwise agreed in writing by the financial institution and the parties to the account, remain subject to liens, security interests, rights of setoff, and charges, notwithstanding the determination or allocation of net contributions with respect to the parties [*Prob. Code § 5401(d)*].

[e] Court Order Restraining Payment From Multiple-Party Account

The financial institution is not discharged from claims with regard to payments made in accordance with *Prob. Code §§ 5401-5404* if those payments were made after the financial institution has been served with a court order restraining payment [*Prob. Code § 5405(a), (b)*]. No other notice or any other information shown to have been available to a financial institution affects its right to the protection provided by *Prob. Code § 5405(a)* [*Prob. Code § 5405(b)*; *see Prob. Code § 5146* (absent account terms to contrary, receipt of notice as receipt at branch or office where account is carried)].

[f] Notice From Party Restraining Payment From Account

Unless the notice is withdrawn by a subsequent writing, after receipt of a written notice from any party to a multiple-party account that withdrawals in accordance with the terms of the account (other than a checking account, share draft account, or other similar third-party payment instrument) should not be permitted, except with the signatures of more than one of the parties during their lifetimes or of more than one of the survivors after the death of any one of

the parties, the financial institution may only pay the sums on deposit in accordance with the written instructions pending determination of the rights of the parties or their successors [*Prob. Code § 5405(c)*; *see Prob. Code § 5146* (absent account terms to contrary, receipt of notice as receipt at branch or office where account is carried)]. No liability attaches to the financial institution for complying with the terms of any written notice provided pursuant to *Prob. Code § 5405(c)* [*Prob. Code § 5405(c)*].

[g] Effect of Financial Institutions' Protections

The protection provided to the financial institution by *Prob. Code § 5405* has no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of funds in, or withdrawn from, multiple-party accounts, and is in addition to, and not exclusive of, any protection provided the financial institution by any other provision of law [*Prob. Code § 5405(d)*].

[h] Payment to Minor

If a financial institution is required or permitted to make payment under *Prob Code § 5401 et seq.* to a person who is a minor and a party to a multiple-party account, payment may be made to the minor or to the minor's order. Payment made to the minor or to the minor's order is a valid release and discharge of the financial institution [*Prob. Code § 5407(a)*]. However, the foregoing does not apply if the account is to be paid to the minor because the minor was designated as a P.O.D. payee or as a beneficiary of a Totten trust account [*Prob. Code § 5407(a)*]. Then, and in other cases to which *Prob. Code § 5407(a)* does not apply, the financial institution must make payment to the minor in accordance with the California Uniform Transfers to Minors Act (*Prob. Code § 3900 et seq.*) or with the Probate Code provisions governing money or property of a minor (*Prob. Code § 3400 et seq.*) [*Prob. Code § 5407(b)*; *see also* Ch. 278, *Gifts* and Ch. 364, *Minors: Claims and Property of Minors*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsCertificates of Deposit & Savings AccountsBanking LawBank ActivitiesBank AccountsDeposit AccountsJoint AccountsBanking LawBank ActivitiesBank AccountsDeposit AccountsLiabilityEstate, Gift & Trust LawNonprobate TransfersJointly Held PropertyBank AccountsFamily LawMarital Duties & RightsProperty RightsGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 9: Bailments thru Boats and Boating-Chs. 93-100
Chapter 95 BANKS, DEPOSITS, AND CHECKS
PART II. LEGAL BACKGROUND
C. Deposits
5. Multiple-Party And Fiduciary Accounts

9-95 California Forms of Pleading and Practice--Annotated § 95.271

§ 95.271 Fiduciary Accounts

[1] In General

Regular fiduciary and trust accounts maintained in connection with relationships that are established other than by the deposit agreement and accounts established for the deposit of funds of the estate of a ward, conservatee, or decedent are not subject to the Multiple-Party Accounts Law [*see § 95.270*], but are subject to various statutes and case law relating to the fiduciary's standard of care [*Prob. Code § 5122(b)(3), (4)*]. The particular standards of care are discussed in various chapters, such as Ch. 103, *Brokers* ; Ch. 290D, *Guardianship and Conservatorship: Actions Against Guardians, Conservators, and Sureties* ; Ch. 401, *Partnerships: Actions Between General Partners and Partnership* ; Ch. 406, *Partnerships: Dissolution* ; Ch. 427, *Principal and Agent* ; Ch. 458B, *Probate: Suspension, Removal, or Resignation* ,; and Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* . Division 3 of the Commercial Code sets forth the rules for determining when a person who has taken a negotiable instrument from a fiduciary has notice of a breach of fiduciary duty that occurs as result of the transaction with the fiduciary [*see Com. Code § 3307*; Official Comment 1 to U.C.C § 3-307 (1990); *see also § 95.463[3]*].

The Multiple-Party Accounts Law applies to a Totten trust account or an account in the name of one or more parties as trustee for one or more other persons if the financial institution has no other or further notice in writing that the account is not a Totten trust account as defined in *Prob. Code § 80* [*Prob. Code § 5406*; *see also* Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts*]. When an account is not opened in accordance with a Totten trust agreement but is opened in the name of a person described by some fiduciary title, such as trustee, the bank is charged with notice that the funds are received in a fiduciary capacity. However, the bank is not liable for misappropriation of trust funds by the trustee unless it has actual or constructive knowledge of any misappropriation [*Blackmon v. Hale (1970) 1 Cal. 3d 548, 556, 83 Cal. Rptr. 194, 463 P.2d 418* ; *see Dodd v. Citizens Bank of Costa Mesa (1990) 222 Cal. App. 3d 1624, 1627-1628, 272 Cal. Rptr. 623* (no duty owing by bank to company for whom payroll-processing firm opened "payroll trust account"; payroll-processing firm, not other company, as bank's customer within meaning of former *Com. Code § 4104(e)*; *now see Com. Code § 4104(a)(5)*)]. An adverse claimant of deposited funds is required to undertake the procedures set forth in *Fin. Code § 952* before the bank may be subject to liability based on the depositor's

misappropriation [*see § 95.292*]. If an account is opened in the name of coexecutors, the standard of care required of the depository institution, in light of statutory requirements regarding the concurrence of corepresentatives, requires the institution to set up the account contract so that both signatures musppear on checks and withdrawals; the institution's failure to do so renders it liable for misappropriations by one representative [*Bullis v. Security Pac. Nat. Bank (1978) 21 Cal. 3d 801, 809-813, 148 Cal. Rptr. 22, 582 P.2d 109* (decided under former Prob. Code § 570; *now see Prob. Code § 9630*)].

Creation of a trust in personalty does not require a writing, but may be done orally [*Camperi v. Chiechi (1955) 134 Cal. App. 2d 485, 510, 286 P.2d 399* (oral trust relating to insurance proceeds)].

For discussion and forms for use in actions involving trusts, see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

[2] Fiduciary Accounts in Associations

Any association may accept fiduciary savings accounts in the name of any administrator, executor, custodian, conservator, guardian, trustee, or other fiduciary for a named beneficiary or beneficiaries [*Fin. Code § 6850*]. The withdrawal value of a fiduciary account, and interest on it, or other rights relating to it, may be paid or delivered, in whole or in part to the fiduciary without regard to any notice to the contrary as long as the fiduciary is living [*Fin. Code § 6851(a)*; *but see Fin. Code § 6661(a)* (does not include any express exception for a *Fin. Code § 6851(a)* situation; discussed in *§ 95.292*)]. The payment or delivery to the fiduciary or a receipt or acquittance signed by a fiduciary to whom payment or delivery of rights is made is a sufficient release of an association for the payment or delivery [*Fin. Code § 6851(b)*].

Whenever a person holding an account in a fiduciary capacity dies and written notice of the revocation or termination of the fiduciary relationship has not been given to an association and the association has no written notice of any other disposition of the beneficial estate, the withdrawal value of the account, and interest on it, or other rights relating to it, may, at the option of an association, be paid or delivered, in whole or in part, to the beneficiary or beneficiaries [*Fin. Code § 6852(a)*]. In the absence of written notice to the contrary an association may presume that each beneficiary of an account with two or more beneficiaries has an undivided equal beneficial interest in the account [*Fin. Code § 6852(b)*].

No association that pays any fiduciary, beneficiary, or designated person in accordance with *Fin Code §§ 6850-6856* or the California Multiple-Party Accounts Law (*Prob. Code § 5100 et seq.*) may, because of that payment, become liable for any estate, inheritance, or succession taxes due to the state [*Fin. Code § 6855*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsGeneral OverviewBanking LawBank ActivitiesBank AccountsDeposit AccountsJoint AccountsBanking LawBank ActivitiesBank AccountsTrust AccountsRequirementsBanking LawDepository InstitutionsCustomer-Bank RelationsFiduciary RelationshipsBanking LawDepository InstitutionsState Savings Associations

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[Reserved]

§§ 95.272[Reserved]

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6. Other Account Procedures And Remedies

9-95 California Forms of Pleading and Practice--Annotated § 95.290

§ 95.290 Charges for Checks Drawn on Insufficient Funds

The checking account signature card constitutes a contract, albeit a contract of adhesion, between the bank and its depositor. The signature card authorizes the bank to impose charges for checks drawn on insufficient funds (hereinafter NSF checks and NSF charges). The fact that it empowers the bank to unilaterally determine and vary the amount of the NSF charges does not make the contract illusory but imposes on the bank the obligation of good faith and fair dealing. The bank's conduct in setting and varying the NSF charges must be objectively reasonable [*Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 923-924, 216 Cal. Rptr. 345, 702 P.2d 503]* . A $6 NSF charge compared with a $0.30 or a $1 actual cost to process an NSF check is not automatically so unconscionable as to be unenforceable, but it does state a cause of action and requires factual evaluation. Factors generally considered in determining whether a charge is reasonable include the following [*Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 926-929, 216 Cal. Rptr. 345, 702 P.2d 503* ; *see Civ. Code § 1670.5*; *Rebney v. Wells Fargo Bank (1990) 220 Cal. App. 3d 1117, 269 Cal. Rptr. 844* (upholding class settlements, albeit from attackers who lacked standing, that provided for fair procedures rather than refunds)]:

- The basis and justification for the charge;
- The price being paid by other similarly situated consumers in similar transactions;
- The inconvenience imposed on the bank;
- The true value of the service;
- Depositors' absence of meaningful choice; and
- Whether or not deceptive practices are involved.

Although it is unlikely that a court would find a price set by a freely competitive market unconscionable, the market

price set by an oligopoly is not immune from scrutiny [*Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 927, 216 Cal. Rptr. 345, 702 P.2d 503]* . Although a remote possibility for conflict exists, federal banking laws and regulations have not preempted the area of NSF charges. Nor have they authorized unconscionable charges or foreclosed a state court's inquiry into whether the charge is unconscionable [*Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 932-944, 216 Cal. Rptr. 345, 702 P.2d 503]* .

If the signature card contract involved does not contain a promise by the depositor to refrain from writing NSF checks, writing an NSF check is not a breach of contract. The NFS charge is therefore not a penalty nor violative of *Civ. Code §§ 1670-1671* [*Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 930-932, 216 Cal. Rptr. 345, 702 P.2d 503* (disagreeing with interpretation of *Hoffman v. Security Pacific Nat. Bank (1981) 121 Cal. App. 3d 964, 968-969, 176 Cal. Rptr. 14* , *Shapiro v. United California Bank (1982) 133 Cal. App. 3d 256, 262, 184 Cal. Rptr. 34* , and *Com. Code § 4401* that writing of NSF check is always application for credit)].

If the signature card itself or the manner in which it is presented to the depositor is deceptive or misleading, the depositor has a cause of action under *Bus. & Prof. Code § 17200* for unfair competition. Injunctive relief can be awarded without a showing that the plaintiff was actually misled if the practice is such that members of the public are likely to be deceived [*Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 929, 216 Cal. Rptr. 345, 702 P.2d 503]* . No cause of action for unfair competition exists, however, on account of the bank's arbitrary waiver of NSF charges for some preferred customers even though the waiver results in shifting the processing costs to other depositors [*Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 930, 216 Cal. Rptr. 345, 702 P.2d 503]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsGeneral OverviewBanking LawDepository InstitutionsCustomer-Bank RelationsOverdraftsBanking LawDepository InstitutionsState Savings AssociationsCivil ProcedureRemediesInjunctionsGeneral OverviewCommercial Law (UCC)Bank Deposits & Collections (Article 4)Customer-Bank RelationsAccount Charges

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§ 95.291 Release of Demand Deposit Funds

In accordance with the implied contract existing between a financial institution and its depositor, no bank, savings association, credit union, or other financial institution operating in California that maintains and services demand deposit accounts and NOW (negotiable order of withdrawal) accounts may release any funds from those accounts to any person who is not the account holder, unless the funds are released pursuant to the depositor's authorization or in accordance with the law (for example, escheat of unclaimed deposits). This prohibition does not apply to any setoff for a debt claimed to be owed to a bank, savings association, credit union, or other financial institution by a customer [*Fin. Code § 40501*; *see 12 U.S.C. § 1832(a)* (defining "NOW accounts"); *but cf. 12 C.F.R. § 204.2(b)(3)(ii)(A)* (NOW accounts excluded from definition of demand deposits for calculation of reserve requirements)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsGeneral OverviewBanking LawBank ActivitiesBank AccountsDeposit AccountsGeneral DepositsBanking LawBankers Liens & Rights of SetoffSetoffs

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9-95 California Forms of Pleading and Practice--Annotated § 95.292

§ 95.292 Adverse Claims to Deposit or Savings Account

Notice of an adverse claim to a deposit (in the case of a bank) or a savings account (in the case of an association) must be disregarded by the bank or association without liability subject to the following rules:

(1) An adverse claimant may deliver to the bank or association at the office at which the deposit or account is carried, or at which the property is held, his or her affidavit (or declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) stating that of his or her own knowledge the person to whose credit the deposit stands is a fiduciary for the adverse claimant, and that the adverse claimant has reason to believe the fiduciary is about to misappropriate the deposit or account or the property, and stating the facts on which that claim of fiduciary relationship and that belief are founded. If such a notice of an adverse claim is made, the bank or association must refuse payment of the deposit in the case of a bank, or refuse to pay withdrawals or interest on the account in the case of an association, for a period of not more than three court days (including the date of delivery) from the date that the bank or association received the adverse claimant's affidavit. The bank or association may refuse such payments without liability on its part and without liability for the sufficiency or truth of the facts alleged in the affidavit [*Fin. Code §§ 952(a)* (banks), *6661(a)* (associations)].

(2) If at any time, whether before or after or in the absence of the filing of an affidavit [*see Fin. Code §§ 952(a), 6661(a)*, discussed in (1), *above*], the adverse claimant procures and serves on the bank or association, at the office at which the deposit or account is carried, a restraining order, injunction, or other appropriate order against the bank or association from a court of competent jurisdiction in an action in which the adverse claimant and all persons in whose names the deposit or account stands or for whose account the property is held are parties, the bank or association is required to comply with the order or injunction without liability on its part [*Fin. Code §§ 952(b)* (banks), *6661(b)* (associations)].

The foregoing rules apply even though the name of the person appearing on the bank's or association's books to whose credit the deposit or account stands or for whose account the property is held is modified by a qualifying or descriptive term such as "agent," "trustee," or other word or phrase indicating that the person may, in the case of a bank, not be the owner in his or her own right of the deposit or property or, in the case of an association, hold the account or property in

a fiduciary capacity [*Fin. Code §§ 952(c)* (banks), *6661(c)* (associations)].

Nothing in the Multiple-Party Accounts Law (*Prob. Code § 5100 et seq.*) limits the applicability of *Fin. Code §§ 952* or *6661* [*Fin. Code §§ 952(d), 6661(d)*; *see* discussion of Multiple-Party Accounts Law in *§ 95.270*].

With regard to adverse claims under *Fin. Code § 952*, a person who is authorized to make withdrawals from the account is not an adverse claimant [*AARTS Productions, Inc. v. Crocker National Bank (1986) 179 Cal. App. 3d 1061, 1068-1069, 225 Cal. Rptr. 203]* . When several people are authorized by the signature card to make withdrawals, a notice from one of them revoking the authority of another to make withdrawals is governed by *Fin. Code § 953*. Thus, the formalities of *Fin. Code § 952* are not required and the bank may refuse to honor checks drawn by the signatory described in the other signatory's notice without liability for wrongful dishonor [*AARTS Productions, Inc. v. Crocker National Bank (1986) 179 Cal. App. 3d 1061, 1067-1069, 225 Cal. Rptr. 203]* . The account at issue in *AARTS Productions, Inc.* was one of an unincorporated association. If the account in question is governed by the Multiple-Party Accounts Law, *Prob. Code § 5405(c)* [*see § 95.270[9][f]*] rather than *Fin. Code § 953* would govern the bank's response to notices from parties to the account [*see Prob. Code § 5122(b)* (accounts excluded from Multiple-Party Accounts Law)]. Still, if there is an adverse claimant within the meaning of *Fin. Code § 952*, that section would apply even if the account were also governed by the Multiple-Party Account Law [*see Fin. Code § 952(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 95.293 Action to Recover Deposit

[1] Accrual

An action to recover the amount of a bank deposit is in the nature of an action to recover on a debt. The action accrues when the bank has refused the depositor's demand for payment or has otherwise denied liability for the amount in question [*Union Tool Co. v. Farmers etc. Nat. Bk. (1923) 192 Cal. 40, 53, 218 P. 424]* .

[2] Statute of Limitations

There is no period of limitation that applies to actions brought to recover money or other property deposited with any bank except as to institutions that become insolvent and are in the process of liquidation, in which case the statute of limitations commences to run from the beginning of the liquidation process [*Code Civ. Proc. § 348*].

Nevertheless, when a statement of account has been rendered by a bank to a depositor accompanied by vouchers, if any, which are the basis for debit entries in the account, the account is deemed finally adjusted and settled and its correctness is conclusively presumed after the period of four years from the date of its rendition in the event no objection to the statement has been made by the depositor. The depositor thereafter is barred from questioning the account's correctness for any cause [*Fin. Code § 861*].

When the cause of action has arisen in another state, or in a foreign country, and by the laws of that state or country an action cannot be maintained there against the defendant by reason of the lapse of time, the action cannot be maintained against the defendant in California, except by a plaintiff who was a citizen of California at the time the cause of action accrued and who has held the cause of action from the time it accrued [*Code Civ. Proc. § 361*; *Cossman v. DaimlerChrysler Corp. (2003) 108 Cal. App. 4th 370, 378, 133 Cal. Rptr. 2d 376]* . Whether a plaintiff can invoke the exception depends on when, under California law, the cause of action accrued [*Lien Huynh v. Chase Manhattan Bank (9th Cir. 2006) 465 F.3d 992, 998]* . See *§ 95.293[1]* regarding accrual of the cause of action.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 95.294 Lien and Setoff Rights

A bank or savings and loan association has a general lien, dependent on possession, on all property in its hands belonging to a customer for the balance due to it from the customer in the course of business [*Civ. Code § 3054(a)*]. By virtue of this lien, a bank has the right to apply the amount of a deposit as credit on a promissory note against the depositor, thereby discharging the lien and balancing the account [*Arnold v. San Ramon Valley Bank (1921) 184 Cal. 632, 635, 194 P. 1012]* . Funds that are exempt by statute [*see, e.g., Code Civ. Proc. § 704.010 et seq.* (exempt property article)], retain their exempt status when deposited in a bank account and therefore are not subject to the bank's setoff rights under *Civ. Code § 3054* [*Kruger v. Wells Fargo Bank (1974) 11 Cal. 3d 352, 357, 367, 113 Cal. Rptr. 449, 521 P.2d 441]* .

The exercise of a lien on deposit accounts must comply with setoff requirements [*Civ. Code § 3054(b)*; *see Fin. Code §§ 864* (banks), *6660* (savings and loan associations)]. These requirements provide that a bank or association may not exercise any setoff for a debt claimed to be owed by a customer to the bank or association if it would result in an aggregate balance of less than $1,000 as shown on the records of the bank or association for all accounts maintained by the customer with the bank or association or any of its branches [*Fin. Code §§ 864(b)* (banks), 6660(b) (associations)]. These setoff provisions also address notice and response requirements [*see Fin. Code §§ 864(c), (d)* (banks), *6660(c), (d)* (associations)] as well as limitations and exemptions applicable to rights of setoff [*see Fin. Code §§ 864(e)-(h)* (banks), *6660(e)-(h)* (associations)].

Fin. Code § 864 defines a "debt" as an interest-bearing obligation or an obligation which by its terms is payable in installments, which has not been reduced to judgment, arising from an extension of credit to a natural person primarily for personal, family, or household purposes [*see Fin. Code § 864(a)(2)*]. With respect to a credit card, an "extension of credit" occurs when the bank issues the card and it is at that point that the determination is made whether the credit is primarily for personal, family, or household purposes. For example, in a case in which a bank exercised a right of setoff for amounts due on a business credit card which had been used for personal expenditures, the court of appeal held that since the primary purpose of a business card is commercial, a bank may set off the debts incurred in its use without compliance with *Fin. Code § 864(b)* [*Martin v. Wells Fargo Bank (2001) 91 Cal. App. 4th 489, 499-500, 110 Cal.*

Rptr. 2d 653 (stating that cardholder may not apply for and receive business credit card, but then use it for personal purposes and expect to receive consumer protection)].

Fin. Code § 864 expressly excludes overdrafts and bank charges from the statute's definition of debt [*Fin. Code § 864(a)(2)*]. Therefore, a bank's practice of recouping overdrafts and extracting insufficient-funds fees from the customer's overdrawn account is permissible. In light of the unequivocal statement in § 864 that overdrafts and bank charges are not debts, they are not subject to the statute's limitations on a bank's right of setoff [*Miller v. Bank of America (2009) 46 Cal. 4th 630, 640-641, 94 Cal. Rptr. 3d 31, 207 P.3d 531* (noting also that setoff for overdraft and related fee would not implicate independent debt that was at issue in *Kruger v. Wells Fargo Bank*, discussed above; therefore, presence of exempt funds in customer's account would not preclude setoff for overdraft and related fee)].

For a sample notice of setoff and response form in accordance with *Fin. Code §§ 864* (banks) and *6660* (associations), see *California Legal Forms, Ch. 102A, Personal Property Liens, § 102A.345* (Matthew Bender). For discussion and forms relating to the enforcement of liens generally, see Ch. 342, *Liens and Wage Preferences* .

A financial institution's right of setoff is based on equitable principles and not on *Civ. Code § 3054*. That is, a setoff against a general deposit account is considered an exercise of the equitable right of setoff, rather than the statutory lien right [*see* *Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 996 n.3, 275 Cal. Rptr. 201, 800 P.2d 557* ; *Kruger v. Wells Fargo Bank (1974) 11 Cal. 3d 352, 357-358, 113 Cal. Rptr. 449, 521 P.2d 441* ; *Aplanalp v. Forte (1990) 225 Cal. App. 3d 609, 615, 275 Cal. Rptr. 144* (bank's application of funds from checking account to pay delinquencies on note secured by deed of trust is an exercise of its right of equitable setoff, not its statutory banker's lien)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 95.295 Recycling of Consumer Deposit Account Numbers

Beginning July 1, 2006, a supervised financial institution may not issue a consumer deposit account number to a customer, if that account number was previously held by another customer of the institution, until at least three years have passed since the account of the other customer was closed. "Consumer deposit account number" means an account number that the financial institution uses to identify a natural person's checking account or share draft account established primarily for personal, family, or household purposes and that includes the routing number of that institution that is used to identify the institution responsible for the payment of negotiable instruments [*Fin. Code § 4100*].

Legal Topics:

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

§§ 95.296[Reserved]

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§ 95.310 Governing Law

Division 4 of the Commercial Code (*Com. Code § 4101 et seq.*) governs bank deposits and collections. Division 3 of the Commercial Code (*Com. Code § 3101 et seq.*), which is discussed in Ch. 385, *Negotiable Instruments* , governs negotiable instruments, including checks and their endorsement, transfer, or negotiation, and parties' obligations with respect to negotiable instruments. In case of a conflict between Division 3 and Division 4, Division 4 governs [*Com. Code §§ 3102(b), 4102(a)*]. If there is no specific provision in Division 4 governing the situation, Division 3 governs [Official Comment 1 to U.C.C. § 4-102 (1990)].

The relationship between a represented person and his or her fiduciary and entities dealing with the fiduciary with respect to negotiable instruments is governed by *Com. Code § 3307* and *Prob. Code § 18100*.

Com. Code § 3312 governs claims relating to lost, stolen, or destroyed cashier's, teller's, and certified checks. *Com. Code § 3411* governs damages recoverable against a bank for failure to pay a cashier's, teller's, or certified check.

Conversion of negotiable instruments is governed by *Com. Code § 3420*.

The federal Expedited Funds Availability Act (*12 U.S.C. § 4001 et seq.*) and regulations promulgated under it (Regulation CC of the Federal Reserve Board, 12 C.F.R. Part 229) establish rules for collection and return of checks between banks. The provisions of Division 4 may be varied by agreement [*Com. Code § 4103(a)*]. Federal Reserve regulations have the effect of agreements, whether or not specifically assented to by the parties interested in the items concerned [*Com. Code § 4103(b)*]. Thus, Regulation CC supersedes some provisions of Division 4 [*see, e.g., Com. Code § 4214(b)*; Official Comment 1 to U.C.C. § 4-102 (1990); Official Comment 3 to U.C.C. § 4-214 (1990) (*12 C.F.R. § 229.31* preempts subsection (b) with respect to checks)].

Electronic fund transfers by consumers [*see § 95.311[3]*], errors in their transmission and execution, and liability for unauthorized transfers are not governed by Division 4 but by the Electronic Fund Transfer Act (*15 U.S.C. § 1693 et seq.*), which is discussed in California Legal Forms, Ch. 56, *Letters of Credit and Electronic Fund Transfers* (Matthew Bender). That chapter contains a form of notice of error from the consumer to the financial institution.

Division 11 of the California Commercial Code (*Com. Code § 11101 et seq.*), which is substantially similar to Division 4A of the Uniform Commercial Code, governs funds transfers pursuant to payment orders, as defined therein, transmitted on or after January 1, 1991. Division 11 is discussed in detail in *95.340* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawFederal Reserve SystemExpedited Funds Availability ActCommercial Law (UCC)Bank Deposits & Collections (Article 4)CollectionsGeneral Overview

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§ 95.311 Definitions

[1] "Check" as "Item"

An "item" within the meaning of Division 4 (*Com. Code § 4101 et seq*) is an instrument or a promise or order to pay money handled by a bank for collection or payment, except a payment order governed by Division 11 (*Com. Code § 11101 et seq.*; *see § 95.340*) or a credit or debit card slip [*Com. Code § 4104(a)(9)*; *see Com. Code § 3104(a)* (unconditional order or promise to pay sum certain as negotiable instrument); *see also § 95.311[3]*].

A "check" is (1) a draft, other than a documentary draft, payable on demand and drawn on a bank, (2) a cashier's or teller's check, or (3) a demand draft [*Com. Code § 3104(f)*; *see Com. Code § 3104(g), (h), (k)* ("cashier's check," "teller's check," and "demand draft" defined)]. Thus, "item" is broader than "check." Division 4 refers mostly to "items." The distinction between "items" and "checks" is important when Regulation CC (12 C.F.R. Part 229) varies the provision of Division 4 with respect to checks [*see, e.g., Com. Code § 4214(b)*; Official Comment 4 to U.C.C. § 4-214 (1990) (*12 C.F.R. § 229.31* preempts subsection (b) with respect to checks)].

[2] "Customer"

A "customer" within the meaning of Division 4 is a person having an account with a bank or for whom a bank has agreed to collect items, including a bank that maintains an account at another bank [*Com. Code § 4104(a)(5)*].

[3] Electronic Orders to Debit or Credit Account

A "debit card slip," which is excluded from the definition of "item" in Division 4 [*see Com. Code § 4104(a)(9)* (discussed under *§ 95.311[1]*)], is the documentation required by the Electronic Fund Transfer Act (*15 U.S.C. § 1693 et seq.*) to be generated by an electronic terminal, such as an automated teller machine, point-of-sale terminal, or cash-dispensing machine, each time a consumer initiates an electronic fund transfer (EFT) from a terminal [*15 U.S.C. § 1693d(a)*; *see 15 U.S.C. § 1693a(7)* (defining "electronic terminal")].

An "electronic fund transfer" is an order, instruction, or authorization from a consumer to a financial institution to debit

or credit an account that is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape. The term does not include a transaction originated by check, draft, or other paper instrument. An electronic fund transfer is made through the use of what is commonly known as a debit card, used with a Personal Identification Number, called a "PIN code," rather than through the use of commercial paper [*15 U.S.C. § 1693a(6)*; *see 15 U.S.C. § 1693a(1)* (definition of "accepted card or other means of access")].

A consumer whose financial institution does not satisfactorily resolve an error or unauthorized transfer may prefer to complain to the appropriate regulatory agency before initiating litigation. The responsible agencies for enforcement of the Electronic Fund Transfer Act are the following [*15 U.S.C. § 1693o(a)*]:

- For national banks and federal branches and federal agencies of foreign banks, the Office of the Comptroller of the Currency;

- For member banks of the Federal Reserve System (other than national banks) and branches and agencies of foreign banks (other than federal branches, federal agencies, and insured state branches of foreign banks), the Federal Reserve Board;

- For banks insured by Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured state branches of foreign banks, the Federal Deposit Insurance Corporation;

- For savings associations the deposits of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision; and

- For federal credit unions, the Administrator of the National Credit Union Administration.

[4] "Good Faith"

"Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing [*Com. Code § 1201(b)(20)*].

Fair dealing is a broad term that must be defined in context. It is concerned with the fairness of conduct rather than with the care with which an act is performed. Failure to exercise ordinary care in conducting a transaction is an entirely different concept than failure to deal fairly in conducting the transaction. Both fair dealing and ordinary care are to be judged in the light of reasonable commercial standards, but the standards in each case are directed at different aspects of commercial conduct [Official Comment 4 to UCC § 3-103 (1990)].

[5] "Ordinary Care"

Division 4 adopts the definition of ordinary care set forth in Division 3 [*Com. Code § 4104(c)*]. "Ordinary care" in the case of a person engaged in business means observance of reasonable commercial standards prevailing in the area in which the person is located with respect to the business in which the person is engaged. In the case of a bank that takes a check for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the check if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably fromgeneral banking usage not disapproved by Division 3 or Division 4 [*Com. Code § 3103(a)(7)*].

Commercially reasonable standards are also a component of "good faith" (discussed in *§ 95.311[4]*) [*see Com. Code § 1201(b)(20)*].

The second sentence of *Com. Code § 3103(a)(7)* is intended to reflect changes in *Com. Code § 4406*, all occasioned by

technological advances in the check collection process [*see* Official Comment 5 to UCC § 3-103 (1990); *see also* Official Comment 4 to UCC § 4-406 (1990)]. The definition of "ordinary care" in *Com. Code § 3103* is declaratory of the meaning of "ordinary care" in former *Com. Code § 4406* [*see Story Road Flea Market, Inc. v. Wells Fargo Bank (1996) 42 Cal. App. 4th 1733, 1741-1742, 50 Cal. Rptr. 2d 524]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 95.312 Collection Process and Status of Banks Involved in Process

[1] Payor or Drawee Bank

The basic steps and procedures customarily undertaken in processing a check are as follows. First, the drawer [*see Com. Code § 3103(a)(3)*] issues and delivers a check to the payee. The bank on which the check is drawn and that is ordered to pay the check is known as the payor bank [*Com. Code § 4105(3)*], or the "drawee" [*see Com. Code §§ 3103(a)(2), 4104(a)(8)*]. Throughout this part, the terms "payor" and "drawee," or "payor bank" and "drawee bank," are used interchangeably when referring to situations not governed by the federal Expedited Funds Availability Act or Regulation CC.

[2] Paying Bank

Regulation CC uses the term "paying bank" to mean, among other things, the bank by which a check is payable, except in the case of a check that is payable at another bank and is sent to the other bank for payment or collection. In the latter case, the "paying bank" is also the bank at which the check is payable and to which it is sent for payment or collection [*12 C.F.R. § 229.2(z)(1), (2)*]. The term "paying bank" will only be used in this part when discussing rights and duties under the Expedited Funds Availability Act or Regulation CC.

When presented for payment, the paying bank reviews the checks and either honors the check by payment to the presenting bank [*see 12 C.F.R. § 210.9* (payment through Federal Reserve Bank)] or dishonors the check if, for example, there are insufficient funds to cover it or there is a stop-payment order against it. If the check is dishonored, the paying bank can return the check and notice of nonpayment directly to the depositary bank or to any returning bank as long as they will arrive at the depositary bank within the times required by *12 C.F.R. §§ 229.30(a), (c)* and 229.33(a) [*12 C.F.R. §§ 229.30, 229.33*].

[3] Depositary Bank

The payee may present the check directly to the payor bank for payment or may deposit the check to the bank with which he or she maintains an account. The bank at which the check is deposited is referred to as the "depositary bank,"

which means the first bank to take a check, other than one presented for immediate payment over the counter, even though it is also the payor bank [*Com. Code § 4105(2)*].

If the check is cashed over the counter at the drawee, the drawee charges the drawer's account [*see Com. Code §§ 4214, 4215, 4401(a)*]. If the check was deposited to an account at a depositary bank, the depositary bank takes the check for collection, gives a provisional credit to the payee's account [*see Com. Code § 4201(a)*], processes the check, and sends it directly or through an intermediary bank or clearinghouse for ultimate presentment to the payor bank.

[4] Collecting Bank; Intermediary Bank; Presenting Bank

Any bank handling the check for collection except the payor bank is a "collecting bank" [*Com. Code § 4105(5)*]. Any banks to which a check is transferred in the course of collection, except the depositary or payor bank, are "intermediary banks" [*Com. Code § 4105(4)*]. Every bank that presents a check, except the payor bank, can properly be referred to as a "presenting bank" [*Com. Code § 4105(6)*].

In the forward collection process, each depositary and collecting bank "settles" with the prior bank on receipt of the check. Under Regulation CC, settlements between banks for the forward collection of a check are final when made [*12 C.F.R. § 229.36(d)*]. Under the Commercial Code, settlements are only provisional until the payor bank has determined that the check is properly payable from the account on which it is drawn or until, by lapse of time, the payor bank fails to return the check or give notice of dishonor [*Com. Code §§ 4214, 4215, 4301*; Official Comment 4 to U.C.C. § 4-215 (1990)].

[5] Returning Bank

Under Regulation CC, a "returning bank" is a bank (other than the paying bank or depositary bank) handling a returned check or notice in lieu of return. A "returning bank" is also a collecting bank for purposes of *Com. Code § 4202(b)*, governing the bank's duty of prompt return [*12 C.F.R. § 229.2(cc)*].

Each returning bank settles with the bank sending a returned check to it. That settlement is final when made under Regulation CC [*12 C.F.R. § 229.31(c)*]. Returning banks are also obligated to return dishonored items as within the times established by *12 C.F.R. § 229.31(a)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-95 California Forms of Pleading and Practice--Annotated § 95.313

§ 95.313 Determining Applicable Law

[1] By Bank's Location

A bank's liability for action or nonaction with respect to an item handled by it for purposes of presentment, payment, or collection is governed by the law of the place where the bank is located [*Com. Code § 4102(b)*].

In the case of action or nonaction by or at a branch or separate office of a bank, its liability is governed by the law of the place where the branch or separate office is located [*Com. Code § 4102(b)*].

[2] Branch as Separate Bank

A branch or separate office of a bank is a separate bank for the purpose of computing the time within which and determining the place at or to which action may be taken or notice or orders must be given under Division 3 (*Com. Code § 3101 et seq.*) or Division 4 (*Com. Code § 4101 et seq.*) [*Com. Code § 4107*]. This provision, along with *Com. Code §§ 4303(a)* (bank's cutoff hours, discussed in *§ 95.322[1]*) and *4108* (cutoff hour for determining balances, discussed in *§ 95.456[5]*), determines whether a stop-payment notice (*Com. Code § 4403*) is received in time to require the drawee to dishonor a check, to revoke any provisional settlement made to a presenting bank, or to reverse any charge made to the drawer's account to pay a check [*see, e.g.,* Official Comment 2 to UCC § 4-107 (1990)].

Amendments enacted in 1992 altered former *Com. Code §§ 4105* and *4106* by (1) deleting the last clause of former *Com. Code § 4106* (*now see Com. Code § 4107*), which specified that receipt of a notice or order by one branch did not prevent another branch or office from being a holder in due course of a item, and (2) deleting former *Com. Code § 4105(g)*, which also specified that, for purposes of the definitions of the various statutes governing banks, each branch or office of a bank is a separate bank [*see* Stats. 1992, ch. 914]. Thus, the 1990 version of the Uniform Commercial Code does not contain an absolute rule regarding the status of a separate branch office in all situations. The drafters' intent was to require local courts to make case-by-case determinations that seem fair and appropriate given the variations in operating practices among banks [Official Comment 1 to UCC § 4-107 (1990)]. Judicial interpretation should avoid illogical or unreasonable results. For example, in the case of stop-payment orders, it would be unfair to require the drawee to reverse a charge to the drawer's account if it had become obligated to pay the check or settlement

had become final under *Com. Code § 4301* (*discussed under § 95.331[1]*) [Official Comment 3 to UCC § 4-107 (1990)].

The current version of *Com. Code § 4107* may alter the results expected from rulings in earlier California cases such as *Lawrence v. Bank of America (1985) 163 Cal. App. 3d 431, 434-437, 209 Cal. Rptr. 541* (discussed under *§ 95.333[4]*). *Lawrence* did not consider allegations that the branch that cashed the checks was able to, and did, communicate by computer with the branch on which the checks were drawn and had actually charged the drawer's account at the time it paid the checks over the counter.

Commentary to *Com. Code § 4107* specifies that the determination of the branches' status must take into account whether receipt of a stop-payment notice at one branch should be notice to other branches of the same bank so as to impair the right of that branch to become a holder in due course. In some circumstances, ordinary care requires the branch at which the stop-payment order is received to communicate that notice or order to another branch of the bank. In those cases, the notice or order would be effective at the proper branch from the time it was received or should have been received [*see* Official Comment 4 to UCC § 4-107 (1990)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-95 California Forms of Pleading and Practice--Annotated § 95.314

§ 95.314 Disclaimers and Agreements or Regulations Varying Division 4 Provisions

Although parties to an item presented for collection pursuant to Division 4 may agree as to the effect of those provisions, the parties to the agreement cannot disclaim a bank's responsibility for lack of good faith or failure to exercise due care, nor may a bank limit the amount of damages it must pay for such lack or failure. Nevertheless, the parties' agreement may establish the standards by which the bank's responsibility is to be measured, as long as those standards are not manifestly unreasonable [*Com. Code § 4103(a)*]. For discussion of the validity of exculpatory clauses in general, see Ch. 380, *Negligence* . For discussion and a form for an affirmative defense relating to the illegality of a contract for being contrary to public policy, see Ch. 140, *Contracts* .

Between customers and between banks, federal reserve regulations, operating circulars, and opinion ("no action") letters vary the rules established by Division 4. The customer's specific assent is not necessary, nor is that of any other party, to an item handled [*Com. Code § 4103(b), (c)*; *see* Official Comment 1 to UCC § 4-103 (1990)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-95 California Forms of Pleading and Practice--Annotated § 95.315

§ 95.315 Damages for Failure to Exercise Ordinary Care

The measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount that could not have been realized by the exercise of ordinary care. If the bank acted in bad faith, the customer also may recover any other damages he, she, or it suffered as a proximate consequence [*Com. Code § 4103(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-95 California Forms of Pleading and Practice--Annotated § 95.316

§ 95.316 Drawee's Authority Limited to Properly Payable Items

[1] Contractual Duty

When a bank receives deposits, it has an implied contract with the depositor to discharge the indebtedness thus created by honoring checks drawn on the bank. The terms of this contract are set forth in *Com. Code § 4401*, which provides that a bank may charge a customer's account for items that are properly payable from the account, even though the charge creates an overdraft [*Com. Code §§ 4401(a), 4402*; *see also § 95.321*]. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and the bank [*Com. Code § 4401(a)*; *Campbell v. Bank of America (1987) 190 Cal. App. 3d 1420, 1427, 235 Cal. Rptr. 906* ; *Joffe v. United California Bank (1983) 141 Cal. App. 3d 541, 554-555, 190 Cal. Rptr. 443]* . An item containing a forged drawer's signature or a forged endorsement is not properly payable [Official Comment 1 to UCC § 4-401 (1990); *see § 95.316[2]*].

The original and fundamental idea and purpose of checks is that the drawer has funds or effects in the hands of the drawee bank and orders the drawee to pay all or part of this debt or deposit to the payee [*Torrance N. Bk. v. Enesco F. Credit Union (1955) 134 Cal. App. 2d 316, 320, 285 P.2d 737]* . Nevertheless, a check does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until the drawee accepts it [*Com. Code § 3408*; *Arnold v. San Ramon Valley Bank (1921) 184 Cal. 632, 635, 194 P. 1012* ; *Hansen v. Bank of America (1950) 101 Cal. App. 2d 300, 303-304, 225 P.2d 665]* .

[2] Payment on Forged Drawer's Signature or Endorsement

A drawee bank is liable for breach of this primary contractual duty if it pays a check on which the drawer's signature is unauthorized or forged. Absent negligence or misleading conduct on the part of the drawer, no degree of care on the part of the drawee bank will excuse it from liability for payment of a check without its depositor's proper signature as drawer. The drawee bank is charged with knowledge of its depositor's signature [Basch v. Bank of America (1943) 22 Cal. 2d 316, 321, 139 P.2d 1 ; *Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank (1978) 85 Cal. App. 3d 797, 804-805, 149 Cal. Rptr. 883* ; *see § 95.450* for form of complaint for recovery by drawer of checks paid without proper drawer's signature].

Checks with a forged or missing endorsement also are not properly payable by the drawee bank; therefore, a drawee bank may not charge a customer's account for them [*Cooper v. Union Bank (1973) 9 Cal. 3d 371, 376-377, 107 Cal. Rptr. 1, 507 P.2d 609* ; *Joffe v. United California Bank (1983) 141 Cal. App. 3d 541, 554, 190 Cal. Rptr. 443* ; *see § 95.450* for form of complaint for recovery by drawer of checks paid without properendorsement; *see also § 95.451[7]* regarding allocation of loss for forged endorsement].

For further discussion regarding forged drawer's signature or forged endorsements, see *§ 95.327*.

[3] Payment From Corporate Account

When a corporation maintains a deposit account, the bank's duties may also be owed to the individual principals of the corporation [*see, e.g.,* *American Nat. Bank v. Stanfill (1988) 205 Cal. App. 3d 1089, 1098-1101, 252 Cal. Rptr. 861* (unauthorized withdrawals and forged endorsements); *Kendall Yacht Corp. v. United California Bank (1975) 50 Cal. App. 3d 949, 956, 123 Cal. Rptr. 848* (wrongful dishonor)]. Generally, the "owners" of a corporate account, or its agents, are its officers [*see Com. Code § 3110(c)(1), (2)(B), (C)*]. If more than one signature is required on checks, a check with less than the required number of signatures as maker is not properly payable from the account [*Com. Code § 3403(b)*; *American Nat. Bank v. Stanfill (1988) 205 Cal. App. 3d 1089, 1100-1101, 252 Cal. Rptr. 861* ; *see also § 95.456[4]* for discussion of Commercial Code commentary regarding causes of action by principals of business entity depositors].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 95.317 Drawee's Negligence

No amount of care on the part of the drawee excuses it from liability for paying a check without its depositor's authorized signature, under *Com. Code § 4401(a)* [Basch v. Bank of America (1943) 22 Cal. 2d 316, 321, 139 P.2d 1 ; *Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank (1978) 85 Cal. App. 3d 797, 804-805, 149 Cal. Rptr. 883]* .

The preclusion of *Com. Code § 4406(f)* acts like a one-year statute of limitations for actions based on a forged drawer's signature and altered ("raised") checks that were returned to the drawer with the statement, payment of which the drawer failed to report within a reasonable time, if the drawer's failure to report the unauthorized signature or alteration was in fact the cause of the loss [*see Com. Code § 4406*; *Edward Fineman Company v. Superior Court (1998) 66 Cal. App. 4th 1110, 1119, 78 Cal. Rptr. 2d 478* (reiterating that *Com. Code § 4406* is not per se statute of limitation but rather issue-preclusion statute); *see also § 95.455* (affirmative defense based on drawer's negligence in leaving incompleted, signed checks lying about)]. *Code Civ. Proc. § 340(c)* also establishes a one-year limitation period for an action by a depositor against a bank that paid a forged or raised check or one that bears a forged or unauthorized endorsement [*see also § 95.450[4]*].

The drawee's negligence also comes into play if it seeks to defend on the ground of the drawer's negligence [*see Com. Code §§ 3404-3406*; *see §§ 95.453 -95.455*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-95 California Forms of Pleading and Practice--Annotated § 95.318

§ 95.318 Completed and Altered Checks

A drawee bank that in good faith pays a holder may charge the indicated account of the customer according to either (1) the original terms of the altered item or (2) the terms of the completed item, even though the bank knows the item has been completed, unless the bank has notice that the completion was improper [*Com. Code § 4401(d)*].

Com. Code § 4401(d) reflects *Com. Code § 3407(c)* (discussed in Ch. 385, *Negotiable Instruments*), which allows a payor bank or drawee that pays a fraudulently altered instrument in good faith and without notice of the alteration to enforce the instrument according to its original terms or, in the case of an incomplete instrument altered by unauthorized completion, according to its terms as completed. *Com. Code § 4401(d)* follows the rules stated in *Com. Code § 3407(c)* by allowing the bank to enforce rights with respect to an altered item by charging its customer's account [Official Comment 4 to U.C.C. § 4-401 (1990)], again placing the loss on the person best able to have avoided it.

For a form for an affirmative defense based on the drawer's failure to exercise ordinary care that contributed to the alteration or unauthorized completion of a check, *see § 95.455*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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9-95 California Forms of Pleading and Practice--Annotated § 95.319

§ 95.319 Postdated Checks

A drawee bank may charge a customer's account to pay a check that is otherwise properly payable from the account, even though payment was made before the date of the check, unless the customer has given notice to the bank of the postdating that describes the check with reasonable certainty [*Com. Code § 4401(c)*]. The notice is effective for the period stated in *Com. Code § 4403(b)* (which is discussed under *§ 95.322[2]*). That period is six months, but the notice lapses after 14 calendar days if the original notice was oral and was not confirmed in writing during the 14-day period [*see also* Official Comment 6 to U.C.C. § 4-403 (1990), discussed in *§ 95.322[2]*]. The bank must receive the notice not to pay a postdated check in sufficient time and in such a manner as to afford the bank a reasonable opportunity to act on it before the bank takes any action with respect to the check described in *Com. Code § 4303*, which addresses the bank's "cutoff hour" for "unposting" items subject to orders, notices, levies, or setoff [*Com. Code § 4401(c)*]. *Com. Code § 4303* is discussed in *§ 95.322[1]*.

If a bank charges a customer's account to pay a postdated check before the date stated in the notice of postdating, the bank is liable for damages for the loss resulting from its act. The loss may include damages for dishonor of subsequent items under *Com. Code § 4402* [*Com. Code § 4401(c)*].

A business may not request or require a postdated check without first advising the consumer, in writing, that the check can be cashedimmediately unless the consumer files the order not to pay postdated check with his or her bank. The business does not have to give this notice to the consumer if the business does not present the check for collection until on or after its date [*Bus. & Prof. Code § 17538.6(a), (b)*].

Com. Code § 4401(c) was added because the automated check collection system cannot accommodate postdated checks. *Com. Code § 4401(c)* does not purport to regulate fees that banks charge their customers for implementing a notice of postdating, but fees must be set in accordance with the general duty of good faith and fair dealing [Official Comment 3 to U.C.C. § 4-401 (1990); *see also Com. Code § 1304*; *Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 923-929, 216 Cal. Rptr. 345, 702 P.2d 503* (unconscionability)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 95.320 Stale Checks

A drawee bank is under no obligation to a customer having a checking account to pay a check, other than a certified check, that is presented more than six months after its date, but it may charge its customer's account for a payment made thereafter in good faith [*Com. Code § 4404*; *see Com. Code § 1201(b)(20)* (discussed in *§ 95.311[4]*)].

The exception for certified checks reflects the fact that, once certified, they are the primary obligation of the certifying bank [*see Com. Code §§ 3409, 3413*] and the presumption that the customer's account was charged when the check was certified [Official Comment to UCC § 4-404 (1990)].

Legal Topics:

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

Ordinarily, a drawee bank is not obligated or expected to honor a check for any amount greater than the deposit against which it is drawn [*Torrance N. Bk. v. Enesco F. Credit Union (1955) 134 Cal. App. 2d 316, 320-321, 285 P.2d 737]* . Unless there is an agreement between the bank and its customer by which the bank agrees to pay overdrafts, the bank may dishonor any item that creates an overdraft [*Com. Code § 4402(a)*]. On the other hand, the bank also has discretion to charge against the customer's account to pay a check that is otherwise properly payable from that account even though the charge creates an overdraft [*Com. Code § 4401(a)*].

The statutes governing obligations of banks and their depositors are usually incorporated into the signature card agreement and become part of the contract between the parties. Usually, the contract does not contain a promise by the depositor to refrain from writing checks drawn on insufficient funds, and an overdraft check is treated by the bank as an application for credit [*Shapiro v. United California Bank (1982) 133 Cal. App. 3d 256, 262, 184 Cal. Rptr. 34* ; *Hoffman v. Security Pacific Nat. Bank (1981) 121 Cal. App. 3d 964, 968-969, 176 Cal. Rptr. 14]* . An overdraft by a bank amounts to a loan to the depositor, and the bank is entitled to recover the amount of the overdraft from the customer [*Bank of Santa Ana v. Molina (1969) 1 Cal. App. 3d 607, 617, 81 Cal. Rptr. 885]* . Nevertheless, if there is more than one customer who is authorized to draw on the account, a customer who did not sign the check that created the overdraft is not liable for it unless he or she benefited from the proceeds of the check [*Com. Code § 4401(b)*].

If an overdraft is made against an attorney trust account, the bank must report the overdraft to the State Bar [*see Bus. & Prof. Code §§ 6091.1, 6091.2*; *see also Bus. & Prof. Code § 6211(a), (b)* (attorney is required to maintain interest-bearing demand trust account)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawDepository InstitutionsCustomer-Bank RelationsOverdraftsCommercial Law (UCC)Bank Deposits & Collections (Article 4)CollectionsPresentment, Settlement & PaymentCommercial Law (UCC)Bank Deposits & Collections (Article 4)Customer-Bank RelationsAccount Charges

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9-95 California Forms of Pleading and Practice--Annotated § 95.322

§ 95.322 Stop-Payment Orders

[1] Availability and Required Notice

A customer, or any person authorized to draw on the account if there is more than one person, may stop payment of any item drawn on the customer's account or may close the account by an order to the drawee bank that describes the item or account with reasonable certainty. The order must be received at a time and in a manner that affords the bank a reasonable opportunity to act on it before any action by the bank with respect to the item described in *Com. Code § 4303* [*Com. Code § 4403(a)*].

A bank's obligation to abide by any knowledge, notice, stop-payment order, or legal process served on it, and its right to exercise setoff, expires after the earliest of the following periods [*Com. Code § 4303(a)*; *but see* Official Comment 2 to U.C.C. § 4-303 (1990) (effect of customer's bankruptcy is governed by *12 U.S.C. § 542(c)*; *Marin v. England (1966) 385 U.S. 99, 101-103, 87 S. Ct. 274, 17 L. Ed. 2d 197*)]:

- The bank accepts or certifies the check;

- The bank pays the check in cash;

- The bank settles for the item without having the right to revoke settlement under statute, clearing house rule, or agreement;

- The bank becomes accountable for the amount of the item under *Com. Code § 4302*, which deals with the bank's responsibility for return of items, sometimes referred to as its "midnight deadline"; or

- With respect to checks, a cutoff hour no earlier that one hour after the opening of the next banking day after the banking day on which the bank received the check and no later than the close of that next banking day or, if no cutoff hour is fixed, the close of the next banking day after the banking day on which the bank received the check.

Com. Code § 4303(a)(5) gives a bank the opportunity to extend, beyond the period previously allowed, the time within which it must revoke anyprovisional settlement made for the check that is subject to the stop-payment order. The Commentary to the Uniform Commercial Code gives no indication whether it is permissible for a bank to establish one cutoff hour for stop-payment notices and another for exercise of setoff or other types of notices and orders.

In the absence of an agreement to the contrary, the stop-payment notice must provide sufficient information to allow the bank, under technology then existing, to identify the item with reasonable certainty [Official Comment 5 to UCC § 4-403 (1990)].

If the signature of more than one person is required to draw on an account, any of these persons may stop payment or close the account [*Com. Code § 4403(a)*]. If the customer is a corporation that requires checks drawn on its account to be signed by more than one person, any of those persons may stop payment on a check [Official Comment 5 to UCC § 4-403 (1990)]. In addition, since January 1, 1993, a stop-payment order may be issued by any person claiming an interest in an account of a deceased drawer [*see Com. Code § 4405(b)*].

There are some checks, such as certified checks and cashier's checks, on which the customer or purchaser is not entitled to stop payment [*see Com. Code § 3411* (discussed in *§ 95.465*)].

[2] Duration of Effectiveness

Until January 1, 1993, a stop-payment order was not effective unless it was in writing [*see* former *Com. Code § 4403(1)*]. Under current law, an oral stop-payment order is effective for 14 calendar days, and a written order is effective for six months. An oral stop-payment order must be confirmed in writing within the 14-day period to become effective for the six-month period. If an oral order is so confirmed, the six-month period dates from the giving of the oral order [*Com. Code § 4403(b)*; Official Comment 6 to UCC § 4-403 (1990)].

A stop-payment order may be renewed for additional six-month periods by a writing given to the bank within a period during which the stop-payment order is effective [*Com. Code § 4403(b)*].

[3] Liability and Burden of Establishing Loss for Payment Over Order

A payment in violation of an effective stop-payment order is an improper payment, even though it is made by mistake [Official Comment 7 to UCC § 4-403 (1990); *see also § 95.316*]. Any agreement to the contrary is invalid under *Com. Code § 4103(a)* if, in paying the item over the stop-payment order, the bank failed to exercise ordinary care. *Com. Code § 4103* prohibits a bank from entering an agreement that disclaims its responsibility for failure to exercise ordinary care or limits the measure of damages for that failure [Official Comment 7 to UCC § 4-403 (1990); *see also § 95.314*].

The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a stop-payment order or order to close an account is on the customer. The loss from payment of an item contrary to a stop-payment order may include damages for dishonor of subsequent items under *Com. Code § 4402* (*discussed under § 95.464[7][a]*) [*Com. Code § 4403(c)*].

[4] Bank's Right of Subrogation After Payment Over Order

A payor bank obtains specified subrogation rights if it has paid a check over the order of the drawer or maker to stop payment, after an account has been closed, or otherwise under circumstances giving a basis for objection by the drawer or maker. The payor bank is subrogated to the rights of all of the following [*Com. Code § 4407*]:

- Any holder in due course of the item against the drawer or maker;

- The payee or any other holder of the item against the drawer or maker either on the item or under the transaction out of which the item arose; and

- The drawer or maker against the payee or any other holder of the item with respect to the transaction out of which the item arose.

This subrogation right is meant to prevent unjust enrichment, but it is available only to the extent necessary to prevent loss to the bank by reason of its payment of the item [*Com. Code § 4407*].

A defense frequently interposed by a bank in an action against it for wrongful payment over a stop-payment order is that the drawer or maker suffered no loss because it would have been liable to a holder in due course in any event. On this argument, some cases have held that payment cannot be stopped against a holder in due course. Payment can be stopped, but, if it is, the drawer or maker is liable to the holder, and the sound rule is that the bank is subrogated to the rights of the holder [Official Comment 1 to UCC § 4-407 (1990)].

Com. Code § 4407(b) also subrogates the drawee bank to the rights of the payee or other holder against the drawer or maker either on the item or under the transaction out of which it arose [Official Comment 2 to UCC § 4-407 (1990)]. *Com. Code § 4407(c)* subrogates the drawee bank to the rights of the drawer or maker against the payee or other holder with respect to the transaction out of which the item arose. For example, if the payee fraudulently induces the drawer to issue a check for defective securities and the bank pays the check over a stop-payment order but reimburses the drawer for the payment, *Com. Code § 4407(c)* provides the bank a basis for recovering the money from the fraudulent payee [Official Comment 3 to UCC § 4-407 (1990)].

For a form for a complaint for declaratory relief based on *Com. Code § 4407, see § 95.460*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsLiabilityCommercial Law (UCC)Bank Deposits & Collections (Article 4)CollectionsPresentment, Settlement & PaymentCommercial Law (UCC)Bank Deposits & Collections (Article 4)Customer-Bank RelationsPayor Bank DutiesSubrogationCommercial Law (UCC)Bank Deposits & Collections (Article 4)Customer-Bank RelationsStop Payment OrdersEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

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9-95 California Forms of Pleading and Practice--Annotated § 95.323

§ 95.323 Wrongful Dishonor

[1] In General

Except as otherwise provided in Division 4, a payor bank wrongfully dishonors an item if it dishonors an item that is properly payable, but a bank may dishonor an item that would create an overdraft unless it has agreed to pay the overdraft [*Com. Code § 4402(a)*; *but see Kendall Yacht Corp. v. United California Bank (1975) 50 Cal. App. 3d 949, 954-955, 123 Cal. Rptr. 848* (previous pattern of paying overdrafts or oral agreement may require bank to continue to honor items creating overdrafts)].

If several people are authorized by the signature card to make withdrawals and one of them has notified the bank pursuant to *Fin. Code § 953* to revoke the authority of another to make withdrawals, the bank may refuse to honor checks drawn by the signatory described in the other signatory's notice without liability for wrongful dishonor [*AARTS Productions, Inc. v. Crocker National Bank (1986) 179 Cal. App. 3d 1061, 1067-1069, 225 Cal. Rptr. 203* ; *see also Com. Code § 4403(a)* (stop-payment order may be executed by one of two or more authorized to draw on account)].

Other aspects of wrongful dishonor, such as the time for determining the available balance in the account and whether or not an individual principal of a corporate depositor have standing to maintain an action to recover damages for wrongful dishonor, are discussed in *§ 95.456[5]*.

[2] Damages for Wrongful Dishonor

[a] Compensatory Damages

A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. Liability is limited to actual damages proved and may include damages for an arrest or prosecution of the customer or other consequential damages [*Com. Code § 4402(b)*; *Weaver v. Bank of America (1963) 59 Cal. 2d 428, 431-435, 30 Cal. Rptr. 4, 380 P.2d 644* (damages for drawer's arrest); *Kendall Yacht Corp. v. United California Bank (1975) 50 Cal. App. 3d 949, 957-958, 123 Cal. Rptr. 848* (damages for emotional distress)]. An action for damages for wrongful

dishonor sounds both in tort and in contract [*Weaver v. Bank of America (1963) 59 Cal. 2d 428, 431-432, 30 Cal. Rptr. 4, 380 P.2d 644* ; *Abramowitz v. Bank of America (1955) 281 P.2d 380]* .

The drawer can recover damages for emotional distress caused by the wrongful dishonor if his or her emotional distress goes beyond a subjective state of discomfort and verifiable events following the wrongful dishonor would induce mental suffering in a reasonable person [*Kendall Yacht Corp. v. United California Bank (1975) 50 Cal. App. 3d 949, 957-958, 123 Cal. Rptr. 848]* . *Kendall* involved the failure of a business to which the defendant allegedly agreed to loan money. Criminal and administrative charges were brought against the drawers for dishonored payroll checks, failure to maintain workers' compensation insurance, and drawing checks on insufficient funds. Plaintiffs were subjected to vandalism and harassment by employees and creditors and suffered marital problems as a result of the stress of the failure of the business [*Kendall Yacht Corp. v. United California Bank (1975) 50 Cal. App. 3d 949, 952-954, 123 Cal. Rptr. 848]* .

Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case [*Com. Code § 4402(b)*].

Wrongful dishonor is different from failure to exercise ordinary care in handling an item. The measure of damages for wrongful dishonor is that stated in *Com. Code § 4402(b)*, not that stated in *Com. Code § 4103(e)* (*discussed under § 95.315*) [Official Comment 2 to UCC § 4-402 (1990)].

There was confusion arising from the second sentence of former *Com. Code § 4402*, which implied that a bank was liable for some form of damages other than those proximately caused by the dishonor if the dishonor was other than by mistake [Official Comment 1 to UCC § 4-402 (1990); *see, e.g.,* *Lee v. Bank of America (1990) 218 Cal. App. 3d 914, 920, 267 Cal. Rptr. 387* (drawer cannot recover punitive damages for wrongful dishonor occasioned by drawee's mistake)]. The reference to mistake has been deleted from the present version of *Com. Code § 4402(b)*.

[b] Punitive Damages

Whether a bank is liable for noncompensatory damages, such as punitive damages, must be decided under *Com. Code §§ 1103(b)* and *1305* [Official Comment 1 to U.C.C. § 4-402 (1990)]. *Com. Code § 1103(b)* provides that, unless displaced by the particular provisions of the Commercial Code, the principles of law and equity supplement the provisions of the Commercial Code. *Com. Code § 1305(a)* states that the remedies provided by the Commercial Code are to be administered liberally to put the aggrieved party in as good a position as if the other party has fully performed, but neither consequential or special nor penal damages may be had except as specifically provided in the Commercial Code or by other rule of law.

Some California cases that awarded punitive damages seem to have conformed to this approach by basing the punitive damage award on some other cause of action. For example, a bank relied on an affidavit of forgery by a drawer to withdraw the amount of checks on which the drawer's unauthorized signature was forged by its employee, who was also the payee, from the account of the payee, who was also a depositor, and to dishonor checks drawn against the "reversed" deposit. The bank was sued for wrongful dishonor, intentional infliction of emotional distress, negligence, and violations of *Fin. Code §§ 857* and *952*. The punitive damage award was apparently based on the negligence cause of action. The appellate court relied on evidence, although conflicting, that reversal and dishonor were not standard banking practices, or, in Commercial Code parlance, amounted to failure to conform to commercially reasonable standards as practiced in the region in which the bank was located [*Teitel v. First Los Angeles Bank (1991) 231 Cal. App. 3d 1593, 1599-1600, 1604-1605, 1607, 282 Cal. Rptr. 916* (construing former *Fin. Code § 857*); *see Com. Code § 3103(a)(7)* (discussed in *§ 95.311[5]*)]. Nevertheless, damages for failure to exercise ordinary care should not exceed the amount of the item, unless there is a finding of bad faith on the part of the bank [*Com. Code § 4103(e)* (discussed in *§ 95.315*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesDamagesPunitive DamagesCommercial Law (UCC)Bank Deposits & Collections (Article 4)Customer-Bank RelationsWrongful Dishonor

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9-95 California Forms of Pleading and Practice--Annotated § 95.324

§ 95.324 Customer's Duty to Examine Statements and to Notify Bank of Irregularities

[1] Scope of Duty

If a bank sends or makes available to its customer a statement of account or items pursuant to *Com. Code § 4406(a)*, the customer, with reasonable promptness, must examine the statement or the items to determine whether any payment was not authorized because (1) an alteration of an item or (2) a purported signature by or on behalf of the customer was not authorized. If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts [*Com. Code § 4406(c)*; *see also Com. Code § 1205(a)* (what is a reasonable time for taking any action depends on nature, purpose, and circumstances of the action)]. For further discussion of the bank's duty to provide the statement and the bank's defenses based on the customer's failure to examine the statement promptly and to report irregularities, *see §§ 95.451* and *95.452*.

[2] Absolute Preclusion for Failure to Notify Within One Year

Without regard to care or lack of care of either the customer or the bank, a customer who within one year after the statement or items are made available to the customer under *Com. Code § 4406(a)* does not discover and report the customer's unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration [*Com. Code § 4406(f)*; *see Edward Fineman Company v. Superior Court (1998) 66 Cal. App. 4th 1110, 1125, 78 Cal. Rptr. 2d 478* (payroll account owner was precluded from pursuing any recovery against bank after failing to discover and report unauthorized signatures within prescribed one-year period); *see also Com. Code § 4406(c), (d)* (customer is precluded from asserting unauthorized or altered signature against bank if customer had reasonable time, not exceeding 30 days, to examine items and notify bank of problems)].

If there is a preclusion under *Com. Code § 4406(f)*, the payor bank may not recover for breach of warranty under *Com. Code § 4208* with respect to the unauthorized signature or alteration to which the preclusion applies [*Com. Code § 4406(f)*].

For discussion of the availability of punitive damages for bad faith assertion of the one-year preclusion, see *§ 95.452[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Bank Deposits & Collections (Article 4)Customer-Bank RelationsCustomer DutiesGovernmentsLegislationStatutes of LimitationsTime Limitations

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9-95 California Forms of Pleading and Practice--Annotated § 95.325

§ 95.325 Paying or Collecting Checks After Notice of Death or Incompetence of Account Holder

A payor or collecting bank's authority to accept, pay, or collect an item or to account for proceeds of its collection, if otherwise effective, is not rendered ineffective by the drawer's or depositor's death or incompetence until the bank knows of the fact of death or of an adjudication of incompetence and has reasonable opportunity to act on it. The incompetence must exist at the time the item is issued or its collection is undertaken, and the bank must not know of an adjudication of incompetence [*Com. Code § 4405(a)*].

Even with this knowledge, a bank, for 10 days after the date of death, may pay or certify checks drawn on or before the date of death unless a person claiming an interest in the account orders payment stopped [*Com. Code § 4405(b)*; *see § 95.322*].

Any surviving relative, creditor, or other person who claims an interest in the account may give a direction to the bank not to pay checks or not to pay a particular check. The bank is not responsible for determining the validity of the claim or even whether it is "colorable." Anyone who has an interest in the estate, including a person named as a personal representative, even in a will that has not yet been admitted to probate, is entitled to claim an interest in the account [Official Comment 3 to UCC § 4-405 (1990)]. Persons described in *Prob. Code §§ 5201-5203* and *5307* (discussed in *§ 95.270*) obviously have "interests in the account." These include joint tenants and beneficiaries of Totten trusts (also known as "signature card trusts") [*see Prob. Code § 5122(a)* (types of accounts covered include checking, savings accounts); *see also* discussions in Ch. 316, *Joint Tenancy and Tenancy in Common* and Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts*]. The Multiple-Party Accounts Law (*Prob. Code § 5100 et seq.*) does not apply to accounts held by the following [*Prob. Code § 5122(b)*]:

- Corporations, partnerships, joint ventures, or other associations for business purposes;

- Accounts controlled by one or more persons as the duly authorized agent or trustee for a corporation, unincorporated association, or charitable or civic organization; or

- Regular fiduciary or trust accounts maintained in connection with a relationship that is established

other than by the deposit agreement, including accounts established for the deposit of funds of the estate of a ward, conservatee, or decedent.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsLiabilityCommercial Law (UCC)Bank Deposits & Collections (Article 4)CollectionsPresentment, Settlement & Payment

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9-95 California Forms of Pleading and Practice--Annotated § 95.326

§ 95.326 Warranties

[1] Terms Defined

The Division 4 warranties made on transfer and presentment [*Com. Code §§ 4207* (transfer), 4208 (presentment)] are substantially similar to the Division 3 warranties made by the parties on transfer and presentment [*Com. Code §§ 3416* (transfer), 3417 (presentment)]. The warranties differ to the extent necessary to reflect the fact that the Division 4 warranties apply to "items" [*see Com. Code § 4104(a)(9)*], whereas the Division 3 warranties apply to "instruments," which is to say, "negotiable instruments" [*see Com. Code § 3104(b)-(f)*]. A check is usually both a negotiable instrument within Division 3 and and an "item" within Division 4.

Similarly, the presentment warranties of both Division 3 and Division 4 apply to "unaccepted drafts." Checks are "unaccepted drafts" under both definitions [*see Com. Code §§ 3104(b)-(f), 4104(a)(7), (9)*]. "Draft" as used in Division 4 includes items that are orders to pay, which may include orders that are not instruments within Division 3 [Official Comment to U.C.C. § 4-208 (1990)].

[2] *Sun'n Sand* Drawer Warranty Rejected

Although warranties are usually litigated between banks because nonbank parties to checks usually have more direct and easily provable causes of action available to them, nonbank parties to checks may state causes of action for breach of warranties. Note, however, that the 1990 version of the Uniform Commercial Code rejects the holding in *Sun'n Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 148 Cal. Rptr. 329, 582 P.2d 920* , that there is a warranty made to the drawer when presentment is made to the drawee and that the drawer has a cause of action for beach of the presentment warranty. The Uniform Commercial Code contemplates drawer's actions for breach of presentment warranties only on presentment of a previously dishonored draft under *Com. Code § 3417(d)* [Official Comment 2 to U.C.C. § 3-417 (1990)].

[3] Transfer Warranties

[a] Types

A person who transfers an instrument for consideration warrants all of the following to any transferee and, if the transfer is by endorsement, to any subsequent transferee [*Com. Code § 3416(a)*]. A customer or collecting bank that transfers an item and receives a settlement or other consideration also warrants to the transferee and to any subsequent collecting bank that all of the following are applicable [*Com. Code § 4207(a)*; *see Mills v. U.S. Bank (2008) 166 Cal. App. 4th 871, 882, 83 Cal. Rptr. 3d 146* (drawer of check cannot have benefit of these warranties, since drawer cannot be "transferee" to whom these warranties are made)]:

- The warrantor is a person entitled to enforce the item [*see Com. Code § 3301* (discussed in Ch. 385, *Negotiable Instruments*)].

- All signatures on the item are authentic and authorized.

- The item has not been altered.

- The item is not subject to a defense or claim in recoupment [*see Com. Code § 3305(a)* (discussed in Ch. 385, *Negotiable Instruments*)] of any party that can be asserted against the warrantor.

- The warrantor has no knowledge of any insolvency proceeding commenced with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer [*see Com. Code § 3305(c)* (discussed in Ch. 385, *Negotiable Instruments*)].

- If the instrument is a demand draft [*see Com. Code § 3104(k)* (definition)], creation of the instrument according to the terms on its face was authorized by the person identified as drawer. Note that if this particular warranty is not given by a transferor or collecting bank under applicable conflict of law rules, then it is not given to that transferor when that transferor is a transferee, nor to any prior collecting bank of that transferee [*Com. Code §§ 3416(e), 4207(f)*].

These transfer warranties cannot be disclaimed with respect to checks [*Com. Code §§ 3416(c), 4207(d)*], not even by endorsement purporting to do so, such as one stating that the transfer is made "without recourse" [*Com. Code § 4207(b)*]. However, unless the tranferee or other potential plaintiff gives notice of a claim for breach of warranty to the warrantor within 30 days after he, she, or it has reason to know of the breach and the identity of the warrantor, the warrantor is discharged to the extent of any loss caused by the delay in giving notice of the claim [*Com. Code §§ 3416(c), 4207(d)*].

With respect to checks, additional warranties are made by "paying" and "returning" banks under *12 C.F.R. § 229.34* [Official Comment to U.C.C. § 4-207 (1990)].

[b] Actions and Damages for Breach of Transfer Warranties

If an item is dishonored, a customer or collecting bank transferring the item and receiving settlement or other consideration is obliged to pay the amount due on the item (1) according to the terms of the item at the time it was transferred, or (2) if the transfer was of an incomplete item, according to its terms when completed as stated in *Com. Code §§ 3115* and *3407* (both discussed in Ch. 385, *Negotiable Instruments*) [*Com. Code § 4207(b)*]. A cause of action for breach of transfer warranties can be maintained by a transferee, any subsequent tranferee to whom the warranties were made, or any subsequent collecting bank that took the item in good faith [*Com. Code §§ 3416(b), 4207(b)*].

A cause of action for breach of transfer warranties accrues when the claimant has reason to know of the breach [*Com. Code §§ 3416(d), 4207(e)*].

A person to whom the warranties are made that took the item in good faith may recover from the warrantor an amount equal to the loss suffered as a result of the breach, but not more than the amount of the item plus expenses and loss of interest incurred as a result of the breach [*Com. Code §§ 3416(b), 4207(c)*]. *Com. Code § 3416(b)*, however, does not provide for an award of attorney's fees to prevailing plaintiffs [*Grasso v. Crow (1997) 57 Cal. App. 4th 847, 849-850, 67 Cal. Rptr.2d 367* (court declined to expansively interpret section 3416(b) as authorizing award of attorney fees in absence of specific provision providing for such fees as item of expenses)].

[4] Presentment Warranties

[a] Types

If an unaccepted draft is presented to the drawee (payor bank) for payment or acceptance and the drawee pays or accepts the draft, then (1) the person obtaining payment or acceptance, at the time of presentment (payee, depositary bank, or collecting bank, usually) and (2) a previous transferor of the draft, at the time of transfer, warrant to the drawee that pays or accepts the draft in good faith that all of the following apply [*Com. Code §§ 3417(a), 4208(a)*]:

- The warrantor is, or was, at the time the warrantor transferred the draft, a person entitled to enforce the draft or authorized to obtain payment or acceptance of the draft on behalf of a person entitled to enforce the draft [*see Com. Code § 3301* (discussed in Ch. 385, *Negotiable Instruments*)].

- The draft has not been altered [*see Com. Code § 3407* (discussed in Ch. 385, *Negotiable Instruments*)].

- The warrantor has no knowledge that the signature of the purported drawer of the draft is unauthorized.

- If the draft is a demand draft [*see Com. Code § 3104(k)* (definition); *see also Com. Code §§ 3417(g), 4208(g)* ("demand draft" is a "check")], creation of the demand draft according to the terms on its face was authorized by the person identified as drawer.

If the warranty described in (4), *above*, is not given by a transferor under applicable conflict of law rules, then the warranty is not given to that transferor when that transferor is a transferee [*Com. Code §§ 3417(h), 4208(h)*].

[b] Damages for Breach of Presentment Warranties

A drawee making payment may recover from a warrantor damages for breach of warranty equal to the amount paid by the drawee less the amount the drawee received or is entitled to receive from the drawer because of the payment. In addition, the drawee is entitled to compensation for expenses and loss of interest resulting from the breach. The right of the drawee to recover these damages is not affected by any failure of the drawee to exercise ordinary care in making payment. If the drawee accepts the draft, breach of warranty is a defense to the obligation of the acceptor. If the acceptor makes payment with respect to the draft, the acceptor is entitled to recover from a warrantor for breach of warranty the amounts stated above [*Com. Code §§ 3417(b), 4208(b)*].

This alters the result in cases decided under the former Commercial Code when both the drawee and the drawer were negligent. The loss is placed on the drawer, except that when a drawee asserts a claim for breach of warranty based on an unauthorized endorsement of the draft or on an alteration of the draft, the warrantor may defend on the following grounds [*Com. Code §§ 3417(c), 4208(c)*]:

- The endorsement is effective under *Com. Code § 3404* or *3405* (discussed under *§§ 95.329, 95.330*) [

see also §§ 95.453, 95.454]; or

- The drawer is precluded under *Com. Code § 3406* or *4406* from asserting the unauthorized endorsement or alteration against the drawee [*see §§ 95.451, 95.452,* 49].

Com. Code §§ 3417(c) and *4208(c)* augment changes in *Com. Code § 4406(f),* which now provides that if the drawer/customer is precluded from demanding recredit to the account for an item improperly paid and returned more than a year ago with the statement, the drawee cannot recover for breach of warranty of presentment with respect to the unauthorized signature or alteration to which the preclusion applies [*Com. Code § 4406(f)*; *see Com. Code § 4406(d)(2)* (discussed in *§ 95.451*)].

[5] Warranties on Second Presentment

The presentment warranties of *Com. Code §§ 3417(d)* and *4208(d)* apply to presentment of notes and accepted drafts to any party obligated on the instrument or item, including an endorser, and to presentment of dishonored drafts if presentment is made to the drawer or endorser [Official Comment 4 to U.C.C. § 3-417 (1990)].

If (1) a dishonored draft is presented for payment to the drawer or an endorser or (2) any other item or instrument is presented for payment to a party obliged to pay the item or instrument, and the item or instrument is paid, the person obtaining payment and a prior transferor of the item or instrument warrant to the person making payment in good faith that the warrantor is, or was, at the time the warrantor transferred the item or instrument, a person entitled to enforce the item or instrument or authorized to obtain payment on behalf of a person entitled to enforce the item or instrument [*Com. Code §§ 3417(d), 4208(d)* (to drawer or endorser); *see Com. Code § 3301* (discussed in Ch. 385, *Negotiable Instruments*)]. A drawer or endorser who pays the check may recover from any warrantor for breach of warranty the amount paid, plus expenses and loss of interest resulting from the breach [*Com. Code §§ 3417(d), 4208(d)*]. These warranties cannot be disclaimed with respect to checks [*Com. Code §§ 3417(e), 4208(e)*].

[6] Encoders' Warranties

A person who encodes information on or with respect to an item after issue warrants to any subsequent collecting bank and to the payor bank or other payor that the information is correctly encoded. If the customer of a depositary bank encodes, that bank also makes the warranty [*Com. Code § 4209(a)*]. Normally, only the depositary bank encodes items deposited for collection. However, some customers who are payees of large volumes of checks may do the encoding and retain the actual checks. If the customer does the encoding and retention, the depositary bank is also liable for breach of this warranty [Official Comment 1 to U.C.C. § 4-209 (1990)].

A depositary bank that does not present items, but undertakes to retain them pursuant to an agreement for electronic presentment, warrants to any subsequent collecting bank and to the payor bank or other payor that retention and presentment of the item comply with the agreement. If a customer of a depositary bank undertakes to retain an item, that bank also makes this warranty [*Com. Code § 4209(b)*]. A collecting bank or other person to whom encoders' warranties are made and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, plus expenses and loss of interest incurred as a result of the breach [*Com. Code § 4209(c)*].

The misencoding of an amount on the MICR line is not an alteration within the meaning of *Com. Code § 3407(a),* which defines alteration as a change in the obligation of a party [Official Comment 2 to U.C.C. § 4-209 (1990)]. If the drawer wrote a check for $2,500 and the depositary bank encoded it as $25,000, that would not change the obligation of any party: the payor bank cannot charge the drawer's account any more than $2,500. This warranty allows the payor bank to recover the amount paid over $2,500 from the depositary bank without having to pursue claims against the intervening collecting banks or a payee. Intervening collecting banks are not liable for the misencoding. If a $25,000

check was misencoded as $2,500, the payor bank is not likely to suffer a loss unless the drawer's account is less than the amount of the check. If the payor pays the item even though an overdraft is created, it need not pursue its remedy against the drawer beyond the amount in the drawer's account before bringing an action for breach of warranty against the depositary (encoding) bank [Official Comment 2 to U.C.C. § 4-209 (1990)].

[7] Regulation CC (12 C.F.R. Part 229) Warranties by Paying or Returning Bank

Each paying bank or returning bank that transfers a returned check and receives a settlement or other consideration for it warrants the following to the transferee returning bank, any subsequent returning bank, the depositary bank, and the owner of the check [*12 C.F.R. § 229.34(a)*]:

- The paying bank, or in the case of a check payable by a bank and payable through another bank, the bank by which the check is payable, returned the check within its deadline under the Commercial Code [*see Com. Code §§ 4301, 4302*], Regulation J [12 C.F.R. Part 210], or *12 C.F.R. § 229.30(c)* (relating to extension of deadlines in an effort to expedite delivery);

- It is authorized to return the check;

- The check has not been materially altered; and

- In the case of a notice in lieu of return, the original check has not and will not be returned.

The warranties of *12 C.F.R. § 229.34(a)* are not made with respect to a check drawn on the United States Treasury, a U.S. Postal Service money order, or a check drawn on a state or unit of general local government that is not payable through or at a bank [*12 C.F.R. § 229.34(a)*].

Each paying bank that gives a notice of nonpayment warrants the following to the transferee bank, any subsequent transferee bank, the depositary bank, and the owner of the check [*12 C.F.R. § 229.34(b)*]:

- The paying bank, or in the case of a check payable by a bank and payable through another bank, the bank by which the check is payable, returned or will return the check within its deadline under the Commercial Code [*see Com. Code §§ 4301, 4302*], Regulation J [12 C.F.R. Part 210], or *12 C.F.R. § 229.30(c)* (relating to extension of deadlines in an effort to expedite delivery);

- It is authorized to send the notice; and

- The check has not been materially altered.

The warranties of *12 C.F.R. § 229.34(b)* are not made with respect to checks drawn on a state or a unit of general local government that are not payable through or at a bank [*12 C.F.R. § 229.34(b)*].

Each bank that presents one or more checks to a paying bank and in return receives a settlement or other consideration warrants to the paying bank that the total amount of the checks presented is equal to the total amount of the settlement demanded by the presenting bank from the paying bank [*12 C.F.R. § 229.34(c)(1)*]. Each bank that transfers one or more checks or returned checks to a collecting, returning, or depositary bank and in return receives a settlement or other consideration warrants to the transferee bank that the accompanying information, if any, accurately indicates the total amount of the checks or returned checks transferred [*12 C.F.R. § 229.34(c)(2)*]. Each bank that presents or transfers a check or returned check warrants to any bank that subsequently handles it that, at the time of presentment or transfer, the information encoded after issue in magnetic ink on the check or returned check is correct [*12 C.F.R. § 229.34(c)(3)*]. If a bank settles with another bank for checks presented, or for returned checks for which it is the depositary bank, in

amount exceeding the total amount of the checks, the settling bank may set off the excess settlement amount against subsequent settlements for checks presented, or for returned checks for which it is the depositary bank, that it receives from the other bank [*12 C.F.R. § 229.34(c)(4)*].

A bank that transfers or presents a remotely created check [*see 12 C.F.R. § 229.2(fff)* (definition)] and receives a settlement or other consideration warrants to the transferee bank, any subsequent collecting bank, and the paying bank that the person on whose account the remotely created check is drawn authorized the issuance of the check in the amount stated on the check and to the payee stated on the check. In this context, "account" includes an account as defined in *12 C.F.R. § 229.2(a)* [*see § 95.222[1]*] as well as a credit or other arrangement that allows a person to draw checks that are payable by, through, or at a bank [*12 C.F.R. § 229.34(d)(1)*]. If a paying bank asserts a claim for breach of the foregoing warranty, the warranting bank may defend by proving that the customer of the paying bank is precluded under U.C.C. § 4-406, as applicable [*see § 95.451*], from asserting against the paying bank the unauthorized issuance of the check [*12 C.F.R. § 229.34(d)(2)*].

The measure of damages for breach of these warranties is the same as the measure under the Commercial Code; they may not exceed the consideration received by the paying or returning bank, plus finance charges and expenses related to the returned check, if any [*12 C.F.R. § 229.34(e)*].

If a bank is sued for breach of a warranty prescribed in *12 C.F.R. § 229.34*, it may give a prior bank in the collection or return chain written notice of the litigation, and the bank notified may then give similar notice to any other prior bank. If the notice states that the bank notified may come in and defend and that failure to do so will bind the bank notified in an action later brought by the bank giving the notice as to any determination of fact common to the two litigations, the bank notified is so bound unless after seasonable receipt of the notice the bank notified does come in and defend [*12 C.F.R. § 229.34(f)*]. Unless a claimant gives notice of a claim for breach of warranty to the bank that made the warranty within 30 days after the claimant has reason to know of the breach and the identity of the warranting bank, the warranting bank is discharged to the extent of any loss caused by the delay in giving notice of the claim [*12 C.F.R. § 229.34(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsLiabilityBanking LawFederal Reserve SystemExpedited Funds Availability ActCommercial Law (UCC)Bank Deposits & Collections (Article 4)CollectionsPresentment, Settlement & PaymentCommercial Law (UCC)Bank Deposits & Collections (Article 4)CollectionsWarranties

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9-95 California Forms of Pleading and Practice--Annotated § 95.327

§ 95.327 Forged and Altered Checks

[1] Two Types of Forgeries

There are two types of forged checks--those with forged (unauthorized) maker's signatures, and those with forged endorsements [*see Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank (1978) 85 Cal. App. 3d 797, 804, 821-822, 149 Cal. Rptr. 883]* . A check with both a forged drawer's signature and a forged endorsement may be referred to as a double forgery. The Commercial Code provisions are designed to place the loss on the person who dealt with the wrongdoer, in the belief that that person (or bank) is in the best position to protect against the loss. Disregarding certain exceptions, ultimate liability for payment of a check bearing a forged drawer's signature usually rests with the drawee bank, while liability for payment of a check bearing a forged endorsement lies with the collecting bank. The rationale is that the drawee bank possesses the signature card and is in the best position to detect a forged drawer's signature, while the collecting bank is in the best position to detect a forged endorsement because it presumably confronts the endorser [*Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank (1978) 85 Cal. App. 3d 797, 804, 821-822, 149 Cal. Rptr. 883]* .

[2] Drawee's Liability for Forged or Unauthorized Maker's Signature

Under *Com. Code § 4401(a)*, a drawee is not entitled to charge the maker's account for a check with an unauthorized maker's signature, or without a sufficient maker's signatures [*see §§ 95.316, 95.450*]. The drawee may cut off its liability if the drawer does not report the forgery within 30 days after receipt of the statement of account on which the item was drawn [*see Com. Code § 4406(c), (d)(2)*; *see also § 95.324* and *see §§ 95.451 -95.452*]. Note that *Com. Code § 4406(f)* applies without regard to care or lack of care of either the customer or the bank and precludes a customer who does not within one year after the statement or items are made available to the customer discover and report the customer's unauthorized signature from asserting it against the bank [*Com. Code § 4406(f)*; *Espresso Roma Corp. v. Bank of Am. (2002) 100 Cal. App. 4th 525, 528, 124 Cal. Rptr. 2d 549]* .

The drawee is likely to charge the account initially, unless the check is postdated or the subject of a stop-payment order or payment would create an overdraft. *Commercial Cotton* once upheld a cause of action for breach of duty of good faith and fair dealing for the drawee's failure to reverse a charge for a check with a forged maker's signature. The blank check was (orally) reported lost more than a year after the theft, but four years before the forged check was presented

for payment. The court awarded the customer tort and punitive damages [*Commercial Cotton Co. v. United California Bank (1985) 163 Cal. App. 3d 511, 516, 209 Cal. Rptr. 551]* . Although that cause of action has been displaced [*see Copesky v. Superior Court (1991) 229 Cal. App. 3d 678, 694, 280 Cal. Rptr. 338* (same court reversing its holding in *Commercial Cotton* in light of *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373*)], tort damages are recoverable if the bank, in making or failing to reverse the charge, also failed to adhere to reasonable commercial standards prevailing in the geographic region in which it operates [*see Com. Code § 4103(e)* (discussed under *§ 95.315*)].

[3] Loss for Forged Payee Endorsement Initially on Depositary Bank

Under *Com. Code § 3420*, the loss for paying a check on a forged endorsement falls on the one who gave value to the thief/forger. That is usually the depositary bank [*see* Official Comment 1 to U.C.C. § 3-420 (1990)]. The measure of liability is the amount payable on the instrument,and may not exceed the amount of the plaintiff's interest in the instrument [*Com. Code § 3420(b)*; *see Stenseth v. Wells Fargo (1995) 41 Cal. App. 4th 457, 465-466, 48 Cal. Rptr. 2d 192* (payee not entitled to recover damages under *Civ. Code § 3336* for time and effort spent attempting to recover converted property)]. If the forger stole the check before it was delivered to the payee, the payee never became the owner or holder of the check, so the payee has no cause of action for conversion [*Com. Code § 3420(a)(2)*]. The payee may still enforce the underlying obligation [*see* Official Comment 1 to U.C.C. § 3-420 (1990)]. For a complaint for use by a payee whose endorsement has been forged to recover the amount of the check from the depositary bank that paid the forger, *see § 95.461*.

Once the payee has taken delivery of the check, however, the payee no longer can enforce the underlying obligation [*see Com. Code § 3310(b)(4)* (discussed in Ch. 385, *Negotiable Instruments*)], so the payee needs a cause of action for conversion. Thus, if the forger steals a check after it is delivered to the payee and forges the payee's endorsement, the payee has causes of action for conversion against all the banks in the collection chain, including the payor (drawee) bank [*see Cooper v. Union Bank (1973) 9 Cal. 3d 371, 381, 107 Cal. Rptr. 1, 507 P.2d 609* (payee has action against drawee)]. Although the payee may sue any bank in the collection chain, *Com. Code § 3420(c)* makes it far more efficacious for the payee to sue the depositary bank. Each of the other banks in the collection chain is apt to defend on the ground of having paid the proceeds in good faith to one not entitled to enforce the instrument. A payee who sues both depositary and payor banks is entitled to only one recovery [*see* Official Comment 3 to U.C.C. § 3-420 (1990); *see also Resh v. Connecticut National Bank (1996) 89 Fed. 3d 598, 601* (payee ratifies payment made by drawee to depositary when payee sues both depositary and drawee in single suit in state court)].

The drawer has no cause of action for conversion [*Com. Code § 3420(a)(1)*]. The drawer's remedy is under *Com. Code § 4401(a)*, for recredit of any unauthorized charge to his or her account for payment of a check on a forged endorsement [Official Comment 1 to U.C.C. § 3-420 (1990)].

As between the banks, each bank has a claim for breach of warranties against the bank from which it took the check [*Com. Code §§ 3417(a)(1), 4208(a)(1)*; *Cooper v. Union Bank (1973) 9 Cal. 3d 371, 381, 107 Cal. Rptr. 1, 507 P.2d 609]* , until, once again, the loss falls on the depositary bank [Official Comment 1 to U.C.C. § 3-420 (1990)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsLiabilityCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesForgery & FraudCommercial Law (UCC)Bank Deposits & Collections (Article 4)CollectionsPresentment, Settlement & PaymentCommercial Law (UCC)Bank Deposits & Collections (Article 4)Customer-Bank RelationsAccount ChargesTortsIntentional TortsConversionGeneral Overview

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§ 95.328 Missing Endorsement

A check is converted if a bank makes or obtains payment with respect to the check, for a person not entitled to enforce the check or receive payment [*Com. Code § 3420(a)*]. If a bank makes payment with respect to a check, to a person not entitled to receive payment, then the bank is liable for conversion under *Com. Code § 3420(a)*, without regard to whether the check bore a forged or unauthorized endorsement or whether there was a missing endorsement [*Gil v. Bank of America (2006) 138 Cal. App. 4th 1371, 1377, 42 Cal. Rptr. 3d 310]* . It is the depositary bank--the bank to which the check is first presented for payment--that ultimately is liable. If the payor bank is not the depositary bank, or if the check passed through any collecting banks, the plaintiff need not sue any but the depositary bank [*Gil v. Bank of America (2006) 138 Cal. App. 4th 1371, 1378, 42 Cal. Rptr. 3d 310]* .

An action for conversion of the check on the ground of a missing endorsement may not be brought by the issuer or acceptor of the check or by a payee or endorsee who did not receive delivery of the check either directly or through delivery to an agent or a copayee [*Com. Code § 3420(a)*]. An action may be brought by a copayee who endorsed the check, on the ground that the endorsement of another copayee was missing [*Gil v. Bank of America (2006) 138 Cal. App. 4th 1371, 1377, 42 Cal. Rptr. 3d 310* (homeowner's action for conversion of check drawn by fire insurer to pay claim was based on absence of mortgage lender's endorsement)]. The measure of the bank's liability is presumed to be the amount payable on the check, but recovery may not exceed the amount of the plaintiff's interest in the check [*Com. Code § 3420(b)*]. Thus, when there are copayees, the plaintiff's recovery could be limited to an amount less than the amount payable on the check [*Gil v. Bank of America (2006) 138 Cal. App. 4th 1371, 1377, 42 Cal. Rptr. 3d 310]* .

The conversion action is the sole remedy for a payee who is injured by payment of the check without a necessary endorsement. Common law remedies such as an action for negligence are supplanted by *Com. Code § 3420* [*Gil v. Bank of America (2006) 138 Cal. App. 4th 1371, 1379, 42 Cal. Rptr. 3d 310]* .

For a complaint for use by a payee whose endorsement was missing, to recover the amount of the check from the depositary bank that paid on the check, *see § 95.461*.

For an affirmative defense by a bank asserting that the person who made a deposit had the authority to do so, *see §*

95.462.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesConversionCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesSignatures

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9-95 California Forms of Pleading and Practice--Annotated § 95.329

§ 95.329 Checks Payable to "Fictitious Payees" or Impostors

Any endorsement is valid on behalf of a payee that is (1) a nonexistent person (a "fictitious payee") or (2) a person who the maker never intended to have any interest in the item, in favor of a bank or person who, in good faith, takes the item for payment or collection [*see Com. Code § 3404(b)* (set forth in *§ 95.453[3]*)].

An example of the latter involves an accounts payable clerk who is authorized to prepare and sign checks on behalf of her employer to pay suppliers. Checks over a certain amount must also be signed by the treasurer or another officer. ABC is a supplier of the employer, but the employer does not owe ABC anything this month. Nevertheless, the clerk makes a $50,000 check payable to ABC intending to pull it from the outgoing mail when no one is looking and deposit it to her account or cash it and leave for the Yucatan. The clerk's intent governs [*Com. Code §§ 3110(a), (b), 3404(b)*], so ABC never had an interest in the check, and the clerk's forged endorsement is valid [*see* Case 3 of Official Comment 2 to U.C.C. § 3-404 (1990)]. *Com. Code § 3404(b)(2)* prevents any action against the depositary bank. If the employer owed ABC money and the clerk made a check payable to ABC for the amount owing, alone or with the second signature of another authorized person, and then later decided to, and did, steal the check, the forged endorsement would be valid, but not because of *Com. Code § 3404*. Rather, *Com. Code § 3405(b)* would make the endorsement valid in favor of anyone who took the check, in good faith, for value or collection [*see* Case 6 of Official Comment 3 to U.C.C. § 3-405 (1990) (discussed in *§ 95.454*)].

If an impostor induces a person to issue an instrument to the impostor, or to a person acting in concert with the impostor, by impersonating the payee of the instrument or a person authorized to act for the payee, any endorsement in the name of the payee is effective in favor of a person who, in good faith, pays the instrument or takes it for value or for collection [*Com. Code § 3404(a)*]. Impostors dupe drawers, who then usually seek to require the payor bank to reverse the charge made to their account. As long as the drawee bank acted in good faith in paying the check, the drawer cannot require recredit of the account. Similarly, the depositary bank that cashed or collected the check payable to an impostor is entitled to retain the proceeds if it did not know about the forgery [Official Comment 3 to U.C.C. § 3-404 (1990); *see also § 95.453[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesImposters & Fictitious Payees

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9-95 California Forms of Pleading and Practice--Annotated § 95.330

§ 95.330 Forgery by "Responsible Employee"

[1] Loss Initially on Employer

Com. Code § 3405 addresses a group of scenarios, all based on the malfeasance of an employee, independent contractor, or other agent of the payee or maker. A person in that position, whether having responsibility to endorse and deposit checks or to issue and deliver them, is in a position to take advantage of the maker or payee. Again, as part of a design to place the loss on the person best able to prevent or detect it, the Code places the loss on the employer in most situations [*Com. Code § 3405(b)*; *see Com. Code § 3405(a)(3)* (list of functions considered "responsibility" with respect to checks, discussed in Ch. 385, *Negotiable Instruments*); *see also § 95.454[3]*].

[2] Forged Endorsement Valid as Against Holders in Due Course

When an employee forges the employer's endorsement, that endorsement is good as against any other person or bank who, in good faith, pays it, or takes it for value or collection [*Com. Code § 3405(b)*; *see Com. Code §§ 3402(a)* (represented person bound by signature), 3403(a) (unauthorized signature effective in favor of person who in good faith pays instrument or takes for value)], except one that fails to exercise ordinary care [*Com. Code § 3405(b)*; *see Com. Code § 3404(d)* (person taking for value or collection fails to exercise ordinary care)]. The loss is on the payee/employer unless and until there is some handling of the item by a bank that constitutes failure to exercise ordinary care, that is, handling of the item that is not in accordance with the commercial standards prevailing in the region in which it operates [*see Com. Code § 3103(a)(7)* (defining ordinary care); Case 3 of Official Comment 3 to U.C.C. § 3-405 (1990); *Newman v. Wells Fargo Bank (2001) 87 Cal. App. 4th 73, 83-85, 104 Cal. Rptr. 2d 310* (complaint alleging that bank allowed plaintiff's employees to cash or deposit checks in their personal accounts despite suspicious circumstances indicating fraud stated cause of action under *Com. Code § 3405(b)*); *see also § 95.454*].

[3] Unauthorized Maker's Signature

When an employee forges the employer's signature as maker, or uses a check writing machine to draw an unauthorized check, that signature is valid in favor of any other person or bank who pays the check or takes it for value [*see Com. Code § 3403(a)*; *see also Com. Code § 3402(a)* (represented person bound by signature)], except one that fails to

exercise ordinary care [*Com. Code § 3404(d)* (person taking for value or collection fails to exercise ordinary care)]. The loss for an unauthorized signature of a "represented person" made by his or her "representative" is on the maker unless and until he/she/it notifies the drawee that unauthorized items have been charged against the account. If the employee who makes the unauthorized signature is authorized to issue checks, or cause them to be issued, the drawee can charge the employer's account [*see Com. Code § 3402(a)*].

The validity of the signature rests to some extent on the intent of the wrongdoer. For instance, if the signature of more than one person is required to constitute the authorized signature of an organization, the signature of the organization is unauthorized if one of the required signatures is lacking [*Com. Code § 3403(b)*].

For further discussion, see Ch. 385, *Negotiable Intruments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Negotiable Instruments (Article 3)EnforcementHolders in Due CourseRequirementsCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesForgery & Fraud

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§ 95.331 Drawee's Liability for Late Return

[1] Midnight Deadline

Actions for damages arising from late returns are most frequently brought against the drawee or paying bank by other banks in the collection chain [*see, e.g., Los Angeles Nat. Bank v. Bank of Canton (1991) 229 Cal. App. 3d 1267, 280 Cal. Rptr. 831* (depositary bank against drawee)]. Nevertheless, they are mentioned here because if the loss was absorbed by the drawer or payee rather than by the depositary, collecting, or returning bank, the drawer or payee will be able to recover the amount of the check from the payor or returning bank that failed to act by its midnight deadline [*see Com. Code §§ 4301, 4302*; *12 C.F.R. §§ 229.30, 229.34, 229.38*; *see also Chicago Title Ins. Co. v. California Canadian Bank (1991) 1 Cal. App. 4th 798, 812-813, 2 Cal. Rptr. 2d 422 ; Bank of America v. Security Pacific Nat. Bank (1972) 23 Cal. App. 3d 638, 642-643, 100 Cal. Rptr. 438]* . Furthermore, the payor's settlement with the presenting bank, and thus with the other banks in the collection chain, becomes final if the bank fails to send written notice of dishonor (or nonpayment if the item is unavailable for return) or to return the check by its "midnight deadline" [*Com. Code § 4301(a)* (except documentary drafts and checks paid "over the counter," that is, cashed at branch)]. If the payor takes a demand item for credit on its books, it may return the item or send notice of dishonor and may revoke any credit given or recover the amount of any credit withdrawn by its customer if it acts before its midnight deadline [*Com. Code § 4301(b)*].

An item presented through a clearinghouse is returned when it is delivered to the presenting or last collecting bank or to the clearinghouse or is sent or delivered in accordance with clearinghouse rules [*Com. Code § 4301(d)(1)*]. In all other cases, such as presentation by another customer for payment over the counter or for deposit to an account, an item is returned (by the payor bank) when it is sent or delivered to the bank's customer (or other transferor) or in accordance with the customer's or transferor's instruction [*Com. Code § 4301(d)(2)*].

The "midnight deadline" is midnight of the next banking day following the banking day of receipt [*Com. Code §§ 4301(a), 4302(a)(1)*; *see Com. Code § 4104(a)(10)* (defining "midnight deadline")]. The statutory midnight deadline begins to run when the Federal Reserve makes the checks available for pickup, rather than when the payor bank actually receives the checks from its courier [*Los Angeles Nat. Bank v. Bank of Canton (1995) 31 Cal. App. 4th 726, 739-740,*

37 Cal. Rptr. 2d 389] . Because the purpose of the midnight deadline rule is to ensure prompt notification, if the deadline did not begin to run until the bank or its agent actually decided to pick up the checks from the Federal Reserve, the bank could defeat the protection sought to be afforded by imposing strict deadlines for final payment or dishonor [*Los Angeles Nat. Bank v. Bank of Canton (1995) 31 Cal. App. 4th 726, 739-740, 37 Cal. Rptr. 2d 389 , quoting Los Angeles Nat. Bank v. Bank of Canton (1991) 229 Cal. App. 3d 1267, 1280, 280 Cal. Rptr. 831]* . If the drawee has the Federal Reserve clearinghouse deliver the drawee's checks to a processor, the processor is the drawee's agent, and the drawee "receives" checks for purposes of its compliance with the midnight deadline when they are delivered to its processor [*Los Angeles Nat. Bank v. Bank of Canton (1991) 229 Cal. App. 3d 1267, 1280, 280 Cal. Rptr. 831]* .

If the check is "otherwise unavailable for return," the payor bank complies with the midnight deadline if it gives written notice of dishonor (or nonpayment) by then [*Com. Code § 4301(a)(2)*; *Lincoln Nat. Bank v. Dworsky (1990) 218 Cal. App. 3d 852, 855-857, 267 Cal. Rptr. 361* (bank sent photocopy of check and notice of dishonor)]. A check is "otherwise unavailable for return" if it is lost or destroyed. The check does not have to be permanently lost or stolen, only unavailable for return at the time the bank must act to meet its midnight deadline. It does not matter if the check subsequently becomes available [*Lincoln Nat. Bank v. Dworsky (1990) 218 Cal. App. 3d 852, 857, 267 Cal. Rptr. 361* (some evidence that check was later returned to its maker in monthly statement)].

[2] Expeditious Return

12 C.F.R. § 229.30(a) imposes the additional requirement that a paying bank return a check in an expeditious manner. One test of expeditious return is the forward-collection test, which generally requires that the return by the paying bank to the depositary bank be made in the same manner that the paying bank (or a similarly situated bank) would use in presenting a check of a similar amount as the returned check to the depositary bank for forward collection [*12 C.F.R. § 229.30(a)(2)*; *see 12 C.F.R. § 229.2(ee)* (defining "similarly situated bank")]. The return is also expeditious if it is made in such a manner that the returned check would normally arrive at the depositary bank no later than 4 P.M. (local time of the depositary bank) on (1) the second business day following the banking day on which the check was presented to the paying bank, if the paying bank is located in the same check processing region as the depositary bank, or (2) the fourth business day following the banking day on which the check was presented to the paying bank, if the paying bank is not located in the same check-processing region as the depositary bank [*12 C.F.R. § 229.30(a)(1)*; *see 12 C.F.R. § 229.30(b), (c), (f)* (exception for unidentifiable depositary bank, extension for expedited delivery, and notice when check is unavailable)].

If the paying bank determines not to pay a check in the amount of $2,500 or more, a notice to that effect must be provided to the depositary bank. That notice must be received by the depositary bank by 4 P.M. (local time) on the second business day following the banking day on which the check was presented to the paying bank [*12 C.F.R. § 229.33(a)*]. Unless the check is used to satisfy the notice requirement, the requirement for notice is independent of the requirement for expeditious return of the check under *12 C.F.R. § 229.30(a)*. If a paying bank fails both to comply with the notice requirement and to comply with the requirements for timely and expeditious return under 12 C.F.R. § 229.30, the Commercial Code, and Regulation J (12 C.F.R. Part 210), the paying bank is liable either under *12 C.F.R. § 229.33* or under the other requirements, but not both [12 C.F.R. § 229, Appendix E, Commentary to *12 C.F.R. § 229.33(a)*].

Neither the expeditious return requirement [*12 C.F.R §§ 229.30(a), 229.31(a)*] nor the notice of nonpayment requirement [*12 C.F.R § 229.33*] nor the same day settlement requirement [*12 C.F.R § 229.36(f)*] applied to a check drawn on the United States Treasury, a United States Postal Service money order, or a check drawn on a state or unit of general local government that is not payable through or at a bank [*12 C.F.R. § 229.42*].

[3] Damages for Late Return and Limitation Period

In the absence of bad faith on the part of the bank, damages for late return are limited to the amount of the check, except that the amount may be reduced by the amount of any loss the payee would have incurred even if the paying bank had

exercised ordinary care [*see Com. Code §§ 4103(e), 4302*; *12 C.F.R. § 229.38(a)*; *see also Bank of America v. Security Pacific Nat. Bank (1972) 23 Cal. App. 3d 638, 643, 100 Cal. Rptr. 438]* . A drawee may be held strictly liable under *Com. Code § 4302(a)* for its failure to return checks by the applicable deadline, regardless of whether any actual damages suffered by the other party were solely a result of the drawee's failure to comply with *Com. Code § 4302*. This strict liability rule of *Com. Code § 4302* displaces the defense that a party's loss was caused by its own negligence [*see Com. Code § 1103(b)* (only applies if not displaced by other particular provision); *Chicago Title Ins. Co. v. California Canadian Bank (1991) 1 Cal. App. 4th 798, 808-813, 2 Cal. Rptr. 2d 422* ; *Los Angeles Nat. Bank v. Bank of Canton (1991) 229 Cal. App. 3d 1267, 1278, 280 Cal. Rptr. 831]* . For example, a drawee bank was strictly liable for failure to make timely return of a check that was not properly payable even though a contributing factor in the loss was the fact that plaintiff/depositary bank's employee gave cash exceeding her authorized limit against uncollected deposited items [*Los Angeles Nat. Bank v. Bank of Canton (1991) 229 Cal. App. 3d 1267, 1278, 280 Cal. Rptr. 831]* . This rule of strict liability is intended to displace defenses in favor of uniformity, certainty, and finality of commercial transactions [*Chicago Title Ins. Co. v. California Canadian Bank (1991) 1 Cal. App. 4th 798, 808-813, 2 Cal. Rptr. 2d 422]* .

A bank that fails to act in good faith may be liable for other damages, if any, suffered by the party as a proximate consequence [*12 C.F.R. § 229.38(a)*]. If a paying bank fails both to comply with *12 C.F.R. § 229.30(a)* and with the deadline for return under *Com. Code § 4301* or *4302*, Regulation J (12 C.F.R. Part 210), or *12 C.F.R. § 229.30(c)* in connection with one check, the bank is liable under either *12 C.F.R. § 229.30(a)* or such other provision, but not both [*12 C.F.R. § 229.38(b)*]. A paying bank is not liable for the insolvency, neglect, misconduct, mistake, or default of another bank or person [*12 C.F.R. § 229.38(a)*].

An action under *Com. Code § 4302* is subject to the three-year statute of limitations of *Com. Code § 4111*. An action under *12 C.F.R. § 229.38* must be brought within one year [*12 C.F.R. § 229.38(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Bank Deposits & Collections (Article 4)CollectionsMidnight DeadlineCommercial Law (UCC)Bank Deposits & Collections (Article 4)CollectionsPresentment, Settlement & PaymentGovernmentsLegislationStatutes of LimitationsTime Limitations

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9-95 California Forms of Pleading and Practice--Annotated § 95.332

§ 95.332 When Payment by Drawee Becomes Final

An item is finally paid by a payor bank when that bank has first done any of the following [*Com. Code § 4215(a)*]:

- Paid the item in cash [*but see Com. Code § 4215(e)* (if payor is also depositary bank)];

- Settled for the item without having a right to revoke the settlement under statute, clearing house rule, or agreement; or

- Made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearing house rule, or agreement.

If provisional settlement for an item does not become final, the item is not finally paid [*Com. Code § 4215(b)*].

When provisional settlements between the presenting and payor banks are made through a clearing house or by debits or credits in an account between them, then to the extent that provisional debits or credits for theitem are entered in accounts between the presenting and payor banks or between the presenting and successive prior collecting banks seriatim, they become final on final payment of the items by the payor bank [*Com. Code § 4215(c)*].

Once a collecting bank receives a settlement for an item that is or becomes final, the collecting bank is accountable to its customer for the amount of the item and any provisional credit given for the item in an account with its customer becomes final [*Com. Code § 4215(d)*].

Subject to (1) applicable law stating a time for availability of funds and (2) any right of the bank to apply the credit to an obligation of the customer, credit given by a bank for an item in a customer's account becomes available for withdrawal as of right [*Com. Code § 4215(e)*]:

- If the bank has received a provisional settlement for the item, when the settlement becomes final and the bank has had a reasonable time to receive return of the item and the item has not been received within

that time; or

- If the bank is both the depositary bank and the payor bank, and the item is finally paid, the opening of the bank's second banking day following receipt of the item.

Subject to applicable law stating a time for availability of funds and any right of a bank to apply a deposit to an obligation of the depositor, a deposit of money becomes available for withdrawal as of right at the opening of the bank's next banking day after receipt of the deposit [*Com. Code § 4215(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Bank Deposits & Collections (Article 4)CollectionsPresentment, Settlement & Payment

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9-95 California Forms of Pleading and Practice--Annotated § 95.333

§ 95.333 Collecting Bank's Duties With Respect to Deposited Items

[1] Agent and Holder

The bank in which checks are deposited to an account (as opposed to drawn on the account) is termed the depositary bank, which is also a collecting bank and in many cases is the only collecting bank [*see Com. Code § 4105(2), (5)*; *see also § 95.312*]. A bank's duties as collecting bank under Division 4 of the Commercial Code are set forth in Com. Code § 4200 et seq., and include the duty to present all items promptly for collection and make the proceeds available within the times specified by law [*see, e.g., 12 U.S.C. § 4001 et seq.* (Expedited Funds Availability Act); 12 C.F.R. Part 229 (Reg. CC)].

Unless a contrary intent clearly appears prior to the time that a settlement given by a collecting bank for a check is or becomes final [*see Com. Code §§ 4213-4215*], the bank is an agent or subagent of the owner of the check and any settlement, as between them, is provisional [*Com. Code § 4201(a)*; *Symonds v. Mercury Savings & Loan Assn. (1990) 225 Cal. App. 3d 1458, 1464-1468, 275 Cal. Rptr. 871]* . This is so regardless of the form of endorsement or lack of endorsement and even though credit given forthe check is subject to immediate withdrawal as of right or is in fact withdrawn. But the continuance of ownership of an item by its owner and any rights of the owner to proceeds of the check are subject to rights of a collecting bank, such as those resulting from outstanding advances on the check and valid rights of recoupment or setoff [*Com. Code § 4201(a)*].

When a check is handled by banks for purposes of presentment, payment, collection, or return, the relevant provisions of Division 4 apply even though the action of parties clearly establishes that a particular bank has purchased the check and is the owner of it [*Com. Code § 4201(a)*; *see* 12 C.F.R. § 229, Appendix E, Commentary to *§ 229.36(d)*].

When a customer delivers an item to a depositary bank for collection, the depositary bank becomes a holder of the item at the time it receives the item for collection if the customer at the time of delivery was a holder of the item, whether or not the customer endorses the item, and, if the bank satisfies the other requirements of *Com. Code § 3302* (discussed in Ch. 385, *Negotiable Instruments*), it is a holder in due course [*Com. Code § 4205(a)*].

[2] Duties of Prompt Presentment and Return

A collecting bank must use ordinary care in all of the following [*Com. Code § 4202(a)*]:

- Presenting an item or sending it for presentment [*Symonds v. Mercury Savings & Loan Assn. (1990) 225 Cal. App. 3d 1458, 1464, 275 Cal. Rptr. 871]* ;

- Sending notice of dishonor or nonpayment or returning an item other than a documentary draft to the bank's transferor after learning that it has not been paid or accepted, as the case may be;

- Settling for an item when the bank receives final settlement; and

- Notifying its transferor of any loss or delay in transit within a reasonable time after discovery.

A collecting bank uses ordinary care under *Com. Code § 4202(a)* by taking proper action before its midnight deadline following receipt of an item, notice, or settlement. Taking proper action within a reasonably longer time may constitute the exercise of ordinary care, but the bank has the burden of establishing timeliness [*Com. Code § 4202(b)*].

If a collecting bank exercises ordinary care, it may not be held liable for the insolvency, negligence, mistake, misconduct, or default of another bank or person that results in the loss or destruction of an item in the possession of others or in transit [*Com. Code § 4202(c)*; *Symonds v, Mercury Savings & Loan Assn. (1990) 225 Cal. App. 3d 1458, 1464, 275 Cal. Rptr. 871]* .

Absent extraordinary circumstances, a collecting bank does not owe a duty of care to a noncustomer, particularly when the bank has met itsstatutory duties as set forth in *Com. Code § 4202(a)* [*Karen Kane Inc. v. Bank of America NT & SA (1998) 67 Cal. App. 4th 1192, 1202-1203, 79 Cal. Rptr. 2d 712]* . In a case in which a clothing manufacturer wrote numerous checks over several years to fictitious vendors for merchandise it never received, based on an employee's submission of fraudulent invoices, the manufacturer brought a negligence action against the check cashing service that cashed those checks and the bank that deposited the checks into the service's account. The court of appeal found that because the checks were not forged or improperly endorsed, and did not indicate that maker was being defrauded, neither the check cashing service nor the bank had a duty to inquire of the maker if a valid transaction supported the checks before accepting them. The circumstances were not extraordinary enough to give rise to a duty of inquiry by a bank complying with its statutory duties, when in fact they were not even sufficient to constitute notice of fraud to the maker of the checks [*Karen Kane Inc. v. Bank of America NT & SA (1998) 67 Cal. App. 4th 1192, 1202-1203, 79 Cal. Rptr. 2d 712]* .

Although a collecting bank might still be entitled to revoke any provisional settlement it made to its depositor for a negligently processed check [*see Com. Code § 4214(d)(2)* (discussed under *§ 95.333[4]*)], it would be liable to its customer for negligence under *Com. Code §§ 4103* and *4202* [*Symonds v. Mercury Savings & Loan Assn. (1990) 225 Cal. App. 3d 1458, 1467, 275 Cal. Rptr. 871]* . In that case, the collecting back failed for eight months to process a check that became uncollectible 44 days after the payee deposited it. The bank's conduct was so outrageous and such a departure from normal banking practice that the complaint was held to state causes of action for failure to exercise ordinary care, which in the case of bad faith on the part of the bank allows the depositor to recover any other damages suffered by the depositor as a proximate consequence, including for intentional infliction of emotional distress [*Com. Code § 4103(e)*; *Symonds v. Mercury Savings & Loan Assn. (1990) 225 Cal. App. 3d 1458, 1467, 275 Cal. Rptr. 871]* .

A depositary bank that receives a returned check or notice of nonpayment must send notice of that fact to its customer by midnight of the banking day following the banking day on which it received the returned check or notice, or within a longer reasonable time [*12 C.F.R. § 229.33(d)*].

Provisions governing the length of time a bank may hold proceeds of a check before allowing a customer to draw on

them are discussed in *§ 95.180* et seq.

[3] Regulation CC Duty of Expeditious Return

In the context of the requirements imposed by *12 C.F.R. § 229.30 et seq.*, a collecting bank is subject to the expeditious return responsibilities of *12 C.F.R. § 229.31* [*see also 12 C.F.R. § 229.42* (items to which requirementsof *12 C.F.R. § 229.31(a)* do not apply); *12 C.F.R. § 229.2(cc)* ("returning bank" defined, discussed in *§ 95.312[5]*)]. The expeditious return requirements of *12 C.F.R. § 229.31* are more stringent in many cases than the requirement under *Com. Code § 4202(b)* to act seasonably [*see 12 C.F.R. § 229.31*; 12 C.F.R. § 229, Appendix E, Commentary to *§ 229.31(a)*]. A collecting bank may be liable to the depositary bank, the depositary bank's customer, the true owner of the check, or another party to the check for failure to exercise ordinary care or to act in good faith to comply with the expeditious return requirements. Subject to a collecting bank's duty to exercise ordinary care or to act in good faith in choosing the means for return or notice of nonpayment, a bank is only responsible for its own actions, not those of any other bank or person [*12 C.F.R. § 229.38(a)*]. The measure of damages is the same as that imposed on a paying bank that does not make timely return, and is *discussed under § 95.331[3]*.

[4] Provisional Payment and Right of Charge-Back

If a collecting bank makes provisional settlement with its customer for an item, and the item proves uncollectible or is dishonored, the collecting bank may revoke its provisional settlement with its customer and charge the item back to the customer's account or obtain a refund from its customer. This is true whether or not the collecting bank is able to return the item, if by its midnight deadline or within a longer reasonable time after it learns the facts it returns the item or sends notification of the facts [*Com. Code § 4214(a)*; *see Com. Code §§ 4213* (settlement by collecting bank), *4215* (discussed under *§ 95.332*)].

If the return or notice is delayed beyond the bank's midnight deadline or a longer reasonable time after it learns the facts, the bank may revoke the settlement, charge back the credit, or obtain refund from its customer, but it is liable for any loss resulting from the delay. These rights to revoke, charge back, and obtain refund terminate if and when a settlement for the item received by the bank is or becomes final [*Com. Code § 4214(a)*]. Under *Com. Code §§ 4201* and *4214(a)*, the branch that cashes a check for its customer who is the payee of that check is entitled to retroactively dishonor the check and charge the payee's account when, before the check is finally paid, the drawer files a stop-payment order [*see Lawrence v. Bank of America (1985) 163 Cal. App. 3d 431, 434-437, 209 Cal. Rptr. 541* (result may no longer be reliable due to 1992 amendments to *Com. Code § 4107*, discussed under *§ 95.313[2]*)].

Although a collecting bank may be estopped from charging back its customer's account if it has represented to the customer that the check was final and the customer relied on the representations, a collecting bank's right of charge-back is not affected by its failure to exercise ordinary care with respect to the item, but any bank so failing remains liable [*Com. Code § 4214(d)(2)*; *see Symonds v. Mercury Savings & Loan Assn. (1990)225 Cal. App. 3d 1458, 1467, 275 Cal. Rptr. 871* (*discussed under § 95.333[2]*].

Although the term provisional settlement as used in *Com. Code § 4214* is still applicable between a depositary bank and its customer [*see* 12 C.F.R. § 229, Appendix E, Commentary to *12 C.F.R. § 229.35(b)*], since the adoption of expedited return procedures effective September 1, 1988, the terms "provisional settlement" and "charge-back" are no longer applicable in an interbank context [*see 12 C.F.R. §§ 229.31(c), 229.32(b), 229.35(b), 229.36(d)*].

[5] Collecting Bank's Security Interest

A collecting bank has a security interest in an item and any accompanying documents or the proceeds of either [*Com. Code § 4210(a)*]:

- In case of an item deposited in an account, to the extent to which credit given for the item has been withdrawn or applied;

- In case of an item for which it has given credit available for withdrawal as of right, to the extent of the credit given, whether or not the credit is drawn on or there is a right of charge-back; or

- If it makes an advance on or against the item.

If a collecting bank gives credit for several items received at one time or pursuant to a single agreement and that credit is withdrawn or applied in part, the security interest remains on all the items, any accompanying documents, or the proceeds of either. For the purpose of this section, credits first given are first withdrawn [*Com. Code § 4210(b)*].

The collecting bank's receipt of a final settlement for an item is a realization on its security interest in the item, accompanying documents, and proceeds. So long as the bank does not receive final settlement for the item or give up possession of the item or possession or control of the accompanying documents for purposes other than collection, the security interest continues to that extent and is subject to Division 9 of the Commercial Code, but all of the following are applicable [*Com. Code § 4210(c)*]:

- No security agreement is necessary to make the security interest enforceable.

- No filing is required to perfect the security interest.

- The security interest has priority over conflicting perfected security interests in the item, accompanying documents, or proceeds.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Bank Deposits & Collections (Article 4)CollectionsBanks as AgentCommercial Law (UCC)Bank Deposits & Collections (Article 4)CollectionsDuty of Ordinary CareCommercial Law (UCC)Bank Deposits & Collections (Article 4)CollectionsMidnight DeadlineCommercial Law (UCC)Bank Deposits & Collections (Article 4)CollectionsPresentment, Settlement & PaymentCommercial Law (UCC)Bank Deposits & Collections (Article 4)CollectionsSecurity Interests

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§ 95.334 Bank's Status as Holder in Due Course

For purposes of determining its status as a holder in due course, a bank has given value to the extent it has a security interest in an item [*see Com. Code § 4210* (discussed under *§ 95.333[5]*)], if the bank otherwise complies with the requirements of *Com. Code § 3302* on what constitutes a holder in due course [*Com. Code § 4211*]. *Com. Code § 3302* is discussed in Ch. 385, *Negotiable Instruments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Negotiable Instruments (Article 3)EnforcementHolders in Due CourseGeneral OverviewCommercial Law (UCC)Bank Deposits & Collections (Article 4)CollectionsPresentment, Settlement & PaymentCommercial Law (UCC)Bank Deposits & Collections (Article 4)CollectionsSecurity Interests

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§ 95.335 Cashier's Checks and Money Orders

Cashier's checks and money orders are unique in that the drawee and the drawer are usually the same entity, namely the issuing bank. Even if the bank was not privy to any contract between the purchaser of the cashier's check or money order and any other party, the bank is liable to see that those checks are paid to the named payees. Thus, if a cashier's check is paid on a forged endorsement, the drawer/drawee bank is liable to the purchaser of the check directly or to the named payee [*Jerman v. Bank of America (1970) 7 Cal. App. 3d 882, 887, 87 Cal. Rptr. 88]* . A drawer bank cannot refuse to honor its cashier's check in favor of a payee who is a holder in due course merely because the drawer's customer forged endorsements on checks used to purchase the cashier's check [*Tokai Bank of California v. First Pacific Bank (1986) 186 Cal. App. 3d 1664, 1667-1669, 231 Cal. Rptr. 503]* . Issuer's liability for failure to honor a cashier's check, teller's check, or certified check is governed by *Com. Code § 3411*, which is discussed in *see § 95.465*. For a declaration and claim of loss by the payee or drawer of a certified check, or by the payee or remitter of a teller's or cashier's check, *see § 95.464*.

Money orders may or may not be checks or negotiable instruments [*see Com. Code § 3104(f)* (instrument may be check even though noted on its face as "money order")]. For instance, because an instrument must be signed by the drawer or maker to be considered a check or a negotiable instrument [*see Com. Code § 3103(a)(3), (5), (6)*], the money order is not a check if a bank authorizes agents to issue money orders drawn on it and will pay those money orders whether or not the agent's signature or that of purchaser appears on it as drawer [*Central Bank v. Kaiperm Santa Clara Fed. Credit Union (1987) 191 Cal. App. 3d 186, 202, 236 Cal. Rptr. 262]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDefinitionsChecksCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesBank Refusals

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9-95 California Forms of Pleading and Practice--Annotated § 95.336

§ 95.336 Check Cashing Businesses

[1] Regulation and Definition

Check cashing businesses are governed by *Civ. Code § 1789.30 et seq.* Every owner of a check cashing business must obtain a permit from the Department of Justice to conduct the business [*Civ. Code § 1789.37(a)*].

For purposes of *Civ. Code § 1789.30 et seq.*, a "check casher" is a person or entity that for compensation engages, in whole or in part, in the business of cashing checks, warrants, drafts, money orders, or other commercial paper serving the same purpose [*Civ. Code § 1789.31(a)*].

"Check casher" does not include the following [*Civ. Code § 1789.31(a)*]:

- A state or federally chartered bank, savings association, credit union, or industrial loan company; or

- A retail seller engaged primarily in the business of selling consumer goods, including consumables, to retail buyers that cashes checks or issues money orders for a minimum flat fee not exceeding $2 as a service to its customers that is incidental to its main purpose or business.

[2] Posting of Information

Every check casher must post a complete, detailed, and unambiguous schedule of all fees for the following, as applicable to the services provided [*Civ. Code § 1789.30(a)(1)*]:

- Cashing checks, drafts, money orders, or other commercial paper serving the same purpose and making any deferred deposit (see the discussion § 95.336[6]);

- The sale or issuance of money orders; and

- The initial issuance of any identification card.

Each check casher must also post a list of valid identification that is acceptable in lieu of identification provided by the check casher [*Civ. Code § 1789.30(a)(1)*].

The above information must be clear, legible, and in letters not less than one-half inch in height. The information must be posted in a conspicuous location in the unobstructed view of the public within the check casher's premises [*Civ. Code § 1789.30(a)(1)*].

Failure to post information as required, or the imposition of fees or identification requirements contrary to the information posted, constitutes an unfair business practice within the meaning of *Bus. & Prof. Code § 17200* [*Civ. Code § 1789.32*].

[3] Transaction Requirements

A check casher must not charge a fee for cashing a payroll check or government check in excess of the greatest of the following [*Civ. Code § 1789.35(a)*]:

- 3 percent of the face amount of the check, if identification is provided by the customer;
- 3.5 percent of the face amount of the check, without the provision of identification; or
- $3.

Identification is limited to a California driver's license, a California identification card, or a valid U.S. military identification card [*Civ. Code § 1789.35(a)*].

A check casher may charge a fee for cashing a personal check, as posted pursuant to *Civ. Code § 1789.30* [*see* discussion under *§ 95.336[2]*], for immediate deposit in an amount not to exceed 12 percent of the face value of the check [*Civ. Code § 1789.35(d)*].

A check casher may charge a fee of no more than $10 to set up an initial account and issue an optional identification card for providing check cashing services. A replacement optional identification card may be issued at a cost not to exceed $5 [*Civ. Code § 1789.35(b)*].

A check casher must provide a receipt to the customer for each transaction [*Civ. Code § 1789.35(c)*].

For checks cashed on or after January 1, 2006, and until 2008, a check casher who cashed a check, or a series of checks, exceeding $10,000 in the aggregate, for the same person in the same calendar year, whether in a single transaction or in multiple transactions, was required to file an information return with the Franchise Tax Board [*Civ. Code § 1789.30(a)(2), (b)(2)*; *see Rev. & Tax. Code § 18631.7*].

Starting January 1, 2008, a check casher engaged in the trade or business of cashing checks who, in the course of that trade or business, cashes checks, other than one-party checks, payroll checks, or government checks, totaling more than $10,000 in one transaction, or two or more transactions for the same person within the calendar year, must file the informational return [*Civ. Code § 1789.30(a)(2), (b)(2)*; *Rev. & Tax. Code § 18631.7(a)*]. Compliance information is provided on the FTB website at http://www.ftb.ca.gov/businesses/ck_cash.shtml.

[4] Penalties for Violation

Any person who violates any provision of *Civ. Code § 1789.35* [*see* discussion under *§ 95.336[6][b]*] is liable for a

civil penalty not to exceed $2,000 for each violation, which may be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General in any court of competent jurisdiction. Any action for a civil penalty must be commenced within four years of the date on which the act or transaction upon which the action is based occurred [*Civ. Code § 1789.35(e)*; *see* Stats. 2002, ch. 777, §§ 5, 6]. In addition, a willful violation of *Civ. Code § 1789.35* is a misdemeanor [*Civ. Code § 1789.35(f)*; *see* Stats. 2004, ch. 17; Stats. 2002, ch. 777, §§ 5, 6].

[5] Treble Damages and Injunction

Any person who is injured by any violation of *Civ. Code § 1789.35* [*see* discussion under *§ 95.336[6][b]*] may bring an action for the recovery of damages, an equity proceeding to restrain and enjoin those violations, or both. The amount awarded may be up to three times the damages actually incurred, but in no event less than the amount paid by the aggrieved consumer to a person subject to *Civ. Code § 1789.35*. If the plaintiff prevails, the plaintiff must be awarded reasonable attorney's fees and costs. If a court determines by clear and convincing evidence that a breach or violation was willful, the court, in its discretion, may award punitive damages in addition to the amounts set forth above [*Civ. Code § 1789.35(g)*; *see* Stats. 2004, ch. 17; Stats. 2002, ch. 777, §§ 5, 6].

[6] Deferred Deposit Transactions (Payday Loans)

[a] Governing Law

Until December 31, 2004, deferred deposit transactions--commonly called payday loans--by check cashing businesses were governed by *Civ. Code §§ 1789.31*, *1789.33*, and *1789.35*. Thereafter, payday loans (whether made by check-cashing businesses or by others) are governed by the California Deferred Deposit Transaction Law, a specialized statute dealing with these types of transactions [*Fin. Code § 23000 et seq.*; *see generally* Stats. 2004, ch. 17; Stats. 2002, ch. 777]. The discussion in this section deals with the law applicable after December 31, 2004.

Payday lenders make small, short-term loans to individuals who receive regular paychecks. Instead of signing a promissory note, on receiving the loan amount, the borrower hands the lender a personal check covering the loan amount plus the lender's transaction fee--which together may not exceed $300, under California law--and the lender holds that check until an agreed due date, which may not be more than 31 days away, under California law [*Fin. Code § 23035(a)*]. The due date usually is the borrower's next payday, or the payday after next. On the due date, the lender may deposit the borrower's check, or present it to the borrower's bank for payment. When the lender operates a check cashing business (which often is the case), if the borrower brings a paycheck to be cashed on the due date, the lender could retain the loan amount (plus a check cashing fee) and hand over the remainder along with the borrower's personal check that covered the loan. (Pawnbrokers also provide a small loan service. For discussion, see Ch. 568, *Usury* .)

A deferred deposit transaction is technically defined as one in which the check casher refrains from depositing a personal check written by a customer until a specific date, pursuant to a written agreement, as provided in *Civ. Code § 1789.33* [*Fin. Code § 23035*].

[b] Transaction Requirements

Under *Fin. Code § 23035*, a check casher may defer the deposit of a personal check written by a customer for up to 31 days, subject to the statutory requirements. The face amount of the check must not exceed $300. Each deferred deposit must be made pursuant to a written agreement that has been signed by the customer and by the check casher or an authorized representative of the check casher [*Fin Code § 23035(a)*]. The written agreement must contain, among other things, a statement of the total amount of any fees charged for the deferred deposit, expressed both in U.S. currency and as an annual percentage rate (APR). The written agreement must authorize the check casher to defer deposit of the personal check until a specific date not later than 30 days from the date the written agreement was signed and executed. The written agreement must not permit the check casher to accept collateral. The agreement must also comply with the applicable federal Truth in Lending Act requirements [*Fin. Code § 23035(e)*].

A check casher may charge a fee for cashing a personal check for deferred deposit in an amount not to exceed 15 percent of the face value of the check [*Fin. Code § 23036(a)*]. A fee not to exceed $15 may be charged for the return of a dishonored check by a depositary institution [*Fin. Code § 23036(e)*]. No amount in excess of these fees may be directly or indirectly charged by a check casher pursuant to a deferred deposit agreement [*Fin. Code § 23036(f)*].

A check casher must not enter into an agreement for a deferred deposit with a customer during the period of time that an earlier written agreement for a deferred deposit for the same customer is in effect [*Fin. Code § 23035(b)*].

[c] Customer's Immunities

A customer who enters into a deferred deposit agreement and offers a personal check to a check casher pursuant to that agreement is not subject to any criminal penalty for the failure to comply with the terms of that agreement [*Civ. Code § 1789.33(b)*].

A check casher who enters into a deferred deposit agreement and accepts a check passed on insufficient funds, or any assignee of that check casher, is not entitled to recover damages in any action brought pursuant to, or governed by, *Civ. Code § 1719* (liability, including treble damages, for passing a check on insufficient funds) [*Fin. Code § 23036(d)*; *see* Stats. 2002, ch. 777, § 5].

[d] Enforcement

The deferred deposit transaction law is enforced by the Commissioner of Corporations, who is empowered to undertake administrative action and related civil proceedings for license violations, and to impose administrative sanctions and penalties [*see Fin. Code § 23045 et seq.*].

Payday lenders who overcharge or impose fees not authorized by the governing statutes forfeit the right to collect any fees whatsoever on the transaction [*see Fin. Code §§ 23060-23062*]. Limited exceptions exist for unintentional violations that are corrected within 60 days after discovery of the error [*see Fin. Code § 23061(b)*] and acts taken in good faith in accordance with an administrative rule or regulation that is subsequently rescinded or judicially determined to be invalid [*Fin. Code § 23063*].

In addition, any injured person may sue for damages, injunctive relief, or both. Damages awarded may be up to three times the actual damages, and in no event less than the amount paid by the aggrieved consumer to the payday lender. Punitive damages also are available if the court determines by clear and convincing evidence that the violation was willful. The court may also grant any equitable relief that it deems proper, including but not limited to, a claim for restitution and disgorgement. A prevailing plaintiff is entitled to recover reasonable attorney's fees and costs [*Fin. Code § 23064*]. Exhaustion of administrative remedies is not necessary in order to pursue these civil remedies [*Fin. Code § 23064.5*].

These rights, remedies, and penalties are cumulative to any rights, remedies, or penalties established under other laws [*Fin. Code § 23064.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionState LawRemediesCivil ProcedureRemediesInjunctionsGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewGovernmentsState & Territorial GovernmentsLicenses

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[Reserved]

§§ 95.337[Reserved]

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9-95 California Forms of Pleading and Practice--Annotated § 95.340

§ 95.340 Scope of Part

This part covers rights, duties, obligations, and liabilities arising in connection with funds transfers between banks and banking customers under Division 11 of the Commercial Code [*see § 95.341[1][a]*]. Division 11 governs a specialized method of payment commonly referred to in the banking community as a wholesale wire transfer [*see § 95.342[3][a]*]. Funds transfers are made by means of payment orders. The scope of Division 11, and therefore the scope of this part as well, is determined by the definitions of "payment order" and "funds transfer" found in *Com. Code §§ 11103* and *11104* [Official Comment to UCC § 4A-102; *see § 95.342[1][a]*].

Division 11 does not apply to a funds transfer if any part of the transfer is governed by the Electronic Fund Transfer Act of 1978 (EFTA) [*Com. Code § 11108*; *see 15 U.S.C. § 1693 et seq.* (EFTA)] EFTA covers a wide variety of electronic funds transfers involving consumers. The types of transfers covered by EFTA are essentially different from the wholesale wire transfers that are the primary focus of Division 11. Therefore, a funds transfer is excluded from Division 11 if any part of the transfer is covered by EFTA. Existing procedures designed to comply with federal law are unaffected by Division 11. The effect of *Com. Code § 11108* is to make Division 11 and EFTA mutually exclusive. For example, if a funds transfer is to a consumer's account in the beneficiary's bank and the funds transfer is made in part by use of Fedwire [*see § 95.343[2][c]*] and in part by means of an automated clearinghouse (ACH), then EFTA applies to the ACH part of the transfer but not to the Fedwire part; and Division 11 does not apply to any part of the transfer. However, in the absence of any law governing the part of the funds transfer that is not subject to EFTA, a court could apply appropriate principles from Division 11 by analogy [Official Comment to UCC § 4A-108]. For detailed discussion of EFTA, see *California Legal Forms, Ch. 56, Letters of Credit and Electronic Fund Transfers, § 56.80 et seq.* (Matthew Bender).

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9-95 California Forms of Pleading and Practice--Annotated § 95.341

§ 95.341 Governing Law

[1] Commercial Code Division 11

Except as otherwise provided in *Com. Code § 11108* [*see § 95.340*] Division 11 of the Commercial Code applies to funds transfers as defined in *Com. Code § 11104* [*Com. Code § 11102*; *see § 95.342[1][a]*]. Division 11 may be cited as Uniform Commercial Code--Funds Transfers [*Com. Code § 11101*].

When it was enacted in 1990, Division 11 was identical to UCC article 4A. Because in adding Division 11 to the Commercial Code, the legislature adopted UCC article 4A "exactly as written," the NCCUSL comments to a given section in Division 11 are "persuasive in interpreting the statute" [*Zengen, Inc. v. Comerica Bank (2007) 41 Cal. 4th 239, 243 n.1, 252, 59 Cal. Rptr. 3d 240, 158 P.3d 800]* . Such a comment is cited as an "Official Comment" in this part.

The kind of funds transfer governed by Division 11 is in large part a product of developing technological changes. Before Division 11 was drafted, there was no comprehensive body of law--statutory or judicial--that defined the juridical nature of funds transfers or the rights and obligations flowing from payment orders. Judicial authority with respect to funds transfers was sparse, undeveloped, and not uniform. Judges had to resolve disputes by referring to general principles of common law or equity, or they sought guidance in statutes (such as Division 4 of the Commercial Code) that are applicable to other payment methods [*e.g.,* *Bank of Am. v. Sanati (1992) 11 Cal. App. 4th 1079, 1083, 14 Cal. Rptr. 2d 615* ("At the time of the fund transfer in this case the law controlling the risks and liabilities of banks, beneficiaries and originators was general common law and equitable principles.")]. Attempts to define rights and obligations in funds transfers by general principles or by analogy to rights and obligations in negotiable instrument law or the law of check collection proved unsatisfactory [Official Comment to UCC § 4A-102].

In the drafting of Division 11, a deliberate decision was made to write on a clean slate and to treat a funds transfer as a unique method of payment to be governed by unique rules that address the particular issues raised by this method of payment. A deliberate decision was also made to use precise and detailed rules to assign responsibility, define behavioral norms, allocate risks, and establish limits on liability, rather than to rely on broadly stated, flexible principles. In the drafting of these rules, a critical consideration was that the various parties to funds transfers need to be

able to predict risk with certainty, to insure against risk, to adjust operational and security procedures, and to price funds-transfer services appropriately. This consideration is particularly important given the very large amounts of money that typically are involved in funds transfers [Official Comment to UCC § 4A-102].

California courts should take a narrow view in construing and applying Division 11 [*see Zengen, Inc. v. Comerica Bank (2007) 41 Cal. 4th 239, 257, 59 Cal. Rptr. 3d 240, 158 P.3d 800* ("Given the care with which [Division 11 of] the Uniform Commercial Code was drafted, and the goal stated in the Code Comment to section 11102 to use throughout division 11 'precise and detailed rules,' we must interpret section 11505 to mean what it says.")]. California case law interpreting Division 11 is sparse. Thus, in most cases, the official UCC comments are the only pronouncements bearing directly on the interpretation of Division 11 in California.

[2] Common Law Rules; Other California Statutes

Division 1 of the Commercial Code contains general definitions and principles of construction and interpretation applicable throughout Division 11 [*Com. Code § 11105(d)*]. Included is *Com. Code § 1103(b)*, which states that, unless displaced by the particular provisions of the Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause, supplement the provisions of the Code [Official Comment 4 to UCC § 4A-105].

Funds transfers involve competing interests--those of the banks that provide funds-transfer services and the commercial and financial organizations that use the services, as well as the public interest. These competing interests were represented in the drafting process, and they were thoroughly considered. The rules that emerged represent a careful and delicate balancing of those interests and are intended to be the exclusive means of determining the rights, duties, and liabilities of the affected parties in any situation covered by particular provisions of the Division. Consequently, resort to principles of law or equity outside Division 11 is not appropriate to create rights, duties, and liabilities inconsistent with those stated in Division 11 [Official Comment to UCC § 4A-102].

Therefore, Division 11 provides, in effect, that common law causes of action based on allegedly unauthorized funds transfers are displaced in two specific areas:

- When the common law claims would create rights, duties, or liabilities inconsistent with Division 11.

- When the circumstances giving rise to the common law claims are specifically covered by the provisions of Division 11.

This does not mean that Division 11 necessarily displaces all common law actions based on all activities surrounding funds transfers. The exclusivity of Division 11 is deliberately restricted to any situation covered by particular provisions of Division 11. Conversely, situations not covered are not the exclusive province of Division 11 [*Zengen, Inc. v. Comerica Bank (2007) 41 Cal. 4th 239, 253, 254, 59 Cal. Rptr. 3d 240, 158 P.3d 800* (Division 11 "squarely covers the question who should bear the loss when a bank executes an unauthorized payment order"); *see* Official Comment to UCC § 4A-102].

[3] Federal Regulations

Regulations of the Board of Governors of the Federal Reserve System and operating circulars of the Federal Reserve banks supersede any inconsistent provision of Division 11 to the extent of the inconsistency [*Com. Code § 11107*].

Although the terms of Division 11 apply to funds transfers involving Federal Reserve banks, federal preemption would make ineffective any Division 11 provision that conflicts with federal law. The payments activities of the Federal

Reserve banks are governed by regulations of the Federal Reserve Board and by operating circulars issued by the banks themselves. In some instances, the operating circulars are issued pursuant to a Federal Reserve Board regulation. In other cases, the bank issues the operating circular under its own authority under the Federal Reserve Act, subject to review by the Federal Reserve Board. Federal Reserve Board regulations, being valid exercises of regulatory authority pursuant to a federal statute, take precedence over state law if there is an inconsistency. *Com. Code § 11107* treats Federal Reserve bank operating circulars as having the same effect whether issued under the bank's own authority or under a Federal Reserve Board regulation [Official Comment 3 to UCC § 4A-107].

[4] Funds-Transfer System Rules

Funds-transfer system rules govern rights and obligations between banks that use the system [*see § 95.343[2][b]* for discussion of what constitutes a funds transfer system]. They may cover a wide variety of matters such as form and content of payment orders, security procedures, cancellation rights and procedures, indemnity rights, compensation rules for delays in completion of a funds transfer, time and method of settlement, credit restrictions with respect to senders of payment orders, and risk allocation with respect to suspension of payments by a participating bank. Funds-transfer system rules can be very effective in supplementing Division 11 and in filling gaps that may be present in Division 11. To the extent that they do not conflict with Division 11, there is no problem with respect to their effectiveness; they merely supplement Division 11. In addition, unless the contrary is stated, funds-transfer system rules can override provisions of Division 11 [*Com. Code § 11501(b)*; *see § 95.343[1][e]*]. Thus, rights and obligations of banks, with respect to each other in a funds transfer, can be different from what is stated in Division 11, to the extent that a funds-transfer system rule applies [Official Comment 1 to UCC § 4A-501].

Since funds-transfer system rules are defined as those governing the relationship between participating banks [*Com. Code § 11501(b)*; *see §§ 95.343[1][e]*], a rule can have a direct effect only on participating banks. However, a rule that affects the conduct of a participating bank may indirectly affect the rights of nonparticipants such as the originator or beneficiary of a funds transfer, and such a rule can be effective even though it may affect nonparticipants without their consent. For example, a rule might operate to prevent execution of a payment order, or might allow cancellation of a payment order, with the result that a funds transfer is not completed or is delayed. However, a rule purporting to define rights and obligations of nonparticipants in the system will not be effective to alter Division 11 rights, because the rule is not within the definition of a funds-transfer system rule. Rights and obligations arising under Division 11 may also be varied by agreement of the affected parties, except to the extent that Division 11 provides otherwise [Official Comment 1 to UCC § 4A-501].

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9-95 California Forms of Pleading and Practice--Annotated § 95.342

§ 95.342 Funds Transfers--Participants and Process

[1] Instruction to Bank for Payment of Money

[a] Originator, Payment Order, and Beneficiary

A funds transfer that is subject to Division 11 begins when a person called the "originator" transmits to a bank an instruction for payment of a fixed or determinable amount of money to a specified person, called the "beneficiary," and the three conditions stated below are satisfied [*Com. Code §§ 11103(a)(1), (2), 11104(a), (c)*] Such an instruction is a "payment order" [*Com. Code § 11103(a)(1)*].

- The instruction must be transmitted directly to the bank or transmitted directly to an agent, a funds-transfer system, or a communication system for transmission to the bank [*Com. Code § 11103(a)(1)(iii)*; *see § 95.342[3][b]*].

- The instruction must not state a condition to payment other than the time of payment [*Com. Code § 11103(a)(1)(i)*; *see § 95.342[3][c]*].

- The bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the person that transmitted the instruction [*Com. Code § 11103(a)(1)(ii)*; *see § 95.342[3][d]*].

In some cases the originator and the beneficiary may be the same person. This will occur, for example, when a corporation instructs a bank to transfer funds from an account of the corporation in that bank to another account of the corporation in that bank or in some other bank [Official Comment 1 to UCC § 4A-104].

If a payment order is an instruction to make more than one payment to the beneficiary, the instruction is a separate payment order with respect to each payment [*Com. Code § 11103(b)*].

[b] Originator's Bank and Beneficiary's Bank

The bank to which the originator's payment order is addressed is called the "originator's bank" [*Com. Code § 11104(d)*]. The bank that is to make payment to the beneficiary is called the "beneficiary's bank" [*Com. Code § 11103(a)(3)*]. The originator's bank and the beneficiary's bank could be one and the same (for instance, when the originator of a payment order is also the beneficiary).

In some funds transfers, the first bank to issue a payment order is executing a payment order of a customer, in which case the customer is the originator. In other cases, the first bank to issue a payment order is not acting for a customer but is making a payment for its own account. In that event, the first bank to issue a payment order is both the originator and the originator's bank [Official Comment 1 to UCC § 4A-104].

[c] Senders; Issuance of Payment Orders; Receiving Banks

The person transmitting a payment order to a bank is a "sender" [*Com. Code § 11103(a)(5)*]. The bank to which a payment order is addressed is a "receiving bank" [*Com. Code § 11103(a)(4)*]. A payment order is "issued" when it is sent to the receiving bank [*Com. Code § 11103(c)*]. Thus, the originator of a payment order is also a sender, and the originator's bank is also a receiving bank. The beneficiary's bank is also a receiving bank (but, in the role of receiving bank, is never a sender).

[d] Intermediary Banks

In most cases, two or more banks are involved in a funds transfer. Since each bank must be a receiving bank, two or more payment orders have to be sent. When three or more banks are involved, each bank other than the originator's bank and the beneficiary's bank is an "intermediary bank" [*Com. Code § 11104(b)*]. If two or more banks are involved, then each bank, except the beneficiary's bank, deals with two payment orders. Respecting one payment order, the bank is a receiving bank; respecting the other payment order, the bank is a sender. Note that a payment order is never forwarded from one bank to another; rather, each communication transmitted in the chain starting from the originator (to the originator's bank, thence to an intermediary bank, eventually to the beneficiary's bank) is a separate payment order.

Thus, a funds transfer that is subject to Division 11 typically comprises a series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order. Included is any payment order issued by the originator's bank or an intermediary bank intended to carry out the originator's payment order. A funds transfer is completed on acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's payment order [*Com. Code § 11104(a)*].

[2] Illustrative Fact Situations

Division 11 governs a method of payment in which the person making payment (the *originator*) directly transmits an instruction to a bank, either to make payment to the person intended to receive the payment (the *beneficiary*) or to instruct some other bank to make payment to the beneficiary. The payment from the originator to the beneficiary occurs when the bank that is to pay the beneficiary (the *beneficiary's bank*) becomes obligated to pay the beneficiary. Consider the following cases [Official Comment 1 to UCC § 4A-104].

Example 1--Single Payment Order (One Bank).

Payne, having an account in Orange Bank, instructs that bank to pay $1,000,000 to Reeve's account in Orange Bank. Orange Bank carries out Payne's instruction by making a credit of $1,000,000 to Reeve's account and notifying Reeve that the credit is available for immediate withdrawal.

- The instruction by Payne to Orange Bank is a *payment order,* which was issued when it was sent to Orange Bank [*Com. Code § 11103(a)(1), (c)*].

- Payne is the *sender* of the payment order, and Orange Bank is the *receiving bank* [*Com. Code § 11103(a)(4), (5)*] Payne, in addition to being the sender of the payment order to Orange Bank, is the *originator* of the funds transfer [*Com. Code § 11104(c)*].

- Reeve is the *beneficiary* of the payment order, and Orange Bank is the *beneficiary's bank* [*Com. Code § 11103(a)(2), (3)*]. Orange Bank also is the *originator's bank* [*Com. Code § 11104(d)*].

- When Orange Bank notified Reeve of receipt of the payment order, Orange Bank *accepted* the payment order [*Com. Code § 11209(b)(1)*].

On accepting the payment order, Orange Bank incurred an obligation to Reeve to pay the amount of the order [*Com. Code § 11404(a)*] and at the same time, Payne incurred an obligation to pay Orange Bank the amount of the order [*Com. Code § 11402(b)*]. Payment from Payne to Orange Bank normally would be made by a debit to Payne's account in Orange Bank [*Com. Code § 11403(a)(3)*]. When Orange Bank incurred the obligation to pay Reeve, payment of $1,000,000 by Payne to Reeve was made at the same time [*Com. Code § 11406(a)*]. Orange Bank actually paid Reeve when it gave notice to Reeve of a withdrawable credit of $1,000,000 to Reeve's account [*Com. Code § 11405(a)*].

The overall transaction, which comprises the acts of Payne and Orange Bank, in which the payment by Payne to Reeve is accomplished, is referred to as the *funds transfer* [*Com. Code § 11104(a)*]. In this case only one payment order was involved in the funds transfer. A one-payment-order funds transfer is usually referred to as a "book transfer" because the payment is accomplished by the receiving bank's debiting the account of the sender and crediting the account of the beneficiary in the same bank.

Example 2--Two Payment Orders (Two Banks). Assume the same facts as in Example 1 except that Payne instructs Orange Bank to pay $1,000,000 to Reeve's account in Barstow Bank. With respect to this payment order, Payne is the *sender,* Reeve is the *beneficiary,* and Orange Bank is the *receiving bank.* Orange Bank carries out Payne's order by instructing Barstow Bank to pay $1,000,000 to Reeve's account. This instruction is another *payment order,* as to which Orange Bank is the *sender,* Barstow Bank is the *receiving bank,* and Reeve is the *beneficiary.* When Orange Bank issued its payment order to Barstow Bank, Orange Bank *executed* Payne's payment order [*Com. Code § 11301(a)*]. In the funds transfer, Payne is the *originator,* Orange Bank is the *originator's bank,* and Barstow Bank is the *beneficiary's bank.* When Orange Bank executed Payne's order, Payne incurred an obligation to pay Orange Bank the amount of the order that Payne issued to Orange Bank [*Com. Code § 11402(c)*]. When Barstow Bank accepted the payment order issued to it by Orange Bank, Barstow Bank incurred an obligation to Reeve to pay the amount of that payment order [*Com. Code § 11404(a)*], and Orange Bank incurred an obligation to pay Barstow Bank [*Com. Code § 11402(b)*]. Acceptance by Barstow Bank also resulted in payment of $1,000,000 by Payne to Reeve [*Com. Code § 11406(a)*]. In this case two payment orders were involved in the funds transfer.

Example 3--Three or More Payment Orders (Intermediary Banks). Assume the same facts as in Example 2 except that Orange Bank does not execute Payne's payment order by issuing a payment order to Barstow Bank. One bank normally will not act to carry out a funds transfer for another bank unless there is an existing arrangement between the banks for transmitting payment orders and settling accounts. For example, if Barstow Bank is a foreign bank with which Orange Bank has no relationship, then Orange Bank might use a bank that is a correspondent of both Orange Bank and Barstow Bank. Assume that Orange Bank issues a payment order to Irvine Bank to pay $1,000,000 to Reeve's account in Barstow Bank. With respect to this payment order, Orange Bank is the *sender,* Irvine Bank is the *receiving bank,* and Reeve is the *beneficiary.* Irvine Bank will *execute* the payment order of Orange Bank

by issuing a *payment order* to Barstow Bank to pay $1,000,000 to Reeve's account in Barstow Bank. With respect to Irvine Bank's payment order, Irvine Bank is the *sender,* Barstow Bank is the *receiving bank,* and Reeve is the *beneficiary.* Payment of $1,000,000 by Payne to Reeve occurs when Barstow Bank accepts the payment order issued to it by Irvine Bank.

In this case, the funds transfer involves three payment orders. In the funds transfer, Payne is the *originator,* Orange Bank is the *originator's bank,* Barstow Bank is the *beneficiary's bank,* and Irvine Bank is an *intermediary bank* [*Com. Code § 11104(b)*]. In some cases there may be more than one intermediary bank, and in those cases each intermediary bank is treated like Irvine Bank in this example.

In each of the three cases, a payment under Division 11 involves an overall transaction, the funds transfer, in which the originator (Payne) is making payment to the beneficiary (Reeve). The funds transfer may encompass a series of payment orders that are issued so as to effect the payment initiated by the originator's payment order [Official Comment 1 to UCC § 4A-104].

[3] Essential Characteristics of Payment Orders

[a] Payments Are Made Through "Banks" (Wire Transfers)

"Payment order" is defined in Division 11 as an instruction to a "receiving bank" to pay, or to cause another "bank" to pay, a fixed or determinable amount of money [*Com. Code § 11103(a)(1), (4)*].

Division 11 is limited to payments made through the banking system, which are known among bankers as wholesale wire transfers (or simply wire transfers). Transactions covered by Division 11 typically transfer very large amounts of money, and several discrete transactions involving several banks may be necessary to carry out the payment. Payments normally are made by debits and credits to bank accounts. Originators and beneficiaries normally are business organizations, and the transfers are usually made to pay business obligations. Moreover, these transactions are frequently done on the basis of very short-term credit granted by the receiving bank to the sender of the payment order. Wholesale wire transfers involve policy questions that are distinct from those involved in consumer-based transactions by nonbanks. Therefore, a transfer of funds made by an entity outside the banking system is excluded from the coverage of Division 11. A transfer of funds through an entity other than a bank is usually a consumer transaction involving a relatively small amount of money and a single contract carried out by a transfer of cash or a cash equivalent such as a check. Typically, the transferor delivers cash or a check to the company making the transfer, which agrees to pay a like amount to a person designated by the transferor. [Official Comment 2 to UCC § 4A-104].

"Bank" in this context means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, or trust company. A branch or separate office of a bank is a separate bank for purposes of Division 11 [*Com. Code § 11105(a)(2)*]. This definition includes some institutions that are not commercial banks, reflecting the fact that many financial institutions now perform functions previously restricted to commercial banks, including acting on behalf of customers in funds transfers. Since many funds transfers involve payment orders to or from other countries, the definition also covers foreign banks. The definition also includes Federal Reserve banks [Official Comment 1 to UCC § 4A-105], but funds transfers carried out by Federal Reserve banks are subject to *Com. Code § 11107* [*see § 95.341[3]*].

[b] Instruction Is Transmitted Directly to Bank

An instruction to pay is a "payment order" only if it is "transmitted directly to the bank or transmitted directly to an agent, a funds-transfer system, or a communication system for transmission to the bank" [*Com. Code § 11103(a)(1)(iii)*]. The principal effect of this limitation is to exclude from Division 11 payments made by check or credit card. In the case of a check or credit card, the instruction of the debtor to the bank on which the check is drawn or

to which the credit card slip is to be presented is contained in the check or credit card slip signed by the debtor. The instruction is not transmitted by the debtor directly to the debtor's bank; rather, the instruction is delivered or otherwise transmitted by the debtor to the creditor, who then presents it to the bank either directly or through bank collection channels. These payments are governed by Division 3 (negotiable instruments) and Division 4 (bank deposits and collections) of the Commercial Code and by federal law. There are limited instances, however, in which the paper on which a check is printed can be used as the means of transmitting a payment order that is covered by Division 11 [Official Comment 5 to UCC § 4A-104].

[c] Payment Is Unconditional Except as to Time

An instruction to pay is a "payment order" only if it "does not state a condition to payment to the beneficiary other than time of payment" [*Com. Code § 11103(a)(1)(i)*].

An instruction to pay a beneficiary sometimes is subject to a requirement that the beneficiary perform some act (such as delivery of documents). Such an instruction is not covered by Division 11 because payment to the beneficiary is conditional on something other than the time of payment (such as receipt of shipping documents) [Official Comment 3 to UCC § 4A-104].

The function of banks in a funds transfer under Division 11 is comparable to the role of banks in the collection and payment of checks, in that it is essentially mechanical in nature. The low price and high speed that characterize funds transfers reflect this fact. Conditions to payment other than time of payment impose responsibilities on a bank that go beyond those in Division 11 funds transfers. Although a payment by a bank to the beneficiary of a letter of credit is not covered by Division 11, if the beneficiary were paid by another bank, then payment of the issuing bank's obligation to reimburse the paying bank could be made by a Division 11 funds transfer. In such a case, there is a distinction between the payment obligation of the issuing bank to the beneficiary and the payment obligation of the issuing bank to the paying bank [Official Comment 3 to UCC § 4A-104].

[d] Bank Makes Credit Transfer

An instruction to pay is a "payment order" only if the "receiving bank is to be reimbursed by debiting an account of, or otherwise receiving payment from, the sender" [*Com. Code § 11103(a)(1)(ii)*].

Transfers of funds made through the banking system are commonly referred to as either credit transfers or debit transfers. In a credit transfer, the instruction to pay is given by the person making payment; in a debit transfer, the instruction to pay is given by the person receiving payment. The purpose of *Com. Code § 11103(a)(1)(ii)* is to include credit transfers in Division 11 and to exclude debit transfers. All of the instructions to pay in the three cases described in § 95.342[2] are credit transfers. For instance, in Example 2, with respect to Payne's instruction given to Orange Bank, Orange Bank will be reimbursed by debiting Payne's account or otherwise receiving payment from Payne (the first sender). With respect to Orange Bank's instruction to Barstow Bank, Barstow Bank will be reimbursed by receiving payment from Orange Bank (the second sender) [Official Comment 4 to UCC § 4A-104].

In a debit transfer, a creditor, pursuant to authority from the debtor, is enabled to draw on the debtor's bank account by issuing an instruction-to-pay to the debtor's bank. If the debtor's bank pays, it will be reimbursed by the debtor rather than by the person giving the instruction. For example, the holder of an insurance policy may pay premiums by authorizing the insurance company to order the policyholder's bank to pay the insurance company. The order to pay may be in the form of a draft covered by Division 3 of the Commercial Code, or it might be an instruction to pay that is not an instrument under that division. The bank receives reimbursement by debiting the policyholder's account. As another example, a subsidiary corporation may make payments to its parent by authorizing the parent to order the subsidiary's bank to pay the parent from the subsidiary's account. These transactions are not covered by Division 11 because *Com. Code § 11103(a)(1)(ii)* is not satisfied. Division 11 is limited to transactions in which the account to be

debited by the receiving bank is that of the person in whose name the instruction is given [Official Comment 4 to UCC § 4A-104].

When the beneficiary of a funds transfer is also the originator of the transfer, the transfer is governed by Division 11 if it is a credit transfer in form. If it is in the form of a debit transfer, it is not governed by Division 11. For example, assume that Corporation has accounts in Orange Bank and Barstow Bank. Corporation instructs Orange Bank to make a payment into Corporation's account in Barstow Bank. This would be a funds transfer governed by Division 11. Sometimes, Corporation will authorize Barstow Bank to draw on Corporation's account in Orange Bank for the purpose of transferring funds into Corporation's account in Barstow Bank. If Corporation also makes an agreement with Orange Bank under which Orange Bank is authorized to follow instructions of Barstow Bank, as agent of Corporation, to transfer funds from Corporation's account in Orange Bank, the instruction of Barstow Bank is a payment order of Corporation and is governed by Division 11. (This kind of transaction is known in the wire-transfer business as a "drawdown transfer.") However, if Corporation does not make such an agreement with Orange Bank, and Barstow Bank instructs Orange Bank to make the transfer, then the order is in form a debit transfer and is not governed by Division 11. Such debit transfers are normally automated clearinghouse (ACH) transactions in which Orange Bank relies on Barstow Bank's warranties pursuant to ACH rules, including the warranty that the transfer is authorized [Official Comment 4 to UCC § 4A-104].

California Forms of Pleading and Practice--Annotated

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Volume 9: Bailments thru Boats and Boating-Chs. 93-100
Chapter 95 BANKS, DEPOSITS, AND CHECKS
PART II. LEGAL BACKGROUND
E. Funds Transfers

9-95 California Forms of Pleading and Practice--Annotated § 95.343

§ 95.343 Key Concepts

[1] Definitions

[a] Authorized Account

"Authorized account" means a deposit account of a customer in a bank designated by the customer as a source of payment of payment orders issued by the customer to the bank. If a customer does not so designate an account, any account of the customer is an authorized account if payment of a payment order from that account is not inconsistent with any restriction on the use of that account [*Com. Code § 11105(a)(1)*].

[b] Clearinghouse; Item

"Clearinghouse" means an association of banks or other payers regularly clearing items [*Com. Code §§ 4104(a)(4), 11105(c)*].

"Item" means an instrument or a promise or an order to pay money handled by a bank for collection or payment. The term does not include a payment order governed by Division 11 or a credit or debit card slip [*Com. Code §§ 4104(a)(9), 11105(c)*].

The Federal Reserve System provides the principal clearinghouse operation in the United States. A private clearinghouse operation is provided by an association called NACHA--The Electronic Payments Association (formerly the National Automated Clearing House Association). These two operators provide virtually all clearinghouse services in the United States.

[c] Customer

"Customer" means a person, including a bank, having an account with a bank or from whom a bank has agreed to receive payment orders [*Com. Code § 11105(a)(3)*].

[d] Funds-Transfer Business Day

Funds-transfer business is frequently transacted by banks outside general banking hours. Thus, the definition of banking day in *Com. Code § 4104(1)(c)* is not suitable to describe when a bank is open for funds-transfer business. *Com. Code § 11105(a)(4)* defines a new term, "funds-transfer business day," which is applicable to Division 11 [Official Comment 2 to UCC § 4A-105]. "Funds-transfer business day" of a receiving bank means the part of a day during which the receiving bank is open for the receipt, processing, and transmission of payment orders and cancellations and amendments of payment orders [*Com. Code § 11105(a)(4)*].

In some cases it is possible to electronically transmit payment orders and other communications to a receiving bank at any time. If the receiving bank is not open for the processing of an order when it is received, the communication is stored in the receiving bank's computer for retrieval when the receiving bank is open for processing. The use of the conjunctive makes clear that the defined term is limited to the period during which all functions of the receiving bank can be performed, that is, receipt, processing, *and* transmission of payment orders, cancellations, and amendments [Official Comment 2 to UCC § 4A-105].

[e] Funds-Transfer System Rules

"Funds-transfer system rule" means a rule of an association of banks either [*Com. Code § 11501(b)*].

- Governing transmission of payment orders by means of a funds-transfer system of the association or rights and obligations with respect to those orders; or

- To the extent the rule governs rights and obligations between banks that are parties to a funds transfer in which a Federal Reserve bank, acting as an intermediary bank, sends a payment order to the beneficiary's bank.

Except as otherwise provided in Division 11, a funds-transfer system rule governing rights and obligations between participating banks using the system may be effective even if the rule conflicts with Division 11 and indirectly affects another party to the funds transfer who does not consent to the rule. A funds-transfer system rule also may govern rights and obligations of parties other than participating banks using the system, to the extent stated in *Com. Code §§ 11404(c)*, *11405(d)*, and *11507(c)* [*Com. Code § 11501(b)*].

Whether a transfer is made through an automated clearinghouse of a Federal Reserve bank or through an automated clearinghouse of another association of banks, the rights and obligations of the originator's bank and the beneficiary's bank are governed by uniform rules adopted by various associations of banks in various parts of the United States. With respect to transfers in which a Federal Reserve bank acts as an intermediary bank, these rules may be incorporated, in whole or in part, in operating circulars of the Federal Reserve bank. Even if not so incorporated, these rules can still be binding on the associated banks. If a transfer is made through a Federal Reserve bank, the rules are effective under the second clause of *Com. Code § 11501(b)*; if the transfer is not made through a Federal Reserve bank, the association rules are effective under the first clause of *Com. Code § 11501(b)* [Official Comment 2 to UCC § 4A-501].

[f] Payment Date; Settlement Date; Effective Date

"Payment date" of a payment order means the day on which the amount of the order is payable to the beneficiary by the beneficiary's bank. The payment date may be determined by an instruction of the sender but cannot be earlier than the day the order is received by the beneficiary's bank and, unless otherwise determined, is the day the order is received by the beneficiary's bank [*Com. Code § 11401*].

"Payment date" refers to the day the beneficiary's bank is to pay the beneficiary. The payment date may be expressed in

various ways as long as it indicates the day the beneficiary is to receive payment. For example, in transfers through an automated clearinghouse, the payment date is the equivalent of "settlement date" or "effective date." The payment-date rule applies to the payment order issued to the beneficiary's bank, but a payment order issued to a receiving bank other than the beneficiary's bank may also state a date for payment to the beneficiary. In the latter case, the statement of a payment date is an instruction to the receiving bank concerning the time for executing the sender's order [*Com. Code § 11301(b)*; Official Comment to UCC § 4A-401].

[g] Prove

"Prove" with respect to a fact means to meet the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence [*Com. Code §§ 1201(b)(8), 11105(a)(7)*].

[h] Security Procedure

"Security procedure" means a procedure established by agreement of a customer and a receiving bank for the purpose of either (1) verifying that a payment order or communication amending or canceling a payment order is that of the customer, or (2) detecting error in the transmission or the content of the payment order or communication. A security procedure may require the use of algorithms or other codes, identifying words or numbers, encryption, callback procedures, or similar security devices. Comparison of a signature on a payment order or communication with an authorized specimen signature of the customer is not by itself a security procedure [*Com. Code § 11201*].

A large percentage of payment orders and communications amending or canceling payment orders are transmitted electronically, and it is standard practice to use security procedures that are designed to ensure the authenticity of the message. Security procedures can also be used to detect errors in the content of messages or to detect payment orders that are transmitted by mistake (as in the case of multiple transmission of the same payment order). Security procedures also may apply to communications that are transmitted by telephone or in writing. The definition of security procedure limits the term to a procedure "established by agreement of a customer and a receiving bank." The term does not apply to procedures that the receiving bank may follow unilaterally in processing payment orders. The question of whether loss that may result from the transmission of a spurious or erroneous payment order will be borne by the receiving bank or by the sender or purported sender is affected by whether a security procedure was or was not in effect and whether there was or was not compliance with the procedure. Security procedures are referred to in Division 11 with respect to authorized and verified payment orders [*see Com. Code §§ 11202, 11203*; § 95.343[7] and erroneous payment orders [Official Comment to UCC § 4A-201; *see Com. Code § 11205*; § 95.345].

[i] Sender

"Sender" includes the customer in whose name a payment order is issued if the order is the authorized order of the customer under *Com. Code § 11202(a)*, or it is effective as the order of the customer under *Com. Code § 11202(b)* [*Com. Code § 11202(d)*]. See *§ 95.343[7]* regarding when a payment order is authorized; see *§ 95.344[1]* regarding when an unauthorized payment order can be effective.

[2] Transmission of Payment Order

[a] Permissible Methods; Wire Transfers

A payment order may be transmitted orally, electronically, or in writing [*Com. Code § 11103(a)(1)*]. Most payments covered by Division 11 are commonly referred to as wire transfers and usually involve some kind of electronic transmission, but the applicability of Division 11 does not depend on the means used to transmit the instruction of the sender. Transmission may be by letter or other written communication, oral communication, or electronic communication. An oral communication is normally given by telephone. Frequently the message is recorded by the receiving bank to provide evidence of the transaction, but apart from problems of proof there is no need to record the

oral instruction. Transmission of an instruction may be a direct communication between the sender and the receiving bank or through an intermediary such as an agent of the sender, a communication system such as international cable, or a funds-transfer system such as CHIPS, SWIFT, or an automated clearinghouse [Official Comment 6 to UCC § 4A-104].

[b] Funds-Transfer Systems; CHIPS; SWIFT

"Funds-transfer system" means a wire transfer network, automated clearinghouse, or other communication system of a clearinghouse or other association of banks through which a payment order by a bank may be transmitted to the bank to which the order is addressed [*Com. Code § 11105(a)(5)*].

The concept includes a system such as the Clearing House Interbank Payments System (CHIPS), which provides for transmission of a payment order as well as settlement of the obligation of the sender to pay the order. It also includes an automated clearinghouse, operated by a clearinghouse or some other association of banks, which processes and transmits payment orders of banks to other banks. In addition, the concept includes organizations such as the Society for Worldwide Interbank Financial Telecommunication (SWIFT), which provides only transmission services [Official Comment 3 to UCC § 4A-105].

The concept also includes the wire transfer network and automated clearinghouses of Federal Reserve banks. However, systems of the Federal Reserve banks are treated differently from systems of other associations of banks. Funds-transfer systems other than systems of the Federal Reserve banks are treated in Division 11 as a means of communication of payment orders between participating banks [*Com. Code § 11206*]. See *§§ 95.343[2][c]* and *95.345[1]* regarding how Federal Reserve banks function under Division 11.

Funds-transfer systems are able to promulgate rules binding on participating banks that may supplement or in some cases may even override provisions of Division 11 [*see Com. Code § 11501*; Official Comment 3 to UCC § 4A-105].

[c] Transfers by Fedwire

Funds transfers under Division 11 may be made, in whole or in part, by payment orders through a Federal Reserve bank in what is usually referred to as a transfer by Fedwire [Official Comment 1 to UCC § 4A-107 (providing examples)]. A funds transfer also can be made through a Federal Reserve bank in an automated clearinghouse transaction [Official Comment 2 to UCC § 4A-107 (providing example)].

[3] Time of Receipt of Payment Order or Communication to Cancel or Amend

The time of receipt of a payment order or communication canceling or amending a payment order is determined by the rules applicable to receipt of a notice stated in *Com. Code § 1202*. A receiving bank may fix a cutoff time or times on a funds-transfer business day for the receipt and processing of payment orders and communications canceling or amending payment orders. Different cutoff times may apply to payment orders, cancellations, or amendments, or to different categories of payment orders, cancellations, or amendments. A cutoff time may apply to senders generally or different cutoff times may apply to different senders or categories of payment orders. If a payment order or communication canceling or amending a payment order is received after the close of a funds-transfer business day or after the appropriate cutoff time on a funds-transfer business day, the receiving bank may treat the payment order or communication as received at the opening of the next funds-transfer business day [*Com. Code § 11106(a)*].

The time a payment order is received by a receiving bank usually defines the payment date or the execution date of a payment order [*Com. Code §§ 11301, 11401*]. The time of receipt of a payment order, or communication canceling or amending a payment order, is defined in *Com. Code § 11106(a)* by reference to the rules stated in *Com. Code § 1202* on notice. Thus, time of receipt is determined by the same rules that determine when a notice is received. Time of receipt,

however, may be altered by a cutoff time [Official Comment to UCC § 4A-106].

If Division 11 refers to an execution date or payment date or states a day on which a receiving bank is required to take action, and the date or day does not fall on a funds-transfer business day, the next day that is a funds-transfer business day is treated as the date or day stated, unless the contrary is stated in Division 11 [*Com. Code § 11106(b)*].

[4] Rejection of Payment Order

[a] Notice of Rejection Generally Is Not Required

A payment order is a request by the sender to the receiving bank, to execute or pay the order; and that request can be accepted [*see § 95.343[5]*] or rejected by the receiving bank [*Com. Code §§ 11209, 11210*; Official Comment 1 to UCC § 4A-209].

With respect to a payment order issued to a receiving bank other than the beneficiary's bank, notice of rejection is not necessary to prevent acceptance of the order. Acceptance can occur only if the receiving bank executes the order [*Com. Code § 11209(a)*; *see § 95.343[5]*]. However, notice of rejection routinely will be given by such a bank in cases in which the bank cannot or is not willing to execute the order for some reason. There are many reasons why a bank would not execute an order. For example, the payment order might not clearly instruct the receiving bank because of some ambiguity in the order or an internal inconsistency. In some cases, the receiving bank will not be able to carry out the instruction because of equipment failure, credit limitations on the receiving bank, or some other fact that makes proper execution of the order unfeasible. In such cases, notice of rejection is a means of informing the sender of the facts so that a corrected payment order can be transmitted or the sender can pursue some other means of completing the funds transfer. The other major reason for not executing an order is that the sender's account is insufficient to cover the order, and the receiving bank is not willing to give credit to the sender. If the sender's account is sufficient to cover the order and the receiving bank chooses not to execute the order, notice of rejection is necessary to prevent liability to pay interest to the sender if the case falls within *Com. Code § 11210(b)* [Official Comment 1 to UCC § 4A-210; *see § 95.347*].

[b] Rejection Notice by Beneficiary's Bank Can Be Necessary to Prevent Acceptance By Inaction

A payment order to the beneficiary's bank can be accepted by inaction of the bank [*Com. Code § 11209(b)(2), (3)*]. To prevent acceptance by inaction, it is necessary for the beneficiary's bank to send notice of rejection before acceptance occurs [*Com. Code § 11210(a)*; *see § 95.347*]. Rejection is effective when notice is given if it is given by a means that is reasonable in the circumstances; otherwise, it is effective when the notice is received [*see Com. Code § 1202*]. The question of when rejection is effective is important only in the relatively few cases under *Com. Code § 11210(b)(2)* and *(3)* in which a notice of rejection is necessary to prevent acceptance [*see § 95.347*]. The question of whether a particular means is reasonable depends on the facts in a particular case. In a most cases, the sender and the receiving bank will be in direct electronic contact with each other, and a notice of rejection can be transmitted instantaneously. Since time is of the essence in most funds transfers, some quick means of transmission usually would be required, but this is not always the case. The parties may specify by agreement the means by which communication between the parties is to be made [Official Comment 2 to UCC § 4A-210].

[5] Acceptance of Payment Order

A receiving bank has no duty to accept a payment order unless the bank makes an agreement, either before or after issuance of the payment order, to accept it, or acceptance is required by a funds-transfer system rule. If the bank makes such an agreement, the bank incurs a contractual obligation based on the agreement and may be held liable for breach of contract if a failure to execute violates the agreement. In many cases, a bank will enter into an agreement with its customer to govern the rights and obligations of the parties with respect to payment orders issued to the bank by the customer. In cases in which the sender is also a bank, there may be a funds-transfer system rule that governs the

obligations of a receiving bank with respect to payment orders transmitted over the system. The agreement or rule can specify the circumstances under which a receiving bank is obliged to execute a payment order, and can define the extent of liability of the receiving bank for breach of the agreement or rule [Official Comment 3 to UCC § 4A-209; *see Com. Code § 11305(d)* (liability for breach of agreement to execute payment order); § 95.352[1][d]].

If the receiving bank is not the beneficiary's bank, acceptance occurs when the bank executes the payment order [*Com. Code § 11209(a)*] which the bank does by issuing its own payment order [*Com. Code § 11301(a)*; *see § 95.348[3]*]. If the receiving bank is the beneficiary's bank, acceptance occurs on one of three possible events, which are discussed in *§ 95.348[4]*. [*see Com. Code § 11209(b)*].

Acceptance of the payment order imposes on the receiving bank an obligation to either the sender (if the receiving bank is not the beneficiary's bank) or the beneficiary (if the receiving bank is the beneficiary's bank) [*Com. Code §§ 11302, 11404*; Official Comment 1 to UCC § 4A-209].

[6] Execution of Payment Order

[a] Intermediary Banks "Execute" Payment Orders

A payment order is "executed" by the receiving bank when it issues a payment order intended to carry out the payment order received by the bank. A payment order received by the beneficiary's bank can be accepted but cannot be executed [*Com. Code § 11301(a)*].

The terms "executed," "execution," and "execution date" are used only with respect to a payment order to a receiving bank other than the beneficiary's bank. Execution refers to the act of the receiving bank in issuing a payment order "intended to carry out" the payment order that the bank received. A receiving bank has executed an order even if the order issued by the bank is not sufficient to carry out the order received by the bank. For example, the bank might erroneously issue an order to the wrong beneficiary, or in the wrong amount, or to the wrong beneficiary's bank. In each of these cases execution has occurred, but the execution is erroneous [Official Comment 1 to UCC § 4A-301; *see Com. Code § 11303*; § 95.351].

[b] Execution Date

The "execution date" of a payment order is the day on which the receiving bank may properly issue its payment order in execution of the sender's order. The execution date may be determined by instruction of the sender but cannot be earlier than the day the order is received and, unless otherwise determined, is the day the order is received. If the sender's instruction states a payment date, then the execution date is the payment date or an earlier date on which execution is reasonably necessary to allow payment to the beneficiary on the payment date [*Com. Code § 11301(b)*].

The execution date refers to the time a payment order should be executed rather than the day it is actually executed. Normally the sender will not specify an execution date, and most payment orders are meant to be executed immediately; therefore, the execution date is normally the day the order is received by the receiving bank. It is common for the sender to specify a "payment date" which is defined as "the day on which the amount of the order is payable to the beneficiary by the beneficiary's bank" [*Com. Code § 11401*; *see § 95.343[1][f]*]. Except for automated clearinghouse (ACH) transfers, if a funds transfer is entirely within the United States and the payment is to be carried out electronically, the execution date is the payment date unless the order is received after the payment date. If the payment is to be carried out through an automated clearinghouse, execution may occur before the payment date. In an ACH transfer the beneficiary is usually paid one or two days after issue of the originator's payment order. The execution date is determined by the stated payment date and is a date before the payment date on which execution is reasonably necessary to allow payment on the payment date. A funds-transfer system rule also can determine the execution date of orders received by the receiving bank if both the sender and the receiving bank are participants in the funds-transfer system. The execution

date can be determined by the payment order itself or by separate instructions of the sender or an agreement between the sender and the receiving bank [Official Comment 2 to UCC § 4A-301].

If a payment order is received after a cutoff time of the receiving bank, it may be treated by the bank as received at the opening of the next funds transfer business day [*Com. Code § 11106*; Official Comment 2 to UCC § 4A-301].

Execution on the execution date is timely, but the order can be executed before or after the execution date. See *§§ 95.348[2]* and *95.352[2][b]* for the consequences of early execution [*see Com. Code §§ 11209(d), 11402(c)*]. See *§ 95.352[1]* for the consequences of late execution [*see Com. Code § 11305(a)*].

[7] Authorized Payment Order

A payment order received by the receiving bank is the "authorized" order of the person identified as the sender if that person authorized the order or is otherwise bound by it under the law of agency [*Com. Code § 11202(a)*].

Some person will always be identified as the sender of a payment order. Acceptance of the order by the receiving bank is based on a belief by the bank that the order was authorized by the person identified as the sender. If the receiving bank is the beneficiary's bank, acceptance means that the receiving bank is obligated to pay the beneficiary. If the receiving bank is not the beneficiary's bank, acceptance means that the receiving bank has executed the sender's order and is obligated to pay the bank that accepts the order issued in execution of the sender's order. In either case, if the person identified as the sender of the order refuses to pay on the ground that the order was not authorized by that person, the receiving bank would suffer a loss unless it was entitled to enforce payment of the payment order that it accepted. In the absence of a statute or agreement that specifically addresses the issue, the matter usually will be resolved by the law of agency. In some cases, the law of agency works well. For example, suppose the receiving bank executes a payment order given by means of a letter apparently written by a corporation that is a customer of the bank and apparently signed by an officer of the corporation. If the receiving bank acts solely on the basis of the letter, the corporation is not bound as the sender of the payment order unless the signature was that of the officer and the officer was authorized to act for the corporation in the issuance of payment orders, or some other agency doctrine such as apparent authority or estoppel causes the corporation to be bound. Other equitable principles such as subrogation or restitution also may allow a receiving bank to recover with respect to an unauthorized payment order that it accepted [Official Comment 1 to UCC § 4A-203].

Given the large amount of the typical payment order, a prudent receiving bank will be unwilling to accept a payment order unless it has assurance that the order is what it purports to be. This assurance is normally provided by security procedures [*see Com. Code § 11201*; § 95.343[1][h]]. Normally in cases covered by Division 11, transmission of the payment order is made electronically, and the receiving bank is obliged to act on the basis of a message that appears on a computer screen. Common law concepts of authority of an agent to bind the principal are not helpful. There is no way of determining the identity or the authority of the person who caused the message to be sent. The receiving bank is not relying on the authority of any particular person to act for the purported sender. The case is not comparable to payment of a check by the drawee bank on the basis of a signature that is forged. Rather, the receiving bank relies on a security procedure pursuant to which the authenticity of the message can be "tested" by various devices which are designed to provide certainty that the message comes from the sender identified in the payment order. Thus, in the wire transfer business, the concept of "authorized" is different from that found in agency law, in that a payment order is treated as the order of the person in whose name it is issued if it is properly tested pursuant to a security procedure, and the order passes the test [Official Comment 1 to UCC § 4A-203].

[8] Choice-of-Law Rules

[a] Default Rules

The following choice of law rules apply unless the affected parties otherwise agree [*see § 95.343[8][b]*] or a funds-transfer system rule supervenes [*see § 95.343[8][c]*]:

- The rights and obligations between the sender of a payment order and the receiving bank are governed by the law of the jurisdiction in which the receiving bank is located [*Com. Code § 11507(a)(1)*].

- The rights and obligations between the beneficiary's bank and the beneficiary are governed by the law of the jurisdiction in which the beneficiary's bank is located [*Com. Code § 11507(a)(2)*].

- The issue of when payment is made pursuant to a funds transfer by the originator to the beneficiary is governed by the law of the jurisdiction in which the beneficiary's bank is located [*Com. Code § 11507(a)(3)*].

Funds transfers typically are interstate or international in character. If part of a funds transfer is governed by Division 11 and another part is governed by other law, the rights and obligations of parties to the funds transfer may be unclear because there is no clear consensus in various jurisdictions concerning the juridical nature of the transaction. Unless all of a funds transfer is governed by a single law, it may be very difficult to predict the result when something goes wrong in the transfer. *Com. Code § 11507* deals with this problem [Official Comment 1 to UCC § 4A-507].

Payment by the originator to the beneficiary of the funds transfer occurs when the beneficiary's bank accepts a payment order for the benefit of the beneficiary [*Com. Code § 11406*]. A jurisdiction in which UCC article 4A (Division 11) is not in effect may follow a different rule or it may not have a clear rule. Under *Com. Code § 11507(a)(3)* the issue is governed by the law of the jurisdiction in which the beneficiary's bank is located. Since the payment to the beneficiary is made through the beneficiary's bank, it is reasonable that the issue of when payment occurs will be governed by the law of the jurisdiction in which that bank is located. Since it can be difficult in many cases to determine where a beneficiary is located, the location of the beneficiary's bank provides a more certain rule [Official Comment 2 to UCC § 4A-507].

[b] Effect of Parties' Agreement

If the parties described in each paragraph of *Com. Code § 11507(a)* [*see § 95.343[8][a]*] have made an agreement selecting the law of a particular jurisdiction to govern rights and obligations between themselves, the law of that jurisdiction governs those rights and obligations, whether or not the payment order or the funds transfer bears a reasonable relation to that jurisdiction [*Com. Code § 11507(b)*].

This rule gives parties the maximum freedom of choice. As long as the case law of funds transfers is not well developed, there may be a strong incentive to choose the law of a jurisdiction in which UCC Article 4A is in effect because it provides a greater degree of certainty with respect to the rights of the parties. With respect to commercial transactions, uniformity and predictability based on commercial convenience are prime considerations in making the choice of governing law [Official Comment 3 to UCC § 4A-507]. *Com. Code § 11507(b)* is derived in part from *Civ. Code § 1646.5*.

[c] Effect of Funds-Transfer System Rule

Under *Com. Code § 11507(c)*, a funds-transfer system rule may select the law of a particular jurisdiction to govern rights and obligations between participating banks with respect to payment orders transmitted or processed through the system. A choice of law made pursuant to this power is binding on participating banks [*Com. Code § 11507(c)*].

A funds-transfer system rule also may select the law of a particular jurisdiction to govern the rights and obligations of

some or all parties to a funds transfer any part of which is carried out by means of the system. A choice of law made pursuant to this power is binding on the originator, other sender, or a receiving bank having notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system when the originator, other sender, or receiving bank issued or accepted a payment order [*Com. Code § 11507(c)*].

The beneficiary of a funds transfer is bound by the choice of law in a funds-transfer system rule if, when the funds transfer is initiated, the beneficiary has notice that the funds-transfer system might be used in the funds transfer and of the choice of law by the system [*Com. Code § 11507(c)*].

The law of a jurisdiction selected pursuant to *Com. Code § 11507(c)* may govern whether or not that law bears a reasonable relation to the matter in issue [*Com. Code § 11507(c)*; *but see § 95.343[8][d]* (conflicting rules)].

Com. Code § 11507(c) may be the most important provision in regard to creating uniformity of law in funds transfers. Most rights stated in Division 11 regard parties who are in privity of contract such as originator and beneficiary, sender and receiving bank, and beneficiary's bank and beneficiary. Since they are in privity, they can make a choice of law by agreement. Not all parties are in privity, however. For example, an intermediary bank that improperly executes a payment order is not in privity either with the originator or the beneficiary. The ability of a funds-transfer system to make a choice of law by rule is a convenient way of dispensing with individual agreements and to cover cases in which agreements are not feasible. It is probable that funds-transfer systems will adopt a governing law to increase the certainty of commercial transactions that are effected over such systems. A system rule might adopt the law of a particular state where UCC Article 4A (Division 11) is in force, to govern transfers on the system in order to provide a consistent, unitary, law governing all transfers made on the system. To the extent that such system rules become applicable, individual choice-of-law agreements become unnecessary [Official Comment 4 to UCC § 4A-507].

Com. Code § 11507(c) has broad application. A system-rule choice of law not only applies to rights and obligations between banks that use the system but also may apply to other parties to the funds transfer, as long as some part of the transfer is carried out over the system. The originator and any other sender or receiving bank in the funds transfer is bound if at the time of issuing or accepting a payment order, that party had notice that the funds transfer involved use of the system and that the system chose the law of a particular jurisdiction [Official Comment 4 to UCC § 4A-507]. Under *Com. Code § 11107*, the Federal Reserve by regulation could make a similar choice of law to govern funds transfers carried out by use of Federal Reserve banks [*see § 95.341[3]*].

[d] Conflicting Rules

In the event of inconsistency between an agreement under *Com. Code § 11507(b)* and a choice-of-law rule under *Com. Code § 11507(c)*, the agreement under *Com. Code § 11507(b)* prevails [*Com. Code § 11507(d)*].

If a funds transfer is made by use of more than one funds-transfer system, and there is inconsistency between choice-of-law rules of the systems, the matter in issue is governed by the law of the selected jurisdiction that has the most significant relationship to the matter in issue [*Com. Code § 11507(e)*].

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9-95 California Forms of Pleading and Practice--Annotated § 95.344

§ 95.344 Security Procedure Agreements

[1] Effect of Agreement

[a] Unauthorized Payment Order Can Be Effective

Under *Com. Code § 11202*, if a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if the following conditions are satisfied [*Com. Code § 11202(b)*].

- The security procedure is a commercially reasonable method of providing security against unauthorized payment orders.

- The bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer.

The bank is not required to follow an instruction (1) that violates a written agreement with the customer, or (2) notice of which is not received at a time and in a manner affording the bank a reasonable opportunity to act on it before the payment order is accepted [*Com. Code § 11202(b)*].

Com. Code § 11202 reflects the reality of the wire transfer business. A person in whose name a payment order is issued is considered to be the sender of the order if the order is "authorized" as stated in *Com. Code § 11202(a)* [*see § 95.343[7]* or if the order is "verified" pursuant to a security procedure in compliance with *Com. Code § 11202(b)*. If *Com. Code § 11202(b)* does not apply, the question of whether the customer is responsible for the order is determined by the law of agency. The issue is one of actual or apparent authority of the person who caused the order to be issued in the name of the customer. In some cases the law of agency might allow the customer to be bound by an unauthorized order if conduct of the customer can be used to find an estoppel against the customer to deny that the order was unauthorized. If the customer is bound by the order under any of these agency doctrines, *Com. Code § 11202(a)* treats

the order as authorized and thus the customer is deemed to be the sender of the order [*see § 95.343[7]*]. In most cases, however, *Com. Code § 11202(b)* will apply. In that event there is no need to make an agency-law analysis to determine authority; the issue of liability of the purported sender of the payment order will be determined by agency law only if the receiving bank did not comply with *Com. Code § 11202(b)* [Official Comment 1 to UCC § 4A-203].

[b] What Bank Must Prove

Com. Code § 11202(b) is based on the assumption that losses due to fraudulent payment orders can best be avoided by the use of commercially reasonable security procedures, and that the use of such procedures should be encouraged. The subsection is designed to protect both the customer and the receiving bank. A receiving bank needs to be able to rely on objective criteria to determine whether it can safely act on a payment order. Employees of the bank can be trained to "test" a payment order according to the various steps specified in the security procedure. The bank is responsible for the acts of these employees. The bank is required to prove that it accepted the payment order in good faith and "in compliance with the security procedure." If the fraud was not detected because the bank's employee did not perform the acts required by the security procedure, the bank has not complied. The bank also is required to prove that it complied with any agreement or instruction that restricts acceptance of payment orders issued in the name of the customer. For example, the customer may prohibit the bank from accepting a payment order that is not payable from an authorized account, that exceeds the credit balance in specified accounts of the customer, or that exceeds some other amount [Official Comment 3 to UCC § 4A-203].

A limitation may relate instead to the beneficiary. For example, the customer may provide the bank with a list of authorized beneficiaries and prohibit acceptance of any payment order to a beneficiary not appearing on the list [Official Comment 3 to UCC § 4A-203].

Limitations may be incorporated into the security procedure itself, or may be covered by a separate agreement or instruction. In either case, the bank must comply with the limitations if the conditions stated in *Com. Code § 11202(b)* are met. Normally limitations on acceptance would be incorporated into an agreement between the customer and the receiving bank, but in some cases the instruction might be unilaterally given by the customer. If standing instructions or an agreement state limitations on the ability of the receiving bank to act, provision must be made for later modification of the limitations. Normally this would be done by an agreement that specifies particular procedures to be followed. Thus, *Com. Code § 11202(b)* states that the receiving bank is not required to follow an instruction that violates a written agreement [Official Comment 3 to UCC § 4A-203].

The receiving bank is not bound by an instruction unless it has adequate notice of the instruction [Official Comment 3 to UCC § 4A-203; *see Com. Code § 1202* (notice)].

[2] Commercial Reasonableness

[a] Requirement for Reasonableness

Com. Code § 11202(b) assures that the interests of the customer will be protected by providing an incentive to a bank to make available to the customer a security procedure that is commercially reasonable [*see § 95.344[1][a]*]. If a commercially reasonable security procedure is not made available to the customer, *Com. Code § 11202(b)* does not apply. The result is that *Com. Code § 11202(a)* applies and the bank acts at its peril in accepting a payment order that may be unauthorized [*see § 95.343[7]*]. Prudent banking practice may require that security procedures be used in virtually all cases except for those in which personal contact between the customer and the bank eliminates the possibility of an unauthorized order. The burden of making available commercially reasonable security procedures is imposed on receiving banks because they generally determine what security procedures can be used and are in the best position to evaluate the efficacy of procedures offered to customers to combat fraud. The burden on the customer is to supervise its employees to assure compliance with the security procedure and to safeguard confidential security

information and access to transmitting facilities so that the security procedure cannot be breached [Official Comment 3 to UCC § 4A-203].

[b] How Reasonableness Is Determined

The principal issue that is likely to arise in litigation involving *Com. Code § 11202(b)* is whether the security procedure in effect when a fraudulent payment order was accepted was commercially reasonable [Official Comment 4 to UCC § 4A-203]. Commercial reasonableness of a security procedure is a question of law to be determined by considering the following factors [*Com. Code § 11202(c)*]:

- The wishes of the customer expressed to the bank.
- The circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank.
- Alternative security procedures offered to the customer.
- Security procedures in general use by customers and receiving banks similarly situated [*Com. Code § 11202(c)*].

It is appropriate to make the finding concerning commercial reasonableness a matter of law because security procedures are likely to be standardized in the banking industry and a question of law standard leads to more predictability concerning the level of security that a bank must offer to its customers [Official Comment 4 to UCC § 4A-203].

The purpose of *Com. Code § 11202(b)* is to encourage banks to institute reasonable safeguards against fraud, not to make them insurers against fraud. Thus, a security procedure is not commercially unreasonable simply because another procedure might have been better or because the judge deciding the question would have opted for a more stringent procedure. The standard is not whether the security procedure is the best available. Rather, it is whether the procedure is reasonable for the particular customer and the particular bank, which is a lower standard. On the other hand, a security procedure that fails to meet prevailing standards of good banking practice applicable to the particular bank should not be held to be commercially reasonable [Official Comment 4 to UCC § 4A-203].

The concept of what is commercially reasonable in a given case is flexible. Verification entails labor and equipment costs that can vary greatly depending on the degree of security that is sought. A customer that transmits very large numbers of payment orders in very large amounts may desire and may reasonably expect to be provided with state-of-the-art procedures that provide maximum security. However, the expense involved may make use of a state-of-the-art procedure infeasible for a customer that normally transmits payment orders infrequently or in relatively low amounts [Official Comment 4 to UCC § 4A-203].

Another variable is the type of receiving bank. It is reasonable to require large money center banks to make available state-of-the-art security procedures. On the other hand, the same requirement may not be reasonable for a small country bank. A receiving bank might have several security procedures that are designed to meet the varying needs of different customers. The type of payment order is another variable. For example, in a wholesale wire transfer, each payment order normally is transmitted electronically and individually. A testing procedure will be applied individually to each payment order. In funds transfers to be made by means of an automated clearinghouse many payment orders are incorporated into an electronic device that is physically delivered. Testing of the individual payment orders is not feasible. Thus, a different kind of security procedure must be adopted to take into account the different mode of transmission [Official Comment 4 to UCC § 4A-203].

[c] Security Procedure Chosen by Customer Is Deemed Reasonable

A security procedure is deemed to be commercially reasonable if the following conditions are satisfied [*Com. Code § 11202(c)*].

- The security procedure was chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for that customer.

- The customer expressly agreed in writing to be bound by any payment order, whether or not authorized, issued in its name and accepted by the bank in compliance with the security procedure chosen by the customer.

Sometimes an informed customer refuses a security procedure that is commercially reasonable and suitable for that customer and insists on using a higher-risk procedure because it is more convenient or cheaper. In that case, the customer has voluntarily assumed the risk of failure of the procedure and cannot shift the loss to the bank. However, this result follows only if the customer expressly agrees in writing to assume that risk. It is implicit in the last sentence of *Com. Code § 11202(c)* that a bank that accedes to the wishes of its customer in this regard is not acting in bad faith by doing so, as long as the customer is made aware of the risk. In all cases, however, a receiving bank cannot get the benefit of *Com. Code § 11202(b)* unless it has made available to the customer a security procedure that is commercially reasonable and suitable for use by that customer. In most cases, the mutual interest of bank and customer to protect against fraud should lead to agreement to a security procedure which is commercially reasonable [Official Comment 4 to UCC § 4A-203].

[3] Application to Amended or Canceled Payment Order

Com. Code § 11202 applies to amendments and cancellations of payment orders to the same extent as it applies to payment orders [*Com. Code § 11202(e)*].

[4] No Variation by Agreement

Except as otherwise provided in *Com. Code § 11202* [*see § 95.344[1] -[3]*] and in *Com. Code § 11203(a)(1)* [*see § 95.350[1][a]*], rights and obligations arising under *Com. Code § 11202* may not be varied by agreement [*Com. Code § 11202(f)*].

In a large majority of cases, the sender of a payment order is a bank. In many cases in which there is a bank sender, both the sender and the receiving bank will be members of a funds-transfer system over which the payment order is transmitted. *Com. Code § 11202(f)* does not prohibit a funds-transfer system rule from varying rights and obligations under *Com. Code § 11202*. Therefore, a rule of the funds-transfer system can determine how loss arising on account of an unauthorized payment order from a participating bank to another participating bank is to be allocated [Official Comment 7 to UCC § 4A-203]. A funds-transfer system rule, however, cannot change the rights of a customer that is not a participating bank [*Com. Code § 11501(b)*].

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9-95 California Forms of Pleading and Practice--Annotated § 95.345

§ 95.345 Error in Content or Transmission of Payment Order Pursuant to Security Procedure

[1] In General

[a] Transmission Pursuant to Security Procedure

If an accepted payment order was transmitted pursuant to a security procedure for the detection of error, and the payment order either (1) erroneously instructed payment to a beneficiary not intended by the sender, (2) erroneously instructed payment in an amount greater than the amount intended by the sender, or (3) was an erroneously transmitted duplicate of a payment order previously sent by the sender, the following rules apply [*Com. Code § 11205(a)*].

- If the sender proves that the sender or a person acting on behalf of the sender pursuant to *Com. Code § 11206* complied with the security procedure and that the error would have been detected if the receiving bank had also complied, the sender is not obliged to pay the order to the extent stated in the following two rules [*Com. Code § 11205(a)(1)*].

- If the funds transfer is completed on the basis of a payment order that either erroneously instructed payment to a beneficiary not intended by the sender or erroneously instructed payment in an amount greater than the amount intended by the sender, the sender is not obliged to pay the order and the receiving bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution [*Com. Code § 11205(a)(2)*].

- If the funds transfer is completed on the basis of a payment order that was an erroneously transmitted duplicate of a payment order previously sent by the sender, the sender is not obliged to pay the order to the extent the amount received by the beneficiary is greater than the amount intended by the sender. In that case, the receiving bank is entitled to recover from the beneficiary the excess amount received to the extent allowed by the law governing mistake and restitution [*Com. Code § 11205(a)(3)*].

The three cases covered by *Com. Code § 11205* [*see above*] are essentially similar. In each, if the error is not detected, a beneficiary will receive funds that the beneficiary was not intended to receive. If *Com. Code § 11205* applies, the risk of

loss with respect to the error of the sender is shifted to the bank which has the burden of recovering the funds from the beneficiary. The risk of loss is shifted to the bank only if the sender proves that the error would have been detected if there had been compliance with the procedure and that the sender (or an agent under *Com. Code § 11206*; *see § 95.345[2]*) complied. In the case of a duplicate order or a wrong beneficiary, the sender does not have to pay the order. In the case of an overpayment, the sender does not have to pay the order to the extent of the overpayment. If *Com. Code § 11205(a)(1)* applies, the position of the receiving bank is comparable to that of a receiving bank that erroneously executes a payment order as stated in *Com. Code § 11303*. However, failure of the sender to timely report the error is covered by *Com. Code § 11205(b)* rather than by *Com. Code § 11304*, which applies only to erroneous execution under *Com. Code § 11303*. A receiving bank to which the risk of loss is shifted by *Com. Code § 11205(a)(1)* or *(2)* is entitled to recover the amount erroneously paid to the beneficiary to the extent allowed by the law of mistake and restitution. Rights of the receiving bank against the beneficiary are similar to those of a receiving bank that erroneously executes a payment order as stated in *Com. Code § 11303* [Official Comment 1 to UCC § 4A-205; *see* Official Comment 2 to UCC § 4A-303].

A security procedure may be designed to detect an account number that is not one to which the sender normally makes payment. In that case, the security procedure may require a special verification that payment to the stated account number was intended. In the case of dollar amounts, the security procedure may require different codes for different dollar amounts. If a $1,000,000 payment order contains a code that is inappropriate for that amount, the error in amount should be detected. In the case of duplicate orders, the security procedure may require that each payment order be identified by a number or code that applies to no other order. If the number or code of each payment order received is registered in a computer base, the receiving bank can quickly identify a duplicate order [Official Comment 1 to UCC § 4A-205].

[b] Compliance With Security Procedure

A security procedure established for the purpose of detecting error is not effective unless both sender and receiving bank comply with the procedure. Thus, the bank undertakes a duty of complying with the procedure for the benefit of the sender. This duty is recognized in *Com. Code § 11205(a)(1)*. The loss with respect to the sender's error is shifted to the bank if the bank fails to comply with the procedure and the sender (or an agent under *Com. Code § 11206*; *see § 95.345[2]* does comply. Although the customer may have been negligent in transmitting the erroneous payment order, the loss is put on the bank on a last-clear-chance theory [Official Comment 2 to UCC § 4A-205].

[c] Variation by Agreement

Com. Code § 11205 is subject to variation by agreement under *Com. Code § 11501*. Thus, if a receiving bank and its customer have agreed to a security procedure for detection of error, the liability of the receiving bank for failing to detect an error of the customer as provided in *Com. Code § 11205* may be varied as provided in an agreement of the bank and the customer [Official Comment 3 to UCC § 4A-205].

[d] Sender's Duty to Discover Error

If the sender of an erroneous payment order described in *Com. Code § 11205(a)* is not obliged to pay all or part of the order, and the sender receives notification from the receiving bank that the order was accepted by the bank or that the sender's account was debited with respect to the order, then the sender has a duty to exercise ordinary care, on the basis of information available to the sender, to discover the error with respect to the order and to advise the bank of the relevant facts within a reasonable time, not exceeding 90 days, after the bank's notification was received by the sender. If the bank proves that the sender failed to perform that duty, the sender is liable to the bank for the loss the bank proves it incurred as a result of the failure, but the liability of the sender may not exceed the amount of the sender's order [*Com. Code § 11205(b)*].

Whether the bank is entitled to recover from the sender depends on whether the sender's failure to give timely notice would have made any difference. If the bank could not have recovered from the beneficiary that received payment under the erroneous payment order even if timely notice had been given, the sender's failure to notify did not cause any loss of the bank [Official Comment 2 to UCC § 4A-205].

[e] Application to Amendment of Payment Order

Com. Code § 11205 applies to amendments to payment orders to the same extent it applies to payment orders [*Com. Code § 11205(c)*].

[f] Sender's Risk When Transmission Is Not Pursuant to Security Procedure

Com. Code § 11205 concerns error in the content or in the transmission of payment orders transmitted pursuant to a security procedure [*see Com. Code § 11205(a)*]. *Com. Code § 11205* does not apply if the receiving bank and the customer did not agree to the establishment of a procedure for detecting error [Official Comment 1 to UCC § 4A-205; *see Com. Code § 11201* ("security procedure" defined as "a procedure established by agreement of a customer and a receiving bank for the purpose of ... detecting error ...")]. In each case, if *Com. Code § 11205* does not apply and the funds transfer is completed, the sender is obliged to pay the order. Sender's remedy, based on payment by mistake, is to recover from the beneficiary that received payment [Official Comment 1 to UCC § 4A-205].

[2] Transmission of Payment Order to Funds-Transfer System

If a payment order addressed to a receiving bank is transmitted to a funds-transfer system or other third-party communication system for transmission to the bank, the system is deemed to be an agent of the sender for the purpose of transmitting the payment order to the bank. If there is a discrepancy between the terms of the payment order transmitted to the system and the terms of the payment order transmitted by the system to the bank, the terms of the payment order of the sender are those transmitted by the system. However, this does not apply to a funds-transfer system of the Federal Reserve banks [*Com. Code § 11206(a)*]. *Com. Code § 11206* applies to cancellations and amendments of payment orders to the same extent as it applies to payment orders [*Com. Code § 11206(b)*].

If an agent of the sender is employed to transmit orders on behalf of the sender, the sender is bound by the order transmitted by the agent on the basis of agency law. *Com. Code § 11206* is an application of that principle to cases in which a funds-transfer or communication system acts as an intermediary in transmitting the sender's order to the receiving bank. The intermediary is deemed to be an agent of the sender for the purpose of transmitting payment orders and related messages for the sender [Official Comment 1 to UCC § 4A-206; *see* Official Comment 2 to UCC § 4A-206 (examples)].

[3] Misidentification of Beneficiary by Erroneous Reference to Name, Account Number, or Other Fact

Subject to *Com. Code § 11207(b)* [*see § 95.345[4]*], if, in a payment order received by the beneficiary's bank, the name, bank account number, or other identification of the beneficiary refers to a nonexistent or unidentifiable person or account, no person has rights as a beneficiary of the order and acceptance of the order cannot occur [*Com. Code § 11207(a)*].

When a payment order issued to the beneficiary's bank calls for payment to a nonexistent or unidentifiable person or account, it is not possible for the funds transfer to be completed, hence the order cannot be accepted. The sender of a payment order is not obliged to pay its order unless the beneficiary's bank accepts a payment order instructing payment to the beneficiary of that sender's order [*Com. Code § 11402(c)*; *see § 95.352[2][b]*]. Therefore, if the beneficiary of a funds transfer is nonexistent or unidentifiable, each sender in the funds transfer that has paid its payment order is entitled to get its money back [Official Comment 1 to UCC § 4A-207].

[4] Misidentification of Beneficiary by Ambiguous Reference to Both Name and Number

[a] In General

If a payment order received by the beneficiary's bank identifies the beneficiary both by name and by an identifying or bank-account number, and the name and number identify different persons, the following rules apply [*Com. Code § 11207(b)*].

- Except as otherwise provided in *Com. Code § 11207(c)* [*see § 95.345[4][b]*], if the beneficiary's bank does not know that the name and number refer to different persons, it may rely on the number as the proper identification of the beneficiary of the order. The beneficiary's bank need not determine whether the name and number refer to the same person [*Com. Code § 11207(b)(1)*].

- If the beneficiary's bank pays the person identified by name or knows that the name and number identify different persons, no person has rights as beneficiary except the person paid by the beneficiary's bank if that person was entitled to receive payment from the originator of the funds transfer. If no person has rights as beneficiary, acceptance of the order cannot occur [*Com. Code § 11207(b)(2)*].

A very large percentage of payment orders issued to the beneficiary's bank by another bank are processed by automated means using machines capable of reading orders on standard formats that identify the beneficiary by an identifying number or the number of a bank account. The processing of the order by the beneficiary's bank and the crediting of the beneficiary's account are done by use of the identifying or bank account number without human reading of the payment order itself. The process is comparable to that used in automated payment of checks. The standard format, however, may also allow the inclusion of the name of the beneficiary and other information which can be useful to the beneficiary's bank and the beneficiary but which plays no part in the process of payment. If the beneficiary's bank has both the account number and name of the beneficiary supplied by the originator of the funds transfer, it is possible for the beneficiary's bank to determine whether the name and number refer to the same person, but if a duty to make that determination is imposed on the beneficiary's bank, the benefits of automated payment are lost. Manual handling of payment orders is both expensive and subject to human error. If payment orders can be handled on an automated basis, there are substantial economies of operation, and the possibility of clerical error is reduced. *Com. Code § 11207(b)* allows banks to use automated processing, by allowing banks to act on the basis of the number without regard to the name if the bank does not know that the name and number refer to different persons [*see generally Com. Code § 1202(b), (f)* (when bank would "know" that fact)]. The time of payment is the pertinent time at which knowledge or lack of knowledge must be determined [Official Comment 2 to UCC § 4A-207].

Although the clear trend is for beneficiary's banks to process payment orders by automated means, *Com. Code § 11207* is not limited to cases in which processing is done by automated means. A bank that processes by semi-automated means or even manually may rely on number as stated in *Com. Code § 11207* [Official Comment 2 to UCC § 4A-207].

In the typical case the error is made by the originator of the funds transfer. The originator should know the name of the person who is to receive payment and can further identify that person by an address that would normally be known to the originator. It is not unlikely, however, for the originator to be unsure whether an identifying or account number refers to the person the originator intends to pay. *Com. Code § 11207(b)(1)* deals with the typical case in which the beneficiary's bank pays on the basis of the account number and is not aware at the time of payment that the named beneficiary is not the holder of the account which was paid. In some cases the false number will be the result of error by the originator; in other cases, fraud is involved [Official Comment 2 to UCC § 4A-207].

[b] Payment to Beneficiary According to Number

If a payment order described in *Com. Code § 11207(b)* [*see § 95.345[4][a]*] is accepted, and the originator's payment

order describes the beneficiary inconsistently by name and number, and the beneficiary's bank pays the person identified by number as permitted by *Com. Code § 11207(b)(1)*, the following rules apply [*Com. Code § 11207(c)*]:

- If the originator is a bank, the originator is obliged to pay its order [*Com. Code § 11207(c)(1)*].

- If the originator is not a bank and proves that the person identified by number was not entitled to receive payment from the originator, the originator is not obliged to pay its order unless the originator's bank proves that the originator, before acceptance of the originator's order, had notice that payment of a payment order issued by the originator might be made by the beneficiary's bank on the basis of an identifying or bank account number even if it identifies a person different from the named beneficiary. Proof of notice may be made by any admissible evidence. The originator's bank satisfies the burden of proof if it proves that the originator, before the payment order was accepted, signed a writing stating the information to which the notice relates [*Com. Code § 11207(c)(2)*].

The originator is responsible for an inconsistent description of the beneficiary if it had notice that the order might be paid by the beneficiary's bank on the basis of the number. If the originator is a bank, the originator always has that responsibility. The rationale is that any bank should know how payment orders are processed and paid. If the originator is not a bank, the originator's bank must prove that its customer, the originator, had notice. Notice can be proved by any admissible evidence, but the bank can always prove notice by providing the customer with a written statement of the required information and obtaining the customer's signature on the statement. That statement will then apply to any payment order accepted by the bank thereafter. The information need not be supplied more than once [Official Comment 3 to UCC § 4A-207].

[c] Recovery of Amount Paid to Wrong Person

In a case governed by *Com. Code § 11207(b)(1)* [*see* [a] *above*], if the beneficiary's bank rightfully pays the person identified by number, but that person was not entitled to receive payment from the originator, the amount paid may be recovered from that person to the extent allowed by the law governing mistake and restitution, as follows [*Com. Code § 11207(d)*]:

- If the originator is obliged to pay its payment order as stated in *Com. Code § 11207(c)* [*see § 95.345[4][b]*], the originator has the right to recover [*Com. Code § 11207(d)(1)*].

- If the originator is not a bank and is not obliged to pay its payment order, the originator's bank has the right to recover [*Com. Code § 11207(d)(2)*].

[5] Misidentification of Bank by Ambiguous Reference to Both Name and Number

[a] When Sender Is a Bank

In the case of a payment order identifying the beneficiary's bank (or an intermediary bank) both by name and by an identifying number, but the name and number identify different persons, then if the sender is a bank, the receiving bank may rely on the number as the proper identification of the beneficiary's bank (or intermediary bank) if the receiving bank, when it executes the sender's order, does not know that the name and number identify different persons. The receiving bank need not determine whether the name and number refer to the same person or whether the number refers to a bank. The sender is obliged to compensate the receiving bank for any loss and expenses incurred by the receiving bank as a result of its reliance on the number in executing or attempting to execute the order [*Com. Code § 11208(b)(1)*; *see* Official Comment 1 to UCC § 4A-208 (example)].

[b] When Sender Is Not a Bank

In the case of a payment order identifying the beneficiary's bank (or an intermediary bank) both by name and by an identifying number, but the name and number identify different persons, if (1) the sender is not a bank and (2) the receiving bank proves that the sender, before the payment order was accepted, had notice that the receiving bank might rely on the number as the proper identification of the beneficiary's bank (or intermediary bank) even if it identifies a person different from the bank identified by name, then the rights and obligations of the sender and the receiving bank are governed by *Com. Code § 11208(b)(1)*, as though the sender were a bank [*see § 95.345[5][a]*]. Proof of notice may be made by any admissible evidence. The receiving bank satisfies the burden of proof if it proves that the sender, before the payment order was accepted, signed a writing stating the information to which the notice relates [*Com. Code § 11208(b)(2)*; *see* Official Comment 2 to UCC § 4A-208 (example)].

[c] Reliance on Name Alone Can Be Sufficient

Regardless of whether or not the sender is a bank, the receiving bank may rely on the name as the proper identification of the intermediary bank or beneficiary's bank if the receiving bank, at the time it executes the sender's order, does not know that the name and number identify different persons. The receiving bank need not determine whether the name and number refer to the same person [*Com. Code § 11208(b)(3)*]. If the receiving bank knows that the name and number identify different persons, however, reliance on either the name or the number in executing the sender's payment order is a breach of the obligation stated in *Com. Code § 11302(a)(1)* [*Com. Code § 11208(b)(4)*].

[6] Misidentification of Bank by Number Alone

In the case of a payment order identifying an intermediary bank or the beneficiary's bank only by an identifying number, the receiving bank may rely on the number as the proper identification of the intermediary bank or beneficiary's bank, and need not determine whether the number identifies a bank [*Com. Code § 11208(a)(1)*]. The sender is obliged to compensate the receiving bank for any loss and expenses incurred by the receiving bank as a result of its reliance on the number in executing or attempting to execute the order [*Com. Code § 11208(a)(2)*]; *see* Official Comment 1 to UCC § 4A-208 (example)].

[7] Method of Processing Orders Is Immaterial When Bank Is Misidentified

Although the principal purpose of *Com. Code § 11208* is to accommodate automated processing of payment orders, that section applies regardless of whether processing is done by automation, or by semi-automated means, or manually [Official Comment 3 to UCC § 4A-208].

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9-95 California Forms of Pleading and Practice--Annotated § 95.346

§ 95.346 Cancellation or Amendment of Payment Order

[1] In General

Com. Code § 11211 states the conditions under which the cancellation or amendment of payment orders is both effective and rightful. There is no concept of wrongful cancellation or amendment of a payment order. If the conditions stated in *Com. Code § 11211* are not satisfied, the attempted cancellation or amendment is not effective. If the stated conditions are satisfied, the cancellation or amendment is effective and rightful [Official Comment 1 to UCC § 4A-211].

The sender of a payment order may want to withdraw or change the order because the sender has had a change of mind about the transaction or because the payment order was erroneously issued or for any other reason. One common situation is that of multiple transmissions of one order. The sender that mistakenly transmits an order twice wants to correct the mistake by canceling the duplicate order. Or, for example, the amount of the order may have been incorrectly stated; for example, a sender may have intended to order a payment of $1,000,000 but mistakenly issued an order to pay $10,000,000. In this case the sender might try to correct the mistake by canceling the order and issuing another order in the proper amount. Alternatively, the mistake could be corrected by amending the order to change it to the proper amount. Whether the error is corrected by amendment or by cancellation and reissue, the net result is the same [Official Comment 1 to UCC § 4A-211].

A canceled payment order cannot be accepted. If an accepted payment order is canceled, the acceptance is nullified, and no person has any right or obligation based on the acceptance. Amendment of a payment order is deemed to be both cancellation of the original order at the time of amendment and also issuance of a new payment order in the amended form, at the same time [*Com. Code § 11211(e)*].

[2] Before Acceptance of Order

[a] By Timely Transmission of Instruction

A communication of the sender of a payment order, canceling or amending the order, may be transmitted to the

receiving bank orally, electronically, or in writing. If a security procedure is in effect between the sender and the receiving bank, the communication is not effective to cancel or amend the order unless the communication is verified pursuant to the security procedure or the bank agrees to the cancellation or amendment [*Com. Code § 11211(a)*]. If such a communication is not transmitted and the order remains unaccepted for a five-day period, the order will be canceled by operation of law [*see Com. Code § 11211(d)*; § 95.346[2][b]].

Cancellations and amendments normally are subject to verification pursuant to security procedures to the same extent as payment orders. This is necessary to protect the receiving bank because under *Com. Code § 11211(b)*, a cancellation or amendment can be effective by unilateral action of the sender. Without verification, the bank cannot be sure whether the communication was or was not effective to cancel or amend a previously verified payment order [Official Comment 2 to UCC § 4A-211].

Subject to *Com. Code § 11211(a)*, a communication by the sender canceling or amending a payment order is effective to cancel or amend the order if notice of the communication is received at a time and in a manner affording the receiving bank a reasonable opportunity to act on the communication before the bank accepts the payment order [*Com. Code § 11211(b)*]. If the receiving bank has not yet accepted the order, there is no reason why the sender should not be able to cancel or amend the order unilaterally as long as the requirements of *Com. Code § 11211(a)* and *(b)* are met. If the receiving bank has accepted the order, it is still possible to cancel or amend, but only if the requirements of *Com. Code § 11211(c)* are met [Official Comment 3 to UCC § 4A-211]. See *§ 95.346[3]* for discussion of cancellation after acceptance.

[b] By Nonacceptance After Five Business Days (Stale Payment Order)

An unaccepted payment order is canceled by operation of law at the close of the fifth funds-transfer business day of the receiving bank after the execution date or payment date of the order [*Com. Code § 11211(d)*].

In practice, payment orders normally are executed on the execution date or the day after, and an order issued to the beneficiary's bank is normally accepted on the payment date or the day after. If a payment order is not accepted on its execution date or payment date or shortly thereafter, it is probable that there was some problem with the terms of the order or the sender did not have sufficient funds or credit to cover the amount of the order. Delayed acceptance of such an order normally is not contemplated, but the order may not have been canceled by the sender. *Com. Code § 11211(d)* provides for cancellation by operation of law so as to prevent an unexpected delayed acceptance [Official Comment 7 to UCC § 4A-211].

[3] After Acceptance of Order

[a] Agreement or Rule Must Allow Cancellation or Amendment

After a payment order has been accepted, cancellation or amendment of the order is not effective unless the receiving bank agrees or a funds-transfer system rule allows cancellation or amendment without agreement of the bank [*Com. Code § 11211(c)*]. A funds-transfer system rule is not effective to the extent that it conflicts with *Com. Code § 11211(c)(2)* [*Com. Code § 11211(h)*], which concerns cancellation or amendment of an order after acceptance by the beneficiary's bank [*see § 95.346[3][c]*].

The statute does not state how or when the agreement of the receiving bank must be obtained for cancellation after execution. The receiving bank's consent could be obtained at the time cancellation occurs or it could be based on a preexisting agreement. A funds-transfer system rule could provide that cancellation can be made unilaterally by the sender and, by virtue of that rule, any receiving bank covered by the rule would be bound [*Com. Code § 11501*]. If the receiving bank already has executed the sender's order, the bank would not consent to cancellation unless the bank to which the receiving bank has issued its payment order consents to cancellation of that order. It makes no sense to allow

cancellation of a payment order unless all subsequent payment orders in the funds transfer that were issued because of the canceled payment order are also canceled. Under *Com. Code § 11211(c)(1)* [*see § 95.346[3][b]*], if a receiving bank consents to cancellation of the payment order after it is executed, the cancellation is not effective unless the receiving bank also cancels the payment order issued by the bank [Official Comment 3 to UCC § 4A-211].

If a receiving bank agrees to cancellation or amendment, the bank is automatically entitled to indemnification from the sender [*Com. Code § 11211(f)*]. This indemnification requirement recognizes that a sender has no right to cancel a payment order after it is accepted by the receiving bank. If the receiving bank agrees to cancellation, it is doing so as an accommodation to the sender and should not incur a risk of loss in doing so [Official Comment 5 to UCC § 4A-211].

A funds-transfer system rule can govern rights and obligations between banks that are parties to payment orders transmitted over the system even if the rule conflicts with Division 11. In some cases, however, a rule governing a transaction between two banks can affect a third party in an unacceptable way. *Com. Code § 11211(h)* deals with such a case. A funds-transfer system rule cannot allow cancellation of a payment order accepted by the beneficiary's bank if the rule conflicts with *Com. Code § 11211(c)(2)*. Because rights of the beneficiary and the originator are directly affected by acceptance, *Com. Code § 11211(c)(2)* severely limits cancellation [*see § 95.346[3][c]*]. These limitations cannot be altered by funds-transfer system rule [Official Comment 8 to UCC § 4A-211].

[b] By Bank Other Than Beneficiary's Bank

With respect to a payment order that has been accepted by a receiving bank other than the beneficiary's bank, assuming that the agreement-or-rule condition is satisfied [*see § 95.346[3][a]*], cancellation or amendment of the order is not effective unless a conforming cancellation or amendment of the payment order issued by the receiving bank also is made [*Com. Code § 11211(c)(1)*].

If the bank has not yet accepted the order, the sender can unilaterally cancel or amend. The communication amending or canceling the payment order must be received in time to allow the bank to act on it before the bank issues its payment order in execution of the sender's order. The time when the sender's communication is received is governed by *Com. Code § 11106* [*see § 95.343[3]*]. If a payment order does not specify a delayed payment date or execution date, the order will normally be executed shortly after receipt. As a practical matter, the sender usually will have very little time for cancellation or amendment before the order is accepted. In addition, a receiving bank will normally have cutoff times for receipt of such communications, and the receiving bank is not obliged to act on communications received after the cutoff hour [Official Comment 3 to UCC § 4A-211].

Cancellation by the sender after execution of the order by the receiving bank requires the agreement of the bank unless a funds transfer rule otherwise provides [*Com. Code § 11211(c)*]. Although execution of the sender's order by the receiving bank does not itself impose liability on the receiving bank--under *Com. Code § 11402*, no liability is incurred by the receiving bank to pay its order until it is accepted [*see § 95.352[2]*]--acceptance commonly follows shortly after issuance. Therefore, a receiving bank that has executed a payment order usually will incur a liability to the next bank in the chain before it is able to act on the cancellation request of its customer. It is unreasonable to impose on the receiving bank a risk of loss with respect to a cancellation request without the consent of the receiving bank [Official Comment 3 to UCC § 4A-211].

[c] By Beneficiary's Bank

With respect to a payment order that has been accepted by the beneficiary's bank, assuming that the agreement-or-rule condition is satisfied [*see § 95.346[3][a]*], cancellation or amendment is not effective unless the order was issued either [*Com. Code § 11211(c)(2)*; see Official Comment 4 to UCC § 4A-211 (examples)]:

- In execution of an unauthorized payment order; or

- Because of a mistake by a sender in the funds transfer which resulted in the issuance of a payment order that either:

- Is a duplicate of a payment order previously issued by the sender;

- Orders payment to a beneficiary not entitled to receive payment from the originator; or

- Orders payment in an amount greater than the amount the beneficiary was entitled to receive from the originator.

If the payment order is canceled or amended, the beneficiary's bank is entitled to recover from the beneficiary any amount paid to the beneficiary to the extent allowed by the law governing mistake and restitution [*Com. Code § 11211(c)(2)*].

Unless constrained by a funds-transfer system rule, a receiving bank may agree to cancellation or amendment of the payment order under *Com. Code § 11211(c)* but is not required to do so regardless of the circumstances. If the receiving bank has incurred liability as a result of its acceptance of the sender's order, there are substantial risks in agreeing to cancellation or amendment. This is particularly true for a beneficiary's bank. Cancellation or amendment after acceptance by the beneficiary's bank can be made only in the four cases stated, and the beneficiary's bank may not have any way of knowing whether the requirements of *Com. Code § 11211(c)* have been met or whether it will be able to recover payment from the beneficiary that received payment. Even with indemnity, the beneficiary's bank may be reluctant to alienate its customer (the beneficiary) by denying the customer the funds. *Com. Code § 11211(c)* leaves the decision to the beneficiary's bank unless the consent of the beneficiary's bank is not required under a funds-transfer system rule or other interbank agreement [Official Comment 5 to UCC § 4A-211].

With respect to a payment order issued to the beneficiary's bank, acceptance is particularly important because it creates liability to pay the beneficiary, defines when the originator pays its obligation to the beneficiary, and defines when any obligation for which the payment is made is discharged. Since acceptance affects the rights of the originator and the beneficiary, it is not appropriate to allow the beneficiary's bank to agree to cancellation or amendment except in unusual cases. Except as provided in *Com. Code § 11211(c)(2)*, cancellation or amendment after acceptance by the beneficiary's bank is not possible unless all parties affected by the order agree. Under *Com. Code § 11211(c)(2)*, cancellation or amendment is possible only in the four cases stated. [Official Comment 4 to UCC § 4A-211 (examples)].

[d] Sender's Indemnification of Receiving Bank

Unless otherwise provided in an agreement of the parties or in a funds-transfer system rule, if the receiving bank, after accepting a payment order, agrees to cancellation or amendment of the order by the sender or is bound by a funds-transfer system rule allowing cancellation or amendment without the bank's agreement, the sender is liable to the bank for any loss and expenses, including reasonable attorney's fees, incurred by the bank as a result of the cancellation or amendment or attempted cancellation or amendment, whether or not cancellation or amendment is effective [*Com. Code § 11211(f)*].

[4] Effect of Sender's Death or Incapacity

A payment order is not revoked by the death or legal incapacity of the sender unless the receiving bank knows of the death or of an adjudication of incapacity by a court of competent jurisdiction and has a reasonable opportunity to act before acceptance of the order [*Com. Code § 11211(g)*].

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§ 95.347 Rejection of Payment Order by Receiving Bank

[1] Manner of Rejection; When Effective

A payment order is rejected by the receiving bank by a notice of rejection transmitted to the sender orally, electronically, or in writing. A notice of rejection need not use any particular words and is sufficient if it indicates that the receiving bank is rejecting the order or will not execute or pay the order. Rejection is effective when the notice is given if transmission is by a means that is reasonable in the circumstances. If notice of rejection is given by a means that is not reasonable, rejection is effective when the notice is received. If an agreement of the sender and receiving bank establishes the means to be used to reject a payment order, then any means complying with the agreement is reasonable, and any means not complying is not reasonable unless no significant delay in receipt of the notice resulted from the use of the noncomplying means [*Com. Code § 11210(a)*].

[2] Interest

If a receiving bank other than the beneficiary's bank fails to execute a payment order despite the existence on the execution date of a withdrawable credit balance in an authorized account of the sender sufficient to cover the order, and the sender does not receive notice of rejection of the order on the execution date and the authorized account of the sender does not bear interest, the bank is obliged to pay interest to the sender on the amount of the order for the number of days elapsing after the execution date, to the earlier of the day the order is canceled pursuant to *Com. Code § 11211(d)* [*see § 95.346[2][b]*] or the day the sender receives notice or learns that the order was not executed, counting the final day of the period as an elapsed day. If the withdrawable credit balance during that period falls below the amount of the order, the amount of interest is reduced accordingly [*Com. Code § 11210(b)*].

[3] Sender's Failure to Learn of Rejection Until After Execution Date

Com. Code § 11210(b) deals with cases in which a sender does not learn until after the execution date that the sender's order has not been executed. It applies only to cases in which the receiving bank was assured of payment because the sender's account was sufficient to cover the order. Normally, the receiving bank will accept the sender's order if it is assured of payment, but there may be some cases in which the bank chooses to reject. Unless the receiving bank had

obligated itself by agreement to accept, the failure to accept is not wrongful. There is no duty of the receiving bank to accept the payment order unless it is obliged to accept by express agreement [*Com. Code § 11212*].

Even if the bank has not acted wrongfully, however, the receiving bank had the use of the sender's money that the sender could reasonably assume was to be the source of payment of the funds transfer. Until the sender learns that the order was not accepted, the sender is denied the use of that money. *Com. Code § 11210(b)* obliges the receiving bank to pay interest to the sender as restitution unless the sender receives notice of rejection on the execution date. The time of receipt of notice is determined pursuant to *Com. Code § 1202(e)*. The rate of interest is stated in *Com. Code § 11506* [*see § 95.353[6]*. If the sender receives notice on the day after the execution date, the sender is entitled to one day's interest. If receipt of notice is delayed for more than one day, the sender is entitled to interest for each additional day of delay [Official Comment 3 to UCC § 4A-210].

[4] Suspension of Payments by Receiving Bank

If a receiving bank suspends payments, all unaccepted payment orders issued to it are deemed rejected at the time the bank suspends payments [*Com. Code § 11210(c)*]. This prevents acceptance by the passage of time under *Com. Code § 11209(b)(3)* [Official Comment 4 to UCC § 4A-210]. In this context, a bank "suspends payment" if it has been closed by order of the supervisory authorities, or if a public officer has been appointed to take it over, or if it ceases or refuses to make payments in the ordinary course of business [*Com. Code §§ 4104(1)(k), 11105(c)*].

[5] Acceptance Precludes Later Rejection of Order

Acceptance of a payment order precludes a later rejection of the order. Rejection of a payment order precludes a later acceptance of the order [*Com. Code § 11210(d)*]. Acceptance and rejection are mutually exclusive. If a payment order has been accepted, then rejection of that order becomes impossible. If a payment order has been rejected, it cannot be accepted later by the receiving bank. Once notice of rejection has been given, the sender may have acted on the notice by making the payment through other channels. If the receiving bank wants to act on a payment order that it has rejected, it has to obtain the consent of the sender. In that case, the consent of the sender would amount to the giving of a second payment order that substitutes for the rejected first order [Official Comment 4 to UCC § 4A-210].

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§ 95.348 Acceptance of Payment Order

[1] Receipt of Order Is Condition Precedent to Acceptance

Acceptance of a payment order cannot occur before the receiving bank receives the order. Acceptance does not occur under *Com. Code § 11209(b)(2)* or *(3)* [*see § 95.348[4][c], [d]*] if the beneficiary of the payment order does not have an account with the receiving bank, or if the account has been closed, or the receiving bank is not permitted by law to receive credits for the beneficiary's account [*Com. Code § 11209(c)*].

[2] Earliest Date for Acceptance Is Payment Date or Execution Date

A payment order issued to the originator's bank cannot be accepted until the payment date if the bank is the beneficiary's bank, or until the execution date if the bank is not the beneficiary's bank. If the originator's bank executes the originator's payment order before the execution date or pays the beneficiary of the originator's payment order before the payment date and the payment order is subsequently canceled pursuant to *Com. Code § 11211(b)* [*see § 95.346[2][a]*], the bank may recover from the beneficiary any payment received, to the extent allowed by the law governing mistake and restitution [*Com. Code § 11209(d)*]. *Com. Code § 11209(d)* applies only to a payment order by the originator of a funds transfer to the originator's bank, and it refers to the following situation [*see* Official Comment 9 to UCC § 4A-209 (example)].

[3] By Receiving Bank Other Than Beneficiary's Bank

Subject to *Com. Code § 11209(d)* [*see § 95.348[2]*, a receiving bank other than the beneficiary's bank accepts a payment order when it executes the order [*Com. Code § 11209(a)*]. This is the only way in which a bank other than the beneficiary's bank can accept a payment order. A payment order to a bank other than the beneficiary's bank is, in effect, a request for the receiving bank to execute the sender's order by issuing a payment order to the beneficiary's bank or to an intermediary bank. Normally, acceptance occurs at the time of execution, but there is an exception [*see Com. Code § 11209(d)*; § 95.348[2]]. Execution occurs when the receiving bank "issues a payment order intended to carry out" the sender's order [*Com. Code § 11301(a)*; *see § 95.343[6][a]*]. In some cases the payment order issued by the receiving bank may not conform to the sender's order. For example, the receiving bank might make a mistake in the amount of its

order, or the order might be issued to the wrong beneficiary's bank or for the benefit of the wrong beneficiary. In all of these cases, there is acceptance of the sender's order by the bank when the receiving bank issues its order *intended* to carry out the sender's order, even though the bank's payment order does not in fact carry out the instruction of the sender [Official Comment 2 to UCC § 4A-209]. Improper execution of the sender's order may lead to liability to the sender for damages, or may mean that the sender is not obliged to pay its payment order [*see Com. Code §§ 11303, 11305, 11402*].

[4] By Beneficiary's Bank

[a] Three Possible Dates for Acceptance to Occur

Subject to *Com. Code § 11209(c)* and *(d)* [*see § 95.348[1], [2]*], in the case of a payment order issued to the beneficiary's bank, the beneficiary's bank accepts the payment order at the earliest of the dates described in § 95.348[4][b]-[d] [*Com. Code § 11209(b)*].

The function of a beneficiary's bank that receives a payment order is different from that of a receiving bank that receives a payment order for execution. In the typical case, the beneficiary's bank simply receives payment from the sender of the order, credits the account of the beneficiary, and notifies the beneficiary of the credit. Acceptance by the beneficiary's bank does not create any obligation to the sender. Acceptance by the beneficiary's bank means that the bank is liable to the beneficiary for the amount of the order [*Com. Code § 11404(a)*]. There are three ways in which the beneficiary's bank can accept a payment order [Official Comment 4 to UCC § 4A-209; *see § 95.348[4][b] -[d]*].

Com. Code § 11209 is based on a general principle that a receiving bank is not obliged to accept a payment order unless it has agreed to do so or is bound by a funds-transfer system rule to do so [*see § 95.348[3]*. Therefore, provision is made to allow the receiving bank to prevent acceptance of the order. This principle is consistently followed if the receiving bank is not the beneficiary's bank. If the receiving bank is not the beneficiary's bank, acceptance is in the control of the receiving bank because it occurs only if the order is executed [*see § 95.348[3]*]. In the case of the beneficiary's bank, however, acceptance can occur by passive receipt of payment [*see Com. Code § 11209(b)(2), (3)*; § 95.348[4][c], [d]]. In the case of a payment made by Fedwire [*see § 95.343[2][c]*], acceptance cannot be prevented. In other cases, the beneficiary's bank can prevent acceptance by giving notice of rejection to the sender before payment occurs [*see Com. Code § 11403(a)(1), (2)*; § 95.347]. A minor exception to the ability of the beneficiary's bank to reject is stated in *Com. Code § 11502(c)(3)* [Official Comment 8 to UCC § 4A-209; *see § 95.353[2][c]*].

[b] When Bank Pays or Notifies Beneficiary

Unless acceptance has occurred at an earlier date [*see § 95.348[4][c], [d]*], acceptance by the beneficiary's bank results on the occurrence of either of the following events [*Com. Code § 11209(b)(1)*]:

- The bank pays the beneficiary as stated in *Com. Code § 11405(a)* or *(b)* [*see § 95.352[5][a]*].

- The bank notifies the beneficiary of receipt of the order or that the account of the beneficiary has been credited with respect to the order, unless the notice indicates that the bank is rejecting the order or that funds with respect to the order may not be withdrawn or used until receipt of payment from the sender of the order.

While the beneficiary's bank can accept a payment order by actually paying the beneficiary, in the normal case the bank merely credits an account of the beneficiary, and payment occurs when the beneficiary is given notice of the right to withdraw the credit, or the credit is applied to a debt of the beneficiary, or "funds with respect to the order" are otherwise made available to the beneficiary [*Com. Code § 11405(a)*]. The quoted phrase covers cases in which funds are made available to the beneficiary as a result of receipt of a payment order for the benefit of the beneficiary, but the release of funds is not expressed as payment of the order. For example, the beneficiary's bank might express a release of

funds equal to the amount of the order as a "loan" that will be automatically repaid when the beneficiary's bank receives payment by the sender of the order. If the release of funds is designated as a loan pursuant to a routine practice of the bank, the release is conditional payment of the order rather than a loan, particularly if normal incidents of a loan (such as the signing of a loan agreement or note and the payment of interest) are not present. Such a release of funds is payment to the beneficiary under *Com. Code § 11405(a)*. Under *Com. Code § 11405(c)*, the bank cannot recover the money from the beneficiary if the bank does not receive payment from the sender of the payment order that it accepted. Exceptions to this rule are stated in *Com. Code § 11405(d)* and *(e)* [Official Comment 5 to UCC § 4A-209; *see § 95.352[5][c], [d]*].

The beneficiary's bank may also accept by notifying the beneficiary that the order has been received. "Notifies" is defined in *Com. Code § 1202(d)*. In some cases a beneficiary's bank will receive a payment order during the day, but settlement of the sender's obligation to pay the order will not occur until the end of the day. If the beneficiary's bank wants to defer incurring liability to the beneficiary until the beneficiary's bank receives payment, it can do so. The beneficiary's bank incurs no liability to the beneficiary with respect to a payment order that it receives until it accepts the order. If the bank does not accept pursuant to *Com. Code § 11209(b)(1)*, then acceptance does not occur until the end of the day when the beneficiary's bank receives settlement. If the sender settles, the payment order will be accepted under *Com. Code § 11209(b)(2)* [*see § 95.348[4][c]*], and the funds will be released to the beneficiary the next morning. If the sender does not settle, no acceptance occurs. In either case the beneficiary's bank suffers no loss [Official Comment 5 to UCC § 4A-209].

[c] When Bank Receives Payment

Unless acceptance has occurred at an earlier date [*see § 95.348[4][b], [d]*], acceptance by the beneficiary's bank occurs when the bank receives payment of the entire amount of the sender's order pursuant to *Com. Code § 11403(a)(1)* or *(2)* [*Com. Code § 11209(b)(2)*]. However, acceptance does not occur if the beneficiary of the payment order does not have an account with the receiving bank, or the account has been closed, or the receiving bank is not permitted by law to receive credits for the beneficiary's account [*Com. Code § 11209(c)*].

In most cases the beneficiary's bank will receive a payment order from another bank. If the sender is a bank and the beneficiary's bank receives payment from the sender by final settlement through the Federal Reserve System or a funds-transfer system [*Com. Code § 11403(a)(1)*] or, less commonly, through credit to an account of the beneficiary's bank with the sender or another bank [*Com. Code § 11403(a)(2)*], then acceptance by the beneficiary's bank occurs at the time payment is made [*Com. Code § 11209(b)(2)*], subject to a minor exception [*see Com. Code § 11209(c)*]. Thus, *Com. Code § 11209(b)(2)* results in automatic acceptance of payment orders issued to a beneficiary's bank by means of Fedwire [*see § 95.343[2][c]*], because the Federal Reserve account of the beneficiary's bank is credited and final payment is made to that bank when the payment order is received [Official Comment 6 to UCC § 4A-209].

Com. Code § 11209(b)(2) also applies to cases in which the beneficiary's bank mistakenly pays a person who is not the beneficiary of the payment order issued to the beneficiary's bank. For example, suppose the payment order provides for immediate payment to account 12345. The beneficiary's bank erroneously credits account 12346 and notifies the holder of that account of the credit. No acceptance occurs in this case under *Com. Code § 11209(b)(1)* because the beneficiary of the order has not been paid or notified. The holder of account 12345 is the beneficiary of the order issued to the beneficiary's bank. Acceptance normally will occur if the beneficiary's bank takes no other action, because the bank normally will receive settlement with respect to the payment order. At that time the bank has accepted because the sender paid its payment order. The bank is liable to pay the holder of account 12345; but the bank has paid the holder of account 12346 by mistake and has a right to recover the payment if the credit is withdrawn, to the extent provided in the law governing mistake and restitution [Official Comment 6 to UCC § 4A-209].

[d] Next Funds-Transfer Business Day After Payment Date

Unless acceptance has occurred at an earlier date [*see § 95.348[4][b], [c]*], acceptance by the beneficiary's bank occurs at the opening of the next funds-transfer business day of the bank following the payment date of the order if, at that time, the amount of the sender's order is fully covered by a withdrawable credit balance in an authorized account of the sender or the bank has otherwise received full payment from the sender, unless the order was rejected before that time or is rejected within either one hour after that time or one hour after the opening of the next business day of the sender following the payment date if that time is later. If notice of rejection is received by the sender after the payment date and the authorized account of the sender does not bear interest, the bank is obliged to pay interest to the sender on the amount of the order for the number of days elapsing after the payment date to the day the sender receives notice or learns that the order was not accepted, counting that day as an elapsed day. If the withdrawable credit balance during that period falls below the amount of the order, the amount of interest payable is reduced accordingly [*Com. Code § 11209(b)(3)*]. Acceptance does not occur, however, if the beneficiary of the payment order does not have an account with the receiving bank, or the account has been closed, or the receiving bank is not permitted by law to receive credits for the beneficiary's account [*Com. Code § 11209(c)*].

Com. Code § 11209(b)(3) covers cases involving inaction by the beneficiary's bank. It applies whether or not the sender is a bank and covers a case in which the sender and the beneficiary both have accounts with the receiving bank and payment will be made by debiting the account of the sender and crediting the account of the beneficiary. *Com. Code § 11209(b)(3)* is similar to *Com. Code § 11209(b)(2)* in that it bases acceptance by the beneficiary's bank on payment by the sender. Payment by the sender is effected by a debit to the sender's account if the account balance is sufficient to cover the amount of the order. On the payment date [*see Com. Code § 11401*] of the order, the beneficiary's bank will normally credit the beneficiary's account and notify the beneficiary of receipt of the order if it is satisfied that the sender's account balance covers the order or is willing to give credit to the sender. In some cases, however, the bank may not be willing to give credit to the sender, and it may not be possible for the bank to determine until the end of the day on the payment date whether there are sufficient good funds in the sender's account. There may be various transactions during the day involving funds going into and out of the account. Some of these transactions may occur late in the day or after the close of the banking day. To accommodate this situation, *Com. Code § 11209(b)(3)* provides that the status of the account is determined at the opening of the next funds-transfer business day of the beneficiary's bank after the payment date of the order. If the sender's account balance is sufficient to cover the order, the beneficiary's bank has a source of payment, and the result in almost all cases is that the bank accepts the order at that time if it did not previously accept under *Com. Code § 11209(b)(1)*. In rare cases, a bank may want to avoid acceptance under *Com. Code § 11209(b)(3)* by rejecting the order [Official Comment 7 to UCC § 4A-209].

Under *Com. Code § 11209(b)(3)* acceptance occurs at the opening of the next funds-transfer business day of the beneficiary's bank following the payment date unless the bank rejected the order before that time or it rejects within one hour after that time. In some cases the sender and the beneficiary's bank may not be in the same time zone, or the beginning of the business day of the sender and the funds transfer business day of the beneficiary's bank may not coincide. For example, the sender may be located in California and the beneficiary's bank in New York. Since in most cases notice of rejection would be communicated electronically or by telephone, it might not be feasible for the bank to give notice before one hour after the opening of the funds-transfer business day in New York because at that hour, the sender's business day may not have started in California. For that reason, there are alternative deadlines stated in *Com. Code § 11209(b)(3)*. In the case stated, the bank acts in time if it gives notice within one hour after the opening of the business day of the sender. However, if the notice of rejection is received by the sender after the payment date, the bank is obliged to pay interest to the sender if the sender's account does not bear interest. In that case, the bank had the use of funds of the sender that the sender could reasonably assume would be used to pay the beneficiary. The rate of interest is stated in *Com. Code § 11506* [*see § 95.353[6]*]. If the sender receives notice on the day after the payment date, the sender is entitled to one day's interest. If receipt of notice is delayed for more than one day, the sender is entitled to interest for each additional day of delay [Official Comment 8 to UCC § 4A-209].

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9-95 California Forms of Pleading and Practice--Annotated § 95.349

§ 95.349 Liability of Receiving Bank for Failure to Accept Payment Order

If a receiving bank fails to accept a payment order that it is obliged by express agreement to accept, the bank is liable for breach of the agreement to the extent provided in the agreement or in Division 11, but the bank does not otherwise have any duty to accept a payment order or, before acceptance, to take any action, or refrain from taking action, with respect to the order except as provided in Division 11 or by express agreement. Liability based on acceptance arises only when acceptance occurs as stated in *Com. Code § 11209* [*see § 95.348*] and liability is limited to that provided in Division 11. A receiving bank is not the agent of the sender or beneficiary of the payment order it accepts, or of any other party to the funds transfer, and the bank owes no duty to any party to the funds transfer except as provided in Division 11 or by express agreement [*Com. Code § 11212*].

With limited exceptions stated in Division 11, the duties and obligations of receiving banks that carry out a funds transfer arise only as a result of acceptance of payment orders or of agreements made by receiving banks. Exceptions are stated in *Com. Code §§ 11209(b)(3)* and *11210(b)* [*see §§ 95.348[4][d], 95.347*]. A receiving bank is not like a collecting bank under Division 4, that is, no receiving bank, whether it be an originator's bank, an intermediary bank or a beneficiary's bank, is an agent for any other party in the funds transfer [Official Comment to UCC § 4A-212].

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9-95 California Forms of Pleading and Practice--Annotated § 95.350

§ 95.350 Acceptance of Unauthorized Payment Orders

[1] Enforcement of Unauthorized Payment Order May Be Limited

[a] Limiting Written Agreement Exists

If, under *Com. Code § 11202(a)*, an accepted payment order is not an authorized order of a customer identified as sender [*see § 95.343[7]*], but is effective as an order of the customer pursuant to *Com. Code § 11202(b)* [*see § 95.344[1][a]*], then, by express written agreement, the receiving bank may limit the extent to which it is entitled to enforce or retain payment of the payment order [*Com. Code § 11203(a)(1)*]. This applies to amendments of payment orders to the same extent as it applies to payment orders [*Com. Code § 11203(b)*].

Thus, the effect of *Com. Code § 11202(b)* may be changed by an agreement meeting the requirements of *Com. Code § 11203(a)(1)*. Some customers may be unwilling to take all or part of the risk of loss with respect to unauthorized payment orders even if all of the requirements of *Com. Code § 11202(b)* are met. By virtue of *Com. Code § 11203(a)(1)*, a receiving bank may assume all of the risk of loss with respect to unauthorized payment orders or the customer and bank may agree that losses from unauthorized payment orders are to be divided as provided in the agreement [Official Comment 6 to UCC § 4A-203].

[b] Customer Is Not Culpable

If, under *Com. Code § 11202(a)*, an accepted payment order is not an authorized order of a customer identified as sender [*see § 95.343[7]*], but is effective as an order of the customer pursuant to *Com. Code § 11202(b)* [*see § 95.344[1][a]*], then the receiving bank is not entitled to enforce or retain payment of the payment order if the customer proves that the order was not caused, directly or indirectly, by a person who either [*Com. Code § 11203(a)(2)*]:

- Was entrusted at any time with duties to act for the customer with respect to payment orders or the security procedure; or

- Obtained access to transmitting facilities of the customer or obtained, from a source controlled by the

> customer and without authority of the receiving bank, information facilitating breach of the security procedure, regardless of how the information was obtained or whether the customer was at fault. Information includes any access device, computer software, or the like.

This applies to amendments of payment orders to the same extent as it applies to payment orders [*Com. Code § 11203(b)*].

The effect of *Com. Code § 11202(b)* is to place the risk of loss on the customer if an unauthorized payment order is accepted by the receiving bank after verification by the bank in compliance with a commercially reasonable security procedure [*see § 95.344[1][a]*]. An exception to this result is provided by *Com. Code § 11203(a)(2)*. The customer may avoid the loss resulting from such a payment order if the customer can prove that the fraud was not committed by a person described in that provision. Breach of a commercially reasonable security procedure requires that the person committing the fraud must have knowledge of how the procedure works and knowledge of codes, identifying devices, and the like. That person may also need access to transmitting facilities through an access device or other software in order to breach the security procedure. This confidential information must be obtained either from a source controlled by the customer or from a source controlled by the receiving bank. If the customer can prove [*see Com. Code § 11105(a)(7)* (defining "prove"); *see also § 95.343[1][g]*] that the person committing the fraud did not obtain the confidential information from an agent or former agent of the customer or from a source controlled by the customer, the loss is shifted to the bank. Because of bank regulation requirements, in this kind of case there will always be a criminal investigation as well as an internal investigation of the bank to determine the probable explanation for the breach of security. Because a funds-transfer fraud usually will involve a very large amount of money, both the criminal investigation and the internal investigation are likely to be thorough. In some cases there may be an investigation by bank examiners as well. Frequently, these investigations will develop evidence of who is at fault and the cause of the loss. The customer will have access to evidence developed in these investigations, and that evidence can be used by the customer in meeting its burden of proof [Official Comment 5 to UCC § 4A-203].

[2] Consequences for Receiving Bank

If a receiving bank accepts a payment order issued in the name of its customer as sender which is not authorized and not effective as the order of the customer under *Com. Code § 11202* or which is not enforceable, in whole or in part, against the customer under *Com. Code § 11203*, then the bank must refund any payment of the payment order received from the customer to the extent that the bank is not entitled to enforce payment and must pay interest on the refundable amount, calculated from the date the bank received payment to the date of the refund. However, the customer is not entitled to interest from the bank on the amount to be refunded if the customer fails to exercise ordinary care to determine that the order was not authorized by the customer and to notify the bank of the relevant facts within a reasonable time not exceeding 90 days after the date the customer received notification from the bank that the order was accepted or that the customer's account was debited with respect to the order. The bank is not entitled to any recovery from the customer on account of a failure by the customer to give notification as described [*Com. Code § 11204(a)*].

What is a reasonable time under *Com. Code § 11204(a)* may be fixed by agreement as stated in *Com. Code § 1302(b)*, but the obligation of a receiving bank to refund payment as stated in *Com. Code § 11204(a)* may not otherwise be varied by agreement [*Com. Code § 11204(b)*].

With respect to unauthorized payment orders, in a very large percentage of cases a commercially reasonable security procedure will be in effect. *Com. Code § 11204* applies only to cases in which either no commercially reasonable security procedure is in effect, or the bank did not comply with a commercially reasonable security procedure that was in effect, or the sender can prove, pursuant to *Com. Code § 11203(a)(2)*, that the culprit did not obtain confidential security information controlled by the customer, or the bank, pursuant to *Com. Code § 11203(a)(1)*, agreed to take all or part of the loss resulting from an unauthorized payment order. In each of these cases the bank takes the risk of loss with respect to an unauthorized payment order because the bank is not entitled to payment from the customer with respect to

the order. The bank normally debits the customer's account or otherwise receives payment from the customer shortly after acceptance of the payment order. *Com. Code § 11204(a)* states that the bank must recredit the account or refund payment to the extent that the bank is not entitled to enforce payment [Official Comment to UCC § 4A-204].

Com. Code § 11204 is designed to encourage a customer to promptly notify the receiving bank that it has accepted an unauthorized payment order. Since cases of unauthorized payment orders will almost always involve fraud, the bank's remedy is normally to recover from the beneficiary of the unauthorized order if the beneficiary was party to the fraud. This remedy may not be worth very much, and it may not make any difference whether the bank promptly learns about the fraud. In some cases, however, prompt notification may make it easier for the bank to recover some part of its loss from the culprit. The customer will routinely be notified of the debit to its account with respect to an unauthorized order or will otherwise be notified of acceptance of the order. The customer has a duty to exercise ordinary care to determine that the order was unauthorized after it has received notification from the bank, and to advise the bank of the relevant facts within a reasonable time not exceeding 90 days after receipt of notification [Official Comment to UCC § 4A-204].

Reasonable time is not defined and may depend on the facts of the particular case. For example, if a payment order for $1,000,000 is wholly unauthorized, the customer should normally discover it well within 90 days. If a $1,000,000 payment order was authorized but the name of the beneficiary was fraudulently changed, a much longer period may be necessary to discover the fraud. In any event, if the customer delays more than 90 days, the customer's duty has not been met. The only consequence of a failure of the customer to perform this duty is a loss of interest on the refund payable by the bank. A customer that acts promptly is entitled to interest from the time the customer's account was debited or the customer otherwise made payment. The rate of interest is stated in *Com. Code § 11506* [*see § 95.353[6]*. If the customer fails to perform the duty, no interest is recoverable for any part of the period before the bank learns that it accepted an unauthorized order. The bank is not entitled to any recovery from the customer based on negligence for failure to inform the bank. Loss of interest is in the nature of a penalty on the customer designed to provide an incentive for the customer to police its account. There is no intention to impose a duty on the customer that might result in shifting loss on the unauthorized order to the customer [Official Comment to UCC § 4A-204].

[3] No Variation by Agreement

Except as otherwise provided in *Com. Code § 11202* [*see § 95.344[1] -[3]*] and in *Com. Code § 11203(a)(1)* [*see § 95.350[1][a]*], rights and obligations arising under *Com. Code § 11203* may not be varied by agreement [*Com. Code § 11202(f)*].

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§ 95.351 Execution of Payment Order

[1] Obligations of Receiving Bank in Executing Payment Order

[a] In General

Except as provided in *Com. Code § 11302(b)-(d)* [*see § 95.351[1][b], [c]*], if the receiving bank accepts a payment order pursuant to *Com. Code § 11209(a)* [*see § 95.348[3]*], the receiving bank is obliged to issue, on the execution date, a payment order complying with the sender's order and to follow the sender's instructions concerning any intermediary bank or funds-transfer system to be used in carrying out the funds transfer or concerning the means by which payment orders are to be transmitted in the funds transfer. If the originator's bank issues a payment order to an intermediary bank, the originator's bank is obliged to instruct the intermediary bank according to the instruction of the originator. An intermediary bank in the funds transfer is similarly bound by an instruction given to it by the sender of the payment order that it accepts [*Com. Code § 11302(a)(1)*].

In the absence of agreement, the receiving bank is not obliged to execute an order of the sender [*Com. Code § 11212*]. *Com. Code § 11302* states the manner in which the receiving bank may execute the sender's order if execution occurs. *Com. Code § 11302(a)(1)* states the residual rule. The payment order issued by the receiving bank must comply with the sender's order and, unless some other rule in the section applies, the receiving bank is obliged to follow any instruction of the sender concerning which funds-transfer system is to be used, which intermediary banks are to be used, and what means of transmission must be used. The instruction of the sender may be incorporated in the payment order itself or may be given separately. For example, there may be a master agreement between the sender and receiving bank containing instructions governing payment orders to be issued from time to time by the sender to the receiving bank. In most funds transfers, speed is a paramount consideration. A sender wanting assurance that the funds transfer will be expeditiously completed can specify the means to be used. The receiving bank can follow the instructions literally or it can use an equivalent means. For example, if the sender instructs the receiving bank to transmit by telex, the receiving bank could use the telephone instead [Official Comment to UCC § 4A-302; *see Com. Code § 11302(c)*; § 95.351[1][c]].

If the sender's instruction states that the funds transfer is to be carried out by telephone or by wire transfer, or it otherwise indicates that the funds transfer is to be carried out by the most expeditious means, then the receiving bank is

obliged to transmit its payment order by the most expeditious available means, and to instruct any intermediary bank accordingly. If a sender's instruction states a payment date, the receiving bank is obliged to transmit its payment order at a time and by means reasonably necessary to allow payment to the beneficiary on the payment date or as soon thereafter as is feasible [*Com. Code § 11302(a)(2)*].

In most cases the sender will not specify a particular means but will use a general term such as "by wire" or "wire transfer" or "as soon as possible." Such words signify that the sender wants a same-day transfer. In these cases, the receiving bank is required to use a telephone or an electronic communication to transmit its order and is also required to instruct any intermediary bank to which it issues its order to transmit by similar means [*Com. Code § 11302(a)(2)*]. In other cases, such as an automated clearinghouse (ACH) transfer, a same-day transfer is not contemplated. Normally the sender's instruction or the context in which the payment order is received makes clear what type of funds transfer is appropriate. If the sender states a payment date with respect to the payment order, the receiving bank is obliged to execute the order at a time and in a manner sufficient to meet the payment date if that is feasible [*Com. Code § 11302(a)(2)*]. This requirement would apply to many ACH transfers made to pay recurring debts of the sender. In other cases, involving relatively small amounts, time may not be an important factor, and cost may be a more important element. Fast means, such as the telephone or electronic transmission, are more expensive than slow means such as mailing. *Com. Code § 11302(c)* states that in the absence of instructions, the receiving bank is given discretion to decide. It may issue its payment order by first-class mail or by any means reasonable in the circumstances [*see § 95.351[1][c]*]. *Com. Code § 11305* [*see § 95.352[1]*] governs the liability of a receiving bank for breach of the obligations stated in *Com. Code § 11302* [Official Comment to UCC § 4A-302].

[b] Bank's Use of Funds-Transfer System or Intermediary Bank

Unless otherwise instructed, a receiving bank executing a payment order may use any funds-transfer system, if use of that system is reasonable in the circumstances, and may issue a payment order to the beneficiary's bank or to an intermediary bank through which a payment order conforming to the sender's order can expeditiously be issued to the beneficiary's bank if the receiving bank exercises ordinary care in the selection of the intermediary bank. A receiving bank is not required to follow an instruction of the sender designating a funds-transfer system to be used in carrying out the funds transfer if the receiving bank, in good faith, determines that it is not feasible to follow the instruction or that following the instruction would unduly delay completion of the funds transfer [*Com. Code § 11302(b)*].

Com. Code § 11302(b) concerns the choice of intermediary banks to be used in completing the funds transfer, and the funds-transfer system to be used. If the receiving bank is not instructed about the matter, it can issue an order directly to the beneficiary's bank or can issue an order to an intermediary bank. The receiving bank also has discretion concerning use of a funds-transfer system. In some cases it may be reasonable to use either an automated clearinghouse system or a wire transfer system such as CHIPS or Fedwire [*see § 95.343[2][b], [c]*]. Normally, the receiving bank will follow the instruction of the sender in these matters, but in some cases it may be prudent for the bank not to follow instructions. The sender may have designated a funds-transfer system to be used in carrying out a funds transfer, but it may not be feasible to use the designated system because of some impediment such as a computer breakdown which prevents prompt execution of the order. The receiving bank is permitted to use an alternate means of transmission in a good faith effort to execute the order expeditiously [Official Comment to UCC § 4A-302].

The same leeway is not given to the receiving bank if the sender designates an intermediary bank through which the funds transfer is to be routed. The sender's designation of that intermediary bank may mean that the beneficiary's bank is expecting to obtain a credit from that intermediary bank and may have relied on that anticipated credit. If the receiving bank uses another intermediary bank, the expectations of the beneficiary's bank may not be realized. The receiving bank could choose to route the transfer to another intermediary bank and then to the designated intermediary bank if there were some reason such as a lack of a correspondent-bank relationship or a bilateral credit limitation, but the designated intermediary bank cannot be circumvented, since to do so would violate the sender's instructions [Official Comment to UCC § 4A-302].

[c] Bank's Election of Reasonable Transmission Means

Unless *Com. Code § 11302(a)(2)* applies [*see § 95.351[1][a]*] or the receiving bank is otherwise instructed, the bank may execute a payment order by transmitting its payment order by first-class mail or by any means reasonable in the circumstances. If the receiving bank is instructed to execute the sender's order by transmitting its payment order by a particular means, the receiving bank may issue its payment order by the means stated or by any means as expeditious as the means stated [*Com. Code § 11302(c)*].

Unless instructed by the sender, the receiving bank may not obtain payment of its charges for services and expenses in connection with the execution of the sender's order by issuing a payment order in an amount equal to the amount of the sender's order less the amount of the charges, nor may the bank instruct a subsequent receiving bank to obtain payment of its charges in that manner [*Com. Code § 11302(d)*].

The normal rule, under *Com. Code § 11302(a)(1)* [*see § 95.351[1][a]*], is that the receiving bank, in executing a payment order, is required to issue a payment order that complies as to amount with that of the sender's order. In most cases the receiving bank issues an order equal to the amount of the sender's order and makes a separate charge for services and expenses in executing the sender's order. In some cases, particularly if it is an intermediary bank that is executing an order, charges are collected by deducting them from the amount of the payment order issued by the executing bank. If that is done, the amount of the payment order accepted by the beneficiary's bank will be slightly less than the amount of the originator's payment order [Official Comment to UCC § 4A-302].

[2] Transferring Wrong Amount of Funds

[a] More Than Proper Amount; Duplicate Orders

A receiving bank that executes the payment order of the sender by issuing a payment order in an amount greater than the amount of the sender's order, or by issuing a correct payment order and then issuing a duplicate order, is entitled to payment of the amount of the sender's order under *Com. Code § 11402(c)* [*see § 95.352[2][b]*] if that subdivision is otherwise satisfied. The bank is entitled to recover from the beneficiary of the erroneous order the excess payment received, to the extent allowed by the law governing mistake and restitution [*Com. Code § 11303(a)*].

Com. Code § 11303 states the effect of erroneous execution of a payment order by the receiving bank. Under *Com. Code § 11402(c)* [*see § 95.352[2][b]*] the sender of a payment order is obliged to pay the amount of the order to the receiving bank if the bank executes the order, but the obligation to pay is excused if the beneficiary's bank does not accept a payment order instructing payment to the beneficiary of the sender's order. If erroneous execution of the sender's order causes the wrong beneficiary to be paid, the sender is not required to pay. If erroneous execution causes the wrong amount to be paid, the sender is not obliged to pay the receiving bank an amount in excess of the amount of the sender's order. *Com. Code § 11303* takes precedence over *Com. Code § 11402(c)* respecting the liability of the sender and the rights of the receiving bank in various cases of erroneous execution [Official Comment 1 to UCC § 4A-303].

[b] Less Than Proper Amount

A receiving bank that executes the payment order of the sender by issuing a payment order in an amount less than the amount of the sender's order is entitled to payment of the amount of the sender's order under *Com. Code § 11402(c)* [*see § 95.352[2][b]*] if that subdivision is otherwise satisfied and if the bank corrects its mistake by issuing an additional payment order for the benefit of the beneficiary of the sender's order. If the error is not corrected, the issuer of the erroneous order is entitled to receive or retain payment from the sender of the order that it accepted, up to the amount of the erroneous order. These rules do not apply, however, if the receiving bank executes the sender's payment order by issuing a payment order in an amount less than the amount of the sender's order for the purpose of obtaining payment of

its charges for services and expenses pursuant to instruction of the sender [*Com. Code § 11303(b)*; *see* Official Comment 2 to UCC § 4A-303 (example)].

[3] Transferring Funds to Wrong Beneficiary

If a receiving bank executes the payment order of the sender by issuing a payment order to a beneficiary different from the beneficiary of the sender's order, and the funds transfer is completed on the basis of that error, the sender of the payment order that was erroneously executed together with all previous senders in the funds transfer are not obliged to pay the payment orders they issued. The issuer of the erroneous order is entitled to recover from the beneficiary of the order the payment received, to the extent allowed by the law governing mistake and restitution [*Com. Code § 11303(c)*; *see* Official Comment 4 to UCC § 4A-303 (example)].

[4] Sender's Duty to Discover Erroneous Execution of Payment Order

If the sender of a payment order that is erroneously executed as stated in *Com. Code § 11303* receives notification from the receiving bank that the order was executed or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care to determine, on the basis of information available to the sender, that the order was erroneously executed and to notify the bank of the relevant facts within a reasonable time not exceeding 90 days after the notification from the bank was received by the sender. If the sender fails to perform that duty, the bank is not obliged to pay interest on any amount refundable to the sender under *Com. Code § 11402(d)* [*see § 95.352[2][c]*] for the period before the bank learns of the execution error. The bank is not entitled to any recovery from the sender on account of a failure by the sender to perform the duty stated in *Com. Code § 11304* [*Com. Code § 11304*].

This section is identical in effect to *Com. Code § 11204* [*see § 95.350[2]*, which applies to unauthorized orders issued in the name of a customer of the receiving bank [Official Comment 2 to UCC § 4A-304].

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§ 95.352 Payment

[1] Obligation of Receiving Bank on Delay in Payment to Beneficiary

[a] Interest Must Be Paid

If a funds transfer is completed but execution of a payment order by the receiving bank in breach of *Com. Code § 11302* [*see § 95.351[1]* results in delay in payment to the beneficiary, the bank must pay interest either to the originator or the beneficiary of the funds transfer for the period of delay caused by the improper execution. Except as provided in *Com. Code § 11305(c)* [*see § 95.352[1][c]*], additional damages are not recoverable [*Com. Code § 11305(a)*].

Com. Code § 11305(a) covers cases of delay in completion of a funds transfer resulting from an execution by a receiving bank in breach of *Com. Code § 11302(a)*. The receiving bank is obliged to pay interest on the amount of the order for the period of the delay. The rate of interest is stated in *Com. Code § 11506* [*see § 95.353[6]*. With respect to wire transfers (other than automated clearinghouse transactions) within the United States, the expectation is that the funds transfer will be completed the same day. In those cases, the originator can reasonably expect that the originator's account will be debited on the day the beneficiary's account is credited. If the funds transfer is delayed, compensation can be paid either to the originator or to the beneficiary. The normal practice is to compensate the beneficiary's bank, allowing that bank to compensate the beneficiary by back-valuing the payment by the number of days of delay. Thus, the beneficiary's position is the same as it would have been if the funds transfer had been completed on the same day [Official Comment 1 to UCC § 4A-305].

Reasonable attorney's fees are recoverable only in cases in which damages are limited to statutory damages stated in *Com. Code § 11305(a), (b)* and *(d)* [*see § 95.352[1][e]*]. If additional damages are recoverable because provided for by an express written agreement, then attorney's fees are not recoverable. The rationale is that there is no need for statutory attorney's fees in the latter case, because the parties have agreed to a measure of damages which may or may not provide for attorney's fees [Official Comment 4 to UCC § 4A-305].

[b] Expenses May Have to Be Reimbursed

If execution of a payment order by a receiving bank in breach of *Com. Code § 11302* [*see § 95.351[1]* results in noncompletion of the funds transfer, or in failure to use an intermediary bank designated by the originator, or in issuance of a payment order that does not comply with the terms of the payment order of the originator, then the bank is liable to the originator for the originator's expenses in the funds transfer and for incidental expenses and interest losses, to the extent not covered by *Com. Code § 11305(a)*, resulting from the improper execution. Except as provided in *Com. Code § 11305(c)* [*see § 95.352[1][c]*], additional damages are not recoverable [*Com. Code § 11305(b)*].

Com. Code § 11305(b) applies to cases of breach of *Com. Code § 11302* involving more than mere delay. In those cases, the bank is liable for damages for improper execution, limited to compensation for interest losses and incidental expenses of the sender resulting from the breach, the expenses of the sender in the funds transfer, and attorney's fees. *Com. Code § 11305(b)* reflects the judgment that imposition of consequential damages on a bank for commission of an error is not justified [Official Comment 2 to UCC § 4A-305].

[c] Damages Pursuant to Agreement

In addition to amounts payable under *Com. Code § 11305(a)* and *(b)*, damages, including consequential damages, are recoverable to the extent provided in an express written agreement of the receiving bank [*Com. Code § 11305(c)*].

Com. Code § 11305(c) allows the measure of damages in *Com. Code § 11305(b)* to be increased by an express written agreement of the receiving bank. An originator's bank might be willing to assume additional responsibilities and incur additional liability in exchange for a higher fee [Official Comment 2 to UCC § 4A-305].

[d] Damages for Breach of Express Agreement to Execute Payment Order

If a receiving bank fails to execute a payment order that it was obliged by express agreement to execute, the receiving bank is liable to the sender for its expenses in the transaction and for incidental expenses and interest losses resulting from the failure to execute. Additional damages, including consequential damages, are recoverable to the extent provided in an express written agreement of the receiving bank, but are not otherwise recoverable [*Com. Code § 11305(d)*].

Com. Code § 11305(d) governs cases in which a receiving bank has obligated itself by express agreement to accept payment orders of a sender. In the absence of such an agreement, there is no obligation by a receiving bank to accept a payment order [*Com. Code § 11212*]. The measure of damages for breach of an agreement to accept a payment order is the same as that stated in *Com. Code § 11305(b)*, that is, additional damages, including consequential damages, may be recovered to the extent stated in an express written agreement of the receiving bank [Official Comment 3 to UCC § 4A-305].

[e] Attorney's Fees

Reasonable attorney's fees are recoverable if demand for compensation under *Com. Code § 11305(a)* or *(b)* is made and refused before an action is brought on the claim. If a claim is made for breach of an agreement under *Com. Code § 11305(d)*, and the agreement does not provide for damages, then reasonable attorney's fees are recoverable if demand for compensation under *Com. Code § 11305(d)* is made and refused before an action is brought on the claim [*Com. Code § 11305(e)*].

[f] No Variation by Agreement

Except as otherwise stated in *Com. Code § 11305*, the liability of a receiving bank under *Com. Code § 11305(a)* and*(b)* may not be varied by agreement [*Com. Code § 11305(f)*]. The effect of *Com. Code § 11305(f)* is to prevent reduction of a receiving bank's liability under *Com. Code § 11305* [Official Comment 5 to UCC § 4A-305].

[2] Acceptance of Payment Order by Receiving Bank

[a] Sender Must Pay Amount to Beneficiary's Bank

Subject to *Com. Code §§ 11205* and *11207*, with respect to a payment order issued to the beneficiary's bank, acceptance of the order by the bank obliges the sender to pay the bank the amount of the order, but payment is not due until the payment date of the order [*Com. Code § 11402(a), (b)*].

Com. Code § 11402(b) states that the sender of a payment order to the beneficiary's bank must pay the order when the beneficiary's bank accepts the order. At that point the beneficiary's bank is obliged to pay the beneficiary [*Com. Code § 11404(a)*]. The last clause of *Com. Code § 11402(b)* covers a case of premature acceptance by the beneficiary's bank. In some funds transfers, notably automated clearinghouse transfers, a beneficiary's bank may receive a payment order with a payment date after the day the order is received. The beneficiary's bank might accept the order before the payment date by notifying the beneficiary of receipt of the order. Although the acceptance obliges the beneficiary's bank to pay the beneficiary, payment is not due until the payment date. Moreover, the beneficiary's bank is not entitled to payment from the sender until the payment date [Official Comment 1 to UCC § 4A-402].

A payment order is not like a negotiable instrument on which the drawer or maker has liability. Acceptance of the order by the receiving bank creates an obligation of the sender to pay the receiving bank the amount of the order. That is the extent of the sender's liability to the receiving bank, and no other person has any rights against the sender with respect to the sender's order [Official Comment 3 to UCC § 4A-402].

[b] Sender Must Pay Amount to Intermediary Bank

Subject to *Com. Code §§ 11205*, *11207*, *11303* and *11402(e)*, with respect to a payment order issued to a receiving bank other than the beneficiary's bank, acceptance of the order by the receiving bank obliges the sender to pay the bank the amount of the sender's order. Payment by the sender is not due until the execution date of the sender's order. The obligation of the sender to pay its payment order is excused if the funds transfer is not completed by acceptance by the beneficiary's bank of a payment order instructing payment to the beneficiary of that sender's payment order [*Com. Code § 11402(a), (c)*; *see* Official Comment 2 to UCC § 4A-402 (example)].

[c] Receiving Bank Might Have to Make Refund Payment

Subject to *Com. Code §§ 11205* and *11207*, if the sender of a payment order pays the order but was not obliged to pay all or part of the amount paid, the bank receiving payment is obliged to refund payment to the extent that the sender was not obliged to pay. Except as provided in *Com. Code §§ 11204* and *11304*, interest is payable on the refundable amount from the date of payment [*Com. Code § 11402(a), (d)*].

Subject to *Com. Code §§ 11205* and *11207*, if a funds transfer is not completed as stated in *Com. Code § 11402(c)* and an intermediary bank is obliged to refund payment as stated in *Com. Code § 11402(d)* but is unable to do so because it is not permitted by applicable law or because the bank suspends payments [*see § 95.347*] a sender in the funds transfer that executed a payment order in compliance with an instruction to route the funds transfer through that intermediary bank [*see Com. Code § 11302(a)(1)*] is entitled to receive or retain payment from the sender of the payment order that it accepted. The first sender in the funds transfer that issued an instruction requiring routing through that intermediary bank is subrogated to the right of the bank that paid the intermediary bank to refund as stated in *Com. Code § 11402(d)* [*Com. Code § 11402(a), (e)*; *see* Official Comment 2 to UCC § 4A-402 (example)].

Subject to *Com. Code §§ 11205* and *11207*, the right of the sender of a payment order to be excused from the obligation to pay the order as stated in *Com. Code § 11402(c)* or to receive refund under *Com. Code § 11402(d)* may not be varied by agreement [*Com. Code § 11402(a), (f)*].

[3] Payment of Sender's Obligation to Receiving Bank

[a] In General

Payment of the sender's obligation to the receiving bank under *Com. Code § 11402* [*see § 95.352[2]* occurs as follows [*Com. Code § 11403(a)*]:

- If the sender is a bank, payment occurs when the receiving bank receives final settlement of the obligation through a Federal Reserve bank or through a funds-transfer system [*Com. Code § 11403(a)(1)*].

- If the sender is a bank and the sender credited an account of the receiving bank with the sender or caused an account of the receiving bank in another bank to be credited, payment occurs when the credit is withdrawn or, if not withdrawn, at midnight of the day on which the credit is withdrawable and the receiving bank learns of that fact [*Com. Code § 11403(a)(2)*].

- If the receiving bank debits an account of the sender with the receiving bank, payment occurs when the debit is made, to the extent that the debit is covered by a withdrawable credit balance in the account [*Com. Code § 11403(a)(3)*].

Com. Code § 11403 defines when a sender pays the obligation stated in *Com. Code § 11402*. If a group of two or more banks engage in funds transfers with each other, the participating banks will sometimes be senders and sometimes be receiving banks. With respect to payment orders other than Fedwires, the amounts of the various payment orders may be credited and debited to accounts of one bank with another or to a clearinghouse account of each bank, and amounts owed and amounts due are netted. Settlement is made through a Federal Reserve bank by charges to the Federal Reserve accounts of the net debtor banks and credits to the Federal Reserve accounts of the net creditor banks. In the case of Fedwires, the sender's obligation is settled by a debit to the Federal Reserve account of the sender and a credit to the Federal Reserve account of the receiving bank at the time the receiving bank receives the payment order. Both of these cases are covered by *Com. Code § 11403(a)(1)*. When the Federal Reserve settlement becomes final, the obligation of the sender under *Com. Code § 11402* is paid [Official Comment 1 to UCC § 4A-403].

In some cases a bank does not settle an obligation owed to another bank through a Federal Reserve bank. This is the case if one of the banks is a foreign bank without access to the Federal Reserve payment system. In this kind of case, payment is usually made by credits or debits to accounts of the two banks with each other or to accounts of the two banks in a third bank [Official Comment 2 to UCC § 4A-403 (providing example)].

Com. Code § 11403(a)(3) applies to a case in which the sender (bank or nonbank) has a funded account in the receiving bank. If the sender issues a payment order to the bank, the bank can obtain payment from the sender by simply debiting the account of the sender, which pays its *Com. Code § 11402* obligation to the bank when the debit is made [Official Comment 3 to UCC § 4A-403].

[b] Use of Funds-Transfer System

If the sender and receiving bank are members of a funds-transfer system that nets obligations multilaterally among participants, the receiving bank receives final settlement when settlement is complete in accordance with the rules of the system. The obligation of the sender to pay the amount of a payment order transmitted through the funds-transfer system may be satisfied, to the extent permitted by the rules of the system, by setting off and applying against the sender's obligation the right of the sender to receive payment from the receiving bank of the amount of any other payment order transmitted to the sender by the receiving bank through the funds-transfer system. The aggregate balance of obligations owed by each sender to each receiving bank in the funds-transfer system may be satisfied, to the extent

permitted by the rules of the system, by setting off and applying against that balance the aggregate balance of obligations owed to the sender by other members of the system. The aggregate balance is determined after the right of setoff stated in the second sentence has been exercised [*Com. Code § 11403(b)*].

Com. Code § 11403(b) deals with multilateral settlements made through a funds-transfer system and is based on the CHIPS settlement system [*see § 95.343[2][b]*]. In a funds-transfer system such as CHIPS, which allows the various banks that transmit payment orders over the system to settle obligations at the end of each day, settlement is not based on individual payment orders. Each bank using the system engages in funds transfers with many other banks using the system. Settlement for any participant is based on the net credit or debit position of that participant with all other banks using the system. *Com. Code § 11403(b)* is designed to make clear that the obligations of any sender are paid when the net position of that sender is settled in accordance with the rules of the funds-transfer system. This provision is intended to invalidate any argument, based on common-law principles, that multilateral netting is not valid because mutuality of obligation is not present. *Com. Code § 11403(b)* dispenses with any mutuality of obligation requirements [Official Comment 4 to UCC § 4A-403].

[c] Setoff Between Two Banks

If two banks transmit payment orders to each other under an agreement that settlement of the obligations of each bank to the other under *Com. Code § 11402* will be made at the end of the day or other period, the total amount owed with respect to all orders transmitted by one bank shall be set off against the total amount owed with respect to all orders transmitted by the other bank. To the extent of the setoff, each bank has made payment to the other [*Com. Code § 11403(c)*].

Com. Code § 11403(c) applies to cases in which two banks send payment orders to each other during the day and settle with each other at the end of the day or at the end of some other period. It is similar to *Com. Code § 11403(b)* in that it recognizes that a sender's obligation to pay a payment order is satisfied by a setoff. The obligations of each bank as sender to the other as receiving bank are obligations of the bank itself and not as representative of customers. These two sections are important in the case of insolvency of a bank. They make clear that liability under *Com. Code § 11402* is based on the net position of the insolvent bank after setoff [Official Comment 4 to UCC § 4A-403].

[d] Sender Without Account Relationship

In a case not covered by *Com. Code § 11403(a)* [*see* [a] *above*], the time when payment of the sender's obligation under *Com. Code § 11402(b)* or *(c)* occurs is governed by applicable principles of law that determine when an obligation is satisfied [*Com. Code § 11403(d)*].

Com. Code § 11403(d) relates to the uncommon case in which the sender does not have an account relationship with the receiving bank and does not settle through a Federal Reserve bank. An example would be a customer that pays over the counter for a payment order that the customer issues to the receiving bank. Payment would normally be by cash, check, or bank obligation. When payment occurs is determined by law outside Division 11 [Official Comment 5 to UCC § 4A-403].

[4] Obligation of Beneficiary's Bank to Pay Beneficiary

[a] In General

Subject to *Com. Code §§ 11211(e)* and *11405(d)* and *(e)* [*see §§ 95.346[1], 95.352[5][c], [d]*], if a beneficiary's bank accepts a payment order, the bank is obliged to pay the amount of the order to the beneficiary of the order. Payment is due on the payment date of the order, but if acceptance occurs on the payment date after the close of the funds-transfer business day of the bank, payment is due on the next funds-transfer business day. If the bank refuses to pay after demand by the beneficiary and receipt of notice of particular circumstances that will give rise to consequential damages

as a result of nonpayment, then the beneficiary may recover damages resulting from the refusal to pay, to the extent that the bank had notice of the damages, unless the bank proves that it did not pay because of a reasonable doubt concerning the right of the beneficiary to payment [*Com. Code § 11404(a)*].

The first sentence of *Com. Code § 11404(a)* states the time when the obligation of the beneficiary's bank arises. The second and third sentences state when the beneficiary's bank must make funds available to the beneficiary. They also state the measure of damages for failure, after demand, to comply. Since the Expedited Funds Availability Act [*12 U.S.C. § 4001 et seq.*; *see § 95.220*] also governs funds availability in a funds transfer, the second and third sentences of *Com. Code § 11404(a)* may be subject to preemption by that act [Official Comment 1 to UCC § 4A-404].

Com. Code § 11404(a) provides that the beneficiary of an accepted payment order may recover consequential damages if the beneficiary's bank refuses to pay the order after demand by the beneficiary, provided the bank at that time had notice of the particular circumstances giving rise to the damages. Such damages are recoverable only to the extent that the bank had "notice of the damages." The quoted phrase requires that the bank have notice of the general type or nature of the damages that will be suffered as a result of the refusal to pay and their general magnitude. There is no requirement that the bank have notice of the exact or even the approximate amount of the damages, but if the amount of damages is extraordinary, the bank is entitled to notice of that fact [Official Comment 2 to UCC § 4A-404].

Under the last clause of *Com. Code § 11404(a)*, the beneficiary's bank is not liable for damages if its refusal to pay was "because of a reasonable doubt concerning the right of the beneficiary to payment." Normally there will not be any question about the right of the beneficiary to receive payment. The bank should be able to determine whether it has accepted the payment order and, if it has been accepted, the first sentence of *Com. Code § 11404(a)* states that the bank is obliged to pay. There may be uncommon cases, however, in which there is doubt whether acceptance occurred. For example, if acceptance is based on receipt of payment by the beneficiary's bank under *Com. Code § 11403(a)(1)* or *(2)*, there may be cases in which the bank is not certain that payment has been received. There may also be cases in which there is doubt about whether the person demanding payment is the person identified in the payment order as beneficiary of the order [Official Comment 3 to UCC § 4A-404].

The last clause of *Com. Code § 11404(a)* does not apply to cases in which a funds transfer is being used to pay an obligation, and a dispute arises between the originator and the beneficiary concerning whether the obligation is in fact owed. For example, the originator may try to prevent payment to the beneficiary by the beneficiary's bank by alleging that the beneficiary is not entitled to payment because of fraud against the originator or a breach of contract relating to the obligation. The fraud or breach of contract claim of the originator may be grounds for recovery by the originator from the beneficiary after the beneficiary is paid, but it does not affect the obligation of the beneficiary's bank to pay the beneficiary. Unless the payment order has been canceled pursuant to *Com. Code § 11211(c)*, there is no excuse for refusing to pay the beneficiary. In a proper case, the refusal may result in consequential damages. Except in the case of a book transfer, in which the beneficiary's bank is also the originator's bank, the originator of a funds transfer cannot cancel a payment order to the beneficiary's bank, with or without the consent of that bank, because the originator is not the sender of that order. Thus, the beneficiary's bank may safely ignore any instruction by the originator to withhold payment to the beneficiary [Official Comment 3 to UCC § 4A-404].

[b] Duty to Notify Beneficiary

If a payment order accepted by the beneficiary's bank requires payment to an account of the beneficiary, the bank is obliged to notify the beneficiary of receipt of the order before midnight of the next funds-transfer business day following the payment date. If the payment order does not instruct payment to an account of the beneficiary, the bank is required to notify the beneficiary only if notice is required by the order. Notice may be given by first-class mail or any other means reasonable in the circumstances. If the bank fails to give the required notice, the bank is obliged to pay interest to the beneficiary on the amount of the payment order from the day notice should have been given until the day the beneficiary learned of receipt of the payment order by the bank. No other damages are recoverable. Reasonable

attorney's fees also are recoverable if demand for interest is made and refused before an action is brought on the claim [*Com. Code § 11404(b)*].

If acceptance of the order occurs under *Com. Code § 11209(b)(1)*, the beneficiary is normally notified; hence, *Com. Code § 11404(b)* applies primarily to cases in which acceptance occurs under *Com. Code § 11209(b)(2)* or *(3)*. Notice under *Com. Code § 11404(b)* is not required if the person entitled to the notice agrees (or a funds-transfer system rule provides) that notice is not required (and the beneficiary is given notice of the rule). In automated clearinghouse transactions, the normal practice is not to give notice to the beneficiary unless notice is requested by the beneficiary. This practice can be continued by adoption of a funds-transfer system rule [Official Comment 4 to UCC § 4A-404].

[c] No Variation by Agreement or Funds-System Rule

The right of a beneficiary to receive payment and damages as stated in *Com. Code § 11404(a)* may not be varied by agreement or a funds-transfer system rule. The right of a beneficiary to be notified as stated in *Com. Code § 11404(b)* may be varied by agreement of the beneficiary or by a funds-transfer system rule if the beneficiary is notified of the rule before initiation of the funds transfer [*Com. Code § 11404(c)*].

[5] Payment of Obligation of Beneficiary's Bank to Beneficiary

[a] In General

If the beneficiary's bank credits an account of the beneficiary of a payment order, payment of the bank's obligation under *Com. Code § 11404(a)* occurs when and to the extent that either the beneficiary is notified of the right to withdraw the credit, or the bank lawfully applies the credit to a debt of the beneficiary, or funds with respect to the order are otherwise made available to the beneficiary by the bank [*Com. Code § 11405(a)*].

Com. Code § 11405 defines when the beneficiary's bank pays the beneficiary and when the obligation of the beneficiary's bank under *Com. Code § 11404* to pay the beneficiary is satisfied. In almost all cases, the bank will credit an account of the beneficiary when it receives a payment order. In the typical case, the beneficiary is paid when the beneficiary is given notice of the right to withdraw the credit. In some cases payment might be made to the beneficiary, not by releasing funds to the beneficiary, but by applying the credit to a debt of the beneficiary; in that case, the beneficiary gets the benefit of the payment order because a debt of the beneficiary has been satisfied. The two principal cases in which payment will occur in this manner are setoff by the beneficiary's bank and payment of the proceeds of the payment order to a garnishing creditor of the beneficiary [Official Comment 1 to UCC § 4A-405; *see Com. Code § 11502*].

If the beneficiary's bank does not credit an account of the beneficiary of a payment order, the time when payment of the bank's obligation under *Com. Code § 11404(a)* occurs is governed by principles of law that determine when an obligation is satisfied [*Com. Code § 11405(b)*].

[b] Unenforceable Condition on Payment

Except as stated in *Com. Code § 11405(d)* and *(e)* [*see § 95.352[5][c], [d]*], if the beneficiary's bank pays the beneficiary of a payment order under a condition to payment or agreement of the beneficiary giving the bank the right to recover payment from the beneficiary if the bank does not receive payment of the order, the condition to payment or agreement is not enforceable [*Com. Code § 11405(c)*].

If a beneficiary's bank releases funds to the beneficiary before it receives payment from the sender of the payment order, it assumes the risk that the sender may not pay the sender's order because of suspension of payments or other reason. The beneficiary's bank can protect itself against this risk by delaying acceptance. If the bank accepts the order, however, it is obliged to pay the beneficiary. If the beneficiary's bank has given the beneficiary notice of the right to withdraw a

credit made to the beneficiary's account, the beneficiary has received payment from the bank. Once payment has been made to the beneficiary with respect to an obligation incurred by the bank under *Com. Code § 11404(a)*, the payment cannot be recovered by the beneficiary's bank unless *Com. Code § 11405(d)* or *(e)* applies. Thus, a right to withdraw a credit cannot be revoked if the right to withdraw constituted payment of the bank's obligation. This principle applies even if funds were released as a "loan" or were released subject to a condition that they would be repaid in the event the bank does not receive payment from the sender of the payment order, or if the beneficiary agreed to return the payment if the bank did not receive payment from the sender [Official Comment 2 to UCC § 4A-405].

[c] Use of Funds-Transfer System

A funds-transfer system rule may provide that payments made to beneficiaries of funds transfers made through the system are provisional until receipt of payment by the beneficiary's bank of the payment order that it accepted. If the beneficiary's bank makes a payment that is provisional under such a rule, the bank is entitled to refund from the beneficiary if the following conditions are satisfied:

- The rule requires that both the beneficiary and the originator be given notice of the provisional nature of the payment before the funds transfer is initiated.
- The beneficiary, the beneficiary's bank, and the originator's bank agreed to be bound by the rule.
- The beneficiary's bank did not receive payment of the payment order that it accepted.

If the beneficiary is obliged to refund payment to the beneficiary's bank, then acceptance of the payment order by the beneficiary's bank is nullified, and no payment by the originator of the funds transfer to the beneficiary occurs under *Com. Code § 11406* [*Com. Code § 11405(d)*].

Com. Code § 11405(c) [*see § 95.352[5][b]*] is subject to the exception stated in *Com. Code § 11405(d)*, which is intended to apply to automated clearinghouse (ACH) transfers. ACH transfers are made in batches. A beneficiary's bank will normally accept, at the same time and as part of a single batch, payment orders with respect to many different originator's banks. The custom in ACH transactions is to release funds to the beneficiary early on the payment date even though settlement to the beneficiary's bank does not occur until later in the day. The understanding is that payments to beneficiaries are provisional until the beneficiary's bank receives settlement. This practice is similar to what happens when a depositary bank releases funds with respect to a check forwarded for collection. If the check is dishonored the bank is entitled to recover the funds from the customer. ACH transfers are widely perceived as check substitutes; therefore, *Com. Code § 11405(d)* allows the funds-transfer system to adopt a rule making payments to beneficiaries provisional. If such a rule is adopted, a beneficiary's bank that releases funds to the beneficiary will be able to recover the payment if it does not receive payment of the payment order that it accepted [Official Comment 3 to UCC § 4A-405].

The beneficiary, the beneficiary's bank, and the originator's bank must all agree to be bound by the rule, and the rule must require that both the beneficiary and the originator be given notice of the provisional nature of the payment before the funds transfer is initiated. There is no requirement that the notice be given with respect to a particular funds transfer. Once notice of the provisional nature of the payment has been given, the notice is effective for all subsequent payments to or from the person to whom the notice was given. *Com. Code § 11405(d)* provides only that the funds-transfer system rule must require notice to the beneficiary and the originator. The beneficiary's bank will know what the rule requires, but it has no way of knowing whether the originator's bank complied with the rule. *Com. Code § 11405(d)* does not require proof that the originator received notice. If the originator's bank failed to give the required notice, and the originator suffered as a result, the appropriate remedy is an action by the originator against the originator's bank based on that failure. However, the beneficiary's bank will not be able to get the benefit of *Com. Code § 11405(d)* unless the beneficiary had notice of the provisional nature of the payment, because *Com. Code § 11405(d)* requires an agreement

by the beneficiary to be bound by the rule. Implicit in an agreement to be bound by a rule that makes a payment provisional is a requirement that notice be given of what the rule provides. The notice can be part of the agreement or separately given; for example, notice can be given by providing a copy of the system's operating rules [Official Comment 3 to UCC § 4A-405].

With respect to ACH transfers made through a Federal Reserve bank acting as an intermediary bank, the Federal Reserve bank is obliged to pay a beneficiary's bank that accepts the payment order [*Com. Code § 11402(b)*]. Unlike Fedwire transfers, under current ACH practice a Federal Reserve bank that processes a payment order does not obligate itself to pay if the originator's bank fails to pay the Federal Reserve bank. It is assumed that the Federal Reserve will use its right of preemption [*see Com. Code § 11107*] to disclaim the payment obligation in ACH transactions if it decides to retain the provisional payment rule [Official Comment 3 to UCC § 4A-405].

[d] Effect of Loss-Sharing Agreement

A funds-transfer system that nets obligations multilaterally among participants could have in effect a loss-sharing agreement among participants for the purpose of providing funds necessary to complete settlement of the obligations of participants that do not meet their settlement obligations. With respect to a funds transfer that includes a payment order transmitted over such a funds-transfer system, if the beneficiary's bank accepts a payment order, and the system fails to complete settlement pursuant to its rules with respect to any payment order in the funds transfer, the following consequences ensue [*Com. Code § 11405(e)*].

- The acceptance by the beneficiary's bank is nullified, and no person has any right or obligation based on the acceptance.

- The beneficiary's bank is entitled to recover payment from the beneficiary.

- No payment by the originator to the beneficiary occurs under *Com. Code § 11406*.

- Subject to *Com. Code § 11402(e)*, each sender in the funds transfer is excused from its obligation to pay its payment order under *Com. Code § 11402(c)*, because the funds transfer has not been completed.

Com. Code § 11405(e) is another exception to *Com. Code § 11405(c)* [*see § 95.352[5][b]*]. It refers to funds-transfer systems having loss-sharing rules described in the subsection. *Com. Code § 11405(e)* applies only if the system fails to settle despite the loss-sharing rule. Since funds under the loss-sharing rule will instantly be available to the system and will be in an amount sufficient to cover any failure that can be reasonably anticipated, it is extremely unlikely that the system would ever fail to settle. Thus, *Com. Code § 11405(e)* addresses an event that should never occur. If that event were to occur, all payment orders made over the system would be canceled under the system's loss-sharing rule, and no bank would receive settlement, whether or not a failed bank was involved in a particular funds transfer. *Com. Code § 11405(e)* provides that each funds transfer in which there is a payment order with respect to which there is a settlement failure will be unwound. Acceptance by the beneficiary's bank in each funds transfer is nullified. The consequences of nullification are that the beneficiary has no right to receive or retain payment by the beneficiary's bank, no payment is made by the originator to the beneficiary, and each sender in the funds transfer is not obligated (subject to *Com. Code § 11402(e)*), to pay its payment order and is entitled to refund under *Com. Code § 11402(d)* if it has already paid [Official Comment 4 to UCC § 4A-405].

[6] Payment by Originator of Funds Transfer

[a] When Payment Occurs

Subject to *Com. Code §§ 11211(e)* and *11405(d)* and *(e)* [*see §§ 95.346[1], 95.352[5][c], [d]*], the originator of a funds

transfer pays the beneficiary of the originator's payment order at the time a payment order for the benefit of the beneficiary is accepted by the beneficiary's bank in the funds transfer. The payment is in an amount equal to the amount of the order accepted by the beneficiary's bank, but not more than the amount of the originator's order [*Com. Code § 11406(a)*].

Com. Code § 11406(a) states the fundamental rule of Division 11 that payment by the originator to the beneficiary is accomplished by providing to the beneficiary the obligation of the beneficiary's bank to pay [Official Comment 1 to UCC § 4A-406].

[b] Payment Discharges Originator's Obligation to Beneficiary

If payment under *Com. Code § 11406(a)* is made to satisfy an obligation, the obligation is discharged to the same extent that discharge would result from payment to the beneficiary of the same amount in money, unless all of the following conditions are satisfied:

- The payment under *Com. Code § 11406(a)* was made by a means prohibited by the contract of the beneficiary with respect to the obligation.

- The beneficiary, within a reasonable time after receiving notice of receipt of the order by the beneficiary's bank, notified the originator of the beneficiary's refusal of the payment.

- Funds with respect to the order were not withdrawn by the beneficiary or applied to a debt of the beneficiary.

- The beneficiary would suffer a loss that could reasonably have been avoided if payment had been made by a means complying with the contract.

If payment by the originator does not result in discharge under *Com. Code § 11406*, the originator is subrogated to the rights of the beneficiary to receive payment from the beneficiary's bank under *Com. Code § 11404(a)* [*Com. Code § 11406(b)*].

In a large percentage of funds transfers, the transfer is made to pay an obligation of the originator. *Com. Code § 11406(a)* states that the beneficiary is paid by the originator when the beneficiary's bank accepts a payment order for the benefit of the beneficiary. When that happens, the effect under *Com. Code § 11406(b)* is to substitute the obligation of the beneficiary's bank for the obligation of the originator. The effect is similar to that under Division 3 when a cashier's check payable to the beneficiary has been taken by the beneficiary. Normally, payment by funds transfer is sought by the beneficiary because it puts money into the hands of the beneficiary more quickly. As a practical matter, the beneficiary and the originator will nearly always agree to the funds transfer in advance. Under *Com. Code § 11406(b)*, acceptance by the beneficiary's bank will result in discharge of the obligation for which payment was made unless the beneficiary had made a contract with respect to the obligation which did not permit payment by the means used. Thus, if there is no contractual obstacle with respect to the means of payment of the obligation, acceptance by the beneficiary's bank of a payment order to the account of the beneficiary can result in discharge [Official Comment 2 to UCC § 4A-406; *see* Official Comments 3, 4 to UCC § 4A-406 (examples)].

[c] Effect of Deducting Bank Charges From Original Amount

For the purpose of determining whether discharge of an obligation occurs under *Com. Code § 11406(b)*, if the beneficiary's bank accepts a payment order in an amount equal to the amount of the originator's payment order less charges of receiving banks in the funds transfer, then payment to the beneficiary is deemed to be in the amount of the originator's order unless, on demand by the beneficiary, the originator does not pay the beneficiary the amount of the

deducted charges [*Com. Code § 11406(c)*].

Charges of receiving banks in a funds transfer normally are minimal compared to the amount being paid by the originator to the beneficiary. Wire transfers are normally agreed-to in advance, and the parties may agree concerning how the charges are to be covered between the parties. *Com. Code § 11406(c)* states a rule that applies in the absence of such an agreement. In some funds transfers, charges of banks that execute payment orders are collected by deducting the charges from the amount of the payment order issued by the bank--the bank issues a payment order for an amount slightly less than the amount of the payment order that is being executed. The result in such a case is that the payment order accepted by the beneficiary's bank will be for an amount slightly less than the amount of the originator's order. *Com. Code § 11406(c)* recognizes the principle that a beneficiary is entitled to full payment of a debt paid by wire transfer as a condition to discharge, yet the section prevents a beneficiary from denying the originator the benefit of the payment by asserting that discharge did not occur because deduction of bank charges resulted in less-than-full payment. The typical case is one in which the payment is made to exercise a valuable right such as an option, when that would be unfavorable to the beneficiary. *Com. Code § 11406(c)* allows discharge notwithstanding the deduction, unless the originator fails to reimburse the beneficiary for the deducted charges after demand by the beneficiary [Official Comment 5 to UCC § 4A-406].

[d] Variation by Agreement

Rights of the originator or of the beneficiary of a funds transfer under *Com. Code § 11406* may be varied only by agreement of the originator and the beneficiary [*Com. Code § 11406(d)*].

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§ 95.353 Additional Rules

[1] Variation of Rights and Obligations by Agreement

Except as otherwise provided in Division 11, the rights and obligations of a party to a funds transfer may be varied by agreement of the affected party [*Com. Code § 11501(a)*].

[2] Creditor's Claim

[a] "Creditor Process"

As used in *Com. Code § 11502*, "creditor process" means levy, attachment, garnishment, notice of lien, sequestration, or similar process issued by or on behalf of a creditor or other claimant with respect to an account [*Com. Code § 11502(a)*]. This definition is intended to cover the various devices by which a creditor of the holder of a bank account or a claimant to a bank account can seize the account. Procedure and nomenclature vary widely from state to state; hence, the term used in *Com. Code § 11502* is a generic term [Official Comment 5 to UCC § 4A-502].

[b] Receiving Bank's Interest Is Protected

With respect to an authorized account of the sender of a payment order, if the creditor process is served on the receiving bank, then for the purpose of determining rights with respect to the creditor process, if the receiving bank accepts the payment order, the balance in the authorized account is deemed to be reduced by the amount of the payment order to the extent that the bank did not otherwise receive payment of the order, unless the creditor process is served at a time and in a manner affording the bank a reasonable opportunity to act on it before the bank accepts the payment order [*Com. Code § 11502(b)*].

When a receiving bank accepts a payment order, the bank normally receives payment from the sender by debiting an authorized account of the sender. In accepting the sender's order the bank may be relying on a credit balance in the account. If creditor process is served on the bank with respect to the account before the bank accepts the order, but the bank employee responsible for the acceptance is not aware of the creditor process at the time the acceptance occurs,

then it would be unjust to the bank to allow the creditor process to take the credit balance on which the bank has relied. *Com. Code § 11502(b)* allows the bank to obtain payment from the sender's account in this case, by providing that the balance in the sender's account to which the creditor process applies is deemed to be reduced by the amount of the payment order unless there was sufficient time for notice of the service of creditor process to be received by personnel of the bank responsible for the acceptance [Official Comment 1 to UCC § 4A-502].

[c] Effect on Beneficiary's Bank

If a beneficiary's bank has received a payment order for payment to the beneficiary's account in the bank, the following rules apply [*Com. Code § 11502(c)*]:

- The bank may credit the beneficiary's account. The amount credited may be set off against an obligation owed by the beneficiary to the bank or may be applied to satisfy creditor process served on the bank with respect to the account [*Com. Code § 11502(c)(1)*].

- The bank may credit the beneficiary's account and allow withdrawal of the amount credited unless creditor process with respect to the account is served at a time and in a manner affording the bank a reasonable opportunity to act to prevent withdrawal [*Com. Code § 11502(c)(2)*].

- If creditor process with respect to the beneficiary's account has been served, and the bank has had a reasonable opportunity to act on it, the bank may not reject the payment order except for a reason unrelated to the service of process [*Com. Code § 11502(c)(3)*].

The bank may credit the beneficiary's account when the order is received, but under *Com. Code § 11404(a)* the bank incurs no obligation to pay the beneficiary until the order is accepted pursuant to *Com. Code § 11209(b)*. Thus, before acceptance, the credit to the beneficiary's account is provisional. Under *Com. Code § 11209(b)*, however, acceptance occurs if the beneficiary's bank pays the beneficiary pursuant to *Com. Code § 11405(a)*, under which payment occurs if the credit to the beneficiary's account is applied to a debt of the beneficiary. *Com. Code § 11502(c)(1)* allows the bank to credit the beneficiary's account with respect to a payment order and to accept the order by setting off the credit against an obligation owed to the bank or applying the credit to creditor process with respect to the account [Official Comment 2 to UCC § 4A-502; *see* Official Comment 2 to UCC § 4A-502 (example)].

Com. Code § 11502(c)(2) is similar to *Com. Code § 11502(b)*. Normally the beneficiary's bank will release funds to the beneficiary shortly after acceptance or it will accept by releasing funds. Since the bank is bound by a garnishment order served before funds are released to the beneficiary, the bank might suffer a loss if funds were released without knowledge that a garnishment order had been served. *Com. Code § 11502(c)(2)* protects the bank if it did not have adequate notice of the garnishment when the funds were released [Official Comment 3 to UCC § 4A-502].

[d] Process Must Be Served on Beneficiary's Bank

Creditor process with respect to a payment by the originator to the beneficiary pursuant to a funds transfer may be served only on the beneficiary's bank with respect to the debt owed by that bank to the beneficiary. Any other bank served with the creditor process is not obliged to act with respect to the process [*Com. Code § 11502(d)*].

A creditor may want to reach funds involved in a funds transfer. The creditor may try to do so by serving process on the originator's bank, an intermediary bank or the beneficiary's bank. The purpose of *Com. Code § 11502(d)* is to guide the creditor and the court as to the proper method of reaching the funds involved in a funds transfer. A creditor of the originator can levy on the account of the originator in the originator's bank before the funds transfer is initiated, but that levy is subject to the limitations stated in *Com. Code § 11502(b)*. The creditor of the originator cannot reach any other funds because no property of the originator is being transferred. A creditor of the beneficiary cannot levy on property of

the originator, and until the funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary, the beneficiary has no property interest in the funds transfer which the beneficiary's creditor can reach. A creditor of the beneficiary that wants to reach the funds to be received by the beneficiary must serve creditor process on the beneficiary's bank, so as to reach the obligation of the beneficiary's bank to pay the beneficiary, which arises on acceptance by the beneficiary's bank under *Com. Code § 11404(a)* [Official Comment 4 to UCC § 4A-502].

[3] Restraining Orders

Under *Com. Code § 11503*, for proper cause and in compliance with applicable law, a court may restrain:

- A person from issuing a payment order to initiate a funds transfer;
- An originator's bank from executing the payment order of the originator; or
- The beneficiary's bank from releasing funds to the beneficiary or the beneficiary from withdrawing the funds.

A court may not otherwise restrain a person from issuing a payment order, making or receiving payment of a payment order, or otherwise acting with respect to a funds transfer [*Com. Code § 11503*].

Com. Code § 11503 is intended to prevent interruption of a funds transfer after it has been set in motion. The initiation of a funds transfer can be prevented by enjoining the originator or the originator's bank from issuing a payment order. After the funds transfer is completed by acceptance of a payment order by the beneficiary's bank, that bank can be enjoined from releasing funds to the beneficiary, or the beneficiary can be enjoined from withdrawing the funds. No other injunction is permitted. In particular, intermediary banks are protected, and injunctions against the originator and the originator's bank are limited to preventing issuance of a payment order. Except for the beneficiary's bank, nobody can be enjoined from paying a payment order, and no receiving bank can be enjoined from receiving payment from the sender of the order that it accepted [Official Comment to UCC § 4A-503].

[4] Charging Sender's Account

If a receiving bank has received more than one payment order of the sender, or received any payment orders and other items [*see § 95.343[1][b]* (what are "items")] that are payable from the sender's account, then the bank may charge the sender's account with respect to the various orders and items in any sequence [*Com. Code § 11504(a)*].

Com. Code § 11504(a) concerns priority among various obligations that are to be paid from the same account. A customer may have written checks on its account with the receiving bank and may have issued payment orders payable from the same account. If the account balance is not sufficient to cover all of the checks and payment orders, some checks may be dishonored and some payment orders may not be accepted. Although there is no concept of wrongful dishonor of a payment order in Division 11 (in the absence of an agreement to honor by the receiving bank), some rights and obligations may depend on the amount in the customer's account [*see Com. Code §§ 11209(b)(3), 11210(b)*]. Whether dishonor of a check is wrongful also may depend on the balance in the customer's account. Under *Com. Code § 11504(a)*, the bank is not required to consider the competing items and payment orders in any particular sequence. Rather, it may charge the customer's account for the various items and orders in any sequence [Official Comment to UCC § 4A-504 (includes example)].

In determining whether a credit to an account has been withdrawn by the holder of the account or applied to a debt of the holder of the account, credits first made to the account are first withdrawn or applied [*Com. Code § 11504(b)*]. In other words, a "first in, first out" rule applies.

[5] Notice to Bank That Customer Objects to Payment

If a receiving bank has received payment from its customer with respect to a payment order issued in the name of the customer as sender and accepted by the bank, and the customer received notification reasonably identifying the order, the customer is precluded from asserting that the bank is not entitled to retain the payment, unless the customer notifies the bank of the customer's objection to the payment within one year after the notification was received by the customer [*Com. Code § 11505*].

Com. Code § 11505 is in the nature of a statute of repose for objecting to debits made to the customer's account. A receiving bank that executes payment orders of a customer may have received payment from the customer by debiting the customer's account with respect to a payment order that the customer was not required to pay. For example, the payment order may not have been authorized or verified pursuant to *Com. Code § 11202*, or the funds transfer may not have been completed. In either case the receiving bank is obliged to refund the payment to the customer, and this obligation to refund payment cannot be varied by agreement [*Com. Code §§ 11204, 11402*].

Refund also may be required if the receiving bank is not entitled to payment from the customer because the bank erroneously executed a payment order [*Com. Code § 11303*]. A similar analysis applies to that situation: *Com. Code § 11402(d)* and *(f)* require refund, and the obligation to refund may not be varied by agreement. Under *Com. Code § 11505*, however, the obligation to refund may not be asserted by the customer if the customer has not objected to the debiting of the account within one year after the customer received notification of the debit [Official Comment to UCC § 4A-505].

The statutory requirement is to notify the bank "of the customer's objection to the payment" [*Com. Code § 11505*]. The customer need not precisely state in so many words that the customer objects to the debiting of its account, but the customer must inform the bank in some fashion that it believes the bank should not have accepted the payment order or otherwise is liable for the loss. Under Division 11, a bank is not necessarily liable for accepting an unauthorized, or even fraudulent, payment order. Accordingly, merely informing the bank that a payment order was fraudulent does not inform it that the customer considers the bank liable for the loss [*Zengen, Inc. v. Comerica Bank (2007) 41 Cal. 4th 239, 256, 59 Cal. Rptr. 3d 240, 158 P.3d 800* (customer "must object to *what the bank did*, not merely inform the bank [that] the payment order was unauthorized"; emphasis in original)].

The notice requirement is not technical. The purpose of the notification requirement is to inform the bank reasonably promptly that the customer believes it is liable for the loss. That way, the bank knows that it should take appropriate steps to protect itself. The customer's notice need only be sufficient to satisfy this purpose. The customer does not have to state specifically that it objects to the debiting or otherwise use any particular words. While it would certainly be preferable and clearer, and might avoid unnecessary litigation, for the customer to tell the bank expressly that the bank erred in processing the payment orders, or that it is liable for the loss, or to use some other clear language, such specific words are not always necessary. What is necessary is that the customer convey to the bank in some way that the customer objects to what the bank did or, stated slightly differently, the customer must in some way assert a claim against the bank. Whether the notification is sufficient in a given case depends on the overall circumstances. The test is whether, in view all of the relevant circumstances, a reasonable bank would understand from the customer's communication that the customer was objecting to what the bank had done in accepting the payment orders, or the customer otherwise considered the bank liable for the loss. If a reasonable bank would so understand the communication, it would know that it should take appropriate steps to protect itself, thus satisfying the purpose behind *Com. Code § 11505* [*Zengen, Inc. v. Comerica Bank (2007) 41 Cal. 4th 239, 259, 59 Cal. Rptr. 3d 240, 158 P.3d 800]* .

[6] Calculation of Interest

If, under Division 11, a receiving bank is obliged to pay interest with respect to a payment order issued to the bank, the

amount payable may be determined either by agreement of the sender and receiving bank or by a funds-transfer system rule if the payment order is transmitted through a funds-transfer system [*Com. Code § 11506(a)*].

If the amount of interest is not determined by an agreement or rule as stated in *Com. Code § 11506(a)*, the amount is calculated by multiplying the applicable federal funds rate by the amount on which interest is payable, and then multiplying the product by the number of days for which interest is payable. The applicable federal funds rate is the average of the federal funds rates published by the Federal Reserve Bank of New York for each of the days for which interest is payable, divided by 360. The federal funds rate for any day on which a published rate is not available is the same as the published rate for the next preceding day for which there is a published rate. If a receiving bank that accepted a payment order is required to refund payment to the sender of the order because the funds transfer was not completed, but the failure to complete was not due to any fault by the bank, the interest payable is reduced by a percentage equal to the reserve requirement on deposits of the receiving bank [*Com. Code § 11506(b)*].

A receiving bank is required to pay interest on the amount of a payment order received by the bank in a number of situations. Sometimes the interest is payable to the sender; in other cases it is payable to either the originator or the beneficiary of the funds transfer [*see Com. Code §§ 11204(a), 11209(b)(3), 11210(b), 11305(a), 11402(d), 11404(b)*]. The rate of interest may be governed by a funds-transfer system rule or by agreement as stated in *Com. Code § 11506(a)*; otherwise, the rate is determined under *Com. Code § 11506(b)* [Official Comment 1 to UCC § 4A-506].

Example.

> A bank is obliged to pay interest on $1,000,000 for three days, July 3, July 4, and July 5. The published Fed Funds rate is 0.082 for July 3 and 0.081 for July 5. There is no published rate for July 4 because that day is not a banking day. The rate for July 3 applies to July 4. The applicable Fed Funds rate is 0.08167 (the average of 0.082, 0.082, and 0.081) divided by 360, which equals 0.0002268. The amount of interest payable is $1,000,000 times 0.0002268 times 3, which is $680.40.

In some cases, interest is payable even though there is no fault by the receiving bank. The last sentence of *Com. Code § 11506(b)* applies to those cases. For example, a funds transfer might not be completed because the beneficiary's bank rejected the payment order issued to it by the originator's bank or an intermediary bank. *Com. Code § 11402(c)* provides that the originator is not obliged to pay its payment order, and *Com. Code § 11402(d)* provides that the originator's bank must refund any payment received, plus interest. The requirement to pay interest in this case is not based on fault by the originator's bank. Rather, it is based on restitution. Since the originator's bank had the use of the originator's money, it is required to pay the originator for the value of that use. The value of that use is not determined by multiplying the interest rate by the refundable amount because the originator's bank is required to deposit with the Federal Reserve a percentage of the bank's deposits as a reserve requirement. Since that deposit does not bear interest, the bank had use of the refundable amount reduced by a percentage equal to the reserve requirement. If the reserve requirement is 12 percent, the amount of interest payable by the bank under the formula stated in *Com. Code § 11506(b)* is reduced by 12 percent [Official Comment 2 to UCC § 4A-506].

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9-95 California Forms of Pleading and Practice--Annotated § 95.360

§ 95.360 Related Matthew Bender Publications

For memoranda of points and authorities relating to jurisdiction and venue of corporations, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

Legal Topics:

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

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§ 95.361 Federal Statutes

National Banking Act. *12 U.S.C. § 21 et seq.*

Federal Home Loan Bank Act. *12 U.S.C. § 1421 et seq.*

Resolution Trust Corporation (RTC) is successor to Federal Savings and Loan Insurance Corporation (FSLIC) as conservator or receiver of associations for which conservator or receiver is appointed after December 31, 1988, and before October 1, 1993; RTC as conservator or receiver has same authority as Federal Deposit Insurance Corporation (FDIC). *12 U.S.C. § 1441a(b)*

Home Owners' Loan Act. *12 U.S.C. § 1461 et seq.*

Federal Deposit Insurance Act. *12 U.S.C. § 1811 et seq.*

Claims against FDIC as conservator or receiver of association. *12 U.S.C. § 1821(d)(3)-(13), (e)*

No suit pending against FSLIC on day before Pub. L. No. 101-73 was enacted was abated, but appropriate successor must be substituted. Pub. L. No. 101-73, § 401(f)(2)

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawFederal ActsFederal Deposit Insurance Corporation Improvement ActBanking LawFederal ActsHome Owners' Loan ActBanking LawFederal ActsNational Bank ActBanking LawRegulatory AgenciesFederal Home Loan Bank SystemBanking LawRegulatory AgenciesU.S. Resolution Trust Corporation

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§ 95.362 Federal Administrative Regulations

Federal associations. *12 C.F.R. § 541.1 et seq.*

All associations. *12 C.F.R. § 561.1 et seq.*

Powers of Office of Thrift Supervision is conservator or receiver of state savings associations. *12 C.F.R. § 579.1 et seq.*

Savings and loan holding companies. *12 C.F.R. § 583.1 et seq.*

Preemption of state usury and due-on-sale laws. *12 C.F.R. § 590.1 et seq.*

Federal home loan banks. *12 C.F.R. § 931.1 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawDepository InstitutionsCommercial BanksBanking LawDepository InstitutionsFederal Savings AssociationsBanking LawDepository InstitutionsState Savings AssociationsBanking LawRegulatory AgenciesFederal Home Loan Bank SystemBanking LawRegulatory AgenciesU.S. Office of Thrift Supervision

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§ 95.363 State Statutes

[1] Appraisals

Licensing, certification, education, and other requirements for persons engaged in federally related real estate appraisal activity on and after July 1, 1991. *Bus. & Prof. Code § 11300 et seq.*

[2] Automated Teller Machines (ATMs)

On or before July 1, 1991, operators of ATMs must have procedure for evaluating safety of consumers using them; safety and consumer education requirements imposed on operators and those who control parking lots in which ATMs are located; exemptions; preemption of other laws, regulations, ordinances. *Fin. Code § 13000 et seq.*

[3] Consumer Credit Reporting Laws

One who, for monetary fees or dues or on cooperative nonprofit basis, regularly assembles, evaluates, or disseminates information on checking account experiences of consumer customers of banks or other financial institutions is subject (with some exceptions) to laws governing consumer credit reporting agencies. *Civ. Code § 1785.5*; *see Civ. Code § 1785.1 et seq.* (discussed in Ch. 129, *Consumer Credit Reporting*)

[4] Foreign Savings Association

Foreign savings associations in, or controlled by holding companies with their principal place of deposits in, states with reciprocal provisions permitted, on and after January 1, 1991, to conduct savings association business in California with commissioner's approval. *Fin. Code §§ 10002, 10003, 10007*

[5] Interstate Operations

Caldera, Weggeland, and Killea California Interstate Banking and Branching Act of 1995. *Fin. Code § 3750 et seq.*

[6] Loans

Disclosures required by lender offering adjustable-rate residential mortgage loans; injunctive relief, damages, and attorney's fees authorized for lender's failure to comply. *Civ. Code § 1921(b)*

Action by bank for fraudulent inducement to make real estate loan; exemplary damages. *Fin. Code § 551*

[7] Related Financial Service Institutions

Money exchange houses. *Bus. & Prof. Code § 22515 et seq.*

Transmission of money abroad by entity other than insured bank, savings and loan association, credit union, trust company, industrial loan company, or thrift and loan company. *Fin. Code § 1800 et seq.*

[8] Securities

Prohibitions and disclosure requirements relating to sale of securities in retail branch of savings and loan associations. *Fin. Code § 4980 et seq.*

[9] Usury Exemptions

Bank exemptions from usury restrictions of *Cal. Const., art. XV, § 1. Fin. Code §§ 1504, 1716, 3707, 22002*

Savings associations usury exemption. *Fin. Code § 6515(c), 7675*

[10] Venue and Service of Summons

Venue in actions against corporations. *Code Civ. Proc. § 395.5*

Wrong venue; transfer to appropriate court. *Code Civ. Proc. § 396b*

Grounds for change of venue. *Code Civ. Proc. § 397*

Service of summons on banking corporation. *Code Civ. Proc. § 416.10(c)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral OverviewBanking LawDepository InstitutionsGeneral OverviewBanking LawNational BanksInterest & UsuryInterestCivil ProcedureVenueCorporationsCivil ProcedurePleading & PracticeService of ProcessGeneral Overview

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§ 95.364 Decisions

[1] Appraisals

Financial institution, in performing appraisal of property that would secure loan to be made by it, was acting in its own interest and did not owe any duty of care to buyer/borrower. *Nymark v. Heart Fed. Savings & Loan Assn. (1991) 231 Cal. App. 3d 1089, 1100, 283 Cal. Rptr. 53*

[2] Automated Teller Machines (ATMs)

Nevada statute allowing Nevada banks to charge transaction fee for ATM transaction initiated at bank-owned ATMs and accomplished through shared ATM network overrode network member agreement's prohibition on such fees and did not violate commerce clause [U.S. Const., art. I, § 8, cl. 3]; statute did not discriminate in favor of Nevada banks. *Valley Bank of Nevada v. Plus System, Inc. (9th Cir. 1990) 914 F.2d 1186, 1197*

ATM is public accommodation within meaning of Unruh Civil Rights Act (*Civ. Code § 54.1*) and other laws, thus requiring that they be accessible to handicapped persons, specifically that ramp-type access, rather than stairway, be used. *Donald v. Sacramento Valley Bank (1989) 209 Cal. App. 3d 1183, 1190-1196, 260 Cal. Rptr. 49*

[3] "Bank" Defined

Federal reserve regulation *12 C.F.R. § 225.2(b)(1)* (also known as Reg Y) is impermissibly broad definition of bank; *12 U.S.C. § 1841(c)* (Bank Holding Company Act) definition of bank is controlling; bank is required to offer deposits that customer can legally withdraw on demand and to make commercial loans, which may not be defined to include money market transactions. *Fed. Reserve Bd. v. Dimension Financial (1986) 474 U.S. 361, 364-375, 106 S. Ct. 681, 88 L. Ed. 2d 691*

Deposits held by lender were "demand deposits" within meaning of Bank Holding Company Act when lender's oral policy allowed depositors to withdraw funds as needed and funds to be transferred to third parties; thus, lender was "bank" within meaning of *Act. S&N Equipment Co. v. Casa Grande Cotton Fin. Co. (9th Cir. 1996) 97 F.3d 337, 345*

[4] Director's Liability

[a] Federally Insured Banks

Business judgment rule immunizes directors of federally insured national bank from liability for purely negligent acts; nonofficer directors entitled to rely on company employees and advisors without duty of further inquiry, absent special circumstances. *FDIC v. Castetter (9th Cir. 1999) 184 F.3d 1040, 1044-1046*

[b] Savings and Loan Associations

[i] In General

Director and sole shareholder who arranged for loan to third party, proceeds of which were used to purchase director's interest in association, breached fiduciary duty to association; however, recovery did not extend to amount of entire loan proceeds, but was limited to amount of profit director realized on transaction. *Federal Sav. and Loan Ins. Corp. v. Molinaro (9th Cir. 1989) 889 F.2d 899, 904-905* (applying California law; relying on *F. & M. Bank v. Downey (1879) 53 Cal. 466, 468* ; *Bank of America v. Ryan (1962) 207 Cal. App. 2d 698, 706, 24 Cal. Rptr. 739* ; and *Broadway Fed. etc. Loan Assoc. v. Howard (1955) 133 Cal. App. 2d 382, 393, 285 P.2d 61*)

[ii] Officers' and Directors' Standard of Conduct

State law sets standard of conduct for officers and directors of federally insured savings institutions as long as state standard (such as simple negligence) is stricter than that of *12 U.S.C. § 1821(k)*, which sets "gross negligence" floor and applies as substitute for state standards that are more relaxed. *Atherton v. F.D.I.C. (1997) 519 U.S. 213, 117 S. Ct. 666, 669-676, 136 L. Ed. 2d 656*

[5] Electronic Funds Transfer Act

As matter of law, cardholder was liable for unauthorized electronic fund transfers occurring in July and August of 1987 that could have been prevented had cardholder reported unauthorized transaction that was shown on December 1986 statement. *Kruser v. Bank of America (1991) 230 Cal. App. 3d 741, 750, 281 Cal. Rptr. 463*

[6] Escrow Services

Bank that performed "in-house" escrow services in connection with construction loan did not undertake, and therefore did not owe, any fiduciary duty to borrower, even though third-party escrow would be fiduciary. *Peterson Development Co. v. Torrey Pines Bank (1991) 233 Cal. App. 3d 103, 119-120, 284 Cal. Rptr. 367*

[7] Federal Preemption

Comptroller regulation limiting exercise of visitorial powers by state officials [*see 12 C.F.R. § 7.4000(a)*] was overbroad in precluding state officials from "prosecuting enforcement actions" in courts, under applicable state laws; however, that regulation could be applied to prevent state official from issuing executive subpoena (as distinct from

judicial subpoena) requiring national bank to disclose information about lending practices. *Cuomo v. Clearing House Ass'n, L.L.C. (2009) -- U.S. -- 129 S. Ct. 2710, 2721-2722, 174 L. Ed. 2d 464*

National Bank Act and implementing regulations preempted state law claims that, in connection with real estate lending to consumers, national bank (1) committed "unfair" competition by overcharging for underwriting fees and by marking up tax-service fees and (2) engaged in "fraudulent" practices by failing to disclose actual costs of its underwriting and tax services. *Martinez v. Wells Fargo Home Mortgage, Inc. (9th Cir. 2010) 598 F.3d 549, 2010 U.S. App. LEXIS 4899, at *13-*16*

Civ. Code §§ 9 and *11* (stating that whenever legal or contractual act is required to be performed on holiday, it may be performed on next business day without any adverse consequence) do not apply to national bank's credit card payment due dates because those state laws are preempted by federal law stating that national bank may make non real estate loans without regard to state law limitations concerning terms of credit, including schedule for repayment of principal and interest and payments due [*12 C.F.R. § 7.4008(d)(2)(iv)*]. *Miller v. Bank of Am. (2009) 170 Cal. App. 4th 980, 982, 88 Cal. Rptr. 3d 723*

National banking regulations describing preemption of state laws on visitorial powers of state officials [*12 C.F.R. § 7.4000(a)*], taking of deposits [*12 C.F.R. § 7.4007(b)*], and making of non-real-estate loans [*12 C.F.R. § 7.4008(d)*], did not bar consumer class action under unfair competition law [*Bus. & Prof. Code § 17200 et seq.*] and Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*] against group of national banks arising from alleged violations of those laws and Rosenthal Fair Debt Collection Practices Act [*Civ. Code § 1788 et seq.*] in connection with making income tax refund loans. *Hood v. Santa Barbara Bank & Trust (2006) 143 Cal. App. 4th 526, 541-548, 49 Cal. Rptr. 3d 369*

Neither Home Owners Loan Act (*12 U.S.C. § 1461 et seq.*) nor related regulations [*see 12 C.F.R. §§ 545.1, 545.2*] preempted cause of action against savings association and its officers for unfair competition (*Bus. & Prof. Code § 17200 et seq.*) based on making loans to unqualified strawmen to maximize income and perpetuate slum conditions; however, allegation with regard to "points" charged was in conflict with *12 U.S.C. § 1463(g)* and portion of prayer seeking foreclosure was in conflict with 12 C.F.R. § 545.34, requiring that both be stricken. *People v. Highland Fed. Savings & Loan (1993) 14 Cal. App. 4th 1692, 1708-1713, 19 Cal. Rptr. 2d 555*

Borrowers' state claims challenging lender's collection of reconveyance fee when deed of trust was recorded was not preempted, expressly or impliedly, by former *12 U.S.C. § 1464* or by related regulations, which created no direct right of action. *Siegel v. American Savings & Loan Assn. (1989) 210 Cal. App. 3d 953, 960-961, 965-966, 258 Cal. Rptr. 746* ; *but see Lopez v. World Savings & Loan Assn. (2003) 105 Cal. App. 4th 729, 740, 130 Cal. Rptr. 42* (agreeing with *Siegel* court's construction of former *12 C.F.R. Part 545.2*, but noting that *Siegel's* continuing validity was in "serious doubt" in light of successor regulation, *12 C.F.R. Part 560.2*, which contained clear statement of OTS to occupy entire field of leading regulation for federal savings associations)

[8] Insolvent Institutions

[a] Bankrupt Holding Company

When bank holding company files petition in bankruptcy, ongoing, nonfinal administrative proceeding by Federal Reserve Board is not within stay of *11 U.S.C. § 362*, but, if action results in judgment enforcement of which would effect bankruptcy estate, Bankruptcy Court is permitted to exercise its concurrent jurisdiction under *28 U.S.C. § 1334(b)*. *Federal Reserve Board v. MCorp Fin., Inc. (1991) 502 U.S. 32, 112 S. Ct. 459, 116 L. Ed. 2d 358, 368, 370*

[b] Claims Against Insolvent Institutions

Stockholder who sued Office of Thrift Supervision (OTS) in capacity as stockholder, officer, or director of savings bank that was under conservatorship of FDIC, had standing under conflict of interest exception to FIRREA requirement that FDIC receivers succeed to all rights of institution, including right to sue on behalf of institution; because FDIC and OTC are closely related agencies with overlapping structures, FDIC faces conflict of interest when it contemplates suing *OTC. Delta Savings Bank v. United States (9th Cir. 2001) 265 F.3d 1017, 1022-1024*

When FDIC as receiver of insolvent bank pursuant to FIRREA repudiated contracts with service provider, *12 U.S.C. § 1821(e)* exclusion of lost profits precluded provider from recovering damages based on its expectation interest in agreements. *Alltel Information Services, Inc. v. FDIC (9th Cir. 1999) 194 F.3d 1036, 1042*

Aggrieved parties to whom bank tendered cashier's checks in lieu of wire fund transfer required by state court-approved settlement agreement were neither "depositors" of bank under California law nor "creditors" of bank subject to FIRREA claims process. *Sharpe v. F.D.I.C. (9th Cir. 1997) 126 F.3d 1147, 1156-1157*

FDIC could invoke preliminary injunction asset freeze in action against bank's officers and directors under Taxpayer Recovery Act absent allegations of fraudulent conduct pursuant to *12 U.S.C. § 1821(d)(18), (19). F.D.I.C. v. Garner (9th Cir. 1997) 125 F.3d 1272, 1277-1278*

Fin. Code § 3110.1 is not authority for receiver of insolvent bank to omit creditor's claim against insolvent bank from purchase and assumption agreement by which solvent bank assumed all other liabilities of insolvent bank; *Fin. Code §§ 857, 3119* requires all creditors of insolvent bank to be treated equally; receiver is liable to creditor in its capacity as insurer, rather than as receiver. *Woodbridge Plaza v. Bank of Irvine (9th Cir. 1987) 815 F.2d 538, 540-542, 544* (construing former *Fin. Code § 857*)

Fact that creditor's claim against insolvent bank was not reduced to judgment did not affect its ripeness for purposes of requiring its inclusion in purchase and assumption agreement. *Woodbridge Plaza v. Bank of Irvine (9th Cir. 1987) 815 F.2d 538, 542*

Claim against receiver for excluding creditor's claim from purchase and assumption agreement by which solvent bank assumed all other liabilities of insolvent bank was not tort and was not barred by Federal Tort Claims Act; *12 U.S.C. § 1819* is general waiver of sovereign immunity from claims brought against *Federal Deposit Insurance Corporation. Woodbridge Plaza v. Bank of Irvine (9th Cir. 1987) 815 F.2d 538, 542-543*

When FDIC became receiver for failed bank while action on claim against bank was pending, FDIC was entitled to have action stayed during 180-day period specified in *12 U.S.C. § 1821(d)(5)(A)(i)*, in order to permit exhaustion of administrative review process as it pertained to underlying claim. *Neman v. Commercial Capital Bank (2009) 173 Cal. App. 4th 645, 652-653, 92 Cal. Rptr. 3d 800*

Once determination becomes final without any challenge under Administrative Procedures Act (*see 5 U.S.C. § 702 et seq.*), unsecured creditor and California court was bound by Federal Home Loan Bank Board's decision that claims of general creditors of insolvent institution are worthless and entry of summary judgment against unsecured creditor was proper. *Tri-Continent Internat. Corp. v. Paris Savings & Loan Assn. (1993) 12 Cal. App. 4th 1354, 1359-1360, 16 Cal. Rptr. 2d 508*

Maximum liability of FDIC is amount claimant would have received if FDIC liquidated assets and liabilities of failed institution. *Tri-Continent Internat. Corp. v. Paris Savings & Loan Assn. (1993) 12 Cal. App. 4th 1354, 1359, 16 Cal. Rptr. 2d 508*

Entity that assumed deposits and secured liabilities of failed institution and acquired its assets from FSLIC as receiver is not successor in sense that it is not party to contract of failed institution and cannot be sued on it. *Tri-Continent*

Internat. Corp. v. Paris Savings & Loan Assn. (1993) 12 Cal. App. 4th 1354, 1359, 16 Cal. Rptr. 2d 508

If FDIC as receiver of insolvent bank intends to retain possession of branch under lease and/or sells or assigns lessee's interest to third party, FDIC or third party is required to cure defaults accrued prior to insolvency; lessor cannot be required to accept receivership certificate pending liquidation of insolvent's assets. *In re Valley State Bank (1990) 223 Cal. App. 3d 221, 223-225, 272 Cal. Rptr. 707* ; *see Fin. Code §§ 3110.1(d)(1), 3111*

Fin. Code § 3118 does not require claim to be filed by plaintiff whose action against bank was already pending at time bank became insolvent. *Nulph v. Federal Deposit Ins. Corp. (1987) 190 Cal. App. 3d 1116, 1119-1122, 235 Cal. Rptr. 831*

[c] Claims by Receiver or Its Assignee

FSLIC, in its corporate capacity and as assignee of FSLIC acting as receiver of insolvent state-chartered association, was entitled to collect dividends paid to sole shareholder who was also director out of paid-in surplus in violation of *Fin. Code § 6522* [*see also Corp. Code § 316(a)(1)* (liability of director for illegal dividends)]. *Federal Sav. and Loan Ins. Corp. v. Molinaro (9th Cir. 1990) 901 F.2d 1490, 1492-1493*

Assignment by FDIC, as receiver, of cause of action held by insolvent savings and loan association to FDIC in corporate capacity [*see 12 U.S.C. § 1823(d), (e)*] after state action was dismissed for failure to be tried within five years and filing of second action in federal court was forum shopping, but was not ground for federal court to abstain from trying, or to dismiss, federal action. *Federal Deposit Ins. Corp. v. Nichols (9th Cir. 1989) 885 F.2d 633, 637*

Actions by FDIC as receiver of failed bank governed by six-year limitation of *12 U.S.C. § 1821(d)(14)(A)* or by any longer period applicable under state law; six-year period commences when FDIC receivership commences, but does not revive any claim (or, on installment note, any portions of claim) barred under state law before FDIC's appointment as receiver. *White v. Moriarty (1993) 15 Cal. App. 4th 1290, 1297-1299, 19 Cal. Rptr. 2d 200* (California statute compared was *Code Civ. Proc. § 337(1)*; *see now Com. Code § 3118(a)*, which provides for six-year limitation period)

Six-year limitation of *12 U.S.C. § 1821(d)(14)(A)* passes to assignee with assignment by FDIC of claim it acquired as receiver of failed bank. *White v. Moriarty (1993) 15 Cal. App. 4th 1290, 1297-1298, 19 Cal. Rptr. 2d 200*

[d] Oral Agreements (D'Oench, Duhme Doctrine)

Alleged misrepresentation by bank to borrowers regarding amount of land and extent of mineral interests in it was express warranty within purview of *12 U.S.C. § 1823(e)*, which required it to be in writing to establish defense against FDIC in its action as receiver to collect note. *Langley v. FDIC (1987) 484 U.S. 86, 90-96, 108 S. Ct. 396, 98 L. Ed. 2d 340*

D'Oench, Duhme doctrine did not preclude debtors' reliance on unwritten agreement that their obligations under promissory notes were conditioned on bank's fulfillment of obligations under loan commitment letter; *D'Oench, Duhme* doctrine does not apply when FDIC acts as receiver in foreclosure action in which agreement is asserted as defense. *F.D.I.C. v. Craft (9th Cir. 1998) 157 F.3d 697, 705*

D'Oench, Duhme doctrine did not bar fraud claim when no unique federal interest existed to justify application of federal common law; *12 U.S.C. § 1823(e)* was inapplicable because oral agreement in case pertained to liabilities of bank rather than assets. *Ledo Financial Corporation v. Summers (9th Cir. 1997) 122 F.3d 825, 828-830*

D'Oench, Duhme doctrine and *12 U.S.C. § 1823(e)* bar affirmative defenses and counterclaims without regard to

negotiability of underlying obligation or federal regulatory agency's status as holder in due course. *Resolution Trust Corp. v. Kennelly (9th Cir. 1995) 57 F.3d 818, 822*

Common law *D'Oench, Duhme* doctrine of equitable estoppel applies to protect banking authorities and bar suit even when financial institution does not acquire specific asset whose value is affected by alleged secret agreement; fact that acquisition of asset is required in order to invoke statutory bar to suit [*see 12 U.S.C. § 1823(e)*] does not affect application of common law doctrine. *Brookside Associates v. Rifkin (9th Cir. 1995) 49 F.3d 490, 495-496*

FDIC, being receiver for bank, was entitled to rely on *12 U.S.C. § 1823(e)* and refuse to honor letter of credit issued to investor by failed bank when letters were not reflected on bank's books, lacked collateral required under federal banking statutes, and had adverse impact on bank's assets. *Murphy v. FDIC (9th Cir. 1993) 12 F.3d 1485, 1491-1492*

Neither common-law *D'Oench, Duhme* doctrine nor its statutory counterpart [*12 U.S.C. § 1823(e)*] prohibited reformation of loan documents to include nonrecourse provision, when "side agreement" to include this provision in loan was evidenced by loan commitment letter, minutes of bank board meeting approving loan, and board submission describing loan to board members before approval. *Resolution Trust Corp. v. Midwest Fed. Sav. Bank (9th Cir. 1993) 4 F.3d 1490, 1497-1502*

Doctrine enunciated in *D'Oench, Duhme & Co. v. FDIC (1942) 315 U.S. 447, 460-461, 62 S. Ct. 676, 86 L. Ed. 956* , applied to bar affirmative defense in action by FSLIC to enforce promissory note when unsigned prior loan commitment letter constituted "secret agreement." *Federal Sav. & Loan Ins. v. Gemini Management (9th Cir. 1990) 921 F.2d 241, 245-246*

D'Oench, Duhme doctrine applied to bar borrower's purported state law defenses that were based on exculpatory agreement signed only by borrower and witness. *RTC Mortgage Trust v. Shlens (1998) 62 Cal. App. 4th 304, 318-319, 72 Cal. Rptr. 2d 581*

D'Oench, Duhme cases and statutes do not provide that "records speak for themselves as to enforceability of the debt"; rule allowing or requiring admissibility of any document found in bank's records without evidence of reliability would be break with past practice, could raise grave implications for continued maintenance of reliable bank records over long term, and is far beyond the scope of *D'Oench, Duhme* doctrine. *Remington Investments, Inc. v. Hamedani (1997) 55 Cal. App. 4th 1033, 1039, 64 Cal. Rptr. 2d 376*

D'Oench, Duhme doctrine barred both defenses and affirmative claims for relief that would either diminish value of insolvent institution's assets or increase its liabilities, but did not bar claim for breach of implied in fact employment agreement that rested in part on oral evidence. *Thomka v. Financial Corp. (1993) 15 Cal. App. 4th 877, 887, 19 Cal. Rptr. 2d 382*

Association created by FSLIC to take over pooled assets and liabilities of several failed associations in receivership was entitled to raise *D'Oench, Duhme* doctrine to bar cause of action based on breach of alleged agreement (commitment letter) not properly documented in records of failed predecessor association. *Weber v. New West Federal Savings & Loan Assn. (1992) 10 Cal. App. 4th 97, 107-108, 12 Cal. Rptr. 2d 468*

Receiver for savings and loan association was entitled to raise *D'Oench, Duhme* doctrine [*see 12 U.S.C. § 1823(e)*] in state court to bar cause of action against association based on breach of agreement not properly documented in association's records; defense may be raised initially on appeal when supporting facts are not disputed. *Resolution Trust Corp. v. Winslow (1992) 9 Cal. App. 4th 1799, 1807-1811, 12 Cal. Rptr. 2d 510*

D'Oench, Duhme doctrine bars any claim against insolvent institution that would either diminish value of assets held by FSLIC or increase liabilities of insolvent institution, whether asserted affirmatively or as defense, as general creditor, or

to recover specific asset. *Bartram v. Federal Deposit Ins. Corp. (1991) 235 Cal. App. 3d 1749, 1752-1753, 1757-1758, 1 Cal. Rptr. 2d 614* (seeking damages for misrepresentations related to exchange of real property)

Although express language of *12 U.S.C. § 1823(e)* applies only to FDIC, statute is based on equitable doctrine enunciated in *D'Oench, Duhme & Co. v. FDIC (1942) 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956* , and extends to FSLIC and savings and loan industry; statute thus bars setoff against successor to FSLIC as receiver of insolvent association when claim against insolvent and successor is based on oral agreement. *Walsh v. New West Federal Savings & Loan Assn. (1991) 234 Cal. App. 3d 1539, 1543-1544 n.6, 1 Cal. Rptr. 2d 35* ; *Webb v. Superior Court (1990) 225 Cal. App. 3d 990, 1002-1003, 275 Cal. Rptr. 581*

Defense of *12 U.S.C. § 1823(e)* (*D'Oench, Duhme* doctrine) was applicable to claims of fraud and to enforce oral agreement for exchange of property against successor of insolvent savings and loan association alleged to be principal and coconspirator; direct relationship was not essential to application of doctrine. *Walsh v. New West Federal Savings & Loan Assn. (1991) 234 Cal. App. 3d 1539, 1545-1546, 1 Cal. Rptr. 2d 35*

Despite application of *12 U.S.C. § 1823(e)* (*D'Oench, Duhme* doctrine) to bar action against successor of insolvent savings and loan association, successor was entitled to attorney's fees [*see Civ. Code § 1717*] under provision in notes between plaintiffs and codefendant. *Walsh v. New West Federal Savings & Loan Assn. (1991) 234 Cal. App. 3d 1539, 1546-1548, 1 Cal. Rptr. 2d 35*

Failure of insolvent association to raise *D'Oench, Duhme* doctrine as affirmative defense to plaintiff's claim based on oral agreement did not constitute waiver of defense on behalf of successor that raised it on becoming defendant in intervention. *Webb v. Superior Court (1990) 225 Cal. App. 3d 990, 1002-1003, 275 Cal. Rptr. 581*

Federal association that voluntarily answered complaint against insolvent state association, describing itself in answer as successor in interest, and participated in action for two years waived any defense that might have been available to it under former *12 U.S.C. § 1823(e)*. *California Concrete Co. v. Beverly Hills Savings & Loan Assn. (1989) 215 Cal. App. 3d 260, 270-273, 261 Cal. Rptr. 484*

As matter of public policy to ensure maximum return to insured depositors, FDIC, acting as receiver for insolvent bank, was not bound by secret or oral agreement between bank and its debtors (borrower's guarantors), whether fraudulent or not; when FDIC takes possession as receiver, borrower is estopped to rely on defenses of fraud and mistake to conform written loan documents to oral understanding. *Federal Deposit Ins. Corp. v. Dureau (1989) 212 Cal. App. 3d 956, 960-961, 963-965, 261 Cal. Rptr. 19* (distinguishing defense of failure of consideration)

[9] Insurance Business

12 U.S.C. § 92 (authorizing national bank, with approval of Controller of Currency, to sell insurance in any of its branches in community with population of 5,000 or less) was not repealed; attempted repeal in 1916 was mere scrivener's error. *U.S. Nat. Bank of Ore. v. Ins. Agents (1993) 508 U.S. 439, 113 S. Ct. 2173, 124 L. Ed. 2d 402, 422*

Proposition 103 (1988) intended to allow banks to enter into insurance business, and express repeal of (former) *Ins. Code § 1643* was essential step in implementing that intent; Proposition 103 did not repeal former *Fin. Code § 772(b)* (prohibiting bank's investment in company that acts as insurance agent) or *Fin. Code § 1208* (grant of authority to limited types of banks to act as insurance agent) by implication; bank subsidiaries still prevented from selling insurance. *Sanford v. Garamendi (1991) 233 Cal. App. 3d 1109, 1119, 1121, 1123-1125, 284 Cal. Rptr. 897*

[10] Interstate Operations

Bank Holding Company Act [*12 U.S.C. § 1842(d)*] allows states to prohibit establishment or acquisition of bank, as defined in *12 U.S.C. § 1841(c)*, within its borders by bank holding company with its principal banking operations in another state. *Lewis v. Continental Bank Corp. (1990) 494 U.S. 472, 474, 110 S. Ct. 1249, 108 L. Ed. 2d 400*

12 U.S.C. § 1842(d) (Bank Holding Company Act) and state laws that allow bank holding company located in one state to acquire bank in another state if other state is in same region and has reciprocal statute does not violate commerce clause or compact clause or equal protection; out-of-state corporations from outside region not discriminated against. *Northeast Bancorp v. Board of Governors (1985) 472 U.S. 159, 174-178, 105 S. Ct. 2545, 86 L. Ed. 2d 112*

[11] Jurisdiction

Federal courts do not have exclusive jurisdiction over actions against financial institution filed before appointment of FDIC under FIRREA as receiver following failure of institution. *Robbins v. Foothill Nissan (1994) 22 Cal. App. 4th 1769, 1783-1784, 28 Cal. Rptr. 2d 190*

[12] Loans and Loan Relationship

Federal law precludes any requirement that "Rule of 78's" be further defined or effect be further disclosed in lending agreement. *Drennan v. Security Pac. Nat. Bank (1981) 28 Cal. 3d 764, 767-780, 170 Cal. Rptr. 904, 621 P.2d 1318*

Letter of commitment for which fee is paid was option to addressee to obtain loan at specific term. *Peterson Development Co. v. Torrey Pines Bank (1991) 233 Cal. App. 3d 103, 115, 284 Cal. Rptr. 367*

Commitment letter for permanent ("takeout") financing, even when construed with construction loan agreement that named nonsignatory affiliate as permanent lender and required permanent loan commitment as condition of construction financing, lacked definite terms and, thus, was not contract but only agreement to agree. *Peterson Development Co. v. Torrey Pines Bank (1991) 233 Cal. App. 3d 103, 115, 284 Cal. Rptr. 367*

Ordinary arm's-length commercial lender/borrower relationship between bank and commercial borrower of equal bargaining strengths does not support cause of action for tortious breach of covenant of good faith and fair dealing. *Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal. App. 3d 1371, 1400-1401, 272 Cal. Rptr. 387* ; *Mitsui Manufacturers Bank v. Superior Court (1989) 212 Cal. App. 3d 726, 729, 731-733, 260 Cal. Rptr. 793*

Evidence of parallel pricing, meetings, discussions, and sharing of information on subject insufficient to establish triable issue of fact regarding existence of conspiracy among banks and bankers' associations to set and manipulate variable interest rates on loans to "middle-market" commercial borrowers. *BILJAC Assocs. v. First Interstate Bank (1990) 218 Cal. App. 3d 1410, 1429-1433, 267 Cal. Rptr. 819 , superseded by statute as stated in 78 Cal. App. 4th 79 (2009)*

Bank/depositor relationship and bank/borrower relationship is that of debtor and creditor, not as quasi-fiduciary or special, and thus does not support recovery of tort damages for breach of covenant of good faith and fair dealing. *Price v. Wells Fargo Bank (1989) 213 Cal. App. 3d 465, 476-479, 261 Cal. Rptr. 735*

Application of rule that trust deed beneficiary cannot recover damages after acquiring property that is security for loan on full credit bid at foreclosure sale to bar bank's claims for waste, fraud, and breach of contract based on construction defects were not inconsistent with *Fin. Code § 779*. *Sumitomo Bank v. Taurus Developers, Inc. (1986) 185 Cal. App. 3d 211, 220 n.4, 229 Cal. Rptr. 719*

[13] National Banking Act

National bank's agreement with bank president to pay six months' salary as severance pay upon discharge without cause did not violate *12 U.S.C.A. § 24*, which provides that all officers of national bank serve at pleasure of board of directors. *Mardula v. Rancho Dominguez Bank (1996) 43 Cal. App. 4th 790, 792, 51 Cal. Rptr. 2d 63* .

[14] Related Operations

National bank is permitted to have operating subsidiary engaged in retail securities brokerage business, since brokerage is not core banking function [*see 12 U.S.C. § 36(j)*]. *Clarke v. Securities Indus. Ass'n (1987) 479 U.S. 388, 390-391, 409, 107 S. Ct. 750, 93 L. Ed. 2d 757*

Bank holding company was permitted, under Bank Holding Company Act [*see 12 U.S.C. § 1843(c)(8)*], to acquire subsidiary engaged in retail securities brokerage business; retail securities brokerage business was not barred by § 20 of Glass-Steagall Act (former *12 U.S.C. § 377*, repealed 1999), which prohibited issue, flotation, underwriting, public sale, or distribution of securities by bank or bank affiliate when no investment advice was provided and purchases and sales were for account of customer. *Securities Ind. Assn. v. Fed. Reserve Bd. (1984) 468 U.S. 207, 214-221, 104 S. Ct. 3003, 82 L. Ed. 2d 158*

Commercial paper is security; trial court had to determine whether bank's selling of commercial paper of its corporate customers was "underwriting" within prohibition of *12 U.S.C. § 24* para. 7 and § 378(a)(1). *Securities Ind. Assn. v. Fed. Reserve Bd. (1984) 468 U.S. 137, 139-140, 148-160, 104 S. Ct. 2979, 82 L. Ed. 2d 107*

[15] Racketeer-Influenced and Corrupt Organizations Act (RICO; 18 U.S.C. § 1961 et seq.)

RICO cause of action for mail fraud, based on use of mails to make loans to unqualified straw men to maximize income and perpetuate slum conditions, was adequately pleaded; claim based on wire fraud (telephone) was insufficient, but leave to amend should have been granted. *People v. Highland Fed. Savings & Loan (1993) 14 Cal. App. 4th 1692, 1713-1717, 19 Cal. Rptr. 2d 555*

[16] Taxation

City is not empowered to impose license tax (calculated on annual business activity) on federal savings bank; nondiscriminatory treatment of state and federally chartered financial institutions is matter of statewide concern that requires prohibition on local taxation of financial institutions [*see Rev. & Tax. Code § 23182* (uniform "in lieu" tax on financial corporations)]. *California Fed. Savings & Loan Assn. v. City of Los Angeles (1991) 54 Cal. 3d 1, 19-25, 283 Cal. Rptr. 569, 812 P.2d 916*

[17] Unsafe or Unsound Practice

Federal regulation prohibiting insured financial institutions from entering contracts constituting "unsafe or unsound practice" did not invalidate alleged contract between state-chartered savings institution in federal receivership and employee that provided for dismissal only for good cause; special representative of FSLIC serving as receiver is entitled to qualified immunity in action by terminated employee. *Meyer v. Fidelity Sav. (9th Cir. 1991) 944 F.2d 562, 572-577*

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Forms of Pleading and Practice--Annotated

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§ 95.365 Attorney General Opinions

Department of Savings and Loan, through its Commissioner, may copy and distribute copyright-protected working papers and other documents prepared in connection with audit of savings and loan association. *72 Ops. Cal. Att'y Gen. 72 (1989)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 95.366 Law Reviews

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Wade, *Bank-Sponsored Collective Investment Funds: An Analysis of Applicable Federal Banking and Securities Laws, 35 Bus. Law. 361 (1980)*

Note, *Fletcher v. Security Pacific National Bank: Unfair Bank Practices and Consumer Class Actions, 68 Cal. L. Rev. 862 (1980)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawDirectors & OfficersMisfeasance & NonfeasanceBanking LawNational BanksInsolvencies, Liquidations & RehabilitationsInsolvencyBanking LawRegulatory AgenciesGeneral OverviewCommercial Law (UCC)Bank Deposits & Collections (Article 4)CollectionsPresentment, Settlement & Payment

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[Reserved]

§§ 95.367[Reserved]

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9-95 California Forms of Pleading and Practice--Annotated § 95.370

§ 95.370 Federal Statutes

Expedited Funds Availability Act; when proceeds of deposited items must be available for withdrawal. *12 U.S.C. § 4001 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawFederal Reserve SystemExpedited Funds Availability Act

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9-95 California Forms of Pleading and Practice--Annotated § 95.371

§ 95.371 State Statutes

Lien on property of customer for debt. *Civ. Code § 3054*

No statute of limitation applicable to action for recovery of bank deposit. *Code Civ. Proc. § 348*

Deposits in joint accounts. *Fin. Code §§ 852, 6800*; *Prob. Code §§ 5130, 5203, 5301-5307*

Deposit accounts. *Fin. Code §§ 866-866.9, 40500, 40501*

Permissible holds on depository checks defined. *Fin. Code § 867*

Adverse claims to bank deposits. *Fin. Code § 952*

Commercial banks' repayment of savings deposits. *Fin. Code § 1381*

Approved claims for unsecured deposits entitled to third priority in liquidation of bank; interest given same priority as claim on which it is based. *Fin. Code § 3119.5(a)(3), (b)*

Demand account, NOW (negotiable order of withdrawal) account are types of savings accounts. *Fin. Code § 5116*

Savings liability of association. *Fin. Code § 6600*

Savings accounts. *Fin. Code § 6651 et seq.*

Savings accounts as issued to married persons and minors. *Fin. Code §§ 6750-6752*

Savings accounts of fiduciaries. *Fin. Code §§ 6850-6856*

Savings accounts of incompetents. *Fin. Code § 6900*

Demand deposit and NOW account (negotiable order of withdrawal, *see* Fin. Code § 7011(a)) funds to be released only on depositor's authorization or as otherwise permitted by law; setoff not prohibited. *Fin. Code § 40501*; *see 12 U.S.C. § 1832(a)* (defining "NOW accounts"); *but cf. 12 C.F.R. § 204.2(b)(3)(ii)(A)* (NOW accounts excluded from definition of demand deposits for calculation of reserve requirements)

Multiple-Party Accounts Law. *Prob. Code § 5100 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsGeneral OverviewBanking LawBank ActivitiesBank AccountsDeposit AccountsCertificates of Deposit & Savings AccountsBanking LawBank ActivitiesBank AccountsDeposit AccountsJoint AccountsBanking LawBank ActivitiesBank AccountsDeposit AccountsLiabilityBanking LawBankers Liens & Rights of SetoffBankers Liens

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9-95 California Forms of Pleading and Practice--Annotated § 95.372

§ 95.372 Decisions

[1] Assignment of Account

Savings account, being chose in action, permissibly assigned with or without delivery of passbook. *Watson v. Stockton Morris Plan Co. (1939) 34 Cal. App. 2d 393, 405, 93 P.2d 855*

Assignment of savings account best evidenced by delivery of passbook together with formal written assignment of account. *Watson v. Stockton Morris Plan Co. (1939) 34 Cal. App. 2d 393, 405, 93 P.2d 855*

Assignment of savings account carries with it and confers on assignee all remedies that assignor possessed, including right to sue bank for misappropriation of funds. *Watson v. Stockton Morris Plan Co. (1939) 34 Cal. App. 2d 393, 405, 93 P.2d 855*

[2] Banker's Lien and Setoff Rights

Bank's practice of using directly deposited Social Security and SSI benefits to cover overdrafts and overdraft fees was prohibited by *42 U.S.C. §§ 407(a)* and 1383(d)(1), which provide that such benefits are not subject to execution, levy, or "other legal process." *Lopez v. Washington Mutual Bank, Inc. (9th Cir. 2002) 284 F.3d 990, 993-995*

Code Civ. Proc. § 701.030(b)(1) and *(6)* require bank to give creditor true reason for not honoring attachment and to notify creditor of other claims to deposit, including bank's own right of setoff. *Da-Green Electronics, Ltd. v. Bank of Yorba Linda (9th Cir. 1989) 891 F.2d 1396, 1399*

Bank's exercise of setoff rights under banker's lien law [*Civ. Code § 3054*] does not constitute state action and does not violate due process clauses of federal or state constitutions even though exercised without notice or hearing afforded to depositor. *Kruger v. Wells Fargo Bank (1974) 11 Cal. 3d 352, 357, 113 Cal. Rptr. 449, 521 P.2d 441*

Bank cannot exercise its right of setoff against deposits derived from unemployment and disability benefits. *Kruger v. Wells Fargo Bank (1974) 11 Cal. 3d 352, 357, 368-372, 113 Cal. Rptr. 449, 521 P.2d 441*

Bank, not having notice of trust status of deposited funds, was entitled to apply funds against depositor's debt without liability to trust beneficiary. *Arnold v. San Ramon Valley Bank (1921) 184 Cal. 632, 636, 194 P. 1012*

Bank, collecting on note executed by individual shareholder, unable to exercise banker's lien setoff rights against funds deposited by corporation, when shareholder did not act as agent for corporation in executing note and corporation was not liable on note. *Potts v. First City Bank (1970) 7 Cal. App. 3d 341, 345-346, 86 Cal. Rptr. 552*

Deceased depositor's insolvency at time of death was cause for exercise of bank's right of setoff under banker's lien law [*Civ. Code § 3054*] for collection of note owed to bank, notwithstanding that note was not due at time of death. *Pendleton v. Hellman Com. etc. Bk. (1922) 58 Cal. App. 448, 450, 208 P. 702*

[3] Certificates of Deposit

Certificate of deposit issued by domestic bank were not "security" within meaning of federal securities acts. *Marine Bank v. Weaver (1982) 455 U.S. 551, 558-559, 102 S. Ct. 1220, 71 L. Ed. 2d 409*

Certificate of deposit issued by foreign bank were not "security" within meaning of federal securities acts. *Wolf v. Banco Nacional de Mexico, S. A. (9th Cir. 1984) 739 F.2d 1458, 1463-1464 , cert. denied, 469 U.S. 1108*

[4] Check Processing Fees

Provision in bank's depositor signature card contract imposing $3 deposit item returned fee was not unconscionable, based on industry-wide comparison of fees. *California Grocers Ass'n v. Bank of America (1994) 22 Cal. App. 4th 205, 215-216, 27 Cal. Rptr. 2d 396*

[5] Foreign (Eurodollar) Deposits

Eurodollar deposit is deposit of U.S. dollars in foreign bank or foreign branch of U.S. bank with commitment that it will be repaid in U.S. dollars; distinction between repayment and collection is that repayment refers to place of payment and collection designates assets to which depositor may look for payment. *Citibank v. Wells Fargo Asia (1990) 495 U.S. 660, 668-671, 110 S. Ct. 2034, 109 L. Ed. 2d 677*

When foreign government prohibits assets of foreign branch of U.S. bank to be used to repay deposits outside country, whether depositor can look to general assets of bank in U.S. may be determined by agreement of parties. *Citibank v. Wells Fargo Asia (1990) 495 U.S. 660, 672, 110 S. Ct. 2034, 109 L. Ed. 2d 677* (no agreement found, remanded for determination of which law controls)

[6] Insurance of Accounts

Standby letter of credit backed by depositor's contingent promissory note does not create insured deposit within meaning of *12 U.S.C. § 1813(l)(1)*, and thus beneficiary is unable to recover FDIC insurance on insolvency of issuing bank. *FDIC v. Philadelphia Gear Corp. (1986) 476 U.S. 426, 439-440, 106 S. Ct. 1931, 90 L. Ed. 2d 428*

Fee accounts of former directors of failed bank were not insured deposits within meaning of *12 U.S.C. § 1813(1)* and

thus were properly excluded from transfer of "deposits" to new savings institution; directors were limited to recovery as unsecured creditors of bank. *Betz v. F.D.I.C. (9th Cir. 1996) 99 F.3d 904, 906*

When community property funds of family trust were deposited in three accounts, totaling more than $300,000, in names of spouses as trustees and, under terms of trust, interests of beneficiaries other than surviving spouse were contingent, insurance coverage under *12 C.F.R. § 330.3* was $200,000/$100,000 for interest of each spouse. *Lambert v. Federal Deposit Ins. Corp. (9th Cir. 1988) 847 F.2d 604, 608-609*

[7] Interest

Award of prejudgment interest from date of unauthorized withdrawal of funds from bank by coexecutor of estate proper in action against bank to recover funds misappropriated from account by coexecutor. *Bullis v. Security Pac. Nat. Bank (1978) 21 Cal. 3d 801, 814-815, 148 Cal. Rptr. 22, 582 P.2d 109*

[8] Multiple-Party/Joint Accounts

If, under state law and deposit contract, delinquent taxpayer can withdraw all funds in account, IRS levy pursuant to *I.R.C. § 6331(d)* reaches all funds and bank is required to pay over all sums owed even if only one account holder is delinquent taxpayer; third party's rights determinable in postseizure hearings. *United States v. National Bank of Commerce (1985) 472 U.S. 713, 720-727, 731, 105 S. Ct. 2919, 86 L. Ed. 2d 565*

Generally, when multiple-party account is used to make gift, delivery of passbook to donee is not required. *Kennedy v. McMurray (1915) 169 Cal. 287, 295, 146 P. 647* ; *but see Berl v. Rosenberg (1959) 169 Cal. App. 2d 125, 130-134, 336 P.2d 975* (gift of securities in possession of broker requires delivery, but letter of instructions to broker constituted sufficient delivery)

One who holds title to account as surviving joint tenant may be held to be trustee for others. *Estate of Fisher (1988) 198 Cal. App. 3d 418, 428, 244 Cal. Rptr. 5* ; *Jarkieh v. Badagliacco (1946) 75 Cal. App. 2d 505, 507-510, 170 P.2d 994* (*overruled on other grounds in Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 30, 216 Cal. Rptr. 130, 702 P.2d 212*)

Use of word "or" between names of account holders not sufficient to create joint tenancy; evidence establishing that depositor intended to create joint tenancy required. *Estate of Fisher (1988) 198 Cal. App. 3d 418, 427, 244 Cal. Rptr. 5* ; *Manti v. Gunari (1970) 5 Cal. App. 3d 442, 447, 85 Cal. Rptr. 366*

When account title was A or B as trustees for C and D, no box indicating type of account chosen by depositor was checked, and only A signed signature card, signature card did not establish B's entitlement to account as surviving joint tenant, as surviving joint trustee of Totten trust, or as beneficiary of third-party beneficiary contract; parole evidence admissible to determine A's intent. *Estate of Fisher (1988) 198 Cal. App. 3d 418, 423-430, 244 Cal. Rptr. 5*

When contributing joint tenant's intention was that noncontributing tenant could only withdraw funds while both were living to use them for contributing tenant's benefit, arrangement was legal equivalent of revocable living trust; noncontributing tenant had no right to property purchased by contributing tenant with funds withdrawn from account and standing in name of contributing tenant alone. *Estate of Drucker (1984) 152 Cal. App. 3d 509, 514-515, 199 Cal. Rptr. 345* (*overruled on other grounds in Estate of Propst (1990) 50 Cal. 3d 448, 462, 268 Cal. Rptr. 114, 788 P.2d 628*)

Bank entitled to restitution against administrator to whom account balance had been inappropriately transferred. *Willis v. Bank of America (1973) 33 Cal. App. 3d 745, 752-753, 109 Cal. Rptr. 359* (joint tenancy account)

[9] Pay-on-Death Accounts; Totten Trusts

Person who claims to be cotrustee, but who did not sign signature card, cannot rely on account title on signature card as evidence of his or her intent to create trust. *Estate of Fisher (1988) 198 Cal. App. 3d 418, 425, 244 Cal. Rptr. 5* (no box indicating type of account chosen by depositor was checked)

Totten trust, like any other trust, requires trustor, trustee (usually same person), trust res, trust beneficiary, and trust intent. *Estate of Fisher (1988) 198 Cal. App. 3d 418, 424-425, 244 Cal. Rptr. 5*

[10] Savings Accounts

Complaint for recovery of money on deposit did not state cause of action when deposit was made by third parties into their own account and subsequently was withdrawn by them in manner appropriate to that account, even though money deposited and withdrawn was plaintiff's. *La Vista Cemetery Assn. v. American Sav. & L. Ass'n (1970) 12 Cal. App. 3d 365, 368, 90 Cal. Rptr. 722*

[11] Standard of Care Owed to Depositor

When embezzler's victim sued to recover stolen money from bank at which embezzler had opened phony account in victim's name, court held that victim did not acquire standing to sue as depositor from mere fact that account was fraudulently opened in his name. *Rodriguez v. Bank of the West (2008) 162 Cal. App. 4th 454, 460-462, 75 Cal. Rptr. 3d 543*

When plaintiff failed to comply with requirements of Enforcement of Judgments Law [*Code Civ. Proc. § 680.010 et seq.*] for levy on deposit account of debtor's spouse, bank had no right or duty to freeze or prevent withdrawals on the account (citing *Chazen, below*, for summary of bank's basic duties with respect to depositors and nondepositors). *Grover v. Bay View Bank (2001) 87 Cal. App. 4th 452, 456-458, 104 Cal. Rptr. 2d 677*

Fin. Code §§ 952, 953 codify well-established principle that bank has no duty to monitor trust accounts for breaches of fiduciary duty; specifically, bank has no duty to prevent commingling of assets in fiduciary accounts, monitor fiduciary accounts for irregular transactions, prevent improper disbursements from accounts, or conduct investigation of possible misappropriation of funds. *Chazen v. Centennial Bank (1998) 61 Cal. App. 4th 532, 541, 71 Cal. Rptr. 2d 462*

Immunity provided to bank by former *Prob. Code § 631* (*now see Prob. Code § 13106*) is not absolute; bank that has actual notice of superior claim to account of decedent cannot rely on affidavit of person claiming entitlement to account. *Mautner v. Peralta (1989) 215 Cal. App. 3d 796, 799, 805-807, 263 Cal. Rptr. 535*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsCertificates of Deposit & Savings AccountsBanking LawBank ActivitiesBank AccountsDeposit AccountsJoint AccountsBanking LawBankers Liens & Rights of SetoffSetoffsBanking LawFederal Deposit Insurance CorporationDeposit InsuranceCommercial Law (UCC)Bank Deposits & Collections (Article 4)Customer-Bank RelationsAccount Charges

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§ 95.373 Law Reviews

Comment, *American Parent Bank Liability for Foreign Branch Deposits: Which Party Bears Sovereign Risk? 18 Pepperdine L. Rev. 561 (1991)*

Cooter and Rubin, *Orders and Incentives as Regulatory Methods: The Expedited Funds Availability Act of 1987, 35 UCLA L. Rev. 1115 (1988)*

Comment, *Balancing the Checkbook: Re-Allocating Economic Power Between Banks and Depositors, 21 U.C. Davis L. Rev. 1275 (1988)*

Baxter and Patrikis, *The Check-Hold Revolution*, 18 U.C.C. L.J. 99 (1985)

Comment, *Bank Charges for Insufficient Funds Checks, 69 Cal. L. Rev. 599 (1981)*

Bailey, *Commercial Paper, Bank Deposits and Collections, Letters of Credit, 35 Bus. Law. 1129 (1980)*

Kepner, *The Joint and Survivorship Bank Account--A Concept Without a Name, 41 Cal. L. Rev. 596 (1953)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsGeneral DepositsBanking LawBank ActivitiesBank AccountsDeposit AccountsJoint AccountsBanking LawFederal Reserve SystemExpedited Funds Availability ActBanking LawInternational BankingForeign Banks in the United StatesCommercial Law (UCC)Bank Deposits & Collections (Article 4)Customer-Bank RelationsAccount Charges

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§ 95.374 Text References

Banking Law, Chs. 9, 11, 27 (Matthew Bender)

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, §§ 73-85, 88, 109, 119 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Negotiable Instruments (Article 3)General Overview

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§§ 95.375[Reserved]

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C. Check Collections

9-95 California Forms of Pleading and Practice--Annotated § 95.390

§ 95.390 Related Matthew Bender Publications

For points and authorities relating to the liability of banks on checks, see California Points And Authorities, Ch. 34, *Checks and Banks* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsLiability

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9-95 California Forms of Pleading and Practice--Annotated § 95.391

§ 95.391 Federal Statutes

Preemption of state law, including Commercial Code, by inconsistent provisions of federal Expedited Funds Availability Act (*12 U.S.C. § 4001 et seq.*) and regulations promulgated under it (12 C.F.R. §§ 210, *229.1* et seq.). *12 U.S.C. § 4007*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawFederal Reserve SystemExpedited Funds Availability ActCivil ProcedureFederal & State InterrelationshipsFederal Common LawPreemption

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9-95 California Forms of Pleading and Practice--Annotated § 95.392

§ 95.392 State Statutes

[1] Assignment

Check or draft is not an assignment of funds in hands of drawee available for its payment until its acceptance by drawee. *Com. Code § 3408*

[2] Consumer Credit Reporting Laws

One who, for monetary fees, dues, or on cooperative nonprofit basis, regularly assembles, evaluates, or disseminates information on checking account experiences of consumer customers of banks or other financial institutions is subject (with some exceptions) to laws that govern consumer credit reporting agencies. *Civ. Code § 1785.5*; *see Civ. Code § 1785.1 et seq.* (Consumer Credit Reporting Act, discussed in Ch. 129, *Consumer Credit Reporting*)

[3] Deceptive Practices

Production, advertising, offering to sell, selling, distributing, or otherwise transferring for use in California any simulated check is prohibited and may be enjoined; civil penalty. *Bus. & Prof. Code § 22433*

[4] Definitions

"Account" defined. *Com. Code § 4104(a)(1)*

"Check" defined. *Com. Code § 3104(f)*

Classification of banks handling checks. *Com. Code § 4105*

"Clearinghouse" defined. *Com. Code § 4104(a)(4)*

"Customer" defined. *Com. Code § 4104(a)(5)*

"Endorsement" defined. *Com. Code § 3204*

"Item" defined. *Com. Code § 4104(a)(9)*

"Settle" defined. *Com. Code § 4104(a)(11)*

"Signature" defined. *Com. Code § 3401*

"Unauthorized signature" defined. *Com. Code §§ 1201(b)(41), 3403*

[5] Signatures and Endorsements

Special, blank, and anomalous endorsements. *Com. Code § 3205*

Restrictive endorsements. *Com. Code § 3206*

Pleading validity of signatures; presumptions, and proof. *Com. Code § 3308*

Signature by authorized representative. *Com. Code § 3402*

Unauthorized signatures. *Com. Code § 3403*

Imposters, fictitious payees. *Com. Code § 3404*

Fraudulent endorsement or signature by employee; employer bound. *Com. Code § 3405*

Negligence contributing to alteration or forged signature. *Com. Code § 3406*

Recovery for conversion on forged endorsement. *Com. Code § 3420*

Customer's duty to discover and report unauthorized signature, alteration, or other irregularities. *Com. Code § 4406*

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionFalse AdvertisingState RegulationCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesConversionCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesForgery & FraudCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesSignaturesCommercial Law (UCC)Bank Deposits & Collections (Article 4)CollectionsPresentment, Settlement & Payment

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§ 95.393 Decisions

[1] Collecting Bank's Liability to Drawer or Payee

Collecting bank's duty to notify customer that drawee bank dishonored check deposited by customer in order for collecting bank to charge back amount of check against customer's account arises only after bank has learned facts sufficient to enable it to do so. *Lufthansa German Airlines v. Bank of America (9th Cir. 1981) 652 F.2d 835, 836*

Under common law negligence theory, drawer of check is owed duty of care by collecting bank when risk of harm is foreseeable. *Mills v. U.S. Bank (2008) 166 Cal. App. 4th 871, 888 n.22, 83 Cal. Rptr. 3d 146* (dictum)

Com. Code § 4103(a) and *(e)* [*see §§ 95.314, 95.315*] neither create duty on part of depositary banks to drawers nor authorize action for negligence in any specific situation. *Mills v. U.S. Bank (2008) 166 Cal. App. 4th 871, 889, 83 Cal. Rptr. 3d 146*

Com. Code §§ 3404-3406 [*see §§ 95.329, 95.330, 95.455[2]*] and *Com. Code § 4202(a)(1)* [*see § 95.333[2]*] do not establish that drawer has statutory cause of action for negligence against depositary bank which deposits checks with missing endorsements. *Mills v. U.S. Bank (2008) 166 Cal. App. 4th 871, 889, 83 Cal. Rptr. 3d 146*

When bank's depositor and second party were involved in scheme in which depositor presented NSF checks to noncustomer/payee, causing noncustomer/payee, on close of sham escrows, to issue its good checks to second party (who would endorse checks over to depositor for deposit to cover NSF checks), bank had no duty to disclose its suspicions or fact of suspicious account activity to payee. *Chicago Title Ins. Co. v. Superior Court (1985) 174 Cal. App. 3d 1142, 1145-1147, 1155-1160, 220 Cal. Rptr. 507*

After delivery of check has been made with intent and purpose of giving effect thereto and it falls into hands of unauthorized person, rightful payee may charge collecting bank with having received it as agent for use and benefit of payee. *Indiana Plumbing Supply Co. v. Bank of America (1967) 255 Cal. App. 2d 910, 913-917, 63 Cal. Rptr. 658*

Fact that provisional credit is given does not convert creditor-debtor relationship between bank and depositor into one of principal and agent; thus, bank is entitled to reverse provisional credit when one joint payee died before final settlement. *Camperi v. Chiechi (1955) 134 Cal. App. 2d 485, 510, 286 P.2d 399*

[2] Collection of Dishonored Checks

Third-party debt collector's efforts to collect dishonored check are governed by Fair Debt Collection Practices Act (*15 U.S.C. § 1692 et seq.*); addressing issue of first impression in Ninth Circuit, court held that dishonored check is "debt" within meaning of FDCPA. *Charles v. Lungdren & Associates (9th Cir. 1997) 119 F.3d 739, 742*

[3] Drawee Bank's Liability to Payee

Payee of dishonored check states cause of action against drawee bank pursuant to former *Com. Code § 4302(a)* (*now see Com. Code § 4302(a)(1)*) for failure to give notice of dishonor on second presentment of check previously dishonored for lack of sufficient funds. *Huntmix, Inc. v. Bank of America (1982) 134 Cal. App. 3d 347, 361, 184 Cal. Rptr. 551*

Drawee was not liable to payee when check was not paid because drawer stole it from payee, forged payee's endorsement, and deposited it in account on which it was drawn. *Pupko v. Bank of America (1981) 114 Cal. App. 3d 495, 498-502, 170 Cal. Rptr. 615*

[4] Guaranty

Language of continuing guaranty covered overdraft incurred as customary banking practice when overdraft was result of credit arrangement with bank; overdraft was deemed to amount to loan to depositor. *Bank of Santa Ana v. Molina (1969) 1 Cal. App. 3d 607, 617-618, 81 Cal. Rptr. 885*

[5] Liability of Endorser

Summary judgment in favor of collecting bank in action to enforce liability of endorser for dishonored checks proper when defendant admitted endorsing checks and bank gave timely notice of dishonor to defendant endorser. *Security Pac. Nat. Bank v. Associated Motor Sales (1980) 106 Cal. App. 3d 171, 175-176, 165 Cal. Rptr. 38*

[6] Money Orders

Bank's issuance of money order for fee is sale of product under Unfair Practices Act (*Bus. & Prof. Code §§ 17043, 17044*) and subject to "sales below cost" and "loss leader" prohibitions. *Los Angeles Check Sellers Asso. v. United States Nat'l Bank (1969) 275 Cal. App. 2d 570, 573, 80 Cal. Rptr. 321*

[7] Overdrafts

Drawee's paying of checks drawn by its depositor on insufficient funds does not constitute misrepresentation to payee. *Chicago Title Ins. Co. v. Superior Court (1985) 174 Cal. App. 3d 1142, 1155-1156, 220 Cal. Rptr. 507*

Right of bank to general lien authorized by statute (*Civ. Code § 3054*) is not to be tested by character of indebtedness, but solely by fact that bank customer is indebted to it in balance due to it and accruing in course of business;

indebtedness due bank within meaning of *Civ. Code § 3054* permissibly consists of overdrafts of depositor. *Bromberg v. Bank of America (1943) 58 Cal. App. 2d 1, 6-7, 135 P.2d 689*

[8] Restitution for Mistake

Despite its negligence, bank that mistakenly transferred principal of account on depositor's instructions to transfer interest periodically entitled to recover amount from transferee, when transferee neither relied on payment nor believed that larger sum was paid to discharge preexisting debt. *Bank of America v. Sanati (1992) 11 Cal. App. 4th 1079, 1085, 14 Cal. Rptr. 2d 615* (same result required by *Com. Code § 11303* had payment order originated after January 1, 1991)

[9] Statute of Limitations

Limitation period on action for payment of forged check is one year [*Code Civ. Proc. § 340(c)*], which begins to run on receipt of statement showing improper payment of that check. *Chatsky & Assocs. v. Superior Court (2004) 117 Cal. App. 4th 873, 875, 880, 12 Cal. Rptr. 3d 154* ; *see Com. Code § 4406(f)* (issue preclusion if bank not notified of forgery within one year).

Com. Code § 4406(f) applies regardless of lack of care of customer or bank, precluding customer who does not within one year after statement or items are made available discover and report unauthorized signature from asserting it against bank. *Com. Code § 4406(c)* requires customer promptly to review monthly statements or checks made available by bank, to exercise reasonable care in discovering unauthorized signature or alteration, and promptly to notify bank of such items. Pursuant to *Com. Code § 4406(d)*, if customer fails to comply when that person has forged checks on account, customer is precluded from making claim against bank for unauthorized payment unless customer notified bank no more than 30 days after first forged item was included in monthly statement or canceled checks, and should have been discovered. Preclusion is conditional because customer may avoid its application by establishing that bank failed to exercise ordinary care in paying item and failure contributed to loss. *Espresso Roma Corp. v. Bank of Am. (2002) 100 Cal. App. 4th 525, 528, 124 Cal. Rptr. 2d 549*

When bank honors depositor's check, fails to debit account, and subsequently seeks repayment, applicable statute of limitations is three-year period, beginning on discovery of mistake, provided by *Code Civ. Proc. § 338(d)*. *Creditors Collection Service v. Castaldi (1995) 38 Cal. App. 4th 1039, 1043-1044, 45 Cal. Rptr. 2d 511*

[10] Stop Payments

False statement made to influence bank to stop payment of bank check relates to "application" or "commitment" for purposes of *18 U.S.C. § 1014*, which prohibits knowingly making false statement for purpose of influencing action of FDIC-insured institution upon various enumerated types of transactions; district court's dismissal of two counts of indictment reversed. *United States v. Boren (9th Cir. 2002) 278 F.3d 911, 916-917*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawDepository InstitutionsCustomer-Bank RelationsOverdraftsCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesParty ObligationsCommercial Law (UCC)Bank Deposits & Collections (Article 4)CollectionsPresentment, Settlement & PaymentCommercial Law (UCC)Bank Deposits & Collections (Article 4)Customer-Bank RelationsStop Payment OrdersGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 95.394 Law Reviews

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Oberg, *A Check in Your Hand Is Not the Same as Cash,* 27 Bev. Hills B.A.J. 36 (Winter 1993)

Ballen and Homrighausen, *Revised Articles 3 and 4: Selected Topics, 24 U.C.C. L.J. 3 (1991)*

Ellis and Dow, *Banks and Their Customers Under the Revisions to Uniform Commercial Code Articles 3 and 4: Allocation of Losses Resulting From Forged Drawers' Signatures, 25 Loy. L.A.L. Rev. 57 (1991)*

Miller, *The Benefits of New Articles 3 and 4, 24 U.C.C. L.J. 99 (1991)*

Norwood, *An Overview of Revised Articles Three and Four of the Uniform Commercial Code,* 97 Com. L.J. 1 (1991)

Rapson, *Loss Allocation and Forgery in Fraud Cases: Significant Changes Under Revised Articles 3 and 4, 42 Ala. L. Rev. 435 (1991)*

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Bailey III, *What You Should Know About Altered or Forged Checks,* 34(4) Prac. Law. 63, 34(5) Prac. Law. 35 (1988)

Powers, *Negligence and the Holder in Due Course Doctrine,* 16 Bev. Hills B.J. 193 (1982)

Bailey, *Commercial Paper, Bank Deposits and Collections, Letters of Credit, 35 Bus. Law. 1129 (1980)*

Note, *Torts: Liability of Bank for Negligent Dishonor of Depositor's Check: Weaver v. Bank of America (Cal. 1964), 5 Santa Clara Law. 103 (1964)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsGeneral DepositsCommercial Law (UCC)Negotiable Instruments (Article 3)Dishonor & PresentmentDishonorCommercial Law (UCC)Negotiable Instruments (Article 3)EnforcementHolders in Due CourseGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesForgery & FraudCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesSignatures

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9-95 California Forms of Pleading and Practice--Annotated § 95.395

§ 95.395 Text References

Hart & Willier, Forms And Procedures Under The UCC (Matthew Bender)
Article 3, *Negotiable Instruments*
Article 4, *Bank Deposits and Collections*

Banking Law, Chs. 125-138, 251, 252 (Matthew Bender)

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, §§ 39-40, 50, 53, 55, 57-58, 87, 89-90, 94-95, 97-99, 101, 104, 106108, 110, 115-117, 119-126, 128-135 (10th ed. 2005)

Legal Topics:

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

§§ 95.396[Reserved]

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9-95 California Forms of Pleading and Practice--Annotated § 95.400

§ 95.400 Related Matthew Bender Publications

California Legal Forms, Ch. 56, *Letters of Credit and Electronic Fund Transfers* (Matthew Bender)

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§ 95.401 Federal Statutes

Electronic Fund Transfer Act of 1978 (EFTA). *15 U.S.C. § 1693 et seq.*

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§ 95.402 State Statutes

Citation of Division 11 (Funds Transfers). *Com. Code § 11101*

Application of Division 11. *Com. Code § 11102*

Payment orders. *Com. Code § 11103*

Funds transfer; intermediary bank; originator; originator's bank. *Com. Code § 11104*

Definitions. *Com. Code § 11105*

Determination of time of receipt of payment order. *Com. Code § 11106*

Application of federal regulations. *Com. Code § 11107*

Transfers to which Division 11 does not apply. *Com. Code § 11108*

Security procedure. *Com. Code § 11201*

Authorized order; security procedure agreements; sender; application to amendments and cancellations of payment orders. *Com. Code § 11202*

Rules for order of customer that is not authorized by customer identified as sender. *Com. Code § 11203*

Acceptance of unauthorized or unenforceable payment order. *Com. Code § 11204*

Erroneous payment instruction following security procedure. *Com. Code § 11205*

Transmittal of payment order to funds-transfer system. *Com. Code § 11206*

Identification of beneficiary in payment order. *Com. Code § 11207*

Identification of intermediary or beneficiary's bank by number. *Com. Code § 11208*

Acceptance of payment order by bank other than beneficiary's bank. *Com. Code § 11209*

Rejection of payment order by receiving bank. *Com. Code § 11210*

Transmittal of cancellation or amendment of payment order. *Com. Code § 11211*

Liability of receiving bank for failure to accept payment. *Com. Code § 11212*

Execution of payment order. *Com. Code § 11301*

Obligations of receiving bank in executing payment order. *Com. Code § 11302*

Payment to receiving bank of amount of sender's order; recovery of excess payment from beneficiary. *Com. Code § 11303*

Duty of sender on erroneous execution of payment order. *Com. Code § 11304*

Obligation of receiving bank on delay in payment to beneficiary. *Com. Code § 11305*

Payment date. *Com. Code § 11401*

Acceptance of payment order by beneficiary's bank. *Com. Code § 11402*

Payment of sender's obligation to pay receiving bank. *Com. Code § 11403*

Obligation of beneficiary's bank to pay amount of order to beneficiary. *Com. Code § 11404*

Payment of obligation of beneficiary's bank when beneficiary's account is credited. *Com. Code § 11405*

Payment by originator of funds transfer; discharge of obligation. *Com. Code § 11406*

Variation of rights and obligations by agreement; funds-transfer system rule. *Com. Code § 11501*

Creditor process. *Com. Code § 11502*

Restraining orders. *Com. Code § 11503*

Charge against sender's account. *Com. Code § 11504*

Notice to bank that customer objects to payment. *Com. Code § 11505*

Calculation of interest. *Com. Code § 11506*

Rules. *Com. Code § 11507*

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§ 95.403 Decisions

Common law causes of action based on allegedly unauthorized funds transfers are displaced by Division 11 in two specific areas: (1) when common law claims would create rights, duties, or liabilities inconsistent with Division 11, and (2) when circumstances giving rise to common law claims are specifically covered by provisions of Division 11. *Zengen, Inc. v. Comerica Bank (2007) 41 Cal. 4th 239, 253, 254, 59 Cal. Rptr. 3d 240, 158 P.3d 800*

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9-95 California Forms of Pleading and Practice--Annotated § 95.404

§ 95.404 Law Reviews

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Winn, *Clash of the Titans: Regulating the Competition Between Established and Emerging Electronic Payment Systems, 14 Berkeley Tech. L.J. 675 (1999)*

Sneddon, *The Effect of Uniform Commercial Code Article 4A on the Law of International Credit Transfers, 29 Loy. L.A. L. Rev. 1107 (1996)*

Turner, *The UCC Drafting Process and Six Questions About Article 4A: Is There a Need for Revisions to the Uniform Funds Transfers Law? 28 Loy. L.A. L. Rev. 351 (1994)*

Cooter & Rubin, *Orders and Incentives as Regulatory Methods: The Expedited Funds Availability Act of 1987, 35 UCLA L. Rev. 1115 (1988)*

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[Reserved]

§§ 95.405[Reserved]

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9-95 California Forms of Pleading and Practice--Annotated § 95.410

§ 95.410 Allegation of Capacity and Location of Bank--National Banking Association [12 U.S.C. § 21]

[1] FORM Allegation of Capacity and Location of Bank--National Banking Association [12 U.S.C. § 21]

Defendant _____ [*name of bank*] is, and at all times herein mentioned was, a national banking association organized and existing under and by virtue of the laws of the United States of America, with its principal place of business [in California] in _____ County, California, [*if a county other than the county of the principal office branch determines venue, add:* and the branch office at which the _____ (transaction that is the subject of this action arose *or* account that is the subject of this action is maintained) at _____ (*street address*), _____ (*city*), _____ County, California].

[2] Use of Form

This form is an allegation for use in an action against a national banking association.

[3] Venue

Venue is proper in the county in which a contract is made or is to be performed, in which the obligation or liability arises or the breach occurs, or in which the financial institution maintains its principal place of business [*Code Civ. Proc. § 395.5*].

[4] Federal Statutes

Formation of national banking associations. *12 U.S.C. § 21*

[5] Decisions

[a] In General

Term "national" is permitted as part of bank's name only if banking association is chartered under federal law [*12 U.S.C. § 22* (organization certificate)]. *Kozlowsky v. Westminster Nat. Bank (1970) 6 Cal. App. 3d 593, 596, 86 Cal. Rptr. 52*

[b] Jurisdiction

Federal district court's personal jurisdiction over foreign corporation in diversity action is tested under forum state's jurisdictional standard; three-part test requires consideration of seven relevant factors; one party's execution of contract in California and delivery of payment in California as insufficient contact when subject matter and performance were in *Fiji. FDIC v. British-American Ins. Co., Ltd (9th Cir. 1987) 828 F.2d 1439, 1441-1445*

For purpose of suing and being sued, national banks as treated as citizens of states in which they are located, and jurisdiction of federal courts as not to be invoked simply on ground that national banks were created by and exercised their rights under acts of *Congress. Bachman v. First-Mechanics Nat. Bank of Trenton (D. N.J. 1947) 69 F. Supp. 739, 741-742*

State court jurisdiction over out-of-state national bank as proper based on 56 percent equity participation in single $20 million purchase-leaseback transaction and existence of subsidiary's office in California; California contacts of trustee/servicing agent, another out-of-state bank, as attributable to out-of-state national bank for purposes of determining sufficiency of contacts. *Rice Growers Assn. v. First National Bank (1985) 167 Cal. App. 3d 559, 568-570, 214 Cal. Rptr. 468*

State court jurisdiction over out-of-state state bank as proper based on its legal owner/servicing agent status in single $20 million purchase-leaseback-type transaction and on fact that California corporation acted as its agent in transaction for partial supervision of construction of collateral in *California. Rice Growers Assn. v. First National Bank (1985) 167 Cal. App. 3d 559, 571-574, 214 Cal. Rptr. 468*

Code Civ. Proc. § 410.10 (jurisdiction defined) as manifesting intent to allow courts to exercise broadest possible jurisdiction over disputes involving foreign corporations transacting business within state; one such transaction as conferring jurisdiction. *Michigan Nat. Bank v. Superior Court (1972) 23 Cal. App. 3d 1, 5-6, 99 Cal. Rptr. 823*

State courts as having jurisdiction in action against national bank by virtue of provisions of National Banking Act (*12 U.S.C. § 38*). *Mason v. Shapro (1970) 3 Cal. App. 3d 789, 791, 83 Cal. Rptr. 753*

[c] Venue

National bank as subject to suit in state court only in county in which it is located. *Citizens & Southern Nat. Bank v. Bougas (1977) 434 U.S. 35, 38, 98 S. Ct. 88, 54 L. Ed. 2d 218* ; *see also National Bank v. Associates of Obstetrics (1976) 425 U.S. 460, 460-461, 96 S. Ct. 1632, 48 L. Ed. 2d 92* (decided under *12 U.S.C. § 94* prior to 1982 amendment limiting its application to national banks for which FDIC has been appointed receiver)

[6] Cross References

For captions and introductions regarding state and national banks, see Ch. 108, *Captions and Introductions* .

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9-95 California Forms of Pleading and Practice--Annotated § 95.411

§ 95.411 Allegation of Capacity of Bank--State Bank [Fin. Code § 350]

[1] FORM Allegation of Capacity of Bank--State Bank [Fin. Code § 350]

Defendant _____ [*name of bank*] is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California and authorized to do business as a bank by _____ [*if bank was formed before July 1, 1997,* the Superintendent of the State Banking Department *or, if bank was formed on or after July 1, 1997,* the Commissioner of Financial Institutions] of the State of California, with its principal place of business in _____ County, California, [*if a county other than the county of the principal office branch determines venue, add:* and the branch office at which the _____ (transaction that is the subject of this action arose *or* account that is the subject of this action is maintained) at _____ (*street address*), _____ (*city*), _____ County, California].

[2] Use of Form

This form of allegation is for use in an action against a state bank.

[3] State Statutes

Formation of banking corporation. *Fin. Code § 350*

Authorization to engage in banking. *Fin. Code §§ 400-407*

[4] Cross References

See also *§ 95.410*.

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9-95 California Forms of Pleading and Practice--Annotated § 95.412

§ 95.412 Allegation of Capacity and Location of State-Chartered Savings and Loan Association or Savings Bank [Fin. Code § 5400 et seq.]

[1] FORM Allegation of Capacity and Location of State-Chartered Savings and Loan Association or Savings Bank [Fin. Code § 5400 et seq.]

Defendant is, and at all times mentioned herein was, a _____ [savings association *or* savings bank] organized and existing a under the the California Savings Association Law (*Financial Code Section 5000 et seq.*), with it principal office in _____ [*city*], _____ County, California, [*if a county other than the county of the principal office branch determines venue, add:* and the branch office at which the _____ (transaction that is the subject of this action arose *or* account that is the subject of this action is maintained) at _____ (*street address*), _____ (*city*), _____ County, California].

[2] Use of Form

This allegation is for use in an action against a state savings association.

[3] State Statutes

Formation of association. *Fin. Code § 5400 et seq.*

Names and offices of association. *Fin. Code § 5650 et seq.*

[4] Cross References

See also *§ 95.410*.

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9-95 California Forms of Pleading and Practice--Annotated § 95.413

§ 95.413 Allegation of Capacity and Location of Federal Savings Association or Federal Savings Bank [12 U.S.C. § 1464]

[1] FORM Allegation of Capacity and Location of Federal Savings Association or Federal Savings Bank [12 U.S.C. § 1464]

Defendant is, and at all times mentioned herein was, a _____ [federal savings association *or* federal savings bank] organized and existing a under the Home Owners' Loan Act (*12 United States Code Section 1464*) and chartered by the _____ [Office of Thrift Supervision *or* Federal Home Loan Bank Board], with its principal office [in California] in _____ County, California, [*if a county other than the county of the principal office branch determines venue, add:* and the branch office at which the _____ (transaction that is the subject of this action arose *or* account that is the subject of this action is maintained) at _____ (*street address*), _____ (*city*), _____ County, California].

[2] Use of Form

This allegation is for use in an action against a federal savings association [*see also § 95.123[5]*].

[3] State Statutes

Federal association as having all rights, powers, and privileges of state-chartered association. *Fin. Code § 8500(a)*

[4] Cross References

See also *§ 95.410*.

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9-95 California Forms of Pleading and Practice--Annotated § 95.414

§ 95.414 Complaint--Members or Stockholders Derivative Action Against Savings Association [Fin. Code § 6052]

[1] FORM Complaint--Members or Stockholders Derivative Action Against Savings Association [Fin. Code § 6052]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR _____ [*specify, e.g.,* DAMAGES]
a Corporation and	)	
_____ [*name(s)*],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

1. [*Capacity of defendant association. Choose appropriate allegation from § 95.412[1] or 95.411[1].*]

2. _____ [*Allege capacity and residence of other defendants, e.g.,* Defendant _____ (*name of director of association*) is a resident of _____ County, California.

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff believes these defendants are

responsible in some manner for the occurrences alleged herein and will amend this complaint to allege their true names and capacities when ascertained.]

[*EITHER*]

4. At all times mentioned herein and at the time of [that part of] the transaction complained of, plaintiff was, and presently remains, a _____ [registered stockholder in *or* member of] defendant association, holding _____ [_____ (*number*) shares of _____ (*describe type, e.g.,* Class A, Series 1, stock) *or* Account No. _____] therein.

[*OR*]

4. Plaintiff is a _____ [registered stockholder in *or* member of] defendant association, holding _____ [_____ (*number*) shares of _____ (*describe type, e.g.,* Class A, Series 1, stock) *or* Account No. _____] therein. The _____ [stock *or* membership] devolved on the plaintiff by operation of law from _____ [*name*], who was a holder at the time of [that part of] the transaction.

[*CONTINUE*]

5. _____ [*Allege facts stating cause of action against defendants other than association that show injury to association.*]

[*EITHER allege plaintiff's efforts to obtain board action and the board's failure and/or refusal to act*]

6. Plaintiff made the following efforts to secure action from the board of directors of defendant association against the defendant directors to _____ [*describe action desired*]. On _____ [*date*], plaintiff _____ [informed the _____ (association *or* board of directors) in writing of the ultimate facts of each cause of action against each defendant director *or* delivered to the _____ (association *or* board of directors) a true copy of this complaint, which plaintiff then proposed to file,] and demanded that the board of directors take all necessary and appropriate action on behalf of the association to obtain redress from the aforementioned directors.

7. The board of directors and the association have refused, and continue to refuse, to undertake or pursue any action against the named directors, and plaintiff's efforts to obtain such action have failed for the following reasons: _____ [*set forth reasons board failed to act on the claim*]. In failing and refusing to prosecute the action against the named directors, the board did not act in good faith or in any reasonable belief that its failure or refusal was consistent with good business judgment or in the best interests of the association. Rather, the board's failure and refusal was in the exercise of bad faith and a breach of the board's fiduciary duty to maintain and defend the interest of the association.

[*OR allege why it would have been futile for plaintiff to attempt to persuade the board to initiate the action*]

6. Plaintiff did not make any effort to secure action from the board of directors in prosecuting this action. Any effort to persuade the board to proceed against _____ [*name of proposed defendants*] would have been futile in

that _____ [*set forth facts demonstrating futility of demand*]. On or about _____ [*date*], however, plaintiff _____ [informed the _____ (association *or* board of directors) in writing of the ultimate facts of each cause of action against each defendant director *or* delivered to the _____ (association *or* board of directors) a true copy of this complaint, which plaintiff then proposed to file].

[*CONTINUE*]

8. Thereafter, and on or about _____ [*date*], plaintiff filed a formal request with the Savings and Loan Commissioner to bring this action. The commissioner gave at least 20 days' written notice to the association and each of its directors of a hearing on this request. On or about _____ [*date*], the commissioner held the hearing and determined that the action proposed by plaintiff was proposed in good faith and that there is a reasonable probability that the prosecution of the action will benefit the association and its _____ [stockholders *or* members]. A copy of that determination is attached hereto as Exhibit "A" and made a part hereof.

[9. If plaintiff is successful in this action, plaintiff will have _____ (_____ (recovered *or* protected) a common fund for *or* brought about a substantial benefit to) defendant association on whose behalf this action is prosecuted, and plaintiff is entitled to attorney's fees incurred herein (in the sum of $_____) against the defendant association.]

WHEREFORE, plaintiff prays judgment against defendants _____ [*names of defendant directors*], and each of them, as follows:

1. For _____ [*specify relief sought, e.g.,* damages in the sum of $_____];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

Plaintiff also prays judgment against defendant association as follows:

4. For attorney's fees in the amount of $_____; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged

on information and belief and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This complaint is for use in a derivative action by a stockholder or member against a savings association after the commissioner has determined that the action was proposed in good faith and that there was a reasonable probability that its prosecution would benefit the association and its stockholders or members [*Fin. Code § 6052*; *see § 95.161*].

By way of contrast, an injury done to a particular group of stockholders or members is not the ground for a derivative action. A plaintiff from within the group may bring an action on the group's behalf against the association without having to obtain permission of the Commissioner, so long as the injury is not alleged to have been done to the association itself [*see Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 105-107, 81 Cal. Rptr. 592, 460 P.2d 464]* .

[3] Corporation Code Provisions Applicable

In addition to the requirements discussed in *§ 95.161*, the provisions of *Corp. Code § 800(c)-(f)* apply to derivative actions by stockholders or members of a savings association [*Fin. Code § 6052(c)*]. *Corp. Code § 800(c)-(f)* governs a defendant's motion, in a regular derivative suit against a corporation, to require plaintiff to furnish security.

[4] Allegations

This complaint alleges in pertinent part

- The plaintiff's status as a registered stockholder or member at the time of the transaction or by legal devolution (alternative Paragraphs 4) [*Fin. Code § 6052(b)(1)*]

- The defendant association's cause of action against the defendant directors (Pargraph 5)

- The plaintiff's attempt to have the association act against its culpable directors, along with a required form of notice (first alternative Paragraph 6), and the association's refusal to so respond (Paragraph 7), or the plaintiff's excusable failure to seek action from the association and notification as to the claim (second alternative Paragraph 6) [*Fin. Code § 6052(b)(2)*]

- The plaintiff's submission of a request to bring the action to the Savings and Loan Commissioner and the Commissioner's determination, on noticed hearing, that the action is proposed in good faith and is of probable benefit to the association (Paragraph 8) [*Fin. Code § 6052(b)(3)*]

- A request for attorney's fees from the association if the suit on its behalf is successful (Paragraph 9) [*Fletcher v. A.J. Industries, Inc. (1968) 266 Cal. App. 2d 313, 322-325, 72 Cal. Rptr. 146]* .

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when their inclusion is necessary, in all pleadings and other papers filed in the

court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[5] Commissioner's Function in Screening Derivative Actions

The commissioner's function is to screen proposed actions and to separate those that are frivolous from those that are not. The burden of proof is on the plaintiff to establish the two conditions that the commissioner must find to allow the action to go forward as nonfrivolous [*see Fin. Code § 6052(b)(3)*]. The burden is not heavy, but the plaintiff must establish by a preponderance of the evidence that the proposed action is "built on facts rather than frivolity," and that it has some possibility of success. As to the first or "good faith" requirement, the commissioner only need find that the plaintiff believes in the validity of the suit, and need not determine whether or not that party entertains an improper or ulterior motive. In determining whether or not the plaintiff meets the requirement that there be a reasonable possibility that the action will benefit the association and its stockholders or members, the commissioner is obliged to look at the proposed action in the light of the applicable legal principles [*see Mueller v. MacBan (1976) 62 Cal. App. 3d 258, 271, 273-274, 282, 132 Cal. Rptr. 222]* .

[6] Attorney's Fees

An award of attorney's fees to a successful plaintiff may be available in a derivative action [*see Fletcher v. A.J. Industries, Inc. (1968) 266 Cal. App. 2d 313, 320, 322-323, 72 Cal. Rptr. 146* ; for further discussion, *see* Ch. 168, *Corporations: Derivative Actions*].

[7] State Statutes

Members or stockholders as permitted to institute action against association. *Fin. Code § 6052(a)*

Savings account holder who is not stockholder or member of association as not permitted to institute action. *Fin. Code § 6052(a)*

Prerequisites to action. *Fin. Code § 6052(b)*

Applicability of *Corp. Code § 800(c)-(f). Fin. Code § 6052(c)*

[8] Decisions

Allegations that actions of defendant majority stockholders diminished value of minority stockholders' stock, absent allegation that diminished value reflects injury to corporation and resultant depreciation in value of its stock, constitute cause of action on behalf of plaintiff and other minority stockholders and not on behalf of corporation, so derivative action requirements not applicable. *Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 107, 81 Cal. Rptr. 592, 460 P.2d 464*

Former *Fin. Code § 7616* (*now see Fin. Code § 6052*), authorizing derivative actions on behalf of associations, as not applicable to suit by stockholder of savings and loan holding company. *Mueller v. MacBan (1976) 62 Cal. App. 3d 258, 267-269, 132 Cal. Rptr. 222*

When parties do not complain of plaintiff stockholder's standing until appeal, parties treat plaintiff as alter ego of savings and loan holding company, and holding company, controlling stockholder of association, declines to institute or maintain action, plaintiff is entitled to maintain derivative action on behalf of association under former *Fin. Code § 7616* (*now see Fin. Code § 6052*) *Mueller v. MacBan (1976) 62 Cal. App. 3d 258, 269-270, 132 Cal. Rptr. 222*

Attorney's fees awardable to successful plaintiff, measured by and paid from common fund when derivative action on behalf of corporation recovered or protected fund, but fund is not a prerequisite of award. *Fletcher v. A.J. Industries, Inc. (1968) 266 Cal. App. 2d 313, 322-325, 72 Cal. Rptr. 146*

[9] Cross References

For forms for instituting class actions generally, see Ch. 120, *Class Actions*

For a discussion and forms of derivative actions by stockholders generally, see Ch. 168, *Corporations: Derivative Actions*

For memoranda relating to the institution of a class action, see California Points and Authorities, Ch. 41, *Class and Representative Actions* (Matthew Bender)

For memoranda of points and authorities relating to derivative actions by stockholders generally, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

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Volume 9: Bailments thru Boats and Boating-Chs. 93-100
Chapter 95 BANKS, DEPOSITS, AND CHECKS
PART IV. FORMS
A. Organization, Powers, And Functions

9-95 California Forms of Pleading and Practice--Annotated §§ 95.415-95.429

[Reserved]

§§ 95.415[Reserved]

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Volume 9: Bailments thru Boats and Boating-Chs. 93-100
Chapter 95 BANKS, DEPOSITS, AND CHECKS
PART IV. FORMS
B. Deposits

9-95 California Forms of Pleading and Practice--Annotated § 95.430

§ 95.430 Complaint for Money--To Recover Bank Deposit and Interest on Deposit [Civ. Code § 3302]--By Depositor Against Financial Institution--General Form

[1] FORM Complaint for Money--To Recover Bank Deposit and Interest on Deposit [Civ. Code § 3302]--By Depositor Against Financial Institution--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONEY
_____ [*name*],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

1. [*Name and capacity of defendant financial institution. Choose appropriate allegation from §§ 95.410-95.411].*

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I through _____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of such fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by such defendants.)]

[3. At all times herein mentioned defendants DOES I through _____ were the agents, servants, and employees of their codefendants, and in doing the things hereinafter alleged were acting in the scope of their authority as agents, servants, and employees of the codefendants, and with the permission and consent of their codefendants.]

4. On or about _____ [*date*], plaintiff opened a _____ [*specify type of account, e.g.,* savings account], designated No. _____, with defendant at its branch located at _____ [*street address*], _____ [*city*], California. The deposit stood on defendant's books to the credit of _____ [*title as it appears on signature card agreement or on statements furnished by defendant*] and for his/her use and benefit, and was governed by _____ [*continue with as much description as is necessary to incorporate any relevant terms and conditions of the account, e.g.,* the terms and conditions set forth in the passbook and a signature card contract dated _____ (, true and correct copies of which are attached as Exhibit "A" and incorporated by reference)].

5. The account was credited with amounts deposited from time to time by plaintiff [*if necessary to dispel any issue regarding escheat (see Code Civ. Proc. § 1513(a)(2), (6)), add:*, the last such deposit having been made by plaintiff on or about _____ (*date*) *or* quarterly statements having been sent by defendant to plaintiff at _____ (*address*), showing interest credited during the quarter] [, and with interest accrued on those balances].

6. On or about _____ [*date*], [when plaintiff closed the account,] plaintiff had a balance of $_____ in that account, representing accumulated deposits and interest thereon to _____ [*specify last date on which interest was credited*]. [In accordance with _____ (*specify contract or regulation that governs, e.g.,* defendant's regulations), that account continues to earn interest at _____ percent per annum.]

7. On or about that date plaintiff attempted to withdraw $_____ from the account [*specify mode of attempted withdrawal if relevant, e.g.,* by presenting an executed withdrawal slip at the branch], but defendant then refused, and to the present refuses, to pay, and despite plaintiff's protest and demand on that date [and on subsequent occasions] has not paid plaintiff the $_____ [or any part thereof], and there is now due, owing, and unpaid the sum of $_____, with interest as described above running from _____ [*date*].

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For the sum of $_____;

2. For interest at the rate of _____ percent per annum from _____ [*date*];

[3. For additional damages according to proof;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This complaint is for use to recover sums on deposit with a financial institution that refuses to honor plaintiff's withdrawal requests.

[3] Allegations

This complaint alleges:

- That plaintiff has a sum of money on deposit with defendant bank (Paragraphs 4-6).
- That plaintiff has demanded the return of that money (Paragraph 7).
- That despite plaintiff's demand defendant refuses to return the deposited money (Paragraph 7) [*Civ. Code § 1822*; *Bank of America Assn. v. California Bk. (1933) 218 Cal. 261, 273-274, 22 P.2d 704* ; *Union Tool Co. v. Farmers etc. Nat. Bk. (1923) 192 Cal. 40, 53, 218 P. 424]* .

The complaint also contains an optional fictitious name allegation (Paragraph 2) for use, if appropriate, when there are multiple defendants whose names and capacities are unknown to plaintiff at the time the complaint is filed [*see Code Civ. Proc. § 474*; *see also* Ch. 20, *Allegations Commonly Used*]. An agency allegation (Paragraph 3) is also included for optional use when any of multiple defendants are sued as agents [*see* Ch. 427, *Principal and Agent*].

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when their inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[4] Attorney's Fees

Attorney's fees recovered under a contract provision in a signature card or other agreement or under a statute that authorizes their recovery are an element of costs [*see Civ. Code § 1717(a)*; *Code Civ. Proc. § 1033.5(a)(10)*; *see also Code Civ. Proc. § 1033.5(c)(5)* (methods of fixing attorney's fees that are item of costs)]. It is not necessary to plead or

to prove a contract provision for attorney's fees or the amount of attorney's fees incurred. It is sufficient if the contract, including the attorney's fees provision, is attached to and incorporated by reference in the complaint [*Ganey v. Doran (1987) 191 Cal. App. 3d 901, 911-912, 236 Cal. Rptr. 787]* . Nor is it necessary to plead the right to recover attorney's fees that are authorized by statute [*see Beneficial Standard Properties, Inc. v. Scharps (1977) 67 Cal. App. 3d 227, 232, 136 Cal. Rptr. 549* ; *T.E.D. Bearing Co. v. Walter E. Heller & Co (1974) 38 Cal. App. 3d 59, 62, 112 Cal. Rptr. 910]* . However, no election or waiver results from pleading an entitlement to attorney's fees [*see Lanyi v. Goldblum (1986) 177 Cal. App. 3d 181, 188, 223 Cal. Rptr. 32]* . Discussion and forms addressing the various methods for recovering attorney's fees provided by statutes are located in Ch. 174, *Costs and Attorney's Fees*.

[5] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

A national banking association is considered a citizen of the state in which it is located [*28 U.S.C. § 1348*]. This means that a national bank (1) is a citizen of the state in which its main office is located, as set forth in its articles of association, and (2) is not a citizen of any other state in which it has established a branch [*Wachovia Bank, N.A. v. Schmidt (2006) 546 U.S. 303, 318, 126 S. Ct. 941, 163 L. Ed. 2d 797]* . Although limited areas of jurisdiction over national banking associations are reserved to federal courts [*see, e.g., 12 U.S.C. § 91* (injunction)], *28 U.S.C. § 1348* confers general jurisdiction over an action by or against a national bank on state courts [*First Nat. Bank v. Superior Court (1966) 240 Cal. App. 2d 109, 110-111, 49 Cal. Rptr. 358]* . No jurisdiction is conferred on a federal district court merely because the action is by or against a corporation that was incorporated by or under an act of Congress, unless the United States owns more than half of its capital stock [*28 U.S.C. § 1349*].

A corporation or association may be sued in the county in which the contract is made or is to be performed, or in which the obligation or liability arises or the breach occurs, or in the county in which its principal place of business is situated [*Code Civ. Proc. § 395.5*; *see generally* Ch. 571, *Venue*].

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case in the superior court [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned toa third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[7] Statute of Limitations

There is no statute of limitations on an action to recover a deposit unless the financial institution has become insolvent and is in the process of liquidation [*Code Civ. Proc. § 348*; *see* discussion in *§ 95.293[2]*]. However, there are other theories, such as negligence or a depositor's action on an implied contract established by *Com. Code § 4401(a)*, that would be subject to a one-year or three-year period of limitation [*see Sun'n Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 698-700, 148 Cal. Rptr. 329, 582 P.2d 920* ; *Commercial Cotton Co. v. United California Bank (1985) 163 Cal. App. 3d 511, 515, 209 Cal. Rptr. 551* (applying three-year limitation of former *Code Civ. Proc. §*

338(3) (*now see Code Civ. Proc. § 338(c)*) to action based on drawee's and collecting bank's negligence); *see also Code Civ. Proc. § 340(c)* (one year, forgeries); *Com. Code §§ 4111* (three-year, right created in Division 4), *4406(f)* (one year, unauthorized drawer's signature)]. These other theories are discussed in *§ 95.180* et seq., and in §§ 95.450-95.452.

[8] Federal Statutes

National banking association as party to suit. *28 U.S.C. § 1348*

[9] State Statutes

Right to interest in action for money. *Civ. Code § 3302*

Money due with interest. *Civ. Code § 3302*

Time for initiating action to recover money deposited with any financial institution is unlimited except when financial institution is in process of liquidation. *Code Civ. Proc. § 348*

Service of summons on banking corporation. *Code Civ. Proc. § 416.10(c)*

[10] Decisions

Code Civ. Proc. § 348, providing that there is no limitation on time for initiating action "brought to recover money ... deposited with any bank" on its face permits person to file suit at any time to recover money deposited in bank whether action is ex delicto or ex contractu. *Bullis v. Security Pac. Nat. Bank (1978) 21 Cal. 3d 801, 813, 148 Cal. Rptr. 22, 582 P.2d 109*

Cause of action accrues and statute of limitations is set in motion when bank denies liability to depositor for amount in question; such denial dispenses with need for demand by depositor. *Union Tool Co. v. Farmers etc. Nat. Bk. (1923) 192 Cal. 40, 53, 218 P. 424*

Creation of express trust, with bank as trustee, does not establish debtor-creditor relationship between beneficiary and bank because express trust does not constitute deposit of money; thus action by beneficiary against bank for rescission of trust does not fall within open limitation provisions of *Code Civ. Proc. § 348*. *Morse v. Crocker National Bank (1983) 142 Cal. App. 3d 228, 233-234, 190 Cal. Rptr. 839*

Action against bank to recover bank deposit and damages is not subject to demurrer on ground that plaintiff held time certificate of deposit subject to restricted right of redemption when terms on certificate's face suggest that it is demand obligation payable on presentation and surrender. *Jennings v. Imperial Bank (1978) 87 Cal. App. 3d 896, 899, 152 Cal. Rptr. 15*

[11] Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, §§ 73-85, 88, 109, 119 (10th ed. 2005)

[12] Cross References

For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought

in a California state court, see Ch. 2, *Procedural Guide for Civil Actions*

For forms for alternative allegations of capacity and residence of parties, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used*

For complaints showing alternate captions and introductions regarding state and national banks, see Ch. 108, *Captions and Introductions*

For a complaint by a depositor against a bank for money had and received, see Ch. 121, *Common Counts*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue*

For alternative verification forms, see Ch. 572, *Verification*

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9-95 California Forms of Pleading and Practice--Annotated § 95.431

§ 95.431 Complaint for Damages for Failing to Make Deposited Funds Available for Withdrawal Within Time Required [12 U.S.C. § 4010(a); 12 C.F.R. § 229.21(a)]--By Depositor Against Depositary Institution

[1] FORM Complaint for Damages for Failing to Make Deposited Funds Available for Withdrawal Within Time Required [12 U.S.C. § 4010(a); 12 C.F.R. § 229.21(a)]--By Depositor Against Depositary Institution

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR FAILURE TO ALLOW WITH-
_____ [*name*],	)	DRAWAL OF DEPOSITED FUNDS
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Defendant _____ [*name of depositary institution*] is, and at all times mentioned in this complaint was, a _____ [*specify status of depositary institution as one required to comply with federal Expedited Funds Availability Act, e.g.,* national banking association organized and existing under the laws of the United States of America, with its principal office (in California) located at _____ (*street address, city, and county*), California].

[2. *Fictitious name allegation, if appropriate. See § 95.430[1], Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 95.430[1], Paragraph 3.*]

4. At all times mentioned in this complaint, plaintiff maintained _____ [*specify type of transaction account as one being subject to Expedited Funds Availability Act, e.g.,* an individual checking account at defendant's branch located at _____ (*street address, city, and county*), California. The account was numbered _____, was entitled _____ (*title as it appears on signature card agreement or on statements furnished by defendant*) (, and was originally established on _____ (*date*))].

[5. On or about _____ (*date*), plaintiff received a disclosure statement from defendant, a copy of which is attached to this complaint as Exhibit "A" and incorporated by reference, which stated that funds deposited in the form of _____ (*specify form of deposit at issue, e.g.,* cashier's check made payable to plaintiff and with a special form of deposit slip) would be available for withdrawal on the _____ (*specify availability of form of deposit at issue, e.g.,* next) business day after the day of deposit.]

[6. Plaintiff never received any disclosure from defendant explaining any delay in the availability of deposited funds although defendant was required by Title *12 of the United States Code, Section 4004*, and *Title 12 of the Code of Federal Regulations, Sections 229.15-299.18*, _____ (*add any other unsuperseded state or federal law or regulation applicable to defendant that requires additional disclosures*) to provide such disclosure(s).]

7. At _____ [*time*] on _____ [*day of week and calendar date*], [*unless it is obvious from other allegations that the day of deposit was a banking day for defendant, specify day as banking day or not, e.g.,* a day on which all of defendant's branches were open to the public for carrying on substantially all of its banking functions,] plaintiff deposited _____ [*describe check and all aspects of it required to establish its category, e.g.,* cashier's check number _____, drawn on _____ (*name of drawee, and if relevant to category, first four digits of drawee's routing symbol*) and payable to _____ (*specify, e.g.,* plaintiff) in the amount of $_____], to plaintiff's account number _____ at defendant. Plaintiff made the deposit _____ [*describe place other than nonproprietary ATM, e.g.,* in person to a teller at defendant's _____ (*address*) branch]. [*Continue if check was type that required use of special deposit slip:* The deposit was accompanied by a special deposit slip in the form of Exhibit "B," attached to this complaint and incorporated by reference.]

8. _____ [After 5 P.M. on *or* On] _____ [*date*], which was a _____ [*specify day as business day or not, e.g.,* Wednesday and a business day], plaintiff _____ [*describe attempted withdrawal or use of funds that should have been available, e.g.,* sought to have defendant certify plaintiff's check number _____ payable to _____ (*payee's name*) in the sum of $_____].

9. Defendant refused to make [_____ ($100 *or* $400 *or* $5,000) of] the funds represented by plaintiff's deposit(s) of _____ [*date(s)*] available for use or withdrawal on _____ [*date*], in that _____ [*specify how withdrawal or use of funds was refused, e.g.,* _____ (*name*), an employee at defendant's _____ (*address*) branch, refused to certify plaintiff's check number _____ and said the refusal was based on the fact that a 12-day hold had been placed on the check deposited by plaintiff on _____ (*date*), although no notice of dishonor or return had been received from the bank _____ (on which that check was drawn *or* _____ at/through which the check was payable), and without the funds represented by that check there were not sufficient funds available in plaintiff's account to pay plaintiff's check number _____].

10. As a proximate result of defendant's wrongful failure to make [_____ ($100 *or* $400 *or* $5,000)

of] the funds represented by plaintiff's deposit(s) of _____ [*date(s)*] available for withdrawal _____ [after 5 P.M. on *or* on] _____ [*date*], plaintiff has suffered damages of $_____, in addition to the amount of the check, in that _____ [*describe consequential damages*].

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For actual damages _____ [in the sum of $_____ or according to proof];

2. For $1,000, or any lesser sum allowed by the court under Title *12 of the United States Code, Section 4010(a)(2)(A)*;

3. For reasonable attorney's fees;

4. For costs of suit incurred herein; and

5. For such other and further relief as the Court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification if desired. see § 95.430.*]

[2] Use of Form

This complaint is for use by a depositor to recover damages from a depositary institution arising from the institution's refusal to allow withdrawal of deposited funds after the time specified in the federal Expedited Funds Availability Act [*12 U.S.C. § 4001 et seq.*; *12 C.F.R. §§ 229.10-229.12*] or any shorter time period provided by a state law or regulation that supersedes the Expedited Funds Availability Act [*12 U.S.C. § 4010(a)*; *12 C.F.R. § 229.21(a)*; *see § 95.229[1]*; *see, e.g., 10 Cal. Code Reg. § 10.190402(a), (b)* (possibly shorter maximum hold period)]. Banks, savings and loan associations, credit unions, industrial loan companies, and almost every type of institution that accepts funds for deposit, other than trust funds, are subject to the Act [*see 12 U.S.C. § 4001(12)*; *12 C.F.R. § 229.2(e)* (defining depository institution to include all institutions listed in *12 U.S.C. §§ 461(b)(1)(A)(i)-(vi)*), discussed in *§ 95.221*].

[3] Allegations

This complaint alleges:

- The status of the defendant as a type of institution required to comply with the Expedited Funds Availability Act (Paragraph 1) [*see 12 U.S.C. § 4001(12)*; *12 C.F.R. § 229.2(e)*].

- Plaintiff's status as the holder of an account that is not subject to the new-accounts exception from the maximum hold periods (Paragraph 4) [*see 12 U.S.C. §§ 4001(1), 4003(a)*; *12 C.F.R. §§ 229.2(a), 229.13(a)*; *see §§ 95.222[1], 95.226[1]*].

- The date and description of the deposited item with enough detail to establish the category of the item for purposes of determining when the funds were required to be available for withdrawal (Paragraph 7) [*see 12 U.S.C. § 4002(a), (b), (c), (e)*; *12 C.F.R. §§ 229.10-229.12*; *see also §§ 95.224[1], 95.225[1]*].

- The manner of plaintiff's attempted withdrawal or use of the funds (Paragraph 8).

- The circumstances constituting defendant's wrongful failure to allow withdrawal or use of the funds (Paragraph 9).

- The facts giving rise to any damages in excess of the amount of funds that should have been available [*see 12 U.S.C. § 4010(a)(1), (2)(A)*; *12 C.F.R. § 229.21(a)*; 12 C.F.R. § 229, Appendix E, Commentary to § 229.20, discussed in *§ 95.229[1]*].

Optional Paragraph 5 is for use when defendant violated its own announced policy regarding availability of funds for withdrawal. Optional Paragraph 6 is for use when defendant failed to comply with the disclosure requirements of *12 U.S.C. § 4004* or 12 C.F.R. §§ 229.15-229.18, discussed in *§ 95.227*.

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when their inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[4] Jurisdiction

An action under *12 U.S.C. § 4010* may be brought in United States district court or in any other court of competent jurisdiction [*12 U.S.C. § 4010(d)*; *12 C.F.R. § 229.21(d)*; *see also § 95.430[5]*]. Note that the United States Supreme Court has held that the Act provides for federal court jurisdiction not only in suits between customers and banks, but also in cases initiated by one bank against another bank [*Bank One Chicago v. Midwest B & T (1996) 516 U.S. 264, 270-275, 116 S. Ct. 637, 133 L. Ed. 2d 635]* .

[5] Statute of Limitations

An action under *12 U.S.C. § 4010* must be brought within one year after the date of the occurrence of the violation involved [*12 U.S.C. § 4010(d)*; *12 C.F.R. § 229.21(d)*; *see, e.g., Mihai Beffa v. Bank of the West (1998) 152 F.3d 1174, 1176-1177* (even if statute of limitations is tolled until plaintiff receives notice of violation, complaint was untimely because once plaintiff knew foreign wire transfer was not credited to his account, he chose to blame foreign bank rather than track it through his own bank)].

[6] State Statutes

Individual or class action for damages arising from depository institution's failure to comply with *Fin. Code §§ 866-866.9. Fin. Code § 866.4*

[7] California Code of Regulations

Regulations regarding delayed funds availability. *10 Cal. Code Reg. §§ 10.190400-10.190402, 106.200-106.202*

[8] Law Reviews

Baxter, Patrikis, *The Check-Hold Revolution*, *18 U.C.C. L.J. 99 (1985)*

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9-95 California Forms of Pleading and Practice--Annotated § 95.432

§ 95.432 Declaration [Code Civ. Proc. § 2015.5] and Notice of Adverse Claim to Funds Deposited in Bank or Savings Account [Fin. Code §§ 952, 6661]

[1] FORM Declaration [Code Civ. Proc. § 2015.5] and Notice of Adverse Claim to Funds Deposited in Bank or Savings Account [Fin. Code §§ 952, 6661]

To _____ [*name of bank or association*], _____ [*name of branch*], and its manager _____ [*name*]:

NOTICE IS HEREBY GIVEN that _____ [*name of depositor or account holder*] is a fiduciary for _____ [*name of claimant*] as to funds in the sum of $_____ now on deposit with your _____ [bank *or* association] and branch in account number _____ and in the name of _____ [*name of depositor or account holder*]. I believe that _____ [*name of depositor or account holder*] is about to misappropriate those funds and the undersigned _____ [*name of claimant*] directs that you refuse payment of funds from that account for a period of three court days from the date you receive this declaration and notice and for such further time as may be ordered hereafter by a court of competent jurisdiction.

The fiduciary capacity in which your above named _____ [depositor *or* account holder] stands with relation to the undersigned arises from _____ [*set forth facts on which fiduciary relationship is founded*].

The undersigned has reason to believe that such funds are about to be misappropriated from the following facts: _____ [*specify*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This declaration and notice is for use by an adverse claimant to prevent misappropriation of fiduciary funds from a bank deposit or savings account, pursuant to *Fin. Code § 952* (banks) or *6661* (savings associations). *Fin. Code §§ 952* and *6661* provide for use of an affidavit, but a declaration under penalty of perjury may be used in lieu of an affidavit if it is executed in California [*Code Civ. Proc. § 2015.5*].

The form sets forth the facts on which the claim of fiduciary relationship and belief of imminent misappropriation of funds are based.

The declaration and notice have the effect of preventing a bank from paying a deposit or, in the case of an association, preventing an association from paying any withdrawals or interest on an account [*see Fin. Code §§ 952(a)* (banks), *6661(a)* (associations)]. However, the declaration and notice only have the effect of stopping payment for a period of three days [*see Fin. Code §§ 952(a)* (banks), *6661(a)* (associations)]. Thus, they should be used preliminarily to obtaining a temporary restraining order and preliminary injunction against payment of the funds [*see Fin. Code §§ 952(b)* (banks), *6661(b)* (associations)]. For forms for use in actions seeking restraining orders and injunctions, see Ch. 303, *Injunctions* .

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when their inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[3] Decisions

Bank that relied on employer-depositor's forged affidavit to withdraw amount of allegedly forged checks from employee-depositor's account and to dishonor checks drawn by employee against them was liable for punitive damages ($500,000, but remanded for determination whether that was excessive) on evidence, although conflicting, that reversal and dishonor were not standard banking practices. *Teitel v. First Los Angeles Bank (1991) 231 Cal. App. 3d 1593, 1599-1600, 1604-1605, 1607, 282 Cal. Rptr. 916*

Person who is authorized by signature card to make withdrawals from account is not adverse claimant under *Fin. Code § 952*; notice from one of several authorized signatories on account of unincorporated association revoking authority of another signatory to make withdrawals is governed by *Fin. Code § 953*, and thus, formalities of *Fin. Code § 952* are not required. *AARTS Productions, Inc. v Crocker National Bank (1986) 179 Cal. App. 3d 1061, 1067-1069, 225 Cal. Rptr. 203*

[4] Cross References

See also *§ 95.433*

For discussion and forms for affidavits and declarations generally, see Ch. 15, *Affidavits, Certificates, and Declarations*

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9-95 California Forms of Pleading and Practice--Annotated § 95.433

§ 95.433 Complaint in Interpleader [Code Civ. Proc. § 386]--By Bank to Determine Rights of Adverse Claimants to Bank Deposit

[1] FORM Complaint in Interpleader [Code Civ. Proc. § 386]--By Bank to Determine Rights of Adverse Claimants to Bank Deposit

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT IN INTERPLEADER
	)	[Amount demanded _____
vs.	)	(exceeds *or* does not exceed) $10,000]
_____ [*names*],	)	[LIMITED CIVIL CASE]
Defendants.	)	
	)	

_____

Plaintiff alleges:

1. Defendants are, and at all times herein mentioned were, residents of _____ [*city*], _____ County, California [*or allege other capacity and residence of defendants*].

2. _____ [*Name*] died on or about _____ [*date*].

3. _____ [*Name(s) of depositor(s)*] have maintained account number _____, a _____ [*specify type of account, e.g.*, savings account] with plaintiff at _____ [*branch of bank*], _____ [*street address*], _____ [*city*], since _____ [*date*].

_____ [*Describe title of account names of parties having present right to withdraw, e.g.,* The account is entitled Arbuckle and Bull, joint tenants with the right of survivorship; and both parties were authorized to make withdrawals].

4. The present balance of the account is $_____.

5. Defendant _____ [*name*] claims the sums on deposit as _____ [*describe basis of one defendant's claim, e.g.,* the sole surviving joint tenant, and has presented plaintiff with a certified copy of Bull's death certificate].

6. Defendant _____ [*name*] claims the sums on deposit as _____ [*describe basis of other defendant's claim, e.g.,* the executor of the estate of Bull and has presented plaintiff with a certified copy of letters testamentary and a declaration under penalty of perjury stating that the decedent's intention was not to create a joint account or to make a gift of funds to Arbuckle but to allow Arbuckle to withdraw sums necessary for the maintenance and repair of certain of decedent's investment properties while decedent was traveling abroad].

7. Plaintiff is ignorant of the respective rights of the defendants, is indifferent between the claimants with reference thereto, does not know which of the claimants is entitled thereto, and cannot safely determine for itself which claim is right and lawful.

8. Plaintiff has no claim on the funds and is ready and willing to and hereby offers to deposit the same in court or to deliver the same to such persons as the court shall direct.

9. This action is not brought by collusion with any of the defendants.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. That defendants, and each of them, be restrained from initiating any proceeding or action against the plaintiff in relation thereto;

2. That defendants be required to interplead and to litigate among themselves their claims to the funds;

3. That the clerk of the court or some other person be designated by the court and authorized to receive the funds pending such litigation;

4. That on delivering the funds to the clerk of the court or to such other person as the court may designate, plaintiff be discharged from any and all liability to any and all of the defendants in relation thereto;

5. That plaintiff be awarded its costs to be paid out of the funds; and

6. For such other and further relief as the court may deem just and proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. see § 95.430.*]

[2] Use of Form

This complaint in interpleader is for use in situations in which a bank desires to compel two adverse claimants to a bank deposit to litigate their claims to the money deposited.

If the account in question is one governed by the Multiple-Party Accounts Law (*Prob. Code § 5100 et seq.*) [*see Prob. Code § 5122* (defining account, discussed in *§ 95.270[1]*)], a bank faced with adverse claims between parties to the account or a P.O.D. payee or the beneficiary of a Totten trust account may prefer to rely on the protections of *Prob. Code §§ 5401-5405* and honor withdrawal requests, or not, in compliance with those sections, thus effectively placing the onus on the parties to initiate proceedings to determine entitlement to the account [*see § 95.270[9][a]*].

If the claim in question is one governed by *Fin. Code § 952* [*see § 95.292*)], a bank may also prefer to rely on the protections of that section and honor withdrawal requests, or not, in compliance with that section, requiring the adverse claimant to obtain and serve a restraining order within three days after serving the initial notice of adverse claim [*see Fin. Code § 952*].

When a depositor of a commercial or savings account has authorized any person to make withdrawals from the account, the bank, in the absence of written notice otherwise, may assume that any check, receipt, or order of withdrawal drawn by that person in the authorized form or manner, including checks drawn to that person's order and withdrawal orders payable to that person, were drawn for a purpose authorized by the depositor and within the scope of the authority conferred on the person entitled to make withdrawals [*Fin. Code § 953*].

Thus, this form is most apt to be used when the bank has received written notice in accordance with *Fin. Code § 953* and is faced with truly conflicting instructions from persons who are authorized signatories, including possible liability for wrongful dishonor [*see Com. Code § 4402* (discussed in *§ 95.323*); *see, e.g., AARTS Productions, Inc. v Crocker National Bank (1986) 179 Cal. App. 3d 1061, 1067-1069, 225 Cal. Rptr. 203]* .

If there are more than two adverse claimants, add an additional paragraph for each additional claimant, between Paragraphs 6 and 7, setting forth the basis of the claim.

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when their inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[3] State Statutes

Interpleader. *Code Civ. Proc. § 386*

Dismissal of stakeholder. *Code Civ. Proc. § 386.5*

Costs and attorney's fees in interpleader. *Code Civ. Proc. § 386.6*

Joint accounts are governed by Multiple-Party Accounts Law. *Fin. Code § 852*

Adverse claims to fiduciary bank accounts. *Fin. Code § 952*

Notice to revoke authority of person previously authorized to withdraw. *Fin. Code § 953*

Adverse claims to savings accounts. *Fin. Code § 6661*

[4] Decisions

Bank's motion for order authorizing it to deposit in court certain sum owed to opposing party was properly denied when motion was purportedly not made under *Code Civ. Proc. § 386* (interpleader), amount to be deposited was less than amount claimed by opposing party, and bank's offer was conditioned on complete discharge. *Crocker-Anglo Nat. Bk. v. American Tr. Co. (1959) 170 Cal. App. 2d 289, 299-300, 338 P.2d 617*

[5] Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, §§ 78, 80 (10th ed. 2005

[6] Cross References

See also *§§ 95.430* and *95.432*

For forms for use in interpleader actions generally, see Ch. 314, *Interpleader*

For memoranda of points and authorities related to the foregoing form, see California Points and Authorities, Ch. 123, *Interpleader* (Matthew Bender)

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9-95 California Forms of Pleading and Practice--Annotated § 95.434

§ 95.434 Complaint for Damages [Civ. Code §§ 1709, 3333]--For Fraud and Deceit--Intentional Misrepresentation of Fact of Solvency of Debtor [Civ. Code § 1710(1)] and Suppression of Fact of Insolvency of Debtor [Civ. Code § 1710(3)]--By Creditor Against Bank and Employee

[1] FORM Complaint for Damages [Civ. Code §§ 1709, 3333]--For Fraud and Deceit--Intentional Misrepresentation of Fact of Solvency of Debtor [Civ. Code § 1710(1)] and Suppression of Fact of Insolvency of Debtor [Civ. Code § 1710(3)]--By Creditor Against Bank and Employee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Fraud and Misrepresentation)
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Fraudulent Misrepresentation)

1. [*Capacity and residence of defendants. See § 95.433[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 95.430[1], Paragraph 2.*]

3. Defendant _____ [*name*] is in the employ of defendant corporation as _____ [*specify defendant's position with bank, e.g.,* the branch manager at a branch of the bank conducted by defendant corporation at _____ (*street address*), _____ (*city*), California, known as defendant corporation's _____ (*specify*) branch].

4. At all times mentioned in this complaint, defendant _____ [*name*] was the agent and employee of defendant corporation, and in doing the things alleged in this complaint was acting within the course and scope of his/her agency and with the permission and consent of defendant corporation.

5. On or about _____ [*date*], in response to plaintiff's inquiry as to the solvency and creditworthiness of _____ [*name of debtor*] _____ [*specify, e.g.,* relative to his/her ability to repay a potential business loan from plaintiff to cover an overdraft in _____'s (*name of debtor*) commercial account at _____ (*name of third-party bank*)], defendant _____ [*name*] falsely and fraudulently represented to plaintiff, in writing, _____ [*specify statements of material fact claimed by plaintiff to be false, e.g.,* that _____ (*name of debtor*) was solvent, in good credit, and worth in excess of his/her liabilities]. [A copy of _____ (*identify document containing representations*) containing these representations, signed by defendant _____ (*name*), is attached to this complaint, marked Exhibit "A," and incorporated herein by reference.]

6. The representations made by defendant _____ [*name*], as alleged above were, in fact, false, in that _____ [*specify true facts, e.g.,* at the time the representations were made to plaintiff, _____ (*name of debtor*) was, in fact, insolvent, and neither in good credit nor worth in excess of his/her liabilities].

7. On or about _____ [*date*], in reliance on the representations of defendant _____ [*name*], plaintiff was induced to and did _____ [*specify plaintiff's acts in reliance on defendant's misrepresentations, e.g.,* obtain a loan of $_____ from defendant corporation that plaintiff, in turn, loaned to _____ (*name of debtor*), together with $_____from plaintiff's own commercial account at the _____ (*name of branch*) of defendant corporation]. Had plaintiff known the true nature of the creditworthiness and solvency of _____ [*name of debtor*], plaintiff would not have so acted.

8. Plaintiff's reliance on the representations of defendant _____ [*name*] were justified in that _____ [*allege facts showing justifiable reliance, e.g.,* the facts of _____'s (*name of debtor*) solvency and creditworthiness were peculiarly within the knowledge of defendant _____ (*name*), and not within plaintiff's knowledge].

9. Defendant _____ [*name*] knew these representations to be false when he/she made them. Defendant _____ [*name*] made these representations with the intent to defraud and deceive plaintiff, and with the intent to induce plaintiff to act in reliance on the representations, as alleged above, in that _____ [*state facts tending to show defendant's motive to induce plaintiff to act, e.g.,* the _____ (*name of branch*) of defendant corporation stood to lose $_____ if _____'s (*name of debtor*) overdraft at _____ (*name of third-party bank*) was not covered]. At the time these representations were made, and at the time plaintiff took the action alleged above, plaintiff was ignorant of the falsity of these representations and believed them to be true.

10. Thereafter, and on or about _____ [*date*], plaintiff demanded repayment of the sum of $_____, together with interest thereon, from _____ [*name of debtor*]. He/She has

failed and refused, and continues to fail and refuse, to pay plaintiff this sum or any part of it.

11. As a proximate result of defendant's misrepresentations as alleged above, plaintiff was induced to make the loan on which _____ [*name of debtor*] defaulted, all to plaintiff's general damage in the amount of $_____.

12. In doing the acts alleged above, defendants acted with oppression, fraud, and malice, and plaintiff is therefore entitled to punitive damages.

SECOND CAUSE OF ACTION
(Fraudulent Concealment)

13. Plaintiff refers to Paragraphs 1 through 11 of his/her first cause of action and incorporates them into his/her second cause of action as if the same were alleged verbatim herein.

14. On or about _____ [*date*], in written response to plaintiff's inquiry as to the solvency and creditworthiness of _____ [*name of debtor*], as alleged above, defendant _____ [*name*] failed to reveal and suppressed the facts _____ [*specify facts suppressed by defendant, e.g.,* that _____ (*name of debtor*) was insolvent and not worth in excess of his/her liabilities]. The suppression of these facts was likely to and did mislead plaintiff in light of representations made by defendant _____ [*name*], as alleged above, relative to _____'s [*name of debtor*] solvency and good creditworthiness. [A copy of _____ (*identify document*) reflecting these suppressed facts, signed by defendant _____ (*name*), is attached to this complaint, marked Exhibit "B," and incorporated herein by reference.]

15. On or about _____ [*date*], in reliance on the representations of defendant _____ [*name*], plaintiff was induced to and did _____ [*specify plaintiff's acts in reliance on defendant's misrepresentations, e.g.,* obtain a loan of $_____ from defendant corporation that plaintiff, in turn, loaned to _____ (*name of debtor*), together with $_____ from plaintiff's own commercial account at the _____ (*name of branch*) of defendant corporation]. Had plaintiff known the true nature of the creditworthiness and solvency of _____ [*name of debtor*], plaintiff would not have so acted.

16. Plaintiff's reliance on defendant _____'s [*name*] suppressions of fact was justified in that _____ [*allege facts showing justifiable reliance, e.g.,* these facts were peculiarly within the knowledge of defendant _____ (*name*) and not within plaintiff's knowledge].

17. At the time defendant _____ [*name*] suppressed these facts and at the time plaintiff acted in reliance thereon, plaintiff was ignorant of the existence of the facts so suppressed. Had plaintiff known of their existence, he/she would not have so acted.

18. Defendant _____ [*name*] suppressed facts as to _____'s [*name of debtor*] solvency and creditworthiness with the intent to defraud and deceive plaintiff, and with the intent to induce plaintiff to act in reliance thereon, as above alleged, in that _____ [*state facts tending to show defendant's motive to induce plaintiff to act, e.g.,* the _____ (*name of branch*) of defendant corporation stood to lose $_____ if _____'s (*name of debtor*) overdraft at _____ (*name of third-party bank*) was not covered]. At the time defendant _____ [*name*] suppressed these facts, and at the time plaintiff took the action alleged above, plaintiff was ignorant of the actual facts and believed defendant _____'s [*name*] misrepresentations to be true for want of communication of the suppressed facts.

19. Thereafter, and on or about _____ [*date*], plaintiff demanded repayment of the sum of $_____, together with interest thereon, from _____ [*name of debtor*]. He/She has failed and refused, and continues to fail and refuse, to pay plaintiff this sum or any part of it.

20. As a proximate result of defendant's suppression of facts as alleged above, plaintiff was induced to make the loan on which _____ [*name of debtor*] defaulted, all to plaintiff's general damage in the amount of $_____.

21. In doing the acts alleged above, defendants acted with oppression, fraud, and malice, and plaintiff is therefore entitled to punitive damages.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

On the FIRST CAUSE OF ACTION:

1. For general damages in the sum of $_____ with interest thereon at _____ percent per annum from _____ [*date*];

2. For exemplary and punitive damages;

On the SECOND CAUSE OF ACTION:

3. For general damages in the sum of $_____ with interest thereon at _____ percent per annum from _____ [*date*];

4. For exemplary and punitive damages;

On all CAUSES OF ACTION:

5. For costs of suit herein incurred; and

6. For such other and further relief as the court deems necessary.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 95.430[1].*]

[2] Use of Form

This form of complaint is for use by a creditor in an action against a bank and its branch manager for damages for fraud arising out of the bank's intentional misrepresentation and suppression of the fact of the insolvency of a debtor of the creditor [*Civ. Code §§ 1710(1), 1710(3)*].

The availability of such an action appears to be limited to commercial transactions involving business entities or individuals engaged in their business capacities, inasmuch as the rights and remedies surrounding credit reporting in consumer transactions are largely regulated by the federal Fair Credit Reporting Act (*15 U.S.C. § 1681 et seq.*), the California Consumer Credit Reporting Agencies Act (*Civ. Code § 1785.1 et seq.*), and the California Investigative Consumer Reporting Agencies Act (*Civ. Code § 1786 et seq.*). Additionally, the definitions of consumer credit reports and consumer credit reporting agencies under *Civ. Code § 1785.3(c), (d)* of the California Consumer Credit Reporting Agencies Act have been held inapplicable to credit information, and a provider of that information, concerning business entities or individuals engaged in business in their business capacities and not as consumers [*Mende v. Dun & Bradstreet, Inc. (9th Cir. 1982) 670 F.2d 129, 133-134]* . Note, however, that one who, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling, evaluating, or disseminating information on the checking account experiences of consumer customers of banks or other financial institutions is subject (with some exceptions) to the laws that govern consumer credit reporting agencies [*Civ. Code § 1785.5*]. For discussion of consumer credit reporting agencies, see Ch. 129, *Consumer Credit Reporting* .

This complaint is adapted from the facts in *Bank of America v. Hutchinson (1963) 212 Cal. App. 2d 142, 27 Cal. Rptr. 787* .

[3] Allegations

This complaint alleges two causes of action for fraud and deceit. The first cause of action is for misrepresentation of a fact and includes allegations of:

- Defendant's false representations (Paragraphs 5 and 6).
- Plaintiff's justifiable reliance on the false representations (Paragraphs 7 and 8).
- Defendant's knowledge of their falsity and intent to defraud plaintiff (Paragraph 9).
- Plaintiff's damages (Paragraphs 10 and 11) [*see Civ. Code §§ 1709, 1710(1)*].

The second cause of action is for suppression of a fact, and includes allegations of:

- Defendant's suppression of facts by giving information of other facts that are likely to mislead absent communication of the suppressed facts (Paragraph 14) [*see Bank of America v. Hutchinson (1963) 212 Cal. App. 2d 142, 148, 27 Cal. Rptr. 787]* .
- Defendant's intent to induce reliance (Paragraph 18).
- Plaintiff's justifiable reliance on plaintiff's suppression of facts (Paragraph 15-17) [*see Civ. Code § 1710(3)*]; and (4) plaintiff's damages (Paragraphs 19-20) [*see Civ. Code §§ 1709, 1710(1)*].

The complaint includes an optional paragraph in each cause of action to seek punitive damages (Paragraphs 12 and 21) [*see Civ. Code § 3294(a), (c)(3)*].

[4] Statute of Frauds

No evidence is admissible to charge a person on a representation as to the credit of a third person unless the representation, or some memorandum of it, is in writing, and either subscribed by or in the handwriting of the party to be charged [*Code Civ. Proc. § 1974*]. The statute applies to all third-party deceit actions, whether based on a negligence

theory or an intentional misrepresentation theory [*Seneca Communications, Inc. v. International Bank of California (1980) 103 Cal. App. 3d 541, 547-550, 163 Cal. Rptr. 176]* .

If a defendant permits parol proof of the representation of credit, without timely objection, the defense of *Code Civ. Proc. § 1974* is generally deemed to be waived, since the statute relates only to a remedy and not to a right [*Bank of America v. Hutchinson (1963) 212 Cal. App. 2d 142, 149, 27 Cal. Rptr. 787]* .

[5] State Statutes

Measure of damages in actions for deceit. *Civ. Code § 1709*

Deceit is suggestion, as fact, of that which is not true by one who does not believe it to be true. *Civ. Code § 1710(1)*

Deceit is suppression of fact by one who gives information of other facts likely to mislead for want of communication of suppressed fact. *Civ. Code § 1710(3)*

[6] Decisions

Test of whether cause of action comes within *Code Civ. Proc. § 1974* is whether action can be sustained without proof of representation of third party's credit. *Seneca Communications, Inc. v. International Bank of California (1980) 103 Cal. App. 3d 541, 547, 163 Cal. Rptr. 176*

Two tests of whether misrepresentation is within *Code Civ. Proc. § 1974* are (1) if primary intent and purpose is to procure credit for another, and (2) if misrepresentation induces recipient to enter into transaction resulting in debt due from third party. *Seneca Communications, Inc. v. International Bank of California (1980) 103 Cal. App. 3d 541, 552, 163 Cal. Rptr. 176*

[7] Cross References

See also *§ 95.430*

For a discussion of and forms for use in actions involving consumer credit reporting, see Ch. 129, *Consumer Credit Reporting*

For a discussion of and forms of complaints for use in actions involving fraud and deceit, see Ch. 269, *Fraud and Deceit*

For a discussion of and forms for use in raising the defense of the statute of frauds, see Ch. 530, *Statute of Frauds*

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9-95 California Forms of Pleading and Practice--Annotated § 95.435

§ 95.435 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for Wrongful Exercise of Setoff [Fin. Code § 6660]--By Account Holder Against Savings Association--Failure to Give Notice or React Properly to Response Thereto [Fin. Code § 6660(c), (d)]

[1] FORM Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for Wrongful Exercise of Setoff [Fin. Code § 6660]--By Account Holder Against Savings Association--Failure to Give Notice or React Properly to Response Thereto [Fin. Code § 6660(c), (d)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR WRONGFUL
_____ [*name*],	)	EXERCISE OF SETOFF
a Corporation,	)	[Amount demanded _____
Defendant.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Defendant is, and at all times mentioned in this complaint was, a corporation organized and existing as a savings association under the laws of the State of California, with it principal office in _____ [*city*], _____ County, California [*if a county other than the county of the principal office branch is involved, add* and a branch office located in _____ (*city*), _____ (*county*), California].

2. On or about _____ [*date*], plaintiff opened a savings account designated No.

_____, with defendant at its office located in _____ [*city*], _____ [*county*], California, which account stood on defendant's books to the credit of plaintiff's name and for his/her use and benefit. Plaintiff _____ [has kept deposits of money in this account ever since and to the present *or* maintained deposits in this account thereafter until on or about _____ (*date*)(, at which time plaintiff closed the account)].

3. On or about _____ [*date*], plaintiff had a balance of $_____ in his/her account, representing accumulated deposits and interest on the deposits to date, and which account, under defendant's regulations, was earning interest at _____ percent per annum. [The interest rate was changed to _____ percent from and after _____ (*date*), at which rate the account to earn interest _____ (to the present *or* until the account was closed).]

4. On or about _____ [*date*], plaintiff became obligated to defendant in the amount of $_____, to be repaid with interest at _____ percent, [payable in periodic installments and] due on _____ [*date*]. This obligation arose from an extension of credit by defendant to plaintiff primarily for personal, family, or household purposes, and has never been reduced to judgment.

5. On or about _____ [*date*], defendant set off against plaintiff's account the above debt that it claimed was owing, in the sum of $_____, and deducted this amount from the account, leaving plaintiff unable to withdraw that amount[, or any part of that amount or interest on it,] from the account. The balance after the setoff was $_____.

[*EITHER, if defendant failed to notify plaintiff of the impending setoff*]

6. At no time before or after the setoff did defendant notify plaintiff of the setoff as required under *Financial Code Section 6660(c)*, nor did defendant transmit to plaintiff a response form inquiring as to any defenses to the act of setoff as required under that code provision.

[*OR, if plaintiff responded to the notice of setoff*]

6. On or about _____ [*date*], defendant sent plaintiff a notice informing plaintiff that defendant _____ [had exercised *or* was about to exercise] a setoff on the account, and inviting plaintiff to make timely assertion of any defenses to the setoff. A copy of this notice is attached to this complaint as Exhibit A and incorporated by reference. Plaintiff filled out the response form attached for assertion of such defenses and _____ [mailed *or* delivered] the form to defendant on or about _____ [*date*], as required under *Financial Code Section 6660(d)*, claiming that the debt was _____ [paid *or* not then owing *or* not subject to setoff because the money in the account was _____ (*describe exempt status, e.g.*, proceeds from an execution sale of household furnishings or other personal effects)]. A copy of this response form is attached to this complaint as Exhibit B and incorporated by reference.

[*CONTINUE*]

7. In fact defendant had no right to the funds in plaintiff's account for purposes of the debt's setoff because the debt was _____ [paid *or* not then owing *or* not subject to setoff because the money in the account was _____ (*describe exempt status, e.g.*, proceeds from execution sale of household furnishings or other personal effects, and therefore was exempt pursuant to *Code of Civil Procedure Section 704.020*)].

8. On or about _____ [*date*], plaintiff attempted to withdraw certain funds from his/her account, but was told personally that a setoff had been exercised and the amounts covered thereby were no longer in the account. Plaintiff thereon, and on subsequent occasion, protested to defendant that the setoff was wrongful and demanded that the setoff be reversed and the deducted amount be credited to the account, with all interest accruing on the account, immediately. Defendant on these occasions, and ever since, has refused to repay the amounts to plaintiff or credit the account with payments.

[9. _____ (At such time of protest *or* On or about _____ (*date*),) plaintiff explained to defendant that plaintiff was dependent on the ability to withdraw and utilize these amounts for the purposes of _____ (*explain proposed uses for the funds*), and that it would be very difficult for plaintiff to obtain the funding in any other manner. Plaintiff expended a great deal of effort in raising the funds elsewhere and finally did obtain a loan, on or about _____ (*date*), from _____ (*name of lender*) for $_____, _____ (at _____ percent interest per annum for _____ years *or* with a gross obligation of $_____ as interest for the full term). In raising the funds, plaintiff _____ (*describe costs and inconvenience incurred in securing loan, e.g.,* was forced to be absent from work and to incur travel expenses, and was otherwise subject to much mental anguish in attempting to find alternate funding.]

[10. As of and from the time of exercising the setoff, defendant at all times was guilty of _____ (oppression *or* fraud *or* malice *or any combination thereof*) in instituting and continuing the setoff, and in refusing to reverse it and credit plaintiff's account with the deducted funds in that _____ (*allege facts constituting oppression, fraud, and/or malice within meaning of Civ. Code § 3294)* .]

11. As a proximate result of defendant's wrongful conduct, plaintiff has been damaged by loss of the amount in plaintiff's account owing on the date of setoff in the amount of $_____, [and] loss of interest accruing from date of setoff in the amount of $_____ [, interest on the replacement loan in the amount of $_____, loss of _____ (wages *or* profits from plaintiff's business) due to absence in seeking a replacement loan in the amount of $_____, and for travel and related expenses incurred in seeking a replacement loan in the amount of $_____].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages in the sum of $_____ for loss of funds in plaintiff's account to defendant's setoff;

[2. For special damages in the sum of $_____representing interest owing on the loan plaintiff obtained to replace such account funds;]

[3. For special damages in the amount of $_____ for loss of _____ (wages *or* profits) in obtaining the replacement loan;]

[4. For special damages in the amount of $_____ for travel and incidental expenses in seeking replacement funds;]

[5. For punitive damages;]

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 95.430[1]* .]

[2] Use of Form

This complaint is for use by a plaintiff whose savings account balance has been wrongfully subjected to a setoff by the defendant association, based on an underlying consumer debt, because of the association's improper notification procedure or the association's failure to react properly to plaintiff's return of the response form [*see Fin. Code § 6660*.]. For discussion of wrongful setoff, see *§ 95.294*.

[3] Allegations

This complaint alleges, in pertinent part:

- The balance of the plaintiff's account before the setoff (Paragraph 3);
- A consumer debt owed to the defendant (Paragraph 4);
- The defendant's setoff against the plaintiff's account (Paragraph 5);
- The defendant's failure to notify the plaintiff of the impending setoff, or the plaintiff's delivery of a response form after receipt of a notice (Paragraph 6);
- The defendant's lack of entitlement to a setoff (Paragraph 7);
- The plaintiff's inability to withdraw funds after the setoff and the defendant's refusal to pay or credit the amount that was set off (Paragraph 8) [*Fin. Code § 6660*];
- The resulting general and special damages (Paragraph 11).

The complaint includes optional allegations to support special damages (Paragraph 9) and punitive damages (Paragraph 10) [*see Civ. Code § 3294(a), (c)*].

[4] Setoff Limitations Only Applicable to Consumer Debts and Accounts

The restrictions of *Fin. Code § 6660* apply to natural persons owing a interest-bearing obligation or an obligation that by its terms is payable in installments, which has not been reduced to judgment, arising from an extension of credit primarily for personal, family, or household purposes. A "debt" under *Fin. Code § 6660* does not mean a charge for savings and loan services, for a debit for uncollected funds, for dishonored checks cashed for a customer, or for an overdraft account imposed by an association on a savings account [*Fin. Code § 6660(a)(4), (5)*]. The restrictions of *Fin. Code § 6660* also apply to account holders [*see Fin. Code § 6660(a)(2)* (account holder defined)] of withdrawable or repurchasable shares, investment certificates, deposits, or savings accounts as defined in *12 C.F.R. §§ 561.2, 561.16, 561.28, 561.29,* and *561.42* [*Fin. Code § 6660(a)(1)*].

[5] Minimum Balance Requirement

An association may not exercise any setoff if it would result in an aggregate balance of less than $1,000 as shown on the association records for all that customer's accounts [*Fin. Code § 6660(b)*]. For form of allegation for failure to leave minimum balance, *see § 95.436*.

[6] Notice Requirement

Within one day following the exercise of a setoff against a customer's account an association must deliver to the account holder personally, or mail postage prepaid to the address of each customer as shown on the records of the association a written notice of the setoff [*Fin. Code § 6660(c)*]. For a discussion of the contents of the notice as well as a sample notice (and response), see *California Legal Forms, Ch. 102A, Personal Property Liens, § 102A.345* (Matthew Bender).

[7] Effect of Returning Response Form

To contest the setoff, the account holder must return the response form that is included in the written notice of setoff and the association must receive the form within 20 days after the account holder receives the notice. If it is received within this time period, the amount of the setoff for any debt claimed to be owed to the association by the account holder and any service charges resulting from the setoff must be reversed and be credited to the account holder's account not later than the end of the third business day following receipt of the executed response form [*Fin. Code § 6660(d)*].

[8] Inapplicability of Limitations

The limitations provided in *Fin. Code § 6660* do not apply to accounts in which the association has a security interest expressed by a written contract as collateral for the debt owing to the association by the customer [*Fin. Code § 6660(e)*], or when a customer previously has authorized an association in writing to periodically debit an account as the agreed method of payment of the debt [*Fin. Code § 6660(f)*].

[9] Punitive Damages

When a statute recognizes a cause of action for violation of a right, all forms of relief granted to civil litigants generally, including appropriate punitive damages, are available unless a contrary legislative intent appears [*Commodore Home Systems, Inc. v. Superior Court (1982) 32 Cal. 3d 211, 215, 185 Cal. Rptr. 270, 649 P.2d 912]* . Punitive damages are available to civil litigants generally when there is a breach of an obligation that does not not arise from contract, and the defendant has been proven guilty, by clear and convincing evidence, of oppression, fraud, or malice [*Civ. Code § 3294(a), (c)*]. The word "contract" in *Civ. Code § 3294* is used in its ordinary sense to mean an agreement between the parties, not an obligation imposed by law despite the absence of any such agreement [*Ward v. Taggart (1959) 51 Cal. 2d 736, 743, 336 P.2d 534]* .

Although the depositor-depository relationship between a customer and an association arises out of contract, the requirements that an association take certain steps in particular transactions such as setoff [*Fin. Code § 6660*] or dealing with an adverse claim [*Fin. Code § 6661*; *see § 95.432*] appear to derive exclusively from regulatory controls embodied in statutes with comprehensive regulatory features aimed at the goal of special protection for a particular class, that is, the account holder [*see Hudson v. Craft (1949) 33 Cal. 2d 654, 660, 204 P.2d 1]* . When there is a tortious breach of an obligation imposed by law, even if the conduct constituting the tort also involves the breach of a covenant in the contract, the plaintiff may recover punitive damages under *Civ. Code § 3294* [*see Vale v. Union Bank (1979) 88 Cal. App. 3d 330, 339-340, 151 Cal. Rptr. 784* (exemplary damages awarded against trustee for breach of his fiduciary duties); *Richardson v. Employers Liab. Assur. Corp. (1972) 25 Cal. App. 3d 232, 239, 244-246, 102 Cal. Rptr. 547* (punitive damages awarded for tortious breach by insurer of obligation imposed by law, to deal fairly and in good faith with its insured; overruled on other grounds in *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 580-581 n.10, 108*

Cal. Rptr. 480, 510 P.2d 1032)].

Therefore, the violation of the setoff provisions, even if also constituting a breach of contract, would involve a tortious breach of an obligation imposed by statute, and if the defendant has been proven guilty, by clear and convincing evidence, of oppression, fraud, or malice, plaintiff should be able to recover punitive damages [*see Civ. Code § 3294(a), (c)*; *Hudson v. Craft (1949) 33 Cal. 2d 654, 660, 204 P.2d 1* ; *Richardson v. Employers Liab. Assur. Corp. (1972) 25 Cal. App. 3d 232, 239, 244-246, 102 Cal. Rptr. 547* (overruled on other grounds in *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 580-581 n.10, 108 Cal. Rptr. 480, 510 P.2d 1032*); *Vale v. Union Bank (1979) 88 Cal. App. 3d 330, 339-340, 151 Cal. Rptr. 784* (cases decided before 1987 amendment to *Civ. Code § 3294*)].

[10] State Statutes

Restrictions on bank's right of setoff against customer. *Fin. Code § 864*

Restrictions on association's right of setoff against account holder's accounts. *Fin. Code § 6660*

[11] Law Reviews

Note, *Banker's Lien and Equitable Setoff: Constitutional and Policy Considerations for Protecting Bank Customers, 27 Stan. L. Rev. 1149 (1975)*

[12] Cross References

For discussion and alternative forms for pleading punitive damages, see Ch. 177, *Damages* .

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Volume 9: Bailments thru Boats and Boating-Chs. 93-100
Chapter 95 BANKS, DEPOSITS, AND CHECKS
PART IV. FORMS
B. Deposits

9-95 California Forms of Pleading and Practice--Annotated § 95.436

§ 95.436 Allegation--Failure to Leave Minimum Balance [Fin. Code § 6660(b)]

[1] FORM Allegation--Failure to Leave Minimum Balance [Fin. Code § 6660(b)]

Defendant's exercise of the above-described setoff resulted in an aggregate balance of less than $1,000 as shown on defendant's records for _____ [plaintiff's account *or* all of plaintiff's deposit accounts maintained by plaintiff as a customer with defendant] in contravention of the requirements of *Financial Code Section 6660(b)*.

[2] Use of Form

This allegation may be used to plead the wrongful setoff by a defendant association against plaintiff's account, for an underlying consumer obligation, when the balance left is under $1,000 [*see Fin. Code § 6660(b)*]. The allegation may be substituted for Paragraphs 6 and 7 in *see § 95.435*, or may be made the basis of a separate count.

[3] Minimum Balance Requirement

An association is limited in exercising any setoff for a debt claimed to be owed to the association by a customer in that a setoff shall not result in an aggregate balance of less than $1,000 as shown on the records of the association for all accounts maintained by a customer with the association or any of its branches [*Fin. Code § 6660(b)*].

[4] Cross References

See also *§ 95.435*.

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[Reserved]

§§ 95.437[Reserved]

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Volume 9: Bailments thru Boats and Boating-Chs. 93-100
Chapter 95 BANKS, DEPOSITS, AND CHECKS
PART IV. FORMS
C. Check Collections

9-95 California Forms of Pleading and Practice--Annotated § 95.450

§ 95.450 Complaint for Money [Civ. Code § 3302] or Damages [Civ. Code §§ 1714(a), 3333; Com. Code § 4103(a)]--By Drawer Against Drawee Bank to Recover Amount Improperly Charged to Account [Com. Code § 4401(a)]--Check Cashed Without Authorized Drawer's Signature [Com. Code §§ 3401-3406] or With Forged Endorsement [Com. Code §§ 3205, 3401-3406]

[1] FORM Complaint for Money [Civ. Code § 3302] or Damages [Civ. Code §§ 1714(a), 3333; Com. Code § 4103(a)]--By Drawer Against Drawee Bank to Recover Amount Improperly Charged to Account [Com. Code § 4401(a)]--Check Cashed Without Authorized Drawer's Signature [Com. Code §§ 3401-3406] or With Forged Endorsement [Com. Code §§ 3205, 3401-3406]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONEY OR DAMAGES
_____ [*name*],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Unauthorized Drawer's Signature or Forged Endorsement)

1. [*Name, capacity, and location of defendant financial institution. Choose appropriate allegation from §§ 95.410, 95.411]*

[2. *Fictitious name allegation, if appropriate. See § 95.430[1], Paragraph 2.]*

[3. *Agency allegation, if appropriate. See § 95.430[1], Paragraph 3.*]

4. [*Opening of checking account, incorporating governing instruments. See § 95.430[1], Paragraph 4.*]

5. Defendant is authorized to charge the account for checks properly drawn in accordance with the signature card[, plaintiff's instructions,] and the laws governing checks and checking accounts. Withdrawals were permitted from the account only by check or other order bearing the signature(s) of [both] plaintiff [*specify any other signatures required or authorized, e.g.,* and her bookkeeper, John Alias].

[*EITHER, if drawer's signature is forged or by unauthorized person*]

6. On or about _____ [*date*], check number _____ in the amount of $_____ drawn on plaintiff's account _____ [on which the drawer's signature, which purports to be that of plaintiff, had been forged *or* and bearing the signature of _____ (*name unauthorized signer*) as drawer] was presented to defendant for payment. The purported drawer's signature was made without plaintiff's knowledge or authorization. Defendant paid the check and charged plaintiff's account for that payment. [A copy of the check is attached as Exhibit "B" and incorporated by reference.]

[*OR, if the checks had fewer than the required number of drawer's signatures*]

6. Between _____ [*date*], and _____ [*date*], there were presented to defendant for payment _____ [*number of checks, e.g.,* 16] checks in the aggregate amount of $_____ bearing only the signature of _____ [*name*] and drawn on plaintiff's account. Defendant paid these checks and charged plaintiff's account for the payments. These checks were made without plaintiff's knowledge or authorization. [Copies of the checks are attached as Exhibit "B" and incorporated by reference.] The checks charged to plaintiff's account by defendant were those with the following number, made for the following amounts, and charged on the following dates: _____ [*specify*].

[*OR, if endorsement is forged, missing, or improper*]

6. On or about _____ [*date*], plaintiff executed, issued, and delivered to _____ [*name of payee*] his/her/its check number _____ in the amount of $_____, payable to _____ [*name of payee exactly as set forth in check*], and drawn on plaintiff's account. On or about _____ [*date*], that check was presented to defendant for payment _____ [without endorsement *or* with the endorsement of _____ (*specify endorsement that differs from payee designation*) *or* with a forgery of the payee's signature as endorser]. Plaintiff is informed and believes and thereon alleges that the _____ [lack of endorsement *or, if endorsement differs from designated payee,* endorsement by _____ (*name of endorser*) *or, if endorsement was forged,* purported endorsement of _____ (*name of payee*)] was made without knowledge or authorization of _____ [*name of payee*]. Plaintiff [has issued a replacement check to the payee and] has neither made any demand of, nor received any reimbursement from, _____ [*name(s) of depositary and/or collecting bank(s) through which check was negotiated*], the depositary or collecting bank(s) through which the check was negotiated. Defendant

paid the check and charged plaintiff's account for that payment. [A copy of the check is attached as Exhibit "B" and incorporated by reference.]

[*CONTINUE*]

7. Defendant's payment of the check(s) and consequent charge(s) to plaintiff's account were contrary to the signature card agreement of the parties and the laws governing checks and checking accounts.

8. On or about _____ [*date*], and prior to the commencement of this action, plaintiff demanded of defendant that it replace and recredit plaintiff's bank account with the sum of $_____, and defendant has failed and refused and still fails and refuses to do so.

9. By reason of the foregoing, there is now due, owing, and unpaid from defendant to plaintiff, the sum of $_____ with interest thereon from _____ [*date*].

[10. As a further proximate result of the unauthorized and improper charges made by defendant to plaintiff's account, _____ (*describe any additional consequential damages, e.g.,* the balance in plaintiff's account was decreased below the amount plaintiff believed he/she maintained on deposit, causing checks properly drawn by plaintiff on the account to be dishonored by defendant. This in turn resulted in damages to plaintiff's credit reputation, in an amount according to proof.]

SECOND CAUSE OF ACTION
(Negligence)

11. Plaintiff realleges and incorporates herein by reference each and every allegation contained in Paragraphs 1-10 of the First Cause of Action.

12. On or about _____ [*date*], plaintiff discovered that _____ [*describe actual or potential irregularity, e.g.,* checks numbered 1026 through 1050, inclusive, were lost or missing (and presumed stolen)]. Plaintiff immediately notified defendant of the _____ [*specify irregularity, e.g.,* loss] _____ [*specify manner of giving notice, e.g.,* by telephone and in a confirming letter, a copy of which is attached as Exhibit "C" and incorporated by reference].

13. Defendant so failed to exercise ordinary care in maintaining its records and operating, managing, and controlling its check processing functions as to cause unauthorized checks with _____ [*specify defect in signature or endorsement, e.g.,* forged drawer's signatures] to be charged to plaintiff's account, to plaintiff's damage in the sum of $_____ [*amount of checks*].

[*Prayer. See § 95.430.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 95.430[1].*]

[2] Use of Form

This complaint is for use in an action by the holder of a checking account against a bank for the recovery of the amount of checks cashed without sufficient authorized drawer's signatures, or with a forged drawer's signature or forged endorsement. It contains two causes of action--one based on the statutory duty under *Com. Code § 4401(a)* only to charge items in accordance with the depositor's order, and one based on "failure to exercise ordinary care" [*see Com. Code § 3103(a)(7)* (discussed in *§ 95.311[5]*)] or negligence [*see Civ. Code § 1714(a)*; *see Copesky v. Superior Court (1991) 229 Cal. App. 3d 678, 694, 280 Cal. Rptr. 338* (causes of action stated for negligence and breach of contract by drawer against drawee for having paid checks on signature forged by plaintiff's employee; after *Foley*, no longer any tort liability for breach of covenant of good faith and fair dealing)].

If properly payable checks have been dishonored or returned unpaid because of insufficient funds and no overdraft would have been created by paying those items if the account had been credited for the improper charge as soon as plaintiff notified defendant of it (or an overdraft agreement was in effect), counsel may wish to add a third cause of action for wrongful dishonor [*see § 95.456*].

[3] Statutory Versus Common Law Action

The cause of action under *Com. Code § 4401* has been equated with a contract measure of damages [*see, e.g., Joffe v. United California Bank (1983) 141 Cal. App. 3d 541, 554-555, 557-558, 190 Cal. Rptr. 443* ; *Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank (1978) 85 Cal. App. 3d 797, 804-805, 149 Cal. Rptr. 883]* . However, consequential damages are available for the generally foreseeable wrongful dishonors flowing from exhaustion of the account balance in payment of unauthorized items [*see Com. Code § 4402(b)*; *see § 95.456*].

The Division 4 measure of damages for failure to exercise ordinary care in handling an item is the amount of the item reduced by an amount that could not have been realized by the exercise of ordinary care. However, if the bank acted in bad faith, the customer may recover any other damages he, she, or it suffered as a proximate consequence [*Com. Code § 4103(e)*].

The older cases such as Basch v. Bank of America (1943) 22 Cal. 2d 316, 321, 139 P.2d 1 , hold that it is negligence of a drawee to fail to recognize its drawer's signature and to pay a check with a forged drawer's signature. Those cases are displaced by the second sentence of the Commercial Code definition of "ordinary care" [*see Com. Code § 3103(a)(7)* (discussed in *§ 95.311[5]*)].

[4] Limitation Periods Applicable

[a] Three-Year Versus One-Year

The old conflict as to whether *Com. Code § 4401(a)* has displaced common law negligence theories in regard to the drawee's obligations in processing checks charged against its depositor's account [*compare Joffe v. United California Bank (1983) 141 Cal. App. 3d 541, 557-558, 190 Cal. Rptr. 443* (former *Com. Code § 4401(1)*, now *Com. Code § 4401(a)*, displaced common law negligence) *with Commercial Cotton Co. v. UnitedCalifornia Bank (1985) 163 Cal. App. 3d 511, 514-516, 515 n.1, 209 Cal. Rptr. 551* (drawee admitted negligence)] is less compelling when consequential damages are available in any related wrongful dishonor cause of action [*see Com. Code § 4402(b)*]. Nevertheless, old distinctions may determine how counsel denominates the cause of action.

The statutory action is subject to the three-year limitation period of *Com. Code § 4111* for "[a]n action to enforce an obligation, duty, or right arising under [Division 4 of the Commercial Code]." However, *Code Civ. Proc. § 340(c)*

establishes a one-year limitation period for an action "by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement." The later-enacted and more general three-year limitation period of *Com. Code § 4111* does not supersede or implicitly repeal the specific one-year limitation period of *Code Civ. Proc. § 340(c)* [*Chatsky & Assocs. v. Superior Court (2004) 117 Cal. App. 4th 873, 875, 12 Cal. Rptr. 3d 154]* . Furthermore, *Com. Code § 4406(f)* precludes a depositor from asserting a claim against a bank based on a forged or unauthorized signature on a check drawn on the depositor's account unless the depositor discovers and reports the matter within one year after the bank made available a statement of account showing payment of the check, regardless of either the depositor's or the bank's lack of care [*Chatsky & Assocs. v. Superior Court (2004) 117 Cal. App. 4th 873, 877, 12 Cal. Rptr. 3d 154* (*Com. Code § 4406(f)* is issue-preclusion statute rather than statute of limitations, and claims that are not dependent on proof of forgery will not be precluded)]. The limitation period of *Code Civ. Proc. § 340(c)* and the period in which a depositor must act under *Com. Code § 4406(f)* both begin to run on receipt of an account statement showing the wrongful payment of the check [*Chatsky & Assocs. v. Superior Court (2004) 117 Cal. App. 4th 873, 877, 880, 12 Cal. Rptr. 3d 154* ; *Roy Supply Inc. v. Wells Fargo Bank (1995) 39 Cal. App. 4th 1051, 1074, 46 Cal. Rptr. 2d 309]* .

Note that pursuant to *Com. Code § 4406(d)*, if the customer fails to comply with *Com. Code § 4406(c)* as to reviewing items, when that person has forged checks on the account, the customer is precluded from making a claim against the bank for unauthorized payment unless the customer notified the bank no more than 30 days after the first forged item was included in a monthly statement or canceled checks, and should have been discovered. This preclusion is conditional because the customer may avoid its application by establishing that the bank failed to exercise ordinary care in paying the item and that failure contributed to the loss. *Espresso Roma Corp. v. Bank of America (2002) 100 Cal. App. 4th 525, 528* Cal. R ptr. 2d 549.

For discussion of the award of punitive damages for bad faith assertion of the one-year preclusion, see *§ 95.452[3]*.

[b] No Limit if Action Is on Deposit, Unless Drawee Is Insolvent

If the action is based on a charge made for a check that did not have the required drawer's signature(s), as opposed to a forged one, it is considered an action to recover money deposited with a bank and is governed by *Code Civ. Proc. § 348*, which provides no limitation on the time for initiating the action [*Bullis v. Security Pac. Nat. Bank (1978) 21 Cal. 3d 801, 813, 148 Cal. Rptr. 22, 582 P.2d 109* ; *Far West Citrus, Inc. v. Bank of America (1979) 91 Cal. App. 3d 913, 917-918, 154 Cal. Rptr. 464* ; *see also § 95.430*]. See discussion in *§ 95.293[2]*.

"Bank" is used here to mean all the entities listed in *Code Civ. Proc. § 348*: banks, bankers, trust companies, building and loan associations, industrial loan companies, credit unions, and savings and loan societies. If the actions is brought to recover money or other property deposited with a "bank," it is not subject to any statute of limitations. If the bank has become insolvent and is in process of liquidation, however, "the statute of limitations" is deemed to have commenced to run from the beginning of the process of liquidation [*Code Civ. Proc. § 348* (section does not indicate which statute commences to run if bank is insolvent)].

[5] Allegations

The complaint alleges the following:

- The capacity and residence of the drawee (Paragraph 1) [*Code Civ. Proc. § 395.5*; *12 U.S.C. § 94* (venue of action against national banking association); *see also §§ 95.410[3], 95.412[2], 95.413[2]*].

- Plaintiff's maintenance of a checking account with the defendant and identification of the account and provisions governing it (Paragraphs 4, 5) [*see* *Hoffman v. Security Pacific Nat. Bank (1981) 121 Cal. App. 3d 964, 968-969, 176 Cal. Rptr. 14* (statutes governing obligations of banks and their

depositors as usually incorporated into signature card agreement)].

- The defect in the check wrongfully charged against the account, and the fact that plaintiff has no knowledge of the defect, did not authorize the facial defect, and did not benefit from the defect (alternative Paragraphs 6) [*see Com. Code §§ 3403(b)* (two or more signatures required), 4401(a), (b) (authorized items or items from which plaintiff benefitted), 4407 (subrogation to avoid unjust enrichment)].

- That charging the check against plaintiff's account was not in accordance with the contract of the parties or law (Paragraph 7) [*Com. Code § 4401*].

- Plaintiff's demand to be reimbursed (Paragraph 8).

- Entitlement to interest (Paragraph 9) [*see Civ. Code §§ 3288* (interest on noncontractual duty), 3289(a) (interest on contractual duty), 3302 (right to interest in action for money); *Bullis v. Security Pac. Nat. Bank (1978) 21 Cal. 3d 801, 814-815, 148 Cal. Rptr. 22, 582 P.2d 109* (prejudgment interest award under *Civ. Code § 3288*)].

- Any other damages suffered by plaintiff as a consequence of the improper payments (Paragraph 10) [*see also § 95.456* (damages for wrongful dishonor)].

The second cause of action is for negligence and alleges the following:

- By incorporation, the allegations of Paragraph 1-10 (Paragraph 11).

- That the drawee had notice of sufficiently suspicious circumstances, the risks of which were sufficiently apparent to give rise to a duty of care (Paragraph 12) [*see Com. Code § 3103(a)(7)* ("ordinary care" defined)].

- That despite this knowledge, the drawee failed to exercise ordinary care in paying the checks with missing or forged signatures (Paragraph 13) [*see Civ. Code § 1714(a)*; *Commercial Cotton Co. v. United California Bank (1985) 163 Cal. App. 3d 511, 515 n.1, 209 Cal. Rptr. 551* (drawee admitted negligence on facts similar to those in form)].

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when their inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[6] State Statutes

Three-year limitation. *Code Civ. Proc. § 338(a)*; *Com. Code § 4111*

One-year limitation; preclusion applicable if item with unauthorized drawer's signature or alteration was returned with statement. *Code Civ. Proc. § 340(c)*; *Com. Code § 4406(f)*

No limitation on commencement of action to recover deposit (unless depositary institution is insolvent, in receivership). *Code Civ. Proc. § 348*

Unauthorized signature defined. *Com. Code § 1201(b)(41)*

Unauthorized signatures. *Com. Code §§ 3401-3406*

Signature of represented person. *Com. Code § 3402*

Unless otherwise provided in Division 4, unauthorized signature ineffective except as signature of unauthorized signer in favor of one who in good faith pays instrument or takes it for value. *Com. Code § 3403(a)*

Unauthorized signature ratifiable for all purposes of Division 3. *Com. Code § 3403(a)*

If more than one person's signature is required to constitute authorized signature of organization, its signature unauthorized if one of required signatures is lacking. *Com. Code § 3403(b)*

Civil or criminal liability of one who makes unauthorized signature not affected by any provision of Division 3 that makes unauthorized signature effective for purposes of that division. *Com. Code § 3403(c)*

Alteration, forgeries, comparative negligence. *Com. Code §§ 3406, 3407, 4406(c)-(e)*

When bank may charge customer's account. *Com. Code § 4401*

[7] Federal Regulations

Collection of checks. *12 C.F.R. §§ 210.1-210.15, 229.1* et seq.

[8] Decisions

[a] Bank-Depositor Relationship

Drawee bank handling collection and disbursement of royalties did not breach its fiduciary duty by paying on checks naming owner as payee but endorsed by husband alone, as bank had not expressly or by implication agreed to supervise or monitor owner's finances and accounts; bank's payment on royalty checks deposited into joint account by husband when presented by depository bank constituted final payment to owner, not husband. *LaMonte v. Sanwa Bank, California (1996) 45 Cal. App. 4th 509, 522-523, 52 Cal. Rptr. 2d 861*

Bank, in receiving ordinary deposits, becomes debtor of depositor; implied contract exists with depositor to discharge this indebtedness by honoring such checks as depositor may draw on it; bank not entitled to debit depositor's account with payments not made by his or her order or direction. Glassell Dev. Co. v. Citizens' Nat. Bank (1923) 191 Cal. 375, 379, 216 P. 1012 ; *Certified Grocers of California, Ltd. v. San Gabriel Valley Bank (1983) 150 Cal. App. 3d 281, 286, 197 Cal. Rptr. 710*

Bank-depositor relationship is that of debtor and creditor; title to deposited funds passes immediately to bank, which may use them for its own purpose, does not become trustee, and cannot be charged with conversion for paying unauthorized check. *Lee v. Bank of America (1990) 218 Cal. App. 3d 914, 919-920, 267 Cal. Rptr. 387*

No cause of action for breach of covenant of good faith and fair dealing stated against drawee that reinstated drawer's account with amount of unauthorized check previously paid by it within 30 days of notification from drawer that check was unauthorized. *Lee v. Bank of America (1990) 218 Cal. App. 3d 914, 919, 267 Cal. Rptr. 387*

Bank has duty to pay checks only in strict accordance with its customer's order. *Danning v. Bank of America (1984) 151 Cal. App. 3d 961, 969, 199 Cal. Rptr. 163*

Bank authorized to honor withdrawals from account on signatures authorized by signature card; signature card serves as contract between depositor and bank for handling account. *Certified Grocers of California, Ltd. v. San Gabriel Valley Bank (1983) 150 Cal. App. 3d 281, 287, 197 Cal. Rptr. 710*

[b] Forged Drawer's Signature

Bank pays check with forged drawer's signature at its peril; payment is considered to have been made from bank's own funds so that it has no right to charge depositor's account. Basch v. Bank of America (1943) 22 Cal. 2d 316, 321, 139 P.2d 1

Depositor's negligence subsequent to commission of forgeries relieves bank from its absolute liability on instruments on which drawer's signature had been forged by depositor's employee only if bank has itself been free from negligence. Basch v. Bank of America (1943) 22 Cal. 2d 316, 332-333, 139 P.2d 1

Rule that when one of two innocent parties must suffer, principal employing dishonest agent should bear loss caused by agent rather than equally innocent third party inapplicable to relieve bank of liability for cashing check on which drawer's signature had been forged by drawer's agent, when it is not shown that bank was free from negligence. *Sommer v. Bank of Italy (1930) 109 Cal. App. 370, 376, 293 P. 98*

[c] Forged Endorsement

Checks with forged or missing endorsement not properly payable by drawee bank. *Cooper v. Union Bank (1973) 9 Cal. 3d 371, 376-377, 107 Cal. Rptr. 1, 507 P.2d 609* ; *Joffe v. United California Bank (1983) 141 Cal. App. 3d 541, 554, 190 Cal. Rptr. 443*

Former *Com. Code § 3404(a)* (now *Com. Code § 3403(a)*) provided only that unauthorized endorsements are wholly inoperative. *Southern Cal. Permanente Medical Group v. Bozinovski (1983) 148 Cal. App. 3d 503, 508, 196 Cal. Rptr. 150* (multiple payees)

Question of whether bank has been negligent in paying on forged endorsement on check generally one for jury. *Atlas Vegetable Exchange, Inc. v. Bank of America (1970) 10 Cal. App. 3d 868, 876, 89 Cal. Rptr. 274*

Even if corporate depositor was guilty of negligence in signing checks made out by employee and based on fraudulent vouchers, that negligence did not contribute to or induce acceptance by bank of endorsements forged on those checks; thus, depositor not estopped from alleging forged endorsements and bank's negligence. *Edgington v. Security-First Nat. Bank (1947) 78 Cal. App. 2d 849, 858-859, 179 P.2d 640*

[d] Lack of Drawer's Signature

Drawee bank liable for breach of primary contractual duty if it pays check on which drawer's signature is unauthorized or forged; drawee bank charged with knowledge of its depositor's signature. Basch v. Bank of America (1943) 22 Cal. 2d 316, 321, 139 P.2d 1 ; *Fireman's Fund Ins. Co. v. Security Pacific Nat. Bank (1978) 85 Cal. App. 3d 797, 804-805, 149 Cal. Rptr. 883*

Bank is without authority to charge its customer's account for check bearing only one of two required signatures as

drawer; such a check is paid out of bank's own funds. *Danning v. Bank of America (1984) 151 Cal. App. 3d 961, 969, 199 Cal. Rptr. 163*

Although ordinarily bank is liable for paying check with only one of two required drawer's signatures, oral instruction to waive second signature of officer who was out of town was binding and bank is entitled to charge account. *V of I Productions v. California Bank (1961) 194 Cal. App. 2d 897, 904, 15 Cal. Rptr. 562*

[e] Unauthorized Drawer's Signature

Under *Fin. Code § 953* (authorized withdrawals), bank is not required to inquire into financial relationship of persons ostensibly authorized to make withdrawals from account who act within scope of their conferred authority until bank receives notice that authority has been revoked or bank officially learns that authorization never existed. *Desert Bermuda Properties v. Union Bank (1968) 265 Cal. App. 2d 146, 150, 71 Cal. Rptr. 93* ; *but see Com Code § 3307* (discussed in *§ 95.463*)

[9] Cross References

See also *§ 95.430*.

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9-95 California Forms of Pleading and Practice--Annotated § 95.451

§ 95.451 Affirmative Defense to Action to Recover Money or Damages for Improper Charge to Plaintiff's Checking Account [Com. Code § 4401(a)]--Plaintiff's Failure to Inform Bank of Irregularities Shown on Statements or Items [Com. Code § 4406(a)-(e)]

[1] FORM Affirmative Defense to Action to Recover Money or Damages for Improper Charge to Plaintiff's Checking Account [Com. Code § 4401(a)]--Plaintiff's Failure to Inform Bank of Irregularities Shown on Statements or Items [Com. Code § 4406(a)-(e)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. On or about the _____ [*ordinal number*] day of each month following the opening of plaintiff's account, down to and including _____ [*date*], this defendant has rendered a statement to plaintiff showing in detail the dates and amounts of all checks paid by defendant and charged against the account of plaintiff, and of all deposits made therein, and stating the balances credited to the account as of the date of the statements. The balances contained in the statements accurately reflected the result of all transactions in the account. Together with each such statement of account, there _____ [were returned to plaintiff *or* was given the phone number from which plaintiff could obtain (copies of)] all of the cancelled checks that had been paid and charged against the deposit account during the month preceding the date of the statement.

2. These statements of account [and cancelled checks] were duly rendered by defendant to plaintiff and came to his/her/its knowledge and attention. [*Describe method of transmission, if desired, e.g.:* Defendant mailed the statements (and items) by first class mail to plaintiff's address as shown on the signature card contract, which is attached as Exhibit A to the complaint.]

3. Plaintiff at all times herein mentioned had notice, express or implied, of all the foregoing facts.

4. Plaintiff, notwithstanding its knowledge of defendant's practices as described above, failed to exercise ordinary care

in that plaintiff failed and neglected to examine its statements [and returned items] and inform defendant that _____ [*describe irregularity that is basis of allegedly improper charge, e.g.,* its signature as drawer on the checks described in the complaint was unauthorized or forged by its employee, Ron G. Doer].

5. Plaintiff, by its failure to notify defendant of the _____ [unauthorized signatures *or* alterations] complained of, induced defendant to believe that plaintiff had authorized and approved the payment by defendant of checks _____ [*describe irregularity that is basis of allegedly improper charge, e.g.,* signed by Ron G. Doer or with the Ron G. Doer stamp, as drawer or Treasurer of drawer]. [With respect to the checks charged toplaintiff's account on and after _____ (*date*), more than 30 days after plaintiff's receipt of the first statement showing _____ (unauthorized signatures *or* alterations) allegedly made by _____ (*name of wrongdoer*), plaintiff's failure to notify defendant of the irregularities complained of prevented defendant from discovering the irregularities in the _____ (*number*) checks charged after _____ (*date*)].

6. Defendant at all times herein mentioned exercised ordinary care in processing the items drawn on plaintiff's account. The actual cause of the losses complained of is plaintiff's own failure to exercise reasonable care and promptness in discovering and reporting the irregularities.

[2] Use of Form

This affirmative defense is for use by a drawee bank sued for charging a checking account to pay items that were not properly payable [*Com. Code § 4401(a)*; *see § 95.450*], to assert that the actual cause of the improper payment was the drawer's failure to notify the bank of irregularities on the checks that allegedly were improperly paid [*see Com. Code § 4406(c)* (discussed in *§ 95.324*)]. A bank that sends or makes available to a customer a statement of account showing payment of items for the account must either (1) return or make available to the customer the items paid or (2) provide information in the statement of account sufficient to allow the customer reasonably to identify the items paid [*Com. Code § 4406(a)*; *see § 95.451[4]*; *but see Com. Code § 4406(h)* (requirement that customer must be able to "reasonably" identify items paid is superseded on January 1, 2015, by requirement that customer must be able merely to identify items paid)]. If the bank does not return the items, it must provide in the statement of account the telephone number that the customer may call to request an item, a substitute check [*see Com. Code § 4406(g)* (definition)], or a legible copy [*Com. Code § 4406(a)*].

In order to prevail on this defense, the customer's failure to notify the bank of the irregularity must be the cause of the improper payment [*Com. Code § 4406(d)(1)*]. As a practical matter, that is only likely when (1) a single wrongdoer perpetrates a series of alterations or unauthorized signatures, and (2) the bank, had the customer informed it of the first (or earlier) alteration or unauthorized signature, would have been able to prevent payment [*see Com. Code § 4406(d)(2)*; *see § 95.451[7]*].

Once a bank defends on the ground of the customer's failure to promptly examine his or her statement and report irregularities, the bank places its own exercise of ordinary care in issue, and the comparative negligence standard of *Com. Code § 4406(e)* applies [*see § 95.451[7]*].

If the loss was caused by a wrongdoer in plaintiff's employ, or otherwise authorized by plaintiff to handle checks on plaintiff's behalf, the defendant drawee bank may also defend on the basis of *Com. Code §§ 3404-3406* [*see §§ 95.453 -95.455*].

[3] Allegations

This affirmative defense alleges:

- The bank's rendering of a statement and related items to the plaintiff (Paragraphs 1, 2) [*Com. Code § 4406(a), (b)*];

- That the delivery of the statement and items placed plaintiff on notice of all that was contained in them (Paragraph 3);

- That plaintiff failed to examine the statement and returned items and report the irregularities complained of to defendant (Paragraph 4) [*Com. Code § 4406(c), (d)*]; and

- That the plaintiff's failure to report the irregularities, not the bank's lack of ordinary care, was the actual cause of the loss (Paragraphs 5, 6) [*Com. Code § 4406(d), (e)*].

The bracketed language in Paragraph 5 is for use when the case involves more than one forgery or alteration by the same wrongdoer and some of the items with unauthorized signatures or alternations have been returned with or described in statements rendered more than 30 days before others were charged to the account [*see Com. Code § 4406(d)(2)* and related UCC Commentary, *discussed in § 95.451[5]*].

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when their inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[4] Sufficiency of Account Information; Items or Copies

Until January 1, 2015, a statement of account provides sufficient information to allow the customer to identify an item paid if the item is described by (1) item number, (2) amount, and (3) date of payment [*Com. Code § 4406(a),(h)*]. The current requirement for item number, amount, and date of payment is based on the existing state of technology, and was chosen because it can be obtained by the bank's computer from the check's microencoding ("MICR line") without examination of the items themselves. The name of the payee and the date of the item cannot currently be obtained from the MICR. However, the U.C.C. Permanent Editorial Board expects that technological advances will make it possible for banks to give customers more information in the future in a manner that is fully compatible with automation or truncation systems, and will make recommendations for revising the "sufficiency of information" standard in light of those advances [Official Comment 1 to UCC § 4-406 (1990)].

If the bank does not return the items, it must provide in the statement of account the telephone number that the customer may call to request an item, a substitute check, or a legible copy [*Com. Code § 4406(a)*]. If the items are not returned to the customer, the person retaining the items must either retain the items or, if the items are destroyed, maintain the capacity to furnish legible copies of the items until the expiration of seven years after receipt of the items. A customer may request an item from the bank that paid the item, and that bank must provide in a reasonable time either the item or, if the item has been destroyed or is not otherwise obtainable, a legible copy of the item. If the paid item requested by a customer was presented as a substitute check [*see Com. Code § 4406(g)* (definition)], the bank must provide, in a reasonable time, either thesubstitute check or, if the substitute check has been destroyed or is not otherwise obtainable, a legible copy of the substitute check. A bank must provide, on request and without charge to the customer, at least two items, substitute checks, or legible copies with respect to each statement of account sent to the customer [*Com. Code § 4406(b)*].

[5] Customer's Failure to Notify Precludes Assertion Against Bank

If the bank proves that the customer failed, with respect to an item, to comply with the duties imposed on the customer by *Com. Code § 4406(c)*, the customer is precluded from asserting against the bank both of the following [*Com. Code §*

4406(d); *see, e.g., Espresso Roma Corporation v. Bank of America, N.A. (2002) 100 Cal. App. 4th 525, 529-530, 535, 124 Cal. Rptr. 2d 549* (plaintiff failed to report first of many items forged by employee with within 30 days, despite bank's monthly account statements which included canceled checks)]:

- The customer's unauthorized signature or any alteration on the item if the bank also proves that it suffered a loss by reason of the failure; and

- The customers' unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank if the payment was made before the bank received notice from the customer of the unauthorized signature or alteration and after the customer had been afforded a reasonable period of time, not exceeding 30 days, in which to examine the item or statement of account and notify the bank.

If the customer proves that the bank did not pay the item in good faith, the foregoing preclusion under *Com. Code § 4406(d)* does not apply [*Com. Code § 4406(e)*].

[6] Fourteen-Day Period No Longer Reasonable

Former *Com. Code § 4406(2)* provided for a 14-day examination and notification period with respect to unauthorized signatures or alterations made by the same wrongdoer. Although the 14-day period was considered sufficient when the original Division 4 was drafted in the 1950s, given the much greater volume of checks at the time of the revision, the longer period was viewed as more appropriate [Official Comment 2 to U.C.C. § 4-406 (1990)].

The purpose of the 30-day limit in *Com. Code § 4406(d)(2)* is to place the burden on the customer to avoid the most serious consequences of its failure to comply with *Com. Code § 4406(c)*, namely the opportunity presented to the wrongdoer to repeat the misdeeds, and to avoid disputes regarding what would be a reasonable period for the customer to comply. If there are no losses resulting from payment of additional items, a reasonable period for customer compliance with the duties imposed by *Com. Code§ 4406(c)* depends on the circumstances [*see Com. Code § 1205(a)*], and the 30-day time limit of *Com. Code § 4406(d)(2)* should not be imported by analogy into *Com. Code § 4406(c)* [Official Comment 2 to U.C.C. § 4-406 (1990)].

[7] Comparative Negligence; Preclusion Inapplicable

If *Com. Code § 4406(d)* (*discussed under § 95.451[5]*) applies, and the customer proves that the bank failed to exercise ordinary care in paying the item and that the bank's failure contributed to loss, the loss is allocated between the customer precluded and the bank asserting the preclusion according to the extent to which the failure of the customer to examine the statement and items and report irregularities to the bank and the failure of the bank to exercise ordinary care contributed to the loss [*Com. Code § 4406(e)*; *see, e.g., Espresso Roma Corporation v. Bank of America, N.A. (2002) 100 Cal. App. 4th 525, 530-532, 535, 124 Cal. Rptr. 2d 549* (declaration of bank's expert that bank's practices and procedures were consistent with those of all other large "bulk file bookkeeping" banks in California was sufficient to establish prima facie case that bank exercised ordinary care); *see also § 95.311[5]*].

Com. Code § 4406(e) replaces former *Com. Code § 4406(3)* and implements a modified comparative negligence test for determining liability [Official Comment 4 to UCC § 4-406 (1990)]. For example, in a case decided under former *Com. Code § 4406(3)*, the customer reported checks missing four years before the bank paid them, and reported the unauthorized drawer's signatures two years after the statement and forged checks were furnished. The court found that the bank's negligence in paying the checks, not the customer's failure to report the unauthorized signatures after receiving the statement, was the sole actual cause of loss, and held the bank liable for the entire loss [*Commercial Cotton Co. v. United California Bank (1985) 163 Cal. App. 3d 511, 515, 209 Cal. Rptr. 551* (decision regarding action for breach of implied covenant of good faith and fair dealing abrogated by *Copesky v. Superior Court (1991) 229 Cal. App. 3d 678, 694, 280 Cal. Rptr. 338*)].

The second sentence of the definition of ordinary care [*see Com. Code § 3103(a)(7)* (discussed in *§ 95.311[5]*)] is intended to resolve the split of authority and to provide that a payor bank is not required to examine each check by sight if its procedure is reasonable and is commonly followed by other regional banks in the area. The effect of that sentence is to provide that in the small percentage of cases in which a customer's failure to examine its statement or returned items has led to the loss under *Com. Code § 4406(d)*, a bank should not have to share that loss solely because it has adopted an automated collection or payment procedure in order to deal with the great volume of items at a lower cost to all customers [Official Comment 4 to UCC § 4-406 (1990)].

[8] State Statutes

Negligence contributing to alteration or unauthorized signature. *Com. Code § 3406*

Warranties of customer and collecting bank on transfer or presentment of checks. *Com. Code §§ 3416-3417, 4207-4208*

Customer's duty to discover and report unauthorized signatures or alteration. *Com. Code § 4406*

[9] Decisions

Ordinarily, question whether bank is free from negligence in paying forged or altered check, and whether depositor is negligent or estopped to deny correctness of payments, are determinations for jury. Pac. Coast Cheese, Inc. v. Security-First Nat. Bk. (1955) 45 Cal. 2d 75, 79, 286 P.2d 353 (dictum)

Bank depositor not permitted, to detriment of bank, to refrain from acting as prudent businessman in stopping disappearance of funds from account after depositor has become aware of that activity. Basch v. Bank of America (1943) 22 Cal. 2d 316, 328-329, 139 P.2d 1

Bank depositor has legal duty to examine within reasonable time documentary evidence forwarded by bank indicating status of account and to report without delay any discrepancies revealed. Basch v. Bank of America (1943) 22 Cal. 2d 316, 326, 139 P.2d 1

Corporation defrauded by former employee who forged checks on plaintiff's account was precluded from asserting claims against bank for unauthorized payment of checks, when plaintiff failed to report first of forged items with 30 days and bank issued monthly account statements which included canceled checks; plaintiff failed to create triable issue of fact regarding bank's exercise of ordinary care in paying items. *Espresso Roma Corporation v. Bank of America, N.A. (2002) 100 Cal. App. 4th 525, 535, 124 Cal. Rptr. 2d 549*

Bank that sent corporate depositor's statements to officer's (wrongdoer's) address, rather than address designated by depositor, is unable to defend on basis of depositor's failure to examine statements and report payment of checks drawn without sufficient number of drawer signatures. *Far West Citrus, Inc. v. Bank of America (1979) 91 Cal. App. 3d 913, 917, 154 Cal. Rptr. 464*

When depositor's statement has been returned to him with canceled checks that have been charged to his account, depositor is required to examine those checks within reasonable time, and if they disclose forgeries or alterations to report them to bank; if depositor's failure to fulfill these duties results in detriment to bank, depositor cannot dispute correctness of payments thereafter made on similar checks. *Atlas Vegetable Exchange Inc. v. Bank of America (1970) 10 Cal. App. 3d 868, 875, 89 Cal. Rptr. 274*

[10] Cross References

See also *§§ 95.450* and *95.452*.

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9-95 California Forms of Pleading and Practice--Annotated § 95.452

§ 95.452 Affirmative Defense to Action to Recover Money or Damages for Improper Charge to Plaintiff's Checking Account [Com. Code § 4401(a)]--Plaintiff's Failure to Inform Bank Within One Year of Irregularities Shown on Statements or Items [Com. Code § 4406(f)]

[1] FORM Affirmative Defense to Action to Recover Money or Damages for Improper Charge to Plaintiff's Checking Account [Com. Code § 4401(a)]--Plaintiff's Failure to Inform Bank Within One Year of Irregularities Shown on Statements or Items [Com. Code § 4406(f)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that this action is precluded by the provisions of *Commercial Code Section 4406(f)* in that all the _____ [unauthorized signatures *and/or* forged endorsements *and/or* alterations] complained of relate to checks returned by defendant to plaintiff with [regular monthly] statements of account rendered by defendant to plaintiff between _____ [*date*], and _____ [*date*], all more than one year before the commencement of this action. During that time, plaintiff failed and neglected to examine his/her/its statements [and returned items] and inform defendant of the irregularities alleged in the complaint.

[2] Use of Form

This affirmative defense is for use by a drawee bank sued for charging a checking account to pay items that were not properly payable [*Com. Code § 4401(a)*; *see § 95.450*], to assert the preclusion of *Com. Code § 4406(f)* as an affirmative defense based on the drawer's failure, for more than a year after the statement was rendered, to notify the bank of irregularities constituting the improper charges alleged in the complaint [*see also § 95.451*].

[3] Absolute Preclusion for Failure to Notify Within One Year

Without regard to care or lack of care of either the customer or the bank, a customer who does not within one year after the statement or items are made available to the customer under *Com. Code § 4406(a)* [*see § 95.451[5]*] discover and report the customer's unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration [*Com. Code § 4406(f)*].

If this preclusion applies, the payor bank may not recover for breach of warranty under *Com. Code § 4208* with respect to the unauthorized signature or alteration to which the preclusion applies [*Com. Code § 4406(f)*].

The court of appeal in *Commercial Cotton Co. v. United California Bank (1985) 163 Cal. App. 3d 511, 515-518, 209 Cal. Rptr. 551* , upheld an award of $100,000 in punitive damages against a bank for assertion of the one-year preclusion of former *Com. Code § 4406(4)* (*now see Com. Code § 4406(f)*), believing that the one-year period could only have been asserted in bad faith because the preclusion was applicable only to a drawer's action for breach of warranty regarding the drawer's own signature as drawer, a cause of action created by *Sun'n Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 692, 148 Cal. Rptr. 329, 582 P.2d 920* . Official Comment 2 to U.C.C. § 3-417 (1990) specifically rejects the existence of such a cause of action.

[4] Decisions

Payroll account owner was precluded from pursuing any recovery against bank after failing to discover and report unauthorized signatures within prescribed one-year period; amendment to *Com. Code § 3403* providing that signature of organization is unauthorized if multiple signatures are required and one of required signatures is lacking was clarification of existing law and therefore operated retroactively. *Edward Fineman Company v. Superior Court (1998) 66 Cal. App. 4th 1110, 1124-1125, 78 Cal. Rptr. 2d 478*

Three-year statute of limitations set forth in *Com. Code § 4111* applied retroactively to unauthorized checks drawn on company's payroll checking account during two-year period in question and barred recovery for those checks. *Edward Fineman Company v. Superior Court (1998) 66 Cal. App. 4th 1110, 1125-1126, 78 Cal. Rptr. 2d 478*

Former *Com. Code § 4406(4)* (*now Com. Code § 4406(f)*) precluded depositors from asserting forged checks against bank, and preclusion was fatal to claims for negligent payment of forged checks not timely reported to bank; code provisions are controlling and displace common law negligence principles with respect to payment of forged checks by payor bank. *Roy Supply, Inc. v. Wells Fargo (1996) 39 Cal. App. 4th 1051, 1067, 46 Cal. Rptr. 2d 309*

[5] Cross References

See also *§ 95.451*.

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9-95 California Forms of Pleading and Practice--Annotated § 95.453

§ 95.453 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action to Recover Money or Damages for Improper Charge to Plaintiff's Checking Account [Com. Code § 4401(a)]--Plaintiff Bound by Endorsement of Fictitious Payee [Com. Code § 3404(b)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action to Recover Money or Damages for Improper Charge to Plaintiff's Checking Account [Com. Code § 4401(a)]--Plaintiff Bound by Endorsement of Fictitious Payee [Com. Code § 3404(b)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. [Defendant is informed and believes and thereon alleges that] [A]t all times herein mentioned and in doing the things complained of, _____ [*name of responsible employee or* the persons responsible for the _____ (*specify improper charge complained of, e.g.,* issuance of checks to fictitious or nonexistent payees, negotiation of those checks as payee, and collection of the proceeds of those checks) complained of] was an [employee and] agent of plaintiff, and was authorized by plaintiff to do all of the following and had responsibility to do all of the following on behalf of plaintiff: _____ [*specify as many responsibilities set forth in Com. Code § 3405(a)(3) as are applicable:* to sign or endorse checks on behalf of plaintiff, to process checks received by plaintiff for bookkeeping purposes, for deposit to an account, or for other disposition, to prepare or process checks for issue in the name of the plaintiff, to supply information determining the names or addresses of payees of checks to be issued in the name of the plaintiff, to control the disposition of checks to be issued in the name of the plaintiff, and to act otherwise with respect to checks in a responsible capacity].

2. In his/her capacity as _____ [*specify, e.g.,* accounts payable clerk], _____ [*name of responsible employee or* the persons responsible for the issuance of checks] _____ [issued *or* was authorized to issue and issued *or* caused plaintiff to issue] the checks numbered _____, _____, _____, _____, and _____, which are the subject of the complaint, by _____ [*specify, e.g,* using a stamp "Plaintiff Co., by RG Doer,

Treasurer" to make the signature of plaintiff as drawer].

3. Defendant _____ [*name*] paid the checks numbered _____, _____, _____, _____, and _____ in good faith and exercised ordinary care in processing and paying them in that _____ [*specify, e.g,* the signature card agreement between plaintiff and defendant (which is Exhibit "A" to the complaint) (and the corporate resolution of plaintiff attached thereto containing specimen signatures of all officers authorized to draw checks on the account) provide that Ron G. Doer is authorized as Treasurer of plaintiff to draw checks on account number _____, and to use plaintiff's stamp, an imprint of which is affixed to the signature card contract, to make plaintiff's signature as drawer. Further, the agreement provides that defendant is authorized to use automated processing methods and is not required to verify plaintiff's signature as maker by sight before paying items written for sums less than $2,500 or which will not create an overdraft if paid].

4. The checks numbered _____, _____, _____, _____, and _____ were _____ [*specify negotiation or endorsement that meets requirements of Com. Code § 3404(b) or (c), e.g,* endorsed with a stamp "Ficto Payee Co. For deposit only to account #_____" (which account was opened and maintained by _____ (*name of responsible employee or the persons responsible for the issuance of checks to fictitious payees or person acting in concert with either or both*) specifically in furtherance of this fraudulent scheme)].

[2] Use of Form

This form is an affirmative defense for use by a drawee bank sued for charging a checking account to pay items that were not properly payable [*Com. Code § 4401(a)*; *see § 95.450*], to assert that the endorsement of a fictitious payee is good as against the drawee bank because it paid the check in good faith and in the exercise of ordinary care [*see Com. Code § 3404(b)(2)* (*discussed under § 95.463[4]* and in Ch. 385, *Negotiable Instruments*)].

The "any endorsement valid" defense of *Com. Code § 3404* may be asserted by a depositary or collecting bank as well, but the foregoing form would need appropriate modifications. In particular, allegations regarding the exercise of ordinary care in taking the check, and if appropriate, requiring identification of the persons negotiating it are likely to be necessary to state a defense under *Com. Code § 3404(b)(2)* on behalf of a depositary bank. A depositary bank is more likely to rely on *Com. Code § 3404(b)(1)* (discussed under *§ 95.463[4]*) to validate the wrongdoer-holder's endorsement.

Com. Code § 3404 is intended to place the loss on the drawer, rather than on the depositary bank that took the check for collection or on the drawee. Cases involving impostors, fictitious payees, or payees not intended to have an interest in the check almost always involve fraud, which the drawer is in the best position to avoid. In some cases the person taking the check could detect the fraud and prevent the loss by the exercise of ordinary care [Official Comment 3 to U.C.C. § 3-404 (1990)]. In those cases, the loss is allocated in accordance with *Com. Code § 3404(d)*. Thus, use of this defense will put the drawee's exercise of ordinary care in issue.

[3] Changes From Previous Fictitious Payee, Impostor Provision

Com. Code § 3404 replaces former *Com. Code § 3405(1)(a)* (impostors) and 3405(1)(b) (fictitious payees), and changes the law in some respects. Under former law, the endorsement, to be effective, had to be exactly in the name of the named payee. Now, under *Com. Code § 3404(c)*, it is enough that the endorsement be substantially similar, or alternatively the check may be deposited without negotiation as is allowed by *Com. Code § 4205(a)* [Official Comment 1 to U.C.C. § 3-404 (1990)].

In the case of impostors, which is not addressed by the foregoing form, *Com. Code § 3404* is broader than its

counterpart under the former code. Under former *Com. Code § 3405(1)(a)*, if an impostor impersonated Smith and induced the drawer to issue a check to the order of Smith, the impostor could negotiate the check. If the impostor impersonated Smith, president of Smith Corporation, and the check was payable to the order of Smith Corporation, former *Com. Code § 3405(1)(a)* did not apply. Now *Com. Code § 3404* enables the impostor to negotiate the check, and renders his or her endorsement effective, in both situations [Official Comment 1 to U.C.C. § 3-404 (1990)].

[4] Allegations

Paragraphs 1 and 2 allege the issuance of a check payable to a fictitious payee. Paragraph 2 is intended to illustrate a the rule of *Com. Code §§ 3110(b)* and *3404(b)* that the intent of the person who draws the check or, in the case of an employee who prepares checks for signature by another officer, causes it to be drawn, determines the status of the payee. If (i) a person whose intent determines to whom an instrument is payable [*see Com. Code § 3110(a), (b)* (discussed in Ch. 385, *Negotiable Instruments*)] does not intend the person identified as payee to have any interest in the instrument, or (ii) the person identified as payee of an instrument is a fictitious person, the following rules apply until the instrument is negotiated by special endorsement [*Com. Code § 3404(b)*]:

(1) Any person in possession of the instrument is its holder.

(2) An endorsement by any person in the name of the payee stated in the instrument is effective as the endorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

While an impostor may induce the drawer (or the drawer's responsible employee) to make a check payable to someone the drawer or employee believes is a bona fide creditor of the drawer, essentially making the drawer or its responsible employee the innocent dupe of the impostor, fictitious payee situations almost always involve an unauthorized drawer's signature, too [*see Com. Code § 3405(b)*]. Thus, Paragraph 3 alleges how, in the exercise of ordinary care, the defendant drawee could have neglected to spot any irregularity in the drawer's signature [*see Com. Code § 3103(a)(7)* (discussed in *§ 95.311[5]*); for UCC Commentary regarding application of the ordinary care standard in situations governed by *Com. Code § 3405(b), see also § 95.454*].

Paragraph 4 alleges the facts surrounding the endorsement of the check. It could be modified to allege negotiation by deposit without endorsement to an account in a name substantially similar to that of the payee [*see Com. Code §§ 3404(c), 4204(a)*].

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when their inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[5] Cross References

See also *§ 95.454*.

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Volume 9: Bailments thru Boats and Boating-Chs. 93-100
Chapter 95 BANKS, DEPOSITS, AND CHECKS
PART IV. FORMS
C. Check Collections

9-95 California Forms of Pleading and Practice--Annotated § 95.454

§ 95.454 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action to Recover Money or Damages for Improper Charge to Plaintiff's Checking Account [Com. Code § 4401(a)]--Plaintiff Is Bound by Fraudulent Endorsement of Responsible Employee [Com. Code § 3405]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action to Recover Money or Damages for Improper Charge to Plaintiff's Checking Account [Com. Code § 4401(a)]--Plaintiff Is Bound by Fraudulent Endorsement of Responsible Employee [Com. Code § 3405]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. [Defendant is informed and believes and thereon alleges that] [A]t all times herein mentioned, and in doing the things complained of, _____ [*name of responsible employee*] was an [employee and] agent of plaintiff and was authorized by plaintiff to do all of the following and had responsibility to do all of the following on behalf of plaintiff: _____ [*specify as many responsibilities set forth in Com. Code § 3405(a)(3) as are applicable*: to sign or endorse checks on behalf of plaintiff, to process checks received by plaintiff for bookkeeping purposes, for deposit to an account, or for other disposition, to prepare or process checks for issue in the name of the plaintiff, to supply information determining the names or addresses of payees of checks to be issued in the name of the plaintiff, to control the disposition of checks to be issued in the name of the plaintiff, and to act otherwise with respect to checks in a responsible capacity].

2. In his/her capacity as _____ [*specify, e.g.,* preparer of checks to pay plaintiff's suppliers], _____ [*name of responsible employee*] _____ [issued *or* caused plaintiff to issue] the checks numbered _____, _____, _____, _____, and _____, which are the subject of the complaint, payable to _____ [*name(s)*] as payee(s), and _____ [*specify, e.g.,* used a stamp "Plaintiff Co., by RG Doer, Treasurer" to make the signature of plaintiff as drawer].

3. After drawing the checks that are the subject of the complaint, _____ [*name of responsible employee*] did not deliver them to the payees, but stole and converted them to his/her own use, negotiated them by _____ [*specify how checks were negotiated or endorsed, e.g.,* endorsing them with a stamp "Supplier Co. For deposit only to account #_____" (which account was opened and maintained by _____ (*name of responsible employee*) in the name of Supplier Co. specifically in furtherance of his/her fraudulent scheme)], and collecting the proceeds _____ [*specify how employee collected proceeds, e.g.,* and using them to purchase a cashier's check, payable to Bearer, on closing the "Supplier Co." account].

4. [*Defendant's exercise of ordinary care in paying the checks. see § 95.453[1],* Paragraph 3.]

[2] Use of Form

This affirmative defense is for use by a drawee bank sued for charging a checking account to pay items that were not properly payable [*Com. Code § 4401(a)*; *see § 95.450*], to assert that the fraudulent endorsement of a responsible employee of plaintiff is good as against it because it paid the check in good faith and in the exercise of ordinary care [*see Com. Code § 3405* (discussed in Ch. 385, *Negotiable Instruments*)]. The "any endorsement by responsible employee is valid" defense of *Com. Code § 3405* may be asserted by a depositary or collecting bank as well, but this form only addresses the drawee's defense.

Com. Code § 3405 applies to two types of forged endorsements: (1) those forged on instruments payable to the employer that purport to be the endorsement of the employer [*Com. Code § 3405(a)(2)(A)*], and (2) those forged on instruments issued by the employer that purport to be the endorsement of the person identified as the payee [*Com. Code § 3405(a)(2)(B)*]. Only the second category is addressed by this form, on the assumption that situations involving the first category are more likely to involve litigation between the employer/payee and the depositary banks at which the thief/employee deposited or negotiated the checks on which he or she forged the employer's endorsement.

[3] Former Law Imposed Loss on Employer Only if Negligent

The first category of forged endorsements (in name of employer as payee) was governed by former *Com. Code § 3406*, which placed the loss on the employer only if its negligence could be proved. Now, *Com. Code § 3406* need not be used with respect to forgeries of the employer's endorsement as payee [for an affirmative defense alleging drawer's negligence, *see § 95.455*]. *Com. Code § 3405* imposes the loss on the employer without proof of its negligence [Official Comment 1 to U.C.C. § 3-405 (1990)]. However, if the person paying the instrument (drawee bank) or taking it for value or collection (depositary bank) fails to exercise ordinary care in paying or taking the instrument and that failure contributes to the loss resulting from the fraud, the person (drawer or payee) bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss [*Com. Code § 3405(b)*].

The second category of forged endorsements (those of payee on instruments issued by employer) was covered by former *Com. Code § 3405(1)(c)* (agent or employee of drawer supplied name of payee, intending payee to have no interest in instrument) [*see § 95.329*; *see also § 95.453*]. The scope of current *Com. Code § 3405(a)(2)(B)* is somewhat broader, in that it covers some cases not covered by former *Com. Code § 3405(1)(c)* in which the entrusted employee makes a forged endorsement to a check drawn by the employer [Official Comment 1 to U.C.C. § 3-405 (1990); *see* Case 6 in Official Comment 3 to U.C.C. § 3-405 (1990), discussed in *§ 95.464[7][b]*].

[4] Allegations

This affirmative defense alleges:

- The wrongdoer's status as a "responsible employee" of plaintiff within the meaning of *Com. Code §*

3405(a)(3) (Paragraph 1).

- The ways in which the employee was authorized to, and did, deal with the checks in question (Paragraph 2).

- The employee's fraudulent endorsement and negotiation of the checks payable to the employer as payee and collection of the proceeds (Paragraph 3) [*see Com. Code § 3405(a)(2)(B)*].

Paragraph 4 is necessary only to rebut any anticipated challenge to the defendant's (payor bank) good faith or exercise of ordinary care.

As with other amendments to Divisions 3 and 4, *Com. Code § 3405* adopts the principle that the risk of loss for fraudulent endorsement by employees who are entrusted with responsibility with respect to checks should fall on the employer rather than on the financial institution that takes the check for collection or pays it. *Com. Code § 3405* is based on the belief that the employer is in a better position to avoid the loss by care in choosing the employees, in supervising them, and in adopting other measures to prevent forged endorsements on instruments payable to the employer or fraud in the issuance of instruments in the name of the employer. An employer can insure against this risk by employee fidelity bonds [Official Comment 1 to U.C.C. § 3-405 (1990)].

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when their inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[5] Bank's Negligence

If the bank fails to exercise ordinary care, *Com. Code § 3405(b)* allows the employer to shift the loss to the bank to the extent the bank's failure contributed to the loss [Official Comment 1 to U.C.C. § 3-405 (1990); *see Com. Code § 4406(e)* (discussed *see § 95.451*); *see, e.g., Newman v. Wells Fargo Bank (2001) 87 Cal. App. 4th 73, 83-85, 104 Cal. Rptr. 2d 310* (complaint alleging that bank allowed plaintiff's employees to cash or deposit checks in their personal accounts despite suspicious circumstances indicating fraud stated cause of action under § 3405(b))]. The 1990 version of the Uniform Commercial Code contains several changes to the concept of "ordinary care" or reasonable commercial standards to reflect current technologies. Ordinary care equates to adherence to commercially reasonable standards as practiced in the region in which the bank operates. In the case of a bank that takes a check for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the check if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by Division 3 or Division 4 [*Com. Code § 3103(a)(7)* (made applicable by *Com. Code § 4104(c)*)].

Com. Code § 3405(b) applies regardless of whether the employer was negligent [Official Comment 1 to U.C.C. § 3-405 (1990)].

[6] Illustrations

[a] Responsible Employee Forges Endorsement on Check Payable to Supplier

Treasurer is authorized to draw checks on corporation's account. Treasurer draws a check to Supplier Co., a company that sold goods to Corporation. The check was issued to pay the price of those goods. At the time the check was signed, Treasurer had no intention of stealing it. Later, Treasurer stole the check, endorsed it "Supplier Co." and obtained payment by depositing it to an account at Depositary Bank, which Treasurer opened in the name of "Supplier Co." The

endorsement is effective under *Com. Code § 3405(b)* as against one who gave value and paid or collected the check in good faith. *Com. Code § 3404(b)* (impostor) does not apply to this case [Case 6 of Official Comment 3 to U.C.C. § 3-405 (1990)]. *Com. Code § 3404(b)* is discussed in *§ 95.453* and Ch. 385, *Negotiable Instruments* .

[b] Com. Code § 3405 Not Applicable if Responsible Employee Endorses Check in Blank Before Stealing It

Employee's duties include stamping Employer's unrestricted blank endorsement on checks received by Employer and depositing them in Employer's bank account. After stamping Employer's unrestricted blank endorsement on a check [making it payable to bearer and thus negotiable by transfer of possession alone; *see Com. Code § 3205(b)* and discussion in Ch. 385, *Negotiable Instruments*], Employee steals the check and deposits it to Employee's personal bank account. *Com. Code § 3405* does not apply because there is no forged endorsement. Employee is authorized by Employer to endorse Employer's checks. Employee's fraud is the theft of the endorsed check, which is by then, a bearer instrument [*see Com. Code § 3205(b)* (blank endorsement converts instrument to bearer instrument, which may be negotiated without endorsement)]. Whether Employer has a cause of action against the bank in which the check was deposited is determined by whether the bank had notice of the breach of fiduciary duty by the Employee. That issue is determined under *Com. Code § 3307* (which is discussed in *§ 95.463* and in Ch. 385, *Negotiable Instruments*) [Case 4 of Official Comment 3 to U.C.C. § 3-405 (1990)].

[c] Responsible Employee Draws Check Payable to Self

X is Treasurer of Corporation and is authorized to draw checks on Corporation's account by signing X's name as Treasurer. X draws a check in the name of the Corporation and signs X's name to it as Treasurer. The check is payable to X. X then endorses the check and obtains payment. Assume that Corporation did not owe any money to X and did not authorize X to write the check. Although the writing of the check is not authorized, Corporation is bound as drawer by the act of its Treasurer because X had authority to sign checks on behalf of the corporation. This result follows from agency law and *Com. Code § 3402(a)* (when signature of representative is binding on represented person). *Com. Code § 3405* does not apply in this case because there is no forged endorsement. X was the payee of the check, so X's endorsement was valid under *Com. Code § 3110(a)* (intent of signer, whether or not authorized, determines to whom check is payable; discussed in Ch. 385, *Negotiable Instruments*) [Case 2 of Official Comment 3 to U.C.C. § 3-405 (1990)].

[7] State Statutes

In case of instrument payable to employer, payee is bound by endorsement forged by responsible employee in name of employer as payee. *Com. Code § 3405(a)(2)(A)*

In case of instrument issued by drawer who is employer, drawer is bound by endorsement forged by responsible employee in name of person identified as payee. *Com. Code § 3405(a)(2)(B)*

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9-95 California Forms of Pleading and Practice--Annotated § 95.455

§ 95.455 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action to Recover Money or Damages for Improper Charge to Plaintiff's Checking Account [Com. Code § 4401(a)]--Plaintiff's Lack of Care in Issuing Incomplete Instrument Contributed to Alteration or Loss [Com. Code §§ 3115, 3406, 3407]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action to Recover Money or Damages for Improper Charge to Plaintiff's Checking Account [Com. Code § 4401(a)]--Plaintiff's Lack of Care in Issuing Incomplete Instrument Contributed to Alteration or Loss [Com. Code §§ 3115, 3406, 3407]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant _____ [*name*] alleges that plaintiff is precluded from requiring defendant to _____ [recredit his/her/its account with *or* reimburse her/him/it for the amount of the check(s) mentioned in the complaint, specifically, *or* absorb the loss for the _____ (*specify, e.g.,* alteration of check number _____) in] the sum of $_____, alleged to have been improperly charged to pay check number _____, drawn on plaintiff's account at defendant's branch. Plaintiff's own failure to exercise ordinary care with respect to _____ [*specify, e.g.,* the custody, control, handling, and storage of his/her/its checkbook and maker's signature stamp and the payment of household expenses] was the actual cause of the _____ [alteration of *and/or* unauthorized completion of *and/or* making of the unauthorized signature on] that check by _____ [*specify, e.g.,* raising the amount on the check from $150 to $1,500. It was Plaintiff's custom to sign 12 or 15 blank checks on the first of each month and leave them for household staff to fill in as payments for monthly bills that were presented for payment by grocers, gardeners, dry cleaners, poolpersons, and the like].

[2] Use of Form

This affirmative defense is for use by a drawee bank sued for charging a checking account to pay items that were not properly payable [*Com. Code § 4401(a)*; *see § 95.450*], to assert that the drawer is precluded from requiring the drawee bank to absorb the loss because the drawer's own negligence contributed to the fraudulent alteration, unauthorized completion, or forged drawer's signature on the checks [*see Com. Code § 3406(a)* (discussed in Ch. 385, *Negotiable Instruments*)]. The defense only applies if the drawee bank paid the checks in good faith and in the exercise of ordinary

care [*see Com. Code § 3406(a), (b)*]. If the drawee is also negligent, and its failure to exercise ordinary care contributes to any loss, the loss is allocated between the bank and the drawer [*Com. Code § 3406(b)*].

The same facts may also be sufficient to invoke *Com. Code § 3407(c)*, which provides that a payor bank or drawee paying a fraudulently altered instrument or a person taking it for value, in good faith and without notice of the alteration, may enforce rights with respect to the instrument (1) according to its original terms, or (2) in the case of an incomplete instrument altered by unauthorized completion, according to its terms as completed.

If the wrongdoer is an employee of the drawer, or someone acting in concert with an employee of the drawer, the bank probably will rely on *Com. Code §§ 3404* and *3405*, which are discussed in *§§ 95.453* and *95.454*, respectively.

Counsel should also be aware of other provisions of Division 3, such as *Com. Code § 3402* (when signature binds represented person, discussed in *§ 95.330[3]*) and *Com. Code § 3403* (unauthorized maker's signature as invalid except as against one who in good faith pays instrument or takes it for value). Other defenses from Division 3, such as lack of delivery or failure to complete the check, may be relevant [*see Com. Code §§ 3105, 3115*]. For further discussion and related forms, see Ch. 385, *Negotiable Instruments* .

[3] Illustrations

The U.C.C. Comments illustrate three cases of conduct that may preclude liability because of plaintiff's lack of care [Official Comment 3 to U.C.C. § 3-406 (1990)]:

(1) The drawer keeps a rubber signature stamp and the check forms together in an unlocked drawer. A thief steals blank checks and uses the stamp to make an unauthorized drawer's facsimile signature. Whether this method of storing the stamp and checks amounts to failure to exercise ordinary care and, if so, whether that failure contributed to the forgery are questions of fact.

(2) An insurance company with two insureds named "Sally Smith," one in Ohio and one in Illinois, mails a check in payment of a claim to the wrong one. Endorsement by the wrong one is a forged endorsement [*Com. Code § 3110(a)* (person to whom check is payable as determined by intent of maker)]. Whether the insurance company's mistake in using a possibly ambiguous payee designation or in mailing the check to the wrong payee amounted to failure to exercise ordinary care and, if so, whether that failure contributed to the forged endorsement are questions of fact.

(3) A company writes a check for $10. The figure "10" and the word "ten" are typewritten in the appropriate spaces on the check form. A large blank space is left after the figure and the word. The payee of the check, using a typewriter with a typeface similar to that used to write the check, adds the word "thousand" after the word "ten" and adds a comma and three zeros after the figure "10." The drawee bank in good faith pays $10,000 when the check is presented. The trier of fact could find that the drawer failed to exercise ordinary care in writing the check and that that failure substantially contributed to the alteration.

[4] State Statutes

[a] Alteration

One whose failure to exercise ordinary care contributes to alteration or to making of forged signature as precluded from asserting alteration or forgery against person who, in good faith, pays instrument or takes it for value or for collection. *Com. Code § 3406(a)*

If bank fails to exercise ordinary care in paying or taking instrument and that failure contributes to loss, loss as allocated between parties according to extent to which failure of each to exercise ordinary care contributed to loss. *Com.*

Code § 3406(b)

Bank has burden of proving drawer failed to exercise ordinary care; burden of proving bank's failure to exercise ordinary care as on drawer. *Com. Code § 3406(c)*

"Alteration" as including unauthorized addition of words or numbers or other change in obligation of party to incomplete instrument. *Com. Code § 3407(a)(2)*

Fraudulently made alteration as discharging party whose obligation is affected by alteration, unless that party assents or is precluded from asserting alteration. *Com. Code § 3407(b)*

Payor bank or drawee paying fraudulently altered instrument or person taking it for value, in good faith and without notice of alteration, as entitled to enforce instrument (1) according to its original terms, or (2) in case of incomplete instrument altered by unauthorized completion, according to its terms as completed. *Com. Code § 3407(c)*

[b] Unauthorized Completion

"Incomplete instrument" defined. *Com. Code § 3115(a)*

Enforcement of incomplete instruments. *Com. Code § 3115(b)*

Addition of words or numbers to incomplete instrument without authority of signer as alteration under *Com. Code § 3407*. *Com. Code § 3115(c)*

Burden of establishing that words or numbers were added to incomplete instrument without authority of signer as on person asserting lack of authority. *Com. Code § 3115(d)*

[5] Decisions

Increasing amount of check as material alteration within meaning of former *Com. Code § 4207(1)(c)* (*now see Com. Code §§ 4207(a)(3), 4208(a)(2)*), which warranty is subject to exception in favor of holder in due course. *Sun'n Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 688, 148 Cal. Rptr. 329, 582 P.2d 920*

With respect to warranties against alteration, collecting bank as not holder in due course if transaction or negotiation in which it took check was so irregular as to call into question its validity, ownership, or terms or to create ambiguity as to party to pay; irregularities need not be limited to those appearing on face of check to impart notice. *Sun'n Sand, Inc. v. UnitedCalifornia Bank (1978) 21 Cal. 3d 671, 688-690, 148 Cal. Rptr. 329, 582 P.2d 920*

Recovery for breach of warranty of material alteration as limited to difference between raised amount and amount for which check was originally drawn. *Sun'n Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 690-691, 148 Cal. Rptr. 329, 582 P.2d 920*

Depositor as negligent for not taking steps that careful and prudent businessman would take after acquiring knowledge that funds seemed to be disappearing through probable issuance of forged checks. Basch v. Bank of America (1943) 22 Cal. 2d 316, 328-329, 139 P.2d 1

Bank as permitted to justify payment of checks with forged drawer's signature on principles of estoppel, or on basis of negligence or misleading conduct of depositor if depositor's conduct proximately caused bank to pay; however, bank as required to show due diligence before it may assert these defenses. Basch v. Bank of America (1943) 22 Cal. 2d 316,

321, 139 P.2d 1

Imposter doctrine applicable only when issuance of check has been accomplished through impersonation of payee; misrepresentation of perpetrator's agency status insufficient to constitute impersonation and, thus, to invoke imposter doctrine. *Title Ins. Co. v. Commercial Bank of California (1994) 27 Cal. App. 4th 800, 806-807, 32 Cal. Rptr. 2d 735*

Estoppel arose in favor of drawee bank when depositor signs checks in blank and delivers them to depositor's agent who thereafter fraudulently fills in blanks. *Wright v. Bank of America (1959) 176 Cal. App. 2d 176, 179-180, 1 Cal. Rptr. 202*

[6] Cross References

See also *§§ 95.450 -95.454*.

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9-95 California Forms of Pleading and Practice--Annotated § 95.456

§ 95.456 Complaint for Damages for Wrongful Dishonor of Checks [Com. Code § 4402]--By Drawer Against Drawee Bank--Interruption of Business Credit

[1] FORM Complaint for Damages for Wrongful Dishonor of Checks [Com. Code § 4402]--By Drawer Against Drawee Bank--Interruption of Business Credit

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR WRONGFUL
_____ [*name*],	)	DISHONOR OF CHECKS
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Name, capacity, and location of defendant financial institution. Choose appropriate allegation from §§ 95.410-95.413.*]

[2. *Fictitious name allegation, if appropriate. See § 95.430[1], Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 95.430[1], Paragraph 3.*]

4. [*Opening, maintenance, and existence of checking account, incorporating governing instruments. See § 95.430[1],*

Paragraph 4].

5. Defendant is required and agreed to pay all checks properly drawn by plaintiff(s) [even if payment would result in an overdraft, so long as the overdraft did not exceed $_____]. Checks are properly drawn if they contain the requisite signatures as specified on the signature card (Exhibit "A")[, in plaintiff's instructions,] and by the laws governing checks and checking accounts. Withdrawals require the signature(s) of [both] plaintiff [*specify any other signatures required or authorized, e.g.,* and her bookkeeper, John Alias].

[*In as many paragraphs as necessary, allege background facts regarding consequential damages, if any. Paragraph 6 is intended as an example only of the types of business credit that could be interrupted, canceled, or accelerated because of "bounced checks."*]

6. At all times herein mentioned, plaintiff was a _____ [*specify type of business*], carrying on business at _____ [*street address*], _____ [*city*], _____ County, California, and up until the time of the occurrence of the events hereinafter alleged enjoyed an unblemished credit rating and a sound financial reputation as one who paid his/her/its obligations promptly as they came due [or before]. Plaintiff was held in high esteem and good standing and his/her/its favorable credit reputation enabled plaintiff to negotiate and maintain the following accommodations and extensions of credit from the following _____ [*specify, using additional separate paragraphs if necessary, e.g.,* suppliers and financial institutions:

ABC BANK, short term (90 day) revolving unsecured line of credit;

$25,000 6-month note, prime plus 2 percent per annum, secured by a first lien on accounts receivables and inventory (sometimes referred to as "the flooring line"); and

$3,200,000 approved construction loan for plant, retail outlet, and parking facility 1/2 mile off Route 12 in Sonoma County.

Discounts of two percent from XYS CopyGraffix on all services and repair invoices paid in full within 30 days.

Discounts of two percent from Supplier Co. on all purchase invoices paid in full within 30 days].

[*CONTINUE*]

7. On _____ [*date*], plaintiff drew his/her/its check number _____ on defendant bank for the sum of $_____ [, and on the same day his/her/its check number _____ in the sum of $_____, both checks] payable to the order of _____ [*name of creditor(s)*] and delivered it/them to _____ [*name of creditor/payee*] in payment of _____ [*describe indebtedness or obligation for which check was payment, e.g.,* the July 1993 installment of the 5-year notes].

8. When plaintiff executed, issued, and delivered the check(s), _____ [the balance in plaintiff's account with defendant exceeded $_____ *or* there remained unused overdraft credit available to plaintiff of $_____ pursuant to the overdraft agreement mentioned above], and that _____ [balance *or* unused overdraft credit] at all times since has continued, and continues, to exceed the amount of the check(s).

9. _____ [*Name of creditor*] _____ [deposited the check(s) to its account *or*

negotiated the check(s)][,properly endorsed for deposit,] at the _____ [*address of depositary or collecting bank*] branch of _____ [*name of depositary or collecting bank*] _____ [through an automated teller machine on the premises of that branch *or* during business hours]. [In the usual course of business] [T]he check(s) was/were presented to defendant['s operations department] on _____ [*date*][, before defendant's "cutoff hour" of two o'clock p.m.]. After the close of defendant's offices on that day[, and after credit to plaintiff's account of deposits made that day], the balance _____ [in plaintiff's account *or* available to plaintiff in accordance with his/her/its overdraft agreement] with defendant was sufficient to pay the check(s), to wit, more than $_____. On _____ [*date*], defendant dishonored and failed to pay the check and returned it to _____ [*name of collecting or intermediate bank*] [*if notice of dishonor was given, add:* with the notation _____ (*specify, e.g.,* "insufficient funds")].

[*In as many paragraphs as necessary, describe each credit line or accommodation that was interrupted, cancelled, or accelerated because of the wrongful dishonor. Paragraphs 10-13 are intended as examples only and should be modified to address plaintiff's particular situation.*]

10. Immediately thereafter and on _____ [*date*], _____ [*name of creditor*] _____ [*specify action taken, e.g.,* sent plaintiff a Notice of Default and Acceleration of Revolving Credit Line, a copy of which is attached hereto as Exhibit "B" and incorporated by reference, stating that plaintiff's failure to timely make the quarterly (interest) payment due July, 15, 1993, constituted an Event of Default, which entitled it to demand, and it did demand, immediate repayment of the entire $300,000 outstanding balance. _____ (*name of creditor*) filed its action against plaintiff in the Superior Court of _____ County, Action Number _____, alleging that nonpayment of installment and dishonor of the check(s) was an event of default that entitled it to declare all other indebtednesses of plaintiff immediately due and payable. Specifically, _____ (*name of creditor*)'s lawsuit also declared accelerated and sought immediate repayment of the $25,000 loan secured by receivables and inventory and the construction loan. In addition, _____ (*name of creditor*) recorded notice of default of the deed of trust that secures the construction loan. (A copy of that notice is attached hereto as Exhibit"C" and incorporated by reference)].

11. The foregoing lawsuit [and recordation of notice of default] effectively deprived plaintiff of credit entirely in that _____ [*specify, e.g.,* other creditors of plaintiff, specifically Supplier Co., refused to extend plaintiff discount terms and demanded immediate payment of all outstanding invoices, which amounts to approximately $3,500].

12. _____ [*name of creditor*] as part of the litigation mentioned above, has obtained a writ of attachment and caused plaintiff's deposit account with defendant to be garnished and certain of plaintiff's personal property and business inventories to be taken into custody by the sheriff.

13. The acts of defendant have caused injury to plaintiff's good name and credit, and _____ [*name of creditor*] withdrew from plaintiff its esteem and credit and refused to extend plaintiff further credit because of the refusal of defendant to pay the checks. These acts of defendant have caused plaintiff to suffer great loss and injury to his/her/its good name and reputation in his/her/its business, his/her/its standing in the community as a reputable merchant has been destroyed, and because of these acts of defendant, plaintiff's business has been or will be entirely lost, to his/her/its damage in the sum of $_____.

[*Prayer. See § 95.430.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 95.430[1].*]

[2] Use of Form

This complaint is for use in an action by a drawer of checks against the drawee bank for damages resulting from the bank's wrongful dishonor of the checks [*see Com. Code § 4402* (discussed in *§ 95.323*)]. The foregoing form contains allegations appropriate for loss of business credit, credit accommodations, and reputation, with optional allegations for use when there is an overdraft agreement in effect between plaintiff and defendant [*see Com. Code §§ 4401(a), 4402(a)*].

For allegations regarding damages for emotional distress caused by the drawer's arrest or by plaintiff's loss of a single opportunity, *see §§ 95.457* and *95.458*, respectively. In addition to those allegations, counsel may wish to add other causes of action, including some sounding in tort, such as intentional infliction of emotional distress or negligence in order to obtain punitive damages [*see Teitel v. First Los Angeles Bank (1991) 231 Cal. App. 3d 1593, 1599-1600, 1604-1605, 1607, 282 Cal. Rptr. 916* (discussed in the Introduction *§ 95.323[2]*)].

[3] Allegations

This complaint alleges:

- What constitutes a proper drawer's signature and the existence and amount of any overdraft credit (Paragraph 5) [*Com. Code §§ 4401(a)* (properly payable), *4402(a)* (overdraft agreement)].

- Plaintiff's status, financial and business reputation, and credit availability before the wrongful dishonor (Paragraph 6).

- Plaintiff's relationship with the payee of the dishonored check(s) prior to the wrongful dishonor and, if relevant, the purpose of the check(s) (Paragraph 7).

- That the balance in plaintiff's account, or the unused portion of any overdraft line of credit, was, and continues to be, sufficient to pay the check(s) (Paragraph 8) [*Com. Code § 4402(a)*; *see Com. Code § 4402(c)* (*discussed under § 95.456[5]*)].

- Negotiation or deposit, presentment, and dishonor of the check(s) (Paragraph 9).

- The consequential damages caused by the wrongful dishonor (Paragraphs 10-13) [*see Com. Code § 4402(b)*].

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when their inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[4] Standing to Maintain Action for Wrongful Dishonor

[a] Principal of Corporate Depositor

At one time, there was a split of authority on the issue of whether anyone other than the customer could recover damages for wrongful dishonor [*see Com. Code § 4104(a)(5)*]. The situation usually arises when the customer is a business entity and the individual principals seek to recover damages for wrongful dishonor [Official Comment 5 to UCC § 4-402 (1990)]. California courts have held that such noncustomers may recover damages for wrongful dishonor when there is substantial unity of interest and the bank looks to the individuals to repay overdrafts or loans to troubled or shell corporations [*see, e.g., Karsh v. American City Bank (1980) 113 Cal. App. 3d 419, 421-422, 169 Cal. Rptr. 851* ; *Kendall Yacht Corp. v. United California Bank (1975) 50 Cal. App. 3d 949, 956, 123 Cal. Rptr. 848]* . According to the Commentary to the Uniform Commercial Code, when the wrongful dishonor impugns the reputation of principals of the business customer, the issue is not, as *Kendall* characterized it, one of literal versus liberal interpretation of *Com. Code § 4402*, but whether the statutory cause of action under *Com. Code § 4402* displaces, in accordance with *Com. Code § 1103(b)*, any cause of action that existed at common law in a person who is not the customer. While *Com. Code § 4402* should not be interpreted to displace any common law cause of action, the section gives causes of action only to the "customer," however that definition is construed [Official Comment 5 to UCC § 4-402 (1990)].

[b] Payee Has No Action Against Drawee Bank

The payee of a dishonored check has no cause of action against the drawee bank for wrongful dishonor [*Hansen v. Bank of America (1950) 101 Cal. App. 2d 300, 303, 225 P.2d 665* ; *see Com. Code § 4402(b)*]. After wrongful dishonor, the payee can re-present the check or sue the drawer on the underlying obligation or on the check [*see Com. Code § 3310(b)(1), (3), (4)*]. For forms for use by the payee to pursue its action against the drawer of a dishonored check, see Ch. 385, *Negotiable Instruments* .

[5] Time for Determining Sufficiency of Funds in Drawee's Account

A payor bank's determination of the customer's account balance for purposes of deciding whether to dishonor an item for insufficiency of available funds may be made at any time between the time the item is received by the payor bank and the time that the payor bank returns the item or gives notice in lieu of return, and no more than one determination need be made [*Com. Code § 4402(c)*]. Banks commonly determine whether there are sufficient funds in an account to honor an item after the close of banking hours on the day of presentment when they post debit and credit items to the account. The determination is made on the basis ofcredits available for withdrawal as of right or made available for withdrawal by the bank as a matter of accommodation to its customer. If the account balance at that time is such that paying the item will create an overdraft, the bank has until midnight of the following day to return the item. Before that midnight deadline, new credits that are withdrawable as of right may be added to the account [*see* Official Comment 4 to UCC § 4-402 (1990)]. For the purpose of processing items and proving balances, a bank may fix an afternoon "cutoff hour" of 2 P.M. or later [*Com. Code § 4108(a)*]. An item or deposit received after the bank's "cutoff hour" or after the close of its banking day may be treated as having been received at the opening of the next banking day [*Com. Code § 4108(b)*; *but cf. Com. Code § 4303(a)(5)* (cutoff hour for stop-payment orders)].

If the payor elects to make a subsequent balance determination for the purpose of reevaluating its decision to dishonor the item, the account balance at the time of the subsequent determination must be used to determine whether dishonor for insufficiency of available funds is wrongful [*Com. Code § 4402(c)*]. *Com. Code § 4402(c)* was added to eliminate uncertainty regarding whether the payor's failure to make a second determination before returning the item on the day following presentment is wrongful if new credits that would cover the amount of the check are added to the account on that day [Official Comment 4 to UCC § 4-402 (1990)].

[6] State Statutes

Measure of damages arising other than from contract. *Civ. Code § 3333*

Liability of drawee to drawer for wrongful dishonor of check. *Com. Code § 4402*

[7] Decisions

[a] Accrual of Action

Cause of action accrues when bank fails to discharge its agreement by dishonoring duly presented check. *Allen v. Bank of America (1943) 58 Cal. App. 2d 124, 127, 136 P.2d 345*

[b] Damages

"Actual damage" as used in former *Civ. Code § 3320* (*now see Com. Code § 4402*) is not confined to amount of check if detriment occasioned by loss of property proximately resulting from wrongful dishonor of check actually exceeds amount of check. *Abramowitz v. Bank of America (1955) 131 Cal. App. 2d Supp. 892, 897, 281 P.2d 380*

Former *Civ. Code § 3320* (*now see Com. Code § 4402*), providing that no liability attaches to bank in favor of depositor because of nonpayment of check that should have been paid unless depositor proves actual damage by reason of that nonpayment, places both traders and nontraders on equal basis so far as liability on part of bank and its depositors is concerned. *Allen v. Bank of America (1943) 58 Cal. App. 2d 124, 130-131, 136 P.2d 345* ; *accord*, Official Comment 1 to UCC § 4-402 (1990)

[c] Pleading and Procedure

Having undertaken no action that could prejudice defendant, plaintiff stating cause of action in both contract and tort for bank's wrongful dishonor of check did not need to elect remedy, but was permitted to go to trier of fact on both theories. *Weaver v. Bank of America (1963) 59 Cal. 2d 428, 432, 30 Cal. Rptr. 4, 380 P.2d 644*

Sufficiency of complaint for damages based on dishonor of check is not impaired by allegations regarding items of damage that are not recoverable as long as allegations regarding recoverable items of damage are pleaded. *Allen v. Bank of America (1943) 58 Cal. App. 2d 124, 131, 136 P.2d 345*

[8] Cross References

See also *§§ 95.410 -95.413*, and *95.430*.

For discussion and forms relating to damage to one's reputation, see Ch. 340, *Libel and Slander* .

For discussion of and forms for alleging emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress* .

California Forms of Pleading and Practice--Annotated

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Volume 9: Bailments thru Boats and Boating-Chs. 93-100
Chapter 95 BANKS, DEPOSITS, AND CHECKS
PART IV. FORMS
C. Check Collections

9-95 California Forms of Pleading and Practice--Annotated § 95.457

§ 95.457 Allegations for Use in Drawer's Action for Wrongful Dishonor of Checks [Com. Code § 4402]--Drawer's Arrest and Emotional Distress

[1] FORM Allegations for Use in Drawer's Action for Wrongful Dishonor of Checks [Com. Code § 4402]--Drawer's Arrest and Emotional Distress

1. _____ [*Name of payee of dishonored check*], on receipt of the returned check marked _____ [*describe, e.g.,* insufficient funds], and in reliance on and as a proximate result of dishonor of that check and the reason given for it, caused criminal charges to be brought against plaintiff, which resulted in issuance of warrant for plaintiff's arrest. On _____ [*date*], plaintiff was arrested, charged with _____ [*specify, e.g.,* petty theft], and temporarily confined until _____ [*date*].

2. Defendant bank and its employees knew, or should have known, that the issuance of a check _____ [*describe reason for return, e.g.,* on insufficient funds] is a public offense that frequently results in the arrest and imprisonment of the maker. Notwithstanding this knowledge, defendant bank wrongfully refused to honor this check.

3. As a proximate result of defendant bank's wrongful dishonor of the check, plaintiff suffered humiliation, mental anguish, and emotional [and physical] distress, and has been injured in mind [and body] as follows: _____ [*describe, e.g.,* plaintiff lost sleep, became ill, and his/her health was impaired], all to plaintiff's damage [in the sum of $_____].

4. As a further proximate result of defendant bank's wrongful dishonor of the check, plaintiff was required to and did employ physicians and psychotherapists to care for and treat him/her, and incurred additional expenses for those treatments and the medications prescribed by the physicians in an amount according to proof.

5. By reason of plaintiff's arrest and incarceration, plaintiff was prevented from performing his/her usual _____ [occupation *or* profession] as a _____ [*specify, e.g.,* carpenter] and thereby lost _____ [wages *or* income] in an amount according to proof.

[2] Use of Form

These allegations are for use in place of, or in addition to, the allegations in § 95.456[1], Paragraphs 10-13, to allege emotional distress as consequential damages suffered by the drawer because of the drawee's wrongful dishonor of a check and resultant arrest and incarceration of the drawer [*see also § 95.323[2]*].

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when their inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[3] State Statutes

Criminal penalties for drawing check on closed account or account with insufficient funds to pay check. *Penal Code § 476a*

[4] Decisions

Complaint for damages for arrest and detention of plaintiff caused by defendant bank's wrongful dishonor of check stated sufficient proximate cause either under principles of tort or contract. *Weaver v. Bank of America (1963) 59 Cal. 2d 428, 430-431, 434-435, 30 Cal. Rptr. 4, 380 P.2d 644*

Arrest under bad check law is an obvious risk against which bank has undertaken to protect depositor; whether plaintiff's complaint be conceived as sounding in tort or contract, plaintiff can allege breach of duty and consequential damages that were sufficiently causally connected to state cause of action when plaintiff arrested because of defendant bank's wrongful dishonor of check. *Weaver v. Bank of America (1963) 59 Cal. 2d 428, 430-431, 434-435, 30 Cal. Rptr. 4, 380 P.2d 644*

Damages for emotional distress caused by wrongful dishonor are recoverable when drawer's emotional distress goes beyond subjective discomfort and verifiable events following wrongful dishonor would cause reasonable person mental suffering. *Kendall Yacht Corp. v. United California Bank (1975) 50 Cal. App. 3d 949, 957-958, 123 Cal. Rptr. 848*

[5] Cross References

See also *§ 95.456*.

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9-95 California Forms of Pleading and Practice--Annotated § 95.458

§ 95.458 Allegation for Use in Action for Wrongful Dishonor of Checks [Com. Code § 4402]--Loss of Benefit of Transaction for Which Check Was Issued

[1] FORM Allegation for Use in Action for Wrongful Dishonor of Checks [Com. Code § 4402]--Loss of Benefit of Transaction for Which Check Was Issued

1. On _____ [*date*], plaintiff(s) drew his/her/its/their check number _____ on defendant bank for the sum of $_____, payable to the order of _____ [*name of creditor*], and delivered that check to _____ [*name of creditor*] to _____ [*describe purpose of check, e.g.,* redeem their personal residence from foreclosure].

2. As a proximate result of defendant bank's wrongful dishonor of the check, _____ [*describe loss of benefit of transaction for which check was issued, e.g.,* plaintiffs' home was sold to a third party at foreclosure on _____ (*date*) and plaintiffs were forced to vacate their residence and to reside with relatives for three months].

3. At the time of the _____ [*specify lost benefit, e.g.,* foreclosure, plaintiffs' equity in their home] amounted to approximately $_____, all of which was lost to him/her/it/them. Additional _____ [*specify other appreciation or income likely to have resulted from transaction, e.g.,* appreciation of that real property would likely have continued] had defendant honored the check. That _____ [appreciation *or* income] from the time of the wrongful dishonor until the time of trial would likely have amounted to _____ [$_____ *or* an amount in exceed of $_____, which plaintiffs cannot now determine].

4. As a further proximate result of defendant bank's wrongful dishonor of the check, plaintiffs were required to and did expend the following additional expenses _____ [*specify, e.g.,* $_____ for moving expenses].

[2] Use of Form

Paragraph 1 of this form is for use in place of Paragraph 5 of *§ 95.456[1]*. The remaining paragraphs of the foregoing form of allegation are for use in addition to, or in place of, Paragraphs 10-13 of *§ 95.456[1]* to allege the financial losses sustained as a consequence of the drawee's wrongful dishonor of a check [*see also § 95.323[2]*].

It may also be appropriate to incorporate allegations regarding emotional distress from *§ 95.457[1]*.

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when their inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[3] Cross References

See also *§§ 95.456* and *95.457*.

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9-95 California Forms of Pleading and Practice--Annotated § 95.459

§ 95.459 Complaint for Damages for Payment of Check After Payment Ordered Stopped [Com. Code § 4403]--By Drawer Against Drawee Bank

[1] FORM Complaint for Damages for Payment of Check After Payment Ordered Stopped [Com. Code § 4403]--By Drawer Against Drawee Bank

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR PAYMENT
_____ [*name*],	)	OF CHECK AFTER STOP- PAYMENT ORDER
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Name, capacity, and location of defendant financial institution. Choose appropriate allegation from §§ 95.410-95.413.*]

[2. *Fictitious name allegation, if appropriate. See § 95.430[1], Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 95.430[1], Paragraph 3.*]

4. [*Opening, maintenance, and existence of checking account, incorporating governing instruments. see § 95.430[1],*

Paragraph 4.]

5. On or about _____ [*date*], plaintiff drew his/her/its check number _____ [*number*], which was properly payable from his/her/its account with defendant [and contained the signature(s) of _____ (*name(s)*) as drawer(s)]. The check is dated _____ [*date*], and is payable to the order of _____ [*name of payee*] in the amount of $_____. A copy of the check, front and back, is attached as Exhibit "B" and incorporated by reference. Plaintiff delivered that check to _____ [*name of payee*] on or about _____ [*date*]. [*Rebut anticipated defense if desired, e.g.,* Although the check was issued in payment for the purchase of securities, plaintiff later learned that the securities were not qualified in that no permit for issuance had been issued by the California Corporations Commissioner and no notice of issuance pursuant to any exception to or exemption from permit requirements had been filed.]

6. On _____ [*date*], [*add specificity if desired to overcome any anticipated defense based on "cutoff hour," e.g.,* at approximately 3 o'clock p.m.,] plaintiff gave oral instructions to defendant['s _____ (*specify name and title of person taking oral order, if known, e.g.,* Operations Officer, Alfred Officer)] at its _____ [*type and address of facility, e.g.,* main operations center at 350 Mission Street, St Elsewhere, California], not to pay the check.

7. Thereafter and on _____ [*date*], plaintiff [caused to be] delivered to defendant written instructions not to pay the check. Plaintiff's instructions specified the date, amount, and payee of the check and directed defendant not to honor or pay the check if it should ever be presented to defendant for payment. [A copy of the notice is attached as Exhibit "C" and incorporated by reference.]

8. The stop-payment notice was _____ [*specify means of transmission, e.g.,* delivered by private messenger] [*continue to describe any receipt, acknowledgment, or record of transmission, e.g.,* who obtained defendant bank's written acknowledgment of receipt, signed by its _____ (*specify name and title of person taking oral order, if known, e.g.,* Operations Officer, Alfred Officer) at its _____ (*type and address of facility, e.g.,* main operations center at 350 Mission Street, St Elsewhere, California). (A copy of the acknowledgment of receipt is attached as Exhibit "D" and incorporated by reference.)]

9. Thereafter and on or about _____ [*date*], this check was presented to defendant for payment and defendant wrongfully and in violation of, and contrary to, the stop-payment notice given it by plaintiff paid this check from plaintiff's account. That account was sufficient to cover this check[, but its payment resulted in wrongful dishonor of other checks properly payable from plaintiff's account as alleged below].

10. Prior to the commencement of this action, plaintiff demanded that defendant replace and recredit plaintiff's account with the sum of $_____, and defendant has failed and refused and still fails and refuses to do so.

11. As a result of the foregoing there is due and owing to plaintiff from defendant the sum of $_____ with interest thereon from _____ [*date*].

[*Prayer. See § 95.430.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 95.430[1].*]

[2] Use of Form

This complaint is for use in a drawer's action against a drawee bank, and its agents, if desired, for the recovery of the amount of a check cashed contrary to a valid stop-payment order [*see Com. Code § 4403* (discussed in the Introduction under *§ 95.322*)]. If more than one person's signature is required to draw on the account, any of the authorized signers may stop payment or close the account [*Com. Code § 4403(a)*].

Stopping payment or closing an account is a service that customers expect and are entitled to receive from banks notwithstanding its difficulty, inconvenience, and expense. The inevitable occasional losses through failure to stop payment or close an account should be borne by payor banks as a cost of doing business [Official Comment 1 to U.C.C. § 4-403 (1990)]. Thus, the drawee bank is liable for failing to stop payment in accordance with a valid and effective stop payment order even if the failure was not due to the bank's negligence or lack of ordinary care [*see Com. Code § 4103(a)* (discussed in *§ 95.314*)].

The loss from payment of an item contrary to a stop-payment order may include damages for dishonor of subsequent items under *Com. Code § 4402* [*Com. Code § 4403(c)*; *see §§ 95.456 -95.458*]. If the payment contrary to the stop payment order resulted in wrongful dishonor of other checks, appropriate allegations from Paragraphs 5-13 of § 95.456[1] may be incorporated or added as a separate cause of action.

[3] Allegations

This complaint alleges:

- The issuance of a check that was properly payable from plaintiff's account (Paragraph 5) [*see* Official Comment 1 to U.C.C. § 4-401 (1990) (discussed in *§ 95.459[5]*].

- Any oral stop-payment notice given by plaintiff (Paragraph 6) [*see Com. Code § 4403(b)* (oral notice not confirmed in writing as effective for 14 calendar days)].

- The written stop-payment notice given by plaintiff (Paragraphs 7, 8) [*see Com. Code § 4403(b)* (written stop-payment notice effective for six months)].

- Any acknowledgment by the bank of receipt of the stop-payment notice or any evidence of delivery of the written notice (Paragraph 8).

- Defendant's payment of the check despite the valid and effective stop payment order (Paragraph 9).

- Plaintiff's demand for recredit or payment of the amount of the check and defendant's refusal and failure to do so (Paragraph 10).

- The amount still owing (Paragraph 11) [*Hiroshima v. Bank of Italy (1926) 78 Cal. App. 362, 367-368, 248 P. 947]* .

If the check was paid more than six months after the written stop-payment notice was given, counsel should modify Paragraphs 7 and 8 to alleging the giving of a renewal notice by the drawer [*see Com. Code § 4403(b)* (discussed in *§*

95.322[2])].

If there is some question regarding damages and the drawee's right of subrogation [*see Com. Code § 4407* (discussed in *§ 95.322[4]*); *see also § 95.460*], counsel may wish to include the optional allegation in Paragraph 5 stating why plaintiff owed no obligation to the payee, or otherwise explaining why the bank will not be entitled to subrogation.

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when their inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[4] Limitation Period

An action to enforce an obligation, duty, or right arising under Division 4 of the Commercial Code must be commenced within three years after the cause of action accrues [*Com. Code § 4111*; *cf. Union Tool Co. v. Farmers etc. Nat. Bk. (1923) 192 Cal. 40, 52, 218 P. 424* (decided prior to enactment of *Com. Code § 4111*; no statute of limitations applicable to action to recover deposit)].

[5] When Stop-Payment Order Should Not Be Required or Accepted

A cashier's check or teller's check purchased by a customer whose account is charged to pay for the check is not a check drawn on the customer's account within the meaning of *Com. Code § 4403(a)*. Hence, a customer purchasing a cashier's check or teller's check has no right to stop payment of that check. If the bank issuing the teller's check or cashier's check does stop payment on it as an accommodation to its customer, or for other reasons, its liability on the check is governed by *Com. Code § 3411*, which is discussed in the Comment to *see § 95.465* [Official Comment 4 to U.C.C. § 4-403 (1990)]. Similarly, a drawer has no right to stop payment after certification of a check, and a bank that refuses to pay a certified check will be liable in accordance with *Com. Code § 3411* [Official Comment 4 to U.C.C. § 4-403 (1990)].

A bank has no right to require its customer to execute a stop-payment order of an item that is not properly payable from the customer's account. For instance, if a customer notifies a bank that an unendorsed or specially endorsed check has been lost or stolen, it is not proper for the bank to require a stop-payment order because the check when presented will likely bear a forged endorsement and not be properly payable from the customer's account [Official Comment 1 to U.C.C. § 4-401 (1990)].

[6] State Statutes

Check or draft is not assignment of funds in hands of drawee and drawee as not liable on check until it accepts it. *Com. Code § 3408*

Stop payment orders. *Com. Code §§ 4303, 4403*

[7] Cross References

See also *§§ 95.430* and *95.450*.

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C. Check Collections

9-95 California Forms of Pleading and Practice--Annotated § 95.460

§ 95.460 Complaint for Declaratory Relief [Code Civ. Proc. § 1060] to Determine Liability for Payment of Check After Stop-Payment Order [Com. Code §§ 4403(c), 4407]--By Drawee Bank Against Drawer and Payee/Endorser

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. § 1060] to Determine Liability for Payment of Check After Stop-Payment Order [Com. Code §§ 4403(c), 4407]--By Drawee Bank Against Drawer and Payee/Endorser

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	COMPLAINT FOR DECLARATORY RELIEF
[and DOES I through _____,]	)	
Defendants.	)	
	)	
	)	

Plaintiff alleges:

[1. At all times herein mentioned defendants were and are residents of _____ (*city*), _____ County, California (*or other allegation establishing venue*).]

[2. *Fictitious name allegation, if appropriate. See § 95.430[1], Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 95.430[1], Paragraph 3.*]

4. Prior to _____ [*date*], defendant _____ [*name of drawer*] executed and issued his/her/its check number _____, dated _____, and payable to the order of _____ [*name of payee*] in the amount of $_____. The check was drawn on and properly payable from defendant's account number _____ at plaintiff's branch located at _____ [*street address and city of branch*]. On or about _____ [*date*], defendant _____ [*name of drawer*] delivered that check to defendant _____ [*name of payee*].

5. On _____ [*date*], defendant _____ [*name of drawer*] executed and delivered to plaintiff a _____ [written *or* oral] order notifying plaintiff not to pay the check, described in the stop-payment order as _____ [*give particulars as described in order, e.g.,* Check No. _____, in the amount of $_____].

6. On _____ [*date*], defendant _____ [*name of payee or endorser or person who negotiated the check*] caused the check to be presented to plaintiff for payment [*if endorsement or lack thereof is relevant, add:* with the endorsement of defendant _____, (*name of payee*)], and plaintiff paid the amount of the check to defendant _____ [*name of person paid*].

7. On or about _____ [*date*], defendant _____ [*name of drawer*] demanded of plaintiff the return of the sum of $_____ [, and plaintiff thereon made demand on defendant _____ (*name of payee and/or endorser*) for the return of the sum and also made demand on defendant _____ (*name of drawer*) for the sum of $_____. Neither defendant has returned any portion of the sum of $_____ to plaintiff]. Plaintiff has not returned the sum or any part thereof to defendant _____ [*name of drawer*].

8. An actual controversy exists between plaintiff and defendants concerning their respective rights under the check and under the circumstances set out herein, and a judicial declaration is necessary and appropriate at this time under the circumstances in order that plaintiff may ascertain his/her/its rights and duties.

9. Plaintiff contends that defendant _____ [*name of drawer*] was indebted to defendant _____ [*name of payee or endorser*] at the time plaintiff paid the check, or that defendant _____ [*name of payee or endorser*] was a holder in due course of the check at the time plaintiff made payment, and thus defendant _____ [*name of drawer*] is not entitled to reimbursement for the amount of the check from plaintiff and any such reimbursement would unjustly enrichment defendant _____ [*name of drawer*] at the expense of plaintiff.

10. Defendant _____ [*name of drawer*] contends that he/she/it was not indebted to defendant _____ [*name of payee or endorser*] at the time the check was paid [in that _____ (*specify defense, if known, e.g.,* defendant _____ (*name of payee*) had not performed the work and services for which the check was intended as payment], and thus, that plaintiff's payment of the check was wrongful and caused loss and damage to defendant _____ [*name of drawer*], which entitles that defendant to reimbursement from plaintiff.

WHEREFORE, plaintiff prays judgment against defendants as follows:

1. For a declaration of the rights, duties, and liabilities of plaintiff and defendants with respect to the transaction set out in plaintiff's complaint, and that if it is determined that plaintiff is liable to defendant _____ [*name of drawer*] with respect to the transaction set out in plaintiff's complaint in the amount of $_____, that it also be determined that defendant _____ [*name of payee or endorser*] is liable to plaintiff in the same amount;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 95.430.*].

[2] Use of Form

This complaint is for use by a drawee bank that paid a check contrary to a stop-payment order to assert and seek a declaration in accordance with its contention that it is entitled to subrogation to prevent unjust enrichment [*see Com. Code § 4407* (discussed in *§ 95.322[4]*)].

[3] Allegations

This complaint alleges:

- The issuance of a check (Paragraph 4).
- Plaintiff's receipt of a stop-payment order with regard to that check (Paragraph 5).
- Plaintiff's payment of the check despite the stop-payment order (Paragraph 6).
- Drawer's demand for reimbursement of the amount of the check and plaintiff drawee's refusal to do so (Paragraph 7).
- The existence of an actual controversy regarding whether the drawer suffered any loss or damage by virtue of the bank's payment over the order and whether the bank is entitled to be subrogated to any payee or holder of the check (Paragraph 8) [*Code Civ. Proc. § 1060*].
- Plaintiff's contention that it is so entitled (Paragraph 9).
- Defendant drawee's contention that it is not (Paragraph 10).

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when their inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[4] Jurisdiction

An action for declaratory relief is within the original jurisdiction of the superior court [*Code Civ. Proc. § 1060*].

[5] State Statutes

Customer's right to stop payment. *Com. Code § 4403*

Payor bank's right to subrogation on improper payment. *Com. Code § 4407*

[6] Decisions

Drawee was not entitled to subrogation when drawer owed no debt to payee of check, which was issued in perpetration of securities fraud. *Danning v. Bank of America (1984) 151 Cal. App. 3d 961, 976-977, 199 Cal. Rptr. 163* (disapproved on other grounds in *In re Marriage of Arceneaux (1990) 51 Cal. 3d 1130, 1137-1138, 275 Cal. Rptr. 797, 800 P.2d 1227*)

Cause of action for declaratory relief was stated by complaint disclosing controversies between plaintiff drawee bank and drawer, payee, endorsers, and holders concerning rights arising out of negotiation of check. *California Bank v. Diamond (1956) 144 Cal. App. 2d 387, 390, 301 P.2d 60*

Court had jurisdiction to render money judgments in action for declaratory relief. *California Bank v. Diamond (1956) 144 Cal. App. 2d 387, 390, 301 P.2d 60*

Denial of declaratory relief is abuse of discretion when multiplicity of actions would result unless parties' rights were first declared and relief given in same action. *California Bank v. Diamond (1956) 144 Cal. App. 2d 387, 390, 301 P.2d 60*

[7] Cross References

See also *§§ 95.430* and *95.459*.

For discussion and forms relating to the recovery of costs, see Ch. 174, *Costs and Attorneys' Fees* .

For forms for use in actions for declaratory relief generally, see Ch. 182, *Declaratory Relief* .

For interrogatories for use in actions by banks against endorsers of notes, see Bender's Forms Of Discovery, *Promissory Notes, Bills and Checks* (Matthew Bender).

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9-95 California Forms of Pleading and Practice--Annotated § 95.461

§ 95.461 Complaint for Money to Recover Amount Paid on Check--By Payee Against Depositary Bank--Check Cashed on Forged or Missing Endorsement [Com. Code § 3420]

[1] FORM Complaint for Money to Recover Amount Paid on Check--By Payee Against Depositary Bank--Check Cashed on Forged or Missing Endorsement [Com. Code § 3420]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONEY
_____ [*name*],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 95.430[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 95.430[1], Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 95.430[1], Paragraph 3.*]

4. On or about _____ [*date*], _____ [*name of drawer*], for valuable consideration, executed, issued, and delivered to plaintiff his/her/its check, numbered _____, dated

_____, and drawn on _____ [*name of drawee*], at its branch located at _____ [*address of office on which drawn*], _____ County, California, and payable to the order of plaintiff [and _____ (*name(s) of joint payee(s)*] in the amount of $_____. [A copy of the check, front and back, is attached as Exhibit "A" and incorporated by reference.]

[5. The check was issued by _____ (*name of drawer*) in _____ (*specify purpose of check, e.g.,* settlement of litigation between its insured and the payees of the check). Drawer intended the proceeds to be payable _____ (*specify, e.g.,* in accordance with the terms of the settlement agreement, which provided that plaintiff was to receive $32,500).]

[*EITHER, if endorsement was forged:*]

6. Thereafter, on or about _____ [*date*], the check was [stolen from plaintiff and] presented to, and paid by, defendant on the forged endorsement of plaintiff. Plaintiff's endorsement was forged by _____ [*name of forger or* a person unknown to plaintiff]. _____ [*Name of forger or* The person who forged plaintiff's signature as endorser] was without authority from plaintiff to endorse the check. Defendant [collected the amount of the check from the drawee, in return for the delivery of the check to the drawee, and] has ever since refused to pay and still withholds from plaintiff the amount of the check.

[*OR, if endorsement was missing:*]

6. Thereafter, on or about _____ [*date*], the check was presented to, and paid by, defendant although plaintiff's endorsement was missing. The person who deposited the check was without authority from plaintiff to deposit the check.

[*CONTINUE*]

7. Plaintiff has demanded of defendant that defendant pay plaintiff the amount of the check but defendant failed and refused and still fails and refuses to pay the same, and no part thereof has been paid, and the whole of the sum is due and owing from defendant to plaintiff.

[*Prayer. see § 95.430.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 95.430[1].*]

[2] Use of Form

This complaint is for use in an action by a payee to whom the check was delivered, either directly or through delivery to an agent or a copayee, against the depositary bank to recover the amount of a check cashed on a forged or missing endorsement [*see Com. Code § 3420(a)(2)* (discussed in Ch. 385, *Negotiable Instruments*); *see also § 95.327[3]*]. Under *Com. Code § 3420(a)*, as amended by Stats. 1992, ch. 914, neither the drawer or a payee or endorsee who never took delivery of a check has a cause of action for conversion [*accord, Jones v. Bank of America (1942) 49 Cal. App. 2d 115, 119-122, 121 P.2d 94* (action by payees' assignee; checks stolen by drawer's manager before delivery to payees)]. For forms and discussion of conversion in general, see Ch. 150, *Conversion* .

[3] Parties' Remedies for Conversion Based on Forged Endorsement

Under *Com. Code § 3420*, the loss for paying a check on a forged endorsement falls on the one who gave value to the thief/forger. That is usually the depositary bank [*see* Official Comment 1 to U.C.C. § 3-420 (1990)]. The measure of liability is the amount payable on the instrument, and may not exceed the amount of the plaintiff's interest in the instrument [*Com. Code § 3420(b)*; *see Stenseth v. Wells Fargo (1995) 41 Cal. App. 4th 457, 465-466, 48 Cal. Rptr. 2d 192* (payee not entitled to recover damages under *Civ. Code § 3336* for time and effort spent attempting to recover converted property)]. If the forger stole the check before it was delivered to the payee, the payee never became the owner or holder of the check, so the payee has no cause of action for conversion [*Com. Code § 3420(a)(2)*]. The payee may still enforce the underlying obligation [*see* Official Comment 1 to UCC § 3-420 (1990)].

Once the payee has taken delivery of the check, however, the payee no longer can enforce the underlying obligation [*see Com. Code § 3310(b)(4)*], so the payee needs a cause of action for conversion. Thus, if the forger steals a check after it is delivered to the payee and forges the payee's endorsement, the payee has causes of action for conversion against all the banks in the collection chain, including the payor (drawee) bank [*see Cooper v. Union Bank (1973) 9 Cal. 3d 371, 381, 107 Cal. Rptr. 1, 507 P.2d 609* (payee has action against drawee)]. Although the payee may sue any bank in the collection chain, *Com. Code § 3420(c)* makes it far more efficacious for the payee to sue the depositary bank. Each of the other banks in the collection chain is apt to defend on the ground of having paid the proceeds in good faith to one not entitled to enforce the instrument. A payee who sues both depositary and payor banks is entitled to only one recovery [*see* Official Comment 3 to UCC § 3-420 (1990); *see also Resh v. Connecticut National Bank (1996) 89 F.3d 598, 601* (payee ratifies payment made by drawee to depositary when payee sues both depositary and drawee in single suit in state court)].

The drawer has no cause of action for conversion [*Com. Code § 3420(a)(1)*]. The drawer's remedy is under *Com. Code § 4401(a)*, for recredit of any unauthorized charge to his or her account for payment of a check on a forged endorsement [Official Comment 1 to UCC § 3-420 (1990)].

As between the banks, each bank has a claim for breach of warranties against the bank from which it took the check [*Com. Code §§ 3417(a)(1), 4208(a)(1)*; *Cooper v. Union Bank (1973) 9 Cal. 3d 371, 381, 107 Cal. Rptr. 1, 507 P.2d 609]* , until, once again, the loss falls on the depositary bank [Official Comment 1 to UCC § 3-420 (1990)].

[4] Remedies for Conversion Based on Missing Endorsement

A check is converted if a bank makes or obtains payment with respect to the check, for a person not entitled to enforce the check or receive payment [*Com. Code § 3420(a)*]. If a bank makes payment with respect to a check, to a person not entitled to receive payment, then the bank is liable for conversion under *Com. Code § 3420(a)*, without regard to whether the check bore a forged or unauthorized endorement or there was a missing endorsement [*Gil v. Bank of America (2006) 138 Cal. App. 4th 1371, 1377, 42 Cal. Rptr. 3d 310]* . For further discussion, see *§ 95.328*.

An action may be brought by a copayee who endorsed the check, on the ground that the endorsement of another copayee was missing [*Gil v. Bank of America (2006) 138 Cal. App. 4th 1371, 1377, 42 Cal. Rptr. 3d 310*

(homeowner's action for conversion of check drawn by fire insurer to pay claim was based on absence of mortgage lender's endorsement)].

[5] Allegations and Measure of Damages

This complaint alleges:

- The making, issuance, and delivery of the check, for value, to plaintiff as payee (Paragraph 4) [*see Com. Code § 3420(a)(2)*];

- The forging of plaintiff's endorsement, or the fact that the check was deposited without endorsement, and payment of the check by defendant on the forged or missing endorsement (Paragraph 6); and

- Defendant's refusal to pay plaintiff the amount of the check (Paragraph 7).

The measure of liability for conversion of a check is presumed to be the face amount of the check, but the payee's recovery may not exceed his or her interest in the check [*Com. Code § 3420(b)*; *see, e.g., Southern Cal. Permanente Medical Group v. Bozinovski (1983) 148 Cal. App. 3d 503, 507, 196 Cal. Rptr. 150* (bank as not required to duplicate payment to joint payee/forger)]. Thus, the allegations of Paragraph 5 are for use to allege the extent of plaintiff's interest in the check and are necessary only when plaintiff is not the sole owner of the check.

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when their inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[6] Limitation Period

An action for conversion of a negotiable instrument must be commenced within three years after the cause of action accrues [*Com. Code § 3118(g)(1)*]. The cause of action accrues when the conversion occurs, regardless of whether the plaintiff knows of the conversion [*see, e.g., AmerUS Life Ins. Co. v. Bank of Am. (2006) 143 Cal. App. 4th 631, 637, 49 Cal. Rptr. 3d 493* (insurance company's 2002 action for conversion, based on bank's payment of premium check on forged endorsement by other person that occurred in 1996, was time-barred even though plaintiff had no knowledge of material facts until 2001)], except when the defendant conceals facts constituting the conversion or when the defendant is a fiduciary of the plaintiff [*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 561, 305 P.2d 20]* . If the defendant conceals facts, the statute of limitations does not begin to run until the plaintiff discovers, or should discover, those facts [*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 561, 305 P.2d 20]* . If defendant is a fiduciary of plaintiff, the limitation period does not begin until the conversion is clearly and unequivocally brought to the attention of the plaintiff [*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 561-563, 305 P.2d 20]* .

[7] State Statutes

"Unauthorized signature" is one made without actual, implied, or apparent authority and includes forgery. *Com. Code § 1201(b)(41)*

Effects of unauthorized signature on instrument. *Com. Code § 3403*

Forged endorsement by employee. *Com. Code § 3405*

Effect of negligence that contributes to making of forged signature. *Com. Code § 3406*

Conversion of instrument. *Com. Code § 3420*

[8] Decisions

Depositary bank's liability for statutory conversion under *Com. Code § 3420* for depositing check without payee's endorsement turns on whether person who deposited check had authority to do so. *In re Bartoni-Corsi Produce, Inc. (9th Cir. 1997) 130 F.3d 857, 861-863*

Com. Code § 3420(b), limiting measure of liability to amount payable on instrument, rather than *Civ. Code § 3336* allowing damages for time and effort spent attempting to recover converted property, applies to conversion actions involving negotiable instruments. *Stenseth v. Wells Fargo (1995) 41 Cal. App. 4th 457, 465-466, 48 Cal. Rptr. 2d 192*

Grant of summary judgment in favor of depositary banks was error under former *Com. Code § 3419(1)(c)* (*now see Com. Code § 3420(a)*) because material question of fact was presented regarding scope of employee's authority to endorse and deposit checks. *Oswald Machine & Equipment, Inc. v. Yip (1992) 10 Cal. App. 4th 1238, 1245-1249, 13 Cal. Rptr. 2d 193* ; *now see Com. Code § 3405(a)(3)* (defining "responsibility" of employee for purposes of fraudulent endorsements)

Joint payee is permitted to bring action for conversion against depositary bank and drawee bank that actually paid check. *Southern Cal. Permanente Medical Group v. Bozinovski (1983) 148 Cal. App. 3d 503, 508, 196 Cal. Rptr. 150* (check was delivered to one of three joint payees, who forged endorsements of other two); *Indiana Plumbing Supply Co. v. Bank of America (1967) 255 Cal. App. 2d 910, 917-918, 63 Cal. Rptr. 658* (check delivered to one of two joint payees who forged endorsement of plaintiff)

Bank's liability for conversion for paying check on forged endorsement is limited by extent to which any payee has received funds in accordance with drawer's intent; thus, bank as not required to duplicate payment to joint payee/forger. *Southern Cal. Permanente Medical Group v. Bozinovski (1983) 148 Cal. App. 3d 503, 507, 196 Cal. Rptr. 150* ; *see Indiana Plumbing Supply Co. v. Bank of America (1967) 255 Cal. App. 2d 910, 918, 63 Cal. Rptr. 658* (forger had no interest in check)

Drawee bank's recredit to drawer's account does not alter extent of its liability for conversion. *Southern Cal. Permanente Medical Group v. Bozinovski (1983) 148 Cal. App. 3d 503, 508, 196 Cal. Rptr. 150*

[9] Cross References

See also *§ 95.430*.

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9-95 California Forms of Pleading and Practice--Annotated § 95.462

§ 95.462 Affirmative Defense to Action to Recover Amount Paid on Check--Missing Endorsement--Authority to Deposit [Com. Code § 3420]

[1] FORM Affirmative Defense to Action to Recover Amount Paid on Check--Missing Endorsement--Authority to Deposit [Com. Code § 3420]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant _____ [*name*] alleges that although the payee did not endorse the check, the person who deposited the check had the authority to deposit it.

[2] Use of Form

This affirmative defense is for use by a depositary bank sued for conversion for paying a check with a missing endorsement [*see Com. Code § 3420* (discussed in Ch. 385, *Negotiable Instruments*]. It asserts as an affirmative defense the authority of the person depositing the check to do so [*see Civ. Code § 2316*]. For forms and discussion of conversion in general, see Ch. 150, *Conversion* .

[3] Authority to Deposit Without Endorsement

Under *Com. Code § 3420(a)*, an instrument is converted if a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. There is no California case law directly on point regarding the conversion liability of the depositary bank under that section when the payee has not endorsed the check. A Ninth Circuit case, however, has held that a depositary bank's liability for statutory conversion for depositing a check without the payee's endorsement turns on the question of whether the person who deposited the check had the authority to do so. In *In re Bartoni-Corsi Produce, Inc. (9th Cir. 1997) 130 F.3d 857* , a corporation's sole director and shareholder approved the sale of all corporate assets to a corporation formed to purchase its assets, and authorized its agents to deposit checks payable to the selling corporation into a bank account of the purchasing corporation. The president and vice-president of the new corporation deposited a number of checks payable to the first corporation into the new corporation's account, without endorsement of the first corporation. The first corporation's

bankruptcy trustee brought a conversion action against the bank which had accepted those checks for deposit, alleging that it improperly accepted for deposit checks payable to the debtor without the debtor's endorsement. The Bankruptcy Court found the bank liable for statutory conversion under California law and the federal district court affirmed [*In re Bartoni-Corsi Produce, Inc. (9th Cir. 1997) 130 F.3d 857, 860]* .

The Ninth Circuit held the bankruptcy court erred in concluding that conversion liability arises without regard to whether the person who deposited the check had the authority to do so when the payee has not endorsed the check. The precise question presented in this matter had not been resolved by a California court in a published opinion. The federal court of appeals, therefore, was required to predict how the highest California court would decide the issue [*In re Bartoni-Corsi Produce, Inc. (9th Cir. 1997) 130 F.3d 857, 861]* . It held that the depositary bank's liability for statutory conversion for depositing the check without the payee's endorsement turned on the authority of the person depositing the check, that the persons making the deposits had implied actual authority to deposit the checks payable to the debtor into an account belonging to the business formed to purchase debtor's assets, and that the agents were acting within the scope of implied actual authority as to the bank when they deposited the checks, even though their conduct was detrimental to the debtor [*In re Bartoni-Corsi Produce, Inc. (9th Cir. 1997) 130 F.3d 857, 861-863]* .

[4] Burden of Proof

Once the plaintiff has shown that the necessary endorsement is missing, the burden to prove authority shifts to the defendant [*In re Bartoni-Corsi Produce, Inc. (9th Cir. 1997) 130 F.3d 857, 862 n.8*].

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9-95 California Forms of Pleading and Practice--Annotated § 95.463

§ 95.463 Complaint for Damages for Breach of Fiduciary Duty--By Represented Person Against Bank That Took Check With Notice of Breach [Com. Code § 3307]

[1] FORM Complaint for Damages for Breach of Fiduciary Duty--By Represented Person Against Bank That Took Check With Notice of Breach [Com. Code § 3307]

[*Caption. See § 95.430[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 95.430[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 95.430[1], Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 95.430[1], Paragraph 3.*]

[*Allege, in as many paragraphs as necessary, facts that establish bank's knowledge of fiduciary's status. Paragraphs 4 and 5 are intended as examples only*]

4. At all times herein mentioned, plaintiff maintained _____ [*specify type of account, e.g.,* a fiduciary checking account] at defendant's branch located at _____ [*street address, city, and county*], California. The account was numbered _____, was entitled _____ [*title as it appears on signature card agreement or on statements furnished by defendant, e.g.,* Aaron Burr, Trustee of the Lucy C. Burr Trust]. The account was originally established on _____ [*date*]. At the time the account was established, defendant asked for, and was provided with, a copy of the trust agreement. On the signature card for the account, the "fiduciary account" choice has been marked in the "type of account" section. A copy of the signature card for that account is attached and incorporated by reference.

5. The branch of defendant where the fiduciary account is maintained has only five employees who handle transactions on accounts: the manager, a new accounts clerk, and three tellers. Plaintiff is well known to all five employees. All five employees know, and have known since the fiduciary account was opened, that a fiduciary relationship exists between plaintiff and her nephew, the trustee.

[*CONTINUE*]

6. On or about _____ [*date*], in breach of his/her fiduciary duty to plaintiff, _____ [*name of fiduciary*] deposited to his/her personal account, numbered _____, [and entitled _____ (*name of account*),] a check _____ [*specify whether check was issued by represented person or fiduciary, as such, or was payable to represented person or to fiduciary as such, e.g.,* payable to (the order of) _____ (*name of fiduciary*), Trustee], in the amount of $_____. [A copy of the check, front and back, is attached hereto as Exhibit "A" and incorporated by reference].

7. Defendant collected the amount of the check from the _____ [drawee *or* fiduciary account *or* account on which it was drawn] andcredited the proceeds to _____'s [*name of fiduciary*] aforementioned personal account.

8. [*Demand and nonpayment. See § 95.461[1], Paragraph 7.*]

[*Prayer. See § 95.430[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 95.430[1].*]

[2] Use of Form

This complaint is for use in an action by a "represented person" against a bank to recover the amount of a check deposited to the fiduciary's personal account at the bank. Whether the check was issued by the represented person, or the fiduciary as such, to the bank as payee [*Com. Code § 3307(b)(4)*] or was payable to the represented person or the fiduciary as such [*Com. Code § 3307(b)(2)*], deposit to the fiduciary's personal account constitutes notice, on the part of the bank, of a breach of fiduciary duty [*see Com. Code § 3307(b)(2)(C), (4)(C)* (discussed in Ch. 385, *Negotiable Instruments*)]. The bank would also have notice of a breach of fiduciary duty if either of those types of checks was taken (1) in payment of or as security for a debt known by the bank to be the personal debt of the fiduciary, or (2) in a transaction known by the bank to be for the personal benefit of the fiduciary [*see Com. Code § 3307(b)(2)(A), (B), (4)(A), (B)*]. Those situations are beyond the scope of this form, which would have to be modified for use in those situations.

Com. Code § 3307 was added by Stats. 1992, ch. 914, and is thought by some to be inconsistent with the protection

afforded by *Prob. Code § 18100* to third parties in their dealings with trustees.

The "represented person" can be a principal, beneficiary, partnership, corporation, limited liability company (LLC), or other person to whom the fiduciary duty is owed [*Com. Code § 3307(a)(2)*]. The fiduciary can be an agent, trustee, partner, corporate officer or director, LLC manager, or other representative owing a fiduciary duty with respect to the check [*Com. Code § 3307(a)(1)*].

The more difficult allegation to sustain under this provision is the knowledge, on the part of the person who handled the deposit of the check for the bank, of the fiduciary relationship [*see Com. Code § 3307(b)*, and *discussion under § 95.463[5]*]. *Com. Code § 3307* is applicable only in the relatively rare situations in which the person acting for the bank has that knowledge [Official Comment 1 to UCC § 3-307 (1990); *but see Blackmon v. Hale (1970) 1 Cal. 3d 548, 556, 83 Cal. Rptr. 194, 463 P.2d 418* (dealing with law firms' trust account; if deposit is made to credit of person as trustee, bank is charged with notice that funds are received in fiduciary capacity)].

[3] Checks Payable to Fiduciary Personally

If the check is issued by the represented person or the fiduciary as such, and is payable to the fiduciary personally (as an individual and not as a fiduciary), the bank is not liable to the represented person for the proceeds unless the bank knows of the breach of fiduciary duty [*Com. Code § 3307(b)(3)*]. Such checks are the normal mode of paying the fiduciary's salary or paying the fiduciary for services or expenses incurred on behalf of the represented person and are not considered unusual. If the fiduciary is authorized to write checks on behalf of the represented person to pay debts of the represented person, a check drawn by the fiduciary as such and payable to himself or herself personally is a normal way of paying a debt owed by the represented person to the fiduciary. Thus, the bank may assume the fiduciary may use such a check for his or her personal benefit [Official Comments 3 and 4 to UCC § 3-307 (1990)].

[4] Allegations

This complaint alleges:

- Defendant's knowledge, including knowledge of the person who handled the transaction for defendant bank, of the fiduciary status of the fiduciary (Paragraphs 4, 5) [*Com. Code § 3307(b)*; *see § 95.463[5]*];

- That defendant took a check issued by, or payable to, the represented person or the fiduciary as such (Paragraph 6) [*see Com. Code § 3307(b)(2), (4)*]; and

- That the check was deposited to the fiduciary's personal account (Paragraph 7) [*Com. Code § 3307(b)(2)(C), (4)(C)*].

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when their inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[5] Bank Must Know of Fiduciary's Status

Com. Code § 3307 only applies if the bank dealing with the fiduciary has knowledge of the fiduciary status of the fiduciary [*Com. Code § 3307(b)*]. Notice that does not amount to knowledge is not enough to render *Com. Code § 3307* applicable [Official Comment 2 to UCC § 3-307 (1990)]. Knowledge is actual knowledge [*Com. Code § 1202(a)(1), (3)*]. An organization has knowledge of a particular fact when the individual handling the transaction on behalf of the

organization has knowledge of that fact [*see Com. Code § 1202(f)*]. In many cases the individual who receives and processes the check for payment or collection or value is a clerk who has no knowledge of the fiduciary status of the person from whom the check is received. In those cases, *Com. Code § 3307* does not apply [Official Comment 2 to UCC § 3-307 (1990)]. In this form, the extensive factual allegations of Paragraphs 4 and 5 are designed to establish knowledge on the part of all personnel of a particular branch who were likely to have handled the deposit of the fiduciary's status as such.

Com. Code § 3307(b)(2) and *(4)* also require that the person acting for the bank have knowledge of the facts that constitute the breach of fiduciary duty. In the case of a check taken for deposit to an account, knowledge of the breach is found in the fact that the deposit is made to an account other than that of the represented person or a fiduciary account for the benefit of that person [Official Comment 2 to UCC § 3-307 (1990); *see Com. Code § 3307(b)(2)(C), (4)(C)*].

[6] State Statutes

When represented person is bound by signature of representative. *Com. Code § 3402*

Third person is not required to inquire regarding trustee's proper exercise of power. *Prob. Code § 18100*

[7] Decisions

Drawee bank is authorized to honor withdrawals from account on signatures authorized by signature card, which serves as contract between depositor and bank for handling of account; so long as checks drawn on that account are signed in conformity with signature card, and absent any knowledge of misappropriation, bank is free from liability for honoring check drawn in breach of trust. *Blackmon v. Hale (1970) 1 Cal. 3d 548, 556, 83 Cal. Rptr. 194, 463 P.2d 418* ; *but see Com. Code § 3307(b)(4)* (situations in which bank may have notice of breach of fiduciary duty)

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Volume 9: Bailments thru Boats and Boating-Chs. 93-100
Chapter 95 BANKS, DEPOSITS, AND CHECKS
PART IV. FORMS
C. Check Collections

9-95 California Forms of Pleading and Practice--Annotated § 95.464

§ 95.464 Declaration [Code Civ. Proc. § 2015.5] of Loss of Teller's, Cashier's, or Certified Check [Com. Code § 3312(a)(3)] and Notice of Claim [Com. Code § 3312(b)]

[1] FORM Declaration [Code Civ. Proc. § 2015.5] of Loss of Teller's, Cashier's, or Certified Check [Com. Code § 3312(a)(3)] and Notice of Claim [Com. Code § 3312(b)]

To _____ [*name of bank*], _____ [*name of branch*], and its manager _____ [*name*]:

NOTICE IS HEREBY GIVEN that I, _____ [*name of declarant/claimant*], claim entitlement to, and hereby request payment [or recredit to my account] of, the amount of a _____ [teller's *or* cashier's *or* certified] check _____ [issued *or* certified] by _____ [*name of bank*], _____ [*name of branch*], on _____ [*date*]. I claim these funds as _____ [drawer *or* payee *or* remitter] of that check.

The _____ [teller's *or* cashier's *or* certified] check that is the basis of this claim is numbered _____, drawn on account number _____ at _____ [*name of drawee bank*], in the amount of $_____, and is payable to the order of _____ [bearer *or name of payee*].

On or about _____ [*date*], and while in my possession, the _____ [teller's *or* cashier's *or* certified] check was _____ [lost *or* stolen *or* destroyed]. I did not transfer the check, nor was the check lawfully seized. _____ [*Describe circumstances of loss, destruction or theft, e.g.,* The loss occurred during a flood that forced our family to evacuate our home. I have searched diligently for it in all the papers that remained in our home when we returned].

[*EITHER*]

The whereabouts of the check cannot be determined.

[*OR*]

The check is in the wrongful possession of an unknown person.

[*OR*]

The check is in the wrongful possession of _____ [*name*], who _____ [cannot be found *or* is not amenable to service of process].

[*CONTINUE*]

Please inform me as soon as is reasonably possible at _____ [*mailing address*][, or by phone at _____ (*phone number*)], whether the check was paid before you received this notice.

[I am prepared to supply any reasonable identification you require in order to reimburse me.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This declaration and notice is for use to claim the amount of a cashier's check, teller's check, or certified check that has been lost, stolen, or destroyed while in the possession of the claimant. The declaration and notice need not be combined [*see Com. Code § 3312(a)(3), (b)*].

The claimant can be (1) the drawer or payee of a certified check, or (2) the remitter (purchaser) or payee of a cashier's check or teller's check [*Com. Code § 3312(a)(3)(ii)*]. For other persons entitled to enforce the check, see *Com. Code § 3309* (discussed in Ch. 385, *Negotiable Instruments*) [*see also § 95.464[9]*].

The claim is made to the "obligated bank," the acceptor (drawee) in the case of a certified check or to the issuer (drawer) in the case of a teller's check or cashier's check [*Com. Code § 3312(a)(4)*].

The statute does not specify a means of delivery of the claim. However it is sent or delivered, it seems appropriate to require a receipt or acknowledgment of delivery, such as one would receive if the claim was sent by certified mail, return receipt requested [*see § 95.464[6], [7]*].

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when their inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[3] Claim as Warranty

Delivery of a declaration of loss is a warranty of the truth of the statements made in the declaration. This warranty is made to the obligated bank and any person entitled to enforce the check [*Com. Code § 3312(b)(iv)*].

[4] Required Contents of Declaration

The declaration of loss must be a written statement, made under penalty of perjury, that states the following [*Com. Code § 3312(a)(3)*]:

- The declarant lost possession of a check;
- The declarant is the drawer or payee of the check, in the case of a certified check, or the remitter or payee of the check, in the case of a cashier's check or teller's check;
- The loss of possession was not the result of a transfer by the declarant or a lawful seizure; and
- The declarant cannot reasonably obtain possession of the check because the check was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

[5] Contents of Claim

A claim to the amount of a check is a communication to the obligated bank by the drawer or payee of a certified check or the remitter or payee of a cashier's check or teller's check that does the following [*Com. Code § 3312(b)*]:

- Describes the check with reasonable certainty;
- Requests payment of the amount of the check;
- Contains or is accompanied by a declaration of loss of the claimant with respect to the check; and
- Is received at a time and in a manner affording the bank a reasonable time to act on it before the check is paid.

The claimant also must provide reasonable identification if requested by the obligated bank [*Com. Code § 3312(b)*].

The bank may not impose additional requirements on the claimant to assert a claim under *Com. Code § 3312(b)* [*see* Official Comment 2 to U.C.C. § 3-312 (1990) (procedures stated in other law for stating claims as displaced within meaning of *Com. Code § 1103(b)*)].

[6] When Claim Becomes Enforceable

The claim becomes enforceable at the later of (1) the time the claim is asserted, or (2) the 90th day following the date of the check, in the case of a cashier's check or teller's check, or the 90th day following the date of the acceptance, in the case of a certified check [*Com. Code § 3312(b)(1)*].

[7] Bank's Options Regarding Payment of Claim or Check

[a] In General

Until the claim becomes enforceable, it has no legal effect and the obligated bank may pay the check or, in the case of a teller's check, may permit the drawee to pay the check [*Com. Code § 3312(b)(2)*]. If the check is presented by and paid to a person entitled to enforce the check before the claim becomes enforceable, the bank's liability with respect to the check is discharged [*Com. Code § 3312(b)(2)*].

If the claim becomes enforceable before the check is presented for payment, the bank is not obliged to pay the check [*Com. Code § 3312(b)(3)*].

When the claim becomes enforceable, the bank is obliged to pay the amount of the check to the claimant unless the check has been paid to a person entitled to enforce the check. Except for any liability the bank may incur for failure to return the check by its midnight deadline [*see Com. Code § 4302(a)(1)*], payment to the claimant discharges all the bank's liability with respect to the check [*Com. Code § 3312(b)(4)*].

[b] Illustrations

[i] Payment to Thief

To illustrate, suppose Obligated Bank (OB) issues a cashier's check payable to its customer, P. The check is stolen from P. P files a claim with OB two days after the date of the check. Thief forges P's endorsement and deposits the check to another bank (DB), which obtains payment from OB. On the 90th day, OB is obligated to pay P [*Com. Code § 3312(b)(4)*]. Because of the forged endorsement, thief is not a holder or "a person entitled to enforce the check," and neither is DB [*see Com. Code § 3312(b)(2), (4)*]. OB can recoup its loss from DB through a breach of warranty claim under *Com. Code § 4208(a)(1)*. As an alternative to the claim procedure, P has a cause of action against DB for conversion under *Com. Code § 3420(a)* [Case 3 of Official Comment 4 to UCC § 3-312 (1990)].

[ii] Payment to Finder Who Becomes Entitled to Enforce Check

Suppose that Obligated Bank (OB) issues a cashier's check payable to P. P endorses it in blank and mails it to another bank for deposit to P's account. The check is lost in the mail and never received by P's bank. When P discovers the loss, P files a claim with OB. X finds the check, endorses it, and deposits it to DB, which collects the check form OB before the end of the 90-day period. In this situation, because of the blank endorsement, X is a holder and entitled to enforce the check. Therefore, DB is also a holder and P is not entitled to payment of the claim [Case 4 of Official Comment 4 to UCC § 3-312 (1990)].

[iii] Finder of Overdue Check Cannot Become Holder

Suppose that Obligated Bank (OB) issues a cashier's check payable to P. P endorses it in blank and mails it to another bank for deposit to P's account. The check is lost in the mail and never received by P's bank. When P discovers the loss, P files a claim with OB, which OB pays after the expiration of the 90-day period. More than 90 days after the date of the check, X finds it, endorses it, and deposits it to DB, which presents the check to OB for payment. OB is not obligated to pay the check because it has already been discharged by payment of the claim to P [*Com. Code § 3312(b)(4)*]. DB cannot be a holder in due course, because it took the check when it was overdue [*see Com. Code § 3304(a)(2)*]. Thus, OB is not obligated to pay the check. For the same reason, if OB dishonors the check, P does not become liable to DB under *Com. Code § 3312(c)* (*discussed under § 95.464[8]*). DB's remedy is to charge back X's account pursuant to *Com. Code § 4214(a)*. Ordinarily, P would by liable to DB as endorser pursuant to *Com. Code § 3415(a)*. However, under *Com. Code § 3415(e)*, P is released from that liability 30 days after the endorsement [Case 5 of Official Comment 4 to UCC § 3-312 (1990)].

[8] Claimant's Potential Liability for Reimbursement or After Dishonor

If the bank pays the amount of a check to a claimant and, after the claim became enforceable, a person having rights of a

holder in due course presents the check for payment, the claimant is obliged either to pay the holder in due course or to reimburse the bank, depending on whether the bank chooses to pay the check or to dishonor it. If the bank pays the check, the claimant must reimburse the bank. If the bank dishonors the check, the claimant will have to pay the holder in due course [*Com. Code § 3312(c)*].

If the declaration of loss falsely alleges a loss, destruction, or theft that did not in fact occur, a holder of the check who is unable to obtain payment because the bank dishonored the check after paying the claimant [*see Com. Code § 3312(b)(3), (4)*] has a cause of action against the claimant/declarant for breach of warranty [*see Com. Code § 3312(b)*; Official Comment 2 to UCC § 3-312 (1990)].

[9] Alternative Procedure Available to Payee

If a person entitled to assert a claim under *Com. Code § 3312(b)* is also a person entitled to enforce the lost, stolen, or destroyed check, usually as payee or bearer, he or she may assert rights with respect to the check either under *Com. Code § 3312* or *Com. Code § 3309* [*Com. Code § 3312(d)*]. For discussion of *Com. Code § 3309* and a form for a complaint for enforcement of a lost, stolen, or destroyed instrument, see Ch. 385, *Negotiable Instruments* . *Com. Code § 3312* is intended to offer a person who loses a teller's, cashier's, or certified check a means of getting refund of the amount of the check within a reasonable period of time without the expense of posting a bond (which may be required under *Com. Code § 3309*) and with full protection of the obligated bank [Official Comment 1 to UCC § 3-312 (1990)].

Com. Code §§ 3312 and *3309* are not coextensive. *Com. Code § 3309* does not apply to the remitter of a cashier's check or teller's check or to the drawer of a certified check [Official Comment 1 to UCC § 3-312 (1990)]. An endorsee of a check may not proceed under *Com. Code § 3312* because an endorsee is neither an original party to the check or a remitter. Limitation of *Com. Code § 3312* to an original party or a remitter gives the obligated bank the ability to determine, at the time it becomes obligated on the check, the identity or the person or persons who can assert claims with respect to the check. The bank is not faced with having to determine the rights of some person who was not a party to the check at that time or with whom it has not dealt. If a cashier's check is issued to the order of the person who purchased it and that person endorses it over to a third person who loses the check, the third person can assert rights under *Com. Code § 3309*, but has no rights under *Com. Code § 3312* [Official Comment 2 to UCC § 3-312 (1990)].

[10] State Statutes

Action to require execution of duplicate of lost or destroyed document; indemnity. *Civ. Code § 3415*

"Remitter" is purchaser of instrument from its issuer if instrument is payable to identified person other than purchaser. *Com. Code § 3103(a)(11)*

Enforcement of lost, stolen, or destroyed instrument. *Com. Code § 3309*

Claim by payee, remitter, or drawer of lost, stolen, or destroyed teller's, cashier's, or certified check. *Com. Code § 3312*

[11] Cross References

For discussion and forms regarding lost instruments in general, see Ch. 356, *Lost Papers* .

For discussion and form for holder to enforce lost, stolen, or destroyed instrument, see Ch. 385, *Negotiable Instruments* .

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9-95 California Forms of Pleading and Practice--Annotated § 95.465

§ 95.465 Notice of Potential Damages Likely to Be Caused by Wrongful Refusal to Pay Teller's, Cashier's, or Certified Check [Com. Code § 3411(b)]--By Payee to Issuer or Acceptor

[1] FORM Notice of Potential Damages Likely to Be Caused by Wrongful Refusal to Pay Teller's, Cashier's, or Certified Check [Com. Code § 3411(b)]--By Payee to Issuer or Acceptor

To _____ [*name of bank*], _____ [*address of branch*], and its manager _____ [*name*]:

NOTICE IS HEREBY GIVEN that I, _____ [*name*], am the holder and _____ [payee *or* endorsee *or* bearer] of _____ [teller's *or* cashier's *or* certified] check numbered _____, _____ [issued *or* certified] by _____ [*name of bank*], _____ [*address of branch*], on _____ [*date*]. That check is drawn on account number _____ at _____ [*name of drawee bank*], in the amount of $_____, and is payable to the order of _____ [bearer *or name of payee*].

On or about _____ [*date*], I _____ [presented the check for payment at *or* deposited the check for collection with] _____ [*name of bank*], _____ [*address of branch*]. The check has not been paid, and no [lawful] reason has been given [or exists] for your failure to honor the check.

I intended to use the proceeds of the check _____ [*specify, e.g.,* to meet a margin call issued by my securities broker on July 13, 1993]. If the proceeds of that check are not paid to me by _____ [*date*], it is likely that _____ [*specify, e.g.,* I will not be able to make the payment required and will forfeit stocks and securities with an approximate market value of $_____, which represented a gain to me, since purchasing them, of $_____].

As a consequence of _____ [*refer to event described in previous paragraph, e.g.,* forfeiting $_____ in securities], it is likely that I will suffer _____ [*continue with as many consequences as are foreseeable, e.g.,* severe emotional distress, possibly manifesting itself in physical illness, impaired

creditworthiness, and damages to my financial reputation and ability to obtain credit from securities dealers in the future. For the last 15 years, my primary source of income has been from investments, so impairment of my ability to maintain a satisfactory credit rating is likely to have serious long-term financial consequences for me].

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This notice is for use by a person entitled to enforce a cashier's check, teller's check, or certified check to put the issuer or acceptor on notice of particular circumstances giving rise to consequential damages likely toresult from nonpayment of the check. The person asserting the right to enforce the check is entitled to compensation for expenses and loss of interest resulting from the nonpayment, and may recover consequential damages if the obligated bank wrongfully refuses to pay after receiving notice of particular circumstances giving rise to the damages [*see Com. Code § 3411(b)*; *see § 95.465[6]*]. *Com. Code § 3411(b)* does not contain an express provision for attorney's fees, but attorney's fees are not meant to be necessarily excluded. They could be granted because they fit within the language "expenses ... resulting from the nonpayment" [Official Comment 2 to UCC § 3-411 (1990)].

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when their inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[3] Suggested Methods of Service

Com. Code § 3411 does not specify the means of giving notice to the obligated bank. It seems prudent to have the notice served by someone who will complete an affidavit of service, to fax it, or to send it by first class mail, return receipt requested, so that the payee will have evidence to establish when the bank received notice [*see, e.g., Cal. Rules of Ct., Rule 2.301(6)* (defining "transmission record" for purposes of fax filings)].

[4] Wrongful Refusal to Pay Cashier's, Teller's, or Certified Check

The acceptor of a certified check or the issuer of a cashier's check or teller's check may be liable for consequential damages if it wrongfully (1) refuses to pay a cashier's check or certified check, (2) stops payment of a teller's check, or (3) refuses to pay a dishonored teller's check [*Com. Code § 3411(a), (b)*].

[5] When Bank Is Not Liable

The person entitled to enforce the check cannot recover expenses or consequential damages under *Com. Code § 3411(b)* if the bank's refusal to pay occurs because of any of the following [*Com. Code § 3411(c)*]:

- The bank suspends payments;
- The obligated bank asserts a claim or defense of the bank that it has reasonable grounds to believe is available against the person entitled to enforce the instrument;
- The obligated bank has a reasonable doubt whether the person demanding payment is the person

entitled to enforce the instrument; or

- Payment is prohibited by law.

Com. Code § 3411(c) is intended to limit recovery to cases in which the bank refuses to pay even though its obligation to pay is clear and it is able to pay. If the bank is not obligated to pay, there is no recovery. Thus, the bank may assert any claim or defense that it has, although normally it will not have a claim or defense. In the usual case, it is the remitter that isasserting a claim to the check on the basis of rescission of the negotiation to the payee under *Com. Code § 3202*. A bank can assert that claim only if there is compliance with *Com. Code § 3305(c)* (joinder of, and assertion by, person entitled to assert claim, discussed in Ch. 385, *Negotiable Instruments*); but the bank is not protected from liability for damages under *Com. Code § 3411(b)* if the claim of the remitter is not upheld. A bank that seeks to defend on the basis of the remitter's defense is insulated from liability only if payment is enjoined under *Com. Code § 3602(b)(1)* (also discussed in Ch. 385, *Negotiable Instruments*) [Official Comment 3 to UCC § 3-411 (1990)].

An example of reasonable doubt regarding the identity of the person demanding payment of a check is a check payable to "Supplier Co." presented for payment over the counter by a person claiming to be an officer of Supplier Co. The bank may refuse payment until it has been given adequate proof that the presentment in fact is being made for Supplier Co, the person entitled to enforce the check [Official Comment 3 to UCC § 3-411 (1990); *see also Com. Code § 3307* (payor bank or collecting bank as on notice of breach of fiduciary duty if representative cashes check payable to represented person or applies it to personal obligation of representative; discussed in *§ 95.463* and Ch. 385, *Negotiable Instruments*), *Com. Code § 3413* (drawee bank has no duty to payee to pay check, other than cashier's check, until after acceptance)].

[6] Drafter's Intent

As an accommodation to their customers who have purchased cashier's or teller's checks or had checks certified to pay a creditor and become embroiled in a dispute with the creditor regarding the underlying transaction, banks will sometimes stop payment on a teller's check or refuse to honor a cashier's or certified check [*see Com. Code § 3602* (bank as entitled to pay check despite notice of adverse claim)]. In most situations, the issuer or acceptor has no right to refuse or stop payment, and customers using these methods of payment have no right to stop payment or require it stopped. *Com. Code § 3411* is designed to discourage banks from accommodating customers in this way [*see* Official Comment 1 to UCC § 3-411 (1990)].

[7] State Statutes

Issuer's obligation with respect to cashier's check. *Com. Code § 3412*

Acceptor's obligation to pay draft according to its terms at time of acceptance or as accepted. *Com. Code § 3413(a)(1), (2)*

Acceptor's obligation to pay accepted draft that is incomplete instrument, according to its terms when completed, to extent stated in *Com. Code §§ 3115, 3407*. *Com. Code § 3413(a)(3)*

Acceptor's obligation is owed to person entitled to enforce draft or to drawer or endorser who paid draft under *Com. Code § 3414* or *3415*. *Com. Code § 3413(a)*

Acceptor's obligation with respect to certified check as amount certified, if any is stated, or, if (1) acceptance does not state amount, (2) amount is subsequently raised, and (3) instrument is negotiated to holder in due course, obligation is amount at instrument was taken by holder in due course. *Com. Code § 3413(b)*

Drawer's obligation with respect to drafts (other than cashier's checks or other drafts drawn on drawer). *Com. Code § 3414*

Endorser's obligation. *Com. Code § 3415*

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Chapter 97 BARBERING AND COSMETOLOGY

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§ 97.syn Synopsis to Chapter 97: BARBERING AND COSMETOLOGY

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§§ 97.03-97.09 [Reserved]

§ 97.10 Governing Law

§ 97.11 Definitions

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[2] Cosmetology

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§ 97.30 Negligence

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[4] Affirmative Defenses

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§ 97.31 Strict Liability

[1] Services Rendered

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§§ 97.32-97.49 [Reserved]

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[a] Assumption of Risk

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[2] Negligence

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[a] In General

[b] Assumption of Risk

[c] Misuse of Product

[2] Negligence

[3] Res Ipsa Loquitur

[4] Strict Liability

[a] In General

[b] Defects

[5] Warning of Danger

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§ 97.94 Law Reviews

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§ 97.110 Complaint for Damages [Civ. Code § 3333] Based on Negligence [Civ. Code § 1714(a)]--By Patron Against Personal Grooming Services Provider--Negligent Compounding and Applying of Cosmetic or Personal Grooming Product

[1] FORM

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[3] Allegations

[4] Venue

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[6] Verification

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§ 97.111 Allegation--Failure to Warn Patron of Products Containing Hazardous Substances and to Conduct Recommended Patch Test

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[2] Use of Form

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[4] State Statutes

[5] Decisions

[6] Cross References

§ 97.112 Allegation--Negligent Electrolysis or Thermolysis Treatment for Removal of Hair

[1] FORM

[2] Use of Form

[3] State Statutes

§ 97.113 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Comparative Negligence of Plaintiff [Code Civ. Proc. § 431.30]--Patron's Denial or Failure to Advise of Allergic Sensitivity to Cosmetic Product and Refusal to Permit Patch Test

[1] FORM

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[3] Cross References

[4] Decisions

§§ 97.114-97.129 [Reserved]

§ 97.130 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Strict Liability in Tort--By Consumer Against Manufacturer, Wholesaler, and Retailer

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[2] Use of Form

[3] Strict Liability in Tort

[4] Allegations

[5] Cross References

§ 97.131 Allegation--Nonpurchasing User of Defective Product Suing Manufacturer, Wholesaler, and Retailer

[1] FORM

[2] Use of Form

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[4] Cross References

§ 97.132 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714]--By Consumer Against Manufacturer, Wholesaler, and Retailer of Cosmetic or Personal Grooming Product

[1] FORM

[2] Use of Form

[3] Cross References

[4] Decisions

§ 97.133 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Strict Liability Action Against Manufacturer, Wholesaler, or Retailer of Cosmetic or Personal Grooming Product--Preliminary Patch Test Recommended on Container Warning Label Was Not Conducted Prior to Application of Product

[1] FORM

[2] Use of Form

[3] Cross References

§ 97.134 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Strict Liability Action Against Manufacturer, Wholesaler, or Retailer of Cosmetic or Personal Grooming Product--Use of Product That Was Not Reasonably Foreseeable

[1] FORM

[2] Use of Form

[3] Cross References

§ 97.135 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Strict Liability Action Against Manufacturer, Wholesaler, or Retailer of Cosmetic or Personal Grooming Product--Allergy Was Sole Cause of Plaintiff's Injuries

[1] FORM

[2] Use of Form

[3] Cross References

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§ 97.01 Scope of Chapter

This chapter discusses actions involving services provided by a barber, cosmetologist, electrologist, or other personal grooming provider. It includes forms of complaint and related allegations for use in an action based on negligence brought by a patron against a personal grooming services provider [*see §§ 97.110 -97.112*]. The part also includes a form of affirmative defense based on the comparative negligence of a patron of personal grooming services [*see § 97.113*].

This chapter also discusses actions against manufacturers, wholesalers, and retailers of cosmetic products. It includes forms of complaints and allegations based on strict liability in tort [*see §§ 97.130 -97.131*] and negligence [*see § 97.132*]. It also contains affirmative defenses to such actions [*see §§ 97.133 -97.135*].

For further discussion and forms for use in actions based on products liability generally, including discussion and forms relating to strict liability in tort and alternative theories of recovery, see Ch. 460, *Products Liability* .

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§ 97.02 Cross References

For forms for use in negligence actions generally, see Ch. 380, *Negligence*

For forms for use in strict liability actions generally, see Ch. 460, *Products Liability*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceGeneral OverviewTortsProducts LiabilityGeneral Overview

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[Reserved]

§§ 97.03[Reserved]

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§ 97.10 Governing Law

Statutes governing the administration of the Board of Barbering and Cosmetology (the "Board") are contained in the Barbering and Cosmetology Act (*Bus. & Prof. Code § 7301 et seq.*, the "Act"). Qualifications of applicants for licensing examinations are set out in *Bus. & Prof. Code §§ 7321* (cosmetologists), *7321.5* (barbers), *7324* (estheticians), *7326* (manicurists), and *7330* (electrologists). *Bus. & Prof. Code § 7337 et seq.* governs licensing examinations. Requirements for establishments in which barbering and cosmetology are practiced are governed by *Bus. & Prof. Code § 7346 et seq.* Barbering and cosmetology schools are regulated by *Bus. & Prof. Code § 7362 et seq.* Licenses are governed by *Bus. & Prof. Code § 7396 et seq.*, *Bus. & Prof. Code § 7403 et seq.* governs disciplinary proceedings. Statutes pertaining to administrative fines and citations are set out in *Bus. & Prof. Code § 7406 et seq.*

Federal statutes aimed primarily at products and their ingredients, packaging, and labeling are contained in the Food, Drug, and Cosmetic Act (*21 U.S.C.S. § 361 et seq.*), and in the Federal Hazardous Substances Act (*15 U.S.C.S. § 1261 et seq.*). Those provisions are implemented by regulations contained in *21 C.F.R. §§ 1.20 et seq.* and 21 C.F.R. § 700.1 et seq.

California's Sherman Food, Drug, and Cosmetic Law (*Health & Safety Code § 109875 et seq.*) has provisions similar to federal legislation relating to products, their ingredients, packaging, labeling, advertising, and guarantees. *Bus. & Prof. Code § 7320.2* controls the application to persons of cosmetic solutions containing phenol (carbolic acid) and corrosive sublimate (mercury), or any of their preparations, derivatives, or compounds.

The practices of barbering and cosmetology are regulated by *16 Cal. Code Reg. §§ 200 et seq.* and *900 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesContracts LawTypes of ContractsPersonal Service Agreements

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§ 97.11 Definitions

[1] Barbering

The practice of barbering is all or any combination of the following practices [*Bus. & Prof. Code § 7316(a)*; see *Bone v. State Board of Cosmetology (1969) 275 Cal. App. 2d 851, 853, 80 Cal. Rptr. 164*]:

- Shaving or trimming the beard or cutting the hair.
- Giving facial and scalp massages or treatments with oils, creams, lotions, or other preparations either by hand or by mechanical appliances.
- Singeing, shampooing, arranging, dressing, curling, waving, chemical waving, hair relaxing, or dyeing the hair, or applying hair tonics.
- Applying cosmetic preparations, antiseptics, powders, oils, clays, or lotions to scalp, face, or neck.
- Hair styling of all textures of hair by standard methods that are current at the time of the hair styling.

African hair stylists and hair braiders, who perform a highly specialized artistic and cultural form of hair styling and hair care whose main techniques include hair braiding, locking, twisting, weaving, and cornrows without the use of any chemicals, are not subject to the licensing requirements of the Cosmetology and Barbering Act [*Cornwell v. California Board of Barbering and Cosmetology (S.D. Cal. 1997) 962 F. Supp. 1260, 1278*].

[2] Cosmetology

[a] In General

The practice of cosmetology is all or any combination of the following practices [*Bus. & Prof. Code § 7316(b)*; see *Bone v. State Board of Cosmetology (1969) 275 Cal. App. 2d 851, 853, 80 Cal. Rptr. 164*]:

- Arranging, dressing, curling, waving, machineless permanent waving, permanent waving, cleansing, cutting, shampooing, relaxing, singeing, bleaching, tinting, coloring, straightening, dyeing, applying hair tonics to, beautifying, or otherwise treating by any means, the hair of any person.

- Massaging, cleaning, or stimulating the scalp, face, neck, arms, or upper part of the human body, by means of the hands, devices, apparatus, or appliances, with or without the use of cosmetic preparations, antiseptics, tonics, lotions, or creams.

- Beautifying the face, neck, arms, or upper part of the human body, by use of cosmetic preparations, antiseptics, tonics, lotions, or creams.

- Removing superfluous hair from the body of any person by the use of depilatories or by the use of tweezers, chemicals, or preparations, or by the use of devices or appliances of any kind or description, except by the use of light waves, commonly known as rays.

- Cutting, trimming, polishing, tinting, coloring, cleansing, or manicuring the nails of any person.

- Massaging, cleansing, treating, or beautifying the hands or feet of any person.

The practice of cosmetology includes the specialty branches of skin care and nail care [*Bus. & Prof. Code § 7316(c)*; *see §§ 97.11[2][b], [c]*].

The practice of barbering and the practice of cosmetology do not include the mere sale, fitting, or styling of wigs or hairpieces. Nor does it include natural hair braiding. Natural hair braiding is a service that results in tension on hair strands or roots by twisting, wrapping, weaving, extending, locking, or braiding by hand or mechanical device, provided that the service does not include hair cutting or the application of dyes, reactive chemicals, or other preparations to alter the color of the hair or to straighten, curl, or alter the structure of the hair. The practice of barbering and cosmotology also do not include threading. Threading is a technique that results in removing hair by twisting thread around unwanted hair and pulling it from the skin and the incidental trimming of eyebrow hair. [*Bus. & Prof. Code § 7316(d)*].

However, a person who engages in natural hair styling, which is defined as the provision of natural hair braiding services together with any of the services or procedures defined within the regulated practices of barbering or cosmetology, is subject to regulation and must obtain and maintain a barbering or cosmetology license for those services [*Bus. & Prof. Code § 7316(e)*].

[b] Skin Care

Skin care is any one or more of the following practices [*Bus. & Prof. Code § 7316(c)(1)*]:

- Giving facials, applying makeup, giving skin care, removing superfluous hair from the body of any person by the use of depilatories, tweezers, or waxing, or applying eyelashes to any person.

- Beautifying the face, neck, arms, or upper part of the human body, by use of cosmetic preparations, antiseptics, tonics, lotions, or creams.

- Massaging, cleaning, or stimulating the face, neck, arms, or upper party of the human body, by means of the hands, devices, apparatus, or appliances, with the use of cosmetic preparations, antiseptics, tonics, lotions, or creams.

[c] Nail Care

Nail care is the practice of cutting, trimming, polishing, coloring, tinting, cleansing, or manicuring the nails of any person, or massaging, cleansing, or beautifying the hands or feet of any person [*Bus. & Prof. Code § 7316(c)(2)*]. Application of artificial fingernails also constitutes an act of cosmetology *[59 Ops. Cal. Att'y Gen. 587 (1976)]* .

[3] Electrolysis

Electrolysis is the practice of removing hair from, or destroying hair on, the human body by the use of an electric needle only. It includes electrolysis or thermolysis [*Bus. & Prof. Code § 7316(f)*].

[4] Apprentice

An apprentice is any person who is licensed by the Board to engage in learning or acquiring a knowledge of barbering, cosmetology, skin care, nail care, or electrology, in a licensed establishment under the supervision of a licensee approved by the Board [*Bus. & Prof. Code § 7332*].

[5] Establishment

An establishment is any premises, building, or part of a building in which any activity licensed under *Bus. & Prof. Code § 7301 et seq.* is practiced [*Bus. & Prof. Code § 7346*]. For discussion of health requirements related to establishments, as defined, see *§ 97.14[1]*.

[6] Mobile Unit

A mobile unit means any self-contained, self-supporting, enclosed mobile unit that is at least 24 feet long and is licensed as an establishment for the practice of any occupation licensed by the Board that complies with *Bus. & Prof. Code § 7354 et seq.* and all health and safety regulations established by the Board [*Bus. & Prof. Code § 7354*]. For discussion of health requirements related to mobile units, *see § 97.14[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicensesContracts LawTypes of ContractsPersonal Service Agreements

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§ 97.12 Rulemaking Authority of Board

The statutes that license cosmetology and barbering are essentially public health regulations [*Mains v. Board of Barber Examiners (1967) 249 Cal. App. 2d 459, 466, 57 Cal. Rptr. 573* ; *Doyle v. Board of Barber Examiners (1966) 244 Cal. App. 2d 521, 526, 53 Cal. Rptr. 420]* . The Board, a subdivision of the Department of Consumer Affairs, is required by statute to establish rules governing sanitary conditions and other precautions that are reasonably necessary to protect the public health and safety [*Bus. & Prof. Code § 7312(e)*]. For discussion of particular health requirements, *see § 97.14*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingFormal RulemakingGovernmentsState & Territorial GovernmentsLicensesContracts LawTypes of ContractsPersonal Service Agreements

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§ 97.13 Licensing of Providers

A license to practice cosmetology, barbering, skin care, nail care, or electrolysis is issued by the Board to an applicant who satisfactorily completes an examination for that occupation, possesses the other qualifications required by law, and who has remitted the required fee [*Bus. & Prof. Code § 7342*; *see Bus. & Prof. Code § 7321 et seq.* (qualifications of applicants for licensing examinations)]. The license entitles the holder to practice that occupation in a licensed establishment and shall be issued by the board on the same day that the applicant satisfactorily passes the examination. [*Bus. & Prof. Code § 7342*; *see Bus. & Prof. Code § 7347* (application for license as establishment)].

The form and content of the license issued by the Board must be determined by the Director of Consumer Affairs after consultation with the Board [*Bus. & Prof. Code § 7396*; *see Bus. & Prof. Code § 164*]. The license must prominently state that the holder is licensed as a barber, cosmetologist, esthetician, manicurist, electrologist, or apprentice, and shall contain a photograph of the licensee [*Bus. & Prof. Code § 7396*]. The license holder must display the license in a conspicuous location in his or her place of business or place of employment [*Bus. & Prof. Code § 7397*]. The Board may not issue a temporary license under any circumstances [*Bus. & Prof. Code § 7399*].

A license that has expired for failure of the licensee to renew may be renewed at any time within five years following its expiration upon application and payment of all accrued and unpaid renewal fees and delinquency fees and the licensee must meet current continuing education requirements [*Bus. & Prof. Code § 7417*]. A license which has not been renewed within five years following its expiration shall be deemed canceled [*Bus. & Prof. Code § 7418*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicensesContracts LawTypes of ContractsPersonal Service Agreements

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§ 97.14 Health Requirements

[1] Establishments

No person having charge of an establishment, whether as an owner or any employee, may permit any room or part of a room in which any occupation regulated under *Bus. & Prof. Code § 7301 et seq.* is conducted or practiced to be used for residential purposes, or for any other purpose that would tend to make the room unsanitary, unhealthy, or unsafe, or endanger the health and safety of the consuming public. An establishment must have a direct entrance separate and distinct from any entrance in connection with private quarters [*Bus. & Prof. Code § 7350*].

Every establishment must provide at least one public toilet room located on or near the premises for its patrons [*see Bus. & Prof. Code § 7351*]. Specific requirements as to how the public toilet room is to be constructed, including what materials must be used, are set forth in *Bus. & Prof. Code § 7351*. Every establishment must provide adequate and convenient handwashing facilities, including running water, soap, and approved sanitary towels [*Bus. & Prof. Code § 7352*]. Establishments are subject to regular inspections regarding compliance with statutory requirements [*see Bus. & Prof. Code § 7353*].

[2] Mobile Units

Mobile units must comply with regulations adopted by the Board that assure that the unit will be kept clean, in good repair, and in compliance with *Bus. & Prof. Code § 7354 et seq.* [*Bus. & Prof. Code § 7357(a)*]. All laws governing establishments in *Bus. & Prof. Code § 7301 et seq.*, except *Bus. & Prof. Code § 7346 et seq.*, apply to mobile units unless otherwise provided [*Bus. & Prof. Code § 7361*]. Each mobile unit must be equipped with a self-contained, potable water supply, hot water tanks, a flush chemical toilet, a waste container, a split-lead generator, and a sealed combustible heater with an outside vent [*see Bus. & Prof. Code § 7357(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicensesGovernmentsState & Territorial GovernmentsPolice

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§ 97.15 Inspection of Facilities

The Board's executive officer and authorized representatives are required by law to have access to, and inspect, each establishment or mobile unit at any time in which barbering, cosmetology or electrolysis is being performed in order to assure compliance with the Act [*Bus. & Prof. Code § 7313(a)(1)*; *see Bus. & Prof. Code § 7353*; *see also § 97.11*]. The Board must maintain a program of random and targeted inspections of establishments to ensure compliance with applicable laws relating to public health and safety and the conduct and operation of establishments [*Bus. & Prof. Code § 7313(a)(2)*; *see Bus. & Prof. Code § 7353*]. For discussion of particular health requirements, *see § 97.14*.

The Board's executive officer and authorized representatives must also have access to and is required to inspect the premises of all schools in which the practice of barbering, cosmetology or electrolysis is performed on the public to insure compliance with health and safety requirements adopted by the Board [*Bus. & Prof. Code § 7313(b)*].

With prior written authorization from the Board or its executive officer, any Board member may enter and visit, in his or her capacity as a Board member, any establishment during business hours or at any time when barbering, cosmetology, or electrolysis is being performed, for the purpose of conducting official board business. Such a visit may not be used as a basis for any licensing disciplinary action by the board [*Bus. & Prof. Code § 7313(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 97.16 Disciplinary Action

[1] Authorized Sanctions

A license required by the Act may at any time be revoked, suspended, or denied by the Board if there exists any one of the statutory grounds for disciplinary action [*see Bus. & Prof. Code § 7403*; *see also Bone v. State Board of Cosmetology (1969) 275 Cal. App. 2d 851, 80 Cal. Rptr. 164* ; *Mains v. Board of Barber Examiners (1967) 249 Cal. App. 2d 459, 57 Cal. Rptr. 573*]. For discussion of the grounds for which discipline may be imposed, *see § 97.16[2]*.

The Board has the authority to assess administrative fines for the violation of any section of the Act or of any rules and regulations adopted by the Board under the Act [*Bus. & Prof. Code § 7406*]. The Board must, through its duly authorized representatives, issue a citation with respect to any violation for which an administrative fine may be assessed [*Bus. & Prof. Code § 7408*].

In addition, the Board may establish, by regulation, a system for issuing citations that contain abatement orders or an order to pay an administrative fine for violations of the Act or regulations adopted under the Act [*see Bus. & Prof. Code § 125.9(a)*].

[2] Grounds for Discipline

The statutory grounds for disciplinary action by the Board are as follows [*Bus. & Prof. Code § 7404*]:

- Unprofessional conduct which includes, but is not limited to, any of the following:

  - Incompetence or gross negligence, including failure to comply with generally accepted standards for the practice of barbering, cosmetology, or electrology or disregard for the health and safety of patrons.

  - Repeated similar negligent acts.

- Conviction of any crime substantially related to the qualifications, functions, or duties of the license holder, in which case, the records of conviction or a certified copy shall be conclusive evidence thereof.

- Advertising by means of knowingly false or deceptive statements.

- Failure to comply with the requirements of this chapter.

- Failure to comply with the rules governing health and safety adopted by the Board and approved by the State Department of Health Care Services, for the regulation of establishments, or any practice licensed and regulated under this chapter.

- Failure to comply with the rules adopted by the Board for the regulation of establishments, or any practice licensed and regulated under this chapter.

- Continued practice by a person knowingly having an infectious or contagious disease.

- Habitual drunkenness, habitual use of or addiction to the use of any controlled substance.

- Obtaining or attempting to obtain practice in any occupation licensed and regulated under this chapter, or money, or compensation in any form, by fraudulent misrepresentation.

- Failure to display the license or health and safety rules and regulations in a conspicuous place.

- Engaging, outside of a licensed establishment and for compensation in any form whatever, in any practice for which a license is required under this chapter, except that when such service is provided because of illness or other physical or mental incapacitation of the recipient of the service and when performed by a licensee obtained for the purpose from a licensed establishment.

- Permitting a license to be used where the holder is not personally, actively, and continuously engaged in business.

- The making of any false statement as to a material matter in any oath or affidavit, which is required by the provisions of this chapter.

- Refusal to permit or interference with an inspection authorized under this chapter.

- Any action or conduct which would have warranted the denial of a license.

- Failure to surrender a license that was issued in error or by mistake.

[3] Administrative Review

In the case of a license denial, the Board must provide a statement of reasons for the denial including rehabilitation criteria and consideration of the applicant's particular evidence of rehabilitation [*Bus. & Prof. Code § 7403(b), (c)*]. If the Board's decision was based on the applicant's prior criminal conviction, the statement of reasons must justify the Board's denial of a license and convey the reasons why the prior criminal conviction is substantially related to the qualifications, functions, or duties of a barber or cosmetologist [*Bus. & Prof. Code § 7403(c)(3)*]. Commencing July 1, 2009, if the denial of a license is due at least in part to the applicant's state or federal criminal history record, the Board must additionally provide to the applicant a copy of his or her criminal history record if the applicant makes a written

request to the Board for a copy, specifying an address to which it is to be sent [*Bus. & Prof. Code § 7403(d)(1)*]. The state or federal criminal history record must not be modified or altered from its form or content as provided by the Department of Justice [*Bus. & Prof. Code § 7403(d)(1)(A)*] and must be provided in such a manner as to protect the confidentiality and privacy of the applicant's criminal history record, and the criminal history record must not be made available by the Board to any employer [*Bus. & Prof. Code § 7403(d)(1)(B)*. The Board must retain a copy of the applicant's written request and a copy of the response sent to the applicant, which must include the date and the address to which the response was sent [*Bus. & Prof. Code § 7403(d)(1)(C)*]. The Board must make this information available upon request by the Department of Justice or the Federal Bureau of Investigation [*Bus. & Prof. Code § 7403(d)(2)*].

For a license denial, the Board must provide a hearing within 90 days after the applicant's request; for all other hearing requests, the board shall determine when the hearing shall be conducted *Bus. & Prof. Code § 7403 (e)*. Citations are appealable first to the disciplinary review committee, and then to the program administrator. Any administrative fines are stayed while an appeal is pending. In addition, the fines may not be increased on appeal. The review proceedings are to be conducted in accordance with the Administrative Procedures Act (*Gov. Code § 11500 et seq.*) [*Bus. & Prof. Code §§ 7410, 7411*]. For discussion relating to administrative hearings, see Ch. 473, *Public Agency Adjudication* , through Ch. 473H, *Alternative Procedures for Agency Decisions* .

[4] Judicial Review

Review by administrative mandate apparently applies to disciplinary action taken by the Board [*see Code Civ. Proc. § 1094.5(a)*; *Winkelman v. City of Tiburon (1973) 32 Cal. App. 3d 834, 840, 108 Cal. Rptr. 415]* .

In a mandate proceeding for review of a final administrative decision, the court may inquire into any of the following [*Code Civ. Proc. § 1094.5(b)*]:

- Whether the agency has proceeded without or in excess of jurisdiction.
- Whether there has been a fair trial.
- Whether there has been any prejudicial abuse of discretion.

For further discussion and forms relating to judicial review of an agency's decision, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesGovernmentsState & Territorial GovernmentsPolice PowerContracts LawTypes of ContractsPersonal Service Agreements

California Forms of Pleading and Practice--Annotated

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Volume 9: Bailments thru Boats and Boating-Chs. 93-100
Chapter 97 BARBERING AND COSMETOLOGY
PART II. LEGAL BACKGROUND
A. In General

9-97 California Forms of Pleading and Practice--Annotated §§ 97.17-97.29

[Reserved]

§§ 97.17[Reserved]

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9-97 California Forms of Pleading and Practice--Annotated § 97.30

§ 97.30 Negligence

[1] In General

A patron of a barber or cosmetologist relies on the skill and knowledge of the person providing the treatment or rendering services [*Romero v. And'ra (1963) 216 Cal. App. 2d 295, 300, 30 Cal. Rptr. 645]* . A barber or cosmetologist who fails to exercise the ordinary skill and competence of members of his or her profession may be liable for negligence [*see, e.g., Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 812, 110 Cal. Rptr. 543* ; *Wolf v. Superior Court (2003) 107 Cal. App. 4th 25, 40, n.6, 130 Cal. Rptr. 2d 860 see also § 97.30[2]*]. For forms of complaint and allegations relating to a cause of action for negligence in the provision of personal grooming services, *see §§ 97.110 -97.112*.

For further discussion and forms for use in negligence actions generally, see Ch. 380, *Negligence* .

[2] Standard of Care

As experts in their profession, the services of a barber or cosmetologist are sought because of their special skill. Therefore, a barber or cosmetologist has a duty to exercise the ordinary skill and competence of members of their profession [*Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 811, 110 Cal. Rptr. 543* ; *Wolf v. Superior Court (2003) 107 Cal. App. 4th 25, 40, n.6, 130 Cal. Rptr. 2d 860]* .

For instance, when a patron of a beauty salon requests a well-known hair treatment and submits to that process, the patron has a right to expect that the cosmetologist will comply with precautionary instructions of the manufacturer regarding application of the solution to the hair [*Romero v. And'ra (1963) 216 Cal. App. 2d 295, 300, 30 Cal. Rptr. 645]* .

Negligence in the application of cosmetic products may consist of failure to use pads and other protective devices to keep such color preparations away from the face, eyes, and ears. In the case of permanent wave solutions, negligence may consist of failure to confine the solutions to the hair, away from the scalp or other skin areas [*see Briggs v. National Indus., Inc. (1949) 92 Cal. App. 2d 542, 543-546, 207 P.2d 110]* . Negligence may also consist of failure to

make appropriate effort by test and inquiry to ascertain whether the patron has any preexisting hypersensitivity to the particular beauty preparations [*see Romero v. And'ra (1963) 216 Cal. App. 2d 295, 300, 30 Cal. Rptr. 645]* .

Although a barber or cosmetologist who fails to exercise the ordinary skill and competence of members of his or her profession may be liable for negligence, a patron may not reasonably expect that a barber or cosmetologist be infallible in rendering services because the professional has not undertaken to be an insurer of the result [*Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 812, 110 Cal. Rptr. 543* ; *Allied Properties v. John A. Blume & Associates (1972) 25 Cal. App. 3d 848, 856, 102 Cal. Rptr. 259]* .

[3] Presumptions

[a] Negligence Per Se

A violation of either a statute or regulation may form the basis for an action against a barber or cosmetologist under the doctrine of negligence per se. The failure of a person to exercise due care is presumed if [*Evid. Code § 669(a)*]:

- He or she violated a statute, ordinance, or regulation of a public entity;
- The violation proximately caused death or injury to person or property;
- The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
- The person suffering the death or injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

A duty of care and the attendant standard of conduct required of a reasonable person may be found in a legislative enactment that does not provide for civil liability [*Elsner v. Uveges (2004) 34 Cal. 4th 915, 928 22 Cal. Rptr. 3d 530 102 P.3d 915* (violation of California OSHA provisions); *Vesely v. Sager (1971) 5 Cal.3d 153, 157, 164 95 Cal. Rptr. 623, 486 P.2d 151* (violation of liquor laws)].

[b] Res Ipsa Loquitur

Res ipsa loquitur applies when the occurrence of the injury is of such a nature that it can be said in the light of past experience that the injury probably was a result of negligence by someone and that the defendant is probably the person who is responsible. In determining whether such probabilities exist with regard to a particular occurrence, the courts have relied both on common knowledge and expert testimony [*Romero v. And'ra (1963) 216 Cal. App. 2d 295, 300, 30 Cal. Rptr. 645* (citing *Siverson v. Weber (1962) 57 Cal. 2d 834, 836, 22 Cal. Rptr. 337, 372 P.2d 97*)].

The doctrine has been applied in an action to recover damages from proprietors of a beauty parlor on account of a burn inflicted on the plaintiff's scalp while she was receiving a permanent wave [*Chauvin v. Krupin (1935) 4 Cal. App. 2d 322, 324-325, 40 P.2d 904* ; *Brown v. Higbee (1959) 175 Cal. App. 2d Supp. 917, 922-923* , *1 Cal. Rptr. 316]* . It has also been applied when injuries resulted from the use of dyes as well as from mechanical treatments administered in a beauty salon. The rationale for applying the doctrine in such cases is that it is a matter of common knowledge among laypersons that the dyeing and bleaching of hair is not ordinarily harmful unless negligently done [*Romero v. And'ra (1963) 216 Cal. App. 2d 295, 301, 30 Cal. Rptr. 645]* .

[4] Affirmative Defenses

[a] In General

Two common defenses in negligence actions against barbers and cosmetologists are negligence of the plaintiff and assumption of risk. As statements of new matter, these defenses must be affirmatively pleaded [*see Code Civ. Proc. § 431.30(b)(2)*; *see also §§ 97.30[4][b], [c]*]. For a form of affirmative defense asserting that a plaintiff patron's injuries were a result of his or her negligence in failing to advise of an allergic sensitivity to a cosmetic product, *see § 97.113*.

[b] Comparative Negligence

The defense of contributory negligence has been invalidated in California and replaced with a system of comparative negligence in which the fundamental purpose is to assign liability for damage in direct proportion to the amount of negligence of each of the parties. Thus, in all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured does not bar recovery, but the damages awarded are diminished in proportion to the amount of negligence attributable to the person recovering [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

Prior cases involving contributory negligence are, however, instructive insofar as they illustrate negligent conduct of plaintiffs. For example, a case decided under former law held that a plaintiff was negligent when she failed to disclose known allergies to a cosmetologist and refused to take a patch test suggested on the label of the hair dye container after the test had been recommended and offered by the cosmetologist [*Arata v. Tonegato (1957) 152 Cal. App. 2d 837, 841-842, 314 P.2d 130]* . Although *Arata* is still valid with regard to the existence of the plaintiff's negligence, under the doctrine of comparative negligence the plaintiff's recovery now would depend on the amount of negligence attributable to plaintiff and the amount attributed to the cosmetologist [*see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

[c] Assumption of Risk

In analyzing assumption of risk since *Li v. Yellow Cab* [*see § 97.72[1][b]*], the Supreme Court has distinguished between two separate types of implied assumption of risk [*Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (lead opinion); *see also Ford v. Gouin (1992) 11 Cal. Rptr. 2d 30, 834 P.2d 724* (companion case to *Knight*)]. Under "primary assumption of risk," by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury, and the doctrine operates as a complete bar to the plaintiff's recovery [*Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . Under "secondary assumption of risk," the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty. In this situation, the doctrine is merged into the comparative fault scheme, and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties [*Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

Prior to the adoption of comparative fault principles, one appellate court held that a jury could conclude that when a patron in the course of hair bleaching treatments went to a second cosmetologist for hot oil treatments that the first refused to administer on account of the condition of the patron's scalp, the defense of assumption of risk may be asserted to bar the patron from recovery because the plaintiff had placed herself in a place of known danger with knowledge and appreciation of the risk [*see Romero v. And'ra (1963) 216 Cal. App. 2d 295, 302-303, 30 Cal. Rptr. 645]* . Although the Supreme Court has not yet ruled on the proper analysis of implied assumption of risk in the context of the rendering of personal grooming services, it appears that the rationale of *Romero* no longer applies. The lead opinion in *Knight v. Jewett* rejected the dissent's view that implied assumption of risk bars an action whenever there is a voluntary acceptance of a specific, known, and appreciated risk. Rather, a court would consider the nature of the activity and the parties relationship to the activity [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 312-313, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

A plaintiff who is faced with a situation similar to that in *Romero, supra* , might argue that his or her relationship to

the defendant as a consumer of personal grooming services is distinguishable from the relationship between the parties in *Knight* (coparticipants in active sport), arguing that the nature of the activity and the relationship of the parties is such that the plaintiff "did not consent to negligent conduct or agree to excuse [the defendant] from liability in the event of such negligence" [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 316, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . Thus, defendant breached a duty of care, and plaintiff's choice to encounter the risk of such negligence only permits an apportionment of damages under secondary assumption of risk, rather than a complete bar to recovery under primary assumption of risk [*Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesComparative NegligenceGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesContracts LawTypes of ContractsPersonal Service AgreementsTortsNegligenceProofViolations of LawStatutesTortsNegligenceStandards of CareReasonable CareReasonable Person

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9-97 California Forms of Pleading and Practice--Annotated § 97.31

§ 97.31 Strict Liability

[1] Services Rendered

Although cosmetic or personal grooming products are frequently used in the practice of barbering and cosmetology, whether the doctrine of strict liability in tort applies depends on the primary objective of the transaction. There remains a distinction between a transaction in which the primary objective is the acquisition of ownership or use of a product and one in which the dominant purpose is to obtain services [*Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 978, 95 Cal. Rptr. 381]* . The well settled rule in California is that the doctrines of implied warranty and strict liability do not apply when the primary objective of a transaction is to obtain services [*Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 811, 110 Cal. Rptr. 543* ; *Allied Properties v. John A. Blume & Associates (1972) 25 Cal. App. 3d 848, 855, 102 Cal. Rptr. 259]* .

While no case specifically involving litigation against barbers or cosmetologist has been found when this principle has been applied, the courts have relied on the rule against application of strict liability to persons rendering services in cases involving, among others, engineers [*Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 110 Cal. Rptr. 543* ; *Allied Properties v. John A. Blume & Associates (1972) 25 Cal. App. 3d 848, 102 Cal. Rptr. 259* ; *Bonadiman-McCain, Inc. v. Snow (1960) 183 Cal. App. 2d 58, 6 Cal. Rptr. 52]* , hospitals [*Silverhart v. Mount Zion Hosp. (1971) 20 Cal. App. 3d 1022, 98 Cal. Rptr. 187]* , physicians [*Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 95 Cal. Rptr. 381]* , pharmacies [*Murphy v. E. R. Squibb & Sons, Inc.(1985) 40 Cal. 3d 672, 681, 221 Cal. Rptr. 447, 710 P.2d 247]* , and a test hole driller [*Gagne v. Bertran (1954) 43 Cal. 2d 481, 275 P.2d 15* ; *see generally* Ch. 460, *Products Liability*].

Even though a beauty salon or barber shop uses and applies cosmetic or personal grooming products in rendering its services, and as such, the cost of those products used are included in the price for the services rendered to patrons, the salon or barber shop apparently would not be strictly liable for defects in such products when it is not a seller engaged in the business of selling such products but a user or consumer of such products [*see* *Silverhart v. Mount Zion Hosp. (1971) 20 Cal. App. 3d 1022, 1028, 98 Cal. Rptr. 187* (hospital supplies and services)]. The process of manufacturing and distribution ends with the person or firm that sold or otherwise supplied the cosmetic or personal grooming products

to the salon or barber shop, and the product that is first placed on the market by the manufacturer leaves the stream of commerce when it comes into the possession of the salon or barber shop [*see Silverhart v. Mount Zion Hosp. (1971) 20 Cal. App. 3d 1022, 1027-1028, 98 Cal. Rptr. 187]* .

[2] Products Sold

A salon or barber shop that is a retailer engaged in the business of distributing goods to the public is strictly liable in tort for personal injuries caused by defects in the products it sells [*see Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 263, 37 Cal. Rptr. 896, 391 P.2d 168* (automobile sales); *Jimenez v. Superior Court (2002) 29 Cal. 4th 473, 479, 127 Cal. Rptr. 2d 614, 58 P.3d 450]* . Such strict liability in tort has virtually superseded and replaced actions for breach of implied warranty [*Grinnell v. Charles Pfizer & Co. (1969) 274 Cal. App. 2d 424, 432, 79 Cal. Rptr. 369]* .

For discussion and forms relating to actions based on strict liability in tort arising from purchase of products, see *§ 97.50 et seq.* and *§ 97.130 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProducts LiabilityDuty to WarnTortsProducts LiabilityPlaintiff's ConductTortsProducts LiabilityStrict Liability

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[Reserved]

§§ 97.32[Reserved]

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9-97 California Forms of Pleading and Practice--Annotated § 97.50

§ 97.50 Strict Liability in Tort

[1] In General

The rules governing liability of manufacturers, wholesalers, distributors, and retailers of cosmetic and personal grooming products for personal injuries sustained by consumers as a result of the use or application of such products are governed by California law of products liability generally.

The plaintiff's burden of proof in a products liability case for strict liability in tort is met if he or she establishes the elements as formulated in *Greenman v. Yuba Power Prods., Inc. (1963) 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897* [*Foglio v. Western Auto Supply (1976) 56 Cal. App. 3d 470, 474, 128 Cal. Rptr. 545]* . That is, the manufacturer (1) places an article on the market, (2) knowing that it is to be used without inspection for defects, and the article (3) proves to have a defect (4) that causes injury to a human being [*Greenman v. Yuba Power Prods., Inc. (1963) 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 377 P.2d 897* ; *see Jimenez v. Superior Court (2002) 29 Cal. 4th 473, 477, 127 Cal. Rptr. 2d 614, 58 P.3d 450]* .

The policy underlying the doctrine of strict liability is not limited to cases involving latent defects [*Luque v. McLean (1972) 8 Cal. 3d 136, 145, 104 Cal. Rptr. 443, 501 P.2d 1163]* , nor does it require a plaintiff to prove that he or she was unaware of the claimed defect at the time of the injury [*Luque v. McLean (1972) 8 Cal. 3d 136, 141-145, 104 Cal. Rptr. 443, 501 P.2d 1163]* . When a party relies on the rule of strict liability, however, the requirement of showing a defect cannot be satisfied by reliance on the doctrine of res ipsa loquitur [*Tresham v. Ford Motor Co. (1969) 275 Cal. App. 2d 403, 408, 79 Cal. Rptr. 883* ; *McCurter v. Norton Co. (1968) 263 Cal. App. 2d 402, 408, 69 Cal. Rptr. 493]* .

For forms of complaint and allegation alleging that a defendant manufacturer, wholesaler, or retailer is liable for injuries resulting from a defective product under the theory of strict liability in tort, *see §§ 97.130* and *97.131*.

For a comprehensive treatment of the subject of products liability, see Ch. 460, *Products Liability* .

[2] Rejection of Restatement Component

Restatement (Second) of Torts § 402A provides, in part, that one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to the consumer's property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to that person's property, if

- The seller is engaged in the business of selling such a product; and

- It is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

The California Supreme Court rejected the Restatement standard to the extent that it requires the product to be in a "defective condition unreasonably dangerous," because adopting that requirement would impose two burdens on the plaintiff instead of one. That is, it would require proof that a defect existed, and that the defect was unreasonably dangerous. The Court held that the phrase "unreasonably dangerous" relates to the law of negligence and not strict liability, and therefore, the requirement is inconsonant with the rule of strict liability pursuant to *Greenman v. Yuba Power Prods., Inc. (1963) 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 377 P.2d 897* [*Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 131-135, 104 Cal. Rptr. 433, 501 P.2d 1153]* .

[3] Defective Warning or Instruction

[a] Known or Knowable Risks

A manufacturer or seller must adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific evidence at the time of manufacture and distribution [*see* *Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1113, 56 Cal. Rptr. 2d 162, 920 P.2d 1347]* . The warning must be given when the manufacturer or seller knows or should know that a product is dangerous to some persons, even though few in number as compared with the number of users of the product [*McKinney v. Revlon, Inc. (1992) 2 Cal. App. 4th 602, 607, 3 Cal. Rptr. 2d 72, 74]* . Thus, for example, a manufacturer of a hair frosting product is strictly liable for failing to include a warning that some persons may have an adverse reaction to an irritant contained in the product when a manufacturer has actual knowledge of the possible undesirable consequences [*McKinney v. Revlon, Inc. (1992) 2 Cal. App. 4th 602, 608, 3 Cal. Rptr. 2d 72]* .

If a product contains an ingredient to which a substantial number of the population is allergic, and the ingredient is one whose danger is not generally known or, if known, is one that the consumer would reasonably not expect to find in the product, the manufacturer or seller is required to give warning against it if it has knowledge or, by the application of reasonable, developed human skill and foresight, should have knowledge of the presence of the ingredients and the danger [*Oakes v. E.I. Du Pont de Nemours & Co., Inc. (1969) 272 Cal. App. 2d 645, 649, 77 Cal. Rptr. 709]* . To prevent the product from being unreasonably dangerous, the manufacturer or seller may be required to give directions or warning on the containers as to its use [*Oakes v. E.I. Du Pont de Nemours & Co., (1969) 272 Cal. App. 2d 645, 649, 77 Cal. Rptr. 709]* .

In the case of cosmetic products containing coal tar color derivatives, the manufacturer is required by federal and California statutes to place a warning on the product cautioning the potential user that the product contains ingredients that may cause skin irritation on certain individuals, and that a preliminary test should be made in accordance with accompanying directions. The warning must also caution that the product is not to be used for dyeing the eyelashes or eyebrows, because it may cause blindness [*21 U.S.C.S. § 361(a)*; *Health & Safety Code § 111675*].

A manufacturer may be liable for an inadequate warning, as well as for a complete lack of warning [*see* *McKinney v. Revlon, Inc. (1992) 2 Cal. App. 4th 602, 608 n.4, 3 Cal. Rptr. 2d 72* ; *Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1113, 56 Cal. Rptr. 2d 162, 920 P.2d 1347]* .

[b] Adequate Warning or Unknown Risks

If a warning is given, the manufacturer or seller may reasonably assume that it will be read and followed. If a product bearing a warning is safe for use if the warning is followed, it is not in defective condition, nor is it unreasonably dangerous [*Oakes v. E.I. Du Pont de Nemours & Co., Inc. (1969) 272 Cal. App. 2d 645, 649, 77 Cal. Rptr. 709]* . If an injury results from the particular susceptibility of the consumer to the ingredients of a product, and the ingredients are ordinarily safe for use, it is not unreasonable to put the burden on the consumer to protect himself or herself, provided that a proper warning was given [*Harris v. Belton (1968) 258 Cal. App. 2d 595, 608, 65 Cal. Rptr. 808]* .

In the absence of a showing that a manufacturer or seller knew or should have known by reasonable, developed human skill and foresight that a product is dangerous, any requirement that the user be warned of unknown and unknowable allergies, sensitivities, and idiosyncracies would place the manufacturer or seller in the role of an insurer [*Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 993, 95 Cal. Rptr. 381* ; *Huynh v. Ingersoll-Rand (1993) 16 Cal. App. 4th 825, 833-835, 20 Cal. Rptr. 2d 296]* . The law does not prohibit the manufacture and sale of a beauty product that adversely affects only about one in 20 users who happen to be allergic or sensitive to it, but it requires that the consumer be advised of the possibility of untoward consequences [*Harris v. Belton (1968) 258 Cal. App. 2d 595, 607, 65 Cal. Rptr. 808]* .

An adequate instruction on the use of a product may be sufficient to satisfy the warning requirement [*see McKinney v. Revlon, Inc. (1992) 2 Cal. App. 4th 602, 608, 3 Cal. Rptr. 2d 72* (dicta); *see also Finn v. G. D. Searle & Co. (1984) 35 Cal. 3d 691, 699, 200 Cal. Rptr. 870, 677 P.2d 1147]* .

[4] No Privity Limitations

The initial purchaser of a cosmetic or personal grooming product is not the only person who may recover under strict liability in tort, because the doctrine of strict liability may not be restricted on a theory of privity of contract. Rather, strict liability extends to consumers, users, bystanders, and human beings generally [*see Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 586, 75 Cal. Rptr. 652, 451 P.2d 84* (defective automobile steering mechanism); *Nelson v. Superior Court (2006) 144 Cal. App. 4th 689, 696-697, 50 Cal. Rptr. 3d 684]* .

[5] Proper Defendants

[a] Manufacturers

A manufacturer who places a defective article on the market, knowing that it is to be used without inspection for defects, is strictly liable for injuries caused by the defect [*see, e.g., Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 260-261, 37 Cal. Rptr. 896, 391 P.2d 168* ; *Jimenez v. Superior Court (2002) 29 Cal. 4th 473, 477, 127 Cal. Rptr. 2d 614, 58 P.3d 450]* .

[b] Wholesalers

The doctrine of strict liability is applicable to wholesalers [*Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 130, 104 Cal. Rptr. 433, 501 P.2d 1153* ; *Barth v. B.F. Goodrich Tire Co. (1968) 265 Cal. App. 2d 228, 252-253, 71 Cal. Rptr. 306]* . This is the case even though the wholesaler neither manufactures the product or has possession of the goods [*Barth v. B.F. Goodrich Tire Co. (1968) 265 Cal. App. 2d 228, 253, 71 Cal. Rptr. 306]* .

[c] Retailers

Retailers are subject to strict liability because, like manufacturers, they are engaged in the business of distributing goods to the public. Retailers are an integral part of the overall producing and marketing enterprise, and should bear the cost of injuries resulting from defective products. The retailer's strict liability thus serves as an additional incentive to safety,

and together with the strict liability of manufacturers affords maximum protection to injured persons [*Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 262, 37 Cal. Rptr. 896, 391 P.2d 168* ; *Jimenez v. Superior Court (2002) 29 Cal. 4th 473, 477-478, 127 Cal. Rptr. 2d 614, 58 P.3d 450]* .

[6] Defenses

[a] Absence of Defect

Since a manufacturer is strictly liable in tort when an article it places on the market proves to have a defect that causes injury to a human being [*Greenman v. Yuba Power Products, Inc. (1963) 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 377 P.2d 897]* , a requirement for the application of the doctrine of strict liability is that the article was defective when manufactured or sold [*Erickson v. Sears, Roebuck & Co. (1966) 240 Cal. App. 2d 793, 798, 50 Cal. Rptr. 143]* . Hence, it is a defense to such an action that the product was not defective. Such a defense would take the form of a general denial, because the burden is on the plaintiff to prove that the article was defective and that the defect was a proximate cause of the injury [*Bunch v. Hoffinger Indus., Inc. (2004) 123 Cal. App. 4th 1278, 1302, 20 Cal. Rptr. 3d 780 Erickson v. Sears, Roebuck & Co. (1966) 240 Cal. App. 2d 793, 798, 50 Cal. Rptr. 143]* .

For a form of affirmative defense alleging that the plaintiff's injuries were caused solely by an allergic condition, *see § 97.135*.

[b] Misuse or Unintended Use

Misuse of a manufacturer's product is recognized as a defense to an action based on strict liability. Misuse will refute an allegation made by a plaintiff of defective condition of the manufacturer's product [*McCurter v. Norton Co. (1968) 263 Cal. App. 2d 402, 407, 69 Cal. Rptr. 493]* .

Strict liability should not be imposed on a manufacturer if injury results from a use of its product that is not reasonably foreseeable [*Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 126, 104 Cal. Rptr. 433, 501 P.2d 1153* ; *Bunch v. Hoffinger Indus., Inc. (2004) 123 Cal. App. 4th 1278, 1302-1303, 20 Cal. Rptr. 3d 780]* . A manufacturer or supplier is entitled to expect normal use of the product, and if the product is used in another manner or, if a specific manner of use or caution is prescribed but not complied with, no liability will attach. In addition, if a warning is given on the product or its package, the manufacturer or seller may reasonably assume that the warning will be read and followed. A product bearing a warning, which is safe for use if the warning is followed, is not in defective condition [*Oakes v. E.I. Du Pont de Nemours & Co., Inc. (1969) 272 Cal. App. 2d 645, 649, 77 Cal. Rptr. 709]* .

The defenses of misuse or unintended use of a product are statements of new matter under *Code Civ. Proc. § 431.30(b)(2)*, and accordingly, must be affirmatively pleaded. For a form of affirmative defense alleging that the plaintiff's misuse of a product was an intervening cause of his or her injuries, *see § 97.133*. For a form of affirmative defense alleging that the plaintiff's use of the product was not reasonably foreseeable, *see § 97.134*.

[c] Comparative Fault

The doctrine of comparative fault, set forth in *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226* , applies to actions based on strict products liability [*Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 730, 742, 144 Cal. Rptr. 380, 575 P.2d 1162]* . Moreover, in strict products liability claims, the separate defense of assumption of the risk, to the extent that it is a form of contributory negligence, has been merged into comparative fault, and is therefore abolished as a complete or absolute bar to the plaintiff's recovery [*Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 738-742, 144 Cal. Rptr. 380, 575 P.2d 1162]* . Therefore, in an action based on either strict products liability or negligence, a plaintiff's recovery will be reduced in proportion to the amount of comparative fault attributable to him or her [*Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 738, 742, 144 Cal. Rptr. 380, 575 P.2d 1162* ; *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

For a form of affirmative defense alleging that the plaintiff's negligence contributed to his or her injury, *see § 97.134*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProducts LiabilityDuty to WarnTortsProducts LiabilityPlaintiff's Conduct

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9-97 California Forms of Pleading and Practice--Annotated § 97.51

§ 97.51 Negligence Actions

In a products liability case against a manufacturer, wholesaler, and retailer of cosmetic or personal grooming products, not only may a plaintiff seek recovery on the theory of strict liability in tort, but a cause of action may also be based on the theory of negligence, especially if there is a possibility of conflicting evidence concerning whether the product contained a specific defect in design or manufacture. There is no valid reason to require a plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence, hence it is still common to find both theories pleaded in product liability cases for personal injuries [*see Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 384-387, 93 Cal. Rptr. 769, 482 P.2d 681* ; *see also Pike v. Frank G. Hough Co. (1970) 2 Cal. 3d 465, 474, 85 Cal. Rptr. 629, 467 P.2d 229* ; *Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 261, 37 Cal. Rptr. 896, 391 P.2d 168]* .

In an appropriate case, the jury may properly be instructed on traditional negligence principles, the doctrine of res ipsa loquitur, and on the law of strict liability in tort [*Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 384-387, 93 Cal. Rptr. 769, 482 P.2d 681]* .

Negligence of the manufacturer, wholesaler, and retailer, if it exists, usually consists of the use of dangerous product ingredients to achieve product efficacy without adequate controls, and of inadequate warning of a dangerous propensity of the products when the products are sold [*Briggs v. National Indus., Inc. (1949) 92 Cal. App. 2d 542, 543-546, 207 P.2d 110]* .

For a form of complaint alleging negligence based on a defective product, *see § 97.132*. For a further discussion of negligence actions generally, see Ch. 380, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceProofRes Ipsa LoquiturGeneral OverviewTortsProducts LiabilityGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsProducts LiabilityNegligence

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[Reserved]

§§ 97.52[Reserved]

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9-97 California Forms of Pleading and Practice--Annotated § 97.70

§ 97.70 Federal Statutes

Prohibition of use of coal tar color derivative, such as paraphenylenediamine, in products for eyebrows or eyelashes and required container warning on hair dyes. *21 U.S.C.S. § 361(a)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesGeneral OverviewGovernmentsAgriculture & FoodFederal Food, Drug & Cosmetic Act

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9-97 California Forms of Pleading and Practice--Annotated § 97.71

§ 97.71 State Statutes

Regulation of cosmetic solutions containing phenol (carbolic acid), corrosive sublimate (bichloride of mercury), or any of their preparations, derivatives, or compounds. *Bus. & Prof. Code § 7320.2*

Presumption of negligence from violation of statute. *Evid. Code § 669(a)*

Prohibition of use of coal tar color derivative, such as paraphenylenediamine, in products for eyebrows or eyelashes and required container warning on hair dyes. *Health & Safety Code § 111675*

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesContracts LawTypes of ContractsPersonal Service AgreementsTortsNegligenceProofViolations of LawStatutes

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9-97 California Forms of Pleading and Practice--Annotated § 97.72

§ 97.72 Decisions

[1] Defenses

[a] Assumption of Risk

"Reasonable/unreasonable implied assumption of risk" classifications as disapproved; determination of whether plaintiff's recovery is barred or merely apportioned as governed by "primary/secondary assumption of risk" classifications. *Knight v. Jewett (1992) 3 Cal. 4th 296, 307, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

Assumption of risk when plaintiff agrees to relieve defendant of obligation of reasonable conduct as not merged into comparative negligence system. *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 119 Cal. Rptr. 858, 532 P.2d 1226*

[b] Comparative Negligence

Negligence of plaintiff available as defense in negligence action when plaintiff returned for repeated treatments in having her hair bleached even though her scalp felt sore and numb after second treatment. *Romero v. And'ra (1963) 216 Cal. App. 2d 295, 303, 30 Cal. Rptr. 645*

Negligence of plaintiff available as defense in negligence action when plaintiff failed to disclose knowledge of her allergies to defendant and refused to take patch test suggested on label of hair dye container. *Arata v. Tonegato (1957) 152 Cal. App. 2d 837, 841-842, 314 P.2d 130*

[2] Negligence

[a] In General

Persons who render services as having duty to exercise ordinary skill and competence of members of their profession, for failure of which they are liable for negligence. *Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 811-812, 110 Cal. Rptr. 543* ; *Allied Properties v. John A. Blume & Associates (1972) 25 Cal. App. 3d 848, 855-856, 102 Cal. Rptr. 259* ; *Wolf v. Superior Court (2003) 107 Cal. App. 4th 25, 40, n.6, 130 Cal. Rptr. 2d 860*

Patron coming to beauty salon as entitled to rely on skill and knowledge of operator who is issuing treatments to her. *Romero v. And'ra (1963) 216 Cal. App. 2d 295, 300, 30 Cal. Rptr. 645*

Patron of beauty salon who requests well-known treatment involving chemical as having right to expect cosmetologist to comply with precautionary instructions of manufacturer relating to application of solution to hair. *Romero v. And'ra (1963) 216 Cal. App. 2d 295, 300, 30 Cal. Rptr. 645*

[b] Violation of Statute or Regulation

Presumption of negligence as arising in California from violation of statute that was enacted to protect class of persons of which plaintiff is member against type of harm that plaintiff suffered as result of statutory violation. *Vesely v. Sager (1971) 5 Cal. 3d 153, 164, 95 Cal. Rptr. 623, 486 P.2d 151* (violation of liquor laws)

Duty of care and attendant standard of conduct for reasonable man as being found in legislative enactment that does not provide for civil liability. *Vesely v. Sager (1971) 5 Cal. 3d 153, 164, 95 Cal. Rptr. 623, 486 P.2d 151* (violation of liquor laws); *Elsner v. Uveges (2004) 34 Cal. 4th 915, 928 22 Cal. Rptr. 3d 530 102 P.3d 915* (violation of California OSHA provisions)

[c] Res Ipsa Loquitur

Doctrine of res ipsa loquitur as applicable in negligence actions involving dyes and mechanical treatments administered in beauty salon. *Romero v. And'ra (1963) 216 Cal. App. 2d 295, 300, 30 Cal. Rptr. 645*

Res ipsa loquitur as applicable when occurrence of injury is of such nature it can be said in light of past experience it probably was result of negligence by someone and defendant cosmetologist is probably person responsible. *Romero v. And'ra (1963) 216 Cal. App. 2d 295, 300, 30 Cal. Rptr. 645*

Application of doctrine of res ipsa loquitur in case in which plaintiff received permanent wave as proper when devices used in process were under exclusive control of defendants and injury was one that would not have occurred with use of due care. *Chauvin v. Krupin (1935) 4 Cal. App. 2d 322, 326, 40 P.2d 904*

[3] Strict Liability

Doctrines of strict liability and implied warranty as not applicable when primary objective of transaction is to obtain service. *Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 811, 110 Cal. Rptr. 543* ; *Allied Properties v. John A. Blume & Associates (1972) 25 Cal. App. 3d 848, 855, 102 Cal. Rptr. 259* ; *Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 979, 95 Cal. Rptr. 381* ; *Murphy v. E. R. Squibb & Sons, Inc.(1985) 40 Cal. 3d 672, 681, 221 Cal. Rptr. 447, 710 P.2d 247*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesAssumption of RiskGeneral OverviewTortsNegligenceDefensesComparative

NegligenceGeneral OverviewTortsStrict LiabilityGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesTortsNegligenceProofViolations of LawStatutes

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§ 97.73 Text References

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Benders Forms Of Discovery, Vol. 3, *Beauty Parlors and Cosmetologists* (Matthew Bender)

Personal Injury: Actions, Defenses, Damages, Vol. 5, *Barbers and Beauticians*, §§ 1-6 (Matthew Bender)

Witkin, California Procedure, Vol. 5, *Pleading*, § 591 (4th ed. 1997)

9 Cal. Jur. 3d, *Barber and Beauty Shops*, § 35

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[Reserved]

§§ 97.74[Reserved]

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9-97 California Forms of Pleading and Practice--Annotated § 97.90

§ 97.90 Federal Statutes

Regulation of hazardous substances and their labeling under Federal Hazardous Substances Act. *15 U.S.C.S. § 1261 et seq.*

Regulation of cosmetic products, their ingredients, packaging, and labeling under Federal Food, Drug, and Cosmetic Act. *21 U.S.C.S. § 361 et seq.*

Prohibition of use of coal tar color derivative, such as paraphenylenediamine, in products for eyebrows or eyelashes and required container warning on hair dyes. *21 U.S.C.S. § 361(a)*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsAgriculture & FoodFederal Food, Drug & Cosmetic Act

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9-97 California Forms of Pleading and Practice--Annotated § 97.91

§ 97.91 State Statutes

Regulation of products, their ingredients, packaging, labeling, advertising, and guarantees under Sherman Food, Drug, and Cosmetic Law. *Health & Safety Code § 109875 et seq.*

Prohibition of use of coal tar color derivative, such as paraphenylenediamine, in products for eyebrows or eyelashes and required container warning on hair dyes. *Health & Safety Code § 111675*

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesToxic Substances

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§ 97.92 Federal Administrative Regulations

Implementing regulations under Federal Food, Drug, and Cosmetic Act. *21 C.F.R. § 1.1-1.4*

Implementing regulations under Federal Hazardous Substances Act. 16 C.F.R. § 1500 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesToxic SubstancesGovernmentsAgriculture & FoodFederal Food, Drug & Cosmetic Act

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9-97 California Forms of Pleading and Practice--Annotated § 97.93

§ 97.93 Decisions

[1] Defenses

[a] In General

Mere failure to discover defects in product as no defense in strict liability case. *Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 127, 104 Cal. Rptr. 433, 501 P.2d 1153*

Plaintiff as under no requirement to prove he or she is not aware of danger or dangerous defect in action based on strict liability in tort for injuries caused by defective product. *Luque v. McLean (1972) 8 Cal. 3d 136, 145, 104 Cal. Rptr. 443, 501 P.2d 1163* ; *Smith v. Dhy-Dynamic Co. (1973) 31 Cal. App. 3d 852, 857, 107 Cal. Rptr. 907*

Manufacturer as not liable when specific manner of use or caution is prescribed on product package but not complied with by injured party. *Oakes v. E.I. Du Pont de Nemours & Co., Inc. (1969) 272 Cal. App. 2d 645, 649, 77 Cal. Rptr. 709*

[b] Assumption of Risk

In strict liability action, separate defense of assumption of risk, to extent that it is form of contributory negligence, as merged into comparative fault, and therefore abolished as bar to plaintiff's recovery. *Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 738, 742, 144 Cal. Rptr. 380, 575 P.2d 1162* (rejecting contrary result reached in *Luque v. McLean (1972) 8 Cal. 3d 136, 145, 104 Cal. Rptr. 443, 501 P.2d 1163*); *Bunch v. Hoffinger Indus., Inc. (2004) 123 Cal. App. 4th 1278, 1302, 20 Cal. Rptr. 3d 780*

[c] Misuse of Product

Strict liability as not being imposed on manufacturer when injury results from use of its product that is not reasonably

foreseeable. *Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 126, 104 Cal. Rptr. 433, 501 P.2d 1153* ; *Bunch v. Hoffinger Indus., Inc. (2004) 123 Cal. App. 4th 1278, 1302, 20 Cal. Rptr. 3d 780*

Manufacturer as not liable when specific manner of use or caution is prescribed on product package but not complied with by injured party. *Oakes v. E.I. Du Pont de Nemours & Co., Inc. (1969) 272 Cal. App. 2d 645, 649, 77 Cal. Rptr. 709*

Misuse of product recognized as defense, since misuse would refute allegation of defective condition and include conduct otherwise labeled contributory negligence. *McCurter v. Norton Co. (1968) 263 Cal. App. 2d 402, 407, 69 Cal. Rptr. 493*

[2] Negligence

Instructing jury on traditional negligence principles, doctrine of res ipsa loquitur, and law of strict liability in tort as permitted in proper case. *Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 384-387, 93 Cal. Rptr. 769, 482 P.2d 681*

Plaintiff as not required to elect between theories of strict liability in tort and negligence, but permitted to seek recovery on both theories. *Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 384-387, 93 Cal. Rptr. 769, 482 P.2d 681* ; *Pike v. Frank G. Hough Co. (1970) 2 Cal. 3d 465, 474, 85 Cal. Rptr. 629, 467 P.2d 229*

[3] Res Ipsa Loquitur

Requirement of showing defect in strict liability case as not satisfied by reliance on doctrine of res ipsa loquitur. *Tresham v. Ford Motor Co. (1969) 275 Cal. App. 2d 403, 408, 79 Cal. Rptr. 883* ; *McCurter v. Norton Co. (1968) 263 Cal. App. 2d 402, 408, 69 Cal. Rptr. 493*

[4] Strict Liability

[a] In General

Strict liability as applicable to wholesalers and distributors. *Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 130, 104 Cal. Rptr. 433, 501 P.2d 1153* ; *Barth v. B.F. Goodrich Tire Co. (1968) 265 Cal. App. 2d 228, 252-253, 71 Cal. Rptr. 306*

Doctrine of strict liability as not restricted by theory of privity of contract. *Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 586, 75 Cal. Rptr. 652, 451 P.2d 84* ; *Nelson v. Superior Court (2006) 144 Cal. App. 4th 689, 696-697, 50 Cal. Rptr. 3d 684*

[b] Defects

Strict liability action as not requiring proof by plaintiff that he or she was unaware of claimed defect. *Luque v. McLean (1972) 8 Cal. 3d 136, 141, 144-145, 104 Cal. Rptr. 443, 501 P.2d 1163*

Strict liability as not limited to cases involving latent defects. *Luque v. McLean (1972) 8 Cal. 3d 136, 145, 104 Cal. Rptr. 443, 501 P.2d 1163*

Manufacturer as strictly liable in tort when article he or she places on market, knowing it is to be used without

inspection for defects, proves to have defect that causes injury. *Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 260-261, 37 Cal. Rptr. 896, 391 P.2d 168* ; *Greenman v. Yuba Power Prods., Inc. (1963) 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 377 P.2d 897* ; *Casetta v. United States Rubber Co. (1968) 260 Cal. App. 2d 792, 800, 67 Cal. Rptr. 645*

Rationale of strict liability as being that injured person is helpless to protect himself or herself from defective product, and therefore, as between injured user and one who places product on market, the latter should bear the loss. *Oakes v. E.I. Du Pont de Nemours & Co., Inc. (1969) 272 Cal. App. 2d 645, 651, 77 Cal. Rptr. 709*

Burden as on plaintiff to prove product was defective and defect was proximate cause of injury, in applying strict liability in tort. *Erickson v. Sears, Roebuck & Co. (1966) 240 Cal. App. 2d 793, 798, 50 Cal. Rptr. 143*

[5] Warning of Danger

[a] In General

Manufacturer as under duty to give appropriate warning of any danger that user ordinarily would not discover, if manufacturer knows or should know article is dangerous. *McKinney v. Revlon, Inc. (1992) 2 Cal. App. 4th 602, 3 Cal. Rptr. 2d 72* ; *Proctor & Gamble Mfg. Co. v. Superior Court of Marin County (1954) 124 Cal. App. 2d 157, 162, 268 P.2d 199* ; *Briggs v. National Indus., Inc. (1949) 92 Cal. App. 2d 542, 546, 207 P.2d 110*

When manufacturer fails to give warning of dangerous propensity of ingredient in hair frosting product, manufacturer as not exempt from liability if instructions for use of product is insufficient to prevent adverse reaction. *McKinney v. Revlon, Inc. (1992) 2 Cal. App. 4th 602, 3 Cal. Rptr. 2d 72*

Product bearing required warning, which is safe for use if warning is followed, as not in defective condition, nor unreasonably dangerous. *Oakes v. E.I. Du Pont de Nemours & Co., Inc. (1969) 272 Cal. App. 2d 645, 649, 77 Cal. Rptr. 709*

When warning is given, seller as being able to reasonably assume it will be read and heeded. *Oakes v. E.I. Du Pont de Nemours & Co., Inc. (1969) 272 Cal. App. 2d 645, 649, 77 Cal. Rptr. 709*

Seller as required to give directions or warning on containers for use of product in order to prevent product from being unreasonably dangerous. *Oakes v. E.I. Du Pont de Nemours & Co., Inc. (1969) 272 Cal. App. 2d 645, 649, 77 Cal. Rptr. 709*

[b] Allergies

Manufacturer of product as not insurer and therefore not obligated to warn user of unknown and unknowable allergies, sensitivities, and idiosyncracies in absence of manufacturer's knowledge that product is dangerous. *Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 993, 95 Cal. Rptr. 381* ; *Oakes v. E.I. Du Pont de Nemours & Co., Inc. (1969) 272 Cal. App. 2d 645, 651, 77 Cal. Rptr. 709*

Seller as required to give warning on product when product contains ingredient to which substantial number of population are allergic, and ingredient is one whose danger is not generally known, if seller has, or by developed human skill and foresight should have, knowledge of the presence of ingredient and danger. *Oakes v. E.I. Du Pont de Nemours & Co., Inc. (1969) 272 Cal. App. 2d 645, 649, 77 Cal. Rptr. 709*

Manufacture and sale of beauty preparation that adversely affects only one in 20 users who happen to be allergic or

sensitive to it as not prohibited, but consumer must be advised of possibility of untoward consequences. *Harris v. Belton (1968) 258 Cal. App. 2d 595, 607, 65 Cal. Rptr. 808*

Duty to warn of any dangers incident to use of product as not existing when allergic person not within class reasonably expected to use product. *Magee v. Wyeth Labs., Inc. (1963) 214 Cal. App. 2d 340, 352, 29 Cal. Rptr. 322*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesAssumption of RiskGeneral OverviewTortsNegligenceProofRes Ipsa LoquiturGeneral OverviewTortsProducts LiabilityDuty to WarnTortsProducts LiabilityPlaintiff's ConductTortsProducts LiabilityStrict Liability

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§ 97.94 Law Reviews

Fischer, *Cosmetic Labeling--The FDA's Response to Consumer Needs, 14 Santa Clara Law. 542 (1974)*

Houser, *The Consumer's Sleeping Giant--The Federal Hazardous Substances Act, 14 Santa Clara Law. 520 (1974)*

Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 Stan. L. Rev. 713 (1970)

Prosser, *Strict Liability to the Consumer in California, 18 Hastings L.J. 9 (1966)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)General Provisions (Article 1)General OverviewEnvironmental LawLitigation & Administrative ProceedingsToxic TortsEnvironmental LawLitigation & Administrative ProceedingsNuisances, Trespasses & Strict Liability

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§ 97.95 Text References

J. Cotchett & R. Cartwright, eds., California Products Liability Actions (Matthew Bender)

Benders Forms Of Discovery, Vol. 3, *Beauty Parlors and Cosmetologists; Products Liability* (Matthew Bender)

California Tort Guide, Ch. 11, *Products Liability*, 11.1-11.29 (Cal. C.E.B. 2d ed. 1979)

Restatement (Second) of Torts § 402A

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[Reserved]

§§ 97.96[Reserved]

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§ 97.110 Complaint for Damages [Civ. Code § 3333] Based on Negligence [Civ. Code § 1714(a)]--By Patron Against Personal Grooming Services Provider--Negligent Compounding and Applying of Cosmetic or Personal Grooming Product

[1] FORM Complaint for Damages [Civ. Code § 3333] Based on Negligence [Civ. Code § 1714(a)]--By Patron Against Personal Grooming Services Provider--Negligent Compounding and Applying of Cosmetic or Personal Grooming Product

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	(Negligence)
[and DOES 1 through _____,]	)	[Amount demanded _____
Defendants	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Defendant _____ [*name of personal grooming services provider*] is, and at all times herein mentioned was, a domestic corporation with its principal place of business at _____ [*street address*], _____ [*city*], California [*or allege other capacity and residence*] and licensed to do business and doing business as a _____ [*specify, e.g.,* beauty salon].

2. Defendant _____ [*name of operator or barber performing service*] is, and at all times herein

mentioned was, a licensed _____ [cosmetologist *or* barber] and was the agent and employee of defendant _____ [*name of personal grooming services provider*], and in doing the things herein alleged was acting within the scope of such agency and employment.

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I through _____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend the complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that plaintiff's losses as herein alleged were proximately caused by such negligence of the fictitiously named defendants.)]

4. At all times herein mentioned, the business of defendant _____ [*name of personal grooming services provider*] included _____ [*describe business operations, e.g.,* bleaching, coloring, and otherwise treating the hair *or* giving permanent waves to the hair *or* removing blemishes and other disfigurements of the skin from the face and neck *or other as appropriate*] of patrons from among members of the general public for consideration, and in connection with these services the compounding, application, and use on patrons of certain chemical products hereinafter called _____ [*describe products, e.g.,* hair color preparations *or* permanent wave solutions *or* blemish removing lotions *or other as appropriate*].

5. On or about _____ [*date*], at such establishment, plaintiff employed defendants, and each of them, to _____ [*describe treatment requested, e.g.,* color plaintiff's hair]. At such time and place, and at all times herein mentioned, defendants, and each of them, expressly warranted to plaintiff that defendants were competent, experienced _____ [cosmetologists *or* barbers] and that they possessed and exercised reasonable care and skill in _____ [*specify services, e.g.,* compounding and applying hair color preparations].

6. At such time and place, defendants, and each of them, undertook to _____ [*describe type of treatment performed, e.g.,* color plaintiff's hair], and in connection therewith applied _____ [*describe products used, e.g.,* hair color preparations] to plaintiff's _____ [*describe, e.g.,* hair].

7. Defendants, and each of them, negligently and improperly compounded and applied _____ [*describe, e.g.,* the hair color preparations] to plaintiff's _____ [*describe, e.g.,* hair and scalp] and failed to exercise minimal and reasonable care and skill possessed by other _____ [cosmetologists *or* barbers] in the community.

8. As a proximate result of such negligence of defendants, and each of them, plaintiff was hurt and injured in his/her health, strength, and activity. He/she sustained bodily injuries, and shock and injury to his/her nervous system, all of which have caused, now cause, and will continue to cause him/her great physical and mental pain and suffering.

9. As a proximate result of the negligence of defendants, and each of them, plaintiff sustained permanent injuries consisting of _____ [*describe injuries, e.g.,* loss of hair *or* loss of vision *or other as appropriate*], all of which have caused, now cause, and will continue to cause him/her great physical and mental pain and suffering.

10. As a further proximate result of such negligence and the injuries to plaintiff thereby caused, plaintiff was, now is, and in the future will be, required to obtain and to incur expense for the services of physicians to examine, diagnose, prescribe, treat, and care for him/her and to incur other medical, hospital, and incidental expenses, all to his/her damage.

11. As a further proximate result of such negligence and the injuries to plaintiff thereby sustained, plaintiff has been prevented and will be prevented from carrying on regular employment.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages;

2. For special damages for medical, hospital, and incidental expenses;

3. For loss of earnings to date, together with future loss of earnings;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This complaint is for use in an action for damages against a barber, cosmetologist, or other personal grooming services provider by a patron for personal injuries suffered as a result of negligence in compounding or applying a cosmetic or personal grooming product.

For discussion and forms relating to a cause of action based on negligence generally, see Ch. 380, *Negligence* .

[3] Allegations

The complaint alleges the following:

- Defendant's residence and capacity (Paragraph 1) [*see Code Civ. Proc. §§ 395(a), 395.5*].

- That defendant was licensed to do business as a beauty salon or barber shop (Paragraph 1) [*see Bus. & Prof. Code § 7317*].

- The agency relationship, including the fact that the employee barber or cosmetologist was duly licensed (Paragraph 2) [*see Bus. & Prof. Code § 7317*].

- The fictitious names of unnamed defendants (Paragraph 3) [*see Code Civ. Proc. § 474*].

- Defendants duty of care (Paragaphs 4-6) [*see Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 513-514, 150 Cal. Rptr. 1, 585 P.2d 851* ; *Peter W. v. San Francisco Unified Sch. Dist. (1976) 60 Cal. App. 3d 814, 820, 131 Cal. Rptr. 854* ; *Miglierini v. Havemann (1966) 240 Cal. App. 2d 570, 572, 49 Cal. Rptr. 795]* .

- Actions or omissions of defendants that constitute breaches of duty (Paragraph 7) [*see Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 513-514, 150 Cal. Rptr. 1, 585 P. 2d 851* ; *Peter W. v. San Francisco Unified Sch. Dist. (1976) 60 Cal. App. 3d 814, 820, 131 Cal. Rptr. 854* ; *Miglierini v. Havemann (1966) 240 Cal. App. 2d 570, 572, 49 Cal. Rptr. 795]* .

- That defendants' breach of duty was a proximate cause of plaintiff's injury, resulting in general and special damages (Paragraphs 8-11) [*see Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 513-514, 150 Cal. Rptr. 1, 585 P2d 851* ; *Peter W. v. San Francisco Unified Sch. Dist. (1976) 60 Cal. App. 3d 814, 820, 131 Cal. Rptr. 854* ; *Miglierini v. Havemann (1966) 240 Cal. App. 2d 570, 572, 49 Cal. Rptr. 795]* .

[4] Venue

In an action for injury to a customer caused by the negligence of a barber or cosmetologist, either the county in which the injury occurs or the county in which the defendants or some of them reside at the commencement of the action is a proper county for the trial of the action [*Code Civ. Proc. § 395(a)*]. If the defendant is a corporation, the defendant may be sued in the county in which the principal place of business is located or in the county in which liability arises [*Code Civ. Proc. § 395.5*].

For further discussion of venue, see Ch. 571, *Venue* .

[5] Damages

In an action brought to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action, except in a limited civil case [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages must be alleged [*Code Civ. Proc. § 425.10(a)(2)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment. The defendant may at any time request a statement setting forth the nature and amount of damages being sought [*Code Civ. Proc. § 425.11(b)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial

even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

[8] Decisions

Beauty salon patron as entitled to rely on skill and knowledge of operator who issues treatments. *Romero v. And'ra (1963) 216 Cal. App. 2d 295, 300, 30 Cal. Rptr. 645*

Applicability of res ipsa loquitur in negligence actions involving services of cosmetologist. *Romero v. And'ra (1963) 216 Cal. App. 2d 295, 300, 30 Cal. Rptr. 645*

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9-97 California Forms of Pleading and Practice--Annotated § 97.111

§ 97.111 Allegation--Failure to Warn Patron of Products Containing Hazardous Substances and to Conduct Recommended Patch Test

[1] FORM Allegation--Failure to Warn Patron of Products Containing Hazardous Substances and to Conduct Recommended Patch Test

1. At such time and place, defendants, and each of them, undertook to _____ [*describe type of treatment performed, e.g.,* color] plaintiff's hair, and in connection therewith, selected a cosmetic _____ [*describe, e.g.,* hair coloring] product, known as _____ [*identify trade name of product*].

2. _____ [*Identify trade name of product*] contained _____ [*identify hazardous substances, e.g.,* a coal tar color derivative called paraphenylenediamine], _____ [*allege basis for hazardous substance classification, e.g.,* classified by federal and California statutes and regulations as a potentially hazardous substance and a strong allergic sensitizer].

3. Because of the classification herein alleged and the danger to potential users, and pursuant to _____ [*state authority, e.g.,* federal and California statutes and regulations], the package of this product contains a warning _____ [*state substance of warning, e.g.,* cautioning against using the product without first testing it on the intended recipient for potential skin irritation or other allergic reactions].

4. Defendants, and each of them, negligently and improperly failed to notify plaintiff of the warning of the product's package and the possible danger to potential recipients of the product's use, failed to make inquiry of plaintiff as to any sensitivity or allergies plaintiff might have to the product's ingredients, and failed to conduct the recommended patch test as described on the product's package, which negligence and recklessness proximately caused injury to plaintiff after the product was applied to plaintiff by defendants.

[2] Use of Form

These allegations are for use in a complaint for personal injuries against a personal grooming services provider, such as

a salon or barber shop, to allege negligence in failing (1) to give adequate and recommended warnings to a patron of the potentially injurious effects of a cosmetic or personal grooming product, and (2) to conduct proper patch tests on the patron for adverse effects prior to application [*see Romero v. And'ra (1963) 216 Cal. App. 2d 295, 300-301, 30 Cal. Rptr. 645]* .

This form should be used with the *form in § 97.110*. In an appropriate case these allegations may be used in addition to, or instead of, Paragraphs 6 and 7 of that form.

[3] Federal Statutes

Use of coal tar color derivatives as prohibited in products for eyebrows or eyelashes and as requiring warning on containers for hair dyes. *21 U.S.C.S. § 361(a)*

[4] State Statutes

Use of coal tar color derivatives as prohibited in products for eyebrows or eyelashes and as requiring warning on containers for hair dyes. *Health & Safety Code § 111675*

[5] Decisions

Salon patron entitled to expect cosmetologist to comply with precautionary instructions on product label. *Romero v. And'ra (1963) 216 Cal. App. 2d 295, 300, 30 Cal. Rptr. 645*

[6] Cross References

For a related form, *see § 97.110*

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9-97 California Forms of Pleading and Practice--Annotated § 97.112

§ 97.112 Allegation--Negligent Electrolysis or Thermolysis Treatment for Removal of Hair

[1] FORM Allegation--Negligent Electrolysis or Thermolysis Treatment for Removal of Hair

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a domestic corporation having its principal place of business at _____ [*street address*], _____ [*city*], California [*or allege other capacity and residence*], duly licensed to do business and doing business as a cosmetological establishment engaging in the service to the public of removing unwanted hair from the human body by process of _____ [electrolysis *or* thermolysis].

2. Defendant _____ [*name*] is, and at all times herein mentioned was, a duly licensed electrologist and was the agent and employee of defendant _____ [*name of establishment*]; in doing the things herein alleged such defendant was acting within the scope of such agency and employment.

4. Defendants, and each of them, held themselves out to the public and to plaintiff as being competent, experienced electrologists and cosmetologists in removing hair from the body by _____ [*describe process, e.g.,* use of an electric needle *or* the process of thermolysis].

5. On or about _____ [*date*], at such establishment, plaintiff employed defendants, and each of them, to remove superfluous hair from plaintiff's _____ [*describe area, e.g.,* face *or* legs *or other area as appropriate*] by _____ [*describe process, e.g.,* use of an electric needle *or* the process of thermolysis].

6. At such time and place, defendants, and each of them, undertook to remove the hair from plaintiff's _____ [*describe part of body, e.g.,* face] by _____ [*describe process, e.g.,* use of an electric needle *or* the process of thermolysis].

7. Defendants, and each of them, negligently and improperly operated, maintained, controlled, and applied the _____ [*describe process, e.g.,* electric needle *or other as appropriate*] to plaintiff's person in undertaking to remove the hair, and failed to exercise minimal and reasonable care and skill possessed by other

cosmetologists in the community, thereby proximately causing injury to plaintiff.

[2] Use of Form

These allegations are for use in a complaint in an action for personal injuries resulting from negligent performance of electrolysis or thermolysis treatments in removal of hair.

This form should be used with the *form in § 97.110*. In an appropriate case these allegations would be used instead of Paragraphs 1 and 2 and 4-7 of that form.

[3] State Statutes

Illegal methods of hair removal. *Bus. & Prof. Code § 7320.2*

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9-97 California Forms of Pleading and Practice--Annotated § 97.113

§ 97.113 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Comparative Negligence of Plaintiff [Code Civ. Proc. § 431.30]--Patron's Denial or Failure to Advise of Allergic Sensitivity to Cosmetic Product and Refusal to Permit Patch Test

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Comparative Negligence of Plaintiff [Code Civ. Proc. § 431.30]--Patron's Denial or Failure to Advise of Allergic Sensitivity to Cosmetic Product and Refusal to Permit Patch Test

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. At all times mentioned in the complaint, plaintiff knew of his/her hypersensitive and allergic condition to substances and ingredients contained in the _____ [*describe product, e.g.,* hair color preparations *or* permanent wave solutions *or other as appropriate*] used by defendant.

2. Prior to the treatment and application of _____[*describe product*] to plaintiff, defendant informed plaintiff of the warning of potential skin irritation contained on the _____ [package *or* label] of such product. In addition, defendant asked plaintiff if he/she knew of any hypersensitivity or allergy he/she might have to ingredients contained in the product[, and recommended that a preliminary patch test, as suggested and directed on the product's _____ (package *or* label), be performed prior to the treatment and application of the product.]

3. Plaintiff _____ [denied any knowledge of *or* failed to reveal any] hypersensitivity or allergy to _____[*describe product*], [and refused and declined to have the preliminary patch test,] directing and instructing defendant to perform the treatment and application of the _____ [*describe product*].

4. Plaintiff's injuries, if any, as alleged in his/her complaint were proximately caused, contributed to, and the result of his/her own negligence in _____[refusing to disclose *or* denying the fact of] his/her hypersensitivity or

allergy to _____ [*describe product*] [and by refusing to have the preliminary skin patch test administered].

[2] Use of Form

This form of affirmative defense is for use in an answer to a complaint alleging negligence by a defendant personal grooming services provider for injuries suffered as a result of negligence in compounding or applying a cosmetic or other personal grooming product. The form alleges that the plaintiff refused to disclose or denied that he or she had any allergic sensitivity and refused to permit a patch test.

Under comparative negligence, damages awarded to a plaintiff are diminished in proportion to the amount of negligence attributable to plaintiff [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

A statement of any new matter constituting a defense must be contained in an answer to a complaint [*Code Civ. Proc. § 431.30(b)(2)*]. If more than one affirmative defense is set forth in the answer, each defense must be separately stated [*Code Civ. Proc. § 431.30(g)*] and numbered [*Cal. Rules of Ct., Rule 2.112(i)*]. If the complaint sets forth more than one cause of action, the affirmative defense must refer to the cause of action it is intended to answer [*Code Civ. Proc. § 431.30(g)*].

[3] Cross References

For discussion relating to answers generally and general forms of answer into which this allegation may be inserted, see Ch. 26, *Answers*

For forms of allegations of affirmative defense to negligence actions generally, see Ch. 380, *Negligence*

[4] Decisions

Negligence of plaintiff available as defense in negligence action when plaintiff returned for repeated treatments in having her hair bleached even though her scalp felt sore and numb after second treatment. *Romero v. And'ra (1963) 216 Cal. App. 2d 295, 303, 30 Cal. Rptr. 645*

Negligence of plaintiff available as defense in negligence action when plaintiff fails to disclose knowledge of his or her allergies to defendant and refuses to take patch test suggested on label of hair dye container. *Arata v. Tonegato (1957) 152 Cal. App. 2d 837, 841-842, 314 P.2d 130*

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[Reserved]

§§ 97.114[Reserved]

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9-97 California Forms of Pleading and Practice--Annotated § 97.130

§ 97.130 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Strict Liability in Tort--By Consumer Against Manufacturer, Wholesaler, and Retailer

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Strict Liability in Tort--By Consumer Against Manufacturer, Wholesaler, and Retailer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR
_____ [*names*],	)	DAMAGES
and DOES 1 through _____,	)	[Amount demanded _____
Defendants.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Defendant _____ [*name of manufacturer*] ("Manufacturer") is, and at all times herein mentioned was, a corporation duly organized and existing under [and by virtue of] the laws of California, with its principal place of business at _____ [*street address*], _____ [*city*], California.

2. At all times herein mentioned, defendant Manufacturer was engaged in manufacturing, compounding, packaging, and distributing to retail stores [and _____ (beauty salons *or* barber shops)] for consideration certain chemical [and _____ (cosmetic *or* personal grooming)] products, known as _____ [

describe products, if possible using trade name], for resale to and use by members of the general public in _____ [*describe product's use, e.g.,* cleansing dirt and other foreign matter from the skin and pores of the face and neck *or* controlling underarm perspiration and odor *or* coloring the hair *or other as appropriate*].

3. Defendant _____ [*name of wholesaler*] ("Wholesaler") is, and at all times herein mentioned was, a corporation duly organized and existing under [and by virtue of] the laws of California with its principal place of business at _____ [*street address*], _____ [*city*], California [*or allege other capacity and residence*].

4. At all times herein mentioned, defendant Wholesaler was engaged in the business of distributing, supplying, and selling certain chemical [and _____ (cosmetic *or* personal grooming)] products, known as _____[*describe products, if possible using trade name*] of defendant Manufacturer to retail stores [and _____ (beauty salons *or* barber shops)], including the _____ [store *or* salon *or* shop] of defendants _____ [*names of proprietors*], for resale to and use by members of the general public in _____ [*describe product's use, e.g.,* cleansing dirt and other foreign matter from the skin and pores of the face and neck *or* controlling underarm perspiration and odor *or* coloring the hair *or other as appropriate*].

5. Defendants _____ [*name*] and _____ [*name*] ["Proprietors"] owned and operated a retail store known as _____ [*store's name*], located at _____ [*street address*], _____ [*city*], California, and were engaged in recommending the sale to and use by customers from among members of the general public of _____ [cosmetic *or* personal grooming] products, including defendant manufacturer's product known as _____ [*product name*].

6. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I through _____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend the complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's losses as herein alleged were proximately caused by such fictitiously named defendants.)

7. On or about _____ [*date*], at the retail store of defendant Proprietors, plaintiff purchased _____ [*name of product*] of defendant Manufacturer and applied it to his/her _____ [*describe part of body, e.g.,* face and neck] in the manner and for the purpose as intended for such product by defendants, and each of them. Plaintiff is informed and believes and thereon alleges that _____ [*name of product*] was distributed, supplied, and sold by defendant Wholesaler.

8. Defendants, and each of them, knew that the product of defendant Manufacturer as purchased by plaintiff would be purchased from defendant Proprietors and used [and applied] by members of the general public, such as plaintiff, without inspection for defects by such members of the general public.

9. At the time of plaintiff's purchase of defendant Manufacturer's product, the product, _____ [*name of product*], was defective, contaminated, dangerous, and unsafe for its intended purpose in that _____ [*specify*].

10. As a proximate result of the defective, contaminated, dangerous, and unsafe condition of the product as manufactured by defendant Manufacturer, distributed by defendant Wholesaler, and sold at retail to plaintiff by defendant Proprietors, plaintiff was hurt and injured in his/her health, strength, and activity. He/she sustained bodily injuries, and shock and injury to his/her nervous system, all of which have caused, now cause, and will continue to cause him/her great physical and mental pain and suffering.

11. As a further proximate result of the defective, contaminated, dangerous, and unsafe condition of the product,

plaintiff sustained permanent injuries consisting of _____ [*describe injuries, e.g.,* loss of hair *or* loss of vision *or other as appropriate*], all of which have caused, now cause, and will continue to cause him/her great physical and mental pain and suffering.

12. As a further proximate result of the defective, contaminated, dangerous, and unsafe condition of the product, plaintiff was, now is, and in the future will be, required to obtain and to incur expense for the services of physicians to examine, diagnose, prescribe, treat, and care for him/her and to incur other medical, hospital, and incidental expenses, all to his/her damage.

13. As a further proximate result of the defective, contaminated, dangerous, and unsafe condition of the product, plaintiff has been prevented and will be prevented from carrying on regular employment.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages;

2. For special damages for medical, hospital, and incidental expenses;

3. For loss of earnings to date, together with future loss of earnings;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____[*name*]

[*Verification. See § 97.110.*]

[2] Use of Form

This form is for use in an action for damages based on strict liability in tort for injuries against the manufacturer, wholesaler, and retailer of cosmetic or personal grooming products.

Retail sellers include barbers or cosmetologists who sell cosmetic or personal grooming products to members of the general public.

[3] Strict Liability in Tort

The elements of a claim for strict liability in tort by a consumer against a manufacturer, wholesaler, or retailer are that the defendant (1) has placed an article on the market, (2) knowing that it is to be used without inspection for defects, and the article (3) proves to have a defect (4) that causes injury to a human being [*Luque v. McLean (1972) 8 Cal. 3d 136, 141, 104 Cal. Rptr. 443, 501 P.2d 1163* ; *Greenman v. Yuba Power Products, Inc. (1963) 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 377 P.2d 897* ; *Foglio v. Western Auto Supply (1976) 56 Cal. App. 3d 470, 474, 128 Cal. Rptr. 545]* .

[4] Allegations

This complaint alleges the following:

- The principal place of business of the defendant manufacturer as a basis for venue (Paragraph 1) [*see Code Civ. Proc. § 395.5*; *see also* Ch. 460, *Products Liability*];

- That the defendant manufacturer was engaged in the production and distribution for resale of the product in question, and hence, placed the product on the market (Paragraph 2);

- The principal place of business of the wholesaler (Paragraph 3);

- That the defendant wholesaler was engaged in the business of distributing, supplying, and selling the product in question to retail stores and beauty salons, and hence, placed the product on the market (Paragraph 4);

- That the defendant retailers sold to product in question to the public, and hence, placed the product on the market (Paragraph 5);

- Facts demonstrating that the plaintiff used the product in question, and did so for the purpose and in the manner for which it was intended (Paragraph 7);

- That the product in question was distributed down the line from the defendant manufacturer to the wholesaler to the retailer (Paragraph 7);

- That the defendant manufacturer, wholesaler, and retailer each knew that the product in question was to be used without inspection by consumers for defects (Paragraph 8);

- That the product was defective (Paragraph 9);

- That the defective product caused the plaintiff injuries (Paragraph 10); and

- Plaintiff's damages include physical injuries, as well as pain and suffering, medical expenses, and loss of earnings (Paragraphs 10-13).

[5] Cross References

For a related from, *see § 97.110*

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9-97 California Forms of Pleading and Practice--Annotated § 97.131

§ 97.131 Allegation--Nonpurchasing User of Defective Product Suing Manufacturer, Wholesaler, and Retailer

[1] FORM Allegation--Nonpurchasing User of Defective Product Suing Manufacturer, Wholesaler, and Retailer

On or about _____ [*date*], at the retail store of defendant proprietors, _____ [*name of product*] of defendant manufacturer was purchased by _____ [*name*] and _____ [given to *or* delivered to *or* received by] plaintiff, who applied the same to his/her _____ [*describe part of body, e.g.,* face and neck] in the manner and for the purpose as intended for the product by defendants, and each of them.

[2] Use of Form

This allegation is for use when the plaintiff was the user and injured party but was not the purchaser of the product.

This form should be used with the *form in § 97.130*. In an appropriate case these allegations may be used in addition to, or instead of, Paragraph 7 of that form.

[3] Decisions

Doctrine of strict liability as applicable to consumers, users, and bystanders generally. *Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 586, 75 Cal. Rptr. 652, 451 P.2d 84*

[4] Cross References

For a related form, *see § 97.130*

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9-97 California Forms of Pleading and Practice--Annotated § 97.132

§ 97.132 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714]--By Consumer Against Manufacturer, Wholesaler, and Retailer of Cosmetic or Personal Grooming Product

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714]--By Consumer Against Manufacturer, Wholesaler, and Retailer of Cosmetic or Personal Grooming Product

[*Caption. See § 97.130.*]

Plaintiff alleges:

[1. *Capacity and residence of defendant manufacturer. See § 97.130, Paragraph 1.*]

[2. *Business activities of defendant manufacturer. See § 97.130, Paragraph 2.*]

[3. *Capacity and residence of defendant wholesaler. See § 97.130, Paragraph 3.*]

[4. *Business activities of defendant wholesale distributor. See § 97.130, Paragraph 4.*]

[5. *Capacity, residence, and business activities of defendant proprietors. See § 97.130, Paragraph 5.*]

[6. *Fictitious name allegations. See § 97.130, Paragraph 6.*]

7. On or about _____ [*date*], at the retail store owned and operated by Proprietors, plaintiff purchased _____ [*type of product, e.g.,* skin cleanser] and thereafter applied the same to his/her _____ [*describe part of body, e.g.,* face and neck] in the manner and for the purpose intended and recommended for the product by defendants, and each of them.

8. At all times herein mentioned, defendants, and each of them, knew, or in the exercise of reasonable care should have known, that _____ [*describe product, e.g.,* the skin cleanser] of defendant Manufacturer was a chemical product of such a nature that if it was not properly manufactured, compounded, tested, inspected, packaged, labeled, distributed, and marketed for the use and purpose for which it was intended, it was unsafe and likely to injure the person by whom it was used.

9. Defendant Manufacturer so negligently manufactured, compounded, tested or failed to test, inspected or failed to inspect, packaged, labeled, distributed, and recommended the use of its product that its product was defective, contaminated, and dangerous, unsafe for the use and purpose for which it was intended when used and applied as recommended by defendants, and each of them.

10. The defective, contaminated, and dangerous character of the product and its unsafety for the use and purpose for which it was intended when used and applied as recommended by defendants, and each of them, was known to defendants, and each of them, or in the exercise of reasonable care should have been known or discovered by them, but was not disclosed nor made known to plaintiff.

11. As a proximate result of the negligence of defendants, and each of them, plaintiff was hurt and injured in his/her health, strength, and activity. He/she sustained bodily injuries, and shock and injury to his/her nervous system, all of which have caused, now cause, and will continue to cause him/her great physical and mental pain and suffering.

12. As a proximate result of the negligence of defendants, and each of them, plaintiff sustained permanent injuries consisting of _____ [*describe injuries, e.g.,* loss of hair *or* loss of vision *or other as appropriate*], all of which have caused, now cause, and will continue to cause him/her great physical and mental pain and suffering.

13. As a further proximate result of the negligence and the injuries to plaintiff thereby caused, plaintiff was, now is, and in the future will be, required to obtain and to incur expense for the services of physicians to examine, diagnose, prescribe, treat, and care for him/her and to incur other medical, hospital, and incidental expenses, all to his/her damage.

14. As a further proximate result of the negligence and the injuries to plaintiff thereby sustained, plaintiff has been prevented and will be prevented from carrying on regular employment.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages;

2. For special damages for medical, hospital, and incidental expenses;

3. For loss of earnings to date, together with future loss of earnings;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____[*name*]

[*Verification. See § 97.130.*]

[2] Use of Form

This complaint is for use in a negligence action against the manufacturer, wholesaler, and retailer of a cosmetic or personal grooming product. The allegations of this complaint may be incorporated into the form in *§ 97.130* as an alternative count in an appropriate case.

Although causes of action based on strict liability against manufacturers, wholesalers, and retailers appear to have replaced actions based on negligence in most instances, negligence actions are still pleaded and still serve useful purposes in complaints [*see Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 93 Cal. Rptr. 769, 482 P.2d 681]* .

[3] Cross References

For related forms, see *§§ 97.110* and *97.130*

For alternative forms for use in negligence actions generally, see Ch. 380, *Negligence*

[4] Decisions

Causes of action based on strict liability and negligence as not inconsistent; instructions to jury based on each as not confusing to jury. *Jimenez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 384-387, 93 Cal. Rptr. 769, 482 P.2d 681*

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9-97 California Forms of Pleading and Practice--Annotated § 97.133

§ 97.133 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Strict Liability Action Against Manufacturer, Wholesaler, or Retailer of Cosmetic or Personal Grooming Product--Preliminary Patch Test Recommended on Container Warning Label Was Not Conducted Prior to Application of Product

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Strict Liability Action Against Manufacturer, Wholesaler, or Retailer of Cosmetic or Personal Grooming Product--Preliminary Patch Test Recommended on Container Warning Label Was Not Conducted Prior to Application of Product

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. The label contained on and the directions with defendant's _____ [*describe product, e.g.,* hair color preparation] used on plaintiff directed that a preliminary patch test be made before the preparation was applied to the _____ [*describe part of body, e.g.,* hair] to ascertain whether the patron was hypersensitive or allergic to the preparation[, which directions and warning were in compliance with federal and California statutes].

2. Plaintiff did not conduct a preliminary patch test before applying defendant's preparation to his/her _____ [*describe part of body, e.g.,* hair]. If the test had been conducted, any hypersensitivity or allergy plaintiff may have had to defendant's product would have been discovered.

3. The failure to make the preliminary patch test on plaintiff was the sole proximate cause of plaintiff's injuries, if any, and not the result of any defect in defendant's product.

[2] Use of Form

This form is for use as an affirmative defense in an action against a manufacturer, wholesaler, or retailer based in strict liability in tort. The form asserts the defense that the plaintiff's misuse of the product was an intervening cause of the injuries [*see Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 126, 104 Cal. Rptr. 433, 501 P.2d 1153* ; *Oakes v. E.I. Du Pont de Nemours & Co., Inc. (1969) 272 Cal. App. 2d 645, 649, 77 Cal. Rptr. 709]* .

[3] Cross References

For a related form, see *§ 97.113*

For alternative defenses in strict liability actions generally, see Ch. 460, *Products Liability*

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9-97 California Forms of Pleading and Practice--Annotated § 97.134

§ 97.134 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Strict Liability Action Against Manufacturer, Wholesaler, or Retailer of Cosmetic or Personal Grooming Product--Use of Product That Was Not Reasonably Foreseeable

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Strict Liability Action Against Manufacturer, Wholesaler, or Retailer of Cosmetic or Personal Grooming Product--Use of Product That Was Not Reasonably Foreseeable

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. Plaintiff[, in disregard of the warning and caution contained on the _____ (label *or* package *or* package insert) of the product,] used the product in a manner that was not reasonably foreseeable, by _____ [*describe use of product that was not reasonably foreseeable, e.g.,* applying the hair color preparation to her eyelashes].

2. Plaintiff's injuries, if any, were solely and proximately caused by plaintiff's unforeseeable use of the product, and not by any defect in the product.

[3. Plaintiff failed to exercise reasonable and ordinary care, caution, or prudence for his/her own safety to avoid the alleged accident. The resulting injuries and damages, if any, sustained by plaintiff were proximately caused and contributed to by the negligence of plaintiff in that, among other things, he/she _____ (*set out acts or omissions of plaintiff that constitute negligence, e.g.,* applied the hair color preparation to her eyelashes)]

[2] Use of Form

This form is for use as an affirmative defense in an action against a manufacturer, wholesaler, or retailer based in strict liability in tort. The form asserts the defense that the plaintiff's use of the product was not reasonably foreseeable, and therefore the defendant is not liable [*see Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 426 n.9, 143 Cal. Rptr. 225,*

573 P.2d 443 ; *Horn v. General Motors Corp. (1976) 17 Cal. 3d 359, 370, 131 Cal. Rptr. 78, 551 P.2d 398]* .

Alternative Paragraph 3 alleges that the plaintiff's negligence contributed to his or her injury, so that, should a defect in the product be found, any damages would be reduced by the percentage of plaintiff's fault under comparative negligence principles [*see* *Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 730, 742, 144 Cal. Rptr. 380, 575 P.2d 1162]* .

[3] Cross References

For related forms, see *§§ 97.113* and *97.133*

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9-97 California Forms of Pleading and Practice--Annotated § 97.135

§ 97.135 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Strict Liability Action Against Manufacturer, Wholesaler, or Retailer of Cosmetic or Personal Grooming Product--Allergy Was Sole Cause of Plaintiff's Injuries

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Strict Liability Action Against Manufacturer, Wholesaler, or Retailer of Cosmetic or Personal Grooming Product--Allergy Was Sole Cause of Plaintiff's Injuries

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that, at all times mentioned in plaintiff's complaint, plaintiff's injuries and damages, if any, were proximately caused by plaintiff's hypersensitive and allergic physical condition and constitutional composition.

[2] Use of Form

This form is for use as an affirmative defense in an action against a manufacturer, wholesaler, or retailer based in strict liability in tort. The form asserts the defense of preexisting allergy or hypersensitivity of the plaintiff [*see Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 993, 95 Cal. Rptr. 381* ; *Oakes v. E.I. Du Pont de Nemours & Co., Inc. (1969) 272 Cal. App. 2d 645, 651, 77 Cal. Rptr. 709]* .

[3] Cross References

For related forms, see *§§ 97.113* and *97.133*

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[a] In General

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[6] Motorcycles

§ 98.33 Attorney General Opinions

§ 98.34 Law Reviews

§§ 98.35-98.49 [Reserved]

§ 98.50 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Minor Bicyclist and Parents--Against Automobile Owner-Operator

[1] FORM

[2] Use of Form

[3] Verification

[4] Specifying Amount of Damages

[5] Cross References

§ 98.51 Complaint for Damages [Civ. Code § 3333] for Wrongful Death of Bicyclist [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a)]--By Entitled Persons(s)--Against Automobile Owner and Operator

[1] FORM

[2] Use of Form

[3] Cross References

§ 98.52 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Strict Liability in Tort--By Minor [Fam. Code § 6601] Purchaser-User of Bicycle and Parents--Against Manufacturer and Retailer

[1] FORM

[2] Use of Form

[3] Cross References

§ 98.53 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Negligence of Bicyclist

[1] FORM

[2] Use of Form

[3] Cross References

§ 98.54 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence of Bicyclist [Civ. Code § 1714(a)]

[1] FORM

[2] Use of Form

[3] Cross References

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9-98 California Forms of Pleading and Practice--Annotated § 98.01

§ 98.01 Scope of Chapter

This chapter discusses the rights and duties of bicyclists and the duties of motorists in relation to bicyclists. The following forms are included in this chapter:

- A complaint for damages for personal injuries based on negligence of automobile owner-operator by a minor bicyclist and parents [*see § 98.50*].

- A complaint for wrongful death of a deceased adult bicyclist [*see § 98.51*].

- A complaint for personal injuries based on strict liability in tort caused by a defective bicycle or bicycle part [*see § 98.52*].

- An affirmative defense of the negligence of the bicyclist [*see § 98.53*].

- A complaint for damages for personal injuries caused by a negligent bicyclist [*see § 98.54*].

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§ 98.02 Cross References

- See generally Ch. 380, *Negligence*

- For discussion and forms for use in actions against motorists generally, see Ch. 82, *Automobiles: Causes of Action* .

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[Reserved]

§§ 98.03[Reserved]

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§ 98.10 Governing Law

The general principles and rules of negligence law govern the reciprocal rights and duties between bicyclists and the drivers of motor vehicles as to the ordinary standard of care required, the special standards applied when children are involved, and the legal consequences of contributory negligence, violation of statute, last clear chance, and imminent peril [*Albrecht v. Broughton (1970) 6 Cal. App. 3d 173, 178-181, 85 Cal. Rptr. 659* ; *Lopez v. Ormonde (1968) 258 Cal. App. 2d 176, 180-181, 65 Cal. Rptr. 513]* .

Bicycle riders on a roadway or any paved shoulder have all of the rights and are subject to all of the provisions applicable to vehicle drivers by *Veh. Code § 21000 et seq.* (rules of the road), which include, but are not limited to, the provisions dealing with driving under the influence of intoxicating liquor or drugs, or the combined influence thereof (*Veh. Code § 23100 et seq.*), as well as *Veh. Code §§ 20000-20017* (accidents and accident reports), 27400 (operating vehicle while wearing headphones or earplugs), and 40000.1 et seq. (offenses and prosecutions), except for those provisions that by their very nature can have no application [*Veh. Code § 21200*].

Bicyclists are also subject to the special provisions regulating the operation and licensing of bicycles as contained in *Veh. Code § 21200 et seq.* and *Veh. Code § 39000 et seq.*, respectively.

Gov. Code § 831.4 provides public entities with immunity for injuries caused by the condition of roads and trails used for, or to provide access to, specified recreational activities, and this immunity has been applied to injuries sustained on bicycle trails [*see, e.g.,* *Prokop v. City of Los Angeles (2007) 150 Cal. App. 4th 1332, 1341-1342, 59 Cal. Rptr. 3d 355* (injury allegedly caused by design of access gate to bikeway was covered by trail immunity)]. This public entity immunity is discussed in Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsTransportation TortsGeneral OverviewTortsTransportation TortsMotor VehiclesMotor CarriersTortsNegligenceGeneral OverviewTransportation LawPrivate VehiclesTraffic RegulationGeneral OverviewTransportation LawPrivate VehiclesSafety StandardsGeneral Overview

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9-98 California Forms of Pleading and Practice--Annotated § 98.11

§ 98.11 Definition

The Vehicle Code defines a bicycle as a device on which any person may ride, propelled by human power through a belt, chain, or gears, and having one or more wheels [*Veh. Code § 231*]. Bicycles are excluded from the definition of "vehicles" under the Vehicle Code [*see Veh. Code § 670*; *Tomson v. Kischassey (1956) 144 Cal. App. 2d 363, 366, 301 P.2d 55]* , but the code provides that a bicyclist riding on a roadway has all the rights and is subject to all the duties applicable to the driver of a vehicle, except where those provisions by their very nature have no application [*Veh. Code § 21200*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesTraffic RegulationGeneral Overview

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§ 98.12 Motorists' Duty to Bicyclists

[1] In General

The driver of a motor vehicle who fails to exercise toward a bicyclist that care that would have been exercised by a man of ordinary prudence in the same situation and possessing the same knowledge is chargeable with negligence [*Albrecht v. Broughton (1970) 6 Cal. App. 3d 173, 179, 85 Cal. Rptr. 659]* .

The duties of motorists regarding the operation of their vehicles are set out in *Veh. Code §§ 21000 et seq.* (rules of the road). For a general discussion of the liability of owners and operators of automobiles, including the rules of the road, see Ch. 82, *Automobiles: Causes of Action* . For a complaint for damages for personal injuries based on the negligence of the motorist, see *§ 98.50*.

[2] Minor Bicyclists

Ordinarily, it is necessary to exercise greater caution for the protection and safety of a youth of adolescent years than for an adult person who possesses normal physical and mental faculties. One dealing with children must anticipate their ordinary behavior. The fact that they usually cannot and do not exercise the same degree of prudence for their own safety as adults, that they often are thoughtless and impulsive, imposes a duty on those from whose conduct injury to a child may result to exercise vigilance and caution [*Albrecht v. Broughton (1970) 6 Cal. App. 3d 173, 179 n. 1, 85 Cal. Rptr. 659* ; *Calandri v. Ione Unified Sch. Dist. (1963) 219 Cal. App. 2d 542, 547 n.2, 33 Cal. Rptr. 333* ; *Guyton v. City of Los Angeles (1959) 174 Cal. App. 2d 354, 359-360, 344 P.2d 910]* .

A driver approaching a child bicycling on a street or highway is not bound to guard against every possible contingency. Nevertheless, if the driver sees a child in a place of danger or reasonably apprehends that, if approached without warning, the child would through fright or bewilderment place itself in a place of danger, it is his or her duty to keep the car under such control as would be reasonably necessary to avoid a collision [*Hunt v. Los Angeles Ry. Corp. (1930) 110 Cal. App. 456, 461, 294 P. 745]* . For a complaint by a minor bicyclist against driver of motor vehicle for personal injuries based on negligence, see *§ 98.50*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesTraffic RegulationGeneral OverviewTortsNegligenceStandards of CareReasonable CareReasonable PersonTortsNegligenceStandards of CareSpecial CareChildren

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§ 98.13 Statutes Regulating Operation of Bicycles

[1] In General

The operation of a bicycle is governed by the same provisions of the Vehicle Code respecting rules of the road (*Veh. Code § 21000 et seq.*), accidents and accident reports (*Veh. Code §§ 20000-20017*), operating a vehicle while wearing headphones or earplugs (*Veh. Code § 27400*), and offenses and prosecutions (*Veh. Code § 40000.1 et seq.*) that govern vehicle drivers generally, except whenthese provisions can have no application [*Veh. Code § 21200*]. In addition, the Vehicle Code imposes specific regulations regarding the operation of bicycles, as discussed under the following subheadings, *below*.

[2] Riding Under the Influence of Liquor or Drugs

Any person who rides a bicycle on a highway while under the influence of intoxicating liquor or drugs, or under the combined influence thereof, will be punished by a fine of not more than $250 [*Veh. Code § 21200.5*; *see Veh. Code § 23100 et seq.* (driving under influence of alcohol and/or drugs)]. Violation of*Veh. Code § 21200.5* is a misdemeanor [*Veh. Code §§ 21200.5, 40000.13*], and a person under 21 years of age convicted of a violation is subject to *Veh. Code § 13202.5*, which governs suspension, restriction, and delay of juvenile driving privileges [*Veh. Code § 21200.5*].

[3] Keeping to Right

Every person operating a bicycle on a roadway at a speed less than the normal speed of traffic moving in the same direction at that time must ride as close as practicable to the right-hand curb or edge of the roadway except [*Veh. Code § 21202(a)*]:

- when overtaking and passing another bicycle or vehicle proceeding in the same direction;
- when preparing for a left turn at an intersection or into a private road or driveway;
- when reasonably necessary to avoid conditions (including, but not limited to, fixed or moving objects, vehicles, bicycles, pedestrians, animals, surface hazards, or substandard width lanes) that make it

unsafe to continue along the right-hand curb or edge, subject to the provisions of *Veh. Code § 21656* (requirement that slow moving vehicles turn out); or

- when approaching a place where a right turn is authorized.

[4] Riding on One Way Street

Any person operating a bicycle on a roadway that carries traffic in one direction only and has two or more marked traffic lanes may ride as near the left-hand curb or edge of such roadway as practicable [*Veh. Code § 21202(b)*].

[5] Bicycle Hitching to Vehicle

No person riding on any bicycle may attach the bicycle or himself or herself to any streetcar or vehicle on the roadway [*Veh. Code § 21203*].

[6] Riding on Seat Required

A person propelling a bicycle upon a highway may not ride other than on or astride a permanent and regular seat attached to the bicycle, unless the bicycle was designed by the manufacturer to be ridden without a seat [*Veh. Code § 21204(a)*].

[7] Passengers

A bicycle operator may not allow a person to ride as a passenger on a bicycle on a highway anywhere other than on or astride a separate seat attached to the bicycle. If the passenger is four years of age or younger or weighs 40 pounds or less, the seat must have adequate provision for retaining the passenger in place and for protecting the passenger from the moving parts of the bicycle [*Veh. Code § 21204(b)*]. In addition, *Veh. Code § 21712* prohibits a person driving a motor vehicle from allowing a person to ride on a vehicle or portion thereof not designed or intended for the use of passengers. Because of a statutory provision making the duties of vehicle operators generally applicable to bicyclists [*see Veh. Code § 21200*], *Veh. Code § 21712* would appear to prohibit a bicyclist from allowing a passenger to ride on any part of a bicycle not intended for passengers, a broader restriction than that contained in *Veh. Code § 21204(b)* [*Tomson v. Kischassey (1956) 144 Cal. App. 2d 363, 366-367, 301 P.2d 55* ; *La Fleur v. Hernandez (1948) 84 Cal. App. 2d 569, 574, 191 P.2d 95]* . By its terms, *Veh. Code § 21712* applies to the passenger as well as the bicyclist; that is, it not only prohibits a bicyclist from permitting a passenger to ride on a portion of the bicycle not intended for passengers, it also prohibits the passenger from so riding. *Veh. Code § 21204(b)*, on the other hand, is applicable only to the bicycle operator.

[8] Helmet Requirements

A person under 18 years of age must wear a properly fitted and fastened bicycle helmet when operating a bicycle, or riding on a bicycle as a passenger, on a street, bikeway, public bicycle path, or trail [*Veh. Code § 21212(a)*]. This requirement also applies to a person who is a passenger in a restraining seat attached to a bicycle or in a trailer towed by the bicycle [*Veh. Code § 21212(a)*]. The helmet must meet the standards of the American Society for Testing and Materials (ASTM) or the United States Consumer Product Safety Commission (CPSC), or standards subsequently established by those entities [*Veh. Code § 21212(a)*]. Violation of the helmet law is an infraction punishable by a fine of not more than $25. The parents or legal guardian of a bicycle operator or passenger who is an unemancipated minor and who violates the law will be jointly and severally liable with the minor for any fine imposed [*Veh. Code § 21212(e)*]. However, charges against first time offenders will be dismissed [*Veh. Code § 21212(d)*]. Under prior law, helmet requirements only applied to passengers four years of age or younger, or weighing 40 pounds or less, when the bicycle operator was traveling on a highway [*see* former *Veh. Code § 21204(c)-(d)*].

[9] Carrying Articles

No person operating a bicycle may carry any package, bundle, or article which prevents the operator from keeping at least one hand upon the handlebars [*Veh. Code § 21205*].

[10] Regulation by Local Ordinance

The Vehicle Code does not prevent local authorities, by ordinance, from regulating the registration of bicycles and the parking and operation of bicycles on pedestrian or bicycle facilities, provided such regulation is not in conflict with the provisions of the Vehicle Code [*Veh. Code § 21206*].

[11] Bicycle Lanes

The Vehicle Code does not prevent local authorities from establishing, by ordinance or resolution, bicycle lanes separated from any vehicular lanes upon highways, other than state highways [*Veh. Code § 21207*].

With certain exceptions for utility or public utility vehicles, newspaper delivery vehicles, and garbage trucks [*see Veh. Code § 21211(c)-(e)*], no person shall stop, stand, sit, or loiter on any bikeway as defined in *Sts. & Hy. Code § 890.4*, or on any bicycle path or trail if the act impedes or blocks the normal and reasonable movement of any bicyclist [*Veh. Code § 21211(a)*]. Neither shall any person place or park any bicycle, vehicle, or other object on any bikeway or bicycle path or trail that impedes or blocks the normal and reasonable movement of any bicyclist, unless it is necessary for safe operation or it is in compliance with the law [*Veh. Code § 21211(b)*].

[12] Bicycles Prohibited From Freeways

The Department of Transportation and local authorities may, by order, ordinance, or resolution, with respect to freeways, expressways, or designated portions thereof under their respective jurisdiction, prohibit or restrict the use of the freeways, expressways, or any portion thereof by bicycles [*Veh. Code § 21960(a)*]. Such prohibitory regulation shall be effective when appropriate signs giving notice thereof are erected upon any freeway or expressway and the approaches thereto [*Veh. Code § 21960(b)*].

[13] Bicycles Prohibited or Restricted on Vehicular Crossings

Bicycles are not permitted on any vehicular crossing, except where the Department of Transportation indicates by signs that bicycles are permitted on all or any portion of the vehicular crossing, or where a special permit has been obtained from the department [*Veh. Code § 23330(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesVehicular CrimesDriving Under the InfluenceGeneral OverviewTransportation LawCommercial VehiclesTraffic Regulation

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§ 98.14 Statutes Regulating Bicycle Equipment

A bicycle operated on a roadway must be equipped with a brake which will enable the operator to make one braked wheel skid on dry, level, clean pavement [*Veh. Code § 21201(a)*]. A bicycle may not be operated on a highway if it has been altered in such a way that (1) the bicyclist must elevate his or her hands above the level of his or her shoulders in order to grasp the normal steering grip area [*Veh. Code § 21201(b)*] or (2) the operator cannot safely stop the bicycle, support it in an upright position with at least one foot on the ground, and safely restart it [*Veh. Code § 21201(c)*].

A bicycle operated during darkness on a highway, a sidewalk where bicycle operation is not prohibited by the local jurisdiction, or a bikeway as defined by *Streets & Highway Code § 890.4*, must be equipped with the following [*Veh. Code § 21201(d), (e)*]:

- A white light that, while the bicycle is in motion, illuminates the highway, sidewalk, or bikeway in front of the bicyclist and is visible from a distance of 300 feet in front and from the sides of the bicycle. A lamp or lamp combination that emits a white light and is attached to the operator and visible from 300 feet in front and to the sides may be used instead.

- A red rear reflector visible from 500 feet to the rear when directly in front of lawful upper beams of motor vehicle headlamps.

- A white or yellow reflector on each pedal, shoe, or ankle visible from the front and rear of the bicycle from 200 feet.

- A white or yellow reflector on each side forward of the center of the bicycle, and a white or red reflector on each side to the rear of the center of the bicycle, except on bicycles equipped with reflectorized tires on the front and rear.

For a complaint based on strict liability in tort against the manufacturer and retailer, see *§ 98.52*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesTraffic RegulationGeneral Overview

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§ 98.15 Negligence of Bicyclists

[1] In General

Bicyclists have the same rights to the use of the streets as automobile drivers [*Hart v. Farris (1933) 218 Cal. 69, 75, 21 P.2d 432* ; *Hunt v. Los Angeles Ry. Corp. (1930) 110 Cal. App. 456, 460, 294 P. 745]* . However, a bicycle rider is required to exercise ordinary care at all times to avoid placing himself or others in danger and to avoid a collision [*La Fleur v. Hernandez (1948) 84 Cal. App. 2d 569, 574, 191 P.2d 95]* .

The defense of contributory negligence has been invalidated in California and replaced with a system of comparative negligence in which the fundamental purpose is to assign responsibility and liability for damage in direct proportion to the amount of negligence of each of the parties. Thus, in all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured does not bar recovery, but the damages awarded are diminished in proportion to the amount of negligence attributable to the person recovering [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

Prior cases involving contributory negligence are, however, instructive insofar as they illustrate negligent conduct of plaintiffs. Thus, cases decided under former law which held that a bicycle rider who failed to maintain a proper lookout when entering an intersection [*see* *Fietz v. Hubbard (1943) 59 Cal. App. 2d 124, 131, 138 P.2d 315* ; *Judd v. Webster (1920) 50 Cal. App. 743, 745-747, 195 P. 929]* or who turned suddenly without looking and without warning [*see* *Church v. Payne (1939) 36 Cal. App. 2d 382, 393, 97 P.2d 819* ; *Peel v. California Belting Co., Inc. (1930) 108 Cal. App. 93, 95-96, 291 P. 219]* was negligent are still valid under comparative negligence. However, plaintiff's recovery will depend on the amount of negligence attributable to plaintiff and the amount attributed to defendant.

A bicyclist is not, however, required to look back for vehicles approaching from behind to avoid collisions or to avoid being run over from behind [*Hart v. Farris (1933) 218 Cal. 69, 75, 21 P.2d 432* ; *La Fleur v. Hernandez (1948) 84 Cal. App. 2d 569, 574, 191 P.2d 95]* . Thus, a bicyclist who sees approaching automobiles and then looks away because there is nothing in the situation to warn him or her of impending danger may not be negligent [*Morris v. Standard Oil Co. (1922) 188 Cal. 468, 471-472, 205 P. 1073]* .

The violation of a statute, ordinance, or regulation of a public entity gives riseto a presumption of negligence where the violation was a proximate cause of resulting death or injury [*Evid. Code § 669(a)*]. For example, even if it is assumed that a plaintiff bicyclist's action in allowing another to ride on the handlebars in violation of *Veh. Code § 21204(b)* is not excusable or justifiable, it does not follow that the plaintiff is barred from recovery absent a showing that the violation was a proximately contributing cause of the injury [*Farole v. Eichman (1952) 39 Cal. 2d 822, 824, 249 P.2d 261]* . Also, the presumption may be rebutted by proof that the violator did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law [*Evid. Code § 669(b)*].

The primary assumption of risk doctrine may constitute a defense for a negligent bicyclist who injures another bicyclist during an organized cycling event. Under the primary assumption of risk doctrine, a participant in an active sport breaches a legal duty of care to other participants only if intentionally injuring another participant or engaging in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sporting activity [*Knight v. Jewett (1992) 3 Cal. 4th 296, 320-321, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . In one case, for example, an organized, long-distance bicycle ride on a public highway was a sport covered by the primary assumption of risk doctrine, even though the ride was noncompetitive. The court concluded that a ride of that kind, with a large number of riders, is an athletic activity done for enjoyment and physical challenge, and the risk of injury caused by a negligent coparticipant who swerves into another rider is inherent in the sport. The court also noted that the plaintiff in that case had signed a pre-injury release form that specifically warned of the risk of injuries caused by other participants. Under those circumstances, a negligent bicyclist could not be held liable [*Moser v. Ratinoff (2003) 105 Cal. App. 4th 1211, 1220-1222, 130 Cal. Rptr. 2d 198]* . This defense is probably unavailable, however, if the defendant was merely riding a bicycle on a public street or bike path and was not participating in an organized event [*see Moser v. Ratinoff (2003) 105 Cal. App. 4th 1211, 1221, 130 Cal. Rptr. 2d 198]* . For a more complete discussion of the primary assumption of risk doctrine, see Ch. 273, *Games, Sports, and Athletics* , and Ch. 380, *Negligence* .

For an affirmative defense of the negligence of the bicyclist, see *§ 98.53*.

[2] Minor Bicyclist

The defense of negligence of plaintiff may be invoked in an action to recover damages for injuries or death of a minor bicyclist where the child was of an age sufficient to exercise discretion for the avoidance of injury [*see Hunt v. Los Angeles Ry. Corp. (1930) 110 Cal. App. 456, 460, 294 P. 745]* . However, children are judged by a special subjective standard of care and not by the objective reasonable man standard of care of adults. Children are only required to exercise that degree of care expected of children of like age, experience, and intelligence [*Brown v. Connolly (1962) 206 Cal. App. 2d 582, 587, 24 Cal. Rptr. 57]* . There is no precise age at which as a matter of law a child is to be held accountable for his or her actions to the same extent as one of full adult age, and the question as to the capacity of a particular child at the time to exercise care to avoid a particular danger is one of fact falling within the province of the trier of fact to determine [*Hunt v. Los Angeles Ry. Corp. (1930) 110 Cal. App. 456, 460, 294 P. 745]* .

Conduct that might otherwise constitute negligence on the part of a child may not be so considered where the child's acts or omissions were done or omitted in an emergency calculated to produce fright, bewilderment, or confusion. As has been held with respect to the conduct of adults under similar circumstances, if the negligence of a driver caused fear and loss of presence of mind on the part of the child so as to impel the child to rush into danger, the child's mere error or mistake of judgment does not necessarily constitute negligence of the plaintiff [*Hunt v. Los Angeles Ry. Corp. (1930) 110 Cal. App. 456, 461, 294 P. 745]* .

The presumption of negligence brought about by the violation of a statute, ordinance, or regulation of a public entity which proximatelycauses death or injury to person or property [*Evid. Code § 669(a)*] may be rebutted by proof that the person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his or her maturity, intelligence, and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and

requiring adult qualifications [*Evid. Code § 669(b)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsNegligenceProofViolations of LawGeneral OverviewTransportation LawPrivate VehiclesTraffic RegulationGeneral OverviewTortsNegligenceStandards of CareReasonable CareReasonable PersonTortsNegligenceStandards of CareSpecial CareChildren

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[Reserved]

§§ 98.16[Reserved]

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§ 98.30 Related Titles From LexisNexis Publishing

N. Levy, M. Golden & L. Sacks, eds., California Torts, Ch. 20 (Matthew Bender)

Personal Injury: Actions, Defenses Damages, *Bicycles* (Matthew Bender)

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§ 98.31 State Statutes

Civil action by minor as authorized. *Fam. Code § 6601*

Two-year limitation period on action for personal injury. *Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)* (one-year period prior to 2003)

Appointment of guardian ad litem for minor. *Code Civ. Proc. §§ 372, 373*

Rebuttable presumption of failure to exercise due care on violation of statute proximately causing injury. *Evid. Code § 669*

Bicycle defined. *Veh. Code § 231*

Motorcycle defined. *Veh. Code § 400*

Motor-driven cycle defined. *Veh. Code § 405*

Motorized bicyle or moped defined. *Veh. Code § 406*

License plate requirements for motorized bicycles. *Veh. Code §§ 5030-5039*

Licensing of motorcycles and motor-driven cycles, including motorized bicycles. *Veh. Code § 12804.9*

Rules of the road. *Veh. Code § 21000 et seq.*

Duties of bicyclists *Veh. Code § 21200 et seq.*

Bicyclists as subject to vehicle drivers' rules of the road, requirements for accidents and accident reports, and

provisions governing offenses and prosecutions; exemption for peace officers under prescribed conditions. *Veh. Code § 21200*

Punishment for riding bicycle under influence of liquor and/or drugs. *Veh. Code § 21200.5*

Operation and equipment of bicycle. *Veh. Code §§ 21200-21207*

Equipment required. *Veh. Code § 21201*

Duty to ride on right edge of roadway. *Veh. Code § 21202(a)*

Bicyclist permitted to ride on left edge of one way street. *Veh. Code § 21202(b)*

Bicyclist prohibited from hitching to vehicle. *Veh. Code § 21203*

Bicyclist to ride on seat, unless bicycle designed by manufacturer to be ridden without seat. *Veh. Code § 21204(a)*

Passenger as required to ride on or astride separate seat. *Veh. Code § 21204(b)*

Seat of passenger who is four years of age or younger or who weighs 40 pounds or less as required to adequately retain passenger in place and protect passenger from moving bicycle parts. *Veh. Code § 21204(b)*

Bicyclists carrying articles. *Veh. Code § 21205*

Local regulation of registration, parking and operation of bicycles on pedestrian or bicycle facilities not prohibited. *Veh. Code § 21206*.

Bicycle lanes established by city ordinance as permitted. *Veh. Code § 21207*

Helmet requirement for bicycle operators and passengers under 18. *Veh. Code § 21212*

Bicycles prohibited from freeways. *Veh. Code § 21960*

Bicycles prohibited or restricted on vehicular crossings. *Veh. Code § 23330(b)*

Requirement that riders or passengers of motorized bicycles wear helmets. *Veh. Code § 27803*

Licensing of bicycles. *Veh. Code § 39000 et seq.*

Violation of *Veh. Code § 21200.5* (riding bicycle under influence of liquor and/or drugs) as misdemeanor. *Veh. Code § 40000.13*

Legal Topics:

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

[1] Bicycle Races

Release signed by participant in bicycle race releasing sponsors and cities was valid under *Civ. Code § 1668* (discussed in Ch. 380, *Negligence*), since bicycle racing is not compelled essential service of great public importance; no triable issue of fact existed as to whether release related to type of risk that caused participant's injuries. *Okura v. United States Cycling Fed'n (1986) 186 Cal. App. 3d 1462, 1466-1468, 231 Cal. Rptr. 429*

[1A] Organized, Noncompetitive Bike Rides

Although participant did not expressly assume the risk of negligence by a co-participant, organized, long-distance bicycle rides on public highways with large numbers of riders involved physical exertion and athletic risks not associated with automobile driving or individual bicycle riding on public streets or on bicycle lanes or paths. The organized, long-distance, group bicycle ride qualified as a "sport" for purposes of the application of the primary assumption of risk doctrine [*see* Ch. 273, *Games, Sports, and Athletics*]. The release the participant signed warned of the risk of accidents caused by the participants, indicating that such accidents were an inherent risk of the activity. The rider's movements that caused the collision were not intentional, wanton, or reckless conduct totally outside the range of ordinary activity involved in the sport. Although the rider violated provisions of the vehicle code designed to protect persons using public roads, such violations did not nullify the participant's assumption of the risk. *Moser v. Ratinoff (2003) 105 Cal. App. 4th 1211, 1222, 130 Cal. Rptr. 2d 198*

[2] Negligence of Bicyclist

[a] In General

System of comparative negligence established. *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226*

Bicyclists have same rights to use of streets as automobile drivers. *Hart v. Farris (1933) 218 Cal. 69, 75, 21 P.2d 432* ; *Hunt v. Los Angeles Ry. Corp. (1930) 110 Cal. App. 456, 460, 294 P. 745*

Bicycle riders must exercise ordinary care at all times to avoid placing themselves or others in danger and to avoid collision. *La Fleur v. Hernandez (1948) 84 Cal. App. 2d 569, 574, 191 P.2d 95*

[b] Examples

Violation of county ordinance prohibiting riding of bicycles on sidewalk was insufficient ground for dismissal of action against county for personal injuries sustained by minor bicyclist on negligently maintained sidewalk. *Acosta v. Los Angeles County (1961) 56 Cal. 2d 208, 210-214, 14 Cal. Rptr. 433, 363 P.2d 473*

Minor bicycle rider crossing intersection and looking into a sack was not negligent where there was nothing in the situation to warn him or her of impending danger from truck approaching from opposite direction and truck driver was negligent in turning in intersection and colliding with bicycle rider properly crossing intersection. *Morris v. Standard Oil Co. (1922) 188 Cal. 468, 470-472, 205 P. 1073*

Bicyclist is not negligent if he or she looks and sees approaching automobiles and then looks away, where there is nothing in situation to warn him or her of impending danger. *Morris v. Standard Oil Co. (1922) 188 Cal. 468, 471-472, 205 P. 1073*

Negligence of minor bicyclists in riding tandem is question for jury. *Tomson v. Kischassey (1956) 144 Cal. App. 2d 363, 366, 301 P.2d 55* ; *La Fleur v. Hernandez (1948) 84 Cal. App. 2d 569, 574, 191 P.2d 95*

Negligence of bicyclist for failure to give left turn signal is question for jury. *Wright v. Sniffin (1947) 80 Cal. App. 2d 358, 365, 181 P.2d 675*

Bicyclist riding into intersection in center of roadway was not negligent where bicyclist and motorist entered intersection at about same time, view was unobstructed, and driver did not see bicyclist and did not apply brakes before collision. *Green v. Pedigo (1946) 75 Cal. App. 2d 300, 303-307, 170 P.2d 999*

Bicycle rider was negligent in failing to maintain proper lookout when entering intersection. *Fietz v. Hubbard (1943) 59 Cal. App. 2d 124, 131, 138 P.2d 315* ; *Judd v. Webster (1920) 50 Cal. App. 743, 745-747, 195 P. 929*

Bicycle rider struck by automobile behind him was negligent in suddenly turning without looking and without warning. *Church v. Payne (1939) 36 Cal. App. 2d 382, 393, 97 P.2d 819* ; *Peel v. California Belting Co., Inc. (1930) 108 Cal. App. 93, 95-96, 291 P. 219*

Bicyclist suddenly making left hand turn into path of car following without any warning and without looking to ascertain safety was negligent. *Church v. Payne (1939) 36 Cal. App. 2d 382, 393, 97 P.2d 819*

[3] Duties of Drivers

[a] Examples

Driver crossing or turning into intersection and striking bicyclist in plain view is negligent. *Morris v. Standard Oil Co. (1922) 188 Cal. 468, 470-472, 205 P. 1073* ; *Flury v. Beeskau (1934) 139 Cal. App. 398, 402-405, 33 P.2d 1033* ; *Christie v. McCall (1917) 35 Cal. App. 546, 548-549, 177 P. 507*

Person who struck passing bicyclist by opening vehicle door was included within definition of "driver," for purposes of *Veh. Code § 16070(a)* financial responsibility requirement. *Adler v. Department of Motor Vehicles (1991) 228 Cal. App. 3d 252, 258-259, 279 Cal. Rptr. 28*

Driver of motor vehicle, who fails to exercise that care toward bicyclist which would have been exercised by man of ordinary prudence in same situation and possessing same knowledge, is chargeable with negligence. *Albrecht v. Broughton (1970) 6 Cal. App. 3d 173, 179, 85 Cal. Rptr. 659*

Duty of driver to sound horn when conditions are such as to require timely warning of approach of his or her automobile; fact that operation of vehicle is productive of noise does not relieve driver of duty to give warning where it appears that bicyclist rightfully using highway is unaware of his or her approach. *Hunt v. Los Angeles Ry. Corp. (1930) 110 Cal. App. 456, 461, 294 P. 745*

Taxi driver striking bicyclist from behind was negligent. *Peluso v. City Taxi Co. (1919) 41 Cal. App. 297, 298-299, 182 P. 808*

[b] Toward Minor Bicyclists

Motor vehicle drivers' special duty of care toward minor bicyclists. *Albrecht v. Broughton (1970) 6 Cal. App. 3d 173, 179 n.1, 85 Cal. Rptr. 659* (approving BAJI No. 148); *Calandri v. Ione Unified Sch. Dist. (1963) 219 Cal. App. 2d 542, 547 n. 2, 33 Cal. Rptr. 333* ; *Guyton v. City of Los Angeles (1959) 174 Cal. App. 2d 354, 359-360, 344 P.2d 910* ; *Hunt v. Los Angeles Ry. Corp. (1930) 110 Cal. App. 456, 461, 294 P. 745*

Driver's knowledge that paper boy on bicycle might be in vicinity was one factor to be considered by trier of fact in determining what reasonable man would have done in same situation. *Albrecht v. Broughton (1970) 6 Cal. App. 3d 173, 179, 85 Cal. Rptr. 659*

Truck driver striking minor bicyclist crossing street in residential area was negligent where minor was clearly visible and had looked up and down street from sidewalk edge, had seen no moving traffic, and was half way across street when struck by truck. *Carter v. Saxton (1963) 211 Cal. App. 2d 836, 838, 27 Cal. Rptr. 671*

Driver approaching child bicycling on street or highway is not bound to guard against every possible contingency; nevertheless, driver has duty, if driver sees child in place of danger, or might reasonably apprehend that if approached without warning child would through fright or bewilderment place itself in place of danger, to keep his or her car under such control as would be reasonably necessary to avoid collision. *Hunt v. Los Angeles Ry. Corp. (1930) 110 Cal. App. 456, 461, 294 P. 745*

[4] Equipment

Plaintiff not required to establish that he or she was not aware of defect at time of accident. *Luque v. McLean (1972) 8 Cal. 3d 136, 139, 104 Cal. Rptr. 443, 501 P.2d 1163*

Requirements for imposing strict liability in tort. *Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 260-261, 37 Cal. Rptr. 896, 391 P.2d 168* ; *Greenman v. Yuba Power Prod., Inc. (1963) 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 377 P.2d 897* ; *Barth v. B.F. Goodrich Tire Co. (1968) 265 Cal. App. 2d 228, 241-242, 71 Cal. Rptr. 306*

Failure of bicycle to have front light or rear reflector at night was not proximate cause of accident or contributory negligence where bicyclist was visible in headlights of car which struck him from behind. *Hart v. Farris (1933) 218 Cal. 69, 73, 21 P.2d 432*

Presumption of negligence based on failure of bicycle to carry lights at night. *Rabe v. Western Union Tel. Co. (1926) 198 Cal. 290, 295-297, 244 P. 1077* ; *Joseph v. Vogt (1939) 35 Cal. App. 2d 439, 440-441, 95 P.2d 947*

Liability under theory of strict liability in tort is not precluded because danger is obvious. *Thompson v. Package Mach. Co. (1971) 22 Cal. App. 3d 188, 192-196, 99 Cal. Rptr. 281*

Doctrine of strict liability in tort is not confined to products which are inherently dangerous; defect in article as well as proximate cause may be established by circumstantial evidence. *Johnson v. Standard Brands Paint Co. (1969) 274 Cal. App. 2d 331, 337-338, 79 Cal. Rptr. 194*

Strict liability in tort of manufacturer, wholesaler, retail dealer, or distributor; only group of persons exempt from liability is occasional seller not engaged in that activity as part of his or her business. *Barth v. B. F. Goodrich Tire Co. (1968) 265 Cal. App. 2d 228, 250-251, 71 Cal. Rptr. 306*

Presumption of negligence on failure to have lights on bicycle at night is consideration for jury in determining issue of contributory negligence and not contributory negligence as a matter of law. *Wright v. Sniffin (1947) 80 Cal. App. 2d 358, 365, 181 P.2d 675* ; *Young v. Boy Scouts of Am. (1935) 9 Cal. App. 2d 760, 766-767, 51 P.2d 191*

Bicycles not required by law to have horn or other audible warning device. *Green v. Pedigo (1946) 75 Cal. App. 2d 300, 307-308, 170 P.2d 999*

Failure to have front headlamps on bicycles at night was immaterial and not negligence where two minor bicyclists riding on right edge of road at night had red reflectors on rear of bicycles and were struck from behind by negligent driver. *Flynn v. Kumamoto (1937) 22 Cal. App. 2d 607, 607-610, 72 P.2d 248*

Failure of minor bicyclist to have front light or rear reflector at night was not proximate cause of accident or negligence where it was dark, rainy, and slippery, and bicyclist was struck from behind by truck driven at high speed with dim lights which would not have shown rear reflector on bicycle in time to avoid collision. *Greeneich v. Knoll (1925) 73 Cal. App. 1, 5-8, 238 P. 163*

[5] Rights and Duties of Bicyclists

[a] In General

Bicyclists and minor bicyclists have same rights to use of streets as automobile drivers. *Hart v. Farris (1933) 218 Cal. 69, 75, 21 P.2d 432* ; *Hunt v. Los Angeles Ry. Corp. (1930) 110 Cal. App. 456, 460, 294 P. 745*

Bicycle rider not required to look back for vehicles approaching from behind to avoid collisions or to avoid being run over from behind. *Hart v. Farris (1933) 218 Cal. 69, 75, 21 P.2d 432* ; *La Fleur v. Hernandez (1948) 84 Cal. App. 2d 569, 574, 191 P.2d 95*

Bicyclist was properly convicted of violating *Veh. Code § 22350* (basic speed law) for riding bicycle at approximately 49 miles per hour; bicycles are subject to same rules as motor vehicles under *Veh. Code § 21200 et seq.*; bicyclist's contention that it was impossible for bicycle to travel 49 miles per hour was issue for trier of fact that could not be relitigated on appeal. *People v. Fong (1993) 17 Cal. App.4th Supp 1, 21 Cal. Rptr. 2d 907*

Bicycle rider must exercise ordinary care at all times to avoid placing himself or others in danger and to avoid collision. *La Fleur v. Hernandez (1948) 84 Cal. App. 2d 569, 574, 191 P.2d 95*

[b] Minor Bicyclists

Presumption of negligence derived from child's violation of statute pertaining to standards of conduct as set forth in the Vehicle Code is rebuttable by showing that child, in spite of violation, exercised care that children of his or her maturity, intelligence, and capacity ordinarily exercise under similar circumstances. *Cummings v. County of Los Angeles (1961) 56 Cal. 2d 258, 14 Cal. Rptr. 668, 363 P.2d 900* ; *Brown v. Connolly (1962) 206 Cal. App. 2d 582, 587, 24 Cal. Rptr. 57*

Children are judged by special subjective standard of care and not by objective reasonable man standard of care of adults; children are only required to exercise degree of care expected of children of like age, experience, and intelligence. *Brown v. Connolly (1962) 206 Cal. App. 2d 582, 587, 24 Cal. Rptr. 57*

Question as to capacity of particular child to exercise care to avoid particular danger is one of fact falling within province of jury to determine, there being no precise age at which as matter of law child is held accountable for his or her actions to same extent as one of full adult age. *Hunt v. Los Angeles Ry. Corp. (1930) 110 Cal. App. 456, 460, 294 P. 745*

Negligence of driver in causing fear and loss of presence of mind on part of child so as to impel child to rush into danger and make error or mistake of judgment does not necessarily constitute negligence of child. *Hunt v. Los Angeles Ry. Corp. (1930) 110 Cal. App. 456, 461, 294 P. 745*

[6] Motorcycles

Trial court properly denied preliminary injunction in action by four motorcyclists to enjoin enforcement of California Mandatory Motorcycle Helmet Law (*Veh. Code § 27802 et seq.*) because plaintiffs had failed to demonstrate likelihood of success at trial on merits. *Buhl v. Hannigan (1993) 16 Cal. App. 4th 1612, 1626-1628, 20 Cal. Rptr.2d 740*

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPrivate VehiclesTraffic RegulationGeneral OverviewTortsNegligenceStandards of CareReasonable CareReasonable PersonTortsNegligenceStandards of CareSpecial CareChildren

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§ 98.33 Attorney General Opinions

Riding a bicycle on a highway while under the influence of alcohol or drugs, or both, as violation of *Veh. Code § 21200(b). 67 Ops. Cal. Att'y Gen. 398, 400 (1984)*

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§ 98.34 Law Reviews

Prosser, *Strict Liability to the Consumer in California, 18 Hastings L.J. 9 (1966)*

Lascher, *Strict Liability in Tort for Defective Products: The Road to and Past Vandermark, 38 So. Cal. L. Rev. 30 (1965)*

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[Reserved]

§§ 98.35[Reserved]

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9-98 California Forms of Pleading and Practice--Annotated § 98.50

§ 98.50 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Minor Bicyclist and Parents--Against Automobile Owner-Operator

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Minor Bicyclist and Parents--Against Automobile Owner-Operator
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name of minor*], a Minor, by _____ [*name*], his Guardian [ad Litem], _____ [*names of parents*], Plaintiffs, vs. _____ [*name(s)*], [and DOES I through_____] Defendant(s).	)))))))	NO. _____ COMPLAINT FOR DAMAGES (Negligence) [Amount demanded _____ (exceeds *or* does not exceed) $10,000] [LIMITED CIVIL CASE]

CAUSE OF ACTION OF PLAINTIFF _____ [*name of minor*]

Plaintiff _____ [*name of minor*], a minor, through his/her guardian [ad litem] alleges:

1. Plaintiff _____ [*name of minor*] is a minor child of the age of _____ years and at all times relevant herein was of the age of _____ years.

[*EITHER*]

2. For the purposes of this action, _____ [*name*] was duly appointed by order of the above-entitled court, and now is, guardian ad litem of plaintiff _____ [*name of minor*].

[*OR*]

2. On _____ [*date*], _____ [*name*] was, by order duly made in the above-entitled court, appointed guardian of the person of plaintiff _____ [*name of minor*], and ever since has been, and now is, the guardian of said plaintiff.

[*CONTINUE*]

3. Defendant _____ [*name*] is, and at all times herein mentioned was, the owner of a certain _____ [*year, make, model*] automobile, California License No. _____.

[4. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I through _____ (*numeral, e.g.,* V), inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of said fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged and that plaintiff's injuries as herein alleged were proximately caused by said negligence.)]

5. At all times herein mentioned, _____ [*street*] and _____ [*street*] were public streets and highways in _____ [*city*], _____ County, California.

6. On or about _____ [*date*], at or about _____ [*time*], plaintiff _____ [*name of minor*] was operating a bicycle _____ [*description of plaintiff's position or actions, e.g.,* along the right hand edge of the roadway of Main Street in a northerly direction near its intersection with First Street in said city, county, and state].

7. At that time and place, defendant negligently controlled, operated, and drove his/her automobile along and on _____ [*street*] so as proximately to cause it _____ [*description of accident and effect of impact, e.g.,* to collide with the bicycle operated by plaintiff _____ (*name of minor*), throwing him/her violently to the pavement and dragging him/her approximately 10 feet,] and to cause the injuries and damages described below.

8. As a proximate result of the negligence[, carelessness, recklessness, and unlawfulness] of defendant, plaintiff _____ [*name of minor*] was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her body and shock and injury to his/her nervous system and person, all of which injuries have caused and continue to cause him/her great mental, physical, and nervous pain and suffering.

9. Plaintiff _____ [*name of minor*] is informed and believes and thereon alleges that the injuries will result in some permanent disability to him/her.

10. As a further proximate result of the negligence of defendant and the collision described above, plaintiff _____'s [*name of minor*] bicycle was _____ [*describe damage, e.g.,* totally

demolished] and his/her clothing and _____ [*other personal property damaged*] were destroyed; for the replacement of the bicycle and the damaged clothing and personal property, said plaintiff will be required to pay approximately $_____, which is the reasonable value of the replacement necessitated by the damage.

CAUSE OF ACTION OF PLAINTIFFS _____ [*names of parents*]

Plaintiffs _____ [*names of parents*] allege:

11. Plaintiffs _____ [*names of parents*] repeat the allegations contained in Paragraphs 1-8 of the Cause of Action of Plaintiff _____ [*name of minor*] and make each of those allegations a part of this Cause of Action as if each such allegations were herein repeated in full.

12. Plaintiffs _____ [*names of parents*] are, and at all times herein mentioned were, the parents of plaintiff _____ [*name of minor*].

13. As a proximate result of the negligence of defendant and the injuries suffered by plaintiff _____ [*name of minor*], as alleged above, plaintiffs _____ [*names of parents*] were compelled to, and did, necessarily employ medical and surgical aid and attention for their minor child, and did necessarily pay and become liable therefor, and for nursing, medicine, surgical appliances, and incidental expenses; plaintiffs _____ [*names of parents*] are informed and believe and thereon allege that they will incur additional bills for medical, surgical, and other expenses in order to alleviate the pain and suffering and effect a cure of their minor child as a result of the injuries.

WHEREFORE, plaintiffs pray judgment against defendant as follows:

1. In favor of plaintiff _____ [*name of minor*] for general damages according to proof.

2. In favor of plaintiff _____ [*name of minor*] for damages to his/her personal property in the sum of $_____.

3. In favor of plaintiffs _____ [*names of parents*] for medical and incidental expenses according to proof.

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiffs _____ [*names*]

VERIFICATION

I, _____ [*name*], am one of the plaintiffs in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This complaint is for use by a minor bicyclist to recover general damages sustained as the result of being struck by an automobile.In this complaint, the parents of the minor are joined in a separate cause of action to recover medical expenses incurred in treatment of the minor. Alternatively, when a parent is the guardian ad litem of the minor, the minor's cause of action may include an allegation to recover such medical expenses as have not been paid [*Morningred v. Golden State Co. (1961) 196 Cal. App. 2d 130, 138-139, 16 Cal. Rptr. 219* ; *Mattox v. Isley (1952) 111 Cal. App. 2d 774, 779-780, 245 P.2d 664]* . Some attorneys prefer to seek medical expenses in the minor's cause of action rather than to include a separate cause of action by the parents. Recovery of the minor's medical expenses, whether sought in the minor's cause of action or a separate cause of action by the parents, will be reduced by the negligence of the parents [*see Randles v. Lowry (1970) 4 Cal. App. 3d 68, 73, 84 Cal. Rptr. 321]* .

[3] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is an unlimited civil case [*see Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[4] Specifying Amount of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[5] Cross References

For alternative allegations as to capacity and residence of parties, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used*

For general discussion and forms for use in actions against automobile operators, see Ch. 82, *Automobiles: Causes of Action*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For forms relating to the appointment of a guardian ad litem, see Ch. 291, *Guardians ad Litem*

For forms involving civil actions by minors, see Ch. 367a, *Minors: Tort Actions*

See generally Ch. 380, *Negligence*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* and Ch. 572, *Verification* , respectively

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9-98 California Forms of Pleading and Practice--Annotated § 98.51

§ 98.51 Complaint for Damages [Civ. Code § 3333] for Wrongful Death of Bicyclist [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a)]--By Entitled Persons(s)--Against Automobile Owner and Operator

[1] FORM Complaint for Damages [Civ. Code § 3333] for Wrongful Death of Bicyclist [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a)]--By Entitled Persons(s)--Against Automobile Owner and Operator
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*names*]	)	
Plaintiffs,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*], [and DOES I	)	(Wrongful Death)
through_____,]	)	[Amount demanded _____
Defendants.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff(s) alleges/allege:

1. _____ [Plaintiff(s) *or* The person(s) listed below] is/are entitled to bring an action for the wrongful death of _____ [*name of decedent*] (hereinafter "decedent") pursuant to *Code of Civil Procedure Section 377.60*, based on his/her/their relationship to decedent, as follows:

Name(s)	Relationship(s) to Decedent
_____	_____
_____	_____

_____
_____ _____
_____

[_____ (*If one or more persons are required by statute to establish additional facts, such as that there is no surviving spouse, domestic partner, child, or issue of deceased child or that the person was dependent on decedent, in order to be entitled to bring a wrongful death action, specify facts that satisfy applicable requirement*).]

[*If decedent's personal representative is maintaining action on behalf of one or more entitled persons, add*]

Plaintiff _____ [*name*] is the duly appointed, qualified, and acting personal representative of the estate of decedent, and brings this action on behalf of [all of the above-listed persons entitled to bring a cause of action for the wrongful death of decedent *or* the following person(s) entitled to bring an action for the wrongful death of decedent: _____ (*specify person(s) on whose behalf personal representative is maintaining action*)].

[*CONTINUE*]

2. Defendant _____ [*name*] is, and at all times herein mentioned was, the owner of a certain _____ [*year, make, model*] automobile, California License No. _____.

[3. Plaintiff(s) is/are ignorant of the true names and capacities of defendants sued herein as DOES I through _____ (*numeral, e.g.,* V), inclusive, and therefore sues/sue these defendants by such fictitious names. Plaintiff(s) will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff(s) is/are informed and believe and thereon alleges/allege that each of such fictitiously named defendants is responsible in some manner for the occurrences herein alleged and that the death of _____ (*name of deceased*) as herein alleged was proximately caused by such defendants.)]

4. At all times herein mentioned, defendant _____ [*name of operator*] was the agent and employee of defendant _____ [*name of owner*] and was at all times herein mentioned acting within the purpose and scope of said agency and employment and was operating the aforementioned automobile with the consent and permission of defendant _____ [*name of owner*].

5. At all times herein mentioned, _____ [*street*] and _____ [*street*] were public streets and highways in _____ [*city*], _____ County, California.

6. On or about _____ [*date*], at or about _____ [*time*], decedent was _____ [*description of decedent's position and actions, e.g.,* riding a bicycle along the right-hand edge of Main Street in a northerly direction near its intersection with First Street].

7. At that time and place, defendants, and each of them, negligently[, carelessly, recklessly, and unlawfully] entrusted, owned, maintained, operated, and drove the automobile described above along and on _____ [*street*] in a general _____ [*describe*] direction so as proximately to cause it _____ [*description of accident and effect of impact, e.g.,* to collide with the bicycle operated by decedent, throwing him/her violently to the pavement and dragging him/her approximately 10 feet,] and proximately to cause injuries from which he/she thereafter died.

8. At the time of the events described herein and prior thereto, decedent was gainfully employed as _____ [*specify*], was earning an average monthly income in excess of $_____, was the sole support of plaintiff(s) _____ [*name(s)*], and was a faithful and dutiful _____ [*specify relationship, e.g., husband and father*].

9. By reason of all of the foregoing, plaintiff(s) has/have been deprived of the support, cohabitation, comfort, protection, and society of _____ [*name of decedent*] and has/have been thereby damaged.

10. By reason of all of the foregoing and the death of _____ [*name of decedent*], plaintiff _____ [*name*] has incurred funeral and burial expenses.

WHEREFORE, plaintiff(s) prays/pray judgment against defendants, and each of them, as follows:

1. For general damages according to proof.

2. For funeral and burial expenses according to proof.

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff(s) _____ [*name(s)*]

[*Verification, if desired. See § 98.50[1].*]

[2] Use of Form

This complaint for damages sets forth a cause of action for the wrongful death of a bicyclist killed in a collision with an automobile.

Paragraph 1 of the complaint alleges the capacity of plaintiffs as persons who are entitled to bring a cause of action under *Code Civ. Proc. § 377.60* (permitting decedent's surviving spouse, domestic partner, children, and issue of deceased children to bring action without qualification, permitting others to bring action under specified circumstances, and permitting personal representative of decedent's estate to bring action on behalf of entitled persons). For forms of allegations establishing that specific classes of persons are entitled to bring a wrongful death action, including allegations that are required of plaintiffs who are not the decedent's surviving spouse, domestic partner, children, or issue of deceased children, see Ch. 181, *Death and Survival Actions* .

When the plaintiff is a minor, a guardian ad litem will have to be appointed for the purposes of the action, unless the minor already has a guardian [*see Code Civ. Proc. § 372*]. For discussion and forms relating to appointment of a guardian ad litem generally, see Ch. 291, *Guardians ad Litem* .

If the decedent incurred medical expenses before his or her death, these expenses are not recoverable in a wrongful

death action [*Follansbee v. Benzenberg (1954) 122 Cal. App. 2d 466, 473-474, 265 P.2d 183]* . They should instead be sought by the personal representative in a survival action under *Code Civ. Proc. § 377.30* [*see Code Civ. Proc. § 377.34*], and counsel may wish to combine this action with the wrongful death action since both arise out of the same occurrence [*see Code Civ. Proc. § 377.62(a)* (joinder of plaintiffs)].

[3] Cross References

For a complaint for damages for personal injuries, see *§ 98.50*

See generally Ch. 181, *Death and Survival Actions*

For forms for use in appointing a guardian or guardian ad litem, see Ch. 291, *Guardians ad Litem*

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9-98 California Forms of Pleading and Practice--Annotated § 98.52

§ 98.52 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Strict Liability in Tort--By Minor [Fam. Code § 6601] Purchaser-User of Bicycle and Parents--Against Manufacturer and Retailer

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Strict Liability in Tort--By Minor [Fam. Code § 6601] Purchaser-User of Bicycle and Parents--Against Manufacturer and Retailer

[*Caption. See § 98.50[1].*]

CAUSE OF ACTION OF PLAINTIFF _____ [*name of minor*]

Plaintiff _____ [*name of minor*], a minor, through his/her guardian [ad litem] alleges:

1. Plaintiff _____ [*name of minor*] is a minor child of the age of _____ years and at all times relevant herein was of the age of _____ years.

2. [*Appointment of guardian (ad litem). See § 98.50[1], Paragraph 2.*]

3. Defendant _____ [*manufacturer*] is, and at all times herein mentioned was, a corporation organized under the laws of _____ [*state*] [, with its principal place of business in this state in _____ (*city*), California] [*or specify other capacity of defendant manufacturer*].

4. Defendant _____ [*manufacturer*] is, and at all times herein mentioned was, engaged in the business of _____ [*specify, e.g.,* designing, manufacturing, and assembling *or any combination of the foregoing*] _____ [*trade name or other designation*] bicycles for sale to and use by members of the general public, and [plaintiff is informed and believes and thereon alleges that], as a part of its business, defendant designed, manufactured, and assembled the specific _____ [*trade name or other designation*] bicycle hereinafter referred to.

5. Defendant _____ [*retailer*] is, and at all times herein mentioned was, a corporation organized and existing under the laws of _____ [*state*] [, with its principal place of business in this state in _____ (*city*), California] [*or specify other capacity of defendant retailer*].

6. Defendant _____ [*retailer*] is, and at all times herein mentioned was, engaged in the business of selling at retail to members of the general public at its place of business in _____ [*city*], California, the hereinabove described _____ [*trade name or other designation*] bicycles designed, manufactured, and assembled by defendant _____ [*manufacturer*].

[7. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I through _____ (*numeral, e.g.,* V), inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of such fictitiously named defendants is responsible in some manner for the occurrences herein alleged and that the injuries of plaintiff _____ [*name of minor*] as herein alleged were proximately caused by such defendants.)]

8. Defendant _____ [*manufacturer*] intended that the _____ [*trade name or other designation*] bicycles manufactured, designed, and assembled by it were to be used for the purpose of transporting persons and property from one place to another by operation by an individual of the mechanical devices therein installed.

9. Defendants, and each of them, at all times herein mentioned knew that the _____ [*trade name or other designation*] bicycles manufactured, designed, and assembled by defendant _____ [*manufacturer*] would be purchased from defendant _____ [*retailer*] and used by the purchaser or user without inspection for defects therein or in any of its component parts.

10. On or about _____ [*date*], plaintiff _____ [*name of minor*] purchased from defendant _____ [*retailer*] at its principal place of business in _____ [*city*], California, a _____ [*specify model, make, size, etc., and trade name or other designation*] bicycle, manufactured, designed, and assembled by defendant _____ [*manufacturer*].

11. At the time of said plaintiff's purchase, the _____ [*trade name or other designation*] bicycle was defective and unsafe for its intended purpose in that _____ [*specify, e.g.,* the bicycle chain was not attached together securely enough for its intended use resulting in its continually being overstrained by the normal and intended use of the bicycle].

12. On or about _____ [*date*], plaintiff _____ [*name of minor*] was using and operating the hereinabove described _____ [*trade name or other designation*] bicycle at _____ [*location*] for the purpose of transporting himself/herself from one place to another, and, during the course of such use and operation and as a proximate result of the defect hereinabove described, _____ [*describe, e.g.,* the bicycle chain broke, causing said plaintiff to be thrown from the bicycle], proximately causing the injuries and damages to plaintiff hereinafter described.

13. As a proximate result of the defect and the accident proximately caused thereby, plaintiff _____ [*name of minor*] was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her body and shock and injury to his/her nervous system and person, all of which injuries have caused and continue to cause said plaintiff great mental, physical, and nervous pain and suffering.

14. Plaintiff _____ [*name of minor*] is informed and believes and thereon alleges that the injuries will result in some permanent disability to him/her and that he/she is damaged thereby.

15. As a further proximate result of the defect and the accident proximately caused thereby, plaintiff _____'s [*name of minor*] bicycle was damaged and his/her clothing and _____ [*other personal propertydamaged*] were damaged; for the _____ [repair *or* replacement] of the bicycle and the damaged clothing and personal property, said plaintiff will be required to pay approximately $_____, which is the reasonable value of the _____ [repair *or* replacement] necessitated by the damage.

CAUSE OF ACTION OF PLAINTIFFS _____ [*names of parents*]

Plaintiffs _____ [*names of parents*] allege:

16. Plaintiffs _____ [*names of parents*] repeat the allegations contained in Paragraphs 1-15 of the Cause of Action of Plaintiff _____ [*name of minor*] and make each of such allegations a part of this Cause of Action as if each of such allegations were herein repeated in full.

17. Plaintiffs _____ [*names of parents*] are, and at all times herein mentioned have been, the _____ [*specify relationship, e.g.,* parents] of plaintiff _____ [*name of minor*].

18. As a proximate result of the defect and the accident proximately caused thereby and by reason of the injuries suffered by plaintiff _____ [*name of minor*], as aforesaid, plaintiffs _____ [*names of parents*] were compelled to, and did, necessarily employ medical and surgical aid and attention for their minor child, and did necessarily pay and become liable therefor, and for nursing, medicine, surgical appliances and incidental expenses; plaintiffs _____ [*names of parents*] are informed and believe and thereon allege that they will incur additional bills for medical, surgical, and other expenses in order to alleviate the pain and suffering and to effect a cure of their minor child, all as a result of the aforementioned injuries.

WHEREFORE, plaintiffs pray judgment against defendants, and each of them, as follows:

1. In favor of plaintiff _____ [*name of minor*] for general damages according to proof;

2. In favor of plaintiff _____ [*name of minor*] for damages to his/her personal property in the sum of $_____;

3. In favor of plaintiffs _____ [*names of parents*] for medical and incidental expenses according to proof;

4. For costs of suit herein incurred;

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiffs _____ [*names*]

[*Verification. See § 98.50[1].*]

[2] Use of Form

The form in [1], *above*, is a general form for use in an action against a manufacturer and retailer based on strict liability in tort in a case in which a minor bicyclist is injured as the result of a defect in a bicycle.

[3] Cross References

For a complaint for damages for personal injuries, see *§ 98.50*

For general discussion and alternative forms and allegations for use in actions based on strict liability in tort for defective products, see Ch. 460, *Products Liability*

Personal Injury: Actions, Defenses, Damages, *Products Liability* (Matthew Bender)

Frumer and Friedman, *Products LiabilitY, §§ 12.03 -12.03[10]*, 16-16B, 18-*20.05*, 44-44.11, 48 (Matthew Bender)

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9-98 California Forms of Pleading and Practice--Annotated § 98.53

§ 98.53 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Negligence of Bicyclist

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Negligence of Bicyclist

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

At the time and place of the accident herein alleged, plaintiff did not exercise ordinary care or caution to avoid the accident, and plaintiff maintained, controlled, and operated his/her bicycle in a careless, reckless, and negligent manner and thereby proximately caused and contributed to the injuries and damages, if any, sustained by plaintiff.

[2] Use of Form

This defense of plaintiff's negligence may be set forth in an answer [*Code Civ. Proc. § 431.30*] to a complaint by a bicyclist or the bicyclist's representative. Under comparative negligence, damages awarded to a plaintiff are diminished in proportion to the amount of negligence attributable to that plaintiff [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

Defendant may wish to set out in the answer the specific acts constituting the negligence of plaintiff, but there is no requirement that the defendant do so [*see Singer v. Superior Court (1960) 54 Cal. 2d 318, 323-324, 5 Cal. Rptr. 697, 353 P.2d 305]* .

[3] Cross References

For a complaint for damages for personal injuries, see *§ 98.50*

See generally Ch. 26, *Answers*

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9-98 California Forms of Pleading and Practice--Annotated § 98.54

§ 98.54 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence of Bicyclist [Civ. Code § 1714(a)]

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence of Bicyclist [Civ. Code § 1714(a)]

[*Caption. See § 98.50[1].*]

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California.

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and plaintiff's injuries as herein alleged were proximately caused by defendants' negligence.)]

[3. (Plaintiff is informed and believes and on this information and belief alleges that) (A)t all times mentioned in this complaint each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things alleged in this complaint, was acting within the course and scope of this agency and employment.]

4. At all times herein mentioned, _____ [*street*] and _____ [*street*] were public streets and highways in _____ [*city*], _____ County, California.

5. On or about _____ [*date*], at or about _____ [*time*], plaintiff was _____ [*allege facts showing status and activity of plaintiff at time of accident, e.g.,* a pedestrian crossing (*street*) at its intersection with _____ (*street*) in _____, California].

6. At that time and place, defendant negligently controlled, operated, and rode his/her bicycle along and on _____ [*street*] so as proximately to cause it _____ [*description of accident and effect of impact, e.g.,* to collide with plaintiff, throwing him/her violently to the pavement and causing the injuries and damages described below].

7. As a proximate result of the negligence[, carelessness, recklessness, and unlawfulness] of defendant, plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her body and shock and injury to his/her nervous system and person, all of which injuries have caused and continue to cause him/her great mental, physical, and nervous pain and suffering. [Plaintiffis informed and believes and on this information and belief alleges that these injuries will result in permanent disability to him/her.] As a result of these injuries, plaintiff has suffered general damages.

8. As a further direct and legal result of the negligence of defendant, plaintiff has incurred[, and will continue to incur,] medical and related expenses. Plaintiff does not know at this time the exact amount of expenses that have been incurred and that will be incurred in the future.

9. As a further direct and legal result of the negligence of defendant, plaintiff's earning capacity has been and will be greatly impaired, both in the past and present in an amount according to proof.

10. As a further proximate result of the negligence of defendant and the collision described above, plaintiff's clothing and _____ [*other personal property damaged*] were destroyed; for the replacement of the damaged clothing and personal property, plaintiff will be required to pay approximately $ _____, which is the reasonable value of the replacement necessitated by the damage. [*If property was not destroyed, add:* Plaintiff has expended $_____ for repair of _____ (*describe personal property*), which is a reasonable sum for such repair.]

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

4. For damage to personal property in the sum of $_____;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 98.50[1].*]

[2] Use of Form

This general form of complaint may be used to obtain damages for personal injuries and personal property damage caused to a pedestrian by a negligent bicyclist. With appropriate modification, this form can be used if the plaintiff was also a bicyclist and sustained injuries caused by another bicyclist.

Depending on the facts of the case, counsel may wish to delete paragraphs of the complaint that do not apply. For example, if no DOE defendants are involved, Paragraphs 2 and 3 would be omitted. If no property damage is involved, Paragraph 10 of the complaint and Paragraph 4 of the prayer would be omitted.

[3] Cross References

For a complaint for damages caused to a bicyclist, see *§ 98.50*

For an affirmative defense asserting the negligence of a plaintiff bicyclist, see *§ 98.53*

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9-99 California Forms of Pleading and Practice--Annotated 99.syn

§ 99.syn Synopsis to Chapter 99: BIRTH AND DEATH, ESTABLISHING THE FACT OF

§ 99.01 Scope of Chapter

§ 99.02 Cross References

§§ 99.03-99.09 [Reserved]

§ 99.10 Governing Law

§ 99.11 Delayed Application for Birth Certificate

[1] Procedures

[2] Use as Evidence

§ 99.12 Court Proceeding to Establish Birth

[1] In General

[2] Presumption

[3] Recording

§ 99.13 Revision of Birth Records to Reflect Change of Sex

§ 99.14 Court Proceeding to Establish Death

§§ 99.15-99.19 [Reserved]

§ 99.20 Related Matthew Bender Publications

§ 99.21 State Statutes

[1] In General

[2] Delayed Registration of Birth

[3] Delayed Registration of Death

[4] Revision of Birth Records to Reflect Change of Sex

[5] Official Records as Evidence

§ 99.22 Decisions

§§ 99.23-99.29 [Reserved]

§ 99.30 Application for Delayed Registration of Birth [Health & Safety Code § 102535]--Department of Health Form

[1] FORM

[2] Use of Form

[3] Application; Who May Apply

[4] Supporting Papers and Evidence

[5] Filing Fee

§ 99.31 Petition to Establish Fact of Birth [Health & Safety Code § 103450]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[a] In General

[b] Unknown Time or Place of Birth

[4] Setting Hearing

[5] Notice of Hearing

[6] Filing Fee

[7] Assignment to Probate Court

[8] Hearing and Court Order

[a] In General

[b] Unknown Time or Place of Birth

[c] State Form of Order

§ 99.32 Order Establishing Fact of Birth [Health & Safety Code § 103485]--Department of Health Form

[1] FORM

[2] Use of Form

§ 99.33 Petition to Establish Record of Death [Health & Safety Code § 103450]--Judicial Council Forms MC-360, MC-360A

[1] FORM

[2] Use of Form

[3] Verification

[4] Time of Hearing

[5] Notice of Hearing

[6] Filing Fee

[7] Order

[8] Filing With Local Registrar

§ 99.34 Order Establishing Fact of Death [Health & Safety Code § 103485]--Department of Health Form

[1] FORM

[2] Use of Form

§ 99.35 Petition for New Birth Certificate--Surgical Change of Sex [Health & Safety Code § 103425]

[1] FORM

[2] Use of Form

[3] Right to New Birth Certificate

[4] Jurisdiction and Venue

[5] Supporting Papers

[6] Hearing and Order

[7] Issuance of New Birth Certificate

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9-99 California Forms of Pleading and Practice--Annotated § 99.01

§ 99.01 Scope of Chapter

This chapter discusses the procedures for registering a birth or death that has not previously been registered, or for which a certificate of birth or death is not obtainable [*Health & Safety Code §§ 102525-103490*; *see § 99.10* et seq.]. It includes the following forms:

- Application for delayed registration of birth [*see § 99.30*].
- Petition to establish fact of birth [*see § 99.31*].
- Order establishing fact of birth [*see § 99.32*].
- Petition to establish record of death [*see § 99.33*].
- Order establishing fact of death [*see § 99.34*].
- Petition for new birth certificate--surgical change of sex [*see § 99.35*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCourt RecordsFamily LawPaternity & SurrogacyBirth CertificatesGeneral Overview

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9-99 California Forms of Pleading and Practice--Annotated § 99.02

§ 99.02 Cross References

For discussion of proceedings under *Prob. Code § 200 et seq.* to establish and report the fact of death when title to or an interest in real or personal property is affected by a person's death, see Ch. 441, *Probate: Disposition Without Administration* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral Overview

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[Reserved]

§§ 99.03[Reserved]

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9-99 California Forms of Pleading and Practice--Annotated § 99.10

§ 99.10 Governing Law

Applications for delayed registration of birth are governed by *Health & Safety Code §§ 102525-102610*.

Judicial proceedings to establish a record of birth or death are governed by *Health & Safety Code §§ 103450-103490*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCourt RecordsFamily LawPaternity & SurrogacyBirth CertificatesGeneral Overview

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9-99 California Forms of Pleading and Practice--Annotated § 99.11

§ 99.11 Delayed Application for Birth Certificate

[1] Procedures

An application may be filed with the State Registrar of Vital Statistics for delayed registration of the birth of any person born in California whose birth is not registered [*Health & Safety Code § 102535*]. The administrative procedure provided in *Health & Safety Code §§ 102525-102610* for delayed application for a birth certificate of a person born in California is not exclusive of the procedure provided in *Health & Safety Code §§ 102400-102520* for live birth registration or the procedure provided in *Health & Safety Code §§ 103450-103490* to establish a record of birth by a court proceeding; it merely offers an alternative method of establishing a record of birth [*Health & Safety Code § 102525*].

When the State Registrar receives an application for delayed registration of birth and the required fee, the Registrar must review the application, together with the affidavits and documentary evidence accompanying it, and must accept the application if it meets the statutory requirements. After acceptance by the Registrar, the application constitutes a delayed certificate of birth [*Health & Safety Code § 102600(a)*]. The Registrar is required to give priority in processing to any application for a child who has been adjudged a dependent child of, and who is subject to the jurisdiction of, the juvenile court under *Welf. & Inst. Code § 300* [*Health & Safety Code § 102600(b)*].

[2] Use as Evidence

Delayed certificates of birth issued pursuant to *Health & Safety Code §§ 102525-102610* are not considered as evidence in any action or proceeding involving estates of decedents or in any proceeding to establish heirship unless the affidavit [*see Health & Safety Code § 102575*] of at least one person who knew the facts was filed at the time of obtaining the certificate [*Health & Safety Code § 102530*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDocumentary EvidenceGeneral OverviewFamily LawPaternity & SurrogacyBirth CertificatesGeneral Overview

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9-99 California Forms of Pleading and Practice--Annotated § 99.12

§ 99.12 Court Proceeding to Establish Birth

[1] In General

Any beneficially interested person may petition the superior court for an order judicially establishing the fact, time, and place of a birth [*Health & Safety Code § 103450*]. The petition must be filed with the clerk of the superior court of the county in which the birth took place or in which the person whose birth is sought to be established resides [*Health & Safety Code § 103450*]. If the time and place of birth are not known, the petition should contain all of the facts known to the petitioner or otherwise available and a statement of the probable time and place of birth as accurately as the circumstances permit [*Health & Safety Code § 103460*]. If a petitioner files a petition to correct the original birth certificate to state the actual names of the petitioner's birth parents, rather than fictitious names used when the original certificate was prepared, a trial court has the authority to adjudicate the facts concerning a possible biological relationship [*Wynn v. Superior Court (2009) 176 Cal. App. 4th 346, 350, 98 Cal. Rptr. 3d 86*].

If a court determines a plaintiff' birth certificate is not accurate, the court is obligated to order the issuance of a new birth certificate [*Wynn v. Superior Court (2009) 176 Cal. App. 4th 346, 350, 98 Cal. Rptr. 3d 86*].

[2] Presumption

Every order determining the date of birth made pursuant to *Health & Safety Code §§ 103450-103490* establishes a presumption that the matter contained therein is a true and accurate statement of the time of birth. This presumption is a presumption affecting the burden of proof [*Health & Safety Code § 103485*].

[3] Recording

The State Registrar of Vital Statistics is required to send certified copies of the court order establishing the fact, time, and place of a birth to the local registrar and county recorder of the county in which the birth took place and in whose offices records for the year of the birth are on file [*Health & Safety Code § 103490*]. However, if the birth took place outside of California, a certified copy will be sent only to the county recorder of the county in which the petitioner resides [*Health & Safety Code § 103490*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawPaternity & SurrogacyBirth CertificatesGeneral OverviewGovernmentsCourtsClerks of Court

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9-99 California Forms of Pleading and Practice--Annotated § 99.13

§ 99.13 Revision of Birth Records to Reflect Change of Sex

Whenever a person born in California has undergone surgical treatment for the purpose of altering his or her sexual characteristics to those of the opposite sex, a new birth certificate may be prepared for that person reflecting the change of sex and any change of name accomplished by an order of a court of this state, another state, the District of Columbia, or any territory of the United States [*Health & Safety Code § 103425*]. Out-of-state residency does not bar a change of gender on a California birth certificate [*Somers v. Superior Court (2009) 172 Cal. App. 4th 1407, 1414, 92 Cal. Rptr. 3d 116* (*Health & Safety Code § 103425* requirement that petition be filed in the county of residence violated *Equal Protection clause* and Priviledges and Immunities clause and trial court has jurisdiction to order issuance of new California birth certificate)]. In these circumstances, a petition for the issuance of a new birth certificate may be filed in the superior court of the county in which the petitioner resides [*Health & Safety Code § 103425*; *see § 99.35[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawPaternity & SurrogacyBirth CertificatesGeneral Overview

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9-99 California Forms of Pleading and Practice--Annotated § 99.14

§ 99.14 Court Proceeding to Establish Death

Any beneficially interested person may petition the superior court for an order judicially establishing the fact, time, and place of a death [*Health & Safety Code § 103450(a)*]. The petition must be filed with the clerk of the superior court of the county in which the death took place or in which the decedent was domiciled at the time of death [*Health & Safety Code § 103450(a)*].

In the event of a mass fatalities incident, a verified petition may be filed by a coroner, medical examiner, or any beneficially interested person with the superior court for the county in which the death is alleged to have occurred or in which the person was domiciled at the date of death, for an order to establish judicially the fact, time, and place of death [*Health & Safety Code § 103450(b)*]. In the event of such an incident, a single verified petition with respect to all persons who died may be filed by a coroner or medical examiner with the superior court for the county in which the incident occurred to establish the fact, time, and place of each person's death [*Health & Safety Code § 103450(c)*]. A "mass fatalities incident" is a situation in which there are more dead bodies than can be handled using local resources, numerous persons are known to have died but no bodies were recovered from the site of the incident, or numerous persons are known to have died but the recovery and identification of the bodies of those persons is impracticable or impossible [*Health & Safety Code § 103451(a)*]. The county coroner or medical examiner may make the determination that one or more of these conditions exists [Health & Safety Code § 130451(b)].

On the filing of a petition for a determination of the fact of death in the event of a mass fatalities incident, the clerk must set a hearing within 15 days from the date the petition is filed [*Health & Safety Code § 103466*]. The petitioner must make a reasonable effort to provide notice of the hearing to the deceased's known heirs up to the second degree of relationship [*Health & Safety Code § 103466*]. Failure to provide this notice will not invalidate the judicial proceedings regarding the determination of the fact of death [*Health & Safety Code § 103466*].

The State Registrar must send a certified copy of the court ordered death certificate to the local registrar and the county recorder within the area where the event occurred [*Health & Safety Code § 103490(a)*]. In the event of a mass fatalities incident, the State Registrar must send a certified copy of the court ordered death certificate to the local registrar and the county recorder of the county in which the incident occurred and to the decedent's spouse or next of kin [*Health & Safety Code § 103490(b)*].

If title to or an interest in real or personal property is affected by the death of a person, the appropriate proceeding to establish the fact of death is provided by *Prob. Code §§ 200-215* [for forms, *see* Ch. 441, *Probate: Disposition Without Administration*]. Under those sections, specified documents establishing the fact of death may be recorded in the county in which the real property is located [*see Prob. Code § 210*]. In contrast, a proceeding under *Health & Safety Code §§ 103450-103490* is used to obtain a registration of a death when registration is not otherwise obtainable, as when there is no body for examination and issuance of a death certificate [*see Health & Safety Code § 103450*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral Overview

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[Reserved]

§§ 99.15[Reserved]

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9-99 California Forms of Pleading and Practice--Annotated § 99.20

§ 99.20 Related Matthew Bender Publications

California Legal Forms, Ch. 101, *Vital Records* (Matthew Bender)

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9-99 California Forms of Pleading and Practice--Annotated § 99.21

§ 99.21 State Statutes

[1] In General

Use of affidavit to verify pleading or paper in special proceeding. *Code Civ. Proc. § 2009*

State Director of Health Services as State Registrar of Vital Statistics. *Health & Safety Code § 102175*

Authority of State Registrar of Vital Statistics to destroy original birth and death records and permanently preserve and store copies on microfilm or optical disk, or by other technique that does not permit additions, deletions, or changes. *Health & Safety Code § 102235*

Certified photographic reproduction of any record stored on authorized permanent storage medium is deemed certification of original record. *Health & Safety Code § 102240*

[2] Delayed Registration of Birth

Right to apply to State Registrar of Vital Statistics for delayed registration of birth of person born in California whose birth is not registered. *Health & Safety Code § 102535*

Application for delayed registration of birth to be made on forms furnished by State Registrar of Vital Statistics and accompanied by affidavits and documentary evidence. *Health & Safety Code § 102550*

"Affidavit" defined for purposes of application for delayed registration of birth. *Health & Safety Code § 10275*

"Documentary evidence" defined for purposes of application for delayed registration of birth. *Health & Safety Code § 102580*

Documentary evidence required for delayed registration of birth. *Health & Safety Code § 102585*

Application as delayed certificate of birth upon acceptance by State Registrar of Vital Statistics. *Health & Safety Code § 102600*

Duty of State Registrar of Vital Statistics to send certified copy of delayed certificate of birth to applicant. *Health & Safety Code § 102605*

Duty of State Registrar of Vital Statistics to send certified copies of delayed certificate of birth to local registrar and county recorder. *Health & Safety Code § 102610*

[3] Delayed Registration of Death

Right of any beneficially interested person to petition superior court for order judicially establishing fact, time, and place of unregistered death. *Health & Safety Code § 103450*

"Mass fatalities incident" defined for purposes of filing petition for order judicially establishing fact, time, and place of unregistered death in event of such an incident. *Health & Safety Code § 103451*

Petition must be verified and contain all facts necessary to enable court to determine fact of death. *Health & Safety Code § 103455*

If time and place of birth are not known, petition must contain all facts known to petition and statement of probable time and place of birth. *Health & Safety Code § 103460*

Time of hearing petition. *Health & Safety Code § 103465*

Time of hearing petition for determination of fact of death in mass fatalities incident. *Health & Safety Code § 103466*

Filing fee and assignment to probate department for hearing. *Health & Safety Code § 103470*

Order when time and place of birth are known. *Health & Safety Code § 103475*

Order when time and place of birth are not known. *Health & Safety Code § 103480*

Order required to be made on form furnished by State Registrar of Vital Statistics. *Health & Safety Code § 103485*

Duty of State Registrar of Vital Statistics to send certified copies of court order to local registrar and county recorder. *Health & Safety Code § 103490*

Court proceedings to establish fact of death when title to or interest in real property is affected by person's death. *Prob. Code §§ 200-215*

[4] Revision of Birth Records to Reflect Change of Sex

Petition for new birth certificate reflecting change of gender and any change of name when person born in California has undergone surgical treatment to alter his or her sexual characteristics to those of opposite sex. *Health & Safety Code § 103425*

Petition, hearing, order, and new birth certificate. *Health & Safety Code § 103430*

Optional petition for change of name and issuance of new birth certificate reflecting change of gender. *Health & Safety Code § 103435*

New birth certificate supplants any previous birth certificate. *Health & Safety Code § 103440*

Duty of State Registrar of Vital Statistics to transmit certified copy of new birth certificate to registrant. *Health & Safety Code § 103445*

[5] Official Records as Evidence

Purported copy of writing in custody of public entity is prima facie evidence of existence and content of writing under specified circumstances. *Evid. Code § 1530(a)*

Certification requirements for writings in custody of public entities outside United States. *Evid. Code § 1530(a)(3)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEvidenceDocumentary EvidenceGeneral OverviewFamily LawPaternity & SurrogacyBirth CertificatesGeneral OverviewFamily LawName ChangesGeneral Overview

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9-99 California Forms of Pleading and Practice--Annotated § 99.22

§ 99.22 Decisions

When plaintiff filed petition seeking order to correct original birth certificate so it would state actual names of birth parents, rather than fictitious names that mother used when original certificate was prepared, a trial court had authority to adjudicate the facts concerning a possible biological relationship, and is obligated to order issuance of new birth certificate if court determines that original birth certificate is inaccurate. *Wynn v. Superior Court (2009) 176 Cal. App. 4th 346, 350, 98 Cal. Rptr. 3d 86* .

Health & Safety Code § 103425 requirement that petition for change of gender on a California birth certificate by an out-of-state residence be filed in county of residence violated *Equal Protection clause* and Privileges and Immunities clause, and trial court had jurisdiction to order issuance of new California birth certificate. *Somers v. Superior Court (2009) 172 Cal. App. 4th 1407, 1414, 92 Cal. Rptr. 3d 116* .

Record of birth properly certified and recorded is prima facie evidence in all courts and places of facts therein stated. *Casares-Moreno v. United States (9th Cir. 1955) 226 F.2d 873, 874*

Requirements of full faith and credit satisfied by admitting, into federal court, evidence of decree of state court establishing birth; such evidence given prima facie weight. *Casares-Moreno v. United States (9th Cir. 1955) 226 F.2d 873, 874* ; *Mah Toi v. Brownell (9th Cir. 1955) 219 F.2d 642, 644*

Decree of state court establishing birth is prima facie evidence of birthplace but not conclusive proof of citizenship, and requires full faith and credit in federal courts to that extent. *Casares-Moreno v. United States (9th Cir. 1955) 226 F.2d 873, 874* ; *Mah Toi v. Brownell (9th Cir. 1955) 219 F.2d 642, 644*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawRelations Among GovernmentsFull Faith & CreditFamily LawPaternity & SurrogacyBirth CertificatesGeneral Overview

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[Reserved]

§§ 99.23[Reserved]

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§ 99.30 Application for Delayed Registration of Birth [Health & Safety Code § 102535]--Department of Health Form

[1] FORM Application for Delayed Registration of Birth [Health & Safety Code § 102535]--Department of Health Form

Click here to view image.

[2] Use of Form

The form in [1], *above*, is the official application form prescribed by the State Registrar of Vital Statistics for an application for delayed registration of birth [*see Health & Safety Code § 102550*]. The application may be filed with the State Registrar for delayed registration of the birth of any person born in California whose birth is not registered [*Health & Safety Code § 102535*]. If the person was born outside California, a court proceeding to establish a record of birth is required [*see § 99.31*]. The official instructions printed on the reverse side of the application form should be read carefully before the application is completed.

A copy of this form may be obtained from the county health department or from the State Registrar at the following address:

State of California
Department of Health Services
Office of the State Registrar of Vital Statistics
304 S Street
Sacramento, CA 95814

[3] Application; Who May Apply

An application may be filed with the State Registrar of Vital Statistics for delayed registration of the birth of any person born in California whose birth is not registered. If the person whose name is being registered is 18 years of age or older

at the time of the application, he or she is the only person who may make the application. If the person whose birth is being registered is under 18 years of age at the time of filing the application, the application may be made only by his or her mother, father, legal guardian, or the attending physician or principal attendant at birth [*Health & Safety Code § 102535*].

[4] Supporting Papers and Evidence

The application must be supported by documentary evidence, affidavits, or declarations under penalty of perjury [*Health & Safety Code § 102550*; *see Code Civ. Proc. § 2015.5*) (declaration under penalty of perjury in lieu of affidavit)]. At least one of the following must be presented [*Health & Safety Code § 102585*]:

- Two pieces of documentary evidence, at least one of which supports the parentage.

- One piece of documentary evidence and an affidavit or declaration executed by the physician or other principal attendant.

- One piece of documentary evidence and two affidavits or declarations executed by the mother, the father, or another person having knowledge of the facts of birth.

"Documentary evidence," as used in *Health & Safety Code §§ 102525-102610*, is defined as original or certified copies of a record that was executed at least five years before the date of application, which substantiates the date and place of birth of the person whose birth is being registered [*Health & Safety Code § 102580*]. However, if the person whose birth is being registered is under 12 years of age, the record must have been executed only two years or more before the date of application [*Health & Safety Code § 102580*]. Examples of documentary evidence that are generally considered acceptable are hospital records of birth, baptismal certificates or other church records, school records, census records, social security records, military service records, voting registration records, birth certificates of the child of the person whose birth is being registered, certificates of registry of marriage, and newspaper notices of birth [*Health & Safety Code § 102580*].

"Affidavit," as used in *Health & Safety Code §§ 102525-102610*, is defined as a written statement executed under oath by a person who was at least five years old at the time of birth and had knowledge of the facts of birth [*Health & Safety Code § 102575*]. It must include the full name of the person whose birth is being registered, the names of his or her parents, the date and place of his or her birth, and the basis of the affiant's knowledge of these facts [*Health & Safety Code § 102575*].

[5] Filing Fee

The filing fee for the application may be adjusted annually [*see Health & Safety Code § 100430*].

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Chapter 99 BIRTH AND DEATH, ESTABLISHING THE FACT OF
PART IV. FORMS

9-99 California Forms of Pleading and Practice--Annotated § 99.31

§ 99.31 Petition to Establish Fact of Birth [Health & Safety Code § 103450]

[1] FORM Petition to Establish Fact of Birth [Health & Safety Code § 103450]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In re the Birth of _____ [*name*].	)	NO. _____
	)	PETITION TO ESTABLISH FACT OF BIRTH
	)	

_____

Petitioner, _____ [*name*], respectfully represents:

1. _____ [*Allege facts showing petitioner is beneficially interested person, e.g.*, Petitioner seeks to establish the record of his/her own birth *or* Petitioner is the father of _____ (*name*) and is beneficially interested in establishing the record of the birth of _____ (*name*).]

2. [Petitioner is informed and believed and thereon alleges that] [O]n _____ [*date*], at _____[*time*], in _____ [*city*], _____ County, _____ [*state*], _____ [petitioner *or* _____(*name*)] was born to _____ [*name*], father, and _____ [*name*], mother. This allegation is based on _____ [*set forth facts, if any, within personal knowledge of petitioner and refer to supporting affidavits, declarations, and documentary evidence, e.g.*, the fact that petitioner was in attendance at the birth and if called as a witness would be competent to testify as to all matters relevant thereto, and is also based on the supporting declaration of _____ (*name*), the attending physician, and the hospital birth record of the event, both of which will be presented at the hearing on this matter].

3. The birth of _____ [petitioner *or* _____(*name*)] was _____ [not

registered because _____ (*state reason*) *or* was registered but the record was thereafter _____ (lost *or* destroyed)].

[4. _____ (Petitioner *or* _____(*name of person whose birth is to be established*) is a resident of _____ County, California.]

WHEREFORE, petitioner prays for an order of this court establishing the fact of and the time and place of the birth of _____ [*name*], and for such other and further relief as the court may deem proper.
Dated: _____.

_____ [*signature*]

[*typed name*]

Petitioner

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a petition for a judicial order establishing the fact, time, and place of a birth that is not registered or for which a certified copy of a birth certificate is not available [*see Health & Safety Code § 103450(a)*]. Any beneficially interested person may file the petition in the superior court of the county in which the birth occurred or in which the person whose birth is sought to be established is domiciled [*Health & Safety Code § 103450(a)*].

[3] Contents of Petition

[a] In General

The petition must be verified and must contain all the facts necessary to enable the court to determine the fact of and the time and place of the birth on the proofs adduced at the hearing [*Health & Safety Code § 103455*].

[b] Unknown Time or Place of Birth

If the time and place of birth are not known, the petition must contain all the facts known to the petitioner or otherwise available and a statement of the probable time and place of birth as accurately as the circumstances permit, and the petition in such a case will be verified only as to the known facts [*Health & Safety Code § 103460*].

[4] Setting Hearing

When the petition is filed, hearing is set by the clerk and at the convenience of the court at a time not less than five nor more than 10 days after the filing of the petition. The hearing may be continued beyond the 10-day period by the court for good cause [*Health & Safety Code § 103465*].

[5] Notice of Hearing

The statutes do not prescribe notice requirements for the hearing on the petition [*see Health & Safety Code §§ 103450-103490*]. Local rules of court should be consulted.

[6] Filing Fee

The fee for filing the petition is $205 [*Health & Safety Code § 103470*]. In addition, an $11.00 fee is payable to the State Registrar [*Health & Safety Code § 103695*].

[7] Assignment to Probate Court

In counties having more than one superior court judge, the petition may be heard by any judge of the superior court hearing probate matters, or if a probate department has been designated for hearing probate matters, the clerk assigns the matter to the probate department for hearing [*Health & Safety Code § 103470*].

[8] Hearing and Court Order

[a] In General

The hearing may be held in chambers [*Health & Safety Code § 103465*]. If the allegations of the petition are established to the satisfaction of the court, the court may make an order determining that the birth did in fact occur at the time and place shown by the proofs adduced at the hearing [*Health & Safety Code § 103475*]. In uncontested proceedings, an affidavit (or declaration under penalty of perjury may be used to establish a record of birth [*Code Civ. Proc. § 2009*; *see Code Civ. Proc. § 2015.5*].

[b] Unknown Time or Place of Birth

If the time and place of birth are not known, the court must receive and consider whatever evidence and testimony may be available, and, from the facts adduced, may, by order, fix the time and place which the court finds to be a probable time and place of birth of the person in relation to whom the petition was filed. The time and place so fixed thereafter is the time and place of birth of the person for all purposes [*Health & Safety Code § 103480*].

[c] State Form of Order

The order must be made in the form and on the blank prescribed and furnished by the State Registrar [*see § 99.32*], and will become effective on the filing of a certified copy with the State Registrar [*Health & Safety Code § 103485*].

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9-99 California Forms of Pleading and Practice--Annotated § 99.32

§ 99.32 Order Establishing Fact of Birth [Health & Safety Code § 103485]--Department of Health Form

[1] FORM Order Establishing Fact of Birth [Health & Safety Code § 103485]--Department of Health Form

Click here to view image.

[2] Use of Form

The form in [1], *above*, is Department of Health Services Form VS-108, the official form of court order establishing the fact of birth, prescribed by the State Registrar of Vital Statistics pursuant to *Health & Safety Code § 103485*. It must be used in court proceedings to judicially establish the fact, time, and place of a birth that is not registered [*see Health & Safety Code §§ 103450-103490*; *see also § 93.31[2]*]. It becomes effective on the filing of a certified copy with the State Registrar [*Health & Safety Code § 103485*].

This form is included for illustrative purposes only. Only an original printed copy of the form should be used. Original copies may be obtained from the Department of Health Services, Office of Vital Statistics, local county recorders' offices, or local county health department offices. Requests for this form may be transmitted to the Department by online e-mail request [*see* OVRform@dhs.ca.gov], or by telephone at (916) 445-2684. The form will be accompanied by specific instructions to be used in completing the form. These instructions must be adhered to exactly or the record will not be accepted for filing with the Office of Vital Statistics.

The Court Order Delayed Registration of Birth attached to the order should be completed before the order is presented to the judge for signature.

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9-99 California Forms of Pleading and Practice--Annotated § 99.33

§ 99.33 Petition to Establish Record of Death [Health & Safety Code § 103450]--Judicial Council Forms MC-360, MC-360A

[1] FORM Petition to Establish Record of Death [Health & Safety Code § 103450]--Judicial Council Forms MC-360, MC-360A

Click here to view image.

[2] Use of Form

The forms in [1], *above*, are filled-in illustrative versions of the optional Judicial Council forms titled Petition to Establish Record of Death [Cal. Judicial Form MC-360] and Declaration in Support of Petition to Establish Record of Death [Cal. Judicial Form MC-360-A]. They may be used to request a judicial order establishing the fact, time, and place of a death that is not registered or for which a certified copy of a death certificate is not available [*see Health & Safety Code § 103450(a)*]. Any beneficially interested person may file the petition in the superior court of the county in which the death occurred or in which the decedent was domiciled at the date of death [*Health & Safety Code § 103450(a)*].

Although the Judicial Council has approved these forms for optional use [*see Cal. Rules of Ct., Rule 1.35*], local practice frequently requires use of Judicial Council forms. These form are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

There are various reasons why a death may not be registered. For example, there may be no registration when the body of the deceased person is not available for examination and issuance of a death certificate. In these cases a petition under *Health & Safety Code § 103450* is required.

In the event of a mass fatalities incident, the petition may be filed by a coroner, medical examiner, or any beneficially interested person with the superior court for the county in which the death is alleged to have occurred or in which the person was domiciled at the date of death, for an order to establish judicially the fact, time, and place of death [*Health*

& Safety Code § 103450(b)]. In the event of such an incident, a single verified petition with respect to all persons who died may be filed by a coroner or medical examiner with the superior court for the county in which the incident occurred to establish the fact, time, and place of each person's death [*Health & Safety Code § 103450(c)*]. A "mass fatalities incident" is a situation in which there are more dead bodies than can be handled using local resources, numerous persons are known to have died but no bodies were recovered from the site of the incident, or numerous persons are known to have died but the recovery and identification of the bodies of those persons is impracticable or impossible [*Health & Safety Code § 103451(a)*]. The county coroner or medical examiner may make the determination that one or more of these conditions exists [Health & Safety Code § 130451(b)].

[3] Verification

The petition must be verified and contain all the facts necessary to enable the court to determine the fact of the time and the place of death on proof adduced in behalf of the petitioner at the hearing [*Health & Safety Code § 103455*].

[4] Time of Hearing

On the filing of the petition, a hearing is fixed by the clerk and, at the convenience of the court, is set at a time not less than five nor more than 10 days after the filing of the petition. The hearing may be held in chambers. The court, for good cause, may continue the hearing beyond the 10-day period [*Health & Safety Code § 103465*].

On the filing of a petition for a determination of the fact of death in the event of a mass fatalities incident, the clerk must set a hearing within 15 days from the date the petition is filed [*Health & Safety Code § 103466*].

[5] Notice of Hearing

The statutes do not prescribe the notice to be given on the hearing of the petition, except in the case of a petition to determine the fact of death in the event of a mass fatalities incident [*see Health & Safety Code §§ 103450-103490*]. Local rules of court should be consulted. In the case of a mass fatalities incident, the petitioner must make a reasonable effort to provide notice of the hearing to the deceased's known heirs up to the second degree of relationship [*Health & Safety Code § 103466*]. Failure to provide this notice will not invalidate the judicial proceedings regarding the determination of the fact of death [*Health & Safety Code § 103466*].

[6] Filing Fee

The fee for filing the petition is $205 [*Health & Safety Code § 103470*]. In addition, an $11.00 fee is payable to the State Registrar [*Health & Safety Code § 103695*].

[7] Order

If, at the hearing, the allegations of the petition are established to the satisfaction of the court, the court may make an order determining that the death did in fact occur at the time and place shown by the proof adduced at the hearing [*Health & Safety Code § 103485*]. The order must be made in the form and on the blank prescribed and furnished by the State Registrar [*see § 99.34*], and becomes effective on a filing of a certified copy with the State Registrar [*Health & Safety Code § 103485*].

[8] Filing With Local Registrar

The State Registrar is required to send certified copies of the court-ordered delayed certificate to the local registrar and to the county recorder in the area in which the death occurred and in whose offices copies of the records for the year in which the death occurred are on file [*Health & Safety Code § 103490(a)*]. However, if the death occurred outside California, a certified copy of the order must be sent only to the county recorder of the county in which the decedent

resided [*Health & Safety Code § 103490(a)*].

In the event of a mass fatalities incident, the State Registrar must send a certified copy of the court ordered death certificate to the local registrar and the county recorder of the county in which the incident occurred and to the decedent's spouse or next of kin [*Health & Safety Code § 103490(b)*].

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9-99 California Forms of Pleading and Practice--Annotated § 99.34

§ 99.34 Order Establishing Fact of Death [Health & Safety Code § 103485]--Department of Health Form

[1] FORM Order Establishing Fact of Death [Health & Safety Code § 103485]--Department of Health Form

Click here to view image.

[2] Use of Form

The form in [1], *above*, is Department of Health Services Form VS-109, the official form for court order establishing the fact of death prescribed by the State Registrar of Vital Statistics pursuant to *Health & Safety Code § 103485*. It must be used in court proceedings to judicially establish the fact, time, and place of a death that is not registered [*see Health & Safety Code §§ 103450-103490*; *see also § 93.33[2]*]. It becomes effective on the filing of a certified copy with the State Registrar [*Health & Safety Code § 103485*].

This form is included for illustrative purposes only. Only an original printed copy of the form should be used. Original copies may be obtained from the Department of Health Services, Office of Vital Statistics, local county recorders' offices, or local county health department offices. Requests for this form may be transmitted to the Department by online e-mail request [*see* OVRform@dhs.ca.gov], or by telephone at (916) 445-2684. The form will be accompanied by specific instructions to be used in completing the form. These instructions must be adhered to exactly or the record will not be accepted for filing with the Office of Vital Statistics.

The Court Order Delayed Registration of Birth attached to the order should be completed before the order is presented to the judge for signature.

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9-99 California Forms of Pleading and Practice--Annotated § 99.35

§ 99.35 Petition for New Birth Certificate--Surgical Change of Sex [Health & Safety Code § 103425]

[1] FORM Petition for New Birth Certificate--Surgical Change of Sex [Health & Safety Code § 103425]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
In re the Birth of _____ [*name*].	)	PETITION TO ESTABLISH FACT OF BIRTH
	)	

_____

Petitioner, _____ [*name*], respectfully represents:

1. Petitioner was born in this state on _____ [*date*]. The birth was recorded in state records showing petitioner's name as _____ [*name*] and sex as _____ [male *or* female].

2. Petitioner has undergone surgical treatment for the purpose of altering petitioner's sexual characteristics to those of a _____ [male *or* female].

3. Pursuant to an order duly made and entered in the Superior Court of California for the County of _____, petitioner's name has been changed to _____ [*name*]. A certified copy of this order is marked Exhibit _____, attached hereto, and made a part hereof.

4. Petitioner now resides in _____ County, California.

WHEREFORE, petitioner prays that the court order issuance of a new birth certificate reflecting the change of petitioner's sex and the change of petitioner's name for filing in state records in lieu of petitioner's original birth record.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

[*Verification, if desired. See § 99.31*.]

[2] Use of Form

The form in [1], *above*, is a petition for a new birth certificate reflecting a change of gender and any change of named accomplished pursuant to a previous court order. For discussion and a form for a petition seeking a change of name on account of a sex-change operation, see Ch. 377, *Name, Change of , §§ 377.24, 377.70*.

[3] Right to New Birth Certificate

If a person born in California has undergone surgical treatment for the purpose of altering his or her sexual characteristics to those of the opposite sex, a new birth certificate may be prepared for that person reflecting the change of sex and any change of name accomplished by an order of a court of California, another state, the District of Columbia, or any territory of the United States [*Health & Safety Code § 103425*]. Out-of-state residency does not bar a change of gender on a California birth certificate [*Somers v. Superior Court (2009) 172 Cal. App. 4th 1407, 1414, 92 Cal. Rptr. 3d 116* (*Health & Safety Code § 103425* requirement that petition be filed in county of residence violated *Equal Protection clause* and Privileges and Immunities clause, and trial court had jurisdiction to order issuance of new California birth certificate)].

[4] Jurisdiction and Venue

The petition is filed in the superior court in the county in which the petitioner resides [*Health & Safety Code § 103425*]. The petition is not required to be verified.

[5] Supporting Papers

The petition must be accompanied by the affidavit (or declaration under penalty of perjury) of a physician documenting the sex change and, if applicable, a certified copy of the court order changing the petitioner's name [*Health & Safety Code § 103430(a)*; *see Code Civ. Proc. § 2015.5* (use of declaration under penalty of perjury in lieu of affidavit)].

[6] Hearing and Order

The petition will be heard at the time appointed by the court, and objections may be filed by any person who can show to the court good reason against changing the petitioner's birth record [Health & Safety Code § 10340(b)]. At the hearing, the court may examine the petitioner and any other person having knowledge of the facts relevant to the petition [*Health & Safety Code § 103430(b)*]. At the conclusion of the hearing, the court is required to make an order for issuance of a new birth certificate, or to dismiss the petition [*Health & Safety Code § 103430(b)*].

[7] Issuance of New Birth Certificate

A certified copy of the court order ordering the new birth certificate must be filed with the State Registrar within 30 days from the date of the order [*Health & Safety Code § 103430(c)*]. The order must be accompanied by a copy of Department of Health Services Form VS-24(S), Affidavit to Amend a Record, together with a fee of $20. Copies of

Form VS-24(S) may be obtained from the Department of Health Services, Office of Vital Statistics, local county recorders' offices, or local county health department offices. Requests for this form may be transmitted by letter to the address listed below, online e-mail request [*see* OVRform@dhs.ca.gov], or by telephone at (916) 445-2684. The form will be accompanied by specific instructions to be used in completing the form. These instructions must be adhered to exactly or the record will not be accepted for filing with the Office of Vital Statistics.

The documents and fee must be mailed to the Office of Vital Records, Attention: Amended Records, MS5103, P.O. Box 997410, Sacramento, CA 95899-7410. Upon receipt of these documents and the required fee, the Registrar will establish a new birth certificate for the applicant [*Health & Safety Code § 103430(c)*; *see Health & Safety Code § 103725 (fee)*]. Because of administrative backlog, there may be a considerable delay (approximately 10 months as of 2004, according to the Department) before the certificate is actually issued.

The new birth certificate must indicate the change of sex of the registrant as it has been surgically altered, and must reflect any change of name specified in the application and the court order [*Health & Safety Code § 103430(d)*]. Neither the form of the new birth certificate nor any reference in it may indicate in any way that it is not the original birth certificate of the registrant [*Health & Safety Code § 103430(d)*].

The new birth certificate supplants any previous birth certificate for the petitioner and is the only birth record for the petitioner that is open to public inspection [*Health & Safety Code § 103440*]. The application and the physician's supporting affidavit (or declaration under penalty of perjury) must be filed with the original record of birth, and that record must remain as a part of the records of the State Registrar [*Health & Safety Code § 103440*]. All records other than the newly issued birth certificate may be available only on written request of the registrant or an order of a court of record [*Health & Safety Code § 103440*].

The State Registrar is required to transmit copies of the newly established birth certificate for filing to the local registrar and county recorder whose records contain copies of the original certificate [*Health & Safety Code § 103440*]. The local registrar and county recorder is required to forward copies of the original certificate to the State Registrar for filing with the original certificate, if it is practical to do so. If it is impractical to do so, the local registrar and county recorder is required to seal a cover over the copy of the original certificate in a manner that will not deface or destroy the copy, and to forward a certified statement of his or her action to the State Registrar. Thereafter, the information contained in the record must be available only on written request of the registrant or an order of a court of record [*Health & Safety Code § 103440*].

The State Registrar is required to send a copy of the new birth certificate to the petitioner without additional charge [*Health & Safety Code § 103445*]. There is a $15 fee for additional copies.

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§ 100.11 Boat Defined

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[3] Application of Admiralty Law

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[b] Coast Guard Standards

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[b] Liability for Repairs

[4] Contract to Repair Boat

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[6] Contract to Furnish Supplies or Equipment for Boat

[7] No Per Se Exception for Agency Contracts

§ 100.15 Actions in Rem Against Vessel

§ 100.16 Limitation of Liability

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§ 100.18 Removal of State Court Action

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[1] Generally

[2] Effect of Navigation Rules

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§ 100.28 Duty to Assist Victims of Boating Accident

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§ 100.29 Duty to Report Boating Accident

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[ii] Determination of Liability

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[11] Vessels Owned by Governments

[a] Federal

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§ 100.47 Law Reviews

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[1] FORM

[2] Use of Form

[3] Duty of Care

[a] Nautical Rules of the Road

[b] Imminent Peril

[4] Operation of Boat Towing Water-Skier

[5] Res Ipsa Loquitur

[6] Allegations

[a] Identity and Capacity of Defendant (Paragraph 1)

[b] Venue Facts (Paragraph 2)

[c] Unknown Defendants (Paragraph 3)

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[e] Elements of Cause of Action (Paragraphs 4-8)

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[7] Specification of Damages

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[9] Defenses

[a] Assumption of Risk

[b] Negligence

[10] Cross References

§ 100.61 Allegation--Defendant as Owner or Lessee of Shore Property and as Concessionaire

[1] FORM

[2] Use of Form

[3] Liability of Concessionaire

[4] Cross References

§ 100.62 Allegation--Breach of Duty by Concessionaire on Shore Property

[1] FORM

[2] Use of Form

[3] Cross References

§ 100.63 Allegation--Defendants as Owner of Boat Causing Injury and as Operator With Owner's Consent

[1] FORM

[2] Use of Form

[3] Liability of Boat Owner Based on Imputed Negligence

[4] Owner and Vessel Defined

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[7] Limitation on Liability of Owner

[8] Owners' Right to Subrogation

[9] Bailee of Owner Deemed to Be Operator

[10] Settlement and Extinguishment of Liability

[11] Conditional Seller and Buyer

[12] Chattel Mortgagee of Vessel

[13] Death of Plaintiff or Defendant

[14] Numbered Vessels

[15] Limited Application of Harb. & Nav. Code § 661

[16] Cross References

§ 100.64 Complaint for Property Damage [Civ. Code § 3333] Based on Negligence [Civ. Code § 1714]--Collision Between Two Boats on Nonnavigable Water

[1] FORM

[2] Use of Form

[3] Rules of Navigation on Nonnavigable Waters

[4] Collision on Nonnavigable Waters

[5] Cross References

§ 100.65 Complaint for Property Damage [Civ. Code § 3333] Based on Negligence [Civ. Code § 1714]--Collision Between Boat and Stationary Object

[1] FORM

[2] Use of Form

[3] Cross References

§ 100.66 Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--By Purchaser-User of Boat Against Multiple Defendants (Manufacturer, Supplier of Associated Equipment, and Retailer)

[1] FORM

[2] Use of Form

[3] Restrictions on Manufacture and Sale

[4] Record of Compliance With Federal Requirements

[5] Manufacturer's Duty to Give Notice of Defects

[6] Effect of Compliance With Federal Requirements

[7] Cross References

§ 100.67 Complaint for Damages [Civ. Code § 3333] for Wrongful Death [Code Civ. Proc. § 377.60]--By Personal Representative of Estate of Decedent on Behalf of Entitled Persons--Negligent Maintenance of Boat and Equipment

[1] FORM

[2] Use of Form

[3] Liability of Boat Owner

[4] Cross References

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[1] FORM

[2] Use of Form

[3] Action Between Owners

[a] Generally

[b] Declaratory Relief

[c] Matters Other Than Use and Repair

[4] Cross References

§ 100.69 Complaint for Damages [Civ. Code § 3300] Based on Breach of Contract--Contract to Build Boat

[1] FORM

[2] Use of Form

[3] Actions Involving Installment or Automotive Sales or Consumer Obligations

[4] Cross Reference

§ 100.70 Allegation--Contract to Repair Boat

[1] FORM

[2] Use of Form

[3] Cross References

§ 100.71 Allegation--Contract to Store Boat

[1] FORM

[2] Use of Form

[3] Cross References

§ 100.72 Allegation--Contract to Rent Boat

[1] FORM

[2] Use of Form

[3] Cross References

§ 100.73 Allegation--Contract to Furnish Supplies or Equipment for Boat

[1] FORM

[2] Use of Form

[3] Cross References

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§ 100.01 Scope of Chapter

This chapter discusses actions for damages based on tort and breach of contract in cases involving the owner or operator of a boat [*see § 100.11, below*] that is owned and operated for recreation. It also discusses an action between coowners of a recreational boat to settle a controversy arising from their coownership [*see § 100.26, below*]. Substantive admiralty law is only discussed where it provides for different rights than the law of California because in certain cases the California courts will be bound to apply admiralty law rather than state law in determining substantive rights.

This chapter contains the following forms:

- A complaint for personal injury to a water skier resulting from a collision with a boat in nonnavigable water [*see § 100.60*], and additional allegations that may be used in that complaint [*see §§ 100.61 -100.63*].

- A complaint for property damage resulting from a collision between two boats in nonnavigable water [*see § 100.64*].

- A complaint for property damage resulting from a collision between a boat and a stationary object, such as a pier [*see § 100.65*].

- A complaint for personal injury and property damage suffered by a purchaser-user of a defective boat based on strict liability of the manufacturer and/or retailer [*see § 100.66*].

- A complaint for wrongful death of a guest passenger resulting from negligent maintenance of a boat and its equipment [*see § 100.67*].

- A complaint for declaratory relief to resolve a controversy between coowners as to use or repair of a boat [*see § 100.68*].

- Complaints for breach of a contract to build, repair, store, rent, or furnish supplies or equipment for a

boat [*see §§ 100.69 -100.73*].

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§ 100.02 Cross References

For discussion and forms relating to actions based on torts and breach of contract in the commercial shipping industry and involving maritime trade, see Ch. 522, *Ships and Shipping* .

For an extended discussion of admiralty law, see the multivolume treatise Benedict on Admiralty (7th ed. Matthew Bender), which also contains forms and commentary on the federal admiralty rules; see also the one volume hornbook, Gilmore and Black, The Law of Admiralty (1957).

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawMaritime ContractsGeneral Overview

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[Reserved]

§§ 100.03[Reserved]

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§ 100.10 Governing Law

Divisions 1-3 of the Harbors and Navigation Code govern cases involving recreational boats and boating to the extent that state law is applicable (that is, where admiralty law is not paramount).

Cases within admiralty jurisdiction are governed by admiralty and maritime law, which is contained mostly in opinions of the federal courts. Applicable statutory law is set out in Titles 33 (navigation and navigable waters) and 46 (shipping) of the United States Code and in *28 U.S.C.S. § 1333* (jurisdiction).

Administrative regulations governing cases involving boats and boating are set out in Titles 33 (navigation and navigable waters) and 46 (shipping) of the Code of Federal Regulations and in Title 14, Division 4 (Department of Boating and Waterways) of the California Code of Regulations.

Various local ordinances may have some bearing on cases involving boats and boating. This will depend on the facts of each case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawWater RightsNonconsumptive UsesWatercraftAdmiralty LawPractice & ProcedureJurisdiction

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§ 100.11 Boat Defined

The term "boat" is not used in this chapter as a term of art distinguishable from "ship" and other nautical terms describing a vessel. The kind of vessel to which this chapter relates is one, whether called a boat or something else, which is owned and operated purely for a recreational purpose, notwithstanding that the owner may occasionally rent it to someone else and realize income from the transaction. The persons to whom this chapter relates are the weekend boaters, whether owners, operators, or guests aboard another person's boat, and persons who have contracts with them involving a boat, such as an artisan who repairs the boat. This definition is intended to exclude cases involving commercial activities connected with a boat or maritime trade.

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPersonal InjuriesMaritime Tort ActionsGeneral OverviewTortsTransportation TortsWatercraftGeneral Overview

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9-100 California Forms of Pleading and Practice--Annotated § 100.12

§ 100.12 Scope and Effect of Admiralty Jurisdiction

[1] Extension of Jurisdiction to All Boats on Navigable Waters

The judicial power of the United States extends to all cases of admiralty and maritime jurisdiction [U.S. *Const., art. III, § 2*]. The federal district courts have original jurisdiction, exclusive of the state courts, of any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled [*28 U.S.C.S. § 1333*].

Admiralty jurisdiction was given, under the federal Constitution, to the national government for the purpose of securing uniformity of the law respecting maritime trade between the states and with other nations [*see* Benedict on Admiralty, § 105 (7th ed. Matthew Bender)]. Admiralty jurisdiction has been extended, and substantive admiralty law has been applied, to cases involving pleasure craft where there is no connection with maritime trade other than use of the vessel on navigable waters, although the purpose of securing uniformity of the law respecting maritime trade does not appear to require such an extension of jurisdiction or the application of substantive admiralty law.

Because of this extension of admiralty law, analysis of the rights and liabilities of the parties in the situations described in this chapter require at the outset, determination of:

- Whether or not the particular case in question is a case of admiralty or maritime jurisdiction; and

- If it is, then what is the effect of the saving clause in *28 U.S.C.S. § 1333* on the parties' substantive rights and on the question of whether or not the injured party has a right to sue in a state court.

[2] Concurrent Jurisdiction of State Court Under Saving Clause

When Congress first created the admiralty jurisdiction of federal district courts, it did not grant those courts exclusive jurisdiction. Instead it saved to all suitors the right of a common law remedy where the common law was competent to give it. Subsequently, this saving clause was amended to save to all suitors all other remedies to which they are otherwise entitled, although this amendment did not narrow the effect of the saving clause under the original act [*Madruga v. Superior Court (1954) 346 U.S. 556, 560, 560 n.12, 74 S. Ct. 298, 98 L. Ed. 290]* .

The effect of this saving clause is to preserve to the federal district court an exclusive jurisdiction over maritime actions carried on as proceedings in rem, but to permit state courts to establish concurrent jurisdiction in actions in personam based on a common law remedy [*Madruga v. Superior Court (1954) 346 U.S. 556, 560-561, 74 S. Ct. 298, 98 L. Ed. 290* ; *Intagliata v. Shipowners & Mer. etc. Co. (1945) 26 Cal. 2d 365, 370, 159 P.2d 1]* . In essence, the saving clause affords a choice of forums in any case of admiralty or maritime jurisdiction where the remedy sought is one that a state court is competent, on common law principles, to give [*see* Benedict on Admiralty §§ 121-127 (7th ed. Matthew Bender)].

[3] Application of Admiralty Law

Although state courts possess jurisdiction to adjudicate maritime claims, if the case is one of admiralty jurisdiction, the substantive rights of the parties are determined by admiralty law [*see* Benedict on Admiralty §§ 121-127 (7th ed. Matthew Bender)]. This principle applies to actions for personal injury that occurred on navigable waters and actions that require the construction of maritime contracts [*Assistance, Inc. v. Teledyne Indus., Inc. (1974) 37 Cal. App. 3d 644, 647 n. 2, 112 Cal. Rptr. 418* ; *Longfellow v. Presidente Miguel Aleman (1974) 36 Cal. App. 3d 508, 513, 111 Cal. Rptr. 643]* . It permits state courts to adjudicate personal injury actions arising under maritime law, whether based on negligence or on unseaworthiness [*see Dixon v. Grace Lines, Inc. (1972) 27 Cal. App. 3d 278, 284-285, 103 Cal. Rptr. 595]* .

In some instances of state litigation, the principles applicable to litigation under state law may conflict with admiralty principles. When this occurs, the general rule is that state law does not apply to a maritime cause if it contravenes the essential purpose expressed by an act of Congress, works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. That is, state law cannot be applied in a maritime cause if it would substantially impair a substantial right arising under federal maritime law [*Intagliata v. Shipowners & Mer. etc. Co. (1945) 26 Cal. 2d 365, 373, 159 P.2d 1]* . This principle has been applied to require subordination of such state rules as those regarding burden of proof [*Garrett v. Moore-McCormack Co. (1942) 317 U.S. 239, 243, 63 S. Ct. 246, 87 L. Ed. 239]* and periods of limitation [*Longfellow v. Presidente Miguel Aleman (1974) 36 Cal. App. 3d 508, 513-514, 111 Cal. Rptr. 643]* .

[4] Application of Harbors and Navigation Code Provisions

The Harbors and Navigation Code contains many provisions describing the substantive rights of parties in actions arising from a tort or breach of contract. They do not, however, govern such cases in which federal admiralty law is paramount, and the Legislature has acknowledged this in the code [*see Harb. & Nav. Code §§ 90, 240, 399, 790*]. The provisions of the Harbors and Navigation Code must be understood to govern cases arising within the territorial limits of California and not subject to admiralty jurisdiction.

One of the principles of constitutional law that is, of course, paramount to admiralty law is that state law may supplement admiralty law [*see, e.g., Pope & Talbot, Inc. v. Hawn (1953) 346 U.S. 406, 409-410, 74 S. Ct. 202, 98 L. Ed. 143 , superseded by statute on other grounds as stated in Babbitt v. Hanover Towing, 7 F. Supp. 2d 650 (E.D. N.C. 1998)* . A state is free to adopt such remedies, and to attach to them such incidents, as it sees fit, so long as it does not attempt to make changes in the substantive maritime law [*Madruga v. Superior Court (1954) 346 U.S. 556, 561, 74 S. Ct. 298, 98 L. Ed. 290* (review of action by superior court in San Diego County]. The effect of this principle is to allow state law to fill in gaps in the admiralty law; and, to that extent, only provisions of the Harbors and Navigation Code may be applicable to cases of admiralty jurisdiction.

In view of the paramount authority of federal admiralty law in cases of admiralty or maritime jurisdiction, whether suit is brought in a federal court or a state court, it is necessary to determine how substantive rights under admiralty law, in cases of tort and breach of contract such as are discussed in this chapter, differ from the substantive rights of parties in

such cases under the law of California.

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPractice & ProcedureJurisdictionAdmiralty LawPractice & ProcedureFederal PreemptionCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent Jurisdiction

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§ 100.13 Torts Subject to Admiralty Jurisdiction

[1] In General

The admiralty and maritime jurisdiction of the United States extends to and includes all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury was done or consummated on land [*46 U.S.C.S. § 30101(a)*].

[2] Potential Hazard to Maritime Commerce That Substantially Relates to Traditional Maritime Activity

Federal admiralty jurisdiction is invoked when a potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity [*Sisson v. Ruby (1990) 497 U.S. 358, 362, 110 S. Ct. 2892, 111 L. Ed. 2d 292]* . Its reach is not limited to those engaged in commercial maritime activity, but extends as well to all operators of vessels on navigable waters because of the potential impact of noncommercial activities on maritime commerce [*Sisson v. Ruby (1990) 497 U.S. 358, 362, 110 S. Ct. 2892, 111 L. Ed. 2d 292]* .

In determining whether the activity involved is potentially hazardous to maritime commerce, a court must assess the general features of the incident rather than the actual effects of that particular incident on maritime commerce [*Sisson v. Ruby (1990) 497 U.S. 358, 363, 110 S. Ct. 2892, 111 L. Ed. 2d 292]* . For example, in an action arising from a fire on a pleasure yacht docked at a marina in which there were no commercial vessels at the time, the general features consisted of a fire on a vessel docked at a marina on navigable waters, which were held to constitute a sufficient potential hazard [*Sisson v. Ruby (1990) 497 U.S. 358, 363, 110 S. Ct. 2892, 111 L. Ed. 2d 292]* . In an action arising from the collision in navigable waters between a pleasure boat and a recreational fishing boat, neither of which engaged in any commercial maritime activity, the general features consisted of a collision between boats on navigable waters (also consituting sufficient potential hazard) [*Foremost Ins. Co. v. Richardson(1982) 457 U.S. 668, 675, 102 S. Ct. 2654, 73 L. Ed. 2d 300* ; *see Sisson v. Ruby (1990) 497 U.S. 358, 363, 110 S. Ct. 2892, 111 L. Ed. 2d 292]* . Similarly, when passengers who fell off of jet skis operated on navigable waters were injured by the jets, the general features were described as harm caused by a vessel in navigable waters to passengers, which had a potential disruptive effect on commercial maritime activity [*In re Mission Bay Jet Sports, LLC (9th Cir. 2009) 570 F.3d 1124, 1129*].

In determining whether an incident has a substantial relationship to traditional maritime activity, courts must first define

the nature of the underlying "activity," and then determine whether it relates to "traditional maritime activity" [*Sisson v. Ruby (1990) 497 U.S. 358, 364, 110 S. Ct. 2892, 111 L. Ed. 2d 292]* . In defining the nature of the underlying activity, courts must again focus on the general character of that activity, rather than on the particular causes of the harm [*Sisson v. Ruby (1990) 497 U.S. 358, 364, 110 S. Ct. 2892, 111 L. Ed. 2d 292]* . Courts must use a broad perspective in determining whether activity substantially relates to "traditional maritime activity" [*Sisson v. Ruby (1990) 497 U.S. 358, 366-367, 110 S. Ct. 2892, 111 L. Ed. 2d 292]* . Activities found to constitute traditional maritime activity include navigation [*Foremost Ins. Co. v. Richardson (1982) 457 U.S. 668, 675-677, 102 S. Ct. 2654, 73 L. Ed. 2d 300* ; *see also In re Mission Bay Jet Sports, LLC (9th Cir. 2009) 570 F.3d 1124, 1129* (operation of passenger-carrying jet ski was operation of vessel in navigable waters)]. They also include, at least, any other activities traditionally undertaken by vessels, commercial or noncommercial [*see Sisson v. Ruby (1990) 497 U.S. 358, 367, 110 S. Ct. 2892, 111 L. Ed. 2d 292]* . Conduct held not to constitute traditional maritime activity include air travel generally [*Executive Jet Aviation, Inc. v. Cleveland (1972) 409 U.S. 249, 269-270, 93 S. Ct. 493, 34 L. Ed. 2d 454* (regarding sinking of aircraft into navigable lake shortly after takeoff)], and aquatic recreation off a pleasure craft [*see Delta Country Ventures, Inc. v. Magana, 986 F.2d 1260, 1263 (9th Cir. 1993)* (claim of guest injured as a result of diving off houseboat)].

[3] Navigability Under Admiralty Jurisdiction

A body of water is a part of the "navigable waters of the United States," that is, within admiralty jurisdiction, if it is used or susceptible to use in its ordinary condition, alone or in conjunction with other waters, as a continued highway for interstate or foreign commerce conducted in customary modes of trade and travel on water [*The Daniel Ball v. United States (1871) 77 U.S. 557, 563, 19 L. Ed. 999* ; *Davis v. United States (9th Cir. 1950) 185 F.2d 938, 942-943]* . A body of water may come within admiralty jurisdiction under this definition despite limitations in the duration, extent, or manner of use, so long it remains substantially useful for interstate or foreign commerce [*The Montello (1874) 87 U.S. 430, 439-440, 22 L. Ed. 391* (river held navigable despite existence of rapids in certain sections); *see also Benedict on Admiralty § 143* (7th ed. Matthew Bender)]. In addition, a body of water that is open to the Pacific Ocean and subject to the ebb and flow of tides is considered navigable for purposes of establishing admiralty jurisdiction, even if the particular area where the injury occurred is cordoned off by buoys and restricted in use to personal watercraft [*In re Mission Bay Jet Sports, LLC (9th Cir. 2009) 570 F.3d 1124, 1127*].

Thus, under this definition, inland waters that are open to and used by seagoing traffic are clearly navigable waters of the United States [*see Nelson v. United States (9th Cir. 1980) 639 F.2d 469, 472 (San Francisco Bay)]* . On the other hand, a body of water wholly within California would not be considered among the navigable waters of the United States, regardless of actual navigablity, if it could be used only for intrastate purposes, as, for example, in the case of an isolated lake not connected with other navigable waters [*see The Montello (1871) 78 U.S. 411, 416, 20 L. Ed. 191]* . Lake Tahoe, although isolated from other waters, is a navigable body of water of the United States because it lies within two states and was historically used for interstate commerce [*Davis v. United States (9th Cir. 1950) 185 F.2d 938, 943]* .

In the absence of a controlling judicial decision or legislative determination, the question as to whether or not a particular body of water is a navigable body of water is one of fact [*United States v. Appalachian Elec. Power Co. (1940) 311 U.S. 377, 405, 61 S. Ct. 291, 85 L. Ed. 243]* . The court may consider such factors as the character of the body of water, its situation and availability as a highway of commerce, and other surrounding circumstances [*Bohn v. Albertson (1951) 107 Cal. App. 2d 738, 742, 238 P.2d 128* ; *see also Davis v. United States (9th Cir. 1950) 185 F.2d 938, 943* (Lake Tahoe as navigable body of water of United States)].

[4] Navigability Under Other Standards

[a] Determinations Not Related to Maritime Jurisdiction

There have been administrative, legislative, and judicial determinations of navigability of waters for purposes other than

maritime jurisdiction and under standards that differ from the maritime standards. These determinations, although apparently not binding on a federal district court, could be a persuasive authority, especially if they are in favor of navigability.

[b] Coast Guard Standards

The Coast Guard, in connection with its duty to enforce the law of navigable waters of the United States, has made an administrative determination that certain rivers and lakes in, or partially in, California are or are not navigable waters [*see* 33 C.F.R. § 2.10-1]. Such a determination is apparently not binding on a court, but it probably would have great weight. The criteria employed by the Coast Guard include whether the waters in question [33 C.F.R. § 2.05-25(a)(2),(3)]:

- Are subject to tidal influence;

- Are or have been used, or are or have been susceptible for use, by themselves or in connection with other waters, as highways for substantial interstate or foreign commerce, notwithstanding natural or man-made obstructions that require portage; or

- Are capable of improvement at a reasonable cost to provide, by themselves or in connection with other waters, highways for substantial interstate or foreign commerce according to a determination by a governmental or nongovernmental body with expertise in waterway improvement.

The Bridge Sections of the Aids to Navigation Branches of the Eleventh Coast Guard District in Long Beach and the Twelfth Coast Guard District in San Francisco maintain lists of California waters that have been administratively determined to be navigable. Attorneys may obtain this information in person or by phone from the appropriate district office [*see* 33 C.F.R. §§ 2.10-1, 2.10-5].

[c] Designation by California Legislature

The California Legislature has designated more than 40 rivers, creeks, and sloughs in California as navigable waters [*see Harb. & Nav. Code §§ 101-106*]. *Harb. & Nav. Code § 100* defines navigable waters as a water or stream of sufficient capacity to transport the products of the country and declares such waters to be public ways for the purposes of navigation and transportation.

[d] Standards Under California Decisional Law

Court decisions have ruled on navigability under a variety of standards [*see, e.g.,* *Newcomb v. Newport Beach (1936) 7 Cal.2d 393, 399, 60 P.2d 825 (Newport Bay as navigable in fact)* ; *People v. Gold Run Ditch & Mining Co. (1884) 66 Cal. 138, 146, 4 P. 1152* (judicial notice of navigability of *Sacramento River); City of Los Angeles v. Aitken (1935) 10 Cal. App. 2d 460, 466-470, 52 P.2d 585* (Mono Lake as navigable because susceptible of use as a public highway)].

Recent state court decisions have developed a standard of navigability applicable to determining whether or not the public has navigational easement consisting of a right of access to the water, notwithstanding private ownership of the land under the water.

Under this more liberal test which permits use of the water for recreational boating, a body of water is navigable for purposes of a public navigational easement if it is physically navigable, by oar or motor-propelled small craft, in its natural state for a sufficiently long period each year to make it suitable, useful, and valuable as a public recreational highway [*Hitchings v. Del Rio Woods Recreation & Park Dist. (1976) 55 Cal. App. 3d 560, 568-571, 127 Cal. Rptr. 830* ; *People ex rel. Baker v. Mack (1971) 19 Cal. App. 3d 1040, 1050, 97 Cal. Rptr. 448 (Fall River as navigable)]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPersonal InjuriesMaritime Tort ActionsGeneral OverviewAdmiralty LawPractice & ProcedureJurisdiction

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§ 100.14 Contracts Subject to Admiralty Jurisdiction

[1] Nature of Contract Test

The boundaries of admiralty jurisdiction over contracts have always been difficult to draw [*Kossick v. United Fruit Co. (1961) 365 U.S. 731, 735 , 6 L. Ed. 2d 56]* . It is usually said that admiralty jurisdiction embraces all maritime contracts; in other words, the characterization by the courts depends on the nature of the contract, and is limited to contracts, claims and services purely maritime, and touching rights and duties pertaining to commerce and navigation [*In re The Steamer Eclipse (1889) 135 U.S. 599, 608, 10 S. Ct. 873, 34 L. Ed. 269]* . In one case, the Supreme Court explained that in determining whether a contract falls within admiralty jurisdiction, the true criterion is the nature and subject matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions [*Exxon Corp. v. Central Gulf Lines (1991) 500 U.S. 603, 111 S. Ct. 2071, 114 L. Ed. 2d 649, 657* (quoting *Insurance Co. v. Dunham (1871) 78 U.S. (11 Wall.) 1, 26, 20 L. Ed. 90*)]. For a discussion of what arguments are, and what agreements are not, maritime contracts, see Benedict on Admiralty §§ 183-190 (7th ed. Matthew Bender).

Too much emphasis, however, should not be placed on the agreement and its subject matter. The real question is whether or not a court of admiralty has jurisdiction to enforce certain promises, award damages for certain contractual defaults, and give other relief to an aggrieved party to a contract. It is possible to characterize a contract as maritime and nevertheless deny admiralty jurisdiction to give the aggrieved party relief. For example, a contract for the repair of an existing vessel is unquestionably maritime [*see Flowers v. Travelers Ins. Co. (5th Cir. 1958) 258 F.2d 220, 221* (dictum)]. However, a cause of action based on repudiation of an executory contract to provide such repairs (or any other executory maritime contract) has been considered by at least one circuit not to be amenable to an admiralty lawsuit but, instead, to be an ordinary common law action for damages over which the admiralty court has no jurisdiction [*see, e.g., Yankee v. Brewer Dry Dock Co. (E.D.N.Y. 1941) 37 F. Supp. 512, 514* (contract as executory contract to render a maritime service for which in the absence of even part performance, admiralty jurisdiction cannot be invoked even in personam); *but see Benedict on Admiralty § 185* (7th ed. Matthew Bender) (action in personam in admiralty as available but not lien on vessel)].

[2] Contract to Build Boat

It appears that an admiralty court has no jurisdiction to give relief for any kind of default, by any party, under a contract

to build a boat or to supply materials or services for the building of a boat [*Kossick v. United Fruit Co. (1961) 365 U.S. 731, 735, 81 S. Ct. 886, 6 L. Ed. 2d 56* (dictum; contract to build); *Thames Towboat Co. v. The Schooner "Francis McDonald" (1920) 254 U.S. 242, 243-244, 41 S. Ct. 65, 65 L. Ed. 245* (contract to supply materials and labor to finish building vessel where hull launched, after default by original builder); *North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co. (1918) 249 U.S. 119, 126-127, 39 S. Ct. 221, 63 L. Ed. 510* (dictim; contract to supply materials for construction); *Bond v. F/V Mermaid (S.D. Fla. 1970) 311 F. Supp. 1013, 1014* (services of marine architect in designing ship for construction)].

The rationale for the rule denying relief for default under a contract to build a boat is a triumph of form over substance. The structure does not become a ship, in the legal sense, until it is completed and launched. Prior to launching a ship is a mere congeries of wood and iron--an ordinary piece of personal property--as distinctly a land structure as a house but the moment the keel touches the water, the ship is transformed and becomes a subject of admiralty jurisdiction [*North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co. (1918) 249 U.S. 119, 127, 39 S. Ct. 221, 63 L. Ed. 510]* .

[3] Contract to Rent Boat

[a] Charter Parties

The kind of rental contract relevant to this chapter [*see* form at *§ 100.72*] is similar to what in admiralty is known as a charter party. A charter party is usually effected for a commercial purpose and has been described as a contract by which an entire ship or some principal part of it is let to a merchant, called the charterer, for the conveyance of goods on a determined voyage to one or more places or until the expiration of a specified period [*Benedict on Admiralty § 225* (7th ed. Matthew Bender)]. The purpose of the contract may be the carriage of persons as well as the conveyance of goods. A familiar example is the charter party for a sport fishing expedition.

In admiralty there are two kinds of charter parties. The kind of rental contract relevant to this chapter resembles a demise charter party, also called a bare boat charter. This is a contract by which the vessel is, in effect, leased to a charterer, who takes possession and has control of the vessel as though he or she were the owner [*Assistance, Inc. v. Teledyne Indus., Inc. (1974) 37 Cal. App. 3d 644, 647, 112 Cal. Rptr. 418* ; *see also Benedict on Admiralty § 225* (7th ed. Matthew Bender)]. Admiralty law governs a demise charter party-type agreement. Nevertheless, general principles governing the hiring of personal property may govern a rental contract which is not made for any commercial purpose. The object of the renter is to obtain possession of the boat for the purpose of using it for pleasure, not for transporting a cargo or passengers for profit. The parties to such a contract will seldom or never intend to make a charter party-type agreement; rather, they will intend a hiring of personal property (as the Civil Code describes it), in the same way that a car might be hired. No case in admiralty has been found dealing with this kind of contract, and it is questionable whether admiralty law relating to charter parties does or should govern the enforcement of rights under such a contract.

For a discussion of admiralty jurisdiction of charter parties, see *Benedict on Admiralty § 225* (7th ed. Matthew Bender).

[b] Liability for Repairs

The Harbors and Navigation Code provides that if the owner of a vessel commits its profession and navigation to another, then that other person, and not the owner, is responsible for the repairs of and supplies for the vessel [*Harb. & Nav. Code § 404*]. This statute refers to a demise charter party [*see* [a], *above*]. The rule expressed in this statute is the same as the rule in admiralty law, that is, the charterer, in effect, becomes the owner during the term of the contract [*see Benedict on Admiralty § 225* (7th ed. Matthew Bender)]. If possession alone were given, without the right to navigate the vessel also, the charter would be the nondemise type and the charterer would not assume responsibility for repairs and supplies.

The fact that the state rule expressed in *Harb. & Nav. Code § 404* is identical to the admiralty rule is not significant. The

state rule applies only to cases exclusively within the state's jurisdiction, and the admiralty rule applies to cases within the concurrent jurisdiction of the federal and state courts.

[4] Contract to Repair Boat

It may not appear important to draw a distinction between the original construction of a vessel and the virtual reconstruction of a vessel after extensive repairs were made to it, but the act of launching, and transforming a structure into a ship [*see* [2], *above*], is a crucial point in jurisdictional analysis. Reconstruction of a vessel is a maritime transaction, and in general, defaults under a contract for reconstruction are within admiralty jurisdiction [*Wall Street Traders, Inc. v. Sociedad Espanola de Construccion Naval (S.D.N.Y. 1964) 245 F. Supp. 344, 350* (dictum; contract to alter or convert); *The Ky-Ill (6th Cir. 1931) 50 F.2d 70, 71* (extensive alterations held reconstruction not original construction)]. California law recognizes that admiralty law in general governs the validity and interpretation of ship repair contracts, including exculpatory clauses [*Fahey v. Gledhill (1983) 33 Cal. 3d 884, 889, 191 Cal. Rptr. 639, 663 P.2d 197]* . If there is any reasonable doubt whether the subject of a contract is original construction or repairs and alteration in the nature of a reconstruction, the subject of the contract will be considered as reconstruction so as to give an admiralty court jurisdiction [*New Bedford Dry Dock Co. v. Purdy (1921) 258 U.S. 96, 99, 42 S. Ct. 243, 66 L. Ed. 482]* .

Within admiralty jurisdiction are defaults in obligations to pay for repairs [*New Bedford Dry Dock Co. v. Purdy (1921) 258 U.S. 96, 100, 42 S. Ct. 243, 66 L. Ed. 482]* , which may be relieved by enforcement of a lien [*see* discussion of maritime liens in Benedict on Admiralty §§ 21-66 (7th ed. Matthew Bender)]; to pay for materials furnished for repairs [*The Ky-Ill (6th Cir. 1931) 50 F.2d 70, 71]* ; to complete repairs [*Wall Street Traders, Inc. v. Sociedad Espanola de Construccion Naval (S.D.N.Y. 1964) 245 F. Supp. 344, 350]* ; to pay for plans and specifications furnished for alteration [*The Susquehanna (2d Cir. 1920) 267 F. 811, 813]* ; and to use due care in performing contractual obligations in the nature of repairs [*Fahey v. Gledhill (1983) 33 Cal. 3d 884, 890, 191 Cal. Rptr. 639, 663 P.2d 197* ; *see Luckenbach S.S. Co. v. Ruddy Fumigant Co. (W.D. Wash. 1935) 11 F. Supp. 390, 390-391* (negligent performance of contractual obligation to fumigate ship)], which may be better dealt with as a tort instead of breach of contract.

[5] Contract to Store Boat

A default in an obligation to pay for another's services in providing storage for equipment removed from a yacht, including small boats, is within admiralty jurisdiction [*The Navis (D. Me. 1912) 196 F. 843, 846-847]* . It would therefore appear that the same rule should apply to storage of the vessel itself. There is, however, an old case that holds that a claim for wharfage of a vessel while it was laid up for the winter (when navigation was not possible) is not within admiralty jurisdiction [*The Murphy Tugs (E.D. Mich. 1886) 28 F. 429, 432]* . The distinction seems to be that when a vessel is taken out of service (except temporarily for the purpose of repairs or the like), a contract for services rendered to the vessel while it is thus laid up is not maritime in nature.

While no case has been found extending admiralty jurisdiction to a default in the obligations of the person promising to provide the storage, the principle of mutuality of remedy would dictate that admiralty jurisdiction extends to such a case, at least when the boat remains in service [*see, e.g., Lake Union Dry Dock & Mach. Works v. United States (9th Cir. 1935) 79 F.2d 802, 803* (shipyard repairing vessel as bailee liable for negligence in case of loss of vessel by fire)].

[6] Contract to Furnish Supplies or Equipment for Boat

A default in an obligation to furnish supplies or equipment to a vessel, or the obligation to pay for supplies or equipment, is within admiralty jurisdiction [*Campbell v. Loznicka (5th Cir. 1950) 181 F.2d 356, 357-358* (contract to make repairs and furnish supplies; action based on default in obligation to pay); *The Sam & Priscilla (D. Mass. 1921) 275 F. 937, 939* (contract to furnish fishing net; action based on breach of seller's implied warranty of fitness for particular use)]. A person who furnishes supplies or equipment has a statutory lien on the vessel for payment [*see 46*

U.S.C.S. § 31342].

A contract to furnish supplies, which are items for the personal use of those on board, such as clothing, tobacco, and similar items, is not a maritime contract; a default under such a contract is not within admiralty jurisdiction [*The Mary F. Chisholm (D. Me. 1904) 129 F. 814, 817* (action to recover such items furnished for crew members of fishing boat)].

[7] No Per Se Exception for Agency Contracts

The United States Supreme Court has overruled old case precedent, and held that there is no per se exception of agency contracts from admiralty jurisdiction [*Exxon Corp. v. Central Gulf Lines (1991) 500 U.S. 603, 607-607, 111 S. Ct. 2071, 114 L. Ed. 2d 649* (overruling *Minturn v. Maynard (1855) 58 U.S. (17 How.) 477, 15 L. Ed. 235*)]. The action arose in the context of the enforcement of a maritime lien under former *46 U.S.C.S. § 971* (*now 46 U.S.C.S. § 31342*); the subject matter of the contract must fall within the admiralty jurisdiction for a maritime lien based on a breach of contract to exist [*see* *Exxon Corp. v. Central Gulf Lines (1991) 500 U.S. 603, 606, 111 S. Ct. 2071, 114 L. Ed. 2d 649* ; for discussion of maritime liens generally, *see* Ch. 522, *Ships and Shipping*]. The Court noted that admiralty jurisdiction is designed to protect maritime commerce, and that there is nothing in the nature of an agency relationship that necessarily excludes those relationships from the realm of maritime commerce. Moreover, the theoretical underpinnings of previous precedent (based on the categorization of an agent's claim as a mere demand for balance of accounts, available through common law remedies, and the "hypothecation" or lien requirement for a maritime contract claim)) are not consistent with trends in modern admiralty law [*Exxon Corp. v. Central Gulf Lines (1991) 500 U.S. 603, 610-611, 111 S. Ct. 2071, 114 L. Ed. 2d 649]* .

The Supreme Court emphasized the narrowness of its ruling. Although lower courts may not apply a rule excluding all or certain agency contracts from the realm of admiralty, they must look to the subject matter of the agency contract and determine whether the services performed under the contract are maritime in nature [*Exxon Corp. v. Central Gulf Lines (1991) 500 U.S. 603, 611-612, 111 S. Ct. 2071, 114 L. Ed. 2d 649]* . In the case before it, the Court analyzed a contract between a fuel supplier and shipowner under which fuel is provided directly wherever possible, and through a third party in remote locations. The Court found that the subject matter regarding third-party fuel supply in Saudi Arabia, as in United States locations (where the supplier provided the fuel directly, and over which the district court had held that admiralty jurisdiction existed), is the value of the fuel received by the ship. Because the nature and subject-matter of the two transactions are the same as they relate to maritime commerce, if admiralty jurisdiction extends to one, it must extend to the other [*Exxon Corp. v. Central Gulf Lines (1991) 500 U.S. 603, 612-613, 111 S. Ct. 2071, 114 L. Ed. 2d 649]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPractice & ProcedureJurisdictionAdmiralty LawMaritime ContractsCoverage

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§ 100.15 Actions in Rem Against Vessel

One of the peculiarities of admiralty law is the remedy of an action in rem against a vessel. The vessel itself is, in effect, a party, the style of the case being, for example, *The Resolute* or *Smith v. The S.S. Goodship.* Such an action is an exclusive admiralty remedy which the state courts have no jurisdiction over [*Madruga v. Superior Court (1954) 346 U.S. 556, 560-561, 74 S. Ct. 298, 98 L. Ed. 290* ; *Longfellow v. Presidente Miguel Aleman (1974) 36 Cal. App. 3d 508, 512, 111 Cal. Rptr. 643* (noting exception for actions to forfeit maritime property used in violation of state law)]. The function of an action in rem is to enforce a maritime lien, which certain persons may acquire under *46 U.S.C.S. § 31342* for furnishing repairs and supplies, among other reasons.

The existence of a cause of action in rem does not deprive a party of the common-law right to bring an action in personam for collection of a debt due for furnishing repairs or supplies or for any other reason giving rise to a maritime lien [*see, e.g.,* *Rounds v. Cloverport Foundry & Mach. Co. (1915) 237 U.S. 303, 307-308, 35 S. Ct. 596, 59 L. Ed. 966]* .

If the law of California gives a lien for a matter that is the subject of admiralty jurisdiction [*see Harb. & Nav. Code § 500 et seq.* (Boaters Lien Law); *see also Harb. & Nav. Code § 410 et seq.* (exception for service and repair of noncommercial vessel)], that lien may be enforced in an action in rem in the federal district court sitting as a court of admiralty, although the California courts cannot enforce it by such an action [*see, e.g.,* *The J. E. Rumbell (1893) 148 U.S. 1, 13, 13 S. Ct. 498, 37 L. Ed. 345]* .

If the law of California gives a lien [*see Harb. & Nav. Code § 410 et seq., Harb. & Nav. Code § 500 et seq.*] for a matter that is not a subject of admiralty jurisdiction, such as for a debt arising under a contract for the construction of a vessel, the lien may be enforced by any action, including a foreclosure, resembling an in rem action, which the law of California provides. Since the subject of the action is not of admiralty jurisdiction, there is no bar in federal admiralty law to proceeding in that way [*see* *Islander Yachts, Inc. v. One Freeport 36-Foot Vessel (1985) 173 Cal. App. 3d 1081, 1086-1087, 219 Cal. Rptr. 654* (foreclosure of lien under *Harb. & Nav. Code §§ 490, 491, 495* for payment of construction of vessel as not preempted by federal admiralty law); for a form of complaint foreclosing lien, *see* Ch. 342, *Liens and Wage Preferences* ; *see* *Benedict On Admiralty § 125* (7th ed. Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPractice & ProcedureAttachment & GarnishmentIn Personam ActionsAdmiralty LawPractice & ProcedureAttachment & GarnishmentIn Rem ActionsAdmiralty LawPractice & ProcedureAttachment & GarnishmentIn Rem Actions GenerallyAdmiralty LawMaritime LiensNatureJurisdictionAdmiralty LawMaritime LiensNatureProperty Subject to Lien

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§ 100.16 Limitation of Liability

A feature of admiralty law which may become important to both sides in the kinds of cases discussed in this chapter is the Limitation of Liability Act of 1851 [*46 U.S.C.S. § 30501 et seq.*]. The principal provision of this act provides that the liability of the owner of any vessel for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, cannot exceed the amount or value of the interest of such owner in such vessel and pending freight [*46 U.S.C.S. § 30505(a)*].

For a discussion of the Limitation of Liability Act of 1851 and forms for use under the act, see Ch. 522, *Ships and Shipping* . See also Benedict On Admiralty §§ 1-119 (7th ed. Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawCollisionsLiabilityLimitations on LiabilityAdmiralty LawCollisionsLiabilityGeneral OverviewAdmiralty LawShippingCarrier Duties & ObligationsLimitations on Liability

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§ 100.17 Choosing State or Federal Court

Where there is a choice of forums, the decision of which court to choose will usually depend on the following considerations:

- Regardless of whether suit is brought in a state court or in a federal court sitting in admiralty, the substantive rights of the parties are determined by federal admiralty law, not state law.

- There generally is no right to a jury in a trial in admiralty.

- It has been said that technical niceties play a minimal role in admiralty courts [California Pleasure Boating Law (Cal CEB 1963), Ch. 3, *Pleading and Practice*, § 3.5].

- Federal judges sitting in admiralty are by experience more familiar with maritime problems and facts than state court judges.

- The location of the district court may be inconvenient.

- The court sitting in admiralty has no jurisdiction to give general relief, for the purpose of doing complete justice between the parties. Jurisdiction is limited to maritime matters. That is, the court sitting in admiralty can give complete relief with respect to the maritime matter before it, including equitable relief; but the court cannot give relief on a nonmaritime matter such as might be raised in a state court by cross complaint.

- If suit is brought in a state court, a defendant, who is the owner of the vessel in question, may nevertheless begin a proceeding in the federal court sitting in admiralty for the purpose of limiting liability to the value of the interest in the vessel under the Limitation of Liability Act of 1851 [*46 U.S.C. § 30511*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPractice & ProcedureJurisdiction

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§ 100.18 Removal of State Court Action

Where a case of admiralty jurisdiction has been brought in a state court under the saving clause in *28 U.S.C.S. § 1333*, the question may arise as to whether or not the defendant has the right to remove the action to the federal district court under the removal statute [*29 U.S.C.S. § 1441*]. In *J.J. Ryan & Sons, Inc. v. Continental Ins. Co. (D.S.C. 1974) 369 F. Supp. 692, 697-698* , the court found that (1) if diversity jurisdiction exists, or if there is a federal question involved, the action is removable, irrespective of its being a case of admiralty jurisdiction, but (2) in the absence of diversity jurisdiction or a federal question, the action is not removable. The courts concluded that the savings clause gave to suitors, that is plaintiffs, the right to select the remedy and the forum where causes of admiralty jurisdiction can be litigated. To permit removal would, in fact, give this selection right to the defendant, since all cases within the admiralty jurisdiction that are saved are within the federal district courts' admiralty jurisdiction, without regard to amount in controversy or diversity of citizenship. Furthermore, this selection right controls the right to a jury trial and the right to seek some remedies that are available in common law courts that are not a part of the law of admiralty.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisDiversity of CitizenshipAdmiralty LawPractice & ProcedureJurisdictionCivil ProcedureRemovalBasisFederal Questions

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§ 100.19 Substantive Admiralty Law of Collision

[1] Generally

Liability for collision is not a strict liability imposed regardless of precautions taken [*The Java v. Judd Oil Co. (1872) 81 U.S. 189, 20 L. Ed. 834, 837]* , but fault is premised on failure to meet the following standards:

- Statutory rules of navigation. Two sets of rules operative in the United States apply within or adjacent to California: the International Regulations [*33 U.S.C.S. §§ 1601-1608*] applying to navigation on the high seas, and the Inland Rules [*33 U.S.C.S. § 2001 et seq.*] applying to all other navigable waters.

- Other statutes and administrative regulations, both federal and state. Of greatest importance, with respect to California, are the Pilot Rules for Inland Waters [33 C.F.R. Part 93] promulgated by the Coast Guard.

- Local customs. With respect to matters governed by the Inland Rules, local custom might be included in Rule 27 providing exceptions from observance of the rules in special circumstances [*see 33 U.S.C.S. § 2002(b)*; *The Luzerne (2d Cir. 1913) 204 F. 981, 982]* .

- Good seamanship and due care [*see, e.g., Pentz v. The Steamer Ariadne (1872) 80 U.S. 475, 478-479, 20 L. Ed. 542* ; *Stevens v. United States Lines Co. (1st Cir. 1951) 187 F.2d 670, 673]* .

[2] Effect of Navigation Rules

The finding of fault often rests on the violation of one of the rules of navigation. These statutory rules are strictly and literally construed, and exact adherence is required [*see Belden v. Chase (1893) 150 U.S. 674, 698, 14 S. Ct. 264, 37 L. Ed. 1218* ; *First Nat'l Bank of Chicago v. Material Serv. Corp. (7th Cir. 1979) 597 F.2d 1110, 1116]* , with the narrow exception that when a vessel is placed in a position where collision is apparently imminent through no fault of the vessel and it attempts to avoid the collision it will not be held at fault for violating the rules or the standards of due care in navigation if a collision occurs [*Maroceano Compania Naviera S.A. v. S.S. Verdi (2d Cir. 1971) 438 F.2d 854, 857]* .

[3] Causation

Liability will not rest on fault in the abstract, but rather on fault which is the contributing cause of the collision [*The Farragut (1870) 77 U.S. 334, 338, 19 L. Ed. 946* ; *see also The Oregon (1895) 158 U.S. 186, 195-197, 15 S. Ct. 804, 39 L. Ed. 943]* . If a vessel has been guilty of statutory fault before a collision, there is a rebuttable presumption that the fault was a contributing cause of the collision; and in order to rebut it, the vessel must prove not only that the fault probably did not contribute to the collision, but also that it could not have contributed to the collision [*see The Pennsylvania v. Troop (1874) 86 U.S. 125, 136, 22 L. Ed. 148* (called the Pennsylvania rule); *First Nat'l Bank of Chicago v. Material Serv. Corp. (7th Cir. 1979) 597 F.2d 1110, 1117]* .

The Pennsylvania rule only applies where there has been a breach of one of the rules of navigation or some other statute. Where a ship is at fault in some other way, such as being guilty of negligence by general standards, a causal connection between the fault and the collision must be proved in order to hold the ship liable for its half of the damages [*Oriental Trading & Transp. Co. v. Gulf Oil Corp. (2d Cir. 1949) 173 F.2d 108, 110 , cert. denied, 337 U.S. 919, 69 S. Ct. 1162, 93 L. Ed. 1728]* .

[4] Negligence

Negligence may be a basis for liability, under the rule that nothing in the statutory rules exonerates a vessel or person from the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case [*see 33 U.S.C.S. § 2002(a)*]. The effect of this principle is that literal compliance with a specific rule of navigation is not always enough to exonerate a vessel from fault [*see United States v. Woodbury (1st Cir. 1949) 175 F.2d 854, 861]* .

[5] Determination of Liability

Liability for collision damage is determined by the following rules:

- If neither vessel is at fault, neither is liable for the other's loss [*see The "Clara" (1880) 102 U.S. 200, 203, 26 L. Ed. 145]* . In some cases the court will be able to see that some fault exists but will be unable, because of a conflict of evidence, to say where the fault lies. This is spoken of as a case of inscrutable fault, and neither vessel can recover [*see The Worthington & Davis (E.D. Mich. 1883) 19 F. 836, 839]* .

- If one vessel is wholly at fault, it is liable for the other's loss, in addition to paying for its own loss [*see The "Clara" (1880) 102 U.S. 200, 203, 26 L. Ed. 145]* .

- If both vessels are at fault, the liability is allocated between the parties in proportion to the comparative degree of their fault. Liability is allocated equally only when the parties are equally at fault or when it is not possible to measure the comparative degree of fault fairly [*United States v. Reliable Transfer Co. (1975) 421 U.S. 397, 411, 95 S. Ct. 1708, 44 L. Ed. 2d 251* , repudiating the divided damages rule of *The Schooner Catharine v. Dickinson (1855) 58 U.S. 170, 177-178, 15 L. Ed. 233]* .

In collisions involving more than two ships, the courts have apportioned liability among the ships at fault (not to the owners) [*see The Norwich Victory (E.D. Pa. 1948) 77 F. Supp. 264, 269 , aff'd sub nom, United States v. The Dump Scows No. 116, No. 120 and No. 122 (3d Cir. 1949) 175 F.2d 556 , cert. denied sub nom. American Dredging Co. v. United States (1949) 338 U.S. 871* ; *see also United States v. Reliable Transfer Co. (1975) 421 U.S. 397, 411, 95 S. Ct. 1708, 44 L. Ed. 2d 251]* .

If two ships are at fault for damages to a third party, liability is joint and several; the injured party can recover wholly

from one or the other, or partially from one and partially from the other [*see The Beaconsfield (1895) 158 U.S. 303, 307, 15 S. Ct. 860, 39 L. Ed. 993]* .

There is a lien against any vessel at fault in a collision [*see The John G. Stevens (1898) 170 U.S. 113, 122, 18 S. Ct. 544* ; *see also Oriente Com'l v. Am. Flag Vessel, M/V Floridian (4th Cir. 1975) 529 F.2d 221, 222]* , and, usually, personal liability in its owner [*see Burns Bros. v. The Central R.R. of N.J. (2d Cir. 1953) 202 F.2d 910, 913]* or in a demise charterer having the position of owner [*see The Barnstable (1901) 181 U.S. 464, 467, 21 S. Ct. 684, 45 L. Ed. 954]* . Collision suits may be brought in personam or in rem or both [*see Burns Bros. v. The Central R.R. of N.J. (2d Cir. 1953) 202 F.2d 910, 913]* .

[6] Effects of Settlement

The United States Supreme Court has established the federal common law applicable to admiralty cases in which one or more defendants have settled with plaintiff, and held that the proper calculation of the liability of nonsettling defendants is based on the jury's allocation of proportionate responsibility. The Court rejected the alternative method of giving nonsettling defendants a credit for the dollar value of the settlement [*McDermott, Inc. v. AmClyde (1994) 511 U.S. 202, 114 S. Ct. 1461, 128 L. Ed. 2d 148, 154]* . The rejected method is that reflected in California law regarding the effect of settlement, discussed in Ch. 300, *Indemnity and Contribution* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawCollisionsLiabilityGeneral OverviewAdmiralty LawCollisionsLiabilityComparative & Contributory NegligenceAdmiralty LawCollisionsRemediesApportionmentAdmiralty LawCollisionsRemediesMaritime LiensAdmiralty LawPersonal InjuriesMaritime Tort ActionsMultiple DefendantsContribution

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§ 100.20 Collisions and Accidents Subject to State Law

[1] Generally

If a collision between vessels occurs on waters of the state that are not subject to admiralty jurisdiction, the resulting action will be governed by state law and relevant rules of navigation and liability provided in *Harb. & Nav. Code §§ 250-268* and *281-284*. For discussion of these principles, see *§ 100.64[2] -[4]*.

[2] Accident Involving Water-Skier

Few decisions have analyzed the combined effect of state navigational rules and principles of negligence to define the nature of liability in an accident which involves personal injury to a water-skier [*see, e.g., Shahinian v. McCormick (1963) 59 Cal. 2d 554, 559, 30 Cal. Rptr. 521, 381 P.2d 377* ; *Press v. Lyford (1974) 36 Cal. App. 3d 986, 996-997, 111 Cal. Rptr. 817]* . For a form of complaint and an analysis of liability in a waterskiing accident where there has been negligent operation of a motorboat on waters not subject to admiralty jurisdiction, see *§ 100.60*.

[3] Liability Based on Imputed Negligence

Harb. & Nav. Code § 661 establishes a basis for imputing negligence to the owners of undocumented vessels, numbered under the Harbors and Navigation Code, when negligent operation of the vessel by another causes death or injury to person or property. For a form of allegation and discussion of the principles of imputed negligence, see *§ 100.63*.

[4] Liability of Swimming Concessionaire

Individuals who offer the use of public waters for bathing in connection with bathhouses and other appropriate facilities maintained by them as owner or lessee of the shore may owe a duty to patrons who use the waters in the usual and ordinary way to exercise reasonable care to prevent injury [*see Sorensen v. Hutson (1959) 175 Cal. App. 2d 817, 826, 346 P.2d 785]* . For a form of allegation and discussion of the liability of concessionaires, see *§ 100.61[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsTransportation TortsWatercraftGeneral OverviewAdmiralty LawPractice & ProcedureJurisdictionAdmiralty LawPersonal InjuriesMaritime Tort ActionsNegligenceGeneral OverviewAdmiralty LawCollisionsLiabilityGeneral Overview

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9-100 California Forms of Pleading and Practice--Annotated § 100.21

§ 100.21 Wrongful Death Actions

[1] Death Occurring Outside State's Territorial Limits

Prior to 1970, the only remedies in admiralty for wrongful death resulting from maritime duties were statutory. The primary statute providing a remedy was the Death on the High Seas Act (DOHSA; *46 U.S.C.S. § 30301 et seq.*). This statute provides a cause of action for the death of a person caused by wrongful act, neglect, or default occurring on the high seas beyond three nautical miles from the shore of any state [*46 U.S.C.S. § 30302*]. It authorizes the personal representative of the decedent to maintain a suit for damages in the federal district court sitting in admiralty, for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative, against the person or vessel responsible [*see 46 U.S.C.S. § 30302*].

The DOHSA covers wrongful death beyond the territorial limits of the State of California in the Pacific Ocean [*see Gov. Code § 170* (western boundary of state as three English nautical miles seaward from coast); Webster's Third New International Dictionary (nautical mile as 6,080.20 feet [times 3 equals 18,240.60 feet] before July 1, 1954, and thereafter as 1,852 meters, approximately 6,076.1033 feet [times 3 equals approximately 18,228.31 feet]; English nautical mile as 6,080 feet [times 3 equals 18,240 feet])]. The boundary of the state in the Pacific Ocean lies approximately 3.45 land miles from the coast. The DOHSA is not the only federal statute governing death in those circumstances [*see Sennett v. Shell Oil Co. (E.D. La. 1971) 325 F. Supp. 1, 7* (mentioning other possibly applicable congressional enactments)], but it is the statute most likely to apply in the kinds of cases discussed in this chapter.

The courts have construed the term "high seas" to include all waters that are not the territorial waters of the United States. Therefore, DOHSA applies to injuries that occur within the territorial waters of another nation, even if that body of water is an inland river or lake [*Beckett v. MasterCraft Boat Co. (2005) 126 Cal. App. 4th 1045, 1048-1049, 24 Cal. Rptr. 3d 490]* .

DOHSA's savings clause, *46 U.S.C.S. § 30308(a)*, makes federal court jurisdiction concurrent with state jurisdiction to hear DOHSA actions. Thus, DOHSA beneficiaries have a choice of a convenient forum for their wrongful death claims, although DOHSA's substantive provisions must be applied because DOHSA preempts state law [*see 46 U.S.C.S. § 30308(a)*; *Offshore Logistics, Inc. v. Tallentire (1986) 477 U.S. 207, 221-222, 232-233, 106 S. Ct. 2485, 91 L. Ed. 2d*

174] . Although one California court of appeal decision nevertheless held that California state courts have no subject matter jurisdiction over DOHSA actions because the California wrongful death statute has no extraterritorial effect [*Chromy v. Lawrance (1991) 233 Cal. App. 3d 1521, 1526-1527, 285 Cal. Rptr. 400]* , that decision has been criticized as contrary to the U.S. Supreme Court's holding and has not been followed subsequently by the California court of appeal [*Garofalo v. Princess Cruises, Inc. (2000) 85 Cal. App. 4th 1060, 1079-1085, 102 Cal. Rptr. 2d 754]* .

So long as the injury occurring on the high seas is one cause of the death, DOHSA provides the exclusive remedy, even if that injury is not the sole cause of the death [*Garofalo v. Princess Cruises, Inc. (2000) 85 Cal. App. 4th 1060, 1079, 102 Cal. Rptr. 2d 754]* .

[2] Death Occurring Within State's Territorial Limits

[a] Maritime Remedy

There is no federal statute covering wrongful death on navigable waters within the territorial limits of a state. Prior to 1970, in an admiralty action based on such a death, the admiralty court would apply the appropriate state wrongful-death statute [*Matter of S/S Helena (5th Cir. 1976) 529 F.2d 744, 748-749]* . Subsequently, in *Moragne v. States Marine Lines,* the Supreme Court recognized the availability of a remedy for wrongful death, based on negligence or unseaworthiness, under general martime law in situations not covered by the DOHSA that may be applied, in particular, to deaths within state territorial waters [*Moragne v. States Marine Lines (1970) 398 U.S. 375, 402, 90 S. Ct. 1772, 26 L. Ed. 2d 339* ; *see also Norfolk Shipbldg. & Drydock Corp. v. Garris (2001) 532 U.S. 811, 121 S. Ct. 1927, 150 L. Ed. 2d 34, 43* (although holding in *Moragne* technically addressed only claims brought for violation of duty of seaworthiness, holding extends to negligence claims)]. Admiralty courts may now apply only the general maritime remedy and not the state's wrongful death statute [*Nelson v. United States (9th Cir. 1980) 639 F.2d 469, 473* ; *Matter of S/S Helena (5th Cir. 1976) 529 F.2d 744, 753]* .

If the death occurred on the high seas, damages under the maritime remedy are restricted by the measure of damages under the DOHSA [*Mobil Oil Corp. v. Higginbotham (1978) 436 U.S. 618, 623-624, 98 S. Ct. 2010, 56 L. Ed. 2d 581]* . The United States Supreme Court has allowed the recovery of nonpecuniary damages (such as loss of support, services, society, and funeral expenses) in a claim brought under general maritime law with respect to a death within territorial waters, but that holding applies only to a claim based on the death of a longshore worker that occurs in territorial waters [*Miles v. Apex Marine Corp. (1990) 498 U.S. 19, 30-31, 30 n.1, 111 S. Ct. 317, 112 L. Ed. 2d 275* (discussing *Sea-Land Services, Inc. v. Gaudet (1974) 414 U.S. 573, 584-585, 94 S. Ct. 806, 39 L. Ed. 2d 9* , which holding is now further limited by subsequent federal legislation under *33 U.S.C.S. § 905(b)* regarding longshore workers)]. For discussion of this issue, see Ch. 522, *Ships and Shipping* .

In *Yamaha Motor Corp. v. Calhoun,* the U.S. Supreme Court held that state law remedies are available in *Moragne*-type wrongful death actions brought for the death of a non-seafarer--that is, someone who was neither a seaman covered by the Jones Act nor a longshore worker [*Yamaha Motor Corp. v. Calhoun (1996) 516 U.S. 199, 202, 116 S. Ct. 619, 133 L. Ed. 2d 578]* . For a discussion of remedies afforded under California wrongful death law, see Ch. 181, *Death and Survival Actions* .

Although a specific list of dependent relatives who are eligible to recover has not been established, the schedule of beneficiaries in the DOHSA [*see* [1], *above*] is persuasive authority [*see Moragne v. States Marine Lines (1970) 398 U.S. 375, 407-408, 90 S. Ct. 1772, 26 L. Ed. 2d 339]* .

The time period for bringing an action for personal injury or death arising out of any maritime tort is three years from accrual of the cause of action [*46 U.S.C.S. § 30106*].

For discussion of wrongful-death actions under the general maritime law with emphasis on its application to the

shipping industry, see Ch. 522, *Ships and Shipping* .

[b] State Remedy

The California wrongful-death statute (*Code Civ. Proc. § 377.60*), which applies to accidents occurring on the state's nonnavigable waters, provides that persons who may bring a wrongful death action, in addition to the decedent's personal representative (who may bring an action on behalf of a person otherwise entitled to do so), are (1) the surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue, the persons, including the surviving spouse, who would be entitled to the property of the decedent by intestate succession; (2) the putative spouse, children of a putative spouse, stepchildren, and parents of the decedent, if they were dependent on the decedent, regardless of whether or not they are entitled to succeed to the decedent's property; and (3) any other minor residing in the decedent's household for at least 180 days before the decedent's death who was dependent on the decedent for at least one-half of his or her support [*Code Civ. Proc. § 377.60*]. For further discussion of death actions under *Code Civ. Proc. § 377.60*, see Ch. 181, *Death and Survival Actions* .

The wrongful death action may be brought against the person whose wrongful act or neglect caused the death [*Code Civ. Proc. § 377.60*], or if he or she has died, the personal representative of the wrongdoer or, to the extent provided by statute, the wrongdoer's successor in interest [*Code Civ. Proc. § 377.40*]. Thus, in addition to the broader category of plaintiffs who may sue under state law compared to admiralty law, Code Civ. Proc. § 377.40 also permits suit to be brought against the wrongdoer's estate, although under both the federal act and the maritime remedy the estate of the wrongdoer is apparently not subject to suit.

Even if an action may not be brought against the estate of the wrongdoer, an action in rem against the vessel is available if suit is brought in a federal district court sitting in admiralty, whether or not the wrongdoer is dead. The DOHSA expressly authorizes an action against the vessel [*see 46 U.S.C.S. § 30302*]; the in rem action is a traditional one in admiralty and is available whether or not the act is applicable [for discussion, *see § 100.15, above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsTransportation TortsWatercraftGeneral OverviewTortsWrongful Death & Survival ActionsGeneral OverviewAdmiralty LawPersonal InjuriesDeath ActionsWrongful Death & SurvivalGeneral OverviewAdmiralty LawPersonal InjuriesDeath ActionsDeath on the High Seas ActProcedureAdmiralty LawPersonal InjuriesDeath ActionsDeath on the High Seas ActCoverage

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§ 100.22 Demise Charter Party

An owner of a vessel who charters the vessel under a demise charter party is bound to see that the vessel is seaworthy and suitable for the service in which it is to be employed [*see Work v. Leathers (1878) 97 U.S. 379, 380, 24 L. Ed. 1012]* . The charterer must return the vessel in as good a condition as he or she received it, excepting ordinary wear and tear [*see The E. T. Halloran (2d Cir. 1940) 111 F.2d 571, 572]* .

The demise charterer is treated as the owner for purposes of statutes relating to limitation of liability [*see Leary v. United States (1872) 81 U.S. 607, 610, 20 L. Ed. 756]* . The charterer also acquires in personam liability arising out of the vessel's operation [*see Cannella v. United States (2d Cir. 1950) 179 F.2d 491, 491-492* ; *see also The Barnstable (1901) 181 U.S. 464, 469-471, 21 S. Ct. 684, 45 L. Ed. 954* ; *The Norland (9th Cir. 1939) 101 F.2d 967, 971-973]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPractice & ProcedureAttachment & GarnishmentIn Personam ActionsAdmiralty LawCharterpartiesParty LiabilityCharterer LiabilityAdmiralty LawCharterpartiesParty LiabilityLimitations on Liability

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§ 100.23 Liens

Maritime contracts for goods (materials, supplies, equipment) and service (repair, storage) create lien rights by operation of law. Federal maritime lien law provides that any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel will have a maritime lien on the vessel [*46 U.S.C.S. §§ 31301(4), 31342(a)(1)*].

When a claimant under a maritime contract has a lien right, the ship itself becomes liable, to the value of the ship and freight (i.e., charges for the carriage of cargo), for the obligation, which is enforceable in an action in rem. The owner of the ship is also liable personally (in the sense that an action in personam may be maintained) for obligations under a maritime contract, whether or not an obligation is secured by a lien.

For a general discussion of maritime liens, see Ch. 522, *Ships and Shipping* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPractice & ProcedureAttachment & GarnishmentIn Personam ActionsAdmiralty LawMaritime LiensNatureJurisdictionAdmiralty LawMaritime LiensPriority & SourcesContractsGeneral OverviewAdmiralty LawMaritime LiensNatureProperty Subject to Lien

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§ 100.24 Liability of Governmental Vessel

[1] United States Government

A case involving a vessel owned by the United States government or any corporation in which the United States government owns the entire outstanding capital stock, including a vessel not owned but possessed or operated by the United States government or such a corporation, is governed by the Suits in Admiralty Act [*46 U.S.C.S. § 30901 et seq.*]. That act provides that in cases where if such vessel were privately owned or operated, or if a private person or property were involved, a proceeding in admiralty could be maintained, a nonjury proceeding in personam may be brought against the United States or against any corporation described above in the district court of the United States [*46 U.S.C.S. § 30903*].

There is also the Public Vessels Liability Act [*46 U.S.C.S. § 31101 et seq.*], which was enacted after the Suits in Admiralty Act, providing that a civil action in personam in admiralty may be brought against the United States in the federal district court for damages caused by a public vessel of the United States [*46 U.S.C.S. § 31102(a)*]. It has been held that the two acts must be construed together, with the result that an action under the Public Vessels Liability Act may be maintained only where a proceeding in admiralty could be maintained if the public vessel were privately owned or operated [*Mejia v. United States (5th Cir. 1946) 152 F.2d 686, 687-688* ; *see 46 U.S.C.S. § 30903(a)*]. The Public Vessels Liability Act did not create a cause of action; it simply removed the government's immunity [*Maine v. United States (1st Cir. 1943) 134 F.2d 574, 575]* .

[2] California State Government

The California Legislature has not enacted a statute similar to the Suits in Admiralty Act or the Public Vessels Liability Act. A state's sovereign immunity, unless waived, protects the state from suit in cases of admiralty jurisdiction [*The Charlotte (W.D.N.Y. 1922) 285 F. 84, 86-87]* and protects the state's vessels from suits in admiralty in rem [*Ex parte New York (1921) 256 U.S. 503, 511, 41 S. Ct. 592, 65 L. Ed. 1063]* , provided that the vessel in question, in any case, is both wholly owned by the state government and also engaged in a governmental function [*The West Point (E.D. Va. 1947) 71 F. Supp. 206, 211* (dictum)].

Therefore, a case involving a vessel owned by the State of California is not a case of admiralty jurisdiction unless the

state has waived its sovereign immunity (assuming that the conditions of complete ownership and engagement in a governmental function are met).

In cases of breach of contract, it appears that there never is any sovereign immunity [*Souza & McCue Constr. Co. v. Superior Court (1962) 57 Cal. 2d 508, 510, 20 Cal. Rptr. 634, 370 P.2d 338* (state, in contract with an individual, as liable for breach of agreement in like manner as an individual, and doctrine of governmental immunity as not applicable)]. Since the state is liable for breach of contract in like manner as an individual, it appears that the state is subject to suit in admiralty for breach of a maritime contract and that, therefore, principles of admiralty law will govern a suit in a state court against the state for breach of a maritime contract. No reported case has so held, however.

In cases of tort, the state has waived its sovereign immunity to some extent. The Tort Claims Act [*Gov. Code § 810 et seq.*] provides that a public entity (that is, the state, the Regents of the University of California, a county, city, district, public authority, public agency, or any other political subdivision or public corporation in California) is liable for injury proximately caused by an act or omission of an employee (that is, an officer, judicial officer, employee, or servant, whether or not compensated, excepting an independent contractor) of the public entity within the scope of employment (including both office and employment) if the act or omission would have given rise to a cause of action against that employee or personal representative other than under the Tort Claims Act [*Gov. Code § 810.2* (employee), *Gov. Code § 810.4* (employment), *Gov. Code § 811.2* (public entity), *Gov. Code § 815.2(a)*; *see Gov. Code § 810.8* (injury defined)].

Except as otherwise provided by statute, a public entity is not liable for an injury when the employee is immune from liability [*Gov. Code § 815.2(b)*].

Public entities and public employees are immune from liability for injuries or damages arising out of hazardous recreational activities, which include boating, conducted on public property [*Gov. Code § 831.7(a)*]. This immunity applies against participants in the activity, those who assist participants, and spectators who knew or reasonably should have known that the activity created a substantial risk of injury to themselves and were voluntarily in the place of risk, or having the ability to leave failed to do so [*Gov. Code § 831.7(a)*]. There are specified exceptions to this immunity, such as gross negligence by the public entity or employee which proximately caused the injury [*Gov. Code § 831.7(c)(5)*]. For a discussion of this immunity, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[3] Local Governments and Political Subdivisions

In California the protection of sovereign immunity extends to cities, counties, districts, public authorities, public agencies, and all other political subdivisions and all public corporations [*see Gov. Code §§ 811.2* (public entity defined), *815(a), 815.2(b)* (immunity of public entities)]. Therefore, the discussion of immunity and waiver of immunity in [2], *above*, applies to local governments as well as to the state.

Since the state has no immunity in cases of breach of contract but may be sued in the same way as a citizen may be sued, it appears that local governments likewise are not immune in such cases and also may be sued.

[4] Foreign Governments

Prior to 1976, vessels owned by a foreign government were largely immune from suit [*see The Schooner Exchange v. M'Faddon (1812) 11 U.S. 116, 144-147, 3 L. Ed. 287* ; *The Pesaro (1921) 255 U.S. 216, 219, 41 S. Ct. 308, 65 L. Ed. 592]* . The Foreign Sovereign Immunities Act of 1976 (*28 U.S.C.S. §§ 1330, 1332(a)(4), 1391(f), 1441(d), 1602*-1611) qualified this rule, and, subject to special procedural requirements, now generally allows plaintiffs to bring in personam actions against foreign states in both state and federal courts for tort causes of action arising from vessel collisions [*28 U.S.C.S. § 1605(a)(2), (5), (b)*]. Foreign states do, however, remain immune from certain claims, including those for punitive damages [*28 U.S.C.S. § 1606*], those based on a discretionary function of the foreign state, and those based on malicious prosecution, abuse of process, defamation, deceit, or interference with the contract rights [*28 U.S.C.S. §*

1605(a)(5)(A), (B)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral OverviewAdmiralty LawSovereign Immunity & LiabilityState & Local GovernmentsAdmiralty LawSovereign Immunity & LiabilityForeign GovernmentsAdmiralty LawSovereign Immunity & LiabilityFederal GovernmentPublic Vessels ActGeneral OverviewAdmiralty LawSovereign Immunity & LiabilityFederal GovernmentSuits in Admiralty ActGeneral Overview

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§ 100.25 Products Liability

Where personal injury and property damage occurring on state waters not subject to admiralty jurisdiction are caused by a defect in the boat, the purchaser-user may have an action for damages based on strict liability of the manufacturer of the boat and the retailer under state principles of products liability. For a form of complaint and discussion of the effect of the federal recreational boating safety law [*see 46 U.S.C.S. §§ 2101(1), (25), (26), 4301-4311*] on products liability action in California, see *§ 100.66*. The general principles governing products liability in California are discussed in Ch. 460, *Products Liability* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawWater RightsNonconsumptive UsesWatercraftTortsTransportation TortsGeneral OverviewTortsProducts LiabilityGeneral OverviewAdmiralty LawPersonal InjuriesMaritime Tort ActionsProducts Liability

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§ 100.26 Actions Between Owners

A controversy between coowners of a vessel as to its use or repair may be subject to admiralty jurisdiction or it may be governed by state law, depending on the particular facts of the situation. For for a form of complaint and analysis of a lawsuit arising out of such a controversy, see *§ 100.68*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPractice & ProcedureJurisdictionAdmiralty LawMaritime ContractsGeneral Overview

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§ 100.27 Boat and Boating Equipment Safety Requirements

State issuance of standards and requirements for recreational boating are generally preempted by federal law on the subject [*46 U.S.C.S. § 4306*; *see 46 U.S.C.S. §§ 2101(1), (25), (26)*, 4301-4311]. Relevant federal regulations are set out in 33 C.F.R. Parts 175 (equipment requirements), 181 (manufacturer requirements), and 183 (boats and associated equipment).

The states are permitted to establish and enforce standards that are identical to those established under the act; the states may establish different standards if permitted to do so by the secretary; and where different standards are required to meet uniquely hazardous conditions within a state, that state may establish such standards regarding the carrying or using of marine safety articles, subject to the authority of the secretary to nullify them by disapproval [*46 U.S.C.S. § 4306*].

The Department of Boating and Waterways has established fairly comprehen sive safety regulations with the avowed purpose of better conformity with federal law and regulations [*14 Cal. Code Reg § 6550*]. These are set out in *14 Cal. Code Reg § 6550 et seq.* With respect to the matters covered by the federal regulations, the state regulations are substantially the same.

Although federal law prohibits a state from imposing or enforcing a recreational boating equipment or safety standard that is not identical to a regulation prescribed under the federal law [*46 U.S.C.S. § 4306*], it also provides that compliance with the federal law does not preclude any liability at common law or under state law [*46 U.S.C.S.§ 4311(g)*].

The United States Supreme Court has concluded that the express preemption provisions apply only to the application of nonconforming state statutes and regulations, not to common law liability, a decision that gives full effect to the savings clause [*Sprietsma v. Mercury Marine (2002) 537 U.S. 51, 62-63, 123 S. Ct. 518, 154 L. Ed. 2d 466]* . Therefore, the Court held that a products liability action against an outboard motor manufacturer for the failure to install a propeller guard was not preempted, despite the Coast Guard's earlier decision not to implement a regulation requiring propeller guards [*Sprietsma v. Mercury Marine (2002) 537 U.S. 51, 64-68, 123 S. Ct. 518, 154 L. Ed. 2d 466]* ; *see also LaPlante v. Wellcraft Marine Corp. (2001) 94 Cal. App. 4th 282, 291-296, 114 Cal. Rptr. 2d 196* (because no regulation

governed hand rails or grips on recreational boats, tort action for failure to provide them was not preempted)].

The Court also concluded that the federal statute did not completely occupy the field of safety regulation of recreational boats so as to implicitly preempt liability under state common law [*Sprietsma v. Mercury Marine (2002) 537 U.S. 51, 68-70, 123 S. Ct. 518, 154 L. Ed. 2d 466]* . However, the Court recognized that a tort action may be preempted if the imposition of liability would directly conflict with a federal regulation promulgated under the federal statute, or if it is impossible to comply with a regulation without incurring liability under state common law [*Sprietsma v. Mercury Marine (2002) 537 U.S. 51, 64-65, 123 S. Ct. 518, 154 L. Ed. 2d 466]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawWater TransportationGeneral OverviewTortsProducts LiabilityGeneral OverviewTransportation LawWater TransportationState & Local RegulationCivil ProcedureFederal & State InterrelationshipsFederal Common LawPreemption

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§ 100.28 Duty to Assist Victims of Boating Accident

[1] Duty to Render Assistance

It is the duty of the operator of a vessel involved in a collision, accident, or other casualty, if he or she can render assistance without seriously endangering the vessel, crew, and passengers, to render to other persons affected by the collision, accident, or casualty such assistance as may be practicable and as may be necessary in order to save them from, or to minimize, any danger caused by the collision, accident, or casualty [*Harb. & Nav. Code § 656(a)*]. This provision substantially duplicates *46 U.S.C.S. § 2303(a)*; thus the duty is applicable to operators of vessels on waters subject to either admiralty or state jurisdiction [*see Harb. & Nav. Code § 650.1(a)*]. Operators of vessels on waters subject to admiralty jurisdiction also have a duty to render assistance to any individual found at sea in danger of being lost, without regard to involvement in a collision or other marine casualty, so far as he or she can do so without seriously endangering the vessel or individuals on board [*46 U.S.C.S. § 2304(a)(1)*].

[2] Exemption From Liability When Rendering Assistance

Any person who complies with *Harb. & Nav. Code § 656(a), above,* or *Harb. & Nav. Code §§ 656.1, 656.2,* or *656.3* (boating accident reporting requirements, discussed in *§§ 100.30 -100.32*), who gratuitously and in good faith renders assistance at the scene of a vessel collision, accident, or other casualty without objection by any person assisted cannot be held liable for any civil damages sought as a result of the rendering of assistance or for any act or omission in providing or arranging salvage, towage, medical treatment, or other assistance, where the assisting person has acted as an ordinary, reasonably prudent person would have acted under the same or similar circumstances [*Harb. & Nav. Code § 656(b)*]. This provision substantially duplicates *46 U.S.C.S. § 2303(c)*.

Harb. & Nav. Code § 656(c) provides for the limited liability and immunity of public entities and their employees engaged in the rescue of vessels pursuant to the Harbors and Navigation Code. For a discussion of these liabilities and immunities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

Legal Topics:

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

Healthcare LawGood Samaritan LawsAdmiralty LawCollisionsPreventionRegulatory & Statutory DutiesGeneral OverviewAdmiralty LawSovereign Immunity & LiabilityState & Local GovernmentsAdmiralty LawShippingCarrier Duties & ObligationsGeneral OverviewAdmiralty LawShippingCarrier Duties & ObligationsLimitations on Liability

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§ 100.29 Duty to Report Boating Accident

[1] Reporting Requirement

The owner, operator, or other person on board a vessel involved in a casualty or accident on waters subject to state jurisdiction is required to report the casualty or accident in accordance with regulations adopted by the Department of Boating and Waterways [*Harb. & Nav. Code §§ 650.1, 656(d)*]. The department's regulations for making such reports are set out in *14 Cal. Code Reg § 6501 et seq.* They are substantially the same as the regulatons of the Secretary of Transportation adopted under federal law [*see 46 U.S.C.S. §§ 6101-6104*] which are set out in *33 C.F.R. § 173.51 et seq.*

[2] Accident Report Inadmissible in Civil Action

Neither the report required by *Harb. & Nav. Code § 656(d)* nor any action taken by the Department of Boating and Waterways with regard to the report may be referred to in any way or be any evidence of negligence or due care of any party at the trial of any action at law to recover damages [*Harb. & Nav. Code § 656(e)*].

[3] Contents of Report Partially Available

All required accident reports and all supplemental reports are to be kept confidential, except that the Department of Boating and Waterways is required to disclose the following information contained in a report to any person having a proper interest in the information [*Harb. & Nav. Code § 656(f)*]:

- Names and addresses of persons involved in or witnessing an accident;
- Registration numbers and descriptions of vessels involved; and
- Date, time, and location of an accident.

Persons having a proper interest in such information include the operator involved, the legal guardian of the operator, the parent of a minor operator, the authorized representative of an operator, a person injured in the accident, the owner

of a vessel damaged in the accident, and the owner of other property damaged in the accident [*Harb. & Nav. Code § 656(f)*]. This list is apparently only illustrative, and it would appear that the owner of an undamaged offending vessel, to whom liability might be imputed under *Harb. & Nav. Code § 661*, has a proper interest in obtaining any available information.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceRelevanceGeneral OverviewAdmiralty LawCollisionsPreventionRegulatory & Statutory DutiesGeneral OverviewTransportation LawWater TransportationLicensing & RegistrationAdministrative LawGovernmental InformationRecordkeeping & Reporting

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§ 100.30 Duty to Report Property Damage

The operator of any vessel involved in an accident in California waters who knows or has reason to know that the accident resulted in damage to other property must, if reasonable to do so under the circumstances, stop at the scene of the accident and do either of the following [*Harb. & Nav. Code § 656.1*]:

- Locate and notify the owner or person in charge of the damaged property of the name and address of the operator and owner of the vessel involved, and on locating the owner or operator of any other vessel involved, or the owner or person in charge of any other property damaged, exhibit the vessel registration and furnish the current residence address of the vessel's owner and operator on request.

- If the owner or person in charge of the damaged property, or the owner or operator of any other vessel involved, cannot be located, leave, in a conspicuous place on the property damaged or other vessel involved, a written notice giving the name and address of the operator and of the owner of the vessel involved and a statement of the circumstances of the accident. Additionally, the law enforcement agency having jurisdiction over the waterway must be notified, without unnecessary delay. If the appropriate law enforcement agency is unknown, the sheriff of the county in which the accident occurred must be notified.

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawWater TransportationState & Local RegulationAdmiralty LawCollisionsPreventionRegulatory & Statutory DutiesGeneral Overview

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§ 100.31 Duty to Report Personal Injury

In addition to the requirements of *Harb. & Nav. Code § 656.1* [for discussion, *see § 100.30*], the operator of any vessel involved in an accident in California waters who knows or has reason to know that the accident resulted in injury to any person, must furnish his or her name, address, the registration number of the vessel, and the name of the owner, to the person injured, the occupant of any other vessel involved, or any peace officer at the scene of the accident. Additionally, reasonable assistance, including transportation for medical treatment if required or requested by the injured person, must be rendered to the injured person, so far as can be done without serious danger to the vessel or passengers [*Harb. & Nav. Code § 656.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPersonal InjuriesMaritime Tort ActionsNegligenceInvitees, Passengers & StowawaysTransportation LawWater TransportationLicensing & RegistrationTortsTransportation TortsWatercraftGuests & Invitees

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9-100 California Forms of Pleading and Practice--Annotated § 100.32

§ 100.32 Duty to Report Death or Disappearance of Persons

In addition to the requirements of *Harb. & Nav. Code §§ 656.1* and *656.2* [for discussion *see §§ 100.30, 100.31*], the operator of any vessel involved in an accident in California waters who knows or has reason to know that the accident resulted in the death or disappearance of any person must, after fulfilling the requirements of *Harb. & Nav. Code §§ 440-876*, without delay, furnish the information required by *Harb. & Nav. Code § 656.2* to any peace officer at the scene of the accident. If there is no peace officer at the scene, the accident must be reported to the law enforcement agency having jurisdiction over the waterway. If the appropriate law enforcement agency is unknown, then the accident must be reported to the sheriff of the county in which the accident occurred [*Harb. & Nav. Code § 656.3*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawWater TransportationState & Local RegulationAdmiralty LawCollisionsPreventionRegulatory & Statutory DutiesGeneral Overview

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[Reserved]

§§ 100.33[Reserved]

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§ 100.40 Related Matthew Bender Publications

Benedict On Admiralty (7th ed. Matthew Bender)

For forms of interrogatories for use in actions involving motorboats, see 2 Bender's Forms Of Discovery, *Boats and Ships*

Legal Topics:

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

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9-100 California Forms of Pleading and Practice--Annotated § 100.41

§ 100.41 Federal Constitution

Judicial power of United States extends to all cases of admiralty and maritime jurisdiction. U.S. *Const., art. III, § 2*

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPractice & ProcedureConstitutional Authority

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9-100 California Forms of Pleading and Practice--Annotated § 100.42

§ 100.42 Federal Statutes

Jurisdiction in admiralty or maritime civil cases. *28 U.S.C.S. § 1333*

Navigable waters of United States. *33 U.S.C.S. § 1 et seq.*

International Navigation Rules. *33 U.S.C.S. § 1601 et seq.*

Navigation rules of inland waterways. *33 U.S.C.S. § 2001 et seq.*

Limitation of Liability Act. *46 U.S.C. § 30501 et seq.*

Suits in Admiralty Act. *46 U.S.C. § 30901 et seq.*

Death on the High Seas Act. *46 U.S.C. § 30301 et seq.*

Public Vessels Liability Act. *46 U.S.C. § 31101 et seq.*

Duties and penalties relating to general operation of vessels subject to admiralty jurisdiction. *46 U.S.C.S. § 2301 et seq.*

Regulation of recreational vessels. *46 U.S.C.S. § 4301 et seq.*

Marine accident reporting requirements. *46 U.S.C.S. § 6101 et seq.*

Numbering of recreational vessels. *46 U.S.C.S. § 12301 et seq.*

Recreational Boating Safety Programs. *46 U.S.C.S. § 13101 et seq.*

Maritime liens. *46 U.S.C.S. §§ 31305, 31341* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPersonal InjuriesDeath ActionsDeath on the High Seas ActGeneral OverviewAdmiralty LawSovereign Immunity & LiabilityFederal GovernmentPublic Vessels ActGeneral OverviewAdmiralty LawSovereign Immunity & LiabilityFederal GovernmentSuits in Admiralty ActGeneral OverviewAdmiralty LawMaritime LiensPriority & SourcesContractsMaritime Lien ActAdmiralty LawShippingCarrier Duties & ObligationsLimitations on Liability

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§ 100.43 State Statutes

Elements of contract to let ship (charter party). *Civ. Code § 1959*

Harbors and Navigation Code applicable to extent it does not conflict with federal law or admiralty and maritime jurisdiction. *Harb. & Nav. Code §§ 90, 240, 399, 790*

Navigable waters in *California. Harb. & Nav. Code §§ 101-106*

Navigation rules. *Harb. & Nav. Code §§ 280-285*

Responsibility of lessee having possession and navigation of vessel for vessel's repairs and supplies. *Harb. & Nav. Code § 404*

Assistance to victims of boating accident. *Harb. & Nav. Code § 656(a),(b)*

Duty to report boating accident. *Harb. & Nav. Code § 656(d)-(f)*

Negligence of boat operator with owner's permission is imputable to owner. *Harb. & Nav. Code § 661*

Exception to lien for service and repair of noncommercial vessel. *Harb. & Nav. Code §§ 410-418*

Intoxication offenses. *Harb. & Nav. Code §§ 655, 655.1, 655.5, 668*

Duty to report property damage resulting from boating accident. *Harb. & Nav. Code § 656.1*

Duty to report personal injury resulting from boating accident. *Harb. & Nav. Code § 656.2*

Duty to report death or disappearance of persons resulting from boating accident. *Harb. & Nav. Code § 656.3*

Requirement of floatation device for children 13 years of age or less. *Harb. & Nav. Code § 658.3*

Liability of operator of boat or vessel for costs of emergency response caused by operation of boat or vessel under influence of alcohol or drugs. *Gov. Code §§ 53151, 53153-53158*

Liability of public entity and its employee engaged in rescue. *Harb. & Nav. Code § 656(c)*

Infraction to operate motorized vessel while person is teak surfing, platform dragging, or body surfing behind vessel, or is occupying or holding onto swim platform or ladder. *Harb. & Nav. Code § 681*

Charter Boat Safety Act of 1983. *Harb. & Nav. Code § 773 et seq.*

Boaters Lien Law. *Harb. & Nav. Code § 500 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawMaritime LiensGeneral OverviewHealthcare LawGood Samaritan LawsTransportation LawWater TransportationState & Local RegulationAdmiralty LawCharterpartiesCharter ContractsGeneral OverviewAdmiralty LawSovereign Immunity & LiabilityState & Local Governments

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§ 100.44 Federal Administrative Regulations

Navigable waterways defined. 33 C.F.R. § 2.05-25

Pilot Rules for Inland Waters. 33 C.F.R. Part 93

Casualty and accident reporting. *33 C.F.R. § 173.51 et seq.*

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§ 100.45 State Administrative Regulations

Boating accident and casualty reporting. *14 Cal. Code Reg § 6501 et seq.*

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§ 100.46 Decisions

[1] Berth Lease

Exculpatory clause in berth lease is void; operation of private wharfs and piers is proper subject of public regulation; of great importance to public, and of practical necessity to boat owners; lessor is in superior bargaining position; transaction placed lessee's property at risk of carelessness of lessor. *Pelletier v. Alameda Yacht Harbor (1986) 188 Cal. App. 3d 1551, 1554-1557, 230 Cal. Rptr. 253*

[2] Choice of Law

Failure to assert applicability of federal maritime law is a waiver; law of forum state applies unless timely request is made to invoke maritime law. *Pelletier v. Alameda Yacht Harbor (1986) 188 Cal. App. 3d 1551, 1554 n.1, 230 Cal. Rptr. 253*

[3] Dry Docks

Exculpatory clause in dry dock user's agreement which repair contractor was required to sign with port district is adjunct to repair contract with Navy, and which absolved port district and its maintenance contractor from liability for losses arising from delay or disruption, is valid under both California and maritime law; thus repair contractor was unable to recover for delays caused by malfunction and absence of gantry cranes on dock. *Arcwel Marine, Inc. v. Southwest Marine, Inc. (9th Cir. 1987) 816 F.2d 468, 470-471*

Under California law, validity of exculpatory clause in dry dock user's agreement is influenced by fact that repair contractor knew before bidding for Navy repair contract that user agreement with exculpatory clause would be required of successful bidder and had opportunity to increase its bid to account for risk imposed by clause. *Arcwel Marine, Inc. v. Southwest Marine, Inc. (9th Cir. 1987) 816 F.2d 468, 471*

[4] In Rem

Remedy of in rem action in admiralty does not deprive party of common law right to bring action in personam for collection of debt giving rise to maritime lien enforceable by in rem action. *Rounds v. Cloverport Foundry & Mach. Co. (1915) 237 U.S. 303, 307-308, 35 S. Ct. 596, 59 L. Ed. 966*

State court is without jurisdiction to enforce maritime lien by in rem action, even if lien is given by state statute. *The J.E. Rumbell (1893) 148 U.S. 1, 13, 13 S. Ct. 498, 37 L. Ed. 345*

[5] Jurisdiction in Admiralty Cases

[a] Contract Cases

[i] Maritime Nature of Contract

Admiralty jurisdiction of contract cases depends on nature of contract and is limited to contracts, claims, and services purely maritime, or touching rights and duties pertaining to commerce and navigation. *In re The Steamer Eclipse (1889) 135 U.S. 599, 608, 10 S. Ct. 873, 34 L. Ed. 269*

Contract is within admiralty jurisdiction if its subject matter is maritime; policies of marine insurance are clearly within admiralty jurisdiction. *Royal Ins. Co. v. Pier 39 Ltd. Partnership (9th Cir. 1984) 738 F.2d 1035, 1036*

Insurance policy is within admiralty jurisdiction when interests insured, and not simply risks insured against, are maritime; breakwater and dock are not maritime interests. *Royal Ins. Co. v. Pier 39 Ltd. Partnership (9th Cir. 1984) 738 F.2d 1035, 1036-1037*

[ii] Contract to Build Boat

Admiralty jurisdiction does not extend to contract to build boat or to supply materials or services for building boat. *Kossick v. United Fruit Co. (1961) 365 U.S. 731, 735, 81 S. Ct. 886, 6 L. Ed. 2d 56* (dictum; contract to build); *North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co. (1918) 249 U.S. 119, 126-127, 39 S. Ct. 221, 63 L. Ed. 510* (dictum; contract to supply materials for construction); *Bond v. F/V Mermaid (S.D. Fla. 1970) 311 F. Supp. 1013, 1014* (services of marine architect)

Admiralty jurisdiction does not extend to contract to supply materials and labor to finish building boat after default to original builder, even after hull is launched. *Thames Towboat Co. v. The Schooner "Francis McDonald" (1920) 254 U.S. 242, 243-244, 41 S. Ct. 65, 65 L. Ed. 245*

Vessel is not subject to admiralty jurisdiction until launched. *North Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co. (1918) 249 U.S. 119, 127, 39 S. Ct. 221, 63 L. Ed. 510*

Foreclosure of lien under *Harb. & Nav. Code §§ 490, 491, 495* for payment for construction of vessel is not preempted by federal admiralty law. *Islander Yachts, Inc. v. One Freeport 36-Foot Vessel (1985) 173 Cal. App. 3d 1081, 1086-1087, 219 Cal. Rptr. 654*

Manufacturer's lien under *Harb. & Nav. Code § 491* is not enforceable until perfected by filing of complaint to foreclose it or by attachment; transfer to bona fide purchaser for value without notice of lien before perfection extinguishes lien. *Islander Yachts, Inc. v. One Freeport 36-Foot Vessel (1985) 173 Cal. App. 3d 1081, 1089-1092, 219 Cal. Rptr. 654*

[iii] Contract to Furnish Supplies or Equipment

Admiralty jurisdiction extends to contract to furnish supplies and equipment for boat, and to pay therefor. *Campbell v Loznicka (5th Cir. 1950) 181 F.2d 356, 357-358* (default in obligation to pay for repairs and supplies); *The Sam & Priscilla (D. Mass. 1921) 275 F. 937, 939* (default in contractual obligation to furnish fishing net; action for breach of warranty)

Contract to furnish supplies which are items for personal use of those aboard is not maritime contract and is not subject to admiralty jurisdiction. *The Mary F. Chisholm (D. Me. 1904) 129 F. 814, 817* (clothing, tobacco, etc., furnished to crew members of fishing boat)

[iv] Contract to Repair Boat

Contract to repair vessel is maritime. *Flowers v. Travelers Ins. Co. (5th Cir. 1958) 258 F.2d 220, 221* (dictum)

Contract for reconstruction of vessel is maritime and within admiralty jurisdiction. *Wall Street Traders, Inc. v. Sociedad Espanola de Construccion Naval (S.D.N.Y. 1964) 245 F. Supp. 344, 350* (dictum; contract to alter or convert)

Extensive alterations of vessel held reconstruction, not original construction. *The Ky-Ill (6th Cir. 1931) 50 F.2d 70, 71*

Admiralty law governs the validity and interpretation of ship repair contracts, including exculpatory clauses. *Fahey v. Gledhill (1983) 33 Cal. 3d 884, 889, 191 Cal. Rptr. 639, 663 P.2d 197*

[v] Contract to Store Boat

Admiralty jurisdiction extends to contract to provide storage for equipment removed from yacht, including small boats. *The Navis (D. Me. 1912) 196 F. 843, 846-847*

Claim for wharfage for vessel while laid up during winter (when navigation impossible) is not within admiralty jurisdiction. *The Murphy Tugs (E.D. Mich. 1886) 28 F. 429, 432*

In determining admiralty jurisdiction over tort cases, relationship of wrong to traditional maritime activity is often more sensible test than mechanically applied locality test. *Executive Jet Aviation, Inc. v. Cleveland (1972) 409 U.S. 249, 258-261, 93 S. Ct. 493, 34 L. Ed. 2d 454*

[b] Products Liability Cases

Products liability claim is subject to admiralty jurisdiction if injury occurs on navigable waters and other factors pointing to admiralty jurisdiction exist. *Martinez v. Pacific Indus. Service Corp. (9th Cir. 1990) 904 F.2d 521, 524*

[c] Tort Cases

[i] On Navigable Waters or Related to Maritime Commerce

Every species of tort, however occurring, and whether on board vessel or not, if on high seas or navigable waters, is case of admiralty jurisdiction. *The Plymouth (1866) 70 U.S. 20, 36, 18 L. Ed. 125*

Action by subcontractor injured while cleaning boiler tubes aboard United States Navy ship, claiming negligence in operation of hydroblast pump and negligence in manufacture of pump, is subject to admiralty jurisdiction; work performed by subcontractor for several years in course of attachment to United States Navy, using equipment with operations manual designed for Navy use, bears directly on function of vessel and has intimate connection with maritime commerce. *Martinez v. Pacific Indus. Service Corp. (9th Cir. 1990) 904 F.2d 521, 525*

Under doctrine of *Feres v. United States (1950) 340 U.S. 135, 71 S. Ct. 153, 95 L. Ed. 152* , courts lack subject matter jurisdiction to adjudicate claims under Public Vessels Act (*46 U.S.C. § 31101 et seq.*) and Suits in Admiralty Act (*46 U.S.C. § 30901 et seq.*) by members of armed services when injuries complained of arise out of or are in course of activity incident to military service. *Bon v. United States (9th Cir. 1986) 802 F.2d 1092, 1094 n.2*

[ii] Limitation of Liability

Federal district court has jurisdiction over action, seeking declaratory and injunctive relief regarding application of limitation of owner's liability under *46 U.S.C. § 30501 et seq.*, arising from fire aboard noncommercial vessel docked in marina that was in navigable waters, even though no commercial vessels were in marina at time of fire. *Sisson v. Ruby (1990) 497 U.S. 358, 110 S. Ct. 2892, 111 L. Ed. 2d 292, 299-303*

[iii] Navigable Waters

Body of water is navigable water if susceptible of being used, in ordinary condition or with reasonable improvements, by itself or by uniting with other waters, as highway over which trade and travel may be carried on with other states or foreign countries in customary modes in which such commerce is conducted by water. *Davis v. United States (9th Cir. 1950) 185 F.2d 938, 942-943* , relying on *The Daniel Ball v. United States (1870) 77 U.S. 557, 563, 19 L. Ed. 999* and *United States v. Appalachian Elec. Power Co. (1940) 311 U.S. 377, 407, 61 S. Ct. 291, 85 L. Ed. 243*

Determination of navigability. *Hitchings v. Del Rio Woods Recreation & Park Dist. (1976) 55 Cal. App. 3d 560, 567, 127 Cal. Rptr. 830*

Navigability is question of fact. *United States v. Appalachian Elec. Power Co. (1940) 311 U.S. 377, 405, 61 S. Ct. 291, 85 L. Ed. 243*

[6] Operation of State Laws in Admiralty Cases

In matters of admiralty and maritime jurisdiction, state law is permitted to supplement but not to change substantive admiralty law. *Pope & Talbot, Inc. v. Hawn (1953) 346 U.S. 406, 409-410, 74 S. Ct. 202, 98 L. Ed. 143 , superseded by statute on other grounds as stated in Babbitt v. Hanover Towing, 7 F. Supp. 2d 650 (E.D. N.C. 1998)* ; *Madruga v. Superior Court (1953) 346 U.S. 556, 561, 74 S. Ct. 298, 98 L. Ed. 290*

Harbors and Navigation Code provisions applied in case of admiralty jurisdiction. *Nemec v. Polley (1954) 129 Cal. App. 2d 453, 456, 277 P.2d 76*

Claim for injuries arising on high seas is subject to substantive principles of admiralty law, while subject to procedural laws, including principles of review, of state forum. *Arthur v. Avon Inflatables Ltd. (1984) 156 Cal. App. 3d 401, 404, 203 Cal. Rptr. 1*

[7] Removal From State Court

Case of admiralty or maritime jurisdiction brought in state court is not removable under *28 U.S.C.S. § 1441* unless there is diversity citizenship question or federal question involved. *J.J. Ryan & Sons, Inc. v. Continental Ins. Co. (D.S.C. 1974) 369 F. Supp. 692, 697-698*

[8] Savings Clause

Concurrent jurisdiction of state courts and federal district courts in admiralty cases explained. *Intagliata v. Shipowners & Mer. etc. Co. (1945) 26 Cal. 2d 365, 369-375, 159 P.2d 1*

Former *46 U.S.C. § 767* (now *46 U.S.C. § 30308(a)*) is the savings clause giving concurrent jurisdiction under Death on the High Seas Act (*46 U.S.C. § 30301 et seq.*) to state courts. *OffshoreLogistics, Inc. v. Tallentire (1986) 477 U.S. 207, 232-233, 106 S. Ct. 2485, 91 L. Ed. 2d 174*

[9] Substantive Admiralty Law

[a] Collision

[i] Rules of Navigation

Statutory rules of navigation are strictly and literally construed and compliance is insisted upon. *Belden v. Chase (1893) 150 U.S. 674, 698, 14 S. Ct. 264, 37 L. Ed. 1218*

Literal compliance with specific rule of navigation is not always sufficient to exonerate vessel from fault. *United States v. Woodbury (1st Cir. 1949) 175 F.2d 854, 861* (applying special circumstances rule [e.g., former *33 U.S.C.S. § 211*; *now see 33 U.S.C.S. § 2002(b)*])

Vessel guilty of statutory fault is presumed at fault for collision; presumption is rebuttable by showing vessel's fault could not have contributed to collision. *The Pennsylvania v. Troop (1874) 86 U.S. 125, 136, 22 L. Ed. 148*

[ii] Determination of Liability

Liability for collision does not attach to either vessel where neither at fault; attaches to one if it is wholly at fault; or allocated according to comparative fault if both are at fault. *The "Clara" (1880) 102 U.S. 200, 203, 26 L. Ed. 145* ; *United States v. Reliable Transfer Co. (1975) 421 U.S. 397, 411, 95 S. Ct. 1708, 44 L. Ed. 2d 251* ; *The Worthington & Davis (E.D. Mich. 1883) 19 F. 836, 839* (inscrutable fault cases)

Liability in multiship disasters are apportioned among all ships involved according to fault. *The Norwich Victory (E.D. Pa. 1948) 77 F. Supp. 264, 269 , aff'd sub nom., United States v. The Dump Scows No. 116, No. 120 and No. 122 (3d Cir. 1949) 175 F.2d 556* , cert. denied sub nom. *American Dredging Co. v. United States (1949) 338 U.S. 871, 70 S. Ct. 147, 94 L. Ed. 534*

Liability of two ships at fault for injury to third party is joint and several. *The Beaconsfield (1895) 158 U.S. 303, 307, 15 S. Ct. 860, 39 L. Ed. 993*

Suits for collision are permitted to be in personam or in rem or both. *Burns Bros. v. The Central R.R. of N.J. (2d Cir. 1953) 202 F.2d 910, 913*

[b] Demise Charter Party

Owner's primary obligation under demise charter party is to furnish vessel in seaworthy condition at beginning of voyage. *Work v. Leathers (1878) 97 U.S. 379, 380, 24 L. Ed. 1012*

Demise charterer's obligation is to redeliver vessel in as good a condition as when received, excepting ordinary wear and tear. *The E. T. Halloran (2d Cir. 1940) 111 F.2d 571, 572*

[10] Products Liability

In injury claim subject to substantive admiralty law, Restatement (Second) of Torts § 402A is applicable to assess strict liablility based on product defect. *Arthur v. Avon Inflatables Ltd. (1984) 156 Cal. App. 3d 401, 404-405, 203 Cal. Rptr. 1*

[11] Vessels Owned by Governments

[a] Federal

Suits in Admiralty Act [*46 U.S.C. § 30901 et seq.*] and Public Vessels Liability Act [*46 U.S.C. § 31101 et seq.*] are to be construed together. *Mejia v. United States (5th Cir. 1946) 152 F.2d 686, 687-688*

Under Suits in Admiralty Act (*46 U.S.C. § 30901 et seq.*) and Clarification Act (*50 U.S.C.S. App. § 1291*), suit for death of merchant seaman from exposure to asbestos requires dismissal because administrative disallowance is required before suit may be brought, and suit must be brought within two-year statute of limitations, which is jurisdictional and not subject to extension. *Smith v. U.S. (9th Cir. 1989) 873 F.2d 218, 219-222*

Ninth Circuit declined to decide whether discretionary function exception, similar to that in Federal Torts Claims Act (*28 U.S.C.S. § 2680(a)*), should be implied in Suits in Admiralty Act (*46 U.S.C. § 30901 et seq.*), although other circuits have implied exception. *Huber v. U.S. (9th Cir. 1988) 838 F.2d 398, 400, 400 n.1*

[b] State

State is not subject to suit in cases of admiralty jurisdiction unless immunity is waived. *The Charlotte (W.D.N.Y. 1922) 285 F. 84, 86-87*

Vessels wholly owned by state and engaged in governmental function is not subject to in rem action in federal courts sitting in admiralty. *Ex parte New York (1921) 256 U.S. 503, 511, 41 S. Ct. 592, 65 L. Ed. 1063* ; *The West Point (E.D. Va. 1947) 71 F. Supp. 206, 211* (dictum)

State, when making contract with individual, is liable for breach of agreement in like manner as individual; doctrine of governmental immunity is not applicable. *Souza & McCue Constr. Co. v. Superior Court (1962) 57 Cal. 2d 508, 510, 20 Cal. Rptr. 634, 370 P.2d 338*

[c] Foreign Powers

Vessel owned by foreign power and in service of its government is immune from suit in courts of United States. *The Schooner Exch. v. McFaddon & Others (1812) 11 U.S. 116, 144-147, 3 L. Ed. 287*

[12] Wrongful Death Actions

Federal court jurisdiction is concurrent with state jurisdiction to hear Death on High Seas Act (DOHSA; *46 U.S.C. § 30301 et seq.*) actions; state statutes are preempted by DOHSA whenever it applies. *Offshore Logistics, Inc. v. Tallentire (1986) 477 U.S. 207, 221, 232-233, 106 S. Ct. 2485, 91 L. Ed. 2d 174*

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPractice & ProcedureChoice of LawAdmiralty LawMaritime ContractsGeneral OverviewAdmiralty LawPractice & ProcedureAttachment & GarnishmentIn Rem Actions GenerallyAdmiralty LawPractice & ProcedureFederal PreemptionAdmiralty LawCollisionsLiabilityLimitations on Liability

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§ 100.47 Law Reviews

Comment, *Admiralty in Rem and in Personam Procedures: Are They Exempt From Common Law Constitutional Standards? 29 Santa Clara L. Rev. 331 (1989)*

Note, *Pleasure Boat Owner Tort Liability in Admiralty: An Examination of the Limited Liability Act and a Proposal for Reform, 50 S. Cal. L. Rev. 549 (1977)*

Comment, *Torts; Navigation-- Rescuer's Liability and Accident Reports,*

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPersonal InjuriesGeneral OverviewAdmiralty LawShippingCarrier Duties & ObligationsLimitations on Liability

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§ 100.48 Text References

California Pleasure Boating Law, ch. 3, *Pleading and Practice*, §§ 3.2-3.6, 3.20; Ch. 4, *Liability*, §§ 4.1-4.54 (Cal. CEB 1963)

Gilmore & Black, The Law of Admiralty (1957)

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[Reserved]

§§ 100.49[Reserved]

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PART IV. FORMS

9-100 California Forms of Pleading and Practice--Annotated § 100.60

§ 100.60 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714]--By Water-Skier--Collision Between Boat and Water-Skier in Nonnavigable Water

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714]--By Water-Skier--Collision Between Boat and Water-Skier in Nonnavigable Water

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*], [and DOES I	)	(Personal Injury)
through _____,]	)	[Amount demanded _____
Defendants.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Identity and capacity of defendant if other than a natural person, e.g.,* Defendant _____ (*name, unless there is only one defendant*) is, and at all times herein mentioned was, a corporation organized and existing under the laws of California *or* Defendant is, and at all times herein mentioned was, the duly appointed, qualified, and acting personal representative of the estate of _____ (*name*), deceased.]

[2. *Venue facts, if appropriate, e.g.,* Defendant _____ (*name, unless there is only one defendant*) is a resident of _____ County, California.]

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint and insert

their names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that such fictitiously named defendants are negligently responsible in some manner for the occurrences herein alleged.]

4. _____ [*Describe circumstances of accident, e.g.,* On or about _____ [*date*], plaintiff was waterskiing on _____ (*body of water, e.g.,* Lake Arrowhead) in _____ County, California. At the same time defendant _____ (*name, unless there is only one defendant*) was operating a _____ (*describe boat, e.g.,* an inboard motorboat) on the _____ (*describe body of water, e.g.,* lake) in the vicinity where plaintiff was waterskiing. Plaintiff released the towrope by which plaintiff was being towed on the waterskis; the skis fell off of plaintiff's feet and floated free; and plaintiff became relatively immobile in the water and waited, being supported by the life jacket type, to be picked up by the towing boat. While plaintiff was waiting in the water, defendant _____ (*name, unless there is only one defendant*) operated his/her boat so that it collided with plaintiff].

5. The collision referred to in Paragraph 4 above was the proximate result of the negligence of defendant _____ [*name, unless there is only one defendant*] in that _____ [*specify lack of due care, e.g.,* he/she failed to exercise due care to avoid colliding with plaintiff by, among other negligent acts, following closer than 200 feet behind the boat which was towing plaintiff so that, when he/she saw that plaintiff had released the towrope and was floating in the water, he/she was unable to stop his/her boat or to swerve so as to avoid colliding with plaintiff].

[6. *Allege local ordinance or private rule of navigation, if any, which defendant failed to obey, e.g.,* On _____ (*date*), the _____ (*specify, e.g.,* San Bernardino County Board of Supervisors) duly made and passed _____ (*specify, e.g.,* an ordinance) for the _____ (*specify, e.g.,* County of San Bernardino), entitled _____ (*specify formal title, e.g.,* Rules of Navigation for Lake Arrowhead), and this _____ (*specify, e.g.,* ordinance) was in full force and effect on _____ (*date of accident*). _____ (*If copy is attached, add:* A copy of the _____ (*specify, e.g.,* ordinance) is attached hereto marked Exhibit A and made a part hereof *or if copy is not attached, add:* The _____ (*specify, e.g.,* ordinance) provides _____ (*specify, e.g.,* "Motorboats on the lake shall move in a counterclockwise direction at all times and shall not follow other boats closer than 200 feet")).]

[7. *Allege applicable Harbors and Navigation Code sections, if any, which defendant violated, e.g.,* The acts of defendant _____ (*name, unless there is only one defendant*) described in this complaint were in violation of _____ (*specify, e.g., Section 655 of the Harbors and Navigation Code*), which was in effect at the time of the accident described herein and which provides that no person shall operate any vessel in a reckless or negligent manner so as to endanger the life, limb, or property of any person.]

8. As a proximate result of the negligence of defendant _____ [*name, unless there is only one defendant*], plaintiff _____ [was injured in his/her health, strength, and activity, sustaining bodily injuries and shock and injury to his/her nervous system, which have caused, and will cause, him/her great mental and physical pain and suffering], all to plaintiff's general damage; and plaintiff has incurred [and will continue to incur] medical and related expenses; and plaintiff has been prevented [and will continue to be prevented] from attending to his/her usual occupation as a _____ [*specify*] with the result that plaintiff has lost earnings [and will continue to lose earnings].

9. _____ [*Specify body of water, e.g.,* Lake Arrowhead] is not a navigable water of the United States subject to the admiralty jurisdiction of the federal courts.

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

1. For general damages according to proof;

2. For damages for medical and related expenses according to proof;

3. For damages for lost earnings [both past and future] according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form of complaint in [1], *above*, may be used to obtain damages based on the negligent operation of a motorboat on a nonnavigable water resulting in collision with a fallen water-skier. This would not be a case of admiralty jurisdiction; therefore, substantive rules of California law will determine the rights of the parties. The discussion in [3]-[9], applies only to nonnavigable waters.

[3] Duty of Care

[a] Nautical Rules of the Road

Nautical rules of the road, even in a relatively confined area (such as Lake Arrowhead, for example), tend not to be absolute. Technically, the nautical right-of-way rules do not come into effect in a situation between two vessels until the possibility of a collision exists, and they are not applicable otherwise. (In contrast, Vehicle Code statutes governing traffic signals, direction of traffic, and other matters often apply regardless of the likelihood of a collision.)

California has enacted some statutes and regulations regarding both boat operation and waterskiing [*see Harb. & Nav. Code § 650 et seq.*; *14 Cal. Code Reg § 6600 et seq.*], but none of them may have direct application to a particular case, such as a collision between a boat and a skier in the water. Federal statutes [*see, e.g., 46 U.S.C.S. §§ 2301-2306, 4301-4311*] may not provide any guidance. In such a case, an assessment of the conduct of the parties must necessarily be based on such standards as may be reasonably inferred from those nautical and waterskiing rules and regulations as

do exist and, to some extent, on common sense.

By analogy, a water-skier would generally have the right-of-way over a motorboat. A water-skier in tow is less maneuverable than a motorboat; like a sailing vessel, the skier is dependent for continuing movement on an external force. Moreover, the skier is subject to falling into the water and, once in the water, is relatively immobile. Generally, then, a motorboat with a water-skier in tow, maintaining a fixed course, has the right-of-way over a motorboat planning to cross the channel within which the skier is moving, and the second boat is obligated to stay away from that channel. Nevertheless, a water-skier has a duty to keep a proper lookout for his or her own safety and may be chargeable with negligence for failure to do so [*Press v. Lyford (1974) 36 Cal. App. 3d 986, 993-994, 111 Cal. Rptr. 817* (waterskiing accident on Lake Arrowhead; motorboat collided with skier who had released towrope and was floating in water)].

[b] Imminent Peril

There is a qualification to the requirement that a person must use ordinary care for the safety of others. Under the imminent peril rule, a person who, without negligence is suddenly and unexpectedly confronted with a peril arising from either the actual presence of, or the appearance of, imminent danger to the person or to others, is not expected or required to use the same judgment and prudence that is required in the exercise of ordinary care in calmer and more deliberate moments [*see Shuster v. Weeks (1962) 203 Cal. App. 2d 225, 226-227, 21 Cal. Rptr. 388]* .

This qualification may or may not apply in a case where a motorboat has collided with a water-skier. It would not apply where it was manifest from the evidence that the defendant was not confronted with a sudden and unexpected peril. In *Press v. Lyford (1974) 36 Cal. App. 3d 986, 997-998, 111 Cal. Rptr. 817* , the evidence showed that defendant had been using the motorboat on the lake for waterskiing for over four years and he knew that water-skiers fall or jump off their skis. The boat that concerned defendant (and caused him to overlook plaintiff) was about 700 feet behind and going slower than defendant's boat. Plaintiff was on a parallel path 150 feet away. The court concluded that to apply the rule of unexpected peril in these circumstances would convert the sport of waterskiing into a hazardous activity and encourage irresponsible conduct by operators of motorboats.

[4] Operation of Boat Towing Water-Skier

Harb. & Nav. Code § 658 places certain restriction on water-skiers and the boats that tow them [*see Harb. & Nav. Code § 651(bb)* (definition of "water skis, aquaplane, or similar device")]. In general these are:

- Another person, in addition to the operator, who is at least 12 years old must ride in the boat in a position to observe the progress of the skier [*Harb. & Nav. Code § 658(a)*].

- A person may not waterski or operate a boat towing a water-skier between sunset and sunrise, or between other prohibited hours under any applicable local ordinance, law, or regulation [*Harb. & Nav. Code § 658(b)*].

- A person may not maneuver a boat towing a water-skier in such a way as to cause the skier or his or her skis to collide with or strike against an object or another person [*Harb. & Nav. Code § 658(d)*]. This restriction does not apply where two or more persons are being towed by the same boat.

- The water-skier may not operate his or her skis in such a way as to endanger the life, limb, or property of any person [*Harb. & Nav. Code § 658(e)*].

The first two restrictions do not apply to a performer engaged in a professional exhibition or to a person engaged in an authorized race or other marine event [*Harb. & Nav. Code § 658(c)*]. Authorization for such an event may be obtained pursuant to *Harb. & Nav. Code § 268*.

The California Supreme Court is divided on the issue of whether *Harb. & Nav. Code § 658(d)* protects the towed water skier from collision with an object or person. One justice has concluded that the statute is intended to safeguard only the lives and property of third persons and that, therefore, the towed water skier is not within this protected statutory class [*see Ford v. Gouin (1992) 3 Cal. 4th 339, 350, 11 Cal. Rptr. 2d 30, 834 P.2d 724* (lead opinion of Arabian, J.)]. Three justices have concluded, on the other hand, that the statute's protection extends to the towed water skier [*see Ford v. Gouin (1992) 3 Cal. 4th 339, 368, 369, 11 Cal. Rptr. 2d 30, 834 P.2d 724* (George, J., concurring and dissenting; Lucas, C.J., concurring; Mosk, J., dissenting)]. The remaining justices have analyzed the issue within the context of traditional implied assumption of risk analysis without finding the statute dispositive of the question of assumption of risk [*see Ford v. Gouin (1992) 3 Cal. 4th 339, 362-364, 11 Cal. Rptr. 2d 30, 834 P.2d 724* (Kennard, J., Panelli, J., and Baxter, J. concurring)]. For further discussion regarding the defense of assumption of risk generally, see Ch. 380, *Negligence* .

[5] Res Ipsa Loquitur

There are three requirements for the application of the doctrine of res ipsa loquitur to a case of negligence [*see, e.g., Roddiscraft, Inc. v. Skelton Logging Co. (1963) 212 Cal. App. 2d 784, 793-802, 28 Cal. Rptr. 277]* :

- The accident or injury in question ordinarily does not occur in the absence of someone's negligence;

- The accident or injury was caused by an agency or instrumentality in the exclusive control of the defendant (and, if the defendant had relinquinshed control, which was not mishandled or otherwise changed thereafter); and

- The accident or injury was not due to any voluntary action or contribution on the part of the plaintiff which was the cause of his or her injury.

As to the first requirement, the Supreme Court has accepted the view that boats, like automobiles, do not ordinarily run over people when driven in a prudent manner [*Shahinian v. McCormick (1963) 59 Cal. 2d 554, 559, 30 Cal. Rptr. 521, 381 P.2d 377* (waterskiing accident)].

There seldom will be any doubt that the second requirement exists. It may usually be shown that the defendant had sole control of the offending boat at all relevant times [*see Shahinian v. McCormick (1963) 59 Cal. 2d 554, 559, 30 Cal. Rptr. 521, 381 P.2d 377]* .

Whether the third requirement exists may be difficult to ascertain. When a water-skier has been struck by a motorboat after releasing the towrope and while floating in the water, it may be argued that both the motorboat operator and the skier were in the exercise of an equal right and each chargeable with the same degree of care [*see Sauer v. Eagle Brewing Co. (1906) 3 Cal. App. 127, 132, 84 P. 425]* , and that the skier's voluntary action in releasing the towrope negates the existence of the third requirement so that the doctrine of res ipsa loquitur does not apply. This argument has been rejected by the court of appeal in a case arising from the collision of a motorboat with a skier floating in the water after having released the towrope. In *Press v. Lyford (1974) 36 Cal. App. 3d 986, 996-997, 111 Cal. Rptr. 817* (trial court's refusal to give requested res ipsa loquitur instruction as error), the court reasoned that the defendant may be held to be in exclusive control of the situation even though the plaintiff is not completely inactive as long as there is evidence removing the inference of plaintiff's responsibility for the accident. The interpretation that both parties were in the exercise of an equal right is generally applied in automobile accident cases where right-of-way cannot be clearly established. But in the waterskiing situation, plaintiff had a right to be in the water corridor at the time of the accident, and it was irrelevant whether plaintiff was up on skis or in the water since waterskiing necessarily involves both activities. Although the precise parameters of plaintiff's right-of-way were difficult for the court to define, this fact did not alter the court's conclusion that defendant had a duty not to cross plaintiff's path.

[6] Allegations

[a] Identity and Capacity of Defendant (Paragraph 1)

If the defendant is not a natural person, the complaint should allege the defendant's identity as an existing entity against which the court's judgment will operate [*see Tanner v. Best (1940) 40 Cal. App. 2d 442, 445, 104 P.2d 1084]* , such as a corporation, a partnership, an unincorporated association, or a governmental agency. A defendant who is a natural person need not be identified as such.

If the defendant is sued in a particular capacity, that is, if liability depends on the defendant's having certain obligations because of holding a status (such as executor, trustee, real estate broker, or attorney) to which the law attaches special significance, the complaint should allege that capacity [*see, e.g., Katleman v. First Nat'l Bank (1963) 212 Cal. App. 2d 520, 524, 28 Cal. Rptr. 135* (discharged executor as not subject to suit in representative capacity)]. When a defendant's capacity is simply that of a private individual, an allegation as to capacity is not necessary.

When the defendant is not a natural person sued in his or her individual capacity, it may be necessary to reflect that fact in the caption. See Ch. 108, *Captions and Introductions* , for discussion and forms.

[b] Venue Facts (Paragraph 2)

There is no requirement that facts establishing venue be specially pleaded. The plaintiff does not have a burden to show that venue is proper; rather, the defendant has a burden, if venue is not proper, to raise an objection and prove the point [*see Code Civ. Proc. § 396b*]. If venue is proper in only one county, however, it is advisable for the complaint to show what county that is. This may be done in an allegation describing the events in question. A separate paragraph devoted to nothing but venue facts is not necessary. In this form of complaint Paragraph 2 set outs a venue fact to illustrate an appropriate place for such an allegation, if it is desired.

[c] Unknown Defendants (Paragraph 3)

A plaintiff who is ignorant of the name of a defendant must state that fact in the complaint; and such defendant may be designated by any name [*Code Civ. Proc. § 474*]. When such a defendant's name is discovered, the complaint, and any other pleading in which he or she has been designated by a fictitious name, must be amended [*Code Civ. Proc. § 474*]. For further discussion and forms, see Ch. 20, *Allegations Commonly Used* (alternative forms of Doe allegations), and (forms relating to amending pleadings to substitute a named defendant for a Doe defendant).

If a defendant is designated by a fictitious name, the caption must reflect that [*Code Civ. Proc. § 422.40* (title of action in complaint as required to include names of all parties)].

[d] Identity and Capacity of Plaintiff (Paragraph 4)

If the plaintiff is not a natural person suing in his or her own behalf, the complaint should state the identity of the plaintiff and the capacity in which he or she sues [for discussion, *see* [a], *above*].

If the plaintiff brings the action in a special capacity, the complaint should allege his capacity to show that the plaintiff is entitled to relief, if other facts are true [*see Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6* (distinguishing standing and capacity to sue); *Tinsley v. Palo Alto Unified School Dist. (1979) 91 Cal. App. 3d 871, 883, 154 Cal. Rptr. 591* (distinguishing standing and capacity to sue)].

If the plaintiff is not a natural person suing in his or her own behalf, it may be necessary to reflect that fact in the caption. See Ch. 108, *Captions and Introductions* .

[e] Elements of Cause of Action (Paragraphs 4-8)

To have a cause of action for damages based on negligence, the plaintiff must both plead and prove the following [*see, e.g., Miglierini v. Havemann (1966) 240 Cal. App. 2d 570, 572, 49 Cal. Rptr. 795]* :

- The existence of a duty of care owed by defendant to plaintiff (or to a class of which plaintiff is a member);
- Breach of that duty by defendant (either by act or by omission to act);
- Actual detriment to plaintiff; and
- A causal relationship between defendant's breach of duty and the detriment suffered by plaintiff.

For a discussion of elements of a cause of action and for damages based on negligence and a discussion of the pleading of such a cause of action, see Ch. 380, *Negligence* .

Regarding the pleading of statutes and ordinances, see Ch. 531, *Statutes and Ordinances* .

[f] Nonnavigability of Body of Water (Paragraph 9)

Whether or not a particular body of water is navigable so as to give the federal courts a sitting in admiralty jurisdiction is a question of fact [*United States v. Appalachian Elec. Power Co. (1940) 311 U.S. 377, 405, 61 S. Ct. 291, 85 L. Ed. 243]* .

[7] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[8] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[9] Defenses

[a] Assumption of Risk

The defense of assumption of risk arises from the concurrence of three facts: (1) the plaintiff actually knew of the danger to his or her life and limb; (2) the plaintiff had an appreciation of the magnitude of the danger (the plaintiff knew that the risk of injury was great); and (3) the plaintiff had freedom of choice whether or not to expose himself or herself to that risk [*see, e.g.,* *Shahinian v. McCormick (1963) 59 Cal. 2d 554, 566-567, 30 Cal. Rptr. 521, 381 P.2d 377]* .

Apparently, water-skiers do not assume the risk of being hit by a motorboat merely because they go waterskiing [*see Shahinian v. McCormick (1963) 59 Cal. 2d 554, 565, 30 Cal. Rptr. 521, 381 P.2d 377* (purpose of county ordinance regulating speed of boat within 100 feet of water-skier was to protect skier from collision, and that purpose would be frustrated if skier were held to assume risk of collision)]. However, if the defendant is a co-participant in the waterskiing activity, assumption of risk may apply [*see* *Ford v. Gouin (1992) 3 Cal. 4th 339, 344-345, 11 Cal. Rptr. 2d 30, 834 P.2d 724]* . In one case, for example, the court of appeal held that provisions of the Harbors and Navigation Code governing the use of jet skis did not prevent application of the primary assumption of risk doctrine to a collision between two jet skis driven by friends engaged in the sport of recreational jet skiing, because the language of the statutes does not demonstrate a clear intent to abrogate the assumption of risk doctrine in that context [*Whelihan v. Espinoza (2003) 110 Cal. App. 4th 1566, 1575, 2 Cal. Rptr. 3d 883* ; *see Harb. & Nav. Code §§ 655(a), 655.7(c)*; *see also* *Peart v. Ferro (2004) 119 Cal. App. 4th 60, 78-82, 13 Cal. Rptr. 3d 885* (same result; personal watercraft used by parties was not technically jet ski because it was equipped with seat)].

For further discussion, see *§ 100.60[4]* and Ch. 380, *Negligence* .

[b] Negligence

There is no clear principle in the few cases on collisions between motorboats and water-skiers describing what constitutes negligence on the part of a skier. There are, however, some suggestions.

A water-skier may be negligent in consenting to be towed by a driver the skier knows or has reason to know is inexperienced in operating a motorboat or towing skiers [*Shahinian v. McCormick (1963) 59 Cal. 2d 554, 568-569, 30 Cal. Rptr. 521, 381 P.2d 377]* .

A water-skier's crossing of the wake of his or her own tow, with the result that he or she falls and is struck by another motorboat approaching at right angles, may constitute negligence [*see* *Press v. Lyford (1974) 36 Cal. App. 3d 986, 995 n.9, 111 Cal. Rptr. 817* ; *see also* *Reddick v. Lindquist (Tex. Civ. App. 1972) 484 S.W.2d 441, 444-445]* . For example, the skier's negligence can be established by evidence that the ski rope was extended from the boat for five minutes and the skier, who was adjusting a ski, did not make sufficient efforts to be clearly visible [*Metzger v. Barnes (1977) 74 Cal. App. 3d 6, 11, 141 Cal. Rptr. 257]* .

In general, a water-skier's failure to keep a proper lookout for his or her own safety may be negligence [*Press v. Lyford (1974) 36 Cal. App. 3d 986, 993, 111 Cal. Rptr. 817]* .

[10] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For discussion and appropriate forms relating to identifying unknown defendants under *Code Civ. Proc. § 474*, see Ch. 20, *Allegations Commonly Used* , and Ch. 21, *Amended and Supplemental Pleadings*

For forms of captions to be used where a party is not a natural person suing in his or her own behalf, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For discussion of the elements of a cause of action for damages based on negligence, see Ch. 380, *Negligence*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For discussion of the pleading of statutes and ordinances, see Ch. 531, *Statutes and Ordinances*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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PART IV. FORMS

9-100 California Forms of Pleading and Practice--Annotated § 100.61

§ 100.61 Allegation--Defendant as Owner or Lessee of Shore Property and as Concessionaire

[1] FORM Allegation--Defendant as Owner or Lessee of Shore Property and as Concessionaire

At the time of the accident described below, defendant _____ [*name*] was the _____ [owner *or* lessee] of the real property, including the beach, that adjoins the water where the accident occurred. _____ [*Describe defendant's status as concessionaire, e.g.,* At the time of the accident, defendant operated on that property a business providing food and drink and certain facilities for the convenience of patrons using the water adjoining the property. Defendant offered the use of the water for bathing and other water-related recreational use, including waterskiing, in connection with his/her/its business operation].

[2] Use of Form

The form of allegation in [1], *above,* may be inserted into a complaint [*see § 100.60*] if plaintiff's injury was the proximate result of a breach of a concessionaire's duty [*see* [3], *below*].

If this allegation is used, it will be necessary to insert a paragraph describing how the concessionaire breached a duty. The form in *§ 100.62, below,* is an example of such a paragraph.

[3] Liability of Concessionaire

It is the duty of a person who offers the use of public waters for bathing in connection with bathhouses and other appropriate facilities maintained by him or her as owner or lessee of the shore, to exercise reasonable care to prevent injury to patrons who use the waters in the usual and ordinary way and consistent with the invitation extended [*Sorensen v. Hutson (1959) 175 Cal. App. 2d 817, 826, 346 P.2d 785* (dictum quoting Connecticut case)]. That duty may include warning boats not to come too close to shore, providing buoys or markers to indicate an area of restricted speed because of the presence of bathers, and providing, by ropes other means, a protected area for swimmers, bathers, and beginning water-skiers. It may also include keeping an attendant on duty at all times for constant surveillance and appropriate regulation of both boaters and bathers. If a person, such as a beginning water-skier, is injured in a collision resulting from a breach of such duty, the obligor landowner or lessee (who may broadly be called a concessionaire) may be liable [*see Sorensen v. Hutson (1959) 175 Cal. App. 2d 817, 820, 830, 346 P.2d 785* (affirming judgment against

concessionaire as well as owners and operator of boat which collided with plaintiff; affirming nonsuit of concessionaire's lessor, owner of property and beach area leased by concessionaire)].

The *Sorensen* case involved an injury that occurred in Newport Bay; therefore, the case was one of admiralty jurisdiction. That point, however, was not referred to in the opinion of the court of appeal. The rules set out in that case would be applicable to a case in which the California courts have exclusive jurisdiction; but it is open to question whether those rules are part of the substantive admiralty law. The *Sorensen* case should not be regarded as establishing the liability of a concessionaire for a breach of duty which makes the case one of admiralty jurisdiction.

[4] Cross References

For additional discussion of personal injury to water-skiers, see *§ 100.60[2]* et seq.

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9-100 California Forms of Pleading and Practice--Annotated § 100.62

§ 100.62 Allegation--Breach of Duty by Concessionaire on Shore Property

[1] FORM Allegation--Breach of Duty by Concessionaire on Shore Property

Defendant _____ [*name*] negligently failed to provide any buoys or markers to indicate an area in the water where motorboats should reduce speed because of the presence of bathers, swimmers, and beginning water-skiers in the water; he/she/it negligently failed to provide, by ropes or other means, a protected area for such persons; and at the time of the accident hereinafter described, he/she/it negligently failed to provide an attendant to warn motorboat operators to stay away from areas where bathers, swimmers, and beginning water-skiers were in the water, and to warn such persons of the dangerous proximity of motorboats. As a proximate result of the negligence of defendant _____ [*name*], defendant _____ [*name of motorboat operator*] was able to, and did, operate a motorboat in a negligent, reckless, and careless manner, resulting in plaintiff's injuries as described in this complaint, and plaintiff was not made aware of the imminent danger of collision.

[2] Use of Form

The form of allegation in [1], *above*, is a companion to the allegation in § 100.61, and should be inserted into a complaint immediately following that allegation. The collision and plaintiff's injuries would be described in later paragraphs, as in the form of complaint in § 100.60.

[3] Cross References

For additional discussion regarding the use of this allegation, see *§§ 100.60[2]* et seq. and *100.61[2]* and *[3]*.

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9-100 California Forms of Pleading and Practice--Annotated § 100.63

§ 100.63 Allegation--Defendants as Owner of Boat Causing Injury and as Operator With Owner's Consent

[1] FORM Allegation--Defendants as Owner of Boat Causing Injury and as Operator With Owner's Consent

Defendant _____ [*name*] was, at the time of the accident described below, the owner of the boat that was the instrumentality causing plaintiff's injuries. That boat was then an undocumented vessel numbered or required to be numbered under the law of California. Defendant _____ [*name of operator of boat*] was, at the time of plaintiff's injuries, _____ [*insert if appropriate*: an immediate member of the family of _____ (*name of owner*), namely _____ (*specify, e.g.,* his/her son *or other family member mentioned in Harb. & Nav. Code § 661(a)*), and was then] operating the boat with the permission, knowledge, and consent of defendant _____ [*name of owner*].

[2] Use of Form

The form of allegation in [1], *above*, may be inserted into a complaint, such as the one set out in *§ 100.60* when liability for negligence can be imputed to the owner of a boat under *Harb. & Nav. Code § 661*.

[3] Liability of Boat Owner Based on Imputed Negligence

Every owner of an undocumented vessel numbered under the Harbors and Navigation Code [*see* [14], *below*] is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such vessel, in the business of the owner or otherwise, by any person using and operating the vessel with the permission, express or implied, of the owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damage [*Harb. & Nav. Code § 661(a)*].

In any action against an owner on account of imputed negligence as imposed by *Harb. & Nav. Code § 661*, the operator of the vessel whose negligence is imputed to the owner must be made a defendant if personal service of process can be had on the operator within California. On recovering a judgment, recourse must first be had against the property of the operator so served [*Harb. & Nav. Code § 661(c)*].

[4] Owner and Vessel Defined

An owner of a vessel is a person having all the incidents of ownership, including the legal title, of the vessel, whether or not such person lends, rents, or pledges the vessel; or a person entitled to the possession of the vessel as purchaser under a conditional sale contract; or a mortgagor of the vessel. The term "owner" does not include a person holding legal title to a vessel under a conditional sale contract, the mortgagee of a vessel, or the renter or lessor of a vessel to the state or any county, city, district, or political subdivision of the state under a lease, lease-sale agreement, or rental-purchase agreement which grants possession of the vessel to the lessee for a period of 30 consecutive days or more [*Harb. & Nav. Code § 651(p)*].

A "legal owner" of a vessel is a person holding the legal title to a vessel under a conditional sale contract, the mortgagee of a vessel, or the renter or lessor of a vessel to the state, or to any county, city, district, or political subdivision of the state, under a lease, lease-sale, or rental-purchase agreement that grants possession of the vessel to the lessee for a specified period [*Harb. & Nav. Code § 651(k)*]. A registered owner of a vessel is the person registered by the Department of Motor Vehicles as the owner of the vessel [*Harb. & Nav. Code § 651(u)*].

A vessel is a watercraft of any description used or capable of being used as a means of transportation on water except (1) a seaplane on the water, and (2) a watercraft specifically designed to operate on a permanently fixed course, the movement of which is restricted to a fixed track or arm to which the watercraft is attached or by which the watercraft is controlled [*Harb. & Nav. Code § 651(aa)*].

[5] Use by Family Member

It is presumed that the vessel in question is being operated with the knowledge and consent of the owner if, at the time of the injury, death, or damage, the vessel is under the control of an immediate member of the owner's family. An immediate member of the owner's family may be, but is not limited to, a spouse, parent, brother or sister, or child [*Harb. & Nav. Code § 661(a)*].

[6] Vicarious Liability as Not Relieving Other Liabilities

The provisions of *Harb. & Nav. Code § 661* may not be construed as relieving any person from any liability which he or she would otherwise have; however, there can be no recovery in excess of injury or damage actually incurred [*Harb. & Nav. Code § 661(a)*].

[7] Limitation on Liability of Owner

The liability of an owner for imputed negligence imposed by *Harb. & Nav. Code § 661* and not arising through the relationship of principal and agent or master and servant is limited to the amount of $10,000 for the death of or injury to one person in any one accident and, subject to that limit, is limited to the amount of $20,000 for the death of or injury to more than one person in any one accident and is limited to the amount of $10,000 for damage to property of others in any one accident [*Harb. & Nav. Code § 661(b)*].

[8] Owners' Right to Subrogation

If there is recovery under *Harb. & Nav. Code § 661* against an owner based on imputed negligence, the owner is subrogated to all of the rights of the person injured or whose property has been injured, and the owner may recover from the operator of the vessel in question the total amount of any judgment and costs recovered against the owner [*Harb. & Nav. Code § 661(d)*].

[9] Bailee of Owner Deemed to Be Operator

For the purposes of joinder, recourse to property for satisfaction of judgment, and subrogation [*see Harb. & Nav. Code*

§ 661(c),(d)], if a bailee of the owner with the express or implied permission of the owner permits another person to operate the vessel in question, both the bailee and the actual operator shall be deemed to be operators [*Harb. & Nav. Code § 661(e)*].

[10] Settlement and Extinguishment of Liability

When two or more persons are injured or killed in one accident, the owner of the vessel in question may settle and pay any bona fide claims for damages arising out of personal injuries or death, whether or not they have been reduced to judgment, and the payments shall diminish to the extent thereof the owner's total liability on account of the accident [*Harb. & Nav. Code § 661(f)*].

Payments aggregating the full sum of $20,000 shall extinguish all liability of the owner for personal injury or death arising out of the accident which exists by reason of imputed negligence, pursuant to *Harb. & Nav. Code § 661*, and which did not arise through the negligence of the owner or through the relationship of principal and agent, or master and servant [*Harb. & Nav. Code § 661(f)*].

[11] Conditional Seller and Buyer

If a vessel is sold under a conditional contract of sale whereby the title to the vessel remains in the conditional seller, neither the conditional seller nor his or her assignee, if any, shall be deemed to be the owner of the vessel for the purpose of imputing negligence under *Harb. & Nav. Code § 661*; and the conditional buyer, or his or her assignee, if any, shall be deemed to be the owner for that purpose, notwithstanding the terms of the contract, until and unless the seller or his or her assignee, if any, retakes possession of the vessel [*Harb. & Nav. Code § 661(g)*].

[12] Chattel Mortgagee of Vessel

A chattel mortgagee of a vessel out of possession is not an owner of the vessel for the purpose of imputed negligence under *Harb. & Nav. Code § 661* [*Harb. & Nav. Code § 661(g)*].

[13] Death of Plaintiff or Defendant

An action based on imputed negligence under *Harb. & Nav. Code § 661* does not abate by reason of the death of either any injured person or any person liable or responsible under that section. In any action for physical injury based on imputed negligence under that section by the executor, administrator, or personal representative of any deceased person, the damages recoverable shall be the same as those recoverable under former *Civ. Code § 956* [*Harb. & Nav. Code § 661(h)* (former *Civ. Code § 956* was repealed in 1961; the substance of that section is now set out in *Code Civ. Proc. § 377.34*; *Harb. & Nav. Code § 661* has not been amended to reflect this change)].

[14] Numbered Vessels

The provisions of *Harb. & Nav. Code § 661* apply in the case of injury, death, or property damage caused by an undocumented vessel numbered under the Harbors and Navigation Code [*Harb. & Nav. Code § 661(a)*].

An undocumented vessel is any vessel which is not required to have, and which does not have, a valid marine document issued by the United States Coast Guard or any federal agency which is its successor [*Harb. & Nav. Code § 651(y)*].

There is no provision for numbering vessels under the Harbors and Navigation Code. In a reorganization of the state government [*see* Governor's Reorganization Plan No. 2 of 1969, dated March 5, 1969] those provisions were moved to the Vehicle Code [*see Veh. Code §§ 9840-9924*], but the language of *Harb. & Nav. Code § 661(a)* was not amended. Hence, that section continues to refer to vessels "numbered under this code." The Vehicle Code provisions now require that every undocumented vessel [*see Veh. Code § 9840(g)*] using the waters or on the waters of California must be

currently numbered in accordance with Chapter 2 of Division 3.5 of the Vehicle Code [*Veh. Code § 9850 et seq.*], federal law, or a federally approved numbering system of another state [*Veh. Code § 9850*].

If a vessel numbered pursuant to federal law or the law of another state changes its state of principal use and remains within California for a period in excess of 90 days, it must obtain a new number in accordance with the requirements of the Vehicle Code [*Veh. Code § 9873(a)*].

There are exceptions to the apparently absolute requirement that every undocumented vessel be numbered. Foreign vessels temporarily in the waters of California, public vessels of the United States or another state or a subdivision or municipality of another state, and ships' lifeboats need not be numbered [*Veh. Code § 9873(b)-(d)*]. The following kinds of vessels are also excepted [*Veh. Code § 9873(e)*]:

- A vessel propelled solely by oars or paddles.

- A vessel eight feet or less propelled solely by sail.

- A nonmotorized surfboard-like vessel over eight feet in length, propelled solely by sail, and with a mast which is required to be held upright by the operator in order to sail [*13 Cal. Code Reg § 301.00* (adopted pursuant to *Veh. Code § 9873(e)*)].

- Any vessel belonging to a class of boats which has been exempted from numbering by the Department of Motor Vehicles after the department has found that the numbering of vessels of that class will not materially aid in their identification. If any agency of the federal government has a numbering system applicable to that class of vessels, then the department must also find that the vessel would also be exempt from numbering if it were subject to federal law.

Under federal law (*46 U.S.C.S. §§ 12301-12309*), an undocumented vessel equipped with propulsion machinery of any kind must have a number issued by the proper issuing authority in the state in which the vessel is principally operated [*46 U.S.C.S. § 12301*]. The Secretary of Transportation is required to prescribe by regulation a standard numbering system for such vessels [*46 U.S.C.S. § 12302(a)*].

The numbering system employed by the Department of Motor Vehicles pursuant to *Veh. Code §§ 9850-9875* is required to conform with any overall system of identification numbering for undocumented vessels within the United States which any agency of the United States government has in force [*Veh. Code § 9857*]. The present numbering system appears to meet this requirement [*see 46 U.S.C.S. §§ 12302, 12303*; *33 C.F.R. §§ 173.1-173.35*].

The documentation of vessels, formerly the responsibility of the Bureau of Customs, is now the responsibility of the Coast Guard [46 C.F.R. § 66.01-3]. Vessels entitled (but not necessarily required) to be documented, vessels exempt from documentation, and vessels required to be documented are described in 46 C.F.R. §§ 67.01-1-67.01-13. In general, a pleasure boat under five net tons is not entitled to documentation [46 C.F.R. § 67.01-3; *see 46 U.S.C. §§ 12103(a), 12114* (referring to recreational vehicles)]. Thus, most pleasure boats, excepting only the larger yachts, are not entitled to documentation. (The measurement of vessels is covered in 46 C.F.R. §§ 69.01-1-69.15-41. It is somewhat complex. A simplified system of measurement is given in 46 C.F.R. §§ 69.05-1-69.05-11 for pleasure vessels. Basically the system combines length, breadth, and depth of a vessel. As an example, a pleasure vessel measuring about 30 feet long, nine feet abeam, and five feet from the deck to the top of the keel would be approximately five net tons.) Since *Harb. & Nav. Code § 661* applies only to undocumented vessels, the owner of a pleasure boat large enough to be documented can avoid the operation of that statute simply by having his or her boat documented.

[15] Limited Application of Harb. & Nav. Code § 661

Harb. & Nav. Code § 661 will not apply to any case of admiralty jurisdiction, and whether a vessel is documented or not is irrelevant because documentation is not a basis for admiralty jurisdiction. The sole jurisdictional question is whether the injury occurred on navigable water. Therefore, the actual effect of *Harb. & Nav. Code § 661* is to give some boat owners an opportunity to escape vicarious liability. That section would not apply to the owner of a boat over five net tons (assuming the boat is documented) even though the injury occurred on nonnavigable water, that is, water exclusively within the state's jurisdiction; and it would not apply to any boat owner, regardless of the size of the boat or documentation, if the injury occurred on navigable water.

[16] Cross References

For discussion of actions and forms of complaints with which this allegation may be used, see *§§ 100.60, 100.64, 100.65*

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9-100 California Forms of Pleading and Practice--Annotated § 100.64

§ 100.64 Complaint for Property Damage [Civ. Code § 3333] Based on Negligence [Civ. Code § 1714]--Collision Between Two Boats on Nonnavigable Water

[1] FORM Complaint for Property Damage [Civ. Code § 3333] Based on Negligence [Civ. Code § 1714]--Collision Between Two Boats on Nonnavigable Water

[*Caption, introduction. See form in § 100.60[1].*]

1. [*Identity, capacity of defendant. See form in § 100.60[1], Paragraph 1.*]

[2. *Venue facts, if desired. See form in § 100.60[1], Paragraph 2.*]

[3. *Fictitious name allegation, if desired. See form in § 100.60[1], Paragraph 3.*]

[4. *Allegation as to ownership of boat, if desired. See form in § 100.63[1].*]

5. On or about _____ [*date*], plaintiff was operating _____ [*briefly describe boat, e.g.,* a single-masted sailing boat approximately 20 feet in length and commonly called a "shark"], on _____ [*specify body of water, e.g.,* Lake Shasta] in _____ County, California. At the same time, defendant _____ [*name, unless there is only one defendant*] was operating a _____ [*briefly describe boat, e.g.,* a 50-horsepower inboard motorboat] on the _____ [*specify, e.g.,* lake] in the vicinity where plaintiff was operating his/her boat. There and then defendant _____ [*name, unless there is only one defendant*] so negligently operated his/her boat as to cause it to collide with the boat which plaintiff was operating.

6. As a proximate result of the collision, _____ [*describe results, e.g.,* plaintiff was thrown overboard, plaintiff's boat was so damaged that it sank, and plaintiff lost items of personal property, including _____ (*specify particularly valuable items, e.g.,* a wet suit, scuba diving equipment, and a Geiger counter) as well as clothing and miscellaneous nautical gear, all of which were in the boat and sank along with it].

7. At the time of the accident, the boat had a fair market value of $_____, [*add, if personal property was lost or damaged*: and the personal property which plaintiff lost when the boat sank had an aggregate fair market value of $_____].

8. Plaintiff was the owner of the boat and the personal property that was aboard the boat at the time of the accident. As a proximate result of the negligence of defendant _____ [*name, unless there is only one defendant*] plaintiff has been damaged in the sum of $_____.

9. [*Allege applicable Harbors and Navigation Code provisions which defendant violated. See, e.g., form in § 100.60[1], Paragraph 7.*]

10. [*Allege nonnavigability of body of water. See form in § 100.60[1], Paragraph 9.*]

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

1. For general damages in the sum of $_____;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See form in § 100.60[1].*]

[2] Use of Form

The form of complaint in [1], *above*, may be used to obtain damages, for property damage only, based on the negligent operation of a motorboat on nonnavigable water resulting in collision between plaintiff's boat and defendant's boat, with consequent loss of plaintiff's boat and personal property aboard. This would not be a case of admiralty jurisdiction; therefore, substantive rules of California law will determine the rights of the parties.

[3] Rules of Navigation on Nonnavigable Waters

The Harbors and Navigation Code contains a few rules of navigation governing the operation of boats on nonnavigable waters, that is, waters over which the federal courts have no admiralty jurisdiction. They are set out as *Harb. & Nav. Code §§ 250-268* and *281-285*. The Department of Boating and Waterways has promulgated extensive rules of navigation [*see 14 Cal. Code Reg § 6600 et seq.*] pursuant to its authority under *Harb. & Nav. Code § 652* to promulgate such rules if they are in conformity with the pilot rules contained in the federal navigation laws or the navigation rules promulgated by the United States Coast Guard [*Harb. & Nav. Code § 652(b)*]. These rules apply to navigation on nonnavigable waters within the territorial jurisdiction of the state; but they have no application on navigable waters over which the federal courts have admiralty jurisdiction, notwithstanding their conformity with federal rules of navigation. Except for the legislative requirement that the state rules conform, there is no necessity for conformity. To the extent that the state rules supplement federal rules and are not inconsistent with them, however, the state rules may be applied to navigation on navigable waters within the territorial jurisdiction of the state [for discussion, *see § 100.12*].

[4] Collision on Nonnavigable Waters

The Harbors and Navigation Code contains three rules of liability for collision, which are applicable on nonnavigable waters.

First, if a collision is occasioned by failure to observe any rule in *Harb. & Nav. Code §§ 281-284*, the owner of the vessel by which the rule is infringed cannot recover compensation for damages sustained by the vessel unless the circumstances of the case made a departure from the rule necessary [*Harb. & Nav. Code § 290*].

Second, damage to person or property arising from the failure of a vessel to observe any rule in *Harb. & Nav. Code §§ 281-284* is deemed to have been occasioned by the willful default of the person in charge of the deck at the time, unless the circumstances of the case made a departure from the rule necessary [*Harb. & Nav. Code § 291*].

Third, losses caused by collision are to be borne according to the following rules [*Harb. & Nav. Code § 292*]:

- If one party was exclusively at fault, then the party at fault bears his or her own loss and he or she must compensate the other party for any loss which the other has sustained;

- If neither party was at fault, then the loss shall be borne by the party on whom it falls;

- If both parties were at fault and there appears to be no great disparity in fault, then the loss is equally divided;

- If both parties were at fault and it appears that there was a great disparity in fault, then the loss is equitably apportioned;

- If it cannot be ascertained where the fault lies, then the loss is equally divided.

Although *Harb. & Nav. Code § 292* appears in the same part of the Harbors and Navigation Code as *Harb. & Nav. Code §§ 281-284*, it does not refer to those sections (unlike *Harb. & Nav. Code §§ 290* and *291* preceding it). By its terms *Harb. & Nav. Code § 292* is not limited to collisions occasioned by a failure to observe the rules of navigation set out in *Harb. & Nav. Code §§ 281-284*; however, no judicial decision has clarified the scope of *Harb. & Nav. Code § 292*. As there is no evident reason for limiting application of that section to cases of collision occasioned by a failure to observe the rules in *Harb. & Nav. Code §§ 281-284*, it may probably be safely assumed, until a court decides otherwise, that *Harb. & Nav. Code § 292* is not so limited, and that it applies to any case of collision.

It is interesting that, although the Legislature apparently tried to make the rules in *Harb. & Nav. Code § 292* conform to the admiralty rules for distribution of loss [for discussion, *see § 110.19*], there are two significant differences. Under *Harb. & Nav. Code § 292(d)*, if it cannot be ascertained where the fault lies, the loss is equally divided; but under admiralty law, in a case of inscrutable fault, the loss is not equally divided. Rather, each party bears his or her own loss, and neither one recovers anything. Under *Harb. & Nav. Code § 292(c)*, if both parties are at fault, the loss is equally divided unless the major-minor fault rule applies. However, the admiralty rule of equal division was repudiated in *United States v. Reliable Transfer Co. (1975) 421 U.S. 397, 411, 95 S. Ct. 1708, 44 L. Ed. 2d 251* in favor of allocation of liability in proportion to fault [for discussion, *see § 100.19[5]*].

Neither the master nor the owner of any vessel can recover damages for injuries, to the vessel or to himself or herself, resulting from a collision growing out of a failure to comply with the provisions of *Harb. & Nav. Code §§ 253-258* [*Harb. & Nav. Code § 259*]. There is no evident reason why such a limitation on recovery should extend only to those sections.

[5] Cross References

For additional discussion of actions and complaints involving recreational boating, see *§§ 100.60* and *100.63*

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§ 100.65 Complaint for Property Damage [Civ. Code § 3333] Based on Negligence [Civ. Code § 1714]--Collision Between Boat and Stationary Object

[1] FORM Complaint for Property Damage [Civ. Code § 3333] Based on Negligence [Civ. Code § 1714]--Collision Between Boat and Stationary Object

[*Caption, introduction. See form in § 100.60[1].*]

1. [*Identity, capacity of defendant. See form in § 100.60[1], Paragraph 1.*]

[2. *Venue facts, if desired. See form in § 100.60[1], Paragraph 2.*]

[3. *Fictitious name allegation, if desired. See form in § 100.60[1], Paragraph 3.*]

[4. *Allegation as to ownership of boat, if desired. See form in § 100.63[1].*]

5. On or about _____ [*date*], defendant _____ [*name, unless there is only one defendant*] so negligently operated a certain boat, to wit: _____ [*describe briefly, e.g.,* a motorboat equipped with an outboard motor and approximately 13 feet in length] on _____ [*specify body of water, e.g.,* Millerton Lake] in _____ County, California, that the boat collided with _____ [*specify stationary object rammed by defendant's boat, e.g.,* a floating boat pier extending out into the lake approximately 35 feet and anchored at the shore on the following-described property: _____ (*briefly describe so that location of property can be determined*)].

6. As a proximate result of the collision, the _____ [*specify, e.g.,* pier] was damaged in that _____ [*briefly describe damage, e.g.,* part of it was torn away and sank].

7. The cost of repairing the _____ [*specify, e.g.,* pier] is $_____. Plaintiff _____ [has paid this sum *or* will incur this expense] as a proximate result of the negligence of

defendant _____ [*name, unless there is only one defendant*].

8. Plaintiff was and now is the owner of the _____ [*specify, e.g.,* rammed pier]. As a proximate result of the negligence of defendant _____ [*name, unless there is only one defendant*], plaintiff has been damaged in the sum of $_____.

9. [*Allege applicable Harbors and Navigation Code provisions which defendant violated. See, e.g., Form 1, Paragraph 7.*]

10. [*Allege nonnavigability of body of water. See form in § 100.60[1], Paragraph 9.*]

[*Prayer. See form in § 100.64[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See form in § 100.60[1].*]

[2] Use of Form

The form of complaint in [1], *above*, may be used to obtain damages, for property damage only, based on the negligent operation of a boat on nonnavigable water resulting in collision between defendant's boat and a stationary object, such as a pier, belonging to plaintiff. This would not be a case of admiralty jurisdiction; therefore, substantive rules of California law will determine the rights of the parties.

[3] Cross References

For additional discussion of actions and complaints involving recreational boating, see *§§ 100.60*, *100.63*, and *100.64*

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§ 100.66 Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--By Purchaser-User of Boat Against Multiple Defendants (Manufacturer, Supplier of Associated Equipment, and Retailer)

[1] FORM Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--By Purchaser-User of Boat Against Multiple Defendants (Manufacturer, Supplier of Associated Equipment, and Retailer)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*], [and DOES I	)	(Products Liability)
through _____,]	)	[Amount demanded _____
Defendants.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Identity, capacity of defendant. See form in § 100.60[1], Paragraph 1.*]

[2. *Venue facts, if desired. See form in § 100.60[1], Paragraph 2.*]

[3. *Fictitious name allegation, if desired. See form in § 100.60[1], Paragraph 3.*]

4. Defendant _____ [*name*] is, and at all times herein mentioned was, engaged in the business of manufacturing boats for sale to and use by the general public. Defendant _____ [*name*] manufactured the particular boat hereinafter described. In manufacturing that boat, defendant _____ [*name*] installed in it the _____ [*specify component or associated equipment, e.g.,* engine] described in Paragraph 5

below.

5. Defendant _____ [*name*] is, and at all times herein mentioned was, engaged in the business of manufacturing components for boats and associated equipment which is sold to manufacturers of boats for subsequent assembly. Defendant _____ [*name*] manufactured and sold to the boat manufacturer mentioned in Paragraph 4 above _____ [*describe component or item of associated equipment, e.g.,* a 50-horsepower internal combustion gasoline engine called by defendant _____ (*name, make, and model of engine in defendant's terminology, e.g.,* a Viceroy II Model D-477 inboard engine)].

6. Defendant _____ [*name*] is, and at all times herein mentioned was, engaged in the business of selling at retail to the general public boats and associated equipment.

7. On or about _____ [*date*], plaintiff purchased from defendant _____ [*describe, e.g.,* a 1994 model motorboat 13 feet in length equipped with a 50-horsepower inboard gasoline engine and called by the manufacturer a Comanche Raider].

8. At the time when plaintiff purchased the boat it was defective and unsafe for its intended purpose and use in that _____ [*describe defect, e.g.,* the carburetor of its engine was not equipped with a backfire flame arrester meeting the minimum specifications for such a device promulgated by the United States Coast Guard and set out in *Section 58.10-5(b)(2)*, (3) of Title 46 of the Code of Federal Regulations].

9. On or about _____ [*date*], plantiff was operating the boat on _____ [*specify, body of water, e.g.,* the Salton Sea in Imperial County, California]. There and then, when plaintiff was in the boat and at a location approximately _____ [*number*] feet from the shore, an explosion occurred in the engine compartment of the boat as a proximate result of the defect described in Paragraph 8 above.

10. As a proximate result of the _____ [*specify, e.g.,* explosion] plaintiff sustained _____ [*describe personal injuries, e.g.,* serious and permanent injuries to his/her health, strength, and activity, severe shock to his/her nervous system, broken bones, burns, and multiple contusions and abrasions on and about his/her head and body] and was caused to suffer extreme physical and mental pain, all to his/her general damage.

11. As a further proximate result of the _____ [*specify, e.g.,* explosion], plaintiff was required to and did employ _____ [*specify, e.g.,* physicians and surgeons *or other medical personnel*] to examine, treat, and care for him/her, and incurred expenses therefor [and for hospital care and other incidental medical care]. [Plaintiff will be required to incur additional medical expenses.]

12. As a further proximate result of the _____ [*specify, e.g.,* explosion], plaintiff was prevented from attending to his/her usual occupation as a _____ [*specify*] and thereby lost earnings. [Plaintiff will be prevented from attending to his/her usual occupation for a period in the future that he/she cannot now ascertain and will thereby sustain further loss of earnings.]

13. As a further proximate result of the _____ [*specify, e.g.,* explosion], plaintiff's boat was damaged _____ [*specify, e.g.,* beyond repair] to plaintiff's further damage in the amount of $_____.

14. _____ [*Allege nonnavigability of body of water. See form in § 100.60[1], Paragraph 9*].

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages;

2. For damages for medical and related expenses;

3. For damages for loss of earnings;

4. For damages for loss of plaintiff's boat [in the sum of $_____];

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See form in § 100.60[1].*]

[2] Use of Form

The form of complaint in [1], *above*, may be used to obtain damages for personal injury and property damage occurring on nonnavigable water and based on strict liability of the manufacturer of a boat, and of the retailer if subject to jurisdiction, where the purchaser-user has been injured because of a defect. This would not be a case of admiralty jurisdiction; therefore, substantive rules of California law will determine the rights of the parties. Certain duties are imposed on the manufacturer and retailer, however, under federal law.

For discussion of products liability and other appropriate forms of complaint, see Ch. 460, *Products Liability* .

[3] Restrictions on Manufacture and Sale

Federal recreational boating safety statutes [*46 U.S.C.S. § 4301 et seq.*] place some restrictions on the freedom of manufacturers and sellers to make and sell boats. These statutes prohibit any person from manufacturing, constructing, assembling, selling or offering for sale, introducing, delivering for introduction into interstate commerce, or importing into the United States, any boat, or associated equipment, or component thereof to be sold for subsequent assembly, unless (A) it conforms with *46 U.S.C.S. §§ 4301-4311* or a regulation prescribed thereunder; or (B) it is intended solely for export, and both it and the container, if any, in which it is exported are so labeled, tagged, or marked [*46 U.S.C.S. § 4307(a)(1)*; *see 33 C.F.R. §§ 183.1-183.901*].

The act also prohibits any person from affixing, attaching, or displaying on, in, or with a boat or an item of associated equipment a seal, label, plate, insignia, or other device which is false or misleading in indicating or suggesting compliance with federal safety standards [*46 U.S.C.S. § 4307(a)(2)*].

Any violation of these provisions may subject the violator, or the individual executives of a corporate violator, to civil penalties [*46 U.S.C.S. § 4311*].

[4] Record of Compliance With Federal Requirements

Every manufacturer subject to the provisions of *46 U.S.C.S. § 4301 et seq.* is required to establish and maintain records, make reports, and provide information as the Secretary of Transportation may reasonably require to enable the secretary to determine whether the manufacturer has acted or is acting in compliance with *46 U.S.C.S. §§ 4301-4311* and

regulations prescribed thereunder [*46 U.S.C.S. § 4309(a)*]. Those records would probably be available by subpena if not through cooperation, to counsel for the plaintiff in a lawsuit against a manufacturer based on negligence or strict liability. Trade secrets of the manufacturer cannot be disclosed [*see 46 U.S.C.S. § 4309(b)*].

[5] Manufacturer's Duty to Give Notice of Defects

If a boat or an item of associated equipment has left the place of manufacture and the manufacturer thereafter discovers or acquires information which he or she determines, in the exercise of reasonable and prudent judgment, to indicate that the boat or item of associated equipment, being subject to a safety standard or regulation prescribed under *46 U.S.C.S. § 4302*, either fails to comply with the safety standard or regulation, or contains a defect which creates a substantial risk of personal injury to the public, the manufacturer is required to notify, within a reasonable time, the dealer or distributor to whom the boat or item of associated equipment was delivered, and the first purchaser for a purpose other than resale (subject to reasonable limitations on efforts to discover such a purchaser), and any subsequent purchaser known to the manufacturer [*46 U.S.C.S. § 4310(b),(c)(1)*]. The manufacturer, in giving this notice, must clearly describe either the defect or in what way the boat or item of associated equipment fails to comply with the applicable safety standard or regulation, must state an evaluation of the hazard reasonably related to it, must state what measures should be taken to correct the defect or failure in compliance, and must offer to take such measures at his or her sole cost and expense [*46 U.S.C.S. § 4310(d)*].

In addition to the private notices, a notice must be given to the Secretary of Transportation, who may publicly disclose the information contained in the notice, including trade secrets if necessary, for the purpose of preventing injuries from the defect or from failure in compliance and promotion of safety [*46 U.S.C.S. § 4310(e)*].

The secretary also has authority to determine through testing, inspection, investigation, research, or examination of reports that a boat or associated equipment contains a defect or fails to comply with applicable standards and to require the manufacturer to issue a notice [*46 U.S.C.S. § 4310(f)*].

Notice to purchasers for a purpose other than resale is not required, however, if the defect or failure of compliance is discovered by the manufacturer or the Secretary of Transportation more than ten years after the date of manufacture or, if the boat or associated equipment was required by regulation to have a date of certification affixed, more than ten years from the date of certification [*46 U.S.C.S. § 4310(c)(2)*].

[6] Effect of Compliance With Federal Requirements

Although *46 U.S.C.S. § 4306* expressly preempts any state law or regulation establishing a safety standard that is not identical to a regulation established pursuant to that federal statute, *46 U.S.C.S. § 4311(g)* provides that compliance with the federal statute and its implementing regulations do not relieve a person from liability at common law or under state laws. The United States Supreme Court has concluded that the express preemption provisions apply only to the application of nonconforming state statutes and regulations, not to common law liability, a decision that gives full effect to the savings clause [*Sprietsma v. Mercury Marine (2002) 537 U.S. 51, 123 S. Ct. 518, 154 L. Ed. 2d 466, 477-478]* . However, the Court recognized that a tort action may be preempted if the imposition of liability would directly conflict with a federal regulation promulgated under the federal statute, or if it is impossible to comply with a regulation without incurring liability under state common law [*Sprietsma v. Mercury Marine (2002) 537 U.S. 51, 123 S. Ct. 518, 154 L. Ed. 2d 466, 479]* .

It does not appear that any decisions have applied *46 U.S.C.S. § 4301 et seq.* to a products liability action in California for the principle that noncompliance with a standard set out in a governmental safety order furnishes probative evidence of a design deficiency [*see Balido v. Improved Mach., Inc. (1972) 29 Cal. App. 3d 633, 641, 105 Cal. Rptr. 890 , criticized on other grounds, Regents of University of Cal. v. Hartford Acci. & Indem. Co. (1978) 21 Cal. 3d 624, 641, 147 Cal. Rptr. 486, 581 P.2d 197]* .

[7] Cross References

For discussion and cross references relevant to complaints in general, see *§ 100.60[2]* et seq.

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Volume 9: Bailments thru Boats and Boating-Chs. 93-100
Chapter 100 BOATS AND BOATING
PART IV. FORMS

9-100 California Forms of Pleading and Practice--Annotated § 100.67

§ 100.67 Complaint for Damages [Civ. Code § 3333] for Wrongful Death [Code Civ. Proc. § 377.60]--By Personal Representative of Estate of Decedent on Behalf of Entitled Persons--Negligent Maintenance of Boat and Equipment

[1] FORM Complaint for Damages [Civ. Code § 3333] for Wrongful Death [Code Civ. Proc. § 377.60]--By Personal Representative of Estate of Decedent on Behalf of Entitled Persons--Negligent Maintenance of Boat and Equipment

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Personal Repres-	)	
entative of the Estate of _____	)	NO. _____
[*name*], Deceased,	)	COMPLAINT FOR DAMAGES FOR WRONGFUL
Plaintiff	)	DEATH
vs.	)	[Amount demanded _____
_____ [*name*], [and DOES I-	)	(exceeds *or* does not exceed) $10,000]
_____, inclusive,]	)	[LIMITED CIVIL CASE]
Defendant(s).		

Plaintiff alleges:

1. On _____ [*date*], plaintiff was issued _____ [*specify, e.g.,* Letters of Administration for the Estate of] _____ [*name*], deceased, by order duly given and made by the Superior Court of California for _____ County, and plaintiff now is the duly appointed, qualified, and acting _____ [*specify, e.g.,* Administrator of the Estate].

2. Plaintiff brings this action as specified in *Code of Civil Procedure Section 377.60* on behalf of the following person[s] entitled to a cause of action for the wrongful death of _____ [*name*], deceased (hereinafter referred to as "decedent"):

_____ [*Name(s) of entitled person(s), and status under Code Civ. Proc. § 377.60, e.g.,* a minor who resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support].

3. [*Identity, capacity of defendant. See form in § 100.60[1], Paragraph 1.*]

[4. *Venue facts, if desired. See form in § 100.60[1], Paragraph 3.*]

[5. *Fictitious name allegation, if desired. See form in § 100.60[1], Paragraph 3.*]

6. On or about _____ [*date*], decedent was a passenger as an invited guest on a certain boat. This boat was _____ [*describe briefly, e.g.,* a 50-horsepower inboard motorboat approximately 18 feet in length] that defendant _____ [*name, unless there is only one defendant*] owned and was then operating on _____ [*specify body of water, e.g.,* Lake Shasta] in _____ County, California. While decedent was in the boat, _____ [*describe events causing death, e.g.,* a fire broke out in the engine compartment. The fire could not be put out because there was no fire extinguisher on board. Defendant _____ (*name, unless there is only one defendant*) advised all persons on board to jump into the water and swim as far away from the boat as possible to avoid being injured in the subsequent explosion anticipated by him/her. Decedent could not swim. No life preserver was available for decedent's use. Defendant _____ (*name, unless there is only one defendant*) handed decedent a cushion from one of the seats for decedent's use as a flotation aid and pushed decedent into the water. Decedent thereupon attempted to move away from the burning boat and was not seen alive thereafter by anyone else present at the scene. Decedent's body was recovered from the lake two days later. Decedent died by drowning].

7. Defendant _____ [*name, unless there is only one defendant*] was negligent in that _____ [*describe negligent acts, e.g.,* he/she failed to keep on board the boat an approved fire extinguisher and approved personal flotation devices as required by the regulations of the California Department of Boating and Waterways and by the Secretary of Transportation pursuant to Title *46 of the United States Code, Section 4302*. As a proximate result of that negligence, _____ [*describe briefly how decedent's death was caused by defendant's negligence, e.g.,* decedent was placed in a position of extreme danger to his/her life and limb from which decedent was unable to extricate himself/herself, and decedent died].

8. At the time of his/her death, decedent was _____ [*briefly describe age, physical and mental conditions, e.g.,* an adult person of the age of 35 and was in good physical and mental condition] and was a faithful and dutiful _____ [*specify relationship to entitled person, e.g.,* caregiver to Joey Smith] [and was his/her sole source of support].

9. As a proximate result of the negligence of defendant _____ [*name, unless there is only one defendant*] and the death of decedent which was caused thereby, _____ [*names of heirs*] have, and each of them has, sustained pecuniary loss.

10. As a further proximate result of the negligence of defendant _____ [*name, unless there is only one defendant*] and the death of decedent which was caused thereby, plaintiff has _____ [paid from decedent's estate *or* incurred] funeral and burial expenses.

11. _____ [*Allege nonnavigability of body of water. See Form 1, Paragraph 9.*]

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

1. For general damages on behalf of decedent's heirs;

2. For funeral and burial expenses;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See form in § 100.60[1].*]

[2] Use of Form

The form of complaint in [1], *above,* may be used by the personal representative of the estate of a decedent to obtain damages for wrongful death on behalf of entitled persons [*see Code Civ. Proc. § 377.60*]. The decedent's death was the result of negligence, on nonnavigable water, of the owner and operator of a boat in failing to keep necessary safety equipment aboard. This would not be a case of admiralty jurisdiction; therefore, substantive rules of California law will determine the rights of the parties. For discussion of wrongful death actions arising out of recreational boating accidents, see *§ 100.21*.

An action for damages based on wrongful death resulting from violation of maritime duties is a case of admiralty jurisdiction [*Moragne v. States Marine Lines (1970) 398 U.S. 375, 409, 90 S. Ct. 1772, 26 L. Ed. 2d 339]* .

[3] Liability of Boat Owner

The owner of a boat may be liable for the negligence of an operator who was using the boat with the owner's permission. In such a case, allegation of ownership should be inserted into the complaint [for a form and further discussion, see *§ 100.63*].

[4] Cross References

For additional discussion of actions and complaints involving recreational boating, see *§§ 100.60, 100.63*

For discussion of wrongful death actions and survival actions, and for other forms of complaint, including a general form, and forms of defense, see Ch. 181, *Death and Survival Actions*

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9-100 California Forms of Pleading and Practice--Annotated § 100.68

§ 100.68 Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--Rights and Duties of Coowners of Vessel for Certain Repairs [Harb. & Nav. Code § 403]

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--Rights and Duties of Coowners of Vessel for Certain Repairs [Harb. & Nav. Code § 403]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	COMPLAINT FOR DECLARATORY RELIEF
Defendant(s)	)	
	)	
	)	

Plaintiff alleges:

1. [*Identity, capacity of defendant. See form in § 100.60[1], Paragraph 1.*]

[2. *Venue facts, if desired. See form in § 100.60[1], Paragraph 2.*]

3. Plaintiff and defendant(s) _____ [*name(s) of other coowner(s)*] own as tenants in common a _____ [*briefly describe boat, e.g.*, a sailing vessel approximately 25 feet in length having a single mast and named "The Mary Anne"].

4. An actual controversy has arisen and now exists between plaintiff and defendant(s) concerning their respective rights and duties with respect to the boat in that plaintiff contends _____ [*specify plaintiff's contentions as to legal rights of parties as owners of boat, e.g.,* that the liability to pay for certain repairs done to the boat by _____ (*name*) on or about _____ (*date*), rests neither wholly nor partially on plaintiff], whereas this contention is disputed by defendant(s).

5. Plaintiff desires a judicial determination of his/her rights and duties with respect to this matter and a declaration as to _____ [*specify, e.g.,* whether plaintiff is liable to pay any part of the charges for the repairs in question]. Plaintiff invokes the jurisdiction of the court under both *Code of Civil Procedure Section 1060* and *Harbors and Navigation Code Section 403* for the determination of his/her rights and duties.

WHEREFORE, plaintiff prays judgment as follows:

1. For a declaration that plaintiff is not liable to pay for any part of the repairs done to the boat hereinabove described by _____ [*name*] on or about _____ [*date*];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See form in § 100.60[1].*]

[2] Use of Form

The form of complaint in [1], *above,* may be used to enforce a right by one of two or more coowners of a pleasure boat against the other or others respecting the use of the boat or liability to pay for repairs. In addition, this complaint probably may be used to enforce other rights arising from the relationship of coowners.

Counsel intending to use this form should bear in mind, as pointed out in [3], *below,* that the question as to whether admiralty law or state law governs the substantive rights of the parties may not be settled.

[3] Action Between Owners

[a] Generally

The Harbors and Navigation Code provides that if a vessel belongs to several persons who are not, as to the vessel, partners, and they differ as to its use or repair, then the controversy may be determined by any court of competent jurisdiction [*Harb. & Nav. Code § 403*]. The terminology "any court of competent jurisdiction" probably means any state court having jurisdiction of the subject matter and able to get jurisdiction of the parties. It does not mean a federal court because the state cannot define the jurisdiction of a federal court, but the existence of *Harb. & Nav. Code § 403* does not diminish the jurisdiction of the federal courts sitting in admiralty to determine a controversy between owners, if the case is one of admiralty jurisdiction [*see Fischer v. Carey (1916) 173 Cal. 185, 187, 159 P. 577* (former Civ. Code § 964, now *Harb. & Nav. Code § 403,* as applicable only to cases not encroaching on federal admiralty jurisdiction)].

In most cases, a controversy between owners as to the use or repair of a pleasure boat will be based neither in tort nor on a contract. The rights and duties of the owners between or among themselves are more likely to rest solely on the legal principles governing ownership and the relations between or among coowners, rather than on the terms of a contract; and the owners' complaints will seldom arise from tortious conduct. In most cases, therefore, it will not be readily apparent whether the substantive rights of the parties are governed by admiralty law (i.e., whether the case is one of admiralty jurisdiction) or by state law.

A leading authority on admiralty has concluded that the admiralty has jurisdiction of all matters that concern owners and proprietors of ships [*Benedict On Admiralty, § 201* (7th ed. Matthew Bender)]. The application of this principle to cases involving vessels engaged in or substantially related to maritime trade cannot be doubted; but it is questionable whether admiralty jurisdiction does or should extend to controversies between owners of pleasure boats. There are many cases dealing with controversies between owners, but they are not helpful where ownership of a pleasure boat is concerned because they all consider the rights and duties of owners whose vessels are engaged in maritime trade.

It may be important which law defines the substantive rights of the parties. For example, it is a principle of admiralty law that the majority owners of a ship may employ it as they see fit, regardless of the wishes of the minority owners, if the majority owners give a bond, for the benefit of the dissenting minority owners, that the ship will remain and return in safety [*see* Benedict On Admiralty § 203 (7th ed. Matthew Bender)]. This principle facilitates maritime trade, but it is ineffectual in cases of pleasure boating, which have no connection with maritime trade.

One of three owners of a pleasure boat who never has the use of it because the other two monoplize it would have no satisfaction in receiving the bond of those other two owners that they will keep the boat safe and return it from its voyages in good condition. Such owners, however, if their rights are governed by state law rather than admiralty law would be considered, at least, as tenants in common [*see Higgins v. Eva (1928) 204 Cal. 231, 239, 267 P. 1081* (vessel as property which can be owned in tenancy in common)]. Each owner would have a right to use the boat and the right to enforce an equal opportunity to use it, according to the well-established principles of law governing the rights of cotenants as to use of the commonly owned property. Also, the rights of such cotenants respecting liability to pay for repairs would be the same as in any other case of coownership of personal property.

[b] Declaratory Relief

Harb. & Nav. Code § 403 does not specify what sort of action may be begun for the determination of rights between coowners as to use or repair of a vessel. The nature of the right given by that section, however, suggests that an action for declaratory relief under *Code Civ. Proc. § 1060* would be appropriate.

Actions for declaratory relief are discussed in Ch. 182, *Declaratory Relief* . An action for declaratory relief may be maintained in the superior court as a case of general jurisdiction by anyone who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over, or on property. An action for declaratory relief may be classified as a limited civil case only when brought as a cross complaint for indemnity in an action or proceeding that is otherwise a limited civil case or in cases following nonbinding arbitration between an attorney and client where theamount in controversy is $25,000 or less [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 86(a)(7)(A), 580(b)(4), 1060*].

[c] Matters Other Than Use and Repair

Harb. & Nav. Code § 403 mentions only controversies regarding use or repair of a vessel. However, it is obvious that other kinds of controversies might arise between coowners, such as who has liability to pay for supplies, wharfage and similar charges, and transportation and storage fees; obligations with respect to insurance; and questions involving title. If the use of the boat is left to nonowners, a controversy may arise over distribution of the rental income.

In any such case, the state courts should be competent to settle a controversy according to state law. An action for

declaratory relief, with or without other relief [*see Code Civ. Proc. § 1060*], should be available for settling these kinds of controversies.

Certain kinds of relief are unquestionably outside admiralty jurisdiction. For example, an action for an accounting between coowners is traditionally not within admiralty jurisdiction [*see Benedict On Admiralty § 204* (7th ed. Matthew Bender)], although a federal court sitting in admiralty has jurisdiction to order an accounting as incidental or ancillary relief. (A leading authority on admiralty has suggested that this rule should be changed [*see Benedict On Admiralty § 204* (7th ed. Matthew Bender)].) Also, it appears to be the rule that admiralty jurisdiction does not extend to the enforcement of an equitable right of a coowner, other than as incidental or ancillary relief [*see* 2 C.J.S., *Admiralty*, § 59].

[4] Cross References

For additional discussion and references related to complaints in general, see *§ 100.60*

Benedict On Admiralty §§ 201, 203, (7th ed. Matthew Bender)

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9-100 California Forms of Pleading and Practice--Annotated § 100.69

§ 100.69 Complaint for Damages [Civ. Code § 3300] Based on Breach of Contract--Contract to Build Boat

[1] FORM Complaint for Damages [Civ. Code § 3300] Based on Breach of Contract--Contract to Build Boat

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Breach of Contract)
[and DOES I through _____,]	)	[Amount demanded _____
Defendant.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. [*Identity, capacity of defendant. See form in § 100.60[1], Paragraph 1.*]

[2. *Venue facts, if desired. See form in § 100.60[1], Paragraph 2.*]

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint and insert their names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that such fictitiously named defendants are responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by such defendants.]

4. On or about _____ [*date*], at _____ [*city*], California, plaintiff, as

_____ [*specify, e.g.*, purchaser], and defendant, as _____ [*specify, e.g.*, builder and seller], made _____ [a written *or* an oral] agreement for the construction and sale of a certain boat, to wit: _____ [*specify, e.g.*, a single-masted sailing vessel 20 feet in length], according to certain plans and specifications,the terms of which _____ [*state terms or* as stated in the agreement, a copy of which is attached hereto as Exhibit A and made a part hereof].

5. Plaintiff has performed all obligations on his/her part to be performed under the agreement [except _____ (*obligation not performed*), the performance of which is excused on the ground that _____ (*specify*)].

6. Defendant has failed to perform his/her obligations under the agreement in that _____ [*specify acts constituting breach*].

7. As a result of defendant's failure to perform as hereinabove alleged, _____ [*specify in what respect plaintiff has been damaged*], to plaintiff's detriment in the sum of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages in the sum of $_____;

2. For interest on the sum of $_____ from _____ [*date*], at the _____ [contract rate of _____ percent per annum *or* rate of 10 percent per annum];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See form in § 100.60[1].*]

[2] Use of Form

The form of complaint in [1], *above*, may be used by either party to obtain damages for breach of an agreement to build a boat. Such an agreement is not a maritime contract; therefore, the case is not one of admiralty jurisdiction. The substantive rights of the parties will be determined by California law. The parties' rights are the same as in any other case of breach of contract. For discussion and alternative forms of complaint, see Ch. 140, *Contracts* , and Ch. 500, *Sales and Secured Transactions* .

[3] Actions Involving Installment or Automotive Sales or Consumer Obligations

In any action or proceeding subject to the provisions of the Unruh Retail Installment Sales Act (*Civ. Code § 1801 et seq.*) or the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*), or in any action or proceeding commenced as a limited civil case that is subject to the provisions of *Code Civ. Proc. § 395(b)*, concerning a defendant's obligations for goods, services, loans, or extensions of credit intended primarily for personal, family, or household use, the plaintiff must file, concurrently with the complaint, an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) stating facts showing that the action has been commenced in the proper court for

the trial of the action or proceeding, and that the action is subject to the provisions of *Civ. Code § 1812.10* or *2984.4*, or of *Code Civ. Proc. § 395(b)*. In lieu of an affidavit or declaration, the required facts may be stated in a complaint verified by the oath of the plaintiff or of his or her attorney [*Civ. Code §§ 1812.10, 2984.4*; *Code Civ. Proc. § 396a*]. In cases subject to *Civ. Code § 1812.10* or *2984.4*, however,the facts may not be stated on information or belief when they are stated in a verified complaint [*Civ. Code §§ 1812.10, 2984.4*]. When an affidavit or declaration is filed with the complaint, a copy must be served with the summons [*Civ. Code §§ 1812.10, 2984.4*; *Code Civ. Proc. § 396a*].

If a plaintiff fails to file an affidavit or declaration or to state the required facts in a verified complaint, there may be no further proceedings, except to dismiss the action without prejudice [*Civ. Code §§ 1812.10, 2984.4*; *Code Civ. Proc. § 396a*]. In an action subject to *Civ. Code § 1812.10* or *2984.4*, such dismissal is obtained on the court's own motion or on motion of any party [*Civ. Code §§ 1812.10, 2984.4*]. The court may, however, on such terms as may be just, permit the affidavit or declaration to be filed after the complaint. In that case, a copy of the affidavit must be served on the defendant, and the time to answer or otherwise plead will date from the service [*Civ. Code §§ 1812.10, 2984.4*; *Code Civ. Proc. § 396a*; for venue allegation forms, see Ch. 20, *Allegations Commonly Used* ; for further discussion and forms, see Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* , and Ch. 500, *Sales and Secured Transactions*].

[4] Cross Reference

For discussion and cross references relevant to complaints in general, see *§ 100.60[2]* et seq.

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Chapter 100 BOATS AND BOATING
PART IV. FORMS

9-100 California Forms of Pleading and Practice--Annotated § 100.70

§ 100.70 Allegation--Contract to Repair Boat

[1] FORM Allegation--Contract to Repair Boat

On or about _____ [*date*], at _____ [*city*], California, plaintiff, as _____ [*specify, e.g.,* an artisan skilled in the repair of boats], and defendant, as _____ [*specify, e.g.,* the owner of a boat needing repair], made _____ [a written *or* an oral] agreement for the repair of a certain boat, to wit: _____ [*specify, e.g.,* a 50-horsepower inboard motorboat 13 feet in length], the terms of which were _____ [*state terms or* as stated in the agreement, a copy of which is attached hereto as Exhibit A and made a part hereof].

[2] Use of Form

The form of allegation in [1], *above,* may be used in the form of complaint set out in *§ 100.69* in place of Paragraph 3 when either party seeks damages for breach of an agreement to repair a boat. Such an agreement is traditionally a maritime contract; therefore, the case is one of admiralty jurisdiction [*see Fahey v. Gledhill (1983) 33 Cal. 3d 884, 889, 191 Cal. Rptr. 639, 663 P.2d 197]* . The state courts, however, may entertain an action in personam for damages arising from the breach of such an agreement [for discussion, *see § 100.14*]. The artisan who repairs the boat has a lien on it for his or her charges, but the lien may be enforced only in a federal court sitting in admiralty.

[3] Cross References

For related discussion, see *§ 100.69*

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9-100 California Forms of Pleading and Practice--Annotated § 100.71

§ 100.71 Allegation--Contract to Store Boat

[1] FORM Allegation--Contract to Store Boat

On or about _____ [*date*], at _____ [*city*], California, plaintiff, as _____ [*specify, e.g.,* the owner of the boat hereinafter referred to], and defendant, as _____ [*specify, e.g.,* the owner of a boatyard], made _____ [a written *or* an oral] agreement for the storage of a certain boat, to wit: _____ [*specify, e.g.,* an oceangoing Sea Admiral motor cruiser 42 feet in length], the terms of which were _____ [*state terms or* as stated in the agreement, a copy of which is attached hereto as Exhibit A and made a part hereof].

[2] Use of Form

The form of allegation in [1], *above,* may be used in the form of complaint in § 100.69 in place of Paragraph 3 when either party seeks damages for breach of an agreement to store a boat. Such an agreement may or may not be a maritime contract [for discussion, *see* in § 100.14[5]]. If it is, then the case is one of admiralty jurisdiction. The state courts could entertain an action in personam for damages arising from the breach of such an agreement. The person who furnishes storage would have a lien on the boat for his or her charges, but the lien could be enforced only in a federal court sitting in admiralty. If the agreement is not a maritime contract, the substantive rights of the parties would be governed by California law. A lien for storage charges would exist in that case, too, provided the unpaid charges due amount to $50 or more and provided the storage is wharfage or anchorage [*see Harb. & Nav. Code §§ 490, 491*]. Such a lien would be enforceable in an action in the state courts.

[3] Cross References

For related discussion, see *§ 100.69*

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9-100 California Forms of Pleading and Practice--Annotated § 100.72

§ 100.72 Allegation--Contract to Rent Boat

[1] FORM Allegation--Contract to Rent Boat

On or about _____ [*date*], at _____ [*city*], California, plaintiff, as _____ [*specify, e.g.,* owner and lessor of the boat hereinafter referred to], and defendant, as _____ [*specify, e.g.,* lessee of the boat], made _____ [a written *or* an oral] agreement for the leasing of a certain boat, to wit: _____ [*specify, e.g.,* an outboard motor boat 13 feet in length], the terms of which were [*state terms or* as stated in the agreement, a copy of which is attached hereto as Exhibit A and made a part hereof].

[2] Use of Form

The form of allegation in [1], *above,* may be used in the form of complaint set out in *§ 100.69* in place of Paragraph 3 when either party seeks damages for the breach of an agreement to rent or lease a boat. Such an agreement may or may not be a maritime contract [for discussion, *see § 100.14[3]*]. If it is, then the case is one of admiralty jurisdiction. The state courts could entertain an action in personam for damages arising from the breach of such an agreement. If the agreement is not a maritime contract, the substantive rights of the parties would be governed by California law.

[3] Cross References

For related discussion, see *§ 100.69*

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9-100 California Forms of Pleading and Practice--Annotated § 100.73

§ 100.73 Allegation--Contract to Furnish Supplies or Equipment for Boat

[1] FORM Allegation--Contract to Furnish Supplies or Equipment for Boat

On or about _____ [*date*], at _____ [*city*], California, plaintiff, as _____ [*specify, e.g.,* a supplier of nautical supplies and equipment], and defendant, as _____ [*specify, e.g.,* the lessee of the boat hereinafter referred to], made _____ [a written *or* an oral] agreement for the furnishing of certain _____ [*specify, e.g.,* supplies and equipment], to wit: _____ [*specify, e.g.,* an approved fire extinguisher, 200 feet of quarter-inch nylon line, a sail repairing kit, and a sextant], for a certain boat, to wit: _____ [*specify, e.g.,* a single-masted sailing vessel approximately 25 feet in length], the terms of which were _____ [*state terms or* as stated in the agreement, a copy of which is attached hereto as Exhibit A and made a part hereof].

[2] Use of Form

The form of allegation in [1], *above,* may be used in the form of complaint set out in *§ 100.69* in place of Paragraph 3 when either party seeks damages for breach of an agreement to furnish supplies or equipment for a boat. Such an agreement is traditionally a maritime contract; therefore, the case is one of admiralty jurisdiction [for discussion, *see § 100.14[6]*]. The state courts, however, may entertain an action in personam for damages arising from the breach of such an agreement. The supplier has a lien on the boat for his or her charges, but the lien may be enforced only in a federal court sitting in admiralty.

[3] Cross References

For related discussion, see *§ 100.69*

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[5] Land Bounded by Body of Water

[6] Land Bounded by Highway or Street

[7] Official Maps

[8] Reestablishment of Boundaries Following Earth Movement

[9] Surveyors

[10] Quieting Title

[11] Subdivision Map Act

§ 101.32 Decisions

[1] Agreed Boundaries

[a] Doctrine of Agreed Boundaries

[b] Effect

[c] Requirement of Uncertainty

[d] Writing

[2] Estoppel

[3] Evidence

[a] Admissibility

[b] Use of Expert Witnesses

[4] Government Surveys

[5] Meander Lines

[6] Monuments

[7] Quiet Title Actions

[8] Reestablishing Obliterated and Lost Corners

[a] Definitions

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§ 101.50 Complaint to Establish Boundary and Quiet Title to Real Property [Code Civ. Proc. §§ 760.020(a), 761.020]--Boundary Line in Dispute

[1] FORM

[2] Use of Form

[3] Required Allegations

[4] Who Must Be Made Defendants

[5] Unknown Defendants

[6] Appointment of Guardian ad Litem

[7] Verification

[8] Jurisdiction and Venue

[9] Service of Summons

[10] Lis Pendens

[11] Cross References

§ 101.51 Complaint to Establish Boundary and Quiet Title to Real Property [Code Civ. Proc. §§ 760.020, 761.020]--Existing Boundary Agreement

[1] FORM

[2] Use of Form

[3] Essential Allegations

[4] Cross References

§ 101.52 Complaint to Establish Boundary and Quiet Title to Real Property [Code Civ. Proc. §§ 760.020, 761.020]--Existing Boundary Agreement Conflicts With Partition Agreement

[1] FORM

[2] Use of Form

§ 101.53 Complaint to Establish Boundary and for Reformation [Civ. Code § 3399] of Deed

[1] FORM

[2] Use of Form

[3] Essential Allegations

[4] Reformation of Deeds

[5] Defenses

[a] Negligence

[b] Laches, Unclean Hands, and Waiver

[c] Statute of Limitations

[6] Cross References

§ 101.54 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Estoppel by Agreement and Acquiescence

[1] FORM

[2] Use of Form

§ 101.55 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Estoppel and Laches

[1] FORM

[2] Use of Form

[3] Essential Allegations

[a] Estoppel

[b] Laches

§ 101.56 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Adverse Possession [Code Civ. Proc. §§ 321-325]

[1] FORM

[2] Use of Form

[3] Essential Allegations

[4] Cross References

§ 101.57 Cullen Earthquake Act--Application to File Complaint [Code Civ. Proc. § 751.51(a)(3)] and Order

[1] FORM

[2] Use of Form

§ 101.58 Cullen Earthquake Act--Complaint to Reestablish Boundary [Code Civ. Proc. § 751.50]--By Plaintiff--General Form

[1] FORM

[2] Use of Form

[3] Requirement That Court Permit Plaintiff to Bring Suit

[4] Plaintiff's Affidavit or Declaration

[5] Essential Allegations

[6] Cross References

§ 101.59 Cullen Earthquake Act--Summons and Memorandum [Code Civ. Proc. §§ 751.05-751.07, 751.54]

[1] FORM

[2] Use of Form

[3] Memorandum

§ 101.60 Cullen Earthquake, Act--Order for Publication of Summons [Code Civ. Proc. §§ 751.06, 751.54]

[1] FORM

[2] Use of Form

§ 101.61 Cullen Earthquake Act--Plaintiff's Declaration Under Penalty of Perjury [Code Civ. Proc. §§ 751.09, 751.54]

[1] FORM

[2] Use of Form

§ 101.62 Cullen Earthquake Act [Code Civ. Proc. § 751.56]--Answer

[1] FORM

[2] Use of Form

[3] Essential Allegations

[4] Cross References

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10-101 California Forms of Pleading and Practice--Annotated § 101.01

§ 101.01 Scope of Chapter

This chapter discusses the establishment of uncertain and disputed boundary lines and includes the following forms:

- Complaints to establish boundary and quiet title to real property [*see §§ 101.50 -101.52*], and for reformation of deed [*see § 101.53*].

- Affirmative defenses [*see §§ 101.54 -101.56*].

- Forms to establish boundaries after an earth movement, including a complaint and related papers [*see §§ 101.57 -101.61*] and an answer [*see § 101.62*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersBoundariesReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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10-101 California Forms of Pleading and Practice--Annotated § 101.02

§ 101.02 Cross References

- For forms for use in actions between adjoining landowners generally, see Ch. 11, *Adjoining Landowners*
- For an affirmative defense based on adverse possession, see Ch. 13, *Adverse Possession*
- For forms for use in actions to cancel instruments, see Ch. 107, *Cancellation of Instruments*
- For forms for use in actions concerning deeds, see Ch. 184, *Deeds*
- For forms for use in actions concerning easements, see Ch. 240, *Easements*
- For forms for use in actions for ejectment, see Ch. 241, *Ejectment*
- For forms for use in proceedings to establish title where records have been lost or destroyed, see Ch. 356, *Lost Papers*
- For forms for use in quiet title actions generally, and for forms for use in obtaining order allowing surveyor to enter on land, see Ch. 482, *Quieting Title*
- For forms for use in the reformation of instruments generally, see Ch. 488, *Reformation of Instruments*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTitle QualityAdverse Claim ActionsEjectmentReal Property LawTitle QualityAdverse Claim ActionsGeneral Overview

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[Reserved]

§§ 101.03[Reserved]

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§ 101.10 Governing Statutes

Rules governing the admissibility of evidence concerning boundaries are set forth in *Evid. Code §§ 1322* and *1323*. Rules of construction for interpreting property descriptions are set forth in *Code Civ. Proc. § 2077*. Boundary terms used in describing the California counties are defined in *Gov. Code §§ 23070-23076*.

Presumptions where a street or highway is a boundary are set out in *Civ. Code §§ 831, 1112*. Presumptions where a body of water is the boundary are set out in *Civ. Code §§ 830, 1014-1018*.

The procedure for reestablishing boundaries following an earth movement are set out in *Code Civ. Proc. §§ 751.50-751.65*. The procedure for entering property to make a survey is set forth in *Code Civ. Proc. §§ 742, 743*.

Actions to quiet title to real property are governed by *Code Civ. Proc. § 760.010 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersBoundariesReal Property LawWater RightsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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10-101 California Forms of Pleading and Practice--Annotated § 101.11

§ 101.11 Definitions

[1] Boundary

A boundary is a line or mark indicating the limit or furthermost extent of a tract of land or territory, or a separating or dividing line between countries, states, districts or territories, or tracts of land [*Randolph v. County of Stanislaus (1919) 44 Cal. App. 322, 329, 186 P. 625]* .

[2] Monument

A monument is any natural or artificial object used to mark the location on the ground of a boundary line or corner [*see Goss v. Golinsky (1909) 12 Cal. App. 71, 74-75, 106 P. 604]* . Roads, highways, rivers, streams, rocks, heaps of stones, trees [*Freeman v. Affiliated Property Craftsmen (1968) 266 Cal. App. 2d 723, 729, 72 Cal. Rptr. 357]* , fences [*Rodgers v. Roseville Gold Dredging Co. (1955) 135 Cal. App. 2d 6, 10, 286 P.2d 536]* , or even known boundary lines have been held to be monuments [*Wagnor v. Blume (1945) 71 Cal. App. 2d 94, 101, 161 P.2d 1001]* .

[3] Obliterated Corner

An obliterated corner is one of which no visible evidence remains of the work of the original surveyor in establishing it but of which the location may be shown by competent evidence [*Chandler v. Hibberd (1958) 165 Cal. App. 2d 39, 52, 332 P.2d 133]* .

[4] Lost Corner

A lost corner is one that cannot be replaced by reference to any existing data or sources of information. A corner will not be regarded as lost when it may be located by field notes referring to discoverable natural objects [*Chandler v. Hibberd (1958) 165 Cal. App. 2d 39, 52, 332 P.2d 133]* .

Legal Topics:

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

Real Property LawAdjoining LandownersBoundariesReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 101.12 Lost or Obliterated Corners

[1] Effect of Obliteration of Monuments

The obliteration of a monument made in a survey does not destroy the survey or justify a court in disregarding it when enough data remain to locate the place occupied by the monument by reference to the natural objects referred to in the survey. Nor does such obliteration justify the adoption of the proportionate method [*see* [5], *below*] of locating a common corner as a lost corner, when the field notes refer to certain natural objects that can be found along the line mentioned and used to locate the line approximately [*Chandler v. Hibberd (1958) 165 Cal. App. 2d 39, 52, 332 P.2d 133]* . For a form of complaint to establish boundary and quiet title when the boundary line is in dispute, see *§ 101.50*.

[2] Object of Court Proceedings

The task of the court, when confronted with an obliterated corner, uncertain boundary location, and the like, is to decide from the data appearing in evidence its approximate position when the exact spot cannot be found. The court will attempt to fix the place at a point where it will best accord with the natural objects described in the field notes and found to exist on the ground, and that is least inconsistent with the distances mentioned in the plat and field notes [*Chandler v. Hibberd (1958) 165 Cal. App. 2d 39, 57, 332 P.2d 133]* .

[3] Use of U.S. Government Plats and Field Notes

The court may take judicial notice that under the laws of the United States and the regulations of the land office no sales of public lands are made until the plat and field notes have been returned and approved. The field notes of the government surveyor are available in the land office of each state. The purpose for which these notes are preserved is to enable subsequent holders of these lands to accurately relocate section and quarter section corners when the original marker or monument locating this point has been obliterated or when the corner has otherwise been lost. It is incumbent upon the surveyor to relocate the boundaries by reference to the government plat or field notes [*Saunders v. Polich (1967) 250 Cal. App. 2d 136, 140, 58 Cal. Rptr. 198]* . There is a presumption that these surveys and field notes are correct [*see* *Chandler v. Hibberd (1958) 165 Cal. App. 2d 39, 58, 332 P.2d 133]* .

[4] Use of Surveys

In seeking to locate a previously established government boundary, it is generally the duty of the surveyor to first attempt to establish these lines by reference to the monuments placed in the original survey. If such corners cannot be established, the government survey field notes should be taken and from the courses and distances, natural monuments or objects, and bearing trees described therein, the surveyor should endeavor to fix the line precisely as it is called for by the field notes. He or she should endeavor to retrace the steps of the person who made the original survey, and if by doing so the line can be located it must be done, and when so located it must control [*Saunders v. Polich (1967) 250 Cal. App. 2d 136, 140, 58 Cal. Rptr. 198]* .

If a surveyor, in relocating the boundary lines of a particular piece of property, fails to locate or utilize any markers or monuments established as section corners or otherwise by the last official government survey of the region, it makes no difference that he or she accurately ran the respective courses and distances involved. Such a survey will be deemed by the courts to be insufficient as a matter of law because, as a matter of geometric construction, there can be no certainty that the survey commenced at the same point as the government survey or that the parcel encompassed within the boundaries ascertained in the survey is congruent with or coextensive to the parcel as described in the official survey [*Saunders v. Polich (1967) 250 Cal. App. 2d 136, 141-142, 58 Cal. Rptr. 198]* .

[5] Use of Proportionate Method

The surveyor may use the proportionate method only when the original corner or monument is lost and cannot be relocated on the ground [*California v. Thompson (1971) 22 Cal. App. 3d 368, 377, 99 Cal. Rptr. 594]* . The proportionate method is a method that redistributes an excess or shortage proportionately among all owners along the particular line or lines that cannot be relocated. When used it must not contradict or conflict with the official data that are available [*Chandler v. Hibberd (1958) 165 Cal. App. 2d 39, 51, 332 P.2d 133]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersBoundariesReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 101.13 Agreed Boundaries

[1] Doctrine of Agreed Boundaries

Frequently, the exact location of the boundary line between two adjacent parcels of real property will be unknown to the owners. There may be a conflict in the common boundary line as described in the respective deeds of the parties causing a "paper" overlap, although there can be only one line of ownership on the ground, or uncertainty as to the boundary may arise for other causes, such as destruction of the monument. In such a case, the parties may wish to establish the common boundary line by agreement. These agreements are favored by the courts [*see Aborigine Lumber Co. v. Hyman (1966) 245 Cal. App. 2d 938, 941, 54 Cal. Rptr. 371]* .

According to the California Supreme Court, the doctrine of agreed boundaries may be invoked only under carefully specified circumstances. The doctrine requires that the following be persent [*Bryant v. Blevins (1994) 9 Cal. 4th 47, 55, 36 Cal. Rptr. 2d 86, 884 P.2d 1034* ; *Ernie v. Trinity Lutheran Church (1959) 51 Cal. 2d 702, 707, 336 P.2d 525]* :

- An uncertainty as to the true boundary line.
- An agreement between the coterminous owners fixing the line.
- Acceptance and acquiescence in the line so fixed for a period equal to the statute of limitations or under such circumstances that substantial loss would be caused by a change of its position.

The long-term acceptance of a fence as a boundary may support an inference that the coterminous landowners agreed to rely on the fence in fixing an uncertain boundary [*Bryant v. Blevins (1994) 9 Cal. 4th 47, 57, 36 Cal. Rptr. 2d 86, 884 P.2d 1034* ; *Ernie v. Trinity Lutheran Church (1959) 51 Cal. 2d 702, 707, 336 P.2d 525]* . However, when the true boundary is ascertainable from the legal description set forth in an existing deed or survey, the party asserting the agreed boundary must provide direct evidence that the neighboring owners entered into an agreement to resolve a boundary dispute [*Bryant v. Blevins (1994) 9 Cal. 4th 47, 56, 36 Cal. Rptr. 2d 86, 884 P.2d 1034 see Armitage v. Decker (1990) 218 Cal. App. 3d 887, 902-904, 267 Cal. Rptr. 399* ; *Mesnick v. Caton (1986) 183 Cal. App. 3d 1248, 1256-1258, 228 Cal. Rptr. 779* ; *Finley v. Yuba County Water Dist. (1979) 99 Cal. App. 3d 691, 698-701, 160 Cal.*

Rptr. 423] .

Strong public policy justifications counsel against application of the agreed-boundary doctrine when a legal description of the true boundary exists. The doctrine arose as a means to settle disputes at a time when surveys were notoriously inaccurate and monuments and landmarks they described often could not be found. Now, however, accurate surveys and verifiable recorded deeds are the rule. Thus, when existing legal records provide a basis for fixing the boundary, there is no justification for inferring, without additional evidence, that the prior owners were uncertain as to the location of the true boundary or that they agreed to fix their common boundary at that location [*Bryant v. Blevins (1994) 9 Cal. 4th 47, 56, 36 Cal. Rptr. 2d 86, 884 P.2d 1034* ; citing *Armitage v. Decker (1990) 218 Cal. App. 3d 887, 901-903, 267 Cal. Rptr. 399]* . For additional discussion, see [3], *below*.

For a forms of complaint to establish a boundary and quiet title when a boundary agreement exists, see *§§ 101.51, 101.52*. For a form of complaint to establish a boundary and to reform a deed so that the boundary descriptions for the properties accurately reflect the true understanding of the parties to the agreement, see *§ 101.53*.

[2] Effect

When a boundary line is established pursuant to the doctrine of agreed boundaries, it becomes in legal effect the true boundary line [*Ernie v. Trinity Lutheran Church (1959) 51 Cal. 2d 702, 708, 336 P.2d 525]* . It is then binding upon all consenting parties and their successors by subsequent conveyances [*Kraus v. Griswold (1965) 232 Cal. App. 2d 698, 705, 43 Cal. Rptr. 139]* . However, the application of the doctrine to successors in interest must be applied in conjunction with the rule that bona fide purchasers for value and without notice are entitled to protection against undisclosed rights and title [*see* *Steele v. Shuler (1963) 211 Cal. App. 2d 698, 706, 27 Cal. Rptr. 569]* .

[3] Requirement of Uncertainty

The requirement of uncertainty is aimed at preventing boundary shifts by oral agreement or acquiescence when the parties have actual knowledge of the true line [*Zachery v. McWilliams (1972) 28 Cal. App. 3d 57, 62, 104 Cal. Rptr. 293]* .

Notwithstanding the requirement of uncertainty, the doctrine of agreed boundaries may apply when existing legal records are adequate to settle the boundary dispute. The California Supreme Court has reasoned that an inflexible rule prohibiting application of the doctrine when there is a reliable legal description of the true boundary would risk destabilizing long-standing agreements made in good faith by coterminous property owners in order to resolve uncertainty as to the location of their common boundaries [*Bryant v. Blevins (1994) 9 Cal. 4th 47, 54, 36 Cal. Rptr. 2d 86, 884 P.2d 1034*]. However, to prevail when available legal records provide a reasonable basis for fixing the boundary, the party relying on the doctrine must affirmatively show that uncertainty as to the location of the true boundary led to an agreement between the landowners to create a boundary at an agreed-upon location [*Bryant v. Blevins (1994) 9 Cal. 4th 47, 56, 36 Cal. Rptr. 2d 86, 884 P.2d 1034*].

The doctrine should most plausibly come into play when legal records fail to settle a boundary dispute [*Bryant v. Blevins (1994) 9 Cal. 4th 47, 56, 36 Cal. Rptr. 2d 86, 884 P.2d 1034* ; citing *Armitage v. Decker (1990) 218 Cal. App. 3d 887, 901-903, 267 Cal. Rptr. 399]* . That failure may occur when records never existed, have been destroyed, or are inaccurate, or when the natural features or surveyors/ monuments or corners have changed or vanished. When no reliable legal description exists, the courts have resorted to the agreed boundary doctrine on the ground that it is better than nothing. But the law should not employ this residual doctrine, a last legal resort, to dispossess an owner of his or her land when a legal means of establishing an accurate boundary lies quite readily and conveniently to hand [*Mesnick v. Caton (1986) 183 Cal. App. 3d 1248, 1256-1257, 228 Cal. Rptr. 779* (legal description existed; court acknowledged inconsistent application by courts of doctrine of agreed boundary); *see also* *Armitage v. Decker (1990) 218 Cal. App. 3d 887, 901-904, 267 Cal. Rptr. 399* (requirement of uncertainty as lacking when deeds all contain consistent, accurate,

and ascertainable legal descriptions; presence of fence near boundary not sufficient to create uncertainty)]. In any case, a dispute or controversy is not essential to the required uncertainty [*Kunza v. Gaskell (1979) 91 Cal. App. 3d 201, 209, 154 Cal. Rptr. 101]* .

Uncertainty as to the true boundary location is not present if the descriptions in the deeds are certain and accurate and evidence is readily available from government monuments, field notes, and fixed corners in the immediate neighborhood from which to ascertain the true line [*Pedersen v. Reynolds (1939) 31 Cal. App. 2d 18, 25, 87 P.2d 51]* . Therefore, if a person constructs a fence on his or her property and locates it for purposes of convenience rather than for the purpose of locating the boundary line, the doctrine will not be applicable [*Pedersen v. Reynolds (1939) 31 Cal. App. 2d 18, 25, 87 P.2d 51]* .

The element of uncertainty may be inferred in certain cases. For example, where a substantial fence or other structure has been constructed and acquiesced in for a long period of time, it may be inferred that there was uncertainty as to the true line at the time the structure was built or that the uncertainty arose after the improvements were constructed and the coterminous owners, by acceptance and acquiescence, agreed that the boundary of the structure constituted the true boundary line between their properties [*see* *Ernie v. Trinity Lutheran Church (1959) 51 Cal. 2d 702, 708, 336 P.2d 525]* .

[4] No Requirement of Writing; Effect of Agreed Boundary

There is no requirement that a boundary agreement be in writing [*Duncan v. Peterson (1970) 3 Cal. App. 3d 607, 611, 83 Cal. Rptr. 744]* , or even express [*Shelton v. Malette (1956) 144 Cal. App. 2d 370, 375, 301 P.2d 18]* . The boundary agreement does not operate to convey title to land that may be between the agreed line and the true line, but fixes the line itself and the description carries title up to the agreed line regardless of its accuracy [*Kraus v. Griswold (1965) 232 Cal. App. 2d 698, 705, 43 Cal. Rptr. 139]* . The division line thus established attaches itself to the deeds of the respective parties and defines, not adds to, the land described in each deed [*Kraus v. Griswold (1965) 232 Cal. App. 2d 698, 705, 43 Cal. Rptr. 139]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersBoundaries

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§ 101.14 Construing Boundary Descriptions

The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it [*Code Civ. Proc. § 2077*]:

- While there are certain, definite, and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false does not frustrate the conveyance, but it is to be construed by the first mentioned particulars.

- When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount.

- Between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both.

- When a road, or stream of water not navigable, is the boundary, the rights of the grantor to the middle of the road or the thread of the stream are included in the conveyance, except where the road or thread of the stream is held under another title.

- When tidewater is the boundary, the rights of the grantor to ordinary high water mark are included in the conveyance, and when a navigable lake, where there is no tide, is the boundary, the rights of the grantor to low water mark are included in the conveyance.

- When the description refers to a map, and that reference is inconsistent with other particulars, it controls them if it appears that the parties acted with reference to the map; otherwise the map is subordinate to other definite and ascertained particulars.

Quantity is the least reliable of all descriptions [*Phelps v. Pacific Gas & Elec. Co. (1948) 84 Cal. App. 2d 243, 248, 190 P.2d 209]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsProperty DescriptionsReal Property LawAdjoining LandownersBoundaries

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§ 101.15 Evidence

[1] Admissibility

When the description of a granted tract of land embraced within the terms of a United States patent is clear and unambiguous on its face, that description constitutes the final word. In that case, evidence will not be admissible to show that the grantor intended to do other than that which is clearly set forth upon the face of said grant. But that rule has no application to a case in which it sufficiently appears upon the face of the description embraced in the terms of the patent itself or of the plat that accompanies and is made a part of the patent that the patent is in certain vital respects uncertain. In this case, the extrinsic evidence is admissible to explain away the uncertainties of the grant and to prove the real intent of the grantor in making the it, provided that the evidence does not go to the extent of changing the clear intent of the grant as to the premises to be conveyed [*Claudino v. Pereira (2008) 165 Cal. App. 4th 1282, 1288, 82 Cal. Rptr. 3d 464* (extrinsic evidence admissible on reference to "gulch")].

In cases of disputed boundary lines, all evidence, whether documentary or parol, which bears upon the point in issue and which is not inadmissible on general principles, may be received into evidence, including records of original proprietors, their plans and maps, the location of lands by ancient settlers [*Chandler v. Hibberd (1958) 165 Cal. App. 2d 39, 55, 332 P.2d 133]* , plats, and field notes [*see Swarzwald v. Cooley (1940) 39 Cal. App. 2d 306, 324, 103 P.2d 580]* .

Evidence of reputation in a community is not made inadmissible by the hearsay rule if the reputation concerns boundaries of, or customs affecting, land in the community and the reputation arose before controversy [*Evid. Code § 1322*].

Evidence of a statement concerning the boundary of land is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and had sufficient knowledge of the subject, but evidence of a statement is not admissible under *Evid. Code § 1323* if the statement was made under circumstances such as to indicate its lack of trustworthiness [*Evid. Code § 1323*].

[2] Use of Expert Testimony

Surveyors and civil engineers, like other experts, may give testimony on questions involving matters of technical skill and experience with which they are particularly acquainted [*Verdi Dev. Co. v. Dono-Han Mining Co. (1956) 141 Cal. App. 2d 149, 155, 296 P.2d 429]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersBoundariesEvidenceTestimonyExpertsAdmissibilityEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral Overview

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§ 101.16 Defenses

[1] Adverse Possession

A defendant may defeat a quiet title action if he can meet the prerequisites for adverse possession [*see Schoenfeld v. Pritzker (1967) 257 Cal. App. 2d 117, 121-122, 64 Cal. Rptr. 592]* . The one claiming title to property through adverse possession has the burden of proving every element necessary as follows [*Dimmick v. Dimmick (1962) 58 Cal. 2d 417, 421-422, 24 Cal. Rptr. 856, 374 P.2d 824* ; *Laubisch v. Roberdo (1954) 43 Cal. 2d 702, 706, 277 P.2d 9* ; *West v. Evans (1936) 29 Cal. 2d 414, 417, 175 P.2d 219* ; *Harvey v. Nurick (1968) 268 Cal. App. 2d 213, 214-215, 74 Cal. Rptr. 94]* :

- Possession must be actual occupation under such circumstances as to constitute reasonable notice to the owner.
- It must be hostile to the owner's title.
- The holder must claim the property as his own, under either color of title or claim of right.
- Possession must be continuous and uninterrupted for five years.
- The holder must pay all the taxes levied and assessed on the property during the period.

For a form of affirmative defense alleging that the defendant claims title through adverse possession, see *§ 101.56*. For a more detailed discussion and additional forms, see Ch. 13, *Adverse Possession* .

[2] Estoppel

A grantor may be estopped from showing the true boundary of his property where all the elements of estoppel are present [*see Frericks v. Sorensen (1952) 113 Cal. App. 2d 759, 761, 248 P.2d 949]* . The elements of estoppel are as follows [*Granco Steel, Inc. v. Workmen's Compensation Appeals Bd. (1968) 68 Cal. 2d 191, 203, 65 Cal. Rptr. 287, 436 P.2d 287* (insurance company estopped from denying coverage); *Crestline Mobile Homes Mfg. Co. v. Pacific*

Finance Corp. (1960) 54 Cal. 2d 773, 778, 8 Cal. Rptr. 448, 356 P.2d 192 (party estopped from asserting title to trailer)]:

- The party to be estopped must be apprised of the facts.
- He or she must intend that his or her conduct be acted on, or must so act that the party asserting the estoppel had a right to believe it was so intended.
- The other party must be ignorant of the true state of facts.
- He or she must rely on the conduct to his or her injury.

For a form of affirmative defense alleging that the plaintiff is estopped from seeking a new boundary by reason of prior agreement and acquiescence, see *§ 101.54*.

[3] Laches

Laches applies to quiet title actions [*see Muktarian v. Barmby (1965) 63 Cal. 2d 558, 561, 47 Cal. Rptr. 483, 407 P.2d 659]* and to reformation of instruments [*see Utica Mut. Ins. Co. v. Monarch Ins. Co. (1967) 250 Cal. App. 2d 538, 543, 58 Cal. Rptr. 639]* . Laches is an equitable defense and is analogous to the statute of limitations as applicable to actions at law [*Central Pac. Ry. Co. v. Costa (1927) 84 Cal. App. 577, 597, 258 P. 991]* . The basic elements of laches are as follows [*Stafford v. Ballinger (1962) 199 Cal. App. 2d 289, 296, 18 Cal. Rptr. 568]* :

- An omission to assert a right.
- A delay in the assertion of the right of some appreciable period.
- Circumstances which would cause prejudice to an adverse party if assertion of the right is permitted.

For a form of affirmative defense alleging that the plaintiff is estopped from asserting a boundary line because the claim is barred by laches, see *§ 101.55*.

[4] Validating Act

A so-called validating act may provide a defense against a mistake in a boundary change [*see, e.g.*, Stats. 2009, ch. 2]. According to nonbinding legislative history materials, for nearly 70 years, the Legislature's annual validating acts have boosted the stability and credit ratings of state and local bonds. The validating acts cure public officials' mistakes that might otherwise invalidate boundary changes. However, the acts do not protect against fraud, corruption, or unconstitutional actions [Bill Analysis of SB 101 on First Validating Act of 2009, Cal. Sen. Local Gov. Comm. 1 (March 4, 2009); the Analysis may be found online at http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0101-0150/sb_101_cfa_20090226_094145_sen_comm.html]. The current custom and practice is to pass three validating acts per year that retroactively cure public officials' mistakes. The first two measures are urgency bills that go into effect when they are chaptered (i.e., spring and late summer). The third validating act generally takes effect on January 1 of the following year [Bill Analysis of SB 101 on first validating act of 2009, Cal. Sen. Local Gov. Comm. 2 (March 4, 2009)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewReal

Property LawAdjoining LandownersBoundariesReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsReal Property LawAdverse PossessionGeneral Overview

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§ 101.17 Establishing Boundaries Following Earth Movement

[1] Remedies Provided by Cullen Earthquake Act

Where boundaries of land have been disturbed by earth movements such as, but not limited to, slides, subsidence, lateral or vertical displacements, or similar disasters caused by man, or by earthquake or other acts of God, remedies are provided by *Code Civ. Proc. §§ 751.50-751.65*, the Cullen Earthquake Act [*Code Civ. Proc. § 751.50*].

The remedies provided by the act are cumulative and in addition to any other remedy provided by law for quieting or establishing title to real property or boundaries of it [*Code Civ. Proc. § 751.64*]. For a form of application to file a complaint and order under the Cullen Earthquake Act, see *§ 101.57*.

[2] Who May Commence Action

An action authorized by the Cullen Earthquake Act may be commenced by [*Code Civ. Proc. § 751.51(a)*]:

- A county in which lands were affected by a disaster described in *Code Civ. Proc. § 751.50* with or without the joinder of a city or cities included in the county and within the area so affected.

- A city, if the disaster has affected land in the city.

- Any other entity or person owning or having an interest in or lien on land affected by the disaster if granted permission by the court to bring the action, and if the county in which the land is located is made a party to the action [for a form of application for permission to bring the action, *see § 101.57*].

An entity which is a permissible plaintiff under *Code Civ. Proc. § 751.51(a)* may bring a separate action with respect to separate portions of the disaster area of sufficient size to equitably reestablish boundaries without harm to other areas of the common disaster, its decision regarding the desirability of the separate action, and regarding the area to be dealt with in each action, to be approved by the court [*Code Civ. Proc. § 751.52*].

For a complaint to reestablish a boundary under the Cullen Earthquake Act, see *§ 101.58*.

[3] Persons Designated in Complaint; Contents; Notice

Every entity in actual and peaceable possession of, or having an estate or interest in or lien on, any of the land affected by the action, whose possession or evidence of estate or interest is either recorded or known to the plaintiffs, the city, if the land is within a city, the county in which the land is located, and the State of California must be designated in the complaint of the action, and given notice in the manner required by *Code Civ. Proc. § 751.54* [*Code Civ. Proc. § 751.51(b)*].

All unknown entities, including owners, lien or interest claimants, heirs, devisees, legatees, or assigns, may be described in the caption and complaint as "all entities claiming any interest in or lien upon the real property herein described or any part of it" [*Code Civ. Proc. § 751.51(c)*].

The complaint must also substantially include the following [*Code Civ. Proc. § 751.53*]:

- A statement of the facts that make the Cullen Earthquake Act [*Code Civ. Proc. §§ 751.50-751.65*] applicable.

- A description of the exterior boundaries of the real property area sought to be affected by the action.

- A specification of the estate, title, interest, or claim owned, and in the actual possession of the plaintiff or plaintiffs in described parts of the entire real property sought to be affected by the actions.

- A specification of the estate, title, interest, or claim, so far as they are known to the plaintiff or plaintiffs, and so far as they are capable of being discovered by reasonably diligent search by the plaintiff or plaintiffs, in each separate part of the entire real property sought to be affected by the action.

- A specification of the street areas sought to be vacated or offered by the plaintiff or plaintiffs to be vacated in whole or in part for judicial equitable allocation to landowners for the mitigation of the losses inflicted on the landowners by the particular disaster or disasters to which the Act is applicable.

- A proposed replatting of the entire real property sought to be affected by the action, embodying the land boundaries as fixed by the disaster, except as these boundaries have been equitably and judicially readjusted, or as liberalized by judicially directed use of the vacated lands.

[4] Notice of Pendency of Action

A party to the action may file a notice of the pendency of the action by filing a notice of lis pendens in the office of the recorder of the county in which the property is situated [*see Code Civ. Proc. §§ 405.20, 751.57*].

[5] Plaintiff's Affidavit

At the time of filing the complaint, the plaintiff must file with it his or her affidavit (or declaration under *Code Civ. Proc. § 2015.5*) fully and explicitly setting forth the following [*Code Civ. Proc. §§ 751.09, 751.54*]:

- The character of his estate, right, title, interest, or claim in, and possession of, the property, the period it has existed, and from whom obtained.

- Whether or not he has ever made any conveyance of all or any part of the property, or any interest therein, and if so when and to whom, and a statement of any and all subsisting mortgages, deeds of trust, and other liens thereon.

- That he does not know and has never been informed of any other person who claims or who may claim any interest in or lien on all or any part of the property adversely to him, or if he does know or has been informed of any such person, the name and address of such person.

If the plaintiff is unable to state any of the required matters, he must set forth and show fully and explicitly the reasons for such inability [*Code Civ. Proc. §§ 751.09, 751.54*].

For a form of plaintiff's declaration under penalty of perjury required to be filed with a complaint under the Cullen Earthquake Act, see *§ 101.61*.

[6] Summons

[a] Contents

On the filing of the complaint, a summons issues under the seal of the court. The summons must contain the name of the court and county in which the action is brought, and the name of the plaintiff and a particular description of the real property involved, and is directed to "all persons claiming any interest in, or lien upon, the real property herein described, or any part thereof" [*Code Civ. Proc. §§ 751.05, 751.54*]. The form of the summons is prescribed by statute [*see Code Civ. Proc. §§ 751.05, 751.54*; for a form, *see § 101.59*].

[b] Publication

The summons must be published in a newspaper of general circulation published in the county in which the action is brought. The newspaper in which publication is to be made must be designated by an order of the court or judge thereof to be signed and filed with the clerk [*Code Civ. Proc. §§ 751.06, 751.54*; for order for publication of summons, see *§ 101.60*]. The summons must be published in the newspaper once a week for eight successive weeks [*Code Civ. Proc. §§ 751.06, 751.54*; *Gov. Code § 6065*].

To each publication of the summons must be appended a memorandum stating when and where the summons was first published [*see Code Civ. Proc. §§ 751.06, 751.54*].

If the affidavit by plaintiff discloses the name of any person claiming an interest in the property or a lien thereon adverse to the plaintiff, that fact and the name and address, if given, of the person must be stated in a memorandum to be appended to the summons [*Code Civ. Proc. §§ 751.07, 751.54*].

For the form of summons and memorandum, *see § 101.59*.

[c] Posting

A copy of the summons and a copy of the memorandum must be posted in a conspicuous place on each separate parcel of the property described in the complaint within 15 days after the first publication of the summons [*Code Civ. Proc. §§ 751.08, 751.54*].

[d] Service

If the plaintiff's affidavit discloses the name of any person claiming any interest in or lien on the property adverse to the plaintiff, a copy of the summons and complaint and affidavit must be served up that person, if he or she can be found, in the manner provided by law for the service of a summons in a civil action, other than by publication *Code Civ. Proc. §§ 751.10, 751.54*; *see Code Civ. Proc. §§ 415.10-415.40*]. A copy of the memorandum provided for in *Code Civ. Proc. § 751.07* [for a form, *see § 101.59*] must be appended to the copy of the summons served on any such person [*Code Civ.*

Proc. §§ 751.10, 751.54].

Service must be made during the period of the publication of the summons. If the person cannot, with reasonable diligence, be served within the time of publication, a copy of the summons, memorandum, complaint, and affidavit must be mailed, postage prepaid, addressed to him or her at the address given in the affidavit, or, if no address is given, at his or her last address known to the plaintiff, or, if none, at the county seat of the county in which the action is brought, forthwith upon the expiration of the period of publication [*Code Civ. Proc. §§ 751.10, 751.54*].

[7] Answer

An answer must be served within 90 days after the first publication of the notice, or such further time not exceeding 30 days, as the court for good cause may grant [*Code Civ. Proc. § 751.56(a)*].

The answer must [*Code Civ. Proc. § 751.56(b)*]:

- Specifically set out the particulars in which the claimant's estate, right, title, or interest in or to, or lien on all or any part of the property is different from, or greater than, the interest of the claimant as it is described in the complaint.

- Be confined to rights based on events occurring at the time of, or since the time of the disaster.

For an answer to a complaint filed under the Cullen Earthquake Act, see *§ 101.62*.

[8] Judgment

[a] Required Determinations

The judgment in an action under the Cullen Earthquake Act [*Code Civ. Proc. §§ 751.50-751.65*] must do three things [*Code Civ. Proc. § 751.60*]:

- Determine the land boundaries of each parcel of land located within the entire area of real property sought to be affected by the action whether owned publicly or privately, as fixed by the disaster, except as these boundaries have been judicially and equitably readjusted.

- Determine the entity or entities having estates, rights, titles, interests, and claims in and to each parcel, whether legal or equitable, present or future, vested or contingent, or whether they consist of mortgages or liens of any description.

- Approve and direct the proper filing of an official map covering the entire area of real property sought to be affected by the action, as a substitute for the plat maps previously filed, but rendered inaccurate by the disaster.

In reaching the conclusions called for in the judgment, the court must give effect to the changes in land boundaries caused by the disaster, mitigated, however, so far as can equitably be done by adjustment of land boundaries and by allocating to contiguous lots parts of the land released by a city, county, or the state by its voluntary vacation of areas formerly constituting public ways. Any such vacating of streets must be approved by the judgment, and will be effective without complying with any other formalities of law [*Code Civ. Proc. §§ 751.58, 751.61*].

In an action of the type authorized by the Cullen Earthquake Act [*Code Civ. Proc. §§ 751.50-751.65*], judgment cannot be given by default, but the court must require proof of the facts alleged in the complaint and other pleadings [*Code Civ.*

Proc. § 751.59].

[b] Effect

The judgment rendered in an action under the Cullen Earthquake Act [*Code Civ. Proc. §§ 751.50-751.65*] will be conclusive with the respect to land boundaries on every entity who at the commencement of the action had or claimed an estate, right, title, or interest in or to, or lien on a part of the entire area of real property described in the complaint as intended to be affected by the action, and on every entity claiming under any such person by title subsequent to the commencement of the action [*Code Civ. Proc. § 751.62*].

A certified copy of the judgment must be recorded, at the expense of the plaintiff or plaintiffs in the action, in the officer of the recorder of the county in which the affected land is situated. Such recorded judgment constitutes constructive notice of the findings therein and of the official plat or plats referred to therein. The findings and plats issued in connection with such judgment supersede and control all prior plats, maps, and documents to the extent that they are inconsistent therewith [*Code Civ. Proc. § 751.63*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersBoundariesReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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[Reserved]

§§ 101.18[Reserved]

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§ 101.30 Related Matthew Bender Publications

For forms of boundary agreements, see California Legal Forms, Ch. 28, Part D, *Boundary Agreements*

For a treatise on the subject of boundaries, see 3 California Real Estate Law & Practice, Ch. 81, *Boundaries and Descriptions*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersBoundaries

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§ 101.31 State Statutes

[1] Adverse Possession

Adverse possession; statute of limitations. *Code Civ. Proc. § 325*

[2] California Coordinate System

California Coordinate System. *Pub. Res. Code §§ 8801, 8816*

[3] Construction of Property Descriptions

Rules of construction in interpreting property descriptions. *Code Civ. Proc. § 2077*

County boundary descriptions; terms; definitions. *Gov. Code §§ 23070-23076*

[4] Evidence

Admissibility of community reputation concerning boundaries. *Evid. Code § 1322*

Admissibility in evidence of statements of unavailable witnesses concerning boundaries. *Evid. Code § 1323*

[5] Land Bounded by Body of Water

Presumption regarding land bounded by river, stream, lake or other body of water. *Civ. Code § 830*

Ownership of land bounded by body of water. *Civ. Code §§ 1014-1018*

[6] Land Bounded by Highway or Street

Presumption that land bounded by road or street passes title to center of way. *Civ. Code § 831*

Presumption that land bounded by highway passes title to center of highway. *Civ. Code § 1112*

[7] Official Maps

Official maps. *Gov. Code §§ 66499.50-66499.58*

[8] Reestablishment of Boundaries Following Earth Movement

Action of equitably reestablish boundaries. *Code Civ. Proc. § 751.50*

Commencement of action. *Code Civ. Proc. § 751.51*

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Summons, publication of notice, and related matters and procedures. *Code Civ. Proc. § 751.54*

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Vacating of streets, highways, or other public ways. *Code Civ. Proc. § 751.58*

No judgment by default. *Code Civ. Proc. § 751.59*

Contents of judgment. *Code Civ. Proc. § 751.60*

Considerations in making judgment. *Code Civ. Proc. § 751.61*

Effect of judgment. *Code Civ. Proc. § 751.62*

Recordation of judgment. *Code Civ. Proc. § 751.63*

Remedies as being cumulative. *Code Civ. Proc. § 751.64*

[9] Surveyors

Requirement of certificate of merit in malpractice action against surveyor; sanctions for failure to file. *Code Civ. Proc. § 411.35*

[10] Quieting Title

Quiet title actions. *Code Civ. Proc. § 760.010 et seq.*

[11] Subdivision Map Act

Subdivision Map Act. *Gov. Code §§ 65000-66499.58*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersBoundariesReal Property LawAdjoining LandownersWaterEvidenceHearsayExceptionsReputationBoundariesReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

California Forms of Pleading and Practice--Annotated

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Volume 10: Boundaries thru Captions and Introductions-Chs. 101-108
Chapter 101 BOUNDARIES
PART III. RESEARCH GUIDE

10-101 California Forms of Pleading and Practice--Annotated § 101.32

§ 101.32 Decisions

[1] Agreed Boundaries

[a] Doctrine of Agreed Boundaries

Requirements of doctrine of agreed boundaries. *Bryant v. Blevins (1994) 9 Cal. 4th 47, 56, 36 Cal. Rptr. 2d 86, 884 P.2d 1034*

Longstanding acceptance of fence as boundary between parties' lands is strong evidence of implied agreement to accept boundary. *Ernie v. Trinity Lutheran Church (1959) 51 Cal. 2d 702, 708, 336 P.2d 525* ; *Duncan v. Peterson (1970) 3 Cal. App. 3d 607, 611, 83 Cal. Rptr. 744*

Agreed boundaries doctrine was not applicable when there was no uncertainty as to boundary and no agreement that existing fence established the boundary. *Mehdizadeh v. Mincer (1996) 46 Cal. App. 4th 1296, 54 Cal. Rptr. 2d 284*

Agreed boundaries doctrine was not applicable to determination of public property rights on Lake Tahoe because there was no controversy over boundary when alleged acquiescence in boundary occurred. *Fogerty v. State of California (1987) 187 Cal. App. 3d 224, 236-237, 231 Cal. Rptr. 810*

Element of uncertainty is not established when adequate legal description exists even though fence is not on boundary. *Mesnick v. Caton (1986) 183 Cal. App. 3d 1248, 1256-1257, 228 Cal. Rptr. 779*

Agreed boundary was established by parties sighting along two trees and agreeing as to the boundary. *Humphrey v. Futter (1985) 169 Cal. App. 3d 333, 342, 215 Cal. Rptr. 178*

Agreed boundaries inference was upheld when fence connected monuments and owners had acquiesced in fence as boundary. *McKinney v. Kull (1981) 118 Cal. App. 3d 951, 956-957, 173 Cal. Rptr. 696* .

Doctrine of agreed boundaries does not apply when land is used with owner's consent unless there is evidence of intent

to fix boundary. *Finley v. Yuba County Water Dist. (1979) 99 Cal. App. 3d 691, 700, 160 Cal. Rptr. 423*

Payment of taxes is not material where boundary line is fixed by agreement and acquiescence of parties. *Duncan v. Peterson (1970) 3 Cal. App. 3d 607, 611, 83 Cal. Rptr. 744*

Question of legally recognizable boundary line is issue of fact in boundary dispute. *Tomity Corp. v. Sovkueff (1966) 244 Cal. App. 2d 685, 689, 53 Cal. Rptr. 328* ; *Gibson v. Cobb (1965) 236 Cal. App. 2d 226, 230, 46 Cal. Rptr. 57*

Purpose of doctrine of agreed boundaries is to secure repose, to prevent strife and disputes concerning boundaries, and to make titles permanent and stable. *Kraus v. Griswold (1965) 232 Cal. App. 2d 698, 705, 43 Cal. Rptr. 139*

Alternative or contingent judgment is permitted where original boundary line may be determined but evidence also establishes agreed boundary. *Chandler v. Hibberd (1958) 165 Cal. App. 2d 39, 50, 332 P.2d 133*

[b] Effect

Agreed boundary becomes in legal effect true boundary. *Ernie v. Trinity Lutheran Church (1959) 51 Cal. 2d 702, 708, 336 P.2d 525*

Agreed boundary line as not only binding parties but also their successors by subsequent conveyances. *Kraus v. Griswold (1965) 232 Cal. App. 2d 698, 705, 43 Cal. Rptr. 139* ; *but see Steele v. Shuler (1963) 211 Cal. App. 2d 698, 706, 27 Cal. Rptr. 569* (rule as required to be applied in connection with rule that bona fide purchaser for value without notice is entitled to protection against undisclosed rights and titles)

[c] Requirement of Uncertainty

Strong public policy justifications counsel against applying doctrine when true boundary is ascertainable from legal descriptions set forth in existing deed or survey, and party asserting agreed boundary when such legal descriptions exist must provide direct evidence that neighboring owners entered into boundary agreement to resolve boundary dispute. *Bryant v. Blevins (1994) 9 Cal. 4th 47, 56, 36 Cal. Rptr. 2d 86, 884 P.2d 1034*

Doctrine of agreed boundaries requires uncertainty as to true boundary line but not that its true location be absolutely unascertainable. *Ernie v. Trinity Lutheran Church (1959) 51 Cal. 2d 702, 707-708, 336 P.2d 525* ; *see also Pedersen v. Reynolds (1939) 31 Cal. App. 2d 18, 25, 87 P.2d 51*

Requirement of uncertainty is aimed at preventing boundary shift by oral agreement or acquiescence where parties have actual knowledge of true line. *Zachery v. McWilliams (1972) 28 Cal. App. 3d 57, 62, 104 Cal. Rptr. 293*

[d] Writing

No requirement that boundary agreement be in writing or even express. *Duncan v. Peterson (1970) 3 Cal. App. 3d 607, 611, 83 Cal. Rptr. 744* ; *Shelton v. Malette (1956) 144 Cal. App. 2d 370, 375, 301 P.2d 18*

[2] Estoppel

Grantor is estopped from showing true boundary line where all elements of estoppel present. *Friedman v. Southern Cal. Trust Co. (1918) 179 Cal. 266, 270, 176 P. 442* ; *Frericks v. Sorensen (1952) 113 Cal. App. 2d 759, 761, 248*

P.2d 949

[3] Evidence

[a] Admissibility

In cases of disputed boundary, all evidence, whether documentary or parol, which bears upon point in issue and which is not inadmissible on general principles, including records of original proprietors, their plans and maps, plats, and field notes, may be received into evidence. *Chandler v. Hibberd (1958) 165 Cal. App. 2d 39, 55, 332 P.2d 133*

[b] Use of Expert Witnesses

When aggregate description of parcels in plat and field notes was ambiguous, trial court properly admitted and used testimony of land surveyor and historian to resolve the ambiguity. *Claudino v. Pereira (2008) 165 Cal. App. 4th 1282, 1286, 82 Cal. Rptr. 3d 464*

Surveyors and civil engineers, like other experts, may give testimony on questions involving matters of technical skill and experience with which they are peculiarly acquainted. *Verdi Dev. Co. v. Dono-Han Mining Co. (1956) 141 Cal. App. 2d 149, 155, 296 P.2d 429*

[4] Government Surveys

Surveys under Townsite Acts ascertained boundaries, but did not create them. *Claudino v. Pereira (2008) 165 Cal. App. 4th 1282, 1287, 82 Cal. Rptr. 3d 464*

Townsite Acts do not provide that the plat is evidence of the parcel of land; rather "such plats, field notes and records, and certified copies thereof, shall be prima facie evidence of the contents and correctness thereof." *Claudino v. Pereira (2008) 165 Cal. App. 4th 1282, 1287, 82 Cal. Rptr. 3d 464*

Boundaries shown on parcel map are not product of government survey and therefore can be challenged for failure to follow boundary lines of parcel from which smaller parcels were derived. *Fripp v. Walters (2005) 132 Cal. App. 4th 656, 664, 33 Cal. Rptr. 3d 794*

When survey has been made, approved, and acted upon by the state, its correctness is not to be impeached or disregarded except by direct proceedings instituted for that purpose. *White v. California (1971) 21 Cal. App. 3d 738, 751, 99 Cal. Rptr. 58* ; *see also Chandler v. Hibberd (1958) 165 Cal. App. 2d 39, 57, 332 P.2d 133*

Government survey of public lands do not ascertain boundaries, but create them. *Reid v. Dunn (1962) 201 Cal. App. 2d 612, 615, 20 Cal. Rptr. 273*

Original government surveys, whether mathematically correct or grossly erroneous, control location and length of boundaries of sections and parts thereof and shape and size of tracts granted to patentees. *Verdi Dev. Co. v. Dono-Han Mining Co. (1956) 141 Cal. App. 2d 149, 152, 296 P.2d 429*

Government resurvey to correct erroneous survey do not affect rights of those who have acquired an interest in lands with reference to original survey. *Phelps v. Pacific Gas & Elec. Co. (1948) 84 Cal. App. 2d 243, 248, 190 P.2d 209* .

[5] Meander Lines

Exception to general rule that meander line is not a boundary line where body of water which constituted actual boundary line no longer exists. *People ex rel. Dept. Pub. Wks. v. Shasta Pipe etc. Co. (1968) 264 Cal. App. 2d 520, 531, 70 Cal. Rptr. 618*

Meander line defined. *Den v. Spalding (1940) 39 Cal. App. 2d 623, 627, 104 P.2d 81*

Meander line generally does not constitute boundary line for property bordering on body of water. *Den v. Spalding (1940) 39 Cal. App. 2d 623, 627, 104 P.2d 81*

[6] Monuments

In absence of qualifying term, designation in conveyance of monument as boundary implies middle or central point of the monument. *Freeman v. Affiliated Property Craftsmen (1968) 266 Cal. App. 2d 723, 729, 72 Cal. Rptr. 357*

Rule of construction that monuments control over distances and courses is not absolute. *Luginbuhl v. Hammond (1960) 179 Cal. App. 2d 350, 355, 3 Cal. Rptr. 582*

Monument defined. *Randolph v. Stanislaus County (1919) 44 Cal. App. 322, 329, 186 P. 625*

Rule of construction that monuments control over distances and courses. *Williamson v. Pratt (1918) 37 Cal. App. 363, 368, 174 P. 114*

[7] Quiet Title Actions

Plaintiff, in quiet title action, must prove title in himself or herself superior to that of defendant, rather than being required to establish his or her own title without relying on weakness in defendant's title. *Gerhard v. Stephens (1968) 68 Cal. 2d 864, 918, 69 Cal. Rptr. 612, 442 P.2d 692*

Elements of quiet title action. *Ephraim v. Metropolitan Trust Co. (1946) 28 Cal. 2d 824, 833, 172 P.2d 501*

Nature of quiet title action. *Thomson v. Thomson (1936) 7 Cal. 2d 671, 681, 62 P.2d 358*

Under rule peculiar to quiet title actions, defendant is not required to seek affirmative relief in cross complaint; if plaintiff fails to establish title, defendant is entitled to affirmative judgment declaring rights asserted in answer. *Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1031, 84 Cal. Rptr. 538*

[8] Reestablishing Obliterated and Lost Corners

[a] Definitions

"Obliterated corner" defined as one of which no visible evidence remains of work of original surveyor, but that may be shown by competent evidence. *Chandler v. Hibberd (1958) 165 Cal. App. 2d 39, 52, 332 P.2d 133*

"Lost corner" is one that cannot be replaced by reference to any existing data or sources of information. *Chandler v. Hibberd (1958) 165 Cal. App. 2d 39, 52, 332 P.2d 133*

[b] Object of Court Proceedings

Task of court when confronted with obliterated corner is to determine from available data its approximate position. *Chandler v. Hibberd (1958) 165 Cal. App. 2d 39, 57, 332 P.2d 133*

[c] Use of U.S. Government Plats and Field Notes

In conflict between plat and field notes, field notes are superior authority. *Claudino v. Pereira (2008) 165 Cal. App. 4th 1282, 1287-1288, 82 Cal. Rptr. 3d 464*

Use of government plats and field notes to reestablish lost or obliterated corner. *Saunders v. Polich (1967) 250 Cal. App. 2d 136, 140, 58 Cal. Rptr. 198*

[d] Surveys

Steps included in retracement of lines of public land survey. *Reid v. Dunn (1962) 201 Cal. App. 2d 612, 616, 20 Cal. Rptr. 273*

[e] Proportionate Method

Proportionate measurement method is used as last resort when original corner is "lost" and cannot be relocated on ground. *California v. Thompson (1971) 22 Cal. App. 3d 368, 377, 99 Cal. Rptr. 594*

Proportionate method redistributes excess or shortage proportionately among all owners along particular line that cannot be relocated. *Chandler v. Hibberd (1958) 165 Cal. App. 2d 39, 51, 332 P.2d 133*

[9] Rivers and Other Bodies of Water

[a] Determination of Navigability

Navigability of body of water is largely a question of fact, determined from its character, its situation and availability as highway of commerce, and other surrounding circumstances. *Bohn v. Albertson (1951) 107 Cal. App. 2d 738, 742, 238 P.2d 128*

[b] Navigable Waters

Trial court properly determined boundary line between areas of littoral rights in lake by drawing line perpendicular to shoreline; slight angle in shoreline where parties' property line met shore was not equivalent to dramatic indentations or projections that would require equitable consideration to avoid unjust result. *Kendall v. Walker (2009) 181 Cal. App. 4th 584, 596-597, 104 Cal. Rptr. 3d 262*

Owner of land bordering on navigable lake or stream, where there is tide, takes to high water mark. *People v. Ward Redwood Co. (1964) 225 Cal. App. 2d 385, 390, 37 Cal. Rptr. 397*

Island or accumulation of land originating in bed of navigable river belongs to state. *People v. Ward Redwood Co. (1964) 225 Cal. App. 2d 385, 395, 37 Cal. Rptr. 397*

[c] Nonnavigable Waters

Where deed described land by measurement and also specified creek as boundary, creek, however it shifted, remains boundary. *Santa Cruz v. Younger (1963) 223 Cal. App. 2d 818, 820-821, 36 Cal. Rptr. 253*

In absence of language to contrary, bed of nonnavigable stream or river deemed to be bounded by permanent banks which confine waters in their course at their highest level. *Mammoth Gold Dredging Co. v. Forbes (1940) 39 Cal. App. 2d 739, 751, 104 P.2d 131*

Banks of nonnavigable river or stream determined during times of normal flow of water, not during times of storm flow. *San Pedro, Los Angeles & Salt Lake R.R. Co. v. Simons Brick Co. (1919) 45 Cal. App. 57, 61-62, 187 P. 62*

[d] Tidelands

"Tideland" is land lying between ordinary high and low tide lines, covered and uncovered successively by ebb and flow thereof. *Marks v. Whitney (1971) 6 Cal. 3d 251, 257-258, 98 Cal. Rptr. 790, 491 P.2d 374* ; *White v. California (1971) 21 Cal. App. 3d 738, 742, 99 Cal. Rptr. 58*

Mean high tide defined is average height of all high tide waters at particular locality over considerable period of time. *Swarzwald v. Cooley (1940) 39 Cal. App. 2d 306, 313, 103 P.2d 580*

Presumption that mean high tide does not change. *Swarzwald v. Cooley (1940) 39 Cal. App. 2d 306, 316, 103 P.2d 580*

[10] Natural Accretion

When parcel of land that was formerly riverbed accreted due to historic hydraulic gold mining that was performed miles from parcel, accretion was natural rather than artificial and therefore belonged to owners of land that was adjacent to parcel. *State of California ex rel. State Lands Com. v. Superior Court (1995) 11 Cal. 4th 50, 56, 44 Cal. Rptr. 2d 399, 900 P.2d 648*

[11] Rules of Construction

In construing boundaries, intention of parties at time of conveyance is controlling consideration. *Machado v. Title Guar. & Trust Co. (1940) 15 Cal. 2d 180, 186, 99 P.2d 245* ; *Freeman v. Affiliated Property Craftsmen (1968) 266 Cal. App. 2d 723, 729, 72 Cal. Rptr. 357* ; *Santa Cruz v. Younger (1963) 223 Cal. App. 2d 818, 821, 36 Cal. Rptr. 253*

Conveyance of definite quantity of land within and as parcel of larger tract of land well described, but without locating land thus conveyed, is to be construed as conveying undivided interest in larger tract provided deed does not purport specifically to describe smaller tract and fails to do so with reasonable certainty. *Cullen v. Sprigg (1890) 83 Cal. 56, 61-62, 23 P. 222* ; *Grogan v. Vache (1873) 45 Cal. 610, 613* ; *Ames v. Irvine Co. (1966) 246 Cal. App. 2d 832, 835 n. 3, 55 Cal. Rptr. 180*

Construction of boundaries is limited to language of deed. *Hyman v. Haun (1961) 191 Cal. App. 2d 891, 896, 13 Cal. Rptr. 87*

Rules for awarding priorities were developed as means for determining intention of parties and as rules of construction rather than rules of property. *Hyman v. Haun (1961) 191 Cal. App. 2d 891, 896, 13 Cal. Rptr. 87*

Parol evidence is admissible to explain location of objects mentioned in description of property in deed. *Williamson v. Pratt (1918) 37 Cal. App. 363, 367, 174 P. 114*

[12] Streets and Highways

Transfers of land bounded by highways or streets pass title to center of highway or street, unless different intent appears from grant. *Machado v. Title Guar. & Trust Co. (1940) 15 Cal. 2d 180, 186, 99 P.2d 245* ; *Allan v. City & County of San Francisco (1936) 7 Cal. 2d 642, 646, 61 P.2d 1175* ; *Pilkington v. Fausone (1970) 11 Cal. App. 3d 349, 351, 90 Cal. Rptr. 38* (applicability to alleys); *Freeman v. Affiliated Property Craftsmen (1968) 266 Cal. App. 2d 723, 730, 72 Cal. Rptr. 357* (applicability to railway right of way); *Murray v. Title Ins. & Trust Co. (1967) 250 Cal. App. 2d 248, 254, 58 Cal. Rptr. 273* ; *Canal Oil Co. v. National Oil Co. (1937) 19 Cal. App. 2d 524, 531, 66 P.2d 197* (nonapplicability to private easement)

Presumption that grant of fractional part or given number of feet of a "lot" conveys given fractional part or number of feet which is set apart for private use and occupancy and is not reduced by portion of abutting street even though boundary of lot is technically center of street. *Earl v. Dutour (1919) 181 Cal. 58, 60, 183 P. 438* ; *Peake v. Azusa Valley Sav. Bank (1940) 37 Cal. App. 2d 296, 301, 99 P.2d 382*

When street easement had been abandoned on one side of tract, adjacent owners in tract had title to street even though deed description did not include street. *Besneatte v. Gourdin (1993) 16 Cal. App. 4th 1277, 1281-1282, 21 Cal. Rptr. 2d 82*

Deed granted title to middle of adjacent street and owner was entitled to possession thereof when street was abandoned. *Baker v. Ramirez (1987) 190 Cal. App. 3d 1123, 1132, 235 Cal. Rptr. 857*

Description of metes and bounds including all of alley rebutted presumption that property only extends to middle of alley. *Pilkington v. Fausone (1970) 11 Cal. App. 3d 349, 352, 90 Cal. Rptr. 38* ; *but see Hixson v. Jones (1967) 253 Cal. App. 2d 860, 864, 61 Cal. Rptr. 883* (presumption not rebutted where metes and bounds description was inserted by title company on its own initiative)

For presumption to arise, necessary that street or highway be designated as monument or boundary. *Millyard v. Faus (1968) 268 Cal. App. 2d 76, 83, 73 Cal. Rptr. 697*

Metes and bounds description in deed to property which actually abuts street or highway is some evidence of grantor's intent to withhold any interet in abutting street or highway, and use of metes and bounds description is of itself some evidence to rebut presumption of *Civ. Code § 831*, providing that owner of land actually bounded by road or street is presumed to own to center of way. *Millyard v. Faus (1968) 268 Cal. App. 2d 76, 84, 73 Cal. Rptr. 697*

Presumption that grant of fractional part of a "lot" conveys given fractional part which is set apart for private use and occupancy is rebuttable. *Tomity Corp. v. Sovkueff (1966) 244 Cal. App. 2d 685, 687, 53 Cal. Rptr. 328* ; *Pierson v. Bradfield (1941) 43 Cal. App. 2d 519, 523-524, 111 P.2d 460* ; *Peake v. Azusa Valley Sav. Bank (1940) 37 Cal. App. 2d 296, 302, 99 P.2d 382*

Marginal street doctrine defined. *Everett v. Bosch (1966) 241 Cal. App. 2d 648, 655 n. 3, 50 Cal. Rptr. 813* ; *see also Los Angeles City High School Dist. v. Swensen (1964) 226 Cal. App. 2d 574, 580, 38 Cal. Rptr. 214*

Reason for presumption that land bounded by highway or street passes title to center of highway or street. *Los Angeles City High School Dist. v. Swensen (1964) 226 Cal. App. 2d 574, 579-580, 38 Cal. Rptr. 214*

Presumption that property extends to middle of bounding street does not applying where description uses side line of street, rather than street itself, as boundary. *Speer v. Blasker (1961) 195 Cal. App. 2d 155, 159, 15 Cal. Rptr. 528*

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyExpertsGeneral OverviewReal Property LawDeedsProperty DescriptionsReal Property LawAdjoining LandownersBoundariesReal Property LawAdjoining LandownersWaterReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 101.33 Law Reviews

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Note, *Property Boundries--Civil Code Section 830 Grants Nontidal Shorezone to Private Landowners, Subject to Tidelands Trust-- State v. Superior Court of Lake County, 29 Cal. 3d 210, 172 Cal. Rptr. 696, 625 P.2d 239 (1981) , 22 Santa Clara L. Rev. 559 (1982)*

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Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawWater RightsGeneral OverviewReal Property LawWater RightsBoundariesReal Property LawWater RightsRiparian Rights

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§ 101.34 Text References

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Bowman, Real Estate Law in California, Ch. 10, *Land: Descriptions, Surveys, Subdivisions*

Brown, Boundary Control and Legal Principles

Brown & Eldridge, Evidence and Procedures for Boundary Location

Miller & Starr, Current Law of California Real Estate, Vol. 2, Ch. IV, *Acquisition and Transfer*, §§ 396-399; Ch. VII, *Adjoining Landowners*, §§ 670-674

Ogden's Revised California Real Property Law, ch. 15, *Boundaries* (Cal. C.E.B. 1974)

Legal Topics:

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

§§ 101.35[Reserved]

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§ 101.50 Complaint to Establish Boundary and Quiet Title to Real Property [Code Civ. Proc. §§ 760.020(a), 761.020]--Boundary Line in Dispute

[1] FORM Complaint to Establish Boundary and Quiet Title to Real Property [Code Civ. Proc. §§ 760.020(a), 761.020]--Boundary Line in Dispute

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*(*s*), *of known defendant(s)*] [*if unknown defendants are included, allege*: all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to Plaintiff's title, or any cloud on Plaintiff's title thereto] [; and DOES I-_____, inclusive],	)	COMPLAINT TO ESTABLISH BOUNDARY AND QUIET TITLE
Defendant(s).	)	

_____

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, the owner in fee simple and in possession and control of that real property situated in _____ County, known as _____ [*street address*], _____ [*city*], California, and more particularly described as follows: _____ [*legal description*].

2. Defendant _____ [*name*] is, and at all times herein mentioned was, the owner in fee simple and in

possession and control of that real property situated in _____ County, known as _____ [*street address*], _____ [*city*], California, and more particularly described as follows: _____ [*legal description*].

3. The above-described properties of plaintiff and defendant _____ [*name*] adjoin each other at plaintiff's _____ [*specify, e.g.,* north] and defendant's _____ [*specify, e.g.,* south] boundaries.

4. The basis of plaintiff's title is _____ [*describe basis of plaintiff's title, e.g.,* a deed from _____ (*name of grantor*) granting the above-described property in fee simple to plaintiff dated _____, and recorded in the Official Records of the County of _____, Book/Reel _____, page/image _____. (*If plaintiff relies on something other than record title, for instance, adverse possession, and seeks a present interest in the property, add:* Plaintiff was _____ (seised *or* possessed) of all the property within the boundary he/she contends is the true and correct boundary within five years of the commencement of this action)].

5. Defendants claim some right, title, estate, lien, or interest in and to the lands of plaintiff hereinbefore described, or a portion thereof, and dispute and deny that the true and correct boundary line between their respective properties runs as follows: _____ [*legal description of boundary line that plaintiff believes to be correct*], but to the contrary, contend that the true and correct boundary line between their respective lands runs as follows: _____ [*legal description of boundary line that defendants claim to be correct*]. Defendants' claim or claims are without any right whatever, and defendants are without any right, title, estate, lien, or interest whatever in the aforementioned real property or any part of that property.

[6. *If unknown defendants have been named, allege:* The defendants herein named as "all persons unknown claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud on plaintiff's title thereto," are unknown to plaintiff. These unknown defendants, and each of them, claim some right, title, estate, lien, or interest in the above-described property adverse to plaintiff's title and then claim or claims constitute a cloud on plaintiff's title thereto. This claim or claims are without any right whatever and these defendants have no right, title, estate, lien, or interest whatever in the above-described property or any part of that property.]

[7. *If the claim of a named defendant is unknown, uncertain, or contingent, allege:* The claim of _____ (*name of defendant*) is _____ (unknown *or* uncertain *or* contingent). (*If the lack of knowledge, uncertainty, or contingency is caused by a transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, allege:* _____ (*name*), age _____, is the person who would be entitled to an adverse claim if _____ (*describe contingency*) had occurred prior to the commencement of this action.) (*If such person is subject to a legal disability, allege:* Such person is subject to _____ (*specify legal disability*)). The claim or claims of _____ (*name of this defendant*) are without any right whatever, and _____ (*name of this defendant*) is without any right, title, estate, lien, or interst whatever in the aforementioned real property or any part of that property.]

8. Plaintiff seeks to quiet title as of _____ [*date*]. [*If the date is a date other than the date the complaint is filed, allege why a determination as of that date is sought.*]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. That they be required to set forth each and every claim they may assert in and to plaintiff's lands and to the location of the boundary line set out above;

2. That this court adjudge the true and correct location of the boundary line;

3. That plaintiff's title in and to his/her lands be quieted and that it be adjudged that plaintiff is the owner in fee and entitled to the possession of the lands, that the true and correct location of the boundary line between plaintiff's land and defendants' land is as described in this complaint, and that none of the defendants has any right, title, estate, lien, or interest in or to the land of plaintiff, nor any portion thereof;

4. That defendants, and each of them, be forever enjoined and restrained from claiming or asserting any claim or interest in or to plaintiff's land, or any portion thereof, and from questioning, distributing, or interfering with the boundary line hereinbefore set out in this complaint, or attempting so to do;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The complaint in [1], *above,* is a general form that may be used to establish a boundary line and to quiet title to the properties involved in a dispute between adjoining owners over the location of the boundary line.

Plaintiff may wish to obtain a title report before commencing the action. If plaintiff intends to add unknown persons as defendants, an examination of the record title and an inspection of the property will be necessary [*see Code Civ. Proc. § 762.060(b)*]. Also, the court may order plaintiff to obtain a title report and keep it available for inspection and copying by the parties [*Code Civ. Proc. § 762.040(b)*].

[3] Required Allegations

By statute, a quiet title complaint must include the following allegations [*Code Civ. Proc. § 761.020*]:

- A description of the property that is the subject of the action (Paragraph 1). In the case of real property, the description must include both its legal description and its street address or common designation, if any. This requirement does not preclude the joinder of several properties or of real and personal property, if appropriate [15 Cal. L. Rev. Comm. 1198 (1979)].

- The title of the plaintiff as to which a determination is sought and the basis of the title (Paragraphs 1-4). If the title is based on adverse possession, the complaint must allege the specific facts constituting the adverse possesson [*see* Ch. 13, *Adverse Possession*].

- The adverse claims to the title of the plaintiff against which a determination is sought (Paragraphs 5-7). If the plaintiff admits the validity of any adverse claim, the complaint must so state [*Code Civ. Proc. § 762.060(c)*]. If the claim or the share or quantity of the claim of a person required to be named as a defendant is unknown, uncertain, or contingent, the plaintiff must so state in the complaint. If the lack of knowledge, uncertainty, or contingency is caused by transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, the plaintiff must also state in the complaint, so far as is known to the plaintiff, the name, age, and legal disability, if any, of the person in being who would be entitled to the claim had the contingency on which the claim depends occurred prior to the commencement of the action (Paragraph 7) [*Code Civ. Proc. § 762.020(b)*].

- The date as of which the determination is sought. If the determination is sought as of a date other than the date the complaint is filed, the complaint must include a statement of the reasons why a determination as of that date is sought (Paragraph 8).

- A prayer for the determination of the title of the plaintiff against the adverse claims.

To recover real property, or possession of real property, a plaintiff must allege and prove that he or she, or his or her ancestor, predecessor, or grantor, was seised or possessed of the property in question within five years before the commencement of the action (Paragraph 4) [*Code Civ. Proc. § 318*; *see Civ. Code § 689* (owner of present interest in real property as entitled to immediate possession)]. The requirement of seisin under *Code Civ. Proc. § 318* is met, however, if plaintiff had record title even though the defendant may have been in actual possession [*Tobin v. Stevens (1988) 204 Cal. App. 3d 945, 949-951, 251 Cal. Rptr. 587* ; *Schoenfeld v. Pritzker (1967) 257 Cal. App. 2d 117, 121, 64 Cal. Rptr. 592]* . Thus, the allegation regarding possession or seisin is not necessary when plaintiff's claim is based on a boundary described in the document establishing record title. Application of the foregoing principles is complicated by the rule that, when a boundary has been in dispute and the contiguous owners have agreed to or acquiesced in another boundary for the period of limitation, the agreed boundary becomes the true boundary [*French v. Brinkman (1963) 60 Cal. 2d 547, 553, 35 Cal. Rptr. 289, 387 P.2d 1* ; *Martin v. Lopes (1946) 28 Cal. 2d 618, 622, 170 P.2d 881* ; *Sneed v. Osborn (1864) 25 Cal. 619, 626* ; *see also § 101.51[3], [4]*].

[4] Who Must Be Made Defendants

The plaintiff must name as defendants the persons having adverse claims to the title of the plaintiff against which a determination is sought [*Code Civ. Proc. § 762.010*]. If the name of a person required to be named as a defendant is not known to plaintiff, the plaintiff must so state in the complaint and must name as parties all persons unknown in the manner described in [5], *below* [*Code Civ. Proc. § 762.020(a)*].

The court on its own motion may, and on motion of any party must, make such orders as appear appropriate for joinder of such additional parties as are necessary or proper [*Code Civ. Proc. § 762.040(a)*].

If a person required to be named as a defendant is dead and the plaintiff knows of a personal representative, the plaintiff must join the personal representative [*Code Civ. Proc. § 762.030(a)*]. If a person required to be named as a defendant is dead, or is believed by the plaintiff to be dead, and the plaintiff knows of no personal representative, the plaintiff must state these facts in an affidavit filed with the complaint. When it is stated in the affidavit that such person is dead, the plaintiff may join as defendants "the testate and intestate successors of _____ (*name of deceased person*), deceased, and all persons claiming by, through, or under such decedent" naming them in that manner [*Code Civ. Proc. § 762.030(b)(2)*].

If a person required to be named as a defendant is believed by plaintiff to be deceased, the person believed to be deceased may be named as a defendant as may that person's successors. The successors must be denominated as follows: "the testate and intestate successors of _____ (*name of person believed to be deceased*), believed to be deceased, and all persons claiming by, through, or under such person" [*Code Civ. Proc. § 762.030(b)(3)*].

The form does not contain any allegations regarding defendants who are personal representatives [*Code Civ. Proc. § 762.030(a)*], heirs, intestate or testate successors [*Code Civ. Proc. § 762.030(b)*], of persons known or believed by the plaintiff to be deceased. If those defendants are necessary in your particular situation, use the appropriate allegations from Ch. 482, *Quieting Title* .

[5] Unknown Defendants

In addition to the persons required to be named as defendants in the action, the plaintiff may name as defendants "all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud upon plaintiff's title thereto," naming them in that manner (Paragraph 6) [*Code Civ. Proc. § 762.060(a)*]. If unknown defendants are named, the plaintiff must name as defendants the persons having adverse claims that are of record or known to the plaintiff or reasonably apparent from an inspection of the property [*Code Civ. Proc. § 762.060(b)*]. Naming unknown defendants and serving them by publication [*see* [9], *below*] will entitle the plaintiff to an in rem judgment against the whole world [*Code Civ. Proc. § 764.030*], except that a person who is in open and actual possession of the property cannot be named as an unknown defendant [*Code Civ. Proc. § 763.010(c)*].

Some people also additionally designate testate and intestate successors and "all persons unknown" as DOES. That is not recommended because it differs from the statutory language of *Code Civ. Proc. §§ 762.030(b)(2),(3)* and *762.060* by which those defendants are to be designated, and because it may limit the in rem effect of the judgment by limiting the number of adverse claimants in those classes [*see Code Civ. Proc. § 763.030(b)*]. Fictitious defendants, however, may be named as DOES pursuant to *Code Civ. Proc. § 474* [*see Code Civ. Proc. § 760.060* (rules governing civil actions generally as applicable in quiet title actions unless they are inconsistent with quiet title provisions)].

The form does not contain any allegations regarding fictitious defendants [*Code Civ. Proc. § 474*]. If those defendants are necessary in your particular situation [*see* [4], *above*], use the appropriate allegations from Ch. 482, *Quieting Title*.

[6] Appointment of Guardian ad Litem

The court on its own motion may, and on motion of any party must, make such orders for appointment of guardians ad litem as appear necessary to protect the interest of any party [*Code Civ. Proc. § 762.080*]. Appointment of guardians ad litem is discussed in Ch. 291, *Guardians ad Litem* .

[7] Verification

The complaint must be verified [*Code Civ. Proc. § 761.020*; *see Code Civ. Proc. §§ 446, 2015.5*].

[8] Jurisdiction and Venue

The superior court has jurisdiction over quiet title actions [*Code Civ. Proc. § 760.040(a)*]. The actions are unlimited civil cases [*Code Civ. Proc. §§ 85, 88, 580(b)(3)*]. Subject to the power of the court to transfer actions, the proper county for the trial of an action to quiet title to real property is the county in which the real property, or some of it, is located [*Code Civ. Proc. § 760.050(a)*].

[9] Service of Summons

The form, content, and manner of the service of summons in quiet title actions is the same as in civil actions generally [*Code Civ. Proc. § 763.010(a)*]. If unknown defendants are named, there must also be service by publication and posting [*Code Civ. Proc. § 763.010(b)*]. The requirements for service by publication and posting are discussed in Ch. 482, *Quieting Title* . The procedure for service of summons is set forth in Ch. 518, *Service of Summons and Papers* .

[10] Lis Pendens

Immediately on the commencement of a quiet title action by filing the complaint, the plaintff must file a lis pendens in the office of the county recorder of each county in which any real property described in the complaint is located [*Code Civ. Proc. § 761.010*]. The lis pendens gives constructive notice of the pendency of the action to subsequent purchasers or encumbrancers [*Code Civ. Proc. § 405.24*]. For further discussion and forms of lis pendens, see Ch. 348, *Lis Pendens* .

[11] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to Fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

See generally Ch. 482, *Quieting Title*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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10-101 California Forms of Pleading and Practice--Annotated § 101.51

§ 101.51 Complaint to Establish Boundary and Quiet Title to Real Property [Code Civ. Proc. §§ 760.020, 761.020]--Existing Boundary Agreement

[1] FORM Complaint to Establish Boundary and Quiet Title to Real Property [Code Civ. Proc. §§ 760.020, 761.020]--Existing Boundary Agreement

[*Caption, introduction. See § 101.50[1].*]

1-3. [*Ownership of respective adjoining properties by plaintiff and defendants. See § 101.50[1], Paragraphs 1-3.*]

4. [*Basis of plaintiff's title. See § 101.50[1], Paragraph 4.*]

5. The boundary line between the land of the parties hereto is as set out in a deed from _____ [*name of grantor*] to plaintiff, dated _____. The deed was recorded on _____ [*date*], in the Official Records of _____ County, Book _____, page _____. A copy of the deed is attached hereto as Exhibit A and made a part hereof.

6. During the month of _____ [*month and year*], and prior thereto, both plaintiff and defendants were uncertain and in doubt as to the true location on the ground of that certain line referred to in the deed as _____ [*legal description of boundary in question contained in deed*], and for the purpose of agreeing to, resolving, and establishing once and for all the true location of the boundary line, plaintiff and defendants, on or about _____ [*date*], and more than _____ [*number*] years before the commencement of this action, went on the land in question, measured off the courses and distances as recited in Exhibit A herein, and agreed and determined to locate a _____ [*describe way in which boundary was marked, e.g.*, fence] along a line agreed to by both parties herein as that certain line _____ [*legal description of boundary in question contained in deed*] referred to in the deed. In accordance with the agreement of plaintiff and defendants, a _____ [*describe way in which boundary was marked, e.g.*, fence] was constructed on _____ [*date*] along the line so agreed on by the parties hereto, and such _____ [*specify mark, e.g.*, fence] has been maintained by the plaintiff herein continuously from that date to the present.

7. At all times since the _____ [*specify creation of the mark, e.g.*, erection of the fence] both plaintiff and defendants have continuously recognized the line of the _____ [*specify mark, e.g.*, fence] as marking the true and correct boundary to their respective lands, and have at all times since the _____ [*creation of the mark, e.g.*, erection of the fence] acquiesced in and abided by this boundary line.

[*EITHER*]

8. In reliance on the agreement and the acquiescence of the defendants in the establishment of the boundary line as the true and correct boundary between their respective lands, plaintiff has _____ [*specify circumstances that would cause plaintiff substantial loss if line were changed, e.g.*, made improvements on that portion of his/her land immediately adjacent to the boundary line, and has maintained the same continuously thereon for more than _____ (*number*) years preceding the commencement of this action).

[*OR*]

8. The defendants have accepted and acquiesced in the line so fixed for a period equal to the statute of limitations.

[*CONTINUE*]

9. Plaintiff is informed and believes and thereon alleges that defendants claim some right, title, estate, lien, or interest in and to the land of plaintiff hereinbefore described, or a portion thereof, and dispute and deny that the aforementioned _____ [*specify mark, e.g.*, fence] marks the true and correct boundary line between the lands of the parties, and, to the contrary, contend and claim that the true and correct boundary line between the lands of the parties lies _____ [*legal description of boundary line which defendants claim to be correct*]. Defendants' claims are without any right whatever, and defendants have no right, title, estate, lien, or interest in or to any or all of the land of plaintiff lying between the true and correct boundary line and that line alleged by defendant to be the boundary line.

[10. *Unknown defendants and unknown, uncertain, or contingent claims allegations, if appropriate. See § 101.50[1], Paragraphs 6 and 7.*]

11. Plaintiff seeks to quiet title as of _____ [*date*]. [_____ (*If the date is a date other than the date the complaint is filed, allege why a determination as of that date is sought*).]

[*Prayer. See § 101.50[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 101.50[1].*]

[2] Use of Form

The form of complaint in [1], *above,* is for use in an action to establish a boundary line between adjoining landowners and to quiet title to their respective lands where an agreement has been entered into between these landowners as to the location of the boundary between their lands.

[3] Essential Allegations

The doctrine of agreed boundaries requires that there be an uncertainty as to the true boundary line (Paragraph 6), an agreement between the adjoining owners fixing the line (Paragraph 6), and acceptance and acquiescence in the line so fixed for a period equal to the statute of limitations or under such circumstances that substantial loss would be caused by a change of its position (Paragraphs 7, 8) [*French v. Brinkman (1963) 60 Cal. 2d 547, 551, 35 Cal. Rptr. 289, 387 P.2d 1* ; *Ernie v. Trinity Lutheran Church (1959) 51 Cal. 2d 702, 707, 336 P.2d 525* ; *Zachery v. McWilliams (1972) 28 Cal. App. 3d 57, 60, 104 Cal. Rptr. 293]* .

Two additional elements which some cases list as required are a marking or building up to the agreed boundary (Paragraph 6) and occupation of the real property to such line [*Nusbickel v. Stevens Ranch Co. (1921) 187 Cal. 15, 16, 200 P. 651* ; *Vella v. Ratto (1971) 17 Cal. App. 3d 737, 739, 95 Cal. Rptr. 72]* .

The essential allegations of a quiet title complaint are discussed in *§ 101.50[3]*.

[4] Cross References

For discussion and cross references relating to the general requirements for a complaint, see *§ 101.50[2]* et seq.

For a further discussion, see *California Real Estate Law & Practice, Ch. 81, Boundaries and Descriptions, § 81.30* (Matthew Bender)

Witkin, Summary of California Law, vol. 12, *Real Property*, § 271 et seq. (10th ed. 2005)

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§ 101.52 Complaint to Establish Boundary and Quiet Title to Real Property [Code Civ. Proc. §§ 760.020, 761.020]--Existing Boundary Agreement Conflicts With Partition Agreement

[1] FORM Complaint to Establish Boundary and Quiet Title to Real Property [Code Civ. Proc. §§ 760.020, 761.020]--Existing Boundary Agreement Conflicts With Partition Agreement

[*Caption, introduction. See 101.50[1].*]

1. On or about _____ [*date*], plaintiff and defendants entered into a partition agreement whereby they agreed to partition and divide certain lands located in _____ County, California, theretofore owned by plaintiff and defendants as joint tenants. A copy of this agreement is attached hereto as Exhibit A and made a part hereof.

2. On _____ [*date*], the respective parties hereto executed, exchanged, and delivered deeds, one to the other, all in accordance with the partition agreement. A copy of the deed executed by defendants and delivered to plaintiff on the last mentioned date is attached hereto as Exhibit B and made a part hereof. A copy of the deed executed by plaintiff and delivered to defendants on the last mentioned date is attached hereto as Exhibit C and made a part hereof. These deeds were thereafter, on _____ [*date*], duly recorded in the Official Records of the County of _____, Book _____, page _____.

3. As a result of the partition agreement, plaintiff is, and at all times herein mentioned since the partition agreement was, the owner in fee simple and in possession and control of that real property situated in _____ County, known as _____ [*street address*], _____ [*city*], California, and more particularly described as follows: _____ [*legal description*].

4. Also as a result of the partition agreement, defendants are, and at all times herein mentioned since the partition agreement were, the owners and in possession and control of that real property situated in _____ County, known as _____ [*street address*(*es*)], _____ [*city*], California, and more particularly described as follows: _____ [*legal description(s)*].

5. The above-described properties of plaintiff and defendants adjoin each other at plaintiff's _____ [*specify, e.g.*, north] and defendants' _____ [*specify, e.g.*, south] boundaries.

6. Prior to the execution of the partition agreement and the execution, delivery, and recordation of the deeds, the actual location on the ground of the boundary line between the respective parcels of land was uncertain, and neither party thereto had certain knowledge of the location of the true and correct line. The descriptions of the parcels of land, as the same are set out in Exhibits A, B, and C, attached hereto, were taken from earlier deeds to the premises and no survey of the property was made at that time.

7. On or about _____ [*date*], and approximately _____ [*number*] weeks before the execution of the partition agreement, for the purpose of agreeing, resolving, and establishing once and for all the true location of the line, and with full intent so to do, plaintiff and defendants went on the land together and orally agreed that the true boundary line between their respective parcels would be _____ [*describe boundary line agreed on, e.g.*, a certain row of trees standing some _____ (*number*) feet _____ (*direction*) of the line of a certain fence then standing on defendants' land].

8. The true and correct description of the boundary line agreed on by the plaintiff and defendants, as aforesaid, is as follows: _____ [*describe*].

9. Each of the parties has acquiesced in the aforesaid boundary line continuously since _____ [*date*], and for more than _____ [*number*] years immediately preceding the commencement of this action. Plaintiff has continuously and exclusively occupied all of the land lying to the _____ [*direction from agreed boundary, e.g.*, south of the row of trees], and neither of the parties in any way disputed the location of the boundary line until _____ [*date*].

10. Defendants now claim that the common boundary between the parties, as determined by a survey based on the description recited in Exhibits A, B, and C, attached hereto, does not correspond with the location of the boundary agreed on, but to the contrary, is located some _____ [*number*] feet to the _____ [*direction*] thereof.

[*EITHER*]

11. In reliance on the agreement and the acquiescence of the defendants in the establishment of the boundary line as the true and correct boundary between their respective lands, plaintiff has _____ [*specify circumstances that would cause plaintiff substantial loss if line were changed, e.g.*, made improvements on that portion of his/her land immediately adjacent to the boundary line, and has maintained the same continuously thereon for more than _____ (*number*) years preceding the commencement of this action).

[*OR*]

11. The defendants have accepted and acquiesced in the line so fixed for a period equal to the statute of limitations.

[*CONTINUE*]

[12. *Unknown defendants and unknown, uncertain, or contingent claims allegations, if appropriate. See 101.50[1], Paragraphs 6 and 7.*]

13. Plaintiff seeks to quiet title as of _____ [*date*]. [_____ (*If the date is a date other than the date the complaint is filed, allege why a determination as of that date is sought*).]

[*Prayer. See 101.50[1]*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See 101.50[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action to establish a boundary line between adjoining landowners and to quiet title to their respective lands where an agreement has been entered into between these landowners as to the location of the boundary between their lands but the agreed boundary conflicts with a partition agreement.

For discussion of the allegations in this form, see *§ 101.51[2]* et seq.

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§ 101.53 Complaint to Establish Boundary and for Reformation [Civ. Code § 3399] of Deed

[1] FORM Complaint to Establish Boundary and for Reformation [Civ. Code § 3399] of Deed

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR REFORMATION DEED
Defendant.	)	
	)	
	)	

Plaintiff alleges:

[1. At all times herein mentioned, defendant _____ (*name*) was authorized and empowered by defendant _____ (*principal*) to act, and did act, as the agent of defendant _____ (*principal*), and each and all of the things herein alleged to have been done by him/her were done in the capacity of and as agent for defendant _____ (*principal*).]

2. On or about _____ [*date*], plaintiff and defendant entered into a written contract of conveyance of certain real property owned by defendant and located in _____ County, known as _____ [*street address*], _____ [*city*], California, and more particularly described as follows: _____ [*legal description*]. A copy of the contract is attached hereto as Exhibit A and made a part hereof.

3. Under the terms of the contract, defendant was to convey all of such property to plaintiff and deliver to plaintiff a

grant deed describing the property.

[*EITHER*]

4. On or about _____ [*date*], as per agreement, defendant delivered a grant deed to plaintiff, but due to fraud on the part of defendant in that _____ [*specify*], the deed failed to convey all the property agreed on. The fraud lies in that the deed reads _____ [*specify what is incorrect in description of boundaries*] and the deed should instead read _____ [*specify what true description should be*].

[*OR*]

4. On or about _____ [*date*], as per agreement, defendant delivered a grant deed to plaintiff. The deed contained a _____ [mutual mistake of defendant and plaintiff *or* mistake of plaintiff] and the deed failed to convey all the property agreed on. The mistake lies in that the deed reads _____ [*specify error in description of boundaries*] and the deed should instead read _____ [*specify what true description should be*]. [*If mistake is only mistake of plaintiff, add facts showing defendant knew or suspected plaintiff's mistake.*]

[*CONTINUE*]

5. A copy of the erroneously drawn deed is attached hereto as Exhibit B and made a part hereof.

6. Plaintiff took possession of the property believing that the deed described all the property agreed to be conveyed by the conveyance contract.

7. On or about _____ [*date*], plaintiff discovered the mistake in the deed, and contacted defendant to have the mistake corrected, but defendant refused, and continues to refuse, to do so.

WHEREFORE, plaintiff prays judgment as follows:

1. That the deed be reformed to express the true intended conveyance, to wit: _____ [*specify what true boundary should be*] instead of _____ [*give erroneous description*].

2. For costs of suit incurred herein.

3. For such other and further relief the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 101.50[1].*]

[2] Use of Form

The form of complaint in [1], *above*, may be used to reform a deed so that the boundary descriptions for the properties accurately reflect the true understanding of the parties to the agreement.

[3] Essential Allegations

The elements of reformation are:

- Fraud, mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected (Paragraph 4) [*Civ. Code § 3399*].

- A valid agreement made between the parties (Paragraph 2) [*Paterson v. Board of Trustees (1958) 157 Cal. App. 2d 811, 815, 321 P.2d 825]* .

- A written contract that does not truly express the intention of the parties (Paragraph 4) [*Civ. Code § 3399*].

[4] Reformation of Deeds

Civ. Code § 3399 providing for reformation, though by its terms applying only to "written contracts," also applies to deeds [*Welsher v. Glickman (1969) 272 Cal. App. 2d 134, 140, 77 Cal. Rptr. 141]* .

[5] Defenses

[a] Negligence

Where the failure to familiarize one's self with the contents of a written contract prior to its execution is traceable solely to carelessness or negligence, reformation as a rule should be denied; but where such failure, and perhaps negligence, is induced by the false representations and fraud of the other party to the contract in that its provisions are different from those set out, the courts, even in the absence of a fiduciary or confidential relationship between the parties, should reform the instrument [*California Trust Co. v. Cohn (1932) 214 Cal. 619, 627, 7 P.2d 297]* .

[b] Laches, Unclean Hands, and Waiver

Reformation, being an equitable remedy, is subject to the usual equitable defenses including laches, unclean hands, and waiver. These defenses must be pleaded affirmatively [*see Utica Mut. Ins. Co. v. Monarch Ins. Co. (1967) 250 Cal. App. 2d 538, 543, 58 Cal. Rptr. 639* (laches); *Behm v. Fireside Thrift Co. (1969) 272 Cal. App. 2d 15, 21-22, 76 Cal. Rptr. 849* (unclean hands); *San Fernando Valley C. of C. v. Thomas (1954) 123 Cal. App. 2d 348, 350-351, 266 P.2d 891* (waiver)]. Absent unusual circumstances, a cause of action for reformation is not barred by laches if a cause of action based upon the same contract is not barred by the statute of limitations [*Utica Mut. Ins. Co. v. Monarch Ins. Co. (1967) 250 Cal. App. 2d 538, 543, 58 Cal. Rptr. 639]* .

[c] Statute of Limitations

An action for reformation for fraud or mistake must be brought within three years following the discovery thereof [*see Code Civ. Proc. § 338(d)*]. The statute begins to run when the mistake or fraud is discovered, or when it should have been discovered by the exercise of due diligence [*see Welsher v. Glickman (1969) 272 Cal. App. 2d 134, 140, 77 Cal. Rptr. 141* ; *Tarrant v. Butler (1960) 180 Cal. App. 2d 235, 239, 4 Cal. Rptr. 230]* .

[6] Cross References

For discussion and cross references relating to the general requirements for a complaint, see *§ 101.50[2]* et seq.

See generally Ch. 488, *Reformation of Instruments*

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10-101 California Forms of Pleading and Practice--Annotated § 101.54

§ 101.54 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Estoppel by Agreement and Acquiescence

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Estoppel by Agreement and Acquiescence

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. Defendant now is, and since _____ [*date*] has been, the owner and in possession of all that real property located in _____ [*city*], _____ County, California, consisting of a _____ [*generally describe real property, e.g.,* house], commonly known as _____ [*street address*], more particularly described as follows, to wit: _____ [*legal description*].

2. Prior to the year _____ [*year*], _____ [*name*], a predecessor in interest to plaintiff herein, and _____ [*name*], then and there a predecessor in interest to defendant herein, became and were uncertain and in doubt as to the true boundary of and between their respective properties. Thereon and by reason of such uncertainty, the predecessors in interest of the parties hereto agreed that the boundary between their respective lands should be and was _____ [*description of agreed boundary*], and marked the agreed boundary line upon the ground as follows: _____ [*specify creation of the mark, e.g.,* by erecting a fence].

3. Thereon and thereafter, pursuant to the agreement, the predecessors in interest and their respective successors, including plaintiff and defendant herein, for a period of more than _____ [*number*] years and up to the present time continuously used and occupied and acquiesced in the use and occupation of their respective parcels of land in accordance with the agreed boundary.

4. By reason of the agreement and acquiescence on the parts of the plaintiff and his predecessors in interest in the premises, as set out above, plaintiff is estopped to deny that the true boundary line between his land and the land of defendant is other than as set out in Paragraph 2 of this affirmative defense, and is further estopped from ascerting any right, title, or interest in or to any of the lands of defendant herein described.

WHEREFORE, defendant prays judgment against plaintiff as follows:

1. That plaintiff take nothing by his action.

2. That this court adjudge that the true and correct boundary line between the lands of plaintiff and defendant is as set out above and that plaintiff has neither right, title, nor interest in or to the real property of defendant described above, or any of the real property.

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

[2] Use of Form

The form in [1], *above*, is for use as an affirmative defense to an action to establish the boundary between adjoining landowners. It alleges that plaintiff is estopped from seeking a new boundary by reason of a prior agreement and acquiescence therein [*Frericks v. Sorensen (1952) 113 Cal. App. 2d 759, 761, 248 P.2d 949]* .

For discussion, see *§ 101.16[2]*.

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10-101 California Forms of Pleading and Practice--Annotated § 101.55

§ 101.55 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Estoppel and Laches

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Estoppel and Laches

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. On or about _____ [*date*], plaintiff executed and delivered a deed to defendant conveying to defendant all that real property described in Paragraph _____ [*specify*] of plaintiff's complaint on file herein, and from the aforesaid date of conveyance to the present time defendant has been the owner and in possession of the real property.

2. Prior to the conveyance plaintiff was the owner of a larger tract of land consisting of the land coveyed by the deed, together with the land more specifically described in Paragraph _____ [*specify*] of plaintiff's complaint, the last mentioned land having been retained by plaintiff from the time of conveyance, as aforesaid, to the present time.

3. Immediately prior to and at the time of the conveyance plaintiff represented to defendant that the line of a _____ [*specify mark, e.g.,* fence] then existing on the land of plaintiff was the true and correct boundary between the land retained by plaintiff and the land conveyed to defendant, as aforesaid, and defendant relied on the representations to him by plaintiff, and but for these representations defendant would not have purchased the parcel then conveyed to him by plaintiff.

4. In further reliance on the representations to him made by plaintiff, as aforesaid, defendant, during the months of _____ [*specify*], in the year _____ [*specify*], commenced and constructed _____ [*specify improvements, e.g.,* a building] adjacent to the boundary line as the same had been represented by plaintiff at the time of the aforesaid conveyance.

5. On numerous occasions during the months of _____ [*specify*], in the year _____ [*specify*], while the aforementioned improvements were being constructed, plaintiff observed the commencement,

course, and completion of the work then being done, and made no protest to defendant at any time, nor did plaintiff then in any manner object to such construction, nor did he claim any right, title, or interest to the land on which the construction was taking place, nor any part thereof, and the first knowledge defendant had that plaintiff claimed any right, title, or interest in or to any of the lands of defendant or any part thereof came when defendant was served with plaintiff's complaint herein on _____ [*date*], some _____ [*number*] months after all of the construction was completed.

6. By reason of the representations, conduct, and activity of the plaintiff in the premises, as hereinbefore set out, he is estopped to deny that the true and correct boundary line between his land and the land of defendant is other than as set out in Paragraph 3 of this affirmative defense, and is further barred by his own laches in the premises from so denying, and plaintiff is further estopped and barred by his own laches in the premises from asserting or claiming any right, title, or interest in or to the lands of defendant as bounded by the aforesaid boundary line.

[2] Use of Form

The form in [1], *above,* is for use as an affirmative defense where plaintiff may be estopped from asserting the true boundary line and where plaintiff is barred by laches from asserting his claim.

[3] Essential Allegations

[a] Estoppel

Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel [*Granco Steel, Inc. v. Workmen's Compensation Appeals Bd. (1968) 68 Cal. 2d 191, 203, 65 Cal. Rptr. 287, 436 P.2d 287]* :

- The party to be estopped must be apprised of the facts;
- He or she must intend that his or her conduct be acted on, or must so act that the party asserting the estoppel had a right to believe it was so intended;
- The other party must be ignorant of the true state of facts; and
- He or she must rely on the conduct to his or her injury.

[b] Laches

The basic elements of laches are [*Stafford v. Ballinger (1962) 199 Cal. App. 2d 289, 296, 18 Cal. Rptr. 568]* :

- An omission to assert a right;
- A delay in the assertion of the right for some appreciable period; and
- Circumstances which would cause prejudice to an adverse party if assertion of the right is permitted.

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10-101 California Forms of Pleading and Practice--Annotated § 101.56

§ 101.56 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Adverse Possession [Code Civ. Proc. §§ 321-325]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Adverse Possession [Code Civ. Proc. §§ 321-325]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. Defendant now is, and at all times mentioned herein was, the owner and in possession of all that real property located in _____ [*city*], _____ County, California, consisting of a _____ [*specify, e.g.,* house], commonly known as _____ [*street address*], more particularly described as follows: _____ [*give legal description of property*].

2. Defendant, by himself and by his predecessors in interest, has been for more than _____ [*number of years*] last past in continuous, actual, exclusive, open, notorious, and adverse possession of the real property, claiming to own the same in fee against the whole world; and during a period of more than _____ [*number*] years, continuously and immediately preceding the filing of this complaint, defendant has paid all taxes of every nature levied or assessed against this property.

[2] Use of Form

The form of affirmative defense in [1], *above,* may be used where defendant claims title through adverse possession to property involved in a boundary dispute.

[3] Essential Allegations

The elements necessary to show adverse possession are [*Dimmick v. Dimmick (1962) 58 Cal. 2d 417, 421-422, 24 Cal. Rptr. 856, 374 P.2d 824]* :

- Possession must be by actual occupation under such circumstances as to constitute reasonable notice

to the owner.

- It must be hostile to the owner's title.
- The holder must claim the property as his own, under either color of title or claim of right.
- Possession must be continuous and uninterrupted for five years.
- The holder must pay all taxes levied and assessed on the property during the period.

[4] Cross References

See generally Ch. 13, *Adverse Possession*

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10-101 California Forms of Pleading and Practice--Annotated § 101.57

§ 101.57 Cullen Earthquake Act--Application to File Complaint [Code Civ. Proc. § 751.51(a)(3)] and Order

[1] FORM Cullen Earthquake Act--Application to File Complaint [Code Civ. Proc. § 751.51(a)(3)] and Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	APPLICATION TO BRING ACTION UNDER
[_____ (*city*)], County of	)	CULLEN EARTHQUAKE ACT
_____, State of California, and all	)	
entities claiming any interest in or lien upon the real	)	
property herein described or part of it,		
Defendants.		

_____

Application is hereby made for permission to bring an action under the Cullen Earthquake Act, *Sections 751.50 through 751.65 of the Code of Civil Procedure*, to reestablish boundaries and quiet title thereto in plaintiff's property where the boundaries have been disturbed by _____ [*specify, e.g.*, a slide]. [A copy of the complaint to be filed in such action is attached hereto.] The [city and] county in which the land affected by the _____ [*e.g.*, slide] is located is made a party to the action.

_____ [*Specify reasons plaintiff desires to bring action, e.g., refusal of city or county in which affected land is located to bring action, or plaintiff's need for speedy determination of boundary.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

ORDER

Permission is hereby granted for plaintiff _____ [*name*] to _____ [bring an action under the Cullen Earthquake Act *or* file the attached complaint].

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form of application in [1], *above,* is for use where a person or entity, other than a city or county in which the disaster takes place, having an interest in property affected by a disaster covered in the Cullen Earthquake Act seeks to bring an action under the Act [*see Code Civ. Proc. § 751.51(a)(3)*; for discussion, *see § 101.17[2]*].

The Act does not require the attachment of a copy of the complaint to such application, nor does it require that the application specify the reasons therefor; however, this would appear to be the better practice.

For the related form of complaint, see *§ 101.58*.

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10-101 California Forms of Pleading and Practice--Annotated § 101.58

§ 101.58 Cullen Earthquake Act--Complaint to Reestablish Boundary [Code Civ. Proc. § 751.50]--By Plaintiff--General Form

[1] FORM Cullen Earthquake Act--Complaint to Reestablish Boundary [Code Civ. Proc. § 751.50]--By Plaintiff--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*], Plaintiff, vs _____ [*names*] [_____ (*city*)], County of _____, State of California and all entities claiming any interest in or lien upon the real property herein described or part of it, Defendants.	))))	NO. _____ COMPLAINT TO REESTABLISH BOUNDARIES UNDER CULLEN EARTHQUAKE ACT

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, the owner _____ [*specify interest, e.g.,* in fee simple] and in possession and control of that real property situated in _____ County, known as _____ [*street address*], _____ [*city*], California, and more particularly described as follows: _____ [*legal description*].

2. _____ [*In this and subsequent paragraphs, state the estate, title, interest, or claim, so far as known*

to plaintiff or so far as they are capable of being discovered by reasonably diligent search by plaintiff, in each separate part of entire real property sought to be affected by action, e.g., Defendant _____ (*name*) is, and at all times herein mentioned was, the owner and in possession and control of that real property situated in _____ County, known as _____ (*street address*), _____ (*city*), California, and more particularly described as follows: _____ (*legal description*)].

3. On or about _____ [*date*], _____ [*specify type of earth movement, e.g.,* an earthquake *or* a mud slide] occurred in _____ [*specify general location, e.g.,* Los Angeles County] moving the earth and the boundary lines within the following area: _____ [*describe exterior boundaries of total area affected*].

4. Attached hereto as Exhibit A and made a part hereof is a proposed replatting of the entire real property sought to be affected by this action, embodying the land boundaries as fixed by the disaster, except as these boundaries have been equitably and judicially readjusted, or as liberalized by judicially directed use of vacated lands.

5. Plaintiff _____ [seeks *or* offers] to have vacated the following street areas for judicial equitable allocation to landowners for the mitigation of losses inflicted on them by the _____ [*specify, e.g.,* earthquake *or* mud slide].

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. That this court adjudge the true and correct location of the boundary lines affected by the earth movement to be as set out in Exhibit A.

2. That plaintiff's title in and to his lands be quieted and that it be adjudged that plaintiff is the owner in fee and entitled to the possession of the lands, that the true and correct boundary lines of his property are as described in Exhibit A and that none of the defendants has any right, title, or interest in or to the land of plaintiff, nor any portion thereof.

3. That defendants, and each of them, be forever enjoined and restrained from claiming or asserting any claim or interest in or to plaintiff's land, or any portion thereof, and from questioning or interfering with the boundary lines as hereinbefore set out in Exhibit A, or attempting so to do.

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 101.50[1].*]

[2] Use of Form

The form of complaint in [1], *above,* may be used to commence an action to reestablish boundary lines and to quiet title

to land in an area affected by earth movements such as earthquakes and mud slides.

[3] Requirement That Court Permit Plaintiff to Bring Suit

Any entity or person, other than a city or county, who seeks to bring an action under the Cullen Earthquake Act [*Code Civ. Proc. §§ 751.50-751.65*] must obtain permission from the court to bring the action and must make the county in which the land is located a party to the action [*see Code Civ. Proc. § 751.51(a)(3)*; for a form of application for permission, *see § 101.57*].

[4] Plaintiff's Affidavit or Declaration

At the time the complaint is filed, the plaintiff must file with it an affidavit or declaration relating to title to the property involved [*Code Civ. Proc. §§ 751.09, 751.54*; for a form of declaration, *see § 101.61*].

[5] Essential Allegations

The complaint must substantially include [*Code Civ. Proc. § 751.53*]:

- A statement of the facts which make the provisions of the Cullen Earthquake Act [*Code Civ. Proc. §§ 751.50-751.65*] applicable (Paragraph 3).

- A description of the exterior boundaries of the real property area sought to be affected by the action (Paragraph 3).

- A specification of the estate, title, interest, or claim owned, and in the actual possession of the plaintiff in described parts of the entire real property sought to be affected by the action (Paragraph 1).

- A specification of the estate, title, interest, or claim, so far as they are known to the plaintiff and so far as they are capable of being discovered by reasonably diligent search by the plaintiff in each separate part of the entire real property sought to be affected by the action (Paragraph 2).

- A specification of the street areas sought to be vacated or offered by the plaintiff to be vacated in whole or in part for judicial equitable allocation to landowners for the mitigation of the losses inflicted on the landowners by the particular disaster or disasters (Paragraph 5).

- A proposed replatting of the entire real property sought to be affected by the action, embodying the land boundaries as fixed by the disaster, except as these boundaries have been equitably and judicially readjusted, or as liberalized by judicially directed use of the vacated lands (Paragraph 4).

[6] Cross References

For discussion and cross references relating to the general requirements for a complaint, see *§ 101.50[2]* et seq.

See generally *California Real Estate Law & Practice, Ch. 81, Boundaries and Descriptions, § 81.33* (Matthew Bender)

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10-101 California Forms of Pleading and Practice--Annotated § 101.59

§ 101.59 Cullen Earthquake Act--Summons and Memorandum [Code Civ. Proc. §§ 751.05-751.07, 751.54]

[1] FORM Cullen Earthquake Act--Summons and Memorandum [Code Civ. Proc. §§ 751.05-751.07, 751.54]

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF_____

	)	
_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs	)	SUMMONS
All Persons Claiming Any Interest in, or Lien Upon,	)	
the Real Property Herein Described or Any Part there-	)	
of,	)	
Defendants.		

_____

The People of the State of California, to all persons claiming any interest in, or lien on, the real property herein described or any part thereof, defendants:

You are hereby notified to appear and answer the complaint of _____ [*name*], plaintiff, filed with the clerk of the above-entitled court and [City and] County, within three months after the first publication of this summons, and to set forth what interest or lien, if any, you have in or on that certain real property or any part thereof, situated in the [City and] County of _____ [*specify*], State of California, particularly described as follows: _____ [*legal description*].

And you are hereby notified that, unless you so appear and answer, the plaintiff will apply to the court for the relief demanded in the complaint, to wit: _____ [*insert a statement of the relief so demanded*].
Dated: _____.

Witness my hand and the seal of this court

_____, Clerk

By _____, Deputy Clerk

MEMORANDUM

The first publication of this summons was made in _____ [*name of newspaper*] on _____ [*date*].

The following persons are said to claim an interest in, or lien on, the property adverse to plaintiff:

Name	Address
_____	_____
_____	_____
_____	_____

[2] Use of Form

The form of summons in [1], *above*, is to be used in conjunction with the complaint in *§ 101.58*. The form is adapted from the form set out in *Code Civ. Proc. § 751.05*. The memoranda were adopted from *Code Civ. Proc. §§ 751.06, 751.07* [*see Code Civ. Proc. § 751.54*]. For discussion, see *§ 101.17[6]*.

For a related form of order to publish summons, see *§ 101.60*.

[3] Memorandum

To each publication of the summons must be appended a memorandum stating when and where the summons was first published [*see Code Civ. Proc. §§ 751.06, 751.54*].

If the affidavit by the plaintiff [*see § 101.61*] discloses the name of any person claiming an interest in the property or a lien thereon adverse to the plaintiff, that fact and the name and address, if given, of such person must be stated in a memorandum to be appended to the summons [*Code Civ. Proc. §§ 751.07, 751.54*].

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§ 101.60 Cullen Earthquake, Act--Order for Publication of Summons [Code Civ. Proc. §§ 751.06, 751.54]

[1] FORM Cullen Earthquake, Act--Order for Publication of Summons [Code Civ. Proc. §§ 751.06, 751.54]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER FOR PUBLICATION OF SUMMONS
vs	)	
_____ [*names*]		
[_____ (*city*)], County of		
_____, State of California and all		
entities claiming any interest in or lien upon the real		
property herein described or part of it,		
Defendants.		
_____		

This action having been commenced by the above-named plaintiff against the above-named defendants in the Superior Court of California, County of _____, under and by virtue of, and in accordance with, the provisions of the Cullen Earthquake Act, *Sections 751.50 through 751.65, inclusive, of the Code of Civil Procedure*, and good cause appearing therefor,

IT IS HEREBY ORDERED that the summons in this action be published in _____ [*name of newspaper*], a newspaper of general circulation published in _____ [*county in which action is brought*], California, at least once a week for eight weeks, pursuant to *Section 6065 of the Government Code*, and that to such summons when published shall be appended and published the memorandum required by *Section 751.06 of the Code of Civil Procedure.*

Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form of order in [1], *above*, is used in connection with the publication of the form of summons set forth in *§ 101.59* [*Code Civ. Proc. § 751.06*].

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10-101 California Forms of Pleading and Practice--Annotated § 101.61

§ 101.61 Cullen Earthquake Act--Plaintiff's Declaration Under Penalty of Perjury [Code Civ. Proc. §§ 751.09, 751.54]

[1] FORM Cullen Earthquake Act--Plaintiff's Declaration Under Penalty of Perjury [Code Civ. Proc. §§ 751.09, 751.54]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*], Plaintiff, vs _____ [*names*] [_____ (*city*)], County of _____, State of California and all entities claiming any interest in or lien upon the real property herein described or part of it, Defendants.	)))))	NO. _____ PLAINTIFF'S DECLARATION UNDER CULLEN EARTHQUAKE ACT

I, _____ [*name*], state:

1. I am, and have been continuously since _____ [*specify*], the _____ [*specify plaintiff's estate, title, interest, or claim in property, e.g.*, owner in fee simple] and in possession of that real property described in the complaint.

2. _____ [I have never made any conveyance of all or any part of the property or any interest therein *or specify any such conveyance, when it was made, and to whom.*]

3. _____ [*Specify all subsisting mortgages, deeds of trust, and other liens on the property.*]

4. _____ [I do not know and have never been informed of any other person who claims or who may claim any interest in or lien on all or any part of the property adverse to me *or specify the names and addresses of such persons.*]

5. [_____ (*Specify fully and explicitly the reasons for plaintiff's inability to state any of the matters required by Code Civ. Proc. § 751.09*).]

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on _____ [*date*], at _____, California.

_____ [*signature*]

[2] Use of Form

The form of declaration in [1], *above,* is for use as the declaration under penalty of perjury required to be filed with a complaint under the Cullen Earthquake Act [*Code Civ. Proc. §§ 751.09, 751.54, 751.65*; for the related form of complaint, *see § 101.58*; for discussion, *see 101.17[5]*].

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10-101 California Forms of Pleading and Practice--Annotated § 101.62

§ 101.62 Cullen Earthquake Act [Code Civ. Proc. § 751.56]--Answer

[1] FORM Cullen Earthquake Act [Code Civ. Proc. § 751.56]--Answer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs	)	ANSWER
_____ [*names*]	)	
[_____ (*city*)], County of		
_____, State of California and all		
entities claiming any interest in or lien upon the real		
property herein described or part of it,		
Defendants.		
_____		

Defendant alleges:

1. The allegations in Paragraph _____ [*specify*] of plaintiff's complaint are incorrect in that _____ [*specify the particulars in which the defendant's estate, right, title, or interest in or to, or lien on all, or any part, of the property is different from, or greater than, the interest of the defendant as described in the complaint*].

WHEREFORE, defendant prays judgment against plaintiff as follows:

1. That plaintiff be denied the relief sought to the extent such relief is inconsistent with defendant's right, title, estate,

lien, or interest on the property as stated herein.

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant

[2] Use of Form

The skeletal form in [1], *above*, may be used to draft an answer to a complaint filed under the Cullen Earthquake Act [for a form of complaint, *see § 101.58*].

[3] Essential Allegations

The answer must [*Code Civ. Proc. § 751.56*]:

- Specifically set out the particulars in which the claimant's right, title, estate, or interest in or to, or lien on all or any part of the property is different from, or greater than, the interest of the claimant as described in the complaint.

- Be confined to rights based on events occurring at the time of, or since the time of, the disaster.

[4] Cross References

For discussion of answers and the format of answers in general, see Ch. 26, *Answers*

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10-102 California Forms of Pleading and Practice--Annotated 102.syn

§ 102.syn Synopsis to Chapter 102: BRIDGES

§ 102.01 Scope of Chapter

§ 102.02 Cross References

§§ 102.03-102.09 [Reserved]

§ 102.10 Liability of Public Entities

[1] Limited Liability

[2] Liability for Acts or Omissions of Employees

[3] Liability for Failure to Discharge Mandatory Duty Imposed by Enactment

[4] Liability for Dangerous Condition of Property

[5] Nonliability for Dangerous Condition of Property

§ 102.11 Liability of Employees of Public Entities

§§ 102.12-102.29 [Reserved]

§ 102.30 State Statutes

[1] Actions Against Public Entities and Public Employees

[2] Bridge Districts

[3] Claims Against Public Entities

[4] Definitions

[5] Liability of Public Entities and Public Employees

[6] Toll Bridges

§ 102.31 Decisions

§ 102.32 Law Reviews

§ 102.33 Text References

§§ 102.34-102.49 [Reserved]

§ 102.50 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity [Gov. Code § 835] (First Cause of Action)--And Against Public Employee [Gov. Code § 840.2] (Second Cause of Action)--Dangerous Condition of Property--Collision With Draw Section of Lift Span Bridge

[1] FORM

[2] Use of Form

[3] Essential Allegations

[a] Against Public Entity

[b] Against Public Employee

[4] Verification

[5] Specification of Damages

[6] Cross References

§ 102.51 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity--Dangerous Condition of Property [Gov. Code § 835]--Fall From Bridge

[1] FORM

[2] Use of Form

[3] Cross References

§ 102.52 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity--By Minor Through Guardian ad Litem--Dangerous Condition of Property [Gov. Code § 835]--Fall From Pipeline Parelleling Bridge and Attractive to Children

[1] FORM

[2] Use of Form

[3] Cross References

§ 102.53 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity--Dangerous Condition of Property [Gov. Code § 835]--Accumulation of Ice on Bridge

[1] FORM

[2] Use of Form

[3] Cross References

§ 102.54 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity--Dangerous Condition of Property [Gov. Code § 835]--Collapse of Bridge

[1] FORM

[2] Use of Form

[3] Cross References

§ 102.55 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity--Dangerous Condition of Property [Gov. Code § 835]--Lack of Guard Rails on Bridge Approaches

[1] FORM

[2] Use of Form

[3] Cross References

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PART I. SCOPE

10-102 California Forms of Pleading and Practice--Annotated § 102.01

§ 102.01 Scope of Chapter

This chapter covers actions resulting from injuries involving bridges and contains forms of complaints [*see §§ 102.50 -102.55*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsBridges & RoadsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview

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10-102 California Forms of Pleading and Practice--Annotated § 102.02

§ 102.02 Cross References

For forms for use in actions against public entities and their employees generally, see

- Ch. 464, *Public Entities and Officers: California Tort Claims Act,*
- Ch. 465, *Public Entities and Officers: Civil Claims Arising From Criminal Acts,*
- Ch. 466, *Public Entities and Officers: Taxpayers' Actions,*
- Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities,* and
- Ch. 468, *Public Entities and Officers: False Claims Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview

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10-102 California Forms of Pleading and Practice--Annotated §§ 102.03-102.09

[Reserved]

§§ 102.03[Reserved]

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PART II. LEGAL BACKGROUND

10-102 California Forms of Pleading and Practice--Annotated § 102.10

§ 102.10 Liability of Public Entities

[1] Limited Liability

Except as otherwise provided by statute, a public entity is not liable for an injury, whether that injury arises out of an act or omission of the public entity, or a public employee, or any other person [*Gov. Code § 815(a)*].

[2] Liability for Acts or Omissions of Employees

A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his or her employment if the act or omission would, apart from *Gov. Code § 815.2*, have given rise to the cause of action against that employee or the employee's personal representative. Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity if the employee is immune from liability [*Gov. Code § 815.2*].

[3] Liability for Failure to Discharge Mandatory Duty Imposed by Enactment

If a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty, unless the entity establishes that it exercised reasonable diligence to discharge the duty [*Gov. Code § 815.6*].

[4] Liability for Dangerous Condition of Property

Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury that was incurred, and that either (1) a negligent or wrongful act or omission of an employee of the public entity within the scope of his or her employment created the dangerous condition or (2) the public entity had actual or constructive notice of the dangerous condition [*see Gov. Code § 835.2*] a sufficient time prior to the injury to have taken measures to protect against the dangerous condition [*Gov. Code § 835*].

[5] Nonliability for Dangerous Condition of Property

A public entity is not liable under *Gov. Code § 835(a)* for injury caused by a condition of its property if the public entity establishes that the actor omission that created the condition was reasonable. The reasonableness of the act or omission that created the condition is determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury [*Gov. Code § 835.4(a)*].

A public entity is not liable under *Gov. Code § 835(b)* for injury caused by a dangerous condition of its property if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable. The reasonableness of the action or inaction of the public entity is determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and costs of protecting against the risk of such injury [*Gov. Code § 835.4(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployeesTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From LiabilityTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral OverviewTortsNegligenceCausationProximate CauseGeneral Overview

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10-102 California Forms of Pleading and Practice--Annotated § 102.11

§ 102.11 Liability of Employees of Public Entities

Except as otherwise provided by statute, a public employee is liable for injury caused by his or her act or omission to the same extent as a private person [*Gov. Code § 820(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployees

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[Reserved]

§§ 102.12[Reserved]

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10-102 California Forms of Pleading and Practice--Annotated § 102.30

§ 102.30 State Statutes

[1] Actions Against Public Entities and Public Employees

Actions against public entities and public employees generally. *Gov. Code § 940 et seq.*

Prohibition against suit in absence of presentation of claim. *Gov. Code § 945.4*

Time for commencing suit if claim required. *Gov. Code § 945.6*

Actions against public employees. *Gov. Code § 950*

Action against public employee barred if action against employing public entity barred. *Gov. Code § 950.2*

Exception to rule that action against public employee barred if action against employing public entity barred. *Gov. Code § 950.4*

Defense of public employees. *Gov. Code §§ 995-996.6*

[2] Bridge Districts

Bridge and highway districts. *Pub. Contract Code § 20910 et seq.*; *Sts. & Hy. Code § 27000 et seq.*

[3] Claims Against Public Entities

Claims against public entities generally. *Gov. Code §§ 900-935.6*

Causes of action in which claim required to be presented. *Gov. Code §§ 905-905.6*

Contents of claim. *Gov. Code §§ 910-910.4*

Time for presentation of claim. *Gov. Code § 911.2*

Late claims. *Gov. Code §§ 911.4-912.2*

Action on claim. *Gov. Code §§ 912.4-912.8*

Notice of action on claim. *Gov. Code § 913*

Reexamination of rejected claim. *Gov. Code § 913.2*

Prohibition against suit in absence of presentation of claim. *Gov. Code § 945.4*

[4] Definitions

Employee defined. *Gov. Code § 810.2*

Injury defined. *Gov. Code § 810.8*

Public entity defined. *Gov. Code § 811.2*

Public employee defined. *Gov. Code § 811.4*

Dangerous condition defined. *Gov. Code § 830(a)*

Highway defined to include bridges. *Sts. & Hy. Code § 23*

Bridge includes approaches. *Sts. & Hy. Code § 30004*

[5] Liability of Public Entities and Public Employees

Liability of public entities and public employees generally. *Gov. Code §§ 814-895.8*

Absence of public entity's liability for injury except under statute. *Gov. Code § 815(a)*

Public entity's liability for injury caused by acts or omissions of employees. *Gov. Code § 815.2*

Public entity's liability for injury caused by failure to discharge statutory duty. *Gov. Code § 815.6*

Public entity not liable for exemplary and punitive damages. *Gov. Code § 818*

Liability of public employee. *Gov. Code §§ 820(a), 840-840.6*

Indemnification. *Gov. Code §§ 825-825.6*

Failure to provide traffic signals. *Gov. Code §§ 830.4, 830.8*

Public entity not liable for injury caused by approved plan or design. *Gov. Code § 830.6*

Injury caused by effect of weather conditions on use of streets and highways. *Gov. Code § 831*

Liability for injury caused by dangerous condition of property. *Gov. Code § 835*

Actual and constructive notice to public entity of dangerous condition. *Gov. Code § 835.2*

Requirements for nonliability for injury caused by dangerous condition of property under *Gov. Code § 835*. *Gov. Code § 835.4*

[6] Toll Bridges

California Toll Bridge Authority Act. *Sts. & Hy. Code § 30000 et seq.*

Particular highway crossings, toll bridges. *Sts. & Hy. Code § 30600 et seq.*

Toll bridges generally. *Sts. & Hy. Code § 30800 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployeesGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsPublic ImprovementsBridges & RoadsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From LiabilityTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview

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10-102 California Forms of Pleading and Practice--Annotated § 102.31

§ 102.31 Decisions

If state is immune from liability for injuries caused by dangerous condition because dangerous condition was created as result of plan or design that conferred immunity under *Gov. Code § 830.6*, state is possibly liable for failure to warn of dangerous condition if failure to warn is negligent and independent, separate, concurring cause of accident. *Cameron v. State of California (1972) 7 Cal. 3d 318, 329, 102 Cal. Rptr. 305, 497 P.2d 777*

Gov. Code § 830.6, making public entity immune from liability for injuries caused by approved plan or design, is unavailable as defense if no evidence presented that injury was caused by element conforming to approved design. *Cameron v. State of California (1972) 7 Cal. 3d 318, 326, 102 Cal. Rptr. 305, 497 P.2d 777*

In action by motorist against city, alleging that traffic accident was caused by dangerous condition on public bridge, summary judgment for defendant as proper based on immunity under *Gov. Code § 830.6* when evidence showed substantial basis on which governmental official could have decided that design was reasonable, and no triable issues existed regarding changed conditions or notice sufficient to defeat continuance of immunity. *Compton v. City of Santee (1993) 12 Cal. App. 4th 591, 597-600, 15 Cal. Rptr. 2d 660*

Elements of design immunity defense are: (1) causal relationship between plan and accident; (2) approval of design prior to construction; and (3) substantial evidence supporting reasonableness of design. *Ramirez v. City of Redondo Beach (1987) 192 Cal. App. 3d 515, 523, 237 Cal. Rptr. 505*

Design immunity under *Gov. Code § 840.6* applies even if evidence is conflicting, if evidence is substantial (that is, evidence that reasonably inspires confidence or is of solid value). *Ramirez v. City of Redondo Beach (1987) 192 Cal. App. 3d 515, 526, 237 Cal. Rptr. 505* ; *Muffett v. Royster (1983) 147 Cal. App. 3d 289, 306-307, 195 Cal. Rptr. 73*

Gov. Code § 830.6, limiting liability of public entities and public employees for injury caused by plan or design of construction, is limited to design caused accident and does not immunize from liability caused by negligence independent of design. *Flournoy v. State of California (1969) 275 Cal. App. 2d 806, 811, 80 Cal. Rptr. 485*

Liability for creation of dangerous condition and immunity for designing it under *Gov. Code § 830.6* depends on proximate causation. *Flournoy v. State of California (1969) 275 Cal. App. 2d 806, 813, 80 Cal. Rptr. 485*

If it is reasonably foreseeable that persons held to lower standard for their own care, such as children, may be exposed to substantial risk of injury from property, public entity is required to take reasonable precautions to protect such persons from that risk. *Holmes v. City of Oakland (1968) 260 Cal. App. 2d 378, 386, 67 Cal. Rptr. 197*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployeesTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From LiabilityTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview

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10-102 California Forms of Pleading and Practice--Annotated § 102.32

§ 102.32 Law Reviews

O'Brien, *Claims Against California Public Entities and Public Employees*, 43 State B.J. 693 (1968)

Comment, *Overcoming Barriers in California Highway Litigation, 11 U.S.F. L. Rev. 379 (1977)*

Comment, *The California Tort Claims Act: Discretionary Immunity, 39 So. Cal. L. Rev. 470 (1966)*

Comment, *Governmental Liability for Torts of Employees--The End of Sovereign Immunity in California, 5 Santa Clara Lawyer 81 (1964)*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From LiabilityTortsPublic Entity LiabilityImmunityQualified ImmunityGovernmentsState & Territorial GovernmentsClaims By & Against

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§ 102.33 Text References

Witkin, California Procedure, Vols. 4, 5, *Pleading*, §§ 91-94 577-583 (4th ed. 1997)

Witkin, Summary of California Law, Vols. 5, 6, *Torts*, §§ 105-106 150, 151, 153-167, 170-179, 182-197, 1100 (9th ed. 1990)

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10-102 California Forms of Pleading and Practice--Annotated §§ 102.34-102.49

[Reserved]

§§ 102.34[Reserved]

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PART IV. FORMS

10-102 California Forms of Pleading and Practice--Annotated § 102.50

§ 102.50 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity [Gov. Code § 835] (First Cause of Action)--And Against Public Employee [Gov. Code § 840.2] (Second Cause of Action)--Dangerous Condition of Property--Collision With Draw Section of Lift Span Bridge

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity [Gov. Code § 835] (First Cause of Action)--And Against Public Employee [Gov. Code § 840.2] (Second Cause of Action)--Dangerous Condition of Property--Collision With Draw Section of Lift Span Bridge

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

	)	
	)	NO. _____
_____ [*name*], Plaintiff, vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*], Defendants.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

The plaintiff alleges:

FIRST CAUSE OF ACTION

(Against Public Entity)

[*EITHER*]

1.At all times herein mentioned, the defendant State of California was a sovereign state of the United States of America.

[*OR*]

1.At all times herein mentioned, the defendant _____[*name of public entity*] was, and now is, a _____ [municipal corporation *or* county and political subdivision of the State of California] organized and existing by virtue of the laws of the State of California.

[*CONTINUE*]

2.Prior to the filing of this complaint and on _____[*date*], the plaintiff filed a claim against the defendant _____[*name of public entity*] for the injuries alleged herein. On _____[*date*], the defendant _____[*name of public entity*] _____ [rejected the plaintiff's claim in its entirety *or* allowed the plaintiff's claim in the amount of $_____ but rejected it as to the remainder].

3.At all times herein mentioned, the _____[*name*] Bridge was a public draw bridge of the elevator type located in _____ County, California over and across the _____[*name of body of water*], and was a part of the public highway designated as _____[*name*], running in a general _____[*specify direction*] at that location.

4.At all times herein mentioned, the defendant _____[*name of public entity*] operated, maintained, and controlled the _____[*name*] Bridge.

5.On _____[*date of injury*], and prior thereto, the _____[*name*] Bridge was in a dangerous condition, which created a substantial risk of injury when the bridge was used with due care in a manner in which it was reasonably foreseeable it would be used, in that _____ [*specify facts rendering property in dangerous condition, e.g.,* the defendant failed to provide adequate lighting and warning devices to warn motorists driving over the bridge of the elevating of the draw, failed to provide barriers to protect such motorists from collision with the elevated draw section, and elevated the draw section without adequate warning to motorists on the bridge].

6.The defendant _____'s [*name of public entity*] failure to provide adequate lighting, warning devices, and barriers to protect motorists from the elevating of the draw created a reasonably foreseeable risk of the kind of injury that is hereinafter alleged. The resulting dangerous condition had existed for a sufficient period of time prior to _____[*date of injury*] and was of such an obvious nature as to give the defendant _____[*name of public entity*] constructive notice of its existence [*or allege facts sufficient to show actual notice*]. The defendant _____[*name of public entity*] _____ [knew *or* should have known] of its dangerous character a sufficient period of time prior to _____[*date of injury*] to have taken adequate measures to protect motorists from the elevating of the draw.

7.At all times herein mentioned, the plaintiff was the legal and registered owner of a certain _____[*year, make, model*] automobile bearing California License No. _____.

8.On or about _____[*date*], at approximately _____[*time*], the plaintiff was operating [his *or* her] automobile in a _____[*specify direction*] on the _____[*name*] Bridge.

9.As a proximate result of the acts and conditions herein complained of, the plaintiff was caused to collide with the elevated draw section of the bridge.

10.As a proximate result of the acts and conditions herein complained of, and the accident caused thereby, the plaintiff sustained permanent injuries consisting of _____[*specify*], has suffered and will suffer great physical pain and mental anguish, and is damaged thereby according to proof.

11. As a further proximate result thereof, the plaintiff was required to and did employ physicians and surgeons to examine, treat, and care for [him *or* her], and incurred additional medical expenses for hospital bills [and other incidental medical expenses]. [The plaintiff is informed and believes and thereon alleges that [he *or* she] will incur some additional medical expenses, the exact amount of which is unknown.]

12. As a further proximate result thereof, the plaintiff was prevented from attending to [his *or* her] usual _____ [occupation *or* profession] and thereby lost earnings. [The plaintiff is informed and believes and thereon alleges that [he *or* she] will thereby be prevented from attending to such _____ (occupation *or* profession) for a period in the future that [he *or* she] cannot now ascertain, and will thereby sustain further loss of earnings.]

SECOND CAUSE OF ACTION

(Against Public Employee)

1.The plaintiff refers to Paragraphs 1-5 and 7-12 of [his *or* her] First Cause of Action and incorporates them as if fully set forth herein.

2.At all times herein mentioned, the defendant _____[*name of public employee*] was an employee of the defendant _____[*name of public entity*], and in doing the things hereinafter described, acted within the course and scope of [his *or* her] employment.

3.The plaintiff is ignorant of the true names and capacities of the defendants sued herein as DOES 1 through _____ (*roman numeral*), inclusive, and therefore sues these defendants by such fictitious names. The plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

4.The dangerous condition of the bridge created a reasonably foreseeable risk of the kind of injury that is hereinabove alleged and was directly attributable in substantial part to the defendant _____[*name of public employee*] in that _____ [*specify negligent or wrongful act of employee that was responsible for the dangerous condition, e.g.*, the defendant _____ (*name of public employee*) negligently raised the bridge while the plaintiff was operating [his *or* her] automobile on it without giving warning and knowing that adequate warning was not otherwise provided]. The defendant _____[*name of public employee*] at all times herein mentioned had the authority and other means immediately available to take alternative action by _____ [*specify reasonable alternative action employee could have taken, e.g.*, either warning the plaintiff of the elevating of the bridge or delaying elevating the bridge until the plaintiff had passed].

WHEREFORE, the plaintiff prays judgment against the defendants, and each of them, as follows:

1. For general damages according to proof.

2. For medical and incidental expenses according to proof.

3. For lost wages according to proof.

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION [*Code Civ. Proc. §§ 446, 2015.5*]

I, _____[*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge except as to those matters that are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California.

_____[*date*]

_____ [*signature*]

CAUTION:

Except as provided in *Gov. Code §§ 946.4* and *946.6*, no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented [*see* *Gov. Code §§ 905-905.6*] until a written claim therefor has been presented to the public entity and the appropriate body within the public entity has acted [***see*** *Gov. Code §§ 912.4-912.8*] or failed to act within the time provided by Gov. Code § 914.4 [*Gov. Code § 945.4*]. A claim relating to a cause of action for death or for injury to person or to personal property must be presented not later than 6 months after the accrual of the cause of action [*Gov. Code § 911.2*]. For forms of claims, see Ch. 464, ***Public Entities and Officers: California Tort Claims Act*** .

Except as provided in *Gov. Code § 946.4* and *Gov. Code § 946.6*, and subject to *Gov. Code § 945.6(b)*, any suit brought against a public entity on a cause of action for which a claim is required to be presented [*see* *Gov. Code §§ 905-905.6*] must be commenced not later than six months after the date written notice the board is required to give under *Gov. Code § 913* is personally delivered or deposited in the mail or, if written notice is not given in accordance with *Gov. Code § 913*, within two years from the accrual of the cause of action [*Gov. Code § 945.6(a)*].

Except as provided in *Gov. Code § 950.4*, a cause of action against a public employee of former public employee for injury resulting from an act or omission in the scope of [his *or* her] employment as a public employee is barred if an action against the employing public entity for

such injury is barred for failure to properly present a claim or failure to commence an action within the time provided. This is true even though the public entity is immune from liability for the injury [*see* *Gov. Code § 950.2*].

[2] Use of Form

This form is for use as a complaint against a public entity and its employee for injuries resulting from a collision caused by the dangerous condition of a lift span bridge.

[3] Essential Allegations

[a] Against Public Entity

Except as otherwise provided by a statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury (First Cause of Action, Paragraph 5), that the injury was proximately caused by the dangerous condition (First Cause of Action, Paragraphs 9-12), that the dangerous condition created a reasonably foreseeable risk of the kind of injury that was incurred (First Cause of Action, Paragraph 5), and that the public entity had actual or constructive notice of the dangerous condition under *Gov. Code § 835.2* a sufficient time prior to the injury to have taken measures to protect against the dangerous condition (First Cause of Action, Paragraph 6) [*Gov. Code § 835*].

[b] Against Public Employee

An employee of a public entity is liable for injury caused by a dangerous condition of public property if the plaintiff establishes that the property of the public entity was in a dangerous condition at the time of the injury (First Cause of Action, Paragraph 5), that the injury was proximately caused by the dangerous condition (First Cause of Action, Paragraphs 9-12), that the dangerous condition created a reasonably foreseeable risk of the kind of injury that was incurred (Second Cause of Action, Paragraph 4), and that the dangerous condition was directly attributable wholly or in substantial part to a negligent or wrongful act of the employee and the employee had the authority, funds, and other means immediately available to take alternative action that would not have created the dangerous condition (Second Cause of Action, Paragraph 4) [*Gov. Code § 840.2*].

[4] Verification

A public entity need not verify its answer even though the complaint is verified [*see Code Civ. Proc. § 446(a)*]. However, the verification of a complaint against a public entity does preclude a general denial in superior court actions and in some limited civil cases [*see Code Civ. Proc. § 431.30(d)*].

[5] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see *Ch. 177, Damages, § 177.40* et seq., and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[6] Cross References

For additional forms of complaints and allegations for use in complaints in an action against a public entity, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

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10-102 California Forms of Pleading and Practice--Annotated § 102.51

§ 102.51 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity--Dangerous Condition of Property [Gov. Code § 835]--Fall From Bridge

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity--Dangerous Condition of Property [Gov. Code § 835]--Fall From Bridge
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*], Plaintiff, vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

The plaintiff alleges:

[1. *Capacity of defendant. See § 102.50, First Cause of Action, Paragraph 1.*]

[2. *Fictitious name allegation, if desired. See § 102.50, Second Cause of Action, Paragraph 3.*]

[3. *Claim against public entity. See § 102.50, First Cause of Action, Paragraph 2*]

4.At all times herein mentioned, the _____[*name*] Bridge was a public bridge located in _____[*city*], _____ County, California over and across certain depressed railroad

tracks, and was a part of _____[*name*] Street, running in a general _____[*specify direction*] at that location.

5.At all times herein mentioned, the defendant city operated, maintained, and controlled the _____[*name*] Bridge.

6.At all times herein mentioned, the _____[*name*] Bridge provided the only means within a reasonable area for pedestrians, as well as motorists, to cross over the railroad tracks in carrying on their regular activities.

7.On _____[*date of injury*], and prior thereto, the _____[*name*] Bridge was in a dangerous condition, which created a substantial risk of injury when the bridge was used with due care in a manner in which it was reasonably foreseeable it would be used, in that _____ [*specify facts rendering property in dangerous condition, e.g.*, it lacked a pedestrian crosswalk separated and protected from motor vehicle traffic, was of insufficient width to safely handle pedestrian and motor vehicle traffic without protective devices that were lacking for pedestrians, was unsafely constructed for pedestrians and was in a state of disrepair, and was otherwise in a dangerous condition].

[8. *Foreseeability of risk and actual or constructive notice. See § 102.50, First Cause of Action, Paragraph 6.*]

9.On or about _____[*date*], at approximately _____[*time*], the plaintiff was a pedestrian crossing the _____[*name*] Bridge in a _____[*specify direction*].

10.At that time and place and as a proximate result of the dangerous condition of the bridge, the plaintiff was caused to fall from the bridge and for a distance of _____[*specify*] feet onto the railroad tracks below.

[11-13. *General and special damages. See § 102.50, First Cause of Action, Paragraphs 10-12.*]

[*Prayer. See § 102.50.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 102.50.*]

[2] Use of Form

This form is for use as a complaint against a public entity for injuries resulting from a fall from a bridge caused by its dangerous condition.

[3] Cross References

See also Comments and References to *§ 102.50*.

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10-102 California Forms of Pleading and Practice--Annotated § 102.52

§ 102.52 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity--By Minor Through Guardian ad Litem--Dangerous Condition of Property [Gov. Code § 835]--Fall From Pipeline Parelleling Bridge and Attractive to Children

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity--By Minor Through Guardian Ad Litem--Dangerous Condition of Property [Gov. Code § 835]--Fall From Pipeline Parelleling Bridge and Attractive to Children

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], a Minor, through _____ [*name*], [his *or* her] Guardian ad Litem, Plaintiff, vs. _____ [*name*], Defendant.	))))))	NO. _____ COMPLAINT FOR DAMAGES [Amount demanded _____ (exceeds *or* does not exceed) $10,000] [LIMITED CIVIL CASE]

The plaintiff _____[*name*], a minor, through _____[*name*], [his *or* her] guardian ad litem, alleges:

1.On _____[*date*], _____[*name of guardian ad litem*] was duly and regularly appointed guardian ad litem of the plaintiff _____[*name of minor*], a minor _____ years of age, by order of the above-entitled court, and now is the qualified and acting guardian ad litem of said minor for purposes of this action.

[2. *Capacity of defendant. See § 102.50, First Cause of Action, Paragraph 1.*]

[3. *Fictitious name allegation, if desired. See § 102.50, Second Cause of Action, Paragraph 3.*]

[4. *Claim against public entity. See § 102.50, First Cause of Action, Paragraph 2.*]

5.At all times herein mentioned, the _____[*name*] Bridge was a public bridge located in _____[*city*], _____ County, California over and across certain depressed railroad tracks, and was a part of _____[*name*] Street, running in a general _____[*specify direction*] at that location.

6.At all times herein mentioned, the defendant city operated, maintained, and controlled the _____[*name*] Bridge.

7.At all times herein mentioned, the _____[*name*] Bridge provided the only means within a reasonable area for pedestrians, as well as motorists, to cross over the railroad tracks in carrying on their regular activities.

8.On _____[*date of injury*], and prior thereto, the _____[*name*] Bridge was in a dangerous condition, which created a substantial risk of injury when the bridge was used with due care in a manner in which it was reasonably foreseeable it would be used in that it had attached parallel to and as part of it an unguarded pipeline.

9.At all times herein mentioned, this pipeline was attractive and alluring to children of tender years as a means of crossing over the railroad tracks, as a place of play, and as an object of childish curiosity,

10.At all times herein mentioned, a large number of children of tender years had been attracted to the pipeline for these purposes, and the pipeline and bridge so maintained by the defendant in such dangerous condition constituted a nuisance, menace, and danger to children of tender years so attracted thereto against which immature judgment opposed no warning.

[11. *Foreseeability of risk and actual or constructive notice. See § 102.50, First Cause of Action, Paragraph 6.*]

12. On or about _____[*date*], at approximately _____[*time*], the plaintiff was a child of tender years to wit, _____[*specify*] years of age, and was attracted onto the pipeline and bridge.

13. As proximate result the dangerous condition of the bridge, including the pipeline so attached thereto, the plaintiff was caused to fall from the bridge and pipeline and for a distance of _____[*specify*] feet onto the railroad track below.

[14-16. *General and special damages. See § 102.50, First Cause of Action, Paragraphs 10-12.*]

[*Prayer. See § 102.50.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 102.50.*]

[2] Use of Form

This form is for use as a complaint against a public entity for a child's injuries resulting from its fall from a pipeline paraleling a bridge. If a parent is the guardian ad litem of the minor, the minor's cause of action may include an allegation to recover medical expenses that have not been paid [*Morningred v. Golden State Co. (1961) 196 Cal. App. 2d 130, 138-139, 16 Cal. Rptr. 219* ; *Mattox v. Isley (1952) 111 Cal. App. 2d 774, 779-780, 245 P.2d 664]* . Some attorneys prefer to seek medical expenses in theminor's cause of action rather than include a separate cause of action by the parents. Recovery of the minor's medical expenses, whether sought in the minor's cause of action or a separate cause of action by the parents, will be barred by the contributory negligence of the parents [*Randles v. Lowry (1970) 4 Cal. App. 3d 68, 73, 84 Cal. Rptr. 321]* .

[3] Cross References

See also Comments and References to § 102.50

For forms relating to appointment of guardians ad litem, see Ch. 291, *Guardians ad Litem*

For forms for use in tort actions by minors generally, see Ch. 394, *Parent and Child*

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10-102 California Forms of Pleading and Practice--Annotated § 102.53

§ 102.53 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity--Dangerous Condition of Property [Gov. Code § 835]--Accumulation of Ice on Bridge

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity--Dangerous Condition of Property [Gov. Code § 835]--Accumulation of Ice on Bridge
[*Caption, introduction. See § 102.51*]

[1. *Capacity of defendant. See § 102.50, First Cause of Action, Paragraph 1.*]

[2. *Fictitious name allegation, if desired. See § 102.50, Second Cause of Action, Paragraph 3.*]

[3. *Claim against public entity. See § 102.50, First Cause of Action, Paragraph 2.*]

4.At all times herein mentioned, the _____[*name*] Bridge was a public bridge located in _____ County, California over and across the _____[*name of body of water*], and was a part of the public highway designated as _____[*name*], running in a general _____[*specify direction*] at that location.

5.At all times herein mentioned, the defendant _____[*name of public entity*] operated, maintained, and controlled the _____[*name*] Bridge.

6.On _____[*date of injury*], and prior thereto, the _____[*name*] Bridge was in a dangerous condition, which created a substantial risk of injury when the bridge was used with due care in a manner in which it was reasonably foreseeable it would be used, in that moisture condensed on the bridge and was permitted to accumulate and remain as pools of water on the bridge roadbed, and to freeze into sheets of ice thereon during freezing weather.

[7. *Foreseeability of risk and actual or constructive notice. See § 102.50, First Cause of Action, Paragraph 6.*]

8.On or about _____[*date*], at approximately _____[*time*], a sheet of ice had formed

and was present on the roadbed of the bridge, causing it to be extremely slippery on which to drive an automobile.

9.At that time and place, the plaintiff was the legal and registered owner of a certain _____[*year, make model*] automobile bearing California License No. _____, and was operating the same in a _____[*specify direction*] on the bridge.

10.As a proximate result of the dangerous condition of the bridge, the plaintiff's automobile was caused to skid and collide violently with the side railing of the bridge.

[11-13. *General and special damages. See § 102.50, First Cause of Action, Paragraph 10-12.*]

[*Prayer. See § 102.50.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 102.50.*]

[2] Use of Form

This form is for use a complaint against a public entity for injuries resulting from a collision caused by an accumulation of ice on a bridge.

[3] Cross References

See also Comments and References to § 102.50.

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10-102 California Forms of Pleading and Practice--Annotated § 102.54

§ 102.54 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity--Dangerous Condition of Property [Gov. Code § 835]--Collapse of Bridge

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity--Dangerous Condition of Property [Gov. Code § 835]--Collapse of Bridge
[*Caption, introduction. See § 102.51.*]

[1. *Capacity of defendant. See § 102.50, First Cause of Action, Paragraph 1.*]

[2 *Fictitious name allegation, if desired. See § 102.50, Second Cause of Action, Paragraph 3.*]

[3. *Claim against public entity. See § 102.50, First Cause of Action, Paragraph 2.*]

4.At all times herein mentioned, the _____[*name*] Bridge was a public bridge located in _____ County, California over and across the _____[*name of body of water*], and was a part of the public highway designated as _____[*name*], running in a general _____[*specify direction*] at that location.

5.At all times herein mentioned, the defendant _____[*name of public entity*] operated, maintained, and controlled the _____[*name*] Bridge.

6.On _____[*date of injury*], and prior thereto, the _____[*name*] Bridge was in a dangerous condition that created a substantial risk of injury when the bridge was used with due care in a manner in which it was reasonably foreseeable it would be used, in that _____ [*specify facts rendering property in dangerous condition, e.g.,* the bridge was of wooden construction and the stringers thereof on which the bridge floor planks rested were permitted to decay and to remain without replacement].

[7. *Foreseeability of risk and actual or constructive notice. See § 102.50, First Cause of Action, Paragraph 6.*]

8.At all times herein mentioned, the plaintiff was the legal and registered owner of a certain _____[

year, make, model] automobile bearing California License No. _____.

9.On or about _____[*date*], at approximately _____[*time*], the plaintiff was operating [his *or* her] automobile in a _____[*specify direction*] on the bridge.

10.At that time and place and as a proximate result of the dangerous condition of the bridge, a section of the bridge floor collapsed, dropping the plaintiff's automobile into the stream of water below.

[11-13. *General and special damages. See § 102.50, First Cause of Action, Paragraphs 10-12.*]

[*Prayer. See § 102.50.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 102.50.*]

[2] Use of Form

This form is for use as a complaint against a public entity for injuries resulting from the collapse of a bridge caused by its dangerous condition.

[3] Cross References

See also Comments and References to § 102.50.

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10-102 California Forms of Pleading and Practice--Annotated § 102.55

§ 102.55 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity--Dangerous Condition of Property [Gov. Code § 835]--Lack of Guard Rails on Bridge Approaches

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity--Dangerous Condition of Property [Gov. Code § 835]--Lack of Guard Rails on Bridge Approaches [*Caption, Introduction. See § 102.51.*]

[1. *Capacity of defendant. See § 102.50, First Cause of Action, Paragraph 1.*]

[2. *Fictitious name allegation, if desired. See § 102.50, Second Cause of Action, Paragraph 3.*]

[3. *Claim against public entity. See § 102.50, First Cause of Action, Paragraph 2.*]

4.At all times herein mentioned, the _____[*name*] Bridge was a public bridge located in _____ County, California over and across the _____[*name of body of water*], and was a part of the public highway designated as _____[*name*], running in a general _____[*specify direction*] at that location.

5.At all times herein mentioned, the defendant _____[*name of public entity*] operated, maintained, and controlled the _____[*name*] Bridge.

6.On _____[*date of injury*], and prior thereto, the _____[*name*] Bridge was in dangerous condition that created a substantial risk of injury when the bridge was used with due care in a manner in which it was reasonably foreseeable it would be used, in that _____ [*specify facts rendering property in dangerous condition, e.g.*, the bridge approach at the _____ (*specify*) end of the bridge constituted a sharp curve of approximately _____ (specify) degrees, the curve was inadequately engineered, balanced, and constructed so that it did not possess a safe inward slope, and no guard rails or barriers were set on the curve to safeguard motorists from driving or being forced off the curve, and was otherwise in a dangerous condition].

[7. *Foreseeability of risk and actual or constructive notice. See § 102.50, First Cause of Action, Paragraph 6.*]

8.At all times herein mentioned, the plaintiff was the registered owner of a certain _____[*year, make, model*] automobile bearing California License No. _____.

9.On or about _____[*date*], at approximately _____[*time*], the plaintiff was driving [his *or* her] automobile in a _____[*specify direction*] on the bridge approach.

10.At that time and place and as a proximate result of the dangerous condition of the bridge and approaches, the plaintiff's automobile was caused to leave the curved approach and fall into the stream of water below.

[11-13. *General and special damages. See § 102.50, First Cause of Action, Paragraphs 10-12.*]

[*Prayer. See § 102.50.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 102.50.*]

[2] Use of Form

This form is for a use as a complaint against a public entity for injuries resulting from an automobile leaving the approach to a bridge because of its dangerous condition.

[3] Cross References

See also Comments and References to *§ 102.50*

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Chapter 103 BROKERS

10-103 California Forms of Pleading and Practice--Annotated 103.syn

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Fixed Expiration Date in Contract

[5] Plaintiff's Capacity

[6] Broker's License

[7] Verification

[8] Jurisdiction

[9] Venue

[10] Statute of Limitations

[11] Cross References

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[1] FORM

[2] Use of Form

[3] Allegations

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[1] FORM

[2] Use of Form

[3] Allegations

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[1] FORM

[2] Use of Form

[3] Allegations

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[1] FORM

[2] Use of Form

[3] Allegations

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[1] FORM

[2] Use of Form

[3] Allegations

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[1] FORM

[2] Use of Form

[3] Allegations

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[1] FORM

[2] Use of Form

[3] Allegations

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction and Venue

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[1] FORM

[2] Use of Form

[3] Allegations

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction and Venue

[6] Cross References

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction and Venue

[6] Statute of Limitations

[7] Cross References

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[1] FORM

[2] Use of Form

[3] Allegations

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[1] FORM

[2] Use of Form

[3] Allegations

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[1] FORM

[2] Use of Form

[3] Allegations

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[1] FORM

[2] Use of Form

[3] Allegations

[a] Fraud

[b] Breach of Duty to Disclose

[c] Breach of Duty to Be Honest and Truthful

[d] Negligence

[e] Negligent Misrepresentation

[4] Verification

[5] Jurisdiction and Venue

[6] Cross References

§ 103.95 Complaint for Damages--Breach of Fiduciary Duty, Constructive Fraud--Failure to Disclose Defects--By Buyer Against Selling Agent

[1] FORM

[2] Use of Form

[3] Allegations

[a] Breach of Fiduciary Duty

[b] Constructive Fraud

[4] Statute of Limitations

[5] Verification

[6] Jurisdiction and Venue

§ 103.96 Complaint for Damages--Breach of Fiduciary Duty--Failure to Investigate Material Facts--By Buyer Against Selling Agent

[1] FORM

[2] Use of Form

[3] Allegations

[4] Buyer's Cause of Action Against Listing Agent

[5] Statute of Limitations

[6] Verification

[7] Jurisdiction and Venue

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Statute of Limitations

[5] Verification

[6] Jurisdiction and Venue

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[1] FORM

[2] Use of Form

[3] Contents of Application; Proof of Legal Presence

[4] Verification

[5] Service and Delivery of the Application

[6] Statute of Limitations

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[1] FORM

[2] Use of Form

[3] Service

§ 103.107 Application for Order Directing Payment Out of Recovery Account of Real Estate Fund [Bus. & Prof. Code § 10472(a)]--By Judgment Creditor

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Venue

[6] Service and Notice

[7] Statute of Limitations

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[1] FORM

[2] Use of Form

§ 103.109 Order Directing Payment Out of Recovery Account of Real Estate Fund [Bus. & Prof. Code § 10473]

[1] FORM

[2] Use of Form

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FOOTNOTES:
(n3)Footnote *.
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(n4)Footnote **.

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10-103 California Forms of Pleading and Practice--Annotated § 103.01

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§ 103.01 Scope of Chapter

This chapter discusses the rights and obligations of real estate brokers and salespersons in California. The primary focus of this chapter is on the real estate agent's rights and obligations in relation to the agent's clients and third parties. It also includes discussion and forms relating to recovery from the Recovery Account of the Real Estate Fund.

The chapter contains the following forms:

- Complaints for the recovery of a commission, allegations for use in these complaints, and related affirmative defense allegations [*see §§ 103.70 -103.84*].

- A complaint by the broker for equitable indemnity against the seller or buyer [*see § 103.85*].

- Complaints for use in actions against brokers, along with related affirmative defense allegations [*see §§ 103.90 -103.100*].

- Applications, notices, and an order for use in seeking payments from the Recovery Account of the Real Estate Fund [*see §§ 103.105 -103.109*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersFiduciary ResponsibilitiesReal Property LawBrokersRight to Commissions

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10-103 California Forms of Pleading and Practice--Annotated § 103.02

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§ 103.02 Cross References

[1] California Forms of Pleading and Practice Chapters

For discussion and forms relating to contracts generally, see Ch. 140, *Contracts* .

For discussion and forms relating to agency relationships generally, see Ch. 427, *Principal and Agent* .

For discussion and forms relating to brokerage contracts in probate proceedings, see Ch. 455, *Probate: Sale of Estate Property* .

For discussion and forms relating to licensing issues generally, see Ch. 471B, *Licensing By Public Agencies* .

For discussion and forms relating to the rights and obligations of sellers and buyers of property, see Ch. 569, *Vendor and Purchaser* .

[2] Other Matthew Bender Publications

For discussion of issues relating to real estate brokers, see the following chapters in California Real Estate Law & Practice (Matthew Bender):

- Ch. 60, *Regulation of Real Estate Brokers* .
- Ch. 61, *Employment and Authority of Brokers* .
- Ch. 62, *Recovery of Brokers' Commissions* .

- Ch. 63, *Duties and Liabilities of Brokers* .
- Ch. 64, *Licensing and Discipline of Brokers* .

For forms and discussion relating to brokerage contracts, see Ch. 21, *Agreements with Real Estate Brokers and Agents*, in California Legal Forms (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersGeneral OverviewReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersRight to Commissions

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[Reserved]

§§ 103.03[Reserved]

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§ 103.10 Governing Law

The primary statutory provisions governing the real estate profession are known as the Real Estate Law [*see Bus. & Prof. Code § 10000 et seq.*]. The Real Estate Commissioner has the authority to adopt regulations that are reasonably necessary to enforce the provisions of the Real Estate Law [*Bus. & Prof. Code § 10080*]. These regulations are set forth in *Title 10 of the California Code of Regulations, Section 2705 et seq.* In addition, many of the statutory provisions have been extensively discussed and interpreted in decisions issued by the courts of this state. Collectively, these sources constitute the general regulatory scheme for the real estate industry in California.

As agents and fiduciaries, real estate brokers and salespersons are also subject to the general laws of agency, as defined and interpreted by case law. The relevant rules regarding agency as applied to the real estate profession are discussed throughout this chapter.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary Responsibilities

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10-103 California Forms of Pleading and Practice--Annotated § 103.11

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§ 103.11 Definitions

[1] Broker

A real estate broker is a person who, for compensation or in expectation of compensation, does or negotiates to do one or more of the following acts for another or others [*Bus. & Prof. Code § 10131(a)-(e)*]:

- Sells or offers to sell, buys or offers to buy, solicits prospective sellers or purchasers of, solicits or obtains listings of, or negotiates the purchase, sale, or exchange of real property or a business opportunity.

- Leases or rents or offers to lease or rent, or places for rent, or solicits listings of places for rent, or solicits for prospective tenants, or negotiates the sale, purchase, or exchange of leases on real property, or on a business opportunity, or collects rents from real property, or improvements on real property, or from business opportunities [*see Bus. & Prof. Code § 10131.01* regarding exclusions for certain property management persons and functions].

- Assists or offers to assist in filing an application for the purchase or lease of, or in locating or entering on, lands owned by the state or federal government.

- Solicits borrowers or lenders for, or negotiates loans or collects payments or performs services for, borrowers or lenders or note owners in connection with loans secured directly or collaterally by liens on real property or on a business opportunity.

- Sells or offers to sell, buys or offers to buy, or exchanges or offers to exchange a real property sales contract, or a promissory note secured directly or collaterally by a lien on real property or on a business opportunity, and performs services for the holders of the foregoing.

A real estate broker is also defined to include the following:

- A person who engages as a principal in certain transactions involving real property sales contracts or promissory notes [*see Bus. & Prof. Code § 10131.1* for specific criteria].

- A person who engages in the business of charging advance fees to promote the sale or lease of real property or of a business opportunity or related loans [*see Bus. & Prof. Code § 10131.2* for specific criteria].

- A person who sells, solicits, or negotiates the purchase, sale, or exchange of certain securities [*see Bus. & Prof. Code § 10131.3* for specific criteria].

- A person who either acts for others, or as a principal, in the sale, solicitation or negotiation of the purchase, sale, or exchange of mineral, oil, or gas properties or related loans or leases on the foregoing [*see Bus. & Prof. Code §§ 10131.4, 10131.45* for specific criteria].

The terms "agent" and "broker" are used interchangeably in this chapter and in the opinions of the courts. The fiduciary duties and obligations of a broker and an agent working under the license of a broker are identical [*see § 103.31[1]* (fiduciary duties generally)].

PRACTICE TIP:

Potential Differences in Standard of Care Relating to Brokers and Agents. Determination of the standard of care applicable to a broker or agent is dependent upon an evaluation of the facts of the particular case. The standard of care is the degree of care that a reasonably prudent real estate licensee would exercise, and is measured by the degree of knowledge through education, experience, and examination required to obtain a license [*Civ. Code § 2079.2*]. Because brokers typically have a greater breadth of professional experience and have passed additional educational requirements, it is likely in most cases that a higher standard of care may be applied to a broker. Accordingly, it is imperative in defending real estate professionals that counsel obtain a thorough understanding of the background and experience of the agent or broker he or she is representing. *By Jeffrey S. Martin*

[2] Finder Distinguished

A finder is a person whose employment is limited to bringing parties together so that they may negotiate their own contract. The distinction between a finder and a broker frequently turns on whether an intermediary has been invested with authority to participate in negotiations. One who simply finds and introduces two parties to a real estate transaction does not need to be licensed as a real estate broker; such an intermediary is protected by the finder's exception to the real estate licensing laws [*Tyrone v. Kelley (1973) 9 Cal. 3d 1, 8-9, 106 Cal. Rptr. 761, 507 P.2d 65]* . A finder can collect a commission for his or her services [*Zappas v. King Williams Press, Inc. (1970) 10 Cal. App. 3d 768, 772, 89 Cal. Rptr. 307]* .

The distinction between a finder and a broker is also significant in determining whether the intermediary in a transaction stands in a confidential relationship to one of the parties to the transaction, thereby subjecting the intermediary to all of the fiduciary duties of a broker [*see Batson v. Strehlow (1968) 68 Cal. 2d 662, 668-670, 68 Cal. Rptr. 589, 441 P.2d 101* (broker's argument that he was merely a "finder" was unsuccessful; as a broker he had a fiduciary duty to disclose his role as a buyer to the seller)].

[3] Factor Distinguished

A broker may be distinguished from a factor in that the latter is an agent who, in pursuit of an independent calling, is employed by another to sell property for him or her and is vested by the latter with the possession or control of the property or authorized to receive payment for the property from the purchaser [*see Civ. Code § 2026* (defining factor)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersBrokerage AgreementsReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawBrokersRight to Commissions

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§ 103.12 Broker-Client Relationship

[1] Overview

[a] "Real Estate Agent" Defined

A real estate agent is a person who represents another, called the principal, in dealings with third persons, and includes a person who is licensed as a real estate broker and under whose license a listing is executed or an offer to purchase is obtained [*Civ. Code §§ 2079.13(a), 2295*].

[b] Applicability of Agency and Contract Law; Creation of Relationship

A real estate brokerage contract is a contract for employment of an agent. Hence, the broker-principal relationship is governed by both agency and contract law. The law of agency supplies terms regarding contingencies not addressed by the provisions of the contract [*R.J. Kuhl Corp. v. Sullivan (1993) 13 Cal. App. 4th 1589, 1599, 17 Cal. Rptr. 2d 425* ; *see also Rhode v. Bartholomew (1949) 94 Cal. App. 2d 272, 278, 210 P.2d 768* (agency relationship between broker and client)].

The agreement between a broker and his or her client need not be in writing, except for purposes of a broker's right to recover a commission [*see § 103.21[1]* (statute of frauds)]. An oral agreement authorizing someone to act as an agent and find a buyer for the principal's property, and under which the agent receives confidential information respecting the property, is sufficient to create a fiduciary relationship between the parties [*Gann v. Williams Brothers Realty, Inc. (1991) 231 Cal. App. 3d 1698, 1705, 283 Cal. Rptr. 128]* . An agency relationship may also be implied from the circumstances and conduct of the parties [*Michelson v. Hamada (1994) 29 Cal. App. 4th 1566, 1579, 36 Cal. Rptr. 2d 343]* .

The question of whether an agency relationship is created can be determinative of other rights and obligations. For example, if a person is acting as a broker in relationship to his or her client, he or she is subject to all of the fiduciary and other duties of a broker [*see § 103.31* for discussion of duties of broker]. It is not uncommon for a broker to assert that he or she was merely acting as a finder, not a broker, and therefore was not subject to the fiduciary obligations of a broker [*see § 103.11[2]* for discussion of the distinction between a finder and a broker].

For further discussion and forms relating to agency relationships, *see* Ch. 427, *Principal and Agent* .

[2] Types of Agency Relationships

[a] "Listing Agent"; "Selling Agent"; "Dual Agent"

A "listing agent" is an agent who has obtained a listing of real property to act as an agent for compensation [*Civ. Code § 2079.13(f)*]. A "selling agent" is either a listing agent who acts alone, or an agent who acts in cooperation with a listing agent, and who sells or finds and obtains a buyer for the real property, or an agent who locates property for a buyer or who finds a buyer for a property for which no listing exists and presents an offer to purchase to the seller [*Civ. Code § 2079.13(n)*]. A "dual agent" is an agent acting as agent for both the seller and the buyer in a real property transaction [*Civ. Code § 2079.13(d)*].

PRACTICE TIP:

Confusion Over Types of Agents. Members of the public sometimes are confused by the terms "listing agent" and "selling agent." To avoid this confusion, the real estate community also uses the term "seller's agent" when referring to a listing agent, and the term "buyer's agent" when referring to a selling agent. The terms "seller's agent" and "buyer's agent" are also used in the agency disclosure form provided in *Civ. Code § 2079.16* [*see* [3], *below* (agency disclosure requirements)]. *By Linda Breen Pierce*

[b] Subagency

The law is not entirely clear on when a cooperating broker who brings in a buyer and splits the commission with the listing agent is a subagent of the seller, or a subagent of the listing broker, or when he or she is merely a cooperating broker who may have a contractual right to recover his or her split of the commission from the listing agent. Whether an agent is a subagent of the seller is significant for two reasons. First, if the agent is a subagent of the seller, the agent has fiduciary duties to that seller [*see § 103.31[1]* (fiduciary duties generally)]. Second, an agent who is a subagent of the seller may have a right to recover his or her commission directly from the seller [*see § 103.20[11]* (cooperating broker's standing to sue)].

Some courts assume that a broker cooperating through a multiple listing service is automatically a subagent of either the seller or the listing agent [*see, e.g., Derish v. San Mateo-Burlingame Bd. of Realtors (1982) 136 Cal. App. 3d 534, 539, 186 Cal. Rptr. 390]* . Subagency is a question of fact [*Hale v. Wolfsen (1969) 276 Cal. App. 2d 285, 290, 81 Cal. Rptr. 23]* .

PRACTICE TIP:

Creation of Subagency. As discussed above, the question of whether a subagency is created is a question of fact and presumably would be based on the same criteria as the creation of any other agency relationship [*see* Ch. 427, *Principal and Agent* , for discussion of the creation of an agency relationship]. Any language in the listing agreement authorizing the listing agent to appoint subagents, and the rules of the multiple listing service to which the agents are subscribed (if any), are important factors to apply in making this determination. *By Linda Breen Pierce*

[c] Dual Agency

The general rule is that a broker may represent both parties to a contract with their full knowledge and consent [*Wilson v. Lewis (1980) 106 Cal. App. 3d 802, 806, 165 Cal. Rptr. 396]* . When a broker represents both parties, he or she is known as a dual agent. A broker's real estate license may be suspended or revoked if the broker acts for more than one party in a transaction without the knowledge or consent of all parties to the transaction [*Bus. & Prof. Code § 10176(d)*].

The payment of compensation to an agent by the seller or buyer is not necessarily determinative of a particular agency relationship between an agent and the seller or buyer. Also, a listing agent and a selling agent may agree to share any compensation or commission paid, and the terms of any such agreement will not necessarily be determinative of a particular relationship [*Civ. Code § 2079.19*]. A determination of whether a broker is acting as a dual agent depends on the circumstances of the particular case [*Bonaccorso v. Kaplan (1963) 218 Cal. App. 2d 63, 68, 32 Cal. Rptr. 69]* .

PRACTICE TIP:

Non-Disclosure of Dual Agency Is Rare. Form purchase/sale contracts, including those published by the California Association of Realtors ("CAR"), are utilized in virtually every residential real estate transaction. All of these contracts have a section devoted to agency confirmation [*see, e.g.,* CAR Form DLF-14, P 41 (revised 6/96)]. The broker or agent is typically not reluctant to identify himself or herself as a dual agent because of the financial reward. As a result, it is a rare case where there is an actionable claim that the broker or agent failed to adequately disclose a dual agency. *By Jeffrey S. Martin*

[3] Disclosure Regarding Agency Relationships

[a] Statutory Disclosure Form

Listing agents and selling agents must provide the seller and buyer in a real property transaction with a copy of the disclosure form set forth in *Civ. Code § 2079.16* and, except as provided below, obtain a signed acknowledgment of receipt from the seller or buyer [*Civ. Code § 2079.14*]. The front of the statutory form sets forth disclosures regarding real estate agency relationships in general, and the back contains the full text of *Civ. Code §§ 2079.13-2079.24* (excluding Section 2079.16).

The agents must comply with the following requirements, as applicable, when providing this disclosure form [*Civ. Code § 2079.14*]:

- The listing agent must provide the disclosure form to the seller prior to entering into the listing agreement.

- The selling agent must provide the disclosure form to the seller as soon as practicable prior to presenting the seller with an offer to purchase, unless the selling agent previously provided the seller with a copy of the disclosure form as a listing agent.

- When the selling agent does not deal on a face-to-face basis with the seller, (1) the disclosure form prepared by the selling agent may be furnished to the seller (and acknowledgment of receipt obtained for the selling agent from the seller) by the listing agent, or (2) the selling agent may deliver the disclosure form by certified mail addressed to the seller at his or her last known address, in which case no signed acknowledgment of receipt is required.

- The selling agent must provide the disclosure form to the buyer as soon as practicable prior to execution of the buyer's offer to purchase, except that if the offer to purchase is not prepared by the selling agent, the selling agent must present the disclosure form to the buyer not later than the next

business day after the selling agent receives the offer to purchase from the buyer.

- In any circumstance in which the seller or buyer refuses to sign an acknowledgment of receipt of the agency disclosure form, the agent must set forth, sign, and date a written declaration of the facts of the refusal [*Civ. Code § 2079.15*].

[b] Confirmation of Agency Relationships

As soon as practicable, the selling agent must disclose to the buyer and seller whether the selling agent is acting in the real property transaction exclusively as the buyer's agent, exclusively as the seller's agent, or as a dual agent representing both the buyer and the seller. Similarly, as soon as practicable, the listing agent must disclose to the seller whether the listing agent is acting in the real property transaction exclusively as the seller's agent, or as a dual agent representing both the buyer and seller. These relationships must be confirmed in the contract to purchase and sell real property or in a separate writing executed or acknowledged by the seller, the buyer, and the selling agent or listing agent, as applicable, prior to or coincident with execution of that contract by the buyer and the seller, respectively [*Civ. Code § 2079.17(a), (b)*]. A form for this confirmation of the agency relationships is provided in *Civ. Code § 2079.17(c)*.

PRACTICE TIP:

Practical Ramifications Regarding Deficiencies in Agency Disclosure. Given the relative complexity of *Civ. Code §§ 2079.14-2079.17*, it is not uncommon for a broker or agent to make a technically inadequate disclosure of agency as a result of not following one of the many steps set forth in the statutes. However, few cases arise out of issues relating to technically improper agency disclosures in residential real estate transactions. Disclosure of agency relationships is generally made, as a practical matter, even if there is a violation of the statutes. Further, it is typically difficult to establish actionable damage as a result of a statutory violation. *By Jeffrey S. Martin*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawBrokersRight to Commissions

California Forms of Pleading and Practice--Annotated

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Volume 10: Boundaries thru Captions and Introductions-Chs. 101-108
Chapter 103 BROKERS
PART II. LEGAL BACKGROUND
A. Brokers Generally

10-103 California Forms of Pleading and Practice--Annotated § 103.13

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§ 103.13 Brokerage Contracts

[1] Listing Agreements

The following types of listing agreements between a broker and seller are defined by statute [*Civ. Code § 1086(f)(1)-(3)*]:

(1) An "exclusive right to sell listing" is a listing whereby the owner grants to an agent, for a specified period of time, the exclusive right to sell or to find or obtain a buyer for the property. The agent is entitled to the agreed compensation if during that period of time (a) the property is sold, no matter who effected the sale, or (b) the listing agent receives and presents to the owner any enforceable offer from a ready, able, and willing buyer on terms authorized by the listing or accepted by the owner. The exclusive right to sell listing may provide for compensation of the listing agent if the property is sold within a specified period after termination of the listing to anyone with whom the agent has had negotiations before that termination.

(2) An "exclusive agency listing" is the same as an "exclusive right to sell listing," except that the owner reserves the right to sell directly but not through any other agent and, in that event, without obligation to pay compensation to the agent.

(3) An "open listing" is a listing that grants no exclusive rights or priorities to the listing agent. A commission is payable to the agent only if the agent procures and presents to the owner an enforceable offer from a ready, able, and willing buyer on the terms authorized by the listing or accepted by the owner, (a) before the property is otherwise sold either through another agent or by the owner directly, and (b) before the listing expires by its terms or is revoked.

A contract that creates an exclusive agency to sell does not create an exclusive right to sell, prohibiting direct sale by the principal, unless the contract expressly confers this exclusive right on the agent or contains other language indicating that the parties intended to prohibit direct sale by the principal or to guarantee the agent a commission in the event of a sale [*Pacific Scientific Co. v. Glassey (1966) 245 Cal. App. 2d 831, 836-837, 54 Cal. Rptr. 235]* . The use of the words "exclusive agency" or "exclusive sale" is not conclusive on the issue of whether the contract is one for an exclusive agency to deal with certain property or one giving the exclusive right to sell, but, as in other cases involving interpretation, all of the circumstances must be considered together [*Wilck v. Herbert (1947) 78 Cal. App. 2d 392, 412-413, 178 P.2d 25]* .

PRACTICE TIP:

Form Listing Agreements Typically Provide for Exclusive Listing. The form documents currently used as listing agreements, including the forms published by the California Association of Realtors, provide for the exclusive right to sell the listed property and also include saving clauses preserving the right to a commission after expiration of the listing. *By Jeffrey S. Martin*

[2] Termination of Agency Relationship

[a] Revocation by Principal

Except in the case of an agency coupled with an interest, a principal has the power to revoke an agent's authority at any time before the agent has completed performance [*Civ. Code § 2356(a)(1)*]. A principal may, however, curtail this right of revocation by contracting not to revoke the authority for a definite time. If the principal does so contract, he or she still retains the power to terminate the agency, and the termination cannot be prevented by the agent. However, a revocation of authority within the designated period renders the principal liable for damages for the violation of a legal right of the agent, just as in the case of any other breach of contract [*Elevator Operators etc. Union v. Newman (1947) 30 Cal. 2d 799, 807, 186 P.2d 1* ; *see also Century 21 Butler Realty, Inc. v. Vasquez (1995) 41 Cal. App. 4th 888, 892, 49 Cal. Rptr. 2d 1* (owner had right to change agents, but was liable to original broker for commission when property was sold by second broker during exclusive listing period of first broker)].

What constitutes an interest within the meaning of this exception has not been made particularly clear by the numerous and conflicting decisions dealing with the subject. However, an essential element of this irrevocable power must be a coexisting interest in the subject of the agency [*Capital Nat. Bk. of Sacramento v. Stoll (1934) 220 Cal. 260, 264, 30 P.2d 411]* . For example, it was held that an agency was coupled with an interest when the agency was to manage a hotel, and the agent had a 20-year lease of one floor, without rent [*Lane Mortgage Co. v. Crenshaw (1928) 93 Cal. App. 411, 428-429, 269 P. 672]* .

[b] Death or Incapacity of Principal

An agency will be terminated by the death or incapacity of the principal to contract, unless the agency is coupled with an interest [*Civ. Code § 2356(a)(2), (3)*].

In contrast to the termination of an agency by the principal's revocation, the termination of the agency by death of the principal generally does not render the principal's estate liable for breach of contract. Death is a fortuitous event beyond the control of the decedent and cannot be deemed to be a wrongful act. However, if the personal representative of the decedent's estate ratifies or affirms the brokerage contract, or if the estate receives benefits from the broker, the estate may still be liable for the broker's commission [*Charles B. Webster Real Estate v. Rickard (1971) 21 Cal. App. 3d 612, 616-620, 98 Cal. Rptr. 559]* .

[c] Expiration of Brokerage Contract

If a definite time for the broker's agency is fixed in the employment agreement, his or her authority terminates on the

lapse of the time [*Civ. Code 2355(a)*; *Preston v. Carnation Co. (1961) 196 Cal. App. 2d 43, 46, 16 Cal. Rptr. 240]* . The expiration date of a brokerage contract cannot be extended through an oral agreement [*Miller v. Cortese (1954) 125 Cal. App. 2d 656, 659-660, 271 P.2d 87]* .

However, notwithstanding the termination of the broker's authority to act as an agent on behalf of the principal, the broker may still recover a commission for a sale subsequently consummated with a prospect with whom the broker had negotiated during the listing period if the employment contract includes a "safety clause" [*see § 103.20[9]*] or if the principal waives the termination date [*see § 103.20[8]*].

PRACTICE TIP:

Safety Clause Protects Broker's Interests. As noted above, form listing agreement contracts, including the form currently published by the California Association of Realtors ("CAR"), include safety clauses that provide for the recovery of a commission if certain steps are taken after the expiration of the listing period. CAR Form A-14 (revised 1/96) provides in Paragraph 5(a)(2) for recovery of a commission "if within _____ calendar days after expiration of the Listing Period, or any extension, the Property is sold, conveyed, leased, or otherwise transferred to anyone with whom Broker or a cooperating broker has had negotiations, provided the Broker gives Seller, prior to or within five [or _____] days after expiration of the Listing Period or any extension, a written notice including the name(s) of the prospective purchaser(s)." Such a clause protects the broker or agent by assuring compensation for his or her work on the transaction. *By Jeffrey S. Martin*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsTerminationsGeneral OverviewBusiness & Corporate LawAgency RelationshipsTerminationsExpiration of TimeReal Property LawBrokersBrokerage Agreements

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A. Brokers Generally

10-103 California Forms of Pleading and Practice--Annotated §§ 103.14-103.19

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[Reserved]

§§ 103.14[Reserved]

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Volume 10: Boundaries thru Captions and Introductions-Chs. 101-108
Chapter 103 BROKERS
PART II. LEGAL BACKGROUND
B. Actions by Brokers

10-103 California Forms of Pleading and Practice--Annotated § 103.20

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§ 103.20 Broker's Action for Commission

[1] Broker's Right to Commission

It is well established that, in the absence of any specific agreement to the contrary, a broker employed to sell real or personal property has earned his or her commission when, within the life of his or her employment contract, or any extension of that term, the broker has done any of the following [*Twogood v. Monnette (1923) 191 Cal. 103, 107, 215 P. 542* ; *R.J. Kuhl Corp. v. Sullivan (1993) 13 Cal. App. 4th 1589, 1599-1600, 17 Cal. Rptr. 2d 425]* :

- Produced a person who is ready, willing, and able to purchase the property on terms satisfactory to the seller, and has obtained a binding and valid contract for the sale on terms proposed by the seller.

- Brought the seller and buyer together and thus enabled them to enter into a contract of sale.

- Produced such a purchaser (ready, willing, and able to buy) who has verbally accepted the seller's terms and offered to enter into a written contract embodying those terms and binding on both parties.

In these instances, the broker's right to a commission accrues when the contract of sale is executed or when an opportunity to make this contract is given the seller. The broker becomes entitled to the commission even though the seller is unable or unwilling to complete the sale [*Twogood v. Monnette (1923) 191 Cal. 103, 107, 215 P. 542* ; *R.J. Kuhl Corp. v. Sullivan (1993) 13 Cal App 4th 1589, 1599-1600, 17 Cal. Rptr. 2d 425]* .

For forms of complaints for the recovery of a commission generally, see *§§ 103.70 -103.79*. For allegations for use in a complaint for the recovery of a commission for leasing a property, see *§ 103.77[1]*.

[2] Contract Provisions

As stated in [1], *above*, the broker earns his or her commission in the above instances *in the absence of any specific agreement to the contrary*. The parties to a listing agreement are entitled to make the broker's employment and his or her right to compensation depend on any lawful condition that they agree to insert in the agreement, and the listing agreement is strictly construed according to its terms [*Blank v. Borden (1974) 11 Cal. 3d 963, 969, 972 n. 8, 115 Cal. Rptr. 31, 524 P.2d 127]* .

For example, the agreement may provide that no commission will be earned until the happening of a specific event or contingency or upon certain defined terms and conditions, such as consummation of the sale, or upon receipt of funds by the seller from an escrow [*Steve Schmidt & Co. v. Berry (1986) 183 Cal. App. 3d 1299, 1305, 228 Cal. Rptr. 689]* . For a form of an affirmative defense to a complaint for the recovery of a commission based on the fact that certain conditions were not met, see *§ 103.83[1]*.

The agreement may also provide that the broker will receive the full amount of the commission if the owner withdraws the property from the market [*Blank v. Borden (1974) 11 Cal. 3d 963, 969, 115 Cal. Rptr. 31, 524 P.2d 127]* . If the seller unilaterally terminates the agency relationship with a broker and thereafter sells the property during the exclusive listing period through another broker, the seller will be liable to the first broker for the commission based on breach of the listing agreement [*Century 21 Butler Realty, Inc. v. Vasquez (1995) 41 Cal. App. 4th 888, 892, 49 Cal. Rptr. 2d 1* (agency agreement specifically provided that broker would be compensated if the property was sold during the listing period, irrespective of agency relationships)].

When the listing agreement is prepared by a broker, any uncertainty in its provisions relating to the commission will be construed in favor of the seller [*Century 21 Butler Realty, Inc. v. Vasquez (1995) 41 Cal. App. 4th 888, 891, 49 Cal. Rptr. 2d 1]* .

When the only agreement to pay a broker a commission is contained in the contract between his or her principal and the customer, the broker's right to compensation is dependent on performance of that contract. If the sale is not consummated, the commission does not become due [*City of Turlock v. Paul M. Zagaris, Inc. (1989) 209 Cal. App. 3d 189, 193, 256 Cal. Rptr. 902]* .

[3] Ready, Willing, and Able Buyer

The readiness and willingness of a person to purchase the subject property can be shown only by an offer on his or her part to purchase. Unless the prospective buyer has actually entered into a contract binding him or her to a purchase, or has offered to the seller, and not merely the broker, to enter into such a contract, he or she cannot be considered a ready and willing buyer. To entitle the broker to a commission, the prospective buyer must be willing to purchase on the terms prescribed in the broker's employment contract. The offer to purchase on those terms must be unconditional [*Martin v. Culver Enterprises, Inc. (1966) 239 Cal. App. 2d 925, 929, 49 Cal. Rptr. 149]* .

A purchaser is "able" when he or she has the legal capacity and the financial ability to purchase the property. "Financial ability" means that the purchaser has sufficient resources available to him or her to consummate the transaction when the time comes for him or her to do so. Although the purchaser is not required to have the ready cash at the time he or she makes the offer, the purchaser must have sufficient property, credit, or other assets at that time that will reasonably enable him or her to obtain the requisite funds at the prescribed time [*Steve Schmidt & Co. v. Berry (1986) 183 Cal. App. 3d 1299, 1307, 228 Cal. Rptr. 689]* .

When a seller enters into a valid unconditional contract of sale with a purchaser procured by a broker, the purchaser's acceptability is conclusively presumed because the seller is estopped to deny the qualifications of a purchaser with whom he or she is willing to contract [*Edwards v. Billow (1948) 31 Cal. 2d 350, 359-360, 188 P.2d 748]* . In contrast,

when the contract is conditional, the broker's commission is not earned if the condition is not performed or is waived [*Kopf v. Milam (1963) 60 Cal. 2d 600, 605, 35 Cal. Rptr. 614, 387 P.2d 390* ; *see Keystone Mortgage Co. v. MacDonald (1967) 254 Cal. App. 2d 808, 812-816, 62 Cal. Rptr. 562* (broker did not earn commission prior to fulfillment of loan contingency in sales agreement executed by seller)]. Once any conditions in the contract have been met, the broker's commission is due. It makes no difference if the transaction is not thereafter consummated [*Weber v. Ross (1958) 159 Cal. App. 2d 77, 80-81, 323 P.2d 465]* .

[4] Broker as Procuring Cause

In the absence of a special contract, such as one giving the broker the exclusive right to sell the subject property, the broker must show not only that he or she has produced a purchaser who is ready, willing, and able to purchase the subject property, but also that he or she was the efficient agent or procuring cause of the sale. The procuring cause is the originating cause that ultimately leads to the conclusion of the transaction. However, the broker need not be the first one to bring to the attention of the purchaser the fact that the property in question was for sale [*Rose v. Hunter (1957) 155 Cal. App. 2d 319, 322-323, 317 P.2d 1027]* .

To establish that a broker is the procuring cause, it must affirmatively appear that the purchaser, as the result of the broker's efforts, was induced to buy the property, or that a prospective purchaser was ready, able, and willing to buy on the terms and at the price specified by the owner [*Duffy v. Campbell (1967) 250 Cal. App. 2d 662, 667, 58 Cal. Rptr. 653]* . It is not enough that the broker contributes indirectly or incidentally to the sale by imparting information that tends to arouse interest. The broker must set in motion a chain of events that, without a break in the continuity of the events, causes the buyer and seller to come to terms as a proximate result of the broker's peculiar activities [*Sessions v. Pacific Improvement Co. (1922) 57 Cal. App. 1, 17, 206 P. 653]* .

Whether or not the sale is primarily the result of the broker's efforts is a question of fact [*Buckaloo v. Johnson (1975) 14 Cal. 3d 815, 829, 122 Cal. Rptr. 745, 537 P.2d 865* (disapproved on other grounds in *Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 393 n. 5, 45 Cal. Rptr. 2d 436, 902 P.2d 740*)].

PRACTICE TIP:

Broker Disputes Resolved By Local Association of Realtors. If there is a dispute as to which cooperating broker is the procuring cause of the sale, and all interested brokers are members of, and therefore subject to the rules of, the local association of realtors, this issue would normally be submitted to a committee of the local association of realtors for resolution by arbitration proceedings. *By Linda Breen Pierce*

PRACTICE TIP: Local Rules Regarding Procuring Cause. As noted in the Practice Tip *above*, procuring cause issues are often resolved through arbitrations before local associations. It is not uncommon for the local associations to have rules addressing the issue of procuring cause, which obviously should be reviewed in representing a party to such an arbitration. *By Jeffrey S. Martin*

[5] License Requirements

It is unlawful for any person to engage in the business of, act in the capacity of, or advertise or assume to act as a real estate broker or a real estate salesperson without first obtaining a real estate license [*Bus. & Prof. Code § 10130*]. Any person engaged in the business or acting in the capacity of a real estate broker or a real estate salesperson must allege and prove that he or she was a duly licensed real estate broker or real estate salesperson at the time any alleged cause of action arose as a condition to bringing or maintaining an action in the courts of California for the collection of compensation for the performance of any of the acts for which a real estate license is required [*Bus. & Prof. Code § 10136*].

Thus, an agreement employing a person to act as a real estate broker who is not licensed as such is illegal, void, and unenforceable [*Fellom v. Adams (1969) 274 Cal. App. 2d 855, 862, 79 Cal. Rptr. 633]* .

Furthermore, it is unlawful for a real estate broker or salesperson to split a commission with, or make other payments for services for which a real estate license is required to, any person who is not known to be or who does not present evidence to the broker or salesperson that he or she is licensed at the time the compensation is earned. Likewise, it is unlawful for an unlicensed person to receive payment for or perform these services [*Bus. & Prof. Code §§ 10137-10138*; *Richardson v. Roberts (1962) 210 Cal. App. 2d 603, 606, 26 Cal. Rptr. 829]* . Therefore, if a broker's performance includes services of an unlicensed person performing acts for which a real estate license is required, the broker cannot recover a commission from the seller unless he or she was justifiably ignorant of the unlicensed person's unlawful acts [*Preach v. Monter Rainbow (1993) 12 Cal. App. 4th 1441, 1454-1458, 16 Cal. Rptr. 2d 320]* .

For a form of an affirmative defense to a complaint for the recovery of a commission based on the absence of a broker's license, see *§ 103.81[1]*.

PRACTICE TIP:

Broker/Agent Must Be Licensed Only at Time Right to Recover Commission Arose. In order to recover a commission, a real estate broker or agent must prove that he or she was a duly licensed real estate broker or real estate salesperson "*at the time the alleged cause of action arose*" [*Bus. & Prof. Code § 10136* (emphasis added)]. This requirement does not mean that the real estate broker or agent must be licensed throughout the entire transaction. A license is required at the time that the "alleged cause of action arose" for a commission [*see Estate of Lopez [1992] 8 Cal App. 4th 317, 321-324, 10 Cal Rptr. 2d 67* (broker was awarded a commission because his license was active at the time the sale was completed, even though it had lapsed when the sale was arranged and confirmed in probate)]. *By Jeffrey S. Martin*

PRACTICE TIP: Use of Unlicensed Assistance. Many real estate brokers and agents employ non-licensed individuals to assist them in their day-to-day work. These assistants can engage in many activities for or on behalf of the broker or agent that do not require a license. An unlicensed assistant engaged in activities that require a license can result in liability exposure for the licensed broker or agent. Brokers and agents, as well as their counsel, must be aware of the limits placed on unlicensed assistants. The California Department of Real Estate has set forth guidelines with respect to the use of unlicensed assistants. *By Jeffrey S. Martin*

[6] Principal's Bad Faith or Fraud

The seller owes a duty to the broker not to act arbitrarily or in bad faith to prevent consummation of a transaction when the broker has found a prospective buyer who is ready, willing, and able to purchase the property, and the prospective buyer and prospective seller have agreed on the terms and conditions of the sale. If the sale is not consummated because the seller, acting arbitrarily or in bad faith, prevents consummation, the broker is entitled to the commission even though his or her contract provides that payment is to be made out of the proceeds of the sale [*Stromer v. Browning (1966) 65 Cal. 2d 421, 424-425, 55 Cal. Rptr. 18, 420 P.2d 730]* . This rule appears to be grounded on the implied covenant of good faith and fair dealing, and applies equally to a broker's employment agreement with a buyer [*R.J. Kuhl Corp. v. Sullivan (1993) 13 Cal. App. 4th 1589, 1601, 17 Cal. Rptr. 2d 425]* or a lessor [*Colwell Co. v. Hubert (1967) 248 Cal. App. 2d 567, 576, 56 Cal. Rptr. 753]* .

An example of a seller's breach of the implied covenant of good faith occurred when the seller's counteroffer, which included a promise to pay a commission, lapsed and the seller and buyer thereafter independently reached an agreement on essentially the same terms, except for eliminating the payment to the broker [*Torelli v. J.P. Enterprises, Inc. (1997) 52 Cal. App. 4th 1250, 1254-1257, 61 Cal. Rptr. 2d 76]* .

Similarly, if the sale is not consummated as a result of the principal's fraudulent conduct, the broker is nevertheless entitled to the commission. Fraud, however, is never presumed and must be established by clear proof. In such a situation there is a presumption of fair dealing that approximates in strength that of innocence in the criminal law [*Sanstrum v. Gonser (1956) 140 Cal. App. 2d 732, 742, 295 P.2d 532]* .

For allegations for use in a complaint for recovery of a commission based on the seller's breach of the implied covenant of good faith and fair dealing, see *§ 103.78[1]*.

[7] Seller Renders Broker's Performance Impossible

A seller becomes liable for the broker's commission if the seller renders the broker's performance impossible. This is so even if the broker had not yet performed by procuring a purchaser during the listing period or could not show he or she was the procuring cause of the sale [*Howard Gitlen & Associates, Inc. v. Ameri (1989) 208 Cal. App. 3d 90, 96, 256 Cal. Rptr. 36* ; *see Gribin Von Dyl & Associates, Inc. v. Kovalsky (1986) 185 Cal. App. 3d 653, 656, 230 Cal. Rptr. 50* (seller of condominium units violated the implied covenant of good faith and prevented the broker's performance by raising the sales prices to an unreasonable level and failing to install billboards as required under the agreement with the broker)].

However, a breach of the employment agreement by an owner will not necessarily render the broker's performance impossible, and in that case, the broker may not be entitled to recover a commission [*Metzenbaum v. R.O.S. Associates (1986) 188 Cal. App. 3d 202, 210-213, 232 Cal. Rptr. 741* (owner's agreement with a second mortgage broker within the last few days of the original broker's listing was not the proximate cause of the broker's failure to perform when the original broker was unaware of the agreement with the second broker and it was evident that the original broker was unable to obtain an acceptable loan from the only lender with whom he was negotiating); *see also Never v. King (1969) 276 Cal. App. 2d 461, 81 Cal. Rptr. 161* (similar facts and ruling)].

For allegations for use in a complaint for the recovery of a commission based on the seller rendering the broker's performance impossible, see *§ 103.79[1]*.

PRACTICE TIP:

Distinction Between Real Estate Brokers and Mortgage Loan Brokers on Proximate Cause Issues. The burden of a mortgage loan broker to prove that he or she could have performed but for the owner's breach [*see* discussion of *Metzenbaum v. R.O.S. Associates (1986) 188 Cal. App. 3d 202, 232 Cal. Rptr. 741* , *above*], may not be as difficult to surmount for a real estate broker. For example, if a real estate broker lists the property on a multiple listing service, inviting the cooperation of many other brokers, it is plausible that any one of the cooperating brokers could bring in a buyer at any time within the listing period. This situation can be distinguished from the typical situation for a mortgage loan broker, who does not rely on other mortgage loan brokers to provide a lender for his or her clients. *By Linda Breen Pierce*

[8] Seller's Waiver of Expiration Date of Contract

The time limit in a written contract of employment will be considered as waived and the broker will be entitled to a commission if the following occur: (1) after the time limit provided in the contract expires, the owner urges and encourages the broker to continue his or her efforts to find a purchaser for the property; (2) the broker continues with the knowledge, approval, and encouragement of the owner; and (3) the owner sells the property to a purchaser who is produced as a result of the broker's efforts [*Kraemer v. Smith (1960) 179 Cal. App. 2d 52, 55, 3 Cal. Rptr. 471* ; *see Hughes v. Morrison (1984) 160 Cal. App. 3d 103, 105-106, 206 Cal. Rptr. 321* (broker entitled to commission for repurchase by original buyer after foreclosure action)]. However, the waiver lasts no longer than the time during which

the owner encourages the broker to render his or her services and the broker diligently complies with the owner's request [*Augustine v. Trucco (1954) 124 Cal. App. 2d 229, 239, 268 P.2d 780]* .

For allegations for use in a complaint for recovery of a commission based on the seller's waiver of the expiration date in a brokerage contract, see *§ 103.76[1]*.

[9] Safety Clause

[a] Effect; Subagents

When a broker shows property during the listing period to a prospective purchaser, and there is afterwards a sale to that prospect, the broker may be entitled to a commission even though he or she was not the procuring cause of the sale, if the listing agreement so provides [*Leonard v. Fallas (1959) 51 Cal. 2d 649, 652, 335 P.2d 665]* .

Often a listing agreement will provide that the broker may recover under a safety clause if the broker or "any subagent or cooperating broker" had negotiations with the eventual purchaser during the listing period. However, a selling agent who negotiated with the eventual purchaser during the listing period will not necessarily be deemed to be a subagent or cooperating broker of the listing agent [*see* *Simank Realty, Inc. v. DeMarco (1970) 6 Cal. App. 3d 610, 617, 86 Cal. Rptr. 212* (the selling agent was not a subagent of the listing broker merely because he was another broker in the same community, when there were no dealings between the listing agent and the selling agent or the listing agent and the buyer)].

PRACTICE TIP:

Effect of MLS Listing on Status of Subagent. The opinion in *Simank Realty, Inc. v. DeMarco (1970) 6 Cal. App. 3d 610, 617, 86 Cal. Rptr. 212* (discussed *above*) did not mention whether the listing was included in the MLS (Multiple Listing Service). If a listing is included in the MLS and the MLS rules provide that a cooperating broker becomes a subagent, it could be argued that an agent negotiating with a buyer during the listing period is a subagent of the listing broker. In one case the court held that an MLS "is a cooperative arrangement by real estate brokers through local boards for the pooling of listings--the sharing of information about properties for sale *so that all subscribers to the service may have an opportunity to act as subagents* in procuring a buyer" [*Derish v. San Mateo-Burlingame Bd. of Realtors (1982) 136 Cal. App. 3d 534, 538, 186 Cal. Rptr. 390* (emphasis added)]. However, the question of whether a subagency is created is a question of fact and must be determined on a case-by-case basis [*see* *§ 103.12[2][b]* (subagency)]. *By Linda Breen Pierce*

[b] Negotiated Agreement; List of Names

For these purposes, the term "negotiated" has been defined to mean "to communicate or confer with another so as to arrive at the settlement of some matter: meet with another so as to arrive through discussion at some kind of agreement or compromise about something." The fact that the agreement negotiated varies from the stated intention of the seller in the listing agreement will not deprive a broker of a commission under a safety clause [*Al Herd, Inc. v. Isaac (1969) 271 Cal. App. 2d 749, 752, 76 Cal. Rptr. 697* (broker could recover when lease was negotiated, notwithstanding the fact that the listing agreement contemplated a sale)].

If the listing agreement requires the broker to provide the seller with a list of the names of the parties with whom the broker has negotiated by a certain deadline, that condition will be deemed satisfied as to a buyer for whom the listing broker presents an offer to the seller during the listing period. An additional or separate notice is not required [*Al Herd, Inc. v. Isaac (1969) 271 Cal. App. 2d 749, 752, 76 Cal. Rptr. 697]* .

For allegations for use in a complaint for recovery of a commission based on a safety clause provision, see *§ 103.75[1]*.

[10] Broker's Action Against Buyer

[a] Implied Promise to Complete Transaction

When a buyer retains or solicits the broker to find or show him or her property, the broker finds property satisfactory to the buyer that the owner agrees to sell at the price offered, and the buyer knows that the broker will earn a commission from the owner on the consummation of the transaction, a promise is implied on the part of the buyer to complete the transaction with the owner. If the buyer fails or refuses to purchase the property without a valid reason, the buyer becomes liable to the broker for a breach of this implied promise. The broker's damages are measured by the amount of the commission he or she would have earned if the buyer had performed [*Chan v. Tsang (1991) 1 Cal. App. 4th 1578, 1586-1587, 3 Cal. Rptr. 2d 14]* .

[b] Third Party Beneficiary Theory

Alternatively, the broker can recover a commission from the defaulting buyer on a third party beneficiary theory. A contract made expressly for the benefit of a third party is enforceable by that party at any time before the parties rescind it [*Civ. Code § 1559*]. For example, an agreement between a seller and buyer for the purchase of real property that expressly provides for payment of a commission to a broker makes the broker a third party beneficiary [*Donnellan v. Rocks (1972) 22 Cal. App. 3d 925, 930, 99 Cal. Rptr. 692]* .

In order for a broker to be a third party beneficiary under *Civ. Code § 1559*, it is not necessary that the broker be specifically named as a beneficiary, but only that the contract be made expressly for the benefit of that third person. In this context, "expressly" means in an express manner, in direct or unmistakable terms, explicitly, definitely, or directly [*Watson v. Aced (1957) 156 Cal. App. 2d 87, 91-92, 319 P.2d 83]* .

[c] Implied Covenant of Good Faith and Fair Dealing

When a commission is conditioned on completion of a purchase transaction, the broker's principal cannot refuse to perform under the purchase contract and thereby obtain an economic advantage unfairly derived from the broker's services. To do so violates the implied covenant of good faith and fair dealing and excuses the nonoccurrence of the condition [*R.J. Kuhl Corp. v. Sullivan (1993) 13 Cal. App. 4th 1589, 1593, 17 Cal. Rptr. 2d 425* (buyer liable to broker for transferring right to buy to third party who bought property without paying commission)].

[11] Cooperating Broker's Standing to Sue

A cooperating broker may have standing to sue a seller for an unpaid commission. In one case, a cooperating broker had standing to sue when the seller refused to sell on the terms of the listing agreement. The listing agreement provided that the owner authorized the listing agent to cooperate with other brokers and to divide any commission due under the agreement with them. These provisions created an implied promise to the cooperating broker to pay the commission because the owner knew of the listing broker's representation and the reliance by the cooperating broker [*Steve Schmidt & Co. v. Berry (1986) 183 Cal. App. 3d 1299, 1312-1313, 228 Cal. Rptr. 689]* . In addition, the court held that liability also could be based on a third-party beneficiary theory because cooperating brokers were members of a class that was intended to be directly benefited by the seller's promise to pay a commission [*Steve Schmidt & Co. v. Berry (1986) 183 Cal. App. 3d 1299, 1313, 228 Cal. Rptr. 689]* .

However, a cooperating broker could not bring an action against the seller in a case in which (1) the listing agreement authorized the broker to cooperate with subagents, but did not specifically refer to dividing the commission with cooperating brokers; (2) there was no written agreement between the listing broker and the cooperating broker; and (3) the commission was paid in full through escrow. In such a case, the question of whether the cooperating broker was the procuring cause of the sale is not decisive. His or her recovery from the listing broker is limited to the terms of the cooperation agreement. Whether the broker has a direct cause of action against the owner depends on whether the owner

was aware of, or expressly authorized, the cooperation agreement between the listing broker and the cooperating broker, whether the seller accepted the buyer's offer by executing a contract of sale, and whether the sale to the buyer was consummated [*Colbough v. Hartline (1994) 29 Cal. App. 4th 1516, 1523-1524, 35 Cal. Rptr. 2d 213]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawPerformanceImpossibility of PerformanceGeneral OverviewReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersRight to Commissions

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B. Actions by Brokers

10-103 California Forms of Pleading and Practice--Annotated § 103.21

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§ 103.21 Defenses to Broker's Action for Commission

[1] Statute of Frauds

[a] Basic Requirement; Applicability to Broker's Services

An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate, or to lease real estate for a longer period than one year, or to procure, introduce, or find a purchaser or seller of real estate or a lessee or lessor of real estate when the lease is for a longer period than one year, for compensation or a commission is invalid unless the agreement itself, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his or her agent [*Civ. Code § 1624(a)(4)*].

In determining the nature of the services that will bring an employment contract within *Civ. Code § 1624(a)(4)*, the phrase "to sell or purchase" includes "to aid or assist in the purchase or sale" of real estate. This broad construction of the term conforms with one of the primary purposes of the statute, which is the protection of real estate owners from the assertion of false claims by brokers and agents. For example, a contract employing a broker to obtain an option for the purchase of real property comes within the statute because an option is viewed as aiding or assisting in the purchase of real estate [*Pac. etc. Dev. Corp. v. Western Pac. R.R. Co. (1956) 47 Cal. 2d 62, 67-68, 301 P.2d 825]* .

On the other hand, a licensed broker may be able under appropriate circumstances to recover under an oral agreement or in quantum meruit for certain services other than the purchase, sale, or leasing of real property [*Phillippe v. Shapell Industries (1987) 43 Cal. 3d 1247, 1255, 241 Cal. Rptr. 22, 743 P.2d 1279* ; *see Owen v. National Container Corp. of Cal. (1952) 115 Cal. App. 2d 21, 25-26, 251 P.2d 765* (a broker's special services consisting of obtaining surveys, furnishing plans, specifications, and estimates, and negotiating for the construction of a building could be the subject of a valid oral agreement); *see also Carey v. Cusack (1966) 245 Cal. App. 2d 57, 67-69, 54 Cal. Rptr. 244* (broker could

recover in quantum meruit for services rendered in subdividing property)].

When a broker's only agreement with his or her principal relates solely to specifically described property, the principal is not liable to the broker for a commission on the purchase of different property unless the broker's written employment agreement covers the other property [*Phillippe v. Shapell Industries (1987) 43 Cal. 3d 1247, 1259, 241 Cal. Rptr. 22, 743 P.2d 1279]* .

For a form of an affirmative defense to a complaint for the recovery of a commission based on the statute of frauds, see *§ 103.80[1]*.

PRACTICE TIP:

Recovery of Commission Without a Writing. Under certain circumstances, a broker or agent may collect a commission without a written agreement [*Torelli v. J.P. Enterprises, Inc. (1997) 52 Cal. App. 4th 1250, 61 Cal. Rptr. 2d 76]* . In *Torelli*, the plaintiff, who previously listed a residential income property owned by the defendant, located a potential buyer for the property. Plaintiff prepared an offer, which included a commission for plaintiff. Defendant seller received the offer and responded with a counter-offer that included the same commission arrangement. The counter-offer was not accepted. Shortly thereafter, the buyers' broker drafted a new offer that was identical to the previous offer except that it did not include the original commission split. The second offer was accepted. Plaintiff broker sued for the commission.

The *Torelli* court held that even though there was no written commission agreement, the seller's promise to pay a commission did not terminate with the expiration of the original counter-offer. The court found that the seller was bound by an implied promise not to deprive the plaintiff-broker of the benefits of the bargain to pay the commission. The *Torelli* court relied heavily on principles of equity, in essence holding that a broker could not be cheated out of his or her commission by the simple artifice of entering into direct negotiations and making substantially the same bargain, albeit without the commission [*Torelli v. J.P. Enterprises, Inc. (1997) 52 Cal. App. 4th 1250, 1256-1257, 61 Cal. Rptr. 2d 76]* .

Regardless of the outcome of the *Torelli* decision, it is better practice to obtain a written commission agreement so that the broker or agent does not have to rely on the generosity of the courts. *By Jeffrey S. Martin*

[b] Sufficiency of Writing

The essential requirements of *Civ. Code § 1624(a)(4)* are that there be some written evidence of (1) subscription by the party to be charged, and (2) the fact of employment, in other words, the authority to act [*Friddle v. Epstein (1993) 16 Cal. App. 4th 1649, 1655, 21 Cal. Rptr. 2d 85]* . The writing need not include all of the terms of the contract between the broker and principal. When the above two requirements are met, the other terms, including the amount of commission, and even the agreement to pay the commission, may be shown by parol [*Rader Co. v. Stone (1986) 178 Cal. App. 3d 10, 21, 223 Cal. Rptr. 806]* . Also, if there is reference to the employment, the agreement to compensate is permissibly inferred; conversely, when there is reference to a commission, the broker's authority to act may be inferred [*Seck v. Foulks (1972) 25 Cal. App. 3d 556, 567, 102 Cal. Rptr. 170]* .

With regard to the subscription requirement of the statute of frauds, if one of a series of papers that appear to have some relation to the same matter is signed by the party to be charged, this is enough, as all the papers are to be considered together as forming one contract or memorandum. Further, subscription does not require that the signature appear at the end of the instrument, nor that it be handwritten. The name of the party will satisfy the statutory requirement if it is intended as a signature, that is, as an authentication, but not if it appears for some other purpose, as for mere identification [*Rader Co. v. Stone (1986) 178 Cal. App. 3d 10, 23, 223 Cal. Rptr. 806]* .

In addition to showing the requisite authority to act, the writing must describe the property with sufficient certainty to identify it [*Woodbridge Realty v. Plymouth Dev. Corp. (1955) 130 Cal. App. 2d 270, 274, 278 P.2d 713]* . Much greater liberality is allowed in construing and curing defective descriptions in brokers' contracts than in a deed of grant of land, for, so far as the statute of frauds is concerned, the terms of the employment are the essential part. These contracts will not be declared void merely because of a defect, uncertainty, or ambiguity in the description of the property to be sold or exchanged when the defect can be cured by the allegation or proof of extrinsic facts and circumstances [*Russell v. Ramm (1927) 200 Cal. 348, 370, 254 P. 532* ; *Babcock v. Houston (1973) 33 Cal. App. 3d 858, 864, 109 Cal. Rptr. 454]* .

[c] Exceptions

[i] Performance With Consent

If the broker completes his or her part of a contract with the consent of the seller after the employment contract has expired, his or her performance will take the contract out of the statute of frauds [*Love v. Gulyas (1948) 87 Cal. App. 2d 608, 619, 197 P.2d 405* ; *see also § 103.20[8]* (seller's waiver of expiration date)].

[ii] Equitable Estoppel

A licensed broker cannot rely on the doctrine of equitable estoppel to recover a commission based on an oral agreement unless there is a showing of actual fraud by the party to be charged under the invalid oral agreement. The licensed broker is presumed to know that contracts for real estate commissions are invalid and unenforceable unless put in writing and subscribed by the person to be charged. Stated another way, the broker's reliance on the oral contract is not reasonable in light of the broker's presumed knowledge of the requirements of the statute of frauds. To give rise to equitable estoppel, the promisee's reliance must be reasonable [*Phillippe v. Shapell Industries (1987) 43 Cal. 3d 1247, 1259-1264, 241 Cal. Rptr. 22, 743 P.2d 1279]* .

However, this restriction against the defense of equitable estoppel does not apply to the finder, who is not required to be licensed. Even though an agreement for a finder's fee is subject to the statute of frauds requirement, the doctrine of estoppel to plead the statute of frauds may be applied in a finder's fee arrangement when necessary to prevent either unconscionable injury or unjust enrichment [*Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 25-28, 216 Cal. Rptr. 130, 702 P.2d 212]* .

[iii] Actual Fraud

The statute of frauds does not preclude an action for actual fraud. To recover for actual fraud, the broker must show that he or she reasonably relied on misrepresentations. A broker cannot reasonably rely on an oral promise to pay a commission or an oral promise to later execute a writing. However, a broker might reasonably rely on a representation that the necessary contract had actually been executed [*Phillippe v. Shapell Industries (1987) 43 Cal. 3d 1247, 1269-1270, 241 Cal. Rptr. 22, 743 P.2d 1279]* .

[2] Breach of Broker's Fiduciary Duty

A common defense to an action for a broker's commission is a breach of the broker's fiduciary duty to his or her principal [*see § 103.31[1] -[7]* (discussion of various fiduciary duties)]. However, not all breaches of a fiduciary duty will deprive the broker of a commission. For example, when a broker failed to disclose to the seller-client that he was lending his commission to the buyer as part of the down payment, the court reversed the trial court's ruling depriving the broker of his commission. The court held that while the failure to disclose was a breach of the broker's fiduciary duty to disclose a material fact, it appeared to have been inadvertent and there was no attempt made by the broker to conceal the prospective loan [*Ziswasser v. Cole & Cowan, Inc. (1985) 164 Cal. App. 3d 417, 423, 425, 210 Cal. Rptr. 428]* .

For a form of an affirmative defense to a complaint for the recovery of a commission based on a breach of the broker's fiduciary duty, see *§ 103.84[1]*.

[3] No Termination Date in Contract

An exclusive employment agreement for compensation must contain a definite, specified date of final and complete termination [*see Bus. & Prof. Code § 10176(f)*; *see also Nystrom v. First Nat. Bank of Fresno (1978) 81 Cal. App. 3d 759, 764-766, 146 Cal. Rptr. 711]* . However, an employment contract that fails to comply with this requirement may still permit a broker to recover a commission for property sold prior to the owner's rescission, but not for damages for an anticipatory breach. This exception is based on the theory that to deny the broker a commission would result in unjust enrichment to the principal [*Babcock v. Houston (1973) 33 Cal. App. 3d 858, 863, 109 Cal. Rptr. 454]* .

[4] Failure to Disclose Dual Agency

A real estate agent must refrain from dual representation in a sale transaction unless he or she obtains the consent of both principals after full disclosure [*see § 103.12[2][c]* (dual agency)]. In the context of residential real estate transactions, this disclosure must be in writing [*Civ. Code § 2079.17*; *see also Smith v. Rickard (1988) 205 Cal. App. 3d 1354, 1363, 254 Cal. Rptr. 633]* . Unless both principals know of the dual agency at the time of the transaction, the agent cannot recover a commission from either [*L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp. (1991) 1 Cal. App. 4th 300, 304-305, 1 Cal. Rptr. 2d 680]* .

For a form of an affirmative defense allegation to a complaint for the recovery of a commission based on the broker's failure to disclose a dual agency, see *§ 103.82[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawStatutes of FraudsRequirementsGeneral OverviewReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawBrokersRight to CommissionsTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral Overview

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10-103 California Forms of Pleading and Practice--Annotated § 103.22

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§ 103.22 Intentional Interference With Broker's Contract

The following are the elements that a plaintiff must plead to state a cause of action for intentional interference with contractual relations [*Pacific Gas & Electric Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1126, 270 Cal. Rptr. 1, 791 P.2d 587]* :

- A valid contract between plaintiff and a third party.
- Defendant's knowledge of this contract.
- Defendant's intentional acts designed to induce a breach or disruption of the contractual relationship.
- Actual breach or disruption of the contractual relationship.
- Resulting damage.

PRACTICE TIP:

Relief Against Competing Broker/Agent. Claims for intentional interference with contract and interference with prospective economic advantage [*see § 103.23*] may be brought against a third party broker or agent who has conducted himself or herself in such a manner as to damage a relationship between the broker/agent and his or her principal or potential principal. *By Jeffrey S. Martin*

For further discussion and forms relating to a cause of action for intentional interference with contractual relations in general, see Ch. 565, *Unfair Competition , §§ 565.130-565.137, 565.290-565.294*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersBrokerage AgreementsReal Property LawBrokersRight to CommissionsTortsBusiness TortsCommercial InterferenceContractsGeneral Overview

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§ 103.23 Interference With Broker's Prospective Economic Advantage

In a real estate brokerage context, the elements of a cause of action for interference with prospective economic relations are as follows [*Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 389-393, 45 Cal. Rptr. 2d 436, 902 P.2d 740]* :

- An economic relationship between a broker and a seller or a broker and a buyer containing the probability of future economic benefit to the broker.
- Knowledge by the defendant of the existence of the relationship.
- Intentional wrongful acts or conduct on the part of the defendant designed to interfere with or disrupt the relationship.
- Actual disruption of the relationship.
- Damages to the plaintiff proximately caused by the acts of the defendant.

In addition, the plaintiff must allege that the defendant's conduct was "wrongful by some measure beyond the fact of the interference itself" [*Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 392-393, 45 Cal. Rptr. 2d 436, 902 P.2d 740]* . In this context, "an act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard" [*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1153-1154, 1164-1165, 131 Cal. Rptr. 2d 29, 63 P.3d 937* ("act of interference with prospective §§ 564.130-565.137, 565.290-565.294 Della Penna v. Toyota Motor Sales, U.S.A., Inc.

(1995) 11 Cal. 4th 376, 389-393, 45 Cal. Rptr. 2d 436, 902 P.2d 740] Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 392-393, 45 Cal. Rptr. 2d 436, 902 P.2d 740] Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1153-1154, 1164-1165, 131 Cal. Rptr. 2d 29, 63 P.3d 937 economic advantage is not tortious in and of itself" but requires "pleading that a defendant has engaged in an act that was independently wrongful" in order to distinguish "lawful competitive behavior from tortious interference")]. One case held that a broker could assert a claim against another broker for intentional interference with economic advantage based on alleged violations of the Rules of Professional Conduct of the American Industrial Real Estate Association [*Stevenson Real Estate Services, Inc. v. CB Richard Ellis Real Estate Services, Inc. (2006) 138 Cal. App. 4th 1215, 1223, 42 Cal. Rptr. 3d 235]* . The court concluded that in an action between competitors who are bound by well-defined, established rules or standards of a trade, association, or profession, those rules may constitute "a determinable legal standard" within the scope of *Korea Supply* [*Stevenson Real Estate Services, Inc. v. CB Richard Ellis Real Estate Services, Inc. (2006) 138 Cal. App. 4th 1215, 1223, 42 Cal. Rptr. 3d 235]* .

Liability for interference with prospective advantage has evolved as a broader application of the principles underlying the tort of interference with contract. This "more inclusive" tort protects the expectation of an advantageous business relation even in the absence of an existing, legally binding agreement [*Buckaloo v. Johnson (1975) 14 Cal. 3d 815, 822-823,122 Cal. Rptr. 745, 537 P.2d 865* (disapproved on other grounds in *Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 393 n.5, 45 Cal. Rptr. 2d 436, 902 P.2d 740*)]. The two causes of action are similar in many other respects, although the law recognizes a wider range of justification for intrusion into relations that are merely prospective [*Pacific Gas & Electric Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1126, 270 Cal. Rptr. 1, 791 P.2d 587]* .

This cause of action is often alleged when a prospective purchaser negotiates directly with a seller, even though the purchaser is aware of an oral agreement between the seller and the broker to pay the broker a commission. The fact that the oral agreement may be in violation of the statute of frauds is not decisive. The mere fact that a prospective economic relationship has not attained the dignity of a legally enforceable agreement does not permit third parties to interfere with performance. The cases are clear that a prospective purchaser may not induce a seller bound under an oral agreement to breach that agreement and sell to him or her at a price that necessarily excludes the broker [*Buckaloo v. Johnson (1975) 14 Cal. 3d 815, 827, 122 Cal. Rptr. 745, 537 P.2d 865* (disapproved on other grounds in *Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 393 n.5, 45 Cal. Rptr. 2d 436, 902 P.2d 740*)].

PRACTICE TIP:

Relief Against Competing Broker/Agent. Claims for interference with prospective economic advantage and intentional interference with contract [*see § 103.22*] may be brought against a third party broker or agent who has conducted himself or herself in such a manner as to damage a relationship between the broker/agent and his or her principal or potential principal. *By Jeffrey S. Martin*

For further discussion and forms relating to a cause of action for intentional interference with prospective economic advantage in general, see *Ch. 565, Unfair Competition, §§ 565.130 et seq., 565.290 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersBrokerage AgreementsReal Property LawBrokersRight to CommissionsTortsBusiness TortsCommercial InterferenceProspective AdvantageElements

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[Reserved]

§§ 103.24[Reserved]

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10-103 California Forms of Pleading and Practice--Annotated § 103.30

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§ 103.30 Regulatory Duties

[1] Regulatory Statutes and General Law of Agency

Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes [*see § 103.10* (governing law)], and those arising from the general law of agency [*Carleton v. Tortosa (1993) 14 Cal. App. 4th 745, 755, 17 Cal. Rptr. 2d 734]* . Many wrongful acts of a broker can, and often do, constitute both a breach of duty under agency law [*see §§ 103.31* (liability to seller and buyer), 103.33 (liability to third parties)] and a violation of a statutory duty. References to statutory duties affecting brokers are included throughout this Part II(C) where applicable.

The general body of statutes and administrative regulations that pertain to real estate brokers and salespersons are set forth in *Bus. & Prof. Code § 10000 et seq.* ("Real Estate Law") and *10 Cal. Code Reg. § 2700 et seq.* For a general discussion and forms relating to procedures to challenge the denial, suspension, or revocation of a license, see Ch. 471B, *Licensing By Public Agencies* .

[2] Collateral Estoppel Effect of Administrative Ruling

If the Real Estate Commissioner suspends or revokes the license of a broker or salesperson based on the finding of a wrongful act, that ruling may, in certain circumstances, be used to prove the wrongful act in a subsequent civil proceeding between the licensee and another party. For example, in one case, a salesperson's real estate license was revoked based on his fraudulent act as a buyer-agent. The seller later sued the agent and relied on the determination of fraud in the earlier administrative proceeding to prove fraud in the seller's case for damages. The court held that the use of collateral estoppel turns on whether the administrative agency acted in a judicial capacity and resolved disputed issues of fact that the parties had an adequate opportunity to litigate. In this instance, the court concluded that it was proper to use the earlier administrative determination of fraud in the subsequent action by the sellers [*Imen v.*

Glassford (1988) 201 Cal. App. 3d 898, 906-908, 247 Cal. Rptr. 514] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsCollateral EstoppelReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & Regulation

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§ 103.31 Liability of Brokers to Seller and Buyer

[1] Fiduciary Duties Generally

An agent is a fiduciary [*Michelson v. Hamada (1994) 29 Cal. App. 4th 1566, 1579, 36 Cal. Rptr. 2d 343]* . The law imposes on a real estate agent the same obligation of undivided service and loyalty to the client that it imposes on a trustee in favor of the beneficiary [*Rattray v. Scudder (1946) 28 Cal. 2d 214, 222-223, 169 P.2d 371]* . These duties include the duties of trustees set forth in *Prob. Code §§ 16002* (duty of loyalty), 16004 (duty to avoid conflict of interest), 16005 (duty not to undertake adverse trust), and 16009 (duty to keep trust property separate and identified) [*see Civ. Code § 2322(c)*].

Among others, the broker has the duty to do the following [*Loughlin v. Idora Realty Co. (1968) 259 Cal. App. 2d 619, 629, 66 Cal. Rptr. 747* ; *see also Twomey v. Mitchum, Jones & Templeton, Inc. (1968) 262 Cal. App. 2d 690, 709, 69 Cal. Rptr. 222* (stockbrokers)]:

- Treat the principal's affairs with the same standard of care as that of a trustee, which has a duty to administer the trust solely in the interest of the beneficiary [*Prob. Code § 16002(a)*].

- Make to the principal the fullest disclosure of all material facts concerning the transaction that might affect the principal's decision.

- Disclose to the principal all offers to buy the property in addition to the offer accepted.

- Refrain from dual representation in a sale transaction without full disclosure to both principals and

their knowledge and consent.

A real estate agent has a fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings with the client [*see Civ. Code § 2079.16* (agency disclosure form)]. This relationship not only imposes on the agent the duty of acting in the highest good towards the principal but also precludes the agent from obtaining any advantage over the principal by virtue of the agency [*Batson v. Strehlow (1968) 68 Cal. 2d 662, 674-675, 68 Cal. Rptr. 589, 441 P.2d 101]* .

The fiduciary duties of a real estate agent apply equally to a mortgage loan broker [*Wyatt v. Union Mortgage Co. (1979) 24 Cal. 3d 773, 783-784, 157 Cal. Rptr. 392, 598 P.2d 45]* and to a cooperating broker who is a subagent of the primary broker [*Kruse v. Miller (1956) 143 Cal. App. 2d 656, 660, 300 P.2d 855]* .

As discussed in *§ 103.12[1]* (broker-client relationship), an agency relationship can be created by an oral agreement. Although the statute of frauds is applicable to the collection of compensation or commission by the agent or broker [*see § 103.21[1]* (statute of frauds)], it does not apply to a cause of action to recover commissions or secret profits from a fiduciary [*Gann v. Williams Brothers Realty, Inc. (1991) 231 Cal. App. 3d 1698, 1705-1706, 283 Cal. Rptr. 128]* .

PRACTICE TIP:

Agent's Relationship to Buyer or Seller Who Is Not a Client. When an agent represents a seller or a buyer, but not both parties, the agent's fiduciary duties extend to the client only and not to the other party. However, this is gradually becoming a distinction without much of a difference, as the trend is for the courts and the legislature to impose similar duties on the agent with respect to all parties in a transaction without regard to agency relationships. For example, the duty of honest and fair dealing and good faith [*see* [7], *below*], the duty to exercise reasonable care [*see* [2], *below*], and the duty to disclose material facts affecting the desirability of the property [*see* [4], *below*] are all duties that each agent has to both seller and buyer without regard to whether the seller or buyer is that agent's client. Additionally, the language used by the courts does not always make clear distinctions between the fiduciary duties owed by a broker to the client and the non-fiduciary duties owed to a prospective purchaser or other parties to a transaction. Finally, there is not a clear, linear distinction between one duty and another. For example, a broker's failure to investigate and disclose a material fact that could affect a buyer's decision to buy the property conceivably could be simultaneously a breach of the broker's duty to disclose, a breach of the broker's duty of honesty, fair dealing, and good faith, and a breach of the broker's duty to exercise reasonable care in the performance of his or her duties. Depending on whether this broker represents the seller or the buyer (or both), this breach could be a breach of a fiduciary duty to the client or a breach of a non-fiduciary duty to the prospective purchaser. Counsel should be mindful that the law is not particularly linear in this area and that the trend is to impose greater duties and liabilities on the broker with respect to all parties in the transaction and to third parties as well. *By Linda Breen Pierce*

PRACTICE TIP: Existence of Fiduciary Duty Is Significant in Analyzing Claims Against Broker or Agent. While it is true that certain duties owed by a broker or agent to a principal in a transaction are unaffected by whether the broker or agent has a fiduciary relationship with that principal, the complete scope of the broker's or agent's duties to the principal is significantly impacted by the existence of a fiduciary relationship. An evaluation of a particular broker's or agent's conduct in a transaction cannot be completed without consideration of whether the broker or agent is the plaintiff-principal's fiduciary. For example, whereas a listing agent may have to disclose a particular material fact to a buyer, the listing agent is not required to explain the significance or import of that material fact [*Sweat v. Hollister (1995) 37 Cal. App. 4th 603, 605-609, 43 Cal. Rptr. 2d 399]* . However, the broker or agent for the buyer may be obligated to offer such an explanation to his or her client. Further, the discovery of certain material facts might require the broker or agent for the buyer to conduct or suggest further investigation. The broker or agent for the seller would not have such a duty and, in fact, he or she may have a duty not to conduct such an investigation, which could result in damage to his or her client's position. *By Jeffrey*

S. Martin

PRACTICE TIP: The Scope of Fiduciary Duties. Because the scope of fiduciary duty is nebulous, individuals bringing claims against brokers or agents will often claim that the defendant broker or agent breached a litany of obligations that allegedly arose out of the fiduciary relationship with the plaintiff. A recent decision in *Padgett v. Phariss (1997) 54 Cal. App. 4th 1270, 63 Cal. Rptr. 2d 373* places limits on the scope of fiduciary duty in the context of claims against real estate brokers or agents. In *Padgett*, the court held that neither the selling nor listing broker/agent owed a duty to the plaintiff- buyer of a townhouse to inquire of the homeowners' association whether there were any construction defects in the common areas of the property or whether there was any pending or proposed litigation concerning these defects. The plaintiff in *Padgett* had purchased a unit in a townhouse development and learned shortly thereafter that there were construction defects in common areas and that the association was involved in litigation regarding these defects. The plaintiff-buyer argued that the agents had a duty to contact the association and ask about defects or any litigation. The *Padgett* court found that the statutory scheme applicable to real estate brokers and agents did not impose the duty to inspect or disclose defects that were off-site of the particular unit being sold. Specifically, *Civ. Code § 2079.3* provides that "[t]he inspection to be performed pursuant to this article does not include or involve an inspection of areas that are reasonably and normally inaccessible to such an inspection, nor an affirmative inspection of areas off the site of the subject property or public records or permits concerning the title or use of the property, and, if the property compromises a unit in a planned development ... a condominium ... or a stock cooperative ... does not include an inspection of more than the unit offered for sale. ..." The *Padgett* court refused to expand the duty of investigation as to the selling agent, who represented the plaintiff-buyer, based on an alleged fiduciary responsibility. The court remained unconvinced that the duty of the selling agent went any further than the duty owed by the listing agent to inspect and disclose as provided in *Civ. Code § 2079.3* [*Padgett v. Phariss (1997) 54 Cal. App. 4th 1270, 1280-1282, 63 Cal. Rptr. 2d 373]* .
By Jeffrey S. Martin

For a form of a complaint for damages based on the broker's breach of fiduciary duty generally, see *§ 103.90[1]*.

[2] Duty to Use Reasonable Care and Due Diligence

An agent must exercise reasonable skill and care for the benefit of the principal in the performance of agency duties, and will be liable for any damages suffered by the principal as a result of the agent's negligence [*Smith v. Rickard (1988) 205 Cal. App. 3d 1354, 1364, 254 Cal. Rptr. 633]* . Furthermore, a real estate agent who is negligent or incompetent in the performance of his or her duties may have his or her license suspended or revoked [*Bus. & Prof. Code § 10177(g)*].

As a professional, a real estate licensee must exercise a higher degree of skill and diligence than a non-professional [*Montoya v. McLeod (1985) 176 Cal. App. 3d 57, 65, 221 Cal. Rptr. 353]* . Specifically, the real estate broker is charged with more than a layman's knowledge of the real estate business. The broker must exercise the particular skill to be reasonably expected of him or her and to have special knowledge with respect to his or her agency [*Wilson v. Hisey (1957) 147 Cal. App. 2d 433, 438, 305 P.2d 686]* . This includes an ordinary professional knowledge concerning the title and natural characteristics of the property he or she is selling [*Brady v. Carman (1960) 179 Cal. App. 2d 63, 68, 3 Cal. Rptr. 612]* .

The existence and extent of the broker's duties are determined further by the terms of a valid agreement between the broker and principal, interpreted in light of the circumstances under which it is made. For example, when the listing agreement and other documents signed by the client clearly state that the client should consult an appropriate professional if tax advice is desired, a real estate broker will not be liable to the client for the client's unanticipated tax liabilities in an exchange [*Carleton v. Tortosa (1993) 14 Cal. App. 4th 745, 754-756, 17 Cal. Rptr. 2d 734]* .

An agent's duty to exercise reasonable skill and care in the performance of the agent's duties extends to both buyer and seller, even if the agent represents only one of the parties [*Civ. Code § 2079.16* (agency disclosure form)].

PRACTICE TIP:

Duty of Care Extends to Non-Client Party in Transaction. As discussed *above*, the legislature has imposed a duty on the agent to use reasonable care with respect *to both the buyer and seller*, even if the agent represents only one of the parties. This is evidence of the trend to weaken the distinction between the fiduciary duties owed to a principal and the non-fiduciary duties owed to the other party in the transaction. *By Linda Breen Pierce*

PRACTICE TIP: Duties Arising Out of Fiduciary Relationship. A broker or agent who is a fiduciary may be liable in damages if he or she provides information to the principal that has not been verified, unless the broker or agent advises the principal that the information has not been verified [*Salahutdin v. Valley of California, Inc. (1994) 24 Cal. App. 4th 555, 562, 29 Cal. Rptr. 2d 463* ; *see* [3], *below*]. *By Jeffrey S. Martin*

For a form of a cause of action in a complaint for damages based on the broker's failure to use reasonable care as it relates to the broker's duty to disclose material facts about a property, see *§ 103.94[1]*, Fourth Cause of Action.

[3] Duty to Investigate/Negligent Misrepresentation

[a] Nature of Duty

A broker has a fiduciary duty to investigate the material facts of a transaction, and cannot accept information received from others as being true, and transmit it to the principal, without either verifying the information or disclosing to the principal that the information has not been verified [*Salahutdin v. Valley of California, Inc. (1994) 24 Cal. App. 4th 555, 562, 29 Cal. Rptr. 2d 463]* . Furthermore, because the broker is charged with superior knowledge of the subject of the agency, the client has a right to rely on the statements and recommendations made to the client by the broker and has no duty to make an independent investigation [*Schoenberg v. Romike Properties (1967) 251 Cal. App. 2d 154, 162, 59 Cal. Rptr. 359]* .

A broker's fiduciary duty can be much broader than the nonfiduciary duty to visually inspect imposed on sellers' brokers by *Civ. Code § 2079* [*see* [8][b], *below*], and may include a duty to inspect public records or permits concerning title or use of the property, a duty which is expressly excluded from *Civ. Code § 2079* [*Field v. Century 21 Klowden-Forness Realty (1998) 63 Cal. App. 4th 18*].

[b] Examples

A broker representing a buyer can be liable to the buyer for representing a certain amount of net income on an apartment building when further investigation of maintenance and vacancy factors would disclose a substantially less amount [*see* *Ford v. Cournale (1973) 36 Cal. App. 3d 172, 179-180, 111 Cal. Rptr. 334]* . Similarly, a broker was found liable to his buyer-client for falsely representing that the subject parcel exceeded one acre and could be subdivided. The fact that the multiple listing information sheet contained a representation that the property exceeded one acre, and that the property was surrounded by a perimeter fence enclosing more than one acre, did not relieve the broker of liability. A broker who is merely an innocent conduit of the seller's fraud may be innocent of actual fraud, but the broker may be liable for negligence on a constructive fraud theory if the broker passes on the misstatements as true without personally investigating them [*Salahutdin v. Valley of California, Inc. (1994) 24 Cal. App. 4th 555, 559-560, 562, 29 Cal. Rptr. 2d 463]* .

Other examples of broker liability to the principal based on the failure to investigate material facts resulting in negligent

misrepresentation include:

- Advising the seller, who was receiving a note and deed of trust secured on another property, that the value assigned to the other property was a "safe figure," that the buyer assuming the note was "a financially substantial individual," and that the proposed transaction "was a good deal," without making any investigation of those subjects [*see Banville v. Schmidt (1974) 37 Cal. App. 3d 92, 97-99, 112 Cal. Rptr. 126* ; *see also Schoenberg v. Romike Properties (1967) 251 Cal. App. 2d 154, 59 Cal. Rptr. 359* (similar facts)].

- Failing to discover and disclose that the lessor of the property did not have a sufficient interest to enter into a 10-year lease [*George Ball Pacific, Inc. v. Coldwell Banker & Co. (1981) 117 Cal. App. 3d 248, 255-257, 172 Cal. Rptr. 597* (summary judgment reversed based on disputed question of fact)].

- Failing to determine that the extent of an easement in favor of a water district was substantially more burdensome than represented and that the acreage of the property as represented in the listing was not accurate [*Field v. Century 21 Klowden-Forness Realty (1998) 63 Cal. App. 4th 18*].

PRACTICE TIP:

Broker's Liability for Legal or Tax Advice. *Civ. Code § 2079.16* sets forth the contents of the agency disclosure form that real estate agents are required to give to sellers and buyers. Included in the form is the following language: "A real estate agent is a person qualified to advise about real estate. If legal or tax advice is desired, consult a competent professional." Because the legislature intended that this advice be provided by competent professionals other than real estate licensees, it is likely that a real estate broker will not be held liable for failure to provide this advice, as was held in *Carleton v. Tortosa (1993) 14 Cal. App. 4th 745, 754-756, 17 Cal. Rptr. 2d 734* (discussed in [2], *above*). On the other hand, if the real estate broker undertakes to provide this advice, the broker may be liable for negligence if the advice is incorrect [*see Biakanja v. Irving (1958) 49 Cal. 2d 647, 651, 320 P. 2d 16* (notary held liable to beneficiary for preparing will that did not conform to California law)]. *By Linda Breen Pierce*

In addition to the potential liability of a broker representing a buyer for passing on false information to his or her client, as discussed in the examples *above*, a listing agent may be liable to the buyer for false information included in the multiple listing service. *Civ. Code § 1088* provides that if an agent places a listing or other information in the multiple listing service, that agent will be responsible for the truth of all representations and statements made by the agent of which the agent had knowledge or reasonably should have had knowledge to anyone injured by their falseness or inaccuracy.

For a complaint for damages based on the broker's failure to investigate material facts, see *§§ 103.93[1]* (by seller against listing agent) and *103.96[1]* (by buyer against selling agent).

[4] Duty to Disclose Material Facts

[a] In General

[i] Common Law Duty; Statutory Expansion of Duty

An agent is charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision. Furthermore, when the principal questions the acts done by the agent in the course of the agency, the burden is on the agent to prove that he or she acted with the utmost good faith toward the principal and that prior to the transaction he or she made a full disclosure of all the facts relating to the acts under attack [*Batson v. Strehlow (1968) 68 Cal. 2d 662, 674-675, 68 Cal. Rptr. 589, 441 P.2d 101]* . The duty of full disclosure is applicable to gratuitous agents as well as compensated agents [*St. James Armenian Church of Los Angeles v. Kurkjian (1975) 47*

Cal. App. 3d 547, 551, 121 Cal. Rptr. 214] .

This common law duty to disclose material facts has been expanded in residential transactions to include not only facts that are within the actual knowledge of the agent, but also facts that would be revealed with a reasonable and competent visual inspection [*see* [8], *below* (statutory duty to inspect and disclose)]. Furthermore, the duty to disclose material facts is not limited to a party who is in a fiduciary relationship with the agent, but applies to both the buyer and seller, even if the agent is representing only one of the parties [*Civ. Code § 2079.16* (agency disclosure form--agent has duty to disclose to the buyer and seller all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties)].

PRACTICE TIP:

Failure to Disclose May Also Be Breach of Duty to Use Reasonable Care. In many instances, the language used by the courts to refer to wrongful actions by the broker include references to both reasonable care duties and fiduciary duties, including the duty to disclose material facts, the duty to act in the highest good of the principal, the duty to act in good faith, and other duties. As noted earlier, there is considerable overlapping among the various duties a broker owes to the principal. In most instances, a breach of the duty to disclose will also constitute a breach of the duty to use reasonable care [*see* [2], *above*], and/or constructive fraud [*see* [5], *below*]. *By Linda Breen Pierce*

PRACTICE TIP: Limits on Duty of Disclosure. *Sweat v. Hollister (1995) 37 Cal. App. 4th 603, 605-609, 43 Cal. Rptr. 2d 399* , holds that the seller and listing agent/broker are obligated to disclose material facts, but not necessarily the ramifications of the disclosed facts. In *Sweat*, the seller disclosed that the subject property was located in a floodplain. The seller and his agent did not disclose that a local ordinance prevented altering or enlarging the home if it was destroyed by fire or other calamity as a result of its location in the floodplain. Plaintiff-buyer sued the seller and the listing broker for failure to disclose that the property was a nonconforming use. The *Sweat* court found that the defendants were obligated only to disclose that the property was in a floodplain, that the information regarding the existence and effect of the city ordinance was information equally available to the plaintiff-buyer, and that actionable non-disclosure related only to the facts not discoverable by the plaintiff. The court went on to find that it was not the obligation of the seller or the listing broker to research local land use ordinances and advise the buyer as to the effect of the classification on the subject property. *By Jeffrey S. Martin*

[ii] Additional Disclosure Duties

A broker has a duty to disclose to the seller all offers to buy the property, in addition to the offer accepted [*Smith v. Zak (1971) 20 Cal. App. 3d 785, 793, 98 Cal. Rptr. 242]* . Further, the Real Estate Commissioner may suspend or revoke the license of a broker or salesperson who has failed to disclose to the buyer of real property, in a transaction in which the licensee is an agent for the buyer, the nature and extent of any direct or indirect ownership interest of the licensee in that real property. The direct or indirect ownership in the property by a person related to the licensee by blood or marriage, by an entity in which the licensee has an ownership interest, or by any other person with whom the licensee occupies a special relationship must be disclosed to the buyer [*Bus. & Prof. Code § 10177(o)*].

[iii] Examples of Breaches

Examples of broker's actions that constituted a breach of an agent's duty to disclose include the following:

- Failure to disclose to the seller that the buyer's deposit check was postdated and conditioned upon inspections [*see* *Wilson v. Lewis (1980) 106 Cal. App. 3d 802, 808-810, 165 Cal. Rptr. 396* (dual agency relationship)].

- Failure to disclose relevant facts about air conditioning necessary for a client to intelligently enter into a construction contract [*see* Chapple v. Big Bear Super Market No. 3 *(1980) 108 Cal. App. 3d 867, 876, 167 Cal. Rptr. 103]* .

- Misrepresenting the price at which the broker was able to sell the property [*see* *Rattray v. Scudder (1946) 28 Cal. 2d 214, 223, 169 P.2d 371]* .

- Failure of a mortgage loan broker to disclose to an individual lender that it was illegal for her broker-employer to accept the principal's funds in exchange for an unsecured promissory note, and failure to take reasonable steps to learn and advise the principal that the actual "borrower" of the money was her broker-employer [*see* *Montoya v. McLeod (1985) 176 Cal. App. 3d 57, 61, 65, 221 Cal. Rptr. 353]* .

- Failure to disclose to the seller-client that the broker was loaning his commission to the buyer as part of the buyer's down payment [*see* *Ziswasser v. Cole & Cowan, Inc. (1985) 164 Cal. App. 3d 417, 421, 423, 210 Cal. Rptr. 428]* .

- Failure to disclose details of an assignment transaction, when the broker entered into a written contract of purchase and sale with her principal and subsequently assigned her rights to a third party for an assignment fee of $1.2 million [*see* *Roberts v. Lomanto (2003) 112 Cal. App. 4th 1553, 1568, 5 Cal. Rptr. 3d 866]* .

The broker must make a *full* disclosure of all material facts. For example, when a broker disclosed one termite report to the buyer, but failed to disclose a second report that showed greater infestation, the broker was liable to the buyer for his failure to disclose [*Godfrey v. Steinpress (1982) 128 Cal. App. 3d 154, 177-178, 180 Cal. Rptr. 95]* .

For forms of a complaint for damages based on the broker's breach of the duty to disclose material facts, see *§§ 103.94[1]* (by buyer against listing agent) and 103.95[1] (by buyer against selling agent).

[b] Broker as Buyer

[i] Seller's Knowledge and Consent

The agent representing a seller may not purchase the seller's property without the seller's full knowledge and consent. This rule is aimed at not only the indirect or collusive sale or transfer, but also the direct sale or transfer to the agent. For example, brokers were held to have violated their fiduciary duty to their sellers-clients when they participated in the purchase of their clients' property without disclosing this to their clients and then later sold the property at a profit [*Bate v. Marsteller (1965) 232 Cal. App. 2d 605, 612-613, 43 Cal. Rptr. 149]* . The rule also extends to the sale to the agent's spouse, or an indirect or collusive sale to some other relative of the agent, or to the agent's partner or employee. Further, it applies to a corporation in which the agent has a large concealed interest, or indirectly to the agent in the name of a third person [*Batson v. Strehlow (1968) 68 Cal. 2d 662, 675-676, 68 Cal. Rptr. 589, 441 P. 2d 101]* .

This rule applies whether the agreement between the broker and principal is characterized as an option, a binding contract of sale, or a nonbinding contract of sale [*Roberts v. Lomanto (2003) 112 Cal. App. 4th 1553, 1566, 5 Cal. Rptr. 3d 866]* . Thus, a broker who entered into a written contract with her principal, subsequently assigned her rights to a third party with the principal's consent, did not notify the principal that she would receive an assignment fee until he was signing papers to close escrow, and refused to disclose the amount of the $1.2 million fee, breached her fiduciary duty to the principal by refusing to disclose the details of the assignment transaction [*Roberts v. Lomanto (2003) 112 Cal. App. 4th 1553, 1568, 5 Cal. Rptr. 3d 866]* . Execution of the purchase agreement did not complete the purpose of

the broker's agency toward the principal and end the broker's duty toward him. The broker's contract of assignment with the third party, under which she in effect substituted the third party for herself as the buyer, became an essential part of the transaction, as did the principal's consent to the assignment. Thus, the broker's duty of disclosure extended to the assignment [*Roberts v. Lomanto (2003) 112 Cal. App. 4th 1553, 1566-1567, 5 Cal. Rptr. 3d 866]* . Because the broker's $1.2 million assignment fee was a form of compensation to her that was not disclosed to the principal until after the sale of the shopping center was consummated, it was by definition a secret profit that the broker could not legally retain. The fact that the transaction yielded the principal his full asking price did not change that result [*Roberts v. Lomanto (2003) 112 Cal. App. 4th 1553, 1570, 5 Cal. Rptr. 3d 866]* .

Under most circumstances, if the agent is related to the buyer in a way that suggests a reasonable possibility that the agent himself or herself could indirectly be acquiring an interest in the subject property, the relationship is a "material fact" that must be disclosed [*Sierra Pacific Industries v. Carter (1980) 104 Cal. App. 3d 579, 582, 163 Cal. Rptr. 764* (agent for seller breached duty by failing to disclose that buyer was agent's daughter and son-in-law)].

This rule is supported further by the agent's statutory duty to refrain from taking part in any transaction concerning the subject property in which the broker has an interest adverse to the beneficiary [*Civ. Code § 2322(c)*; *Prob. Code § 16004(a)*].

A seller can recover the commission paid to his or her broker if the broker failed to disclose the fact that the broker was an undisclosed purchaser of the seller's property [*Batson v. Strehlow (1968) 68 Cal. 2d 662, 675-676, 68 Cal. Rptr. 589, 441 P.2d 101]* . Alternatively, if the seller discovers the agent's failure to disclose his or her interest prior to the close of escrow, the seller can void the transaction [*Newell-Murdoch Realty Co. v. Wickham (1920) 183 Cal. 39, 44, 190 P. 359]* .

[ii] Exception for Net Listing Agreement

The broker's duty of disclosure when he or she is the buyer is limited when the parties have entered into a net listing agreement. A net listing agreement is one in which the principal agrees to accept a specified net price for the property to be sold, and the agent's compensation for negotiating a sale is to be any amount received in excess of the specified figure. If the broker and the principal enter into a net listing agreement in which *the principal determines the net sale price without influence by the agent*, the broker has no fiduciary duty to disclose the buyer's identity to the principal, even if the agent is buying the property himself or herself. On the other hand, if the principal agrees to a sales price as a result of the broker's misrepresentations, this exception to the disclosure rule will not apply [*Smith v. Zak (1971) 20 Cal. App. 3d 785, 795, 98 Cal. Rptr. 242* (emphasis added)].

The key factor in permitting the real estate broker relief from disclosing the buyer's identity in a net listing arrangement is the independent and completely uninfluenced determination of the net sales price by the seller [*Sierra Pacific Industries v. Carter (1980) 104 Cal. App. 3d 579, 582, 163 Cal. Rptr. 764* (agent not exempted from disclosure requirement because seller based listing price on agent's opinion of value)].

[c] Fraud or Deceit

[i] Broker's Nondisclosure and Knowledge

In some instances, the failure to disclose a material fact to a buyer may constitute fraud. When a real estate broker or agent representing the seller knows facts materially affecting the value or the desirability of property offered for sale, these facts are known or accessible only to the licensee and his or her principal, and the licensee also knows that these facts are not known to or within the reach of the diligent attention and observation of the buyer, the licensee is under a duty to disclose these facts to the buyer. The failure to disclose these facts constitutes negative fraud or deceit [*Cooper v. Jevne (1976) 56 Cal. App. 3d 860, 866, 128 Cal. Rptr. 724* (broker represented property to be luxurious and an

outstanding investment, and failed to disclose broker's knowledge of the substandard construction of property, which facts were not easily discoverable by buyer)].

Exculpatory clauses in a standardized form used in the purchase and sale of real estate will not bar a claim for intentional misrepresentation brought by buyers of real property against the sellers' brokers. A party to a contract is precluded under *Civ. Code § 1668* from contracting away his or her liability for fraud or deceit based on intentional misrepresentation. The fact that the brokers are not parties to the agreement between the buyers and sellers will not preclude application of § 1668 when buyers allege that brokers induced them to enter into an agreement by means of intentional misrepresentations. The plain language of *Civ. Code § 1668* shows that its provisions apply to "all contracts" the object of which is to directly or indirectly exempt "anyone" from responsibility for his or her "own fraud" [*Manderville v. PCG&S Group, Inc. (2007) 146 Cal. App. 4th 1486, 1501, 55 Cal. Rptr. 3d 59* (exculpatory clauses did not preclude, as matter of law, buyers' showing of justifiable reliance)].

[ii] Confidential Relationship Not Required

Fraud may exist in this context in the absence of a fiduciary relationship between the agent or broker and the buyer [*see Civ. Code § 2079.16* (agency disclosure form--duty extends to both buyer and seller without regard to agency relationships)]. The elements of a cause of action for damages for fraud based on mere nondisclosure and involving no confidential relationship would therefore appear to be the following [*Lingsch v. Savage (1963) 213 Cal. App. 2d 729, 738, 29 Cal. Rptr. 201* (buyer stated cause of action for fraud against seller's broker for latter's failure to disclose that building was in state of disrepair, that units contained in it were illegal, and that building had been condemned)]:

- Nondisclosure by the defendant of facts materially affecting the value or desirability of the property.
- Defendant's knowledge of these facts and of their being unknown to or beyond the reach of the plaintiff.
- Defendant's intention to induce action by the plaintiff.
- Inducement of the plaintiff to act by reason of the nondisclosure.
- Resulting damages.

[iii] No Exception for Broker-Seller or "As Is" Clause

The fact that the broker is also the seller will not relieve the broker-seller of the duty to disclose material facts [*Prichard v. Reitz (1986) 178 Cal. App. 3d 465, 468, 223 Cal. Rptr. 734* (buyer stated cause of action against broker-seller for failing to disclose defective foundation that was known to broker-seller)]. Nor will the presence of an "as is" clause shield an agent from liability for affirmative or negative fraud [*Wilson v. Century 21 Great Western Realty (1993) 15 Cal. App. 4th 298, 304, 18 Cal. Rptr. 2d 779*].

PRACTICE TIP:

"As Is" Clause May Impact Elements of Fraud Claim. While an "as is" clause will not act as a shield to a non-disclosure claim, it should be considered when analyzing fraud claims. The inclusion in a transaction of an "as is" clause with respect to a certain condition may be used to attack the reliance element of a misrepresentation claim. *By Jeffrey S. Martin*

[iv] Liability of Mortgage Loan Broker

A mortgage loan broker may be liable for fraud in failing to disclose certain information to a prospective borrower. For example, when a mortgage broker knowingly conceals the fact that loans above a certain amount will expose the buyer

to an increase in the broker's commission and escrow expenses, for the purpose of obtaining a higher commission, this nondisclosure constitutes fraud and deceit [*Realty Projects, Inc. v. Smith (1973) 32 Cal. App. 3d 204, 211, 108 Cal. Rptr. 71]* .

[v] Defrauded Buyer's Remedies

In an action for fraud against a broker, the defrauded buyer has the option to either rescind the sales contract or stand on the contract and sue for damages. Even though a party who elects to affirm a contract will not be completing it in "reliance" on the fraud, the party's continued performance of the agreement does not constitute a waiver of his or her action for damages. Fraud at the inception of the transaction (such as the time of entering into the purchase contract) is sufficient [*Bagdasarian v. Gragnon (1948) 31 Cal. 2d 744, 750, 192 P.2d 935* ; *Storage Services v. Oosterbaan (1989) 214 Cal. App. 3d 498, 511, 262 Cal. Rptr. 689]* .

PRACTICE TIP:

Discovery of Alleged Misrepresentation or Undisclosed Material Fact Prior to Close of Escrow. A plaintiff-buyer who becomes aware of a non-disclosed or misrepresented fact prior to close of escrow may close and then sue for damages [*Jue v. Smiser (1994) 23 Cal. App. 4th 312, 313-319, 28 Cal. Rptr. 2d 242]* . In *Jue*, the sellers represented that the subject property was designed by a famous architect. Before close of escrow, plaintiff-buyers learned that the representation might not be true, but they decided to close escrow and then sue for damages. The *Jue* court found that for plaintiffs to recover for fraud in the sale of real property under *Civ. Code § 3343*, the reliance of plaintiffs had to be established at the time the initial contract was entered into, and it was not necessary that plaintiffs establish continuing reliance until the contract was fully executed. *By Jeffrey S. Martin*

For further discussion and forms relating to a cause of action relating to fraud or deceit, see Ch. 269, *Fraud and Deceit* . For a complaint for damages based on fraud relating to nondisclosure of defects, see *§ 103.94[1]*.

[5] Constructive Fraud

[a] Definition

The statutory definition of constructive fraud is as follows [*Civ. Code § 1573*]:

> (1) Any breach of duty that, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under that person, by misleading another to his or her prejudice, or to the prejudice of any one claiming under him or her; or
>
> (2) Any such act or omission that the law specially declares to be fraudulent, without respect to actual fraud.

In other words, constructive fraud comprises any act, omission, or concealment involving a breach of legal or equitable duty, trust, or confidence that results in damage to another *even though the conduct is not otherwise fraudulent*. Most acts by an agent in breach of his or her fiduciary duties constitute constructive fraud. For example, the failure of a fiduciary to disclose a material fact to the principal that might affect the fiduciary's motives or the principal's decision, that is known (or should be known) to the fiduciary, may constitute constructive fraud. Also, a careless misstatement may constitute constructive fraud *even though there is no fraudulent intent* [*Salahutdin v. Valley of California, Inc. (1994) 24 Cal. App. 4th 555, 562, 29 Cal. Rptr. 2d 463* ; *see also Montoya v. McLeod (1985) 176 Cal. App. 3d 57, 65, 221 Cal. Rptr. 353* (breach of fiduciary duty amounted to constructive fraud)].

[b] Fiduciary Relationship Required

In contrast to an action for actual fraud, constructive fraud requires the existence of a fiduciary relationship. To constitute positive or actual fraud, there must be fraud that affects the conscience, that is, there must be an intentional deception. Constructive fraud, on the other hand, is presumed from the relation of the parties to a transaction, or the circumstances under which it takes place [*Mary Pickford Co. v. Bayly Bros., Inc. (1939) 12 Cal. 2d 501, 525, 86 P.2d 102]* . Consequently, when nondisclosure is alleged in a fiduciary relationship, the elements of representation and falsity--always part of a cause of action for actual fraud--are absent, because the fraud consists of the breach of the fiduciary duty of disclosure of relevant matters arising from the relationship [*Byrum v. Brand (1990) 219 Cal. App. 3d 926, 940-942, 268 Cal. Rptr. 609]* .

PRACTICE TIP:

Constructive Fraud Distinguished From Actual Fraud. Note that for a cause of action against a broker who is not in a fiduciary relationship with the buyer or seller, actual fraud must be alleged and proved [*see* [4][c], *above*], whereas an action for constructive fraud, with its less stringent burden of proof regarding intent, may be brought when there is a fiduciary relationship between the agent and the principal. This is consistent with the higher duties of loyalty and good faith required in a fiduciary relationship [*see* [1], *above* (fiduciary duties in general)]. *By Linda Breen Pierce*

[c] Required Elements

The elements for the cause of action for constructive fraud are the following: (1) fiduciary relationship [*see* [b], *above*]; (2) nondisclosure (breach of fiduciary duty); (3) intent to deceive; and (4) reliance and resulting injury (causation). The intent to deceive does not require an intent to defraud; rather, it is implied from the failure to disclose [*Stokes v. Henson (1990) 217 Cal. App. 3d 187, 197, 265 Cal. Rptr. 836]* . Further, the reliance element is relaxed in constructive fraud to the extent that reasonable reliance is presumed upon the misrepresentation or nondisclosure of the fiduciary, absent direct evidence of a lack of reliance [*Estate of Gump (1991) 1 Cal. App. 4th 582, 601, 2 Cal. Rptr. 2d 269]* .

For a complaint for damages based on a constructive fraud relating to the broker's failure to disclose defects, see *§ 103.95[1]*.

[6] Secret Profits

The term *secret profits* has been used by courts to describe any number of situations in which a broker reaps a profit from the subject of his or her agency without the prior knowledge of the principal.

A broker is not entitled to make any secret profit from the subject of his or her agency. The rationale for this rule is that all benefits and advantages acquired by the broker as an outgrowth of the agency, exclusive of the broker's agreed compensation, are deemed to have been acquired for the benefit of the principal, and the principal is entitled to recover these benefits in an appropriate action. The principal's right to recover does not depend on any deceit of the broker, but is based on the duties incident to the agency relationship and on the fact that all profits resulting from that relationship belong to the principal [*Savage v. Mayer (1949) 33 Cal. 2d 548, 551, 203 P.2d 9]* .

An example of an improper realization of secret profits is the dummy sale, in which the broker arranges for the sale of his or her principal's property to a third party (such as a relative or employee of the broker). In reality, the third party is merely a "dummy" purchasing the property on the broker's behalf. When the property is then resold at a higher price, the broker reaps the profit of the difference in selling prices [*see* *Rodes v. Shannon (1963) 222 Cal. App. 2d 721, 722-723, 727, 35 Cal. Rptr. 339* (principal entitled to rescind contract)].

A similar situation occurs when the broker has an option to purchase the subject property. A broker using the option device to gain secret profits will wait until he or she has received an offer for the property that is higher than the option price. The broker then exercises the option and purchases the property at the lower option price without informing the

principal of the higher offer. The final step is to resell the property at the higher price and pocket the difference as a secret profit. In such a case, the principal can recover the amount of the secret profits from the broker [*see Zikratch v. Stillwell (1961) 196 Cal. App. 2d 535, 541, 16 Cal. Rptr. 660]* .

For allegations for use in a complaint for damages based on the broker's realization of secret profits from the transaction, see *§§ 103.91[1]* (with an option to purchase) and *103.92[1]* (with a "dummy" sale).

A real estate agent who violates the prohibition against secret profits may have his or her license suspended or revoked [*Bus. & Prof. Code § 10176(g), (h)*].

[7] Duty to Be Honest and Truthful

[a] Scope of Duty; Definition of Honesty

A broker must be honest and truthful in all activities for which a real estate license is required [*Bus. & Prof. Code §§ 10152, 10176(a)-(c), (i)*; *Ward v. Taggart (1959) 51 Cal. 2d 736, 741, 336 P.2d 534]* . This duty applies not only to a broker's dealings with the client, but also with other parties in a transaction, and is not to be confused with an agent's fiduciary duties of loyalty, diligence, and disclosure to the client [*Nguyen v. Scott (1988) 206 Cal. App. 3d 725, 734-735, 739, 253 Cal. Rptr. 800* ; *see also Civ. Code § 2079.16* (agency disclosure form--broker has duty of honest and fair dealing and good faith to both buyer and seller, even if agent represents only one of the parties)].

For these purposes, honesty is construed to have the broadest possible meaning: a fastidious allegiance to the standards of one's profession, calling, or position; fairness and straightforwardness of conduct and speech; integrity; truthfulness; and freedom from fraud. Truthfulness has been abstractly defined as the truth, the whole truth, and nothing but the truth. A broker who makes a statement in the expectation that the facts stated will be relied on by another, and who withholds material facts and thereby creates a false understanding, is as guilty of untruthfulness as he or she would be if the facts stated were untrue [*Rhoades v. Savage (1963) 219 Cal. App. 2d 294, 299, 32 Cal. Rptr. 885]* .

For a complaint for damages based on the broker's breach of the duty to be honest and truthful as it relates to the disclosure of defects in the property, see *§ 103.94[1],* Third Cause of Action.

[b] Breaches of Duty

A broker representing a seller may breach his or her duty of honesty and fair dealing to a prospective purchaser by failing to convey the purchaser's offer to the seller and by secretly competing with the purchaser [*Nguyen v. Scott (1988) 206 Cal. App. 3d 725, 736, 253 Cal. Rptr. 800]* .

A broker's failure to disclose that he or she is bidding on property also works an unfairness on other prospective purchasers. Not only is the broker likely to have an advantage over other bidders because of the broker's knowledge of their offers and the owner's desires, but the broker's contacts with other purchasers may easily lead them to rely on his or her assistance and forego their own efforts to negotiate for the property [*Nguyen v. Scott (1988) 206 Cal. App. 3d 725, 736, 253 Cal. Rptr. 800]* .

For example, a broker representing the seller was liable to a buyer for false representations made about the buyer's offer and what the seller would accept, resulting in a secret profit realized by the broker. The court reasoned that an involuntary trust should be imposed as a result of the broker's unjust enrichment due to the broker's violation of his duty to be honest and truthful in his dealings. The public policy of this state does not permit one to "take advantage of his own wrong" [*Civ. Code § 3517*], and the law provides a quasi-contractual remedy to prevent one from being unjustly enriched at the expense of another. *Civ. Code § 2224* provides that one "who gains a thing by fraud ... or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the

person who would otherwise have had it" [*Ward v. Taggart (1959) 51 Cal. 2d 736, 741, 336 P.2d 534]* .

In a situation in which the broker representing the seller fails to convey the first buyer's offer and instead buys the property for himself or herself, but does not resell it for a secret profit, the broker may be compelled to convey the property to the original buyer [*see Nguyen v. Scott (1988) 206 Cal. App. 3d 725, 740-741, 253 Cal. Rptr. 800]* .

[c] Suspension or Revocation of License

A real estate licensee may have his or her license suspended or revoked for (1) making any substantial misrepresentation, (2) making any false promises of a character likely to influence, persuade, or induce, or (3) engaging in any other conduct that constitutes fraud or dishonest dealing [*Bus. & Prof. Code §§ 10176(a), (b), (i), 10177(j)*]. Additionally, a real estate licensee may have his or her license suspended or revoked for violating *Bus. & Prof. Code § 10237 et seq.*, which imposes requirements on any transaction that involves the sale or offer to sell a series of notes secured directly by an interest in the same real property, or the sale of undivided interests in a note secured directly by real property equivalent to a series transaction [*Bus. & Prof. Code § 10177(p)*; *see Bus. & Prof. Code § 10237 et seq.*; *see also Civ. Code §§ 2944.6, 2944.7* (additional disclosure and prohibitions related to arranging mortgages)].

[8] Statutory Duty to Inspect and Disclose

[a] Overview

[i] Two Sets of Statutory Requirements

Two sets of coordinated inspection and disclosure requirements apply to real estate brokers involved in the purchase and sale of residential properties. The first set requires the inspection of certain residential properties and the disclosure of material facts [*see* [b], *below*], while the second set involves the completion of a statutory disclosure statement [*see* [c], *below*].

A real estate agent's license may be suspended or revoked for willful or repeated violations of the statutory disclosure provisions [*Bus. & Prof. Code § 10176.5(a)*].

For a complaint for damages based on the broker's violation of the statutory duty to inspect and disclose, see *§ 103.94[1]*.

The remaining subsections *below* discuss the two sets of requirements. For additional discussion of the disclosure requirements, including certain excluded transactions and the timing of the disclosure statement, see Ch. 569, *Vendor and Purchaser* .

[ii] Buyer's Duty to Use Reasonable Care

The court in *Easton v. Strassburger (1984) 152 Cal. App. 3d 90, 199 Cal. Rptr. 383* , held that the broker's duty to inspect and disclose does not relieve the buyer of the duty to exercise reasonable care to protect himself or herself. So, for example, a defect in a property could be so clearly apparent that as a matter of law a broker would not be negligent for failure to expressly disclose it, as the broker could reasonably expect that the buyer's own inspection of the premises would reveal the flaw [*Easton v. Strassburger (1984) 152 Cal. App. 3d 90, 103, 199 Cal. Rptr. 383]* . In discharging the duty to exercise reasonable care to protect himself or herself, the buyer must take into account those facts that are known to or within the diligent attention and observation of the buyer [*Civ. Code § 2079.5*].

For a form of an affirmative defense based on the buyer's failure to use reasonable care relating to the alleged defects, see *§ 103.97[1]*.

[b] Inspection of Residential Property and Disclosure of Material Facts

[i] Scope of Duty; Standard of Care

Civ. Code § 2079 et seq. apply to a licensed real estate broker who has a written contract with a seller to find or obtain a buyer for residential real property containing one to four dwelling units, or a manufactured home [*Civ. Code § 2079(a)*; *see Health & Safety Code § 18007* ("manufactured home" defined)]. The broker, or another broker who acts in cooperation with the broker to find and obtain a buyer, must conduct a reasonably competent and diligent visual inspection of the property offered for sale, and must disclose to prospective purchasers all facts materially affecting the value or desirability of the property that an investigation would reveal [*Civ. Code § 2079(a)*].

Civ. Code §§ 2079-2079.6 codified the rule set forth in the leading case of *Easton v. Strassburger (1984) 152 Cal. App. 3d 90, 199 Cal. Rptr. 383* , which held that there is a common law duty on the part of the broker to inspect and disclose to the buyer [*Easton v. Strassburger (1984) 152 Cal. App. 3d 90, 102, 199 Cal. Rptr. 383]* . These statutory provisions should be construed as a definition of the duty of care found to exist by the holding of *Easton v. Strassburger*, and the manner of its discharge, and are declarative of the common law regarding this duty [*Civ. Code § 2079.12(a)(4)*].

This statutory duty to inspect does not extend to commercial real estate transactions [*Smith v. Rickard (1988) 205 Cal. App. 3d 1354, 1360, 254 Cal. Rptr. 633* (broker had no duty to inspect the commercial portion of the property containing the lemon and avocado groves)] or to certain properties sold as part of a subdivision, unless the property has been previously occupied [*see Civ. Code § 2079.6*]. Further, the Section 2079 disclosure duty does not include a duty to independently verify or disclaim the accuracy of the seller's representations. In making the required disclosures, the seller's agent is required only to act in good faith and to not convey the seller's representations without a reasonable basis for believing them to be true [*Robinson v. Grossman (1997) 57 Cal. App. 4th 634, 643-644, 67 Cal. Rptr. 2d 380]* .

The statutory duty to inspect and disclose goes only toward prospective buyers and not to persons who are not parties to the real estate transaction [*Coldwell Banker Residential Brokerage Co. v. Superior Court (2004) 117 Cal. App. 4th 158, 165, 11 Cal. Rptr. 3d 564]* . Thus, a broker owed no duty under *Civ. Code § 2079* to a homebuyer's minor child who allegedly suffered injuries as the result of undisclosed microbial contamination of the home [*Coldwell Banker Residential Brokerage Co. v. Superior Court (2004) 117 Cal. App. 4th 158, 165, 11 Cal. Rptr. 3d 564]* .

The standard of care owed by a broker under *Civ. Code § 2079 et seq.* is the degree of care that a reasonably prudent real estate licensee would exercise, and is measured by the degree of knowledge through education, experience, and examination, required to obtain a real estate license [*Civ. Code § 2079.2*].

[ii] Visual Inspection

The statutory duty to inspect requires the broker "to conduct a reasonably competent and diligent *visual* inspection of the property" [*Civ. Code § 2079(a)* (emphasis added)]. This duty does not require the broker to inspect areas that are reasonably and normally inaccessible to a visual inspection [*Civ. Code § 2079.3*; *Wilson v. Century 21 Great Western Realty (1993) 15 Cal. App. 4th 298, 308* (broker did not breach statutory duty to inspect and disclose by failing to discover defects in foundation when lack of steel bolts was not visually apparent)].

For a form of an affirmative defense based on the fact that the defects were not within a reasonably and normally accessible area, see *§ 103.99[1]*.

Furthermore, this duty to inspect does not require an affirmative inspection of areas off the site of the subject property or public records or permits concerning the title or use of the property. If the property comprises a unit in a planned

development [*see Bus. & Prof. Code § 11003* (definition)], a condominium [*see Civ. Code § 783* (definition)], or a stock cooperative [*see Bus. & Prof. Code § 11003.2* (definition)], the duty to inspect does not require an inspection of more than the unit offered for sale, if the seller or the broker complies with the provisions of *Civ. Code § 1368* to provide the buyer with the relevant documents pertaining to the development [*Civ. Code § 2079.3*].

PRACTICE TIP:

Limitations on Broker's/Agent's Duty of Inspection. Relying on *Civ. Code § 2079.3*, the court in *Padgett v. Phariss (1997) 54 Cal. App. 4th 1270, 1280-1282, 63 Cal. Rptr. 2d 373* , held that neither the selling nor the listing real estate broker/agent was obligated to inquire of the homeowners' association for a townhouse or condominium development as to whether there were any construction defects in the common areas of the property or any pending or proposed litigation concerning these defects. As noted *above*, § 2079.3 specifically provides that the broker/agent is not required to inspect more than the unit offered for sale. *By Jeffrey S. Martin*

[iii] Statute of Limitations

The statute of limitations for bringing an action against a broker for a breach of the statutory duty to inspect and disclose is two years from the date of possession, which means the date of recordation, the date of close of escrow, or the date of occupancy, whichever occurs first [*Civ. Code § 2079.4*]. However, this statute of limitations does not apply if the failure to disclose is based on intentional fraud. In that type of action, the applicable statute of limitations is three years from the date of discovery of the fraud [*Williams v. Wells & Bennett Realtors (1997) 52 Cal. App. 4th 857, 861-865, 61 Cal. Rptr. 2d 34* (buyer not barred from bringing action after two-year period when broker concealed cracks to hide defects in property and failed to disclose concealment to buyer)]. Nor does the limitations period of *Civ. Code § 2079.4* apply to an action for breach of fiduciary duty brought against a buyer's broker. That limitations period commences on the date of possession, while the statute of limitations for actions involving a fiduciary obligation is triggered on the date the plaintiff discovers, or should have discovered, the negligence [*Field v. Century 21 Klowden-Forness Realty (1998) 63 Cal. App. 4th 18, 25, 73 Cal. Rptr. 2d 784* (two-year limitation period did not bar action alleging broker breached fiduciary duty by failing to determine that extent of easement was substantially more burdensome than represented and that acreage of property as represented in listing was not accurate)].

PRACTICE TIP:

Open-Ended Liability for Failure to Disclose. The case of *Williams v. Wells & Bennett Realtors*, discussed *above*, appears to carve out an exception to the two-year statute of limitations for a cause of action based on the failure to disclose when the failure amounts to actual fraud. The statute of limitations for fraud is three years from the date of discovery of the fraud [*Code Civ. Proc. § 338(d)*]. Because discovery of the fraud conceivably could occur years after the close of escrow, there is no absolute cut-off date for the broker's potential liability based on the failure to disclose. However, the broker has some protection in that the required elements for an action based on fraud include proof of the broker's intent to induce an action by the plaintiff; an inadvertent nondisclosure will not suffice. *By Linda Breen Pierce*

PRACTICE TIP: Courts Will Closely Analyze Fraud Claims Intended to Avoid Application of the Statute of Limitations. The courts in both *Williams v. Wells & Bennett Realtors* (discussed *above*) and *Loken v. Century 21-Award Properties (1995) 36 Cal. App. 4th 263, 266, 42 Cal. Rptr. 2d 883* , suggest that the false labeling of time-barred negligence causes of action in a complaint as "fraud" will not necessarily protect these claims from dismissal. The court in *Williams* held that no matter how a cause of action is labeled, if the claim is "derived from a statutory duty to inspect and disclose, it is subject to the two year statute of limitations" [*Williams v. Wells & Bennett Realtors (1997) 52 Cal. App. 4th 857, 865, 61 Cal. Rptr. 2d 34]* . The emphasis on the underlying facts of the case and not the labels in the complaint will provide opportunities for successfully asserting the statute of limitations defense. *By*

Jeffrey S. Martin

[c] Statutory Real Estate Transfer Disclosure Statement

[i] Scope of Duty

The statutory requirements discussed in [b], *above*, have been coordinated with a second set of statutory disclosure requirements. *Civ. Code § 1102 et seq.* require transferors of real property, or residential stock cooperatives, containing one to four dwelling units to complete and provide prospective transferees with a statutory real estate transfer disclosure statement [*see Civ. Code §§ 1102.3*, *1102.6*; *see also Civ. Code § 1102(b)* (applicability of these requirements, on or after January 1, 2000, to resale of manufactured home or mobilehome that is classified as personal property intended for use as residence)].

The types of transfers subject to these statutory disclosure requirements include sales, exchanges, installment land sale contracts [*see Civ. Code § 2985* (definition)], leases with options to purchase, any other options to purchase, and ground leases coupled with improvements [*Civ. Code § 1102(a)*; *see Civ. Code § 2079.1* (lease-related transactions)].

This statutory duty to inspect and disclose is independent of, and does not in any way change or diminish, a broker's duty to disclose any known fact materially affecting the value and desirability of the property [*Civ. Code § 1102.1*; *see* [4], *above*, for discussion of broker's duty to disclose material facts]. In addition, the specification of items for disclosure on the statutory form [*see* [ii], *below*] does not limit or abridge any obligation for disclosure created by any other provision of law or that may exist in order to avoid fraud, misrepresentation, or deceit in the transaction [*Civ. Code § 1102.8*].

An "as is" sale does not constitute a waiver of these disclosure requirements [*Civ. Code § 1102.1*; *Loughrin v. Superior Court (1993) 15 Cal. App. 4th 1188, 1195, 19 Cal. Rptr. 2d 161]* . Furthermore, any waiver of the statutory disclosure requirements is void as against public policy [*Civ. Code § 1102(c)*].

Each required disclosure under *Civ. Code § 1102 et seq.*, and each act that may be performed in making the disclosure, must be made in good faith. "Good faith" means honesty in fact in the conduct of the transaction [*Civ. Code § 1102.7*].

[ii] Disclosure Form

An official disclosure form satisfying the statutory disclosure requirements, entitled the Real Estate Transfer Disclosure Statement, is set forth in *Civ. Code § 1102.6* [*Civ. Code § 1102.1*]. For further discussion regarding the timing of delivery and other requirements regarding this form, see Ch. 569, *Vendor and Purchaser* . For the official form, see California Legal Forms, Ch. 23 (Matthew Bender).

PRACTICE TIP:

Seller and Broker/Agent Have Distinct Duties Regarding Preparation of Transfer Disclosure Statement. In analyzing claims for non-disclosure or misrepresentation arising out of the purchase and sale of residential real property, it is important to recognize that the seller and broker or agent have separate and distinct obligations in preparing their respective sections of the Transfer Disclosure Statement ("TDS"). The TDS is prepared in part by the seller and in part by the broker/agent. The majority of the TDS seeks to elicit information solely from the seller regarding the condition of specific aspects of the subject property. The seller must respond to specific inquiries regarding the property. The broker or agent is required to identify those material facts discovered during a reasonably competent and diligent visual inspection of the property. In advising brokers and agents with regard to the preparation of the TDS, it is imperative to impress upon them that it is the seller's duty to make the required disclosures and to fill out the seller's portion of the TDS. It is troubling to counsel representing a listing broker or agent to learn that the broker or agent filled out in whole or in part the portions of the TDS that the seller

is obligated to complete. *By Jeffrey S. Martin*

[iii] Limitation on Broker's Liability

A listing or selling agent will not be liable for any error, inaccuracy, or omission of any information delivered pursuant to the statutory disclosure requirements if the following factors are present [*Civ. Code § 1102.4*]:

- The error, inaccuracy, or omission was not within the personal knowledge of that agent.

- The error, inaccuracy, or omission was based on information timely provided by public agencies or by certain other persons (i.e., a licensed engineer, land surveyor, geologist, structural pest control operator, contractor, or other expert, dealing with matters within the scope of the professional's license or expertise) pursuant to a request by a prospective transferee.

- Ordinary care was exercised in obtaining and transmitting it.

For a form of an affirmative defense based on the fact that the alleged defects were included in a third party report as discussed above, see *§ 103.98[1]*.

[iv] Delivery of Transfer Disclosure Statement

If more than one licensed real estate broker is acting as an agent in the transaction, the broker who has obtained the offer must deliver the transfer disclosure statement to the buyer unless the seller has given other written instructions for delivery and except as provided in the next paragraph [*Civ. Code § 1102.12(a)*].

If a licensed real estate broker responsible for delivering the disclosures cannot obtain the required disclosure document and does not have written assurance from the buyer that the disclosure has been received, the broker must advise the buyer in writing of his or her rights to the disclosure. A licensed real estate broker responsible for delivering disclosures must maintain a record of the action taken to effect compliance in accordance with *Bus. & Prof. Code § 10148* [*Civ. Code § 1102.12(b)*].

[v] Related Disclosure Statements: Local Option Real Estate Transfer Disclosure Statement and Natural Hazard Disclosure Statement

When the transfer disclosure statement must be completed for a particular transaction, the city or county in which the subject property is located may require the transferor to provide additional information regarding the property. These additional disclosures must be made on a statutory form (the "local option real estate transfer disclosure statement") or on an alternative form required by a local ordinance adopted prior to July 1990 [*Civ. Code § 1102.6a(a)*]. For the statutory form, see California Legal Forms, Ch. 23, *Real Property Sales Agreements* (Matthew Bender).

When the property is located in a specified natural hazard area, the transferor and his or her agent must make certain disclosures in a statutory natural hazard disclosure statement form [*see Civ. Code § 1103.2(a)*] or in the local option real estate disclosure statement if that statement includes substantially the same information and substantially the same warnings that are in the statutory natural hazard disclosure statement [*Civ. Code § 1103.2(e)*; *see Civ. Code § 1103* ret seq.]. These disclosures must be made with respect to same types of transfers subject to *Civ. Code § 1102 et seq.* [*see Civ. Code § 1103(a)*, discussed under [i], *above*]. They also apply to a resale transaction entered into on or after January 1, 2000, for a manufactured home or mobilehomes that is classified as personal property intended for use as a residence [*Civ. Code § 1103(b)*; *see Health & Safety Code §§ 18007, 18008*]. The disclosures must be made when the property is located in a special flood hazard area, an area of potential flooding, a very high fire hazard severity zone, an earthquake fault zone, a seismic hazard zone, or a wildland area that may contain substantial forest fire risks and hazards [*Civ. Code*

§ 1103(c); for additional disclosure requirements relating to earthquake hazards, *see* [10], *below*]. For complete coverage of these disclosures, see Ch. 569, *Vendor and Purchaser* , and California Legal Forms, Ch. 23, *Real Property Sales Agreements* (Matthew Bender).

[9] Environmental Hazards

[a] Consumer Information Booklet Covering Common Environmental Hazards

If the consumer information book described in *Bus. & Prof. Code § 10084.1* is delivered to a transferee in connection with a transfer of real property, the seller or broker is not required to provide additional information concerning, and the information provided is deemed to be adequate to inform the transferee regarding, common environmental hazards that can affect the real property [*Civ. Code § 2079.7(a)*]. This does not increase the duties of sellers or brokers or alter the duty of a seller or broker to disclose the existence of known environmental hazards on or affecting the real property [*Civ. Code § 2079.7(b)*].

[b] Lead-based Paint Disclosures

[i] Governing Federal Regulations

Two identical sets of federal disclosure requirements concerning the residential use of lead-based paint are set forth in the Environmental Protection Agency (EPA) and the Department of Housing and Urban Development (HUD) titles in the Code of Federal Regulations [*see 24 C.F.R. § 35.80 et seq.* (HUD); *40 C.F.R. § 745.100 et seq.* (EPA); *see also* Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, *42 U.S.C. § 4852d* (directing EPA and HUD to jointly promulgate regulations)]. The regulatory requirements became applicable on September 6, 1996, for owners of more than four residential dwellings, and on December 6, 1996, for owners of one to four residential dwellings [*24 C.F.R. § 35.84*; *40 C.F.R. § 745.102*].

[ii] Required Disclosures; Failure to Comply

The regulations require sellers and lessors of most residential housing built before 1978 to disclose the presence of known lead-based paint or lead-based paint hazards in the housing. For these purposes, "lead-based paint" means paint or other surface coatings that contain lead equal to or in excess of 1.0 milligram per square centimeter or 0.5 percent by weight [*24 C.F.R. § 35.86*; *40 C.F.R. § 745.103*]. "Lead-based paint hazard" means any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil, or lead-contaminated paint that is deteriorated or present in accessible surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects as established by the appropriate federal agency [*24 C.F.R. § 35.86*; *40 C.F.R. § 745.103*]. The seller or lessor must also disclose this information to each agent involved in the transaction [*24 C.F.R. § 35.88(a)(3)*; *40 C.F.R. § 745.107(a)(3)*].

Sellers, lessors, and their agents who fail to comply with the requirements are subject to civil and criminal penalties pursuant to the rule's enforcement provisions, and can be held jointly and severally liable in an amount equal to three times the amount of damages incurred [*24 C.F.R. § 35.96*; *40 C.F.R. § 745.118*]. However, failure to comply does not invalidate a sales contract or lease.

For extensive coverage of these federal requirements, see the following discussions in California Real Estate Law & Practice (Matthew Bender):

- For a description of sellers' duties under the regulations and copies of sample EPA/HUD forms, see Ch. 71, *Deposit Receipts and Other Agreements of Sale* .

- For coverage of lessors' duties and a sample EPA/HUD form, see Ch. 170, *The Premises: Duties and Liabilities* .

- For discussion of agents' duties, see Ch. 63, *Duties and Liabilities of Brokers* .

[c] Notification of Controlled Substance Release

A seller of residential real property who knows that any release of an illegal controlled substance has come to be located on or beneath the real property must give written notice advising of that condition to the buyer before the property's sale. Notice is given by checking "yes" on the appropriate question on the Real Estate Transfer Disclosure Statement [*see Civ. Code § 1102.6*] and attaching a copy of any notice received from law enforcement or any other entity, such as the Department of Toxic Substances Control, the county health department, or the local environmental health officer [*Civ. Code § 1102.18(b)(1)*; *see Civ. Code § 1940.7*.5 (similar disclosure requirements applicable to landlords)]. A seller's knowledge of the condition is established by receipt of a notice as specified, or by actual knowledge of the condition from a source independent of the notice [*Civ. Code § 1102.18(b)(2)*]. A seller's delivery of this disclosure information is legally adequate for purposes of informing the prospective buyer of the condition; the seller is not required to provide any additional disclosure of the information [*Civ. Code § 1102.18(b)(3)*].

"Illegal controlled substance" means a drug, substance, or immediate precursor listed in specified schedules [*see Health & Safety Code §§ 11054-11058*], or an emission or waste material resulting from the unlawful manufacture or attempt to manufacture of an illegal controlled substance, which does not include marijuana [*Civ. Code § 1102.18(a)(1)*]. "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing of an illegal controlled substance in a structure or into the environment [*Civ. Code § 1102.18(b)(1)*].

The owner's failure to provide written notice to the buyer when required by *Civ. Code § 1102.18(b)* will subject the owner to actual damages and any other remedies provided by law. In addition to any other damages provided by law, if the owner has actual knowledge of the presence of any release of an illegal controlled substance, and knowingly and willfully fails to provide written notice to the buyer as required, the owner is liable for a civil penalty not to exceed $5,000 for each separate violation [*Civ. Code § 1102.18(b)(4)*].

[d] Toxic Mold Protection Act of 2001--Future Disclosure Requirements

The Toxic Mold Protection Act of 2001 [*Health & Safety Code §§ 26100-26156*] requires the Department of Health Services to convene a task force of various experts and interested parties to advise the Department on the development of permissible exposure limits to molds, standards for assessment of molds in indoor environments, standards for identification of molds, and remediation of mold. The Act will eventually require any person who sells, transfers, or rents specified types of residential, commercial, or industrial real property to provide written disclosures to potential buyers, prospective tenants, renters, and landlords concerning mold problems in the real property [*see Health & Safety Code §§ 26140-26153*]. However, these disclosure duties and requirements would not apply until the January 1 or July 1 that occurs at least six months after the Department adopts the requisite standards and guidelines [*see Health & Safety Code § 26154*]. Adding additional uncertainty concerning these requirements, the Act will be implemented only to the extent the Department determines that funds are available for its implementation [*Health & Safety Code § 26156*].

[10] Earthquake Hazards

[a] Pre-1960 Light-Frame Residential Properties

The transferor of real property containing any residential dwelling built before January 1, 1960, with one to four living units of conventional light-frame construction must, as soon as practicable before the transfer, deliver to the purchaser or transferee a copy of the "Homeowner's Guide to Earthquake Safety" published pursuant to *Bus. & Prof. Code § 10149* and complete the earthquake hazards disclosure regarding the property, clearly indicating whether the transferor has actual knowledge that the dwelling has any of the deficiencies listed in *Gov. Code § 8897.2* [*Gov. Code § 8897.1(a)*

]. The duty of a real estate licensee under *Gov. Code § 8897.1 et seq.* is limited to providing the seller with a copy of the Homeowner's Guide to Earthquake Safety for delivery to the transferee under *Civ. Code § 2079.8* [*Gov. Code § 8897.5*].

[b] Pre-1975 Precast Concrete or Unreinforced Masonry Buildings

The transferor (or his or her agent) of any precast concrete or reinforced masonry building with wood frame floors or roofs, built before January 1, 1975, that is located within any county or city must, as soon as practicable before the transfer, deliver to the purchaser a copy of the Commercial Property Owner's Guide to Earthquake Safety described in *Bus. & Prof. Code § 10147* [*Gov. Code § 8893.2*; *Gov. Code § 8875.6*].

PRACTICE TIP:

Commercial Guide to Be Used for Certain Residential Properties. Notwithstanding the title of the guide described in *Bus. & Prof. Code § 10147* ("Commercial Property Owner's Guide to Earthquake Safety"), this guide must be delivered to purchasers of residential as well as commercial properties. This requirement sometimes is misinterpreted by real estate agents to apply only to commercial properties, no doubt due to the title of the guide. *By Linda Breen Pierce*

[c] Earthquake Guides as Sufficient Disclosure

If the Homeowner's Guide to Earthquake Safety published pursuant to *Bus. & Prof. Code § 10149* or the Commercial Property Owner's Guide to Earthquake Safety described in *Bus. & Prof. Code § 10147* is delivered to a transferee in connection with a transfer of real property, the seller or broker will not be required to provide additional information concerning (1) geologic and seismic hazards in general that may affect real property, or (2) mitigating measures that the transferee or seller might consider [*Civ. Code §§ 2079.8(a), 2079.9(a)*]. Notwithstanding the foregoing, *Civ. Code §§ 2079.8* and *2079.9* do not increase or decrease the duties of a seller or broker or alter the duty of a seller or broker to disclose the existence of known hazards on or affecting the real property [*Civ. Code §§ 2079.8(b), 2079.9(b)*].

[d] Earthquake Fault Zone or Seismic Hazard Zone

As mentioned in *§ 103.31[8][c][v]*, an agent for a seller of real property that is subject to *Civ. Code § 1103 et seq.* must notify prospective purchasers when the property lies within an earthquake fault zone [*see Pub. Res. Code § 2622*] or a seismic hazard zone [*see Pub. Res. Code § 2696*]. The notice must be set forth in a local option real estate transfer disclosure statement or a statutory natural hazard disclosure statement [*see Civ. Code § 1103.2(a), (e)*]. For coverage of these disclosure requirements, see Ch. 569, *Vendor and Purchaser* .

[11] Mello-Roos Tax and Street Improvement Lien Assessment Installment Disclosures

The seller of any real property subject to the disclosure requirements of *Civ. Code § 1102 et seq.* [*see § 103.31[8]*] must make disclosures if the property being transferred is subject to a continuing lien securing the levy of special taxes pursuant to the Mello-Roos Community Facilities Act [*Gov. Code § 53111 et seq.*] or to a fixed lien assessment collected in installments to secure bonds issued pursuant to the Improvement Bond Act of 1915 [*Sts. & Hy. Code § 8500 et seq.*] which concerns street improvements [*Civ. Code § 1102.6b(a)*]. The seller must make a good faith effort to obtain and deliver to the transferee a disclosure notice concerning the special Mello-Roos tax provided in *Gov. Code § 53340.2*, and the assessment installment provided in *Gov. Code § 53754* from each local agency that levies the special tax or that collects the assessment installments [*Civ. Code § 1102.6b(b)*]. Special provisions require the legislative body collecting assessment installments under the Improvement Bond Act of 1915 to designate an office, department, or bureau in the local agency to handle annual assessment installment obligation information, reports, and dissemination, among other related activities [*Gov. Code § 53754(a)*]. For purposes of enabling sellers of real property to satisfy notice requirements concerning these assessments, the agency must furnish a Notice of Assessment on request within five working days, at a charge not to exceed $10 [*Gov. Code § 53754(b)*; *see Gov. Code § 53754(c)* (prescribed form for notice of assessment)].

A seller may satisfy the disclosure notice requirements by delivering a disclosure notice obtained from a nongovernmental source that satisfies the specified requirements [*Civ. Code § 1102.6b(d)(1)*; *see Civ. Code § 1102.6b(d)(3)* (provision does not change ability to make disclosures under *Civ. Code § 1102.4*)]. With regard to each type of required disclosure, a notice provided by a private entity other than a designated office, department, or bureau of the levying entity may be modified as needed to clearly and accurately describe either of the following [*Civ. Code § 1102.6b(d)(2)*]:

- A special tax pursuant to the Mello-Roos Community Facilities Act levied against the property, or clearly and accurately consolidated information about two or more districts that levy or are authorized to levy a special tax pursuant to the Mello-Roos Community Facilities Act against the property. This notice must include the name of the Mello-Roos levying taxes against the property, the annual tax due for the Mello-Roos for the current tax year, the maximum tax that may be levied against the property in any year, the percentage by which the maximum tax for the Mello-Roos may increase per year, and the date until the tax may be levied against the property for the Mello-Roos and a contact telephone number, if available, for further information about the Mello-Roos.

- Special assessments and bonds pursuant to the Improvement Bond Act of 1915 levied against the property, or clearly and accurately consolidated information about two or more districts that levy or are authorized to levy special assessments and bonds pursuant to the Improvement Bond Act of 1915 against the property. This notice must include the name of the special assessments and bonds issued pursuant to the Improvement Bond Act of 1915, the current annual tax on the property for the special assessments and bonds issued pursuant to the Improvement Bond Act of 1915, and a contact telephone number, if available, for further information about the special assessments and bonds issued pursuant to the Improvement Bond Act of 1915.

If these required disclosures have been delivered to the transferee, the seller or the seller's agent is not required to provide additional information concerning the special tax or assessment installments, and the disclosure information is deemed to satisfy the responsibility of the seller or the seller's agent to provide this information to the transferee. In any case, these disclosure requirements do not impose a duty agent to discover a special tax or assessment installments, or the existence of any levying district not actually known to the agents [*Civ. Code § 1102.6b(e)*].

[12] Home Energy Ratings and Water Conservation

If the informational booklet published pursuant to *Pub. Res. Code § 25402.9* is delivered to a transferee in connection with the transfer of real property, the seller or broker is not required to provide information additional to that contained in the booklet concerning home energy ratings, and the information in the booklet will be deemed to be adequate to inform the transferee about the existence of a statewide home energy rating program [*Civ. Code § 2079.10(a)*].

Notwithstanding the foregoing, nothing in § 2079.10 alters any existing duty of the seller or broker under any other law including, but not limited to, the duties of a seller or broker under *Civ. Code § 1102 et seq.*, or *Pub. Res. Code § 2621 et seq.*, to disclose information concerning the existence of a home energy rating program affecting the real property [*Civ. Code § 2079.10(b)*].

If the informational booklet or materials described in *Water Code § 375.5* concerning water conservation and water conservation programs are delivered to a transferee in connection with the transfer of real property, including property described in *Civ. Code § 2079.10(a)*, the seller or broker is not required to provide additional information concerning water conservation and water conservation programs [*Civ. Code § 2079.10(c)*]. The information in the booklet or materials will be deemed to be adequate to inform the transferee about water conservation and water conservation programs [*Civ. Code § 2079.10(c)*].

[13] Disclosure of Law Enforcement Data Base of Registered Sex Offenders Locations

In response to the passage of "Megan's Law" requiring law enforcement authorities to maintain a data base of the locations of registered sex offenders and to provide that information to the public [*see Penal Code §§ 290, 290.4, 290.46*], certain written real estate contracts must contain a notice related to that data base [*see Civ. Code § 2079.10a(a)* (notice)]. The notice requirement applies to every contract of sale for residential real property comprising one to four dwelling units, including installment land sales contracts [*Civ. Code § 2079.10a(a)*; *see Civ. Code § 2985(a)* (definition of real property sales contract)].

The information in the notice is deemed adequate to inform the transferee about the existence of the statewide data base and information from the data base regarding the locations of registered sex offenders [*Civ. Code § 2079.10a(b)*]. On delivery of this notice, the seller is not required to provide any further information in addition to that contained in the notice regarding the proximity of registered sex offenders, and making those disclosures cannot give rise to any cause of action against the seller by a registered sex offender [*Civ. Code § 2079.10a(b)*]. However, providing the statutory notice regarding the existence of the data base of registered sex offender locations does not alter any other existing duty that a seller has to make disclosures [*Civ. Code § 2079.10a(c)*].

[14] Other Disclosure Duties

[a] Notice of Selling Price

Within one month after the closing of a real estate transaction, a broker must give written notice to the seller and purchaser of the selling price. If the transaction is closed through escrow and the escrow holder renders a closing statement that reveals this information, that will be deemed compliance on the part of the broker [*Bus. & Prof. Code § 10141*].

[b] Structural Pest Control Inspection Report

The transferor or his or her agent must deliver a copy of a structural pest control inspection report to the buyer as soon as practicable prior to the close of escrow, provided that certification or preparation of a report is a condition of the contract effecting that transfer, or is a requirement imposed as a condition of financing the transfer [*Civ. Code § 1099(a)*].

[c] Occupant's Death

The transferor or his or her agent need not disclose to the buyer or lessee any death that occurred on the property more than three years prior to the date the buyer or lessee offers to purchase or lease the property. Furthermore, the transferor or agent need not disclose that a death was related to HIV-Aids, even if the death occurred within the previous three years [*Civ. Code § 1710.2(a)*]. Notwithstanding the foregoing, an agent may not intentionally misrepresent any information concerning deaths in response to a direct inquiry from the prospective purchaser or lessee [*Civ. Code § 1710.2(d)*].

[d] Supplemental Property Tax Bills

It is the sole responsibility of the seller of any residential real property in a transfer that is subject to *Civ. Code § 1102 et seq.*, or the seller's agent, to deliver to the prospective purchaser a prescribed disclosure notice concerning supplemental property tax bills, in addition to any other disclosure required by *Civ. Code § 1102 et seq.* [*Civ. Code § 1102.6c(a)*].

PRACTICE TIP:

Agent Liability for Seller's Failure to Disclose. In addition to the disclosure requirements of both the transferor and the agent discussed in this § 103.31, there are many other disclosure requirements that are

placed on the seller [*see* Ch. 569, *Vendor and Purchaser*]. If the seller breaches his or her duty to disclose, the seller's agent may have some potential liability also. If the seller claims to have been unaware of a disclosure requirement, the seller might have a cause of action for equitable indemnity against his or her agent for the latter's breach of his or her duty of due care in failing to advise the seller of the disclosure requirement. Also, because the duty of a seller's agent to exercise reasonable skill and care in the performance of his or her duties extends to the buyer as well as the seller [*see § 103.31[2]* (duty to use reasonable care)], a buyer might have a direct cause of action against the seller's agent for breach of this duty. *By Linda Breen Pierce*

PRACTICE TIP: Keep the Seller's Duty to Disclose Separate and Distinct. A seller has disclosure obligations that are independent from the obligations of the broker or agent. To protect against a claim by the seller that he or she did not adequately understand the duty of disclose, the listing broker or agent should provide the statutory real estate transfer disclosure statement (TDS) [*see § 103.31[8]*] to the seller and advise the seller to ask any questions that he or she may have regarding the TDS. The broker/agent should memorialize any questions and the responses provided as well as the failure of the seller to ask any questions. *By Jeffrey S. Martin*

[e] Private Transfer-Fee Requirement

If property being transferred after 2007 is subject to a private transfer fee, the transferor must provide, at the time the transfer disclosure statement required pursuant to *Civ. Code § 1102.6* is provided, an additional disclosure statement containing all of the following [*Civ. Code § 1102.6e*]:

- Notice that payment of a transfer fee is required on transfer of the property;
- The amount of the fee required for the asking price of the real property, and a description of how the fee is calculated;
- Notice that the final amount of the fee may be different if the fee is based on a percentage of the final sale price;
- The entity to which funds from the fee will be paid;
- The purposes for which funds from the fee will be used; and
- The date or circumstances under which the obligation to pay the transfer fee expires, if it could expire.

A private transfer fee, for this purpose, is any fee-payment requirement imposed in a covenant, restriction, or condition contained in any deed, contract, security instrument, or other document affecting the transfer or sale of, or any interest in, real property, which requires a fee be paid on transfer of the real property [*Civ. Code § 1098*; *but see Civ. Code § 1098(a)-(i)* (exceptions)].

In addition, the recipient of any such fee imposed before 2008, or the person or entity imposing any such fee after 2007, must record a document, entitled "Payment of Transfer Fee Required," in which pertinent facts about the fee-payment requirement are disclosed [*Civ. Code § 1098.5*].

For forms of these disclosure statements, see *California Legal Forms, Ch. 23, Real Property Sales Agreements, § 23.314* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesRescission & RedhibitionGeneral OverviewReal Property LawBrokersFiduciary ResponsibilitiesTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationConstructive FraudGeneral OverviewTortsDamagesCompensatory DamagesGeneral Overview

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10-103 California Forms of Pleading and Practice--Annotated § 103.32

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§ 103.32 Vicarious Liability for Negligence of Third Party

A mortgage loan broker can be liable to the lender for the fraud or negligence of an independent property appraiser hired to appraise property that will be used to secure the loan. The rationale is that the business of mortgage loan brokering primarily benefits the broker, not the appraiser. Furthermore, the broker selects the appraiser and is free to insist on an appraiser who is financially able to indemnify the broker for any wrongdoing. The insurance necessary to protect the broker is viewed as a cost of the broker's business [*Barry v. Raskov (1991) 232 Cal. App. 3d 447, 454-457, 283 Cal. Rptr. 463]* .

PRACTICE TIP:

Vicarious Liability of Real Estate Brokers. The decision in *Barry v. Raskov*, discussed *above*, is an exception to the general rule that a person is not liable for the negligence of an independent contractor. Query whether the California courts will extend this exception to real estate brokers. One might argue that the relationship factors between mortgage loan brokers and appraisers could apply equally to the real estate broker and a termite inspector, home inspector, title company, or escrow officer, at least *in those situations in which the real estate broker selects the third party provider rather than letting the client choose*. On the other hand, a distinction can be made between the two types of relationships in that an appraisal of the property is an essential part of the services provided to the lender by the mortgage broker, whereas the service provided by the home inspector, for example, is a separate, independent service from that of a real estate broker. *By Linda Breen Pierce*

PRACTICE TIP: Liability for Negligent Recommendation. When it is alleged that a property inspector retained by the plaintiff-buyer prior to close of escrow conducted an inadequate inspection, the plaintiff-buyer will often allege that the broker or agent was negligent in recommending or retaining the

inspector on the plaintiff-buyer's behalf. To avoid such circumstances, a real estate broker or agent should provide his or her client (the buyer) with a list ofinspectors to choose from and have the buyer select the inspector. The broker or agent may also want to provide a written disclaimer that the broker/agent makes no recommendation with respect to the abilities of any particular contractor on the list. The list of inspectors and any disclaimers should be reviewed and signed by the buyer. *By Jeffrey S. Martin*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersFiduciary ResponsibilitiesTortsVicarious LiabilityAgentsNegligenceTortsVicarious LiabilityIndependent ContractorsGeneral Overview

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§ 103.33 Liability of Brokers to Third Parties

[1] In General

In some instances the duties of a broker extend to both the buyer and seller, even if the agent represents, and therefore has a fiduciary relationship with, only one of the parties [*see, e.g., §§ 103.31[2]* (duty to use reasonable care), 103.31[4] (duty to disclose material facts), 103.31[7] (duty to be honest and truthful)]. These duties are similar to and closely related to the duties a broker has to his or her principal and are discussed in the applicable subsections in § 103.31. This section focuses on atypical situations in which the broker has liability to third parties (parties outside the fiduciary relationship).

[2] Negligence

A broker may be liable for negligence to a third party with whom the broker is not in privity of contract. In the leading case of *Biakanja v. Irving (1958) 49 Cal. 2d 647, 650, 320 P.2d 16* , the California Supreme Court set forth the following guidelines that will determine, as a matter of policy, whether liability will be imposed for the negligent performance of a contract [*Biakanja v. Irving (1958) 49 Cal. 2d 647, 650, 320 P.2d 16]* :

- The extent to which the transaction was intended to affect the plaintiff.
- The foreseeability of harm to the plaintiff.
- The degree of certainty that the plaintiff suffered injury.
- The closeness of the connection between the defendant's conduct and the injury suffered.

- The moral blame attached to the defendant's conduct.
- The policy of preventing future harm.

For example, a broker who, in leasing premises, negligently fails to warn a prospective tenant of a hidden defect, is liable if the tenant is injured as a result of that defect [*Merrill v. Buck (1962) 58 Cal. 2d 552, 561-563, 25 Cal. Rptr. 456, 375 P.2d 304]* . However, one court placed a limit to the broker's liability in this area when it held that the broker is not liable to guests of the buyer who are injured by a defective condition that the broker failed to disclose [*FSR Brokerage, Inc. v. Superior Court (1995) 35 Cal. App. 4th 69, 73, 41 Cal. Rptr. 2d 404* (partygoers were not intended beneficiaries of information supplied by broker under ruling of *Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370* , discussed in [5], *below*); *see also Coldwell Banker Residential Brokerage Co. v. Superior Court (2004) 117 Cal. App. 4th 158, 166, 11 Cal. Rptr. 3d 564* (homebuyer's minor child was not intended beneficiary of disclosures made by broker to buyer with regard to property, and therefore could not sue broker for injury from undisclosed mold contamination)].

For a complaint for damages by a third party against a broker for the negligent performance of a contract, see *§ 103.100[1]*.

[3] Negligent Interference With Prospective Economic Advantage

Liability to third parties under the guidelines set forth in *Biakanja v. Irving (1958) 49 Cal. 2d 647, 650, 320 P.2d 16* [*see § 103.33[2]*] has also been applied to negligent interference with prospective advantage [*see J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 804-805, 157 Cal. Rptr. 407, 598 P.2d 60]* . For example, a broker was held liable to a seller, notwithstanding the possible lack of an agency relationship with the seller, for interfering with the seller's abilities to sell its property and effect an exchange in the following circumstances. The broker made an offer on behalf of a buyer that was signed by the corporate seller's representative, but expressly conditioned on the oral approval of the controller. This approval was not obtained. The broker communicated to the buyer that the deal was firm, and when the seller refused to sell to the buyer, the buyer recorded a lis pendens against the property, thereby effectively preventing the seller from selling its property. The broker was held to be liable to the seller for interference with prospective advantage [*Earp v. Nobmann (1981) 122 Cal. App. 3d 270, 289-293, 175 Cal. Rptr. 767* (*disapproved on other grounds in Silberg v. Anderson (1990) 50 Cal. 3d 205, 219, 266 Cal. Rptr. 638, 786 P.2d 365*)].

For further discussion and forms relating to a cause of action for interference with prospective economic advantage in general, see Ch. 565, *Unfair Competition* .

[4] Failure to Disclose

The liability criteria in *Biakanja v. Irving (1958) 49 Cal. 2d 647, 650, 320 P.2d 16* [*see § 103.33[2]*] may be applied to a broker who fails to disclose information to a party with whom there is no privity or fiduciary relationship. For example, a broker was held liable to the holder of an unrecorded deed of trust for failing to notify the holder of a pending sale when the broker was well aware of the holder's interest and when the broker assured the seller that he would "take care of" the matter [*Norman I. Krug Real Estate Investments, Inc. v. Praszker (1990) 220 Cal. App. 3d 35, 41-43, 269 Cal. Rptr. 228]* .

However, in a case involving a duty imposed by statute, the court held that a real estate broker owed no duty of care under *Civ. Code § 2079* to a homebuyer's minor child who allegedly suffered injuries as the result of undisclosed microbial contamination of the home [*Coldwell Banker Residential Brokerage Co. v. Superior Court (2004) 117 Cal. App. 4th 158, 165, 11 Cal. Rptr. 3d 564]* . *Civ. Code § 2079(a)* provides that a real estate broker has a duty "to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective

purchaser all facts materially affecting the value or desirability of the property that an investigation would reveal" [*see § 103.31[8][b]*]. The court concluded that the statute expressly imposes inspection and disclosure duties only toward prospective buyers and not to persons, such as the minor child, who are not parties to the real estate transaction [*Coldwell Banker Residential Brokerage Co. v. Superior Court (2004) 117 Cal. App. 4th 158, 165, 11 Cal. Rptr. 3d 564]* . The court further concluded that the child was not an intended beneficiary of disclosures made by the broker to the buyer with regard to the property, and therefore could not sue the broker for injury from the undisclosed mold contamination [*Coldwell Banker Residential Brokerage Co. v. Superior Court (2004) 117 Cal. App. 4th 158, 166, 11 Cal. Rptr. 3d 564]* .

PRACTICE TIP:

Expansion of Foreseeable Risk for Broker Liability. The case of *Norman I. Krug Real Estate Investments, Inc. v. Praszker*, discussed *above*, is evidence of a judicial trend to hold a broker liable for his or her wrongful acts to third parties well outside the typical buyer-seller transaction. *By Linda Breen Pierce*

[5] Negligent Misrepresentation

A person who negligently supplies false information "for the guidance of others in their business transactions" is liable for economic loss suffered by the recipients in justifiable reliance on the information. The supplier of information is liable for negligence to a third party only if he or she intends to supply the information for the benefit of one or more third parties in a specific transaction or type of transaction identified to the supplier. In an opinion that held that an auditor could be liable to third party investors for negligent misrepresentation (as distinguished from general negligence) in preparing an independent audit of a client's financial statements, the California Supreme Court stated [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 392, 410, 11 Cal. Rptr. 2d 51, 834 P.2d 745]* :

> Accountants are not unique in their position as suppliers of information and evaluations for the use and benefit of others. Other professionals, including attorneys, architects, engineers, title insurers and abstractors, and others also perform that function. And, like auditors, these professionals may also face suits by third persons claiming reliance on information and opinions generated in a professional capacity.

A real estate appraiser who, although retained by a mortgage broker, knows that his or her report will be used by potential investors in the brokered loan, may also be liable to third parties for negligent misrepresentation in preparing an appraisal. The fact that the appraiser does not know the specific lenders who might rely on the appraisal is immaterial. It is sufficient that the provider supplies the information for repetition to a certain group or class of persons and that the plaintiff proves to be one of them, even though the provider never had heard of the plaintiff by name when the information was given [*Soderberg v. McKinney (1996) 44 Cal. App. 4th 1760, 1767-1769, 52 Cal. Rptr. 2d 635]* .

PRACTICE TIP:

Potential Liability of Real Estate Broker or Agent to Unrelated Third Party. The decision in *Soderberg v. McKinney*, discussed *above*, leads to the obvious question of the potential exposure of a real estate agent or broker to a party with whom the broker or agent has no contractual or fiduciary relationship. Brokers and agents offer many opinions and prepare documents that could be relied on by third parties. For example, a broker or agent often prepares a market analysis for an owner of property who is considering retaining or who has retained the broker or agent to sell his or her property. It is possible that this documentation could end up in the hands of a third party who would rely on the information contained in it. Theoretically, a real estate agent or broker could be exposed to liability if this third party relied on this information to his or her detriment. *By Jeffrey S. Martin*

Legal Topics:

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

Real Property LawBrokersFiduciary ResponsibilitiesTortsBusiness TortsCommercial InterferenceProspective AdvantageGeneral OverviewTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationGeneral OverviewTortsVicarious LiabilityAgentsNegligence

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§ 103.34 Broker's Right to Indemnification

A broker can be liable to his or her client for misrepresenting information received from a third party if the broker fails to verify the information or disclose that the information has not been verified [*see § 103.31[3]*]. In certain situations, the broker may be entitled to equitable indemnification from that third party.

For example, when a broker representing a buyer falsely represented to his client that an easement existed for a landlocked property, the broker had a cause of action for equitable indemnity against the seller who originally provided the false information about the easement. To justify equitable indemnification, the wrongs of the respective tortfeasors must differ essentially in character or kind, resulting in the conclusion that the negligence of the primary tortfeasor is active, while the broker's negligence is passive [*Gardner v. Murphy (1975) 54 Cal. App. 3d 164, 167-168, 126 Cal. Rptr. 302]* .

In another action, a mortgage loan broker was sued by its client because the client did not understand that the loan would be secured by her home. The court held that the mortgage loan broker could state a cause of action against an attorney who had provided written verification that he had explained the terms of the loan documentation to the client [*Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices (1989) 207 Cal. App. 3d 1277, 1283-1285, 255 Cal. Rptr. 483]* .

PRACTICE TIP:

Contractual Indemnity. A broker or agent may also have a right to contractual indemnity against his or her principal. For example, many of the standard listing agreements contain a clause that provides that the seller will indemnify the broker or agent for any claims arising out of misrepresentations or non-disclosures made by the seller. The ability to raise such a claim is important, particularly in the

> context of settlement. A contractual indemnity claim will survive a good faith settlement determination. Additionally, the clause typically provides for the recovery of attorney's fees by the broker or agent [for complaints for express contractual indemnity, *see* Ch. 300, *Indemnity and Contribution*]. *By Jeffrey S. Martin*

For a complaint for equitable indemnity by a broker against a seller or buyer, see *§ 103.85[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersFiduciary ResponsibilitiesTortsProcedureMultiple DefendantsIndemnityNoncontractual Indemnity

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10-103 California Forms of Pleading and Practice--Annotated §§ 103.35-103.39

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[Reserved]

§§ 103.35[Reserved]

California Forms of Pleading and Practice--Annotated

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Volume 10: Boundaries thru Captions and Introductions-Chs. 101-108
Chapter 103 BROKERS
PART II. LEGAL BACKGROUND
D. Recovery Account of Real Estate Fund

10-103 California Forms of Pleading and Practice--Annotated § 103.40

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§ 103.40 General Purpose

Bus. & Prof. Code § 10470 et seq. create a special fund ("Recovery Account") supported by license fees to compensate individuals who are defrauded by real estate licensees. *Bus. & Prof. Code § 10471(a)* provides for recovery from the fund of an unpaid judgment against a licensee for actual or constructive fraud or conversion of trust funds arising directly out of any transaction when the judgment debtor was licensed and performed acts for which that license was required. Recovery is available to those who have been defrauded by either a licensed real estate broker or a licensed real estate salesperson [*Vinci v. Edmonds (1986) 185 Cal. App. 3d 1251, 1254, 230 Cal. Rptr. 308]* .

Bus. & Prof. Code § 10471 is a remedial statute intended to protect the public against loss resulting from misrepresentation and a breach of fiduciary duty by licensed real estate personnel who are unable to respond to damage awards. Consequently, it is to be given a liberal construction to promote its purpose and protect persons within its purview. Relief is to be granted under the statute unless to do so would be clearly forbidden by that statute [*Doyle v. Department of Real Estate (1994) 30 Cal. App. 4th 893, 896-897, 36 Cal. Rptr. 2d 193* ; *Vinci v. Edmonds (1986) 185 Cal. App. 3d 1251, 1256, 230 Cal. Rptr. 308]* .

Real estate licensees acting in their capacity as licensees are outside the class of aggrieved persons entitled to compensation from the Recovery Account. The protected class is the client, not the licensee [*Wallace v. Onate (1991) 2 Cal. App. 4th 549, 553-554, 3 Cal. Rptr. 2d 3* (agent who reimbursed her buyer-clients for losses due to the fraud of seller-licensee could not recover from the *Recovery Account); Middelsteadt v. Karpe (1975) 52 Cal. App. 3d 297, 302, 124 Cal. Rptr. 840* (broker could not recover from Recovery Account based on fraud of his salesperson related to an internal commission dispute)]. In addition, title insurance companies do not qualify as "aggrieved parties" who may recover from the Recovery Account because a title insurer is neither a "client" of the broker nor a vulnerable member of the general public [*Stewart Title Guaranty Co. v. Park (9th Cir. 2001) 250 F.3d 1249, 1253]* . In contrast, a defrauded

licensee who acts as a principal in a transaction and whose conduct does not require a real estate license is not precluded from recovering from the fund by virtue of his or her status as a licensee [*Buccella v. Mayo (1980) 102 Cal. App. 3d 315, 327, 162 Cal. Rptr. 369]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary ResponsibilitiesTortsBusiness TortsFraud & MisrepresentationGeneral Overview

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Chapter 103 BROKERS
PART II. LEGAL BACKGROUND
D. Recovery Account of Real Estate Fund

10-103 California Forms of Pleading and Practice--Annotated § 103.41

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§ 103.41 Eligibility for Payment

[1] Type of Judgment Required

An application for a payment from the Recovery Account may be submitted if the following requirements have been met [*Bus. & Prof. Code § 10471(a)*]:

- An aggrieved person obtains a final judgment in a court of competent jurisdiction or an arbitration award that (1) includes findings of fact and conclusions of law rendered in accordance with the rules established by the American Arbitration Association or another recognized arbitration body, and in accordance with *Code Civ. Proc. § 1280 et seq.* (California arbitration law) when applicable, and (2) has been confirmed and reduced to judgment pursuant to *Code Civ. Proc. § 1287.4*. A court of competent jurisdiction, for purposes of these provisions, includes federal courts, but does not include the courts of another state [*Bus. & Prof. Code § 10471(a)*].

- The judgment against the defendant is based on the defendant's fraud, misrepresentation, or deceit, made with intent to defraud, or conversion of trust funds arising directly out of any transaction not in violation of *Bus. & Prof. Code § 10137* or *10138* in which the licensed defendant performed acts for which that license was required.

For these purposes, a final judgment in a court of competent jurisdiction includes, but is not limited to, a criminal restitution order issued pursuant to *Penal Code § 1202.4(f)* or *18 U.S.C. § 3663* [*Bus. & Prof. Code § 10471(a)*]. An application for payment from the Recovery Account that is based on such an order must comply with all of the requirements of *Bus. & Prof. Code § 10470 et seq.* [*Bus. & Prof. Code § 10471(e)* (this provision also sets forth

definitions relevant to applications based on such an order)].

[2] Acts Requiring License

The defendant must actually have been licensed during the time the activity complained of occurred. An unlicensed defendant will not be treated as a licensee simply because he or she represented to the applicant that he or she held a license [*Powers v. Fox (1979) 96 Cal. App. 3d 440, 447, 158 Cal. Rptr. 92]* .

The fact that the defendant has a real estate license is not sufficient by itself; the activity forming the basis of the judgment must consist of acts for which that license is required. For example, if the defendant-licensee engages in activity as a principal, a judgment based on that activity will not satisfy the requirements of *Bus. & Prof. Code § 10471(a)* [*Buccella v. Mayo (1980) 102 Cal. App. 3d 315, 322-324, 162 Cal. Rptr. 369* ; *Robinson v. Murphy (1979) 96 Cal. App. 3d 763, 767-769, 158 Cal. Rptr. 246* (broker-seller selling property co-owned with his wife was not a broker who "acts for another or others" within the meaning of *Bus. & Prof. Code § 10131*, and therefore his acts did not satisfy the requirements of performing acts for which a license was required); *Stout v. Edmonds (1986) 180 Cal. App. 3d 66, 69-70, 225 Cal. Rptr. 345* (buyer-agent receiving a portion of listing agent's commission is not acting for another and therefore is not a broker within the definition of *Bus. & Prof. Code § 10131*)].

The language "performed acts for which *that license* was required" (emphasis added) in *Bus. & Prof. Code § 10471(a)* limits recovery to transactions that fall within the purview of the specific license held by the judgment debtor. In other words, a broker must perform acts for which a broker's license is required, and a salesperson must perform acts for which a salesperson's license is required. If the defendant's acts exceed the scope of his or her license, recovery is not permitted from the Recovery Account [*Davis v. Harris (1998) 61 Cal. App. 4th 507, 511-512, 71 Cal. Rptr. 2d 591* (judgment creditors not entitled to recovery because the judgment debtor was a salesperson and performed acts for which a broker's license was required)]. Prior to January 1, 1987, the words "that license" (emphasized above) in Section 10471(a) read "a license." In a decision interpreting that earlier language, the court held that it was not required that the licensee be licensed to take part in the particular transaction out of which the fraud arose; that is, it was not necessary that the transaction in question be within the scope of the licensee's license, at least in those situations in which the licensee failed to disclose to an innocent member of the public his or her true license status [*see* *Dierenfield v. Stabile (1988) 198 Cal. App. 3d 126, 131-132, 243 Cal. Rptr. 598* (claimant entitled to payment based on default judgment against salesperson who failed to disclose to claimant that he was not employed by a broker at the time he performed acts for which a license was required), following the decision in *Vinci v. Edmonds (1986) 185 Cal. App. 3d 1251, 1254-1256, 230 Cal. Rptr. 308* (claimant could recover even though real estate salesperson performed acts requiring a broker's license when salesperson affirmatively misrepresented that he was a broker)].

When the licensee performs acts outside the scope of his or her particular license, but does not misrepresent his or her true licensing status to the claimant, the claimant may not recover from the Recovery Account. The rationale for this holding is that when the claimant is aware of the agent's true licensing status and engages the agent to perform acts outside the scope of that license, the claimant is not an innocent member of the public but is acting in pari delicto (in equal fault) by entering into an illegal contract with the agent [*see* *Merrifield v. Edmonds (1983) 146 Cal. App. 3d 336, 343-345, 194 Cal. Rptr. 104]* .

The judgment against the defendant may be a judgment in a class action suit [*Edmonds v. Augustyn (1988) 198 Cal. App. 3d 465, 472, 243 Cal. Rptr. 673]* , a judgment by default, stipulation, or consent, or a judgment pursuant to *Code Civ. Proc. § 594* (nonappearance at trial or hearing) [*see Bus. & Prof. Code § 10473*; *see also* *Doyle v. Department of Real Estate (1994) 30 Cal. App. 4th 893, 897-899, 36 Cal. Rptr. 2d 193* (stipulated judgment)].

[3] Actual and Direct Loss

The amount of payment from the Recovery Account is limited to the amount unpaid on the judgment that represents an

actual and direct loss to the claimant in the transaction [*Bus. & Prof. Code § 10471(a)*]. The Legislature intended minimum and limited rather than maximum benefits to those otherwise qualifying. The statutory scheme is not intended to ensure that applicants recover profits; rather, the intent is to prevent applicants from suffering losses on money actually paid [*Dierenfield v. Stabile (1988) 198 Cal. App. 3d 126, 132-133, 243 Cal. Rptr. 598]* .

Punitive damages and indirect damages such as attorney's fees are deemed not to be within the meaning of "actual and direct" losses [*Acebo v. Real Estate Education etc. Fund (1984) 155 Cal. App. 3d 907, 910-911, 202 Cal. Rptr. 518]* . Noneconomic losses, such as emotional distress damages, are also not recoverable [*Temple v. Kerwin (1989) 209 Cal. App. 3d 1087, 1091, 257 Cal. Rptr. 651]* .

However, costs incurred in connection with the applicant's attempts to satisfy a judgment against the defendant, as well as the prejudgment and postjudgment interest portions of any judgment that remain unpaid, are recoverable, subject to the limitation of the maximum recovery amounts discussed in [4], *below* [*Deas v. Knapp (1981) 29 Cal. 3d 69, 75-76, 171 Cal. Rptr. 823, 623 P.2d 775* (costs); *Nordahl v. Department of Real Estate (1975) 48 Cal. App. 3d 657, 666, 121 Cal. Rptr. 794]* .

The pecuniary benefit of tax write-offs from an investment resulting from the defendant's fraud may be used to offset the losses suffered by claimants to determine the "actual and direct loss" from the transaction. This serves the purpose of the statute to place the applicants "in the same position, from a monetary standpoint" that they would have been in had the fraud not occurred [*Froid v. Fox (1982) 132 Cal. App. 3d 832, 838-839, 183 Cal. Rptr. 461]* .

[4] Maximum Recovery Amounts

Regardless of the number of persons aggrieved or parcels of real estate involved in a transaction or the number of judgments against a licensee, the liability of the Recovery Account will not exceed $50,000 for any one transaction and $250,000 for any one licensee, for causes of action occurring on or after January 1, 2009, or $20,000 for any one transaction and $100,000 for any one licensee, for causes of action occurring before that date [*Bus. & Prof. Code § 10474(a), (b)*; *Edmonds v. Augustyn (1987) 193 Cal. App. 3d 1056, 1065-1066, 238 Cal. Rptr. 704]* .

When multiple licensed real estate personnel are involved in a transaction and the individual conduct of two or more of the licensees results in a judgment, the claimant may seek recovery from the Recovery Account based on the judgment against any of the licensed real estate personnel [*Bus. & Prof. Code § 10474(c)*; *Edmonds v. Augustyn (1987) 193 Cal. App. 3d 1056, 1067, 238 Cal. Rptr. 704]* .

The term "transaction" as used in *Bus. & Prof. Code § 10474* may involve a series of many occurrences, depending not so much on the immediateness of their connection as on their logical relationship [*Dombalian v. Fox (1979) 88 Cal. App. 3d 763, 765-767, 152 Cal. Rptr. 86* (listing agent who was undisclosed principal and who also forged owner's initials in escrow instructions was considered to have committed fraudulent acts in one transaction only)].

[5] Application Form

An application for payment must be made on a form prescribed by the Department and verified by the claimant, and must include the following information [*Bus. & Prof. Code § 10471(c)(1)-(6)*; *10 Cal. Code Reg. § 3101(a)*; for form, *see § 103.105[1]*]:

- The name and address of the claimant.

- If the claimant is represented by an attorney, the name, business address, and telephone number of the attorney.

- The identification of the judgment, the amount of the claim, and an explanation of its computation.

- A detailed narrative statement of the facts in explanation of the allegations of the complaint upon which the underlying judgment is based.

- For an application other than one based on a criminal restitution order, statement by the claimant, signed under penalty of perjury, that the complaint upon which the underlying judgment is based was prosecuted conscientiously and in good faith. For these purposes, "conscientiously and in good faith" means that no party potentially liable to the claimant in the underlying transaction was intentionally and without good cause omitted from the complaint, that no party named in the complaint who otherwise reasonably appeared capable of responding in damages was dismissed from the complaint intentionally and without good cause, and that the claimant employed no other procedural tactics contrary to the diligent prosecution of the complaint in order to provide access to the Recovery Account.

- For an application based on a criminal restitution order, statements that (1) the claimant has not intentionally and without good cause failed to pursue any person potentially liable to the claimant in the underlying transaction other than a defendant who is the subject of a criminal restitution order, (2) the claimant has not intentionally and without good cause failed to pursue in a civil action for damages all persons potentially liable to the claimant in the underlying transaction who otherwise reasonably appeared capable of responding in damages other than a defendant who is the subject of a criminal restitution order, and (3) the claimant employed no other procedural means contrary to the diligent prosecution of the complaint in order to seek to qualify for the Recovery Account [*see Bus. & Prof. Code § 10471(e)*].

- The name and address of the judgment debtor or, if not known, the names and addresses of persons who may know the judgment debtor's present whereabouts.

Additionally, the application form must include the following information and representations made by the claimant [*Bus. & Prof. Code § 10471(c)(7)*]:

- That he or she is not a spouse of the judgment debtor or a personal representative of the spouse.

- That he or she has complied with all of the requirements of *Bus. & Prof. Code § 10470 et seq.*

- That the judgment underlying the claim meets the requirements of *Bus. & Prof. Code § 10471(a)* [*see* [1], *above* (type of judgment required)], including that the judgment was issued by a court of competent jurisdiction, which for purposes of these provisions includes federal courts, but does not include the courts of another state [*Bus. & Prof. Code § 10471(a)*].

- A description of searches and inquiries conducted by or on behalf of the claimant with respect to the judgment debtor's assets liable to be sold or applied to satisfaction of the judgment, an itemized valuation of the assets discovered, and the results of actions by the claimant to have the assets applied to satisfaction of the judgment.

- That he or she has diligently pursued collection efforts against other judgment debtors and all other persons liable to the claimant in the transaction that is the basis for the underlying judgment. For example, failure to sue personally the principals and employees of a bankrupt corporate broker (or even to conduct discovery) was held to preclude recovery from the fund on a judgment against the corporate broker when there was evidence of possible personal liability of the principals and employees [*Fine v. Southern Cal. Business Sales, Inc. (1987) 190 Cal. App. 3d 480, 482-484, 235 Cal. Rptr. 489]* .

- That the underlying judgment and debt have not been discharged in bankruptcy, or, in the case of a bankruptcy proceeding that is open at the time of the filing of the application, that the judgment and debt have been declared to be nondischargeable.

- That the application was mailed or delivered to the Department no later than one year after the underlying judgment became final.

An applicant for a payment from the Real Estate Recovery Account must also provide the Department of Real Estate with proof of the applicant's legal presence in the United States [*see 10 Cal. Code Reg. § 2718*]. For further discussion, see [7], *below*.

Finally, the application form must include detailed instructions with respect to documentary evidence, pleadings, court rulings, the products of discovery in the underlying litigation, and a notice to the applicant of his or her obligation to protect the underlying judgment from discharge in bankruptcy, to be appended to the application [*Bus. & Prof. Code § 10471(d)*].

[6] Substantially Complete Application

Except as provided *below*, and in addition to the contents of the application described in [5], *above* (application form), an application will be deemed to be "substantially complete" when it includes all of the following information [*10 Cal. Code Reg. § 3102(a)-(s)*]:

(1) Proof that the judgment debtor was served with the notice prescribed by *Bus. & Prof. Code § 10471.1(e)* (notice to judgment debtor of application for payment out of Recovery Account) [*see § 103.106[1]* (form)] and application.

(2) A copy of the judgment showing it to be a final judgment and any findings of facts, conclusions of law, jury verdicts, jury special verdicts, statements of decisions, memorandum decisions, or any other indication by the court or jury, as the case may be, of its decision and the reasons for the decision. If the original judgment was appealed, the application must include copies of the appellate decision and remittitur.

(3) Copies of the original complaint, answer, cross-complaints, answers to cross-complaints, and all amendments or other subsequent versions of any of those documents.

(4) Copies of any pre-trial or post-trial briefs or settlement conference statements.

(5) A listing of all depositions and interrogatories taken in the underlying action, describing the party or parties taking the deposition or propounding the interrogatories, the deponent or person responding to interrogatories, and all persons present at any deposition.

(6) Copies of any demurrers or motions for summary judgment, supporting documents, and rulings on the demurrers or motions.

(7) Copies of all documents reflecting the terms of the underlying transaction, including, for example, offers, counteroffers, escrow instructions, closing statements, deeds, notes, and deeds of trust.

(8) A detailed narrative description by the claimant under penalty of perjury of all the facts of the underlying transaction, including how he or she was damaged by the judgment debtors, and the roles of

all other persons involved in the transaction (such as other brokers or salespersons, sellers, and buyers).

(9) A description by the claimant of the basis for each element of damages.

(10) If the only judgment debtor was a salesperson, a statement as to why the employing broker was not either sued or taken to judgment.

(11) If any codefendants were dismissed from the underlying lawsuit, a statement of the reason for dismissal as to each such codefendant.

(12) A list of the names of any witnesses who testified at the underlying trial and the present or last known addresses of the witnesses to the extent known by the claimant.

(13) A description of searches and inquiries conducted by or on behalf of the claimant with respect to the assets of the judgment debtor and the assets of all other persons liable to the claimant in the transaction, which assets may be liable to be sold or applied to the losses suffered by the claimants; an itemized valuation of the assets discovered; and the results of actions by the claimant to have the assets applied to the losses suffered by the claimant.

(14) If the claimant claimed any loss related to the transaction as a deduction on his or her tax return or returns, a description of the amount of the tax benefit derived from the deduction.

(15) A statement whether the judgment debtor is known to have filed bankruptcy. If so, a statement whether the claimant was named as a creditor in the bankruptcy, filed a claim in the bankruptcy, and pursued an adversary complaint to have the debt determined to be nondischargeable. If the judgment debtor filed bankruptcy and the claimant failed to take any of the foregoing actions, a statement as to why the claimant failed to take the actions.

(16) Abstracts of judgment bearing evidence of having been recorded in the county or counties in which the judgment debtor may possibly have assets.

(17) If any of the above items are not included in the initial application, or are requested in a deficiency letter and not supplied, a statement under penalty of perjury that the claimant has made a diligent effort to locate and produce the items but has been unable to locate them or has found that they do not exist.

(18) Certification by the claimant that all documents submitted are true and correct copies of the originals, and if such documents purport to be copies of documents filed in court, that they are true and correct copies of the originals filed with the court [*10 Cal. Code Reg. § 3101(c)*].

All of the above documents or copies of documents must be clear and legible [*10 Cal. Code Reg. § 3102(r)*].

An application with less than all of the above information may constitute a substantially complete application if the claimant believes that the information submitted with the application is sufficient for the Department to determine whether the application qualifies for payment under *Bus. & Prof. Code § 10470 et seq.*, and either of the following applies [*10 Cal. Code Reg. § 3101(b)*]:

- The Department determines that what has been submitted is sufficient for it to make a determination whether the application qualifies for payment from the Recovery Account and so notifies the claimant.

- The application and supporting information meet all of the requirements specified in the above list of

documents and information.

[7] Proof of Legal Presence

In addition to satisfying the requirements set forth in [5] and [6], *above*, an applicant for a payment from the Real Estate Recovery Account must provide the Department of Real Estate (DRE) with proof of the applicant's legal presence in the United States [*10 Cal. Code Reg. § 2718*]. A similar requirement applies to applicants for a real estate license [*see* California Real Estate Law & Practice, Ch. 64, *Licensing and Discipline of Brokers* (Matthew Bender)]. These requirements became operative on August 1, 1998, and were promulgated by the DRE pursuant to federal legislation that eliminated certain public benefits for illegal immigrants [*10 Cal. Code Reg. § 2718*; *see 8 U.S.C. § 1621*; *see also 8 U.S.C. § 1601 et seq.*].

To satisfy the DRE requirements, an applicant for payment must do the following:

- Declare himself or herself to be (1) a citizen of the United States, (2) a qualified alien [*see 10 Cal. Code Reg. § 2718(d)* (definition of "qualified alien," which includes an alien lawfully admitted for permanent residence or granted asylum under the Immigration and Nationality Act (INA) [*8 U.S.C. § 1101 et seq.*])], (3) a nonimmigrant alien [*see 10 Cal. Code Reg. § 2718(e)* (adopting INA definition of this term, which is set forth in *8 U.S.C. § 1101(a)(15)*)], or (4) an alien paroled into the United States for less than one year under *Section 212(d)(5) of the Immigration and Nationality Act* (INA) [*8 U.S.C. § 1182(d)(5)*]. The applicant must declare this status by completing and signing the "State Public Benefits Statement" (DRE Form 205) [*10 Cal. Code Reg. § 2718(f)(1)*]. An alien who does not fall within one of the three categories described in items (2)-(4), *above*, is not eligible to receive a payment from the Account [*10 Cal. Code Reg. § 2718(b)*].

- Present documents that are acceptable to the Immigration and Naturalization Services (INS) and are included in List A or List B of DRE Form 205. List A sets forth acceptable documents to establish U.S. citizenship, such as a birth certificate; List B identifies documents that may be submitted by an alien lawfully admitted for permanent residence under the INA, such as a "green card." These documents will serve as reasonable evidence of the applicant's declared status [*10 Cal. Code Reg. § 2718(f)(2)*; *see 10 Cal. Code Reg. § 2718(g), (i)* (circumstances under which documents must be submitted to INS for verification through Systematic Alien Verification for Entitlements [SAVE] system or alternative verification-related procedures must be followed)].

When the documents presented do not on their face appear to be genuine or to relate to the individual presenting them, the government entity that originally issued the documents must be contacted for verification [*10 Cal. Code Reg. § 2718(f)(3), (j)*]. With regard to naturalized citizens and derivative citizens presenting certificates of citizenship and aliens, the DRE will request verification from the INS. If the applicant has lost his or her original documents, presents expired documents, or is unable to present any documentation evidencing his or her immigration status, the applicant will be referred to the local INS office to obtain documentation [*10 Cal. Code Reg. § 2718(f)(3), (j)*; *see 10 Cal. Code Reg. § 2718(k)* (requiring acceptance of INS verification, and denial of benefits if INS cannot verify applicant's status)].

The applicant may present documents described above that serve as reasonable evidence of the applicant's declared status prior to applying for payment from the Real Estate Recovery Fund [*see 10 Cal. Code Reg. § 2718(h)*].

Any denial of a payment application pursuant to the above provisions will be subject to the provisions of the Administrative Procedure Act [*Gov. Code § 11340 et seq.*] governing formal hearings [*10 Cal. Code Reg. § 2718(o)*; *see Bus. & Prof. § 10100*; *see also Gov. Code § 11500 et seq.* (hearing provisions)].

[8] Limitation Period and Delivery to Department of Real Estate

The application must be delivered in person or by certified mail to an office of the Department of Real Estate not later than one year after the judgment has become final [*Bus. & Prof. Code § 10471(b)*].

[9] Service and Notice to Judgment Debtor

The claimant must serve a copy of the application and of the notice prescribed in *Bus. & Prof. Code § 10471.1(e)* (notice to judgment debtor of application for payment out of Recovery Account) on the judgment debtor [for a form of notice, *see § 103.106[1]*]. Service must be personal, by certified mail, or by publication [*Bus. & Prof. Code § 10471.1(a)*]. If the judgment debtor holds unexpired and unrevoked licenses issued by the Department, service of the notice and a copy of the application may be made by certified mail addressed to the judgment debtor at the latest business or residence address on file with the Department. If the judgement debtor does not hold an unexpired and unrevoked license issued by the Department, and personal service cannot be effected through the exercise of reasonable diligence, the claimant must serve the judgment debtor by one publication of the notice in each of two successive weeks in a newspaper of general circulation in the county in which the judgment debtor was last known to reside [*Bus. & Prof. Code § 10471.1(b)*].

If the application is served on the judgment debtor by certified mail, service is complete five days after mailing if the address is within California, and 10 days after mailing if the address is outside California but within the United States. Personal service is complete on the date of service, and service by publication is complete on completion of the second week of publication [*Bus. & Prof. Code § 10471.1(c)*].

Forms for proof of service are available from the Department of Real Estate and are normally obtained when the application is obtained.

[10] Contest of Payment by Judgment Debtor

If a judgment debtor wishes to contest payment of an application by the Commissioner, he or she must mail or deliver a written response to the application. The response must be addressed to the Department's headquarter office and mailed or delivered within 30 days after service of the notice and application. The judgment debtor must also mail or deliver a copy of the response to the claimant. A judgment debtor who fails to mail or deliver a timely response waives his or her right to present objections to payment [*Bus. & Prof. Code § 10471.1(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary ResponsibilitiesTortsBusiness TortsFraud & MisrepresentationGeneral Overview

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§ 103.42 Administrative Proceedings

[1] Judgment Debtor's Response

Any response by a judgment debtor objecting to payment from the Recovery Account on account of the judgment against him or her must be in writing and must be filed with the Department within 30 days after mailing, delivery, or publication of the notice by the claimant [*see § 103.41[9]* (notice to judgment debtor); *see* Bus. & Prof. Code § 10474.1(c)]. The response must contain a verification that a copy of the response was sent to the claimant, or if the claimant is represented by an attorney, to the claimant's attorney, at the address specified in the application for the claimant or his or her attorney [*10 Cal. Code Reg. § 3103(a)*]. If the judgment debtor is not represented by an attorney in objecting to payment of the application, the response must contain the judgment debtor's name, the address at which he or she wishes to receive correspondence and notices relating to the application, and a telephone number where he or she can be reached during regular business hours. If the judgment debtor is represented by an attorney in objecting to the application, the response must contain the name, business address, and telephone number of the attorney [*10 Cal. Code Reg. § 3103(b)*].

A judgment debtor who fails to respond within the 30-day period described above is not thereafter entitled to notice of any action taken or proposed to be taken by the Commissioner with respect to the claim [*Bus. & Prof. Code § 10471.1(d)*].

[2] Service of Subsequent Notices and Correspondence

After initial service of the application on the Department and the judgment debtor by the claimant [*see §§ 103.41[8]* (delivery to Department) and 103.41[9] (service on judgment debtor)], and after service of a response by the judgment debtor as discussed in [1], *above* (judgment debtor's response), all parties must be served with subsequent

correspondence and notices by first class mail as follows [*10 Cal. Code Reg. § 3104*]:

- The Department must be served at:

  Department of Real Estate
  Recovery Account Unit
  P.O. Box 187007
  Sacramento, CA 95818-7007

- The claimant must be served at his or her address as specified in the application, or if the claimant is represented by an attorney, at the address of the attorney as specified in the application.

- The judgment debtor must be served at his or her address as specified in the response, or if the judgment debtor is represented by an attorney, as specified in the response.

[3] Deficient Application

If the Commissioner determines that the application as submitted by the claimant fails to comply substantially with the requirements of *Bus. & Prof. Code § 10471* or with the requirements of a regulation adopted by the Commissioner under *Bus. & Prof. Code § 10080*, the Commissioner must, within 15 days after receipt of the application, mail an itemized list of deficiencies to the claimant [*Bus. & Prof. Code § 10471.2(a)*].

If the Department has mailed one or more itemized lists of deficiencies to a claimant and, after an unreasonable length of time, the Department has received no response to the latest such list of deficiencies, the Department may notify the claimant that, unless the application is substantially complete within a specified period of time of not less than 30 days, the application will be denied [*10 Cal. Code Reg. § 3107(a)*]. The determination of what constitutes an unreasonable length of time is within the discretion of the Commissioner, taking into account the degree of difficulty in meeting the deficiencies specified. However, an unreasonable length of time must not be deemed to be less than six months after the last mailing of a list of deficiencies [*10 Cal. Code Reg. § 3107(b)*]. If no response is received from the claimant after the passing of the deadline, the Commissioner may deny the application [*10 Cal. Code Reg. § 3107(c)*].

[4] Filing of Claim With Court in Event of Irreconcilable Dispute as to Sufficiency of Application

In the event of an irreconcilable dispute between the claimant and the Commissioner on the question of whether the application is substantially complete, the claimant may immediately file the claim with the court pursuant to *Bus. & Prof. Code § 10472* [*Bus. & Prof. Code § 10471.2(b)*; *see § 103.44* (judicial review initiated by claimant)].

[5] Written Arguments

A judgment debtor who has filed a response objecting to payment to a claimant from the Recovery Account may submit written argument setting forth in detail the factual and legal bases on which he or she believes the application should be denied. The argument may be submitted at any time from the filing of the response until 30 days after the date of mailing of the notice to the judgment debtor set forth in *Bus. & Prof. Code § 10471.1(c)*, and must be served on the Department and the claimant [*10 Cal. Code Reg. § 3106(a)*; *see* [2], *above* (service requirements for subsequent notices and correspondence)].

The claimant has 30 days after the mailing of argument by the judgment debtor in which to submit his or her own reply argument in favor of payment. The argument must be served on the judgment debtor and Department [*10 Cal. Code Reg. § 3106(b)*; *see* [2], *above* (service requirements for subsequent notices and correspondence)].

[6] Proration of Claims

If, at any time prior to the rendering of a decision on an application, the Commissioner makes a preliminary determination that the aggregate valid applications of all aggrieved persons against that licensee are likely to exceed the limits of liability in *Bus. & Prof. Code § 10474* [*see § 103.41[4]* (maximum recovery amounts)], the Commissioner must, in lieu of further administrative proceedings, initiate a proration proceeding pursuant to *Bus. & Prof. Code § 10474.5* in a superior court of any county in this state that would be a proper court for the filing of a denied application or writ of mandamus pursuant to *Bus. & Prof. Code § 10471.5* [*Bus. & Prof. Code § 10471.6*]. Proper courts for a denied application are discussed in [9], *below*, and proper courts for a writ of mandamus are discussed in *§ 103.43*.

The proration proceeding will determine the distribution of the amount of liability in the Recovery Account allocated to one licensee for payment to all aggrieved persons with valid claims [*see § 103.41[4]* (maximum recovery amounts)]. The amount will be distributed among the claimants in the ratio that their respective claims bear to the aggregate of the valid claims, or in any other manner that the court deems equitable. Distribution of any moneys will be among the persons entitled to share in the moneys, without regard to the order of priority in which their respective judgments may have been obtained or their claims have been filed. On petition of the Commissioner, the court may require all claimants and prospective claimants against one licensee to be joined in one action, to the end that the respective rights of all claimants to the Recovery Account may be equitably adjudicated and settled [*Bus. & Prof. Code § 10474.5*].

For purposes of a proration petition, persons may have "valid claims" without first having obtained a judgment against the licensee from a court of competent jurisdiction (which includes California and federal courts, but does not include the courts of another state) as required by *Bus. & Prof. Code § 10471(a)*. However, the claims of aggrieved persons who do not have a final judgment against the licensee must first be adjudicated in either the proration or another proceeding, and the judgment against the licensee must become final, before the distribution of money from the Recovery Account may be ordered. The court adjudicating the Commissioner's proration petition may adopt reasonable procedures to permit the claimants to first obtain a judgment in the same or another proceeding, allow the judgment to become final, engage in appropriate collection efforts, and finally apply for and obtain a judgment allowing payment from the Recovery Account [*Edmonds v. Augustyn (1988) 198 Cal. App. 3d 465, 471, 243 Cal. Rptr. 673]* .

[7] Commissioner's Action on Application

The Commissioner must render a final written decision on the application within 90 days after receipt of a completed application, unless the claimant agrees in writing to extend the time within which the Commissioner may render a decision. If the Commissioner fails to render a written decision in response to the claim within 90 days after its receipt or within the extended period agreed to by the claimant, the claim is deemed to have been denied by the Commissioner on the final day for rendering the decision [*Bus. & Prof. Code § 10471.3(a)*].

The Commissioner may deny or grant the application, or may enter into a compromise with the claimant to pay less in settlement than the full amount of the claim. If the claimant refuses to accept a settlement of the claim offered by the Commissioner, the written decision of the Commissioner will be to deny the claim or it will be deemed denied if a written decision is not rendered within the 90-day time limit. Evidence of settlement offers and discussions between the Commissioner and the claimant will not be competent evidence in judicial proceedings undertaken by the claimant pursuant to *Bus. & Prof. Code § 10472* [*Bus. & Prof. Code § 10471.3(b)*; *see § 103.44* (judicial review initiated by claimant)].

[8] Investigation and Discovery

In its consideration and investigation of an application, the Department of Real Estate has recourse to all appropriate means of investigation and discovery available to it under *Gov. Code §§ 11180-11191* [*Bus. & Prof. Code § 10471.4*].

[9] Notice of Decision

The Commissioner must give notice of a decision rendered with respect to the application to the claimant and to a judgment debtor who has filed a timely response to the claim in accordance with *Bus. & Prof. Code § 10471.1* [*Bus. & Prof. Code § 10471.5(a)*].

If the application is denied, the notice to the claimant and judgment debtor must include language stating that the claimant's application is denied, and that if the claimant wishes to pursue the application in court, the claimant must file the application in a superior court of this state not later than six months after receipt of the notice, pursuant to *Bus. & Prof. Code § 10472*. If the underlying judgment is a California state court judgment, the application must be filed in the court in which the underlying judgment was entered. If the underlying judgment is a federal court judgment, the application must be filed in a superior court of any county within California that would have been a proper venue if the underlying lawsuit had been filed in a California state court, or in the superior court of Sacramento County [*Bus. & Prof. Code § 10471.5(b)*; *see § 103.44* (judicial review initiated by claimant)].

[10] Insufficient Funds in Recovery Account

If at any time, the money deposited in the Recovery Account is insufficient to satisfy any duly authorized claim or portion of such a claim, the Commissioner must, when sufficient money has been deposited in the Recovery Account, satisfy the unpaid claims or portions of claims, in the order that the claims or portions of claims were originally filed, plus accumulated interest at the rate of four percent a year [*Bus. & Prof. Code § 10476*].

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10-103 California Forms of Pleading and Practice--Annotated § 103.43

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§ 103.43 Judicial Review Initiated by Judgment Debtor

If the claimant is to be paid out of the Recovery Account, the Commissioner must give the judgment debtor a notice along with a copy of the decision. The notice must specify the amount of the payment to be made to the claimant, and state that pursuant to *Bus. & Prof. Code § 10475* [*see § 103.45[1]* (suspension of license)], the debtor's licenses and license rights are suspended and may not be reinstated until the debtor has reimbursed the Account for the payment plus interest at the prevailing legal rate. In addition, the notice must indicate that if the judgment debtor desires a judicial review of the suspension of the licenses and license rights, the debtor may petition the superior court for a writ of mandamus. If the underlying judgment is a California state court judgment, the petition must be filed in the court in which the judgment was entered. If the underlying judgment is a federal court judgment, the petition must be filed in the superior court of any county within California that would have been a proper venue if the underlying lawsuit had been filed in a California state court, or in the superior court of Sacramento County. To be timely, the petition must be filed with the court within 30 days after receipt of the notice [*Bus. & Prof. Code § 10471.5(c)*].

If the decision of the Commissioner is to make a payment out of the Recovery Account and the judgment debtor petitions for a writ of mandamus, no payment will be made on the pending application unless and until the writ of mandamus has been denied and the denial has become final [*10 Cal. Code Reg. § 3109(a)*]. If the writ of mandamus is granted on the basis that the claimant has not met the requirements for payment from the Recovery Account, the application must be denied [*10 Cal. Code Reg. § 3109(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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WritsMandamusReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary ResponsibilitiesTortsBusiness TortsFraud & MisrepresentationGeneral Overview

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§ 103.44 Judicial Review Initiated by Claimant

[1] Application

If the Commissioner renders a decision denying an application for payment from the Recovery Account, the claimant may file a verified application within six months after the mailing of the notice of the denial in superior court for an Order Directing Payment Out of the Recovery Account, based on the grounds set forth in the application to the Commissioner. If the underlying judgment is a California state court judgment, the application must be filed in the court in which the underlying judgment was entered. If the underlying judgment is a federal court judgment, the application must be filed in the superior court of any county within California that would have been a proper venue if the underlying lawsuit had been filed in a California state court, or in the superior court of Sacramento County [*Bus. & Prof. Code § 10472(a)*].

For a form of application, see *§ 103.107[1]*.

This judicial review procedure is available only to the claimant when the application is denied, and is not intended as a forum for review by the judgment debtor when the application is granted [*Doyle v. Department of Real Estate (1994) 30 Cal. App. 4th 893, 897-898, 36 Cal. Rptr. 2d 193]* . However, a broker-judgment debtor has the right to challenge an adverse decision by traditional mandate [*Rodriguez v. Department of Real Estate (1996) 51 Cal. App. 4th 1289, 1298, 59 Cal. Rptr. 2d 652* ; *see § 103.43* (judicial review initiated by judgment debtor)].

[2] Service and Notice

A copy of the verified application must be served on the Commissioner. The service may be made by certified mail addressed to the headquarters office of the Department of Real Estate [*Bus. & Prof. Code § 10472(b)*].

A copy of the verified application, together with a prescribed notice, must be served on the judgment debtor [*Bus. & Prof. Code § 10472(b)*; *see § 103.108[1]* for notice form]. Service may be made on the judgment debtor in accordance with *Bus. & Prof. Code § 10471.1* [*Bus. & Prof. Code § 10472(b)*; *see § 103.41[9]* (service on judgment debtor)].

Finally, the claimant must file with the court a certificate or affidavit of service on the Commissioner and the judgment debtor [*Bus. & Prof. Code § 10472(b)*].

[3] Written Response and Settlement

The Commissioner and the judgment debtor each have 30 days after being served with the application in which to file a written response [*Bus. & Prof. Code § 10472.1(a)*].

If the judgment debtor fails to file a written response to the application, the claim may be compromised or settled by the Commissioner at any time during the court proceedings and the court will, on joint petition of the applicant and the Commissioner, issue an order directing payment out of the Recovery Account [*Bus. & Prof. Code § 10472.1(c)*]. However, if the judgment debtor timely files a written response, any compromise made by the Commissioner on the claim is subject to court approval [*see Bus. & Prof. Code § 10473* (Commissioner may compromise claim, subject to court approval)]. In any event, the Commissioner is not bound by any compromise or stipulation of the judgment debtor [*Bus. & Prof. Code § 10473*].

[4] Hearing

After the 30-day response period has passed, the court must set the matter for hearing [*Bus. & Prof. Code § 10472.1(a)*].

Any party may request a continuance and, on a showing of good cause, the court may continue the hearing for any time that the court deems appropriate. However, the Commissioner may request a continuance of as much as 30 days without showing good cause, which, if so requested, the court is required to grant [*Bus. & Prof. Code § 10472.1(a)*].

[5] Applicant's Burden of Proof

The claimant has the burden of proving compliance with the requirements of *Bus. & Prof. Code § 10471* by competent evidence at an evidentiary hearing. The claimant is entitled to a de novo review of the merits of the application as contained in the administrative record [*Bus. & Prof. Code § 10472.1(b)*; *see § 103.41* (eligibility for payment)].

All matters that were finally adjudicated in the underlying action, including, but not limited to, the issues of fraud, misrepresentation, deceit, or conversion of trust funds, are conclusive as to the applicant in the proceeding against the Recovery Account [*Bus. & Prof. Code § 10473.1*]. Thus, when the findings of fact and conclusions of law supporting the underlying judgment do not include fraud, misrepresentation, deceit, or conversion of trust funds, the applicant is precluded from relitigating this issue in the proceedings to recover from the Recovery Account [*Stuart v. Department of Real Estate (1983) 148 Cal. App. 3d 1, 4, 195 Cal. Rptr. 524]* .

If the judgment in favor of the applicant was by default, stipulation, or consent, or pursuant to *Code Civ. Proc. § 594* (nonappearance at trial or hearing), or whenever the action against the licensee was defended by a trustee in bankruptcy, the applicant has the burden of proving that the cause of action against the licensee was for fraud, misrepresentation, deceit, or conversion of trust funds [*Bus. & Prof. Code § 10473*].

[6] Defense by Judgment Debtor

The judgment debtor may defend an action against the Recovery Account on his or her own behalf. In so doing, the judgment debtor has recourse to all appropriate means of defense and review, including examination of witnesses.

However, all matters that were finally adjudicated in the underlying action, including but not limited to the issues of fraud, misrepresentation, deceit, or conversion of trust funds, are conclusive as to the judgment debtor in the proceeding against the Recovery Account [*Bus. & Prof. Code § 10473.1*].

[7] Defense by Commissioner

The Commissioner may defend the action on behalf of the Recovery Account. In so doing, the Commissioner has recourse to all appropriate means of defense and review, including examination of witnesses and the right to relitigate any issues material and relevant in the proceeding against the Recovery Account that were determined in the underlying action on which the judgment in favor of the applicant was based. The underlying judgment normally creates a rebuttable presumption of the fraud, misrepresentation, deceit, or conversion of trust funds by the licensee, and this presumption affects the burden of producing evidence. This presumption does not apply, and the applicant has the burden of proof, (1) in the case of a judgment by default, stipulation, or consent, or pursuant to *Code of Civil Procedure Section 594* (nonappearance at trial or hearing), or (2) whenever the action against the licensee was defended by a trustee in bankruptcy [*Bus. & Prof. Code § 10473*; *see Doyle v. Department of Real Estate (1994) 30 Cal. App. 4th 893, 897-899, 36 Cal. Rptr. 2d 193]* .

The Commissioner may move the court at any time to dismiss the application when no triable issues are apparent and when the petition is without merit. The motion may be supported by affidavit of any person or persons having knowledge of the facts, and may be made on the basis that the petition, and the judgment referred to in the petition, does not form the basis for a meritorious recovery claim within the purview of *Bus. & Prof. Code § 10471*. The Commissioner must give written notice at least 10 days before the motion [*Bus. & Prof. Code § 10473*].

[8] Order for Payment

When the court proceeds on an application under *Bus. & Prof. Code § 10472*, it must order payment out of the Recovery Account only on a determination that the aggrieved party has a valid cause of action within the purview of *Bus. & Prof. Code § 10471* [*see § 103.41* (eligibility for payment), and has complied with *Bus. & Prof. Code § 10472* (*see* [1], *above*) [*Bus. & Prof. Code § 10473*; *see § 103.109[1]* for an order for payment].

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§ 103.45 Legal Effect of Recovery Account Payment

[1] Suspension of License

If the Commissioner pays from the Recovery Account any amount in settlement of a claim or toward satisfaction of a judgment against a licensed broker or salesperson, the license of the broker or salesperson is automatically suspended on the date of payment from the Recovery Account. No broker or salesperson may be granted reinstatement until he or she has repaid in full, plus interest at the prevailing legal rate applicable to a judgment rendered in any court of this state, the amount paid from the Recovery Account on his or her account. A discharge in bankruptcy does not relieve a person from these penalties and disabilities [*Bus. & Prof. Code § 10475*].

The fact that the statutory scheme permits this automatic suspension of the broker's license without a right to a full hearing at which oral testimony may be offered and witnesses may be confronted and cross-examined is not a violation of due process under the California constitution. The broker has the opportunity to be heard in the underlying action, a second opportunity to present his or her case in writing to the Department of Real Estate, and finally, the opportunity for judicial review by traditional mandate [*Rodriguez v. Department of Real Estate (1996) 51 Cal. App. 4th 1289, 1298, 59 Cal. Rptr. 2d 652* (traditional, not administrative, mandate is appropriate procedure); *see § 103.43* (judicial review initiated by judgment debtor)].

[2] Commissioner's Subrogation Rights

When the Commissioner has paid from the Recovery Account any sum to the judgment creditor, the Commissioner is subrogated to all of the rights of the judgment creditor. The judgment creditor must assign all of his or her right, title, and interest in the judgment to the Commissioner. Any amount and interest recovered by the Commissioner on the judgment must be deposited in the Recovery Account [*Bus. & Prof. Code § 10479*].

[3] Disciplinary Action Against Licensee

Nothing in *Bus. & Prof. Code §§ 10470-10481* limits the authority of the Commissioner to take disciplinary action against any licensee for a violation of the Real Estate Law (*Bus. & Prof. Code § 11000 et seq.*) or of the rules and regulations of the Commissioner. Nor does the repayment in full of all obligations to the Recovery Account by any licensee nullify or modify the effect of any other disciplinary proceeding brought pursuant to the Real Estate Law [*Bus. & Prof. Code § 10481*].

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§ 103.46 False or Willful Misstatement

Any person or the agent of any person who files with the Commissioner any notice, statement, or other document required under *Bus. & Prof. Code § 10470 et seq.* that is false or untrue or contains any willful, material misstatement of fact is guilty of a misdemeanor [*Bus. & Prof. Code § 10478*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 103.47 Waiver by Claimant

The failure of an aggrieved person to comply with all of the provisions of *Bus. & Prof. Code § 10470 et seq.* constitutes a waiver of any rights under those provisions [*Bus. & Prof. Code § 10480*].

Legal Topics:

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[Reserved]

§§ 103.48[Reserved]

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§ 103.60 Related Matthew Bender Publications

For forms of interrogatories for use in actions involving brokers, see s Bender' s S s Forms of Discovery, *Brokers* (Matthew Bender)

For discussion and forms relating to agreements with brokers, see California Legal Forms, Ch. 21, *Agreements With Real Estate Brokers and Agents* (Matthew Bender)

For discussion and forms relating to the disclosure obligations of brokers, see California Legal Forms, Ch. 23, *Real Property Sales Agreements* (Matthew Bender)

For memoranda of points and authorities relating to the recovery of a broker's commission, see California Points and Authorities, Ch. 31, *Brokers and Salespersons* (Matthew Bender)

For discussion of real estate brokers, see California Real Estate Law And Practice, Ch. 60, *The Brokerage Industry and Its Regulation*, Ch. 61, *Employment and Authority of Brokers*, Ch. 62, *Actions for Broker's Commissions*, Ch. 63, *Duties and Liabilities of Brokers*, and Ch. 64, *Licensing and Discipline of Brokers* (Matthew Bender)

For discussion of actions by brokers, see California Real Estate Law And Practice, Ch. 61, *Employment and Authority of Brokers* , Ch. 62, *Actions for Broker's Commissions* (Matthew Bender)

For discussion of actions against brokers by principals and third parties, and for discussion of the Real Estate Education, Research and Recovery Fund, see California Real Estate Law And Practice, Ch. 63, *Duties and Liabilities of Brokers* (Matthew Bender)

Legal Topics:

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§ 103.61 State Statutes

[1] Real Estate Brokers

Licensing and regulating of real estate brokers. *Bus. & Prof. Code §§ 10130-10249*

Necessity for possession of broker's license. *Bus. & Prof. Code § 10130*

"Real estate broker" defined. *Bus. & Prof. Code §§ 10131-10131.45*

Action for compensation; pleading and proof of license. *Bus. & Prof. Code § 10136*

Standard of care owed by broker. *Civ. Code § 2079.2*

Obligations of trustee. *Civ. Code § 2228 et seq.*

Obligations and limitations on terms of agency. *Prob. Code § 1600 et seq.*

[2] Duty to Inspect; Duty to Disclose

Disclosures by vendor of one-to-four-unit residential property and by brokers; actual damages as provided for negligent or willful failure to disclose. *Civ. Code § 1102 et seq.*

No requirement to disclose that prior occupant died, if death occurred more than three years prior to offer to buy or

lease, or that prior occupant had or died of AIDS. *Civ. Code § 1710.2*

Duty of real estate broker to make visual inspection and to disclose material facts. *Civ. Code § 2079*

Limits of broker's duty to inspect. *Civ. Code § 2079.3*

Information and delivery of information regarding environmental hazards, earthquake hazards, and home energy rating program. *Civ. Code §§ 2079.7-2079.10*

Disclosure of law enforcement data base of registered sex offenders locations. *Civ. Code § 2079.10a*

Provision of disclosure and disclosure forms. *Civ. Code §§ 2079.14-2079.17*

Agency disclosure form. *Civ. Code § 2079.16*

Disclosure by transferors of certain residential property of known deficiencies that constitute earthquake hazards. *Gov. Code § 8897.1 et seq.*

[3] Duty of Buyer

Duty of buyer or prospective buyer to exercise reasonable care to protect himself or herself. *Civ. Code § 2079.5*

[4] Dual Agency

All parties must consent to dual agency. *Bus. & Prof. Code § 10176(d)*

Dual agency disclosure must be in writing. *Civ. Code § 2079.17*

Nondisclosure responsibilities of dual agents. *Civ. Code § 2079.21*

[5] Listing and Listing Agent

Definitions. *Civ. Code § 1086*

Placement of listing. *Civ. Code § 1088*

Open listing compensation agreement. *Civ. Code § 1089*

[6] Disciplinary Action

Suspension or revocation of real estate license. *Bus. & Prof. Code §§ 10175-10185*

[7] Real Estate Recovery Fund

Recovery Account. *Bus. & Prof. Code §§ 10470-10481*

[8] Requirement of Writing

Statute of Fraud requirements. *Civ. Code § 1624(a)(4)*

[9] Prepaid Rental Listing Services

Licensing and regulation of prepaid rental listing services. *Bus. & Prof. Code §§ 10167-10167.16*

Definition of "multiple listing service" and rules for compensation when open listing placed on MLS. *Civ. Code § 1087*

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§ 103.62 Decisions

[1] Broker as Fiduciary

Broker abused trust and breached fiduciary duties to buyer when she procured legal title to condominium by making false promises and duping buyer out of monies he put toward down payment. *Warren v. Merrill (2006) 143 Cal. App. 4th 96, 111-112, 49 Cal. Rptr. 3d 122*

Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes and those arising from general law of agency. *Carleton v. Tortosa (1993) 14 Cal. App. 4th 745, 754-756, 17 Cal. Rptr. 2d 734*

Oral agreement authorizing someone to act as an agent and find a buyer for principal's property, and under which agent receives confidential information respecting the property, is sufficient to create fiduciary relationship between the parties. *Gann v. Williams Brothers Realty, Inc. (1991) 231 Cal. App. 3d 1698, 1705, 283 Cal. Rptr. 128*

Salesperson employed by mortgage loan broker was agent of investors when salesperson acted as investment counselor, negotiated loan, and signed note to investors, and thus was liable for breach of fiduciary duty to investors in not disclosing real borrower and illegality of unsecured note. *Montoya v. McLeod (1985) 176 Cal. App. 3d 57, 63-65, 221 Cal. Rptr. 353*

Relationship between broker and his or her principal is fiduciary in nature, and imposes on broker duty of acting in highest good faith toward principal; this duty of good faith precludes broker from assuming position adverse to that of principal unless principal consents; broker is under legal obligation to disclose to principal all facts in broker's knowledge that are material to matter in connection with which broker was employed. *Bate v. Marsteller (1959) 175 Cal. App. 2d 573, 580-581, 346 P.2d 903*

[2] Broker as Dual Agent

Broker representing both parties has duty of disclosure to both principals, and failure to disclose to both precludes recovery of commission. *L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp. (1991) 1 Cal. App. 4th 300, 304-306, 1 Cal. Rptr. 2d 680*

General rule is that broker may represent both parties to a contract with their full knowledge and consent. *Wilson v. Lewis (1980) 106 Cal. App. 3d 802, 806, 165 Cal. Rptr. 396*

[3] Broker as Intermediary or Finder

Finder is person whose employment is limited to bringing parties together so that they may negotiate their own contract; distinction between finder and broker frequently turns on whether intermediary has been invested with authority or duties beyond merely bringing parties together, usually authority to participate in negotiations; act of solicitation under *Bus. & Prof. Code § 10131* of buyer when no advance fee is involved does not necessarily preclude determination that person was finder. *Tyrone v. Kelley (1973) 9 Cal. 3d 1, 9, 106 Cal. Rptr. 761, 507 P.2d 65*

Distinction between broker and finder is significant in determining whether intermediary stands in confidential relationship to one party to transaction. *Batson v. Strehlow (1968) 68 Cal. 2d 662, 668-670, 68 Cal. Rptr. 589, 441 P.2d 101*

Bus. & Prof. Code § 10136, prohibiting person acting in capacity of real estate broker from maintaining action for compensation, applicable to plaintiff unable to allege facts that would cast him or her in role of finder. *Zappas v. King Williams Press, Inc. (1970) 10 Cal. App. 3d 768, 775, 89 Cal. Rptr. 307*

[4] Broker and Principal Relationship

As agent, broker's relationship with principal is that of trustee to beneficiary. *Smith v. Zak (1971) 20 Cal. App. 3d 785, 792, 98 Cal. Rptr. 242*

Principles of implied covenant of good faith and fair dealing applicable to broker's employment agreement with buyer and also applicable to prospective lessor in his or her dealings with broker. *Colwell Co. v. Hubert (1967) 248 Cal. App. 2d 567, 576, 56 Cal. Rptr. 753*

[5] Lack of License

If broker's performance includes services of unlicensed person performing acts for which real estate license is required, broker cannot recover commission from seller unless he or she was justifiably ignorant of unlicensed person's unlawful acts. *Preach v. Monter Rainbow (1993) 12 Cal. App. 4th 1441, 1454-1458, 16 Cal. Rptr. 2d 320*

One who simply finds and introduces two parties to real estate transaction does not need to be licensed as real estate broker; such an intermediary is protected by finder's exception to real estate licensing law. *Tyrone v. Kelley (1973) 9 Cal. 3d 1, 8-9, 106 Cal. Rptr. 761, 507 P.2d 65*

[6] Statute of Frauds

Licensed real estate broker presumed to know that contracts for real estate commissions are invalid and unenforceable

unless put in writing and subscribed by person to be charged; broker who fails to secure proper written authorization to protect himself or herself in transaction and assumes risk of relying on seller's claimed oral promises has no cause for complaint if his or her efforts go unrewarded. *Pacific S.W. Dev. Corp. v. Western Pac. R.R. Co. (1956) 47 Cal. 2d 62, 70, 301 P.2d 825*

Under certain circumstances, broker or agent may collect commission without written agreement. *Torelli v. J.P. Enterprises, Inc. (1997) 52 Cal. App. 4th 1250, 1256-1257, 61 Cal. Rptr. 2d 76*

Essential requirements of *Civ. Code § 1624(d)* are that there be some written evidence of (1) subscription by party to be charged, and (2) fact of employment, in other words, authority to act. *Friddle v. Epstein (1993) 16 Cal. App. 4th 1649, 1655, 21 Cal. Rptr. 2d 85*

When broker completes his or her part of contract with seller's consent after expiration of time limit set forth in listing agreement, broker's performance of contract takes it out of statute of frauds and estops seller from relying on that statute. *Love v. Gulyas (1948) 87 Cal. App. 2d 608, 619, 197 P.2d 405*

[7] Broker's Employment Contracts

Principal has right to change agents, but is liable to original broker for commission when property is sold by second broker during exclusive listing period of first broker. *Century 21 Butler Realty, Inc. v. Vasquez (1996) 41 Cal. App. 4th 888, 892, 49 Cal. Rptr. 2d 1*

Real estate brokerage contract is contract for employment of agent; hence, broker-principal relationship is governed by both agency and contract law, and law of agency supplies terms regarding contingencies not addressed by contract. *R.J. Kuhl Corp. v. Sullivan (1993) 13 Cal. App. 4th 1589, 1599, 17 Cal. Rptr. 2d 425*

In brokerage employment contract when there is reference to employment, agreement to compensate is permissibly inferred; conversely, when there is reference to commission, broker's authority to act is permissibly inferred. *Seck v. Foulks (1972) 25 Cal. App. 3d 556, 567, 102 Cal. Rptr. 170*

Contract that creates exclusive agency to sell is not held to create exclusive right to sell, thus prohibiting direct sale by principal, unless contract expressly confers this exlusive right on agent or contains other language indicating that parties intended to prohibit direct sale by principal or to guarantee agent commission in event of such sale. *Pacific Scientific Co. v. Glassey (1966) 245 Cal. App. 2d 831, 836-837, 54 Cal. Rptr. 235*

Use of words "exclusive agency" or "exclusive sale" is not conclusive on issue of whether contract is one of exclusive agency to deal with certain property or one giving exclusive right to sell, but, as in other cases involving interpretation, all circumstances must be considered together. *Wilck v. Herbert (1947) 78 Cal. App. 2d 392, 412-413, 178 P.2d 25*

[8] Contract Extension, Termination, and Revocation

Exclusive real estate listing terminates by operation of law on death of owner. *Charles B. Webster Real Estate v. Rickard (1971) 21 Cal. App. 3d 612, 614-620, 98 Cal. Rptr. 559*

If definite time for continuance of broker's agency is fixed in employment agreement, broker's authority terminates upon lapse of time. *Preston v. Carnation Co. (1961) 196 Cal. App. 2d 43, 46, 16 Cal. Rptr. 240*

Waiver of time element in broker's contract to find buyer lasted as long as sellers were encouraging plaintiff to render his services and he was diligently complying with their requests, but waiver did not last longer than that. *Augustine v.*

Trucco (1954) 124 Cal. App. 2d 229, 239, 268 P.2d 780

[9] Broker's Right to Commission Generally

Under exclusive right to sell listing agreement, broker will be entitled to commission if (1) seller terminates agreement prior to its expiration, (2) property is sold during original listing period by another broker, and (3) agreement provides for compensation to broker if property is sold by broker or any other person during listing period. *Century 21 Butler Realty, Inc. v. Vasquez (1996) 41 Cal. App. 4th 888, 892, 49 Cal. Rptr. 2d 1*

Broker's right to commission accrues when contract of sale is executed or when opportunity to make this contract is given the seller; broker becomes entitled to commission even though seller is unable or unwilling to complete sale. *R.J. Kuhl Corp. v. Sullivan (1993) 13 Cal. App. 4th 1589, 1599-1600, 17 Cal. Rptr. 2d 425*

When buyer retains or solicits broker to find or show him or her property, broker finds property satisfactory to buyer that owner agrees to sell at price offered, and buyer knows that broker will earn a commission from owner on consummation of the transaction, promise is implied on buyer's part to complete transaction with owner; if buyer fails or refuses to purchase property without valid reason, buyer becomes liable to broker for breach of this implied promise, and broker's damages are measured by amount of commission he or she would have earned if buyer had performed. *Chan v. Tsang (1991) 1 Cal. App. 4th 1578, 1586-1587, 3 Cal. Rptr. 2d 14*

Seller becomes liable for broker's commission if seller renders broker's performance impossible, even if broker had not yet performed by procuring a purchaser during listing period or could not show he or she was procuring cause of the sale. *Howard Gitlen & Associates, Inc. v. Ameri (1989) 208 Cal. App. 3d 90, 96, 256 Cal. Rptr. 36*

Cooperating broker had standing to sue when seller refused to sell on terms of listing agreement because it provided that owner authorized listing agent to cooperate with other brokers and to divide any commission due under agreement with them; these provisions created implied promise to cooperating broker to pay commission because owner knew of listing broker's representation and reliance by the cooperating broker. *Steve Schmidt & Co. v. Berry (1986) 183 Cal. App. 3d 1299, 1312-1313, 228 Cal. Rptr. 689*

When broker was to be paid commission on proceeds of installment sale based on writing describing sale, broker did not lose rights to commission when buyer defaulted and seller and buyer negotiated new contract. *Hughes v. Morrison (1984) 160 Cal. App. 3d 103, 104, 206 Cal. Rptr. 321*

Employment contract failing to comply with *Bus. & Prof. Code § 10176(f)* is not void ipso facto, and broker is entitled, on theory of unjust enrichment, to recover commissions for property sold by him or her before rescission, but broker is not entitled to recover damages for anticipatory breach. *Babcock v. Houston (1973) 33 Cal. App. 3d 858, 863, 109 Cal. Rptr. 454*

If sale is not consummated because seller, acting arbitrarily or in bad faith, prevented consummation, broker is entitled to commission even though his or her contract provides that payment shall be made out of proceeds of sale. *Colwell Co. v. Hubert (1967) 248 Cal. App. 2d 567, 576, 56 Cal. Rptr. 753*

If performance by broker is frustrated by wrongful or fraudulent act of principal, recovery is possible by broker; fraud, however, is never presumed and must be established by clear proof. *Sanstrum v. Gonser (1956) 140 Cal. App. 2d 732, 742, 295 P.2d 532*

[10] Ready, Willing, and Able Purchaser

Seller entering valid unconditional contract of sale with purchaser procured by broker is estopped to deny purchaser's qualifications; purchaser's acceptability is conclusively presumed. *Edwards v. Billow (1953) 31 Cal. 2d 350, 359, 188 P.2d 748*

Real estate broker has earned his or her commission when, during life of contract, or extension thereof, he or she has brought to vendor a ready,willing, and able purchaser who will take property on terms offered by seller, or when contract acceptable to seller has been entered into with such purchaser; broker is then entitled to commission even if sale is not completed. *R.J. Kuhl Corp. v. Sullivan (1993) 13 Cal. App. 4th 1589, 1599-1600, 17 Cal. Rptr. 2d 425*

Purchaser is "able" when he or she has legal capacity and financial ability to purchase the property; "financial ability" means that purchaser has sufficient resources available to him or her to consummate transaction when the time comes for him or her to do so. *Steve Schmidt & Co. v. Berry (1986) 183 Cal. App. 3d 1299, 1307, 228 Cal. Rptr. 689*

If broker produces buyer on terms set out in his or her listing agreement, and seller refuses to perform, broker is permitted to recover his or her commission on contract with seller; conversely, if broker produces buyer on terms different from those contained in listing contract, seller ordinarily has no obligation to broker. *Seck v. Foulks (1972) 25 Cal. App. 3d 556, 569, 102 Cal. Rptr. 170*

To entitle broker to commission, prospective buyer must be willing to purchase on terms prescribed in broker's employment contract; offer to purchase on those terms must be unconditional. *Martin v. Culver Enterprises, Inc. (1966) 239 Cal. App. 2d 925, 929, 49 Cal. Rptr. 149*

In absence of special contract, broker is required to show, in order to collect compensation, that he or she produced purchaser who was ready and willing to make purchase on terms satisfactory to owner and that he or she was efficient agent or procuring cause of sale. *Rose v. Hunter (1957) 155 Cal. App. 2d 319, 322, 317 P.2d 1027*

[11] Broker's Inspection and Disclosure Duties

Measure of damages for real estate broker's intentional misrepresentation to buyer for whom broker acted as agent not limited to buyer's out-of-pocket losses; because broker was fiduciary, damages for intentional fraud could be measured by benefit-of-the-bargain rule. *Fragale v. Faulkner (2003) 110 Cal. App. 4th 229, 239, 1 Cal. Rptr. 3d 616*

Brokers sued by purchaser of home for failure to disclose defects in property could cross-complain for equitable indemnity against home inspection companies, including companies that had inspected home on behalf of other prospective purchasers but whose reports were provided to ultimate purchaser. *Leko v. Cornerstone Home Inspection (2001) 86 Cal. App. 4th 1109, 1119-1120, 103 Cal. Rptr. 2d 858*

Fiduciary duty of buyer's broker may be much broader than duty to visually inspect imposed on sellers' brokers by *Civ. Code § 2079*, and therefore may include duty to inspect public records or permits concerning title or use of property. *Field v. Century 21 Klowden-Forness Realty (1998) 63 Cal. App. 4th 18, 26, 73 Cal. Rptr. 2d 784*

Broker and seller's broker are not required to disclose legal ramifications of factual nature of realty, or a conclusion as to how they may adversely impact value; thus, they are not obligated to research local land use ordinances and advise buyer as to their effect on realty. *Sweat v. Hollister (1995) 37 Cal. App. 4th 603, 605-609, 43 Cal. Rptr. 2d 399*

Brokers for sellers of property owed no duty to buyer's guests who were injured when balcony collapsed because guests were not intended beneficiaries of information supplied by sellers' brokers. *FSR Brokerage, Inc. v. Superior Court (1995) 35 Cal. App. 4th 69, 41 Cal. Rptr. 2d 404*

Broker has fiduciary duty to investigate material facts of a transaction, and cannot accept information received from others as being true, and transmit it to principal, without either verifying information or disclosing to principal that information has not been verified. *Salahutdin v. Valley of California, Inc. (1994) 24 Cal. App. 4th 555, 562, 29 Cal. Rptr. 2d 463*

Plaintiff-buyer who becomes aware of non-disclosed or misrepresented fact prior to close of escrow may close and then sue for damages. *Jue v. Smiser (1994) 23 Cal. App. 4th 312, 313-319, 28 Cal. Rptr. 2d 242*

Broker representing both parties has duty of disclosure to both principals, and failure to disclose to both precludes recovery of commission. *L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp. (1991) 1 Cal. App. 4th 300, 304-306, 1 Cal. Rptr. 2d 680*

Broker has duty to notify third party of pending sale when broker knows that third party has loan secured by unrecorded deed of trust and that terms of sale would wipe out security. *Norman I. Krug Real Estate Investments, Inc. v. Praszker (1990) 220 Cal. App. 3d 35, 41-43, 269 Cal. Rptr. 228*

Fact that broker is also seller will not relieve broker-seller of the duty to disclose material facts. *Prichard v. Reitz (1986) 178 Cal. App. 3d 465, 468, 223 Cal. Rptr. 734*

Broker was liable for failure to disclose to seller that broker was loaning part of down payment to buyer. *Ziswasser v. Cole & Cowan, Inc. (1985) 164 Cal. App. 3d 417, 421-423, 210 Cal. Rptr. 428*

Broker for seller has duty to buyer to conduct reasonably competent and diligent inspection of residential property for sale and to disclose all facts materially affecting value or desirability of property that inspection would reveal; this duty does not relieve buyer of duty to exercise reasonable care to protect himself or herself. *Easton v. Strassburger (1984) 152 Cal. App. 3d 90, 98-107, 199 Cal. Rptr. 383*

Broker representing both parties to transaction has duty of full disclosure to both parties. *Wilson v. Lewis (1980) 106 Cal. App. 3d 802, 806, 165 Cal. Rptr. 396*

Broker had duty to disclose to seller that buyer was broker's relative even though broker and seller had net sale price agreement, under which broker ordinarily is not obligated to disclose relationship to buyer, because broker was involved in setting net price. *Sierra Pacific Industries v. Carter (1980) 104 Cal. App. 3d 579, 581-583, 163 Cal. Rptr. 764*

[12] Statute of Limitations

Two-year limitations period in *Civ. Code § 2079.4* does not apply to action against buyers' broker for breach of fiduciary duty. *Field v. Century 21 Klowden-Forness Realty (1998) 63 Cal. App. 4th 18, 25, 73 Cal. Rptr. 2d 784*

Two-year statute of limitations does not apply if failure to disclose is based on intentional fraud; in such an action, applicable statute of limitations is three years from date of discovery of fraud. *Williams v. Wells & Bennett Realtors (1997) 52 Cal. App. 4th 857, 861-865, 61 Cal. Rptr. 2d 34*

Negligent misrepresentation claim arising out of broker's alleged breach of statutory obligation to conduct reasonably diligent inspection and to disclose any defects in property was subject to two-year statute of limitations on claims for real estate broker's breach of statutory duties, and not to general three-year statute of limitations (*Civ. Code §§ 1102, 2079(a)*). *Loken v. Century 21-Award Properties (1995) 36 Cal. App. 4th 263, 270, 42 Cal. Rptr. 2d 683*

[13] Broker Negligence

Homebuyers could state cause of action for negligent nondisclosure against their broker, who failed to provide them notes about defects in the property that had been taken by an agent working for the broker prior to the sale of the home. *Michel v. Moore & Associates,, Inc. (2007) 156 Cal. App. 4th 756, 67 Cal. Rptr. 3d 797*

Broker was not liable in negligence for failure to advise about tax consequences when listing agreement expressly provided that broker would not give tax advice and that seller should consult tax professional. *Carleton v. Tortosa (1993) 14 Cal. App. 4th 745, 754-756, 17 Cal. Rptr. 2d 734*

Agent must exercise reasonable skill and care for benefit of principal in performance of agency duties, and will be liable for any damages suffered by principal as a result of agent's negligence. *Smith v. Rickard (1988) 205 Cal. App. 3d 1354, 1364, 254 Cal. Rptr. 633*

[14] Principal's Right to Recover Secret Profit

Principal's right to recover secret profits made out of subject of agency does not depend on any deceit of agent, but is based on duties incident to agency relationship and on fact that all profits resulting from that relationship belong to principal. *Savage v. Mayer (1949) 33 Cal. 2d 548, 551, 203 P.2d 9* (*Civ. Code § 3343* [measure of damages for fraud] does not limit principal's recovery even though profits may have been acquired through fraudulent representations)

[15] Broker as Third Party Beneficiary

Contract made expressly for benefit of third party may be enforced by him or her at any time before parties rescind it; thus, agreement between vendor and purchaser that expressly provides for payment of commission to broker makes broker third party beneficiary. *Donnellan v. Rocks (1972) 22 Cal. App. 3d 925, 930, 99 Cal. Rptr. 692*

Third party beneficiary relationship is not inconsistent with agency relationship. *Hale v. Wolfsen (1969) 276 Cal. App. 2d 285, 291, 81 Cal. Rptr. 23*

[16] Real Estate Recovery Fund

Title insurance companies do not qualify as "aggrieved parties" who may recover from Recovery Account because title insurer is neither "client" of broker nor vulnerable member of general public. *Stewart Title Guaranty Co. v. Park (9th Cir. 2001) 250 F.3d 1249, 1253*

Claimants against Recovery Account could not rely on judgment that had been discharged in bankruptcy but as to which bankruptcy court subsequently ruled that judgment was not discharged for limited purpose of "obtaining recovery from the real estate recovery fund;" such judgment does not constitute requisite personal judgment against licensee. *Zinnemann v. Bagnol (2002) 104 Cal. App. 4th 656, 664, 128 Cal. Rptr. 2d 342*

Claimant who obtains final judgment against estate of deceased broker must file application for payment from Recovery Account within one year of judgment, and may not delay filing pending issuance of probate orders settling broker's estate. *Mason v. Department of Real Estate (2002) 102 Cal. App. 4th 1349, 1355, 126 Cal. Rptr. 2d 278*

Applications for payment from Recovery Account may be based on stipulated judgment, but when stipulated judgment and settlement documents expressly preclude possibility that judgment was based on fraud, Commissioner is not required to consider underlying facts establishing more serious offenses. *Yergan v. Department of Real Estate (2000) 77 Cal. App. 4th 959, 968-969, 92 Cal. Rptr. 2d 189*

Licensee whose actions give rise to Recovery Account claim must have, while licensed, performed acts for which that license was required. *Davis v. Harris (1998) 61 Cal. App. 4th 507, 510-511, 71 Cal. Rptr. 2d 591*

Interest at contract rate and damages for emotional distress are not recoverable from fund. *Temple v. Kerwin (1989) 209 Cal. App. 3d 1087, 1091-1092, 257 Cal. Rptr. 651*

Persons without final judgments against licensee are proper parties to proration proceedings; however, final judgment is prerequisite to distribution of money from recovery account. *Edmonds v. Augustyn (1988) 198 Cal. App. 3d 465, 470-472, 243 Cal. Rptr. 673*

Recovery limited to amount actually paid out plus interest at statutory rate; additional profits lost are not recoverable. *Dierenfield v. Stabile (1988) 198 Cal. App. 3d 126, 132-133, 243 Cal. Rptr. 598*

When multiple licensed real estate personnel were involved in acts requiring license and individual conduct of each resulted in judgment, victim was allowed to seek recovery from any licensed debtor and other licensees' limits on total recovery were not applicable. *Edmonds v. Augustyn (1987) 193 Cal. App. 3d 1056, 1065-1068, 238 Cal. Rptr. 704*

Punitive damages and attorney's fees are not "actual and direct loss" and are not awarded from fund. *Acebo v. Real Estate Education, etc. Fund (1984) 155 Cal. App. 3d 907, 910-911, 202 Cal. Rptr. 518*

Judgment creditor is not entitled to relitigate issue of fraud at hearing on recovery from fund. *Stuart v. Department of Real Estate (1983) 148 Cal. App. 3d 1, 4-5, 195 Cal. Rptr. 524*

Award from fund must be reduced by amount of any tax savings realized by applicant. *Froid v. Fox (1982) 132 Cal. App. 3d 832, 837-840, 183 Cal. Rptr. 461*

Fund was not liable when application was based on default judgment and applicant did not establish that broker was acting as licensee and not as principal. *Buccella v. Mayo (1980) 102 Cal. App. 3d 315, 323-327, 162 Cal. Rptr. 369*

Recovery against fund precluded because plaintiff had obtained judgment against defendant who, although licensed real estate broker, had not acted in that capacity in selling house owned by himself and his spouse. *Robinson v. Murphy (1979) 96 Cal. App. 3d 763, 767-770, 158 Cal. Rptr. 246*

Recovery from fund includes interest portions of judgment remaining unpaid, up to statutory limitation of recovery. *Antonio v. Hempel (1977) 71 Cal. App. 3d 128, 130-132, 139 Cal. Rptr. 309*

Real estate broker was not qualified as "aggrieved person" entitled to recovery from fund for internal dispute with her saleswoman over division ofcommissions. *Middelsteadt v. Karpe (1975) 52 Cal. App. 3d 297, 301-304, 124 Cal. Rptr. 840*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawStatutes of FraudsGeneral OverviewReal Property LawBrokersBrokerage AgreementsReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawBrokersRight to Commissions

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§ 103.63 Attorney General Opinions

Bus. & Prof. Code § 10131.1, requiring real estate license of anyone engaged in buying, selling, or exchanging promissory notes with public, applies to institutional lenders. *68 Ops. Cal. Atty. Gen. 286 (1985)*

Home maintenance service contract offered by real estate broker under homeowner's protection plan or warranty is insurance. *61 Ops. Cal. Atty. Gen. 214 (1978)*

Real estate broker must comply with *Bus. & Prof. Code §§ 11010* and *11018.2* in situation involving aspect of "4x4'ing" division of land problem and scope of coverage of Subdivided Lands Law. 59 Ops. Cal. Atty. Gen. 630 (1976)

Effect of *Bus. & Prof. Code §§ 10132, 10137, 10151, 10160,* and *10177(h)* on relationship between real estate brokers and their salespersons depends on particular area of law one is examining. *59 Ops. Cal. Atty. Gen. 369 (1976)*

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§ 103.64 Law Reviews

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PART IV. FORMS
A. Actions by Brokers

10-103 California Forms of Pleading and Practice--Annotated § 103.70

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§ 103.70 Complaint for Recovery of Commission Based on Breach of Contract--Exclusive-Right-To-Sell Agreement [Civ. Code § 1086(f)(1)]--By Broker Against Seller

[1] FORM Complaint for Recovery of Commission Based on Breach of Contract--Exclusive-Right-To-Sell Agreement [Civ. Code § 1086(f)(1)]--By Broker Against Seller

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RECOVERY OF COMMIS-
_____ [*name*],	)	SION
[and DOES I through _____,]	)	(Breach of Contract)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. _____ [Defendant _____ (*name*) is, and at all times mentioned in this complaint was, a resident of _____ County, California *or allege other capacity and basis of venue as appropriate*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued in this complaint as DOES I-_____, inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by such defendants.)]

[3. At all times herein mentioned plaintiff _____ (*name*) is and was _____ (an individual *or allege other capacity as appropriate*) doing business under the fictitious business name of _____ (*fictitious business name*), and plaintiff has filed the statement and published the notice as required by *Business and Professions Code Sections 17910 through 17917*.]

4. Plaintiff is, and at all times mentioned in this complaint was, a real estate broker duly licensed by the State of California, doing business in _____[*city*], _____ County, California. [At all times herein mentioned _____ (*name of corporate officer authorized to act as real estate broker*) was authorized and empowered by plaintiff as required under *Business and Professions Code Sections 10159* and *10211* to act, and acted, as the agent of plaintiff, and each and all of the things herein alleged to have been done by him/her were done in the capacity of and as agent for plaintiff.]

5. On or about _____ [*date*], defendant employed plaintiff by an agreement in writing to sell the real property owned by defendant situated at _____ [*street address*] in _____ [*city*] of _____ County, California, for a period through and including _____ [*expiration date*]. A copy of this agreement ("listing agreement") is attached to this complaint as Exhibit A and made a part of this complaint by reference.

6. Among other things, defendant promised and agreed in this exclusive-right-to-sell listing agreement to pay plaintiff a commission of _____ percent of the selling price of the property if plaintiff, defendant, or any other person produced a buyer who offered to purchase the property on the terms specified in the listing agreement, or on any other terms acceptable to defendant, as set forth in Paragraph _____ of the listing agreement.

7. _____ [Plaintiff performed all of the duties and conditions of the listing agreement *or allege any excuse for nonperformance*].

[*EITHER*]

8. On or about _____ [*date*], defendant sold the property to _____ [*name of buyer*] for a total consideration of $_____. As a result, defendant is indebted to plaintiff in the sum of $_____ [*amount of commission*] for and on account of the commission earned by plaintiff.

[*OR*]

8. On or about _____ [*date*], _____ [plaintiff *or* defendant *or specify name of another agent*] procured _____ [*name of buyer*], who offered to purchase, and was ready, willing, and able to purchase, the property from defendant on terms _____ [specified in the listing agreement *or* acceptable to defendant], for a total consideration of $_____. [Defendant accepted the buyer's offer on _____ (*date*).] As a result, defendant is indebted to plaintiff in the sum of $_____ [*amount of commission*] for and on account of the commission earned by plaintiff.

[*CONTINUE*]

9. Defendant has failed to pay the above sum, or any part of it, to plaintiff although plaintiff has made a demand for the payment. As a proximate result of defendant's breach of contract, plaintiff has suffered, and continues to suffer, losses in the sum of $_____ [*amount of commission*], which is the amount of the commission now due to plaintiff.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For recovery of the commission due in the sum of $_____;

2. For interest on this sum at the prevailing legal rate from _____ [*date*];

[3. For reasonable attorney's fees _____ (in the sum of $_____ *or* according to proof);]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a complaint for use by a broker in an action against the seller for recovery of the broker's commission based on an exclusive-right-to-sell listing agreement.

An allegation based on an exclusive agency agreement is *set forth in § 103.71[1]*, and an allegation based on an open

listing agreement is *set forth in § 103.72[1]*. For an allegation based on the seller's written commitment in the sales agreement to pay a commission, see *§ 103.73[1]*. Finally, for an allegation based on the seller's written commitment in the escrow instructions to pay a commission, see *§ 103.74[1]*.

[3] Allegations

The complaint in [1], *above*, alleges (1) the existence and terms of a written agreement between the broker and the seller (Paragraphs 5 and 7) [*see* [5], *below* (fixed expiration date in contract)], (2) the license status of the plaintiff (Paragraph 4) [*see* [6], *below*], (3) the broker's performance of the contract (Paragraph 6), (4) the satisfaction of the condition entitling the broker to a commission (Paragraph 8), and (5) the seller's failure to pay the commission according to the contract (Paragraph 9). Further, it contains an optional allegation regarding the plaintiff's transaction of business under a fictitious business name [*see* [5], *below*].

A broker may not recover a commission based on an employment agreement unless that agreement is in writing [*Civ. Code § 1624(a)(4)*]. For further discussion of the statute of frauds requirement, see *§ 103.21[1]*.

The broker is entitled to a commission in an exclusive-right-to-sell contract if (1) the property is sold during the listing period, or any extension of the period, no matter who effected the sale, or (2) the listing agent receives and presents to the owner any enforceable offer from a ready, able, and willing buyer on terms authorized by the listing or accepted by the owner [*Civ. Code § 1086(f)(1)*]. For further discussion of the broker's right to a commission, see *§§ 103.13[1]* and *103.20[1]*.

[4] Fixed Expiration Date in Contract

Paragraph 5 sets forth the expiration date of the employment contract. An exclusive employment agreement for compensation must contain a definite, specified date of final and complete termination [*see Bus. & Prof. Code § 10176(f)*; *see also Nystrom v. First Nat. Bank of Fresno (1978) 81 Cal. App. 3d 759, 764-766, 146 Cal. Rptr. 711]* . However, an employment contract that fails to comply with this requirement may still permit a broker to recover a commission for property sold prior to the owner's rescission, but not for damages for an anticipatory breach [*Babcock v. Houston (1973) 33 Cal. App. 3d 858, 863, 109 Cal. Rptr. 454]* .

[5] Plaintiff's Capacity

Paragraph 3 of this complaint should be included when the broker transacts business under a fictitious business name. A person using a fictitious business name cannot maintain an action on, or on account of, a contract made, or a transaction had, in the fictitious business name without first filing and publishing a statement [*see Bus. & Prof. Code § 17918*].

[6] Broker's License

Paragraph 4 contains an allegation regarding the real estate license status of the plaintiff. Any person engaged in the business or acting in the capacity of a real estate broker or a real estate salesperson must allege and prove that he or she was a duly licensed real estate broker or real estate salesperson at the time any alleged cause of action arose as a condition to bringing or maintaining an action in the courts of California for the collection of compensation for the performance of any of the acts for which a real estate license is required [*Bus. & Prof. Code § 10136*]. If the plaintiff real estate broker is a corporation, the optional provision naming the designated officer to act on behalf of the corporate plaintiff should be added. For further discussion of the license requirements of a real estate agent to bring a suit, see *§ 103.20[5]*.

[7] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any

answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[8] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Code Civ. Proc. §§ 85, 86(a)(8)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*Code Civ. Proc. § 88*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[9] Venue

In a breach of contract action, proper venue is in the county where the defendant resides, where the contract was to be performed, or where the contract was entered into. The county in which the obligation was incurred will be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary [*see Code Civ. Proc. § 395(a)*]. If the defendant in the contract action is a corporation, the action may also be brought in the county in which the corporation has its principal place of business [*see Code Civ. Proc. § 395.5*].

[10] Statute of Limitations

The statute of limitations for a breach of contract action based on a written agreement is four years [*Code Civ. Proc. § 337(1)*].

[11] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to actions on contracts generally, see Ch. 140, *Contracts*

For discussion relating to damages in a breach of contract action, see Ch. 177, *Damages*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For discussion of the statute of limitations for breach of contract actions, see Ch. 345, *Limitation of Actions*

For alternative forms of prayers, see Ch. 420, *Prayers*

For general discussion and forms relating to actions between an agent and a principal, see Ch. 427, *Principal and Agent*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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10-103 California Forms of Pleading and Practice--Annotated § 103.71

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§ 103.71 Allegations for Use in Complaint for Recovery of Commission Based on Breach of Contract--Exclusive Agency Agreement [Civ. Code § 1086(f)(2)]--By Broker Against Seller

[1] FORM Allegations for Use in Complaint for Recovery of Commission Based on Breach of Contract--Exclusive Agency Agreement [Civ. Code § 1086(f)(2)]--By Broker Against Seller

1. Among other things, defendant promised and agreed in this exclusive agency listing agreement to pay plaintiff a commission of _____ percent of the selling price of the property if plaintiff or any other real estate broker or salesperson produced a buyer who offered to purchase the property on the terms specified in the listing agreement, or on any other terms acceptable to defendant, as set forth in Paragraph _____ of the listing agreement.

[*EITHER*]

2. On or about _____ [*date*], defendant sold the property to _____ [*name of buyer*], who was procured by _____ [plaintiff *or name of another agent*], for a total consideration of $_____. As a result, defendant is indebted to plaintiff in the sum of $_____ [*amount of commission*] for and on account of the commission earned by plaintiff.

[*OR*]

2. On or about _____ [*date*], _____ [plaintiff *or name of another agent*] procured _____ [*name of buyer*], who offered to purchase, and was ready, willing, and able to purchase, the

property from defendant on terms _____ [specified in the listing agreement *or* acceptable to defendant] for a total consideration of $_____. [Defendant accepted the buyer's offer on _____ (*date*).] As a result, defendant is indebted to plaintiff in the sum of $_____ [*amount of commission*] for and on account of the commission earned by plaintiff.

[2] Use of Form

The allegations in [1], *above*, may be used in a broker's complaint for recovery of a commission when the underlying employment contract with the seller is based on an exclusive agency listing agreement, in contrast to an exclusive-right-to-sell agreement [*see § 103.70*] or an open listing agreement [*see § 103.72*]. These allegations may be incorporated into the form of complaint in *§ 103.70[1]* by substituting Paragraphs 1 and 2 of these allegations for Paragraphs 6 and 8, respectively, of that form.

[3] Allegations

Paragraph 1 of the allegations sets forth the terms of the exclusive agency agreement that entitle the broker to a commission. A broker is entitled to a commission in an exclusive agency listing agreement if (1) the property is sold during the listing period, or any extension of the period, by the broker or any other agent (but not if sold by the owner), or (2) the broker receives and presents to the owner any enforceable offer from a ready, able, and willing buyer on terms authorized by the listing or accepted by the owner [*Civ. Code § 1086(f)(2)*]. For further discussion of the broker's right to a commission, see *§§ 103.13[1]* and *103.20[1]*.

Paragraph 2 of the allegations sets forth events entitling the broker to a commission, that is, that the defendant either sold the property to, or was presented with an acceptable offer from, a buyer who was procured by the plaintiff-broker or another agent.

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10-103 California Forms of Pleading and Practice--Annotated § 103.72

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§ 103.72 Allegations for Use in Complaint for Recovery of Commission Based on Breach of Contract--Open Listing Agreement [Civ. Code § 1086(f)(3)]--By Broker Against Seller

[1] FORM Allegations for Use in Complaint for Recovery of Commission Based on Breach of Contract--Open Listing Agreement [Civ. Code § 1086(f)(3)]--By Broker Against Seller

1. Among other things, defendant promised and agreed in this listing agreement to pay plaintiff a commission of _____ percent of the selling price of the property if plaintiff produced a buyer who offered to purchase the property on the terms specified in the listing agreement, or on any other terms acceptable to defendant, as set forth in Paragraph _____ of the listing agreement.

2. On or about _____ [*date*], plaintiff procured _____ [*name of buyer*], who offered to purchase, and was ready, willing, and able to purchase, the property from defendant on terms _____ [specified in the listing agreement *or* acceptable to defendant] for a total consideration of $_____. [Defendant accepted the buyer's offer in writing on _____ (*date*)]. [The closing for the sales transaction occurred on _____ (*date*).] As a result, defendant is indebted to plaintiff in the sum of $_____ [*amount of commission*] for and on account of the commission earned by plaintiff.

[2] Use of Form

The allegations in [1], *above*, may be used in a broker's complaint for recovery of a commission when the underlying employment contract with the seller is based on an open listing agreement, in contrast to an exclusive-right-to-sell agreement [*see § 103.70*] or an exclusive agency agreement [*see § 103.71*]. These allegations may be incorporated into the form of complaint in *§ 103.70[1]* by substituting Paragraphs 1 and 2 of the allegations for Paragraphs 6 through 8 of that form.

[3] Allegations

Paragraph 1 of the allegations sets forth the terms of the open listing agreement that provide for a commission to be paid to the broker. In an open listing agreement, a commission is payable to the broker if the broker procures and presents to the owner an enforceable offer from a ready, able, and willing buyer on the terms authorized by the listing or accepted by the owner, before the property is otherwise sold either through another agent or by the owner directly and before the listing expires by its terms or is revoked [*Civ. Code § 1086(f)(3)*]. Paragraph 2 sets forth facts that allege that plaintiff produced a ready, willing, and able buyer to buy the defendant's property on acceptable terms within the listing period. For further discussion of the broker's right to a commission, see *§§ 103.13[1]* and *103.20[1]*.

[4] Fixed Expiration Date Not Required for Open Listing

Paragraph 5 of the complaint in *§ 103.70[1]* sets forth the expiration date of the listing agreement, which is a requirement in any exclusive agreement [*see § 103.70[4]*]. However a specific, fixed expiration date is not required for an open listing, and this portion of Paragraph 5 may be omitted if no fixed expiration date exists [*see Bus. & Prof. Code § 10176(f)*].

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10-103 California Forms of Pleading and Practice--Annotated § 103.73

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§ 103.73 Allegations for Use in Complaint for Recovery of Commission Based on Breach of Contract--Commission Included in Property Sales Agreement--By Broker Against Seller

[1] FORM Allegations for Use in Complaint for Recovery of Commission Based on Breach of Contract--Commission Included in Property Sales Agreement--By Broker Against Seller

1. On or about _____ [*date*], defendant orally employed plaintiff to sell the property owned by defendant situated at _____ [*street address*] in _____ [*city*] of _____ County, California. Pursuant to this agreement, defendant promised to pay plaintiff a commission of _____ percent of the selling price of the property upon the close of escrow for the sales transaction.

2. On or about _____ [*date*], defendant entered into a written sales agreement to sell the property to _____ [*name of buyer*], the buyer procured by plaintiff. Defendant promised in writing to pay plaintiff the commission, as set forth in Paragraph _____ of the sales agreement. A copy of this agreement ("sales agreement") is attached to this complaint as Exhibit A and made a part of this complaint by reference.

3. _____ [Plaintiff performed all of the duties and conditions of the above agreement between plaintiff and defendant *or allege any excuse for nonperformance*].

4. On or about _____ [*date*], defendant sold the property to the buyer named in the sales agreement for a total consideration of $_____. As a result, defendant is indebted to plaintiff in the sum of $_____ [*amount of commission*] for and on account of the commission earned by plaintiff.

[2] Use of Form

The allegations in [1], *above*, may be used in a broker's complaint for recovery of a commission when the commitment to pay the broker a commission is contained in the sales agreement between the buyer and the seller. These allegations may be incorporated into the form of complaint in § 103.70[1] by substituting Paragraphs 1 through 4 of the allegations for Paragraphs 5 through 8 of that form.

[3] Allegations

Paragraph 1 of the allegations alleges the existence of the agreement between the plaintiff and defendant for the defendant to pay the plaintiff a commission. Paragraph 2 of the allegations alleges the basis for the written memoranda of that agreement, signed by the defendant, which is required by the statute of frauds [*see Civ. Code § 1624(a)(4)*]. For further discussion of the statute of frauds requirement, see *§ 103.21[1]*.

Paragraph 3 alleges the plaintiff's performance, and Paragraph 4 alleges the closing of the sales transaction, which was the condition required for payment of the commission.

An alternative theory for recovery by the broker would be as a third party beneficiary of the sales agreement between the buyer and seller [*see* Ch. 140, *Contracts* , for cause of action based on a third party beneficiary theory]. However, this is not strictly necessary because a broker can recover directly from the seller based on an oral agreement that is reduced to writing in the sales agreement signed by the defendant [*see City of Turlock v. Paul M. Zagaris, Inc. (1989) 209 Cal. App. 3d 189, 193, 256 Cal. Rptr. 902]* .

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10-103 California Forms of Pleading and Practice--Annotated § 103.74

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§ 103.74 Allegations for Use in Complaint for Recovery of Commission Based on Breach of Contract--Commission Included in Escrow Instructions--By Broker Against Seller

[1] FORM Allegations for Use in Complaint for Recovery of Commission Based on Breach of Contract--Commission Included in Escrow Instructions--By Broker Against Seller

1. On or about _____ [*date*], defendant orally employed plaintiff to sell the property owned by defendant situated at _____ [*street address*] in _____ [*city*] of _____ County, California. Pursuant to this agreement, defendant promised to pay plaintiff a commission of _____ percent of the selling price of the property upon the close of escrow for the sales transaction.

2. On or about _____ [*date*], defendant executed escrow instructions for the sale of the property to _____ [*name of buyer*], the buyer procured by plaintiff. Defendant promised in writing to pay plaintiff the commission, as set forth in Paragraph _____ of the escrow instructions. A copy of the escrow instructions ("escrow instructions") is attached to this complaint as Exhibit A and made a part of this complaint by reference.

3. _____ [Plaintiff performed all of the duties and conditions of the above agreement between plaintiff and defendant *or allege any excuse for nonperformance*].

4. On or about _____ [*date*], defendant sold the property to the buyer named in the escrow instructions for a total consideration of $_____. As a result, defendant is indebted to plaintiff in the sum of $_____ [*amount of commission*] for and on account of the commission earned by plaintiff.

[2] Use of Form

The allegations in [1], *above*, may be used in a broker's complaint for recovery of a commission when the commitment to pay the broker a commission is contained in the escrow instructions executed by the seller for the sale of the property. These allegations may be incorporated into the form of complaint in § 103.70[1] by substituting Paragraphs 1 through 4 of the allegations for Paragraphs 5 through 8 of that form.

[3] Allegations

Paragraph 1 of the allegations alleges the existence of the agreement between the plaintiff and defendant for the defendant to pay the plaintiff a commission. Paragraph 2 of the allegations alleges the basis for the written memoranda of that agreement, signed by the defendant, which is required by the statute of frauds [*see Civ. Code § 1624(a)(4)*]. For further discussion of the statute of frauds requirement, see *§ 103.21[1]*.

Paragraph 3 alleges the plaintiff's performance, and Paragraph 4 alleges the closing of the sales transaction, which was the condition required for payment of the commission.

An alternative theory for recovery by the broker would be as a third party beneficiary of the sales agreement between the buyer and seller [*see* Ch. 140, *Contracts* , for a cause of action based on a third party beneficiary theory]. However, this is not strictly necessary because a broker can recover directly from the seller based on an oral agreement that is reduced to writing in the sales agreement signed by the defendant [*see City of Turlock v. Paul M. Zagaris, Inc. (1989) 209 Cal. App. 3d 189, 193, 256 Cal. Rptr. 902]* .

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10-103 California Forms of Pleading and Practice--Annotated § 103.75

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§ 103.75 Allegations for Use in Complaint for Recovery of Commission Based on Breach of Contract--Safety Clause in Listing Agreement--By Broker Against Seller

[1] FORM Allegations for Use in Complaint for Recovery of Commission Based on Breach of Contract--Safety Clause in Listing Agreement--By Broker Against Seller

1. Among other things, defendant promised and agreed in this listing agreement to pay plaintiff a commission of _____ percent of the selling price of the property if within _____ [*number of days*] of the expiration of the listing agreement, the property is sold to anyone with whom plaintiff has had negotiations [provided that plaintiff provide defendant within _____ (*number of days*) after the expiration of the listing agreement a written notice of the names of the prospective purchasers], as set forth in Paragraph _____ of the listing agreement.

2. Plaintiff performed all of the duties and conditions of the listing agreement[, including, on or about _____ (*date*), providing to defendant a written notice setting forth the name(s) of the prospective purchaser(s) with whom plaintiff had negotiated, including the name of _____ (*name of buyer*)].

3. On or about _____ [*date*], defendant sold the property to _____ [*name of buyer*] for a total consideration of $_____. As a result, defendant is indebted to plaintiff in the sum of $_____ [*amount of commission*] for and on account of the commission earned by plaintiff.

[2] Use of Form

The allegations in [1], *above*, may be used in a broker's complaint for recovery of a commission when the listing agreement contains a safety clause and the property is sold after the expiration date to a buyer with whom the broker has had negotiations during the listing period. These allegations may be incorporated into the form of complaint in *§*

103.70[1] by substituting Paragraphs 1 through 3 of the allegations for Paragraphs 6 through 8 of that form.

[3] Allegations

When a broker shows property during the listing period to a prospective purchaser, and there is afterwards a sale to that prospect, the broker may be entitled to a commission even though he or she was not the procuring cause of the sale, if the listing agreement so provides [*Leonard v. Fallas (1959) 51 Cal. 2d 649, 652, 335 P.2d 665]* . For further discussion of recovery under a safety clause, see *§ 103.20[9]*.

Paragraph 1 of the allegations alleges the terms of the safety clause in the listing agreement, including, as an option, the common provision requiring the broker to provide the seller with notice of prospective purchasers with whom the broker has negotiated. Paragraph 2 alleges plaintiff's performance, including an optional allegation alleging that the broker has complied with the notice provisions. If the listing agreement requires notice, this allegation is mandatory. Paragraph 3 alleges the completion of the sale to the named buyer, entitling the broker to the commission.

PRACTICE TIP:

Adequate Notice Regarding Prospective Purchasers. The condition regarding the provision of written notice setting forth the names of the prospective purchasers with whom the broker/agent negotiated may also be met by simply presenting an offer during the time of the listing on behalf of individuals who eventually purchase the property. *By Jeffrey S. Martin*

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10-103 California Forms of Pleading and Practice--Annotated § 103.76

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§ 103.76 Allegations for Use in Complaint for Recovery of Commission Based on Breach of Contract--Waiver of Expiration Date by Seller--By Broker Against Seller

[1] FORM Allegations for Use in Complaint for Recovery of Commission Based on Breach of Contract--Waiver of Expiration Date by Seller--By Broker Against Seller

1. Among other things, defendant promised and agreed in this listing agreement to pay plaintiff a commission of _____ percent of the selling price of the property if _____ [*allege nature of commitment to pay commission, which will depend on type of listing agreement used by parties; for appropriate language, see § 103.70[1], Paragraph 6 (exclusive right to sell); § 103.71[1], Paragraph 1 (exclusive agency); or § 103.72[1] (open listing)*], as set forth in Paragraph _____ of the listing agreement.

2. After _____ [*expiration date of listing agreement*], defendant urged and encouraged plaintiff to continue to seek a buyer for the property by _____ [*allege acts of defendant, e.g.,* defendant orally instructed plaintiff to continue his/her efforts to find a purchaser, and assured plaintiff that the provisions in the listing agreement regarding a commission would continue to apply].

3. As a result of defendant's actions, plaintiff continued to search for a buyer and did in fact procure _____ [*name of buyer*] who was ready, willing, and able to purchase the property from defendant. Plaintiff performed all other duties and conditions of the listing agreement.

4. On or about _____ [*date*], defendant sold the property to _____ [*name of buyer*] for a total consideration of $_____. As a result, defendant is indebted to plaintiff in the sum of $_____ [*amount of commission*] for and on account of the commission earned by plaintiff.

[2] Use of Form

The allegations in [1], *above*, may be used in a broker's complaint for recovery of a commission when the property is sold after the expiration of the listing agreement as a result of the broker's efforts based on the seller's encouragement and requests that the broker continue to locate a buyer for the property. These allegations may be incorporated into the form of complaint in *§ 103.70[1]* by substituting Paragraphs 1 through 4 of the allegations for Paragraphs 6 through 8 of that form.

[3] Allegations

If, after the time limit provided in a written contract of employment expires, the owner urges and encourages the broker to continue his or her efforts to find a purchaser for the property, the time limit may be considered as waived and the broker will be entitled to his or her commission if (1) the broker continues with the knowledge, approval, and encouragement of the owner, and (2) as a result of the broker's efforts, a purchaser to whom the owner sells the property is produced [*Kraemer v. Smith (1960) 179 Cal. App. 2d 52, 55, 3 Cal. Rptr. 471]* . For further discussion of this point, see *§ 103.20[8]*.

Paragraph 1 alleges the commitment on the part of the seller to pay the broker a commission. Paragraph 2 alleges the specific acts of the seller that encouraged the broker to continue looking for a buyer after the expiration of the listing agreement and the fact that the broker did in fact procure a buyer. Paragraph 3 alleges the completion of the sale to the buyer procured by the broker.

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PART IV. FORMS
A. Actions by Brokers

10-103 California Forms of Pleading and Practice--Annotated § 103.77

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§ 103.77 Allegations for Use in Complaint for Recovery of Commission Based on Breach of Contract--By Broker Against Lessor

[1] FORM Allegations for Use in Complaint for Recovery of Commission Based on Breach of Contract--By Broker Against Lessor

1. On or about _____ [*date*], defendant employed plaintiff by an agreement in writing to lease the real property owned by defendant situated at _____ [*street address*] in _____ [*city*] of _____ County, California. The expiration date of the listing agreement was _____ [*expiration date*]. A copy of this agreement ("listing agreement") is attached to this complaint as Exhibit A and made a part of the complaint by reference.

2. Among other things, defendant promised and agreed in this listing agreement to pay plaintiff a commission of _____ percent _____ [of the gross rental payments to be made by the tenant if plaintiff, defendant, or any other person produced a tenant who offered to lease the property on the terms specified in the listing agreement, or on any other terms acceptable to defendant *or allege other terms of listing agreement if not exclusive*], as set forth in Paragraph _____ of the listing agreement.

3. Plaintiff performed all of the duties and conditions of the listing agreement [*or allege any excuse for nonperformance*].

[*EITHER*]

4. On or about _____ [*date*], defendant entered into a written lease agreement for the property with _____ [*name of tenant*] for a term of _____ [*number*] years at a rental rate of $_____ per _____ [month *or* year]. [*If listing was not an exclusive agreement, add:* Plaintiff procured this tenant to lease the property.] As a result, defendant is indebted to plaintiff in the sum of $_____ [*amount of commission*] for and on account of the commission earned by plaintiff.

[*OR*]

4. On or about _____ [*date*], defendant was presented with an offer by _____ [*name of tenant*], who was ready, willing, and able to lease the property from defendant on terms [specified in the listing agreement *or* acceptable to defendant] for a rental rate of $_____ per _____ [month *or* year]. [*If listing was not an exclusive agreement, add:* Plaintiff procured the tenant to lease the property]. [Defendant accepted the tenant's offer on _____ (*date*)]. As a result, defendant is indebted to plaintiff in the sum of $_____ [*amount of commission based on terms of listing agreement*] for and on account of the commission earned by plaintiff.

[2] Use of Form

The allegations in [1], *above*, may be used in a broker's complaint for recovery of a commission based on an owner's breach of a listing agreement to lease the property. These allegations may be incorporated into the form of complaint in *§ 103.70[1]* by substituting Paragraphs 1 through 4 of the allegations for Paragraphs 5 through 8 of that form.

[3] Allegations

Paragraph 1 of the allegations alleges the existence of a listing agreement between the plaintiff as broker and the defendant as owner to lease the property. Paragraph 2 alleges plaintiff's performance of the agreement.

Paragraph 3 alleges the specific terms of the listing agreement in which the owner agrees to pay the broker a commission for leasing the property. Paragraph 4 provides alternative paragraphs alleging fulfillment of the listing agreement, that is, either the defendant leased the property to the tenant or the defendant was presented with an offer to lease the property on terms that were acceptable to the defendant. For further discussion of a broker's right to a commission, see *§ 103.20[1]*.

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10-103 California Forms of Pleading and Practice--Annotated § 103.78

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§ 103.78 Complaint for Recovery of Commission--Breach of Implied Covenant of Good Faith and Fair Dealing--By Broker Against Seller

[1] FORM Complaint for Recovery of Commission--Breach of Implied Covenant of Good Faith and Fair Dealing--By Broker Against Seller

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RECOVERY OF COMMIS-
_____ [*name*],	)	SION
[and DOES I through _____,]	)	(Breach of Implied Covenant of Good Faith and Fair
Defendant(s).	)	Dealing)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 103.70[1], Paragraph 1.*]

[2. *Fictitious name allegations. See § 103.70[1], Paragraph 2.*]

[3. *Fictitious business name of plaintiff, if appropriate. See § 103.70[1], Paragraph 3.*]

4. [*Plaintiff's real estate license status. See § 103.70[1], Paragraph 4.*]

5. On or about _____ [*date*], defendant employed plaintiff by an agreement in writing to sell the real property owned by defendant situated at _____ [*street address*] in _____ [*city*] of _____ County, California, for a period through and including _____ [*expiration date*]. A copy of this agreement ("listing agreement") is attached to this complaint as Exhibit A and made a part of this complaint by reference.

6. Among other things, defendant promised and agreed in this listing agreement to pay plaintiff a commission of _____ percent of the selling price of the property if [*allege nature of commitment to pay commission, which will depend on type of listing agreement used by parties; for appropriate language, see § 103.70[1], Paragraph 6 (exclusive right to sell); § 103.71[1], Paragraph 1 (exclusive agency); or § 103.72[1] (open listing)*], as set forth in Paragraph _____ of the listing agreement.

7. On or about _____ [*date*], plaintiff procured a purchaser for defendant's property who was ready, willing, and able to purchase the property on terms [specified in the listing agreement *or* acceptable to defendant] for a total consideration of $_____. [Defendant accepted the purchaser's offer on _____ (*date*).] Plaintiff performed all other duties and conditions of the listing agreement [*or allege any excuse for nonperformance*].

8. On or about _____ [*date*], defendant breached the implied covenant of good faith and fair dealing by acting arbitrarily and in bad faith in _____ [*allege acts of the seller that constitute a breach, e.g.,* defendant sold the property to the purchaser described in Paragraph 2 directly, without going through plaintiff, and then refused to pay plaintiff a commission].

9. As a proximate result of defendant's breach of the implied covenant of good faith and fair dealing, plaintiff has suffered, and continues to suffer, losses in the sum of $_____ [*amount of commission*], which is the amount of the commission plaintiff would have earned under the listing agreement, but for defendant's breach.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For recovery of the commission due in the sum of $_____;

2. For interest on this sum at the prevailing legal rate from _____ [*date*];

[3. For reasonable attorney's fees _____ (in the sum of $_____ *or* according to proof);]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature*]

[2] Use of Form

The form in [1], *above*, is a complaint for use by a broker in an action against the seller for recovery of the broker's commission based on the seller's breach of the covenant of good faith and fair dealing.

[3] Allegations

Paragraphs 5 and 6 allege the existence and commission terms of the listing agreement. Paragraph 7 alleges that the broker produced a prospective purchaser who was ready, willing, and able to purchase the seller's property on the seller's terms.

Paragraph 8 alleges the acts of the seller that constitute a breach of the implied covenant of good faith and fair dealing. The seller owes a duty to the broker not to act arbitrarily or in bad faith to prevent consummation of a transaction when the broker has found a prospective buyer who is ready, willing, and able to purchase the property, and the prospective buyer and prospective seller have agreed on the terms and conditions of the sale. If the sale is not consummated because the seller, acting arbitrarily or in bad faith, prevents consummation, the broker is entitled to the commission even though his or her contract provides that payment is to be made out of the proceeds of the sale [*Stromer v. Browning (1966) 65 Cal. 2d 421, 424-425, 55 Cal. Rptr. 18, 420 P.2d 730]* . For further discussion of this point, see *§ 103.20[6]*.

[4] Verification

For discussion of verification, see *§ 103.70[7]*.

[5] Jurisdiction and Venue

For coverage of jurisdiction, see *§ 103.70[8]*. For discussion of venue, see *§ 103.70[9]*.

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10-103 California Forms of Pleading and Practice--Annotated § 103.79

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§ 103.79 Allegations for Use in Complaint for Recovery of Commission--Breach of Implied Covenant of Good Faith and Fair Dealing--Seller Renders Broker's Performance Impossible--By Broker Against Seller

[1] FORM Allegations for Use in Complaint for Recovery of Commission--Breach of Implied Covenant of Good Faith and Fair Dealing--Seller Renders Broker's Performance Impossible--By Broker Against Seller

1. On or about _____ [*date*], defendant breached the implied covenant of good faith and fair dealing by acting in a manner that rendered plaintiff's performance of the listing agreement impossible, to wit: _____ [*allege acts of the seller that rendered the broker's performance impossible, e.g.,* defendant orally notified plaintiff that defendant was canceling the listing agreement, effective immediately, and entering into a new agency relationship with another broker].

[2] Use of Form

The allegation in [1], *above*, is for use in a complaint by a broker in an action against the seller for recovery of the broker's commission based on the seller's breach of the covenant of good faith and fair dealing, when the seller has acted in a manner that rendered the broker's performance impossible. This is a variation of the complaint *set forth in § 103.78[1]*, which is based on the seller's breach of the covenant of good faith and fair dealing for acts occurring after the broker has performed.

This allegation may be incorporated into the form of complaint in *§ 103.78[1]* by substituting Paragraph 1 of the allegation for Paragraphs 7 and 8 of that form.

When a seller terminates the broker's agency without cause, the broker may also add a cause of action for breach of contract for wrongful termination of the agency [*see* Ch. 140, *Contracts* , for a sample complaint for this cause of

action].

[3] Allegations

Paragraph 1 of the allegation alleges the defendant's acts that rendered the broker's performance impossible. A seller becomes liable for the broker's commission if the seller renders the broker's performance impossible. This is so even if the broker had not yet performed by procuring a purchaser during the listing period or could not show he or she was the procuring cause of the sale [*Howard Gitlen & Associates, Inc. v. Ameri (1989) 208 Cal. App. 3d 90, 96, 256 Cal. Rptr. 36]* . For further discussion of this point, see *§ 103.20[7]*.

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10-103 California Forms of Pleading and Practice--Annotated § 103.80

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§ 103.80 Affirmative Defense Allegation--Recovery Barred by Statute of Frauds

[1] FORM Affirmative Defense Allegation--Recovery Barred by Statute of Frauds

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff's alleged cause of action herein is barred by the provisions of *Civil Code Section 1624(a)(4)* in that the contract upon which plaintiff's cause of action is based is one employing a real estate broker [to purchase or sell real estate *or* to lease real estate for a longer period than one year *or* to procure a purchaser or seller of real estate *or* to procure a lessee or lessor of real estate for a lease that is for a longer period than one year] for a commission, and that no note or memorandum of the contract is in writing and subscribed by the defendant.

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer to a complaint by the broker for breach of contract, when the complaint fails to allege that the contract for the broker's services is in writing. An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate, or to lease real estate for a longer period than one year, or to procure, introduce, or find a purchaser or seller of real estate or a lessee or lessor of real estate when the lease is for a longer period than one year, for compensation or a commission, is invalid unless the agreement itself, or some note or memorandum of the agreement, is in writing and subscribed by the party to be charged or by his or her agent [*Civ. Code § 1624(a)(4)*]. For further discussion of the statute of frauds in real estate contracts, see *§ 103.21[1]*.

[3] Cross References

For discussion and forms relating to answers to complaints generally, see Ch. 26, *Answers*

For discussion and forms relating to actions on contracts generally, see Ch. 140, *Contracts*

For discussion and forms relating to demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

For further discussion and forms relating to the statute of frauds generally, see Ch. 530, *Statute of Frauds*

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10-103 California Forms of Pleading and Practice--Annotated § 103.81

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§ 103.81 Affirmative Defense Allegation--Plaintiff Not Licensed [Bus. & Prof. Code § 10136]

[1] FORM Affirmative Defense Allegation--Plaintiff Not Licensed [Bus. & Prof. Code § 10136]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff's alleged cause of action is barred by the provisions of *Business and Professions Code Section 10136* in that plaintiff did not have a real estate license at all times referred to in the complaint.

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer to a complaint by the broker for compensation based on any cause of action. Any person engaged in the business or acting in the capacity of a real estate broker or a real estate salesperson must allege and prove that he or she was a duly licensed real estate broker or real estate salesperson at the time any alleged cause of action arose as a condition to bringing or maintaining an action in the courts of California for the collection of compensation for the performance of any of the acts for which a real estate license is required [*Bus. & Prof. Code § 10136*].

For further discussion on the license requirements, see *§ 103.20[5]*.

[3] Cross References

For discussion and forms relating to answers to complaints generally, see Ch. 26, *Answers*

For discussion and forms relating to licensing laws and regulations in general, see Ch. 471B, *Licensing By Public Agencies*

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10-103 California Forms of Pleading and Practice--Annotated § 103.82

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§ 103.82 Affirmative Defense Allegation--Failure to Disclose Dual Agency [Civ. Code § 2079.17]

[1] FORM Affirmative Defense Allegation--Failure to Disclose Dual Agency [Civ. Code § 2079.17]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff's alleged cause of action is barred in that plaintiff failed to disclose to defendant that he/she was a dual agent representing both the buyer and the seller [*or* the lessor and lessee] in the real estate transaction that is the basis for plaintiff's claim for a commission.

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer to a complaint by the broker for recovery of a commission when the broker was acting as a dual agent and failed to disclose this fact to one or both of the parties in the sales transaction. Unless both principals know of the dual agency at the time of the transaction, the agent cannot recover a commission from either [*L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp. (1991) 1 Cal. App. 4th 300, 304-305, 1 Cal. Rptr. 2d 680* ; *see Civ. Code § 2079.17(a), (b)* (disclosure of agency relationships].

For further discussion of dual agency, see *§§ 103.12[2][c], 103.21[4]*.

[3] Cross References

For discussion and forms relating to answers to complaints generally, see Ch. 26, *Answers*

For discussion and forms relating to agency relationships generally, see Ch. 427, *Principal and Agent*

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10-103 California Forms of Pleading and Practice--Annotated § 103.83

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§ 103.83 Affirmative Defense Allegation--Conditions Not Met

[1] FORM Affirmative Defense Allegation--Conditions Not Met

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff's alleged cause of action is barred in that, pursuant to Paragraph _____ of the listing agreement between plaintiff and defendant, the payment of a commission to plaintiff was conditioned on the closing of the sales transaction [*or allege other condition that was not met*], and the sales transaction failed to close due to the inability or unwillingness of the buyer to purchase the property [*or allege other failure of a condition*].

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer to a complaint by the broker for recovery of a commission when the commission was conditioned on an event that did not take place. The parties to a listing agreement are entitled to make the broker's employment and his or her right to compensation depend on any lawful condition that they agree to insert in the agreement, and the listing agreement must be strictly construed according to its terms [*Blank v. Borden (1974) 11 Cal. 3d 963, 969, 972 n.8, 115 Cal. Rptr. 31, 524 P.2d 127]* . For further discussion of conditions to a listing agreement, see *§ 103.20[2]*.

[3] Cross References

For discussion and forms relating to answers to complaints generally, see Ch. 26, *Answers*

For discussion and forms relating to answers to complaints generally, see Ch. 140, *Contracts*

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10-103 California Forms of Pleading and Practice--Annotated § 103.84

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§ 103.84 Affirmative Defense Allegation--Broker's Breach of Fiduciary Duty

[1] FORM Affirmative Defense Allegation--Broker's Breach of Fiduciary Duty

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff's alleged cause of action is barred in that plaintiff breached his/her fiduciary duties to defendant when _____ [*allege specific acts of plaintiff constituting breach, e.g.,* plaintiff failed to disclose to defendant that plaintiff is the sister-in-law of _____ (*name*), the purchaser who was procured by plaintiff and whose offer was accepted by defendant].

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer to a complaint by the broker for recovery of a commission when the broker has breached his/her fiduciary duty to the defendant. The types of acts that constitute a breach of fiduciary duty are varied and numerous; see *§ 103.31* for an extended discussion of the various fiduciary duties a broker owes to his/her principal.

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10-103 California Forms of Pleading and Practice--Annotated § 103.85

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§ 103.85 Complaint for Equitable Indemnity--By Broker Against Seller or Buyer

[1] FORM Complaint for Equitable Indemnity--By Broker Against Seller or Buyer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR EQUITABLE INDEMNITY
[and DOES I through _____,]	)	
Defendant(s).	)	
	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 103.70[1], Paragraph 1.*]

[2. *Fictitious name allegations. See § 103.70[1], Paragraph 2.*]

[3. *Fictitious business name allegation for plaintiff, if appropriate. See § 103.70[1], Paragraph 3.*]

4. [*Real Estate license status of plaintiff. See § 103.70[1], Paragraph 4.*]

[*EITHER*]

5. On or about _____ [*date*], defendant, as the seller, and _____ [*name of buyer*], as the buyer, entered into a written agreement for the sale of the property situated at _____ [*street address*] in _____ [*city*] of _____ County, California. [The escrow closed on this sales transaction on _____ (*date*)].

[*OR*]

5. On or about _____ [*date*], defendant, as the buyer, and _____ [*name of seller*], as the seller, entered into a written agreement for the sale of the property situated at _____ [*street address*] in _____ [*city*] of _____ County, California. [The escrow closed on this sales transaction on _____ (*date*)].

[*CONTINUE*]

6. In this sales transaction, plaintiff acted as the real estate broker for the _____ [buyer *or* seller] of the property.

7. On or about _____ [*date*], defendant represented to plaintiff that [*allege specific nature of misrepresentation, e.g.,* there was an easement extending from the property described in Paragraph 5 to the public right-of-way and provided plaintiff with a copy of the recorded easement]. Based on defendant's representation to plaintiff, plaintiff represented to _____ [*name of buyer or seller, as appropriate*] that _____ [*allege substance of representation, e.g.,* an easement existed from the property described in Paragraph 5 to the public right-of-way]. In fact, this representation was false.

[*EITHER*]

8. On or about _____ [*date*], a judgment was entered in _____ [*case name and number*] in the _____ [*name of court*] Court, adjudging plaintiff as individually liable to _____ [*name of buyer or seller, as appropriate*], based on the above representation made by plaintiff in reliance on information provided by defendant. Plaintiff has been damaged by this imposition of personal liability in that _____ [*specify damages sustained, e.g.,* plaintiff satisfied the judgment for $_____ entered in the above case]. [A true and correct copy of the judgment is attached to this complaint as Exhibit A and made a part of this complaint by reference.]

[*OR*]

8. On or about _____ [*date*], plaintiff was named as defendant in the action entitled _____ [*case name and number*], in the _____ [*name of court*] Court. Plaintiff agreed to pay the reasonable sum of $_____ to _____ [*name of buyer or seller, as appropriate*] in settlement of the action once it became clear that plaintiff was liable to _____ [*name*

of buyer or seller, as appropriate].

[*CONTINUE*]

9. In addition, plaintiff was required to pay the sum of $_____ in costs and the sum of $_____ as attorney's fees in the course of defending the above action.

10. The damages recovered by _____ [*name of buyer or seller, as appropriate*] against plaintiff, and the costs and attorney's fees incurred by plaintiff, were caused solely by the misrepresentation by defendant described in Paragraph 7.

[11. On or about _____ [*date*], plaintiff gave defendant written notice of the action for damages commenced by _____ [*name of buyer or seller, as appropriate*] against plaintiff, requested a defense of the action, and indicated defendant's primary responsibility for the damages and resultant obligation to indemnify plaintiff for any loss that plaintiff might sustain as a result of the action. (A copy of this notice is attached to this complaint as Exhibit B and is made a part of the complaint by reference.) Nevertheless, defendant failed to undertake the defense of the action and refused to indemnify plaintiff for any loss resulting from the action.]

12. By reason of the foregoing, plaintiff is entitled to indemnity from defendant in the total sum of $_____, which amount includes damages paid and costs and attorney's fees incurred as set forth above, but defendant has not paid any part of this sum to plaintiff.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For recovery of damages in the sum of $_____;

2. For interest on this sum at the prevailing legal rate from _____ [*date*];

[3. For reasonable attorney's fees _____ (in the sum of $_____ *or* according to proof);]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

[*Add verification, if desired. See § 103.70[1]*.]

[2] Use of Form

The form [1], above, is a complaint for use in an action by a broker for equitable indemnity against a seller or buyer of real property. It may be used when (1) the seller or buyer made a false representation during the course of the underlying sales transaction, (2) the broker passed this misrepresentation on to the other party during the course of the transaction, and (3) the broker subsequently paid a judgment or settlement in a lawsuit brought by that other party based on the misrepresentation.

PRACTICE TIP:

Claim for Contractual Indemnity. As noted in the Practice Tip in *§ 103.34*, the potential for a claim for contractual indemnity should always be considered. *By Jeffrey S. Martin*

[3] Allegations

Paragraph 5 alleges the basic facts about the sales transaction. Paragraph 6 alleges the agency relationship of the defendant and either the buyer or the seller of the property. Paragraph 7 alleges the misrepresentation made by the defendant to the plaintiff, and the subsequent misrepresentation by the plaintiff to one of the parties in the transaction.

Paragraph 8 provides two alternatives: the first is an allegation of the amount of judgment paid by the plaintiff in the underlying case, and the second is the amount of settlement paid by the plaintiff to settle the underlying case. Paragraph 9 alleges the amount of costs and attorney's fees paid by the plaintiff in the underlying case.

Paragraph 10 alleges that plaintiff's damages resulting from defendant's misrepresentation. Paragraph 11 alleges plaintiff's tender of the defense to the defendant, and defendant's failure to assume the defense. Paragraph 12 alleges the amount of damages sustained by the plaintiff.

When a broker makes a false representation to a party in a transaction based on information provided by another party, the broker may have a cause of action for equitable indemnity against the party who originally provided the false information. To justify equitable indemnification, the wrongs of the respective tortfeasors must differ essentially in character or kind, resulting in the conclusion that the negligence of the primary tortfeasor is active, while the broker's negligence is passive [*Gardner v. Murphy (1975) 54 Cal. App. 3d 164, 167-168, 126 Cal. Rptr. 302]* .

For discussion and forms relating to indemnity actions generally, see Ch. 300, *Indemnity and Contribution* .

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

An action for equitable indemnity is in the jurisdiction of the superior court and is not a limited civil action [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*Code Civ. Proc. § 88*].

In an action for equitable indemnity arising out of a false representation, the county in which the defendant resides at the commencement of the action is the proper county for the trial of the action [*see Code Civ. Proc. § 395(a)*].

[6] Cross References

For discussion and forms relating to indemnity actions generally, see Ch. 300, *Indemnity and Contribution* .

For additional cross references, see *§ 103.70[11]*.

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PART IV. FORMS
A. Actions by Brokers

10-103 California Forms of Pleading and Practice--Annotated §§ 103.86-103.89

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[Reserved]

§§ 103.86[Reserved]

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PART IV. FORMS
B. Actions Against Brokers

10-103 California Forms of Pleading and Practice--Annotated § 103.90

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§ 103.90 Complaint for Damages--Breach of Fiduciary Duty--By Seller Against Broker

[1] FORM Complaint for Damages--Breach of Fiduciary Duty--By Seller Against Broker

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff, _____ vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DAMAGES
[and DOES I through _____,]	)	(Breach of Fiduciary Duty)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times mentioned in this complaint was, a resident of _____ County, California [*or allege other capacity and basis of venue as appropriate*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued in this complaint as DOES I-_____, inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the

fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by such defendants.)]

3. Defendant is, and at all times mentioned in this complaint was, a real estate broker duly licensed by the State of California [under the fictitious business name of _____], with his/her principal place of business in _____ [*city*], _____ County, California.

4. On or about _____ [*date*], plaintiff employed defendant by an agreement in writing to act as plaintiff's agent to sell the real property owned by plaintiff situated at _____ [*street address*] in _____ [*city*] of _____ County, California. A copy of this agreement ("listing agreement") is attached to this complaint as Exhibit A and made a part of the complaint by reference. As plaintiff's agent, defendant owed to plaintiff a fiduciary duty to _____ [*allege specific duty, e.g.,* make the fullest disclosure of all material facts that might affect plaintiff's interest in entering into the transaction].

5. Defendant breached his/her fiduciary duty as plaintiff's agent when defendant _____ [*allege acts of broker that constituted a breach of fiduciary duty, e.g.,* failed to disclose that defendant was a dual agent, representing both defendant and the buyer identified in Paragraph 6].

6. On or about _____ [*date*], plaintiff sold the property to _____ [*name of buyer*] for a total consideration of $_____. On or about that date, plaintiff paid defendant a commission in the sum of $_____ pursuant to the terms of the listing agreement.

7. As the result of defendant's breach of fiduciary duty, plaintiff has been damaged in $_____, the amount of the commission paid to defendant[, and plaintiff has been damaged further in that plaintiff could have sold the property for a higher price but for defendant's act of (*allege specific act, e.g.,* failing to disclose his/her dual agency].

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For recovery of the commission paid to defendant in the sum of $_____;

[2. For loss of compensation in the sale of property _____ (in the sum of $_____ *or* according to proof);]

3. For interest on this sum at the prevailing legal rate from _____ [*date*];

[4. For reasonable attorney's fees _____ (in the sum of $_____ *or* according to proof);]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Add verification, if desired. See § 103.70[1]*.]

[2] Use of Form

The form in [1], *above*, is a complaint for breach of fiduciary duty by a seller against a listing agent. It can be adapted for any breach of fiduciary duty. For allegations in a complaint based on a broker taking a secret profit by means of an option to purchase, see *§ 103.91[1]*. For allegations in a complaint based on a broker taking a secret profit by arranging a "dummy" sale, see *§ 103.92[1]*.

[3] Allegations

Paragraph 4 alleges the creation of the agency relationship. Paragraph 5 alleges the specific acts of the defendant broker that constitute a breach of fiduciary duty. Paragraph 6 alleges the sale of the property and the plaintiff's payment of the commission to the defendant. Paragraph 7 alleges the damages suffered by the plaintiff in the amount of the commission plus any losses on the sale of the property.

An agent is a fiduciary [*Michelson v. Hamada (1994) 29 Cal. App. 4th 1566, 1579, 36 Cal. Rptr. 2d 343]* . A real estate agent has the same obligation of undivided service and loyalty to the client that a trustee owes its beneficiary *Rattray v. Scudder (1946) 28 Cal. 2d 214, 222*]. For an extended discussion of a real estate licensee's fiduciary duties and liability for a breach of these duties, see *§ 103.31*.

[4] Verification

For discussion of verification, see *§ 103.70[7]*.

[5] Jurisdiction and Venue

For coverage of jurisdiction, see *§ 103.70[8]*. For discussion of venue, see *§ 103.70[9]*.

[6] Statute of Limitations

The statute of limitations for breach of fiduciary duty is four years [*Code Civ. Proc. § 343*]. The statute begins to run when the plaintiffs discovers, or in the exercise of reasonable diligence could have discovered, the essential facts giving rise to the cause of action for breach of fiduciary duty [*Stalberg v. Western Title Ins. Co. (1991) 230 Cal. App. 3d 1223, 1230, 282 Cal. Rptr. 43]* .

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used* .

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions* .

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to actions on contracts generally, see Ch. 140, *Contracts*

For discussion relating to damages in a breach of contract action, see Ch. 177, *Damages*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For discussion of the statute of limitations for breach of contract actions, see Ch. 345, *Limitation of Actions*

For alternative forms of prayers, see Ch. 420, *Prayers*

For general discussion and forms relating to actions between an agent and a principal, see Ch. 427, *Principal and Agent*

For forms of allegations showing proper venue, see Ch. 571, *Venue* .

For alternative forms of verification, see Ch. 572, *Verification*

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10-103 California Forms of Pleading and Practice--Annotated § 103.91

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§ 103.91 Allegations for Use in Complaint for Damages--Breach of Fiduciary Duty--Secret Profits From Broker's Option to Purchase--By Seller Against Broker

[1] FORM Allegations for Use in Complaint for Damages--Breach of Fiduciary Duty--Secret Profits From Broker's Option to Purchase--By Seller Against Broker

1. On or about _____ [*date*], plaintiff granted defendant an option to purchase the property at a price of $_____.

2. Defendant breached his/her fiduciary duty as plaintiff's agent by taking secret profits from the sale of plaintiff's property when defendant exercised his/her option to purchase the property after defendant had received a higher offer for the property without disclosing this higher offer to plaintiff.

3.On or about _____ [*date*], plaintiff sold the property to defendant for a total consideration of $_____. [On or about that date, plaintiff paid defendant a commission in the sum of $_____ pursuant to the terms of the listing agreement.]

4. Thereafter, on or about _____ [*date*], defendant sold the property to _____ [*name of buyer who now holds title*] for a total consideration of $_____, realizing a secret profit of $_____.

5. As the result of defendant's breach of fiduciary duty, plaintiff has been damaged in that plaintiff could have sold the property directly to _____ [*name of third party who now holds title*] for a total consideration of $_____. As a result, plaintiff has been damaged in the sum of $_____ [*amount of*

profit].

[2] Use of Form

The allegations in [1], *above*, may be used in a seller's complaint for damages and secret profits when the broker has breached his/her fiduciary duty to the seller by (1) exercising an option to purchase the property from the seller after the broker has received, and failed to notify the seller of, a higher offer, and (2) then reselling the property for the higher price. These allegations may be incorporated into the form of complaint in § 103.90[1] by substituting Paragraphs 1 through 5 of the allegations for Paragraphs 5 through 7 of that form. For a complaint against a broker for secret profits arising out of a "dummy" sale to an associate of the broker, see *§ 103.92[1]*.

[3] Allegations

Paragraph 1 of the allegations alleges the existence of the option granted to the defendant broker. Paragraph 2 alleges the defendant's exercise of that option after the defendant received a higher offer for the property and failed to disclose the higher offer to the plaintiff. Paragraph 3 alleges the sale of the property to the defendant, and Paragraph 4 alleges the defendant's sale of the property to a third party for a secret profit. Paragraph 5 alleges the damages sustained by the plaintiff.

A broker is not entitled to make a secret profit out of his or her agency relationship with the principal. A seller who grants a broker an option to purchase can recover any secret profits realized by the broker in a subsequent sale to an undisclosed offeree at a higher price [*see Zikratch v. Stillwell (1961) 196 Cal. App. 2d 535, 541, 16 Cal. Rptr. 660]* .

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§ 103.92 Allegations for Use in Complaint for Damages--Breach of Fiduciary Duty--Secret Profits From Dummy Sale--By Seller Against Broker

[1] FORM Allegations for Use in Complaint for Damages--Breach of Fiduciary Duty--Secret Profits From Dummy Sale--By Seller Against Broker

1. Defendant breached his/her fiduciary duty as plaintiff's agent by taking secret profits from the sale of plaintiff's property when (1) defendant presented an offer to plaintiff from _____ [*name of buyer*], who was in fact _____ [*allege relationship of buyer to defendant, e.g.,* defendant's brother], and (2) _____ [*name of buyer*] was taking title solely to resell the property to a third party at a higher price and then transfer the profits to defendant. Defendant failed to disclose to plaintiff the true facts of the proposed sale to the buyer.

2. On or about _____ [*date*], plaintiff sold the property to _____ [*name of buyer*] for a total consideration of $_____. On or about that date, plaintiff paid defendant a commission in the sum of $_____ pursuant to the terms of the listing agreement.

3. Thereafter, on or about _____ [*date*], _____ [*name of buyer*] sold the property to _____ [*name of third party who now holds title*] for a total consideration of $_____. Based on an agreement between defendant and _____ [*name of buyer*], the profit of $_____ realized from the sale to _____ [*name of third party who now holds title*] was transferred to defendant.

4. As the result of defendant's breach of fiduciary duty, plaintiff has been damaged in that plaintiff could have sold the

property directly to _____ [*name of third party who now holds title*] for a total consideration of $_____. As a result, plaintiff has been damaged in the sum of $_____ [*amount of profit*].

[2] Use of Form

The allegations in [1], *above*, may be used in a seller's complaint for damages when the broker breaches his/her fiduciary duty by arranging a "dummy" sale in order to resell the property at a profit. The first buyer is usually a friend, relative, or business associate of the broker and agrees to take title as a mere formality. These allegations may be incorporated into the form of complaint in § 103.90[1] by substituting Paragraphs 1 through 4 of the allegations for Paragraphs 5 through 7 of that form. For allegations in a complaint based on a broker taking a secret profit by means of an option to purchase, see *§ 103.91[1]*.

[3] Allegations

Paragraphs 1 through 3 allege the breach of a fiduciary duty by the defendant-broker in the form of arranging a dummy sale to a buyer for the purpose of reselling the property to a third party at a profit and retaining the profit. Paragraph 4 alleges the damages sustained by the plaintiff in the amount of the unrealized profit from the sale to the third party.

A broker is not entitled to make any secret profit from the subject of his or her agency. The principal's right to recover does not depend on any deceit of the broker, but is based on the duties incident to the agency relationship and on the fact that all profits resulting from that relationship belong to the principal [*Savage v. Mayer (1949) 33 Cal. 2d 548, 551, 203 P.2d 9]* .

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§ 103.93 Allegations for Use in Complaint for Damages--Breach of Fiduciary Duty--Failure to Investigate Material Facts--By Seller Against Broker

[1] FORM Allegations for Use in Complaint for Damages--Breach of Fiduciary Duty--Failure to Investigate Material Facts--By Seller Against Broker

1. Defendant breached his/her fiduciary duty to investigate material facts when _____ [*allege specific facts, e.g.,* defendant represented to seller, who was receiving a note and deed of trust secured by property owned by the buyer, that the value assigned to the other property was a "safe figure,"] without investigating whether the facts as represented were in fact true.

2. As the result of defendant's breach of fiduciary duty to investigate material facts, plaintiff has been damaged in the sum of $_____, the amount of the commission paid to defendant, and plaintiff has been damaged further in that [*allege damages resulting from failure to investigate, e.g.,* the buyer has defaulted on the above note to plaintiff in the total amount of $_____ and continuing at a rate of $_____ per _____ (month/year)].

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For recovery of the commission paid to defendant in the sum of $_____;

[2. For further damages for _____ (*allege specific damages, e.g.,* buyer's default on the note to plaintiff) _____ (in the sum of $_____ *or* according to proof);]

3. For interest on this sum at the prevailing legal rate from _____ [*date*];

[4. For reasonable attorney's fees _____ (in the sum of $_____ *or* according to proof);]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

[2] Use of Form

The allegations in [1], *above*, may be used in a seller's complaint for damages when the broker breaches his/her fiduciary duty by representing a material fact to the seller without investigating whether the information is in fact true. This will usually come up in the context of a seller carrying a loan for the buyer or taking property instead of cash for the seller's property. Obviously, the creditworthiness of the buyer and the value of the property to be received are material facts that would affect the seller's decision to agree to the transaction. These allegations may be incorporated into the form of complaint in *§ 103.90[1]* by substituting Paragraphs 1 and 2 of the allegations for Paragraphs 5 and 7, respectively, of that form. Also, the prayer in the allegations above should be substituted for the prayer in *§ 103.90[1]*.

PRACTICE TIP:

Selling Agent's Failure to Investigate Material Facts. Claims for breach of fiduciary duty based on the failure of the plaintiff-buyer's broker or agent (selling broker/agent) to conduct an adequate investigation can arise in a multitude of different factual scenarios. Perhaps the most common would be representations or information provided by the seller and his or her broker/agent that is passed on to the buyer by his or her broker/agent without verification or without a disclaimer regarding the source of the information. If the selling broker/agent has not verified the veracity of the information provided, he or she must so advise the buyer [*Salahutdin v. Valley of California, Inc. (1994) 24 Cal. App. 4th 555, 562, 29 Cal. Rptr. 2d 463]* . *By Jeffrey S. Martin*

[3] Allegations

Paragraph 1 of the allegations alleges the breach of the defendant's fiduciary duty by representing to plaintiff certain material facts without investigating the truth of the facts. Paragraph 2 alleges the damages suffered by the plaintiff in the amount of the commission paid to the defendant and any further damages resulting from the sales transaction itself.

A broker has a fiduciary duty to investigate the material facts of a transaction, and cannot accept information received from others as being true, and transmit it to the principal, without either verifying the information or disclosing to the principal that the information has not been verified [*Salahutdin v. Valley of California, Inc. (1994) 24 Cal. App. 4th 555, 562, 29 Cal. Rptr. 2d 463]* . For further discussion of this duty, see *§ 103.31[3]*.

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§ 103.94 Complaint for Damages--Fraud, Breach of Duty to Disclose [Civ. Code §§ 2079-2079.6, 2079.16], Breach of Duty to Be Honest and Truthful [Bus. & Prof. Code §§ 10152, 10176(a)-(c), (i); Civ. Code § 2079.16], Negligence [Civ. Code § 2079.16], Negligent Misrepresentation--Failure to Disclose Defects--By Buyer Against Listing Agent

[1] FORM Complaint for Damages--Fraud, Breach of Duty to Disclose [Civ. Code §§ 2079-2079.6, 2079.16], Breach of Duty to Be Honest and Truthful [Bus. & Prof. Code §§ 10152, 10176(a)-(c), (i); Civ. Code § 2079.16], Negligence [Civ. Code § 2079.16], Negligent Misrepresentation--Failure to Disclose Defects--By Buyer Against Listing Agent

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Fraud, Breach of Duty to Disclose, Breach of Duty
[and DOES I through _____,]	)	to Be Honest and Truthful, Negligence, Negligent
Defendant(s).	)	Misrepresentation)
	)	[Amount demanded _____

) (exceeds *or* does not exceed) $10,000]
[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 103.90[1], Paragraph 1.*]

[2. *Fictitious name allegations. See § 103.90[1], Paragraph 2.*]

3. [*Defendant's real estate license status. See § 103.90[1], Paragraph 3.*]

FIRST CAUSE OF ACTION
(Fraud)

4. On or about _____ [*date*], plaintiff entered into a written agreement to purchase the property situated at _____ [*street address*] in _____ [*city*] of _____ County, California from _____ [*name of seller*]. A copy of this agreement ("sales agreement") is attached to this complaint as Exhibit A and made a part of this complaint by reference. The escrow closed on this sales transaction on _____ [*date*].

5. In this sales transaction, defendant acted as the real estate broker for the seller of the property. Plaintiff, as the buyer, was represented by _____ [*name of selling agent*]. Confirmation of the agency relationships is set forth in Paragraph _____ of the sales agreement.

6. _____ [Prior to the close of escrow *or* At some time prior to the execution of the sales agreement and continuing through the escrow period], defendant became aware of certain defects in the property, to wit: _____ [*allege defects, e.g.,* the building was constructed in violation of code requirements for structural support and about to be condemned]. Defendant knew that these defects were unknown to, or were beyond the reach of, plaintiff.

7. These defects materially affect the value and the desirability of the property.

8. Defendant failed to disclose to plaintiff the existence of these defects with the intent to induce plaintiff to complete the purchase of the property. [Defendant took certain affirmative actions to insure that plaintiff would not discover the defects, namely: _____ (*allege defendant's actions, e.g.,* defendant arranged to have all the cracks in the foundation plastered and painted over)].

9. As a result of defendant's fraudulent failure to disclose these defects to plaintiff, plaintiff completed the purchase of the property and has been damaged in the sum equal to the amount required to repair these defects.

SECOND CAUSE OF ACTION
(Breach of Duty to Disclose)

10. Plaintiff incorporates in this cause of action by reference Paragraphs 4 and 5 of the First Cause of Action.

[*EITHER*]

11. Prior to the close of escrow [*or* At some time prior to the execution of the sales agreement and continuing through the escrow period], defendant became aware of certain defects in the property, to wit: _____ [*allege defects, e.g.,* the building was constructed in violation of code requirements for structural support and about to be condemned]. Defendant knew that these defects were unknown to plaintiff and were not within the diligent attention and observation of plaintiff, and failed to disclose these defects to plaintiff.

[*OR*]

11. At all times mentioned in this complaint, defendant failed to conduct a reasonably competent and diligent visual inspection of the property, which inspection would have revealed certain defects in the property, to wit: _____ [*allege defects, e.g.,* improper soil compaction resulting in sliding and settlement problems, as evidenced by cracks in the driveway]. Defendant failed to disclose these defects to plaintiff.

[*CONTINUE*]

12. These defects materially affect the value and the desirability of the property.

13. As a result of defendant's breach of his/her duty to [inspect the property and] disclose these defects to plaintiff, plaintiff completed the purchase of the property and has been damaged in the sum equal to the amount required to repair these defects.

THIRD CAUSE OF ACTION
(Breach of Duty to Be Honest and Truthful)

14. Plaintiff incorporates herein by reference Paragraphs 4 and 5 of the First Cause of Action.

15. _____ [Prior to the close of escrow *or* At some time prior to the execution of the sales agreement and continuing through the escrow period], defendant became aware of certain defects in the property, to wit: _____ [*allege defects, e.g.,* the building was constructed in violation of code requirements for structural support and about to be condemned].

16. Defendant breached his/her duty to be honest and truthful when defendant failed to disclose to plaintiff the existence of these defects, which were unknown to plaintiff _____ [*allege any other pertinent facts, e.g.,* notwithstanding plaintiff's direct request for information regarding such potential defects]. [Further, defendant took certain affirmative actions to insure that plaintiff would not discover these defects, namely: _____ (*allege defendant's actions, e.g.,* defendant arranged to have all the cracks in the foundation plastered and painted over)].

17. As a result of defendant's breach of his/her duty to be honest and truthful with plaintiff, plaintiff completed the purchase of the property and has been damaged in the sum equal to the amount required to repair these defects.

FOURTH CAUSE OF ACTION
(Negligence)

18. Plaintiff incorporates in this cause of action by reference Paragraphs 4 and 5 of the First Cause of Action.

19. At all times mentioned in this complaint, defendant breached his/her duty to exercise reasonable skill and care in performing his/her duties in that defendant failed to conduct a reasonably competent and diligent visual inspection of the property and disclose to plaintiff certain defects in the property, to wit: _____ [*allege defects, e.g.,* improper soil compaction resulting in sliding and settlement problems, as evidenced by cracks in the driveway].

20. As a result of defendant's breach of his/her duty to be exercise reasonable skill and care in performing his/her duties, plaintiff completed the purchase of the property and has been damaged in the sum equal to the amount required to repair these defects.

FIFTH CAUSE OF ACTION
(Negligent Misrepresentation)

21. Plaintiff incorporates in this cause of action by reference Paragraphs 4 and 5 of the First Cause of Action.

22. On or about _____ [*date*], defendant represented in writing [on the Transfer Disclosure Statement] that he/she had conducted a competent and diligent visual inspection of the property and found no defects [except _____ (*allege any problems noted by the listing agent in writing*)]. Defendant made this representation without a reasonable basis to believe that it was true. In fact, defendant had not conducted a competent and diligent visual inspection of the property. Defendant failed to disclose to plaintiff certain defects that would have been discovered had he/she undertaken such an inspection, to wit: _____ [*allege defects, e.g.,* improper soil compaction resulting in sliding and settlement problems as evidenced by cracks in the driveway]. Defendant failed to disclose these defects with the intent to induce plaintiff to complete the purchase of the property.

23. At all times mentioned in this complaint, plaintiff was unaware of the existence of these defects.

24. As a result of defendant's misrepresentations, plaintiff completed the purchase of the property and has been damaged in the sum equal to the amount required to repair these defects.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For damages _____ [in the sum of $_____ *or* equal to the amount required to repair the defects, according to proof];

2. For interest on this sum at the prevailing legal rate from _____ [*date*];

[3. For reasonable attorney's fees _____ (in the sum of $_____ *or* according to proof);]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Add verification, if desired. See § 103.70[1]*.]

[2] Use of Form

The form in [1], *above*, is a complaint for use by a buyer against a listing agent for the failure to disclose defects. If the listing agent had actual knowledge of the defects, all five causes of action may be included. Otherwise, the second cause of action for breach of duty to disclose based on the failure to inspect [*see* Paragraph 11 in [1], *above*] and the fourth cause of action for negligence may be used. Additionally, if the broker signed a statement indicating that he or she had undertaken the required inspection, the fifth cause of action for negligent misrepresentation may be included. For a complaint by a buyer against the selling agent or a dual agent based on the failure to disclose defects, see *§ 103.95[1]*.

The form in [1], *above*, may be adapted for use in a complaint by a buyer against a listing agent for the failure to disclose facts not pertaining to the property itself. In that case, the language relating to defects should be replaced with language relating to the other facts. For example, failure to disclose facts relating to impending governmental action (such as eminent domain or condemnation), or facts relating to development in the surrounding area (e.g., a hazardous waste facility coming soon to the neighborhood), could also be the basis for a cause of action for failure to disclose [*see §§ 103.31[2], 103.31[4]*].

[3] Allegations

[a] Fraud

Paragraph 4 alleges the basic facts about the purchase agreement and close of escrow. Paragraph 5 alleges the agency relationships.

In the first cause of action, for fraud, Paragraph 6 alleges the defendant's knowledge of certain defects that were unknown to plaintiff or beyond the reach of plaintiff. Paragraph 7 alleges that the defects materially affect the value and the desirability of the property. Paragraph 8 alleges the defendant's failure to disclose the defects to the plaintiff with the intent to induce the plaintiff to purchase the property. An optional allegation includes any affirmative acts by the defendant to hide the defects from the plaintiff. Paragraph 9 alleges the fact that, as a result of defendant's fraud, the plaintiff purchased the property, with the resulting damages in the amount of the cost to repair the defects. These allegations are the required elements for a buyer to state a cause of action for fraud against a broker who is not in a fiduciary relationship with the buyer [*see Lingsch v. Savage (1963) 213 Cal. App. 2d 729, 738, 29 Cal. Rptr. 201* ; *see also § 103.31[4][c]* for further discussion of this cause of action].

The statute of limitations for an action based on fraud is three years from the date of discovery of the facts constituting the fraud [Code Civ. Proc. § 338(d)]. For discussion and forms relating to fraud generally, see Ch. 269, *Fraud and Deceit* .

[b] Breach of Duty to Disclose

In the second cause of action for breach of the duty to disclose, Paragraph 11 provides two alternatives. The first alleges the defendant's knowledge of, and failure to disclose, defects that were unknown to the plaintiff or were not within the diligent attention and observation of the plaintiff. A listing agent has the duty to disclose these facts to the buyer without

regard to agency relationships [*see Civ. Code § 2079.16* (agency disclosure form)].

The second alternative version of Paragraph 11 alleges the defendant's failure to conduct a reasonably competent and diligent visual inspection of the property, and to disclose the defects that would have been revealed by such an inspection. This duty is based on the ruling in *Easton v. Strassburger (1984) 152 Cal. App. 3d 90, 102, 199 Cal. Rptr. 383* , which has since been codified in *Civ. Code §§ 2079-2079.6* [*see § 103.31[8]* for extended discussion of the statutory and case law pertaining to this duty].

Paragraph 12 alleges the fact that the defects materially affect the value and desirability of the property. Paragraph 13 alleges that, as a result of the defendant's failure to disclose the defects, the plaintiff completed the purchase and has been damaged in the amount required to repair the defects.

The statute of limitations for an action against a broker for the failure to inspect and disclose material facts is two years from the date of possession or the close of escrow, whichever comes first [*Civ. Code § 2079.4*]. However, if the failure to disclose amounts to actual fraud, the three-year statute of limitations will apply [*see* [a], *above*; *Williams v. Wells & Bennett Realtors (1997) 52 Cal. App. 4th 857, 861-865, 61 Cal. Rptr. 2d 34]* .

PRACTICE TIP:

Two-Year Statute of Limitations for Breach of Fiduciary Duty Based on Failure to Disclose. The statute of limitations for breach of fiduciary duty is four years, pursuant to *Code Civ. Proc. § 343* [*Stalberg v. Western Title Ins. Co. (1991) 230 Cal. App. 3d 1223, 1230, 282 Cal. Rptr. 43]* . As noted *above*, the statute of limitations for a failure to inspect the property and disclose material facts is two years [*Civ. Code § 2079.4*]. As yet, there are no cases deciding which of the two statutes applies in an action for breach of a fiduciary duty based on the failure to disclose material facts about the property. The applicable statute of limitations is determined by the substance or gravamen of the action rather than the form of the pleading [*Hatch v. Collins (1990) 225 Cal. App. 3d 1104, 1110, 275 Cal. Rptr. 476]* . So, for example, in an action against an attorney for legal malpractice and a breach of fiduciary duty, the one-year statute of limitations for legal malpractice [*see Code Civ. Proc. § 340.6*] applies rather than the four-year statute for breach of fiduciary duty, notwithstanding the title of the cause of action as breach of fiduciary duty. As stated in one case, the legislature intended to enact a comprehensive, more restrictive statute of limitations for practicing attorneys facing malpractice claims [*see Stoll v. Superior Court (1992) 9 Cal. App. 4th 1362, 1368, 12 Cal. Rptr. 2d 354]* . It is this author's opinion that the same analysis would apply in an action for breach of fiduciary duty based on the failure to inspect and disclose material facts. A court would most likely conclude that the legislature intended that the two-year statute of limitations for the more specific, narrowly defined duty to disclose material facts would apply, rather than the four-year statute of limitations for the general class of breach of fiduciary duty. *By Linda Breen Pierce*

[c] Breach of Duty to Be Honest and Truthful

In the third cause of action for breach of the duty to be honest and truthful, Paragraph 15 alleges the defendant's knowledge of certain defects. Paragraph 16 alleges the defendant's breach of this duty in failing to disclose the defects to the plaintiff, with an optional allegation referring to any acts of plaintiff requesting information regarding the subject matter of the defects. Paragraph 17 alleges that as a result of the defendant's breach, the plaintiff completed the purchase of the property and has been damaged in the amount required to repair the defects.

A broker must be honest and truthful in all activities for which a real estate license is required [*Bus. & Prof. Code §§ 10152, 10176(a)-(c), (i)*; *Ward v. Taggart (1959) 51 Cal. 2d 736, 741, 336 P.2d 534]* . This duty applies not only to a broker's dealings with his or her client, but also with other parties in a transaction [*Nguyen v. Scott (1988) 206 Cal. App. 3d 725, 734-735, 739, 253 Cal. Rptr. 800]* . A listing agent has a duty of honest and fair dealing and good faith to

the buyer, without regard to agency relationships [*see Civ. Code § 2079.16* (agency disclosure form)]. For an extensive discussion of this duty, see *§ 103.31[7]*.

[d] Negligence

In the fourth cause of action for negligence, Paragraph 19 alleges the defendant's breach of the duty to exercise reasonable skills and care in performing his or her duties by failing to conduct a reasonably competent and diligent visual inspection of the property and disclose to the plaintiff certain defects in the property. Paragraph 20 alleges that as a result of the defendant's breach, the plaintiff completed the purchase of the property and suffered damages in the amount required to repair the defects.

A listing agent must exercise reasonable skill and care in the performance of his or her duties, without regard to agency relationships [*see Civ. Code § 2079.16* (agency disclosure form); *see also § 103.33[2]* for discussion of negligence liability to parties outside the fiduciary relationship].

[e] Negligent Misrepresentation

In the fifth cause of action for negligent misrepresentation, Paragraph 22 alleges the written statement made by the defendant that he or she had conducted a competent and diligent visual inspection of the property. This paragraph also alleges the fact that this statement was not true and that the defendant failed to inspect and disclose defects to the plaintiff. Paragraph 23 alleges the plaintiff's lack of knowledge of the defects. Paragraph 24 alleges that, as a result of the defendant's misrepresentations, the plaintiff suffered damages in the amount required to repair the defects.

The statute of limitations for negligent misrepresentation relating to a broker's duty to inspect and disclose is the two-year statute of limitations provided in *Civ. Code § 2079.4* [*Loken v. Century 21-Award Properties (1995) 36 Cal. App. 4th 263, 269-270, 42 Cal. Rptr. 2d 683]* .

[4] Verification

For coverage of verification, see *§ 103.70[7]*.

[5] Jurisdiction and Venue

For coverage of jurisdiction, see *§ 103.70[8]*. For discussion of venue, see *§ 103.70[9]*.

[6] Cross References

For forms and discussion regarding fraud, see Ch. 269, *Fraud and Deceit*

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Volume 10: Boundaries thru Captions and Introductions-Chs. 101-108
Chapter 103 BROKERS
PART IV. FORMS
B. Actions Against Brokers

10-103 California Forms of Pleading and Practice--Annotated § 103.95

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§ 103.95 Complaint for Damages--Breach of Fiduciary Duty, Constructive Fraud--Failure to Disclose Defects--By Buyer Against Selling Agent

[1] FORM Complaint for Damages--Breach of Fiduciary Duty, Constructive Fraud--Failure to Disclose Defects--By Buyer Against Selling Agent

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Breach of Fiduciary Duty, Constructive Fraud)
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 103.90[1], Paragraph 1.*]

[2. *Fictitious name allegations. See § 103.90[1], Paragraph 2.*]

3. [*Defendant's real estate license status. See § 103.90[1], Paragraph 3.*]

FIRST CAUSE OF ACTION
(Breach of Fiduciary Duty)

4. On or about _____ [*date*], plaintiff entered into a written agreement to purchase the property situated at _____ [*street address*] in _____ [*city*] of _____ County, California, from _____ [*name of seller*]. A copy of this agreement ("sales agreement") is attached to this complaint as Exhibit A and made a part of this complaint by reference. The escrow closed on this sales transaction on _____ [*date*].

5. In this sales transaction, defendant acted as _____ [the real estate agent for plaintiff *or* a dual agent, representing both plaintiff and the seller of the property]. Confirmation of the agency relationship is set forth in Paragraph _____ of the sales agreement. As plaintiff's agent, defendant owed to plaintiff a fiduciary duty to make the fullest disclosure of all material facts that might affect plaintiff's decision to purchase the property.

[*EITHER*]

6. _____ [Prior to the close of escrow *or* At some time prior to the execution of the sales agreement and continuing through the escrow period], defendant became aware of certain defects in the property, to wit: _____ [*allege defects, e.g.,* the building was constructed in violation of code requirements for structural support and about to be condemned]. Defendant breached his/her fiduciary duty to make the fullest disclosure of all material facts that might affect plaintiff's decision to purchase the property by failing to disclose these defects to plaintiff.

[*OR*]

6. At all times mentioned in this complaint, defendant failed to conduct a reasonably competent and diligent visual inspection of the property, which inspection would have revealed certain defects in the property, to wit: _____ [*allege defects, e.g.,* improper soil compaction resulting in sliding and settlement problems as evidenced by cracks in the driveway]. Defendant breached his/her fiduciary duty to make the fullest disclosure of all material facts that might affect plaintiff's decision to purchase the property by failing to inspect the property and disclose these defects to plaintiff.

[*CONTINUE*]

7. At all times mentioned in this complaint, plaintiff was unaware of the existence of these defects.

8. As a result of defendant's breach of his/her fiduciary duty to make the fullest disclosure of all material facts that

might affect plaintiff's decision to purchase the property, plaintiff completed the purchase of the property and has been damaged in the sum equal to the amount required to repair these defects.

SECOND CAUSE OF ACTION
(Constructive Fraud)

9. Plaintiff incorporates in this cause of action by reference Paragraphs 4 and 5 of the First Cause of Action.

10. Prior to the close of escrow [*or* At some time prior to the execution of the sales agreement and continuing through the escrow period], defendant became aware of certain defects in the property, to wit: _____ [*allege defects, e.g.,* the building was constructed in violation of code requirements for structural support and about to be condemned]. Defendant failed to disclose these defects to plaintiff with the intent to induce plaintiff to complete the purchase of the property.

11. At all times mentioned in this complaint, plaintiff was unaware of the existence of these defects.

12. As a result of defendant's failure to make the fullest disclosure of all material facts that might affect plaintiff's decision to purchase the property, plaintiff completed the purchase of the property and has been damaged in the sum equal to the amount required to repair these defects.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For damages _____ [in the sum of $_____ *or* equal to the amount required to repair the defects, according to proof];

2. For interest on this sum at the prevailing legal rate from _____ [*date*];

[3. For reasonable attorney's fees _____ (in the sum of $_____ *or* according to proof);]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Add verification, if desired. See § 103.70[1].*]

[2] Use of Form

The form in [1], *above*, is a complaint for use by a buyer against a selling agent for the failure to disclose defects. It includes two causes of action that are based on a fiduciary relationship; one is for breach of fiduciary duty, and the other for constructive fraud. In addition, the causes of action *set forth in § 103.94[1]* may be added to this complaint by a buyer against a selling agent in appropriate circumstances [*see § 103.94[3]* for discussion of allegations]. For a

complaint by a buyer against the listing agent, see *§ 103.94[1]*.

The form in [1], *above*, may be adapted for use in a complaint by a buyer against a selling agent for the failure to disclose facts not pertaining to the property itself. In that case, the language relating to defects should be replaced with language relating to the other facts. For example, failure to disclose facts relating to impending governmental action (such as eminent domain), or facts relating to development in the surrounding area (*e.g.*, a hazardous waste facility coming soon to the neighborhood), could also be the basis for a cause of action for failure to disclose [*see §§ 103.31[2], 103.31[4]*].

[3] Allegations

[a] Breach of Fiduciary Duty

In the first cause of action for breach of fiduciary duty, Paragraph 4 alleges the basic facts about the purchase agreement and close of escrow. Paragraph 5 alleges the agency relationship between the plaintiff and the defendant, and the defendant's fiduciary duty to disclose all material facts that might affect the plaintiff's decision to purchase the property.

Paragraph 6 includes two alternative allegations: the first alleges the defendant's knowledge of certain defects and the failure to disclose these defects to the plaintiff; the second alleges the defendant's failure to inspect the property and to disclose the defects to the plaintiff.

Paragraph 7 alleges plaintiff's lack of knowledge of the defects, and Paragraph 8 alleges that as a result of the defendant's breach of his or her fiduciary duty, the plaintiff suffered damages in the amount required to repair the defects.

An agent has a duty to the principal to make the fullest disclosure of all material facts concerning the transaction that might affect the principal's decision [*Loughlin v. Idora Realty Co. (1968) 259 Cal. App. 2d 619, 629, 66 Cal. Rptr. 747]* . For complete coverage of this duty, see *§ 103.31[4]*.

[b] Constructive Fraud

In the second cause of action for constructive fraud, Paragraph 10 alleges the defendant's knowledge of certain defects and the failure to disclose these defects to the plaintiff, with the intent to induce the plaintiff to complete the purchase of the property. Paragraph 11 alleges the plaintiff's lack of knowledge of the defects, and Paragraph 12 alleges that as a result of the defendant's failure to disclose, the plaintiff suffered damages in the amount required to repair the defects.

The elements for a cause of action for constructive fraud are (1) fiduciary relationship, (2) nondisclosure (breach of fiduciary duty), (3) intent to deceive, and (4) reliance and resulting injury (causation) [*Stokes v. Henson (1990) 217 Cal. App. 3d 187, 197, 265 Cal. Rptr. 836* ; *see Civ. Code § 1573* (statutory definition of "constructive fraud")]. The elements of representation and falsity--always part of a cause of action for actual fraud--are absent, as the fraud consists of the breach of the fiduciary duty of disclosure of relevant matters arising from the relationship [*Byrum v. Brand (1990) 219 Cal. App. 3d 926, 940-942, 268 Cal. Rptr. 609]* . In summary, constructive fraud exists if there is a breach of a legal or equitable duty, trust, or confidence that results in damage to another, even though the conduct is not otherwise fraudulent [*Salahutdin v. Valley of California, Inc.(1994) 24 Cal. App. 4th 555, 562, 29 Cal. Rptr. 2d 463]* . For further discussion of constructive fraud, see *§ 103.31[5]*.

[4] Statute of Limitations

The statute of limitations for bringing an action against a broker for a breach of the duty to disclose is two years from the date of possession, which means the date of recordation, the date of close of escrow, or the date of occupancy, whichever occurs first [*Civ. Code § 2079.4*]. However, the statute of limitations for breach of fiduciary duty is four

years [*Stalberg v. Western Title Ins. Co. (1991) 230 Cal. App. 3d 1223, 1230, 282 Cal. Rptr. 43* ; *see Code Civ. Proc. § 343*]. There are no cases deciding which of the two statutes applies in an action for breach of a fiduciary duty based on the failure to disclose material facts about the property. For further discussion of this issue, see *§ 103.94[3][b]*.

[5] Verification

For coverage of verification, see *§ 103.70[7]*.

[6] Jurisdiction and Venue

For coverage of jurisdiction, see *§ 103.70[8]*. For discussion of venue, see *§ 103.70[9]*.

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10-103 California Forms of Pleading and Practice--Annotated § 103.96

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§ 103.96 Complaint for Damages--Breach of Fiduciary Duty--Failure to Investigate Material Facts--By Buyer Against Selling Agent

[1] FORM Complaint for Damages--Breach of Fiduciary Duty--Failure to Investigate Material Facts--By Buyer Against Selling Agent

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Breach of Fiduciary Duty)
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 103.90[1], Paragraph 1.*]

[2. *Fictitious name allegations. See § 103.90[1], Paragraph 2.*]

3. [*Defendant's real estate license status. See § 103.90[1], Paragraph 3.*]

4. On or about _____ [*date*], plaintiff entered into a written agreement to purchase the property situated at _____ [*street address*] in _____ [*city*] of _____ County, California, from _____ [*name of seller*]. A copy of this agreement ("sales agreement") is attached to this complaint as Exhibit A and made a part of this complaint by reference. The escrow closed on this sales transaction on _____ [*date*].

5. In this sales transaction, defendant acted as the real estate agent for plaintiff [*or* defendant acted as a dual agent, representing both plaintiff and the seller of the property]. Confirmation of the agency relationships is set forth in Paragraph _____ of the sales agreement. As plaintiff's agent, defendant owed to plaintiff a fiduciary duty to investigate material facts prior to transmitting them to plaintiff.

6. Defendant breached his/her fiduciary duty to investigate material facts when defendant represented to plaintiff that _____ [*allege specific facts, e.g.,* the net income stated on the seller's financial statements was correct], without investigating whether the facts as represented were in fact true.

7. As the result of defendant's breach of fiduciary duty to investigate material facts, plaintiff has been damaged in that _____ [*allege damages resulting from failure to investigate, e.g.,* the net income on the property purchased by plaintiff is in fact less than half of what was stated on the seller's financial statements and therefore the value of the property is $_____ less than what plaintiff paid for the property].

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For _____ [*state nature of damage, e.g.,* loss of value of plaintiff's property] in the sum of $_____;

2. For interest on this sum at the prevailing legal rate from _____ [*date*];

[3. For reasonable attorney's fees _____ (in the sum of $_____ *or* according to proof);]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Add verification, if desired. See § 103.70[1].*]

[2] Use of Form

The form in [1], *above*, is a complaint for use by a buyer against a selling agent for the failure to investigate material facts. This situation can arise when a selling agent represents certain information to the buyer about a property, such as square footage or permitted uses, without doing an investigation of these facts or disclosing to the buyer that the agent has not investigated the truth of these facts.

[3] Allegations

Paragraph 4 alleges the basic facts about the purchase transaction. Paragraph 5 alleges the agency relationship between the plaintiff and the defendant and the defendant's fiduciary duty to investigate material facts.

Paragraph 6 alleges the defendant's transmission of material facts to plaintiff without investigating their veracity, and Paragraph 7 alleges the resulting damages to plaintiff.

A broker has a fiduciary duty to investigate the material facts of a transaction, and cannot accept information received from others as being true, and transmit it to the principal, without either verifying the information or disclosing to the principal that the information has not been verified [*Salahutdin v. Valley of California, Inc. (1994) 24 Cal. App. 4th 555, 562, 29 Cal. Rptr. 2d 463]* . For further discussion of this duty, see *§ 103.31[3]*.

[4] Buyer's Cause of Action Against Listing Agent

If the material facts that were communicated to the buyer originated from information included in the multiple listing service, the buyer could also name the listing agent (if other than the selling agent) as an additional party. *Civ. Code § 1088* provides that if an agent places a listing or other information in the multiple listing service, that agent will be responsible for the truth of all representations and statements made by the agent of which the agent had knowledge or reasonably should have had knowledge to anyone injured by their falseness or inaccuracy.

[5] Statute of Limitations

The statute of limitations for breach of fiduciary duty is four years [*Code Civ. Proc. § 343*]. The statute begins to run when the plaintiff discovers, or in the exercise of reasonable diligence could have discovered, the essential facts giving rise to the cause of action for breach of fiduciary duty [*Stalberg v. Western Title Ins. Co. (1991) 230 Cal. App. 3d 1223, 1230, 282 Cal. Rptr. 43]* .

[6] Verification

For coverage of verification, see *§ 103.70[7]*.

[7] Jurisdiction and Venue

For coverage of jurisdiction, see *§ 103.70[8]*. For discussion of venue, see *§ 103.70[9]*.

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10-103 California Forms of Pleading and Practice--Annotated § 103.97

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§ 103.97 Affirmative Defense Allegation--Failure to Disclose--Buyer Failed to Use Reasonable Care

[1] FORM Affirmative Defense Allegation--Failure to Disclose--Buyer Failed to Use Reasonable Care

1. AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff's alleged cause of action is barred in that the defects plaintiff alleges the defendant failed to disclose were known to or within the diligent attention and observation of the buyer.

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in a broker's answer to a complaint for failure to disclose when the defects were so apparent that the broker could reasonably expect that the buyer's own inspection of the premises would reveal the flaw.

The broker's duty to inspect and disclose does not relieve the buyer of the duty to exercise reasonable care to protect himself or herself [*Civ. Code § 2079.5*; *Easton v. Strassburger (1984) 152 Cal. App. 3d 90, 103, 199 Cal. Rptr. 383]* . In discharging this duty, the buyer must take into account those facts that are known to or within the diligent attention and observation of the buyer [*Civ. Code § 2079.5*].

PRACTICE TIP:

Discovery Regarding Buyers' Failure to Use Reasonable Care. The duty of the buyer to use reasonable care to protect his or her own interest in the purchase and sale of residential real property can be an important defense. In establishing this defense, discovery must be conducted with respect to the buyer. Specifically, the buyer's sophistication and experience regarding the purchase and sale of

residential real property must be explored. One starting place would be to identify all other real property transactions in which the buyer was a party and his or her previous experience with real estate brokers/agents. *By Jeffrey S. Martin*

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§ 103.98 Affirmative Defense Allegation--Failure to Disclose--Subject Matter of Alleged Defect Contained in Third Party Report [Civ. Code § 1102.4]

[1] FORM Affirmative Defense Allegation--Failure to Disclose--Subject Matter of Alleged Defect Contained in Third Party Report [Civ. Code § 1102.4]

1. AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff's alleged cause of action is barred in that the defects plaintiff alleges the defendant failed to disclose were not within the personal knowledge of defendant but were in fact the subject matter of information provided by _____ [*allege name and occupation of third party providing report, e.g.,* Bug-a-Roma Termite Company, a licensed structural pest control operator], in that certain report entitled _____ [*title of report*] and dated _____.

2. The information provided by _____ [*name of third party*] was within the scope of his/her professional license or expertise and was provided at the request of _____ [plaintiff *or* the seller] for the purpose of providing full disclosures to plaintiff concerning _____ [*allege subject matter of alleged defects, e.g.,* any infested or infected areas of the building].

3. Defendant exercised ordinary care in obtaining and transmitting to plaintiff the information provided by _____ [*name of third party*].

[2] Use of Form

The form of affirmative defense in [1], *above,* is for use in a broker's answer to a complaint for failure to disclose when

the subject matter of the alleged defects was covered by a report or other information provided by a third party professional and the alleged defects were not within the personal knowledge of the broker.

A listing or selling agent will not be liable for any error, inaccuracy, or omission of any information delivered pursuant to the statutory disclosure requirements if the following factors are present [*Civ. Code § 1102.4*]:

- The error, inaccuracy, or omission was not within the personal knowledge of that agent.

- The error, inaccuracy, or omission was based on information timely provided by public agencies or by certain other persons (i.e., a licensed engineer, land surveyor, geologist, structural pest control operator, contractor, or other expert, dealing with matters within the scope of the professional's license or expertise) pursuant to a request by prospective transferee.

- Ordinary care was exercised in obtaining and transmitting it.

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Chapter 103 BROKERS
PART IV. FORMS
B. Actions Against Brokers

10-103 California Forms of Pleading and Practice--Annotated § 103.99

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§ 103.99 Affirmative Defense Allegation--Defects Are Not Visible Within Accessible Area

[1] FORM Affirmative Defense Allegation--Defects Are Not Visible Within Accessible Area

1. AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff's alleged cause of action is barred in that the defects plaintiff alleges the defendant failed to disclose are not in areas that are reasonably and normally accessible to a visual inspection.

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in a broker's answer to a complaint for failure to disclose defects when the alleged defects are not in areas that are reasonably and normally accessible to a visual inspection. The broker has no duty to inspect inaccessible areas [*see Civ. Code § 2079.3*]. For example, a broker did not breach the statutory duty to inspect and disclose by failing to discover defects in a foundation when the lack of steel bolts was not visually apparent [*Wilson v. Century 21 Great Western Realty (1993) 15 Cal. App. 4th 298, 308, 18 Cal. Rptr. 2d 779]* .

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10-103 California Forms of Pleading and Practice--Annotated § 103.100

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§ 103.100 Complaint for Damages--Negligent Performance of Contract--By Third Party Against Broker

[1] FORM Complaint for Damages--Negligent Performance of Contract--By Third Party Against Broker

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Negligent Performance of Contract)
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 103.90[1], Paragraph 1.*]

[2. *Fictitious name allegations. See § 103.90[1], Paragraph 2.*]

3. [*Defendant's real estate license status. See § 103.90[1], Paragraph 3.*]

[*EITHER*]

4. At some time prior to _____ [*date*], _____ [*name of seller*] employed defendant to act as his/her agent to sell [*or* lease] the real property owned by him/her situated at _____ [*street address*] in _____ [*city*] of _____ County, California.

[*OR*]

4. At some time prior to _____ [*date*], _____ [*name of buyer*] employed defendant to act his/her agent to purchase [*or* lease] the real property owned by _____ [*name of seller*] situated at _____ [*street address*] in _____ [*city*] of _____ County, California.

[*CONTINUE*]

5. At all times mentioned in this complaint, plaintiff was _____ [*allege status and relationship of plaintiff to other parties in transaction to establish that plaintiff was in a class of persons to whom defendant's duty of due care would extend, e.g.,* a prospective buyer/tenant for the property *or* the holder of a note executed by the seller].

6. During the course of defendant's representation of the _____ [seller *or* buyer] for the _____ [sale *or* lease] of the property, defendant was negligent in the performance of his/her duties, in that _____ [*allege negligent acts of defendant, e.g.,* defendant failed to warn plaintiff of the dangerous condition of the stairs of the property when showing the property to the plaintiff *or* defendant failed to notify plaintiff of the pending sale, notwithstanding defendant's knowledge of plaintiff's interest in the property and defendant's promise to the seller to advise plaintiff of the closing date].

7. As a result of defendant's negligence, _____ [*allege nature of damages, e.g.,* plaintiff fell on the dangerous steps and broke several bones in his/her body *or* the sale of the property closed without payment of plaintiff's note and plaintiff has lost the security for his/her note], resulting in damages to plaintiff in the sum of _____ [$_____ *or* in an amount within the jurisdiction of the Superior Court].

[8. *In a personal injury action, consider adding additional allegations for further damages, such as lost wages, ongoing medical costs, etc. See Ch. 380, Negligence, for forms for this purpose*].

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For damages _____ [in the sum of $_____ *or* according to proof];

2. For interest on this sum at the prevailing legal rate from _____ [*date*];

[3. For reasonable attorney's fees _____ (in the sum of $_____ *or* according to proof);]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Add verification, if desired. See § 103.70[1]*.]

[2] Use of Form

The form in [1], *above*, is a complaint for use by a third party (defined as a person not in a fiduciary relationship with the agent) against a real estate agent for the latter's negligence in performing the agent's duties. The cause of action would apply to any third party, including a buyer or seller in the sales transaction.

[3] Allegations

Paragraph 4 alleges the agency relationship between the defendant and either the buyer or seller in the sales transaction. Paragraph 5 alleges the status and relationship of the plaintiff to the sales transaction to establish that plaintiff is in a class of persons to whom the defendant owes a duty of care. Paragraph 6 alleges the nature of the defendant's negligent acts, and Paragraphs 7 and 8 allege the nature and amount of the plaintiff's damages.

A broker may be liable for negligence to a third party with whom the broker is not in privity of contract. The following guidelines will determine whether liability will be imposed for the negligence performance of a contract [*Biakanja v. Irving (1958) 49 Cal. 2d 647, 650, 320 P.2d 16]* :

- The extent to which the transaction was intended to affect the plaintiff.
- The foreseeability of harm to the plaintiff.
- The degree of certainty that the plaintiff suffered injury.
- The closeness of the connection between the defendant's conduct and the injury suffered.
- The moral blame attached to the defendant's conduct.
- The policy of preventing future harm.

For further discussion of an agent's liability to a third party, see *§ 103.33*.

[4] Statute of Limitations

The statute of limitations is two years for an action based on negligent performance of a contract [*see Code Civ. Proc. § 339(1)*], unless the damages suffered are in the nature of a personal injury, in which case the statute of limitations is one

year [*Code Civ. Proc. § 340(c)*]. The statute of limitations is two years for an action for assault, battery, or injury to, or the death of, an individual caused by the wrongful act or neglect of another [*Code Civ. Proc. § 335.1*].

[5] Verification

For coverage of verification, see *§ 103.70[7]*.

[6] Jurisdiction and Venue

For coverage of jurisdiction, see *§ 103.70[8]*. For discussion of venue, see *§ 103.70[9]*.

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10-103 California Forms of Pleading and Practice--Annotated §§ 103.101-103.104

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[Reserved]

§§ 103.101[Reserved]

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10-103 California Forms of Pleading and Practice--Annotated § 103.105

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§ 103.105 Application for Payment Out of Recovery Account of Real Estate Fund [Bus. & Prof. Code § 10471]--By Judgment Creditor of Real Estate Broker or Salesperson

[1] FORM Application for Payment Out of Recovery Account of Real Estate Fund [Bus. & Prof. Code § 10471]--By Judgment Creditor of Real Estate Broker or Salesperson

Click here to view image.

[2] Use of Form

The form in [1], *above*, is Form RE807A, available from the Department of Real Estate, which is to be used to apply for payment from the Recovery Account. Payment is available to persons who have a final judgment based on the defendant's fraud, misrepresentation, deceit, or conversion of trust funds arising directly out of a transaction in which the defendant, while licensed under *Bus. & Prof. Code § 10000 et seq.*, performed acts for which that license was required [*see Bus. & Prof. Code § 10471(a)*]. A court of competent jurisdiction, for purposes of these provisions, includes federal courts, but does not include courts of another state [*Bus. & Prof. Code § 10471(a)*].

Use of the form is mandatory [*Bus. & Prof. Code § 10471(c)*]. The form, instructions for filling out the form, and other related forms are available on the Department of Real Estate web site (www.dre.ca.gov) or can be obtained by mail from:

Department of Real Estate
Recovery Account Unit
PO Box 187007

Sacramento, CA 95818-7007

For further discussion of the requirements for recovery and procedures related to this remedial statute, see *§§ 103.40 -103.47*.

[3] Contents of Application; Proof of Legal Presence

The application form must include certain information by *Bus. & Prof. Code § 10471(c)*. For discussion of the requirements for a completed application, see *§ 103.41[5], [6]*.

In addition to submitting the application, an applicant for a payment from the Real Estate Recovery Account must provide the Department of Real Estate with proof of the applicant's legal presence in the United States [*10 Cal. Code Reg. § 2718*]. For further discussion of this requirements, see *§ 103.41[7]*.

[4] Verification

The form must be verified by the claimant [*Bus. & Prof. Code § 10471(c)*].

[5] Service and Delivery of the Application

The application must be delivered in person or by certified mail to an office of the Department of Real Estate [*Bus. & Prof. Code § 10471(b)*].

Service of the application on the judgment debtor must be personal or by registered mail [*Bus. & Prof. Code § 10471.1(a)*]. If the judgment debtor holds a current license issued by the Department, service of the notice and a copy of the application may be made by registered mail addressed to the judgment debtor at the latest business or residence address on file with the Department. If the judgment debtor does not hold a current license issued by the Department and personal service cannot be effected through the exercise of reasonable diligence, the claimant must serve the judgment debtor by one publication of the notice in each of two successive weeks in a newspaper of general circulation published in the county in which the judgment debtor was last known to reside [*Bus. & Prof. Code § 10471.1(b)*]. See *§ 103.106* for a notice form to use when serving the judgment debtor.

[6] Statute of Limitations

The application must be filed with the Department of Real Estate not later than one year after the judgment has become final [*Bus. & Prof. Code § 10471(b)*].

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10-103 California Forms of Pleading and Practice--Annotated § 103.106

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§ 103.106 Notice to Judgment Debtor of Application for Payment Out of Recovery Account of Real Estate Fund [Bus. & Prof. Code § 10471.1(c)]--By Judgment Creditor

[1] FORM Notice to Judgment Debtor of Application for Payment Out of Recovery Account of Real Estate Fund [Bus. & Prof. Code § 10471.1(c)]--By Judgment Creditor

Click here to view image.

[2] Use of Form

The form in [1], *above,* is Form RE809, available from the Department of Real Estate, which is to be used to notify the judgment debtor of the application for payment from the Recovery Account [*see Bus. & Prof. Code § 10471.1(c)*].

The form is available on the Department of Real Estate web site (www.dre.ca.gov) or can be obtained by mail from:

Department of Real Estate
Recovery Account Unit
PO Box 187007
Sacramento, CA 95818-7007

[3] Service

Service must be personal, by certified mail, or by publication [*Bus. & Prof. Code § 10471.1(a)*]. If the judgment debtor holds an unexpired and unrevoked license issued by the Department, service of the notice and a copy of the application

may be made by certified mail addressed to the judgment debtor at the latest business or residence address on file with the Department. If the judgment debtor does not hold an unexpired and unrevoked license issued by the Department, and personal service cannot be effected through the exercise of reasonable diligence, the claimant must serve the judgment debtor by one publication of the notice in each of two successive weeks in a newspaper of general circulation publication in the county in which the judgment debtor was last known to reside [*Bus. & Prof. Code § 10471.1(b)*].

If the application is served on the judgment debtor by certified mail, service is complete five days after mailing if the address is within California, and 10 days after the mailing if the address is outside California but within the United States. Personal service is complete on the date of service, and service by publication is complete on completion of the second week of publication [*Bus. & Prof. Code § 10471.1(c)*].

Forms for proof of service are available from the Department of Real Estate and are normally provided when the application is obtained.

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10-103 California Forms of Pleading and Practice--Annotated § 103.107

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§ 103.107 Application for Order Directing Payment Out of Recovery Account of Real Estate Fund [Bus. & Prof. Code § 10472(a)]--By Judgment Creditor

[1] FORM Application for Order Directing Payment Out of Recovery Account of Real Estate Fund [Bus. & Prof. Code § 10472(a)]--By Judgment Creditor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and Applicant,	)	
vs.	)	NO. _____
_____ [*name*],	)	APPLICATION FOR ORDER DIRECTING PAY-
Real Estate Commissioner of the State of California,	)	MENT OUT OF RECOVERY ACCOUNT OF REAL
Respondent,	)	ESTATE FUND
and	)	[Amount demanded _____
_____ [*name*]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	

Plaintiff and Applicant (hereafter referred to as "plaintiff") hereby makes application for an order directing payment out of the Real Estate Recovery Account, and alleges:

1. On _____ [*date of judgment*], a judgment was entered by this court in favor of plaintiff against defendant, based on the defendant's _____ [fraud *and/or* misrepresentation *and/or* deceit *and/or* conversion of trust funds] arising directly out of a transaction in which the defendant, while licensed as a real estate broker [*or* salesperson] under the laws of the State of California, performed acts for which that license was required. The amount of the judgment is $_____, and the judgment is now final. A copy of the judgment and a copy of the complaint on which the judgment is based are attached to this application as Exhibits A and B, respectively.

2. The judgment remains unsatisfied as to the sum of $_____.

3. On _____ [*date*], plaintiff filed an application with the Department of Real Estate for payment from the Recovery Account for the amount unpaid on the judgment that represents an actual and direct loss to the plaintiff in the transaction. A copy of the application is attached to this application as Exhibit C and is incorporated in this application by reference.

4. On _____ [*date*], the Real Estate Commissioner rendered a decision on the application that denied payment from the Recovery Account, notice of which was received by plaintiff on _____ [*specify date within six months of filing application to court*]. A copy of that decision is attached to this application as Exhibit D.

5. Plaintiff is entitled to file this application to this court for an Order Directing Payment Out of the Recovery Account, pursuant to *Business and Professions Code Section 10472*.

6. Plaintiff bases this application on the grounds set forth in the application to the Department of Real Estate that is attached to this application as Exhibit C.

WHEREFORE, plaintiff prays that this court make its order directing that the Real Estate Commissioner pay to plaintiff from the Recovery Account of the Real Estate Fund the sum of $_____ [*amount of unpaid actual damages or $20,000, whichever is less*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff and Applicant _____ [*name*]

[*Add verification, if desired. See § 103.70[1]*.]

[2] Use of Form

The form in [1], *above*, may be used by a judgment creditor whose application for payment out of the Recovery Account was denied by the Real Estate Commissioner. It may not be used by the judgment debtor if the Real Estate Commissioner granted the application [*Doyle v. Department of Real Estate (1994) 30 Cal. App. 4th 893, 897-898, 36 Cal. Rptr. 2d 193]* .

[3] Allegations

Paragraph 1 alleges the date, amount, and basis of the underlying judgment against the defendant. Paragraph 2 alleges the amount of the unsatisfied portion of that judgment. Paragraph 3 alleges the date and basic facts relating to the plaintiff's application to the Department of Real Estate for payment out of the Recovery Account. Paragraph 4 alleges the denial of the application by the Real Estate Commissioner.

Paragraph 5 alleges the plaintiff's right to file this application, and Paragraph 6 alleges the grounds for filing the application.

If the Commissioner renders a decision denying an application for payment from the Recovery Account, the claimant may file a verified application in the court in which judgment was entered in favor of the claimant for an Order Directing Payment out of the Recovery Account. The application must be based on the grounds set forth in the claimant's application to the Commissioner [*Bus. & Prof. Code § 10472(a)*].

[4] Verification

The application form in [1], *above*, must be verified by the applicant [*Bus. & Prof. Code § 10472(a)*].

[5] Venue

If the underlying judgment is a California state court judgment, the application must be filed in the court in which the underlying judgment was entered. If the underlying judgment is a federal court judgment, the application must be filed in the superior court of any county within California that would have been a proper venue if the underlying lawsuit had been filed in a California state court, or in the superior court of Sacramento County [*Bus. & Prof. Code § 10472(a)*].

[6] Service and Notice

A copy of the verified application must be served on the Commissioner. The service may be made by registered mail addressed to the headquarters office of the Department of Real Estate [*Bus. & Prof. Code § 10472(b)*].

A copy of the verified application, together with a prescribed notice [*see § 103.108[1]* for form of notice], must be served on the judgment debtor [*Bus. & Prof. Code § 10472(b)*]. Service may be made on the judgment debtor in the same manner as service of the application to the Department of Real Estate [*see § 103.105[5]* for discussion of service requirements].

The claimant also must file with the court a certificate or affidavit of service on the Commissioner and the judgment debtor [*Bus. & Prof. Code § 10472(b)*].

[7] Statute of Limitations

The application for an order for payment out of the recovery account must be filed with the court within six months of the date the judgment creditor receives notice from the Department of Real Estate that the application for payment has been denied [*Bus. & Prof. Code § 10472(a)*].

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10-103 California Forms of Pleading and Practice--Annotated § 103.108

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§ 103.108 Notice of Application for Order Directing Payment Out of Recovery Account of Real Estate Fund [Bus. & Prof. Code § 10472(b)]--By Judgment Creditor to Judgment Debtor

[1] FORM Notice of Application for Order Directing Payment Out of Recovery Account of Real Estate Fund [Bus. & Prof. Code § 10472(b)]--By Judgment Creditor to Judgment Debtor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and Applicant,	)	
vs.	)	
_____ [*name*],	)	NO. _____
Real Estate Commissioner of the State of California,	)	NOTICE OF APPLICATION FOR ORDER DIR-
Respondent,	)	ECTING PAYMENT OUT OF RECOVERY AC-
and	)	COUNT OF REAL ESTATE FUND
_____ [*name*]	)	[*Bus. & Prof. Code § 10472(b)*]
Defendant(s).	)	
	)	
	)	

NOTICE:

An application has been filed with the court for a payment from the Recovery Account that was

previously denied by the Real Estate Commissioner.

If the Department of Real Estate makes a payment from the Recovery Account pursuant to court order, all of your licenses and license rights under the Real Estate Law will be automatically suspended until the Recovery Account has been reimbursed for the amount paid plus interest at the prevailing rate.

If you wish to defend in court against this application, you must file a written response with the court within 30 days after having been served with a copy of the application. If you do not file a written response, you will have waived your right to defend against the application.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff and Applicant _____ [*name*]

[2] Use of Form

The notice form in [1], *above*, is for use by a judgment creditor who has filed an application with the court for an order directing payment pursuant to the provisions of *Bus. & Prof. Code § 10472(a)*; *see § 103.107*]. The notice contains the language prescribed by *Bus. & Prof. Code § 10472(b)*. This notice must be served on the judgment debtor along with the verified application for payment from the Recovery Fund [*Bus. & Prof. Code § 10472(b)*; *see § 103.107[6]* for service requirements].

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10-103 California Forms of Pleading and Practice--Annotated § 103.109

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§ 103.109 Order Directing Payment Out of Recovery Account of Real Estate Fund [Bus. & Prof. Code § 10473]

[1] FORM Order Directing Payment Out of Recovery Account of Real Estate Fund [Bus. & Prof. Code § 10473]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and Applicant,	)	
vs.	)	
_____ [*name*],	)	
Real Estate Commissioner of the State of California,	)	NO. _____
Respondent,	)	ORDER DIRECTING PAYMENT OUT OF RE-
and	)	COVERY ACCOUNT OF REAL ESTATE FUND
_____ [*name*]	)	
Defendant(s).	)	
	)	
	)	

This matter came on regularly for hearing on _____ [*date*], pursuant to plaintiff's application to this court, dated _____, and duly served on the Commissioner of Real Estate and on the judgment debtor defendant. _____ [*Name of attorney*] appeared as attorney for plaintiff, and _____ [*name of attorney*] _____ appeared as attorney for the Commissioner of Real Estate.

[_____ (*Name of attorney*) _____ appeared as attorney for defendant.] On hearing the testimony of the plaintiff, examining the documents and evidence on file in this matter, and determining that plaintiff has a valid cause of action within the purview of *Business and Professions Code Section 10471* and has complied with *Business and Professions Code Section 10472*:

IT IS HEREBY ORDERED that the Real Estate Commissioner of the State of California is required to pay to plaintiff the sum of $_____ from the Recovery Account of the Real Estate Fund (*Business and Professions Code Sections 10470 through 10481*), and plaintiff's costs in the amount of $_____.
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The form in [1], *above*, is an order directing payment out of the Recovery Account of the Real Estate Fund [*see Bus. & Prof. Code § 10473*]. For an application for such an order and related discussion, see *§ 103.107*.

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10-104 California Forms of Pleading and Practice--Annotated 104.syn

§ 104.syn Synopsis to Chapter 104: BUILDING CONTRACTS

§ 104.01 Scope of Chapter

§ 104.02 Cross References

§§ 104.03-104.09 [Reserved]

§ 104.10 Governing Law

§ 104.11 Formation of Building Contract

[1] Essential Elements

[2] Subcontractor's Bid as Offer to Contractor

[3] Estimates and Quotations

§ 104.12 Prohibited Building Contract Provisions

§ 104.13 Required Building Contract Provisions

[1] License Number

[2] Licensing Statement

[3] Discipline Disclosure Required in Small Residential Contracts

[4] Single-Family Dwelling Contracts

§ 104.14 Bond Provisions

[1] Payment or Labor-and-Materials Bond

[2] Faithful Performance Bond

§ 104.15 Scope of Work

[1] Substantial Performance

[2] Effect of Deviations From Contract

[3] Extra Work

[a] Agreement for Extras if Original Contract Is Written

[b] Agreement for Extras if Original Contract Is Oral

[c] Extras Subject to Approval by State Architect

[d] Amount Recoverable for Extras

[e] Excessive Changes Constitute Abandonment of Original Contract

[f] No Rescission for Breach of Subordinate Extras Agreement

§ 104.16 Standards of Performance

[1] Satisfaction of Party

[2] Satisfaction of Architect

§ 104.17 Excuses for Nonperformance

§ 104.18 Risk of Destruction

[1] Express Apportionment of Risk

[2] No Express Apportionment of Risk

§ 104.19 Time for Performance

§ 104.20 Mechanics' Liens

§ 104.21 Stop Notices

[1] Defined

[2] Owner's Obligations

[3] Lender's Obligations

[4] Period to Commence Action

§ 104.22 Arbitration of Disputes

[1] Public Agency Contracts

[2] Small Residential Contracts

§ 104.23 Rescission

[1] When Available

[2] When Unavailable

[3] Measure of Recovery

[4] Statute of Limitations

§ 104.24 Contractor's Action for Breach

[1] Damages

[a] Availability and Measure

[b] Damages for Failure to Pay

[c] Damages for Prevention of Performance

[d] Interest on Damages

[2] Statute of Limitations for Contractor's Action

§ 104.25 Owner's Action for Breach

[1] Waiver of Defects

[2] Measure of Owner's Damages

[a] Cost of Completion Less Contract Price

[b] Difference in Value Due to Defect

[c] Compensatory Damages

[3] Statute of Limitations for Owner's Action

[a] Patent and Latent Deficiencies Distinguished

[b] Patent Deficiency

[c] Exclusions From Four-Year Statute

[d] Latent Deficiency

[e] Commencement of 10-Year Statute

[f] Tolling of 10-Year Statute

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California Forms of Pleading and Practice--Annotated

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Volume 10: Boundaries thru Captions and Introductions-Chs. 101-108
Chapter 104 BUILDING CONTRACTS
PART I. SCOPE

10-104 California Forms of Pleading and Practice--Annotated § 104.01

§ 104.01 Scope of Chapter

This chapter covers the formation of building contracts, and actions for breach of contract [*see § 104.10* et seq.].

Forms in this chapter for use in actions by contractors or sureties include:

- Complaints and allegations by a contractor against an owner for breach of contract [*see §§ 104.210 -104.215*].
- A complaint by a subcontractor against the prime contractor [*see § 104.216*].
- Affirmative defenses and ground of demurrer relating to whether a contractor or subcontractor was licensed or an architect's certificate was obtained [*see §§ 104.217, 104.222*].
- A complaint by a contractor against a purchaser for breach of contract [*see § 104.218*].
- Complaints by a contractor against a subcontractor for breach of contract, including the joinder of a surety [*see §§ 104.219, 104.220*].
- A complaint by a contractor's surety against an owner [*see § 104.221*].
- A complaint by a contractor against an owner for the reasonable value of work and material furnished [*see § 104.224*].

Additional forms for use in actions by owners include:

- A complaint and allegations by an owner against a contractor [*see §§ 104.225, 104.226*] and an affirmative defense by the contractor [*see § 104.227*] relating to delayed or excused performance by the contractor.

- Complaints by an owner against a contractor and the surety for negligent performance or nonperformance [*see §§ 104.228 -104.230*].

- An allegation for use by an owner [*see § 104.231*] and an affirmative defense for use by a contractor [*see § 104.232*] relating to a payment bond and terms of the bond.

- A complaint for rescission and restitution by an owner based on the contractor's inability to obtain a building permit [*see § 104.233*].

This chapter also discusses actions by or against contractors, subcontractors, developers, owners, purchasers, and lenders who are connected with or affected by building contracts, other than actions for breach of a building contract [*see § 104.40* et seq.]. This chapter also includes coverage of statutory requirements for actions for construction defects in new residential units when the purchase agreement with the buyer was signed by the seller on and after January 1, 2003 [*see § 104.43*].

This chapter also includes forms of complaint for use by an owner against a contractor for negligence for building code violations [*see § 104.250*] or against a contractor and subcontractor for conspiracy to defraud [*see § 104.258*]; a complaint for damages for fraudulent nondisclosure of soil conditions [*see § 104.257*]; complaints and a denial relating to actions by a purchaser for construction defects or breach of warranties [*see §§ 104.251, 104.253*]; a complaint by a contractor against a public entity for injunctive relief and damages for negligence and fraud [*see § 104.252*]; a complaint by a tenant against a contractor for interference with prospective economic advantage [*see § 104.256*]; and a complaint and an allegation for injunctive relief or damages against an unlicensed contractor [*see §§ 104.259, 104.260*]. This chapter also includes forms relating to actions for construction defects in new residential units when the purchase agreement with the buyer was signed by the seller on and after January 1, 2003, including a notice of claim for violation of statutory construction standards by the owner to the builder [*see § 104.261*]; a complaint for damages for violation of statutory construction standards [*see § 104.262*]; and various affirmative defenses [*see §§ 104.263 -104.269*].

For further discussion of injunctive relief and the torts discussed in this chapter, see generally Chapters 269, *Fraud and Deceit* , 303, *Injunctions* , 380, *Negligence* , and 460, *Products Liability* .

This chapter also covers licensing and bond requirements for contractors, disciplinary proceedings under the Contractors' State License Law (*Bus. & Prof. Code § 7000 et seq.*), and the penalties for engaging in contracting work without possessing the appropriate license and for other violations of the license law [*see § 104.70* et seq.].

This chapter also discusses the home improvement business, which is regulated by special provisions of the Contractor's State License Law [*see Bus. & Prof. Code §§ 7150-7168*; *see also § 104.100* et seq.].

It includes a form of complaint for damages for inducing plaintiff to enter into a contract for a work of improvement in reliance on the contractor's or solicitor's false representations or statements [*see § 104.310*], and a form of complaint alleging violations of the Unruh Act (*Civ. Code § 1801 et seq.*) [*see § 104.311*].

The provisions discussed in this analysis are not applicable to contracts for the construction of swimming pools to be built for the use and enjoyment of other than a single-family unit on or contiguous to premises occupied only by a single-family unit, nor do they apply to the construction of swimming pools built as part of an original building plan by the same contractor who builds a single-family dwelling unit on the premises [*Bus. & Prof. Code § 7166*].

Formalities required for and forms relating to home solicitation contracts are found in Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicensesReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsProcedureMultiple DefendantsIndemnityGeneral Overview

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§ 104.02 Cross References

For a form of affirmative defense of prevention of a building contract by an irresistible, superhuman cause, see Ch. 10, *Act of God*

For forms for use in actions involving architects, see Ch. 56, *Architects*

For discussion and forms relating to home solicitation contracts, see Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts*

For discussion of the formation of contracts generally, see Ch. 140, *Contracts*

For discussion of the recovery of damages generally in contract actions, see Ch. 177, *Damages*

For a form relating to entitlement to treble damages when defendant is not licensed, see Ch. 177, *Damages*

For forms for use in actions involving employees of contractors, see Ch. 248, *Employer's Liability for Employee's Torts*

For forms of complaints on an indemnity agreement involving a contractor's bond, see Ch. 300, *Indemnity and Contribution*

For discussion and forms of claims of lien, see Ch. 361, *Mechanics' Liens*

For forms for use in actions involving principals and agents, see Ch. 427, *Principal and Agent*

For forms for use in an action on a public works contract, see Ch. 481, *Public Works*

For discussion and forms relating to administrative investigations, see Ch. 471, *Investigations by Public Agencies*

For forms of allegation that a local licensing requirement is preempted by the Contractors' State License Law, see Ch. 471B, *Licensing by Public Agencies*

For discussion and forms relating to administrative trials, see Ch. 473, *Public Agency Adjudication*

For discussion and forms relating to review of administrative trials, see Ch. 474, *Availability of Judicial Review of Agency Decisions* et seq.

For discussion and forms for use in connection with violations of the Uniform Commercial Code or the Unruh Act in building contract transactions, see Ch. 500, *Sales: Sales Under the Commercial Code* , and Ch. 501, *Sales: Retail Installment Sales*

For forms of complaints for subrogation by an insurer against a contractor or subcontractor, see Ch. 536, *Subrogation*

For forms of complaints in an action against a contractor and surety on a faithful performance bond or labor and material bond, see Ch. 538, *Suretyship, Bonds, and Undertakings*

For discussion and forms relating to tort theories of misrepresentation, see generally Ch. 269, *Fraud and Deceit* , and Ch. 380, *Negligence*

For discussion of copyright protection of architectural works, see Ch. 349, *Literary Property and Copyright*

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionHome SolicitationBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesGeneral OverviewContracts LawFormationGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral OverviewGovernmentsState & Territorial GovernmentsLicenses

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[Reserved]

§§ 104.03[Reserved]

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§ 104.10 Governing Law

Building contracts are governed generally by *Civ. Code § 1549 et seq.*, as well as specific provisions of *Bus. & Prof. Code § 7000 et seq.* ("the license law") [*see, e.g., Bus. & Prof. Code §§ 7030, 7030.5, 7034, 7164*]. The formation, interpretation, performance, and enforcement of contracts generally are discussed in Ch. 140, *Contracts* . For discussion of the persons and activities subject to the license law, see *§ 104.70* et seq.

The provisions of the Uniform Commercial Code (UCC) are generally applicable to commercial transactions rather than personal or consumer transactions [*James Talcott, Inc. v. Gee (1968) 266 Cal. App. 2d 384, 388, 72 Cal. Rptr. 168* ; *see Com. Code § 1102*]. In determining whether a transaction is a commercial transaction or a personal transaction for purposes of applying the Uniform Commercial Code, the courts will consider the intent of the purchasing party at the time the transaction is entered into [*Cessna Finance Corp. v. Pivo (1976) 58 Cal. App. 3d 281, 287-288, 129 Cal. Rptr. 888]* , and the principal use to which the purchased property is put [*James Talcott, Inc. v. Gee (1968) 266 Cal. App. 2d 384, 388, 72 Cal. Rptr. 168]* . For discussion of the UCC, see Ch. 500, *Sales: Sales Under the Commercial Code* .

For discussion of the possible application of the federal Truth In Lending Act (*15 U.S.C. § 1601 et seq.*, governing disclosure of credit terms) or the Unruh Act (*Civ. Code § 1801 et seq.*, governing retail installment contracts) to home improvement contracts, see *§ 104.100* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 104.11 Formation of Building Contract

[1] Essential Elements

The elements essential to the existence of a valid building contract are the same as the essential elements of any other contract: (1) parties capable of contracting [*see Civ. Code § 1556 et seq.*], (2) consent to the contract [*see Civ. Code § 1565 et seq.*], (3) a lawful object [*see Civ. Code § 1595 et seq.*], and (4) a sufficient cause or consideration [*Civ. Code § 1550*; *see Civ. Code § 1605 et seq.*]. Except for contracts between an owner and a contractor for the construction of a single-family dwelling to be retained by the owner for at least one year [*Bus. & Prof. Code § 7164(a)*; *see § 104.13[4]*], building contracts are not required to be in writing [*see Civ. Code §§ 1622, 1624*].

For further discussion of the formation of contracts, see Ch. 140, *Contracts* .

[2] Subcontractor's Bid as Offer to Contractor

Under certain circumstances, a subcontractor's bid submitted to a general contractor constitutes an offer to contract with the general contractor that the general contractor may accept by using the bid as a basis for calculating its own bid on the total project. The equitable doctrine of promissory estoppel will be invoked to prevent the subcontractor from withdrawing its bid after this use by the general contractor if the court finds that (1) the general contractor reasonably and in good faith relied on the subcontractor's bid in preparing and submitting its own bid, (2) the general contractor's bid was accepted, and (3) the general contractor will be damaged by the subcontractor's refusal to perform according to the terms of the subcontract bid [*Drennan v. Star Paving Co. (1958) 51 Cal. 2d 409, 414-415, 333 P.2d 757* ; *see C & K Engineering Contractors v. Amber Steel Co. (1978) 23 Cal. 3d 1, 8-11, 151 Cal. Rptr. 323, 587 P.2d 1136* (no right to jury trial because action is equitable in nature)]. Actual reliance by the general contractor is necessary to transform the bid into a binding obligation; a bid is not in any sense a complete or binding contract merely because it has been filed by the subcontractor or opened by the general contractor [*People v. Olson (1965) 232 Cal. App. 2d 480, 487, 42 Cal. Rptr. 760]* .

The general contractor's reliance on the bid will not be considered reasonable if the parties' usual dealings, their negotiations concerning the subject proposal, or the terms of the bid itself indicate that the bid is not in fact an offer [*see*

Drennan v. Star Paving Co. (1958) 51 Cal. 2d 409, 414-415, 333 P.2d 757] . If the subcontractor's bid is significantly lower than the range of other bids submitted to the general contractor, or the general contractor has other reasons to believe that the subcontractor made a mistake in preparing its bid, it may have a duty to check with the subcontractor before relying on the bid [*H.W. Stanfield Constr. Corp. v. Robert McMullan & Son, Inc. (1971) 14 Cal. App. 3d 848, 852-853, 92 Cal. Rptr. 669]* .

The measure of a general contractor's damages for a subcontractor's failure to perform under the terms of a properly accepted bid is usually the difference between the subcontractor's bid and the next highest bid for the work received by the general contractor [*see, e.g.,* *H.W. Stanfield Constr. Corp. v. Robert McMullan & Son, Inc. (1971) 14 Cal. App. 3d 848, 851, 92 Cal. Rptr. 669]* .

[3] Estimates and Quotations

Unlike bids, estimates and quotations provided by subcontractors are usually not considered offers to contract. However, a subcontractor's characterization of a document as an estimate or quotation is not conclusive on the matter. If the general contractor has relied on the figure given in preparing and submitting its own bid, and the nature of the parties'dealings, the language of the entire document in which the figure appears, or other facts and circumstances indicate that the reliance was reasonable, an "estimate" or "quotation" may be treated as an offer by the courts [*Leo F. Piazza Paving Co. v. Bebek & Brkich (1956) 141 Cal. App. 2d 226, 230-231, 296 P.2d 368* ; *Parker v. Meneley (1951) 106 Cal. App. 2d 391, 398-399, 235 P.2d 101]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 104.12 Prohibited Building Contract Provisions

No licensed contractor may insert in any contract, or be a party to any contract that contains, a clause that is void or unenforceable under *Civ. Code § 2782* for indemnifying the promisee against liability for damages arising from his or her sole negligence or willful misconduct [*Bus. & Prof. Code § 7034(a)*]. Provisions in construction contracts entered into by public agencies under which the public agency purports to impose on the contractor, or relieve the agency from, liability for the agency's active negligence are similarly void and unenforceable [*Civ. Code § 2782(b)*]. For further discussion, see *§ 104.41[7]*.

No licensed contractor may require a waiver of lien rights from any subcontractor, employee, or supplier in violation of *Civ. Code § 3262* [*Bus. & Prof. Code § 7034(b)*].

For contracts entered into before 2006, a provision in a subcontract that sets forth the subcontractor's duty "to defend" the general contractor against claims "founded upon" damage or loss caused by the subcontractor's negligent performance of its work imposes a duty to defend on the subcontractor as soon as a suit is filed against the general contractor asserting such claims, regardless of whether it is ultimately determined that the subcontractor was actually negligent [*Crawford v. Weather Shield Mfg. Inc. (2008) 44 Cal. 4th 541, 568, 79 Cal. Rptr. 3d 721, 187 P.3d 424]* . However, with respect to construction contracts for residential construction entered into after January 1, 2006, all provisions, clauses, covenants, and agreements that require a subcontractor to indemnify the builder, including the cost to defend, against liability for claims of construction defects are unenforceable to the extent the claims arise out of, pertain to, or relate to the negligence of the builder, or agents, servants, or independent contractors who are directly responsible to the builder [*Civ. Code § 2782(c)*]. This prohibition also applies to indemnification of the builder by the subcontractor for defects in design furnished by those persons, or to the extent the claims do not arise out of, pertain to, or relate to the scope of work in the written agreement between the parties [*Civ. Code § 2782(c)*]. The prohibition may not be waived or modified by contractual agreement, act, or omission of the parties [*Civ. Code § 2782(c)*]. However, a subcontractor and builder may mutually agree to the timing or immediacy of the defense and provisions for reimbursement of defense fees and costs, so long as that agreement does not waive or modify the provisions of *Civ. Code § 2782(c)* [*Civ. Code § 2782(d)*].

For residential construction contracts entered into after January 1, 2008, *Civ. Code § 2782(e)* uses parallel language to expand the categories of project participants as to whom a subcontractor cannot be made contractually responsible for construction defect indemnity, including defense costs, "to the extent" such claims :arise out of, pertain to, or relate to" the negligence of those entities or their agents, their servants, or the independent contractors directly responsible to them. Under subdivision (e), the categories of project participants who may not obtain such contractual indemnity from a subcontractor now include not only the builder, but also "the general contractor or contractor that is not affiliated with the builder."

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 104.13 Required Building Contract Provisions

[1] License Number

Every person licensed under the license law must include his or her contractor's license number in all construction contracts, subcontracts, and calls for bid, and in all forms of advertising used by the person [*Bus. & Prof. Code § 7030.5*; *see Bus. & Prof. Code § 7027.3*].

[2] Licensing Statement

Except for contractors writing home improvement contracts [*see Bus. & Prof. Code § 7151.2*] and service and repair contracts [*see Bus. & Prof. Code § 7159.10*], on or after January 1, 2006, every person licensed under the license law who is engaged as a prime contractor must include in all written building contracts entered into by him or her the following statement in at least 10-point type [*Bus. & Prof. Code § 7030(a), (d)*]:

> Contractors are required by law to be licensed and regulated by the Contractors' State License Board which has jurisdiction to investigate complaints against contractors if a complaint regarding a patent act or omission is filed within four years of the date of the alleged violation. A complaint regarding a latent act or omission pertaining to structural defects must be filed within 10 years of the date of the alleged violation. Any questions concerning a contractor may be referred to the Registrar, Contractors' State License Board, P.O. Box 26000, Sacramento, California 95826.

On and after January 1, 2006, licensed contractors writing home improvement contracts pursuant to *Bus. & Prof. Code § 7151.2* and service and repair contracts pursuant to *Bus. & Prof. Code § 7159.10* must include the following licensing statement in those contracts [*Bus. & Prof. Code § 7030(b)*]:

> Information about the Contractors' State License Board (CSLB): CSLB is the state consumer protection agency that licenses and regulates construction contractors.
>
> Contact CSLB for information about the licensed contractor you are considering, including

information about disclosable complaints, disciplinary actions and civil judgments that are reported to CSLB.

Use only licensed contractors. If you file a complaint against a licensed contractor within the legal deadline (usually four years), CSLB has authority to investigate the complaint. If you use an unlicensed contractor, CSLB may not be able to help you resolve your complaint. Your only remedy may be in civil court, and you may be liable for damages arising out of any injuries to the unlicensed contractor or the unlicensed contractor's employees.

For more information:

Visit CSLB's Web site at www.cslb.ca.gov

Call CSLB at 800-321CSLB (2752)

Write CSLB at P.O. Box 26000, Sacramento, CA 95826.

Although the failure of a licensed contractor to include this statement in a contract constitutes grounds for disciplinary action [*see Bus. & Prof. Code § 7030(c)*], it will not bar the contractor from bringing an action to recover compensation under the contract [*Gonzales v Concord Gardens Mobile Home Park, Ltd. (1979) 90 Cal. App. 3d 871, 874-875, 153 Cal. Rptr. 559]* .

For discussion of the licensing of contractors, see *§ 104.70* et seq. For forms relating to allegations that a contractor or subcontractor is unlicensed, see *§§ 104.217* and *104.222*. For coverage of home improvement and service and repair contracts, see *§ 104.100* et seq.

[3] Discipline Disclosure Required in Small Residential Contracts

Before entering into a contract to perform work on residential property with four or fewer units, any contractor who has had his or her license suspended or revoked two or more times within an eight-year period must disclose any disciplinary license suspension or license revocation during the last eight years resulting from any violation of the License Law by the contractor, whether or not the suspension or revocation was stayed. The disclosure may be provided in a bid, estimate, or other document before entering into a contract, and must appear either in capital 10-point roman boldface type or in contrasting red 8-point roman boldface type [*Bus. & Prof. Code § 7030.1(a), (b)*].

If a contractor fails to provide this discipline disclosure when required, he or she will be subject to the following penalties [*Bus. & Prof. Code § 7030.1(b)*]:

- First violation--$1,000.
- Second violation--$2,500.
- Third violation--$5,000 and a one-year license suspension.
- Fourth violation--license revocation.

[4] Single-Family Dwelling Contracts

There are specific requirements for every contract, and any changes in a contract, between an owner and a contractor, for the construction of a single-family dwelling to be retained by the owner for at least one year. These contracts must contain the following information [*Bus. & Prof. Code § 7164(b), (d)*]:

- The contractor's name, address, and license number.

- The approximate dates when the work will begin and be substantially completed.

- A legal description of the location where the work will be done.

- A statutorily-prescribed statement with the heading "Mechanics' Lien Warning," which informs the owner of the contractor's rights under the Mechanics' Lien Law and suggests measures the owner can take to protect himself or herself from liens [*see Bus. & Prof. Code § 7164(b)(4)* (text of statement)].

- A CSLB statement that emphasizes the value of commercial general liability insurance and encourages the owner to verify the contractor's coverage and status, and a check box indicating whether or not the contractor carries commercial general liability insurance, and if so, the insurer's name and telephone number [*see* http://www.cslb.ca.gov/forms/glisfd.pdf].

- A notice in close proximity to the parties' signatures, in at least 10-point bold type or all capital letters, stating that the owner has the right to require the contractor to have a performance and payment bond and that the expense of the bond may be borne by the owner.

The contract may also contain other matters agreed to by the parties. It must clearly describe any other document incorporated into the contract. Before work begins, the owner must be furnished a copy of the contract signed by the contractor [*Bus. & Prof. Code § 7164(c)*].

In "compelling cases," contracts for the construction of a single-family dwelling may be enforced even though the statutory requirements are not met. In one case, the contractor provided design, construction, and general contracting services for construction of a single-family house even though the property owner never signed the contract. The property owner terminated the contractor without paying for all the services it had provided. In reversing a demurrer granted the property owner, the court of appeal held that the violation of *Bus. & Prof. Code § 7164* did not preclude the contractor from bringing an action for breach of contract. The pleadings alleged that the property owner was a highly sophisticated homeowner with previous involvement in residential construction projects, that her legal representatives assisted her in negotiating the construction project agreement, that the contractor had already completed a substantial amount of the work when the property owner terminated the parties' agreement, and that the property owner would be unjustly enriched if she were not required to compensate the contractor for the reasonable value of its work. Under those circumstances, the court declined to hold that the contractor's noncompliance with § 7164 absolutely foreclosed it from seeking to enforce the oral agreement it purportedly made with the homeowner, which was allegedly memorialized in an unsigned, written contract [*see Arya Group, Inc. v. Cher (2000) 77 Cal. App. 4th 610, 615-616, 91 Cal. Rptr. 2d 815]* . The rationale for *Arya Group* is unaffected by the subsequent repeal and enactment of a new *Bus. & Prof. Code § 7164* [*see* 2005 Stats., ch. 48, §§ 18, 19].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 104.14 Bond Provisions

[1] Payment or Labor-and-Materials Bond

Building contracts often contain provisions requiring bonds. One kind of bond frequently required is a payment bond [*see Civ. Code § 3096*], also called a labor-and-materials bond [*see Sukut-Coulson, Inc. v. Allied Canon Co. (1978) 85 Cal. App. 3d 648, 654, 149 Cal. Rptr. 711]* . By its terms, a payment bond is made to inure to the benefit of all claimants and to give these persons a right of action to recover on the bond in any suit brought to foreclose the liens provided for by the California mechanics' lien laws [*Civ. Code § 3109 et seq.*; *see Civ. Code §§ 3110, 3111, 3112*; *see also* Ch. 361, *Mechanics' Liens*], or in a separate suit brought on the bond [*Civ. Code § 3096*]. Either an owner or an original contractor may be the principal on any payment bond [*Civ. Code § 3096*].

There are several types of payment bonds, depending on whether a public or private work of improvement is involved [*see Civ. Code §§ 3096* (payment bond defined), 3225, 3226 (general provisions), 3235-3242 (private works), 3247-3252 (public works); *Pub. Contract Code § 7103* (payment bonds on public works)]. The general purpose of a payment bond is to secure payment of the claims of subcontractors, material suppliers, or laborers who perform work on or supply materials to a work of improvement. This kind of bond is normally obtained by the general, or prime, contractor on the building contract.

An owner of property who contracts for a private work of improvement in an amount exceeding $5 million if the owner's interest is a fee simple absolute interest or $1 million if the owner's interest is less than a fee simple absolute interest, is to provide one of three specified forms of security for the project to be used only when the owner defaults on his or her contractual obligations to the original contractor. A payment bond may be used to satisfy this security requirement. The requirement does not apply to single-family residences, public works projects, and housing developments eligible for a density bonus and certain publicly-traded and qualified private companies [*see Civ. Code § 3110.5*].

For a form of allegation relating to payment bond, see *§ 104.231*. For discussion and forms relating to actions to recover on payment bonds for public works, see Ch. 481, *Public Works* .

[2] Faithful Performance Bond

The faithful performance bond is frequently used in connection with building contracts. Under a faithful performance bond, the surety promises the obligee (the owner) that the work undertaken by the principal (the contractor) will be performed pursuant to the terms of the contract. The surety is liable for losses incurred by the obligee when the principal breaches the contract. A faithful performance bond that refers to a contract providing that the contractor will pay the claims of all persons performing labor or furnishing materials binds the surety for labor performed and materials furnished even in the absence of a payment bond [*Culbertson v. Cizek (1964) 225 Cal. App. 2d 451, 466-467, 37 Cal. Rptr. 548]* .

The sufficiency of a performance bond tendered by a contractor is determined according to an objective reasonableness test [*see Weisz Trucking Co. v. Emil R. Wohl Constr. (1970) 13 Cal. App. 3d 256, 263, 91 Cal. Rptr. 489]* .

For a form of complaint joining a surety in an action by a contractor against a subcontractor, see *§ 104.219*. For a form of complaint for subrogation by a surety against an owner, see *§ 104.221*. For a form of complaint by an owner against a contractor and its surety for nonperformance or abandonment by the contractor, see *§ 104.230*. For a form of affirmative defense relating to limitations set forth in a performance bond, see *§ 104.232*. For further discussion of actions on bonds and the rights and liabilities of sureties, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 104.15 Scope of Work

[1] Substantial Performance

California cases determining rights under building contracts have relaxed the common law rule that recovery will not be allowed on a contract until the party bringing the action has fully performed [*see, e.g., Patrick J. Ruane, Inc. v. Parker (1960) 185 Cal. App. 2d 488, 503, 8 Cal. Rptr. 379]* . A contractor may recover for work performed under a building contract, subject to a reduction to compensate for any defects in the work, based on a showing of substantial performance of his or her obligations under the contract [*Patrick J. Ruane, Inc. v. Parker (1960) 185 Cal. App. 2d 488, 503, 8 Cal. Rptr. 379* ; *see §§ 104.211, 104.214*].

For purposes of this rule, "substantial performance" means that there has been no willful departure from the terms of the contract, and no omission of any of its essential parts, and that the contractor has in good faith performed all of his or her substantive obligations under the contract. If these requirements have been satisfied, the contractor will not be held to have forfeited his or her right to recovery by reason of trivial defects or imperfections in the work performed. If the omission is so slight that it cannot be regarded as an integral or substantive part of the original contract, and the other party can be compensated for it by an award of damages, the contractor does not lose his or her right of action. This rule is particularly applicable when the other party has received the benefit of what has been done, and is enjoying the fruits of the contractor's work [*Lowy v. United Pac. Ins. Co. (1967) 67 Cal. 2d 87, 92-93, 60 Cal. Rptr. 225, 429 P.2d 577]* .

[2] Effect of Deviations From Contract

In determining whether a contractor has substantially performed his or her obligations under a contract, the court will consider whether the contractor's deviations from the terms of the contract are so slight that they might have been made by one who was honestly endeavoring to comply with the contract [*Perry v. Quackenbush (1894) 105 Cal. 299, 309, 38 P. 740* ; *Shell v. Schmidt (1958) 164 Cal. App. 2d 350, 356, 330 P.2d 817 , cert. denied, 359 U.S. 959 (1959)* ; *see § 104.213*]. Good faith on the part of the contractor is not, however, conclusive. The owner has a right to the structure, in all essential particulars, that he or she contracted for. A court may not say that anything is immaterial that the parties have made material by their contract. An owner has the right to determine for himself or herself what the owner deems a

good foundation or what materials the owner desires to be used, and neither the contractor nor the court has the right to compel the owner to accept something else even if that thing is shown by witnesses to be just as good or even better than the thing contracted for [*see Perry v. Quackenbush (1894) 105 Cal. 299, 309-310, 38 P. 740* ; *Shell v. Schmidt (1958) 164 Cal. App. 2d 350, 356-357, 330 P.2d 817 , cert. denied, 359 U.S. 959 (1959)]* .

[3] Extra Work

[a] Agreement for Extras if Original Contract Is Written

A contract in writing may be modified as follows [*Civ. Code § 1698(a)-(c)*]:

(1) By a contract in writing;

(2) By an oral agreement, to the extent that the oral agreement is executed by the parties; or

(3) Unless the contract expressly provides otherwise, by an oral agreement supported by new consideration; except that the statute of frauds [*Civ. Code § 1624*] must be satisfied if the contract as modified is within its provisions.

Under these rules, an executed oral agreement for extras, if supported by consideration, may be considered a modification of any written agreement that only extras ordered or approved in writing will be paid for [*MacIsaac & Menke Co. v Cardox Corp. (1961) 193 Cal. App. 2d 661, 670, 14 Cal. Rptr. 523* ; *First Olympic Corp. v Hawryluk (1960) 185 Cal. App. 2d 832, 841, 8 Cal. Rptr. 728]* . Similarly, although a written building contract contains a maximum limit as to cost and requires all change orders to be written and approved by the architect, by ignoring these requirements the parties can abandon the contract and proceed on a straight cost plus basis [*Opdyke & Butler v. Silver (1952) 111 Cal. App. 2d 912, 918-919, 245 P.2d 306]* .

A contractor may recover the reasonable value of extras if the extras are furnished at the request of the owner, become a part of the construction work generally described in the building contract, and are accepted by the owner, even though the request for the extras is oral and the written contract provides that the owner will be chargeable only for extras that are requested in writing [*see, e.g., First Olympic Corp. v. Hawryluk (1960) 185 Cal. App. 2d 832, 841, 8 Cal. Rptr. 728]* . The reasonable value of extras may also be recovered when the owner does not complete a change order for the extras as required by the contract, but the owner's performance of a portion of the work in a manner contrary to that set forth in the contract causes the contractor to complete the work in the same manner under the assumption that the owner's conduct amounts to an authorization for the change and for the extras necessary to accomplish it [*see, e.g., Weeshoff Constr. Co. v. Los Angeles County Flood Control Dist. (1979) 88 Cal. App. 3d 579, 582-594, 152 Cal. Rptr. 19]* .

In appropriate cases, the provisions of *Civ. Code § 1698* do not preclude the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts [*Civ. Code § 1698(d)*].

For a form of complaint by a contractor against an owner relating to modifications of a contract for extra work, see *§ 104.215*. For a form of complaint by a subcontractor against a prime contractor and a municipality for extra work, see *§ 104.216*.

[b] Agreement for Extras if Original Contract Is Oral

A contract not in writing may be modified in any respect by the consent of the parties, in writing, without a new consideration. The original contract will be extinguished to the extent of the modification [*Civ. Code § 1697*].

[c] Extras Subject to Approval by State Architect

A mandatory requirement in a contract for the construction of a state building that orders for changes, additions, or extras be approved in writing by the State Architect may not be waived by subordinate field personnel [*Acoustics, Inc. v. Trepte Constr. Co. (1971) 14 Cal. App. 3d 887, 912, 92 Cal. Rptr. 723]* .

[d] Amount Recoverable for Extras

Usually, the amount recoverable by the contractor for any extras supplied is the market rate or reasonable value of the extras [*see* *First Olympic Corp. v. Hawryluk (1960) 185 Cal. App. 2d 832, 841, 8 Cal. Rptr. 728]* . For example, the amount recoverable for extras was determined by taking the total cost of the project and subtracting payments made as provided under the contract, when assessment of costs in the manner provided by the contract was found to be impractical due to the large number of changes made to the contract [*State ex rel. Dept. of Transportation v. Guy F. Atkinson Co. (1986) 187 Cal. App. 3d 25, 32-35, 231 Cal. Rptr. 382]* .

[e] Excessive Changes Constitute Abandonment of Original Contract

When an owner imposes on the contractor such an excessive number of changes that it can fairly be said that the scope of the work under the original contract has been altered, abandonment of the contract may properly be found. In such a case, the contractor may complete the project with the approval of the owner. The contractor is then entitled to recover the value of its services on a quantum meruit basis [*C. Norman Peterson Co. v. Container Corp. of America (1985) 172 Cal. App. 3d 628, 640-645, 218 Cal. Rptr. 592]* .

[f] No Rescission for Breach of Subordinate Extras Agreement

The owner's breach of an agreement for extras that is subordinate and incidental to the main purpose of the underlying contract does not warrant the contractor's rescission of the underlying contract [*Karz v. Department of Professional & Vocational Standards (1936) 11 Cal. App. 2d 554, 557, 54 P.2d 35]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceSubstantial PerformanceContracts LawRemediesEquitable ReliefQuantum MeruitContracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawTypes of ContractsConstruction ContractsContracts LawTypes of ContractsOral Agreements

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§ 104.16 Standards of Performance

[1] Satisfaction of Party

A stipulation in a contract to perform to the satisfaction of only one of the parties calls for perfomance that should be satisfactory to a reasonable person [*Gladding, McBean & Co. v. Montgomery (1912) 20 Cal. App. 276, 279, 128 P. 790]* . Performance of a building contract that is satisfactory to a reasonable person constitutes performance of the contract, even if the owner is, in fact, not satisfied [*Patrick J. Ruane, Inc. v. Parker (1960) 185 Cal. App. 2d 488, 503, 8 Cal. Rptr. 379]* . This rule does not apply when the performance involves matters dependent on fancy, taste, sensibility, or judgment of the other party, but it does apply when the question is merely one of operative fitness or mechanical utility, and especially to contracts for the erection of buildings [*Thomas Haverty Co. v. Jones (1921) 185 Cal. 285, 296, 197 P. 105]* .

[2] Satisfaction of Architect

Building contracts often include a stipulation to perform to the satisfaction of an architect. When the parties authorize the architect, as arbiter, to determine and certify the existence of a fact when the fact becomes material to a proceeding under the contract, the duly made certificate of the architect that the fact exists is binding on the parties in such a proceeding. The architect's certificate can be impeached as to the relevant fact only by a showing of fraud or gross mistake amounting to fraud [*Connell v. Higgins (1915) 170 Cal. 541, 552, 150 P. 769]* . If, however, the architect is satisfied with the work and arbitrarily refuses to issue the certificate, the necessity for the production of the certificate is dispensed with [*Patrick J. Ruane, Inc. v. Parker (1960) 185 Cal. App. 2d 488, 502, 8 Cal. Rptr. 379]* .

A provision in a subcontract that work is to be done "to the satisfaction of the architect" concerns the architect's authority to pass on matters of the quality and quantity of the performance. It does not purport to give the architect final and sole authority to make a legal interpretation of the subcontract or to resolve ambiguities on the plans and specifications. That kind of power cannot be inferred, but must be unequivocally expressed [*Walnut Creek Elec. v. Reynolds Constr. Co. (1968) 263 Cal. App. 2d 511, 515, 69 Cal. Rptr. 667]* .

When the contract states that performance should be to the satisfaction of a named architect or architects who are

subsequently discharged in the course of the work by the owner with no one substituted in their place, the architect's certificate is no longer required [*Thomas Haverty Co. v. Jones (1921) 185 Cal. 285, 295-296, 197 P. 105]* .

For a form of affirmative defense by an owner based on a contractor's failure to obtain an architect's certificate, see *§ 104.223*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts

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§ 104.17 Excuses for Nonperformance

The lack of performance of an obligation, or an offer of performance, in whole or in part, or any delay in performance, is excused by the following causes, to the extent to which they operate [*Civ. Code § 1511*]:

> (1) When the performance or offer of performance is prevented or delayed by the act of the creditor (usually, the owner), or by the operation of law, even though there may have been a stipulation that this shall not be an excuse; however, the parties may expressly require in a contract that the party relying on these provisions give written notice to the other party or parties, within a reasonable time after the occurrence of the event excusing performance, of an intention to claim an extension of time or of an intention to bring suit or of any other similar or related intent, provided the requirement of this notice is reasonable and just.
>
> (2) When the performance or offer of performance is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of California or of the United States, unless the parties have expressly agreed to the contrary.
>
> (3) When the debtor (usually, the contractor) is induced not to perform or offer to perform the obligation by any act of the creditor intended or naturally tending to have that effect, done at or before the time when the performance or offer may be made, and not rescinded before that time [*see Civ. Code § 1512*, discussed in *§ 104.213[6]*].

A building moratorium imposed by ordinance does not provide an excuse for nonperformance based on either impossibility or commercial frustration [*G.W. Andersen Construction Co. v. Mars Sales (1985) 164 Cal. App. 3d 326, 334-339, 210 Cal. Rptr. 409]* . Fire also will not generally excuse the nonperformance of a building contract [*see § 104.18[2]*].

For forms relating to delay of performance or excuse of nonperformance, see *§§ 104.225 -104.227*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSales of GoodsBreach, Repudiation & ExcuseExcuse From PerformanceContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts

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§ 104.18 Risk of Destruction

[1] Express Apportionment of Risk

The parties to the contract may include provisions apportioning the risk of loss from fire or other events [*see Ahlgren v. Walsh (1916) 173 Cal. 27, 31-33, 158 P. 748* ; *see also Varco-Pruden, Inc. v. Hampshire Constr. Co. (1975) 50 Cal. App. 3d 654, 659-663, 123 Cal. Rptr. 606]* . Large building contracts are usually covered by a policy or policies of insurance protecting the parties against destruction of the building prior to completion.

[2] No Express Apportionment of Risk

If a building contract contains no express provisions regarding destruction of the building by fire, or by another cause not related to either party's negligence, before full completion, the contractor and the owner each must perform their parts of the contract if the building is destroyed. If the whole price is due on completion, the contractor must complete the project before he or she can lawfully demand payment. If the price is payable in installments during the progress of the work, the contractor may not recover any installments earned but not paid at the time the building was destroyed until the reconstruction has proceeded to the stage necessary to make the installments due. The contractor must stand the loss resulting from the destruction, and must replace the destroyed building at his or her own expense [*Ahlgren v. Walsh (1916) 173 Cal. 27, 31, 158 P. 748* ; *see Kennedy v. Reece (1964) 225 Cal. App. 2d 717, 725-726, 37 Cal. Rptr. 708]* .

Fire is not considered an "irresistible, superhuman cause" that will excuse the performance of a building contract under *Civ. Code § 1511* [*Keeling v. Schastey & Vollmer (1912) 18 Cal. App. 764, 765-766, 124 P. 445]* . Nonetheless, when the building contract calls for improvements to an existing building rather than construction of a building, the destruction of the building by fire or another cause not related to either party's negligence will excuse the contractor's performance, and the contractor will be entitled to recover the reasonable value of his or her performance up to the date of the destruction [*Keeling v. Schastey & Vollmer (1912) 18 Cal. App. 764, 766, 124 P. 445* ; *see Civ. Code § 1511*, discussed in *§ 104.134[5]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 104.19 Time for Performance

If no time is specified for the performance of an act required to be performed, a reasonable time for performance is allowed [*Civ. Code § 1657*]. A reasonable time for performance in a given case must be determined by the situation of the parties, the nature of the transaction, and the other circumstances of the case [*D.A. Parrish & Sons v. County Sanitation Dist. (1959) 174 Cal. App. 2d 406, 410, 344 P.2d 883]* . Failure to commence performance of a contract within a reasonable time constitutes a breach of the contract [*Stark v. Shaw (1957) 155 Cal. App. 2d 171, 178, 317 P.2d 182]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 104.20 Mechanics' Liens

NOTE:

SB 189, which was introduced in February 2009 as a two-year bill, would comprehensively revise the law governing mechanics' liens and associated construction remedies. If enacted, the legislation will be operative January 1, 2011. For further information, see the Special Alert preceding Ch. 361, *Mechanics' Liens*.

Except as it may arise through the contract or by some voluntary assumption of the obligation, the owner has no personal liability towards laborers, material suppliers, or subcontractors with whom the owner has no contractual privity [*Distefano v. Hall (1963) 218 Cal. App. 2d 657, 675, 32 Cal. Rptr. 770* ; *but see § 104.52* (owner liability under peculiar risk doctrine)]. Nonetheless, mechanics, material suppliers, artisans, and laborers will have a lien on the property on which they have bestowed labor or furnished material for the value of the labor done and the material furnished [*Cal. Const., art. XIV, § 3*; *see Civ. Code § 3109 et seq.* (mechanics' liens)].

Payment bonds are often used to protect owners against suits brought to foreclose the liens provided for by the mechanics' lien laws [*see Civ. Code § 3069*; *see also* § 104.109].

For discussion of a contractor's obligation to provide notice of California's mechanics' lien laws regarding a contract of home improvement or swimming pool construction, see *§ 104.100* et seq. For discussion of California's mechanics' lien laws and forms for use in actions involving mechanics' liens, see Ch. 361, *Mechanics' Liens* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 104.21 Stop Notices

NOTE:

SB 189, which was introduced in February 2009 as a two-year bill, would comprehensively revise the law governing mechanics' liens and associated construction remedies, including stop notices. If enacted, the legislation will be operative January 1, 2011. For further information, see the Special Alert preceding Ch. 361, *Mechanics' Liens*.

[1] Defined

A stop notice is a written notice given by a claimant to an owner (including a public entity) or a construction lender, directing the owner or lender to withhold payment from a contractor under a building contract because the contractor owes money to the claimant for labor or services provided in connection with the contract [*Civ. Code § 3103*; *see Civ. Code §§ 3110, 3111, 3112, 3158, 3159, 3181* (persons who may be claimants)].

[2] Owner's Obligations

An owner who has been properly served with a stop notice [*see Civ. Code §§ 3160, 3183*] has a duty to withhold from the original contractor or from any person acting under his or her authority and to whom labor or materials, or both, have been furnished or agreed to be furnished, sufficient money due or to become due to the contractor to answer the claim made by the stop notice and, if the owner is a public entity, to pay the entity's reasonable cost of any litigation to enforce the claim [*Civ. Code §§ 3161, 3186*]. If a payment bond has been recorded [*see Civ. Code § 3235*], the owner may, but is not obligated to, withhold this money [*Civ. Code § 3161*].

[3] Lender's Obligations

A construction lender who has been properly served with a stop notice is required to withhold funds under the following circumstances: (1) when the stop notice is a bonded stop notice filed by an original contractor, regardless of whether a payment bond has been previously recorded [*Civ. Code §§ 3159(a)(1), 3162(a)(1)*; *see Civ. Code § 3235* (effect of recording payment bond)]; or (2) when the stop notice is a bonded stop notice filed by any person entitled to do so [*see*

Civ. Code § 3159(a)] other than an original contractor and a payment bond was *not* recorded pursuant to *Civ. Code § 3235* before the first stop notice was served [*Civ. Code §§ 3159(a)(2), 3162(a)(2), (3)*].

A construction lender may, but is not required to, withhold funds on receipt of a stop notice under the following circumstances: (1) when the stop notice is not bonded, regardless of who gives it [*Civ. Code § 3161(a)*]; or (2) when the stop notice is a bonded stop notice filed by any person entitled to do so [*see Civ. Code § 3159(a)*] other than an original contractor and a payment bond was recorded pursuant to *Civ. Code § 3235* before the first stop notice was served [*Civ. Code §§ 3159(a)(2), 3162(a)(2), (3)*].

In relevant situations, the lender must furnish the claimant with notice of its election not to withhold funds within 30 days after it so elects; provided that, at the time it gives the lender the stop notice or bonded stop notice, the claimant includes a written request for notice of the election accompanied by a preaddressed, stamped envelope. The lender will not be liable for failing to furnish a copy of the bond if: (1) the failure was not intentional and resulted from a bona fide error; (2) the lender maintains reasonable procedures to avoid these errors; and (3) the error was corrected not more than 20 days from the date the violation was discovered [*Civ. Code §§ 3159(a)(3), 3162(a)(3)*].

[4] Period to Commence Action

An action against a private owner or a lender to enforce payment of the claim stated in a stop notice may be commenced at any time after 10 days from the date of service of the stop notice, and must be commenced within 90 days following the expiration of the period within which claims of lien must be recorded [*Civ. Code § 3172*]. An action against a public entity to enforce payment of the claim stated in a stop notice may be commenced 10 days after the date of service of the stop notice, and must be commenced within 90 days after the expiration of the period for filing of stop notices for the project [*Civ. Code § 3210*]. Neither money nor bonds will be held pursuant to a stop notice after the expiration of the 90-day period, unless the claimant has commenced proceedings to enforce the claim [*Civ. Code §§ 3172, 3210*].

For further discussion of stop notices, see Ch. 361, *Mechanics' Liens* , and Ch. 481, *Public Works* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 104.22 Arbitration of Disputes

[1] Public Agency Contracts

Construction contracts entered into by public agencies sometimes provide that one party to the contract, or one party's agent or employee, will decide any disputes arising under the contract. Because these provisions are unlawful, any dispute arising under such a contract must be resolved by submitting the dispute to independent arbitration, if that is mutually agreeable; otherwise, the dispute must be resolved by ordinary litigation [*Civ. Code § 1670*].

[2] Small Residential Contracts

In any binding arbitration of a claim for more than $3,000 involving a contract to construct or improve residential property consisting of one to four units, the arbitrator must disclose to each party whether the arbitrator, or the arbitrator's employer or arbitration service, (1) had or has a personal or professional affiliation with either party, and (2) has been selected or designated as an arbitrator by either party in another transaction. The disclosure must be provided to each party within 10 days following the arbitrator's appointment, and must take the form of a written declaration under penalty of perjury [*Code Civ. Proc. § 1281.95(a)*]. The arbitrator is subject to disqualification by either party if the declaration reveals a potential conflict of interest, or if the arbitrator fails to furnish the declaration [*Code Civ. Proc. § 1281.95(b)*; *see Code Civ. Proc. § 1281.95(c)* (disqualification procedure)].

If a contract for work on residential property with four or fewer units contains a provision for arbitration of a dispute between the principals in the transaction, the provision must be clearly titled "ARBITRATION OF DISPUTES" and must contain a specified notice [*Bus. & Prof. Code § 7191(a), (b)*]. If the provision is included in a printed contract, it must be set out in at least 10-point roman boldface type or in contrasting red print in at least 8-point roman boldface type; if the provision is included in a typed contract, it must be set out in capital letters [*Bus. & Prof. Code § 7191(a), (b)*]. A provision for arbitration of a dispute between a principal in a contract for work on a residential property with four or fewer units that does not comply with these requirements will not be enforceable against any person other than the licensee [*Bus. & Prof. Code § 7191(c)*; *Woolls v. Superior Court (2005) 127 Cal. App. 4th 197, 208-209, 25 Cal. Rptr. 3d 426]* . In *Woolls*, the court held that under the facts of the case, the requirements in *Bus. & Prof. Code § 7191* were not preempted by the Federal Arbitration Act [*9 U.S.C. § 1 et seq.*] because the contractor failed to show that the

transaction at issue involved interstate commerce [*Woolls v. Superior Court (2005) 127 Cal. App. 4th 197, 214, 25 Cal. Rptr. 3d 426* ; *see Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.24[2]* for discussion of federal preemption of state law that seeks to invalidate arbitration agreements].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration ClausesContracts LawTypes of ContractsConstruction ContractsPublic Contracts LawContract ProvisionsGeneral OverviewReal Property LawConstruction LawContracts

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§ 104.23 Rescission

[1] When Available

A contract may be rescinded if all the parties to the contract consent to the rescission [*Civ. Code § 1689(a)*], regardless of any express terms to the contrary in the contract [*Rackliff v. Coronet Construction Co. (1958) 157 Cal. App. 2d 419, 424, 321 P.2d 50]* . A contract may be unilaterally rescinded if the the rescinding party's consent to the contract, or of any party jointly contracting with him or her, was given due to a material mistake of law or fact [*Civ. Code § 1689(b)(1)*; *Merced County Mut. Fire Ins. Co. v. State of California (1991) 233 Cal. App. 3d 765, 771, 284 Cal. Rptr. 680]* , or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of any party as to whom the contract is rescinded or any party jointly interested with that party [*Civ. Code § 1689(b)(1)*].

In addition, a party may rescind the contract in the following cases [*Civ. Code § 1689(b)(2)-(7)*]:

- The consideration for the obligation of the rescinding party fails, in whole or in part, through the fault of the party as to whom he or she rescinds;

- The consideration becomes entirely void from any cause;

- The consideration fails in any material respect, from any cause, before it is rendered to the rescinding party;

- The contract is unlawful for causes that do not appear in its terms or conditions, and the parties are not equally at fault;

- The public interest will be prejudiced by permitting the contract to stand;

- The rescinding party's consent is not free but nevertheless not absolutely void [*see Civ. Code § 1566*]; or

- There is a statutory provision allowing the rescission.

A building contract may also be rescinded for a substantial failure to make installment payments as provided for by the contract [*Integrated Inc. v. Alec Fergusson Electrical Contractor (1967) 250 Cal. App. 2d 287, 297, 58 Cal. Rptr. 503]* .

In every building contract that contains no express covenants on the subject, there are implied covenants that the contractor must be permitted to proceed with construction in accordance with the other terms of the contract without interference by the owner, and that the contractor must be given such possession of the premises as will enable him or her to adequately carry on the construction and complete the work agreed on. A failure to observe these covenants that is not consented to by the contractor constitutes a breach of the contract on the part of the owner and entitles the contractor to rescind the contract [*Gray v. Bekins (1921) 186 Cal. 389, 395, 199 P. 767]* .

For a form of complaint for rescission, see *§ 104.233*.

[2] When Unavailable

If the covenant breached is of minor importance and one that can readily be compensated in damages, the contractor may not rescind the contract but must perform his or her part of the contract and seek compensation in damages [*Ely v. Bottini (1960) 179 Cal. App. 2d 287, 296, 3 Cal. Rptr. 756]* . For example, an owner's breach of an oral contract for extras, which was determined to be an independent covenant that was subordinate and incidental to the main purpose of the written building contract and did not go to the whole consideration of that contract, was held not to constitute a breach of the entire contract and thus not to justify the contractor's rescission of the entire contract [*Karz v. Department of Professional & Vocational Standards (1936) 11 Cal. App. 2d 554, 557, 54 P.2d 35* ; *see § 104.15[3][f]*].

A party who has previously ratified a contract by suing on it waives the right to rescind the contract [*Price v. McConnell (1960) 184 Cal. App. 2d 660, 666, 7 Cal. Rptr. 695]* .

[3] Measure of Recovery

An action for damages flowing from the breach of a contract is inconsistent with an action for rescission, because the former action affirms the contract and the latter one disaffirms it [*Lozier v. Janss Investment Co. (1934) 1 Cal. 2d 666, 669, 36 P.2d 620* ; *Paularena v. Superior Court (1965) 231 Cal. App. 2d 906, 915, 42 Cal. Rptr. 366]* . Nonetheless, a claim for damages is not inconsistent with a claim for relief based on rescission, as long as the damages sought are consequential damages arising from the rescission rather than damages based on breach [*Civ. Code § 1692*; *see, e.g., Ely v. Bottini (1960) 179 Cal. App. 2d 287, 296, 3 Cal. Rptr. 756]* .

The aggrieved party in a rescission action is entitled to complete relief, including restitution of all benefits conferred by him or her as a result of the transaction, and any consequential damages [*Civ. Code § 1692*]. When the aggrieved party is the contractor, restitution of benefits conferred ordinarily involves payment of the reasonable value of any work completed prior to the rescission [*see C. Norman Peterson Co. v. Container Corp. of America (1985) 172 Cal. App. 3d 628, 644-646, 218 Cal. Rptr. 592* ; *Ely v. Bottini (1960) 179 Cal. App. 2d 287, 296, 3 Cal. Rptr. 756]* . The aggrieved party's recovery may be reduced by any amount that the court deems necessary to justly compensate the other party or to adjust the equities between the parties, and must not include any duplicate or inconsistent items of recovery [*Civ. Code § 1692*].

For further discussion of recovery in actions based on rescission of a contract, see Ch. 490, *Rescission and Restitution* .

[4] Statute of Limitations

An action based on rescission of a contract must be brought within four years if the contract was in writing [*Code Civ. Proc. § 337(3)*], or within two years if the contract was not in writing [*Code Civ. Proc. § 339(3)*]. The limitations period begins to run on the date on which the facts that entitle the aggrieved party to rescind occur, except that when the ground for rescission is fraud or mistake, the time does not begin to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake [*Code Civ. Proc. §§ 337(3), 339(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Forms of Pleading and Practice--Annotated

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Volume 10: Boundaries thru Captions and Introductions-Chs. 101-108
Chapter 104 BUILDING CONTRACTS
PART II. LEGAL BACKGROUND
A. Building Contracts and Actions for Breach

10-104 California Forms of Pleading and Practice--Annotated § 104.24

§ 104.24 Contractor's Action for Breach

[1] Damages

[a] Availability and Measure

If a party to a contract elects to proceed under the contract in seeking relief for the other party's breach, his or her exclusive remedy is in damages for the breach [*Ely v. Bottini (1960) 179 Cal. App. 2d 287, 296, 3 Cal. Rptr. 756]* . The measure of damages for the breach of an obligation arising under a contract is ordinarily the amount that will compensate the aggrieved party for all the detriment proximately caused by the breach or all the detriment that, in the ordinary course of things, would be likely to result from the breach [*Civ. Code § 3300*]. No damages may be recovered for a breach of contract that are not clearly ascertainable in both their nature and origin [*Civ. Code § 3301*]. For example, damages for emotional distress may not be included as consequential or special damages in an action for negligent breach of a contract to construct a home [*Erlich v. Menezes (1999) 21 Cal. 4th 543, 558-561, 87 Cal. Rptr. 2d 886, 981 P.2d 978]* .

For a form of complaint for damages for breach of contract by a contractor against an owner, see *§ 104.210*. For general discussion and forms relating to contract damages, see *Ch. 177, Damages, § 177.140* et seq. If an action for breach is not appropriate, see *§ 104.224* for a form of complaint by a contractor for the reasonable value of work and materials furnished (common count of quantum meruit).

[b] Damages for Failure to Pay

If the owner's breach consists merely of refusing to pay the contractor for the completed project, the measure of damages is the amount due under the terms of the contract, with interest from the due date [*Civ. Code § 3302*; *see Civ. Code § 3289*].

For a form of complaint by a contractor for breach of contract to pay for improvements and purchase real property, see *§ 104.218*.

[c] Damages for Prevention of Performance

If the owner's breach consists of some unjustifiable act or omission that prevents the contractor from completing his or her performance under the contract, a contractor who has been and is ready and willing to perform may either treat the contract as rescinded or sue to recover damages for the breach [*see Connell v. Higgins (1915) 170 Cal. 541, 549, 150 P. 769* (for damages); *Stark v. Shaw (1957) 155 Cal. App. 2d 171, 181, 317 P.2d 182 , cert. denied, 356 U.S. 937* (for damages); *see also § 104.23*].

The measure of the contractor's damages for a breach consisting of prevention of his or her performance is the profits the contractor would have made if permitted to complete the work, plus any actual expenses [*Civ. Code § 1512*; *Connell v. Higgins (1915) 170 Cal. 541, 549, 150 P. 769* ; *Stark v. Shaw (1957) 155 Cal. App. 2d 171, 180, 317 P.2d 182 , cert. denied, (1958) 356 U.S. 937, 78 S. Ct. 781, 2 L. Ed. 2d 814]* . That is, the contractor should be compensated for his or her part performance and indemnified for his or her loss in respect to the unexecuted part [*Bellwood Discount Corp. v. Empire Steel Buildings Co. (1959) 175 Cal. App. 2d 432, 438, 346 P.2d 467]* . The amount of the contractor's lost profits are computed by showing how much less than the contract price it would cost the contractor to perform the contract [*Stark v. Shaw (1957) 155 Cal. App. 2d 171, 181, 317 P.2d 182 , cert. denied, 356 U.S. 937]* .

If the work is substantially complete at the time the owner interferes with the contractor's performance, so that the portion lacking is nominal only, and the owner refuses to accept the performance or to allow further performance, the refusal to accept will be considered unjustifiable and the contractor may recover the entire unpaid balance of the contract price [*Connell v. Higgins (1915) 170 Cal. 541, 549, 150 P. 769]* .

The reasonable expenditures already incurred by the contractor, the unavoidable losses incident to stopping construction, the progress attained, the unfinished part and the probable cost of its completion, the whole contract price, and the estimated pecuniary result, favorable or unfavorable to the contractor, had he or she been permitted to complete performance may be taken into consideration by the court in awarding damages [*Bellwood Discount Corp. v. Empire Steel Buildings Co. (1959) 175 Cal. App. 2d 432, 437-438, 346 P.2d 467]* .

The contractor who seeks damages on the grounds of an owner's prevention of performance of a building contract has the burden of proof that but for the owner's acts he or she was ready, willing, and able to perform [*Kenworthy v. State of California (1965) 236 Cal. App. 2d 378, 394-395, 46 Cal. Rptr. 396]* .

For a form of complaint for declaratory relief and damages by a contractor against a subcontractor for delays, see *§ 104.220*.

[d] Interest on Damages

Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and whose right to recover is vested in him or her on a particular day, is entitled also to recover interest on the damages from that date, except during the time that the debtor is prevented by law or by the act of the creditor from paying the debt [*Civ. Code § 3287(a)*]. Every person who is entitled under any judgment to receive damages based on a cause of action in contract when the claim was unliquidated may also recover interest on the award from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed [*Civ. Code § 3287(b)*].

Any legal rate of interest stipulated by a contract remains chargeable after a breach of that contract, as before, until the contract is superseded by a verdict or other new obligation [*Civ. Code § 3289(a)*]. If a contract does not stipulate a legal rate of interest, the obligation will bear interest at a rate of 10 percent per annum after a breach [*Civ. Code § 3289(b)*].

Acceptance of payment of the whole principal, as such, waives all claim to interest [*Civ. Code § 3290*].

[2] Statute of Limitations for Contractor's Action

Subject to certain exceptions [*see Code Civ. Proc. § 336a*], the statute of limitations on an action on any contract, obligation, or liability founded on an instrument in writing is four years [*Code Civ. Proc. § 337(1)*]. Most actions on contracts, obligations, or liabilities not founded on an instrument in writing must be brought within two years [*Code Civ. Proc. § 339(1)*; *see Kralow Co. v. Sully-Miller Contracting Co. (1985) 168 Cal. App. 3d 1029, 1034-1035, 214 Cal. Rptr. 630]* .

For further discussion of issues relating to statutes of limitations, see Ch. 345, *Limitation of Actions* .

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10-104 California Forms of Pleading and Practice--Annotated § 104.25

§ 104.25 Owner's Action for Breach

[1] Waiver of Defects

An owner who, with full knowledge of all the defects in the contractor's work, accepts and pays for it thereby waives any claim for damages for the defects [*Sirch Elec. & Testing Laboratories v. Garbutt (1910) 13 Cal. App. 435, 439, 110 P. 140]* .

[2] Measure of Owner's Damages

[a] Cost of Completion Less Contract Price

The measure of damages for breach of a construction contract by the contractor is ordinarily the difference between the contract price and the reasonable cost of completing the work the contractor had agreed to perform [*Walker v. Signal Companies, Inc. (1978) 84 Cal. App. 3d 982, 993, 149 Cal. Rptr. 119* ; *Amerson v. Christman (1968) 261 Cal. App. 2d 811, 823, 68 Cal. Rptr. 378* ; *Fairlane Estates v. Carrico Constr. Co. (1967) 228 Cal. App. 2d 65, 72, 39 Cal. Rptr. 35]* . Thus, for defects that can be remedied, the owner is entitled to recover the reasonable cost of remedying the defects [*Shell v. Schmidt (1958) 164 Cal. App. 2d 350, 360, 366, 330 P.2d 817* , *cert. denied, 359 U.S. 959]* .

A different measure of damages may be appropriate when a contractor intends to lease the building being constructed from the owner. In one case, a tenant/contractor breached a contract to construct a building and then lease the building from the owner for 25 years. The court declined to measure the owner's damages based on the full value of the contractor's cost of constructing the building. The owner's damages must instead be based on the discounted, present value of the building at the end of the 25-year lease [*Sanders Construction Co. v. San Joaquin First Fed. Sav. & Loan Assn. (1982) 136 Cal. App. 3d 387, 397-400, 186 Cal. Rptr. 218]* .

For forms of complaints and allegations by an owner against a contractor for breach resulting from delays in performance, negligent work, or nonperformance, see *§§ 104.225* and *104.226*.

[b] Difference in Value Due to Defect

For defects that would not be practical or cost effective to correct, the owner's damages are measured by the difference between the value of the building with the defects and its value without them [*Orndorff v. Christiana Community Builders (1990) 217 Cal. App. 3d 683, 687-688, 266 Cal. Rptr. 193* ; *Shell v. Schmidt (1958) 164 Cal. App. 2d 350, 360, 366, 330 P.2d 817 , cert. denied, 359 U.S. 959* ; *see Jones v. Kvistad (1971) 19 Cal. App. 3d 836, 843-844, 97 Cal. Rptr. 100]* , unless the owner establishes a personal reason to repair the building [*Orndorff v. Christiana Community Builders (1990) 217 Cal. App. 3d 683, 688-689, 266 Cal. Rptr. 193]* . The defendant contractor has the burden of proving affirmatively and convincingly that economic waste would result from the replacement of the omissions and the correction of the defects [*Shell v. Schmidt (1958) 164 Cal. App. 2d 350, 360, 366, 330 P.2d 817 , cert. denied, 359 U.S. 959]* .

[c] Compensatory Damages

An owner aggrieved by a contractor's breach is also entitled to recover damages in the amount necessary to compensate him or her for any other detriment proximately caused by the breach [*Civ. Code § 3300*]. For example, damages were allowed for the loss of crops planted in reliance on the contractor's promise to complete a project within the time specified in the contract [*Wilkinson & Co. v. McKinley (1948) 84 Cal. App. 2d 100, 103, 106, 190 P.2d 35]* . In another case, the owners were permitted to recover damages for expenses incurred in traveling to the construction site to complete the work, as well as damages for adverse tax consequences resulting from the delay in completing the work. The court noted that the contractor had been aware, at the time the parties entered into the contract, that the owners would be able to defer payment of the capital gains tax from the sale of their previous home only if their new home was completed by the time stated in the contract. The court did not permit recovery for medical expenses occasioned by the contractor's alleged negligent infliction of emotional distress, since those damages are not recoverable in contract actions [*Walker v. Signal Companies, Inc. (1978) 84 Cal. App. 3d 982, 993-994, 149 Cal. Rptr. 119]* .

[3] Statute of Limitations for Owner's Action

[a] Patent and Latent Deficiencies Distinguished

The statute of limitations for an owner's action against a contractor based on deficiencies on a completed work of construction is four years if the the deficiency is patent [*Code Civ. Proc. § 337.1(a)*; *see § 104.25[3][b]*] or 10 years if the deficiency is latent [*Code Civ. Proc. § 337.15(a)*; *see § 104.25[3][d]*]. For discussion of limitations periods applicable to other breach of contract actions, see *§ 104.24[2]*.

The distinction between a patent deficiency and a latent deficiency, for purposes of determining which limitations period applies, is the susceptibility of the deficiency to detection or, put another way, whether or not the deficiency is discoverable by a reasonable inspection. A patent deficiency is apparent by reasonable inspection; a latent deficiency is not [*see Code Civ. Proc. §§ 337.1(e), 337.15(b)*].

What constitutes a reasonable inspection is determined with reference to the totality of circumstances in a given case. The reasonableness of the inspection varies with the nature of the thing to be inspected and the nature and gravity of the harm that is sought to be averted. One factor to be considered in assessing the reasonableness of an inspection is the knowledge possessed by the inspector. Although knowledge within the common experience of the average consumer may legitimately establish a minimum standard below which an individual inspector will not be allowed to fall, when the inspector possesses perception, knowledge, intelligence, or judgment superior to the average consumer, the law will demand of him or her conduct consistent with that superior perception, knowledge, intelligence, or judgment [*Renown, Inc. v. Hensel Phelps Construction Co. (1984) 154 Cal. App. 3d 413, 420-421, 201 Cal. Rptr. 242]* .

In a case involving a defective roof, the four-year limitations period for patent defects rather than the ten-year period for latent defects was applied when the defects in the roof not only should have been apparent to the owners, but were in

fact known to them through their agent [*Renown, Inc. v. Hensel Phelps Construction Co. (1984) 154 Cal. App. 3d 413, 420-421, 201 Cal. Rptr. 242]* . An unfenced swimming pool was also determined to be a patent defect requiring application of the four-year statute [*Mattingly v. Anthony Industries, Inc. (1980) 109 Cal. App. 3d 506, 510-511, 167 Cal. Rptr. 292]* . Conversely, a defect in an air-conditioning system that caused temperature fluctuations was held not to be patent because the defect was not readily discoverable [*Baker v. Walker & Walker, Inc. (1982) 133 Cal. App. 3d 746, 758-763, 184 Cal. Rptr. 245]* .

[b] Patent Deficiency

Except as otherwise provided below, no action shall be brought to recover damages from any person performing or furnishing the design, specifications, surveying, planning, supervision, or observation of construction or construction of an improvement to real property more than four years after the substantial completion of the improvement for any of the following [*Code Civ. Proc. § 337.1(a)*]:

- Any deficiency that is apparent by reasonable inspection ("patent deficiency") [*see Code Civ. Proc. § 337.1(e)*] in the design, specifications, surveying, planning, supervision, or observation of construction or construction of an improvement to real property;

- Any injury to real or personal property arising out of any such patent deficiency; or

- Any personal injury or wrongful death arising out of any such patent deficiency.

When the patent defect is discovered, or when the harm occurs, has no effect on when the limitation period begins to run. In all situations, it begins with substantial completion of the improvement [*Tomko Woll Group Architects, Inc. v. Superior Court (1996) 46 Cal. App. 4th 1326, 1336-1337, 54 Cal. Rptr. 2d 300]* .

If, by reason of a patent deficiency, an injury to property or the person or an injury causing wrongful death occurs during the fourth year after substantial completion, an action in tort to recover damages for the injury or wrongful death may be brought within one year after the date on which the injury occurred, irrespective of the date of death, but in no event may the action be brought more than five years after the substantial completion of construction of the improvement [*Code Civ. Proc. § 337.1(b)*].

Nothing in the above-described rule is to be construed as extending the period prescribed by the laws of California for the bringing of any action [*Code Civ. Proc. § 337.1(c)*].

The limitation period is tolled during any period when the contractor attempts to make repairs, but is tolled only with respect to the particular defects that he or she repairs or attempts to repair [*Winston Square Homeowner's Assn. v. Centex West, Inc. (1989) 213 Cal. App. 3d 282, 287-289, 261 Cal. Rptr. 605]* .

The four-year statute of limitations established by *Code Civ. Proc. § 337.1* has been described as a mere "economic regulation," since it touches neither on a suspect class nor a fundamental right, and that no equal protection problem is raised by its extension to persons associated with construction and improvements to real property benefits not conferred on persons associated with personal property [*Salinero v. Pon (1981) 124 Cal. App. 3d 120, 128, 177 Cal. Rptr. 204]* .

[c] Exclusions From Four-Year Statute

The four-year limitations period set forth by *Code Civ. Proc. § 337.1* does not apply to any owner-occupied single-unit residence [*Code Civ. Proc. § 337.1(f)*]. Additionally, it may not be asserted by way of defense by any person who is in actual possession or control, as owner, tenant, or otherwise, of an improvement to real property at the time any deficiency in the improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an

action [*Code Civ. Proc. § 337.1(d)*].

The four-year limitation period also does not apply in cases in which damages are sought solely for reasons other than patent deficiencies. For example, *Code Civ. Proc. § 337.1* was held not to apply to an action by a developer seeking damages for delay in the performance of a construction contract [*Kralow Co. v. Sully-Miller Contracting Co. (1985) 168 Cal. App. 3d 1029, 1035, 214 Cal. Rptr. 630]* .

[d] Latent Deficiency

No action [*see Code Civ. Proc. § 337.15(c)*] may be brought to recover damages from any person, or the surety of any person, who develops real property or performs or furnishes the design, specification, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement for either of the following [*Code Civ. Proc. § 337.15(a)*]:

(1) Any deficiency that is not apparent by reasonable inspection ("latent deficiency") [*see Code Civ. Proc. § 337.15(b)*] in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property; or

(2) Any injury to real or personal property arising out of any such latent deficiency.

Nothing in the above-described rule is to be construed as extending the period prescribed by the laws of California for bringing any action [*Code Civ. Proc. § 337.15(d)*]. The relationship between the 10-year limitations period prescribed by *Code Civ. Proc. § 337.15* and the four and three-year limitations periods prescribed by *Code Civ. Proc. §§ 337* and *338*, respectively, have been characterized as a "two-step limitation." Actions founded on a latent defect in the development of real property must be filed within three or four years after discovery, depending on whether the action rests on a breach of warranty or negligence, but in any case within 10 years after the date of substantial completion of the improvement [*Regents of University of Cal. v. Hartford Acci. & Indem. Co. (1978) 21 Cal. 3d 624, 640-641, 147 Cal. Rptr. 486, 581 P.2d 197* ; *North Coast Business Park v. Nielsen Construction Co. (1993) 17 Cal. App. 4th 22, 27, 21 Cal. Rptr. 2d 104* ; *Anderson v. Brouwer (1979) 99 Cal. App. 3d 176, 180-181, 160 Cal. Rptr. 65]* . According to the First District, when a claim is based on a latent construction defect that results in toxic contamination subject to the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) [*42 U.S.C. § 9601 et seq.*], however, the 10-year limitation period of *Code Civ. Proc. § 337.15* is irrelevant. It is inconsistent with § 309 of CERCLA [*42 U.S.C. § 9658*], which requires that the applicable state statute of limitations begin to run when the plaintiff discovers or could have discovered through reasonable diligence the cause of the contamination. Thus, in these cases, the applicable statute of limitations is either the three-year period of *Code Civ. Proc. § 338(b)* for negligence claims, or the four-year period of *Code Civ. Proc. § 337(1)* for contract claims based on a written agreement [*Angeles Chemical Co. v. Spencer & Jones (1996) 44 Cal. App. 4th 112, 125-126, 51 Cal. Rptr. 2d 594]* .

The Second District came to a different conclusion in a case in which the CERCLA preemption issue apparently was not raised. The case involved a defective underground storage tank, which caused underground contamination that the current landowner was required to remove. The landowner then sought to recover the cleanup costs from the previous owner who had defectively installed the tanks 19 years earlier. At trial, the installer unsuccessfully raised the 10-year limitation period of *Code Civ. Proc. § 337.15* and appealed denial of summary judgment. On appeal, the landowner claimed that the leaking tank was a continuing nuisance and that therefore its action was not barred because it had been filed within three years of abatement of the nuisance [*Chevron U.S.A. Inc. v. Superior Court (1996) 54 Cal. Rptr. 2d 324 , citing Wilshire Westwood Associates v. Atlantic Richfield Co. (1993) 20 Cal. App. 4th 732, 744-745, 24 Cal. Rptr. 2d 562* (applying three-year period of *Code Civ. Proc. § 338*)]. In effect, the landowner argued for creation of a "pollution exception" to the 10-year limitation period. The court, however, held that the 10-year period of § 337.15 applied to bar the landowner's action, finding that the decision was consistent with the broad term "no action" in § 337.15, and that it furthered the legislative goal of setting an outside limit to protect contractors from liability [

Chevron U.S.A. Inc. v. Superior Court (1996) 54 Cal. Rptr. 2d 324] .

The purpose of the 10-year statute is to prevent liability of indefinite duration from impinging on the work of contractors and developers [*Cascade Gardens Homeowners Assn. v. McKellar & Associates (1987) 194 Cal. App. 3d 1252, 1256, 240 Cal. Rptr. 113* (limited to its facts in *A & B Painting & Drywall, Inc. v. Superior Court (1994) 25 Cal. App. 4th 349, 355, 30 Cal. Rptr. 2d 418*)].

The 10-year statute has been held to apply to claims for breach of contract as well as tort claims [*Moseley v. Abrams (1985) 170 Cal. App. 3d 355, 361, 216 Cal. Rptr. 40]* . Actions that are barred by the 10-year statute also include actions for indemnity arising out of any act within the scope of the statute. Nonetheless, a cross complaint for indemnity arising from the same transaction or occurrence as that sued on in the complaint may be filed beyond the 10-year period if the principal action was timely filed [*Code Civ. Proc. § 337.15(c)*; *see Code Civ. Proc. § 428.10(b)*]. This rule serves the public policy favoring cross complaints over separate actions and favoring holding subcontractors liable for their work when the general contractor is liable [*Valley Circle Estates v. VTN Consolidated, Inc. (1983) 33 Cal. 3d 604, 613-615, 189 Cal. Rptr. 871, 659 P.2d 1160]* .

For further discussion of indemnity issues, see Ch. 300, *Indemnity and Contribution* .

[e] Commencement of 10-Year Statute

The 10-year period commences on substantial completion of the improvement, but in no case later than the earliest of the following dates [*Code Civ. Proc. § 337.15(g)*]:

- The date of final inspection by the applicable public agency.
- The date a valid notice of completion is recorded [*see* *Schwetz v. Minnerly (1990) 220 Cal. App. 3d 296, 309, 269 Cal. Rptr. 417* (not relevant who recorded notice as long as it was validly recorded)].
- The date of use of occupation of the improvement.
- One year after termination or cessation of work on the improvement.

For this purpose, "the date of substantial completion" relates specifically to the performance or furnishing of designs, specifications, surveying, planning, supervision, testing, observation of construction, or construction services by each profession or trade rendering services to the improvement [*Code Civ. Proc. § 337.15(g)*; *see* *Liptak v. Diane Apartments, Inc. (1980) 109 Cal. App. 3d 762, 770-773, 167 Cal. Rptr. 440* ; *Eden v. Van Tine (1978) 83 Cal. App. 3d 879, 883-885, 148 Cal. Rptr. 215* ; *see* *Nelson v. Gorian & Associates, Inc. (1998) 61 Cal. App. 4th 93, 96, 71 Cal. Rptr. 2d 345* ("substantial completion" is controlling date, and four conditions listed in Section 337.15(g) do not define "substantial completion")]. Thus, the statute begins to run as to a particular defendant's profession when that defendant's work on the improvement is substantially completed, rather than when the improvement itself is substantially completed [*Industrial Risk Insurers v. Rust Eng'g Co. (1991) 232 Cal. App. 3d 1038, 1042, 283 Cal. Rptr. 873]* . "Improvement" as used in Section 337.15 is in the singular and refers separately to each of the individual changes or additions to real property that qualifies as an "improvement," such as grading and filling, putting in curbs and streets, and laying storm drains [*Nelson v. Gorian & Associates, Inc. (1998) 61 Cal. App. 4th 93, 97, 71 Cal. Rptr. 2d 345* , citing *Liptak v. Diane Apartments, Inc. (1980) 109 Cal. App. 3d 762, 771, 167 Cal. Rptr. 440]* .

[f] Tolling of 10-Year Statute

The 10-year statute of limitations for latent construction defects is not subject to a general rule of equitable tolling while promises or attempts to repair are pending [*Lantzy v. Centex Homes (2003) 31 Cal. 4th 363, 379, 2 Cal. Rptr. 3d 655,*

73 P.3d 517 , disapproving *Grange Debris Box & Wrecking Co. v. Superior Court (1993) 16 Cal. App. 4th 1349, 20 Cal. Rptr. 2d 515* and *Cascade Gardens Homeowners Assn. v. McKellar & Associates (1987) 194 Cal. App. 3d 1252, 240 Cal. Rptr. 113* , to extent they held otherwise, and approving *FNB Mortgage Corp. v. Pacific General Group (1999) 76 Cal. App. 4th 1116, 90 Cal. Rptr. 2d 841]* . In so holding, the California Supreme Court reasoned that a broad tolling-for-repairs rule would contravene the Legislature's clear intent, at the time it adopted *Code Civ. Proc. § 337.15*, to ensure a generous but firm cutoff date for latent-defect suits, and that the extraordinary length of the limitations period set forth in § 337.15 weighs strongly against the need for such a tolling rule as a matter of fair procedure [*Lantzy v. Centex Homes (2003) 31 Cal. 4th 363, 367, 2 Cal. Rptr. 3d 655, 73 P.3d 517]* . However, a defendant whose conduct has induced plaintiffs to refrain from filing suit within the 10-year period may be equitably estopped to assert that the statute of limitations has expired [*Lantzy v. Centex Homes (2003) 31 Cal. 4th 363, 383-384, 2 Cal. Rptr. 3d 655, 73 P.3d 517]* .

One court has concluded that *Code Civ. Proc. § 337.15* is a special statute of repose, and therefore the tolling provision contained in *Code Civ. Proc. § 356* ("when the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action") does not extend the 10-year statute of limitations as a result of bankruptcy stays occurring wholly within that period. Thus, in an action by homeowners to recover compensation for construction defects, the 10-year limitations period was not tolled by the contractor's filing of a bankruptcy petition [*Inco Development Corp. v. Superior Court (2005) 131 Cal. App. 4th 1014, 1021-1022, 31 Cal. Rptr. 3d 872]* .

[g] Exclusions From 10-Year Statute

The 10-year limitations period set forth by *Code Civ. Proc. § 337.15* may not be asserted by way of defense by any person who is in actual possession or control, as owner, tenant, or otherwise, of an improvement to real property at the time any deficiency in the improvement constitutes the proximate cause for which it is proposed to bring an action [*Code Civ. Proc. § 337.15(e)*]. This exclusionary provision refers to the person in possession or control at the time that the deficiency becomes the proximate cause of the damages, and not to the person in possession or control at the time when the defective latent condition was designed, installed, or built into the improvement [*Eden v. Van Tine (1978) 83 Cal. App. 3d 879, 886, 148 Cal. Rptr. 215]* . The exclusion may be applied to claims against governmental and public entities [*Magnuson-Hoyt v. County of Contra Costa (1991) 228 Cal. App. 3d 139, 143-144, 278 Cal. Rptr. 770]* . Thus, for example, the 10-year limitations period could not be asserted by a city that installed drains on city property to insulate itself from liability for defects in the installation [*Leaf v. City of San Mateo (1980) 104 Cal. App. 3d 398, 404-405, 163 Cal. Rptr. 711]* .

The exclusion of owners of property from the protections of the rule has been held not to deny equal protection of the law [*Barnhouse v. City of Pinole (1982) 133 Cal. App. 3d 171, 183, 183 Cal. Rptr. 881]* .

The terms of *Code Civ. Proc. § 337.15* do not apply to actions for personal injury or to cross complaints for indemnity against contractors by owners who are defendants in actions for personal injury. The terms of this section apply only to actions for deficient work or property itself or for damage to other real or personal property arising from such a deficiency. The Legislature did not intend that this section bar actions for personal injuries from latent defects [*Martinez v. Traubner (1982) 32 Cal. 3d 755, 758-760, 187 Cal. Rptr. 251, 653 P.2d 1046]* .

The terms of *Code Civ. Proc. § 337.15* are also inapplicable to actions based on willful misconduct or fraudulent concealment [*Code Civ. Proc. § 337.15(f)*; *see Code Civ. Proc. § 338(d)*]. One court held that for this purpose, the term "willful misconduct" encompasses not only intentional wrongdoing, but also negligence of such a character as to constitute reckless disregard for the rights of others [*Felburg v. Don Wilson Builders (1983) 142 Cal. App. 3d 383, 391, 191 Cal. Rptr. 92]* . However, in a subsequent decision, the court of appeal disagreed with *Felburg*'s use of the word "negligence" in defining "willful misconduct" for purposes of the statute. Instead, the court cited principles set forth in more recent Supreme Court decisions [*see* *Ewing v. Cloverleaf Bowl (1978) 20 Cal. 3d 389, 402, 143 Cal.*

Rptr. 13, 572 P.2d 1155 (willful misconduct implies intentional doing of something either with knowledge, express or implied, that serious injury is probable, as distinguished from possible, result, or intentional doing of act with wanton and reckless disregard of its consequences); *Calvillo-Silva v. Home Grocery (1998) 19 Cal. 4th 714, 729-730, 80 Cal. Rptr. 2d 506, 968 P.2d 65* , disapproved on another ground in *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 853 n.19, 107 Cal. Rptr. 2d 841, 24 P.3d 493]* in concluding that more than negligence must be shown [*Acosta v. Glenfed Development Corp. (2005) 128 Cal. App. 4th 1278, 1296 n.13, 28 Cal. Rptr. 3d 92]* . In *Acosta*, the court of appeal held that a finding that willful misconduct by someone has occurred in connection with the construction of a plaintiff's home, when such construction resulted in latent defects in the home, is sufficient to preclude reliance by a developer and general contractor on the statute of limitations set forth in § 337.15, even in the absence of evidence that the developer and general contractor had actual knowledge of the willful misconduct or directly engaged in such willful misconduct themselves. The court based this rule on the language of the statute, the nondelegable supervisory duties of owners and general contractors, principles of vicarious liability, and public policy considerations [*Acosta v. Glenfed Development Corp. (2005) 128 Cal. App. 4th 1278, 1301-1302, 28 Cal. Rptr. 3d 92]* .

[4] Ten-Year Limitation Period for Actions Involving Construction Defects in New Residential Units Sold on or After January 1, 2003

With specified limited exceptions, any action against a builder, subcontractor, individual product manufacturer, or design professional, seeking recovery of damages arising out of, or related to deficiencies in, residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction when the property involved is a new residential unit the purchase agreement for which was signed by the seller on or after January 1, 2003, must be brought within 10 years after substantial completion of the residence, but not later than 10 years after the date a valid notice of completion was recorded [*see Civ. Code §§ 938, 941*]. The four-year statute of limitations specified for patent defects and the 10-year statute of limitations for latent defects, specified by *Code Civ. Proc. §§ 337.1* and *337.15*, respectively, do not apply to these actions [*Civ. Code § 941(d)*].

The action is governed by detailed statutory standards related to the various functions and components of the building [*see Civ. Code §§ 896-897*]. It must be preceded by a pre-litigation procedure that provides the potential defendant with a right to attempt a repair of any alleged defect before litigation. The pre-litigation procedure also includes inspections and exchanges of documentation between the parties under certain circumstances, and mediation at various points, all pursuant to statutory time frames [*see Civ. Code §§ 910-938*]. For coverage of these actions, see *§ 104.43*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachMaterial BreachContracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawTypes of ContractsConstruction ContractsGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawConstruction LawContracts

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§ 104.26 Prerequisites to Suit by Common Interest Development Association Against Builder Based on Alleged Defects in Design or Construction

Before a common interest development association files suit for damages against a developer for alleged damage to the common areas, or to other areas in a development that the association has an obligation to maintain and repair, the board of directors must call a general meeting with the members to discuss the problems and consider available options, including filing a civil action [*Civ. Code § 1368.5*]. Before an association in a common interest development with 20 or more units can file suit against a developer based on a claim for defects in the design or construction of the development, the association must initiate negotiations with the builder as part of a statutory procedure in which both parties must make a good faith effort either to settle the matter or submit it to some form of alternative dispute resolution [*see Civ. Code § 1375*]. Failure of the association to initiate the procedure is a procedural defect that may be raised by the builder in defense of any civil action for damages filed by the association [*Civ. Code § 1375.05(g)(1)*]. For complete coverage of these prerequisities to suit by an association against a builder based on alleged defects in design and construction, see Ch. 124, *Condominiums and Other Common Interest Developments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 104.27 Liquidated Damages Clause

Except when a statute expressly applicable to a contract prescribes the rules or standard for determining the validity of such a provision, a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made [*Civ. Code § 1671(a), (b)*]. However, a promise by the retail purchaser of personal property or services, primarily for his or her personal, family, or household purposes, to pay liquidated damages for breach of the purchase contract is void, except that the parties may agree in the contract on an amount that shall be presumed to be the damages arising from a breach, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damages [*Civ. Code § 1671(c), (d)*].

Liquidated damages are a penalty not favored in equity, and should be enforced only after the party seeking the liquidated damages has strictly complied with the contractual requisites to enforcement [*General Ins. Co. v Commerce Hyatt House (1970) 5 Cal. App. 3d 460, 472, 85 Cal. Rptr. 317* ; *but see Nomellini Constr. Co. v. State of California ex rel. Dept. of Wat. Resources (1971) 19 Cal. App. 3d 240, 246, 96 Cal. Rptr. 682* (rule not applicable when statute, such as former *Gov. Code § 14376*, expressly requires liquidated damages clause)].

A contract to perform certain work secured by a faithful performance bond in a specified penal sum does not amount to an agreement for liquidated damages [*County of Los Angeles v. Margulis (1935) 6 Cal. App. 2d 57, 60, 44 P.2d 608* ; *see § 104.14[2]*].

For further discussion of liquidated damages, see Ch. 177, *Damages* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesLiquidated DamagesContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts

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§ 104.28 Attorney's Fees

If the contract gives any party the right to attorney's fees and costs in any action to enforce the contract, the party determined by the court to be the prevailing party in any action on the contract will be entitled to reasonable attorney's fees and costs, as fixed by the court, even if that party is not one of the parties named in this provision [*Civ. Code § 1717(a)*; *see Civ. Code § 1717(b)* (determining prevailing party)]. The court may also determine that there is no party prevailing on the contract for purposes of awarding attorney's fees [*Civ. Code § 1717(b)(1)*]. In the absence of any provision in the contract for payment of attorney's fees in the event of an action on the contract, the parties will be required to pay their own attorney's fees [*see Civ. Code § 1717(a)*; *Code Civ. Proc. § 1021*].

When the contract provides for attorney's fees, the provision will be construed as applying to the entire agreement, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract [*Civ. Code § 1717(a)*]. If a contract provides for attorney's fees, neither party may waive his or her rights under that provision [*Civ. Code § 1717(a)*].

In an action seeking relief in addition to that based on contract, if the court awards noncontract-based damages against the party prevailing on the contract, the amounts awarded under *Civ. Code § 1717* to that party are deducted from any damages awarded in favor of the party who did not prevail on the contract. If the amount awarded under § 1717 exceeds the amount of damages awarded the party not prevailing on the contract, judgment may be entered in favor of the party prevailing on the contract for the net amount [*Civ. Code § 1717(c)*].

For further discussion relating to the recovery of attorney's fees, see Ch. 174, *Costs and Attorney's Fees* .

Legal Topics:

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

§§ 104.29[Reserved]

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§ 104.40 Governing Law

The duty of care and extent of liability of some of the parties commonly involved with building contracts, such as contractors [*see Bus. & Prof. Code §§ 7034, 7160*], construction employers [*see, e.g., Lab. Code §§ 3300, 6303, 6304, 6400, 6413.5*], and lenders [*see Civ. Code § 3434*], are generally governed by statute. Also governed by statute are actions for construction defects in new residential units when the purchase agreement with the buyer was signed by the seller on and after January 1, 2003 [*see Civ. Code § 895 et seq.*]. In addition, general legal theories of obligation and recovery that have been codified include fraud [*see, e.g., Civ. Code §§ 1709, 1710, 3294, 3343*] and negligence [*see also Civ. Code §§ 1708, 1714(a)*]. Other theories of obligation and recovery are governed by the common law, as modified by the courts [*see, e.g., GEM Developers v. Hallcraft Homes of San Diego, Inc. (1989) 213 Cal. App. 3d 419, 431-433, 261 Cal. Rptr. 626* ; *Avner v. Longridge Estates (1969) 272 Cal. App. 2d 607, 615, 77 Cal. Rptr. 633* (strict liability)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 104.41 Contractor's Negligence

[1] Duty of Care

A contractor's duty of care is a general duty imposed by law to use reasonable care to prevent injury to all persons who may be reasonably expected to be affected by the contractor's work, regardless of their relationship to the contractor or the owner [*Chance v. Lawry's Inc. (1962) 58 Cal. 2d 368, 378, 24 Cal. Rptr. 209, 374 P.2d 185]* . For example, if a contractor's negligence in the supervision and inspection of the cutting, filling, and compacting of soil causes damage to a house built on that soil, the protected class is not limited to those in privity of contract with the contractor [*Oakes v. McCarthy Co. (1968) 267 Cal. App. 2d 231, 249, 73 Cal. Rptr. 127]* .

A contractor is liable for breach of the duty of care even after the work has been completed and accepted by the owner [*Dow v. Holly Manufacturing Co. (1958) 49 Cal. 2d 720, 724-725, 321 P.2d 736]* . For example, a developer may be held liable for negligence in design or construction of an improvement such as a pedestrian walkway even if the walkway has been dedicated to and accepted by the city [*Fisher v. Morrison Homes, Inc. (1980) 109 Cal. App. 3d 131, 136, 167 Cal. Rptr. 133]* .

Because the general contractor is considered to have supervision over the entire project contracted for, including the work performed by subcontractors, when the contractor negligently creates a dangerous condition, either personally or through a subcontractor, he or she is primarily responsible for that condition and the consequences that may flow from it [*Dow v. Holly Manufacturing Co. (1958) 49 Cal. 2d 720, 725-726, 321 P.2d 736]* .

[2] Accrual of Cause of Action for Defective Construction to Subsequent Owners

A tort duty runs, not only to the original owner for whom construction services are provided, but also to subsequent owners of the same property [*Krusi v. S.J. Amoroso Construction Co. (2000) 81 Cal. App. 4th 995, 1005-1006, 97 Cal. Rptr. 2d 294* ; *see Biakanja v. Irving (1958) 49 Cal.2d 647, 650, 320 P.2d 16* ; *Huang v. Garner (1984) 157 Cal. App. 3d 404, 419-425, 203 Cal. Rptr. 800]* . This does not mean, however, that in a case involving damage to the property, once a cause of action in favor of a prior owner accrues, another cause of action against the same defendant or defendants can accrue to a subsequent owner, unless the damaged suffered by that subsequent owner is fundamentally

different from the earlier type. Thus, if owner number one has an obviously leaky roof and suffers damage to its building as a result, a cause of action accrues to it against the defendant whose deficient construction work cause the defect. But, if that condition goes essentially unremedied over a period of years, owners two and three of the same building have no such right of action against the defendant (unless the right was explicitly transferred to them by owner number one. But owners two and three could well have a cause of action against the defendant contractor for damage caused by, for example, an earthquake if it could be shown that the construction included inadequate seismic safeguards. This is a new and different cause of action [*see Krusi v. S.J. Amoroso Construction Co. (2000) 81 Cal. App. 4th 995, 1005-1006, 97 Cal. Rptr. 2d 294]* .

A cause of action for damages from latent construction defects accrues when the owner discovers, or should have discovered, the damage. Thus, a subsequent owner who discovers latent construction defects may bring an action against the builder for any resulting damage, absent proof that the previous owner suffered actual economic injuries as a result of the construction defects [*Siegel v. Anderson Homes, Inc. (2004) 118 Cal. App. 4th 994, 1009, 13 Cal. Rptr. 3d 462]* .

[3] Negligence Presumed if Code Violations

Ordinarily, expert testimony as to the relevant standard of care for like professionals in the local community is required to prove that a contractor or other professional has acted negligently in the practice of his or her profession [*Huang v. Garner (1984) 157 Cal. App. 3d 404, 413, 203 Cal. Rptr. 800]* . Nevertheless, a plaintiff is entitled to a presumption that a contractor has acted negligently if the plaintiff shows that (1) the defendant violated the building code, (2) the violation proximately caused the injury claimed, (3) the injury resulted from an occurrence of the nature the code was designed to prevent, and (4) the plaintiff was one of the class of persons for whose protection the code was adopted. Testimony concerning the appropriate standard of care is not required if such violations are established [*Evid. Code § 669(a)*; *Huang v. Garner (1984) 157 Cal. App. 3d 404, 412-414, 203 Cal. Rptr. 800]* .

For a form of complaint for negligence against a contractor based on a building code violation, see *§ 104.250*.

[4] Contractor's Liability to Employees of Subcontractors

A general contractor may be liable for injuries to others when he or she has actual or constructive knowledge of a condition hazardous to those who come on the premises, and has a degree of control that permits him or her to take reasonable preventive or protective measures [*Johnson v. Tosco Corp. (1991) 1 Cal. App. 4th 123, 138-141, 1 Cal. Rptr. 2d 747* ; *Caswell v. Lynch (1972) 23 Cal. App. 3d 87, 91, 99 Cal. Rptr. 880]* . Thus, a general contractor will be liable for on-the-job injuries to a subcontractor's employees if he or she knew of the danger that caused the injuries and failed to take whatever reasonable measures were within his or her control to prevent the injuries [*Johnson v. Tosco Corp. (1991) 1 Cal. App. 4th 123, 138-139, 1 Cal. Rptr. 2d 747* ; *Gonzales v. Robert Hiller Constr. Co. (1960) 179 Cal. App. 2d 522, 531-534, 3 Cal. Rptr. 832]* . *Lab. Code §§ 6300, 6303, 6304, 6400,* and *6413.5* treat employees of subcontractors as employees of contractors for purposes of imposing liability to provide a safe place of employment. Nonetheless, these provisions do not impose an affirmative duty to supervise the safety of employees, or impute to the general contractor knowledge of a negligent subcontractor [*Caswell v. Lynch (1972) 23 Cal. App. 3d 87, 91, 99 Cal. Rptr. 880]* .

[5] Damages Recoverable

Except as otherwise provided by statute, the measure of damages for the breach of an obligation not arising from contract is the amount that will compensate for all the detriment proximately caused by the breach, whether it could have been anticipated or not [*Civ. Code § 3333*]. A contractor's liability for negligence for faulty construction is not limited to personal injuries, but also extends to diminution in the value of the structure [*Pollard v. Saxe & Yolles Dev. Co. (1974) 12 Cal. 3d 374, 378, 115 Cal. Rptr. 648, 525 P.2d 88]* .

[6] Contract vs. Tort Action for Negligent Breach

While a contractual obligation may create a legal duty and the breach of that duty may support an action in tort [*see North American Chemical Co. v. Superior Court (1997) 59 Cal. App. 4th 764, 774, 69 Cal. Rptr. 2d 466]* , in the context of a building contract, a mere negligent breach of contract will not give rise to a tort cause of action [*Erlich v. Menezes (1999) 21 Cal. 4th 543, 552-557, 87 Cal. Rptr. 2d 886, 981 P.2d 978]* . Unless the parties to the contract have a "special relationship" (such as that involved in an insurance contract), recovery in tort requires that (1) the breach of contract be accompanied by a traditional common law tort, such as fraud or conversion; (2) the means used to breach the contract be tortious, involving deceit or undue coercion; or (3) one party intentionally breached the contract intending or knowing that the breach would cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages [*Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal. 4th 85, 105, 44 Cal. Rptr. 2d 420, 900 P.2d 669* ; *see Harris v. Atlantic Richfield Co. (1993) 14 Cal. App. 4th 70, 81-82, 17 Cal. Rptr. 2d 649]* .

More than mere negligence has been involved in each case in which tort damages have been permitted. The benefits of broad compensation must be balanced against the burdens on commercial stability. Tort remedies will be applied only when the conduct in question is so clear in its deviation from socially useful business practices that the effect of enforcing tort duties will be to aid rather than discourage commerce [*Erlich v. Menezes (1999) 21 Cal. 4th 543, 554, 87 Cal. Rptr. 2d 886, 981 P.2d 978 , citing Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal. 4th 85, 109, 44 Cal. Rptr. 2d 420, 900 P.2d 669]* . Thus, for example, a preexisting contractual relationship in the form of a building contract, without more, did not support a recovery for emotional distress when the defendant's tortious conduct resulted only in economic injury to the plaintiff [*Erlich v. Menezes (1999) 21 Cal. 4th 543, 87 Cal. Rptr. 2d 886, 981 P.2d 978* (implying a different result if negligent construction caused actual physical injury)].

Given the above discussion, if the plaintiff does have causes of action in both tort and contract, the injured party may plead both causes of action in a single proceeding. The injured party may not, however, elect inconsistent remedies or recover duplicative damages. The pleading should segregate the tort and contract allegations in distinct counts, and be legally sufficient to put the defendant on notice of the multiple theories of liability [*Perry v. Robertson (1988) 201 Cal. App. 3d 333, 340, 247 Cal. Rptr. 74* (real estate listing agreement)].

[7] Indemnity Agreements

Except in certain insurance contracts or as specifically provided otherwise by statute [*see Civ. Code §§ 2782.1, 2782.2, 2782.5, 2782.6*], provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract and that purport to indemnify the promisee against liability for damages for death or bodily injury to persons, injury to property, or any other loss, damage, or expense arising from the sole negligence or willful misconduct of the promisee or the promisee's agents, servants, or independent contractors who are directly responsible to the promisee, or for defects in design furnished by those persons, are against public policy and are void and unenforceable [*Civ. Code § 2782(a)*; *see Bus. & Prof. Code § 7034(a)*].

All provisions, clauses, covenants, and agreements contained in, collateral to, or affecting a residential construction contract or amendment to such a contract, entered into after January 1, 2009, that purport to indemnify the builder by a subcontractor against liability for construction defect claims are unenforceable to the extent the claims arise out of, pertain to, or relate to (1) the negligence of the builder or the builder's other agents, servants, or independent contractors who are directly responsible to the builder, or (2) defects in design furnished by those persons. Such provisions, clauses, covenants, and agreements are also unenforceable to the extent the claims do not arise out of, pertain to, or relate to the scope of work in the written agreement between the parties [*Civ. Code § 2782(c)*; *see Civ. Code § 911* ("builder" defined)]. This prohibition on indemnification of the builder by a subcontractor may not be waived or modified by contract, act, or omission. But contractual provisions, clauses, covenants, or agreements that are not expressly rendered unenforceable by the prohibition are reserved to the parties' agreement [*Civ. Code § 2782(c)*]. This does not affect a

subcontractor's insurance carrier's obligation to provide a complete defense in a construction defect action when the subcontractor added the builder to its liability insurance policies as an additional insured [*see Presley Homes, Inc. v. Am. States Ins. Co. (2001) 90 Cal. App. 4th 571, 108 Cal. Rptr. 2d 686*]. Also unaffected are the obligations of a builder or subcontractor with regard to any action based on a construction defect generally, including a builder's or subcontractor's obligation to attempt to resolve a construction defect claim through the pre-litigation procedure prescribed by statute [*Civ. Code § 2782(c)*; *see Civ. Code §§ 895 et seq., 910(a)*; *see also § 104.43[8]*].

A subcontractor and builder are not prohibited, however, from mutually agreeing to the timing or immediacy of the defense and provisions for reimbursement of defense fees and costs, as long as that agreement, when the claims are finally resolved, does not waive or modify the above-described prohibition on indemnity [*Civ. Code § 2782(d)*]. A subcontractor owes no defense or indemnity obligation to a builder or general contractor for a construction defect claim unless and until the builder or general contractor provides a written tender of the claim to the subcontractor. The tender must include all of the information provided to the builder or general contractor by the claimant related to claims caused by the subcontractor's scope of work. The written tender will have the same force and effect as a notice of commencement of legal proceedings. If a builder or general contractor tenders a claim for construction defects to a subcontractor, the subcontractor must elect to either [*Civ. Code § 2782(d)*]:

> (1) Defend the claim with counsel of choice, in which case the subcontractor will maintain control of the defense for any claim to which the defense obligation applies [*see Civ. Code § 2782(d)(1)*]; or
>
> (2) Pay, within 30 days of receipt of an invoice from the builder or general contractor, no more than a reasonable allocated share of the builder's or general contractor's defense fees and costs [*see Civ. Code § 2782(d)(2)*].

If a subcontractor fails to timely and adequately perform its obligation to defend the claim as described in (1), above, the builder or general contractor will have the right to pursue a claim against the subcontractor for any resulting compensatory damages, consequential damages, and reasonable attorney's fees. Similarly, if a subcontractor fails to timely perform its obligation to pay the claim as described in (2), above, the builder or general contractor will have the right to pursue a claim against the subcontractor for any resulting compensatory and consequential damages, as well as for interest on defense and indemnity costs, and reasonable attorney's fees incurred to recover these amounts. In either case, the builder or general contractor bears the burden of proof to establish the subcontractor's failure to perform and any resulting damages [*Civ. Code § 2782(e)*].

If a builder or general contractor is requested to, but does not, reallocate defense fees to a subcontractor within 30 days following final resolution of the claim, the subcontractor will have the right to pursue a claim for any resulting compensatory and consequential damages, as well as for interest on the fees. The subcontractor will bear the burden of proof to establish both the failure to reallocate fees and any resulting damages [*Civ. Code § 2782(e)*].

A builder, general contractor, or subcontractor has the right to seek equitable indemnity for any of these claims, including against any supplier, design professional or product manufacturer [*Civ. Code § 2782(f), (g)*].

The provisions of *Civ. Code § 2782* do not, however, prevent a party to a construction contract and the owner or other party for whose account the contract is being performed from negotiating and expressly agreeing with respect to the allocation, release, liquidation, exclusion, or limitation as between the parties of any liability for design defects or any liability of the promisee to the promisor arising out of or relating to the construction contract [*Civ. Code § 2782.5*; *see Civ. Code § 2784* ("design defect" defined)]. Agreements to indemnify professional engineers and geologists are also permissible, if certain criteria are satisfied [*Civ. Code §§ 2782.2, 2782.6*].

Nor do these provisions prevent a contractor responsible for the performance of a construction contract from indemnifying fully a person, firm, corporation, state, or other agency for whose account the construction contract is not

being performed but who, as an accommodation, enters into an agreement with the contractor permitting the contractor to enter on or adjacent to its property for the purpose of performing the construction contract [*Civ. Code § 2782.1*; *see Civ. Code § 2783* ("construction contract" defined)].

Legal Topics:

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§ 104.42 Contractor's Breach of Warranty

[1] Implied Warranty in Building Contracts

A warranty of quality attaches to a building construction contract [*Pollard v. Saxe & Yolles Dev. Co. (1974) 12 Cal. 3d 374, 377-378, 115 Cal. Rptr. 648, 525 P.2d 88]* . Builders and sellers of new construction are held to what is implicitly represented--that the completed structure was designed and constructed in a reasonably workerlike manner [*Pollard v. Saxe & Yolles Dev. Co. (1974) 12 Cal. 3d 374, 380, 115 Cal. Rptr. 648, 525 P.2d 88]* , and that the finished product is fit for its intended use [*Aced v. Hobbs-Sesack Plumbing Co. (1961) 55 Cal. 2d 573, 582, 12 Cal. Rptr. 257, 360 P.2d 897]* . For a form of complaint by a purchaser against a contractor for breach of the implied warranty, and a form of denial by a contractor if the work was performed pursuant to plan, see *§§ 104.253* and *104.254*, respectively.

[2] Notice of Breach of Warranty

A buyer is required to give notice to the seller within a reasonable time after he or she discovers or should have discovered a breach of the warranty. A delay of nearly four years in giving notice has been held to be unreasonable and to constitute a bar to recovery [*Pollard v. Saxe & Yolles Dev. Co. (1974) 12 Cal. 3d 374, 380, 115 Cal. Rptr. 648, 525 P.2d 88]* . The notice requirement is designed to provide the seller with the opportunity to correct the defects, thereby reducing the damages, to avoid similar defects in future projects, and to negotiate a settlement [*Pollard v. Saxe & Yolles Dev. Co. (1974) 12 Cal. 3d 374, 380, 115 Cal. Rptr. 648, 525 P.2d 88]* .

[3] No Warranty When Plans Furnished by Owner

An exception to the warranty rule applies when the plans for the project are furnished by the owner. When the plans for the project are furnished by the owner, and the contractor faithfully performs the work as specified by those plans, there is no implied warranty that the contractor will supplement the inadequacy of the plans [*Sunbeam Constr. Co. v. Fisci (1969) 2 Cal. App. 3d 181, 184-185, 82 Cal. Rptr. 446]* . The owner having specified what is to be done, the contractor is relieved from liability insofar as he or she complies with the specifications. In such a case, the contractor guarantees not the sufficiency of the specifications to produce the desired results, but merely the effectiveness of what he or she did under them [*Kurland v. United Pac. Ins. Co. (1967) 251 Cal. App. 2d 112, 118, 59 Cal. Rptr. 258* ; *see § 104.254*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionBreach of WarrantyContracts LawContract Conditions & ProvisionsImplied WarrantiesGeneral OverviewContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts

California Forms of Pleading and Practice--Annotated

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Chapter 104 BUILDING CONTRACTS
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B. Other Liabilities of Contractors, Owners, and Third Parties Arising From Construction Projects

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§ 104.43 Actions for Defective Construction in New Residences Sold on or After January 1, 2003

[1] Overview and Applicability

In accordance with Division 2, Part 2, Title 7 of the Civil Code, "Requirements for Actions for Construction Defects" [*Civ. Code § 895 et seq.*], any action against a builder, general contractor, subcontractor, individual product manufacturer, or design professional, seeking recovery of damages arising out of, or related to deficiencies in, residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction when the property involved is a new residential unit (excluding a condominium conversion) when the purchase agreement with the buyer was signed by the seller on or after January 1, 2003, is governed by detailed statutory standards related to the various functions and components of the building [*see Civ. Code §§ 896, 938*]. The action is preceded by a mandatory pre-litigation procedure, which provides the potential defendant with a right to attempt a repair of any alleged defect before litigation. The pre-litigation procedure also includes inspections and exchanges of documentation between the parties under certain circumstances, and mediation at various points, all pursuant to statutory time frames [*see Civ. Code §§ 910-938*, discussed in *§ 104.43[8]*].

At least in the case of construction defect situations involving new residential units (excluding condominium conversions) when the purchase agreement with the buyer was signed by the seller on or after January 1, 2003, the Legislature has effectively rendered inapplicable the effects of a California Supreme Court decision in which the Court held, among other things, that construction defects must cause actual damage before they can be actionable in tort [*see Aas v. Superior Court (2000) 24 Cal. 4th 627, 636-647, 101 Cal. Rptr. 2d 718, 12 P.3d 1125]* .

The provisions, standards, rights, and obligations set forth in Title 7 are binding on all original purchasers and their successors-in-interest. Associations are considered to be original purchasers and have standing to enforce these provisions, standards, rights, and obligations [*Civ. Code § 945*].

Title 7 does not apply to any action by a claimant to enforce a contract or express contract provision, or any action for fraud, personal injury, or violation of a statute (other than Title 7) [*Civ. Code § 943(a)*].

Title 7 does not eliminate or abrogate the requirements of *Code Civ. Proc. § 411.35*, which requires plaintiff's counsel to furnish an Attorney's Certificate in an action against a design professional, for claims and damages that are not covered by the statutory scheme governing construction defect litigation [*Civ. Code § 937*; *see Ch. 56, Architects, § 56.34*].

[2] Parties

A "claimant" or "homeowner" who may bring an action under Title 7 includes individual owners of single-family homes, individual unit owners of attached dwellings and, in the case of a common interest development, any association created for the purpose of managing the development [*Civ. Code § 895(f)*].

A "builder" against whom an action governed by Title 7 may be brought may be any entity or individual, including, but not limited to, a builder, developer, general contractor, contractor, or original seller, who, at the time of sale (1) was also in the business of selling residential units to the public for the property that is the subject of the homeowner's claim, or (2) was in the business of building, developing, or constructing residential units for public purchase for the property that is the subject of the homeowner's claim [*Civ. Code § 911(a)*]. "Builder" does not include any entity or individual whose involvement with a residential unit that is the subject of the homeowner's claim is limited to his or her capacity as general contractor, or contractor and who is not a partner, member of, subsidiary of, or otherwise similarly affiliated with the builder. These non-affiliated general contractors and non-affiliated contractors must be treated the same as subcontractors, material suppliers, individual product manufacturers, and design professionals [*Civ. Code § 911(b)*].

General contractors, subcontractors, material suppliers, individual product manufacturers, and design professionals may also be liable for damages to the extent that they cause, in whole or in part, a violation of a particular statutory construction standard as the result of a negligent act or omission or a breach of contract. All actions by a claimant or builder to enforce an express contract, or any provision of an express contract, against a general contractor, subcontractor, material supplier, individual product manufacturer, or design professional is preserved. General contractors, subcontractors, suppliers, manufacturers, or design professionals may be held joint and severally liable to the extent that they contribute to any specific violation of the statutory construction standards. This does not apply, however, to any general contractor, subcontractor, material supplier, individual product manufacturer, or design professional to which strict liability applies [*Civ. Code § 936*].

[3] Standards for Determining When Construction Is Defective

The statutory standards used to determine the existence of construction defects relate to all of the following issues [*see Civ. Code § 896(a)-(f)*]:

- Water issues related to the building's windows, doors, roofs, decks and balconies, foundations, hardscape (e.g., paths and patios, landscap ing, and drainage systems), exterior surfaces (e.g., stucco and siding), retaining walls, plumbing and sewer systems, shower and bath enclosures, and ceramic tile and countertops;

- Structural issues related to the foundations, load-bearing components, and slabs, including compliance with applicable established standards for earthquake and wind load resistance;

- Soil and retaining wall issues related to the structural integrity of the building and the suitability of the surrounding land for the purpose represented at the time of the original sale, or for the purpose for which the land is commonly used (e.g., as a garden);

- Fire protection issues related to applicable government regulations, fireplaces and chimneys, and electrical and mechanical systems;

- Issues related to the operation of the plumbing and sewer systems; and
- Issues related to the operation of the electrical systems.

Issues related to other areas of construction to which standards apply include all of the following [*see Civ. Code § 896(g)*]:

- Cracking in exterior pathways, driveways, landscape, sidewalks, patios, stucco, exterior siding, and other exterior wall finishes and fixtures;
- Installation of products that are completely manufactured offsite (e.g., doors, windows, fireplaces, and HVAC units);
- Installation of the heating system;
- Installation of untreated wood and steel fences;
- Compliance with government standards for inter-unit noise transmission;
- Operation of irrigation and drainage systems;
- Application of paint and stains;
- Installation of roofing materials;
- Installation of ceramic tile and tile backing;
- Installation of dryer ducts; and
- General construction standards to avoid hazards to public health.

The standards set forth in the statute and summarized above are intended to address every function or component of the building. To the extent that a function or component of a building is not addressed by these standards, it is actionable if it causes damage [*Civ. Code § 897*].

[4] Builder's Express Warranty for Fit and Finish Items

Issues related to the fit and finish of cabinets, mirrors, flooring, interior and exterior walls, countertops, paint finishes, and trim that do not rise to the level of construction defects under the statutory construction standards are nonetheless subject to a minimum one-year express written warranty, which the builder must provide to the home buyer. The express warranty does not apply to damage to these items caused by defects in other components that are governed by the construction standards. If the builder fails to provide the express warranty, a statutory one-year warranty for these items will apply [*Civ. Code § 900*].

[5] Builder May Offer Enhanced Protection Agreement

A builder may, but is not required to, offer greater protection or protection for longer time periods in its express contract with the homeowner. This constitutes an "enhanced protection agreement" [*Civ. Code § 901*]. If an enhanced protection agreement is in place, the statutory construction standards described above no longer apply other than to set forth

minimum provisions by which to judge the enforceability of the particular provisions of the enhanced protection agreement [*Civ. Code § 902*]. Employing an enhanced protection agreement, however, does not affect the applicability of the mandatory pre-litigation procedure [*Civ. Code § 906*; *see Civ. Code §§ 910-938*, discussed in *§ 104.43[8]*].

The builder's election to offer its own protection agreement must be made in writing no later than the close of escrow [*see Civ. Code § 895(c)* ("close of escrow" defined)]. In addition to the enhanced protection agreement, the builder must also provide the homeowner with a complete copy of the statutory construction standards and advise the homeowner that the builder has elected not to be subject to the statutory standards. If any provision of the builder's protection agreement is later found to be unenforceable, as not meeting the statutory standards, the builder may use the statutory standards in lieu of the provisions in its own protection agreement that are found to be unenforceable [*Civ. Code § 903*]. If a homeowner seeks to enforce a particular statutory standard in lieu of a provision in the builder's protection agreement, the homeowner must give the builder written notice of that intent at the time the homeowner files a notice of claim [*Civ. Code § 904*; *see Civ. Code § 910(a)*, discussed in *§ 104.43[8][b]*].

If a homeowner seeks to enforce the statutory construction standards in lieu of the enhanced protection agreement in a subsequent litigation or other legal action, the builder may have the matter bifurcated and have an immediately binding determination of his or her responsive pleading within 60 days after that pleading is filed, but in no event later than the commencement of discovery. If the builder fails to seek such a determination in the specified time frame, he or she waives the right to do so and the statutory construction standards will apply [*Civ. Code § 905*].

Any nonoriginal homeowner will be deemed to be in privity for purposes of the enhanced protection agreement only if the builder has recorded the enhanced protection agreement on title or provided actual notice of the agreement to the nonoriginal homeowner. If the builder's protection agreement is not recorded or no actual notice is provided, the statutory construction standards will apply to the nonoriginal homeowner's claims [*Civ. Code § 905*].

[6] Homeowner's Obligation to Follow Maintenance Obligations and Schedules

A homeowner is obligated to follow all reasonable maintenance obligations and schedules communicated in writing by the builder and product manufacturers, as well a commonly accepted maintenance practices. The homeowner's failure to do so may subject him or her to the affirmative defenses afforded the builder in any subsequent action [*Civ. Code § 907*; *see Civ. Code § 945.5(c)*, discussed in *§ 104.43[11]*].

[7] Statute of Limitations

With certain limited exceptions listed below, any action brought under Title 7 must be filed within 10 years after substantial completion of the residence, but not later than 10 years after the date a valid notice of completion was recorded [*see Civ. Code §§ 938, 941*]. The four-year statute of limitations specified for patent defects and the 10-year statute of limitations for latent defects, specified by *Code Civ. Proc. §§ 337.1* and *337.15*, respectively, do not apply to these actions [*Civ. Code § 941(d)*].

Exceptions to the 10-year limitation period include all of the following:

- Four years for actions alleging improper operation of electrical systems [*Civ. Code § 896(f)*];

- One year from original occupancy of adjacent unit for actions alleging noncompliance with governmental inter-unit noise transmission standards [*Civ. Code § 896(g)(6)*];

- Four years from close of escrow for actions alleging improper installation of untreated steel fences and adjacent components [*Civ. Code § 896(g)(9)*];

- Five years from close of escrow for actions alleging improper application of paint and stains [*Civ. Code § 896(g)(10)*];

- Two years from close of escrow for actions alleging improper installation of landscaping systems [*Civ. Code § 896(g)(12)*]; and

- Two years from close of escrow for actions alleging improper installation of dryer ducts [*Civ. Code § 896(g)(14)*].

"Close of escrow" means the date of the close of escrow between the builder and the original homeowner. If the claimant is an association, "close of escrow" means the date of substantial completion [*see Civ. Code § 1351(a)*], or the date the builder relinquishes control over the association's ability to decide whether to initiate a claim, whichever is later [*Civ. Code § 895(c)*].

The applicable statute of limitations may be tolled pending the outcome of the mandatory pre-litigation process [*see Civ. Code § 928*]. For discussion, see *§ 104.43[8][g]*.

The statute of limitations cannot be asserted by way of defense by any person in actual possession or control, as owner, tenant, or otherwise, of the subject residential property, at the time any deficiency in the residence constitutes the proximate cause for which it is proposed to make a claim or bring an action [*Civ. Code § 941(c)*].

Existing statutory and decisional law governing the tolling of statutes of limitations applies to the time periods for filing an action or making a claim for violation of the statutory construction standards, except for the special tolling provisions related to the pre-litigation procedure [*Civ. Code § 941(e)*; *see Civ. Code § 927*, discussed in *§ 104.43[8][g]*].

The above-described time limitations "... do not apply to any action by a claimant for a contract or express contractual provision" [*Civ. Code § 941(e)*]. Though it was probably not the drafters' intent, if taken literally, this could be construed to exempt an action based on violation of a builder's enhanced protection agreement from the 10-year limitation period specified by *Civ. Code § 941(a)*, in which case the shorter limitation period applicable to a contract action [*see Code Civ. Proc. § 337(1)*] or an action based on a patent defect [*see Code Civ. Proc. § 337.1*] arguably could apply.

[8] Mandatory Pre-Litigation Procedure

[a] Overview

Before a homeowner can file an action seeking damages for alleged construction defects based on the construction standards described above, he or she must initiate a process the main component of which is the builder's right to attempt to repair any alleged defects before the homeowner can initiate litigation [*Civ. Code § 910*]. The goal of the pre-litigation process is to afford the parties the opportunity for quick and fair resolution of construction defect claims without having to resort to lengthy and expensive litigation [*see* 2002 Stats., ch. 722, § 1(c)].

The following discussion describes the statutory pre-litigation process [*see Civ. Code §§ 910-938*]. In lieu of this statutory process, a builder may provide, by contract, for its own non-adversarial procedure. If the builder does so, however, and the contractual procedure either fails to resolve the construction defects or is subsequently found to be unenforceable, the builder may not then require adherence with the statutory procedure [*Civ. Code § 914(a)*].

When the sales agreement is executed, the builder must notify the homeowner which non-adversarial procedure--i.e., the statutory procedure or the builder's alternative non-adversarial contractual provisions--will apply to resolve any construction defects. If the builder elects to use alternative non-adversarial contractual provisions, the election is

binding regardless of whether those provisions successfully resolve the ultimate dispute or are ultimately deemed enforceable [*Civ. Code § 914(c)*].

If the builder fails to comply with the requirements of a non-adversarial procedure or elects not to go through with such a procedure, the homeowner is released from the obligation to participate in the procedure and may proceed to file an action to resolve the alleged construction defects [*Civ. Code § 915*].

When the claimant is an association representing a common interest development that includes 20 or more units and the parties comply with the statutory pre-litigation process discussed below, the parties will be excused from performing the pre-litigation dispute resolution process required by *Civ. Code § 1375* to the extent that the provisions of the Title 7 procedure are substantially similar to the provisions of *Civ. Code § 1375* [*Civ. Code § 935*]. For further coverage, see *§ 104.26*.

[b] Notice of Claim

Before the claimant can file an action alleging violation of the construction standards, he or she must provide the builder with written notice of the claimant's claim that the construction of his or her residence violates any of the statutorily-prescribed standards [*Civ. Code § 910(a)*; *see § 104.261*]. The notice must be delivered via certified mail, overnight mail, or personal delivery. The notice has the same force and effect as a notice of commencement of a legal proceeding [*Civ. Code § 910(a)*].

The notice of claim must include all of the following [*Civ. Code § 910(a)*]:

- The claimant's name, address, and preferred method of contact;

- A statement that the claimant alleges a violation pursuant to *Civ. Code § 895 et seq.* against the builder; and

- A description of the claim in reasonable detail sufficient to determine the nature and location, to the extent known, of the claimed violation.

If the claimant is a group of homeowners or an association, the notice must identify the claimants solely by address or other description sufficient to apprise the builder of the locations of the subject residences.

The notice requirement does not preclude a homeowner from seeking redress through any applicable normal customer service procedure set forth in any contract, warranty, or other builder-generated document. If the homeowner requests this form of recourse through such a procedure, however, the request does not satisfy the statutory notice requirement [*Civ. Code § 910(b)*].

The builder must acknowledge receipt of the notice of claim in writing within 14 days [*Civ. Code § 913*].

[c] Builder's Obligation to Provide Copies of Requested Materials

Within 30 days of the claimant's written request, the builder must provide, at the claimant's expense, copies of the following [*Civ. Code § 912(a)-(d)*]:

- All relevant documents, such as plans, specifications and soil reports, public reports, and engineering calculations pertaining to the claimant's residence, or as part of a larger development tract;

- All maintenance and preventative maintenance recommendations;

- All manufactured products maintenance, preventive maintenance, and limited warranty information; and

- All of the builder's limited contractual warranties in effect at the time the residence was originally sold.

[d] Inspection of Claimed Unmet Standards

The builder may elect to inspect the alleged violations of the statutory construction standards specified in the notice of claim. Any inspection and testing must be completed within 14 days after the builder acknowledges receipt of the notice of claim. The builder must bear the cost of the inspection and testing [*Civ. Code § 916(a)*]. If reasonably necessary, the builder may, within three days of the initial inspection or testing, request a second inspection or testing. The second inspection must be completed within 40 days of the initial inspection [*Civ. Code § 916(c)*].

If the builder intends to hold a third party, i.e., a subcontractor, design professional, individual product manufacturer, or material supplier (including an insurance carrier, warranty company, or service company), responsible for its contribution to the unmet standard, the builder must give the third party notice sufficiently in advance to allow them to attend the initial or second inspection and to participate in any subsequent repair process. Failure to include a third party in the inspection process will not be construed to relieve the third party from liability in any subsequent action brought by the claimant [*Civ. Code § 916(e)*].

[e] Offer to Repair

Within 30 days of the initial or, if requested, second inspection or testing, the builder may offer to repair any violation found. The offer must also compensate the claimant for damages recoverable within the time frame for the repair. It must be accompanied by a repair plan, including a detailed statement identifying the violation to be repaired and setting a reasonable completion date, which, barring unforseen events, should be within 120 days of the claimant's acceptance of the offer [*Civ. Code §§ 917, 921*; *see Civ. Code § 944* (recoverable damages)].

If the builder elects to repair some, but not all of the claimed unmet construction standards, he or she must also set forth in writing the reasons and support for those reasons for not repairing all claimed unmet standards [*Civ. Code § 924*].

The offer of repair must be accompanied by an offer to mediate the dispute at the homeowner's option. If the builder makes an offer to repair and the mediation fails to resolve the dispute, the claimant must allow the repair to be performed [*Civ. Code § 919*].

The builder may not obtain a release or waiver of any kind in exchange for required repair work [*Civ. Code § 926*].

When a repair has been made but not to the claimant's satisfaction, the claimant may proceed to file suit for violation of the applicable construction standard, for inadequate repair, or for both [*Civ. Code § 926*]. However, if there has been no previous mediation between the parties, the claimant must request mediation before filing suit [*Civ. Code § 928*].

If the builder fails to make an offer to repair, the claimant may proceed to file an action for violation of the statutory construction standards [*Civ. Code § 920*].

[f] Cash Offer in Lieu of Repair

The builder may make a cash offer instead of making the repair. The claimant may either (1) accept the offer, or (2) reject it and proceed to file an action based on violation of the statutory construction standards [*Civ. Code § 929(a)*]. In

exchange for a cash payment, the builder is entitled to obtain a reasonable release the terms and conditions of which are negotiable between the builder and the claimant [*Civ. Code § 929(b)*].

[g] Effect of Pre-Litigation Process on Statute of Limitations

If the applicable statute of limitations has otherwise run during the statutory pre-litigation process when the process resulted in an inadequate repair, the time period for filing an action is extended from the time of the claimant's original claim to 100 days after the inadequate repair is completed. The action is not limited to the inadequate repair; it may encompass any violation of the construction defect standards [*Civ. Code § 927*].

If the statute of limitations has otherwise run during the statutory pre-litigation process, it will be extended to 45 days after the time for responding to the notice of claim has expired if the builder does any of the following [*Civ. Code § 927*]:

- Fails to acknowledge the claim in a timely manner [*see Civ. Code § 913*];
- Elects not to go through the statutory pre-litigation process; or
- Fails to request an inspection in a timely manner.

If the builder has elected to employ its own alternative non-adversarial procedure in lieu of the statutory procedure [*' see § 104.43[8][a]*] and the statute of limitations would otherwise run during that procedure, the time period for filing an action for violation of the statutory construction standards is extended from the time of the claimant's original claim to the later of either (1) 100 days after the completion of the alternative procedure, or (2) 100 days after the alternative procedure is deemed unenforceable [*Civ. Code § 927*].

[h] Dealing With Claims Discovered After Action Filed

Once an action has been filed, subsequently discovered claims of unmet statutory construction standards must be administered separately--i.e., they are subject to the pre-litigation procedure. However, in the case of a detached single family residence, if the subsequently discovered claim is for a violation of the same construction standard as a standard that is the subject of a pending action brought by the same claimant, the claimant need not reinitiate the process as to that standard. The same is true in the case of an attached project, if the subsequently discovered claim is for a violation of the same construction standard for a connected component system in the same building as a standard that is the subject of a pending action brought by the same claimant [*Civ. Code § 932*].

[9] Claimant's Cause of Action; Burden of Proof

To state a cause of action for damages resulting from a violation of the statutory construction standards, a homeowner need only demonstrate, in accordance with the applicable evidentiary standard, that the home does not meet the applicable standard, subject to specified statutory affirmative defenses [*see Civ. Code § 945.5*, discussed in *§ 104.43[11]*]. No further showing of causation or damages is required to meet the burden of proof regarding a violation of the statutory construction standards, provided that the violation arises out of, pertains to, or is related to, the original construction [*Civ. Code § 942*].

No other cause of action for a claim for construction defects covered by Title 7 is allowed. Title 7 does not apply to any action by a claimant to enforce a contract or express contract provision, or any action for fraud, personal injury, or violation of a statute other than Title 7 [*Civ. Code § 943(a)*].

[10] Damages

The homeowner is entitled to recover all of the following as damages in an action on a claim based on violation of the statutory construction standards [*Civ. Code § 944*]:

- The reasonable cost of repairing any violation of the statutory construction standards;
- The reasonable cost of repairing any damages caused by the repair efforts;
- The reasonable cost of repairing and rectifying any damages resulting from the home's failure to meet the standards;
- The reasonable cost of removing and replacing any improper repair by the builder;
- Reasonable relocation and storage expenses;
- Lost business income if the home was used as a principal place of business licensed to be operated from the home;
- Reasonable investigative costs for each established violation; and
- All other costs or fees recoverable by contract or statute.

As to any claims involving a detached single-family home, the homeowner's right to the reasonable value of repairing any nonconformity is limited to the repair costs, or the diminution in the home's current value caused by the nonconformity, whichever is less, subject to the common law personal use exception [*Civ. Code § 943(b)*].

Damages awarded in an action by the claimant that was not brought under Title 7--e.g., an action to enforce a contract or express contractual provision, or an action for fraud, personal injury, or violation of another statute--must be reduced by any amounts recovered for the same items in an action under Title 7 [*Civ. Code § 943(a)*].

[11] Affirmative Defenses

Under the principles of comparative fault pertaining to affirmative defenses, a builder, general contractor, subcontractor, material supplier, individual product manufacturer, or design professional may be excused, in whole or in part, from any obligation, damage, loss, or liability if he or she can demonstrate that the claimed violation of the statutory construction standards was caused by any of the following [*Civ. Code § 945.5(a)-(d)*]:

- An unforseen act of nature, defined as a weather condition, earthquake, or manmade event such as war, terrorism, or vandalism, in excess of the design criteria expressed by the applicable building codes, regulations, and ordinances in effect at the time of the original construction [*see § 104.263*];
- A homeowner's unreasonable failure to minimize or prevent the claimed damages in a timely manner, including (1) the homeowner's failure to allow reasonable and timely access for inspections and repairs, and (2) the homeowner's failure to give timely notice to the builder after discovering a violation; but excluding damages due to the builder's untimely or inadequate response to the homeowner's claim [*see § 104.264*];
- The failure of the homeowner or his or her agent, employee, subcontractor, independent contractor, or consultant to follow the builder's or manufacturer's recommendations, or commonly accepted homeowner maintenance obligations; provided the builder can show that the homeowner had written notice of these recommendations and that the recommendations were reasonable at the time they were

issued [*see § 104.265*]; and

- The homeowner's, his or her agent's, or an independent third party's alterations, ordinary wear and tear, misuse, abuse, or neglect, or by the structure's use for something other than its intended purpose [*see § 104.266*].

Other affirmative defenses include establishing that [*Civ. Code § 945.5(e)-(g)*]:

- The applicable statute of limitations has expired [*see § 104.267*];
- The builder has obtained a valid release for the particular violation claimed [*see § 104.268*]; and
- The builder has successfully repaired the particular violation claimed [*see § 104.269*].

All affirmative defenses are preserved as to any causes of action to which Title 7 does not apply [*Civ. Code § 945.5(h)*].

[12] Admissibility of Evidence from Pre-Litigation Procedure

Nothing that occurs during a builder's or claimant's inspection or testing during the pre-litigation process may be used or introduced as evidence to support a spoilation defense by any potential party in any subsequent litigation [*Civ. Code § 916(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 104.44 Developer's Strict Liability

[1] Mass Producers as Strictly Liable

Residential developers are held strictly liable for defective construction because of a recognition that they are the best-positioned to bear the costs associated with construction defects and to monitor and coordinate construction from start to finish. Also, they are held strictly liable because they are essentially the manufacturers of the finished product or residence, as well as the marketer of the finished product. The strict liability of residential developers therefore is in keeping with the public policy behind the doctrine of strict liability, which evolved to afford protection to individual consumers by fixing responsibility for injuries caused by defective products where it will most efficiently reduce safety hazards inherent in defective products in the marketplace [*Heppler v. J.M. Peters Co. (1999) 73 Cal. App. 4th 1265, 1279, 87 Cal. Rptr. 2d 497* ; *see La Jolla Village Homeowners' Assn. v. Superior Court (1989) 212 Cal. App. 3d 1131, 1143-1145, 261 Cal. Rptr. 146]* .

A builder-vendor of mass-produced homes is liable to a purchaser for failure to produce a home reasonably fit for its intended use on the basis of strict liability [*Kriegler v. Eichler Homes, Inc. (1969) 269 Cal. App. 2d 224, 228-229, 74 Cal. Rptr. 749]* . Under this rule, the developer of a 190-unit condominium development was determined to be a mass producer of housing and therefore liable in strict liability for injuries to common areas of the development caused by erosion [*Del Mar Beach Club Owners Assn. v. Imperial Contracting, Co. (1981) 123 Cal. App. 3d 898, 909-914, 176 Cal. Rptr. 886]* . Similarly, developers of a multiple-unit, residential planned development complex were held strictly liable for defective design and construction of the project on an unstable bluff [*Del Mar Beach Club Owners Assn. v. Imperial Contracting Co. (1981) 123 Cal. App. 3d 898, 911, 913, 176 Cal. Rptr. 886]* .

For a form of complaint against a developer based on strict liability, see *§ 104.255*.

[2] Manufacturing Process Included

The manufacturer of a lot (or tract developer) may also be held strictly liable for damages suffered by the ultimate occupier of the lot as a proximate result of any defects in the manufacturing process, such as improper filling and grading that cause foundation instability [*Avner v. Longridge Estates (1969) 272 Cal. App. 2d 607, 615, 77 Cal. Rptr.*

633] . Further, a developer who mass grades land into lots and sells the lots to another developer who subsequently develops them into a residential subdivision is strictly liable to the buyers for defects in the lots [*GEM Developers v. Hallcraft Homes of San Diego, Inc. (1989) 213 Cal. App. 3d 419, 431-433, 261 Cal. Rptr. 626]* .

[3] Defective Condition Required

In determining whether a house is defective for purposes of imposing strict liability, the test is one of reasonableness rather than perfection. The imposition of strict liability on mass developers does not make them insurers of the safety of all who thereafter come on the premises [*Kriegler v. Eichler Homes, Inc. (1969) 269 Cal. App. 2d 224, 228, 74 Cal. Rptr. 749]* . Strict liability does not apply unless the product (the home) allegedly causing the injury was in a defective condition. The burden is on the plaintiff to establish the defective condition of the product and to prove that the defect proximately caused the plaintiff's injury [*Miller v. Los Angeles County Flood Control Dist. (1973) 8 Cal. 3d 689, 703-704, 106 Cal. Rptr. 1, 505 P.2d 193]* .

[4] Location of Defective System

It is immaterial in an action based on strict liability whether a defective system, such as pipes or hydrants, installed by a developer is actually located on the plaintiff's property when the purpose of the system is the protection of all the properties in the subdivision. Legally it makes no difference whether the systems are located on or off any particular lot. The doctrine that strict liability extends to bystanders is ample to protect the plaintiffs who own homes within the subdivision [*Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 811, 110 Cal. Rptr. 543]* .

[5] Effect of Approval by Public Entity

When a public entity approves and accepts as a public improvement private construction by a developer, the developer cannot thereafter be held strictly liable for defects in the construction [*Blau v. City of Los Angeles (1973) 32 Cal. App. 3d 77, 89-91, 107 Cal. Rptr. 727* ; *but cf. Fisher v. Morrison Homes, Inc. (1980) 109 Cal. App. 3d 131, 136-139, 167 Cal. Rptr. 133* (contractor's liability for negligence not cut off by improvement's dedication to and acceptance by public entity)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsTortsProducts LiabilityDesign DefectsTortsProducts LiabilityManufacturing DefectsTortsProducts LiabilityStrict Liability

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10-104 California Forms of Pleading and Practice--Annotated § 104.45

§ 104.45 Persons Not Strictly Liable

[1] Occasional Developers

The doctrine of strict liability is inapplicable to an occasional constructor of homes. It is only applicable to mass producers. Thus, it was not applicable to a developer who built only two homes at different times in different locations [*Oliver v. Superior Court (1989) 211 Cal. App. 3d 86, 87-88, 259 Cal. Rptr. 160]* .

[2] Commercial Parties on Equal Footing

The strict liability doctrine is also not available to commercial parties who deal on an equal level, such as a commercial developer who sues a seller of graded lots [*Gentry Construction Co. v. Superior Court (1989) 212 Cal. App. 3d 177, 180, 260 Cal. Rptr. 421]* .

[3] Professional Consultants

Soil engineers, structural engineers, and architects of multiple-unit, residential, planned development complexes are not strictly liable for defective design and construction of the projects. Those who sell their services for the guidance of others in their economic, financial, and personal affairs cannot be held liable in connection with those services in the absence of negligence or intentional misconduct [*Del Mar Beach Club Owners Assn. v. Imperial Contracting Co. (1981) 123 Cal. App. 3d 898, 914, 176 Cal. Rptr. 886]* .

[4] Subcontractors

The strict liability doctrine is not applicable to subcontractors because they do not have control over the entire project and do not typically construct a finished project to their own specifications [*Heppler v. J.M. Peters Co. (1999) 73 Cal. App. 4th 1265, 1279, 87 Cal. Rptr. 2d 497* ; *La Jolla Village Homeowners' Assn. v. Superior Court (1989) 212 Cal. App. 3d 1131, 1144, 261 Cal. Rptr. 146]* . For example, a subcontractor who installed a soap dish was not held strictly liable for an injury caused by its breaking because the subcontractor was not in the business of selling soap dishes [*Monte Vista Development Corp. v. Superior Court (1991) 226 Cal. App. 3d 1681, 1687-1688, 277 Cal. Rptr. 608]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawDesign ProfessionalsReal Property LawPurchase & SaleRemediesLiability of Developers & VendorsReal Property LawTortsConstruction DefectsTortsProducts LiabilityDesign DefectsTortsProducts LiabilityStrict Liability

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10-104 California Forms of Pleading and Practice--Annotated § 104.46

§ 104.46 Developer's Recourse Against Supplier and Manufacturer

A contractor who is liable to a home purchaser because of a defect in a component part used in the construction of the home may in turn have recourse against the supplier and manufacturer for any loss he or she incurs. For example, if a seller of a defective component knows of the purpose for which the component will be used and representatives of the seller expressly state that the component is suitable for the intended purpose, the developer is entitled to recovery based on findings of express and implied warranties of fitness and merchantability [*Eichler Homes, Inc. v. Anderson (1970) 9 Cal. App. 3d 224, 230-232, 87 Cal. Rptr. 893]* .

A home builder may recover from a product manufacturer for economic losses caused by the manufacturer's violation of the standards set forth in the Right to Repair Act [*Civ. Code § 895 et seq.*; *see § 104.43*] through a derivative equitable indemnity action, even though a builder may not recover for those losses through a direct negligence claim against the manufacturer [*Greystone Homes, Inc. v. Midtec, Inc. (2008) 168 Cal. App. 4th 1194, 1219, 86 Cal. Rptr. 3d 196]* . Although there is generally no duty to prevent economic loss to third parties in negligence actions at common law, the Right to Repair Act abrogates that rule with respect to actions brought by homeowners against individual product manufacturers for a violation of the Act's standards based on the manufacturer's negligence or breach of contract [*Greystone Homes, Inc. v. Midtec, Inc. (2008) 168 Cal. App. 4th 1194, 1217, 86 Cal. Rptr. 3d 196]* . A builder's derivative equitable indemnity claim is premised on the homeowners' losses. Thus, the fact that the builder could not prevail on a direct cause of action against a manufacturer would not defeat the builder's derivative equitable indemnity claim [*Greystone Homes, Inc. v. Midtec, Inc. (2008) 168 Cal. App. 4th 1194, 1218-1219, 86 Cal. Rptr. 3d 196]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsExpress WarrantiesContracts LawContract Conditions & ProvisionsImplied WarrantiesFitnessContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawTortsConstruction Defects

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10-104 California Forms of Pleading and Practice--Annotated § 104.47

§ 104.47 Strict Liability Action Not Available to Lender

A lender may not invoke the doctrine of strict liability in an action against a developer for defects in construction, because a lender has the power to require the developer to conform to proper construction methods and standards, and is not in the vulnerable position of a buyer who must rely on the owner's representations and expertise [*U.S. Financial v. Sullivan (1974) 37 Cal. App. 3d 5, 17-18, 112 Cal. Rptr. 18]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawDefectsReal Property LawTortsConstruction DefectsTortsProducts LiabilityManufacturing DefectsTortsProducts LiabilityStrict Liability

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10-104 California Forms of Pleading and Practice--Annotated § 104.48

§ 104.48 Contractor's Injury to Prospective Economic Advantage

A contractor owes a duty of care to the tenant of a building undergoing construction work to perform the work in a manner that does not cause undue injury to the tenant's business, when the injury is foreseeable. Thus, a tenant has a cause of action against a contractor for negligence in not completing improvements on the premises within a reasonable time pursuant to the contractor's contract with the landlord, if the delay damaged the tenant by causing loss of prospective advantage in its business on the premises [*J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 803-808, 157 Cal. Rptr. 407, 598 P.2d 60* ; *see § 104.256*].

Similarly, a contractor has a cause of action against a negligent subcontractor when the subcontractor's failure to perform damages the contractor by delaying the contractor's performance [*Chameleon Engineering Corp. v. Air Dynamics Inc. (1980) 101 Cal. App. 3d 418, 421-423, 161 Cal. Rptr. 463]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawTortsConstruction DefectsTortsBusiness TortsCommercial InterferenceBusiness RelationshipsGeneral OverviewTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligenceGeneral Overview

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10-104 California Forms of Pleading and Practice--Annotated § 104.49

§ 104.49 Fraud in Inducement to Contract

Any person who is induced to contract for a work of improvement, including but not limited to a home improvement, in reliance on false or fraudulent representations or false statements knowingly made, may sue and recover from the contractor or solicitor a penalty of $500 plus reasonable attorney's fees, in addition to any damages sustained by him or her by reason of the false or fraudulent statements or representations made by the contractor or solicitor [*Bus. & Prof. Code § 7160*]. For forms of complaint based on fraud by an owner or by a contractor and subcontractor, see *§§ 104.257* and *104.258*, respectively.

For discussion of actions based on fraud, see Ch. 269, *Fraud and Deceit* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsTortsBusiness TortsFraud & MisrepresentationConstructive FraudGeneral Overview

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10-104 California Forms of Pleading and Practice--Annotated § 104.50

§ 104.50 Award Against Unlicensed Contractor

[1] Treble Damages

Any unlicensed contractor who causes injury or damage to another person as a result of providing goods or performing services for which a contractor's license is required pursuant to *Bus. & Prof. Code 7000 et seq.* (Chapter 9 of Division 3 of the Business and Professions Code) is liable to the injured person for treble the amount of damages assessed in a civil action in any court having proper jurisdiction [*Code Civ. Proc. § 1029.8(a)*]. The additional damages provided may not exceed $10,000 [*Code Civ. Proc. § 1029.8(c)*].

For a form of complaint seeking to restrain an unlicensed person from acting as a contractor, see *§ 104.259*. For a form of allegation for treble damages for use in a complaint against an unlicensed person, see *§ 104.260*.

[2] Costs and Fees

The court may also, in its discretion, award all costs and attorney's fees to the injured person if he or she prevails in the action [*Code Civ. Proc. § 1029.8(a)*].

[3] Effect and Applicability of Award Provision

Code Civ. Proc. § 1029.8 may not be construed to confer an additional cause of action or to affect or limit any other remedy, including, but not limited to, a claim for exemplary damages [*Code Civ. Proc. § 1029.8(b)*; *see generally* Ch. 177, *Damages*]. They do not apply to actions for unfair trade practices under the Unfair Practices Act (*Bus. & Prof. Code § 17000 et seq.*) brought by persons who hold the same license as is required for the activity over which the unlicensed person is being sued, or a closely related license [Civ. Code § 1029.8(e); *see generally* Ch. 565, *Unfair Competition*].

[4] "Unlicensed Person" Exclusions

For purposes of *Code Civ. Proc. § 1029.8*, "unlicensed person" does not include a person, partnership, corporation, or

other entity providing goods or services under the good faith belief that he, she, or it is properly licensed and acting within the proper scope of the license [*Code Civ. Proc. § 1029.8(d)(1)*]. This good faith exception is broader than the substantial compliance exception to the licensing requirement set forth in the license law [*Bus. & Prof. Code § 7031(e)*; *see § 104.83[4][d]*]. "Unlicensed person" also excludes any person, partnership, corporation, or other entity whose license has expired for nonpayment of renewal fees but who is eligible to renew the license simply by paying the required fees [*Code Civ. Proc. § 1029.8(d)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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10-104 California Forms of Pleading and Practice--Annotated § 104.51

§ 104.51 Owner's Misrepresentation

[1] Duty to Disclose Difficulties

By failing to impart its knowledge of difficulties to be encountered in a project, the owner will be liable for misrepresentation if the contractor is unable to perform according to the contract provisions because of the undisclosed difficulties [*Warner Constr. Corp. v. City of Los Angeles (1970) 2 Cal. 3d 285, 293-294, 85 Cal. Rptr. 444, 466 P.2d 996]* . For example, the State of California had a duty to inform a contractor on a bridge repair job of tidal difficulties encountered during the prior repair of an identical part of the bridge 200 feet from the part being bid on by the contractor [*Welch v. State (1983) 139 Cal. App. 3d 546, 555-556, 188 Cal. Rptr. 726* ; *see § 104.257* (nondisclosure of soil condition)].

[2] Tort and Contract Liability to Contractor

In a situation in which the owner fails to disclose its knowledge of difficulties to be encountered in a project contracted for, the owner's misrepresentation or nondisclosure will give rise to both tort and contract causes of action [*Warner Constr. Corp. v. City of Los Angeles (1970) 2 Cal. 3d 285, 293-294, 85 Cal. Rptr. 444, 466 P.2d 996* ; *see Civ. Code §§ 1567, 1572-1574, 1689, 1709, 1710*]. This is an important point in cases involving contracts with public agencies, since tort actions for misrepresentation against public agencies are barred by statute [*Gov. Code § 818.8*], but contract actions are not [*Warner Constr. Corp. v. City of Los Angeles (1970)2 Cal. 3d 285, 293-294, 85 Cal. Rptr. 444, 466 P.2d 996* ; *see Civ. Code § 2782(b)*; *see also § 104.12*].

If the contractor elects to perform the contract and sue for damages for the misrepresentation, he or she will be entitled to recover the additional cost of construction attributable to the misrepresentation plus a reasonable profit on the additional work [*Warner Constr. Corp. v. City of Los Angeles (1970) 2 Cal. 3d 285, 301, 85 Cal. Rptr. 444, 466 P.2d 996]* . Alternatively, the contractor may rescind the contract and sue for restitution of any benefits conferred on the owner under the contract [*Civ. Code §§ 1689(b)(1), 1692*; *see § 104.23[1]*].

For discussion of the right to plead inconsistent causes of action and the rules applicable to such actions, see *§ 104.41[6]*. For a form of complaint by a contractor against a public entity for injunctive relief and damages for breach,

negligence, and fraud, see *§ 104.252*.

[3] Availability of Negligent-Reliance Defense

A defendant who misrepresents the facts and induces the plaintiff to rely on his or her statements may not assert in an equitable action that the plaintiff's reliance was negligent, unless the plaintiff's conduct, in light of his or her intelligence and information, is preposterous or irrational [*Van Meter v. Bent Constr. Co. (1956) 46 Cal. 2d 588, 595, 297 P.2d 644]* .

[4] Liability for Incorrect Plans and Specifications

A contractor who, acting reasonably, is misled by incorrect plans and specifications issued by the owner as the basis for bids, and who, as a result, submits a bid that is lower than he or she would otherwise make, may recover in a contract action against the owner for any extra work necessitated by the incorrect plans and specifications [*Coleman Engineering Co. v. North American Aviation, Inc. (1966) 65 Cal. 2d 396, 404, 55 Cal. Rptr. 1, 420 P.2d 713* ; *see § 104.254*].

For discussion of the contractor's rights when the parties enter into an agreement concerning payment for the extras occasioned by the incorrect plans and specifications, see *§ 104.15[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 104.52 Owner's Liability Under Peculiar Risk Doctrine

Under the peculiar risk doctrine, a property owner who hires an independent contractor to perform work that is inherently dangerous can be held liable for tort damages when the contractor's negligence causes injury to others [*Privette v. Superior Court (1993) 5 Cal. 4th 689, 691, 21 Cal. Rptr. 2d 72, 854 P.2d 721]* . The property owner is entitled to equitable indemnity from the independent contractor responsible for the injury [*Privette v. Superior Court (1993) 5 Cal. 4th 689, 695, 21 Cal. Rptr. 2d 72, 854 P.2d 721]* .

This doctrine protects innocent bystanders or neighboring property owners; if the injured party is an employee of the independent contractor, the employee's remedy is the workers' compensation system, and the employee cannot reach the property owner under the peculiar risk doctrine [*Privette v. Superior Court (1993) 5 Cal. 4th 689, 696, 701-702, 21 Cal. Rptr. 2d 72, 854 P.2d 721* ; *see Toland v. Sunland Housing Group, Inc. (1998) 18 Cal. 4th 253, 256, 74 Cal. Rptr. 2d 878, 955 P.2d 504* (*Privette* rationale precludes hirer's liability for failure to require necessary precautions in the contract or otherwise ensure that precautions are undertaken)] or under a negligent hiring theory [*see Camargo v. Tjaarda Dairy (2001) 25 Cal. 4th 1235, 1241, 108 Cal. Rptr. 2d 617, 25 P.3d 1096]* .

For further discussion of the peculiar risk doctrine and a form of complaint under the doctrine against an independent contractor and the person who hired the contractor to do a particular job, see Ch. 248, *Employer's Liability for Employee's Torts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsTortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsVicarious LiabilityIndependent ContractorsPeculiar Risk

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10-104 California Forms of Pleading and Practice--Annotated § 104.53

§ 104.53 Lender's Liability

[1] No Liability Unless Acting Outside Normal Scope of Activities or Party to Misrepresentation

A lender who makes a loan of money, the proceeds of which are used or may be used by the borrower to finance the design, manufacture, construction, repair, modification, or improvement of real or personal property for sale or lease to others, may not be held liable to third persons for any loss or damage occasioned by any defect in the real or personal property so designed, manufactured, constructed, repaired, modified, or improved, or for any loss or damage resulting from the failure of the borrower to use due care in the design, manufacture, construction, repair, modification, or improvement of the property, unless the loss or damage is a result of an act of the lender outside the scope of the activities of a lender of money or unless the lender has been a party to misrepresentations with respect to the property [*Civ. Code § 3434*; *Nymark v. Heart Fed. Savings & Loan Assn. (1991) 231 Cal. App. 3d 1089, 1092, 283 Cal. Rptr. 53]* . When a lender's participation has little or no effect on purchasers and is limited to that of a conventional construction lender, the lender owes purchasers of the property no legal duty to protect them from damages caused by defects in the construction [*Bradler v. Craig (1969) 274 Cal. App. 2d 466, 476, 79 Cal. Rptr. 401]* . A lender's occasional general inspections of the project, made solely to protect its security interest in the project, are within the scope of the normal activities of a lender and will not expose the lender to liability for defects in the construction [*Meyers v. Guarantee Sav. & Loan Assn (1978) 79 Cal. App. 3d 307, 312, 144 Cal. Rptr. 616* ; *see Kim v. Sumitomo Bank (1993) 17 Cal. App. 4th 974, 979-982, 21 Cal. Rptr. 2d 834* (construction lender who does not have control over construction project is not fiduciary of borrower and does not have duty to inspect the project)].

[2] Active Participation With Right of Control

Conversely, a lender who is an active participant in the construction of a housing development with the right to exercise extensive control of the enterprise is under a duty to the buyers of the homes to exercise reasonable care to protect them from damages caused by major structural defects [*Connor v. Great Western Sav. & Loan Ass'n (1968) 69 Cal. 2d 850, 866-867, 73 Cal. Rptr. 369, 447 P.2d 609]* . The fact that the lender was not in privity of contract with any of the home buyers does not absolve it of liability for its own negligence in creating an unreasonable risk of harm to them. Privity of contract is not necessary to establish the existence of a duty to exercise ordinary care not to injure another. Such a duty may arise out of a voluntarily assumed relationship if public policy so dictates [*Connor v. Great Western*

Sav. & Loan Ass'n (1968) 69 Cal. 2d 850, 865, 73 Cal. Rptr. 369, 447 P.2d 609] . For a form of complaint by a purchaser against a lender for defects in construction, see *§ 104.251*.

[3] Factors Considered

The facts and circumstances to be considered in determining whether a lender owes a duty to the purchasers of developed properties include all of the following [*Connor v. Great Western Sav. & Loan Ass'n (1968) 69 Cal. 2d 850, 865, 73 Cal. Rptr. 369, 447 P.2d 609* ; *Nymark v. Heart Fed. Savings & Loan Assn. (1991) 231 Cal. App. 3d 1089, 1098, 283 Cal. Rptr. 53]* :

- The extent to which the transaction was intended to affect the plaintiff;
- The foreseeability of harm to the plaintiff;
- The degree of certainty that the plaintiff suffered injury;
- The closeness of the connection between the lender's conduct and the injury suffered;
- The moral blame attached to the lender's conduct; and
- The policy of preventing future harm.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawDefectsReal Property LawFinancingConstruction LoansReal Property LawTortsConstruction Defects

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10-104 California Forms of Pleading and Practice--Annotated § 104.54

§ 104.54 Statutes of Limitations for Tort Actions

Actions for personal injury or wrongful death are ordinarily required to be brought within two years [*Code Civ. Proc. § 335.1*]. Actions based on injury to personal or real property must be brought within three years [*Code Civ. Proc. § 338(b), (c)*].

Actions based on patent deficiencies in the design, specifications, surveying, planning, supervision or observation of construction, or construction of an improvement to real property are governed by a four-year statute of limitations [*Code Civ. Proc. § 337.1(a)*; *see § 104.25[3][b]*]. If an injury to property or to a person, or an injury causing wrongful death, occurs as a result of such a deficiency during the fourth year after substantial completion of the construction, an action in tort to recover damages may be brought within one year after the date on which the injury occurred (irrespective of the date of death). In no event may such an action be brought more than five years after the substantial completion of construction of the improvement [*Code Civ. Proc. § 337.1(b)*]. The four-year limitations period may not be asserted by way of defense by any person who is in actual possession or control, as owner, tenant, or otherwise, of an improvement to real property at the time any deficiency in the improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action [*Code Civ. Proc. § 337.1(d)*].

An action for relief on the ground of fraud or mistake must be brought within three years, and the cause of action will be deemed not to have occurred until the aggrieved party's discovery of the facts constituting the fraud or mistake [*Code Civ. Proc. § 338(d)*].

For further discussion of statutes of limitations, see Ch. 345, *Limitation of Actions* .

Legal Topics:

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

§§ 104.55[Reserved]

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§ 104.70 Governing Statutes

The licensing, bonding, and discipline of contractors is governed by the Contractors' State License Law (*Bus. & Prof. Code § 7000 et seq.*) ("the license law") and the rules and regulations adopted by the Contractors' State License Board to carry out the provisions of the license law [*Bus. & Prof. Code § 7008*; *see 16 Cal. Code Reg. § 810 et seq.*]. The license law is administered by the Contractor's State License Board, an agency of the Department of Consumer Affairs [*Bus. & Prof. Code §§ 7000.5* (repealed by its own terms on January 1, 2011, unless a subsequent statute that deletes or extends that date is enacted before January 1, 2011), 7010]. The Board appoints a Registrar as its executive officer and secretary to carry out all of the administrative duties provided in the license law and delegated to the Board [*Bus. & Prof. Code § 7011* (repealed by its own terms on January 1, 2011, unless a subsequent statute that deletes or extends that date is enacted before January 1, 2011)]. In its discretion, the Board may review any decision of the Registrar and sustain or reverse it by a majority vote [*Bus. & Prof. Code § 7013*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesReal Property LawConstruction LawContractors & Subcontractors

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§ 104.71 Purpose of License Law

The primary purpose of the license law is to protect the public against dishonesty and incompetency in the contracting business [*Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 995, 277 Cal. Rptr. 517, 803 P.2d 370* ; *Vallejo Development Co. v. Beck Development Co. (1994) 24 Cal. App. 4th 929, 938, 29 Cal. Rptr. 2d 669]* . Consistent with this purpose, protecting the public is the highest priority of the Contractors' State License Board in exercising its licensing, regulatory, and disciplinary functions. Whenever protection of the public is inconsistent with other interests sought to be promoted, protection of the public is paramount [*Bus. & Prof. Code § 7000.6*].

Legal Topics:

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§ 104.72 Contractor Defined

For purposes of the license law, the term "contractor" is synonymous with the term "builder" [*Bus. & Prof. Code § 7026*]. It refers to any person who undertakes to construct, alter, repair, add to, subtract from, improve, move, wreck, or demolish any building, highway, road, parking facility, railroad, excavation or other structure, project, development, or improvement, including the erection of scaffolding or cleaning of grounds or structures connected with this work, or the preparation and removal of roadway construction zones, lane closures, flagging, or traffic diversions, or installing, repairing, maintaining, or calibrating monitoring equipment for underground storage tanks. "Roadway" includes, but is not limited to, public or city streets, highways, or any public conveyance [*Bus. & Prof. Code § 7026*]. The definition of "contractor" encompasses subcontractors and specialty contractors [*Bus. & Prof. Code § 7026*; *see Bus. & Prof. Code § 7058* ("specialty contractor" defined)]. "Master builders" or "master developers," that is, developers who provide labor and materials through licensed, third-party general contractors, are also contractors and required to be licensed [*Vallejo Development Co. v. Beck Development Co. (1994) 24 Cal. App. 4th 929, 939-943, 29 Cal. Rptr. 2d 669]* .

The term "contractor" also includes any person, consultant to an owner-builder, firm, association, organization, partnership, business trust, corporation, or company who or that undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid to construct any building or home improvement project, or any part of a building or home improvement project [*Bus. & Prof. Code § 7026.1(b)*].

The term "person," as used in the license law, includes an individual, firm, copartnership, corporation, association, or other organization, or any combination of the foregoing [*Bus. & Prof. Code § 7025*].

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§ 104.73 Other Persons Considered Contractors

[1] Home Improvement Contractors

A contractor engaged in the home improvement business, which includes improvements outdoors as well as indoors [*see Bus. & Prof. Code § 7151*], is subject to special provisions of the license law [*see Bus. & Prof. Code § 7150 et seq.*]. For further discussion of home improvement contractors, see *§ 104.100* et seq.

[2] Mobilehome Installers

The term "contractor" includes persons who are involved in the construction, installation, alteration, repair, or preparation for moving of a mobilehome [*see Bus. & Prof. Code § 7026.2(d)(1)*; *Health & Safety Code § 18008* ("mobilehome" defined)] or one of its accessory buildings or structures [*see Bus. & Prof. Code § 7026.2(d)(2)*; *Health & Safety Code § 18008.5* ("mobilehome accessory building or structure" defined)], when the work is performed on a site for the purpose of occupancy as a dwelling [*Bus. & Prof. Code § 7026.2(a)*; *see Bus. & Prof. Code §§ 7045, 7046*].

A manufacturer who constructs a mobilehome or mobilehome accessory building or structure at a place other than the site on which the mobilehome is installed for the purpose of occupancy as a dwelling is not subject to the license law, nor is a manufacturer who is engaged solely in performing work in compliance with a warranty. The license law covers, however, a manufacturer who is engaged in on-site construction, alteration, or repair of mobilehomes pursuant to specialized plans, specifications, or models, or any work other than in compliance with a warranty [*Bus. & Prof. Code § 7026.2(b)*].

The seller of a manufactured home [*see Bus. & Prof. Code § 7026.2(d)(3)*; *Health & Safety Code § 18007* ("manufactured home" defined)] or mobilehome who holds a retail manufactured home or mobilehome dealer's license under California law is not subject to the license law if the installation of the manufactured home or mobilehome is to be performed by a licensed contractor and the seller certifies that fact in writing to the buyer prior to the performance of the installations. The certification must include the name, business address, and contractor's license number of the contractor by whom the installation will be performed [*Bus. & Prof. Code § 7026.2(c)*].

[3] Air Conditioning, Heating, and Refrigeration Servicers

The term "contractor" embraces any person not exempt as an employee who maintains or services air conditioning, heating, or refrigeration equipment that is a fixed part of the structure to which it is attached [*Bus. & Prof. Code § 7026.1(a)*; *see Bus. & Prof. Code § 7053*, discussed *§ 104.74[4]*].

[4] Carpet Installers

Persons who install or contract for the installation of carpet wherein the carpet is attached to the structure by any conventional method (as determined by custom and usage in the trade) are considered contractors for purposes of the license law. Nonetheless, a seller of installed carpet who holds a retail furniture dealer's license is not required to have a contractor's license if (1) the installation of the carpet is performed by a licensed contractor, and (2) the seller so certifies to the buyer in a writing that contains specified information and is delivered to the buyer prior to the performance of the installation [*Bus. & Prof. Code § 7026.3*].

[5] Temporary Labor Service Agencies

The term "contractor" also includes a temporary labor service agency that, as the employer, provides employees to perform work for which a license is required. A qualifying individual is not required to be present to supervise the work. This does not apply if there is a properly licensed contractor who exercises supervision on behalf of an individual or firm and who is directly responsible for the final results of the work. A contractor requesting the services of a temporary labor service agency must provide his or her license number to the agency [*Bus. & Prof. Code § 7026.1(c)*; *see Bus. & Prof. Code § 7068.1(a)*].

[6] Tree Trimmers and Movers

Persons not otherwise exempt from the license law who perform tree removal, tree pruning, or stump removal, or who engage in tree or limb cabling or guying, are also considered contractors. The term "contractor" does not, however, cover a person performing the activities of a nurseryperson who in the normal course of routine work performs incidental pruning of trees, or guying of planted trees and their limbs, or a gardener who in the normal course of routine work performs incidental pruning of trees measuring less than 15 feet in height after planting [*Bus. & Prof. Code § 7026.1(d)*].

[7] Water Well Drillers

The term "contractor" covers any person engaged in the business of drilling, digging, boring, or otherwise constructing, deepening, repairing, reperforating, or abandoning any water well, cathodic protecting well, or monitoring well [*Bus. & Prof. Code § 7026.1(e)*].

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§ 104.74 Persons Not Governed by License Law

[1] Architects

The license law does not apply to a licensed architect acting solely in his or her professional capacity [*Bus. & Prof. Code § 7051*; *see Bus. & Prof. Code § 5500 et seq*. (licensing of architects)]. An unlicensed architect may, however, be subject to the license law [*see Cash v. Blackett (1948) 87 Cal. App. 2d 233, 237, 196 P.2d 585]* .

[2] Civil or Professional Engineers

The license law does not apply to a registered civil or professional engineer acting solely in his or her professional capacity [*Bus. & Prof. Code § 7051*; *see Bus. & Prof. Code § 6700 et seq.* (licensing of civil engineers)].

[3] Geologists and Geophysicists

The license law does not apply to geologists or geophysicists who are licensed under the Geologist and Geophysicist Act and who are operating within the scope of that act [*Bus. & Prof. Code § 7051*; *see Bus. & Prof. Code § 7800 et seq.* (Geologist and Geophysicist Act)].

[4] Employees

Employees in the construction business who receive wages as their sole compensation are exempt from the provisions of the license law, provided that they do not customarily engage in an independently established business and do not have the right to control the final results of the work performed or discretion as to the manner of performance [*Bus. & Prof. Code § 7053*]. Thus, application of the license law may depend on the capacity in which work is performed rather than the nature of the work. A person working in the construction trades will be considered a contractor rather than an employee if he or she renders service for a specified compensation for a specified result, under the control of the owner only as to the result of the work, not as to the means by which the result is accomplished. The fact that the owner or an architect may be able to make alterations, deviations, modifications, and omissions will not change that status [*People v. Rogers (1954) 124 Cal. App. 2d Supp. 909, 911 , 271 P. 2d 231]* .

The determination of employee status for purposes of qualifying under the statutory exemption usually depends on the facts of the particular case. For example, the person will probably be deemed an employee if he or she is paid an hourly rate, and the owner supervises the construction and hires the subcontractors [*see Rodoni v. Harbor Eng'rs (1961) 191 Cal. App. 2d 560, 562-563, 12 Cal. Rptr. 924* ; *Denton v. Wiese (1956) 144 Cal. App. 2d 175, 180, 300 P.2d 746* ; *Dorsk v. Spivack (1951) 107 Cal. App. 2d 206, 208-209, 236 P.2d 840]* . Conversely, in an action in which the workers agreed to construct several houses, employed and discharged all labor without consulting the owner, kept time records of all employees' hours except their own, and were to receive, in addition to an incentive bonus for completion, such a large sum as compensation for the construction that the money could not possibly be construed as wages, the court held them to be contractors subject to the requirements of the license law [*Albaugh v. Moss Constr. Co. (1954) 125 Cal. App. 2d 126, 128-131, 269 P.2d 936* ; *see Barry v. Contractors State License Bd. (1948) 85 Cal. App. 2d 600, 605, 193 P.2d 979* (plaintiffs who received lump sum payment rather than wages as compensation as not exempt employees)].

The exemption of *Bus. & Prof. Code § 7053* does not apply to employees covered by regulations governing the home improvement business [*Bus. & Prof. Code § 7053*; *see Bus. & Prof. Code § 7150 et seq.*; *see also § 104.100*].

The presumption of *Lab. Code § 2750.5*, which provides that workers performing services requiring a contractor's license are employees for purposes of determining eligibility for workers' compensation benefits, does not apply to a determination of whether a worker is exempt from the requirements of the contractors' license law as an employee [*see Fillmore v. Irvine (1983) 146 Cal. App. 3d 649, 656-657, 194 Cal. Rptr. 319]* .

[5] Government Officials and Employees

The license law does not apply to authorized representatives of the United States government, the State of California, or any incorporated town, city, county, irrigation district, reclamation district, or other municipal or political corporation or subdivision of California, provided the entity or its representative is acting within the scope of the entity's or representative's official capacity [*Bus. & Prof. Code § 7040(a)*]. Nor does it apply to court officers acting within the scope of their offices [*Bus. & Prof. Code § 7041*]. These provisions, however, do not authorize an entity or its authorized representative to enter into or authorize a contract with an unlicensed contractor for work that is required by the license law to be performed by a licensed contractor [*Bus. & Prof. Code § 7040(b)*].

[6] Public Utilities and Cable Television Corporations

Public utilities operating under the regulation of the State Railroad Commission or the Public Utilities Commission, and cable television corporations, are excluded from the coverage of the law under specified conditions [*Bus. & Prof. Code §§ 7042-7042.5*].

The conditions under which gas, heat, or electrical corporations, or their subsidiaries, that are regulated as public utilities may conduct work for which a contractor's license is normally required are set forth in *Bus. & Prof. Code § 7042.1*.

[7] Owner Doing Own Work

The license law does not apply to an owner who owns or improves a structure on his or her property, provided [*Bus. & Prof. Code § 7044(a)(1)*]]:

- None of the improvements is intended or offered for sale; and

- Either the owner personally performs all of the work, or any work not performed by the owner is performed by the owner's employees with wages as their sole compensation.

The license law is also inapplicable to an owner who builds or improves a structure on his or her property, provided [*Bus. & Prof. Code § 7044(a)(2)*]:

- The owner directly contracts with licensees who are duly licensed to contract for the work of the respective trades involved in completing the project; and

- For projects involving single-family residential structures, no more than four of these structures are intended or offered for sale in a calendar year, and the owner does not contract with a general contractor for the construction.

A homeowner who improves his or her principal place of residence is exempt from the provisions of the license law if all of the following conditions exist [*Bus. & Prof. Code § 7044(a)(3)*]:

- The work is performed before sale;

- The homeowner has actually resided in the residence for the 12 months before completion of the work; and

- The homeowner has not availed himself or herself of this exemption on more than two structures more than once during any three-year period.

Proof of the sale or offering for sale of a structure by or for the owner-builder within one year after completion for the structure constitutes a rebuttable presumption affecting the burden of proof that the structure was undertaken for purposes of sale [*Bus. & Prof. Code § 7044(b)(1)*]. The presumption becomes conclusive if there is proof of sale or offering for sale of five or more structures by the owner-builder within one year after completion [*Bus. & Prof. Code § 7044(b)(2)*].

Injunctive relief is available to any licensed contractor, association of contractors, labor organization, affected consumer, or district attorney, as well as to the attorney general, to prohibit violation of the license law by an owner-builder who is not licensed or exempt from the law's provisions. In such an action, the plaintiff is not required to prove irreparable injury. The prevailing party is entitled to attorney's fees and all costs incurred in prosecuting or defending the action [*Bus. & Prof. Code § 7044.01*; *see § 104.259*].

[8] Real Estate Licensees

The license law does not apply to real estate licensees acting within the course and scope of their license. The exemption, however, does not authorize a real estate licensee or property manager to act in the capacity of a contractor without a contractor's license [*Bus. & Prof. Code § 7044.1*].

[9] Construction Managers

An entity that provides construction management services to a private owner developing commercial real property is not required to be licensed pursuant to the Contractors' State License Law. The term "contractor" does not include persons who perform construction management services [*The Fifth Day LLC v. Bolotin (2009) 172 Cal. App. 4th 939, 950, 91 Cal. Rptr. 3d 633]* .

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§ 104.75 Surety Insurers

The license law does not apply to an admitted surety insurer whenever it engages a contractor to undertake the completion of a contract on which a performance or completion bond was issued by the surety insurer; provided all actual construction work is performed by duly licensed contractors [*Bus. & Prof. Code § 7044.2*].

[1] Furnishers of Materials or Supplies

The license law does not apply to persons who merely furnish materials or supplies without fabricating them into products or consuming them in the performance of the work of the contractor [*Bus. & Prof. Code § 7052*].

[2] Alarm Company Operators

The license law does not apply to licensed alarm company operators who install, maintain, monitor, sell, alter, or service alarm systems [*Bus. & Prof. Code § 7054*; *see Bus. & Prof. Code § 7590 et seq.* (licensing of alarm company operators)].

[3] Satellite Antenna Installers

The license law exempts electronic and appliance repair dealers whose activities consist only of installing satellite antenna systems on residential structures or property [*Bus. & Prof. Code § 7054.5*].

[4] Structural Pest Control Operators

A licensed structural pest control operator acting within the scope of his or her license is exempt from the requirements of the license law [*Bus. & Prof. Code § 7051*; *see Bus. & Prof. Code § 8500 et seq.* (licensing of structural pest control operators)].

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§ 104.76 Activities Not Governed by License Law

[1] Activities Out of State

The license law has been held not to apply to persons who perform construction work outside of California. Because the purpose of the law is to protect only California consumers against incompetent or dishonest contractors, the legislative objective would not be served in cases involving structures located out of state [*Conderback, Inc. v. Standard Oil Co. (1966) 239 Cal. App. 2d 664, 679, 48 Cal. Rptr. 901]* . Therefore, a California corporation that enters into a contract in California to do construction work in another state is not required to meet the requirements of the California license law [*Conderback, Inc. v. Standard Oil Co. (1966) 239 Cal. App. 2d 664, 678-679, 48 Cal. Rptr. 901]* . On the other hand, foreign contractors engaging in construction activities in California are within the coverage of the license law [*Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 995, 277 Cal. Rptr. 517, 803 P.2d 370]* .

[2] Activities Involving Finished Products and Personal Property

The license law does not apply to the sale or installation of any finished products, materials, or articles of merchandise that do not become a fixed part of the structure, or to any material supplier or manufacturer furnishing finished products, materials, or articles of merchandise who does not install or contract for the installation of those items. For this purpose, the term "finished products" does not include installed carpets [*see § 104.73[4]*] or mobilehomes or mobilehome accessory structures [*Bus. & Prof. Code § 7045*; *see § 104.73[2]*]. The determination of whether goods installed become a fixed part of the structure is a question of fact [*Walker v. Thornsberry (1979) 97 Cal. App. 3d 842, 847, 158 Cal. Rptr. 862* ; *see King v. Hinderstein (1981) 122 Cal. App. 3d 430, 436, 176 Cal. Rptr. 53* (installation of prefabricated swimming pool as not within finished products exception)].

Construction, alteration, improvement, or repair of personal property is also exempt from the license law. The term "personal property" does not include mobilehomes or mobilehome accessory structures [*Bus. & Prof. Code § 7046*; *see Bus. & Prof. Code § 7026.2*].

[3] Oil and Gas Operations

The license law does not apply to any construction, repair, or operation incidental to the discovering of petroleum or gas, or to the drilling, testing, abandoning, or other operation of any petroleum or gas well, when performed by an owner or lessee [*Bus. & Prof. Code § 7043*].

[4] Projects Under $500

The license law does not apply to small operations of a casual, minor, or inconsequential nature on a project in which the aggregate contract price for labor, materials, and all other items is less than $500 [*Bus. & Prof. Code § 7048*]. These operations are not exempt when the construction work is part of a larger operation by the same or a different contractor, or when the operation is purposely divided into contract amounts of less than $500 to evade the provisions of the license law [*Bus. & Prof. Code § 7048*; *see Barry v. Contractors State License Bd. (1948) 85 Cal. App. 2d 600, 604-605, 193 P.2d 979* ($100 aggregate limit under former *Bus. & Prof. Code § 7048*)].

[5] Irrigation, Conservation, and Cultivation Work

The license law does not apply to any construction or operation incidental to the construction and repair of irrigation and drainage ditches of regularly constituted irrigation or reclamation districts, or to farming, dairying, agriculture, viticulture, horticulture, or to stock or poultry raising, or to clearing or other work on the land in rural districts for fire prevention purposes. The license law does apply, however, if the work is done by a licensed contractor [*Bus. & Prof. Code § 7049*]. Moreover, the license law applies to the business of drilling, digging, boring, or otherwise constructing, deepening, repairing, reperforating, or abandoning water wells [*Bus. & Prof. Code § 7049*; *see Bus. & Prof. Code § 7026.1(e)* (discussed under *§ 104.73[7]*)].

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§ 104.77 Examination Requirement

[1] Qualification of Individuals or Entities

The registrar of the Contractors' State License Board is responsible for the investigation, classification, and qualification of applicants for licensure by written examination [*Bus. & Prof. Code §§ 7065, 7065.01*; *see Bus. & Prof. Code §§ 7068(b), 7071* (qualification for examination of individuals, partnerships, or corporations); *see also Housing Development Co. v. Hoschler (1978) 85 Cal. App. 3d 379, 388, 149 Cal. Rptr. 400* (manner in which general partner conducted union relations was relevant factor in evaluation of new partnership's application for license)]. Under certain circumstances, the examination requirement may be waived [*see Bus. & Prof. Code § 7065 et seq.*].

It is a misdemeanor for any unauthorized person to take the qualifying examination on behalf of an applicant [*Bus. & Prof. Code § 7068.5*].

[2] Financial Solvency and Clean Record

Every applicant for a license must prove financial solvency, that is, operating capital in excess of $2,500. The applicant is required to provide any financial information deemed necessary by the Registrar. This information is confidential, but it may be admissible as evidence in an administrative hearing or judicial action if it is relevant to the proceeding [*Bus. & Prof. Code § 7067.5*].

Applicants for licensure must also show that they have never been refused a license or had a license revoked for reasons that would preclude the issuance of a license [*Bus. & Prof. Code § 7070*], and have never been convicted of a crime, done any act involving dishonesty, fraud, or deceit, or done any act that would be grounds for suspension or revocation of a license [*Bus. & Prof. Code §§ 480, 7069(a)*]. License applicants also must furnish a full set of fingerprints as part of a criminal history record check [*Bus. & Prof. Code § 7069(b)*].

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§ 104.78 Workers' Compensation Insurance Requirement

An applicant or licensee must have on file with the registrar at all times a current and valid Certificate of Workers' Compensation Insurance or Certification of Self-Insurance as a condition precedent to the issuance, reinstatement, reactivation, renewal, or continued maintenance of a license [*Bus. & Prof. Code § 7125(a)*]. Provided all other licensing requirements have been met, a contractor must be considered duly licensed at all times in which the registrar is required to accept a certificate of insurance or self-insurance [*Bus. & Prof. Code § 7125.3*]. This does not apply to an applicant or licensee who has no employees, provided he or she files a statement with the Board, on a prescribed form, before the issuance, reinstatement, reactivation, or continued maintenance of a license, certifying that the applicant or licensee does not employ any person so as to become subject to the workers' compensation laws, or is not otherwise required to provide workers' compensation insurance coverage [*Bus. & Prof. Code § 7125(b)*]. It also does not apply to the holder of an inactive license [*Bus. & Prof. Code § 7125(c)*]. The insurer must report to the Registrar specified information about the policy, including the dates that coverage is scheduled to commence and lapse and any applicable cancellation date [*Bus. & Prof. Code § 7125(d)*]. Until January 1, 2011, a roofing contractor holding an active C-39 license may be exempt from the workers' compensation certificate requirement for up to one year, after which he or she will be placed on inactive status [*see Bus. & Prof. Code § 7125(e), (f)*].

A certificate may be accepted up to 90 days after its effective date and, assuming the contractor is otherwise eligible to be licensed, the license will be reinstated retroactive to the certificate's effective date [*Bus. & Prof. Code § 7125.1(a)*]. Even if the certificate is not received within the initial 90-day period after it is effective, the Registrar will accept it and retroactively reinstate the license if the contractor can show that the failure to file within the 90-day period was due to circumstances beyond his or her control [*Bus. & Prof. Code § 7125.1(b)*].

The failure of a licensee to obtain or maintain workers' compensation insurance coverage when he or she is required to do so, will result in automatic license suspension by operation of law [*Bus. & Prof. Code § 7125.2*]. The suspension is effective on the earlier of either (1) the date the coverage lapses, or (2) the date the coverage is required to be obtained [*Bus. & Prof. Code § 7125.2(a)*].

The registrar must provide a licensee who is subject to suspension with a notice that includes the following [*Bus. &*

Prof. Code § 7125.2(b)]:

- The reason for the suspension and the effective date;

- A statement informing the licensee that a pending suspension will be posted to the license record for not more than 45 days before the posting of any required license suspension periods; and

- The procedures required to reinstate the license.

Following the suspension, the license may be reinstated at any time by showing proof of compliance with the workers' compensation insurance requirement [*Bus. & Prof. Code § 7125.2(c)*].

The following acts related to the workers' compensation insurance requirement constitute cause for disciplinary action [*Bus. & Prof. Code § 7125.4(a)*]:

- Filing a false statement or exemption;

- Employing a person for whom workers' compensation coverage is required after filing an exemption certificate and without first filing a Certificate of Workers' Compensation Insurance or Certificate of Self-Insurance; or

- Employing a person subject to workers' compensation coverage without maintaining coverage for that person.

A license qualifer who is responsible for assuring that a licensee complies with the Contractors' State License Law is also guilty of a misdemeanor for committing or failing to prevent the commission of any of these acts [*Bus. & Prof. Code § 7125.4(b)*].

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§ 104.79 Issuance and Renewal of License

[1] Issuance

Once an applicant has passed the licensing examination and investigation, he or she will be issued a license on payment of the required fee as determined by the Board [*see Bus. & Prof. Code §§ 7137, 7138.1*], and may then engage in business as a contractor under the terms of the license law [*Bus. & Prof. Code § 7072*]. An original license is considered probationary until it is renewed [*Bus. & Prof. Code § 7077*; *see Bus. & Prof. Code §§ 7140, 7141*].

If a licensee makes a conclusive showing of experience in the classification applied for that is satisfactory to the Registrar, an additional classification may be added without further examination under certain conditions [*Bus. & Prof. Code § 7065.3*].

[2] Expiration and Renewal

A contractor's license expires two years after the last day of the month in which the license is issued, or two years from the date on which the renewed license last expired [*Bus. & Prof. Code § 7140*; *see Bus. & Prof. Code § 7153.2* (expiration of home improvement registration)]. The license may be renewed before expiration [*Bus. & Prof. Code § 7140*], or at any time within three years after expiration [*Bus. & Prof. Code § 7141*], by filing the prescribed form with the Registrar and paying the appropriate fee [*Bus. & Prof. Code §§ 7140, 7141*; *see Bus. & Prof. Code §§ 7137, 7138.1*]. If a license is not renewed within three years, the contractor must apply for a new license [*Bus. & Prof. Code § 7141*; *but see Bus. & Prof. Code § 7075.1(b), (c)* (when licenses may be reissued or reassigned)].

The Registrar may refuse to renew a license based on the failure of a licensee to complete the renewal application [*Bus. & Prof. Code § 7145*]. If a renewal application rejected for insufficiency or incompleteness is not returned by the licensee within 90 days, it will be deemed abandoned. The applicant then has 90 days after the date of abandonment to file a petition showing good cause for renewal [*Bus. & Prof. Code § 7145*].

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§ 104.80 Reciprocity Licensure

If an applicant is a licensed contractor in a similar classification in another state that accepts the California licensure qualifications for purposes of licensure in that state, and the Contractors' State License Board ascertains that the professional qualifications and conditions of good standing for licensure in the other state are at least as stringent as California's, the Registrar may accept the applicant's qualifications on a reciprocity basis [*Bus. & Prof. Code § 7065.4*]. In addition, if the applicant provides written certification from the other state that his or her license has been in good standing for the previous five years, the applicant's trade examination may be waived by the Registrar [*Bus. & Prof. Code § 7065.4*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesReal Property LawConstruction LawContractors & Subcontractors

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10-104 California Forms of Pleading and Practice--Annotated § 104.81

§ 104.81 Contractors Engaged in Asbestos-Related Work

[1] Required Certificate

A contractor who engages in asbestos-related work involving 100 square feet or more of asbestos-containing materials must be licensed and must be certified under the license law to perform the work [*Bus. & Prof. Code § 7058.5*]. For purposes of the certification requirements, "asbestos-related work" means any activity that, by disturbing asbestos-containing material, may release asbestos fibers into the air and that is not related to the manufacture of asbestos-containing products [*Lab. Code § 6501.8*; *see Lab. Code § 6501.7* (defining "asbestos")].

[2] Effect of Failure to Be Certified

Any contractor, whether licensed or unlicensed, who is required to be, but is not, certified to perform asbestos-related work is subject to a fine and possible license revocation or suspension for a first offense. Conviction of a subsequent offense carries with it a larger fine or imprisonment in the county jail, or both fine and imprisonment along with mandatory license revocation or suspension [*see Bus. & Prof. Code § 7028.1*]. Moreover, any owner of a commercial or industrial building or structure, any employer who engages in or contracts for asbestos-related work, any contractor or public agency, or any employee acting for any of the above who knowingly or negligently, or by failing to inquire, enters into a contract with another person who is required to be, and is not, certified is subject to civil prosecution on a first offense and to both civil and criminal prosecution on a subsequent offense [*see Bus. & Prof. Code § 7118.5*].

A criminal complaint may be brought by the Attorney General or by the District Attorney or prosecuting attorney of any city, in any county in the state with jurisdiction over the contractor or employer, by reason of the contractor's or employer's act, or failure to act, within that jurisdiction [*Bus. & Prof. Code § 7028.2*].

[3] Disclosure of Financial Relationship on Inspection

A contractor who has made an inspection to determine the presence of asbestos or the need for related remedial action with knowledge that the report either has been required by a person as a condition of making a loan of money secured by the property or is required by a public entity as a condition of issuing a permit concerning the property must disclose,

orally and in writing, if it is owned by or has any common ownership, or any financial relationship whatsoever, including, but not limited to, commissions or referral fees, with an entity in the business of performing the corrective work [*Bus. & Prof. Code § 7118.4(a)*]. This requirement does not prohibit a contractor that has contracted to perform corrective work after the report of another company has indicated the presence of asbestos or the need for related remedial action from making its own inspection prior to performing that corrective work or from making an inspection to determine whether the corrective measures were successful and, if not, thereafter performing additional corrective work [*Bus. & Prof. Code § 7118.4(b)*].

A violation of *Bus. & Prof. Code § 7118.4* is both (1) grounds for disciplinary action against the contractor, and (2) a misdemeanor punishable by fine or imprisonment in the county jail, or both [*Bus. & Prof. Code § 7118.4(c), (d)*]. Similar provisions apply to asbestos consultants [*see Lab. Code § 6509.5(c), (d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesAsbestosGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesReal Property LawConstruction LawContractors & Subcontractors

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§ 104.82 Contractors Removing or Remedying Other Hazardous Substances

[1] Required Certificate

A contractor must be certified before engaging in any removal or remedial action with regard to the release or threatened release of a hazardous substance, if the action requires the contractor to dig into the surface of the earth to remove the excavated material from a hazardous waste site [*Bus. & Prof. Code § 7058.7(a), (d)*; *see Health & Safety Code §§ 25322* ("remedial action" defined), 25323 ("removal" defined); *see also Health & Safety Code § 25300 et seq.*; *Bus. & Prof. Code § 7137(j)* (application fee for certification examination)]. "Removal or remedial action" does not include asbestos-related work, as defined in *Lab. Code § 6501.8* (discussed in *§ 104.81[1]*), or work related to a hazardous substance spill on a highway [*Bus. & Prof. Code § 7058.7(d)*].

[2] Penalties for Failure to Be Certified

Any contractor, whether licensed or unlicensed, who performs or engages in a removal or remedial action, as defined in *Bus. & Prof. Code § 7058.7(d)*, without being certified to perform those activities, on conviction of a first offense, is guilty of an infraction punishable by a fine and possible suspension or revocation of any contractor's license. On conviction of a subsequent offense, he or she is guilty of a misdemeanor requiring revocation or suspension of any contractor's license and either a fine or incarceration in the county jail, or both the fine and incarceration [*Bus. & Prof. Code § 7028.1*]. Identical penalties are imposed on any contractor who, either knowingly or negligently, or by reason of a failure to inquire, enters into a contract with another person who is required to be and is not certified to engage in a removal or remedial action [*Bus. & Prof. Code § 7118.6*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesCleanupGovernmentsState & Territorial GovernmentsLicensesReal Property LawConstruction LawContractors & Subcontractors

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§ 104.83 Penalties for Contracting Without Valid License

[1] Criminal Penalties

It is a misdemeanor for any person to engage in the business or act in the capacity of a contractor within California without having a valid contractor's license, unless that person is particularly exempted from the provisions of the license law [*Bus. & Prof. Code § 7028(a)*].

A first conviction is punishable by a fine not exceeding $5,000 or by imprisonment in a county jail not exceeding six months, or both [*Bus. & Prof. Code § 7028(b)*]. A second conviction carries a fine of the greater between: (1) 20 percent of the contract price; (2) 20 percent of the aggregate payments made to, or at the direction of, the unlicensed contractor; or (3) $5,000 and imprisonment in the county jail for not less than 90 days, except in an unusual case when the interests of justice would be served by a lesser sentence or fine [*Bus. & Prof. Code § 7028(c)*]. A third or subsequent conviction is punishable by a fine of (1) not less than $5,000 nor more than the greater of $10,000 or 20 percent of the contract price, or (2) 20 percent of the aggregate payments made to, or at the direction of, the unlicensed contractor, and by imprisonment in the county jail for not more than one year or less than 90 days. These penalties are cumulative to penalties available under other California laws [*Bus. & Prof. Code § 7028(d)*]. A person who engages in the business or acts in the capacity of a contractor is subject to these penalties if the person was named on a license that was previously revoked and, either in fact or under law, was held responsible for any act or omission resulting in the revocation [*Bus. & Prof. Code § 7028(e)*]. The indictment, information, or complaint based on any such violation by an unlicensed contractor must be filed within four years from the date the contract was proposed, entered into, completed, or abandoned, whichever occurred last [*Bus. & Prof. Code § 7028(g)*].

Any person who used the services of a contractor who has been convicted of engaging in the business, or acting in the capacity, of a contractor without a valid California contractor's license is a victim of crime and is eligible for restitution for economic losses, regardless of whether that person had knowledge that the contractor was unlicensed [*Bus. & Prof. Code § 7028(h)*; *see Penal Code § 1202.4*].

Any person, licensed or unlicensed, who willfully and intentionally uses, with intent to defraud, a contractor's license

number that does not correspond to the number on a currently valid contractor's license held by that person is punishable by a fine not exceeding $10,000 or by imprisonment in state prison, or in county jail for not more than one year, or by both the fine and imprisonment [*Bus. & Prof. Code § 7027.3* (penalties are cumulative)].

[2] Penalties for Conspiracy

Any person licensed under the provisions of *Bus. & Prof. Code § 100 et seq.* (Department of Consumers Affairs) or *Bus. & Prof. Code § 500 et seq.* (healing arts, professions, and vocations generally) is guilty of a misdemeanor and subject to the disciplinary provisions of the applicable code if he or she (1) conspires with a person not so licensed to violate any provision of the code, or (2) intends to aid or assist such a person in violating the provisions and allows his or her license to be used by the person or acts as his or her agent or partner [*Bus. & Prof. Code § 125*].

[3] Injunction Restraining Violations

In addition to all other remedies provided by law, when it appears to the Registrar, either on complaint or otherwise, that a licensee has engaged in, or is engaging in, any act, practice, or transaction that constitutes a violation of the license law whereby another person may be substantially injured, or that any person who does not hold a state contractor's license in any classification has engaged in, or is engaging in, any act, practice, or transaction that constitutes a violation of the license law, whether or not there is substantial injury, the Registrar may, either through the Attorney General or through the district attorney of the county in which the act, practice, or transaction is alleged to have been committed, apply to the superior court of that county, or any other county in which the person maintains a place of business or resides, for an injunction restraining that person from acting in the capacity of a contractor without a license in violation of the license law, or from acting in violation of the license law when another person may be substantially injured. On a proper showing, a temporary restraining order, a preliminary injunction, or a permanent injunction shall be granted [*Bus. & Prof. Code § 7028.3*].

A continuing violation of the licensing statutes [*see Bus. & Prof. Code § 7065 et seq.*] by a person who does not hold a valid California contractor's license in any classification may also be enjoined, on a proper showing, on the request of a licensed contractor or an association of contractors, a consumer affected by the violation, a district attorney, or the Attorney General. The plaintiff will not be required to prove irreparable injury [*Bus. & Prof. Code § 7028.4*; *see § 104.259*].

[4] Actions by Unlicensed Contractor Barred

[a] General Prohibition

No person engaged in the business or acting in the capacity of a contractor may bring or maintain any action, or recover in law or equity in any action, in any court of California for the collection of compensation for the performance of any act or contract for which a license is required under the license law without alleging that he or she was a duly licensed contractor at all times during the performance of the act or contract. This prohibition applies regardless of the merits of the cause of action [*Bus. & Prof. Code § 7031(a)*]. However, it does not apply to contractors who are each individually licensed under the license law but who fail to comply with the joint venture licensing provisions [*Bus. & Prof. Code § 7031(a)*; *see Bus. & Prof. Code § 7029* (license for joint venture)]. Lack of a license may be alleged as an affirmative defense to an action by a contractor [*see § 104.217*].

The prohibition on actions by unlicensed contractors "represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business outweighs any harshness between the parties, and that the deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of the state" [*Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 151, 308 P.2d 713]* . Moreover, the courts may not resort to equitable considerations in defiance of *Bus. & Prof. Code § 7031* [*Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 152, 308 P.2d 713]* , or carve "exceptional circumstances" exceptions from the

licensing requirement, such as to allow an out-of-state contractor who performs one-time construction services to bring an action to recover compensation [*Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 994-997, 277 Cal. Rptr. 517, 803 P.2d 370]* .

Bus. & Prof. Code § 7031 does not allow a contractor who was unlicensed at any time during contractual performance to recover compensation for individual acts performed while he or she was duly licensed [*MW Erectors Inc. v. Niederhauser Ornamental and Metal Works Co. (2005) 36 Cal. 4th 412, 425, 30 Cal. Rptr. 3d 755, 115 P.3d 41]* . However, if fully licensed at all times during contractual performance, a contractor is not barred from recovering compensation for the work solely because he or she was unlicensed when the contract was executed [*MW Erectors Inc. v. Niederhauser Ornamental and Metal Works Co. (2005) 36 Cal. 4th 412, 440, 30 Cal. Rptr. 3d 755, 115 P.3d 41]* .

1989 Stats., ch. 368, § 1, added the phrase "or recover in law or equity in any action" to *Bus. & Prof. Code § 7031(a)*, and thus presumably abrogated application of the rationale enunciated in *R.M. Sherman Co. v. W.R. Thomason, Inc. (1987) 191 Cal. App. 3d 559, 565, 236 Cal. Rptr. 577* , to situations in which an unlicensed contractor who is sued on the contract seeks to assert the equitable defense of set-off with respect to sums owing from the plaintiff.

[b] Proof of Licensure

If licensure or proper licensure is controverted, proof of licensure must be made by production of a verified certificate of licensure from the Contractors' State License Board, which establishes that the individual or entity bringing the action was duly licensed in the proper classification of contractors at all times during the performance of any act or contract covered by the action. No person or entity controverting licensure or proper licensure is required to produce a verified certificate. When licensure is controverted, the burden of proof to establish licensure is on the licensee [*Bus. & Prof. Code § 7031(d)*]. A general denial is sufficient to controvert a contractor's pleading of licensure so that the contractor must produce a verified certificate [*Advantec Group, Inc. v. Edwin's Plumbing Co. (2007) 153 Cal. App. 4th 621, 627, 63 Cal. Rptr. 3d 195]* .

[c] Unenforceability of Security Interests

A security interest taken to secure any payment for the performance of any act or contract for which a license is required is unenforceable if the person performing the act or contract was not a duly licensed contractor at all times during the performance of the act or contract [*Bus. & Prof. Code § 7031(c)*].

[d] Substantial Compliance Doctrine

Except under narrowly defined circumstances, in cases arising from contracts entered into on or after January 1, 1992, strict adherence to the license requirement is required, and a showing of substantial compliance with that requirement will be of no avail in an unlicensed person's action for compensation based on an act or contract for which a contractor's license is required [*Bus. & Prof. Code § 7031(e)*].

In cases commenced before January 1, 1995, that arose from contracts entered into on or after January 1, 1992, a court may determine that there has been substantial compliance with licensing requirements if it is shown at an evidentiary hearing that the plaintiff was a duly licensed contractor during any portion of the 90 days immediately preceding the performance of the act or contract that formed the basis for the action, and that noncompliance with the licensing requirement was the result of either inadvertent clerical error, or other error or delay not caused by the plaintiff's negligence [former *Bus. & Prof. Code § 7031(d), (e)* in effect prior to amendment by 1994 Stats., ch. 550, § 1]. A court may also apply these criteria to determine substantial compliance in cases commenced after January 1, 1995, if an action based on the same contract was commenced before that date and subsequently dismissed [*Bus. & Prof. Code § 7031(f)*].

In all other cases commenced on or after January 1, 1995, a court may determine that there has been substantial compliance with the licensure requirements if all of the following are shown at an evidentiary hearing [*Bus. & Prof. Code § 7031(e), (f)*]:

- The plaintiff had been duly licensed as a contractor in California before performance of the contract [*see MW Erectors Inc. v. Niederhauser Ornamental and Metal Works Co. (2005) 36 Cal. 4th 412, 434, 30 Cal. Rptr. 3d 755, 115 P.3d 41* (contractor that was not duly licensed "at all times" during performance of contract and could not establish its substantial compliance with licensure requirements because it had never held a valid California contractor's license "prior to" beginning performance, could not sue to recover any compensation for work performed under contract)];

- The plaintiff acted reasonably and in good faith to maintain proper licensure [*see Pacific Custom Pools, Inc. v. Turner Construction Co. (2000) 79 Cal. App. 4th 1254, 1265, 94 Cal. Rptr. 2d 756* (contractor who failed to renew license on notice of expiration and whose check was dishonored when contractor did attempt to renew failed to show that it acted reasonably and in good faith)];

- The plaintiff did not know or reasonably should not have known that he or she was not duly licensed when performance of the act or contract commenced [*see ICF Kaiser Engineers, Inc. v. Superior Court (1999) 75 Cal. App. 4th 226, 241, 89 Cal. Rptr. 2d 88* (requirement met when contractor did not have actual knowledge that its license was suspended due to clerk's failure to file a bond with licensing board and board was unaware of suspension at time of its occurrence due to error in its computer records); *cf. Pacific Custom Pools, Inc. v. Turner Construction Co. (2000) 79 Cal. App. 4th 1254, 1265, 94 Cal. Rptr. 2d 756* (no substantial compliance when contractor's license remained suspended for five months after contractor received notice of suspension); *but see Slatkin v. White (2002) 102 Cal. App. 4th 963, 971, 126 Cal. Rptr. 2d 54* (contractor may be compensated for work performed after discovering loss of licensure if contractor did not have knowledge or notice of loss before start of job)]; and

- The plaintiff acted promptly and in good faith to reinstate his or her license on learning that it was invalid.

Effective January 1, 1990, *Bus. & Prof. Code § 7031* was amended to provide explicitly that the substantial compliance doctrine "shall not apply to this section" [former *Bus. & Prof. Code § 7031(d)* as amended by 1989 Stats., ch. 368, § 1]. The 1989 amendments are not retroactive [*G.E. Hetrick & Associates, Inc. v. Summit Construction & Maintenance (1992) 11 Cal. App. 4th 318, 329, 13 Cal. Rptr. 2d 803]* . As discussed above, Section 7031 has subsequently been amended to specify narrow circumstances in which a court may apply the doctrine to cases arising from contracts entered into on or after January 1, 1992. In cases that arose from contracts entered into between January 1, 1990, and January 1, 1992, there were no circumstances under which an unlicensed contractor could avoid the bar to compensation recovery by alleging substantial compliance.

Before *Bus. & Prof. Code § 7031* was amended in 1989 as discussed above, an unlicensed person was allowed to recover in an action for compensation based on substantial compliance with the licensing requirements. This exception to the statutory bar of Section 7031 was developed by the courts to avoid what were seen as harsh consequences of strict application of the license requirement [*see Asdourian v. Araj (1985) 38 Cal. 3d 276, 284-288, 211 Cal. Rptr. 703, 696 P.2d 95* ; *Latipac, Inc. v. Superior Court (1966) 64 Cal. 2d 278, 281-282, 49 Cal. Rptr. 676, 411 P.2d 564* ; *G.E. Hetrick & Associates, Inc. v. Summit Construction & Maintenance (1992) 11 Cal. App. 4th 318, 327-330, 13 Cal. Rptr. 2d 803]* .

[e] Persons Protected by License Law

"[W]hen the Legislature enacts a statute forbidding certain conduct for the purpose of protecting one class of persons from the activities of another, a member of the protected class may maintain an action notwithstanding the fact that he [or she] has shared in the illegal transaction" [*Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 153, 308 P.2d 713]* . A member of the class for whose protection the license law was enacted generally is not in pari delicto with the contractor and can recover for the contractor's breach of contract [*Fairlane Estates v. Carrico Constr. Co. (1964) 228 Cal. App. 2d 65, 68-69, 39 Cal. Rptr. 35]* .

When the person required to have a license is a general contractor, the protected class includes subcontractors, materialpersons, employees, and owners dealing with the general contractor. When the person who was required to have a license but did not have one is a subcontractor, he or she is not to be protected from his or her own unlicensed activities [*Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 153, 308 P.2d 713]* . General contractors are among the persons protected by the licensing statute, and may assert a subcontractor's lack of a license defensively to the same extent as owners [*Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 997, 277 Cal. Rptr. 517, 803 P.2d 370* ; *Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 153-154, 308 P.2d 713]* .

If an unlicensed person performs a contract for agreed service, and the person benefited voluntarily pays for the service, the latter cannot subsequently recover the sum paid. This does not, however, preclude the person so paying from defending on the ground of illegality against a claim for payment by a third person, such as an assignee whose claim is subject to the infirmities of the illegality [*Walker v. Nitzberg (1970) 13 Cal. App. 3d 359, 367, 369, 91 Cal. Rptr. 526]* .

The prohibition on actions by unlicensed contractors applies even though those against whom the action is brought knew that the contractor was unlicensed at the time the contract was entered into [*Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 997, 277 Cal. Rptr. 517, 803 P.2d 370* ; *Vallejo Development Co. v. Beck Development Co. (1994) 24 Cal. App. 4th 929, 941-942, 29 Cal. Rptr. 2d 669]* .

[f] Actions Within Scope of Prohibition

In addition to actions on the contract and actions for services and materials rendered, the requirement that a contractor must allege and prove that he or she was licensed at all times during the performance of the contract applies to an action to foreclose a mechanic's lien by a contractor [*Albaugh v. Moss Construction Co. (1954) 125 Cal. App. 2d 126, 132, 269 P.2d 936]* and to an application for judicial confirmation of an arbitrator's award [*Loving & Evans v. Blick (1949) 33 Cal. 2d 603, 613, 204 P.2d 23]* . The requirements of alleging and proving licensure must also be met in an action on a bond [*Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 154, 308 P.2d 713]* .

[g] No Fraud Action Based on False Promise to Pay

An unlicensed contractor may not circumvent the purposes of the licensing requirement by bringing an action for fraud based on a false promise to pay by the owner. The purpose of the prohibition on suits by unlicensed contractors is to deter unlicensed contractors from offering their services or accepting solicitations of work. Recovery is therefore precluded even if the owner acts in bad faith. The falsity of the promise to pay is irrelevant, even if the unlicensed contractor contends that he or she reasonably relied on the promise [*Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 998-1002, 277 Cal. Rptr. 517, 803 P.2d 370]* .

When the plaintiff's involvement as an unlicensed contractor is incidental to the overall agreement or transaction, however, and the primary fraud involved is external to the arrangement for the construction work, a fraud cause of action may be permitted [*Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 1001-1002, 277 Cal. Rptr. 517, 803 P.2d 370]* . Thus, an unlicensed contractor who improved the defendant's house in reliance on the promise of an option to buy the house was able to allege a cause of action for fraud based on misrepresentations about encumbrances on the house [*Pickens v. American Mortgage Exchange (1969) 269 Cal. App. 2d 299, 303-304, 74 Cal.*

Rptr. 788] .

[h] Actions Not Within Scope of Prohibition

An unlicensed contractor may bring and maintain an action for the breach of a contract not within the scope of the protective purpose of *Bus. & Prof. Code § 7031* [*Davis Co. v. Superior Court (1969) 1 Cal. App. 3d 156, 159, 81 Cal. Rptr. 453]* . The fact that a contractor is unlicensed does not bar a cause of action for wrongful detention and use of his or her property [*Leonard v. Hermreck (1959) 168 Cal. App. 2d 142, 145-146, 335 P.2d 515]* . However, although an unlicensed contractor can assert his or her claim defensively to reduce in whole or in part the claims against him or her, the contractor cannot recover an affirmative judgment for an excess [*Culbertson v. Cizek (1964) 225 Cal. App. 2d 451, 473, 37 Cal. Rptr. 548]* .

Lack of a contractor's license did not preclude developers of two residential projects who also acted as the general contractors from asserting claims for equitable indemnity against their subcontractors after being sued on a strict liability theory for construction defects, because the primary relief sought was not compensation for the work performed within the meaning of *Bus. & Prof. Code § 7031*, but rather the spreading of the cost of the plaintiffs' damages incurred because of defective work by others. The developers' entitlement to equitable indemnity had a separate genesis than did their express indemnity claims against the subcontractors, which arose out of illegal construction contracts and were barred by *Bus. & Prof. Code § 7031*. The developers could also state negligence claims against the subcontractors. The developers did not allege any negligence damages beyond those suffered by the homeowner-plaintiffs, and thus the negligence claims were closely related to the indemnity claims [*Ranchwood Communities Limited Partnership v. Jim Beat Construction Co. (1996) 49 Cal. App. 4th 1397, 1420-1421, 57 Cal. Rptr. 2d 386]* .

[i] Application Against Contractor's Assignee

The disability of *Bus. & Prof. Code § 7031* attaches to the contractor's assignee to whom the contractor's right to compensation has been assigned if the assignee is not a holder in due course [*Walker v. Nitzberg (1970) 13 Cal. App. 3d 359, 367, 91 Cal. Rptr. 526]* . Additionally, if a note that is payment for a construction contract is assigned to a holder in due course, the unlicensed status of the contractor is a defense to enforcement of the note [*Wilson v. Steele (1989) 211 Cal. App. 3d 1053, 1060-1062, 259 Cal. Rptr. 851]* .

For an assignee to recover, he or she must allege and prove that the contractor had a valid contractor's license during the performance of the contract. If the assignee cannot make this allegation or proof because the contractor was not licensed, but at the time of the assignment the assignee was a holder in due course or a purchaser in good faith for value without knowledge that the contractor was not licensed, the assignee must affirmatively prove the facts that relieve him or her from the taint of the assignor's disability [*Walker v. Nitzberg (1970) 13 Cal. App. 3d 359, 367-368, 91 Cal. Rptr. 526]* .

[5] Action Against Unlicensed Contractor

A person who uses the services of an unlicensed contractor may bring an action in any California court of competent jurisdiction to recover all compensation paid to the unlicensed contractor for performance of any act or contract, unless the unlicensed contractor can establish that he or she substantially complied with the licensing requirements [*Bus. & Prof. Code § 7031(b)*; *see Bus. & Prof. Code § 7031(e)*]. For discussion of the substantial compliance doctrine, see *§ 104.83[4][d]*.

The recovery authorized by *Bus. & Prof. Code § 7031(b)* may not be reduced by an unlicensed contractor's claim of offset for materials and services provided in connection with the unlicensed work [*White v. Cridlebaugh (2009) 178 Cal. App. 4th 506, 520-521, 100 Cal. Rptr. 3d 434* ; *see Alatriste v. Cesars Exterior Designs, Inc. (2010) 183 Cal. App. 4th 656, 672-673, 108 Cal. Rptr. 3d 277* (property owner entitled to recover payments made to landscape contractor

based on landscaper's unlicensed status even though property owner knew landscaper was not licensed; landscaper was not entitled to offsets for work performed during time it held license or for materials retained by the property owner)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 104.83A Prohibitions Related to Individual With Revoked License Who Performs Acts for Which License Is Required

[1] Acts Performed by Individual Whose License Has Been Revoked

An individual is prohibited from performing any act regulated under the Contractors' License Law for or on behalf of a licensee, other than as a bona fide nonsupervising employee, when that individual [*Bus. & Prof. Code § 7121.6(a)*]:

- Was a member, officer, director, owner, or partner of a license that was revoked;
- Had knowledge of or participated in any act or omission for which the license was revoked; and
- Is not eligible for license reinstatement.

An individual also is prohibited from performing any act regulated under the License Law for or on behalf of a licensee, other than as a bona fide nonsupervsing employee, when that individual [*Bus. & Prof. Code § 7121.6(b)*]:

- Furnished the qualifications for licensure and that license was revoked [*see Bus. & Prof. Code § 7068*];
- Served in the capacity of the qualifying individual during the commission or omission of any of the acts that resulted in the license revocation, whether or not the individual had knowledge of or participated in those acts; and
- Is not eligible for license reinstatement.

A "bona fide nonsupervising employee" is a person who is exempt from the license requirement because he or she (1) receives wages as his or her sole compensation, (2) does not customarily engage in an independently established business, (3) does not have the right to control or discretion as to the manner of performance so as to determine the final

results of the work performed, and (4) does not otherwise meet the test of an independent contractor [*Bus. & Prof. Code § 7121.8*; *see Bus. & Prof. Code § 7053*; *Labor Code § 2750.5*].

A violation of these prohibitions is a misdemeanor punishable by a fine of not less than $4,500, and/or imprisonment in county jail for not less than 90 days nor more than one year [*Bus. & Prof. Code § 7121.6(c)*]. An indictment for violating either of these prohibitions must be found, or an information or complaint must be filed, within four years of the prohibited act [*Bus. & Prof. Code § 7121.6(d)*].

Before becoming an employee in any capacity by an entity that is subject to the contractors' license requirements, an individual described in *Bus. & Prof. Code § 7121.6(a)* or *(b)* (*see above*) must provide the prospective employer with written notice of the revocation [*Bus. & Prof. Code § 7121.65*].

[2] Acts by Licensee Employing Individual Whose License Has Been Revoked

A qualifying individual, officer, partner, or other person named on a license is prohibited from knowingly employing an individual who is violating *Bus. & Prof. Code § 7121.6(a)* or *(b)* [*see § 104.83A[1]*], except as a bona fide nonsupervising employee [*Bus. & Prof. Code § 7121.7(a)*; *see Bus. & Prof. Code § 7121.8* ("bona fide nonsupervising employee" defined)].

A violation of this prohibition is a misdemeanor punishable by a fine of not less than $4,500, and/or imprisonment in county jail for not less than 30 days nor more than one year [*Bus. & Prof. Code § 7121.7(b)*]. An indictment for violating this prohibition must be found, or an information or complaint must be filed, within four years of the prohibited act [*Bus. & Prof. Code § 7121.7(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 104.84 Contractors' Official Bonds

[1] Types

Various official bonds may be required of an applicant for a contractor's license or of a licensee [*see Bus. & Prof. Code § 7065 et seq.*]. They include a contractor's bond [*Bus. & Prof. Code § 7071.6*; *see § 104.84[3]*], a qualifying individual's bond [*Bus. & Prof. Code § 7071.9*; *see § 104.84[4]*], a judgment bond guaranteeing payment of an unpaid judgment or award against the contractor [*Bus. & Prof. Code § 7071.17*; *see § 104.84[5]*], and a disciplinary contractor's bond [*Bus. & Prof. Code § 7071.8*; *see § 104.84[6]*].

The license of a licensee who fails to maintain a sufficient bond is subject to suspension or revocation [*Bus. & Prof. Code § 7071.15*; *see Code Civ. Proc. § 996.020*].

For forms of bonds and undertakings and related forms, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[2] In-Lieu Deposit of Money or Securities

Until January 1, 1999, a deposit of money or other securities could be given instead of a bond as provided in *Code Civ. Proc. § 995.710 et seq.* [*Bus. & Prof. Code § 7071.12(a)*]. Any contractor who made a deposit with the Secretary of State in lieu of posting a bond before January 1, 1999, may continue to utilize the deposit in lieu of a bond; however, the deposit cannot be renewed [*Code Civ. Proc. § 995.710(e)*].

If the Contractors' State Licence Board is notified in writing of a civil action against the deposit, no portion of the deposit will be released without a determination by the court [*Bus. & Prof. Code § 7071.11(b)*]. If a deposit is insufficient to pay all claims adjudicated under any action for the deposit, the deposit will be distributed to all claimants in proportion to the amount of their respective claims [*Bus. & Prof. Code § 7071.12(c)*].

An action, other than an action to recover wages or fringe benefits, against a deposit given in lieu of either a contractor's bond or a disciplinary bond must be brought within three years of the first to occur between: (1) the expiration of the license period during which the act or omission occurred; (2) the date the license of the active licensee was inactivated,

canceled, or revoked by the board; or (3) in a case involving a deposit in lieu of a disciplinary bond, the last date a deposit was required [*Bus. & Prof. Code § 7071.12(d)(1), (2)*]. A claim to recover wages or fringe benefits must be brought within six months from the date the wage or fringe benefit delinquencies were discovered, but in no event can a civil action on such a claim be brought later than two years from the date the wage or fringe benefit contributions were due [*Bus. & Prof. Code § 7071.12(d)(3)*].

[3] Contractor's Bond

[a] Amount

As a condition precedent to the issuance, reinstatement, reactivation, or renewal of a license, and as a condition to the continued maintenance of any active license, the applicant or licensee must file or have on file with the registrar a contractor's bond in the principal sum of $12,500 [*Bus. & Prof. Code § 7071.6(a)*]. No bond is required of a licensee whose license is inactive during the period the license is inactive [*Bus. & Prof. Code § 7071.6(c)*].

[b] Form, Filing, and Beneficiaries

The contractor's bond must be executed by an admitted surety in favor of the State of California, in a form acceptable to the registrar, and must be filed with the Registrar [*Bus. & Prof. Code § 7071.5*]. An admitted surety insurer is a corporate insurer or a reciprocal or interinsurance exchange to which the insurance commissioner has issued a certificate of authority to transact surety insurance in California as defined in *Ins. Code § 105* [*Code Civ. Proc. § 995.120(a)*].

The bond must be for the benefit of the following persons or entities [*Bus. & Prof. Code § 7071.5*]:

(1) Any homeowner contracting for home improvement on the homeowner's personal family residence damaged as a result of the licensee's violation of the license law;

(2) Any property owner contracting for construction of a single-family dwelling who is damaged as a result of a licensee's violation of the license law;

(3) Any person damaged as a result of a willful and deliberate violation of that law by the licensee or by the licensee's fraud in the execution or performance of a construction contract;

(4) Any employee of the licensee damaged by the licensee's failure to pay wages; or

(5) Any person or entity, including an express trust fund [*see Civ. Code § 3111*], to whom a portion of the compensation of a licensee's employee is paid by agreement with the employee or the employee's collective bargaining agent, damaged as the result of the licensee's failure to pay employee fringe benefits.

With regard to (2), *above*, the property owner can only recover if the single-family dwelling is not intended for sale or offered for sale at the time the damages were incurred [*Bus. & Prof. Code § 7071.5(b)*]. For purposes of (5), *above*, damage to an express trust fund is limited to actual employer payments required to be made on behalf of the licensee's employees, as part of the overall compensation of those employees, that the licensee fails to pay [*Bus. & Prof. Code § 7071.5(e)*].

[4] Qualifying Individual's Bond

A qualifying individual who is not the proprietor, a general partner, or a joint licensee must file or have on file a qualifying individual's bond as provided in *Bus. & Prof. Code § 7071.10* in the sum of $12,500 [*see Bus. & Prof. Code*

§§ 7068, 7068.1 (qualifying individual)]. This bond is in addition to, and may not be combined with, any contractor's bond required by *Bus. & Prof. Code § 7071.5 et seq.*, and is required for the issuance, reinstatement, reactivation, or continued valid use of a license [*Bus. & Prof. Code § 7071.9(a)*].

Excluding the claim of a homeowner who contracted for home improvements on the homeowner's personal family residence that was damaged as a result of a violation of the Contractor's State License Law, the aggregate liability of a surety on claims brought against the qualifying individual's bond cannot exceed $7,500 [*Bus. & Prof. Code § 7071.9(b)*; *see Bus. & Prof. Code § 7071.10(a)*]. The bond proceeds in excess of that amount are reserved exclusively for the claims of home improvement contract homeowners whose personal family residence was damaged as a result of the License Law. However, the homeowner is not precluded from claiming or recovering the full measure of the bond [*Bus. & Prof. Code § 7071.9(b)*].

The responsible managing officer of a corporation is not required to file or have on file a qualifying individual's bond if he or she owns 10 percent or more of the voting stock of the corporation and certifies to that fact on a form prescribed by the Registrar [*Bus. & Prof. Code § 7071.9(c)*].

The bond must be executed by an admitted insurer in favor of the State of California and must be for the benefit of specified persons [*Bus. & Prof. Code § 7071.10*].

[5] Bond to Secure Payment of Unsatisfied Judgment or Arbitration Award

As a condition precedent to the issuance, reinstatement, or reactivation of a license, and in addition to the normal contractor's bond, an applicant previously found to have failed or refused to pay a contractor, subcontractor, consumer, materials supplier, or employee based on an unsatisfied final judgment must have filed or have on file with the Contractors' State License Board a contractor's bond or other security sufficient to guarantee payment of an amount equal to the unsatisfied judgment or judgments [*Bus. & Prof. Code § 7071.17(a)*]. The Board is required to include on the license application a statement, to be made under penalty of perjury, as to whether there are any unsatisfied final judgments against the applicant [*Bus. & Prof. Code § 7071.17(a)*]. If it is found that the applicant falsified the statement, then the license will be retroactively suspended to the date of issuance and will stay suspended until the judgment bond is filed. The bond must be on file for a minimum period of one year, after which it may be removed on submission of proof that all debts have been satisfied. In lieu of filing a bond, the licensee may provide the Board with a notarized copy of any accord reached with the creditor holding an unsatisfied final judgment [*Bus. & Prof. Code § 7071.17(a)*]. Failure to maintain the bond or to abide by the accord will result in automatic suspension of the license by operation of law [*Bus. & Prof. Code § 7071.17(c)*].

A licensee is responsible for notifying the registrar of any unsatisfied final judgments within 90 days of judgment. Failure to do so will result in automatic suspension of the license from the date the registrar is made aware of the judgment. The suspension will be removed only on proof that the judgment has been satisfied or when a notarized copy of an accord with the judgment creditor has been submitted to the registrar. Assuming the licensee complies with the requirement to notify the registrar of the existence of an unsatisfied judgment, the registrar will notify the licensee of the obligation to maintain a sufficient judgment bond. The licensee has 90 days from that notification to either file the bond or provide the Board with a copy of any accord reached with the judgment creditor [*Bus. & Prof. Code § 7071.17(b)*].

A license that is suspended for failure to file or maintain the bond, or to abide by the accord, can only be reinstated on proof that all debts have been satisfied or when a notarized copy of an accord reached with the judgment creditor has been filed with the Board [*Bus. & Prof. Code § 7071.17(d)*].

If, when a license is due for renewal, the licensee submits proof that an outstanding judgment has been partially satisfied, the Board may authorize a reduction in the amount of the bond [*Bus. & Prof. Code § 7071.17(g)*].

The above rules apply only to an unsatisfied final judgment that is substantially related to the qualifications, functions, or duties of the license being applied for [*Bus. & Prof. Code § 7071.17(e)*]. The rules do not apply to an applicant or licensee when a bankruptcy proceeding has been filed [*Bus. & Prof. Code § 7071.17(f)*].

[6] Disciplinary Contractor's Bond

As a condition precedent to the issuance, reissuance, renewal, or restoration of a license to the applicant, or to the approval of an application to change officers of a corporation, or removal of suspension, or to the continued valid use of a license that has been suspended or revoked, but which suspension or revocation has been stayed, the applicant or licensee must file or have on file a contractor's bond in a sum to be fixed by the Registrar [*see Bus. & Prof. Code § 7011* (duties of registrar; repealed by its own terms on January 1, 2011, unless a subsequent statute that deletes or extends that date is enacted before January 1, 2011)]. The amount of the bond is determined by the seriousness of the violation. It will not be less than $15,000 or more than 10 times the amount required by *Bus. & Prof. Code § 7071.6* [*Bus. & Prof. Code § 7071.8(b)*]. This bond is in addition to, may not be combined with, and does not replace any other type of bond required by the license law [*Bus. & Prof. Code § 7071.8(c)*].

The bond must remain on file with the registrar for a period of at least two years, and for such additional time as the registrar may determine. The bond period will run only while the license is current, active, and in good standing, and will be extended until the license has been current, active, and in good standing for the required period. Each applicant or licensee will be required to file only one disciplinary contractor's bond for each application or license subject to the bond requirement [*Bus. & Prof. Code § 7071.8(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 104.85 Claims Against Official Bond

[1] Liability of Contractor and Surety

The beneficiary may enforce the liability on a bond against both the principal and sureties [*Code Civ. Proc. § 996.410(a)*]. If the beneficiary is a class of persons, any person in the class may enforce the liability on a bond in the person's own name, without assignment of the bond [*Code Civ. Proc. § 996.410(b)*]. The aggregate liability of a surety to all persons for all breaches of the condition of a bond is limited to the amount of the bond. Except as otherwise provided by statute, the liability of the principal is not limited to the amount of the bond [*Code Civ. Proc. § 996.470(a)*]. Payment by a surety of the amount of a bond constitutes a full discharge of all liability of the surety on the bond [*Code Civ. Proc. § 996.490(a)*].

For further discussion of the liability of the principal and the sureties on a bond, see the Bond and Undertaking Law (*Code Civ. Proc. § 995.010 et seq.*) and Ch. 538, *Suretyship, Bonds, and Undertakings*.

[2] Payment by Surety

If the surety desires to make payment without awaiting court action, the amount of any bond filed in compliance with the license law is reduced to the extent of any payment or payments made by the surety in good faith thereafter [*see Code Civ. Proc. § 996.480(a)(1)*]. Partial payment of a claim by a surety is not considered satisfaction of the claim, and the claimant may enforce the liability on the bond. If a contractor's license is suspended or revoked until payment of a claim, the license continues to be suspended or revoked until the claim is satisfied in full [*see Code Civ. Proc. § 996.480(b)*].

[3] Priority of Claims for Wages and Benefits

The claim of any employee of the contractor for wages and fringe benefits is a preferred claim against the bond. The aggregate liability of a surety on a claim for wages and fringe benefits brought against any bond required by *Bus. & Prof. Code § 7065 et seq.*, other than a bond required by *Bus. & Prof. Code § 7071.8* [*see § 104.84[6]*], may not exceed the sum of $4,000 [*Bus. & Prof. Code § 7071.11(a)*].

[4] Procedural Requirements

No license may be renewed, reissued, or reinstated while any judgment or admitted claim in excess of the amount of the bond remains unsatisfied [*Bus. & Prof. Code § 7071.11(b)*].

Except for claims to recover wages or fringe benefits [*see Bus. & Prof. Code § 7071.11(d)* described *below*], any action against a bond (except a judgment bond resulting from an unsatisfied final judgment for failure to pay [*Bus. & Prof. Code § 7071.17*; *see § 104.84[5]*]) must be brought in accordance with the following limitations period [*Bus. & Prof. Code § 7071.11(c)*]:

> (1) Within two years after the expiration of the license period during which the act or omission occurred, provided the license has not been inactivated, canceled, or revoked during the period for which the bond was posted.
>
> (2) If the license has been inactivated, canceled, or revoked, within two years of the date the license of the active licensee would have expired had the license not been inactivated, canceled, or revoked, provided the omission for which the action was filed occurred before the license was inactivated, canceled, or revoked.
>
> (3) If the action is against a disciplinary bond filed by an active licensee, within the relevant period specified in (1) or (2), above, as applicable, or within two years after the last date for which a disciplinary bond was required [*Bus. & Prof. Code § 7071.8*; *see § 104.84[6]*].

A claim to recover wages or fringe benefits must be brought within six months from the date the wage or fringe benefit delinquencies were discovered, but in no event can a civil action on such a claim be brought later than two years from the date the wage or fringe benefit contributions were due [*Bus. & Prof. Code § 7071.11(d)*].

[5] Proportionate Distribution

If any bond that may be required is insufficient to pay all claims in full, the sum of the bond must be distributed to all claimants in proportion to the amount of their respective claims [*Bus. & Prof. Code § 7071.11(a)*; *see § 104.85[3]*].

[6] Legal Fees

Legal fees may not be charged against the bond by the Contractors' State License Board [*Bus. & Prof. Code § 7071.11(i)*; *see Bus. Prof. Code § 7000.5* (repealed by its own terms on January 1, 2011, unless a subsequent statute that deletes or extends that date is enacted before January 1, 2011)]. However, this means only that the Board may not charge for its legal fees in enforcing the disciplinary or bonding provisions of the license law [*Boliver v. Surety Co. (1977) 72 Cal. App. 3d Supp. 22, 32-33 , 140 Cal. Rptr. 259* (surety was not exempted from liability for attorney's fees awarded to homeowner in action against contractor)].

[7] Surety's Notice to Registrar of Payments Made and Effect on Licensee

When the surety makes payment on any claim against a bond required by *Bus. & Prof. Code § 7065 et seq.*, whether payment is made through a court action or otherwise, the surety must, within 30 days of the payment, notify the registrar. The notice must contain all of the following information by declaration, on a form prescribed by the registrar [*Bus. & Prof. Code § 7071.11(e)*]:

- The contractor's name and license number;

- The surety bond number;
- The amount of payment;
- The statutory basis on which the claim is made;
- The names of the person or persons to whom payments have been made; and
- Whether or not the payments were the result of the surety's good faith action.

The notice must also clearly indicate whether or not the licensee filed a protest, as discussed below [*Bus. & Prof. Code § 7071.11(b)*; *see Bus. & Prof. Code § 7071.11(e)*].

Before a claim is settled through a good faith payment by the surety, a licensee has not less than 15 days in which to provide the surety with a written protest. The protest must instruct the surety not to make payment from the bond on the licensee's account on the specific ground that the licensee opposes the claim. The protest must also provide a specific and reasonable basis for the licensee's opposition to payment [*Bus. & Prof. Code § 7071.11(f)*].

When a licensee files a protest, the Board must investigate the matter and file disciplinary action if there is evidence that the surety has sustained a loss as the result of a good faith payment made for purposes of mitigating any damages incurred by a person or entity covered by the bond [*Bus. & Prof. Code § 7071.11(f)(1)*; *see Bus. & Prof. Code § 7071.5(a)-(e)*].

Any licensee that does not file a protest has 90 days from the date of notification by the Board to submit proof that it has paid the actual amount owed to the surety and, if appropriate, proof that it has paid any judgment or admitted claim in excess of the bond's amount. If proof of payment is not submitted, the licensee's license will be suspended by operation of law at the end of the 90 days [*Bus. & Prof. Code § 7071.11(f)(2)*].

The license may not be renewed, reissued, or reinstated while any judgment or admitted claim in excess of the amount of the bond remains unsatisfied. In addition, the license may not be renewed, reissued, or reinstated while any surety remains unreimbursed for loss and expense sustained on any bond issued for the licensee or for any entity of which any officer, director, member, partner, or qualifying person was an officer, director, member, partner, or qualifying personof the licensee while the licensee was subject to suspension or disciplinary action [*Bus. & Prof. Code § 7071.11(g)*].

The licensee and surety may reach an accord to satisfy the debt in lieu of full payment, in which case the licensee should provide the Board with a notarized copy of the accord. Failure to abide by the accord will result in the automatic suspension of the license by operation of law. A license that is suspended for failure to abide by the accord may only be renewed or reinstated on presentation of proof that all debts have been satisfied [*Bus. & Prof. Code § 7071.11(h)*].

Legal Topics:

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§ 104.86 Discipline

[1] Grounds for Discipline

Violations of the license law that may give rise to disciplinary action by the Contractors' State License Board may be divided into the following general categories:

- Violations involving performance of work or payment of money [*Bus. & Prof. Code §§ 7107, 7108, 7108.5, 7109, 7113, 7113.5, 7119, 7120, 7123.5*; *see Tellis v. Contractors' State License Bd. (2000) 79 Cal. App. 4th 153, 159-160, 163, 93 Cal. Rptr. 2d 734* (discipline was proper for willful departure from trade standards and failure to complete project for price stated in contract); *Viking Pools, Inc. v. Maloney (1989) 48 Cal. 3d 602, 609, 257 Cal. Rptr. 320, 770 P.2d 732* (failure to honor express warranty constituted abandonment of project); *All Bay Mill & Lumber Co. v. Surety Co. (1989) 208 Cal. App. 3d 11, 16, 255 Cal. Rptr. 790* (supplier may not recover for violation of § 7108 unless causal link between contractor's failure to account and resulting damage is established); *Linda Jones General Builder v. Contractors' State License Board (1987) 194 Cal. App. 3d 1320, 1325, 240 Cal. Rptr. 180* (willful departure from plans is permissible if done with consent of owner)];

- Violations of safety standards [*Bus. & Prof. Code §§ 7109.5, 7110, 7110.5*];

- Violations of administrative and licensing requirements [*Bus. & Prof. Code §§ 7111(a), 7111.1, 7115, 7117.5, 7117.6, 7118, 7121, 7123*]; and

- Violations involving fraud and misrepresentation [*Bus. & Prof. Code §§ 7112, 7114, 7114.1, 7116, 7117, 7118.4, 7125(b)*].

[2] Disciplinary Powers of Registrar and Board

[a] Availability

The registrar is authorized to investigate the actions of any licensed contractor or applicant for licensure, and to take appropriate disciplinary action as provided by the license law for the protection of the general public [*Bus. & Prof. Code § 7090*; *West v. State (1986) 181 Cal. App. 3d 753, 764, 227 Cal. Rptr. 16]* . The Registrar is not precluded from taking disciplinary action against a licensee by the fact that the licensee has corrected the conditions resulting from a fraudulent act that constitutes a ground for disciplinary action under the license law [*Bus. & Prof. Code § 7090.5*]. Similarly, if a licensee has engaged in repeated acts that would have been grounds for disciplinary action except that the licensee avoided discipline for each individual act by correcting the conditions resulting from those acts, the registrar may nonetheless take disciplinary action against the licensee [*Bus. & Prof. Code § 7090.5*].

The expiration, cancellation, forfeiture, suspension, or voluntary surrender of a license does not deprive the registrar of jurisdiction over any investigation of or disciplinary proceeding against a licensee [*Bus. & Prof. Code § 7106.5*].

[b] Citation or Injunction

As an alternative to commencing disciplinary proceedings when an applicant or licensee has committed acts or omissions that are grounds for denial, revocation, or suspension of a contractor's license, the registrar may issue a written citation containing an order for correction and an assessment of a civil penalty [*Bus. & Prof. Code § 7099*; *see Bus. & Prof. Code §§ 7099.3-7099.5* (procedure for contesting citation), 7099.7 (civil penalty may not be assessed against bond)]. The citation procedure may also be applied to an unlicensed person acting in the capacity of a contractor who is not otherwise exempt from the provisions of the license law [*Bus. & Prof. Code § 7028.6*]. The failure of an unlicensed contractor to comply with a final citation is a misdemeanor [*Bus. & Prof. Code § 7028.17(a)*].

If the license of a partnership, corporation, firm, or association is cited, any member, officer, director, or associate who becomes disassociated from the entity's license is nonetheless responsible for complying with the citation if he or she had knowledge of, or participated in, any of the acts for which the citation was issued. Failure of such a person to comply with the citation after it is final constitutes grounds for disciplinary action [*Bus. & Prof. Code § 7121.1*; *see Bus. & Prof. Code § 7121*]. Similarly, a qualifying partner, responsible managing officer, or responsible managing employee who becomes disassociated from a license after the act or omission has occurred that resulted in a citation is also not relieved from complying with the citation. Furthermore, if the partner, manager, or employee fails to comply with the citation after it is final, he or she is subject to disciplinary action by the registrar whether or not he or she had knowledge of or participated in the act or omission for which the citation was issued [*Bus. & Prof. Code § 7122.1*; *see Bus. & Prof. Code § 7122.5*].

In addition to all other remedies provided by law, the registrar may seek aninjunction restraining the activities of any contractor who acts in violation of the license law [*Bus. & Prof. Code § 7028.3*; *see § 104.259*].

The preponderance of the evidence standard applies in an administrative citation proceeding when the only potential sanctions were orders of correction and civil penalties, and there is no potential for the restriction, suspension, or revocation of the contractor's license [*Owen v. Sands (2009) 176 Cal. App. 4th 985, 993, 98 Cal. Rptr. 3d 167*]. The applicable standard of proof depends on the nature of the fundamental vested property right at issue in a licensee disciplinary case. The procedural safeguards the due process clause requires in an administrative proceeding are not solely based on whether the proceeding is "disciplinary." Instead, the necessary procedural safeguards are determined through a balancing test, which includes assessing the weight of the private interest that will be affected by the official action. Licensed contractors cited for violations and subject only to sanctions such as correction orders or monetary penalties are not entitled to the same procedural safeguards afforded to contractors who face restriction, suspension, or revocation of their licenses [*Owen v. Sands (2009) 176 Cal. App. 4th 985, 992-993, 98 Cal. Rptr. 3d 167*].

[c] Application of Administrative Procedure Act

Disciplinary proceedings are governed by the provisions of the California Administrative Adjudication Act (also known

as the Administrative Procedure Act) [*Bus. & Prof. Code § 7091(f)*; *see Gov. Code § 11500 et seq.*]. For discussion and forms for use in proceedings under the Act, see Ch. 473, *Public Agency Adjudication*, et seq.

[3] Judicial Review of Disciplinary Proceedings

The decision of the registrar in a disciplinary proceeding is subject to judicial review [*see Code Civ. Proc. § 1094.5*]. The applicant or licensee is entitled to present to the reviewing court any relevant evidence in addition to that received by the registrar in the administrative hearing [*Contractors' State License Board v. Superior Court of Los Angeles County (1960) 187 Cal. App. 2d 557, 561-562, 10 Cal. Rptr. 95]* . Because the Contractors' State License Board lacks judicial power, the findings of the registrar will not be given res judicata effect in the superior court proceedings, and administrative orders will not be permitted to interfere with the determination of the action by the court or to irreparably injure the contractor [*Contractors' State License Board v. Superior Court of Los Angeles County (1960) 187 Cal. App. 2d 557, 561, 10 Cal. Rptr. 95]* . The court may issue a stay of the disciplinary proceeding, in which case the contractor must file a bond with the court pursuant to *Bus. & Prof. Code § 7100*, and the judgment of the court will be res judicata in the disciplinary action [*Contractors' State License Board v. Superior Court of Los Angeles County (1960) 187 Cal. App. 2d 557, 562, 10 Cal. Rptr. 95]* .

For further discussion and forms for judicial review of agency decisions, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 104.87 Arbitration of Alleged Violations

In the case of certain specified violations, the registrar may, with the concurrence of both the licensee and the complainant, refer the complaint to arbitration pursuant to the provisions of the license law [*Bus. & Prof. Code § 7085(a)*]. Comprehensive procedural rules governing administrative arbitration are set forth by statute [*see Bus. & Prof. Code § 7085.5*]. Arbitration is mandatory if the contract price or demand for damages is equal to or less than the amount of the required bond [*Bus. & Prof. Code § 7085(b)*]. An arbitration award is deemed to be an order of the Registrar [*Bus. & Prof. Code § 7085.2*]. As such, it is subject to review by the Contractors' State License Board [*Bus. & Prof. Code § 7013*]. An arbitration award may also be enforced by means of legal action taken pursuant to *Code Civ. Proc. § 1285 et seq.*, governing enforcement of arbitration awards generally [*Bus. & Prof. Code § 7085.7*; *see generally* Ch. 34, *Contractual Arbitration: Judicial Review*].

The disassociation of any qualifying partner, responsible managing officer, or responsible managing employee from a license that has been referred to arbitration will not relieve that partner, officer, or employee from responsibility for complying with an arbitration award rendered as a result of acts or omissions committed while he or she was acting as the qualifying partner, responsible managing officer, or responsible managing employee [*Bus. & Prof. Code § 7122.2(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesReal Property LawConstruction LawContractors & Subcontractors

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[Reserved]

§§ 104.88[Reserved]

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10-104 California Forms of Pleading and Practice--Annotated § 104.100

§ 104.100 Governing Law

The home improvement business is governed by the provisions of *Bus. & Prof. Code § 7150 et seq.*, which are part of the Contractors' State License Law ("the license law") (*Bus. & Prof. Code § 7000 et seq.*). Swimming pool contracts and contractors are governed by the statutes that govern home improvement contracts and contractors generally [*Bus. & Prof. Code §§ 7150.1*, *7151*], except that certain statutory provisions apply specifically to swimming pool contracts [*Bus. & Prof. Code §§ 7165-7168*; *see Bus. & Prof. Code § 7166* (nonapplicability of statutes to certain swimming pool contracts)].

Home improvement contracts may also be regulated by other consumer protection laws such as the Unruh Retail Installment Sales Act (*Civ. Code § 1801 et seq.*) and the federal Truth in Lending Act (*15 U.S.C. § 1601 et seq.*), which are discussed in Ch. 501, *Sales: Retail Installment Sales* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationBanking LawConsumer ProtectionTruth in LendingGeneral OverviewContracts LawTypes of ContractsConstruction ContractsGovernmentsState & Territorial GovernmentsLicensesReal Property LawConstruction LawContracts

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§ 104.101 Definitions

[1] Person

As used in the provisions of the license law governing home improvement contracts [*Bus. & Prof. Code § 7150 et seq.*], the term "person" is limited to natural persons [*Bus. & Prof. Code § 7150*; *cf. Bus. & Prof. Code § 7025* ("person," as used in other provisions of license law, as including individuals, firms, copartnerships, corporations, associations, or other organizations, or any combination of the above)].

[2] Home Improvement Contractor

A "home improvement contractor," including a swimming pool contractor, is a contractor licensed under the provisions of the license law who is engaged in the business of home improvement either full-time or part-time [*Bus. & Prof. Code § 7150.1*]. A home improvement contractor, whether engaged in the business of home improvement full-time or part-time, must be licensed under the license law [*Bus. & Prof. Code § 7150.1*]. On and after July 1, 2000, a contractor may not engage in the home improvement business or provide home improvement goods or services unless he or she is certified as a home improvement contractor [*Bus. & Prof. Code § 7150.2(c)*]. To qualify for certification, an applicant must [*Bus. & Prof. Code § 7150.3(a)*]:

- Hold a valid contractor's license;
- Apply for certification on a prescribed form; and
- Take and pass an open book examination.

Although they are not contractors within the meaning of that term under the license law, home improvement salespeople [*see Bus. & Prof. Code § 7152(a)*] are subject to registration requirements and other regulations under the license law [*Bus. & Prof. Code § 7153.1*; *see Bus. & Prof. Code § 7152(b)* (exceptions), and *§ 104.101[3]*]. For discussion of the persons covered by the term "contractor," see *§ 104.70* et seq.

[3] Home Improvement Salesperson

A "home improvement salesperson" is a person employed by a home improvement contractor licensed under the provisions of the license law to solicit, sell, negotiate, or execute contracts for home improvements, for the sale, installation, or furnishing of home improvement goods or services, or of swimming pools, spas, or hot tubs [*Bus. & Prof. Code § 7152(a)*].

Home improvement salespersons are required to be registered with the Contractor's State License Board [*Bus. & Prof. Code § 7153.1*; *see Bus. & Prof. Code §§ 7153.2*, *7153.3* (renewal of registration)], except for the following persons [*Bus. & Prof. Code § 7152(b)*]:

- Officers of record of a contractors' corporation;

- General partners listed on the license records of partnerships licensed under laws governing the home improvement business;

- Qualifying persons [*see Bus. & Prof. Code § 7068*];

- Salespersons whose sales are all made pursuant to negotiations between the parties, if the negotiations are initiated by the prospective buyer at or with a general merchandise retail establishment that operates from a fixed location where goods or services are offered for sale;

- Persons who contact the prospective buyer for the exclusive purpose of scheduling appointments for a registered home improvement salesperson; and

- Bona fide service repairpersons who are in the employ of a licensed contractor and whose repair or service calls are limited to the service, repair, or emergency repair initially requested by the buyer of the service.

The registration exemption for licensed corporate officers, general partners listed on the license record of a licensed partnership, and persons who qualify as contractors on behalf of other firms or individuals, applies only to those who, at the time of the sales transaction, are listed as personnel of record for the licensee responsible for soliciting, negotiating, or contracting for a service or improvement that is subject to regulation under the home improvement business statutes [*Bus. & Prof. § 7152(c)*; *see Bus. & Prof. Code § 7150 et seq.*].

It is a misdemeanor for any person not exempt from the registration requirement to engage in the occupation of salesperson of home improvement goods or services within California without having a registration issued by the Registrar, or to engage in the occupation of salesperson for one or more home improvement contractors within California without having a registration issued by the Registrar for each of the contractors by whom he or she is employed as a salesperson [*Bus. & Prof. Code § 7153(a)*].

Any security interest taken by a contractor to secure payment pursuant to a contract for home improvement good or services that is performed on or after January 1, 1995, is unenforceable if the person soliciting the act or contract was not a duly registered salesperson or was not exempt from registration when the homeowner signed the home improvement contract solicited by the salesperson [*Bus. & Prof. Code § 7153(b)*].

[4] Home Improvement Contract

A "home improvement contract" is an agreement, whether oral or written, or contained in one or more documents, between a contractor and an owner or between a contractor and a tenant, regardless of the number of residence or

dwelling units contained in the building in which the tenant resides, if the work is to be performed in, to, or on the residence or dwelling unit of the tenant, for the performance of a home improvement, and includes all labor, services, and materials to be furnished and performed under the contract [*Bus. & Prof. Code § 7151.2*; *see Bus. & Prof. Code § 7159(b)*].

"Home improvement contract" also means an agreement, whether oral or written, or contained in one or more documents, between a salesperson, whether or not he or she is a home improvement salesperson, and an owner or a tenant, regardless of the number of residence or dwelling units contained in the building in which the tenant resides, which provides for the sale, installation, or furnishing of home improvement goods or services [*Bus. & Prof. Code §§ 7151.2*, *7159(b)*].

[5] Home Improvement

"Home improvement" means the repairing, remodeling, altering, converting, or modernizing of, or adding to, residential property and includes, but is not limited to, the construction, erection, replacement, or improvement of driveways, swimming pools (including spas and hot tubs) [*but see Bus. & Prof. Code § 7166*], terraces, patios, awnings, storm windows, landscaping, fences, porches, garages, fallout shelters, basements, and other improvements of the structures or land adjacent to a dwelling house. "Home improvement" also means the installation of home improvement goods or the furnishing of home improvement services [*Bus. & Prof. Code § 7151*].

[6] Home Improvement Goods or Services

For purposes of the license law, "home improvement goods or services" means goods and services that are bought in connection with the improvement of real property [*Bus. & Prof. Code § 7151*]. "Goods" means tangible chattels bought for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for the goods, and including goods that, at the time of sale or subsequently, are to be so affixed to real property as to become a part of the real property whether or not severable from it [*Bus. & Prof. Code § 7151*; *Civ. Code § 1689.5(c)*]. "Services" means work, labor, and services, including, but not limited to, services furnished in connection with the repair, restoration, alteration, or improvement of residential premises, or services furnished in connection with the sale or repair of goods as defined by the Unruh Act [*see Civ. Code § 1802.1*], and courses of instruction, regardless of the purpose for which they are taken [*Bus. & Prof. Code § 7151*; *Civ. Code § 1689.5(d)*]. But the term "services" does not include (1) services of attorneys, real estate brokers and salespersons, or (2) financial services offered by banks, savings institutions, credit unions, industrial loan companies, personal property brokers, consumer finance lenders, or commercial finance lenders, organized pursuant to state or federal law, which are not connected with the sale of goods or services, or the sale of insurance that is not connected with the sale of goods or services as defined above [*Bus. & Prof. Code § 7151*; *Civ. Code § 1689.5(d)*].

Home improvement goods and services include, but are not limited to, carpeting, texture coating, fencing, air conditioning or heating equipment, and termite extermination. Home improvement goods include goods that are to be so affixed to real property as to become a part of real property whether or not severable from the real property [*Bus. & Prof. Code § 7151*].

[7] Service and Repair Contract

A service and repair contract is an agreement between a general or specialty contractor, or salesperson for such a contractor [*see Bus. & Prof. Code § 7159.10(f)*], who is licensed or subject to be licensed with regard to the transaction, and a homeowner or a tenant, for the performance of a home improvement. A service and repair contract must conform to the following requirements [*Bus. & Prof. Code § 7159.10(a)(1)*]:

- The contract amount can be no more than $750;

- The prospective buyer must initiate contact with the contractor to request the work;

- The contractor may not sell the buyer goods or services beyond those reasonably necessary to take care of the particular problem that caused the buyer to contact the contractor; and

- No payment will be due, or accepted by the contractor, until the work is completed [*see Bus. & Prof. Code § 7159.10(a)(2)* (meaning of "work is completed")].

Service and repair contracts are governed by Bus. & Prof. Code §§ 1759.10-1759.14 rather than *Bus. & Prof. Code § 1759*, which applies to "home improvement contracts" [*Bus. & Prov. Code § 1759(a)(2)*; *see § 104.101[4]* ("home improvement contract" defined)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionGeneral OverviewAntitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationContracts LawTypes of ContractsConstruction ContractsGovernmentsState & Territorial GovernmentsLicensesReal Property LawConstruction LawContracts

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§ 104.102 Home Improvement Contracts Subject to Content Requirements

[1] Necessity for Writing

While *Bus. & Prof. Code § 7159*, which sets forth the content requirements for a home improvement contract, provides that such contracts may be oral or written, there is no practical way to satisfy those requirements in the absence of a writing, although the contract may consist of more than one document. Thus, the following discussion assumes a writing is required for a home improvement contract that is between a contractor and an owner or between a contractor and a tenant, regardless of the number of residence or dwelling units contained in the building in which the owner or tenant resides, if [*Bus. & Prof. Code § 7159(b)*]:

- The work is to be performed in, to, or on the owner's or tenant's residence or dwelling unit.

- The contract is for the performance of a home improvement, and includes all labor, services, and materials to be furnished and performed by the contractor [*see Bus. & Prof. Code § 7151* ("home improvement" defined)].

- The aggregate contract price specified in the contract, including all labor, services, and materials to be furnished by the contractor exceeds $500.

A writing is also required for an agreement between a salesperson, whether or not he or she is a home improvement salesperson, and an owner or tenant, regardless of the number of residence or dwelling units contained the building in which the owner or tenant resides, which provides for the sale, installation, or furnishing of home improvement goods or services [*Bus. & Prof. Code § 7159(b)*; *see Bus. & Prof. Code §§ 7151, 7152* ("home improvement goods and services" and "home improvement salesperson" defined)].

The home improvement contract content requirements do not apply to (1) service and repair contracts, which are subject to their own requirements [*see Bus. & Prof. Code § 7159.10*; *see also § 104.103*], or (2) contracts for the sale, installation, and servicing of a fire alarm sold in conjunction with an alarm system, provided all costs attributable to

making the system operable do not exceed $500, and the licensee complies with the requirements that are specific to the sale, installation, and servicing of fire alarm systems [*Bus. & Prof. Code § 7159(a)(3), (4)*; *see Bus. & Prof. Code § 7159.9*].

A licensee, his or her agent or salesperson, or a person subject to the contractor's licensing requirements, who fails to provide the required information, notices, and disclosures in the contract, or who otherwise fails to comply with any of the content requirements, is subject to discipline by the Contractors' State License Board (CSLB) [*Bus. & Prof. Code § 7159(a)(5)*].

Notwithstanding the statutory requirement that a home improvement contract be in writing, recovery may be allowed on an oral home improvement contract. The cases that have allowed the contractor to enforce the oral contract have involved improvements to properties owned by sophisticated investors who were friends or social acquaintances of the contractor [*Asdourian v. Araj (1985) 38 Cal. 3d 276, 291-294, 211 Cal. Rptr. 703, 696 P.2d 95* ; *Calwood Structures, Inc. v. Herskovic (1980) 105 Cal. App. 3d 519, 521-522, 164 Cal. Rptr. 463* (*Asdourian* specifically disapproved *Calwood Structures* to the extent it held that *Bus. & Prof. Code § 7159* excludes additional penalties by implication)]. Similarly, a contractor was allowed to recover for work done pursuant to oral changes requested by an owner who was a partner in a real estate investment and development firm [*Davenport & Co. v. Spieker (1988) 197 Cal. App. 3d 566, 570-571, 242 Cal. Rptr. 911]* .

[2] General Requirements

A home improvement contract must be legible, or if it is printed, it must be readable and printed in at least 10-point typeface with 10-point boldface headings [*Bus. & Prof. Code § 7159(c)(1), (2)*]. Before work is commenced, the contractor must give the buyer a copy of the contract signed and dated by both parties [*see Bus. & Prof. Code § 7159(d)(4)*]. Because the buyer's receipt of the copy initiates the buyer's cancellation rights, the first page must include the date the buyer signed the contract along with the contractor's name and address to which a Notice of Cancellation must be mailed [*Bus. & Prof. Code § 7159(c)(3)*].

The contract must also include a statement that, on satisfactory payment being made for partial performance, the contractor must, before any further payment is made, furnish a person contracting for home improvement or swimming pool work a full and unconditional release from any potential lien claimant or mechanics' lien authorized for the portion for the work for which payment has been made [*Bus. & Prof. Code § 7159(c)(4)*].

A change-order form for changes or extra work must be incorporated into and become part of the contract only if it is in writing and signed by the parties before any work covered by the change order has begun [*Bus. & Prof. Code § 7159(c)(5)*]. In close proximity to the parties' signatures, there must be a notice stating that the owner or tenant has the right to require the contractor to have a performance and payment bond [*Bus. & Prof. Code § 7159(c)(6)*]. A contract, the primary purpose of which is to construct a swimming pool, which does not substantially comply with either of these requirements, is void and unenforceable by the contractor as contrary to public policy. However, the contractor's failure to satisfy the change-order form requirement will not preclude him or her from recovering compensation for work performed based on quasi-contract, quantum meruit, restitution, or other similar legal or equitable remedies designed to prevent unjust enrichment [*Bus. & Prof. Code § 7167*].

If the contract provides for a contractor to furnish joint control, the contractor may not have any financial or other interest in the joint control [*Bus. & Prof. Code § 7159(c)(7)*].

As described in *§ 104.102[3]*, home improvement contracts have other, very specific, requirements for disclosures and other information that must be included in the writing.

For forms that conform to the requirements for written home improvement contracts, see California Legal Forms, Ch.

89, *Home Improvement and Specialty Contracts* (Matthew Bender).

[3] Specific Requirements

A home improvement contract must include all of the following information [*Bus. & Prof. Code § 7159(d)*]:

(1) The contractor's name, business address, and license number.

(2) If applicable, the name and registration number of any home improvement salesperson that solicited or negotiated the contract.

(3) The heading "Home Improvement" in at least 10-point boldface type.

(4) A 12-point boldface statement informing the buyer that he or she is entitled to a completely filled-in and signed copy of the contract before work may be started.

(5) The heading "Contract Price" followed by the amount of the contract [*see Bus. & Prof. Code § 7159.5(a)(1)*].

(6) If applicable, the heading "Finance Charge" followed by the amount of the charge [*see Bus. & Prof. Code § 7159.5(a)(2)*].

(7) The heading "Description of the Project and Description of the Significant Materials to be Used and Equipment to be Installed" followed by that information, including if relevant, a plan and scale drawing of any swimming pool to be installed including the construction and equipment specifications.

(8) If a down payment will be charged, it may not exceed the lesser of $1,000 or 10 percent of the contract price and its details must be set forth in a statutory format [*see Bus. & Prof. Code § 7159(d)(8)(A)-(C)*; *see also Bus. & Prof. Code § 7159.5(a)(3)* (down payment limitation)].

(9) If any progress payments are to be made, the contract must include (a) a schedule of those payments with specific reference to the amount of each payment and the amount of work or services to be performed and any materials and equipment to be supplied in connection with each payment; and (b) a statutorily-prescribed statement informing the buyer about the nature of the schedule with a notice that, while a contractor may require a down payment, it is unlawful for the contractor to collect payment for work not completed or materials not yet delivered [*see Bus. & Prof. Code §§ 7159(d)(9)(C), 7159.5(a)(4), (5)*].

(10) The heading "Approximate Start Date" followed by a statement describing what constitutes substantial commencement of work and an approximate date for that commencement.

(11) The heading "Approximate Completion Date" followed by that date.

(12) If applicable, the heading "List of Documents to be Incorporated Into the Contract" followed by that list.

(13) The heading "Note About Extra Work and Change Orders" followed by a statutorily-prescribed statement informing the buyer of the nature and effect of change orders [*see Bus. & Prof. Code § 7159(d)(13)*].

A contractor who furnishes a payment and performance bond, lien and completion bond, or a bond equivalent or joint control approved by the registrar covering full performance and payment is exempt from the downpayment limitation described in (8), above, as well as the details and statement regarding progress payments specified in (9), above [*Bus. & Prof. Code § 7159.5(a)(8)*].

If the contract provides for a payment of a salesperson's commission out of the contract price, that payment must be made on a pro rata basis in proportion to the schedule of progress payments described in (9), above [*Bus. & Prof. Code § 7159.5(a)(7)*].

A contract, the primary purpose of which is to construct a swimming pool, which does not substantially comply with the requirements enumerated in (7)-(9), above, is void and unenforceable by the contractor as contrary to public policy [*Bus. & Prof. Code § 7167(a)*].

[4] Required Notices

Notices concerning the following subject matter must be either included as part of the contract form, or, if otherwise specified, provided as an attachment to the form [*Bus. & Prof. Code § 7159(e)*]:

(1) Commercial general liability insurance.

(2) Workers' compensation insurance.

(3) Information concerning the performance of extra or change-order work.

(4) A mechanic's lien warning the wording of which is prescribed by statute [*see Bus. & Prof. Code § 7159(e)(4)*].

(5) Information about the role of the CSLB, including how to contact the Board.

(6) If applicable, a notice informing the buyer that he or she has three days within which to cancel the contract, the effect of which would be to place the parties in their pre-contract positions [*see Bus. & Prof. Code § 7159(e)(6)(B)* (wording of notice); *see also Bus. & Prof. Code § 7159(e)(6)(C)* (format and location of notice in contract)]. The three-day notice is required unless (a) the contract is negotiated in the contractor's place of business; (b) the contract is to repair or restore residential premises damaged by a sudden or catastrophic event; or (c) the contractor is subject to licensure under the Alarm Company Act [*Bus. & Prof. Code § 7159(e)(6)(A*); *see Bus. & Prof. Code § 7590 et seq.*].

(7) If the contract involves repairing or restoring a residence damaged or destroyed by a sudden or catastrophic event for which a state of emergency has been declared, a notice informing the buyer that he or she has seven days within which to cancel the contract, the effect of which would be to place the parties in their pre-contract positions [*see Bus. & Prof. Code § 7159(e)(7)(A)* (wording of notice); *see also Bus. & Prof. Code § 7159(e)(7)(B)* (format and location of notice in contract)].

A contractor who furnishes a payment and performance bond, lien and completion bond, or a bond equivalent or joint control approved by the registrar covering full performance and payment need not include the mechanics' lien warning described in (4), above [*Bus. & Prof. Code § 7159.5(a)(8)*].

In addition, any person entering into an agreement to build a swimming pool in connection with a single family residence must give the owner notice of the requirements of the Swimming Pool Safety Act [*Health & Safety Code §§ 115920-115927*], which imposes requirements related to pool covers, enclosures, and alarms [*Health & Safety Code §*

115924].

A contractor or installer who installs security or "burglar" bars on residential dwellings must provide a dwelling owner with specified warning information regarding the fire safety ramifications of security bars before installing bars on the dwelling [*Health & Safety Code § 13113.9*; *see 19 Cal. Code Reg. § 4.3* (warning information)].

[5] Release for Partial Payment

On any payment by the buyer, and before any further payment is made, the contractor must, at the other buyer's request, obtain and furnish a full and unconditional release from any potential lien claimant claim or authorized mechanics' lien [*see Civ. Code § 3110*] for any part of the work for which payment has been made. The buyer may withhold all further payments until these releases are furnished [*Bus. & Prof. Code § 7159.5(a)(6)*].

[6] Penalties for Violation of Requirements

Failure by a licensee, or a person subject to be licensed under the Contractor's State License Law, or by his or her agent or salesperson to provide the required information, notices, and disclosures in a contract, or to comply with them is cause for discipline [*Bus. & Prof. Code § 7159.5(a)*]. In addition, misrepresentation of, or failure to include, the contract price, violation of the down payment limitations, or requesting or accepting payment that exceeds the value of work performed or material delivered is a misdemeanor punishable by a fine of between $100 and $5,000 and/or imprisonment for up to one year [*Bus. & Prof. Code § 7159.5(b)*].

Any person who violates the requirements described in *Bus. & Prof. Code § 7159.5(a)*, which generally relate to the contract requirements for contract price, finance charge, down payment, and progress payments, as part of a plan or scheme to defraud an owner or tenant of a residential or nonresidential structure, including a mobilehome or manufactured home, in connection with the offer or performance of repairs to the structure for damage caused by a natural disaster, will be ordered to make full restitution to the victim based on the person's ability to pay, as defined in *Penal Code § 1203.1b(e)*. In addition to full restitution, and imprisonment for up to one year, the court may impose a fine of not less than $500 nor more than $25,000, also based on the defendant's ability to pay. This applies to natural disasters for which the governor proclaims a state of emergency, or for which an emergency or major disaster is declared by the President of the United States [*Bus. & Prof. Code § 7159.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationContracts LawTypes of ContractsConstruction ContractsCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesReal Property LawConstruction LawContracts

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§ 104.103 Content Requirements for Service and Repair Contracts

[1] General Requirements

A service and repair contract is an agreement between a general or specialty contractor, or salesperson for such a contractor [*see Bus. & Prof. Code § 7159.10(f)*], who is licensed or subject to be licensed with regard to the transaction, and a homeowner or a tenant, for the performance of a home improvement that meets the following conforming requirements [*Bus. & Prof. Code § 7159.10(a)(1)*]:

- The contract amount can be no more than $750;
- The prospective buyer must initiate contact with the contractor to request the work;
- The contractor may not sell the buyer goods or services beyond those reasonably necessary to take care of the particular problem that caused the buyer to contact the contractor; and
- No payment will be due, or accepted by the contractor, until the work is completed [*see Bus. & Prof. Code § 7159.10(a)(2)* (meaning of "work is completed")].

If all of these conforming requirements are not met, the requirements for a "home improvement contract" will apply, including any rights to rescind, regardless of the aggregate contract price [*Bus. & Prof. Code § 7159.10(b)*; *Civ. Code § 1689.6(a)(3)(B)*; *see Bus. & Prof. Code § 7159(c)-(e)* (applicable home improvement contract requirements); *Civ. Code §§ 1689.6, 1689.7* (applicable rescission rights); *see also § 104.102*].

If all of the conforming requirements are met, the notices and requirements described in § 104.102[2] apply to the contract [*Bus. & Prof. Code § 7159.10(c)*].

For forms that conform to the requirements for service and repair contracts, see California Legal Forms, Ch. 89, *Home Improvement and Specialty Contracts* (Matthew Bender).

[2] Specific Requirements

A service and repair contract and any changes or attachments to the contract must be in written in the same language as was principally used in the oral sales presentation and signed or acknowledged by the parties. If the contract is written, it must be legibly written. If it is printed, it must be readable and in at least 10-point typeface with 10-point boldface headings [Bus. & Prof. Code § 1759.10(d)(1)-(3)].

Before work is started, the contractor must give the buyer a copy of the contract signed by both parties with the contractor's name, business address, and license number, and the date it was signed [*Bus. & Prof. Code § 7159.10(d)(4)-(6)*].

The contract must include the following information, notices, and disclosures [Bus. & Prof. Code § 7159.20(d)(7), (8), (e); *but see Bus. & Prof. Code § 7159.10(g)* (contractor not relieved from compliance with other applicable laws)]:

(1) A notice, which may be provided as an attachment, with the heading "Commercial General Liability Insurance" followed by a prescribed statement indicating whether or not the contractor carries such insurance, or is self-insured.

(2) A notice, which may be provided as an attachment, with the heading "Workers' Compensation Insurance" followed by a prescribed statement indicating whether the contractor carries such insurance or is exempt.

(3) A heading "Service and Repair" in at least 10-point boldface type.

(4) A "Notice to the Buyer" in at least 12-point boldface type informing the buyer of the conforming requirements for a service and repair contract [*see Bus. & Prof. Code § 7159.10(a)(1)(A)-(D)*].

(5) A12-point boldface notice informing the buyer of his or her right to a completely filled in and signed copy of the contract before work begins.

(6) If applicable, a "List of Documents to be Incorporated Into the Contract."

(7) When the contract is for a fixed amount, the heading "Contract Price" followed by the relevant amount.

(8) If there will be a finance charge, the heading "Finance Charge" followed by the amount, which must be set out separately from the contract amount.

(9) If the contract is estimated by a time and materials formula, the heading "Estimated Contract Price" followed by the estimated contract amount. The contract must disclose the set rate and estimated cost of materials. It also must disclose how time will be computed, e.g., in increments of quarter hours, half hours, or hours, and the statement: "The actual contract amount of a time and materials contract may not exceed the estimated contract amount without written authorization from the buyer."

(10) The heading "Description of the Project and Materials to be Used and Equipment to be Installed" followed by that description.

(11) A prescribed statement informing the buyer that the contractor is obligated to offer the buyer any replaced parts with a checkbox to be initialed if the buyer does not want the parts.

(12) If applicable, the heading "Amount of Service Charge" followed by the service charge and a prescribed statement informing the buyer that he or she may be charged only one service charge.

(13) In immediate proximity to the space reserved for the buyer's signature, a 12-point boldface notice, the wording of which is prescribed by statute, informing the buyer of his or her cancellation rights. The notice may be included as an attachment in which case it must be signed and dated by the buyer [*see Bus. & Prof. Code § 7159.10(e)(12)(C)*; *see also Civ. Code § 1689.6(a)* (cancellation rights)].

The notice of cancellation rights described in (13), above, informs the buyer that he or she may cancel the contract anytime before work begins. Even after work has begun, the buyer may cancel within three business days of signing a contract for normal service and repairs, or within seven business if the contract is to repair and correct conditions resulting from a sudden or catastrophic event for which a state of emergency has been declared, if the contract does not conform to any of the four basic requirements for a service and repair contract specified by *Bus. & Prof. Code § 7159.10(a)(1)(A)-(D)*. The right to cancel may be exercised by email, postal mail, fax, or personal deliver to the contractor at his or her place of business with the relevant three- or seven-day period. The cancellation must include the buyer's name, address, and the date he or she received a signed copy of the copy and the notice of cancellation rights. The effect of cancellation is to return the parties to their pre-contract positions [*Bus. & Prof. Code § 7159.10(e)(12)(A)*]. The cancellation notice does not apply to home improvement contracts entered into by a licensed alarm company operator provided the operator complies with the cancellation provisions applicable to such contracts under the law governing home solicitation contracts [*Bus. & Prof. Code § 7159.10(e)(12)(B)*; *see Civ. Code §§ 1689.5-1689.7*].

[3] Release for Partial Payment

On any payment by buyer, the contractor must, at the buyer's request, obtain and furnish a full and unconditional release from any potential lien claimant claim or authorized mechanics' lien [*see Civ. Code § 3110*] for any part of the work for which payment has been made [*Bus. & Prof. Code § 7159.14(a)(11)*].

[4] Penalties for Violation of Requirements

Failure by a licensee, or a person subject to be licensed under the Contractor's State License Law, or by his or her agent or salesperson to provide the required information, notices, and disclosures in a contract, or to comply with them is cause for discipline [*Bus. & Prof. Code §§ 7159.11, 7159.14(a)*]. In addition, misrepresentation of, or failure to include the contract price, violation of the down payment limitations, or requesting or accepting payment that exceeds the value of work performed or material delivered is a misdemeanor punishable by a fine of between $100 and $5,000 and/or imprisonment for up to one year [*Bus. & Prof. Code § 7159.14(b)*].

Any person who violates the requirements described in (3)-(7) in the list in § 104.103[2], as part of a plan or scheme to defraud an owner or tenant of a residential or nonresidential structure, including a mobilehome or manufactured home, in connection with the offer or performance of repairs to the structure for damage caused by a natural disaster, will be ordered to make full restitution to the victim based on the person's ability to pay, as defined in *Penal Code § 1203.1b(e)*. In addition to full restitution, and imprisonment for up to one year, the court may impose a fine of not less than $500 nor more than $25,000, also based on the defendant's ability to pay. This applies to natural disasters for which the Governor proclaims a state of emergency, or for which an emergency or major disaster is declared by the President of the United States [*Bus. & Prof. Code § 7159.14(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationContracts LawTypes of ContractsConstruction ContractsCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral

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§ 104.104 Financing Provisions

[1] Enforceability

"Home improvement" as used in the following provisions means "home improvement" as that term is defined in *Bus. & Prof. Code § 7151*. Goods are included within the definition whether or not they are to be attached to real property or so affixed to real property as to become a part of the real property [*Bus. & Prof. Code § 7163(e)*].

No home improvement contract is enforceable against the buyer if obtaining a loan for all or a portion of the contract price is a condition precedent to the contract, or if the contractor provides financing or in any manner assists the buyer in obtaining a loan or refers the buyer to any person who may loan, or arrange a loan for, all or part of the contract price, unless all the following conditions are met [*Bus. & Prof. Code § 7163(a)*]:

- The third party, if any, agrees to make the loan;
- The buyer agrees to accept the loan or financing; and
- The buyer does not rescind the loan or financing transaction, within the rescission period prescribed in the federal Truth in Lending Act or Regulation Z, if applicable [*see* Ch. 501, *Sales: Retail Installment Sales*].

Until these three conditions are met, it is unlawful for the contractor to deliver any property, perform any services other than obtaining building permits or other similar services before the commencement of the home improvement for which no mechanic's lien can be claimed, or represent in any manner that the contract is enforceable or that the buyer has any obligation on the contract. A violation of this provision also renders the contract unenforceable [*Bus. & Prof. Code § 7163(b)*].

An alternative set of conditions may be applied to swimming pool contracts to be financed by third-party lenders [*Bus. & Prof. Code § 7165*].

[2] Return of Property or Consideration Given by Buyer

If the contract is unenforceable for failure to satisfy required conditions [*see § 104.104[1]*], the contractor must immediately and without condition return all money, property, and other consideration given by the buyer. If the buyer gave property as consideration and the contractor does not or cannot return it, for whatever reason, the contractor must immediately return the greater of the property's fair market value or its value as designated in the contract. Nothing in *Bus. & Prof. Code § 7163* prohibits a contractor from receiving a down payment otherwise permitted by law, provided that the contractor returns the down payment in accordance with this provision if the contract is unenforceable [*Bus. & Prof. Code § 7163(c)*].

[3] Payment for or Return of Property or Services Given by Contractor

Except as provided in *Bus. & Prof. Code § 7163(d)(2)* (discussed *below*), the buyer may retain without obligation in law or in equity any services or property provided pursuant to a contract that is unenforceable for failure to satisfy the conditions set forth in *Bus. & Prof. Code § 7163(a)* or *(b)* [*Bus. & Prof. Code § 7163(d)(1)*; *see § 104.106[1]*]. If the contract is unenforceable and the contractor has delivered property to the buyer, the buyer must make the property available for return to the contractor if all of the following requirements are satisfied [*Bus. & Prof. Code § 7163(d)(2)*]:

- The property can be practically returned to the contractor without causing damage to the buyer.

- The contractor, at the contractor's expense, first returns to the buyer any money, property, and other consideration taken by the contractor, provided that the property is returned in the condition that it was in immediately prior to its taking. If applicable, the contractor must, at its own expense, reinstall any property taken in the manner in which the property had been installed prior to its taking.

- The contractor, at its own expense, picks up the property within 60 days of the execution of the contract.

[4] Remedies as Nonexclusive

The rights and remedies provided to the buyer under *Bus. & Prof. Code § 7163* are nonexclusive and cumulative with regard to all other rights and remedies under other laws [*Bus. & Prof. Code § 7163(f)*].

[5] Waiver of Rights and Remedies

Any waiver of the provisions in *Bus. & Prof. Code § 7163* is contrary to public policy and is void and unenforceable [*Bus. & Prof. Code § 7163(g)*]. Nonetheless, the buyer may waive the conditions of *Bus. & Prof. Code § 7163(a)* and *(b)* to the extent that the contract is executed in connection with the making of emergency repairs or services that are necessary for the immediate protection of persons or real or personal property. The buyer's waiver for emergency repairs or services must be in a dated written statement that (1) describes the emergency, (2) states that the contractor has informed the buyer of the provisions of *Bus. & Prof. Code §§ 7163(a)* and *(b)* and that the buyer waives those provisions, and (3) is signed by each owner of the property. Waivers made on printed forms are void and unenforceable [*Bus. & Prof. Code § 7163(g)*].

[6] Unruh Act

The Unruh Act (*Civ. Code § 1801 et seq.*) governs retail installment contracts [*see Civ. Code § 1802.6* ("retail installment contract" defined)] for the purchase of goods to be used primarily for personal, family, or household purposes [*Civ. Code § 1802.1*] or services, including those furnished in connection with the improvement of real property, for other than a commercial or business use [*Civ. Code § 1802.2*]. The provisions of the Unruh Act are expressly made inapplicable to any contract or series of contracts providing for the construction, sale, or construction

and sale of an entire residence, including a mobilehome, or all or part of a structure designed for commercial or industrial occupancy, with or without a parcel of real property or an interest in such a parcel; and to any sale of a lot or parcel of real property, including any site preparation incidental to the sale [*Civ. Code § 1801.4*]. Home improvement contracts do not fall under any of these descriptions, and may thus be subject to the Unruh Act if they involve installment payments.

The Unruh Act was designed to protect consumers from abusive credit practices. The protection, however, was not deemed by the Legislature to be necessary in transactions between equally competent business persons dealing with each other in arm's length transactions, and it was not the intent of the Legislature that consumer transactions be governed by the same principles that govern business transactions. Thus, transactions subject to the Unruh Act are ordinarily not subject to the provisions of the Uniform Commercial Code, and vice versa [*see Cessna Finance Corp. v. Pivo (1976) 58 Cal. App. 3d 281, 287, 129 Cal. Rptr. 888* ; *James Talcott, Inc. v. Gee (1968) 266 Cal. App. 2d 384, 386-387, 72 Cal. Rptr. 168]* . However, transactions subject to the secured transaction provisions of the Uniform Commercial Code [*Com. Code § 9101 et seq.*] are subject to the provisions of the Unruh Act [*see Com. Code § 9201(b)*]. In the case of a conflict between the two statutory schemes, the provisions of the Unruh Act control [*Com. Code § 9201(c)*].

For a form of complaint by a purchaser against a contractor for violation of a provision of the Unruh Act, see *§ 104.311*. For further discussion, see Ch. 501, *Sales: Retail Installment Sales* , and Ch. 503, *Sales: Secured Transactions* .

[7] Federal Truth in Lending Act

The stated purposes of the federal Truth In Lending Act (*15 U.S.C. § 1601 et seq.*) are to assure a meaningful disclosure of credit terms so that consumers will be able to compare more readily the various credit terms available to them and avoid the uninformed use of credit, and to protect consumers against inaccurate and unfair credit billing and credit card practices [*15 U.S.C. § 1601(a)*]. The Truth in Lending Act applies to credit transactions in which goods or services are purchased primarily for personal, family, or household purposes [*15 U.S.C. § 1602(h)*].

Like the Unruh Act, which covers similar types of transactions [*see § 104.133[10]*], the Truth in Lending Act may apply to home improvement contracts that involve the extension of consumer credit. The Truth in Lending Act is inapplicable to credit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes, or extensions of credit to governments, government agencies or instrumentalities, or organizations [*15 U.S.C. § 1603(1)*]. It is also not applicable to credit transactions, other than those in which a security interest is or will be acquired in real property or in personal property used or expected to be used as the consumer's principal dwelling, in which the total amount financed exceeds $25,000 [*15 U.S.C. § 1603(3)*].

For further discussion, see Ch. 501, *Sales: Retail Installment Sales* .

[8] Requirements for Contracts Secured by Real Property

[a] General Requirements

No home improvement goods or services contract of $5,000 or less can provide for a security interest in real property, except for a mechanics' lien or other property interest that arises by operation of law. Any lien purported to be created by such a contract is void and unenforceable [*Bus. & Prof. Code § 7159.2(a)*].

When a home improvement goods or services contract of more than $5,000 is secured by a mortgage or deed of trust on real property, the person or entity making the loan may pay the contractor only by an instrument payable to the borrower or jointly to the borrower and contractor; or if the borrower so elects, through a third-party escrow agent pursuant to the terms of a written agreement signed by the parties before the funds are disbursed [*Bus. & Prof. Code §*

7159.2(b)].

[b] Notice Requirement for Door-to-Door Sales

With specified exceptions, any contract for the sale of home improvement goods or services offered by door-to-door sale that contains or is secured by a lien on real property, must be accompanied by a notice in 18-point boldface type that informs the buyer that he or she may lose his or her house if any required payments are missed. A security interest created in any door-to-door sale contract that does not provide the notice is void and unenforceable [*Bus. & Prof. Code § 7159.1*].

The notice requirement does not apply to any of the following [*Bus. & Prof. Code § 7159.1(a)-(c)*]:

- Contracts subject to the Unruh Act [*see Civ. Code § 1801 et seq.*; *see also § 104.133[10]*];
- Mechanics' liens [*see Civ. Code § 3109 et seq.*; *see also* Ch. 361, *Mechanics' Liens*]; and
- Home improvement goods or services contracts of $5,000 or less [*see Bus. & Prof. Code § 7159.2(a)*; *see also § 104.106[8]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationAntitrust & Trade LawConsumer ProtectionHome SolicitationContracts LawRemediesRescission & RedhibitionGeneral OverviewReal Property LawConstruction LawContractsReal Property LawFinancingConstruction Loans

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§ 104.105 Contractor's Representations Concerning Materials

Any representation by a person licensed pursuant to the license law with respect to a trademark or brand name, quality, or size of any goods or materials, in reference to bathroom fixtures, a sink, stove, refrigerator, lighting, carpeting and other floor surfaces, burglar and smoke alarms, paints, textured coatings, siding and other wall surfaces, insulation, roofing, air conditioning and heating systems, and appliances, to be provided by the person pursuant to a home improvement contract, must set forth, in writing, in the contract or specifications and must include a description of the goods or materials, including any brand name, model number, or similar designation [*Bus. & Prof. Code § 7162(a)*].

Failure to install the specific goods or materials as represented constitutes a cause for disciplinary action under the license law [*Bus. & Prof. Code § 7162(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 104.106 Action for Damages and Attorney's Fees for Fraud in Inducement

Any person who is induced to contract for a work of improvement, including but not limited to a home improvement, in reliance on false or fraudulent representations or false statements knowingly made, may sue and recover from the contractor or solicitor a penalty of $500, plus reasonable attorney's fees, in addition to any damages sustained by reason of the statements or representations made by the contractor or solicitor [*Bus. & Prof. Code § 7160*; *see Bus. & Prof. Code § 7168* (attorney's fees for prevailing party in action on swimming pool contract)]. For a form of complaint for damages for fraud by an owner against a contractor, *see § 104.310*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewReal Property LawConstruction LawContractsReal Property LawFinancingConstruction LoansTortsBusiness TortsFraud & MisrepresentationConstructive FraudGeneral Overview

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[Reserved]

§§ 104.107[Reserved]

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§ 104.130 California Points and Authorities

For forms of memoranda of points and authorities relating to contractor's failure or delay of performance, see California Points and Authorities, Ch. 50, *Contracts* (Matthew Bender)

For forms of memoranda of points and authorities relating to rescission, abandonment, or modification of contracts, see California Points and Authorities, Ch. 50, *Contracts* (Matthew Bender)

For forms of memoranda of points and authorities relating to the recovery of contract damages, see California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

For forms of memoranda of points and authorities relating to mechanics' liens, see California Points and Authorities, Ch. 152, *Mechanics' Liens* (Matthew Bender)

For forms of memoranda of points and authorities relating to violations of the Uniform Commercial Code or the Unruh Act, see California Points and Authorities, Ch. 206, *Sales* (Matthew Bender)

For forms of memoranda of points and authorities relating to suretyship and bonds, see California Points and Authorities, Ch. 222, *Suretyship* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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10-104 California Forms of Pleading and Practice--Annotated § 104.131

§ 104.131 California Real Estate Law and Practice

For detailed discussion and forms relating to construction and development law, see California Real Estate Law And Practice, Chs. 415- 491 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts

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10-104 California Forms of Pleading and Practice--Annotated § 104.132

§ 104.132 Construction Law

For general discussion of construction contracts, construction claims, government contracting and regulation, lien law, construction financing, and remedies, see Construction Law (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 104.133 State Statutes

[1] Contractors

Contractors' State License Law. *Bus. & Prof. Code § 7000 et seq.*

Contents of building contracts. *Bus. & Prof. Code §§ 7030, 7030.5, 7034, 7164*

Contractors' bonds. *Bus. & Prof. Code §§ 7071.5-7071.17*; *Civ. Code § 3225 et seq.*

[2] Contracts

Excuses for performance. *Civ. Code § 1511*

Contracts in general. *Civ. Code § 1549 et seq.*

Essential elements. *Civ. Code § 1550*

Interpretation. *Civ. Code § 1635 et seq.*

Time for performance. *Civ. Code § 1657*

Rescission. *Civ. Code §§ 1688, 1690-1693*

Statutes of limitations in actions on building contracts. *Code Civ. Proc. §§ 335.1, 337.1, 337.15, 338, 339*

Provision in subcontract of subcontractor with principal offices in state that requires dispute to be determined outside state is void. *Code Civ. Proc. § 410.42*

Pleading and proving performance of conditions precedent. *Code Civ. Proc. § 457*

[3] Damages

Liquidated damages. *Civ. Code § 1671*

Damages for breach of contract. *Civ. Code §§ 3300-3302*

[4] Government Construction Contracts

Penalties and forfeitures withheld from public work contract payment. Gov. Code § 1727 et seq.

Verification of licensure prior to award of contract by any state agency or department. *Pub. Contract Code § 6100*

Contractor's liability on public work for act of God. *Pub. Contract Code § 7105*

State Contract Act. *Pub. Contract Code § 10100 et seq.*

[5] Housing Construction Regulations

State Housing Law. *Health & Safety Code § 17910 et seq.*

Earthquake safety standards. *Health & Safety Code § 19100 et seq.*

[6] Mechanics' Liens

Mechanics' liens in general. *Civ. Code § 3109 et seq.*

[7] Stop Notices

Stop notices for private works of improvement. *Civ. Code § 3156 et seq.*

Stop notices for public works of improvement. *Civ. Code § 3179 et seq.*

[8] Suretyship and Bonds

Suretyship in general. *Civ. Code § 2787 et seq.*

Bonds in general. *Civ. Code §§ 3225, 3226*

Payment bonds for private works. *Civ. Code §§ 3235-3242*

Payment bonds for public works. *Civ. Code §§ 3247-3252*

[9] Uniform Commercial Code

Applicability to commercial transactions. *Com. Code § 1102*

Writing requirements for contracts for sales of goods for $500 or more. *Com. Code § 2201(1)*

Secured transactions provisions. *Com. Code § 9101 et seq.*

[10] Unruh Act

Inapplicability to contract for construction of entire residence or construction of all or part of commercial structure. *Civ. Code § 1801.4*

Legal Topics:

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

[1] Architect's Certificate

Architect's certificate was not required when contract named two architects and stated performance was to be to their satisfaction, but owner later discharged both architects. *Thomas Haverty Co. v. Jones (1921) 185 Cal. 285, 295, 296, 197 P. 105*

Intent to confer on architect power to make legal interpretation of subcontract or resolve ambiguities in plans must be unequivocally expressed. *Walnut Creek Elec. v. Reynolds Constr. Co. (1968) 263 Cal. App. 2d 511, 515, 69 Cal. Rptr. 667*

[2] Bond

City entitled to recover under performance bond when developer failed to build contracted-for improvements, even though improvements were subsequently built by another developer. *City of Merced v. American Motorists Ins. Co. (2005) 126 Cal. App. 4th 1316, 1324, 24 Cal. Rptr. 3d 788*

Recovery is proper under contractor's bond only if violation of Contractor's Licensing Law caused damage. *All Bay Mill & Lumber Co. v. Surety Co. (1989) 208 Cal. App. 3d 11, 17, 255 Cal. Rptr. 790*

When contract was made part of performance bond, liquidated damages clause in contract was covered by bond, and surety was liable for liquidated damages even though contractor abandoned work and surety had to finish performance. *Pacific Employers Ins. Co. v. Berkeley (1984) 158 Cal. App. 3d 145, 150-154, 204 Cal. Rptr. 387*

Lender who was defrauded into believing that person was contractor on job and loaned person money was not able to collect on contractor bond because person was neither contractor on job nor acting as contractor. *Brown v. Surety Co. of Pacific (1981) 122 Cal. App. 3d 614, 619-622, 176 Cal. Rptr. 143*

[3] Construction Defects

Civil engineer was not liable for defective construction notwithstanding engineer's signing of plans when plans omitted certain details of project not requiring his participation and engineer had not assumed responsibility for all aspects of project. *Wynner v. Buxton (1979) 97 Cal. App. 3d 166, 176-178, 158 Cal. Rptr. 587*

[4] Damages for Breach by Contractor

Sale of property after damage from construction defect did not assign cause of action for damage, and owner at time of damage had cause of action against contractor for damage. *Vaughn v. Dame Construction Co. (1990) 223 Cal. App. 3d 144, 148-149, 272 Cal. Rptr. 261*

Damages for restoration costs in excess of diminution of value are proper if there is reason that is personal to owner for restoring original condition. *Orndorff v. Christiana Community Builders (1990) 217 Cal. App. 3d 683, 687-688, 266 Cal. Rptr. 193*

Damages for breach of contract involving construction and 25-year leaseback of building by defendant were based on discounted, present value of used building at end of 25-year lease rather than on full value of defendant's cost of constructing building. *Sanders Construction Co. v. San Joaquin First Fed. Sav. & Loan Assn. (1982) 136 Cal. App. 3d 387, 397-400, 186 Cal. Rptr. 218*

Measure of damages for contractor's breach of building contract was reasonable cost to plaintiff to finish work in accordance with contract. *Walker v. Signal Companies, Inc. (1978) 84 Cal. App. 3d 982, 993, 149 Cal. Rptr. 119*

Measure of damages for contractor's breach of building contract included lost profits and prejudgment interest. *Burnett & Doty Development Co. v. Phillips (1978) 84 Cal. App. 3d 384, 389-392, 148 Cal. Rptr. 569*

[5] Excuses for Nonperformance

Building contract contained implied covenant that owner would not interfere with or prevent performance by contractor. *Gray v. Bekins (1921) 186 Cal. 389, 395, 199 P. 767*

Moratorium imposed by ordinance did not provide excuse based on either impossibility or commercial frustration. *G.W. Andersen Construction Co. v. Mars Sales (1985) 164 Cal. App. 3d 326, 334-339, 210 Cal. Rptr. 409*

[6] Extra Work

Right of contractor who, acting reasonably, is misled by incorrect plans and specifications issued by another contracting party as basis for bids and who, as result, submits lower bid than he or she would otherwise have made, to recover under contract for extra work necessitated by incorrect plans and specifications. *Coleman Engineering Co. v. North Am. Aviation, Inc. (1966) 65 Cal. 2d 396, 404, 55 Cal. Rptr. 1, 420 P.2d 713*

Measure of damages for extra work obtained by taking total cost of project and subtracting payments made was proper when assessment of costs as planned was difficult or impossible. *State ex rel. Dept. of Transportation v. Guy F. Atkinson Co. (1986) 187 Cal. App. 3d 25, 32-34, 231 Cal. Rptr. 382*

Absence of change order as required by contract and acceptance of compensation by contractor did not preclude

contractor's recovery of compensation for extra work when contractor was performing according to contract, owner thought otherwise and demanded that work be performed according to contract, contractor requested but did not receive clarification of owner's views, owner subsequently performed portion of work in manner different from contract requirements, and contractor thereafter finished work in that manner on assumption that owner's conduct amounted to authorization for change. *Weeshoff Constr. Co. v. Los Angeles County Flood Control Dist. (1979) 88 Cal. App. 3d 579, 582-594, 152 Cal. Rptr. 19*

[7] Statute of Limitations

Ten-year statute of limitations for latent construction defects not subject to equitable tolling while promises or attempts to repair are pending. *Lantzy v. Centex Homes (2003) 31 Cal. 4th 363, 379, 2 Cal. Rptr. 3d 655, 73 P.3d 517* , disapproving *Grange Debris Box & Wrecking Co. v. Superior Court (1993) 16 Cal. App. 4th 1349, 20 Cal. Rptr. 2d 515* and *Cascade Gardens Homeowners Assn. v. McKellar & Associates (1987) 194 Cal. App. 3d 1252, 240 Cal. Rptr. 113*

Homeowners' action against builder for latent construction defects was barred by 10-year statute of limitations in *Code Civ. Proc. § 337.15*; fact that builder owned home for year and a half between notice of completion and sale of property did not preclude builder from asserting *Code Civ. Proc. § 337.15* as defense. *Gundogdu v. King Mai Inc. (2009) 171 Cal. App. 4th 310, 314-315, 89 Cal. Rptr. 3d 489*

Ten-year limitations period for latent construction defects [*Code Civ. Proc. § 337.15*] does not apply to contractor's indemnification claim against subcontractors based on willful misconduct and pursued using cross-complaint. *Pine Terrace Apartments, LP v. Windscape, LLC (2009) 170 Cal. App. 4th 1, 14-15, 87 Cal. Rptr. 3d 630*

Although county landfill built on leased property was "improvement" within meaning of *Code Civ. Proc. § 337.15*, statute did not bar lessor's contractual and indemnification claims or claims to recover remediation costs arising out of contamination from landfill. *San Diego Unified School Dist. v. County of San Diego (2009) 170 Cal. App. 4th 288, 309-311, 87 Cal. Rptr. 3d 796*

Tolling provision in *Code Civ. Proc. § 356* (when commencement of action is stayed by injunction or statutory prohibition, time of continuance of injunction or prohibition is not part of time limited for action's commencement) does not extend *Code Civ. Proc. § 337.15* 10-year statute of limitations for bankruptcy stays occurring wholly within 10-year period. *Inco Development Corp. v. Superior Court (2005) 131 Cal. App. 4th 1014, 1021-1022, 31 Cal. Rptr. 3d 872*

Ten-year limitations period [*Code Civ. Proc. § 337.15*] is not tolled during period of repair after initial completion. *FNB Mortgage Corp. v. Pacific General Group (1999) 76 Cal. App. 4th 1116, 1132, 90 Cal. Rptr. 2d 841*

For purposes of 10-year period of *Code Civ. Proc. § 337.15*, statute begins to run after "substantial completion" of each individual change or addition that qualifies as an improvement, and four conditions listed in *Section 337.15(g)* do not define "substantial completion"; thus, action for subsidence damage by purchasers of lot in "lots only" development was barred because it was brought more than 10 years after grading was completed on lot, even though action was filed less than 10 years after notice of completion was filed. *Nelson v. Gorian & Associates, Inc. (1998) 61 Cal. App. 4th 93, 96, 97, 71 Cal. Rptr. 2d 345*

If plaintiff obtains repairs by third party, 10-year period of *Code Civ. Proc. § 337.15* is not tolled because plaintiff is not relying on the defendant to remedy problem; thus there is no basis for tolling statute. *A & B Painting & Drywall, Inc. v. Superior Court (1994) 25 Cal. App. 4th 349, 354-355, 30 Cal. Rptr. 2d 418*

Patent defect limitations period is applicable to all actions based on patent defects, including actions by persons who

did not have access to location of defect and thus could not have discovered it. *Geertz v. Ausonio (1992) 4 Cal. App. 4th 1363, 1369-1370, 6 Cal. Rptr. 2d 318*

Definition of "substantial completion" is applicable to all improvers, including developers. *Schwetz v. Minnerly (1990) 220 Cal. App. 3d 296, 306, 269 Cal. Rptr. 417*

Filing of cross complaint beyond 10-year period is permissible when main action was filed within 10-year period only if cross complaint is transactionally related to main action. *Sandy v. Superior Court (1988) 201 Cal. App. 3d 1277, 1282-1284, 247 Cal. Rptr. 677*

Code Civ. Proc. § 337.15's 10-year limitations period for latent defects is applicable to products liability actions, such as strict liability action. *Stoneson Dev. Corp. v. Superior Court (1987) 197 Cal. App. 3d 178, 180-181, 242 Cal. Rptr. 721*

Limitations period is tolled during period of repair after initial completion. *Cascade Gardens Homeowners Assn. v. McKellar & Assocs. (1987) 194 Cal. App. 3d 1252, 1256-1257, 240 Cal. Rptr. 113* , disapproved by *Lantzy v. Centex Homes (2003) 31 Cal. 4th 363, 367, 2 Cal. Rptr. 3d 655, 73 P.3d 517*

Code Civ. Proc. § 337.1's four-year limitations period for patent defects was not applicable to developer's action for delay in performance of building contract. *Kralow Co. v. Sully-Miller Contracting Co. (1985) 168 Cal. App. 3d 1029, 1035, 214 Cal. Rptr. 630*

Second action for damages for further subsidence under foundation was barred by statute of limitations and res judicata. *McCloskey v. Carlton Builders (1985) 165 Cal. App. 3d 689, 691-693, 211 Cal. Rptr. 659*

Period of limitation in action for negligent fill and fraudulent concealment of fill conditions commenced when negligence and fraud were discovered or should have been discovered in exercise of reasonable diligence. *Allen v. Sundean (1982) 137 Cal. App. 3d 216, 222-224, 186 Cal. Rptr. 863*

Defect in air-conditioning system that caused temperature fluctuations was not patent defect because it was not readily discoverable. *Baker v. Walker & Walker, Inc. (1982) 133 Cal. App. 3d 746, 758-763, 184 Cal. Rptr. 245*

Code Civ. Proc. § 337.1's four-year limitations period for actions against contractors for patent defects is constitutional. *Salinero v. Pon (1981) 124 Cal. App. 3d 120, 127-129, 177 Cal. Rptr. 204*

Unfenced swimming pool was patent defect requiring application of four-year limitations period under *Code Civ. Proc. § 337.1*. *Mattingly v. Anthony Industries, Inc. (1980) 109 Cal. App. 3d 506, 510-511, 167 Cal. Rptr. 292*

Code Civ. Proc. § 337.15's 10-year limitations period for latent defects was not applicable to person in actual possession of property at time of injury and thus did not insulate from liability city that installed drains on city property. *Leaf v. City of San Mateo (1980) 104 Cal. App. 3d 398, 405, 163 Cal. Rptr. 711*

Code Civ. Proc. § 337's four-year limitations period running from discovery of defect and *Code Civ. Proc. § 337.15*'s 10-year limitations period running from substantial completion of improvement are mutually exclusive; shorter of two periods applies in cases of latent defects. *Anderson v. Brouwer (1979) 99 Cal. App. 3d 176, 180-181, 160 Cal. Rptr. 65*

[8] Venue

When action is for damages for construction defects and does not allege breach of contract, venue is proper only in county where property is located under *Code Civ. Proc. § 392*, which sets venue in actions for injuries to real property. *Foundation Engineers, Inc. v. Superior Court (1993) 19 Cal. App. 4th 104, 108-112, 23 Cal. Rptr. 2d 469*

Legal Topics:

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§ 104.135 Law Reviews

Brown and Fortin, *An Introduction to Interpretation of Express Contractual Indemnity Provisions in Construction Contracts Under California and Nevada Law, 32 McGeorge L. Rev. 1019 (2001)*

Embrey, *Notes and Comments: Limitation of Defect and Related Emotional Distress Damages in California Construction Defect Lawsuits, 23 Whittier L. Rev. 215 (2001)*

Note, *Freedom from the Freedom-to-Contract: California Supreme Court Invokes Public Policy to Invalidate "Pay-if-Paid" Clauses in Construction Contracts, 21 T. Jefferson L. Rev. 253 (1999)*

Note, *When That Dream Home Becomes a Nightmare: Should Emotional Distress Be a Compensable Damage in Construction Defect Cases? 3 San Diego Justice J. 297 (1995)*

Unruh and Worden, *Liquidated Damages for Delay in Completion of Commercial Construction Projects: Are They Recoverable by the Owner When the Owner Contributes to the Delay? 34 Santa Clara L. Rev. 1 (1993)*

Aaen, *Total Cost Method of Calculating Damages in Construction Cases, 22 Pac. L.J. 1185 (1991)*

Boyle & Hastings, *California Code of Civil Procedure Sections 337.1 and 337.15: Defective Construction Defect Statutes, 21 Pac. L.J. 235 (1990)*

Hart and Kane, *What Every Real Estate Lawyer Should Know About Payment and Performance Bonds, 17 Real Prop. Prob. & Tr. J. 674 (1982)*

Hunt, *Construction Industry Claims,* 55 State B.J. 374 (1980)

Legal Topics:

For related research and practice materials, see the following legal topics:
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J. Acret, Attorney's Guide to California Construction Contracts and Disputes (Cal. C.E.B. 2d ed. 1990)

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§ 104.150 California Points and Authorities

For a form of memorandum relating to the recovery of treble damages when defendant is not properly licensed, see California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

For forms of memoranda relating to fraud and deceit, see California Points AndAuthorities, Ch. 105, *Fraud and Deceit* (Matthew Bender)

For forms of memoranda relating to negligence actions and defenses, see California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 104.151 State Statutes

Fraud in inducement to contract. *Civ. Code §§ 1567, 1571-1574*

Duty to avoid injuring persons or property. *Civ. Code §§ 1708, 1714(a)*

Damages for deceit. *Civ. Code § 1709*

Elements of actionable fraud. *Civ. Code § 1710*

Indemnity clauses in building contracts. *Civ. Code §§ 2782-2784*

Exemplary or punitive damages for oppression, fraud, or malice. *Civ. Code § 3294*

Damages for breach of obligation not arising from contract. *Civ. Code § 3333*

Lender immunity from liability for construction defects. *Civ. Code § 3434*

Recovery of treble damages and costs and attorney's fees at discretion of court when unlicensed person causes injury or damage to another while providing goods or performing services for which specified licenses are required. *Code Civ. Proc. § 1029.8*

Duty of care owed to construction employees by employer. *Lab. Code §§ 3300, 6303, 6304, 6400, 6413.5*

Legal Topics:

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§ 104.152 Decisions

[1] Fraud and Misrepresentation

Misrepresentation was established when contract contained implied representation that other contractor would have dredge available and dredge was not available, causing extra expense to contractor. *Tonkin Constr. Co. v. County of Humboldt (1987) 188 Cal. App. 3d 828, 832-833, 233 Cal. Rptr. 587*

Measure of damages for fraud in inducement consisting of contractor's misrepresentations as to completion date of house to be constructed. *Walker v. Signal Companies, Inc. (1978) 84 Cal. App. 3d 982, 995-996, 149 Cal. Rptr. 119*

[2] Indemnity

Indemnity between general contractor and subcontractor is governed by particular agreement except when general contractor is vicariously liable. *Western Contracting Corp. v. Southwest Steel Rolling Mills, Inc. (1976) 58 Cal. App. 3d 532, 539-541, 129 Cal. Rptr. 782*

[3] Negligence

Individual who was president, director, and 50 percent stockholder of business that subcontracted to build patio and driveway at plaintiffs' home could be held personally liable for negligence; defendant's stipulation that he was negligent in constructing patio and driveway acknowledged that breach of duty owed to plaintiffs as third parties was violated, rather than merely breach of duty defendant owed to corporation, and plaintiffs alleged facts indicating defendant could be personally liable for negligent act by his direct participation and decisionmaking in construction of patio and driveway. *Michaelis v. Benavides (1998) 61 Cal. App. 4th 681, 686, 71 Cal. Rptr. 2d 776*

Economic as well as physical loss is recoverable in negligence action against contractors, and proof of building code

violations as sufficient for presumption of negligence; testimony about standard of care is not required. *Huang v. Garner (1984) 157 Cal. App. 3d 404, 412-414, 419-420, 203 Cal. Rptr. 800*

Corporation's complaint for damages resulting from contractor's improper construction of condominium, alleging it was charged with duty of maintaining and repairing common areas of condominium but failing to allege that corporation owned real property or that it was in possession or had right to possession, failed to state cause of action. *Friendly Village Community Assn., Inc. v. Silva & Hill Constr. Co. (1973) 31 Cal. App. 3d 220, 224-225, 107 Cal. Rptr. 123*

[4] Owner's Liability to Third Parties

Explanation of "peculiar risk doctrine" as stated in Restatement (Second) of Torts §§ 413, 416, and instruction to be given jury on doctrine. *Griesel v. Dart Industries, Inc. (1979) 23 Cal. 3d 578, 585-587, 153 Cal. Rptr. 213, 591 P.2d 503*

General contractor who claimed power to control all safety procedures on worksite could not be held liable to injured employee of subcontractor for failing to direct subcontractor to take safety precautions when there was no evidence that any conduct by general contractor contributed affirmatively to injuries. *Kinney v. CSB Construction, Inc. (2001) 87 Cal. App. 4th 28, 36, 103 Cal. Rptr. 2d 594*

[5] Strict Liability

Strict liability in tort was not applicable unless home was in defective condition. *Miller v. Los Angeles County Flood Control Dist. (1973) 8 Cal. 3d 689, 703, 106 Cal. Rptr. 1, 505 P.2d 193*

Settling defendants who were strictly liable for construction defects not entitled to recover on joint and several basis from other joint tortfeasors whose negligence was proximate cause of injuries; equitable indemnity principles apply in such circumstances. *Expressions at Rancho Niguel Assn. v. Ahmanson Developments, Inc. (2001) 86 Cal. App. 4th 1135, 1140-1141, 103 Cal. Rptr. 2d 895*

Developers of multiple-unit, residential, planned development complex were strictly liable for defective design and construction of project on unstable bluff, but soil engineers, structural engineers, and architects were not liable in absence of negligence or intentional misconduct. *Del Mar Beach Club Owners Assn. v. Imperial Contracting Co. (1981) 123 Cal. App. 3d 898, 914, 176 Cal. Rptr. 886*

Developer was strictly liable for failure of water distributing system resulting in harm from fire to properties in subdivision. *Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 810-811, 110 Cal. Rptr. 543*

When public entity approves and accepts as public improvement private construction by developer, developer is not strictly liable for defects. *Blau v. Los Angeles (1973) 32 Cal. App. 3d 77, 89-91, 107 Cal. Rptr. 727*

[6] Warranty

Builders and sellers of new construction are held to implied warranty that completed structure was designed and constructed in reasonably workmanlike manner. *Pollard v. Saxe & Yolles Dev. Co. (1974) 12 Cal. 3d 374, 380, 115 Cal. Rptr. 648, 525 P.2d 88*

Action alleging concrete slabs under plaintiffs' houses were defective was certifiable as class action as to breach of warranty claims. *Hicks v. Kaufman & Broad Home Corp. (2001) 89 Cal. App. 4th 908, 107 Cal. Rptr. 2d 761*

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§ 104.153 Law Reviews

Note, *Jasper Construction, Inc. v. Foothill Junior College District of Santa Clara: How Does a Contractor Prove Breach of Implied Warranty of Plans and Specifications?, 18 Cal. W.L. Rev. 499 (1982)*

Note, *Builders' Liability for Latent Defects in Used Homes, 32 Stan. L. Rev. 607 (1980)*

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10-104 California Forms of Pleading and Practice--Annotated § 104.170

§ 104.170 California Environmental Law and Land Use Practice

For discussion of the licensing and the citation procedure involving contractors working in the environmental field, see California Environmental Law And Land Use Practice, Ch. 10, *Administrative Law Issues* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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10-104 California Forms of Pleading and Practice--Annotated § 104.171

§ 104.171 California Points and Authorities

For forms of points and authorities relating to unlicensed contractors, see California Points and Authorities, Ch. 50, *Contracts* (Matthew Bender)

For forms of points and authorities relating to review of administrative proceedings, see California Points and Authorities, Ch. 195, *Public Administrative Law* (Matthew Bender)

Legal Topics:

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§ 104.172 State Statutes

[1] Asbestos Certification

Certification and examination of contractors regarding asbestos-related work. *Bus. & Prof. Code §§ 7028.1, 7028.2, 7028.5, 7118.5*

Requirements for asbestos removal contracts. *Health & Safety Code §§ 25914-25914.3*

Definition of "asbestos-related work." *Lab. Code § 6501.8*

[2] Contractors

"Contractor" defined. *Bus. & Prof. Code § 7026*

Persons included within definition of contractor. *Bus. & Prof. Code § 7026.1 et seq.*

Exemptions from licensing requirement. *Bus. & Prof. Code § 7040 et seq.*

Licensing requirements are not applicable to materials or articles that do not become fixed part of structure, or to materialpersons or manufacturers furnishing finished products. *Bus. & Prof. Code § 7045*

Persons excluded from definition of contractor. *Bus. & Prof. Code § 7051 et seq.*

Classification of contractors. *Bus. & Prof. Code § 7055 et seq.*

[3] Hazardous Waste Remedial or Removal Action

Certification and examination of contractors engaging in remedial or removal action regarding hazardous waste. *Bus. & Prof. Code §§ 7028.1, 7137(j), 7058.7, 7118.6*; *Lab. Code § 142.7*

[4] Licensing and Discipline of Contractors

Act in capacity of contractor without license is misdemeanor. *Bus. & Prof. Code § 7028*

Injunction against unlicensed contractor. *Bus. & Prof. Code §§ 7028.3, 7028.4*

Civil penalties against unlicensed contractor. *Bus. & Prof. Code §§ 7028.6-7028.13, 7044*

Bid on public contract without relevant contractor's license is misdemeanor. *Bus. & Prof. Code § 7028.15*

Licensing statement required in written contracts. *Bus. & Prof. Code § 7030(a)*

Discipline disclosure required in small residential contracts. *Bus. & Prof. Code § 7030.1*

License number required in written contracts, calls for bids, and advertising. *Bus. & Prof. Code § 7030.5*

Necessity of alleging licensure. *Bus. & Prof. Code § 7031*

Local regulation of contractors. *Bus. & Prof. Code §§ 7032, 7033*

Licensing and renewal procedure. *Bus. & Prof. Code §§ 7065 et seq., 7140 et seq.*

Licensee must notify registrar in writing of unsatisfied final judgments within 90 days of judgment; failure to do so results in automatic license suspension. *Bus. & Prof. Code § 7071.17(b)*

Licenses as nontransferable. *Bus. & Prof. Code § 7075.1(a)*

Disciplinary proceedings. *Bus. & Prof. Code § 7090 et seq.*

Prohibitions related to individual with revoked license who performs acts for which license is required. *Bus. & Prof. Code §§ 7121.6-7121.8*

Mandatory disciplinary action, including six month license suspension or permanent revocation, if licensee is convicted of violating *Penal Code § 396*, which relates to charging inordinately higher prices for goods and services in time of emergency and major disaster. *Bus. & Prof. Code § 7123.5*

Public availability of nature and disposition of complaints against licensee referred for legal action, except those resolved in favor of contractor. *Bus. & Prof. Code § 7124.6*

City government licensing of contractors. *Gov. Code § 37101.7*

Legal Topics:

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

[1] Actions Barred for Lack of License

Corporate subcontractor who submitted bid to general contractor before it obtained corporate contractor's license and who performed some work on the project before license was issued was barred from bringing suit against general contractor, because subcontractor was unlicensed during period in which it performed services that could only be performed by a licensed contractor; fact that subcontractor's president held individual license did not constitute substantial compliance with license requirement. *Great West Contractors Inc. v. WSS Industrial Construction Inc. (2008) 162 Cal. App. 4th 581, 592-593, 596, 76 Cal. Rptr. 3d 8*

Licensed contractor whose unlicensed corporation entered in subcontract with general contractor could not sue to recover compensation even though contractor's license number appeared on all documents relating to contract, because corporation was contracting party. *Opp v. State Farm Fire & Marine Ins. Co. (2007) 154 Cal. App. 4th 71, 76, 64 Cal. Rptr. 3d 260*

Contractor failed to show substantial compliance with licensing laws [*Bus. & Prof. Code § 7031*] when its license remained suspended for five months after contractor received notice of suspension and contractor failed to renew license on notice of expiration. *Pacific Custom Pools, Inc. v. Turner Construction Co. (2000) 79 Cal. App. 4th 1254, 1265, 94 Cal. Rptr. 2d 756*

Unlicensed contractor's breach of contract action against city was barred when, in lieu of payment of money, contract gave contractor fill rights on city land, which contractor would exploit by collecting dumping fees from third parties; court construed those fill rights as "compensation" which contractor could not collect without license. *K&K Services, Inc. v. City of Irwindale (1996) 47 Cal. App. 4th 818, 823-824, 54 Cal. Rptr. 2d 836*

[2] Actions Not Barred for Lack of License

Claims brought under Contractors' State License Law against unlicensed contractor may form basis for writ of attachment because agreement for the performance of services lies at heart of such a claim. *Goldstein v. Barak Construction (2008) 164 Cal. App. 4th 845, 853, 79 Cal. Rptr. 3d 603*

Bus. & Prof. Code § 7031 does not bar civil rights claims under *42 U.S.C. § 1981* for racial discrimination; non-licensed contractor may pursue nominal damages, emotional distress damages, and punitive damages, but may not recover contract damages. *Holland v. Morse Diesel Internat., Inc. (2001) 86 Cal. App. 4th 1443, 1453, 104 Cal. Rptr. 2d 439*

Contractor demonstrated substantial compliance with licensing requirements [*Bus. & Prof. Code § 7031(e)*] when contractor did not have actual knowledge that its license was suspended due to clerk's failure to file a bond with licensing board and board was unaware of suspension at time of its occurrence due to error in its computer records. *ICF Kaiser Engineers, Inc. v. Superior Court (1999) 75 Cal. App. 4th 226, 241, 89 Cal. Rptr. 2d 88*

Business that simply furnished laborers to subcontractor and did not actually perform or supervise any construction services or contract was not acting in capacity of a contractor and therefore was not barred by its lack of license from enforcing its rights under contract with subcontractor. *Contractors Labor Pool, Inc. v. Westway Contractors, Inc. (1997) 53 Cal. App. 4th 152, 166, 61 Cal. Rptr. 2d 715*

Lack of license did not preclude claims against subcontractors for negligence and equitable indemnity by developers/general contractors sued on strict liability theory for construction defects. *Ranchwood Communities Limited Partnership v. Jim Beat Construction Co. (1996) 49 Cal. App. 4th 1397, 1420-1421, 57 Cal. Rptr. 2d 386*

Lack of license does not preclude owner's suit against unlicensed contractor for breach of contract. *Domach v. Spencer (1979) 101 Cal. App. 3d 308, 311, 161 Cal. Rptr. 459*

[3] Contractors' State License Law

Purpose of Contractors' State License Law is to protect public by prohibiting dishonest, incompetent, inexperienced, or financially irresponsible persons from acting as building contractors. *Rinaldi v. Workers' Comp. Appeals Bd. (1988) 199 Cal. App. 3d 217, 225, 244 Cal. Rptr. 637*

[4] Discipline of Contractors

Discipline was proper under *Bus. & Prof. Code § 7109* (willful departure from accepted trade standards) when inference that contractor knew his work was substandard was supported by evidence that violation was based on 17 instances of substandard work involving significant errors, which contractor ultimately agreed to repair. *Tellis v. Contractors' State License Bd. (2000) 79 Cal. App. 4th 153, 159-160, 93 Cal. Rptr. 2d 734*

Contractor's failure to correct defects after repeated requests constituted violation of *Bus. & Prof. Code § 7113* (failure in any material respect to complete project or operation for price stated in contract); even though cost of repairs was minor in proportion to cost of project, there was evidence supporting reasonable finding that cost, nature, and amount of substandard work was substantial or material, as opposed to trivial. *Tellis v. Contractors' State License Bd. (2000) 79 Cal. App. 4th 153, 163, 93 Cal. Rptr. 2d 734*

Disciplinary provisions of Contractors' State License Law did not preempt municipality's authority to temporarily preclude dishonest contractor from bidding on that municipality's public work projects. *Stacy & Witbeck, Inc. v. City and County of San Francisco (1995) 36 Cal. App. 4th 1074, 1093, 44 Cal. Rptr. 2d 472*

Contractors' State License Law governs licensing requirements for and disciplinary actions against contractors; causes for discipline are contained in *Bus. & Prof. Code § 7107 et seq.*; disciplinary proceedings are subject to Administrative Procedure Act (*Gov. Code § 11501*; *Bus. & Prof. Code § 7091(f)*). *Linda Jones General Builder v. State License Bd. (1987) 194 Cal. App. 3d 1320, 1324, 240 Cal. Rptr. 180*

Disciplinary proceeding against licensed contractor required to be initiated by accusation specifying statutes and rules that contractor allegedly violated *Gov. Code § 11503*; fulfillment of requirement is statutory predicate for disciplinary action, so that only violations properly charged in accusation will support disciplinary action. *Linda Jones General Builder v. State License Bd. (1987) 194 Cal. App. 3d 1320, 1324, 1326, 240 Cal. Rptr. 180*

Building contractor was not subject to discipline under *Bus. & Prof. Code § 7109* (willful and prejudicial departure from accepted trade standards for good and workmanlike construction) or *Bus. & Prof. Code § 7113* (failure to complete project for contract price), based on contractor's deviation from architect's plans and specifications and subsequent damage to house constructed by contractor, because contractor was owner of property when house was built, there was no construction contract, and there was no third-party owner whose consent was required, although contractor later sold house to third party. *Linda Jones General Builder v. State License Bd. (1987) 194 Cal. App. 3d 1320, 1323-1328, 240 Cal. Rptr. 180*

[5] Licensing Requirements and Procedure

Penalties imposed under *Bus. & Prof. Code § 7108.5* for failure to pay subcontractor are recoverable in either disciplinary action before Contractors State License Board or civil action filed by subcontractor. *Morton Engineering & Construction, Inc. v. Patscheck (2001) 87 Cal. App. 4th 712, 720, 104 Cal. Rptr. 2d 815*

Contract to construct foundation for residence is within scope of general engineering contractor's license and is legal if it requires specialized engineering knowledge and skill, even though residential foundations are not specifically enumerated in *Bus. & Prof. Code § 7056*. *Ron Yates Constr. Co. v. Superior Court (1986) 186 Cal. App. 3d 337, 344-348, 230 Cal. Rptr. 629*

Lab. Code § 2750.5 is not applicable to determinations of whether one is employee or unlicensed contractor under *Bus. & Prof. Code §§ 7031* and *7053*. *Fillmore v. Irvine (1983) 146 Cal. App. 3d 649, 657, 194 Cal. Rptr. 319*

Demurrer for defendant-owner was not proper when factual issue existed as to whether plaintiff's contract to maintain condominium grounds required work for which license was required or whether plaintiff was doing such work. *Executive Landscape Corp. v. San Vicente Country Villas IV Assn. (1983) 145 Cal. App. 3d 496, 499-501, 193 Cal. Rptr. 377*

Contractors' State License Law does not provide for issuance of conditional or probationary contractor's license. *Housing Development Co. v. Hoschler (1978) 85 Cal. App. 3d 379, 390, 149 Cal. Rptr. 400*

Effect of running of statute of limitations [*Bus. & Prof. Code § 7091(a)-(e)*] on acts warranting discipline on subsequent application for license. *Housing Development Co. v. Hoschler (1978) 85 Cal. App. 3d 379, 388, 149 Cal. Rptr. 400*

Partnership did not acquire vested right to contractor's license merely because its qualifying partner had previous affiliations with company that had once been so licensed. *Housing Development Co. v. Hoschler (1978) 85 Cal. App. 3d 379, 386, 149 Cal. Rptr. 400*

Scope of judicial review of denial of application for contractor's license; when Registrar of Contractor's decision will be

set aside for abuse of discretionary powers. *Housing Development Co. v. Hoschler (1978) 85 Cal. App. 3d 379, 385-387, 149 Cal. Rptr. 400*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsState & Territorial GovernmentsLicensesReal Property LawConstruction LawContractors & Subcontractors

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10-104 California Forms of Pleading and Practice--Annotated § 104.174

§ 104.174 Law Reviews

Comment, *Contract Licensing in the Construction Industry: Substantial Compliance Doctrine Prevents Egregious Results, 28 Santa Clara L. Rev. 143 (1988)*

Sobel, *Owners Delay Damages Chargeable to Performance Bond Surety, 21 Cal. W. L. Rev. 128 (1984)*

Legal Topics:

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[Reserved]

§§ 104.175[Reserved]

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10-104 California Forms of Pleading and Practice--Annotated § 104.190

§ 104.190 California Legal Forms

For forms of home improvement contracts, see California Legal Forms, Ch. 89, *Home Improvement and Specialty Contracts* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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10-104 California Forms of Pleading and Practice--Annotated § 104.191

§ 104.191 California Points and Authorities

For memoranda relating to the formation of contracts generally, see California Points and Authorities, Ch. 50, *Contracts* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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10-104 California Forms of Pleading and Practice--Annotated § 104.192

§ 104.192 State Statutes

"Person" defined. *Bus. & Prof. Code § 7150*

Home improvement business. *Bus. & Prof. Code § 7150 et seq.*

"Home improvement contractor" defined. *Bus. & Prof. Code § 7150.1*

Certification requirements for home improvement contractors. *Bus. & Prof. Code §§ 7150.2, 7150.3*

"Home improvement" defined. *Bus. & Prof. Code § 7151*

"Home improvement contract" defined. *Bus. & Prof. Code § 7151.2*

"Home improvement salesperson" defined. *Bus. & Prof. Code § 7152*

Registration of home improvement salespersons. *Bus. & Prof. Code § 7153 et seq.*

Contents of home improvement contracts. *Bus. & Prof. Code § 7159*

Requirements for contracts secured by real property. *Bus. & Prof. Code §§ 7159.1, 7159.2*

Service and repair contracts. *Bus. & Prof. Code §§ 7159.10, 7159.14*

Financing of home improvement contracts. *Bus. & Prof. Code §§ 7163, 7165*

Nonapplicability of home improvement statutes to certain swimming pool contracts. *Bus. & Prof. Code § 7166*

Attorney's fees in actions on swimming pool contracts. *Bus. & Prof. Code § 7168*

"Goods" defined. *Civ. Code § 1689.5(c)*

"Services" defined. *Civ. Code § 1689.5(d)*

Retail installment sales contracts (Unruh Act). *Civ. Code § 1801 et seq.*

Applicability of Unruh Act to services furnished in connection with improvement of real property. *Civ. Code § 1802.2*

Consumer notice of Swimming Pool Safety Act requirements. *Health & Safety Code § 115924*

Contractor's duty to provide warning regarding fire safety issues related to security or "burglar" bars. *Health & Safety Code § 13113.9*

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewContracts LawTypes of ContractsConstruction ContractsContracts LawTypes of ContractsInstallment ContractsReal Property LawConstruction LawContracts

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10-104 California Forms of Pleading and Practice--Annotated § 104.193

§ 104.193 Decisions

Enforceability of oral home improvement contract. *Calwood Structures, Inc. v. Herskovic (1980) 105 Cal. App. 3d 519, 521-522, 164 Cal. Rptr. 463*

Legal Topics:

For related research and practice materials, see the following legal topics:
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10-104 California Forms of Pleading and Practice--Annotated § 104.194

§ 104.194 Attorney General Opinions

Licensed contractor may employ contractor whose license has been revoked. *85 Ops. Cal. Atty. Gen. 171 (2002)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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10-104 California Forms of Pleading and Practice--Annotated §§ 104.195-104.209

[Reserved]

§§ 104.195[Reserved]

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10-104 California Forms of Pleading and Practice--Annotated § 104.210

§ 104.210 Complaint for Damages [Civ. Code § 3300] for Breach of Building Contract--By Contractor Against Owner--General Form

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Building Contract--By Contractor Against Owner--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Breach of Construction Contract)
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s)	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, duly licensed by the Contractors' State License Board of the State of California to conduct business as a contractor within this state and to engage in the work described below.

2. _____ [*Allege capacity and residence of defendant, e.g.,* Defendant _____ (*name*) is, and at all times herein mentioned was, a corporation organized and existing under the laws of California with its principal place of business in this state in _____ County *or* Defendant _____ (*name*) is, and at all times herein mentioned was, a resident at _____ (*address*), _____ County, California].

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I through _____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes that each of these defendants is an agent and employee of defendant _____ (*name*), and proximately caused plaintiff's damages as herein alleged while acting in such capacity.]

4. On or about _____ [*date*], plaintiff and defendant entered into a[n] _____ [written contract *or* oral contract *or* contract implied by conduct] in which plaintiff agreed to provide all labor and materials and to _____ [*specify in general terms the work to be performed by the contractor, e.g.,* construct _____ (*specify type of structure*) on the property of defendant situated at _____ (*street address*), _____ (*city*), _____ County, California]. Defendant agreed to pay plaintiff the total sum of $_____ [*specify payment schedule if relevant, e.g.,* in progress payments to be made as follows: _____]. [*If the contract is oral, specify other pertinent provisions. If the contract is written, attach a copy as an exhibit and add:* A copy of the contract (together with the pertinent plans and specifications) is attached to and incorporated into this complaint as Exhibit A.]

5. Plaintiff has performed all conditions, covenants, and promises under the contract to be performed on his/her/its part [precedent to defendant's payment of the $_____ progress payment due on _____ (*specify date or event, e.g.,* completion of the foundation work)][, except _____ (*describe condition not performed*), the performance of which was excused on the ground that _____ (*specify facts excusing performance*)].

6. On or about _____ [*date*], defendant breached the contract by _____ [*specify defendant's acts constituting a breach of the contract, e.g.,* failing and refusing to pay plaintiff the progress payment due on that date under the contract].

7. As a result of defendant's breach of the contract, plaintiff has suffered damages as follows: _____ [*specify items and amounts, e.g.,* an unpaid progress payment in the amount of $_____].

8. On or about _____ [*date*], plaintiff made demand on defendant for the payment of his/hers/its total damages as set forth in Paragraph 7, but defendant has failed and refused and still fails and refuses to pay the sum, and the whole sum remains due, owing, and unpaid.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For compensatory damages in the sum of $_____;

2. For interest on the sum of $_____ at _____ percent per annum from and after _____ [*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____, [*name*], am the plaintiff in this action. I have read the foregoing complaint and know its contents. The complaint is true of my own knowledge[, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of complaint for damages is a general form for use by a contractor for the owner's breach of a building contract.

[3] Allegations

The complaint contains the following allegations:

- Plaintiff was a duly licensed contractor at all times relevant to the action (Paragraph 1) [*Bus. & Prof. Code § 7031(a)*; *see MW Erectors Inc. v. Niederhauser Ornamental and Metal Works Co. (2005) 36 Cal. 4th 412, 425-426, 30 Cal. Rptr. 3d 755, 115 P.3d 41* (contractor is ineligible to recover any compensation if, at any time during performance of agreement for contractor services, he or she was not duly licensed); *see also § 104.83[4][a]*];

- The existence and terms of the contract, and whether it is written, oral, or implied by conduct (Paragraph 4) [*Code Civ. Proc. § 430.10(g)*; *see Civ. Code §§ 1622, 1624*];

- Plaintiff has substantially performed all of his or her obligations under the contract precedent to defendant's performance, except as plaintiff's performance is excused (Paragraph 5) [*Civ. Code §§ 1439, 1511*; *Code Civ. Proc. § 457*; *see § 104.15[1]*];

- Defendant's breach (Paragraph 6); and

- The existence and amount of plaintiff's damages (Paragraph 7) [*Civ. Code § 3300*].

[4] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*].

Proper venue for this action is established by the allegation concerning defendant's residence (Paragraph 2) [*Code Civ. Proc. § 395(a)*]. For forms of allegations of venue based on other considerations, see Ch. 571, *Venue* .

In limited civil cases the caption must state whether the demand exceeds or does not exceed $10,000. The caption must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule*

2.111(9), (10)].

[5] Performance of Conditions and Excuses for Nonperformance

Paragraph 5 asserts that plaintiff has performed all conditions precedent to defendant's performance, and contains an optional clause for describing any conditions not performed and the excuse for the nonperformance. In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing the performance. It may simply be stated that the party duly performed all the conditions [*Code Civ. Proc. § 457*; *see also § 104.17*].

[6] Damages

For the breach of an obligation arising from contract, the measure of damages is ordinarily the amount that will compensate the aggrieved party for all the detriment proximately caused by the breach or all the detriment that, in the ordinary course of things, would be likely to result from the breach [*Civ. Code § 3300*]. The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest [*Civ. Code § 3302*; *see Civ. Code § 3289*]. No damages may be recovered for a breach of a contract that are not clearly ascertainable in both their nature and origin [*Civ. Code § 3301*].

For discussion of the recovery of interest on a damages award, see *§ 104.24[2][b]*.

[7] Verification

Verification of a complaint for damages for breach of contract is not generally required, but verification of the complaint requires the defendant to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446(a)*] and precludes a general denial in superior court and in some limited civil cases [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect on the answer of verifying a complaint, see Ch. 26, *Answers* .

[8] Attorney's Fees

If the contract sued on provides for the recovery of attorney's fees in an action to enforce the contract [*see Code Civ. Proc. § 1021*], those fees are recoverable as an item of the costs of suit [*Civ. Code § 1717(a)*]. In such a case, because the fees are not an item of damages, they would not be alleged in the body of the complaint, but would instead be mentioned as an item of costs in the prayer. For further discussion, see *§ 104.28*.

[9] State Statutes

Necessity of alleging and proving license in action on building contract. *Bus. & Prof. Code § 7031*

Excuses for nonperformance. *Civ. Code § 1511*

Complaint in action on contract is subject to objection by demurrer or answer if it cannot be ascertained from pleading whether contract is written, oral, or implied by conduct. *Code Civ. Proc. § 430.10(g)*

Pleading performance of conditions precedent in action on contract. *Code Civ. Proc. § 457*

[10] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For other forms of complaint for breach of contract, see Ch. 140, *Contracts*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to service and filing of papers by facsimile transmission, see Ch. 264, *Fax Filing and Service of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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10-104 California Forms of Pleading and Practice--Annotated § 104.211

§ 104.211 Allegation--Substantial Performance by Contractor

[1] FORM Allegation--Substantial Performance by Contractor

1. Plaintiff has substantially performed all the terms, covenants, and conditions of the contract except for certain omissions and deviations consisting of _____ [*specify portions of the project not fully completed*]. These omissions and deviations resulted from inadvertence, and were not willful or intentional. They are slight and trivial, and may be corrected and supplied at the cost of $_____.

2. On or about _____ [*date*], defendant breached the contract by failing to pay plaintiff the sum of $_____, which represents the contract price of $_____ less the sum of $_____ as stated in _____ [*specify number of preceding paragraph as incorporated into complaint, e.g.,* Paragraph 5].

[2] Use of Form

This form of allegation is for use in a complaint in a breach of contract action by a contractor against an owner. These allegations may be substituted for Paragraphs 5 and 6 in the complaint in § 104.210 when the contractor has substantially rather than fully performed the contract.

[3] Suit Permitted by Substantially Performing Contractor

A contractor may recover for work performed under a building contract, subject to a reduction to compensate for any defects in his or her work, based on a showing of substantial performance of the contractor's obligations under the contract [*Patrick J. Ruane, Inc. v. Parker (1960) 185 Cal. App. 2d 488, 503, 8 Cal. Rptr. 379]* . For purposes of this rule, "substantial performance" means that there has been no willful departure from the terms of the contract, and no omission of any of its essential parts, and that the contractor has in good faith performed all of his or her substantive obligations under the contract [*Lowy v. United Pac. Ins. Co. (1967) 67 Cal. 2d 87, 92-93, 60 Cal. Rptr. 225, 429 P.2d 577* ; *Connell v. Higgins (1915) 170 Cal. 541, 556, 150 P. 769]* .

For further discussion, see *§ 104.15[1]*.

[4] Cross References

For a related form, see *§ 104.210*.

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10-104 California Forms of Pleading and Practice--Annotated § 104.212

§ 104.212 Allegation--Defendant Is Municipality

[1] FORM Allegation--Defendant Is Municipality

1. Defendant City of _____ [*name*] ("the City") is now and at all times herein mentioned has been a municipal corporation existing under and by virtue of the laws of the State of California, and situated in _____ County.

2. On or about _____ [*date*], plaintiff entered into a written contract with the City, in which plaintiff agreed to furnish all work, labor, and materials for the construction of a _____ [*describe construction project*] in the City, according to the plans and specifications prepared by the City. The contract was known and designated as Contract No. _____, City of _____ [*name*]. A copy of the contract is attached to and incorporated into this complaint as Exhibit A.

3. Plaintiff has filed with the _____ [*specify appropriate city officer, e.g.,* Controller] of the City a verified claim for the amount of such damages, but the City has _____ [rejected the claim *or* failed to act within 45 days of the filing of the claim] and the whole of the amount is due, owing, and unpaid from defendant the City to plaintiff. A copy of the claim is attached to and incorporated into this complaint as Exhibit B.

[2] Use of Form

This form of allegation is for use by a contractor in an action against a municipality for damages for breach of a building contract. The three paragraphs set forth in this form should be substituted for Paragraphs 2, 4, and 8, respectively, of § 104.210. The resulting form of complaint may be used, for example, in situations in which the municipality has breached the complaint by refusing to pay the contractor [*see § 104.210*, Paragraph 6], failing to timely furnish sufficiently detailed plans and specifications to the contractor, failing to make prompt decisions regarding modifications of plans and specifications, requiring unreasonable time in making inspections in connection with the work in progress, hiring inexperienced personnel to make inspections of the work in progress, failing to approve materials within a reasonable time, or failing to accept structures on completion.

[3] Presentation of Claim Allegation Required

The third paragraph of the above allegations concerns plaintiff's presentation to the city of a claim for his or her damages and the city's action on the claim. When a municipality has breached a building contract, a claim for damages must be presented to the city's board of supervisors within one year after the accrual of the cause of action for breach [*Gov. Code § 911.2(a)*; *see Gov. Code §§ 900.4* (city within definition of public entity), 901 (determining accrual date), 915-915.4 (manner of presentation of claim)]. The claim must be acted on or deemed rejected by the board before the plaintiff may bring a suit for money or damages for the breach [*Gov. Code § 945.4*].

[4] State Statutes

Public entity is capable of suing and being sued. *Gov. Code § 945*

[5] Cross References

For a related form, see *§ 104.210*.

For forms of claims against public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

For discussion and forms relating to breach of contracts for public work, see Ch. 481, *Public Works* .

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10-104 California Forms of Pleading and Practice--Annotated § 104.213

§ 104.213 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] for Breach of Building Contract--By Contractor Against Owner--Owner Prevented Performance by Contractor [Civ. Code §§ 1511(1), 1512]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] for Breach of Building Contract--By Contractor Against Owner--Owner Prevented Performance by Contractor [Civ. Code §§ 1511(1), 1512]

[*Caption. See § 104.210.*]

Plaintiff alleges:

1. [*Licensing allegation. See § 104.210, Paragraph 1.*]

2. [*Capacity and residence of defendant owner. See § 104.210, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

4. [*Nature and terms of contract. See § 104.210, Paragraph 4.*]

[*EITHER, if plaintiff began preliminary work*]

[5. Immediately after the contract was entered into, plaintiff, at the special insistence and request of defendant, began performance of certain preliminary work necessary to be performed before beginning the actual construction of the building on the site. Specifically, plaintiff _____ (*specify preliminary work performed by plaintiff, e.g.*, contracted for engineering work, purchased materials, and negotiated with persons and firms for the performance of portions of the work and the acquisition of materials necessary to the work), all at a cost to plaintiff of $_____, which was the reasonable value of this work.)]

[*OR, if plaintiff began actual construction*]

[5. On or about _____ (*date*), plaintiff commenced performance of his/her/its duties and obligations under the contract, by _____ (*specify work performed by plaintiff, e.g.*, purchasing materials, hiring subcontractors and laborers, and constructing _____ (*specify nature or extent of construction completed*)), all at a cost to plaintiff of $_____, which was the reasonable value of this work.]

[*CONTINUE*]

[6. After the commencement by plaintiff of the work described in Paragraph 5, and on or about _____ (*date*), defendant breached the agreement by _____ (*specify defendant's acts constituting breach, e.g.*, entering into an agreement with _____ (*name of third party*) that provided for the construction of the building to be constructed under defendant's contract with plaintiff, notifying plaintiff to cease performance under that contract, and thereafter preventing plaintiff from further performance of the contract).]

7. Plaintiff has at all times mentioned herein been, and now is, ready, willing, and able to perform all of the duties and obligations to be performed by him/her/it under the terms of the contract.

8. Plaintiff has demanded that defendant allow plaintiff to proceed with the performance of the contract, and that defendant otherwise perform his/her/its obligations under the contract, but defendant has wrongfully refused and continues to refuse to allow plaintiff to perform the contract or any part of it.

[9. On or about _____ (*date*), plaintiff provided written notice to defendant of plaintiff's intent to bring suit for defendant's prevention of plaintiff's performance, as expressly required by the contract.]

[*EITHER*]

10. The time specified in the contract for its performance has expired.

[*OR*]

10. A reasonable time for the performance of the contract has expired.

[*CONTINUE*]

11. Had plaintiff been permitted to perform his/her/its duties and obligations under the contract, plaintiff would have expended $_____ as the reasonable cost of labor and materials necessary to the performance, and would have been entitled under the terms of the contract to collect payment in the amount of $_____ from defendant; plaintiff has therefore been damaged in the sum of $_____, the [sum of the amount reasonably expended by plaintiff as described in Paragraph 5 and the] amount of his/her/its reasonably anticipated profit from the contract, by defendant's breach.

[*Prayer. See § 104.210.*]

Dated: _____.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 104.210.*]

[2] Use of Form

This form of complaint is for use by a contractor in an action for damages for breach of a building contract when the owner breaches the contract by preventing the contractor from performing it.

[3] Allegations

Optional Paragraph 5 contains alternative allegations to be used if plaintiff performed preliminary work or began actual construction before his or her performance was prevented by defendant. Optional Paragraph 6 is to be used if defendant has entered into an agreement with a third party for the work for which it previously contracted with plaintiff. Optional Paragraph 9 is to be used if the contract expressly requires that any party relying on the provisions of *Civ. Code § 1511(1)* to excuse his or her performance of some or all of the contract give written notice to the other party or parties of an intention to bring suit, or of any other similar or related intent [*see Civ. Code § 1511(1)*].

For a form of allegation to be used in a complaint based on prevention of performance when the contractor has substantially completed his or her work under the contract at the time of the owner's prevention of further performance, see *§ 104.214*.

[4] Alleging Owner's Prevention of Performance as Excuse for Contractor's Nonperformance

The complaint should allege that plaintiff attempted to perform the contract, and was prevented from doing so by plaintiff (Paragraphs 5, 7, and 8). The lack of performance of an obligation, or an offer of performance, in whole or in part, or any delay in performance, is excused when the performance or offer of performance is prevented or delayed by the act of the creditor (usually, the owner), even though there may have been a stipulation that this shall not be an excuse [*Civ. Code § 1511(1)*].

[5] Implied Covenant of Permission to Enter on Premises and Perform Contract

It is not necessary to allege that the contract provided that defendant would allow plaintiff reasonable access to the building site or that defendant would permit and cooperate in plaintiff's performance of the contract. Every building contract that contains no express covenants to the contrary includes implied covenants that the contractor must be given possession of the premises as required to complete his or her performance and must be permitted to proceed with construction in accordance with the terms of the contract without interference by the owner [*Gray v. Bekins (1921) 186 Cal. 389, 395, 199 P. 767]* . For further discussion, see *§§ 104.23[1], 104.24[1][c]*.

[6] Damages for Prevention of Performance

Plaintiff should allege damages in the amount of the net profit he or she would have made if the contract was performed according to its terms, plus any amounts already expended in performance or preparation for performance and less any progress payments already received (Paragraph 11). The measure of the contractor's damages for a breach consisting of prevention of his or her performance is the profits he or she would have made if permitted to complete the work, plus any actual expenses [*Civ. Code § 1512*; *Stark v. Shaw (1957) 155 Cal. App. 2d 171, 181, 317 P.2d 182 , cert. denied, 356 U.S. 937]* . For further discussion, see *§ 104.24[1][c]*.

If at the time the owner interferes with the contractor's performance the work is substantially complete, so that the

portion lacking is nominal only, and the owner refuses to accept the performance or to allow further performance, the refusal to accept will be considered unjustifiable and the contractor may recover the entire unpaid balance of the contract price [*Connell v. Higgins (1915) 170 Cal. 541, 549, 150 P. 769* ; *see § 104.214*].

[7] Time for Performance

If no time is specified for the performance of an act required to be performed, a reasonable time for performance is allowed [*Civ. Code § 1657*]. For further discussion, see *§ 104.19*.

[8] Cross References

For a related form, see *§ 104.210*.

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10-104 California Forms of Pleading and Practice--Annotated § 104.214

§ 104.214 Allegation--Contractor's Performance Substantially Complete

[1] FORM Allegation--Contractor's Performance Substantially Complete

1. On or about _____ [*date*], plaintiff commenced performance of his/her/its duties and obligations under the contract. Plaintiff proceeded with his/her/its duties and obligations under the terms of the contract until _____ [*date*], at which time the work was substantially completed [except for _____ (*specify portion not completed, e.g.,* the installation of smoke detectors in each bedroom in the complex)].

2. Plaintiff has demanded that defendant either allow plaintiff to complete performance of the contract, or accept plaintiff's substantially complete performance and pay plaintiff the contract price of $_____ [, less installments already paid totaling $_____], but defendant has wrongfully refused to do either of these things.

3. As a result of defendant's unjustifiable refusal to either allow plaintiff to complete performance of the contract or pay plaintiff the contract price, plaintiff has been damaged in the sum of $_____, which is the entire unpaid balance of the contract price.

[2] Use of Form

This form of allegation is for use by a contractor in a complaint alleging prevention of performance [*see § 104.213*]. These alternative allegations should be used when the contractor has substantially completed the construction project and seeks damages for the owner's refusal to either pay the contractor or accept performance of the remaining, nominal work to be done by the contractor. The paragraphs set forth in this form may be substituted for Paragraphs 5, 8, and 11, respectively, in § 104.213.

[3] Damages for Prevention of Further Performance When Performance Is Substantially Complete

The third paragraph of this form seeks damages in the amount of the entire contract price rather than the amount of profit the contractor would have earned on the contract [*see § 104.213*, Paragraph 11 (contrasting allegation)]. If at the time the owner interferes with the contractor's performance the contractor's work is substantially complete, so that the

portion lacking is nominal only, and the owner refuses to accept the performance or to allow further performance, the refusal to accept will be considered unjustifiable and the contractor may recover the entire unpaid balance of the contract price [*Connell v. Higgins (1915) 170 Cal. 541, 549, 150 P. 769]* .

[4] Cross References

For related forms, see *§§ 104.210, 104.213*.

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10-104 California Forms of Pleading and Practice--Annotated § 104.215

§ 104.215 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] for Breach of Building Contract--By Contractor Against Owner--Modification of Contract by Executed Oral Agreement or Written Agreement [Civ. Code § 1698]--Extra Work

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] for Breach of Building Contract--By Contractor Against Owner--Modification of Contract by Executed Oral Agreement or Written Agreement [Civ. Code § 1698]--Extra Work

[*Caption. See § 104.210.*]

Plaintiff alleges:

1. [*Licensing allegation. See § 104.210, Paragraph 1.*]

2. [*Capacity and residence of defendant owner. See § 104.210, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

4. [*Nature and terms of contract. See § 104.210, Paragraph 4.*]

[*EITHER, if modification was by executed oral agreement*]

5. During the performance of the contract, defendant orally demanded that plaintiff install as part of the contract and the plans and specifications _____ [*specify modifications requested, e.g.,* copper pipe instead of cast iron pipe]. All of this work was "extras" and not called for by the contract or the plans and specifications. Plaintiff orally agreed to proceed with the modifications desired and specified by defendant, reserving his/her/its right to demand payment for the extra work and expense necessitated by the modifications. Thereafter, and at the specific insistence and

request of defendant, plaintiff furnished and installed on the job _____ [*specify modifications carried out, e.g.,* copper pipe instead of cast iron pipe]. The actual and necessary cost to plaintiff for obtaining and installing these extras was $_____.

[*OR, if modification was by written agreement*]

5. During the performance of the contract, defendant demanded that plaintiff install as a part of the contract and the plans and specifications _____ [*specify modifications requested, e.g.,* copper pipe instead of cast iron pipe]. All of this work was "extras" and not called for by the contract or the plans and specifications. Thereafter, on or about _____ [*date*], plaintiff and defendant entered into a written agreement embodying these modifications and providing that an additional sum of $_____ be paid to plaintiff for the extras. A copy of that written agreement is attached to and incorporated into this complaint as Exhibit B. Thereafter, plaintiff furnished and installed on the job _____ [*specify modifications carried out, e.g.,* copper pipe instead of cast iron pipe.]

[*CONTINUE*]

6. Plaintiff completed all the work to be performed by him/her/it under the contract, including the modifications described in Paragraph 5, on or about _____ [*date*].

[7. On or about _____ [*date*], defendant accepted plaintiff's performance and agreed in writing that the contract had been fully performed in accordance with the plans and specifications.]

8. On or about _____ [*date*], defendant breached the contract by refusing to pay for the modifications as provided by the _____ [executed oral *or* written] agreement for extras.

9. On or about _____ [*date*], plaintiff made demand on defendant for payment pursuant to the _____ [executed oral *or* written] agreement for extras, but defendant failed and refused and still fails and refuses to pay the sum, and the whole sum remains due, owing, and unpaid.

10. As a result of defendant's breach of the contract, plaintiff has suffered damages in the sum of $_____. [*If amount of damages exceeds amount set forth in Paragraph 5, explain additional amount, e.g.,* This includes the amount payable under the _____ (executed oral *or* written) agreement for extras, and a late charge in the amount of $_____ assessed by Rich's Pipe Company of Stockton, California, for plaintiff's nonpayment of an invoice dated _____ (*date*), for materials purchased by plaintiff pursuant to the agreement for extras].

[*Prayer. See § 104.210.*]

Dated: _____.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 104.210.*]

[2] Use of Form

This form of complaint for damages for breach of a building contract is for use by a contractor when the contract has been modified by a written agreement or an executed oral agreement calling for extra work. A contract in writing may be modified as follows [*Civ. Code § 1698(a)-(c)*]:

- By a contract in writing;
- By an oral agreement, to the extent that the oral agreement is executed; or
- Unless the contract expressly provides otherwise, by an oral agreement supported by new consideration, except that the statute of frauds [*Civ. Code § 1624*] must be satisfied if the contract as modified is within its provisions.

A contract not in writing may be modified in any respect by the consent of the parties, in writing, without a new consideration. The original contract will be extinguished to the extent of the modification [*Civ. Code § 1697*].

For further discussion, see *§ 104.15[3][a], [b]*.

[3] Damages for Breach of Extras Agreement

The complaint must state the amount the plaintiff seeks to recover for the extras [*Code Civ. Proc. § 425.10(a)(2)*]. If the extras agreement does not specify the price to be paid by the owner for the extra work, or the manner in which the price is to be determined, the contractor should allege the market or reasonable value of the extras [*see First Olympic Corp. v. Hawryluk (1960) 185 Cal. App. 2d 832, 841, 8 Cal. Rptr. 728]* . Alternatively, if the changes imposed are so excessive that it can fairly be said that the scope of the work under the original contract has been altered, the contractor may allege that the original contract has been abandoned and seek recovery for the value of his or her services on a quantum meruit basis [*C. Norman Peterson Co. v. Container Corp. of America (1985) 172 Cal. App. 3d 628, 640-646, 218 Cal. Rptr. 592]* . For further discussion, see *§ 104.15[3][e]*.

[4] Cross References

For a related form, see *§ 104.210*.

For forms relating to modification of a written contract, see Ch. 140, *Contracts* .

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10-104 California Forms of Pleading and Practice--Annotated § 104.216

§ 104.216 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] for Breach of Building Contract--By Subcontractor Against Prime Contractor and Public Entity--Payments Withheld on Claim for Extra Work [Civ. Code §§ 3186, 3210]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] for Breach of Building Contract--By Subcontractor Against Prime Contractor and Public Entity--Payments Withheld on Claim for Extra Work [Civ. Code §§ 3186, 3210]

[*Caption. See § 104.210.*]

Plaintiff alleges:

1. [*Licensing allegation. See § 104.210, Paragraph 1.*]

2. [*Capacity and residence of defendant prime contractor. See § 104.210, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

4. Defendant City of _____ [*name*] ("the City") is now and at all time herein mentioned has been a municipal corporation existing under and by virtue of the laws of the State of California, and located in _____ County.

5. On or about _____ [*date*], defendant _____ [*contractor*] ("defendant contractor") entered into a written agreement with the City under which defendant contractor, in consideration of the payment of the sum of $_____, agreed to _____ [*specify work to be performed by prime contractor under contract*].

6. On _____ [*date*], plaintiff entered into a written subcontract with defendant contractor under which

plaintiff, in consideration of the payment of the sum of $_____, agreed to furnish all labor, tools, materials, and scaffolding necessary to _____ [*specify work to be done by plaintiff as subcontractor on project*]. The work provided for in the subcontract is a part of the work described in the agreement between defendant contractor and the City described in Paragraph 5. A true copy of the subcontract is attached to and incorporated into this complaint as Exhibit A.

7. During the course of the work performed by plaintiff under the subcontract, at the special instance and request of defendant contractor, plaintiff furnished certain extra labor, materials, and equipment for which defendant contractor agreed to pay the reasonable cost. The extra labor, materials, and equipment furnished, and the reasonable cost of these extras, are as follows: _____ [*list extra labor performed, materials and equipment furnished, and the cost of each item*]. The total sum of these costs is $_____.

8. Before this action commenced, plaintiff delivered to defendant contractor a detailed written statement and account describing the extra labor, materials, and equipment furnished by plaintiff during the course of the work performed by plaintiff under the subcontract, and the reasonable cost of these items. A true copy of that statement and account is attached to and incorporated into this complaint as Exhibit B.

9. The total amount payable to plaintiff by defendant contractor, pursuant to the subcontract and for the extras, is $_____. Defendant contractor has paid to plaintiff the sum of $_____, leaving a balance due, owing, and unpaid of $_____.

10. Plaintiff has fully performed all the terms and conditions on his/her/its part to be performed pursuant to the subcontract and the agreement for extras.

11. All of the labor, materials, and equipment furnished as set forth in Paragraph 7 were furnished with the knowledge and consent of each of the defendants. All of the labor, materials, and equipment were furnished at the prevailing rates for such items in the City.

12. All of the labor, materials, and equipment described in Paragraph 7 were actually furnished by plaintiff and all were used and consumed in and entered into the erection and construction of the improvement described in Paragraph 6. The improvement became and since has been affixed permanently to and is an integral part of the real property on which it was constructed.

13. On or about _____ [*date*], in compliance with *Civil Code Sections 3183* and *3184*, plaintiff delivered to the City and to _____ [*name*], its controller, a written, verified notice to withhold payment. A copy of the notice is attached to and incorporated into this complaint as Exhibit C.

14. The City, in compliance with *Civil Code Section 3186*, is withholding from amounts payable by it to defendant contractor, pursuant to the contract between the City and defendant contractor described in Paragraph 5, a sum sufficient to pay plaintiff's claim of $_____. The City is joined as a party to this action as provided by *Civil Code Section 3210*, and for the reason that the sum is withheld and retained by the City pending the judgment of the court in this action.

15. On _____ [*date*], the City recorded a written notice of completion certifying that defendant contractor had completed all the work described in the contract between defendant contractor and the city. The notice was recorded in Book _____ at Page _____ of the Official Records of _____ County.

[*Prayer. See § 104.210.*]

Dated: _____.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 104.210.*]

[2] Use of Form

This form of complaint seeking damages for breach of a building contract for extras is to be used by a subcontractor when the prime contractor fails to pay the subcontractor for the extras. The public entity that contracted with the prime contractor for the main project may be joined in the action if the public entity withheld payment from the prime contractor pursuant to a stop notice filed by the subcontractor [*see Civ. Code § 3181 et seq.*].

A cause of action on a prime contractor's payment bond is often included in a complaint for damages based on a contractor's failure to pay for extras [*see § 104.231* (allegation for use in complaint by owner against contractor on payment bond)].

[3] Time for Filing Action Concerning Stop Notice

An action against the original contractor and a public entity to enforce payment of the claim stated in a stop notice may be commenced 10 days after the date of service of the stop notice, and must be commenced within 90 days after the expiration of the period for filing of stop notices for the project [*Civ. Code § 3210*]. For further discussion, see *§ 104.21*.

[4] State Statutes

"Stop notice" defined. *Civ. Code § 3103*

"Subcontractor" defined. *Civ. Code § 3104*

Stop notices for public work. *Civ. Code § 3179 et seq.*

[5] Cross References

For related forms, see *§§ 104.210* and *104.215*.

For a form of complaint by a subcontractor against a general contractor for damages for breach of a public works contract, see Ch. 481, *Public Works* .

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10-104 California Forms of Pleading and Practice--Annotated § 104.217

§ 104.217 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--By Prime Contractor to Action by Subcontractor--Subcontractor Not Licensed [Bus. & Prof. Code § 7031]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--By Prime Contractor to Action by Subcontractor--Subcontractor Not Licensed [Bus. & Prof. Code § 7031]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant _____ [*name*] alleges:

1. Plaintiff subcontractor entered into the contract with defendant, and acted as a contractor within the meaning of *Business and Professions Code Section 7026* at all times relevant to this action, but without holding a valid contractor's license as required by *Business and Professions Code Section 7028*.

2. Therefore, plaintiff is barred by *Business and Professions Code Section 7031* from bringing or maintaining any action for collection of compensation for performance of the contract, any act under the contract, or any agreement for extras to be furnished in connection with the contract.

3. This bar extends to any action against defendant.

[2] Use of Form

This form of affirmative defense is for use by a contractor in an answer to a complaint by a subcontractor to recover for the subcontractor's services. A contractor, including a subcontractor, may not maintain an action for the collection of compensation for the performance of any act or contract for which a contractor's license is required without alleging that he or she was a duly licensed contractor at all times during the performance of the act or contract [*Bus. & Prof. Code § 7031(a)*; *see MW Erectors Inc. v. Niederhauser Ornamental and Metal Works Co. (2005) 36 Cal. 4th 412, 425-426, 30 Cal. Rptr. 3d 755, 115 P.3d 41* (contractor is ineligible to recover any compensation if, at any time during performance of agreement for contractor services, he or she was not duly licensed)].

For further discussion, see *§ 104.83[4][a]*. For forms of answers generally, see Ch. 26, *Answers* .

[3] Contractor's Right to Assert Defense Against Subcontractor

General contractors are among the persons protected by the licensing statute, and they may rely on the defense of a subcontractor's lack of license to the same extent as owners [*Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 997, 277 Cal. Rptr. 517, 803 P.2d 370* ; *Lewis & Queen v N. M. Ball Sons (1957) 48 Cal. 2d 141, 153-154, 308 P.2d 713]* . The lack-of-license defense may be used even when the person for whom the work was performed knew that the contractor or subcontractor was unlicensed [*Hydrotech Systems, Ltd. v Oasis Waterpark (1991) 52 Cal. 3d 988, 997, 277 Cal. Rptr. 517, 803 P.2d 370* ; *Vallejo Development Co. v. Beck Development Co. (1994) 24 Cal. App. 4th 929, 941-942, 29 Cal. Rptr. 2d 669]* .

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10-104 California Forms of Pleading and Practice--Annotated § 104.218

§ 104.218 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code §§ 3300, 3307] for Breach of Contract to Construct Improvement and Sell Real Property--By Contractor Against Purchaser--For Difference Between Contract Price and Sales Price Obtained From Third Party

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code §§ 3300, 3307] for Breach of Contract to Construct Improvement and Sell Real Property--By Contractor Against Purchaser--For Difference Between Contract Price and Sales Price Obtained From Third Party

[*Caption. See § 104.210.*]

Plaintiff alleges:

1. [*Licensing allegation. See § 104.210, Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 104.210, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

4. On or about _____ [*date*], plaintiff and defendant entered into a written contract under which plaintiff agreed to provide all labor and materials and to construct _____ [*describe in general terms the type of structure to be built*], on certain property owned by plaintiff in _____ County, California, described more particularly in Exhibit A to this complaint. Defendant agreed to pay plaintiff the sum of $_____ for the structure and property on completion of the construction. A true copy of the contract (together with the pertinent plans and specifications) is attached to and incorporated into this complaint as Exhibit A.

5. Plaintiff fully performed all of the duties and obligations to be performed by him/her/it under the contract, and constructed and completed the structure on the property referred to in Exhibit A, at a total cost to plaintiff of $_____.

6. After performing his/her/its duties and obligations under the contract, plaintiff demanded that defendant perform his/her/its part of the contract by paying to plaintiff the sum of $_____ for the structure and the property.

7. Defendant failed and refused, and still fails and refuses, to comply with the demand and to perform the contract.

8. On defendant's refusal to perform the contract, plaintiff promptly advertised and sought to sell the property and structure described in Exhibit A, employing all due diligence to obtain the best price for the property and structure, at a cost to plaintiff of $_____. Plaintiff received from _____ [*name of third-party buyer*] an offer to purchase the property and structure for $_____, which was both the best offer received by plaintiff and a sum equal to the fair market value of the property and structure at that time.

9. On or about _____ [*date*], plaintiff advised defendant in writing that defendant was in default of the contract, that an offer had been received by plaintiff for the property and structure, and that unless defendant performed the contract within _____ [*number*] days, plaintiff would sell the property and structure and hold defendant liable for damages by reason of his/her/its failure and refusal to perform the contract.

10. Defendant failed and refused to comply with the demand in a timely fashion.

11. On or about _____ [*date*], plaintiff sold the property and structure to _____ [*name of third-party buyer*] for $_____. A copy of that sales agreement is attached to and incorporated into this complaint as Exhibit B.

12. By reason of defendant's failure and refusal to perform the contract, plaintiff has been damaged in the amount of $_____, which is the difference between the contract price and the price for which the property and structure was sold, plus the sum of $_____ incurred by plaintiff to obtain a buyer for the property and structure.

[*Prayer. See § 104.210.*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 104.210.*]

[2] Use of Form

This form of complaint for damages for breach of a building contract and real estate sales agreement is for use by a contractor when the purchaser fails to perform and the property and structure are sold to a third party for a price lower than the contract price.

[3] Allegations

The essential elements of a contractor/seller's action for a purchaser's breach of a building contract and real estate sales agreement are (1) a valid contract (Paragraph 4), (2) the plaintiff's performance or excuse for nonperformance (Paragraph 5), (3) the defendant's breach (Paragraphs 7, 10), and (4) resulting damages to the plaintiff (Paragraph 12) [*Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377* ; *see Civ. Code §§ 3300, 3307*

].

[4] Statute of Frauds for Real Property Sales Agreements

The complaint should allege that the building contract and sales agreement were in writing (Paragraph 4), because contracts for the sale of real property or any interest in real property must be evidenced by a writing in order to be valid. The writing must be signed by the party to be charged, or by that party's agent. If the writing is signed by the party's agent, the agent must be authorized to act in that capacity by a writing signed by the party [*Civ. Code § 1624(a)(3)*].

For further discussion of the statute of frauds, see Ch. 530, *Statute of Frauds* .

[5] Measure of Damages and Allegation of Property's Value

When a buyer defaults on an obligation to purchase real property, the measure of the seller's general damages for the breach is the difference between the contract price and the value of the property to the seller at the time of the breach [*Civ. Code § 3307*]. A complaint for damages for the buyer's default must allege the value of the subject property at the time of breach (Paragraph 8), or it will be subject to demurrer for failure to state a cause of action [*Employees' Participating Asso. v. Pine (1949) 91 Cal. App. 2d 299, 300-301, 204 P.2d 965* ; *Caspar Lumber Co. v. Stowell (1940) 37 Cal. App. 2d 58, 61, 98 P.2d 744]* .

[6] Resale Price as Indicator of Property's Value

The value of the property to the seller at the time of the breach is ordinarily its fair market value [*see, e.g.,* *Abrams v. Motter (1970) 3 Cal. App. 3d 828, 840, 83 Cal. Rptr. 855* ; *Beason v. Griff (1954) 127 Cal. App. 2d 382, 386, 274 P.2d 47]* . Fair market value may be defined as the best price obtainable from a buyer who is ready, willing, and able to buy at the time of the breach [*Major-Blakeney Corp. v. Jenkins (1953) 121 Cal. App. 2d 325, 334, 263 P.2d 655]* , for cash or its equivalent [*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co. (1977) 66 Cal. App. 3d 101, 142, 135 Cal. Rptr. 802]* . The court may, but is not required to, consider the actual price the plaintiff obtained in the sale of the property to a third party as evidence of the property's fair market value at the time of the breach [*see, e.g.,* *Royer v. Carter (1951) 37 Cal. 2d 544, 548, 233 P.2d 539* ; *Wickman v. Opper (1961) 188 Cal. App. 2d 129, 132-133, 10 Cal. Rptr. 291]* . This complaint claims damages in the amount of the difference between the price obtained from the third-party sale and the contract price (Paragraph 12), and alleges that the price obtained from the third-party buyer was in fact the true value of the property to the plaintiff at the time of the breach (Paragraph 8).

[7] Diligent Resale Efforts Required

The complaint should allege that plaintiff made prompt and diligent efforts to find another buyer for the property following defendant's failure and refusal to perform the contract (Paragraph 8). A seller of real property has the duty to exercise diligence and resell the property within the shortest possible time after learning of the buyer's breach. If the property increases in value after the breach and the seller does not diligently resell, the seller will not be permitted to recover benefit-of-the-bargain damages against the defaulting buyer [*Spurgeon v. Drumheller (1985) 174 Cal. App. 3d 659, 665-666, 220 Cal. Rptr. 195* ; *but see* *Askari v. R & R Land Co. (1986) 179 Cal. App. 3d 1101, 1110-1111, 225 Cal. Rptr. 285* (rule not applicable when failure to resell is caused by buyer's actions)].

[8] Consequential Damages

In addition to general damages, plaintiff claims consequential damages in the form of expenses incurred in selling the property and structure to a third party following defendant's breach (Paragraphs 8, 12). The damages recoverable in an action for breach of an agreement to purchase real property include consequential damages according to proof [*Civ. Code § 3307*]. Reasonable expenses incurred in selling the property to a third party, such as escrow expenses, broker's commissions, and advertising costs, is an accepted element of consequential damages [*see* *Abrams v. Motter (1970) 3*

Cal. App. 3d 828, 848, 83 Cal. Rptr. 855 ; *Barton v. White Oak Realty, Inc. (1969) 271 Cal. App. 2d 579, 585, 76 Cal. Rptr. 587]* .

[9] Cross References

For a related form, see *§ 104.210*.

For discussion and forms relating to the breach of real estate sales contracts, see Ch. 569, *Vendor and Purchaser* .

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10-104 California Forms of Pleading and Practice--Annotated § 104.219

§ 104.219 Complaint for Damages [Civ. Code § 3300] for Breach of Building Contract--By Contractor Against Subcontractor and Surety [Code Civ. Proc. §§ 996.410(a), 996.430(a)]

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Building Contract--By Contractor Against Subcontractor and Surety [Code Civ. Proc. §§ 996.410(a), 996.430(a)]

[*Caption. See § 104.210.*]

Plaintiff alleges:

1. [*Licensing allegation. See § 104.210, Paragraph 1.*]

2. [*Capacity and residence of defendant subcontractor. See § 104.210, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

4. Defendant _____ [*name of surety*] ("surety") is, and at all times herein mentioned was, a corporation, organized and existing under and by virtue of the laws of _____ [*state of incorporation*]. At all times herein mentioned defendant surety was authorized to conduct, and did conduct, an insurance and surety business within the State of California.

5. Prior to _____ [*date subcontract entered into*], plaintiff entered into a written contract with _____ [*name of owner*] for the construction of _____ [*specify work to be done by plaintiff under primary contract*]. A copy of this contract is attached to and incorporated into this complaint as Exhibit A.

6. On or about _____ [*date*], during the time plaintiff was performing work required by the contract described in Paragraph 5, plaintiff, as prime contractor, entered into a written subcontract with defendant

_____ [*name of subcontractor*] ("defendant subcontractor"). Under the terms of the subcontract, defendant subcontractor agreed to furnish all of the materials for and perform all the work required under the following portion of the contract described in Paragraph 5: _____ [*specify portion of prime contract to be performed by subcontractor under subcontract, e.g.,* Paragraph E6 of the contract, which provides for the installation of electrical wiring throughout the ground floor of the building to be constructed by plaintiff]. A true copy of the subcontract is attached to and incorporated into this complaint as Exhibit B.

7. Under the terms of the subcontract, defendant subcontractor agreed to commence work on _____ [*date*] and to complete the work required under the subcontract in coordination with plaintiff so as not to delay the job. For the performance of these requirements on the part of defendant subcontractor, plaintiff agreed, under the terms of the subcontract, to pay defendant subcontractor the sum of $_____.

8. According to the terms of the subcontract, defendant subcontractor was to furnish plaintiff with a performance and material bond.

9. Pursuant to the requirements set forth in the subcontract, defendant surety executed its bond for the faithful performance of the subcontract on the part of defendant subcontractor, which by its terms incorporated the subcontract, in the sum of $_____. A true copy of the bond is attached to and incorporated into this complaint as Exhibit C.

10. On or about _____ [*date*], after defendant subcontractor had partially performed the subcontract, defendant subcontractor breached the subcontract in that _____ [*specify defendant's act or acts breaching the subcontract, e.g.,* defendant subcontractor abandoned the further performance of the subcontract without cause or reason and failed thereafter to perform any work or furnish any materials to carry out the terms of the subcontract].

11. Plaintiff then, within the time and in the manner provided by the bond, served written notice on defendant subcontractor to proceed with the work as required under the terms of the contract within _____ [*number*] days after the date of notice.

12. Defendant subcontractor failed and refused after receipt of the notice to perform his/her/its duties under the subcontract within the time stated in the notice. Because of this breach of the subcontract, plaintiff declared defendant subcontractor in default and _____ [completed the work under the subcontract *or* contracted with _____ (*name*) to complete the work under the subcontract].

13. In completing the work under the subcontract, plaintiff was required to and did expend for labor, material, and equipment the reasonable sum of $_____ over and above the contract price specified in the subcontract. Plaintiff holds defendant subcontractor and defendant surety responsible for these damages and for any and all other damages or loss sustained by plaintiff by reason of defendant subcontractor's breach of the subcontract.

14. Plaintiff has, at all times mentioned herein, fully performed and complied with all of the requirements to be performed or complied with by him/her/it under the terms of the subcontract.

[*Prayer. See § 104.210.*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 104.210.*]

[2] Use of Form

This form is for use by a contractor in an action for damages for breach of a building contract by a subcontractor, with the subcontractor's surety joined. When a civil action is brought to enforce liability on a bond, both the principal and the sureties must be joined as parties to the action [*Code Civ. Proc. § 996.430(a)*].

[3] Liability of Principal and Surety on Bond

Paragraph 13 of this complaint alleges that plaintiff holds defendant subcontractor and subcontractor's surety responsible for any and all damages flowing from the subcontractor's breach. The beneficiary may enforce the liability on a bond against both the principal and the sureties [*Code Civ. Proc. § 996.410(a)*]. The aggregate liability of a surety to all persons for all breaches of the condition of a bond is limited to the amount of the bond. Except as otherwise provided by statute, the liability of the principal is not limited to the amount of the bond [*Code Civ. Proc. § 996.470(a)*].

[4] State Statutes

"Suretyship" defined. *Civ. Code §§ 2787, 2788*

Liability of sureties. *Civ. Code §§ 2806-2811*

Bonds and Undertakings Law. *Code Civ. Proc. § 995.010 et seq.*

[5] Cross References

For a related form, see *§ 104.210*.

For discussion and forms relating to actions against sureties, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

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10-104 California Forms of Pleading and Practice--Annotated § 104.220

§ 104.220 Complaint for Declaratory Relief [Code Civ. Proc. § 1060] and Damages [Civ. Code § 3300] for Breach of Building Contract--By Contractor Against Subcontractor--Delay Causing Damage

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. § 1060] and Damages [Civ. Code § 3300] for Breach of Building Contract--By Contractor Against Subcontractor--Delay Causing Damage

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DECLARATORY RELIEF
_____ [*name(s)*], [and DOES I	)	AND DAMAGES
through _____,]	)	(Breach of Construction Contract)
Defendant(s)	)	
	)	

_____

Plaintiff alleges:

1. [*Licensing allegation. See § 104.210, Paragraph 1.*]

2. [*Capacity and residence of defendant subcontractor. See § 104.210, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

4. On or about _____ [*date*], plaintiff and defendant entered into a written contract in which defendant agreed to do certain construction work consisting of _____ [*specify work to be done by subcontractor under subcontract, e.g.,* building curbs, gutters, and sidewalks, and performing miscellaneous related work], within a

period of _____ [*number*] working days after _____ [*date*], for plaintiff on a certain tract of land located in _____ [*city*], _____ County, California. This work was part of a construction project that was the subject of a contract between plaintiff and _____ [*name of other party to prime contract*]. A true copy of the contract between plaintiff and defendant is attached to and incorporated into this complaint as Exhibit A. [A true copy of the contract between plaintiff and _____ (*name of other party to prime contract*) is attached and incorporated into this complaint as Exhibit B.]

5. Defendant commenced performance of the contract sometime after _____ [*date*], but proceeded so slowly that there were substantial portions of the work unfinished on _____ [*date*], at which time plaintiff first complained to defendant, by written notice, of the delays and defendant's poor performance. Plaintiff made further written complaints on _____ [*dates*]. [True copies of plaintiff's complaint notices are attached to and incorporated into this complaint as Exhibit C.]

6. As a result of defendant's delay in the performance of the contract, a result of _____ [*identify any other specific contributing factors, e.g.,* seasonal heavy rains doing certain damage to portions of the work that were in an unfinished condition when the rains began], and a result of certain portions of the work being poorly done by defendant and not in accordance with the terms of the contract, plaintiff was compelled to do certain portions of the work for defendant.

7. Plaintiff has expended $_____ for the work done by him/her/it as described in Paragraph 6, which is the reasonable cost of the work.

8. An actual controversy has arisen and now exists between plaintiff and defendant. Plaintiff contends that he/she/it had a right to do the work for defendant and to charge defendant $_____ for the work. Defendant contends plaintiff had no right to do the work and that plaintiff has no right to charge defendant $_____ or any sum for the work; that on the contrary plaintiff owes $_____ to defendant for the work the latter did under the contract[, of which plaintiff has paid defendant only $_____].

9. Plaintiff desires a judicial determination of his/her/its rights and duties, and a declaration as to whether plaintiff had a right to do the work of defendant and to charge defendant $_____ for the work.

10. The declaration is necessary and appropriate at this time in order that plaintiff may ascertain his/her/its rights and duties.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For a declaration that plaintiff had the right to do the work for defendant and to charge defendant $_____ for the work;

2. For damages in the sum of $_____;

3. For interest at _____ percent per annum on the sum of $_____ from and after _____ [*date*];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 104.210.*]

[2] Use of Form

This form of complaint for declaratory relief and damages is for use by a contractor when a subcontractor delays in performing and the delay results in damages to the contractor. It is based in part on the facts in *Ely v. Bottini (1960) 179 Cal. App. 2d 287, 3 Cal. Rptr. 756* , in which heavy but seasonal rainstorms were held not to be an unforeseeable and superseding cause of plaintiff's damages when the parties contemplated at the time the subcontract was executed that rain damages would occur if the subcontract was not performed in the time stated.

If the subcontractor has provided a bond in connection with the contract, the surety must be joined as a party to the action [*see Code Civ. Proc. § 996.430(a)*]. Paragraphs 4 (capacity and residence of surety), 8 (bond required by contract), and 9 (issuance of bond) in § 104.219 may be added to this form if a surety is involved.

[3] Jurisdiction

An action for declaratory relief is in the jurisdiction of the superior court as a case of unlimited jurisdiction. An action for declaratory relief is a limited civil case only when it is brought as a cross complaint for indemnity in an action or proceeding that is otherwise a limited civil case or in a case following nonbinding arbitration between an attorney and client when the amount in controversy is $25,000 or less [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 86(a)(7)(A)*, 580(b)(4), *1060*].

[4] Essential Allegations for Declaratory Relief

A complaint for declaratory relief must allege facts showing that the subject of the action is a proper matter for declaratory relief (Paragraphs 8-10) [*see Code Civ. Proc. § 1060*]. For further discussion of required allegations in a complaint for declaratory relief, see Ch. 182, *Declaratory Relief* .

[5] State Statutes

Declaratory relief is required to be necessary and proper at the time under all the circumstances. *Code Civ. Proc. § 1061*

Declaratory relief is cumulative remedy. *Code Civ. Proc. § 1062*

Priority given to actions for declaratory relief. *Code Civ. Proc. § 1062.3*

[6] Cross References

For a related form, see *§ 104.210*.

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10-104 California Forms of Pleading and Practice--Annotated § 104.221

§ 104.221 Complaint for Subrogation--By Contractor's Surety Against Owner--Funds Paid to Contractor's Creditors

[1] FORM Complaint for Subrogation--By Contractor's Surety Against Owner--Funds Paid to Contractor's Creditors

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR SUBROGATION
_____ [*name(s)*],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s)	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

1. At all times herein mentioned plaintiff was, and now is, a corporation, organized and existing under and by virtue of the laws of _____ [*state of incorporation*]. At all times herein mentioned plaintiff was, and now is, authorized to conduct and is conducting an insurance and surety business within the State of California.

2. [*Capacity and residence of defendant owner. See § 104.210, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

4. On or about _____ [*date*], _____ [*name of contractor*] ("the contractor"), a duly licensed contractor, entered into a contract with defendant for the construction of _____ [*specify construction project, e.g.,* a two-story steel and concrete building]. [A copy of the contract is attached to and incorporated into this complaint as Exhibit A.]

5. On or about _____ [*date*], plaintiff issued its labor and material bond for the faithful performance of the contract on the part of the contractor, in the sum of $_____. A true copy of the bond is attached to and incorporated into this complaint as Exhibit B.

6. Thereafter the building was substantially completed and occupied by defendant beginning on or about _____ [*date*]. The building was accepted by defendant on _____ [*date*].

7. The total revised amount of and contract price for the construction of the building, which figure has been and is agreed to by plaintiff, contractor, and defendant, is $_____. Defendant has paid the sum of $_____ to the contractor. The sum of $_____ became due on _____ [*date*], and now remains due, owing, and unpaid. This sum, together with interest on it from and after _____ [*date*], is now due and owing to the contractor or its assignees or plaintiff.

8. After the completion of the building pursuant to the terms of its labor and material bond, plaintiff was compelled to, and did, pay labor and material claimants sums far in excess of the sum of $_____ still due and owing from defendant. By reason of those payments plaintiff became subrogated to all the rights and entitled to enforce all the remedies of the contractor against defendant. Plaintiff is entitled to all sums now due and owing to plaintiff from defendant.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For the sum of $_____;

2. For interest at _____ percent per annum on the sum of $_____ from and after _____ [*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 104.210.*]

[2] Use of Form

This form of complaint is for use by a surety against the owner for monies owed by the owner to the contractor. A surety, on satisfying the obligation of the principal (the contractor), is entitled to be subrogated to the rights and remedies of the principal against the creditor (the owner) to the extent of the surety's expenditure in satisfying the obligation [*Civ. Code § 2848*; *see Estate of Elizalde (1920) 182 Cal. 427, 432, 433, 188 P. 560]* .

[3] State Statutes

Position of sureties. *Civ. Code § 2832 et seq.*

[4] Cross References

For related forms, see *§§ 104.210* and *104.219*.

For discussion and forms relating to subrogation involving contractors, see Ch. 536, *Subrogation* .

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10-104 California Forms of Pleading and Practice--Annotated § 104.222

§ 104.222 Ground of Demurrer [Code Civ. Proc. § 430.30(a)]--No Allegation That Plaintiff Is Duly Licensed Contractor [Bus. & Prof. Code § 7031]

[1] FORM Ground of Demurrer [Code Civ. Proc. § 430.30(a)]--No Allegation That Plaintiff Is Duly Licensed Contractor [Bus. & Prof. Code § 7031]

The complaint fails to state facts sufficient to constitute a cause of action against this defendant, in that there is no allegation by plaintiff that he/she/it was a duly licensed contractor at all times during the performance of the _____ [act *or* contract] mentioned in the complaint.

[2] Use of Form

This form of ground for demurrer is for use by a defendant in an action by a contractor when the contractor fails to allege in the complaint that he or she was at all relevant times a duly licensed contractor [*see Bus. & Prof. Code § 7031*]. Under the license law, no person engaged in the business or acting in the capacity of a contractor may bring or maintain any action, or recover in law or equity in any action, in any court in California, for the collection of compensation for the performance of any act or contract for which a California contractor's license is required without alleging that he or she was a duly licensed contractor at all times during the performance of that act or contract [*Bus. & Prof. Code § 7031(a)*; *see MW Erectors Inc. v. Niederhauser Ornamental and Metal Works Co. (2005) 36 Cal. 4th 412, 425-426, 30 Cal. Rptr. 3d 755, 115 P.3d 41* (under terms of *§ 7031(a)*, contractor is ineligible to recover any compensation if, at any time during performance of agreement for contractor services, he or she was not duly licensed)]. Persons entitled to assert a defense or demurrer based on this provision include general contractors defending against suits by subcontractors, persons contracting with out-of-state contractors, and even persons who knew that the contractor was unlicensed at the time the work was contracted for or performed [*Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 997, 277 Cal. Rptr. 517, 803 P.2d 370* ; *Vallejo Development Co. v. Beck Development Co. (1994) 24 Cal. App. 4th 929, 941-942, 29 Cal. Rptr. 2d 669]* .

For further discussion of the prohibition against actions by unlicensed contractors, and discussion of the narrow "substantial compliance" exception to this prohibition [*Bus. & Prof. Code § 7031(e)*], see *§ 104.83[4]*.

For further discussion of demurrers, see Ch. 206, *Demurrers and Motions for Judgments on the Pleadings* .

[3] Statement of Ground for Objection

A demurrer may be disregarded by the court unless it distinctly specifies the grounds on which any of the objections to the complaint, cross complaint, or answer are taken [*Code Civ. Proc. § 430.60*].

[4] Time for Filing Demurrer

A demurrer must be filed within 30 days after service of the complaint or cross complaint [*Code Civ. Proc. § 430.40(a)*].

[5] Affirmative Defense

An objection to a complaint, cross complaint, or answer may be made by demurrer to that pleading when the ground for the objection appears on the face of the pleading [*Code Civ. Proc. § 430.30(a)*]. If the ground for the objection does not appear on the face of the pleading--as is the case, for example, when the contractor properly alleges licensure but was not in fact duly licensed at all times during the performance of the contract--the objection may be taken by answer [*see Code Civ. Proc. § 430.30(b)*]. For an example of a form of affirmative defense based on lack of licensure, see *§ 104.217*.

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10-104 California Forms of Pleading and Practice--Annotated § 104.223

§ 104.223 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--By Owner to Action by Contractor--Contractor's Failure to Obtain Architect's Certificate

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--By Owner to Action by Contractor--Contractor's Failure to Obtain Architect's Certificate

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant _____ [*name*] alleges:

1. The contract required plaintiff contractor to obtain a certificate of satisfactory completion from _____ [*name of architect*], architect for the project, as a condition to payment by defendant.

2. Plaintiff has failed to obtain the certification.

[2] Use of Form

This form of affirmative defense is for use by an owner in an answer to a complaint by a contractor for breach of a building contract. It may be used when the contract provides for an architect's certificate of completion as a condition to payment by the owner and the contractor has failed to obtain the certificate.

The defense asserted in this allegation will be effective only if the contractor is responsible for the failure to obtain the certificate.

For further discussion, see *§ 104.16[2]*.

[3] Cross References

For discussion and forms relating to architects, see Ch. 56, *Architects* .

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10-104 California Forms of Pleading and Practice--Annotated § 104.224

§ 104.224 Complaint for Work, Labor, and Materials Furnished--By Contractor Against Owner--Reasonable Value (Quantum Meruit)

[1] FORM Complaint for Work, Labor, and Materials Furnished--By Contractor Against Owner--Reasonable Value (Quantum Meruit)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONEY
_____ [*name(s)*], [and DOES I	)	(Quantum Meruit)
through _____,]	)	[Amount demanded _____
Defendant(s)	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Licensing allegation. See § 104.210, Paragraph 1.*]

2. [*Capacity and residence of defendant owner. See § 104.210, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

4. On and between _____ [*date*] and _____ [*date*], at the special instance and request of defendant, and on his/her promise to pay the reasonable value thereof, plaintiff performed work and labor and furnished certain lumber and other building materials to defendant for the construction of a _____ [

specify type and location of construction project, e.g., five-room dwelling on a parcel owned by defendant at _____ (*street address*), _____ (*city*), California]. Plaintiff completed this construction project on _____ [*date*].

5. The reasonable value of the labor and materials actually furnished and used by plaintiff in the construction of the _____ [*describe structure, e.g.,* dwelling] is $_____.

6. On or about _____ [*date*], plaintiff made demand on defendant for payment of the above sum, but defendant has failed and refused and still fails and refuses to pay the sum, and the whole sum remains due, owing, and unpaid.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For the sum of $_____;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 104.210.*]

[2] Use of Form

This form of complaint is for use by a contractor against an owner stating a common count for quantum meruit. An action in quantum meruit is used to recover the reasonable value of services rendered by the plaintiff to the defendant when the defendant is not liable for a fixed sum [*McFarland v. Holcomb (1898) 123 Cal. 84, 86, 55 P. 761]* . An action in quantum meruit may be used to recover money due under an express or implied-in-fact contract [*Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 793, 256 P.2d 947]* .

[3] No Prayer for Prejudgment Interest

In an action to recover the reasonable value of services rendered, the amount, character, or value of which can only be established by evidence in court, the plaintiff is not entitled to interest prior to the verdict or judgment [*Swinnerton v. Argonaut L. & D. Co. (1896) 112 Cal. 375, 379, 44 P. 719* ; *Parker v. Maier Brewing Co. (1960) 180 Cal. App. 2d 630, 634, 4 Cal. Rptr. 825]* .

[4] Cross References

For a related form, see *§ 104.210*.

For discussion and forms relating to quantum meruit, see Ch. 121, *Common Counts* .

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10-104 California Forms of Pleading and Practice--Annotated § 104.225

§ 104.225 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] for Breach of Building Contract--By Owner Against Contractor--Delay in Performance

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] for Breach of Building Contract--By Owner Against Contractor--Delay in Performance

[*Caption. See § 104.210.*]

Plaintiff alleges:

1. [*Capacity and residence of defendant contractor. See § 104.210, Paragraph 2.*]

[2. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

3. On or about _____ [*date*], plaintiff and defendant entered into a written contract in which defendant agreed to provide all labor and materials and to _____ [*specify in general terms the work to be performed by the contractor, e.g.,* construct _____ (*specify type of structure*) on the property of plaintiff situated at _____ (*street address*), _____ (*city*), _____ County, California], and plaintiff agreed to pay defendant _____ [*specify payment terms, e.g.,* the sum of $_____ (in progress payments to be made as follows: _____) *or* the cost of construction, plus a fixed fee in the amount of $_____]. A copy of the contract (together with the pertinent plans and specifications) is attached to and incorporated into this complaint as Exhibit A.

4. The construction work to be performed under the contract was to be completed pursuant to the terms of the contract by _____ [*date*]. It was not completed until _____ [*date*], approximately _____ [*number*] _____ [weeks *or* months] later than the time specified in the contract.

5. On _____ [*date*], and on various occasions thereafter, and up to and on or about _____ [*date*], defendant represented to plaintiff that the work would be completed and ready for occupancy by _____ [*date*]. Plaintiff believed these representations and relied on them, and, accordingly, made arrangements to move into the premises on _____ [*date*].

6. On _____ [*date*], plaintiff's lease terminated and plaintiff was evicted from the premises he/she/it was then occupying and was forced to find new _____ [*describe nature of premises required, e.g.,* living quarters *or* office space]. Plaintiff at that time rented _____ [*describe premises rented, e.g.,* an apartment *or* offices] in _____ [*city*], California, and _____ [lived at *or* operated his/her/its business from] that location from _____ [*date*] up to and including _____ [*date*]. During this period, plaintiff paid a sum of $_____ for the rent of the premises.

7. Plaintiff was compelled to hire a moving van and movers to move his/her/its _____ [*specify items moved, e.g.,* belongings and furniture *or* stock and furnishings] to the premises described in Paragraph 6, at the reasonable cost to plaintiff of $_____. Plaintiff was compelled to hire a moving van and movers to move these items to the premises described in Paragraph 3, on defendant's completion of the construction project, at the reasonable cost to plaintiff of $_____. The cost of these two moves exceeded the cost of a single move from plaintiff's original premises to the newly constructed premises by a sum of $_____.

8. Plaintiff incurred the following additional costs by reason of being unable to move into the premises described in Paragraph 3 on _____ [*date*]: _____ [*specify costs, e.g.,* $_____ cancellation fee for moving van and furniture movers; _____ (*number*) months telephone rental].

[*Prayer. See § 104.210.*]

Dated: _____.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 104.210.*]

[2] Use of Form

This form of complaint for damages is for use by an owner when the contractor fails to complete his or her performance within the allotted time and the owner is damaged by the delay. This form of complaint may be used in connection with both residential and commercial construction projects (*see* alternative language in Paragraphs 6 and 7).

[3] Damages Proximately Caused by Breach

The complaint claims damages for the owner's costs to rent a home or office during the period of delay (Paragraph 6), to make two moves instead of a single move (Paragraph 7), and for miscellaneous other costs incurred due to the delay (Paragraph 8). If the owner wishes to claim unusual damages such as, for example, damages for adverse tax consequences resulting from the delay, the complaint should indicate that the contractor was aware, at the time the contract was executed, of the potential for those damages if his or her performance was not completed in a timely manner [*see Walker v. Signal Companies, Inc. (1978) 84 Cal. App. 3d 982, 993, 149 Cal. Rptr. 119]* . If this is not the case, the owner may have difficulty establishing that the damages were proximately caused by the breach or likely, in the ordinary course of things, to result from the breach [*see Civ. Code § 3300*].

For further discussion of the damages recoverable by the owner for a contractor's breach, see *§ 104.25[2]*.

[4] No Time Specified for Performance

Paragraph 4 specifies the date on which the contractor's performance was to be completed under the terms of the contract. If a building contract does not specify a completion date, the contractor will be allowed a reasonable time to complete the project [*Civ. Code § 1657*]. For further discussion, see *§ 104.19*.

[5] Cross References

For a related form, see *§ 104.210*.

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10-104 California Forms of Pleading and Practice--Annotated § 104.226

§ 104.226 Allegation--Liquidated Damages [Civ. Code § 1671]

[1] FORM Allegation--Liquidated Damages [Civ. Code § 1671]

The contract provided that the amount of damages that plaintiff would sustain by reason of delay in the completion of defendant's performance would be impractical or extremely difficult to determine and that defendant would pay to plaintiff liquidated damages in the sum of $_____ per day for each and every day the work remained uncompleted beyond the completion date specified in the contract.

[2] Use of Form

This form of allegation is for use in an owner's complaint for damages for the contractor's delay in completing performance of the contract when the contract contains a liquidated damages provision. It may be used in the complaint in § 104.225, in place of Paragraphs 5 through 8 of that form.

[3] Recoverability of Liquidated Damages

A provision in a building contract liquidating the owner's damages for the contractor's breach of the contract is valid unless the contractor establishes that the provision was unreasonable under the circumstances existing at the time the contract was made [*see Civ. Code § 1671(b)*].

[4] Joinder of Surety

If a performance bond incorporating the contract has been issued, the surety must be joined to the action so that it may be held liable for the liquidated damages [*see Code Civ. Proc. § 996.430(a)*]. When a contract containing a liquidated damages clause is made part of a performance bond, the liquidated damages clause is covered by the bond and the surety is liable for liquidated damages [*Pacific Employers Ins. Co. v. Berkeley (1984) 158 Cal. App. 3d 145, 156, 204 Cal. Rptr. 387]* . Paragraphs 4 (capacity and residence of surety), 8 (bond required by contract), and 9 (issuance of bond) in § 104.219 may be used to join the surety to this action.

[5] Owner's Responsibility for Delay

The owner will not be allowed to recover liquidated damages for the contractor's delay in performance if the delay occurred through the combined fault of the owner and the contractor [*Aetna Casualty & Sur. Co. v. Board of Trustees (1963) 223 Cal. App. 2d 337, 340-341, 35 Cal. Rptr. 765]* or if the owner's acts contributed substantially to the delay [*General Ins. Co. v. Commerce Hyatt House (1970) 5 Cal. App. 3d 460, 472, 85 Cal. Rptr. 317]* . If, however, the owner and contractor each caused some delay and the portion of the delay caused by the owner can be identified and separated from the portion caused by the contactor, the owner may recover for the portion of the delay attributable solely to the contractor [*Jasper Const. v. Foothill Junior College Dist. (1979) 91 Cal. App. 3d 1, 14-15, 153 Cal. Rptr. 767]* .

[6] Cross References

For forms and discussion relating to liquidated damages, see Ch. 177, *Damages* .

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10-104 California Forms of Pleading and Practice--Annotated § 104.227

§ 104.227 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--By Contractor to Action by Owner--Delay by Owner Excused Performance by Contractor [Civ. Code § 1511(1)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--By Contractor to Action by Owner--Delay by Owner Excused Performance by Contractor [Civ. Code § 1511(1)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant _____ [*name*] alleges:

Plaintiff unreasonably delayed the construction of the project contrary to the agreement of the parties to the contract, and as a proximate result of this unreasonable delay, the cost of the project has been substantially increased. By reason of the unreasonable delay plaintiff has committed a substantial breach of the contract and defendant is thereby excused from further performance of the contract.

[2] Use of Form

This form of affirmative defense is for use by a contractor in an answer to an owner's complaint when the owner has delayed the contractor's performance of the contract. It may be used as a defense to an owner's action alleging delay by the contractor [*see § 104.225*], or to an owner's action for abandonment of the contract [*see § 104.230*]. The contractor's nonperformance of the contract will be excused to the extent that his or her performance is prevented or delayed by the owner's acts [*Civ. Code § 1511(1)*]. For further discussion, see *§ 104.17*.

[3] Cross References

For related forms, see *§§ 104.213* and *104.220*.

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10-104 California Forms of Pleading and Practice--Annotated § 104.228

§ 104.228 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] for Breach of Building Contract--By Owner Against Contractor--Negligent Work and Defective Materials

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] for Breach of Building Contract--By Owner Against Contractor--Negligent Work and Defective Materials

[*Caption. See § 104.210.*]

Plaintiff alleges:

1. [*Capacity and residence of defendant contractor. See § 104.210, Paragraph 2.*]

[2. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

3. Plaintiff is now and was at all times herein mentioned the owner of a parcel of real property located in _____ [*city*], _____ County, California, and described as follows: _____ [*set forth legal description or street address*].

4. [*Formation and terms of contract. See § 104.225, Paragraph 3.*]

5. Defendant began to purchase materials for and to perform labor on the construction project in accordance with the contract on or about _____ [*date*]. Defendant completed the project on _____ [*date*].

6. Defendant has at all times failed, refused, and neglected to perform according to the terms of the contract and the plans and specifications referred to in the contract, in that defendant so negligently and carelessly _____ [*specify negligent labor performed or defective materials furnished, e.g.,* performed the paint work on the interior and exterior of the premises as to necessitate that all the surfaces be repainted *or* caused a type of paint wholly unsuitable for the purpose to be applied to the exterior; defendant knew or should have known that the

paint was unsuitable for this purpose].

7. On or about _____ [*date(s)*], plaintiff demanded in writing that defendant _____ [*specify work to be refinished or replaced, e.g.*, repaint the interior and exterior of the premises *or* remove the unsuitable paint and apply appropriate exterior paint], but defendant failed and refused and continues to fail and refuse to perform this work. [True copies of the demands are attached to and incorporated into this complaint as Exhibit B.]

8. By reason of defendant's breach of the contract, plaintiff has been damaged in the sum of $_____, the amount reasonably expended by plaintiff to pay another contractor to correct defendant's work and make it conform to the contract and the plans and specifications.

[*Prayer. See § 104.210.*]

Dated: _____.

_____ [*signature*]
Attorney for Plaintiff

[2] Use of Form

This form of complaint for damages for breach of a building contract is for use by an owner when the contractor negligently performed the contract or performed the contract using defective materials. Performance of a contract in a negligent manner may give rise to a breach of contract action even if no express contract provisions are violated [*see, e.g., Perry v. Robertson (1988) 201 Cal. App. 3d 333, 340, 247 Cal. Rptr. 74]* .

The suggested language concerning the contractor's use of defective or unsuitable materials includes a statement that the contractor knew or should have known that the materials used were unsuitable (Paragraph 6). For a form of complaint setting forth both tort and contract causes of action, see *§ 104.250*. For further discussion of combined tort and breach of contract actions, see *§ 104.41[6]*.

[3] Cross References

For a related form, see *§ 104.210*.

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10-104 California Forms of Pleading and Practice--Annotated § 104.229

§ 104.229 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] for Breach of Contract--By Owner Against Contractor--Failure to Repair Defective Roof and Pay for Property Damaged by Leak

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] for Breach of Contract--By Owner Against Contractor--Failure to Repair Defective Roof and Pay for Property Damaged by Leak

[*Caption. See § 104.210.*]

Plaintiff alleges:

1. [*Capacity and residence of defendant contractor. See § 104.210, Paragraph 2.*]

[2. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

3. Prior to _____ [*date*], defendant constructed a building for plaintiff pursuant to a [written] contract between plaintiff and defendant[, a copy of which is attached to and incorporated into this complaint as Exhibit A]. Thereafter a dispute arose between plaintiff and defendant as to whether the roof of the building was defective, and as to the extent of damages caused by leakage resulting from the roof.

4. On or about _____ [*date*], plaintiff and defendant compromised the dispute by an agreement in writing, under the terms of which defendant agreed to repair the claimed defects, and to pay for all damages to plaintiff's property in the building caused by leakage resulting from the defects, in consideration of plaintiff's forbearance to sue defendant on the original contract. [Under the terms of the agreement, defendant was to make the repairs and pay the damages to plaintiff before _____ (*date*).] A copy of the compromise agreement is attached to and incorporated into this complaint as Exhibit B.

5. Plaintiff has performed all conditions, covenants, and promises to be performed on his/her/its part under the terms of the compromise agreement.

[*EITHER, if compromise agreement specified deadline for defendant's performance*]

6. On _____ [*date*], after the time for defendant's performance of the compromise agreement had passed without defendant having performed the agreement, plaintiff made [written] demand on defendant to repair the roof of the building and to pay for all damages to plaintiff's _____ [*describe damaged property, e.g.,* stock and merchandise].

[*OR, if no deadline for defendant's performance was specified in compromise agreement*]

6. After the expiration of a reasonable time for defendant's performance of the compromise agreement, plaintiff on _____ [*date*] made [written] demand on defendant to repair the roof on the building and to pay all damages to plaintiff's _____ [*describe damaged property, e.g.,* stock and merchandise].

[*CONTINUE*]

7. Defendant has failed and refused, and continues to fail and refuse, to perform any part of the compromise agreement.

8. The reasonable value of the cost of replacement and/or repair of the roof is $_____. Plaintiff has sustained damage to his/her/its _____ [*describe damaged property, e.g.,* stock and merchandise] in the building in the sum of $_____.

[*Prayer. See § 104.210.*]

Dated: _____.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 104.210.*]

[2] Use of Form

This form of complaint is for use by an owner in an action for a contractor's breach of a compromise agreement to repair a defective roof constructed under a building contract and to pay for property damaged as a result of the defect.

[3] Compromise Agreements

Paragraph 4 sets forth the consideration given by the contractor (repair roof and pay for damaged property) and the owner (forbearance to sue) for the compromise agreement. A compromise agreement to repair a defectively constructed building must be supported by consideration [*Enslow v. Von Guenthner (1961) 193 Cal. App. 2d 318, 321-322, 14 Cal. Rptr. 231]* . Forbearance to sue is a sufficient consideration for such an agreement [*Civ. Code § 1605*; *Louisville Title Ins. Co. v. Surety Title & Guar. Co. (1976) 60 Cal. App. 3d 781, 792-793, 132 Cal. Rptr. 63]* .

[4] Time for Performance

The first Alternative Paragraph 6 should be used if the compromise agreement specified a deadline for the contractor's performance, and the contractor failed to perform by the deadline. The second Alternative Paragraph 6 should be used if the compromise agreement contained no deadline for the contractor's performance, but a reasonable time for the performance has expired and the contractor has failed or refused to perform in response to the owner's demands for performance. If no time is specified for the performance of an act required to be performed, a reasonable time for performance is allowed [*Civ. Code § 1657*]. For further discussion, see *§ 104.19*.

[5] State Statutes

Consideration required for contract. *Civ. Code § 1550(4)*

Elements of consideration. *Civ. Code § 1605 et seq.*

[6] Cross References

For a related form, see *§ 104.210*.

For discussion of releases generally, see Ch. 520, *Settlement and Release* .

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10-104 California Forms of Pleading and Practice--Annotated § 104.230

§ 104.230 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] for Breach of Building Contract--By Owner Against Contractor and Surety--Nonperformance or Abandonment

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] for Breach of Building Contract--By Owner Against Contractor and Surety--Nonperformance or Abandonment

[*Caption. See § 104.210.*]

Plaintiff alleges:

1. [*Capacity and residence of defendant contractor. See § 104.210, Paragraph 2.*]

[2. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

3. [*Capacity and residence of defendant surety. See § 104.219, Paragraph 4.*]

4. On or about _____ [*date*], in _____ County, California, plaintiff entered into a written contract with defendant contractor for the construction by defendant contractor of _____ [*briefly describe project to be constructed, e.g.,* a certain building in that county]. A copy of the contract is attached to and incorporated into this complaint as Exhibit A.

5. On or about _____ [*date*], in accordance with the contract, defendant surety executed and delivered to plaintiff, and plaintiff accepted, its bond ensuring the faithful performance by defendant contractor of the contract according to its terms, plans, and specifications, and promising to pay to plaintiff, on contractor's failure to so perform, all damages caused by such a failure in a sum not exceeding $_____. A copy of the bond is attached to and incorporated into this complaint as Exhibit B.

6. Defendant contactor has failed and refused to faithfully perform the contract in that _____ [*specify*

acts showing nonperformance or abandonment of project].

7. No notice of completion for the building has been filed.

8. On or about _____ [*date*], [and several times thereafter,] plaintiff made written demand on defendant contractor to faithfully perform the contract, but defendant contractor has failed, refused, and neglected to do so.

9. As a proximate result of contractor's failure and refusal to faithfully perform the contract, plaintiff has been damaged in the reasonable sum of $_____, the difference between the contract price and the cost of the agreement obtained by plaintiff from _____ [*name of new contractor*] to [perform *or* complete performance of] contractor's obligations under the contract. Defendant surety is liable to plaintiff on the bond to pay these damages, as well as any and all other damages or loss sustained by plaintiff by reason of defendant contractor's breach of the contract.

[10. Also as a proximate result of contractor's failure and refusal to faithfully perform the contract, plaintiff has been damaged in the amount of $_____ for lost rent. The building that is the subject of the contract was not and could not be occupied by plaintiff's tenant until _____ (*date*). The tenant's occupancy was delayed for _____ (*number*) _____ [weeks *or* months] after the completion date agreed on in the contract between plaintiff and defendant contractor. The rental agreed on by plaintiff and his/her/its tenant for the occupancy of the building was the reasonable sum of $_____ per month.]

11. In compliance with the condition of the bond relating to notice to surety, on or about _____ [*date*], plaintiff gave defendant surety written notice of the failure and refusal of defendant contractor to faithfully perform the contract and the damages to plaintiff occasioned by defendant contractor's breach, and made demand on defendant surety for payment of plaintiff's damages. Defendant surety has failed and refused, and still fails and refuses, to pay any part of plaintiff's damages. A copy of the notice and demand is attached to and incorporated into this complaint as Exhibit C.

12. Plaintiff has faithfully and fully performed all of the conditions and covenants required of him/her/it by the terms of the contract.

[*Prayer. See § 104.210.*]

Dated: _____.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 104.210.*]

[2] Use of Form

This form of complaint for damages for breach of contract is for use by an owner against a contractor. The contractor's surety is joined to allow recovery on the faithful performance bond [*Code Civ. Proc. § 996.430(a)*]. When a civil action is brought to enforce liability on a bond, both the principal and the sureties must be joined as parties to the action [*Code Civ. Proc. § 996.430(a)*].

[3] Time for Filing Action

If the faithful performance bond contains a condition concerning the time within which an action against the bond must be filed, any action against the surety on the bond must be filed within that time [*Jew v. Pacific Employers Ins. Co. (1961) 196 Cal. App. 2d 310, 314-316, 16 Cal. Rptr. 542]* . A condition waiving the statute of limitations must be in writing and signed by the waiving party [*see Code Civ. Proc. § 360.5*].

[4] Extent of Recovery Against Faithful Performance Bond

The complaint includes an allegation seeking damages for the costs of completing the construction work called for by the contract (Paragraph 9), and an optional allegation seeking damages for lost rent (Paragraph 10). Allegations concerning other types of damages proximately caused by the breach, or that would be likely in the ordinary course of things to be caused by the breach, may also be added [*see Civ. Code § 3300*]. The extent to which the surety will be liable for the damages depends mainly on the terms of the contract and the bond [*Cates Constr. Inc. v. Talbot Ptnrs. (1999) 21 Cal. 4th 28, 39-40, 86 Cal. Rptr. 2d 855, 980 P.2d 407]* . For example, when a contract is made a part of the performance bond, a valid liquidated damages clause in the contract [*see Civ. Code § 1671*] is covered by the bond and the surety will be liable for liquidated damages even when the contractor abandons the contract and the surety is compelled to complete his or her performance [*Pacific Employers Ins. Co. v. City of Berkeley (1984) 158 Cal. App. 3d 145, 156, 204 Cal. Rptr. 387]* . For further discussion of the liability of a surety under a faithful performance bond, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[5] Cross References

For related forms, see *§§ 104.210* and *104.219*.

For discussion and forms relating to damage allegations generally in contract actions, see *Ch. 177, Damages, § 177.140* et seq.

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10-104 California Forms of Pleading and Practice--Annotated § 104.231

§ 104.231 Allegation--Contractor Furnished Payment Bond

[1] FORM Allegation--Contractor Furnished Payment Bond

On or about _____ [*date*], in accordance with the contract, defendant surety executed and delivered to plaintiff owner, and plaintiff accepted, its bond ensuring that if defendant contractor or his/her/its subcontractors failed to pay for any materials, provisions, or other supplies used in, on, for, or about the performance of the contract, or for any work or labor of any kind performed on the contract, or for any amounts due under the Unemployment Insurance Act with respect to the work or labor, defendant surety would pay for the same in an amount not exceeding $_____. The bond also provided that if suit was brought on the bond, defendant surety would pay a reasonable sum, to be fixed by the court, for attorney's fees. A copy of this bond is attached to and incorporated into this complaint as Exhibit C.

[2] Use of Form

This form of allegation is for use by an owner in a complaint against a contractor and the contractor's surety when the surety has provided a payment bond. It may be included in a complaint such as the one set forth in *§ 104.230*.

[3] Claims Payable From Payment Bond

A payment bond is a bond for payment in full of the claims of all claimants, which is also by its terms made to inure to the benefit of all claimants and to give these persons a right of action to recover on the bond in any suit brought under the California mechanics' lien laws [*Civ. Code § 3109 et seq.*] or in a separate suit brought on the bond [*Civ. Code § 3096*]. A payment bond allegation is thus appropriate in an action in which the lien claims of subcontractors, suppliers, or other persons who provided labor or materials for the performance of the contract are an item of the owner's damages. For further discussion, see *§ 104.14[1]*.

[4] Payment of Lien Claims Under Faithful Performance Bond

A faithful performance bond that refers to a contract providing that the contractor will pay the claims of all persons

performing labor or furnishing materials binds the surety for labor performed and materials furnished even in the absence of a payment bond [*Culbertson v Cizek (1964) 225 Cal. App. 2d 451, 466-467, 37 Cal. Rptr. 548]* . For further discussion, see *§ 104.14[2]*.

[5] Decisions

ERISA preempts employee trust fund's right to recover for fringe benefits from contractor's payment bond. *Carpenters Health & Welfare Trust Fund v. Barry (1993) 13 Cal. App. 4th 1406, 1409-1412, 18 Cal. Rptr. 2d 661*

[6] Cross References

See *§ 104.219*.

For forms concerning claims against payment bonds, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

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10-104 California Forms of Pleading and Practice--Annotated § 104.232

§ 104.232 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--By Surety to Action by Owner--Plaintiff Failed to Commence Suit Within Time Provided by Performance Bond

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--By Surety to Action by Owner--Plaintiff Failed to Commence Suit Within Time Provided by Performance Bond

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant _____ [*name*] alleges:

1. Defendant surety denies that plaintiff has duly performed all of the conditions of the surety bond on his/her/its part.

2. Paragraph _____ [*number, letter, or other paragraph designation*] of the surety bond, Exhibit _____ of plaintiff's complaint, provides _____ [*set forth provisions of surety bond pertinent to commencement of action, e.g.,* that no suit, action, or proceeding to recover on the bond shall be sustained unless commenced within six months from the completion of the structure or work of improvement, as "completion" is defined in *Civil Code Section 3086*].

3. On or about _____ [*date*], in Book _____, Page _____, Official Records of the County of _____, there was recorded a notice of completion, executed by plaintiff. "Completion" as used in the notice constitutes "completion" as defined in *Civil Code Section 3086*. A copy of the notice of completion is attached to and incorporated into this answer as Exhibit 1.

4. Plaintiff's complaint was filed on _____ [*date*], which was more than _____ [*specify period provided for in bond condition, e.g.,* six months] after the completion of the structure or work of improvement.

[2] Use of Form

This form of affirmative defense is for use by a surety in an answer to an owner's complaint on a performance bond. It

should be used when the complaint was not filed within the time specified in the conditions to the bond. Ordinarily, conditions of this type specify that an action on the bond must be filed within a certain number of months after completion of the structure or work of improvement that is the subject of the underlying contract. For forms of answer generally, see Ch. 26, *Answers* .

[3] Shortening of Statutory Limitations Period

Contracting parties may agree on a shorter period of limitation for bringing an action than that prescribed by statute, so long as the time allowed is reasonable [*Jew v. Pacific Employers Ins. Co. (1961) 196 Cal. App. 2d 310, 315, 16 Cal. Rptr. 542]* . If the bond sued on is a payment bond rather than a performance bond, the period for bringing an action on the bond may not be shortened to less than six months, and may not be shortened at all as to claimants, unless the bond is recorded before the work of improvement is commenced [*Civ. Code §§ 3239, 3240*]. A condition waiving the statute of limitations must be in writing and signed by the waiving party [*Code Civ. Proc. § 360.5*].

[4] Cross References

See *§ 104.230*.

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§ 104.233 Complaint for Restitution [Civ. Code § 1692] Based on Rescission of Contract [Civ. Code § 1689]--By Owner Against Contractor--Inability to Procure Building Permit

[1] FORM Complaint for Restitution [Civ. Code § 1692] Based on Rescission of Contract [Civ. Code § 1689]--By Owner Against Contractor--Inability to Procure Building Permit
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO.
Plaintiff,	)	COMPLAINT FOR RESTITUTION
vs.	)	(Relief Based on Rescission
_____ [*name(s)*], [and DOES I	)	of Construction Contract)
through _____,]	)	[Amount demanded _____
Defendant(s)	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. [*Capacity and residence of defendant contractor. See § 104.210, Paragraph 2.*]

[2. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

3. [*Contract allegation. See § 104.225, Paragraph 3.*]

4. The contract provides in part as follows: _____ [*set out provisions of contract pertaining to compliance with governmental laws, rules, and regulations, e.g.,* the contractor will comply with all applicable laws, rules, and regulations of any governmental authority relating to the work set forth in this contract, and will obtain necessary permits, covering the work, at the expense of the owner].

5. On execution of the contract, plaintiff paid to defendant $_____ in cash.

6. Plaintiff and defendant agreed on the plans and specifications for the contract, including the labor and materials to be used in the construction of the _____ [building *or* improvement]. The plans and specifications agreed to by plaintiff and defendant are attached to Exhibit A. Defendant then endeavored to secure a permit from the building department of the City of _____ to construct the _____ [building *or* improvement] in accordance with the plans and specifications. The building permit was denied by the building department of the city of _____.

7. Defendant failed to perform the contract in that defendant was unable to, and did not, obtain from the necessary governmental agency the permit to construct the building in accordance with the plans and specifications approved by plaintiff.

8. On or about _____ [*date*], plaintiff rescinded the contract by reason of the above facts, since a necessary element of the consideration for the contract was the permit from the City of _____, and gave defendant written notice of the rescission. A copy of the rescission notice is attached to and incorporated into this complaint as Exhibit B.

9. On or about _____ [*date*], plaintiff demanded that defendant return the $_____ paid by plaintiff to defendant on execution of the contract. Defendant has wholly failed and refused to pay this sum or any part of it to plaintiff, and the entire sum is now due, owing, and unpaid from defendant to plaintiff, with interest on it at the rate of _____ percent per annum from _____ [*date stated in rescission notice*].

[*Prayer. See § 104.210.*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 104.210.*]

[2] Use of Form

This form of complaint for restitution of money paid by an owner to a contractor is for use when the owner has rescinded the contract due to the inability of the contractor to procure a necessary building permit.

[3] Failure to Obtain Permits as Grounds for Rescission

A contract may be unilaterally rescinded if, among other reasons, it is unlawful for causes that do not appear in its terms and conditions, and the parties are not equally at fault, or if the consideration for the obligation of the rescinding party becomes entirely void or fails in any material respect, from any cause, before it is rendered to the rescinding party

(Paragraphs 6-8) [*see Civ. Code § 1689(b)(2)-(5)*]. Ordinarily, the contractor's inability to obtain a building permit will permit the owner to rescind the building contract. However, if the contractor's inability to obtain the permit is due to the owner's failure to provide information necessary to the permit application or determination, the owner may not rely on the failure to obtain the permit as a basis for rescinding the contract [*Bellwood Discount Corp. v. Empire Steel Buildings Co. (1959) 175 Cal. App. 2d 432, 436, 346 P.2d 467]* . For further discussion, see *§ 104.17*.

[4] Amounts Recoverable by Owner and Contractor

The aggrieved party in a rescission action is entitled to complete relief, including restitution of all benefits conferred by him or her as a result of the transaction, and any consequential damages (Paragraphs 5, 9) [*Civ. Code § 1692*]. However, the aggrieved party's recovery may be reduced by any amount that the court deems necessary to justly compensate the other party or to adjust the equities between the parties [*Civ. Code § 1692*]. Thus, in the situation set out in this complaint, the court may elect to deduct from the money due from the contractor to the owner some or all of the reasonable expenditures of the contractor in preparing to perform the contract that cannot be recouped by the contractor. If the complaint does not allege that the contractor was in any way at fault for the inability to obtain the permit, it would not be equitable to force him or her to bear the entire amount of these losses.

If the owner has received anything of value under the contract from the contractor, he or she must promptly return it on rescinding the contract [*Civ. Code § 1691(b)*].

[5] State Statutes

Grounds for rescission of contract. *Civ. Code § 1689*

Relief based on rescission. *Civ. Code § 1692*

[6] Cross References

For a related form, see *§ 104.210*.

For further discussion and forms relating to restitution based on rescission of a contract, see Ch. 490, *Rescission and Restitution* .

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A. Building Contracts and Actions for Breach

10-104 California Forms of Pleading and Practice--Annotated §§ 104.234-104.249

[Reserved]

§§ 104.234[Reserved]

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B. Other Liabilities of Contractors, Owners, and Third Parties Arising From Construction Projects

10-104 California Forms of Pleading and Practice--Annotated § 104.250

§ 104.250 Complaint for Damages for Negligence [Civ. Code §§ 1714(a), 3333] and Breach of Contract [Civ. Code § 3300]--By Owner Against Contractor--Building Code Violations

[1] FORM Complaint for Damages for Negligence [Civ. Code §§ 1714(a), 3333] and Breach of Contract [Civ. Code § 3300]--By Owner Against Contractor--Building Code Violations
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*], [and DOES I	)	(Negligence and Breach of Construction Contract)
through _____,]	)	[Amount demanded _____
Defendant(s)	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Negligence)

1. [*Capacity and residence of defendant contractor. See § 104.210, Paragraph 2.*]

[2. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

3. [*Contract allegation. See § 104.225, Paragraph 3.*]

4. The contract specifically provided that in constructing the _____ [building *or* improvement] defendant would conform to all applicable building code requirements of the State of California and the City of _____ [*name of city in which construction project is located*].

5. During and as part of his/her/its performance of the contract, defendant negligently _____ [*specify negligent act, e.g.,* installed sliding glass doors fitted with ordinary pane glass instead of safety glass], in violation of _____ [*specify building code provision violated, e.g.,* Article A, Section 7 of the Building Code of City of _____ (*name of city*)].

6. Defendant knew or should have known that _____ [*specify negligent act, e.g.,* the installation of sliding glass doors fitted with ordinary pane glass instead of safety glass] was a violation of the Building Code and created an unreasonable risk of serious bodily harm to others, including plaintiff.

7. On or about _____ [*date*], and as a proximate result of defendant's negligence, plaintiff sustained serious bodily injuries when _____ [*describe injury and how it occurred, e.g.,* he/she accidentally walked into the glass door between the deck and the living room, causing the door to shatter].

8. As a proximate result of the negligence of defendant[s, and each of them], plaintiff was injured in his/her health, strength, and activity, and sustained shock and injury to his/her nervous system. These injuries have caused and will cause plaintiff great mental and physical pain and suffering, all to his/her general damage.

9. As a further proximate result of the negligence of defendant[s, and each of them], plaintiff incurred medical and related expenses [in the sum of $_____][, and will continue to incur medical expenses]. [The full amount of plaintiff's medical expenses is not known to plaintiff at this time, and plaintiff will seek leave to amend this complaint to state this amount when it is known.]

[10. At the time of his/her injuries, plaintiff was _____ (employed *or* employable) in his/her usual occupation as a _____ (*specify occupation, e.g.,* nurse). As a further proximate result of the negligence of defendant[s, and each of them], and by reason of the injuries suffered by plaintiff, plaintiff was prevented from attending to his/her occupation from _____ (*date*) to _____ (*date*), and lost earnings in the amount of $_____. (Plaintiff is informed and believes and alleges that he/she will continue to be prevented from attending to his/her/any occupation for a period in the future, and will thereby lose future earnings. The amount of these future losses is unknown to plaintiff at this time, and plaintiff will seek leave to amend this complaint to state this amount when it is known.)]

SECOND CAUSE OF ACTION
(Breach of Contract)

11. Plaintiff realleges and incorporates into this cause of action by reference Paragraphs 1-5 of Plaintiff's First Cause of Action set forth above.

12. The contract specifically stated that plaintiff would conform to all applicable building code requirements of the State of California and the City of _____ [*name of city in which construction project is located*].

13. Plaintiff's _____ [*specify defendant contractor's acts or omissions constituting violation of building code and breach of contract, e.g.,* failure to install safety glass in the sliding glass doors], in violation of the

Building Code, constituted a material breach of the contract.

14. On or about _____ [*date or dates*], plaintiff demanded in writing that defendant _____ [*specify work to be refinished or replaced, e.g.,* replace the ordinary pane glass in each of the four sliding glass doors in plaintiff's home with safety glass meeting the requirements of the contract and of _____ [*specify applicable building code provision, e.g.,* Article A, Section 7 of the Building Code of City of _____ (*name of city*)]. Defendant failed and refused and continues to fail and refuse to perform this work.

15. By reason of defendant's breach of the contract, plaintiff has been damaged in the sum of $_____, the amount reasonably expended to pay another contractor to correct defendant's work and make it conform to the contract and the plans and specifications and to the provisions of the Building Code.

WHEREFORE, plaintiff prays for judgment against defendant[s, and each of them,] as follows:

On the FIRST CAUSE OF ACTION:

1. For general damages according to proof;

2. For medical and related damages according to proof;

3. For lost earnings according to proof;

On the SECOND CAUSE OF ACTION:

4. For damages in the sum of $_____;

5. For interest at _____ percent per annum on the sum of $_____ from and after _____ [*date*];

On ALL CAUSES OF ACTION:

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 104.210.*]

[2] Use of Form

This form of complaint is for use by an owner against a contractor for negligence and breach of contract. It may be used when the contractor's breach of the contract also constitutes a breach of the contractor's duty of care in performing the construction work contracted for.

[3] Negligence Allegations

The complaint contains allegations of a duty to the plaintiff (Paragraph 6), breach of that duty (Paragraph 5), and injury and damages proximately caused by the breach (Paragraphs 7-10) [*see Civ. Code §§ 1714(a), 3333*; *see also § 104.41[3]*].

[4] Damages

In a superior court action that is not a limited civil case, brought to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages must be alleged [*Code Civ. Proc. § 425.10(a)(2)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* .

[5] Contract and Tort Action

A wrongful act committed in the course of a contractual relationship may give rise to both a breach of contract action and a tort action [*Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 174-175, 164 Cal. Rptr. 839, 610 P.2d 1330* ; *see § 104.41[6]*].

A complaint stating both a tort and a contract cause of action should segregate the tort and contract allegations in distinct counts, and be legally sufficient to put the defendant on notice of the multiple theories of liability [*Perry v. Robertson (1988) 201 Cal. App. 3d 333, 340, 247 Cal. Rptr. 74]* . For a form of complaint stating a single cause of action for negligent breach of a contract, see *§ 104.228*.

[6] Election of Remedies

Although an injured party may set forth inconsistent or duplicative damages in a complaint, he or she may not actually recover inconsistent or duplicative damages but must elect which items of recovery to accept [*Perry v. Robertson (1988) 201 Cal. App. 3d 333, 340, 247 Cal. Rptr. 74]* . This complaint does not allege inconsistent or duplicative damages or theories of recovery, because it seeks tort damages for plaintiff's injuries and lost wages (Paragraphs 8-10) and contract damages for the cost of remedying the contractor's negligent performance (Paragraph 15) [*see Walker v. Signal Companies, Inc. (1978) 84 Cal. App. 3d 982, 993, 149 Cal. Rptr. 119* ; *Amerson v. Christman (1968) 261 Cal. App. 2d 811, 823, 68 Cal. Rptr. 378* ; *Shell v. Schmidt (1958) 164 Cal. App. 2d 350, 360, 366 , cert. denied, 359 U.S. 959]* . Instead of or in addition to the contract allegation seeking damages for the cost of remedying the negligent performance, plaintiff could add to the First Cause of Action an allegation of damages for the diminution in the value of the construction caused by the contractor's negligent performance [*see Sabella v. Wisler (1963) 59 Cal. 2d 21, 29, 27 Cal. Rptr. 689, 377 P.2d 889* ; *Stewart v. Cox (1961) 55 Cal. 2d 857, 862-863, 13 Cal. Rptr. 521, 362 P.2d 345]* . Plaintiff could not, however, actually recover damages under both of these theories.

[7] State Statutes

Duty to avoid injuring persons or property. *Civ. Code §§ 1708, 1714(a)*

Measure of damages for breach of obligation arising from contract. *Civ. Code § 3300*

Measure of damages for breach of obligation not arising from contract. *Civ. Code § 3333*

[8] Cross References

For a related form, see *§ 104.210*.

For general discussion and for forms of alternative allegations of physical injuries, see Ch. 380, *Negligence* .

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10-104 California Forms of Pleading and Practice--Annotated § 104.251

§ 104.251 Complaint for Damages [Civ. Code § 3333] Based on Negligence [Civ. Code § 1714(a)]--By Purchaser Against Lender--Defects in Construction [Civ. Code § 3434]

[1] FORM Complaint for Damages [Civ. Code § 3333] Based on Negligence [Civ. Code § 1714(a)]--By Purchaser Against Lender--Defects in Construction [Civ. Code § 3434]

[*Caption. See § 104.250*]

Plaintiff alleges:

1. [*Capacity and residence of defendant lender. See § 104.210, Paragraph 2.*]

[2. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

3. Defendant _____ [*name of lender*] ("lender") provided loans for the construction of _____ [*specify project, e.g.,* a certain residential development situated in _____ (*city*), _____ County, California, commonly known as _____ (*name of development, e.g.,* "Rooster Rock Estates")], in which plaintiff purchased and has at all times herein mentioned owned _____ [*specify interest owned by plaintiff, e.g.,* a home].

4. Defendant lender acted outside the scope of the activities of a lender of money with respect to this project in that it _____ [*specify activities of defendant lender outside the scope of the activities of a lender, e.g.,* became an active participant in the home construction enterprise with the right to exercise extensive control over the enterprise, received substantial fees for making the loans in addition to interest, and received a 20 percent capital gain for holding title to the property to be developed until the developer was ready to use it].

5. Defendant lender's actions were intended to affect plaintiff significantly in that _____ [*specify acts showing such intention, e.g.,* defendant lender's loan to the developer was made on the condition that a sufficient

number of persons make commitments to buy homes and defendant lender arranged for the developer to channel buyers of homes in the development to defendant lender for home loans].

6. Defendant lender knew, or in the exercise of reasonable care should have known, that _____ [*specify knowledge with which lender is charged, e.g.,* the developer was inexperienced and operating on a dangerously thin capitalization and could be driven to cutting corners in construction, that there was an expansive soil problem on the property to be developed, and that the prepackaged plans purchased by the developer required correction].

7. Defendant lender so negligently, carelessly, and unlawfully exercised its control of the development of the project that on or about _____ [*date*], _____ [*specify occurrence causing injury, e.g.,* the soil under plaintiff's home in the project expanded during a rainstorm and the ill-designed and ill-constructed foundation of the home cracked].

8. As the proximate result of defendant lender's negligence, plaintiff's property was damaged in the sum of $_____.

9. As a further proximate result of defendant lender's negligence, plaintiff suffered the loss of the use of his/her/its property for _____ [*specify period*], all to plaintiff's damage in the sum of $_____, which is a reasonable amount for the use of plaintiff's property for that period.

WHEREFORE, plaintiff prays for judgment defendant[s, and each of them,] as follows:

1. For general damages in the sum of $_____;

2. For damages for loss of use of the property in the sum of $_____;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 104.210.*]

[2] Use of Form

This form of complaint for property damage is for use by the purchaser of a home against the lender who financed construction of the home.

[3] Allegations

The legal theory of recovery against the lender is that the lender's involvement in the construction project was outside the scope of the activities of a lender of money (Paragraph 4), that the lender negligently failed to exercise appropriate control over the project (Paragraphs 6, 7), and that it was thus responsible for defects in the construction that foreseeably led to plaintiff's property damage (Paragraphs 5, 8, 9) [*see Civ. Code § 3434*; *see also Dillon v. Legg (1968) 68 Cal. 2d 728, 733-734, 69 Cal. Rptr. 72, 441 P.2d 912]* . For further discussion, see *§ 104.53*.

[4] Cross References

For related forms, see *§§ 104.210* and *104.250*.

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10-104 California Forms of Pleading and Practice--Annotated § 104.252

§ 104.252 Complaint [Code Civ. Proc. § 425.10] for Injunctive Relief Restraining Expenditure of Monies From Construction Fund [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527(a)], Damages for Breach of Contract [Civ. Code § 3300], Negligence [Civ. Code § 1714(a)], and Fraud [Civ. Code § 3333], and Exemplary and Punitive Damages [Civ. Code § 3294]--By Contractor Against Public Entity

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Injunctive Relief Restraining Expenditure of Monies From Construction Fund [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527(a)], Damages for Breach of Contract [Civ. Code § 3300], Negligence [Civ. Code § 1714(a)], and Fraud [Civ. Code § 3333], and Exemplary and Punitive Damages [Civ. Code § 3294]--By Contractor Against Public Entity

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*], [and DOES I	)	COMPLAINT FOR DAMAGES AND INJUNCT-
through _____,]	)	IVE RELIEF
Defendants	)	
	)	

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Breach of Contract)

1. At all times herein mentioned, defendant [*name, e.g.,* Sanitary District of City of _____ ("Sanitary District")] was, and now is, a public entity and political subdivision of the State of California, and defendants _____ [*names*] were, and now are, _____ [*specify capacities of individual defendants, e.g.,* the duly elected, qualified, and acting members of the Board of Directors of defendant Sanitary District], and in doing the things alleged in this complaint were, and now are, acting in that capacity.

2. At all times herein mentioned, defendant _____ [*name*] was, and now is, _____ [*describe capacity of additional individual defendant, e.g.,* the duly appointed, qualified, and acting administrative officer of defendant Sanitary District], and in doing the things alleged in this complaint was, and now is, acting in that capacity.

3. [Plaintiff is informed and believes and alleges that] [a]t all times herein mentioned, defendant _____ [*name of corporation*] was, and now is, a corporation organized and existing under the laws of the State of California, having its principal place of business in _____ County, California.

4. [Plaintiff is informed and believes and alleges that] [a]t all times herein mentioned, defendant _____ [*name*] was, and now is, a civil engineer licensed to practice in the State of California, and that he/she was, and now is, an officer, director, and agent of defendant _____ [*corporation*], and in doing the things alleged in this complaint was, and now is, acting in such capacities.

5. At all times herein mentioned, defendants _____ [*name of corporation*] and _____ [*name of civil engineer*] were, and now are, the agents, servants, and employees of defendant _____ [*identify public entity defendant, e.g.,* Sanitary District], and in doing the things herein alleged, were at all times acting in those capacities.

[6. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

7. At all times herein mentioned, plaintiff was, and now is, a duly licensed California contractor [and a corporation organized and existing under the laws of the State of California and having its principal place of business in _____County, California].

8. On or about _____ [*date*], plaintiff and defendant _____ [*identify public entity defendant, e.g.,* Sanitary District] entered into a written agreement designated "Agreement of Release, Compromise, and Settlement," under which plaintiff agreed to complete the construction of a _____ [*describe project, e.g.,* sanitary sewer collection system] for defendant _____ [*identify public entity defendant, e.g.,* Sanitary District] in accordance with certain plans, specifications, practices, and methods; and defendant [*identify public entity defendant, e.g.,* Sanitary District] agreed, among other things, to do the following: _____ [*specify, e.g.,*

a. Pay to plaintiff on _____ (*date*) the sum of $_____, as partial settlement for prior claims by plaintiff against defendant _____ (*identify public entity defendant, e.g.,* Sanitary District);

b. Deposit on _____ (*date*) the sum of $_____ with a mutually agreeable commercial bank paying the highest rate of interest on such deposits, as security for payment to plaintiff of sufficient monies to guarantee plaintiff a net profit of _____ percent for all work performed and to be performed by plaintiff;

c. Pay to plaintiff the sum of $_____ in accordance with a certain progress payment schedule

provided for in the agreement; and

d. Furnish to plaintiff, on or before the last day of each month during performance of the agreement and construction of the work, a report of the estimated amount of work completed or acceptable, the materials furnished and delivered by plaintiff on the ground and not used, and the value of such work and materials].

A true and correct copy of the agreement is attached to and incorporated into this complaint as Exhibit A.

9. Plaintiff performed all conditions, covenants, and promises under the agreement on its part to be performed, until on or about _____ [*date*], at which time defendants, and each of them, refused, and still refuse, to allow plaintiff to continue to perform the agreement, as alleged below.

10. On or about _____ [*date*], defendant _____ [*identify public entity defendant, e.g.,* Sanitary District] and the other defendants breached the agreement in that _____ [*specify conduct constituting breach, e.g.,* (a) defendants failed and refused, and still fail and refuse, to deposit the sum of $_____, or any sum at all, in a mutually agreeable commercial bank as provided in the agreement; (b) defendants failed and refused, and still fail and refuse, to pay plaintiff the sum of $_____ by the time and in the manner provided by the agreement, or at all, (except the sum of $_____); and (c) defendants failed and refused, and still fail and refuse, to furnish plaintiff with reports of the estimated amount of work completed or acceptable, the materials furnished and delivered by plaintiff on the ground and not used, and the value of the work and materials].

11. Defendants, and each of them, have further breached the agreement in that _____ [*specify conduct constituting breach, e.g.,* they have, without the knowledge and consent of plaintiff, taken possession of and used the sewer collection system, have allowed consumers to tie into the system and use it, and have allowed sewage to flow through the system, all of which has materially interfered with, hindered, and delayed plaintiff's performance and completion of the agreement].

12. Since on or about _____ [*date*], defendants, and each of them, have further breached the agreement by willfully, wrongfully, maliciously, and oppressively refusing to allow plaintiff to complete its performance under the agreement in accordance with the plans, specifications, methods, and practices set forth in the agreement, or to perform any work whatsoever.

13. As a proximate result of the acts, conduct, and breaches on the part of defendants, as set forth above, plaintiff has suffered expense and damage in the sum of $_____, and loss of profit in the sum of $_____; the total of the monies due and damage to plaintiff is $_____.

14. Prior to the commencement of this action, on or about _____ [*date*], plaintiff caused to be served on defendant _____ [*identify public entity defendant, e.g.,* Sanitary District] a claim, pursuant to the provisions of *Government Code Sections 930, 930.2* and *930.6*, for the monies and damages sought in this action in the amount of $_____.

15. On or about _____ [*date*], defendant [*identify public entity defendant, e.g.,* Sanitary District] rejected the claim in its entirety.

SECOND CAUSE OF ACTION
(Injunction)

16. Plaintiff realleges and incorporates into this cause of action by reference Paragraphs 1-13 of plaintiff's First Cause of

Action set forth above.

17. The assessed valuation of defendant _____ [*identify public entity defendant, e.g.,* Sanitary District] is less than $_____. _____ [*Set forth facts showing public entity's inability to pay plaintiff, e.g.,* Under the provisions of *Health and Safety Code Section 6695*, defendant may not levy taxes in excess of $1 on each $100 assessed valuation in any one year, except what is required for the payment of bond principal and interest in that year. Under *Health and Safety Code Section 6651* the outstanding bonded indebtedness of defendant, other than for revenue bonds, cannot at any one time exceed 15 percent of the assessed valuation of the real and personal property of defendant, except that if defendant elects to use the County Assessor's tax roll, this outstanding bonded indebtedness cannot at any one time exceed 20 percent of the assessed valuation of the real and personal property of defendant. During the fiscal year _____ (*date*) through _____ (*date*), defendant's assessed valuation was $_____; defendant's general obligation bonded indebtedness during the fiscal year was, and still is, in excess of the maximum bonded indebtedness authorized by law. In addition, defendant had, and now has, a revenue bond obligation in the amount of $_____. The maximum amount defendant has available to it, including proceeds from all bond issues and revenues from all taxes for payment of the amount due plaintiff for any judgment that may be rendered in this action is less than $_____].

18. Attached to and incorporated into this complaint as Exhibit B is a true and correct copy of the receipts, disbursements, assets, and liabilities of defendant _____ [*identify public entity defendant, e.g.,* Sanitary District] as prepared by _____ [*name*], Auditor and Controller of the County of _____, State of California. As of the date of the audit, _____ [*date*], defendant had available for payment to plaintiff the sum of $_____, out of the total of (a) the monies due plaintiff pursuant to the agreement described in Paragraph 8 of plaintiff's First Cause of Action, and (b) the damages claimed by plaintiff herein as a result of defendants' breach of the agreement. Since that date, defendant has expended at least $_____ of those monies. Defendant at this time has available for payment to plaintiff of the monies due plaintiff pursuant to the agreement and the damages claimed by plaintiff herein less than $_____.

19. Defendant _____ [*identify public entity defendant, e.g.,* Sanitary District] is insolvent, has no financial ability to pay its obligations as they mature, and is without financial or legal ability to obtain from any source sufficient funds with which to pay any judgment in favor of plaintiff rendered in this action. Defendant has employed and, unless restrained and enjoined by this court from doing so, threatens to continue to employ contractors other than plaintiff to perform construction work on the _____ [*describe project, e.g.,* sewer collection system] in addition to the work provided for under the agreement between plaintiff and defendant. Defendant has substantially completed an operating _____ [*describe project constructed by plaintiff, e.g.,* sanitary sewer collection system] and any work by other contractors, if performed, is not necessary to its operation or maintenance and is in violation of the agreement between plaintiff and defendant. Defendant's wrongful conduct and threatened wrongful conduct, unless and until it is enjoined and restrained by order of this court, will cause great and irreparable injury to plaintiff and plaintiff will be unable to recover the monies due it under the agreement or to satisfy any judgment that may be rendered in favor of plaintiff in this action.

20. Plaintiff has no adequate remedy at law for the injuries, damages, and expenses set forth above, in that defendant _____ [*identify public entity defendant, e.g.,* Sanitary District] is insolvent and has no financial or legal ability to meet its obligations as they mature or to satisfy any judgment that may be entered in favor of plaintiff in this action.

THIRD CAUSE OF ACTION
(Negligence)

21. Plaintiff realleges and incorporates into this cause of action by reference Paragraphs 1-4 and 6-8 of plaintiff's First

Cause of Action set forth above.

22. Plaintiff is informed and believes and alleges that at all times herein mentioned each of the defendants was, and now is, the agent, servant, and employee of each of the remaining defendants, and in doing the things herein alleged was at all times acting in such capacity.

23. At all times herein mentioned, defendants _____ [*names of corporation and civil engineer*] were, and now are, civil engineers, each individual being licensed to practice in the State of California, and each of them has held himself/herself/itself out to possess the ordinary skill and competence of members of the profession of civil engineering in the County of _____, which is the community in which they work.

24. On or about _____ [*date*], plaintiff and defendant _____ [*identify public entity defendant, e.g.,* Sanitary District] entered into a written agreement designated _____ [*specify title of agreement, e.g.,* "Contract Documents and Specifications for the Construction of a Sanitary Sewer Collection System" ("the Contract Documents and Specifications")], under which plaintiff agreed to _____ [*specify plaintiff's general obligations under contract, e.g.,* construct a sanitary sewer collection system for defendant in accordance with certain plans and specifications amended by the agreement set forth as Exhibit A to plaintiff's First Cause of Action], and defendant _____ [*identify public entity defendant, e.g.,* Sanitary District] agreed to pay to plaintiff the sum of $_____ in the time and manner set forth in the agreement. A copy of the the Contract Documents and Specifications is attached to and incorporated into this complaint as Exhibit C. The Contract Documents and Specifications were prepared by defendant _____ [*civil engineer*] and the remaining defendants. Prior to and at the time the Contract Documents and Specifications were prepared and the agreement was entered into by plaintiff and defendant _____ [*identify public entity defendant, e.g.,* Sanitary District], and at all times herein mentioned, defendant _____ [*corporation*] was, and now is, the consulting engineer to defendant _____ [*identify public entity defendant, e.g.,* Sanitary District] and defendant _____ [*civil engineer*] was, and now is, the project engineer on the work performed by plaintiff under the agreement.

25. On or about _____ [*date*], plaintiff commenced construction of the _____ [*specify construction project, e.g.,* sanitary sewer collection system] pursuant to the Contract Documents and Specifications. During the performance of the work and at all times herein mentioned, defendants were, and are, responsible under the terms of the agreement for the control and progress of the work and the engineering of the _____ [*specify construction project, e.g.,* sanitary sewer collection system], and at all times during the work and all time herein mentioned defendants undertook to control the performance and progress of the work and the engineering of the project.

26. Defendants, and each of them, so carelessly and negligently prepared the Contract Documents and Specifications, so carelessly and negligently controlled and directed the progress of the work, and so carelessly and negligently engineered the _____ [*specify construction project, e.g.,* sanitary sewer collection system] that plaintiff was prevented from receiving and did not receive the monthly progress reports and progress payments required by the Contract Documents and Specifications. The _____ [*specify individual items of construction not completed in accordance with agreement or with accepted practices, e.g.,* sewer lines, sewer covers, and appurtenant fixtures] were in many instances not constructed in accordance with the plans and specifications or in accordance with accepted engineering practices as exercised by members of the civil engineering profession possessing the degree of skill, ability, and learning common to the profession in _____ County, California. As a result of defendant's carelessness and negligence, plaintiff was caused to, and did, suffer the injuries and damages alleged below.

27. As a proximate result of the negligence and carelessness of defendants, and each of them, plaintiff was injured in that plaintiff has not received the monies due him/her/it under the agreement and was, and still is, hindered, delayed, and obstructed in the performance of his/her/its work, all to plaintiff's damage in the sum of $_____.

Plaintiff is informed and believes and alleges that he/she/it has incurred, and will incur in the future, additional damage, injury, and expense. The exact nature, extent, and amount of the damage and injury are not known to plaintiff at this time, and plaintiff will seek leave to amend this complaint to state these things when they are ascertained.

28. As a further proximate result of the negligence and carelessness of defendants, and each of them, plaintiff was prevented from attending to its business as a contractor from on or about _____ [*date*] to the date of filing of this complaint, and thus lost income and profits. The exact amount of plaintiff's lost income and profits is unknown to plaintiff at this time, and plaintiff will seek leave to amend this complaint to state this amount when it is ascertained.

FOURTH CAUSE OF ACTION
(Fraud)

29. Plaintiff realleges and incorporates into this cause of action by reference Paragraphs 1, 3, 4, and 6-8 of plaintiff's First Cause of Action set forth above, and Paragraphs 22-25 of plaintiff's Third Cause of Action set forth above.

30. On or about _____ [*date*], while plaintiff was engaged in the performance of the Contract Documents and Specifications set forth as Exhibit C to this complaint, and while defendants, and each of them, knew plaintiff was so engaged, defendants falsely and fraudulently, and with the intent to wrongfully interfere with and prevent plaintiff's performance of the agreement and the intent to induce defendant _____ [*identify public entity defendant, e.g.,* Sanitary District] to breach the agreement, represented to defendant _____ [*identify public entity defendant, e.g.,* Sanitary District] that plaintiff's performance was not in accordance with the plans, specifications, methods, and practices provided for in the agreement in, among other things, the following respects: _____ [*specify, e.g.,*

a. The plans, specifications, methods, and practices provided for in the agreement required air testing of all sewer lines in the sanitary sewer collection system;

b. Sewer covers constructed by plaintiff under the agreement were not constructed in accordance with the plans, specifications, methods, and practices as provided in the agreement, or in accordance with defendants' directions and instructions as consulting engineers to defendant _____ (*identify public entity defendant, e.g.,* Sanitary District);

c. Certain sewer lines and sewer laterals constructed by plaintiff were not constructed in accordance with the plans, specifications, methods, and practices provided in the agreement or in accordance with the instructions of defendants as consulting engineers to defendant _____ (*identify public entity defendant, e.g.,* Sanitary District)].

31. The representations so made by defendants were in fact false and known by defendants to be false when made. The true facts were as follow: _____ [*specify, e.g.,*

a. The plans, specifications, methods, and practices did not require the lines to be tested; defendants had specifically instructed plaintiff only to spot test certain lines and plaintiff had performed the testing procedures as required by the plans, specifications, methods, and practices of the agreement and the instructions of defendants as consulting engineers to _____ (*identify public entity defendant, e.g.,* Sanitary District), all of which defendants knew at the time the work was performed and at the time the representations were made by defendants to defendant _____ (*identify public entity defendant, e.g.,* Sanitary District);

b. Defendants had willfully and deliberately surveyed and staked certain sewer covers, sewer lines, and sewer laterals in a manner contrary to the written plans and specifications and concealed these acts from plaintiff with the intent to

wrongfully interfere with plaintiff's performance under the agreement and to induce defendant _____ (*identify public entity defendant, e.g.,* Sanitary District) to breach its agreement with plaintiff].

32. On or about _____ [*date*], defendant _____ [*civil engineer*] falsely and fraudulently represented to defendant _____ [*identify public entity defendant, e.g.,* Sanitary District] and plaintiff that a suspension of work order issued to plaintiff by defendants as consulting engineers to defendant _____ [*identify public entity defendant, e.g.,* Sanitary District] on _____ [*date*] would be, and was, then rescinded and that plaintiff would be allowed to complete performance of the agreement.

33. The representations made by defendants were in fact false and the true facts were that on _____ [*date*], defendants wrongfully refused to allow plaintiff to continue performance.

34. The representations, and each of them, were false and known by defendants to be false and were made by defendants in bad faith and with the intent and purpose of cheating and defrauding plaintiff and with the intent to wrongfully interfere with, hinder, delay, obstruct, and prevent performance by plaintiff of the agreement between plaintiff and defendant _____ [*identify public entity defendant, e.g.,* Sanitary District] and to induce defendant _____ [*identify public entity defendant, e.g.,* Sanitary District] to breach its agreement with plaintiff.

35. As a proximate result of the misrepresentations by defendants and wrongful interference with plaintiff's performance of its agreement with defendant _____ [*identify public entity defendant, e.g.,* Sanitary District], defendant _____ [*identify public entity defendant, e.g.,* Sanitary District] was caused to and did breach the agreement, all to plaintiff's damage in the sum of $_____.

36. At the time the representations were made, plaintiff was ignorant of their falsity and believed them to be true. In reliance on the representations, plaintiff was induced to, and did, incur additional expense, loss, and damage in attempting to complete performance of its agreement with defendant _____ [*identify public entity defendant, e.g.,* Sanitary District]. Had plaintiff known the true facts, he/she/it would not have taken such action.

37. In making the representations and wrongfully obstructing, hindering, delaying, interfering, and preventing plaintiff's performance of the agreement, defendants acted fraudulently and maliciously with an intent to cause plaintiff injury and were guilty of despicable conduct carried on with a willful and conscious disregard of plaintiff's rights. Plaintiff accordingly demands exemplary and punitive damages against defendants _____ [*names*].

WHEREFORE, plaintiff prays judgment as follows:

On the FIRST CAUSE OF ACTION for breach of contract:

1. For judgment against defendants _____ [*identify public entity, e.g.,* Sanitary District] and _____ [*names*], each _____ [*specify capacity of defendants, e.g.,* a member of the Board of Directors of the District], and each of them, for the following relief:

a. For damages in the sum of $_____, together with interest on this sum at the legal rate from and after _____ [*date*];

b. For loss of profits in the sum of $_____, together with interest on this sum at the legal rate from and after _____ [*date*];

On the SECOND CAUSE OF ACTION for injunctive relief:

2. For an order requiring defendants _____ [*identify public entity defendant, e.g.,* Sanitary District] and _____ [*names*], each _____ [*specify capacity, e.g.,* a member of the Board of Directors of the District], _____ [*name*], as _____ [*specify capacity, e.g.,* administrative officer of defendant Sanitary District], _____ [*name of corporation*], and _____ [*name of civil engineer*] to show cause, if they have any, why they should not be enjoined as set forth below, during the pendency of this action;

3. For a temporary restraining order and a preliminary injunction against defendants _____ [*identify public entity and other defendants, e.g.,* Sanitary District and _____ (*names*), each a member of the Board of Directors of the District; _____ (*name*), as administrative officer of defendant Sanitary District; _____ (*name of corporation*); and _____ (*name of civil engineer*)], enjoining and restraining defendants, and each of them, and their agents, servants, employees, and all persons acting under, in concert, or for them, as follows:

a. From performing any construction, reconstruction, alteration, or addition to the _____ [*specify construction project, e.g.,* sewer collection system of the _____ (*name*) Sanitary District, except any maintenance, repairs, and/or operation that may be necessary to maintain the system, or any part of it, in its existing condition];

b. From disbursing or expending monies or obligating the _____ [*identify public entity defendant, e.g.,* Sanitary District] to disburse or expend any monies from the _____ [*name*] Construction Fund, or from any other fund held for the purpose of constructing the _____ [*specify construction project, e.g.,* Sanitary District Sewer Collection System];

On the THIRD CAUSE OF ACTION for negligence:

4. For judgment against defendants _____ [*identify corporation*] and _____ [*identify civil engineer*] for the following relief:

a. For general damages in the sum of $_____;

b. For special damages for loss of income and profits according to proof;

On the FOURTH CAUSE OF ACTION for fraud:

5. For judgment against defendants _____ [*identify corporation*] and _____ [*identify civil engineer*] for the following relief:

a. For compensatory damages according to proof;

b. For exemplary and punitive damages according to proof;

On ALL CAUSES OF ACTION:

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification. See § 104.210.*]

DECLARATION OF _____ [*name*] RE NOTICE

I, _____ [*name of declarant*] hereby declare that _____ [on _____ (*date*), I informed defendant _____ (*name*) of the time and place where this application for a temporary restraining order would be made *or* in good faith I attempted to inform defendant _____ (*name*) of the time and place where this application for a temporary restraining order would be made, by _____ (*specify efforts*), but I was unable to do so *or* notice to defendant _____ (*name*) of this application for a temporary restraining order should not be required for the reason that _____ (*specify*)].

I declare under penalty of perjury under the laws of the State of California that this is true and correct.

_____ [*date*]

_____ [*signature*]
[Attorney for] Plaintiff

[2] Use of Form

This form of complaint for damages and injunctive relief is for use by a contractor against a public entity when the public entity has breached a construction contract and committed other wrongful acts, and is insolvent. It contains causes of action for breach of contract, injunction, negligence, and fraud, naming the public entity, its board of directors and administrative officer, an engineering corporation involved with the project, and an engineer employed by the corporation as defendants (Paragraphs 1-4).

This form is modeled on the complaint filed in *West Coast Constr. Co. v. Oceano Sanitary Dist. (1971) 17 Cal. App. 3d 693, 95 Cal. Rptr. 169* , in which a local sanitary district was enjoined from expending monies from its sewer construction fund during the pendency of an action for breach of contract and various torts by a contractor who had worked on the project.

[3] Allegation of Service of Claim

In the First Cause of Action, Paragraph 14 alleges that plaintiff has served a claim on the public entity for the contract damages claimed. Paragraph 15 alleges that the public entity has rejected the claim in its entirety. A state agency of local entity may include in any written agreement to which it is a party provisions governing the presentation of claims arising out of the agreement [*Gov. Code §§ 930, 930.2*]. The claims procedure may include a requirement that a claim be presented and acted on before any suit on the claim may be filed [*Gov. Code § 930.6*; *see Gov. Code §§ 945.6, 946* (time for filing suit after filing of claim)].

When a municipality has breached a building contract, a claim for damages must be presented to the city's board of supervisors within one year after the accrual of the cause of action for breach [*Gov. Code § 911.2(a)*; *see § 104.212*].

[4] Damages for Fraud

Plaintiff's losses flowing from the public entity's breach of the contract and from plaintiff's extra attempts, necessitated by defendant's fraud, to perform the contract (Paragraphs 35, 36), are recoverable in the fraud action, because one who wilfully deceives another with intent to induce the other to alter his or her position to his or her injury or risk is liable for any damages the deceived party suffers as a result [*Civ. Code § 1709*]. Exemplary or punitive damages are also available in the fraud action based on any fraudulent or malicious conduct of defendants (Paragraph 37) [*see Civ. Code § 3294(a)*].

[5] Verification of Complaint Seeking Temporary or Preliminary Injunction

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc.§ 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

If preliminary injunctive relief is not sought, verification of this complaint is not required, but verification of the complaint requires the defendant to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446(a)*] and is precluded from making a general denial in a superior court action and in some limited civil cases [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[6] Certification re Notice

When a temporary restraining order is sought without formal notice to the opposing party, the applicant or the applicant's attorney is required to certify to the court under oath that he or she (1) informed the opposing party or the opposing party's attorney of the time and place where the application would be made, within a reasonable period of time prior to the application; (2) attempted in good faith to inform the opposing party or the opposing party's attorney but was unable to do so, specifying the efforts made to contract them; or (3) should not be required, for reasons specified, to inform the opposing party or the opposing party's attorney [*Code Civ. Proc. § 527(a)*].

[7] Jurisdiction

An action seeking a permanent injunction is in the jurisdiction of the superior court and is not a limited civil case [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*].

[8] Cross References

For further discussion, procedural guide, and forms relating to obtaining injunctive relief, see Ch. 303, *Injunctions*

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Chapter 104 BUILDING CONTRACTS
PART IV. FORMS
B. Other Liabilities of Contractors, Owners, and Third Parties Arising From Construction Projects

10-104 California Forms of Pleading and Practice--Annotated § 104.253

§ 104.253 Complaint for Damages for Breach of Implied Warranty--By Purchaser Against Contractor

[1] FORM Complaint for Damages for Breach of Implied Warranty--By Purchaser Against Contractor
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR
vs.	)	DAMAGES
_____ [*name(s)*], [and DOES I	)	(Breach of Implied
through _____,]	)	Warranty)
Defendant(s)	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. [*Capacity and residence of defendant contractor. See § 104.210, Paragraph 2.*]

[2. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

3. Defendant _____ [*contractor*] ("contractor") constructed a house located at _____ [*street address*], _____ [*city*], California.

4. On or about _____ [*date*], defendant contractor sold the house to plaintiff for use as a residence.

5. Defendant contractor implicitly warranted that the house was designed and constructed in a skillful manner, so as to be reasonably fit for its intended purpose as a home.

6. Plaintiff relied on the warranty and believed in good faith that the house was of merchantable quality.

7. Defendant contractor breached the warranty in that _____ [*specify defects, e.g.,* the roof of the house was constructed with an inadequate slope to allow drainage and no other drainage system was installed].

8. As a proximate result of defendant contractor's breach of warranty, plaintiff suffered damages in the sum of $_____ in that _____ [*specify damages resulting from defect, e.g.,* water leaked in and through the roof, causing warping and permanent water staining of the hardwood floors, warping of window sills, and waterlogging, staining, and sagging of interior plasterboard surfaces].

9. Plaintiff gave written notice to defendant contractor of the breach of warranty on or about _____ [*date*], which was within a reasonable time after plaintiff discovered the breach and before the filing of this complaint.

10. Defendant contractor has declined to acknowledge responsibility for the breach of warranty and plaintiff's damages resulting from the breach or to make any repairs or to make payment to plaintiff for plaintiff's damages.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For damages in the sum of $_____;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 104.210.*]

[2] Use of Form

This form of complaint is for use by the purchaser of a house against the contractor for damages flowing from a breach of the implied warranty that the house was designed and constructed in a reasonably skillful or workmanlike manner, so as to be reasonably fit for its intended use.

For a form of specific denial for use in defendant's answer when the plans for the project are furnished by the owner, and the contractor faithfully performs the work as specified by those plans, see *§ 104.254*.

[3] Allegations

The complaint alleges defendant's construction of the house (Paragraph 3), the sale of the house to plaintiff (Paragraph 4), the implied warranty (Paragraph 5), plaintiff's reliance on the warranty (Paragraph 6), defendant's breach of the

warranty (Paragraph 7), plaintiff's damages (Paragraph 8), and plaintiff's notice to defendant within a reasonable time after plaintiff discovered the breach (Paragraph 9) [*see Com. Code § 2607(3)(A)*; *Pollard v. Saxe & Yolles Dev. Co. (1974) 12 Cal. 3d 374, 377-380, 115 Cal. Rptr. 648, 525 P.2d 88]* .

For further discussion of the implied warranty of fitness that attaches to a contract to construct a building, see *§ 104.42[1]*.

[4] Cross References

For a related form, see *§ 104.210*.

For forms of complaint for breach of warranty in actions involving the sale of goods, see Ch. 502, *Sales: Warranties* .

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10-104 California Forms of Pleading and Practice--Annotated § 104.254

§ 104.254 Specific Denial by Contractor--No Implied Warranty--Work Performed in Accordance With Purchaser's Plans

[1] FORM Specific Denial by Contractor--No Implied Warranty--Work Performed in Accordance With Purchaser's Plans

Further answering Paragraph _____ of plaintiff's complaint, defendant specifically denies that he/she/it implicitly warranted the house was designed in a skillful and workmanlike manner so as to be fit for its intended use. No such warranty existed, by virtue of the fact that defendant complied with the plans and specifications furnished by plaintiff in constructing the house.

[2] Use of Form

This form of specific denial is for use by a contractor in an answer to a complaint by a purchaser alleging that the contractor breached an implied warranty that the house was designed in a reasonably workmanlike manner [*see § 104.253*]. It should be used when the contractor followed plans and specifications furnished by the plaintiff in constructing the house. For a skeletal form of answer, see Ch. 26, *Answers* .

[3] No Implied Warranty When Purchaser Furnishes Plans

When the plans for the project are furnished by the owner, and the contractor faithfully performs the work as specified by those plans, there is no implied warranty that the contractor will supplement the inadequacy of the plans [*Sunbeam Constr. Co. v. Fisci (1969) 2 Cal. App. 3d 181, 184-185, 82 Cal. Rptr. 446]* . For further discussion, see *§ 104.42[3]*.

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10-104 California Forms of Pleading and Practice--Annotated § 104.255

§ 104.255 Complaint for Damages [Civ. Code § 3333] Based on Strict Liability--By Purchaser Against Developer

[1] FORM Complaint for Damages [Civ. Code § 3333] Based on Strict Liability--By Purchaser Against Developer
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*], [and DOES I	)	(Strict Liability)
through _____,]	)	[Amount demanded _____
Defendant(s)	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. [*Capacity and residence of defendant developer. See § 104.210, Paragraph 2.*]

[2. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

3. Defendant _____ [*developer*] ("developer") is, and at all times herein mentioned was, engaged in the mass production of houses for sale to and use by members of the general public, and [plaintiff is informed and believes and alleges that] as a part of its business defendant developer constructed _____ [*describe house with which action is concerned, e.g.,* a four-bedroom, two-story frame house] located at _____ [*street address*], _____ [*city*], _____ County, California.

4. [Plaintiff is informed and believes and alleges that] [D]efendant developer intended that the houses constructed by him/her/it were to be used for the purpose of residences.

5. Defendant developer, at all times herein mentioned, knew that the houses would be purchased and used without inspection for defects by the purchasers.

6. On or about _____ [*date*], defendant developer sold the house referred to in Paragraph 3 to _____ [*name of original purchaser*].

7. At the time of the purchase, the house was defective in that _____ [*specify defect, e.g.,* the radiant heating system of the house was improperly installed].

8. On or about _____ [*date*], plaintiff purchased the house from _____ [*name of original purchaser*].

9. Plaintiff relied on the skill of defendant developer in producing a house with a _____ [*describe defective part, e.g.,* heating system] that was reasonably fit for its intended purpose.

10. On or about _____ [*date*], as a proximate result of the defect described in Paragraph 7, _____ [*describe occurrence caused by defect, e.g.,* the radiant heating system in plaintiff's home failed], rendering the home unfit for its intended purpose.

11. As a proximate result of the failure of the _____ [*describe defective part, e.g.,* heating system], plaintiff incurred expenses in the sum of $_____ for repairs, in the sum of $_____ for the removal and storage of furniture necessitated by the repairs, and in the sum of $_____ for the temporary acquisition of other shelter, all to his/her damage in the total sum of $_____.

[*Prayer. See § 104.253.*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 104.210.*]

[2] Use of Form

This form of complaint for damages based on strict liability in tort is for use by the purchaser of a mass-produced home against the developer who built the home. This complaint may also be modified to allege a strict liability cause of action against a tract developer who, for example, improperly filled and graded the property so that it became unstable [*see Avner v. Longridge Estates (1969) 272 Cal. App. 2d 607, 615, 77 Cal. Rptr. 633]* , even if that developer later sold the property to another developer who built the homes [*see GEM Developers v. Hallcraft Homes of San Diego, Inc. (1989) 213 Cal. App. 3d 419, 431-433, 261 Cal. Rptr. 626]* .

This form of complaint may be used in connection with (1) a defect located on and unique to plaintiff's property, such as a defective heating system; (2) a defect located on common areas of the development, such as an erosion problem [*see*

Del Mar Beach Club Owners Assn. v. Imperial Contracting Co. (1981) 123 Cal. App. 3d 898, 909-914, 176 Cal. Rptr. 886] ; or (3) even in connection with defects located on another person's property that affect the plaintiff's use of his or her home [*see also Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 811, 110 Cal. Rptr. 543* ; *see § 104.44*].

[3] Allegations Establishing Strict Liability of Developer

A developer will be strictly liable in tort for damages caused by defects in a construction project only if [*see Kriegler v. Eichler Homes, Inc. (1969) 269 Cal. App. 2d 224, 228-229, 74 Cal. Rptr. 749]* :

- The defect occurs in or affects a home (Paragraphs 3, 7);
- The developer is a mass producer of homes (Paragraph 3); and
- The defect makes the home not reasonably fit for its intended use (Paragraphs 4, 9, 10).

The burden is on the plaintiff to establish the defective condition of the product and to prove that the defect proximately caused the plaintiff's injury [*Miller v. Los Angeles County Flood Control Dist. (1973) 8 Cal. 3d 689, 704, 106 Cal. Rptr. 1, 505 P.2d 193]* .

For further discussion, see *§ 104.44[3]*.

[4] Measure of Purchaser's Damages

The proper measure of damages in an action against a mass developer of homes based on strict liability in tort is the cost of remedying the defects, together with the value of any loss of use of the home during the period of injury (Paragraph 11) [*Raven's Cove Townhomes, Inc. v. Knuppe Development Co., Inc. (1981) 114 Cal. App. 3d 783, 801-802, 171 Cal. Rptr. 334]* .

[5] Cross References

For a related form, see *§ 104.210*.

For further discussion and forms of complaint for damages based on strict liability, see Ch. 460, *Products Liability* .

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10-104 California Forms of Pleading and Practice--Annotated § 104.256

§ 104.256 Complaint for Damages [Civ. Code § 3333] for Negligent Interference With Prospective Economic Advantage [Civ. Code § 1714(a)]--By Tenant Against Contractor--Delay in Constructing Improvements

[1] FORM Complaint for Damages [Civ. Code § 3333] for Negligent Interference With Prospective Economic Advantage [Civ. Code § 1714(a)]--By Tenant Against Contractor--Delay in Constructing Improvements

[*Caption. See § 104.250.*]

Plaintiff alleges:

1. [*Capacity and residence of defendant contractor. See § 104.210, Paragraph 2.*]

[2. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

3. On or about _____ [*date*], plaintiff and [*name of landlord*] entered into a lease of certain premises described as follows: _____ [*set forth street address and legal description*]. In the lease, _____ [*name of landlord*] agreed to construct certain improvements _____ [*specify purpose of improvements, e.g.,* to enable plaintiff to conduct a restaurant business on the premises]. The contract provided that the improvements were to be completed by _____ [*date*]. A copy of the contract is attached to and incorporated into this complaint as Exhibit A.

4. On or about _____ [*date*], _____ [*name of landlord*] and defendant entered into a contract in which defendant agreed to construct the improvements on the premises described above, and to complete the improvements on or before _____ [*date*]. A copy of this contract is attached to and incorporated into this complaint as Exhibit B.

5. On or about _____ [*date*], plaintiff informed defendant [in writing] that he/she/it was the tenant for whom the improvements were being constructed, and that any significant delay in completing the improvements would

adversely affect plaintiff's business beyond the normal disruption associated with construction.

6. Defendant negligently and carelessly failed to commence construction of the improvements, dilatorily proceeded with construction of the improvements, and failed to complete the improvements by the date specified in the contract entered into between defendant and _____ [*name of landlord*]. As a result, the construction of the improvements was not completed until _____ [*date*].

7. Plaintiff was unable to operate its business for _____ [*specify period, e.g.,* six months] due to defendant's negligent failure to complete the construction within the time provided in defendant's contract. [Plaintiff suffered additional loss after the business opened because the building was without _____ (*specify improvements not completed when plaintiff took possession of premises, e.g.,* air conditioning and heat for two additional weeks)].

8. As a proximate result of defendant's failure to complete construction by _____ [*date*], plaintiff was damaged in the amount of $_____ from loss of business and resulting loss of profits.

[*Prayer. See § 104.253.*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 104.210.*]

[2] Use of Form

This form of complaint alleging negligent interference with prospective economic advantage is for use by a tenant when a contractor fails to timely complete construction on premises rented and used by the tenant to conduct a business.

[3] Allegations

The complaint alleges the following [*see J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 803-808, 157 Cal. Rptr. 407, 598 P.2d 60]* :

- The plaintiff's claim to the premises (Paragraph 3);
- The defendant's contract to complete the improvements within a specified time (Paragraph 4);
- The defendant's knowledge that a delay would harm the plaintiff (Paragraph 5);
- The defendant's negligence in failing to timely complete the improvements (Paragraph 6); and
- The plaintiff's resulting damages (Paragraphs 7, 8).

[4] Privity Not Required

The tenant of a person who contracts for improvements to the premises occupied by the tenant may sue the contractor

for damages to the tenant caused by the contractor's failure to complete the project on time. No privity of contract between the tenant and the contractor is required; the special relationship created by the contractor's working on premises he or she knows to be occupied by the tenant is sufficient to create a duty to the tenant [*J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 803-808, 157 Cal. Rptr. 407, 598 P.2d 60]* .

[5] Cross References

For related forms, see *§§ 104.210* and *104.250*.

For a form of complaint for damages for wrongful interference with prospective economic relationship, see Ch. 565, *Unfair Competition* .

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10-104 California Forms of Pleading and Practice--Annotated § 104.257

§ 104.257 Complaint for Compensatory [Civ. Code §§ 1709, 3333] and Exemplary and Punitive [Civ. Code § 3294] Damages for Fraud [Civ. Code § 1710(3)]--By Contractor Against Owner--Nondisclosure of Soil Condition

[1] FORM Complaint for Compensatory [Civ. Code §§ 1709, 3333] and Exemplary and Punitive [Civ. Code § 3294] Damages for Fraud [Civ. Code § 1710(3)]--By Contractor Against Owner--Nondisclosure of Soil Condition
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*], [and DOES I	)	(Fraud)
through _____,]	)	[Amount demanded _____
Defendant(s)	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. [*Capacity and residence of defendant owner. See § 104.210, Paragraph 2.*]

2. [*Plaintiff's capacity as contractor and principal place of business. See § 104.252, Paragraph 7.*]

[3. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

4. On or about _____ [*date*], in _____ [*city*], _____ County,

California, defendant gave plaintiff a soil report on the composition of the soil at a certain construction site located at _____ [*street address*], _____ [*city*], California. The report erroneously reported the soil to be _____ [*specify the soil composition as given in the report, e.g.,* coarse sand with clay binder]. A copy of the report is attached to and incorporated into this complaint as Exhibit A.

5. Defendant knew that the report was mistaken, in that _____ [*specify true soil condition, e.g.,* the soil was coarse sand with minute binder]; and knew that the condition of the soil would largely determine the difficulty and expense of constructing _____ [*specify structure plaintiff contracted to construct, e.g.,* a 300-foot retaining wall] on the soil test site; but defendant failed to disclose to plaintiff the true nature of the soil.

6. Defendant further failed to disclose that _____ [*specify other facts concealed, e.g.,* cave-ins occurred in the test holes drilled to test the composition of the soil and that two landslides had occurred at the construction site during the year previous to the testing].

7. Defendant withheld the information described in Paragraphs 5 and 6 with the intent to defraud and deceive plaintiff and to induce plaintiff to enter into a contract for the construction of the _____ [*specify structure, e.g.,* retaining wall] at the site of the soil tests.

8. Plaintiff, at the time defendant gave him/her/it the soil report, was ignorant of the mistakes in the report and reasonably believed the report to be true. In reliance on the report, and without knowledge of the other facts concealed by defendant, plaintiff was induced to and did enter into a contract for the construction of the _____ [*specify structure, e.g.,* retaining wall] at the site of the soil tests. Had plaintiff known the true facts he/she/it would not have entered into the contract.

9. By reason of defendant's fraud, plaintiff was damaged in the sum of $_____ in that the actual soil conditions at the site necessitated the use of a different method of drilling that exceeded the cost of drilling as planned by plaintiff, based on the soil report, by $_____, including a reasonable profit of $_____, and required the employment of additional workers at the actual and reasonable cost to plaintiff of $_____.

10. Defendant's failure to disclose as alleged in this complaint was done maliciously and oppressively and with intent to defraud plaintiff. Plaintiff therefore is entitled to exemplary and punitive damages.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For compensatory damages in the sum of $_____;

2. For exemplary and punitive damages;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 104.210.*]

[2] Use of Form

This form of complaint is for use by a contractor in an action for damages caused by an owner's fraud in concealing from the contractor the true condition of the soil at the construction site.

[3] Allegations

The complaint states an action for fraud in that it alleges defendant's suppression of a material fact under circumstances in which he or she was bound to disclose it (Paragraphs 5, 6) [*Civ. Code § 1710(3)*], defendant's intent to induce reliance (Paragraph 7) and to defraud plaintiff (Paragraph 10), plaintiff's reasonable reliance on defendant's representations (Paragraph 8) [*see Van Meter v. Bent Constr. Co. (1956) 46 Cal. 2d 588, 593-596, 297 P.2d 644]* , and plaintiff's resulting damages (Paragraph 9) [*see Tonkin Constr. Co. v. County of Humboldt (1987) 188 Cal. App. 3d 828, 832-833, 233 Cal. Rptr. 587* ; *Welch v. State (1983) 139 Cal. App. 3d 546, 555-556, 188 Cal. Rptr. 726]* .

[4] Actual and Punitive Damages

Plaintiff's increased construction costs (Paragraph 9) are a recoverable element of damages, since one who wilfully deceives another with intent to induce the other to alter his or her position to his or her injury or risk is liable for any damages the deceived party suffers as a result [*Civ. Code § 1709*].

The claim for exemplary or punitive damages (Paragraph 10) is also proper. In an action for the breach of an obligation not arising from contract, when it is proven by clear and convincing evidence that the defendant has been guilty of fraud or malice, the plaintiff may recover, in addition to his or her actual damages, damages for the sake of example and by way of punishing the defendant [*Civ. Code § 3294(a)*; *see Civ. Code § 3294(c)(1), (3)* ("malice" and "fraud" defined, respectively)].

[5] Cross References

For related forms, see *§§ 104.210* and *104.252*.

For forms for use in an action based on fraud, see Ch. 269, *Fraud and Deceit* .

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10-104 California Forms of Pleading and Practice--Annotated § 104.258

§ 104.258 Complaint for Damages [Civ. Code § 3333] for Conspiracy to Defraud Plaintiff--By Owner Against Contractor and Subcontractors--Performing Work Contrary to Plans and Specifications

[1] FORM Complaint for Damages [Civ. Code § 3333] for Conspiracy to Defraud Plaintiff--By Owner Against Contractor and Subcontractors--Performing Work Contrary to Plans and Specifications
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*], [and DOES I	)	(Conspiracy)
through _____,]	)	[Amount demanded _____
Defendant(s)	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. [*Capacity and residence of defendant contractor. See § 104.210, Paragraph 2.*]

2. [*Capacity and residence of defendant subcontractor. See § 104.210, Paragraph 2.*]

3. [*Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

4. On or about _____ [*date*], plaintiff entered into a written contract with defendant

_____ [*name of prime contractor*] ("prime contractor"), in which defendant prime contractor agreed to build a _____ [*specify structure to be constructed, e.g.,* residence] for plaintiff on land owned by plaintiff and situated at _____ [*street address*], _____ [*city*], _____ County, California. As part of the contract, defendant prime contractor agreed to build the _____ [*specify structure, e.g.,* residence] according to certain plans and specifications, copies of which were signed by the parties and by reference made a part of the contract. A true and correct copy of the contract, together with the plans and specifications, is attached to and incorporated into this complaint as Exhibit A.

5. Defendant _____ [*name of subcontractor*] ("subcontractor") was supplied by defendant prime contractor with copies of the plans and specifications for the purpose of making a bid to _____ [*specify work bid on, e.g.,* perform electrical work under the contract].

6. Defendant subcontractor submitted a bid to defendant prime contractor contrary to the requirements of the plans and specifications. This bid was accepted by defendant prime contractor without plaintiff's knowledge that the bid was contrary to the requirements of the plans and specifications.

7. Thereafter defendant subcontractor and defendant prime contractor entered into subcontracts both written and oral with each other to perform the work under the contract contrary to the plans and specifications, each well knowing that this was without the consent or knowledge of plaintiff.

8. Pursuant to these agreements defendant subcontractor did proceed to perform the subcontract labor contrary to the requirements of the plans and specifications in that _____ [*specify departures from plans and specifications*].

9. Defendants prime contractor and subcontractor did the acts and things alleged above pursuant to and in furtherance of the conspiracy and agreement alleged above.

10. By reason of the conspiracy among the defendants to perform the subcontract contrary to the plans and specifications and by reason of the installation in accordance with the conspiracy, plaintiff has been damaged in the sum of $_____, which is the _____ [difference between the value of the structure as constructed and as specified in the contract *or* reasonable cost to plaintiff to make the structure conform to the plans and specifications (plus the actual and reasonable cost to plaintiff to secure other lodgings during the repair period)].

WHEREFORE, plaintiff prays for judgment against defendants, and each of them, as follows:

1. For damages in the sum of $_____;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 104.210.*]

[2] Use of Form

This form of complaint for damages for conspiracy to defraud the owner is for use by an owner when the prime contractor and the subcontractor or subcontractors have knowingly performed work under the contract contrary to the requirements of the plans and specifications.

[3] Allegations

The complaint alleges that both the contractor and the subcontractor were aware of the requirements of the plans and specifications, and of their failure to conform to them (Paragraphs 5-7, 9). The owner's remedies are simplified in an action such as this one, since the owner is only required to allege and prove one theory of recovery based on one set of activities.

As an alternative to this action, the owner may sue the contractor for breach or negligent performance of the contract [*see § 104.228*]. An action naming both contractor and subcontractor as defendants may, however, be useful in a case in which the contractor is insolvent or otherwise judgment-proof.

[4] Measure of Damages

Paragraph 10 sets forth alternative measures of the plaintiff's damages. In an action for fraud, the plaintiff is entitled to recover damages in the amount that will compensate him or her for all the detriment caused by the wrongful conduct of the defendant or defendants, whether it could have been anticipated or not [*Civ. Code § 3333*].

[5] State Statutes

Admissibility of acts and declarations of conspirator against coconspirators. *Evid. Code § 1223*

[6] Cross References

For forms of complaint in an action for damages based on conspiracy, see Ch. 126, *Conspiracy* .

For a related form, see *§ 104.210*.

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10-104 California Forms of Pleading and Practice--Annotated § 104.259

§ 104.259 Complaint for Temporary Restraining Order and Preliminary and Permanent Injunction [Bus. & Prof. Code § 7028.4]--To Restrain Unlicensed Person From Acting in Capacity of Contractor

[1] FORM Complaint for Temporary Restraining Order and Preliminary and Permanent Injunction [Bus. & Prof. Code § 7028.4]--To Restrain Unlicensed Person From Acting in Capacity of Contractor
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR TEMPORARY RESTRAINING
_____ [*name(s)*], [and DOES I	)	ORDER AND PRELIMINARY AND PERMANENT
through _____,]	)	INJUNCTION
Defendant(s)	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of defendant(s). See § 104.210, Paragraph 2.*]

[2. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

[3. At all times herein mentioned, defendant _____ (*name of individual defendant*) was the agent and employee of defendant _____ (*corporate defendant*) and, in doing the things herein mentioned, was acting in the scope of this authority and employment.]

4. Commencing on or about _____ [*date*], and continuing to the present time, defendant(s) wrongfully and unlawfully _____ [*set forth activities that constitute a continuing violation of the license law, e.g.,* has/have engaged, and continue(s) to engage, in the construction of houses to be sold to the general public without being duly licensed under the Contractors' State License Law of the State of California].

5. Plaintiff is _____ [a licensed contractor *or* an association of contractors *or* a consumer affected by the above violation] and seeks relief as authorized by *Business and Professions Code Section 7028.4*.

WHEREFORE, plaintiff prays for judgment against defendants, and each of them, as follows:

1. For an order requiring defendant(s) to show cause, if any, why he/she/it/they should not be enjoined as set forth below during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant(s), and all agents, servants, and employees of defendant(s), and all persons acting under, in concert with, or for defendant(s), from _____ [*specify activities to be enjoined, e.g.,* constructing houses to be sold to the general public], and otherwise acting in the capacity of a contractor, without a license in violation of the Contractors' State License Law;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification. See § 104.210.*]

[*Declaration re Notice. See § 104.252.*]

[2] Use of Form

This form of complaint is for use by a licensed contractor, an association of contractors, or a consumer affected by the unlicensed person's activities to enjoin an unlicensed person from acting in the capacity of a contractor. The license law (*Bus. & Prof. Code § 7000 et seq.*) authorizes injunctive relief at the request of a licensed contractor, an association of contractors, an affected consumer, a district attorney, or the Attorney General to enjoin an unlicensed person from engaging in any act, practice, or transaction that constitutes a continuing violation of the license law [*Bus. & Prof. Code § 7028.4*].

[3] Allegations

This complaint alleges (1) the acts of the unlicensed person constituting a continuing violation of the license law (Paragraph 4), and (2) the basis for relief (Paragraph 5). It is not necessary to allege substantial injury [*Bus. & Prof. Code § 7028.3*] or irreparable injury [*Bus. & Prof. Code § 7028.4*].

[4] Verification and Certification Requirements

Certain verification and pleading requirements apply to complaints seeking a preliminary injunctions or temporary restraining orders. In addition, a certificate concerning efforts to notify the opposing party of the time and place of an application for a temporary restraining order must be executed by the party seeking the order, or by his or her attorney, when the order is sought without formal notice to the opposing party [*Code Civ. Proc. § 527(a)-(f)*]. For further discussion, see *§ 104.252*.

[5] Jurisdiction

Application for a permanent injunction against an unlicensed contractor is made to the superior court of the county in which the act, practice, or transaction is alleged to have been committed, or in any other county in which the person maintains a place of business or resides [*Bus. & Prof. Code §§ 7028.3, 7028.4*]. The action is not a limited civil case [*see Code Civ. Proc. § 580(b)(2)*].

[6] Cross References

For a related form, see *§ 104.252*.

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10-104 California Forms of Pleading and Practice--Annotated § 104.260

§ 104.260 Allegation to Complaint Against Unlicensed Contractor--Treble Damages and Attorney's Fees and Costs [Code Civ. Proc. § 1029.8]

[1] FORM Allegation to Complaint Against Unlicensed Contractor--Treble Damages and Attorney's Fees and Costs [Code Civ. Proc. § 1029.8]

Because defendant _____ [*name of contractor*] acted as a contractor within the meaning of *Business and Professions Code Section 7026* at all times relevant to this action, but without holding a valid contractor's license as required by *Business and Professions Code Section 7028*, plaintiff is entitled to treble damages and, if the court in its discretion so determines, attorney's fees and costs incurred in connection with this action, as provided by *Code of Civil Procedure Section 1029.8*.

[2] Use of Form

This form is for use in a complaint against an unlicensed contractor when the plaintiff's injuries or damages occurred as a result of the provision of services by the contractor for which a contractor's license is required. It may be used by any person suing an unlicensed contractor in such a situation, except a person who holds a contractor's license or a closely related license and is suing for unfair trade practices [*Code Civ. Proc. § 1029.8(e)*].

When this allegation is used, the prayer should include a request for attorney's fees and costs.

[3] Entitlement to Treble Damages, Attorney's Fees, and Costs

Any unlicensed person who causes injury or damage to another person as a result of providing goods or performing services for which a contractor's license is required will be liable to the injured person for treble the amount of damages assessed, up to $10,000, in a civil action in any court having proper jurisdiction. The court may, in its discretion, award all costs and attorney's fees to the injured person if that person prevails in the action [*Code Civ. Proc. § 1029.8(a), (c)*].

For further discussion, see *§ 104.50*.

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10-104 California Forms of Pleading and Practice--Annotated § 104.261

§ 104.261 Notice of Claim for Violation of Statutory Construction Standards--By Owner to Builder [Civ. Code § 910(a)]

[1] FORM Notice of Claim for Violation of Statutory Construction Standards--By Owner to Builder [Civ. Code § 910(a)]

NOTICE OF CLAIM

To: _____ [*builder's name*], Builder
_____ [*address*]

From: _____ [*claimant's name*], Claimant
_____ [*address*]
_____ [*phone or fax number, e-mail address, or other preferred method of contact*]

Claimant is the owner of residential property located at _____ [*address*], which was originally purchased by _____ [claimant *or* _____ (*name of original purchaser*)] from builder as a new residence. The purchase agreement was with _____ [claimant *or* _____ (*name of original purchaser*)] and was signed by builder on _____ [*date on or after January 1, 2003*].

Claimant hereby alleges against builder the following violation(s) of the construction standard(s) set forth in *Civil Code Section 896*. The violation(s) relate(s) to _____ [*describe claim in reasonable detail sufficient to determine the nature and location, to the extent known, of the claimed violation(s), e.g.,* water leaking from outside the windows and patio doors on the rear (north side) of the unit causing extensive damage to interior walls and floors. This

constitutes a violation of *Civil Code Section 896(a)(2)*, which requires that windows, patio doors, deck doors, and their systems must not allow water to pass beyond, around, or through the window, patio door, or deck door or its designed or actual moisture barriers].
Dated: _____

_____ [*signature*]
Claimant

[2] Use of Form

This form is a notice of claim for use by a purchaser of a new residential unit (excluding a condominium conversion) when the purchase agreement with the buyer was signed by the builder on or after January 1, 2003, and the buyer is seeking to hold the builder responsible for any violation of the statutory construction standards specified in *Civ. Code § 896*. Those standards generally concern the construction, design, specifications, surveying, planning, supervision, testing, and observation of construction of new residential units when the purchaser agreement with the buyer was signed by the builder on or after January 1, 2003 [*see Civ. Code § 896*]. For discussion of the process for resolving claims based on defective construction, see *§ 104.43*.

[3] Notice of Claim Is Mandatory

Before the claimant is entitled to file an action alleging violation of the construction standards, he or she must provide the builder with written notice of the claimant's claim that the construction of his or her residence violates any of the statutory construction standards. The notice has the same force and effect as a notice of commencement of a legal proceeding [*Civ. Code § 910(a)*].

[4] Contents of Notice

The notice of claim must include all of the following [*Civ. Code § 910(a)*]:

- The claimant's name, address, and preferred method of contact;
- A statement that the claimant alleges a violation pursuant to *Civ. Code § 895 et seq.* against the builder; and
- A description of the claim in reasonable detail sufficient to determine the nature and location, to the extent known, of the claimed violation.

If the claimant is a group of homeowners or an association, the notice must identify the claimants solely by address or other description sufficient to apprise the builder of the locations of the subject residences [*Civ. Code § 910(a); see Civ. Code § 895(f)*].

[5] Delivery of Notice

The notice must be delivered via certified mail, overnight mail, or personal delivery [*Civ. Code § 910(a)*].

[6] Effect of Notice on Claimant's Right to Seek Other Redress

The notice requirement does not preclude a homeowner from seeking redress through any applicable normal customer service procedure set forth in any contract, warranty, or other builder-generated document. However, if the homeowner requests this form of recourse through such a procedure, the request does not satisfy the statutory notice requirement [*Civ. Code § 910(b)*].

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10-104 California Forms of Pleading and Practice--Annotated § 104.262

§ 104.262 Complaint for Damages [Civ. Code § 944] for Violation of Statutory Construction Standards--By Owner Against Builder--Reasonable Repair Costs and Related Expenses [Civ. Code §§ 895-945.5]

[1] FORM Complaint for Damages [Civ. Code § 944] for Violation of Statutory Construction Standards--By Owner Against Builder--Reasonable Repair Costs and Related Expenses [Civ. Code §§ 895-945.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Violation of *Civil Code §§ 896, 897*)
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]

Plaintiff alleges:

1. [*Capacity and residence of defendant(s). See § 104.210, Paragraph 2.*]

2. [*Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

3. Defendant _____ [*name of builder*] ("builder") is the _____ [builder *or* developer *or* original seller] of an individual dwelling unit consisting of _____ [*specify residential property, e.g.,* a single family residence situated at _____ (*address*), _____ County, California], the purchase agreement with the plaintiff for which was signed by the builder on _____ [*date on or after January 1, 2003*].

4. The unit purchased by plaintiff is in violation of the construction standards set forth in *Civil Code Section 896*, specifically _____ [*specify in detail standard(s) violated, e.g., Civil Code Section 896(a)(2)*, which requires that windows, patio doors, deck doors, and their systems must not allow water to pass beyond, around, or through the window, patio door, or deck door or its designed or actual moisture barriers].

5. In accordance with the pre-litigation procedure specified in *Civil Code Sections 910 through 938*, on _____ [*date*], plaintiff provided written notice by _____ [certified mail *or* overnight mail *or* personal delivery] to defendant of its claim that the construction of plaintiff's unit was in violation of the standard(s) specified in Paragraph 4.

6. Defendant failed to comply with the requirements of the pre-litigation procedure specified in *Civil Code Sections 910 through 938* by _____ [*specify facts constituting defendant's noncompliance, e.g.,* failing to acknowledge receipt of plaintiff's notice of claim in writing within 14 days after receipt].

WHEREFORE, plaintiff prays for judgment against defendant[s, and each of them,] as follows:

1. For reasonable repair costs and related expenses in the sum of $_____;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 104.210.*]

[2] Use of Form

This form of complaint is for use by a purchaser of a new residential unit (excluding a condominium conversion) when the purchase agreement with the buyer was signed by the builder on or after January 1, 2003, and the buyer is seeking to recover damages arising out of, or related to, violation of the statutory construction standards specified in *Civ. Code § 896*. Those standards generally concern the construction, design, specifications, surveying, planning, supervision, testing, and observation of construction of new residential units when the purchase agreement was signed by the builder on or after January 1, 2003. For discussion of the statutory construction standards, see *§ 104.43*.

[3] Allegations

To make a claim for violation of the statutory construction standards used to determine the existence of actionable construction defects [*see Civ. Code § 896*], a plaintiff "... need only demonstrate, in accordance with the applicable evidentiary standard, that the home does not meet the applicable standard. ... No further showing of causation or damages is required to meet the burden of proof regarding a violation of a standard ... provided that the violation arises out of, pertains to, or is related to, the original construction" [*Civ. Code § 942*].

Because the statutory scheme that governs construction defect litigation requires the homeowner to initiate a statutory pre-litigation procedure, the goal of which is to permit the defendant the opportunity to repair the defect [*see Civ. Code §§ 910-938*], Paragraphs 5 and 6 of this form include allegations related to that issue.

[4] Damages

The plaintiff is entitled to recover all of the following as damages in an action on a claim based on violation of the statutory construction standards [*Civ. Code § 944*]:

- The reasonable cost of repairing any violation of the statutory construction standards;
- The reasonable cost of repairing any damages caused by the repair efforts;
- The reasonable cost of repairing and rectifying any damages resulting from the home's failure to meet the standards;
- The reasonable cost of removing and replacing any improper repair by the builder;
- Reasonable relocation and storage expenses;
- Lost business income if the home was used as a principal place of business licensed to be operated from the home;
- Reasonable investigative costs for each established violation; and
- All other costs or fees recoverable by contract or statute.

As to any claims involving a detached single-family home, the homeowner's right to the reasonable value of repairing any nonconformity is limited to the repair costs, or the diminution in the home's current value caused by the nonconformity, whichever is less, subject to the common law personal use exception [*Civ. Code § 943(b)*].

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10-104 California Forms of Pleading and Practice--Annotated § 104.263

§ 104.263 Affirmative Defense [Civ. Code § 945.5(a)]--By Builder to Action by Owner for Violation of Statutory Construction Standards--Violation Caused by Unforeseen Act of Nature

[1] FORM Affirmative Defense [Civ. Code § 945.5(a)]--By Builder to Action by Owner for Violation of Statutory Construction Standards--Violation Caused by Unforeseen Act of Nature

AS A [_____ (*if more than one, specify number, e.g.,* FIRST) SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* FIRST) CAUSE OF ACTION] defendant alleges that:

The violation(s) of the statutory construction standard(s) alleged by plaintiff were caused by _____ [*specify unforeseen act of nature, e.g.,* a storm with winds in excess of 90 miles per hour], which is in excess of the applicable building codes, regulations, and ordinances at the time of original construction.

[2] Use of Form

This form of affirmative defense is for use in an answer to a complaint by a purchaser of a new residential unit (excluding a condominium conversion) when the purchase agreement with the buyer was signed by the builder on or after January 1, 2003, and the buyer is seeking to recover damages arising out of, or related to, violation of the statutory construction standards specified in *Civ. Code § 896*. The defense is based on the allegation that the cause of any alleged violation of the statutory construction standards is an unforeseen act of nature, rather than any defective construction on the defendant's part.

[3] Unforeseen Act of Nature

Under the principles of comparative fault pertaining to affirmative defenses, a builder may be excused, in whole or in part, from any obligation, damage, loss, or liability if the builder, general contractor, subcontractor, material supplier, individual product manufacturer, or design professional can demonstrate, in response to a claimed violation, that the violation was caused by an unforeseen act of nature which caused the structure not to meet the standard. "Unforeseen

act of nature" means weather condition, earthquake, or manmade event such as war, terrorism, or vandalism, in excess of the design criteria expressed by the applicable building codes, regulations, and ordinances in effect at the time of original construction [*Civ. Code § 945.5(a)*].

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10-104 California Forms of Pleading and Practice--Annotated § 104.264

§ 104.264 Affirmative Defense [Civ. Code § 945.5(b)]--By Builder to Action by Owner for Violation of Statutory Construction Standards--Damages Caused by Owner's Failure to Minimize or Prevent Damages

[1] FORM Affirmative Defense [Civ. Code § 945.5(b)]--By Builder to Action by Owner for Violation of Statutory Construction Standards--Damages Caused by Owner's Failure to Minimize or Prevent Damages

AS A [_____ (*if more than one, specify number, e.g.,* FIRST) SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* FIRST) CAUSE OF ACTION] defendant alleges that:

The damages allegedly caused by violation of the statutory construction standard(s) alleged by plaintiff were caused by the plaintiff's unreasonable failure to minimize or prevent those damages in a timely manner.

[2] Use of Form

This form of affirmative defense is for use in an answer to a complaint by a purchaser of a new residential unit (excluding a condominium conversion) when the purchase agreement with the buyer was signed by the builder on or after January 1, 2003, and the buyer is seeking to recover damages arising out of, or related to, violation of the statutory construction standards specified in *Civ. Code § 896*. The defense is based on the allegation that the owner unreasonably failed to minimize or prevent (in a timely manner) any damages that may have resulted from a violation of the standards.

[3] Unreasonable Failure to Prevent or Minimize Damages

Under the principles of comparative fault pertaining to affirmative defenses, a builder, general contractor, subcontractor, material supplier, individual product manufacturer, or design professional may be excused, in whole or in part, from any obligation, damage, loss, or liability if he or she can demonstrate, in response to a claimed violation, that any damages complained of were caused by the homeowner's unreasonable failure to minimize or prevent those damages in a timely manner, including the homeowner's failure to allow the defendant reasonable and timely access for inspections and

repairs. This includes the failure to give timely notice to the builder after discovery of a violation, but does not include damages due to the builder's untimely or inadequate response to the homeowner's claim [*Civ. Code § 945.5(b)*].

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10-104 California Forms of Pleading and Practice--Annotated § 104.265

§ 104.265 Affirmative Defense [Civ. Code § 945.5(c)]--By Builder to Action by Owner for Violation of Statutory Construction Standards--Damages Caused by Owner's Failure to Follow Builder's or Manufacturer's Recommendations or Accepted Homeowner Maintenance Obligations

[1] FORM Affirmative Defense [Civ. Code § 945.5(c)]--By Builder to Action by Owner for Violation of Statutory Construction Standards--Damages Caused by Owner's Failure to Follow Builder's or Manufacturer's Recommendations or Accepted Homeowner Maintenance Obligations

AS A [_____ (*if more than one, specify number, e.g.,* FIRST) SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* FIRST) CAUSE OF ACTION] defendant alleges that:

The damages allegedly caused by violation(s) of the statutory construction standard(s) alleged by plaintiff were caused by the failure of the _____ [plaintiff *or* plaintiff's (agent *or* employee *or* subcontractor *or* independent contractor *or* consultant)] to follow _____ [the defendant's recommendations *or* the manufacturer's recommendations *or* commonly accepted homeowner maintenance obligations].

[2] Use of Form

This form of affirmative defense is for use in an answer to a complaint by a purchaser of a new residential unit (excluding a condominium conversion) when the purchase agreement with the buyer was signed by the builder on or after January 1, 2003, and the buyer is seeking to recover damages arising out of, or related to, violation of the statutory construction standards specified in *Civ. Code § 896*. The defense is based on the allegation that the plaintiff (or the plaintiff's agent, employee, subcontractor, independent contractor, or consultant) failed to follow the defendant's or manufacturer's recommendations, or commonly accepted homeowner maintenance obligations [*see Civ. Code § 945.5(c)*].

[3] Failure to Follow Recommendations

Under the principles of comparative fault pertaining to affirmative defenses, a builder, general contractor, subcontractor, material supplier, individual product manufacturer, or design professional may be excused, in whole or in part, from any obligation, damage, loss, or liability if he or she can demonstrate, in response to a claimed violation, that any damages complained of were caused by the homeowner's, or the homeowner's agent, employee, subcontractor, independent contractor, or consultant, by virtue of their failure to follow the builder's or manufacturer's recommendations, or commonly accepted homeowner maintenance obligations [*Civ. Code § 945.5(c)*; *see Civ. Code § 907*]. To rely on this defense as it relates to a recommended maintenance schedule, the builder, general contractor, subcontractor, material supplier, individual product manufacturer, or design professional must show that the homeowner had written notice of these schedules and recommendations and that the recommendations and schedules were reasonable at the time they were issued [*Civ. Code § 945.5(c)*].

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10-104 California Forms of Pleading and Practice--Annotated § 104.266

§ 104.266 Affirmative Defense [Civ. Code § 945.5(d)]--By Builder to Action by Owner for Violation of Statutory Construction Standards--Damages Caused by Owner's Alterations, Ordinary Wear and Tear, Misuse, Abuse, or Neglect, or Structure's Use for Other Than Intended Purpose

[1] FORM Affirmative Defense [Civ. Code § 945.5(d)]--By Builder to Action by Owner for Violation of Statutory Construction Standards--Damages Caused by Owner's Alterations, Ordinary Wear and Tear, Misuse, Abuse, or Neglect, or Structure's Use for Other Than Intended Purpose

AS A [_____ (*if more than one, specify number, e.g.,* FIRST) SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* FIRST) CAUSE OF ACTION] defendant alleges that:

The damages allegedly caused by violation(s) of the statutory construction standard(s) alleged by plaintiff were caused by _____ [*specify, e.g.,* alterations by _____ (the plaintiff *or* the plaintiff's agent *or* an independent third party) *or* (ordinary wear and tear *or* misuse *or* abuse *or* neglect) *or* (the structure's use for something other than its intended purpose)].

[2] Use of Form

This form of affirmative defense is for use in an answer to a complaint by a purchaser of a new residential unit (excluding a condominium conversion) when the purchase agreement with the buyer was signed by the builder on or after January 1, 2003, and the buyer is seeking to recover damages arising out of, or related to, violation of the statutory construction standards specified in *Civ. Code § 896*. The defense is based on the allegation that the damages complained of were caused by (1) alterations made by the plaintiff, the plaintiff's agent, or an independent third party, (2) ordinary wear and tear, misuse, abuse, or neglect, or (3) the structure's use for something other than its intended purpose [*Civ. Code § 945.5(d)*].

[3] Failure to Follow Recommendations

Under the principles of comparative fault pertaining to affirmative defenses, a builder, general contractor, subcontractor, material supplier, individual product manufacturer, or design professional may be excused, in whole or in part, from any obligation, damage, loss, or liability if he or she can demonstrate, in response to a claimed violation, that any damages complained of were caused by one or more of the following [*Civ. Code § 945.5(d)*]:

- Alterations made by the homeowner, the homeowner's agent, or an independent third party;
- Ordinary wear and tear;
- Misuse;
- Abuse;
- Neglect; or
- Use of the structure for a purpose other than that for which it was intended.

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10-104 California Forms of Pleading and Practice--Annotated § 104.267

§ 104.267 Affirmative Defense [Civ. Code § 945.5(e)]--By Builder to Action by Owner for Violation of Statutory Construction Standards--Time Period for Filing Action Bars Claimed Violation

[1] FORM Affirmative Defense [Civ. Code § 945.5(e)]--By Builder to Action by Owner for Violation of Statutory Construction Standards--Time Period for Filing Action Bars Claimed Violation

AS A [_____ (*if more than one, specify number, e.g.,* FIRST) SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* FIRST) CAUSE OF ACTION] defendant alleges that:

The action is barred by the provisions of _____ [*Civil Code Section 941(a) or Civil Code Section 896(g)*].

[2] Use of Form

This form of affirmative defense is for use in an answer to a complaint by a purchaser of a new residential unit (excluding a condominium conversion) when the purchase agreement with the buyer was signed by the builder on or after January 1, 2003, and the buyer is seeking to recover damages arising out of, or related to, violation of the statutory construction standards specified in *Civ. Code § 896*. The defense is based on an allegation that the plaintiff's action was filed after the limitation period applicable to the alleged violations has expired. As described below, the statutory scheme governing these construction defect actions specifies different limitation periods for various violations.

[3] Limitation Periods

With certain limited exceptions, any action brought under the statutory scheme governing construction defects in new residential units (excluding condominium conversions) when the purchase agreement with the buyer was signed by the seller on or after January 1, 2003, must be filed within 10 years after substantial completion of the residence, but not later than 10 years after the date a valid notice of completion was recorded [*see Civ. Code §§ 938, 941*]. The four-year

statute of limitations specified for patent defects [*Code Civ. Proc. § 337.1*] and the 10-year statute of limitations for latent defects [*Code Civ. Proc. § 337.15*] do not apply to these actions [*Civ. Code § 941(d)*].

Exceptions to the 10-year limitation period include all of the following:

- Four years for actions alleging improper operation of electrical systems [*Civ. Code § 896(f)*];

- One year from original occupancy of adjacent unit for actions alleging noncompliance with governmental inter-unit noise transmission standards [*Civ. Code § 896(g)(6)*];

- Four years from close of escrow for actions alleging improper installation of untreated steel fences and adjacent components [*Civ. Code § 896(g)(9)*];

- Five years from close of escrow for actions alleging improper application of paint and stains [*Civ. Code § 896(g)(10)*];

- Two years from close of escrow for actions alleging improper installation of landscaping systems [*Civ. Code § 896(g)(12)*]; and

- Two years from close of escrow for actions alleging improper installation of dryer ducts [*Civ. Code § 896(g)(14)*].

"Close of escrow" means the date of the close of escrow between the builder and the original homeowner. If the claimant is an association, "close of escrow" means the later of the date of substantial completion [*see Civ. Code § 1351(a)*] or the date the builder relinquishes control over the association's ability to decide whether to initiate a claim [*Civ. Code § 895(c)*].

For further discussion of the applicability of the statute of limitations for actions involving construction defects in new residential units (excluding condominium conversions) when the purchase agreement with the buyer was signed by the seller on or after January 1, 2003, see *§ 104.43[7]*.

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10-104 California Forms of Pleading and Practice--Annotated § 104.268

§ 104.268 Affirmative Defense [Civ. Code § 945.5(f)]--By Builder to Action by Owner for Violation of Statutory Construction Standards--Builder Obtained Valid Release

[1] FORM Affirmative Defense [Civ. Code § 945.5(f)]--By Builder to Action by Owner for Violation of Statutory Construction Standards--Builder Obtained Valid Release

AS A [_____ (*if more than one, specify number, e.g.,* FIRST) SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* FIRST) CAUSE OF ACTION] defendant alleges that:

The defendant has obtained a valid release as to the particular violation(s) claimed by plaintiff.

[2] Use of Form

This form of affirmative defense is for use in an answer to a complaint by a purchaser of a new residential unit (excluding a condominium conversion) when the purchase agreement with the buyer was signed by the seller on or after January 1, 2003, and the buyer is seeking to recover damages arising out of, or related to, violation of the statutory construction standards specified in *Civ. Code § 896*. The defense is based on an allegation that the defendant has obtained a valid release from liability for the claimed violations.

[3] Valid Release

Under the principles of comparative fault pertaining to affirmative defenses, a builder, general contractor, subcontractor, material supplier, individual product manufacturer, or design professional may be excused, in whole or in part, from any obligation, damage, loss, or liability if he or she can demonstrate, in response to a claimed violation, that he or she has obtained a valid release as to the particular violation or violations alleged by the plaintiff [*Civ. Code § 945.5(f)*].

The use of a valid release as an affirmative defense must be reconciled with *Civ. Code § 926*, which provides that the

builder may not obtain a release or waiver of any kind in exchange for required repair work.

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10-104 California Forms of Pleading and Practice--Annotated § 104.269

§ 104.269 Affirmative Defense [Civ. Code § 945.5(g)]--By Builder to Action by Owner for Violation of Statutory Construction Standards--Builder Has Successfully Completed Repair

[1] FORM Affirmative Defense [Civ. Code § 945.5(g)]--By Builder to Action by Owner for Violation of Statutory Construction Standards--Builder Has Successfully Completed Repair

AS A [_____ (*if more than one, specify number, e.g.,* FIRST) SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* FIRST) CAUSE OF ACTION] defendant alleges that:

The defendant's repair was successful in correcting the particular violation(s) of the applicable construction standard(s) claimed by plaintiff.

[2] Use of Form

This form of affirmative defense is for use in an answer to a complaint by a purchaser of a new residential unit (excluding a condominium conversion) when the purchase agreement with the buyer was signed by the seller on or after January 1, 2003, and the buyer is seeking to recover damages arising out of, or related to, violation of the statutory construction standards specified in *Civ. Code § 896*. The defense is based on an allegation that the defendant's repair was successful in correcting the particular violation(s) of the applicable standard(s).

[3] Successful Repairs

Under the principles of comparative fault pertaining to affirmative defenses, a builder, general contractor, subcontractor, material supplier, individual product manufacturer, or design professional may be excused, in whole or in part, from any obligation, damage, loss, or liability if the builder can demonstrate, in response to a claimed violation, that the builder's repair was successful in correcting the particular violation(s) of the applicable standard(s) [*Civ. Code § 945.5(g)*].

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10-104 California Forms of Pleading and Practice--Annotated §§ 104.270-104.309

[Reserved]

§§ 104.270[Reserved]

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10-104 California Forms of Pleading and Practice--Annotated § 104.310

§ 104.310 Complaint for Damages [Bus. & Prof. Code § 7160; Civ. Code §§ 1709, 3333] for Fraud [Civ. Code § 1710]--By Owner Against Contractor--False Representation to Induce Plaintiff to Contract for Work of Improvement

[1] FORM Complaint for Damages [Bus. & Prof. Code § 7160; Civ. Code §§ 1709, 3333] for Fraud [Civ. Code § 1710]--By Owner Against Contractor--False Representation to Induce Plaintiff to Contract for Work of Improvement

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR
vs.	)	DAMAGES, PENALTY, AND ATTORNEY'S
_____ [*name(s)*], [and DOES I	)	FEES
through _____,]	)	(False Representations)
Defendant(s)	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

Plaintiff alleges:

1. [*Capacity and residence of defendant contractor. See § 104.210, Paragraph 2.*]

[2. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

3. On or about _____ [*date*], in _____ [*city*], _____ County, California, defendant _____ [*name of contractor*] represented to plaintiff that _____ [*specify false representation, e.g.,* the installation of certain materials in the outer walls of plaintiff's home would reduce plaintiff's heating costs by 90 percent].

4. The representation made by defendant was in fact false. The true facts were _____ [*specify, e.g.,* that the installation of the materials would reduce plaintiff's heating costs by five percent].

5. When defendant made the representation, he/she knew it to be false and made it with the intent to defraud and deceive plaintiff and to induce plaintiff to contract for the work of improvement.

6. Plaintiff, at the time the representation was made, was ignorant of its falsity and believed it to be true. Plaintiff was induced to enter into a contract for _____ [*specify work of improvement, e.g.,* the installation of certain materials in the outer walls of plaintiff's home to reduce plaintiff's heating bill] in reliance on the false representation, and would not have entered into the contract had he/she known the true facts.

7. As a proximate result of defendant's false representation, plaintiff has been damaged in the sum of $_____ in that _____ [*specify measure of damages, e.g.,* plaintiff paid defendant $_____ for the installation while the actual worth of the installation was only $_____].

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For damages in the sum of $_____;

2. For a penalty of $500, as provided by *Business and Professions Code Section 7160*;

3. For reasonable attorney's fees in the sum of $_____, as provided by *Business and Professions Code Section 7160*;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 104.210.*]

[2] Use of Form

This form of complaint for damages, penalty, and attorney's fees is for use by a person induced by a contractor to contract for a work of improvement in reliance on false representations. A person who is induced to contract for a work of improvement, including, but not limited to, a home improvement, in reliance on "false or fraudulent representations or false statements knowingly made" is entitled to recover a penalty of $500, plus reasonable attorney's fees, in addition to any damages sustained by him or her by reason of the false statements [*Bus. & Prof. Code § 7160*].

It is not clear from the language of the statute whether both "statements" and "representations" or only "statements" must be knowingly made for the penalty to apply, or how a "statement" differs from a "representation." The allegations of this form are based on false representations knowingly made (Paragraph 5).

This form may also be used in an action to claim the statutory penalty against a solicitor of a work of improvement [*Bus. & Prof. Code § 7160*].

[3] Venue Requirements for Actions Under Code Civ. Proc. § 395(b)

Special venue requirements apply to actions and proceedings that are limited civil cases arising from an offer or provision of goods, services, loans, or extensions of credit intended primarily for personal, family, or household use (excluding obligations subject to the Unruh Act [*see Civ. Code § 1812.10*] or other specified laws or transactions) [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86* (limited civil cases)]. In such actions, the proper county for trial is the county in which the buyer signed the contract, the buyer resided at the time the contract was entered into, or the buyer resided at the commencement of the action [*Code Civ. Proc. § 395(b)*]. The plaintiff must state facts in the complaint, verified by plaintiff's oath or the oath of his or her attorney, showing that the action has been commenced in the proper court and that the action is subject to the provisions of *Code Civ. Proc. § 395(b)*. Alternatively, these statements may be made in an affidavit or declaration by the plaintiff or his or her attorney, which must be filed with the complaint and served with the summons [*Code Civ. Proc. § 396a*].

If a complaint or affidavit is not filed as required by these provisions, no further proceedings may be had in the action or proceeding except to dismiss it without prejudice. However, the court may, on such terms as may be just, permit the affidavit or declaration to be filed and served after the filing of the complaint [*Code Civ. Proc. § 396a(a)*].

If it appears from the complaint, affidavit, or declaration, or otherwise that the court in which the action or proceeding is commenced is not the proper court, the court must transfer the action or proceeding to a proper court, on its own motion or the defendant's motion, whenever the fact of improper venue appears. The action or proceeding may be kept in the court where it was filed if the defendant consents in writing, or in open court, to venue in that court. The defendant must be represented by counsel at the time this consent is given [*Code Civ. Proc. § 396a*].

For further discussion and forms relating to venue, see Ch. 571, *Venue* .

[4] Cross References

For related forms, see *§§ 104.210* and *104.252*.

For discussion and forms relating to fraud generally, see Ch. 269, *Fraud and Deceit* .

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10-104 California Forms of Pleading and Practice--Annotated § 104.311

§ 104.311 Complaint for Money Based on Violation of Unruh Act [Civ. Code § 1812.7]--By Purchaser Against Contractor--Installment Contract Not Contained in One Document [Civ. Code § 1803.2]

[1] FORM Complaint for Money Based on Violation of Unruh Act [Civ. Code § 1812.7]--By Purchaser Against Contractor--Installment Contract Not Contained in One Document [Civ. Code § 1803.2]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONEY
_____ [*name(s)*], [and DOES I	)	(Violation of Unruh Act)
through _____,]	)	[Amount demanded _____
Defendant(s)	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence of plaintiff*].

2. [*Capacity and residence of defendant developer. See § 104.210, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 104.210, Paragraph 3.*]

4. At all times herein mentioned, _____ [*name of defendant's employee*] was the agent, servant, and employee of defendant and in doing the things herein mentioned was acting in the course and scope of that agency, service, and employment.

5. On or about _____ [*date*], plaintiff and defendant, through _____ [*name of employee*], entered into a retail installment contract subject to the provisions of the Unruh Act, as set forth in *Civil Code Section 1801 et seq.* Under the terms of the contract, defendant sold to plaintiff a _____ [*describe part of residence to be improved or constructed, e.g.,* patio], for which plaintiff agreed to pay the total sum of $_____ as follows: _____ [*describe installment payment terms*]. A copy of the contract is attached to and incorporated into this complaint as Exhibit A.

6. At the same time as the above contract was executed, plaintiff executed in a separate document a promissory note in favor of defendant that represented the $_____ cost of the _____ [*describe part of residence to be improved or constructed, e.g.,* patio] plus a time price differential of $_____. A copy of the note is attached to and incorporated into this complaint as Exhibit B.

7. The contract and note were, and are, in violation of the provisions of *Civil Code Section 1803.2* in that the retail installment contract was not contained in a single document.

8. By reason of defendant's failure to comply with a provision of the Unruh Act, defendant is barred by the provisions of *Civil Code Section 1812.7* from recovery of charges imposed in connection with the contract and the promissory note.

9. Plaintiff has demanded of defendant that he/she/it repay to plaintiff the sum of $_____, which is the total of all finance charges imposed on and paid by plaintiff in connection with the contract and the promissory note. Defendant has failed and refused, and still fails and refuses, to repay the sum, and the whole sum remains unpaid.

10. Under *Civil Code Section 1811.1*, plaintiff is entitled to reasonable attorney's fees and costs incurred and to be incurred in this action on the contract in an amount to be determined by the court.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For the sum of $_____ as recovery of finance charges paid by plaintiff to defendant;

2. For a declaration that defendant is barred from recovery of any such charges;

3. For reasonable attorney's fees in an amount to be determined by the court;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 104.210.*]

[2] Use of Form

This form of complaint is for use by a consumer in an action for a statutory penalty [*Civ. Code § 1812.7*] based on a violation of the Unruh Act (*Civ. Code § 1801 et seq.*) when a contractor sells a home improvement or an addition to a residence and the promissory note is contained in a separate document from the contract. Under the provisions of the Unruh Act, every retail installment contract, with the exception of certain revolving credit transactions, must be contained in a single document that must include, among other things, any promissory note or other evidence of indebtedness between the parties relating to the transaction [*Civ. Code § 1803.2(a)*]. A creditor who fails to comply with this requirement, or with any other requirement of the Unruh Act, is barred from recovering any finance, delinquency, collection, extension, deferral, or refinance charge imposed in connection with the transaction in which the failure to comply occurred. In such a case, the buyer has a right to recover any such charges paid to the creditor [*Civ. Code § 1812.7*].

[3] Allegations

This complaint alleges the existence of the contract and the promissory note as separate documents (Paragraphs 5, 6), the violation of the Unruh Act (Paragraph 7), plaintiff's payment of finance charges and demand for their return (Paragraph 9), and that plaintiff is entitled to reasonable attorney's fees (Paragraph 10) [*see Civ. Code § 1811.1*].

[4] Limited Application of Unruh Act to Building Contracts

The provisions of the Unruh Act are expressly made inapplicable to any contract or series of contracts providing for the construction, sale, or construction and sale of an entire residence, including a mobilehome, or all or part of a structure designed for commercial or industrial occupancy, with or without a parcel of real property or an interest in such a parcel; and to any sale of a lot or parcel of real property, including any site preparation incidental to the sale [*Civ. Code § 1801.4*].

[5] Venue

Proper venue in an action on a contract or installment account under the provisions of the Unruh Act is in (1) the county in which the contract was signed by the buyer, (2) the county in which the buyer resided at the time the contract was entered into, (3) the county in which the buyer resides at the commencement of the action, or (4) the county in which the goods purchased pursuant to the contract have been so affixed to real property as to become a part of the real property [*Civ. Code § 1812.10(a)*]. Venue in this action is established by the plaintiff's residence at the commencement of the action (Paragraph 1). If the action is brought in the county in which the contract was signed, the county in which the buyer resided at the time the contract was entered into, or the county in which the improvement was constructed, these facts may be added to Paragraph 5.

[6] Subvenue

The proper court location for trial is the location in the county (1) where the court tries Unruh Act cases that is nearest or most accessible to where the contract was in fact signed by the buyer, (2) where the buyer resided when he or she entered into the contract, (3) where the buyer resides at the commencement of the action, or (4) where the goods purchased under the contract have been so affixed to real property as to become part of that real property. Otherwise, any location of the superior court is the proper location for trial [*Civ. Code § 1812.10(b)*; *see Code Civ. Proc. § 402*].

[7] Affidavit or Declaration Concerning Venue Required

In any action under the Unruh Act, the plaintiff must either (1) file an affidavit or declaration concurrently with the filing of the complaint, stating facts showing that the action has been commenced in a county or judicial district in which proper venue exists for the trial of the action, or (2) state those facts in a verified complaint. These facts cannot

be stated on information or belief [*Civ. Code § 1812.10(c)*; *Code Civ. Proc. § 396a(a)*].

If the plaintiff fails to comply with these requirements, no further proceedings may be had in the action. The court must, on its own motion or the motion of any party, dismiss the action without prejudice. Alternatively, the court may, on any just terms, permit the affidavit to be filed and served on the defendant after the filing of the complaint [*Civ. Code § 1812.10*; *Code Civ. Proc. § 396a*].

[8] State Statutes

Buyer's right to damages for willful violation of Unruh Act. *Civ. Code § 1812.9*

[9] Cross References

For a related form, see *§ 104.210*.

For discussion and forms relating to the Unruh Retail Installment Sales Act (*Civ. Code § 1801 et seq.*), see Ch. 501, *Sales: Retail Installment Sales* .

For further discussion and forms relating to venue, see Ch. 571, *Venue* .

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Chapter 106 BUSES AND STREETCARS

10-106 California Forms of Pleading and Practice--Annotated 106.syn

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[1] Defined

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[1] Defined

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[2] Mutual Duties of Streetcars and Automobiles

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§ 106.33 State Statutes

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[2] Duties of Carriers

[3] Operation, Maintenance, and Regulation of Vehicles

[4] Penal Provisions

[5] Street Railroads

Court Decisions

[1] Carrier-Passenger Relationship

[2] Buses

[3] Carriers' Duty of Care

[4] Street Railroads

§ 106.35 Text References

§§ 106.36-106.39 [Reserved]

§ 106.40 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Injured While Boarding Bus

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Specification of Damages

[6] Carrier-Passenger Relationship

[7] Cross References

§ 106.41 Allegations--Boarding Passenger Injured When Struck by Closing Doors

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.42 Allegations--Passenger With Special Physical Condition Injured While Attempting to Board Bus

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.43 Allegation--Bus Stopped Outside Bus Zone--Passenger's Trip and Fall

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.44 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Injured While Being Conducted by Carrier's Employee Preparatory to Boarding Bus

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.45 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Transit District--Passenger Thrown to Floor When Bus Stopped Suddenly

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.46 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Thrown to Floor by Sudden Jolt or Stop

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.47 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Thrown About Interior of Bus on Collision With Automobile

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.48 Allegation--Passenger Thrown About Interior of Bus on Collision With Another Carrier

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.49 Allegation--Passenger Thrown About Interior of Bus When It Ran Off Highway

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.50 Allegation--Passenger Thrown About Interior of Bus When It Suddenly Changed Speed and Direction

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.51 Allegation--Passenger Thrown About Interior of Cable Car When Obstruction in Cable Slot Caused Sudden Stop

[1] FORM

[2] Use of Form

§ 106.52 Complaint for Damages [Civ. Code § 3333] for Wrongful Death of Passenger [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Entitled Person(s) Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343] and Owner-Operator of Other Vehicle--Bus Passenger's Death After Automobile-Bus Collision

[1] FORM

[2] Use of Form

[3] Wrongful Death; Survival Actions

[4] Cross References

§ 106.53 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Injured by Baggage Falling From Overhead Rack

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.54 Allegation--Passenger Injured When Fellow Passenger and Luggage Fell on Him

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.55 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100, 2101]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2101]--Passenger Injured Because of Carrier's Faulty Equipment

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.56 Allegation--Passenger Injured When Bus Seat Broke

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.57 Complaint for Damages [Civ. Code §§ 3294, 3333] for Injuries Based on Willful Misconduct [Civ. Code § 1714(a)]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2103, 2338] and Its Agent [Civ. Code § 2343]--Incivility of Driver to Passenger

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.58 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Failure of Driver to Prevent Assault by Fellow Passenger

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.59 Allegation--Failure of Driver to Prevent Injury to Passenger by Dog Being Transported in Passenger Area

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.60 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Injured by Sudden Movement of Bus While Alighting

[1] FORM

[2] Use of Form

[3] Carrier-Passenger Relationship

[4] Cross References

§ 106.61 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Injured by Slip and Fall on Steps of Bus While Alighting

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.62 Allegations--Passenger With Special Physical Condition Injured While Attempting to Alight From Bus

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.63 Allegation--Passenger Injured While Leaving Through Emergency Exit After Accident

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.64 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Injured When Bus Stopped in Unsafe Area

[1] FORM

[2] Use of Form

[3] Carrier-Passenger Relationship

[4] Cross References

§ 106.65 Allegations--Passenger Injured by Passing Automobile When Bus Stopped Outside Safety Zone

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.66 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Pedestrian Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Pedestrian Struck by Bus

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.67 Complaint for Damages [Civ. Code § 3333] for Wrongful Death of Pedestrian [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a)]--By Entitled Person(s) Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.68 Complaint for Damages [Civ. Code § 3333] for Personal Injuries and Property Damage Based on Negligence [Civ. Code § 1714(a)]--Against Transit District--Plaintiff's Automobile Hit by Bus

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.69 Allegation--Plaintiff Injured While Sitting in Parked Automobile Hit by Bus

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.70 Allegations--Cable Car Struck Automobile Because of Negligence in Operation and Maintenance of Signals and Equipment

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.71 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Workman on Street or Highway Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.72 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Prospective Passenger Against Carrier of Passengers for Reward [Civ. Code § 1714]--Slip and Fall in Bus Depot

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.73 Affirmative Defense--Negligence of Plaintiff--Passenger Failed to Use Hand Bars for Support

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.74 Affirmative Defense--Negligence of Plaintiff--Passenger Attempted to Board or Alight From Bus While It Was Still in Motion

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.75 Affirmative Defense--Negligence of Plaintiff--Passenger's Conduct Violated Ordinance

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.76 Affirmative Defense--Negligence of Plaintiff--Pedestrian Failed to Use Caution in Crossing Street

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.77 Affirmative Defense--Assumption of Risk--Passenger Injured as Result of Ordinary Bus Movements

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.78 Affirmative Defense--Imminent Peril--Bus Stopped Suddenly to Avoid Collision

[1] FORM

[2] Use of Form

[3] Cross References

§ 106.79 Affirmative Defense--Lack of Knowledge by Carrier That Passenger Was Afflicted With Special Physical Condition

[1] FORM

[2] Use of Form

[3] Cross References

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Chapter 106 BUSES AND STREETCARS
PART I. SCOPE

10-106 California Forms of Pleading and Practice--Annotated § 106.01

§ 106.01 Scope of Chapter

This chapter discusses and contains forms for use in personal injury actions arising from the negligent operation or maintenance of buses, streetcars, and certain other related transit vehicles. The chapter contains the following forms:

- Complaints and allegations alleging injuries to boarding passengers [*see §§ 106.40 -106.44*].
- Complaints and allegations alleging injuries to passengers en route [*see §§ 106.45 -106.59*].
- Complaints and allegations in alleging injuries to alighting passengers [*see §§ 106.60 -106.65*].
- Complaints and allegations alleging injuries to nonpassengers [*see §§ 106.66 -106.72*].
- Affirmative defenses for use by the owner or operator of the transit vehicle [*see §§ 106.73 -106.79*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCommercial VehiclesGeneral OverviewTortsTransportation TortsMotor VehiclesMotor CarriersTortsNegligenceActionsGeneral OverviewTortsTransportation TortsGeneral Overview

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10-106 California Forms of Pleading and Practice--Annotated § 106.02

§ 106.02 Cross References

For related discussion and forms regarding the duties and liabilities of common carriers generally, including discussion of defenses and the application of doctrines such as res ipsa loquitur to common carriers, see Ch. 109, *Carriers* .

For discussion and forms related to automobile accidents in general, including injuries to pedestrians arising from motor vehicle accidents, see Ch. 82, *Automobiles: Causes of Action* .

The following chapters cover related issues that may arise in an action dealt with in this chapter:

- For discussion and forms involving wrongful death actions, see Ch. 181, *Death and Survival Actions* .

- For discussion and forms for use in negligence actions generally, see Ch. 380, *Negligence* .

- For discussion and forms for use in actions involving premises liability generally, see Ch. 421, *Premises Liability* , and Ch. 525, *Slip and Fall* .

- For discussion, forms, and procedural guides for filing claims against public entities and employees, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

- For discussion and forms regarding public utilities generally, see Ch. 480, *Public Utilities* .

Other types of public transportation are addressed in other chapters:

- For discussion and forms regarding injuries to passengers and other persons involving railroads, see Ch. 485, *Railroads* .

- For discussion and forms regarding injuries to passengers involving taxicabs, see Ch. 544, *Taxicabs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCommercial VehiclesGeneral OverviewTortsTransportation TortsMotor VehiclesMotor CarriersTortsNegligenceActionsGeneral Overview

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10-106 California Forms of Pleading and Practice--Annotated §§ 106.03-106.09

[Reserved]

§§ 106.03[Reserved]

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PART II. LEGAL BACKGROUND

10-106 California Forms of Pleading and Practice--Annotated § 106.10

§ 106.10 Governing Law

The classification of common carriers as public utilities is governed by *Cal. Const., art. XII, § 3*.

Duties of carriers of persons generally are governed by *Civ. Code §§ 2096 et seq.* and *2180 et seq.* Charter-party carriers are governed by *Pub. Util. Code § 5351 et seq.* The operation of street railroads is governed by *Pub. Util. Code § 7801 et seq.*, and by certain provisions of *Pub. Util. Code § 7503 et seq.*, which pertain generally to railroad corporations.

Safety regulations regarding buses and general public paratransit vehicles are governed by *Veh. Code § 34500 et seq.* Inspection of tour buses is governed by *Veh. Code § 34505*. Qualifications for drivers of general public paratransit vehicles are governed by *Veh. Code § 12523.5*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCommercial VehiclesGeneral OverviewTortsTransportation TortsMotor VehiclesMotor CarriersTransportation LawRail TransportationMaintenance & Safety

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10-106 California Forms of Pleading and Practice--Annotated § 106.11

§ 106.11 Common Carriers Defined

Private corporations and persons who own, operate, control, or manage a line, plant, or system for the transportation of people or property, and common carriers, are public utilities subject to control by the Legislature [*Cal. Const., art. XII, § 3*]. Under the Public Utilities Code, "common carrier" means every person and corporation providing transportation for compensation to or for the public or any portion of the public, except as otherwise provided in *Pub. Util. Code § 201 et seq.* [*Pub. Util. Code § 211*]. Everyone who offers to the public to carry persons, property, or messages (except telegraphic messages) is a common carrier of whatever he or she offers to carry [*Civ. Code § 2168*]. Every common carrier is a "public utility" subject to the jurisdiction, control, and regulation of the Public Utilities Commission [*Pub. Util. Code § 216*]. The definition of a common carrier includes every "street railroad corporation" and every "passenger stage corporation" that operates within California [*Pub. Util. Code § 211(a),(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState & Local Regulation

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10-106 California Forms of Pleading and Practice--Annotated § 106.12

§ 106.12 Carriers' Duty of Care to Passengers

[1] Carrier for Reward

A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill [*Civ. Code § 2100*].

This high standard of care does not make a bus company liable for injuries received by a disembarking passenger if the bus fails to stop directly at the sidewalk curb, but stops as close as possible under the circumstances [*MacLean v. City & County of San Francisco (1954) 127 Cal. App. 2d 263, 272, 273 P.2d 698]* . In that situation, a carrier is not responsible for injuries received by a passenger who has alighted safely from a bus but is injured by the condition of the street that must be crossed to reach the sidewalk [*MacLean v. City & County of San Francisco (1954) 127 Cal. App. 2d 263, 271, 273 P.2d 698]* .

For discussion of particular provisions of *Civ. Code § 2085 et seq.*, which concern the duties and liabilities of common carriers generally, see Ch. 109, *Carriers* .

[2] Gratuitous Carrier

Carriers without reward are subject to the same rules as employees without reward, except as far as otherwise provided in *Civ. Code § 2085 et seq.* [*Civ. Code § 2089*]. For further discussion, see Ch. 109, *Carriers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceStandards of CareSpecial CareCommon CarriersTortsTransportation TortsMotor VehiclesMotor Carriers

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10-106 California Forms of Pleading and Practice--Annotated § 106.13

§ 106.13 Safety Regulations Applicable to Buses

[1] In General

Safety regulations set forth in *Veh. Code § 34500 et seq.* are applicable to a bus, schoolbus, youth bus, farm labor vehicle, or general public paratransit vehicle [*Veh. Code § 34500(c)*]. They are also applicable to a tour bus [*Veh. Code § 34500.1*].

[2] Schedule Requiring Excessive Speeds Prohibited

No motor carrier may schedule a run, or permit or require the operation of any motor vehicle subject to *Veh. Code § 34500 et seq.* between points in a period of time that would require the vehicle to be operated at speeds greater than those prescribed by the Vehicle Code [*Veh. Code § 34501.3(a)(1)*]. A logbook of a driver that reflects a trip between points within a period of time that would have required excessive speed to complete gives rise to a rebuttable presumption that the driver exceeded the lawful speed limit [*Veh. Code § 34501.3(b)*].

[3] Schedule Requiring Driver to Exceed Maximum Hours of Service Prohibited

A motor carrier is prohibited from scheduling a run, or permitting or requiring the operation of any motor vehicle subject to *Veh. Code § 34500 et seq.* between points within a period of time that would require the driver of the vehicle to exceed the applicable maximum hours of service [*Veh. Code § 34501.3(a)(2)*; *see also Veh. Code §§ 34501* (requiring regulation of hours of service), *34501.2* (statutory requirements for regulations adopted); *13 Cal. Code Reg. §§ 1212-1213*]. Violation of this provision is punishable by a fine [*see Veh. Code § 34501.3(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCommercial VehiclesMaintenance & SafetyTransportation LawPublic TransportationTransportation LawCarrier Duties & LiabilitiesState & Local RegulationCriminal Law & ProcedureCriminal OffensesVehicular CrimesSpeedingGeneral Overview

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10-106 California Forms of Pleading and Practice--Annotated § 106.14

§ 106.14 Passenger Stage Corporation

[1] Defined

A "passenger stage" includes every stage, auto stage, or other motor vehicle used in the transportation of persons, or persons and their baggage or express, or persons or baggage or express, when the baggage or express is transported incidental to the transportation of passengers [*Pub. Util. Code § 225*].

A "passenger stage corporation" includes every corporation or person engaged as a common carrier, for compensation, in the ownership, control, operation, or management of any passenger stage over any public highway in California between fixed termini, or over a regular route, unless 98 percent or more of the route (measured by total route mileage operated) is exclusively within the limits of a single city or city and county, or the operations consist solely of transporting pupils between their homes and their educational institutions [*Pub. Util. Code § 226(a)*].

The fact that a metropolitan transit authority is publicly owned rather than privately owned does not place it outside the general category of "common carrier" within the meaning of *Pub. Util. Code § 226*. Hence, such a transit authority is subject to regulation by the Public Utilities Commission, which has the power to secure the transit authority's compliance with the Commission's safety regulations [*Los Angeles Met. Transit Authority v. Public Util. Com. (1963) 59 Cal. 2d 863, 869-870, 31 Cal. Rptr. 463, 382 P.2d 583]* .

[2] Excluded Operations

The term "passenger stage corporation" does not include the following:

1. That part of the operations of any corporation or person engaged in the ownership, control, operation, or management of any passenger stage engaged in the transportation of any pupils or students to and from a public or private school, college, or university or to and from activities of those schools when the rate, charge, or fare for transportation is not computed, collected, or demanded on an individual-fare basis [*Pub. Util. Code § 226(b)*];

2. The transportation of persons between home and work locations or of persons having a common

work-related trip purpose in a vehicle having a seating capacity of 15 or less, including the driver; or in a vehicle that is used for ridesharing and has a seating capacity of more than 15 passengers, if the driver files evidence of liability insurance and pays a special fee, and the vehicle passes an annual safety inspection [*see Pub. Util. Code § 226(c)*; *see also Veh. Code § 522* ("ridesharing" defined)]. This exemption does not apply if the primary purpose for the transportation is to make a profit [*Pub. Util. Code § 226(c)*];

3. That part of the operations of any corporation or person engaged in the ownership, control, operation, or management of any medical transportation vehicles, including vehicles employed to transport developmentally disabled persons for regional centers established pursuant to *Welf. & Inst. Code § 4620 et seq.* [*Pub. Util. Code § 226(d)*];

4. The transportation of persons ancillary to commercial river rafting, and for the sole purpose of returning passengers to the point of origin of their rafting trip [*Pub. Util. Code § 226(e)*];

5. Social-service transportation by a nonprofit social-service transportation provider or a locally licensed or franchised for-profit transportation provider under contract with a nonprofit organization, if the vehicle is a dedicated vehicle that does not carry more than 16 persons including the driver, and the services are not offered over regularly scheduled or fixed routes [*Pub. Util. Code § 226(f)*; *see Gov. Code § 15985* (public utilities statutes and regulations relating to common carriers do not apply to social-service transportation)]; and

6. Intrastate operations conducted under federal authority to the extent that regulation is preempted by the federal Bus Regulatory Reform Act of 1982 (Pub. L. No. 97-261), as amended [*Pub. Util. Code § 226(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCommercial VehiclesGeneral OverviewTransportation LawPublic TransportationTransportation LawCarrier Duties & LiabilitiesState & Local Regulation

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10-106 California Forms of Pleading and Practice--Annotated § 106.15

§ 106.15 Charter-Party Carriers of Passengers

[1] Defined

The term "charter-party carrier of passengers" means every person engaged in the transportation of persons by motor vehicle for compensation, whether in common or contract carriage, over any public highway in California [*Pub. Util. Code § 5360*].

The term does not, however, apply to any of the following:

1. Transportation service rendered wholly within the corporate limits of a single city or city and county and licensed or regulated by ordinance [*Pub. Util. Code § 5353(a)*].

2. Transportation of school pupils conducted by or under contract with the governing board of any school district [*see Pub. Util. Code § 5353(b)*].

3. Passenger stage corporations between fixed termini over a regular route [*see Pub. Util. Code § 5353(c)*; *see also Pub. Util. Code § 1031 et seq.*];

4. Occasional transportation services afforded for farm employees [*see Pub. Util. Code § 5353(d)*].

5. Transportation service rendered by a publicly owned transit system [*Pub. Util. Code § 5353(e)*].

6. Passenger vehicles that carry passengers on a noncommercial enterprise basis [*Pub. Util. Code § 5353(f)*].

7. Taxicab transportation services that are licensed and regulated by a city or county that are designed for carrying not more than eight persons excluding the driver [*Pub. Util. Code § 5353(g)*].

8. Transportation of persons between home and work locations or of persons having a common

work-related trip purpose in a vehicle that seats 15 passengers or less, including the driver; or in a vehicle that is used for ridesharing (incidental to the driver's main purpose) and seats more than 15 passengers, if the driver files evidence of liability insurance and pays a special fee, and the vehicle passes an annual safety inspection [*see Veh. Code § 522* ("ridesharing" defined)]. This exemption does not apply if the primary purpose for the transportation is to make a profit [*see Pub. Util. Code § 5353(h)*].

9. Medical transportation vehicles, including vehicles that transport developmentally disabled persons [*see Pub. Util. Code § 5353(i)*].

10. Transportation services rendered solely within the Lake Tahoe Basin [*see Pub. Util. Code § 5353(j)*].

11. Subject to *Veh. Code § 34507.6* (requiring carrier identification numbers for buses), transportation service provided by the operator of an automobile rental business in vehicles owned or leased by that operator, without charge other than that included in the automobile rental charges, to carry its customers to or from its office or facility where rental vehicles are furnished or returned after the rental period [*Pub. Util. Code § 5353(k)*].

12. Subject to *Veh. Code § 34507.6* (requiring carrier identification numbers for buses), transportation service provided by a hotel, motel, or other place of temporary lodging in vehicles owned or leased by that operator, without charge other than that included in the lodging, between the lodging facility and an air, rail, water, or bus passenger terminal or between the lodging facility and any place of entertainment or commercial attraction, including facilities providing snow skiing, but excluding round-trip sight-seeing service that requires a permit under *Pub. Util. Code § 5384(c)* [*Pub. Util. Code § 5353(l)*].

13. Transportation of hot air balloon ride passengers in a balloon chase vehicle from the balloon landing site back to the original take-off site, provided that the balloon ride was conducted by a balloonist who meets specified conditions [*see Pub. Util. Code § 5353(m)*].

14. Transportation incidental to the operation of youth camps, as defined, provided specified conditions are met [*Pub. Util. Code § 5353(n)*].

[2] Certificate to Operate Charter-Party Carrier

No charter-party carrier of passengers is permitted to engage in transportation services subject to *Pub. Util. Code § 5351 et seq.* without first obtaining a certificate that public convenience and necessity require the operation [*Pub. Util. Code § 5371*]. The certificate requirement does not apply to transit districts, transit authorities, or cities owning and operating local transit systems themselves or through wholly owned nonprofit corporations, nor to certain specialized carriers defined in *Pub. Util. Code § 5384* [*Pub. Util. Code § 5371*].

No charter-party carrier of passengers initially issued a certificate is restricted with regard to point of origin or destination in California [*Pub. Util. Code § 5371.1(a)*]. This initial certificate is a Class A certificate [*see Pub. Util. Code § 5383*]. A permit or certificate, or a renewal of a permit or certificate, is effective for three years, unless suspended or revoked by the commission [*Pub. Util. Code § 5376*]. All other persons who have obtained a certificate operate from a service area determined by the Public Utilities Commission, limited to a radius of 40 air miles from the home terminal [*Pub. Util. Code § 5371.2*]. This restricted certificate is a Class B certificate [*Pub. Util. Code §§ 5371.2, 5383*]. A Class C certificate enables charter-party carriers to provide services incidental to commercial balloon operations, commercial river rafting, or skiing when no additional compensation is provided for transportation [*Pub. Util. Code § 5383*]. If a complaint is made to the Public Utilities Commission that a charter-party carrier is operating without a valid certificate or permit, the Commission may order the carrier to cease and desist from operation until the Commission decides the matter or makes a further order [*Pub. Util. Code § 5379.5*].

[3] Permit to Operate Charter-Party Carrier

The Public Utilities Commission issues permits to persons, who are otherwise qualified, whose passenger-carrier operations fall into the following categories [*Pub. Util. Code § 5384*]:

- Specialized carriers who do not hold themselves out to serve the general public, but only provide services under contract with industrial and business firms, governmental agencies, and private schools, or who only transport agricultural workers to and from farms for compensation, or who only conduct transportation services that are incidental to another business. These permits are limited to a 50 mile radius of operation from the home terminal;

- Carriers using only vehicles that seat fewer than 15 passengers and are under 25 feet in length; and

- Carriers conducting round-trip sightseeing tour services.

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCommercial VehiclesGeneral OverviewTransportation LawPublic TransportationTransportation LawCarrier Duties & LiabilitiesState & Local RegulationGovernmentsLocal GovernmentsLicenses

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10-106 California Forms of Pleading and Practice--Annotated § 106.16

§ 106.16 Tour Bus

[1] Defined

A "tour bus" is a bus that is operated by or for a charter-party carrier of passengers, as defined in *Pub. Util. Code § 5360*, or a passenger stage corporation as defined in *Pub. Util. Code § 226*, or any highway carrier of passengers required to register with the California Public Utilities Commission pursuant to *Pub. Util. Code § 3910* [*Veh. Code § 612*].

[2] Inspection of Tour Buses

Tour bus operators must comply with the systematic inspection, maintenance, and lubrication services required of all motor carriers. They must also require inspections of each tour bus at least every 45 days, or more often if necessary to ensure safe operation. The tour bus may not be used to transport passengers until any discovered defects are corrected [*Veh. Code § 34505*].

[3] Administrative Remedies for Safety Violations

If a tour bus operator either (1) fails to maintain any vehicle used in transportation for compensation in a safe operating condition, or fails to comply with the Vehicle Code or safety regulations, and the failure presents an imminent danger to public safety or is consistent enough to warrant remedial action; or (2) fails to comply with required reporting procedures, the carrier's operating authority is subject to suspension, denial, or revocation or other administrative action [*see Veh. Code § 34505.1(a)*; *see also Veh. Code § 40000.21(e)* (violation of *Veh. Code § 34505* as misdemeanor); *13 Cal. Code Reg. §§ 1200-1270* (safety regulations)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 106.17 General Public Paratransit Vehicles

[1] Defined

A "general public paratransit vehicle" is any motor vehicle that is designed to carry no more than 24 persons and the driver, and that provides local transportation to the general public, including transportation of pupils at or below the 12th-grade level to or from a public or private school or school activity, under the exclusive jurisdiction of a publicly owned and operated transit system through one of the following modes: dial-a-ride, subscription service, or route-deviated bus service. Vehicles used for the exclusive transportation of the handicapped, as defined by *Pub. Util. Code § 99206.5*, or of persons 55 years of age or older, including any persons necessary to provide assistance to these passengers, are not general public paratransit vehicles [*Veh. Code § 336*].

However, transportation of attendants, companions, or both traveling together with those individuals who are determined to be eligible for complementary paratransit services in accordance with Title II of the Americans with Disabilities Act (*42 U.S.C. § 12101 et seq.*) and federal regulations adopted pursuant to the Act, is not sufficient to qualify a vehicle as a general public paratransit vehicle [*Veh. Code § 336*].

[2] Certificate to Operate General Public Paratransit Vehicle

A person who operates a general public paratransit vehicle must possesses a valid driver's license of the appropriate class endorsed for passenger transportation when operating a vehicle designed, used, or maintained to carry more than ten persons including the driver. The operator must also possess either (1) a certificate issued by the California Department of Motor Vehicles to operate a general public paratransit vehicle, or (2) a certificate issued by the DMV to drive a schoolbus or school pupil-activity bus pursuant to *Veh. Code § 12517* [*Veh. Code § 12523.5(a)*]. An applicant for a certificate must present evidence that he or she has successfully completed a driver-training course consisting of a minimum of 40 hours of instruction within the previous two years [*Veh. Code § 12523.5(b)*]. An applicant seeking to renew a certificate must present evidence that he or she has received two hours of refresher training during each 12 months of driver's certificate validity [*Veh. Code § 12523.5(b)*]. An operator must use seat belts, refrain from smoking, and report any accident reportable under *Veh. Code § 16000* to the Department of the California Highway Patrol [*Veh. Code § 12523.5(d)*].

A person holding a valid certificate issued prior to January 1, 1991, is not required to reapply for a certificate to satisfy any additional requirements imposed by 1990 legislation (Stats. 1990, ch. 1360) until the certificate expires or is cancelled or revoked [*Veh. Code § 12523.5(e)*]. *Veh. Code §§ 12517.2, 12517.3, 12517.4*, discussed *below*, were added by that chapter, and are therefore covered by *Veh. Code § 12523.5(e)*.

Applicants for an original or renewal certificate to drive a general public paratransit vehicle (and certain other vehicles) must submit a report of a medical examination of the applicant given not more than two years prior to the date of the application by a physician licensed to practice medicine, a licensed advanced practice registered nurse qualified to perform a medical examination, or a licensed physician assistant. The report must be on a form approved by the DMV, the Federal Highway Administration, or the Federal Aviation Administration [*Veh. Code § 12517.2(a)*]. Applicants for an original certificate to drive a general public paratransit vehicle (and certain other vehicles) must be fingerprinted by the Department of the California Highway Patrol on a form provided or approved by the DMV for submission to the Department of Justice [*Veh. Code § 12517.3(a)*].

The certificate to drive a general public paratransit vehicle (and certain other vehicles) is issued only to applicants meeting all applicable provisions of the California Vehicle Code and passing the examinations prescribed by the DMV and the Department of the California Highway Patrol [*Veh. Code § 12517.4(a)*]. A temporary driver's certificate is issued by the CHP after an applicant has cleared a criminal history background check by the Department of Justice and, if applicable, the Federal Bureau of Investigation, and has passed the examinations and meets all other applicable provisions of the Vehicle Code [*Veh. Code § 12517.4(b)*]. A permanent driver's certificate is issued by the DMV after an applicant has passed all tests and met all applicable provisions of the Vehicle Code. Certificates are valid for a maximum of five years and expire on the fifth birthday following the issuance of an original certificate or the expiration of a renewed certificate [*Veh. Code § 12517.4(c)*]. In addition, restrictions may be placed on the certificate [*see Veh. Code § 12517.4(d), (e)*].

[3] Regulation of General Public Paratransit Vehicles

The Department of the California Highway Patrol must inspect each vehicle at least once a year to certify that its condition complies with all provisions of law, including being equipped with a fire extinguisher, first-aid kit, and three-point tie downs for transporting wheelchair passengers [*Veh. Code § 34501.8(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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10-106 California Forms of Pleading and Practice--Annotated § 106.18

§ 106.18 Street Railroad

[1] Definition

"Street railroad" includes every railway, and each branch or extension of every railway, operated by any type of power, that is mainly on, along, above, or below any street, avenue, road, highway, bridge, or public place within any city or city and county, together with all real estate, fixtures, and personal property of every kind used in connection with it, and that is owned, controlled, operated, or managed for public use in the transportation of persons or property. It does not include a railway constituting or used as a part of a commercial or interurban railway [*Pub. Util. Code § 231*]. "Street railroad corporation" includes every corporation or person owning, controlling, operating, or managing any street railroad for compensation within California, or owning, controlling, operating, or managing as a part of or in conjunction with such street railroad any automobile, jitney bus, stage, or auto stage used in the business of transportation of persons or property for compensation over any route [*Pub. Util. Code § 232*].

[2] Mutual Duties of Streetcars and Automobiles

The duties of a streetcar operator and those of the driver of an automobile that is about to cross the streetcar tracks at an intersection are reciprocal; each is required to approach the intersection with due regard for the right of the other [*Wright v. Los Angeles Ry. Corp. (1939) 14 Cal. 2d 168, 173, 93 P.2d 135* (streetcar)]. For example, a streetcar operator is required to watch vigilantly for automobiles approaching the tracks and to have the streetcar under control when approaching a street intersection; the fact that a streetcar was not exceeding the speed limit as it approached an intersection does not excuse any negligent operation of the car [*Bennett v. Central California Trac. Co. (1931) 115 Cal. App. 1, 12, 1 P.2d 47]* .

[3] Right of Action for Overcharging

Any corporation, or its agent or employee, demanding a greater sum of money for fare on the cars of a street railroad than that fixed by law forfeits to the person from whom the sum is received, or who is overcharged, the sum of $200, to be recovered in a civil action against the corporation [*Pub. Util. Code § 7814*].

[4] Application of Railroad Law Generally

Pub. Util. Code § 7801 et seq., which governs street railroads exclusively, generally concerns such matters as the establishment of rights of way between different street railroad lines, and track construction [*see, e.g., Pub. Util. Code § 7806* (municipality's authority to grant rights of way to different railway companies)]. Street railroads are also governed by *Pub. Util. Code § 7501 et seq.*, so far as those provisions are applicable, unless street railroads are specifically excepted [*Pub. Util. Code § 7801*]. Certain of those provisions relating to injuries to passengers and other persons, are discussed in Ch. 485, *Railroads* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 106.19 Public Utilities Commission Address

Counsel who desire a list of carriers under the jurisdiction of the Public Utilities Commission may write to the following address: California Public Utilities Commission, Transportation Division, 505 Van Ness Ave., San Francisco, California 94102

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral Overview

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[Reserved]

§§ 106.20[Reserved]

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§ 106.30 Related Matthew Bender Publications

For memoranda of points and authorities regarding carriers generally, see California Points and Authorities, Ch. 33, *Carriers*

For memoranda of points and authorities regarding public entities generally, see California Points and Authorities, Ch. 196, *Public Entities*

For discussion of carriers, see Levy, Golden & Sacks, California Torts, Ch. 23

For discussion of tort claims against public entities and employees, see Levy, Golden & Sacks, California Torts, Chs. 60-62

For forms of interrogatories for use in actions involving buses and streetcars, see Bender's Forms Of Discovery, *Buses and Streetcars*

For forms of interrogatories for use in actions involving carriers, see Bender's Forms Of Discovery, *Carriers*

Personal Injury: Actions, Defenses, Damages, *Buses*

Personal Injury: Actions, Defenses, Damages, *Carriers, Common and Private*

Personal Injury: Actions, Defenses, Damages, *Subways, Street and Elevated Railways*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewTortsTransportation TortsGeneral OverviewTransportation LawPublic TransportationTransportation LawCarrier Duties & LiabilitiesDamages

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§ 106.31 State Constitution

Common carriers are public utilities subject to control and regulation by Public Utilities Commission; restriction on local control. *Cal. Const., art. XII, §§ 3, 8*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 106.32 Federal Statutes

Regulation of transportation of passengers by motor carriers engaged in interstate or foreign commerce. *49 U.S.C. §§ 10521-10526*

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10-106 California Forms of Pleading and Practice--Annotated § 106.33

§ 106.33 State Statutes

[1] Definitions

Common carrier. *Civ. Code § 2168*; *Pub. Util. Code § 211*

Common carrier includes street railroad corporation and passenger stage corporation. *Pub. Util. Code § 211(a), (c)*

Common carrier is included in definition of public utility. *Pub. Util. Code § 216*

Passenger stage. *Pub. Util. Code § 225*

Passenger stage corporation. *Pub. Util. Code § 226*

Street railroad. *Pub. Util. Code § 231*

Street railroad corporation. *Pub. Util. Code § 232*

Bus. *Veh. Code § 233*

General public paratransit vehicle. *Veh. Code § 336*

Schoolbus. *Veh. Code § 545*

Tour bus. *Veh. Code § 612*

Trailer bus. *Veh. Code § 636*

Trolley coach. *Veh. Code § 650*

[2] Duties of Carriers

Gratuitous carrier. *Civ. Code §§ 2089, 2090*

Duties of carriers regarding carriage of persons. *Civ. Code § 2096 et seq.*

Carrier of persons for reward is obligated to use utmost care and diligence for passengers' safety. *Civ. Code § 2100*

Carrier of persons for reward is obligated to provide safe vehicles and any default is not excused by any degree of care. *Civ. Code § 2101*

Common carriers. *Civ. Code §§ 2168 et seq., 2180 et seq.*

Duty of charter-party carrier to state permit number or identifying symbol in advertisement. *Pub. Util. Code § 5386*

[3] Operation, Maintenance, and Regulation of Vehicles

Social service transportation is not subject to provisions of Public Utilities Code and authority of Public Utilities Commission relating to common carriers. *Gov. Code § 15985*

Regulation of some intrastate passenger transportation services is preempted by Bus Regulatory Reform Act of 1982 (Pub. L. No. 97-261), as amended. *Pub. Util. Code § 226(g)*

Suspension or revocation of certificate or permit of charter-party carrier for violation of safety provisions. *Pub. Util. Code § 5378.5*

Certificate to operate general public paratransit vehicle. *Veh. Code §§ 12517.2, 12517.3, 12517.4*

Certificate to operate tour bus. *Veh. Code § 12519.5*

Regulation by Department of Motor Vehicles of buses and general public paratransit vehicles. *Veh. Code § 34500 et seq.*

Required tour bus equipment inspections. *Veh. Code § 34505*

Denial, suspension, or revocation of operating authority for inadequate inspection compliance or failure to comply with reporting requirements. *Veh. Code § 34505.1*

[4] Penal Provisions

Willful removal of, tampering with, or destruction of passenger transit vehicle or of transit system, or obstruction of transit system right-of-way, or willful setting in motion of vehicle as felony. *Penal Code § 625c*

Advertising charter-party carrier service without permit is a misdemeanor. *Pub. Util. Code § 5414.5*

Failure of street railroad corporation to maintain safe brakes and fenders is a misdemeanor. *Pub. Util. Code § 7817*

Operation of streetcar while intoxicated is a misdemeanor. *Pub. Util. Code § 7818*

[5] Street Railroads

Duties regarding railroad equipment generally. *Pub. Util. Code § 7601 et seq.*

Duties regarding operation of railroads generally. *Pub. Util. Code § 7653 et seq.*

Ejectment of passenger on street railroad refusing to pay fare. *Pub. Util. Code §§ 7656, 7801*

Laws relating to railroad corporation as applicable to street railroads. *Pub. Util. Code § 7801*

Construction of street railway cars. *Pub. Util. Code § 7810*

Legal Topics:

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

[1] Carrier-Passenger Relationship

Common carriers owe a duty of utmost care and vigilance of a very cautious person towards their passengers. *Acosta v. Southern California Rapid Transit Dist. (1970) 2 Cal. 3d 19, 27* ; *Rogers v. Los Angeles Transit Lines (1955) 45 Cal. 2d 414, 417, 289 P.2d 226*

Carrier-passenger relationship arises when a passenger enters the vehicle with intent to pay or pays fare or goes to site of departure and carrier's actions indicate acceptance of person as passenger. *Gray v. City & County of San Francisco (1962) 202 Cal. App. 2d 319, 323, 20 Cal. Rptr. 894* ; *Lagomarsino v. Market Street Ry. Co. (1945) 69 Cal. App. 2d 388, 395, 158 P.2d 982* ; *Sanchez v. Pacific Auto Stages (1931) 116 Cal. App. 392, 396-398, 2 P.2d 845*

Carrier-passenger relationship is not sustained when prospective passenger merely stands in indicated area prior to immediate approach of carrier's vehicle. *Lagomarsino v. Market S. R. Co. (1945) 69 Cal. App. 2d 388, 395*

Carrier assuming duty of conducting passenger to point of departure creates a carrier-passenger relationship. *Sanchez v. Pacific Auto Stages (1931) 116 Cal. App. 392, 396-397, 2 P.2d 845*

Carrier slowing down its vehicle to enable some persons to board it establishes carrier-passenger relationship. *Hart v. Fresno Traction Co. (1917) 175 Cal. 489, 491, 167 P. 885*

Carrier slowing its vehicle to virtual standstill in response to prospective passenger's signal and person starting to board vehicle creates carrier-passenger relationship. *Nilson v. Oakland Traction Co. (1909) 10 Cal. App. 103, 109, 101 P. 413*

Creation of carrier-passenger relationship by carrier's acceptance of person as passenger can be being implied regardless of whether carrier actually knows of passenger's presence on vehicle. *Ivancich v. Davies (1921) 186 Cal. 520, 523-524, 199 P. 784* ; *Hellman v. Los Angeles Ry. Corp. (1934) 135 Cal. App. 627, 635, 27 P.2d 946*

[2] Buses

Assumption of risk is not shown, and jury is justified in concluding that bus passenger did not have actual knowledge and appreciation of danger involved in resting arm on window sill of bus so as to find that he consented to risk or knew of and appreciated hazard. *Rogers v. Los Angeles Transit Lines (1955) 45 Cal. 2d 414, 418, 289 P.2d 226*

Evidence of carrier's custom of stopping bus in crosswalk, even though it tends to show violation of law, is admissible to prove right of passenger who was familiar with custom to rely on its continuance. *Fowler v. Key System Transit Lines (1951) 37 Cal. 2d 65, 73, 230 P.2d 339*

Passenger assumes known risk of ordinary movements of bus or streetcar. *Mudrick v. Market Street Ry. Co. (1938) 11 Cal. 2d 724, 733-734, 81 P.2d 950* ; *McIntosh v. Los Angeles Ry. Corp. (1936) 7 Cal. 2d 90, 96, 59 P.2d 959* ; *Tait v. San Francisco (1956) 143 Cal. App. 2d 787, 793, 300 P.2d 74*

Res ipsa loquitur is applicable to passenger injury caused when bus lurched as it rounded curve. *McIntosh v. Los Angeles Ry. Corp. (1936) 7 Cal. 2d 90, 93-94, 59 P.2d 959* ; *Ferrate v. Key System Transit Lines (1958) 165 Cal. App. 2d 391, 397-398, 331 P.2d 991*

Carrier is not liable to prospective passenger who falls while standing on sidewalk marked as bus zone. *Kotronakis v. City & County of San Francisco (1961) 192 Cal. App. 2d 624, 627, 13 Cal. Rptr. 709*

Res ipsa loquitur is applicable when bus passengers are injured as result of collision between car and bus. *Stewart v. Miranda (1959) 170 Cal. App. 2d 373, 375, 338 P.2d 941*

Res ipsa loquitur is applicable when bus seat breaks and causes injuries to passenger's leg despite absence of unusual streetcar movements or movements of person in seat. *Adam v. Los Angeles Transit Lines (1957) 154 Cal. App. 2d 535, 538-540, 317 P.2d 642*

Res ipsa loquitur is applicable when bus comes to sudden stop after having run into ladders that extended from truck in front of bus. *Jacob v. Key System Transit Lines (1956) 140 Cal. App. 2d 357, 361, 363, 295 P.2d 569*

Bus stopping away from sidewalk curb but as close as practical under circumstances does not establish negligence. *MacLean v. City & County of San Francisco (1954) 127 Cal. App. 2d 263, 272, 273 P.2d 698*

Carrier is not responsible for injuries to passenger who alights safely from bus but is injured by condition of street that must be crossed to reach sidewalk. *MacLean v. City & County of San Francisco (1954) 127 Cal. App. 2d 263, 271, 273 P.2d 698*

Passenger who alights from bus in complete safety and then crosses street where there is no crosswalk assumes responsibility for his conduct. *Hill v. Wilson (1954) 124 Cal. App. 2d 472, 475, 268 P.2d 748*

In action by passenger for injuries received from fall caused by sudden stopping of bus, defense of imminent peril is available. *Abney v. City & County of San Francisco (1953) 115 Cal. App. 2d 506, 514, 252 P.2d 654* (bus stopped to avoid hitting child); *Dodge v. San Diego Electric Ry. Co. (1949) 92 Cal. App. 2d 759, 767, 208 P.2d 37* (bus stopped to avoid collision)

When passenger is injured by sudden stopping of bus, appellate court as bound by finding of judge in nonjury case that driver was confronted with choice of either stopping bus or striking car in front of it; issue whether bus driver acted in manner that was reasonably prudent for safety of his passengers is question of fact. *Aboudara v. City & County of San*

Francisco (1952) 114 Cal. App. 2d 630, 632, 251 P.2d 32

Res ipsa loquitur is applicable when passenger is injured by suitcase falling from luggage rack because of sudden bus movement. *Williamson v. Pacific Greyhound Lines (1947) 78 Cal. App. 2d 482, 486-488, 177 P.2d 977*

Res ipsa loquitur is applicable when bus runs off highway. *Lawrence v. Pickwick Stages, N.D. (1924) 68 Cal. App. 494, 498-499, 229 P. 885*

[3] Carriers' Duty of Care

Common carriers have duty to exercise utmost degree of care. *McBride v. Atchison, T. & S. F. R. Co. (1955) 44 Cal. 2d 113, 116, 279 P.2d 966* (railroad accident); *Greyhound Lines, Inc. v. Superior Court (1970) 3 Cal. App. 3d 356, 360, 83 Cal. Rptr. 343 , cert. denied, 400 U.S. 868*

Carrier is not insurer of absolute safety of passengers. *Rocray v. Pasadena City Lines, Inc. (1958) 159 Cal. App. 2d 265, 269, 323 P.2d 772*

[4] Street Railroads

Refusing to give instruction that riding on steps of streetcar constituted contributory negligence as matter of law is proper when instruction omitted important qualification that conduct might be excused under certain circumstances. *Combs v. Los Angeles Railway Corp. (1947) 29 Cal. 2d 606, 609, 177 P.2d 293* , disapproved on other ground in *Alarid v. Vanier (1958) 50 Cal. 2d 617, 623-624, 327 P.2d 897*

Negligence is not shown when person had no reason to believe safety zone in which he was standing would be within area of overswing of streetcar making turn. *Brandenburg v. Pac. Gas & Elec. Co. (1946) 28 Cal. 2d 282, 287, 169 P.2d 909*

Carrier is obligated to instruct streetcar motorman to warn any person, whether passenger or not, of danger existing from improper location of safety zone that created foreseeable risk of danger from overswing of turning streetcar. *Brandenburg v. Pac. Gas & Elec. Co. (1946) 28 Cal. 2d 282, 286-287, 169 P.2d 909*

Streetcar and automobile drivers owe to each other reciprocal duties of care on approaching intersection. *Wright v. Los Angeles Ry. Corp. (1939) 14 Cal. 2d 168, 173, 93 P.2d 135* ; *Aungst v. Central California Trac. Co. (1931) 115 Cal. App. 113, 116, 1 P.2d 56*

Res ipsa loquitur is applicable when passenger is injured in collision between two streetcars. *Osgood v. Los Angeles etc. Co. (1902) 137 Cal. 280, 283, 70 P. 169* ; *Hyman v. Market Street Ry. Co. (1940) 41 Cal. App. 2d 647, 650-651, 107 P.2d 485*

Street railway company is liable as principal for all actual damages suffered by passenger from wrongful expulsion by conductor even though conductor was expressly forbidden to act as he did; carrier is not liable for exemplary and punitive damages unless employee's acts were within express or implied authority of employer. *Turner v. N. B. & M. R.R. Co. (1868) 34 Cal. 594, 599-600*

In passenger's suit for personal injuries caused by sudden swerving of bus to avoid collision with automobile and subsequent overturning of bus, whether bus was in position of imminent danger when driver first saw oncoming car, and whether driver's subsequent conduct constituted negligence, are jury questions. *James v. American Buslines (1952) 111 Cal. App. 2d 273, 276, 244 P.2d 503*

Streetcar operator approaching traffic-congested avenue in highly developed area with another streetcar obscuring view of operator is approaching place fraught with peril; operator is required to be constantly on lookout and to use such reasonable precautions as circumstances require. *Saphire v. Los Angeles Transit Lines (1950) 99 Cal. App. 2d 880, 883, 222 P.2d 956*

In passenger's suit for personal injuries caused by sudden application of brakes by streetcar operator to avoid hitting truck that suddenly entered street, jury instruction on sudden emergency doctrine is proper. *Bovette v. Los Angeles Transit Lines (1947) 78 Cal. App. 2d 860, 863, 179 P.2d 80*

Streetcar operator is required to use ordinary degree of care not to injure pedestrian in crosswalk; pedestrian is entitled to rely on streetcar to sound warnings it customarily sounds when approaching point where he walks. *Amendt v. Pacific Elec. Ry. Co. (1941) 46 Cal. App. 2d 248, 253, 115 P.2d 588*

Pedestrian and streetcar have mutual rights to use area of streetcar tracks, and pedestrian is not negligent as matter of law because he crosses streetcar track knowing car is approaching or because he walks in close proximity thereto. *Amendt v. Pacific Elec. Ry. Co. (1941) 46 Cal. App. 2d 248, 253, 115 P.2d 588*

Carrier is liable for streetcar's premature start that caused injury to passenger. *Keyser v. San Diego Electric Ry. Co. (1936) 16 Cal. App. 2d 48, 55, 60 P.2d 136*

Passenger is negligent when he boards moving streetcar in violation of ordinance and conduct proximately contributes to passenger's injury. *Schultheiss v. Los Angeles Ry. Corp. (1936) 11 Cal. App. 2d 525, 527, 54 P.2d 49*

Negligence finding is sustained on appeal by evidence that passenger had worked in neighborhood, had taken streetcar for over a year, and knew that rear overhang of car would jut out as it went around curve. *Dwyer v. Los Angeles Ry. Corp. (1931) 115 Cal. App. 709, 712, 2 P.2d 468*

Streetcar operator is required to be vigilant in watching for automobiles approaching tracks and to have his streetcar under control when approaching street intersection. *Bennett v. Central California Trac. Co. (1931) 115 Cal. App. 1, 12, 1 P.2d 47*

Fact that streetcar is not exceeding speed limit as it approaches street intersection is not excusing negligent operation of car. *Bennett v. Central California Trac. Co. (1931) 115 Cal. App. 1, 12, 1 P.2d 47*

Workman whose duty requires him to be on street is not required to look continually for approach of streetcar. *Driscoll v. California St. R.R. Co. (1926) 80 Cal. App. 208, 219, 250 P. 1062* (municipal employee excavating between streetcar tracks struck by car); *Milosevich v. Pacific Electric Ry. Co. (1924) 68 Cal. App. 662, 672, 230 P. 15* (pipe layer struck by streetcar and killed)

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawPublic TransportationTortsNegligenceProofRes Ipsa LoquiturGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState & Local RegulationTransportation LawRail TransportationState & Local RegulationTortsNegligenceStandards of CareSpecial CareCommon Carriers

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§ 106.35 Text References

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 923-932, 1377-11402 (10th ed. 2005)

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[Reserved]

§§ 106.36[Reserved]

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10-106 California Forms of Pleading and Practice--Annotated § 106.40

§ 106.40 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Injured While Boarding Bus

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Injured While Boarding Bus
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*], [and DOES I	)	(Negligence)
through _____,]	)	[Amount demanded _____
Defendants.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. Defendant _____ [*name of carrier*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California, with its principal place of business in _____ [*city*], _____ County, California, and doing business as a [common] carrier [of passengers for reward] [*or allege other capacity and venue*].

2. Defendant _____ [*name of agent*] is, and at all times herein mentioned was, a resident of

_____ [*city*], _____ County, California [*or allege other capacity and residence*].

3. [Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1 through _____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of such fictitiously named defendants is negligently responsible in some manner for the occurences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by such negligence.)]

4. At all times herein mentioned, defendant _____ [*name of carrier*] owned, operated, maintained, and controlled a certain _____ [*e.g.*, system of buses *or designate other type of vehicle*] used to transport passengers over, among others, a route _____ [from _____ to _____ *or* along _____ Street in _____ (*city*), California].

5. At all times herein mentioned, defendant _____ [*name of agent*] was the agent and employee of his codefendant and in doing all of the things herein mentioned was acting within the scope of his authority and employment as such agent and employee and with the permission and consent of his codefendant.

6. On or about _____ [*date*], at about _____ [*time*], plaintiff stood waiting to board one of the _____ [buses *or designated or other type of vehicle*] used by defendant _____ [*name of carrier*] on its _____ line [*identify line or route by common name or number*], at or near the intersection of _____ and _____ Streets in _____ [*city*], California, in the place designated by defendant _____ [*name of carrier*] for such purpose, and on the arrival of the _____ [bus *or designate other type of vehicle*], plaintiff attempted to board it. Plaintiff was ready and able to pay the fare for transportation on the _____ [bus *or designate other type of vehicle*].

Defendant _____ [*name of agent*], while plaintiff was in the process of boarding the _____ [bus *or designate other type of vehicle*], and at times prior thereto, so negligently managed, maintained, drove, operated, and controlled the _____ [bus *or designate other type of vehicle*] and the equipment thereon that plaintiff was hit by and thrown violently against parts of the _____ [bus *or designate other type of vehicle*] and thrown violently to the ground, causing plaintiff to sustain severe and painful injuries as alleged below.

7. As a proximate result of the negligence of defendants, and each of them, plaintiff was hurt and injured in his health, strength, and activity, sustaining injury to his body and shock and injury to his nervous system and person, all of which injuries have caused and continue to cause plaintiff great mental, physical, and nervous pain and suffering and plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disablility to him. As a result of such injuries, plaintiff has suffered general damage.

8. As a further proximate result of the negligence of defendants, and each of them, plaintiff has incurred and will continue to incur medical and related expenses.

[*EITHER*]

9. As a further proximate result of the negligence of defendants, and each of them, plaintiff's earnings capacity has been greatly impaired, both in the past and at present.

[*OR*]

9. As a further proximate result of the negligence of defendants, and each of them, plaintiff was presented from attending to his usual occupation as a _____ [*state occupation*] and thereby lost earnings.

10. Furthermore, plaintiff's future earning capacity has been diminished and impaired.

[*CONTINUE*]

[11. On or about _____ (*date*), plaintiff presented to _____ (*name of governmental entity*) by _____ (delivering *or* mailing) a claim to the _____ (clerk *or* secretary *or* auditor) for the injuries, disability, losses, and damages suffered and incurred by him by reason of the above described occurrence, all in compliance with the requirements of *Section 905 of the Government Code*. A copy of the claim is attached hereto as Exhibit A and made a part hereof.]

[12. On or about _____ (*date*), _____ (*name of governmental entity*) _____ (rejected the claim in its entirety *or* allowed the claim in the amount of $_____ and rejected it as to the remainder *or* failed to act on the claim within the period of forty-five days after its presentation, and the claim was thus deemed rejected, under the provisions of *Section 912.4 of the Government Code*, at the expiration of the forty-five day period, to wit, on _____ (*date*)).]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages according to proof.

2. For medical and related expenses according to proof.

3. For loss of earnings according to proof.

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

by: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I,_____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. _____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This complaint is for damages for personal injuries based on negligence brought by a passenger who was attempting to board the vehicle of a carrier of passengers for reward or a common carrier of passengers.

[3] Allegations

The complaint alleges: (1) a legal duty on the carrier's part to use the highest degree of care for the passenger's safety pursuant to *Civ. Code § 2100* (Paragraphs 4-6); (2) a breach of such duty (Paragraph 6); (3) injury to person proximately caused by such breach (Paragraph 7); and (4) damages (Paragraphs 7-10).

The complaint also alleges the filing of a claim with a public entity and either its total or partial rejection (Paragraphs 11-12). This allegation must be used if the passenger was injured by a vehicle owned and operated by a public transit authority because *Gov. Code § 905* requires that such a claim be presented to the appropriate public entity as a prerequisite to filing suit against it.

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*], or an equivalent statement must be included--for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177 *Damages,* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[6] Carrier-Passenger Relationship

A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill [*Civ. Code § 2100*]. While a carrier of persons for reward is obligated to exercise this high standard of care for the safety of its passengers, it needs to utilize only ordinary care for the safety of nonpassengers [*see Amendt v. Pacific Elec. Ry. Co. (1941) 46 Cal. App. 2d 248, 253, 256, 115 P.2d 588* (pedestrian); *Sanchez v. Pacific Auto Stages (1931) 116 Cal. App. 392, 396, 2 P.2d 845* (station premises)]. It is therefore essential for a plaintiff to allege that he was a passenger of the carrier in order to

activate the higher standard of care. The relation of carrier and passenger does not exist where a prospective passenger is merely standing in an indicated area prior to the immediate approach of the carrier's vehicle [*Lagomarsino v. Market Street Ry. Co. (1945) 69 Cal. App. 2d 388, 395, 158 P.2d 982]* , but it arises when the carrier acts in a way which indicates an acceptance of the person as a passenger [*Gray v. City & County of San Francisco (1962) 202 Cal. App. 2d 319, 323, 20 Cal. Rptr. 894]* .

The range of actions by the carrier which can indicate an acceptance of a person as a passenger is wide. Included are actions such as assuming the duty of conducting the person to the point of departure [*Sanchez v. Pacific Auto Stages (1931) 116 Cal. App. 392, 396-397, 2 P.2d 845* (helping person across highway)], stopping the vehicle and preparing to immediately recieve a person as a passenger who intends to board the vehicle and is standing alongside the vehicle [*Lagomarsino v. Market Street Ry. Co. (1945) 69 Cal. App. 2d 388, 395, 158 P.2d 982]* , slowing down the vehicle to enable some persons to board it [*Hart v. Fresno Traction Co. (1917) 175 Cal. 489, 491, 167 P. 885]* , and slowing a vehicle to a virtual standstill in response to a prospective passenger's signal and the person is in the act of boarding the vehicle [*Nilson v. Oakland Traction Co. (1909) 10 Cal. App. 103, 109, 101 P. 413]* . Hence, while it is not necessary to allege actual payment of the fare and, furthermore, while the relation of carrier and passenger can be implied [*Ivancich v. Davies (1921) 186 Cal. 520, 523-524, 199 P. 784* ; *Hellman v. Los Angeles R. Corp. (1934) 135 Cal. App. 627, 635, 27 P.2d 946]* , as the four preceding cases indicate it is essential to allege some facts which demonstrate that the operator of the vehicle accepted the person as a passenger in order to activate the high standard of care required of carriers for reward.

[7] Cross References

See generally Ch. 380, *Negligence*

For alternative allegations as to capacity and residence of parties, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* and Ch. 572, *Verification* , respectively

For allegations against a railroad by a passenger injured while boarding a train, see Ch. 485, *Railroads*

For an allegation by a taxicab passenger injured while boarding a taxicab, see Ch. 544, *Taxicabs*

For forms of interrogatories for use in actions involving the operation of buses or streetcars, see Bender's Forms Of Discovery, *Buses and Streetcars*

Note, *Common Carriers: Special Duties Owed a Prospective Passenger, 33 So. Cal. L. Rev. 219 (1960)*

Witkin, California Procedure, vol. 3, *Actions*, §§ 169-221; vol. 4, *Pleading*, §§ 567-575 (4th ed. 1997)

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 203-262, 264-343, 345-380; vol. 6, *Torts*, §§ 923-928 (10th ed. 2005)

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10-106 California Forms of Pleading and Practice--Annotated § 106.41

§ 106.41 Allegations--Boarding Passenger Injured When Struck by Closing Doors

[1] FORM Allegations--Boarding Passenger Injured When Struck by Closing Doors

1. Defendant _____ [*name of carrier*], on or about _____ [*date*], while engaged as a [common] carrier [of passengers for reward], by and through its agents, servants, and employees, stopped one of its _____ [buses *or designate other type of vehicle*] at the _____ corner of the intersection of _____ and _____ Streets in _____ [*city*], California, and invited plaintiff, who was then standing at or near that corner, to board the vehicle. Plaintiff accepted the invitation and commenced to board the vehicle at the place provided for persons to board it with the means and intention of paying his fare and being carried by defendant as a passenger for reward. Defendant then and there received the plaintiff as a passenger for reward.

2. Defendant _____ [*name of carrier*], by and through its agents and employees, then and there negligently and carelessly failed to manage, operate, and control the _____ [bus *or designate other type of vehicle*] in a careful and prudent manner with the utmost care and diligence for the safety and welfare of plaintiff as a passenger as he was boarding the _____ [bus *or designate other type of vehicle*], in that defendant, acting by and through its agents and employees, negligently, carelessly, and unlawfully caused the doors of the _____ [bus *or designate other type of vehicle*] to close and thus to strike plaintiff, and then to open and close rapidly, again striking plaintiff with great force and violence, causing plaintiff to be thrown to the _____ [ground *or* floor of the vehicle], and thereby injuring plaintiff as alleged below.

[2] Use of Form

These allegations are for use in a complaint in an action by a passenger injured by the closing doors of a bus, streetcar, or other transit vehicle while the passenger was attempting to board the vehicle. The complaint alleges that a carrier is liable for doors closing on a boarding passenger [*Rocray v. Pasadena City Lines, Inc. (1958) 159 Cal. App. 2d 265, 270, 323 P.2d 772* ; *Gamwell v. Key System Transit Lines (1956) 140 Cal. App. 2d 308, 309-310, 294 P.2d 1035]* .

[3] Cross References

For discussion of the carrier-passenger relationship, see *§ 106.40[6]*

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10-106 California Forms of Pleading and Practice--Annotated § 106.42

§ 106.42 Allegations--Passenger With Special Physical Condition Injured While Attempting to Board Bus

[1] FORM Allegations--Passenger With Special Physical Condition Injured While Attempting to Board Bus

1. Defendant _____ [*name of carrier*], on or about _____ [*date*], while engaged as a [common] carrier [of passengers for reward], by and through its agents, servants, and employees, stopped one of its _____ [buses *or designate other type of vehicle*] at the _____ corner of the intersection of _____ and _____ Streets in _____ [*city*], California, and invited plaintiff, who was then standing at or near that corner, to board the vehicle. Plaintiff accepted the invitation and commenced to board the vehicle at the place provided for persons to board it, with the means and intention of paying his fare and being carried by defendant as a passenger for reward. Defendant received the plaintiff as a passenger for reward.

2. Plaintiff is, and at that time was, obviously and apparently _____ [blind *or* sick *or* aged *or* very young *or* crippled *or* infirm]. Defendant _____ [*name of carrier*], by and through its agent and employee _____ [*name of agent*], negligently and carelessly failed to render plaintiff the necessary assistance in boarding the _____ [bus *or designate other type of vehicle*]. As a proximate result thereof, plaintiff fell to the _____ [ground *or* floor of the vehicle], thereby injuring plaintiff as alleged below.

[2] Use of Form

These allegations are for use in a complaint in an action by a passenger with a known special physical condition who was injured while boarding the carrier's vehicle because of the carrier's failure to render the passenger necessary assistance. A carrier is obligated to render necessary assistance, in boarding or alighting, to a passenger who is known to be blind, sick, aged, very young, crippled or infirm [*McBride v. Atchison, T. & S. F. R. Co. (1955) 44 Cal. 2d 113, 119120, 279 P.2d 966* (crippled passenger's crutches slipped on wet cigar butt lying on train steps)]. In general, a carrier owes a greater degree of care to child passengers than to adult passengers [*Mudrick v. Market Street Ry. Co. (1938) 11 Cal. 2d 724, 734, 81 P.2d 950* ; *Brizzolari v. Market S. R. Co. (1935) 7 Cal. App. 2d 246, 248, 46 P.2d 783]* .

[3] Cross References

For discussion of the carrier-passenger relationship, see *§ 106.40[6]*

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10-106 California Forms of Pleading and Practice--Annotated § 106.43

§ 106.43 Allegation--Bus Stopped Outside Bus Zone--Passenger's Trip and Fall

[1] FORM Allegation--Bus Stopped Outside Bus Zone--Passenger's Trip and Fall

On _____ [*date*], at or about _____ [*time*], at the _____ corner of _____ and _____ Streets, plaintiff sought to board a _____ [bus *or designate other type of vehicle*] owned and operated by defendant _____ [*name of carrier*] and its agents, servants, and employees. Defendant so carelessly, negligently, and unlawfully stopped the _____ [bus *or designate other type of vehicle*] outside the zone provided to take on passengers and in a place unfit for the embarkation of passengers, to wit: _____ [immediately adjacent to and above an open grill sewer cover, so that plaintiff in attempting to board the _____ (bus *or designate other type of vehicle*) stepped off the curb and fell through the open grill work of the sewer cover with a part of his shoe, and tripped and fell violently to the pavement *or* immediately adjacent to a large hole, so that plaintiff in attempting to board the _____ (bus *or designate other type of vehicle*) stepped off the curb and slipped and fell violently to the pavement after stepping off the curb].

[2] Use of Form

This allegation is for use in a complaint in an action by a passenger injured by the negligence of the operator in stopping the vehicle in an unsafe area, outside the zone marked for the purpose.

[3] Cross References

For discussion of the carrier-passenger relationship, *see § 106.40[6]*

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10-106 California Forms of Pleading and Practice--Annotated § 106.44

§ 106.44 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Injured While Being Conducted by Carrier's Employee Preparatory to Boarding Bus

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Injured While Being Conducted by Carrier's Employee Preparatory to Boarding Bus

[*Caption. See Form at § 106.40[1].*]

Plaintiff alleges:

1. [*Capacity of defendants. See § 106.40[1] , Paragraph 1.*]

2. [*Residence of defendants. See § 106.40[1] , Paragraph 2.*]

3. [*Fictitious name allegation, if appropriate. See § 106.40[1] , Paragraph 3.*]

4. [*Agency allegation. See § 106.40[1] , Paragraph 5.*]

5. At all times herein mentioned, defendant _____ [*name of carrier*] owned, operated, maintained, and controlled a certain _____ [*e.g.*, system of buses *or designate other type of vehicle*] used to transport passengers over, among others, a route _____ [from _____ to _____ *or* along _____ Street in _____ (*city*), California].

6. On or about _____ [*date*], at about _____ [*time*], plaintiff presented himself at the place provided for by defendant _____ [*name of carrier*] and offered to become a passenger on one of defendant's _____ [buses *or designate other type of vehicle*] and plaintiff paid the fare

demanded by defendant _____ [*name of agent*], a _____ [*e.g.*, ticket agent *or designate other type of employee*], who was the duly authorized servant, agent, and employee of defendant _____ [*name of carrier*]. In consideration of the fare so paid to it by the plaintiff, defendant _____ [*name of carrier*] undertook and agreed as a carrier of passengers to transport and convey plaintiff from the point where the fare was paid by the plaintiff to _____ [*destination*].

7. Thereafter, at about _____ [*time*] of that day, defendant _____ [*name of carrier*] through its servant, agent, and employee defendant _____ [*name of agent*] undertook to conduct plaintiff from the point where he had been accepted as a passenger and had paid the fare so demanded from him to the point where plaintiff was to board the _____ [bus *or designate other type of vehicle*] for the purpose of placing plaintiff into and on the vehicle. While plaintiff was being conducted and assisted by defendant _____ [*name of agent*] and walking across _____ [Highway _____ *or designate other unsafe area*], defendant _____ [*name of agent*] so negligently and carelessly conducted and assisted plaintiff as to cause plaintiff to _____ [be struck by an automobile being operated carelessly and negligently and proceeding along Highway _____ in a _____ direction *or* slip and fall violently to the ground].

8. By reason of the failure of defendant _____ [*name of carrier*] to provide plaintiff a safe and suitable place and means for boarding the _____ [bus *or designate other type of vehicle*] and by reason of the negligence of defendant _____ [*name of agent*] in conducting plaintiff over and across _____ [Highway _____ *or designate other unsafe area*], plaintiff _____ [was struck *or* slipped and fell] as aforementioned and was thrown violently on the _____ [pavement of the highway *or* ground], causing plaintiff to suffer personal injuries as hereinafter alleged.

9-12. [*Injuries and damages. See § 106.40[1] , Paragraphs 7-10.*]

13-14. [*Filing of claim with and rejection by governmental entity where it is one of the defendants. See § 106.40[1] , Paragraphs 11-12.*]

[*Prayer. See § 106.40[1].*]

_____ [*firm name, if any*]

by: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired, See § 106.40[1].*]

[2] Use of Form

This form of complaint is for damages for personal injuries based on negligence brought by a passenger who was injured while being conducted across a highway or other unsafe area by one of the carrier's agents. A carrier that assumes the duty of conducting a passenger to the point of departure has created a carrier-passenger relationship [*Sanchez v. Pacific Auto Stages (1931) 116 Cal. App. 392, 396-397, 2 P.2d 845]* .

[3] Cross References

For discussion of the carrier-passenger relationship, *see § 106.40[6]*

Note, "Common Carriers: Special Duties Owed a Prospective Passenger," *33 So. Cal. L. Rev. 219 (1960)*

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10-106 California Forms of Pleading and Practice--Annotated § 106.45

§ 106.45 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Transit District--Passenger Thrown to Floor When Bus Stopped Suddenly

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Transit District--Passenger Thrown to Floor When Bus Stopped Suddenly

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR
vs.	)	DAMAGES
_____ [*name*],	)	(Negligence)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, a public corporation organized and existing under the laws of the State of California with its principal office for the transaction of business in _____ [*city*], _____ County, California. At all times herein mentioned, defendant was in the business of operating a public bus transit system in _____ [*city*], _____ County, California.

2. At all times herein mentioned, defendant owned and operated as part of its business activities a bus bearing California License No. _____. This bus was involved in the accident alleged below.

3. At all times herein mentioned _____ Street and _____ Street were and are

intersecting public streets and highways in _____ [*city*], _____ County, California, and run in a _____ and a _____ direction, respectively.

4. On _____ [*date*], at about _____ [*time*], plaintiff was a fare paying passenger on defendant's above described bus which was traveling _____ [*direction*] on _____ Street _____ [*direction*] of its intersection with _____ Street.

5. At that time and place, the bus was being operated by one _____ [*name*] who was the agent and employee of defendant and was operating the bus in the course and scope of his agency and employment.

6. At that time and place, defendant through its agents and employees so negligently owned, operated, and maintained its bus as to cause it to stop suddenly.

7. As a proximate result of the negligence of defendant, as herein alleged, plaintiff was knocked to the floor of the bus, whereby he sustained serious and severe injuries, some of which may be permanent, to various parts of his body, and was rendered sick, sore, and disabled, all to his damage.

8. As a further proximate result of defendant's negligence, as herein alleged, and the injuries sustained by plaintiff, plaintiff was reasonably required to incur, and did incur, expenses for extensive hospitalization, medical attention and treatment, and allied services in a total amount presently undetermined. Plaintiff is informed and believes, and thereon alleges, that he will reasonably be required in the future to incur additional expenses for hospitalization, medical care and treatment, and related services.

9. As a further proximate result of defendant's negligence, as herein alleged, plaintiff was rendered unable to engage in his usual occupation of _____ [*specify*]. Plaintiff is informed and believes, and thereon alleges, that he will continue for some time in the future to be unable to pursue his occupation.

10. On _____ [*date*], plaintiff filed a verified claim with defendant for damages sustained by him as a result of the negligence of defendant as herein alleged. A copy of the claim is attached hereto as Exhibit A and made a part hereof.

11. _____ [On _____ (*date*), defendant rejected and denied plaintiff's claim _____ (in full *or* except as to $_____) *or* Defendant neither approved nor rejected plaintiff's claim within the time provided by law, and the claim is therefore, under the provisions of *Section 912.4 of the Government Code*, deemed denied].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages according to proof for personal injury.

2. For hospital, medical, and allied expenses according to proof.

3. For loss of earnings according to proof.

4. For costs of suit herein incurred.

5. For such other relief as the court may deem proper.

_____ [*firm name, if any*]

by: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 106.40[1].*]

[2] Use of Form

This form of complaint is for damages for personal injuries based on negligence brought by a passenger who was thrown to the floor when the bus stopped suddenly. A passenger is not required, as matter of law, to anticipate a "sudden" or "violent" jerk that has sufficient force to throw the passenger to the ground [*Acosta v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 19, 27, 84 Cal. Rptr. 184, 465 P.2d 72* ; *Dempsey v. Market Street Ry. Co. (1943) 23 Cal. 2d 110, 113, 142 P.2d 929]* . The form is adapted from the complaint filed in *Acosta v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 19, 84 Cal. Rptr. 184, 465 P.2d 72* . In *Acosta*, the plaintiff sued only the transit district without joining the bus driver. For a complaint which names the driver of the vehicle as well, see *§ 106.40[1]*.

The res ipsa loquitur doctrine creates an inference of a carrier's negligence when a passenger is injured in the movement or operation of the carrier's vehicle [*Hardin v. San Jose City Lines, Inc. (1953) 41 Cal. 2d 432, 436, 260 P.2d 63* ; *Mudrick v. Market Street Ry. Co. (1938) 11 Cal. 2d 724, 729-734, 81 P.2d 950* ; *Gray v. City & County of San Francisco (1962) 202 Cal. App. 2d 319, 326, 20 Cal. Rptr. 894]* . This doctrine applies to a passenger's injury that is caused when the carrier's vehicle starts with a jerk [*McIntosh v. Los Angeles Ry. Corp. (1936) 7 Cal. 2d 90, 93-94, 59 P.2d 959* ; *Ferrate v. Key System Transit Lines (1958) 165 Cal. App. 2d 391, 397-398, 331 P.2d 991* ; *Kerr v. Key Sys. Transit Lines (1956) 145 Cal. App. 2d 631, 633-635, 302 P.2d 884* ; *Freitas v. Peerless Stages, Inc. (1952) 108 Cal. App. 2d 749, 758, 239 P.2d 671]* .

[3] Cross References

For discussion of the carrier-passenger relationship, *see § 106.40[6]*

Note, "Torts: Jerks and Jolts on Common Carriers," *4 Hastings LJ 72 (1952)*

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10-106 California Forms of Pleading and Practice--Annotated § 106.46

§ 106.46 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Thrown to Floor by Sudden Jolt or Stop

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Thrown to Floor by Sudden Jolt or Stop

[*Caption. See § 106.40[1].*]

Plaintiff alleges:

1-2. [*Capacity and residence of defendants. See § 106.40[1] , Paragraphs 1, 2*]

3. [*Fictitious name allegation, if appropriate. See § 106.40[1] , Paragraph 3.*]

4. [*Agency allegation. See § 106.40[1] , Paragraph 5.*]

5. At all times herein mentioned, defendant _____ [*name of carrier*] owned, operated, maintained, and controlled a certain _____ [*e.g.*, system of buses *or designate other type of vehicle*] used to transport passengers over, among others, a route _____ [from _____ to _____ *or* along _____ Street in _____ (*city*), California].

6. On or about _____ [*date*], at about _____ [*time*], plaintiff was riding as a fare paying passenger on the aforementioned _____ [bus *or designate other type of vehicle*]. Defendant _____ [*name of agent*], while the _____ [bus *or designate other type of vehicle*] was at or near the intersection of _____ and _____ Streets in _____ (*city*) and being driven and operated by _____ [*name of agent*] in a generally _____ direction on _____ Street, so negligently operated and drove the _____ [bus *or*

designate other type of vehicle] that it suddenly and violently lurched, jerked, jolted, and abruptly stopped. Plaintiff was violently thrown _____ [from his seat *or* from the place where he was standing] and thus was caused to and did come into contact with the interior parts of the _____ [bus *or designate other type of vehicle*] and then was thrown to the floor of it. As a proximate result thereof plaintiff sustained injuries as alleged below.

7--10. [*Injuries and damages. See § 106.40[1], Paragraphs 7-10.*]

11-12. [*Filing of claim with and rejection by governmental entity where it is one of the defendants. See § 106.40[1], Paragraphs 11-12.*]

[*Prayer. See § 106.40[1].*]

_____ [*firm name, if any*]

by: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 106.40[1].*]

[2] Use of Form

This complaint is for damages for personal injuries based on negligence brought by a passenger who was thrown about the interior of a bus or other vehicle and then to the floor when the driver suddenly and violently jerked the bus or other vehicle in bringing it to a stop.

[3] Cross References

For discussion of the carrier-passenger relationship, *see § 106.40[6]*

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10-106 California Forms of Pleading and Practice--Annotated § 106.47

§ 106.47 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Thrown About Interior of Bus on Collision With Automobile

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Thrown About Interior of Bus on Collision With Automobile

[*Caption. See § 106.40[1].*]

Plaintiff alleges:

1-2. [*Capacity and residence of defendants. See § 106.40[1] , Paragraphs 1, 2.*]

3. [*Fictitious name allegation, if appropriate. See § 106.40[1] , Paragraph 3.*]

4. [*Agency allegation. See § 106.40[1] , Paragraph 5.*]

5. At all times herein mentioned, defendant _____ [*name of carrier*] owned, operated, maintained, and controlled a certain _____ [*e.g.*, system of buses *or designate other type of vehicle*] used to transport passengers over, among others, a route _____ [from _____ to _____ *or* along _____ Street in _____ (*city*), California].

6. On or about _____ [*date*], at about _____ [*time*], plaintiff was riding as a fare paying passenger on the aforementioned _____ [bus *or designate other type of vehicle*]. Defendant _____ [*name of agent*], while the _____ [bus *or designate other type of vehicle*] was at or near the intersection of _____ and _____ Streets in _____ [*city*], proceeding in a generally _____ direction along _____ Street, so negligently operated and drove the _____ [bus *or designate other type of vehicle*] that it was caused to and did

collide with an automobile being driven in a generally _____ direction along _____ Street by _____ [*name of automobile driver*]. Plaintiff was violently thrown _____ [from his seat *or* from the place where he was standing] and thus was caused to and did come into contact with the interior parts of the _____ [bus *or designate other type of vehicle*] and then was thrown to the floor of it. As a proximate result thereof plaintiff sustained injuries as described below.

7-12. [*Injuries and damages. See § 106.40[1] , Paragraphs 7-10.*]

13-14. [*Filing of claim with and rejection by governmental entity when it is one of the defendants. See § 106.40[1] , Paragraphs 11-12.*]

[*Prayer. See § 106.40[1].*]

_____ [*firm name, if any*]

by: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 106.40[1].*]

[2] Use of Form

This complaint is for damages for personal injuries based on negligence brought by a passenger who was thrown about the interior of a bus or other vehicle and then to the floor when the driver negligently collided with an automobile. The res ipsa loquitur doctrine is applicable to a situation where a bus came to a sudden stop after having run into ladders which extended from the truck being driven in front of bus [*Jacob v. Key System Transit Lines (1956) 140 Cal. App. 2d 357, 361, 363, 295 P.2d 569]* and to a situation when there was a collision between a car and the bus [*Stewart v. Miranda (1959) 170 Cal. App. 2d 373, 375, 338 P.2d 941* ; *Silva v. Pacific Greyhound Lines (1953) 119 Cal. App. 2d 284, 287-288, 259 P.2d 743* (judgment for defendants affirmed)].

[3] Cross References

For additional discussion, see *§§ 106.40[6], [7]*; *106.45[3]*

For forms for use in an actions against automobile owners and operators, see Ch. 83, *Automobiles: Bringing the Action* .

For forms of interrogatories for use in actions involving automobile collisions with buses or streetcars, see Bender's Forms Of Discovery, *Buses and Streetcars*

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10-106 California Forms of Pleading and Practice--Annotated § 106.48

§ 106.48 Allegation--Passenger Thrown About Interior of Bus on Collision With Another Carrier

[1] FORM Allegation--Passenger Thrown About Interior of Bus on Collision With Another Carrier

On or about _____ [*date*], at about _____ [*time*], plaintiff was riding as a fare paying passenger on the aforementioned _____ [bus *or designate other type of vehicle*]. While the _____ [bus *or designate other type of vehicle*] was at or near the intersection of _____ and _____ Streets in _____ [*city*], proceeding in a generally _____ direction on _____ Street, defendant _____ [*name of agent*] so negligently operated and drove the _____ [bus *or designate other type of vehicle*] that it was caused to and did collide with _____ [another bus *or designate other type of vehicle*] being driven in a generally _____ direction along _____ Street. Plaintiff was violently thrown _____ [from his seat *or* from the place where he was standing] and thus was caused to and did come into contact with the interior parts of the _____ [bus *or designate other type of vehicle*] and then was thrown to the floor of it. As a result thereof plaintiff sustained injuries as alleged below.

[2] Use of Form

This allegation is for use in a complaint for damages for personal injuries based on negligence brought by a passenger who was thrown about the interior of a bus or other vehicle and then to the floor when the driver negligently collided with another bus or other type of vehicle. Res ipsa loquitur is applicable to a situation where a passenger is injured in a collision between two streetcars [*Osgood v. Los Angeles Traction Co. (1902) 137 Cal. 280, 283, 70 P. 169* ; *Hyman v. Market Street Ry. Co. (1940) 41 Cal. App. 2d 647, 651, 107 P.2d 485]* . Additionally, a passenger injured by concurrent negligence of two carriers is entitled to recover from either or both carriers [*Simmons v. Pacific Elec. Ry. Co. (1922) 60 Cal. App. 140, 142, 212 P. 641]* .

[3] Cross References

For additional discussion, *see §§ 106.45[3], [4]*; *106.47[2], [3]*

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10-106 California Forms of Pleading and Practice--Annotated § 106.49

§ 106.49 Allegation--Passenger Thrown About Interior of Bus When It Ran Off Highway

[1] FORM Allegation--Passenger Thrown About Interior of Bus When It Ran Off Highway

On or about _____ [*date*], at about _____ [*time*], plaintiff was riding as a fare paying passenger on the aforementioned _____ [bus *or designate other type of vehicle*] which was traveling in a generally _____ direction on _____ [*name of street or highway*] _____ [in *or* near] _____ [*city*]. At that time and place defendant _____ [*name of agent*] so negligently operated and drove the _____ [bus *or designate other type of vehicle*] that it left the traveled portion of the _____ [street *or* highway] and _____ [overturned *or* plunged into a ditch *or* collided with an embankment]. Plaintiff was violently thrown _____ [from his seat *or* from the place where he was standing] and thus was caused to and did come into contact with the interior parts of the _____ [bus *or designate other type of vehicle*] and then was thrown to the floor of it. As a result thereof, plaintiff sustained injuries as alleged below.

[2] Use of Form

This allegation is for use in a complaint for damages for personal injuries based on negligence brought by a passenger who was thrown about the interior of a bus or other vehicle and then to its floor when the driver negligently permitted the vehicle to run off the street or highway on which it was being operated. Res ipsa loquitur is applicable to a situation where a carrier's bus runs off the highway into a gulch [*Lawrence v. Pickwick Stages, N. D. (1924) 68 Cal. App. 494, 498-499, 229 P. 885]* , where a vehicle operated by a common carrier overturns [*Seney v. Pickwick Stages Northern Div., Inc. (1927) 82 Cal. App. 226, 229, 255 P. 279]* , and where a vehicle plunges from the highway into ditch and partially overturns on an embankment [*Jianou v. Pickwick Stages Sys. (1931) 111 Cal. App. 754, 756-757, 296 P. 108]* .

[3] Cross References

For additional discussion, *see §§ 106.45[3], [4]*; *106.47[2], [3]*; *106.48[2]*

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10-106 California Forms of Pleading and Practice--Annotated § 106.50

§ 106.50 Allegation--Passenger Thrown About Interior of Bus When It Suddenly Changed Speed and Direction

[1] FORM Allegation--Passenger Thrown About Interior of Bus When It Suddenly Changed Speed and Direction

On or about _____ [*date*], at about _____ [*time*], plaintiff was riding as a fare paying passenger on the aforementioned _____ [bus *or designate other type of vehicle*] which was traveling in a generally _____ direction on _____ [*name of street or highway*] _____ [in *or* near] _____ [*city*]. At that time and place defendant _____ [*name of agent*] so negligently operated and drove the _____ [bus *or designate other type of vehicle*] that it suddenly changed its speed and direction, causing the _____ [bus *or designate other type of vehicle*] to swerve to one side and lurch. Plaintiff was violently thrown _____ [from his seat *or* from the place where he was standing] and thus was caused to and did come into contact with the interior part of the _____ [bus *or designate other type of vehicle*] and then was thrown to the floor of it. As a result thereof plaintiff sustained injuries as alleged below.

[2] Use of Form

This allegation is for use in a complaint for damages for personal injuries based on negligence brought by a passenger who was thrown about the interior of a bus or other vehicle and then to its floor when the driver negligently changed the speed and direction of the vehicle.

[3] Cross References

For additional discussion, *see §§ 106.45[3], [4]*; *106.47[2], [3]*; *106.48[2]*; *106.49[2]*

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10-106 California Forms of Pleading and Practice--Annotated § 106.51

§ 106.51 Allegation--Passenger Thrown About Interior of Cable Car When Obstruction in Cable Slot Caused Sudden Stop

[1] FORM Allegation--Passenger Thrown About Interior of Cable Car When Obstruction in Cable Slot Caused Sudden Stop

On or about _____ [*date*], at about _____ [*time*], plaintiff was riding as a fare paying passenger on the aforementioned cable car of defendant City and County of San Francisco. The cable car was proceeding in a generally _____ direction on _____ Street and was crossing tracks maintained by defendant on _____ Street. By reason of the carelessness and negligence of the owners, operators, maintainers, and controllers of the cables, tracks, slots, and other appurtenances of the _____ Street Line and the _____ Street Line, which it crossed, in maintaining the cables, tracks, and appurtenances in a dangerous and hazardous condition, and allowing an obstruction on and in the tracks and slots to obstruct the passage of the cable car, all of which was known to defendants, the cable car came to an abrupt and sudden stop, throwing plaintiff about the cable car and proximately causing him to sustain injuries as alleged below.

[2] Use of Form

This allegation is for use in a complaint for damages for personal injuries based on negligence brought by a cable car passenger who was thrown about the interior of the cable car when it suddenly came to a stop because of obstructions in the cables and tracks. Whether negligence is shown when a cable car suddenly comes to a stop when the rails were clear is a jury question [*Finley v. City & County of San Francisco (1952) 115 Cal. App. 2d 116, 119, 251 P.2d 687]* .

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10-106 California Forms of Pleading and Practice--Annotated § 106.52

§ 106.52 Complaint for Damages [Civ. Code § 3333] for Wrongful Death of Passenger [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Entitled Person(s) Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343] and Owner-Operator of Other Vehicle--Bus Passenger's Death After Automobile-Bus Collision

[1] FORM Complaint for Damages [Civ. Code § 3333] for Wrongful Death of Passenger [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Entitled Person(s) Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343] and Owner-Operator of Other Vehicle--Bus Passenger's Death After Automobile-Bus Collision

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*names*], [as _____ (*specify capacity*, *e.g.*, Personal Representative of the Estate of _____ (*name*), Deceased,] Plaintiffs, vs. _____ [*names*], [and Does I through _____,] Defendants.	)))))))	NO. _____ COMPLAINT FOR DAMAGES (Wrongful Death) [Amount demanded _____ (exceeds *or* does not exceed) $10,000] [LIMITED CIVIL CASE]

Plaintiff(s) allege(s):

1. _____ [Plaintiff(s) *or* The person(s) listed below] is/are entitled to bring an action for the wrongful death of _____ [*name of decedent*] (hereinafter "decedent") pursuant to *Code of Civil Procedure*

Section 377.60, based on his/her/their relationship to decedent, as follows:

Name(s)	Relationship(s) to Decedent
_____	___
_____	___
	___
	___
	___
	___
	___
	_
_____	___
_____	___
	___
	___
	___
	___
	___
	_
_____	___
_____	___
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	___
	_

[_____ (*If one or more persons are required by statute to establish additional facts, such as that there is no surviving spouse, domestic partner, child, or issue of deceased child, or that the person was dependent on decedent, in order to be entitled to bring a wrongful death action, specify facts that satisfy that requirement*).]

[*If decedent's personal representative is maintaining action on behalf of one or more entitled persons, add:*]

Plaintiff _____ [*name*] is the duly appointed, qualified, and acting personal representative of the estate of decedent, and brings this action on behalf of _____ [all of the above-listed persons entitled to bring a cause of action for the wrongful death of decedent *or* the following person(s) entitled to bring an action for the wrongful death of decedent: _____ (*specify person(s) on whose behalf personal representative is maintaining action*)].

[*CONTINUE*]

2. [*Capacity of defendant(s). See § 106.40[1], Paragraph 1.*]

3. [*Residence of defendant(s). See § 106.40[1], Paragraph 2.*]

4. Defendant _____ [*name of owner-operator of other vehicle*] is, and at all times herein mentioned was, a resident of _____ [*city*], _____ County, California [*or allege other capacity and residence*].

5. [*Fictitious name allegation, if appropriate. See § 106.40[1], Paragraph 3.*]

6. At all times herein mentioned, defendant _____ [*name of carrier*] owned, operated, maintained, and controlled a certain _____ [bus *or designate other type of vehicle*] used to transport passengers for reward in and about _____ [*describe locations or general area of activities*].

[7. *Agency allegation. See § 106.40[1] , Paragraph 5.*]

8. Defendant _____ [*name of owner-operator*], at all times herein mentioned, owned, operated, maintained, and controlled a certain _____ [*year, make, model*] automobile, California License No. _____.

9. On or about _____ [*date*], decedent [paid the requested fare and] rode as a passenger for reward on defendant _____'s [*name of carrier*] _____ [bus *or designate other type of vehicle*]. Defendant _____ [*name of agent*] so negligently maintained, operated, and controlled the _____ [bus *or designate other type of vehicle*] in a generally _____ direction along _____ [*name of street or highway*] and defendant _____ [*name of owner-operator*] so negligently owned, operated, and controlled the automobile in a generally _____ direction along _____ [*name of street or highway*] that the vehicles of the defendants were caused to and did violently collide _____ [in *or* near] _____ [*city*].

10. As a proximate result of the negligence of defendants, and each of them, and of the resulting collision, decedent was thrown violently about the interior of the _____ [bus *or designate other type of vehicle*] and thereby sustained injuries from which he thereafter died.

11. _____ [*Describe relationship of decedent and wrongful death plaintiffs, e.g.*, Prior to the death of decedent, plaintiffs lived with him and were totally dependent on him for their support and maintenance and decedent was a faithful and dutiful _____ (*e.g.*, husband and father) to plaintiffs].

12. As a proximate result of the negligence of defendants, and each of them, and the death of decedent, plaintiffs have sustained pecuniary loss resulting from the loss of the society, comfort, attention, services, and support of decedent.

13. As a further proximate result of the negligence of defendants, and the death of decedent, plaintiff _____ [*name*], has incurred funeral and burial expenses.

[14-15. *If one defendant carrier is a public entity, allege filing and rejection of claim. See § 106.40[1],* Paragraphs 11-12.]

WHEREFORE, plaintiffs pray judgment against defendants, and each of them, as follows:

1. For general damages according to proof;

2. For funeral and burial expenses for plaintiff _____ [*name*] according to proof;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

by: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 106.40[1].*]

[2] Use of Form

This form of complaint is for damages for wrongful death of a passenger brought by entitled persons against a common carrier of passengers for reward, the carrier's employee or agent, and the owner-operator of another vehicle. The action is based on the negligence of carrier's employee and that of the operator of the other vehicle. The complaint alleges:

- The basis for plaintiff's entitlement to bring the action (Paragraph 1) [*see Code Civ. Proc. § 377.60* (permitting decedent's surviving spouse, domestic partner, children, and issue of deceased children to bring action without qualification, and permitting others to bring action under specified circumstances and permitting personal representative of decedent's estate to bring action on behalf of entitled persons); for alternative forms of allegations establishing standing to bring a wrongful death action, see Ch. 181, *Death and Survival Actions*];

- A legal duty of care under *Civ. Code § 2100* (Paragraphs 6, 7) and *Civ. Code § 1714(a)* (Paragraph 8);

- A breach of duty (Paragraph 9);

- The death of the decedent as a proximate result of the breach of duty (Paragraph 10) [*Code Civ. Proc. § 377.60*]; and

- Resulting damages (Paragraphs 11-13) [*Code Civ. Proc. § 377.61*].

The complaint also alleges the filing and rejection, either total or partial, of a claim with a public entity for use if the passenger was killed by a vehicle owned and operated by a public transit authority (Paragraphs 14-15). *Gov. Code § 905* requires that a claim must be presented to the appropriate public entity as a prerequisite to filing suit against it.

For a general form of complaint for a wrongful death action, and allegations setting forth plaintiffs' entitlement to bring a wrongful death action, and for a form of complaint to be filed by the personal representative of the deceased, see Ch. 181, *Death and Survival Actions* . For discussion and forms regarding claims against public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[3] Wrongful Death; Survival Actions

If the death of a person was caused by the wrongful act of neglect of another, specified entitled persons (or the personal representative of the decedent on their behalf) may maintain a wrongful death action [*Code Civ. Proc. § 377.60*]. In an action under *Code Civ. Proc. § 377.60*, damages may be awarded that may be just, under all the circumstances of the

case, but may not include damages recoverable under *Code Civ. Proc. § 377.34* (survival actions) [*Code Civ. Proc. § 377.61*]. The court must determine the respective rights in an award of the persons entitled to maintain the cause of action [*Code Civ. Proc. § 377.61*]. An action that survives the death of the person entitled to commence the action under *Code Civ. Proc. § 377.30* may be joined with a wrongful death actions brought under *Code Civ. Proc. § 377.60* if the actions arise out of the same wrongful act or neglect [*Code Civ. Proc. § 377.62(a)*]. An action under *Code Civ. Proc. § 377.60* (wrongful death) and an action under *Code Civ. Proc. § 377.31* (survival of pending actions) arising out of the same wrongful act or neglect may be consolidated for trial as provided in *Code Civ. Proc. § 1048* [*Code Civ. Proc. § 377.62(b)*].

The wrongful death action may be brought against the person whose wrongful act or neglect caused the death [*Code Civ. Proc. § 377.60*], or against the personal representative of the wrongdoer or, to the extent provided by statute, the wrongdoer's successor in interest, if the wrongdoer has died [*Code Civ. Proc. § 377.40*]. For complete discussion of wrongful death actions and survival actions, see Ch. 181, *Death and Survival Actions* .

[4] Cross References

For additional discussion, *see §§ 106.40[6], [7]*; *106.45[3], [4]*; *106.47[2], [3]*; *106.48[2]*; *106.49[2]*

For alternative complaints and allegations for use in actions for wrongful death, see Ch. 181, *Death and Survival Actions*

For a complaint for wrongful death of a taxicab passenger killed in an intersection collision against the taxicab owner, driver, and third party, see Ch. 544, *Taxicabs*

For forms of interrogatories for use in actions for wrongful death generally, see Bender's Forms Of Discovery, *Death Actions* (Matthew Bender)

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 1377-1402 (10th ed. 2005)

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10-106 California Forms of Pleading and Practice--Annotated § 106.53

§ 106.53 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Injured by Baggage Falling From Overhead Rack

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Injured by Baggage Falling From Overhead Rack

[*Caption. See § 106.40[1].*]

Plaintiff alleges:

1-2. [*Capacity and residence of defendants. See § 106.40[1] , Paragraphs 1, 2.*]

3. [*Fictitious name allegation, if appropriate. See § 106.40[1], Paragraph 3.*]

4. [*Agency allegation. See § 106.40[1], Paragraph 5.*]

5. At all times herein mentioned, defendant _____ [*name of carrier*] owned, operated, maintained, and controlled a certain _____ [*e.g.*, system of buses *or designate other type of vehicle*] used to transport passengers over, among others, a route _____ [from _____ to _____ *or* along _____ Street in _____ (*city*), California].

6. On or about _____ [*date*], in _____ [*city*], _____ County, California, in consideration of a fare paid by plaintiff to defendant _____ [*name of agent*], defendant agreed to safely carry plaintiff as a passenger from _____ to _____, and to use the utmost care and diligence for plaintiff's safe carriage between those points, and to provide everything necessary for that purpose. Plaintiff paid the fare to defendant and entered the _____ [bus *or designate other type of vehicle*] provided by defendant for the trip to _____ [*designation*].

7. Defendant _____ [*name of carrier*] through its agents and employees and in violation of the terms of its contract with plaintiff and prior to the commencement of as well as during the duration of the trip, carelessly and negligently permitted other passengers riding in the _____ [bus *or designate other type of vehicle*] to store their personal baggage in racks built in the _____ [bus *or designate other type of vehicle*] above the seats occupied by passengers. Further, defendant through its agents and employees negligently failed to inspect the location and storage of the baggage in the racks and carelessly and negligently failed to take any precaution to see that the baggage was safely stored therein. Defendant _____ [*name of agent*] carelessly and negligently operated the _____ [bus *or designate other type of vehicle*] during the trip by driving it at dangerous and excessive speeds around curves on the _____ [street *or* highway]. By reason of each and all of the careless and negligent acts and omissions on the part of defendants, a heavy piece of baggage belonging to some person or persons unknown to the plaintiff fell from one of the racks which defendant _____ [*name of carrier*] maintained over the seats occupied by its passengers and struck plaintiff on his head and shoulder with great force and violence.

8-11. [*Injuries and damages. See § 106.40[1], Paragraphs 7-10.*]

12-13. [*Filing of claim with and rejection by governmental entity where it is one of the defendants. See § 106.40[1], Paragraphs 11-12.*]

[*Prayer. See § 106.40[1].*]

_____ [*firm name, if any*]

by: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 106.40[1].*]

[2] Use of Form

This form of complaint is for damages for personal injuries based on negligence brought by a passenger who was injured by baggage which fell on him from an overhead rack. Res ipsa loquitur is applicable in the case where a passenger is injured by a suitcase falling from the luggage rack when the bus suddenly returned to its own lane of traffic [*Williamson v. Pacific Greyhound Lines (1947) 78 Cal. App. 2d 482, 486-487, 177 P.2d 977* ; *Prunty v. Allred (1946) 73 Cal. App. 2d 67, 71-73, 165 P.2d 935]* . A bus passenger is not charged with the duty of inspecting baggage when there is no notice that would require the passenger to be on the lookout to protect against such danger [*Williamson v. Pacific Greyhound Lines (1949) 93 Cal. App. 2d 484, 487, 209 P.2d 146]* .

[3] Cross References

For additional discussion, *see §§ 106.40[6], [7]*; *106.45[3], [4]*; *106.47[2], [3]*; *106.48[2]*; *106.49[2]*

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10-106 California Forms of Pleading and Practice--Annotated § 106.54

§ 106.54 Allegation--Passenger Injured When Fellow Passenger and Luggage Fell on Him

[1] FORM Allegation--Passenger Injured When Fellow Passenger and Luggage Fell on Him

On or about _____ [*date*], at about _____ [*time*], plaintiff was riding as a fare paying passenger on the aforementioned _____ [bus *or designate other type of vehicle*] which was traveling in a generally _____ direction on _____ [*name of street or highway*] _____ [in *or* near] _____ [*city*]. At that time and place defendant _____ [*name of agent*] so negligently operated and drove the _____ [bus *or designate other type of vehicle*] that it caused another passenger on the _____ [bus *or designate other type of vehicle*] to fall on and strike plaintiff with great force and violence.

The passenger had in his/her possession certain pieces of luggage. By reason of the negligence and carelessness of defendants, and each of them, as set forth above, when the passenger was caused to fall on plaintiff, the luggage was also caused to and did strike plaintiff with great force and violence.

[2] Use of Form

This allegation is for use in a complaint for damages for personal injuries based on negligence brought by a passenger who was injured when a fellow passenger and luggage fell on him.

[3] Cross References

For additional discussion, *see §§ 106.40[6], [7]*; *106.45[3], [4]*; *106.47[2], [3]*; *106.48[2]*; *106.49[2]*; *106.53[2]*

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10-106 California Forms of Pleading and Practice--Annotated § 106.55

§ 106.55 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100, 2101]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2101]--Passenger Injured Because of Carrier's Faulty Equipment

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100, 2101]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2101]--Passenger Injured Because of Carrier's Faulty Equipment

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*], [and DOES I	)	(Negligence)
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 106.40[1] , Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 106.40[1] , Paragraph 3.*]

3. At all times herein mentioned, defendant owned, operated, maintained, and controlled a certain _____ [*e.g.*, system of buses *or designate other type of vehicle*] used to transport passengers over, among others, a route _____ [from _____ to _____ *or* along _____ Street in _____ (*city*), California].

4. On or about _____ [*date*], at about _____ [*time*], plaintiff was riding as a fare paying passenger on the aforementioned _____ [bus *or designate other type of vehicle*]. Because of defendant's negligent failure to provide and maintain reasonably safe equipment, the _____ [tires and/or wheels *or* brakes *or* engine *or* windshield *or designate other part of the vehicle*] failed to function properly. As a result, the _____ [bus *or designate other type of vehicle*] _____ [broke down *or* collided with another vehicle *or* ran off street]. Plaintiff was violently thrown _____ [from his seat *or* from the place where he was standing] and thus was caused to and did come into contact with the interior parts of the _____ [bus *or designate other type of vehicle*] and then was thrown to the floor of it. As a proximate result thereof plaintiff sustained the injuries hereinafter alleged.

5-8. [*Injuries and damages. See § 106.40[1] , Paragraphs 7-10.*]

9-10. [*Filing of claim with and rejection by governmental entity if it is one of the defendants. See Form 1, Paragraphs 11-12.*]

[*Prayer. See § 106.40[1].*]

_____ [*firm name, if any*]

by: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 106.40[1].*]

[2] Use of Form

This form of complaint is for damages for personal injuries based on negligence brought by a passenger who was thrown about the interior of a bus or other vehicle and then to the floor because of the carrier's negligent failure to provide and maintain safe equipment.

[3] Cross References

For additional discussion, *see § 106.40[6], [7]*

For forms of interrogatories for use in actions involving defective maintenance of buses or streetcars, see Bender's Forms Of Discovery, *Buses and Streetcars*

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10-106 California Forms of Pleading and Practice--Annotated § 106.56

§ 106.56 Allegation--Passenger Injured When Bus Seat Broke

[1] FORM Allegation--Passenger Injured When Bus Seat Broke

On or about _____ [*date*], at about _____ [*time*], plaintiff was riding as a fare paying passenger on the aforementioned _____ [bus *or designate other type of vehicle*]. Defendant _____ [*name of carrier*] maintained and operated the _____ [bus *or designate other type of vehicle*] in such a negligent, careless, and wrongful manner that one of the seats in the _____ [bus *or designate other type of vehicle*] broke. Portions of the broken seat struck plaintiff's _____ [*e.g.*, leg], thereby causing plaintiff personal injuries as hereinafter alleged.

[2] Use of Form

This allegation is for use in a complaint for damages for personal injuries based on negligence brought by a passenger who was injured when a bus seat broke and injured him. Res ipsa loquitur is applicable when a bus seat breaks and causes injuries to a passenger's leg despite absence of any unusual movements of the vehicle or of the person in that seat [*Adam v. Los Angeles Transit Lines (1957) 154 Cal. App. 2d 535, 538-540, 317 P.2d 642]* .

[3] Cross References

For additional discussion, *see §§ 106.53[2], [6]*; *106.55[3]*

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10-106 California Forms of Pleading and Practice--Annotated § 106.57

§ 106.57 Complaint for Damages [Civ. Code §§ 3294, 3333] for Injuries Based on Willful Misconduct [Civ. Code § 1714(a)]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2103, 2338] and Its Agent [Civ. Code § 2343]--Incivility of Driver to Passenger

[1] FORM Complaint for Damages [Civ. Code §§ 3294, 3333] for Injuries Based on Willful Misconduct [Civ. Code § 1714(a)]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2103, 2338] and Its Agent [Civ. Code § 2343]--Incivility of Driver to Passenger

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*], [and DOES I	)	(Willful Misconduct)
through _____,]	)	[Amount demanded _____
Defendants.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1-2. [*Capacity and residence of defendants. See § 106.40[1] , Paragraphs 1, 2.*]

3. [*Fictitious name allegation, if appropriate. See § 106.40[1] , Paragraph 3.*]

4. [*Agency allegation. See § 106.40[1] , Paragraph 5.*]

5. At all times herein mentioned, defendant _____ [*name of carrier*] owned, operated, maintained, and controlled a certain _____ [*e.g.*, system of buses *or designate other type of vehicle*] used to

transport passengers over, among others, a route _____ [from _____ to _____ *or* along _____ Street in _____ (*city*), California].

6. While the _____ [bus *or designate other type of vehicle*] was at or near _____ [*location*], defendant _____ [bus driver *or other type of employee*], in full view and hearing of the other passengers on the _____ [bus *or designate other type of vehicle*], spoke to and about plaintiff, and treated plaintiff in a loud, rude, crude, insulting, intimidating, and otherwise uncivil manner.

7. As a proximate result of such uncivil treatment, plaintiff suffered humiliation, indignity, apprehension, anxiety, embarrassment, injured feelings, wounded pride, and other mental and physical suffering and detriment to his damage.

8. [*Special damages, if any. See generally § 106.40[1] , Paragraphs 8, 9.*]

9. The acts of defendant _____ [bus driver *or designate other type of employee*] were committed without provocation, with malice and ill will, and with the intent and design to frighten, oppress, and injure plaintiff. By reason of the foregoing, plaintiff is entitled to exemplary and punitive damages.

10-11. [*Filing of claim with and rejection by governmental entity where it is one of the defendants. See § 106.40[1] , Paragraphs 11-12.*]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages according to proof.

2. [*Special damages, if any.*]

3. For exemplary and punitive damages against defendant _____ [*name of agent*].

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

by: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 106.40[1].*]

[2] Use of Form

This form of complaint is for damages for injuries based on willful misconduct by a carrier and its agent suffered by a passenger as a result of uncivil conduct by the agent of the carrier for reward toward him [*see Civ. Code § 2103*].

Plaintiff is entitled to exemplary and punitive damages (Paragraph 9) [*see Civ. Code § 3294(a)*] if he or she shows that the employee has been guilty of oppression or malice. Although the carrier is liable as principal for all actual damage

caused by its employees [*see Civ. Code § 2338*], the carrier is not liable for punitive damages unless the carrier, as employer, had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice [*Civ. Code § 3294(b)*; *Turner v. N.B. & M. R.R. Co. (1868) 34 Cal. 594, 599-600* (wrongful expulsion by railroad conductor)]. A carrier has a duty to treat passengers with "civility" and give them a "reasonable degree of attention" as required by *Civ. Code § 2103* but this does not deny a reciprocal obligation on the part of passengers to use all reasonable care within their power for their own safety or to accord same "civility" to the carrier, its agents, or employees [*Dayton v. Yellow Cab Co. (1948) 85 Cal. App. 2d 740, 744, 193 P.2d 959* (fight between cab driver and passenger over fare)].

[3] Cross References

For additional discussion, *see § 106.40[6], [7]*

For a complaint by a passenger against a common carrier of passengers for reward based on wrongful ejection from the vehicle and unnecessary use of force and violence, see Ch. 109, *Carriers*

For a complaint by a taxicab passenger injured while fleeing the driver's immoral advances, see Ch. 544, *Taxicabs*

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10-106 California Forms of Pleading and Practice--Annotated § 106.58

§ 106.58 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Failure of Driver to Prevent Assault by Fellow Passenger

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Failure of Driver to Prevent Assault by Fellow Passenger

[*Caption. See § 106.40[1].*]

Plaintiff alleges:

1-2. [*Capacity and residence of defendants. See § 106.40[1] , Paragraphs 1, 2.*]

3. [*Fictitious name allegation, if appropriate. See § 106.40[1] , Paragraph 3.*]

4. [*Agency allegation. See § 106.40[1] , Paragraph 5.*]

5. At all times herein mentioned, defendant _____ [*name of carrier*] owned, operated, maintained, and controlled a certain _____ [*e.g.*, system of buses *or designate other type of vehicle*] used to transport passengers over, among others, a route _____ [from _____ to _____ *or* along _____ Street in _____ (*city*)].

6. On or about _____ [*date*], at about _____ [*time*], plaintiff boarded defendant _____'s [*name of carrier*] _____ [bus *or designate other type of vehicle*] to travel to _____ [*destination*] _____ [after having paid the required fare *or* and paid the required fare]. Thereafter, defendant _____ [*name of bus driver or other type of employee*] negligently, carelessly, and wrongfully allowed passengers to _____ [*e.g.*, shoot dice and gamble on the vehicle and while engaged in such gambling games to become involved in a fight in which knives were drawn, and

to] push plaintiff, who was not a participant in the _____ [*e.g.*, gambling game *or* fight] to the floor of the _____ [bus *or designate other type of vehicle*] while the vehicle was in motion at or near _____ [*location*], severely injuring plaintiff as alleged below.

7. At times prior to the date of this occurrence, passengers aboard _____ [buses *or designate other type of vehicle*] on the route _____ [from _____ to _____ *or* along _____ (*name of street or highway*)] have engaged in _____ [*e.g.*, gambling games and had become embroiled in disputes, fights, and threatened fights], and defendant _____ [*name of carrier*] and defendant _____ [*name or bus driver or other type of employee*] well knew that such conduct had occurred and was likely to occur and that such conduct constituted a threat to the safety of passengers who were not participants. Defendants failed to take _____ [adequate *or* any] steps to prevent their passengers from suffering harm as a result of such conduct and failed to warn passengers and prospective passengers of the danger.

8-11. [*Injuries and damages. See § 106.40[1] , Paragraphs 7-10.*]

12-13. [*Filing of claim with and rejection by governmental entity where it is one of the defendants. See § 106.40[1] , Paragraphs 11-12.*]

[*Prayer. See § 106.40[1].*]

_____ [*firm name, if any*]

by: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 106.40[1].*]

[2] Use of Form

This form of complaint is for damages based on negligence brought by a passenger against a carrier of persons for reward and its agent in a case where the agent negligently failed to prevent an assault on the plaintiff by a fellow passenger.

The complaint alleges that the plaintiff was a fare paying passenger (Paragraph 6) and that the bus driver or other type of employee negligently permitted plaintiff to be assaulted by a fellow passenger (Paragraph 6), under such circumstances that defendants knew or should have known of the danger and taken steps to prevent the occurrence (Paragraph 7) [see *Civ. Code § 2100*]. A carrier is obligated to exercise the utmost care to protect passenger from an assault by a fellow passenger, but such liability arises only if the carrier had or should have had knowledge of the conditions from which such wrong could be apprehended [*Terrell v. Key System (1945) 69 Cal. App. 2d 682, 685-688, 159 P.2d 704* ; *Hicks v. Scott (1942) 48 Cal. App. 2d 481, 485-486, 120 P.2d 107]* . Additionally, the duty of care to protect passengers from an assault by a third person applies to public entities; again, the duty arises when the carrier has, or with the exercise of the utmost care should have, knowledge from which it may reasonably be apprehended that an assault may occur and the carrier, in addition, has the ability, through the exercise of utmost care, to prevent injury [*Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal. 3d 780, 785, 791, 221 Cal. Rptr. 840, 710 P.2d 907]* .

[3] Cross References

For additional discussion, *see §§ 106.40[6], [7]*; *106.57[2], [3]*

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10-106 California Forms of Pleading and Practice--Annotated § 106.59

§ 106.59 Allegation--Failure of Driver to Prevent Injury to Passenger by Dog Being Transported in Passenger Area

[1] FORM Allegation--Failure of Driver to Prevent Injury to Passenger by Dog Being Transported in Passenger Area

On or about _____ [*date*], at about _____ [*time*], plaintiff boarded defendant _____'s [*name of carrier*] _____ [bus *or designate other type of vehicle*] to travel to _____ [*destination*] _____ [and paid the required fare *or* after having paid the required fare]. Thereafter, defendant _____ [*name of bus driver or other type of employee*] negligently, carelessly, and wrongfully allowed another passenger to keep his dog on said _____ [bus *or designate other type of vehicle*]. The dog was growling and had nipped at several other passengers before it finally bit plaintiff. As a result, plaintiff sustained injuries as alleged below.

[2] Use of Form

This allegation is for use in a complaint for damages based on negligence brought by a passenger against a carrier of persons for reward and its agent in a case where the agent negligently failed to prevent a dog from biting the plaintiff. Although a carrier has the right to carry dogs in a coach set apart for passengers, the carrier is required to use utmost care. This includes ascertaining the conditions and natural tendencies of the dog and reasonably supervising the dog in relation to the place allotted to the dog and its opportunity to injure with tooth, paw, or body, irrespective of its apparent reputation for having a calm temperament [*Westwater v. Southern Pacific Co. (1940) 38 Cal. App. 2d 369, 371-372, 101 P.2d 154* (minor train passenger bitten by dog)].

[3] Cross References

For additional discussion, *see §§ 106.40[6], [7]*; *106.57[2], [3]*; *106.58[2]*

For complaints for damages against owners of animals, see Ch. 23, *Animals: Civil Liability*

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10-106 California Forms of Pleading and Practice--Annotated § 106.60

§ 106.60 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Injured by Sudden Movement of Bus While Alighting

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Injured by Sudden Movement of Bus While Alighting

[*Caption. See § 106.40[1].*]

Plaintiff alleges:

1-2. [*Capacity and residence of defendants. See § 106.40[1] , Paragraphs 1, 2.*]

3. [*Fictitious name allegation, if appropriate. See § 106.40[1] , Paragraph 3.*]

4. [*Agency allegation. See § 106.40[1], Paragraph 5.*]

5. At all times herein mentioned, defendant _____ [*name of carrier*] owned, operated, maintained, and controlled a certain _____ [*e.g.*, system of buses *or designate other type of vehicle*] used to transport passengers over, among others, a route _____ [from _____ to _____ *or* along _____ Street in _____ (*city*), California.]

6. On or about _____ [*date*], at about _____ [*time*], plaintiff was a fare paying passenger on one of the defendant's _____ [buses *or designate other type of vehicle*], which at that time was traveling in a generally _____ direction along _____ [*name of street or highway*]. While the _____ [bus *or designate other vehicle*] was stopped at or near _____ [*location*] to permit passengers to get off, plaintiff commenced to alight.

7. While plaintiff was alighting, defendant _____ [*name of bus driver or other type of employee*] so negligently operated, maintained, and controlled the _____ [bus *or designate other type of vehicle*] that it jerked and suddenly moved forward while plaintiff was in the process of alighting. As a result, plaintiff was caused to be thrown violently about the exit of the _____ [bus *or designate other type of vehicle*] and then to the _____ [pavement *or* ground] immediately below the place where the vehicle had stopped. As a proximate result thereof, plaintiff sustained injuries as alleged below.

8-11. [*Injuries and damages. See § 106.40[1] , Paragraphs 7-10.*]

12-13. [*Filing of claim with and rejection by governmental entity where it is one of the defendants. See § 106.40[1] , Paragraphs 11-12.*]

[*Prayer. See § 106.40[1].*]

_____ [*firm name, if any*]

by: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 106.40[1].*]

[2] Use of Form

This form of complaint is for damages for personal injuries based on negligence brought by a passenger who was attempting to alight from the vehicle of a carrier of passengers for reward.

[3] Carrier-Passenger Relationship

The relationship between a carrier and a passenger exists throughout the duration of the passenger's carriage, and that period includes the period when the passenger is alighting from the carrier's vehicle [*McBride v. Atchison, T. & S. F. R. Co. (1955) 44 Cal. 2d 113, 116, 279 P.2d 966]* . The carrier must exercise as high a degree of care in affording passengers a reasonable opportunity to alight in safety as in carrying them safely [*McBride v. Atchison, T. & S. F. R. Co. (1955) 44 Cal. 2d 113, 116, 279 P.2d 966]* . Hence, because a passenger is not required, as a matter of law, to anticipate "sudden" or "violent" jerks during the time he is being transported [*Acosta v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 19, 27, 84 Cal. Rptr. 184, 465 P.2d 72]* , a jury can find that a carrier is liable for starting its vehicle without warning while a passenger is alighting [*see Raub v. Los Angeles Terminal Ry. Co. (1894) 103 Cal. 473, 475, 37 P. 374]* . Furthermore, the carrier's employees have the duty of ascertaining whether any passengers are attempting to alight before starting the vehicle again after the vehicle has come to a stop where a passenger might properly and conveniently alight [*Moeller v. Market S. R. Co. (1938) 27 Cal. App. 2d 562, 565, 81 P.2d 475]* .

[4] Cross References

For additional discussion, *see §§ 106.40[6], [7]*; *106.41[2]*; *106.42[2]*; *106.44[2], [3]*

For a complaint for personal injuries by a disembarking railroad passenger caused by a violent jolt on a darkened

platform, see Ch. 485, *Railroads*

For an allegation by a taxicab passenger injured while alighting from a taxicab, see Ch. 544, *Taxicabs*

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10-106 California Forms of Pleading and Practice--Annotated § 106.61

§ 106.61 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Injured by Slip and Fall on Steps of Bus While Alighting

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Injured by Slip and Fall on Steps of Bus While Alighting

[*Caption. See § 106.40[1].*]

Plaintiff alleges:

1-2. [*Capacity and residence of defendants. See § 106.40[1] , Paragraphs 1, 2.*]

3. [*Fictitious name allegation, if appropriate. See § 106.40[1] , Paragraph 3.*]

4. [*Agency allegation. See § 106.40[1] , Paragraph 5.*]

5. At all times herein mentioned, defendant _____ [*name of carrier*] owned, operated, maintained, and controlled a certain _____ [*e.g.*, system of buses *or designate other type of vehicle*] used to transport passengers over, among others, a route _____ [from _____ to _____ *or* along _____ Street in _____ (*city*), California].

6. On or about _____ [*date*], at about _____ [*time*], plaintiff was a fare paying passenger on one of defendant's _____ [buses *or designate other type of vehicle*], which at that time was traveling in a generally _____ direction along _____ [*name of street or highway*]. While the _____ [bus *or designate other type of vehicle*] was stopped at or near _____ [*location*] to permit passengers to get off, plaintiff commenced to alight.

7. While plaintiff was descending the steps, plaintiff stepped on _____ [grease *or* a banana peel *or* a wet cigar butt *or other substance*] and was caused to slip and fall as a proximate result of the carelessness and negligence of defendant's agents, employees, and servants in failing to maintain the steps of the _____ [bus *or designate other type of vehicle*]. As a proximate result thereof, plaintiff sustained injuries as alleged below.

8-11. [*Injuries and damages. See § 106.40[1] , Paragraphs 7-10.*]

12-13. [*Filing of claim with and rejection by governmental entity where it is one of the defendants. See § 106.40[1] , Paragraphs 11-12.*]

[*Prayer. See § 106.40[1].*]

_____ [*firm name, if any*]

by: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 106.40[1].*]

[2] Use of Form

This form of complaint is for damages for personal injuries based on negligence brought by a passenger who was attempting to alight from the vehicle of a carrier of passengers for reward when he slipped and fell on the steps. A carrier-passenger relationship ceases only after a passenger has alighted safely from the vehicle [*Parker v. City & County of San Francisco (1958) 158 Cal. App. 2d 597, 603, 323 P.2d 108* ; *MacLean v. City & County of San Francisco (1954) 127 Cal. App. 2d 263, 272, 273 P.2d 698]* . Thus, a carrier is obligated to keep the steps or vestibules of its cars free from debris or foreign substances other than snow or ice [*McBride v. Atchison, T. & S. F. R. Co. (1955) 44 Cal. 2d 113, 116, 279 P.2d 966* (alighting train passenger slipped on wet cigar butt)].

[3] Cross References

For additional discussion, *see §§ 106.40[6], [7]*; *106.41[2]*; *106.42[2]*; *106.44[2], [3]*; *106.60[3], [4]*

See generally Ch. 525, *Slip and Fall*

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10-106 California Forms of Pleading and Practice--Annotated § 106.62

§ 106.62 Allegations--Passenger With Special Physical Condition Injured While Attempting to Alight From Bus

[1] FORM Allegations--Passenger With Special Physical Condition Injured While Attempting to Alight From Bus

1. On or about _____ [*date*], at about _____ [*time*], plaintiff was a fare paying passenger on one of defendant _____'s [*name of carrier*] _____ [buses *or designate other type of vehicle*], which at that time was traveling in a generally _____ direction along _____ [*name of street or highway*]. While the _____ [bus *or designate other type of vehicle*] was stopped at or near _____ [*location*] to permit passengers to get off, plaintiff commenced to alight.

2. Plaintiff is, and at that time was, obviously and apparently _____ [blind *or* sick *or* aged *or* very young *or* crippled *or* infirmed *or specify other condition*]. Defendant _____ [*name of carrier*], by and through its agent and employee _____ [*name of agent*], negligently and carelessly failed to render the necessary assistance to plaintiff in alighting from the _____ [bus *or designate other type of ve hicle*]. As a proximate result thereof, plaintiff fell to the _____ [ground *or* floor of the vehicle], thereby injuring plaintiff as alleged below.

[2] Use of Form

These allegations are for use in a complaint in an action by a passenger with a special physical condition which was apparent to the carrier and its employee who was injured while attempting to alight from the carrier's vehicle because of the employee's failure to render the passenger the necessary assistance. A carrier is obligated to render necessary assistance to a passenger known to be blind, sick, aged, very young, crippled, or infirm while they are boarding or alighting [*McBride v. Atchison, T. & S. F. R. Co. (1955) 44 Cal. 2d 113, 119120, 279 P.2d 966* (crippled passenger's crutches slipped on wet cigar butt lying on train steps)]. Additionally, a carrier owes children who are passengers on its cars a greater degree of care than it owes to adults [*Mudrick v. Market Street Ry. Co. (1938) 11 Cal. 2d 724, 734, 81 P.2d 950* ; *Brizzolari v. Market S. R. Co. (1935) 7 Cal. App. 2d 246, 248, 46 P.2d 783]* .

[3] Cross References

For additional discussion, *see §§ 106.42[2]*; *106.60[3]*, *[4]*; *106.61[2]*, *[3]*

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10-106 California Forms of Pleading and Practice--Annotated § 106.63

§ 106.63 Allegation--Passenger Injured While Leaving Through Emergency Exit After Accident

[1] FORM Allegation--Passenger Injured While Leaving Through Emergency Exit After Accident

On or about _____ [*date*], at about _____ [*time*], plaintiff was a fare paying passenger on one of defendant's _____ [buses *or designate other type of vehicle*], which at that time was traveling in a generally _____ direction along _____ [*name of street or highway*]. Defendant _____ [*name of carrier*], by and through its agent and employee _____ [*name of agent*], negligently and carelessly maintained, operated, and controlled the _____ [bus *or designate other type of vehicle*] so that it collided with _____ [an automobile *or* a truck *or* another bus] at or near _____ [*location*]. As a result, the _____ [bus *or designate other type of vehicle*] was brought to a halt and the passengers were forced to alight through the emergency exit. The emergency exit was in such a dangerous and unsafe condition that when plaintiff walked through the door he _____ [was caused to slip and fall to the ground *or* was cut by a piece of metal] and as a consequence sustained injuries as alleged below.

[2] Use of Form

This allegation is for use in a complaint in an action by a passenger who was forced to alight through an unsafe emergency exit after the vehicle in which he was riding collided with another vehicle.

[3] Cross References

For additional discussion, *see §§ 106.60[3], [4]*; *106.61[2], [3], 106.62[2], [3]*

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10-106 California Forms of Pleading and Practice--Annotated § 106.64

§ 106.64 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Injured When Bus Stopped in Unsafe Area

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Passenger Injured When Bus Stopped in Unsafe Area

[*Caption. See § 106.40[1].*]

Plaintiff alleges:

1-2. [*Capacity and residence of defendants. See § 106.40[1] , Paragraphs 1, 2.*]

3. [*Fictitious name allegation*, if appropriate. See *§ 106.40[1]*, Paragraph 3.]

4. [*Agency allegation. See § 106.40[1] , Paragraph 5.*]

5. At all times herein mentioned, defendant _____ [*name of carrier*] owned, operated, maintained, and controlled a certain _____ [*e.g.*, system of buses *or designate other type of vehicle*] used to transport passengers over, among others, a route _____ [from _____ to _____ *or* along _____ Street in _____ (*city*), California].

6. On or about _____ [*date*], at about _____ [*time*], plaintiff was a fare paying passenger on one of defendant's _____ [buses *or designate other type of vehicle*], which at that time was traveling in a generally _____ direction along _____ [*name of street or highway*]. While the _____ [bus *or designate other type of vehicle*] was stopped at or near _____ [*location*] to permit passengers to get off, plaintiff alighted from the _____ [bus *or designate other type of vehicle*].

7. At that time and place, defendant _____ [*name of bus driver or other employee*] so negligently maintained, operated, and controlled the _____ [bus *or designate other type of vehicle*] that it was brought to a stop outside the safety zone delineated and provided for stops of the _____ [buses *or designate other type of vehicle*] to discharge their passengers. Plaintiff was thus caused to alight from the vehicle in an unsafe place and as a result _____ [was forced to step down into and walk through a slimy, slippery substance on the pavement between the vehicle and sidewalk *or* slipped and fell into the gutter *or* slipped and fell into a large hole]. As a proximate result thereof, plaintiff sustained injuries as alleged below.

8-11. [*Injuries and damages. See § 106.40[1] , Paragraphs 7-10.*]

12-13. [*Filing of claim with and rejection by governmental entity where it is one of the defendants. See § 106.40[1] , Paragraphs 11-12.*]

[*Prayer. See § 106.40[1].*]

_____ [*firm name, if any*]

by: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 106.40[1].*]

[2] Use of Form

This form of complaint is for damages for personal injuries based on negligence brought by a passenger who was injured as a result of a bus or some other type of vehicle having stopped to discharge passengers in an unsafe area.

[3] Carrier-Passenger Relationship

The general rule is that the relationship between carrier and passenger terminates when the passenger has alighted safely from the carrier's vehicle on a public street and has cleared the vehicle [*Brandelius v. San Francisco (1957) 47 Cal. 2d 729, 735, 306 P.2d 432* ; *Parker v. City & County of San Francisco (1958) 158 Cal. App. 2d 597, 603, 323 P.2d 108* ; *MacLean v. City & County of San Francisco (1954) 127 Cal. App. 2d 263, 272, 273 P.2d 698]* . That general rule is subject to an important qualification, however. The carrier must discharge the passenger into a relatively safe area, and the carrier-passenger relationship which requires the carrier to exercise the utmost care and diligence for its passengers' safety is not terminated if the passenger is discharged into a dangerous area [*Riggins v. Pacific Greyhound Lines (1962) 203 Cal. App. 2d 125, 128, 21 Cal. Rptr. 336* ; *Parker v. City & County of San Francisco (1958) 158 Cal. App. 2d 597, 603, 323 P.2d 108]* .

A carrier is not liable merely because it stops its bus away from the sidewalk curb where the vehicle nevertheless has been stopped as close thereto as is practical under the circumstances [*MacLean v. City & County of San Francisco (1954) 127 Cal. App. 2d 263, 272, 273 P.2d 698]* , but evidence of a carrier's custom of stopping its buses in a crosswalk, even though tending to show violations of the law, is admissible to show a custom established by the carrier and a right of the passenger who was familiar with the custom to rely on its continuance when the passenger falls into a curbside gutter rather than alighting on the crosswalk [*Fowler v. Key System Transit Lines (1951) 37 Cal. 2d 65, 73,*

230 P.2d 339] . Moreover, a carrier has an obligation to warn any person, whether passenger or not, of the foreseeable risk of danger that exists from the improper location of a safety zone [*Brandenburg v. Pacific Gas & Elec. Co. (1946) 28 Cal. 2d 282, 286-287, 169 P.2d 909* (persons standing in safety zone injured by overswing of turning streetcar)].

[4] Cross References

For additional discussion, *see §§ 106.40[6], [7]*; *106.60[3], [4]*; *106.61[2], [3], 106.62[2], [3]*

See generally Ch. 525, *Slip and Fall*

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10-106 California Forms of Pleading and Practice--Annotated § 106.65

§ 106.65 Allegations--Passenger Injured by Passing Automobile When Bus Stopped Outside Safety Zone

[1] FORM Allegations--Passenger Injured by Passing Automobile When Bus Stopped Outside Safety Zone

1. On or about _____ [*date*], at about _____ [*time*], plaintiff was a fare paying passenger on one of defendant _____'s [*name of carrier*] _____ [buses *or designate other type of vehicle*], which at that time was traveling in a generally _____ direction along _____ [*name of street or highway*]. While the _____ [bus *or designate other type of vehicle*] was stopped at or near _____ [*location*] to permit passengers to get off, plaintiff alighted from the _____ [bus *or designate other type of vehicle*].

2. At that time and place, defendant _____ [*name of bus driver or other employee*] so negligently maintained, operated, and controlled the _____ [bus *or designate other type of vehicle*] that it was brought to a stop outside the safety zone provided for stops of the _____ [buses *or designate other type of vehicle*] to discharge passengers. Plaintiff was thus caused to alight from the vehicle in an unsafe place and as a result was struck by an automobile which was being negligently and carelessly operated, maintained, and controlled by _____ [*name of owner-operator*]. As a proximate result of the defendants' negligence in so stopping the bus and in operating the automobile, plaintiff sustained injuries as alleged below.

[2] Use of Form

These allegations are for use in a complaint in an action by a passenger who was discharged into an unsafe area and then struck by a negligently driven automobile. However, a carrier-passenger relationship has ended when a passenger is discharged on to the shoulder of a highway, several feet away from nearest traffic lane [*Riggins v. Pacific Greyhound Lines (1962) 203 Cal. App. 2d 125, 128, 21 Cal. Rptr. 336]* or when a passenger who alights from a bus in complete safety then chooses to cross a street where there is no crosswalk [*Hill v. Wilson (1954) 124 Cal. App. 2d 472, 475, 268 P.2d 748* (passenger assumes responsibility for his conduct)].

[3] Cross References

For additional discussion, see *§§ 106.40[6]*, *[7]*; *106.64[3]*

See generally Ch. 82, *Automobiles: Causes of Action* .

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10-106 California Forms of Pleading and Practice--Annotated § 106.66

§ 106.66 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Pedestrian Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Pedestrian Struck by Bus

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Pedestrian Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]--Pedestrian Struck by Bus

[*Caption. See § 106.40[1].*]

Plaintiff alleges:

1-2. [*Capacity and residence of defendants. See § 106.40[1] , Paragraphs 1, 2.*]

3. [*Fictitious name allegation, if appropriate. See § 106.40[1] , Paragraph 3.*]

4. [*Agency allegation. See § 106.40[1] , Paragraph 5.*]

5. At all times herein mentioned, defendant _____ [*name of carrier*] owned, operated, maintained, and controlled a certain _____ [*e.g.*, system of buses *or designate other type of vehicle*] used to transport passengers over, among others, _____ [_____ Street in _____ (*city*) *or* along Highway _____ near _____ (*city*)].

6. On or about _____ [*date*], at about _____ [*time*], plaintiff was a pedestrian walking in a duly marked crosswalk while crossing _____ [*name of street or highway*] _____ [in *or* near] _____ [*city*].

7. At that time and place, defendant _____ [*name of carrier*] by and through its agent _____ [*name of bus driver or other employee*] so negligently and carelessly owned, maintained,

operated, and drove the _____ [bus *or designate other type of vehicle*] in a generally _____ direction along _____ [*name of street or highway*] that the _____ [bus *or designate other type of vehicle*] collided with plaintiff [and threw him violently to the pavement and dragged him approximately _____ feet]. As a proximate result thereof, plaintiff sustained injuries as alleged below.

8-11. [*Injuries and damages. See § 106.40[1] , Paragraphs 7-10.*]

12-13. [*Filing of claim with and rejection by governmental entity where it is one of the defendants. See § 106.40[1] , Paragraphs 11-12.*]

[*Prayer. See § 106.40[1].*]

_____ [*firm name, if any*]

by: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 106.40[1].*]

[2] Use of Form

This form of complaint is for damages for personal injuries based on negligence brought by a pedestrian who was struck by a bus or other vehicle while crossing a street or highway in a crosswalk. A pedestrian has the right of way while in a crosswalk [*Veh. Code § 21950*] and all vehicles are prohibited from passing another vehicle that is stopped for a pedestrian in a crosswalk [*Veh. Code § 21951*]. Additionally, even though a pedestrian has a duty to yield the right of way to vehicles when the pedestrian is outside a crosswalk [*see Veh. Code § 21955* (prohibition against pedestrians crossing between controlled intersections outside crosswalk)], this does not relieve the motorist of the duty to exercise due care for the safety of the pedestrian [*Veh. Code § 21954*].

[3] Cross References

For additional discussion, *see § 106.40[6], [7]*

For a complaint by a pedestrian struck by an automobile while crossing a street, see *Ch. 83, Automobiles: Bringing the Action, § 83.80* et seq.

For a complaint on behalf of a minor pedestrian struck by an automobile while crossing a street, see *Ch. 83, Automobiles: Bringing the Action, § 83.80* et seq.

For allegations by pedestrians crossing a street, walking in a crosswalk at an intersection, and walking on a sidewalk and then being struck by negligently driven automobiles, see Ch. 83, *Automobiles: Bringing the Action*, § 83.82 et seq.

For forms of interrogatories for use in actions involving a pedestrian injured by a bus or streetcar, see Bender's Forms Of Discovery, *Buses and Streetcars* (Matthew Bender)

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10-106 California Forms of Pleading and Practice--Annotated § 106.67

§ 106.67 Complaint for Damages [Civ. Code § 3333] for Wrongful Death of Pedestrian [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a)]--By Entitled Person(s) Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]

[1] FORM Complaint for Damages [Civ. Code § 3333] for Wrongful Death of Pedestrian [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a)]--By Entitled Person(s) Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]

[*Caption. See § 106.52[1].*]

Plaintiff(s) allege(s):

1. [*Capacity of plaintiffs. See § 106.52[1], Paragraph 1.*]

2. [*Capacity of defendant(s). See § 106.40[1], Paragraph 1.*]

3. [*Residence of defendant(s). See § 106.40[1], Paragraph 2.*]

[4. *Fictitious name allegation, if appropriate. See § 106.40[1] , Paragraph 3.*]

5. At all times herein mentioned, defendant _____ [*name of carrier*] owned, operated, maintained, and controlled a certain _____ [bus *or designate other type of vehicle*] used to transport passengers for reward in and about _____ [*describe locations of general area of activities*].

[6. *Agency allegation. See § 106.40[1], Paragraph 5.*]

7. On or about _____ [*date*], at about _____ [*time*], decedent _____ [*name*] was walking in a marked crosswalk in a generally _____ direction across _____ [*name of street or highway*]. At that time and place defendant _____ [

name of bus driver or other employee] so recklessly, carelessly, and negligently operated, managed, and drove the _____ [bus *or designate other type of vehicle*] in a generally _____ direction on the _____ [street *or* highway] as to cause it to collide with decedent, proximately causing his death.

8. _____ [*Describe relationship of decedent and wrongful death plaintiffs, e.g.,* Prior to the death of decedent, plaintiffs lived with him/her and were totally dependent on him/her for their support and maintenance and decedent was a faithful and dutiful _____ (*e.g.,* husband and father) to plaintiffs.]

9. [*Allegations of damages based on pecuniary loss. See § 106.52[1], Paragraph 12.*]

10. [*Allegations of damages based on funeral and burial expenses. See § 106.52[1], Paragraph 13.*]

[11-12. *Allegation that claim was filed with, and rejected by, any public entity defendant. See § 106.40[1], Paragraphs 11-12.*]

[*Prayer. See § 106.52[1].*]

_____ [*firm name, if any*]

by: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 106.40[1].*]

[2] Use of Form

This form of complaint is for damages for the wrongful death of a pedestrian, brought by the persons entitled by statute to bring the action [*see Code Civ. Proc. § 377.60*], against a common carrier for reward and its agent, alleging that the defendants' negligence caused the death. For a general form of complaint for a wrongful death action, and allegations setting forth plaintiffs' entitlement to bring a wrongful death action, see Ch. 181, *Death and Survival Actions* .

If the plaintiff is a minor, a guardian ad litem must be appointed for the purposes of the action, unless the minor already has a guardian [*see Code Civ. Proc. § 372*]. For discussion and forms relating to appointment of a guardian ad litem generally, see Ch. 291, *Guardians ad Litem* .

[3] Cross References

For additional discussion, *see § 106.40[6], [7]*; *106.52[2], [3], [4]*; *106.66[2], [3]*

For forms of interrogatories for use in actions for wrongful death generally, see Bender's Forms Of Discovery, *Death Actions* (Matthew Bender)

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 1377-1402 (10th ed. 2005)

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10-106 California Forms of Pleading and Practice--Annotated § 106.68

§ 106.68 Complaint for Damages [Civ. Code § 3333] for Personal Injuries and Property Damage Based on Negligence [Civ. Code § 1714(a)]--Against Transit District--Plaintiff's Automobile Hit by Bus

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries and Property Damage Based on Negligence [Civ. Code § 1714(a)]--Against Transit District--Plaintiff's Automobile Hit by Bus

[*Caption. See § 106.40[1].*]

Plaintiff alleges:

1. At all times herein mentioned, plaintiff was the owner of a _____ [*year, make, model*], California License No. _____.

2. Defendant _____ [*name of transit district*], hereinafter referred to as "Transit District," is, and at all times herein mentioned was, a public corporation organized and existing under the laws of California with its principal office for the transaction of business in _____ County, California. At all times herein mentioned, defendant Transit District was in the business of operating a public bus transit system in _____ [*city*], _____ County, California.

3. The true names and capacities, whether individual, corporate, associate, or otherwise of defendants DOES I through _____ are unknown to plaintiff who therefore sues said defendants by such fictitious names and will seek leave of court to amend this complaint to show their true names and capacities when ascertained.

4. At all times herein mentioned, defendant _____ [*name*] was the agent and employee of defendant[s] Transit District [and DOES I through X] and, in doing the things hereinafter alleged, was acting within the course and scope of such agency and employment.

5. At all times herein mentioned, defendant[s] Transit District [and DOES I through X] was/were the owners of a bus, California License No. _____

6. At all times herein mentioned _____ Street and _____ Street were and are intersecting public streets and highways in _____ [*city*] _____ County, California, and run in a _____ and a _____ direction, respectively.

7. On or about _____ [*date*], at approximately _____ [*time*], plaintiff was driving his above-described vehicle _____ [*direction*] on _____ Street near the intersection with _____ Street.

8. At that time and place, defendant _____ [*name of agent*] was driving the above-described bus _____ [*direction*] on _____ Street. At that time and place, defendant _____ [*name of agent*] drove, operated, maintained, and propelled the bus in such a negligent manner as to cause it to collide with and strike the left side of plaintiff's vehicle.

9. As a proximate result of the negligence of defendants, as herein alleged, plaintiff was rendered sick, sore, and disabled, and suffered and sustained injuries to _____ [*e.g.*, his left hand, wrist, forearm and elbow, neck, and to other parts of his body], and has suffered distress in mind and body, pain and mental anguish, and suffering; plaintiff has been damaged thereby.

10. As a further proximate result of the negligence of defendants, as alleged herein, and of the injuries sustained by plaintiff, plaintiff was reasonably required to incur, and incurred, certain expenditures for medical care and attention [, the full amount of which is yet undetermined]. Plaintiff is informed and believes, and thereon alleges, that he will reasonably be required in the future to incur additional expenses for medical care and attention.

11. As a further proximate result of the negligence of defendants, as herein alleged, and of the injuries sustained by plaintiff, plaintiff was, now is, and will in the future be prevented from following his usual occupation as a _____ [*specify*] and has suffered loss of earnings and diminution of earning capacity.

12. Immediately prior to and at the time of the collision, plaintiff's above-described automobile was in good mechanical condition. As a further proximate result of the negligence of defendants, as herein alleged, plaintiff's automobile was damaged and depreciated to the extent of $_____, which sum is a reasonable amount for the necessary repairs to the automobile.

13. On _____ [*date*], plaintiff filed a verified claim with defendant Transit District for damages sustained by him as a result of the negligence of defendants as herein alleged. A copy of the claim is attached hereto as Exhibit A and made a part hereof.

14. _____ [On _____ (*date*), defendant Transit District rejected and denied plaintiff's claim _____ (in full *or* except as to $_____) *or* Defendant Transit District has neither rejected nor denied plaintiff's claim and the statutory period provided by law for action on the claim has elapsed; the claim is therefore deemed denied by operation of law].

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general and compensatory damages according to proof.

2. For necessary and reasonable medical expenses according to proof.

3. For loss of earnings and diminution of earning capacity according to proof.

4. For the sum of $_____ for damages to his automobile.

5. For costs of suit herein incurred.

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

by: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 106.40[1].*]

[2] Use of Form

This form of complaint is for damages for personal injuries and property damage brought by an automobile driver whose automobile was negligently struck by a transit vehicle. A streetcar operator is required to be vigilant in his watch for automobiles and to have his streetcar under control when approaching street intersections and the fact that the streetcar was not exceeding the speed limit as it approached a street intersection does not excuse any negligent operation of the car [*Bennett v. Central Cal. Trac. Co. (1931) 115 Cal. App. 1, 12, 1 P.2d 47]* . Additionally, a streetcar operator approaching a traffic-congested avenue in a highly developed area, with another streetcar obscuring the view of operator, has an obligation to be constantly on the lookout and to use such reasonable precautions as the circumstances require [*Saphire v. Los Angeles Transit Lines (1950) 99 Cal. App. 2d 880, 883, 222 P.2d 956]* .

This form is based on the complaint filed in *Helfend v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 1, 84 Cal. Rptr. 173, 465 P.2d 61* .

[3] Cross References

For additional discussion, *see § 106.40[6], [7]*

For alternative forms of complaints for damage to automobiles, see Ch. 83, *Automobiles: Bringing the Action* .

For a complaint for damages for personal injuries based on negligence by a driver of an automobile against a railroad resulting from an automobile-train collision at a grade crossing, see Ch. 485, *Railroads*

For allegations in a complaint for damages for personal injuries based on negligence by an automobile passenger against a railroad resulting from an automobile-train collision at a grade crossing, see Ch. 485, *Railroads*

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10-106 California Forms of Pleading and Practice--Annotated § 106.69

§ 106.69 Allegation--Plaintiff Injured While Sitting in Parked Automobile Hit by Bus

[1] FORM Allegation--Plaintiff Injured While Sitting in Parked Automobile Hit by Bus

On or about _____ [*date*], at about _____ [*time*], plaintiff was sitting in a parked automobile on _____ Street near its intersection with _____ Street in _____ [*city*], California. At that time and place, defendant _____ [*name of carrier*] by and through its agent _____ [*name of agent*] so negligently and carelessly operated the _____ [bus *or designate other type of vehicle*] under his control as to cause it to collide with the automobile in which plaintiff was sitting. As a proximate result, plaintiff was thrown in and about the automobile and sustained injuries as alleged below.

[2] Use of Form

This allegation is for use in a complaint in an action by a person who was injured when a bus or other vehicle collided with the automobile in which he was sitting.

[3] Cross References

For additional discussion, *see §§ 106.66[2], [3]*; *106.68[2], [3], [4]*

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10-106 California Forms of Pleading and Practice--Annotated § 106.70

§ 106.70 Allegations--Cable Car Struck Automobile Because of Negligence in Operation and Maintenance of Signals and Equipment

[1] FORM Allegations--Cable Car Struck Automobile Because of Negligence in Operation and Maintenance of Signals and Equipment

1. At all times herein mentioned, defendant City and County of San Francisco owned, operated, and controlled certain automatic signals and signaling equipment and certain cable car tracks at and near the intersection of _____ and _____ Streets in the City and County of San Francisco. The signal and signaling equipment and tracks were used in the operation and control of cable cars operated by defendant on _____ Street.

2. On or about _____ [*date*], at about _____ [*time*], at or near the intersection of _____ and _____ Streets, defendants _____ [*names of cable car operators*] so negligently and carelessly operated and controlled the cable car so that in conjunction with the negligence of _____ [*names of repairmen*] who had negligently and carelessly maintained, repaired, inspected, and serviced the signals, signal equipment, and tracks the cable car was caused to strike and collide with the _____ [*year*, *make*, *model*] automobile owned and operated by plaintiff.

[2] Use of Form

These allegations are for use in an action for property damage to plaintiff's automobile which was struck by a cable car.

[3] Cross References

For additional discussion, *see § 106.68[2], [3], [4]*

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10-106 California Forms of Pleading and Practice--Annotated § 106.71

§ 106.71 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Workman on Street or Highway Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Workman on Street or Highway Against Carrier of Passengers for Reward [Civ. Code §§ 2100, 2338] and Its Agent [Civ. Code § 2343]

[*Caption. See § 106.40[1].*]

Plaintiff alleges:

1-2. [*Capacity and residence of defendants. See § 106.40[1] , Paragraphs 1, 2.*]

3. [*Fictitious name allegation, if appropriate. See § 106.40[1] , Paragraph 3.*]

4. [*Agency allegation. See § 106.40[1] , Paragraph 5.*]

5. At all times herein mentioned, defendant _____ [*name of carrier*] owned, operated, maintained, and controlled a certain _____ [*e.g.*, system of buses *or designate other type of vehicle*] used to transport passenger over, among others, route _____ [from _____ to _____ *or* along _____ Street in _____ (*city*), California].

6. On or about _____ [*date*], at about _____ [*time*], plaintiff was duly employed by _____ [*name of employer*] to work at repairing _____ [the street *or* the highway *or* a gas line *or* a transmission line *or* a sewer line *or other*]. Plaintiff had taken appropriate safety precautions by _____ [*specify what precautions were taken*] to warn all vehicles on _____ [*name of street or highway*] of his presence and the nature of his work.

7. At that time and place, defendant _____ [*name of driver*] so negligently maintained, operated, and controlled the _____ [bus *or designate other type of vehicle*] in a generally _____ direction along _____ [*name of street or highway*] that the _____ [bus *or designate other type of vehicle*] collided with plaintiff [and threw him violently to the pavement and dragged him approximately _____ feet]. As a proximate result thereof, plaintiff sustained injuries as alleged below.

8-11. [*Injuries and damages. See § 106.40[1] , Paragraphs 7-10.*]

11-12. [*Filing of claim with and rejection by governmental entity where it is one of the defendants. See § 106.40[1] , Paragraphs 11-12.*]

[*Prayer. See § 106.40[1].*]

_____ [*firm name, if any*]

by: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 106.40[1].*]

[2] Use of Form

This form of complaint is for damages for personal injuries based on negligence brought by a workman who was struck by a bus or other vehicle while working on or near a street or highway. A laborer on or near a street is required to use lesser quantum of care than a pedestrian [*Scott v. City & County of San Francisco (1949) 91 Cal. App. 2d 887, 889, 206 P.2d 45* (roofer tending kettle of tar struck by streetcar)]. Additionally, a laborer whose duty requires him to be on or near the street is not required to look continually for the approach of a streetcar [*Driscoll v. California St. R.R. Co. (1926) 80 Cal. App. 208, 219, 250 P. 1062* (municipal employee excavating between streetcar tracks struck by car); *Milosevich v. Pacific Electric Ry. Co. (1924) 68 Cal. App. 662, 672, 230 P. 15* (pipe layer struck by streetcar and killed)].

[3] Cross References

For additional discussion, *see § 106.40[6], [7]*

For an allegation of a workman on a street or highway injured by an automobile, see *Ch. 83, Automobiles: Bringing the Action, § 83.81*.

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10-106 California Forms of Pleading and Practice--Annotated § 106.72

§ 106.72 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Prospective Passenger Against Carrier of Passengers for Reward [Civ. Code § 1714]--Slip and Fall in Bus Depot

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Prospective Passenger Against Carrier of Passengers for Reward [Civ. Code § 1714]--Slip and Fall in Bus Depot

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*], [and DOES I	)	(Negligence)
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1-2. [*Capacity and residence of defendant. See § 106.40[1] , Paragraph 1.*]

3. [*Fictitious name allegation, if appropriate. See § 106.40[1] , Paragraph 3.*]

4. At all times herein mentioned, defendant _____ [*name of carrier*] owned, operated, maintained, and controlled a certain _____ [*e.g.*, system of buses *or designate other type of vehicle*] used to transport passengers over, among others, a route _____ [from _____ to _____ *or* along _____ Street in _____ (*city*), California].

5. On or about _____ [*date*], at about _____ [*time*], plaintiff was _____ [waiting to board *or* walking to purchase a ticket] at defendant _____'s [*name of carrier*] bus depot when he stepped on _____ [grease *or* a banana peel *or* a wet cigar butt *or other substance*] and was caused to slip and fall as a proximate result of the carelessness and negligence of defendant's agents, employees, and servants in failing to maintain the floor of the bus depot. As a proximate result thereof, plaintiff sustained the injuries alleged below.

6. At that time and place defendant _____ [*name of carrier*] had either actual knowledge of the condition of the floor or constructive knowledge of the condition, because plaintiff had been observing the area in which he fell for _____ minutes and not one of defendant's servants or employees was seen cleaning up the area.

7-10. [*Injuries and damages. See § 106.40[1], Paragraphs 7-10.*]

11-12. [*Filing of claim with and rejection by governmental entity where it is one of the defendants. See § 106.40[1], Paragraphs 11-12.*]

[*Prayer. See § 106.40[1].*]

_____ [*firm name, if any*]

by: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See Form 1.*]

[2] Use of Form

This form of complaint is for damages for personal injuries based on negligence brought by a prospective bus passenger who was injured when he slipped and fell in the defendant's bus depot. A carrier is required to select a reasonably safe station space to receive its passengers [*Lagomarsino v. Market Street Ry. Co. (1945) 69 Cal. App. 2d 388, 395, 158 P.2d 982]* and it has a duty to inspect its waiting room [*Hamilton v. Pacific E. R. Co. (1939) 12 Cal. 2d 598, 604-605, 86 P.2d 829* ; *see Gray v. City & County of San Francisco (1962) 202 Cal. App. 2d 319, 330-331, 20 Cal. Rptr. 894* (dictum)]. However, a carrier is required to exercise only ordinary care to maintain the condition of the station where the passengers are received [*Sanchez v. Pacific Auto Stages (1931) 116 Cal. App. 392, 396, 2 P.2d 845* ; *see Gray v. City & County of San Francisco (1962) 202 Cal. App. 2d 319, 329, 20 Cal. Rptr. 894* (carrier's actual or constructive notice of particular physical facts constituting condition dangerous to passengers is a prerequisite to liability when the condition is not created by anaffirmative act of the carrier or its agents)].

[3] Cross References

For additional discussion, *see § 106.40[6], [7]*

See generally Ch. 525, *Slip and Fall*

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10-106 California Forms of Pleading and Practice--Annotated § 106.73

§ 106.73 Affirmative Defense--Negligence of Plaintiff--Passenger Failed to Use Hand Bars for Support

[1] FORM Affirmative Defense--Negligence of Plaintiff--Passenger Failed to Use Hand Bars for Support

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that at the time and place of the injuries herein alleged, plaintiff was not exercising ordinary care, caution, or prudence to prevent himself from falling. The injuries complained of by plaintiff in his complaint, if there were any, were proximately caused by his own failure to utilize the hand support bars which defendant _____ [*name*] has provided in all of its _____ [buses *or designate other type of vehicle*] for the safety of its passengers.

[2] Use of Form

This form of affirmative defense, raising the issue of plaintiff's negligence, may be set forth in an answer [*Code Civ. Proc. § 431.30*] to a complaint by a plaintiff for damages based on negligence arising from the operation of a bus or other vehicle. Under comparative negligence, damages awarded to a plaintiff are diminished in proportion to the amount of negligence attributable to plaintiff [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858, 532 P.2d 1226]* . The negligence of a passenger is shown by the fact that the passenger failed to use the bars provided for hand support [*Tait v. San Francisco (1956) 143 Cal. App. 2d 787, 790, 300 P.2d 74* ; *Gerfers v. San Diego Transit System (1954) 126 Cal. App. 2d 733, 736-737, 272 P.2d 930]* .

[3] Cross References

For the format of affirmative defenses in an answer, see Ch. 26, *Answers*

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10-106 California Forms of Pleading and Practice--Annotated § 106.74

§ 106.74 Affirmative Defense--Negligence of Plaintiff--Passenger Attempted to Board or Alight From Bus While It Was Still in Motion

[1] FORM Affirmative Defense--Negligence of Plaintiff--Passenger Attempted to Board or Alight From Bus While It Was Still in Motion

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that at the time and place of the injuries herein alleged, plaintiff was not exercising ordinary care, caution, or prudence to prevent his falling and being struck by defendant's _____ [bus *or designate other type of vehicle*]. The injuries complained of by plaintiff in his complaint, if there were any, were proximately caused by his own failure to wait until the _____ [bus *or designate other type of vehicle*] had come to a complete and full stop before he attempted to _____ [board *or* alight from] it.

[2] Use of Form

This form of affirmative defense, raising the issue of plaintiff's negligence,may be set forth in an answer [*Code Civ. Proc. § 431.30*] to a complaint by a plaintiff for damages based on negligence arising from the operation of a bus or other vehicle.

[3] Cross References

For additional discussion, *see § 106.73[2], [3]*

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10-106 California Forms of Pleading and Practice--Annotated § 106.75

§ 106.75 Affirmative Defense--Negligence of Plaintiff--Passenger's Conduct Violated Ordinance

[1] FORM Affirmative Defense--Negligence of Plaintiff--Passenger's Conduct Violated Ordinance

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that at the time and place of the injuries herein alleged, plaintiff was not exercising ordinary care, caution, or prudence to prevent his injuries. Plaintiff was injured while _____ [*e.g.*, boarding a moving vehicle *or* riding on the steps of a moving vehicle]. That conduct was in direct violation of _____ [*cite or identify statute or ordinance*], which was then and there in full force and effect [, and which provides that: _____ (*set out relevant portions*)]. Therefore, the alleged injuries were proximately caused by the negligence of plaintiff.

[2] Use of Form

This form of affirmative defense, raising the issue of plaintiff's negligence, may be set forth in an answer [*Code Civ. Proc. § 431.30*] to a complaint by a plaintiff for damages based on negligence arising from the operation of a bus or other vehicle when it is clear that the plaintiff's conduct violated an ordinance or statute and that it was a proximate cause of his alleged injuries. A violation of a statute creates a presumption of negligence [*Evid. Code § 669*] but violation of the prima facie speed limit does not establish negligence as matter of law [*Veh. Code §§ 40830, 40831*]. Thus, a passenger is negligent when he is riding on the steps of a carrier's vehicle in violation of an ordinance and such conduct proximately contributes to the injury [*Reeves v. Lapinta (1938) 25 Cal. App. 2d 680, 681, 78 P.2d 465 ; Lorry v. Englander Drayage & Warehouse Co. (1930) 108 Cal. App. 116, 119, 291 P. 467]* . Additionally, a passenger is negligent when he boards a moving streetcar in violation of an ordinance and that conduct proximately contributed to the injury [*Schultheiss v. Los Angeles Ry. Corp. (1936) 11 Cal. App. 2d 525, 527, 54 P.2d 49]* .

[3] Cross References

For additional discussion, *see § 106.73[2], [3]*

For a general form for alleging violation of a statute or ordinance, see Ch. 531, *Statutes and Ordinances*

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10-106 California Forms of Pleading and Practice--Annotated § 106.76

§ 106.76 Affirmative Defense--Negligence of Plaintiff--Pedestrian Failed to Use Caution in Crossing Street

[1] FORM Affirmative Defense--Negligence of Plaintiff--Pedestrian Failed to Use Caution in Crossing Street

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that at the time and place of the injuries herein alleged, plaintiff was not exercising ordinary care, caution, or prudence in crossing _____ [*name of street or highway*]. The injuries alleged by plaintiff in his complaint, if there were any, were proximately caused by his own failure to exercise ordinary caution before starting to cross _____ [*name of street or highway*]. As a result, plaintiff stepped directly out in front of defendant's _____ [bus *or designate other type of vehicle*]. Thus, the alleged injuries were proximately caused by the negligence of plaintiff.

[2] Use of Form

This form of affirmative defense, raising the issue of plaintiff's negligence, may be set forth in an answer [*Code Civ. Proc. § 431.30*] to a complaint by a plaintiff for damages based on negligence arising from the operation of a bus or other vehicle.

[3] Cross References

For additional discussion, *see § 106.73[2], [3]*

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10-106 California Forms of Pleading and Practice--Annotated § 106.77

§ 106.77 Affirmative Defense--Assumption of Risk--Passenger Injured as Result of Ordinary Bus Movements

[1] FORM Affirmative Defense--Assumption of Risk--Passenger Injured as Result of Ordinary Bus Movements

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff was aware and knew of, appreciated, and voluntarily encountered the movements of defendant's _____ [bus *or designate other type of vehicle*] when he boarded it. More particularly, plaintiff was aware and knew of, appreciated, and voluntarily encountered the risk of _____ [*e.g.*, falling *or* being pushed by other passengers] as a result of the ordinary movements of the vehicle. The injuries complained of by plaintiff in his complaint, if there were any, were caused solely by movements of the _____ [bus *or designate other type of vehicle*] which were ordinary and completely capable of being anticipated by passengers riding on the _____ [bus *or designate other type of vehicle*] and therefore arose out of the risks assumed by him. Therefore, plaintiff must be denied all recovery for each and every injury allegedly sustained while riding as a passenger on defendant's vehicle.

[2] Use of Form

This form of affirmative defense, raising the issue of assumption of risk, may be set forth in an answer [*Code Civ. Proc. § 431.30*] to a complaint by a plaintiff for damages based on negligence arising from the operation of a bus or other vehicle.

The California Supreme Court has rejected the analysis under which a reasonable implied assumption of the risk bars recovery, but an unreasonable assumption of the risk merely requires apportionment of fault under comparative fault principles [*Knight v. Jewett (1992) 3 Cal. 4th 296, 306-309, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . Instead, the Court held that the proper distinction is between "primary assumption of risk," involving instances in which the plaintiff's conduct leads to the legal conclusion that the defendant owed no duty of care to the plaintiff, and plaintiff is therefore precluded from recovering any damages, and "secondary assumption of risk," involving instances in which defendant did owe a duty of care, but in which plaintiff's knowing encounter of the risk of injury caused by defendant's breach justifies application of comparative fault principles [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 308-311, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

The Court's discussion of these issues came in cases involving participants in sporting events, and the precise application of the analysis to other types of cases is not yet clear. For complete discussion of assumption of risk, see Ch. 380, *Negligence* .

[3] Cross References

Witkin, California Procedure, vol.5, *Pleading*, § 1030 (4th ed. 1997)

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 1281-1282, 1284-1292, 1294 (10th ed. 2005)

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10-106 California Forms of Pleading and Practice--Annotated § 106.78

§ 106.78 Affirmative Defense--Imminent Peril--Bus Stopped Suddenly to Avoid Collision

[1] FORM Affirmative Defense--Imminent Peril--Bus Stopped Suddenly to Avoid Collision

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that at the time and place of the injuries herein alleged, defendant _____ [*name of driver*] was suddenly and unexpectedly put into an emergency situation not caused in any way by his own fault or carelessness. In order to avoid hitting _____ [an automobile *or* a truck *or* a pedestrian *or* a child *or other*], defendant _____ [*name of driver*] was forced immediately and without hesitation to apply the brakes of the _____ [bus *or designate other type of vehicle*]. The injuries complained of by plaintiff in his complaint, if there were any, were caused solely by this extraordinary situation of emergency. Defendant _____ [*name of driver*] acted with due care and precaution considering that emergency, and thus was not acting negligently within the scope of his employment. Therefore, plaintiff must be denied all recovery prayed for in his complaint.

[2] Use of Form

This form of affirmative defense is based on the doctrine of imminent peril and may be set forth in an answer [*Code Civ. Proc. § 431.30*] to a complaint by a plaintiff for damages based on negligence arising from the operation of a bus or other vehicle. For example, in a passenger's suit for personal injuries caused by the sudden stopping of a bus, instruction on imminent peril was proper when a child ran into the street and the bus driver stopped the bus to avoid hitting the child [*Abney v. City & County of San Francisco (1953) 115 Cal. App. 2d 506, 514, 252 P.2d 654* ; *see James v. American Buslines (1952) 111 Cal. App. 2d 273, 276, 244 P.2d 503* (question of imminent danger is a jury question); *Bovette v. Los Angeles Transit Lines (1947) 78 Cal. App. 2d 860, 863, 179 P.2d 80* (instruction to jury on sudden emergency doctrine is proper when only a brief interval of time exists from time of seeing the danger to time of the accident)]. And, in wrongful death action for the death of a five year old girl killed when struck by a motor bus, the bus driver, who without fault was suddenly put in a situation where a collision was imminent, without sufficient time to consider all the circumstances, is excused for omitting some precaution or for making an unwise choice [*Burton v. Los Angeles Ry. Corp. (1947) 79 Cal. App. 2d 605, 610, 180 P.2d 367]* .

[3] Cross References

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 900, 901 (10th ed. 2005)

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10-106 California Forms of Pleading and Practice--Annotated § 106.79

§ 106.79 Affirmative Defense--Lack of Knowledge by Carrier That Passenger Was Afflicted With Special Physical Condition

[1] FORM Affirmative Defense--Lack of Knowledge by Carrier That Passenger Was Afflicted With Special Physical Condition

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that at the time and place of the injuries herein alleged, defendant _____ [*name of driver or other employee*] did not have and could not have had any knowledge that plaintiff was _____ [blind *or* sick *or* aged *or* very young *or* crippled *or* infirm *or other*] because _____ [*state reasons*]. Thus, defendant _____ [*name of driver or other employee*] was not obligated to render any special assistance to plaintiff while plaintiff was attempting to _____ [board *or* alight from] defendant _____'s [*name of carrier*] _____ [bus *or designate other type of vehicle*]. Defendant _____ [*name of driver or other employee*] was at all times mentioned in plaintiff's complaint acting with due care in operating the _____ [bus *or designate other type of vehicle*], and thus plaintiff must be denied all recovery prayed for in his or her complaint.

[2] Use of Form

This form of affirmative defense may be set forth in an answer [*Code Civ. Proc. § 431.30*] to a complaint by a plaintiff for damages based on negligence for failure to render assistance to a passenger with a special physical infirmity in boarding or alighting from a bus or other vehicle.

[3] Cross References

For additional discussion, *see §§ 106.42[2], [3]*; 106.6[2], [3]

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10-107 California Forms of Pleading and Practice--Annotated 107.syn

§ 107.syn Synopsis to Chapter 107: CANCELLATION OF INSTRUMENTS

§ 107.01 Scope of Chapter

§ 107.02 Cross References

§§ 107.03-107.09 [Reserved]

§ 107.10 Governing Law

§ 107.11 Action for Cancellation of Instrument

[1] Cancellation

[2] Distinguished From Rescission

[3] In Addition to Restitution

[4] Notice and Offer to Restore Consideration Not Prerequisite to Action

§ 107.12 Lost Instruments

§ 107.13 Distinction Between Void and Voidable Instruments

[1] Void and Voidable Distinguished

[2] Effect of Distinction on Action for Cancellation of Instrument

[3] Mistakenly Executed Instrument

[4] Other Void Instruments

[5] Effect of Void Instrument on Related Valid Instrument

§ 107.14 Possibility of Serious Injury

§ 107.15 Partial Cancellation

§ 107.16 Written Instruments Subject to Cancellation

§ 107.17 Entry of Judgment for Cancellation on Default

§ 107.18 Defenses

[1] Defendant Not Connected With Fraud, Duress, Menace, or Undue Influence

[2] Plaintiff's Lack of Equity

[3] Waiver of Right to Rescind Underlying Transaction

[4] Instrument Apparently Invalid on Its Face

[5] Availability of Defense by Plaintiff Is Immaterial

§ 107.19 Trial

[1] No Right to Jury

[2] Evidence of Fraudulent Inducement

§§ 107.20-107.39 [Reserved]

§ 107.40 Related Matthew Bender Publications

§ 107.41 State Statutes

[1] Cancellation of Instruments

[2] Lost Instruments

[3] Rescission of Contracts

[4] Miscellaneous

§ 107.42 Decisions

[1] Action for Cancellation of Instrument

[a] Nature of Cancellation

[b] Distinguished From Rescission of Contract

[2] Damages

[3] Default Judgment

[4] Defenses

[5] Distinction Between Void and Voidable Instruments

[6] Lost Instruments

[7] Partial Cancellation

[8] Parties

[9] Possibility of Serious Injury

[10] Trial

[11] Written Instruments Subject to Cancellation

[a] Contracts

[b] Instruments Involving Children

[c] Instruments Involving Personal Property

[d] Instruments Involving Real Property

[e] Promissory Notes

[f] Release

[g] Stock Certificates

[h] Miscellaneous

§ 107.43 Text References

§§ 107.44-107.59 [Reserved]

§ 107.60 Complaint for Cancellation of Written Instrument [Civ. Code § 3412]--General Form

[1] FORM

[2] Use of Form

[a] Complaint

[b] Cross Complaint

[3] Parties

[4] Allegations

[a] Elements of Cause of Action

[b] Identity and Capacity of Defendant [Paragraph 1]

[c] Venue Facts [Paragraph 2]

[d] Fictitiously Named Defendants [Paragraph 3]

[e] Identity and Capacity of Plaintiff [Paragraph 4]

[f] Existence and Custody of Instrument [Paragraph 5]

[g] Description of Instruments [Paragraph 5]

[h] Apparent Validity and Actual Invalidity of Instrument [Paragraphs 5, 6]

[i] Allegation Required

[ii] Multiple Theories of Invalidity

[iii] Facts Showing Invalidity

[iv] Mistake

[v] Mistaken Belief as to Nature of Instrument

[i] Apprehension of Serious Injury [Paragraph 7]

[j] Claim for Damages [Paragraph 8]

[k] Exemplary and Punitive Damages [Paragraph 9]

[5] Prayer

[a] Voiding of Instrument, Delivery, and Damages

[b] Availability of Relief Consistent With Complaint

[c] Injunctive Relief Is Available

[6] Verification

[7] Jurisdiction

[a] Equitable Case

[b] Instrument Affecting Real Property Outside California

[8] Venue

[a] Instrument Not Affecting Title to Real Property

[b] Instrument Affecting Real Property

[i] Recorded Contract Affecting Real Property

[ii] Promissory Note and Deed of Trust

[iii] Request for Cancellation and Other Relief

[9] Statute of Limitations

[10] Cross References

§ 107.61 Allegation--Rescission of Underlying Transaction and Offer to Restore Consideration--Cancellation of Voidable Instrument [Civ. Code § 3412]

[1] FORM

[2] Use of Form

[3] Necessity of Restoring Consideration Where Instrument Voidable

[4] Cross References

§ 107.62 Allegation--Discovery of Facts Making Instrument Voidable--Cancellation of Voidable Instrument [Civ. Code § 3412]

[1] FORM

[2] Use of Form

[3] Necessity of Rescinding Promptly

[4] Cross References

§§ 107.63-107.69 [Reserved]

§ 107.70 Proposed Statement of Decision--Cancellation of Instrument [Civ. Code § 3412]--General Form

[1] FORM

[2] Use of Form

[3] Cross References

§ 107.71 Judgment for Cancellation of Instrument [Civ. Code § 3412]--General Form

[1] FORM

[2] Use of Form

[3] Interlocutory Judgment for Cancellation

[4] Conditional Order for Cancellation

[5] Determination of Rights and Obligations Under Instrument

[6] Cross References

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10-107 California Forms of Pleading and Practice--Annotated § 107.01

§ 107.01 Scope of Chapter

This chapter discusses the cancellation of written instruments. It includes:

- A general form of complaint [*see § 107.60*].
- Forms of allegations for use where the instrument in question is voidable rather than void [*see §§ 107.61*, *107.62*].
- A general form of judgment for cancellation [*see § 107.71*].

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10-107 California Forms of Pleading and Practice--Annotated § 107.02

§ 107.02 Cross References

For discussion and forms relating to cancellation of instruments in particular circumstances and related subjects, see the following chapters:

- Ch. 94, *Bankruptcy* .
- Ch. 307, *Insolvency* (cancellation of debts).
- Ch. 95, *Banks, Deposits, and Checks* (cancellation of banking acts, such as certification of checks or notes and extensions of credit, and instruments connected with banking acts).
- Ch. 184, *Deeds* (cancellation of deeds).
- Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* (grounds on which cancellation may be had; proving instrument to be void or voidable).
- Ch. 243, *Elections* (cancellation of registration of electors).
- Ch. 308, *Insurance* (cancellation of insurance policies).
- Ch. 342, *Liens and Wage Preferences* (cancellation of notice of inventory lien).
- Ch. 490, *Rescission and Restitution* .
- Ch. 569, *Vendor and Purchaser* (cancellation of deeds of trust and notes in connection with rescission of real property sale agreement).

For discussion and forms relating to lost instruments, see Ch. 385, *Negotiable Instruments* (establishment of lost note) and Ch. 356, *Lost Papers*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawDeedsRemediesCancellation & RescissionContracts LawNegotiable InstrumentsEnforcementDefensesDuressContracts LawNegotiable InstrumentsEnforcementLost & Stolen Instruments

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[Reserved]

§§ 107.03[Reserved]

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10-107 California Forms of Pleading and Practice--Annotated § 107.10

§ 107.10 Governing Law

Actions for the cancellation of a written instrument are governed by *Civ. Code §§ 3412-3414*.

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10-107 California Forms of Pleading and Practice--Annotated § 107.11

§ 107.11 Action for Cancellation of Instrument

[1] Cancellation

A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, on that person's application, be so adjudged and ordered to be delivered up or canceled [*Civ. Code § 3412*; for discussion of what constitutes serious injury, *see § 107.14, below*].

The operation of *Civ. Code § 3412* has been explained as follows: "Wherever an instrument of writing exists, which has been obtained without consideration, or has become a nullity, or which, if left outstanding, may cause injury to a plaintiff, or may be vexatiously used against him, after the evidence to impeach or invalidate it is lost or may throw a cloud or suspicion over his title, a court of equity will afford relief by ordering it to be delivered up and cancelled" [*Wiard v. Brown (1881) 59 Cal. 194, 197]* .

To be subect to an action for cancellation, the instrument must appear to be valid [*Civ. Code § 3413*; for discussion, *see § 107.18[4]*].

[2] Distinguished From Rescission

An action for cancellation of an instrument should not be begun for the purpose of rescinding the underlying contract. The former action to obtain rescission of a contract by a court has been abolished by enactment of *Civ. Code § 1692* and repeal of former *Civ. Code §§ 3406-3408* [*see Runyan v. Pacific Air Industries, Inc. (1970) 2 Cal. 3d 304, 312-313, 85 Cal. Rptr. 138, 466 P.2d 682]* . Rescission of a contract is now accomplished unilaterally [*see Civ. Code § 1691*], and relief based on the rescission may then be sought.

However, a contract (whether oral or in writing) can be canceled by agreement of the parties. To cancel a contract is to abrogate so much of it as remains unperformed. It differs from rescission in that rescission involves the restoration of the parties to their former positions; cancellation of a contract leaves the parties where they are when it is canceled [*see Mamula v. McCulloch (1969) 275 Cal. App. 2d 184, 197, 79 Cal. Rptr. 571]* .

The writing which evidences a contract may be the subject of an action for cancellation under *Civ. Code § 3412* [*see §*

107.16, below], and the effect would be to cancel the contract unless that would cause the defendant to suffer a forfeiture [*see Ebbert v. Mercantile Trust Co. (1931) 213 Cal. 496, 499-501, 2 P.2d 776* (court of equity as denying cancellation that would cause a forfeiture)]. Forfeiture can be prevented by requiring restoration as a condition of cancellation, in which case cancellation of the writing which evidences the contract would be in effect a rescission and restitution.

[3] In Addition to Restitution

Cancellation of an instrument may be had in an action for restitution [*see, e.g., Millar v. James (1967) 254 Cal. App. 2d 530, 532, 534, 62 Cal. Rptr. 335* (affirming judgment for restitution of real property conveyed in consequence of fraudulent inducement, and for cancellation of plaintiff's deed to defendant)]. A plaintiff seeking restitution on the basis of his unilateral rescission of a contract is entitled to complete relief [*see Civ. Code § 1692*].

[4] Notice and Offer to Restore Consideration Not Prerequisite to Action

Since an action for cancellation brought under *Civ. Code § 3412* is not an action for restitution after rescission under *Civ. Code §§ 1689* and *1691*, notice and an offer to restore consideration are not required before cancellation of a void instrument may be sought [*see Smith v. Williams (1961) 55 Cal. 2d 617, 620-621, 12 Cal. Rptr. 665, 361 P.2d 241]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesRestitutionContracts LawRemediesRescission & RedhibitionGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)EnforcementLost, Destroyed & Stolen InstrumentsCommercial Law (UCC)Negotiable Instruments (Article 3)Discharge & PaymentDischargeReal Property LawDeedsRemediesCancellation & Rescission

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§ 107.12 Lost Instruments

If an instrument exists which would be subject to cancellation under *Civ. Code § 3412*, but it has been lost, it clearly cannot be canceled. However, on proper application the instrument may be adjudged void [*Civ. Code § 3412*]. An action for this purpose would have to be in rem rather than in personam [*see Brown v. Anderson-Cottonwood Irrigation Dist. (1920) 183 Cal. 186, 189, 190 P. 797]* .

Civ. Code § 3415 provides for the proof and establishment of a lost instrument, and the compelling of issuance, execution, or acknowledgment of a duplicate. For forms and discussion, see Ch. 356, *Lost Papers* , and Ch. 385, *Negotiable Instruments* .

The object of an action under *Civ. Code § 3415* is the converse of that under *Civ. Code § 3412*, that is, under the former the object is to establish an instrument, whereas under the latter the object is to annul an instrument.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsTrue in Rem ActionsContracts LawNegotiable InstrumentsEnforcementLost & Stolen Instruments

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10-107 California Forms of Pleading and Practice--Annotated § 107.13

§ 107.13 Distinction Between Void and Voidable Instruments

[1] Void and Voidable Distinguished

There is a basic distinction between a void instrument and a voidable instrument which affects an action for cancellation.

The words void and voidable have been distinguished thus: void in the strict sense means that an instrument is nugatory and ineffectual so that nothing can cure it, and voidable means that an imperfection or defect can be cured by the act or confirmation of the person who could take advantage of it [Black's Law Dictionary (4th ed)].

An instrument may be described as void if the courts would not enforce it in any event, whereas an instrument which the courts would enforce in the absence of objection may be described as voidable. In most cases the distinction will be that a void instrument is one executed by a person without legal capacity to execute it; a voidable instrument is one which the person executing it was competent to execute but which he executed under circumstances entitling him to repudiate it, the usual circumstances being fraud, duress, menace, undue influence, or mistake.

[2] Effect of Distinction on Action for Cancellation of Instrument

Whether the instrument is void or merely voidable may be crucial to the outcome of an action for cancellation. Where an instrument is voidable, the plaintiff in an action for cancellation of it must offer to restore to the defendant everything of value which the plaintiff has received in the underlying transaction, less damages sustained. That is to say, the plaintiff must rescind a voidable transaction. This is not necessary where the instrument in question is void [*see Ebbert v. Mercantile Trust Co. (1931) 213 Cal. 496, 501, 2 P.2d 776* (deduction, for damages actually suffered, from amount of consideration required to be restored); *Fleming v. Kagan (1961) 189 Cal. App. 2d 791, 796-798, 11 Cal. Rptr. 737]* . However, if the damages sustained equal or exceed the value of what would have to be restored, the plaintiff need not restore, and need not offer to restore, anything [*see Peterson v. Wagner (1921) 52 Cal. App. 1, 12, 198 P. 25]* .

Where an instrument is voidable, the plaintiff's action for cancellation of it will be barred unless he acted promptly, after discovering the facts making it voidable, to rescind the underlying transaction [*see Leeper v. Beltrami (1959) 53 Cal. 2d 195, 215, 1 Cal. Rptr. 12, 347 P.2d 12]* . By implication from the reasoning in *Leeper,* there is no necessity to act

promptly to rescind a transaction which resulted in a void instrument.

[3] Mistakenly Executed Instrument

The case of mistaken execution has been described as involving a void instrument. The usual case is execution of an instrument which the person executing it did not intend to execute, such as signing a paper which turns out to be a deed but which at the time the signer believed to be something else [*see, e.g., Fleming v. Kagan (1961) 189 Cal. App. 2d 791, 797, 11 Cal. Rptr. 737* (describing such a case in attempting to distinguish void and voidable)]. This kind of case focuses attention on the distinguishing factor where there is no question about competency to execute instruments generally. The issue in such a case is the intent of the person executing the instrument. If he knowingly and voluntarily executed the instrument, recognizing it to be what it purports to be, but did so because of fraudulent inducement, duress, menace, undue influence, or mistake as to a material, underlying fact, the instrument is merely voidable. A mistake as to the nature and effect of the instrument, however, makes the instrument void because there never was any intent to execute it, that is, to become bound by it in the manner and to the extent actually provided in the instrument.

[4] Other Void Instruments

An instrument may be void for many reasons. If it was executed under coercion and without consideration, it is void [*see Oswald v. El Centro (1930) 211 Cal. 45, 52, 292 P. 1073* (lease)].

An instrument need not be void *ab initio;* it can become void because of events after its execution. For example, where the maker of a promissory note gave the payee securities as collateral, and the payee thereafter converted the securities to his own use, the note was not merely voidable but became void because of failure of consideration [*see Nichols v. Leach (1931) 114 Cal. App. 545, 550, 300 P. 103]* .

The fact that an instrument is void does not necessarily mean that it can be canceled. Agreements of minors are void for want of capacity, but are enforceable after majority unless the minor disaffirms within a reasonable time [*see Fam. Code § 6710*]. The general rule that a void agreement is not curable by either ratification or estoppel applies where the reason for voidness is illegality or violation of public policy. However, where the events establishing a ground for estoppel occured while the plaintiff was under no disability, the fact that the instrument was executed while he was entirely without understanding [*see Civ. Code § 38*] will not prevent application of the principle of estoppel, even though the instrument is void [*see Dool v. First Nat'l Bank of Calexico (1930) 209 Cal. 717, 725, 290 P. 15* (reversing judgment canceling note executed when plaintiff's decedent was arguably disabled and entirely without understanding on ground of estoppel arising from decedent's subsequent actions); *see also Dool v. First Nat'l Bank of Calexico (1930) 107 Cal. App. 585, 589, 290 P. 478* (on same facts, in opinion issued one month after foregoing opinion of Supreme Court, characterizing same note as "not void but voidable" and ratified by maker's subsequent actions; opinion by Supreme Court not cited)].

[5] Effect of Void Instrument on Related Valid Instrument

Where there are two related instruments, one subject to cancellation because it is either void or voidable, and the other enforceable, the court will not necessarily cancel both. In *Dool v. First Nat'l Bank of Calexico (1930) 107 Cal. App. 585, 588-589, 290 P. 478* , a promissory note was executed when the maker was disabled, and the note was either void or voidable. Later, when the maker was under no disability, he executed a deed of trust to secure the indebtedness evidenced by the note, and that deed set out a copy of the note. The plaintiffs sought cancellation of both the note and the deed of trust, arguing that the deed of trust was merely incidental to the note. Judgment upholding the deed of trust as a good and valid lien was affirmed on the ground that existence of a note was irrelevant and that it made no difference whether the note in question was void or voidable.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)EnforcementDefenses & ClaimsContracts LawNegotiable InstrumentsEnforcementDefensesGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesPublic Policy Violations

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§ 107.14 Possibility of Serious Injury

The reasonable apprehension of serious injury required by *Civ. Code § 3412* for cancellation (*see § 107.11[1], above*) is not limited to pecuniary loss. It may be the alteration of one's position to his prejudice. It is not necessary to allege or prove any pecuniary loss so long as the record indicates there was injury or prejudice resulting. It is sufficient to show that the plaintiff is in a worse position than he otherwise would have been [*Turner v. Turner (1959) 167 Cal. App. 2d 636, 641-642, 334 P.2d 1011* (action for cancellation of father's written consent to marriage of minor son, on ground of fraudulent inducement, and annulment of marriage)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesGeneral OverviewReal Property LawDeedsEnforceabilityCommercial Law (UCC)Negotiable Instruments (Article 3)EnforcementDefenses & ClaimsContracts LawNegotiable InstrumentsEnforcementDefensesGeneral Overview

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10-107 California Forms of Pleading and Practice--Annotated § 107.15

§ 107.15 Partial Cancellation

Where an instrument is evidence of different rights or obligations, it may be canceled in part and allowed to stand as to the part remaining uncanceled [*Civ. Code § 3414*].

As a general rule, a person may not affirm a transaction in part and rescind in part; but where an instrument sought to be canceled is separable or divisible and where the circumstances justify a rescission only as to particular matters or particular parties involved in an entire transaction, partial rescission is permissible [*see Reina v. Erassarret (1949) 90 Cal. App. 2d 418, 425-426, 203 P.2d 72]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesGeneral OverviewReal Property LawDeedsEnforceabilityCommercial Law (UCC)Negotiable Instruments (Article 3)EnforcementDefenses & ClaimsContracts LawNegotiable InstrumentsEnforcementDefensesGeneral Overview

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§ 107.16 Written Instruments Subject to Cancellation

The following kinds of written instruments appear from the cases to be instruments subject to cancellation in an action under *Civ. Code § 3412*. This list is not exhaustive but only illustrates the variety of instruments which may be canceled under that section.

- Applications of a contractual nature [*see* *Klombies v. Weeks Poultry Community (1932) 121 Cal. App. 175, 8 P.2d 940* (application to become member of nonprofit cooperative marketing corporation which, if accepted, would bind applicant to contract with corporation for exclusive marketing of applicant's farm products; disapproved on other grounds in *Mary Pickford Co. v. Bayly Bros., Inc. (1939) 12 Cal. 2d 501, 521, 86 P.2d 102*)].

- Assignments [*see* *Lentz v. Hartman (1941) 43 Cal. App. 2d 609, 111 P.2d 404* (affirming judgment for cancellation of assignment of promissory note and mortgage)].

- Bills of sale for personal property [*see* *Bland v. Kelley (1945) 69 Cal. App. 2d 116, 158 P.2d 206* (bill of sale for household furnishings sold in connection with sale of real property)].

- Consent to the marriage of a minor child [*see* *Turner v. Turner (1959) 167 Cal. App. 2d 636, 334 P.2d 1011* (reversing trial court judgment denying relief on complaint for cancellation of father's written consent to minor son's marriage, on ground of fraudulent inducement, and annulment of marriage)].

- Deeds [*see* *Smith v. Williams (1961) 55 Cal. 2d 617, 12 Cal. Rptr. 665, 361 P.2d 241* (trust deeds; ground of fraud); *Peterson v. Ellebrecht (1962) 205 Cal. App. 2d 718, 23 Cal. Rptr. 349* (ground of mental incompetency at time of execution); *see also* Ch. 184, *Deeds*].

- Executory contracts for the sale of personal property [*see* *Matlin v. Crescent Commercial Corp. (1949) 93 Cal. App. 2d 8, 207 P.2d 873* (contract for continuing purchases of beer; judgment for concellation, after quality of beer declined because of governmental war policies affecting grain supplies, affirmed)].

- Leases [*see* *Oswald v. El Centro (1930) 211 Cal. 45, 292 P. 1073* (lease as void because of lack of consideration, violation of public policy, and execution under coercion)].

- Options [*see* *Bard v. Kent (1942) 19 Cal. 2d 449, 122 P.2d 8* (affirming judgment for plaintiff administrator of optionor's estate against optionor's attorney in fact who executed option, for cancellation on ground of revocation by optionor's death when there was no consideration for option)].

- Promissory notes and security instruments [*see* *Fleming v. Kagan (1961) 189 Cal. App. 2d 791, 11 Cal. Rptr. 737* , (note which maker was fraudulently induced to execute as voidable in hands of all except holder in due course for value before maturity without notice of infirmity or defect; note which maker executed because of fraud and without knowledge of nature of instrument, believing it to be something else, as wholly void); *Gardner v. Rubin (1957) 149 Cal. App. 2d 368, 308 P.2d 892* (note and deed of trust); *Lincoln v. Averill (1941) 47 Cal. App. 2d 335, 117 P.2d 913* (note and chattel mortgage)].

- Reconveyances by a trustee under a deed of trust [*see* *Phelps v. American Mortgage Co. (1936) 6 Cal. 2d 604, 59 P.2d 95* (action by holders in due course of notes secured by deed of trust against trustee and beneficiary)].

- Releases from liability [*see* *O'Meara v. Haiden (1928) 204 Cal. 354, 268 P. 334* (father signing release of liability for personal injuries suffered by son as not bound by release with respect to liability for wrongful death where release executed at time when father did not contemplate son might die from injuries); *Union P. Co. v. Zimmer (1948) 87 Cal. App. 2d 524, 197 P.2d 363* (action for declaratory relief after attempted rescission of release on ground of fraud and mistake)].

- Stock certificates [*see* *Noble v. Learned (1908) 153 Cal. 245, 94 P. 1047* (plaintiff personal representative of estate of owner, defendant personal representative of estate of person who wrongfully obtained possession of certificate; judgment for cancellation of outstanding certificate and issuance of new certificate affirmed); *Klinker v. Guarantee Title Co. (1929) 98 Cal. App. 469, 277 P. 177* (certificates void because issue not authorized by permit from Commissioner of Corporations; cancellation ordered on complaint of corporation)].

- Written agreements which purport to be contracts but are not because there was no meeting of the minds [*see* *Patterson v. Clifford F. Reid, Inc. (1933) 132 Cal. App. 454, 23 P.2d 35* ("The instrument here involved is on its face a completed contract [for the sale of real property], signed and executed by all parties thereto. It could be placed upon record at any time by defendants [sellers] or assigned by them to a third party. That such recordation or assignment might cause serious injury to plaintiff [buyer] is not open to question. We are of the opinion that the facts of this case entitle respondent [buyer] to invoke the provisions of [*Civ. Code § 3412*]")], or agreements obtained by fraud or voidable for other reasons [*see* *California Credit etc. Corp. v. Goodin (1926) 76 Cal. App. 785, 246 P. 121]* , or agreements that are void for lack of consideration [*see* *Rottman v. Rottman (1921) 55 Cal. App. 624, 204 P. 46* (affirming judgment for rescission of interspousal agreement for lack of consideration, on wife's complaint praying for declaration that agreement is null and void and for cancellation)].

- Written relinquishment of child for adoption if a parent has been induced by fraud, duress, or undue influence (or other means) to sign the relinquishment [*see* *Brooks v. Los Angeles County Bureau of Adoptions (1963) 218 Cal. App. 2d 732, 32 Cal. Rptr. 466* ; *Fiske v. Director, Dep't of Public Welfare (1951) 107 Cal. App. 2d 31, 236 P.2d 427* (affirming judgment described by court of appeal as "that the relinquishment was not a valid one and that it should be and was ordered canceled and declared void" on

ground of mistake resulting from misrepresentation of fact)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesGeneral OverviewReal Property LawDeedsEnforceabilityCommercial Law (UCC)Negotiable Instruments (Article 3)EnforcementDefenses & ClaimsContracts LawNegotiable InstrumentsEnforcementDefensesGeneral Overview

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§ 107.17 Entry of Judgment for Cancellation on Default

The provisions of *Code Civ. Proc. § 585(a)*, authorizing the clerk or judge to enter judgment immediately after entering the defendant's default in an action arising on a contract for the recovery of money or damages only, do not authorize the entry of judgment after the defendant's default in an action for cancellation of an instrument, such as a promissory note, arising from the rescission of an underlying contract. Such a judgment, if entered, is void [*Farrar v. Steenbergh (1916) 173 Cal. 94, 97, 159 P. 707* (construing statutory language substantially equivalent to current statute)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesGeneral OverviewReal Property LawDeedsEnforceabilityCommercial Law (UCC)Negotiable Instruments (Article 3)General Provisions & DefinitionsDefinitionsNegotiable & Nonnegotiable InstrumentsCommercial Law (UCC)Negotiable Instruments (Article 3)EnforcementDefenses & ClaimsContracts LawNegotiable InstrumentsEnforcementDefensesGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault Judgments

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10-107 California Forms of Pleading and Practice--Annotated § 107.18

§ 107.18 Defenses

[1] Defendant Not Connected With Fraud, Duress, Menace, or Undue Influence

When cancellation of an instrument is sought on the ground of fraud, duress, menace, or undue influence, it is apparently a defense that the defendant was in no way connected with the alleged fraud, duress, menace, or undue influence to which the plaintiff was subjected by another [*see Carroll v. Carroll (1940) 16 Cal. 2d 761, 770-771, 108 P.2d 420* (wife who executed note and deed of trust as result of husband's fraud, duress, menace, and undue influence was not entitled to cancellation against other defendants not participating in or having any knowledge or notice of husband's acts)].

[2] Plaintiff's Lack of Equity

Cancellation of an instrument under *Civ. Code § 3412* is equitable relief, and it may be denied if the complainant has been guilty of inequitable conduct which contributed to execution of the instrument [*see Taylor v. Taylor (1944) 66 Cal. App. 2d 390, 399-400, 152 P.2d 480* (affirming denial of cancellation of joint tenancy deed between spouses when complainant husband had been guilty of unclean hands in contracting void marriage as a result of which deed was executed)].

If the instrument in question is merely voidable rather than void, and the plaintiff has not offered to do equity or has been guilty himself of inequitable conduct, it is appropriate for the defendant to assert the relevant facts in his answer and to ask that the court grant relief on the complaint only on the condition that the plaintiff do equity [*see Ebbert v. Mercantile Trust Co. (1931) 213 Cal. 496, 499, 2 P.2d 776]* .

[3] Waiver of Right to Rescind Underlying Transaction

If the instrument in question is voidable, rather than void, and it appears that the plaintiff has waived the right to rescind the underlying transaction. The defendant asserting such a waiver has the burden of proving it by evidence that does not leave the matter doubtful or uncertain [*see Mobley v. Richfield Oil Corp. (1942) 53 Cal. App. 2d 406, 410, 128 P.2d 105]* .

[4] Instrument Apparently Invalid on Its Face

The Civil Code declares that an instrument, the invalidity of which is apparent on its face, or on the face of another instrument which is necessary to the use of the first instrument in evidence, is not to be deemed capable of causing injury for purposes of *Civ. Code § 3412* [*Civ. Code § 3413*]. The result of this rule is that the plaintiff in an action for cancellation of an instrument under *Civ. Code § 3412* must show not only that the instrument is invalid but also that it is apparently valid. If the complaint fails to disclose, either by pleading facts or by exhibiting a copy of the instrument, that the instrument is apparently valid, a demurrer would probably be appropriate [*see Hughes v. Beekley (1927) 85 Cal. App. 313, 316, 259 P. 337]* . If the instrument is apparently invalid on its face, or if another instrument which is necessary to the use of the first instrument in evidence shows on its face that the first instrument is apparently invalid, this is a matter which may appropriately be asserted in defense.

[5] Availability of Defense by Plaintiff Is Immaterial

It is not a defense to an action for cancellation that, conceding the instrument to be void or voidable, the plaintiff has a defense against any attempt by the holder or anyone else to enforce the instrument. The fact that the plaintiff could, if called to it, defend successfully any lawsuit based on the instrument is immaterial; the plaintiff is entitled to have all controversies arising from the instrument determined in one action for cancellation [*Bradley v. Gas Control Co. (1894) 102 Cal. 627, 632, 36 P. 1011]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesGeneral OverviewContracts LawContract Conditions & ProvisionsWaiversGeneral OverviewReal Property LawDeedsEnforceabilityCommercial Law (UCC)Negotiable Instruments (Article 3)EnforcementDefenses & ClaimsFamily LawMarriageValidityVoid & Voidable MarriagesGeneral Overview

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§ 107.19 Trial

[1] No Right to Jury

An action for the cancellation of an instrument is an equitable action. Trial by jury is not a matter of right [*see Santa Ana Mortgage & Inv. Co. v. Kinslow (1938) 30 Cal. App. 2d 107, 109-110, 85 P.2d 899]* .

If a jury is used, its verdict is advisory only. The court may disregard the verdict and the verdict is not binding unless approved by the court [*see Bennett v. Bennett (1919) 41 Cal. App. 537, 539-540, 182 P. 461* (action to cancel deed on ground grantor was insane, feeble, mentally incompetent, and subjected to undue influence, and deed was executed without consideration)].

[2] Evidence of Fraudulent Inducement

In an action for cancellation of an instrument on the ground of fraudulent inducement to execute it, judgment may be given for the plaintiff if there is substantial evidence to support a finding of any one material misrepresentation or concealment of fact, or a finding that there was never any meeting of the minds on the terms of an underlying contract [*see Kuhn v. Gottfried (1951) 103 Cal. App. 2d 80, 84, 229 P.2d 137* (affirming judgment for plaintiffs in action for cancellation of promissory note secured by chattel mortgage on ground of fraudulent inducement)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury TrialContracts LawFormationCapacity of PartiesGeneral OverviewReal Property LawDeedsEnforceabilityCommercial Law (UCC)Negotiable Instruments (Article 3)EnforcementDefenses & ClaimsContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesForgery, Fraud & Mistake

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[Reserved]

§§ 107.20[Reserved]

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10-107 California Forms of Pleading and Practice--Annotated § 107.40

§ 107.40 Related Matthew Bender Publications

For points and authorities for use in an action involving cancellation of an instrument executed by an insane or incompetent person, see California Points and Authorities, Ch. 117, *Insane and Incompetent Persons*

For forms for interrogatories for use in actions between parties to the execution of an instrument, where one party seeks to cancel the instrument, see Bender's Forms of Discovery, *Cancellation of Instruments* (including cross references to forms of interrogatories on related topics such as deeds and fraud)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewReal Property LawDeedsEnforceabilityCivil ProcedureDiscoveryMethodsGeneral Overview

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10-107 California Forms of Pleading and Practice--Annotated § 107.41

§ 107.41 State Statutes

[1] Cancellation of Instruments

Cancellation of written instrument that might cause serious injury if left outstanding. *Civ. Code § 3412*

Instrument invalid on its face, or on face of another instrument necessary to its use in evidence, deemed incapable of causing injury. *Civ. Code § 3413*

Cancellation in part of instrument evidencing different rights or obligations. *Civ. Code § 3414*

[2] Lost Instruments

Lost or destroyed private document or instrument in writing may be subject of action to prove or establish it or to compel issuance, execution, or acknowledgment of duplicate. *Civ. Code § 3415*

[3] Rescission of Contracts

Grounds for rescission of contract. *Civ. Code § 1689*

Procedure for rescission of contract. *Civ. Code § 1691*

Relief based on rescission. *Civ. Code § 1692*

[4] Miscellaneous

Disaffirmance of contract made while obligor was a minor. *Fam. Code § 6710*

Person entirely without understanding is not capable of making contract. *Civ. Code § 38*

Agreement by person of unsound mind but not entirely without understanding is subject to rescission. *Civ. Code § 39*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)EnforcementDefenses & ClaimsCommercial Law (UCC)Negotiable Instruments (Article 3)EnforcementLost, Destroyed & Stolen InstrumentsReal Property LawDeedsLost Deeds

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10-107 California Forms of Pleading and Practice--Annotated § 107.42

§ 107.42 Decisions

[1] Action for Cancellation of Instrument

[a] Nature of Cancellation

Court of equity can provide relief by ordering instrument delivered up and canceled when it was obtained without consideration, or has become nullity, or if left outstanding, may be vexatiously used against plaintiff after evidence to impeach or invalidate it has been lost, or may throw cloud or suspicion over title. *Wiard v. Brown (1881) 59 Cal. 194, 197*

[b] Distinguished From Rescission of Contract

Action for rescission of contract was abolished by enactment of *Civ. Code § 1692* and repeal of former *Civ. Code §§ 3406-3408*. *Runyan v. Pacific Air Industries, Inc. (1970) 2 Cal. 3d 304, 312-313, 85 Cal. Rptr. 138, 466 P.2d 682*

To cancel contract is to abrogate so much of it as remains unperformed; cancellation of contract differs from rescission, which restores parties to their former positions. *Mamula v. McCulloch (1969) 275 Cal. App. 2d 184, 197, 79 Cal. Rptr. 571* (quoting *Young v. Flickinger (1925) 75 Cal. App. 171, 174, 242 P. 516*)

In case involving voidable instrument, court must deny cancellation of instrument where cancellation would cause defendant to suffer forfeiture. *Ebbert v. Mercantile Trust Co. (1931) 213 Cal. 496, 499-501, 2 P.2d 776*

Cancellation of deed is relief in addition to restitution of real property; cancellation appropriate in order to give complete relief as provided for in *Civ. Code § 1692*. *Millar v. James (1967) 254 Cal. App. 2d 530, 532-534, 62 Cal. Rptr. 335*

[2] Damages

In action to cancel deed and marital settlement agreement induced by fraud, damages for pain and suffering is not awardable, whether sought under *Civ. Code § 1692* or *Civ. Code § 3343*; punitive damages are recoverable even when recovery is in form of restitution rather than monetary damages. *In re Marriage of McNeill (1984) 160 Cal. App. 3d 548, 559, 561, 206 Cal. Rptr. 641* (disapproved on other grounds in *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 224 Cal. Rptr. 333, 715 P.2d 253*)

[3] Default Judgment

Clerk or judge has no authority under *Code Civ. Proc. § 585(a)* to enter judgment on default of defendant in action for cancellation of instrument arising from rescission of underlying contract. *Farrar v. Steenbergh (1916) 173 Cal. 94, 97, 159 P. 707* (construing statutory language substantially equivalent to current statute)

[4] Defenses

Lack of connection with alleged fraud, duress, menace, or undue influence under which plaintiff executed instrument as defense in action forcancellation of note and deed of trust. *Carroll v. Carroll (1940) 16 Cal. 2d 761, 770-771, 108 P.2d 420*

Cancellation of joint tenancy deed between spouses was properly denied when complainant husband had been guilty of unclean hands in contracting void marriage as a result of which deed was executed. *Taylor v. Taylor (1944) 66 Cal. App. 2d 390, 399-400, 152 P.2d 480*

Defendant's request in answer that court grant relief only on condition plaintiff do equity is appropriate when instrument in question is voidable rather than void and plaintiff has been guilty of inequitable conduct or refuses to do equity. *Ebbert v. Mercantile Trust Co. (1931) 213 Cal. 496, 499, 2 P.2d 776*

Defendant has burden of proving defense of waiver of right to rescind for fraud; evidence must not leave matter doubtful or uncertain. *Mobley v. Richfield Oil Corp. (1942) 53 Cal. App. 2d 406, 410, 128 P.2d 105*

Requirement that plaintiff in action for cancellation under *Civ. Code § 3412* show both apparent validity and actual invalidity of instrument. *Hughes v. Beekley (1927) 85 Cal. App. 313, 316, 259 P. 337*

Failure to demur to complaint precludes challenge of sufficiency on appeal. *Gross v. Needham (1960) 184 Cal. App. 2d 446, 453-456, 7 Cal. Rptr. 664*

Existence of defenses against enforcement of instrument is not defense to action for its cancellation. *Bradley v. Gas Control Co. (1894) 102 Cal. 627, 632, 36 P. 1011*

[5] Distinction Between Void and Voidable Instruments

Restoration of benefits received is required on part of plaintiff seeking cancellation of voidable instrument, but not if instrument is void. *Fleming v. Kagan (1961) 189 Cal. App. 2d 791, 796-798, 11 Cal. Rptr. 737*

Plaintiff in case of voidable instrument is entitled to deduction, for damages actually suffered, from amount of consideration required to be restored to defendant. *Ebbert v. Mercantile Trust Co. (1931) 213 Cal. 496, 501, 2 P.2d 776*

Restoration of consideration and offer to restore is not required when plaintiff has sustained damages equaling or

exceeding value of what would have to be restored. *Peterson v. Wagner (1921) 52 Cal. App. 1, 12, 198 P. 25*

Action for cancellation of voidable instrument is barred unless plaintiff acted promptly, after discovering facts making instrument voidable, to rescind underlying transaction. *Leeper v. Beltrami (1959) 53 Cal. 2d 195, 215, 1 Cal. Rptr. 12, 347 P.2d 12*

Instrument executed under mistake as to nature of instrument being executed is void. *Fleming v. Kagan (1961) 189 Cal. App. 2d 791, 797, 11 Cal. Rptr. 737*

Lack of consideration and execution under coercion render lease void. Oswald v. El Centro, *Oswald v. El Centro (1930) 211 Cal. 45, 52, 292 P. 1073*

Failure of consideraion renders promissory note void (*functus officio*) and subject to cancellation on complaint of maker. *Nichols v. Leach (1931) 114 Cal. App. 545, 550, 300 P. 103*

Instrument executed when plaintiff's decedent was arguably disabled and entirely without understanding [*see Civ. Code § 38*] was not cancelable even though void, where decedent's subsequent actions when he was not disabled established ground for estoppel. *Dool v. First Nat'l Bank of Calexico (1930) 209 Cal. 717, 725, 290 P. 15* ; *see Dool v. First Nat'l Bank of Calexico (1930) 107 Cal. App. 585, 589, 290 P. 478*

Instrument executed when plaintiff's decedent was arguably disabled and entirely without understanding [*see Civ. Code § 38*] is voidable and ratified by decedent's later execution of trust deed, incorporating note, when he was not disabled. *Dool v. First Nat'l Bank of Calexico (1930) 107 Cal. App. 585, 589, 290 P. 478* ; *see also Dool v. First Nat'l Bank of Calexico (1930) 209 Cal. 717, 725, 290 P. 15*

Notice and offer to restore is not required where plaintiff brings action under *Civ. Code § 3412* for cancellation of void instrument rather than under *Civ. Code §§ 1689* and *1691* for restitution after rescission. *Smith v. Williams (1961) 55 Cal. 2d 617, 620-621, 12 Cal. Rptr. 665, 361 P.2d 241*

[6] Lost Instruments

Action to have lost instrument adjudged void is necessarily in rem rather than in personam. *Brown v. Anderson-Cottonwood Irrigation Dist. (1920) 183 Cal. 186, 189, 190 P. 797*

Lost instrument is subject to order for reissuance under *Civ. Code § 3415* even if voidable; object of proceeding is to restore record. *Shores v. Withers (1913) 166 Cal. 403, 405, 137 P. 7*

[7] Partial Cancellation

Rescission of only part of underlying transaction is permissible and is exception to general rule prohibiting partial rescission, where instrument to be canceled is separable or divisible. *Reina v. Erassarret (1949) 90 Cal. App. 2d 418, 425-426, 203 P.2d 72*

[8] Parties

Holder in due course of promissory notes secured by deed of trust is entitled to maintain action for cancellation of reconveyance by trustee. *Phelps v. American Mortgage Co. (1936) 6 Cal. 2d 604, 609-610, 59 P.2d 95*

Surviving joint tenant is entitled to bring action for cancellation of deed executed by deceased cotenant. *Reina v. Erassarret (1949) 90 Cal. App. 2d 418, 424, 203 P.2d 72*

Each of several persons having causes of action against single defendant for cancellation of their several promissory notes on ground of fraud, where notes were executed at different times, did not have community of interest sufficient to justify joinder in one action; each was required to sue separately. *Noroian v. Bennett (1919) 179 Cal. 806, 809-810, 179 P. 158*

Owner of instrument in question is necessary party in order for court to cancel it. *Lawrence v. Long Beach Pleasure Pier Co. (1919) 44 Cal. App. 410, 414, 186 P. 606*

Grantee named in deed sought to be canceled was necessary party even though only straw man for real party in interest and expressly exculpated in complaint from participating in fraud of real party in interest. *Palmer v. Lantz (1932) 215 Cal. 320, 322, 9 P.2d 821*

Person having actual possession of instrument is necessary defendant, even if he or she was not responsible for events making instrument void or voidable. *Briscoe v. Guaranty Mortg. Co. (1922) 57 Cal. App. 492, 494, 207 P. 487*

Complaint for cancellation which alleges that holder of instrument received it from plaintiff and was to hold it pending further instructions from plaintiff was required to allege that holder intends or threatens to disobey plaintiff's instructions. *Fitch v. Bunch (1866) 30 Cal. 208, 214*

Purchaser at sale under trust deed of land subject to mortgage was successor in interest of mortgagor and was entitled to maintain action against assignee of mortgage for cancellation of mortgage, on ground of failure of consideration in transaction between mortgagor and original mortgagee, whether or not assignee knew of the defect in transaction when taking assignment. *Briggs v. Crawford (1912) 162 Cal. 124, 129-130, 121 P. 381*

[9] Possibility of Serious Injury

Injury referred to in *Civ. Code § 3412* is not required to be pecuniary loss; showing that plaintiff is in worse position than he or she would otherwise be in is sufficient. *Turner v. Turner (1959) 167 Cal. App. 2d 636, 641-642, 334 P.2d 1011*

[10] Trial

Action for cancellation of instrument is equitable action in which trial by jury is not matter of right. *Santa Ana Mortgage & Inv. Co. v. Kinslow (1938) 30 Cal. App. 2d 107, 109-110, 85 P.2d 899*

Jury verdict, if jury is used, is advisory only, subject to being disregarded by court, and not binding unless approved by court. *Bennett v. Bennett (1919) 41 Cal. App. 537, 539-540, 182 P. 461*

Substantial evidence supporting finding as to any one material representation or concealment, or finding that there never was any meeting of minds on terms of contract, requires appellate court to affirm judgment for plaintiffs in action for cancellation of promissory note secured by chattel mortgage, on ground of fraudulent inducement. *Kuhn v. Gottfried (1951) 103 Cal. App. 2d 80, 84, 229 P.2d 137*

[11] Written Instruments Subject to Cancellation

[a] Contracts

Writing purporting to be contract but not actually contract because of no meeting of minds is instrument subject to cancellation. *Patterson v. Clifford F. Reid, Inc. (1933) 132 Cal. App. 454, 457, 23 P.2d 35*

Civ. Code § 3412 gives specific remedy for cancellation of contract obtained by fraud, voidable for other reasons, or void. *California Credit etc. Corp. v. Goodin (1926) 76 Cal. App. 785, 794, 246 P. 121*

Written agreement that is void for lack of consideration is instrument subject to cancellation. *Rottman v. Rottman (1921) 55 Cal. App. 624, 631, 633, 634, 204 P. 46*

[b] Instruments Involving Children

Written relinquishment of child for purpose of adoption is subject to rescission for cause. *Brooks v. Los Angeles County Bureau of Adoptions (1963) 218 Cal. App. 2d 732, 734, 32 Cal. Rptr. 466*

Judgment that relinquishment of plaintiff's child for purpose of adoption was not valid and that it should be and was ordered canceled and declared void was affirmed. *Fiske v. Director, Dep't of Public Welfare (1951) 107 Cal. App. 2d 31, 33, 37, 236 P.2d 427*

Written consent to marriage of minor child is instrument subject to cancellation. *Turner v. Turner (1959) 167 Cal. App. 2d 636, 641, 334 P.2d 1011*

[c] Instruments Involving Personal Property

Chattel mortgage is instrument subject to cancellation. *Lincoln v. Averill (1941) 47 Cal. App. 2d 335, 340, 117 P.2d 913*

Executory contract for sale of personal property (beer) is subject to cancellation. *Matlin v. Crescent Commercial Corp. (1949) 93 Cal. App. 2d 8, 11, 207 P.2d 873*

[d] Instruments Involving Real Property

Overall effect of *Code Civ. Proc. §§ 318, 319,* and *328* is that actions relating to either possession of or title to real property, or both, must be commenced within five years from end of possession or seizin of property by claimant or his or her predecessor in interest, unless chain of title includes person who was either minor or insane. *Robertson v. Superior Court (2001) 90 Cal. App. 4th 1319, 1327-1329, 109 Cal. Rptr. 2d 650* (trial court erred in finding that action under *Civ. Code § 3412* can be brought at any time)

Deed is instrument subject to cancellation. *Smith v. Williams (1961) 55 Cal. 2d 617, 620-621, 12 Cal. Rptr. 665, 361 P.2d 241* ; *Peterson v. Ellebrecht (1962) 205 Cal. App. 2d 718, 719-723, 23 Cal. Rptr. 349* ; *Gardner v. Rubin (1957) 149 Cal. App. 2d 368, 369-375, 308 P.2d 892*

Reconveyance from trustee of deed of trust is instrument subject to cancellation. *Phelps v. American Mortgage Co. (1936) 6 Cal. 2d 604, 605, 610, 59 P.2d 95*

Bill of sale for household furnishings, sold in connection with sale of real property, is subject to cancellation. *Bland v. Kelley (1945) 69 Cal. App. 2d 116, 117-119, 158 P.2d 206*

Lease is instrument subject to cancellation. *Oswald v. El Centro (1930) 211 Cal. 45, 46, 52, 292 P. 1073*

Option to extend lease is subject to cancellation. *Bard v. Kent (1942) 19 Cal. 2d 449, 451-453, 122 P.2d 8*

[e] Promissory Notes

Promissory note is instrument subject to cancellation. *Fleming v. Kagan (1961) 189 Cal. App. 2d 791, 796, 11 Cal. Rptr. 737* ; *Gardner v. Rubin (1957) 149 Cal. App. 2d 368, 369-375, 308 P.2d 892* ; *Lincoln v. Averill (1941) 47 Cal. App. 2d 335, 337-340, 117 P.2d 913*

[f] Release

Release from liability was executed as result of fraud and mistake; judgment declaring release not valid affirmed in declaratory relief action after attempted rescission. *Union P. R Co. v. Zimmer (1948) 87 Cal. App. 2d 524, 529-533, 197 P.2d 363*

Person signing release of liability for personal injuries suffered by his child is not bound thereby with respect to liability for wrongful death where release executed at time when child's death from such injuries was not contemplated. *O'Meara v. Haiden (1928) 204 Cal. 354, 358, 361, 268 P. 334*

[g] Stock Certificates

Stock certificate is instrument subject to cancellation. *Noble v. Learned (1908) 153 Cal. 245, 247-250* ; *Klinker v. Guarantee Title Co. (1929) 98 Cal. App. 469, 476, 277 P. 177*

[h] Miscellaneous

Application for membership in nonprofit cooperative marketing corporation which, if accepted, would bind applicant to contract with corporation for exclusive marketing of applicant's farm products is instrument subject to cancellation. *Klombies v. Weeks Poultry Community (1932) 121 Cal. App. 175, 177-179, 8 P.2d 940* (disapproved on other grounds in *Mary Pickford Co. v. Bayly Bros., Inc. (1939) 12 Cal. 2d 501, 521, 86 P.2d 102*)

Assignment is instrument subject to cancellation. *Lentz v. Hartman (1941) 43 Cal. App. 2d 609, 613-615, 111 P.2d 404* (affirming judgment for cancellation of assignment of promissory note and mortgage)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)EnforcementDefenses & ClaimsCommercial Law (UCC)Negotiable Instruments (Article 3)EnforcementLost, Destroyed & Stolen InstrumentsReal Property LawDeedsLost Deeds

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PART III. RESEARCH GUIDE

10-107 California Forms of Pleading and Practice--Annotated § 107.43

§ 107.43 Text References

Witkin, California Procedure, Vol. 3, *Actions*, §§ 123, 746 (4th ed. 1996)

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 130-142; vol.2, *Insurance, §§ 37-43*; vol. 4, *Negotiable Instruments*, §§ 9, 16, 21-23, 27-33, 39-43, 45-49, 51-52, 55-56; vol. 12, *Personal Property*, §§ 172-175 (10th ed. 2005)

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[Reserved]

§§ 107.44[Reserved]

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Volume 10: Boundaries thru Captions and Introductions-Chs. 101-108
Chapter 107 CANCELLATION OF INSTRUMENTS
PART IV. FORMS

10-107 California Forms of Pleading and Practice--Annotated § 107.60

§ 107.60 Complaint for Cancellation of Written Instrument [Civ. Code § 3412]--General Form

[1] FORM Complaint for Cancellation of Written Instrument [Civ. Code § 3412]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*], [and DOES-I	)	COMPLAINT FOR CANCELLATION OF WRIT-
through _____,]	)	TEN INSTRUMENT
Defendant(s).	)	
	)	

_____

Plaintiff alleges:

1. _____ [Defendant _____ (*name*) is, and at all times herein mentioned was, _____ (*entity other than natural person, e.g.,* a corporation organized and existing under the laws of California) _____ (*special capacity, if any, in which defendant is sued, e.g.,* and duly licensed under the laws of California to engage in the business of banking).]

2. _____ [The instrument described below was executed in _____ County, California.]

[3. Plaintiff is ignorant of the names of defendants sued as DOES I through _____, respectively, who are so designated for that reason. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences alleged in this complaint, and that plaintiff's damages as alleged herein were proximately caused by such defendants.)]

4. _____ [Plaintiff is, and at all times herein mentioned was, _____ (*entity other than natural person, e.g.,* a corporation organized and existing under the laws of California) _____ (*special capacity, if any, in which plaintiff sues e.g.,* and duly licensed under the laws of California to engage in the business of banking).]

5. There is in existence a certain written instrument which purports to be _____ [*describe generally, e.g.,* a promissory note]. The form and contents of the _____ [*e.g.,* purported note] are _____ [as set out in the copy of it which is attached to this complaint as Exhibit A and incorporated by reference *or* as follows: _____ (*set out instrument verbatim, following its form as closely as possible*)]. The _____ [*e.g.,* purported note] is _____ [in the possession *or* under the control] of defendant.

6. _____ [*Allege facts making instrument void or voidable against plaintiff, e.g.,* The purported signature of _____ (*name*) on the _____ (*e.g.,* purported note) is not the signature of _____ (*name*) and was not placed on the _____ (*e.g.,* purported note) at the direction of _____ (*name*). *Allege such other facts as are necessary to show that plaintiff is the person against whom the instrument is void or voidable where the instrument bears the forged signature of someone other than plaintiff, e.g.,* By an agreement in writing executed on _____ (*date*), the validity of which plaintiff does not question in this action, plaintiff assumed all outstanding obligations of _____ (*name of person who purportedly signed instrument*) arising from the operation by _____ (*name*) of a certain business known as _____ (*business name*) between _____ (*date*), and _____ (*date*), inclusive.]

7. _____ [*Allege facts showing a reasonable apprehension that if left outstanding the instrument may cause serious injury to plaintiff, e.g.,* If the _____ (*e.g.,* purported note) is left outstanding, plaintiff may be required to pay it or to defend a lawsuit based on it, and by refusing to pay it, plaintiff may be damaged in his/her credit. Defendant has refused to surrender the _____ (*e.g.,* purported note) to plaintiff and has communicated to plaintiff an intention to hold the _____ (*e.g.,* purported note) for payment according to its terms.]

8. _____ [*Allege facts establishing a basis for a claim for damages as additional relief, if any, e.g.,* On _____ (*date*), before plaintiff discovered that the purported signature of _____ (*name*) on the _____ (*e.g.,* purported note) is not genuine, plaintiff paid to defendant the sum of $_____ as the installment payment due on that date according to the terms of the _____ (*e.g.,* purported note).]

9. _____ [*Allege facts establishing a basis for a claim for exemplary damages, if any, e.g.,* Defendant transferred the _____ (*e.g.,* purported note) on or about _____ (*date*), to _____ (*name of transferee*) for value. Defendant knew at the time of making the transfer that the purported signature of _____ (*name*) on the _____ (*e.g.,* purported note) is not genuine, but he did not disclose this fact to the transferee. Defendant made the transfer with intent to defraud plaintiff. Plaintiff therefore seeks exemplary and punitive damages.]

WHEREFORE, plaintiff prays judgment as follows:

1. That the _____ [*e.g.,* purported note] be declared void.

2. That defendant deliver the _____ [*e.g.,* purported note] immediately to the clerk of the court for cancellation.

3. For damages, in the event that defendant fails to surrender the _____ [*e.g.*, purported note] for cancellation pursuant to the judgment, in the sum of $_____ [*monetary value to plaintiff represented by instrument*], plus interest thereon from and after _____ [*date of execution of instrument*], at the rate of _____ [*e.g.*, 7 percent per annum], as compensation and in lieu of cancellation.

[4. For damages in the sum of $_____, plus interest thereon from and after _____ [*date*], at the rate of _____ (*e.g.*, 7 per cent per annum).]

[5. For exemplary and punitive damages.]

6. For costs of suit herein incurred.

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

[a] Complaint

The form of complaint in [1], *above*, may be used to obtain cancellation of a written instrument as provided in *Civ. Code § 3412*.

[b] Cross Complaint

With appropriate minor changes in wording, the complaint in [1], *above*, can be used as a cross complaint to obtain cancellation of an instrument in an action based on the instrument [*see Fair Oaks Bank v. Johnson (1926) 198 Cal.*

196, 198, 202-203, 244 P. 335 (action to collect on promissory note and foreclose mortgage given as security; cross complaint by defendant for cancellation of note and mortgage on ground of fraudulent inducement to make underlying contract; judgment for defendant cross complainant affirmed)].

If the person who wants an instrument canceled is the defendant in an action for enforcement of the instrument, a cause of action for cancellation should be pleaded by cross complaint. It is error for the court to enter judgment canceling the instrument solely on the basis of the defendant's allegation in defense, in the answer, that the instrument is invalid [*see Walker v. Rockwood (1915) 26 Cal. App. 624, 627-628, 147 P. 992* (striking portion of judgment ordering cancellation of promissory note found by trial court to be void, when defendant merely alleged invalidity of note in defense of action for collection); *see also Shain v. Belvin (1889) 79 Cal. 262, 263, 21 P. 747]* .

[3] Parties

Persons having direct beneficial interests in the instrument sought to be canceled are necessary parties to an action for cancellation [*see Toomey v. Toomey (1939) 13 Cal. 2d 317, 319, 89 P.2d 634* (minor daughter who was beneficiary of maintenance trust created by property settlement agreement between parents was necessary party to action by wife and mother to annul agreement)].

If the plaintiff has no actual knowledge of beneficial interests not disclosed by the facts of record, it probably is not necessary to look beyond those facts to discover whether there are unknown beneficial interests [*see Johnson v. Curley (1927) 83 Cal. App. 627, 629-635, 257 P. 163* (undisclosed assignees of beneficiary were bound by judgment canceling trust deed, even though not made parties to action, when beneficiary appeared and defended, and record did not show that assignees were without knowledge of action; assignees are proper but not necessary parties in such case); *Tosi v. Northern Cal. Bldg. & Loan Ass'n (1937) 23 Cal. App. 2d 416, 419, 73 P.2d 286* (owner of real property who executed deed of trust to secure promissory notes executed by someone else was entitled to have notes canceled)].

[4] Allegations

[a] Elements of Cause of Action

A statement of the facts constituting an instrument's invalidity constitutes a sufficient allegation of a cause of action for cancellation of a void or voidable instrument under *Civ. Code § 3412* [*see Zakaessian v. Zakaessian (1945) 70 Cal. App. 2d 721, 725, 161 P.2d 677]* .

Civ. Code § 3412 contemplates that any written instrument which for any reason is void or voidable and outstanding, and which by reason thereof may result in serious injury or prejudice to the party as to whom it is void or voidable, upon proper application, may be adjudged to be void, and ordered to be delivered up and canceled. All that is required either in pleading or in proof is to show the facts constituting the invalidity of the instrument, whether they involve fraud, duress, accident, mistake, or lack of consideration. If, in other words, the instrument has been procured by fraud, accident, or mistake, the fraud, accident, or mistake should be pleaded; if the instrument is for any other reason void or voidable, the facts showing it to be so, whatever they may be, should be shown [*Hironymous v. Hiatt (1921) 52 Cal. App. 727, 731, 199 P. 850* ; *see Keele v. Clouser (1929) 101 Cal. App. 500, 502, 281 P. 1073]* .

The apparent validity of the instrument must also be alleged [*see Civ. Code § 3413*; *Hughes v. Beekley (1927) 85 Cal. App. 313, 316, 259 P. 337]* .

[b] Identity and Capacity of Defendant [Paragraph 1]

If the defendant is not a natural person, the complaint should allege the defendant's identity as an existing entity against which the court's judgment will operate [*see Tanner v. Best (1940) 40 Cal. App. 2d 442, 445, 104 P.2d 1084]* , such as a corporation, a partnership, an unincorporated association, or a governmental agency. A defendant who is a natural

person need not be identified as such.

If the defendant is sued in a particular capacity, that is, if liability depends on the defendant having certain obligations because of holding a status (such as executor, trustee, real estate broker, attorney) to which the law attaches special significance, the complaint should allege that capacity [*see, e.g., Katleman v. First Nat'l Bank (1963) 212 Cal. App. 2d 520, 524, 28 Cal. Rptr. 135* (discharged executor not subject to suit in representative capacity)]. If a defendant's capacity is simply that of a private individual, an allegation as to capacity is not necessary.

If the defendant is not a natural person sued in his or her individual capacity, it may be necessary to reflect that fact in the caption. For discussion and forms, see Ch. 108, *Captions and Introductions* .

[c] Venue Facts [Paragraph 2]

Generally there is no requirement to plead facts establishing venue. Such a requirement does exist, however, in certain cases arising from consumer-related transactions [*see Civ. Code §§ 1812.10(c), 2984.4(c)*; *Code Civ. Proc. §§ 395(b), 396a(a)*; for discussion and forms, *see* Ch. 571, *Venue*]. Except in those cases, the plaintiff does not have a burden to show that venue is proper; rather, the defendant has a burden, if venue is not proper, to raise an objection and prove the point [*see Code Civ. Proc. § 396b*].

However, if venue is proper in only one county (usually true only in the case of cancellation of a deed), it is advisable for the complaint to show what county that is. This may be done by an allegation in the paragraph describing the instrument. A separate paragraph devoted to nothing but venue facts is not necessary. In this form, Paragraph 2 sets out a venue fact to illustrate an appropriate place for such an allegation, if it is desired.

[d] Fictitiously Named Defendants [Paragraph 3]

When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, and such defendant may be designated by any name. When such a defendant's name is discovered, the complaint, and any other pleading in which he has been designated by a fictitious name must be amended [*Code Civ. Proc. § 474*]. For further discussion and appropriate forms, see Ch. 20, *Allegations Commonly Used* (alternative forms of allegations for use under *Code Civ. Proc. § 474*) and Ch. 21, *Amended and Supplemental Pleadings*.

[e] Identity and Capacity of Plaintiff [Paragraph 4]

If the plaintiff is not a natural person suing in his own behalf, the complaint should state the identity of the plaintiff and the capacity in which he sues [*see* [b], *above*].

If the plaintiff brings the action in a special capacity, the complaint should allege this capacity to show that the plaintiff is entitled to relief, if other facts are true [*see Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6* (distinguishing standing and capacity to sue)].

If the plaintiff is not a natural person suing in his or her own behalf, it may be necessary to reflect that fact in the caption. For discussion and forms, see Ch. 108, *Captions and Introductions* .

[f] Existence and Custody of Instrument [Paragraph 5]

The complaint must show that the instrument in question actually came into being, that it was in existence at the time the action was begun, and that it was in the possession of, or under the control of, the defendant [*see Consolidated Concessions Co. v. McConnell (1919) 40 Cal. App. 443, 445, 180 P. 842]* . If the instrument has been lost, it would seem unnecessary to show the custody of it, which is unknown [*see 107.12, above*].

[g] Description of Instruments [Paragraph 5]

It is advisable to describe the instrument in the complaint as particularly as possible. A copy of it should be exhibited in the complaint if the plaintiff has a copy. Too brief a description may lead the court into describing the instrument incorrectly in the judgment, to the plaintiff's detriment [*see Throop v. Weaver (1919) 180 Cal. 335, 336-337, 181 P. 55]* .

[h] Apparent Validity and Actual Invalidity of Instrument [Paragraphs 5, 6]

[i] Allegation Required

The complaint must state facts which show both the apparent validity of the instrument [*see Civ. Code § 3413*] and its actual invalidity [*see Hughes v. Beekley (1927) 85 Cal. App. 313, 316, 259 P. 337]* .

Since the apparent validity must be on the face of the instrument [*see Civ. Code § 3413*], apparent validity will be shown by attaching a copy of the instrument as an exhibit or, if a copy is not available, properly describing the instrument as in Paragraph 5 of the form.

Actual invalidity will be shown by alleging facts establishing the instrument as void or voidable, as in Paragraph 6 of the form. The instrument must be void or voidable as to the plaintiff [*see Civ. Code § 3412*]. This will usually be evident from the facts showing voidness or voidability, but if it is not evident from those facts, additional facts must be alleged. The statement of facts showing the instrument to be void or voidable as to the plaintiff may be too long for one paragraph, and in that case the facts should be stated in separate paragraphs. Paragraph 6 of the form, for example, could be divided into two paragraphs.

[ii] Multiple Theories of Invalidity

It is permissible for the complaint to charge the invalidity of the instrument in question on the basis of two or more theories, such as fraud and lack of consideration, and these should be set out in separate counts [*see North Confidence Mining & Dev. Co. v. Morrice (1922) 56 Cal. App. 145, 147, 204 P. 851]* .

When two or more theories as to invalidity are set out, it is error for the court to compel the plaintiff to elect one and abandon any other [*Tanforan v. Tanforan (1916) 173 Cal. 270, 274, 159 P. 709]* .

If two or more grounds for invalidity of the instrument exist, those which are not stated in the complaint will be deemed abandoned. All grounds must be stated in one action; the plaintiff cannot maintain several actions, one on each ground [*see Little v. Smith (1920) 47 Cal. App. 8, 12-15, 189 P. 1059]* .

[iii] Facts Showing Invalidity

In setting forth a cause of action for the cancellation of an instrument because of menace, fraud, and the like exercised on the person who executed the instrument, the facts relied on, rather than conclusions, should be stated [*see Campbell v. Genshlea (1919) 180 Cal. 213, 217, 180 P. 336]* .

The statement of grounds on which the invalidity of the instrument is based must be drafted with care. Counsel must be careful to avoid negating the claim of invalidity through a statement of inconsistent facts [*see Stromberg v. Tanforan (1920) 50 Cal. App. 1, 5-6, 194 P. 516]* .

[iv] Mistake

Courts of equity will not encourage the cancellation or revocation of instruments on the ground of mistake if they

appear to have been executed by the complainant without the exercise of reasonable care. *Civ. Code § 1577* states the law with reference to mistakes of fact. It limits the mistakes for which relief may be granted to those that are not caused by the neglect of a legal duty [*see Mesmer v. White (1953) 121 Cal. App. 2d 665, 674, 264 P.2d 60* ; *see also Donovan v. RRL Corp. (2001) 26 Cal. 4th 261, 294, 109 Cal. Rptr. 2d 807, 27 P.3d 702* (construing *Civ. Code § 1577* and determining that defendant satisfied requirements for rescission of contract on ground of unilateral mistake of fact)].

If a mistake of fact is the result of a failure to read the instrument, the instrument is voidable if the plaintiff signed without reading because he relied on false representations as to the contents and a confidential relationship existed between plaintiff and defendant [*see Kane v. Mendenhall (1936) 5 Cal. 2d 749, 758, 56 P.2d 498* (noting conflict in rules where no confidential relationship exists)], but in general it is probably a neglect of legal duty to fail to read an instrument before signing it, at least for the purpose of determining whether the instrument is voidable on the basis of a mistake of fact.

[v] Mistaken Belief as to Nature of Instrument

An allegation that plaintiff signed the instrument in question under a misapprehension that it was something other than a deed indicates that plaintiff is seeking to cancel a deed that was void [*see Smith v. Williams (1961) 55 Cal. 2d 617, 620, 12 Cal. Rptr. 665, 361 P.2d 241]* .

[i] Apprehension of Serious Injury [Paragraph 7]

Civ. Code § 3412 requires, before an instrument can be canceled, that there be a reasonable apprehension that the instrument, if left outstanding, may cause serious injury to the plaintiff. A reasonable apprehension of serious injury will usually be apparent from facts alleged elsewhere in the complaint, so that a separate, additional paragraph stating such apprehension would be unnecessary.

Paragraph 7 of the form alleges that the defendant has refused to surrender the instrument in question. Demand and refusal are not prerequisite to maintaining an action, but often the plaintiff will have demanded surrender of the instrument. If so, it is approprate to allege the defendant's refusal.

[j] Claim for Damages [Paragraph 8]

Cancellation alone may not give the plaintiff complete relief. If a compensable loss has been sustained, damages may be awarded as additional relief [*see Oswald v. El Centro (1930) 211 Cal. 45, 52, 292 P. 1073* (rental value of property which plaintiff lost because coerced into executing lease)].

[k] Exemplary and Punitive Damages [Paragraph 9]

Exemplary and punitive damages [*Civ. Code § 3294*] may be recovered if the facts justify an award in an action for cancellation [*see Wright v. Rogers (1959) 172 Cal. App. 2d 349, 368, 342 P.2d 447* ; *see also Ward v. Taggart (1959) 51 Cal. 2d 736, 743, 336 P.2d 534]* .

For discussion of the availability and restrictions on the pleading of punitive damages, see Ch. 177, *Damages* .

[5] Prayer

[a] Voiding of Instrument, Delivery, and Damages

Civ. Code § 3412 provides that the instrument may be (1) adjudged void and (2) ordered delivered up or canceled. Both kinds of relief need not be sought or given [*see § 107.12*].

When the instrument in question, if coming into the hands of a bona fide transferee for value, would render the plaintiff liable to pay money or sustain some other loss, the judgment should protect the plaintiff by ordering, as an alternative to surrender and cancellation of the instrument, that the plaintiff recover from the defendant damages equal to the monetary value of the possible loss, such as the amount of a promissory note [*see Loud v. Luse (1931) 214 Cal. 10, 13, 3 P.2d 542]* . An appropriate paragraph should be added to the prayer seeking the alternative damages. In the usual case, damages will be in an amount equal to the value of the supposedly valid instrument, as set out in Paragraph 5, and no additional allegations in the complaint will be necessary.

[b] Availability of Relief Consistent With Complaint

The court in a cancellation action may grant any relief consistent with the case made by the complaint and embraced within the issues although not specifically prayed for. The court may grant any monetary relief necessary to do complete equity between the parties [*see Wright v. Rogers (1959) 172 Cal. App. 2d 349, 367-368, 342 P.2d 447]* .

The relief granted to the plaintiff cannot exceed that demanded in the complaint if there is no answer, but in any other case, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issues. The court may impose liability, regardless of whether the theory upon which liability is sought to be imposed involves legal or equitable principles [*Code Civ. Proc. § 580(a)*].

In a limited civil case, however [*see Code Civ. Proc. §§ 85, 86(a)(1)* (amount in controversy, exclusive of interest, is $25,000 or less)], the court may not grant relief exceeding $25,000 [*see Code Civ. Proc. § 85*] excluding attorney's fees, interest, and costs. Nor may the court in a limited civil case grant a permanent injunction except as otherwise authorized by statute, or a determination of title to real property, or declaratory relief except as authorized by *Code Civ. Proc. § 86* [*Code Civ. Proc. § 580(b)*].

[c] Injunctive Relief Is Available

When the facts show that unless the holder is restrained from transferring the instrument, he or she may transfer it to the plaintiff's detriment, it would be proper for the court to enjoin transfer pending determination of an action for cancellation [*see Ingram v. Smith (1890) 83 Cal. 234, 238, 23 P. 298]* . For discussion and forms relating to the assertion of a claim for injunctive relief, see Ch. 303, *Injunctions* .

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require that any answer also must be verified, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification also will preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[7] Jurisdiction

[a] Equitable Case

The superior court has jurisdiction of the action. Because relief under *Civ. Code § 3412* is equitable, actions for cancellation will be classified as unlimited civil cases unless they fall within one of the specific categories of actions that are designated as limited civil cases [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(3),(b), 88*].

Actions to cancel or rescind a contract are limited civil cases when the relief is sought in connection with an action to recover money or property, not exceeding $25,000 in value, paid or delivered under or in consideration of the contract [*Code Civ. Proc. § 86(a)(3)*]. In addition, the following cases in equity are designated as limited civil cases, and an

action seeking cancellation of an instrument presumably would be a limited civil case if it came within one of these categories [*Code Civ. Proc. § 86(b)*]:

- Cases to try title to personal property when the amount involved is not more than $25,000.
- Cases when equity is pleaded as a defensive matter in any case that is otherwise a limited civil case.
- Cases to vacate a judgment or order of the court obtained in a limited civil case through extrinsic fraud, mistake, inadvertence, or excusable neglect.

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[b] Instrument Affecting Real Property Outside California

If the instrument in question relates to or affects real property located outside California, that fact does not necessarily deprive a California court of jurisdiction to render a judgment canceling the instrument. For example, a judgment canceling deeds to properties located in Wisconsin has been affirmed when the defendants claiming title through the deeds were California residents [*see Tully v. Bailey (1941) 46 Cal. App. 2d 195, 198-200, 115 P.2d 542]* .

[8] Venue

[a] Instrument Not Affecting Title to Real Property

When the instrument in question does not affect the title to real property, it is clear that the action for cancellation is transitory and may be tried in any county where venue for such an action is proper under *Code Civ. Proc. § 392 et seq.*

See generally Ch. 571, *Venue* .

[b] Instrument Affecting Real Property

[i] Recorded Contract Affecting Real Property

An action for cancellation of a recorded contract that clouds title to real property is local and must be tried in the county in which the real property is located [*see Kejr v. Construction Engineers, Inc. (1952) 111 Cal. App. 2d 817, 819, 245 P.2d 21]* .

[ii] Promissory Note and Deed of Trust

An action for cancellation of a promissory note secured by a deed of trust is transitory. Although an action for cancellation of the deed of trust alone would be local and would have to be tried in the county in which the real property is located, an action for cancellation of both the promissory note and also the deed of trust remains transitory. Trial may be had in any county where a transitory action against the defendant may be tried [*see Howe v. Tucker (1933) 219 Cal. 193, 194-195, 25 P.2d 832]* .

[iii] Request for Cancellation and Other Relief

When the instrument sought to be canceled relates to or affects real property, venue will be determined by the principal cause of action if other relief is also sought. For example, an action for cancellation of a note or deed of trust is

transitory and need not be tried in the county in which the real property subject to the deed of trust is located; an action to quiet title to real property is local and must be tried in the county in which the real property is located [*see Code Civ. Proc. § 392(a)(1)*]. If the quieting of title is sought as incidental relief to the cancellation of a deed, the combined actions may be tried in any county where a transitory action against the defendant can be tried. On the other hand, if cancellation of a deed is sought incidentally to quieting title, the combined actions must be tried in the county in which the real property in question is located [*see Vaughan v. Roberts (1941) 45 Cal. App. 2d 246, 251-256, 113 P.2d 884]* .

[9] Statute of Limitations

The statute of limitations in an action to cancel a deed depends on the underlying relief sought. Based on this rule, the California Supreme Court has held that if the basis for the right to cancel is a right to rescind the contract, the time limits for rescission apply [*Leeper v. Beltrami (1959) 53 Cal. 2d 195, 215, 1 Cal. Rptr. 12, 347 P.2d 12]* . Since that case, the statute of limitations for rescission actions has been set at four years from discovery of the facts that entitle the party to rescission [*Code Civ. Proc. § 337(3)*].

There is also authority stating that if the basis for relief is fraud or mistake, the statute of limitations is the one for actions based on fraud or mistake under *Code Civ. Proc. § 338(d)*. That statute of limitations is three years from discovery of the fraud or mistake [*Leeper v. Beltrami (1959) 53 Cal. 2d 195, 212, 1 Cal. Rptr. 12, 347 P.2d 12* ; *Turner v. Milstein (1951) 103 Cal. App. 2d 651, 659, 230 P.2d 25]* . Thus, if the basis of the cancellation action is fraud or mistake, which are bases for rescission [*Code Civ. Proc. § 1689(b)(1)*], it is not clear whether the statute of limitations is three or four years from the discovery of the facts. If the basis of the action for cancellation is essentially one to recover real property, the five-year statute of limitations for such actions may be applicable [*Campbell v. Genshlea (1919) 180 Cal. 213, 218-219, 180 P. 336]* . If the basis for relief is one for which there is no specific statute of limitations, such as illegality, the four-year statute of limitations for actions with no controlling statute may be applicable [*Moss v. Moss (1942) 20 Cal. 2d 640, 644, 128 P.2d 526]* .

The four year limitation period provided in *Code Civ. Proc. § 343* applies in seeking cancellation on ground of execution under undue influence [*Wade v. Busby (1944) 66 Cal. App. 2d 700, 702, 152 P.2d 754* ; *see also Boyd v. Lancaster (1942) 56 Cal. App. 2d 103, 111, 132 P.2d 214* (action for cancellation based on incompetency of person executing instrument astimely filed less than four years after instrument was obtained from alleged incompetent)].

The overall effect of *Code Civ. Proc. §§ 318, 319*, and *328* is that actions relating to either the possession of or title to real property, or both, must be commenced within five years from the end of possession or seizin of that property by the claimant or his or her predecessor in interest, unless the chain of title includes a person who was either a minor or insane. In those circumstances, a tolling period not to exceed 20 years is allowed, provided that the action is commenced within no more than five years after the end of the disability [*Robertson v. Superior Court (2001) 90 Cal. App. 4th 1319, 1327-1329, 109 Cal. Rptr. 2d 650* (in action for cancellation of deed based on ground of mental incompetency at time of execution, court of appeal issued writ of mandate ordering trial court to vacate order overruling demurrer based on statute of limitations grounds)].

[10] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion and forms relating to assertion of a claim for injunctive relief, for use in connection with an action for cancellation of an instrument, see Ch. 303, *Injunctions*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue*

For alternative verification forms, see Ch. 572, *Verification*

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10-107 California Forms of Pleading and Practice--Annotated § 107.61

§ 107.61 Allegation--Rescission of Underlying Transaction and Offer to Restore Consideration--Cancellation of Voidable Instrument [Civ. Code § 3412]

[1] FORM Allegation--Rescission of Underlying Transaction and Offer to Restore Consideration--Cancellation of Voidable Instrument [Civ. Code § 3412]

1. The _____ [*instrument, e.g.,* purported note] was executed by plaintiff as the result of a certain _____ [written *or* oral] agreement between plaintiff and defendant made on _____ [*date*], for the purpose of _____ [*specify purpose of agreement*].

2. On or about _____ [*date*], plaintiff notified defendant in writing that plaintiff thereby rescinded the agreement on the ground that _____ [*describe ground for rescission*]. _____ [Plaintiff offered in that written notice to restore all consideration which defendant had given, to wit: _____ (*describe*), on condition that all consideration given by plaintiff, to wit: _____ (*describe*) be restored to plaintiff *or* Defendant has given no consideration to plaintiff.]

[*OR*]

2. By service of this complaint, plaintiff notifies defendant that plaintiff hereby rescinds the agreement on the ground that _____ [*describe ground for rescission*]. _____ [Plaintiff hereby offers to restore all consideration which defendant has given, to wit: _____ (*describe*), on condition that all consideration given by plaintiff, to wit: _____ (*describe*) be restored to plaintiff *or* defendant has given no consideration to plaintiff].

[2] Use of Form

The allegation in [1], *above,* should be inserted into the complaint [*see § 107.60*] if the instrument in question arose from a transaction which the plaintiff is entitled to rescind, making the instrument voidable rather than void.

[3] Necessity of Restoring Consideration Where Instrument Voidable

If an instrument is voidable, the plaintiff in an action for cancellation of it must offer to restore to the defendant everything of value which plaintiff has received in the underlying transaction, less damages sustained. That is to say, plaintiff must rescind a voidable transaction [*see Civ. Code §§ 1689, 1691, 1692*]. This is not necessary where the instrument in question is void [*see Ebbert v. Mercantile Trust Co. (1931) 213 Cal. 496, 501, 2 P.2d 776* ; *Fleming v. Kagan (1961) 189 Cal. App. 2d 791, 796-798, 11 Cal. Rptr. 737* ; *Civ. Code § 3412*].

If the damages sustained equal or exceed the value of what would have to be restored, plaintiff need not restore, and need not offer to restore, anything [*see Peterson v. Wagner (1921) 52 Cal. App. 1, 12, 198 P. 25]* . If damages are claimed, then the phrase "less plaintiff's actual damages" should be inserted into the allegation after the description of the consideration given by the defendant.

[4] Cross References

For forms relating to rescission and restitution of contracts generally, see Ch. 490, *Rescission and Restitution*

For additional comments and cross references, see *§ 107.60[2] -[10]*

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10-107 California Forms of Pleading and Practice--Annotated § 107.62

§ 107.62 Allegation--Discovery of Facts Making Instrument Voidable--Cancellation of Voidable Instrument [Civ. Code § 3412]

[1] FORM Allegation--Discovery of Facts Making Instrument Voidable--Cancellation of Voidable Instrument [Civ. Code § 3412]

1. Plaintiff did not know until _____ [*date*], that _____ [*state facts constituting ground for rescission of underlying transaction making instrument voidable*], and on that date _____ [*describe circumstances under which plaintiff discovered such facts, including explanation for any delay*].

[2] Use of Form

The allegation in [1], *above*, should be inserted into the complaint [*see § 107.60*] where the instrument in question arose from a transaction which the plaintiff is entitled to rescind, making the instrument voidable rather than void.

[3] Necessity of Rescinding Promptly

Where an instrument is voidable, plaintiff's action for cancellation of it will be barred unless he acted promptly, after discovering the facts making it voidable, to rescind the underlying transaction [*see Leeper v. Beltrami (1959) 53 Cal. 2d 195, 215, 1 Cal. Rptr. 12, 347 P.2d 12]* .

[4] Cross References

For additional comments and cross references, see *§§ 107.60[2] -[10], 107.61[2] -[4]*

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[Reserved]

§§ 107.63[Reserved]

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10-107 California Forms of Pleading and Practice--Annotated § 107.70

§ 107.70 Proposed Statement of Decision--Cancellation of Instrument [Civ. Code § 3412]--General Form

[1] FORM Proposed Statement of Decision--Cancellation of Instrument [Civ. Code § 3412]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	PROPOSED STATEMENT OF DECISION
Defendant.	)	
	)	
	)	

The above-entitled cause came on regularly for trial on _____ [*date*], in Department _____ of the above-entitled court, the Honorable _____, Judge, presiding without a jury and was tried on that date [and on _____ (*state any additional dates*)]. _____ [*Name*] appeared as counsel for plaintiff and _____ [*name*] appeared as counsel for defendant. _____ [*Specify other appearances, if any*].

Oral and documentary evidence was introduced on behalf of the respective parties and the cause was argued and submitted for decision. The court, having considered the evidence and heard the arguments of counsel and being fully advised, issues the following statement of decision:

1. A certain written instrument purporting to be _____ [*e.g.*, a promissory note], which is more particularly described below, is _____ [in the possession *or* under the control] of defendant _____ [*name*].

2. The form and content of the _____ [*e.g.*, purported note] are _____ [as set out in the copy of it which is attached to this judgment as Exhibit A *or* as follows: _____ (*particular description*)].

3. _____ [*State fact making instrument void or voidable, e.g.,* The purported signature of _____ (*name*) on the _____ (*e.g.*, purported note) is not the signature of _____ (*name*) and was not placed on the _____ (*e.g.*, purported note) by _____ (*name*).]

4. If the _____ [*e.g.*, purported note] is left outstanding, there is a reasonable apprehension that plaintiff will be seriously injured in that, among other possible injuries, _____ [*e.g.*, plaintiff may become bound to pay the purported note, plaintiff may be required to defend a lawsuit based on the purported note, and plaintiff may be injured in his credit by refusing to pay the purported note].

5. _____ [*Set out any other specific relevant facts.*]

6. All of the facts alleged in the complaint and not specifically found above to be true are true.

7. The _____ [*e.g.*, purported note] is void, and plaintiff is entitled to an order by this court that the _____ [*e.g.*, purported note] be delivered to the clerk of the court for cancellation.

8. _____ [*Set out any other specific conclusions, such as those involving damages*].

[2] Use of Form

The proposed statement of decision in [1], *above,* may be used as a model for drafting a statement of decision in favor of the plaintiff if the court does not draft the judgment itself.

The language of this statement has been adapted from that decreed for findings of fact and a statement of decision by the Supreme Court in *Loud v. Luse (1931) 214 Cal. 10, 3 P.2d 542* .

[3] Cross References

For a related form of judgment, see *§ 107.71*

For discussion and forms relating to statements of decision, see Ch. 529, *Statement of Decision*

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10-107 California Forms of Pleading and Practice--Annotated § 107.71

§ 107.71 Judgment for Cancellation of Instrument [Civ. Code § 3412]--General Form

[1] FORM Judgment for Cancellation of Instrument [Civ. Code § 3412]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	JUDGMENT CANCELING INSTRUMENT
Defendant.	)	
	)	
	)	

This cause came on regularly for trial on _____ [*date*], the Honorable _____ [*name*], Judge, presiding, sitting without a jury. Plaintiff appeared by _____ [*name*], his attorney, and defendant appeared by _____ [*name*], his attorney. Evidence, both testimonial and documentary, was presented by _____ [both parties *or* plaintiff only *or* defendant only], and the cause having been argued and submitted for decision, and _____ [the court(, on request of _____ (plaintiff *or* defendant),) having caused its written statement of decision to be made and filed *or* a statement of decision not having been requested,]

IT IS HEREBY ORDERED AND ADJUDGED _____ [*include, if plaintiff must restore anything to defendant:* that on plaintiff's depositing with the clerk of this court, within _____ (*e.g.*, thirty) days after the date of entry of this judgment, _____ (*describe what plaintiff must restore to defendant*), judgment shall be entered] as follows:

1. Defendant _____ [*name*] shall immediately deliver the written instrument purporting to be

_____ [*describe instrument to be cancelled with specificity, e.g.,* a promissory note dated _____ in the amount of $_____, payable to _____ (*name*) and apparently made by _____ (*name*)], to the clerk of this court for cancellation, and the clerk shall cancel it upon receiving it and shall thereafter deliver the canceled instrument, or cause it to be delivered, promptly to plaintiff.

2. If defendant _____ [*name*] fails to surrender the instrument to the clerk within the time provided by law for filing a notice of appeal from this judgment, plaintiff shall have and recover from defendant _____ [*name*] the sum of $_____ [*monetary value to plaintiff represented by instrument*], together with interest from _____ [*date of execution of instrument*], at the rate of _____ [*e.g.,* 7 percent per annum], as compensation and in lieu of cancellation of the instrument.

[3. *If plaintiff is entitled to restoration of money or property, add:* Defendant _____ (*name*) shall immediately deposit with the clerk of this court, for _____ (payment *or* delivery) to plaintiff, _____ (the sum of $_____ *or specific property*), and the clerk shall thereafter _____ (pay *or* deliver) it, or cause it to be _____ (paid *or* delivered) promptly to plaintiff _____ (*add, if appropriate:* on plaintiff's making the deposit as required above). If defendant _____ (*name*) fails to make the _____ (payment *or* delivery) ordered within the time provided by law for filing a notice of appeal from this judgment, plaintiff shall have and recover from defendant _____ (*name*) the sum of $_____, together with interest thereon from _____ [*date*], at the rate of _____ (*e.g.,* 7 percent per annum), as compensation and in lieu of the payment or delivery ordered herein.]

[4. *If plaintiff is required to restore anything to defendant, add:* When defendant _____ (*name*) has performed the obligations ordered above, the clerk of this court shall deliver, or cause to be delivered, to him/her the _____ (*specify*) deposited by plaintiff.]

[5. *If plaintiff is entitled to damages as additional relief, add:* As additional relief, plaintiff shall have and recover from defendant _____ (*name*) the sum of $_____ as damages.]

[6. _____ *If plaintiff is to receive exemplary and punitive damages, add:* In addition to the other relief ordered, plaintiff shall have and recover from defendant _____ (*name*) the sum of $_____ for the sake of example and by way of punishing defendant _____ (*name*).]

IT IS FURTHER ORDERED AND ADJUDGED that the court retains jurisdiction of this cause until the terms of this judgment have been fully complied with or until further order of the court.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff shall have and recover from defendant _____ (*name*) his costs and disbursements herein.
Dated: _____, [*date*].

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The judgment in [1], *above,* may be used as a model for drafting a judgment in favor of the plaintiff if the court does not draft the judgment itself.

The language of this judgment has been adapted from that decreed by the Supreme Court in *Loud v. Luse (1931) 214 Cal. 10, 3 P.2d 542* (additional aspect of the language decreed in *Loud* has been used in the proposed statement of decision set out in *§ 107.70*).

[3] Interlocutory Judgment for Cancellation

In *Hatch v. Penzner (1941) 44 Cal. App. 2d 874, 878, 113 P.2d 295* , the court of appeal affirmed a later judgment after an interlocutory judgment canceling certain conveyances and approved the trial court's retention of jurisdiction for the purpose of enforcing compliance with the judgment of cancellation, on the ground that a court may retain jurisdiction in an equitable action to enforce the original judgment.

[4] Conditional Order for Cancellation

Where the instrument in question is evidence of security for a debt, the plaintiff is entitled to have the instrument canceled, and the debt is valid, if the debt is owed by the plaintiff, the judgment for cancellation may properly impose the condition that the debt be paid [*see* *Ross v. Allen (1927) 82 Cal. App. 758, 761, 256 P. 248* (cancellation of deed given to attorney as security for payment of fee for legal services)]; but if the debt is owed by someone other than the plaintiff, a condition that the debt be paid is improper [*see* *McCain v. Burch (1928) 92 Cal. App. 141, 142-145, 267 P. 748* (cancellation of note and mortgage given to attorney as security for payment of fee for legal services owed by plaintiff's husband)].

[5] Determination of Rights and Obligations Under Instrument

Where the parties have acquired rights and assumed obligations under the instrument sought to be canceled, it is proper, and usually necessary, for the court to determine those rights and obligations when rendering a judgment that the instrument be canceled [*see* *Martin v. Burris (1922) 57 Cal. App. 739, 741, 746, 208 P. 174* (remanding with directions to hear and determine such rights and obligations under canceled contract for joint venture)].

[6] Cross References

For discussion and forms relating to judgments, including a form of notice of judgment, see Ch. 318, *Judgments*

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10-108 California Forms of Pleading and Practice--Annotated 108.syn

§ 108.syn Synopsis to Chapter 108: CAPTIONS AND INTRODUCTIONS

§ 108.01 Scope of Chapter

§ 108.02 Cross References

§§ 108.03-108.09 [Reserved]

§ 108.10 Governing Law

§ 108.11 Caption

[1] Required

[2] Contact Information and Title of Court

[3] Title of Case

[a] Description of Parties

[i] On Initial Pleading

[ii] Correction of Technical Defect

[iii] On Subsequent Pleadings

[4] Number of Case

[5] Description of Pleadings and Papers

[6] Assigned Judge and Department

§ 108.12 Address to Court

§ 108.13 Introduction to Allegations

§§ 108.14-108.29 [Reserved]

§ 108.30 State Statutes

§ 108.31 California Rules of Court

§ 108.32 Text References

§ 108.50 Sample Caption and Introduction--Complaint

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§ 108.51 Sample Caption and Introduction--Answer

[1] FORM

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[1] FORM

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§ 108.54 Title of Court--Appellate Division of Superior Court

[1] FORM

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[1] FORM

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§ 108.56 Title of Court--Court of Appeal

[1] FORM

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[1] FORM

§ 108.58 Title of Case--Civil Action

[1] FORM

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§ 108.59 Title of Case--Cross Complaint--Against Plaintiff

[1] FORM

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§ 108.60 Title of Case--Cross Complaint--Against Third Party

[1] FORM

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[3] Cross Reference

§ 108.61 Title of Case--Cross Complaint--Against Several Parties

[1] FORM

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§ 108.62 Title of Case--Complaint in Intervention [Code Civ. Proc. § 387]

[1] FORM

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§ 108.63 Title of Case--Interpleader [Code Civ. Proc. § 386]--Obligor as Plaintiff

[1] FORM

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§ 108.64 Title of Case--Interpleader [Code Civ. Proc. § 386]--Obligor as Cross Complainant

[1] FORM

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§ 108.65 Title of Case--Consolidated Action [Code Civ. Proc. § 1048(a)]

[1] FORM

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[3] Cross References

§ 108.66 Title of Case--Quiet Title Action [Code Civ. Proc. §§ 760.020(a), 761.020]

[1] FORM

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§ 108.67 Title of Case--Special Proceeding

[1] FORM

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§ 108.68 Title of Case--Adoption Proceeding

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§ 108.69 Title of Case--Guardianship Proceeding

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§ 108.70 Title of Case--Conservatorship Proceeding

[1] FORM

§ 108.71 Title of Case--Habeas Corpus Proceeding--Superior Court

[1] FORM

[2] Cross References

§ 108.72 Title of Case--Habeas Corpus Proceeding--Appellate Courts

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[3] Cross Reference

§ 108.73 Title of Case--Probate Proceeding

[1] FORM

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[3] Cross References

§ 108.74 Title of Case--Will Contest

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[2] Cross References

§ 108.75 Title of Case--Appeal

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[3] Number of Case

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§ 108.77 Description of Parties--Subsequent to Complaint--Party With Complex Name

[1] FORM

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§ 108.78 Description of Parties--Party Known Under Two or More Names

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§ 108.79 Description of Parties--Husband and Wife

[1] FORM

[2] Use of Form

[3] State Statutes

§ 108.80 Description of Parties--Fictitiously Named Defendants

[1] FORM

[2] Cross References

[3] State Statutes

§ 108.81 Description of Parties--Fictitiously Named Defendants--Part of Name Known

[1] FORM

§ 108.82 Description of Parties--Individual Doing Business Under Fictitious Name

[1] FORM

[2] Use of Form

[3] Cross References

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§ 108.83 Description of Parties--Corporation

[1] FORM

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§ 108.84 Description of Parties--Corporation--Foreign Corporation

[1] FORM

§ 108.85 Description of Parties--Corporation--Charitable, Eleemosynary, or Religious Corporation

[1] FORM

[2] Cross References

§ 108.86 Description of Parties--Corporation--Nonprofit Corporation

[1] FORM

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[1] FORM

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§ 108.88 Description of Parties--National Bank

[1] FORM

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[1] FORM

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[1] FORM

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[3] Cross References

§ 108.91 Description of Parties--Partnership--Individuals Named

[1] FORM

§ 108.92 Description of Parties--Partnership--Individuals Joined

[1] FORM

§ 108.93 Description of Parties--Limited Partnership

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§ 108.94 Description of Parties--Unincorporated Association

[1] FORM

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§ 108.95 Description of Parties--Unincorporated Association--Individuals Joined

[1] FORM

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§ 108.96 Description of Parties--United States of America

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§ 108.97 Description of Parties--State of California

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§ 108.98 Description of Parties--State of California--Department

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§ 108.99 Description of Parties--State of California--Criminal Action

[1] FORM

§ 108.100 Description of Parties--County

[1] FORM

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§ 108.101 Description of Parties--County--County Officers Joined as Defendants

[1] FORM

§ 108.102 Description of Parties--County--County Board

[1] FORM

§ 108.103 Description of Parties--County--Board of Supervisors

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§ 108.104 Description of Parties--Municipal Corporation (Incorporated City)

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§ 108.105 Description of Parties--Municipal Corporation (Incorporated City)--Chartered City

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§ 108.106 Description of Parties--Municipal Corporation (Incorporated City)--City Council and City Clerk Joined as Defendants

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§ 108.107 Description of Parties--Municipal Corporation (Incorporated City)--City Board of Commissioners

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§ 108.108 Description of Parties--School District

[1] FORM

§ 108.109 Description of Parties--School District--Defendant Trustees

[1] FORM

§ 108.110 Description of Parties--Public Officer

[1] FORM

[2] Cross References

§ 108.111 Description of Parties--Personal Representative of Deceased

[1] FORM

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§ 108.112 Description of Parties--Guardian or Guardian ad Litem for Minor

[1] FORM

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[3] State Statutes

§ 108.113 Description of Parties--Conservator or Guardian ad Litem for Incompetent Person

[1] FORM

[2] Cross References

[3] State Statutes

§ 108.114 Description of Parties--Class Action

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

§ 108.115 Description of Parties--Representative Action--By Member of Unincorporated Association

[1] FORM

[2] Use of Form

[3] Cross Reference

§ 108.116 Description of Parties--Taxpayer's Action

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

§ 108.117 Description of Parties--Shareholder's Derivative Action [Corp. Code § 800 respecting corporations subject to the new General Corporation Law, Corp. Code § 100 et seq. (see Corp. Code §§ 2300-2319)]

[1] FORM

[2] Cross References

§ 108.118 Description of Parties--Trustees--Generally

[1] FORM

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§ 108.119 Description of Parties--Trustee--In Bankruptcy

[1] FORM

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§ 108.120 Description of Parties--Receiver

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§ 108.121 Description of Document--General Form

[1] FORM

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§ 108.122 Description of Document--Complaint Seeking One Type of Relief

[1] FORM

§ 108.123 Description of Document--Complaint Seeking Multiple Types of Relief--Example

[1] FORM

§ 108.124 Description of Document--Class Action Complaint

[1] FORM

[2] Use of Form

[3] Cross References

§ 108.125 Description of Document--Amended Pleading

[1] FORM

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§§ 108.126-108.139 [Reserved]

§ 108.140 Address to Court--Superior Court

[1] FORM

[2] Use of Form

§ 108.141 Address to Court--Court of Appeal

[1] FORM

[2] Use of Form

§ 108.142 Address to Court--California Supreme Court

[1] FORM

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§ 108.160 Introduction--Complaint--Single Plaintiff--Single Cause of Action

[1] FORM

§ 108.161 Introduction--Complaint--Single Plaintiff--Multiple Causes of Action

[1] FORM

[2] Use of Form

§ 108.162 Introduction--Complaint--Multiple Plaintiffs--Single Cause of Action

[1] FORM

§ 108.163 Introduction--Complaint--Multiple Plaintiffs--Separate Causes of Action

[1] FORM

§ 108.164 Introduction--Complaint--Multiple Plaintiffs--Multiple Causes of Action in Common

[1] FORM

§ 108.165 Introduction--Complaint--Plaintiff Suing in Representative Capacity

[1] FORM

§ 108.166 Introduction--Complaint--Plaintiffs Suing Individually and as Business

[1] FORM

§ 108.167 Introduction--Complaint--Plaintiff Minor Through Guardian or Guardian ad Litem [Code Civ. Proc. § 372]

[1] FORM

§ 108.168 Introduction--Complaint--Plaintiff Incompetent Person Through Conservator or Guardian ad Litem [Code Civ. Proc. § 372]

[1] FORM

§ 108.169 Introduction--Complaint--Plaintiff Personal Representative

[1] FORM

§ 108.170 Introduction--Complaint--Representative Suit [Code Civ. Proc. § 382]

[1] FORM

§ 108.171 Introduction--Complaint--Plaintiff Political Body

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§ 108.172 Introduction--Complaint--Trustee in Bankruptcy

[1] FORM

§ 108.173 Introduction--Complaint in Intervention [Code Civ. Proc. § 387]

[1] FORM

§ 108.174 Introduction--Demurrer to Complaint--Single Defendant--Single Cause of Action

[1] FORM

§ 108.175 Introduction--Demurrer to Complaint--Single Defendant--Multiple Causes of Action or Counts

[1] FORM

§ 108.176 Introduction--Demurrer to Complaint--Multiple Defendants

[1] FORM

§ 108.177 Introduction--Demurrer to Complaint--Where Question of Improper Venue

[1] FORM

§ 108.178 Introduction--Answer to Complaint--Single Defendant

[1] FORM

§ 108.179 Introduction--Answer to Complaint--One Defendant Separately

[1] FORM

§ 108.180 Introduction--Answer to Complaint--Multiple Defendants

[1] FORM

§ 108.181 Introduction--Answer to Complaint--Multiple Causes of Action

[1] FORM

[2] Use of Form

§ 108.182 Introduction--Answer to Complaint--Defendant Sued Under Fictitious Name [Code Civ. Proc. § 474]

[1] FORM

§ 108.183 Introduction--Answer to Complaint--Defendant Sued Under Wrong Name

[1] FORM

§ 108.184 Introduction--Answer to Complaint--Corporation

[1] FORM

§ 108.185 Introduction--Answer to Complaint--Personal Representative

[1] FORM

§ 108.186 Introduction--Answer to Complaint--Assignee

[1] FORM

§ 108.187 Introduction--Answer to Complaint--Minor Defendant

[1] FORM

§ 108.188 Introduction--Answer to Complaint--Incompetent Defendant

[1] FORM

§ 108.189 Introduction--Answer to Complaint--Affirmative Defenses

[1] FORM

§ 108.190 Introduction--Answer to Complaint--Affirmative Defenses--Defense to One of Multiple Causes

[1] FORM

§ 108.191 Introduction--Demurrer to Answer

[1] FORM

§ 108.192 Introduction--Demurrer to Answer--Separate Defenses

[1] FORM

§ 108.193 Introduction--Cross Complaint--No Parties Added

[1] FORM

[2] Use of Form

§ 108.194 Introduction--Cross Complaint--New Party Added

[1] FORM

§ 108.195 Introduction--Demurrer to Cross Complaint

[1] FORM

§ 108.196 Introduction--Answer to Cross Complaint

[1] FORM

§ 108.197 Introduction--Demurrer to Answer to Cross Complaint

[1] FORM

§ 108.198 Introduction--Special Proceeding--Petition

[1] FORM

§ 108.199 Introduction--Special Proceeding--Petition--With Address to Court

[1] FORM

§ 108.200 Introduction--Special Proceeding--Petition for Writ

[1] FORM

§ 108.201 Introduction--Special Proceeding--Return or Answer to Petition for Writ

[1] FORM

§ 108.202 Introduction--Amended Pleading [Code Civ. Proc. §§ 472, 473(a)]

[1] FORM

[2] Cross References

§ 108.203 Introduction--Amended Complaint [Code Civ. Proc. §§ 425.10, 472, 473(a)]

[1] FORM

§ 108.204 Introduction--Amendment to Complaint [Code Civ. Proc. §§ 425.10, 471.5, 472, 473(a)]

[1] FORM

§ 108.205 Introduction--Demurrer to Amended Complaint [Code Civ. Proc. § 471.5]

[1] FORM

§ 108.206 Introduction--Answer to Complaint After Motion to Strike Certain Portions Granted

[1] FORM

§ 108.207 Introduction--Answer to Amended Complaint [Code Civ. Proc. § 471.5]

[1] FORM

§ 108.208 Introduction--Answer to Amended Cause of Action in Complaint [Code Civ. Proc. § 471.5]

[1] FORM

§ 108.209 Introduction--Answer to Amendment to Complaint [Code Civ. Proc. § 471.5]

[1] FORM

§ 108.210 Introduction--Supplemental Complaint [Code Civ. Proc. §§ 425.10, 464]

[1] FORM

§ 108.211 Introduction--Answer to Supplemental Complaint [Code Civ. Proc. §§ 425.10, 464]

[1] FORM

§ 108.212 Introduction--Supplemental Answer [Code Civ. Proc. §§ 431.30, 464]

[1] FORM

§ 108.213 Introduction--Interrogatories to Party [Code Civ. Proc. § 2030 (Code Civ. Proc. § 2030.010 et seq. operative July 1, 2005)]

[1] FORM

[2] Cross References

[3] Rules of Court

§ 108.214 Introduction--Answers and Objections to Interrogatories [Code Civ. Proc. § 2030]

[1] FORM

§ 108.215 Introduction--Deposition on Written Questions [Code Civ. Proc. § 2020]--Interrogatories

[1] FORM

§ 108.216 Introduction--Deposition on Written Questions [Code Civ. Proc. § 2020]--Cross Questions

[1] FORM

§ 108.217 Introduction--Notice--Generally

[1] FORM

§ 108.218 Introduction--Notice--Party in Propria Persona

[1] FORM

§ 108.219 Introduction--Notice--All Parties

[1] FORM

§ 108.220 Introduction--Notice--Clerk

[1] FORM

§ 108.221 Introduction--Affidavit [Code Civ. Proc. § 2003]

[1] FORM

[2] Cross References

§ 108.222 Introduction--Declaration [Code Civ. Proc. § 2015.5]

[1] FORM

§ 108.223 Introduction--Stipulation [Code Civ. Proc. § 283]

[1] FORM

[2] Cross References

§ 108.224 Introduction--Points and Authorities

[1] FORM

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PART I. SCOPE

10-108 California Forms of Pleading and Practice--Annotated § 108.01

§ 108.01 Scope of Chapter

This chapter discusses and contains forms of captions and introductions commonly used in pleadings and papers in actions and special proceedings. Specifically, it contains a sample caption and introduction for a complaint [*see § 108.50*] and an answer [*see § 108.51*], plus other forms of the following parts of a caption:

- Titles of courts [*see §§ 108.53 -108.57*].
- Titles of cases [*see §§ 108.58 -108.75*].
- Descriptions of parties [*see §§ 108.76 -108.120*].
- Descriptions of pleadings and papers [*see §§ 108.121 -108.125*].

This chapter also includes forms of addresses to courts [*see §§ 108.140 -108.142*] and introductions [*see §§ 108.160 -108.224*].

Forms of captions and introductions, some of which are not included in this chapter, are included elsewhere in this set. The reader is advised to consult the subject matter index.

For discussion and forms relating to the content of pleadings, see Ch. 21, *Amended and Supplemental Pleadings* , Ch. 26, *Answers* , Ch. 123, *Complaints and Cross Complaints* ,, Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* and Ch. 375, *Motions to Strike: Pleadings* , and Ch. 376, Motions to Strike: Anti-SLAPP.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral Overview

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10-108 California Forms of Pleading and Practice--Annotated § 108.02

§ 108.02 Cross References

For forms relating to the form and content of affidavits, certificates, and declarations, see Ch. 15, *Affidavits, Certificates, and Declarations* .

For forms relating to the form and content of amended and supplemental pleadings, see Ch. 21, *Amended and Supplemental Pleadings* .

For forms relating to the form and content of answers, see Ch. 26, *Answers* .

For forms relating to the form and content of complaints and cross complaints, see Ch. 123, *Complaints and Cross Complaints* .

For forms relating to the form and content of demurrers and motions for judgment on the pleadings, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

For forms relating to the form and content of motions to strike, see Ch. 375, *Motions to Strike* .

For forms relating to the form and content of memoranda, see Ch. 417, *Points and Authorities* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsSupplemental PleadingsCivil ProceduresPretrial JudgmentsGeneral OverviewCivil ProceduresPretrial JudgmentsJudgment on the PleadingsCivil ProceduresPleading & PracticePleadingsComplaintsCross-Complaints

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10-108 California Forms of Pleading and Practice--Annotated §§ 108.03-108.09

[Reserved]

§§ 108.03[Reserved]

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10-108 California Forms of Pleading and Practice--Annotated § 108.10

§ 108.10 Governing Law

The requirement that a pleading contain a caption is found in *Code Civ. Proc. § 422.30*. The contents of a caption are set forth in *Code Civ. Proc. § 422.40*.

The format of captions is governed by *Cal. Rules of Ct., Rule 2.111*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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10-108 California Forms of Pleading and Practice--Annotated § 108.11

§ 108.11 Caption

[1] Required

Every pleading and paper is required to contain a caption setting forth the name of the court and county to which the action is brought, and the title of the action [*Code Civ. Proc. § 422.30*; *Cal. Rules of Ct., Rule 2.111*].

[2] Contact Information and Title of Court

Following the name, address, telephone number, fax number, and email address (if available), and state bar membership number of the attorney in the upper left hand corner [*Cal. Rules of Ct., Rule 2.111(1)*], the caption proper begins with the name of the court and county in which the action is brought and the title of the action [*Code Civ. Proc. § 422.30(a)*]. The name or title of the court and county is set forth on or below 31/3 inches from the top of the page at line 8 on the first page of the pleading or other paper [*Cal. Rules of Ct., Rule 2.111(3)*].

A clerk cannot reject a paper for filing solely on the ground that it does not contain an attorney's or a party's fax number or e-mail address on the first page [*Cal. Rules of Ct., Rule 2.118(6)*].

[3] Title of Case

The title of the case appears below the title of the court and to the left of center on the page [*Cal. Rules of Ct., Rule 2.111(4)*] and sets forth the names of all the parties to the action [*Code Civ. Proc. § 422.40*]. In the title of the case on each initial complaint or cross-complaint, the name of each party must commence on a separate line beginning at the left margin of the page [*Cal. Rules of Ct., Rule 2.111(4)*]. On any subsequent pleading or paper, it is sufficient in the title of the case to (1) state the name of the first party on each side, with appropriate indication of other parties, and (2) state that a cross-action or cross-actions are involved, if applicable [*Cal. Rules of Ct., Rule 2.111(4)*].

In a civil action, the party complaining is known as the plaintiff, and the adverse party is the defendant [*Code Civ. Proc. § 308*]. The party prosecuting a special proceeding may be known as the plaintiff and the adverseparty as the defendant [*Code Civ. Proc. § 1063*], although in many special proceedings, particularly those in which the initial pleading is referred to as a petition, the terms petitioner and respondent, respectively, are used.

[a] Description of Parties

[i] On Initial Pleading

In the initial complaint or petition, the names of all parties to the action or proceeding are to be included in the title of the case [*Code Civ. Proc. § 422.40*]. In the title of the case on each initial complaint or cross-complaint, the name of each party must commence on a separate line beginning at the left margin of the page [*Cal. Rules of Ct., Rule 2.111(4)*]. A party may sue or be sued in any name in which he or she is known and recognized, even if that is an assumed name [*Emery v. Kipp (1908) 154 Cal. 83, 84, 97 P. 17* ; *Cabrera v. McMullen (1988) 204 Cal. App. 3d 1, 3-4, 251 Cal. Rptr. 34]* . When a party is an individual acting on his or her own behalf, and not in a representative capacity, it is sufficient to include the party's name (including at least first and last name and middle name or initial if the name is a common one or likely to be confused with another party). When a party is an individual acting in a representative capacity (e.g., as a guardian ad litem for a minor), a short description to that effect will follow the party's name. If a party is an entity other than an individual (e.g., a corporation), the party's name will be followed by a description of its status.

[ii] Correction of Technical Defect

The omission of a named defendant from the caption is a technical and nonsubstantive defect subject to correction by amendment. Although helpful to the court, the caption is not considered a part of the pleader's statement of claim and is not determinative of the parties to the action or the court's jurisdiction. The court is entitled to consider the allegations of the complaint as well as the title in determining the identity of a party. If the body of the complaint correctly identifies the party or if the proper person actually has been served with process, courts generally will allow an amendment to correct technical defects in the caption [*Bell v. Tri-City Hospital Dist. (1987) 196 Cal. App. 3d 438, 445-446, 449, 241 Cal. Rptr. 796]* .

[iii] On Subsequent Pleadings

In pleadings subsequent to the initial complaint or petition, it is generally sufficient to state the name of the first party named on each side, followed by the designation "et al." [*Code Civ. Proc. § 422.40*]. On any subsequent pleading or paper, it is sufficient in the title of the case to (1) state the name of the first party on each side, with appropriate indication of other parties, and (2) state that a cross-action or cross-actions are involved, if applicable[*Cal. Rules of Ct., Rule 2.111(4)*]. However, some courts require that all parties also be named in the caption to the answer; counsel is advised to consult local practice in this regard. Further, the names of all parties should be included in a judgment; one reason is that a judgment lien may be lost on a judgment which does not mention all parties since the clerk who records the abstract of the judgment will not index parties not listed in the caption. Counsel is also advised to include in the caption of an order the names of all parties involved in the order; parties to whom the order does not pertain may, however, still be identified by use of "et al."

[4] Number of Case

The number of the case appears to the right of and opposite the title of the case on the first page of the papers filed [*Cal. Rules of Ct., Rule 2.111(5)*]. In the initial complaint or petition, the phrase "NO. _____" should be typed. The number will be stamped on by the clerk when the complaint or petition is filed. That number should be included on all subsequent pleadings and papers.

[5] Description of Pleadings and Papers

Below the number of the case appears a brief statement in capital letters setting forth the nature of the paper (*e.g.*, COMPLAINT FOR DAMAGES). Below this, on all complaints and petitions, is a brief statement of the character of the action or proceeding (*e.g.*, Personal Injury and Property Damage). In a case having mutiple parties, any answer, response, or opposition must specifically identify the complaining, propounding, or moving party and the complaint,

motion, or other matter being answered or opposed [*Cal. Rules of Ct., Rule 2.111(6)*].

The first page of the first paper filed in a limited civil case must state whether the amount demanded exceeds or does not exceed $10,000 [*Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9)*]. The caption of every pleading filed in a limited civil case must state the words: "Limited Civil Case" [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*].

For examples, see *§ 108.121* et seq.

[6] Assigned Judge and Department

Below the description of the pleadings and papers appears the name of the judge and department, if any, to which the case is assigned.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral Overview

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10-108 California Forms of Pleading and Practice--Annotated § 108.12

§ 108.12 Address to Court

Pleadings may begin with an address to the court located below the caption. The address includes the court's name, the appropriate judicial subdivision, and sometimes the name of the particular judge of the court. Generally, an address is not used in a pleading filed in a trial court.Complaints never contain an address. Petitions in special proceedings sometimes contain an address, usually in court printed forms, although there is no requirement than an address be included and the modern practice is to omit it. The address to the appellate court is widely used, however.

Legal Topics:

For related research and practice materials, see the following legal topics:
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10-108 California Forms of Pleading and Practice--Annotated § 108.13

§ 108.13 Introduction to Allegations

Although not required by statute, an introductory phrase commonly follows the caption and precedes the body of the pleading. The introduction identifies the pleader. It may also state the nature of the pleading although the simplest forms of introductions (e.g., "plaintiff alleges" in a complaint by a single plaintiff) are those most commonly used by attorneys.

The introduction is located below the caption and address to the court, if any.

Legal Topics:

For related research and practice materials, see the following legal topics:
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10-108 California Forms of Pleading and Practice--Annotated §§ 108.14-108.29

[Reserved]

§§ 108.14[Reserved]

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10-108 California Forms of Pleading and Practice--Annotated § 108.30

§ 108.30 State Statutes

Designation of parties. *Code Civ. Proc. § 308*

Contents of caption. *Code Civ. Proc. § 422.30*

Title of action in complaint; designation of parties in pleadings subsequent to complaint. *Code Civ. Proc. § 422.40*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral Overview

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10-108 California Forms of Pleading and Practice--Annotated § 108.31

§ 108.31 California Rules of Court

Size of paper, pagination, etc. *Cal. Rules of Ct., Rule 2.100 et seq.*

Name, address, telephone number, fax number and e-mail address (if available), and state bar membership number of attorney. *Cal. Rules of Ct., Rule 2.111(1)*

Title of court and county. *Cal. Rules of Ct., Rule 2.111(3)*

Title of case. *Cal. Rules of Ct., Rule 2.111(4)*

Number of case. *Cal. Rules of Ct., Rule 2.111(5)*

Nature of paper and character of proceeding. *Cal. Rules of Ct., Rule 2.111(6)*

Name of assigned judge or department. *Cal. Rules of Ct., Rule 2.111(7)*

Notice of change of address of party or attorney. *Cal. Rules of Ct., Rule 2.200*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral Overview

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10-108 California Forms of Pleading and Practice--Annotated § 108.32

§ 108.32 Text References

Witkin, California Procedure, vol. 5, *Pleading*, §§ 11-13, 57, 431-433 (4th ed. 1967)

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PART IV. FORMS
A. CAPTIONS
1. Sample Forms

10-108 California Forms of Pleading and Practice--Annotated § 108.50

§ 108.50 Sample Caption and Introduction--Complaint

[1] FORM Sample Caption and Introduction--Complaint

_____ [Name of attorney]

_____ [Street address]

_____ [City, state, and ZIP]

_____ [Area code and phone number]

_____ [State Bar No. of attorney]

Attorney for _____ [e.g., Plaintiff]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [name],	)	
Plaintiff vs. _____ [name],	)	NO. _____
Defendant.	)	COMPLAINT FOR_____ [specify,
	)	e.g., Personal Injury--Negligence]
	)	

_____

Plaintiff alleges:

[2] Use of Form

The foregoing form is a sample caption and introduction for a complaint. For a discussion of the elements of a caption, see the Introduction. For forms related to various parts of captions, see the following: §§ 108.53-108.57 for titles of courts; §§ 108.58-108.75 for titles of cases; §§ 108.76-108.120 for descriptions of parties; and §§ 108.121-108.125 for descriptions of pleadings and papers. For alternative forms of introductions, see *§§ 108.160 -108.173*.

If a case is reclassified by an amended complaint, cross-complaint, amended cross-complaint, or other pleading under *Code Civ. Proc. §§ 403.020* or *403.030*, the caption must indicate that the action or proceeding is reclassified by this pleading [*Cal. Rules of Ct., Rule 2.111(11)*]. If a case is reclassified by stipulation under *Code Civ. Proc. § 403.050*, the title of the stipulation must state that the action or proceeding is reclassified by this stipulation. The caption or title must state that the case is a limited civil case reclassified as an unlimited civil case, or an unlimited civil case reclassified as a limited civil case, or other words to that effect [*Cal. Rules of Ct., Rule 2.111(11)*].

[3] Cross References

See generally Ch. 123, *Complaints and Cross Complaints*

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A. CAPTIONS
1. Sample Forms

10-108 California Forms of Pleading and Practice--Annotated § 108.51

§ 108.51 Sample Caption and Introduction--Answer

[1] FORM Sample Caption and Introduction--Answer

_____ [Name of attorney]

_____ [Street address]

_____ [City, state, and ZIP]

_____ [Area code and phone number]

_____ [State Bar No. of attorney]

_____ Attorney for _____ [e.g., Defendant]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [name],	)	
Plaintiff, vs. _____ [name],	)	NO. _____
Defendant	)	ANSWER OF _____
	)	[specify, e.g., ABC Corp.]
	)	

Defendant _____ [name of defendant] answers the complaint herein and admits, denies, and alleges as follows:

[2] Use of Form

This form is a sample caption and introduction for an answer. For a discussion of the elements of a caption, see the Introduction.

For forms related to various part of captions, see the following: §§ 108.53-108.57 for titles of courts; §§ 108.58-108.75 for titles of cases; §§ 108.76-108.120 for descriptions of parties; and §§ 108.121-108.125 for descriptions of pleadings and papers. For alternative forms of introductions, see *§§ 108.178 -108.190*.

[3] Cross References

See generally Ch. 26, *Answers*

For a related form, *see § 108.50*.

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PART IV. FORMS
A. CAPTIONS
1. Sample Forms

10-108 California Forms of Pleading and Practice--Annotated § 108.52

§ 108.52 Sample Caption and Introduction--Notice of Motion

[1] FORM Sample Caption and Introduction--Notice of Motion

_____ [*Name of attorney*]
_____ [*Street address*]
_____ [*City, state, and ZIP*]
_____ [*Area code and phone number*]
_____ [*State Bar No. of attorney*]

Attorney for _____ [*moving party, e.g.*, Defendant] _____ [*name*]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*]	)	NOTICE OF MOTION FOR
Plaintiff,	)	_____ [*specify, e.g.*, CHANGE OF
vs.	)	VENUE]
_____ [*name*]	)	Date: _____
Defendant.	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*adverse party, e.g.,* plaintiff] and to his/her attorney of record:

[2] Use of Form

This form is a sample caption and introduction for any notice of motion subject to the Civil Law and Motion Rules [*Cal. Rules of Ct., Rule 3.1100 et seq.*].

If a case is reclassified by an amended complaint, cross-complaint, amended cross-complaint, or other pleading under *Code Civ. Proc. §§ 403.020* or *403.030*, the caption must indicate that the action or proceeding is reclassified by this pleading [*Cal. Rules of Ct., Rule 2.111(11)*]. If a case is reclassified by stipulation under *Code Civ. Proc. § 403.050*, the title of the stipulation must state that the action or proceeding is reclassified by this stipulation. The caption or title must state that the case is a limited civil case reclassified as an unlimited civil case, or an unlimited civil case reclassified as a limited civil case, or other words to that effect [*Cal. Rules of Ct., Rule 2.111(11)*].

[3] Applicability of Civil Law and Motion Rules

The civil law and motion rules apply to proceedings in civil law and motion, as defined in *Cal. Rules of Ct., Rule 3.1103(a)*, and to discovery proceedings in family law and probate [*Cal. Rules of Ct., Rule 3.1100*]. Unless the context or subject matter otherwise require, they also apply to demurrers [*Cal. Rules of Ct., Rule 3.1103(c)*]. "Law and motion" is defined as including any proceedings (1) on application before trial for an order, except for causes arising under the Welfare & Institutions Code, the Probate Code, the Family Code, or *Code Civ. Proc. § 527.6*, *527.7*, and *527.8* (injunctive relief against harassment, gang violence, and violence or threatened violence in the workplace); or (2) on application for an order regarding the enforcement of judgment, attachment of property, appointment of a receiver, obtaining or setting aside a judgment by default, writs of review, mandate, and prohibition, a petition to compel arbitration, and enforcement of an award by arbitration [*Cal. Rules of Ct., Rule 3.1103(c)*].

[4] Format and Content

The first page must specify all of the following immediately below the case number [*Cal. Rules of Ct., Rule 3.1110(b)*]:

- The date, time, and location, if ascertainable, of any scheduled hearing and the name of the hearing judge, if ascertainable.
- The nature or title of any attached document other than an exhibit.
- The date of filing of the action.
- The trial date, if set.

Documents bound together must be consecutively paginated [*Cal. Rules of Ct., Rule 3.1110(c)*].

A notice of motion must state in the opening paragraph the nature of the order being sought and the grounds for issuance of the order [*Cal. Rules of Ct., Rule 3.1110(a)*]. Any paper previously filed must be referred to by date of execution and title [*Cal. Rules of Ct., Rule 3.1110(d)*].

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PART IV. FORMS
A. CAPTIONS
2. Titles of Courts

10-108 California Forms of Pleading and Practice--Annotated § 108.53

§ 108.53 Title of Court--Superior Court

[1] FORM Title of Court--Superior Court

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*OR*]

[IN THE] SUPERIOR COURT OF THE
STATE OF CALIFORNIA
FOR THE [CITY AND] COUNTY OF _____

[2] Use of Form

The first court title under this form is the one used on forms approved by the Judicial Council. When so used, it is printed on one line.

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2. Titles of Courts

10-108 California Forms of Pleading and Practice--Annotated § 108.54

§ 108.54 Title of Court--Appellate Division of Superior Court

[1] FORM Title of Court--Appellate Division of Superior Court

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
APPELLATE DIVISION

[*OR*]

APPELLATE DIVISION OF THE SUPERIOR COURT
[CITY AND] COUNTY OF _____,
STATE OF CALIFORNIA

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10-108 California Forms of Pleading and Practice--Annotated § 108.55

§ 108.55 Title of Court--Small Claims Division

[1] FORM Title of Court--Small Claims Division

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
SMALL CLAIMS DIVISION

[2] Use of Form

This court title may be used on a paper filed in a small claims case, that is, one filed in the small claims division of the superior court [*see Code Civ. Proc. § 116.210*].

Many forms typically used in small claims cases are provided by the Judicial Council as mandatory or optional forms. This caption may be used if no Judicial Council form is applicable or when choosing not to use an optional form.

[3] Cross References

See generally Ch. 526, *Small Claims*

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10-108 California Forms of Pleading and Practice--Annotated § 108.56

§ 108.56 Title of Court--Court of Appeal

[1] FORM Title of Court--Court of Appeal

[IN THE] COURT OF APPEAL OF THE
STATE OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]

[*OR*]

[IN THE] COURT OF APPEAL
_____ APPELLATE DISTRICT
[DIVISION _____]
STATE OF CALIFORNIA

[*OR*]

[IN THE] COURT OF APPEAL OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]

[2] Use of Form

These are examples of common designations of a California court of appeal. The reference to "DIVISION

_____" is bracketed to indicate it is optional since it would not be correct in a district which does not have more than one division. And, even in a court of appeal in a district with two or more divisions, counsel is not expected to include the division number until notice is received that the cause has been assigned to a particular division.

[3] Cross References

See generally Ch. 40, *Appeal: An Overview* , through Ch. 54, *Appeal: California Supreme Court Review*

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10-108 California Forms of Pleading and Practice--Annotated § 108.57

§ 108.57 Title of Court--California Supreme Court

[1] FORM Title of Court--California Supreme Court

[IN THE] SUPREME COURT OF THE
STATE OF CALIFORNIA

[*OR*]

[IN THE] SUPREME COURT OF CALIFORNIA

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10-108 California Forms of Pleading and Practice--Annotated § 108.58

§ 108.58 Title of Case--Civil Action

[1] FORM Title of Case--Civil Action

_____ [*name(s)*],	)
Plaintiff(s),	)
vs.	)
_____ [*name(s)*],	)
Defendant(s).	)
	)
	)

_____

[2] Cross References

For format of complaints and cross complaints, see Ch. 123, *Complaints and Cross Complaints*

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10-108 California Forms of Pleading and Practice--Annotated § 108.59

§ 108.59 Title of Case--Cross Complaint--Against Plaintiff

[1] FORM Title of Case--Cross Complaint--Against Plaintiff

_____ [*name*],	)
Plaintiff and Cross Defendant,	)
vs.	)
_____ [*name*],	)
Defendant and Cross Complainant.	)
	)
	)

[2] Use of Form

Some counsel prefer, in papers and pleadings subsequent to the cross complaint, to delete the phrases "and Cross Defendant" and "Cross Complainant."

If a case is reclassified by an amended complaint, cross-complaint, amended cross-complaint, or other pleading under *Code Civ. Proc. §§ 403.020* or *403.030*, the caption must indicate that the action or proceeding is reclassified by this pleading [*Cal. Rules of Ct., Rule 2.111(11)*]. If a case is reclassified by stipulation under *Code Civ. Proc. § 403.050*, the title of the stipulation must state that the action or proceeding is reclassified by this stipulation. The caption or title must state that the case is a limited civil case reclassified as an unlimited civil case, or an unlimited civil case reclassified as a limited civil case, or other words to that effect [*Cal. Rules of Ct., Rule 2.111(11)*].

[3] Cross Reference

For a related form, *see § 108.58*.

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10-108 California Forms of Pleading and Practice--Annotated § 108.60

§ 108.60 Title of Case--Cross Complaint--Against Third Party

[1] FORM Title of Case--Cross Complaint--Against Third Party

_____ [*name*],	)
Plaintiff,	)
vs.	)
_____ [*name*],	)
Defendant and Cross Complainant,	)
vs.	)
_____ [*name*],	)
Cross Defendant.	)
	)
	)

_____

[2] Use of Form

The foregoing form is for use where the sole defendant, or all defendants if there is more than one, has cross complained against a third party. Where more than one cross complaint is anticipated, or where not all defendants are cross complainant, the case title set out in *§ 108.61[1]* should be used.

[3] Cross Reference

For a related form, *see § 108.58*.

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10-108 California Forms of Pleading and Practice--Annotated § 108.61

§ 108.61 Title of Case--Cross Complaint--Against Several Parties

[1] FORM Title of Case--Cross Complaint--Against Several Parties

_____ [*name*],	)
Plaintiff,	)
vs.	)
_____ [*name*],	)
Defendant,	)
_____ [*name*],	)
Cross Complainant,	)
vs.	)
_____ [*name*],	)
Cross Defendant,	)
_____ [*name*],	)
Cross Complainant,	)
vs.	)
_____ [*name*],	)
Cross Defendant.	)
	)
	)

_____

[2] Use of Form

The foregoing case title is for use where there are multiple cross actions. In such a case especially where the caption is

lengthy, counsel may prefer, in pleadings and papers subsequent to the complaint, to repeat only the case title that appeared on the initial complaint and underneath add the phrase "and Related Cross Actions."

In the title of the case on each initial complaint or cross-complaint, the name of each party must commence on a separate line beginning at the left margin or the page [*Cal. Rules of Ct., Rule 2.111(4)*]. On any subsequent pleading or paper, it is sufficient in the title of the case to (1) state the name of the first party on each side, with appropriate indication of other parties, and (2) state that a cross-action or cross-actions are involved, if applicable [*Cal. Rules of Ct., Rule 2.111(4)*].

[3] Cross Reference

For a related form, *see § 108.58*.

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10-108 California Forms of Pleading and Practice--Annotated § 108.62

§ 108.62 Title of Case--Complaint in Intervention [Code Civ. Proc. § 387]

[1] FORM Title of Case--Complaint in Intervention [Code Civ. Proc. § 387]

_____ [*name*],	)
Plaintiff,	)
vs.	)
_____ [*name*],	)
Defendant.	)
_____ [*name*],	)
Plaintiff in Intervention,	)
vs.	)
_____ [*name*],	)
Defendant in Intervention.	)
	)
	)

_____

[*OR*]

_____ [*name*],	)
Plaintiff,	)
vs.	)
_____ [*name*],	)
Defendant,	)
_____ [*name*],	)
Intervenor.	)

)
)

---

[2] Cross References

See generally Ch. 395, *Parties*

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10-108 California Forms of Pleading and Practice--Annotated § 108.63

§ 108.63 Title of Case--Interpleader [Code Civ. Proc. § 386]--Obligor as Plaintiff

[1] FORM Title of Case--Interpleader [Code Civ. Proc. § 386]--Obligor as Plaintiff

_____ [*name*],	)
Plaintiff,	)
vs.	)
_____ [*name*],	)
Defendant.	)
	)
	)

[2] Use of Form

The foregoing case title is for use where the obligor initiates the interpleader action. In such a case, the parties with conflicting claims are named as defendants and the obligor is the plaintiff.

[3] Cross References

See generally Ch. 314, *Interpleader*

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10-108 California Forms of Pleading and Practice--Annotated § 108.64

§ 108.64 Title of Case--Interpleader [Code Civ. Proc. § 386]--Obligor as Cross Complainant

[1] FORM Title of Case--Interpleader [Code Civ. Proc. § 386]--Obligor as Cross Complainant

_____ [*name*],	)
Plaintiff,	)
vs.	)
_____ [*name*],	)
Defendant,	)
_____	)
_____ [*name*],	)
Cross Complainant,	)
vs.	)
_____ [*names*],	)
Cross Defendants.	)
	)

_____

[2] Use of Form

The foregoing case title may be used where an action has been initiated against an obligor who wishes to interplead his obligation between the conflicting claims of plaintiff and a third party. The obligor then files a cross complaint, naming both the plaintiff and the third party and cross defendants.

[3] Cross Reference

For a related form, *see § 108.63*.

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10-108 California Forms of Pleading and Practice--Annotated § 108.65

§ 108.65 Title of Case--Consolidated Action [Code Civ. Proc. § 1048(a)]

[1] FORM Title of Case--Consolidated Action [Code Civ. Proc. § 1048(a)]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	
Defendant.	)	
	)	
	)	

_____

_____ [*name*],	)	
Plantiff,	)	
vs.	)	NO. _____
_____ [*name*]	)	
Defendant.	)	
	)	
	)	

_____

[2] Use of Form

The foregoing case title may be used in the caption of pleadings and papers filed in consolidated actions. The title

includes the full case title for each action, although the term "et al." may be used in place of enumerating all parties where complaints have been filed in both actions [*see § 108.76*]. Some courts permit the use of an abbreviated title for consolidated actions, and counsel is advised to consult local practice.

[3] Cross References

See generally Ch. 125, *Consolidation, Severance, and Coordination of Actions*

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10-108 California Forms of Pleading and Practice--Annotated § 108.66

§ 108.66 Title of Case--Quiet Title Action [Code Civ. Proc. §§ 760.020(a), 761.020]

[1] FORM Title of Case--Quiet Title Action [Code Civ. Proc. §§ 760.020(a), 761.020]

_____ [*name*],)
Plaintiff,)
vs.)
_____ [*names(s) of known defendant(s)*], [*if person required to be named as defendant is dead, and plaintiff knows identity of personal representative, add:*; _____)
(*name*), as _____ (*description, e.g.,* Executor *or* Administrator (With Will Annexed)) of the Estate of _____ (*name*), Deceased(, and as devisee)] [*if person required to be named as defendant is believed by plaintiff to be dead but plaintiff does not know identity of personal representative, and/or if plaintiff wishes to include unknown successors of known decedent, add:*; the testate and intestate successors of _____ (*name of decedent*), _____ (deceased *or* believed to be deceased), and all persons claiming by, through, or under such _____ (decedent *or* person)] [*if unknown defendants are included, add:*; all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to Plaintiff's title, or any cloud on Plaintiff's title thereto] [; and DOES I-

_____, inclusive],
Defendant(s).
_____

[2] Cross References

See generally Ch. 482, *Quieting Title*

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10-108 California Forms of Pleading and Practice--Annotated § 108.67

§ 108.67 Title of Case--Special Proceeding

[1] FORM Title of Case--Special Proceeding

_____ [*name*],	)
Petitioner,	)
vs.	)
_____ [*name*],	)
Respondent[,]	)
[_____ (*name*),	)
Real Party in Interest].	)
	)
	)

[2] Use of Form

The foregoing case title is appropriate in most special proceedings, including proceedings for writs of mandate, prohibition, and review (certiorari). Although the use of the terms plaintiff and defendant to refer to parties in a special proceeding is expressly authorized [*see Code Civ. Proc. § 308*], the terms petitioner and respondent are most commonly used, especially if the initial pleading in the proceeding is a petition.

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10-108 California Forms of Pleading and Practice--Annotated § 108.68

§ 108.68 Title of Case--Adoption Proceeding

[1] FORM Title of Case--Adoption Proceeding

	)
In the Matter of the Adoption Petition of	)
_____	)
[*names*],	)
Adopting Parents [*or* Petitioners].	)

[2] Use of Form

The caption in an adoption petition is required to contain the names of the petitioners (adopting parents), but not the name of the minor [*see Fam. Code §§ 8714(d)* (agency adoptions), 8802(c) (independent adoptions)].

[3] Cross References

See generally Ch. 12, *Adoptions: Nature and Effect* , through Ch. 12E, *Adoptions: Attack on Decree*

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10-108 California Forms of Pleading and Practice--Annotated § 108.69

§ 108.69 Title of Case--Guardianship Proceeding

[1] FORM Title of Case--Guardianship Proceeding

	)
[In the Matter of the] Guardianship of the Person and	)
Estate of	)
_____ [*name*], a Minor [*or*] an Incompetent Person [*or*] an Insane Person].	

_____

[2] Use of Form

The foregoing case title may generally be used in the caption of a pleading or paper filed in the guardianship of the person and estate of a minor or an incompetent person.

If guardianship of the person or estate only is sought, the form will need to be modified by striking the inapplicable words. The phrase "In the Matter of the" is often included but does not appear to be required.

[3] Cross References

See generally Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , through Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships*

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10-108 California Forms of Pleading and Practice--Annotated § 108.70

§ 108.70 Title of Case--Conservatorship Proceeding

[1] FORM Title of Case--Conservatorship Proceeding

	)
[In the Matter of the] Conservatorship of the Person	)
and Estate of	)
_____ [*name*],	
Conservatee.	
_____	

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10-108 California Forms of Pleading and Practice--Annotated § 108.71

§ 108.71 Title of Case--Habeas Corpus Proceeding--Superior Court

[1] FORM Title of Case--Habeas Corpus Proceeding--Superior Court

	)
In the Matter of the Application of	)
_____ [*name*],	)
Petitioner,	)
on Behalf of _____ [*name*].	)

[*OR*]

_____ [*name*],	)
Petitioner,	)
vs.	)
_____ [*name*],	)
Respondent.	)
	)
	)

[2] Cross References

See generally Ch. 292, *Habeas Corpus*

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10-108 California Forms of Pleading and Practice--Annotated § 108.72

§ 108.72 Title of Case--Habeas Corpus Proceeding--Appellate Courts

[1] FORM Title of Case--Habeas Corpus Proceeding--Appellate Courts

	)
In re _____ [*name*],	)
on Habeas Corpus.	)
	)

_____

[2] Use of Form

The foregoing title is for use in the California courts of appeal or the California Supreme Court.

[3] Cross Reference

For a related form, *see § 108.71*.

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10-108 California Forms of Pleading and Practice--Annotated § 108.73

§ 108.73 Title of Case--Probate Proceeding

[1] FORM Title of Case--Probate Proceeding

)
Estate of _____ [*name*],)
[also known as _____(*name*),])
Deceased.
_____

[2] Use of Form

The foregoing case title is for use generally in captions on pleadings and papers filed in a probate proceeding.

[3] Cross References

See generally Ch. 442, *Probate: Initiating Probate Administration*

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10-108 California Forms of Pleading and Practice--Annotated § 108.74

§ 108.74 Title of Case--Will Contest

[1] FORM Title of Case--Will Contest

Estate of _____ [*name*], [also	)
known as _____(*name*),]	)
Deceased.	)
_____ [*name*],	)
Contestant,	)
vs.	)
_____ [*names*],	)
Respondents.	)
	)

_____

[2] Cross References

See generally Ch. 444, *Probate: Will Contents* , and Ch. 445, *Probate: Independent Administration of Estates*

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10-108 California Forms of Pleading and Practice--Annotated § 108.75

§ 108.75 Title of Case--Appeal

[1] FORM Title of Case--Appeal

[*Where a cause originates as an adversary proceeding*]

_____ [*name*],	)
Plaintiff and Respondent	)
[*or* Appellant],	)
vs.	)
_____ [*name*],	)
Defendant and Appellant	)
[*or* Respondant].	)
	)
	)

_____

[*Where a cause originates as a nonadversary proceeding*]

_____ [*title of case in lower court,*	)
e.g., Guardianship of the Person of	)
_____ (*name*), a Minor]	)
_____	)
_____ [*name*],	)
Appellant,	)
vs.	)
_____ [*name*],	)
Respondent.	)

---

[2] Use of Form

Where an appeal is taken in a cause which originated as an adversary proceeding, the designation "and Appellant" is added after the term which described the appealing party (in this example, defendant appealed). The term "and Respondent" is added after the term which described the party opposing the appeal. No designation is added to a party who is neither prosecuting nor opposing the appeal (this may occur where there are multiple cross actions).

[3] Number of Case

The number assigned to the case by the trial court is not used in the appellate court. A new number will be assigned by the appellate court clerk after the record on appeal is lodged and the fees, if any, paid. Until a number is assigned, a blank should be left for insertion of the number.

Petitions for hearing in the Supreme Court should carry the number assigned by the court of appeal, with a blank for insertion of a Supreme Court number if a hearing is granted.

[4] Cross References

See generally Ch. 40, *Appeal: An Overview* , through Ch. 54, *Appeal: California Supreme Court Review*

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10-108 California Forms of Pleading and Practice--Annotated § 108.76

§ 108.76 Description of Parties--Subsequent to Complaint--Numerous Parties on One Side

[1] FORM Description of Parties--Subsequent to Complaint--Numerous Parties on One Side

_____ [*name of first named party*], et al.	))))

[2] Use of Form

It is customary, in pleadings and papers filed subsequent to the complaint, to include by name only the party named first in the complaint or petition and to refer to all others by use of the term "et al." On any subsequent pleading or paper, it is sufficient in the title of the case to (1) state the name of the first party on each side, with appropriate indication of other parties, and (2) state that a cross-action or cross-actions are involved, if applicable [*Cal. Rules of Ct., Rule 2.111(4)*]. However, some courts require that all defendants be named separately in the answer since a filing fee must be paid by each; counsel is advised to consult local practice. Further, the names of all parties should be included in a judgment; one reason is that a judgment lien may be lost on a judgment which does not mention all parties since the clerk who records the abstract of the judgment will not index parties not listed in the caption. Counsel is also advised to include in the caption of an order the names of all parties involved in the order; parties to whom the order does not pertain may, however, still be identified by use of "et al."

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10-108 California Forms of Pleading and Practice--Annotated § 108.77

§ 108.77 Description of Parties--Subsequent to Complaint--Party With Complex Name

[1] FORM Description of Parties--Subsequent to Complaint--Party With Complex Name

	)
_____ [*first words of name*], etc.,	)
Inc.	)

_____

[2] Use of Form

The foregoing case title may be used in papers and pleadings filed after the complaint where a first named party who will be referred to by name has a long and complicated name. The first word or, if the first word is short, the first two words of the name are followed by the term "etc." which is followed by the designation of status, if any, at the end of the name. Thus, "Market Redevelopment and Research Co." becomes "Market etc. Co."

It is suggested, however, that the full name of each party appear in the caption to the judgment and to any order affecting such party.

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10-108 California Forms of Pleading and Practice--Annotated § 108.78

§ 108.78 Description of Parties--Party Known Under Two or More Names

[1] FORM Description of Parties--Party Known Under Two or More Names

```
                                        )
_____ [name],                           )
also known as [or aka]                  )
_____ [name],                           )
[if more than two names, continue:      )
also known as (or aka)                  )
_____ (name),                           )
also known as (or aka)                  )
_____ (name), etc.]                     )
                                        )
_____________________________________________
```

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10-108 California Forms of Pleading and Practice--Annotated § 108.79

§ 108.79 Description of Parties--Husband and Wife

[1] FORM Description of Parties--Husband and Wife

	)
_____ [*name*]	)
and _____ [*name*],	)
husband and wife	)
	)

_____

[2] Use of Form

There does not appear to be any requirement that married persons on the same side of an action or proceeding be identified as husband and wife. However, it is common practice to so identify them.

[3] State Statutes

Right of married woman to sue without joining her husband as party. *Code Civ. Proc. § 370*

Right of wife sued with husband to defend for her own right and for husband, if he fails to defend. *Code Civ. Proc. § 371*

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10-108 California Forms of Pleading and Practice--Annotated § 108.80

§ 108.80 Description of Parties--Fictitiously Named Defendants

[1] FORM Description of Parties--Fictitiously Named Defendants

	)
DOES 1 through 20, inclusive	)
[*OR*]	)
FIRST DOE TO TENTH DOE, inclusive	)
[*OR*]	)
	)
DOE I; DOE II; DOE III; DOE IV [*continue if more*	)
fictitiously named defendants are needed]	)

[2] Cross References

For discussion and forms related to fictitiously named defendants, see Ch. 3, *Abatement of Actions*

[3] State Statutes

Fictitiously named defendants. *Code Civ. Proc. § 474*

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10-108 California Forms of Pleading and Practice--Annotated § 108.81

§ 108.81 Description of Parties--Fictitiously Named Defendants--Part of Name Known

[1] FORM Description of Parties--Fictitiously Named Defendants--Part of Name Known

	)
DOE _____	)
[*known part of name, e.g.*, WHITE] [*if sued in other than individual capacity, add:* (individually and) as _____ (*capacity, e.g.*, President of defendant WHITE CORPORATION)]	)
_____	

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10-108 California Forms of Pleading and Practice--Annotated § 108.82

§ 108.82 Description of Parties--Individual Doing Business Under Fictitious Name

[1] FORM Description of Parties--Individual Doing Business Under Fictitious Name

	)
_____ [*name*],	)
doing business under the fictitious	)
name of _____ [*name*]	)
[*OR*]	)
_____ [*name*],	)
an individual doing business under the fictitious firm	)
name and style of _____ Company	)
[*OR*]	)
_____ [*name*],	)
individually and doing business as	)
_____ [*fictitious name*]	

_____

[2] Use of Form

The foregoing is a description of a party who is an individual doing business under a fictitious business name. The requirement that one who is transacting business in California under a fictitious name file a statement to that effect is applicable to corporations, limited liability companies, and other associations, as well as individuals [*Bus. & Prof. Code § 17902*], and this description may be modified for use by such entities.

A person transacting business under a fictitious business name may not maintain an action in a California state court on,

or on account of, any contract made or transaction had in the fictitious name until a fictitious business name statement has been executed, filed, and published as required by law [*Bus. & Prof. Code § 17918*].

[3] Cross References

For discussion of fictitious business names, see *Ch. 20, Allegations Commonly Used, § 20.34* et seq.

[4] State Statutes

Fictitious business names. *Bus. & Prof. Code §§ 17900-17930*

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10-108 California Forms of Pleading and Practice--Annotated § 108.83

§ 108.83 Description of Parties--Corporation

[1] FORM Description of Parties--Corporation

	)
_____ [*name of corporation, including "Co." or "Inc." if that is part of name*], a corporation	)
	)

_____

[2] Cross References

See generally Ch. 160, *Corporations*

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10-108 California Forms of Pleading and Practice--Annotated § 108.84

§ 108.84 Description of Parties--Corporation--Foreign Corporation

[1] FORM Description of Parties--Corporation--Foreign Corporation

	)
_____, a(n)	)
_____	)
[*name of state or foreign country*] corporation	)

_____

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10-108 California Forms of Pleading and Practice--Annotated § 108.85

§ 108.85 Description of Parties--Corporation--Charitable, Eleemosynary, or Religious Corporation

[1] FORM Description of Parties--Corporation--Charitable, Eleemosynary, or Religious Corporation

	)
_____ [*name*, e.g.,	)
THE CHURCH OF THE MERCIFUL SAVIOUR], a	)
charitable corporation [*or* corporation sole]	)

_____

[2] Cross References

See generally Ch. 110, *Churches and Religious Organizations*

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10-108 California Forms of Pleading and Practice--Annotated § 108.86

§ 108.86 Description of Parties--Corporation--Nonprofit Corporation

[1] FORM Description of Parties--Corporation--Nonprofit Corporation

```
                                                    )
_____ [                                             )
 name of nonprofit corporation, e.g.                )
, _____                                             )
UNIVERSITY FOUNDATION], a nonprofit corpora-        )
tion                                                )
_____________________________________________________
```

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10-108 California Forms of Pleading and Practice--Annotated § 108.87

§ 108.87 Description of Parties--State Bank

[1] FORM Description of Parties--State Bank

	)
THE _____ BANK OF	)
_____,	)

a California banking corporation
[*OR*]
THE _____ BANK OF
_____,
a banking corporation organized under the laws of the
State of California

_____

[2] Cross References

See generally Ch. 94, *Banks, Deposits, and Checks*

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10-108 California Forms of Pleading and Practice--Annotated § 108.88

§ 108.88 Description of Parties--National Bank

[1] FORM Description of Parties--National Bank

```
                                        )
THE _________________ NATIONAL BANK OF  )
_________________,                      )
a corporation                           )
 [OR]                                   )
THE _________________ NATIONAL BANK OF  )
_________________,                      )
a national banking association
_____________________________________________
```

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10-108 California Forms of Pleading and Practice--Annotated § 108.89

§ 108.89 Description of Parties--Federal Savings and Loan Association

[1] FORM Description of Parties--Federal Savings and Loan Association

)
_____ FEDERAL SAVINGS AND)
LOAN ASSOCIATION OF)
_____, a federal savings and loan)
association
_____

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10-108 California Forms of Pleading and Practice--Annotated § 108.90

§ 108.90 Description of Parties--Partnership

[1] FORM Description of Parties--Partnership

_____ [*name*], a partnership

[2] Use of Form

The foregoing description may be used in an action by or against a partnership since a partnership may sue or be sued in the name which it has assumed or by which it is known *Code Civ. Proc. § 369.5(a)*. Where the litigation seeks to adjudicate only the rights or liabilities of partners in their partnership, as opposed to individual capacity, there appears to be no reason to name the individual partners, as is done in §§ 108.88 and 108.89. However, some counsel prefer to do this. Section 108.92 may also be used where one or more partners are to be sued individually in addition to their being sued in their capacity as partners.

[3] Cross References

See generally Ch. 400, *Partnerships: Governing Statutes* , through Ch. 406, *Partnerships: Dissolution*

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10-108 California Forms of Pleading and Practice--Annotated § 108.91

§ 108.91 Description of Parties--Partnership--Individuals Named

[1] FORM Description of Parties--Partnership--Individuals Named

	)
_____ [*names*],	)
members of a partnership engaged in business under	)
the name of _____	)
[*name*]	)

_____

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10-108 California Forms of Pleading and Practice--Annotated § 108.92

§ 108.92 Description of Parties--Partnership--Individuals Joined

[1] FORM Description of Parties--Partnership--Individuals Joined

)
_____ [*name*], a partnership, and)
_____ [*names*], individually)
_____

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10-108 California Forms of Pleading and Practice--Annotated § 108.93

§ 108.93 Description of Parties--Limited Partnership

[1] FORM Description of Parties--Limited Partnership

_____ [*name*], a limited partnership

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10-108 California Forms of Pleading and Practice--Annotated § 108.94

§ 108.94 Description of Parties--Unincorporated Association

[1] FORM Description of Parties--Unincorporated Association

	)
_____ [	)
name	)
],	)
an unincorporated association	)
	)

_____

[2] Use of Form

The foregoing may be used in an action by or against an unincorporated association since unincorporated associations may sue or be sued in their own name [*Code Civ. Proc. § 388(a)*]. However, unlike partnerships [see Comments to § 108.90], only the property of the association may be levied on under a writ of execution to enforce a judgment [*Corp. Code § 18260*]. The property of individual members may be reached only if they are named and an action can be stated against them as individuals. For discussion of the liability of members of unincorporated associations, see Ch. 61, *Associations and Clubs* . For a form describing an unincorporated association and individual members, see *§ 108.95*.

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10-108 California Forms of Pleading and Practice--Annotated § 108.95

§ 108.95 Description of Parties--Unincorporated Association--Individuals Joined

[1] FORM Description of Parties--Unincorporated Association--Individuals Joined

	)
_____ [	)
name	)
],	)
an unincorporated association, and	)
_____ [	)
names	)
], individually	)
	)

_____

[2] Use of Form

The foregoing form may be used where individual members are to be named in addition to the association.

[3] Cross Reference

For a related form, *see § 108.94*.

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10-108 California Forms of Pleading and Practice--Annotated § 108.96

§ 108.96 Description of Parties--United States of America

[1] FORM Description of Parties--United States of America

THE UNITED STATES OF
AMERICA

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10-108 California Forms of Pleading and Practice--Annotated § 108.97

§ 108.97 Description of Parties--State of California

[1] FORM Description of Parties--State of California

THE STATE OF CALIFORNIA

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10-108 California Forms of Pleading and Practice--Annotated § 108.98

§ 108.98 Description of Parties--State of California--Department

[1] FORM Description of Parties--State of California--Department

	)
DEPARTMENT OF	)
_____	)
[*department suing or sued, e.g.*, INSURANCE], a department [*or* subdivision] of the State of California	

_____

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10-108 California Forms of Pleading and Practice--Annotated § 108.99

§ 108.99 Description of Parties--State of California--Criminal Action

[1] FORM Description of Parties--State of California--Criminal Action

THE PEOPLE OF THE
STATE OF CALIFORNIA

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10-108 California Forms of Pleading and Practice--Annotated § 108.100

§ 108.100 Description of Parties--County

[1] FORM Description of Parties--County

	)
[THE] COUNTY OF _____	)
[*name*]	)

[*OR*]
COUNTY OF _____
[*name*], a subdivision of the State of California
[*OR*]
COUNTY OF _____
[*name*], a body politic and corporate
_____

[2] California Constitution

Counties as political subdivisions of the state. *Cal. Const., Art XI, § 1(a)*

[3] State Statutes

Names of counties. *Gov. Code § 23012*

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10-108 California Forms of Pleading and Practice--Annotated § 108.101

§ 108.101 Description of Parties--County--County Officers Joined as Defendants

[1] FORM Description of Parties--County--County Officers Joined as Defendants

)
COUNTY OF _____ [*name*];)
_____ [*name*])
as _____
[*particular office, e.g.*, County Treasurer]; and
_____
[*name*] as _____
[*particular office, e.g.*, County Auditor
_____

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10-108 California Forms of Pleading and Practice--Annotated § 108.102

§ 108.102 Description of Parties--County--County Board

[1] FORM Description of Parties--County--County Board

	)
THE _____ [*type of county board, e.g.,* RETIREMENT] BOARD OF THE COUNTY RETIREMENT SYSTEM OF _____ [*name*] COUNTY.	)
	)

_____

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10-108 California Forms of Pleading and Practice--Annotated § 108.103

§ 108.103 Description of Parties--County--Board of Supervisors

[1] FORM Description of Parties--County--Board of Supervisors

	)
THE BOARD OF SUPERVISORS OF	)
_____	)
[*name*], COUNTY and	)
_____ [*names*], members of the	)
Board	

_____

[2] Use of Form

Generally, an action by or against a board of supervisors may be prosecuted in the name of the county only [see *§ 108.100*]. However, counsel may wish in a particular action or proceeding to name the board and its members, for example, where plaintiff seeks a court order directing the board and its members to act or refrain from acting in a particular situation.

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10-108 California Forms of Pleading and Practice--Annotated § 108.104

§ 108.104 Description of Parties--Municipal Corporation (Incorporated City)

[1] FORM Description of Parties--Municipal Corporation (Incorporated City)

	)
[THE] CITY OF _____	)
[*name*], a municipal corporation	)
	)

_____

	)
[*OR*]	)
CITY OF _____ [*name*], a political	)
subdivision of the State of California	

_____

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10-108 California Forms of Pleading and Practice--Annotated § 108.105

§ 108.105 Description of Parties--Municipal Corporation (Incorporated City)--Chartered City

[1] FORM Description of Parties--Municipal Corporation (Incorporated City)--Chartered City

	)
CITY OF _____ [*name*], a chartered	)
city	)

_____

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10-108 California Forms of Pleading and Practice--Annotated § 108.106

§ 108.106 Description of Parties--Municipal Corporation (Incorporated City)--City Council and City Clerk Joined as Defendants

[1] FORM Description of Parties--Municipal Corporation (Incorporated City)--City Council and City Clerk Joined as Defendants

	)
CITY OF _____	)
[*name*], a municipal Corporation;	)
_____	)
[*names*], members of the City Council of the City of	)
_____	)
_____ [*name*]; and	)
_____ [*name*], City Clerk of the	
City of _____ [*name*]	

_____

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10-108 California Forms of Pleading and Practice--Annotated § 108.107

§ 108.107 Description of Parties--Municipal Corporation (Incorporated City)--City Board of Commissioners

[1] FORM Description of Parties--Municipal Corporation (Incorporated City)--City Board of Commissioners

	)
THE BOARD OF _____	)
[*type of commissioners, e.g.*, POLICE *or* PENSION]	)
COMMISSIONERS OF THE CITY OF	)
_____ [*name*], a municipal corpora-	)
tion	

_____

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10-108 California Forms of Pleading and Practice--Annotated § 108.108

§ 108.108 Description of Parties--School District

[1] FORM Description of Parties--School District

_____ [*official name of school district*], a school district	)
[*OR*]	)
_____ [*official name of school district, e.g.*, UNION HIGH] SCHOOL DISTRICT OF _____ [*name*] COUNTY, STATE OF CALIFORNIA, a public corporation	)

_____

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10-108 California Forms of Pleading and Practice--Annotated § 108.109

§ 108.109 Description of Parties--School District--Defendant Trustees

[1] FORM Description of Parties--School District--Defendant Trustees

_____ [*names*] as members of and constituting the Board of Trustees [*or* individually and collectively, as the Board of Trustees] of _____ [*official name of school district*]	)))

_____

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10-108 California Forms of Pleading and Practice--Annotated § 108.110

§ 108.110 Description of Parties--Public Officer

[1] FORM Description of Parties--Public Officer

)
_____ [*name*] [individually and] as)
_____ [*public office*] of)
_____ [*public entity, e.g.*, City of
_____ *or* County of
_____ *or* _____
District]
_____

[2] Cross References

From forms for use in actions against public officers, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

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10-108 California Forms of Pleading and Practice--Annotated § 108.111

§ 108.111 Description of Parties--Personal Representative of Deceased

[1] FORM Description of Parties--Personal Representative of Deceased

	)
_____ [*name*], as executor of the	)
will [*or* administrator of the estate with the will an-	)
nexed *or* administrator of the estate] of	
_____ [*name*], deceased	
_____	

[2] Cross References

See generally, Ch. 181, *Death and Survival Actions*, and Ch. 457, *Probate: Instructions to Personal Representative*

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10-108 California Forms of Pleading and Practice--Annotated § 108.112

§ 108.112 Description of Parties--Guardian or Guardian ad Litem for Minor

[1] FORM Description of Parties--Guardian or Guardian ad Litem for Minor

)
_____ [*name*], a minor, by)
_____ [*name*], his/her guardian [ad)
litem]
_____

[2] Cross References

For discussion and forms relating to the appointment and powers of guardians, see generally Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , through Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships*

For discussion of the appointment of guardians ad litem, see Ch. 291, *Guardians ad Litem*

[3] State Statutes

Requirement that minor who is a party appear by guardian or guardian ad litem. *Code Civ. Proc. § 372*

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10-108 California Forms of Pleading and Practice--Annotated § 108.113

§ 108.113 Description of Parties--Conservator or Guardian ad Litem for Incompetent Person

[1] FORM Description of Parties--Conservator or Guardian ad Litem for Incompetent Person

	)
_____ [*name*], an incompetent per-	)
son, by _____ [*name*], his/her	)
_____ [conservator *or* guardian ad litem]	
_____	

[2] Cross References

For discussion and forms relating to the appointment and powers of conservators, see generally Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* , through Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships*

For discussion of the appointment of guardians ad litem, see Ch. 291, *Guardians ad Litem*

[3] State Statutes

Requirement that incompetent person who is a party appear by guardian or guardian ad litem. *Code Civ. Proc. § 372*

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10-108 California Forms of Pleading and Practice--Annotated § 108.114

§ 108.114 Description of Parties--Class Action

[1] FORM Description of Parties--Class Action

	)
_____ [*name*],	)
individually and on behalf of all others similarly situated	)
	)

_____

[2] Use of Form

A complaint for or against a class party must include in the caption the designation "CLASS ACTION." This designation must be in capital letters on the first page of the complaint, immediately below the case number but above the description of the nature of the complaint. The complaint in a class action must contain a separate heading entitled "CLASS ACTION ALLEGATIONS," under which the plaintiff describes how the requirements for class certification are met [*Cal. Rules of Ct., Rule 3.761*].

[3] Cross References

See generally Ch. 120, *Class Actions*

[4] State Statutes

Suit by one for benefit of all. *Code Civ. Proc. § 382*

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10-108 California Forms of Pleading and Practice--Annotated § 108.115

§ 108.115 Description of Parties--Representative Action--By Member of Unincorporated Association

[1] FORM Description of Parties--Representative Action--By Member of Unincorporated Association

	)
_____ [*name*], as	)
_____ [*title, e.g.*, Secretary] of	)
[*name of association, e.g.*, _____ Furniture Dealers Association], an unincorporated association	

_____

[2] Use of Form

The foregoing description may be used in an action by a member of an unincorporated association on behalf of all members. While such an action is appropriate, the action may also be brought in the name of the unincorporated association [see Comments to § 108.94].

[3] Cross Reference

For a related form, *see § 108.114*.

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10-108 California Forms of Pleading and Practice--Annotated § 108.116

§ 108.116 Description of Parties--Taxpayer's Action

[1] FORM Description of Parties--Taxpayer's Action

_____ [*name*], a taxpayer [, on be-)
half of himself and all other taxpayers] of the)
_____ [*political subdivision, e.g.,*)
City of _____, State of California],)
Plaintiff,)
vs.)
_____ [*political subdivision levying*)
taxes, e.g., City of _____, a muni-
cipal corporation] and [*name*], [*city official respons-
ible, e.g.*, Treasurer *or* Auditor],
Defendants
_____

[2] Use of Form

The foregoing may be used in a taxpayer's action. Generally there does not appear to be any requirement that a taxpayer's action be brought as a class action [see *Code Civ. Proc. § 526a*]. A taxpayer's action in the form of a class action would appear to be appropriate, however, although it would compel plaintiff to comply with the various provisions governing class actions [see generally Ch. 120, *Class Actions*].

[3] Cross References

See generally Ch. 540, *Taxes and Assessments*

[4] State Statutes

Taxpayer's right to sue to enjoin waste of public funds. *Code Civ. Proc. § 526a*

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10-108 California Forms of Pleading and Practice--Annotated § 108.117

§ 108.117 Description of Parties--Shareholder's Derivative Action [Corp. Code § 800 respecting corporations subject to the new General Corporation Law, Corp. Code § 100 et seq. (see Corp. Code §§ 2300-2319)]

[1] FORM Description of Parties--Shareholder's Derivative Action [Corp. Code § 800 respecting corporations subject to the new General Corporation Law, Corp. Code § 100 et seq. (see Corp. Code §§ 2300-2319)]

	)
_____ [*names*],	)
on behalf of themselves and of all other shareholders	)
[*or* stockholders] of _____ [*name*], a corporation	)

_____

[2] Cross References

See generally Ch. 160, *Corporations*

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10-108 California Forms of Pleading and Practice--Annotated § 108.118

§ 108.118 Description of Parties--Trustees--Generally

[1] FORM Description of Parties--Trustees--Generally

	)
_____ [*names*],	)
[individually and] as trustees of	)
_____ [*description of trust*]	)

_____

[2] Cross References

See generally Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts*

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10-108 California Forms of Pleading and Practice--Annotated § 108.119

§ 108.119 Description of Parties--Trustee--In Bankruptcy

[1] FORM Description of Parties--Trustee--In Bankruptcy

	)
_____ [*name*], as trustee in bank-	)
ruptcy of the estate of _____	)
[*name*], Bankrupt	
_____	

[2] Cross References

See generally Ch. 94, *Bankruptcy*

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10-108 California Forms of Pleading and Practice--Annotated § 108.120

§ 108.120 Description of Parties--Receiver

[1] FORM Description of Parties--Receiver

)
_____ [*name*], as receiver)
_____ [*description of receivership,*)
e.g., appointed in the case of _____,
Plaintiff, vs. _____, Defendant,
_____ County Superior Court No.
_____]
_____

[2] Cross References

See generally Ch. 486, *Receivers*

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5. Description of Documents

10-108 California Forms of Pleading and Practice--Annotated § 108.121

§ 108.121 Description of Document--General Form

[1] FORM Description of Document--General Form

)	
)	NO. _____
)	_____
)	[*nature of pleading or paper, e.g.*, ANSWER OF
)	DEFENDANT JOHN RHODES]
)	[LIMITED CIVIL CASE]
)	
)	

_____

[2] Use of Form

To the right of the title of a pleading or paper, there appears the number of the case and, immediately below, a brief designation of the nature of the pleading or other paper. On all complaints and petitions, the character of the action or proceeding must also appear. In a case having multiple parties, any answer, response, or opposition shall specifically identify the complaining, propounding, or moving party and the complaint, motion, or other matter being answered or opposed [*Cal. Rules of Ct., Rule 2.111(6)*]. For descriptions of complaints, see *§§ 108.122 -108.124*.

In a limited civil case the caption of every pleading must state that the case is a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*].

In the case of a complaint or a petition filed a limited civil case, the first page of the first paper must state whether the

amount of damages claimed exceeds or does not exceed $10,000, which affects the amount of the filing fee [*Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9)*; for an example, *see § 108.122*].

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10-108 California Forms of Pleading and Practice--Annotated § 108.122

§ 108.122 Description of Document--Complaint Seeking One Type of Relief

[1] FORM Description of Document--Complaint Seeking One Type of Relief

```
                                        )
                                        )
                                        )     NO. _____
                                        )     COMPLAINT FOR _____ [relief
                                        )     sought, e.g., DAMAGES]
                                        )     (_____
                                        )     [brief description of specific character of action, e.g.,
                                        )    Conversion and Negligence])
                                        )     [LIMITED CIVIL CASE]
                                        )     [Amount demanded _____
                                        )    (exceeds or does not exceed) $10,000]
                                        )
_____
```

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10-108 California Forms of Pleading and Practice--Annotated § 108.123

§ 108.123 Description of Document--Complaint Seeking Multiple Types of Relief--Example

[1] FORM Description of Document--Complaint Seeking Multiple Types of Relief--Example

)	
)	NO. _____
)	COMPLAINT
)	(Damages for Fraud; Injunction)
)	

_____

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5. Description of Documents

10-108 California Forms of Pleading and Practice--Annotated § 108.124

§ 108.124 Description of Document--Class Action Complaint

[1] FORM Description of Document--Class Action Complaint

)	
)	NO. _____
)	CLASS ACTION
)	COMPLAINT FOR
)	_____
)	[*e.g.*, DAMAGES]
)	(_____ [*e.g.*, Fraud])
)	

_____

[2] Use of Form

A complaint for or against a class party must include in the caption the designation "CLASS ACTION." This designation must be in capital letters on the first page of the complaint, immediately below the case number but above the description of the nature of the complaint. The complaint in a class action must contain a separate heading entitled "CLASS ACTION ALLEGATIONS," under which the plaintiff describes how the requirements for class certification are met [*Cal. Rules of Ct., Rule 3.761*].

[3] Cross References

See generally Ch. 120, *Class Actions*

For a related form, *see § 108.121*.

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10-108 California Forms of Pleading and Practice--Annotated § 108.125

§ 108.125 Description of Document--Amended Pleading

[1] FORM Description of Document--Amended Pleading

)	
)	NO. _____
)	[_____ (SECOND *or subsequent*
)	*number*)]
)	AMENDED
)	_____
)	[*e.g.*, COMPLAINT]

_____

[2] Use of Form

If a case is reclassified by an amended complaint, cross-complaint, amended cross-complaint, or other pleading under *Code Civ. Proc. §§ 403.020* or *403.030*, the caption must indicate that the action or proceeding is reclassified by this pleading [*Cal. Rules of Ct., Rule 2.111(11)*]. If a case is reclassified by stipulation under *Code Civ. Proc. § 403.050*, the title of the stipulation must state that the action or proceeding is reclassified by this stipulation. The caption or title must state that the case is a limited civil case reclassified as an unlimited civil case, or an unlimited civil case reclassified as a limited civil case, or other words to that effect [*Cal. Rules of Ct., Rule 2.111(11)*].

[3] Cross References

See generally Ch. 21, *Amended and Supplemental Pleadings*

For a related form, *see § 108.121*.

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[Reserved]

§§ 108.126[Reserved]

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10-108 California Forms of Pleading and Practice--Annotated § 108.140

§ 108.140 Address to Court--Superior Court

[1] FORM Address to Court--Superior Court

TO THE HONORABLE _____ [*name*], JUDGE OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____:

[*OR*]

TO THE HONORABLE _____ [*name*], JUDGE OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF _____:

[*OR*]

TO THE HONORABLE _____ [*name*], JUDGE OF THE ABOVE ENTITLED COURT:

[*OR*]

TO THE JUDGE OF THE ABOVE ENTITLED COURT:

[*OR*]

TO THE HONORABLE SUPERIOR COURT:

[*OR*]

TO THE ABOVE ENTITLED COURT:

[2] Use of Form

Generally, an address to the court is not used in a pleading filed in a trial court. Complaints never contain an address. Petitions in special proceedings sometimes contain an address, usually in a court printed form, although there is no requirement that an address be included and the modern practice is to omit it.

The address is flush left, typed all in capitals. It follows the caption and is placed before the introduction.

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10-108 California Forms of Pleading and Practice--Annotated § 108.141

§ 108.141 Address to Court--Court of Appeal

[1] FORM Address to Court--Court of Appeal

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA:

[*OR*]

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF CALIFORNIA:

[*OR*]

TO THE HONORABLE COURT OF APPEAL OF THE STATE OF CALIFORNIA:

[*OR*]

TO THE HONORABLE COURT OF APPEAL OF CALIFORNIA:

[2] Use of Form

An address to the court is customarily included in petitions and briefs filed in the courts of appeal. The address follows the caption.

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10-108 California Forms of Pleading and Practice--Annotated § 108.142

§ 108.142 Address to Court--California Supreme Court

[1] FORM Address to Court--California Supreme Court

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

[*OR*]

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

[*OR*]

TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

[*OR*]

TO THE HONORABLE SUPREME COURT OF THE STATE OF CALIFORNIA:

[*OR*]

TO THE HONORABLE SUPREME COURT OF CALIFORNIA:

[2] Use of Form

An address to the court is customarily included in petitions and briefs filed in the Supreme Court. The address follows the caption.

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10-108 California Forms of Pleading and Practice--Annotated §§ 108.143-108.159

[Reserved]

§§ 108.143[Reserved]

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10-108 California Forms of Pleading and Practice--Annotated § 108.160

§ 108.160 Introduction--Complaint--Single Plaintiff--Single Cause of Action

[1] FORM Introduction--Complaint--Single Plaintiff--Single Cause of Action

[*Form preferred*]

Plaintiff alleges:

[*Forms also used*]

Plaintiff complains and alleges:

[*OR*]

Plaintiff complains of defendant(s) [, and each of them,] and for cause of action alleges:

[*OR*]

Comes now the plaintiff and for cause of action alleges:

[*OR*]

Comes now the plaintiff and for cause of action against defendant(s) [, and each of them,] alleges as follows:

[*OR*]

Plaintiff above named complains of the above named defendant(s) and alleges:

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10-108 California Forms of Pleading and Practice--Annotated § 108.161

§ 108.161 Introduction--Complaint--Single Plaintiff--Multiple Causes of Action

[1] FORM Introduction--Complaint--Single Plaintiff--Multiple Causes of Action

Plaintiff alleges

FIRST CAUSE OF ACTION FOR _____ [*e.g.*, NEGLIGENCE]
AGAINST DEFENDANTS _____ [*names*]

I *etc.*

SECOND CAUSE OF ACTION FOR _____ [*e.g.*, FRAUD]
AGAINST DEFENDANTS _____ [*names*]

I *etc.*

[*OR*]

FIRST CAUSE OF ACTION FOR _____ [*e.g.*, NEGLIGENCE]
[AGAINST DEFENDANTS _____ (*names*)]

For a First Cause of Action, plaintiff alleges:

SECOND CAUSE OF ACTION FOR _____ [*e.g.*, FRAUD]
[AGAINST DEFENDANTS _____ (*names*)]

For a Second Cause of Action, plaintiff alleges:

[2] Use of Form

This introduction may be used in a complaint that alleges multiple causes of action. Each separate cause of action in a pleading must be specifically identify its number and nature. If there are multiple parties, the parties, the party or parties asserting the cause of action and the party or parties against whom it is directed must be also be identified [*see Cal. Rules of Ct., Rule 2.112*].

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10-108 California Forms of Pleading and Practice--Annotated § 108.162

§ 108.162 Introduction--Complaint--Multiple Plaintiffs--Single Cause of Action

[1] FORM Introduction--Complaint--Multiple Plaintiffs--Single Cause of Action

Plaintiffs allege:

[*OR*]

Plaintiffs, and each of them, allege:

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10-108 California Forms of Pleading and Practice--Annotated § 108.163

§ 108.163 Introduction--Complaint--Multiple Plaintiffs--Separate Causes of Action

[1] FORM Introduction--Complaint--Multiple Plaintiffs--Separate Causes of Action

[*If plaintiff has one cause of action*]

CAUSE OF ACTION BY _____ [*name*]
FOR _____ [*e.g.*, NEGLIGENCE]

Plaintiff _____ [*name*] alleges:

[*OR, if plaintiff has more than one cause of action*]

Plaintiff _____ [*name*] alleges:

FIRST CAUSE OF ACTION OF _____ [*name*]
FOR _____ [*e.g.*, NEGLIGENCE]

I *etc.*

SECOND CAUSE OF ACTION OF _____ [*name*]

I *etc.*

[*OR*]

FIRST CAUSE OF ACTION OF _____ [*name*]
FOR _____ [*e.g.*, NEGLIGENCE]

For a First Cause of Action, plaintiff _____ [*name*] alleges:

I *etc.*

SECOND CAUSE OF ACTION OF _____ [*name*]
FOR _____ [*e.g.*, FRAUD]

For a Second Cause of Action, plaintiff _____ [*name*] alleges:

I *etc.*

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10-108 California Forms of Pleading and Practice--Annotated § 108.164

§ 108.164 Introduction--Complaint--Multiple Plaintiffs--Multiple Causes of Action in Common

[1] FORM Introduction--Complaint--Multiple Plaintiffs--Multiple Causes of Action in Common

Plaintiffs allege:

FIRST CAUSE OF ACTION
FOR _____ [*e.g.*, NEGLIGENCE]
[AGAINST DEFENDANTS _____ (*names*)]

I *etc*.

SECOND CAUSE OF ACTION
FOR _____ [*e.g.*, FRAUD]
[AGAINST DEFENDANTS _____ (*names*)]

I *etc*.

[*OR*]

FIRST CAUSE OF ACTION
FOR _____ [*e.g.*, NEGLIGENCE]
[AGAINST DEFENDANTS _____ (*names*)]

For a First Cause of Action, plaintiffs allege:

I *etc*.

SECOND CAUSE OF ACTION
FOR _____ [*e.g.*, FRAUD]
[AGAINST DEFENDANTS _____ (*names*)]

For a Second Cause of Action, plaintiffs allege:

I *etc*.

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10-108 California Forms of Pleading and Practice--Annotated § 108.165

§ 108.165 Introduction--Complaint--Plaintiff Suing in Representative Capacity

[1] FORM Introduction--Complaint--Plaintiff Suing in Representative Capacity

Plaintiff, as _____ [*representative capacity in which plaintiff is suing, e.g.*, executor of the will of _____(*name*), deceased], alleges:

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10-108 California Forms of Pleading and Practice--Annotated § 108.166

§ 108.166 Introduction--Complaint--Plaintiffs Suing Individually and as Business

[1] FORM Introduction--Complaint--Plaintiffs Suing Individually and as Business

Plaintiffs, individually and doing business under the name of _____ Company, allege:

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10-108 California Forms of Pleading and Practice--Annotated § 108.167

§ 108.167 Introduction--Complaint--Plaintiff Minor Through Guardian or Guardian ad Litem [Code Civ. Proc. § 372]

[1] FORM Introduction--Complaint--Plaintiff Minor Through Guardian or Guardian ad Litem [Code Civ. Proc. § 372]

Plaintiff, a minor, through his/her guardian [ad litem], alleges:

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10-108 California Forms of Pleading and Practice--Annotated § 108.168

§ 108.168 Introduction--Complaint--Plaintiff Incompetent Person Through Conservator or Guardian ad Litem [Code Civ. Proc. § 372]

[1] FORM Introduction--Complaint--Plaintiff Incompetent Person Through Conservator or Guardian ad Litem [Code Civ. Proc. § 372]

Plaintiff, an incompetent person through his/her _____ [conservator *or* guardian ad litem], alleges:

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10-108 California Forms of Pleading and Practice--Annotated § 108.169

§ 108.169 Introduction--Complaint--Plaintiff Personal Representative

[1] FORM Introduction--Complaint--Plaintiff Personal Representative

_____ [*name*], as _____ [executor of the will *or* administrator of the estate *or* administrator of the estate with the will annexed] of _____ [*name*], deceased, alleges:

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10-108 California Forms of Pleading and Practice--Annotated § 108.170

§ 108.170 Introduction--Complaint--Representative Suit [Code Civ. Proc. § 382]

[1] FORM Introduction--Complaint--Representative Suit [Code Civ. Proc. § 382]

Plaintiff on behalf of himself and all other _____ [*status in which parties represented*] of _____ [*company or entity*], alleges:

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10-108 California Forms of Pleading and Practice--Annotated § 108.171

§ 108.171 Introduction--Complaint--Plaintiff Political Body

[1] FORM Introduction--Complaint--Plaintiff Political Body

[*EITHER*]

Plaintiff, City of _____ [*name*], a municipal corporation, alleges:

[*OR*]

Plaintiff, _____ [*particular political body, e.g.*, City of _____ *or* County of _____ *or* State of _____], a _____ [*type of political body, e.g.*, municipal corporation *or* subdivision of the State of _____], alleges:

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10-108 California Forms of Pleading and Practice--Annotated § 108.172

§ 108.172 Introduction--Complaint--Trustee in Bankruptcy

[1] FORM Introduction--Complaint--Trustee in Bankruptcy

Plaintiff, as trustee in bankruptcy of the estate of _____ [*name*], bankrupt, alleges:

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10-108 California Forms of Pleading and Practice--Annotated § 108.173

§ 108.173 Introduction--Complaint in Intervention [Code Civ. Proc. § 387]

[1] FORM Introduction--Complaint in Intervention [Code Civ. Proc. § 387]

Intervenor _____ [*name*] [by leave of court] alleges:

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2. Demurrers, Answers, and Other Pleadings

10-108 California Forms of Pleading and Practice--Annotated § 108.174

§ 108.174 Introduction--Demurrer to Complaint--Single Defendant--Single Cause of Action

[1] FORM Introduction--Demurrer to Complaint--Single Defendant--Single Cause of Action

Defendant demurs to the complaint herein on the following grounds:

[*OR*]

Defendant demurs to the complaint on file herein and specifies the following grounds of demurrer:

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10-108 California Forms of Pleading and Practice--Annotated § 108.175

§ 108.175 Introduction--Demurrer to Complaint--Single Defendant--Multiple Causes of Action or Counts

[1] FORM Introduction--Demurrer to Complaint--Single Defendant--Multiple Causes of Action or Counts

Defendant demurs to Count _____ of the complaint herein on the following grounds:

[*OR*]

Defendant demurs to the alleged _____ [*e.g.*, First] Cause of Action in the complaint herein on the following grounds:

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10-108 California Forms of Pleading and Practice--Annotated § 108.176

§ 108.176 Introduction--Demurrer to Complaint--Multiple Defendants

[1] FORM Introduction--Demurrer to Complaint--Multiple Defendants

Defendants _____ [*names*], and each of them, demur to the complaint herein on the following grounds:

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10-108 California Forms of Pleading and Practice--Annotated § 108.177

§ 108.177 Introduction--Demurrer to Complaint--Where Question of Improper Venue

[1] FORM Introduction--Demurrer to Complaint--Where Question of Improper Venue

Defendant_____ [*name*], without waiving any objection he may have that the venue of the above entitled action does not properly lie in this court, demurs to the complaint on file herein as follows:

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10-108 California Forms of Pleading and Practice--Annotated § 108.178

§ 108.178 Introduction--Answer to Complaint--Single Defendant

[1] FORM Introduction--Answer to Complaint--Single Defendant

Defendant answers the complaint herein as follows:

[*OR*]

Defendant, in answer to the complaint herein on file, admits, denies, and alleges as follows:

[*OR*]

Defendant answers the complaint herein by admitting, denying, and alleging as follows:

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10-108 California Forms of Pleading and Practice--Annotated § 108.179

§ 108.179 Introduction--Answer to Complaint--One Defendant Separately

[1] FORM Introduction--Answer to Complaint--One Defendant Separately

Defendant _____ [*name*], answers the complaint herein as follows:

[*OR*]

Defendant _____ [*name*], answering the complaint herein for himself alone, admits, denies, and alleges as follows:

[*OR*]

Defendant _____ [*name*], severing from [his *or* her *or* its] codefendants herein, and answering plaintiff's complaint for himself alone, admits, denies, and alleges as follows:

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10-108 California Forms of Pleading and Practice--Annotated § 108.180

§ 108.180 Introduction--Answer to Complaint--Multiple Defendants

[1] FORM Introduction--Answer to Complaint--Multiple Defendants

Defendants answer the complaint herein as follows:

[*OR*]

Defendants in the above entitled proceeding, in answering the complaint on file herein, jointly and severally admit, deny, and allege as follows:

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10-108 California Forms of Pleading and Practice--Annotated § 108.181

§ 108.181 Introduction--Answer to Complaint--Multiple Causes of Action

[1] FORM Introduction--Answer to Complaint--Multiple Causes of Action

ANSWER TO FIRST CAUSE OF ACTION

Defendant answers the allegations of the alleged First Cause of Action of the complaint herein as follows:

ANSWER TO SECOND CAUSE OF ACTION

Defendant answers the allegations of the alleged Second Cause of Action of the complaint herein as follows:

etc.

[2] Use of Form

The designation "ANSWER TO FIRST CAUSE OF ACTION," "ANSWER TO SECOND CAUSE OF ACTION," etc. is often not used. In such cases the introduction would be only "Defendant answers the allegations of the alleged First Cause of Action, etc.," and then "Defendant answers the allegations of the alleged Second Cause of Action, etc."

Often the introduction is begun as in §§ 108.178 and 108.179, and after answering the First Cause of Action, a designation is made in the center of the page "ANSWER TO THE SECOND CAUSE OF ACTION," after which defendant answers the Second Cause of Action, starting the paragraph numbers again from roman numeral I.

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10-108 California Forms of Pleading and Practice--Annotated § 108.182

§ 108.182 Introduction--Answer to Complaint--Defendant Sued Under Fictitious Name [Code Civ. Proc. § 474]

[1] FORM Introduction--Answer to Complaint--Defendant Sued Under Fictitious Name [Code Civ. Proc. § 474]

Defendant _____ [*name*], sued herein as [*e.g.*, DOE I], answers the complaint herein for himself alone, as follows:

[*OR*]

Defendant _____ [*name*], sued herein under the fictitious name of [*e.g.*, DOE I], in answer to the complaint herein on file, admits, denies, and alleges as follows:

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10-108 California Forms of Pleading and Practice--Annotated § 108.183

§ 108.183 Introduction--Answer to Complaint--Defendant Sued Under Wrong Name

[1] FORM Introduction--Answer to Complaint--Defendant Sued Under Wrong Name

Defendant _____ [*true name of defendant*], sued herein as _____ [*incorrect name under which sued*], answers the complaint herein as follows:

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10-108 California Forms of Pleading and Practice--Annotated § 108.184

§ 108.184 Introduction--Answer to Complaint--Corporation

[1] FORM Introduction--Answer to Complaint--Corporation

Defendant _____ [*corporate name*], a corporation, answers the complaint herein as follows:

[*OR*]

Defendant _____ [*corporate name*], a corporation, for itself and itself alone, and in answer to plaintiff's complaint, admits, denies, and alleges as follows:

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10-108 California Forms of Pleading and Practice--Annotated § 108.185

§ 108.185 Introduction--Answer to Complaint--Personal Representative

[1] FORM Introduction--Answer to Complaint--Personal Representative

Defendant _____ [*name*], as executor of the will *or* administrator of the estate _____ of _____ [*name*], deceased, [and individually,] in answering plaintiff's complaint herein, admits, denies, and alleges as follows:

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10-108 California Forms of Pleading and Practice--Annotated § 108.186

§ 108.186 Introduction--Answer to Complaint--Assignee

[1] FORM Introduction--Answer to Complaint--Assignee

Defendant _____ [*name*], as assignee [for the benefit of the creditors] of _____ [*name*], admits, denies, and alleges as follows:

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10-108 California Forms of Pleading and Practice--Annotated § 108.187

§ 108.187 Introduction--Answer to Complaint--Minor Defendant

[1] FORM Introduction--Answer to Complaint--Minor Defendant

Defendant, a minor, by _____ [*name*], his guardian ad litem, for answer to plaintiff's complaint herein, admits, denies, and alleges:

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10-108 California Forms of Pleading and Practice--Annotated § 108.188

§ 108.188 Introduction--Answer to Complaint--Incompetent Defendant

[1] FORM Introduction--Answer to Complaint--Incompetent Defendant

Defendant _____ [*name*], an incompetent person, by _____ [*name*], his _____ [guardian *or* guardian ad litem], for answer to the plaintiff's complaint herein, admits, denies, and alleges:

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10-108 California Forms of Pleading and Practice--Annotated § 108.189

§ 108.189 Introduction--Answer to Complaint--Affirmative Defenses

[1] FORM Introduction--Answer to Complaint--Affirmative Defenses

[*After introduction as in §§ 108.178-108.188 and denials and admissions, if any, add*]:

FIRST AFFIRMATIVE DEFENSE

I, *etc*.

SECOND AFFIRMATIVE DEFENSE

I, etc.

[*OR*]

FIRST DEFENSE

I, *etc*.

SECOND DEFENSE

I, *etc*.

[*OR*]

AS _____ [A *or* ANOTHER] SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

[*OR*]

FOR _____ [*A or* ANOTHER] DISTINCT, SEPARATE, AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

[*OR*]

AS A FIRST AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

I, *etc*.

AS A SECOND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

I, *etc*.

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10-108 California Forms of Pleading and Practice--Annotated § 108.190

§ 108.190 Introduction--Answer to Complaint--Affirmative Defenses--Defense to One of Multiple Causes

[1] FORM Introduction--Answer to Complaint--Affirmative Defenses--Defense to One of Multiple Causes

AS AN AFFIRMATIVE DEFENSE TO PLAINTIFF'S ALLEGED _____ [*e.g.*, FIRST CAUSE OF ACTION], DEFENDANT ALLEGES:

[*OR*]

AS A SEPARATE AND AFFIRMATIVE DEFENSE TO PLAINTIFF'S ALLEGED _____ [*e.g.*, FIRST CAUSE OF ACTION], DEFENDANT ALLEGES:

[*OR*]

AS A SEPARATE AND AFFIRMATIVE DEFENSE TO THE ALLEGED _____ [*e.g.*, FIRST CAUSE OF ACTION] TO THE COMPLAINT HEREIN, DEFENDANT ALLEGES:

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10-108 California Forms of Pleading and Practice--Annotated § 108.191

§ 108.191 Introduction--Demurrer to Answer

[1] FORM Introduction--Demurrer to Answer

Plaintiff demurs to [defendant's answer *or* the (separate) answer of defendant _____ (*name*)] herein on the following grounds:

[*OR*]

Plaintiff above named demurs to the answer of defendant _____ [*name*] on file herein, on the following grounds, to wit:

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10-108 California Forms of Pleading and Practice--Annotated § 108.192

§ 108.192 Introduction--Demurrer to Answer--Separate Defenses

[1] FORM Introduction--Demurrer to Answer--Separate Defenses

DEMURRER TO FIRST DEFENSE

Plaintiff demurs to the first defense set forth in _____ [defendant's answer *or* the (separate) answer of defendant _____ (*name*)] on (each of) the following grounds:

DEMURRER TO SECOND DEFENSE, *etc.*

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10-108 California Forms of Pleading and Practice--Annotated § 108.193

§ 108.193 Introduction--Cross Complaint--No Parties Added

[1] FORM Introduction--Cross Complaint--No Parties Added

Cross complainant alleges:

[*OR*]

Defendant for cross complaint alleges:

[*OR*]

Cross complainant and defendant, hereinafter referred to as defendant, for cross complaint against cross defendant and plaintiff, hereinafter referred to as plaintiff, alleges:

[*OR*]

Cross complainant and defendant cross complains against plaintiff and cross defendant and for cross complaint alleges:

[*OR*]

Cross complainant complains of cross defendants and for cross complaint alleges:

[2] Use of Form

If the cross complainant and cross defendant are the original parties, it is proper to refer to them as defendant and plaintiff, and is preferable in the interests of simplicity and to avoid confusion.

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10-108 California Forms of Pleading and Practice--Annotated § 108.194

§ 108.194 Introduction--Cross Complaint--New Party Added

[1] FORM Introduction--Cross Complaint--New Party Added

Cross complainant and defendant, hereinafter referred to as defendant, for cause of action against cross defendant and plaintiff _____ [*name*], hereinafter referred to as plaintiff, and cross defendant _____ [*n ame of new party*], alleges:

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10-108 California Forms of Pleading and Practice--Annotated § 108.195

§ 108.195 Introduction--Demurrer to Cross Complaint

[1] FORM Introduction--Demurrer to Cross Complaint

Plaintiff and cross defendant demurs to the cross complaint herein on the following grounds:

[*OR*]

Cross defendant _____ [*name*], appearing for himself alone, demurs to the cross complaint herein on the following grounds:

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10-108 California Forms of Pleading and Practice--Annotated § 108.196

§ 108.196 Introduction--Answer to Cross Complaint

[1] FORM Introduction--Answer to Cross Complaint

Plaintiff and cross defendant answers the cross complaint herein as follows:

[*OR*]

Plaintiff and cross defendant, by way of answer to the cross complaint of _____ [*name*] on file herein, admits, denies, and alleges as follows:

[*OR*]

Cross defendant _____ [*name*] for answer to the cross complaint of cross complainant on file herein, admits, denies, and alleges:

[*OR*]

Cross defendant _____ [*name*] answer the cross complaint herein as follows:

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10-108 California Forms of Pleading and Practice--Annotated § 108.197

§ 108.197 Introduction--Demurrer to Answer to Cross Complaint

[1] FORM Introduction--Demurrer to Answer to Cross Complaint

Defendant [and cross complainant] demurs to plaintiff [and cross defendant]'s answer [*or* the answer of cross defendant _____ (*name*)] to the cross complaint herein on file on the following grounds:

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10-108 California Forms of Pleading and Practice--Annotated § 108.198

§ 108.198 Introduction--Special Proceeding--Petition

[1] FORM Introduction--Special Proceeding--Petition

Petitioner alleges:

[*OR*]

The petition of _____ [*name*] respectfully shows:

[*OR*]

Petitioner respectfully _____ [shows *or* alleges]:

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10-108 California Forms of Pleading and Practice--Annotated § 108.199

§ 108.199 Introduction--Special Proceeding--Petition--With Address to Court

[1] FORM Introduction--Special Proceeding--Petition--With Address to Court

TO THE HONORABLE _____ [*court in which petition filed*]:

The petition of _____ [*name*] respectfully shows:

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10-108 California Forms of Pleading and Practice--Annotated § 108.200

§ 108.200 Introduction--Special Proceeding--Petition for Writ

[1] FORM Introduction--Special Proceeding--Petition for Writ

[*Address to court, if desired. See §§ 108.140 -108.142.*]

Petitioner alleges:

[*OR*]

Petitioner respectfully prays that a writ of _____ [*type of writ, e.g.,* mandate *or* prohibition] issue against respondent [court] directing respondent _____ [*type of relief desired, e.g.,* to enter an order quashing service of summons on defendant and petitioner herein] and respectfully shows:

[*OR*]

Petitioner above named respectfully applies for a _____ [*type of writ, e.g.,* Peremptory Writ of Mandate] by this verified petition, and in support thereof sets forth the following facts and causes for the issuance of said writ:

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10-108 California Forms of Pleading and Practice--Annotated § 108.201

§ 108.201 Introduction--Special Proceeding--Return or Answer to Petition for Writ

[1] FORM Introduction--Special Proceeding--Return or Answer to Petition for Writ

Respondent for return and answer to the (alternative) writ and petition herein states as follows:

[*OR*]

Respondent makes the following return to the petition for writ of _____ [*type of writ, e.g.*, mandate] heretofore issued in the above matter, showing why said respondents have not complied with _____ [*particular command of writ or alternative writ*].

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10-108 California Forms of Pleading and Practice--Annotated § 108.202

§ 108.202 Introduction--Amended Pleading [Code Civ. Proc. §§ 472, 473(a)]

[1] FORM Introduction--Amended Pleading [Code Civ. Proc. §§ 472, 473(a)]

_____ [*Party, e.g.*, Petitioner] for his [second *or subsequent*] amended _____ [*e.g.*, petition] [admits, denies, and] alleges:

[2] Cross References

See generally Ch. 21, *Amended and Supplemental Pleadings*

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10-108 California Forms of Pleading and Practice--Annotated § 108.203

§ 108.203 Introduction--Amended Complaint [Code Civ. Proc. §§ 425.10, 472, 473(a)]

[1] FORM Introduction--Amended Complaint [Code Civ. Proc. §§ 425.10, 472, 473(a)]

Plaintiff alleges:

[*OR*]

Plaintiff for his [second *or subsequent*] amended complaint alleges:

[*OR*]

Plaintiff _____ [as of course *or* pursuant to leave of court first obtained *or* pursuant to stipulation with counsel for defendant] files his [second *or subsequent*] amended complaint and alleges:

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10-108 California Forms of Pleading and Practice--Annotated § 108.204

§ 108.204 Introduction--Amendment to Complaint [Code Civ. Proc. §§ 425.10, 471.5, 472, 473(a)]

[1] FORM Introduction--Amendment to Complaint [Code Civ. Proc. §§ 425.10, 471.5, 472, 473(a)]

Plaintiff files this amendment to his complaint and hereby amends said complaint in the following respects:

[*OR*]

Plaintiff _____ [as of course *or* pursuant to leave of court *or* pursuant to stipulation with counsel for defendant] amends his complaint herein by _____ [*e.g.*, striking out lines _____ through _____ of page _____] and substituting therefor the following allegations:

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10-108 California Forms of Pleading and Practice--Annotated § 108.205

§ 108.205 Introduction--Demurrer to Amended Complaint [Code Civ. Proc. § 471.5]

[1] FORM Introduction--Demurrer to Amended Complaint [Code Civ. Proc. § 471.5]

Defendant demurs to the [second *or subsequent*] amended complaint on file herein on the following grounds:

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10-108 California Forms of Pleading and Practice--Annotated § 108.206

§ 108.206 Introduction--Answer to Complaint After Motion to Strike Certain Portions Granted

[1] FORM Introduction--Answer to Complaint After Motion to Strike Certain Portions Granted

Defendant answers those portions of the complaint on file herein not stricken by the above entitled court as follows:

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10-108 California Forms of Pleading and Practice--Annotated § 108.207

§ 108.207 Introduction--Answer to Amended Complaint [Code Civ. Proc. § 471.5]

[1] FORM Introduction--Answer to Amended Complaint [Code Civ. Proc. § 471.5]

Defendant answers plaintiff's [second *or subsequent*] amended complaint as follows:

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10-108 California Forms of Pleading and Practice--Annotated § 108.208

§ 108.208 Introduction--Answer to Amended Cause of Action in Complaint [Code Civ. Proc. § 471.5]

[1] FORM Introduction--Answer to Amended Cause of Action in Complaint [Code Civ. Proc. § 471.5]

Defendant, answering the _____ [*e.g.*, Second] Cause of Action, as amended, of the complaint herein on file, admits, denies, and alleges:

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10-108 California Forms of Pleading and Practice--Annotated § 108.209

§ 108.209 Introduction--Answer to Amendment to Complaint [Code Civ. Proc. § 471.5]

[1] FORM Introduction--Answer to Amendment to Complaint [Code Civ. Proc. § 471.5]

Defendant answers the amendment to [Paragraph _____ of] the complaint herein on file as follows:

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10-108 California Forms of Pleading and Practice--Annotated § 108.210

§ 108.210 Introduction--Supplemental Complaint [Code Civ. Proc. §§ 425.10, 464]

[1] FORM Introduction--Supplemental Complaint [Code Civ. Proc. §§ 425.10, 464]

Plaintiff alleges:

[*OR*]

Plaintiff files this supplemental complaint and alleges:

[*OR*]

Plaintiff, by way of supplemental complaint, alleges:

[*OR*]

Plaintiff, by leave of court first had and obtained, files this, his supplemental complaint herein, and alleges that since the filing of the complaint herein the following facts in reference to cause(s) of action stated therein and affecting said cause(s) of action have arisen:

[*OR*]

Plaintiff files his supplemental complaint and alleges that after the filing of the complaint herein the following has occurred:

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C. INTRODUCTIONS
4. Amended and Supplemental Pleadings and Amendments to Pleadings

10-108 California Forms of Pleading and Practice--Annotated § 108.211

§ 108.211 Introduction--Answer to Supplemental Complaint [Code Civ. Proc. §§ 425.10, 464]

[1] FORM Introduction--Answer to Supplemental Complaint [Code Civ. Proc. §§ 425.10, 464]

Defendant answers the supplemental complaint on file herein as follows:

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4. Amended and Supplemental Pleadings and Amendments to Pleadings

10-108 California Forms of Pleading and Practice--Annotated § 108.212

§ 108.212 Introduction--Supplemental Answer [Code Civ. Proc. §§ 431.30, 464]

[1] FORM Introduction--Supplemental Answer [Code Civ. Proc. §§ 431.30, 464]

Defendant, by way or supplemental answer, alleges:

[*OR*]

_____ [Pursuant to leave of court heretofore granted *or* By stipulation of the parties hereto][, d]efendant files his supplemental answer as follows:

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5. Discovery

10-108 California Forms of Pleading and Practice--Annotated § 108.213

§ 108.213 Introduction--Interrogatories to Party [Code Civ. Proc. § 2030 (Code Civ. Proc. § 2030.010 et seq. operative July 1, 2005)]

[1] FORM Introduction--Interrogatories to Party [Code Civ. Proc. § 2030 (Code Civ. Proc. § 2030.010 et seq. operative July 1, 2005)]

To _____ [*opposing party*] and to _____ [*name*], his attorney:

_____ [*Requesting party, e.g.*, Plaintiff] _____ [*name*] requests that _____ [*opposing party, e.g.*, defendant] [*if not an individual, add:* by an officer or agent thereof who shall furnish such information as is available to said _____ (*e.g.*, defendant)] answer under oath pursuant to *Section 2030 of the Code of Civil Procedure* the following _____ [first *or subsequent*] set of interrogatories, that the answers be signed by the person making them, and that the answers be served on _____ [*requesting party, e.g.*, plaintiff] within 30 days [*unless the court enlarges or shortens the time*] after service of these interrogatories:

[2] Cross References

See generally Ch. 194, *Discovery: Interrogatories* .

[3] Rules of Court

Format of interrogatories. *Cal. Rules of Ct., Rules 3.1100, 3.1000(a)*

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5. Discovery

10-108 California Forms of Pleading and Practice--Annotated § 108.214

§ 108.214 Introduction--Answers and Objections to Interrogatories [Code Civ. Proc. § 2030]

[1] FORM Introduction--Answers and Objections to Interrogatories [Code Civ. Proc. § 2030]

_____ [*Party, e.g.*, Plaintiff] [*if not an individual, add:* by _____ (*name*), its _____ (*title or capacity*)] answers and objects to the interrogatories served on _____ [him *or* her *or* it] by _____ [*party, e.g.*, defendant] _____ [*name*] on _____ [*date*], as follows:

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10-108 California Forms of Pleading and Practice--Annotated § 108.215

§ 108.215 Introduction--Deposition on Written Questions [Code Civ. Proc. § 2020]--Interrogatories

[1] FORM Introduction--Deposition on Written Questions [Code Civ. Proc. § 2020]--Interrogatories

Questions to be propounded on behalf of _____ [*party, e.g.*, plaintiff] _____ [*name*] to _____ [*deponent*], whose address is _____, by _____ [*name and title of officer before whom deposition is to be taken, e.g.*, John Jones, Notary Public of California].

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10-108 California Forms of Pleading and Practice--Annotated § 108.216

§ 108.216 Introduction--Deposition on Written Questions [Code Civ. Proc. § 2020]--Cross Questions

[1] FORM Introduction--Deposition on Written Questions [Code Civ. Proc. § 2020]--Cross Questions

Cross questions to be propounded on behalf of _____ [*party, e.g.*, defendant] _____ [*name*] to _____ [*deponent*] at the taking of _____ [his *or* her] deposition before _____ [*name and title of officer before whom deposition is to be taken, e.g.*, John Jones, Notary Public of California].

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10-108 California Forms of Pleading and Practice--Annotated § 108.217

§ 108.217 Introduction--Notice--Generally

[1] FORM Introduction--Notice--Generally

To _____ [*party, e.g.*, plaintiff], _____ [*name*], and to _____ [*name*], his attorney:

NOTICE IS HEREBY GIVEN that

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6. Notices

10-108 California Forms of Pleading and Practice--Annotated § 108.218

§ 108.218 Introduction--Notice--Party in Propria Persona

[1] FORM Introduction--Notice--Party in Propria Persona

To _____ [*party, e.g.*, plaintiff] _____ [*name*] in propria persona:

NOTICE IS HEREBY GIVEN that

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C. INTRODUCTIONS
6. Notices

10-108 California Forms of Pleading and Practice--Annotated § 108.219

§ 108.219 Introduction--Notice--All Parties

[1] FORM Introduction--Notice--All Parties

To all parties herein and to their attorneys of record:

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10-108 California Forms of Pleading and Practice--Annotated § 108.220

§ 108.220 Introduction--Notice--Clerk

[1] FORM Introduction--Notice--Clerk

To the clerk of the above entitled court:

NOTICE IS HEREBY GIVEN that

[*OR*]

To _____ [*name*], clerk of the above entitled court:

NOTICE IS HEREBY GIVEN that

[*OR*]

To _____ [*name*], Clerk of the _____ [*specify court, e.g.*, Superior Court of _____ County, California]:

NOTICE IS HEREBY GIVEN that

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10-108 California Forms of Pleading and Practice--Annotated § 108.221

§ 108.221 Introduction--Affidavit [Code Civ. Proc. § 2003]

[1] FORM Introduction--Affidavit [Code Civ. Proc. § 2003]

State of California ss.
[City and] County of _____

_____ [*name*], being [first] duly sworn [on his oath, deposes and] says:

[2] Cross References

See generally Ch. 15, *Affidavits, Certificates, and Declarations*

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10-108 California Forms of Pleading and Practice--Annotated § 108.222

§ 108.222 Introduction--Declaration [Code Civ. Proc. § 2015.5]

[1] FORM Introduction--Declaration [Code Civ. Proc. § 2015.5]

I, _____ [*name*], declare:

[*OR*]

I, the undersigned, declare:

[*OR*]

The undersigned declares:

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10-108 California Forms of Pleading and Practice--Annotated § 108.223

§ 108.223 Introduction--Stipulation [Code Civ. Proc. § 283]

[1] FORM Introduction--Stipulation [Code Civ. Proc. § 283]

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective counsel, that

[2] Cross References

See generally Ch. 533, *Stipulations*

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10-108 California Forms of Pleading and Practice--Annotated § 108.224

§ 108.224 Introduction--Points and Authorities

[1] FORM Introduction--Points and Authorities

_____ [*Party, e.g.*, Plaintiff] submits the following points and authorities in _____ [support of *or* opposition to] _____ [*specify motion, demurrer, etc.*]:

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11-109 California Forms of Pleading and Practice--Annotated 109.syn

§ 109.syn Synopsis to Chapter 109: CARRIERS

§ 109.01 Scope of Chapter

§ 109.02 Cross References

§§ 109.03-109.09 [Reserved]

§ 109.10 Governing Statutes

§ 109.11 Inland and Marine Carriage

§ 109.12 Intrastate and Interstate Carriage

§ 109.13 Regulation by Public Utilities Commission

[1] Carriers as Public Utilities

[2] Powers of Commission

[3] Rates

[4] Other Regulation

§ 109.14 Common Carriers

[1] Definition

[2] Duty to Serve Public

[3] Discrimination Prohibited

[4] Duty to Follow Time Schedule

§ 109.15 Private Carriers

§ 109.16 Carriers Without Reward

§§ 109.17-109.29 [Reserved]

§ 109.30 Scope of Analysis

§ 109.31 Governing Law

§ 109.32 Standard of Care Owed by Carriers to Passengers

§ 109.33 Duties of Carrier

[1] Passengers With Special Physical Conditions

[2] Prevention of Assault on Passengers

[3] Passengers in Waiting Area

[4] Reciprocal Duty of Civility

[5] Boarding and Alighting Vehicle

[6] Prohibition Against Overcrowding of Vehicles

[7] Ejectment of Passenger

[8] Safe Operation and Maintenance of Equipment

§ 109.34 Duty of Gratuitous Carrier

§ 109.35 Doctrine of Imminent Peril

§ 109.36 Carrier-Passenger Relationship

[1] Contract Required

[2] Commencement and Termination of Relationship

§ 109.37 Injury to Nonpassengers

[1] Carrier's Standard of Care

[2] Pedestrians

[3] Persons on Premises

[4] Workers in Street

§ 109.38 Torts Committed by Carrier's Employees

§ 109.39 Limitations on Carrier's Liability

§ 109.40 Prohibitions Against Liability Waiver

§ 109.41 Presumption of Negligence Based on Violation of Statute

§ 109.42 Res Ipsa Loquitur

[1] Presumption Affecting Burden of Producing Evidence

[2] Doctrine Applicable

[3] Doctrine Inapplicable

§ 109.43 Collateral Source Rule

§ 109.44 Defenses

[1] Comparative Negligence

[2] Assumption of Risk

[3] Plaintiff's Violation of Statute

[4] Statute of Limitations

§ 109.45 Public Utilities Commission Address

§§ 109.46-109.59 [Reserved]

§ 109.60 Governing Law

§ 109.61 Services Other Than Carriage

§ 109.62 Definitions

[1] In General

[2] Documents of Title

§ 109.63 Delivery of Freight

[1] Directions to Carrier

[2] Place and Manner

[3] To Person Entitled Under Document

[4] Liability for Nonreceipt of Goods

[5] Defenses to Claim of Nondelivery or Misdelivery

[6] Damages

§ 109.64 Liability for Negligent Delay in Delivery

§ 109.65 Liability for Loss or Injury to Freight

[1] Gratuitous Carriers

[2] Carrier for Reward

[3] Carrier Issuing Bill of Lading

[4] Common Carriers

§ 109.66 Termination of Liability as Carrier

[1] By Delivery

[2] Notice of Arrival

[3] Failure of Consignee to Accept Goods

§ 109.67 Limitations on Liability

[1] Agreed Valuation Contracts

[2] Assent to Limitation of Liability

[3] Other Limitations on Liability

[a] Baggage

[b] Valuable Items

§ 109.68 Consignee and Consignor Liability to Motor Carrier

§§ 109.69-109.79 [Reserved]

§ 109.80 Governing Law

§ 109.81 Regulation

§ 109.82 Liability for Loss and Injury to Freight

§ 109.83 Parties

§ 109.84 Damages

§ 109.85 Limitation on Damages

§§ 109.86-109.99 [Reserved]

§ 109.100 Regulation of Carriers by Commission

[1] In General

[2] Rates Fixed by Filed Tariffs

[3] Discrimination Prohibited

[4] Long and Short Haul Charges

§ 109.101 Compensation of Common Carrier

§ 109.102 Liability for Payment of Freight

[1] In General

[2] Natural Increase of Freight

[3] Apportionment

[4] Extended or Faster Carriage

§ 109.103 Time for Payment

§§ 109.104-109.119 [Reserved]

§ 109.120 Cross References

[1] California Points and Authorities

[2] California Torts

[3] Forms of Discovery

§ 109.121 State Constitution

§ 109.122 Federal Statutes

§ 109.123 State Statutes

[1] Carrier's Duties to Passengers

[a] General Duties

[b] Speed of Vehicle

[c] Standard of Care

[2] Definitions

[3] Ejection of Passengers

[4] Limitations on Liability

[5] Passengers' Duties

[6] Payment of Fare

[7] Transit Districts

[a] In General

[b] Claims Against Transit Districts

[c] Specific Districts

§ 109.124 Decisions

[1] Carrier-Passenger Relationship

[a] Commencement

[b] Termination

[2] Carrier's Duty of Care

[a] In General

[b] Nonpassengers

[c] Passengers

[i] Assault by Third Person

[ii] Boarding Passengers

[iii] Passengers With Special Conditions and Minors

[iv] Transportation of Animals

[3] Carrier's Employees

[4] Evidence

[5] Passenger's Duty of Care

[6] Res Ipsa Loquitur

[7] Violation of Statute

§ 109.125 Attorney General Opinions

§ 109.126 Text References

§§ 109.127-109.139 [Reserved]

§ 109.140 Cross References

§ 109.141 State Statutes

[1] Definitions

[2] Bills of Lading

[3] Carriers for Reward

[4] Common Carriers

[a] Depositary

[b] Liability

[c] Limitation of Liability

[5] Consignor and Consignee Liability

[6] Damages

[7] Delay

[8] Delivery

[9] Directions of Consignor or Consignee

[10] Gratuitous Carrier

[11] Household Goods Carriers

[12] Lost Property

[13] Unclaimed Goods

§ 109.142 Decisions

[1] Bill of Lading

[2] Contraband

[3] Delay

[4] Liability

[5] Limitation of Liability

[6] Statute of Limitations

§ 109.143 Law Reviews

§ 109.144 Text References

§§ 109.145-109.159 [Reserved]

§ 109.160 Cross References

§ 109.161 Federal Statutes

§ 109.162 Decisions

§ 109.163 Text References

§§ 109.164-109.179 [Reserved]

§ 109.180 Cross References

§ 109.181 California Constitution

§ 109.182 State Statutes

§ 109.183 Decisions

§ 109.184 Text References

§§ 109.185-109.199 [Reserved]

§ 109.200 Complaint for Damages [Civ. Code §§ 3294, 3333] for Injuries for Wrongful Ejection From Vehicle [Civ. Code § 2188]--By Passenger Against Common Carrier of Passengers for Reward and Its Agents [Civ. Code §§ 2338, 2343]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Wrongful Ejection

[5] Allegation of Amounts

[6] Punitive Damages

[7] Verification

[8] State Statutes

[9] Decisions

[a] Liability

[b] Damages

[c] Defenses

[10] Cross References

§ 109.201 Complaint for Damages [Civ. Code §§ 3294, 3333] for Assault and Battery [Civ. Code § 2103]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2103, 2338] and Its Employee [Civ. Code § 2343]--Assault and Battery by Carrier's Agent

[1] FORM

[2] Use of Form

[3] Allegations

[4] Carrier's Liability

[5] State Statutes

[6] Decisions

[7] Cross References

§§ 109.202-109.219 [Reserved]

§ 109.220 Complaint for Damages [Civ. Code § 3316] For Losses Based on Nondelivery of Freight [Com. Code § 7301(a)]--By Consignee Against Common Carrier

[1] FORM

[2] Use of Form

[3] Allegations

[4] Notice of Claim

[5] Damages

[6] Interest

[7] State Statutes

[8] Decisions

[9] Text References

[10] Cross References

§ 109.221 Complaint for Damages [Civ. Code § 3317] for Losses Due to Delayed Delivery--By Consignor Against Common Carrier for Reward for Breach of Contract and Negligence [Civ. Code § 2196]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Condition of Property

[5] Damages

[6] State Statutes

[7] Decisions

[8] Cross References

§ 109.222 Complaint for Damages [Civ. Code § 3316] for Loss of or Injury to Freight by Consignor/Consignee Against Common Carrier of Freight for Reward--Strict Liability of Carrier [Civ. Code § 2194]

[1] FORM

[2] Use of Form

[3] Statute of Limitations

[4] Allegations

[5] Damages

[6] Interest

[7] State Statutes

[8] Decisions

[9] Cross References

§§ 109.223-109.239 [Reserved]

§ 109.240 Complaint for Damages [49 U.S.C.S. § 11707] for Loss of or Injury to Freight Shipped in Interstate Commerce--By Consignor/Consignee

[1] FORM

[2] Use of Form

[3] Allegations

[4] Time for Bringing Suit

[5] Written Notice of Claim

[6] California Legal Forms

[7] Federal Statutes

[8] Federal Regulations

[9] Decisions

[10] Text References

[11] Cross References

§§ 109.241-109.259 [Reserved]

§ 109.260 Complaint for Damages for Recovery of Overcharges on Shipment [Pub. Util. Code §§ 494, 532]--By Shipper Against Public Utility Common Carrier of Freight [Pub. Util. Code § 736]

[1] FORM

[2] Use of Form

[3] Court Action following Commission's Order

[4] Actions Originating in Court

[5] Allegations

[6] Limitation of Action

[a] Time for Filing Action

[b] Accrual of Cause of Action

[7] Damages

[8] California Constitution

[9] State Statutes

[a] Actions Against Public Utility Carriers

[b] Bills of Lading

[c] Definitions

[d] Regulation of Carriers

[10] Decisions

[11] Law Reviews

[12] Law Reviews

[13] Cross References

§ 109.261 Complaint for Damages [Civ. Code § 3300] for Collection of All or Portion of Lawful Tariff Charges by Public Utility Common Carrier [Pub. Util. Code § 737]--Against Consignee

[1] FORM

[2] Use of Form

[3] Allegations

[4] Recovery of Lawful Tariff Charges

[5] Limitation of Action

[6] Cross Complaint

[7] State Statutes

[8] Decisions

[9] Cross References

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11-109 California Forms of Pleading and Practice--Annotated § 109.01

§ 109.01 Scope of Chapter

This chapter discusses the intrastate inland carriage of freight and includes forms of complaints against carriers for nondelivery of freight [*see § 109.220*], delayed delivery of freight [*see § 109.221*], and loss of or injury to freight [*see § 109.222*].

This chapter discusses actions for injury, loss, or nondelivery of freight shipped in interstate commerce. It contains a form of complaint for use in an action for injury, loss, or nondelivery of freight shipped in interstate commerce [*see § 109.240*].

This chapter discusses rates and charges for carrying freight in intrastate commerce and regulation of rates and charges by the California Public Utilities Commission. It includes forms of complaints for recovery by a shipper of overcharges from a public utility common carrier [*see § 109.260*] and a complaint for collection by a public utility of all or a portion of lawful tariff charges from the consignee of the freight [*see § 109.261*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState & Local RegulationTransportation LawIntrastate Commerce

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§ 109.02 Cross References

For discussion and forms for use in actions involving injuries related to airplanes and airports, see Ch. 16, *Airplanes and Airports*

For discussion and forms related to injuries to pedestrians arising from motor-vehicle accidents generally, see *Ch. 82, Automobiles: Causes of Action, § 82.10*, and *Ch. 83, Automobiles: Bringing the Action, § 83.80* et seq.

For discussion and forms related to buses and streetcars, see Ch. 106, *Buses and Streetcars*

For discussion and forms involving wrongful death actions, see Ch. 181, *Death and Survival Actions*

For discussion and forms for use in negligence actions generally, see Ch. 380, *Negligence*

For discussion and forms for use in actions involving premises liability generally, see Ch. 421, *Premises Liability* , and Ch. 525, *Slip and Fall*

For discussion, forms, and procedural guides for filing claims against public entities and employees, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

For discussion and forms regarding public utilities generally, see Ch. 480, *Public Utilities*

For discussion and forms regarding injuries to passengers and other persons involving railroads, see Ch. 485, *Railroads*

For discussion and forms regarding injuries to passengers involving taxicabs, see Ch. 544, *Taxicabs*

For discussion and forms related to trucks, see Ch. 553, *Trucks*

For discussion of and forms relating to the enforcement of liens generally, see Ch. 342, *Liens and Wage Preferences*

For discussion of and forms relating to the Public Utilities Commission, see Ch. 480, *Public Utilities* , and Ch. 553, *Trucks*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState & Local RegulationTransportation LawCommercial VehiclesGeneral OverviewTransportation LawRail TransportationState & Local Regulation

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11-109 California Forms of Pleading and Practice--Annotated §§ 109.03-109.09

[Reserved]

§§ 109.03[Reserved]

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11-109 California Forms of Pleading and Practice--Annotated § 109.10

§ 109.10 Governing Statutes

Intrastate inland carriage is governed generally by *Civ. Code §§ 2085 et seq.* and *2168 et seq.* Public utility carriers are governed by *Pub. Util. Code § 201 et seq.*, as well. Specific aspects of carriage are dealt with in Pub. Util. Code §§ 3501 et seq. (highway carriers), 3901 et seq. (interstate and foreign highway carriers registration), 4301 et seq. (highway carriers' uniform business license tax), 5101 et seq. (household goods carriers), and 4351 et seq. (charter-party carriers).

Statutes governing carriers' liens are *Civ. Code §§ 2144* (lien on for freightage and related items), 2191 (lien on luggage for fare), 3051-3052 (lien of carrier in possession of property), and *Com. Code §§ 7307, 7308* (lien on goods covered by bill of lading).

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState & Local RegulationTransportation LawCommercial VehiclesGeneral OverviewTransportation LawCommercial VehiclesLicensing & Registration

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11-109 California Forms of Pleading and Practice--Annotated § 109.11

§ 109.11 Inland and Marine Carriage

Carriage is either inland or marine [*Civ. Code § 2086*]. Carriers on the ocean and arms of the sea are marine carriers, and all others are inland carriers [*Civ. Code § 2087*]. Right and duties peculiar to carriers by sea are defined by Congress [*Civ. Code § 2088*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPractice & ProcedureConstitutional AuthorityAdmiralty LawPractice & ProcedureFederal PreemptionAdmiralty LawPractice & ProcedureJurisdiction

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11-109 California Forms of Pleading and Practice--Annotated § 109.12

§ 109.12 Intrastate and Interstate Carriage

Congress has power to regulate commerce with foreign nations and among the states [U.S. *Const. art. I, § 8, cl. 3*]. The Interstate Commerce Act (*49 U.S.C.S. § 10101 et seq.*), governing the interstate transportation of persons and freight, does not generally apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one state [*49 U.S.C.S. §§ 10501, 10521*]. Generally, the destination intended by the passenger (or shipper) and known to the carrier at the beginning of the trip determines whether or not the carriage is interstate or intrastate [*see New York, New Haven & Hartford R.R. Co. v. Nothnagle (1953) 346 U.S. 128, 130, 73 S. Ct. 986, 97 L. Ed. 1500]* .

Likewise, the California Public Utilities Act [*Pub. Util. Code § 201 et seq.*] and Highway Carriers Act [Pub. Util. Code § 3501 et seq.] do not apply generally to interstate carriers [*Pub. Util. Code §§ 202*, 3506]. California does have, however, requirements for registration of interstate carriers [*see Pub. Util. Code § 3901 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawCongressional Duties & PowersCommerce ClauseInterstate CommerceGeneral OverviewInternational LawAuthority to RegulateGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState & Local Regulation

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§ 109.13 Regulation by Public Utilities Commission

[1] Carriers as Public Utilities

Private corporations and persons owning, operating, controlling or managing a line, plant, or system for the transportation of people or property, and common carriers are public utilities subject to the control of the legislature [*Cal. Const. art. XII, § 3*]. Pursuant to this constitutional provision, the legislature has defined every common carrier [*see Pub. Util. Code § 211*] performing services for the public as a public utility, and if the carrier receives any compensation, it is subject to the jurisdiction of the Public Utilities Commission (PUC) and to the provisions of the Public Utilities Act under *Pub. Util. Code §§ 201-2115* [*Pub. Util. Code § 216*]. For a definition of common carriers under the Public Utilities Code, see *§ 109.14[1]*.

[2] Powers of Commission

The PUC has the power to fix rates and establish rules for the transportation of passengers and property by transportation companies, to prohibit discrimination, and to award reparation for the exaction of unreasonable, excessive, or discriminatory charges [*Cal. Const. art. XII, § 4*]. In addition, the legislature has given the PUC a broad power to supervise and regulate every public utility in the state and to do all things necessary and convenient in the exercise of such power and jurisdiction [*Pub. Util. Code § 701*]. For a discussion of and forms for use in proceedings before the commission, see Ch. 480, *Public Utilities* .

[3] Rates

A common carrier is required to file with the PUC, and to print and keep open for public inspection, schedules showing its rates, fares, charges, and classifications for transportation of people and property [*Pub. Util. Code § 486*]. A common carrier subject to the provisions of *Pub. Util. Code § 201 et seq.* is prohibited from participating in the transportation of persons or property between points in this state until its schedules of rates, fares, charges and classifications have been filed and published in accordance with the provisions of *Pub. Util. Code § 201 et seq.* [*Pub. Util. Code § 493(a)*]. If any common carrier of property transports any property for which it does not have schedules of rates, fares, charges, and classifications on file, in violation of Pub. Util. Code *§ 493(a), the PUC* may establish a just and reasonable charge for

the transportation [*Pub. Util. Code § 493(b)*]. This requirement does not apply to network railroad transportation, which is defined as railroad transportation subject to the Federal Surface Transportation Board pursuant to *49 U.S.C.S. § 10501(a)* or *(b)* [*Pub. Util. Code §§ 224.8, 493(c)*].

The charges demanded or received by public utilities, as well as the rules made by public utilities pertaining to charges, are required to be just and reasonable. Unjust or unreasonable charges are unlawful [*Pub. Util. Code § 451*]. The commission is permitted to establish rates or charges for transportation of passengers and freight by railroads and other transportation companies except for network railroad transportation [*Pub. Util. Code § 728.5*]. The PUC also has power to order reparations for unreasonable, excessive, or discriminatory rates [*Pub. Util. Code § 734*; *see Pub. Util. Code §§ 451-462, 726-738* (rates), 486-496 (tariff schedules); *see also §§ 109.100, 109.260,* and *109.261*].

[4] Other Regulation

A public utility is required to furnish and maintain such facilities as are required to promote safety, health, comfort and convenience of patrons, employees, and the public [*Pub. Util. Code § 451*]. For regulation of equipment, practices and facilities, see *Pub. Util. Code §§ 761-773*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthorityEnergy & Utilities LawAdministrative ProceedingsRatemakingTransportation LawCarrier Duties & LiabilitiesRates & TariffsTransportation LawCarrier Duties & LiabilitiesState & Local Regulation

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§ 109.14 Common Carriers

[1] Definition

Everyone who offers to the public to carry persons, property, or messages, except telegraph messages, is a common carrier of whatever he or she offers to carry [*Civ. Code § 2168*]. A common carrier has been defined as one who offers to carry goods (or persons) between certain termini and who is bound to carry for all who tender their goods and the price of carriage [*Samuelson v. Public Utils. Comm'n (1951) 36 Cal. 2d 722, 729, 227 P.2d 256* ; *see Gomez v. Superior Court (2005) 35 Cal. 4th 1125, 1136, 29 Cal. Rptr. 3d 352, 113 P.3d 41* (roller coasters and similar amusement park rides are common carriers)]. The Supreme Court has concluded that a passenger's purpose in purchasing transportation, whether that purpose is to get from one place to another or to travel for entertainment or sightseeing, does not determine whether the transportation provider is a common carrier under the Civil Code [*Gomez v. Superior Court (2005) 35 Cal. 4th 1125, 1136, 29 Cal. Rptr. 3d 352, 113 P.3d 41]* .

The common law test of common carriage requires an unequivocal intention to dedicate the property to public use [*Talsky v. Public Utils. Comm'n (1961) 56 Cal. 2d 151, 162, 14 Cal. Rptr. 325, 363 P.2d 341]* . A common carrier within the meaning of *Civ. Code § 2168* has also been defined as any entity that holds itself out to the public generally and indifferently to transport goods or persons from place to place for profit [*Samuelson v. Public Utils. Comm'n (1951) 36 Cal. 2d 722, 728-730, 227 P.2d 256* ; *Squaw Valley Ski Corp. v. Superior Court (1992) 2 Cal. App. 4th 1499, 1508, 3 Cal. Rptr. 2d 897]* . The "public," in this sense, does not necessarily mean everyone all the time; one may be a common carrier even though the nature of the service rendered is so specialized that it is of possible use to only a fraction of the total population [*see Squaw Valley Ski Corp. v. Superior Court (1992) 2 Cal. App. 4th 1499, 1507-1510, 3 Cal. Rptr. 2d 897]* .

Under the Public Utilities Code, a common carrier means every person and corporation providing transportation for compensation to or for the public or any portion of the public, except as otherwise provided under that Code [*Pub. Util. Code § 211*]. "Transportation" is defined as taking up persons or property at some point and putting them down at another [*City of St. Helena v. Public Utils. Comm'n (2004) 119 Cal. App. 4th 793, 802, 14 Cal. Rptr. 3d 713* (wine train not carrier because it provides round-trip excursion, rather than picking up passengers at one location and putting

them down at another location)], although the Supreme Court has cautioned that this definition applies only to regulation of a carrier as a public utility and does not necessarily extend to the definition of a common carrier for other purposes [*Gomez v. Superior Court (2005) 35 Cal. 4th 1125, 1140, 29 Cal. Rptr. 3d 352, 113 P.3d 41* (roller coasters and similar amusement park rides are common carriers for purposes of heightened duty of care imposed by *Civ. Code §§ 2100, 2101*)].

Generally, common carriers for purposes of public utility regulation include entities that operate public transportation facilities, such as buses and railroads [*see Pub. Util. Code § 211(a), (c)*]. The categories of common carriers listed under the Code include railroad corporations (*Pub. Util. Code § 232*), express corporations (*Pub. Util. Code § 219*), freight forwarders (*Pub. Util. Code § 220*), car corporations, highway common carriers (*Pub. Util. Code § 213*), and cement carriers (*Pub. Util. Code § 214.1*) [*Pub. Util. Code § 211*]. "Common carrier" does not include any corporation or person owning, controlling, operating, or managing any recreational conveyance such as a ski lift, ski tow, J-bar, T-bar, chair lift or other such device used primarily while participating in winter sports activities [*Pub. Util. Code § 212(c)*].

The Public Utilities Code enumerates entities exempted from the common-carrier status [*see Pub. Util. Code § 212*]. In addition, because federal law gives exclusive jurisdiction to the Federal Surface Transportation Board to regulate rates, classifications, rules, and other specified activities over network railroad transportation [*see 49 U.S.C.S. § 10501(a), (b)*], the Public Utitilies Code does not apply to those railroads if the Public Utilities Code is in conflict with that federal law [*see Pub. Util. Code §§ 224.8, 486, 493, 494*]. Network railroad transportation is defined as railroad transportation subject to the Federal Surface Transportation Board pursuant to *49 U.S.C.S. § 10501(a)* or *(b)*, which in effect is most intrastate railroad transportation [*Pub. Util. Code § 224.8*].

However, because these exemptions are provided for the purposes of PUC regulation [*see § 109.13*], an entity exempt under the Public Utilities Code is not necessarily exempt from common-carrier status under *Civ. Code § 2168* for purposes of imposing tort liability. The PUC has observed that a transportation company may be exempt from regulation by the PUC as a common carrier under *Pub. Util. Code §§ 211* and *216*, but may occupy the status of common carrier for tort liability purposes under *Civ. Code § 2168* [*see Squaw Valley Ski Corp. v. Superior Court (1992) 2 Cal. App. 4th 1499, 1513, 3 Cal. Rptr. 2d 897]* . Therefore, for purposes of imposing tort liability, an entity's common-carrier status is analyzed pursuant to the criteria under *Civ. Code § 2168*, even if it is exempt from that status under the Public Utilities Code. For example, a ski chairlift operator (exempt under *Pub. Util. Code § 212(c)*) is considered a common carrier for purposes of *Civ. Code § 2168*, because it indiscriminately offers that conveyance to the public to carry skiers at a fixed rate across a certain route [*Squaw Valley Ski Corp. v. Superior Court (1992) 2 Cal. App. 4th 1499, 1508-1514, 3 Cal. Rptr. 2d 897]* . The operator of a skier rope tow conveyance (also exempt under *Pub. Util. Code § 212(c)*), however, is not, because, unlike a chair lift, a rope tow does not lift the skier off the ground [*see Squaw Valley Ski Corp. v. Superior Court (1992) 2 Cal. App. 4th 1499, 1507 n.1, 3 Cal. Rptr. 2d 897]* . An amusement ride operator is a common carrier because it transports the public from place to place [*Gomez v. Superior Court (2005) 35 Cal. Rptr. 4th 1125, 29 Cal. Rptr. 3d 352, 113 P.3d 41]* .

With that caution in mind, note that the Public Utilities Code exempts highway permit carriers [*Pub. Util. Code § 212(d)*; *see* Pub. Util. Code § 3515 (definition)]. It also exempts any corporation or person furnishing or otherwise providing transportation by horse, mule, or other equine animal for entertainment or recreational purposes [*Pub. Util. Code § 212(e)*]. In addition, as already discussed, it exempts entities involved in certain winter sports activities, such as ski facilities [*see Pub. Util. Code § 212(c)*]. Any integrated intermodal small package carrier that is registered subject to *Pub. Util. Code § 4120 et seq.* is also exempt [*Pub. Util. Code §§ 212(f),* 3511(f)].

[2] Duty to Serve Public

A common carrier must, if able to do so, accept and carry whatever is offered, at a reasonable time and place, if it is the kind of item that the carrier is accustomed to carry [*Civ. Code § 2169*].

[3] Discrimination Prohibited

A common carrier may not give preference in time, price or otherwise to one person over another [*Civ. Code § 2170*] and may not extend to any corporation or person any privilege or facility in the transportatin of passengers or property except such as are regularly and uniformly extended to all corporations and persons [*Pub. Util. Code § 494*]. However, a common carrier must always give a preference in time, and may give a preference in price, to the United States and to the state of California [*Civ. Code § 2171*].

[4] Duty to Follow Time Schedule

All common carriers must start at the time and place announced to the public, unless detained by accident or the elements, or in order to connect with carriers on other lines [*Civ. Code § 2172*]. Every common carrier of passengers by railroad must establish and give public notice of a scheduled starting time. Except in the case of accident or detention caused by connecting lines, and weather permitting, such carrier must start its trains at or within ten minutes after the scheduled time [*Civ. Code § 2170*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthorityEnergy & Utilities LawAdministrative ProceedingsRatemakingTransportation LawCarrier Duties & LiabilitiesDuty to Provide ServiceTransportation LawCarrier Duties & LiabilitiesRates & TariffsTransportation LawCarrier Duties & LiabilitiesState & Local Regulation

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§ 109.15 Private Carriers

Private carriers are carriers for hire who do not come within the definition of common carriers. Such carriers are not bound to carry for any reason unless they enter into a special agreement to do so [*Samuelson v. Public Utils. Comm'n (1951) 36 Cal. 2d 722, 730, 227 P.2d 256]* . A private carrier is not held to the higher standard of care that is imposed on a common carrier by *Civ. Code § 2100*, but is required only to exercise ordinary care and diligence [*see Webster v. Ebright (1992) 3 Cal. App. 4th 784, 786, 4 Cal. Rptr. 2d 714]* . Private carriers do not have a nondelegable duty to the public and are therefore not vicariously liable for their independent contractors' negligent acts [*Hill Bros. Chem. Co. v. Superior Court (2004) 123 Cal. App. 4th 1001, 1006-1010, 20 Cal. Rptr. 3d 530]* . The standard required of common carriers is discussed in *§ 109.30* et seq. For discussion of the ordinary standard of care, see Ch. 380, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceStandards of CareReasonable CareReasonable PersonTransportation LawCarrier Duties & LiabilitiesGeneral Overview

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11-109 California Forms of Pleading and Practice--Annotated § 109.16

§ 109.16 Carriers Without Reward

Carriers without reward are subject to the same rules as employees without reward [*see Lab. Code §§ 2850-2853*] except as otherwise provided [*Civ. Code § 2089*]. A carrier without reward who has begun performance of an undertaking must complete it as though a reward were being received, unless it restores the person or thing carried to as favorable a position as before the carrier commenced the carriage [*see Civ. Code § 2090*]. A carrier of property without reward must use at least slight care and diligence [*Civ. Code § 2114*], and a carrier of persons without reward must use ordinary care and diligence [*Civ. Code § 2096*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceStandards of CareReasonable CareReasonable PersonTortsNegligenceStandards of CareSpecial CareGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral Overview

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[Reserved]

§§ 109.17[Reserved]

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§ 109.30 Scope of Analysis

The following sections contain a brief discussion of carriers of passengers. They discuss the duties and liabilities of common carriers to passengers and other persons, and include discussion of some commonly used defenses. They also contain forms of complaints for use in alleging injuries from wrongful ejection from a carrier's vehicle or conveyance [*see § 109.200*] and for assault and battery by an employee of a carrier [*see § 109.201*].

For discussion and forms regarding injuries involving buses and streetcars, railroads, and taxicabs, see Ch. 106, *Buses and Streetcars* , Ch. 485, *Railroads* , and Ch. 544, *Taxicabs* .

For discussion of the duty of ordinary care, which is applicable to private carriers (as discussed in *§ 109.15*), see generally Ch. 380, *Negligence* .

For discussion and forms for use in actions regarding premises liability generally, see Ch. 421, *Premises Liability* , and Ch. 525, *Slip and Fall* .

For discussion, forms, and procedural guides for filing claims against public entities and employees, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* . For discussion and forms regarding public utilities generally, see Ch. 480, *Public Utilities* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAssault & BatteryGeneral OverviewTortsNegligenceStandards of CareReasonable CareReasonable PersonTortsPremises Liability & PropertyGeneral Premises LiabilityActivities & ConditionsSlip & Fall InjuriesGeneral OverviewTortsTransportation TortsGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral Overview

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§ 109.31 Governing Law

The classification of common carriers as public utilities is governed by *Cal. Const. art. XII, § 3*. Duties of carriers of persons generally are governed by *Civ. Code § 2096 et seq.* and *Civ. Code § 2180 et seq.*

For a discussion of the definition of the term "common carrier," see *§ 109.14[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState & Local Regulation

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§ 109.32 Standard of Care Owed by Carriers to Passengers

A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill [*Civ. Code § 2100*; *see Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal. 3d 780, 785 n.2, 221 Cal. Rptr. 840, 710 P.2d 907* (applying *Civ. Code § 2100* to public entity); *see also Civ. Code § 2090* (carrier without reward has duty to complete undertaking as if receiving reward)].

Because common carriers bind themselves to carry safely those whom they take into their vehicles, they owe both a duty of utmost care and the vigilance of a very cautious person towards their passengers. They are responsible for any, even the slightest, negligence and are required to do all that human care, vigilance, and foresight reasonably can do under all the circumstances [*Acosta v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 19, 27, 84 Cal. Rptr. 184, 465 P.2d 72* ; *Rogers v. Los Angeles Transit Lines (1955) 45 Cal. 2d 414, 417, 289 P.2d 226]* . This duty is one of the "highest degree of care" [*Osgood v. Los Angeles etc. Co. (1902) 137 Cal. 280, 281, 70 P. 169* ; *Atchison, Topeka & Santa Fe Ry. Co. v. Lan Franco (1968) 267 Cal. App. 2d 881, 889, 73 Cal. Rptr. 660* (train and truck collision)].

The fact that a carrier of persons for reward owes them the highest duty of care, however, does not mean that the carrier is an insurer of the absolute safety of the passengers [*Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal. 3d 780, 791, 221 Cal. Rptr. 840, 710 P. 2d 907]* .

In actions against airlines, the higher standard of care imposed by *Civ. Code § 2100* may be preempted by the Airline Deregulation Act [*49 U.S.C § 41713(b)(1)*], in which event the common law standard of care will be applied [*Gee v. Southwest Airlines (9th Cir. 1997) 110 F.3d 1400, 1406, 1408* (preempting emotional injury claims against airline stemming from negligent rendition of service and conduct of flight crew, but not as to safety related personal injury or death claims concerning airline operations or maintenance)]. For discussion of the liability of airlines, see Ch. 16, *Airplanes and Airports* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceStandards of CareSpecial CareCommon CarriersTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState & Local Regulation

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§ 109.33 Duties of Carrier

[1] Passengers With Special Physical Conditions

If a passenger is blind, sick, aged, very young, crippled, or infirm, and the condition is apparent or made known to the carrier, the carrier must render the passenger the necessary assistance in boarding or alighting from its trains or cars [*McBride v. Atchison, Topeka & Santa Fe Ry. Co. (1955) 44 Cal. 2d 113, 119, 279 P.2d 966* (crippled passenger on crutches slipped on wet cigar butt alighting from train)]. Thus, a carrier owes to children who are passengers on its cars a greater degree of care than it owes to healthy adults [*Mudrick v. Market Street Ry. Co. (1938) 11 Cal. 2d 724, 734, 81 P.2d 950]* . However, this heightened duty only applies where a passenger is injured while boarding or alighting from a train or car. For example, no special duty of care is owed by a rapid transit district to an inebriated passenger who is injured after having safely exited the train, despite the fact that the train operator is aware of the passenger's inebriated condition [*McGettigan v. Bay Area Rapid Transit Dist. (1997) 57 Cal. App. 4th 1011, 1020, 67 Cal. Rptr. 2d 516* (inebriated passenger left standing on platform after exiting BART train later found injured and still on platform)].

[2] Prevention of Assault on Passengers

A carrier owes to the passenger the highest degree of care in refraining from initiating conduct that would jeopardize the passenger's safety [*Dayton v. Yellow Cab Co. (1948) 85 Cal. App. 2d 740, 745, 193 P.2d 959]* . The rule of utmost care and diligence set forth in *Civ. Code § 2100* applies not only to active negligence but also to personal treatment of passengers by the carrier, its agent, or employees while obligations under the contract of carriage are still unfulfilled [*Dayton v. Yellow Cab Co. (1948) 85 Cal. App. 2d 740, 744, 193 P.2d 959]* .

Carriers are liable for acts of assault on passengers by their employees [*Berger v. Southern Pac. Co. (1956) 144 Cal. App. 2d 1, 6, 300 P.2d 170]* . Because a contract of transportation implies protection to the passenger against acts of personal violence by the agent or employees of the carrier, a carrier is liable for acts of assault and battery by its employees resulting in injury to those it has agreed to transport on its facilities [*Berger v. Southern Pac. Co. (1956) 144 Cal. App. 2d 1, 6, 300 P.2d 170]* . The liability extends not only to cases in which the assault was in the line of the employee's duty, but also to those instances when the act was merely that of an individual and entirely disconnected

with the performance of the agent's duties [*Berger v. Southern Pac. Co. (1956) 144 Cal. App. 2d 1, 6-7, 300 P.2d 170]* .

The carrier also has a duty to provide the highest degree of care to protect a passenger from the unprovoked assaults of other passengers [*Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal. 3d 780, 791, 221 Cal. Rptr. 840, 710 P.2d 907]* . However, the duty only arises if, in the exercise of the required degree of care, the carrier has or should have knowledge of conditions from which it may reasonably be seen that an assault may occur, and the carrier has the ability to prevent the injury [*Terrell v. Key Sys. (1945) 69 Cal. App. 2d 682, 686, 159 P.2d 704]* .

[3] Passengers in Waiting Area

The high degree of care owed by carriers to passengers applies to passengers while they are in transit until they have safely departed from the carrier's vehicle, but it does not apply to a passenger in the carrier's station or waiting area. In that case, the carrier need only exercise a reasonable degree of care for the protection of the passengers [*Marshall v. United Airlines (1973) 35 Cal. App. 3d 84, 86-87, 110 Cal. Rptr. 416* ; *see also McGettigan v. Bay Area Rapid Transit Dist. 57 Cal. App. 4th 1011, 1018, 67 Cal. Rptr. 2d 516* (once inebriated passenger exited train to train platform relationship of carrier-passenger terminated and rapid transit district owed no duty to assist passenger based on existence of special relationship)]. However, the higher degree of care applies to a passenger in a waiting area if he or she has been accepted as a passenger and the carrier assumes the responsibility of conducting him or her to the point of departure [*Grier v. Ferrant (1944) 62 Cal. App. 2d 306, 311, 144 P.2d 631]* .

[4] Reciprocal Duty of Civility

A carrier of passengers for reward must give to passengers all such accommodations as are usual and reasonable, must treat them with civility, and must give them a reasonable degree of attention [*Civ. Code § 2103*]. This duty does not negate a reciprocal obligation on the part of passengers to use all reasonable care within their power for their own safety and to accord the same civility to the carrier, its agents, and its employees [*Dayton v. Yellow Cab Co. (1948) 85 Cal. App. 2d 740, 744, 193 P.2d 959* (fight between taxicab driver and passenger over fare)].

[5] Boarding and Alighting Vehicle

A common carrier owes a duty to provide the utmost care and diligence for the safe carriage of its passengers, including the provision of care to passengers boarding the carrier [*see Rocray v. Pasadena City Lines, Inc. (1958) 159 Cal. App. 2d 265, 269-270, 323 P.2d 772]* . The carrier also owes a passenger the same high degree of care in affording passengers a reasonable opportunity to alight from the vehicle safely as in carrying the passenger safely [*McBride v. Atchison, Topeka & Santa Fe Ry. Co. (1955) 44 Cal. 2d 113, 116, 279 P.2d 966* (railroad accident)]. Thus, after a vehicle stops at a point where passengers might properly and conveniently alight, the carrier's employees have the duty of ascertaining whether any passengers are attempting to alight before starting the car [Moeller v. Market St. Ry. Co. (1938) 27 Cal. App. 2d 562, 565, 81 P.2d 475 (disapproved of on other grounds by *Scott v. Burke (1952) 39 Cal. 2d 388, 401, 247 P.2d 313*)].

With regard to the carrier's duty to keep the steps or vestibules of its cars free from debris or foreign substances other than snow or ice, the general rule is that the carrier must provide safe and convenient means of access to its vehicles and departure from them [*McBride v. Atchison, Topeka & Santa Fe Ry. Co. (1955) 44 Cal. 2d 113, 117-118, 279 P.2d 966]* .

[6] Prohibition Against Overcrowding of Vehicles

A carrier of persons for reward must not overcrowd or overload its vehicle [*Civ. Code § 2102*]. It must provide every passenger with a seat [*Civ. Code § 2185*]. In addition, it must not overload its vehicle by receiving and carrying more passengers than its rated capacity allows [*Civ. Code § 2185*]. But *Civ. Code § 2185* does not apply to any city, county,

or city and county that operates a transportation system, or to any passenger stage corporation or street railroad corporation as defined in *Pub. Util. Code §§ 226* and *232*, which is subject to the jurisdiction of the Public Utilities Commission [*Civ. Code § 2185*].

In cases in which a carrier is not required to comply with *Civ. Code § 2185* because it is exempt from its application under *Pub. Util. Code § 226* or *232* or otherwise, if all of a carrier's seats are occupied, the carrier and the standing passenger are both required to take greater safety precautions than if the passenger were seated [Kelly v. Santa Barbara Consol. R.R. Co. (1915) 171 Cal. 415, 419, 153 P. 903 ; *Sweet v. Los Angeles Ry. Co. (1947) 79 Cal. App. 2d 195, 199, 179 P.2d 824]* . However, this greater obligation on the part of the carrier when all seats are occupied seems to be only an extension of the duty to use the utmost care and diligence for the passengers' safety. Therefore, it is not prejudicial error to fail to give a jury instruction on the carrier's duty to provide seats and the greater duty owed when seats are not available if the jury is instructed of the carrier's duty of utmost care and diligence [*Gerfers v. San Diego Transit Sys. (1954) 126 Cal. App. 2d 733, 738-739, 272 P.2d 930]* .

[7] Ejectment of Passenger

A common carrier may make rules for conducting business, and may require passengers to conform to them, if they are lawful, public, uniform in their application, and reasonable [*Civ. Code § 2* 186]. In addition, a common carrier may demand the fare of passengers, either at starting or at any subsequent time [*Civ. Code § 2187*]. Consequently, a passenger who refuses to pay the fare or to conform to any lawful regulation of the carrier may be ejected from the vehicle by the carrier [*Civ. Code § 2188*]. However, the ejection must be done with as little violence as possible, and at any usual stopping place or near some dwelling house [*Civ. Code § 2188*]. After having ejected a passenger, a carrier has no right to require the payment of any part of the passenger's fare [*Civ. Code § 2190*].

When a common carrier contracts to convey a person, this contract gives rise to a duty to deliver the person to his or her destination, and a breach of this duty may justify tort damages [*Sloane v. Southern Cal. Ry. Co. (1896) 111 Cal. 668, 676-677, 44 P. 320* ; *Ingham v. Luxor Cab Co. (2001) 93 Cal. App. 4th 1045, 1051, 113 Cal. Rptr. 2d 587]* . A common carrier that ejects a passenger at a place other than the designated destination violates a common carrier's affirmative duty to prevent harm to its passengers if the ejectment subjects the passenger to reasonably foreseeable injury [*Ingham v. Luxor Cab Co. (2001) 93 Cal. App. 4th 1045, 1051, 113 Cal. Rptr. 2d 587]* . In addition, ejectment of a passenger by a common carrier may be wrongful and actionable even if the ejectment occurs at an apparently safe place and even if no physical force is used to remove the passenger from the carrier [*Ingham v. Luxor Cab Co. (2001) 93 Cal. App. 4th 1045, 1052, 1055, 113 Cal. Rptr. 2d 587]* .

For example, in a case involving a cab driver that repeatedly told a passenger to leave the cab two blocks downhill from the passenger's intended destination, the cab company owed a duty of care not to eject the passenger from the cab there, even though there was no imminent danger at that spot. Because this particular passenger was obviously infirm, it was reasonably foreseeable that the passenger might suffer an injury as a result of having to walk uphill to her intended destination [*Ingham v. Luxor Cab Co. (2001) 93 Cal. App. 4th 1045, 1053-1054, 113 Cal. Rptr. 2d 587]* .

However, the scope of the duty to deliver a passenger to the intended destination may vary depending on the nature of the carrier, because cabs contract to deliver to the passenger's ultimate destination, while carriers such as trains carry passengers only to fixed stations that may only be near the passenger's ultimate destination [*see Ingham v. Luxor Cab Co. (2001) 93 Cal. App. 4th 1045, 1053, 113 Cal. Rptr. 2d 587]* . There may also be an issue of fact as to whether the ejectment was the proximate cause of a subsequent injury to the passenger, or whether the injury was caused instead by the passenger's own subsequent conduct, which may be unreasonable and unforeseeable [*see Ingham v. Luxor Cab Co. (2001) 93 Cal. App. 4th 1045, 1054-1058, 113 Cal. Rptr. 2d 587]* .

[8] Safe Operation and Maintenance of Equipment

A carrier of persons for reward must provide vehicles that are safe and fit for their intended purpose, and any default in this respect is not excused by any degree of care [*Civ. Code § 2101*].

Although a certain amount of lurching and jerking is inevitable in the lawful operation of a streetcar, bus, or other common carrier, a passenger is not required, as a matter of law, to anticipate a "sudden" or "violent" jerk that has sufficient force to throw the passenger to the ground [*Acosta v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 19, 27, 84 Cal. Rptr. 184, 465 P.2d 72]* .

A carrier of persons for reward must travel at a reasonable rate of speed, without any unreasonable delay or deviation from the proper route [*Civ. Code § 2104*]. Although the Public Utilities Commission has the power to fix rates and regulate services of public utilities, local governmental entities still have the power to regulate public utilities with regard to making and enforcing local, police, sanitary, and other regulations other than the fixing of rates [*Cal. Const. art. XII, § 8*]. Thus, local governmental entities are empowered to establish conditions, regulations, and the speed by which street railroad companies operate streetcars over and across city streets [*Wright v. Los Angeles Ry. Corp. (1939) 14 Cal. 2d 168, 177, 93 P.2d 135* ; *Simoneau v. Pacific Elec. Ry. Co. (1913) 166 Cal. 264, 269, 136 P. 544]* .

It should be recognized that violating a prima facie speed limit does not establish negligence as a matter of law [*Veh. Code §§ 40830, 40831*; *Hardin v. San Jose City Lines, Inc. (1953) 41 Cal. 2d 432, 439, 260 P.2d 63]* . In civil cases, the prima facie speed limit is a factor to be considered with other pertinent factors in determining whether certain conduct was negligent [*Hardin v. San Jose City Lines, Inc. (1953) 41 Cal. 2d 432, 439, 260 P.2d 63]* .

If a collision occurs, an important jury issue is whether or not the carrier exercised the high degree of care required of common carriers to passengers [*see Connor v. Pacific Greyhound Lines (1951) 104 Cal. App. 2d 746, 753, 232 P.2d 500* (bus driver not required to maintain lookout for vehicles that might violate law absent notice that might occur)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAssault & BatteryGeneral OverviewTortsNegligenceStandards of CareSpecial CareCommon CarriersTortsPremises Liability & PropertyGeneral Premises LiabilityGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState & Local Regulation

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§ 109.34 Duty of Gratuitous Carrier

Carriers without reward are subject to the same rules as employees without reward, except as far as otherwise provided in *Civ. Code § 2085 et seq.* [*Civ. Code § 2089*]. A carrier of persons without reward must use ordinary care and diligence for their safe carriage [*Civ. Code § 2096*]. However, a carrier without reward that has begun to perform the undertaking must complete it as though receiving a reward, unless the carrier restores the person or thing carried to as favorable a position as before commencement of carriage [*Civ. Code § 2090*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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11-109 California Forms of Pleading and Practice--Annotated § 109.35

§ 109.35 Doctrine of Imminent Peril

The doctrine of imminent peril relates to the standard of care that a person placed in an emergency situation must exercise. The doctrine states that a person who, without being negligent, is suddenly and unexpectedly confronted with peril, arising from either the actual presence or the appearance of imminent danger to that person or others, is not required to use the same judgment and prudence required in the exercise of ordinary care in calmer and more deliberate moments [*Leo v. Dunham (1953) 41 Cal. 2d 712, 714, 264 P.2d 1]* . For discussion and a form of affirmative defense based on imminent peril, see Ch. 380, *Negligence* .

A jury instruction on the doctrine of imminent peril was held proper in a passenger's suit for personal injuries caused by the sudden stop of a bus, when the bus driver stopped the bus to avoid hitting a child who ran into the street [*Abney v. City & County of San Francisco (1953) 115 Cal. App. 2d 506, 514, 252 P.2d 654]* . The instruction was also held proper in an action brought by a streetcar passenger for injuries incurred because of sudden braking, when the driver applied the brakes to avoid hitting a truck that had suddenly entered the street [*Bovette v. Los Angeles Transit Lines (1947) 78 Cal. App. 2d 860, 863, 179 P.2d 80]* .

In a case in which injuries were caused by sudden swerving of a bus, the question whether the bus was actually in a position of imminent danger when the driver first saw the oncoming car, and the question whether the driver's conduct after discovering the danger constituted negligence, were questions for the jury [*James v. American Buslines (1952) 111 Cal. App. 2d 273, 276, 244 P.2d 503]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 109.36 Carrier-Passenger Relationship

[1] Contract Required

A contract of carriage is a contract for the conveyance of property, persons, or messages, from one place to another [*Civ. Code § 2085*]. It is necessary to establish such a contract, and thus the relationship of carrier and passenger, in order to activate the carrier's duty of "utmost care and diligence" [*see Civ. Code § 2100*; *Dayton v. Yellow Cab Co. (1948) 85 Cal. App. 2d 740, 743, 193 P.2d 959]* .

[2] Commencement and Termination of Relationship

A carrier-passenger relationship customarily arises when a person enters the carrier's vehicle with an intent to pay the fare, or pays the fare, or when the person goes to the site of the vehicle's departure and the carrier's actions indicate an acceptance of the person as a passenger [*Gray v. City & County of San Francisco (1962) 202 Cal. App. 2d 319, 323, 20 Cal. Rptr. 894* ; *Grier v. Ferrant (1944) 62 Cal. App. 2d 306, 310-311, 144 P.2d 631]* .

The carrier-passenger relationship ordinarily terminates when the passenger has alighted safely on a public street and has cleared the vehicle [*Brandelius v. City & County of San Francisco (1957) 47 Cal. 2d 729, 735, 306 P.2d 432* ; *Riggins v. Pacific Greyhound Lines (1962) 203 Cal. App. 2d 125, 128, 21 Cal. Rptr. 336]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 109.37 Injury to Nonpassengers

[1] Carrier's Standard of Care

Although a carrier of persons for reward is obligated to exercise the highest standard of care for its passengers' safety, it needs to utilize only ordinary care for the safety of nonpassengers [*see Amendt v. Pacific Elec. Ry. Co. (1941) 46 Cal. App. 2d 248, 253, 256, 115 P.2d 588* (pedestrian)].

[2] Pedestrians

A pedestrian and a carrier operator have mutual rights to use the street, and each may expect the other to use an ordinary degree of care for the safety of the other [*see Amendt v. Pacific Elec. Ry. Co. (1941) 46 Cal. App. 2d 248, 253, 115 P.2d 588]* . If a carrier knows that its vehicles make a safety zone dangerous it must warn any person, whether prospective passenger or not, of the danger, despite the fact that it had no part in establishing the safety zone in an unsafe location [*Brandenburg v. Pac. Gas & Elec. Co. (1946) 28 Cal. 2d 282, 285-287, 169 P.2d 909]* .

[3] Persons on Premises

In *Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561* , the California Supreme Court held that the proper test to be applied to the liability of the possessor of land pursuant to *Civ. Code § 1714* is whether in the management of the property he or she acted reasonably in view of the probability of injury to others. Although the plaintiff's status as a trespasser, licensee, or invitee may, in the light of the facts giving rise to such status, have some bearing on the question of liability, the status is not determinative. Although the *Rowland* case involved a licensee, the test has been applied in the context of a business invitee [*see Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 25-38, 77 Cal. Rptr. 914]* . In cases decided prior to *Rowland*, courts held that carriers must use ordinary care to select a reasonably safe place to receive their passengers, to maintain the condition of the premises at which passengers are received, and to inspect the premises so that dangerous or defective conditions are discovered [*Hamilton v. Pacific Elec. Ry. Co. (1939) 12 Cal. 2d 598, 604-605, 86 P.2d 829* (inspection); Lagomarsino v. Market St. Ry. Co. (1945) 69 Cal. App. 2d 388, 395, 158 P.2d 982 (receiving passengers); Sanchez v. Pacific Auto Stages *(1931) 116 Cal. App. 392, 396, 2 P.2d 845* (maintaining premises)]. For further discussion, see Ch. 421, *Premises Liability* .

[4] Workers in Street

When a worker must remain physically in the street amidst moving traffic in order to perform his or her duty, there is no duty imposed on him or her to look out constantly for motor vehicles [*Austin v. Riverside Portland Cement Co. (1955) 44 Cal. 2d 225, 237-239, 282 P.2d 69]* . For example, a worker is not required to look continually for the approach of a carrier's vehicles [*Driscoll v. California St. R.R. Co. (1926) 80 Cal. App. 208, 219, 250 P. 1062]* . It is the duty of drivers of vehicles to observe the street laborers and to avoid contact with them [*Woods v. Wisdom (1933) 133 Cal. App. 694, 697, 24 P.2d 863]* . The street worker is required, however, to exercise ordinary care for his or her own safety [*Jones v. Hedges (1932) 123 Cal. App. 742, 751-752, 12 P.2d 111]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 109.38 Torts Committed by Carrier's Employees

The employees of a carrier are required to use the same high degree of care for the passengers' safety as the carrier [*Nance v. Fresno City Lines, Inc. (1941) 44 Cal. App. 2d 868, 870, 113 P.2d 244]* .

Carriers, like other employers, are generally liable under the doctrine of respondeat superior for the torts of their employees performed within the scope of their employment [*see, e.g., Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 967, 227 Cal. Rptr. 106, 719 P.2d 676]* . For discussion of the carrier's liability for assaults by an employee on a passenger, see *§ 109.33[2]*. For discussion and forms regarding the liability of an employer for an employee's torts, see Ch. 248, *Employer's Liability for Employee's Torts* .

Legal Topics:

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§ 109.39 Limitations on Carrier's Liability

The obligations of a common carrier cannot be limited by general notice on its part, but they may be limited by special contract [*Civ. Code § 2174*; *see, e.g., Platzer v. Mammoth Mountain Ski Area (2002) 104 Cal. App. 4th 1253, 1259-1260, 128 Cal. Rptr. 2d 885* (because ski lift is common carrier, contractual provision releasing ski lift operator from liability for ordinary negligence was valid under *Civ. Code § 2174*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 109.40 Prohibitions Against Liability Waiver

A common carrier cannot be exonerated by any agreement made in anticipation thereof from liability for the gross negligence, fraud, or willful wrong of itself or its servants [*Civ. Code § 2175*]. However, a common carrier may enter into a contract to be released from liability for ordinary negligence [*Platzer v. Mammoth Mountain Ski Area, (2002) 104 Cal. App. 4th 1253, 1258, 128 Cal. Rptr. 2d 885]* .

No common carrier may require any person (not including an employee) to waive, limit, or qualify any right to recover damages for injury in exchange for a reduction in price or fare for any service offered by the common carrier [*Pub. Util. Code § 244* (also applicable to transit districts and publicly owned transit systems)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 109.41 Presumption of Negligence Based on Violation of Statute

The violation of a statute, ordinance, or regulation of a public entity by a carrier that proximately causes the death or injury of a passenger may result in a presumption that the carrier was negligent [*see Evid. Code § 669*; *see Schmitt v. Henderson (1969) 1 Cal. 3d 460, 463, 82 Cal. Rptr. 502, 462 P.2d 30* (violation of rules of road by motorist constitutes negligence as matter of law); *see also Maloney v. Rath (1968) 69 Cal. 2d 442, 444, 71 Cal. Rptr. 897, 445 P.2d 513* (failure to comply with *Veh. Code §§ 2600, 26453, 26454* relating to maintenance of vehicle braking system gives rise to presumption of negligence)]. For further discussion, see Ch. 380, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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11-109 California Forms of Pleading and Practice--Annotated § 109.42

§ 109.42 Res Ipsa Loquitur

[1] Presumption Affecting Burden of Producing Evidence

A significant portion of litigation involving passengers' actions against carriers for injuries received during the operation of the carrier's vehicle involves the applicability of the doctrine of res ipsa loquitur. The doctrine of res ipsa loquitur ("the thing speaks for itself") applies when an accident is of such a nature that, in the light of past experience, it can be inferred that the accident was probably caused by negligence, and that the defendant is probably the responsible party [*see Newing v. Cheatham (1975) 15 Cal. 3d 351, 359, 124 Cal. Rptr. 193, 540 P.2d 33* ; *Ybarra v. Spangard (1944) 25 Cal. 2d 486, 489, 154 P.2d 687]* .

The doctrine creates a presumption of negligence when an injured passenger proves that the injury resulted from the movement or operation of the carrier's vehicle [*see, e.g.,* Mudrick v. Market St. Ry. Co. (1938) 11 Cal. 2d 724, 731-732, 81 P.2d 950] . The doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence [*Evid. Code § 646(b)*]. It does not shift the burden of proof from the plaintiff passenger to the defendant carrier [*Hardin v. San Jose City Lines, Inc. (1953) 41 Cal. 2d 432, 437, 260 P.2d 63]* . Rather, the presumption that it raises shifts the burden of going forward with the evidence to the carrier, which is required to rebut the presumption with evidence sufficient to offset or balance it [*Seffert v. Los Angeles Transit Lines (1961) 56 Cal. 2d 498, 502, 15 Cal. Rptr. 161, 364 P.2d 337]* . Despite the very high standard of care imposed on the carrier, the doctrine does not justify a presumption of negligence on the carrier's part merely because a passenger has been injured while on board the carrier's vehicle [Mudrick v. Market St. Ry. Co. (1938) 11 Cal. 2d 724, 731-732, 81 P.2d 950] . Rather, the plaintiff must show that the injury resulted from the movement of the vehicle or from something connected with it or under the control of the defendant [Mudrick v. Market St. Ry. Co. (1938) 11 Cal. 2d 724, 731, 81 P.2d 950] . The passenger need not prove that the movement was unusual in order to justify the application of res ipsa loquitur [Mudrick v. Market St. Ry. Co. (1938) 11 Cal. 2d 724, 730-734, 81 P.2d 950] . For further discussion, see the Ch. 380, *Negligence*.

On appeal, a passenger plaintiff can rely on the doctrine of res ipsa loquitur to support a judgment in his or her favor even though the passenger offered no jury instruction on the subject and none was given [*Rogers v. Los Angeles Transit Lines (1955) 45 Cal. 2d 414, 418, 289 P.2d 226]* .

[2] Doctrine Applicable

The doctrine of res ipsa loquitur has been held applicable to a number of different situations involving injuries to passengers. For example, the doctrine creates an inference of negligence when the passenger proves that the injury resulted from the movement or operation of the carrier's vehicle [*Hardin v. San Jose City Lines, Inc. (1953) 41 Cal. 2d 432, 436, 260 P.2d 63* ; *Gray v. City & County of San Francisco (1962) 202 Cal. App. 2d 319, 326, 20 Cal. Rptr. 894]* . The passenger need not prove that the movement was unusual in order to justify the application of res ipsa loquitur [Mudrick v. Market St. Ry. Co. (1938) 11 Cal. 2d 724, 730-734, 81 P.2d 950] . Moreover, the fact that the plaintiff participated in the events leading to the accident does not preclude application of res ipsa loquitur if there is evidence that the plaintiff's negligence, if any, was not a proximate cause of the accident [*Seffert v. Los Angeles Transit Lines (1961) 56 Cal. 2d 498, 502, 15 Cal. Rptr. 161, 364 P.2d 337]* .

Additional cases in which the doctrine was held to apply involved injuries caused by the following:

- The carrier's vehicle lurched as it rounded a curve [*McIntosh v. Los Angeles Ry. Corp. (1936) 7 Cal. 2d 90, 93-94, 59 P.2d 959]* ;

- The carrier's vehicle ran off the highway [*Lawrence v. Pickwick Stages (1924) 68 Cal. App. 494, 498-499, 229 P. 885]* ;

- The carrier's vehicle overturned [*Seney v. Pickwick Stages (1927) 82 Cal. App. 226, 229, 255 P. 279]* ;

- The carrier's vehicle plunged from the highway into a ditch and partially overturned on an embankment [*Jianou v. Pickwick Stages Sys. (1931) 111 Cal. App. 754, 756-757, 296 P. 108]* ;

- The carrier's streetcar collided with another streetcar [*Osgood v. Los Angeles Traction Co. (1902) 137 Cal. 280, 282-283, 70 P. 169* ; Hyman v. Market St. Ry. Co. (1940) 41 Cal. App. 2d 647, 650-651, 107 P.2d 485] ;

- The carrier's bus collided with an automobile [*Silva v. Pacific Greyhound Lines (1953) 119 Cal. App. 2d 284, 287-288, 259 P.2d 743]* ;

- The carrier's sudden movements caused a suitcase to fall from a luggage rack and strike a passenger [*Williamson v. Pacific Greyhound Lines (1947) 78 Cal. App. 2d 482, 486-487, 177 P.2d 977* ; *Prunty v. Allred (1946) 73 Cal. App. 2d 67, 71-73, 165 P.2d 935]* ; and

- A broken bus seat, in the absence of any unusual movements of the vehicle or of the person occupying the seat [*Adam v. Los Angeles Transit Lines (1957) 154 Cal. App. 2d 535, 538-540, 317 P.2d 642]* .

[3] Doctrine Inapplicable

The doctrine of res ipsa loquitur has been held to be inapplicable when the carrier's vehicle is at a standstill and the passenger's accident did not result from any movement or operation of the carrier's vehicle, for example, when passenger falls down and is injured while boarding or alighting from a stationary vehicle [*Gray v. City & County of San Francisco (1962) 202 Cal. App. 2d 319, 327-328, 20 Cal. Rptr. 894]* .

Res ipsa loquitur is invoked only if the necessary evidence is not readily available to the injured party and if the injury occurs under such circumstances that, when tested by ordinary experience and observation, it may be fairly inferred, in

the absence of any explanation, that the person charged with negligence has failed to fulfill some obligation that he owed to the injured party when he had exclusive control of the operation of the agency that produced the injury [*Williamson v. Pacific Greyhound Lines (1947) 78 Cal. App. 2d 482, 486-487, 177 P.2d 977]* . Therefore, for example, the doctrine is not applicable if the passenger has full knowledge of and testifies as to the specific act of alleged negligence that has caused his injury or if there is direct evidence as to the precise cause of the accident [*Connor v. Atchison, Topeka & Santa Fe Ry. Co. (1922) 189 Cal. 1, 5, 6, 207 P. 378]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 109.43 Collateral Source Rule

The collateral source rule prohibits any deduction from the payment that the plaintiff would collect from the tortfeasor of any compensation received from a source wholly independent of the tortfeasor [*Helfend v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 1, 6, 84 Cal. Rptr. 173, 465 P.2d 61]* . The rule is applicable to governmental entities and public employees as well as to all other tortfeasors [*Acosta v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 19, 84 Cal. Rptr. 184, 465 P.2d 72* , 25-26, *2 Cal. 3d 19, 84 Cal. Rptr. 184, 465 P.2d 72]* . For further discussion of the collateral source rule, see Ch. 177, *Damages* . For additional discussion of this subject, see Levy, Golden & Sacks, California Torts, Ch. 53, Pt. B.

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§ 109.44 Defenses

[1] Comparative Negligence

A passenger is required to use ordinary care for his or her own safety [*Wilson v. City & County of San Francisco (1959) 174 Cal. App. 2d 273, 277, 344 P.2d 828* (cable car)]. In *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858, 532 P.2d 1226* , the California Supreme Court held that in an action for negligence resulting in injury to person or property, the contributory negligence of the person injured does not bar recovery, but the damages awarded are diminished in proportion to the amount of negligence attributable to the person recovering. For discussion and forms regarding comparative negligence generally, see Ch. 380, *Negligence* .

Cases decided prior to *Li* are instructive in that conduct that constituted contributory negligence is now relevant to determine comparative negligence for the purpose of determining damages. They include the plaintiff's failure to use handrails, and failure to avoid the known overswing of a streetcar while standing in a safety zone [*see* *Tait v. City & County of San Francisco (1956) 143 Cal. App. 2d 787, 790, 300 P.2d 74* (handrails); *Dwyer v. Los Angeles Ry. Corp. (1931) 115 Cal. App. 709, 712, 2 P.2d 468* (streetcar overswing)].

[2] Assumption of Risk

The term "assumption of risk" applies to at least two distinct defenses. The first concerns the situation in which the plaintiff has unreasonably undertaken to encounter a specific risk imposed by defendant's negligence. This represents a type of contributory negligence, and is simply a factor in the overall apportionment of responsibility between the plaintiff and defendant [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 119 Cal. Rptr. 858, 532 P.2d 1226]* . The second category refers to a situation in which a plaintiff agrees to relieve a defendant of an obligation of reasonable conduct toward him or her. This type of assumption of risk is not a form of contributory negligence, but rather a reduction of defendant's duty of care, and is a complete defense [*see* *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 119 Cal. Rptr. 858, 532 P.2d 1226]* . For further discussion, see Ch. 380, *Negligence* .

[3] Plaintiff's Violation of Statute

The common law presumption of negligence that arises from an act or failure to act below a statutory standard is codified in *Evid. Code § 669*. Under common law principles identical to these codified principles, it was held that a passenger was negligent when he rode on the steps of a carrier's vehicle in violation of an ordinance, and his conduct proximately contributed to his injury [*see Reeves v. Lapinta (1938) 25 Cal. App. 2d 680, 681, 78 P.2d 465]* . Another passenger was held negligent in boarding a moving streetcar in violation of an ordinance when the conduct proximately contributed to his injury [*see Schultheiss v. Los Angeles Ry. Corp. (1936) 11 Cal. App. 2d 525, 527, 54 P.2d 49]* . For further discussion of the defense of violation of statute, see Ch. 380, *Negligence* .

[4] Statute of Limitations

The usual two-year (one-year, prior to January 1, 2003) period of limitations applies to actions against carriers based on negligence [*Code Civ. Proc. § 335.1*; *see* former Code Civ. Proc. § 340(3); Ch. 345, *Limitation of Actions*, § 345.14]. If the suit is brought against a public entity that regulates and controls the carrier, the special requirements for presentation of claims against public entities and the period of limitations for those claims must be met [*see Gov. Code § 900 et seq.*; *see also* Ch. 464, *Public Entities and Officers: California Tort Claims Act*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsTortsNegligenceDefensesAssumption of RiskGeneral OverviewTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsNegligenceProofViolations of LawStatutesTransportation LawCarrier Duties & LiabilitiesGeneral Overview

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§ 109.45 Public Utilities Commission Address

Counsel who desire a list of carriers under the jurisdiction of the Public Utilities Commission, may write to the following address:

California Public Utilities Commission
Transportation Division
505 Van Ness Avenue
San Francisco, California 94102

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[Reserved]

§§ 109.46[Reserved]

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11-109 California Forms of Pleading and Practice--Annotated § 109.60

§ 109.60 Governing Law

Carriage of freight generally is governed by *Civ. Code §§ 2110-2144, 2194-2205*. Certain freight carriers are subject to Cal. Const. art. XII, and are regulated under *Pub. Util. Code §§ 201-2115* (Public Utilities Act), 3501-5319 (regulation of related businesses), 7501-7681 (railroad corporations). Bills of lading are governed by *Com. Code §§ 7101-7106, 7301-7603*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawUtility CompaniesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState & Local Regulation

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§ 109.61 Services Other Than Carriage

The rights and obligations of common carriers relating to services about freight other than carriage and delivery are defined by *Civ. Code §§ 1813-1881.2*, respecting the deposit of freight, and *Civ. Code §§ 2019-2082*, respecting services generally [*Civ. Code § 2203*].

Legal Topics:

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

[1] In General

Property carried is called freight. The reward, if any, to be paid for its carriage is called freightage. The person who delivers freight to the carrier is called the consignor, and the person to whom the freight is to be delivered by the carrier is called the consignee [*Civ. Code § 2110*]. Under the Uniform Commercial Code, a "consignee" is defined as the person named in a bill to whom or to whose order the bill promises delivery. A "consignor" is the person named in a bill as the person from whom the goods have been received for shipment [*Com. Code § 7102(a)(3), (4)*]. For a more detailed discussion of these and other terms used in Division 7 of the Uniform Commercial Code (*Com. Code §§ 7101-7603*), see Ch. 213, *Documents of Title* .

[2] Documents of Title

"Documents of title" include bills of lading [*see Com. Code § 1201(b)(16)*]. A "bill of lading" is a document evidencing the receipt of goods for shipment and is issued by a person engaged in the business of transporting or forwarding goods [*Com. Code § 1201(b)(6)*]. The bill of lading is the basic shipping instrument apart from the tariff filed by the public utility common carrier, which in effect constitutes the basic contract between the parties [*see Kentner Truck Line v. Maier Brewing Co. (1960) 183 Cal. App. 2d 89, 93, 6 Cal. Rptr. 572]* .

For forms and discussion regarding the rights and obligations created by bills of lading under Division 7 of the Uniform Commercial Code (*see Com. Code §§ 7101-7603*), see Ch. 213, *Documents of Title* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Bills of LadingCommercial Law (UCC)Documents of Title (Article 7)DefinitionsTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesBills of LadingTransportation LawCarrier Duties & LiabilitiesState & Local Regulation

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§ 109.63 Delivery of Freight

[1] Directions to Carrier

Subject to *Com. Code § 7303*, which provides immunity for carriers against liabilty for misdelivery in the event the goods are diverted by any of several enumerated parties, a carrier must comply with the directions of the consignor or consignee to the same extent that an employee is bound to comply with those of his or her employer [*Civ. Code § 2115*]. A carrier must therefore substantially comply with all the directions of the consignor or consignee concerning the service in which the carrier is engaged, except where such obedience is impossible or unlawful or would impose new and unreasonable burdens on the carrier [*see Lab. Code § 2856*]. For forms and discussion regarding a carrier's duty under Division 7 of the Uniform Commercial Code (*Com. Code §§ 7101-7603*) to deliver goods covered by a bill of lading, see Ch. 213, *Documents of Title* .

[2] Place and Manner

Subject to *Com. Code § 7303* [*see § 109.63[1]*], a carrier of property must deliver it to the consignee at the place to which it is addressed in the manner usual at that place [*Civ. Code § 2118*; *see also* Ch. 213, *Documents of Title*]. If there is no usage to the contrary at the place of delivery, freight carried by a railway owned or managed by the carrier may be delivered at the station nearest to the place to which it is addressed. Except for freight carried by sea from a foreign country and subject to *Com. Code § 7303*, freight carried by means other than railway must be delivered to the consignee or the consignee's agent, personally, if either can be found with reasonable diligence [*Civ. Code § 2119*].

[3] To Person Entitled Under Document

The bailee must deliver the goods to a person entitled to them under the bill of lading, if that person complies with *Com. Code § 7403(b), (c)*]. A "person entitled under the document" means the holder in the case of a negotiable bill or the person to whom delivery is to be made by the terms of or pursuant to written instructions under a non-negotiable bill of lading [*Com. Code § 7402(a)(9)*]. To be entitled to the delivery of the goods, the person claiming them must satisfy the bailee's lien if that is requested by the bailee, or if the bailee is prohibited by law from delivering the goods until the

charges are paid. The person claiming the goods, unless one against whom the document confers no right under *Com. Code § 7503(a)* (person with interest in propriety before issuance of bill of lading), must surrender for cancellation or notation of partial deliveries any outstanding negotiable document covering the goods [*Com. Code § 7403(b), (c)*]. For a detailed discussion of the rights and obligations under Division 7 of the Uniform Commercial Code [*Com. Code §§ 7101-7603*] of a person entitled to goods covered by a bill of lading, see Ch. 213, *Documents of Title* .

[4] Liability for Nonreceipt of Goods

A consignee of a nonnegotiable bill of lading who has given value in good faith, or a holder to whom a negotiable bill has been duly negotiated, who relies on the description in the bill of the goods, or on the date shown in the bill, may recover damages from the issuer of the bill of lading for nonreceipt of the goods. The damages may not be recovered to the extent that the bill of lading indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description of the goods [*Com. Code § 7301(a)*]. For forms and a detailed discussion regarding a carrier's liability under Division 7 of the Uniform Commercial Code [*Com. Code §§ 7101-7603*] for nonreceipt of goods covered by a bill of lading, and of the circumstances under which a carrier may be immune for misdelivery, see Ch. 213, *Documents of Title* .

[5] Defenses to Claim of Nondelivery or Misdelivery

A bailee is excused from delivering goods to the person entitled to them under several circumstances enumerated by the Uniform Commercial Code [*see Com. Code § 7403(a)*; *see also § 109.63[3]*; *see generally* Ch. 213, *Documents of Title*].

A bailee who in good faith delivers or otherwise disposes of the goods according to the terms of the document of title, or pursuant to *Com. Code §§ 7101-7603*, is not liable for such delivery or disposition of the goods. This rule applies even if the person from whom the bailee received the goods had no authority to procure the document or to dispose of the goods and even though the person to whom the bailee delivered the goods had no authority to receive them [*Com. Code § 7404*; for detailed discussion, see Ch. 213, *Documents of Title*].

[6] Damages

Damages for a breach of a carrier's obligation to deliver freight if the carrier has not converted the freight to its own use are governed by *Civ. Code § 3316* [*see § 109.220*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 109.64 Liability for Negligent Delay in Delivery

In the absence of a contract to carry and deliver goods within a given time, the carrier is bound only to deliver the goods within a reasonable time, and is liable for a delay only when the delay is caused by the carrier's want of ordinary care and diligence [*see Civ. Code § 2196*; *Palmer v. Atchison, Topeka & Santa Fe R.R. Co. (1894) 101 Cal. 187, 194, 35 P. 630]* .

Damages caused by a carrier's delay are usually measured under *Civ. Code § 3317* [*see § 109.221*].

Legal Topics:

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§ 109.65 Liability for Loss or Injury to Freight

[1] Gratuitous Carriers

A carrier of property without reward must use at least slight care and diligence [*Civ. Code § 2114*; *see § 109.16*].

[2] Carrier for Reward

A carrier of property for reward must use at least ordinary care and diligence in the performance of all of its duties [*Civ. Code § 2114*].

[3] Carrier Issuing Bill of Lading

A carrier who issues a bill of lading must exercise the degree of care in relation to the goods which a reasonably careful person would exercise under like circumstances [*Com. Code § 7309(a)*]. For forms and discussion regarding a carrier's duty of care under Division 7 of the Uniform Commercial Code in relation to goods covered by a bill of lading [*Com. Code §§ 7101-7603*], see Ch. 213, *Documents of Title* .

[4] Common Carriers

A common carrier is strictly liable, with certain exceptions, for loss or injury to property transported [*see Civ. Code § 2194*; *BBD Transp. Co. v. Buller (1975) 49 Cal. App. 3d 124, 128, 122 Cal. Rptr. 357]* . These exceptions are caused by: (1) an inherent defect, vice, or weakness or a spontaneous action of the property itself; (2) the act of a public enemy of the United States or of the state of California; (3) an act of the law, or (4) any irresistable superhuman cause [*Civ. Code § 2194*]. The burden is on the carrier to show that the loss resulted from one of the causes stated as an exception to the general rule [*Brignoli v. Seaboard Transp. Co. (1947) 29 Cal. 2d 782, 792, 178 P.2d 445]* . *Com. Code § 7309(a)*, which makes a carrier who issues a bill of lading liable for negligence, does not change or affect this rule of strict liability of common carriers [*Com. Code § 7309(a)*].

A common carrier is liable for its negligence which exposes the property to the cause of the loss, even in the cases excepted from liability without negligence by *Civ. Code § 2194* [*Civ. Code § 2195*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 109.66 Termination of Liability as Carrier

[1] By Delivery

A common carrier's absolute liability for loss or injury is terminated by its delivery of the goods in compliance with *Civ. Code §§ 2118, 2119* (*see § 109.63[2]*) and *Civ. Code §§ 2120, 2121* (*see § 109.66[2], [3]*) [*Civ. Code § 2194*].

[2] Notice of Arrival

If, for any reason, a carrier does not deliver freight to the consignee or the consignee's agent, personally, the carrier must give notice to the consignee of the arrival of the freight and keep it in safety under the responsibility of a warehouseman until the consignee has had a reasonable time to remove it. The notice may be given by letter if the carrier does not know the place of the consignee's business or residence [*Civ. Code § 2120*]. If the carrier gives notice under *Civ. Code § 2120*, the carrier's strict liability for the goods is reduced to that of a warehouseman of ordinary care [*see* Wilson v. California Cent. R.R. Co. (1892) 94 Cal. 166, 178, 29 P. 861] .

[3] Failure of Consignee to Accept Goods

If the consignee does not accept and remove freight within a reasonable time after the carrier has fulfilled the obligation to deliver or duly offered to fulfill that obligation, the carrier may exonerate itself from further liability by placing the freight in a suitable warehouse in storage on account of the consignee and giving notice of the storage to the consignee [*Civ. Code § 2121*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 109.67 Limitations on Liability

[1] Agreed Valuation Contracts

Though a common carrier cannot limit its obligations by general notice, they may be limited by special contract [*Civ. Code § 2174*]. However, a common carrier cannot be exonerated by any agreement from liability for its own gross negligence, fraud, or willful wrong, or that of its agents [*Civ. Code § 2175*]. "Gross negligence" has been interpreted to mean the want of slight care and diligence [*Walther v. Southern Pac. Co. (1911) 159 Cal. 769, 775, 116 P. 51* ; Pratt v. Western Pac. R.R. Co. (1963) 213 Cal. App. 2d 573, 580, 29 Cal. Rptr. 108] . Although *Civ. Code §§ 2174* and *2175* seem to imply that a carrier could be exonerated from ordinary negligence, a common carrier that is not involved in an important public service may enter into a contract to be released from liability for ordinary negligence [*Platzer v. Mammoth Mountain Ski Area, (2002) 104 Cal. App. 4th 1253, 1258, 128 Cal. Rptr. 2d 885* (operating ski lift not considered important public service)]. California courts have upheld reasonable "agreed valuation contracts" which limit the amount of the carrier's liability [*Muelder v. Western Greyhound Lines (1970) 8 Cal. App. 3d 319, 337, 87 Cal. Rptr. 297]* . Such contracts are considered as contracts in which the valuation of the property is agreed to for the purposes of fixing transportation charges and measuring the carrier's responsibility, and not as contracts limiting liability [*Donlon Bros. v. Southern Pac. Co. (1907) 151 Cal. 763, 769, 91 P. 603]* . For forms and discussion regarding contractual limitation of a carrier's liability under Division 7 of the Uniform Commercial Code (*Com. Code §§ 7101-7603*), see Ch. 213, *Documents of Title* .

[2] Assent to Limitation of Liability

A consignor or consignee who accepts a bill of lading or written contract for carriage with knowledge of its terms is deemed to assent to any limitation stated therein of the amount of the carrier's liability for loss or injury to property carried in packages, trunks, or boxes when the value of such property is not named, and to any stated limitation to the carrier's liability for loss or injury to live animals carried [*Civ. Code § 2176*]. Such knowledge may be constructive as well as actual, but the mere acceptance by the consignor of a document containing the terms of limitation of liability does not of itself amount to assent [*Curtis v. United Transfer Co. (1914) 167 Cal. 112, 114-115, 138 P. 726* ; *Muelder v. Western Greyhound Lines (1970) 8 Cal. App. 3d 319, 337, 87 Cal. Rptr. 297]* .

A member of the public is not bound by a "released value" limitation on liability in a tariff regulation or a receipt, at least when the loss occurs through the carrier's gross negligence, unless the person contracted with knowledge of the limitation and of the existence of an opportunity to purchase higher liability [*Muelder v. Western Greyhound Lines (1970) 8 Cal. App. 3d 319, 336-337, 87 Cal. Rptr. 297* ; *but see Hischemoeller v. National Ice & Cold Storage Co. (1956) 46 Cal. 2d 318, 323-329, 294 P.2d 433* (knowledge by plaintiff merchant of tariff limitation on warehouseman's liability as not required)].

[3] Other Limitations on Liability

[a] Baggage

The liability of any common carrier operating over the public highways for loss of, or damage to, any baggage may not exceed $500 for each trunk and its contents, $250 for each valise, suitcase, or traveling bag and its contents, or $250 for each box, bundle or package and its contents. However, liability may exceed these amounts if a higher valuation is declared at the time of the delivery to the carrier, and the carrier assents in writing [*Civ. Code § 2205*].

The liability of a common carrier by railroad, including a sleeping car company, for loss or injury to property carried in trunks, valises, suitcases, traveling bags, boxes, bundles or packages accepted as a part of or in connection with passenger transportation, is limited to $100 for each trunk and its contents, $50 for each valise, suitcase, or traveling bag and contents, or $10 for each box, bundle, or package and contents, unless the carrier has consented in writing to assume a greater liability [*Civ. Code § 2178*].

[b] Valuable Items

A common carrier is not responsible for loss or miscarriage of a letter, or package in letter form, containing money, notes, bills of exchange, or other papers of value, unless the carrier is informed at the time of receipt of the value of the contents [*Civ. Code § 2177*].

A common carrier of gold, silver, platina, or precious stones or imitations; of timepieces, of negotiable paper or other valuable writings; of pictures, glass, or chinaware; of statuary, silk or laces; or of plated ware of any kind, is not liable for more than $50 on the loss or injury of any one package of such articles, unless the carrier has notice, on receipt of the items, by mark or otherwise, of the nature of the freight. Such a carrier is not liable for any package carried, for more that the value of the articles named in the receipt or the bill of lading [*Civ. Code § 2200*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 109.68 Consignee and Consignor Liability to Motor Carrier

A consignor is liable to a motorcarrier for storage or equipment rental charges assessed against the motor carrier by a railroad or steamship company if the charges arise out of a delay caused by the consignor [*Civ. Code § 2197(a)(1)*].

If the charges arise out of a delay caused by a consignee, the consignee is liable to the motor carrier for the charges [*Civ. Code § 2197(a)(2)*]. In addition, if the freight is shipped prepaid, the consignee is liable to the motor carrier for the charges when the delay was caused by either the consignor or the consignee [*Civ. Code § 2197.5(a)*]. These provisions do not, however, affect the rights, duties, and obligations between a railroad or steamship company and a motor carrier [*Civ. Code §§ 2197(b), 2197.5(b)*].

Legal Topics:

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

§§ 109.69[Reserved]

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11-109 California Forms of Pleading and Practice--Annotated § 109.80

§ 109.80 Governing Law

Loss of or injury to freight carried in interstate commerce by railroad and motor common carriers is generally governed by the Carmack Amendment [*49 U.S.C.S. § 11707*]. Actions under the Carmack Amendment may be brought in state court, as well as in federal court [*see Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor (1924) 266 U.S. 200, 208, 45 S. Ct. 47, 69 L. Ed. 247]* . Where an interstate shipment is involved [*see § 109.12*], rights and liabilities of the parties are governed by the applicable federal statutes as interpreted by the federal tribunals [Missouri Pac. R.R. Co. v. Elmore & Stahl (1964) 377 U.S. 134, 137, 84 S. Ct. 1142, 12 L. Ed. 2d 194 ; *Bauer v. Jackson (1971) 15 Cal. App. 3d 358, 369, 93 Cal. Rptr. 43]* . Federal law preempts any state common-law action against a carrier acting solely as a common carrier. This is true even when the common carrier is operating on a contract basis [*Hughes Aircraft v. North Am. Van Lines (9th Cir. 1992) 970 F.2d 609, 613* (Carmack Amendment preempted state law negligence cause of action)].

The Federal Bills of Lading Act [*49 U.S.C.S. § 80101 et seq.*] applies to bills of lading issued by common carriers in interstate commerce [*49 U.S.C.S. § 80102*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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11-109 California Forms of Pleading and Practice--Annotated § 109.81

§ 109.81 Regulation

The Interstate Commerce Commission is charged by statute with the duty of executing and enforcing the Interstate Commerce Act contained in *49 U.S.C.S. § 10101 et seq.* [*49 U.S.C.S. §§ 10101, 10321*]. Railroads, motor carriers, and freight forwarders are required to establish, observe, and enforce just and reasonable regulations and practices [*49 U.S.C.S. §§ 10701, 10702, 10703*]. For example, if a carrier imposes a higher tariff rate on a shipper than the rate determined to be reasonable by the Interstate Commerce Commission, then the shipper may bring an action under *49 U.S.C.S. § 11705(b)(3)* against the carrier for damages in the amount of the difference between the rate imposed by the carrier and the rate determined to be reasonable by the Interstate Commerce Commission [*see Reiter v. Cooper (1993) 507 U.S. 258, 113 S. Ct. 1213, 122 L. Ed. 2d 604, 614]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesFalse Charges & RebatesTransportation LawCarrier Duties & LiabilitiesRates & TariffsTransportation LawCarrier Duties & LiabilitiesRates & Tariffs

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§ 109.82 Liability for Loss and Injury to Freight

The Carmack Amendment [*49 U.S.C.S. § 11707*] to the Interstate Commerce Act [*49 U.S.C.S. § 10101 et seq.*] is concerned with liability in connection with the transportatin of freight [*49 U.S.C.S. § 11707*]. It applies to railroads and to motor carriers which are common carriers [*see 49 U.S.C.S. §§ 10501, 10730*]. The amendment is a codification of the common law rule imposing liability on a carrier without proof of negligence [*see Secretary of Agriculture v. United States (1955) 350 U.S. 162, 165 n. 9, 76 S. Ct. 244, 100 L. Ed. 173* ; Missouri Pac. R.R. Co. v. Elmore & Stahl (1964) 377 U.S. 134, 137-138, 84 S. Ct. 1142, 12 L. Ed. 2d 194] . It provides that a carrier is liable for loss and damage to goods delivered to it, unless the loss or damage is caused by an act of God, the public enemy, authority of law, an act or default of the shipper or owner, natural shrinkage, or losses resulting from a defect or vice in the property shipped. The delivering carrier has the same liability as the receiving carrier, for loss or damage throughout the entire route [*see 49 U.S.C.S. § 11707*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesDamages

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§ 109.83 Parties

Both the carrier receiving the goods from the consignor and the carrier delivering the goods are liable for loss or damage throughout the entire route. By preserving the common law rights of a holder of a bill of lading, the Carmack Amendment [*49 U.S.C.S. § 11707*] continues the common law liability of a connecting carrier [*49 U.S.C.S. § 11707*; *see also Com. Code § 7302* (liability of connecting carrier)].

The carrier is liable for loss of or injury to the property to the lawful holder of a receipt or bill of lading. The carrier is also liable to any person entitled to recover on the receipt or bill of lading [*49 U.S.C.S. § 11707*].

As provided under the Interstate Commerce Act, the term "carrier" includes a "contract carrier" [*see 49 U.S.C.S. § 10102(2)*]. Thus, liability applying to a carrier applies to a contract carrier as well [*see Hughes Aircraft v. North Am. Van Lines (9th Cir. 1992) 970 F.2d 609, 613]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Bills of LadingCommercial Law (UCC)Documents of Title (Article 7)ObligationsTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesBills of LadingTransportation LawCarrier Duties & LiabilitiesDamages

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11-109 California Forms of Pleading and Practice--Annotated § 109.84

§ 109.84 Damages

A carrier subject to the provisions of the Carmack Amendment [*49 U.S.C.S. § 11707*] is liable for the full actual loss, damage, or injury to property carried in interstate commerce [*49 U.S.C.S. § 11707*]. The general measure of damages for loss of property is the value of the property at the time and place at which is should have been delivered [*see* Illinois Cent. R.R. Co. v. Crail (1929) 281 U.S. 57, 64-65, 50 S. Ct. 180, 74 L. Ed. 699] . The general rule for determining the amount of damages for damaged or injured property is to take the difference between the market value of the property in the condition in which it should have arrived at its destination and the market value of the property as it did arrive [*F.J. McCarty Co. v. Southern Pac. Co. (9th Cir. 1974) 428 F.2d 690, 692]* . However, these rules do not apply if another rule is shown to be a better computation of actual damages [*see* Illinois Cent. R.R. Co. v. Crail (1929) 281 U.S. 57, 64-65, 50 S. Ct. 180, 74 L. Ed. 699 ; F.J. McCarty Co. v. Southern Pac. Co. (9th Cir. [Cal] 1974) *428 F.2d 690, 692]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesDamages

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11-109 California Forms of Pleading and Practice--Annotated § 109.85

§ 109.85 Limitation on Damages

The carrier may limit liability where expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent on the value declared in writing by the shipper or agreed on in writing as the released value of the property [*49 U.S.C.S. § 11707*].

Before a carrier's attempt to limit its liability will be effective, the carrier must do the following [*Hughes Aircraft v. North Am. Van Lines (9th Cir. 1992) 970 F.2d 609, 611-612]* :

- Maintain a tariff in compliance with the requirements of the Interstate Commerce Commission,
- Give the shipper a reasonable opportunity to choose between two or more levels of liability,
- Obtain the shipper's agreement as to his or her choice of carrier liability limit, and
- Issue a bill of lading prior to moving the shipment that reflects any such agreement.

The carrier has the burden of proving that it has complied with these requirements [*Hughes Aircraft v. North Am. Van Lines (9th Cir. 1992) 970 F.2d 609, 612* (carrier met burden when, among other things, shipper had reasonable notice of liability limitation and opportunity to obtain information necessary to making deliberate and well-informed choice)].

This contractual limitation of liability can extend to a shipper's state law tort claims against a carrier [*Dictor v. David & Simon, Inc. (2003) 106 Cal. App. 4th 238, 248-249, 130 Cal. Rptr. 2d 588]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsTransportation TortsAir TransportationContractual Liability LimitationsTransportation LawCarrier Duties &

LiabilitiesDamages

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[Reserved]

§§ 109.86[Reserved]

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11-109 California Forms of Pleading and Practice--Annotated § 109.100

§ 109.100 Regulation of Carriers by Commission

[1] In General

A common carrier who performs a service for the public or a part of the public for any compensation or payment is a public utility subject to regulation by the Public Utilities Commission and to the provisions of the Public Utilities Act contained in *Pub. Util. Code §§ 201-2115* [*Pub. Util. Code § 220*], and highway common carriers [*see Pub. Util. Code § 211*]. Generally, the Public Utilities Act applies only to intrastate carriage of freight and not to interstate commerce [*Pub. Util. Code § 202*]. Any corporation or person owning, controlling, operating, or managing any self-propelled vehicle not operated on rails, used in the business of transportation of property as a common carrier for compensation over any public highway in this state between fixed termini or over a regular route is a highway common carrier. However, passenger state corporations transporting baggage and express on a passenger vehicle incidental to the transportation of passengers are not highway common carriers [*Pub. Util. Code § 213*]. Being subject to regulation under the Public Utilities Act contained in *Pub. Util. Code §§ 201-2115* [*Pub. Util. Code § 216*], a highway common carrier must obtain a certificate of public convenience and necessity [*Pub. Util. Code § 1063*] and file tariffs showing its exact rates [*Pub. Util. Code § 486*]. These carriers are referred to as "certificated" carriers [*see* Poe, *Regulation of Highway Carriers in California, 30 So. Cal. L. Rev. 131, 133 (1957)*].

Highway carriers other than public utility highway common carriers are "permitted carriers" and are regulated under the Highway Carriers Act contained in Pub. Util. Code §§ 3501-3809 [*see* Pub. Util. Code § 3541; *see also* Poe, *Regulation of Highway Carriers in California, 30 So. Cal. L. Rev. 131, 133*-134]. This chapter does not cover permitted carriers.

[2] Rates Fixed by Filed Tariffs

Common carriers, and public utilities in general, may not charge, demand, collect, or receive for the transportation of persons or property, or related services, a compensation different than the applicable rates, fares and charges specified in their schedules (tariffs) filed and in effect at the time. No common carrier or public utility may refund or remit in any manner or by any device any portion of the rates, fares, or charges specified in its filed schedules, except on order of the Public Utilities Commission [*Pub. Util. Code §§ 494, 532*].

[3] Discrimination Prohibited

Discrimination in charges for transportation by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this state is prohibited [*see Pub. Util. Code § 461.5*, formerly *Cal. Const. art. XII, § 21*]. No common carrier, or public utility in general, may extend to any corporation or person any privilege or facility in the transportation of passengers or property except such as are regularly and uniformly extended to all corporations and persons [*Pub. Util. Code §§ 494, 532*].

[4] Long and Short Haul Charges

No railroad or other transportation company, or common carrier subject to the provisions of *Pub. Util. Code §§ 201-2115*, may charge or receive greater compensation in the aggregate for the transportation of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included in the longer distance. Such carriers may not charge a greater compensation for the transportation of like kind of property as a through rate than the aggregate of the intermediate rates. In certain cases, the commission may authorize a carrier to charge rates which do not comply with these requirements [*Pub. Util. Code § 461.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthorityTransportation LawCarrier Duties & LiabilitiesRates & TariffsTransportation LawCarrier Duties & LiabilitiesState & Local Regulation

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§ 109.101 Compensation of Common Carrier

A common carrier is entitled only to reasonable compensation which it may require to be paid in advance. It may refuse to carry, if advance payment is refused [*Civ. Code § 2173*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesRates & Tariffs

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11-109 California Forms of Pleading and Practice--Annotated § 109.102

§ 109.102 Liability for Payment of Freight

[1] In General

The consignor of freight is presumed to be liable for the freightage. However if the contract between the consignor and the carrier provides that the consignee is to pay the freightage, and the carrier allows the consignee to take the freight, the carrier cannot afterwards recover the freightage from the consignor [*Civ. Code § 2137*]. The consignee of freight is liable for the freightage if the consignee accepts the freight with notice of the consignor's intention that the consignee should pay the freightage [*Civ. Code § 2138*].

[2] Natural Increase of Freight

No freightage can be charged on the natural increase of freight [*Civ. Code § 2139*].

[3] Apportionment

If the freightage is apportioned by a bill of lading or other contract made between a consignor and carrier, the carrier is entitled to payment, according to the apportionment, for as much as the carrier delivers [*Civ. Code § 2140*]. Even if the freightage is not apportioned in the original contract, if the consignee accepts part of the freight without a specific objection that the rest is not delivered, the freightage must be apportioned and paid as to that part [*Civ. Code § 2141*].

If a consignee voluntarily receives freight at a place short of the one appointed for delivery, the carrier is entitled to a just proportion of the freightage according to the distance. This rule does not apply if the carrier is ready and willing and offers to complete the transit, in which case the carrier is entitled to the full freightage. It also does not apply if the carrier does not offer completion and the consignee recieves the freight only from necessity. In this case the carrier is not entitled to any freightage [*Civ. Code § 2142*].

[4] Extended or Faster Carriage

If freight is carried further or more expeditiously than was agreed on by the parties, the carrier is not entitled to additional compensation and cannot refuse to deliver the freight on the demand of the consignee at the time and place of its arrival [*Civ. Code § 2143*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 109.103 Time for Payment

A carrier may require freightage, which is the reward to be paid for the carriage of freight [*Civ. Code § 2110*], to be paid when the carrier receives the freight. If the carrier does not demand the freightage at that time, the carrier may not demand the freightage until it is ready to deliver the freight to the consignee [*Civ. Code § 2136*].

Legal Topics:

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

§§ 109.104[Reserved]

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11-109 California Forms of Pleading and Practice--Annotated § 109.120

§ 109.120 Cross References

[1] California Points and Authorities

For memoranda of points and authorities regarding carriers generally, see California Points and Authorities, Ch. 33, *Carriers* (Matthew Bender)

For memoranda of points and authorities regarding public entities generally, see California Points and Authorities, Ch. 196, *Public Entities* (Matthew Bender)

[2] California Torts

For discussion of negligence principals generally, including comparative negligence and the doctrine of res ipsa loquitur, see Levy, Golden & Sacks, California Torts, Chs. 3, 4 (Matthew Bender)

For discussion of vicarious liability, see Levy, Golden & Sacks, California Torts, Ch. 8 (Matthew Bender)

For discussion of carriers, see Levy, Golden & Sacks, California Torts, Ch. 23 (Matthew Bender)

For discussion of tort claims against public entities and employees, see Levy, Golden & Sacks, California Torts, Chs. 60-62 (Matthew Bender)

[3] Forms of Discovery

For forms of interrogatories for use in actions involving buses and streetcars, see Benders Forms of Discovery, *Buses and Streetcars* (Matthew Bender)

For forms of interrogatories for use in actions involving carriers, see Benders Forms of Discovery, *Carriers* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceGeneral OverviewTortsNegligenceStandards of CareSpecial CareCommon CarriersTortsVicarious LiabilityGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState & Local Regulation

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11-109 California Forms of Pleading and Practice--Annotated § 109.121

§ 109.121 State Constitution

Common carriers as public utilities subject to control and regulation by Public Utilities Commission; restriction on local control. *Cal. Const. art XII, §§ 3, 8*

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthority

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11-109 California Forms of Pleading and Practice--Annotated § 109.122

§ 109.122 Federal Statutes

Regulation of transportation of passengers by motor carriers engaged in interstate or foreign commerce. *49 U.S.C.S. §§ 10521-10526*

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesGeneral Overview

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§ 109.123 State Statutes

[1] Carrier's Duties to Passengers

[a] General Duties

Duty to provide safe vehicles. *Civ. Code § 2101*

Prohibition against overcrowding. *Civ. Code § 2102*

Civil treatment of passengers. *Civ. Code § 2103*

Duty to maintain course. *Civ. Code § 2104*

Duty to provide uniform schedules. *Civ. Code § 2170*

Duty to provide sufficient number of vehicles. *Civ. Code § 2184*

Duty to provide seat for every passenger. *Civ. Code § 2185*

Principal liable for all actual damages caused by its agents and employees. *Civ. Code § 2338*

Prohibition against discrimination by public utility. *Pub. Util. Code § 453*

Duty to maintain reasonable, proper, and equal facilities. *Pub. Util. Code § 556*

Obligation to check driver's record. *Veh. Code § 1808.1*

[b] Speed of Vehicle

Duty to maintain reasonable speed. *Civ. Code § 2104*

Basic speed law as reasonable speed considering all conditions. *Veh. Code § 22350*

Prima facie speed limits delineated. *Veh. Code § 22352*

Violation of prima facie speed limit as not establishing negligence as matter of law. *Veh. Code §§ 40830, 40831*

[c] Standard of Care

Carrier of persons without reward. *Civ. Code §§ 2090, 2096*

Carrier of persons for reward. *Civ. Code § 2100*

[2] Definitions

Contract of carriage. *Civ. Code § 2085*

Common carrier. *Civ. Code § 2168*; *Pub. Util. Code § 211*

Common carrier as included in definition of public utility. *Pub. Util. Code § 216*

[3] Ejection of Passengers

Passenger on common carrier refusing to pay fare or obey lawful regulation. *Civ. Code § 2188*

[4] Limitations on Liability

Common carrier as capable of limiting obligations by special contract but not by general notice. *Civ. Code § 2174*

Common carrier as not capable of limiting liability for gross negligence, fraud, or willful wrong. *Civ. Code § 2175*

Transit district, common carrier, or publicly owned transit system as not permitted to waive, qualify, or limit passenger's right to recover damages in exchange for fare reduction. *Pub. Util. Code § 244*

[5] Passengers' Duties

Passengers as required to conform to lawful rules of carrier. *Civ. Code § 2186*

[6] Payment of Fare

Right of common carrier to demand fare from passengers. *Civ. Code § 2187*

Carrier as having no right to require payment of any portion of fare after ejection of passenger. *Civ. Code § 2190*

[7] Transit Districts

[a] In General

Provisions applicable to all public transit. *Pub. Util. Code § 99000 et seq.*

[b] Claims Against Transit Districts

Liability of public entities. *Gov. Code § 814 et seq.*

Claims against public entities. *Gov. Code § 900 et seq.*

Actions against public entities and employees. *Gov. Code § 940 et seq.*

Payment of claims and judgments. *Gov. Code § 965 et seq.*

[c] Specific Districts

Alameda and Conta Costa Counties transit districts. *Pub. Util. Code § 24501 et seq.*

San Francisco Bay Area Rapid Transit District. *Pub. Util. Code § 28500 et seq.*

Southern California Rapid Transit District. *Pub. Util. Code § 30000 et seq.*

Orange County Transit District. *Pub. Util. Code § 40000 et seq.*

San Joaquin Regional Transit District. *Pub. Util. Code § 50000 et seq.*

Marin County Transit District. *Pub. Util. Code § 70000 et seq.*

San Diego County Transit District. *Pub. Util. Code § 90000 et seq.*

Santa Barbara Metropolitan Transit District. *Pub. Util. Code § 95000 et seq.*

Santa Cruz Metropolitan Transit District. *Pub. Util. Code § 98000 et seq.*

Santa Clara County Transit District. *Pub. Util. Code § 100000 et seq.*

Greater Bakersfield Metropolitan Transit District. *Pub. Util. Code § 101000 et seq.*

Sacramento Regional Transit District. *Pub. Util. Code § 102000 et seq.*

Fresno Metropolitan Transit District. Pub. Util. Code, Appendix 1

West Bay Rapid Transit Authority (San Mateo County). Pub. Util. Code, Appendix 2

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceStandards of CareSpecial CareCommon CarriersTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesDamagesTransportation LawCarrier Duties & LiabilitiesDuty to Provide ServiceTransportation LawCarrier Duties & LiabilitiesRates & Tariffs

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§ 109.124 Decisions

[1] Carrier-Passenger Relationship

[a] Commencement

Airline's duty to passengers was in force when passenger went to site of departure and airline accepted him as traveler, not just when airplane took off; under California law, flight attendant's negligence in opening overhead compartment, allowing unstable luggage to fall out, is concurrent or contributing cause, not superseding cause, to passenger's negligence in storing luggage in precarious, unstable position. *USAir Inc. v. United States Dep't of Navy (9th Cir. 1994) 14 F.3d 1410, 1413*

Creation of carrier-passenger relationship by carrier's acceptance of person as passenger as capable of being implied regardless of whether carrier actually knows of passenger's presence on vehicle. *Ivancich v. Davies (1921) 186 Cal. 520, 523-524, 199 P. 784* ; *Hellman v. Los Angeles Ry. Corp. (1933) 135 Cal. App. 627, 635, 27 P.2d 946, 28 P.2d 384*

Carrier-passenger relationship as arising when carrier's vehicle slows down to allow some persons to board it. *Hart v. Fresno Traction Co. (1917) 175 Cal. 489, 491, 167 P. 885*

Carrier-passenger relationship as arising when passenger enters vehicle with intent to pay, pays fare, or goes to site of departure, and carrier's actions indicate acceptance of person as passenger. Lagomarsino v. Market St. Ry. Co. (1945) 69 Cal. App. 2d 388, 395, 158 P.2d 982

Carrier-passenger relationship as not established when prospective passenger stands in station area prior to immediate approach of carrier's vehicle. Lagomarsino v. Market St. Ry. Co. (1945) 69 Cal. App. 2d 388, 395, 158 P.2d 982

Carrier-passenger relationship as not requiring payment of money, and as capable of being established by express or implied contract between carrier and passenger or between carrier and any third person. *Sullivan v. Richardson (1931)*

119 Cal. App. 367, 373, 6 P.2d 567 (automobile passenger)

Carrier assuming duty of conducting passenger to point of departure as creating carrier-passenger relationship. *Sanchez v. Pacific Auto Stages (1931) 116 Cal. App. 392, 396-397, 2 P.2d 845*

Carrier-passenger relationship as arising when carrier slows vehicle to virtual standstill in response to prospective passenger's signal and person starts to board. *Nilson v. Oakland Traction Co. (1909) 10 Cal. App. 103, 109, 101 P. 413*

[b] Termination

Carrier as obligated to exercise utmost care and diligence for passenger's safety after passenger alights and until placed in relatively safe zone and clears zone of carrier's activity. Boa v. San Francisco-Oakland Terminal Rys. (1920) 182 Cal. 93, 100-101, 187 P. 2

Carrier-passenger relationship as ordinarily ceasing when passenger has alighted safely from vehicle. *Parker v. City & County of San Francisco (1958) 158 Cal. App. 2d 597, 603, 323 P.2d 108* ; *MacLean v. City & County of San Francisco (1954) 127 Cal. App. 2d 263, 271, 273 P.2d 698*

[2] Carrier's Duty of Care

[a] In General

Whether carrier's employee has breached duty of utmost care and diligence for passengers' safety as factual question. *Acosta v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 19, 27-28, 84 Cal. Rptr. 184, 465 P.2d 72* ; *McBride v. Atchison, Topeka & Santa Fe Ry. Co. (1955) 44 Cal. 2d 113, 118, 279 P.2d 966*

Common carriers as having duty to exercise utmost degree of care. *McBride v. Atchison, Topeka & Santa Fe Ry. Co. (1955) 44 Cal. 2d 113, 116, 279 P.2d 966* (railroad accident); *Greyhound Lines, Inc. v. Superior Court (1970) 3 Cal. App. 3d 356, 360, 83 Cal. Rptr. 343 , cert. denied, 400 U.S. 868, 91 S. Ct. 100, 27 L. Ed. 2d 108*

Person who rented limousine and who was abandoned inebriated, clad only in swimsuit, without personal effects or any way to get home, as not stating cause of action for tortious breach of covenant of good faith and fair dealing, but may state causes of action for breach of contract (possibly including damages for emotional distress), conversion, and breach of statutory obligations imposed by Civ. Code *§ 2100, Pub. Util. Code* §§ 2106, 5360, 5382. *Rogoff v. Grabowski (1988) 200 Cal. App. 3d 624, 633-634, 246 Cal. Rptr. 185*

Liability of common carrier to its passengers under *Civ. Code § 2100* "utmost care" standard as same whether carrier is public or private entity. *De Vera v. Long Beach Pub. Transp. Co. (1986) 180 Cal. App. 3d 782, 792, 225 Cal. Rptr. 789*

Following accident between common carrier's vehicle and that of third party, carrier as having duty to collect and preserve information concerning other vehicle and its driver for use by passengers in future civil litigation. *De Vera v. Long Beach Pub. Transp. Co. (1986) 180 Cal. App. 3d 782, 795, 225 Cal. Rptr. 789*

Carrier as not insurer of absolute safety of passengers. *Gray v. City & County of San Francisco (1962) 202 Cal. App. 2d 319, 323, 20 Cal. Rptr. 894* ; *Rocray v. Pasadena City Lines, Inc. (1958) 159 Cal. App. 2d 265, 269, 323 P.2d 772* ; *Troutman v. Los Angeles Transit Lines (1947) 82 Cal. App. 2d 183, 185, 185 P.2d 616*

[b] Nonpassengers

Laborer in street as required to use lesser quantum of care than pedestrian. *Scott v. City & County of San Francisco (1949) 91 Cal. App. 2d 887, 889, 206 P.2d 45* (roofer tending kettle of tar struck by streetcar)

Worker whose duty requires him to be on street as not required to look continually for approach of streetcar. *Milosevich v. Pacific Elec. Ry. Co. (1924) 68 Cal. App. 662, 672, 230 P. 15* (pipe layer struck by streetcar and killed)

[c] Passengers

[i] Assault by Third Person

Duty of care to protect passenger from assault by third person as applicable when carrier has, or with exercise of utmost care should have, knowledge that assault may occur, and carrier has ability, with exercise of utmost care, to prevent injury. *Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal. 3d 780, 791, 221 Cal. Rptr. 840, 710 P.2d 907* ; *Hicks v. Scott (1941) 48 Cal. App. 2d 481, 485-486, 120 P.2d 107*

[ii] Boarding Passengers

Carrier as liable when doors close on boarding passenger. *Rocray v. Pasadena City Lines, Inc. (1958) 159 Cal. App. 2d 265, 270, 323 P.2d 772* ; *Gamwell v. Key Sys. Transit Lines (1956) 140 Cal. App. 2d 308, 309-310, 294 P.2d 1035*

[iii] Passengers With Special Conditions and Minors

No inconsistency between one jury instruction defining degree of care owed by and to children and another defining duration of passenger-carrier relationship, when jury had to decide if bus driver was under duty to warn 14-year-old boy of possible danger in alighting from bus. *Riggins v. Pacific Greyhound Lines (1962) 203 Cal. App. 2d 125, 127, 21 Cal. Rptr. 336*

Carrier as owing to minor passengers a greater degree of care than it owes to adults. Brizzolari v. Market St. Ry. Co. (1935) 7 Cal. App. 2d 246, 248, 46 P.2d 783

[iv] Transportation of Animals

Carrier as having right to carry dogs in coach set apart for passengers, but carrier as required to use utmost care to ascertain dog's tendency to injure passenger. *Westwater v. Southern Pac. Co. (1940) 38 Cal. App. 2d 369, 371-372, 101 P.2d 154*

[3] Carrier's Employees

Employees of carrier as required to exercise same degree of care as required of their employer. Moeller v. Market St. Ry. Co. (1938) 27 Cal. App. 2d 562, 566, 81 P.2d 475

Employees of carrier as obligated not to use unreasonable or unnecessary force in ejecting passenger from vehicle; duty of every employee to refrain from committing any assault on any person, whether or not person is passenger. *Galloway v. United R.R.s (1921) 51 Cal. App. 575, 577-579, 197 P. 663*

[4] Evidence

Evidence of custom admissible for its relevance to issues of negligence and contributory negligence. *Fowler v. Key Sys. Transit Lines (1951) 37 Cal. 2d 65, 67-68, 230 P.2d 339* , *37 Cal. 2d 65, 230 P.2d 339* ; *Sanchez v. Pacific Auto Stages (1931) 116 Cal. App. 392, 395, 2 P.2d 845*

[5] Passenger's Duty of Care

Under California law, passenger's negligence in storing luggage in overhead compartment in precarious, unstable position is not superseded by flight attendant's negligence in opening overhead compartment, allowing unstable luggage to fall out; negligence of each person is concurrent or contributing cause. *USAir Inc. v. United States Dep't of Navy (9th Cir. 1994) 14 F.3d 1410, 1413*

Passenger as not required as matter of law to anticipate "sudden" or "violent" jerk of sufficient force to throw one to ground. *Rogers v. Los Angeles Transit Lines (1955) 45 Cal. 2d 414, 418, 289 P.2d 226* ; Dempsey v. Market St. Ry. Co. (1943) 23 Cal. 2d 110, 112, 142 P.2d 929 ; *McIntosh v. Los Angeles Ry. Corp. (1936) 7 Cal. 2d 90, 96, 59 P.2d 959*

Fact that carrier of persons for reward is held to highest standard of care as not meaning that passengers are also held to same high standard of care; passenger as required to exercise only ordinary care for own safety. *Wilson v. City & County of San Francisco (1959) 174 Cal. App. 2d 273, 277, 344 P.2d 828*

Passenger as not obligated to inspect baggage on luggage rack above head. *Williamson v. Pacific Greyhound Lines (1949) 93 Cal. App. 2d 484, 487, 209 P.2d 146*

[6] Res Ipsa Loquitur

Participation by plaintiff passenger in events leading to accident as not precluding application of res ipsa loquitur if there is evidence that plaintiff's negligence, if any, was not proximate cause of accident. *Seffert v. Los Angeles Transit Lines (1961) 56 Cal. 2d 498, 502, 15 Cal. Rptr. 161, 364 P.2d 337* ; *Shaw v. Pacific Greyhound Lines (1958) 50 Cal. 2d 153, 157, 323 P.2d 391*

Res ipsa loquitur presumption of carrier's negligence as shifting burden of going forward with evidence to carrier to provide evidence sufficient to offset or balance it. *Seffert v. Los Angeles Transit Lines (1961) 56 Cal. 2d 498, 502, 15 Cal. Rptr. 161, 364 P.2d 337* ; *Hardin v. San Jose City Lines, Inc. (1953) 41 Cal. 2d 432, 436, 260 P.2d 63*

Defendants as required to rebut res ipsa loquitur inference of negligence with evidence of equivalently convincing force. *Seffert v. Los Angeles Transit Lines (1961) 56 Cal. 2d 498, 502, 15 Cal. Rptr. 161, 364 P.2d 337* ; *Hardin v. San Jose City Lines, Inc. (1953) 41 Cal. 2d 432, 437, 260 P.2d 63*

Res ipsa loquitur as capable of being relied on by passenger to support judgment even though passenger offers no jury instruction on subject and none is given. *Rogers v. Los Angeles Transit Lines (1955) 45 Cal. 2d 414, 418, 289 P.2d 226*

Doctrine of res ipsa loquitur as not justifying inference of carrier's negligence merely because passenger was injured while on board carrier's vehicle. Mudrick v. Market St. Ry. Co. (1938) 11 Cal. 2d 724, 731-732, 81 P.2d 950

Presumption of carrier's negligence as not applicable when passenger has full knowledge of and testifies as to specific

act of negligence that caused injury, or if there is direct evidence as to precise cause of accident. *Connor v. Atchison, Topeka, & Santa Fe Ry. Co. (1922) 189 Cal. 1, 5, 6, 207 P. 378* ; *Jorgensen v. East Bay Transit Co. (1941) 46 Cal. App. 2d 189, 193, 115 P.2d 556*

Doctrine of res ipsa loquitur as not justifying inference of carrier's negligence merely because passenger was injured. *Rystinki v. Central Cal. Co. (1917) 175 Cal. 336, 344, 165 P. 952* ; *Gray v. City & County of San Francisco (1962) 202 Cal. App. 2d 319, 323, 20 Cal. Rptr. 894*

Presumption of negligence arising from res ipsa loquitur as strongest when defendant owes plaintiff highest duty of care, such as that imposed on carrier of passengers. *Ammenti v. Los Angeles Metro. Transit Auth.y (1963) 213 Cal. App. 2d 333, 336, 28 Cal. Rptr. 653* ; *Freitas v. Peerless Stages, Inc. (1952) 108 Cal. App. 2d 749, 758-759, 239 P.2d 671*

Res ipsa loquitur as inapplicable when passenger falls down and is injured while boarding or alighting from stationary carrier. *Gray v. City & County of San Francisco (1962) 202 Cal. App. 2d 319, 327, 20 Cal. Rptr. 894*

[7] Violation of Statute

Whether presumption of negligence is rebutted by violator of statute as determined by whether violator shows that conduct might reasonably be expected of person of ordinary prudence acting under similar circumstances who desired to comply with law. *Alarid v. Vanier (1958) 50 Cal. 2d 617, 621-624, 327 P.2d 897*

Presumption of negligence arising from act or failure to act below statutory standard as capable of being rebutted, but as conclusive until so rebutted. *Satterlee v. Orange Glenn Sch. Dist. (1947) 29 Cal. 2d 581, 588, 177 P.2d 279* ; *Combs v. Los Angeles Ry. Corp. (1947) 29 Cal. 2d 606, 609, 177 P.2d 293* (cases disapproved on other grounds in *Alarid v. Vanier (1958) 50 Cal. 2d 617, 622-624, 327 P.2d 897*)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceProofRes Ipsa LoquiturGeneral OverviewTortsNegligenceProofViolations of LawStatutesTortsNegligenceStandards of CareSpecial CareCommon CarriersTortsNegligenceStandards of CareSpecial CareDisabled PersonsTortsVicarious LiabilityEmployersGeneral Overview

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§ 109.125 Attorney General Opinions

Rapid transit vehicles leased by local government-operated transit system for use in system or used in transportation services provided by private transportation company under contract to transit system as required to be accessible to handicapped. *70 Ops. Cal. Att'y Gen. 70 (1987)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare LawSocial ServicesDisabled & Elderly PersonsGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState & Local Regulation

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Personal Injury: Actions, Defenses, Damages, Vol. 7, *Buses* (Matthew Bender)

Personal Injury: Actions, Defenses, Damages, Vol. 7, *Carriers, Common and Private* (Matthew Bender)

Personal Injury: Actions, Defenses, Damages, Vol. 26, *Subways, Street and Elevated Railways* (Matthew Bender)

Witkin, Summary of California Law, Vols. 5 & 6, *Torts*, §§ 105-267 (governmental liability), 729-1195 (negligence), 767-773 (carrier's degree of care), 1196-1216 (wrongful death) (9th ed. 1988)

Legal Topics:

For related research and practice materials, see the following legal topics:
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11-109 California Forms of Pleading and Practice--Annotated § 109.140

§ 109.140 Cross References

For discussion and forms of bills of lading, see California Legal Forms, Ch. 54, *Shipment of Property* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 109.141 State Statutes

[1] Definitions

Person to whom freight is to be delivered as "consignee." *Civ. Code § 2110*

Person who delivers freight to carrier as "consignor." *Civ. Code § 2110*

Property carried as "freight." *Civ. Code § 2110*

Reward paid for carriage of freight as "freightage." *Civ. Code § 2110*

Bill of lading. *Com. Code § 1201(b)(6)*

Documents of title. *Com. Code § 1201(b)(16)*

Definition of documents of title [*Com. Code §§ 7101-7603*] under Uniform Commercial Code. *Com. Code § 7102*

[2] Bills of Lading

Documents of title. *Com. Code §§ 7101-7603*

Liability for misdating of bill or for nonreceipt or misdescription of goods. *Com. Code § 7301*

Liability on through bill of lading or similar document. *Com. Code § 7302*

Destination bills as permitted. *Com. Code § 7305*

Degree of care required of carrier who issues bill of lading. *Com. Code § 7309(a)*

Provisions as to time and manner of presenting claims, instituting actions, and limiting liability. *Com. Code § 7309(b), (c)*

Consequences of unauthorized alteration or filling in blank. *Com. Code § 7306*

General obligations under bill of lading. *Com. Code §§ 7401-7404*

Negotiation and transfer. *Com. Code §§ 7501-7509*

Interpleader when conflicting claims to title or possession. *Com. Code § 7603*

[3] Carriers for Reward

Duty of carrier of property for reward. *Civ. Code § 2114*

[4] Common Carriers

[a] Depositary

Titles 5 and *6 of the Civil Code* on deposit [*Civ. Code §§ 1813-1881.2*] and services [*Civ. Code §§ 2019-2082*] as defining rights and obligations of common carrier in respect to services, other than carriage and delivery, rendered about freight. *Civ. Code § 2203*

[b] Liability

Liability and exceptions to liability without negligence of inland common carrier for loss of or injury to property. *Civ. Code § 2194*

Common carrier's liability for negligent loss or injury of property. *Civ. Code § 2195*

[c] Limitation of Liability

Limitation of liability by special contract. *Civ. Code § 2174*

No exoneration as permitted by agreement from liability for gross negligence, fraud, or willful wrong of common carrier or carrier's servants. *Civ. Code § 2175*

Effects of acceptance of ticket, bill of lading, or written contract for carriage. *Civ. Code § 2176*

Responsibility for loss of letter, or package in form of letter, containing money or other papers of value as arising only if informed of value of contents at time of receipt. *Civ. Code § 2177*

Limitation of liability of carrier by steam or electric railroad for baggage. *Civ. Code § 2178*

Limitation for loss or injury to precious metals, jewels, and certain goods of value as limited in certain circumstances.

Civ. Code § 2200

Limitation of liability of common carriers operating over public highways for loss of or damage to baggage. *Civ. Code § 2205*

[5] Consignor and Consignee Liability

Liability to motor carrier for railroad and steamship storage and equipment rental charges caused by delay of consignor or consignee. *Civ. Code §§ 2197, 2197.5*

[6] Damages

Measure of damages for breach of obligation to accept freight. *Civ. Code § 3315*

Damages for breach of carrier's obligation to deliver freight. *Civ. Code § 3316*

Damages for delay in delivery of freight. *Civ. Code § 3317*

[7] Delay

Liability for negligent delay. *Civ. Code § 2196*

[8] Delivery

Place and manner of delivery of freight. *Civ. Code §§ 2118, 2119*

Effect of carrier's notice of arrival of freight. *Civ. Code § 2120*

Effect of consignee's refusal to accept delivery. *Civ. Code § 2121*

Delivery of goods under bill of lading. *Com. Code §§ 7303, 7403*

[9] Directions of Consignor or Consignee

Carrier of freight as required, subject to *Com. Code § 7303* (delivery under bill of lading), to comply with directions of consignor or consignee to same extent that employee bound to comply with directions of employer under *Lab. Code § 2856*. *Civ. Code § 2115*

[10] Gratuitous Carrier

Duty of gratuitous carrier of property. *Civ. Code §§ 2089, 2090, 2114*

[11] Household Goods Carriers

Claims against household goods carriers as not denied because lost or damaged goods not noted at time of delivery. *Pub. Util. Code § 5241*

[12] Lost Property

Disposition of lost money and goods. *Civ. Code §§ 2080-2080.9*

[13] Unclaimed Goods

Right to hold or store property received by common carrier. *Civ. Code § 2081*

Sale at auction. *Civ. Code §§ 2081.1-2081.3*

Liability for storage. *Civ. Code § 2081.4*

Civ. Code §§ 2081-2081.5 as provisions governing proceedings regarding unclaimed goods. *Civ. Code § 2081.6*

Legal Topics:

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

[1] Bill of Lading

Bill of lading as basic shipping instrument apart from the tariff filed by public utility common carrier and as effectively constituting basic contract between parties. *Kentner Truck Line v. Maier Brewing Co. (1960) 183 Cal. App. 2d 89, 93, 6 Cal. Rptr. 572*

[2] Contraband

Though common carrier bound to accept whatever freight it holds itself out as accustomed to carry under *Civ. Code § 2169*, such carrier as not bound to accept freight that is illegal to possess or transport and carrier as having right to open and inspect package that it suspects contains contraband. *People v. McKinnon (1972) 7 Cal. 3d 899, 914, 103 Cal. Rptr. 897, 500 P.2d 1097*

[3] Delay

In absence of contract of carriage, carrier as bound to deliver goods within reasonable time, and as liable for delay only when caused by carrier's want of ordinary care and diligence. *Palmer v. Atchison, Topeka & Santa Fe R.R. Co. (1894) 101 Cal. 187, 194, 35 P. 630*

Measure of damages for carrier's delay in delivery of freight under *Civ. Code § 3317* as applicable only when appropriate, such as when goods are perishable, or they have market for use intended by which their value can be determined. *Artists' Embassy v. Hunt (1958) 157 Cal. App. 2d 371, 374, 320 P.2d 924* (*Civ. Code § 3317* as not proper measure of damages for delay in delivery of theatrical properties)

[4] Liability

Civ. Code § 2194 as making inland common carrier of property strictly liable for loss or injury from any cause whatever except for specified exceptions. *BBD Transp. Co. v. Buller (1975) 49 Cal. App. 3d 124, 128, 122 Cal. Rptr. 357*

Burden as on carrier to show that loss resulted from one of causes stated in *Civ. Code § 2194* as exceptions to general rule of strict liability of carrier. *Brignoli v. Seaboard Transp. Co. (1947) 29 Cal. 2d 782, 792, 178 P.2d 445*

Overloading of trailer as not constituting "inherent defect, vice, or weakness, or a spontaneous action of the property itself" under *Civ. Code § 2914(1)* so as to constitute an exception to strict liability of common carrier for loss or injury to property under *Civ. Code § 2194*. *BBD Transp. Co. v. Buller (1975) 49 Cal. App. 3d 124, 132, 122 Cal. Rptr. 357*

If overloading freight is apparent to carrier (driver), carrier as liable notwithstanding negligence of shipper. *BBD Transp. Co v. Buller (1975) 49 Cal. App. 3d 124, 132, 122 Cal. Rptr. 357* ; *Albers v. Greyhound Corp. (1970) 4 Cal. App. 3d 463, 478, 84 Cal. Rptr. 846*

Responsibility of carrier as reduced to that of warehouseman by giving consignee notice under *Civ. Code § 2120* of arrival of freight not delivered. Wilson v. California Cent. R.R. Co. (1892) 94 Cal. 166, 178, 29 P. 861

[5] Limitation of Liability

A common carrier that is involved only in recreational activities may enter into a contract to be released from liability for ordinary negligence. *Platzer v. Mammoth Mountain Ski Area (2002) 104 Cal. App. 4th 1253, 1258, 128 Cal. Rptr. 2d 885*

Consignor's consent to limited liability of carrier is sufficient to limit liability under *Civ. Code § 2176* even if is without actual authority when carrier is not on notice of consignor's lack of authority. *Morville v. United Parcel Serv. (1983) 144 Cal. App. 3d 552, 555, 192 Cal. Rptr. 779*

Airline's liability for loss of baggage was limited by tariff provision to $500 when plaintiff was aware of tariff provision and of availability of additional protection if he disclosed high value and paid additional fee but he deliberately did not disclose value or seek additional protection. *Van Steinburg v. Pacific Sw. Airlines (1980) 102 Cal. App. 3d 842, 844, 160 Cal. Rptr. 612*

"Gross negligence" under *Civ. Code § 2175* (prohibition on contractual limitation of carrier's liability) as interpreted to mean want of slight care and diligence. *Walther v. Southern Pac. Co. (1911) 159 Cal. 769, 775, 116 P. 51* ; Pratt v. Western Pac. R.R. Co. (1963) 213 Cal. App. 2d 573, 580, 29 Cal. Rptr. 108

"Agreed valuation contracts" as contracts in which valuation of property agreed to for purposes of fixing transportation charges and measuring carrier's responsibility and not as contracts limiting liability. *Donlon Bros. v. Southern Pac. Co. (1907) 151 Cal. 763, 769, 91 P. 603*

Reasonable "agreed valuation" contracts as upheld in California if shipper has knowledge of terms of limitation and choice of rates and fair opportunity to obtain higher valuation for higher rate. *Muelder v. Western Greyhound Lines (1970) 8 Cal. App. 3d 319, 329-330, 87 Cal. Rptr. 297*

Common law as having prohibited contracts exempting common carrier from liability based on ordinary negligence. *Muelder v. Western Greyhound Lines (1970) 8 Cal. App. 3d 319, 329, 87 Cal. Rptr. 297*

Rule in Hischemoeller v. Nat'l Ice & Cold Storage Co. (1956) 46 Cal. 2d 318, 325-327, 294 P.2d 433 (warehouseman as entitled to benefit of "released value" limitation contained in tariff, despite lack of knowledge of commercial shipper) as not applicable to member of general public who is customer of grossly negligent carrier, such customer as not bound unless contracted with actual or constructive notice of limitation and opportunity to purchase higher liability existed. *Muelder v. Western Greyhound Lines (1970) 8 Cal. App. 3d 319, 337, 87 Cal. Rptr. 297* (carrier grossly negligent)

"Knowledge" under *Civ. Code § 2196* (assent to limitation on liability by acceptance of receipt) as able to be constructive as well as actual, but mere acceptance of document by consignor as not in itself amounting to assent. *Curtis v. United Transfer Co. (1914) 167 Cal. 112, 114-115, 138 P. 726* ; *Muelder v. Western Greyhound Lines (1970) 8 Cal. App. 3d 319, 337, 87 Cal. Rptr. 297*

"Constructive notice" under *Civ. Code § 2176* (assent to limitation on liability by acceptance of receipt) as notice that would "bring home" to reasonably prudent member of public the terms limiting liability and the availability of choice of purchasing greater protection. *Muelder v. Western Greyhound Lines (1970) 8 Cal. App. 3d 319, 337, 87 Cal. Rptr. 297*

[6] Statute of Limitations

Action against common carrier under *Civ. Code § 2194* for injury to property as action based on statute and governed by three-year statute of limitations of former Code Civ. Proc. § 338(1) (*now see Code Civ. Proc. § 338(a)*). *BBD Transp. Co. v. Buller (1975) 49 Cal. App. 3d 124, 129, 122 Cal. Rptr. 357*

Tolling of statute of limitations under former Code Civ. Proc. § 338(3) (*now see Code Civ. Proc. § 338(c)*) in action for negligent injury to freight. *Allred v. Bekins Wide World Van Servs. (1975) 45 Cal. App. 3d 984, 988-991, 120 Cal. Rptr. 312*

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Bills of LadingGovernmentsLegislationStatutes of LimitationsTime LimitationsTransportation LawCarrier Duties & LiabilitiesBills of LadingTransportation LawCarrier Duties & LiabilitiesContrabandTransportation LawCarrier Duties & LiabilitiesDamages

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§ 109.143 Law Reviews

Recent Developments, *Private Carriage on Trial: Competition in the Motor-Transportation Industry, 21 Stan. L. Rev. 1204 (1969)*

Lakusta, *Regulation of Truckers for Hire in California, 41 Cal. L. Rev. 63 (1953)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesState & Local Regulation

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Witkin, Summary of California Law, Vol. 4, *Personal Property*, § 150 et seq. (9th ed. 1987)

13 C.J.S., *Carriers*, §§ 2-528

13 Am. Jur. 2d, *Carriers*, §§ 225-460

14 Am. Jur. 2d, *Carriers*, §§ 507-732

Legal Topics:

For related research and practice materials, see the following legal topics:
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11-109 California Forms of Pleading and Practice--Annotated § 109.160

§ 109.160 Cross References

For discussion and forms of bills of lading, see California Legal Forms, Ch. 54, *Shipment of Property* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 109.161 Federal Statutes

Interstate Commerce Act. *49 U.S.C.S. § 10101 et seq.*

Carmack Amendment (*49 U.S.C.S. § 11707*) applicable to railroads and motor carriers that are common carriers. *49 U.S.C.S. §§ 10501, 10730*

Provisions for just and reasonable regulations and practices of railroads, motor carriers and freight forwarders. *49 U.S.C.S. §§ 10701, 10702, 10703*

Duties of Interstate Commerce Commission. *49 U.S.C.S. §§ 10101, 10321*

Carmack Amendment. *49 U.S.C.S. § 11707*

Federal Bills of Lading Act. *49 U.S.C.S. § 80101 et seq.*

Household Goods Transportation Act. *49 U.S.C.S. §§ 10102(10), 10721(b)(1), (3), 10734, 10922(b)(9), 10934, 11110, 11342(b)(2),* (3), 11711, 11901(g)-(k), 11917

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Bills of LadingTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesBills of Lading

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11-109 California Forms of Pleading and Practice--Annotated § 109.162

§ 109.162 Decisions

Where interstate shipment involved, rights and liabilities of parties as governed by applicable federal statutes as interpreted by federal tribunals. Missouri Pac. R.R. *Co. v. Elmore & Stahl (1964) 377 U.S. 134, 137, 84 S. Ct. 1142, 12 L. Ed. 2d 194* ; *Bauer v. Jackson (1971) 15 Cal. App. 3d 358, 369, 93 Cal. Rptr. 43*

Liability of carrier as governed by Carmack Amendment [former *49 U.S.C.S. § 21(11)* (*now see 49 U.S.C.S. § 11707*)], in which common law rule is codified for loss and damage to goods delivered to it, unless caused by act of God, public enemy, authority of law, act or default of shipper or owner, natural shrinkage, or defect or vice in property shipped. Missouri Pac. R.R. Co. v. Elmore & Stahl (1964) 377 U.S. 134, 137-138, 84 S. Ct. 1142, 12 L. Ed. 2d 194 ; *Secretary of Agriculture v. United States (1955) 350 U.S. 162, 165 n. 9, 76 S. Ct. 244, 100 L. Ed. 173*

Limitation of liability for interstate shipment as ineffective due to fraud. *Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 917, 114 Cal. Rptr. 622, 523 P.2d 662*

Before carrier's attempt to limit its liability will be effective, carrier must (1) maintain a tariff in compliance with requirements of the Interstate Commerce Commission, (2) give shipper a reasonable opportunity to choose between two or more levels of liability, (3) obtain shipper's agreement as to his or her choice of carrier liability limit, and (4) issue a bill of lading prior to moving the shipment that reflects any such agreement. *Hughes Aircraft v. North Am. Van Lines (9th Cir. 1992) 970 F.2d 609, 611-612*

Reasonable cost of shipper's inspection and testing to determine necessity and scope of repairs to machinery damaged in transit as "actual loss," compensable under *Carmack Amendment. Carlson Indus. v. E.L. Murphy Trucking Co. (1985) 168 Cal. App. 3d 691, 697, 214 Cal. Rptr. 331*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsFederal Common LawPreemptionTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesDamagesTransportation LawCarrier Duties & LiabilitiesRates & Tariffs

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§ 109.163 Text References

Witkin, Summary of California Law, Vol. 4, *Personal Property*, §§ 152-155 (9th ed. 1987)

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[Reserved]

§§ 109.164[Reserved]

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11-109 California Forms of Pleading and Practice--Annotated § 109.180

§ 109.180 Cross References

For discussion and forms of bills of lading, see California Legal Forms, Ch. 54, *Shipment of Property* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Bills of LadingTransportation LawCarrier Duties & LiabilitiesBills of Lading

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11-109 California Forms of Pleading and Practice--Annotated § 109.181

§ 109.181 California Constitution

Regulation of rates of Public Utilities Commission. *Cal. Const. art. XII, § 4*

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthorityEnergy & Utilities LawAdministrative ProceedingsRatemakingTransportation LawCarrier Duties & LiabilitiesRates & Tariffs

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11-109 California Forms of Pleading and Practice--Annotated § 109.182

§ 109.182 State Statutes

Time for payment of freightage. *Civ. Code § 2136*

Liability for freightage. *Civ. Code §§ 2137, 2138*

Freightage as not chargeable on natural increase of freight. *Civ. Code § 2139*

Apportionment. *Civ. Code §§ 2140, 2141*

Freightage on incomplete carriage. *Civ. Code § 2142*

Freightage on extended or faster carriage. *Civ. Code § 2143*

Common carrier as entitled to reasonable compensation and to refuse carriage where prepayment of compensation is refused. *Civ. Code § 2173*

Rates under Public Utilities Act [*Pub. Util. Code §§ 201-2115*]. *Pub. Util. Code §§ 451-462, 726-738*

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsRatemakingTransportation LawCarrier Duties & LiabilitiesDamagesTransportation LawCarrier Duties & LiabilitiesRates & Tariffs

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11-109 California Forms of Pleading and Practice--Annotated § 109.183

§ 109.183 Decisions

Administrative mandamus is proper proceeding to pursue refund of excess fees assessed by Department of Motor Vehicles for truck trailer registration; although *Veh. Code § 8202(d)* does not specify what kind of action legislature contemplated, wording of section is more consistent with review by administrative mandamus than with original action for refund. *American President Lines, Ltd., v. Zolin (1995) 38 Cal. App. 4th 910, 920, 45 Cal. Rptr. 2d 370*

Carrier has right to recover difference between legal minimum shipping rate and amount actually charged. *South Bay Transp. Co. v. Gordon Sand Co. (1988) 206 Cal. App. 3d 650, 658-659, 253 Cal. Rptr. 753*

Tariff regulations as becoming part of contract of shipment and applicable rates as becoming fixed when shipments made. *People ex rel. Pub. Utils. Comm'n v. Ryerson (1966) 241 Cal. App. 2d 115, 122, 50 Cal. Rptr. 246*

Prescribed rules and rate regulations become part of every contract between highway contract carrier and shipper; prescribed rate provisions and regulations deemed as part of hauling contract, and parties as deemed to have contracted with such provisions in mind. *Gardner v. Basich Bros. Constr. Co. (1955) 44 Cal. 2d 191, 194, 281 P.2d 521* ; *Masonite Corp. v. Pacific Gas & Elec. Co. (1976) 65 Cal. App. 3d 1, 135 Cal. Rptr. 170*

In cases where the commission authorized to establish just and reasonable rates and to establish rules and regulations governing rates, such rates, rules and regulations as becoming part of every contract between public utility and its patrons; in such cases courts as called on to determine what rates have been established and to apply them to facts as disclosed by evidence. *Product Research Assocs. v. Pacific Tel. & Tel. (1971) 16 Cal. App. 3d 651, 655, 94 Cal. Rptr. 216*

Legal Topics:

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

Administrative LawJudicial ReviewRemediesMandamusEnergy & Utilities LawAdministrative ProceedingsRatemakingTransportation LawCarrier Duties & LiabilitiesRates & TariffsTransportation LawCarrier Duties & LiabilitiesState & Local Regulation

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11-109 California Forms of Pleading and Practice--Annotated § 109.184

§ 109.184 Text References

Witkin, Summary of California Law, Vol. 8, *Constitutional Law*, §§ 889 et seq. (9th ed. 1988)

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[Reserved]

§§ 109.185[Reserved]

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11-109 California Forms of Pleading and Practice--Annotated § 109.200

§ 109.200 Complaint for Damages [Civ. Code §§ 3294, 3333] for Injuries for Wrongful Ejection From Vehicle [Civ. Code § 2188]--By Passenger Against Common Carrier of Passengers for Reward and Its Agents [Civ. Code §§ 2338, 2343]

[1] FORM Complaint for Damages [Civ. Code §§ 3294, 3333] for Injuries for Wrongful Ejection From Vehicle [Civ. Code § 2188]--By Passenger Against Common Carrier of Passengers for Reward and Its Agents [Civ. Code §§ 2338, 2343]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	(Wrongful Ejection)
[and DOES 1 through _____,]	)	[Amount demanded _____
Defendants.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Defendant _____ [*name of carrier*] is, and at all times mentioned herein, was, _____ [*allege capacity and residence of carrier, e.g.*, a corporation duly organized and existing under the laws of the State of California, with its principal place of business in _____ County, California, and doing business as a common carrier of passengers for reward].

2. At all times herein mentioned, defendant _____ [*name of driver, conductor, or other agent*] was the

agent and employee of _____ [*name of carrier*] and was acting within the scope of his/her authority as such and with the consent and permission of _____ [*name of carrier*]. Defendant _____ [*name of agent*] is, and at all times herein mentioned was, _____ [*allege residence, e.g.*, a resident of _____ County, California].

3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of said fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by such wrongful acts.]

4. At all times herein mentioned, defendant _____ [*name of carrier*] was engaged in business as a common carrier of persons (and freight) for reward and operated a certain _____ [*specify type of conveyance, e.g.*, railroad train] from _____ [*location*], to _____ [*destination*].

5. [On or about _____ [*date*], plaintiff paid to an employee of defendant _____ (*name of carrier*) at _____ (*location*), the fare demanded by that employee for a journey aboard defendant _____'s (*name of carrier*) _____ (*specify type of conveyance, e.g.*, railroad train) from _____ (*location*) to _____ (*destination*), and defendants thereby undertook, contracted, and became obliged to accept and carry plaintiff and transport him/her from _____ (*location*) to his/her destination at _____ (*location*).]

6. On or about _____ [*date*], plaintiff boarded defendant _____'s [*name of carrier*] _____ [*specify type of conveyance, e.g.*, railroad train] at _____ [*location*] and commenced his/her journey to _____ [*destination*]. [At all times during the course of this journey, plaintiff conducted himself/herself in an orderly and proper manner and in conformity with all lawful rules of defendant _____ (*name of carrier*) known to plaintiff.]

7. On or about _____ [*date*], at about _____ [*time*], at or near _____ [*location*] defendants wrongfully, unlawfully, and without regard for their duties and plaintiff's rights ejected plaintiff from the _____ [*specify type of conveyance, e.g.*, railroad train] in that defendant _____ [_____ (*name of agent*) forcefully put plaintiff off of the _____ (*specify type of conveyance, e.g.* railroad car), though plaintiff was lawfully and properly on the vehicle *or* _____ (*name of agent*) used excessive and unnecessary force and violence in ejecting plaintiff in that _____ (*specify, e.g.*, defendant _____ (*name of agent*) pushed plaintiff from the steps of the railroad car while the train was moving) *or* _____ (*name of agent*) did not eject plaintiff at a usual stopping place or near a dwelling house *or allege any combination of the above*].

8. As a proximate result of defendants' wrongful conduct, plaintiff was _____ [*specify applicable general damages, e.g.*, hurt and injured in his/her health, strength, and activity, sustaining injury to his/her body and shock and injury to his/her nervous system and person, all of which injuries have caused and continue to cause plaintiff great mental, physical, and nervous pain and suffering. (Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.) As a result of such injuries, plaintiff has suffered general damages].

[9. As a further proximate result of the wrongful conduct of defendants as alleged above, plaintiff has incurred, and will continue to incur, medical and related expenses.

10. As a further proximate result of the wrongful conduct of defendants as alleged above, plaintiff suffered damages in the amount of

$_____ which he/she paid for a ticket from _____ [*location*], the point where he/she was expelled from the _____ [*specify type of conveyance, e.g.*, railroad train] to _____ [*location*], his/her destination, and in the amount of $_____ [*specify any damages which proximately resulted from loss of time, e.g.*, from missing connecting conveyance].

11. [*Allege any other special damages proximately resulting from defendants' wrongful conduct, such as loss of wages.*]

[12. The acts of defendant _____ (*name of agent*) were committed without provocation, and with malice and ill will, and with the intent to frighten, oppress, and injure plaintiff and plaintiff is therefore entitled to exemplary and punitive damages from defendant _____ (*name of agent*).]

[13. Defendant _____ (*name of carrier*) _____ (authorized *or* ratified *or both*) the willful, malicious, and oppressive acts of defendant _____ (*name of agent*) in that _____ (*specify*) and plaintiff is therefore entitled to exemplary and punitive damages from defendant _____ (*name of carrier*).]

[14. On or about _____ (*date*), plaintiff presented to _____ (*name of governmental entity*) by _____ (delivering *or* mailing) a claim to the _____ (clerk *or* secretary *or* auditor) for the injuries, disability, losses, and damages suffered and incurred by him/her by reason of the above-described occurrence, all in compliance with the requirements of *Section 905 of the Government Code*. A copy of the claim is attached hereto as Exhibit A and made a part hereof.]

[15. On or about _____ (*date*), _____ (*name of governmental entity*) _____ (rejected the claim in its entirety *or* allowed the claim in the amount of $_____ and rejected it as to the remainder *or* failed to act on the claim within the period of 45 days after its presentation, and the claim was thus deemed rejected, under the provisions of *Section 912.4 of the Government Code*, at the expiration of the 45 day period, to wit, on _____ [*date*]).]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages according to proof;

[2. For medical and related expenses according to proof;]

[3. For the cost of a _____ (*specify, e.g.*, train ticket) in the amount of $_____;]

[4. _____ (*Specify any other special damages*);]

[5. For exemplary and punitive damages;]

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form of complaint is for use by a passenger against a common carrier and its agent to recover damages based on wrongful ejection of the passenger. The action may be based on wrongful ejection of the passenger. The action may be based on an ejection which is wrongful under *Civ. Code § 2188* and/or *Pub. Util. Code § 7656* (railroad) and which is accomplished either with or without excessive or unnecessary force or violence. The action may also be based on an ejection which is initially proper because the passenger did not pay the fare [*Civ. Code § 2188*; *Pub. Util. Code § 7656*] or did not follow lawful regulations of the carrier [*Civ. Code § 2188*], but is accomplished either in an improper manner with excessive force or violence or at a place not permitted by the statutes [*see Civ. Code § 2188*; *Pub. Util. Code § 7656*].

Because this form of complaint is a tort action, the jury may award exemplary damages, at least against the agent [*see Gorman v. Southern Pac. Co. (1892) 97 Cal. 1, 7, 31 P. 1112* ; *see also Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 921, 114 Cal. Rptr. 622, 523 P.2d 662*].

[3] Allegations

This complaint alleges in part:

- That defendant carrier is a common carrier of passengers for reward (Paragraph 4);

- When applicable, that plaintiff paid fare (Paragraph 5) [*see Civ. Code § 2188*; *Pub. Util. Code § 7656*];

- That defendant wrongfully ejected plaintiff, with excessive force, if applicable (Paragraph 7) [*see Civ. Code § 2188*; *Pub. Util. Code § 7656*];

- General damages, including plaintiff's mental suffering (Paragraph 8) [*see Sloane v. Southern Cal. Ry. Co. (1896) 111 Cal. 668, 678-684, 44 P. 320]* ;

- Other damages proximately caused by wrongful ejection (Paragraphs 9-11), such as medical expenses (Paragraph 9), cost of ticket for transportation from place of expulsion and damages resulting

from loss of time (Paragraph 10) [*Gorman v. Southern Pac. Co. (1892) 97 Cal. 1, 6, 31 P. 1112]* .

The form also includes optional allegations to seek exemplary and punitive damages, where applicable (Paragraphs 12, 13) [*Civ. Code § 3294*]. In seeking exemplary damages, it is alleged that the acts of the agent of defendant carrier were intentional and malicious [*Civ. Code § 3294*] and where appropriate that the carrier authorized or ratified the acts [*see Warner v. Southern Pac. Co. (1896) 113 Cal. 105, 111-118, 45 P. 187]* .

The complaint also alleges the filing of a claim with a public entity and either its total or partial rejection (Paragraphs 14, 15). This allegation must be used if the passenger was injured by a vehicle owned and operated by a public transit authority since *Gov. Code § 905* requires that such a claim be presented to the appropriate public entity as a prerequisite to filing suit against it. For discussion and forms relating to claims against public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[4] Wrongful Ejection

A common carrier may eject a passenger from the carrier's vehicle if the passenger refuses to pay the fare or to conform to any lawful regulation of the carrier. This must be done with as little violence as possible and either at any usual stopping place or near some dwelling house [*Civ. Code § 2188*]. If the carrier is a railroad corporation [*see Pub. Util. Code § 230*], the conductor and employees of the corporation may, after stopping the train, put any passenger who refuses to pay the fare or to exhibit or surrender his or her ticket out of the train with his or her baggage. This also must be done at any usual stopping place or near any dwelling house and without using unnecessary force [*Pub. Util. Code § 7656*]. Any common carrier who violates *Civ. Code § 2188* or *Pub. Util. Code § 7656* may be liable to the passenger for damages [*see, e.g.,* *Sloane v. Southern Cal. Ry. Co. (1896) 111 Cal. 668, 44 P. 320]* .

In addition, when a common carrier contracts to convey a person, this contract gives rise to a duty to deliver the person to his or her destination, and a breach of this duty may justify tort damages [*Sloane v. Southern Cal. Ry. Co. (1896) 111 Cal. 668, 676-677, 44 P. 320* ; *Ingham v. Luxor Cab Co. (2001) 93 Cal. App. 4th 1045, 1051, 113 Cal. Rptr. 2d 587]* . A common carrier that ejects a passenger at a place other than the designated destination violates a common carrier's affirmative duty to prevent harm to its passengers if the ejectment subjects the passenger to reasonably foreseeable injury [*Ingham v. Luxor Cab Co. (2001) 93 Cal. App. 4th 1045, 1051, 113 Cal. Rptr. 2d 587]* .

[5] Allegation of Amounts

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[6] Punitive Damages

Though the carrier is liable for the actual damages caused by its employee's malicious acts in wrongfully ejecting a passenger, when the act of the employee was within the scope of the employee's general authority, the carrier is apparently not liable for exemplary or punitive damages under *Civ. Code § 3294(a)* for the acts of an employee unless the employer had advance knowledge of the employee's unfitness, and employed him or her with conscious disregard for the safety or rights of others, or authorized or ratified the wrongful conduct for which punitive damages are awarded, or was personally guilty of malice, fraud, or oppression. With respect to corporate employers, the employer will not be liable for punitive damages for the acts of an employee unless an officer, director, or managing agent of the corporation had advance knowledge of the unfitness of the employee, and employed him or her anyway with conscious disregard of the safety or rights of others, or unless an officer, director or managing agent authorized or ratified the wrongful act of the employee, or personally committed an act of malice, fraud, or oppression [*Civ. Code § 3294(b)*].

[7] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[8] State Statutes

Injury while boarding moving train without authority. *Civ. Code § 1714.7*

Carriage in general. *Civ. Code §§ 2085-2090*

Carriage of persons. *Civ. Code §§ 2096-2104*

Common carriers in general. *Civ. Code §§ 2168-2178*

Common carriers of passengers. *Civ. Code §§ 2180-2191*

Duty of common carrier when ejecting passenger. *Civ. Code § 2188*; *Pub. Util. Code § 7656*

Carrier is not entitled to fare from ejected passenger. *Civ. Code § 2190*

Exemplary damages. *Civ. Code § 3294*

Liability for torts of agents. *Civ. Code §§ 2338, 2343*

[9] Decisions

[a] Liability

Liability of carrier for unlawful ejection. Kline v. Central Pac. R.R. Co. (1869) 37 Cal. 400, 407-408, 99 Am. Dec. 282

Wrongfully ejected passenger is able to bring action on contract of carriage or in tort. *Sloane v. Southern Cal. Ry. Co. (1896) 111 Cal. 668, 677, 44 P. 320*

[b] Damages

Carrier is liable for actual damages caused by wanton and malicious act of conductor if act of servant within scope of general authority. *Warner v. Southern Pac. Co. (1896) 113 Cal. 105, 111, 45 P. 187* ; Kline v. Central Pac. R.R. Co. (1869) 37 Cal. 400

Measure of damages in case of wrongful expulsion without unnecessary violence and with no resulting bodily injury is cost of ticket from point of expulsion to passenger's destination with allowance for damages actually resulting from loss of time. *Gorman v. Southern Pac. Co. (1892) 97 Cal. 1, 6, 31 P. 1112*

Plaintiff is entitled to compensatory damages for indignity endured, mental suffering, humiliation and wounded pride, when expulsion accompanied by undue violence or insult and abuse. *Gorman v. Southern Pac. Co. (1892) 97 Cal. 1, 6, 31 P. 1112* ; *Sloane v. Southern Cal. Ry. Co. (1896) 111 Cal. 668, 678-684, 44 P. 320*

Mental suffering of plaintiff as properly inferred from unlawful ejection by unnecessary force. *Cosey v. Los Angeles Ry. Corp. (1923) 192 Cal. 265, 273-274, 219 P. 978*

Damages for personal injuries resulting from walk necessitated by ejection allowed where walking was prudent course to avoid further inconvenience, discomfort, and damage. *Bland v. Southern P. R. Co. (1884) 65 Cal. 626, 628-629, 4 P. 672* ; Clare v. Northwestern Pac. R.R. Co. (1913) 21 Cal. App. 214, 220-221, 131 P. 323

Employer as not liable for exemplary damages based on act of servant unless employer authorized the malicious act beforehand or ratified it afterwards. *Warner v. Southern Pac. Co. (1896) 113 Cal. 105, 111-118, 45 P. 187*

Action as in tort to recover damages when passenger is wrongfully expelled from train and jury as authorized to award exemplary damages if defendant, in expelling passenger, guilty of oppression, fraud or violence. *Gorman v. Southern Pac. Co. (1892) 97 Cal. 1, 6-7, 31 P. 1112*

Failure to discharge agent as evidence of ratification by employer of defendant's malicious act, but standing by itself and unsupported by other circumstances as not sufficient to establish ratification. *Edmunds v. Atchison, Topeka & Santa Fe Ry. Co. (1917) 174 Cal. 246, 249, 162 P. 1038*

[c] Defenses

Conductor's honest mistake as not defense in action against common carrier for wrongful ejection. *Gorman v. Southern Pac. Co. (1892) 97 Cal. 1, 6, 31 P. 1112*

[10] Cross References

For alternative forms of allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms of allegations as to damages, see Ch. 177, *Damages*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* and Ch. 572, *Verification*

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§ 109.201 Complaint for Damages [Civ. Code §§ 3294, 3333] for Assault and Battery [Civ. Code § 2103]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2103, 2338] and Its Employee [Civ. Code § 2343]--Assault and Battery by Carrier's Agent

[1] FORM Complaint for Damages [Civ. Code §§ 3294, 3333] for Assault and Battery [Civ. Code § 2103]--By Passenger Against Carrier of Passengers for Reward [Civ. Code §§ 2103, 2338] and Its Employee [Civ. Code § 2343]--Assault and Battery by Carrier's Agent

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	(Assault and Battery)
[and DOES 1 through _____,]	)	[Amount demanded _____
Defendants.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

[1. *Allegation of capacity and residence of defendant carrier. See § 109.200[1], Paragraph 1.*]

2. [Plaintiff is informed and believes and thereon alleges that] [A]t all times herein mentioned, defendant _____ (*name*) [and DOES 1-_____, inclusive,] was/were the agents of defendant _____ [*name of carrier*] [and in doing the things hereinafter alleged was/were acting within the course and scope of such agency and with the permission and consent of defendant carrier].

[3. *Fictitious name allegation, if appropriate. See § 109.200[1], Paragraph 3.*]

[4. *Allegation of common carriage for reward by defendant carrier. See § 109.200[1], Paragraph 4.*]

5. _____ [*Set forth facts establishing carrier-passenger relationship, e.g.*, Plaintiff boarded defendant carrier's train at _____ (*location*) on or about _____ (*time*) on _____ (*date*), paid his/her fare, and was accepted as a passenger by defendant carrier's conductor.]

6. On or about _____ [*date*], plaintiff was riding as a passenger on a certain _____ [*specify type of conveyance, e.g.*, railroad train] owned, operated, maintained, and controlled by defendant carrier on a route from _____ [*location*] to plaintiff's destination at _____ [*destination*].

7. At approximately _____ [*time*], while the _____ [*specify type of conveyance, e.g.*, railroad train] was at or near _____ [*location*], defendant _____ [*name of agent*] willfully and unlawfully assaulted and battered plaintiff by _____ [*specify, e.g.*, threatening to strike plaintiff and violently grasping, striking, and shoving plaintiff].

8. By reason of the wrongful and malicious acts of defendants and of the fright caused plaintiff, plaintiff has suffered extreme and severe mental anguish and physical pain and has been injured in mind and body as follows: _____ [*describe*], all to plaintiff's damage.

[9-11. *Allegations of damages for medical expenses, other special damages, and exemplary damages, if appropriate. See § 109.200[1], Paragraphs 9, 11-13.*]

[12. *Allegation of filing of claim with and rejection by defendant governmental entity. See § 109.200[1], Paragraphs 14, 15.*]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages according to proof;

[2. For medical and related expenses according to proof;]

3. _____ [*Specify any other special damages*];

[4. For exemplary damages;]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 109.200[1].*]

[2] Use of Form

This form of complaint is for use by a passenger for obtaining damages from a carrier of passengers for reward and its agent for assault and battery.

[3] Allegations

The complaint alleges that: (1) the plaintiff was a passenger on defendant carrier's vehicle [*see Grier v. Ferrant (1944) 62 Cal. App. 2d 306, 310, 144 P.2d 631* (creation of carriage-passenger relationship)] (Paragraphs 5, 6); and (2) agents of defendant carrier violated their duty to plaintiff as a passenger on defendant carrier's vehicle [*see Civ. Code §§ 2100, 2103*] by assaulting and battering plaintiff (Paragraph 7) with resultant damages to plaintiff (Paragraphs 8-11) [*see Civ. Code § 3333*; *see also Berger v. Southern Pac. Co. (1956) 144 Cal. App. 2d 1, 6-8, 300 P.2d 170]* .

[4] Carrier's Liability

A carrier is liable for acts of assault and battery by its employees which result in injury to those it has agreed to transport. This liability is not dependent on whether the employee was acting within the scope of the employee's authority, but is based on the broad duty of a common carrier to protect its passengers from assault [*Berger v. Southern Pac. Co. (1956) 144 Cal. App. 2d 1, 7-8, 300 P.2d 170]* .

[5] State Statutes

Carrier of persons for reward as owing utmost care and diligence for passenger's safe carriage. *Civ. Code § 2100*

Passengers as required to be treated with civility. *Civ. Code § 2103*

[6] Decisions

Carrier liable for assault by employee on passenger, even where act is merely that of individual, entirely disconnected from performance of duties. *Berger v. Southern Pac. Co. (1956) 144 Cal. App. 2d 1, 6-8, 300 P.2d 170*

Allegation of carrier-passenger relationship. *Grier v. Ferrant (1944) 62 Cal. App. 2d 306, 310-312, 144 P.2d 631*

In action for assault and battery, allegation that plaintiff was accepted as passenger for hire by driver acting within course and scope of employment as agent, servant, or employee of defendant carrier was sufficient without allegation that at time of injury driver and other assailant was acting for defendant carrier. *Connell v. Clark (1948) 88 Cal. App. 2d 941, 944-945, 200 P.2d 26*

[7] Cross References

For a related form, see *§ 109.200*

For a discussion of and forms relating to assault and battery, see Ch. 58, *Assault and Battery*

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A. Carriage Of Persons

11-109 California Forms of Pleading and Practice--Annotated §§ 109.202-109.219

[Reserved]

§§ 109.202[Reserved]

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Chapter 109 CARRIERS
PART IV. FORMS
B. Freight
1. Injury, Loss, or Nondelivery in Intrastate Commerce

11-109 California Forms of Pleading and Practice--Annotated § 109.220

§ 109.220 Complaint for Damages [Civ. Code § 3316] For Losses Based on Nondelivery of Freight [Com. Code § 7301(a)]--By Consignee Against Common Carrier

[1] FORM Complaint for Damages [Civ. Code § 3316] For Losses Based on Nondelivery of Freight [Com. Code § 7301(a)]--By Consignee Against Common Carrier

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	(Failure to Deliver Freight)
[and DOES 1 through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, _____ [*allege capacity and residence of defendant, e.g.*, a corporation duly organized and existing under the laws of California with its principle place of business in (_____ (*city*)) _____ County].

[2. *Fictitious name allegation, if appropriate. See § 109.200, Paragraph 3.*]

3. At all times herein mentioned, defendant was a[n] [inland] common carrier of freight for reward.

4. On or about _____ [*date*], at _____ [*name of city or town*], California, _____ [*name of consignor of freight*] delivered to defendant for shipment property of plaintiff consisting of _____ [*describe freight, e.g.,* ten cartons of books]. Defendant received this freight to be carried safely to _____ [*name of city or town*], California, for [personal] delivery to plaintiff.

5. On or about _____ [*date*], at _____ [*name of city or town*], California, defendant issued and delivered its _____ [*specify type, e.g.,* original straight] bill of lading in which plaintiff was designated as consignee of the freight described above in Paragraph 4 and _____ [*name of city or town*], California, was designated as the destination of the freight for delivery to the consignee. A true and correct copy of the bill of lading is attached hereto as Exhibit A and made a part hereof.

6. On or about _____ [*date*], plaintiff became the holder for value of the bill of lading described above in Paragraph 5, and since that date has been and now is the holder for value of the bill of lading.

7. Defendant did not safely carry and deliver the goods and merchandise pursuant to the provisions of the bill of lading, but in direct violation of the bill of lading failed and neglected to [either carry or] deliver [all of] the freight to _____ [*destination*], California, and to plaintiff, [but delivered, instead, only a portion of the freight, such protion consisting of _____ (*specify, e.g.,* 100 of the 200 cartons)].

8. On or about _____ [*date*], plaintiff demanded of defendant [in writing] that defendant deliver to plaintiff [of all] the freight described above, or reimburse plaintiff for the reasonable market value of the freight. [Plaintiff tendered the freight charges and duly endorsed bill of lading to defendant.] Defendant, however, refused plaintiff's demand.

9. Plaintiff's demand was made on defendant after a reasonable time for delivery of the freight by defendant to plaintiff had passed.

10. The value of the freight at _____ [*destination*], California, on _____ [*date on which freight should have been delivered*] was $_____. The freightage to which defendant would have been entitled for delivering the freight was $_____.

11. By reason of the failure of defendant to [carry and] deliver the freight to plaintiff, plaintiff has been damaged in the amount of $_____, which is the value the freight would have had on delivery at its destination, deducting the freightage.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the sum of $_____;

2. For interest from _____ [*date*], to _____ [*date*], at _____ percent [*legal rate*] on $_____, in the amount of $_____;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 109.200.*]

[2] Use of Form

This form of complaint is for use in an action under *Com. Code § 7301* for damages caused by nondelivery or partial delivery of freight brought by a consignee against a common carrier of freight in intrastate commerce. A consignor who has been damaged by nondelivery may adapt this complaint to bring an action based on breach of contract, rather than on *Com. Code § 7301*, which provides only for an action by the consignee.

[3] Allegations

The complaint alleges that:

- The consignor delivered the goods to defendant carrier (Paragraph 4).
- Defendant carrier issued a bill of lading (Paragraph 5).
- Plaintiff was the holder for the value of the bill of lading (Paragraph 6) [*Com. Code § 7301*].
- Defendant carrier failed to deliver the goods as agreed (Paragraph 7).
- Plaintiff demanded delivery of the goods, and, when required by *Com. Code § 7403(b), (c)*, plaintiff tendered freight charges and the bill of lading to defendant (Paragraph 8) [*see Com. Code § 7403(b), (c)*].

[4] Notice of Claim

Generally, the performance of all conditions which are precedent to the liability of a defendant must be alleged. Under *Code Civ. Proc. § 457*, plaintiff may satisfy this requirement by stating generally that plaintiff duly performed all the conditions on his or her part [*see Byrne v. Harvey (1962) 211 Cal. App. 2d 92, 112-113, 27 Cal. Rptr. 110]* . Therefore, if the bill of lading provides that claims for losses must be made to the carrier prior to bringing suit, plaintiff should allege compliance with the requirements of the particular bill of lading.

[5] Damages

If the carrier has not converted the freight, the detriment caused by its breach of an obligation to deliver freight is the value of the freight at the place and on the day it should have been delivered, deducting the freightage to which the carrier would have been entitled had it completed the delivery [*Civ. Code § 3316*; *see also Olcovich v. Grand T. R. Co. (1918) 179 Cal. 332, 335, 176 P. 459]* .

[6] Interest

Except as otherwise provided, every person in whom a right to recover damages is vested on a particular day, is entitled to recover interest on the damages from that day if the damages are certain or capable of being made certain by calculation [*Civ. Code § 3287*]. This provision has been construed to permit interest on claims for loss of a shipment [*see Olcovich v. Grand T. R. Co. (1918) 179 Cal. 332, 336, 176 P. 459]* .

[7] State Statutes

Definitions regarding carriage of freight. *Civ. Code § 2110*

Care required of freight carriers. *Civ. Code §§ 2114, 2194*

Directions of consignor. *Civ. Code § 2115*; *Com. Code § 7303*

Duties of carrier respecting delivery of freight. *Civ. Code §§ 2118-2121*; *Com. Code §§ 7403, 7404*

Freightage. *Civ. Code §§ 2136-2144*

Common carriers generally. *Civ. Code §§ 2168-2178*

Interest on damages. *Civ. Code § 3287*

Damages caused by nonreceipt of freight. *Civ. Code § 3316*; *Com. Code § 7301(a)*

Bills of lading. *Com. Code §§ 7301-7309, 7501-7509*

[8] Decisions

Measure of damages. *Olcovich v. Grand T. R. Co. (1918) 179 Cal. 332, 335, 176 P. 459*

Interest as allowed on claims for loss of shipment. *Olcovich v. Grand T. R. Co. (1918) 179 Cal. 332, 336, 176 P. 459*

[9] Text References

Witkin, Summary of California Law, vol. 3, *Personal Property*, § 150 et seq. (9th ed. 1987)

13 C.J.S., *Carriers*, §§ 2-528

13 Am. Jur. 2d, *Carriers*, §§ 225-732

[10] Cross References

For a related form, see *§ 109.200*

For discussion and forms of bills of lading, see California Legal Forms, Ch. 54, *Shipment of Property* (Matthew Bender)

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1. Injury, Loss, or Nondelivery in Intrastate Commerce

11-109 California Forms of Pleading and Practice--Annotated § 109.221

§ 109.221 Complaint for Damages [Civ. Code § 3317] for Losses Due to Delayed Delivery--By Consignor Against Common Carrier for Reward for Breach of Contract and Negligence [Civ. Code § 2196]

[1] FORM Complaint for Damages [Civ. Code § 3317] for Losses Due to Delayed Delivery--By Consignor Against Common Carrier for Reward for Breach of Contract and Negligence [Civ. Code § 2196]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Delay in Delivery of Freight)
[and DOES 1 through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

FIRST COUNT

(Breach of Contracts)

[1. *Allegation of capacity and residence of defendant carrier. See § 109.220[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 109.200[1], Paragraph 3.*]

3. At all times herein mentioned, defendant was a[n] [inland] common carrier of freight for reward.

4. _____ [*Describe circumstances which caused plaintiff to rely on defendant's services as a carrier, e.g.*, On or about _____ (*date*), plaintiff entered into a written agreement with _____ (*name of third party*) located in _____ (*city*), a copy of which is attached hereto as Exhibit A and made apart hereof, to _____ (*describe services to be performed or property to be delivered, e.g.*, present a play entitled _____ at the Curran Theatre in San Francisco for three weeks beginning on _____ [*date*])].

5. On _____ [*date*], plaintiff delivered [, in good condition,] to defendant at _____ [*location*], California, certain _____ [*describe property to be shipped, e.g.*, scenery] _____ [*state plaintiff's intended use for the property, e.g.*, to be used by plaintiff in the performance of its obligations under the contract with _____ (*third party*) as set out above in Paragraph 4].

6. At the time and place that plaintiff delivered the property [in good condition] to defendant, plaintiff and defendant entered into _____ [an oral *or* a written] agreement [which is attached hereto as Exhibit B and made a part hereof,] whereby defendant, in consideration of a reasonable compensation to be paid by plaintiff, agreed to safely and promptly carry the property and to deliver the same to plaintiff at _____ [*location*], California, on or before _____ [*time*] on _____ [*date*], _____ [*where applicable, state reason for necessity of delivery at this time, e.g.*, so as to permit plaintiff to use the property in the performance of its duties pursuant to its agreement with _____ (*third party*) as described above in Paragraph 4].

7. Plaintiff has performed all conditions, covenants, and promises under the contract, on its part to be performed [, except _____ (*condition not performed*), the performance of which was excused on the ground that _____ (*specify*)].

8. Defendant did not fulfill its agreement to safely and promtly carry and deliver the property. Defendants failed to deliver the property at the time and place agreed on, and did not deliver the property until _____ [*time*] on _____ [*date*].

9. As a direct and proximate result of defendant's breach of contract as set out above, plaintiff was damaged as follows: _____ [*specify damages using depreciation measure under Civ. Code § 3317, or other measure if appropriate, including any additional facts necessary to support award of stated damages, such as facts showing that damages were to be reasonably anticipated by defendant*], in the amount of $_____.

SECOND COUNT

(Negligence)

1. Plaintiff refers to and herein incorporates Paragraphs 1-5, inclusive of the First Count.

[2. Defendant has performed services of a similar character for plaintiff and for other persons in the same business as plaintiff, and is well acquainted with the customs and practices of the business with respect to the moving of such property from one city to another, and particularly in connection with the necessity of delivering such property in time

to permit persons such as plaintiff and others in the same business to _____ [*specify reasons for need for prompt delivery, e.g.*, fulfill their contractual obligations as described above.]

3. Defendant so negligently and carelessly conducted itself in the carriage of plaintiff's property that it did not deliver the property to _____ [*destination*], California, until [_____ [*time*], on _____ [*date*].

4. The time from [_____ [*time*], on _____ [*date*], when plaintiff delivered the freight to defendant for shipping until [_____ (*time*)], when defendant delivered the freight at _____ [*destination*], California, was longer than the reasonable amount of time for transporting the freight from _____ [*beginning location*], California, to _____ [*destination*], California.

5. As a direct and proximate result of defendant's negligent delay, plaintiff was damaged as follows: _____ [*set forth facts showing damages using measure under Civ. Code § 3317, or other measure where appropriate*] in the amount of $_____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Prayer. See § 109.220[1].*]

[*Verification if desired. See § 109.200[1].*]

[2] Use of Form

This form of complaint is for use by a shipper to recover damages for injuries based on delay by a common carrier in delivering freight within California. It is intended for use where the shipper is the consignor and consignee, and there is a contract between the shipper and the carrier which specifies a particular time for delivery. The damages are based on losses incurred due to the delay rather than to direct injury to the freight. The form, however, may be modified for use where the freight is injured. The first count is based on breach of contract, and the second count is based on negligence [*Civ. Code § 2196*]. If there is no contract provision specifying a time for delivery, counsel for plaintiff may adapt this form to state only a cause of action based on negligence [*Civ. Code § 2196*].

[3] Allegations

In the first count for breach of contract, the complaint alleges that:

- Plaintiff delivered the property to defendant for carriage (Paragraph 5).

- Plaintiff and defendant entered into a contract for the carriage of the property which contract specified that the property was to be delivered at the destination at or before a certain time (Paragraph 6).

- Plaintiff performed all conditions precedent (Paragraph 7) [*see* Code Civ. Proc. § 457 (general allegation of performance of conditions precedent as permissible)].

- Defendant's failure to deliver the property within the time allowed by the contract (Paragraph 8).

- Damages as measured under *Civ. Code § 3317*, or other measure as proper (Paragraph 9) [*see Artists' Embassy v. Hunt (1958) 157 Cal. App. 2d 371, 374, 320 P.2d 924]* .

In the second count for negligence, the complaint:

- Incorporates applicable allegations of first count (Paragraph 1).

- Alleges defendants' knowledge of the need for prompt delivery (Paragraph 2).

- Alleges negligence causing late delivery (Paragraphs 3, 4) [*see Civ. Code § 2196*].

- Alleges damages (Paragraph 5) [*Civ. Code § 3317*; *see also Artists' Embassy v. Hunt (1958) 157 Cal. App. 2d 371, 374, 320 P.2d 924]* .

[4] Condition of Property

Plaintiff generally has the burden of proving that the property was in good condition when it was delivered to the carrier for carriage, when there is no direct proof of an accident resulting in injury to the goods [*Merchant Shippers Ass'n v. Kellogg Express & Draying Co. (1946) 28 Cal. 2d 594, 599, 170 P.2d 923* ; *Schraeder v. Robinson (1947) 78 Cal. App. 2d 328, 335, 177 P.2d 788]* . However, the burden of proving that the freight was in good condition when delivered to the carrier is not on plaintiff when facts, such a that the goods were open to inspection, raise a presumption that the freight was in good condition [*Schraeder v. Robinson (1947) 78 Cal. App. 2d 328, 335, 177 P.2d 788* (action for death of a race horse caused by carrier's delay)].

[5] Damages

The detriment caused by a carrier's delay in the delivery of freight is deemed to be the depreciation in the intrinsic value of the freight during the delay, and also the depreciation, if any, in the market value thereof otherwise than by reason of a depreciation in its intrinsic value, at the place where it ought to have been delivered and between the day at which it ought to have been delivered and the day of its actual delivery [*Civ. Code § 3317*]. However, this measure is applicable only where its criterion for measuring damages is appropriate, such as where the goods are perishable, or they have a market for the use intended by which their value can be determined. When the property was not purchased by plaintiff for resale but to be used in performance of a contractual duty or in its business, the measure of damages would be the loss sustained arising from defendant's negligent action, rather than any difference in the value of the property [*Artists' Embassy v. Hunt (1958) 157 Cal. App. 2d 371, 374, 320 P.2d 924* (peculiar value of property to owner under *Civ. Code § 3355* as proper measure of damages for delay in delivery of scenery and stage properties to be used in performance of play)].

[6] State Statutes

Common carriers liability for delay in transit. *Civ. Code § 2196*

Damages for delay in delivery of freight. *Civ. Code § 3317*

[7] Decisions

Measure of liability of common carrier of merchandise for loss or injury of merchandise as very different from liability for delay in transporting and delivering such merchandise, which liability is only for want of ordinary care and diligence under *Civ. Code § 2196*. *Palmer v. Atchison, Topeka & Santa Fe R.R. Co. (1894) 101 Cal. 187, 193-194, 35 P. 630*

Carrier as able to bind itself by contract to deliver goods within given time and in absence of such contract carrier as only bound to deliver goods within reasonable time. *Palmer v. Atchison, Topeka & Santa Fe R.R. Co. (1894) 101 Cal. 187, 194, 35 P. 630*

Plaintiff as generally having burden of proving property in good condition when delivered to carrier where no direct proof of accident resulting in injury as result of delay. *Schraeder v. Robinson (1947) 78 Cal. App. 2d 328, 335, 177 P.2d 788* (delay)

Burden of proving freight in good condition when delivered to carrier as not on plaintiff when facts raise presumption that freight in good condition such as when goods open to inspection. *Schraeder v. Robinson (1947) 78 Cal. App. 2d 328, 335, 177 P.2d 788* (action for death of race horse caused by carrier's delay)

Where property not purchased by plaintiff for resale but to be used in performance of contractual duty or in plaintiff's business, measure of damages as loss sustained arising from defendant's negligent action rather than any difference in the value of property. *Artists' Embassy v. Hunt (1958) 157 Cal. App. 2d 371, 374, 320 P.2d 924* (*Civ. Code § 3355*, not 3317, as measure of damages for delay in performance of play)

[8] Cross References

For related forms, *see §§ 109.200* and *109.221*

For discussion of and forms for actions for breach of contract generally, see Ch. 140, *Contracts*

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11-109 California Forms of Pleading and Practice--Annotated § 109.222

§ 109.222 Complaint for Damages [Civ. Code § 3316] for Loss of or Injury to Freight by Consignor/Consignee Against Common Carrier of Freight for Reward--Strict Liability of Carrier [Civ. Code § 2194]

[1] FORM Complaint for Damages [Civ. Code § 3316] for Loss of or Injury to Freight by Consignor/Consignee Against Common Carrier of Freight for Reward--Strict Liability of Carrier [Civ. Code § 2194]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(_____ [Loss of *or* Injury to]
[and DOES 1 through _____,]	)	Freight)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST COUNT
(Strict Liability)

[1. *Capacity and residence of defendant common carrier. See § 109.220[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 109.200[1], Paragraph 3.*]

3. Defendant _____ [*name of carrier*], at all times mentioned herein, was, and now is, an inland common carrier of goods for reward between various places including those hereinafter mentioned.

[4. DOES 1-_____, inclusive, were at all times herein mentioned the agents, servants, and employees of defendant _____ (*name of carrier*), and in doing the things hereinafter mentioned, were acting in the scope of their authority as such agents, servants, and employees, and with the permission and consent of defendant _____ (*name of carrier*).]

5. On or about _____ [*date*], at _____ [*name of city or town*], California, _____ [*name of plaintiff or consignor, if plaintiff not consignor*] delivered to _____ [*name of carrier*] for shipment, property consisting of _____ [*describe freight*] [, in good condition]. _____ [*name of carrier*] received this freight to be safely carried to _____ [*name of city or town*], California, to be delivered to _____ [*name of plaintiff or consignee, if plaintiff not consignee*].

6. On or about _____ [*date*], at _____ [*name of city or town*], California, defendant issued and delivered its bill of lading. A true and correct copy of the bill of lading is attached hereto as Exhibit A and made a part hereof. [*If necessary, allege further facts showing plaintff's standing to bring the action, e.g.*, At all times herein mentioned, plaintiff was the owner of the goods in question.]

[7. _____ (*If necessary, allege further facts showing plaintiff's standing to bring the action, e.g.*, At all times mentioned herein, plaintiff was the owner of the goods in question).]

8. _____ [*If freight was lost, allege:* To this date the freight has not been delivered and plaintiff was notified by _____ (*name*) that the freight never arrived at _____ (*destination*), California, *or if freight was damaged, allege:*: On or about _____ (*date*), _____ (*name of carrier*) delivered the property to _____ (*destination*), California, in a damaged condition in that _____ (*specify, e.g.*, the carton had been crushed, breaking all of the containers enclosed therin].

[9. On or about _____ (*date*), plaintiff notified _____ (*name of carrier*) (in writing) that the freight was _____ (lost *or* damaged) and that plaintiff was requesting reimbursement for the _____ (loss of *or* injury to) the freight. _____ (*Name of carrier*) has not complied with plaintiff's request for reimbursement. A true copy of plaintiff's notice of claim to _____ (*name of carrier*) is attached hereto as Exhibit B and made a part hereof.]

10. _____ [*If freight was lost or totally destroyed allege:* The value of the freight at _____ (*destination*), California, on the date at which it should have been delivered was $_____, and the freightage was $_____ *or if freight was damaged, allege:* The value which the _____ (*specify nature of freight*) would have had at its destination if it had not been damaged was $_____, and its value at its destination in its damaged condition was $_____, the depreciation in value being therefore $_____ (*difference between first and second amount*)].

SECOND COUNT
(Negligence)

1. Plaintiff refers to and herein incorporates Paragraphs 1-7, inclusive, of the First Count.

2. The _____ [loss of *or* damage to] the freight was proximately caused by the negligence and carelessness of defendants and each of them.

3. As a direct and proximate result of the negligence of defendants and each of them, plaintiff has been damaged in the amount set out in Paragraph 5.

[4. On or about _____ (*date*), plaintiff notified _____ (*name of carrier*) (in writing) that the freight was _____ (lost *or* damaged) and that plaintiff was requesting reimbursement for the _____ (loss of *or* injury to) the freight. _____ (*Name of carrier*) has not complied with plaintiff's request for reimbursement. A true copy of plaintiff's notice of claim to _____ (*name of carrier*) is attached hereto as Exhibit B and made a part hereof.]

5. _____ [*If freight was lost or totally destroyed, allege:* The value of the freight at _____ (*destination*), California, on the date at which it should have been delivered was $_____, and the freightage was $_____ *or if freight was damaged allege:* The value which the _____ (*specify nature of freight*) would have had at its destination if it had not been damaged was $_____, and its value at its destination in its damaged condition was $_____, depreciation in its value being therefore $_____ (*difference between first and second amount*)].

[*Prayer. See § 109.220[1].*]

[*Verification, if desired. See § 109.200[1].*]

[2] Use of Form

This form of complaint is for use by a consignor or consignee in bringing an action for damages against a common carrier of freight for reward.

The first count is based on *Civ. Code § 2194*, which makes a common carrier strictly liable for loss or injury to the freight, with certain excepted causes. The burden is on the carrier to show that the loss resulted from one of the exceptions [*Brignoli v. Seaboard Transp. Co. (1947) 29 Cal. 2d 782, 792, 178 P.2d 445]* , and if it did, the carrier is liable only for negligence [*see Civ. Code § 2195*].

The second count is based on negligence under *Civ. Code § 2195* and is included in case defendant is able to show that the loss or damage occurred from one of the causes excepted from strict liability in *Civ. Code § 2194*.

Plaintiff may wish to add a cause of action for breach of contract to this form of complaint.

[3] Statute of Limitations

When it is established that the defendant is an inland common carrier of the freight in question, *Civ. Code § 2194* (strict liability) governs. Although ordinarily the defendant's capacity as a common carrier arises out of a contract, the cause of action is not based on the contract, which merely defines the relationship between the parties. Rather, the relationship gives rise to the statutory obligation, and therefore, the action is governed by the three-year statute of limitations of *Code Civ. Proc. § 338(a)* [*see BBD Transp. Co. v. Buller (1975) 49 Cal. App. 3d 124, 128-129, 122 Cal. Rptr. 357]* . Negligent injury to goods is limited by the three-year period of *Code Civ. Proc. § 338(c)* [*see Allred v. Bekins Wide World Van Serv. (1975) 45 Cal. App. 3d 984, 988-991, 120 Cal. Rptr. 312* (tolling of statute)].

[4] Allegations

The complaint alleges in the first count based on strict liability [*see Olcovich v. Grand T. R. Co. (1918) 179 Cal. 332, 335-337, 176 P. 459* ; *Civ. Code § 3316*]:

- Defendant is an inland common carrier for reward (Paragraph 3) [*Civ. Code § 2168*].
- The delivery of freight by the consignor to carrier, and the good condition of such freight, where applicable (Paragraph 5).
- The loss of or damage to freight (Paragraph 8).
- Claim to carrier, where applicable (Paragraph 9).
- Damages (Paragraph 10).

The second count:

- Incorporates the essential allegations of the first count (Paragraph 1).
- Alleges that the loss or damage was caused by negligence of defendants (Paragraph 2).
- Alleges that the damages proximately resulted from defendants' negligence (Paragraphs 3, 5).

[5] Damages

The measure of damages for injury to freight in absence of contract provisions, is the depreciation of the goods at the point of destination. Defendant may also be liable for the cost of reconditioning damaged goods, where such reconditioning raises the value of the damaged goods [*Olcovich v. Grand T. R. Co. (1918) 179 Cal. 332, 335-337, 176 P. 459]* .

Damages for loss of freight are deemed to be the value of the freight at the place and on the date it was to be delivered, minus the freightage to which the carrier would have been entitled on completed delivery [*see Civ. Code § 3316*].

[6] Interest

In an action for damages to goods, interest should be allowed on the depreciation of market value from the date of delivery of the goods. The fact that the determination of two market values is necessary does not render these damages "uncertain" [*Olcovich v. Grand T. R. Co. (1918) 179 Cal. 332, 336, 176 P. 459]* .

[7] State Statutes

Liability of common carrier of freight for loss or injury. *Civ. Code §§ 2194, 2195*

Liability on a through bill of lading. *Com. Code § 7302*

[8] Decisions

Burden of showing loss resulted from one of exceptions under *Civ. Code § 2194* (making defendant liable only for

negligence under *Civ. Code § 2195*) as on defendant. *Brignoli v. Seaboard Transp. Co. (1947) 29 Cal. 2d 782, 792, 178 P.2d 445*

Action for loss or injury to property by common carrier as based on statute and three-year limitation of former Code Civ. Proc. § 338(1) (*now see Code Civ. Proc. § 338(a)*) as applicable. *BBD Transp. Co. v. Buller (1975) 49 Cal. App. 3d 124, 128-129, 122 Cal. Rptr. 357*

Tolling of statute of limitations for loss or damage to freight. *Allred v. Bekins Wide World Van Servs. (1975) 45 Cal. App. 3d 984, 989-991, 120 Cal. Rptr. 312*

[9] Cross References

For related forms, *see §§ 109.200, 109.220* and *109.221*

For memoranda of points and authorities for use in actins for loss of or injury to freight, see California Points and Authorities, Ch. 33, *Carriers* (Matthew Bender)

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[Reserved]

§§ 109.223[Reserved]

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11-109 California Forms of Pleading and Practice--Annotated § 109.240

§ 109.240 Complaint for Damages [49 U.S.C.S. § 11707] for Loss of or Injury to Freight Shipped in Interstate Commerce--By Consignor/Consignee

[1] FORM Complaint for Damages [49 U.S.C.S. § 11707] for Loss of or Injury to Freight Shipped in Interstate Commerce--By Consignor/Consignee

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*]	)	(_____ [Loss of *or* Injury to]
Defendant(s).	)	Freight)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a corporation organized and existing under the laws of the state of _____ [*name*], and at all times herein mentioned was engaged in the business of the transportation of freight by _____ [*specify, e.g.*, railroad] for hire in interstate commerce subject to the Interstate Commerce Act [and was doing business in the state of California].

2. _____ [*If defendant is the delivering carrier by railroad allege* : Defendant _____ (*name*) operates and at all times herein mentioned, operated, a line in _____ County, California].

3. On or about _____ [*date*], _____ [plaintiff *or other consignor*] delivered to _____ [defendant *or other receiving carrier*] certain _____ [*describe goods*] at _____ [*city*], _____ [California *or other state*] for delivery to _____ [plaintiff *or other consignee*] at _____ [*city*], _____ [California *or other state*].

4. _____ [Defendant ('s agent) issued and signed the bill of lading acknowledging receipt of the goods in good order and condition *or allege other facts showing goods delivered to receiving carrer in good condition*].

5. _____ [The goods were never delivered to _____ (plaintiff *or name of other consignee*) *or if goods damaged*, On or about _____ (*date*), the goods were delivered in a damaged condition in that _____ (*describe damage*)].

6. _____ [Plaintiff is the lawful holder of the bill of lading *or allege other facts showing that plaintiff is entitled to recover on the bill of lading*].

7. _____ [*Set forth facts showing proper measure of damages, e.g.*, The value of the property as the condition in which it should have been delivered was $_____ and the value of the property as delivered was only $_____].

8. As a direct and proximate result of the _____ [damage to the goods *or* nondelivery of the goods], plaintiff has been damaged in the amount of $_____.

[9. On or about _____ (*date*), plaintiff filed with _____ (defendant *or other carrier as required by bill of lading*) a claim as required by the bill of lading.]

[*Prayer. See § 109.220[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

This form of complaint is for use in recovering damages for loss of or injury to freight shipped in interstate commerce. The complaint may be brought by the consignee or other person who either is the lawful holder of the bill of lading or receipt or is entitled to recovery on the receipt or bill of lading. The complaint is designed to be filed against the carrier who received the goods from the consignor or the carrier who was to deliver the goods to the consignee, but may be adapted, however, to include connecting carriers, if desired. Plaintiff may also add allegations of negligence and breach of contract to this form, if desired.

[3] Allegations

The form alleges the elements necessary for a prima facie case for loss of or injury to the goods, which are [*see* Missouri Pac. R.R. Co. v. Elmore & Stahl (1964) 377 U.S. 134, 137-138, 84 S. Ct. 1142, 12 L. Ed. 2d 194] :

- Delivery of goods to carrier in good condition (Paragraphs 3, 4).
- Arrival of goods in damaged condition or nondelivery of goods (Paragraph 5).
- The amount of damages (Paragraphs 7, 8).

[4] Time for Bringing Suit

No receiving or delivering carrier liable under the Carmack Amendment [*49 U.S.C.S. § 11707*] may provide by rule, contract, regulation, or otherwise a period shorter than two years for instituting a lawsuit. This period begins to run from the time that the carrier gives notice in writing of disallowance of a claim [*49 U.S.C.S. § 11707*].

[5] Written Notice of Claim

The rules of the Interstate Commerce Commission provide that a claim for loss or damage to baggage or loss, damage, injury, or delay to freight, may not be voluntarily paid by the carrier unless the claim is filed in writing [*49 C.F.R. § 1005.1*]. A receiving or delivering carrier is prohibited from providing a period shorter than nine months for the filing of claims [*49 U.S.C.S. § 11707*]. Though failure of the plaintiff to give notice of a claim as required by a bill of lading might be considered a matter of affirmative defense, a plaintiff who has given the required notice should probably plead such notice as condition precedent [*see § 109.220*].

[6] California Legal Forms

For discussion and forms of bills of lading, see California Legal Forms, Ch. 54, *Shipment of Property* (Matthew Bender)

[7] Federal Statutes

Bills of lading. *49 U.S.C.S. § 80101 et seq.*

Carmack Amendment. *49 U.S.C.S. § 11707*

[8] Federal Regulations

Requirement that claim to carrier be in writing. *49 C.F.R. § 1005.1*

[9] Decisions

Actions under Carmack Amendment [*49 U.S.C.S. § 20(11)* (*now see 49 U.S.C.S. § 11707*)] as permitted to be brought in state as well as federal court. *Missouri ex rel. St. Louis, Brownsville & Mexico Ry. Co. v. Taylor (1924) 266 U.S. 200, 208, 45 S. Ct. 47, 69 L. Ed. 247*

Carmack Amendment [*49 U.S.C.S. § 20(11)* (*now see 49 U.S.C.S. § 11707*)] as codifying common law rule of liability of carrier without proof of negligence for damages, except for certain situations. *Secretary of Agriculture v. United States (1955) 350 U.S. 162, 165 n.9, 76 S. Ct. 244, 100 L. Ed. 173*

Elements of prima facie case for loss or injury to goods as delivery of goods to carrier in good condition, arrival of

goods in damaged condition or nondelivery of goods, and amount of damages. Missouri Pac. R.R. Co. v. Elmore & Stahl (1964) 377 U.S. 134, 137-138 , *377 U.S. 134, 84 S. Ct. 1142, 12 L. Ed. 2d 194*

General measure of damages as value of property at time and place it should have been delivered, or market value at destination. Illinois Cent. R.R. Co. v. Crail (1929) 281 U.S. 57, 64-65, 50 S. Ct. 180, 74 L. Ed. 699

Rule of difference between market value of property in condition in which it should have arrived at destination, and market value as it did arrive as not applicable when another rule is shown to be better computation of actual damages. Illinois Cent R.R. Co. v. Crail (1929) 281 U.S. 57, 64-65, 50 S. Ct. 180, 74 L. Ed. 699 ; *F.J. McCarty Co. v. Southern Pac. Co. (9th Cir. 1974) 428 F.2d 690, 692*

Provision authorized by Carmack Amendment (*49 U.S.C.S. § 11707* (former *49 U.S.C.S. § 20(11)*)) in carrier's tariffs limiting time in which to bring suit as applicable despite party's lack of actual notice of provision because reference in bill of lading put party on notice of existence of further terms and conditions. *Clancy v. Consolidated Freightways (1982) 136 Cal. App. 3d 543, 550, 186 Cal. Rptr. 257*

[10] Text References

Witkin, Summary of California Law, Vol. 4, *Personal Property*, §§ 152-155 (9th ed. 1987)

[11] Cross References

For related forms, *see §§ 109.200* and *109.222*

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[Reserved]

§§ 109.241[Reserved]

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3. Rates And Charges In Intrastate Commerce

11-109 California Forms of Pleading and Practice--Annotated § 109.260

§ 109.260 Complaint for Damages for Recovery of Overcharges on Shipment [Pub. Util. Code §§ 494, 532]--By Shipper Against Public Utility Common Carrier of Freight [Pub. Util. Code § 736]

[1] FORM Complaint for Damages for Recovery of Overcharges on Shipment [Pub. Util. Code §§ 494, 532]--By Shipper Against Public Utility Common Carrier of Freight [Pub. Util. Code § 736]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	No. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Rate Overcharge)
[and DOES 1 through _____,]	)	[Amount demanded _____
Defendant.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Defendant is, and at all times mentioned was, _____ [*allege capacity and residence, e.g.*, a corporation duly organized and existing under the laws of California, with its principle place of business in (_____ (*city*),) _____ County].

2. Defendant is, and at all times mentioned was, a _____ [*specify type of certificated carrier, e.g.*, railroad corporation] carrying freight for the public for compensation and a public utility subject to the provisions of the Public Utilities Act of the state of California.

[3. *Fictitious name allegation, if appropriate. See § 109.200[1], Paragraph 3.*]

4. On or about _____ [*date*], defendant contracted in writing in _____ County, California, to deliver the shipments mentioned herein to plaintiff. The _____ [*specify type of contract as applicable, e.g.*, bill of lading issued by defendant] is attached hereto as Exhibit A and made a part hereof.

5. On or about _____ [*date*], at _____, California, plaintiff [through his/her agent] delivered to defendant for transportation by defendant by _____ [*specify, e.g.*, rail] to _____ [*city*], California _____ [*describe freight, e.g.*, 100 carloads of _____ (*specify*)].

6. On or about _____ [*date*], defendant delivered the shipment to _____ [plaintiff *or other consignee*] at _____ [*city*], California.

7. Defendant charged, assessed, and collected freight charges for the shipment from plaintiff based on a purported rate of _____ [*specify rate charged by defendant, e.g.*, _____ cents per 100 pounds, per defendant's through rate from _____ (*point of origin*) to _____ (*destination*), plus _____ percent of the rate and $_____ switching charge].

8. The correct and applicable rate for the shipment based on defendant's tariff on file with the California Public Utilities Commission was _____ [*specify, e.g.*, _____ cents per 100 pounds, plus _____ percent of the rate, plus $_____, which is a combination rate composed of the following parts: _____ cents per 100 pounds from _____ (*point of origin*) to _____ (*intermediate point*) as per Item No. _____ of Freight Bureau, Tariff No. _____, California Public Utilities Commission No. _____; and _____ cents per 100 pounds from _____ (*intermediate point*) to _____ (*destination*) as per Item No. _____ of the tariff. Item No. _____ of the tariff authorizes application of a combination of rates when such combination is less than a through published rate].

9. The proper charges for the shipment pursuant to the rate set out in Paragraph 8, above, based on defendant's tariff filed with the Public Utilities Commission, were $_____, including federal transportation tax. Defendant however, charged, assessed and collected from plaintiff, pursuant to the rates set out in Paragraph 7, above, $_____, including federal transportation tax, which sum plaintiff paid to defendant on or about _____ [*date*]. Defendant thereby overcharged plaintiff in the sum of $_____.

10. As a result of defendant's conduct, as alleged above, plaintiff has been damaged in the sum of $_____, together with interest at the rate of _____ percent per annum on the amount of the overcharge on the shipment.

11. On or about _____ [*date*], plaintiff demanded [in writing] that defendant pay the $_____ in overcharges to plaintiff, but defendant has refused to pay the overcharges, and defendant owes plaintiff the sum of $_____, no part of which has been paid.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the sum of $_____ [*amount of overcharges*];

2. For interest from _____ [*date*] to _____ [*date*] at _____ [

legal rate] percent;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 109.200[1].*]

[2] Use of Form

This form of complaint is for use by a shipper against a public utility common carrier of freight for recovering damages for overcharges on an intrastate shipment of freight.

The use of this complaint is an alternative to the common procedure of filing a complaint for reparations with the Public Utilities Commission [*Pub. Util. Code § 734*] and bringing suit to enforce the commission's order for reparation, if the carrier does not comply [*Pub. Util. Code § 735*; *see § 109.100*].

[3] Court Action following Commission's Order

The Public Utilities Commission may order reparation for rates charged in violation of the provisions of *Pub. Util. Code §§ 203-2115* [*Pub. Util. Code § 734*]. This "reparation" includes refunds of charges which violate tariff provisions. If the public utility does not comply with the order for the payment of reparation within the time specified in the order, suit may be filed in a court of competent jurisdiction for recovery of the payment [*Pub. Util. Code § 735*]. The superior court may not review, revise, annul, or correct an order or decision of the commission [*see Pub. Util. Code § 1759*].

[4] Actions Originating in Court

An action may be brought in any court of competent jurisdiction against any public utility which does, causes, or permits any prohibited or unlawful act, or which does not do any act required to be done by the constitution, laws of this state, or order or decision of the Public Utilities Commission. The action may be brought by the persons (or corporations) affected thereby for all resulting loss, damages, or injury. If the court finds that the act or omission was willful it may award exemplary damages in addition to actual damages [*Pub. Util. Code § 2106*]. In cases interpreting the statutes which preceded the current Public Utilities Act [*Pub. Util. Code § 201 et seq.*], appellate courts have held that the trial courts have concurrent jurisdiction with the commission in all reparation cases which do not involve an exercise of administrative or regulatory power [*Atchison, Topeka & Santa Fe Ry. Co. v. Railroad Com. of California (1931) 212 Cal. 370, 379, 298 P. 991* (referring to §§ 71 A, 71b, and 73a of former Public Utilities Act (*now see Pub. Util. Code §§ 734, 735*, and *2106*))]], and that the shipper is not required to bring a complaint before the commission prior to bringing an action in court in such cases [*see California Adjustment Co. v. Atchison, Topeka & Santa Fe Ry. Co. (1918) 179 Cal. 140, 145, 175 P. 682* (action for discrimination in violation of long and short haul clause of constitution (*now see Pub. Util. Code § 461.5*), as right of shipper within Public Utilities Act § 73a (*now see Pub. Util. Code § 2106*))].

Complaints for damages resulting from the violation of the provisions of *Pub. Util. Code § 494, 532* (charging rates other than those in tariffs) may be filed in a court of competent jurisdiction where concurrent jurisdiction of the cause of action is vested in the courts [*Pub. Util. Code § 736*]. Since concurrent jurisdiction appears to be vested in the courts under *Pub. Util. Code § 2106*, it appears that a cause of action for overcharges based on *Pub. Util. Code § 494* and *Pub. Util. Code § 532* may be brought in an action which originates in the trail court, such as the action in this form. Counsel should consider, however, proceeding by filing a complaint directly with the Public Utilities Commission under *Pub. Util. Code § 737*.

[5] Allegations

The complaint alleges:

- Defendant's status as public utility common carrier (Paragraph 2) [*Pub. Util. Code §§ 211, 216*].
- Existence of a contract, such as a bill of lading, for the transportation of the goods (Paragraph 4).
- That defendant received freight and delivered it at agreed destination (Paragraphs 5, 6).
- The rate charged by defendant (Paragraph 7).
- The correct rate based on tariff filed with Public Utilities Commission (Paragraph 8) [*Pub. Util. Code §§ 486, 494, 532*].
- The amount of the overcharge (Paragraph 9).
- Plaintiff's demand for payment in compliance with bill of lading or tariff and defendant's refusal (Paragraph 11) [*see Com. Code § 7309(3)*].

[6] Limitation of Action

[a] Time for Filing Action

Complaints filed in court for violations of *Pub. Util. Code § 494* and *Pub. Util. Code § 532* (rates in tariff as required to be charged) where there is concurrent jurisdiction with the commission over the cause of action must be filed within three years from the time the cause of action accrues. If the claim for damages has been presented to the public utility in writing within the three-year period, the three-year period is extended to include six months from the date notice in writing is given by the public utility to the claimant of disallowance of all or part of the claim [*Pub. Util. Code § 736*].

[b] Accrual of Cause of Action

Causes of action under *Pub. Util. Code §§ 734-737* accrue on the delivery or tender of delivery of the shipment with respect to which the complaint is filed or claim made [*Pub. Util. Code § 738*].

[7] Damages

The measure of damages for the collection of a rate in excess of the tariff rate is the difference between the rate which was assessed and the applicable rate [Sunset Pac. Oil Co. v. Railroad Co. (1930) 110 Cal. App. 773, 110 Cal. App. Supp. 773, 782, 290 P. 434 (decided under former Public Utilities Act, *now see Pub. Util. Code §§ 494, 532*); *see also South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 Cal. App. 3d 750, 760, 102 Cal. Rptr. 286]* .

[8] California Constitution

Public utilities. *Cal. Const. art. XII, §§ 1-9*

[9] State Statutes

[a] Actions Against Public Utility Carriers

Actions against public utility for unlawful act. *Pub. Util. Code § 2106*

Actions for recovery of reparations ordered by commission. *Pub. Util. Code § 736*

Actions for recovery of lawful tariff charges. *Pub. Util. Code § 737*

[b] Bills of Lading

Bills of lading. *Com. Code §§ 7101-7105, 7301-7603*

[c] Definitions

"Common carrier" defined. *Civ. Code § 2168*; *Pub. Util. Code § 211*

"Rates" defined. *Pub. Util. Code § 210*

"Highway common carrier" defined. *Pub. Util. Code § 213*

"Public utility" defined. *Pub. Util. Code § 216*

"Railroad" and "railroad corporation" defined. *Pub. Util. Code §§ 229, 230*

[d] Regulation of Carriers

Public Utilities Act. *Pub. Util. Code §§ 201-2115*

Rates. *Pub. Util. Code §§ 451-462, 726-738*

Discrimination in charges or facilities by railroad or other transportation company; short and long distance charges. *Pub. Util. Code § 461.5*

Common carrier as required to file rates with commission. *Pub. Util. Code §§ 486, 493*

Tariff schedules. *Pub. Util. Code §§ 486-496*

Tariff rates as required to be charged. *Pub. Util. Code §§ 494, 532*

Reparations as within power of commission. *Pub. Util. Code § 734*

Certificate of public convenience and necessity as required for operation as highway common carrier. *Pub. Util. Code § 1063*

Highway Carrier's Act. Pub. Util. Code § 3501 et seq.

[10] Decisions

Shipper's action against railroad for overcharges. *Transmix Corp. v. Southern Pac. Co. (1960) 187 Cal. App. 2d 257, 264-269, 9 Cal. Rptr. 714*

Tariff as in nature of contract between shipper and carrier; ambiguities as resolved in favor of shipper. *Transmix Corp. v. Southern Pacific Co. (1960) 187 Cal. App. 2d 257, 267-268, 9 Cal. Rptr. 714*

Bill of lading as basic contract between parties. *Kentner Truck Line v. Maier Brewing Co. (1960) 183 Cal. App. 2d 89, 93, 6 Cal. Rptr. 572*

Carrier as not able by conduct, estoppel, or waiver to directly or indirectly increase or decrease carrier's published tariff rate, until published tariff changed. *Transmix Corp. v. Southern Pacific Co. (1960) 187 Cal. App. 2d 257, 264, 9 Cal. Rptr. 714* ; *Empire West v. Southern Cal. Gas Co. (1974) 12 Cal. 3d 805, 809, 117 Cal. Rptr. 423, 528 P.2d 31*

Commission as able to order rate rebate and sue for its enforcement in court (see former Public Utilities Act § 32a, now *Pub. Util. Code § 2102*), but court as having concurrent jurisdiction with commission under § 73a (now *Pub. Util. Code § 2106*) as to rate rebate cases involving no exercise of administrative or regulatory power. *Atchison, T. & S. F. R. Co. v. Railroad Com. of California (1931) 212 Cal. 370, 379, 298 P. 99* ; *see also Vila v. Tahoe Southside Water Util. (1965) 233 Cal. App. 2d 469, 479, 43 Cal. Rptr. 654*

Shipper as able to recover damages in court for carrier's violation of long and short haul clause of state constitution (now *Pub. Util. Code § 461.5*) without first applying to Railroad (now Public Utilities Commission) *California Adjustment Co. v. Atchison, Topeka & Santa Fe Ry. Co. (1918) 179 Cal. 140, 145, 175 P. 682* ; *see also Southern Pac. v. Superior Court (1915) 27 Cal. App. 240, 251, 254-255, 150 P. 397*

Under former Public Utilities Act § 17 (*cf. Pub. Util. Code § 494*), measure of damages for collection of rate in excess of tariff rate as difference between assessed rate and applicable rate. Sunset Pac. Oil Co. v. Railroad Co. (1930) 110 Cal. App. 773, 110 Cal. App. Supp. 773, 782, 290 P. 434

[11] Law Reviews

Poe, *Regulation of Highway Carriers in California, 30 So. Cal. L. Rev. 131 (1957)*

[12] Law Reviews

Witkin, Summary of California Law, Vol. 8, *Constitutional Law*, § 889 et seq. (9th ed. 1988)

[13] Cross References

For related forms, see *§§ 109.200* and *109.220*

For a discussion of and forms for use in proceedings before the Public Utilities Commission, see Ch. 480, *Public Utilities*

For a discussion of regulation of railroads, see Ch. 485, *Railroads*

For discussion and forms of bills of lading, see California Legal Forms, Ch. 54, *Shipment of Property* (Matthew Bender)

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11-109 California Forms of Pleading and Practice--Annotated § 109.261

§ 109.261 Complaint for Damages [Civ. Code § 3300] for Collection of All or Portion of Lawful Tariff Charges by Public Utility Common Carrier [Pub. Util. Code § 737]--Against Consignee

[1] FORM Complaint for Damages [Civ. Code § 3300] for Collection of All or Portion of Lawful Tariff Charges by Public Utility Common Carrier [Pub. Util. Code § 737]--Against Consignee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Tariff Charges)
[and DOES 1 through _____,]	)	[Amount demanded _____
Defendant.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Defendant is, and at all times mentioned was, _____ [*allege defendant's capacity and residence, e.g.*, a corporation duly organized and existing under the laws of California, with its principle place of business in (_____ (city),) _____ County].

2. Plaintiff is, and at all times mentioned was, a _____ [*specify type of certified common carrier, e.g.*, highway common carrier] carrying freight for the public for compensation, and a public utility subject to the provisions of the Public Utilities Act of the State of California. At all times herein mentioned, plaintiff was duly certificated by the

Public Utilities Commission of the State of California.

[3. *Fictitious name allegation, if appropriate. See § 109.200[1], Paragraph 3.*]

4. At various times prior to the filing of this complaint, _____ [*name of consignor*] delivered to plaintiff at his/her/its place of business located at _____ [*address*], certain shipments consisting of _____ [*describe goods*] to be transported to defendant at _____ [*city*], California.

5. Each of the shipments was subject to and conditioned on a bill of lading duly issued in writing. A statement, which is attached hereto as Exhibit A and made a part hereof, lists the dates on which the shipments were delivered to defendant, the identifying numbers of the freight bills prepared to cover the transportation charges for the shipments, and the [unpaid] charges on which this complaint is based. The freight bills were delivered to defendant at or near the time each shipment was transported.

6. Plaintiff has complied with all of the terms of the bills of lading which plaintiff was required to perform, including receiving, transporting, and delivering the shipments in accordance with the terms of the bills of lading.

7. Each of the bills of lading provides, among other things, that the _____ [*specify person required to pay charges, e.g.*, consignee and owner] shall pay the freight and average, if any, and all other lawful charges accruing on the property.

[8. *Where necessary, if defendant is consignee, allege* : Defendant accepted the freight with knowledge that _____ (*name of consignor*) intended that defendant pay the freightage.]

9. At all times herein mentioned, plaintiff's tariff was duly posted, published, and on file with the Public Utilities Commission of the State of California, and kept open for public inspection as required by law. Plaintiff's tariff [as amended] was in full force and effect at the time of the shipments herein alleged and applied to the transportation services rendered by plaintiff for defendant as described above.

10. The amount of compensation due to plaintiff in accordance with the rates, fares, charges, and classifications in the tariff for the transportation services rendered by plaintiff pursuant to the bills of lading amounts to a total of $_____. The charges for each shipment are set forth in Exhibit A.

[*EITHER, if defendant has not paid any of the charges due:*]

11. No part of the compensation due to plaintiff by defendant has been paid. Plaintiff has demanded such compensation from defendant, and defendant has refused to pay plaintiff. The sum of $_____ is now due, owing, and unpaid by defendant to plaintiff.

[*OR, if defendant was undercharged:*]

11. No part of the compensation due to plaintiff by defendant has been paid except the sum of $_____. Plaintiff has demanded the remaining compensation from defendant, and defendant has refused to pay plaintiff. The sum of $_____ [*difference between total amount due and amount paid*] is now due, owing, and unpaid by defendant to plaintiff.

[*OR, if plaintiff has overpaid a refund to defendant:*]

11. Defendant paid $_____ to plaintiff as freight charges for the transportation of the above-described shipments. Thereafter, on the dates set forth in Exhibit A, plaintiff refunded $_____ to defendant from the amount paid to plaintiff as freight charges. On or about _____ [*date*], plaintiff first discovered that the correct charges pursuant to plaintiff's tariff on file with the Public Utilities Commission was the sum of $_____, that the correct amount of the re fund was $_____, and that by mutual mistake of fact plaintiff had erroneously refunded to defendant $_____. Plaintiff demanded that defendant return the $_____ [*difference between amount refunded and correct amount of refund*] erroneously refunded, but defendant has failed, neglected, and refused to return to plaintiff the amount of $_____ which is now due, owing, and unpaid by defendant to plaintiff.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the sum of $_____;

2. For interest from _____ [*date*], to _____ [*date*], computed at _____ [*legal rate*] percent on the sum of $_____;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 109.200[1].*]

[2] Use of Form

This complaint is for use by a public utility common carrier for damages from a consignee for unpaid freightage for intrastate shipments of freight. It may be used by the carrier to recover the total amount of charges due, to recover undercharges, or to recover an improper refund which amounts to undercharges. The form may be adapted for use when someone other than the consignee is liable for payment of the shipping charges.

[3] Allegations

The complaint alleges that: (1) plaintiff is a public utility common carrier (Paragraph 2) [*Pub. Util. Code §§ 211, 216*]; (2) a consignor delivered freight to plaintiff for transportation (Paragraph 4); (3) the shipments were subject to bills of lading which provided that plaintiff was to receive, transport, and deliver the shipments and that defendant was to pay the freightage and average (Paragraphs 5-7); (4) plaintiff made the deliveries as required (Paragraphs 5, 6); (5) where necessary, defendant consignee's acceptance of freight with knowledge of consignor's intention that consignee pay freightage (Paragraph 8) [*see Civ. Code § 2138*]; (6) plaintiff's tariff was on file as required by law (Paragraph 9) [*Pub. Util. Code § 486*]; (7) the amount of compensation due under the tariff (Paragraph 10) [*Pub. Util. Code §§ 494, 532*]; and (8) either none of the compensation was paid, the amount paid was an undercharge, or plaintiff mistakenly made an

overrefund to defendant which resulted in defendant's being undercharged (Paragraph 11).

[4] Recovery of Lawful Tariff Charges

Complaints for the collection of lawful tariff charges, or any part thereof, by public utilities may be filed in any court of competent jurisdiction [*Pub. Util. Code § 737*].

[5] Limitation of Action

Complaints by public utility carriers for the collection of lawful tariff charges may be filed within three years from the time the cause of action accrues [*see Pub. Util. Code § 738*; § 109.260] and not later. However, if a public utility presents its claim or demand in writing within the three-year period to the person from whom the tariff charges are due, the period is extended to include six months from the date a written notice is given to the public utility of refusal to pay all or part of the demand [*Pub. Util. Code § 737*].

[6] Cross Complaint

If a public utility carrier files an action under *Pub. Util. Code § 737* for collection of all or a portion of lawful tariff charges, the person against whom the suit is filed may, within 90 days from the date of service of summons, file any complaint related to the transaction which is the subject of the suit by the public utility, for violation of any provision of the Public Utilities Act (*Pub. Util. Code §§ 201-2115*) [*Pub. Util. Code § 737*].

[7] State Statutes

Consignor as presumed liable for freightage and exception. *Civ. Code § 2137*

Consignee as liable for freightage if accepts freight with notice of intention of consignor that consignee pay. *Civ. Code § 2138*

[8] Decisions

Carrier as having both right and duty to recover undercharges. *Ataide v. Hamilton Cooper & Steel Corp. (1991) 229 Cal. App. 3d 624, 630, 280 Cal. Rptr. 259* ; *South Bay Transp. Co. v. Gordon Sand Co. (1988) 206 Cal. App. 3d 650, 653, 253 Cal. Rptr. 753* ; *West v. Holstrom (1968) 261 Cal. App. 2d 89, 92, 67 Cal. Rptr. 831* (radial highway common carrier)

Prejudgment interest as allowed under *Civ. Code § 3287* in connection with collection of undercharges for hauling freight. *West v. Holstrom (1968) 261 Cal. App. 2d 89, 96, 67 Cal. Rptr. 831* (radial highway common carrier, not public utility)

Though shipper as presumably consignor and shipper's promise to pay as ordinarily inferred, inference as rebuttable by showing in bill of lading or otherwise that shipper not acting in own behalf, that this fact known to carrier, and that parties intended that consignee assume obligation to pay. Kentner Truck Line v. Maier *Brewing Co. (1960) 183 Cal. App. 2d 89, 92, 6 Cal. Rptr. 572* (radial highway common carrier)

[9] Cross References

For related forms, *see §§ 109.200*, *109.220*, and *109.260*

For a discussion of and forms for complaints in the form of common counts, see Ch. 121, *Common Counts*

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[a] FORM

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[2] Use of Form

[3] Jurisdiction

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PART I. SCOPE

11-110 California Forms of Pleading and Practice--Annotated § 110.01

§ 110.01 Scope

This chapter concerns churches and religious groups and discusses forms of organization, tort liability, and civil court jurisdiction over internal controversies. Although this chapter discusses some parts of the Nonprofit Corporation Law (*Corp. Code § 5000 et seq.*) that are applicable to nonprofit religious corporations; see also Ch. 388, *Nonprofit Corporations* , for a discussion of other provisions of the Nonprofit Corporation Law that may be applicable.

The chapter contains the following forms:

- Forms of allegations of capacity and residence of incorporated and unincorporated church societies [*see §§ 110.50, 110.51*].

- Forms of a petition and complaints by church members to resolve property or membership disputes [*see §§ 110.52 -110.54*].

- Form of complaint for damages for personal injuries against a church and its pastor [*see § 110.55*].

The chapter also discusses the fiduciary duties of directors and officers of religious corporations pursuant to the Nonprofit Religious Corporation Law (*Corp. Code §§ 9110-9690*) and contains the following forms:

- Forms of complaints for damages for breach of a director's fiduciary duties [*see § 110.56*].

- Form of allegation of self-dealing by a director [*see § 110.58*].

- Forms of affirmative defenses available to directors and officers [*see §§ 110.57, 110.59*].

- Form of notice of motion and order to permit the filing of an amended pleading to seek punitive damages against a religious corporation [*see § 110.70*].

- Form of amended complaint [*see § 110.71*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral Overview

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§ 110.02 Cross-References

- For discussion and forms relating to unincorporated associations and corporations generally, see Ch. 61, *Associations and Clubs* , and Ch. 160, *Corporations: Capacity* .

- For discussion and forms relating to the property tax-exempt status of church property, see Ch. 540, *Taxes and Assessments* .

- For a discussion of prohibitions against religious discrimination, see Ch. 112, *Civil Rights: Government-Funded Programs and Activities* ; Ch. 115, *Civil Rights: Employment Discrimination* ; Ch. 116, *Civil Rights: Discrimination in Business Establishments* ; Ch. 117, *Civil Rights: Housing Discrimination* .

- For discussion of parents' rights regarding the religious upbringing of their children, see Ch. 394, *Parent and Child* .

- For discussion of an action based on sexual abuse of a minor, see Ch. 5, *Abuse of Minors and Elderly* .

- For discussion of the definition, registration, and regulation of commercial fundraisers for charitable purposes, see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewCivil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsReligious DiscriminationLabor & Employment LawDiscriminationReligious DiscriminationGeneral OverviewTax LawState & Local TaxesReal Property TaxCollectionGeneral Overview

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§ 110.03 "Church" Used as Term of Convenience for Religious Organization

The term "church" is used throughout this chapter chiefly as a term of shorthand convenience, and is meant to include synagogues, temples, and other religious entitites or organizations.

Legal Topics:

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

§§ 110.04[Reserved]

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§ 110.10 Governing Law

Statutes governing churches and religious organizations generally are contained in *Corp. Code § 5002 et seq.*, the Nonprofit Corporation Law. The Nonprofit Religious Corporation Law, *Corp. Code § 9110 et seq.*, specifically governs nonprofit religious corporations.

The applicability of the Nonprofit Religious Corporation Law to various religious corporations, including those organized or incorporated under the former General Nonprofit Corporation Law, is governed by *Corp. Code § 9910 et seq.*

Corporations organized and existing under laws governing corporations for charitable or eleemosynary purposes in effect on December 31, 1979 [*see* former *Corp. Code § 10200 et seq.*], are governed by *Corp. Code § 9110 et seq.*, when such corporations are organized primarily or exclusively for religious purposes [*Corp. Code § 10200*].

Corporations sole are governed by *Corp. Code § 10000 et seq.* of the Nonprofit Corporation Law. Unincorporated nonprofit associations are subject to the provisions of *Corp. Code § 18000 et seq.* governing unincorporated nonprofit associations.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewBusiness & Corporate LawUnincorporated Associations

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§ 110.11 Organization

[1] Distinction Between Church as Religious vs. Legal Entity

Churches and religious organizations exist in two separate legal senses. First, they exist as ecclesiastical bodies, generally as members of a larger or general church body. Second, they exist as legal entities organized to govern the temporal affairs of their ecclesiastical counterparts. This distinction is essential to an understanding of the jurisdiction of courts to adjudicate church-related disputes since, as a general constitutional rule, American courts are bound by church decisions in ecclesiastical matters [*see discussion under § 110.14[1]*] but are not precluded from exercising jurisdiction over civil or property rights involved in a church dispute, even though ecclesiastical matters may be incidentally involved [*see discussion under § 110.14[2]*].

To govern the temporal affairs of the ecclesiastical body, churches and religious societies may exist as unincorporated nonprofit associations [*see* [2], *below*], or as nonprofit religious corporations [*see* [3], *below*], or as corporations sole [*see* [4], *below*].

[2] Unincorporated Nonprofit Associations

A religious society organized as an unincorporated nonprofit association is subject to the provisions of *Corp. Code § 18000 et seq.* For discussion of those provisions, see Ch. 61, *Associations and Clubs* .

[3] Nonprofit Religious Corporations

[a] Definition

A religious society may organize as a nonprofit religious corporation under the Nonprofit Religious Corporation Law [*see Corp. Code § 9110 et seq.*]. A nonprofit religious corporation is formed by one or more persons [*Corp. Code § 9120*] primarily or exclusively for any religious purposes [*Corp. Code § 9111*]. It must not contemplate the distribution of gains, profits, or dividends to its members, although it may carry on business at a profit as an incident to the main religious purpose of the corporation [*Corp. Code §§ 9130, 9140*].

[b] Powers and Functions

A nonprofit religious corporation has all of the powers of a natural person, including among other enumerated powers, the power to make contracts, to act as trustee, to borrow, make donations or lend money, and to do all other acts necessary or expedient for the administration of its affairs and attainment of its purposes [*Corp. Code § 9140*].

Except as discussed in *§ 110.15*, the Nonprofit Religious Corporation Law does not contain provisions affecting the spiritual functions of a religious corporation. Incorporation is permitted as a convenience to assist in the conduct of the temporalities of the church. The function and object of the church corporation is to stand in the capacity of an agent holding the title to the property, with power to manage and control the same in accordance with the interest of the spiritual ends of the church. The directors or trustees of the corporation, as such, have no authority whatever over spiritual or ecclesiastical matters that rest purely with the ecclesiastical governing body, such as the presbytery or synod [*Wheelock v. First Presb. Church (1897) 119 Cal. 477, 483, 51 P. 841* ; *see Samoan Congregational etc. Church in U.S. v. Samoan Congregational etc. Church of Oceanside (1977) 66 Cal. App. 3d 69, 74-75, 135 Cal. Rptr. 793]* . A religious corporation may amend its articles to change its status to that of a public benefit corporation, a mutual benefit corporation, a business corporation, or a cooperative corporation [*Corp. Code § 9621*].

[4] Corporations Sole

A corporation sole [*see Corp. Code § 10000 et seq.*] is a corporate form uniquely applicable to religious organizations. It is formed by the bishop, chief priest, presiding elder, or other presiding officer of any religious denomination, society, or church for the purpose of administering and managing the affairs, property, and temporalities of the church [*Corp. Code § 10002*]. A corporation sole has the same civil rights and duties as other corporations [*Roman Catholic Archbishop v. Superior Court (1971) 15 Cal. App. 3d 405, 411, 93 Cal. Rptr. 338]* .

One principal purpose of the corporation sole is to insure continuation of ownership of property dedicated to the benefit of a religious organization which may be held in the name of its titular head. There is also a clear distinction between the corporation sole and the individual who happens to be the current office holder [*County of San Luis Obispo v. Ashurst (1983) 146 Cal. App. 3d 380, 383-384, 194 Cal. Rptr. 5]* . Thus, in a case involving a pastor who was allegedly appointed by his predecessor pursuant to an amendment to the corporate articles, the court rejected plaintiff's argument that the requirement set forth in *Corp. Code § 10010* that an amendment to the articles be "duly authorized by the religious organization governed by the corporation" was met because there was no evidence of any religious organization other than his predecessor. The statutory scheme makes clear that the chief officer of the corporation sole is not also "the religious organization governed by the corporation" [*Berry v. Society of Saint Pius X (1999) 69 Cal. App. 4th 354, 368-372, 81 Cal. Rptr. 2d 574* (holding that putative pastor's appointment was ineffective and therefore he had no right to possession of church property in dispute)].

[5] Corporations for Charitable or Eleemosynary Purposes

Pursuant to the Nonprofit Corporation Law [*Corp. Code §§ 5002-10015*], every corporation organized or existing under former laws governing corporations for charitable or eleemosynary purposes [*Corp. Code §§ 10200-10208*] in effect on December 31, 1979, is deemed to be a nonprofit religious corporation and is subject to *Corp. Code §§ 9110-9690*, if the corporation is organized primarily or exclusively for religious purposes [*Corp. Code § 10200*]. For a discussion of nonprofit public benefit corporations, see Ballantine and Sterling, California Corporation Laws, Ch. 19, *Nonprofit Corporations and Organizations* , Pt. B (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 110.12 Charitable Immunity

The policy expressed in *Civ. Code § 1714(a)* that everyone is responsible for the result of his or her willful acts and for injury occasioned to others by his or her lack of ordinary care or skill in managing his or her property or person admits of no exception based on the objectives, however laudable, of the tortfeasor. Charitable immunity, therefore, does not exist in California. A religious society is subject to liability for the torts of its agents [*Malloy v. Fong (1951) 37 Cal. 2d 356, 372, 232 P.2d 241]* . In determining the existence of a principal-agent relationship between church bodies and religious workers, the court may examine the bylaws and internal rules and regulations of religious organizations [*Malloy v. Fong (1951) 37 Cal. 2d 356, 367-368, 232 P.2d 241* ; *Stevens v. Roman Catholic Bishop of Fresno (1975) 49 Cal. App. 3d 877, 883, 123 Cal. Rptr. 171* ; *see also discussions under §§ 110.13[2]* and *110.20*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewTortsNegligenceDefensesPrivate ImmunitiesCharitable Immunity

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 110 CHURCHES AND RELIGIOUS ORGANIZATIONS
PART II. LEGAL BACKGROUND

11-110 California Forms of Pleading and Practice--Annotated § 110.13

§ 110.13 Separation of Church and State

[1] Establishment of Religion

[a] Federal

The *First Amendment*, as applied to the states through the *Fourteenth Amendment*, commands that a state make no law respecting an establishment of religion or prohibiting the free exercise thereof [*U.S. Const., amends. I, XIV*; *Cantwell v. Connecticut (1940) 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213* ; *Woodland Hills Homeowners Organization v. Los Angeles Community College Dist. (1990) 218 Cal. App. 3d 79, 92, 266 Cal. Rptr. 767]* . The *Establishment Clause of the First Amendment* prevents a state from enacting laws that have the "purpose" or "effect" of advancing or inhibiting religion [*Zelman v. Simmons-Harris (2002) 536 U.S. 639, 122 S. Ct. 2460, 153 L. Ed. 2d 604, 614* ; *Agostini v. Felton (1997) 521 U.S. 203, 222-223, 117 S. Ct. 1997, 138 L. Ed. 2d 391]* . The clause prohibiting the establishment of religion by law was intended to erect a wall of separation between church and state [*Everson v. Board of Education (1947) 330 U.S. 1, 8, 15-16, 67 S. Ct. 504, 91 L. Ed. 711]* , and to afford protection against three main evils: sponsorship, financial support, and active involvement of the sovereign in religious activity [*Woodland Hills Homeowners Organization v. Los Angeles Community College Dist. (1990) 218 Cal. App. 3d 79, 92, 266 Cal. Rptr. 767]* . The *First Amendment* prohibition of the establishment of religion applies to official disapproval or hostility towards religion, as well as to official condoning of a particular religion or religious belief [*American Family v. City & County of San Francisco (9th Cir. 2002) 277 F.3d 1114, 1120-1121]* .

The *First Amendment* prohibits the use of governmental organs for essentially religious purposes [*Presbyterian Church v. Hull Church (1969) 393 U.S. 440, 449, 89 S. Ct. 601, 21 L. Ed. 2d 658]* . The prohibition extends to both legislative [*Kedroff v. Saint Nicholas Cathedral (1952) 344 U.S. 94, 120-121, 73 S. Ct. 143, 97 L. Ed. 120]* and judicial action [*Kreshik v. Saint Nicholas Cathedral (1960) 363 U.S. 190, 191, 80 S. Ct. 1037, 4 L. Ed. 2d 1140]* . The *First Amendment* precludes a civil court from determining for itself who is entitled to hold religious office and from determining whether the religious organization followed its own ecclesiastical rules in anointing one of its leaders [*Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar (9th Cir. 1999) 179 F.3d 1244, 1247-1248* ; *see Serbian Eastern Orthodox Diocese v. Milivojevich (1976) 426 U.S. 696, 710-711, 49 L. Ed. 2d 151*], even when religious issues arise in the course of a civil property dispute [*Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar (9th Cir. 1999) 179 F.3d 1244, 1247-1248]* . However, religious organizations are not deprived of all recourse to the protections

of civil law available to all others, since that deprivation would raise its own serious problems under the *Free Exercise Clause*. Courts may play a role in resolving religious property disputes [*see* *Presbyterian Church v. Hull Church (1969) 393 U.S. 440, 449, 89 S. Ct. 601, 21 L. Ed. 2d 658* ; *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar (9th Cir. 1999) 179 F.3d 1244, 1248-1250* (court could entertain copyright dispute between two religious bodies); *but see* *Metropolitan Philip v. Steiger (2000) 82 Cal. App. 4th 923, 98 Cal. Rptr. 2d 605* (which faction represents "true" church entitled to property is ecclesiastical matter in which civil courts may not meddle)].

Religious activity typically involves expressive speech and, although protected by the *First Amendment*, as a matter of law, it is subordinate to *establishment clause* concerns [*DiLoreto v. Board of Educ. of Downey Unif. Sch. Dist. (1999) 74 Cal. App. 4th 267, 280, 87 Cal. Rptr. 2d 791]* .

Not every law that confers an indirect, remote, or incidental benefit on a religious institution is constitutionally invalid for that reason alone. Courts must carefully examine any law challenged on establishment grounds to ascertain whether it furthers any of the evils against which the *Establishment Clause* protects. Primary among those evils are "sponsorship, financial support, and active involvement of the sovereign in religious activity" [*Committee for Public Education v. Nyquist (1973) 413 U.S. 756, 771-772, 93 S. Ct. 2955, 37 L. Ed. 2d 948* ; *Lemon v. Kurtzman (1971) 403 U.S. 602, 612, 91 S. Ct. 2105, 29 L. Ed. 2d 745* ; *Walz v. Tax Commission (1970) 397 U.S. 664, 668, 90 S. Ct. 1409, 25 L. Ed. 2d 697* ; *East Bay Asian Local Development Corp. v. State of California (2000) 24 Cal. 4th 693, 705, 102 Cal. Rptr. 2d 280, 13 P.3d 1122]* .

The *Establishment Clause of the First Amendment* is not violated by a law that meets all of the following criteria [*Committee for Public Education v. Nyquist (1973) 413 U.S. 756, 772-773, 93 S. Ct. 2955, 37 L. Ed. 2d 948* ; *East Bay Asian Local Development Corp. v. State of California (2000) 24 Cal. 4th 693, 705-718, 102 Cal. Rptr. 2d 280, 13 P.3d 1122* ; *Rankins v. Commission on Professional Competence (1979) 24 Cal. 3d 167, 177, 154 Cal. Rptr. 907, 593 P.2d 852* ; *DiLoreto v. Board of Educ. of Downey Unif. Sch. Dist. (1999) 74 Cal. App. 4th 267, 276, 87 Cal. Rptr. 2d 791* ; *Woodland Hills Homeowners Organization v. Los Angeles Community College Dist. (1990) 218 Cal. App. 3d 79, 92, 266 Cal. Rptr. 767* ; *see* *Corporation of Presiding Bishop v. Amos (1987) 483 U.S. 327, 335-339, 107 S. Ct. 2862, 97 L. Ed. 2d 273]* :

- Has a secular purpose;
- Has a primary effect that neither advances nor prohibits religion; and
- Avoids excessive government entanglement with religion.

This test, although most frequently used in cases involving government allegedly giving preference to a religion, also accommodates the analysis of a claim brought under a hostility to religion theory as well [*American Family v. City & County of San Francisco (9th Cir. 2002) 277 F.3d 1114, 1121* ; *Vernon v. City of Los Angeles (9th Cir. 1994) 27 F.3d 1385, 1396]* .

In analyzing the secular purpose of the government's conduct, the court's analysis focuses purely on purpose and the court will not question the propriety of the means to achieve that purpose or whether the government was correct or even reasonable in the assumptions underlying its actions. The government's act or practice will stumble on this prong only if it is motivated actually and wholly by an impermissible purpose. The reviewing court must be reluctant to attribute unconstitutional motives to government actors in the face of a plausible secular purpose [*American Family v. City & County of San Francisco (9th Cir. 2002) 277 F.3d 1114, 1121]* . The nature of a government program's operation may reveal its ostensible secular purpose to be a sham [*Winn v. Arizona Christian School Tuition Organization (9th Cir. 2009) 562 F.3d 1002, 1012* ; *see* *McCreary County, Ky v. ACLU (2005) 545 U.S. 844, 862, 125 S. Ct. 2722, 162 L. Ed. 2d 729* (in some cases, government action itself bespoke purpose of program violating *Establishment Clause*)]. The inquiry as to whether a program's putative purpose is genuine and not merely secondary to

a religious objective is undertaken from the perspective of an objective observer, i.e., one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute or comparable official act [*McCreary County, Ky v. ACLU (2005) 545 U.S. 844, 862, 125 S. Ct. 2722, 162 L. Ed. 2d 729* ; *Winn v. Arizona Christian School Tuition Organization (9th Cir. 2009) 562 F.3d 1002, 1012*].

The focus under the "primary effect" prong is on the primary effect of the government's conduct and whether the government action has the principal or primary effect of advancing or inhibiting religion, and the court conducts this inquiry from the perspective of a "reasonable observer" who is both informed and reasonable [*American Family v. City & County of San Francisco (9th Cir. 2002) 277 F.3d 1114, 1122]* .

With regard to the "excessive entanglement" prong, governmental actions encouraging political divisiveness along religious lines is not sufficient to constitute excessive entanglement with religion, since government bodies would be at risk any time they took an action that affected potentially religious issues, including abortion, alcohol use, and sexual issues [*American Family v. City & County of San Francisco (9th Cir. 2002) 277 F.3d 1114, 1123]* .

The three prong test is ill-suited to evaluating an *Establishment Clause* challenge to a law that creates an exemption for religious bodies from a neutral law of general application, but it has not yet been modified to accommodate these exemptions [*East Bay Asian Local Development Corp. v. State of California (2000) 24 Cal. 4th 693, 706-708, 102 Cal. Rptr. 2d 280, 13 P.3d 1122* , citing *Corporation of Presiding Bishop v. Amos (1987) 483 U.S. 327, 334-338, 107 S. Ct. 2862, 97 L. Ed. 2d 273* (exemption of religious organization's secular, nonprofit activities from Title VII of Civil Rights Act of 1964's prohibition of employment discrimination on basis of religion does not violate *establishment clause*; unnecessary to decide if different standard should apply when religious exemption challenged under *establishment clause*); *see* *Texas Monthly, Inc. v. Bullock (1989) 489 U.S. 1, 18, 109 S. Ct. 890, 103 L. Ed. 2d 1* (state religious exemption from generally applicable sales tax on periodicals violates *establishment clause*)].

For purposes of evaluating aid to schools only the first two factors apply [*Mitchell v. Helms (2000) 530 U.S. 793, 120 S. Ct. 2530, 2540, 147 L. Ed. 2d 660* ; *Agostini v. Felton (1997) 521 U.S. 203, 222-223, 117 S. Ct. 1997, 138 L. Ed. 2d 391* ; for discussion of freedom of religion in schools, see Ch. 513, *Schools: Student Rights and Responsibilities*].

If a statute does not have a clearly secular purpose, consideration of the remaining criteria is unnecessary. Although a statute motivated in part by a religious purpose may meet the secular purpose test, if a statute is entirely motivated by the purpose to endorse or disapprove of religion, it violates the *Establishment Clause* [*Wallace v. Jaffree (1985) 472 U.S. 38, 55-56, 105 S. Ct. 2479, 86 L. Ed. 2d 29* (statute authorizing public school teachers to hold one minute of silence for "meditation or voluntary prayer," with sole express purpose of returning voluntary prayer to schools, is prohibited by *First Amendment*)].

Thus, the *First Amendment* does not preclude governmental bodies from regulating secular activities of religious societies [*Gospel Army v. City of Los Angeles (1945) 27 Cal. 2d 232, 242-248, 163 P.2d 704* ; *see* *Amer. Mission Army v. City of Lynwood (1956) 138 Cal. App. 2d 817, 820, 292 P.2d 533* ; *cf.* *Schmoll v. Chapman University (1999) 70 Cal. App. 4th 1434, 1440-1442, 83 Cal. Rptr. 2d 426* (application of California's Fair Employment and Housing Act to church-affiliated university's employment dispute with campus chaplain runs afoul of *Establishment Clause*)]. Nor does it conflict with the duty of the state under *Cal. Const., art. I, § 8*, to make reasonable accommodation for an employee to practice the tenets of his or her religion [*see* *Rankins v. Commission on Professional Competence (1979) 24 Cal. 3d 167, 179-180, 154 Cal. Rptr. 907, 593 P.2d 852* (noting, however, that the United States Supreme Court has not passed on the issue of whether or not a state's duty to reasonably accommodate religious practices of employee violates *Establishment Clause*)].

In the *Establishment Clause* context, spiritual harm resulting from unwelcome direct contact with an allegedly offensive religious or anti-religious symbol is a legally cognizable injury, which suffices to confer standing [*see* *Vasquez v. Los Angeles County (9th Cir. 2007) 487 F.3d 1246, 1249-1253* (county employee allegedly forced to have daily contact

with county seal changed to remove cross alleged legally cognizable injury arising out of his frequent regular contact with seal)].

Government conduct disapproving of or expressing hostility toward religion also violates the *Establishment Clause* [*Catholic League for Religious and Civil Rights v. City and County of San Francisco (9th Cir. 2009) 567 F.3d 595, 599 , reh'g granted, 586 F. 3d 1166 (2009)* ; *see Lynch v. Donnelly (1984) 465 U.S. 668, 694, 104 S. Ct. 1355, 79 L. Ed. 2d 604* (O'Connor, J., concurring) (government conduct toward religion must be judged in its unique circumstances to determine whether it constitutes endorsement or disapproval of religion)]. The Ninth Circuit has phrased the applicable principle in several ways and used the three terms interchangeably: The state may not disapprove of religion, express hostility toward religion, or inhibit religion [*American Family Ass'n v. City & County of San Francisco (9th Cir. 2002) 277 F.3d 1114, 1121, 1122* ; *see also* [*Catholic League for Religious and Civil Rights v. City and County of San Francisco (9th Cir. 2009) 567 F.3d 595, 599 , reh'g granted, 586 F. 3d. 1166 (2009)*]. Disapproval and endorsement are flip sides of the same coin; the same legal tests and underlying *First Amendment* values apply [*Catholic League for Religious and Civil Rights v. City and County of San Francisco (9th Cir. 2009) 567 F.3d 595, 599 , reh'g granted, 586 F. 3d. 1166 (2009).* ; *American Family Ass'n v. City & County of San Francisco (9th Cir. 2002) 277 F.3d 1114, 1121, 1122*]. Thus, courts apply the three-part test to determine whether government conduct through hostility toward it violates the *Establishment Clause*, and the *Establishment Clause*'s neutrality mandate applies with equal force [*Catholic League for Religious and Civil Rights v. City and County of San Francisco (9th Cir. 2009) 567 F.3d 595, 599 , reh'g granted, 586 F. 3d. 1166 (2009).*].

[b] State

An independent constitutional basis for separation of church and state is provided by the California Constitution, which, like the United States Constitution, does not merely proscribe an establishment of religion but forbids all laws respecting an establishment of religion [*see Cal. Const., art. I, § 4* (free exercise and enjoyment of religion without discrimination or preference are guaranteed); *Fox v. City of Los Angeles (1978) 22 Cal. 3d 792, 796-799, 150 Cal. Rptr. 867, 587 P.2d 663* (city display of lighted cross as action respecting establishment of religion because not position of neutrality)]. Because the California Constitution is a document of independent force, the rights it guarantees are not necessarily coextensive with those protected by the federal constitution [*East Bay Asian Local Development Corp. v. State of California (2000) 24 Cal. 4th 693, 718, 102 Cal. Rptr. 2d 280, 13 P.3d 1122* ; *American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 325, 66 Cal. Rptr. 2d 210, 940 P.2d 797* ; *Raven v. Deukmejian (1990) 52 Cal. 3d 336, 351-355, 276 Cal. Rptr. 326, 801 P.2d 1077]* . However, the protection against the establishment of religion in the California Constitution does not create broader protections than those of the *First Amendment*. The California concept of "a law respecting an establishment of religion" coincides with the intent and purpose of the *First Amendment Establishment Clause* [*East Bay Asian LocalDevelopment Corp. v. State of California (2000) 24 Cal. 4th 693, 718, 102 Cal. Rptr. 2d 280, 13 P.3d 1122* ; *see Paulson v. City of San Diego (9th Cir. 2001) 262 F.3d 885, 890-891* (California constitution parallels guarantee of *First Amendment Establishment Clause* prohibiting government from appearing to take position on questions of religious belief)].

Federal cases may supply guidance in interpreting the California *constitution's establishment clause*, but California courts must independently determine the scope of the clause [*Sands v. Morongo Unified School Dist. (1991) 53 Cal. 3d 863, 883, 281 Cal. Rptr. 34, 809 P.2d 809* ; *DiLoreto v. Board of Educ. of Downey Unif. Sch. Dist. (1999) 74 Cal. App. 4th 267, 275, 87 Cal. Rptr. 2d 791]* . *Cal. Const., art. I, § 4* is possibly more comprehensive than the federal Constitution because it also guarantees that religion may be freely exercised and enjoyed without discrimination or preference [*see Cal. Const., art. I, § 4*; *Fox v. City of Los Angeles (1978) 22 Cal. 3d 792, 796-797, 150 Cal. Rptr. 867, 587 P.2d 663* (city display of lighted cross is forbidden preference even if not discriminatory); *see also Lucas Valley Homeowners Assn. v. County of Marin (1991) 233 Cal. App. 3d 130, 145, 284 Cal. Rptr. 427* (under California Constitution, preference is forbidden even when there is no discrimination)], and because it forbids the Legislature, city, county, or school district to grant anything to or in aid of any religious sect, church, creed, or sectarian purpose [*Woodland Hills Homeowners Organization v. Los Angeles Community College Dist. (1990) 218 Cal. App. 3d 79, 92,*

266 Cal. Rptr. 767 ; *see DiLoreto v. Board of Educ. of Downey Unif. Sch. Dist. (1999) 74 Cal. App. 4th 267, 275, 87 Cal. Rptr. 2d 791* (for school district to allow posting of sign on baseball field with Ten Commandments would violate *Cal. Const., art. I, § 4*)].

California Constitution, art. XVI, § 5, prohibits aid to "any religious sect, church, creed, or sectarian purpose." The determination of whether government conduct violates *Cal. Const., art. I, § 4*, requires a different analysis from the determination of whether the same conduct contravenes art. XVI, § 5 [*Paulson v. City of San Diego (9th Cir. 2002) 294 F.3d 1124, 1129* ; *see E. Bay Asian Local Dev. Corp. v. California (2000) 24 Cal. 4th 693, 705-710, 102 Cal. Rptr. 2d 280, 13 P.3d 1122* , *cert. denied, 532 U.S. 1008 (2001)* (analyzing art. I, § 4, by reference to *Lemon v. Kurtzman (1971) 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745* , while analyzing art. XVI, § 5, under separate, state-law framework)]. Art. XVI, § 5, bans any official involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes [*Paulson v. City of San Diego (9th Cir. 2002) 294 F.3d 1124, 1130* ; *East Bay Asian Local Dev. Corp. v. California (2000) 24 Cal. 4th 693, 721, 102 Cal. Rptr. 2d 280, 13 P.3d 1122* , *cert. denied, 532 U.S. 1008 (2001)]* . Art. XVI, § 5, prohibits the government from granting a benefit in any form to any sectarian purpose regardless of the government's secular purpose, unless the benefit is properly characterized as indirect, remote, or incidental [*Paulson v. City of San Diego (9th Cir. 2002) 294 F.3d 1124, 1130-1131* ; *see California Teachers Ass'n v. Riles (1981) 29 Cal. 3d 794, 809-813, 176 Cal. Rptr. 300, 632 P.2d 953* (invalidating state textbook loan program under art. XVI, § 5, even though program was open to students in all nonprofit, nonpublic schools and provided books to eligible students, not to schools, nevertheless unconstitutionally aided sectarian schools because textbooks are critical element in enabling school to carry out its essential mission to teach); *Cal. Educ. Facilities Auth. v. Priest (1974) 12 Cal. 3d 593, 116 Cal. Rptr. 361, 526 P.2d 513, 520* (upholding statutory program permitting sectarian and nonsectarian colleges to borrow money at below-market rates for improvements to facilities, so long as facilities were not used for sectarian purposes); *Feminist Women's Health Ctr., Inc. v. Philibosian (1984) 157 Cal. App. 3d 1076, 203 Cal. Rptr. 918, 920-922, 927* (although state law authorized district attorney to dispose of evidentiary fetal tissue by interment, to inter tissue at location where religious memorial ceremony would be held would unconstitutionally enlist prestige and power of state in burial ceremony); *County of Los Angeles v. Hollinger (1963) 221 Cal. App. 2d 154, 34 Cal. Rptr. 387, 388, 392-393* (that Los Angeles County had secular purpose, promoting commerce and tourism, for ordering films of Christian holiday parade from parade association did not prevent contract for films from violating art. XVI, § 5, because making films and county's use of them would provide forbidden, official support for organization and religious subject matter of parade); *Frohliger v. Richardson (1923) 63 Cal. App. 209, 218 P. 497, 500* (art. XVI, § 5, bars public aid for restoring California missions, despite undeniable importance of missions to history of California)].

[2] Free Exercise of Religion

[a] Religious Beliefs

Under the *Free Exercise Clause of the Federal Constitution*, government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities [*U.S. Const., amends. I, XIV*; *see Sherbert v. Verner (1963) 374 U.S. 398, 402-403, 83 S. Ct. 1790, 10 L. Ed. 2d 965]* . Under the *Free Exercise Clause*, a church's selection of its own clergy is a core matter of ecclesiastical self-governance with which the state may not constitutionally interfere [*Serbian Eastern Orthodox Diocese v. Milivojevich (1976) 426 U.S. 696, 717, 96 S. Ct. 2372, 49 L. Ed. 2d 151* (reversing Illinois Supreme Court's determinations regarding several matters of internal church governance because religious controversies are not proper subject of civil court inquiry); *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America (1952) 344 U.S. 94, 116, 73 S. Ct. 143, 97 L. Ed. 120* ; *Bollard v. The California Province of the Society of Jesus (9th Cir. 1999) 196 F.3d 940, 944, 947-950* (but finding that ministerial exception to Title VII of Civil Rights Act of 1964 does not apply to employment decisions regarding lay employees or sexual harassment claim by novice against order and novice's superiors)].

A rationally based, neutral law of general applicability does not violate the right to free exercise of religion even though the law incidentally burdens a particular religious belief or practice [*People of Guam v. Guerrero (9th Cir. 2002) 290 F.3d 1210, 1215-1216* ; *Miller v. Reed (9th Cir. 1999) 176 F.3d 1202, 1206* (DMV can require social security number for driver's license or identification card); *see Brunson v. Department of Motor Vehicles (1999) 72 Cal. App. 4th 1251, 1253-1255, 85 Cal. Rptr. 2d 710* (DMV can require social security number for driver's license or identification card)]. Thus, a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice [*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah (1993) 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472* ; *Stormans, Inc. v. Selecky (9th Cir. 2009) 586 F.3d 1109, 1127-1128]* . This is a rational basis review [*Stormans, Inc. v. Selecky (9th Cir. 2009) 586 F.3d 1109, 1127-1138]* . However, courts impose a strict scrutiny standard in "hybrid situations" in which a law involves not the *Free Exercise Clause* alone, but in conjunction with other constitutional protections [*Miller v. Reed (9th Cir. 1999) 176 F.3d 1202, 1207]* .

If the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context [*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah (1993) 508 U.S. 520, 533, 113 S. Ct. 2217, 124 L. Ed. 2d 472* ; *Stormans, Inc. v. Selecky (9th Cir. 2009) 586 F.3d 1109, 1130]* . Apart from the text, the effect of a law in its real operation is strong evidence of its object [*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah (1993) 508 U.S. 520, 535, 113 S. Ct. 2217, 124 L. Ed. 2d 472* (assessing design of ordinance and determining that it was under-inclusive relative to its stated object); *Stormans, Inc. v. Selecky (9th Cir. 2009) 586 F.3d 1109, 1130]* . However, the *Free Exercise Clause* is not violated even though a group motivated by religious reasons may be more likely to engage in the proscribed conduct [*Stormans, Inc. v. Selecky (9th Cir. 2009) 586 F.3d 1109, 1131* ; *see Reynolds v. United States (1878) 98 U.S. 145, 166-167, 25 L. Ed. 244* (upholding polygamy ban though practice was followed primarily by members of Mormon church); *cf. United States v. O'Brien (1968) 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672* (rejecting *First Amendment* challenge to statutory prohibition of destruction of draft cards though most violators likely would be opponents of war).

A law is not generally applicable when the government, in a selective manner, imposes burdens only on conduct motivated by religious belief [*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah (1993) 508 U.S. 520, 543, 113 S. Ct. 2217, 124 L. Ed. 2d 472* ; *Stormans, Inc. v. Selecky (9th Cir. 2009) 586 F.3d 1109, 1134]* . The selective manner analysis tests the rules for substantial under-inclusiveness [*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah (1993) 508 U.S. 520, 545, 113 S. Ct. 2217, 124 L. Ed. 2d 472* (challenged ordinances were not of general applicability because each ordinance pursued city's governmental interests only against conduct motivated by religious belief and failed to prohibit nonreligious conduct endangering those interests in similar or greater degree than Santeria animal sacrifice did); *Stormans, Inc. v. Selecky (9th Cir. 2009) 586 F.3d 1109, 1135]* . A means/end test is not an appropriate test for general applicability, as it adopts an intermediate level of scrutiny, rather than a rational basis test [*Stormans, Inc. v. Selecky (9th Cir. 2009) 586 F.3d 1109, 1134]* .

While the analysis of legislative history is proper in the equal protection context, the law is unsettled regarding the scope of its consideration in the free exercise arena [*Stormans, Inc. v. Selecky (9th Cir. 2009) 586 F.3d 1109, 1131-1134* ; *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah (1993) 508 U.S. 520, 540-542, 558, 113 S. Ct. 2217, 124 L. Ed. 2d 472* (analysis of legislative history sanctioned as part of free exercise analysis only in nonprecedential section authored by one justice and joined only by one other, with three justices expressing view that such inquiry was inappropriate in free exercise context); *San Jose Christian College v. City of Morgan Hill (9th Cir. 2004) 360 F.3d 1024, 1030 n.4* ; *KDM v. Reedsport School District (9th Cir. 1999) 196 F.3d 1046, 1048]* .

An independent basis for the free exercise of religion is granted under the California Constitution, which provides that "[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed" [*Cal. Const., art. I, § 4*; *see East Bay Asian Local Development Corp. v. State of California (2000) 24 Cal. 4th 693, 719-720, 102 Cal. Rptr. 2d 280, 13 P.3d 1122* (exempting property owned by religious entities from landmark status does not violate

no-preference provision of *free exercise clause* of California Constitution, since it satisfies all prongs of test under federal *establishment clause* and shows that exemption is neither governmental preference for nor discrimination against religion); *Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1112, 252 Cal. Rptr. 122, 762 P.2d 46*]. California courts have typically construed *Cal. Const., art. I, § 4* to afford the same protection for religious exercise as the federal Constitution and treat the state and federal *free exercise clauses* as interchangeable and apply, to both, the compelling state interest test [*Brunson v. Department of Motor Vehicles (1999) 72 Cal. App. 4th 1251, 1255, 85 Cal. Rptr. 2d 710* ; *see East Bay Asian Local Development Corp. v. State of California (2000) 24 Cal. 4th 693, 720, 102 Cal. Rptr. 2d 280, 13 P.3d 1122* (neither history nor language of no-preference clause of California Constitution's free exercise provision supports argument that clause bans governmental accommodation of religion or religious belief in general); *see also DiLoreto v. Board of Educ. of Downey Unif. Sch. Dist. (1999) 74 Cal. App. 4th 267, 278-279, 87 Cal. Rptr. 2d 791* (private party's free exercise rights not abrogated by school district's refusal to post sign containing Ten Commandments)].

[b] Religiously Motivated Conduct

[i] Balancing Test

Although religious belief is absolutely protected, religiously motivated conduct is not [*Sherbert v. Verner (1963) 374 U.S. 398, 402-403, 83 S. Ct. 1790, 10 L. Ed. 2d 965* ; *Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1113, 252 Cal. Rptr. 122, 762 P.2d 46*].

Government action burdening religious conduct is subject to a balancing test, in which the importance of the state's interest is weighed against the severity of the burden imposed on religion [*Wisconsin v. Yoder (1972) 406 U.S. 205, 214, 92 S. Ct. 1526, 32 L. Ed. 2d 15* ; *Snyder v. Evangelical Orthodox Church (1989) 216 Cal. App. 3d 297, 306, 264 Cal. Rptr. 640]* . The greater the burden imposed on religion, the more compelling must be the government interest at stake [*Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1113, 252 Cal. Rptr. 122, 762 P.2d 46* ; *Snyder v. Evangelical Orthodox Church (1989) 216 Cal. App. 3d 297, 306, 264 Cal. Rptr. 640*]. Only the gravest abuses, endangering paramount interest, give occasion for permissible limitation of this freedom [*Sherbert v. Verner (1963) 374 U.S. 398, 406, 83 S. Ct. 1790, 10 L. Ed. 2d 965* ; *McNair v. Worldwide Church of God (1987) 197 Cal. App. 3d 363, 374, 242 Cal. Rptr. 823* ; *but see Lyng v. Northwest Indian Cemetery Protective Ass'n (1988) 485 U.S. 439, 451, 108 S. Ct. 1319, 99 L. Ed. 2d 534* ; *Bowen v. Roy (1986) 476 U.S. 693, 699-701, 106 S. Ct. 2147, 90 L. Ed. 2d 735* (also upholding government action while declining to balance)].

The balancing test has been described as a two-prong test [*Snyder v. Evangelical Orthodox Church (1989) 216 Cal. App. 3d 297, 306, 310, 264 Cal. Rptr. 640* ; *Wollersheim v. Church of Scientology (1989) 212 Cal. App. 3d 872, 886-887, 260 Cal. Rptr. 331]* :

- That government seek to protect an important, or even, as some opinions suggest, a compelling, state interest.

- The burden on religious expression must be essential to further that interest.

A government action that passes the balancing test must also meet the further requirements that no action imposing a lesser burden on religion would satisfy the government's interest, and that the action does not discriminate between religions or between religion and nonreligion [*Braunfeld v. Brown (1961) 366 U.S. 599, 607, 81 S. Ct. 1144, 6 L. Ed. 2d 563* ; *Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1117-1119, 252 Cal. Rptr. 122, 762 P.2d 46* ; *Snyder v. Evangelical Orthodox Church (1989) 216 Cal. App. 3d 297, 306, 310, 264 Cal. Rptr. 640]* .

Even before application of the balancing test, two criteria must be satisfied to determine whether the activity in question is a religious practice entitled to protection under the *free exercise clause*. First, the system of thought to which the

course of conduct relates must qualify as a religion, not a philosophy, science, or personal preference. Second, the course of conduct must qualify as an expression of that religion and not just as an activity that religious people happen to be doing [*Snyder v. Evangelical Orthodox Church (1989) 216 Cal. App. 3d 297, 306, 264 Cal. Rptr. 640]* .

[ii] Actions Against Religious Organizations

Neither the federal nor the state constitution bar an action against a religious organization for fraud, intentional infliction of emotional distress, and restitution for deceiving nonmembers into subjecting themselves, without their knowledge or consent, to coercive persuasion. Compelling state interests in the substantial threat to public safety, peace, or order that fraudulent conduct poses, and the protection of the family institution, justify the marginal burden imposed by tort liability for fraud. Further, judicial sanctioning of tort liability for fraudulent recruitment has as its purpose and effect the advancement of the state's legitimate secular goal of protecting persons from being harmed by fraud, and is nondiscriminatory [*Molko v. Holy Spirit Ass.n (1988) 46 Cal. 3d 1092, 1117-1118, 252 Cal. Rptr. 122, 762 P.2d 46*].

The protection of a person's good name is a sufficiently important state interest to allow the burden of tort damages to be imposed. Thus, actions of a church or religious organization and its evangelist ministers in the performance of religious activities are subject to liability in tort for defamation, with certain limitations [*McNair v. Worldwide Church of God (1987) 197 Cal. App. 3d 363, 374, 242 Cal. Rptr. 823* (constitutional malice required); for discussion of defamation actions, *see* Ch. 340, *Libel and Slander*].

In addition, a pastor may be subject to tort liability for sexually inappropriate and injurious conduct that breaches a fiduciary duty arising out of a confidential relation with a parishioner without offense to the religion clauses in the *First Amendment of the United States Constitution* and *article I, § 4, of the California Constitution*. Liability exists if (1) the alleged injurious conduct was not dictated by a sincerely held religious belief or carried out in accordance with established beliefs and practices of the religion to which the pastor belongs, and (2) there is no other reason the issues cannot be framed for the trier of fact in secular rather than sectarian terms [*Richelle L. v. Roman Catholic Archbishop (2003) 106 Cal. App. 4th 257, 273-279, 130 Cal. Rptr. 2d 601* (but circumstances not present here)].

On the other hand, one court held that application of California's Fair Employment and Housing Act (FEHA), *Gov. Code § 12900 et seq.*, which prohibits, inter alia, discrimination in employment, to a church-affiliated university's employment dispute with a campus chaplain would run afoul of the *Free Exercise Clause*, since there was no state interest compelling enough to override the university's interest in deciding how its chaplain can best serve the spiritual needs of the campus community [*Schmoll v. Chapman University (1999) 70 Cal. App. 4th 1434, 1442-1445, 83 Cal. Rptr. 2d 426]* .

[c] Standing

In order bring an action alleging a violation of *First Amendment* Free Exercise rights, a plaintiff must have standing, which is governed by Article III of the Federal Constitution [*Alaska Right to Life Political Action Comm. v. Feldman (9th Cir. 2007) 504 F.3d 840, 848* (standing is controlling element in definition of case or controversy)]. To satisfy Article III's standing requirements, a plaintiff must show each of the following [*Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc. (2000) 528 U.S. 167, 180-181, 120 S. Ct. 693, 145 L. Ed. 2d 610* ; *Stormans, Inc. v. Selecky (9th Cir. 2009) 586 F.3d 1109, 1119, 1121* (individual pharmacists had standing to challenge administrative rules requiring pharmacies to dispense contraceptives under *Free Exercise Clause*, when one pharmacist expected to be fired because her religious convictions prohibited her from dispensing contraceptive and her employer told her it would not be able to accommodate her, and second pharmacist alleged she was forced to leave her former job after pharmacy was unable to hire second pharmacist to work at pharmacy that accommodated her religious belief by ensuring there was always another pharmacist on duty, which was farther away from her house for less pay because her religious beliefs did not allow her to dispense contraceptive)]:

- It has suffered an injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical.

- The injury is fairly traceable to the challenged action of the defendant.

- It is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

It does not suffice if the injury complained of is the result of the independent action of a third party not before the court. However, that does not exclude injury produced by determinative or coercive effect upon the action of someone else [*Stormans, Inc. v. Selecky (9th Cir. 2009) 586 F.3d 1109, 1121* ; *see Bennett v. Spear (1997) 520 U.S. 154, 169, 117 S. Ct. 1154, 137 L. Ed. 2d 281]* .

With regard to whether corporations have standing to assert Free Exercise claims, the proper question is not whether corporations have *First Amendment* rights and, if so, whether they are coextensive with those of natural persons. The question is whether the challenged statute or regulation abridges rights the *First Amendment* was meant to protect [*First National Bank of Boston v. Bellotti (1978) 435 U.S. 765, 776-777, 98 S. Ct. 1407, 55 L. Ed. 2d 707* (refusing to address abstract question whether corporations have full measure of rights individuals enjoy under *First Amendment*); *Stormans, Inc. v. Selecky (9th Cir. 2009) 586 F.3d 1109, 1120* (declining to decide whether for-profit corporation can assert its own rights under *Free Exercise Clause* and instead examining rights at issue as those of corporate owners)]. A corporation has standing to assert the free exercise right of its owners [*Stormans, Inc. v. Selecky (9th Cir. 2009) 586 F.3d 1109, 1120-1122* (corporation had standing to assert Free Exercise claims of its owners, when corporation did not present any free exercise rights of its own different from or greater than its owners' rights, and its injuries were concrete and particularized, actual or imminent, not conjectural or hypothetical and fairly traceable to challenged rules); *see EEOC v. Townley Eng'g & Mfg. Co. (9th Cir. 1988) 859 F.2d 610, 619-620* & n.15 (because corporation was merely instrument through and by which owners expressed their religious beliefs, it was unnecessary to address abstract issue whether for-profit corporation had rights under *Free Exercise Clause* independent of those of its shareholders and officers and corporation had standing to assert owners' Free Exercise rights)]. On the other hand, when a Free Exercise ordinarily requires individual participation because a plaintiff must show the coercive effect of a statute or regulation as it operates against the plaintiff in the practice of his or her religion, an organization will not have standing when its members have a diversity of views concerning the statute or regulation [*Harris v. McRae (1980) 448 U.S. 297, 321, 100 S. Ct. 2671, 65 L. Ed. 2d 784* ; *see also Hunt v. Wash. Apple Adver. Comm. (1977) 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383]* .

In addition to the immutable requirements of Article III, the federal judiciary adheres to a set of prudential principles that bear on the question of standing [*Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc. (1982) 454 U.S. 464, 474, 102 S. Ct. 752, 70 L. Ed. 2d 700]* . Prudential standing concerns require that courts consider the following [*Alaska Right to Life Political Action Comm. v. Feldman (9th Cir. 2007) 504 F.3d 840, 848-849]* :

- Whether the alleged injury was more than a mere generalized grievance.

- Whether plaintiffs are asserting their own rights or the rights of third parties.

- Whether the claim falls within the zone of interests to be protected or regulated by the constitutional guarantee in question.

The prudential zone of interest test is not meant to be especially demanding [*Stormans, Inc. v. Selecky (9th Cir. 2009) 586 F.3d 1109, 1122* ; *see Clarke v. Securities Indus. Ass'n (1987) 479 U.S. 388, 399, 107 S. Ct. 750, 93 L. Ed. 2d 757]* . Prudential standing is satisfied unless the party's interests are so marginally related to or inconsistent with the

purposes implicit in the challenged statute or regulation that it cannot reasonably be assumed that the government intended to permit the suit [*Stormans, Inc. v. Selecky (9th Cir. 2009) 586 F.3d 1109, 1122* (pharmacy and two pharmacists met prudential standing requirements for Free Exercise challenge to administrative rules requiring pharmacies to dispense contraceptive, where they alleged that their conduct was directly regulated by new rules and their constitutional interests were directly infringed by rules); *see Ocean Advocates v. U.S. Army Corps of Engrs. (9th Cir. 2005) 402 F.3d 846, 861]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of ReligionEstablishment of ReligionConstitutional LawBill of RightsFundamental FreedomsFreedom of ReligionFree Exercise of ReligionTortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsIntentional TortsDefamationGeneral Overview

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 110 CHURCHES AND RELIGIOUS ORGANIZATIONS
PART II. LEGAL BACKGROUND

11-110 California Forms of Pleading and Practice--Annotated § 110.14

§ 110.14 Jurisdiction

[1] Ecclesiastical Controversies

Civil courts have no jurisdiction over church disputes that are purely ecclesiastical, such as disputes concerning theological controversy, church discipline, ecclesiastical government, or the conformity of church members to a prescribed standard of morals [*Watson v. Jones (1872) 80 U.S. 679, 733, 20 L. Ed. 666* ; *Higgins v. Maher (1989) 210 Cal. App. 3d 1168, 1170, 258 Cal. Rptr. 757* ; *Presbytery of Riverside v. Community Church of Palm Springs (1979) 89 Cal. App. 3d 910, 919-920, 152 Cal. Rptr. 854*]. The exercise of jurisdiction over such ecclesiastical controversies by civil courts violates the *First Amendment* [*Presbyterian Church v. Hull Church (1969) 393 U.S. 440, 449, 89 S. Ct. 601, 21 L. Ed. 2d 658* ; *Wilson v. Hinkle (1977) 67 Cal. App. 3d 506, 510-511, 136 Cal. Rptr. 731]* .

Thus, decisions of proper church tribunals on matters purely ecclesiastical are conclusive and binding on the civil courts, and, although there may be an exception to that rule when such decisions are products of fraud or collusion, the *First Amendment* prohibits civil courts from inquiring into whether or not the decisions of an ecclesiastical tribunal complied with church laws and regulations [*Serbian Orthodox Diocese v. Milivojevich (1976) 426 U.S. 696, 712-713, 96 S. Ct. 2372, 49 L. Ed. 2d 151* ; *Korean United Presbyterian Church v. Presbytery of the Pacific (1991) 230 Cal. App. 3d 480, 497-499, 281 Cal. Rptr. 396* , *disapproved on other grounds, Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 744 n.11* ; *see Gonzalez v. Roman Catholic Archbishop (1929) 280 U.S. 1, 16, 50 S. Ct. 5, 74 L. Ed. 131*].

If a schism, however, has developed within a church, resulting in a dispute as to who holds ultimate authority for congregational or corporate decisions, civil courts may determine which faction is the true or legitimate authority [*Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church (1952) 39 Cal. 2d 121, 131-135, 245 P.2d 481* ; *Higgins v. Maher (1989) 210 Cal. App. 3d 1168, 1173, 258 Cal. Rptr. 757*].

A hierarchical church is one in which individual churches are organized as a body with other churches having similar faith and doctrine, and with a common ruling convocation or ecclesiastical head vested with ultimate ecclesiastical authority over the individual congregations and members of the entire organized church [*Concord Christian Center v. Open Bible Standard Churches (2005) 132 Cal. App. 4th 1396, 1409, 34 Cal. Rptr. 3d 412* ; *see Kedroff v. St.*

Nicholas Cathedral (1952) 344 U.S. 94, 110, 73 S. Ct. 143, 97 L. Ed. 120]. In such a hierarchical church, an individual local congregation that affiliates with the national church body becomes "a member of a much larger and more important religious organization, ... under its government and control, and ... bound by its orders and judgments" [*Concord Christian Center v. Open Bible Standard Churches (2005) 132 Cal. App. 4th 1396, 1409, 34 Cal. Rptr. 3d 412* ; *see Watson v. Jones (1871) 80 U.S. 679, 722-727, 20 L. Ed. 666*]. In contrast, a congregational church is defined as one "strictly independent of other ecclesiastical associations, and [one that] so far as church government is concerned, owes no fealty or obligation to any higher authority" [*Concord Christian Center v. Open Bible Standard Churches (2005) 132 Cal. App. 4th 1396, 1409, 34 Cal. Rptr. 3d 412* ; *see Watson v. Jones (1871) 80 U.S. 679, 722, 20 L. Ed. 666*].

Generally, civil jurisdiction is more limited with respect to hierarchical religious organizations than it is in the case of congregational or independent ones [*Concord Christian Center v. Open Bible Standard Churches (2005) 132 Cal. App. 4th 1396, 1409, 34 Cal. Rptr. 3d 412* ; *Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church (1952) 39 Cal. 2d 121, 131-133, 245 P.2d 481* ; *see also* § 110[2][a]]. This rule is referred to as the "ecclesiastical" or "hierarchical rule" [*see Concord Christian Center v. Open Bible Standard Churches (2005) 132 Cal. App. 4th 1396, 1407, 34 Cal. Rptr. 3d 412]* . In a hierarchical-church dispute between a superior entity (such as a diocese in the Roman Catholic church hierarchy) and a subordinate entity (such as a particular parish), a court must defer to the resolution of a material ecclesiastical issue by the authoritative ecclesiastical body. However, a trial court has power to receive evidence and determine three preliminary issues [*see Concord Christian Center v. Open Bible Standard Churches (2005) 132 Cal. App. 4th 1396, 1411-1413, 34 Cal. Rptr. 3d 412]* :

- Are the parties hierarchical-church entities, one of which is subordinate to the other?

- What is the authoritative ecclesiastical entity to whose decisions, on ecclesiastical issues, the court must give due deference?

- How has that entity resolved the material ecclesiastical issues?

Material ecclesiastical issues could include not only issues of religious doctrine per se, but also issues of membership, clergy credentials and discipline, and church polity and administration [*see Concord Christian Center v. Open Bible Standard Churches (2005) 132 Cal. App. 4th 1396, 1411-1413, 34 Cal. Rptr. 3d 412]* .

On the other hand, it has long been the law in California that the identification of a religious body as the true church is an ecclesiastical issue [*Metropolitan Philip v. Steiger (2000) 82 Cal. App. 4th 923, 931* (two factions disputed who was rightful owner of certain church property); *Korean United Presbyterian Church v. Presbytery of the Pacific (1991) 230 Cal. App. 3d 480, 500, 506, 281 Cal. Rptr. 396* , *disapproved on other grounds*, *Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 744 n.11* ; *Presbytery of Riverside v. Community Church of Palm Springs (1979) 89 Cal. App. 3d 910, 922, 152 Cal. Rptr. 854*]. If there is a church hierarchy to make the determination and it does make the determination, civil courts are bound by it [*Korean United Presbyterian Church v. Presbytery of the Pacific (1991) 230 Cal. App. 3d 480, 502-503, 505-506, 281 Cal. Rptr. 396* , *disapproved on other grounds*, *Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 744 n.11*]. For example, a controversy regarding reaffiliation with the mother church is an example of an ecclesiastical controversy over which civil courts have no jurisdiction, notwithstanding characterization of the issue by one faction as one that only involved interpretation of bylaws (regarding notice of meetings and voting rights), which could be resolved by "application of neutral principles of law" [*Vukovich v. Radulovich (1991) 235 Cal. App. 3d 281, 291-294, 286 Cal. Rptr. 547]* .

[2] Civil or Property Rights

[a] Generally

Courts are not precluded from exercising jurisdiction over civil or property rights involved in a church dispute even though ecclesiastical matters may be incidentally involved [*Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Secretarian Church (1952) 39 Cal. 2d 121, 133, 245 P.2d 481* ; *Wheelock v. First Presb. Church (1897) 119 Cal. 477, 482, 51 P. 841* ; *St. Sava Mission Corp. v. Serbian Eastern Orthodox Diocese (1990) 223 Cal. App. 3d 1354, 1368, 273 Cal. Rptr. 340* (appellant failed to suggest why title issue tendered would necessarily require courts to adjudicate ecclesiastical matters)].

In general, when the question presented is whether the property and funds of the church are being handled in accordance with the bylaws and rules of the church corporation, or whether the bylaws and rules are being properly observed by the governing body of the church, persons who are aggrieved (and have standing) may seek redress through a civil action [*Providence Baptist Church v. Superior Ct. (1952) 40 Cal. 2d 55, 63-64, 251 P.2d 10* ; *Samoan Congregational etc. Church in U.S. v. Samoan Congregational etc. Church of Oceanside (1977) 66 Cal. App. 3d 69, 76-77, 135 Cal. Rptr. 793*]. Courts that are called on to resolve disputes involving church property must not decide questions of religious doctrine, however. Such questions are for the church to resolve. Accordingly, if resolution of a property dispute involves a point of doctrine, the court must defer to the position of the highest ecclesiastical authority that has decided the point. To the extent that the court can resolve a property dispute without reference to church doctrine, the court should apply neutral principles of law. The court should consider sources such as deeds to the property in dispute, a local church's articles of incorporation, the constitution, canons, and rules of the general church, if any, and relevant statutes, including statutes specifically concerning religious property, such as *Corp. Code § 9142* [*Episcopal Church Cases (2009) 45 Cal. 4th 467, 485, 87 Cal. Rptr. 3d 275, 198 P.3d 66* ; *see § 110.14[2][b]* (discussion of *Corp. Code § 9142*)]. The neutral principles approach is exemplified in the following cases:

- If a court must resolve a property dispute involving a church that is incorporated under *Corp. Code § 9110 et seq.* (concerning religious corporations; see discussion in *§ 110.11[3]*), and a material fact is that some of the parties disregarded the church's status and structure as a California religious corporation, then the court could resolve the dispute against those parties because of that fact--thus, the court would apply neutral principles of California corporation law--even if those parties contended, and pointed to evidence supporting the contention, that they had acted strictly within the ambit of ecclesiastical rights under the protection of the *First Amendment* [*Iglesia Evangelica Latina, Inc. v. Southern Pac. Latin Am. Dist. of Assemblies of God (2009) 173 Cal. App. 4th 420, 439-446, 93 Cal. Rptr. 3d 75* ; *accord, Huber v. Jackson (2009) 175 Cal. App. 4th 663, 677, 683, 96 Cal. Rptr. 3d 346* (majority of members of Episcopal Church parish were free to disaffiliate from local diocese and national church, but their attempt to take parish-owned real and personal property was unlawful because their purported changes in parish's corporate structure, effected for that purpose, were *ultra vires* under governing documents of parish, diocese, and national church); *New v. Kroeger (2008) 167 Cal. App. 4th 800, 807, 84 Cal. Rptr. 3d 464* (same)].

- In a dispute between a general church and one of its local churches which had withdrawn from the general church, with respect to the property of the local church, a judgment quieting title to the disputed property in the local church did not deprive the general church of its property without due process of law, when the record indicated that the trial court resolved the dispute by applying principles or rules of law developed for use in all property disputes, whether or not the litigants are religious associations or corporations [*Presbytery of Riverside v. Community Church of Palm Springs (1979) 89 Cal. App. 3d 910, 923-924, 932-933, 152 Cal. Rptr. 854*].

However, if the property right determination rests on the determination of which faction constitutes the "true church," and a church hierarchy has determined who is the true church, the civil court must award the property accordingly [*Metropolitan Philip v. Basil Steiger (2000) 82 Cal. App. 4th 923, 931, 98 Cal. Rptr. 2d 605* (two factions disputed who was rightful owner of certain church property); *Korean United Presbyterian Church v. Presbytery of the Pacific (1991) 230 Cal. App. 3d 480, 502-503, 505-506, 281 Cal. Rptr. 396 , disapproved on other grounds, Morehart v.*

County of Santa Barbara (1994) 7 Cal. 4th 725, 744 n.11].

Nevertheless, in resolving an internal church property dispute as it affects the rights of majority and minority members, the courts are concerned with the form of internal structure or ecclesiastical government. If the judicatory system consists of a hierarchy or supreme judiciary exercising control over a number of member churches, the decision of such a synod, presbytery, or other supreme council is final and conclusive even though those complaining about that decision might comprise a substantial majority of the individual members [*Serbian Orthodox Diocese v. Milivojevich (1976) 426 U.S. 696, 724-725, 96 S. Ct. 2372, 49 L. Ed. 2d 151* ; *Wheelock v. First Presb. Church (1897) 119 Cal. 477, 482, 51 P. 841]* . For additional discussion of this "ecclesiastical" or "hierarchical rule" [*see Concord Christian Center v. Open Bible Standard Churches (2005) 132 Cal. App. 4th 1396, 1407, 34 Cal. Rptr. 3d 412]* , see *§ 110.14[1]*.

If a church is independently organized and governed by the congregation, such as in the Congregational or Baptist groups, the courts will take cognizance of the rights of the majority of the members [*Watson v. Jones (1872) 80 U.S. 679, 724-725, 20 L. Ed. 666* ; *Barber v. Irving (1964) 226 Cal. App. 2d 560, 567, 38 Cal. Rptr. 142]* . In either of the foregoing types or organizational structures, however, the courts will enforce the provisions of an express trust concerning the use of the church property even though the terms of the trust are in derogation of the wishes of the majority or the decision of the governing body of a federated church [*see Watson v. Jones (1872) 80 U.S. 679, 723, 20 L. Ed. 666* ; *see also Presbyterian Church v. Hull Church (1969) 393 U.S. 440, 452, 89 S. Ct. 601, 21 L. Ed. 2d 658* (Harlan, J., concurring); *California-Nevada Annual Conference of the United Methodist Church v. St. Luke's United Methodist Church (2004) 121 Cal. App. 4th 754, 757, 17 Cal. Rptr. 3d 442* (in absence of express declaration that trust created by local church for governing church was irrevocable, local church was free under state law to revoke trust), *disapproved on other grounds, Episcopal Church Cases (2009) 45 Cal. 4th 467, 491-492* ; *but see Guardian Angel Polish Nat'l Catholic Church of L.A., Inc. v. Grotnik (2004) 118 Cal. App. 4th 919, 931, 13 Cal. Rptr. 3d 552* (church property belonged to general church because decision of local church board severing ties with general church had not been approved by governing church board as required by general church constitution)].

[b] Action for Breach of Corporation's Charitable Trust

[i] Who May Bring Action

The Nonprofit Religious Corporation Law provides that any of the following may bring an action to enjoin, correct, obtain damages for, or otherwise remedy a breach of a trust under which any or all of the assets of the corporation are held [*Corp. Code § 9142(a)*]:

- The corporation, a member, or a former member asserting the right in the name of the corporation, provided that for the purpose of such an action, Corp. Code § 5170 (derivative actions by members of nonprofit public benefit corporations) will apply.
- An officer of the corporation.
- A director of the corporation.
- A person with a reversionary, contractual, or property interest in the assets subject to such trust.

The fact that the provision allows a corporation to bring an action for breach of trust is somewhat confusing; the corporation, being the trustee, would appear to be the only entity capable of breaching the trust.

[ii] Creation of Trust

Whether the local church has created a trust in favor of the general church is ordinarily a question of fact to be

determined by ascertaining the intent of the parties. If the trial court's factual determination is based on conflicting evidence, or at least on evidence giving rise to conflicting inferences, the substantial evidence rule applies and the trial court's determination will not be disturbed on appeal [*California-Nevada Annual Conf. of the United Methodist Church v. St. Luke's United Methodist Church (2004) 121 Cal. App. 4th 754, 764, 17 Cal. Rptr. 3d 442 , disapproved on other grounds, Episcopal Church Cases (2009) 45 Cal. 4th 467, 491-492* ; *Presbytery of Riverside v. Community Church of Palm Springs (1979) 89 Cal. App. 3d 910, 931, 152 Cal. Rptr. 854*].

No assets of the corporation are or may be deemed to be impressed with a trust, express or implied, statutory or at common law, unless and only to the extent that one of the following is true:

- The assets are received by the corporation with an express commitment by resolution of its board of directors to hold the assets in trust [*Corp. Code § 9142(c)(1)*].

- The articles or bylaws of the corporation, or the governing instruments of a superior religious body or general church of which the corporation is a member, expressly provide that the assets be held in trust [[*Corp. Code § 9142(c)(2)*] *see Korean United Presbyterian Church v. Presbytery of the Pacific (1991) 230 Cal. App. 3d 480, 509, 281 Cal. Rptr. 396* (bylaws established express trust for superior church body), *disapproved on other grounds, Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 744 n.11*].

- The donor expressly imposed a trust, in writing, on the assets at the time of the gift or donation [*Corp. Code § 9142(c)(3)*].

In a hierarchically organized church, the "general church" can impress a trust on a local religious corporation that is a "member" if the governing instruments of that superior religious body so provide [*Episcopal Church Cases (2009) 45 Cal. 4th 467, 492, 87 Cal. Rptr. 3d 275, 198 P.3d 66 , disapproving contrary statement in California Nevada Annual Conf. of the United Methodist Church v. St. Luke's United Methodist Church (2004) 121 Cal. App. 4th 754, 757, 769-770, 17 Cal. Rptr. 3d 442*]. However, under California trust law, unless a trust is expressly made irrevocable by the trust instrument, the trust is revocable by the settlor [*Prob. Code § 15400*], and this rule would apply to a trust impressed on property of a local religious corporation [*California Nevada Annual Conf. of the United Methodist Church v. St. Luke's United Methodist Church (2004) 121 Cal. App. 4th 754, 767-768, 17 Cal. Rptr. 3d 442 , disapproved on other grounds, Episcopal Church Cases (2009) 45 Cal. 4th 467, 492*].

The articles or bylaws of the religious corporation or the governing instruments of a superior religious body or general church of which the corporation is a member, that expressly provide for the creation of a trust, can be amended to amend or dissolve the trust, but they cannot be amended to delete or amend provisions stating that the property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes [*Corp. Code § 9142(d)*; *see Rev. & Tax Code § 214.01*].

[iii] Contract Performance

In any action under *Corp. Code § 9142* the court may not rescind or enjoin the performance of a contract unless (1) all of the parties to the contract are parties to the action; (2) no party to the contract has, in good faith and without actual notice of the restriction, parted with value under the contract or in reliance upon it; and (3) it is equitable to do so.

[iv] Disposition of Property

When property is received by a religious corporation covered by *Corp. Code § 9110 et seq.*, from a person directly affiliated with that corporation, and the property was contributed based on an affirmative representation that it would be used for a specific purpose other than the general support of the corporation's activities, but is used in a manner contrary

to the specific purpose for which it was contributed, the contributor or any person listed in *Corp. Code § 9142(a)(1), (2),* or *(3)* may bring an action if that person notifies the corporation in writing, before the action is brought, that an action will be brought unless the corporation takes immediate steps to correct any improper diversion of funds [*Corp. Code § 9143(a)*]. A public officer may not bring an action under *Corp. Code § 9143* in his or her official capacity, even on behalf of a private person [*Corp. Code § 9143(c)*].

If it becomes impractical or impossible for the corporation to devote the property to the specific purpose for which it was contributed, or if the directors or members of the corporation in good faith expressly conclude and record in writing that the stated purpose for which the property was contributed is no longer in accord with the policies or best interests of the corporation, the directors or members of the corporation may, in good faith, approve or ratify the use of the property for the general purposes of the corporation, rather than for the specific purpose for which it was contributed [*Corp. Code § 9143(b)*].

[c] Division Within Religious Society

In cases concerning property right disputes occasioned by a schism or division within the religious society in which the court is called on to decide which faction is entitled to the church property, the court is bound by any rulings of the church tribunal concerning the ecclesiastical matters which affect the controverted property rights [*Serbian Orthodox Diocese v. Milivojevich (1976) 426 U.S. 696, 709-710, 96 S. Ct. 2372, 49 L. Ed. 2d 151* ; *Korean United Presbyterian Church v. Presbytery of the Pacific (1991) 230 Cal. App. 3d 480, 502-503, 505-506, 281 Cal. Rptr. 396 , disapproved on other grounds, Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 744 n.11* ; *see Guardian Angel Polish Nat'l Catholic Church of L.A., Inc. v. Grotnik (2004) 118 Cal. App. 4th 919, 927-931, 13 Cal. Rptr. 3d 552* (general church became owner of local church property following schism because actions of local church board had not been approved by general church as required by general church's constitution), *criticized by California-Nevada Annual Conf. of the United Methodist Church v. St.Luke's United Methodist Church (2004) 121 Cal. App. 4th 754, 771, 17 Cal. Rptr. 3d 442* (contrary to California corporation law), *disapproved on other grounds, Episcopal Church Cases (2009) 45 Cal. 4th 467, 492* ; *see also Wheelock v. First Presb. Church (1897) 119 Cal. 477, 482, 51 P. 841]* .

The courts are prohibited by the *First* and *Fourteenth Amendments* from deciding such cases on the basis of their own interpretation of church doctrine [*Serbian Orthodox Diocese v. Milivojevich (1976) 426 U.S. 696, 721, 96 S. Ct. 2372, 49 L. Ed. 2d 151* ; *Presbyterian Church v. Hull Church (1969) 393 U.S. 440, 449, 89 S. Ct. 601, 21 L. Ed. 2d 658]* . For example, if the schism resulted from a diversion on the part of a minister from the denominational doctrine, a civil court may not interfere, and the controversy would have to be settled by the church tribunals [*Providence Baptist Church v. Superior Ct. (1952) 40 Cal. 2d 55, 63, 251 P.2d 10* ; *Wilson v. Hinkle (1977) 67 Cal. App. 3d 506, 512 n.5, 136 Cal. Rptr. 731]* .

Similarly, if the church's governing body determines which faction represents the true church, the civil court must defer to and implement that decision [*Korean United Presbyterian Church v. Presbytery of the Pacific (1991) 230 Cal. App. 3d 480, 502-503, 281 Cal. Rptr. 396 , disapproved on other grounds, Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 744 n.11*].

[d] Expulsion of Church Members

In cases concerning the expulsion of church members and removal of pastors, the courts have been reluctant to take jurisdiction unless property rights were affected. Apparently church membership alone is not a sufficient legal interest to invoke the jurisdiction of the courts to contest a wrongful expulsion [*Owen v. Board of Directors (1959) 173 Cal. App. 2d 112, 117, 342 P.2d 424* ; *see also Maxwell v. Brougher (1950) 99 Cal. App. 2d 824, 826, 222 P.2d 910* ; *Linke v. Church of Jesus Christ (1945) 71 Cal. App. 2d 667, 668-669, 163 P.2d 44]* .

However, if the expulsion is not only from church membership but from membership in a corporation which holds and

administers the church property, a sufficient property right is involved for the courts to determine the validity of the expulsion [*Burnett v. Banks (1955) 130 Cal. App. 2d 631, 636, 279 P.2d 579* ; *see Corp. Code §§ 9310-9353* (rights of members of religious nonprofit corporation generally), 9151(d), 9340 (termination of membership)].

Similarly, if the dispute concerns the removal of a pastor who receives a salary, the emoluments of the office constitute a sufficient property right to invoke civil court jurisdiction. In such a case, the court must look to the usage, custom, rules, and regulations of the organization in deciding whether or not the meeting at which the pastor was removed was properly conducted [*Providence Baptist Church v. Superior Ct. (1952) 40 Cal. 2d 55, 61-62 251 P.2d 10]* . Even if the removal arises out of a dispute over doctrine or another ecclesiastical question, the court may still properly adjudicate resulting disputes over salary or other property so long as it may do so without attempting to resolve the underlying ecclesiastical controversy [*Gipe v. Superior Court (1981) 124 Cal. App. 3d 617, 628, 177 Cal. Rptr. 590]* .

[e] Disaffiliation by Hierarchical Church Body

Assuming that persons with standing have duly appeared in an appropriate action for resolution of the dispute between them [*see, e.g., Corp. Code § 9418* (declaratory relief action to determine validity of election or appointment of director of religious corporation); *see also Classis of Cent. Calif. v. Miraloma Cmty. Church (2009) 177 Cal. App. 4th 750, 768-769, 99 Cal. Rptr. 3d 449* (superior entity in hierarchical church organization had standing to sue local church)], a civil court can apply neutral principles of law to decide whether a subordinate entity in a hierarchical church organization--typically, a local church--was successfully disaffiliated from the organization, even when the issue does not involve conflicting claims to property [*Classis of Cent. Calif. v. Miraloma Cmty. Church (2009) 177 Cal. App. 4th 750, 759-761, 99 Cal. Rptr. 3d 449* (entire congregation, including governing officers, of local church failed in their attempt to disaffiliate it; control of property was not at issue); *see New v. Kroeger (2008) 167 Cal. App. 4th 800, 807, 84 Cal. Rptr. 3d 464* (majority faction in congregation of local church failed in attempt to disaffiliate it; minority faction was properly recognized by superior entity as constituting entire congregation after dissidents affiliated themselves with different church organization; dissidents were legally obligated to relinquish possession of local church's assets and turn over control to remaining loyal congregants)].

The court may determine initially that the parties are related as superior and subordinate entities in a hierarchical church organization, based on the entities' organizational documents and evidence regarding the entities' interaction [*Classis of Cent. Calif. v. Miraloma Cmty. Church (2009) 177 Cal. App. 4th 750, 761-762, 99 Cal. Rptr. 3d 449]* . The court may then determine that an attempt at disaffiliation by the subordinate entity was procedurally ineffective, based on the documents defining the parties' relationship; and the court may give those documents equal status, or even precedence, with respect to Corporations Code sections governing religious corporations [*Classis of Cent. Calif. v. Miraloma Cmty. Church (2009) 177 Cal. App. 4th 750, 763-766, 99 Cal. Rptr. 3d 449]* . The court may further determine that responsive and remedial measures by the superior entity, to prevent or annul the attempted disaffiliation, were legitimate under the applicable organizational documents and therefore also were lawful under the Corporations Code [*Classis of Cent. Calif. v. Miraloma Cmty. Church (2009) 177 Cal. App. 4th 750, 767-768, 99 Cal. Rptr. 3d 449]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of ReligionEstablishment of ReligionConstitutional LawBill of RightsFundamental FreedomsFreedom of ReligionFree Exercise of ReligionEstate, Gift & Trust LawTrustsAdministration

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§ 110.15 Director's Standard of Conduct

[1] Good Faith

The director of a religious corporation must perform directorial duties, including duties as a member of any committee of the board on which he or she may serve, in good faith, in a manner he or she believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as is appropriate under the circumstances [*Corp. Code § 9241(a)*]. The term "good faith" has been used to describe a state of mind denoting honesty of purpose, freedom from intent to defraud, and a general faithfulness to one's duties or obligations [*Efron v. Kalmanovitz (1967) 249 Cal. App. 2d 187, 192, 57 Cal. Rptr. 248]* .

[2] Consideration of Religious Purpose and Tenets

The standard of conduct imposed by the Nonprofit Religious Corporation Law differs in two respects from the analogous provisions set out in the Nonprofit Public Benefit Corporation Law [*Corp. Code §§ 5231, 5233, 5237*], the Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7231*], and the General Corporation Law [*Corp. Code § 309*]. First, in addition to the general provisions respecting standards of conduct [*Corp. Code § 9241*], the director of a religious corporation, in making a good-faith determination, may take into consideration what he or she believes to be the religious purposes of the corporation, as well as applicable religious tenets, canons, laws, policies, and authority [*Corp. Code § 9240(c)*]. Second, the standard of care required by the Nonprofit Religious Corporation Law is that which is appropriate under the circumstances [*Corp. Code § 9241(a)*] and not that which an ordinarily prudent person in a like position would use under similar circumstances, required under analogous provisions of the other corporation laws [*Corp. Code §§ 309(a), 5231(a), 7231(a)*].

These differences derive from the fact that religious corporations often serve as civil vehicles for owning properties and conducting temporal affairs of a somewhat separate religious organization. Thus, the "best interests" of the corporation may be inextricably bound up in religious considerations or in the interests of related religious groups or organizations which a court could not and would not review in determining whether or not a director has performed his or her duties properly.

Additionally, the directors of a religious corporation may have less than full responsibility regarding the conduct of

corporate affairs. To the extent that some or even virtually all of such responsibility can conceivably be assigned to others in accordance with religious rules, the manner of performance of a director's duties may well be constrained. Moreover, a director may feel bound by religious rules or by directions of religious authorities in carrying out directorial duties and thus carry out such duties in a manner other than he or she would without such direction [Ballantine and Sterling, California Corporation Laws, Ch. 19, *Nonprofit Corporations and Organizations* (Matthew Bender)].

[3] Reliance on Information Furnished

In performing the duties of a director, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, in each case prepared or presented by any of the following sources:

- One or more officers or employees of the corporation whom the director believes to be reliable and competent in the matters presented [*Corp. Code § 9241(b)(1)*].

- Counsel, independent accountants, or other persons as to matters that the director believes to be within the professional or expert competence of those persons [*Corp. Code § 9241(b)(2)*].

- A committee on which the director does not serve, that is composed exclusively of any combination of directors, persons described in *Corp. Code § 9241(b)(1)* (listed *above*), or persons described in *Corp. Code § 9241(b)*(2 (listed *above*), as to matters within its designated authority, if the director believes the committee merits confidence [*Corp. Code § 9241(b)(3)*].

- Religious authorities and ministers, priests, rabbis, or other persons whose position or duties in the religious organization the director believes justify reliance and confidence and whom the director believes to be reliable and competent in the matters presented [*Corp. Code § 9241(b)(4)*].

Reliance on information from any of the foregoing sources must be in good faith after reasonable inquiry when the need for such an inquiry is indicated by the circumstances, and without knowledge that would cause such reliance to be unwarranted [*Corp. Code § 9241(b)(4)*].

These provisions also govern the duties of directors as to any acts or omissions in connection with the election, selection, or nomination of directors [*Corp. Code § 9242*].

[4] Liability of Directors for Distribution and Loans

[a] Defined

Subject to the general standard of care requirements set out in *Corp. Code § 9241*, and discussed under [3], *above*, directors of nonprofit religious corporations may be held jointly and severally liable to the corporation for approving any of the following transactions [*Corp. Code § 9245(a)*]:

- The making of any distribution.

- The distribution of assets after institution of dissolution proceedings of the corporation, without paying or adequately providing for all known liabilities of the corporation, excluding any claims not filed by creditors within the time limit set by the court in a notice given to creditors under *Corp. Code § 9680* and those sections made applicable to *Corp. Code § 9245* by *Corp. Code § 9680*.

- The making of any loan or guaranty contrary to *Corp. Code § 9241*, thereby constituting a breach of fiduciary duty.

[b] Who May Bring Suit

Suit to enforce liability may be brought by a member's derivative suit against any or all directors liable for the making of any distribution [*Corp. Code §§ 5710(b), 9245(b)(1)*]. Enforcement of liability for wrongful distribution after institution of dissolution proceedings or for the making of any loan or guaranty contrary to *Corp. Code § 9241* may be brought against any or all directors liable by any one or more creditors of the corporation whose debts or claims arose prior to the time of the corporate action, who have not consented to the corporate action, whether or not they have reduced their claims to judgment [*Corp. Code § 9245(b)(2)*].

[c] Damages

Damages recoverable from a director found liable are the amount of the illegal distribution, or if the illegal distribution consists of property, the fair market value of the property at the time of the illegal distribution, plus interest from the date of the distribution at the legal rate on judgments until paid, together with all reasonably incurred costs of appraisal or other valuation, if any, of the property, or the loss suffered by the corporation as a result of the illegal loan or guaranty, or the loss suffered by the corporation as a result of the illegal loan or guaranty [*Corp. Code § 9245(c)*].

[d] Subrogation of Rights

Directors found liable under *Corp. Code § 9245* are entitled to be subrogated to the rights of the corporation as follows:

- With respect to the making of any distribution, against the members who received the distribution [*Corp. Code § 9245(e)(1)*].

- With respect to wrongful distribution after institution of dissolution proceedings, against the members who received the distribution [*Corp. Code § 9245(e)(2)*].

- With respect to the making of any loan or guaranty contrary to *Corp. Code § 9241*, against the person who received the loan or guaranty [*Corp. Code § 9245(e)(3)*].

Corp. Code § 9245 provides that any director sued under its provisions may file a cross complaint against the person or persons who are liable to such director as a result of the subrogation set out in *Corp. Code § 9245* or may proceed against that person or those persons in an independent action.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 110.16 Special Standard Regarding Self-Dealing Transactions

[1] Self-Dealing Transaction Defined

A self-dealing transaction is one to which a religious corporation is a party and in which one or more of its directors has a material financial interest and that does not meet the requirements of *Corp. Code § 9243(d)(1),(2),(3),* or *(4)*. Such a director is termed an "interested director" [*Corp. Code § 9243(a)*].

In the event that a director is found liable for self-dealing, he or she will be required to do such things and pay such damages as the court deems fair and equitable, considering any benefit received by the corporation and whether or not such interested director acted in good faith and with an intent to further the best interests of the corporation [*Corp. Code § 9243(h)*]. Additionally, the court may order the interested director or directors to do any or all of the following [*Corp. Code § 9243(h)*]:

- Account for any profits made from the transaction and pay them to the corporation.

- Pay the corporation the value of the use of any of its property used in the transaction.

- Return or replace any property lost to the corporation as a result of the transaction, together with any income or appreciation lost to the corporation by reason of the transaction.

- Account to the corporation for any proceeds of sale of such property and pay the proceeds to the legal corporation together with interest at the legal rate.

Additionally, the court may award prejudgment interest to the extent allowed by the Civil Code [*Corp. Code § 9243(h)*; *see Civ. Code §§ 3287, 3288*]. The court may also in its discretion grant exemplary damages for fraudulent or malicious self-dealing [*Corp. Code § 9243(h)*].

[2] Transactions Excluded

The following acts are specifically defined as being outside the scope of self-dealing transactions and are therefore

governed by the general standard of care discussed above:

- An action of the board fixing the compensation of a director as a director or officer of the corporation or making any loan of money or property to or guaranteeing the obligation of any director or officer [*Corp. Code § 9243(b)(1)*].

- A transaction that is a part of a public, charitable, or religious program of the corporation if it (a) is approved or authorized by the corporation in good faith and without unjustified favoritism; and (b) results in a benefit to one or more directors of their families because they are in the class of persons intended to be benefited by the program [*Corp. Code § 9243(b)(2)*].

- A transaction of which the interested director or directors have no actual knowledge and that does not exceed the lesser of one percent of the gross receipts of the corporation for the preceding fiscal year or $100,000 [*Corp. Code § 9243(b)(3)*].

[3] Avoidance of Liability

[a] Approval Prior to Transaction's Consummation

If a director is shown to have been involved in a self-dealing transaction under *Corp. Code § 9243(a)*, he or she may nevertheless avoid liability by sustaining the burden of proving all of the following:

- That the corporation entered into the transaction for its own benefit or for the benefit of the religious organization.

- That the transaction was fair and reasonable as to the corporation or was in furtherance of its religious purposes at the time the corporation entered into the transaction.

- That prior to authorizing or approving the transaction, the board considered, and in good faith determined after reasonable investigation under the circumstances, that the transaction would be fair and reasonable as to the corporation or that it would be in furtherance of its religious purposes.

- That prior to consummating the transaction, or any part of it, the board of the religious corporation authorized or approved the transaction in good faith by a vote of a majority of the directors then in office without counting the vote of the interested director or directors and with knowledge of the material facts concerning the transaction and the director's or directors' interest in it. Except as mentioned below, action by a committee of the board will not satisfy this requirement [*Corp. Code § 9243(d)(3)*].

[b] Approval After Transaction's Consummation

Liability may also be avoided after the transaction has been consummated if the interested director sustains the burden of proving the following [*Corp. Code § 9243(d)(4)*]:

- The transaction was approved by a committee or a person authorized by the board in a manner consistent with the standards prescribed for approval by the board itself.

- It was not reasonably practicable to obtain approval of the board prior to entering into the transaction.

- The board determines in good faith that the person or committee met the same requirements the

board would have had to meet in approving the transaction and ratifies the transaction at its next meeting by a vote of the majority of the directors then in office without counting the vote of the interested director or directors.

An interested director may be counted in determining the presence of a quorum at a meeting of the board in which the transaction is authorized, approved or ratified [*Corp. Code § 9243(g)*].

[c] Approval or Ratification by Members

Liability may also be avoided if the transaction is approved or ratified in good faith by the members other than the directors after notice and disclosure to the members of the material facts concerning the transaction and the director's interest in the transaction [*Corp. Code § 9243(d)(2)*].

[d] Approval by Attorney General

Liability may also be avoided if the Attorney General, or the court in an action in which the Attorney General is an indispensable party, has approved the transaction either before or after it was consummated [*Corp. Code § 9243(d)(1)*].

[4] Persons Entitled to Sue for Self-Dealing

An action for damages based on a director's self-dealing may be brought by a director or officer of the religious corporation, any person authorized by corporate bylaws to bring an action, by the corporation itself, or by a member of the corporation, asserting the right in the name of the corporation [*Corp. Code § 9243(c)*]. Since the Nonprofit Religious Corporation Law itself does not include a provision for bringing a derivative action, the law provides that for the purposes of asserting derivative rights, *Corp. Code § 5710* (Nonprofit Public Benefit Corporation) applies [*Corp. Code § 9243(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 110.17 Indemnification of Volunteer Director or Officer

[1] Nonprofit Corporations

[a] Generally

There are several statutes that immunize volunteer offices or directors from liability for any act or omission done within the scope of his or her duties as a board member or officer. Most of these provisions are discussed in Ch. 388, *Nonprofit Corporations* , which has a form of affirmative defense and forms for proceedings for an order allowing the filing of a complaint or cause of action against the volunteer office or director.

[b] I.R.C. § 501(c)(3), (6) Tax Exempt Corporations

Corp. Code § 5047.5 sets forth general provisions regarding indemnification of volunteer directors. *Corp. Code § 5047.5* governs, whether the corporation is organized under *Corp. Code §§ 5110 et seq.* (nonprofit public benefit corporations), *Corp. Code § 7110 et seq.* (nonprofit mutual benefit corporations), or *Corp. Code § 9110 et seq.* (nonprofit religious corporations), when all of the following are true [*see* Ch. 388, *Nonprofit Corporations*]:

- The nonprofit corporation bases its federal income tax exemption on *I.R.C. § 501(c)(3)* or *501(c)(6)*.
- The claim against the director or officer may also be made directly against the corporation.
- The corporation maintains a general liability insurance policy in the requisite amounts.

[c] Other Tax Exempt Corporations

In the unlikely event that the church, whether organized under Corp. Code *§§ 5110 et seq., Corp. Code* §§ 7110 et seq., or *Corp. Code §§ 9110 et seq.*, bases its federal income tax exemption on *I.R.C. § 501(c)(1)* (entities organized under federal law, except a credit union), (4) (civic league), (5) (labor or agricultural organization), (7) (club, recreational association), or (19) (veterans organization), *Code Civ. Proc. § 425.15* provides immunity to the volunteer officer or director and requires the person intending to sue the volunteer officer or director first to obtain leave from the court to

do so. *Code Civ. Proc. § 425.15* is discussed in Ch. 388, *Nonprofit Corporations* , which also contains a form of petition for obtaining an order allowing the action to proceed against the volunteer officer or director.

[d] Insured Corporations

Regardless of the basis of the corporation's federal income tax exemption, no monetary damages may be obtained from a volunteer officer or director of a public benefit corporation if the corporation has insurance to cover the claim or has made a good faith attempt to obtain insurance [*see Corp. Code § 5239*, discussed in Ch. 388, *Nonprofit Corporations*]. *Corp. Code § 9247*, a similar provision applicable in the case of a church organized as a nonprofit religious corporations, is discussed under [2], *below*.

[2] Religious Corporations

[a] Non-Liability of Directors and Officers

The specific provisions relating to indemnification of volunteer directors and officers of nonprofit religious corporations are set forth in *Corp. Code § 9247*. Volunteer directors and volunteer executive officers of nonprofit corporations subject to the Nonprofit Religious Corporation Law (*Corp. Code § 9110 et seq.*) are not personally liable for monetary damages to third parties caused by the director's or officer's negligent act or omission in the performance of his or her duties as a director or officer committed after January 1, 1988, if all of the following are true:

- The act or omission was within the scope of the director's or officer's duties.
- The act or omission was performed in good faith.
- The act or omission was not reckless, wanton, intentional, or grossly negligent.
- Damages caused by the act or omission are covered by a liability insurance policy issued to the corporation in the form of a general liability policy or a director's or officer's liability policy, or issued to the director or officer personally.

Even if the damages are not covered by a liability insurance policy, the volunteer director or officer will not be personally liable for the damages if the board of directors of the corporation and the person had made all reasonable efforts in good faith to obtain available liability insurance [*Corp. Code § 9247(a),(g)*; *see Corp. Code § 9247(b),(c)* (definitions)].

To be a "volunteer" within the meaning of *Corp. Code § 9247*, one must not receive any remuneration whether by way of salary, fee, or other consideration for services rendered. Nevertheless, the payment of per diem, mileage, or other reimbursement expenses to a director or executive officer does not disqualify him or her from being a volunteer [*Corp. Code § 9247(b)*]. "Executive officer" within the meaning of *Corp. Code § 9247* means the president, vice-president, secretary, or treasurer of the corporation, or other individual serving in like capacity, who assists in making corporate policy [*Corp. Code § 9247(c)*].

[b] Corporate Liability

Corp. Code § 9247 does not eliminate or limit the liability of a director or officer as provided in *Corp. Code § 9243* (self-dealing transactions) or 9245 (joint and several liability of directors relating to certain distributions, loans, and guaranties) or in any action or proceeding brought by the Attorney General [*Corp. Code § 9247(e)*]. Nor does anything in *Corp. Code § 9247* limit the corporation's liability for any damages caused by acts or omissions of the volunteer director or officer [*Corp. Code § 9247(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 110.18 Effect of Transactions Involving Interlocking Directorates

The Nonprofit Religious Corporation Law follows the same rule as do the Nonprofit Public Benefit Corporation Law, Nonprofit Mutual Benefit Corporation Law, and General Corporation Law as to transactions involving interlocking directorates. That is, no contract or other transaction between a religious corporation and any corporation, firm, or association having any director in common is either void or voidable because the common director was present at the meeting of the board or a committee of the board when the contract or transaction was authorized, approved, or ratified if [*Corp. Code § 9244(a)*]:

- Material facts as to the transaction and the common directorship were fully disclosed or known to the board or committee, and that body approved, authorized, or ratified the transaction in good faith by a vote sufficient without counting the vote of the common director; or

- The transaction was either just and reasonable as to the corporation taking into account its religious purposes or furthered the corporation's religious purposes at the time of authorization, approval, or ratification.

Thus, assuming there had not been full disclosure and the contract or transaction is not fair and reasonable as to the corporation in light of its religious aims, an action may be brought for rescission or such remedy as is appropriate, depending on the situation. For further discussion and an illustrative form for such a claim, see Ch. 167, *Corporations: Directors and Management* .

If the common director is also an "interested director," then *Corp. Code § 9243*, governing self-dealing transactions, applies, rather than *Corp. Code § 9244*. In such instance the common director has a more stringent burden of proof in order to uphold the validity of the contract or transaction in question [*Corp. Code § 9244(b)*].

Legal Topics:

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§ 110.19 Standard of Conduct Regarding Investments

Directors of religious corporations are held to the general standard of conduct, *discussed under § 110.15, above,* with regard to investing, reinvesting, purchasing, acquiring, exchanging, selling, and managing corporate investments [*Corp. Code § 9250*; *see Corp. Code § 9241*]. To provide flexibility with regard to investments, the Corp. Code provides that nothing in the prescribed standards abrogates or restricts the court's power in proper cases to direct or permit a corporation to deviate from the terms of a trust or agreement regarding the making or retention of investments [*Corp. Code § 9251*]. For further discussion, see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

Legal Topics:

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§ 110.20 Tort Liability

[1] Generally

Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person [*Civ. Code § 1714(a)*]. This policy admits of no exception based on the laudable objectives of the tortfeasor, and applies to churches and religious organizations. The doctrine of respondeat superior also applies to ecclesiastical bodies as it does to other organizations [*Malloy v. Fong (1951) 37 Cal. 2d 356, 366, 370, 232 P.2d 241]* .

[2] Fraud

A religious organization may be held liable on a traditional cause of action in fraud for deceiving nonmembers into subjecting themselves, without their knowledge or consent, to coercive persuasion [*Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1119, 252 Cal. Rptr. 122, 762 P.2d 46*]. For discussion regarding constitutional restrictions on state-imposed burden on religion, see *§ 110.13[2]*. For further discussion and forms relating to fraud actions generally, see Ch. 269, *Fraud and Deceit* .

[3] Intentional Infliction of Emotional Distress

Deceptions by a religious organization may well constitute an abuse of a relation or position that gives the organization power to damage the plaintiff's interest, and thus give rise to a cause of action for intentional infliction of emotional distress. Threats of divine retribution, however, are protected religious speech and may not form the basis of a claim of intentional infliction of emotional distress [*Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1120, 1122, 252 Cal. Rptr. 122, 762 P.2d 46*]. For discussion and forms relating to an action for intentional infliction of emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress* .

[4] Negligence

In *Nally v. Grace Community Church (1988) 47 Cal. 3d 278, 253 Cal. Rptr. 97, 763 P.2d 948* , *cert. denied, 490 U.S. 1007* , a wrongful death action against a church, the California Supreme Court held that the plaintiffs did not meet the

threshold requirements for imposing a duty on the church and certain members of its pastoral, nontherapist counseling staff to prevent the suicide of a church member or to refer the member to a professional therapist [*Nally v. Grace Community Church (1988) 47 Cal. 3d 278, 299-300, 253 Cal. Rptr. 97, 763 P.2d 948 , cert. denied, 490 U.S. 1007]* .

In *Nally*, there was no special relationship when the defendants provided nonprofessional guidance to another person seeking advice and the defendants had no control over the environment of the individual being counseled [*Nally v. Grace Community Church (1988) 47 Cal. 3d 278, 294, 253 Cal. Rptr. 97, 763 P.2d 948 , cert. denied, 490 U.S. 1007]* . The Court stated it is inappropriate to impose a duty on nontherapist counselors (that is, persons other than licensed psychotherapists, who counsel others concerning their emotional and spiritual problems) to refer persons to licensed mental health professionals based solely on the foreseeability of suicide. The duty could deter those most in need of help from seeking treatment out of fear that their private disclosures could subject them to involuntary commitment to psychiatric facilities. Additionally, the extension of liability to voluntary, noncommercial, and noncustodial relationships is contrary to the trend in the Legislature to encourage private assistance efforts [*Nally v. Grace Community Church (1988) 47 Cal. 3d 278, 283, 297-298, 253 Cal. Rptr. 97, 763 P.2d 948 , cert. denied, 490 U.S. 1007]* .

The Court, however, did not foreclose imposing liability on nontherapist counselors who hold themselves out as professionals for injuries related to their counseling activities [*Nally v. Grace Community Church (1988) 47 Cal. 3d 278, 300 n. 8, 253 Cal. Rptr. 97, 763 P.2d 948 , cert. denied, 490 U.S. 1007]* .

For further discussion and forms relating to negligence actions generally, see Ch. 380, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewTortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsVicarious LiabilityEmployersActivities & ConditionsIntentional Torts

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§ 110.21 Punitive Damages Against Religious Corporation or Religious Corporation Sole

No claim for punitive or exemplary damages against a religious corporation or religious corporation sole may be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive or exemplary damages to be filed. The court may allow the filing of an amended pleading that claims punitive or exemplary damages on a motion by a party seeking the amended pleading if, based on the supporting and opposing affidavits presented, the plaintiff has established evidence that substantiates that he or she will meet the clear and convincing standard under *Civ. Code § 3294* [*Code Civ. Proc. § 425.14*; *see §§ 110.70, 110.71*]. For a general discussion of the availability of punitive damages in tort actions, see *Ch. 177, Damages, § 177.40* et seq.

The requirement under *Code Civ. Proc. § 425.14* that the plaintiff obtain an order, however, is not intended to affect the party's right to discover evidence on the issue of punitive or exemplary damages [*Code Civ. Proc. § 425.14*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewCivil ProcedureRemediesDamagesPunitive DamagesEvidenceProcedural ConsiderationsBurdens of ProofClear & Convincing ProofTortsDamagesGeneral Overview

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§ 110.22 Dissolution of Religious Organizations

Civil courts have jurisdiction to dissolve a religious organization's temporal body [*Fuimaono v. Samoan Congregational etc. Church of Oceanside (1977) 66 Cal. App. 3d 80, 84-85, 135 Cal. Rptr. 799* ; *see Corp. Code § 9680*]. Under the Nonprofit Religious Corporation Law, a religious corporation may dissolve as provided in *Corp. Code § 9680*. It should be noted that this section does not specifically incorporate the provisions of *Corp. Code §§ 6510-6519* providing for involuntary dissolution of a nonprofit public benefit corporation. Rather, the section sets out the means by which a religious corporation may dissolve voluntarily. Two ways it may elect to wind up and dissolve are either by an approval of a majority of all the members [*see Corp. Code § 5033* (what constitutes approval of majority of members)] or by approval of the board and approval of the members) [*Corp. Code § 9680(b)(1)*; *see Corp. Code § 5034* (defining approval of the members)]. A third way it may elect to wind up and dissolve is by approval of the board alone if any of the following are true:

- The corporation was the subject of an order for relief in bankruptcy.

- The corporation disposed of all its assets and has not conducted any activity for a period of five years immediately preceding the adoption of the resolution electing to dissolve the corporation.

- The corporation has no members.

- The corporation is required to dissolve under provisions of its articles adopted pursuant to *Corp. Code § 9132(a)(2)(A)*[*Corp. Code § 9680(b)(2)*].

If a corporation comes within one of the descriptions in *Corp. Code § 9680(b)(2)*, listed *above*, and if the number of directors then in office is less than a quorum, it may elect to voluntarily wind up and dissolve by any of the following [*Corp. Code § 9680(b)(3)*]:

- The unanimous consent of the directors then in office.

- The affirmative vote of a majority of the directors then in office at a meeting held pursuant to valid

waiver of notice by those directors. The meeting and waivers must comply with *Corp. Code § 9211(a)(3)*, which provides that notice of a meeting need not be given to a director who provided a waiver of notice or consent to holding the meeting or an approval of the minutes of the meeting in writing, whether before or after the meeting, or who attends the meeting without protesting, prior to the meeting or at its commencement, the lack of notice to that director. These waivers, consents and approvals must be filed with the corporate records or made a part of the minutes of the meeting [*Corp. Code § 9211(a)(3)*].

- The vote of a sole remaining director.

If a corporation elects to voluntarily wind up and dissolve pursuant to *Corp. Code § 9680(b)(3)*, references to the board will be deemed to be to a board consisting solely of those directors or that sole director, and action by the board will require at least the same consent or vote as would be required under *Corp. Code § 9680(b)(3)* for an election to wind up and dissolve [*Corp. Code § 9680(b)(4)*].

If necessary for the protection of the assets of the corporation, the superior court of the proper county may take jurisdiction over the winding-up proceeding as provided in *Corp. Code § 9680(c)*. The powers and duties of the directors during the proceeding are set out in *Corp. Code § 9680(d)*.

After determining that all the known debts and liabilities of the corporation have been paid or adequately provided for, the corporation's assets must be disposed of in conformity with its articles or bylaws subject to complying with either the provisions of any trust under which such assets are held [*Corp. Code § 9680(e)(1)*] or any valid condition requiring return, transfer, or conveyance that occurs or will occur by reason of the dissolution [*Corp. Code §§ 6715, 9680(e)(1)*]. This disposition must be made by a decree of the superior court of the proper county on petition of any person concerned in the dissolution, with 30 days' notice to the Attorney General [*Corp. Code § 9680(e)(2)*]. If the Attorney General makes a written waiver of objections to the disposition, a court decree is not required [*Corp. Code § 9680(e)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewBusiness & Corporate LawNonprofit Corporations & OrganizationsDissolution & Winding UpEvidenceProcedural ConsiderationsBurdens of ProofClear & Convincing Proof

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[Reserved]

§§ 110.23[Reserved]

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§ 110.30 Related Matthew Bender Publications

For discussion and forms relating to interrogatories for use in actions against churches, see Forms Of Discovery, *Churches and Religious Organizations* (Matthew Bender)

For transactional forms relating to forms in this chapter, see California Legal Forms, Ch. 13, *Nonprofit Corporations and Associations* (Matthew Bender)

Personal Injury: Actions, Defenses, Damages, *Religious Organizations and Institutions*, §§ 1-6 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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11-110 California Forms of Pleading and Practice--Annotated § 110.31

§ 110.31 Federal Constitution

Prohibition against laws respecting establishment of religion or prohibiting free exercise thereof. *U.S. Const., amend. I*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of ReligionEstablishment of ReligionConstitutional LawBill of RightsFundamental FreedomsFreedom of ReligionFree Exercise of Religion

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§ 110.32 State Constitution

Guarantee of free exercise and enjoyment of religion without preference or discrimination. *Cal. Const., art. I, § 4*

Land and buildings used for religious purposes as exempt from taxation. *Cal. Const., art. XIII, §§ 3(f), 4(d), 5*

Public grants not available to churches. *Cal. Const., art. XVI, § 5*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of ReligionEstablishment of ReligionConstitutional LawBill of RightsFundamental FreedomsFreedom of ReligionFree Exercise of ReligionTax LawState & Local TaxesReal Property TaxGeneral Overview

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§ 110.32A Federal Statutes

Religious Freedom Restoration Act. *42 U.S.C. § 2000bb et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of ReligionEstablishment of ReligionConstitutional LawBill of RightsFundamental FreedomsFreedom of ReligionFree Exercise of Religion

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§ 110.33 State Statutes

[1] Unincorporated Associations

Capacity of unincorporated association to sue and be sued in name by which it is known. *Code Civ. Proc. § 369.5(a)*

Incorporation of unincorporated associations. *Corp. Code § 9121*

[2] Corporations for Charitable Purposes

Statutes governing. *Corp. Code § 10200*

[3] Corporations Sole

Limitation on claim for punitive or exemplary damages against religious corporation sole. *Code Civ. Proc. § 425.14*

Statutes governing. *Corp. Code §§ 10000-10015*

Who may form. *Corp. Code § 10002*

Requirements of articles. *Corp. Code § 10003*

Powers. *Corp. Code § 10007*

Voluntary dissolution. *Corp. Code § 10012*

Disposition of assets on dissolution. *Corp. Code § 10015*

[4] Nonprofit Religious Corporations

Limitation on claim for punitive or exemplary damages against religious corporation. *Code Civ. Proc. § 425.14*

Statutes governing. *Corp. Code § 9110 et seq.*

Formation for religious purposes. *Corp. Code § 9111*

Requirements for formation. *Corp. Code § 9120 et seq.*

Powers of nonprofit religious corporation. *Corp. Code § 9140 et seq.*

Standards of conduct governing directors. *Corp. Code §§ 9240, 9241, 9250*

Duties regarding selection of directors. *Corp. Code § 9242*

Self-dealing transactions. *Corp. Code § 9243*

Effect of interlocking directorates. *Corp. Code § 9244*

Director's liability for distribution and loans. *Corp. Code § 9245*

Indemnification of corporate agent. *Corp. Code § 9246*

Deviation from terms of trust. *Corp. Code § 9251*

Disposition of assets. *Corp. Code §§ 9631, 9633*

Service of process. *Corp. Code § 9670*

Winding up and dissolution. *Corp. Code § 9680*

[5] Taxation

Exemption of church property from taxation. *Rev. & Tax. Code §§ 206, 206.1, 206.2, 207, 214, 214.01, 214.1*

Procedures for obtaining tax exemption. *Rev. & Tax. Code §§ 251, 254, 255, 256, 257, 257.1*

Refund actions. *Rev. & Tax. Code § 5140 et seq.*

Refund interest. *Rev. & Tax. Code § 5151*

Earnings of religious corporations are exempt from income tax. *Rev. & Tax. Code §§ 23701d, 23701k, 23741*

[6] Trusts

Supervision of Attorney General over public charitable trusts. *Corp. Code § 5250*

Power of nonprofit corporation to act as trustee. *Corp. Code § 9140(k)*

Power of corporation sole and charitable corporation to establish common trust fund. *Corp. Code § 10250*

Common trust funds. *Corp. Code § 10250*

Trusts, generally. *Prob. Code § 15000 et seq.*

[7] Miscellaneous

Definition, registration, and regulation of commercial fundraisers for charitable purposes. *Bus. & Prof. Code § 17510.9*; *Gov. Code §§ 12599, 12599.5*

Appointment of directors by superior court after resignation, death, or incompetency of existing directors, or resignation, death, or incompetency of incorporators prior to election of initial directors. *Corp. Code §§ 306, 9220(d)*

Nonprofit health or human services corporation are entitled to participate in self-insurance pool for insurance covering acts or omissions of directors, officers, employees, and volunteers on specified conditions. *Corp. Code § 5005.1*

Securities (other than evidences of indebtedness), issuers of which are organized exclusively for religious purposes and not for profit, are exempt from qualification under Corporate Securities Law of 1968. *Corp. Code § 25100(j)*

Exclusion of religious organizations from subversive organization registration. *Corp. Code § 35004*

Limitation on religious organization as fire insurer. *Ins. Code § 9080.3*

Disturbance of religious meeting as disorderly conduct. *Penal Code § 302*

Crime to interfere with or intimidate person seeking to exercise *First Amendment* right of religious freedom at religious place of worship or intentionally damage or destroy property of religious place of worship. *Pen. Code § 423 et seq.*

Civil action for interference with or intimidation of person seeking to exercise *First Amendment* right of religious freedom at religious place of worship or intentional damage or destruction of property of religious place of worship. *Pen. Code § 423.4*

Vandalism of church, synagogue, mosque, temple, building owned and occupied by religious educational institution, or other place primarily used as place of worship where religious services are regularly conducted, or cemetery. *Penal Code § 594.3*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewBusiness & Corporate LawNonprofit Corporations & OrganizationsDissolution & Winding UpBusiness & Corporate LawNonprofit Corporations & OrganizationsManagement Duties & LiabilitiesBusiness & Corporate LawUnincorporated AssociationsCivil ProcedureRemediesDamagesPunitive Damages

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§ 110.34 Decisions

[1] Separation of Church and State

[a] Generally

To pass scrutiny of *U.S. Const., amend. I*, primary effect of statute must neither advance nor inhibit religion and must not foster excessive entanglement of government with religion. *Estate of Thornton v. Caldor, Inc. (1985) 472 U.S. 703, 708-709, 105 S. Ct. 2914, 86 L. Ed. 2d 557*

Statute entirely motivated by purpose to endorse or disapprove of religion without any clearly secular purpose violates *U.S. Const., amend. I.* *Wallace v. Jaffree (1985) 472 U.S. 38, 56, 105 S. Ct. 2479, 86 L. Ed. 2d 29*

First Amendment requires governmental neutrality, not advancement or inhibition of religion. *Abington School Dist. v. Schempp (1963) 374 U.S. 203, 222, 83 S. Ct. 1560, 10 L. Ed. 2d 844*

"Ministerial exception" to Title VII of Civil Rights Act of 1964 (*42 U.S.C. § 2000e et seq.*) did not bar claim of sexual harassment by novice against Jesuit order and novice's superiors; although ministerial exception insulates religious organization's employment decisions regarding its ministers from judicial scrutiny under Title VII, Title VII applies without constitutionally compelled exception when defendant church is neither exercising its constitutionally protected prerogative to choose its ministers nor embracing behavior at issue as constitutionally protected religious practice. *Bollard v. The California Province of the Society of Jesus (9th Cir. 1999) 196 F.3d 940, 947-948*

Court could entertain copyright dispute between two Sufi religious organizations, when although parties disputed whether order is hierarchical and whether hierarchical decision was made identifying and investing teacher, resolution of these questions would not necessarily require court to transgress *First Amendment* boundaries, and when relief was sought for trademark infringement and false designation of origin under Lanham Act (*15 U.S.C. §§ 1114, 1125(a)*) and tortious conversion of books and materials taken from its possession by defendants when they left plaintiffs' organization, which are susceptible to decision by neutral principals; however, request to enjoin defendants from representing that "the Order ceased to exist with the death of the Forty-First Teacher, and that they are teachers or

masters of the Order" cannot be decided by neutral principals. *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar (9th Cir. 1999) 179 F.3d 1244, 1247-1250*

Trial court did not impermissibly intrude into ecclesiastical matters of Sikh temple by finding that temple's bylaws did not specify directors' terms of office, ruling that directors had one-year term pursuant to *Corp. Code § 9220(b)*, ordering election pursuant to *Corp. Code § 9418(c)* when doing so was secular in purpose, no religious authority had spoken on the issue, and elections had been held in the past, and requiring that record of membership be maintained pursuant to *Corp. Code § 9510(a)(3)*, which ensured fair election and did not result in excessive entanglement with religion. *Singh v. Singh (2004) 114 Cal. App. 4th 1264, 1274-1295, 9 Cal. Rptr. 3d 4*

In dispute between two factions of church over who was rightful owner of parish property, question of which faction represents "true" church entitled to property is ecclesiastical matter in which civil courts may not meddle. *Metropolitan Philip v. Steiger (2000) 82 Cal. App. 4th 923, 98 Cal. Rptr. 2d 605*

Establishment and *free exercise clauses* of *U.S. Constitution, Amend. I* bar judicial review in lawsuit alleging church-affiliated university modified terms of employment of campus chaplain in violation of Fair Employment and Housing Act, *Gov. Code § 12900 et seq.* (FEHA); *First Amendment* guarantees right to religious institution to decide matters affecting ministers' employment free from scrutiny and second-guessing of civil courts. *Schmoll v. Chapman University (1999) 70 Cal. App. 4th 1434, 83 Cal. Rptr. 2d 426*

[b] Establishment Clause

[i] Defined

Meaning of "establishment of religion" clause of *First Amendment*. *Everson v. Board of Education (1946) 330 U.S. 1, 15-16, 67 S. Ct. 504, 91 L. Ed. 711*

Not any benefit bestowed by government on religion qualifies as establishment. Variety of benefits have been bestowed by government on religious practices, including government paying for chaplains to pray for Congress, presidents proclaiming days of prayer and of thanksgiving to god, hundreds of millions of dollars spent annually to fund chaplains for armed forces and for holy books and supplies used in acts of worship, payment of chaplains by state Legislatures, subsidy of buildings of worship by tax exemption, provisions in draft law exempting from service members of historic Pence Churches, and discrimination in favor of total pacifists upheld even when it appeared as religious discrimination disfavoring conscientious objection to unjust war. *Kong v. Scully (9th Cir. 2003) 341 F.3d 1132, 1138-1139*

[ii] Court Analysis

In *Establishment Clause* action based on counties' displays of Ten Commandments on courthouse walls, determination of counties' purpose was sound basis for ruling on complaints, and whether evaluation of counties' claim of secular purpose for ultimate displays could take their evolution into account. Counties' manifest objective could be dispositive of constitutional enquiry, and development of presentation should have been considered when determining its purpose. Thus, trial court properly granted preliminary injunction ordering removal of displays on finding of predominantly religious purpose. *McCreary County v. ACLU (2005) 545 U.S. 844, 125 S. Ct. 2722, 2732-2745, 162 L. Ed. 2d 729*

Institution's explicit corporate ties to particular religious faith, and fact that it has policies prohibiting any deviation from religious doctrine, are relevant factors in determining whether institution is "pervasively sectarian" and ineligible to receive government funding; such factors are not conclusive, and court's conclusion that such institutions are "religious organizations" is not equivalent to finding that their secular purposes and religious mission are inextricably intertwined. *Bowen v. Kendrick (1988) 487 U.S. 589, 620 n.16, 108 S. Ct. 2562, 101 L. Ed. 2d 520*

Whether violation of *establishment clause* due to excessive government-church entanglements has occurred is determined by three part test: (1) statute must have secular purpose, (2) statute's principal or primary effect must be one that neither advances nor inhibits religion, and (3) statute must not foster excessive government entanglement with religion. *EEOC v. Fremont Christian School (9th Cir. 1986) 781 F.2d 1362, 1369, 1369 n.2*

[iii] Religious Use of Public Property

Establishment Clause of First Amendment allows display of monument inscribed with Ten Commandments on Texas State Capitol grounds. *Van Orden v. Perry (2005) 545 U.S. 677, 125 S. Ct. 2854, 162 L. Ed. 2d 607* (four justices concurring in opinion, one justice concurring in judgment)

In *Establishment Clause* action based on counties' displays of Ten Commandments on courthouse walls, trial court properly granted preliminary injunction ordering removal of displays on finding of predominantly religious purpose. *McCreary County v. ACLU (2005) 545 U.S. 844, 858-881*

Public elementary school that opened its facilities for public use for specified purposes had no valid *Establishment Clause* interest in denial of use of facilities to religious group providing activities for children aged six through 12, when group sought only to be treated neutrally and given access to speak about same topics as other groups, when children could not attend without parents' permission so that they could not be coerced into engaging in group's religious activities even though activities were taking place on school grounds but after school hours, and when *Establishment Clause* jurisprudence does not foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present. *Good News Club v. Milford Central School (2001) 533 U.S. 98, 121 S. Ct. 2093, 150 L. Ed. 2d 151*

Federal government's distribution of funds to state and local governmental agencies as part of longstanding school aid program known as Chapter 2, which in turn lend educational materials and equipment to public and private schools, many of which are religiously affiliated, does not violate *Establishment Clause*, when Chapter 2 has undisputed secular purpose, and neither results in religious indoctrination by government nor defines its recipients by reference to religion. *Mitchell v. Helms (2000) 530 U.S. 793, 120 S. Ct. 2530, 147 L. Ed. 2d 660*

Denial, by school that lets other groups use facilities after school hours, of religious group's request violates religious group's free speech rights if based on anticipated religious standpoint of meeting; school's allowing use of facilities would not amount to violation of *establishment clause*. *Lamb's Chapel v. Center Moriches (1993) 508 U.S. 384, 390-397, 113 S. Ct. 2141, 124 L. Ed. 2d 352*

Display of creche in county courthouse violates *establishment clause* because it went beyond acknowledgement of Christmas as cultural event and amounted to endorsement of Christian message in banner that was part of display. *Allegheny County v. Greater Pittsburg ACLU (1989) 492 U.S. 573, 621, 109 S. Ct. 3086, 106 L. Ed. 2d 472* ; *but see Lynch v. Donnelly (1984) 465 U.S. 668, 685-686, 104 S. Ct. 1355, 79 L. Ed. 2d 604* (city's creche display in park did not violate *establishment clause*); *Kreisner v. City of San Diego (9th Cir. 1993) 988 F.2d 883, 896-898* (city allowing private committee to display biblical scenes in public park with disclaimer that display was privately sponsored and not allied with city did not violate *establishment clause*)

First Amendment prohibits use of governmental organs for essentially religious purposes. *Presbyterian Church v. Hull Church (1969) 393 U.S. 440, 449, 89 S. Ct. 601, 21 L. Ed. 2d 658*

School district did not violate Equal Access Act by denying student Bible club recognition as student association club under district's non-discrimination policy because of club's restriction of membership to Christian students, where

requirement that members possess true desire to grow in relationship with Jesus Christ inherently excluded non-Christians, and where district's denial of recognition on that account was consistent with Act, because district's non-discrimination policies were content-neutral. However, to extent club alleged district provided waivers to some groups while denying them to others, and that decision was made on basis of religion or religious content of speech, club raised triable issue of fact. *Truth v. Kent School District (9th Cir. 2008) 542 F.3d 634, 643-648*

School district's denial of recognition of organization attempting to form Bible club at high school as school-sponsored group was restriction on limited public forum, where members did not seek merely to associate as group, but, instead, sought to associate as school-sponsored group, giving organization access to district funds, additional access to school's property and facilities, and special rights to post materials around school; school district's denial of access to organization based on organization's failure to comply with district's nondiscrimination policy did not violate organization's *First Amendment* rights, where policy of restricting access to forum based on compliance with its non-discrimination policy was viewpoint neutral and reasonable in light of purposes of forum, and where denial not based on organization's religious viewpoint but on its refusal to comply with non-discrimination policy was not viewpoint discrimination. *Truth v. Kent School District (9th Cir. 2008) 524 F.3d 957, 971-973*

City's display of six-foot-tall granite monument inscribed with Ten Commandments on grounds of city hall did not violate *Establishment Clause*, where purpose of monument was primarily secular, where setting of monument suggested little or nothing of sacred, and where there was historic lack of complaints about monument. *Card v. City of Everett (9th Cir. 2008) 520 F.3d 1009, 1013-1021*

District court did not abuse its discretion in enjoining government from proceeding with land exchange under federal law allowing land in federal preserve on which Latin cross was situated to be transferred to private organization in exchange for parcel of privately owned land located elsewhere in preserve to allow display of cross and ordering the government to otherwise comply with its prior injunction that it not permit display of cross in preserve, where government retained various rights of control over cross and property; method of sale by which federal law transferred property to private buyer was outside normal procedures for transfer of parklands, demonstrating government's unusual involvement in transaction; government's long-standing efforts to preserve and maintain cross led to conclusion that government's purpose was to evade injunction and keep cross in place; and improper governmental endorsement of religion had not ceased. *Buono v. Kempthorne (9th Cir. 2007) 502 F.3d 1069, 1081-1086*

Forest Service's decision to ban rock climbing on site of cultural, historic, and archaeologically significance to Native American tribe and to public did not violate *Establishment Clause*, where *Establishment Clause* did not bar government from protecting historically and culturally important site simply because site's importance derived at least in part from its sacredness to certain groups. *Access Fund v. United States Dep't of Agric. (9th Cir. 2007) 499 F.3d 1036, 1042-1046*

City's lease with organization to operate homeless shelter violated *Establishment Clause*, where, although city leased shelter for valid secular purpose of providing shelter to homeless, not to promote religion, lease of shelter had effect of advancing religion because lease provided organization with publicly financed facility in which to spread its religious message by allowing organization to give instruction in and imbuing residents in attendance at chapel service with tenets of Christianity, even assuming attendance at chapel service was voluntary. *Community House, Inc. v. City of Boise (9th Cir. 2006) 468 F.3d 1118, 1128-1134*

County's policy and practice to prohibit use of public library meeting room for religious worship services (while allowing use for religion-related purposes other than worship) was permissible on ground of preserving intended purpose of that meeting room as limited public forum. *Faith Ctr. Church Evangelistic Ministries v. Glover (9th Cir. 2006) 462 F.3d 1194, 1204*

Presence of Latin cross on federally owned land in national preserve managed by National Park Service violated

Establishment Clause. Latin cross is preeminent symbol of Christianity and is exclusively Christian symbol and not symbol of any other religion. Cross sits on publicly owned land, Park Service has not opened site to other permanent displays nor are there other displays, religious or otherwise, in area, Park Service previously denied third-party request to erect Buddhist stupa near cross, and federal law prohibited Park Service from spending money to remove cross, so that cross would project message of government endorsement to reasonable observer. Remote location of cross made no difference because national parklands and preserves embody notion of government ownership as much as urban parkland. Reasonable observer would still perceive cross site as public land despite proximity of two private ranches and several corrals within two miles of cross, because reasonable observer would know that location was federally owned and given ratio of publicly owned to privately owned land in preserve and use to which area was put, and less well-informed reasonable observer would still believe or at least suspect cross rested on public land. Lastly, reasonable observer aware of history of cross, such as its placement by private individuals, would still believe government was endorsing Christianity by allowing cross to remain at site, because reasonable observer who was that well-informed would know full history of cross, including that Congress designated cross as war memorial and prohibited use of funds to remove it and Park Service denied similar access for expression by adherent of Buddhist faith, demonstrating government preference for one particular sect or creed including a preference for Christianity over other religions. *Buono v. Norton (9th Cir. 2004) 371 F.3d 543, 548-550*

School district's policy restricting student religious group's access to student/staff time, school supplies, vehicles, or AV equipment, violated *First Amendment*, when, while not required to grant student clubs access to these benefits, school had chosen to do so and could not deny access to some groups without compelling government interest that was narrowly drawn to achieve that end, when district's restriction on access to facilities was based purely on religious group's religious viewpoint in violation of *First Amendment*, and when requiring that district grant religious groups access would ensure neutrality rather than violate *Establishment Clause*. *Prince v. Jacoby (9th Cir. 2002) 303 F.3d 1074, 1078-1094*

Condition imposed by public college on pro-life demonstrators to refrain from religious worship or instruction, was content-based regulation which was not required by *Establishment Clause* to maintain separation of church and state, since *First Amendment* does not require public institutions to exclude religious speech from fora held open to secular speakers. *Orin v. Barclay (9th Cir. 2001) 272 F.3d 1207, 1215-1216*

Any violation of private party's free speech rights under *Cal. Const., art. I, § 2* in public school's rejection of sign featuring Ten Commandments and including no mention of party's business, submitted by party in response to fund-raising solicitation for commercial advertisements to be posted on school's baseball field, is outweighed by *establishment clause* considerations embodied in *Cal. Const., art. I, § 4*; school district's termination of fund-raising program was also reasonable in response to litigation brought by party. *DiLoreto v. Board of Educ. of Downey Unif. Sch. Dist. (1999) 74 Cal. App. 4th 267, 87 Cal. Rptr. 2d 791*

Seventy-five-year lease of college district property to religious congregation is governed by *Educ. Code § 81360*, not *Educ. Code § 82530*, and did not violate *Establishment Clauses*; ordinary commercial lessor prerogatives of district in approving improvements and subleases did not amount to prohibited entanglement. *Woodland Hills Homeowners Organization v. Los Angeles Community College Dist. (1990) 218 Cal. App. 3d 79, 90-95, 266 Cal. Rptr. 767*

[iv] Religious Use of Public Funds

Ohio pilot program providing financial assistance to families in any school district under federal court order requiring supervision and operational management of district by state superintendent by providing tuition aid for students in kindergarten through third grade to attend participating public or private school of their parent's choosing, and tutorial aid for students who choose to remain enrolled in public school does not have forbidden effect of advancing or inhibiting religion in violation of *Establishment Clause*, because it is program of true private choice, by being neutral in

all respects toward religion. *Zelman v. Simmons-Harris (2002) 536 U.S. 639, 648-653, 662-663, 122 S. Ct. 2460, 153 L. Ed. 2d 604*

Federally funded program providing supplemental, remedial instruction to disadvantaged children on neutral basis is not invalid under *Establishment Clause* when instruction is given on premises of sectarian schools by government employees under program containing safeguards such as those present in New York City's Title I program. *Agostini v. Felton (1997) 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391*

Government is precluded from funding specifically religious activity in otherwise substantially secular setting. *Bowen v. Kendrick (1988) 487 U.S. 589, 613, 108 S. Ct. 2562, 101 L. Ed. 2d 520*

Extension of aid under state's vocational rehabilitation program to finance blind student's training at Christian college to become pastor, missionary, or youth director, does not advance religion in manner inconsistent with *Establishment Clause* of *U.S. Const., amend. I.* *Witters v. Wash. Dept. of Serv. for Blind (1986) 474 U.S. 481, 489, 106 S. Ct. 748, 88 L. Ed. 2d 846*

Amendments to Medicare and Medicaid allowing payments for nonmedical care of persons who rejected medical care based on religious beliefs did not constitute establishment of religion in violation of *First Amendment*, when amendments did not advance religion; delegation of governmental power without standards to institutions identified by their religious rejection of medicine is not unconstitutional establishment of religion. *Kong v. Scully (9th Cir. 2003) 341 F.3d 1132, 1137-1141*

City's decision not to use tax funds and public employees to provide stage lighting, sound, and other special-event services for events in direct support of religious organizations and specifically for sectarian religious organization's prayer service held in bandshell of public park did not run afoul of *First Amendment's* proscription against abridging freedom of speech; government could decline to subsidize private religious speech when doing so would violate *Establishment Clause* and use of general tax revenue to fund religious activity to raise money that could be used to fund religious organization in future, and fact that observer might conclude that expenditure from civic events fund for religious organization would perceive it as state endorsement of religion, were circumstances pointing to *Establishment Clause* violation if city were to use its resources in way sought by religious organization, and when denial of financial subsidies to religious organizations did not substantially burden Free Exercise rights so as to require court's alteration of its *Establishment Clause* analysis. *Gentala v. City of Tucson (9th Cir. 2001) 244 F.3d 1065*

Rejection of use of city funds to cover costs of in-kind services provided by city to local observance of National Prayer Day from fund established by city to encourage civic events was not justified by *Establishment Clause*, when fund undeniably serves secular interest and does not have primary or principal effect of advancing religion; when support that would be provided by covering costs for observance would be neither substantial nor direct enough to amount to advancement of religion under *Establishment Clause*; when event was opened to public and fact that it might have been organized for and sponsored by particular religious group did not create *Establishment Clause* violation; when money from fund is not paid directly to event's sponsors, but are paid to relevant city departments providing services and city maintains control over what services will be covered by fund so that services are incidental benefit that can be provided to religious group without violating *Establishment Clause*; when allowing religious groups to participate as beneficiaries of otherwise neutral programs fosters nation's commitment to freedom of expression and to religious liberty without raising specter of state-sanctioned or -funded church; when presence of city employees operating lighting and sound equipment did not create city's imprimatur that could be mistakenly interpreted as speech of the city; and when fund's requirement that event acknowledge through event advertising and announcement during event that city has contributed services to event was insufficient to demonstrate that city endorsed National Day of Prayer event as city expression. *Gentala v. City of Tucson (9th Cir. 2000) 213 F.3d 1055, 1066-1071*

Proposals for issuance of tax-exempt bonds for benefit of religious schools violated *Cal. Const., art. XVI, § 5*, when

pervasively sectarian colleges involved were without doubt controlled by religious creed, church, or sectarian denomination, nature of benefit being provided to school appropriately took into consideration nature of school, and bond financing scheme helped to support or sustain colleges; and when it did not matter that no public funds were used in connection with conduit financing, which allowed schools to finance projects at lower cost than they could through conventional financing, because it was form of aid within meaning of art. XVI, § 5. *California Statewide Communities Development Authority v. All Persons Interested etc. (2004) 116 Cal. App. 4th 877, 893-903, 10 Cal. Rptr. 3d 803*

[v] State Support of Religious Views

Father who shared physical custody but did not have legal custody of daughter lacked prudential standing to challenge school district's policy of requiring students, including daughter, to recite Pledge of Allegiance, containing words "under God," as violating daughter's *First Amendment* rights under *Establishment Clause*, because it is improper for federal courts to entertain claim by plaintiff whose standing to sue was founded on family law rights in dispute when prosecution of lawsuit could have adverse effect on person, in this case daughter, who was source of plaintiff's claimed standing. *Elk Grove Unified School District v. Newdow (2004) 542 U.S. 1, 124 S. Ct. 2301, 2308-2312, 159 L. Ed. 2d 98*

Statutes requiring placement of national motto, "In God We Trust," on coins and currency [*31 U.S.C. §§ 5112(d)(1), 5114(b)*] did not violate *Establishment Clause*, where national motto and slogan on coinage and currency "In God We Trust" had nothing to do with establishment of religion, but, rather, its use was of patriotic or ceremonial character and bore no true resemblance to governmental sponsorship of a religious exercise. *Newdow v. Lefevre (9th Cir. 2010) 598 F.3d 638, 643-645*

State statute and school district policy requiring teacher-led recitation of Pledge of Allegiance by students in public schools, and Pledge itself, did not constitute establishment of religion prohibited by United States Constitution, where there was no excessive entanglement with religion, primary effect was neither to advance nor inhibit religion, and Congress' purpose in enacting Pledge was patriotic, not to try to impress religious doctrine upon anyone; where Pledge did not violate Endorsement Test, i.e., did not have purpose or effect of endorsing, favoring, or promoting religion; where recitation of Pledge in public school classroom, which was not compelled, did not unconstitutionally coerce objecting students into affirming belief in God; and where "under God" was added as description of "one Nation" primarily to reinforce idea that U.S. was founded upon concept of limited government, in stark contrast to unlimited power exercised by communist governments. *Newdow v. Rio Linda Union Sch. Dist. (9th Cir. 2010) 597 F.3d 1007, 1017-1042*

State scholarship tax credit program, granting income tax credits to taxpayers who made contributions to nonprofit organizations awarding private school scholarships to children, some of which restricted availability of scholarships to religious schools, violated *Establishment Clause* even though state did not directly decide whether particular sectarian organizations would receive program aid, where program lacked religious neutrality and true private choice in making scholarships available to parents, and, although scholarship aid was allocated partially through individual choices of taxpayers, overall program in practice carried with it imprimatur of government endorsement. *Winn v. Arizona Christian School Tuition Organization (9th Cir. 2009) 562 F.3d 1002, 1011-1023*

Trial court properly dismissed complaint by private mining company alleging that state officials' policy against use in state construction projects of materials mined from area as to which Native American tribes passed resolutions against mining because of area's religious, cultural, and historical significance to these groups, violated its rights under *Establishment Clause*. Policy had secular purpose of carrying out state construction projects in manner that did not harm site of religious, historical, and cultural importance to several Native American groups and nation as whole. In addition, policy did not advance religion, but rather implemented state department of transportation's decision that state construction projects should be carried out so as not to interfere with tribes' religious practices or destroy religious sites

that have historical significance. Further, consulting with tribes in process of evaluating mining company's application to mine materials was not excessive entanglement because tribes were not solely religious in character or purpose but were ethnic and cultural in character as well, and company did not allege that government officials participated in tribes' religious practices, inquired about substance of their religious views, or monitored their religious practices. *Cholla Ready Mix, Inc. v. Civish (9th Cir. 2004) 382 F.3d 969, 975-977*

Manner in which city structured sale of half acre parcel under Latin cross, which had been part of public park and remained surrounded by park, directly, immediately, and substantially aided sectarian purpose of preserving cross in violation of *Cal. Const., art. XVI, § 5*, when structure of sale provided financial incentive to maintain cross. *Paulson v. City of San Diego (9th Cir. 2002) 294 F.3d 1124, 1132*

City's sale of half acre parcel under Latin cross, which had been part of public park and remained surrounded by park, which sale solicited non-profit corporations interested in purchasing parcel for purpose of maintaining historic war memorial, did not demonstrate unconstitutional preference and aid to Christian religion, when sale was conducted in publicized and open bidding process and city accepted highest bid, and when open and public bidding process, which could have resulted in sale of property to someone who would have removed cross made strong showing of government's lack of preference of religion in imposing use restriction of maintaining war memorial, which did not conflict with *Establishment Clause*; further, enhanced demarcation of site as private property rectified any potential appearance of preference for religion. *Paulson v. City of San Diego (9th Cir. 2001) 262 F.3d 885*

Removal of minister as member of city's Human Rights Commission for public comments explicitly condemning homosexuality as sin and implicitly endorsing violence against homosexuals did not violate *Establishment Clause* by endorsing religious faith that interprets scripture less literally than minister's, when mayor's press releases announcing removal of minister consistently acknowledged minister's right to adhere to his religious faith and stressed secular reasons for removal as being public comments that negatively influenced operation of Commission or suggested justification for actions leading to violence. *Lumpkin v. Brown (9th Cir. 1997) 109 F.3d 1498, 1502*

Bond financing agreements between public entity and three religiously affiliated, pervasively sectarian schools likely to include religious perspective in their teachings, which expressly prohibited use of bond proceeds for specified religious purposes and provided that funds for projects would not come from government entity but from private sector purchasers of bonds, and that no public entity would have any obligation on bonds in event of default by schools, did not violate *Cal. Const., art. XVI, § 5* or *First Amendment establishment Clause*, where inquiry centered on substance of education provided by three schools, not on their religious character, when whether schools were pervasively sectarian was not controlling factor in determining validity of bond funding program; when each of recipient schools offered broad curriculum in secular subjects and schools' secular classes consisted of information and coursework that was neutral with respect to religion, ensuring that state's interest in promoting intellectual improvement of its residents was advanced through teaching of secular information and coursework, and expression of religious viewpoint in otherwise secular classes would provide benefit to religion that was merely incidental to bond program's primary purpose of promoting secular education. *California Statewide Communities Development Authority v. All Persons Interested etc. (2007) 40 Cal. 4th 788, 798-812*

Gov. Code §§ 25373(d), 37361(c), which have effect of granting exemption from landmark preservation laws to noncommercial property owned by religious organization that objects to landmark designation and determines in public form that organization would suffer substantial hardship if property were designated historic landmark, are not facially invalid under *establishment clause* of *U.S. Const., amend. I* or *Cal. Const., art. I, § 4*. *East Bay Asian Local Development Corp. v. State of California (2000) 24 Cal. 4th 693, 102 Cal. Rptr. 2d 280, 13 P.3d 1122*

City's transfer of land that had been city park with memorial to war veterans, including Latin cross, to federal government did not violate *First Amendment establishment clause* or *Cal. Const., art. I, § 4*, when in offering to accept transfer of property, nothing in language or explanation of federal policy indicated agreement to keep cross as part of

memorial; when transfer to federal government mandated by public vote did not evidence city's advancement of religion; and when there was no excessive entanglement because effect of public vote was termination of city's control and maintenance of property, and donation was not grossly out of norm of reasonable regulation of city parkland inasmuch as donation succeeded in transferring site for continuing use as parkland. Transfer also did not violate *Cal. Const., art. XVI, § 5*, where city charter authorized transfer of entire site to another public entity and donation for parkland was not gift of public funds, transfer appropriated no public funds for any sectarian purpose, and city offered no financial incentive in donation for federal government to either maintain or remove cross. *Paulson v. Abdelnour (2006) 145 Cal. App. 4th 400, 419-437, 51 Cal. Rptr. 3d 575*

Excessive entanglement of state with religion as result of political entanglement, characterized by potential for political divisiveness based on differences in religious views; abortion is emotionally explosive political issue and appearance of support by state of one side of controversy is improper political entanglement. *Feminist Women's Health Center, Inc. v. Philibosian (1984) 157 Cal. App. 3d 1076, 1091-1092, 203 Cal. Rptr. 918 , cert. denied, 470 U.S. 1052* (district attorney's delivery of fetuses for burial marked by religious memorial service held unconstitutional)

[vi] Invocation Opening Session of Deliberative Body

Nebraska legislature's practice of opening each legislative session with an invocation did not violate the *Establishment Clause*; when there is an historical tradition of solemnizing sessions of deliberative public bodies with prayer, opening legislative session with prayer does not present real danger of establishing religion, and audience to which prayer was directed were adults and presumably not susceptible to religious indoctrination or peer pressure. *Marsh v. Chambers (1983) 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019*

Opening of school board meetings with sectarian invocation does not violate *Establishment Clause*, when, although school board conducts business of public schools, school board meeting does not cause heightened concerns regarding children found in school related contexts, when main purpose of a school board meeting is to conduct the business of the public schools, and when plaintiffs are adults who voluntarily attend Board meetings as individuals and in their capacity as officers of teacher's association, and, as adults, are not susceptible to religious indoctrination or coercion, underlying dangers recognized by United States Supreme Court in its decisions prohibiting prayer at school functions. *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ. (C.D. Cal. 1998) 11 F. Supp. 2d 1192*

Invocation given at Burbank City Council meeting, ending with expression of gratitude and love "in the name of Jesus Christ" violated *Establishment Clause of First Amendment of United States Constitution*, and trial court's order granting injunctive and declaratory relief, ordering city to advise anyone conducting prayer as part of City Council meeting that sectarian prayers are not permitted, did not constitute censorship or viewpoint discrimination under *Free Speech and Exercise Clauses. Rubin v. City of Burbank (2002) 101 Cal. App. 4th 1194, 124 Cal. Rptr. 2d 867*

[vii] Application of State Employment Laws to Churches or Church-Affiliated Institutions

Applying prohibition against employment discrimination in California's Fair Employment and Housing Act (FEHA), *Gov. Code § 12900 et seq.* to church-affiliated university in employment dispute with campus minister runs afoul of *Establishment Clause*, when application of FEHA to university would foster an excessive government entanglement with religion, in violation of *Establishment Clause*. *Schmoll v. Chapman University (1999) 70 Cal. App. 4th 1434, 1440-1442, 83 Cal. Rptr. 2d 426*

[viii] Government Hostility to Religion or Belief

Adoption by city board of supervisor of non-binding resolution in response to directive from Catholic cardinal

instructing city's archdiocese that Catholic social services agencies should not place children in need of adoption with gay or lesbian couples, urging cardinal, in his capacity as head of Congregation for the Doctrine of the Faith at Vatican, to withdraw directive did not violate *Establishment Clause* by expressing disapproval of and hostility toward Catholic religion, where board's purpose in criticizing directive was not disapproval of religious doctrine, but rather call for non-discrimination in adoption of children, and it was well within board's secular purview to promote adoptions of children by same-sex couples and denounce discrimination for general welfare of society; where promotion of same-sex adoption, not disapproval or inhibition of Catholic religion, was reasonably understood as primary message conveyed by resolution; and where non-binding resolution did not foster excessive entanglement. *Catholic League for Religious and Civil Rights v. City and County of San Francisco (9th Cir. 2009) 567 F.3d 595, 599-608 , reh'g granted, 586 F. 3d. 1166 (2009)*

Establishment Clause claim of religious Christian county employee allegedly forced to have daily contact with county seal changed to remove cross was without merit, where county's removal of cross had secular purpose as governmental action taken to avoid potential *Establishment Clause* violations, reasonable view of removal of cross was as effort to restore neutrality and ensure continued compliance with *Establishment Clause* rather than hostility to religion, and plaintiff failed to allege excessive entanglement because he alleged only social and political divisiveness. *Vasquez v. Los Angeles County (9th Cir. 2007) 487 F.3d 1246, 1254-1258*

In action under *42 U.S.C. § 1983* for violation of *Establishment Clause* against city and county based on resolution urging Alabama lawmakers to extend hate crimes legislation to include offenses related to sexual orientation, resolution urging local television stations not to broadcast advertising campaigns aimed at "converting" homosexuals, and letter to plaintiffs who had sponsored advertising campaign regarding homosexuality formally disapproving campaign, trial court properly dismissed *Establishment Clause* claim, when, although resolutions and letter appeared to contain attacks on plaintiffs' religious views, there was also plausible governmental purpose in protecting gays and lesbians from violence; when primary effect of first resolution was denouncement of hate crimes and call for action by Alabama Legislature, and primary effect of second resolution and letter, although aimed directly at plaintiffs and containing statements from which it could be inferred that governmental actors were hostile to religious view that homosexuality is sinful or immoral, read in context as whole, they were primarily geared toward promoting equality for gays and discouraging violence against them; and when even if government's actions encouraged political divisiveness along religious lines, political divisiveness is not sufficient to constitute excessive entanglement with religion. *American Family v. City & County of San Francisco (9th Cir. 2002) 277 F.3d 1114, 1121-1123*

[ix] Standing

Atheist had standing to challenge federal statutes that required inscription of "In God We Trust" on coins and currency [*31 U.S.C. §§ 5112(d)(1), 5114(b)*], where he alleged, given ubiquity of coins and currency in everyday life, placement of "In God We Trust" on nation's money forced him repeatedly to encounter religious belief he found offensive, and spiritual harm resulting from unwelcome direct contact with allegedly offensive religious (or anti-religious) symbol is legally cognizable injury and suffices to confer Article III standing; and where unwelcome contact with national motto was caused by statutes requiring placement of motto on coins and currency, and was redressable by injunction ordering removal of motto from coins and currency; that his encounters with motto were common to all Americans did not defeat his standing, because he alleged concrete, particularized, and personal injury resulting from his frequent, unwelcome contact with motto. However, the standing to challenge *36 U.S.C. § 302*, which merely recognized "In God We Trust" as national motto, but did not authorize or require inscription of motto on any object, where, without *31 U.S.C. §§ 5112* and *5114*, motto would not have appeared on coins and currency, and atheist would have lacked unwelcome direct contact with motto giving rise to his injury-in-fact; abstract stigmatic injury resulting from outsider status was insufficient to confer standing, and claims of personal injury caused by refusal of job because of misperception of his activism and inability to obtain elected office were insufficient to establish standing, where he could not show injuries were traceable to defendants, and not to actions of third parties who were not before court. *Newdow v. Lefevre (9th*

Cir. 2010) 598 F.3d 638, 642-643

Parent of children in state public schools, who asserted interest in being informed about how teachers teach theory of evolution in biology classes, did not have standing to pursue *Establishment Clause* claim arising out of her offense at discussion of religious views on "Understanding Evolution" website created and maintained by state university museum of paleontology and funded in part by National Science Foundation on ground that website endorsed beliefs holding that religion was compatible with evolutionary theory and disapproving beliefs, such as parent's, to contrary, thereby exposing her to government-endorsed religious messages and making her feel like outsider, where harm asserted by parent to her interest in being informed about teaching of evolutionary theory was too generalized and remote to confer standing against faculty who administered website and developed its content on behalf of museum. *Caldwell v. Caldwell (9th Cir. 2008) 545 F.3d 1126, 1131-1133*

Religious Christian county employee allegedly forced to have daily contact with county seal changed to remove cross alleged legally cognizable injury arising out of his frequent regular contact with seal sufficient to confer standing to sue. *Vasquez v. Los Angeles County (9th Cir. 2007) 487 F.3d 1246, 1249-1253*

[c] Free Exercise Clause

[i] Defined

Free exercise of religion clause affords individual protection from certain forms of governmental compulsion; *free exercise clause* does not require government to conduct its own internal affairs in ways that comport with religious beliefs of particular citizens. *Lyng v. Northwest Indian Cemetery Protective Ass'n (1988) 485 U.S. 439, 448-449, 108 S. Ct. 1319, 99 L. Ed. 2d 534*

[ii] Court Analysis

Court cannot determine truth of underlying beliefs that lead to religious objections to challenged governmental action and cannot weigh adverse effects of that action on certain persons and compare them with adverse effects of another such action on other persons; without ability to make comparisons, court is unable to say that one form of incidental interference with individual's spiritual activities should be subjected to different constitutional analysis than another. *Lyng v. Northwest Indian Cemetery Protective Ass'n (1988) 485 U.S. 439, 449-450, 108 S. Ct. 1319, 99 L. Ed. 2d 534*

Plaintiff does not allege hybrid-rights claim entitled to strict scrutiny analysis merely by combining free exercise claim with utterly meritless claim of violation of another alleged fundamental right or claim of alleged violation of a nonfundamental or nonexistent right. *Miller v. Reed (9th Cir. 1999) 176 F.3d 1202, 1208*

Whether neutrally based statute violates *free exercise clause* is determined by weighing three factors: (1) magnitude of statute's impact on exercise of religious belief, (2) existence of compelling state interest justifying burden imposed on exercise of religious belief, and (3) extent to which recognition of exemption from statute would impede objectives sought to be advanced by statute. *EEOC v. Fremont Christian School (9th Cir. 1986) 781 F.2d 1362, 1367*

[iii] Government Interference

Under Religious Freedom Restoration Act of 1993, federal government could not bar small American branch of Christian Spiritist sect with origins in Amazon Rainforest from receiving communion by drinking sacramental tea, brewed from hoasca, which is plant unique to Amazon region containing hallucinogen regulated under Controlled Substances Act. Practice was sincere exercise of religion, which federal government sought to prohibit on ground

Controlled Substances Act barred all use of hallucinogen, and government failed to demonstrate that burden on sect's religious exercise represented least restrictive means of advancing compelling interest in uniform application of *Controlled Substances Act. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal (2006) 546 U.S. 418, 427-437, 126 S. Ct. 1211, 163 L. Ed. 2d 1017*

Under State of Washington's Constitution, which has been authoritatively interpreted as prohibiting even indirectly funding religious instruction that will prepare students for the ministry, state could deny students pursuing degrees in devotional theology state scholarship without violating *Free Exercise Clause*, when nothing in history or text of Washington's Constitution or in operation of scholarship program suggested animus towards religion. *Locke v. Davey (2004) 540 U.S. 712, 717-725, 124 S. Ct. 1307, 1311-1315, 158 L. Ed. 2d 1*

Religious Freedom Restoration Act (RFRA) is unconstitutional as improper exercise of Congress' remedial or preventive power; stringent test RFRA demands of state laws reflects lack of proportionality or congruence between means adopted and legitimate end to be achieved, and is considerable congressional intrusion into states' traditional prerogatives and general authority to regulate for health and welfare of their citizens. *City of Boerne v. Flores (1997) 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624*

Protection that *U.S. Const., amend. I* provides to legitimate claims to free exercise of religion does not extend to conduct that state has validly proscribed; when drug abuse counselors, discharged after they ingested peyote for sacramental purposes during religious ceremony, were denied unemployment benefits, determination of whether their rights were violated required initial determination of whether their conduct was legal under state law. *Employment Division v. Smith (1988) 485 U.S. 660, 672, 108 S. Ct. 1444, 99 L. Ed. 2d 753*

Incidental effects of government programs that may make it more difficult to practice certain religions but that have no tendency to coerce individuals into acting contrary to their beliefs does not require government to bring forward compelling justification for its otherwise lawful actions. *Lyng v. N.W. Indian Cemetery Prot. Ass. (1988) 485 U.S. 439, 450, 108 S. Ct. 1319, 99 L. Ed. 2d 534*

Free exercise clause is written in terms of what government cannot do to individual, not in terms of what individual can extract from government, and it does not require government to conduct its own internal affairs in ways that comport with religious beliefs of particular citizens. *Bowen v. Roy (1986) 476 U.S. 693, 699-700, 106 S. Ct. 2147, 90 L. Ed. 2d 735* (administration of food stamps based on social security number of recipients did not violate religious belief of American Indian opposing assignment of number to individual; plurality opinion)

Investigation by state civil rights commission did not violate *First Amendment* rights of nonprofit private religious school because elimination of prohibited sex discrimination is sufficiently important state interest to warrant investigation, even if only to ascertain whether ascribed religious-based reason was in fact reason for discharge of pregnant teacher. *Ohio Civil Rights Comm'n v. Dayton Schools (1986) 477 U.S. 619, 628, 106 S. Ct. 2718, 91 L. Ed. 2d 512*

Parents have right to exercise of religion in choice of schooling, including home schooling, for children. *Wisconsin v. Yoder (1972) 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15* ; Peterson v. Minidoka County Sch. Dist. No. 331 *(9th Cir. 1997) 132 F.3d 1258*

Rules promulgated by state Board of Pharmacy requiring pharmacies to deliver lawfully prescribed Federal Drug Administration-approved medications and prohibiting discrimination against patients did not violate Free Exercise rights of pharmacy and pharmacists by requiring delivery of contraceptive that pharmacy owners and pharmacists claimed was against their religious beliefs, when rules were facially neutral as they made no reference to any religious practice, conduct, or motivation; where rules operated neutrally and did not suppress, target, or single out practice of any religion because of religious content, and fact that rules could affect pharmacists who objected to contraceptive for

religious reasons did not undermine their neutrality; when, by adopting means/ends test instead of underinclusiveness analysis for general applicability, district court committed legal error, because means/ends test was, in essence, version of intermediate scrutiny under which regulation had to be substantially related to important governmental objective, which was incorrect level of scrutiny; when, utilizing correct legal standard, new rules were generally applicable because they were not substantially underinclusive because there was no evidence state pursued its interests only against conduct with religious motivation; and when district court failed to give proper weight to rules' distinction between pharmacies and pharmacists by allowing individual pharmacists to refuse to dispense contraceptive on religious ground by making it duty of pharmacy, not pharmacist, to deliver lawfully prescribed drugs, and rules provided for religious accommodation by allowing individual pharmacist to decide whether to dispense particular medication based on pharmacist's religious beliefs and pharmacy to continue to employ that pharmacist by making appropriate accommodations. *Stormans, Inc. v. Selecky (9th Cir. 2009) 586 F.3d 1109, 1126-1138*

Use of artificial snow, made from recycled wastewater, on mountains sacred to Native Americans did not impose substantial burden on free exercise of their religion in violation of Religious Freedom Restoration Act, when presence of recycled wastewater did not coerce plaintiffs to act contrary to their religious beliefs under threat of sanctions, nor did it condition governmental benefit on conduct that would violate their religious beliefs, as required to establish substantial burden on religious exercise under *RFRA. Navajo Nation v. United States Forest Service (9th Cir. 2008) 535 F.3d 1058, 1067-1078*

School district's uniform dress policies did not violate students' *First Amendment* rights to free exercise of their religion by forbidding one student from wearing clothes expressing religious beliefs and forcing another to violate anti-conformity teachings of his religion, when policies did implicate *Free Exercise clause* because they were valid, neutral, and of general applicability. *Jacobs v. Clark County Sch. Dist. (9th Cir. 2008) 526 F.3d 419, 439-440*

Decision of Federal Energy Regulatory Commission ("FERC") granting public agency license to operate project for another 40 years hydroelectric did not violate Indian tribe's rights under Religious Freedom Restoration Act ("RFRA"), when substantial evidence supported FERC's finding that relicensing decision did not substantially burden tribe's free exercise of religion, and when, although FERC employed wrong standard for analyzing RFRA claims, error was harmless because FERC's standard was more generous to tribe than standard articulated by Ninth Circuit and tribe failed to demonstrate substantial burden that would meet standard. *Snoqualmie Indian Tribe v. FERC (9th Cir. 2008) 545 F.3d 1207, 1213-1215*

District court erred in finding that compelling criminal defendant to give blood sample for DNA testing could not violate his rights under either *Free Exercise Clause* or Religious Freedom Restoration Act (RFRA) despite his allegation that his religious beliefs prevented him from giving blood or providing any other biological fluid, where without determining precise scope of defendant's beliefs, district court erroneously held that his beliefs were not religious; on remand, district court had to determine precise scope of beliefs, whether beliefs were religious, whether religious beliefs were sincerely held, whether his exercise of religion would be substantially burdened by giving up DNA sample, and whether requiring him to give up sample is nonetheless permissible as least restrictive means of furthering compelling governmental interest. *United States v. Zimmerman (9th Cir. 2007) 514 F.3d 851, 853-855*

City's denial of college's rezoning application from use for hospital to college due to failure to comply with city's application requirements did not deprive college of its *First Amendment* right to free exercise of religion, when incidental burden of city's zoning ordinance applied throughout entire city and there was not even hint that college was targeted on basis of religion for varying treatment in city's application of ordinance; when language of ordinance revealed no content-based orientation and college presented no evidence city enacted or enforced ordinance as pretext for suppressing expression; and when neither ordinance nor city's application of it imposed serious burden on, affected in any significant way, or substantially restrained college's efforts to gather together for purpose of education and worship. *San Jose Christian College v. City of Morgan Hill (9th Cir. 2004) 360 F.3d 1024, 1030-1033*

Exclusion of members of unrecognized Indian bands from permit scheme of Bald and Golden Eagle Protection Act [*16 U.S.C. § 668 et seq.*] allowing members of federally recognized Indian tribes to apply for permits to possess and transport eagles or eagle parts for religious purposes does not violate Religious Freedom Restoration Act (RFRA) [*42 U.S.C. § 2000bb et seq.*]. Permit program is least restrictive means of achieving compelling governmental interest of protecting eagles, foreclosing any challenge to government's refusal to increase supply beyond that. Further, permit program does not discriminate facially on basis of religion in any way that harms member of unrecognized band, because they are not excluded because of faith. *United States v. Antoine (9th Cir. 2003) 318 F.3d 919, 921-924*

Passage by city and county of resolution urging Alabama lawmakers to extend hate crimes legislation to include offenses related to sexual orientation and resolution urging local television stations not to broadcast advertising campaigns aimed at "converting" homosexuals, and letter to plaintiffs who had sponsored advertisingcampaign regarding homosexuality formally disapproving campaign did not violate *Free Exercise Clause* because there was no "law" respecting establishment of religion at issue, and when challenged government action was neither regulatory, proscriptive, nor compulsory; alleging subjective chilling effect on free exercise rights is not sufficient to constitute substantial burden. Resolutions and letter also did not violate *Free Exercise Clause* by implicating other constitutional protections as "hybrid" claim, when, as to claim that governmental actors had orthodoxy of belief on subject of homosexuality as to which they could not prescribe, public officials may criticize practices they would have no constitutional ability to regulate so long as there is no actual or threatened imposition of government power of sanction; and when, as to claim for viewpoint discrimination, governmental actors did not impose or threaten prohibitions or sanctions for plaintiffs' viewpoint. *American Family v. City & County of San Francisco (9th Cir. 2002) 277 F.3d 1114, 1124-1125*

Public college could not, consistent with *First Amendment's* free speech and *free exercise clauses*, impose condition on pro-life demonstrators that they refrain from religious worship or instruction and limit demonstration to secular content. *Orin v. Barclay (9th Cir. 2001) 272 F.3d 1207, 1215-1216*

Religious Freedom Restoration Act (RFRA) is not unconstitutional as applied to federal law; however, private employer did not violate RFRA by refusing to hire prospective employee for refusal to provide social security number where RFRA does not expressly include private employers within its reach and where federal government compulsion of employers to obtain employees' social security numbers does not make every employer liable under RFRA for violating rights of employees or applicants who object on religious grounds to social security number requirement and does not make private employers government actors. *Sutton v. Providence St. Joseph Medical Center (9th Cir. 1999) 192 F.3d 826*

Veh. Code § 1653.5, (as interpreted prior to 2003 amendment allowing DMV to accept specified identifiers other than social security number under specified circumstances), which requires disclosure of social security number to obtain California driver's license, is valid and neutral law of general applicability and enforcement of it does not violate right to free exercise of religion, since California may regulate drivers' licenses and all applicants for drivers' licenses are required to provide their social security numbers, § 1653.5 is facially neutral and does not have object of burdening religion or more than incidental effect on religious practices or beliefs, and § 1653.5 is rationally related to California's legitimate interests in locating whereabouts of errant parents for purposes of carrying out child support programs, collecting tax obligations, and collecting amounts overdue and unpaid for fines, penalties, assessments, bail, and vehicle parking penalties. *Miller v. Reed (9th Cir. 1999) 176 F.3d 1202, 1206-1207* ; Brunson v. Department of *Motor Vehicles (1999) 72 Cal. App. 4th 1251, 1253-1255, 85 Cal. Rptr. 2d 710*

Requiring father, appointed guardian ad litem for son's lawsuit under *42 U.S.C. § 1983*, to obtain lawyer does not violate *free exercise clause* of *U.S. Const., Amend. I*; right of free exercise does not relieve individual of obligation to comply with valid and neutral law of general applicability because law proscribes (or prescribes) conduct that his or her religion prescribes. *Johns v. County of San Diego (9th Cir. 1997) 114 F.3d 874, 877*

State interest in allowing tort liability for fraud and intentional infliction of emotional distress is important enough to outweigh any burden such liability would impose on organization's religious conduct. *Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1119, 252 Cal. Rptr. 122, 762 P.2d 46*

In prosecution for sale and possession for sale of marijuana, trial court properly excluded reference to Religious Freedom Restoration Act ("RFRA") as not providing defense, when RFRA was unconstitutional and did not trump California statutes prohibiting sale or possession of marijuana for sale, and when trial court properly ruled that reference to RFRA would have had marginal probative value and was substantially outweighed by possibility of misleading jury as to what was in issue and consumption of time. *People v. Rubin (2008) 168 Cal. App. 4th 1144, 1147-1148, 86 Cal. Rptr. 3d 170*

In prosecution for sale of marijuana, defendant was not denied fair trial because trial court excluded reference to Religious Freedom Restoration Act of 1993 [*42 U.S.C. § 2000bb et seq.*] as defense, when although RFRA prohibited government from substantially burdening exercise of religion unless government could demonstrate burden was in furtherance of compelling governmental interest and was least restrictive means of furthering compelling governmental interest, RFRA was unconstitutional and did not trump state statutes prohibiting the sale or possession of marijuana for sale, and when reference to RFRA would have had marginal probative value and was substantially outweighed by possibility of misleading jury as to what was in issue and consumption of time it would have taken. *People v. Rubin (2008) 168 Cal. App. 4th 1144, 1147-1148, 86 Cal. Rptr. 3d 170*

There are circumstances in which tort liability for breach of fiduciary duty may be imposed on pastor for injuries resulting from pastor's sexual misconduct with parishioner without offense to state and federal constitutional religion clauses. However, those circumstances were not present when parishioner failed to allege that pastor's exploitation of her alleged vulnerability arose in context of counseling relationship so that parishioner failed to allege relationship creating fiduciary duty, and when parishioner's claim that depth of her religious faith rendered her vulnerable to pastor could not be adjudicated without reference to nature of her religious beliefs and doctrines of her church. *Richelle L. v. Roman Catholic Archbishop (2003) 106 Cal. App. 4th 257, 273-283, 130 Cal. Rptr. 2d 601*

Citation of vendor for sale of incense without vending license did not raise *First Amendment* free exercise protections when solicitation of money for incense had no religious connotations, there were no signs indicating use of incense in church or why incense played role in church doctrine or messages, and vendor made no mention of these concerns to prospective purchasers; even if solicitation of donations for incense did merit *First Amendment* protection, ordinance requiring vending license imposes valid time, place, and manner restrictions, when restriction is content-neutral and no group or message is singled out for restriction; when ordinance is narrowly tailored; and when ordinance provides for ample alternative channels of communication. *People v. Foote (2001) 91 Cal. App. 4th Supp. 7, 14-18 , 110 Cal. Rptr. 2d 260*

School district's rejection of sign proffered by private party containing Ten Commandments in response to district's fund raising campaign did not violate party's free exercise rights under *Cal. Const., art. I, § 4*, when party's freedom to worship was not inhibited and when private party is not free to impose religious beliefs on children in educational arena; even if rejection of sign was considered to be imposition on free exercise rights, state has compelling interest in acting in accordance with *establishment clause* strictures. *DiLoreto v. Board of Educ. of Downey Unif. Sch. Dist. (1999) 74 Cal. App. 4th 267, 278-279, 87 Cal. Rptr. 2d 791*

No state interest compelling enough to override church-affiliated university's interest in deciding how its chaplain can best serve the spiritual needs of campus community allowed application of California's Fair Employment and Housing Act (FEHA), *Gov. Code § 12900 et seq.*, to university's employment discrimination dispute with chaplain; application of FEHA to dispute would unconstitutionally burden free exercise of religion by university so that summary judgment for university was proper. *Schmoll v. Chapman University (1999) 70 Cal. App. 4th 1434, 1442-1444, 83 Cal. Rptr. 2d 426*

Shopping center's ban on leafletting in parking lot is reasonable restriction on time, manner, and place of protected speech and religious expression; however, center could not prohibit all expression; religious expression protected to same extent as political expression. *Savage v. Trammell Crow Co. (1990) 223 Cal. App. 3d 1562, 1576, 1580-1581, 273 Cal. Rptr. 302* (extending *Robins v. Pruneyard Shopping Center (1979) 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341* , to nonpolitical expression)

Protection of person's reputation is sufficiently important state interest to allow burden of tort damages to be imposed. *McNair v. Worldwide Church of God (1987) 197 Cal. App. 3d 363, 374, 242 Cal. Rptr. 823*

[iv] No Preference

Gov. Code §§ 25373, 37361, which have effect of granting exemption from landmark preservation laws to noncommercial property owned by religious organization that objects to landmark designation and determines in public form that organization would suffer substantial hardship if property were designated historic landmark, do not violate no-preference provision of California *Constitution's free exercise clause, Cal. Const., art. I, § 4*. *East Bay Asian Local Development Corp. v. State of California (2000) 24 Cal. 4th 693, 719-720, 102 Cal. Rptr. 2d 280, 13 P.3d 1122*

[2] Civil and Property Rights

[a] Ecclesiastical Issues

Civil courts are prohibited from determining property disputes on basis of their own interpretation of church doctrine. *Serbian Orthodox Diocese v. Milivojevich (1976) 426 U.S. 696, 721, 96 S. Ct. 2372, 49 L. Ed. 2d 151* ; *Presbyterian Church v. Hull Church (1969) 393 U.S. 440, 449, 89 S. Ct. 601, 21 L. Ed. 2d 658*

Exercise of jurisdiction over ecclesiastical controversies by civil courts violates *First Amendment*. *Presbyterian Church v. Hull Church (1969) 393 U.S. 440, 449, 89 S. Ct. 601, 21 L. Ed. 2d 658* ; *Kreshik v. Saint Nicholas Cathedral (1960) 363 U.S. 190, 191, 80 S. Ct. 1037, 4 L. Ed. 2d 1140* ; *Wilson v. Hinkle (1977) 67 Cal. App. 3d 506, 510-511, 136 Cal. Rptr. 731*

Courts prohibited by *First Amendment* from deciding cases involving ecclesiastical matters on basis of their own interpretation of church doctrine. *Presbyterian Church v. Hull Church (1969) 393 U.S. 440, 449, 89 S. Ct. 601, 21 L. Ed. 2d 658*

Autonomous power of churches, within their ecclesiastical jurisdiction, to provide for internal law and government. *Watson v. Jones (1872) 80 U.S. 679, 728-729, 20 L. Ed. 666*

Civil courts have jurisdiction of civil or property rights controversies in religious bodies where ecclesiastical matters are incidentally involved. *Providence Baptist Church v. Superior Ct. (1952) 40 Cal. 2d 55, 60-61, 251 P.2d 10* ; *In re Metropolitan Baptist Church of Richmond, Inc. (1975) 48 Cal. App. 3d 850, 859-860, 121 Cal. Rptr. 899*

General rule that courts will not interfere with ecclesiastical practices of religious societies qualified by rule that civil and property rights may be adjudicated. *Rosicrucian Fellowship v. Rosicrucian Etc. Church (1952) 39 Cal. 2d 121, 131, 245 P.2d 481* ; *Owen v. Board of Directors (1959) 173 Cal. App. 2d 112, 116, 342 P.2d 424*

In attempt by church and its pastor to withdraw from their denominational affiliation with church organizations, trial court properly held that attempt to disaffiliate was ineffective and church organizations properly imposed supervision and control over church and its assets, where trial court correctly determined that organization was hierarchical church

as to which civil court was required to defer with regard to its ecclesiastical decisions, and, having found ecclesiastical rule appropriate, trial court appropriately applied it to abstain from making determination as to only one issue, *i.e.*, propriety of revocation of pastor's ministerial credentials, and made its ultimate determinations that church's attempt to disaffiliate had failed and church was therefore subject to organizations' regional supervision and control by weighing evidence adduced at trial in light of neutral principles of civil law, without reference to ecclesiastical rule. *Concord Christian Center v. Open Bible Standard Churches (2005) 132 Cal. App. 4th 1396, 1409-1416, 34 Cal. Rptr. 3d 412*

Allegation that one was fraudulently induced to become member of church by representation that church's founder had twice risen from the dead as implicating religious beliefs and, thus, not justiciable. *Stansfield v. Starkey (1990) 220 Cal. App. 3d 59, 75, 269 Cal. Rptr. 337*

Dismissal of priest is ecclesiastical matter, even if proper church canons were not followed in process; torts of invasion of privacy, defamation, and intentional and negligent infliction of emotional distress by bishop and other church hierarchy were beyond jurisdiction of civil courts when they arose from priest-bishop relationship and occurred as inseparable part of process of divestiture of priestly authority. *Higgins v. Maher (1989) 210 Cal. App. 3d 1168, 1175-1176, 258 Cal. Rptr. 757*

Representation of discharged minister by Labor Commissioner in dispute over severance pay did not violate *First Amendment* prohibition against state involvement in religious affairs when dispute did not require judicial resolution of any ecclesiastical issues. *Gipe v. Superior Court (1981) 124 Cal. App. 3d 617, 628-629, 177 Cal. Rptr. 590*

First Amendment severely circumscribes role of civil courts in resolving church property disputes and precludes such courts from exercise of jurisdiction over disputes requiring determination of whether or not there has been departure from doctrine on part of party to dispute. *Wilson v. Hinkle (1977) 67 Cal. App. 3d 506, 510-512, 136 Cal. Rptr. 731*

Relevant inquiry in adjudication of property disputes is whether civil court can resolve dispute on basis of neutral principles of law not involving resolution of ecclesiastical issues; if court does not have to resolve doctrinal propriety of church's action to determine who has legal control of property there is no unconstitutional intervention. *In re Metropolitan Baptist Church of Richmond, Inc. (1975) 48 Cal. App. 3d 850, 858-860, 121 Cal. Rptr. 899*

Church canons are governing disposition of trust fund upon death of archbishop. *Johnathan v. Shea (1971) 19 Cal. App. 3d 328, 331-335, 96 Cal. Rptr. 673*

State is constitutionally prohibited from ascertaining truth or error of theological beliefs of religious society. *Saint Germain Foundation v. County of Siskiyou (1963) 212 Cal. App. 2d 911, 916, 28 Cal. Rptr. 393*

Decisions by church tribunals on matters such as discipline, faith, ecclesiastical rule, custom, or law are binding in civil court disputes. *Owen v. Board of Directors (1959) 173 Cal. App. 2d 112, 116, 342 P.2d 424*

[b] Church Rules

Decisions by proper church tribunals on purely ecclesiastical matters are conclusive and binding on civil courts with possible exception when those decisions are products of fraud or collusion, the *First Amendment* prohibiting inquiry into whether such decisions were arbitrary in sense requiring inquiry into whether tribunal complied with church law and regulations. *Serbian Orthodox Diocese v. Milivojevich (1976) 426 U.S. 696, 712-713, 96 S. Ct. 2372, 49 L. Ed. 2d 151* ; *Gonzalez v. Roman Catholic Archbishop (1929) 280 U.S. 1, 16, 50 S. Ct. 5, 74 L. Ed. 131*

Court action transferring control of cathedral from central church governing body to local governing body breached constitutional guarantee of religious liberty. *Kreshik v. Saint Nicholas Cathedral (1960) 363 U.S. 190, 191, 80 S. Ct.*

1037, 4 L. Ed. 2d 1140

Legislative interference with church government is prohibited by *First Amendment*. *Kedroff v. Saint Nicholas Cathedral (1952) 344 U.S. 94, 120-121, 73 S. Ct. 143, 97 L. Ed. 120*

When question is whether church property is handled in accordance with church corporation bylaws and rules or whether these are being properly observed by church governing body, aggrieved person may seek redress through civil courts. *Providence Baptist Church v. Superior Ct. (1952) 40 Cal. 2d 55, 63-64, 251 P.2d 10* ; *Samoan Congregational etc. Church in U.S. v. Samoan Congregational etc. Church of Oceanside (1977) 66 Cal. App. 3d 69, 76-77, 135 Cal. Rptr. 793*

Jurisdiction of civil courts to decide whether meeting at which salaried pastor was removed was properly conducted according to usage, contracts, and rules of religious society of congregational type. *Providence Baptist Church v. Superior Ct. (1952) 40 Cal. 2d 55, 61-62, 251 P.2d 10*

Roman Catholic Church's determination of qualifications for prison priests was not entanglement prohibited by *establishment clause* (in fact state's determination would be entanglement); church's criteria were necessary to allow inmates full and free exercise of their religious rights. *Duffy v. State Personnel Bd. (1991) 232 Cal. App. 3d 1, 19, 283 Cal. Rptr. 622*

Local church that withdrew its affiliation from regional and national bodies, but retained possession of local church property, required to deliver property to general church under express trust theory when canons declared that on dissolution, liquidation, or abandonment, its property would inure to general church. *Protestant Episcopal Church v. Barker (1981) 115 Cal. App. 3d 599, 625, 171 Cal. Rptr. 541*

Decision of church congregation designating recipients of church assets on its dissolution not treated as ecclesiastical decision and, thus, trial court properly permitted distribution in accordance with organization's purpose and purpose of property's donors. *In re Metropolitan Baptist Church of Richmond, Inc. (1975) 48 Cal. App. 3d 850, 857-860, 121 Cal. Rptr. 899*

Removal of plaintiff as church members and as members of church corporation subject to court's power to enjoin in view of property rights involved in corporation question, even though doubt exists as to power of court to enjoin removal from church membership since latter only incidentally involved. *Burnett v. Banks (1955) 130 Cal. App. 2d 631, 637, 279 P.2d 579*

Controversies involving only church policy or discipline are improper subjects for judicial determination or review. *Maxwell v. Brougher (1950) 99 Cal. App. 2d 824, 826, 222 P.2d 910*

[c] Church Organization

In resolving property disputes, when church body's judicatory system consists of hierarchy exercising control over member churches, decision of highest judicatory body is final and conclusive, even though plaintiffs comprise substantial majority of individual members. *Serbian Orthodox Diocese v. Milivojevich (1976) 426 U.S. 696, 724-725, 96 S. Ct. 2372, 49 L. Ed. 2d 151* ; *Wheelock v. First Presb. Church (1897) 119 Cal. 477, 482, 51 P. 841*

Express trust provisions are enforced by courts whether church's organization is hierarchical or congregational, even though terms of trust are in derogation of wishes of governing body or members of congregation. *Watson v. Jones (1872) 80 U.S. 679, 723, 20 L. Ed. 666* ; *Presbyterian Church v. Hull Church (1969) 393 U.S. 440, 452, 89 S. Ct. 601, 21 L. Ed. 2d 658* (concurring opinion)

In resolving property disputes, when church is independently organized and governed by its congregation, courts take cognizance of rights of majority of members. *Watson v. Jones (1872) 80 U.S. 679, 724-725, 20 L. Ed. 666* ; *Barber v. Irving (1964) 226 Cal. App. 2d 560, 567, 38 Cal. Rptr. 142*

Chief officer of corporation sole is not also "the religious organization governed by the corporation"; there is a clear distinction between the corporation sole and the individual who happens to be the current office holder. *County of San Luis Obispo v. Ashurst (1983) 146 Cal. App. 3d 380, 383-384, 194 Cal. Rptr. 5* ; *Berry v. Society of Saint Pius X (1999) 69 Cal. App. 4th 354, 368-372, 81 Cal. Rptr. 2d 574*

[d] Church Factions

In determining which faction of divided church is entitled to church property, *First Amendment* commands civil courts to decide church property disputes without resolving underlying religious doctrine issues, church polity and church administration. *Serbian Orthodox Diocese v. Milivojevich (1976) 426 U.S. 696, 709-710, 96 S. Ct. 2372, 49 L. Ed. 2d 151*

Schism resulting from diversion on part of minister of local church is not within province of civil court to interfere and is matter to be settled by church tribunals. *Providence Baptist Church v. Superior Ct. (1952) 40 Cal. 2d 55, 63, 251 P.2d 10*

In determining which faction of divided church is entitled to church property, courts are bound by church's rulings regarding ecclesiastical matters affecting controverted property rights. *Wheelock v. First Presb. Church (1897) 119 Cal. 477, 482, 51 P. 841*

Members of congregational church are not entitled to division of church property on separation from parish. *Maxwell v. Brougher (1950) 99 Cal. App. 2d 824, 827, 222 P.2d 910*

[e] Expulsion

Expulsion of members is governed by rules and bylaws of church. *Erickson v. Gospel Foundation of Calif. (1954) 43 Cal. 2d 581, 587, 275 P.2d 474*

Church member's right to inspect membership lists does not constitute sufficient property right to justify civil court interference with expulsion of member. *Owen v. Board of Directors (1959) 173 Cal. App. 2d 112, 117, 342 P.2d 424*

[f] Rights of Church Corporation

Corporation sole has same civil rights and duties as other corporations. *Roman Catholic Archbishop v. Superior Court (1971) 15 Cal. App. 3d 405, 411, 93 Cal. Rptr. 338*

[g] Dissolution

Members of nonprofit religious corporation are not required to exhaust internal procedural remedies before seeking judicial intervention in dissolution of corporation since it is not an administrative body bound by rules governing access to courts. *Fuimaono v. Samoan Congregational etc. Church of Oceanside (1977) 66 Cal. App. 3d 80, 85, 135 Cal. Rptr. 799*

Cy pres doctrine applies to distribution of church assets on dissolution of nonprofit religious corporation and requires transfer of those assets to another organization so that original trust purpose can be carried out as nearly as possible. *In re Metropolitan Baptist Church of Richmond, Inc. (1975) 48 Cal. App. 3d 850, 857-858, 121 Cal. Rptr. 899*

[h] Corporation Sole--Liability for Personal Debts of Office Holder in Religious Organization

Trial court properly denied application for writ of execution against real property of church corporation sole to satisfy personal debts of individual holding office as head of organization when there was no showing that office holder fraudulently conveyed property to corporation sole or that the corporation sole improperly used property against its beneficial interest. *County of San Luis Obispo v. Ashurst (1983) 146 Cal. App. 3d 380, 385, 194 Cal. Rptr. 5*

[i] Trusts

Power of courts to enforce trust impressed on church property. *Wheelock v. First Presb. Church (1897) 119 Cal. 477, 482, 51 P. 841*

Substantial evidence supported trial court finding that local church had created trust in favor of general church, but under California law that trust was revocable absent express declaration to the contrary and local church was entitled to retain ownership of property when it revoked trust and severed its affiliation with general church. *California-Nevada Annual Conf. of the United Methodist Church v. St. Luke's United Methodist Church (2004) 121 Cal. App. 4th 754, 764, 17 Cal. Rptr. 3d 442 , disapproved on other grounds, Episcopal Church Cases (2009) 45 Cal. 4th 467, 492*

Assets of religious nonprofit corporation are impressed with charitable trust to carry out object for which organization was created deriving from express declaration of corporate purpose notwithstanding lack of express declaration of purpose by donors. *Samoan Congregational etc. Church in U.S. v. Samoan Congregational etc. Church of Oceanside (1977) 66 Cal. App. 3d 69, 73-74, 135 Cal. Rptr. 793*

Fiduciary nature of relationship between church trustee and church and its members. *St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 361, 287 P.2d 387*

[j] Charitable Bequests

Bequest to church for use in missionary work is charitable bequest. *Estate of Moore (1963) 219 Cal. App. 2d 737, 742, 33 Cal. Rptr. 427*

[k] Zoning

Church is treated same as secular litigant in zoning matters, such as application for conditional use permit. *Lucas Valley Homeowners Assn. v. County of Marin (1991) 233 Cal. App. 3d 130, 143, 284 Cal. Rptr. 427* ; *Mumaw v. City of Glendale (1969) 270 Cal. App. 2d 454, 455, 76 Cal. Rptr. 245*

Requiring synagogue to maintain attendance log, limiting outdoor activities and music, and requiring site to be used only for events with specific religious content are ordinary conditions to use permit and not setting up any unpermitted entanglement of church and state. *Lucas Valley Homeowners Assn. v. County of Marin (1991) 233 Cal. App. 3d 130, 149-152, 284 Cal. Rptr. 427*

[3] Tort Liability

[a] Intentional Infliction of Emotional Distress

State interest in allowing tort liability for fraud and intentional infliction of emotional distress based thereon is important enough to outweigh any burden such liability would impose on organization's religious conduct. *Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1119, 252 Cal. Rptr. 122, 762 P.2d 46*

Minister, who was terminated from his position as worship director because he was homosexual, was precluded by ministerial exception [*see Ch. 115, Civil Rights: Employment Discrimination, § 115.20[2][d],* for discussion of that rule] from maintaining action against church for intentional infliction of emotional distress. *Gunn v. Mariners Church, Inc. (2008) 167 Cal. App. 4th 206, 208, 213-214, 84 Cal. Rptr. 3d 1*

[b] Negligence

Nontherapist counselors who counsel others concerning their emotional and spiritual problems have no duty to refer counselees to licensed mental health professionals based on foreseeability of suicide alone. *Nally v. Grace Community Church (1988) 47 Cal. 3d 278, 297-300, 253 Cal. Rptr. 97, 763 P.2d 948*

Christian Science Church and its members who provided prayer treatment to minor child, who subsequently died of juvenile diabetes, did not owe duty to refer child to conventional medical practitioners after it became reasonably clear Christian Science treatment was ineffective, since child's father made decision to use prayer treatment, and he had legal duty to choose treatment for his child. *Quigley v. First Church of Christ, Scientist (1998) 65 Cal. App. 4th 1027, 1034-1035, 76 Cal. Rptr. 2d 792*

Church is liable for negligent maintenance of church building. *Fernquist v. San Francisco Presbytery (1957) 152 Cal. App. 2d 405, 407, 313 P.2d 192*

[c] Other Torts

Bylaws and internal rules and regulations of religious organizations are relevant to determination of principal-agent relationship. *Malloy v. Fong (1951) 37 Cal. 2d 356, 370-371, 232 P.2d 241* ; *Stevens v. Roman Catholic Bishop of Fresno (1975) 49 Cal. App. 3d 877, 883, 123 Cal. Rptr. 171*

Church supervisory body liable for injuries caused by tort of church pastor acting within scope of authority. *Malloy v. Fong (1951) 37 Cal. 2d 356, 372, 232 P.2d 241*

Minister, who was terminated from his position as worship director because he was homosexual, was precluded by ministerial exception [*see Ch. 115, Civil Rights: Employment Discrimination, § 115.20[2][d],* for discussion of that rule] from maintaining action against church for invasion of privacy based on senior pastor's subsequent, factually specific, denunciation of him to congregation during worship service and to church staff. *Gunn v. Mariners Church, Inc. (2008) 167 Cal. App. 4th 206, 216-217, 84 Cal. Rptr. 3d 1*

There are circumstances in which tort liability for breach of fiduciary duty may be imposed on pastor for injuries resulting from pastor's sexual misconduct with parishioner without offense to state and federal constitutional religion clauses. However, those circumstances were not present when parishioner failed to allege that pastor's exploitation of her alleged vulnerability arose in context of counseling relationship so that parishioner failed to allege relationship creating fiduciary duty, and when parishioner's claim that depth of her religious faith rendered her vulnerable to pastor could not be adjudicated without reference to nature of her religious beliefs and doctrines of her church. *Richelle L. v. Roman Catholic Archbishop (2003) 106 Cal. App. 4th 257, 273-283, 130 Cal. Rptr. 2d 601*

Dismissal of causes of action based on revealing contents of confessions to church's governing body and to entire congregation was erroneous when record did not support finding that such conduct was engaged in pursuant to church doctrine. *Snyder v. Evangelical Orthodox Church (1989) 216 Cal. App. 3d 297, 307-310, 264 Cal. Rptr. 640* (strongest allegation was that conduct was "consistent with church doctrine, tenets, and practice")

Confinement or isolation that is consented to, even if consent is induced by threats of religious retribution, specifically that confinement is necessary for absolution, is protected religious speech, and church is not liable for false imprisonment. *Snyder v. Evangelical Orthodox Church (1989) 216 Cal. App. 3d 297, 304-305, 264 Cal. Rptr. 640*

Dismissal of priest is ecclesiastical matter, even if proper church canons were not followed in process; torts of invasion of privacy, defamation, and intentional and negligent infliction of emotional distress by bishop and other church hierarchy is beyond jurisdiction of civil courts when they arose from priest-bishop relationship and occurred as inseparable part of process of divestiture of priestly authority. *Higgins v. Maher (1989) 210 Cal. App. 3d 1168, 1175-1176, 258 Cal. Rptr. 757*

Actions of church or religious organization and its evangelist ministers in performance of religious activities are subject to liability in tort for defamation, with certain limitations. *McNair v. Worldwide Church of God (1987) 197 Cal. App. 3d 363, 374, 242 Cal. Rptr. 823*

Church is liable for personal injuries sustained by member while doing volunteer construction work on church property. *Timmons v. Assembly of God Church (1974) 40 Cal. App. 3d 31, 35, 115 Cal. Rptr. 917*

[4] Regulation of Secular Activities of Church

Secular activities of church are within regulatory power of municipality. *Gospel Army v. City of Los Angeles (1945) 27 Cal. 2d 232, 242-248, 163 P.2d 704*

Injunction against religious organization's and minister's unauthorized practice of medicine not barred by constitutional doctrine of religious freedom or exemption of *Bus. & Prof. Code § 2063* when practices went beyond prayer and reliance on religious intervention, and were dangerous and had caused injury, and when patients presented themselves not for religious counselling but for medical treatment. *Board of Medical Quality Assurance v. Andrews (1989) 211 Cal. App. 3d 1346, 1354, 1357-1359, 260 Cal. Rptr. 113*

Religious foundation's business telephone directory that published advertisements only from those who affirmed particular religious belief in order to strengthen that religious community subject to laws prohibiting discrimination. *Pines v. Tomson (1984) 160 Cal. App. 3d 370, 379-387, 206 Cal. Rptr. 866*

Ordinance against advertising fortune-telling enforceable against nonreligious function of minister where ordinance expressly provides that it is not to be construed to prohibit minister from exercising spiritual function of minister who is conforming to rites and practices of his or her church. *Allinger v. City of Los Angeles (1969) 272 Cal. App. 2d 391, 396*

Religious freedom does not preclude city from requiring religious group to obtain municipal license to canvass populace within city limits in quest of money or property. *Amer. Mission Army v. City of Lynwood (1956) 138 Cal. App. 2d 817, 819-820, 292 P.2d 533*

[5] Securities Liability for Fund Raising Activity

To establish secondary liability under *15 U.S.C. § 78t(a)*, defendant must have had some means of controlling culpable party and to have participated in culpable activity; neither general council's licensing and promotion of ministers nor bylaw requiring district council approval for local church's fund-raising projects that solicit contributions from nonchurch members are sufficient control to impose secondary liability for alleged fraudulent construction fund share issuance by local church. *Kersh v. General Council of Assemblies of God (9th Cir. 1986) 804 F.2d 546, 548-549*

Application of rule that allows inaction to constitute sufficient indirect participation to impose control person liability under *15 U.S.C. § 78t(a)* is limited to brokerage firm's failure to supervise broker; such liability is not imposed based on control person's inaction when control person did not know that controlled person's actions were unlawful or fraudulent and neither encouraged nor benefited from sale of securities. *Kersh v. General Council of Assemblies of God (9th Cir. 1986) 804 F.2d 546, 550, 552*

[6] Labor Standards

Minimum wage, overtime, and recordkeeping requirements of Fair Labor Standards Act (*29 U.S.C. §§ 201-219*) apply to workers engaged in commercial activities of religious foundation when foundation's businesses constitute enterprise engaged in commerce or production of goods for commerce and workers are employees within meaning of Act; application of Fair Labor Standards Act does not violate *U.S. Const., amend. I.* *Tony & Susan Alamo Foundation v. Sec. of Labor (1985) 471 U.S. 290, 295-306, 105 S. Ct. 1953, 85 L. Ed. 2d 278*

Application of state minimum wage law is subject to ministerial exception (see *Bollard* case, below); plaintiff seeking application of that law was "minister" in this context because plaintiff (1) was employed by religious institution, (2) was chosen for that position largely on religious criteria, and (3) performed some religious duties and responsibilities. *Alcazar v. Corporation of Catholic Archbishop (9th Cir. 2010) 598 F.3d 668, 2010 U.S. App. LEXIS 5356, at *10, *18* (ministerial exception barred plaintiff's claim)

Ministerial exception (see *Bollard* case, below) barred minister's claims against his church, under federal and state laws, for damages for employment discrimination based on failure to accommodate his disabilities. *Werft v. Desert Sw. Annual Conf. of U. Methodist Church (9th Cir. 2004) 377 F.3d 1099, 1104*

First Amendment requires "ministerial exception" to employment statute if application of statute would interfere with religious institution's employment decisions concerning its ministers. *Bollard v. California Province of the Soc'y of Jesus (9th Cir. 1999) 196 F.3d 940, 946-947* (ministerial exception did not bar claim, under Title VII of Civil Rights Act of 1964, by former Jesuit novice seeking damages for sexual harassment that drove him out of Jesuit order before he could take vows as priest)

Religious organizations generally are not immune from all governmental regulation of employment relationships. *Gargano v. Diocese of Rockville Centre (2nd Cir. 1996) 80 F3d 87, 90*

[7] Members' Defenses

Member established privilege of justification mitigating alleged conversion of church documents on ground that taking documents was only way to protect self against harm and harassment by church. *Church of Scientology v. Armstrong (1991) 232 Cal. App. 3d 1060, 1072-1073, 283 Cal. Rptr. 917*

[8] Nonprofit Public Benefit Corporation

Prior to January 1, 1983 (effective date of *Corp. Code § 5342*), compliance with formalities of *Corp. Code § 5341* was

required prior to termination of voting rights of members of nonprofit public benefit corporations by amendment of bylaws; when number of voting memberships sought to be terminated is too large to allow hearing to each member as provided by *Corp. Code § 5341(c)*, some other fair and reasonable procedure is required. *Ferry v. San Diego Museum of Art (1986) 180 Cal. App. 3d 35, 41-46, 225 Cal. Rptr. 258*

[9] Racketeer Influenced and Corrupt Organizations Act ("RICO"; 18 U.S.C. § 1961 et seq.)

No RICO claim was stated by persons who alleged nonprofit religious corporations and others had extorted money from them [*see 18 U.S.C. § 1951(b)(2)* (defining "extortion")] when no threat was alleged and no causal connection existed between defamation, which was basis of threat or coercion element under *18 U.S.C. § 1951(b)(2)* and occurred after plaintiffs left church, and payments to church. *Stansfield v. Starkey (1990) 220 Cal. App. 3d 59, 70-71 n.13, 77-78, 269 Cal. Rptr. 337*

No RICO claim was stated against nonprofit religious corporations and others when only relief sought was for personal injury, loss of reputation, pain, suffering, and damages for emotional distress, because those are not recoverable under RICO; only damages to business or property are recoverable under *RICO. Stansfield v. Starkey (1990) 220 Cal. App. 3d 59, 70 n.13, 77, 269 Cal. Rptr. 337*

[10] Remedies

United Methodist Church was unincorporated association that may be sued by that name, pursuant to former *Code Civ. Proc. § 388* [*now see Code Civ. Proc. § 369.5(a)*]. *Barr v. United Methodist Church (1979) 90 Cal. App. 3d 259, 263-265, 153 Cal. Rptr. 322*

Injunction is proper remedy for church corporation to restrain unauthorized acts of individual trustee in collecting and withholding rents from church property. *St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 361, 287 P.2d 387*

[11] Taxation

Imposition of sales and use taxes on sales of religious books, tapes, records, and other merchandise by religious organization does not violate free exercise or *establishment clauses* of *U.S. Const., amend. I.* *Swaggart v. Calif. Equalization Bd. (1990) 493 U.S. 378, 385-392, 397, 110 S. Ct. 688, 107 L. Ed. 2d 796*

Exemption of church property does not violate *First Amendment*. *Walz v. Tax Commission (1970) 397 U.S. 664, 680, 90 S. Ct. 1409, 25 L. Ed. 2d 697*

Nonprofit corporation operating home for elderly is entitled to property tax welfare exemption. *Fredericka Home v. County of San Diego (1950) 35 Cal. 2d 789, 795 , 221 P.2d 68* ; *Fifield Manor v. County of Los Angeles (1961) 188 Cal. App. 2d 1, 20-23, 10 Cal. Rptr. 242*

Property tax welfare exemption applies to YMCA facilities operated pursuant to organization's general religious and charitable purposes. *Y.M.C.A. v. County of L.A. (1950) 35 Cal. 2d 760, 767, 221 P.2d 47*

Exemption of church property used solely and exclusively for religious worship is applicable to church property incidentally used by other organizations for discussion meetings and social purposes. *Fellowship of Humanity v. Co. Alameda (1957) 153 Cal. App. 2d 673, 698-699, 315 P.2d 394*

Property of religious or charitable entity used exclusively for any facility which is incidental to and reasonably necessary for accomplishment of religious or charitable purposes is within property tax church exemption. *Serra Retreat v. County of L.A. (1950) 35 Cal. 2d 755, 758, 221 P.2d 59* ; *Christward Ministry v. San Diego (1969) 271 Cal. App. 2d 805, 809, 76 Cal. Rptr. 854*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewBusiness & Corporate LawNonprofit Corporations & OrganizationsDissolution & Winding UpCivil Rights LawCivil Rights ActsReligious Freedom Restoration ActEstate, Gift & Trust LawTrustsAdministrationLabor & Employment LawDiscriminationReligious DiscriminationGeneral Overview

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§ 110.35 Attorney General Opinions

Pursuant to Civic Center Act (former *Educ. Code § 40041*), state is permitted to allow public schools to establish "civic center" in public schools; religious organizations entitled to access to those facilities for use during non-instructional hours, so long as organization is charged amount at least equal to school district's direct costs. *76 Ops. Cal. Atty. Gen. 52 (1993)*

Program providing voucher to parents for each elementary- and secondary-school-age child for delivery to public or private school of their choice so that school would receive public funds is unconstitutional under *establishment clause* of *U.S. Const., amend. I*; private, non-church-operated school offering voluntary religious activities or religion-oriented curriculum is constitutionally able to qualify for voucher funding under certain circumstances. *64 Ops. Cal. Atty. Gen. 61 (1980)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsDissolution & Winding UpConstitutional LawBill of RightsFundamental FreedomsFreedom of ReligionEstablishment of ReligionConstitutional LawBill of RightsFundamental FreedomsFreedom of ReligionFree Exercise of ReligionEducation LawReligion in SchoolsPublic Assistance to Religious InstitutionsGeneral OverviewEducation LawReligion in SchoolsPublic Assistance to Religious InstitutionsStudent Tuition

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§ 110.36 Law Reviews

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Galloway, *The Free Exercise Clause After Smith II, 31 Santa Clara L. Rev. 597 (1991)*

O'Brien & Flannery, *The Pending Gauntlet to Free Exercise: Mandating That Clergy Report Child Abuse, 25 Loy. L.A.L. Rev. 1 (1991)*

Note, *Employment Division, Department of Human Resources v. Smith: The Melting of "Sherbert" Means a Chilling Effect on Religion, 26 U.S.F. L. Rev. 149 (1991)*

Note, *The Free Exercise Clause Gets a Costly Workout in Employment Division, Department of Human Resources of Oregon v. Smith, 18 Pepperdine L. Rev. 163 (1990)*

Note, *Accommodation and Neutrality Under the Establishment Clause: The Foster Care Challenge, 98 Yale L.J. 617 (1989)*

Note, *Lyng v. Northwest: Closing the Door to Indian Religious Sites, 18 Sw. U.L. Rev. 603 (1989)*

Kurland, *Religion and the Constitution: "Eternal Hostility Against Every Form of Tyranny Over the Mind of Man," 20 U.C. Davis L. Rev. 705 (1987)*

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Developments in the Law, *Religion and the State, 100 Harv. L. Rev. 1606 (1987)*

Marshall, *"We Know It When We See It": The Supreme Court and Establishment, 59 S. Cal. L. Rev. 495 (1986)*

Note, *Indian Religious Freedom and Governmental Development of Public Lands, 94 Yale L.J. 1447 (1985)*

Shapiro, *Of Robots, Persons, and the Protection of Religious Beliefs, 56 S. Cal. L. Rev. 1277 (1983)*

Comment, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept, 19 Cal. W.L. Rev. 507 (1983)*

Comment, *Structuring California Church Corporations to Allow Judicial Identification of Charitable Trustees in Church Property Disputes, 16 U.S.F. L. Rev. 463 (1982)*

Note, *The Crumbling Wall Between Church and State: Attorney General Supervision of Religious Corporations in California, 9 Hastings Const. L.Q. 691 (1982)*

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Note, *Imposing Corporate Forms on Unincorporated Denominations: Balancing Secular Accountability with Religious Free Exercise, 55 S. Cal. L. Rev. 155 (1981)*

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Note, *Government Protection of Church Assets from Fiscal Abuse: The Constitutionality of Attorney General Enforcement Under the Religion Clauses of the First Amendment , 53 S. Cal. L. Rev. 1277 (1980)*

Note, "Native Americans and the *Free Exercise Clause*," *28 Hastings LJ 1509 (1977)*

Comment, "The Power of Courts Over the Internal Affairs of Religious Groups," *43 Cal. L Rev 322 (1955)*

Comment, "Liability of Members and Officers of Nonprofit Associations for Contracts and Torts," *42 Cal. L Rev 812 (1954)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewBusiness & Corporate LawUnincorporated AssociationsConstitutional LawBill of RightsFundamental FreedomsFreedom of ReligionEstablishment of ReligionConstitutional LawBill of RightsFundamental FreedomsFreedom of ReligionFree Exercise of ReligionEstate, Gift & Trust LawTrustsAdministration

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Witkin, California Procedure, vol. 3, *Actions*, § 89-91 (4th ed. 1996)

Witkin, California Procedure, vol. 5, *Pleading*, §§ 853, 872 (4th ed. 1997)

Witkin, Summary of California Law, vol. 7, *Constitutional Law*, § 514 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of ReligionEstablishment of ReligionConstitutional LawBill of RightsFundamental FreedomsFreedom of ReligionFree Exercise of Religion

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[Reserved]

§§ 110.38[Reserved]

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11-110 California Forms of Pleading and Practice--Annotated § 110.50

§ 110.50 Allegation of Capacity [Corp. Code § 5004] and Principal Place of Business [Code Civ. Proc. § 395.5]--Church Incorporated in California [Corp. Code §§ 9111, 10002, 10200]

[1] FORM Allegation of Capacity [Corp. Code § 5004] and Principal Place of Business [Code Civ. Proc. § 395.5]--Church Incorporated in California [Corp. Code §§ 9111, 10002, 10200]

_____ [*Specify party, e.g.*, Defendant] is, and at all times herein mentioned was, a _____ [nonprofit corporation organized for religious purposes *or* corporation sole *or* corporation for charitable purposes] incorporated under the laws of the State of California and having its principal place of business in [_____ (*city*),] _____ County, California.

[2] Use of Form

The form in [1], *above*, alleges the capacity and principal place of business of a church incorporated in California and may be included in a pleading in an action or proceeding involving such a body.

[3] Contents

Nonprofit religious corporations, corporations sole, and corporations for charitable or eleemosynary purposes, have capacity to sue and be sued [*Corp. Code §§ 5004* (nonprofit corporations), 10007 (corporations sole); *see Corp. Code § 10200*; for discussion of corporate capacity, *see § 110.11[3] -[5]*].

Legal capacity need not be specifically alleged in a pleading, since lack of capacity, is usually a matter for objection by the opposing party, which may be asserted by answer or by demurer if it appears on the face of the complaint [*Los Angeles Railway Co. v. Davis (1905) 146 Cal. 179, 180-181, 79 P. 865* ; *see also Code Civ. Proc. § 430.10* (grounds for objection), 430.30 (objection by demurrer)]. Nevertheless, the general practice appears to be to include allegations of capacity.

Allegations of the principal place of business of the corporate parties to an action are customarily included with allegations of capacity, although they are ordinarily unnecessary unless venue is to be based thereon [*see, e.g., Code Civ. Proc. § 395.5* (venue of actions against corporations)]. Complaints need only state the county of defendant's

principal place of business for venue purposes [*see Code Civ. Proc. § 395.5*].

[4] Cross References

For alternative allegations of corporate capacity, see Ch. 160, *Corporations: Capacity* .

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11-110 California Forms of Pleading and Practice--Annotated § 110.51

§ 110.51 Allegation of Capacity [Code Civ. Proc. § 369.5(a)] and Principal Office [Code Civ. Proc. § 395.2]--Unincorporated Church Associations [Corp. Code § 18020]

[1] FORM Allegation of Capacity [Code Civ. Proc. § 369.5(a)] and Principal Office [Code Civ. Proc. § 395.2]--Unincorporated Church Associations [Corp. Code § 18020]

_____ [*Specify party, e.g.*, Plaintiff] _____ [*name of religious society*] is, and at all times herein mentioned was, a nonprofit unincorporated association having its principal office in _____ [*city*], _____ County, California.

[2] Use of Form

The form in [1], *above*, alleges the capacity and principal place of business of an unincorporated nonprofit association [*Corp. Code § 18020*] and may be used in a pleading in an action or proceeding involving such an organization as a party.

[3] Contents

Unincorporated associations have capacity to sue and be sued [*Code Civ. Proc. § 369.5(a)*; for discussion of unincorporated associations, *see § 110.11[2]*].

Allegations of the principal office of an unincorporated church association are customarily included with allegations of capacity, although they are ordinarily unnecessary unless venue is to be based thereon [*see*, e.g., *Code Civ. Proc. §§ 395.2, 395.5* (venue of actions against unincorporated associations)]. Complaints, however, need only state the county of defendant's principal place of business for venue purposes [*see Code Civ. Proc. § 395.5*]. For a discussion of allegations of capacity of nonprofit corporations, corporations sole, and charitable corporations, see *§ 110.50[3]*.

[4] Cross References

For alternative allegations of capacity of an unincorporated association, see Ch. 61, *Associations and Clubs* .

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11-110 California Forms of Pleading and Practice--Annotated § 110.52

§ 110.52 Petition for Writ of Mandate [Code Civ. Proc. § 1085] to Compel Church Organization and Directors to Recognize Petitioner's Election to Board of Directors

[1] FORM Petition for Writ of Mandate to Compel Church Organization and Directors to Recognize Petitioner's Election to Board of Directors

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR WRIT OF MANDATE
Respondents.	)	
	)	
	)	

Petitioner, _____ [*name*], respectfully represents:

1. _____ [*Capacity and principal place of business of respondent church. See §§ 110.50[1], 110.51[1]*].

2. Respondents _____ [*names of members of board of directors or other governing body such as board of trustees*] are, and at all times herein mentioned were, the duly elected and acting directors of respondent _____ [*name of church corporation or association*], hereinafter referred to as respondent Church.

3. On or about _____ [*date*], petitioner was duly elected and qualified as a member of the board of directors of respondent Church to serve as a director until the next annual meeting of the members of the _____ [corporation *or* association] and until his/her successor is elected, as provided in the bylaws. By

reason of the election and petitioner's immediate acceptance of the office of director, petitioner was and still is entitled to serve as a director and to participate in the management and control of the assets and property of respondent Church. A copy of the bylaws is attached as Exhibit A and incorporated by reference.

4. On or about _____ [*date*], at a regular meeting of the board of directors of respondent Church, respondent directors _____ [*names*] voted to expel petitioner from the board of directors and thereafter refused to permit petitioner to participate in the meeting. Since then respondents have continued to deprive petitioner of his/her office as a director of _____ [corporation *or* association]. The attempted expulsion of petitioner as a director by respondents was ineffective and void in that it was in direct violation of the bylaws, which provide in relevant part: _____ [*quote excerpt from bylaws regarding removal of directors*]. Petitioner has expressly demanded that respondents recognize his/her right to serve as a director but such demands have been, and still are, refused by respondents.

5. Petitioner does not have a plain, speedy, and adequate remedy in the ordinary course of law in that _____ [*state facts showing absence of adequate remedy at law, e.g.*, the law provides no other remedy to compel respondent to recognize his/her right to serve as director, and the right of the members of respondent Church as expressed in its bylaws to have petitioner whom they duly elected as a director so serve is being frustrated by respondent directors' action herein complained of].

WHEREFORE, petitioner prays:

1. That this court issue an alternative writ of mandate commanding respondents, and each of them, to recognize petitioner as a director or to show cause before this court why petitioner should not be recognized as a director of respondent Church and why a peremptory writ should not issue;

2. That on the return of the alternative writ and the hearing of this application and the return thereto, if any, this court issue its peremptory writ of mandate commanding respondents to recognize petitioner as a director of respondent Church;

3. For costs of this proceeding; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
_____ Attorney for Petitioner [*name*]

VERIFICATION

I, _____ [*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is a petition for a writ of mandate [*see Code Civ. Proc. § 1085*] to compel a church organization and its directors to recognize petitioner's election to the church's board of directors or other governing body.

Proof of service of a copy of a petition that seeks an alternative writ on each respondent and real party in interest must accompany the petition when it is offered for filing (except when the court, in its discretion and for good cause, has granted the application for the writ ex parte) [*Code Civ. Proc. § 1107*; for discussion of method of serving petition, *see* Ch. 358, *Mandate and Prohibition*]. A supporting memorandum should be filed with the petition [*Cal. Rules of Ct., Rule 8.486(a)(5)*; *see Code Civ. Proc. § 1090*, referring to the proceeding as a "motion" and *Cal. Rules of Ct., Rule 3.1113(a)*, requiring a supporting memorandum to be filed with a motion; for discussion and forms, *see* Ch. 417, *Points and Authorities*]. If the petition names as respondent a board, court, judge, or other officer acting in a public capacity, it also must disclose the name of any real party in interest [*Cal. Rules of Ct., Rule 8.486(a)(2)*]. In writ proceedings in civil cases (other than family, juvenile, guardianship, and conservatorship cases), every party must comply with the requirements of *Cal. Rules of Ct., Rule 8.208* concerning service and filing of a certificate of interested entities or persons [*Cal. Rules of Ct., Rule 8.488(a), (b)*].

For more detailed coverage of the requirements and procedures governing writs of mandate, see Ch. 358, *Mandate and Prohibition* .

[3] Allegations

The petition alleges facts showing:

- That petitioner is a beneficially interested party (Paragraph 3) [*see Funeral Dirs. Assn. v. Bd. of Funeral Dirs. (1944) 67 Cal. App. 2d 311, 313, 154 P.2d 39]* .

- That proper grounds exist (Paragraphs 3, 4) [*see Code Civ. Proc. § 1085(a)* (unlawful preclusion from office as a ground); *see also Corp. Code §§ 303(a), 304* (lawful removal of directors)].

- That petitioner has made a distinct and express demand on respondent to perform the duty sought to be compelled by the writ (Paragraph 4) [*see Price v. Riverside Land & Irrigating Co. (1880) 56 Cal. 431, 434]* .

- That petitioner has no plain, speedy, and adequate remedy in the ordinary course of law (Paragraph 5) [*see Phelan v. Superior Court (1950) 35 Cal. 2d 363, 370, 217 P.2d 951* ; *see also Code Civ. Proc. § 1086*].

The prayer of the petition requests an award of costs for bringing this special proceeding [*Code Civ. Proc. § 1032*].

[4] Jurisdiction

If the petition is filed in a court of appeal or the Supreme Court, rather than a superior court [*see Cal. Const., art. VI, § 10* (original jurisdiction in mandate proceedings)], and could have been filed first in a lower court, it must explain why the reviewing court should issue the writ as an original matter [*Cal. Rules of Ct., Rule 8.486(a)(1)*].

[5] Verification

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*; *Cal. Rules of Ct., Rule 8.486(a)(4)*]. Proof of service on each respondent and real party in interest of a copy of a petition that seeks an alternative writ must accompany the petition when it is offered for filing except when, in its discretion and for good cause, the court has granted the application for the writ ex parte [*Code Civ. Proc. § 1107*; for a discussion of serving the petition, *see* Ch. 358, *Mandate and Prohibition*]. A supporting memorandum must accompany a petition, but need not repeat facts alleged in the petition [*Cal. Rules of Ct., Rule 8.486(a)(5)*]. When no alternative writ is sought, proof of service of a copy of the petition need not accompany the application, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

[6] Cross References

See generally Ch. 358, *Mandate and Prohibition*

For forms concerning election, appointment, and removal of directors, see Ch. 167, *Corporations: Directors and Management* .

For alternative forms for prayers and verifications, see Ch. 420, *Prayers* and Ch. 572, *Verification*

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Chapter 110 CHURCHES AND RELIGIOUS ORGANIZATIONS
PART IV. FORMS

11-110 California Forms of Pleading and Practice--Annotated § 110.53

§ 110.53 Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526]--Class Action [Code Civ. Proc. § 382] by Church Member on Behalf of Majority Members of Church Corporation Against Church Corporation, Director, and Minority Members--To Enjoin Wrongful Expulsion and Compel Election of Directors [Corp. Code § 9418(c)]

[1] FORM Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526]--Class Action [Code Civ. Proc. § 382] by Church Member on Behalf of Majority Members of Church Corporation Against Church Corporation, Director, and Minority Members--To Enjoin Wrongful Expulsion and Compel Election of Directors [Corp. Code § 9418(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
individually and on behalf of all others similarly situated,	)	NO. _____
Plaintiff,	)	COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTION
vs.	)	
_____ [*names*],	)	
Defendants.	)	
	)	

Plaintiff alleges:

1. [*Capacity and principal place of business of defendant church. See § 110.50[1]*.]

2. Defendants _____ [*names of minority members of church threatening to expel plaintiff*] are, and at all times herein mentioned were, members of defendant Church [residing in _____ County, California].

3. Defendant _____ [*name of director*] is, and at all times herein mentioned was, a director of defendant Church [residing in _____ County, California].

4. Plaintiff brings this action on his/her own behalf as a member in good standing of defendant Church corporation, and on behalf of all members thereof, other than those named as defendants in Paragraph 3, above, who are similarly threatened with expulsion from membership in defendant Church corporation as herein alleged. This class is so numerous that it is impracticable to bring them all before this court. There are questions of law and fact of common and general interest to the class, and the claims and defenses of the plaintiff and the defendant are typical of the claims and defenses of the class and the defendant. The plaintiff will fairly and adequately protect the interests of the class.

5. Defendant _____ [*name of church corporation*] holds title to the real and personal property of the Church, for the benefit, use, and enjoyment of all of its members, including plaintiff.

6. The bylaws of the corporation provide for an annual membership meeting for election of directors; no annual meeting has ever been held; two of the three initial directors have resigned from their directorship; there is only one director, _____ [*name*], remaining, and he/she arbitrarily refuses and neglects to call an annual meeting for the election of directors as required by the bylaws of the corporation. A copy of the bylaws is attached as Exhibit A and incorporated by reference.

7. Plaintiff is informed and believes, and on such information and belief alleges, that _____ [*name of director*] and the other defendants _____ [will *or* are conspiring to *or* have conspired to] attempt to eliminate all competition for the election of the directors of the corporation by holding an unauthorized meeting of a minority of the members and attempting to terminate the membership of plaintiff and the other members of his/her class in the corporation; the bylaws provide that removal of members can only be by vote of the majority of its membership.

8. A fair election cannot be held and a fair decision cannot be reached by an election or a hearing on the issue of expulsion of plaintiff and the other members of his/her class from the corporation in that defendants consist of a minority group of the organization acting in opposition to the majority of the membership; the election ballots are entirely in the hands of defendants, who are hostile to plaintiff and the other members of his/her class. Unless restrained by this court, the defendants will continue to have this meeting and expel plaintiff and the other members of his/her class without a fair and impartial hearing by persons having the authority to set and hear the matter before them.

9. Plaintiff has no adequate remedy at law in that, unless restrained by this court, the actions of the defendants will cause plaintiff and the class he/she represents to suffer irreparable injury in that: _____ [*specify*].

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For a preliminary and permanent injunction enjoining defendants, and each of them, from:

a. Calling or conducting any membership meeting without giving prior notice to plaintiff and all of the members as required by the bylaws of defendant corporation; and

b. Expelling plaintiff or any other members from defendant Church corporation in any manner except by vote of a majority of the members of defendant Church corporation after due notice and hearing as required by the bylaws of defendant Church corporation;

2. For an order compelling defendants, and each of them, to call and conduct an annual meeting of all the members of defendant Church corporation for the purpose of electing the directors thereof and conducting any other proper business in the manner provided in the bylaws;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The complaint in [1], *above*, is designed for use in a class action against a church corporation and its directors and minority members to enjoin the wrongful expulsion of the members of the class and to compel the election of directors. The complaint is based on the facts in *Burnett v. Banks (1955) 130 Cal. App. 2d 631, 279 P.2d 579* .

It is possible that the ousted or about-to-be-ousted minority could be the true church and the majority could be those who have wrongfully usurped church property or offices [*see Korean United Presbyterian Church v. Presbytery of the Pacific (1991) 230 Cal. App. 3d 480, 502-503, 506, 281 Cal. Rptr. 396 , disapproved on other grounds, Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 744 n.11*]. In such a case, the allegations of the foregoing form may be modified.

For further discussion of expulsion of church members, see *§ 110.14[2][d]*.

[3] Allegations

The complaint alleges:

- The existence of an ascertainable class [*Wheelock v. First Presb. Church (1897) 119 Cal. 477, 481-482, 51 P. 841]* and a well-defined community of interest in the questions of law and fact involved (Paragraph 4) [*see Code Civ. Proc. § 382*; *Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 704, 63 Cal. Rptr. 724, 433 P.2d 732]* .

- Facts showing that plaintiff's rights have been violated (Paragraphs 6, 7) and that grounds for issuance of an injunction exist (Paragraphs 8, 9) [*see Civ. Code § 3422*; *Code Civ. Proc. § 526*; *Burnett v. Banks (1955) 130 Cal. App. 2d 631, 636-637, 279 P.2d 579]* .

[4] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*]) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction

A class action against a religious organization is in the jurisdiction of the superior court and is not a limited civil action [*Cal. Const., art VI, § 10*; *see Code Civ. Proc. §§ 85, 86*]. On the filing of an action by a shareholder, the superior court tries and determines the validity of any election or appointment of any director of any domestic corporation, or foreign corporation if the election was held or the appointment was made in this state [*Corp. Code § 9418(a)*; *see also Corp. Code § 9418(b)* (fixing date for hearing; service of notice and complaint)]. The court may determine the person entitled to the office of director or may order a new election to be held or appointment to be made, and direct such other relief as may be just and proper [*Corp. Code § 9418(c)*].

Moreover, an action seeking permanent injunctive relief is in the jurisdiction of the superior court and is not a limited civil case [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*].

[6] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For procedure and forms related to class and representative actions, see Ch. 120, *Class Actions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For allegations showing proper venue, see Ch. 571, *Venue* .

For alternative verification forms, see Ch. 572, *Verification*

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11-110 California Forms of Pleading and Practice--Annotated § 110.54

§ 110.54 Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526]--By Unincorporated Church Association [Code Civ. Proc. § 369.5(a)] Against Church Corporation and Directors--To Compel Distribution of Equitable Share of Church Property After Division of Local Church Authorized by Church Tribunal

[1] FORM Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526]--By Unincorporated Church Association [Code Civ. Proc. § 369.5(a)] Against Church Corporation and Directors--To Compel Distribution of Equitable Share of Church Property After Division of Local Church Authorized by Church Tribunal

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	COMPLAINT FOR PRELIMINARY AND PER-
Defendants.	)	MANENT INJUNCTION
	)	
	)	

Plaintiff alleges:

1. [*Capacity and principal office of plaintiff. See § 110.51.*]

2. [*Capacity and principal place of business of defendant church corporation. See § 110.50.*]

3. Defendants _____ [*names of directors*] are, and at all times herein mentioned were, the duly elected and acting members of the board of directors of defendant _____ [*name of church corporation*].

4. The _____ [*name*] is a church tribunal having ecclesiastical control and authority over all _____ [*specify denomination or sect*] churches in _____ [*specify area of control, e.g.*, Los Angeles County, California]. Such tribunal has authority under the _____ [*specify source of authority, e.g.*, Canons] to approve and authorize the formation of local church associations and organizations subscribing to the tenets, beliefs, and practices of the _____ [*specify denomination or sect*] Church.

5. Article _____ of the articles of incorporation of the _____ [*name of defendant church corporation*] provides that _____ [*summarize or set forth relevant provisions dealing with church property, e.g.*, church property owned by the corporation shall be held in trust for the benefit of all members of the church corporation and that in the event that any members constituting at least _____percent of the total membership of the corporation at the time separate from the corporation to form a church or churches approved and authorized by the _____ (*name of church tribunal*) the property is to be divided, subject to the rights and claims of creditors, equitably between the corporation and such members of the new church or churches on the basis of their respective memberships, as determined by the _____(*name of church tribunal*)]. A copy of the articles of incorporation is attached as Exhibit A and incorporated by reference.

6. On or about _____ [*date*], _____ [*state facts establishing division of church, e.g.:* defendant corporation consisted of _____(*number*) members. On that date, _____(*number*) of the members, constituting _____ percent of the total membership of defendant corporation, with the approval of _____ (*name of church tribunal*), separated from defendant corporation and formed the _____ (*name of new church association*), plaintiff herein. A copy of the decision of _____ (*name of church tribunal*) approving and authorizing the formation of plaintiff association is attached as Exhibit B and incorporated by reference. _____ (*Name of church tribunal*) determined in its decision that the property of defendant corporation should be divided between plaintiff and defendant corporation as follows: _____ (*state*)].

7. Immediately thereafter an inventory and appraisal of the assets and liabilities of the church corporation was conducted by and at the direction of the _____ [*name of tribunal*]. The _____[*name of tribunal*] then determined on the basis of such inventory and appraisal, a copy of which is attached hereto as Exhibit C and made a part hereof, that the distribution to plaintiff of the following described property would constitute an equitable division on the basis of membership; _____ [*describe property*].

8. Plaintiff is informed and believes, and thereon alleges, that the property owned and possessed by defendant _____ [*name of church corporation*] at the time of the above-described separation, and the value thereof, is as disclosed in Exhibit C. Plaintiff is further informed and believes, and thereon alleges, that such defendant now owns and possesses the property described in Paragraph 7 above and that the transfer of such property to plaintiff would effect an equitable division of the church property based on the respective memberships as required by the above-described articles of incorporation.

9. Defendants, and each of them, have continuously failed and refused to distribute to plaintiff the above-described property, or any of it, in violation of defendant corporation's articles of incorporation and in violation of the trust conferred on defendants thereby.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For an order requiring defendants, and each of them, to show cause, if any they have, why they should not be enjoined as hereinafter set forth, during the pendency of this action;

2. For a preliminary and permanent injunction compelling defendants, and each of them, to transfer and distribute the

above-described property to plaintiff;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], declare:

I am the _____ [*title of office*] of which is the plaintiff in the above-entitled action, and I have been authorized to make this verification on its behalf.

I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The complaint in [1], *above,* is for use to compel distribution to plaintiff church association of its share of the assets of defendant church corporation where the association members seceded from the corporation, the division of assets is provided for in the corporation's articles of incorporation, and the establishment of the new church association and distribution of assets are authorized and directed by the governing church tribunal. For discussion of property distribution between church divisions, see *§ 110.14[2]*.

In addition to asset distribution, the plaintiff church association may pray for costs associated with bringing the action against the defendant church corporation [*Code Civ. Proc. § 1026*]. Plaintiffs may also recover other costs [*see Code Civ. Proc. § 1032(a)(4), (b)*].

A nonprofit religious corporation may dispose of all or substantially all of its assets [*Corp. Code §§ 9631, 9633*]. It may also be wound up or dissolved, or both, in essentially the same manner and with basically the same effect as a nonprofit public benefit corporation, under the Nonprofit Public Benefit Corporation Law [*see Corp. Code § 9680* (enumerating sections excepted as inapplicable to a nonprofit religious corporation on dissolution and/or winding up)]. For further discussion of asset distribution on dissolution of a religious organization, see *§ 110.22*.

[3] Allegations

The complaint alleges:

- Capacity of unincorporated association to sue (Paragraph 1) [*see Code Civ. Proc. § 369.5(a)*; *see also §§ 110.50, 110.51*].

- Proper venue [*see Prob. Code § 17005*].

- The authority of the church tribunal to create and approve formation of local churches within its area of control (Paragraph 4).

- The provisions of the articles of incorporation of the church corporation specifying that the corporation holds the church property in trust for the benefit of members and specifying the manner of division of such property in the event some members separate to form a new, approved church (Paragraph 5).

- The separation by plaintiff and the members of the class he or she represents to form a new church approved by the tribunal (Paragraph 6).

- The determination by the tribunal of an equitable division of property (Paragraph 7).

- Defendants' refusal to transfer the property in breach of its trust conferred by the articles of incorporation, justifying injunctive relief (Paragraph 9) [*see Civ. Code §§ 2223* (involuntary trustee), 3422(4) (injunction granted when obligation arises from trust); *Code Civ. Proc. § 526(a)(7)*; *Prob. Code § 16420(a)(1)* (beneficiary may compel trustee to perform obligations of trust); *see also Wheelock v. First Presb. Church (1897) 119 Cal. 477, 482-485, 51 P. 841* (discussing trust relationship between church corporation and members in ownership of church property and approving equitable relief in dividing church property)].

[4] Verification

For a discussion of verification requirements, see *§ 110.53[4]*.

[5] Jurisdiction

The superior court has jurisdiction over actions to enforce trusts and the actions are not limited civil cases [*see Cal. Const., art. VI, § 10* (residual jurisdiction of superior court); *see also Code Civ. Proc. §§ 85, 86* (limited civil cases)].

Moreover, an action seeking permanent injunctive relief is in the jurisdiction of the superior court and is not a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*].

For a discussion of the jurisdiction of civil courts to hear church disputes involving property rights and dissolution, see *§ 110.14*.

[6] Cross References

See generally Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

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11-110 California Forms of Pleading and Practice--Annotated § 110.55

§ 110.55 Complaint for Damages for Personal Injuries Based on Negligence [Civ. Code § 1714]--Against Church and Pastor--Negligent Maintenance of Church Building

[1] FORM Complaint for Damages for Personal Injuries Based on Negligence [Civ. Code § 1714]--Against Church and Pastor--Negligent Maintenance of Church Building

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Negligence)
through _____,]	)	[Amount demanded _____
Defendants.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant church. See §§ 110.50, 110.51*.]

2. Defendant _____ [*name of pastor or other person in charge of the building*] is, and at all times herein mentioned was, the agent and servant of defendant _____ [*name of church*], and in doing the things hereinafter mentioned was acting within the scope of such agency and service.

3. [Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I- _____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of such defendants is negligently responsible in some manner for the occurrences herein alleged and that plaintiff's injuries

as herein alleged were proximately caused by such negligence.)]

4. On or about _____ [*date*], and for some time prior thereto, defendant _____ [*name of church*] was engaged in the construction of a certain building on certain real property owned by defendant _____ [*name of church*] and located at _____ [*state address and city*] in _____ County, California. On that date defendant _____ [*name of pastor or other person in charge of building*] requested and invited plaintiff to enter the building for the purpose of performing work and labor therein gratuitously and without compensation for the benefit of defendant _____ [*name of church*].

5. On or about _____ [*date*], plaintiff entered the aforementioned building, with the knowledge of defendants, for the purpose of performing the work requested of him/her as aforementioned.

6. At that time and place defendants, and each of them, so negligently and carelessly constructed and maintained the building that _____ [*describe condition causing injury, e.g.*, a certain board or plank on which it was necessary for plaintiff to stand, walk, and traverse for the purpose of engaging in the work and labor was caused to, and did, turn and collapse then and there, thereby causing plaintiff to fall therefrom to the floor of the structure].

7. As a proximate result of the negligence of defendants, and each of them, [and of the fall,] plaintiff was caused to and did suffer and sustain serious personal injuries of both a temporary and permanent nature as follows: _____ [*describe injuries*], all to his/her general damage.

As a further proximate result of the negligence of defendants, and each of them, plaintiff has incurred [and will continue to incur] medical and related expenses.

[*In separately numbered paragraphs, set forth any additional special damages, such as loss of wages, or business income, etc., as a proximate result of the negligence.*]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages;

2. For medical and related expenses;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 110.53[1], [4].*]

[2] Use of Form

The complaint in [1], *above*, is intended for use in an action for damages for personal injuries resulting from the negligent maintenance of a church building or premises [*see Fernquist v. San Francisco Presbytery (1957) 152 Cal.*

App. 2d 405, 407, 313 P.2d 192] . The complaint is based on the facts in *Fernquist v. San Francisco Presbytery (1957) 152 Cal. App. 2d 405, 313 P.2d 192* .

For a discussion of religious organization liability for tort offenses, see *§ 110.20*.

[3] Allegations

The complaint alleges the elements of an action for negligence [*see Miglierini v. Havemann (1966) 240 Cal. App. 2d 570, 572, 49 Cal. Rptr. 795]* , including:

- Defendant's legal duty of care toward plaintiff (Paragraphs 4, 5) [*Civ. Code § 1714* (general duty of care)];
- Defendant's breach of duty by an act or omission (Paragraph 6);
- Injury to plaintiff proximately caused by the breach (Paragraph 7); and
- Damages (Paragraphs 7, 8) [*see Hunter v. Freeman (1951) 105 Cal. App. 2d 129, 133, 233 P.2d 65]* .

Allegations of plaintiff's status as an invitee (Paragraphs 4, 5) are desirable to show defendant's awareness of plaintiff's presence on the premises, but they are not essential [*Rowland v. Christian (1968) 69 Cal. 2d 108, 112-120, 70 Cal. Rptr. 97, 443 P.2d 561]* .

[4] Specifying Amount of Damages

When an action is brought to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action. The complaint must comply with the caption requirements set forth in *Code Civ. Proc. § 422.30*, and in a limited civil case, the filing fee requirements set forth in *Gov. Code § 70613(b)* [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages must be alleged [*Code Civ. Proc. § 425.10(a)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see *Ch. 177, Damages, § 177.40* et seq., and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the first paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[7] Cross References

See generally Ch. 380, *Negligence* , and Ch. 421, *Premises Liability*

For alternative and additional allegations of damages, see Ch. 177, *Damages*

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11-110 California Forms of Pleading and Practice--Annotated § 110.56

§ 110.56 Complaint for Actual Damages--Breach of Fiduciary Duty of Director of Nonprofit Religious Corporation [Corp. Code § 9241]--By Corporation or Person Having Standing

[1] FORM Complaint for Actual Damages--Breach of Fiduciary Duty of Director of Nonprofit Religious Corporation [Corp. Code § 9241]--By Corporation or Person Having Standing

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR ACTUAL DAMAGES
_____ [*name*],	)	(Breach of Director's Fiduciary Duty)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[*EITHER*]

1. Plaintiff, _____ [*name of corporation*], is and at all times herein mentioned was, a corporation organized and existing under the Nonprofit Religious Corporation Law of California.

[*OR*]

1. Plaintiff, _____ [*name of director or officer*], is and at all times mentioned herein was, a

_____ [director *or* officer] of _____ [*name of corporation*], a corporation organized and existing under the Nonprofit Religious Corporation Law of California.

[*OR*]

1. Plaintiff, _____ [*name*], is, and at all times herein mentioned was a person authorized by the bylaws of _____ [*name of corporation*], a corporation organized and existing under the Nonprofit Religious Corporation Law of California, a person having a right to bring an action for any breach of fiduciary duty by any director of the corporation.

[*CONTINUE*]

2. At all times herein mentioned, _____ [*name*], defendant, was a director of _____ [*name of corporation*].

3. _____ [*Allege facts giving rise to director's liability*.]

4. In acting as described above, defendant failed to exercise that degree of care required of directors of religious corporations in that _____ [*specify degree of care required*].

5. As a proximate result of the acts of defendant hereinabove alleged, _____ [*name of corporation*] has been damaged in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the sum of $_____;

2. For interest on the sum of $_____ from and after _____ [*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 110.53[1], [4]*.]

[2] Use of Form

The form in [1], *above*, is a complaint for use in an action for damages for a director's breach of his or her fiduciary duty based on the director's failure to exercise the degree of care required by the Nonprofit Religious Corporation Law with regard to the performance of his or her duties [*Corp. Code §§ 9240, 9241*; *see also* discussion in *§ 110.15*]. For a complaint alleging a breach of a director's fiduciary duty when the director was involved in a self-dealing transaction, see *§ 110.58*.

[3] Allegations

Paragraph 1 of the form sets out the possible plaintiffs who have standing to commence an action for a director's breach of fiduciary duty. *Corp. Code § 9241* does not specify these plaintiffs [*cf. Corp. Code § 9243* (liability of director for self-dealing)]. Presumably, any person with an interest in the corporation, such as a director, officer, or member, would have standing to sue for such a breach. In addition, insofar as a breach of a director's fiduciary duty may be considered a breach of the trust under which the religious corporation's assets are held, *Corp. Code § 9142*, providing for an action to enjoin, correct, obtain damages for, or to otherwise remedy a breach of the trust, applies. Under that section, the corporation, an officer or director of the corporation, or a person with a reversionary, contractual, or property interest in the assets subject to the trust may bring an action to remedy the breach. A member or former member, who asserts the right in the name of the corporation, is also permitted to sue for breach of trust provided that, for the purpose of such an action, *Corp. Code § 5710* will apply.

Paragraphs 3 and 4 allege facts constituting a breach of fiduciary duty (Paragraph 3) and in what manner the director failed to exercise the requisite degree of care (Paragraph 4). In addition, it alleges the damages proximately resulting from the director's breach (Paragraph 5).

[4] Limitation of Actions

Code Civ. Proc. § 359 provides that an action against a director of a corporation to enforce a liability created by law must be brought within three years after the discovery by the aggrieved party of the facts on which the liability was created. A consistent line of decisions has interpreted this section to limit the phrase "liability created by law" to liabilities existing by virtue of an express statute and not arising under the common law [*People v. Clauson (1964) 231 Cal. App. 2d 374, 380, 41 Cal. Rptr. 691]* . This interpretive rule may apply to *Corp. Code § 9241*, which does not by its terms create any liability for a breach of the director's standard of care unlike, for example, *Corp. Code § 9243*, which does specify by its terms the liability of a director for a self-dealing transaction, or *Corp. Code § 9245*, which specifies the liability of a director for an illegal distribution or loan.

Therefore, in any case other than an action based on a liability expressly created by statute for which there is no more specific statute of limitations applicable, the period of limitation is probably determined by examining the nature of the underlying action, even though liability will not be imposed unless the action constitutes a breach of the standard of care set out in *Corp. Code § 9241* [*see, e.g., Southern Counties Thrift Co. v. Rairdon (1941) 47 Cal. App. 2d 770, 771-772, 118 P.2d 828* (holding that *Code Civ. Proc. § 359* did not apply to action against directors for authorizing illegal industrial loans where statute imposing illegality did not impose liability; instead liability for unauthorized act as resting on common law rule rendering agent liable who violates his or her authority to principal's damages)]. For further discussion of limitation of actions, see Ch. 345, *Limitation of Actions* .

[5] Indemnification of Volunteer Director or Officer

Volunteer directors and volunteer executive officers are insulated from personal liability to third parties for negligent acts or omissions committed after January 1, 1988, in the performance of their duties as a director or officer [*see Corp. Code § 9247*]. For discussion of director and officer indemnification, see *§ 110.17*.

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require that any answer also be verified, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification also will preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

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Chapter 110 CHURCHES AND RELIGIOUS ORGANIZATIONS
PART IV. FORMS

11-110 California Forms of Pleading and Practice--Annotated § 110.57

§ 110.57 Affirmative Defense to Action Based on Alleged Breach of Fiduciary Duty by Defendant Director--Reliance on Information Furnished

[1] FORM Affirmative Defense to Action Based on Alleged Breach of Fiduciary Duty by Defendant Director--Reliance on Information Furnished

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

[*EITHER*]

1. In performing the acts complained of by plaintiff, defendant reasonably relied on information and reports, _____ [*specify, e.g.,* including the annual fiscal report of the corporation, which was prepared and presented to defendant by _____ (*name*), financial analyst for the corporation].

[*OR*]

2. Defendant reasonably relied on the legal advice of _____ [*name*], official legal counselor for the corporation, whom defendant believed competent to render advice.

[*OR*]

3. Defendant considered the information provided by the religious authorities of the organization for which the corporation was formed, namely: _____ [*specify, e.g.,* _____ (*name*), the presiding Bishop of the church for which the corporation was formed].

[2] Use of Form

The form in [1], *above*, is for use in a director's answer to a complaint brought under *Corp. Code § 9241* based on an alleged breach of fiduciary duty by the director. For discussion of a director's duties and standard of conduct, see *§ 110.15*.

[3] Allegations

The form alleges reliance on information furnished by sources, such as those set out in *Corp. Code § 9241(b)*. Except as provided in *Corp. Code § 9243* regarding "self-dealing transactions," a director who performs his or her duty in accordance with the statutory standard of conduct, including the right of reliance on others, has no liability based on any alleged failure to discharge his or her obligations as a director.

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11-110 California Forms of Pleading and Practice--Annotated § 110.58

§ 110.58 Complaint for Actual and Punitive [Corp. Code § 9243(h)] Damages Based on Director's Self-Dealing Transaction [Corp. Code § 9243(c)]

[1] FORM Complaint for Actual and Punitive [Corp. Code § 9243(h)] Damages Based on Director's Self-Dealing Transaction [Corp. Code § 9243(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Liability of Director to Self-Dealing Transaction)
Defendant.	)	
	)	
	)	

Plaintiff alleges:

1. [*Allegation of plaintiff's capacity. See § 110.56, Paragraph 1.*]

2. [*Allegation of defendant's capacity. See § 110.56, Paragraph 2.*]

3. _____ [*Allege facts as to contract or transaction between religious corporation and another person, corporation, firm, or association in which defendant has a material financial interest*].

4. _____ [*Allege materiality of defendant's interest in transaction, e.g.,* At all times herein mentioned, defendant had a material financial interest in _____ (*name of person, corporation, firm, or association*), namely: _____(*specify, showing materiality of interest, e.g.,* defendant was a controlling

shareholder of _____ (*name of person, corporation, firm, or association*))].

5. [*If appropriate, allege facts showing that the corporation received little or no benefit.*]

6. [*If appropriate, allege facts showing that the director did not act in good faith nor with any intent to further the best interests of the corporation.*]

7. As a proximate result of the aforementioned transaction, _____ [*name of religious corporation*] has been damaged in that _____ [*either* defendant profited as a result of his/her interest in the transaction (in the sum of $_____) *or* it has lost the use of certain property, namely, _____(*specify corporate property used in transaction*) (the reasonable value of such use being $_____) *or* it has lost _____ (*specify property lost to corporation as a result of transaction*) (together with $_____, such sum being _____ (income *or* appreciation) the corporation would have earned if such property had not been lost *or specify any combination of these or any additional or other facts which would entitle corporation to fair and equitable remedy*)].

8. [The amount of money and other property due from defendant to _____ (*name of corporation*) is unknown to plaintiff and cannot be ascertained without an accounting of the _____ (profits *or* proceeds *or specify other property*) that defendant has gained by reason of the aforementioned transaction. Plaintiff has demanded an accounting of the transaction from defendant and payment of any sum found to be due and delivery of any property that defendant should in equity return to _____ (*name of corporation*), but defendant has failed and refused and continues to fail and refuse, to render such an accounting (*or allege facts showing that a demand would have been useless*).]

9. In doing the things hereinabove alleged, defendant acted _____ [maliciously *or* fraudulently] in that _____ [*specify*]. Therefore, defendant is entitled to exemplary damages.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an order requiring defendant to account for any profits he/she may have made by reason of the aforementioned transaction and to pay these profits to _____ (*name of religious corporation*);

2. For an order requiring defendant to pay _____ (*name of religious corporation*) the reasonable sum for use made of its property in such transaction;

3. For an order requiring defendant to return or replace the above-described property, together with any income or appreciation, lost to _____ (*name of religious corporation*) by reason of such transaction;

4. For an order requiring defendant to account for any proceeds of the sale of the above-described property lost to the corporation by reason of such transaction and to pay such proceeds to _____ (*name of religious corporation*), together with interest at the legal rate;

5. For interest on the sum of $_____ from or after _____ [*date*];

6. For exemplary damages; and

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 110.53[1], [4].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action for actual and punitive damages a corporation has sustained by reason of the defendant director's material financial interest in a transaction the religious corporation has had with another person, corporation, firm, or association. For a discussion of a director's self-dealing transactions, see *§ 110.16*.

[3] Allegations

The form in [1], *above*, alleges the capacity of plaintiff (Paragraph 1) [*Corp. Code § 9243(c)*] and defendant (Paragraph 2). Since the Nonprofit Religious Corporation Law itself does not include a provision for bringing a derivative action, the law provides that for the purposes of asserting derivative rights, *Corp. Code § 5710* (Nonprofit Public Benefit Corporation) applies [*Corp. Code § 9243(c)*]. For a form of complaint for use by a person suing in a derivative capacity under the General Corporation Law that may be adapted for use under the Nonprofit Corporation Law, see Ch. 168, *Corporations: Derivative Actions*

In addition, the complaint alleges facts showing that defendant director had a material financial interest in a transaction between the religious corporation of which he or she was a director and some other person, corporation, firm, or association (Paragraph 3, 4) [*Corp. Code § 9243(a)*]; and facts showing that the corporation received little or no benefit and defendant did not act in good faith with an intent to further the best interests of the corporation (Paragraphs 6, 7) [*see Corp. Code § 9243(h)*]. These latter allegations may be included in the complaint, although such facts may also be considered as possible affirmative defenses of the director or as part of the court's equitable power in determining what would be a fair and equitable remedy to the corporation [*see Corp. Code § 9243(h)*]. For a discussion of self-dealing transactions by directors, see *§ 110.16*.

The complaint also alleges facts showing the damages to the corporation thereby entitling it to a fair and equitable remedy (Paragraph 7, 8) [*Corp. Code § 9243(h)*]. Without limiting the generality of the court's power to provide the corporation with a fair and equitable remedy, or to take account of the director's good faith, *Corp. Code § 9243(h)* provides that the court may order the director to (1) account for any profits made from the self-dealing transaction and pay them to the corporation; (2) pay the corporation the value of the use of any of its property used in such transactions; and/or (3) return or replace any property lost to the corporation as a result of such transaction, together with any income or appreciation lost to the corporation by reason of the transaction, or account for any proceeds of sale of such property, and pay the proceeds to the corporation together with interest at the real rate. The complaint also alleges facts showing a fraudulent or malicious violation of *Corp. Code § 9243*, entitling the court in its discretion to grant exemplary damages (Paragraph 9) [*Corp. Code § 9243(h)*]. In any claim for exemplary damages, the pleading may not state any amount [*Civ. Code § 3295(e)*].

The prayer of the complaint requests interest on any award (Paragraph 5). The court may award prejudgment interest to the extent allowed in *Civ. Code §§ 3287* and *3288* [*see generally* Ch. 177, *Damages*].

For a discussion of punitive damages against religious organizations, see *§ 110.21*.

[4] Jurisdiction

The code provides for an action for damages based on a director's self-dealing to be brought in superior court of the proper county [*Corp. Code § 9243(c)*]. *Corp. Code § 5068* defines "proper county" for the purposes of *Corp. Code §§*

9110-9690 as the county in which the corporation's principal office in California is located or, if the corporation has no such office, Sacramento County.

[5] Limitation of Actions

An action to remedy an improper self-dealing transaction must be commenced either (1) within two years after written notice setting forth the material facts of the transaction has been filed with the Attorney General in accordance with such regulations, if any, as the Attorney General may adopt, or (2) if no such notice is filed, within 5 years after the cause of action has accrued [*Corp. Code § 9243(e)*]. For more discussion, see Ch. 345, *Limitation of Actions* .

[6] Cross References

Ballantine and Sterling, California Corporation Laws, Ch. 19, *Nonprofit Corporations and Organizations* (Matthew Bender)

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11-110 California Forms of Pleading and Practice--Annotated § 110.59

§ 110.59 Affirmative Defenses to Action for Damages Based on Defendant Director's Alleged Self-Dealing [Corp. Code § 9243]

[1] Approval by Board Prior to Consummation of Transaction

[a] FORM Affirmative Defenses to Action for Damages Based on Defendant Director's Alleged Self-Dealing [Corp. Code § 9243]--Approval by Board Prior to Consummation of Transaction

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. The corporation entered into the transaction complained of for its own benefit or for the benefit of _____ [*name of religious organization for which corporation was formed*].

2. The transaction complained of was fair and reasonable as to the corporation or was in furtherance of the religious purposes of the corporation at the time the corporation entered into the transaction.

3. Prior to consummating the transaction complained of, the board of directors of _____ [*name of religious corporation*] authorized the transaction in good faith by a vote of the majority of the directors then in office without counting the vote of the defendant director, and with knowledge of the material facts concerning the transaction and the defendant director's interest in the transaction.

4. Prior to authorizing the transaction complained of, the board considered, and in good faith determined after reasonable investigation under the circumstances, that the transaction was fair and reasonable as to the corporation or that it was in furtherance of the religious purposes of the corporation.

[b] Use of Form

The form in [a], *above*, is for use as an affirmative defense to an action brought under *Corp. Code § 9243* to recover for damages based on alleged self-dealing by an interested director. For further discussion of a director's affirmative

defense of prior approval, see *§ 110.16[3][a]*.

[2] Approval by Committee Authorized by Board to Approve Transaction and Subsequent Approval by Board

[a] FORM

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____(*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. The transaction complained of was approved by the _____ [*name of committee, e.g.,* Executive Investment Committee of the Board of Directors], in a manner consistent with the statutory requirements set out in Section 9243(d)(3)(A)-(D) of the California Nonprofit Religious Corporation Law;

2. It was not reasonably practicable to obtain approval of the board of directors of _____ [*name of religious corporation*] prior to entering into the transaction for the reason that _____ [*set out reason such approval would have been impracticable*]; and

3. At the first meeting of the board of directors of _____ [*name of religious corporation*], held subsequent to the consummation of the transaction complained of the board determined in good faith that the _____ [*name of committee, e.g.,* Executive Investment Committee] met the same requirements as the board would have had to meet in approving the transaction. Consequently, at such meeting the board of directors ratified the transaction by a vote of the majority of the directors then in office without counting the vote of the defendant.

[b] Use of Form

The form in [a], *above,* is for use as an affirmative defense to an action brought to recover for damages based on alleged self-dealing by an interested director. The affirmative defense illustrated is based on prior approval of the transaction by a committee of the board of directors rather than the board itself [*Corp. Code § 9243(d)(4)*]. For further discussion, see *§ 110.16[3][b]*.

[3] Cross References

Ballantine and Sterling, California Corporation Laws, Ch. 19, *Nonprofit Corporations and Organizations* (Matthew Bender)

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[Reserved]

§§ 110.60[Reserved]

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11-110 California Forms of Pleading and Practice--Annotated § 110.70

§ 110.70 Proceedings for Order Permitting Filing of Amended Complaint Seeking Punitive Damages Against Religious Corporation or Religious Corporation Sole

[1] Notice of Motion and Supporting Declaration

[a] FORM Proceedings for Order Permitting Filing of Amended Complaint Seeking Punitive Damages Against Religious Corporation or Religious Corporation Sole--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR
Plaintiff,	)	LEAVE TO FILE _____ [*e.g.*,
vs.	)	FIRST] AMENDED COMPLAINT, SUPPORTING
_____[*name*],	)	DECLARATION OF _____ [*name*],
Defendant.	)	AND MEMORANDUM OF POINTS AND AU-
	)	THORITIES
	)	Date: _____
	)	Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		[Trial Date: _____]

To defendant _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____[*city*], plaintiff will move, and hereby does, for an order allowing him/her to file a _____ [*specify number to differentiate any other amended complaints, e.g.,* first] amended complaint, a copy of which is attached hereto, to add an allegation and prayer for punitive damages. The motion will be made on the ground that in doing the things alleged in the complaint herein, defendant acted with _____ [malice *or* oppression *or* fraud *or any combination as applicable*] as _____ [that term is *or* those terms are] defined in *Civil Code Section 3294(c),* and that, if the amended complaint is allowed, there is a substantial probability that plaintiff will prevail on his/her claim for punitive damages.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*), *or other statement as appropriate*].

2. This is an action _____ [*specify the subject matter and issues of the action, specifically referring to pleadings or other documents on file, and summarizing or attaching portions of those pleadings or documents as exhibits, when appropriate*].

3. _____ [*Set forth evidentiary facts or sources substantiating that plaintiff will meet the clear and convincing standard of proof under Civ. Code § 3294, e.g.,* On _____ [*date*], plaintiff received answers to his/her first set of interrogatories to defendant _____ (*name*), and on _____ (*date*), plaintiff received responses to his/her first set of requests for admissions to defendant _____(*name*). Answers to interrogatories 20-25 of that first set (attached hereto as Exhibit _____ and made a part hereof), and responses to requests for admissions 10-25 of that second set (attached hereto as Exhibit _____ and made a part hereof) show that defendant _____ (*specify conduct admitted by the answers and responses that shows malice, oppression, or fraud as those terms are defined under Civ. Code § 3294*).]

4. In the copy of the _____ [*specify number, e.g.,* first] amended complaint attached hereto, a new allegation for punitive damages is added on page 7, lines 20-26. A new prayer for punitive damages is added on page 9,

lines 10-12.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

MEMORANDUM OF POINTS AND AUTHORITIES
[*Add memorandum of points and authorities supporting motion*]

Respectfully submitted, _____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[b] Use of Form

The notice of motion in [a], *above,* is for use by a plaintiff to move to amend the complaint to add a claim for punitive or exemplary damages against a religious corporation or religious corporation sole [*Code Civ. Proc. §§ 425.14, 473*]. The form may be modified for use by a cross complainant seeking to file an amended cross complaint [*see Code Civ. Proc. §§ 422.10, 425.14*].

No claim for punitive or exemplary damages against a religious corporation or religious corporation sole may be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive or exemplary damages to be filed. This limitation, however, is not intended to affect the plaintiff's right to discover evidence on the issue of punitive or exemplary damages [*Code Civ. Proc. § 425.14*]. For further discussion of punitive and exemplary damages, see *§ 110.21*.

[c] Supporting Declaration

The notice of motion in [a], *above,* must be supported by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 425.14*]. The example of supporting declaration in [a], *above,* is by the plaintiff's attorney, identifying parts of the record that support the claim for punitive damages. The motion may also be supported by additional or other declarations, given by the plaintiff and potential witnesses, if any, setting forth facts showing that the defendant's conduct was malicious, oppressive, or fraudulent within the meaning of *Civ. Code § 3294(c)* and, hence, that the plaintiff has established evidence that substantiates that he or she will meet the clear and convincing standard of proof on the claim for punitive or exemplary damages [*see Code Civ. Proc. § 425.14*].

[d] Accompanying Papers

A supporting memorandum must be filed and a copy served with this notice of motion [*see Code Civ. Proc. §§ 1005(b), 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

A motion to amend a pleading must [*Cal. Rules of Ct., Rule 3.1324(a)*]:

- Include a copy of the proposed amended pleading [*see § 110.71*] which must be serially numbered to differentiate it from previous pleadings or amendments,

- State what allegations in the previous pleading, if any, are proposed to be deleted, and where the deleted allegations are located, by page, paragraph and line number, and,

- State what allegations, if any, are proposed to be added to the previous pleading, and where the additional allegations are located by page, paragraph and line number.

A separate declaration specifying the effect of the amendment must accompany the motion [*see Cal. Rules of Ct., Rule 3.1324(b)*]. The court may deem a motion to file an amendment to a pleading to be a motion to file an amended pleading, and require the filing of the entire previous pleading with the approved amendments incorporated into it [*Cal. Rules of Ct., Rule 3.1324(c)*]. An amendment to a pleading must not be made by alterations on the face of a pleading except by permission of the court. All alterations must be initialed by the court or the clerk [*Cal. Rules of Ct., Rule 3.1324(d)*].

[e] Cross References

For discussion and forms relating to motions to file an amended pleading generally, see Ch. 21, *Amended and Supplemental Pleadings*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, § 177.40* et seq.

For discussion, procedures, and forms for use in making motions generally, see Ch. 372, *Motions and Orders*

[2] Order Permitting Filing of Amended Complaint Seeking Punitive Damages Against Religious Corporation or Religious Corporation Sole

[a] FORM Affirmative Defenses to Action for Damages Based on Defendant Director's Alleged Self-Dealing [Corp. Code § 9243]--Order Permitting Filing of Amended Complaint Seeking Punitive Damages Against Religious Corporation or Religious Corporation Sole

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER GRANTING LEAVE TO FILE
Defendant.	)	AMENDED COMPLAINT
	)	
	)	

The motion of plaintiff for an order to file a _____ [*specify number, e.g.,* first] amended complaint against defendant _____ [*name*] to add a claim for punitive or exemplary damages came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the plaintiff has established evidence that substantiates that plaintiff will meet the clear and convincing standard of proof under *Civil Code Section 3294*,

IT IS ORDERED that the motion be, and it hereby is, granted and that plaintiff _____ [*name*] be allowed to file an amended complaint that includes a claim for punitive or exemplary damages against defendant

_____ [*name*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[b] Use of Form

The order in [a], *above*, is for use when the court has granted plaintiff's motion for an order allowing plaintiff to file an amended pleading that adds a claim for punitive damages against a religious corporation or religious corporation sole. The court must make a finding, on the basis of the supporting and opposing affidavits (and declarations under *Code Civ. Proc. § 2015.5*) presented, that the plaintiff has established evidence that substantiates that he or she will meet the clear and convincing standard of proof under *Civ. Code § 3294(c)* [*Code Civ. Proc. § 425.14*]. For further discussion of punitive and exemplary damages, see *§ 110.21*.

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11-110 California Forms of Pleading and Practice--Annotated § 110.71

§ 110.71 Amended Complaint Including Allegations for Punitive Damages Against Religious Corporation or Religious Corporation Sole

[1] FORM Amended Complaint Including Allegations for Punitive Damages Against Religious Corporation or Religious Corporation Sole

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	[_____ (FIRST *or subsequent number*)] AMENDED COMPLAINT
_____ [*name*],	)	
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff _____ [*name*] alleges:

1. [*Here and in succeeding numbered paragraphs, set forth entire pleading. Include allegation for punitive or exemplary damages, e.g.:*]

9. As additional damages against defendant _____ [*name*], plaintiff alleges that defendant was guilty of _____ [malice *and/or* fraud *and/or* oppression] as defined in *Civil Code Section 3294(c)*, and plaintiff should recover, in addition to actual damages, damages to make an example of and to punish defendant. In doing the things hereinabove alleged, _____ [*specify facts showing that defendant was guilty of oppression, fraud, or malice within the meaning of Civ. Code § 3294*].

WHEREFORE, plaintiff prays judgment as follows:

1. [*Here and in succeeding numbered lines set forth prayer. Include prayer for punitive or exemplary damages, e.g.:*]

6. For exemplary and punitive damages.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired or if original pleading was verified. See § 110.53[1], [4].*]

[2] Use of Form

The amended complaint in [1], *above*, is for use when the court grants a motion allowing the filing of amended pleading that includes a claim for punitive or exemplary damages to be filed against a religious corporation or religious corporation sole [*Civ. Code § 3294* (punitive damages permitted); *Code Civ. Proc. §§ 425.14, 473(a)* (punitive and exemplary damage claims); for discussion of punitive damages, see *§ 110.21*; for the form for a notice of motion and order granting leave, see *§ 110.70[1], [2]*].

It is suggested that an amended complaint should be executed in the same manner as the original complaint and, hence, if the complaint was verified [*see Code Civ. Proc. § 446*], the amended complaint should also be verified.

[3] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the first paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[4] Cross References

For discussion, procedure, and forms for use in amending pleadings generally, see Ch. 21, *Amended and Supplemental Pleadings*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, § 177.40* et seq.

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For alternative forms for verification, see Ch. 572, *Verification*

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Chapter 111 [Reserved]

11-111 California Forms of Pleading and Practice--Annotated 111.syn

§ 111.syn Synopsis to Chapter 111: [Reserved]

§ 0 Scope

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Chapter 111 [Reserved]
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11-111 California Forms of Pleading and Practice--Annotated § 0

§ 0

NOTE:

Ch. 111, *Civil Action Mediation*, has been completely revised and replaced by the new Ch. 37, ***Judicially Mandated Civil Action Mediation***. The new chapter is in the alternative dispute resolution volume, which covers this and other forms of alternative dispute resolution.

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 112 CIVIL RIGHTS: GOVERNMENT-FUNDED PROGRAMS AND ACTIVITIES

11-112 California Forms of Pleading and Practice--Annotated 112.syn

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 112.syn Synopsis to Chapter 112: CIVIL RIGHTS: GOVERNMENT-FUNDED PROGRAMS AND ACTIVITIES

§ 112.01 Scope of Chapter

§ 112.02 Cross References

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[3] Federal Statutes

§ 112.11 Prohibition Against Discrimination in State-Funded Programs: Gov. Code §§ 11135-11139.5

[1] Prohibited Discrimination

[2] Administrative Remedy

[3] Private Actions

§ 112.12 Access to Public Buildings by Persons With Disabilities: Gov. Code §§ 4450-4460

[1] Intent of Law

[2] Building Standards

[3] Enforcement

§ 112.13 Procedural Matters Regarding Federal Legislation Prohibiting Discrimination in Government-Funded Programs and Activities

[1] Overview

[2] Original Federal Court Jurisdiction

[3] State Court Jurisdiction

[4] Removal

[5] Federal Court Abstention

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[b] Theories of Abstention

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[6] Applicability of State Law

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[8] Standing to Sue in Federal Court

[a] Case or Controversy Requirement

[b] Standing of Association

§ 112.14 Title VI of Civil Rights Act of 1964

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[2] Effectuating Authority

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[4] Actions Against a State

[5] Claim Based on Hostile Racial Educational Environment

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[iii] "Program or Activity"

[d] Private Right of Action; Elements of Prima Facie Case

[e] Overlap With Disabilities Education Act

[f] Eleventh Amendment Immunity

[2] Title II of Americans With Disabilities Act of 1990

[a] General Prohibition of Title II

[b] Elements of Prima Facie Case

[c] Definitions

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[ii] "Public Entity"

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[e] Intentional Discrimination Required for Action Involving Monetary Damages

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[f.1] Respondeat Superior Liability

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[h] Eleventh Amendment Immunity Issues

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§ 112.16 Title IX of Education Amendments of 1972

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[2] "Educational Institution" Defined

[3] Private Right of Action; Application of Title IX

[4] Exceptions

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[6] Notice and Opportunity to Cure Violation

§ 112.17 Age Discrimination Act of 1975

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[2] General Prohibition

[3] Application of Act

[4] Seeking Compliance With Act

[5] Administrative Complaint, Exhaustion of Administrative Remedies, and Action in Federal Court

[a] Requirement to Exhaust Administrative Remedies

[b] District Court Action to Enjoin Violation of Act

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[1] Statutory Prohibition; Legislative Intent

[2] Definitions

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§ 112.37 Decisions

[1] Prohibition Against Discrimination in State-Funded Programs: Gov. Code §§ 11135-11139.5

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[6] Discrimination Generally

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Prayer

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[b] When Award for Fees Is Appropriate

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§ 112.51 Complaint in Federal Court for Preliminary Injunction, Permanent Injunction, and Damages, for Violation of Title VI of Civil Rights Act of 1964 [42 U.S.C. § 2000d]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Prayer

[a] Injunctive Relief

[b] Damages

[c] Attorney's Fees

[d] Punitive Damages

[5] Jury Demand

[6] Cross References

§ 112.52 Complaint in Federal Court for Preliminary Injunction, Permanent Injunction, and Damages, for Violation of the Rehabilitation Act of 1973 [29 U.S.C. § 794]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Prayer

[a] Injunctive Relief

[b] Damages

[c] Attorney's Fees

[d] Punitive Damages

[5] Jury Demand

[6] Cross References

§ 112.53 Complaint in Federal Court for Preliminary Injunction and Permanent Injunction for Violation of Age Discrimination Act of 1975 [42 U.S.C. §§ 6102, 6104]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Prayer

[a] Injunctive Relief

[b] Damages

[c] Attorney's Fees

[5] Cross References

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Revision Author n*
John H. Scott
Editorial Consultant n*

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PART I. SCOPE

11-112 California Forms of Pleading and Practice--Annotated § 112.01

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 112.01 Scope of Chapter

This chapter discusses state and federal law prohibiting discrimination in government-funded programs and activities, and contains forms for use in actions involving allegations of such discrimination.

Specifically, this chapter discusses the following state provisions:

- *Gov. Code §§ 11135-11139.5*, which prohibit discrimination in state-funded programs and activities [*see § 112.11*];

- *Gov. Code §§ 4450-4460*, which govern access to public buildings by persons with disabilities [*see § 112.12*]; and

- *Gov Code § 53080*, which prohibits discrimination in community youth athletics programs [*see § 112.18*].

This chapter also covers the following federal legislation, prohibiting discrimination in government-funded programs and activities:

- Title VI of the Civil Rights Act of 1964 [*see § 112.14*];

- The Rehabilitation Act of 1973 [*see § 112.15[1]*];

- Title II of the Americans with Disabilities Act of 1990 [*see § 112.15[2]*];

- Title IX of the Education Amendments of 1972 [*see § 112.16*]; and

- The Age Discrimination Act of 1975 [*see § 112.17*].

This chapter contains the following forms:

- Complaint for Preliminary and Permanent Injunction for Violation of *Gov. Code § 11135* [*Gov. Code § 11139*] [*see § 112.50*];

- Complaint in Federal Court for Preliminary Injunction, Permanent Injunction, and Damages, for Violation of Title VI of the Civil Rights Act of 1964 [*42 U.S.C. § 2000d*] [*see § 112.51*];

- Complaint in Federal Court for Preliminary Injunction, Permanent Injunction, and Damages, for Violation of the Rehabilitation Act of 1973 [*29 U.S.C. § 794*] [*see § 112.52*]; and

- Complaint in Federal Court for Preliminary Injunction and Permanent Injunction, for Violation of the Age Discrimination Act of 1975 [*42 U.S.C. §§ 6102, 6104*] [*see § 112.53*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawFederally Assisted ProgramsEnforcementCivil Rights LawFederally Assisted ProgramsRemediesCivil Rights LawProtection of Disabled PersonsAmericans With Disabilities ActRemediesCivil Rights LawProtection of Disabled PersonsRehabilitation ActRemediesLabor & Employment LawDiscriminationAge DiscriminationRemediesEquitable Relief

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11-112 California Forms of Pleading and Practice--Annotated § 112.02

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 112.02 Cross References

- For a comprehensive procedural guide that chronologically outlines the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions* .

- For discussion and forms relating to the rights of members of associations not to be expelled on the basis of status, see Ch. 61, *Associations and Clubs* .

- For discussion and forms relating to the federal post-Civil War civil rights statutes (*e.g., 42 U.S.C. § 1983*, which prohibits any action under color of state law that subjects an individual to deprivation of any rights, privileges, or immunities secured by federal constitution and laws), see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

- For discussion and forms relating to the civil rights of prisoners, see Ch. 114, *Civil Rights: Prisoners' Rights* .

- For discussion and forms relating to employment discrimination, see Ch. 115, *Civil Rights: Employment Discrimination* .

- For discussion and forms relating to discrimination in business establishments, see Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

- For discussion and forms relating to housing discrimination, see Ch. 117, *Civil Rights: Housing Discrimination* .

- For discussion and forms relating to interference with civil rights by threats, intimidation, coercion, or violence, see Ch. 117A, *Civil Rights: Interference with Civil Rights by Threats, Intimidation, Coercion, or Violence* .

- For discussion and forms relating to removal of actions to federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

- For discussion and forms relating to restraining orders, preliminary injunctions, and permanent injunctions, see Ch. 303, *Injunctions* .

- For discussion and forms relating to rights of membership in hospital medical staffs and professional organizations, see Ch. 416, *Physicians: Membership on Hospital Staffs or in Professional Organizations* .

- For discussion and forms relating to civil rights actions arising from illegal searches and seizures, see *Ch. 429, Privacy, § 429.310* et seq.

- For discussion and forms relating to actions against public entities and officers based on state law, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

- For discussion and forms relating to administrative procedures, see Ch. 473, *Public Agency Adjudication* , et seq.

- For discussion and forms relating to the Individuals with Disabilities Education Act, see Ch. 513, *Schools: Student Rights and Responsibilities* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsDisability DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsRemediesCivil Rights LawPrisoner RightsGeneral OverviewHealthcare LawBusiness Administration & OrganizationEmployment DiscriminationTortsPublic Entity LiabilityLiabilityState Tort Claims ActsRemedies

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11-112 California Forms of Pleading and Practice--Annotated §§ 112.03-112.09

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

[Reserved]

§§ 112.03[Reserved]

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PART II. LEGAL BACKGROUND

11-112 California Forms of Pleading and Practice--Annotated § 112.10

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 112.10 Governing Law

[1] State Constitution

The state cannot discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting [*Cal. Const., art. I, § 31(a)*]. However, nothing in *Cal. Const., art. I, § 31*, may be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting [*Cal. Const., art. I, § 31(c)*]. In addition, nothing in *Cal. Const., art. I, § 31*, may be interpreted as invalidating any court order or consent decree in force as of its effective date [*Cal. Const., art. I, § 31(d)*]. Lastly, nothing in *Cal. Const., art. I, § 31*, may be interpreted as prohibiting action that must be taken to establish or maintain eligibility for any federal program, when ineligibility would result in a loss of federal funds to the state [*Cal. Const., art. I, § 31(e)*].

The remedies available for violations of *Cal. Const., art. I, § 31*, are the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law [*Cal. Const., art. I, § 31(g)*].

Cal. Const., art. I, § 31, is self-executing. If any part or parts of it are found to be in conflict with federal law or the federal constitution, it will be implemented to the maximum extent that federal law and the federal constitution permit. Any provision held invalid is severable from the remaining portions [*Cal. Const., art. I, § 31(h)*].

For these purposes, "state" includes, but is not necessarily limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state [*Cal. Const., art. I, § 31(f)*].

For these purposes, "racial discrimination" or "discrimination on the basis of race" have the same meaning as "racial

discrimination" as defined and used in paragraphs 1 and 4 of Article 1 of Part I of the International Convention on the Elimination of All Forms of Racial Discrimination as adopted by the United Nations General Assembly and ratified by the United States Senate [*Gov. Code § 8315(a)*]. The Convention defines "racial discrimination" as any distinction, exclusion, restriction, or preference based on race, color, descent, or national or ethnic origin that has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life [*Gov. Code § 8315(b)*]. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring protection as may be necessary to ensure these groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms is not racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they are not continued after the objectives for which they were taken have been achieved [*Gov. Code § 8315(b)*]. To allow the state to assist the federal government in fulfilling its international obligation to pursue a policy to eliminate all forms of racial discrimination in accordance with the Convention as set forth in *Gov. Code § 8315(d)*, the following provisions are used to interpret and implement *Cal. Const., art. I, § 31* [*Gov. Code § 8315(c)*]:

- *Cal. Const., art. I, § 31*, except as to its prohibition of granting preferential treatment, will not be interpreted as granting an individual a private cause of action to challenge any special measures undertaken for the purpose of securing adequate advancement of those racial groups requiring the protection pursuant to the Convention. Special measures cannot be interpreted as preferential treatment.

- *Cal. Const., art. I, § 31*, cannot be construed as requiring the government to prove racial discrimination before undertaking special measures for the purpose of securing adequate advancement of those racial minority groups needing that protection pursuant to the Convention.

[2] State Statutes

Statutes prohibiting discrimination in state-funded programs and activities are contained in *Gov. Code §§ 11135-11139.5* [*see § 112.11*]. Statutes that govern access to public buildings by persons with disabilities are contained in *Gov. Code §§ 4450-4460* [*see § 112.12*].

[3] Federal Statutes

Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin, in any federally funded program or activity, is found at *42 U.S.C. § 2000d et seq.* [*see § 112.14*].

The Rehabilitation Act of 1973, which prohibits discrimination against disabled persons in programs and activities funded by the federal government, is found at *29 U.S.C. § 701 et seq.* [*see § 112.15[1]*].

Title II of the Americans with Disabilities Act of 1990, which prohibits discrimination against disabled persons in the services, programs, and activities of state and local governments, is found at *42 U.S.C. § 12131 et seq.* [*see § 112.15[2]*].

Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in federally funded educational programs and activities, is found at *20 U.S.C. § 1681 et seq.* (*20 U.S.C. §§ 1687* and *1688* were added in 1988) [*see § 112.16*].

The Age Discrimination Act of 1975, which prohibits discrimination on the basis of age in federally funded programs and activities, is found at *42 U.S.C. § 6101 et seq.* [*see § 112.17*].

For discussion of procedural issues surrounding federal legislation, such as jurisidiction, removal and absention, and

standing, see *§ 112.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawFederally Assisted ProgramsEnforcementCivil Rights LawFederally Assisted ProgramsRemediesEducation LawDiscriminationGender & Sex DiscriminationTitle IXCoverageLabor & Employment LawDiscriminationDisability DiscriminationRehabilitation ActPublic Health & Welfare LawSocial ServicesDisabled & Elderly PersonsAdvocacy & ProtectionDiscriminationAmericans With Disabilities Act

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PART II. LEGAL BACKGROUND

11-112 California Forms of Pleading and Practice--Annotated § 112.11

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 112.11 Prohibition Against Discrimination in State-Funded Programs: Gov. Code §§ 11135-11139.5

[1] Prohibited Discrimination

Gov. Code §§ 11135-11139.5 set forth prohibitions against discrimination in state-funded programs. No person in California may, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, that is funded directly by the state, or that receives financial assistance from the state. Notwithstanding *Gov. Code § 11000*, this prohibition applies to the California State University [*Gov. Code § 11135(a)*]. With regard to discrimination on the basis of disability, programs and activities subject to *Gov. Code § 11135(a)* must meet the protections and prohibitions contained in the relevant provisions of the Americans with Disabilities Act of 1990 and its implementing federal rules and regulations [*Gov. Code § 11135(b)*; *see 42 U.S.C. § 12132*; for discussion of the application of the American with Disabilities Act to discrimination in state-funded programs and activities, *see § 112.15[2]*]. Nevertheless, if state laws prescribe stronger protections and prohibitions, state-funded programs and activities will be subject to the stronger protections and prohibitions [*Gov. Code § 11135(b)*].

As used in *Gov. Code § 11135*, the terms "race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability" include a perception that a person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics [*Gov. Code § 11135(f)*].

As used in *Gov. Code § 11135*, "disability" means any mental or physical disability as defined in *Gov. Code § 12926* [*Gov. Code § 11135(c)*]. "Sex" and "sexual orientation" have the same meanings as defined in *Gov. Code § 12926(p)* and *(q)* [*Gov. Code § 11135(e)*; for definitions of disability in *Gov. Code § 12926*, *see* Ch. 115, *Civil Rights: Employment Discrimination*].

To improve accessibility of existing technology and increase the successful employment of individuals with disabilities, particularly blind, visually impaired, deaf, and hard-of-hearing persons, state governmental entities, in developing,

procuring, maintaining, or using electronic or information technology, either indirectly or through the use of state funds by other entities, must comply with the accessibility requirements of the federal Rehabilitation Act [*29 U.S.C. § 794d*; for discussion of the Rehabilitation Act, see *§ 112.15[1]*] and regulations implementing it. Any entity thatcontracts with a state or local entity subject to *Gov. Code § 11135* for the provision of electronic or information technology or for the provision of related services must agree to respond to, and resolve any complaint regarding accessibility of its products or services brought to the attention of the entity [*Gov. Code § 11135(d)*].

With respect to access by persons with disabilities to state-funded programs and activities, the focus is on the program or activity in its entirety. Access to the buildings or facilities in which the program or activity is located is one factor to be considered. It is not necessary, however, that every building or facility related to a state-funded program or activity be accessible. Rather, the requirement is that the program or activity, viewed in its entirety, must be readily accessible to disabled persons [*Martin v. City of Los Angeles (1984) 162 Cal. App. 3d 559, 564-566, 209 Cal. Rptr. 301]* .

The prohibitions and sanctions imposed by *Gov. Code §§ 11135-11139.5* are in addition to any other prohibitions and sanctions imposed by law. They will not be interpreted in a manner that frustrates their purpose or adversely affects lawful programs that benefit the disabled, the aged, minorities, and women. They may be enforced by a civil action for equitable relief, which is independent of any other rights and remedies [*Gov. Code § 11139*].

Standards for determining which persons are protected by *Gov. Code §§ 11135-11139.5*, and what practices are discriminatory, are set forth in *22 Cal. Code Reg. § 98000 et seq.* [*see Gov. Code § 11139.5*].

[2] Administrative Remedy

Whenever a state agency administering a program or activity that receives state funding has reasonable cause to believe that a contractor, grantee, or local agency has violated the provisions of *Gov. Code § 11135*, or a regulation adopted to implement that provision, the head of the state agency must notify the contractor, grantee, or local agency of the violation and, after considering all relevant evidence, determine whether there is probable cause to believe that a violation has occurred. If it is determined there is probable cause to believe a violation has occurred, an administrative hearing must be held in accordance with the Administrative Procedure Act to determine whether a violation has in fact occurred [*Gov. Code § 11136*; *see Gov. Code § 11400 et seq.*; for discussion and forms pertaining to the Administrative Procedure Act, see Ch. 473, *Public Agency Adjudication*]. If it is determined that a violation has occurred, the administering state agency must take action to curtail state funding in whole or in part to the contractor, grantee, or local agency [*Gov. Code § 11137*].

[3] Private Actions

Before 1999, there was disagreement about whether a private action was available as a means of enforcing *Gov. Code § 11135*. In *Greater L.A.Council on Deafness v. Zolin (9th Cir. 1987) 812 F.2d 1103, 1113-1114* , the federal Ninth Circuit Court of Appeals read *Gov. Code § 11135* to support a private right of action. However, in *Arriaga v. Loma Linda Univ. (1992) 10 Cal. App. 4th 1556, 1561-1564, 13 Cal. Rptr. 2d 619* , the court held that there was no private right of action under *Gov. Code § 11135*.

In 1999, the California Legislature amended *Gov. Code § 11139* to provide that *Gov. Code § 11135* "may be enforced by a civil action for equitable relief."

PRACTICE TIP:

Available Remedies. Often these cases are not pursued because attorneys are not aware of the remedies available *and* because they do not have substantial economic damages. In many situations, injunctive relief and/or class action litigation may be more appropriate.

In addition, "government funded programs" are often conducted by both private and public "actors." These programs can involve "state actors" receiving federal funding as well as private actors receiving federal funding. These remedies frequently will be alternative or parallel remedies to other civil rights remedies, especially as they relate to racial discrimination, disability discrimination, and age discrimination. *By John H. Scott*

Gov. Code § 11139 does not have a venue provision of its own. For venue purposes, a case under *Gov. Code § 11139* will be viewed as a tort actions [*see, e.g., Wagner v. O'Bannon (1969) 274 Cal. App. 2d 121, 132, 79 Cal. Rptr. 44]* . The venue provision applicable in tort actions will likely be applied in an action under *Gov. Code § 11139*. Accordingly, such an action must be brought either in the county where the injury occurred or in the county in which the defendants or some of them reside at the commencement of the action [*Code Civ. Proc. § 395(a)*]. When the defendant is a corporation or association, it may be sued in the county in which its principal place of business is located or where the injury occurred [*Code Civ. Proc. § 395.5*]. An action or proceeding against a county, a city and county, a city, or a local agency may be tried in that county, or city and county, or in the county in which that city or local agency is situated [*see Code Civ. Proc. § 394*].

For a form of complaint to be used in an action for an injunction pursuant to *Gov. Code § 11135*, see *§ 112.50*. For a discussion of procedures and forms related to injunctions generally, see Ch. 303, *Injunctions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawAdministration & OperationStudent Financial AidState AssistanceEducation LawDiscriminationDisability DiscriminationAmericans With Disabilities ActCoverageLabor & Employment LawDiscriminationAge DiscriminationRemediesGeneral OverviewLabor & Employment LawDiscriminationGender & Sex DiscriminationCoverage & DefinitionsSexual OrientationPublic Health & Welfare LawSocial ServicesDisabled & Elderly PersonsAdvocacy & ProtectionDiscriminationAmericans With Disabilities Act

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Chapter 112 CIVIL RIGHTS: GOVERNMENT-FUNDED PROGRAMS AND ACTIVITIES
PART II. LEGAL BACKGROUND

11-112 California Forms of Pleading and Practice--Annotated § 112.12

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 112.12 Access to Public Buildings by Persons With Disabilities: Gov. Code §§ 4450-4460

[1] Intent of Law

Gov. Code §§ 4450-4460 govern access to public buildings by persons with disabilities, and are intended to ensure that all buildings, structures, sidewalks, curbs, and related facilities constructed in California by the use of public monies are accessible to and usable by persons with disabilities [*Gov. Code § 4450(a)*].

[2] Building Standards

The State Architect is required to develop and submit for approval proposed building standards, and develop other regulations for making buildings, structures, sidewalks, curbs, and related facilities accessible to and usable by persons with disabilities [*see Gov. Code § 4450(b)*; *see also Health & Safety Code § 18935 et seq.* (State Building Standards Code)]. In no case can the State Architect's regulations and building standards prescribe a lesser standard of accessibility or usability than that provided by the Accessibility Guidelines prepared by the federal Access Board as adopted by the United States Department of Justice to implement the federal Americans with Disabilities Act of 1990 (ADA) [*Gov. Code § 4450(c)*; *cf. Berkeley Center for Independent Living v. Coyle (1996) 42 Cal. App. 4th 874, 878-879, 50 Cal. Rptr. 2d 39* (Department of Housing and Community Development regulation, defining "publicly funded" to not include loans, grants, guarantees, or other assistance from a public agency to finance privately owned buildings, violated *Gov. Code § 4450* requirement that all buildings constructed using public funds be accessible to disabled persons)].

Except as otherwise provided by law, buildings, structures, sidewalks, curbs, and related facilities subject to the provisions of *Gov. Code § 4450 et seq.* or *Health & Safety Code § 19955 et seq.* (access to public accommodations) must conform to the standards of the California Building Standards Code and other regulations for making buildings, structures, sidewalks, curbs, and related facilities accessible to and usable by persons with disabilities that are in effect on the date of an application for a building permit. With regard to buildings, structures, sidewalks, curbs, and related facilities not requiring a building permit, building standards published in the California Building Standards Code relating to access for persons with disabilities and other regulations adopted in accordance with *Gov. Code § 4450* in

effect at the time construction is commenced are applicable [Gov. Code § 4451(c)]. Until building standards are published in the California Building Standards Code and other regulations are developed by the State Architect and adopted by the California Building Standards Commission under *Gov. Code § 4450*, buildings, structures, sidewalks, curbs, and related facilities subject to the provisions of *Gov. Code § 4450 et seq.* or *Health & Safety Code § 19955 et seq.* must meet or exceed the requirements of the ADA [*Gov. Code § 4451(d)*].

[3] Enforcement

The provisions of *Gov. Code § 4450 et seq.* are enforced by both of the following entities [*Gov. Code § 4453*]:

- The Director of the Department of General Services, if state funds are utilized for any project or if funds of other public entities are utilized for the construction of school projects; and

- The governing bodies of the public entity whose funds are utilized, except for the construction of school projects.

The administrative authorities charged with enforcement may grant exceptions from the literal requirements of the applicable building standards or regulations, or permit the use of other methods or materials, but only when it is clearly evident that equivalent facilitation and protection that meets or exceeds the requirements under federal law are thereby secured [*Gov. Code § 4451(f)*].

The district attorney, the city attorney, or the Attorney General may bring an action to enjoin a violation of *Gov. Code § 4450 et seq.* [*Gov. Code § 4458*].

Additionally, any person who is aggrieved or potentially aggrieved by a violation of *Gov. Code § 4450 et seq.* may seek injunctive relief [*Civ. Code § 55*; *see Health & Safety Code § 19953*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawFederally Assisted ProgramsEnforcementCivil Rights LawFederally Assisted ProgramsRemediesCivil Rights LawProtection of Disabled PersonsAmericans With Disabilities ActAccommodationPublic Health & Welfare LawHousing & Public BuildingsAccessibility, Construction & DesignPublic Health & Welfare LawSocial ServicesDisabled & Elderly PersonsAdvocacy & ProtectionDiscriminationAmericans With Disabilities Act

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11-112 California Forms of Pleading and Practice--Annotated § 112.13

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 112.13 Procedural Matters Regarding Federal Legislation Prohibiting Discrimination in Government-Funded Programs and Activities

[1] Overview

This chapter discusses the following federal legislation prohibiting discrimination in government-funded programs and activities:

- Title VI of the Civil Rights Act of 1964 [*42 U.S.C. § 2000d et seq.*], which prohibits discrimination on the basis of race, color, and national origin in federally funded programs and activities;

- The Rehabilitation Act of 1973 [*29 U.S.C. § 701 et seq.*], which prohibits discrimination against disabled persons in federally funded programs and activities;

- Title II of the Americans with Disabilities Act of 1990 [*42 U.S.C. § 12131 et seq.*], which prohibits discrimination against disabled persons in the services, programs, and activities of state and local governments;

- Title IX of the Education Amendments of 1972 [*20 U.S.C. § 1681 et seq.*], which prohibits discrimination on the basis of sex in federally funded education programs and activities; and

- The Age Discrimination Act of 1975 [*42 U.S.C. § 6101 et seq.*], which prohibits discrimination on the basis of age in federally funded programs and activities.

Aggrieved individuals may bring private actions to enforce each of these federal provisions. Procedurally, such actions have certain issues in common. The following subsections discuss the most important of these procedural issues.

[2] Original Federal Court Jurisdiction

The federal district courts have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States [*28 U.S.C. § 1331*]. Additionally, district courts have original jurisdiction of any civil action authorized by law to be commenced by any person to obtain any of the following remedies [*28 U.S.C. § 1343(a)*]:

- To recover damages for injury to his or her person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in *42 U.S.C. § 1985*;

- To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in *42 U.S.C. § 1985* that he or she had knowledge were about to occur and power to prevent;

- To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom, or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; or

- To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Jurisdiction under *28 U.S.C. § 1343(a)(4)* (the fourth bulleted item, *above*) is not limited to actions against state officials or individuals acting under color of state law [*Chapman v. Houston Welfare Rights Org. (1979) 441 U.S. 600, 603 n.1, 99 S. Ct. 1905, 60 L. Ed. 2d 508]* .

Under *28 U.S.C. §§ 1331* and *1343*, the United States District Courts have original jurisdiction over actions brought to enforce the federal legislation prohibiting discrimination in government-funded programs and activities discussed in this chapter.

For further discussion of federal question jurisdiction, and discussion of the jurisdiction of federal courts to hear pendent state claims when an action is brought in federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal* . For general discussion of jurisdiction of federal courts under *28 U.S.C. § 1343*, see Moore' s Federal Practice, Chapter 104, *Specific Grants of Federal Question Jurisdiction*, § 104.47 (3d ed. Matthew Bender).

[3] State Court Jurisdiction

Unless Congress confers exclusive jurisdiction on federal courts, state courts competent to exercise it have concurrent jurisdiction to enforce federal law in civil actions [*Brown v. Pitchess (1975) 13 Cal. 3d 518, 521, 119 Cal. Rptr. 204, 531 P.2d 772* (*42 U.S.C. § 1983* case); Spaulding v. Mingo County Bd. of Educ. (S.D. W. Va. 1995) *897 F. Supp. 284, 288 (Rehabilitation Act case)]* .

28 U.S.C. § 1343 confers "original jurisdiction" on the federal district courts. "Original jurisdiction" means the power to entertain cases in the first instance, as distinguished from appellate jurisdiction; it does not mean exclusive jurisdiction [*Brown v. Pitchess (1975) 13 Cal. 3d 518, 521, 119 Cal. Rptr. 204, 531 P.2d 772]* .

Whether the state court must accept jurisdiction of a federal claim, jurisdiction of which is not exclusively federal, has not been decided. But if the same type of claim arising under state law would be enforced in the state courts, the state courts are generally not free to refuse enforcement of the federal claim [*Martinez v. California (1980) 444 U.S. 277, 283 n.7, 100 S. Ct. 553, 62 L. Ed. 2d 481]* .

[4] Removal

Except as otherwise provided by an Act of Congress, any civil action brought in a state court, of which the federal district courts have original jurisdiction, may be removed by the defendant or defendants to the federal district court for the district and division embracing the place where the state court action is pending [*28 U.S.C. § 1441(a)*]. When the federal district court has original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States, the case is removable without regard to the citizenship or residence of the parties [*28 U.S.C. § 1441(b)*]. Therefore, it will generally be possible to remove an action brought in state court on the basis of one of the federal statutes prohibiting discrimination in government-funded programs and activities discussed in this chapter.

PRACTICE TIP:

"Remand" to State Court. Note too the possibility of a motion to "remand" a case to state court. If the plaintiff does not want to be in federal court, there may be the opportunity to dismiss the federal claim, thus depriving the federal court of jurisdiction. This can work successfully *if* you have alleged, or can allege, parallel or alternative state claims. There are also other procedural arguments that can sometimes defeat removal, for example, whether the motion was timely. *By John H. Scott*

For discussion and forms relating to removal generally, see Ch. 265, *Federal Courts: Jurisdiction and Removal* . For additional discussion, see Moore' s Federal Practice, Ch. 107, *Removal* (3d ed. Matthew Bender), and Moore' s Manual--Federal Practice And Procedure, Ch. 8, *Removal from State Courts* (Matthew Bender).

[5] Federal Court Abstention

[a] Abstention Involves Postponement of Federal Jurisdiction

The doctrine of abstention may apply to prevent a federal court from exercising jurisdiction over an action while a related action is pending in state court, even though exhaustion of state remedies is not strictly necessary. Abstention does not involve the abdication of federal jurisdiction, but only the postponement of its exercise [*England v. Louisiana Medical Examiners (1964) 375 U.S. 411, 416, 84 S. Ct. 461, 11 L. Ed. 2d 440]* .

[b] Theories of Abstention

[i] *Younger* Doctrine

Although there are several different theories of abstention, the most commonly encountered in civil rights cases derive from *Younger v. Harris (1971) 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669* [*see below*], and *Railroad Commission of Texas v. Pullman Co. (1941) 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971* [*see* [ii], *below*].

Younger v. Harris (1971) 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 precludes federal courts from interfering with state judicial proceedings when [*Martinez v. Newport Beach City (9th Cir. 1997) 125 F.3d 777, 781]* :

- There are ongoing state judicial proceedings that implicate important state interests; and
- There is an adequate opportunity in the state proceedings to raise federal questions.

The *Younger* doctrine has also been applied to state administrative proceedings in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his or her constitutional claim [*see Ohio Civil Rights Comm'n v. Dayton Schools (1986) 477 U.S. 619, 627, 106 S. Ct. 2718, 91 L. Ed. 2d 512* ; Cornwell v. California Bd. of Barbering and Cosmetology *(S.D. Cal. 1997) 962 F. Supp. 1260, 1269-1271* (African hairstyling business association barred under *Younger* from seeking injunctive and declaratory relief prohibiting enforcement of Barbering and Cosmetology Act, *Bus. & Prof. Code § 7301 et seq.*, since two members were involved in pending state administrative proceeding and requested relief would require injunction against state proceeding)].

The *Younger* abstention principle may also apply when there are ongoing state criminal proceedings implicating important state interests and in which there is an adequate opportunity to raise federal questions [*see Adam v. Hawaii (9th Cir. 2000) 235 F.3d 1160]* . However, a federal court need not abstain if the state judicial proceedings were brought in bad faith [*Younger v. Harris (1971) 401 U.S. 37, 53, 91 S. Ct. 746, 27 L. Ed. 2d 669* ; *Adam v. Hawaii (9th Cir. 2000) 235 F.3d 1160, 1163* ; *Lebbos v. Judges of the Superior Court, Santa Clara County (9th Cir. 1989) 883 F.2d 810, 814]* . Further, while a district court may stay an action for damages under the *Younger* abstention principle, *Younger* abstention does not support the outright dismissal of an action for damages [*Adam v. Hawaii (9th Cir. 2000) 235 F.3d 1160, 1163]* .

For further coverage of *Younger* abstention, see Moore' s Federal Practice, Chapter 122, *Abstention Doctrines*, § 122.05 (3d ed. Matthew Bender).

[ii] *Pullman* Abstention

There are three concurrent criteria for *Pullman* abstention [*Pearl Inv. Co. v. City & Cty. of San Francisco (9th Cir. 1985) 774 F.2d 1460, 1463 , cert. denied, 476 U.S. 1170 (1986)]* :

- The complaint touches a sensitive area of social policy into which federal courts ought not to enter unless no alternative to its adjudication is open;

- Constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy; and

- The possibly determinative issue of state law is doubtful.

Federal courts should abstain in cases presenting a federal constitutional issue if constitutional adjudication could be avoided or if the constitutional question could be narrowed by a ruling on an uncertain question of state law. Abstention may be proper to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication. The abstention doctrine does not contemplate, however, that federal courts defer to state adjudication when the state law issues are settled or when the outcome is reasonably uncertain. Abstention is proper only in exceptional cases in which principles of comity and federalism justify postponing the exercise of jurisdiction that Congress conferred on federal courts [*Pearl Inv. Co. v. City & Cty. of San Francisco (9th Cir. 1985) 774 F.2d 1460, 1462 , cert. denied, 476 U.S. 1170 (1986)]* .

There is no per se civil rights exception to the abstention doctrine. There has been some reluctance, however, to order abstention in cases involving certain civil rights claims, such as those involving voting rights or racial equality [*see C-Y Development Co. v. City of Redlands (9th Cir. 1983) 703 F.2d 375, 381* ; *see, e.g., Harman v. Forssenius (1965) 380 U.S. 528, 537, 85 S. Ct. 1177, 14 L. Ed. 2d 50* (discriminatory voting law); *Griffin v. County School Board (1964) 377 U.S. 218, 229, 84 S. Ct. 1226, 12 L. Ed. 2d 256* (school integration)]. Moreover, federal courts may be reluctant to abstain in civil rights cases in recognition of the fact that abstention can delay the redress of significant constitutional wrongs. Nevertheless, abstention may be proper in a civil rights case to avoid unnecessary interference with an important state program [*Pearl Inv. Co. v. City & Cty. of San Francisco (9th Cir. 1985) 774 F.2d 1460, 1463 , cert. denied, 476 U.S. 1170 (1986)]* .

In *Pullman* abstention, when a federal court abstains, in order to allow for state-court clarification of an issue of state law, later adjudication of the federal issues in the case in federal court is not precluded. The federal court retains jurisdiction, but stays proceedings pending a determination of the state issue in state court. The stay in the federal court may be lifted, however, for resolution of the federal issues if the state court has not resolved the entire case.

A litigant has an election to make when the federal court abstains: the party may choose to litigate all issues, including federal issues, in state court, and relinquish the right to return to federal court; or the party may choose to litigate state law issues in state court and reserve the right to return to federal court to litigate the federal issues [*England v. Louisiana State Bd. of Medical Examiners (1964) 375 U.S. 411, 419-422, 84 S. Ct. 461, 11 L. Ed. 2d 440]* .

For additional discussion of *Pullman* abstention, see Moore' s Federal Practice, § 122.02 (3d ed. Matthew Bender). For additional discussion of reservations of right to return to federal court in *Pullman* abstention situations, see Moore' s Federal Practice, § 122.07 (3d ed. Matthew Bender).

[6] Applicability of State Law

If a state court entertains a federally created cause of action, the federal right cannot be defeated by the forms of local practice [*Felder v. Casey (1988) 487 U.S. 131, 138, 108 S. Ct. 2302, 101 L. Ed. 2d 123]* . Under the Supremacy Clause of the federal Constitution (U.S. Const., art. VI, *cl. 2*), the relative importance to the state of its own law is not material if there is a conflict with a valid federal law. Any state law, however clearly within a state's acknowledged power, that interferes with or is contrary to federal law must yield [*see, e.g.,* *Felder v. Casey (1988) 487 U.S. 131, 138, 108 S. Ct. 2302, 101 L. Ed. 2d 123* (state notice-of-claim statute preempted in *42 U.S.C. § 1983* action brought in state court)].

An assessment of the applicability of a state law to federal civil rights litigation in state court must be made in light of the purpose and nature of the federal right. The same assessment also applies in federal court litigation, where, because the federal civil rights laws fail to provide certain rules of decision thought essential to the orderly adjudication of rights, courts are occasionally called on to borrow state law [*Felder v. Casey (1988) 487 U.S. 131, 139, 108 S. Ct. 2302, 101 L. Ed. 2d 123* ; *see* *Denari v. Superior Court (1989) 215 Cal. App. 3d 1488, 1497-1498, 264 Cal. Rptr. 261* (application of state constitutional right of privacy to discovery in state court action); *see also 42 U.S.C. § 1988(a)* ("borrowing" provision)].

[7] Venue in Federal Actions

Venue in an action brought under a federal civil rights act that contains its own venue provisions is governed by those provisions. If there is no specific applicable venue provision, the provisions of *28 U.S.C. § 1391* govern venue in an action brought in federal court.

A civil action in which jurisdiction is not founded solely on diversity of citizenship may be brought only in the following jurisdictions [*28 U.S.C. § 1391(b)*]:

- A judicial district in which any defendant resides, if all defendants reside in the same state;
- A judicial district in which a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated; or
- A judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

A corporate defendant is deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a state with more than one judicial district, and in which a corporate defendant is subject to personal jurisdiction at the time an action is commenced, the corporation is deemed to reside in any district in that state within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate state. If there is no such district, the corporation is deemed to reside in the district within which it has the most significant contacts [*28 U.S.C. § 1391(c)*].

A civil action in which a defendant is an officer or employee of the United States or a federal agency acting in his or her official capacity or under color of legal authority, or an agency of the United States, or the United States, may be brought in any judicial district in which [*28 U.S.C. § 1391(e)*]:

- A defendant in the action resides;
- A substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated; or
- The plaintiff resides if no real property is involved in the action.

Additional persons may be joined as parties to the action in accordance with the Federal Rules of Civil Procedure and with other venue requirements that would be applicable if the United States or one of its officers, employees, or agencies were not a party [*28 U.S.C. § 1391(e)*].

[8] Standing to Sue in Federal Court

[a] Case or Controversy Requirement

The general rule in federal court is that plaintiffs must satisfy the case or controversy requirement of U.S. *Const., art. III, § 2*, as well as judicially created limitations on the right to sue. Accordingly, to have standing, the plaintiffs must do all of the following [*Warth v. Seldin (1975) 422 U.S. 490, 499, 95 S. Ct. 2197, 45 L. Ed. 2d 343]* :

- Show that they have suffered threatened or actual injuries giving them personal stakes in the outcome sufficient to warrant their invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on their behalf;
- Assert more than generalized grievances; and
- Base their claims to relief on their own legal rights and interests rather than on the legal rights and interests of third parties.

Thus, individuals who could not show concretely that the regulation of others had the consequences of injuring them had no standing, even though the regulation had the purpose and effect of discriminating against minority groups to which they belonged [*Warth v. Seldin (1975) 422 U.S. 490, 502-507, 95 S. Ct. 2197, 45 L. Ed. 2d 343* (alleged violation of *42 U.S.C. §§ 1981-1983*)].

[b] Standing of Association

An association has standing to bring suit on behalf of its members when [*Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)* ; California *First Amendment Coalition v. Calderon (9th Cir. 1998) 150 F.3d 976, 980]* :

- Its members would otherwise have standing to sue in their own right;
- The interests it seeks to protect are germane to the organization's purpose; and
- Neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Thus, for example, a coalition of print and broadcast journalists had standing as an association to challenge the constitutionality of prison procedures restricting media access to inmate executions [California *First Amendment Coalition v. Calderon (9th Cir. 1998) 150 F.3d 976, 980-981]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil ProcedureVenueIndividual DefendantsCivil Rights LawFederally Assisted ProgramsRemediesConstitutional LawThe JudiciaryCase or ControversyConstitutional QuestionsAbstentionConstitutional LawThe JudiciaryCase or ControversyStandingGeneral Overview

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§ 112.14 Title VI of Civil Rights Act of 1964

[1] Prohibition Is Against Discrimination in Federally Funded Programs

Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin in federally funded programs and activities, is set forth in *42 U.S.C. § 2000d et seq.*

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance" [*42 U.S.C. § 2000d*; *see, e.g., Hills v. Gautreaux (1976) 425 U.S. 284, 301, 96 S. Ct. 1538, 47 L. Ed. 2d 792* (Title VI prohibitions applicable to federally assisted public housing programs); *Monteiro v. Tempe Union High School Dist. (9th Cir. 1998) 158 F.3d 1022, 1032-1035* (complaint alleging hostile racial educational environment sufficiently alleged cause of action under Title VI)].

Title VI does not reach direct benefit federal programs, such as social security. Rather, Title VI covers "only those situations where federal funding is given to a non-federal entity which, in turn, provides financial assistance to the ultimate beneficiary" [*Soberal-Perez v. Heckler (2d Cir. 1983) 717 F.2d 36, 38 , cert. denied, 466 U.S. 929 (1984)]* .

For further discussion of Title VI, see J. Cook & J. Sobieski, Civil Rights Actions, PP 17.02-17.14 (Matthew Bender) and Wilcox, *California Employment Law, Chapter 40, Overview of Equal Employment Opportunity Laws, § 40.29* (Matthew Bender).

[2] Effectuating Authority

Each federal department and agency empowered to extend federal financial assistance to any program or activity is authorized to effectuate the provisions of *42 U.S.C. § 2000d*. Compliance with § 2000d may be effected by the termination or refusal to grant or continue assistance to any recipient, or by any other means authorized by law [*42 U.S.C. § 2000d-1*]. However, no action may be taken until the department or agency concerned has advised the appropriate person of the failure to comply with § 2000d and has determined that compliance cannot be secured by

voluntary means [*42 U.S.C. § 2000d-1*]. The Department of Justice coordinates the enforcement of § 2000d by the various federal departments and agencies [*see* Exec. Order No. 12250, *45 Fed. Reg. 72995 (1980)]* .

[3] Private Right of Action; Claim for Damages

An individual discriminated against in violation of Title VI has a private right of action [*see Guardians Ass'n v. Civil Service Comm'n (1983) 463 U.S. 582, 593-595, 103 S. Ct. 3221, 77 L. Ed. 2d 866* ; *Cannon v. Universityof Chicago (1979) 441 U.S. 677, 704-709, 99 S. Ct. 1946, 60 L. Ed. 2d 560]* . In cases of intentional violations of Title VI, the full panoply of relief, including compensatory money damages, is available; in cases of unintentional violations, only declaratory and injunctive relief are available [*see Guardians Ass'n v. Civil Service Comm'n (1983) 463 U.S. 582, 593-603, 103 S. Ct. 3221, 77 L. Ed. 2d 866]* . However, there is no private right of action when the claim is solely based on disparate impact [*Alexander v. Sandoval (2001) 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517* (no private right of action in case alleging disparate impact of state regulations requiring that drivers' license examinations be conducted only in English)].

To state a claim for damages under Title VI, a plaintiff must allege both of the following [*Fobbs v. Holy Cross Health System Corp. (9th Cir. 1994) 29 F.3d 1439, 1447 , cert. denied, 513 U.S. 1127 (1995)]* :

- That the entity involved is engaging in racial discrimination (or other discrimination prohibited by Title VI); and

- That the entity involved is receiving federal financial assistance.

Although the plaintiff must prove intentional discrimination at trial to receive money damages, intent need not be pled in the complaint. Furthermore, the plaintiff need not plead that he or she was an intended beneficiary of the federally funded program in which the defendants are alleged to have participated [*Fobbs v. Holy Cross Health System Corp. (9th Cir. 1994) 29 F.3d 1439, 1447 , cert. denied, 513 U.S. 1127 (1995)]* .

Private actions brought under Title VI were subject to California's one-year statute of limitations for personal injury actions [*Taylor v. Regents of Univ. of Cal. (9th Cir. 1993) 993 F.2d 710, 712 , cert. denied, 510 U.S. 1076 (1994)* ; *see* former *Code Civ. Proc. § 340(3)*]. Effective January 1, 2003, *Code Civ. Proc. § 340* was amended and *Code Civ. Proc. § 335.1* was added to provide that personal injury actions are now governed by a two-year statute of limitations.

[4] Actions Against a State

A state is not immune under the *Eleventh Amendment* from suit in federal court for violation of Title VI [*42 U.S.C. § 2000d-7(a)(1)*; *Alexander v. Sandoval (2001) 532 U.S. 275, 280, 121 S. Ct. 1511, 149 L. Ed. 2d 517* ; *Cholla Ready Mix, Inc. v. Civish (9th Cir. 2004) 382 F.3d 969, 973* ; *Miranda B. v. Kitzhaber (9th Cir. 2003) 328 F.3d 1181, 1188-1189]* . All legal and equitable remedies are available in a suit against a state to the same extent as in a suit against any other public or private entity [*42 U.S.C. § 2000d-7(a)(2)*].

The *Eleventh Amendment* does preclude the adjudication of pendent state law claims against nonconsenting state defendants in federal courts [*see Raygor v. Regents of Univ. of Minn. (2002) 534 U.S. 533, 540-541, 122 S. Ct. 999, 152 L. Ed. 2d 27* ; *Pennhurst State Sch. & Hosp. v. Halderman (1984) 465 U.S. 89, 106, 104 S. Ct. 900, 79 L. Ed. 2d 67* ; *Cholla Ready Mix, Inc. v. Civish (9th Cir. 2004) 382 F.3d 969, 973* ; *Ashker v. California Dep't of Corr. (9th Cir. 1997) 112 F.3d 392, 394]* . There is an exception when a state official is sued in a personal capacity [*see, e.g., Ashker v. California Dep't of Corr. (9th Cir. 1997) 112 F.3d 392, 394-395]* .

[5] Claim Based on Hostile Racial Educational Environment

To state a claim of violation of Title VI based on a hostile racial educational environment, the plaintiff must allege all of the following [*Monteiro v. Tempe Union High School Dist. (9th Cir. 1998) 158 F.3d 1022, 1033* ; *see Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11448, 11449 (March 10, 1994)]* :

- There is a racially hostile environment;
- The school district had notice of the problem; and
- The district failed to respond adequately to redress the racially hostile environment.

For discussion and a form complaint alleging a hostile racial educational environment, see Ch. 513, *Schools: Student Rights and Responsibilities* .

[6] Actions Regarding Employment Practices

Actions regarding employment practices are not permitted under Title VI unless a primary objective of the federal financial assistance is to provide employment [*42 U.S.C. § 2000d-3*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawFederally Assisted ProgramsDiscriminatory IntentCivil Rights LawFederally Assisted ProgramsRemediesEducation LawDiscriminationRacial DiscriminationRacial HarassmentEducation LawDiscriminationRacial DiscriminationTitle VIProtected IndividualsLabor & Employment LawDiscriminationHarassmentRacial HarassmentHostile Work Environment

California Forms of Pleading and Practice--Annotated

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 112 CIVIL RIGHTS: GOVERNMENT-FUNDED PROGRAMS AND ACTIVITIES
PART II. LEGAL BACKGROUND

11-112 California Forms of Pleading and Practice--Annotated § 112.15

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§ 112.15 Federal Legislation Prohibiting Discrimination Against Disabled Persons in Government-Funded Programs and Activities

[1] Rehabilitation Act of 1973

[a] Purposes of Act

The Rehabilitation Act of 1973 is set forth in *29 U.S.C. § 701 et seq.* The purposes of the Rehabilitation Act include the following [*29 U.S.C. § 701(b)(1)*]:

- Empowerment of individuals with disabilities to maximize employment;
- Economic self-sufficiency;
- Independence; and
- Inclusion and integration into society.

The federal government is to take a leadership role [*29 U.S.C. § 701(b)(2)*].

[B] Discrimination Against Disabled Persons Is Prohibited

Under the Rehabilitation Act, no otherwise qualified individual with a disability may, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any executive agency or by the United States Postal Service [*29 U.S.C. § 794(a)* (frequently referred to as § 504 of the Rehabilitation Act)]. The individual must show that the exclusion, denial, or discrimination was *solely* because of the disability [*Weinreich v. L.A. County Metro. Transp. Auth. (9th Cir. 1997) 114 F.3d 976, 978-979 , cert. denied, 522 U.S. 971* (defendant had no obligation under Rehabilitation Act to reasonably accommodate plaintiff's financial inability to

provide updated recertification of his disability to qualify for reduced fare program, since exclusion from program was not based on disability, but on his financial circumstances and possibility that he did not have qualifying disability)]. Thus, a plaintiff bringing suit under the Rehabilitation Act must show all of the following [*Lovell v. Chandler (9th Cir. 2002) 303 F.3d 1039, 1052* ; *Duvall v. County of Kitsap (9th Cir. 2001) 260 F.3d 1124, 1135* ; *Weinreich v. L.A. County Metro. Transp. Auth. (9th Cir. 1997) 114 F.3d 976, 978 , cert. denied, 522 U.S. 971* ; *see also* [d], *below*]:

- Plaintiff is an individual with a disability;
- Plaintiff is otherwise qualified to receive the benefit;
- Plaintiff was denied the benefits of the program solely by reason of his or her disability; and
- The program receives federal financial assistance.

For further discussion of the Rehabilitation Act, see J. Cook & J. Sobieski, Civil Rights Actions, PP 17.24-17.37 (Matthew Bender).

[c] Definitions

[i] "Disability"

In contexts other than employment, the term "disability" has the same the meaning as "disability" in the Americans with Disabilities Act [*29 U.S.C. § 705(9)(B)*; *see 42 U.S.C. § 12102*].

[ii] "Individual With a Disability"

The term "individual with a disability," for purposes other than employment, means any person who has a disability as defined in the Americans with Disabilities Act [*29 U.S.C. § 705(20)(B)*; *see 42 U.S.C. § 12102*].

The definition of "individual with a disability" is further refined in the Rehabilitation Act with regard to illegal drug use, contagious diseases and infections, homosexuality, bisexuality, sexual behavior disorders, compulsive gambling, kleptomania, and pyromania. For purposes of certain parts of the Act, and under specified circumstances, these conditions are excluded from the definition [*29 U.S.C. § 705(20)(C)-(F)*].

[iii] "Program or Activity"

"Program or activity" includes all of the operations of any of the following entities, any part of which is extended federal financial assistance [*29 U.S.C. § 794(b)*]:

- A department, agency, special purpose district, or other instrumentality of a state or local government;
- A college, university, or other postsecondary institution, or a public system of higher education;
- A local educational agency system of vocational education, or other school system;
- An entire corporation, partnership, or other private organization, or an entire sole proprietorship, if assistance is extended to that corporation, partnership, private organization, or sole proprietorship as a whole, or if the corporation, partnership, private organization, or proprietorship is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation;

- The entire plant or other comparable geographically separate facility to which federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

- Any other entity which is established by two or more of such entities.

[d] Private Right of Action; Elements of Prima Facie Case

There is a private right of action under *29 U.S.C. § 794* [*see Greater L.A. Council on Deafness v. Zolin (9th Cir. 1987) 812 F.2d 1103, 1107]* . The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 [*42 U.S.C. § 2000d et seq.*] are available in an action brought under *29 U.S.C. § 794* [*29 U.S.C. § 794a(a)(2)*; *see 29 U.S.C. § 794a(b)* (attorney's fees available)]. For discussion of remedies available in Title VI cases, see *§ 112.14*.

To make out a prima facie case under the Rehabilitation Act, a plaintiff must show all of the following [*Zukle v. Regents of the University of California (9th Cir. 1999) 166 F.3d 1041, 1045]* :

- Plaintiff is disabled under the Act;

- Plaintiff is "otherwise qualified," with or without reasonable accommodation;

- Plaintiff was excluded or discriminated against solely because of his or her disability; and

- Defendant receives federal financial assistance.

With regard to the first element of a prima facie case, the Rehabilitation Act and the Americans With Disabilities Act both require that to be considered "disabled," a person must show that he or she is substantially limited in a major life activity. Thus, for example, a person who achieved considerable academic success, beyond the attainment of most people or of the average person, could not be found to be "substantially limited" in reading and learning, and thus was not entitled to claim the protections afforded to a "disabled" person under the Rehabilitation and Americans With Disabilities Acts [*Wong v. Regents of the Univ. of California (9th Cir. 2004) 379 F.3d 1097, 1105-1110]* .

With regard to the second element of the plaintiff's prima facie case, the plaintiff bears the initial burden of producing evidence that he or she is "otherwise qualified." This burden includes the burden of producing evidence of the existence of a reasonable accomodation that would enable him or her to meet the eligibility requirements of the program or activity. The burden then shifts to the defendant to produce evidence that the requested accommodation is not reasonable, in that it would require a fundamental or substantial modification of its program or standards. The defendant may also meet its burden by producing evidence that the requested accomodation, regardless of whether it is reasonable, would not enable the plaintiff to meet its eligibility requirements or standards. However, the plaintiff retains the ultimate burden of persuading the court that he or she is otherwise qualified [*Wong v. Regents of the Univ. of California (9th Cir. 1999) 192 F.3d 807, 816-817* ; *Zukle v. Regents of the Univ. of California (9th Cir. 1999) 166 F.3d 1041, 1047]* .

29 U.S.C. § 794 does not constitute a congressional waiver of the federal government's sovereign immunity, and thus a private right of action for monetary damages is not available against the federal government [*Lane v. Pena (1996) 518 U.S. 187, 191-200, 116 S. Ct. 2092, 135 L. Ed. 2d 486]* . States, however, are not immune from suit for a violation of *29 U.S.C. § 794*, and the full range of legal and equitable remedies provided for a breach of that section is available in an action against a state [*42 U.S.C. § 2000d-7(a)*]. States are subject to suit in federal court under section 504 of the Rehabilitation Act if they accept Rehabilitation Act Funds [*Vinson v. Thomas (9th Cir. 2002) 288 F.3d 1145, 1151* ; *Douglas v. California Department of Youth Authority (9th Cir. 2001) 271 F.3d 812, 820-821 , as amended, 271 F.3d 910]* .

The Rehabilitation Act applies to decisions by public agencies regarding zoning [*Bay Area Addiction Research and Treatment v. City of Antioch (9th Cir. 1999) 179 F.3d 725, 730]* .

[e] Overlap With Disabilities Education Act

In the area of education, the coverage of the Rehabilitation Act overlaps the coverage of the Individuals with Disabilities Education Act. A disabled student in preschool, elementary, or secondary educational programs comes within the ambit of both the Rehabilitation Act and the Individuals with Disabilities Education Act [*see 20 U.S.C. § 1401(9)* (Individuals with Disabilities Education Act applicable to preschool, elementary, or secondary education)]. In essence, the Individuals with Disabilities Education Act, when it applies, requires that states receiving federal funds for education of disabled children provide all disabled children with free appropriate public education [*20 U.S.C. § 1412(a)(1)(A)*]. Cases often combine actions under the Rehabilitation Act and the Individuals with Disabilities Education Act [*see, e.g., Alexopulos v. San Francisco Unified School Dist. (9th Cir. 1987) 817 F.2d 551]* . For discussion and forms relating to the Individuals with Disabilities Education Act, see Ch. 512, *Schools: Student Rights and Responsibilities* .

[f] Eleventh Amendment Immunity

Congress validly abrogated the states' *Eleventh Amendment* immunity under the Rehabilitation Act [*see Miranda B. v. Kitzhaber (9th Cir. 2003) 328 F.3d 1181, 1186-1187* ; *Clark v. California (9th Cir. 1997) 123 F.3d 1267, 1271]* . However, the Ninth Circuit generally does not reach this issue because it has found that states, by accepting federal funds, waived any *Eleventh Amendment* immunity they might have possessed [*Phiffer v. Columbia River Correctional Inst. (9th Cir. 2004) 384 F.3d 791, 792* ; *Pugliese v. Dillenberg (9th Cir. 2003) 346 F.3d 937, 937-938* ; *Miranda B. v. Kitzhaber (9th Cir. 2003) 328 F.3d 1181, 1186-1187* ; *Clark v. California (9th Cir. 1997) 123 F.3d 1267, 1271]* .

[2] Title II of Americans With Disabilities Act of 1990

[a] General Prohibition of Title II

Title II of the Americans with Disabilities Act of 1990 (ADA) is found at *42 U.S.C. § 12131 et seq. 42 U.S.C. § 12132* provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

The prohibition of discrimination against individuals with disabilities in Title II of the ADA extends to all actions of state and local governments [*see San Diego Unified Port Dist. v. Gallagher (1998) 62 Cal. App. 4th 501, 504-505, 73 Cal. Rptr. 2d 30* (activity analogous to zoning, such as municipality's allocation of sites for long-term free anchorages, subject to ADA); *see also Barden v. City of Sacramento (9th Cir. 2002) 292 F.3d 1073, 1074* (city's public sidewalks are service, program, or activity within meaning of ADA and therefore subject to program accessibility regulations); *Hason v. Medical Bd. of California (9th Cir. 2002) 279 F.3d 1167, 1171-1173* (medical licensing); *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch (9th Cir. 1999) 179 F.3d 725, 730-732* (zoning)].

For detailed coverage of Title II of the ADA, see J. Cook & J. Sobieski, Civil Rights Actions, Ch. 15, *Discrimination in Public Accommodations* (Matthew Bender).

[b] Elements of Prima Facie Case

To make out a prima facie case under Title II of the ADA, a plaintiff must show all of the following [*Lovell v. Chandler (9th Cir. 2002) 303 F.3d 1039, 1052* ; *Duvall v. County of Kitsap (9th Cir. 2001) 260 F.3d 1124, 1135* ; *Weinreich v. L.A. County Metro. Transp. Auth. (9th Cir. 1997) 114 F.3d 976, 978 , cert. denied, 522 U.S. 971* ; *see 42*

U.S.C. § 12132]:

- The plaintiff is a "qualified individual with a disability" [*see* [c][i], *below* (definition)];

- The plaintiff was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and

- The exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.

The individual must show that the discrimination was *solely* because of the disability [*Weinreich v. L.A. County Metro. Transp. Auth. (9th Cir. 1997) 114 F.3d 976, 978-979 , cert. denied, 522 U.S. 971* (defendant had no obligation under ADA to reasonably accommodate plaintiff's financial inability to provide updated recertification of his disability to qualify for reduced fare program, since exclusion from program was not based on fact or perception that plaintiff had disability, but on possibility that he did not have qualifying disability)].

Because the plaintiff bears the burden of establishing an ADA violation, he or she must establish the existence of specific reasonable accommodations the defendant failed to provide [*Memmer v. Marin County Courts (9th Cir. 1999) 169 F.3d 630, 633* ; *see Weinreich v. L.A. County Metro. Transp. Auth. (9th Cir. 1997) 114 F.3d 976, 978 , cert. denied, 522 U.S. 971]* . Failure to provide accommodation does not violate the ADA if plaintiff's disability does not disadvantage him or her [*Memmer v. Marin County Courts (9th Cir. 1999) 169 F.3d 630, 633-634* (failure to provide accommodation to visually impaired litigant during pretrial proceedings did not violate ADA when visual disability did not disadvantage litigant in any way)].

To be entitled to injunctive relief, a plaintiff must make a showing that he or she faces a real or immediate threat of substantial injury [*Midgett v. Tri-County Metropolitan Transp. Dist. (9th Cir. 2001) 254 F.3d 846* , 850]. When the action seeks injunctive relief against a government agency, the plaintiff must contend with the well-established rule that government is traditionally granted the widest latitude in dispatching its own internal affairs, which bars federal courts from interfering with nonfederal governmental operations in the absence of facts showing the immediate threat of substantial injury [*Midgett v. Tri-County Metropolitan Transp. Dist. (9th Cir. 2001) 254 F.3d 846, 850]* . However, a plaintiff need not prove an intentional violation of the ADA [*see* [e], *below*] to obtain an injunction mandating compliance with its provisions [*Midgett v. Tri-County Metropolitan Transp. Dist. (9th Cir. 2001) 254 F.3d 846, 851]* .

[c] Definitions

[i] "Qualified Individual With a Disability"

Title II of the ADA prohibits discrimination against a "qualified individual with a disability." The term "qualified individual with a disability" is defined in Title II of the ADA as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity" [*42 U.S.C. § 12131(2)*]. The term "disability" means [*42 U.S.C. § 12102(2)*]:

- A physical or mental impairment that substantially limits one or more of the major life activities;

- A record of such an impairment; or

- Being regarded as having such an impairment.

As an example of a case in which the court considered whether the plaintiff qualified as having a physical or mental

impairment that substantially limited one or more major life activities, a person who achieved considerable academic success, beyond the attainment of most people or of the average person, could not be found to be "substantially limited" in reading and learning [*Wong v. Regents of the Univ. of California (9th Cir. 2004) 379 F.3d 1097, 1105-1110]* .

Therefore, the term "qualified individual with a disability" has essentially the same definition under Title II of the ADA as under the Rehabilitation Act [*see* [1][c][ii], *above*].

[ii] "Public Entity"

The term "public entity" is defined in Title II as including all of the following [*42 U.S.C. § 12131(1)*]:

- Any state or local government;

- Any department, agency, special purpose district, or other instrumentality of a state or states or local government; and

- The National Railroad Passenger Corporation, and any commuter authority (as defined in *49 U.S.C. § 24102(3)*).

Thus, while § 504 of the Rehabilitation Act [*29 U.S.C. § 794(a)*, discussed in [1], *above*] prohibits discrimination against disabled persons in federally funded programs and activities, Title II of the ADA prohibits discrimination against disabled persons in the services, programs, and activities of state and local governments.

[d] "Meaningful Access" Requirement

42 U.S.C. § 12132 requires the state to provide "meaningful access" to state services, programs, and activities for the disabled [*Hunsaker v. Contra Costa County (9th Cir. 1998) 149 F.3d 1041, 1043* (general assistance applicants failed to show county's pen-and-paper screening test denied them meaningful access to public benefits under ADA though recovered and recovering alcohol and drug addicts were disproportionately identified as false positives by test, requiring them to participate in clinical interviews)].

[e] Intentional Discrimination Required for Action Involving Monetary Damages

If the ADA action is for monetary damages, the plaintiff must show intentional discrimination [*Lovell v. Chandler (9th Cir. 2002) 303 F.3d 1039, 1056* ; *Memmer v. Marin County Courts (9th Cir. 1999) 169 F.3d 630, 633* ; *see Ferguson v. City of Phoenix (9th Cir. 1998) 157 F.3d 668, 674-675 , cert. denied, 526 U.S. 1159 (1999)]* .

The test for intentional discrimination is deliberate indifference [*Lovell v. Chandler (9th Cir. 2002) 303 F.3d 1039, 1056* ; *Duvall v. County of Kitsap (9th Cir. 2001) 260 F.3d 1124, 1138-1139]* . Deliberate indifference requires both (1) knowledge that a harm to a federally protected right is substantially likely, and (2) a failure to act on that likelihood [*Lovell v. Chandler (9th Cir. 2002) 303 F.3d 1039, 1056* ; *Duvall v. County of Kitsap (9th Cir. 2001) 260 F.3d 1124, 1139* , citing *City of Canton v. Harris (1988) 489 U.S. 378, 389, 109 S. Ct. 1197, 103 L. Ed. 2d 412]* . When the plaintiff has alerted the public entity to the need for accommodation or the need for accommodation is obvious or required by statute or regulation, the public entity is on notice that an accommodation is required, and the plaintiff has satisfied the first element of the deliberate indifference test [*Duvall v. County of Kitsap (9th Cir. 2001) 260 F.3d 1124, 1139]* . On receiving a request for accommodation, a public entity must undertake a fact-specific investigation to determine what constitutes a reasonable accommodation. The public entity must gather sufficient information from the disabled individual and qualified experts to determine what accommodations are necessary [*Duvall v. County of Kitsap (9th Cir. 2001) 260 F.3d 1124, 1139* ; *Wong v. Regents of the Univ. of California (9th Cir. 1999) 192 F.3d 807]* . The public entity must give primary consideration to the requests of the disabled individual [*28 C.F.R. § 35.160(b)(2)*]. The

failure to act must be a result of conduct that is more than negligent; it involves an element of deliberateness [*Duvall v. County of Kitsap (9th Cir. 2001) 260 F.3d 1124, 1139-1140]* .

By its very terms, facial discrimination, such as in the form of a categorical exclusion of disabled persons from a public program, is "intentional." In the case of facial discrimination, the public entity is, at the very least, deliberately indifferent [*Lovell v. Chandler (9th Cir. 2002) 303 F.3d 1039, 1056]* .

[f] ADA and Rehabilitation Act Apply Same Substantive Standards

The ADA and the Rehabilitation Act [*see* [1], *above*] apply the same substantive standards except as otherwise provided [*see Zukle v. Regents of the Univ. of California (9th Cir. 1999) 166 F.3d 1041, 1045 n.11* (no significant difference in analysis of rights and obligations created by *ADA and Rehabilitation Act); Ferguson v. City of Phoenix (9th Cir. 1998) 157 F.3d 668, 673 , cert. denied, 526 U.S. 1159 (1999)* (by statute, remedies for violations of ADA and Rehabilitation Act are coextensive)]. Furthermore, Title II of the ADA, specifically, *42 U.S.C. § 12133*, provides that the remedies, procedures, and rights set forth in *29 U.S.C. § 794a* (provision of Rehabilitation Act) shall be the remedies, procedures, and rights applicable in cases under Title II. In cases involving discrimination against disabled persons in contexts other than employment, *29 U.S.C. § 794a*, in turn, incorporates the remedies, procedures, and rights provided for in Title VI of the Civil Rights Act of 1964. For discussion of Title VI of the Civil Rights Act of 1964, see *§ 112.14*.

[f.1] Respondeat Superior Liability

When a plaintiff sues directly under either Title II of the ADA or the Rehabilitation Act against a municipality, the public entity is liable for the vicarious acts of its employees [*Duvall v. County of Kitsap (9th Cir. 2001) 260 F.3d 1124, 1141* (municipality includes county)].

[g] Provisions Applicable to Public Transportation Systems

Part B of the ADA, *42 U.S.C. §§ 12141-12150*, set forth the provisions applicable to public transportation other than aircraft and specified rail operations. The provisions are quite comprehensive and apply to the major types of transportation systems, such as fixed-route systems, paratransit, demand-responsive systems, and light-rail and rapid-rail systems, as well as the facilities used in providing those services. The prohibited discrimination is broadly defined. Depending on the type of transportation system, the statutes require all of the following [*see 42 U.S.C. §§ 12142-12144* (rules for vehicles), 12145-12148 (rules for facilities)]:

- The vehicles used are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs;

- The level of services to disabled individuals is comparable to that provided to nondisabled individuals;

- The response time is comparable, to the extent practicable, to that provided to nondisabled individuals; and

- The transportation system, when viewed in its entirety, provides an equivalent level of service to or is readily accessible to and usable by individuals with disabilities.

Part A of the ADA specifically prohibits the Department of Justice from making rules that include any matter within the scope of the authority of the Secretary of Transportation under *42 U.S.C. § 12143* [*42 U.S.C. § 12134(a)*], which authorizes the Secretary of Transportation to promulgate regulations under Part B. The Secretary of Transportation has the sole authority to issue final regulations to carry out Part B [*42 U.S.C. § 12143(b)*], and the regulations must

establish, inter alia, minimum service criteria for determining the level of services to be required under Part B [*42 U.S.C. § 12143(c)*]. Thus, a Department of Justice regulation promulgated pursuant to the ADA that requires public entities to make reasonable modifications in policies, practices, or procedures when necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity [*28 C.F.R. § 35.130(b)(7)*], does not apply to public transportation systems governed by Part B of its own independent force [*Boose v. Tri-County Metropolitan Transportation District of Oregon (9th Cir. 2009) 587 F.3d 997, 1001-1002]* . Further, the regulation is not incorporated by reference in the Department of Transportation's regulations implementing the ADA and Rehabilitation Act even though the Department of Transportation regulations do not mention reasonable modifications, except to the extent that they require private entities to make them [*Boose v. Tri-County Metropolitan Transportation District of Oregon (9th Cir. 2009) 587 F.3d 997, 1002-1005* ; *see 49 C.F.R. § 37.5(f)*]. The Secretary of Transportation has the sole authority to determine the level of services paratransit systems must provide to be considered "comparable" under the ADA [*Boose v. Tri-County Metropolitan Transportation District of Oregon (9th Cir. 2009) 587 F.3d 997, 1005-1006* ; *see 42 U.S.C. § 12143(c)(3)*; *49 C.F.R. § 37.121(b)*]. Although the Secretary has apparently decided that paratransit systems should make reasonable modifications to be considered comparable, the Secretary has yet to issue the final rules that would impose such a requirement [*Boose v. Tri-County Metropolitan Transportation District of Oregon (9th Cir. 2009) 587 F.3d 997, 1006]* .

42 U.S.C. §§ 12161-12165 set forth the provisions applicable to public transportation by intercity and commuter rail. Those rail systems must have at least one passenger car per train that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs [*42 U.S.C. § 12162(a)*; *see 42 U.S.C. §§ 12164, 12165* (regulations)].

[h] Eleventh Amendment Immunity Issues

With regard to *Eleventh Amendment* immunity, the ADA provides: "A State shall not be immune under the *eleventh amendment to the Constitution of the United States* from an action in Federal or State court of competent jurisdiction for a violation" of the ADA [*42 U.S.C. § 12202*]. Furthermore, *42 U.S.C. § 12202* states that in a case against a state under the ADA, "remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State."

Title II of the ADA unquestionably is valid legislation under *§ 5 of the Fourteenth Amendment* as it applies to the class of cases implicating the accessibility of judicial services. Congress' chosen remedy for the pattern of exclusion and discrimination of disabled people from courthouses and judicial services, *i.e.*, Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts, and is a reasonable prophylactic measure, reasonably targeted to a legitimate end. Thus, an action against a state alleging past and ongoing violations of Title II by denial of access to and the services of the state court system by reason of disability was not barred by the *Eleventh Amendment* [*Tennessee v. Lane (2004) 541 U.S. 509, 124 S. Ct. 1978, 1984-1994, 158 L. Ed. 2d 820]* .

Because of the validity of Title II as valid legislation under *§ 5 of the Fourteenth Amendment*, state prisoners can maintain actions against the state for damages for violation of Title II to the extent the state's conduct violates their constitutional rights. Insofar as Title II created a private cause of action for damages against a state for conduct actually violating the *Fourteenth Amendment*, including, for example, violations of the *Eighth Amendment's* prohibition of cruel and unusual punishment, Title II validly abrogated state sovereign immunity [*United States v. Georgia (2006) 546 U.S. 151, 126 S. Ct. 877, 880-882, 163 L. Ed. 2d 650]* .

[i] Punitive Damages

Punitive damages may not be awarded in a private cause of action against a public agency or entity receiving federal

grants for failing to provide accommodations for disabled persons, brought under the Americans with Disabilities Act of 1990 (*42 U.S.C. § 12132*) and the Rehabilitation Act (*29 U.S.C. § 794(a)*) [*Barnes v. Gorman (2002) 536 U.S. 181, 122 S. Ct. 2097, 2103, 153 L. Ed. 2d 230]* .

[j] Prisons and Jails

Title II of the Americans With Disabilities Act applies to the accommodations, services, programs, and activities for prisoners and jail detainees [*Pierce v. County of Orange (9th Cir. 2008) 519 F.3d 985, 1008* (applying ADA to county jail); *see Pa. Dep't of Corr. v. Yeskey (1998) 524 U.S. 206, 209-10, 118 S. Ct. 1952, 141 L. Ed. 2d 215 (1998)* ; *Lee v. City of Los Angeles, 250 F.3d 668, 691 (9th Cir. 2001)*]. However, while regulations promulgated under Title II provide a framework for analyzing ADA claims generally, inmates' rights must be analyzed in light of effective prison administration [*Pierce v. County of Orange (9th Cir. 2008) 519 F.3d 985, 1010* ; *Gates v. Rowland (9th Cir. 1994) 39 F.3d 1439, 1446*]. To prevail on a claim that their statutory rights have been violated, inmates must show that the challenged prison policy or regulation is unreasonable [*Pierce v. County of Orange (9th Cir. 2008) 519 F.3d 985, 1010* ; *Gates v. Rowland (9th Cir. 1994) 39 F.3d 1439, 1447*]. In ADA cases, the plaintiff bears the burden of establishing the elements of the prima facie case, including the existence of a reasonable accommodation that would enable the plaintiff to participate in the program, service, or activity at issue [*Pierce v. County of Orange (9th Cir. 2008) 519 F.3d 985, 1011* ; *Zukle v. Regents of Univ. of California (9th Cir. 1999) 166 F.3d 1041, 1046*]. The public entity may rebut this by showing that the requested accommodation would require a fundamental alteration or would produce an undue burden [*see 28 C.F.R. § 35.150(a)(3)*]. Determining whether a modification or accommodation is reasonable always requires a fact-specific, context-specific inquiry [*Pierce v. County of Orange (9th Cir. 2008) 519 F.3d 985, 1011* ; *Zukle v. Regents of Univ. of California (9th Cir. 1999) 166 F.3d 1041, 1048*]. This analysis permits a court to consider, with deference to the expert views of facility administrators, a detention or correctional facility's legitimate interests, i.e., in maintaining security and order and operating an institution in a manageable fashion, when determining whether a given accommodation is reasonable [*Pierce v. County of Orange (9th Cir. 2008) 519 F.3d 985, 1011*].

[k] Transition Plans

The Code of Federal Regulations requires a public entity to develop a transition plan for achieving the ADA's accessibility requirements [*28 C.F.R. § 35.150(d)*]. In the event structural changes to facilities will be undertaken to achieve program accessibility, a public entity that employs 50 or more persons had to develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete those changes. The public entity had to provide an opportunity to interested persons, including individuals with disabilities or organizations representing individuals with disabilities, to participate in the development of the transition plan by submitting comments. A copy of the transition plan had to be made available for public inspection [*28 C.F.R. § 35.150(d)(1)*].

At a minimum, the plan must do all of the following [*28 C.F.R. § 35.150(d)(3)*]:

- Identify physical obstacles in the public entity's facilities limiting the accessibility of its programs or activities to individuals with disabilities.

- Describe in detail the methods the entity will use to make the facilities accessible.

- Specify the schedule for taking the steps necessary to achieve compliance with the transition plan requirement and, if the time period of the transition plan is longer than one year, identify steps the entity will take during each year of the transition period.

- Indicate the official responsible for implementation of the plan.

Section 35.150(d) was promulgated by the Attorney General pursuant to § 204 of the ADA [*42 U.S.C. § 12134*], in

order to implement § 202 of the ADA [*42 U.S.C. § 12132*; *see 28 C.F.R. § 35.101*].The regulations requiring transition plans are not enforceable through a private right of action under the Americans With Disabilities Act. The ADA says nothing about a public entity's obligation to draft a detailed plan and schedule for achieving such meaningful access, nor does it create a private right to such a plan [*Lonberg v. City of Riverside (9th Cir. 2009) 571 F.3d 846, 850-852*].

The regulations requiring transition plans are not enforceable through a private right of action under the Americans With Disabilities Act. The ADA says nothing about a public entity's obligation to draft a detailed plan and schedule for achieving such meaningful access, nor does it create a private right to such a plan [*Lonberg v. City of Riverside (9th Cir. 2009) 571 F.3d 846, 850-852*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawFederally Assisted ProgramsDiscriminatory IntentCivil Rights LawFederally Assisted ProgramsRemediesCivil Rights LawImplied Causes of ActionCivil Rights LawProtection of Disabled PersonsAmericans With Disabilities ActRemediesCivil Rights LawProtection of Disabled PersonsRehabilitation ActRemedies

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11-112 California Forms of Pleading and Practice--Annotated § 112.16

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 112.16 Title IX of Education Amendments of 1972

[1] Prohibition Is Against Discrimination in Education

Title IX of the Education Amendments of 1972 is set forth in *20 U.S.C. § 1681 et seq.* Under Title IX, with certain exceptions, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" [*20 U.S.C. § 1681(a)*; *see, e.g., Davis v. Monroe County Board of Education (1999) 526 U.S. 629, 646-647, 119 S. Ct. 1661, 143 L. Ed. 2d 839* (recipient of Title IX funds such as school district or board of education may be liable for damages under Title IX based on deliberate indifference to "student-on-student" sexual harassment); *Grove City College v. Bell (1984) 465 U.S. 555, 573-575, 104 S. Ct. 1211, 79 L. Ed. 2d 516* (student financial aid program of private college that receives no direct federal assistance, but enrolls students who receive federal educational grants, is subject to Title IX prohibition); *but see NCAA v. Smith (1999) 525 U.S. 459, 465-470, 119 S. Ct. 924, 142 L. Ed. 2d 929* (dues payments from recipients of federal funds to NCAA do not render NCAA subject to Title IX)].

Title IX applies to education programs conducted in state prisons, although legitimate penological interests may limit the application of Title IX in that context [*see Jeldness v. Pearce (9th Cir. 1994) 30 F.3d 1220, 1224-1230]* .

For further discussion of Title IX, see J. Cook & J. Sobieski, Civil Rights Actions, PP 17.15-17.23 (Matthew Bender).

[2] "Educational Institution" Defined

For purposes of Title IX, an educational institution means "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department" [*20 U.S.C. § 1681(c)*].

[3] Private Right of Action; Application of Title IX

An individual discriminated against in violation of Title IX has a private right of action [*Cannon v. University of Chicago (1979) 441 U.S. 677, 717, 99 S. Ct. 1946, 60 L. Ed. 2d 560]* . The private right of action implied by Title IX encompasses claims of retaliation when the funding recipient retaliates against an individual because the individual has complained about sex discrimination [*Jackson v. Birmingham Bd. of Ed. (2005) 544 U.S. 167, 125 S. Ct. 1497, 1504-1510, 161 L. Ed. 2d 361]* .

A damages remedy is available, at least in cases involving intentional discrimination [*Franklin v. Gwinnett County Pub. Schools (1992) 503 U.S. 60, 76, 112 S. Ct. 1028, 117 L. Ed. 2d 208* (equitable remedies of back pay and prospective relief inadequate for female student subjected to continual sexual harassment and abuse by male teacher); *see Davis v. Monroe County Board of Education (1999) 526 U.S. 629, 646-647, 119 S. Ct. 1661, 143 L. Ed. 2d 839* (recipient of Title IX funds, such as school district, may be liable to student for damages under Title IX for its own deliberate indifference to "student-on-student" sexual harassment)].

Sexual harassment of a student by a teacher is actionable under Title IX, if an official of the defendant school district who at a minimum had authority to institute corrective measures on the district's behalf had actual notice of, and was deliberately indifferent to, the teacher's misconduct [*Gebser v. Lago Vista Independent School Dist. (1998) 524 U.S. 274, 277, 118 S. Ct. 1989, 141 L. Ed. 2d 277]* . Similarly, "student-on-student" sexual harassment is actionable if school officials were deliberately indifferent to the harassment, and the school's response to the harassment, or failure to respond, was clearly unreasonable in light of known circumstances [*Davis v. Monroe County Board of Education (1999) 526 U.S. 629, 646-647, 119 S. Ct. 1661, 143 L. Ed. 2d 839.]* . For further discussion and a form complaint for damages under Title IX for sexual harassment by a teacher or a fellow student, see Ch. 513, *Schools: Student Rights and Responsibilities* .

The Ninth Circuit Court of Appeals has held that Title IX reaches facially neutral policies that have a disparate impact [*De La Cruz v. Tormey (9th Cir. 1978) 582 F.2d 45, 50-61 , cert. denied, 441 U.S. 965 (1979)* ; *see Roberts v. Colorado State Bd. of Agriculture (10th Cir. 1993) 998 F.2d 824, 832-833 , cert. denied, 510 U.S. 1004* (proof of discriminatory intent not required to prove violation of Title IX); *but see Cannon v. University of Chicago (7th Cir. 1981) 648 F.2d 1104, 1109 , cert. denied, 454 U.S. 1128* (intentional discriminatory act required for violation of Title IX)].

Title IX also addresses discrimination based on blindness or severely impaired vision. "No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission to any course of study by a recipient of Federal financial assistance for any education program or activity" [*20 U.S.C. § 1684*]. But nothing in Title IX may be construed to require any recipient of Federal financial assistance for educational programs or activities to provide any special services to a person because of his or her blindness or visual impairment [*20 U.S.C. § 1684*].

[4] Exceptions

20 U.S.C. § 1681 sets forth a variety of specific exceptions to its application. Among the exceptions are the following [*see 20 U.S.C. § 1681(a)(3)-(9)*]:

- An educational institution controlled by a religious organization, if application would not be consistent with the religious tenets of that organization;

- An educational institution whose primary purpose is the training of individuals for United States military service or the merchant marine;

- Any public institution of undergraduate higher education that is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

- Social fraternities and sororities;

- The Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, and Camp Fire Girls;

- Programs or activities of the American Legion, and of secondary schools or educational institutions, related to Girls State, Girls Nation, Boys State, or Boys Nation, conferences;

- Father-son or mother-daughter activities at educational institutions; and

- Scholarship awards given at beauty pageants.

The exception for undergraduate educational institutions that traditionally and continually from their establishment have had a policy of admitting only students of one sex was undermined by *Mississippi University for Women v. Hogan (1982) 458 U.S. 718, 731, 102 S. Ct. 3331, 73 L. Ed. 2d 1090* , in which the United States Supreme Court held that a state university's limitation of enrollment to women violated the *equal protection clause of the Fourteenth Amendment*.

In addition, Title IX does not bar gender-conscious remedial actions designed to provide equal opportunities to men and women [*Neal v. Board of Trustees of California State Universities (9th Cir. 1999) 198 F.3d 763, 770* (Title IX did not prevent university in which males occupied disproportionately high percentage of athletic roster spots from making gender-conscious decision to reduce proportion of spots assigned to men)].

[5] Action Against a State

A state is not immune under the *Eleventh Amendment* from suit in federal court for violation of Title IX [*42 U.S.C. § 2000d-7(a)(1)*]. In a suit against a state for violation of Title IX, remedies (including remedies both at law and in equity) are available to the same extent those remedies are available for such a violation in the suit against any public or private entity other than a state [*42 U.S.C. § 2000d-7(a)(2)*].

[6] Notice and Opportunity to Cure Violation

To sue for money damages for violation of effective accommodation under Title IX, a plaintiff need not give the defendant prelitigation notice of and an opportunity to rectify the specific alleged violation [*Mansourian v. Regents of the Univ. of Cal. (9th Cir. 2010) 594 F.3d 1095, 1100-1106]* . No notice requirement is applicable to Title IX claims that rest on an affirmative institutional decision [*Mansourian v. Regents of the Univ. of Cal. (9th Cir. 2010) 594 F.3d 1095, 1105* ; *see Jackson v. Birmingham Board of Education (2005) 544 U.S. 167, 182, 125 S. Ct. 1497, 161 L. Ed. 2d 361* (high school athletics coach fired in retaliation for complaining about discrimination in athletics funding had private right of action under Title IX and no pre-litigation notice was required in retaliation context)]. Universities' decisions with respect to athletics are easily attributable to the funding recipient and always--by definition--intentional [*Mansourian v. Regents of the Univ. of Cal. (9th Cir. 2010) 594 F.3d 1095, 1105* ; *see Jackson v. Birmingham Board of Education (2005) 544 U.S. 167, 183, 125 S. Ct. 1497, 161 L. Ed. 2d 361]* . Athletic programs that fail effectively to accommodate students of both sexes thus represent official policy of the recipient entity and are not covered by a notice requirement [*Mansourian v. Regents of the Univ. of Cal. (9th Cir. 2010) 594 F.3d 1095, 1105]* .

Notice and an opportunity to cure a violation may be an essential precursor to some sexual harassment suits for damages under Title IX [*Mansourian v. Regents of the Univ. of Cal. (9th Cir. 2010) 594 F.3d 1095, 1103* ; *see Gebser v. Lago Vista Ind. Sch. Dist. (1998) 524 U.S. 274, 290, 118 S. Ct. 1989, 141 L. Ed. 2d 277* (in cases that do not involve official policy of recipient entity, damages remedy will not lie under Title IX unless official who has authority to address alleged discrimination and to institute corrective measures has actual knowledge of discrimination and fails adequately to respond)]. Proof of actual notice is required only when the alleged Title IX violation consists of an institution's deliberate indifference to acts that do not involve official policy of the recipient entity [*Gebser v. Lago*

Vista Ind. Sch. Dist. (1998) 524 U.S. 274, 290, 118 S. Ct. 1989, 141 L. Ed. 2d 277] . In sexual harassment cases, the deliberate failure to curtail known harassment, rather than the harassment itself, constitutes the intentional Title IX violation [*Mansourian v. Regents of the Univ. of Cal. (9th Cir. 2010) 594 F.3d 1095, 1104* ; *see Davis v. Monroe County Bd. of Educ. (1999) 526 U.S. 629, 641, 119 S. Ct. 1661, 143 L. Ed. 2d 839* (plaintiff could hold county board of education liable for its own decision to remain idle in face of known student-on-student harassment in its schools)]. When the official policy is one of deliberate indifference to a known overall risk of sexual harassment, notice of a particular harassment situation and an opportunity to cure it are not predicates for liability [*Mansourian v. Regents of the Univ. of Cal. (9th Cir. 2010) 594 F.3d 1095, 1104* ; *see Simpson v. Univ. of Colo. Boulder (10th Cir. 2007) 500 F.3d 1170]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawFederally Assisted ProgramsRemediesEducation LawDiscriminationGender & Sex DiscriminationTitle IXCoverageEducation LawDiscriminationGender & Sex DiscriminationTitle IXEnforcementEducation LawDiscriminationGender & Sex DiscriminationTitle IXProtected IndividualsEducation LawDiscriminationGender & Sex DiscriminationTitle IXRemedies

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11-112 California Forms of Pleading and Practice--Annotated § 112.17

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§ 112.17 Age Discrimination Act of 1975

[1] Purpose of Act

The Age Discrimination Act of 1975 is set forth in *42 U.S.C. § 6101 et seq.* The purpose of the Act is to prohibit discrimination on the basis of age in programs or activities receiving federal financial assistance [*42 U.S.C. § 6101*].

[2] General Prohibition

Except as otherwise provided, "no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance" [*42 U.S.C. § 6102*].

[3] Application of Act

The term "program or activity" is defined very broadly as "all the operations of" the entity receiving federal funds [*42 U.S.C. § 6107(4)*]. However, the Act limits the ultimate beneficiaries of federal funds to which the Act applies [*see 42 U.S.C. § 6107*]. The Act applies to any of the following, any part of which is extended federal financial assistance [*42 U.S.C. § 6107*]:

- A department, agency, special purpose district, or other instrumentality of a state or local government;

- The entity of such state or local government that distributes such assistance and each such department or agency (and each other state or local government entity) to which the assistance is extended, in the case of assistance to a state or local government;

- A college, university, or other postsecondary institution, or a public system of higher education;

- A local educational agency, system of vocational education, or other school system;

- An entire corporation, partnership, or other private organization, or an entire sole proprietorship, if assistance is extended to such entity as a whole, or if the entity is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation;

- The entire plant or other comparable, geographically separate facility to which federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

- Any other entity that is established by two or more of such entities.

There is no violation of the Act if the program reasonably takes age into account as a factor necessary to its normal operation, or if the program is established under authority of a law that provides benefits or assistance to persons based on their age or establishes criteria for participation in age-related terms [*see 42 U.S.C. § 6103(b)*; *see also 28 C.F.R. § 42.711*].

There are also exceptions to the Act applicable to employment practices and some apprenticeship training programs [*see 42 U.S.C. § 6103(c)*]. For example, nothing in the Act modifies the Age Discrimination in Employment Act of 1967 (*29 U.S.C. § 621 et seq.*, the ADEA) [*42 U.S.C. § 6103(c)(2)*]. For discussion of the ADEA, see Ch. 115, *Civil Rights : Employment Discrimination*, and Wilcox, California Employment Law, Chs. 40, 41, 43 (Matthew Bender).

[4] Seeking Compliance With Act

The head of any federal department or agency in receipt of federal funds may seek to achieve compliance with the Act [*42 U.S.C. § 6104(a)*]. The department or agency head may seek compliance [*42 U.S.C. § 6104(a)*]:

- By terminating or refusing to grant or continue, assistance under the program or activity involved, to any recipient with regard to whom there has been an express finding on the record, after reasonable notice and opportunity for hearing, of a failure to comply; or

- By any any other means authorized by law.

The department or agency head's action must be limited in effect to the particular program or activity found to be in violation [*42 U.S.C. § 6104(b)*]. No action may be taken by the department or agency head until he or she has advised the appropriate person of the failure to comply and has determined that compliance cannot be obtained by voluntary means [*42 U.S.C. § 6104(c)*].

[5] Administrative Complaint, Exhaustion of Administrative Remedies, and Action in Federal Court

[a] Requirement to Exhaust Administrative Remedies

Any interested person alleging a violation of the Act may file an administrative complaint. The complainant is required to exhaust administrative remedies before filing an action in court. The administrative remedies "shall be deemed exhausted upon the expiration of 180 days from the filing of an administrative complaint during which time the Federal department or agency makes no finding with regard to the complaint, or upon the day that the Federal department or agency issues a finding in favor of the recipient of financial assistance, whichever occurs first" [*42 U.S.C. § 6104(f)*; *28 C.F.R. § 42.736*].

[b] District Court Action to Enjoin Violation of Act

Following the exhaustion of administrative remedies, the interested person may bring an action in federal district court to enjoin a violation of the Act [*42 U.S.C. § 6104(e)*].

The interested person must give notice by registered mail, not less than 30 days before commencement of the district court action, to the Secretary of Health and Human Services, the Attorney General of the United States, and the person against whom the action is directed [*42 U.S.C. § 6104(e)(1)*; *see 45 C.F.R. § 90.50(b)(3)(iii)* (indicating that 30-day notice is to be given to "the Secretary, the Attorney General of the United States, the head of the granting agency, and the recipient")].

The 30-day notice must state all of the following [*42 U.S.C. § 6104(e)(2)*]:

- The nature of the alleged violation;
- The relief requested;
- The court in which the action will be brought; and
- Whether or not attorney's fees are being demanded in the event the plaintiff prevails.

No action for injunctive relief may be brought if the same alleged violation by the same defendant is already the subject of a pending action in any court of the United States, or if administrative remedies have not been exhausted [*42 U.S.C. § 6104(e)(2)*].

A prevailing plaintiff may recover attorney's fees [*42 U.S.C. § 6104(e)(1)*].

A state is not immune from suit for violation of the Age Discrimination Act of 1975 under the *Eleventh Amendment* [*42 U.S.C. § 2000d-7(a)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawFederally Assisted ProgramsEnforcementCivil Rights LawFederally Assisted ProgramsFederal AssistanceCivil Rights LawFederally Assisted ProgramsRemediesCivil Rights LawFederally Assisted ProgramsScopeGovernmentsState & Territorial GovernmentsEmployees & Officials

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11-112 California Forms of Pleading and Practice--Annotated § 112.18

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 112.18 Prohibition of Discrimination in Community Youth Athletics Programs

[1] Statutory Prohibition; Legislative Intent

No city, county, city and county, or special district, including, but not limited to, a community services district, recreation and park district, regional park district, regional park and open-space district, regional open-space park district, or resort improvement district may discriminate against any person on the basis of sex or gender in the operation, conduct, or administration of community youth athletics programs or in the allocation of parks and recreation facilities and resources that support or enable these programs [*Gov. Code § 53080(a)*]. It is the Legislature's intent that girls be accorded opportunities for participation in community youth athletics programs on an equal basis, both in quality and scope, to those accorded to boys [*Gov. Code § 53080(e)*].

[2] Definitions

For purposes of the statutory prohibition, "community youth athletics program" means any athletic program in which youth solely or predominantly participate, which is organized for the purposes of training for and engaging in athletic activity and competition, and which is in any way operated, conducted, administered, supported, or enabled by a city, county, city and county, or special district [*Gov. Code § 53080(c)*].

For purposes of the statutory prohibition, "parks and recreation facilities and resources" include, but are not limited to, the park facilities including, but not limited to, the following [*Gov. Code § 53080(d)*]:

- Athletic fields and athletic courts.
- Gymnasiums and recreational rooms.
- Restrooms, concession stands, and storage spaces.
- Lands and areas accessed through permitting, leasing, or other land use arrangements, or otherwise

accessed through cities, counties, cities and counties, or special districts.

- Sports and recreation equipment.
- Devices used to promote athletics such as scoreboards, banners, and advertising.
- All moneys used in conjunction with youth athletics.

[3] Establishing Discrimination and Enforcement

In civil actions brought under *Gov. Code § 53080* or under other applicable antidiscrimination laws alleging discrimination in community youth athletics programs, courts must consider the following factors, among others, in determining whether discrimination exists [*Gov. Code § 53080(f)*]:

- Whether the selection of community youth athletics programs offered effectively accommodate the athletic interests and abilities of members of both genders.
- The provision of moneys, equipment, and supplies.
- Scheduling of games and practice times.
- Opportunity to receive coaching.
- Assignment and compensation of coaches.
- Access to lands and areas accessed through permitting, leasing, or other land use arrangements, or otherwise accessed through a city, a county, a city and county, or a special district.
- Selection of the season for a sport.
- Location of the games and practices.
- Locker rooms.
- Practice and competitive facilities.
- Publicity.
- Officiation by umpires, referees, or judges who have met training and certification standards.

In making the determination as to whether the selection of community youth athletics programs offered effectively accommodate the athletic interests and abilities of members of both genders, a court must assess whether the city, county, city and county, or special district has effectively accommodated the athletic interests and abilities of both genders in any one of the following ways [*Gov. Code § 53080(g)*]:

- The community youth athletics program opportunities for boys and girls are provided in numbers substantially proportionate to their respective numbers in the community.
- When the members of one gender have been, and continue to be, underrepresented in community youth athletics programs, the city, county, city and county, or special district can show a history and

continuing practice of program expansion and allocation of resources that are demonstrably responsive to the developing interests and abilities of the members of that gender.

- When the members of one gender are underrepresented in community youth athletics programs, the city, county, city and county, or special district can demonstrate that the interests and abilities of the members of that gender have been fully and effectively accommodated by the present program and allocation of resources [*see also Gov. Code § 53080(h)* (effective January 1, 2015, city, county, city and county, and special district may no longer rely on *Gov. Code § 53080(g)(2)* to show they have accommodated athletic interests and abilities of both genders)].

Nothing in *Gov. Code § 53080* may be construed to invalidate any existing consent decree or any other settlement agreement entered into by a city, county, city and county, or special district to address gender equity in athletic programs [*Gov. Code § 53080(i)*]. *Gov. Code § 53080* and any ordinances, regulations, or resolutions adopted pursuant to this section by a city, county, city and county, or special district may be enforced against a city, county, city and county, or special district by a civil action for injunctive relief or damages, or both, which is independent of any other rights and remedies [*Gov. Code § 53080(j)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPublic FacilitiesGeneral OverviewCivil Rights LawPublic FacilitiesDefenses & ExceptionsCivil Rights LawPublic FacilitiesEnforcementCivil Rights LawPublic FacilitiesRemediesCivil Rights LawPublic FacilitiesScope

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[Reserved]

§§ 112.19[Reserved]

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11-112 California Forms of Pleading and Practice--Annotated § 112.30

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§ 112.30 Related Matthew Bender Publications

For thorough discussion of federal civil rights legislation and actions, see J. Cook & J. Sobieski, Civil Rights Actions (Matthew Bender)

For thorough discussion of employment discrimination, see Wilcox, California Employment Law (Matthew Bender)

For points and authorities related to civil rights actions generally, see California Points and Authorities, Ch. 35, *Civil Rights* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawCivil Rights ActsGeneral Overview

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11-112 California Forms of Pleading and Practice--Annotated § 112.31

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§ 112.31 Federal Constitution

Due process clause, applicable to federal government. *U.S. Const., amend. V*

Privileges and immunities, due process, and *equal protection clauses*, applicable to states. *U.S. Const., amend. XIV*

Sovereign immunity of states. *U.S. Const., amend. XI*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewConstitutional LawEqual ProtectionScope of ProtectionConstitutional LawPrivileges & Immunities

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11-112 California Forms of Pleading and Practice--Annotated § 112.32

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 112.32 State Constitution

Inalienable rights include enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety, happiness, and privacy. *Cal. Const., art. I, § 1*

Right to equal protection of laws, and protection against denial of life, liberty, or property without due process of law. *Cal. Const., art. I, § 7(a)*

Privileges and immunities of citizens. *Cal. Const., art. I, § 7(b)*

Right not to be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin. *Cal. Const., art. I, § 8*

State must not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, or public contracting. *Cal. Const., art. I, § 31*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawSubstantive Due ProcessEconomic InterestsConstitutional LawEqual ProtectionGender & SexConstitutional LawEqual ProtectionRaceConstitutional LawEqual ProtectionScope of ProtectionConstitutional LawPrivileges & Immunities

California Forms of Pleading and Practice--Annotated

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 112 CIVIL RIGHTS: GOVERNMENT-FUNDED PROGRAMS AND ACTIVITIES
PART III. RESEARCH GUIDE

11-112 California Forms of Pleading and Practice--Annotated § 112.33

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§ 112.33 Federal Statutes

[1] Race, Color, and National Origin

Discrimination on basis of race, color, or national origin prohibited in federally assisted programs (Title VI of Civil Rights Act of 1964). *42 U.S.C. § 2000d et seq.*

Discrimination prohibited in programs and activities receiving community development funds. *42 U.S.C. § 5309*

[2] Disabled Persons

Individuals with Disabilities Education Act. *20 U.S.C. § 1400 et seq.*

Discrimination against disabled persons prohibited in programs and activities funded by federal government, or conducted by federal executive agency or United States Postal Service (Rehabilitation Act of 1973). *29 U.S.C. § 701 et seq.*

Section 504 of Rehabilitation Act of 1973. *29 U.S.C. § 794*

Architectural Barriers Act of 1968. *42 U.S.C. § 4151 et seq.*

Discrimination against disabled persons prohibited in services, programs, and activities of state and local governments (Title II of Americans with Disabilities Act of 1990). *42 U.S.C. § 12131 et seq.*

Discrimination against disabled persons by air carriers. *49 U.S.C. § 41705*

[3] Education

Discrimination on basis of sex prohibited in federally funded educational programs (Title IX of Education Amendments of 1972). *20 U.S.C. § 1681 et seq.*

Desegregation of public schools (Title IV of Civil Rights Act of 1964). *42 U.S.C. § 2000c et seq.*

[4] Age

Discrimination on basis of age prohibited in federally assisted programs and activities (Age Discrimination Act of 1975). *42 U.S.C. § 6101 et seq.*

[5] Procedure

Jurisdiction of United States District Courts in civil rights cases. *28 U.S.C. §§ 1331, 1343, 1344*

General venue provisions. *28 U.S.C. § 1391*

Removal of civil rights actions. *28 U.S.C. § 1443*

Eleventh Amendment immunity not available in action based on discrimination in federally funded program. *42 U.S.C. § 2000d-7*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisFederal QuestionsCivil Rights LawProtection of Disabled PersonsAmericans With Disabilities ActGeneral OverviewCivil Rights LawProtection of Disabled PersonsRehabilitation ActGeneral OverviewEducation LawDiscriminationGender & Sex DiscriminationTitle IXGeneral OverviewEducation LawDiscriminationIndividuals With Disabilities Education ActGeneral Overview

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11-112 California Forms of Pleading and Practice--Annotated § 112.34

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§ 112.34 State Statutes

[1] State-Funded Programs and Activities

Discrimination prohibited in deputizing voting registrars. *Elec. Code § 2110*

Marriage license applicants not required to state race or color. *Fam. Code § 354(d)*

Provision of bilingual services in state agencies. *Gov. Code § 7290 et seq.*

State funds may not be used for payments or contributions to private organizations with discriminatory membership policies. *Gov. Code § 11015*

All open and public meetings of state body must meet protections and prohibitions in § 202 of Americans with Disabilities Act of 1990 (ADA) [*42 U.S.C. § 12132*] and federal rules and regulations adopted in implementing ADA. *Gov. Code § 11123.1*

State and local agencies prohibited from conducting any function in any facility that has discriminatory admittance policies. *Gov. Code §§ 11131, 54961*

No person in California may, on basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, be unlawfully denied benefits of, or unlawfully subjected to discrimination under, any program or activity that is funded directly by the state or that receives financial assistance from the state. *Gov. Code § 11135 et seq.*

All governmental agencies must engage in general recruitment and outreach programs to all individuals, including persons who are economically disadvantaged. *Gov. Code § 11139.6*

State boards and commissions to include women and ethnic minorities. *Gov. Code §§ 11140, 11141*

Discrimination in community youth athletics programs prohibited. *Gov. Code § 53080*

Discrimination at public beaches or public access to beaches prohibited. *Gov. Code §§ 54091, 54092*

Discrimination prohibited in planning and zoning actions of cities and counties. *Gov. Code § 65008*

Discrimination prohibited in community redevelopment projects. *Health & Safety Code § 33050*

Discrimination prohibited in state militia. *Mil. & Vet. Code § 130*

Discrimination prohibited in rates and services of public utilities. *Pub. Util. Code § 453*

Discrimination prohibited in welfare programs. *Welf. & Inst. Code § 10000*

Discrimination prohibited in food stamp eligibility. *Welf. & Inst. Code § 18907*

[2] Health Care

Discrimination prohibited in provision of emergency medical care. *Health & Safety Code § 1317(b)*

[3] Disabled Persons

Entitlement of hearing impaired persons to listening systems or computer-aided transcription systems in court proceedings. *Civ. Code § 54.8*

Access to public buildings by persons with disabilities. *Gov. Code §§ 4450-4460*

Statement of rights of mentally ill persons. *Welf. & Inst. Code § 5325.1*

Access to polling places and voting assistance for disabled persons. *Elec. Code §§ 12280, 14282*

Right of disabled persons to have specially trained dogs on common carriers or in places accomodating public. *Penal Code § 365.5*

Requirement that on and after January 1, 2005, whenever transit operator improves or replaces ticket vending machine at public transit station to include video instructions, transit operator must equip ticket vending machine with audio instructions enabling visually impaired persons to follow visual prompts. *Pub. Util. Code § 99163*

[4] Education

Discrimination prohibited in schools. *Educ. Code § 200 et seq.*

Teachers, textbooks, and instructional materials not to reflect adversely on specified characteristics. *Educ. Code §§ 51500, 51501, 60044*

Discrimination prohibited in community colleges. *Educ. Code § 72010 et seq.*

Legislative intent to provide equal opportunities in athletic programs of state universities. *Educ. Code § 89240*

[5] Attorney's Fees

Attorney's fees available to successful party in action resulting in public benefit. *Code Civ. Proc. § 1021.5*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawDiscriminationDisability DiscriminationAmericans With Disabilities ActGeneral OverviewEducation LawInstructionInstructional MaterialsGeneral OverviewFamily LawMarriageCertificates & LicensesRequirementsPublic Health & Welfare LawSocial ServicesDisabled & Elderly PersonsAdvocacy & ProtectionDiscriminationAmericans With Disabilities ActReal Property LawZoning & Land UseState & Regional Planning

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§ 112.35 Federal Administrative Regulations

Discrimination prohibited in federally assisted programs of Department of Housing and Urban Development under Title VI. *24 C.F.R. § 1.1 et seq.*

Accessibility standards for publicly owned residential structures. *24 C.F.R. §§ 40.1-40.7*

Discrimination on basis of disability prohibited in services of state and local governments. *28 C.F.R. § 35.101 et seq.*

Discrimination on basis of handicap prohibited in federally assisted programs or activities. *28 C.F.R. § 41.1 et seq.*

Discrimination on basis of race, color, or national origin prohibited in programs or activities receiving federal financial assistance from Department of Justice. *28 C.F.R. § 42.101 et seq.*

Discrimination on basis of age prohibited in federally assisted programs or activities. *28 C.F.R. § 42.700 et seq.*

State vocational rehabilitation services program. *34 C.F.R. § 361.1 et seq.*

Vocational rehabilitation services projects. *34 C.F.R. § 369.1 et seq.*

Vocational rehabilitation training. *34 C.F.R. § 385.1 et seq.*

Discrimination on basis of race, color, or national origin prohibited in programs or activities receiving federal financial assistance from Department of Health and Human Services. *45 C.F.R. § 80.1 et seq.*

Discrimination on basis of sex prohibited in education programs or activities receiving federal financial assistance. *45 C.F.R. § 86.1 et seq.*

Discrimination on basis of age prohibited in programs or activities receiving federal financial assistance. *45 C.F.R. § 90.1 et seq.*

Discrimination on basis of handicap prohibited in programs receiving federal financial assistance. *45 C.F.R. § 1232.1 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawFederally Assisted ProgramsEnforcementCivil Rights LawFederally Assisted ProgramsRemediesCivil Rights LawProtection of Disabled PersonsAmericans With Disabilities ActGeneral OverviewCivil Rights LawProtection of Disabled PersonsRehabilitation ActGeneral Overview

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§ 112.36 State Administrative Regulations

Equal employment opportunity at California community colleges. *5 Cal. Code Reg. § 51010*

Reasonable accommodations for disabled persons at community colleges. *5 Cal. Code Reg. § 53025*

Discrimination prohibited in programs receiving state financial assistance through community colleges. *5 Cal. Code Reg. § 59300 et seq.*

Discrimination prohibited in alcohol and drug programs receiving state financial assistance. *9 Cal. Code Reg. § 10800 et seq.*

Discrimination prohibited in state-funded programs and activities. *22 Cal. Code Reg. § 98000 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawFederally Assisted ProgramsEnforcementEducation LawDiscriminationDisability DiscriminationAccommodation

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§ 112.37 Decisions

[1] Prohibition Against Discrimination in State-Funded Programs: Gov. Code §§ 11135-11139.5

Gov. Code § 11135 supports private right of action. *Greater L.A. Council on Deafness v. Zolin (9th Cir. 1987) 812 F.2d 1103, 1113-1114* (decided before 1999 amendment to *Gov. Code § 11139*)

Man who acted as tester, calling domestic violence shelters stating he was domestic violence victim and needed shelter, lacked standing to sue under *Gov. Code §§ 11135, 11139*, when although he alleged he had suffered domestic violence in past, it was not at time he made test calls to shelters and he did not allege that when he suffered domestic violence he asked shelters for shelter and was denied, so he was not personally aggrieved. Further, he lacked standing as tester because *Gov. Code §§ 11135, 11139* do not provide for standing by party who was not personally injured. Concept that rules are relaxed in matters involving public interest did not apply, because § 11139 contained no suggestion of intent to broaden standing rule, and adoption of relaxed rule of standing applied here would frustrate purpose of § 11139 as specifically prohibiting interpretation that would adversely affect lawful program benefitting women. *Blumhorst v. Jewish Family Services of Los Angeles (2005) 126 Cal. App. 4th 993, 1000-1005, 24 Cal. Rptr. 3d 474*

There is no private right of action under *Gov. Code § 11135*. *Arriaga v. Loma Linda Univ. (1992) 10 Cal. App. 4th 1556, 1561-1564, 13 Cal. Rptr. 2d 619* (decided before 1999 amendment to *Gov. Code § 11139*)

State-funded programs, viewed in their entirety, must be accessible to disabled persons. *Martin v. City of Los Angeles (1984) 162 Cal. App. 3d 559, 564-566, 209 Cal. Rptr. 301*

Municipal court's discretionary referral to traffic school does not constitute program or activity within meaning of *Gov. Code § 11135*; refusal to appoint interpreter at public expense to assist deaf defendant at traffic school was not violation of *Gov. Code § 11135*. *People v. Levinson (1984) 155 Cal. App. 3d Supp. 13, 16-19 , 203 Cal. Rptr. 426*

[2] Access to Public Buildings by Persons With Disabilities: Gov. Code §§ 4450-4460

Department of Housing and Community Development regulation, defining "publicly funded" to not include loans, grants, guarantees, or other assistance from a public agency to finance privately owned buildings, violated *Gov. Code § 4450* requirement that all buildings constructed using publicfunds be accessible to disabled persons. *Berkeley Center for Independent Living v. Coyle (1996) 42 Cal. App. 4th 874, 878-879, 50 Cal. Rptr. 2d 39*

[3] Title VI of Civil Rights Act of 1964

University's use of race in its freshman admissions policy was not narrowly tailored to achieve asserted compelling interest in diversity, and violated *Equal Protection Clause of Fourteenth Amendment* as well as Title VI of 1964 Civil Rights Act and *42 U.S.C. § 1981*. *Gratz v. Bollinger (2003) 539 U.S. 244, 123 S. Ct. 2411, 2427-2431, 156 L. Ed. 2d 257*

Law school's use of race in its admission policy did not violate *Equal Protection Clause of federal Constitution* or Title VI or *42 U.S.C.S. § 1981* because use of race was justified by compelling state interest in student body diversity, and admissions program was narrowly tailored because Law School engages in highly individualized, holistic review of each applicant's file, giving serious consideration to all ways applicant might contribute to diverse educational environment. *Grutter v. Bollinger (2003) 539 U.S. 306, 123 S. Ct. 2325, 2338-2347, 156 L. Ed. 2d 304*

In determining whether state has complied with duty to dismantle prior "dual" system of higher education that was racially segregated by law, protection of Title VI extends no further than reach of *equal protection clause* of *U.S. Const., amend. XIV*. *United States v. Fordice (1992) 505 U.S. 717, 732, 112 S. Ct. 2727, 120 L. Ed. 2d 575*

Individual discriminated against in violation of Title VI has right of action; declaratory and injunctive relief are available in all cases, but monetary damages are available only in cases of intentional violations. *Guardians Ass'n v. Civil Service Comm'n (1983) 463 U.S. 582, 593-603, 103 S. Ct. 3221, 77 L. Ed. 2d 866*

Title VI prohibitions are applicable to federally assisted public housing programs. *Hills v. Gautreaux (1976) 425 U.S. 284, 301, 96 S. Ct. 1538, 47 L. Ed. 2d 792*

Complaint by private mining company alleging that state officials' policy against use in state construction projects of materials mined from area as to which Native American tribes passed resolutions against mining because of area's religious, cultural, and historical significance to these groups failed to state claim under *42 U.S.C. § 2000d*, when complaint did not allege that company had imputed racial identity and did not explain how company suffered from racial discrimination. *Cholla Ready Mix, Inc. v. Civish (9th Cir. 2004) 382 F.3d 969, 977-978*

Complaint alleging hostile racial education environment sufficiently alleged cause of action under *Title VI. Monteiro v. Tempe Union High School Dist. (9th Cir. 1998) 158 F.3d 1022, 1032*

To state claim for violation of Title VI, plaintiff must allege that defendant entity is engaging in racial discrimination and is receiving federal financial assistance. *Fobbs v. Holy Cross Health System Corp. (9th Cir. 1994) 29 F.3d 1439, 1447 , cert. denied, 513 U.S. 1127 (1995)*

Actions under Title VI are subject to one-year statute of limitations under *42 U.S.C. § 1983*. *Taylor v. Regents of Univ. of California (9th Cir. 1993) 993 F.2d 710, 712 , cert. denied, 510 U.S. 1076 (1994)*

Title VI only applies to non-federal entities receiving federal funding. *Soberal-Perez v. Heckler (2d Cir. 1983) 717 F.2d 36, 38 , cert. denied, 466 U.S. 929 (1984)*

Punitive damages available in Title VI case. *Davision v. Santa Barbara High School Dist. (C.D.Cal. 1998) 48 F. Supp. 2d 1225, 1233*

[4] Affirmative Action

Classification based on race is subject to strict scrutiny under equal protection analysis, even when it has "benign" purpose of remedying past societal discrimination against racial minorities. *Adarand Constructors v. Pena (1995) 515 U.S. 200, 221-226, 115 S. Ct. 2097, 132 L. Ed. 2d 158*

Governmental programs that impose racial classifications for remedial purposes subject to strict scrutiny under *equal protection clause*. *City of Richmond v. Croson Co. (1989) 488 U.S. 469, 493-498, 109 S. Ct. 706, 102 L. Ed. 2d 854*

Title VI proscribes only those racial classifications that would violate the *equal protection clause of the Fourteenth Amendment*, or the *Fifth Amendment*. *Regents of the University of California v. Bakke (1978) 438 U.S. 265, 284-287, 98 S. Ct. 2733, 57 L. Ed. 2d 750*

Fourteenth Amendment permits university admissions programs that consider race for other than remedial purposes; educational diversity is compelling governmental interest that meets demands of strict scrutiny of race-conscious measures. *Smith v. University of Washington, Law School (9th Cir. 2000) 233 F.3d 1188, 1201*

[5] Rehabilitation Act of 1973

In action under ADA and Rehabilitation Act by paraplegic for failing to maintain appropriate policies for arrest and transportation of persons with spinal cord injuries, trial court properly vacated jury's award of punitive damages as unavailable in suits under § 202 of ADA and § 504 of *Rehabilitation Act. Barnes v. Gorman (2002) 536 U.S. 181, 122 S. Ct. 2097, 2103, 153 L. Ed. 2d 230*

Rehabilitation Act does not constitute congressional waiver of sovereign immunity; private right of action for monetary damages is not available against federal government. *Lane v. Pena (1996) 518 U.S. 187, 191-200, 116 S. Ct. 2092, 135 L. Ed. 2d 486*

Rehabilitation Act prohibition of discrimination against disabled persons, applied to teacher with contagious disease; case remanded for findings whether teacher was "otherwise qualified," and whether employer could provide reasonable accomodation. *School Board of Nassau County v. Arline (1987) 480 U.S. 273, 284, 107 S. Ct. 1123, 94 L. Ed. 2d 307*

Rehabilitation Act extends only to recipients of federal financial assistance, and not to those who may benefit from recipient's use of assistance; commercial airlines are not recipients of federal financial aid given to airports and therefore are not subject to Rehabilitation Act. *Department of Transp. v. Paralyzed Veterans of Am. (1986) 477 U.S. 597, 610-611, 106 S. Ct. 2705, 91 L. Ed. 2d 494*

Effect on disabled person of state's reduction of annual inpatient state Medicaid coverage did not violate *Rehabilitation Act. Alexander v. Choate (1985) 469 U.S. 287, 306-309, 105 S. Ct. 712, 83 L. Ed. 2d 661*

Rehabilitation Act protects individuals who can meet all of program's requirements in spite of disability; program is not required to take affirmative action to accommodate disabled. *Southeastern Community College v. Davis (1979) 442 U.S. 397, 406, 411, 99 S. Ct. 2361, 60 L. Ed. 2d 980*

Jury reasonably found that state department of veterans affairs did not violate Rehabilitation Act by refusing admission to veterans' homes to veteran diagnosed with Alzheimer's disease, where, although veteran was disabled within meaning

of Rehabilitation Act and department was public entity receiving federal assistance, and although she met eligibility requirements for admission under state law and regulatory space and resource considerations were not eligibility requirements that had to be taken into account when deciding whether otherwise eligible applicant should have been admitted to home, veteran's estate failed to establish violation of Rehabilitation Act because it could not prove veteran was denied services solely because of her disability, since evidence at trial demonstrated that she was denied admission because of home's lack of resources and space to provide level of care she required. *Estate of Martin v. California Department of Veterans Affairs (9th Cir. 2009) 560 F.3d 1042, 1047-1049*

Parents' failure to exhaust administrative process required under Individuals With Disabilities Education Act (IDEA) by failing to argue that school district discriminated against children by segregating them barred claim under Rehabilitation Act and school district did not waive exhaustion defense. *JG v. Douglas County School Dist. (9th Cir. 2008) 552 F.3d 786, 802-803*

Person who achieved considerable academic success, beyond attainment of most people or average person, could not be found to be substantially limited in reading and learning, and was not entitled to claim protections afforded under Rehabilitation and Americans With Disabilities Acts to disabled person. *Wong v. Regents of the Univ. of California (9th Cir. 2004) 379 F.3d 1097, 1105-1110*

State of Arizona validly waived its sovereign immunity under *Eleventh Amendment* to claims pursuant to § 504 of Rehabilitation Act of 1973 [*29 U.S.C. § 794 et seq.*], when it accepted federal Rehabilitation Act funds. *Pugliese v. Dillenberg (9th Cir. 2003) 346 F.3d 937, 937-938*

Hawaii unlawfully discriminated against aged, blind, and disabled people in violation of Rehabilitation Act by excluding them from eligibility for HMO medical coverage under state-sponsored program, when viewing Hawaii's Medicaid program as whole did not alter conclusion that Hawaii categorically discriminated against disabled, disabled did not have meaningful access to public benefits after Hawaii implemented program, Hawaii was not relieved of duty to include disabled in program because inclusion would have fundamentally altered program, and it was not necessary to exclude disabled from program. *Lovell v. Chandler (9th Cir. 2002) 303 F.3d 1039, 1052-1056*

Hawaii waived any *Eleventh Amendment* immunity as to claims under § 504 of Rehabilitation Act by accepting Rehabilitation Act funds, since Congress validly conditioned state's receipt of Rehabilitation Act funding on its consent to waive *Eleventh Amendment* immunity from suit under § 504 and since Rehabilitation Act is valid exercise of Congress's spending power. *Lovell v. Chandler (9th Cir. 2002) 303 F.3d 1039, 1051*

Student failed to prove that college discriminated against her while participating in overseas program on basis of disability in violation of Rehabilitation Act so as to entitle her to equitable relief or damages, when, although college failed to provide her with wheelchair access on number of occasions, college offered ample evidence of having accommodated her disability by hiring two helpers for her, paying for her to fly while others took trains and buses, paying for cot, second wheelchair, and unique shower head built to her specifications, and providing alternative wheelchair-accessible lodgings almost everywhere her class stayed, and college did not necessarily fail to make reasonable modifications simply because some aspects of program did not conform to her expectations, and when evidence indicated she enjoyed many benefits offered by program. *Bird v. Lewis & Clark College (9th Cir. 2002) 303 F.3d 1015, 1020-1021*

In Rehabilitation Act action against state department of labor and industrial relations for denial of vocational rehabilitation services, district court erroneously granted state agency summary judgment on ground that agency was entitled to require individual to submit diagnosis of dyslexia from qualified medical professional and he had not done so, when there were genuine issues of fact as to whether individual had dyslexia and whether, if he did, dyslexia was impairment substantially limiting his ability to learn; and when, although agency could require reasonable evidence of disability before providing accommodations, agency relied not on absence of proof that individual was disabled by

dyslexia, but on his failure to provide certain kind of proof, i.e., diagnostic "evidence," and agency could not insist on data supporting claim of disability beyond that which would satisfy reasonable expert in field. However, individual could not sue agency in individual capacity to vindicate rights created by Rehabilitation Act under *42 U.S.C. § 1983*. *Vinson v. Thomas (9th Cir. 2002) 288 F.3d 1145*

City's public sidewalks are service, program, or activity within meaning of Rehabilitation Act and therefore subject to program accessibility regulations. *Barden v. City of Sacramento (9th Cir. 2002) 292 F.3d 1073, 1074*

Medical student with learning disability dismissed from medical school survived summary judgment motion in Rehabilitation Act case, where there were questions of fact whether requested accommodation was reasonable and whether student was otherwise qualified. *Wong v. Regents of the Univ. of California (9th Cir. 1999) 192 F.3d 807, 826*

Rehabilitation Act applies to decisions by public agencies regarding zoning. *Bay Area Addiction Research and Treatment v. City of Antioch (9th Cir. 1999) 179 F.3d 725, 730*

Medical student with learning disability dismissed from medical school failed to satisfy initial burden of producing evidence in case under Rehabilitation Act, because she failed to show she was "otherwise qualified," where school gave student accommodations given to every learning disabled student, where student's requested additional accommodations were not reasonable, and where student failed to meet essential eligibility requirements with aid of reasonable accommodations. *Zukle v. Regents of the Univ. of California (9th Cir. 1999) 166 F.3d 1041, 1048-1051*

No violation of Rehabilitation Act where plaintiff's exclusion from program was not based on disability, but was based on plaintiff's financial circumstances and possibility that he did not have disability qualifying him for program. *Weinreich v. L.A. County Metro. Transp. Auth. (9th Cir. 1997) 114 F.3d 976, 979 , cert. denied, 522 U.S. 971*

Punitive damages not available in Rehabilitation Act case. *Moreno v. CONRAIL (6th Cir. 1996) 99 F.3d 782, 792* (en banc)

Full panoply of legal remedies is available under *Rehabilitation Act. Pandazides v. Virginia Bd. Of Educ. (4th Cir. 1994) 13 F.3d 823, 831*

When plaintiff does not win final judgment on merits, question whether plaintiff prevailed for purpose of receiving attorney's fees under Rehabilitation Act turns upon the inquiries (1) what lawsuit sought to accomplish, and whether some benefit sought was accomplished by means of suit, and (2) whether benefit achieved was required by law and not gratuitous act of defendant; there must be a clear, causal relationship between litigation and practical outcome. *Greater L.A. Council on Deafness v. Comm. TV of So. Cal. (9th Cir. 1987) 813 F.2d 217, 219-220*

There is a private right of action under *29 U.S.C. § 794*. *Greater L.A. Council on Deafness v. Zolin (9th Cir. 1987) 812 F.2d 1103, 1107*

29 U.S.C. § 794a(b), allowing attorney's fees, is liberally construed to achieve its purpose of ensuring compliance with Rehabilitation Act; party who established new legal precedent that significantly strengthens protections of Rehabilitation Act achieves sufficient success to be considered prevailing party. *Mantolete v. Bolger (9th Cir. 1986) 791 F.2d 784, 787*

Damages available in Rehabilitation Act case. *Kling v. County of Los Angeles (9th Cir. 1985) 769 F.2d 532, 534 , rev'd on other grounds, 474 U.S. 936, 106 S. Ct. 300, 88 L. Ed. 2d 277 (1985)*

Punitive damages available in Rehabilitation Act case. *Saylor v. Ridge (E.D.Pa. 1998) 989 F. Supp. 680, 690-691* ; *Burns-Vidlak v. Chandler (D.Hawaii 1997) 980 F. Supp. 1144, 1152*

State and federal courts have concurrent jurisdiction over Rehabilitation Act cases. *Spaulding v. Mingo County Bd. of Educ. (S.D. W. Va. 1995) 897 F. Supp. 284, 288* (case remanded to state court)

Welf. & Inst. Code § 11253, requiring that aid under CalWORKS not be granted to child who has attained age of 18 who cannot reasonably be expected to complete high school or equivalent level of vocational or technical training on full-time basis by child's 19th birthday (completion rule), unlawfully denies benefits to children not expected to complete high school or equivalent training by age of 19 based on their disabilities, when completion rule is not essential eligibility requirement of CalWORKS because program's purposes as expressly defined by Legislature can be achieved without requirement. *Fry v. Saenz (2002) 98 Cal. App. 4th 256, 120 Cal. Rptr. 2d 30*

When applicable, Individuals with Disabilities Education Act (*20 U.S.C. § 1400 et seq.*) supersedes claims under *42 U.S.C. § 1983* and the Rehabilitation Act, and its administrative remedies constitute exclusive remedy of children with handicaps and their families. *Hayes v. Commission on State Mandates (1992) 11 Cal. App. 4th 1564, 1589, 15 Cal. Rptr. 2d 547*

Architectural standards regulations enacted pursuant to *29 U.S.C. § 794* and *Gov. Code § 11135*, requiring accessibility of programs to disabled, are applicable only to construction commenced, or alterations made, after effective date of regulations (1977 and 1980, respectively). *Martin v. City of Los Angeles (1984) 162 Cal. App. 3d 559, 563-564, 209 Cal. Rptr. 301*

[6] Title II of Americans With Disabilities Act of 1990

Prisoner could maintain action against state for damages for violation of Title II of Americans With Disabilities Act to extent state's conduct violated prisoner's constitutional rights, where insofar as Title II created private cause of action for damages against state for conduct actually violating *Fourteenth Amendment*, including violations of *Eighth Amendment's* prohibition of cruel and unusual punishment, Title II validly abrogated state sovereign immunity. United States v. *Georgia (2006) 546 U.S. 151, 126 S. Ct. 877, 880151882, 163 L. Ed. 2d 650*

Action against state alleging past and ongoing violations of Title II by denial of access to and services of state court system by reason of disability was not barred by *Eleventh Amendment*, because Title II unquestionably is valid legislation under *§ 5 of Fourteenth Amendment* as it applies to class of cases implicating accessibility of judicial services. *Tennessee v. Lane (2004) 541 U.S. 509, 124 S. Ct. 1978, 1984-1994, 158 L. Ed. 2d 820*

In action under ADA and Rehabilitation Act by paraplegic for failing to maintain appropriate policies for arrest and transportation of persons with spinal cord injuries, trial court properly vacated jury's award of punitive damages as unavailable in suits under § 202 of ADA and § 504 of *Rehabilitation Act. Barnes v. Gorman (2002) 536 U.S. 181, 122 S. Ct. 2097, 2103, 153 L. Ed. 2d 230*

Proscription of discrimination in public services in Americans with Disabilities Act, *42 U.S.C. § 12132*, may require placement of persons with mental disabilities in community settings rather than in institutions, when state's treatment professionals have determined that community placement is appropriate, transfer from institutional care to less restrictive setting is not opposed by affected individual, and placement can be reasonably accommodated taking into account resources available to the state and needs of others with mental disabilities. *Olmstead v. L.C. (1999) 527 U.S. 581, 587, 119 S. Ct. 2176, 144 L. Ed. 2d 540*

Sight-impaired transit riders could not recover under Americans With Disabilities Act, where public transit service system complied with existing federal Department of Transportation design regulations for train station accessibility; where district court erred by declaring Department of Transportation regulations arbitrary and capricious for

considering impermissible factors or for failing to consider needs of persons with severe vision impairments who required information regarding accessible routes; and where transit district was immune from liability under safe harbor provisions of *49 C.F.R. § 37.9* and *42 U.S.C. § 12150*. *George v. Bay Area Rapid Transit District (9th Cir. 2009) 577 F.3d 1005, 1009-1013*

28 C.F.R. § 35.150(d), requiring public entities to develop transition plan for achieving ADA's accessibility requirements, is not enforceable through private right of action under ADA, and district court erred in granting permanent injunction against city in action by individual requiring city to comply with § 35.150(d). *Lonberg v. City of Riverside (9th Cir. 2009) 571 F.3d 846, 850-852*

In action by paratransit rider under ADA seeking accommodation by rides provided in sedans and taxis rather than buses, Department of Justice regulation requiring public entities to make reasonable modifications in policies, practices, or procedures when necessary to avoid discrimination did not apply to public transportation systems governed by Part B of its own independent force and was not incorporated by reference in Department of Transportation's regulations implementing ADA and Rehabilitation Act even though Department of Transportation regulations did not mention reasonable modifications, except to extent they required private entities to make them, where Secretary of Transportation had sole authority to determine level of services paratransit systems had to provide to be considered "comparable" under ADA, and, although Secretary had apparently decided paratransit systems should make reasonable modifications to be considered comparable, Secretary had yet to issue final rules to impose such requirement. *Boose v. Tri-County Metropolitan Transportation District of Oregon (9th Cir. 2009) 587 F.3d 997, 1001-1006*

Jury reasonably found that state department of veterans affairs did not violate Americans With Disabilities Act by refusing admission to veterans' homes to veteran diagnosed with Alzheimer's disease, where, although veteran was disabled within meaning of ADA and department was public entity receiving federal assistance, and although she met eligibility requirements for admission under state law and regulatory space and resource considerations were not eligibility requirements that had to be taken into account when deciding whether otherwise eligible applicant should have been admitted to home, veteran's estate failed to establish violation of ADA because it could not prove veteran was denied services by reason of her disability, since evidence at trial demonstrated that she was denied admission because of home's lack of resources and space to provide level of care she required. *Estate of Martin v. California Department of Veterans Affairs (9th Cir. 2009) 560 F.3d 1042, 1047-1049*

Trial court erred by terminating order in class action regarding mobility- and dexterity-impaired pretrial detainees, where county's failure to accommodate their disabilities prevented them from enjoying number of county's services, programs, activities, and county did not reasonably address various structural barriers, county maintained unreasonable policies and practices in violation of ADA, and county did not posit any legitimate rationale for maintaining inaccessible bathrooms, sinks, showers, and other fixtures in housing areas and common spaces assigned to mobility- and dexterity-impaired detainees or offer explanation or justification for significant differences between vocational and recreational activities available to able and disabled detainees; district court's determination that although county was not in compliance with ADA, county would move toward full compliance was unwarranted given county's track record. Grant of summary judgment under Prison Litigation Reform Act to county on claims for mental and emotional harms caused by ADA violations was error, where PLRA does not apply to claims under ADA and prisoner's injuries were more than de minimis. *Pierce v. County of Orange (9th Cir. 2008) 519 F.3d 985, 1008-1019*

State does not violate ADA when it limits number of people that can participate in Medicaid waiver program providing disabled persons with alternatives to institutionalization in home and community-based care, which cap is expressly contemplated by Medicaid waiver provisions. *Arc of Wash. State, Inc. v. Braddock (9th Cir. 2005) 427 F.3d 615, 618-622*

Plaintiff with AIDS made out claim under Title II of ADA for disability discrimination by city in denying his request for additional time to clean up his yard to comply with city's nuisance abatement ordinance, when benefit plaintiff

sought was to be allowed sufficient time to comply with city's code enforcement activities in manner consistent with his disability. *McGary v. City of Portland (9th Cir. 2004) 386 F.3d 1259, 1264-1270*

Person who achieved considerable academic success, beyond attainment of most people or average person, could not be found to be substantially limited in reading and learning, and was not entitled to claim protections afforded under Rehabilitation and Americans With Disabilities Acts to disabled person. *Wong v. Regents of the Univ. of California (9th Cir. 2004) 379 F.3d 1097, 1105-1110*

Title II's statutory language does not prohibit injunctive action against state officials in their official capacities. *Miranda B. v. Kitzhaber (9th Cir. 2003) 328 F.3d 1181, 1189*

Refusal of secretary of state Department of Social and Health Services to offer community-based in-home nursing services to some disabled persons violates Title II of ADA by failing to provide long-term care services currently provided to medically needy disabled persons in integrated settings, unless state can show that providing services in community-based settings would fundamentally alter nature of services it currently dispenses to medically needy Medicaid recipients. *Townsend v. Quasim (9th Cir. 2003) 328 F.3d 511, 515-520*

Hawaii unlawfully discriminated against aged, blind, and disabled people in violation of Title II of Americans with Disabilities Act by excluding them from eligibility for HMO medical coverage under state-sponsored program, when viewing Hawaii's Medicaid program as whole did not alter conclusion that Hawaii categorically discriminated against disabled, disabled did not have meaningful access to public benefits after Hawaii implemented program, Hawaii was not relieved of duty to include disabled in program because inclusion would have fundamentally altered program, and it was not necessary to exclude disabled from program. Hawaii acted with deliberate indifference and engaged in intentional discrimination entitling plaintiffs to compensatory damages, when Hawaii facially discriminated against disabled and thus was chargeable with notice that federal rights are implicated by such discrimination and modification was required, when by choosing categorically to exclude disabled persons from program, despite knowing some excluded would remain without any coverage, Hawaii failed to act with requisite care to protect rights of the disabled, and when finding of intentional discrimination did not interfere with purpose of statutory limitation on compensatory damages. *Lovell v. Chandler (9th Cir. 2002) 303 F.3d 1039, 1052-1057*

City's public sidewalks are service, program, or activity within meaning of ADA and therefore subject to program accessibility regulations. *Barden v. City of Sacramento (9th Cir. 2002) 292 F.3d 1073, 1074*

State prisoners stated claim for violation of Title II based on denial of parole release date due to substance abuse histories, when ADA applies to parole proceedings, including substantive decision making, as activity of public entity falling within ADA's reach; when drug addiction that substantially limits one or more major life activities is recognized disability under ADA and ADA protects individuals who have successfully completed or are participating in supervised drug rehabilitation program and are no longer using illegal drugs, which prisoners alleged; when prisoners alleged they are statutorily eligible for parole and thus that they are otherwise qualified for public benefit they seek, i.e., consideration for parole; and when prisoners alleged they were denied benefit of public program or activity, i.e., consideration for parole, by reason of their disability. *Thompson v. Davis (9th Cir. 2002) 282 F.3d 780*

Physician sufficiently alleged Title II claims against state medical board for denying his application for medical license for reasons of mental illness, when claims were not barred by *Eleventh Amendment* immunity since Congress validly abrogated sovereign immunity in enacting Title II, when medical licensing clearly falls within scope of Title II, and when complaint alleges that physician suffers from mental disability and that he had received treatment and was capable of practicing medicine. *Hason v. Medical Bd. of California (9th Cir. 2002) 279 F.3d 1167, 1171-1173*

In action by disabled individuals and disabled rights advocacy organization against hotel, trial court properly ruled that hotel violated ADA Accessibility Guideline 9.4, requiring doors and doorways designed to allow passage into and

within sleeping units to have minimum opening of 32 inches, by only providing opening of 28 inches for doorway between sink area which is open to bedroom area and room containing toilet and bathtub/shower in "standard" rooms, where "sleeping unit" implies entirety of individual hotel guest unit when applied to hotel and includes bathrooms, and Congressional reports accompanying passage of ADA made clear that all doors and doorways designed to allow passage into and within all hotel rooms and bathrooms are required to be sufficiently wide to allow passage by individuals using wheelchairs; however, magistrate erred in (1) declining to order injunctive relief because of enormous expense required to modify hotel and near absence of hardship and minimal inconvenience to wheelchair users, where ADA requires newly constructed facilities to be accessible, so magistrate had no discretion, and where defense of structural impracticability did not apply because terrain on which hotel was constructed had no unique characteristics making accessibility unusually difficult to achieve; and (2) ruling that slot change kiosk counters did not violate Guidelines because Guideline 7.2(2) solely requires accessibility to main counter, even though parties agreed that two of four counters violated Guideline, where "main counter" in Guideline 7.2(2) serves only to distinguish main counter at particular station from "auxiliary counter" at same station, and merchant cannot circumvent guideline by declaring one counter to be "main counter." Magistrate also erred in ruling that hotel violated Guideline 5.2 governing accessibility to bar counters, because two of three bars did not have counters complying with Guideline 5.2, where guideline provides for compliance by hotel providing service that is accessible within same area and one bar contained such seating and magistrate failed to determine whether seating was within same area. Placing six of nine pool cabanas on accessible route was reasonable and complied with ADA. Plaintiffs had no standing to challenge noncompliance in employee area of slot change kiosks since neither plaintiff was employee and organization did not allege any of its members were hotel employees or would have occasion to enter working areas of kiosks. *Long v. Coast Resorts, Inc. (9th Cir. 2001) 267 F.3d 918*

Severely hearing-impaired individual presented sufficient evidence to create triable issue of fact as to whether refusal to provide videotext display during hearings and trial in his state-court marital dissolution proceeding violated ADA, Rehabilitation Act, and state law for failure to make reasonable accommodation, when individual presented evidence that videotext display was available at time of hearings, when individual had examined court's proposed accommodation, which was assistive listening system, before rejecting it, and presented evidence regarding insufficiency of device, and when individual offered detailed testimony explaining the difficulties he experienced following proceedings; individual also presented sufficient evidence to create triable issue of fact to meet deliberate indifference standard by presenting evidence that superior court ADA coordinator and two other county employees had notice of his need for accommodation and failed despite repeated requests to take necessary action. *Duvall v. County of Kitsap (9th Cir. 2001) 260 F.3d 1124, 1136-1138*

Trial court did not abuse its discretion in denying request for permanent injunction against metropolitan transit system under ADA, when evidence presented by wheelchair-bound plaintiff of wheelchair lift failures on public buses established frustrating but isolated instances of malfunctioning lift service on transit system and that few individual operators have not treated passengers as they are required and trained to do, which at most showed past violations of ADA but did not support inference that plaintiff faced real and immediate threat of continued future violations of ADA in absence of injunctive relief; when transit system's practices and procedures for ensuring ADA compliance further showed that plaintiff did not face threat of immediate irreparable harm without injunction; when fact that transit system was local governmental agency with procedures already in place for monitoring lift performance and ADA compliance militated against federal court mandating substitute procedures of its own design to address same issues; and when trial court's determination that plaintiff had standing to bring ADA action did not require court to conclude plaintiff necessarily demonstrated sufficient fear of immediate and substantial injury to warrant injunction. *Midgett v. Tri-County Metropolitan Transp. Dist. (9th Cir. 2001) 254 F.3d 846, 850-851*

Medical student raised triable issues of fact in claim for school's failure to make reasonable accommodation under Americans with Disabilities Act based on dismissal from medical school for failure to meet academic qualifications, where dean's denial of student's requested accommodation is not entitled to deference because university failed to present record undisputedly showing that dean investigated proposed accommodation to determine whether school

feasibly could implement it or alternative modification without substantially altering school's standards. *Wong v. Regents of the Univ. of California (9th Cir. 1999) 192 F.3d 807, 817-818, 826*

California's imposition of $6 biennial fee for disabled persons' parking placards violates Americans with Disabilities Act (ADA), where fee is surcharge for required measure in violation of Ala. *Dare v. California (9th Cir. 1999) 191 F.3d 1167, 1171-1173*

Prisoners' claim that Board of Prison Terms' consideration of prisoners' past substance abuse history as part of its parole decisions violates Americans with Disabilities Act (ADA) may be brought as action under ADA and need not be brought as habeas corpus petition, where claim does not necessarily challenge fact or duration of confinement. *Bogovich v. Sandoval (9th Cir. 1999) 189 F.3d 999, 1002-1004*

Trial court abused its discretion by applying erroneous legal standard to determine whether urgency ordinance forbidding issuance of permits to or operation of new substance abuse clinics, including methadone clinics, located within 500 feet of residential property is likely to violate Americans with Disabilities Act and Rehabilitation Act, where ordinance discriminates on its face against qualified individuals, so that reasonable modifications test did not apply and court should have used significant risk test to analyze alleged threat posed by methadone clinic. *Bay Area Addiction Research and Treatment, Inc. v. City of Antioch (9th Cir. 1999) 179 F.3d 725, 733-737*

Visually impaired litigant failed to show violation of Americans with Disabilities Act by court's refusal to provide her with helper of her choice during trial, where court offered helper with the ability to observe, to read, and to communicate verbally with her, where litigant never consulted with helper to determine in what ways the helper could or could not assist her, and where allowing litigant to refuse services of court-appointed assistant in favor of one previously deemed vexatious and disruptive litigant would require program to make substantial modifications in way it runs its court system. *Memmer v. Marin County Courts (9th Cir. 1999) 169 F.3d 630, 633-634*

Student dismissed from medical school failed to state cause of action under Americans with Disabilities Act based on learning disability where school's academic decision was entitled to deference, where school gave student accommodations given to every learning disabled student, and where student's requested additional accommodations were not reasonable so that student failed to meet essential eligibility requirements with aid of reasonable accommodations. *Zukle v. Regents of the Univ. of California (9th Cir. 1999) 166 F.3d 1041, 1045-1051*

By statute, remedies for violations of American with Disabilities Act and Rehabilitation Act are coextensive. *Ferguson v. City of Phoenix (9th Cir. 1998) 157 F.3d 668, 673 , cert. denied, 526 U.S. 1159 (1999)*

In marital dissolution action, in which husband suffered from permanent cognitive disabilities arising from multiple traumatic injuries to his brain's frontal lobes, resulting in neuropsychiatric impairment including short term memory, organization, executive functioning, and concentration, trial court erred in not ruling on husband's request for neuropsychologist as facilitator as accommodation under *Cal. Rules of Ct., Rule 1.100*, where rules of court required court to respond to request for accommodation [*Cal. Rules of Ct., Rule 1.100(e)*] and to inform applicant in writing [*Cal. Rules of Ct., Rule 1.100(e)(2)*], and tacit denial did neither of those; where nothing in record suggested trial court denied request because husband failed to comply with procedural requirements of Rule 1.100; where no evidence suggested that providing neuropsychologist would have burdened court any differently from appointment of other facilitators, such as readers and certified interpreters for deaf, which Rule 1.100 explicitly contemplated as type of accommodations courts ought to provide; and where nothing in record suggested neuropsychologist assisting husband would have necessarily altered judicial services court provided to public. Appellate court could conclude error was structural without requiring husband to show prejudice. *Biscaro v. Stern (2010) 181 Cal. App. 4th 702, 707-710, 104 Cal. Rptr. 3d 817*

In marital dissolution proceeding, in which wife suffered from bipolar disorder and two forms of cancer, under *Cal.*

Rules of Ct., Rule 1.100, trial court erred by denying wife's second Americans With Disabilities Act request for accommodation by continuing trial again, where wife came within ADA and followed procedures under *Cal. Rules of Ct., Rule 1.100* for requesting accommodation, and not one of three grounds listed in Rule 1.100 required to deny request for accommodation was present. *In re Marriage of James & Christine C. (2008) 158 Cal. App. 4th 1261, 1272-1277, 70 Cal. Rptr. 3d 715*

Welf. & Inst. Code § 11253, requiring that aid under CalWORKS not be granted to child who has attained age of 18 who cannot reasonably be expected to complete high school or equivalent level of vocational or technical training on full-time basis by child's 19th birthday (completion rule), unlawfully denies benefits to children not expected to complete high school or equivalent training by age of 19 based on their disabilities, when completion rule is not essential eligibility requirement of CalWORKS because program's purposes as expressly defined by Legislature can be achieved without requirement. *Fry v. Saenz (2002) 98 Cal. App. 4th 256, 120 Cal. Rptr. 2d 30*

[6A] Title III of Americans with Disabilities Act of 1990

Visually impaired and mobility-impaired woman who depended on electric wheelchair for transportation failed to state claim under Title III of ADA against store and store's landlord, based on claim that she could not traverse long strip of land containing public sidewalk and 10-foot-wide grassy berm to gain access to store. Grassy strip and sidewalk were owned by city; store and landlord did not mow, maintain, or manage grassy strip; and city had exclusive control over design and construction of sidewalk. Further, Title III requires that store and landlord controlling grassy strip of land be subject to liability for failing to build ramp over it, and, according to Department of Justice's regulations implementing ADA, definition of "facility" only included site over which private entity could exercise control or on which place of public accommodation or a commercial facility was located. *Pickern v. Pier 1 Imports (U.S.), Inc. (9th Cir. 2006) 457 F.3d 963, 966-968*

Wheelchair-bound movie patron and his wife had standing to assert cause of action under Title III of Americans With Disabilities Act based on denial of companion seat to patron's wife during screening of one movie for which they had tickets, even though they continued to patronize same theater and denial of companion seat had not occurred since that incident, when individual refused to vacate available companion seat because companion seat was where he and his son wanted to sit and they did not want to move and theater had policy of not making them move to make companion seats available to companions of disabled patrons, and wrong engendered provided evidence bearing on whether there was real and immediate threat of repeated injury as required by ADA, and when, as consequence of theater's policy, disabled patron could be denied opportunity to attend sold-out film screening, regardless of how early he arrived, provided only single non-companion individual refused to change seats, and since there were only four companion seats in theater, policy denied disabled patron opportunity to sit with his companion equal to that enjoyed by ambulatory patrons. District court properly concluded patron had established claim under ADA by showing: (1) he was disabled as defined by ADA; (2) defendant theater was private entity that owned, leased, or operated place of public accommodation; (3) theater employed discriminatory policy or practice, because plaintiff could not attend movies without his wife as his companion; and (4) theater discriminated against plaintiff based on plaintiff's disability by (a) failing to make requested reasonable modification in policy that was (b) necessary to accommodate plaintiff's disability, by ensuring he could be seated next to his wife or another companion at theater, and requested modification in policy did not fundamentally alter nature of services provided by theater. Injunction ensuring wheelchair-bound patrons can sit next to companions did not result in preferential treatment to disabled, but by ensuring wheelchair-bound patron could sit with spouse or another companion, it merely required theater to make reasonable accommodation to permit wheelchair-bound patron to attend and enjoy theater. *Fortyune v. American Multi-Cinema, Inc. (9th Cir. 2004) 364 F.3d 1075, 1080-1086*

District court erred in granting defendants' motion for summary judgment holding that stadium seating plans in movie theaters, which largely resulted in wheelchair-bound patrons being seated in first row, did not violate Title III of ADA [*42 U.S.C. § 12182*], and regulations promulgated by Department of Justice requiring that movie theaters provide

comparable lines of sight for wheelchair-bound and non-wheelchair-bound moviegoers were not entitled to deference. In light of plain meaning of regulation both in general and as understood in movie theater industry, it was not unreasonable for DOJ to interpret "comparable line of sight" to encompass factors in addition to physical obstructions, such as viewing angle, and DOJ's interpretation was entitled to deference. *Oregon Paralyzed Veterans of Am. v. Regal Cinemas, Inc. (9th Cir. 2003) 339 F.3d 1126, 1131-1133*

Student failed to prove that college discriminated against her while participating in overseas program on basis of disability in violation of Title III of ADA so as to entitle her to equitable relief or damages, when, although college failed to provide her with wheelchair access on number of occasions, college offered ample evidence of having accommodated her disability by hiring two helpers for her, paying for her to fly while others took trains and buses, paying for cot, second wheelchair, and unique shower head built to her specifications, and providing alternative wheel-chair accessible lodgings almost everywhere her class stayed, and college did not necessarily fail to make reasonable modifications simply because some aspects of program did not conform to her expectations, and when evidence indicated she enjoyed many benefits offered by program. *Bird v. Lewis & Clark College (9th Cir. 2002) 303 F.3d 1015, 1020-1021*

[7] Title IX of Education Amendments of 1972

In action by parents alleging unconstitutional gender discrimination in school based on alleged peer-to-peer harassment, Title IX of the Education Amendments of 1972 [*20 U.S.C. § 1681(a)*] did not preclude action under *42 U.S.C. § 1983*, where Congress did not intend Title IX to preclude § 1983 constitutional suits. *Fitzgerald v. Barnstable School Committee (2009) -- U.S. --, 129 S. Ct. 788, 172 L. Ed. 2d 582, 590-595*

District court erred in dismissing complaint of school teacher and coach alleging that board of education retaliated against him for complaining about sex discrimination in high school athletic program in violation of Title IX, because retaliation falls within Title IX's prohibition of intentional discrimination on basis of sex, and retaliation against teacher for advocacy of rights of girls' basketball team was discrimination on basis of sex. *Jackson v. Birmingham Bd. of Ed. (2005) 544 U.S. 167, 125 S. Ct. 1497, 1504-1510, 161 L. Ed. 2d 361*

Recipient of federal funds may be liable for damages under Title IX based on deliberate indifference to "student-on-student" sexual harassment. *Davis v. Monroe County Board of Education (1999) 526 U.S. 629, 646-647, 119 S. Ct. 1661, 143 L. Ed. 2d 839*

Dues payments from recipients of federal funds to National Collegiate Athletic Association (NCAA) do not render NCAA subject to Title iX. *NCAA v. Smith (1999) 525 U.S. 459, 470, 119 S. Ct. 924, 142 L. Ed. 2d 929*

Federal sex discrimination regulations are applicable to private school that received no direct federal aid, but that enrolled students who received federal funds for education. *Grove City College v. Bell (1984) 465 U.S. 555, 573-575, 104 S. Ct. 1211, 79 L. Ed. 2d 516*

Title IX regulations prohibiting federally funded education programs from discriminating on basis of gender with respect to employment are valid within Title IX's proscription of gender discrimination in education programs or activities receiving federal financial assistance. *North Haven Board of Education v. Bell (1982) 456 U.S. 512, 520-530, 102 S. Ct. 1912, 72 L. Ed. 2d 299*

The exception to Title IX for undergraduate educational institutions that traditionally and continually have admitted students of only one sex does not shield such institutions from the operation of the *Fourteenth Amendment*. *Mississippi University for Women v. Hogan (1982) 458 U.S. 718, 727-733, 102 S. Ct. 3331, 73 L. Ed. 2d 1090*

Private right of action is available under Title IX to challenge sex discrimination in education program receiving federal financial assistance. *Cannon v. University of Chicago (1979) 441 U.S. 677, 717, 99 S. Ct. 1946, 60 L. Ed. 2d 560*

In class action by female wrestlers against university for money damages for violation of effective accommodation under Title IX based on elimination of women from varsity wrestling team, trial court erred in finding that plaintiffs were required to give defendant prelitigation notice of and opportunity to rectify specific alleged violation, where athletic programs that fail effectively to accommodate students of both sexes represent official policy of recipient entity and are not covered by notice requirement. Trial court erred in granting university summary judgment on ground that record demonstrated history and continuing practice of program expansion for women under Option Two under Title XI, where undisputed facts fell short of demonstrating university's compliance with either facet of Option Two because elimination of women from varsity wrestling team took place in context of overall contraction of female athletic participation opportunities, and university's strategy for sports equality between sexes appears to have consisted of reducing varsity athletics overall and reducing men's participation more than women's participation by using "roster management" to limit size of men's teams, and Title IX explicitly precluded considering such reductions as evidencing program expansion. Further, district court erred in dismissing students' action under *42 U.S.C. § 1983* for violation of *Equal Protection Clause* by maintaining athletics program that discriminated on basis of gender on ground that Title IX's enforcement scheme was sufficiently comprehensive to demonstrate that Congress intended to preclude § 1983 claims when it enacted Title IX, because Title IX does not bar § 1983 suits to enforce rights under *Equal Protection Clause*. *Mansourian v. Regents of the Univ. of Cal. (9th Cir. 2010) 594 F.3d 1095, 1100-1111*

Title IX did not prevent university in which males occupied disproportionately high percentage of athletic roster spots from making gender-conscious decision to reduce proportion of spots assigned to men. *Neal v. Board of Trustees of Cal. State Universities (9th Cir. 1999) 198 F.3d 763, 766-773*

Title IX applies to state prison education programs, although legitimate penological interests may limit Title IX's application in that context. *Jeldness v. Pearce (9th Cir. 1994) 30 F.3d 1220, 1224-1225*

Proof of discriminatory intent not required to prove violation of *Title IX. Roberts v. Colorado State Bd. Of Agriculture (10th Cir. 1993) 998 F.2d 824, 832-833 , cert. denied, 510 U.S. 1004*

Title IX reaches facially neutral policies with a disparate impact. *De La Cruz v. Tormey (9th Cir. 1978) 582 F.2d 45, 50-61 , cert. denied, 441 U.S. 965 (1979)*

[8] Age Discrimination Act of 1975

Plaintiff required to exhaust administrative remedies before initiating court action under Age Discrimination Act. *Belcher v. Ohio Department of Human Services (S.D.Ohio 1999) 48 F. Supp. 2d 729, 738*

Defendant in action under Age Discrimination Act has "burden of going forward with evidence" to show that exception to Act applies. *NAACP v. Wilmington Medical Center (D.Del. 1980) 491 F. Supp. 290, 315-316 , aff'd, 657 F.2d 1322 (3d Cir. 1981)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawFederally Assisted ProgramsDiscriminatory IntentCivil Rights LawFederally Assisted ProgramsEnforcementCivil Rights LawProtection of Disabled PersonsAmericans With Disabilities ActGeneral OverviewCivil Rights LawPublic FacilitiesGeneral OverviewConstitutional LawEqual ProtectionGeneral Overview

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PART III. RESEARCH GUIDE

11-112 California Forms of Pleading and Practice--Annotated § 112.37A

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 112.37A Attorney General Opinions

Otherwise eligible military veterans residing in California are entitled to all state-funded veterans' benefits, including state-funded veterans' housing, regardless of sexual orientation or gender. Registered domestic partners of eligible military veterans residing in California are entitled to all state-funded military benefits available to spouses of eligible military veterans, including state-funded veterans' housing. 08 Ops. Cal. Atty' Gen. 801 (2009)

City is not required, under federal Americans with Disabilities Act, to provide, as accommodation for disabled member of city council or advisory board unable to attend regularly scheduled meeting of council or board, teleconferencing connection at member's residence, where members of public would not be permitted to be present. *00 Ops. Cal. Att'y Gen. 1210 (2001)*

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11-112 California Forms of Pleading and Practice--Annotated § 112.38

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 112.38 Law Reviews

[1] Title VI of Civil Rights Act of 1964

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[2] Affirmative Action

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[3] Rehabilitation Act of 1973 and Title II of Americans with Disabilities Act of 1990

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Infected with Human Immunodeficiency Virus, 33 Ind. L. Rev. 783 (2000)

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[4] Title IX of Education Amendments of 1972

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Note, *Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression, 110 Harv. L. Rev. 1627 (1997)*

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Lohmann, *Single-Sex Courses, Title IX, and Equal Protection: The Case for Self-Defense for Women, 48 Stan. L. Rev. 177 (1995)*

[5] Age Discrimination Act of 1975

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[6] Discrimination Generally

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Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawFederally Assisted ProgramsGeneral OverviewEducation LawDiscriminationDisability DiscriminationRehabilitation ActGeneral OverviewEducation LawDiscriminationGender & Sex DiscriminationTitle IXGeneral OverviewEducation LawDiscriminationGender & Sex DiscriminationTitle IXCoverageLabor & Employment LawDiscriminationDisability DiscriminationRehabilitation Act

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Chapter 112 CIVIL RIGHTS: GOVERNMENT-FUNDED PROGRAMS AND ACTIVITIES
PART III. RESEARCH GUIDE

11-112 California Forms of Pleading and Practice--Annotated § 112.39

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 112.39 Text References

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PART III. RESEARCH GUIDE

11-112 California Forms of Pleading and Practice--Annotated §§ 112.40-112.49

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

[Reserved]

§§ 112.40[Reserved]

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PART IV. FORMS

11-112 California Forms of Pleading and Practice--Annotated § 112.50

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 112.50 Complaint for Preliminary and Permanent Injunction for Violation of Gov. Code § 11135 [Gov. Code § 11139]

[1] FORM Complaint for Preliminary and Permanent Injunction for Violation of Gov. Code § 11135 [Gov. Code § 11139]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR PRELIMINARY AND PER-
_____ [*name*],	)	MANENT INJUNCTION
[and DOEs I through _____,]	)	(*Gov. Code §§ 11135, 11139*)
Defendant(s).	)	[Amount demanded (exceeds *or* does not exceed)
	)	$10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff, _____ [*name*], is, and at all times mentioned in this complaint was, _____ [*allege capacity and allege plaintiff's county of residence, e.g.*, a natural person, and a resident of _____ (*county*), California].

2. Defendant _____ [*name*] is, and at all times mentioned in this complaint was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.*, a corporation duly organized and existing under the laws of the State of California with its principal place of business in

_____ (*city*), _____ (*county*), California].

[3. Plaintiff is ignorant of the true names and capacities of defendants sued in this complaint as DOEs I through _____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences, and the discrimination against plaintiff, alleged in this complaint.)]

[4. (Plaintiff is informed and believes and thereon alleges that,) (A)t all times mentioned in this complaint, each defendant was the agent of the other(s), was acting within the course and scope of this agency, and all acts alleged to have been committed by any one of them was committed on behalf of every other defendant.]

5. _____ [*Allege facts showing that defendants operate one or more programs or activities that are funded directly by the state or that receive any financial assistance from the state*.]

6. _____ [*Allege protected characteristic of plaintiff (race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability) that was the basis for denial to plaintiff of benefits or discrimination against plaintiff by defendants*.]

7. _____ [*Allege facts showing that defendants denied plaintiff full access to the benefits of and/or unlawfully subjected plaintiff to discrimination under the program(s) or activity(ies) funded directly by the state or receiving any financial assistance from the state*.]

8. _____ [*Allege that plaintiff's protected characteristic was the basis for the denial of benefits or discrimination, e.g.*, (Plaintiff is informed and believes and thereon alleges that) (D)efendants, and each of them, denied to plaintiff the benefits of, and discriminated against plaintiff in _____ (*identify the state-funded program(s) or activity(ies)*) because of plaintiff's (race, national origin, ethnic group identification, religion, age, sex, color, or disability).]

[9. _____ (*Allege, if appropriate, plaintiff's demand that defendants stop the unlawful and discriminatory conduct, defendants' refusal, and the resulting necessity for prompt judicial action to protect plaintiff, e.g.*, On or about _____ [*date*], plaintiff demanded that defendants stop the unlawful, discriminatory conduct described above, but defendants refused, and still refuse, to refrain from that conduct)].

10. Defendants' [threatened] unlawful and discriminatory conduct, described above, unless and until enjoined and restrained by order of this Court, will cause great and irreparable _____ [injury, loss, *and/or* damage] to plaintiff in that _____ [*specify particular facts indicating how defendants' actions are continuing and will constitute great and irreparable injury, loss, and/or damage to plaintiff*].

11. Plaintiff has no adequate remedy at law for the _____ [injury, loss, *and/or* damage currently being suffered *or* that is threatened] in that _____ [*specify facts showing the inadequacy of any legal remedy*].

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For _____ [*describe injunctive relief sought, e.g.*, a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant(s) and his/her/their/its agents, servants, and employees, and all such persons acting under, in concert with, or for him/her/them/it from _____ (*describe acts enjoined*)];

[2. For reasonable attorney's fees in the sum of $_____;]

3. For costs of suit incurred in this action; and

4. For such other and further relief as the Court deems proper.

_____ [*date*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The complaint in [1], *above*, is for use in state court, by a person who, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, has been denied full access to the benefits of, or discriminated against in, a program or activity funded directly by the state or receiving any financial assistance from the state [*Gov. Code §§ 11135, 11139*]. *Gov. Code § 11139* provides for only equitable relief for denial of benefits or discrimination by a state-funded program or activity. The complaint in [1], *above*, seeks injunctive relief.

[3] Allegations

The complaint in [1], *above*, alleges all of the following:

- Plaintiff's name, capacity, and residence (Paragraph 1).

- Defendant's capacity and residence, for purposes of establishing venue (Paragraph 2) [*see Code Civ. Proc. § 395*; *see also* discussion in *§ 112.11[3]* and Ch. 571, *Venue*].

- An optional allegation as to fictitiously named defendant(s) (Optional Paragraph 3) [*see Code Civ. Proc. § 474*].

- An optional allegation for use when agents are being sued (Optional Paragraph 4) [*see* Ch. 427, *Principal and Agent*].

- Defendants' operation of one or more programs or activities that are funded directly by the state or that receive any financial assistance from the state (Paragraph 5) [*see Gov. Code § 11135*].

- The protected characteristic of plaintiff that was the basis for the defendants' denial to plaintiff of benefits or defendants' discrimination against plaintiff in the state-funded program or activity (Paragraph 6). The possible protected characteristics are race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability [*Gov. Code § 11135*].

- Defendants' denial to plaintiff of full access to the benefits of, and/or unlawful discrimination against plaintiff under, the state-funded program or activity (Paragraph 7) [*Gov. Code § 11135*].

- That plaintiff's protected characteristic was the basis for the denial of benefits or discrimination (Paragraph 8) [*Gov. Code § 11135*].

- An optional allegation, that plaintiff demanded that defendants stop the unlawful and discriminatory conduct, that defendants refused, and that there is a need for prompt judicial action to protect plaintiff (Optional Paragraph 9).

- That defendants' actual or threatened unlawful and discriminatory conduct will cause plaintiff great and irreparable injury until enjoined and restrained by an order of the court (Paragraph 10).

- That plaintiff has no adequate remedy at law (Paragraph 11).

[4] Prayer

The prayer in the complaint in [1], *above*, seeks the following equitable relief:

- A temporary restraining order;

- A preliminary injunction; and

- A permanent injunction.

The complaint does not seek damages because *Gov. Code § 11139* provides for only equitable relief.

[5] Attorney's Fees

[a] Optional Prayer for Attorney's Fees

The prayer in the complaint in [1], *above*, includes an optional prayer for attorney's fees. *Gov. Code §§ 11135-11139* do not include a provision regarding attorney's fees. However, in an appropriate case, an award of attorney's fees may be available under *Code Civ. Proc. § 1021.5*, which provides for awards of attorney's fees in cases resulting in public benefit.

For detailed discussion and forms relating to *Code Civ. Proc. § 1021.5*, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

[b] When Award for Fees Is Appropriate

An award is appropriate under *Code Civ. Proc. § 1021.5* if all of the following apply [*Flannery v. California Highway Patrol (1998) 61 Cal. App. 4th 629, 634, 71 Cal. Rptr. 2d 632* ; *see* *Woodland Hills Residents Assn., Inc. v. City Council of Los Angeles (1979) 23 Cal. 3d 917, 935-936, 154 Cal. Rptr. 503, 593 P.2d 200* (important rights include constitutional and statutory rights and encompass cases involving racial discrimination [dicta])]:

- A significant benefit, whether or not pecuniary in nature, has been conferred on the general public or a large class of persons;
- The necessity and financial burden of private enforcement make the award appropriate; and
- In the interest of justice, the fees should not be paid out of the recovery, if any.

[c] Award of Fees Is Within Trial Court's Discretion

The question whether to award fees under *Code Civ. Proc. § 1021.5* is within the trial court's discretion, and the decision to award or deny fees will not be disturbed on appeal absent a showing of abuse of that discretion. However, that discretion may not be exercised whimsically. Reversal is required when there is no reasonable basis for the trial court's ruling, or when the trial court has applied the wrong test to determine if the statutory requirements were satisfied [*Flannery v. California Highway Patrol (1998) 61 Cal. App. 4th 629, 634, 71 Cal. Rptr. 2d 632]* .

[6] Verification

Verification of the complaint [*see Code Civ. Proc. § 446*] is required if plaintiff is seeking a temporary restraining order and/or preliminary injunction based on facts alleged in the complaint alone without the use of affidavits (or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*]) [*see Code Civ. Proc. § 527(a)*]. Otherwise, verification of the complaint is not required [*see Code Civ. Proc. § 128.7(a)*]. However, if the complaint is verified, the defendant is required to file a verified answer in superior court, unless the defendant is a public entity [*see Code Civ. Proc. § 446*]. Furthermore, whether or not the defendant is a public entity, if the complaint is verified, the defendant is precluded from making a general denial in superior court [*Code Civ. Proc. § 431.30(d)*].

For further discussion of the effect of verifying a complaint, see Ch. 26, *Answers* . For alternative forms of verification, see Ch. 572, *Verification* .

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to temporary restraining orders, preliminary injunctions, and permanent injunctions,

see Ch. 303, *Injunctions*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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11-112 California Forms of Pleading and Practice--Annotated § 112.51

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 112.51 Complaint in Federal Court for Preliminary Injunction, Permanent Injunction, and Damages, for Violation of Title VI of Civil Rights Act of 1964 [42 U.S.C. § 2000d]

[1] FORM Complaint in Federal Court for Preliminary Injunction, Permanent Injunction, and Damages, for Violation of Title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d]

UNITED STATES DISTRICT COURT,
_____ DISTRICT OF CALIFORNIA

	)	
_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR PRELIMINARY AND PER-
_____ [*name*], Defendant(s).	)	MANENT INJUNCTION, AND FOR DAMAGES
	)	(*42 U.S.C. § 2000d*)
	)	
	)	DEMAND FOR JURY TRIAL

_____

Plaintiff alleges:

1. This is an action to recover damages against defendants for violation of *42 U.S.C. § 2000d* (Title VI of the Civil Rights Act of 1964), and to obtain a preliminary and permanent injunction to prevent defendants from further violating that statute.

2. This action arises under *42 U.S.C. § 2000d* (Title VI of the Civil Rights Act of 1964). The jurisdiction of this Court is predicated on *28 U.S.C. §§ 1331* and *1343*.

3. Plaintiff, _____ [*name*], is, and at all times mentioned in this complaint was, a natural person, and a resident of _____ [*county*], California, [and a citizen of the United States].

4. Defendant _____ [*name*] is, and at all times mentioned in this complaint was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.*, a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), _____ (*county*), California]. Venue is therefore proper under *28 U.S.C. § 1391(b)*.

[5. A substantial part of the events giving rise to this action occurred in _____ (*county*), California. Venue is therefore proper under *28 U.S.C. § 1391(b)*.]

[6. (Plaintiff is informed and believes and thereon alleges that,) (A)t all times mentioned in this complaint, each defendant was the agent of the other(s), was acting within the course and scope of this agency, and all acts alleged to have been committed by any one of them was committed on behalf of every other defendant.]

7. _____ [*Allege facts showing that defendants operate one or more programs or activities that receive federal financial assistance*.]

8. _____ [*Allege protected characteristic of plaintiff (race color, or national origin) that was the basis for discrimination against plaintiff by defendants*.]

9. _____ [*Allege facts showing that defendants excluded plaintiff from participation in, denied plaintiff the benefits of, and/or subjected plaintiff to discrimination under, a program or activity receiving federal financial assistance*.]

10. _____ [*Allege that plaintiff's protected characteristic was the basis for the exclusion, denial of benefits, or discrimination, e.g.*, (Plaintiff is informed and believes and thereon alleges that) (D)efendants, and each of them, excluded plaintiff from participation in, denied to plaintiff the benefits of, and discriminated against plaintiff in _____ (*identify the federally assisted program(s) or activity(ies)*) because of plaintiff's (race color, or national origin).]

[11. _____ (*Allege, if appropriate, plaintiff's demand that defendants stop the unlawful and discriminatory conduct, defendants' refusal, and the resulting necessity for prompt judicial action to protect plaintiff, e.g.*, On or about _____ [*date*], plaintiff demanded that defendants stop the unlawful, discriminatory conduct described above, but defendants refused, and still refuse, to refrain from that conduct)].

12. As a direct and proximate result of defendants' actions, described above, plaintiff has suffered _____ [injury, loss, *and/or* damage] in that _____ [*describe injury, loss, and/or damage*].

[13. In acting as is alleged in this complaint, defendants acted knowingly, willfully, and maliciously, and with reckless and callous disregard for Plaintiff's federally protected rights.]

14. As a result of defendants' actions, plaintiff has suffered and will continue to suffer extreme hardship and actual and impending irreparable _____ [injury, loss, *and/or* damage] in that _____ [*state specific and definite facts showing the impending irreparable injury, loss, and/or damage*].

15. Plaintiff has no adequate or speedy remedy at law for the conduct of defendants described above, because _____ [*explain*]. This action for injunctive relief is plaintiff's only means of securing prospective relief.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For a preliminary injunction ordering defendants, and their officers, agents, employees, successors, and attorneys, and all those in active concert or participation with defendants, to refrain immediately and pending the final hearing and resolution of this action from _____ [*describe conduct to be enjoined*];

2. For a permanent injunction permanently enjoining and restraining defendants, and their officers, agents, employees, successors, and attorneys, and all those in active concert or participation with defendants, from _____ [*describe conduct to be enjoined*];

3. For compensatory damages, in an amount to be determined according to proof at trial;

[4. For punitive damages, in an amount to be determined according to proof at trial;]

5. For reasonable attorney's fees, pursuant to *42 U.S.C. § 1988*;

6. For costs of suit incurred in this action; and

7. For such other and further relief as the Court deems proper.

_____ [*date*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

DEMAND FOR JURY TRIAL

Plaintiff _____ [*name*] hereby demands a jury trial.

_____ [*date*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The form in [1], *above*, is for use in federal court, by a person who, on the basis of race, color, or national origin, has been excluded from participation in, denied the benefits of, and/or discriminated against in a program or activity receiving federal financial assistance [*42 U.S.C. § 2000d*]. The complaint seeks preliminary and permanent injunctive relief and damages.

Recovery of damages is only available in cases involving intentional violations of Title VI; in cases of unintentional violations, only declaratory and injunctive relief is available [*Guardians Ass'n v. Civil Service Comm'n (1983) 463 U.S. 582, 603, 103 S. Ct. 3221, 77 L. Ed. 2d 866]* . The complaint in [1], *above*, is drafted for use in a case involving intentional violations. Although the plaintiff must prove an intentional violation to recover damages, intent need not be pled in the complaint [*Fobbs v. Holy CrossHealth System Corp. (9th Cir. 1994) 29 F.3d 1439, 1447 , cert. denied, 513 U.S. 1127 (1995)]* .

In a case involving only unintentional violations, this form should be altered to remove the prayer for damages.

[3] Allegations

Paragraph 1 of the complaint in [1], *above*, is an introductory paragraph. The form of complaint goes on to allege all of the following:

- That this action arises under *42 U.S.C. § 2000d* (Title VI of the Civil Rights Act of 1964), and that therefore the court has jurisdiction under *28 U.S.C. §§ 1331* and *1343* (Paragraph 2).

- Plaintiff's name, capacity, residence, and United States citizenship (if applicable) (Paragraph 3).

- Defendant's capacity and residence, for purposes of establishing venue (Paragraph 4) [*see 28 U.S.C. § 1391(b)* (venue proper in district where a defendant resides, if all defendants are from the same state)].

- An optional paragraph (Optional Paragraph 5) identifying a county in which a substantial part of the events giving rise to the action occurred. This paragraph is for use in a case when the plaintiff wishes to establish venue in such county [*see 28 U.S.C. § 1391(b)* (venue proper in district where a substantial part of the events giving rise to the action occurred)].

- An optional allegation for use when agents are being sued (Optional Paragraph 6) [*see* Ch. 427, *Principal and Agent*].

- Defendants' operation of one or more programs or activities receiving federal financial assistance (Paragraph 7) [*see 42 U.S.C. § 2000d*].

- The protected characteristic of plaintiff that was the basis for the defendants' exclusion of plaintiff, denial of benefits to plaintiff, or discrimination against plaintiff (Paragraph 8). The protected characteristics under Title VI are race, color, and national origin [*42 U.S.C. § 2000d*].

- Defendants' exclusion of plaintiff from, denial to plaintiff of the benefits of, and/or unlawful discrimination against plaintiff under, the federally assisted program or activity (Paragraph 9) [*42 U.S.C.*

§ 2000d].

- That plaintiff's protected characteristic was the basis for the exclusion, denial of benefits, or discrimination (Paragraph 10) [*42 U.S.C. § 2000d*].

- An optional allegation that plaintiff demanded that defendants stop the unlawful and discriminatory conduct, that defendants refused, and that there is a need for prompt judicial action to protect plaintiff (Optional Paragraph 11).

- That as a direct and proximate result of defendants' actions, plaintiff suffered injury, loss, and/or damage, and a description of the injury, loss, and/or damage (Paragraph 12).

- An optional allegation that defendants acted knowingly, willfully, and maliciously, and with reckless and callous disregard for plaintiff's federally protected rights (Optional Paragraph 13). This optional allegation, if appropriate under the circumstances, would support recovery of punitive damages [*see Smith v. Wade (1983) 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632* (establishing standard for recovery of punitive damages in cases brought under *42 U.S.C. § 1983*); *see also* [4][d], *below*].

- That defendants' actions caused and will continue to cause plaintiff to suffer extreme hardship and actual and impending irreparable injury, loss, and/or damage, and an explanation of the impending irreparable injury, loss, and damage (Paragraph 14).

- That plaintiff has no adequate or speedy remedy at law (Paragraph 15).

[4] Prayer

[a] Injunctive Relief

The prayer in the complaint in [1], *above*, seeks preliminary and permanent injunctive relief.

[b] Damages

The complaint also seeks damages. The damages prayer should only be used in a case in which the plaintiff will attempt to prove that the violation of Title VI was intentional [*see Guardians Ass'n v. Civil Service Comm'n (1983) 463 U.S. 582, 603, 103 S. Ct. 3221, 77 L. Ed. 2d 866]* .

[c] Attorney's Fees

The prayer includes a prayer for attorney's fees. *42 U.S.C. § 1988(b)* specifically provides for the recovery of attorney's fees in Title VI cases.

[d] Punitive Damages

The law is not settled regarding the availability of punitive damages in actions to enforce Title VI [*see Davision v. Santa Barbara High School Dist. (C.D.Cal. 1998) 48 F. Supp. 2d 1225, 1233]* (punitive damages available in a Title VI case); *but see Moreno v. CONRAIL (6th Cir. 1996) 99 F.3d 782, 788-792* (en banc) (holding, in Rehabilitation Act case, that punitive damages are not available). The complaint in [1], *above*, includes an optional prayer for punitive damages. In a case where the violation of Title VI was motivated by evil motive or intent, or involved reckless or callous indifference to the plaintiff's federally protected rights [*see Smith v. Wade (1983) 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632* (establishing standard for recovery of punitive damages in cases brought under *42 U.S.C. § 1983*)], the plaintiff might be able to recover punitive damages. If the facts do not involve evil motive or intent, or

reckless or callous indifference to the plaintiff's federally protected rights, the optional punitive damages allegation (Optional Paragraph 13 of the form of complaint) and the optional prayer for punitive damages should not be used.

[5] Jury Demand

The complaint in [1], *above*, includes a demand for trial by jury. In a Title VI case in which damages are sought, the plaintiff will have a right to a jury trial [*U.S. Const., amend. VII*]. *Fed. R. Civ. Proc., Rule 38* governs demands for trial by jury. Under Rule 38, the demand for trial by jury may be served at any time after commencement of the action and not later than 10 days after service of the last pleading directed to the issue triable by jury. The rule provides further that "[s]uch demand may be indorsed upon a pleading of the party" [*Fed. R. Civ. Proc., Rule 38(b)*]. Therefore, the demand for trial by jury may be included in the complaint, as is the case in the form of complaint in [1], *above*.

[6] Cross References

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms of jurisdictional allegations for use in federal court, and for discussion and forms relating to removal of actions to federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For discussion and forms relating to the procedure and forms required for seeking a temporary restraining order, preliminary injunction, and permanent injunction, see Ch. 303, *Injunctions*

For alternative forms of prayers, see Ch. 420, *Prayers*

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11-112 California Forms of Pleading and Practice--Annotated § 112.52

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 112.52 Complaint in Federal Court for Preliminary Injunction, Permanent Injunction, and Damages, for Violation of the Rehabilitation Act of 1973 [29 U.S.C. § 794]

[1] FORM Complaint in Federal Court for Preliminary Injunction, Permanent Injunction, and Damages, for Violation of Rehabilitation Act of 1973 [29 U.S.C. § 794]

UNITED STATES DISTRICT COURT,
_____ DISTRICT OF CALIFORNIA

	)	
_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR PRELIMINARY AND PER-
_____ [*name*], Defendant(s).	)	MANENT INJUNCTION, AND FOR DAMAGES
	)	(*29 U.S.C. § 794*)
	)	
	)	DEMAND FOR JURY TRIAL

_____

Plaintiff alleges:

1. This is an action to recover damages against defendants for violation of *29 U.S.C. § 794* (The Rehabilitation Act of 1973), and to obtain a preliminary and permanent injunction to prevent defendants from further violating that statute.

2. This action arises under *29 U.S.C. § 794* (The Rehabilitation Act of 1973). The jurisdiction of this Court is predicated

on *28 U.S.C. §§ 1331* and *1343*.

3. Plaintiff, _____ [*name*], is, and at all times mentioned in this complaint was, a natural person, and a resident of _____ [*county*], California, [and a citizen of the United States].

4. Defendant _____ [*name*] is, and at all times mentioned in this complaint was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.*, a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), _____ (*county*), California]. Venue is therefore proper under *28 U.S.C. § 1391(b)*.

[5. A substantial part of the events giving rise to this action occurred in _____ (*county*), California. Venue is therefore proper under *28 U.S.C. § 1391(b)*.]

[6. (Plaintiff is informed and believes and thereon alleges that,) (A)t all times mentioned in this complaint, each defendant was the agent of the other(s), was acting within the course and scope of this agency, and all acts alleged to have been committed by any one of them was committed on behalf of every other defendant.]

7. _____ [*Allege facts showing that defendants operate a program or activity within the meaning of 29 U.S.C. § 794(b), and that defendants receive federal financial assistance*.]

8. _____ [*Allege facts describing plaintiff's disability*.]

9. Plaintiff is disabled within the meaning of *29 U.S.C. § 794* in that _____ [plaintiff's conditions described above are a (physical *and/or* mental) impairment that substantially limits one or more of plaintiff's major life activities, *and/or* plaintiff has a record of a (physical *and/or* mental) impairment that substantially limits one or more of plaintiff's major life activities, *and/or* plaintiff is regarded as having a (physical *and/or* mental) impairment that substantially limits one or more of plaintiff's major life activities].

10. Plaintiff is "otherwise qualified" within the meaning of *29 U.S.C. § 794* in that _____ [*explain how plaintiff meets the qualifications, or with reasonable accommodations could meet the qualifications, of the program or activity in which plaintiff was discriminated against*].

[11. Defendants failed to provide plaintiff with "reasonable accommodation" within the meaning of the Rehabilitation Act of 1973 in that _____ (*describe the reasonable accommodations at issue, plaintiff's requests for the reasonable accommodations, and defendants' failure to provide the reasonable accommodations*).]

12. _____ [*Allege facts showing that defendants excluded plaintiff from participation in, denied plaintiff the benefits of, and/or subjected plaintiff to discrimination under, a program or activity receiving federal financial assistance*.]

13. _____ [*Allege that plaintiff's disability was the sole basis for the exclusion, denial of benefits, or discrimination, e.g.*, (Plaintiff is informed and believes and thereon alleges that) (D)efendants, and each of them, excluded plaintiff from participation in, denied to plaintiff the benefits of, and discriminated against plaintiff in _____ (*identify the federally assisted program(s) or activity(ies)*) solely because of plaintiff's disability.]

[14. _____ (*Allege, if appropriate, plaintiff's demand that defendants stop the unlawful and discriminatory conduct, defendants' refusal, and the resulting necessity for prompt judicial action to protect plaintiff, e.g.*, On or about _____ [*date*], plaintiff demanded that defendants stop the unlawful, discriminatory

conduct described above, but defendants refused, and still refuse, to refrain from that conduct)].

15. As a direct and proximate result of defendants' actions, described above, plaintiff has suffered _____ [injury, loss, *and/or* damage] in that _____ [*describe injury, loss, and/or damage*].

[16. In acting as is alleged in this complaint, defendants acted knowingly, willfully, and maliciously, and with reckless and callous disregard for plaintiff's federally protected rights.]

17. As a result of defendants' actions, plaintiff has suffered and will continue to suffer extreme hardship and actual and impending irreparable _____ [injury, loss, *and/or* damage] in that _____ [*state specific and definite facts showing the impending irreparable injury, loss, and/or damage*].

18. Plaintiff has no adequate or speedy remedy at law for the conduct of defendants described above, because _____ [*explain*]. This action for injunctive relief is plaintiff's only means of securing prospective relief.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For a preliminary injunction ordering defendants, and their officers, agents, employees, successors, and attorneys, and all those in active concert or participation with defendants, to refrain immediately and pending the final hearing and resolution of this action from _____ [*describe conduct to be enjoined*];

2. For a permanent injunction permanently enjoining and restraining defendants, and their officers, agents, employees, successors, and attorneys, and all those in active concert or participation with defendants, from _____ [*describe conduct to be enjoined*];

3. For compensatory damages, in an amount to be determined according to proof at trial;

[4. For punitive damages, in an amount to be determined according to proof at trial;]

5. For reasonable attorney's fees, pursuant to *42 U.S.C. § 1988*;

6. For costs of suit incurred in this action; and

7. For such other and further relief as the Court deems proper.

_____ [*date*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

DEMAND FOR JURY TRIAL

Plaintiff _____ [*name*] hereby demands a jury trial.

_____ [*date*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The complaint in [1], *above*, is for use in federal court, by a person who, solely on the basis of disability, has been excluded from participation in, denied the benefits of, and/or discriminated against in a program or activity receiving federal financial assistance [*29 U.S.C. § 794*]. The form of complaint in [1], *above*, seeks preliminary and permanent injunctive relief, and damages.

The remedies available in a Rehabilitation Act case are the same as those recoverable in a case brought under Title VI of the Civil Rights Act of 1964 [*29 U.S.C. § 794a(a)(2)*]. Therefore, as in Title VI cases, in Rehabilitation Act cases recovery of damages is only available in cases involving intentional violations; in cases of unintentional violations, only declaratory and injunctive relief is available [*Guardians Ass'n v. Civil Service Comm'n (1983) 463 U.S. 582, 603, 103 S. Ct. 3221, 77 L. Ed. 2d 866 (Title VI case)]* . The complaint in [1], *above*, is drafted for use in a case involving intentional violations. Although the plaintiff must prove an intentional violation to recover damages, intent need not be pled in the complaint [*see Fobbs v. Holy Cross Health System Corp. (9th Cir. 1994) 29 F.3d 1439, 1447 , cert. denied, 513 U.S. 1127 (1995)]* .

In a case involving only unintentional violations, this form should be altered to remove the prayer for damages.

[3] Allegations

Paragraph 1 of the complaint in [1], *above*, is an introductory paragraph. The form of complaint goes on to allege all of the following:

- That this action arises under *29 U.S.C. § 794* (Rehabilitation Act of 1973), and that therefore the court has jurisdiction under *28 U.S.C. §§ 1331* and *1343* (Paragraph 2).

- Plaintiff's name, capacity, residence, and United States citizenship (if applicable) (Paragraph 3).

- Defendant's capacity and residence, for purposes of establishing venue (Paragraph 4) [*see 28 U.S.C. § 1391(b)* (venue proper in district where a defendant resides, if all defendants are from the same state)].

- An optional paragraph (Optional Paragraph 5) identifying a county in which a substantial part of the events giving rise to the action occurred. This paragraph is for use in a case where the plaintiff wishes to establish venue in such county [*see 28 U.S.C. § 1391(b)* (venue proper in district where a substantial part

of the events giving rise to the action occurred)].

- An optional allegation for use when agents are being sued (Optional Paragraph 6) [*see* Ch. 427, *Principal and Agent*].

- Defendants' operation of a "program or activity," and defendants' receipt of federal financial assistance (Paragraph 7) [*see 29 U.S.C. § 794*]. The phrase "program or activity" is defined in *29 U.S.C. § 794(b)* to include certain kinds of entities [*see § 112.15[1][c][iii]*]. This paragraph of the complaint should show that defendants operate a program or activity that falls within that definition.

- A description of plaintiff's disability (Paragraph 8) [*29 U.S.C. § 794*].

- An allegation that plaintiff's condition amounts to a "disability" within the meaning of the Rehabilitation Act, using the defining language from the Act (Paragraph 9) [*29 U.S.C. § 705(20)(B)*].

- An allegation that plaintiff is "otherwise qualified" within the meaning of the Rehabilitation Act (Paragraph 10) [*29 U.S.C. § 794*].

- An optional allegation (Optional Paragraph 11) for use in cases in which it is alleged that defendants failed to provide plaintiff with requested reasonable accomodations. This paragraph describes the reasonable accomodations at issue, plaintiffs requests for the reasonable accomodations, and defendants' failure to provide the reasonable accomodations.

- Defendants' exclusion of plaintiff from, denial to plaintiff of the benefits of, and/or unlawful discrimination against plaintiff under, the federally assisted program or activity (Paragraph 12) [*29 U.S.C. § 794*].

- That plaintiff's disability was the sole basis for the exclusion, denial of benefits, or discrimination (Paragraph 13) [*29 U.S.C. § 794*].

- An optional allegation that plaintiff demanded that defendants stop the unlawful and discriminatory conduct, that defendants refused, and that there is a need for prompt judicial action to protect plaintiff (Optional Paragraph 14).

- That as a direct and proximate result of defendants' actions, plaintiff suffered injury, loss, and/or damage, and a description of the injury, loss, and/or damage (Paragraph 15).

- An optional allegation, that defendants acted knowingly, willfully, and maliciously, and with reckless and callous disregard for plaintiff's federally protected rights (Optional Paragraph 16). This optional allegation, if appropriate under the circumstances, would support recovery of punitive damages [*see Smith v. Wade (1983) 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632* (establishing standard for recovery of punitive damages in cases brought under *42 U.S.C. § 1983*); *see also* [4][d], *below*].

- That defendants' actions caused and will continue to cause plaintiff to suffer extreme hardship and actual and impending irreparable injury, loss, and/or damage, and an explanation of the impending irreparable injury, loss, and damage (Paragraph 17).

- That plaintiff has no adequate or speedy remedy at law (Paragraph 18).

[4] Prayer

[a] Injunctive Relief

The prayer in the complaint in [1], *above*, seeks preliminary and permanent injunctive relief.

[b] Damages

The complaint also seeks damages. The damages prayer should only be used in a case in which the plaintiff will attempt to prove that the violation of the Rehabilitation Act was intentional [*see Guardians Ass'n v. Civil Service Comm'n (1983) 463 U.S. 582, 603, 103 S. Ct. 3221, 77 L. Ed. 2d 866* (damages available for intentional violation of *Title VI); Kling v. County of Los Angeles (9th Cir. 1985) 769 F.2d 532, 534 , rev'd on other grounds, 474 U.S. 936, 106 S. Ct. 300, 88 L. Ed. 2d 277 (1985)* (damages available in Rehabilitation Act case)].

[c] Attorney's Fees

The prayer includes a prayer for attorney's fees under *42 U.S.C. § 1988(b)*.

[d] Punitive Damages

The law is not settled regarding the availability of punitive damages in actions to enforce § 504 of the Rehabilitation Act [*see Saylor v. Ridge (E.D.Pa. 1998) 989 F. Supp. 680, 690-691* (punitive damages available; citing several district court cases in accord); *Burns-Vidlak v. Chandler (D.Hawaii 1997) 980 F. Supp. 1144, 1152* (punitive damages available); *see also Pandazides v. Virginia Bd. of Educ. (4th Cir. 1994) 13 F.3d 823, 831-832* (holding that "a full panoply of legal remedies" is available under the Rehabilitation Act, and alluding to the standard for recovery of punitive damages); *but see Moreno v. CONRAIL (6th Cir. 1996) 99 F.3d 782, 788-792* (en banc) (punitive damages unavailable)]. The complaint in [1], *above*, includes an optional prayer for punitive damages. In a case where the violation of Title VI was motivated by evil motive or intent, or involved reckless or callous indifference to the plaintiff's federally protected rights [*see Smith v. Wade (1983) 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632* (establishing standard for recovery of punitive damages in cases brought under *42 U.S.C. § 1983*)], the plaintiff might be able to recover punitive damages. If the facts do not involve evil motive or intent, or reckless or callous indifference to the plaintiff's federally protected rights, the optional punitive damages allegation (Optional Paragraph 16 of the complaint) and the optional prayer for punitive damages should not be used.

[5] Jury Demand

The complaint in [1], *above*, includes a demand for trial by jury. In a case in which damages are sought, the plaintiff will have a right to a jury trial [*U.S. Const., amend. VII*]. *Fed. R. Civ. Proc., Rule 38* governs demands for trial by jury. Under Rule 38, the demand for trial by jury may be served at any time after commencement of the action and not later than 10 days after service of the last pleading directed to the issue triable by jury. The rule provides further that "[s]uch demand may be indorsed upon a pleading of the party" [*Fed. R. Civ. Proc., Rule 38(b)*]. Therefore, the demand for trial by jury may be included in the complaint, as is the case in the form in [1], *above*.

[6] Cross References

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms of jurisdictional allegations for use in federal court, and for discussion and forms relating to

removal of actions to federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For discussion and forms relating to the procedure and forms required for seeking a temporary restraining order, preliminary injunction, and permanent injunction, see Ch. 303, *Injunctions*

For alternative forms of prayers, see Ch. 420, *Prayers*

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 112 CIVIL RIGHTS: GOVERNMENT-FUNDED PROGRAMS AND ACTIVITIES
PART IV. FORMS

11-112 California Forms of Pleading and Practice--Annotated § 112.53

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 112.53 Complaint in Federal Court for Preliminary Injunction and Permanent Injunction for Violation of Age Discrimination Act of 1975 [42 U.S.C. §§ 6102, 6104]

[1] FORM Complaint in Federal Court for Preliminary Injunction and Permanent Injunction for Violation of the Age Discrimination Act of 1975 [42 U.S.C. §§ 6102, 6104]

UNITED STATES DISTRICT COURT,
_____ DISTRICT OF CALIFORNIA

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], Defendant(s).	)	COMPLAINT FOR PRELIMINARY AND PER-
	)	MANENT INJUNCTION
	)	(*42 U.S.C. §§ 6102, 6104*)

_____

Plaintiff alleges:

1. This is an action to obtain preliminary and permanent injunctive relief to prevent defendants from violating *42 U.S.C. § 6102* (The Age Discrimination Act of 1975).

2. This action arises under *42 U.S.C. §§ 6102* and *6104* (The Age Discrimination Act of 1975). The jurisdiction of this Court is predicated on *28 U.S.C. §§ 1331* and *1343*.

3. Plaintiff, _____ [*name*], is, and at all times mentioned in this complaint was, a natural person, and a resident of _____ [*county*], California, [and a citizen of the United States].

4. Defendant _____ [*name*] is, and at all times mentioned in this complaint was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.*, a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), _____ (*county*), California]. Venue is therefore proper under *28 U.S.C. § 1391(b)*.

[5. A substantial part of the events giving rise to this action occurred in _____ (*county*), California. Venue is therefore proper under *28 U.S.C. § 1391(b)*.]

[6. (Plaintiff is informed and believes and thereon alleges that,) (A)t all times mentioned in this complaint, each defendant was the agent of the other(s), was acting within the course and scope of this agency, and all acts alleged to have been committed by any one of them was committed on behalf of every other defendant.]

7. _____ [*Allege facts showing that defendants operate a program or activity within the meaning of 42 U.S.C. § 6107, and that defendants receive federal financial assistance*.]

8. Plaintiff was born on _____ [*date*].

9. _____ [*Allege facts showing that defendants excluded plaintiff from participation in, denied plaintiff the benefits of, and/or subjected plaintiff to discrimination under, a program or activity receiving federal financial assistance; include the dates on which all events occurred*.]

10. _____ [*Allege that plaintiff's age was the basis for the exclusion, denial of benefits, or discrimination, e.g.*, (Plaintiff is informed and believes and thereon alleges that) (D)efendants, and each of them, excluded plaintiff from participation in, denied to plaintiff the benefits of, and discriminated against plaintiff in _____ (*identify the federally assisted program(s) or activity(ies)*) because of plaintiff's age.]

[11. _____ (*Allege, if appropriate, plaintiff's demand that defendants stop the unlawful and discriminatory conduct, defendants' refusal, and the resulting necessity for prompt judicial action to protect plaintiff, e.g.*, On or about _____ [*date*], plaintiff demanded that defendants stop the unlawful, discriminatory conduct described above, but defendants refused, and still refuse, to refrain from that conduct)].

12. As a result of defendants' actions, plaintiff has suffered and will continue to suffer extreme hardship and actual and impending irreparable _____ [injury, loss, *and/or* damage] in that _____ [*state specific and definite facts showing the impending irreparable injury, loss, and/or damage*].

13. Plaintiff has no adequate or speedy remedy at law for the conduct of defendants described above, because _____ [*explain*]. This action for injunctive relief is plaintiff's only means of securing prospective relief.

14. Plaintiff has exhausted _____ [his *or* her] administrative remedies. _____ [*Explain how administrative remedies were exhausted*.]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For a preliminary injunction ordering defendants, and their officers, agents, employees, successors, and attorneys, and all those in active concert or participation with defendants, to refrain immediately and pending the final hearing and

resolution of this action from _____ [*describe conduct to be enjoined*];

2. For a permanent injunction permanently enjoining and restraining defendants, and their officers, agents, employees, successors, and attorneys, and all those in active concert or participation with defendants, from _____ [*describe conduct to be enjoined*];

3. For reasonable attorney's fees under *42 U.S.C. § 6104(e)(1)*;

4. For costs of suit incurred in this action; and

5. For such other and further relief as the Court deems proper.

_____ [*date*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The form in [1], *above*, is for use in federal court, by a person who, on the basis of age, has been excluded from participation in, denied the benefits of, and/or discriminated against in a program or activity receiving federal financial assistance [*42 U.S.C. §§ 6102, 6104*]. The complaint in [1], *above*, seeks preliminary and permanent injunctive relief.

[3] Allegations

Paragraph 1 of the form in [1], *above*, is an introductory paragraph. The form of complaint goes on to allege all of the following:

- That this action arises under *42 U.S.C. §§ 6102, 6104* (The Age Discrimination Act of 1975), and that therefore the court has jurisdiction under *28 U.S.C. §§ 1331* and *1343* (Paragraph 2).

- Plaintiff's name, capacity, residence, and United States citizenship (if applicable) (Paragraph 3).

- Defendant's capacity and residence, for purposes of establishing venue (Paragraph 4) [*see 28 U.S.C. § 1391(b)* (venue proper in district where a defendant resides, if all defendants are from the same state)].

- An optional paragraph (Optional Paragraph 5) identifying a county in which a substantial part of the events giving rise to the action occurred. This paragraph is for use in a case where the plaintiff wishes to establish venue in such county [*see 28 U.S.C. § 1391(b)* (venue proper in district where a substantial part of the events giving rise to the action occurred)].

- An optional allegation for use when agents are being sued (Optional Paragraph 6) [*see* Ch. 427, *Principal and Agent*].

- Defendants' operation of a "program or activity," and defendants' receipt of federal financial assistance (Paragraph 7) [*see 42 U.S.C. § 6107*]. The phrase "program or activity" is defined in *42 U.S.C. § 6107* to include certain kinds of entities [*see § 112.17[3]*]. This paragraph of the complaint should show that defendants operate a program or activity that falls within that definition.

- Plaintiff's birth date (Paragraph 8). This is necessary to establish plaintiff's age at the time of each of the events alleged in the complaint.

- Defendants' exclusion of plaintiff from, denial to plaintiff of the benefits of, and/or unlawful discrimination against plaintiff under, the federally assisted program or activity (Paragraph 9) [*42 U.S.C. § 6102*]. The dates of all events should be included to establish plaintiff's age at the time of each event.

- That plaintiff's age was the basis for the exclusion, denial of benefits, or discrimination (Paragraph 10) [*42 U.S.C. § 6102*].

- An optional allegation that plaintiff demanded that defendants stop the unlawful and discriminatory conduct, that defendants refused, and that there is a need for prompt judicial action to protect plaintiff (Optional Paragraph 11).

- That defendants' actions caused and will continue to cause plaintiff to suffer extreme hardship and actual and impending irreparable injury, loss, and/or damage, and an explanation of the impending irreparable injury, loss, and damage (Paragraph 12).

- That plaintiff has no adequate or speedy remedy at law (Paragraph 13).

- An allegation that plaintiff exhausted his or her administrative remedies (Paragraph 14). The complaint should set forth facts explaining how plaintiff's administrative remedies were exhausted. Exhaustion of administrative remedies can take one of two forms under the Age Discrimination Act: (1) expiration of 180 days from the filing of an administrative complaint, during which time the federal department or agency makes no finding with regard to the complaint, or (2) a finding by the federal department or agency in favor of the recipient of the federal financial assistance, whichever occurs first [*42 U.S.C. § 6104(f)*].

[4] Prayer

[a] Injunctive Relief

The prayer in the complaint in [1], *above*, seeks preliminary and permanent injunctive relief.

[b] Damages

Damages are not recoverable under the Age Discrimination Act [*see 42 U.S.C. 6104* (providing only for action in federal district court to enjoin violation of Act)].

[c] Attorney's Fees

The prayer includes a prayer for attorney's fees under *42 U.S.C. § 6104(e)(1)*, which specifically provides for recovery of attorney's fees in an action for injunctive relief under the Age Discrimination Act.

[5] Cross References

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms of jurisdictional allegations for use in federal court, and for discussion and forms relating to removal of actions to federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For discussion and forms relating to the procedure and forms required for seeking a temporary restraining order, preliminary injunction, and permanent injunction, see Ch. 303, *Injunctions*

For alternative forms of prayers, see Ch. 420, *Prayers*

California Forms of Pleading and Practice--Annotated

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 113 CIVIL RIGHTS: THE POST-CIVIL WAR CIVIL RIGHTS STATUTES

11-113 California Forms of Pleading and Practice--Annotated 113.syn

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§ 113.syn Synopsis to Chapter 113: CIVIL RIGHTS: THE POST-CIVIL WAR CIVIL RIGHTS STATUTES

§ 113.01 Scope of Chapter

§ 113.02 Cross References

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§ 113.10 Governing Statutes

§ 113.11 Nature of Post-Civil War Civil Rights Statutes

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[2] Enforcement of Fourteenth Amendment of United States Constitution: 42 U.S.C. §§ 1983, 1985, and 1986

[3] Federal Law Governs; Recovery of Fees: 42 U.S.C. § 1988

§ 113.12 Equal Rights Under Law: 42 U.S.C. § 1981

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[a] Equality of Rights

[b] "Make and Enforce Contracts" Defined

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[2] Prohibited Discrimination

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[b] Alienage Discrimination

[3] Application to Contracts

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§ 113.13 Property Rights of Citizens: 42 U.S.C. § 1982

§ 113.14 Civil Action for Deprivation of Rights: 42 U.S.C. § 1983

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[b] Officials in Personal Capacity

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[iii] Personal Immunity Defenses

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[iv] Civil Action Prohibited Against Peace Officer When Criminal Charges Pending

[v] Statute Tolled by "Discovery Rule"

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[d] Continuing Violation

[10] Survival of Actions

[11] Defenses

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[b] Qualified Immunity

[i] Conduct to Which Qualified Immunity Applies

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[c] "Good Faith" and State-Law Immunities Not Defenses

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[12] Exhaustion of State Remedies Not Required

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§ 113.15 Conspiracy to Interfere with Rights: 42 U.S.C. § 1985

[1] Conspiracy to Deprive Persons of Equal Protection Rights

[a] Cause of Action for Damages; Elements

[b] Class-Based Invidiously Discriminatory Animus

[c] Intracorporate Conspiracy Exception Not Applicable

[2] Conspiracy to Prevent Officer From Performing Duties

[3] Conspiracy to Obstruct Justice Through Intimidation

[4] Conspiracy to Interfere With Voting

[5] Limitations Period

§ 113.16 Neglect to Prevent Conspiracy to Interfere with Rights: 42 U.S.C. § 1986

§ 113.17 Application of State Law and Attorney's Fees: 42 U.S.C. § 1988

[1] Applicability of Common Law

[2] Attorney's Fees

[a] Availability of Attorney's Fees

[i] Court Has Discretion

[ii] Purpose of Statute

[iii] Judicial Officer Not Liable for Fees

[iv] "Merit Fees" and "Fees on Fees"

[v] Fees on Appeal

[vi] Interest on Fees

[vii] Consideration of Fees Appropriate Only in Post-trial Proceeding

[viii] Statute Controls Only What Losing Defendant Must Pay

[ix] Fees in Cases Litigated in State Court

[b] Prevailing Party

[i] Plaintiff

[ii] Defendant

[c] Amount of Award

[i] Determination of Lodestar

[ii] Adjustment of Lodestar

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[5] Jury Demand

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[2] Use of Form

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[4] Prayer

[5] Jury Demand

[6] Cross References

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Chapter 113 CIVIL RIGHTS: THE POST-CIVIL WAR CIVIL RIGHTS STATUTES
PART I. SCOPE

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§ 113.01 Scope of Chapter

This chapter discusses deprivation of civil rights under the federal post-Civil War statutes, *42 U.S.C. §§ 1981*, *1982*, *1983*, *1985*, *1986*, and *1988*. This chapter reviews each of those statutes, and discusses the elements of causes of action under them.

This chapter contains the following forms:

- Complaint for Damages and Injunctive Relief for Deprivation of Rights Under Color of State Law Pursuant to *42 U.S.C. § 1983*--General Form [*§ 113.50*];

- Complaint for Damages and Injunctive Relief for Deprivation of Rights Under Color of State Law Pursuant to *42 U.S.C. § 1983*--Unlawful Search and Seizure [*§ 113.51*]; and

- Complaint for Damages for Deprivation of Rights Under Color of State Law Pursuant to *42 U.S.C. § 1983*--Claim For Damages Against Local Government Entity [*§ 113.52*].

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11-113 California Forms of Pleading and Practice--Annotated § 113.02

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§ 113.02 Cross References

- For a comprehensive procedural guide that chronologically outlines the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions* .

- For discussion and forms relating to restraint of the right of assembly, see Ch. 59, *Assemblies, Meetings, and Demonstrations* .

- For discussion and forms relating to the rights of members of associations not to be expelled on the basis of status, see Ch. 61, *Associations and Clubs* .

- For discussion and forms relating to discrimination in government-funded programs and activities, see Ch. 112, *Civil Rights: Government-Funded Programs and Activities* .

- For discussion and forms relating to the civil rights of prisoners, see Ch. 114, *Civil Rights: Prisoners' Rights* .

- For discussion and forms relating to employment discrimination, see Ch. 115, *Civil Rights:*

Employment Discrimination .

- For discussion and forms relating to discrimination in business establishments, see Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

- For discussion and forms relating to housing discrimination, see Ch. 117, *Civil Rights: Housing Discrimination* .

- For discussion and forms relating to interference with civil rights by threats, intimidation, coercion, or violence, see Ch. 117A, *Civil Rights: Interference with Civil Rights by Threats, Intimidation, Coercion, or Violence* .

- For discussion and forms of jurisdictional allegations for use in federal court, and for discussion and forms relating to removal of actions to federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

- For discussion and forms relating to temporary restraining orders, preliminary injunctions, and permanent injunctions, see Ch. 303, *Injunctions* .

- For discussion and forms relating to rights of membership in hospital medical staffs and professional organizations, see Ch. 416, *Physicians: Membership on Hospital Staffs or in Professional Organizations* .

- For discussion and forms relating to civil rights actions arising from illegal searches and seizures, see *Ch. 429, Privacy, § 429.310* et seq.

- For discussion and forms relating to actions against public entities and officers based on state law, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

- For discussion of deprivation of civil rights during an administrative investigation, see Ch. 471, *Investigations by Public Agencies* .

- For discussion relating to access for disabled persons to places of public amusement, see Ch. 547, *Theaters, Shows, and Amusement Places* .

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[Reserved]

§§ 113.03[Reserved]

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§ 113.10 Governing Statutes

The post-Civil War statutes are contained in *42 U.S.C. §§ 1981*, *1982*, *1983*, *1985*, *1986*, and *1988*.

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§ 113.11 Nature of Post-Civil War Civil Rights Statutes

[1] Eradication of Slavery: 42 U.S.C. §§ 1981 and 1982

The post-Civil War civil rights statutes encompass a wide variety of civil rights protections. *42 U.S.C. §§ 1981* and *1982* are recodifications of *section 1 of the Civil* Rights Act of 1866, which was enacted to implement the objective of *U.S. Const., amend. XIII*, to eradicate slavery and its incidents [*see Tillman v. Wheaton-Haven Rec. Ass'n (1973) 410 U.S. 431, 439-440, 93 S. Ct. 1090, 35 L. Ed. 2d 403]* . *42 U.S.C. § 1981* does all of the following:

- It prohibits discrimination in the making and enforcement of contracts;
- It provides for equal rights for all to sue, be parties, and give evidence; and
- It provides for full and equal benefit of all laws and proceedings for the security of persons and property for all persons.

42 U.S.C. § 1982 prohibits discrimination in the conveyance of real and personal property.

For additional coverage of *42 U.S.C. §§ 1981* and *1982*, see*§§ 113.12* and *113.13*.

[2] Enforcement of Fourteenth Amendment of United States Constitution: 42 U.S.C. §§ 1983, 1985, and 1986

42 U.S.C. §§ 1983, *1985*, and *1986* are recodifications of the Civil Rights Act of 1871, which was enacted to enforce *U.S. Const., amend. XIV*. *42 U.S.C. § 1983* prohibits any action under color of state law that subjects an individual to the deprivation of any rights, privileges, or immunities secured by the federal Constitution and laws. *42 U.S.C. § 1985* creates an action for damages resulting from a conspiracy to interfere with civil rights. *42 U.S.C. § 1986* creates a cause of action for damages resulting from a conspiracy prohibited by *42 U.S.C. § 1985*, against one who neglected or refused to prevent the injury.

For additional coverage of *42 U.S.C. §§ 1983*, *1985*, and *1986*, see*§§ 113.14*, *113.15*, and *113.16*, respectively.

[3] Federal Law Governs; Recovery of Fees: 42 U.S.C. § 1988

42 U.S.C. § 1988 provides that in civil rights actions federal law governs; however, when federal law is not suitable, or is not adapted to the object, or is deficient, then the common law, as modified by state law, applies, so long as it is not inconsistent with federal law [*42 U.S.C. § 1988(a)*].

42 U.S.C. § 1988 also provides for recovery of attorney's fees in certain civil rights actions, including those brought under *42 U.S.C. §§ 1981*, *1982*, *1983*, *1985*, and *1986* [*42 U.S.C. § 1988(b)*]. *42 U.S.C. § 1988* also provides for recovery of expert fees in actions brought under *42 U.S.C. § 1981* [*42 U.S.C. § 1988(c)*].

For additional coverage of *42 U.S.C. § 1988*, see*§ 113.17*.

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§ 113.12 Equal Rights Under Law: 42 U.S.C. § 1981

[1] Introduction

[a] Equality of Rights

All persons within the jurisdiction of the United States have the same right in every state and territory to make and enforce contracts [*see* [b], *below*], to sue, to be parties, to give evidence, and to receive the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens; all persons within the jurisdiction of United States are subject to the same punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other [*42 U.S.C. § 1981(a)*]. The phrase "all persons within the jurisdiction of the United States" was specifically intended to encompass aliens [*Sagana v. Tenorio (9th Cir. 2004) 384 F.3d 731, 737-738]* .

[b] "Make and Enforce Contracts" Defined

The term "make and enforce contracts" includes the making, performance, modification, and termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship [*42 U.S.C. § 1981(b)*]. However, the loss of an opportunity to enter into a contract that is void, i.e., one that neither party could enforce, or one that is voidable by either party, is not cognizable under § 1981 [*Addisu v. Fred Meyer, Inc. (9th Cir. 2000) 198 F.3d*

1130, 1137] .

[c] Protection Is Against Impairment by Nongovernmental Discrimination and by Impairment Under Color of State Law

The rights protected by *42 U.S.C. § 1981* are protected against impairment by nongovernmental discrimination as well as impairment under color of state law [*42 U.S.C. § 1981(c)*].

To be actionable under § 1981, the discrimination must be purposeful [*General Building Contractors Ass'n v. Pennsylvania (1982) 458 U.S. 375, 387-388, 102 S. Ct. 3141, 73 L. Ed. 2d 835]* .

42 U.S.C. § 1981 applies to discrimination in employment contracts [*Johnson v. Railway Express Agency (1975) 421 U.S. 454, 459-460, 95 S. Ct. 1716, 44 L. Ed. 2d 295]* . For detailed discussion of § 1981 as it relates to employment discrimination, see Ch. 115, *Civil Rights: Employment Discrimination* .

The amendment of *42 U.S.C. § 1981* to add subsection (c) in 1991 created a cause of action against municipalities [*Federation of African-American Contractors v. City of Oakland (9th Cir. 1996) 96 F.3d 1204, 1210-1214*], but did not create an implied right of action against arms of the state under Section 1981 [*Pittman v. Oregon (9th Cir. 2007) 509 F.3d 1065, 1067-1074*].

[d] Standing Under § 1981

A corporation has standing to bring a *42 U.S.C. § 1981* claim against a defendant that employs the corporation as a contractor, but imposes ethnic discrimination against the corporation's employees [*Bains LLC v. ARCO Prods. Co. (9th Cir. 2005) 405 F.3d 764, 770]* . Thus, if a corporation either suffers discrimination harm cognizable under § 1981, or has acquired an imputed racial identity, it is sufficiently within the statutory zone of interest to have prudential standing to bring an action under § 1981 [*Thinket Ink Information Resources, Inc. v. Sun Microsystems, Inc. (9th Cir. 2004) 368 F.3d 1053, 1057-1060]* .

[2] Prohibited Discrimination

[a] Racial Discrimination

Although *42 U.S.C. § 1981* does not use the word "race," it has been construed to forbid all racial discrimination in the making of private and public contracts [*Saint Francis College v. Al-Khazraji (1987) 481 U.S. 604, 609, 107 S. Ct. 2022, 95 L. Ed. 2d 582]* .

42 U.S.C. § 1981 is limited in its application to racial discrimination. Section 1981 does not proscribe discrimination on the basis of sex [*Jones v. Bechtel (9th Cir. 1986) 788 F.2d 571, 574* ; *League of Academic Women v. Regents of Univ. of Cal. (N.D. Cal. 1972) 343 F. Supp. 636, 638-639]* , or on the basis of religion [*see* *Runyon v. McCrary (1976) 427 U.S. 160, 167, 96 S. Ct. 2586, 49 L. Ed. 2d 415]* .

The racial discrimination prohibited by *42 U.S.C. § 1981* is discrimination on the basis of ancestry or ethnic characteristics, whether or not the discrimination would be considered racial in terms of modern scientific theory [*Saint Francis College v. Al-Khazraji (1987) 481 U.S. 604, 613, 107 S. Ct. 2022, 95 L. Ed. 2d 582]* . For example, if an Arab plaintiff can prove that he or she was subjected to intentional discrimination based on the fact that he or she was born an Arab, rather than solely on the place or nation of the plaintiff's origin, or religion, the plaintiff will have stated an action under § 1981 [*Saint Francis College v. Al-Khazraji (1987) 481 U.S. 604, 613, 107 S. Ct. 2022, 95 L. Ed. 2d 582]* .

42 U.S.C. § 1981 does not prohibit racial discrimination against only nonwhite persons. It explicitly applies to "all

persons," and its use of the phrase "as is enjoyed by white citizens" simply emphasizes the racial character of the rights being protected. The broad terms of § 1981 prohibit discrimination in the making or enforcement of contracts against, or in favor of, any race [*McDonald v. Santa Fe Trail Transp. Co. (1976) 427 U.S. 273, 295-296, 96 S. Ct. 2574, 49 L. Ed. 2d 493* ; *see* *Jett v. Dallas Ind. School Dist. (1989) 491 U.S. 701, 731-738, 109 S. Ct. 2702, 105 L. Ed. 2d 598* (Section 1981 action by high school teacher and coach against school district and officials alleging that his removal from athletic director and head coaching positions was motivated by fact that he was white) (plurality opinion)].

42 U.S.C. § 1981 supports an action by all of the following:

- A white plaintiff discriminated against because he or she is in an interracial marriage [*Parr v. Woodmen of the World Life Ins. Co. (11th Cir. 1986) 791 F.2d 888, 890]* ;

- An action by a white plaintiff retaliated against for advocating the rights of blacks [*Liotta v. National Forge Co. (W.D. Pa. 1979) 473 F. Supp. 1139, 1145-1146 , modified, 629 F.2d 903 (3d Cir. 1980) , cert. denied, 451 U.S. 970 (1981)]* ; and

- An action by a white plaintiff terminated from a job for associating with a black person [*Weaver v. Gross (D.D.C. 1985) 605 F. Supp. 210, 212-213]* .

The protections of *42 U.S.C. § 1981* extend to aliens as well as citizens [*Graham v. Richardson (1971) 403 U.S. 365, 377-378, 91 S. Ct. 1848, 29 L. Ed. 2d 534]* .

To evaluate claims of intentional discrimination under § 1981 when intent is impossible to prove, courts apply a burden-shifting analysis [*see* *McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792, 802-803, 93 S. Ct. 1817, 36 L. Ed. 2d 668* ; for discussion of the *McDonnell Douglas* test in employment discrimination context, see Ch. 115, *Civil Rights: Employment Discrimination*]. Under *McDonnell Douglas* as adapted to a claim of racial discrimination under § 1981, if the plaintiff satisfies the initial burden of establishing a prima facie case of racial discrimination, the burden shifts to the defendant to prove it had a legitimate non-discriminatory reason for the adverse action [*Lindsey v. SLT Los Angeles, LLC (9th Cir. 2006) 447 F.3d 1138, 1144-1145* ; *see* *McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668]* . If the defendant meets that burden, the plaintiff must prove that the defendant's articulated reason was merely a pretext for intentional discrimination [*Tex. Dep't of Cmty. Affairs v. Burdine (1981) 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207* ; *Lindsey v. SLT Los Angeles, LLC (9th Cir. 2006) 447 F.3d 1138, 1144-1145]* . The proof required to establish a prima facie case is minimal and does not even need to rise to the level of a preponderance of the evidence [*Lindsey v. SLT Los Angeles, LLC (9th Cir. 2006) 447 F.3d 1138, 1144* ; Chuang v. University of Cal. Davis (9th Cir. 2000) *225 F.3d 1115, 1124 , quoting Wallis v. J.R. Simplot Co. (9th Cir. 1994) 26 F.3d 885, 889]* .

Adapting the *McDonnell Douglas* test to claims of racial discrimination under *42 U.S.C. § 1981*, the elements to prove a prima facie case of discrimination are as follows [*Lindsey v. SLT Los Angeles, LLC (9th Cir. 2006) 447 F.3d 1138, 1145]* :

- The plaintiff belongs to a protected class.

- The plaintiff attempted to contract for services.

- Plaintiff was denied the right to contract for those services.

The Seventh Circuit also requires that the services remained available to similarly situated individuals who were not members of the plaintiff's protected class [*Bratton v. Roadway Package Sys., Inc. (7th Cir. 1996) 77 F.3d 168, 176]* . However, the Sixth Circuit requires that plaintiff was deprived of services while similarly situated persons outside the

protected class were not, and/or plaintiff received services in a markedly hostile manner and in a manner that a reasonable person would find objectively discriminatory [*Christian v. Wal-Mart Stores, Inc. (6th Cir. 2001) 252 F.3d 862, 872]* . The Ninth Circuit has not yet decided whether to adopt the Sixth Circuit's modification of this element of a prima facie case under § 1981 [*Lindsey v. SLT Los Angeles, LLC (9th Cir. 2006) 447 F.3d 1138, 1145* (plaintiff offered clear evidence that similarly situated group of different protected class was offered contractual services denied to plaintiff)].

[b] Alienage Discrimination

42 U.S.C. § 1981 protects against discrimination on the basis of alienage [*Sagana v. Tenorio (9th Cir. 2004) 384 F.3d 731, 737-740* ; *see Graham v. Richardson (1971) 403 U.S. 365, 377, 91 S. Ct. 1848, 29 L. Ed. 2d 534* ; *Takahashi v. Fish & Game Comm'n (1948) 334 U.S. 410, 419-420, 68 S. Ct. 1138, 92 L. Ed. 1478* (*42 U.S.C. § 1981* and *Fourteenth Amendment* on which it rests in part protect all persons against state legislation bearing unequally on them either because of alienage or color); *Yick Wo v. Hopkins (1886) 118 U.S. 356, 369, 6 S. Ct. 1064, 30 L. Ed. 220]* .

[3] Application to Contracts

42 U.S.C. § 1981 prohibits racial discrimination in the making and enforcement of both private and public contracts [*see Runyon v. McCrary (1976) 427 U.S. 160, 168, 96 S. Ct. 2586, 49 L. Ed. 2d 415* ; *see also 42 U.S.C. § 1981(c)* (rights under § 1981 are protected against both impairment by nongovernmental entities and impairment under color of state law)].

In addition to employment contracts, § 1981 has been applied in the context of contracts with private schools to provide children with an education [*see Runyon v. McCrary (1976) 427 U.S. 160, 175-179, 96 S. Ct. 2586, 49 L. Ed. 2d 415]* , and housing contracts that include membership in a local swimming club [*see Tillman v. Wheaton-Haven Rec. Ass'n (1973) 410 U.S. 431, 439-440, 93 S. Ct. 1090, 35 L. Ed. 2d 403* (complaint alleged violation of both *42 U.S.C. §§ 1981* and *1982*; although case focused on § 1982, Court stressed historical similarity between §§ 1981 and 1982)]. Neither of these cases presented a question of the right of a truly private social organization (an organization not open to the public) to limit its membership or contractual arrangements on racial or other grounds. The contracts in these cases were private only in the sense that they were between private persons and did not involve the direct receipt of public funds [*see Runyon v. McCrary (1976) 427 U.S. 160, 167-168, 172-173 n.10, 96 S. Ct. 2586, 49 L. Ed. 2d 415* (issue of whether private establishment exemption of *42 U.S.C. § 2000a(e)* operates to narrow § 1981 was not considered; if applicable at all, that exemption comes into play only if establishment is not open to public)].

42 U.S.C. § 1981 was also applied in an action on a contract to provide cleanup services at a university construction project. In that case, the fact that the plaintiff was an unlicensed contractor precluded by *Bus. & Prof. Code § 7031,* which bars unlicensed contractors from bringing suit to recover compensation for work requiring a license, from pursuing a claim that he was not properly compensated as were caucasian contractors because that claim directly implicated the statutory proscription against recovery of compensation by unlicensed contractors, but his claims of racial discrimination in the form of derogatory comments on the jobsite and retaliation for complaining about the comments were external to the contract. Further, nothing in § 7031 or § 1981 supported the notion that the defendant was free to discriminate racially against the contractor during performance of the contract simply because he was unlicensed, and his claims that he was treated differently on the basis of race, came within the scope of the protection Congress provided in § 1981 [*Holland v. Morse Diesel Internat., Inc. (2001) 86 Cal. App. 4th 1443, 104 Cal. Rptr. 2d 239]* .

[4] Remedies

An individual who establishes a cause of action under *42 U.S.C. § 1981* is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages [*Johnson v. Railway Express Agency*

(1975) 421 U.S. 454, 460, 95 S. Ct. 1716, 44 L. Ed. 2d 295] . Damages for emotional distress are available [*De Malherbe v. International Union of Elevator Constructors (N.D. Cal. 1977) 438 F. Supp. 1121, 1130]* .

When *42 U.S.C. § 1981* is violated by a state actor, the action provided by *42 U.S.C. § 1983* for the deprivation of rights, privileges, or immunities secured by the Constitution and laws of the United States provides the exclusive federal damages remedy [*Jett v. Dallas Ind. School Dist. (1989) 491 U.S. 701, 735, 109 S. Ct. 2702, 105 L. Ed. 2d 598* (plurality opinion)]. Thus, to prevail on a claim for damages against a local government body, a plaintiff must show that the violation of his or her right to make contracts protected by § 1981 was caused by a governmental custom or policy [*Jett v. Dallas Ind. School Dist. (1989) 491 U.S. 701, 735-736, 109 S. Ct. 2702, 105 L. Ed. 2d 598* (plurality opinion)].

PRACTICE TIP:

Section 1981 vs. Title VII. When available, § 1981 is preferable to Title VII of the federal Civil Rights Act of 1964 (regarding unlawful employment practices) [*42 U.S.C. § 2000e et seq.*; *see Ch. 115, Civil Rights: Employment Discrimination, § 115.21[1]*] because it does not have a cap on general and punitive damages of $300,000 [*see Pavon v. Swift Transp. Co., Inc. (9th Cir. 1999) 192 F.3d 902, 910-911* (plaintiff who brought claims under Title VII and *42 U.S.C. § 1981* was entitled to recover damages in excess of $300,000 under the § 1981 claim)]. However, § 1981 has certain limitations if you are attempting to sue the state [*see Jett v. Dallas Ind. School Dist. (1989) 491 U.S. 701, 109 S. Ct. 2702, 105 L. Ed. 2d 598]* . Further, punitive damages are not available against a public entity and it is rare that a jury will award over $300,000 in general damages. Nevertheless, in race-based discrimination cases, the § 1981 cause of action should be pursued in addition to, or instead of, the Title VII remedy. There is no requirement for exhausting administrative remedies in bringing a § 1981 cause of action. In addition, the $300,000 cap on general/punitive damages that exists in Title VII does not exist under the Fair Employment and Housing Act [*see Gov. Code § 12960 et seq.*]. *By John H. Scott*

[5] Limitations Period

42 U.S.C. § 1981, itself, does not include a limitations period. Although § 1981 emphasizes the right to contract, it encompasses much more than contractual rights. It includes personal rights to sue and to testify as well as equal rights under all laws. A violation of § 1981 is a fundamental injury to the individual rights of a person. Thus, until the Civil Rights Act of 1991, the state statute of limitations governing personal injury actions applied to actions under *42 U.S.C. § 1981* [*Goodman v. Lukens Steel Co. (1987) 482 U.S. 656, 660-662, 107 S. Ct. 2617, 96 L. Ed. 2d 572]* .

Since the passage of the Civil Rights Act of 1991, the statute of limitations for a cause of action brought under *42 U.S.C. § 1981*, as amended by the Civil Rights Act of 1991, is the four-year statute of limitations set forth in *28 U.S.C. § 1658(a)* rather than by the personal injury statute of limitations of the forum state [*Jones v. R.R. Donnelley & Sons Co. (2004) 541 U.S. 369, 124 S. Ct. 1836, 1841-1846, 158 L. Ed. 2d 645* ; *Thinket Ink Information Resources, Inc. v. Sun Microsystems, Inc. (9th Cir. 2004) 368 F.3d 1053, 1060-1061]* .

Federal law governs when the claim accrues and the limitations period begins to run [*Fobbs v. Holy Cross Health System Corp. (9th Cir. 1994) 29 F.3d 1439, 1444 , cert. denied, 513 U.S. 1127 (1995)* ; *Chung v. Pomona Valley Community Hosp. (9th Cir. 1982) 667 F.2d 788, 791]* .

When a § 1981 claim is based on an allegedly discriminatory decision, the limitations period begins to run at the time that the defendant notifies the plaintiff of the decision [*Fobbs v. Holy Cross Health System Corp. (9th Cir. 1994) 29 F.3d 1439, 1444 , cert. denied, 513 U.S. 1127 (1995)]* .

State rules regarding tolling of limitations periods apply to claims under *42 U.S.C. § 1981*, unless the application of the tolling doctrine would be inconsistent with federal policy underlying the cause of action [*see Fobbs v. Holy Cross Health System Corp. (9th Cir. 1994) 29 F.3d 1439, 1444-1445 , cert. denied, 513 U.S. 1127 (1995)* (California's

equitable tolling doctrine could not apply, in part because plaintiff failed to show that application of doctrine would be consistent with federal policy)].

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 113 CIVIL RIGHTS: THE POST-CIVIL WAR CIVIL RIGHTS STATUTES
PART II. LEGAL BACKGROUND

11-113 California Forms of Pleading and Practice--Annotated § 113.13

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§ 113.13 Property Rights of Citizens: 42 U.S.C. § 1982

42 U.S.C. § 1982 provides that "[a]ll citizens of the United States have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property" [*42 U.S.C. § 1982*]. Section 1982 bars all racial discrimination, private as well as public, in the sale or rental of property [*City of Memphis v. Greene (1981) 451 U.S. 100, 120-122, 101 S. Ct. 1584, 67 L. Ed. 2d 769* ; *Jones v. Alfred H. Mayer Co. (1968) 392 U.S. 409, 413, 88 S. Ct. 2186, 20 L. Ed. 2d 1189]* .

A private right of action is available to enforce § 1982 [*see, e.g., Johnson v. Hale (9th Cir. 1994) 13 F.3d 1351, 1354* (compensatory damages, plus costs and attorney's fees for refusal to rent property to African-American men); *Phiffer v. Proud Parrot Motor Hotel (9th Cir. 1980) 648 F.2d 548, 552-553* (damages for lost wages, emotional distress, and humiliation, as well as punitive damages, for refusal to rent office space to black man)].

Punitive damages are available for a violation of § 1982, if the defendant acted "with such conscious and deliberate disregard of the consequences of his actions to others that his conduct is wanton" [*Phiffer v. Proud Parrot Motor Hotel (9th Cir. 1980) 648 F.2d 548, 553]* .

An action under *42 U.S.C. § 1982* may be brought in state court [*see Sullivan v. Little Hunting Park (1969) 396 U.S.*

229, 239-240, 90 S. Ct. 400, 24 L. Ed. 2d 386] .

For discussion of *42 U.S.C. § 1982* in the context of housing discrimination, see Ch. 117, *Civil Rights: Housing Discrimination* .

PRACTICE TIP:

Housing Discrimination. Practitioners should be mindful of organizations that exist to make referrals and/or send out "testers" to assist in proving these types of cases. One should also be mindful of parallel state remedies that can be brought in state court or as a pendent cause of action in federal court. *By John H. Scott*

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11-113 California Forms of Pleading and Practice--Annotated § 113.14

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§ 113.14 Civil Action for Deprivation of Rights: 42 U.S.C. § 1983

[1] Introduction

[a] Statute Provides Private Right of Action

Pursuant to *42 U.S.C. § 1983*, every person who, under color of any statute, ordinance, regulation, custom, or usage of a state or territory or the District of Columbia, subjects, or causes to be subjected, a citizen of the United States or other person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws is liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

To seek redress through § 1983, a plaintiff must assert the violation of a federal right, not merely a violation of federal law [*Blessing v. Freestone (1997) 520 U.S. 329, 340, 117 S. Ct. 1353, 137 L. Ed. 2d 569* ; *San Lazaro Ass'n v. Connell (9th Cir. 2002) 278 F.3d 932, 941]* .

It is well established that, under appropriate circumstances, § 1983 provides a private right of action for violations of federal statutes [*Maine v. Thiboutot (1980) 448 U.S. 1, 4, 100 S. Ct. 2502, 65 L. Ed. 2d 555]* . However, § 1983 relief is available only if (1) the statute creates enforceable rights, and (2) Congress has not foreclosed enforcement in the

statute itself [*Wilder v. Virginia Hosp. Ass'n (1990) 496 U.S. 498, 508, 110 S. Ct. 2510, 110 L. Ed. 2d 455* ; *Groten v. California (9th Cir. 2001) 251 F.3d 844, 848]* . To sustain an action under § 1983, the plaintiff must demonstrate that a federal statute creates an individually enforceable right in the class of beneficiaries to which the plaintiff belongs [*City of Rancho Palos Verdes v. Abrams (2005) 544 U.S. 113, 125 S. Ct. 1453, 1458, 161 L. Ed. 2d 316]* . Even after this showing, there is only a rebuttable presumption that the right is enforceable under § 1983. The defendant may defeat the presumption by demonstrating that Congress did not intend that remedy for a newly created right [*City of Rancho Palos Verdes v. Abrams (2005) 544 U.S. 113, 125 S. Ct. 1453, 1458, 161 L. Ed. 2d 316* ; *Blessing v. Freestone (1997) 520 U.S. 329, 341, 117 S. Ct. 1353, 137 L. Ed. 2d 569* ; *see Smith v. Robinson (1984) 468 U.S. 992, 1012*]. Evidence of congressional intent may be found directly in the statute creating the right or inferred from the statute's creation of a comprehensive enforcement scheme incompatible with individual enforcement under § 1983 [*City of Rancho Palos Verdes v. Abrams (2005) 544 U.S. 113, 125 S. Ct. 1453, 1458, 161 L. Ed. 2d 316* ; *Blessing v. Freestone (1997) 520 U.S. 329, 341, 117 S. Ct. 1353, 137 L. Ed. 2d 569* ; *see Middlesex County Sewerage Authority v. National Sea Clammers Ass'n (1981) 453 U.S. 1, 19-20, 101 S. Ct. 2615, 69 L. Ed. 2d 435]* .

A statute creates a right enforceable under *42 U.S.C. § 1983* if all of the following are true [*Wilder v. Virginia Hosp. Ass'n (1990) 496 U.S. 498, 509, 110 S. Ct. 2510, 110 L. Ed. 2d 455* ; *see Groten v. California (9th Cir. 2001) 251 F.3d 844, 848* (*12 U.S.C. § 3351(a)*, providing for issuance of temporary appraiser licenses, creates right enforceable under § 1983); *Legal Services of Northern California v. Arnett (9th Cir. 1997) 114 F.3d 135, 138-141* (Older Americans Act of 1965 (OAA) [renamed as Community Service Senior Opportunities Act by P.L. 109-365 § 501], *42 U.S.C. § 3001 et seq.*, which established program of federal grants for state and community social services designed to assist needy older persons, created no rights enforceable under § 1983 by nonprofit legal services provider that lost bid to provide legal services to elderly with OAA funds)]:

- The statute was intended to benefit the plaintiffs;

- The statute imposes a binding obligation on the government unit rather than merely expressing a congressional preference for a certain kind of conduct; and

- The interest asserted by the plaintiff is not so vague or amorphous that it is beyond the competence of the judiciary to enforce.

PRACTICE TIP:

Overview of § 1983 Actions. For purposes of a historical perspective, "beginners" should read *Monroe v. Pape (1961) 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492* and *Monell v. Dep't of Soc. Servs. (1978) 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611* . These are both landmark cases that refer extensively to the Congressional record and the historical context in which the post-Civil War Civil Rights statutes were passed. Notably, before *Monroe v. Pape* the federal courts created major obstacles to the enforcement of the Constitution through § 1983. Since the expansion of civil rights litigation in the 1960s and 1970s, the United States Supreme Court has created and expanded the doctrine of "qualified immunity" [*see* [11][b], *below*] (together with the right to an interlocutory appeal) to significantly limit § 1983 actions. A rhetorical question should be posed: does the Constitution exist to protect the people from the government *or* the government from the people? *By John H. Scott*

PRACTICE TIP:

Traps for the Uninitiated. Section 1983 litigation has many potential traps for the uninitiated. States and state entities are entitled to *11th Amendment* immunity. Although cities and counties cannot assert qualified immunity as a defense [*see* [11][b], *below*], the doctrine of respondeat superior may not be relied on to establish municipal liability. Most § 1983 cases attempting to establish municipal (*Monell*) liability fail at the summary judgment stage. Defense counsel will often suggest to a jury that any verdict against their individual defendants is "coming out of their pocket"--notwithstanding the fact that

California law, in general, requires public entities to indemnify employees acting within the course and scope of their employment [*see Gov. Code § 825*]. These are all factors to carefully consider before taking the plunge into § 1983 litigation. *By John H. Scott*

[b] Plaintiff Must Allege That Defendant Acted Under "Color of State Law"

To state a claim under *42 U.S.C. § 1983*, a plaintiff must allege that the defendant acted under color of state law to deprive the plaintiff of a right secured by the federal Constitution or by federal law [*Stone v. City of Prescott (9th Cir. 1999) 173 F.3d 1172, 1174* , *cert. denied, 528 U.S. 870* ; *see Gomez v. Toledo (1980) 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572* ; *see also* [4], *below*].

For forms of complaint for damages and injunctive relief for deprivation of rights under color of state law pursuant to *42 U.S.C. § 1983*, see*§§ 113.50, 113.51*, and *113.52*.

[c] Plaintiff Must Show Causation

A *42 U.S.C. § 1983* plaintiff must show causation, that is, that the defendant's act or acts caused the injuries of which the plaintiff complains [*see Mt. Healthy City School Dist. Bd. of Educ. v. Doyle (1977) 429 U.S. 274, 285-286, 97 S. Ct. 568, 50 L. Ed. 2d 471* ; *Estate of Brooks v. United States (9th Cir. 1999) 197 F.3d 1245, 1247-1248* ; *see also Texas v. Lesage (2000) 528 U.S. 18, 120 S. Ct. 467, 145 L. Ed. 2d 347* (when plaintiff challenges discrete governmental decision as based on impermissible criterion and it is undisputed government would have made same decision regardless, there is no cognizable injury warranting relief under § 1983)].

PRACTICE TIP:

Causation. In many instances, where the "proximate cause" standard used to apply, the change in California law to "legal cause" (the substantial factor test) should now apply. In addition, the causation analysis may vary depending on the constitutional right at stake and the theory of liability. The *Johnson v. Duffy* definition is generally accepted [*Johnson v. Duffy (9th Cir. 1978) 588 F.2d 740, 743-744]* . Although there are some cases that have adopted the proximate cause (but for) test, these cases are dated or suspect.

Of many potential remedies, courts often prefer to shift the burden of proof regarding causation to a defendant when the destruction of evidence by a defendant will prejudice the plaintiff's ability to prove liability. The issue of causation traditionally is left for the jury to decide. Although this issue often should be a barrier to summary judgment, courts are increasingly willing to grant summary judgment on the basis that there is insufficient evidence to prove causation--particularly as to municipal or supervisory defendants. *By John H. Scott*

[2] Purpose and Scope

The primary purposes of *42 U.S.C. § 1983* are compensation and deterrence for violations of federal rights committed by persons acting under color of state law [*Howlett v. Rose (1990) 496 U.S. 356, 358, 110 S. Ct. 2430, 110 L. Ed. 2d 332* ; *Pitts v. County of Kern (1998) 17 Cal. 4th 340, 348, 70 Cal. Rptr. 2d 823, 949 P.2d 920]* . In addition, *42 U.S.C. § 1983* serves several other purposes [*Monroe v. Pape (1961) 365 U.S. 167, 173-174, 81 S. Ct. 473, 5 L. Ed. 2d 492* (overruled on other grounds in *Monell v. Dep't of Soc. Servs. (1978) 436 U.S. 658, 663, 98 S. Ct. 2018, 56 L. Ed. 2d 611*); *Williams v. Horvath (1976) 16 Cal. 3d 834, 841, 129 Cal. Rptr. 453, 548 P.2d 1125]* :

- It overrides certain kinds of state laws;
- It provides a federal remedy if state law is inadequate; and

- It provides a federal remedy if the state remedy, although adequate in theory, is not available in practice.

Section 1983 is to be accorded a sweep as broad as its language [*Felder v. Casey (1988) 487 U.S. 131, 139, 108 S. Ct. 2302, 101 L. Ed. 2d 123* (damages and injunctive relief available)].

42 U.S.C. § 1983 does not create any substantive rights; it merely serves as the procedural device for enforcing substantive provisions of the Constitution and federal statutes. Thus, one may not claim a violation of § 1983, because § 1983, by itself, does not protect anyone from anything [*Chapman v. Houston Welfare Rights Org. (1979) 441 U.S. 600, 617-618, 99 S. Ct. 1905, 60 L. Ed. 2d 508* ; *Crumpton v. Gates (9th Cir. 1991) 947 F.2d 1418, 1420]* .

[3] Elements of Cause of Action

The elements of a cause of action under *42 U.S.C. § 1983* are as follows [*Parratt v. Taylor (1981) 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420* (overruled on other grounds in *Daniels v. Williams (1986) 474 U.S. 327, 330-331, 106 S. Ct. 662, 88 L. Ed. 2d 662*); *Crumpton v. Gates (9th Cir. 1991) 947 F.2d 1418, 1420* ; *Venegas v. Wagner (9th Cir. 1987) 831 F.2d 1514, 1518]* :

- A violation of rights protected by the Constitution or created by federal statute;
- Caused;
- By conduct of a "person";
- Acting under color of state law.

For a related jury instruction for use in state court on the essential factual elements of a claim for violation of *42 U.S.C. § 1983*, see *Judicial Council Of California Civil Jury Instructions, CACI No. 3000* (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

In addition, the plaintiff must be "a citizen of the United States or other person within the jurisdiction thereof" [*42 U.S.C. § 1983*; *see* *Inyo County v. Paiute-Shoshone Indians of the Bishop Committee of the Bishop Colony (2003) 538 U.S. 701, 123 S. Ct. 1887, 1892-1894, 155 L. Ed. 2d 933* (as sovereign, Native American tribe did not qualify as "person" for purposes of suing county officials under § 1983); *Martinez v. City of Los Angeles (9th Cir. 1998) 141 F.3d 1373, 1382* (Mexican citizen, who was in Mexico at time of events in question, could not bring § 1983 action); *Crumpton v. Gates (9th Cir. 1991) 947 F.2d 1418, 1420* (child, whose injury and cause of action arose at birth, was a person within meaning of § 1983)].

[4] Color of Law

[a] In General

A cause of action under *42 U.S.C. § 1983* requires that the individual causing the deprivation of rights act under color of a statute, ordinance, regulation, custom, or usage of a state or territory or the District of Columbia [*42 U.S.C. § 1983*].

The "color of law" requirement of § 1983 is equivalent to the "state action" requirement of *U.S. Const., amend. XIV* [*Lugar v. Edmondson Oil Co. (1982) 457 U.S. 922, 928-929, 102 S. Ct. 2744, 73 L. Ed. 2d 482* ; *Rendell-Baker v. Kohn (1982) 457 U.S. 830, 838, 102 S. Ct. 2764, 73 L. Ed. 2d 418]* .

[b] Conduct of Government Officials

Conduct performed by government officers or employees, acting as such, usually meets the color of law requirement. Moreover, the color of law requirement is met regardless of whether the officials or employees acted in accordance with or in abuse of their authority [*see* *Monroe v. Pape (1961) 365 U.S. 167, 172, 81 S. Ct. 473, 5 L. Ed. 2d 492* (cause of action stated under *42 U.S.C. § 1983* against police officers for unconstitutional search and arrest) (overruled on other grounds in *Monell v. Dep't of Soc. Servs. (1978) 436 U.S. 658, 663, 98 S. Ct. 2018, 56 L. Ed. 2d 611*)].

The actions of a government officer or employee are under color of law if they are in some way related to the performance of official duties [*see* *Huffman v. County of Los Angeles (9th Cir. 1998) 147 F.3d 1054, 1058* , *cert. denied, 526 U.S. 1038 (1999)* (intoxicated off-duty sheriff's deputy did not act under color of law when he shot another bar patron over a personal dispute); *Johnson v. Knowles (9th Cir. 1997) 113 F.3d 1114, 1117-1120* , *cert. denied, 522 U.S. 996* (California Assemblyman's membership on county Republican party central committee did not derive from his status as member of Assembly, and therefore did not constitute action under color of state law); *Van Ort v. Estate of Stanewich (9th Cir. 1996) 92 F.3d 831, 838* , *cert. denied, 519 U.S. 1111 (1997)* (police officer did not act under color of law when he committed robbery while off duty and not purporting to act as police officer)].

A government officer or employee who is pursuing his or her own goals and is not in any way subject to control by the public employer does not act under color of law, unless he or she purports or pretends to do so. Thus, for example, a police officer who engages in a confrontation for personal reasons unrelated to law enforcement, and who does not purport or pretend to be an officer, does not act under color of law [*Huffman v. County of Los Angeles (9th Cir. 1998) 147 F.3d 1054, 1058* , *cert. denied, 526 U.S. 1038 (1999)* ; *see* *Gritchen v. Collier (9th Cir. 2001) 254 F.3d 807* (police officer's threat to sue citizen who filed complaint against officer for defamation was not action under color of state law; mere fact that state statute enables officer to file defamation action is insufficient to make it state action); *Melendez v. City of Los Angeles (1998) 63 Cal. App. 4th 1, 16-17, 73 Cal. Rptr. 2d 469* , *cert. denied, 525 U.S. 1001* (off-duty police officers working as private security guards without city approval were not acting under color of state law)].

Whether a public defender acts under color of law in a particular context depends on the nature of duties he or she performs. The public defender is serving the traditional and primary role by advancing the undivided interests of the client, an essentially private function, traditionally filled by retained counsel, for which state office and authority are not needed. A public defender does not act under color of law when performing a lawyer's traditional functions, such as entering pleas, moving to suppress evidence, objecting to evidence at trial, cross-examining witnesses, and making closing arguments [*Polk County v. Dodson (1981) 454 U.S. 312, 319-325, 102 S. Ct. 445, 70 L. Ed. 2d 509]* . A public defender acting in the traditional role of an attorney, although employed by a state agency, is not, as a matter of law, a state actor [*Miranda v. Clark County (9th Cir. 2003) 319 F.3d 465, 469* (en banc)]. However, a public defender performing administrative functions in the allocation of resources within the office is a state actor [*Miranda v. Clark County (9th Cir. 2003) 319 F.3d 465, 469-471* (en banc)].

[c] Private Conduct

Private individuals and private entities are not normally liable for violations of most rights secured by the federal constitution [*Lugar v. Edmondson Oil Co. (1982) 457 U.S. 922, 936, 102 S. Ct. 2744, 73 L. Ed. 2d 482* ; *Morse v. North Coast Opportunities (9th Cir. 1997) 118 F.3d 1338, 1340]* . Further, as a general rule the state's failure to prevent harm inflicted by a private actor does not give rise to a cause of action under *42 U.S.C. § 1983* [*Garcia v. Superior Court (1990) 50 Cal. 3d 728, 739, 268 Cal. Rptr. 779, 789 P.2d 960* ; *Kathleen R. v. City of Livermore (2001) 87 Cal. App. 4th 684, 699, 104 Cal. Rptr. 2d 772]* , although there are two exceptions to the general rule--the "special relationship" exception [*see* [h], *below*] and the "danger creation" exception.

However, private conduct that can be fairly attributed to the state is considered to meet the color of law requirement of *42 U.S.C. § 1983* [*Rendell-Baker v. Kohn (1982) 457 U.S. 830, 838, 102 S. Ct. 2764, 73 L. Ed. 2d 418* ; *Morse v. North Coast Opportunities (9th Cir. 1997) 118 F.3d 1338, 1340]* . What is fairly attributable is a matter of normative

judgment. No fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, because there may be countervailing reasons against attributing activity to the government [*Brentwood Academy v. Tennessee Secondary School Athletic Ass'n (2001) 531 U.S. 288, 295-296, 121 S. Ct. 924, 148 L. Ed. 2d 807]* .

PRACTICE TIP:

Private Hospitals and Private Prisons. Attorneys should note the private hospital and private prison cases. This issue often arises when a mental patient has been civilly committed "under color of state law" and deprived of liberty in a private hospital that contracts with a public entity for that purpose. Because of the emergence of private prisons, it is foreseeable that there will be increased litigation on the "state action" issue, especially as to "independent contractors" and other "agents." Many § 1983 issues remain to be decided as it relates to the private prison industry. Counsel should take note of *Correctional Services Corp. v. Malesko (2001) 534 U.S. 61, 122 S. Ct. 515, 151 L. Ed. 2d 456* , in which the United States Supreme Court held that there is no private right of action for damages against private entities acting under color of federal law in finding that *Bivens* does not allow recovery against a private corporation operating a halfway house under a contract with the federal Bureau of Prisons. *By John H. Scott*

Four distinct tests for determining when the actions of a private individual meet the color of law requirement have been articulated as follows [*Kirtley v. Rainey (9th Cir. 2003) 326 F.3d 1088, 1092* ; *Johnson v. Knowles (9th Cir. 1997) 113 F.3d 1114, 1118 , cert. denied, 522 U.S. 996]* :

- The joint action test [*see* [d], *below*];
- The public function test [*see* [e], *below*];
- The state compulsion test [*see* [f], *below*]; and
- The governmental nexus test [*see* [g], *below*].

Satisfaction of a single test is sufficient to establish that a private entity was a state actor, so long as no countervailing factor exists [*Lee v. Katz (9th Cir. 2001) 276 F.3d 550, 554* ; *see Brentwood Academy v. Tennessee Secondary School Athletic Ass'n (2001) 531 U.S. 288, 304, 121 S. Ct. 924, 148 L. Ed. 2d 807* (when relevant facts show pervasive entwinement or nexus, implication of state action not affected by fact that facts might not loom large under different test); *see also Kirtley v. Rainey (9th Cir. 2003) 326 F.3d 1088, 1092]* .

[d] Joint Participation with State

When private individuals act jointly with state officials in performing a prohibited act, the conduct is deemed to meet the color of law requirement [*Lugar v. Edmondson Oil Co. (1982) 457 U.S. 922, 941-942, 102 S. Ct. 2744, 73 L. Ed. 2d 482* (invoking state-created judicial attachment procedures that required only ex parte application was sufficient joint participation with state officials to meet color of law requirement); *Burton v. Wilmington Parking Authority (1961) 365 U.S. 715, 723-725, 81 S. Ct. 856, 6 L. Ed. 2d 45* (state's leasing of public property to private party in building dedicated to public use made state joint participant and rendered discriminatory acts by private party state action under *U.S. Const., amend. XIV*); *Jensen v. Lane County (9th Cir. 2000) 222 F.3d 570, 574-576* (psychiatrist who has undertaken complex and deeply intertwined process with county and its employees, evaluating and detaining individuals believed to be mentally ill, is state actor); *Sable Com. of California v. Pacific Tel. & Tel. (9th Cir. 1989) 890 F.2d 184, 188-189* (telephone company's repeated requests to law enforcement agents to take action to trigger procedure that would violate customer's *First Amendment* rights was joint participation with state)]. Entwinement between a private entity and a public body will support a conclusion that an ostensibly private organization ought to be

charged with a public character and judged by constitutional standards [*Brentwood Academy v. Tennessee Secondary School Athletic Ass'n (2001) 531 U.S. 288, 298-302, 121 S. Ct. 924, 148 L. Ed. 2d 807* , (nominally private character of not-for-profit statewide secondary school athletic association overborne by pervasive entwinement of public institutions and public officials in its composition and workings)].

[e] Performance of Public Function

When private individuals perform functions or exercise powers that are traditionally the exclusive prerogative of the state, the color of law requirement may be met [*see* *Blum v. Yaretsky (1982) 457 U.S. 991, 1005, 102 S. Ct. 2777, 73 L. Ed. 2d 534* ; *Rendell-Baker v. Kohn (1982) 457 U.S. 830, 842, 102 S. Ct. 2764, 73 L. Ed. 2d 418]* .

One power the United States Supreme Court has recognized as traditionally exclusively sovereign is the power to conduct elections for public officials [*Flagg Bros., Inc. v. Brooks (1978) 436 U.S. 149, 157-158, 98 S. Ct. 1729, 56 L. Ed. 2d 185]* .

A second situation in which the Supreme Court has found a private entity to have taken over a traditionally governmental role was in a case when a corporation, the Gulf Shipbuilding Corporation, performed all the necessary municipal functions in the town of Chickasaw, Alabama, which it owned [*Marsh v. Alabama (1946) 326 U.S. 501, 506, 66 S. Ct. 276, 90 L. Ed. 265* ; *see also* *Flagg Bros., Inc. v. Brooks (1978) 436 U.S. 149, 158-159, 98 S. Ct. 1729, 56 L. Ed. 2d 185* (discussing *Marsh*); *but see* *Hudgens v. NLRB (1976) 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196* (privately owned shopping center does not perform a traditionally governmental role)].

The Ninth Circuit has found a public function in the regulation of free speech by a private entity on public land which is a public forum, that the entity has leased from a municipality, and as to which the municipality retains little, if any, power over the private entity's free speech policies [*Lee v. Katz (9th Cir. 2001) 276 F.3d 550, 554-556* (leased land was freely accessible public forum through which people pass on their way to shows, concerts, games, and restaurants and was gathering place for public events)]. On the other hand, a street festival organizer given non-exclusive powers over a traditional public forum does not, in the absence of other facts, become a state actor when the state maintains the ultimate power to regulate activities in the forum [*Lee v. Katz (9th Cir. 2001) 276 F.3d 550, 556]* .

Management and internal rules of a private political party are not powers traditionally exclusively reserved to the state, and, absent a compelling state interest, political parties are entitled to organize themselves, conduct their affairs, and select their leaders in the manner they think best, without any interference from the state [*San Francisco County Democratic Cent. Comm. v. Eu (9th Cir. 1987) 826 F.2d 814 , aff'd, 489 U.S. 214 (1989)* ; *see* *Johnson v. Knowles (9th Cir. 1997) 113 F.3d 1114, 1119 , cert. denied, 522 U.S. 996* (removal of gay members of Republican party county central committee not action under color of state law because, although they were elected by public ballot, they were elected to private positions within party, not public positions); *but see* *Terry v. Adams (1953) 345 U.S. 461, 73 S. Ct. 809, 97 L. Ed. 1152* (blacks could not be excluded from preprimary election of *Texas' Jaybird Democratic Party); Smith v. Allwright (1944) 321 U.S. 649, 660, 64 S. Ct. 757, 88 L. Ed. 987* ("state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state")].

[f] State Compulsion of Encouragement

If the state has exercised coercive power or has provided significant encouragement to a private action, that action may be considered conduct under color of law [*see* *Blum v. Yaretsky (1982) 457 U.S. 991, 1004, 102 S. Ct. 2777, 73 L. Ed. 2d 534* ; *see also* *Johnson v. Knowles (9th Cir. 1997) 113 F.3d 1114, 1119-1120 , cert. denied, 522 U.S. 996* (*Cal. Elec. Code § 7413*, allowing removal of county central committee member for supporting other-party candidates, did not compel or encourage Republican party county central committee to remove two members on basis of sexual orientation and did not convert committee members' action into action under color of state law)].

[g] Governmental Nexus

An action will be considered to be under color of state law if there is a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." However, the mere fact that a private actor is regulated by the state does not by itself convert its action into that of the state [*Jackson v. Metropolitan Edison Co. (1974) 419 U.S. 345, 350-351, 95 S. Ct. 449, 42 L. Ed. 2d 477* ; *see Johnson v. Knowles (9th Cir. 1997) 113 F.3d 1114, 1120* , *cert. denied, 522 U.S. 996* (fact that California regulates political parties' county central committees did not convert action of committee into state action); *McMahon v. Lopez (1988) 199 Cal. App. 3d 829, 837-838, 245 Cal. Rptr. 172]* .

The actions of a nominally private actor may be under color of law if the actor is "entwined with government policies" or when government is "entwined in [its] management or control" [*Evans v. Newton (1966) 382 U.S. 296, 299, 301, 86 S. Ct. 486, 15 L. Ed. 2d 373* ; *see Brentwood Academy v. Tennessee Secondary School Athletic Assoc. (2001) 531 U.S. 288, 121 S. Ct. 924, 148 L. Ed. 2d 807, 816-823* (association of Tennessee schools, incorporated to regulate athletic competition among state's public and private secondary schools, was state actor); *but see Nat. Collegiate Athletic Ass'n v. Tarkanian (1988) 488 U.S. 179, 194 n.14, 109 S. Ct. 454, 102 L. Ed. 2d 469* (NCAA, which acted on behalf of several hundred institutions from several different states, was not a state actor)].

[h] Special Relationship Between State and Victim

Injuries inflicted by a private party may give rise to liability under *42 U.S.C. § 1983* when a "special relationship" exists between the state and the victim. The special relationship is essential, and without it there is no cause of action under § 1983, even if the state is aware of the danger to the victim [*see DeShaney v. Winnebago County Dep't of Social Servs. (1989) 489 U.S. 189, 198-202, 109 S. Ct. 998, 103 L. Ed. 2d 249* ; *Buenavista v. City and County of San Francisco (1989) 207 Cal. App. 3d 1168, 1175, 255 Cal. Rptr. 329]* .

Although the contours of what constitutes a special relationship between a public entity, acting through its officials, and its citizens are indistinct, the determining factor is the exercise of coercion, dominion, or restraint by the state over the victim. No special relationship has been found when the state has not taken the victim into custody or otherwise assumed responsibility for his or her welfare [*see DeShaney v. Winnebago County Dep't of Social Servs. (1989) 489 U.S. 189, 198-202, 109 S. Ct. 998, 103 L. Ed. 2d 249* (specifically rejecting more expansive view of special relationship in *Balistreri v. Pacifica Police Dep't (9th Cir. 1988) 855 F.2d 1421, 1425)]* .

The state may, however, be responsible for a private-party attack when the victim is incarcerated or is an involuntarily committed mental patient or foster child [*Buenavista v. City and County of San Francisco (1989) 207 Cal. App. 3d 1168, 1175, 255 Cal. Rptr. 329]* .

[i] State Funding and Regulation

Receipt of public funds alone is generally not sufficient state involvement to meet the color of law requirement [*see Rendell-Baker v. Kohn (1982) 457 U.S. 830, 840, 102 S. Ct. 2764, 73 L. Ed. 2d 418* (state funding of private school did not make school's decisions to discharge employee actions under color of law); *Polk County v. Dodson (1981) 454 U.S. 312, 321-322, 102 S. Ct. 445, 70 L. Ed. 2d 509* (public defender's performance of traditional lawyer functions was not conduct under color of law even when he was employed by state)].

Similarly, the mere fact that a business is subject to regulation by the state is generally not sufficient state action to meet the color of law requirement [*see Blum v. Yaretsky (1982) 457 U.S. 991, 1003-1004, 102 S. Ct. 2777, 73 L. Ed. 2d 534* (extensive state regulation of nursing home did not make home's decisions to discharge and transfer Medicaid patients state action under *U.S. Const., amend. XIV*); *Rendell-Baker v. Kohn (1982) 457 U.S. 830, 841-842, 102 S. Ct. 2764, 73 L. Ed. 2d 418* (regulation of private school did not make school's decisions to discharge employee actions under

color of law); Moose Lodge No. 107 v. *Irvis (1972) 407 U.S. 163, 176-177, 92 S. Ct. 1965, 32 L. Ed. 2d 627* (state regulation of liquor licensing did not make private club's discriminatory conduct state action under *U.S. Const., amend. XIV*); *see also Johnson v. Knowles (9th Cir. 1997) 113 F.3d 1114, 1118 , cert. denied, 522 U.S. 996* (county central committees of political parties are private actors, not public agencies, even though regulated by state); *Mathis v. Pacific Gas and Elec. Co. (9th Cir. 1989) 891 F.2d 1429, 1431* (extensive state regulation of utility did not infuse its conduct with state action); *McMahon v. Lopez (1988) 199 Cal. App. 3d 829, 837-838, 245 Cal. Rptr. 172* (extensive state regulation of private hospital did not bring its action under color of law)].

[5] Rights, Privileges, and Immunities Protected

[a] All Rights Guaranteed by Constitution and Laws of United States Are Protected

42 U.S.C. § 1983 makes unlawful the deprivation of any right, privilege, or immunity secured by the United States Constitution or laws [*42 U.S.C. § 1983*; *see Baker v. McCollan (1979) 443 U.S. 137, 146-147, 99 S. Ct. 2689, 61 L. Ed. 2d 433* (failure of plaintiff to meet threshold requirement of showing deprivation of right secured by Constitution and laws); *Stone v. City of Prescott (9th Cir. 1999) 173 F.3d 1172 , cert. denied, 528 U.S. 870]* . For example, the right of a party not to have a state or a political subdivision of a state impair its obligations of contract is protected by U.S. *Const., art. I, § 10, cl. 1,* and a deprivation of that right may give rise to a cause of action under § 1983 [*So. Cal. Gas Co. v. City of Santa Ana (9th Cir. 2003) 336 F.3d 885, 887]* . However, plaintiffs suing under § 1983 must demonstrate that a statute confers an individual right. Thus, a federal agency's regulations can never create individual rights enforceable through *42 U.S.C. § 1983* [*Save Our Valley v. Sound Transit (9th Cir. 2003) 335 F.3d 932, 935-944]* .

By its terms, § 1983 is not limited to traditionally protected characteristics such as race or religion. Instead, it protects against deprivation of all the rights guaranteed by the Constitution or laws of the United States, including those guaranteed by the due process clause, the privileges and immunities clause, and the *equal protection clause of the Fourteenth Amendment* [*Monroe v. Pape (1961) 365 U.S. 167, 170-172, 81 S. Ct. 473, 5 L. Ed. 2d 492* (overruled on other grounds in *Monell v. Dep't of Soc. Servs. (1978) 436 U.S. 658, 663, 98 S. Ct. 2018, 56 L. Ed. 2d 611*); *see Moreland v. Las Vegas Metro. Police Dep't (9th Cir. 1998) 159 F.3d 365, 370* (protection of *Fourteenth Amendment's due process clause* extends to governmental actions that deprive one of life, liberty, or property interest of constitutional magnitude)].

By its own terms, *42 U.S.C. § 1983* protects only violations of federal law. Thus, there can be no § 1983 claim based solely on a violation of state law [*see Ybarra v. Bastian (9th Cir. 1981) 647 F.2d 891, 892]* .

[b] When State Compact Becomes Basis for Action

A state compact becomes transformed into federal law, and may be the basis for an action under *42 U.S.C. § 1983*, when all of the following are true [*Cuyler v. Adams (1981) 449 U.S. 433, 440, 101 S. Ct. 703, 66 L. Ed. 2d 641* ; *Ghana v. Pearce (9th Cir. 1998) 159 F.3d 1206, 1208* (Interstate Corrections Compact is not federal law for § 1983 purposes)]:

- It falls within the scope of the Constitution's compact clause;
- It has received congressional consent; and
- Its subject matter is appropriate for congressional legislation.

However, § 1983 is not a general cause of action reaching all conduct of public officers or those acting under color of law. Violation of a specific constitutional or statutory right must be identified and adequately pleaded [*see Conn v. Gabbert (1999) 526 U.S. 286, 290-293, 119 S. Ct. 1292, 143 L. Ed. 2d 399* (search of attorney under warrant while

client testifies before grand jury not deprivation of right to practice profession in violation of *U.S. Const., amend. XIV* and not actionable under § 1983); *Buckey v. County of Los Angeles (9th Cir. 1992) 968 F.2d 791, 794 , cert. denied, 506 U.S. 999* (mere negligence and self-aggrandizing motives are not actionable under § 1983)].

[c] Constitutional Deprivations Involving Defamatory Conduct or Speech

For a *42 U.S.C. § 1983* case to be based on defamatory conduct or speech, the plaintiff must allege and prove that defendants deprived him or her of a property or liberty interest [*Paul v. Davis (1976) 424 U.S. 693, 709-711, 96 S. Ct. 1155, 47 L. Ed. 2d 405]* . This has become known as the "stigma-plus" test [*Miller v. Cal. Dep't of Soc. Servs. (9th Cir. 2004) 355 F.3d 1172, 1178* ; *Am. Consumer Publ'g Ass'n v. Margosian (9th Cir. 2003) 349 F.3d 1122, 1125* ; *Cooper v. Dupnik (9th Cir. 1991) 924 F.2d 1520, 1532 , rev'd on other grounds, 963 F.2d 1220, 1235 n.6 (9th Cir. 1992)* (en banc)]. A person's interest in his or her reputation alone is not a liberty or property interest protected by the *Fourteenth Amendment* and cognizable under *42 U.S.C. § 1983* [*WMX Techs., Inc. v. Miller (9th Cir. 1999) 197 F.3d 367, 373-378* ; *Johnson v. Barker (9th Cir. 1986) 799 F.2d 1396,1399]* . Allegations involving defamatory public statements allegedly injuring a business reputation are not sufficient to satisfy the requirement that a constitutionally protected property interest must be at stake [*WMX Techs., Inc. v. Miller (9th Cir. 1999) 197 F.3d 367, 373-378]* .

The stigma-plus test requires that the defamation be accompanied by an injury directly caused by the government, rather than an injury caused by the act of some third party in reaction to the government's defamatory statements [*Am. Consumer Publ'g Ass'n v. Margosian (9th Cir. 2003) 349 F.3d 1122, 1125* ; *WMX Techs., Inc. v. Miller (9th Cir. 1996) 80 F.3d 1315, 1320 , appeal dismissed on other grounds, 104 F.3d 1133 (9th Cir. 1997)* (en banc)].

To support a claim under § 1983, the state action complained of must alter or extinguish a right or status previously recognized by state law [*Johnson v. Barker (9th Cir. 1986) 799 F.2d 1396, 1399]* .

A physician's allegation that a press release stating the facts of his arrest for marijuana cultivation damaged his professional reputation and medical practice, without more, failed to state a cause of action under *42 U.S.C. § 1983* [*Higginbotham v. King (1997) 54 Cal. App. 4th 1040, 1045-1047, 63 Cal. Rptr. 2d 114]* .

[d] Examples of Violations to Which Statute Applied

With regard to constitutional violations, the cases reflect broad and varied use of *42 U.S.C. § 1983* to enforce civil rights. A few examples include the following:

- An action for damages against a mental hospital official who repeatedly and without grounds refused to release a mental patient [*O'Connor v. Donaldson (1975) 422 U.S. 563, 573 n.8, 95 S. Ct. 2486, 45 L. Ed. 2d 396* (constitutional right to freedom)].

- An action against prison officials for deliberate indifference to serious medical needs [*Estelle v. Gamble (1976) 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251* (*Eighth Amendment* protection against cruel and unusual punishment)]. For discussion and forms relating to the civil rights of prisoners, see Ch. 114, *Civil Rights: Prisoners' Rights* .

- An action by a public employee for deprivation of the property right to continued employment [*Logan v. Southern Cal. Rapid Transit Dist. (1982) 136 Cal. App. 3d 116, 125-126, 185 Cal. Rptr. 878* (constitutional right to due process of law)].

- An action based on the use of excessive force during a personal seizure [*Graham v. Connor (1989) 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443* (*Fourth Amendment* requires that police use only such force as is objectively reasonable under circumstances); *Tennessee v. Garner (1985) 471 U.S. 1,*

11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (when officer has probable cause to believe suspect poses threat of serious physical harm to officer or others, it is not constitutionally unreasonable to prevent escape by using deadly force); *Robinson v. Solano County (9th Cir. 2002) 278 F.3d 1007* (pointing gun at suspect's head was excessive force when none of factors justifying use of force were present); *Forrett v. Richardson (9th Cir. 1998) 112 F.3d 416, 420-421 , cert. denied, 523 U.S. 1049* (to prevent escape of felony suspect, police officer may use deadly force only when necessary to prevent escape and when suspect poses threat of serious harm to officer or others)]. For discussion and forms relating to civil rights actions arising from illegal searches and seizures, see *Ch. 429, Privacy, § 429.310* et seq.

✹ A clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence deliberately fabricated by the government [*Devereaux v. Abbey (9th Cir. 2001) 263 F.3d 1070, 1074-1075]* .

✹ An action based on an arrest without probable cause in violation of the *Fourth Amendment* [*Dubner v. City and County of San Francisco (9th Cir. 2001) 266 F.3d 959, 964* ; *Knox v. Southwest Airlines (9th Cir. 1997) 124 F.3d 1103, 1107* ; *Kennedy v. Los Angeles Police Dep't (9th Cir. 1989) 901 F.2d 702, 706]* . For discussion and forms relating to civil rights actions arising from illegal searches and seizures, see *Ch. 429, Privacy, § 429.310* et seq.

✹ An action arising from the removal of children from their parents' custody in the middle of the night, based on the constitutional right to live together without government interference, an essential liberty interest protected by the *Fourteenth Amendment's* guarantee that parents and children will not be separated by the state without due process of law except in an emergency [*Wallis v. Spencer (9th Cir. 1999) 202 F.3d 1126, 1136-1137]* .

✹ An action based on injury or death of a patient in a state mental hospital [*Youngberg v. Romeo (1982) 457 U.S. 307, 321, 102 S. Ct. 2452, 73 L. Ed. 2d 28* (safety of patient is protected liberty interest)].

✹ An action against prison officials based on injury or death of a prisoner caused by prison staff or another prisoner [*Farmer v. Brennan (1994) 511 U.S. 825, 835-840, 114 S. Ct. 1970, 128 L. Ed. 2d 811* (prison officials' duty not to be deliberately indifferent to possibility of assaults on inmates by other inmates); *Whitley v. Albers (1986) 475 U.S. 312, 318-322, 106 S. Ct. 1078, 89 L. Ed. 2d 251* (constitutionality of use of force during prison riot depends on whether force was applied in good faith effort to maintain or restore discipline or maliciously and sadistically for very purpose of causing harm)].

✹ An action by a public employee based on violations of the employee's *First Amendment* rights for being a whistleblower [*Waters v. Churchill (1994) 511 U.S. 661, 114 S. Ct. 1878, 128 L. Ed. 2d 686* ; *Rankin v. McPherson (1987) 483 U.S. 378, 107 S. Ct. 2891, 97 L. Ed. 2d 315* ; *Connick v. Myers (1983) 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708* ; *Pickering v. Bd. of Educ. (1968) 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811]* .

✹ An action by a public employee based on violations of the employee's right to procedural due process [*Gilbert v. Homar (1997) 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120* ; *Cleveland Bd. of Educ. v. Loudermill (1985) 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494* ; *Arnett v. Kennedy (1974) 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15]* .

✹ An action against police officers and a towing company for violation of the constitutional right to due process by impounding a car without giving advance notice, and unconstitutionally seizing the car [*Clement v. City of Glendale (9th Cir. 2008) 518 F.3d 1090, 1093-1096*].

- A due process right of limited post-conviction access by a prisoner to evidence used to convict him [*Osborne v. District Attorney's Office (9th Cir. 2008) 521 F.3d 1118, 1128-1132*].

- An action alleging unconstitutional gender discrimination in schools based on peer-to-peer harassment [*see Fitzgerald v. Barnstable School Committee (2009) -- U.S. --, 129 S. Ct. 788, 172 L. Ed. 2d 582, 590-595* (Title IX of Education Amendments of 1972 does not preclude action under *42 U.S.C. § 1983* alleging unconstitutional gender discrimination in schools based on peer-to-peer harassment)].

[e] Statute Not Applied to Remedy Certain Violations

Although the scope of *42 U.S.C. § 1983* is extremely broad, it will not be applied to remedy violations of statutes in which Congress has foreclosed enforcement in the enactment itself, or of statutes that do not create enforceable rights, privileges, or immunities within the meaning of § 1983 [*Wright v. Roanoke Redev. and Housing Auth. (1987) 479 U.S. 418, 423, 107 S. Ct. 766, 93 L. Ed. 2d 781]* .

When Congress has not explicitly foreclosed enforcement of a statute in the enactment itself, the courts look at three factors when determining whether a particular statutory provision gives rise to a federal right [*Blessing v. Freestone (1997) 520 U.S. 329, 340, 117 S. Ct. 1353, 137 L. Ed. 2d 569* ; *Wilder v. Virginia Hospital Ass'n (1990) 496 U.S. 498, 509, 110 S. Ct. 2510, 110 L. Ed. 2d 455* ; *San Lazaro Ass'n v. Connell (9th Cir. 2002) 278 F.3d 932, 941-942* ; *see Golden State Transit Corp. v. Los Angeles (1989) 493 U.S. 103, 105-108, 110 S. Ct. 444, 107 L. Ed. 2d 420]* :

- Whether Congress intended that the provision benefit the plaintiff.

- Whether plaintiff has demonstrated that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence.

- Whether the statute unambiguously imposes a binding obligation on the state.

[f] Criminal Procedure Issues

In the area of criminal procedure, the trend is to look to the specific guarantees of the *Bill of Rights*, rather than the more generalized language contained in earlier cases construing the *Fourteenth Amendment*. Thus, an allegation of a constitutional deprivation, for purposes of an action under *42 U.S.C. § 1983*, is more firmly grounded on a specific provision of one of the first 10 amendments, than on an alleged violation of "substantive due process" [*see Albright v. Oliver (1994) 510 U.S. 266, 271-273, 114 S. Ct. 807, 127 L. Ed. 2d 114* (no cause of action based on asserted substantive due process right to be free from criminal prosecution except on probable cause; rather, cause of action had to be based on *Fourth Amendment* rights); *see also Larson v. Neimi (9th Cir. 1993) 9 F.3d 1397, 1400* (action based on false arrest properly based on *Fourth Amendment* rather than substantive due process)].

A plaintiff may not maintain a claim under *42 U.S.C. § 1983* if success on that claim would necessarily imply the invalidity of a prior criminal conviction [*Heck v. Humphrey (1994) 512 U.S. 477, 486-487, 114 S. Ct. 2364, 129 L. Ed. 2d 383* ; *Cunningham v. Gates (9th Cir. 2002) 312 F.3d 1148, 1153* ; *Sanford v. Motts (9th Cir. 2001) 258 F.3d 1117, 1119* ; *cf. Weilburg v. Shapiro (9th Cir. 2007) 488 F.3d 1202, 1205-1207* (challenge to extradition procedures would not implicate validity of underlying conviction); *Ove v. Gwinn (9th Cir. 2001) 264 F.3d 817, 823* (validity of convictions for driving under influence not affected by legality of blood draws as to which plaintiffs brought § 1983 claim)]. The rule in *Heck* applies to a state prisoner seeking damages for unconstitutional deprivation of good-time credits, so long as the alleged constitutional violation would, if established, imply the invalidity of the deprivation of good-time credits [*Edwards v. Balisok (1997) 520 U.S. 641, 648, 117 S. Ct. 1584, 137 L. Ed. 2d 906* ; *Nonnette v. Small (9th Cir. 2002) 316 F.3d 872, 875]* . However, a prisoner who seeks damages only for being subjected to

unconstitutional procedures, without implying the invalidity of or seeking damages for the resulting loss of good-time credits, may proceed under § 1983 without first invalidating the disciplinary proceeding [*Edwards v. Balisok (1997) 520 U.S. 641, 645-646, 117 S. Ct. 1584, 137 L. Ed. 2d 906* ; *Heck v. Humphrey (1994) 512 U.S. 477, 482-483, 114 S. Ct. 2364, 129 L. Ed. 2d 383* ; *Nonnette v. Small (9th Cir. 2002) 316 F.3d 872, 875 n.3*]. In addition, excessive force used after an arrest is made does not destroy the lawfulness of the arrest [*Sanford v. Motts (9th Cir. 2001) 258 F.3d 1117, 1120* ; *see also Simpson v. Thomas (9th Cir. 2008) 528 F.3d 685, 691-696* (*Heck v. Humphrey* does not create rule of evidence exclusion and may not be used to bar evidence in § 1983 claim for excessive force)].

The standard of liability required to impose § 1983 liability on police officers for failure to disclose material, exculpatory evidence to prosecutors is whether the officers acted with deliberate indifference to or reckless disregard for an accused's rights or for the truth in withholding evidence from prosecutors [*Tennison v. City & County of San Francisco (9th Cir. 2009) 570 F.3d 1078, 1087-1090*]. Suppression of *Brady* material violates due process irrespective of the good faith or bad faith of the prosecution [*Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215* ; *Tennison v. City & County of San Francisco (9th Cir. 2009) 570 F.3d 1078, 1088*]. Mere negligence is not sufficient. However, the plaintiff is also not required to show that the officers acted in bad faith [*Tennison v. City & County of San Francisco (9th Cir. 2009) 570 F.3d 1078, 1088-1090*].

[6] Plaintiff's Standing

[a] No Standing to Assert Rights of Third Party

A plaintiff generally lacks standing to assert the rights and interests of a third party in an action under *42 U.S.C. § 1983*. For example, a white plaintiff does not have standing under that statute solely for the purpose of vindicating the rights of minorities who have suffered from racial discrimination [*see Maynard v. City of San Jose (9th Cir. 1994) 37 F.3d 1396, 1402-1403* (relying on *Halet v. Wend Inv. Co. (9th Cir. 1982) 672 F.2d 1305, 1307-1309)]* . However, a white plaintiff does have standing under *42 U.S.C. § 1983* for the purpose of vindicating his or her right to be free from retaliation for aiding or associating with minorities [*see Maynard v. City of San Jose (9th Cir. 1994) 37 F.3d 1396, 1404]* . A white plaintiff also has standing to assert a claim of discrimination based on mistaken racial identity [*Estate of Amos v. City of Page (9th Cir. 2001) 257 F.3d 1086, 1093-1094]* .

[b] Standing Issue Should Be Resolved Before Reaching Merits of Claim

The question of whether a party has standing to assert a claim under *42 U.S.C. § 1983* should be resolved before reaching the merits of the claim [*Steel Co. v. Citizens for a Better Environment (1998) 523 U.S. 83, 93-102, 118 S. Ct. 1003, 140 L. Ed. 2d 210* ; *Moreland v. Las Vegas Metro. Police Dep't (9th Cir. 1998) 159 F.3d 365, 369* ; *see Byrd v. Guess (9th Cir. 1998) 137 F.3d 1126, 1131 , cert. denied, 525 U.S. 963* (failure to demonstrate *Fourth Amendment* standing precludes claim regardless of potential merits)].

[c] Separate Justiciability Inquiries Are Required

In *City of Los Angeles v. Lyons*, the United States Supreme Court held that a plaintiff lacks standing to obtain injunctive relief for past exposure to illegal conduct alone [*City of Los Angeles v. Lyons (1983) 461 U.S. 95, 111, 103 S. Ct. 1660, 75 L. Ed. 2d 675]* . The federal circuit courts have generally interpreted *Lyons* to require separate justiciability inquiries for damages and injunctive relief [*see, e.g., Hodgers-Durgin v. De La Vina (9th Cir. 1999) 199 F.3d 1037, 1040-1042* ; *Coleman v. Watt (8th Cir. 1994) 40 F.3d 255, 259* ; *Wagshal v. Foster (D.C. Cir. 1994) 28 F.3d 1249, 1251-1252 , cert. denied, 514 U.S. 1004 (1995)* ; *Henschen v. City of Houston (5th Cir. 1992) 959 F.2d 584, 587]* .

[d] Survival Actions

In a *42 U.S.C. § 1983* action, the survivors of an individual killed as a result of an excessive use of force may assert a *Fourth Amendment* claim on that individual's behalf if the relevant state's law authorizes a survival action [*Moreland v.*

Las Vegas Metro. Police Dep't (9th Cir. 1998) 159 F.3d 365, 369 ; *Smith v. City of Fontana (9th Cir. 1987) 818 F.2d 1411, 1416-1417 , cert. denied, 484 U.S. 935* ; *see 42 U.S.C. § 1988(a)*]. The party seeking to bring a survival action bears the burden of demonstrating that a particular state's law authorizes a survival action and the plaintiff meets that state's requirements for bringing a survival action [*Moreland v. Las Vegas Metro. Police Dep't (9th Cir. 1998) 159 F.3d 365, 369* ; *Byrd v. Guess (9th Cir. 1998) 137 F.3d 1126, 1131 , cert. denied, 525 U.S. 963]* . Survival actions are governed in California by *Code Civ. Proc. § 377.60*, which authorizes causes of action to be brought by a decedent's personal representative or any of a defined list of persons, including the decedent's spouse, domestic partner, children, or heirs.

Additionally, the survivors of a person killed by law enforcement officers, including parents and children, may assert a *Fourteenth Amendment* substantive due process claim based on the related deprivation of their liberty interest arising out of their relationship with the decedent [*Moreland v. Las Vegas Metro. Police Dep't (9th Cir. 1998) 159 F.3d 365, 371* ; *Byrd v. Guess (9th Cir. 1998) 137 F.3d 1126, 1133-1134 , cert. denied, 525 U.S. 963* ; *Curnow v. Ridgecrest Police (9th Cir. 1991) 952 F.2d 321, 325 , cert. denied, 506 U.S. 972 (1992)]* .

PRACTICE TIP:

Estate Cases. In death cases it is necessary to name the "Estate" of the decedent as a party in order to have standing to seek punitive damages. In some cases the Estate may be able to assert additional damage claims. The law is unsettled with respect to whether the Estate can seek damages for the pain and suffering suffered by the decedent from the time of the injury until the time of death. The mechanics for setting up an Estate may vary depending on the circumstances. The survival action maintained by heirs is based on the deprivation of the constitutional right to familial association grounded primarily in the *Fourteenth Amendment*. The law is also unsettled as to whether the *Fourteenth Amendment* test should apply to the heirs as opposed to, for example, the *Fourth Amendment* test in police cases or the *Eighth Amendment* test in prison death cases. In addition, there may also be some confusion as to which *Fourteenth Amendment* test to apply.

Attorneys should also keep in mind the potential conflict of interest that may exist between heirs and situations in which heirs who are "necessary parties" choose not to participate in the litigation. *By John H. Scott*

[7] Defendants

[a] Persons Subjecting Others to Deprivation of Rights

Every person who subjects, or causes to be subjected, any citizen or other person within the jurisdiction of the United States to a deprivation of federal rights may be liable under *42 U.S.C. § 1983*.

A person "subjects" another to the deprivation of a constitutional right if he or she performs an affirmative act, participates in another's affirmative act, or omits to perform an act legally required of him or her, and that omission causes the deprivation about which the complaint is made. Moreover, personal participation is not the only predicate for liability. Anyone who "causes" any citizen to be subjected to a constitutional deprivation is also liable. The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others that the actor knows or reasonably should know would cause others to inflict the constitutional injury [*Johnson v. Duffy (9th Cir. 1978) 588 F.2d 740, 743-744]* .

A government official may be liable for the acts of another person, such as a subordinate; however, there can be no liability if the other person commits no violation [*see Forrett v. Richardson (9th Cir. 1998) 112 F.3d 416, 421 , cert. denied, 523 U.S. 1049* (former police chief and city not liable for violation of *Fourth Amendment* rights when liability hinged on conduct of police officers, and officers did not violate plaintiff's rights)]. In addition, members of a governing

board cannot be vicariously liable for the conduct of employees [*Weisbuch v. County of Los Angeles (9th Cir. 1997) 119 F.3d 778, 781* (allegations that members of county board of supervisors refused to overrule decisions of employees rejected as basis for § 1983 liability, because allowing such allegations would permit end run around *Monell v. Dep't of Soc. Servs. (1978) 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611* , discussed in [c], *below*)].

Any person who is implicated by concerted action or conspiracy with another person who is acting under color of law may be held liable under *42 U.S.C. § 1983* [*Briley v. State of Cal. (9th Cir. 1977) 564 F.2d 849, 858* (acting in concert); *Gillibeau v. City of Richmond (9th Cir. 1969) 417 F.2d 426, 430* (conspiracy)]. Further, private citizens may be liable under § 1983 if they invoke or enforce constitutionally defective state laws [*Smith v. United Trans. Union Local No. 81 (S.D. Cal. 1984) 594 F. Supp 96, 99,*].

However, a person cannot be held liable under § 1983 because of membership in a group without a showing of individual participation in unlawful conduct [*Jones v. Williams (9th Cir. 2002) 286 F.3d 1159, 1163* ; *Chuman v. Wright (9th Cir. 1996) 76 F.3d 292, 294]* . Thus, for example, a jury instruction that bases liability on membership in a group, such as a group of police officers, and does not require individual liability is improper [*Jones v. Williams (9th Cir. 2002) 286 F.3d 1159, 1163-1166* ; *Chuman v. Wright (9th Cir. 1996) 76 F.3d 292, 295]* . Further, simply because a police officer remains armed during a search does not make the officer liable for violations occurring during the search unless the plaintiff can show that the officer was an integral participant in unlawful conduct, such as destruction of property [*Jones v. Williams (9th Cir. 2002) 286 F.3d 1159, 1166-1167]* .

[b] Officials in Personal Capacity

[i] Imposition of Personal Liability

State and local government officials may be sued in their personal, or individual, capacity under *42 U.S.C. § 1983* [*see Kentucky v. Graham (1985) 473 U.S. 159, 165-167, 105 S. Ct. 3099, 87 L. Ed. 2d 114* ; *Briley v. State of Cal. (9th Cir. 1977) 564 F.2d 849, 856* ; *M.J. Brock & Sons v. City of Davis (N.D. Cal. 1975) 401 F. Supp. 354, 360]* . However, a plaintiff cannot bring an action under § 1983 against a state official in his or her individual capacity to vindicate rights created by Title II of the Americans with Disabilities Act or section 504 of the Rehabilitation Act [*Vinson v. Thomas (9th Cir. 2002) 288 F.3d 1145, 1156* ; for general discussion of Title II of the ADA and section 504 of the Rehabilitation Act, see *Ch. 112, Civil Rights: Government-Funded Programs and Activities, § 112.15*]. Such a personal-capacity suit seeks to impose personal liability on a government official for actions that he or she takes under color of state law. An official-capacity suit, on the other hand, generally represents only another way of pleading an action against the entity of which the officer is an agent [*Kentucky v. Graham (1985) 473 U.S. 159, 165-167, 105 S. Ct. 3099, 87 L. Ed. 2d 114]* .

To establish personal liability of an official, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right [*Kentucky v. Graham (1985) 473 U.S. 159, 166, 105 S. Ct. 3099, 87 L. Ed. 2d 114* ; *see Redman v. County of San Diego (9th Cir. 1991) 942 F.2d 1435, 1446-1447 , cert. denied, 502 U.S. 1074 (1992)]* .

[ii] Availability of Damages

To recover monetary damages against an individual defendant in a *42 U.S.C. § 1983* action, a plaintiff must show how the deliberate indifference or the affirmative actions of each defendant caused a constitutional violation [*Leer v. Murphy (9th Cir. 1988) 844 F.2d 628, 633-634]* .

An award of damages against an official in his or her personal capacity can be executed only against the official's personal assets. By contrast, an award of damages in an official-capacity suit enables the successful plaintiff to look to the government entity itself to satisfy the judgment [*Kentucky v. Graham (1985) 473 U.S. 159, 165-166, 105 S. Ct. 3099, 87 L. Ed. 2d 114]* .

Punitive damages are also available against an official in a personal-capacity suit [*Kentucky v. Graham (1985) 473 U.S. 159, 167 n.13, 105 S. Ct. 3099, 87 L. Ed. 2d 114]* .

[iii] Personal Immunity Defenses

A government official in a personal-capacity suit may, depending on his or her position, be able to assert personal immunity defenses, such as objectively reasonable reliance on existing law [*Kentucky v. Graham (1985) 473 U.S. 159, 166-167, 105 S. Ct. 3099, 87 L. Ed. 2d 114* (defense unavailable in official-capacity action)]. However, the fact that the entity that employed individuals may be immune from suit does not preclude an action for damages against the individuals in their personal capacity [*Cerrato v. San Francisco Community College Dist. (9th Cir. 1994) 26 F.3d 968, 972* (community college district's immunity under *U.S. Const., amend. XI*, did not protect individual defendants)].

[c] Local Governments

[i] Liability Generally

Municipalities and other local governing bodies are "persons" within the meaning of *42 U.S.C. § 1983* [*Monell v. Dep't of Soc. Servs. (1978) 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611* ; *Lynch v. San Francisco Housing Authority (1997) 55 Cal. App. 4th 527, 542* (housing authority subject to suit, rather than immune as arm of state, at least on record on demurrer)]. However, neither a municipality nor a supervisor can be liable under § 1983 when no injury or constitutional violation has occurred [*Jackson v. City of Bremerton (9th Cir. 2001) 268 F.3d 646, 653-654* , citing *City of Los Angeles v. Heller (1986) 475 U.S. 796, 799, 106 S. Ct. 1571, 89 L. Ed. 2d 806]* . Further, local governments are not responsible for the constitutional infringements of their employees under a theory of respondeat superior [*Monell v. New York City Dep't of Soc. Servs. (1978) 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611* ; *Pitts v. County of Kern (1998) 17 Cal. 4th 340, 348, 70 Cal. Rptr. 2d 823, 949 P.2d 920* ; *County of Los Angeles v. Superior Court of Los Angeles County (Peters) (1998) 68 Cal. App. 4th 1166, 1171, 80 Cal. Rptr. 2d 860]* . Nevertheless, local governing bodies may be sued under § 1983 for monetary, declaratory, or injunctive relief when the actions alleged to be unconstitutional implement or execute a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers [*Monell v. New York City Dep't of Soc. Servs. (1978) 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611* ; *Brass v. County of Los Angeles (9th Cir. 2003) 328 F.3d 1192, 1198* ; *Henry v. County of Shasta (9th Cir. 1997) 132 F.3d 512, 517* , *cert. denied, 525 U.S. 819 (1998)* (post-event evidence admissible to prove existence of municipal defendant's policy or custom, and may be highly probative with regard to that inquiry)]. At least two routes can lead to the conclusion that a municipality has inflicted a constitutional injury [*Gibson v. County of Washoe (9th Cir. 2002) 290 F.3d 1175, 1185-1186]* :

- The plaintiff can show that the municipality itself violated someone's rights or that it directed its employee to do so [*Board of County Comm'rs of Bryan County v. Brown (1994) 520 U.S. 397, 404, 117 S. Ct. 1382, 137 L. Ed. 2d 626]* , or, in limited situations, the plaintiff can demonstrate that the municipality is responsible for a constitutional tort committed by its employee, even though it did not direct the employee to commit the tort [*Board of County Comm'rs of Bryan County v. Brown (1994) 520 U.S. 397, 406-407, 117 S. Ct. 1382, 137 L. Ed. 2d 626* ; *City of Canton v. Harris (1989) 489 U.S. 378, 387, 109 S. Ct. 1197, 103 L. Ed. 2d 412]* .

- The plaintiff can allege that through its omissions the municipality is responsible for a constitutional violation committed by one of its employees, even though the municipality's policies were facially constitutional, the municipality did not direct the employee to take the unconstitutional action, and the municipality did not have the state of mind required to prove the underlying violation, but the plaintiff must show that the municipality's deliberate indifference led to its omission and that the omission caused the employee to commit the constitutional violation [*City of Canton v. Harris (1989) 489 U.S. 378,*

387-389, 109 S. Ct. 1197, 103 L. Ed. 2d 412] .

The liability of a local government entity such as a school district under *42 U.S.C. § 1983* may be premised on any of the following three theories [*Lytle v. Carl (9th Cir. 2004) 382 F.3d 978, 982* ; *Webb v. Sloan (9th Cir. 2003) 330 F.3d 1158, 1164]* :

- An employee acted pursuant to an expressly adopted official policy.
- An employee acted pursuant to a longstanding practice or custom.
- An employee acted as a final policymaker.

Local governments may also be sued when their actions infringe on rights pursuant to governmental custom made by their lawmakers or by those whose edicts or acts may fairly be said to represent official policy [*Monell v. Dep't of Soc. Servs. (1978) 436 U.S. 658, 690-694, 98 S. Ct. 2018, 56 L. Ed. 2d 611* ; *County of Los Angeles v. Superior Court of Los Angeles County (Peters) (1998) 68 Cal. App. 4th 1166, 1172-1178, 80 Cal. Rptr. 2d 860* (in setting policies regarding release of persons from jail, sheriff acted in capacity of state official rather than policymaker for county); *Haskins v. San Diego County Dept. of Public Welfare (1980) 100 Cal. App. 3d 961, 973, 161 Cal. Rptr. 385* (county not liable under *42 U.S.C. § 1983* when injury, if any, was caused by simple negligence rather than official policy)].

When the policy or custom identified by the plaintiff is one of inaction, such as a failure to train employees, the plaintiff must show that the policy amounts to deliberate indifference to the plaintiff's constitutional rights [*City of Canton v. Harris (1989) 489 U.S. 378, 392, 109 S. Ct. 1197, 103 L. Ed. 2d 412* ; *Estate of Amos v. City of Page (9th Cir. 2001) 257 F.3d 1086, 1094* ; Plumeau v. School Dist. No. 40 *(9th Cir. 1997) 130 F.3d 432, 438* ; *Oviatt By and Through Waugh v. Pearce (9th Cir. 1992) 954 F.2d 1470, 1474* ; for a related jury instruction on § 1983 public entity liability for failure to train in a state court action, see *Judicial Council Of California Civil Jury Instructions, CACI No. 3009* (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions].

Because local government officials sued in their official capacities are "persons" within the meaning of *42 U.S.C. § 1983* [*Monell v. Dep't of Soc. Servs. (1978) 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611]* , a judgment against a local government official in his or her official capacity imposes liability on the entity that he or she represents, provided the local entity received notice and had an opportunity to respond to the charges [*Brandon v. Holt (1985) 469 U.S. 464, 471-472, 105 S. Ct. 873, 83 L. Ed. 2d 878]* . Thus, a suit against a governmental officer in an official capacity is equivalent to a suit against the government itself, and the standards applicable in such suits under *Monell* must be met [*Larez v. City of Los Angeles (9th Cir. 1991) 946 F.2d 630, 646-648]* .

For related jury instructions on municipal liability on a claim for violation of *42 U.S.C. § 1983* in an action in state court, see Judicial Council Of California *Civil Jury Instructions, CACI Nos. 3007, 3008* (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

[ii] Liability for Single Decision

Municipal liability may be imposed for a single decision by municipal policymakers because even a single decision by that body unquestionably constitutes an act of official government policy [*Pembaur v. Cincinnati (1986) 475 U.S. 469, 480, 106 S. Ct. 1292, 89 L. Ed. 2d 452* ; *Hammond v. County of Madera (9th Cir. 1988) 859 F.2d 797, 801]* . Municipal liability will not result, however, from a single isolated wrongful act of a city employee not authorized to make city policy [*City of Oklahoma City v. Tuttle (1985) 471 U.S. 808, 813-814, 105 S. Ct. 2427, 85 L. Ed. 2d 791* ; *see City of St. Louis v. Praprotnik (1988) 485 U.S. 112, 130-131, 108 S. Ct. 915, 99 L. Ed. 2d 107* (official did not possess authority to establish employment policy and thereby subject city to liability) (plurality opinion)].

The doctrine of ratification as a basis for municipal liability under *42 U.S.C. § 1983* originated in a decision by a plurality of the United States Supreme Court stating that if the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final. However, to establish municipal liability based on ratification, a plaintiff must prove the existence of an unconstitutional municipal policy [*City of St. Louis v. Praprotnik (1988) 485 U.S. 112, 127-128, 108 S. Ct. 915, 99 L. Ed. 2d 107* ; *see Haugen v. Brosseau (9th Cir. 2003) 339 F.3d 857, 875]* . The plaintiff must show that the triggering decision was the product of a conscious, affirmative choice to ratify the conduct in question [*Haugen v. Brosseau (9th Cir. 2003) 339 F.3d 857, 875* ; *Gillette v. Delmore (9th Cir. 1992) 979 F.2d 1342, 1347* , citing *Pembaur v. City of Cincinnati (1986) 475 U.S. 469, 480-481, 106 S. Ct. 1292, 89 L. Ed. 2d 452]* .

[iii] Liability for Systemic Injuries

A local governing body is liable for systemic injuries that result not so much from the conduct of any single individual but from the interactive behavior of several government officials, each of whom may be acting in good faith. Knowledge that the official policy is constitutionally infirm may not be necessary to establish liability [*Chalmers v. City of Los Angeles (9th Cir. 1985) 762 F.2d 753, 758]* .

[iv] No Municipal Liability for Failure to Overrule Unconstitutional Act of Subordinate

Municipal liability does not result from the mere failure of a policymaker to overrule the unconstitutional discretionary act of a subordinate [*Gillette v. Delmore (9th Cir. 1992) 979 F.2d 1342, 1347-1348 , cert. denied, 510 U.S. 932 (1993)*]. A municipality may be liable, however, if an official policymaker ratifies a subordinate's decision by approving both the decision and the basis for it [*St. Louis v. Praprotnik (1988) 485 U.S. 112, 126-127, 108 S. Ct. 915, 99 L. Ed. 2d 107* ; *Hammond v. County of Madera (9th Cir. 1988) 859 F.2d 797, 802-803* ; *see, e.g., Fuller v. City of Oakland (9th Cir. 1995) 47 F.3d 1522, 1525-1535* (city could be held liable under *42 U.S.C. § 1983* for sex discrimination based on alleged inadequate investigation of plaintiff police officer's sexual harassment charge against fellow officer, because police chief ratified decision to close investigation by approving it after reviewing case file revealing grossly inadequate investigation)].

[d] State Governments

[i] Eleventh Amendment Immunity Generally

The *Eleventh Amendment of the United States Constitution* bars suit against a state or an arm of the state in federal court unless the state has waived its immunity, or unless Congress has exercised its power under the *Fourteenth Amendment* to override that immunity [*Will v. Michigan Dep't of State Police (1989) 491 U.S. 58, 63-69, 109 S. Ct. 2304, 105 L. Ed. 2d 45]* . The State of California has not waived its *Eleventh Amendment* immunity with respect to claims brought under § 1983 in federal court, and § 1983 was not intended to abrogate a state's *Eleventh Amendment* immunity [*Brown v. Cal. Dep't of Corr. (2009) 554 F.3d 747, 752* ; *Dittman v. California (9th Cir. 1999) 191 F.3d 1020, 1025-1026*].

Congress, in enacting *42 U.S.C. § 1983*, did not override the states' *Eleventh Amendment* immunity. Therefore, absent state consent, *Eleventh Amendment* immunity bars a suit against a state or an arm of the state in federal court under *42 U.S.C. § 1983* [*Will v. Michigan Dep't of State Police (1989) 491 U.S. 58, 66, 109 S. Ct. 2304, 105 L. Ed. 2d 45* ; *Lynch v. San Francisco Housing Authority (1997) 55 Cal. App. 4th 527, 532, 65 Cal. Rptr. 2d 620* (housing authority not state agency entitled to *Eleventh Amendment* immunity); *see Dittman v. State of California (9th Cir. 1999) 191 F.3d 1020, 1025-1026 , cert. denied, 530 U.S. 1261 (2000)* (State of California Acupuncture Committee is arm of state and cannot be sued under § 1983); *Franceschi v. Schwartz (9th Cir. 1995) 57 F.3d 828, 831* (California municipal court is arm of state); *Kirchmann v. Lake Elsinore Unified School District (2000) 83 Cal. App. 4th 1098, 100 Cal. Rptr. 2d 289* (California school districts are arms of state); *Eason v. Clark County School District (9th Cir. 2002) 303 F.3d*

1137, 1140-1144 (Nevada school district was immune as arm of state)].

In deciding whether an entity may invoke *Eleventh Amendment* immunity, courts inquire into the relationship between the state and the entity in question. If the state is the real, substantial party in interest, it is entitled to invoke its sovereign immunity from suit, even though the entity and not the state is the named party [*Regents of Univ. of California v. Doe (1997) 519 U.S. 425, 429-431, 117 S. Ct. 900, 137 L. Ed. 2d 55]* . A private entity that is an independent contractor with the state is not entitled to sovereign immunity in an action under *42 U.S.C. § 1983* [*Del Campo v. Kennedy (9th Cir. 2008) 517 F.3d 1070, 1075-1080* (private corporation contracted with district attorney to run bad check diversion program was not entitled to sovereign immunity)].

Sheriffs act on behalf of the state when performing law enforcement activities. Accordingly, California sheriffs when performing law enforcement activities are absolutely immune from prosecution for asserted violations of *42 U.S.C. § 1983* [*Venegas v. County of Los Angeles (2004) 32 Cal. 4th 820, 828-839* ; *see Bougere v. County of Los Angeles (2006) 141 Cal. App. 4th 237, 241-248, 45 Cal. Rptr. 3d 711* (sheriff was carrying out law enforcement function in setting policies pertaining to placement of inmates at county jail and therefore was acting as state official immune from § 1983 liability)]. On the other hand, district attorneys carry out county functions when engaging in employment-related actions and are not entitled to *Eleventh Amendment* immunity [*Ceballos v. Garcetti (9th Cir. 2004) 361 F.3d 1168, 1182-1185]* .

The *Eleventh Amendment* does not bar an action to enforce a consent decree entered into by state officials [*see Frew v. Hawkins (2004) 540 U.S. 431, 124 S. Ct. 899, 903-906, 157 L. Ed. 2d 855* (federal court's enforcement of consent decree entered into by state officials concerning Medicaid not barred by *Eleventh Amendment*)].

Suits under § 1983 against individual officers in their individual capacity for violations of the Constitution do not implicate sovereign immunity [*Miranda B. v. Kitzhaber (9th Cir. 2003) 328 F.3d 1181, 1190]* .

[ii] Factors to Consider Whether Agency Is Immune

To determine if a governmental agency is an arm of the state for purposes of invoking *Eleventh Amendment* immunity, the Ninth Circuit considers the following five factors [*Eason v. Clark County School District (9th Cir. 2002) 303 F.3d 1137, 1141* ; *Hale v. State of Arizona (9th Cir. 1993) 993 F.2d 1387, 1399 , cert. denied, 510 U.S. 946* ; *Mitchell v. Los Angeles Community College Dist. (9th Cir. 1988) 861 F.2d 198, 201 , cert. denied, 490 U.S. 1081 (1989)]* :

- Whether a money judgment would be satisfied out of state funds;
- Whether the entity performs central governmental functions;
- Whether the entity may sue or be sued;
- Whether the entity has the power to take property in its own name or only in the name of the state; and
- The corporate status of the entity.

California courts have examined these five factors identified by the Ninth Circuit, and also other factors identified by courts throughout the federal system [*Lynch v. San Francisco Housing Authority (1997) 55 Cal. App. 4th 527, 533-534, 65 Cal. Rptr. 2d 620]* .

[iii] States and State Officials Are Not "Persons"

Neither states nor state officials sued in their official capacities are "persons" within the meaning of *42 U.S.C. § 1983* when sued for damages. Therefore, neither the state nor arms of the state can be sued for damages under *42 U.S.C. § 1983* in either federal or state court [*Will v. Michigan Dep't of State Police (1989) 491 U.S. 58, 63-64, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45* ; *Pitts v. County of Kern (1998) 17 Cal. 4th 340, 348, 70 Cal. Rptr. 2d 823, 949 P.2d 920* (California district attorney acts on behalf of state, not as county policymaker, in preparation for and prosecution of criminal violations of state law, and when establishing policy and training employees in those areas); *County of Los Angeles v. Superior Court of Los Angeles County (Peters) (1998) 68 Cal. App. 4th 1166, 1172-1178, 80 Cal. Rptr. 2d 860* (policies of Los Angeles County Sheriff's office regarding release of persons from jail were not policies of county since sheriff acted in capacity as state official rather than local policymaker for county); *Rossco Holdings v. State of California (1989) 212 Cal. App. 3d 642, 661, 260 Cal. Rptr. 736 , cert. denied, 494 U.S. 1080 (1990)* (California Coastal Commission not a "person")]. In addition, both the Commonwealth of the Northern Mariana Islands and its officers and the Commonwealth Port Authority (CPA) and its officers are not "persons" who can be sued under § 1983 [*DeNieva v. Reyes (9th Cir. 1992) 966 F.2d 480, 483* (Commonwealth of Northern Mariana Islands); *Aguon v. Commonwealth Port Authority (9th Cir. 2003) 316 F.3d 899, 901-904* (CPA)].

Although state officials literally are "persons," a suit against a state official in his or her official capacity is not a suit against that official as an individual, but rather is a suit against the official's office, and as such, is not different from a suit against the state itself. Thus, a state official sued in an official capacity is not a person who may be sued under § 1983 [*Will v. Michigan Dep't of State Police (1989) 491 U.S. 58, 70-71, 109 S. Ct. 2304, 105 L. Ed. 2d 45* ; *Garcia v. Superior Court (1990) 50 Cal. 3d 728, 739, 268 Cal. Rptr. 779, 789 P.2d 960* ; *see Coeur d'Alene Tribe v. Idaho (9th Cir. 1994) 42 F.3d 1244, 1250, 1255]* .

PRACTICE TIP:

State Cannot Be Sued Under § 1983. As noted above, the State cannot be sued for damages under § 1983 because it is not a "person." There is authority for the proposition that it was Congress's intent, in passing the *Fourteenth Amendment*, to allow citizens to sue States because the *Fourteenth Amendment* followed the *Eleventh Amendment*. Before the *Monell* decision [*Monell v. Dep't of Soc. Servs. (1978) 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611* ; *see* [c][i], *above*], cities and counties were not considered "persons." The *Will* decision [*Will v. Michigan Dep't of State Police (1989) 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45]* was a five to four vote and thus is vulnerable to being overturned--depending on the future makeup of the Supreme Court. *By John H. Scott*

The phrase "official capacity" is best understood as a reference to the capacity in which the state officer is sued, not the capacity in which that officer inflicts the injury [*Hafer v. Melo (1991) 502 U.S. 21, 26-27, 112 S. Ct. 358, 116 L. Ed. 2d 301]* . State officials, sued in their individual capacities, are "persons" within the meaning of § 1983. The *Eleventh Amendment* does not bar such suits, nor are state officers absolutely immune from personal liability under § 1983 solely by virtue of the "official" nature of their acts [*Hafer v. Melo (1991) 502 U.S. 21, 30-31, 112 S. Ct. 358, 116 L. Ed. 2d 301]* .

[iv] Injunctive or Declaratory Relief Is Appropriate Against State Official

Although *U.S. Const., amend. XI* precludes suit against the state regardless of the relief sought, a complaint for injunctive or declaratory relief may lie against a state official in his or her official capacity [*see Will v. Michigan Dep't of State Police (1989) 491 U.S. 58, 71 n.10, 109 S. Ct. 2304, 105 L. Ed. 2d 45* ; *Kentucky v. Graham (1985) 473 U.S. 159, 166-167, 167 n.14, 105 S. Ct. 3099, 87 L. Ed. 2d 114* ; *Doe v. Lawrence Livermore National Laboratory (9th Cir. 1997) 131 F.3d 836, 839* (when sued for prospective injunctive relief, state official in official capacity is considered "person" for § 1983 purposes); *Coeur d'Alene Tribe v. Idaho (9th Cir. 1994) 42 F.3d 1244, 1251-1252, 1255* ; *but see Nat'l Private Truck Council v. Oklahoma Tax Com. (1995) 515 U.S. 582, 588-590, 115 S. Ct. 2351, 132 L. Ed. 2d 509* (state officials may not be enjoined from collecting state taxes under *42 U.S.C. § 1983* if plaintiff has adequate remedy at law)].

[e] Federal Agencies and Officials

42 U.S.C. § 1983 applies only to persons acting under color of state law; therefore, it does not reach the actions of federal agencies and officials acting under color of federal law [*Wheeldin v. Wheeler (1963) 373 U.S. 647, 650, 83 S. Ct. 1441, 10 L. Ed. 2d 605* ; *Daly-Murphy v. Winston (9th Cir. 1987) 837 F.2d 348, 355]* . Nevertheless, violations by federal agents of constitutional rights while acting under color of federal authority provide a different basis for a federal cause of action for damages [*see, e.g.*, *Davis v. Passman (1979) 442 U.S. 228, 242-244, 99 S. Ct. 2264, 60 L. Ed. 2d 846* (federal right of action for damages for violation of *Fifth Amendment due process clause*); *Bivens v. Six Unknown Fed. Narcotics Agents (1971) 403 U.S. 388, 395, 91 S. Ct. 1999, 29 L. Ed. 2d 619* (violation of *U.S. Const. amend. IV* as basis for cause of action)]. Such actions are commonly known as *Bivens* actions.

The United States Supreme Court has allowed a *Bivens* action to redress a violation of the equal protection component of the *Due Process Clause of the Fifth Amendment* [*Ashcroft v. Iqbal (2009) -- U.S. --, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868* ; *see* *Davis v. Passman (1979) 442 U.S. 228, 99 S. Ct. 2264, 60 L. Ed. 2d 846 (1979)]* . However, the Court has not found an implied damages remedy under the *Free Exercise Clause* and has declined to extend *Bivens* to a claim sounding in the *First Amendment* [*Ashcroft v. Iqbal (2009) -- U.S. --, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868* ; *Bush v. Lucas (1983) 462 U.S. 367, 103 S. Ct. 2404, 76 L. Ed. 2d 648*]. In the limited settings in which *Bivens* applies, the implied cause of action is the federal analog to suits brought against state officials under *42 U.S.C. § 1983* [*Ashcroft v. Iqbal (2009) -- U.S. --, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868* ; *Hartman v. Moore (2006) 547 U.S. 250, 254, n.2, 126 S. Ct. 1695, 164 L. Ed. 2d 441* ; *cf.* *Wilson v. Layne (1999) 526 U.S. 603, 609, 119 S. Ct. 1692, 143 L. Ed. 2d 818*].

In *Bivens* actions government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior [*Ashcroft v. Iqbal (2009) -- U.S. --, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868* ; *see* *Monell v. Dep't of Soc. Servs. (1978) 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611* (no vicarious liability for municipal "person" under *42 U.S.C. § 1983*); *Robertson v. Sichel (1888) 127 U.S. 507, 515-516, 8 S. Ct. 1286, 32 L. Ed. 203* (public officer or agent is not responsible for misfeasances, position wrongs, nonfeasance, negligence, or omissions of duty of subagents or servants or other persons properly employed by or under officer or agent, in discharge of official duties); *Dunlop v. Munroe (1812) 11 U.S. 242, 3 L. Ed. 329, 7 Cranch 242, 269* (federal official's liability only results from official's own neglect in not properly superintending discharge of subordinates' duties)]. A supervisor's mere knowledge of a subordinate's discriminatory purpose does not amount to the supervisor's violating the Constitution. Absent vicarious liability, each government official, title notwithstanding, is only liable for his or her own misconduct. Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each government-official defendant, through the official's own individual actions, has violated the Constitution [*Ashcroft v. Iqbal (2009) -- U.S. --, 129 S. Ct. 1937, 1948-1949, 173 L. Ed. 2d 868*].

The factors necessary to establish a *Bivens* violation vary with the constitutional provision at issue. When the claim is invidious discrimination in contravention of the *First* and *Fifth Amendments*, the plaintiff must plead and prove that the defendant acted with discriminatory purpose [*Ashcroft v. Iqbal (2009) -- U.S. --, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868* ; *Church of Lukumi Babalu Aye, Inc. v. Hialeah (1993) 508 U.S. 520, 540-541, 113 S. Ct. 2217, 124 L. Ed. 2d 472* (*First Amendment*); *Washington v. Davis (1976) 426 U.S. 229, 240, 96 S. Ct. 2040, 48 L. Ed. 2d 597* (*Fifth Amendment*). A showing of purposeful discrimination requires more than intent as volition or intent as awareness of consequences. It requires that plaintiff show that a decision maker undertook a course of action because of, not merely in spite of, the action's adverse effects upon an identifiable group [*Ashcroft v. Iqbal (2009) -- U.S. --, 129 S. Ct. 1937, 1948-1949, 173 L. Ed. 2d 868* (to state *Bivens* claim based on violation of clearly established right, plaintiff had to plead sufficient factual matter to show government officials adopted and implemented policies not for neutral, investigative reason, but for purpose of discriminating on account of race, religion, or national origin); *Personnel Administrator of Mass. v. Feeney (1979) 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979)]* .

However, there is no private right of action for damages against private entities acting under color of federal law [

Correctional Services Corp. v. Malesko (2001) 534 U.S. 61, 122 S. Ct. 515, 151 L. Ed. 2d 456 (*Bivens* does not allow recovery against private corporation operating halfway house under contract with federal Bureau of Prisons)]. In addition, the United States Supreme Court has shown an inclination to limit the extent of actions against federal agencies and officials if other remedies exist [*see Wilkie v. Robbins (2007) 551 U.S. 537, 127 S. Ct. 2588, 2597-2604, 168 L. Ed. 2d 389* (rancher did not have *Bivens* claims against officials of Bureau of Land Management, because of variety of administrative and judicial remedies to redress injuries, and no new remedy to redress injuries collectively on theory of retaliation for exercising property rights); *Schweiker v. Chilicky (1988) 487 U.S. 412, 421, 108 S. Ct. 2460, 101 L. Ed. 2d 370* (social security disability recipients could not sue for violation of due process rights when benefits were wrongfully terminated, because existence of remedial program consisting of award of back benefits was sufficient to preclude *Bivens* action); *Bush v. Lucas (1983) 462 U.S. 367, 388, 103 S. Ct. 2404, 76 L. Ed. 2d 648* (no *Bivens* remedy for employee of National Aeronautics and Space Administration fired after making public remarks critical of employer, because Civil Service Reform Act of 1978, providing extensive review of employment decisions via Merit Systems Protection Board, was sufficient to foreclose implied action for money damages); *Carlson v. Green (1980) 446 U.S. 14, 18-19, 100 S. Ct. 1468, 64 L. Ed. 2d 15* (express limitation on creation of *Bivens* claim can be found when Congress has provided alternative remedy it explicitly declares to be substitute for recovery directly under federal Constitution and views as equally effective); *Western Radio Services Co. v. United States Forest Service (9th Cir. 2009) 578 F.3d 1116, 1119-1125* (lessee of national forest land did not have *Bivens* claim against Forest Service officers, where, because claims against officers were based on Forest Service actions or inactions, remedies available to lessee under Administrative Procedure Act constituted adequate alternative, existing process to new and freestanding remedy in damages); *Libas Ltd. v. Carillo (9th Cir. 2003) 329 F.3d 1128, 1130-1131* (importer did not have *Bivens* claim against customs officials for imposition of excess import duties on bales of cotton, when Congress established remedial scheme for importers to challenge classification of goods which ultimately entitles importers that prevail to refund of all excess duties paid with interest, and when Congress expressly exempted customs officers from suit under federal *Tort Claims Act); Moore v. Glickman (9th Cir. 1997) 113 F.3d 988, 993* (because Congress explicitly extended some employment rights to Agriculture Stabilization and Conservation Service (ASCS) county employees while withholding others, exclusion of ASCS employees from procedures of the Civil Service Reform Act for resolution of retaliation claims cannot be characterized as inadvertent and court was precluded from implying *Bivens* remedy); *Brazil v. U.S. Dep't of Navy (9th Cir. 1995) 66 F.3d 193, 198 , cert. denied, 517 U.S. 1103 (1996)* (denying *Bivens* claim to civilian employee of Navy because Title VII provides exclusive judicial remedy for claims of discrimination in federal employment); *Bricker v. Rockwell Int'l Corp. (9th Cir. 1993) 22 F.3d 871, 878* (denying *Bivens* claim to employee at Hanford Nuclear Reservation because administrative procedures included grievance procedure with arbitration as final step, and opportunity to file formal complaint); *Berry v. Hollander (9th Cir. 1991) 925 F.2d 311, 313* (denying *Bivens* claim to Veterans Administration physician because he was subject to regulations of Department of Medicine and Surgery); *Kotarski v. Cooper (9th Cir. 1989) 866 F.2d 311, 312* (administrative remedies available under Civil Service Reform Act to probationary employee, although discretionary, adequate to preclude *Bivens* claim)].

On the other hand, the Ninth Circuit has held that the Federal Tort Claims Act is not the exclusive remedy for constitutional violations committed by officers and employees of the Public Health Service [*Castaneda v. United States (9th Cir. 2008) 546 F.3d 682, 687-701]* , and that there is no subject matter jurisdiction bar in the jurisdictional limitation provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [*8 U.S.C. § 1252*], or amendments to that provision enacted in the REAL ID Act of 2005 [Pub. L. No. 109-13, div. B, § 106, 119 Stat. 231, 310-11], to a *Bivens* action based on the alleged false arrest and detention of a resident alien for deportation by an officer of the former INS [*see Sissoko v. Rocha (9th Cir. 2006) 440 F.3d 1145, 1154-1164]* .

PRACTICE TIP:

Indemnifying Federal Employees. A *Bivens* action can only be asserted against federal employees in their individual capacities. The federal government generally will not indemnify individual employees who suffer a *Bivens* judgment. Some federal agencies have guidelines for deciding whether or not to indemnify employees. Attorneys should pursue a Federal Tort Claim in addition to, or in lieu of, a *Bivens* claim. Judgment in a Federal Tort Claims Act (FTCA) action bars recovery against individual employees

[*28 U.S.C. § 2676*]. State law determines the elements of the cause of action, but federal law determines the scope of the United States' immunity [*28 U.S.C. § 2674*]. Certain intentional torts are excluded under the FTCA unless based on the conduct of "investigative or law enforcement officers" of the United States [*28 U.S.C. § 2680(h)*]. *By John H. Scott*

The defense of qualified immunity [*see § 113.14[11][b], above*] is available to defendants in *Bivens* actions [*see, e.g., Ashcroft v. Iqbal (2009) -- U.S. --, 129 S. Ct. 1937, 1947-1954, 173 L. Ed. 2d 868* (plaintiff failed to plead to state claim of unconstitutional discrimination against federal officials entitled to assert defense of qualified immunity)]. In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination. The same holds true for an official charged with violations arising from his or her superintendent responsibilities [*Ashcroft v. Iqbal (2009) -- U.S. --, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868*].

[f] Indian Tribes

Because the United States Constitution does not restrict actions by tribal governments, a plaintiff in an action under *42 U.S.C. § 1983* cannot succeed in a claim against tribal police officers for deprivation of constitutional rights to the extent the officers were acting under color of tribal law [*Bressi v. Ford (9th Cir. 2009) 575 F.3d 891, 895*]. Tribal officers have authority to investigate violations of state and federal law by any person within the reservation, and when they discover violations, they may detain the violators in order to deliver them to state or federal authorities [*Bressi v. Ford (9th Cir. 2009) 575 F.3d 891, 895* ; *see Ortiz-Barraza v. United States, 512 F.2d 1176, 1180 (9th Cir. 1975)*].

A roadblock on a public right-of-way within tribal territory, established on tribal authority, is permissible only to the extent the suspicionless stop of non-Indians is limited to the amount of time, and the nature of inquiry, that can establish whether or not they are Indians. When obvious violations, such as alcohol impairment, are found, detention on tribal authority for delivery to state officers is authorized. But inquiry going beyond Indian or non-Indian status, or including searches for evidence of crime, are not authorized on purely tribal authority in the case of non-Indians [*Bressi v. Ford (9th Cir. 2009) 575 F.3d 891, 896-897*]. Thus, tribal officers who are authorized to enforce state as well as tribal law, and proceed to exercise both powers in the operation of a roadblock, will be held to constitutional standards in establishing roadblocks [*Bressi v. Ford (9th Cir. 2009) 575 F.3d 891, 897-898*].

[8] Intent

No specific intent to deprive a person of a federal right is necessary to create liability under *42 U.S.C. § 1983* [*Monroe v. Pape (1961) 365 U.S. 167, 187, 81 S. Ct. 473, 5 L. Ed. 2d 492* (overruled on other grounds in *Monell v. Dep't of Soc. Servs. (1978) 436 U.S. 658, 663, 98 S. Ct. 2018, 56 L. Ed. 2d 611*)].

Rather, the plaintiff in a *42 U.S.C. § 1983* action must prove a violation of the underlying constitutional or statutory right. The mental state required to prove the violation varies depending on the nature of that right [*see, e.g., County of Sacramento v. Lewis (1998) 523 U.S. 833, 118 S. Ct. 1708, 1716-1717, 140 L. Ed. 2d 1043* (in substantive due process challenge to executive action, threshold question is whether behavior of governmental officer is so egregious or outrageous that it may fairly be said to shock contemporary conscience); *Daniels v. Williams (1986) 474 U.S. 327, 330-336, 106 S. Ct. 662, 88 L. Ed. 2d 662* (due process clause not implicated by official's negligence); *Arlington Heights v. Metro. Housing Corp. (1977) 429 U.S. 252, 265, 97 S. Ct. 555, 50 L. Ed. 2d 450* (invidious discriminatory purpose required for claim of racial discrimination under *Equal Protection Clause*); *Estelle v. Gamble (1976) 429 U.S. 97, 105, 97 S. Ct. 285, 50 L. Ed. 2d 251* (deliberate indifference to prisoner's serious illness or injury sufficient to constitute cruel and unusual punishment under *U.S. Const., amend. VIII*); *Porter v. Osborn (9th Cir. 2008) 546 F.3d 1131, 1136-1142* (in urgent situation of kind involved here, involving due process right to familial association claim, established standard is whether police officer acted with purpose to harm plaintiffs' decedent without regard to legitimate law enforcement objectives); *Bingue v. Prunchak (9th Cir. 2008) 512 F.3d 1169, 1174-1178* (police officers

involved in all high-speed chases entitled to qualified immunity under *42 U.S.C. § 1983* unless plaintiff can prove officer acted with deliberate intent to harm); *Onossian v. Block (9th Cir. 1999) 175 F.3d 1169, 1171-1172 , cert. denied, 528 U.S. 1004* ("shocks the conscience" standard of *Lewis* applies when innocent bystander injured in high-speed police chase); *Caballero v. City of Concord (9th Cir. 1992) 956 F.2d 204, 206* (inquiry under *U.S. Const., amend. IV*, is whether officer's actions were objectively reasonable in light of circumstances, without regard to underlying intent or motivation)].

[9] Limitations Period

[a] State Statute of Limitations Applies

42 U.S.C. § 1983 does not contain its own statute of limitations. Therefore, under the borrowing provision of *42 U.S.C. § 1988(a)*, the state statute of limitations applies [*Knox v. Davis (9th Cir. 2001) 260 F.3d 1009, 1012-1013* ; *Cabrera v. City of Huntington Park (9th Cir. 1998) 159 F.3d 374, 379* (state law determines statute of limitations for § 1983 actions)]. The statute of limitations for an action under § 1983 is that which the state provides for personal injury torts [*Wallace v. Kato (2007) 549 U.S. 384, 127 S. Ct. 1091, 1094, 166 L. Ed. 2d 973* ; *Owens v. Okure (1989) 488 U.S. 235, 249-250, 109 S. Ct. 573, 102 L. Ed. 2d 594* ; *Wilson v. Garcia (1985) 471 U.S. 261, 279-280, 105 S. Ct. 1938, 85 L. Ed. 2d 254]* . Thus, federal and California courts have applied the one-year limitations period of former *Code Civ. Proc. § 340(3)* to *42 U.S.C. § 1983* actions brought in California [*see Azer v. Connell (9th Cir. 2002) 306 F.3d 930, 935-936* ; *see Knox v. Davis (9th Cir. 2001) 260 F.3d 1009, 1012-1013* ; *Ellis v. City of San Diego (9th Cir. 1999) 176 F.3d 1183, 1188-1189* ; *Trimble v. City of Santa Rosa (9th Cir. 1995) 49 F.3d 583, 585* ; *McDougal v. County of Imperial (9th Cir. 1991) 942 F.2d 668, 672-673* ; *City of Huntington Park v. Superior Court (1995) 34 Cal. App. 4th 1293, 1297*].

Effective January 1, 2003, *Code Civ. Proc. § 340* was amended and *Code Civ. Proc. § 335.1* was added to provide that personal injury actions are now governed by a two-year statute of limitations. However, California's two-year statute of limitations does not apply retroactively [*Maldonado v. Harris (9th Cir. 2004) 370 F.3d 945, 955* ; *see Jones v. Blanas (9th Cir. 2004) 393 F.3d 918, 927* (appropriate limitations period remained one year in this case and district court applied correct limitations period)]. Thus, any cause of action that was more than one-year old as of January 1, 2003, would be barred under the previous one-year statute of limitations [*Canatella v. Van De Kamp (9th Cir. 2007) 486 F.3d 1128, 1132-1133]* .

Rather than applying different state statutes of limitations to § 1983 claims based on an evaluation of the varying factual circumstances and underlying legal theories, a simple, broad characterization of all such claims as personal injury actions is appropriate [*see Wallace v. Kato (2007) 549 U.S. 384, 127 S. Ct. 1091, 1094, 166 L. Ed. 2d 973* (statute of limitations for action under § 1983 is that which state provides for personal injury torts); *TwoRivers v. Lewis (9th Cir. 1999) 174 F.3d 987, 991* (for § 1983 actions, federal courts borrow statute of limitations applicable to personal injury claims in forum state); *Plumeau v. School Dist. No. 40 (9th Cir. 1997) 130 F.3d 432, 438* (same)]. This characterization minimizes the risk that the choice of a state statute of limitations would not fairly serve the federal interests vindicated by § 1983 [*Wilson v. Garcia (1985) 471 U.S. 261, 266-270, 276, 105 S. Ct. 1938, 85 L. Ed. 2d 254* ; *see* discussion of the borrowing provision of *42 U.S.C. § 1988* in*§ 113.17[1]*].

When state law provides multiple statutes of limitations for personal injury actions, courts considering *42 U.S.C. § 1983* claims should borrow the general or residual statute for personal injury actions [*Owens v. Okure (1989) 488 U.S. 235, 249-250, 109 S. Ct. 573, 102 L. Ed. 2d 594* ; *see Reed v. United Transport. Union (1989) 488 U.S. 319, 325-327, 334, 109 S. Ct. 621, 102 L. Ed. 2d 665* (drawing analogy between *29 U.S.C. § 411(a)(2)* claims (union members' *First Amendment* rights), *42 U.S.C. § 1983* claims, and state personal injury claims)].

Note that when the action is filed in federal court, because the underlying cause of action is federal, Federal Rule of *Civil Procedure 3* provides the rule for when the action "commences" for purposes of the statute of limitations and

Federal Rule of *Civil Procedure 6(a)* governs how to compute the time for purposes of Rule 3 [*Sain v. City of Bend (9th Cir. 2002) 309 F.3d 1134, 1136-1138]* .

[b] Issues Relating to Tolling

[i] State Law Governs

Questions closely related to the limitations period, such as tolling, are also governed by state law, unless application of state law would defeat the goals of *42 U.S.C. § 1983* [*Hardin v. Straub (1989) 490 U.S. 536, 538-544, 109 S. Ct. 1998, 104 L. Ed. 2d 582* ; *see Wilson v. Garcia (1985) 471 U.S. 261, 269, 276, 105 S. Ct. 1938, 85 L. Ed. 2d 254* ; *TwoRivers v. Lewis (9th Cir. 1999) 174 F.3d 987, 992* ; *Martinez v. Gomez (9th Cir. 1998) 137 F.3d 1124-1126]* . However, federal law determines whether an amendment to a state tolling provision while a § 1983 action is pending applies retroactively [*TwoRivers v. Lewis (9th Cir. 1999) 174 F.3d 987, 991-993]* .

[ii] Minority or Insanity Statute

Code Civ. Proc. § 352(a), which tolls the limitations period during a plaintiff's minority, or for one who is insane, applies to actions under *42 U.S.C. § 1983* [*May v. Enomoto (9th Cir. 1980) 633 F.2d 164, 166-167* ; *City of Huntington Park v. Superior Court (1995) 34 Cal. App. 4th 1293, 1297-1300, 41 Cal. Rptr. 2d 68]* .

Code Civ. Proc. § 352(b), which makes the tolling provision for a plaintiff's minority or insanity inapplicable to actions for which a claim is required to be presented to a defendant public entity, does not apply to actions under *42 U.S.C. § 1983* because § 352(b) was not intended to apply to such actions [*see City of Huntington Park v. Superior Court (1995) 34 Cal. App. 4th 1293, 1297-1300, 41 Cal. Rptr. 2d 68]* .

[iii] Imprisonment Statute

Code Civ. Proc. § 352.1(a), which tolls, for up to two years, the limitations period for a person "imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life," applies to toll the limitations period in a § 1983 action [*Martinez v. Gomez (9th Cir. 1998) 137 F.3d 1124, 1126]* . *Code Civ. Proc. § 352.1(a)* only applies to § 1983 actions to the extent they are for recovery of damages [*Code Civ. Proc. § 352.1(c)*]. In addition, *Code Civ. Proc. § 352.1(a)* applies to an action brought by an inmate serving a life sentence with the possibility of parole [*Martinez v. Gomez (9th Cir. 1998) 137 F.3d 1124, 1126]* .

The literal language of *Code Civ. Proc. § 352.1(a)* does not cover a civil detainee [*Jones v. Blanas (9th Cir. 2004) 393 F.3d 918, 927-928* (statute does not cover claim of civil detainee under Sexually Violent Predators Act)]. However, California's equitable tolling doctrine operates to toll a statute of limitations for a claim asserted by a continuously confined civil detainee who has pursued his or her claim in good faith [*Jones v. Blanas (9th Cir. 2004) 393 F.3d 918, 928-930]* .

[iv] Civil Action Prohibited Against Peace Officer When Criminal Charges Pending

Gov. Code § 945.3 also applies to *42 U.S.C. § 1983* actions [*see Cabrera v. City of Huntington Park (9th Cir. 1998) 159 F.3d 374, 379* ; *Trimble v. City of Santa Rosa (9th Cir. 1995) 49 F.3d 583, 585]* , and provides as follows:

> No person charged by indictment, information, complaint, or other accusatory pleading charging a criminal offense may bring a civil action for money or damages against a peace officer or the public entity employing a peace officer based upon conduct of the peace officer relating to the offense for which the accused is charged, including an act or omission in investigating or reporting the offense or arresting or detaining the accused, while the charges against the accused are pending before a superior court.

Any applicable statute of limitations for filing and prosecuting these actions must be tolled during the period that the charges are pending before a superior court [*Gov. Code § 945.3*].

For purposes of *Gov. Code § 945.3*, an "accusatory pleading charging a criminal offense" includes a notice to appear or citation to a person charged with a misdemeanor [*see Pen. Code § 853.6(a)*], even though it is subject to supersession by the filing of a complaint, or to defeasance through prosecutorial inaction [*Schmidlin v. City of Palo Alto (2007) 157 Cal. App. 4th 728, 749-753, 69 Cal. Rptr. 3d 365*].

Under *Gov. Code § 945.3*, criminal charges are "pending" from the time the charges are filed with a court [*Cabrera v. City of Huntington Park (9th Cir. 1998) 159 F.3d 374, 379]* until the date of judgment [*Trimble v. City of Santa Rosa (9th Cir. 1995) 49 F.3d 583, 585]* , or until they are dismissed by the prosecutor [*see Schmidlin v. City of Palo Alto (2007) 157 Cal. App. 4th 728, 746-761, 69 Cal. Rptr. 3d 365* (notice to appear inferentially served on criminal defendant, who later filed § 1983 action against officer, at time of his release commenced tolling under § 945.3, and criminal complaint was filed well within statutory 25 days, so that tolling period for § 1983 action continued through final disposition of charges by dismissal by prosecutor)]. Further, misdemeanor charges are "pending before a court" under § 945.3 when a criminal defendant is directed to appear before the court on specified charges by service upon the defendant of a notice to appear [*see Pen. Code § 853.6(a)*], regardless whether that notice is ever filed with a court [*Schmidlin v. City of Palo Alto (2007) 157 Cal. App. 4th 728, 756, 69 Cal. Rptr. 3d 365*].

[v] Statute Tolled by "Discovery Rule"

As a matter of federal as well as state law, the statute of limitations is generally tolled by the "discovery rule," under which the statute only begins to run once a plaintiff has knowledge of the "critical facts" of the injury, which are that the plaintiff has been hurt and who inflicted the injury [*United States v. Kubrick (1979) 444 U.S. 111, 120 n.2, 122, 100 S. Ct. 352, 62 L. Ed. 2d 259* ; *Bibeau v. Pacific Northwest Research Foundation (9th Cir. 1999) 188 F.3d 1105, 1108 , amended, 208 F.3d 831 (2000)]* . The plaintiff must be diligent in discovering the critical facts, so that a plaintiff who did not actually know that his or her rights were violated will be barred from bringing a claim after the running of the statute of limitations, if the plaintiff should have known in the exercise of due diligence [*Bibeau v. Pacific Northwest Research Foundation (9th Cir. 1999) 188 F.3d 1105, 1108 , amended, 208 F.3d 831 (2000)]* .

[c] Accrual of Cause of Action

Federal law, rather than state law, governs the question when a particular cause of action accrues [*Canatella v. Van De Kamp (9th Cir. 2007) 486 F.3d 1128, 1133]* . Under federal rules conforming in general to common-law tort principles [*see Heck v. Humphrey (1994) 512 U.S. 477, 483, 114 S. Ct. 2364, 129 L. Ed. 2d 383* ; *Carey v. Piphus (1978) 435 U.S. 247, 257-258, 98 S. Ct. 1042, 55 L. Ed. 2d 252]* , it is the standard rule that accrual occurs when the plaintiff has a complete and present cause of action, *i.e.*, when the plaintiff can file suit and obtain relief [*Wallace v. Kato (2007) 549 U.S. 384, 127 S. Ct. 1091, 1095, 166 L. Ed. 2d 973* ; *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal. (1997) 522 U.S. 192, 201, 118 S. Ct. 542, 139 L. Ed. 2d 553]* . Thus, for example, a plaintiff suing for false arrest could have filed suit as soon as the allegedly wrongful arrest occurred, which subjecting him to the harm of involuntary detention, so the statute of limitations would normally commence to run from that date [*Wallace v. Kato (2007) 549 U.S. 384, 127 S. Ct. 1091, 1095, 166 L. Ed. 2d 973]* . However, the running of the statute of limitations on false imprisonment, which is analogous to false arrest, is subject to a distinctive rule, which is that limitations begin to run against an action for false imprisonment when the alleged false imprisonment ends [*Wallace v. Kato (2007) 549 U.S. 384, 127 S. Ct. 1091, 1095-1096, 166 L. Ed. 2d 973* , *citing* 2 H. Wood, Limitation of Actions § 187d(4), p. 878 (4th rev. ed. 1916); *see also* 4 Restatement (Second) of Torts § 899, Comment *c* (1977); A. Underhill, Principles of Law of Torts 202 (1881)]. False imprisonment ends once the victim becomes held pursuant to process, such as when he or she is bound over by a magistrate or arraigned on charges. Thereafter, unlawful detention forms part of the damages for the distinct tort of malicious prosecution, which remedies detention accompanied by wrongful institution of legal process rather than the absence of legal process [*Wallace v. Kato (2007) 549 U.S. 384, 127 S. Ct. 1091, 1096, 166 L.*

Ed. 2d 973 (false imprisonment ended when legal process was initiated against plaintiff, and statute would have begun to run from that date, but for its tolling by reason of petitioner's minority)].

Further, the claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action [*Canatella v. Van De Kamp (9th Cir. 2007) 486 F.3d 1128, 1133 Azer v. Connell (9th Cir. 2002) 306 F.3d 930, 936* ; *Knox v. Davis (9th Cir. 2001) 260 F.3d 1009, 1013* ; *TwoRivers v. Lewis (9th Cir. 1999) 174 F.3d 987, 992]* .

Because federal, not state, law determines when a civil rights claim accrues, California's single publication rule does not apply to § 1983 claims by its own force. However, courts have employed the single publication rule's logic to hold that once that standard is met, a single publication gives rise to only one cause of action [*Canatella v. Van De Kamp (9th Cir. 2007) 486 F.3d 1128, 1133-1134]* . In the case of publication on the Internet, a website, not a particular URL, is the touchstone for the single publication rule analysis [*Canatella v. Van De Kamp (9th Cir. 2007) 486 F.3d 1128, 1135]* .

A claim under *42 U.S.C. § 1983*, that if successful would necessarily imply the invalidity of a conviction in a pending criminal prosecution, does not accrue so long as the potential for a conviction in the pending criminal prosecution continues to exist. Further, a § 1983 action alleging illegal search and seizure of evidence on which the criminal charges are based does not accrue until the criminal charges have been dismissed or the conviction overturned, to avoid the potential for inconsistent determinations on the legality of the search and seizure in the civil and criminal cases [*Heck v. Humphrey (1994) 512 U.S. 477, 486-487, 114 S. Ct. 2364, 129 L. Ed. 2d 383* ; *Harvey v. Waldron (9th Cir. 2000) 210 F.3d 1008, 1014-1015]* . On the other hand, an action that would impugn an *anticipated future* conviction is not subject to the rule in *Heck v. Humphrey*, *i.e.*, that it cannot be brought until that conviction occurs and is set aside. If a plaintiff files a false arrest claim or any other claim related to rulings that will likely be made in a pending or anticipated criminal trial before the plaintiff has been convicted, the court has the power to stay the civil action until the criminal case or the likelihood of a criminal case is ended. If the plaintiff is ultimately convicted, and if the stayed civil suit would impugn that conviction, *Heck* requires dismissal; otherwise, the civil action will proceed, absent some other bar to suit [*Wallace v. Kato (2007) 549 U.S. 384, 127 S. Ct. 1091, 1098-1100, 166 L. Ed. 2d 973]* . However, § 1983 actions, unlike the tort of malicious prosecution which *Heck* took as its model, sometimes accrue before the setting aside or even before the existence of the related criminal conviction. Assuming that the *Heck* bar takes effect when the later conviction is obtained, whether the statute of limitations on the once valid cause of action is tolled as long as the *Heck* bar subsists is governed by state law [*see* *Wallace v. Kato (2007) 549 U.S. 384, 127 S. Ct. 1091, 1098-1100, 166 L. Ed. 2d 973* (no Illinois statute or case provided tolling under comparable circumstances and Court would not adopt federal tolling rule to that effect)].

[d] Continuing Violation

The continuing violations doctrine permits a plaintiff to sue for all discriminatory acts that occurred during the limitations period, even if the policy or other event giving rise to the discrimination occurred outside the limitations period [*Committee Concerning Community Improvement v. City of Modesto (9th Cir. 2009) 583 F.3d 690, 701* ; *Cherosky v. Henderson (9th Cir. 2003) 330 F.3d 1243, 1247]* . The continuing violation theory applies to actions under *42 U.S.C. § 1983*. It allows a plaintiff to seek relief for events outside of the limitations period [*Knox v. Davis (9th Cir. 2001) 260 F.3d 1009, 1013]* . To constitute a continuing violation, the alleged discriminatory acts must be related closely enough and one or more of the acts must fall within the limitations period; mere continuing impact from past violations is not actionable [*Knox v. Davis (9th Cir. 2001) 260 F.3d 1009, 1013]* . When the action is based on an allegation of a discriminatory pattern or practice, plaintiff must show that a pattern or practice of discrimination creates an ongoing violation. However, discrete discriminatory acts will not create a pattern of discrimination without more. Pattern-or-practice claims cannot be based on sporadic discriminatory acts; rather, they must be based on discriminatory conduct that is widespread [*Committee Concerning Community Improvement v. City of Modesto (9th Cir. 2009) 583 F.3d 690, 701* ; *Cherosky v. Henderson (9th Cir. 2003) 330 F.3d 1243, 1247]* . The statute of limitations runs separately from each discrete act. Acts falling outside of the limitations period are time barred and not actionable under a continuing violations doctrine, even when they are related to acts that are timely alleged [*AMTRAK v. Morgan*

(2002) 536 U.S. 101, 122 S. Ct. 2061, 2072, 153 L. Ed. 2d 106 ; *RK Ventures, Inc. v. City of Seattle (9th Cir. 2002) 307 F.3d 1045, 1050, 1061* (defendant's discrete action in withdrawing settlement offer in nuisance abatement action was actionable as only act occurring within limitations period)]. However, in assessing whether acts occurring within the limitations period are actionable, the court may look to pre-limitations period events as evidence of an illegal motive [*AMTRAK v. Morgan (2002) 536 U.S.101, 122 S. Ct. 2061, 2072, 153 L. Ed. 2d 106* ; *RK Ventures, Inc. v. City of Seattle (9th Cir. 2002) 307 F.3d 1045, 1062]* .

In determining when an act occurs for statute of limitations purposes, the court looks at when the "operative decision" occurred and separates from the operative decisions inevitable consequences that are not separately actionable [*RK Ventures, Inc. v. City of Seattle (9th Cir. 2002) 307 F.3d 1045, 1058]* .

[10] Survival of Actions

42 U.S.C. § 1983 is silent on the question of whether an action survives the death of the person whose rights were violated. Therefore, state law governs that issue, unless the survival law of the forum state is inhospitable to federal law or inconsistent with the purposes of federal law [*Robertson v. Wegmann (1978) 436 U.S. 584, 588, 98 S. Ct. 1991, 56 L. Ed. 2d 554* ; *County of Los Angeles v. Superior Court of Los Angeles County (Schonert) (1999) 21 Cal. 4th 292, 300-303, 87 Cal. Rptr. 2d 441, 981 P.2d 68* ; *see 42 U.S.C. § 1988(a)*].

In California, a § 1983 claim survives, and the personal representative or successor in interest of the victim may bring the action [*Code Civ. Proc. § 377.20 et seq.*; *see Byrd v. Guess (9th Cir. 1998) 137 F.3d 1126, 1131 , cert. denied, 525 U.S. 963* ; *Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 173-174, 216 Cal. Rptr. 661, 703 P.2d 1]* .

To maintain a survival action under *42 U.S.C. § 1983*, a plaintiff must allege his or her representative capacity in the complaint or introduce evidence that he or she is in fact the successor in interest of the decedent [*Byrd v. Guess (9th Cir. 1998) 137 F.3d 1126, 1131 , cert. denied, 525 U.S. 963* (trial court properly dismissed complaint when decedent's wife and mother failed to allege representative capacity and to introduce evidence that they were decedent's successors in interest)].

Under California's survival statutes, the prohibition against recovery of damages in a survival action for pain and suffering [*Code Civ. Proc. § 377.34*] applies to actions brought under *42 U.S.C. § 1983* [*County of Los Angeles v. Superior Court of Los Angeles County (Schonert) (1999) 21 Cal. 4th 292, 308, 87 Cal. Rptr. 2d 441, 981 P.2d 68* (death unrelated to cause of action; court expressed no opinion on whether preclusion of pain and suffering damages under California's survival law would be inconsistent with policies underlying federal civil rights law in situations in which asserted constitutional deprivation caused the death)].

[11] Defenses

[a] Absolute Immunity

[i] Provides Complete Defense

An absolute immunity provides a complete defense from suit. It generally applies to officials whose special functions or constitutional status require that level of protection [*Harlow v. Fitzgerald (1982) 457 U.S. 800, 807, 102 S. Ct. 2727, 73 L. Ed. 2d 396* (absolute immunity applies to legislators in their legislative capacities); *see also* [ii]-[viii], *below*].

[ii] Immunity of Legislators

State and regional legislators are entitled to absolute immunity from liability under *42 U.S.C. § 1983* for their legislative activities [*see Tenney v. Brandhove (1951) 341 U.S. 367, 372, 71 S. Ct. 783, 95 L. Ed. 1019* (state legislators); *Lake Country Estates v. Tahoe Regional Planning Agency (1979) 440 U.S. 391, 402-406, 99 S. Ct. 1171, 59 L. Ed. 2d 401*

(regional legislators)]. Local legislators are also absolutely immune from suit under *42 U.S.C. § 1983* for their legislative activities [*Bogan v. Scott-Harris (1998) 523 U.S. 44, 49, 118 S. Ct. 966, 140 L. Ed. 2d 79* ; *San Pedro Hotel Co. v. City of Los Angeles (9th Cir. 1998) 159 F.3d 470, 476* (city councilman entitled to absolute immunity for voting or persuading colleagues to vote one way or another on approval of loan of federal housing funds administered by city)]. Legislative activities do not include an administrative (as opposed to legislative) termination of an employee [*Bechard v. Rappold (9th Cir. 2002) 287 F.3d 827]* .

School board members, however, are not entitled to absolute immunity [*see* *Wood v. Strickland (1975) 420 U.S. 308, 321-322, 95 S. Ct. 992, 43 L. Ed. 2d 214]* .

[iii] Immunity of Judges

Federal and state judges are absolutely immune from liability for damages for violating the constitutional rights of others when acting within the scope of their duties [*see* *Stump v. Sparkman (1978) 435 U.S. 349, 355, 98 S. Ct. 1099, 55 L. Ed. 2d 331* (judicial immunity); *Martinez v. Newport Beach City (9th Cir. 1997) 125 F.3d 777, 780* (state court judge who denied petition to expunge record acted in judicial capacity and was absolutely immune)].

There are only two exceptions to the absolute immunity of judges: (1) nonjudicial actions, and (2) actions that, though judicial in nature, are taken in the complete absence of all jurisdiction [*Mireles v. Waco (1991) 502 U.S. 9, 11-12, 112 S. Ct. 286, 116 L. Ed. 2d 9]* . Whether an act is judicial depends on the following [*Mireles v. Waco (1991) 502 U.S. 9, 11-12, 112 S. Ct. 286, 116 L. Ed. 2d 9* ; *Franceschi v. Schwartz (9th Cir. 1995) 57 F.3d 828, 830-831* ; *see* *Nunez v. Davis (9th Cir. 1999) 169 F.3d 1222, 1229 n.3* , *cert. denied*, *528 U.S. 1115 (2000)* (judge not entitled to absolute immunity in action involving firing of court administrator, since hiring and firing of court personnel is nonjudicial act for absolute immunity purposes)]:

- The nature of the act itself;
- Whether it is a function normally performed by a judge; and
- Whether the parties are dealing with the judge in his or her official capacity.

The scope of a judge's jurisdiction is construed broadly [*Franceschi v. Schwartz (9th Cir. 1995) 57 F.3d 828, 830* ; *Rosenthal v. Justices of the Supreme Court of California (9th Cir. 1990) 910 F.2d 561, 565-566* , *cert. denied*, *498 U.S. 1087 (1991)]* . Because it is the nature of the function performed, rather than the identity of the actor performing it, that determines immunity, a judge's direction to another to carry out an order does not transform an action from judicial to executive [*Mireles v. Waco (1991) 502 U.S. 9, 12, 112 S. Ct. 286, 116 L. Ed. 2d 9]* . Thus, for example, a judge was absolutely immune from liability for suit for alleged use of excessive force by police officers bringing a public defender into the courtroom pursuant to the judge's order [*Mireles v. Waco (1991) 502 U.S. 9, 12-13, 112 S. Ct. 286, 116 L. Ed. 2d 9* ; *see* *Franceschi v. Schwartz (9th Cir. 1995) 57 F.3d 828, 831* (court commissioner absolutely immune from liability for actions pertaining to setting bail, issuing and reactivating bench warrant, and transferring case to another judge); *42 U.S.C. § 1988(b)* (judicial officer not liable for costs in action against officer for act or omission in judicial capacity unless action is clearly in excess of officer's jurisdiction)].

Judicial immunity is extended to others who perform functions closely associated with the judicial process because their judgments are functionally comparable to those of judges, that is, they also exercise discretionary judgment as part of their function [*Duvall v. County of Kitsap (9th Cir. 2001) 260 F.3d 1124, 1133-1134* ; *Moore v. Brewster (9th Cir. 1996) 96 F.3d 1240, 1244* ; *see* *Antoine v. Byers & Anderson, Inc. (1993) 508 U.S. 429, 436, 113 S. Ct. 2167, 124 L. Ed. 2d 391]* . The lynchpin of both judicial and quasi-judicial immunities is that the acts in question are an integral part of the judicial process [*Greater Los Angeles Council on Deafness v. Zolin (9th Cir. 1987) 812 F.2d 1103, 1108]* .

[iv] Immunity of Prosecutors

Federal and state prosecuting attorneys are absolutely immune from liability for damages for violating the constitutional rights of others when acting within the scope of their duties [*see* *Imbler v. Pachtman (1976) 424 U.S. 409, 427, 96 S. Ct. 984, 47 L. Ed. 2d 128* (prosecutorial immunity)]. Absolute immunity for prosecutors is warranted for the following reasons [*Burns v. Reed (1991) 500 U.S. 478, 485, 111 S. Ct. 1934* ; *Imbler v. Pachtman (1976) 424 U.S. 409, 423-425, 96 S. Ct. 984, 47 L. Ed. 2d 128* ; *Milstein v. Cooley (9th Cir. 2001) 257 F.3d 1004, 1007]* :

- To allow prosecutors to focus their energies on prosecuting, rather than defending lawsuits.

- To enable prosecutors to exercise independent judgment in deciding which suits to bring and conducting them in court.

- To preserve the criminal justice system's function of determining guilt or innocence by ensuring that triers of fact are not denied relevant (although sometimes conflicting) evidence because of prosecutors' fear of suit.

- To ensure fairness to defendants by enabling judges to make rulings in their favor without the subconscious knowledge that the rulings could subject the prosecutor to liability.

When the official claiming immunity is a prosecutor, courts will examine the nature of the function performed, not the identity of the actor who performed it, in deciding whether absolute immunity is available [*Kalina v. Fletcher (1997) 522 U.S. 118, 127, 118 S. Ct. 502, 139 L. Ed. 2d 471* ; *Burns v. Reed (1991) 500 U.S. 478, 486, 111 S. Ct. 1934, 114 L. Ed. 2d 547* ; *Forrester v. White (1988) 484 U.S. 219, 229, 108 S. Ct. 538, 98 L. Ed. 2d 555* ; *Milstein v. Cooley (9th Cir. 2001) 257 F.3d 1004, 1008* ; *Morley v. Walker (9th Cir. 1999) 175 F.3d 756, 759]* . The prosecutor bears the burden of showing that immunity is justified for the function in question [*Burns v. Reed (1991) 500 U.S. 478, 486, 111 S. Ct. 1934, 114 L. Ed. 2d 547* ; *Milstein v. Cooley (9th Cir. 2001) 257 F.3d 1004, 1008]* . The prosecutor's intent plays no role in the analysis [*Milstein v. Cooley (9th Cir. 2001) 257 F.3d 1004, 1008]* .

Generally, state prosecutors are absolutely immune from liability under *42 U.S.C. § 1983* for conduct intimately associated with the judicial phase of the criminal process [*Imbler v. Pachtman (1976) 424 U.S. 409, 430-431, 96 S. Ct. 984, 47 L. Ed. 2d 128* ; *Pitts v. County of Kern (1998) 17 Cal. 4th 340, 350, 70 Cal. Rptr. 2d 823, 949 P.2d 920]* . Immune conduct includes (1) initiating a prosecution, (2) presenting the state's case, and (3) participating in a probable cause hearing [*Burns v. Reed (1991) 500 U.S. 478, 487, 111 S. Ct. 1934, 114 L. Ed. 2d 547* ; *Pitts v. County of Kern (1998) 17 Cal. 4th 340, 350, 70 Cal. Rptr. 2d 823, 949 P.2d 920* ; *see* *Kalina v. Fletcher (1997) 522 U.S. 118, 129-131, 118 S. Ct. 502, 139 L. Ed. 2d 471* (prosecutor not entitled to absolute immunity in executing certification for determination of probable cause in filing charges against accused, since neither federal nor state law required prosecutor to make certification, which could have been made by any competent witness); *Herb Hallman Chevrolet v. Nash-Holmes (9th Cir. 1999) 169 F.3d 636, 643* , *cert. denied*, *528 U.S. 870* (prosecutors entitled to absolute immunity for performing advocate's role after initiation of grand jury proceedings, when prosecutors had probable cause under state law to initiate proceedings)]. In addition, absolute immunity protects quasi-judicial conduct such as (1) maliciously initiating a prosecution; (2) using perjured testimony at trial; and (3) suppressing material evidence at trial [*Imbler v. Pachtman (1976) 424 U.S. 409, 430, 96 S. Ct. 984, 47 L. Ed. 2d 128* ; *Genzler v. Longanbach (9th Cir. 2004) 384 F.3d 1092, 1097]* .

Prosecutors have absolute immunity for decisions to prosecute or not to prosecute [*Roe v. City and County of San Francisco (9th Cir. 1997) 109 F.3d 578, 583]* . Furthermore, a prosecutor is absolutely immune for acts undertaken in preparing for the initiation of administrative or judicial proceedings or for trial, including professional evaluation of the evidence assembled by the investigative agency against the accused [*Bradley v. Medical Board (1997) 56 Cal. App. 4th 445, 456, 65 Cal. Rptr. 2d 483* (deputy Attorney General absolutely immune when consulting with physician in

preparing to amend administrative accusation presented to Medical Board of California against another physician)].

Absolute immunity for prosecutors extends to certain administrative activities as well, including a failure to disclose impeachment material due to: (1) a failure properly to train prosecutors, (2) a failure properly to supervise prosecutors, or (3) a failure to establish an information system containing potential impeachment material about informants [*Van De Kamp v. Goldstein (2009) -- U.S. --, 129 S. Ct. 855, 172 L. Ed. 2d 706, 714-718]* .

State prosecutors also have absolute immunity for parole recommendations because parole decisions are a continuation of the sentencing process [*Brown v. Cal. Dep't of Corr. (2009) 554 F.3d 747, 750-751*].

However, although a state prosecutor is entitled to absolute immunity for participation in a probable cause hearing, he or she is entitled to only qualified immunity for giving legal advice to the police in the investigative phase of a criminal case [*Burns v. Reed (1991) 500 U.S. 478, 492-496, 111 S. Ct. 1934, 114 L. Ed. 2d 547]* . Similarly, in the investigative phase of a criminal case, if a state prosecutor performs investigative functions normally performed by a detective or police officer, the prosecutor, like a detective or police officer, is entitled to only qualified immunity [*Buckley v. Fitzsimmons (1993) 509 U.S. 259, 272-276, 113 S. Ct. 2606, 125 L. Ed. 2d 209* ; *see Genzler v. Longanbach (9th Cir. 2004) 384 F.3d 1092, 1098-1104* (deputy district attorney and investigator were only entitled to qualified immunity in meeting with and interviewing witness because it was investigative function)]. Moreover, a state prosecutor is entitled to only qualified immunity when making statements to the press at a press conference [*Buckley v. Fitzsimmons (1993) 509 U.S. 259, 276-278, 113 S. Ct. 2606, 125 L. Ed. 2d 209]* . When a prosecutor seeks a material witness warrant in order to investigate or preemptively detain a suspect, rather than to secure the suspect's testimony at another's trial, the prosecutor is entitled at most to qualified, rather than absolute, immunity [al- *Kidd v. Ashcroft (9th Cir. 2009) 580 F.3d 949, 957-964*].

Prosecutorial absolute immunity has been applied to social workers performing certain quasi-prosecutorial functions in connection with the initiation and pursuit of juvenile dependency proceedings [*see Meyers v. Contra Costa County Dep't of Soc. Serv. (9th Cir. 1987) 812 F.2d 1154, 1157 , cert. denied, 484 U.S. 829 (1988)* ; *Alicia T. v. County of Los Angeles (1990) 222 Cal. App. 3d 869, 881, 271 Cal. Rptr. 513]* .

Prosecutorial absolute immunity has also been applied to state and local officials who filed proceedings to revoke a foster care license, as well as to other officials who performed investigative functions in connection with the initiation of the license revocation proceedings [*see Gensburg v. Miller (1994) 31 Cal. App. 4th 512, 521-525, 37 Cal. Rptr. 2d 97]* .

PRACTICE TIP:

Effect on Immunity of Independent Investigation. There is a line of cases that stand for the proposition that police officers, complainants, and/or investigators may be sued for "malicious prosecution" with some exceptions. This is often an extension of a false arrest case when criminal prosecution was terminated in favor of the defendant [*see, e.g., Awabdy v. City of Adelanto (9th Cir. 2004) 368 F.3d 1062, 1066-1070* (because former city councilman properly alleged defendants engaged in malicious conduct with purpose of depriving him of his constitutional rights to free speech and equal protection, he stated claim for malicious prosecution under *42 U.S.C. § 1983* with regard to alleged *First* and *Fourteenth Amendment* violations)]. Generally, prosecutors enjoy absolute immunity and the damages are deemed to be cut off if the decision to prosecute is based on an "independent investigation." However, the prosecutor only enjoys qualified immunity when acting as an investigator. It is important to determine early on whether the District Attorney conducted an independent investigation before prosecuting the case. *By John H. Scott*

[v] Immunity of Executive Branch Officials

Executive branch officials, when participating in a federal administrative agency's adjudicative process, are entitled to absolute immunity because they perform functions comparable to those of judges and prosecutors [*see* *Butz v. Economou (1978) 438 U.S. 478, 512-513, 98 S. Ct. 2894, 57 L. Ed. 2d 895* ; *see also* [iii] and [iv], *above* (immunity of judges and prosecutors)]. However, members of a prison discipline committee who are not professional hearing officers, as are administrative law judges, but are merely prison employees, whose coworkers lodge charges against inmates, are not entitled to absolute immunity [*see* *Cleavinger v. Saxner (1985) 474 U.S. 193, 206-207, 106 S. Ct. 496, 88 L. Ed. 2d 507]* .

State parole board officials are absolutely immune from suits by prisoners for actions taken when processing parole applications [*Brown v. Cal. Dep't of Corr. (2009) 554 F.3d 747, 750-751* ; *Bermudez v. Duenas (9th Cir. 1991) 936 F.2d 1064, 1066*].

[vi] Immunity of Members of State Medical Board

Members of a state medical board are absolutely immune but only when their actions are judicial or closely associated with the judicial process, such as acts occurring during the disciplinary hearing process including holding hearings, taking evidence, and adjudicating [*Mishler v. Clift (9th Cir. 1999) 191 F.3d 998, 1009]* .

[vii] Immunity of Witnesses

All witnesses, including police officers, who give testimony at a criminal trial, have absolute immunity from civil suits for perjury brought under *42 U.S.C. § 1983* by the person convicted in the criminal suit [*Briscoe v. Lahue (1983) 460 U.S. 325, 335-336, 103 S. Ct. 1108, 75 L. Ed. 2d 96]* . The purpose of the immunity is to encourage witnesses to come forward and speak freely in court by relieving the potential defendant of any fear he or she will later have regarding the burden of litigating the propriety of his or her conduct as a witness [*Briscoe v. LaHue (1983) 460 U.S. 325, 335-336, 103 S. Ct. 1108, 75 L. Ed. 2d 96* ; *Paine v. City of Lompoc (9th Cir. 2001) 265 F.3d 975, 980]* . Denying immunity on summary judgment compromises the reasons for the protection accorded court appearances, by subjecting the defendant to the rigors and distractions of standing trial even if he or she is ultimately found not liable on testimonial immunity grounds [*Paine v. City of Lompoc (9th Cir. 2001) 265 F.3d 975, 980]* .

The same absolute immunity applies to witnesses who render perjured testimony in court at adversarial pretrial hearings [*Holt v. Castaneda (9th Cir. 1987) 832 F.2d 123, 127 , cert. denied, 485 U.S. 979]* . Witness immunity also extends to conspiracies to commit perjury [*Paine v. City of Lompoc (9th Cir. 2001) 265 F.3d 975, 981* ; *Franklin v. Terr (9th Cir. 2000) 201 F.3d 1098, 1101* ; *Cunningham v. Gates (9th Cir. 2000) 229 F.3d 1271, 1291]* . However, witness immunity does not extend to complaining witnesses, that is, individuals whose allegations serve to bring about a prosecution [*Malley v. Briggs (1986) 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271* ; *Paine v. City of Lompoc (9th Cir. 2001) 265 F.3d 975, 981 n.2* ; *Harris v. Roderick (9th Cir. 1997) 126 F.3d 1189, 1198-99* (police officer witnesses not entitled to absolute witness immunity for perjured grand jury testimony that brings about wrongful prosecution)]. The immunity also does not shield nontestimonial conduct [*Paine v. City of Lompoc (9th Cir. 2001) 265 F.3d 975, 981* ; *Cunningham v. Gates (9th Cir. 2000) 229 F.3d 1271, 1291* (fabricating evidence)]. Further, there is no immunity from liability for conspiratorial conduct not inextricably tied to testimony [*Paine v. City of Lompoc (9th Cir. 2001) 265 F.3d 975, 981-983* (immunity does not shield out-of-court, pretrial conspiracy to engage in nontestimonial acts such as fabricating or suppressing physical or documentary evidence or suppressing identities of potential witnesses); *Franklin v. Terr (9th Cir. 2000) 201 F.3d 1098, 1102]* .

[viii] Immunity of State Workers in Child Welfare Proceedings

A family social service worker has absolute immunity only for the discretionary, quasi-prosecutorial decisions involved in the initiation and pursuit of child-dependency proceedings to take custody away from parents because they are prosecutorial in nature, except as to a claim the social worker fabricated evidence during an investigation or made false

statements in a dependency petition affidavit that the social worker signed under penalty of perjury, because those actions are not similar to discretionary decisions about whether to prosecute [*Beltran v. County of Santa Clara (9th Cir. 2008) 514 F.3d 906, 908* , *overruling Doe v. Lebbos (9th Cir. 2003) 348 F.3d 820*]. Courts distinguish between a social worker's activities performed as an advocate within the judicial decision-making process, a function for which there is common law absolute immunity, and other actions taken by a social worker. The courts look to functions that enjoyed absolute immunity at common law in 1871, when Congress codified § 1983, not to the relation of the action to a judicial proceeding [*Miller v. Gammie (9th Cir. 2003) 335 F.3d 889, 897]* .

Unless the social worker's activity has the requisite connection to the judicial process, only qualified immunity is available [*Miller v. Gammie (9th Cir. 2003) 335 F.3d 889, 898* ; *Meyers v. Contra Costa County Department of Social Services (9th Cir. 1987) 812 F.2d 1154, 1157-1158]* . Thus, beyond those functions historically recognized as absolutely immune at common law, a social worker only has qualified immunity [*Miller v. Gammie (9th Cir. 2003) 335 F.3d 889, 897]* . Examples of functions for which a social worker has only qualified immunity may include decisions and recommendations as to the particular home where a child is to go or as to the particular foster parents who are to provide care [*Miller v. Gammie (9th Cir. 2003) 335 F.3d 889, 898*], detaining a child before dependency proceedings and referring the child for a medical sexual abuse examination without a court order or parental consent [*Doe v. Lebbos (9th Cir. 2003) 348 F.3d 820, 825* , *overruled on other grounds in Beltran v. County of Santa Clara (9th Cir. 2008) 514 F.3d 906, 908-909]* , or conducting investigations [*Beltran v. County of Santa Clara (9th Cir. 2008) 514 F.3d 906, 908*].

[ix] Burden of Justifying Immunity Is on Official

The official claiming absolute immunity has the burden of justifying it. Establishing that justification is a two-step process [*Harlow v. Fitzgerald (1982) 457 U.S. 800, 812-813, 102 S. Ct. 2727, 73 L. Ed. 2d 396* ; *see Greater Los Angeles Council on Deafness v. Zolin (9th Cir. 1987) 812 F.2d 1103, 1108-1109]* :

- The official must show that the responsibilities of the office embrace a function so sensitive that a total shield of liability is required; and

- The official must demonstrate that he or she was discharging the protected function when performing the act for which liability is asserted.

[b] Qualified Immunity

[i] Conduct to Which Qualified Immunity Applies

Officials and employees of local, state, and federal governments may claim a qualified immunity from *42 U.S.C. § 1983* actions. Qualified immunity is immunity from suit, not merely a defense to liability [*Mitchell v. Forsyth (1985) 472 U.S. 511, 525-527, 105 S. Ct. 2806, 86 L. Ed. 2d 411* ; *see V-1 Oil Co. v. Smith (9th Cir. 1997) 114 F.3d 854, 856-857* (appellate court exercised jurisdiction over appeal of denial of summary judgment motion in *Bivens* action because denial of qualified immunity is appealable final decision suitable for interlocutory review)].

Qualified immunity protects government officials performing discretionary functions insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known [*Harlow v. Fitzgerald (1982) 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396* ; *Bradley v. Medical Board (1997) 56 Cal. App. 4th 445, 456, 65 Cal. Rptr. 2d 483* ; *see Brewster v. Board of Education of Lynwood Unified School Dist. (9th Cir. 1998) 149 F.3d 971, 977* , *cert. denied, 526 U.S. 1018 (1999)* (since probationary teacher's *First Amendment* rights and procedural due process rights were not clearly established, school officials were entitled to immunity)]. Ministerial acts are not shielded by qualified immunity, which protects only actions taken pursuant to discretionary functions [*Groten v. California (9th Cir. 2001) 251 F.3d 844, 851* ; *F.E. Trotter, Inc. v. Watkins (9th Cir. 1989) 869 F.2d 1312, 1314]* .

In neither a *42 U.S.C. § 1983* action nor a *Bivens* action will a supervisor be held strictly vicariously liable for the actions of subordinates under a theory of respondeat superior [*Ashcroft v. Iqbal (2009) -- U.S. --, 129 S. Ct. 1937, 1948, 173 L. Ed. 2d 868* ; al- *Kidd v. Ashcroft (9th Cir. 2009) 580 F.3d 949, 964-965*]. However, direct, personal participation is not necessary to establish liability for a constitutional violation, and supervisors can be liable for the actions of their subordinates for any of the following [al- *Kidd v. Ashcroft (9th Cir. 2009) 580 F.3d 949, 965* ; *Larez v. City of Los Angeles (9th Cir. 1991) 946 F.2d 630, 646*]:

- Setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which they knew or reasonably should have known would cause others to inflict constitutional injury.

- Culpable action or inaction in training, supervision, or control of subordinates.

- Acquiescence in the constitutional deprivation by subordinates.

- Conduct that shows a reckless or callous indifference to the rights of others.

The mere assertion of a vague constitutional right will not defeat a qualified immunity defense. Rather, the contours of the right must be sufficiently clear that a reasonable official would understand that what he or she is doing violates that right [*Anderson v. Creighton (1987) 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523* ; *Brewster v. Board of Education of Lynwood Unified School Dist. (9th Cir. 1998) 149 F.3d 971, 977 , cert. denied, 526 U.S. 1018 (1999)* ; *Liston v. County of Riverside (9th Cir. 1997) 120 F.3d 965, 975* ; *Bradley v. Medical Board (1997) 56 Cal. App. 4th 445, 456, 65 Cal. Rptr. 2d 483* ; *see Wilson v. Layne (1999) 526 U.S. 603, 119 S. Ct. 1692, 1699-1701, 143 L. Ed. 2d 818* (although allowing media representatives to accompany law enforcement officers in execution of warrant in private home violated *U.S. Const., amend. IV*, right was not clearly established at time of search, so officers were entitled to qualified immunity); *Sorrels v. McKee (9th Cir. 2002) 290 F.3d 965, 970* (existence of binding precedent holding unconstitutional prison policy requiring inmates to pay for publications received would clearly establish law and qualified immunity defense would fail, and unpublished decisions of district courts may inform qualified immunity analysis); *Lytle v. Wondrash (9th Cir. 1999) 182 F.3d 1083, 1086-1089* (since it was not patently unreasonable for school administrators to conclude that *First Amendment* did not protect teacher's conduct in prosecuting lawsuit against district and individuals, right was not clearly established and administrators were entitled to qualified immunity)].

The rationales for qualified immunity for public officials are not applicable to private parties [*Wyatt v. Cole (1992) 504 U.S. 158, 166, 112 S. Ct. 1827, 118 L. Ed. 2d 504* ; *Franklin v. Fox (9th Cir. 2002) 312 F.3d 423, 444* ; *Ellis v. City of San Diego (9th Cir. 1999) 176 F.3d 1183, 1191]* . Moreover, mere performance of a governmental function does not entitle a private person to qualified immunity, especially when the person performs the job without government supervision or direction [*Richardson v. McKnight (1997) 521 U.S. 399, 408-409, 117 S. Ct. 2100, 138 L. Ed. 2d 540]* . Thus, for example, prison guards who are employees of a private prison management firm are not entitled to qualified immunity from a § 1983 suit by prisoners [*Richardson v. McKnight (1997) 521 U.S. 399, 407-412, 117 S. Ct. 2100, 138 L. Ed. 2d 540]* . Similarly, a private contractor responsible for processing city parking tickets, and subject to limited direct supervision by the city, is not entitled to assert qualified immunity in a § 1983 action [*Ace Beverage Co. v. Lockheed Information Management Services (9th Cir. 1998) 144 F.3d 1218, 1219-1220]* . And, a firm that conducted radiation experiments and research at a state prison for a decade was not entitled to qualified immunity [*Bibeau v. Pacific Northwest Research Foundation (9th Cir. 1999) 188 F.3d 1105, 1111-1112 , amended, 208 F.3d 831 (2000)]* .

When a defendant asserts qualified immunity as a defense, the court must undertake a two-step analysis [*Liston v. County of Riverside (9th Cir.1997) 120 F.3d 965, 975* ; *Neely v. Feinstein (9th Cir. 1995) 50 F.3d 1502, 1507* ; *Bradley v. Medical Board (1997) 56 Cal. App. 4th 445, 456, 65 Cal. Rptr. 2d 483* ; *see Knox v. Southwest Airlines (9th Cir. 1997) 124 F.3d 1103, 1107* (three-part test, including identification of specific right allegedly violated); *V-1 Oil*

Co. v. Smith (9th Cir. 1997) 114 F.3d 854, 857 (same)]:

- Was the law governing the official's conduct clearly established?
- Under that law, could a reasonable officer have believed the conduct was lawful?

The questions in the qualified immunity test are questions of law, though the latter question may require factual determinations as well [*Nunez v. Davis (9th Cir. 1999) 169 F.3d 1222, 1227 , cert. denied, 528 U.S. 1115 (2000)* ; *Romero v. Kitsap County (9th Cir. 1991) 931 F.2d 624, 627* ; *Bradley v. Medical Board (1997) 56 Cal. App. 4th 445, 456 n.10, 65 Cal. Rptr. 2d 483]* .

Since Saucier v. Katz (2001) 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 [discussed in [iii], *below*], a qualified immunity analysis begins with the threshold question of whether, based on the facts taken in the light most favorable to the party asserting injury, the conduct violated a constitutional right. If no constitutional right was violated, the court need not inquire further. If a constitutional violation occurred, the second inquiry then becomes whether the actor could nevertheless have reasonably but mistakenly believed that his or her conduct did not violate a clearly established constitutional right. This inquiry, focusing first on the underlying constitutional issue, is intended to assist courts to dispose of insubstantial suits at an early stage of litigation and to encourage courts to set forth principles becoming the basis for a holding that the right is clearly established [*Jackson v. City of Bremerton (9th Cir. 2001) 268 F.3d 646, 651]* .

The *Saucier* procedure should not be regarded as an inflexible requirement. While the sequence set forth there is often appropriate, it should not be regarded as mandatory. Judges of district courts and courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand [*Pearson v. Callahan (2009) -- U.S. --, 129 S. Ct. 808, 172 L. Ed. 2d 565, 576-581]* .

Claims of excessive force are to be judged under the *Fourth Amendment's* "objective reasonableness" standard. Specifically with regard to deadly force, it is unreasonable for a police officer to seize an unarmed, nondangerous suspect by shooting him or her dead. However, when the officer has probable cause to believe the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force [*Brosseau v. Haugen (2004) 543 U.S. 194, 125 S. Ct. 596, 598, 160 L. Ed. 2d 583* ; *Graham v. Connor (1989) 490 U.S. 386, 388, 109 S. Ct. 1865, 104 L. Ed. 2d 443* ; *Tennessee v. Garner (1985) 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1]* . Qualified immunity shields an officer from suit when the officer makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances he or she confronted [*Brosseau v. Haugen (2004) 543 U.S. 194, 125 S. Ct. 596, 599, 160 L. Ed. 2d 583]* .

A general constitutional rule already identified in case law may apply with obvious clarity to the specific conduct in question, even though the action in question has not previously been held unlawful [*United States v. Lanier (1997) 520 U.S. 259, 271, 117 S. Ct. 1219, 137 L. Ed. 2d 432* (quoting *Anderson v. Creighton (1987) 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523*); *Devereaux v. Abbey (9th Cir. 2001) 263 F.3d 1070, 1075]* . Precedent directly on point is not necessary to demonstrate that a right is clearly established. If the unlawfulness is apparent in light of preexisting law, the standard is met. Further, even if there is no closely analogous case law, a right can be clearly established on the basis of common sense [*Devereaux v. Abbey (9th Cir. 2001) 263 F.3d 1070, 1075* ; *Giebel v. Sylvester (9th Cir. 2001) 244 F.3d 1182, 1189]* .

PRACTICE TIP:

Qualified Immunity. Given the expanding nature of qualified immunity, together with the knee jerk interlocutory appeal brought in most cases, one should think long and hard before embarking on a § 1983 lawsuit. Most § 1983 cases ultimately become fee driven by the time the case returns from the court of

appeal for trial. It is not unusual for the attorneys' fees for a prevailing plaintiff at trial to exceed the jury verdict. This is illustrative of a phenomenon that is common to § 1983 litigation, i.e., public officials are often making political decisions, as opposed to business decisions, when it comes to settling these cases. After all, it is not their money. That may explain why *Fed. R. Civ. Proc., Rule 68* (settlement offers) is not relied on very frequently by defendants. It is an offer of judgment and therefore an admission of liability. *By John H. Scott*

PRACTICE TIP:

Immediate Interlocutory Appeals of Rulings on Qualified Immunity. Immediate interlocutory appeals of rulings on qualified immunity are routinely taken in § 1983 cases and is a rapidly expanding area of the law. There is an opportunity (1) to bring a motion to certify such appeals as frivolous in the district court, and (2) to bring a motion to dismiss such appeals for lack of jurisdiction. There is a built in delay that comes from interlocutory appeals. It provides a defendant with the opportunity to get at least four bites of the apple when raising the qualified immunity defense. In other words, it can be raised on a motion to dismiss or motion for summary judgment (first bite), an interlocutory appeal before trial (second bite), again at trial (third bite), and on an appeal from trial (fourth bite) [*see Thompson v. Mahre (9th Cir. 1997) 110 F.3d 716 , cert. denied, 522 U.S. 967]* . Notably, principles of stare decisis do not necessarily apply and judges can find qualified immunity after trial based on the same facts which resulted in a denial of qualified immunity before trial. Qualified immunity can be avoided by proving municipal liability or seeking injunctive relief. *By John H. Scott*

[ii] Burden of Pleading and Proof

The defendant in an action under *42 U.S.C. § 1983* bears the burden of pleading qualified immunity as an affirmative defense [*Harlow v. Fitzgerald (1982) 457 U.S. 800, 815, 102 S. Ct. 2727, 73 L. Ed. 2d 396* ; *Gomez v. Toledo (1980) 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572* ; *Benigni v. Hemet (9th Cir. 1988) 879 F.2d 473, 479]* .

If the defendant raises the affirmative defense of qualified immunity, the initial burden is on the plaintiff to show that the rights allegedly violated were clearly established at the time that the official acted [*Siegert v. Gilley (1991) 500 U.S. 226, 232, 111 S. Ct. 1789, 114 L. Ed. 2d 277* ; *Nunez v. Davis (9th Cir. 1999) 169 F.3d 1222, 1229 , cert. denied, 528 U.S. 1115 (2000)* ; *Knox v. Southwest Airlines (9th Cir. 1997) 124 F.3d 1103, 1107* (if plaintiff fails to allege violation of clearly established law, court need not even reach other issues regarding qualified immunity); *Ram v. Rubin (9th Cir. 1997) 118 F.3d 1306, 1310 , cert. denied, 522 U.S. 1045 (1998)* ; *Romero v. Kitsap County (9th Cir. 1991) 931 F.2d 624, 627]* . The plaintiff must offer more than general, conclusory allegations that the defendant violated a constitutional right. To support a judgment, the plaintiff must show that the particular facts of his or her case support a claim of violation of a clearly established right [*Sweaney v. Ada County, Idaho (9th Cir. 1997) 119 F.3d 1385, 1388-1389* (parent did not have clearly established federal constitutional right to strike her child with belt on public school grounds on date deputy filed report with prosecuting attorney)].

However, absence of authority directly on point is not fatal to a *42 U.S.C. § 1983* claim; a right is clearly established if the only reasonable conclusion from binding authority is that the disputed right existed [*Sweaney v. Ada County, Idaho (9th Cir. 1997) 119 F.3d 1385, 1389* ; *Blueford v. Prunty (9th Cir. 1997) 108 F.3d 251, 255]* . Rather, if the only reasonable conclusion from binding authority is that the disputed right existed, even if no case had specifically so declared, officials are on notice of the right and not qualifiedly immune if they acted to offend it [*Blueford v. Prunty (9th Cir. 1997) 108 F.3d 251, 255*]. To determine that the law was clearly established, the court need not look to a case with identical or even materially similar facts [*Hope v. Pelzer (2002) 536 U.S. 730, 739-741, 122 S. Ct. 2508, 153 L. Ed. 2d 666* ; *Serrano v. Francis (9th Cir. 2003) 345 F.3d 1071, 1077* ; *Flores v. Morgan Hill Unified Sch. Dist. (9th Cir. 2003) 324 F.3d 1130, 1136-1137]* . The standard is fair warning, *i.e.*, when the contours of the right have been defined with sufficient specificity that a state official had fair warning that the conduct deprived a victim of rights, the official is not entitled to qualified immunity [*Serrano v. Francis (9th Cir. 2003) 345 F.3d 1071, 1077* ; *see also Hope*

v. Pelzer (2002) 536 U.S. 730, 740 n.10, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (object of "clearly established" immunity standard is not different from "fair warning")].

If the occasion has not risen for the Ninth Circuit to reach a question, the court may draw clearly established law from other circuits [*Prison Legal News v. Lehman (9th Cir. 2005) 397 F.3d 692, 701-702* ; *see Jacobs v. City of Chicago (7th Cir. 2000) 215 F.3d 758, 767* (finding violation of clearly established law when there was such clear trend in case law that recognition of right was only matter of time)].

If the plaintiff succeeds in meeting the initial burden of showing that clearly established rights were violated, the burden shifts to the defendant to prove that his or her conduct was reasonable even though it might have violated the law [*Romero v. Kitsap County (9th Cir. 1991) 931 F.2d 624, 627* ; *see Nunez v. Davis (9th Cir. 1999) 169 F.3d 1222, 1229-1230 , cert. denied, 528 U.S. 1115 (2000)* ; *Neely v. Feinstein (9th Cir. 1995) 50 F.3d 1502, 1509* ; *Shoshone-Bannock Tribes v. Fish & Game Comm'n (9th Cir. 1994) 42 F.3d 1278, 1285]* . The reasonableness of the official's conduct is a question of law for the court, at least when the underlying facts are undisputed [*see Neely v. Feinstein (9th Cir. 1995) 50 F.3d 1502, 1509* ; *Shoshone-Bannock Tribes v. Fish & Game Comm'n (9th Cir. 1994) 42 F.3d 1278-1286* (issue of reasonableness of defendant's conduct, although ultimately question of law, may require fact finding)]. If there is a material dispute as to the facts, the case must proceed to trial, before a jury if one is requested [*LaLonde v. County of Riverside (9th Cir. 2000) 204 F.3d 947, 953]* .

[iii] Resolution by Summary Judgment

Immunity questions should be resolved at the earliest possible stage in litigation [*Saucier v. Katz (2001) 533 U.S. 194, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272]* . In an appropriate case, entitlement to qualified immunity may be determined as a matter of law by the trial court on a motion to dismiss, motion for summary judgment, or motion for directed verdict [*Thorsted v. Kelly (9th Cir. 1988) 858 F.2d 571, 575]* . A court required to rule on the issue of qualified immunity must consider as the initial inquiry the threshold question of whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the official's conduct violated a constitutional right [*Saucier v. Katz (2001) 533 U.S. 194, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272]* . If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity; on the other hand, if a violation could be made out on a favorable view of the parties' allegations, the next sequential step is to determine whether the right was clearly established. This inquiry must be undertaken in light of the specific context of the case and not as a broad general proposition. The relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable official that his or her conduct was unlawful in the situation he or she confronted [*Saucier v. Katz (2001) 533 U.S. 194, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272]* .

On summary judgment, the judge may appropriately determine not only the currently applicable law, but whether that law was clearly established at the time a particular incident occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he or she fairly be said to know that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed [*Harlow v. Fitzgerald (1982) 457 U.S. 800, 818-819, 102 S. Ct. 2727, 73 L. Ed. 2d 396* ; *see Butz v. Economou (1978) 438 U.S. 478, 504, 98 S. Ct. 2894, 57 L. Ed. 2d 895* ; *Procunier v. Navarette (1978) 434 U.S. 555, 561-562, 98 S. Ct. 855, 55 L. Ed. 2d 24* ; *Wood v. Strickland (1975) 420 U.S. 308, 321-322, 95 S. Ct. 992, 43 L. Ed. 2d 214* ; *Ward v. County of San Diego (9th Cir. 1986) 791 F.2d 1329, 1333 , cert. denied, 483 U.S. 1020]* .

However, a plaintiff bringing an action under *42 U.S.C. § 1983* against a government official in which the official's improper motive is a necessary element cannot be required to adduce clear and convincing evidence of an improper motive to defeat the official's motion for summary judgment based on qualified immunity [*Crawford-El v. Britton (1998) 523 U.S. 574, 590-592, 118 S. Ct. 1584, 140 L. Ed. 2d 759]* . Rather, the trial court must exercise discretion to ensure that officials are not subjected to unnecessary, burdensome discovery or trial proceedings, by requiring the

plaintiff to put forward specific, nonconclusory factual allegations establishing an improper motive causing cognizable injury to survive a prediscovery motion for dismissal or summary judgment [*Crawford-El v. Britton (1998) 523 U.S. 574, 596-598, 118 S. Ct. 1584, 140 L. Ed. 2d 759]* .

The court should deny summary judgment based on qualified immunity if under the plaintiff's version of the facts the officer could not reasonably believe his or her conduct was lawful, or if there is a question of fact on which that determination turns [*Knox v. Southwest Airlines (9th Cir. 1997) 124 F.3d 1103, 1108* (denial of summary judgment affirmed when triable issue of fact existed as to whether officers had probable cause to arrest); *Curnow v. Ridgecrest Police (9th Cir. 1991) 952 F.2d 321, 325 , cert. denied, 506 U.S. 972 (1992)]* . The question is whether a reasonable officer could have believed his or her conduct was lawful, in light of clearly established law and the information the officer possessed [*Knox v. Southwest Airlines (9th Cir. 1997) 124 F.3d 1103, 1108]* .

On a motion for summary judgment, where there have not yet been factual findings by a judge or jury, courts are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion. In qualified immunity cases, this usually means adopting the plaintiff's version of the facts. However, if there is undisputed evidence contradicting the plaintiff's version of the facts, such as a videotape of the events, so that no reasonable jury could believe the plaintiff's version of the facts, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment [*Scott v. Harris (2007) 550 U.S. 372, 127 S. Ct. 1769, 1774-1776, 167 L. Ed. 2d 686]* .

If the district court enters an order denying the defendant's motion for dismissal or summary judgment on qualified immunity grounds, the official is entitled to bring an immediate interlocutory appeal of that ruling [*Crawford-El v. Britton (1998) 523 U.S. 574, 118 S. Ct. 1584, 1597, 140 L. Ed. 2d 759* ; *Johnson v. Jones (1995) 515 U.S. 304, 313, 319, 115 S. Ct. 2151, 132 L. Ed. 2d 238* ; *Knox v. Southwest Airlines (9th Cir. 1997) 124 F.3d 1103, 1105* (qualified immunity is immunity from suit, not just defense to liability, and district court's denial of qualified immunity on legal grounds is final decision subject to interlocutory appeal)]. The appellate court has jurisdiction over an interlocutory appeal from denial of qualified immunity when the appeal focuses on whether the defendants violated a clearly established law given undisputed facts; the court does not, however, have jurisdiction over an interlocutory appeal focusing on whether there is a genuine dispute about the underlying facts [*Knox v. Southwest Airlines (9th Cir. 1997) 124 F.3d 1103, 1107]* .

When it has jurisdiction, the appellate court reviews de novo a denial of summary judgment on qualified immunity grounds [*Knox v. Southwest Airlines (9th Cir. 1997) 124 F.3d 1103, 1105* ; *Curnow v. Ridgecrest Police (9th Cir. 1991) 952 F.2d 321, 323 , cert. denied, 506 U.S. 972 (1992)]* .

[iv] Injunctive and Declaratory Relief Unaffected

Qualified immunity is a defense to liability for damages only and does not bar actions for declaratory or injunctive relief [*American Fire, Theft & Collision Managers v. Gillespie (9th Cir. 1991) 932 F.2d 816, 818]* .

[v] Qualified Immunity for Private Citizens

A private party acting jointly with state agents to deprive constitutional rights may be liable under *42 U.S.C. § 1983* [*Lugar v. Edmondson Oil Co. (1982) 457 U.S. 922, 941, 102 S. Ct. 2744, 73 L. Ed. 2d 482]* .

The United States Supreme Court held that private citizens acting under a state replevin statute were not entitled to qualified immunity, since extending qualified immunity to private parties in that situation has no bearing on whether public officials are able to act forcefully and decisively in their jobs or on whether qualified applicants enter public service [*Wyatt v. Cole (1992) 504 U.S. 158, 167-168, 112 S. Ct. 1827, 118 L. Ed. 2d 504]* . However, courts have since, on occasion, found private citizens performing governmental functions or assisting public officials in their

performance of governmental functions to be qualifiedly immune [*see, e.g.,* *Warner v. Grand County (10th Cir. 1995) 57 F.3d 962, 964-967* (private citizen requested by sheriff's department to conduct strip searches of female detainees); *Sherman v. Four County Counseling Center (7th Cir. 1993) 987 F.2d 397, 405* (private facility treating patient pursuant to court order); *Bradley v. Medical Board (1997) 56 Cal. App. 4th 445, 461, 65 Cal. Rptr. 2d 483* (private citizens assisting employees of California Medical Board investigating physician for improperly prescribing drugs)].

The question is whether the private individual performs a unique government function at the request of a state official who enjoys qualified immunity [*Warner v. Grand County (10th Cir. 1995) 57 F.3d 962, 965* ; *Bradley v. Medical Board (1997) 56 Cal. App. 4th 445, 461-462, 65 Cal. Rptr. 2d 483]* . The rationale is that when the state requests that a private citizen serve as its agent, if the private citizen is not permitted to raise the shield of qualified immunity, he or she might reject requests to aid state officials in performing governmental functions, which would, in turn, constrain state officials' agility in performing such functions, frustrate the government's investigatory power, and limit the state's ability to service the public good. Furthermore, it would be anomalous to deny qualified immunity to a private party performing a government function pursuant to state order or request, when a public official would receive immunity if he or she or performed the same task [*Warner v. Grand County (10th Cir. 1995) 57 F.3d 962, 967* ; *Bradley v. Medical Board (1997) 56 Cal. App. 4th 445, 461-462, 65 Cal. Rptr. 2d 483]* .

[c] "Good Faith" and State-Law Immunities Not Defenses

A municipality may not assert the good faith of its officers or agents as a defense to liability under *42 U.S.C. § 1983* [*Owen v. City of Independence (1980) 445 U.S. 622, 638, 100 S. Ct. 1398, 63 L. Ed. 2d 673]* , nor may it raise as a defense an immunity granted to municipalities under state law [*Monell v. Dep't of Soc. Servs. (1978) 436 U.S. 658, 695 n.59, 98 S. Ct. 2018, 56 L. Ed. 2d 611* ; *Morrison v. Jones (9th Cir. 1979) 607 F.2d 1269, 1273* , *cert. denied,* *445 U.S. 962 (1980)]* .

[d] Res Judicata and Collateral Estoppel

If the plaintiff has already had a full and fair opportunity to litigate his or her federal constitutional claim in state court, principles of res judicata and collateral estoppel may bar any subsequent action under *42 U.S.C. § 1983* based on the same claim, even though the state court's ruling on the constitutional issue may have been erroneous. The doctrine of collateral estoppel may preclude relitigation in a civil action of issues decided in a prior criminal proceeding [*Allen v. McCurry (1980) 449 U.S. 90, 104, 101 S. Ct. 411, 66 L. Ed. 2d 308* ; *McCutchen v. City of Montclair (1999) 73 Cal. App. 4th 1138, 1144, 87 Cal. Rptr. 2d 95]* .

Thus, for example, a state court's adverse ruling on a criminal defendant's motion to suppress evidence allegedly seized in violation of the *Fourth Amendment* collaterally estopped the defendant from bringing a subsequent action in federal court under *42 U.S.C. § 1983* based on the allegedly illegal search and seizure [*see* *Allen v. McCurry (1980) 449 U.S. 90, 96-105, 101 S. Ct. 411, 66 L. Ed. 2d 308* ; *Takahashi v. Bd. of Trustees of Livingston (9th Cir. 1986) 783 F.2d 848, 850* , *cert. denied,* *476 U.S. 1182* ; *see also 28 U.S.C. § 1738* (full faith and credit); *but see* *McDonald v. West Branch (1984) 466 U.S. 284, 288, 292, 104 S. Ct. 1799, 80 L. Ed. 2d 302* (arbitration awards not subject to *28 U.S.C. § 1738,* and federal court should not afford res judicata or collateral estoppel effect in § 1983 action to award in arbitration proceeding brought pursuant to collective bargaining agreement)].

A finding of probable cause to hold a criminal defendant over for trial is considered a final determination on the merits and may collaterally estop the defendant from relitigating a probable cause issue in a subsequent § 1983 suit [*Haupt v. Dillard (9th Cir. 1994) 17 F.3d 285, 289* (finding of probable cause to hold defendant for trial collaterally estopped litigation in subsequent § 1983 action of issue of probable cause to arrest)]. However, there may not be such collateral estoppel if the probable cause issue at the preliminary hearing was not the same as the probable cause issue in the § 1983 case [*see* *Morley v. Walker (9th Cir. 1999) 175 F.3d 756, 759-761* (collateral estoppel did not preclude litigation of probable cause to arrest when plaintiff alleged that prosecutor misstated and omitted evidence at preliminary

hearing); *McCutchen v. City of Montclair (1999) 73 Cal. App. 4th 1138, 1144-1146, 87 Cal. Rptr. 2d 95* (finding of probable cause to hold defendant for trial did not have collateral estoppel effect in § 1983 case on issue of probable cause to arrest, because evidence at preliminary hearing was not the same as evidence available to arresting officer)].

A criminal conviction estops a defendant from relitigating facts necessarily established in the criminal proceeding. Thus, a criminal defendant convicted of marijuana cultivation was collaterally estopped from raising in a civil rights action under *42 U.S.C. § 1983* the issue of whether the arresting agency attempted to deprive the defendant of a fair criminal trial by influencing witnesses and jurors with a false press release. Defendant had ample means, including voir dire of the jury, which his attorney in the criminal trial did, and a motion for change of venue, which defendant did not make, to vindicate his right to be tried by an impartial jury in the criminal proceeding [*Higginbotham v. King (1997) 54 Cal. App. 4th 1040, 1044, 63 Cal. Rptr. 2d 114]* .

Moreover, a state court judgment has claim preclusive effect in a subsequent federal suit under § 1983, regarding federal issues the litigant could have raised in the state court proceedings, but did not [*Migra v. Warren City School Dist. Bd. of Education (1984) 465 U.S. 75, 83-85, 104 S. Ct. 892, 79 L. Ed. 2d 56* (court suggested that when federal and state law claims are sufficiently intertwined, plaintiff can preserve right to federal forum for federal claims by informing state court of intention to take federal claims to federal court following state litigation)].

Federal courts will also give preclusive effect to non-judicially reviewed state administrative decisions in a subsequent civil action under § 1983, if the courts of the state would give preclusive effect to such decisions and if the state agency provides the parties with an adequate opportunity to litigate the issues [*see Miller v. County of Santa Cruz (9th Cir. 1994) 39 F.3d 1030, 1032-1034 , cert. denied, 515 U.S. 1160 (1995)* (state Civil Service Commission decision had binding effect in subsequent action under § 1983 arising out of firing of public employee)]. However, when the state administrative action being challenged in a § 1983 action is not the result of a quasi-judicial hearing, and therefore plaintiff may not seek a writ of administrative mandate under *Code Civ. Proc. § 1094.5*, issue preclusion does not apply [*McDaniel v. Board of Education of the Mountain View School Dist. (1996) 44 Cal. App. 4th 1618, 1621-1622, 52 Cal. Rptr. 2d 448]* .

For detailed discussion of res judicata and collateral estoppel, see Ch. 491, *Res Judicata* .

[e] Post-Deprivation Remedy for Procedural Due Process Claim

If a state actor negligently deprives a person of a minor property interest through a "random and unauthorized" act, the state's provision of an adequate post-deprivation remedy satisfies the constitutional requisite of procedural due process [*Parratt v. Taylor (1981) 451 U.S. 527, 541-544, 101 S. Ct. 1908, 68 L. Ed. 2d 420* (overruled on other grounds in *Daniels v. Williams (1986) 474 U.S. 327, 330, 106 S. Ct. 662, 88 L. Ed. 2d 662*)].

However, the *Parratt* doctrine is inapplicable if the plaintiff alleges a violation of a substantive due process right [*Wood v. Ostrander (9th Cir. 1989) 879 F.2d 583, 588-589 , cert. denied, 498 U.S. 938 (1990)* ; *Smith v. City of Fontana (9th Cir. 1987) 818 F.2d 1411, 1415 , cert. denied, 484 U.S. 935]* .

[12] Exhaustion of State Remedies Not Required

The federal remedy provided by *42 U.S.C. § 1983* is supplementary to state remedies, and any state remedies need not be first sought and refused before the federal one is invoked [*Patsy v. Florida Board of Regents (1982) 457 U.S. 496, 516, 102 S. Ct. 2557, 73 L. Ed. 2d 172* ; *Monroe v. Pape (1961) 365 U.S. 167, 183, 81 S. Ct. 473, 5 L. Ed. 2d 492* (overruled on other grounds in *Monell v. Dep't of Soc. Servs. (1978) 436 U.S. 658, 663, 98 S. Ct. 2018, 56 L. Ed. 2d 611*)].

The fact that a plaintiff may have a state forum available, or that there are state procedures the plaintiff could use, does

not mean that the federal court cannot or should not decide the case [*Snyder v. Altman (C.D. Cal. 1978) 444 F. Supp. 1269, 1270]* .

The rule that exhaustion is not required is equally applicable to contractual and administrative remedies [*Smith v. United Trans. Union Local No. 81 (S.D. Cal. 1984) 594 F. Supp 96, 99]* .

[13] Jurisdiction

42 U.S.C. § 1983 does not create substantive rights, but merely provides a remedy for the violation of rights conferred by the Constitution or other statutes [*Maher v. Gagne (1980) 448 U.S. 122, 129 n.11, 100 S. Ct. 2570, 65 L. Ed. 2d 653* ; *Chapman v. Houston Welfare Rights Org. (1979) 441 U.S. 600, 618, 99 S. Ct. 1905, 60 L. Ed. 2d 508]* . Therefore, there is no automatic federal jurisdiction when a plaintiff files a § 1983 claim. Rather, the court must look to the underlying substantive right that was allegedly violated to determine whether that right was conferred by the Constitution or by a civil rights statute [*Maher v. Gagne (1980) 448 U.S. 122, 129 n.11, 100 S. Ct. 2570, 65 L. Ed. 2d 653]* .

Typically the underlying substantive right provides the federal court with jurisdiction; however, there are some instances in which this is not the case [*see, e.g.,* *Chapman v. Houston Welfare Rights Org. (1979) 441 U.S. 600, 603, 608, 612-623, 99 S. Ct. 1905, 60 L. Ed. 2d 508* (federal district court lacked jurisdiction under *28 U.S.C. § 1343(a)(3),(4)* to adjudicate claim premised on § 1983 that state welfare regulation was invalid due to conflict with Social Security Act)].

California courts have concurrent jurisdiction with federal courts over § 1983 actions [*Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 173, 216 Cal. Rptr. 661, 703 P.2d 1* ; *Brown v. Pitchess (1975) 13 Cal. 3d 518, 522-523, 119 Cal. Rptr. 204, 531 P.2d 772]* .

PRACTICE TIP:

Filing in Federal vs. State Court. Courts increasingly rely on summary judgment, qualified immunity, and interlocutory appeals to prevent *42 U.S.C. § 1983* cases from being decided by juries. Unless an attorney is ready, willing, and able to participate in a barrage of motions to dismiss, summary judgment, and appeals, it may be a wiser choice to pursue available state remedies. Attorneys should take a close look at whether *Civ. Code § 52.3* (enacted in 2000, regarding law enforcement officers as not depriving individuals of constitutionally protected rights, privileges, and immunities) allows for a private cause of action. There may not be an opportunity to obtain attorneys' fees with most state remedies. The advantages of federal court *may* include a court house that is more conveniently located, a more diverse jury pool, and the saving of court costs (e.g., jury fees, court reporter/court fees, etc.). On the other hand, in state court you do not need a unanimous verdict. In addition, there are usually fewer hoops to jump through to get to trial in state court (compare *Fed. R. Civ. Proc., Rule 26* requirements, pre trial conference requirements, etc.). In general, it seems that state court judges are often less inclined to grant summary judgment. In federal court the case is initially assigned to a judge. In state court, the judge who will ultimately try the case may not be known until the day of trial. *By John H. Scott*

PRACTICE TIP: Removal of Case to Federal Court. Although a § 1983 case may be filed in state court, more often than not they are removed to federal courts by the defendants. There does exist the option of initially filing in federal court and dismissing pursuant to *Fed. R. Civ. Proc., Rule 41(a)* before a defendant has made an appearance. However, if this tactic is used as a means to "shop" for a federal judge and you then file your § 1983 case in state court, on removal to federal court the rules require you to notify the court of the earlier filing. Under those circumstances the case should be reassigned to the judge assigned in the original filing. Federal claims can be dismissed under Rule 41 and usually district court judges will remand the remaining state claims to state court--particularly if it is at the early stages

of litigation. If there are no federal claims, and no diversity jurisdiction, a lawsuit filed in state court cannot be removed. *By John H. Scott*

[14] Damages

[a] Compensatory Damages

The basic purpose of an award of damages under *42 U.S.C. § 1983* is to compensate a person for injuries caused by the deprivation of rights [*Memphis Community School Dist. v. Stachura (1986) 477 U.S. 299, 307, 106 S. Ct. 2537, 91 L. Ed. 2d 249* ; *Carey v. Piphus (1978) 435 U.S. 247, 254-257, 98 S. Ct. 1042, 55 L. Ed. 2d 252]* .

In that *42 U.S.C. § 1983* creates a species of tort liability, the level of damages is ordinarily determined according to principles derived from the common law of torts [*Memphis Community School Dist. v. Stachura (1986) 477 U.S. 299, 305-306, 106 S. Ct. 2537, 91 L. Ed. 2d 249]* . Tort damages are designed to provide compensation for the injury caused to the plaintiff by the defendant's breach of duty. Accordingly, compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as impairment of reputation, personal humiliation, and mental anguish and suffering [*Memphis Community School Dist. v. Stachura (1986) 477 U.S. 299, 306-307, 106 S. Ct. 2537, 91 L. Ed. 2d 249]* . Although mental and emotional distress is compensable, neither the likelihood of that injury nor the difficulty of proof justifies awarding compensatory damages without actual proof of injury [*Carey v. Piphus (1978) 435 U.S. 247, 262-264, 98 S. Ct. 1042, 55 L. Ed. 2d 252* (action based on denial of procedural due process)].

Abstention principles applicable to actions for injunctive or declaratory relief [*see* *Younger v. Harris (1971) 401 U.S. 37, 45-54, 91 S. Ct. 746, 27 L. Ed. 2d 669* , discussed in [15], *below*] apply to actions at law for damages as well. A determination while a state proceeding is pending that a federal plaintiff's constitutional rights have been violated would have the same practical effect as a declaration or injunction on pending state proceedings [*Gilbertson v. Albright (9th Cir. 2004) 381 F.3d 965, 968]* . For abstention to apply, each of the following must be true [*Gilbertson v. Albright (9th Cir. 2004) 381 F.3d 965, 975]* :

- The proceeding must be pending when the federal action is filed;

- The proceeding must be in the nature of a judicial proceeding implicating important state interests akin to those involved in criminal prosecutions; and

- The proceeding must afford the federal plaintiff an adequate opportunity to present federal constitutional challenges.

However, federal courts should not dismiss actions in which damages are at issue. The damages actions should be stayed until the state proceedings are completed [*Gilbertson v. Albright (9th Cir. 2004) 381 F.3d 965, 968]* .

When the plaintiff has suffered no injuries, no compensatory damages can be awarded. The abstract value or importance of the constitutional right of which the person was deprived may not form the basis for damages under *42 U.S.C. § 1983* [*Memphis Community School Dist. v. Stachura (1986) 477 U.S. 299, 308-310, 106 S. Ct. 2537, 91 L. Ed. 2d 249]* .

Although the "value" of the infringed right may not entitle the plaintiff to damages, nominal damages may be awarded as an appropriate means of vindicating rights whose deprivation has not caused actual, provable injury [*see* *Carey v. Piphus (1978) 435 U.S. 247, 266-267, 98 S. Ct. 1042,55 L. Ed. 2d 252* ; *see also* *Memphis Community School Dist. v. Stachura (1986) 477 U.S. 299, 308 n.11, 106 S. Ct. 2537, 91 L. Ed. 2d 249]* .

PRACTICE TIP:

Nominal Damages. Although nominal damages are available, they are a trap for the unwary since an award of nominal damages will rarely be an appropriate basis for an award of attorneys' fees as a prevailing party [*see § 113.17[2]*]. Practitioners should always object to a nominal damage instruction. You are better off asking a jury to award $100.00 as opposed to $1.00 in cases when there are no economic damages and no permanent injuries. *By John H. Scott*

[b] Punitive Damages

The purpose of punitive damages is to punish the defendant for willful or malicious conduct and to deter others from similar behavior. Punitive damages are only available in a *42 U.S.C. § 1983* action on the showing of the requisite mental state [*Memphis Community School Dist. v. Stachura (1986) 477 U.S. 299, 306 n.9, 106 S. Ct. 2537, 91 L. Ed. 2d 249]* . For recovery of punitive damages, the defendant's conduct must be motivated by evil motive or intent, or must involve reckless or callous indifference to the federally protected rights of others. This threshold applies even when the underlying standard of liability for compensatory damages is one of recklessness [*Smith v. Wade (1983) 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632]* .

The decision to impose punitive damages is generally within the exclusive province of the jury [*see Kennedy v. Los Angeles Police Dep't (9th Cir. 1990) 901 F.2d 702, 707]* . However, defendants are entitled to a directed verdict on the issue if the evidence and its inferences, considered as a whole and viewed in the light most favorable to the plaintiff, can reasonably support only a verdict denying punitive damages [*Ward v. City of San Jose (9th Cir. 1991) 967 F.2d 280, 286]* .

Furthermore, the due process analysis employed by the *United States Supreme Court in Pacific Mut. Life Ins. Co. v. Haslip (1991) 499 U.S. 1, 15-17, 111 S. Ct. 1032, 113 L. Ed. 2d 1* , applies to actions brought under *42 U.S.C. § 1983*, and any award of punitive damages must be the product of procedures that meet those due process requirements [*Morgan v. Woessner (9th Cir. 1993) 997 F.2d 1244, 1254-1260 , cert. denied, 510 U.S. 1033 (1994)* (remanding for trial court to review using *Haslip* analysis, and to record reasons for amount of eventual award)].

With regard to the reasonableness of the amount of punitive damages, the Ninth Circuit has looked to California law for guidance [*see Bouman v. Block (9th Cir. 1991) 940 F.2d 1211, 1234 , cert. denied, 502 U.S. 1005]* . However, a California court of appeal has held that the California rule requiring that a punitive damages award be supported by evidence of a defendant's financial condition [*see Adams v. Murakami (1991) 54 Cal. 3d 105, 110, 114-115, 284 Cal. Rptr. 318, 813 P.2d 1348]* is a substantive limitation that cannot be applied to limit the federal punitive damages remedy under § 1983. Instead, California courts must apply the federal rule that requires the defendant, rather than the plaintiff, to introduce evidence of the defendant's financial condition if the defendant seeks to limit the amount of the punitive damages award on that basis [*see Chavez v. Keat (1995) 34 Cal. App. 4th 1406, 1413-1416, 41 Cal. Rptr. 2d 72]* .

Punitive damages may be recovered against a government official sued in his or her individual capacity [*Kentucky v. Graham (1985) 473 U.S. 159, 167 n.13, 105 S. Ct. 3099, 87 L. Ed. 2d 114]* . Punitive damages may not be recovered against a municipality [*Jefferson v. City of Tarrant (1997) 522 U.S. 75, 79, 118 S. Ct. 481, 139 L. Ed. 2d 433* ; *City of Newport v. Fact Concerts (1981) 453 U.S. 247, 271, 101 S. Ct. 2748, 69 L. Ed. 2d 616]* . However, no federal policy prohibits a city from paying punitive damages on behalf of an employee held liable for punitive damages in a § 1983 case, if it finds its employee acted without malice and it is in its best interests to pay. In making this determination, the city is not bound by the jury's finding regarding good faith of the city employee [*Cornwell v. City of Riverside (9th Cir. 1990) 896 F.2d 398, 399 , cert. denied, 497 U.S. 1026]* .

For detailed discussion of the rules governing punitive damages under California law, see *Ch. 177, Damages, § 177.40* et seq.

PRACTICE TIP:

Punitive Damages. There is a potential conflict that exists if the same attorney is representing multiple defendants who are exposed to punitive damages. The potential "malpractice" may provide another source of payment for a punitive damage award. Practictioners should also distinguish state law from federal law as it relates to punitive damages. For example, under California law there is a "clear and convincing" test.Under federal law the "preponderance of evidence" test applies. For state claims in California the plaintiff has the burden of introducing evidence of the defendant's "net worth" and ability to pay. In federal court the plaintiff is not obligated to do so. If the case is not bifurcated it is possible that the issue of punitive damages in a § 1983 case could go to a jury without any evidence being introduced regarding a defendant's "net worth" or ability to pay. *By John H. Scott*

[15] Injunctions

There are certain limitations on the sorts of injunctions that may be issued in *42 U.S.C. § 1983* actions.

Younger v. Harris (1971) 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 precludes federal courts from issuing an injunction that would interfere with state judicial proceedings, when (1) there are ongoing state judicial proceedings that implicate important state interests, and (2) there is an adequate opportunity in the state proceedings to raise federal questions [*Martinez v. Newport Beach City (9th Cir. 1997) 125 F.3d 777, 780]* . The *Younger* doctrine has also been applied to state administrative proceedings in which important state interests are vindicated, so long as in the course of those proceedings the federal plaintiff would have a full and fair opportunity to litigate his or her constitutional claim [*see Ohio Civil Rights Comm'n v. Dayton Schools (1986) 477 U.S. 619, 627, 106 S. Ct. 2718, 91 L. Ed. 2d 512* ; *Baffert v. Cal. Horse Racing Board (9th Cir. 2003) 332 F.3d 613, 617-622* ; *Cornwell v. California Bd. of Barbering and Cosmetology (S.D. Cal. 1997) 962 F. Supp. 1260, 1269-1271* (African hairstyling business association barred under *Younger* from seeking injunctive and declaratory relief prohibiting enforcement of *Barbering and Cosmetology Act, Bus. & Prof. Code § 7301 et seq.*, since two members were involved in pending state administrative proceeding and requested relief would require injunction against state proceeding)]. However, a federal court need not abstain if the state proceedings were brought in bad faith [*Younger v. Harris (1971) 401 U.S. 37, 53, 91 S. Ct. 746, 27 L. Ed. 2d 669* ; *Lebbos v. Judges of the Superior Court, Santa Clara County (9th Cir. 1989) 883 F.2d 810, 814]* . For additional discussion of *Younger* abstention, see *Moore' s Federal Practice, Ch. 122, Abstention Doctrines, § 122.05 (3rd ed. Matthew Bender).*

A court may not grant injunctive relief in a § 1983 action against a judicial officer for an act or omission in the officer's judicial capacity unless a declaratory decree was violated or declaratory relief was unavailable [*42 U.S.C. § 1983*].

Neither federal nor state courts may enjoin collection of state taxes in an action under *42 U.S.C. § 1983* if the plaintiff has an adequate legal remedy under state law (for example, a suit for refund of improper taxes) [*see Nat. Truck Council v. Okla. Tax Com. (1995) 515 U.S. 582, 588-590, 115 S. Ct. 2351, 132 L. Ed. 2d 509]* .

[16] Evidence

Actions brought under *42 U.S.C. § 1983* alleging discrimination through a pattern or practice require plaintiffs to show that actions of the defendants had a discriminatory impact and defendants acted with an intent or purpose to discriminate based upon plaintiffs' membership in a protected class [*see Committee Concerning Community Improvement v. City of Modesto (9th Cir. 2009) 583 F.3d 690, 702-703* ; *Lee v. City of Los Angeles, 250 F.3d 668, 686-87 (9th Cir. 2001)]* . When the challenged governmental policy is facially neutral, proof of disproportionate impact on an identifiable group, such as evidence of gross statistical disparities, can satisfy the intent requirement when it tends to show that some invidious or discriminatory purpose underlies the policy [*Committee Concerning Community Improvement v. City of Modesto (9th Cir. 2009) 583 F.3d 690, 703* ; *see Village of Arlington Heights v. Metro. Hous. Dev. Corp. (1977) 429 U.S. 252, 264-266, 97 S. Ct. 555, 50 L. Ed. 2d 450* ; *Hazelwood School Dist. v. United States*

(1977) 433 U.S. 299, 307-308, 97 S. Ct. 2736, 53 L. Ed. 2d 768] . Gross statistical disparities alone may constitute proof of a practice of discrimination and relieve plaintiffs from their burden of showing intent to discriminate, but only in the rare case will impact alone will be sufficient to invalidate a challenged government action [*Committee Concerning Community Improvement v. City of Modesto (9th Cir. 2009) 583 F.3d 690, 703* ; *see Village of Arlington Heights v. Metro. Hous. Dev. Corp. (1977) 429 U.S. 252, 266, 97 S. Ct. 555, 50 L. Ed. 2d 450* (absent evidence of very stark statistical disparities, impact alone is not determinative, and court must look to other evidence)].

In addition to statistical evidence showing discriminatory impact, other factors to be considered in determining whether there is evidence of intent or purpose to discriminate include the historical background of the decision, the sequence of events leading up to the decision, and any relevant legislative or administrative history [*Village of Arlington Heights v. Metro. Hous. Dev. Corp. (1977) 429 U.S. 252, 267-268, 97 S. Ct. 555, 50 L. Ed. 2d 450* ; *Committee Concerning Community Improvement v. City of Modesto (9th Cir. 2009) 583 F.3d 690, 703]* . If there is no evidence of intentional discrimination, the court assumes the challenged actions were not based on discrimination and must inquire only whether the actions were rationally related to a legitimate governmental interest [*Committee Concerning Community Improvement v. City of Modesto (9th Cir. 2009) 583 F.3d 690, 703* ; *Hispanic Taco Vendors of Washington v. City of Pasco (9th Cir. 1993) 994 F.2d 676, 680]* .

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 113 CIVIL RIGHTS: THE POST-CIVIL WAR CIVIL RIGHTS STATUTES
PART II. LEGAL BACKGROUND

11-113 California Forms of Pleading and Practice--Annotated § 113.15

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§ 113.15 Conspiracy to Interfere with Rights: 42 U.S.C. § 1985

[1] Conspiracy to Deprive Persons of Equal Protection Rights

[a] Cause of Action for Damages; Elements

If two or more persons in any state or territory conspire to or go in disguise on the highway or on the premises of another for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within that state or territory the equal protection of the laws, the party so injured or deprived has a cause of action for recovery of damages occasioned by the injury or deprivation, against any one or more of the conspirators [*42 U.S.C. § 1985(3)*].

In the case of a conspiracy under § 1985(3), if one or more persons engaged in the conspiracy does, or causes to be done, any act in furtherance of the object of that conspiracy, whereby another is injured in his or her person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party injured or deprived has an action for the recovery of damages occasioned by that injury or deprivation, against any one or more of the conspirators [*42 U.S.C. § 1985(3)*]. Vicarious liability can be imposed on a defendant in an action under *42 U.S.C. § 1985(3)* [*Scott v. Ross (9th Cir. 1998) 140 F.3d 1275, 1284 , cert. denied, 526 U.S. 1033 (1999)]* .

42 U.S.C. § 1985(3) does not create substantive rights; it merely provides a remedy for the rights it designates [*see United Brotherhood of Carpenters and Joiners v. Scott (1983) 463 U.S. 825, 833, 103 S. Ct. 3352, 77 L. Ed. 2d 1049]* . Thus, unless there has been a violation of a substantive federal or state civil rights statute or constitutional provision, no cause of action exists [*see Caldeira v. County of Kauai (9th Cir. 1989) 866 F.2d 1175, 1182 , cert. denied, 493 U.S. 817* (failure to prove violation precluded finding of conspiracy to commit violation); *Bartling v. Glendale Adventist Medical Center (1986) 184 Cal. App. 3d 961, 972, 229 Cal. Rptr. 360* (same)].

Section 1985(3) applies to private conspiracies aimed at interfering with rights constitutionally protected against private, as well as official, encroachment [*United Brotherhood of Carpenters and Joiners v. Scott (1983) 463 U.S. 825, 832-833, 103 S. Ct. 3352, 77 L. Ed. 2d 1049]* .

To succeed in an action under *42 U.S.C. § 1985(3)*, the plaintiff must allege and prove the existence of both of the following elements [*United Brotherhood of Carpenters and Joiners v. Scott (1983) 463 U.S. 825, 828-829, 103 S. Ct. 3352, 77 L. Ed. 2d 1049* ; *Griffin v. Breckenridge (1971) 403 U.S. 88, 102-103, 91 S. Ct. 1790, 29 L. Ed. 2d 338* ; *see Scott v. Ross (9th Cir. 1998) 140 F.3d 1275, 1284 , cert. denied, 526 U.S. 1033 (1999)]* :

- A conspiracy for the purpose of depriving, directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and

- An act in furtherance of the conspiracy, whereby a person is injured in his or her person or property or deprived of a right or privilege of a citizen of the United States.

The conspiracy can be inferred from conduct and need not be proved by evidence of an express agreement [*Scott v. Ross (9th Cir. 1998) 140 F.3d 1275, 1284 , cert. denied, 526 U.S. 1033 (1999)* ; *Ward v. EEOC (9th Cir. 1983) 719 F.2d 311, 314 , cert. denied, 466 U.S. 953 (1984)]* .

Conspiracies may also be alleged and proven under *42 U.S.C. § 1983* [*see United Steelworkers of America v. Phelps Dodge Corp. (9th Cir.) 865 F.2d 1539 , en banc, cert. denied, 493 U.S. 809 (1989)* (conspiracy under § 1983); *Fonda v. Gray (9th Cir. 1983) 707 F.2d 435* (same)]. Such § 1983 conspiracies must be distinguished from the sort of conspiracies actionable under *42 U.S.C. § 1985*. Plaintiffs often allege and seek to prove conspiracies under § 1983 to establish action under color of law on the part of private parties who conspire with state actors. The requirements of § 1985 do not apply to such § 1983 conspiracies.

PRACTICE TIP:

Conspiracy Claims. Courts tend to be skeptical of civil conspiracy claims brought against government defendants. However, courts are much more willing to allow the government to pursue criminal or civil conspiracy claims against others. Under some circumstances it may be helpful to refer to criminal conspiracy cases to persuade a judge that you have enough evidence to go to a jury on a § 1983 or a § 1985 conspiracy claim. *By John H. Scott*

[b] Class-Based Invidiously Discriminatory Animus

The language requiring intent to deprive another of equal protection, or of equal privileges and immunities, means that there must be some racial, or otherwise class-based, invidiously discriminatory animus behind the conspiracy. The conspiracy must aim at a deprivation of the equal enjoyment of rights secured by the law to all [*United Brotherhood of Carpenters and Joiners v. Scott (1983) 463 U.S. 825, 835, 103 S. Ct. 3352, 77 L. Ed. 2d 1049* ; *Griffin v. Breckenridge (1971) 403 U.S. 88, 102, 91 S. Ct. 1790, 29 L. Ed. 2d 338]* .

The requirement of a class-based, invidiously discriminatory animus implies that the actors chose a particular course of

action at least in part because of, not merely in spite of, its adverse effects on an identifiable group. Some activities may be such an irrational object of disfavor that, if targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed [*Bray v. Alexandria Clinic (1993) 506 U.S. 263, 270, 113 S. Ct. 753, 122 L. Ed. 2d 34]* .

This principle reflects a determination that some groups require special assistance in protecting their civil rights [*DeSantis v. Pacific Tel. & Tel. Co. (9th Cir. 1979) 608 F.2d 327, 333]* .

Groups warranting protection from conspiracies under *42 U.S.C. § 1985(3)* are not limited to those based on racial or otherwise suspect classifications [*Life Ins. Co. of North America v. Reichardt (9th Cir. 1979) 591 F.2d 499, 505]* . Thus, for example, the following entities have been found to constitute protected classes under § 1985(3):

- Female purchasers of disability insurance [*Life Ins. Co. of North America v. Reichardt (9th Cir. 1979) 591 F.2d 499, 505]* ;

- Dissident political groups engaging in lawful activities [*Stevens v. Rifkin (N.D. Cal. 1984) 608 F. Supp. 710, 724]* ; and

- Religious groups [*Diem v. City and County of San Francisco (N.D. Cal. 1988) 686 F. Supp. 806, 809-810* ; *Molko v. Holy Spirit Ass'n (1988) 46 Cal. 3d 1092, 1126, 252 Cal. Rptr. 122, 762 P.2d 46* , *cert. denied, 490 U.S. 1084 (1989)]* .

On the other hand, a protected class under § 1985(3) is more than just a group of individuals who share a desire to engage in conduct that an alleged violator disfavors [*see* *Bray v. Alexandria Clinic (1993) 506 U.S. 263, 269, 113 S. Ct. 753, 122 L. Ed. 2d 34* (women seeking abortions do not qualify as protected class); *Portland Feminist Women's Health Ctr. v. Advocates for Life (9th Cir. 1994) 62 F.3d 280, 283-285* (women seeking abortions not a protected class, though abortion clinic could state cause of action against abortion protesters under "hindrance clause" of *42 U.S.C. § 1985(3)* for conspiring to prevent city police officers from maintaining access to clinic)]. Entities denied protected status under *42 U.S.C. § 1985(3)* include all of the following:

- Indigents represented by public defenders [*Glover v. Tower (9th Cir. 1983) 700 F.2d 556, 558]* ;

- Police, as victims of anti-police bias [*Canlis v. San Joaquin Sheriff's Posse Comitatus (9th Cir. 1981) 641 F.2d 711, 720* , *cert. denied, 454 U.S. 967]* ;

- Homosexuals [*DeSantis v. Pacific Tel. & Tel. Co. (9th Cir. 1979) 608 F.2d 327, 333]* ;

- State prisoners [*Nakao v. Rushen (N.D. Cal. 1982) 542 F. Supp. 856, 859]* ; and

- Individuals holding unpopular historical views [*McCalden v. California Library Ass'n (9th Cir. 1990) 955 F.2d 1214, 1223* , *cert. denied, 504 U.S. 957 (1992)* ("holocaust revisionists")].

[c] Intracorporate Conspiracy Exception Not Applicable

The intracorporate conspiracy exception, under which a corporation or enterprise cannot conspire with its agents acting within the scope of their employment, does not apply to civil rights conspiracies, whether the conspirators are a private business or a public entity [*see* *Washington v. Duty Free Shoppers (N.D. Cal. 1988) 696 F. Supp. 1323, 1326-1327* (private business); *Diem v. City and County of San Francisco (N.D. Cal. 1988) 686 F. Supp. 806, 809-810* (public entity)].

The intracorporate conspiracy exception arose in the antitrust context, and its rationale does not apply in the civil rights arena, in which a real danger exists from the collaboration among agents of a single business to discriminate. Agreements to discriminate between a business and its employees threaten exactly the group danger at which conspiracy liability is aimed [*Washington v. Duty Free Shoppers (N.D. Cal. 1988) 696 F. Supp. 1323, 1326-1327]* .

[2] Conspiracy to Prevent Officer From Performing Duties

A conspiracy is actionable under *42 U.S.C. § 1985* if two or more persons in any state or territory [*42 U.S.C. § 1985(1)*]:

- Conspire to prevent, by force, intimidation, or threat, any person from accepting or holding office, trust, or place of confidence under the United States, or from discharging any duties thereof;

- Conspire to induce by like means any officer of the United States to leave any state, district, or place where his or her duties as an officer are required to be performed;

- Conspire to injure the officer's person or property on account of the lawful discharge of the duties of his or her office or while he or she is engaged in the lawful discharge of the office; or

- Conspire to injure the officer's property so as to molest, interrupt, hinder, or impede the officer in the discharge of official duties.

This action does not require an intent to deprive someone of equal protection of the law, and proof of a class-based animus is not necessary [*see Kush v. Rutledge (1983) 460 U.S. 719, 724-725, 103 S. Ct. 1483, 75 L. Ed. 2d 413]* .

42 U.S.C. § 1985(1) applies exclusively to federal officers [*Canlis v. San Joaquin Sheriff's Posse Comitatus (9th Cir. 1981) 641 F.2d 711, 717-718 , cert. denied, 454 U.S. 967* (not applicable to county sheriff)].

[3] Conspiracy to Obstruct Justice Through Intimidation

If two or more persons in any state or territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending that court, or from testifying in any matter pending therein freely, fully, and truthfully, or conspire to injure the person or property of that party or witness on account of his or her having so attended or testified, or conspire to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or conspire to injure the person or property of that juror on account of any verdict, presentment, or indictment lawfully assented to by the juror, or for being or having been a juror, the conspiracy is actionable under *42 U.S.C. § 1985* [*42 U.S.C. § 1985(2)*].

Proof of a class-based animus is not required for this sort of action under § 1985(2) [*Kush v. Rutledge (1983) 460 U.S. 719, 726-727, 103 S. Ct. 1483, 75 L. Ed. 2d 413]* .

To establish a claim under *42 U.S.C. § 1985(2)*, the plaintiff must show a conspiracy between two or more persons to deter a witness by force, intimidation, or threat from attending court or testifying freely in any pending matter, resulting in injury to the plaintiff [*David v. United States (9th Cir. 1987) 820 F.2d 1038, 1040* ; *see Dooley v. Reiss (9th Cir. 1984) 736 F.2d 1392, 1396 , cert. denied, 469 U.S. 1038* (allegations of perjury and concealment of evidence fail to state claim for relief in that they do not show attempt to influence juror by force, intimidation, or threat)].

If an action is based on allegations of witness intimidation, it must be shown that the *litigant* was hampered in being able to present an effective case; an intimidated witness who is not a party to the action in which he or she was intimidated can show no injury under § 1985(2) [*David v. United States (9th Cir. 1987) 820 F.2d 1038, 1040]* .

To be actionable, the conspiracy must result in overt acts done in furtherance of the conspiracy that are the cause of the plaintiff's injuries. A mere allegation of conspiracy without factual specificity is insufficient to support a claim [*Sanchez v. City of Santa Ana (9th Cir. 1990) 936 F.2d 1027, 1039 , cert. denied, 502 U.S. 957]* .

Further, if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any state or territory, with intent to deny to any citizen the equal protection of the laws, or to injure the citizen or his or her property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the law, that conspiracy is actionable under *42 U.S.C. § 1985* [*42 U.S.C. § 1985(2)*]. This type of action under § 1985(2) requires an intent to deprive someone of equal protection of the law, which is best proved by demonstration of a class-based animus [*Guzman v. Van Demark (C.D. Cal. 1987) 651 F. Supp. 1180, 1185-1186* ; *see Kush v. Rutledge (1983) 460 U.S. 719, 724-725, 103 S. Ct. 1483, 75 L. Ed. 2d 413]* .

[4] Conspiracy to Interfere With Voting

If two or more persons conspire to prevent, by force, intimidation, or threat, any citizen who is lawfully entitled to vote from giving his or her support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a member of Congress of the United States, or conspire to injure any citizen in person or property on account of that support or advocacy, that conspiracy is actionable under *42 U.S.C. § 1985* [*42 U.S.C. § 1985(3)*].

This type of action does not require an intent to deprive a person of equal protection of the law, and proof of a class-based animus is not necessary [*see Kush v. Rutledge (1983) 460 U.S. 719, 724-725, 103 S. Ct. 1483, 75 L. Ed. 2d 413]* .

[5] Limitations Period

The one-year limitation period of former *Code Civ. Proc. § 340(3)* applied to actions under *42 U.S.C. § 1985(3)* [*McDougal v. County of Imperial (9th Cir. 1991) 942 F.2d 668, 673-674]* . The cause of action accrues when the primary injury occurs, not on the last overt act of the conspiracy [*see Venegas v. Wagner (9th Cir. 1983) 704 F.2d 1144, 1146]* . Effective January 1, 2003, *Code Civ. Proc. § 340* was amended and *Code Civ. Proc. § 335.1* was added to provide that personal injury actions are now governed by a two-year statute of limitations.

California Forms of Pleading and Practice--Annotated

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 113 CIVIL RIGHTS: THE POST-CIVIL WAR CIVIL RIGHTS STATUTES
PART II. LEGAL BACKGROUND

11-113 California Forms of Pleading and Practice--Annotated § 113.16

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§ 113.16 Neglect to Prevent Conspiracy to Interfere with Rights: 42 U.S.C. § 1986

Every person who has knowledge that any of the wrongs mentioned in *42 U.S.C. § 1985* are conspired to be done [*see § 113.15*], and are about to be committed, and who has the power to prevent or aid in preventing the commission of those wrongs, but neglects or refuses to do so, and the wrongful act is committed, will be liable to the party injured, or to his or her legal representatives, for all damages caused by that wrongful act, which the person by reasonable diligence could have prevented. Any number of persons guilty of that wrongful neglect or refusal may be joined as defendants. If the death of any party is caused by any such wrongful act and neglect, the legal representative of the deceased may bring an action for the benefit of any survivors to recover damages not exceeding $5,000 [*42 U.S.C. § 1986*].

A cause of action under *42 U.S.C. § 1986* requires that there be a valid claim under *42 U.S.C. § 1985* [*Trerice v. Pedersen (9th Cir. 1985) 769 F.2d 1398, 1403* ; *Washington v. Duty Free Shoppers (N.D. Cal 1988) 696 F. Supp. 1323, 1327]* .

An action under *42 U.S.C. § 1986* must be commenced within one year after the cause of action has accrued [*42 U.S.C. § 1986*; *RK Ventures, Inc. v. City of Seattle (9th Cir. 2002) 307 F.3d 1045, 1058]* .

PRACTICE TIP:

Section 1986. This is an often overlooked cause of action that can have significant value in some cases.
By John H. Scott

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§ 113.17 Application of State Law and Attorney's Fees: 42 U.S.C. § 1988

[1] Applicability of Common Law

In cases brought under *42 U.S.C. §§ 1981, 1982, 1983, 1985,* and *1986*, and in certain other civil rights actions, the courts are to apply the laws of the United States, so far as the laws of the United States are suitable to carry the civil rights laws into effect. In all cases in which the laws of the United States are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and law of the forum state, so far as they are not inconsistent with the federal Constitution and laws, is extended to and governs the district courts in the trial and disposition of the cause [*42 U.S.C. § 1988(a)* (frequently referred to as the "borrowing provision")].

Although § 1988(a) only refers to application of state law in federal courts, the Supreme Court has applied the provision to a *42 U.S.C. § 1982* case in state court [*see Sullivan v. Little Hunting Park (1969) 396 U.S. 229, 240-241, 90 S. Ct. 400, 24 L. Ed. 2d 386* ; *see also Felder v. Casey (1988) 487 U.S. 131, 137, 108 S. Ct. 2302, 101 L. Ed. 2d 123]* .

The question whether state law is inconsistent with the federal Constitution or laws focuses on the purpose and nature of the federal right involved. In a § 1983 case, the question is whether the state law is inconsistent with the purposes of §

1983 [*see* *Felder v. Casey (1988) 487 U.S. 131, 139, 108 S. Ct. 2302, 101 L. Ed. 2d 123* (holding state notice of claim requirement to be inapplicable to § 1983 action)].

[2] Attorney's Fees

[a] Availability of Attorney's Fees

[i] Court Has Discretion

In any action or proceeding to enforce a provision of *42 U.S.C. §§ 1981, 1982, 1983, 1985*, or *1986* (or other specified federal statutes), the court, in its discretion, may allow the prevailing party [*see § 113.17[2][b]*], other than the United States, a reasonable attorney's fee as part of costs [*42 U.S.C. § 1988(b)*]. A prevailing party in an action under *42 U.S.C. § 1983* should ordinarily recover an attorney's fee unless special circumstances could render such an award unjust [*Democratic Party of Wash. State v. Reed (9th Cir. 2004) 388 F.3d 1281, 1285-1286* ; *Bauer v. Sampson (9th Cir. 2001) 261 F.3d 775, 785* , quoting *Newman v. Piggie Park Enters., Inc. (1968) 390 U.S. 400, 402, 88 S. Ct. 964, 19 L. Ed. 2d 1263]* . There is a two-pronged test for determining when special circumstances exist [*Democratic Party of Wash. State v. Reed (9th Cir. 2004) 388 F.3d 1281, 1285]* :

- Whether allowing attorneys' fees would further the purposes of *42 U.S.C. § 1988* [*see § 113.17[2][a][ii]*]; and

- Whether the balance of the equities favors or disfavors the denial of fees.

In awarding an attorney's fee in any action or proceeding to enforce *42 U.S.C. § 1981*, the court, in its discretion, may include expert fees as part of the attorney's fee [*42 U.S.C. § 1988(c)*].

[ii] Purpose of Statute

The purpose of *42 U.S.C. § 1988* is to ensure effective access to the judicial process for persons with civil rights grievances [*Hensley v. Eckerhart (1983) 461 U.S. 424, 429*]. However, an attorney who represents himself or herself in a successful civil rights action is not entitled to attorney's fees [*Kay v. Ehrler (1991) 499 U.S. 432, 435-438, 111 S. Ct. 1435, 113 L. Ed. 2d 486]* , whether the attorney is a plaintiff or a defendant in the civil rights action [*see* *Elwood v. Drescher (9th Cir. 2006) 456 F.3d 943, 946-948* (*Kay* applied to preclude attorney's fee award to attorney who successfully represented himself as defendant in action under *42 U.S.C. § 1983*)]. The United States Supreme Court appears to have held that attorney's fees awards in civil rights claims are precluded for all pro se litigants [*see* *Elwood v. Drescher (9th Cir. 2006) 456 F.3d 943, 947* , *citing* *Kay v. Ehrler (1991) 499 U.S. 432, 435-438, 111 S. Ct. 1435, 113 L. Ed. 2d 486]* .

[iii] Judicial Officer Not Liable for Fees

In an action brought against a judicial officer for an act or omission taken in the officer's judicial capacity, the officer cannot be held liable for any costs, including attorney's fees, unless the officer's action was clearly in excess of the officer's jurisdiction [*42 U.S.C. § 1988(b)*].

[iv] "Merit Fees" and "Fees on Fees"

Attorney's fees may be awarded under *42 U.S.C. § 1988* not only for successful litigation of the underlying merits of the action ("merits fees"), but also for fees incurred in successfully litigating an application for merits fees ("fees on fees") [*Thompson v. Gomez (9th Cir. 1995) 45 F.3d 1365, 1366* ; *Clark v. City of Los Angeles (9th Cir. 1986) 803 F.2d 987, 992]* . However, like merits fees, an award of fees for fee litigation may be reduced proportionately to the extent that the fee litigation is unsuccessful [*see* *Thompson v. Gomez (9th Cir. 1995) 45 F.3d 1365, 1367-1368* ; *see also* [c][ii], *below*

].

[v] Fees on Appeal

Attorney's fees may be awarded under *42 U.S.C. § 1988* for all representation on appeal, including work performed in defending or challenging a fee award, if plaintiff prevails [*Bernardi v. Yeutter (9th Cir. 1991) 951 F.2d 971, 976* ; *Cabrales v. County of Los Angeles (9th Cir. 1991) 935 F.2d 1050, 1053]* . If the plaintiff is partially successful on appeal, attorney's fees are awarded only for claims successfully defended on the merits [*see Larez v. City of Los Angeles (9th Cir. 1991) 946 F.2d 630, 649]* .

A denial of attorney's fees under *42 U.S.C. § 1988* is reviewed on appeal for abuse of discretion, elements of legal analysis and statutory interpretation are reviewed de novo, and factual findings underlying the decision are reviewed for clear error [*Native Village of Venetie IRA Council v. Alaska (9th Cir. 1998) 155 F.3d 1150, 1151-1152]* .

[vi] Interest on Fees

Interest on the amount of attorney's fees awarded may be ordered, accruing from the time that services were rendered, to compensate for the delay in receipt of the fees [*Spain v. Mountanos (9th Cir. 1982) 690 F.2d 742, 747-748]* .

[vii] Consideration of Fees Appropriate Only in Post-trial Proceeding

Consideration of attorney's fees is strictly the province of the court in post-trial proceedings. It is error to inform or instruct the jury as to the plaintiff's possible recovery of attorney's fees [*Brooks v. Cook (9th Cir. 1991) 938 F.2d 1048, 1050-1053]* .

Moreover, the trial court retains discretion under *42 U.S.C. § 1988* to deny fees when a post-judgment motion unfairly surprises or prejudices the affected party [*White v. New Hampshire Dep't of Empl. Sec. (1982) 455 U.S. 445, 454, 102 S. Ct. 1162, 71 L. Ed. 2d 325* ; *Board of Admin. of Cal. Public Employees' Retirement System v. Wilson (1997) 57 Cal. App. 4th 967, 974, 67 Cal. Rptr. 2d 477]* .

[viii] Statute Controls Only What Losing Defendant Must Pay

42 U.S.C. § 1988 controls only what the losing defendant must pay; it does not affect what the prevailing plaintiff must pay his or her attorney. Thus, § 1988 does not interfere with the enforceability of a contingent-fee contract between the plaintiff and his or her attorney [*Venegas v. Mitchell (1990) 495 U.S. 82, 90, 110 S. Ct. 1679, 109 L. Ed. 2d 74]* .

[ix] Fees in Cases Litigated in State Court

42 U.S.C. § 1988 attorney's fees are awardable in cases litigated in California state courts under *42 U.S.C. § 1983*. California courts follow federal standards for determining fee awards under § 1988 [*Board of Admin. of Cal. Public Employees' Retirement System v. Wilson (1997) 57 Cal. App. 4th 967, 974, 67 Cal. Rptr. 2d 477* ; *EWAP, Inc. v. City of Ontario (1986) 177 Cal. App. 3d 1108, 1113, 223 Cal. Rptr. 422]* .

A plaintiff who wins a state battery claim but loses a federal claim for violation of civil rights under *42 U.S.C. § 1983* by use of excessive force based on the same conduct may not obtain an award of attorney's fees under *42 U.S.C. § 1988*, since every battery under state law does not result in a constitutional violation [*McFadden v. Villa (2001) 93 Cal. App. 4th 235, 237-242, 113 Cal. Rptr. 2d 80* ; *see Mateyko v. Felix (9th Cir. 1990) 924 F.2d 824, 828 , cert. denied, 502 U.S. 814 (1991)* (fees denied to plaintiff who lost federal civil rights claim and won state negligence claim); *Russo v. State of New York (2d Cir. 1982) 672 F.2d 1014, 1022-1023]* . On the other hand, a plaintiff who succeeds on both a state and federal claim based on the same legal theory or core of common facts may be awarded attorney's fees even if no damages are awarded on the federal claim [*see Allen v. District of Columbia (D.C. 1986) 503 A.2d 1233, 1236-1237*

(court found in favor of plaintiff on both state and federal claims but awarded no damages on federal claim); *Hall v. Western Production Co. (10th Cir. 1993) 988 F.2d 1050, 1055-1056* (jury found for plaintiff on federal age discrimination and state breach of contract claims but awarded no damages for age discrimination)].

A state court action for malicious prosecution following dismissal from an action under *42 U.S.C. § 1983* is not expressly preempted by *42 U.S.C. § 1988*. The provision for an award of attorney's fees to a prevailing defendant under *42 U.S.C. § 1988(b)* does not support an inference that Congress intended to occupy the entire field of relief to defendants who prevail on § 1983 actions not brought in good faith, particularly when the standard for a prevailing defendant's entitlement to attorney's fees under federal law, that is, that the action is brought frivolously, is lower than that for defendants to prevail in a subsequent action for malicious prosecution. The higher standard required to proceed with an action for malicious prosecution defeats a claim that the malicious prosecution action is preempted [*Del Rio v. Jetton (1997) 55 Cal. App. 4th 30, 33-37, 63 Cal. Rptr. 2d 712]* . For discussion of malicious prosecution actions, see Ch. 357, *Malicious Prosecution* .

PRACTICE TIP:

Entitlement to Fees. Under certain circumstances, a Plaintiff may be deemed a prevailing party and entitled to fees under § 1988 if he or she succeeds on a state law claim based on the same legal theory or a core of common facts as a § 1983 claim. However, this depends on the Plaintiff succeeding in some way on a federal claim or a federal claim not being adjudicated at all [*McFadden v. Villa (2001) 93 Cal. App. 4th 235, 113 Cal. Rptr. 2d 80]* . In *McFadden*, the court of appeal reversed an award of attorneys' fees based on a state law battery claim because the jury found no civil rights violation. The trial court awarded fees because an excessive force claim under state law is evaluated by federal civil rights standards [*Edson v. City of Anaheim (1998) 63 Cal. App. 4th 1269, 74 Cal. Rptr. 2d 614]* . The result in *McFadden* (jury found battery under state law but no civil rights violation) could possibly have been avoided by a motion to reconcile the verdicts. Otherwise, the inconsistent verdicts could warrant a new trial. *By John H. Scott*

[b] Prevailing Party

[i] Plaintiff

A plaintiff is considered a prevailing party, and may recover attorney's fees, if he or she succeeds on any significant issue in litigation that achieves some of the benefit sought in bringing the suit [*Hensley v. Eckerhart (1983) 461 U.S. 424, 433* ; *see* *Sokolow v. County of San Mateo (1989) 213 Cal. App. 3d 231, 243, 247-248, 261 Cal. Rptr. 520* (amount of award may be less if plaintiff achieved only limited success)].

The plaintiff must be able to point to a resolution of the dispute that changes the legal relationship between himself or herself and the defendant [*Texas Teachers v. Garland School Dist. (1989) 489 U.S. 782, 792, 109 S. Ct. 1486, 103 L. Ed. 2d 866]* . Additionally, the plaintiff must personally benefit from the relief [*Rhodes v. Stewart (1988) 488 U.S. 1, 4, 109 S. Ct. 202, 102 L. Ed. 2d 1* (plaintiff prisoners not prevailing parties because one had died and other had been released from custody before judicial determination)]. Thus, a plaintiff who succeeds in obtaining a court order incorporating an agreement that includes relief the plaintiff sought in the lawsuit is not a mere catalyst; the plaintiff is a prevailing party for attorney's fees purposes [*Labotest v. Bonta (9th Cir. 2002) 297 F.3d 892, 893]* .

Even if there is a causal link between the litigation and the defendant's subsequent acts, the plaintiff is not the prevailing party unless he or she receives a direct benefit from the acts [*Hewitt v. Helms (1987) 482 U.S. 755, 763-764, 107 S. Ct. 2672, 96 L. Ed. 2d 654* (prisoner's suit caused prisonto promulgate regulations to prevent treatment complained of, but prisoner did not personally benefit from regulations because he had been released)]. In short, a plaintiff prevails if actual relief on the merits of the claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff [*Farrar v. Hobby (1992) 506 U.S. 103, 111, 113 S.*

Ct. 566, 121 L. Ed. 2d 494] . However, the requirement of *Farrar*, that the plaintiff obtain "relief on the merits," does not necessarily mean that the plaintiff must obtain an adjudication of liability. In one case, for example, a plaintiff who obtained an enforceable stipulated judgment requiring a city to make alternations to a public facility to comply with handicap access laws was the prevailing party for purposes of *42 U.S.C. § 1988*, even though the city did not admit liability [*see Kilgour v. City of Pasadena (9th Cir. 1995) 53 F.3d 1007, 1010-1011]* .

Furthermore, the relief need not be judicially decreed to justify an award of attorney's fees. If a lawsuit produces voluntary action by the defendants that affords the plaintiffs all or some of the relief sought, such as a monetary settlement or a change in conduct that redresses the plaintiffs' grievances, the plaintiffs are deemed to have prevailed despite the absence of a formal judgment in their favor [*Hewitt v. Helms (1987) 482 U.S. 755, 760-761, 107 S. Ct. 2672, 96 L. Ed. 2d 654]* . Such voluntary action by the defendant is sometimes referred to as "catalytic relief." However, to qualify as a "prevailing party" under § 1988, a party must obtain a "judicially sanctioned" change in the legal relationship of the parties, so that the catalyst theory no longer applies to § 1988 [*Bennett v. Yoshina (9th Cir. 2001) 259 F.3d 1097, 1100-1101* (9th Circuit precedents to contrary overturned), citing *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources (2001) 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855]* .

PRACTICE TIP:

Fees in "Catalytic Relief" Cases. Since the United States Supreme Court and the Ninth Circuit have effectively eliminated the "catalytic effect" as a basis for a fee award under § 1988 [*see Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources (2001) 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855* ; *Bennett v. Yoshina (9th Cir. 2001) 259 F.3d 1097, 1100-1101]* , defendants can avoid exposure to attorneys' fees in cases based on injunctive relief by simply "voluntarily" changing policies before a court grants the sought after injunctive relief. *By John H. Scott*

Even unadjudicated claims can support an award of attorney's fees under § 1988, so long as the claims are substantial and were not alleged solely to support the fee award [*see Maher v. Gagne (1980) 448 U.S. 122, 130-133, 100 S. Ct. 2570, 65 L. Ed. 2d 653* ; *Native Village of Venetie IRACouncil v. Alaska (9th Cir. 1998) 155 F.3d 1150, 1152-1153* ; *Hoopa Valley Tribe v. Nevins (9th Cir. 1989) 881 F.2d 657, 661 , cert. denied, 494 U.S. 1055 (1990)]* .

The prevailing-party inquiry does not necessarily turn on the magnitude of the relief obtained. A plaintiff who wins only an award of nominal damages may be a prevailing party under § 1988, so long as the plaintiff receives some tangible benefit other than the nominal damages. However, a purely technical victory may be so insignificant as to be insufficient to support an award of attorney's fees [*see Texas State Teachers Ass'n v. Garland Independent School Dist. (1989) 489 U.S. 782, 792, 109 S. Ct. 1486, 103 L. Ed. 2d 866* (giving example of obtaining judgment declaring regulation unconstitutionally vague but without evidence that plaintiffs were adversely affected by regulation)]. If a court chooses to award fees after a judgment for only nominal damages, it must point to some way in which the litigation succeeded, in addition to obtaining a judgment for nominal damage [*Mahach-Watkins v. Depee (9th Cir. 2010) 593 F.3d 1054, 1059]* . A court should consider three factors in determining whether a plaintiff succeeded in some way beyond the judgment for nominal damages [*Mahach-Watkins v. Depee (9th Cir. 2010) 593 F.3d 1054, 1059]* :

- The difference between the amount recovered and the damages sought, which in most nominal damages cases will disfavor an award of fees.
- The significance of the legal issue on which the plaintiff claims to have prevailed.
- Whether the plaintiff accomplished some public goal.

Although a party may "prevail" by obtaining a judgment for nominal damages, a trial court may abuse its discretion in awarding attorney's fees based on nominal damages in a case in which the plaintiff sought compensatory damages [*see Farrar v. Hobby (1992) 506 U.S. 103, 114-116, 113 S. Ct. 566, 121 L. Ed. 2d 494* ; *Romberg v. Nichols (9th Cir. 1995) 48 F.3d 453, 455 , cert. denied, 516 U.S. 943]* . In one case, for example, a judgment that awarded the plaintiffs nominal damages of $1.00, but failed to produce any other tangible results for the plaintiffs, was held to be insufficient to support an award of attorney's fees, even though the plaintiffs were technically "prevailing parties" [*see Romberg v. Nichols (9th Cir. 1995) 48 F.3d 453, 455 , cert. denied, 516 U.S. 943]* . In another case, on the other hand, an award of attorney's fees was held not to be an abuse of the trial court's discretion, even though the plaintiff was awarded only nominal damages, because the litigation achieved tangible results in that it exposed the defendant police department's unconstitutional policy of using excessive force in making arrests, and the city later changed the policy, at least in part because of the lawsuit [*see Wilcox v. City of Reno (9th Cir. 1994) 42 F.3d 550, 554-557]* .

PRACTICE TIP:

Attorneys' Fees and Nominal Damages. Thus, a "nominal damage" jury instruction is a trap because a $1.00 verdict will normally not meet the "prevailing party" threshold for entitlement to an award of attorneys' fees. *By John H. Scott*

A declaratory judgment is sufficient to support an award of attorney's fees under § 1988 if the proper standard is otherwise met [*see Rhodes v. Stewart (1988) 488 U.S. 1, 3, 109 S. Ct. 202, 102 L. Ed. 2d 1]* . Further, an original prevailing party who later defends a consent decree against collateral attack in a separate action is eligible for a fees award under § 1988 [*San Francisco NAACP v. San Francisco Unified Sch. Dist. (9th Cir. 2002) 284 F.3d 1163, 1166-1168]* . Moreover, a plaintiff who succeeds inobtaining a preliminary injunction can be deemed a prevailing party for purposes of *42 U.S.C. § 1988*, even though the plaintiff did not recover other relief sought in the lawsuit [*Watson v. County of Riverside (9th Cir. 2002) 300 F.3d 1092, 1095-1096]* .

A plaintiff who obtains a preliminary injunction but is denied a permanent injunction after a dispositive hearing on the merits is not entitled to attorney's fees as a prevailing party. A final decision on the merits denying permanent injunctive relief ordinarily determines who prevails in the action for purposes of *42 U.S.C. § 1988(b)* [*Sole v. Wyner (2007) 551 U.S. 74, 127 S. Ct. 2188, 2193-2197, 167 L. Ed. 2d 1069, 1076-1079]* .

The prevailing plaintiff should ordinarily recover attorney's fees unless special circumstances render such an award unjust [*Hensley v. Eckerhart (1983) 461 U.S. 424, 429* ; *see Kilgour v. City of Pasadena (9th Cir. 1995) 53 F.3d 1007-1012* (trial court finding of "special circumstances" justifying denial of attorney's fees was not supported when evidence was conflicting as to whether matter would have been settled in as timely a fashion had plaintiff not filed suit)]. The fact that the case was resolved on independent state grounds is not a special circumstance justifying denial of attorney's fees under § 1988. A fee is appropriate if the plaintiff prevails on a state law claim based on a common nucleus of operative facts with a substantial federal claim [*Hewitt v. Joyner (9th Cir. 1991) 940 F.2d 1561, 1571-1572 , cert. denied, 502 U.S. 1073 (1992)]* .

For purposes of awarding attorney's fees in actions under *42 U.S.C. § 1983*, the term "prevailing party" may include labor unions, corporations, nonprofit organizations, and Indian tribes [*see Native Village of Venetie IRA Council v. Alaska (9th Cir. 1998) 155 F.3d 1150, 1152 n.1*].

[ii] Defendant

A prevailing defendant in a civil rights action may recover attorney's fees only if the suit was vexatious, frivolous, or brought to harass or embarrass the defendant [*Hensley v. Eckerhart (1983) 461 U.S. 424, 429* ; *Herb Hallman Chevrolet v. Nash-Holmes (9th Cir. 1999) 169 F.3d 636, 645 , cert. denied, 528 U.S. 870* ; *Bemis v. Edwards (9th Cir. 1995) 45 F.3d 1369, 1375* ; *Benigni v. Hemet (9th Cir. 1989) 879 F.2d 473, 480* ; *Gill v. Hughes (1991) 227 Cal. App. 3d 1299, 1312-1313, 278 Cal. Rptr. 306]* . An action is not frivolous if the plaintiff survives dismissal motions and a

motion for directed verdict. On the other hand, the fact that the case does not reach the jury does not necessarily mean that it was frivolous [*see Brooks v. Cook (9th Cir. 1991) 938 F.2d 1048, 1054-1055]* . Furthermore, the fact that a trier of fact does not believe the plaintiff's version of the facts is insufficient reason to consider a case frivolous [*Brooks v. Cook (9th Cir. 1991) 938 F.2d 1048, 1055]* .

Massive fee awards against plaintiffs who continue to trial are contrary to Congress's goal of promoting vigorous prosecution of civil rights violations [*Sanchez v. City of Santa Ana (9th Cir. 1990) 936 F.2d 1027, 1041 , cert. denied, 502 U.S. 957]* .

[c] Amount of Award

[i] Determination of Lodestar

After it determines that the plaintiff is the prevailing party, the trial court must make a determination of what fee is reasonable [*see Hensley v. Eckerhart (1983) 461 U.S. 424, 429-430*]. The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate [*Blum v. Stenson (1984) 465 U.S. 886, 888, 104 S. Ct. 1541, 79 L. Ed. 2d 891* ; *Hensley v. Eckerhart (1983) 461 U.S. 424, 433*]. The product of the multiplication of the hours reasonably expended times a reasonable hourly rate is frequently referred to as the "lodestar figure."

If the plaintiff fails to prevail on a claim that is distinct in all respects from a successful claim, the hours spent on the unsuccessful claim should be excluded from the calculation of the lodestar figure. Further, the court may exclude hours that were not reasonably expended or that were not properly documented [*Hensley v. Eckerhart (1983) 461 U.S. 424, 433-434, 440*].

Attorney's fees are calculated according to the prevailing market rates in the relevant community [*Blum v. Stenson (1984) 465 U.S. 886, 895, 104 S. Ct. 1541, 79 L. Ed. 2d 891* (no distinction made between private and nonprofit counsel)]. The burden is on the fee applicant to produce satisfactory evidence that the requested rate is in line with that prevailing in the community for similar services by lawyers of reasonably comparative skill, experience, and reputation [*Blum v. Stenson (1984) 465 U.S. 886, 895 n.11, 104 S. Ct. 1541, 79 L. Ed. 2d 891]* . Once the applicant has met this burden, the resulting fee is presumed to be reasonable [*Blum v. Stenson (1984) 465 U.S. 886, 897, 104 S. Ct. 1541, 79 L. Ed. 2d 891]* .

PRACTICE TIP:

Consider Contingency Fee Arrangement. An attorney might consider entering into a contingency fee retainer agreement that allows him or her to obtain a percentage of the settlement/judgment in addition to attorneys' fees awarded. However, there are ethical considerations. The risk of pursuing a § 1983 action may warrant this kind of agreement (especially in Prison Litigation Reform Act cases) [*see* [g], *below*]. In general, retainer agreements should provide for the attorney to receive a percentage of the ultimate settlement/judgment, or court awarded fees, whichever is greater. *By John H. Scott*

PRACTICE TIP:

If Possible, Negotiate Attorneys' Fees Independent of Damages Claim. For ethical reasons, an attorney should not negotiate his or her attorney fee first. This creates an ethical dilemma as there is the risk that an attorney will be "bought off" at the expense of his or her client. The better approach is to first negotiate a settlement for your client with an understanding that attorneys' fees will be resolved pursuant to a fee petition or subsequent negotiations. Often such agreements will include a "high-low" provision that sets both a ceiling and a floor for a subsequent award of attorneys' fees. *By John H. Scott*

[ii] Adjustment of Lodestar

Once the lodestar fee has been determined, the amount may be increased or decreased on the basis of certain factors in the case that are not already reflected in the lodestar [*Hensley v. Eckerhart (1983) 461 U.S. 424, 434*].

The most critical factor in determining the reasonableness of a fee award is the degree of success obtained [*Hensley v. Eckerhart (1983) 461 U.S. 424, 436*]. If the plaintiff achieves only limited success, the lodestar figure should be reduced, unless the limited success is already reflected in the lodestar by the omission of time spent on unsuccessful claims [*see Farrar v. Hobby (1992) 506 U.S. 103, 114-116, 113 S. Ct. 566, 121 L. Ed. 2d 494* ; *Corder v. Gates (9th Cir. 1991) 947 F. 2d 374, 378* ; *see also Thompson v. Gomez (9th Cir. 1995) 45 F.3d 1365, 1367-1368* (reduction of award for fees incurred in fee litigation proper to extent fee litigation is unsuccessful)]. Conversely, a successful result is reflected in the right to fees as prevailing party, and does not justify a further increase over the lodestar, even if the court determines that the litigation benefited a large class of needy people [*Blum v. Stenson (1984) 465 U.S. 886, 900, 104 S. Ct. 1541, 79 L. Ed. 2d 891]* .

If recovery of monetary damages is the purpose of the litigation, the court is required to give primary consideration to the amount of damages awarded as compared to the amount sought. If the disparity is great, the court may award low fees or no fees at all. If a plaintiff recovers only nominal damages because of the failure to prove an essential element of the claim for monetary relief, the only reasonable fee is usually no fee at all [*Farrar v. Hobby (1992) 506 U.S. 103, 114-116, 113 S. Ct. 566, 121 L. Ed. 2d 494* ; *see Romberg v. Nichols (9th Cir. 1995) 48 F.3d 453, 455 , cert. denied, 516 U.S. 943* (judgment awarding plaintiffs nominal damages of one dollar, but failing to produce any other tangible result for plaintiffs, was insufficient to support award of attorney's fees)].

If the plaintiff prevails against some but not all defendants sued on claims arising from a common core of facts, it is within the discretion of the court to reduce the lodestar to reflect limited success [*see Corder v. Gates (9th Cir. 1992) 947 F.2d 374, 378-380]* . However, no reduction is required if the court determines that the full lodestar amount is a reasonable fee under the circumstances [*see Rivera v. City of Riverside (9th Cir. 1985) 763 F.2d 1580, 1582 , aff'd, 477 U.S. 561, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986)]* .

An upward multiplier may be appropriate to reflect the risk inherent in the contingent nature of the fee. Enhancing a fee award for contingent risk is permissible if two prerequisites are met. First, the plaintiff must establish that without an adjustment for risk, he or she would have faced substantial difficulties in finding counsel in the local or other relevant market. Second, any enhancement for contingency must reflect the difference in market treatment of contingent fee cases as a class, rather than the riskiness of any particular case [*Bernardi v. Yeutter (9th Cir. 1991) 951 F.2d 971, 975* ; *see Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (1987) 483 U.S. 711, 730-731, 107 S. Ct. 3078, 97 L. Ed. 2d 585* (plurality opinion approving one-third increase); *Fadhl v. City and County of San Francisco (9th Cir. 1988) 859 F.2d 649, 650* (2.0 multiplier in San Francisco market); *Bouman v. Block (9th Cir. 1991) 940 F.2d 1211, 1236 , cert. denied, 502 U.S. 1005* (remand for consideration of Los Angeles market)].

PRACTICE TIP:

Availability of Multiplier. Since 1992 it has become virtually impossible to get a multiplier as a prevailing party in a § 1983 case [*see City of Burlington v. Dague (1992) 505 U.S. 557, 112 S. Ct. 2638, 120 L. Ed. 2d 449]* . On the other hand, it is still possible to obtain a multiplier in state court on a Fair Employment and Housing Act (FEHA) claim [*see Ch. 115, Civil Rights: Employment Discrimination, § 115.20*] or a claim for fees under *Code Civ. Proc. § 1021.5*. However, this is becoming increasingly difficult [*see, e.g., Flannery v. Prentice (2001) 26 Cal. 4th 572, 110 Cal. Rptr. 2d 809, 28 P.3d 860] . By John H. Scott*

An increase based on the novelty and difficulty of the questions presented is inappropriate because this factor should be reflected in the amount of hours included in the lodestar calculation. Similarly, a high quality of representation should

be reflected by a high hourly rate, and does not justify a further increase, except, perhaps, in a rare, exceptional case [*Blum v. Stenson (1984) 465 U.S. 886, 898-899, 104 S. Ct. 1541, 79 L. Ed. 2d 891]* .

[iii] Trial Court's Findings

The trial court must provide a concise but clear explanation of its reasons for the amount of an attorney's fee award. If it has made an adjustment of the lodestar figure, the court should make clear that it has considered the relationship between the amount of the fee awarded and the results obtained [*Hensley v. Eckerhart (1983) 461 U.S. 424, 437* ; *see Gates v. Deukmejian (9th Cir. 1992) 987 F.2d 1392, 1398]* .

In the case of a voluminous fee application, however, the court is not required to set forth an hour-by-hour analysis [*Gates v. Deukmejian (9th Cir. 1992) 987 F.2d 1392, 1399]* .

[d] Apportionment Among Defendants

If a plaintiff prevails against multiple defendants, the attorney's fees awarded may be apportioned among the defendants under certain circumstances. Apportionment is required if it is possible to make a reasonable allocation of the attorney time that was expended in pursuing each defendant [*see Woods v. Graphic Communications (9th Cir. 1991) 925 F.2d 1195, 1206* ; *Sable Communications of California v. Pacific Telephone & Telegraph Co. (9th Cir. 1989) 890 F.2d 184, 194]* .

Apportionment based on the respective amount of damages awarded against each defendant is not appropriate [*Corder v. Gates (9th Cir. 1991) 947 F.2d 374, 383]* .

[e] Effect of Lack of Subject Matter Jurisdiction

A court may not award attorney's fees under *42 U.S.C. § 1988* when it lacks subject matter jurisdiction over the underlying civil rights claim. Furthermore, when a civil rights action under § 1983 is dismissed for lack of subject matter jurisdiction, the defendant is not deemed to have prevailed on the merits and is therefore not a "prevailing party" within the meaning of § 1988 [*Branson v. Nott (9th Cir. 1995) 62 F.3d 287, 292-293* , *cert. denied, 516 U.S. 1009* ; *see* [b], *above*, for discussion of "prevailing party"].

[f] Effect of Settlement Offer

42 U.S.C. § 1988 does not embody a general rule prohibiting settlements conditioned on the waiver of attorney's fees. However, § 1988 might prohibit fee waivers in three specific situations [*Evans v. Jeff D. (1986) 475 U.S. 717, 739-741, 106 S. Ct. 1531, 89 L. Ed. 2d 747* ; *Willard v. City of Los Angeles (9th Cir. 1986) 803 F.2d 526, 527* ; *Bernhardt v. County of Los Angeles (9th Cir. 2002) 279 F.3d 862, 865-866]* :

- Section 1988 might bar a governmental unit from implementing a statute, policy or practice precluding the payment of attorney's fees in settlements of civil rights cases.

- A district court might be required to disapprove a fee waiver that was part of a vindictive effort to deter attorneys from representing plaintiffs in civil rights suits.

- An action might lie if it were shown that fee waivers have had the effect, in the aggregate and in the long run, of shrinking the pool of lawyers willing to represent plaintiffs in civil cases, thereby constricting the effective access to the judicial process for persons with civil rights grievances which § 1988 was intended to provide.

Under *Fed. R. Civ. Proc., Rule 68*, a defendant may offer to allow judgment to be taken against him or her, with costs

then accrued. If the offer is refused and the plaintiff subsequently fails to obtain a judgment more favorable than the offer, the plaintiff must pay the costs incurred by the defendant after the making of the offer [*Fed. R. Civ. Proc., Rule 68*].

The United States Supreme Court has held that attorney's fees are included within the term "costs," as used in Rule 68 [*Marek v. Chesny (1985) 473 U.S. 1, 9-10, 105 S. Ct. 3012, 87 L. Ed. 2d 1]* . Therefore, if a defendant makes a Rule 68 settlement offer and does not specify that attorney's fees are included in the amount of the offer, the plaintiff may accept the offer and then seek to recover attorney's fees by a subsequent motion [*see Marek v. Chesny (1985) 473 U.S. 1, 6-7, 105 S. Ct. 3012, 87 L. Ed. 2d 1* ; *Erdman v. Cochise County, Arizona (9th Cir. 1991) 926 F.2d 877, 879-881]* .

In a case when the specific offer accepted by plaintiff provides that the plaintiff is entitled to "costs now accrued and reasonable attorney fees as determined by the court," the plaintiff is not precluded from recovering attorney's fees subsequently incurred in litigating the application for attorney's fees. The Ninth Circuit Court of Appeals has held that such language in a settlement offer does not clearly and unambiguously cut off the plaintiff's right under *42 U.S.C. § 1988* to recover attorney's fees later incurred in litigating the attorney's fee award [*see Holland v. Roeser (9th Cir. 1994) 37 F.3d 501, 503-504* ; *see also Erdman v. Cochise County, Arizona (9th Cir. 1991) 926 F.2d 877, 880* (waiver or limitation of right to attorney's fees under § 1988 in connection with settlement must be clear and unambiguous)].

If the plaintiff rejects a Rule 68 settlement offer and then fails to obtain a judgment more favorable than the offer, the plaintiff will not be able to recover attorney's fees for work after the offer, and will have to pay the defendant's costs accrued subsequent to the offer [*Marek v. Chesny (1985) 473 U.S. 1, 5-12, 105 S. Ct. 3012, 87 L. Ed. 2d 1]* . However, the plaintiff, in that case, is not required to pay the defendant's attorney's fees accrued after the offer, unless the plaintiff's case is shown to be frivolous or groundless [*see Crossman v. Marcoccio (1st Cir. 1986) 806 F.2d 329, 333-334 , cert. denied, 481 U.S. 1029 (1987)]* .

PRACTICE TIP:

Rule 68 Offers. The general rule is that a Rule 68 offer that includes "costs" also includes attorneys' fees. When such an offer is made, and rejected, it is good practice to notify your opponent in writing that the offer was rejected, in part, because the attorneys' fees and costs (may have) equaled or exceeded the amount of the offer. In those situations a subsequent verdict or judgment that is less than the Rule 68 offer should not prevent your ability to claim attorneys' fees as a prevailing party. It is also very important that the plaintiff fully understand the significance and consequences of rejecting any Rule 68 offer. Thus, this should be in writing. *By John H. Scott*

[g] Effect of Prison Litigation Reform Act

The Prison Litigation Reform Act (PLRA), when it applies, imposes significant limits on the recovery of attorneys' fees in cases brought by prisoners. Under the PLRA, attorneys' fees may not be awarded under *42 U.S.C. § 1988* unless the amount of the fee is proportionately related to the court ordered relief, or the fee was directly and reasonably incurred in enforcing the relief [*42 U.S.C. § 1997e(d)(1)*]. In addition, the PLRA caps the hourly rates recoverable by attorneys [*42 U.S.C. § 1997e(d)(3)*]. For further discussion of the PLRA, including its restrictions on recovering attorneys' fees, see *Chapter 114, Civil Rights: Prisoners' Rights, § 114.28[6]*.

[h] Attorney's Collection of Fees

42 U.S.C. § 1988 vests the right to seek attorney's fees in the prevailing party, not the prevailing party's attorney. Attorneys therefore lack standing to pursue their fees [*Evans v. Jeff D. (1986) 475 U.S. 717, 730-732, 106 S. Ct. 1531, 89 L. Ed. 2d 747* ; *see Venegas v. Mitchell (1990) 495 U.S. 82, 88, 110 S. Ct. 1679, 109 L. Ed. 2d 74* ; *Pony v. County of Los Angeles (9th Cir. 2006) 433 F.3d 1138, 1142* ; *Churchill Vill., L.L.C. v. GE (9th Cir. 2004) 361 F.3d 566, 579* ; *United States ex rel. Virani v. Jerry M. Lewis Truck Parts & Equip., Inc. (9th Cir. 1996) 89 F.3d 574, 577* ;

Willard v. City of Los Angeles (9th Cir. 1986) 803 F.2d 526, 527] . Once the prevailing party exercises the right to receive fees, the attorney's right to collect them vests, and the attorney may then pursue them on his or her own. However, unless and until the party exercises this power, the attorney has no right to collect fees from the non-prevailing party, and the non-prevailing party has no duty to pay them [*Pony v. County of Los Angeles (9th Cir. 2006) 433 F.3d 1138, 1142* ; *United States ex rel. Virani v. Jerry M. Lewis Truck Parts & Equip., Inc. (9th Cir. 1996) 89 F.3d 574, 577]* .

A plaintiff bringing suit under *42 U.S.C. § 1983* cannot assign the right to seek attorney's fees to his or her attorney. A putative assignment of the right to attorney's fees to an attorney is invalid because the right to seek attorney's fees under *42 U.S.C. § 1988* is a substantive cause of action that cannot be transferred contractually [*Pony v. County of Los Angeles (9th Cir. 2006) 433 F.3d 1138, 1142-1145]* .

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 113 CIVIL RIGHTS: THE POST-CIVIL WAR CIVIL RIGHTS STATUTES
PART II. LEGAL BACKGROUND

11-113 California Forms of Pleading and Practice--Annotated §§ 113.18-113.29

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[Reserved]

§§ 113.18[Reserved]

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PART III. RESEARCH GUIDE

11-113 California Forms of Pleading and Practice--Annotated § 113.30

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§ 113.30 Related Matthew Bender Publications

For thorough discussion of federal civil rights legislation and actions, see J. Cook & J. Sobieski, Civil Rights Actions (Matthew Bender)

For memoranda of points and authorities relating to civil rights actions generally, see California Points and Authorities, Ch. 35, *Civil Rights* (Matthew Bender)

For related jury instructions regarding civil rights, see Judicial Council Of California Civil Jury Instructions (CACI), Series 3000 (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions

For thorough discussion of employment discrimination, see Wilcox, California Employment Law (Matthew Bender)

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11-113 California Forms of Pleading and Practice--Annotated § 113.31

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§ 113.31 Federal Constitution

Due process clause, applicable to federal government. *U.S. Const., amend. V*

Sovereign immunity of states. *U.S. Const., amend. XI*

Privileges and immunities, due process, and *equal protection clauses*, applicable to states. *U.S. Const., amend. XIV*

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PART III. RESEARCH GUIDE

11-113 California Forms of Pleading and Practice--Annotated § 113.32

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§ 113.32 Federal Statutes

Federal question jurisdiction of United States District Courts. *28 U.S.C. § 1331*

Jurisdiction of United States District Courts in civil rights cases. *28 U.S.C. §§ 1331, 1343, 1344*

Removal of cases from state to federal courts. *28 U.S.C. § 1443*

Equal rights under law. *42 U.S.C. § 1981*

Property rights of citizens. *42 U.S.C. § 1982*

Civil action for deprivation of rights under color of state law. *42 U.S.C. § 1983*

Conspiracy to interfere with rights. *42 U.S.C. § 1985*

Neglect to prevent conspiracy to interfere with rights. *42 U.S.C. § 1986*

State law applicable in federal civil rights actions. *42 U.S.C. § 1988(a)*

Recovery of attorney's fees in civil rights actions. *42 U.S.C. § 1988(b)*

Civil action for wrongful search and seizure of public communication work product materials and documentary materials. *42 U.S.C. §§ 2000aa-2000aa-7*

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§ 113.33 State Statutes

Freedom from violence or threat of violence because of protected characteristics. Civ. Code § 51.7

Damages for denial of right provided by *Civ. Code § 51.7. Civ. Code § 52(b)*

Protection from interference with rights by threats, intimidation, coercion, or violence. *Civ. Code § 52.1*

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§ 113.33A California Civil Jury Instructions (CACI)

For related jury instructions regarding civil rights, including an instruction on, for example, the essential factual elements of a claim for violating *42 U.S.C. § 1983*, see Judicial Council Of California Civil Jury Instructions (CACI), Series 3000 (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions

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§ 113.34 Decisions

[1] Equal Rights Under Law: 42 U.S.C. § 1981

Law school's use of race in its admission policy did not violate *Equal Protection Clause of federal Constitution* or Title VI or *42 U.S.C.S. § 1981* because use of race was justified by compelling state interest in student body diversity, and admissions program was narrowly tailored because Law School engages in highly individualized, holistic review of each applicant's file, giving serious consideration to all ways an applicant might contribute to diverse educational environment. *Grutter v. Bollinger, 539 U.S. 306, 123 S. Ct. 2325, 2338-2347, 156 L. Ed. 2d 304*

University's use of race in its freshman admissions policy was not narrowly tailored to achieve asserted compelling interest in diversity, and violated *Equal Protection Clause of the Fourteenth Amendment* as well as Title VI and *42 U.S.C. § 1981*. *Gratz v. Bollinger (2003) 539 U.S. 244, 123 S. Ct. 2411, 2427-2431, 156 L. Ed. 2d 257*

When *42 U.S.C. § 1981* is violated by state actor, action provided by *42 U.S.C. § 1983* provides exclusive federal damages remedy. *Jett v. Dallas Ind. School Dist. (1989) 491 U.S. 701, 735, 109 S. Ct. 2702, 105 L. Ed. 2d 598* (plurality opinion)

State statute of limitations governing personal injury actions is applicable to actions under *42 U.S.C. § 1981*. *Goodman v. Lukens Steel Co. (1987) 482 U.S. 656, 660-662, 107 S. Ct. 2617, 96 L. Ed. 2d 572*

42 U.S.C. § 1981 may be invoked in cases of discrimination against identifiable classes of persons who are treated differently solely because of their ancestry or ethnic characteristics. *Saint Francis College v. Al-Khazraji (1987) 481 U.S. 604, 613, 107 S. Ct. 2022, 95 L. Ed. 2d 582*

Discriminatory intent required to support claim under *42 U.S.C. § 1981*. *General Building Contractors Ass'n v. Pennsylvania (1982) 458 U.S. 375, 391, 102 S. Ct. 3141, 73 L. Ed. 2d 835*

42 U.S.C. § 1981 prohibits discrimination in making or enforcement of contracts against, or in favor of, any race. *McDonald v. Santa Fe Trail Transp. Co. (1976) 427 U.S. 273, 295-296, 96 S. Ct. 2574, 49 L. Ed. 2d 493*

42 U.S.C. § 1981 reaches private conduct, and prohibits racial discrimination in admissions policies of private schools. *Runyon v. McCrary (1976) 427 U.S. 160, 167-175, 96 S. Ct. 2586, 49 L. Ed. 2d 415*

42 U.S.C. § 1981 affords federal remedy against discrimination on basis of race in private employment. *Johnson v. Railway Express Agency (1975) 421 U.S. 454, 459-460, 95 S. Ct. 1716, 44 L. Ed. 2d 295*

Protections of *42 U.S.C. § 1981* extend to aliens. *Graham v. Richardson (1971) 403 U.S. 365, 377-378, 91 S. Ct. 1848, 29 L. Ed. 2d 534*

District court properly dismissed action under *42 U.S.C. § 1981* alleging employment discrimination on basis of race against state employment department, because § 1981 does not contain cause of action against states or arms of states. *Pittman v. Oregon (9th Cir. 2007) 509 F.3d 1065, 1067-1074*

Hawaiian private, non-profit K-12 schools that received no federal funds did not violate *42 U.S.C. § 1981* by preferring Native Hawaiians in its admissions policy, where non-Hawaiian applicant established prima facie case by showing that schools consider applicants' Hawaiian ancestry or lack thereof in making admissions decisions, schools specified their remedial admissions policy as non-discriminatory rationale for their decisions, and plaintiff could not show that rationale was pretextual because manifest imbalance existed in K-12 educational arena in Hawaii with Native Hawaiian falling at bottom of spectrum in almost all areas of educational progress and success and schools advanced curriculum specially tailored to students of Native Hawaiian descent, admissions policy did not unnecessarily trample rights of students with no Hawaiian ancestry or create absolute bar to their advancement, and admissions policy did no more than necessary to correct manifest imbalance suffered by students of Native Hawaiian ancestry. *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate (9th Cir. 2006) 470 F.3d 827, 835-849*

Hotel's placing of smaller bar mitzvah event in main ballroom, instead of African-American organization's annual fashion show and luncheon, which had been held in main ballroom for previous three years, and placing of fashion show and luncheon in much smaller ballroom, showed prima facie case of discriminatory treatment in violation of *42 U.S.C. § 1981*. Plaintiff was member of protected class, plaintiff attempted to contract with defendant for use of main ballroom for fashion show, plaintiff was denied right to contract for those services, and desired services were made available to similarly situated group of different protected class. Although hotel articulated legitimate, nondiscriminatory business reasons for it decision, plaintiff presented genuine issue of fact that hotel's reasons were pretext for discrimination. *Lindsey v. SLT Los Angeles, LLC (9th Cir. 2006) 447 F.3d 1138, 1144-1153*

Allegation by corporation owned entirely by Sikh shareholders that its contract with defendant was terminated due to effects of racial discrimination gave it standing under *42 U.S.C. § 1981* even though not all of its drivers were Sikhs, when even non-Sikh drivers testified that they were treated poorly by defendant's employee based on their association with what employee saw as Sikh company. Further, jury verdict awarding $1.00 in nominal damages and punitive

damages was proper when jury found that defendant had discriminated against corporation because of race, it caused $50,000 loss by breaking its contract with corporation, and it deserved to be punished for its racial discrimination to extent of $5 million. Although corporation was terminated by defendant's manager who did not know that corporation's principals and most of its drivers were Sikhs and based termination on safety violations, jury could have concluded that routine or debatable safety violations were flagged because of racial animus. *Bains LLC v. ARCO Prods. Co. (9th Cir. 2005) 405 F.3d 764, 770-772*

Trial court erred in dismissing action under *42 U.S.C. § 1981* on ground that § 1981 does not apply to Commonwealth of Northern Marianna Islands' immigration laws, when immigration authority did not necessarily deal with rights and duties of persons in jurisdiction after entry had taken place, and covenant by which Commonwealth negotiated permanent political union with United States provided that, with a few exceptions, all laws in existence at time of covenant's passage applied and Commonwealth agreed to be bound by dictates of *Thirteenth* and *Fourteenth Amendments* and statutes enforcing them. However, temporary worker's *Fourteenth Amendment* equal protection challenge to Commonwealth's nonresident worker's legislation failed under rational basis review or intermediate scrutiny because he did not carry his burden to show that legislation was not closely related to Commonwealth's important government goals, and due process challenge failed because there is no fundamental right to pursue work. *Sagana v. Tenorio (9th Cir. 2004) 384 F.3d 731, 740-743*

Complaint by private mining company alleging that state officials' policy against use in state construction projects of materials mined from area as to which Native American tribes passed resolutions against mining because of area's religious, cultural, and historical significance to these groups failed to state claim under *42 U.S.C. § 1981*. Complaint did not allege that company had imputed racial identity and did not explain how company suffered from racial discrimination. *Cholla Ready Mix, Inc. v. Civish (9th Cir. 2004) 382 F.3d 969, 977-978*

Minority-owned technology services contractor certified by United States Small Business Administration as firm owned and operated by socially and economically disadvantaged individuals, eligible to receive federal contracts under SBA's business development program possessed constitutional standing because it alleged concrete and particularized harm traceable to defendant and if successful in its claims, its injury would be redressed by damage award; because it had acquired imputed racial identity since to receive governmental benefits, corporation was required to be certified as corporation with racial identity; and because corporate plaintiff alleged direct racial discrimination based on its status as SBA-certified minority-owned business and race of its shareholders, which easily brought corporation within zone of interest protected by *42 U.S.C. § 1981*. *Thinket Ink Information Resources, Inc. v. Sun Microsystems, Inc. (9th Cir. 2004) 368 F.3d 1053, 1057-1060*

Trial court properly dismissed complaint by African-American professional basketball player, brought under *42 U.S.C. § 1981*, based on punishment imposed on him after altercation with his coach, alleging that black basketball players are punished more frequently and severely than white players and have less favorable termination and compensation clauses in their player contracts; arbitration award annexed to complaint showed that punishment was motivated solely by player's misconduct. *Sprewell v. Golden State Warriors (9th Cir. 2000) 231 F.3d 520, 528*

Plaintiffs of Arabic descent failed to state claim under *42 U.S.C. § 1981* based on store's refusal to sell them Levi jeans, when store had race-neutral policy of refusing to sell Levis to dealers, plaintiffs were aware of that policy, and plaintiffs intentionally misrepresented themselves as ultimate consumers when they were in fact agents of dealers; plaintiffs attempted to enter into voidable contractual relationship, which is not cognizable under § 1981. *Addisu v. Fred Meyer, Inc. (9th Cir. 2000) 198 F.3d 1130, 1137-1141*

Plaintiff private school's allegation that defendant corporation terminated plaintiff's participation in federal student loan guarantee program because plaintiff primarily taught minority and inner-city students sufficiently stated claim of racial discrimination under *42 U.S.C. § 1981*. *Parks School of Business v. Symington (9th Cir. 1995) 51 F.3d 1480, 1487-1488*

In California, *42 U.S.C. § 1981* actions were governed by one-year period of limitations of former *Code Civ. Proc. § 340(3). Fobbs v. Holy Cross Health System Corp. (9th Cir. 1994) 29 F.3d 1439, 1444 , cert. denied, 513 U.S. 1127 (1995) . Note:* Effective January 1, 2003, *Code Civ. Proc. § 340* was amended and *Code Civ. Proc. § 335.1* was added to provide that personal injury actions are now governed by a two-year statute of limitations

42 U.S.C. § 1981 supports action by white plaintiff discriminated against because he or she is in interracial marriage. *Parr v. Woodmen of the World Life Ins. Co. (11th Cir. 1986) 791 F.2d 888, 890*

Federal law governs when claim accrues under *42 U.S.C. § 1981*. *Chung v. Pomona Valley Community Hosp. (9th Cir. 1982) 667 F.2d 788, 791*

42 U.S.C. § 1981 applies to discrimination against individuals of American Indian descent. *Scott v. Eversole Mortuary (9th Cir. 1975) 522 F.2d 1110, 1112-1113*

Unlicensed contractor was not precluded by *Bus. & Prof. Code § 7031*, which bars unlicensed contractors from bringing suit to recover compensation for work requiring license, from pursuing nominal damages, emotional distress damages, and punitive damages under *42 U.S.C. § 1981* based on claims of racial discrimination in form of derogatory comments on jobsite and retaliation for complaining about comments, since claims were external to contract to provide cleanup services at construction project and since plaintiff alleged discrimination during functioning contractual relationship despite fact that he could not enforce compensation terms of contract; contractor's claims that he was not properly compensated as caucasian contractors were, however, is barred, since those claims directly implicated § 7031 proscription against recovery of compensation by unlicensed contractors. *Holland v. Morse Diesel Internat., Inc. (2001) 86 Cal. App. 4th 1443, 1449-1453, 104 Cal. Rptr. 2d 239*

[2] Property Rights of Citizens: 42 U.S.C. § 1982

42 U.S.C. § 1982 protects against actions that treat black property owners differently from white property owners, by actions that depreciate value of property owned by blacks in manner different from property owned by whites, or by actions that restrict access to homes owned by black owners, thereby hampering them in use of their property. *City of Memphis v. Greene (1981) 451 U.S. 100, 122-123, 101 S. Ct. 1584, 67 L. Ed. 2d 769*

42 U.S.C. § 1982 prohibits discrimination on basis of race in sale or rental of property, including discrimination by private owners as well as by public authorities. *Jones v. Alfred H. Mayer Co. (1968) 392 U.S. 409, 421, 88 S. Ct. 2186, 20 L. Ed. 2d 1189*

Action under *42 U.S.C. § 1982* may be brought in state court. *Sullivan v. Little Hunting Park (1969) 396 U.S. 229, 239-240, 90 S. Ct. 400, 24 L. Ed. 2d 386*

42 U.S.C. § 1982 supported action for compensatory damages, plus attorney's fees and costs, for refusal to rent property to African-American men. *Johnson v. Hale (9th Cir. 1994) 13 F.3d 1351, 1354*

Damages for lost wages, emotional distress, and humiliation, as well as punitive damages, awarded in § 1982 action for refusal to rent office space to black man. *Phiffer v. Proud Parrot Motor Hotel (9th Cir. 1980) 648 F.2d 548, 552-553*

[3] Civil Action for Deprivation of Rights: 42 U.S.C. § 1983

[a] Elements of Cause of Action

Elements of cause of action under *42 U.S.C. § 1983* are (1) violation of rights protected by Constitution or created by federal statute, (2) caused, (3) by conduct of a "person," (4) acting under color of state law. *Parratt v. Taylor (1981) 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420* (overruled on other grounds in *Daniels v. Williams (1986) 474 U.S. 327, 330-331, 106 S. Ct. 662, 88 L. Ed. 2d 662*)

Indian tribe suing under *42 U.S.C. § 1983*, attempting to assert communal fishing rights reserved to it as sovereign, by treaty it entered into with United States, is not person that could assert treaty-based fishing rights under § 1983. Tribe's treaty-based rights did not give rise to individual actions cognizable under § 1983, because individual members of tribe sought to vindicate communal, rather than individual rights. *Skokomish Indian Tribe v. United States (9th Cir. 2005) 401 F.3d 979, 987-988*

Complaint by private mining company alleging that state officials' policy against use in state construction projects of materials mined from area as to which Native American tribes passed resolutions against mining because of area's religious, cultural, and historical significance to these groups failed to state claim under *42 U.S.C. § 1983*. Company treated its § 1983 claim as independent, substantive claim and did not state viable claim that defendants violated its federal rights. *Cholla Ready Mix, Inc. v. Civish (9th Cir. 2004) 382 F.3d 969, 978*

Claimants who were denied SSDI and SSI failed to state claim against state defendants under *42 U.S.C. § 1983*, because assuming defendants acted under color of state law, which court doubted, claimants failed to allege deprivation of procedural due process. Claimants have constitutionally protected property interest in receiving disability benefits, but failed to make showing they were denied adequate procedural protections because they have not been deprived of procedural due process until they exhaust their administrative remedies; only then could court determine whether they were deprived of adequate process. *Kildare v. Saenz (9th Cir. 2003) 325 F.3d 1078, 1085-1086*

To recover under *42 U.S.C. § 1983*, plaintiff must be "a citizen of the United States or other person within the jurisdiction thereof;" Mexican citizen, who was in Mexico at time of events in question, could not bring § 1983 action. *Martinez v. City of Los Angeles (9th Cir. 1998) 141 F.3d 1373, 1382*

In action by pretrial detainee for violation of civil rights based on arrest on probable cause for rape and later release, trial court properly granted summary judgment to defendants, when liberty interest at stake, *i.e.*, alleged constitutional right to speedy confirmation of officers' probable cause determination by use of laboratory testing, was not fundamental right objectively deeply rooted in history and tradition, so that individual sheriff's deputies did not violate any of plaintiff's constitutional rights, and county, its policies, customs, and practices regarding DNA testing did not deprive plaintiff of constitutional right or amount to deliberate indifference of constitutional right in view of undisputed testing backlog and county's reasonable priorities for DNA testing. *Jimenez v. County of Los Angeles (2005) 130 Cal. App. 4th 133, 141-143, 29 Cal. Rptr. 3d 553*

Homeowners failed to allege cause of action under *42 U.S.C. § 1983* based on city's failure to provide notice of appeal rights in notice advising homeowners that backyard playhouse was nonconforming structure, when city rescinded notice of violation, revamped its procedure for issuing orders, and provided extensive appeal and hearing process; and when homeowners did not show city threatened to remove playhouse in future or would do so without proper notice, did not produce sufficient evidence to show they suffered damages, and did not show city had official policy depriving homeowners of due process notice. Homeowners were not entitled to abstract trial on constitutionality of past actions of some city employees that caused no damage. *Levy v. City of Santa Monica (2004) 114 Cal. App. 4th 1252, 1260, 8 Cal. Rptr. 3d 507*

[b] Color of Law

Statewide association incorporated to regulate interscholastic athletic competition among public and private secondary

schools could be regarded as engaging in state action in enforcing rule against member school, when association included most public schools located within the state and acted through their representatives, drew its officers from public schools, was largely funded by their dues and income received in their stead, and historically was seen to regulate in lieu of state board of education's exercise of its own authority; and when degree of entwinement with association down from state board of education and up from member public schools supported conclusion that ostensibly private organization ought to be charged with public character and judged by constitutional standards. *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n (2001) 531 U.S. 288, 294-305, 121 S. Ct. 924, 148 L. Ed. 2d 807*

Physician who contracts with state to provide medical services to prison acts under color of state law when treating inmates; fact that physician is independent contractor does not alter analysis; physician's function within state system, not precise terms of employment, determines whether his or her actions can fairly be attributed to state. *West v. Atkins (1988) 487 U.S. 42, 55-57, 108 S. Ct. 2250, 101 L. Ed. 2d 40*

"Color of law" requirement of *42 U.S.C. § 1983* is equivalent to "state action" requirement of *U.S. Const., amend. XIV. Lugar v. Edmondson Oil Co. (1982) 457 U.S. 922, 928-929, 102 S. Ct. 2744, 73 L. Ed. 2d 482*

Receipt of public funds alone is generally not sufficient state involvement to meet color of law requirement. *Rendell-Baker v. Kohn (1982) 457 U.S. 830, 840, 102 S. Ct. 2764, 73 L. Ed. 2d 418*

State funding of private school did not make school's decisions to discharge employee actions under color of law. *Polk County v. Dodson (1981) 454 U.S. 312, 321-322, 102 S. Ct. 445, 70 L. Ed. 2d 509*

Private parties who conspire with judge to deprive another of constitutional rights act under color of state law within meaning of *42 U.S.C. § 1983*, notwithstanding that judge would be immune from liability. *Dennis v. Sparks (1980) 449 U.S. 24, 27-32, 101 S. Ct. 183, 66 L. Ed. 2d 185*

Challenged activity may be under color of law if it is "entwined with government policies" or when government is "entwined in [its] management or control." *Evans v. Newton (1966) 382 U.S. 296, 299, 301, 86 S. Ct. 486, 15 L. Ed. 2d 373*

In § 1983 action by non-Indian challenging roadblock set up and maintained by tribal officers on state highway crossing reservation, district court erred in dismissing claims based on tribal immunity, where officers were acting under color of state law once they departed from, or went beyond, inquiry to establish plaintiff was not Indian, and where material issues of fact existed as to whether they violated plaintiff's constitutional rights when they stopped and questioned him at roadblock. *Bressi v. Ford (9th Cir. 2009) 575 F.3d 891, 895-898*

In action by members of motorcycle gang who were asked to either leave annual festival or remove vests with gang insignia by city police officer providing security services to festival, festival association was not state actor for purposes of liability under *42 U.S.C. § 1983*, where running festivals is not traditional municipal function; where city required permit, showing city retained control of park, provided security services, and billed festival for its security services; and where there was no showing that security activity was dominant or even major purpose of festival association and no indication city played dominant role in controlling actions of organization or content of festival. *Villegas v. Gilroy Garlic Festival Ass'n (9th Cir. 2008) 541 F.3d 950, 955-956*

Plaintiff's allegation that company that had obtained permit to use public space for event and its employees acted in concert with public defendants was insufficient to establish joint action to allege that private defendants acted under color of state law by removing political activist from space in violation of her *First Amendment* rights, where there was no evidence private defendants did anything more than summon police, and merely complaining to police did not convert private party into state actor. *Dietrich v. John Ascuaga's Nugget (9th Cir. 2008) 548 F.3d 892, 899-900*

Police officer's mistake while intending to deploy Taser device holstered near her firearm, instead drawing and firing her service weapon, killing arrestee sitting handcuffed in back of patrol car who was yelling and kicking back window of patrol car, was seizure within meaning of *Fourth Amendment*, and mistake was governed by *Fourth Amendment* reasonableness analysis, for which appellate court remanded to district court. *Torres v. City of Madera (9th Cir. 2008) 524 F.3d 1053, 1055-1057*

In action by estate of individual restrained by police based on his death while in police custody, for use of excessive force in violation of his *Fourth Amendment* rights, district court properly granted summary judgment to officers and county, where relying on undisputed facts that individual was trespassing and acting aggressively and refused to drop pen in his hand that was aimed at officers, and officers never drew their weapons or used pepper spray on him, district court properly concluded that use of force was proportionate and reasonable; and where, because officers did not use excessive force in violation of *Fourth Amendment*, estate's § 1983 claims against county also failed. *Gregory v. County of Maui (9th Cir. 2008) 523 F.3d 1103, 1106-1109*

County jail commander involved in automobile accident with plaintiff while off duty acted under color of state law when he invoked his law enforcement status to keep others from interfering with his assault on plaintiff after accident, when, although he did not have authority of peace or police officer, he pretended to act in performance of his official duties and his actions had purpose and effect of discouraging bystanders from interfering; and when he invoked his governmental status by saying he was a "cop" and telling bystanders to stay back. *Anderson v. Warner (9th Cir. 2006) 451 F.3d 1063, 1067-1070*

Attorney hired to represent Los Angeles county in civil rights suit acted under color of law in accessing civil rights plaintiff's juvenile court file without notifying him and without obtaining authorization from juvenile court and using confidential records in file to cross-examine him at his deposition in underlying civil rights action, because attorney was retained to represent state entities and their employees in litigation, and she inspected file in course of representation, and used her status to gain access to file; her role was analogous to state prosecutor rather than public defender, because she acted on behalf of state rather than as its adversary. *Gonzalez v. Spencer (9th Cir. 2003) 336 F.3d 832, 834*

Sister of man arrested for robbery on her instigation and her son, who translated for his mother and other witnesses to police officer who arrested his uncle, were not state actors, when single request to police, without more, was not sufficient to establish claim against mother or son as private actors, there was no evidence officer knew man was innocent of robbery, and finding of concerted action could not be found on record in this case. *Peng v. Hu (9th Cir. 2003) 335 F.3d 970, 980*

Lobbying efforts by privately owned and operated energy corporation were not attributable to state of Montana or any other government entity so as to constitute action under color of law, when company's efforts to influence passage of legislation by lobbying state legislators bore no characteristics rendering company's actions fairly attributable to state because company, in successfully lobbying for deregulation of state power industry, influenced state, rather than reverse, and when company's lobbying was an exercise of its lawful *First Amendment* right to petition government, which was countervailing reason against attributing company's activity to state. *Single Moms, Inc. v. Montana Power Company (9th Cir. 2003) 331 F.3d 743, 746-749*

State-appointed guardian ad litem in child custody action did not act under color of state law for purposes of *42 U.S.C. § 1983*, where guardian's two primary roles under statutory scheme as advocate for child's best interests and independent source of information for court regarding circumstances of dispute were not traditional or exclusive governmental function, so as to make public function test inapplicable; where, although guardian is appointed, compensated, subject to qualification, and regulated by state, clearly indicated intended benefits flow directly to child in whose interests the guardian must act and guardian acts independently in providing information to court, so joint action test was not satisfied; where although guardian's investigatory and reporting function was performed pursuant to law,

role was independent of court edict or oversight and guardian, although reporter of facts, functioned as witness so compulsion test not satisfied; and where guardian was appointed by state actor, paid by state, and subject to regulation by state law, when guardian reports to court, she reported as independent investigator and when guardian acted as advocate of child, she occupied role distinct from court before which she advocated, so nexus test did not apply. *Kirtley v. Rainey (9th Cir. 2003) 326 F.3d 1088, 1092-1095*

Administrative head of county public defender's office, acting solely as agency's administrative head, responsible for allocating office's finite resources, was state actor in promulgating alleged policy subjecting each client to polygraph test and allocating resources of office according to result of that test and in policy of assigning least-experienced attorneys to capital cases without providing any training. *Miranda v. Clark County (9th Cir. 2003) 319 F.3d 465, 469-471* (en banc)

Daughter who visited father in jail to try to get him to confess to 20-year-old murder did not act under color of state law, when there was no evidence of conspiracy or joint action between daughter and prosecutor, since father offered no evidence that daughter made repeated requests or solicited prosecutor's input on types of questions she should ask her father, and it was undisputed that jailhouse visit was daughter's idea, not state-initiated effort to use her to extract her father's confession. Although interview and its subsequent use against father at trial violated *Sixth Amendment* rights, government did not sufficiently insinuate itself into daughter's jailhouse visit to transform her private actions into ones fairly attributable to state. Further, to extent father claimed his daughter was responsible for one prosecutor's facilitation of visit or trial prosecutor's use of his jailhouse silence against him at trial, he failed to show daughter proximately caused his injuries sustained as a result of actions of prosecutors. *Franklin v. Fox (9th Cir. 2002) 312 F.3d 423, 444-445*

Trial court properly dismissed *42 U.S.C. § 1983* action against reporter and newspaper for which he worked, based on coverage of objectionable search of plaintiff's ranch, when reporter did not perform any government function or engage in any joint action with humane society that was executing search warrant, so that reporter and newspaper were not state actors, but reporter was private spectator, photographing and videotaping search independently and for his and newspaper's own purposes. *Brunette v. Humane Society of Ventura County (9th Cir. 2002) 294 F.3d 1205, 1210-1214*

Private entity's regulation of speech on land leased from municipality was action under color of state law supporting action under *42 U.S.C. § 1983*, when leased land functioned as freely accessible public forum through which people pass on their way to shows, concerts, games, and restaurants and is also gathering place for public events, and when municipality retained little, if any, power over private entity's speech policies. *Lee v. Katz (9th Cir. 2001) 276 F.3d 550, 554-557*

Police officer who threatened to sue citizen for defamation after citizen filed complaint against officer did not act under color of state law when officer's decision to file defamation action was not subject to control of police department for which he worked, pursuing private litigation did not abuse his position or authority as police officer, and defamation suit was personal and would seek recovery of damages that officer would keep if successful, and when existence of state statute enabling police officers to sue citizens for defamation was not sufficient to make action under it state action. *Gritchen v. Collier (9th Cir. 2001) 254 F.3d 807*

Private psychiatrist who provides contract services to county in detention and examination of individuals as possible mental patients, and who signed orderdetaining plaintiff for evaluation, could be sued under *42 U.S.C. § 1983* for action under color of state law under close nexus/joint action test, where psychiatrist and county through its employees have undertaken complex and deeply intertwined process of evaluating and detaining individuals believed to be mentally ill and danger to themselves or others, since there is significant consultation with and among various mental health workers, both county and private, and private group of which psychiatrist is part helps to develop and maintain mental health policies of county facility at which plaintiff was detained. *Jensen v. Lane County (9th Cir. 2000) 222 F.3d 570*

Private employer was not liable in *Bivens* action for violation of applicant's *First Amendment* rights for refusing to hire applicant because of applicant's refusal to provide social security number, when private employer was not engaging in governmental or state action. *Sutton v. St. Joseph Providence Medical Center (9th Cir. 1999) 192 F.3d 826, 844*

To state claim under § 1983, plaintiff must allege that defendant acted under color of state law to deprive plaintiff of right secured by federal Constitution or by federal law. *Stone v. City of Prescott (9th Cir. 1999) 173 F.3d 1172, 1174 , cert. denied, 528 U.S. 870*

Private corporation that guaranteed student loans under federal program did not act under color of state law for purposes of *42 U.S.C. § 1983* in terminating plaintiff private school's participation in program, because state was not involved in decision to terminate plaintiff's participation; benefits of defendant's programs flowed to students and not to the state; defendant's function was not exclusive prerogative of state, because federal law allowed either state or private organization to guarantee loans; and state did not compel defendant's actions. *Parks School of Business v. Symington (9th Cir. 1995) 51 F.3d 1480, 1486*

Private towing companies are potentially liable under *42 U.S.C. § 1983* for towing of automobiles. *Soffer v. City of Costa Mesa (9th Cir. 1986) 798 F.2d 361, 364*

Actions of court-appointed guardian do not constitute action under color of state law when guardian was not acting in concert with state or as its agent. *Taylor v. First Wyoming Bank, N.A. (9th Cir. 1983) 707 F.2d 388, 389-390*

One acting in concert with person acting under color of law may be held liable under *42 U.S.C. § 1983*. *Briley v. State of Cal. (9th Cir. 1977) 564 F.2d 849, 858*

One conspiring with person acting under color of law may be held liable under *42 U.S.C. § 1983*. *Gillibeau v. City of Richmond (9th Cir. 1969) 417 F.2d 426, 430*

Private citizens may be liable under § 1983 if they invoke or enforce constitutionally defective state laws. Smith v. United Trans. Union Local No. 81 *(S.D. Cal. 1984) 594 F. Supp 96, 99*

Prison officials' alleged orchestration of gang fight did not violate substantive due process rights of correctional officer injured in helping to quell fight under *42 U.S.C. § 1983*, where there was no state action restraining him from acting on his own behalf. *O'Dea v. Bunnell (2007) 151 Cal. App. 4th 214, 219-225, 59 Cal. Rptr. 3d 684*

Mother failed to state claim under *42 U.S.C. § 1983* for violation of minor son's right to substantive due process based on son's unlimited access to Internet at public library, when special relationship exception to general rule that state's failure to prevent harm inflicted by private actor does not give rise to cause of action under § 1983 did not apply since library did not exercise pervasive control over minors, much less restrain their freedom to act on their own behalf by allowing them to freely use library computers, and when danger creation exception did not apply, even if plaintiff's harm was foreseeable, since library did not affirmatively place minor in position of danger by allowing unsupervised use of computers linked to Internet; further, it was not policy of library to provide minors with obscene pornography. *Kathleen R. v. City of Livermore (2001) 87 Cal. App. 4th 684, 104 Cal. Rptr. 2d 772*

Meaning of "under color of state law" required by *42 U.S.C. § 1983* is misuse of power, possessed by virtue of state law and made possible only because wrongdoer is clothed with authority of state law. *Lebbos v. State Bar (1985) 165 Cal. App. 3d 656, 664, 211 Cal. Rptr. 847*

[c] Rights, Privileges, and Immunities Protected

In action by parents alleging unconstitutional gender discrimination in school based on alleged peer-to-peer harassment, Title IX of the Education Amendments of 1972 [*20 U.S.C. § 1681(a)*] did not preclude action under *42 U.S.C. § 1983*, where Congress did not intend Title IX to preclude § 1983 constitutional suits. *Fitzgerald v. Barnstable School Committee (2009) -- U.S. --, 129 S. Ct. 788, 172 L. Ed. 2d 582, 590-595*

Rancher did not have *Bivens* claims against officials of Bureau of Land Management, because rancher had variety of administrative and judicial remedies to redress his injuries, and Supreme Court would not create new *Bivens* remedy to redress injuries collectively on theory of retaliation for exercising his property rights. *Wilkie v. Robbins (2007) 551 U.S. 537, 127 S. Ct. 2588, 2597-2604, 168 L. Ed. 2d 389*

District court properly dismissed *Bivens* action against United States Post Office postal inspectors, alleging criminal prosecution in violation of *First Amendment* for retaliation for plaintiff's criticism of postal service, on grounds that plaintiff failed to plead and show absence of probable cause for pressing underlying criminal charges. Although as general matter *First Amendment* prohibits government officials from subjecting individual to retaliatory actions, including criminal prosecutions, for speaking out, showing of no probable cause is element of claim of retaliatory prosecution under *Bivens*. *Hartman v. Moore (2006) 547 U.S. 250, 126 S. Ct. 1695, 1702-1707, 164 L. Ed. 2d 441*

Individual who had obtained state-law restraining order had no constitutionally protected property interest in having police enforce restraining order when they had probable cause to believe it had been violated. Thus, complaint under *42 U.S.C. § 1983* alleging town violated Due Process Clause because its police department had official policy or custom of failing to respond properly to complaints of restraining order violations and tolerated nonenforcement of restraining orders by its police officers, which resulted in murder of plaintiff's children by her estranged husband, and that town's actions were taken willfully, recklessly, or with such gross negligence as to indicate wanton disregard and deliberate indifference to plaintiff's rights, failed to state claim. *Town of Castle Rock v. Gonzales (2005) 545 U.S. 748, 125 S. Ct. 2796, 2802-2810, 162 L. Ed. 2d 658*

Although Telecommunications Act of 1996 [*see 47 U.S.C. § 332(c)(7)*] creates individually enforceable rights, Congress did not mean judicial remedy expressly authorized by § 332(c)(7) to coexist with alternative remedy available in *42 U.S.C. § 1983* action, because Act adds no remedies to those available under § 1983 and limits relief in ways § 1983 does not. *City of Rancho Palos Verdes v. Abrams (2005) 544 U.S. 113, 125 S. Ct. 1453, 1458-1462, 161 L. Ed. 2d 316*

Summary judgment on claim for damages under *42 U.S.C. § 1983* in favor of stateuniversity, which undisputedly considered race of applicants to program to which African immigrant of Caucasian descent applied and from which he was rejected, was proper when government showed it would have rejected applicant regardless of his race, since there was no cognizable injury warranting relief under § 1983. *Texas v. Lesage (1999) 528 U.S. 18, 120 S. Ct. 467, 145 L. Ed. 2d 347*

Attorney failed to state *42 U.S.C. § 1983* claim for violation of right to practice profession under *Fourteenth Amendment*, based on search of attorney while clienttestified before grand jury; although liberty component of *Fourteenth Amendment's Due Process Clause* includes some generalized due process right to choose one's field of private employment, right is subject to reasonable government regulation. *Conn v. Gabbert (1999) 526 U.S. 286, 290-293, 119 S. Ct. 1292, 143 L. Ed. 2d 399*

Constitution imposes on prison officials duty not to be deliberately indifferent to possibility of assaults on inmates by other inmates. *Farmer v. Brennan (1994) 511 U.S. 825, 835-840, 114 S. Ct. 1970, 128 L. Ed. 2d 811*

42 U.S.C. § 1983 is not available to enforce violation of federal statute when Congress has foreclosed enforcement in statutory enactment itself and when statute does not create enforceable rights, privileges, or immunities; Adoption Assistance and Child Welfare Act of 1980 (*42 U.S.C. § 620 et seq.*) is not enforceable under § 1983. *Suter v. Artist M.*

(1992) 503 U.S. 347, 355-356

42 U.S.C. § 1983 does not provide remedy for city employee killed in course of employment as result of city's customary failure to train or warn its employees about known hazards in workplace; Due Process Clause does not impose federal duties analogous to those traditionally imposed by state tort law. *Collins v. Harker Heights (1992) 503 U.S. 115, 117-130, 112 S. Ct. 1061, 117 L. Ed. 2d 261*

Elements of, and defenses to, *42 U.S.C. § 1983* cause of action defined by federal law; state may not, by statute or common law, create cause of action under § 1983 against entity Congress has not subjected to liability. *Howlett v. Rose (1990) 496 U.S. 356, 375-376, 110 S. Ct. 2430, 110 L. Ed. 2d 332*

42 U.S.C. § 1983 relief is available for violation of federal statute if statute creates enforceable rights and if Congress has not foreclosed enforcement in statute itself. *Wilder v. Virginia Hosp. Ass'n (1990) 496 U.S. 498, 508, 110 S. Ct. 2510, 110 L. Ed. 2d 455*

County employee dismissed for expressing, in private conversation hope that President of United States would be assassinated, entitled to reinstatement in § 1983 action alleging that her dismissal was violation of her constitutional right of free speech. *Rankin v. McPherson (1987) 483 U.S. 378, 390-392, 107 S. Ct. 2891, 97 L. Ed. 2d 315*

42 U.S.C. § 1983 is not applied to remedy violations of statutes in which Congress has foreclosed enforcement in enactment itself, or of statutes that do not create enforceable rights, privileges, or immunities within meaning of § 1983. *Wright v. Roanoke Redev. and Housing Auth. (1987) 479 U.S. 418, 423, 107 S. Ct. 766, 93 L. Ed. 2d 781*

Constitutionality of use of force during prison riot depends on whether force was applied in good faith effort to maintain or restore discipline or was maliciously and sadistically used for very purpose of causing harm. *Whitley v. Albers (1986) 475 U.S. 312, 318-322, 106 S. Ct. 1078, 89 L. Ed. 2d 251*

Section 1983 provides private right of action for violations of federal statutes. *Maine v. Thiboutot (1980) 448 U.S. 1, 4, 100 S. Ct. 2502, 65 L. Ed. 2d 555*

42 U.S.C. § 1983 does not create substantive rights, but merely provides remedy for violation of rights conferred by Constitution or other statutes. *Maher v. Gagne (1980) 448 U.S. 122, 129 n.11, 100 S. Ct. 2570, 65 L. Ed. 2d 653* ; *Chapman v. Houston Welfare Rights Org. (1979) 441 U.S. 600, 618, 99 S. Ct. 1905, 60 L. Ed. 2d 508*

For § 1983 case to be based on allegation of defamation, plaintiff must allege and prove that defendants deprived him or her of property or liberty interest. *Paul v. Davis (1976) 424 U.S. 693, 709-711, 96 S. Ct. 1155, 47 L. Ed. 2d 405*

Alleged coercion of confession that he sexually abused 3-year-old child during interrogation of 14-year-old boy at his school stated claim for violation of *Fifth Amendment* to support claim under *42 U.S.C. § 1983* against police officer who obtained confession, even though statements were never used against plaintiff at trial, where statements were used against him in affidavit filed in support of information charging him with child molestation, pretrial arraignment and bail hearing, and pretrial evidentiary hearing to determine admissibility of his confession; and where prosecutor's separate decision to rely on statements did not serve, as matter of law, as superseding cause precluding police officer's liability, because police officer eliciting incriminating statements from criminal suspect could reasonably have foreseen that coerced confession would be used against suspect and would lead to suspect's detention. *Stoot v. City of Everett (9th Cir. 2009) 582 F.3d 910, 922-927*

In § 1983 action based on arrest and prosecution of police officers for allegedly planting gun on suspect, after jury verdict in favor of plaintiffs, trial court properly refused to grant defendants' motion for judgment as matter of law based on substantial evidence from which jury could have concluded officers were arrested without probable cause, violating

their *Fourth Amendment* rights, where evidence produced by defendants did not compel conclusion that only conclusion reasonable jury could have drawn was that probable cause existed to charge officers with filing false report, committing perjury, and conspiring to do so; it was entirely within jury's prerogative to find more credible officers' version of facts surrounding arrest, and jury was entitled to disregard defendants' account of incident, which was fraught with unreasonable inferences, discrepancies, and material omissions. *Harper v. City of Los Angeles (9th Cir. 2008) 533 F.3d 1010, 1022-1024*

Warrantless entry by state parole officer and county deputy sheriff into plaintiffs' home, which commenced when parole officer put his foot in door opening and, together with deputy, began pushing against door in attempt to open it, was unconstitutional and could not be justified as search for parolee in what might have been parolee's residence, where information deputies had about residence of parolee at moment they began entry did not give them probable cause to search residence for him because information suggesting parolee might have resided there was several years old, uncorroborated by available sources, and contradicted by two more recent pieces of information. However, deputies did not violate plaintiffs' *Fourth Amendment* rights by entering residence, where one deputy briefly entered residence and other deputy went to stand in doorway, only after they heard altercation and woman screaming inside residence, when there was objectively reasonable basis for concluding there was immediate need to protect persons inside home from serious harm. Deputy's protective sweep to look around for parolee also did not violate plaintiffs' *Fourth Amendment* rights, where at least one plaintiff consented to sweep and neither objected; however, deputy's opening of drawer as part of sweep violated *Fourth Amendment* rights by exceeding both consent given and limits of lawful protective sweep incident to in-house arrest. *Cuevas v. De Roco (9th Cir. 2008) 531 F.3d 726, 731-735*

42 U.S.C. § 233(a), providing that remedy against United States provided by Federal Tort Claims Act ("FTCA") for damage for personal injury, including death, resulting from performance of medical, surgical, dental, or related functions by any commissioned officer or employee of Public Health Service while acting within scope of office or employment, is exclusive of any other civil action or proceeding by reason of same subject matter against officer or employee whose act or omission gave rise to claim, did not establish Federal Tort Claims Act as exclusive remedy for constitutional violations committed by officers and employees of Public Health Service in failing to provide plaintiff's decedent adequate medical attention while in their custody, resulting in his death, and did not preclude *Bivens* cause of action against them, where § 233(a) did not expressly establish FTCA as substitute remedy for *Bivens*, and where no special factors present in instant action precluding *Bivens* relief. *Castaneda v. United States (9th Cir. 2008) 546 F.3d 682, 687-701*

In § 1983 action for violation of *First* and *Fourth Amendment* rights by man arrested for threatening police officers based on confrontation with two officers, district court erred in granting summary judgment to defendants based on causation issues arising from criminal complaint against him, where there was no probable cause for arrest to arrest him because he did not threaten officers with violence, where evidence supported finding of retaliatory animus in his arrest, and where invocation of work product privilege by prosecutor who issued criminal complaint rendered relevant evidence concerning the prosecutor's decision to prosecute unavailable so that no presumption of prosecutorial independence arose and man did not need to rebut it. *Beck v. City of Upland (9th Cir. 2008) 527 F.3d 853, 862-870*

Under special circumstances of case, right to due process of law prohibited state from denying prisoner reasonable post-conviction access to biological evidence for purpose of further DNA testing, where biological evidence was used to secure his conviction of kidnapping and sexual assault, DNA testing was to be conducted using methods unavailable at time of trial and far more precise than methods that were then available, and new methods were capable of conclusively determining whether prisoner was source of genetic material, testing could be conducted without cost or prejudice to state, and evidence was material to available forms of post-conviction relief. Prisoner's confession during parole proceedings did not necessarily trump materiality of physical evidence or right to obtain post-conviction access to evidence. *Osborne v. District Attorney's Office (9th Cir. 2008) 521 F.3d 1118, 1128-1142*

Because there was very little by way of legitimate government interest in ordering tow without notice to owner of

inoperable car parked in parking lot in violation of valid planned non-operation certificate, rather than giving owner notice and opportunity to avoid cost and hassle of having to deal with towed vehicle, police officer violated owner's due process rights by ordering of towing of car without attempting to notify owner before government could tow and impound it. *Clement v. City of Glendale (9th Cir. 2008) 518 F.3d 1090, 1093-1096*

Seventy-five minute detention at scene was unreasonably long and violated *Fourth Amendment* rights of plaintiffs detained for driving around middle school in truck displaying large, graphic photographs of first-term aborted fetuses on sides of truck with accompanying security vehicle, where, although brief detention to investigate possible Vehicle Code violations was warranted, neither *Cal. Pen. Code § 626.8* nor search for other code provisions that might have been violated justified deputy sheriffs in detaining plaintiffs for 75 minutes while sheriffs tried to find some basis for charging them. Plaintiffs also raised genuine issue of material facts as to whether deputies violated their *Fourth Amendment* rights by improperly searching security vehicle, where there was conflicting evidence as to how many times deputies entered vehicle or whether they had consent and, absent consent, search was improper. *Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dept. (9th Cir. 2008) 533 F.3d 780, 795-798*

Police failure to obtain or to attempt to obtain arrest warrant during twelve-hour standoff with plaintiff, after which plaintiff emerged and submitted to arrest, constituted cognizable violation of his civil rights under § 1983, where, although situation was not without danger, police had sufficient resources and time after probable cause was established to obtain arrest warrant. *Fisher v. City of San Jose (9th Cir. 2007) 509 F.3d 952, 958-968*

In action on behalf of class of foreign nationals arrested and detained without being advised of their right to have consular officer notified as required by Article 36 of Vienna Convention on Consular Relations [April 24, 1963, 21 U.S.T. 77, 100-101, 569 U.N.T.S. 261], district court properly found that Article 36 did not create private of action or corresponding remedies under *42 U.S.C. § 1983*, where Article 36 conferred legal rights and obligations on states that were party to Convention to facilitate and promote consular functions, including protecting interests of detained nationals and for that purpose detainees had right if they wanted for consular post to be notified of their situation, but right to protect nationals belonged to states and no private right was unambiguously conferred on individual detainees such that they could pursue it through § 1983. *Cornejo v. County of San Diego (9th Cir. 2007) 504 F.3d 853, 855-864*

Mother of arrestee who died in custody, alleging violation of *Fourth* and *Fourteenth Amendments* based on police officers' conduct while her son was in custody, failed to present evidence to defeat summary judgment on claim for false arrest based on officer's alleged lack of probable cause to believe arrestee had committed crime because alleged motivation for arrest was failure to produce identification on officer's request. Undisputed facts showed there was probable cause to arrest him because his behavior and appearance created fair probability he had committed crime by being under influence of controlled substance and his behavior warranted belief he had violated other provisions of state penal code. Claim for excessive force in violation of *Fourth* and *Fourteenth Amendments* also did not survive summary judgment. Use of control hold to secure him before his arrest did not constitute excessive force, it was objectively reasonable for officers to position him on his stomach for approximately 90 seconds, and officers exercised objectively reasonable care in monitoring him even if they did not notice that he had rolled onto his back or that he stopped breathing; decision not to perform CPR did not constitute excessive force. *Fourth Amendment* did not require officers to provide what hindsight revealed to be most effective medical care for arrested suspect, and officers promptly summoned necessary medical care by requesting ambulance. *Tatum v. City & County of San Francisco (9th Cir. 2006) 441 F.3d 1090, 1094-1100*

Trial court properly granted summary judgment to police officers and city in plaintiff's § 1983 action for unlawful arrest, excessive force, and malicious prosecution, where officers had probable cause to arrest because they had probable cause to believe he was trespassing and shopping center would want to prosecute or have him removed and prudent person would have believed he was trespassing. *Blankenhorn v. City of Orange (9th Cir. 2007) 485 F.3d 463, 470-475*

One provision of Medicaid Act, *42 U.S.C. § 1396a(a)(10)*, requiring states to provide nursing facility services to eligible individuals, created individual right enforceable under *42 U.S.C. § 1983*. Provision revealed congressional intent to create individualized right because it was phrased in terms of individuals benefitted, and provision set forth explicitly what nursing facility services must be offered, and availability of state administrative procedures did not foreclose right. However, another provision, *42 U.S.C. § 1396a(a)(17)*, requiring states to use reasonable standards in setting Medicaid eligibility, did not create individual right. This provision was not framed in terms of individuals benefitted, and even if it were, right it would create was too vague and amorphous for judicial enforcement. *Watson v. Weeks (9th Cir. 2006) 436 F.3d 1152, 1159-1163*

Former city councilman stated claim for malicious prosecution under *42 U.S.C. § 1983* with regard to alleged *First* and *Fourteenth Amendment* violations by alleging that other council members, police officer, and city manager engaged in malicious conduct with purpose of depriving him of his constitutional rights to free speech and equal protection, when although state criminal trial court held him to answer on embezzlement charge after preliminary hearing, he met lack of probable cause requirement because federal district court that dismissed § 1983 action erred by not affording him opportunity to rebut or overcome prima facie finding of probable cause because among ways plaintiff can rebut prima facie finding ofprobable cause is by showing criminal prosecution was induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith, which he alleged, and when plaintiff's contentions that defendants conspired to deprive him of his *First Amendment* free speech rights by unlawfully interfering with his campaign for reelection and his right to equal protection under *Fourteenth Amendment* by intentionally causing district attorney to bring unfounded action against him because of racial animus towards Arab Americans stated claim for malicious prosecution under § 1983. However, district court properly dismissed claim that defendants intended to deprive plaintiff of his *Thirteenth Amendment* rights, when it was beyond doubt plaintiff would not be able to prove defendants had him prosecuted to coerce him to remain in employment of city until he worked off debt because that assertion was directly contrary to his factual allegation that defendants were trying to end his official service to city by defeating his reelection efforts, and had he been convicted of embezzling public funds, state could have fined or incarcerated him without violating *Thirteenth Amendment*. *Awabdy v. City of Adelanto (9th Cir. 2004) 368 F.3d 1062, 1066-1072*

Bivens action against Internal Revenue Service agents based on IRS audits of partnerships and assessment and collection of partnership taxes failed to state claim for relief for violation of plaintiffs' rights to procedural due process, substantive due process, and conflict-free representation under *Fifth Amendment* and access to courts under *First Amendment*, because *Bivens* action does not lie when there is comprehensive federal program with extensive statutory remedies for federal wrongs and Tax Equity and Fiscal Responsibility Act of 1982 and general provisions of Internal Revenue Code, if properly invoked by plaintiffs, gave them comprehensive and meaningful remedies for harms they allegedly suffered as result of assessment and collection actions. *Adams v. Johnson (9th Cir. 2004) 355 F.3d 1179, 1183-1188*

Noncustodial grandparents acting as de facto parents to grandchildren who were dependents of juvenile court failed to state claim under *42 U.S.C. § 1983* for violation of substantive due process right to family integrity and association with grandchildren and by placing grandfather's name on California Child Abuse Central Index, when grandparents had no constitutional right to visit grandchildren when children were dependents of juvenile court and child protective services and biological mother agreed visitation should cease, and when grandparents failed to show loss of recognizable property or liberty interest in conjunction with injury to their reputation from placement of grandfather's name on index, failing to satisfy "stigma-plus" test required to support claim for defamation under § 1983. *Miller v. Cal. Dep't Soc. Servs. (9th Cir. 2004) 355 F.3d 1172, 1175-1179*

Plaintiff who was arrested and charged with trespassing after speaking before city council failed to show nexus between exercise of *First Amendment* rights and prosecution, when although there was false statement in detective's report about her entering room against orders of law enforcement officer, plaintiff failed to present evidence to contradict detective's statement that he was unaware of plaintiff's statements or her history of criticizing city and its

officials. Plaintiff also failed to present sufficient evidence to create triable issue of fact on allegation that as matter of official policy, practice, or custom, city issued or caused to be issued false police reports to secure arrest of persons who criticized city council, when although she presented evidence that city council had practice of circulating among council members police reports pertaining to council's critics and council shared informal complaints about "gadflies" and "loonies" who made comments at council meetings, council member who testified to these matters stated that to his recollection none of four critics whose police reports he received had ever been prosecuted. *Karam v. City of Burbank (9th Cir. 2003) 352 F.3d 1188, 1194-1195*

Nationwide direct-mail marketing company failed to state claim under *42 U.S.C. § 1983* for defamation against officials of state attorney general's office based on statements to media during attorney general's investigation of company, when company had no constitutionally protected interest in maintaining positive state of mind among employees, and when even if company had protected property interest in existing orders, it alleged only that customer canceled order in reaction to statements, not that allegedly defamatory statements directly caused any injury to constitutionally protected liberty or property interest. *Am. Consumer Publ'g Ass'n v. Margosian (9th Cir. 2003) 349 F.3d 1122, 1126*

In sex abuse investigation, police officer did not violate plaintiff's right to be free from prosecution based on information officer knew or should have known was false, when despite officer's use of overbearing tactics in interviewing children, plaintiff failed to show by independent evidence that officer knew or should have known his interview tactics would yield false information, and when, although officer carelessly handled facts and investigation, plaintiff did not point to any facts showing officer knew plaintiff was innocent and record proved otherwise. *Gausvik v. Perez (9th Cir. 2003) 345 F.3d 813, 816-817*

Police officer did not violate plaintiff's right to be free from prosecution for sexual abuse charges based on false evidence, when plaintiff's confession was not coerced so it was reasonable for officer to continue investigation and daughters' initial failure to corroborate plaintiff's confession was not sufficient for officer to cease investigation, and officer's conduct with plaintiff's daughters was not so coercive and abusive that he knew or should have known he would receive false information. *Cunningham v. City of Wenatchee (9th Cir. 2003) 345 F.3d 802, 811-812*

Federal Department of Transportation disparate impact regulation, prohibiting recipients of federal funds from taking actions having effect of discriminating on basis of race, does not create individual federal right enforceable under *42 U.S.C. § 1983*. Even if regulation could create right enforceable under § 1983, disparate-impact regulation did not create such right, because regulation was promulgated by Department of Transportation based on authority granted it by Congress in Title VI, creating right to be free from intentional discrimination based on race and authorizing federal agencies to effectuate those provisions by issuing rules, regulations, or orders of general applicability, but not authorizing federal agencies to create new rights, so that disparate-impact regulation could not create new right, it could only effectuate right already created by § 601. Section 601 does not create right sought to be enforced to be free from racially discriminatory effects. *Save Our Valley v. Sound Transit (9th Cir. 2003) 335 F.3d 932, 935-944*

Alleged policy of public defender's office to administer polygraph tests to clients and then if client failed examination, as determined by subjective assessment of polygraph examiner, to conduct minimal investigation and provide limiteddefense, while falling short of complete denial of counsel, is policy of deliberate indifference to requirement that every criminal defendant receive adequate representation, regardless of innocence or guilt in violation of core guarantee of *Sixth Amendment*. Allegation that county had policy of assigning least-experienced attorneys to capital cases without providing any training, stated claim for callous indifference to defendant's constitutional rights by alleging deliberate pattern and policy of refusing to train lawyers for capital cases known to county administrators to exert unusual demands on attorneys. *Miranda v. Clark County (9th Cir. 2003) 319 F.3d 465, 469-471*

County prosecutor's advice to state motor vehicles investigator to obtain warrant and conduct search raised no genuine issue of material fact suggesting his actions violated plaintiff's right to protection against unreasonable search and

seizure or constitutional due process rights, when advice did not subject plaintiff to unreasonable search and seizure, and when even if warrant was illegal, advice to obtain it did not encroach on plaintiff's rights. There was also no genuine issue of material fact that investigator violated plaintiff's due process rights by failing to follow state administrative procedures for tax assessment and collection before filing criminal tax charges, since neither state nor federal constitutional law required those procedures as prerequisite to criminal proceeding. Plaintiff failed to establish genuine issue of material fact that any *Fourth Amendment* violations at hands of city police officers who assisted state police department in conducting search, when plaintiff failed to show that officers knew or should have known of defects of search warrant issued without probable cause or that their conduct was otherwise unlawful. Finally, plaintiff failed to make prima facie case against sheriff who openly disliked plaintiff, when plaintiff failed to show that sheriff engaged in any state action that violated plaintiff's constitutional rights, since even if sheriff encouraged state investigator to investigate plaintiff, there was no evidence he did so to retaliate for plaintiff's *First Amendment* activities. *Butler v. Elle (9th Cir. 2002) 281 F.3d 1014, 1021-1023, 1027-1028*

Medi-Cal providers could not maintain actions under *42 U.S.C. § 1983* to enjoin California's Department of Health Services from withholding payments, when plaintiffs could not establish they were intended beneficiaries of Medi-Cal's single state agency requirement, *42 U.S.C. § 1396a(a)(5)*, and regulations interpreting it so as to create enforceable right, since single state agency requirement is structural programmatic requirement facilitating federal oversight of state Medicaid programs. *San Lazaro Ass'n v. Connell (9th Cir. 2002) 278 F.3d 932*

Trial court erroneously dismissed claim for unlawful arrest because plaintiff could not prove identity of arresting officers, when city's practice of not identifying actual arresting officers on arrest report seems deliberately designed to frustrate efforts of potential plaintiffs in false arrest cases to establish lack of probable cause, and plaintiff did everything she could to identify arresting officers so that burden shifted to city to provide some evidence that arresting officers had probable cause for warrantless arrest, which burden city failed to meet; and when record did not support probable cause to believe plaintiff had violated California law. *Dubner v. City and County of San Francisco (9th Cir. 2001) 266 F.3d 959, 968*

Trial court properly dismissed claim that constitutional rights were violated by having blood drawn by people not qualified under state law, when plaintiffs failed to allege blood tests were unreasonable and not taken in accordance with medical practices but focused solely on qualifications. *Ove v. Gwinn (9th Cir. 2001) 264 F.3d 817*

In § 1983 claim based on prosecution for sexual abuse of foster children, trial court properly granted defendants' motion for summary judgment, when plaintiff did not show that defendants continued their investigation of him despite the fact they knew or should have known he was innocent; when allegation that interviewer disbelieved child's initial denial and continued with aggressive questioning of child and could not, without more, support deliberate-fabrication-of-evidence claim, even if allegations were amply supported by evidence. *Devereaux v. Abbey (9th Cir. 2001) 263 F.3d 1070*

Trial court properly granted summary judgment to defendants on plaintiff's § 1983 claim for use of excessive force by police officers, when use of force was reasonable under circumstances described by one officer, and plaintiff did not set forth specific facts disputing officer's version of events to show force used was unreasonable or she sustained actual injuries; further, since plaintiff alleged that strip search was not conducted by arresting officers, but by two other unnamed officers, arresting officers were not liable for any constitutional injury that may have resulted from strip search; however, plaintiff alleged sufficient facts in complaint to state claim that bus driver was both subject to *Fourth Amendment* and violated her *Fourth Amendment* right by alleging facts from which one could permissibly infer that driver summoned police and supervisor, not for independent purpose, but as governmental employee acting with intent to assist agency and county in administering their policy of preventing plaintiff from riding bus without proper identification, since if battery report was false, driver unreasonably caused police to take plaintiff into custody in violation of her *Fourth Amendment* right to be free from unreasonable seizure of her person; complaint also adequately stated claim against officers for violation of plaintiff's *Fourth Amendment* right to be free from unlawful seizure based

on warrantless misdemeanor arrest allegedly not supported by probable cause to believe arrestee has committed crime, when facts raised inference that officers arrested plaintiff based on driver's unexamined charge without independently investigating battery claim. *Arpin v. Santa Clara Valley Transportation Agency (9th Cir. 2001) 261 F.3d 912*

Nolo contendere plea to charge of resisting arrest did not necessarily imply validity of police officer's punching plaintiff so as to preclude action under *42 U.S.C. § 1983*, when nothing in plaintiff's testimony identified act of which she was convicted as being resistance to officer's punch and nothing in record identified punch as arrest or stated basis for plea and defendants failed to meet burden to establish their defense by showing what the basis was; and when validity of conviction was unaffected by showing that officer used excessive force. *Sanford v. Motts (9th Cir. 2001) 258 F.3d 1117*

Deficient and ineffectual police search for runaway driver involved in motor vehicle accident is not actionable under *42 U.S.C. § 1983* as deprivation of substantive due process rights, when state is generally not liable for its omissions in failing to protect individual from danger; when driver was never in custody of state so that no special relationship was created and police did not exercise "de facto custody" over driver by exercising geographic control over surrounding area of accident; and when state did not affirmatively place driver in dangerous situation sincepolice arrived after accident had occurred and driver had disappeared, and there was no affirmative act by police leaving driver in more dangerous position than one in which they found him. *Estate of Amos v. City of Page (9th Cir. 2001) 257 F.3d 1086*

12 U.S.C. § 3351(a), requiring states to allow real estate appraiser not licensed in state to engage temporarily in business of appraising if three requirements met, creates right enforceable under *42 U.S.C. § 1983*, when § 3351(a) was intended to benefit private individuals because it focuses on individual appraiser and his or her license, § 3351(a) unambiguously imposes binding obligations on states by using mandatory term "shall" when describing requirement that states recognize out-of-state license, and interest in right to issuance of temporary license is not so vague or amorphous that it is beyond competence of judiciary to enforce. *Groten v. California (9th Cir. 2001) 251 F.3d 844, 848-849*

Alumnus of state university had no constitutionally established right to frequent university campus and library and could be properly excluded from campus based on allegations of stalking female students, when whatever right alumnus had to be on campus must be balanced against right of university to exclude him, and university may preserve such tranquility as facilities' central purpose requires. *Souders v. Lucero (9th Cir. 1999) 196 F.3d 1040, 1043-1046 , cert. denied, 529 U.S. 1067 (2000)*

Plaintiffs may not found *42 U.S.C. § 1983* claim on *U.S. Const., amend. X*, which is neither source of federal authority nor font of individual constitutional rights. *Stone v. City of Prescott (9th Cir. 1999) 173 F.3d 1172, 1175 , cert. denied, 528 U.S. 870*

Municipal liability created by California under *Gov. Code § 815.2* does not expand remedies available under federal law; *42 U.S.C. § 1983* is express federal damages remedy that may not be expanded by state law. *Medrano v. City of Los Angeles (9th Cir. 1992) 973 F.2d 1499, 1505 , cert. denied, 508 U.S. 940 (1993)*

County's decision to rezone property deprived landowner of protected property interest; landowner was entitled to constitutional due process before deprivation. *Harris v. County of Riverside (9th Cir. 1990) 904 F.2d 497, 503-505*

In Ninth Circuit, claim of malicious prosecution is not generally cognizable under *42 U.S.C. § 1983* if remedy is available under state law; exception exists when malicious prosecution is conducted with intent to deprive person of equal protection of laws or to otherwise subject person to denial of constitutional rights. *Usher v. City of Los Angeles (9th Cir. 1987) 828 F.2d 556, 561-562*

Use of *42 U.S.C. § 1983* to enforce another federal statute is foreclosed if remedial devices in that statute are

sufficiently comprehensive to suggest that they are exclusive. *Almond Hill School v. United States Dep't of Agriculture (9th Cir. 1985) 768 F.2d 1030, 1035*

Adjustment of future rents under mobilehome rent control precludes damages under *42 U.S.C. § 1983* if adequate to prevent constitutional injury by compensating for previous excessively low rent ceilings; therefore, landlord must exhaust administrative remedies by seeking future rent adjustment with local rent control board before pursuing § 1983 claim; however, unreasonable costs in form of administrative and attorney's fees, imposed on landlords seeking rent increases, may be basis of § 1983 claim, when costs are part of government effort to deliberately flout established law, such as by deliberately obstructing legitimate rent increases, or when landlord suffers confiscation as a result of such costs. *Galland v. City of Clovis (2001) 24 Cal. 4th 1003, 1020-1041, 103 Cal. Rptr. 2d 711, 16 P.3d 130*

Contracts that nonprofit corporation providing foster family agency and group home foster care services for dependent minors with county did not give it reasonable expectation of entitlement to continued foster children placements and thus protected property interest in continued funding from county, enforceable in action under *42 U.S.C. § 1983*, where corporation's interest in contracts could have been taken away for something less than cause and at county's convenience, so that lack of permanence defeated claim it was deprived of its constitutionally protected property rights without due process of law, and Adoption Assistance and Child Welfare Act did not create individual rights enforceable under § 1983. *Benn v. County of Los Angeles (2007) 150 Cal. App. 4th 478, 489-500, 58 Cal. Rptr. 3d 563*

Environmental services company sufficiently alleged and provided reasonable inferences from allegations and documents subject to judicial notice of violation of equal protection as class of one to constitute cause of action under *42 U.S.C. § 1983* based on negligence and careless management by air pollution control district of pollutant emissions testing programs and policies so as to result in company not being allowed to do testing because it did not meet testing certification requirements, when company alleged it was treated differently from other similarly situated persons; difference in treatment was intentional; and there was no rational basis for difference in treatment. *Genesis Envtl. Servs. v. San Joaquin Valley Unified Air Pollution Control Dist. (2003) 113 Cal. App. 4th 597, 604-608, 6 Cal. Rptr. 3d 574*

Developer's action for deprivation of due process, equal protection, and just compensation in inverse condemnation under *42 U.S.C. § 1983* against city and county based on regulations severely limiting development of land was not ripe for adjudication when there was no final decision on applications for annexation of parcel by city, zoning variances, and building permit. *Long Beach Equities v. County of Ventura (1991) 231 Cal. App. 3d 1016, 1041-1042, 282 Cal. Rptr. 877*

If government entity, acting under guise of otherwise reasonable measure, attempts to exact illegal concessions from builder or to zone builder's property such that it loses utility, conduct constitutes incursion into landowner's rights of such magnitude as to deny justice and fairness guaranteed by *U.S. Const., amends. V* and *XIV*, and landowner has action under § 1983. *Griffin Homes v. Superior Court (1991) 229 Cal. App. 3d 991, 1000, 280 Cal. Rptr. 792*

Ordinary torts or violations of local law by state officials are not elevated to federal civil rights violations merely by passing references to Constitution. *Duffy v. City of Long Beach (1988) 201 Cal. App. 3d 1352, 1360, 247 Cal. Rptr. 715*

Individuals with Disabilities Education Act (*20 U.S.C. § 1400 et seq.*) establishes enforceable substantive right to free appropriate public education; plaintiff alleging systematic denial of free appropriate public education caused by illegal allocation of funds can pursue that action under *42 U.S.C. § 1983*. *White v. State of California (1987) 195 Cal. App. 3d 452, 461-471, 240 Cal. Rptr. 732*

[d] Plaintiff's Standing

Question whether party has standing to assert claim under *42 U.S.C. § 1983* resolved before reaching merits of claim. *Steel Co. v. Citizens for a Better Environment (1998) 523 U.S. 83, 93-102, 118 S. Ct. 1003, 140 L. Ed. 2d 210*

In challenging nuisance abatement ordinance, night club owners did not have standing to assert equal protection claims on behalf of its former patrons for damages or for declaratory relief, when damages paid to night club owners would not redress former patrons' injuries, and when owners had sold club and did not intend torevive business so that they no longer had requisite close relation to patrons to establish third-party standing. However, owners had standing under § 1983 to pursue their *First Amendment* and equal protection damages claims in their own right, because city-defendant's efforts were designed to prevent them from playing music of their choice so that their free expression claims did not rest on right of their patrons to listen to rap or hip hop music, and because owners were direct targets of city's alleged racial discrimination due to their association with African-American patrons and city's efforts were aimed at forcing owners to discriminate against members of protected class. Finally, owners had no standing to seek declaratory relief, because they had sold business and were no longer subject to challenged ordinance. *RK Ventures, Inc. v. City of Seattle (9th Cir. 2002) 307 F.3d 1045, 1055-1056*

Estate of white decedent had standing to bring claim for violation of decedent's equal protection rights by police selectively withholding protective services from decedent because they believed he was Native American by refusing to search for decedent after he left scene of motor vehicle accident, under policy not to search for runaway drivers because city believes most runaway drivers are Native Americans who bolt to Navajo reservation after accident and call police shortly thereafter, reporting car as stolen, but city does search for runaway drivers when they have reason to believe they are white, when decedent was allegedly direct target of discrimination based on mistaken racial identity, and fact that he was white does not make discrimination or resulting injury less direct, so that for purposes of standing, decedent should be viewed as police officers allegedly viewed him, as *Native American. Estate of Amos v. City of Page (9th Cir. 2001) 257 F.3d 1086*

Organization holding erotic art exhibition and trade show had standing to allege claims under § 1983 against officials of California Department of Alcoholic Beverage Control for attempting to prevent exhibition by threatening liquor licensees whose facilities organization rented to hold exhibition. *LSO, Ltd. v. Stroh (9th Cir. 2000) 205 F.3d 1146, 1152-1156*

Survivors of person killed by law enforcement officers, including parents and children, may assert *Fourteenth Amendment* substantive due process claim based on deprivation of their liberty interest arising out of their relationship with decedent. *Moreland v. Las Vegas Metro. Police Dep't (9th Cir. 1998) 159 F.3d 365, 371* ; *Byrd v. Guess (9th Cir. 1998) 137 F.3d 1126, 1133-1134 , cert. denied, 525 U.S. 963* ; *Curnow v. Ridgecrest Police (9th Cir. 1991) 952 F.2d 321, 325 , cert. denied, 506 U.S. 972 (1992)*

White plaintiff does not have standing under *42 U.S.C. § 1983* solely for purpose of vindicating rights of minorities who have suffered from racial discrimination; however, white plaintiff does have standing under § 1983 for purpose of vindicating his or her right to be free from retaliation for aiding or associating with minorities. *Maynard v. City of San Jose (9th Cir. 1994) 37 F.3d 1396, 1402-1404*

[e] Pleading

Appellate courts should not establish heightened pleading or proof requirements regarding improper motive in constitutional tort cases against individual defendants. *Crawford-El v. Britton (1998) 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759*

Federal court not permitted to apply heightened pleading standard more stringent than usual pleading requirements of

Fed. R. Civ. Proc., Rule 8(a), in civil rights cases alleging municipal liability under *42 U.S.C. § 1983*. *Leatherman v. Tarrant County Narcotics and Coordination Unit (1993) 507 U.S. 163, 164-169, 113 S. Ct. 1160, 122 L. Ed. 2d 517*

Allegations of bad faith not required for cause of action against public official under *42 U.S.C. § 1983*. *Gomez v. Toledo (1980) 446 U.S. 635, 639-642, 100 S. Ct. 1920, 64 L. Ed. 2d 572*

District court erred in applying heightened pleading statute to complaint under *42 U.S.C. § 1983* involving right to petition governmental bodies immune from liability under Noerr-Pennington doctrine, where heightened pleading standard should only be applied when Federal Rules of Civil Procedure so require, and Rules did not require heightened pleading standard for these claims. *Empress LLC v. City & County of San Francisco (9th Cir. 2005) 419 F.3d 1052, 1055-1056*

Heightened pleading standard does not apply to constitutional tort claims in which improper motive is element; thus, coroner's reckless or intentional falsification of autopsy report that plays material role in false arrest and prosecution of individual can support claim under *42 U.S.C. § 1983* and *Fourth Amendment*. *Galbraith v. County of Santa Clara (9th Cir. 2002) 307 F.3d 1119, 1121-1127*

In case of pro se plaintiff in § 1983 case, court must construe pleadings liberally, to afford plaintiff benefit of any doubt, and must give plaintiff leave to amend complaint unless it is absolutely clear that deficiencies of complaint could not be cured by amendment. *Karim-Panahi v. Los Angeles Police Dep't (9th Cir. 1988) 839 F.2d 621, 623* ; *Eldridge v. Block (9th Cir. 1987) 832 F.2d 1132, 1135-1136*

To maintain survival action under *42 U.S.C. § 1983*, plaintiff must allege his or her representative capacity in complaint or introduce evidence that he or she is in fact decedent's successor in interest. *Byrd v. Guess (9th Cir. 1998) 137 F.3d 1126, 1131 , cert. denied, 525 U.S. 963*

State courts required to apply federal law in determining whether complaint pleads cause of action under § 1983 sufficient to survive general demurrer; such complaints must be construed liberally, and dismissal requires appearance of certainty that plaintiff would not be entitled to relief under any set of facts that could be proven. *Thorning v. Hollister School Dist. (1992) 11 Cal. App. 4th 1598, 1609-1610, 15 Cal. Rptr. 2d 91*

Federal law, rather than state law, determines whether complaint sufficiently pleads cause of action under *42 U.S.C. § 1983*. *Bach v. County of Butte (1983) 147 Cal. App. 3d 554, 563, 195 Cal. Rptr. 268*

[f] Defendants

State officials, sued in their individual capacities, are "persons" within meaning of *42 U.S.C. § 1983*; *Eleventh Amendment* does not bar such suits, nor are state officers absolutely immune from personal liability under § 1983 solely by virtue of "official" nature of their acts. *Hafer v. Melo (1991) 502 U.S. 21, 30-31, 112 S. Ct. 358, 116 L. Ed. 2d 301*

Eleventh Amendment bars suit against state or arm of state in federal court unless state has waived its immunity, or unless Congress has exercised its power under *Fourteenth Amendment* to override that immunity. *Will v. Michigan Dep't of State Police (1989) 491 U.S. 58, 63-69, 109 S. Ct. 2304, 105 L. Ed. 2d 45*

Municipality may be liable under *42 U.S.C. § 1983* for failure to train its employees, when failure amounts to deliberate indifference to constitutional rights of people coming into contact with the employees, and when there is close, causal nexus between failure and injury sustained. *City of Canton v. Harris (1989) 489 U.S. 378, 388-391, 109 S. Ct. 1197, 103 L. Ed. 2d 412*

Municipal liability under § 1983 attaches when deliberate choice to follow course of action is made from among various alternatives by official or officials responsible for establishing final policy with regard to subject matter in question. *Pembaur v. Cincinnati (1986) 475 U.S. 469, 483-484, 106 S. Ct. 1292, 89 L. Ed. 2d 452*

State and local government officials may be sued in their personal capacity under *42 U.S.C. § 1983*. *Kentucky v. Graham (1985) 473 U.S. 159, 165-167, 105 S. Ct. 3099, 87 L. Ed. 2d 114*

42 U.S.C. § 1983 does not support claim based on respondeat superior theory of liability. *Polk County v. Dodson (1981) 454 U.S. 312, 325, 102 S. Ct. 445, 70 L. Ed. 2d 509*

Municipalities are not immune from § 1983 action on basis of good faith of their employees. *Owen v. City of Independence (1980) 445 U.S. 622, 651, 100 S. Ct. 1398, 63 L. Ed. 2d 673*

Municipalities are subject to suit under § 1983; they are not, however, subject to respondeat superior liability; liability of municipalities must be based on implementation or execution of policy, statement, ordinance, regulation, or decision officially adopted and promulgated by municipality's officers, or by custom of municipality. *Monell v. Dep't of Social Services (1978) 436 U.S. 658, 690-691, 98 S. Ct. 2018, 56 L. Ed. 2d 611*

Although federal officials are not subject to suit under *42 U.S.C. § 1983*, federal officials are subject to suit directly under the Constitution for violations of constitutional rights. *Bivens v. Six Unknown Fed. Narcotics Agents (1971) 403 U.S. 388, 395, 91 S. Ct. 1999, 29 L. Ed. 2d 619*

District court properly granted summary judgment to county on claims that county had constitutionally impermissible policy, practice, or custom violative of plaintiff's rights, where plaintiff failed to allege any facts supporting claim by failing to point to no express county policy or custom and providing no evidence showing even inference that such procedure existed. The district court also properly granted summary judgment to county on claim of inaction by county by conducting inadequate training and supervision of its prosecutors in securing bench warrants, where plaintiff failed to provide any facts indicating either what training practices were employed by county at time of alleged constitutional violation, or what type of constitutionally-mandated training was lacking. *Waggy v. Spokane County Wash. (9th Cir. 2010) 594 F.3d 707, 713-714*

Lessee of national forest land did not have *Bivens* claim against Forest Service officers, where, because claims against officers were based on Forest Service actions or inactions, remedies available to lessee under Administrative Procedure Act constituted adequate alternative, existing process to new and freestanding remedy in damages. *Western Radio Services Co. v. United States Forest Service (9th Cir. 2009) 578 F.3d 1116, 1119-1125*

In *Bivens* action against tribal officers based on roadblock across state highway, at which they stopped plaintiff, who was non-Indian, district court correctly determined there was no issue of fact as to officers' status as federal actors in operating roadblock, despite presence of federal Customs and Border Patrol agents on scene, where no federal agents were consulted for initiation of the roadblock, and where merely referring suspected federal law violations to appropriate authorities was not tantamount to acting under color of federal law. *Bressi v. Ford (9th Cir. 2009) 575 F.3d 891, 898*

In § 1983 action based on arrest and prosecution of police officers for allegedly planting gun on suspect, there was substantial evidence to support jury's determination that violations of plaintiffs' constitutional rights were result of official policy set by police chief, where jury reasonably could have concluded that chief's telephonic statements to district attorney, in which chief expressed confidence in informant and pressured district attorney to file criminal charges without complete or fully corroborated investigation, were indicative of official policy whereby city impliedly or tacitly authorized, approved, or encouraged illegal conduct by its police officers, and where chain of command of task force investigating police corruption reported regularly to chief and jury was entitled to believe chief's expressions

as official policymaker accurately reflected direction and quality of task force investigation, which was to ready cases for filing of charges as quickly as possible, with or without probable cause. The jury also could have supported their determination of official policy from chief's failure to take remedial steps after officers were acquitted on all charges related to arrest and it became clear task force investigation was flawed. Jury also had ample support for proposition that judgment of prosecutor who caused complaint to be filed may have drawn legal conclusion that probable cause existed was based almost entirely on police investigation adjudged to be deficient by jury. *Harper v. City of Los Angeles (9th Cir. 2008) 533 F.3d 1010, 1024-1027*

District court properly granted summary judgment to city and police department in action by political activist based on removal of her from public space in violation of her *First Amendment* rights, where plaintiff did not point to any portion of city's municipal code prohibiting or restricting person's exercise of *First Amendment* rights as matter of city policy, and where actions of single police officer on one day, without more, could not establish custom, policy, practice, or procedure by police department and defendants submitted affidavit from chief of police that police department had no such custom, policy, practice, or procedure to exclude private citizens exercising their *First Amendment* rights from specially permitted areas, and plaintiff failed to rebut that evidence. *Dietrich v. John Ascuaga's Nugget (9th Cir. 2008) 548 F.3d 892, 900*

Although private towing company that towed owner's car in violation of her due process based on actions of police officer who ordered tow without notice to owner could not claim qualified immunity because that defense is not available to private defendants in § 1983 actions, tow company could assert good faith defense, where tow was authorized by police department, conducted under close police supervision and appeared to be permissible under both local ordinance and state law, and where constitutional defect, i.e., lack of notice to owner, could not have been observed by towing company at time when tow was conducted and there was no easy way for towing company to know whether owner had been notified. Towing company did not waive its good faith defense, because it asserted in its answer and motion for summary judgment that its employees were acting under apparently lawful direction and authority of city and officer, which was sufficient to put plaintiffs on notice towing company intended to raise good faith defense. *Clement v. City of Glendale (9th Cir. 2008) 518 F.3d 1090, 1097*

District court erred in granting summary judgment to city for police officer's use of deadly force in fatally shooting plaintiffs' decedent while he remained seated in car with his seatbelt fastened and unarmed, where, although city's official policy governing use of lethal force by police officers did not violate *Fourth Amendment's* requirements, and no rational finder of fact could decide that city violated plaintiffs' decedent's constitutional rights by failure to train its officers, plaintiffs presented genuine issue of material fact as to their interpretation of city's history of discipline and training and its relevance to allegedly unconstitutional longstanding use of deadly force in situations in which objective facts did not support use of force. *Price v. Sery (9th Cir. 2008) 513 F.3d 962, 966-973*

In mother's action against city under *42 U.S.C. § 1983* based on fatal shooting of son by police officer, city was not liable for failure to properly train officers on use of deadly force, for ratification of conduct of officer who fatally shot son, for failure to properly supervise and control its officers, or for failure to render medical aid to son, where no constitutional violation occurred, and where there was no evidence that any failure to render aid was pursuant to city policy or custom and municipality could not be liable under respondeat superior theory. *Long v. City & County of Honolulu (9th Cir. 2007) 511 F.3d 901, 907*

Dismissal of *42 U.S.C. § 1983* claim against city based on police officers' arrest and search of plaintiff was error, where, as to arrest, jury could reasonably find city had policy of training officers to make trespass arrests where probable cause did not exist, policymakers in police department had implemented policy of making unconstitutional arrests at location of arrest, and city policies were moving force behind officers' violation of plaintiff's constitutional rights; and where, as to search, reasonable jury could find city had implemented policy of permitting unreasonable searches, officers were aware of policy, and policy was moving force behind officers' violation of constitutional rights. However, grant of summary judgment to police supervisor was proper, where no reasonable trier of fact could find

supervisor had any personal involvement in incident, since he was not aware of arrest or search until after they were completed, nor could reasonable trier of fact find sufficient causal connection between supervisor and officers' unconstitutional actions based on his enforcement of station policy. *Edgerly v. City & County of San Francisco (9th Cir. 2007) 495 F.3d 645, 657-661*

Trial court properly granted summary judgment to city in § 1983 action for unlawful arrest, excessive force, and malicious prosecution, where evidence of failure to train single officer was insufficient to establish city's deliberate policy. However, summary judgment in favor of police chief was improper, where chief approved personnel evaluations of officer involved despite repeated and serious complaints against him for use of excessive force, which, together with expert testimony regarding ineffectiveness of discipline of officer for those complaints, could have led rational fact finder to conclude that chief knowingly condoned and ratified actions by officer that chief reasonably should have known would cause constitutional injuries like ones plaintiff may have suffered. *Blankenhorn v. City of Orange (9th Cir. 2007) 485 F.3d 463, 484-486*

In action against city and city officials by plaintiffs who were attacked by private individuals in course of Mardi Gras celebrations sponsored by private businesses, based on change in police enforcement policy that allegedly violated plaintiffs' *Fourteenth Amendment* right to due process by affirmatively placing them in position of enhanced danger, trial court properly granted defendants summary judgment, when, because city had no constitutional duty to protect plaintiffs against violence from members of riotous crowd, its failure to do so did not constitute violation of Due Process Clause; and when plaintiffs failed to offer evidence defendants engaged in affirmative conduct enhancing dangers plaintiffs exposed themselves to by participating in Mardi Gras celebration. Police department's decision to switch from more aggressive to more passive operation plan was not affirmative conduct placing plaintiffs in danger, because it did not place them in any worse position than they would have been in had police not come up with any operational plan whatsoever. *Johnson v. City of Seattle (9th Cir. 2007) 474 F.3d 634, 638-641*

Wife of county jail inmate who suffered from congestive heart failure and who died in custody as result of cardiac arrest presented sufficient evidence to create triable issue regarding county's liability for her husband's death. Complaint raised genuine issue of triable fact regarding whether county medical facility staff acted with deliberate indifference to his serious medical needs in violation of *Eighth Amendment*, since evidence created triable issue of fact regarding whether county's policy of relying on medical professionals without training them how to implement proper procedures for documenting, monitoring, and assessing patients for medical instability within confines of medical facility amounted to deliberate indifference, as to which policy of hiring trained medical professionals did not insulate county from municipal liability as matter of law. Further, evidence created triable issue regarding whether county's failure to implement policy for responding to fall of medically unstable patient, policy providing for prompt medical assessment if patient refused necessary treatment, and transfer policy directing staff immediately to transfer patients no longer medically stable, amounted to deliberate indifference to inmate's constitutional rights. Lastly, evidence created triable issue as to whether county's policy deficiencies were moving force behind inmate's death. *Long v. County of Los Angeles (9th Cir. 2006) 442 F.3d 1178, 1185-1190*

There was no subject matter jurisdiction bar in jurisdictional limitation provision of Illegal Immigration Reform and Immigrant Responsibility Act of 1996 or amendments to provision in REAL ID Act of 2005 and district properly exercised jurisdiction over *Bivens* action based on violation of *Fourth Amendment* rights by false arrest and detention of resident alien for deportation by officer of former INS. *Sissoko v. Rocha (9th Cir. 2006) 440 F.3d 1145, 1154-1164*

District court erred in dismissing § 1983 action against county, which was based on actions of district attorney in retaliating against former sheriff's office investigator, when district attorney had final policymaking authority and, under Nevada law, was final policymaker for county when he decided not to prosecute former investigator's cases, and other than adopting nonprosecution policy, district attorney's conduct was as county policymaker. *Botello v. Gammick (9th Cir. 2005) 413 F.3d 971, 978-979*

Civil rights plaintiff who had been arrested for violating state's privacy law presented sufficient evidence of city's policy or custom to overcome city's motion for summary judgment, when plaintiff submitted declaration of law enforcement expert opining that police department's "self-training" program, which assigned responsibility to individual officer for keeping abreast of recent court decisions involving law enforcement, amounted to "failure to train" police officers about enforcement of suspected violations of privacy law, which could amount to city's deliberate indifference to unlawful arrests. *Johnson v. Hawe (9th Cir. 2004) 388 F.3d 676, 686*

In kindergarten teacher's *42 U.S.C. § 1983* action for retaliation based on previously successful lawsuit against district, trial court properly denied school district's motion for judgment as matter of law contending that because school board was only authorized policymaker and teacher had not shown any retaliatory action taken by board, there was no basis for district liability, when superintendent and assistant superintendent had final policymaking authority and there was sufficient evidence to support jury's conclusion that district violated teacher's *First Amendment* right of access to courts by assistant superintendent's acts of retaliation or ratification of retaliatory acts of others. *Lytle v. Carl (9th Cir. 2004) 382 F.3d 978, 982-987*

Trial court erroneously granted summary judgment in arrestee's municipal liability claim in action against police chief for arrest under state's privacy act in violation of *Fourth Amendment* rights, on basis that plaintiff set forth no evidence to support establishment of policy or custom which police chief followed in arresting him. Declaration of law enforcement expert submitted by arrestee opining that police department's self-training program, which assigned responsibility to individual officer to keep abreast of recent court decisions involving law enforcement, amounted to failure to train police officers about enforcement of suspected violations of privacy act created genuine issue as to whether self-training amounted to deliberate indifference. *Johnson v. Hawe (9th Cir. 2004) 382 F.3d 944, 953-954*

District court properly granted summary judgment on jail detainee's municipal liability claim against county, when district court concluded there was no policy, custom, or practice to support detainee's causes of action for use of excessive force and deliberate indifference to serious medical need and detainee made no distinct arguments on appeal directly challenging conclusion or presented evidence that through its omissions county should have been held responsible for alleged constitutional violations of its employees. *Lolli v. County of Orange (9th Cir. 2003) 351 F.3d 410, 415*

There was no basis to assert liability under *42 U.S.C. § 1983* against county based on social worker's violation of rights of custodial father and child in child dependency proceedings, when father and child plaintiffs provided no evidence that social worker was final decisionmaker or acted with deliberate indifference to their constitutional rights or sufficient evidence that county failed adequately to train its social workers or, had county failed to train, failure deliberately caused deprivation of their constitutional rights. *Doe v. Lebbos (9th Cir. 2003) 348 F.3d 820, 831 , overruled on other grounds in Beltran v. County of Santa Clara (9th Cir. 2008) 514 F.3d 906, 908-909*

City and police department were properly dismissed from action based on police officer's shooting of criminal suspect, when, although officer was not entitled to qualified immunity, suspect based liability of city and police department on ratification of officer's conduct because of city's and department's failure to discipline officer for her use of deadly force, and suspect failed to demonstrate that decision by city and department was product of conscious, affirmative choice to ratify officer's conduct. *Haugen v. Brosseau (9th Cir. 2003) 339 F.3d 857, 874-875*

Importer did not have *Bivens* claim against customs officials for imposition of excess import duties on bales of cotton, when Congress established remedial scheme for importers to challenge classification of goods, which ultimately entitles importers that prevail to refund of all excess duties paid with interest, and importer pursued and obtained relief under this scheme, and when Congress expressly exempted customs officers from suit under federal *Tort Claims Act. Libas Ltd. v. Carillo (9th Cir. 2003) 329 F.3d 1128, 1130-1131*

Neither Commonwealth of Northern Mariana Islands and its officers nor Commonwealth Port Authority and its officers

are "persons" who can be sued under *42 U.S.C. § 1983*. *Aguon v. Commonwealth Ports Auth. (9th Cir. 2003) 316 F.3d 899, 901-904* ; *DeNieva v. Reyes (9th Cir. 1992) 966 F.2d 480, 483*

Actions of California sheriff could be attributable to county for purposes of *42 U.S.C. § 1983*; Los Angeles County Sheriff acts as final policymaker for Los Angeles County in establishing and implementing policies and procedures for safekeeping of inmates in county jail, so that district court properly denied county's motion to dismiss, subjecting county to § 1983 liability as person acting under color of state law, in an action based on beating death of pretrial detainee held in special gang unit. *Cortez v. County of Los Angeles (9th Cir. 2002) 294 F.3d 1186, 1187*

In action by widow under *42 U.S.C. § 1983* based on death of her husband from heart attack while detained in county custody, trial court erroneously granted county summary judgment, when there was evidence from which jury could properly conclude that county itself violated husband's rights under the constitution because county's policies and procedures regarding medical evaluations of incoming detainees violated husband's constitutionally protected right to receive medical care while in county's custody, and when there was evidence from which jury could properly conclude that county's failures to act caused its employee to violate his rights and those failures amounted to deliberate indifference. *Gibson v. County of Washoe (9th Cir. 2002) 290 F.3d 1175, 1187*

District court properly refused to give plaintiff's proposed jury instructions allowing police officers to be held liable for unlawful conduct including destruction of property during search of house without showing of individual participation in unlawful conduct, when house was not under officers' exclusive control because of presence of residents in living room, albeit handcuffed and forced to remain on couch, and when jury had instructions permitting it to find liability for individual officers adequately covering idea of liability for members of searching team. Further, district court properly refused to instruct jury that simply because officer remains armed during search, officer is participant and therefore liable for violations, when evidence did not indicate that officers who simply remained outside were integral participants in destruction of personal property and manner in which house was searched. *Jones v. Williams (9th Cir. 2002) 286 F.3d 1159*

Exoneration of individual officer of charge of excessive force precludes municipal liability for alleged unconstitutional use of such force; however, city could be held independently liable for arrest without probable cause and deprivation of liberty without due process based on arresting man and holding him on twin brother's warrants, when alleged deprivations were not suffered as result of actions of individual officers but as result of collective inaction of police department. *Fairley v. Luman (9th Cir. 2002) 281 F.3d 913*

County sheriff's department acts for county rather than state when investigating crime, and therefore county is subject to liability under *42 U.S.C. § 1983* for violations of civil rights during investigation of crime, since county sheriff acts as final policymaker for county; thus, trial court properly denied county summary judgment in § 1983 action against county and two county sheriff's department deputies for violation of civil rights during investigation of murder and sexual assault by manipulating witness into giving false identification, failing to test physical evidence, and ignoring exculpatory evidence. *Brewster v. Shasta County (9th Cir. 2001) 275 F.3d 803*

Because plaintiff's *Fourth Amendment* right to be free from excessive force was not violated by police officer's conduct in arresting her for interfering with arrest of her son at barbecue in public park, there was no basis on which to find either city or police chief liable under § 1983. *Jackson v. City of Bremerton (9th Cir. 2001) 268 F.3d 646, 653-654*

Evidence introduced by plaintiff at trial that it was common practice in the police department to have complainants sign citizen's arrest forms and then fill in names of arrestees and their offenses later and testimony suggesting officers were instructed to use citizen's arrest forms in this way was sufficient to allege practice by city and require determination of liability of chief of police in his official capacity. *Dubner v. City and County of San Francisco (9th Cir. 2001) 266 F.3d 959*

Complaint alleging false arrest and imprisonment did not state claim against county transportation agency, sheriff's department, or county for violation of *Fourth Amendment* rights, when complaint did not even contain bare allegation that arrest was pursuant to official policy, conduct, or practice of public entity defendants. *Arpin v. Santa Clara Valley Transportation Agency (9th Cir. 2001) 261 F.3d 912*

Trial court erroneously granted summary judgment on claim under *42 U.S.C. § 1983* by severely hearing-impaired individual that denial of his request for videotext display during hearings in marital dissolution proceeding resulted from a custom or policy of county, when individual established he was denied requested accommodation based on decisions of county's policy-makers, and it was clear from record that before September 1995 it was county's custom and practice not to accommodate hearing-impaired individuals with videotext display at public hearings; however, summary judgment was appropriate as to three members of Board of Commissioners who did not become aware of request for accommodation until after county had arranged to provide videotext display at his future court hearings. *Duvall v. County of Kitsap (9th Cir. 2001) 260 F.3d 1124, 1141-1142*

Estate of white driver who ran away from scene of motor vehicle accident, alleging that city has policy not to search for runaway drivers because city believes most runaway drivers are Native Americans who bolt to Navajo reservation after accident and call police shortly thereafter, reporting car as stolen, but city does search for runaway drivers when they have reason to believe they are white, sufficiently alleged that city maintained policy amounting to deliberate indifference to decedent's constitutional rights and that policies were moving force behind constitutional violation. *Estate of Amos v. City of Page (9th Cir. 2001) 257 F.3d 1086, 1094-1095*

State of California is not "person" for purposes of *42 U.S.C. § 1983* and therefore was not proper defendant to § 1983 action by out-of-state real estate appraiser alleging deprivation of right under *12 U.S.C. § 3351(a)* and *Fourteenth Amendment* to apply for temporary and reciprocal real estate appraiser license. *Groten v. California (9th Cir. 2001) 251 F.3d 844, 851*

Trial court properly dismissed county as defendant in action under *42 U.S.C. § 1983* based on prolonged detention of federal detainee in county jail (1) when county held detainee only so long as directed by United States Marshals Service and acted under *Pen. Code § 4005(a)*, which requires county sheriff to keep prisoner committed to county jail by process or order issued under federal authority until discharged, (2) when there was no allegation that county failed to follow either instructions of Marshals Service or mandates of § 4005(a), and there was no allegation that § 4005(a) itself is unconstitutional, and (3) when county was without authority to bring detainee before federal magistrate judge. *Estate of Brooks v. United States (9th Cir. 1999) 197 F.3d 1245, 1247-1249*

County not liable under *42 U.S.C. § 1983* for acts of prosecutor for prosecution of advocates of legalized marijuana, when prosecutor's supervisor made initial decision to prosecute and prosecutor could not decide unilaterally to drop case so that prosecutor lacked final policymaking authority to initiate or terminate prosecutions, and when plaintiff presented no triable issue of fact as to whether there was ratification of prosecutor's acts or deliberate indifference. *Christie v. Iopa (9th Cir. 1999) 176 F.3d 1231, 1234-1241 , cert. denied, 528 U.S. 928*

City was not liable under *42 U.S.C. § 1983* for acts and omissions of state judicial officer whose judicial conduct it could not require, control, or remedy, even if that conduct parallels or appears entangled with desires of municipality. *Eggar v. City of Livingston (9th Cir. 1994) 40 F.3d 312, 316 , cert. denied, 515 U.S. 1136 (1995)*

For municipality to be liable in civil rights action under *42 U.S.C. § 1983*, allegedly unconstitutional action must implement policy officially adopted by municipality. *Scofield v. City of Hillsborough (9th Cir. 1988) 862 F.2d 759, 765*

In action under *42 U.S.C. § 1983* against county based on erroneous wage garnishments and levy on plaintiff's savings account because county family support agency confused plaintiff's name, birthdate, and Social Security number with

another man who owed delinquent child support and agency's neglect in failing to contact Franchise Tax Board to correct its mistake, trial court erred in granting motion for judgment on the pleadings in favor of county in absence of evidence that agency procedures were state mandated or county initiated, when at that stage in proceedings, complaint on its face and undeveloped factual record did not permit trial court to rule, as matter of law, that family support agency was state actor, making county free from liability under § 1983 based on *Eleventh Amendment* immunity, nor could trial court properly decide whether family support agency was policymaker for county, making county liable under § 1983. *Hernandez v. County of San Bernardino (2004) 117 Cal. App. 4th 1055, 1058-1064, 12 Cal. Rptr. 3d 452*

Since public education in California is uniquely a fundamental concern of the state, California school districts are arms of the state for *U.S. Const., amend. XI* purposes and thus immune from liability under *42 U.S.C. § 1983*. *Kirchmann v. Lake Elsinore Unified School District (2000) 83 Cal. App. 4th 1098, 100 Cal. Rptr. 2d 289*

County is not liable under *42 U.S.C. § 1983* for actions of sheriff's office in detaining person after bond posted, on warrant that office allegedly should have known did not apply to person, when sheriff acted in capacity of state official rather than local policymaker in promulgating policies and acts at issue in action. *County of Los Angeles v. Superior Court of Los Angeles County (Peters) (1998) 68 Cal. App. 4th 1166, 1172-1178, 80 Cal. Rptr. 2d 860*

California State University campus police officers, sued in their official capacities, not subject to suit under *42 U.S.C. § 1983*. *Baughman v. State of California (1995) 38 Cal. App. 4th 182, 187-189, 45 Cal. Rptr. 2d 82*

Liability under *42 U.S.C. § 1983* may be imposed against municipality for its omissions as well as its actions. *Buenavista v. City and County of San Francisco (1989) 207 Cal. App. 3d 1168, 1178, 255 Cal. Rptr. 329*

[g] Intent

Actor not required to act with specific intent to deprive a person of federal right to be held liable under *42 U.S.C. § 1983*. *Monroe v. Pape (1961) 365 U.S. 167, 187, 81S. Ct. 473, 5 L. Ed. 2d 492* (overruled on other grounds in *Monell v. Dep't of Soc. Servs. (1978) 436 U.S. 658, 663, 98 S. Ct. 2018, 56 L. Ed. 2d 611*); *Jackson v. Gates (9th Cir. 1992) 975 F.2d 648, 656 , cert. denied, 509 U.S. 905 (1993)*

[h] Limitations Period

Statute of limitations on § 1983 claim of false arrest commenced to run when plaintiff appeared before examining magistrate and was bound over for trial, rather than when charges against him were ultimately dropped; state law provided limitations period of two years, and since more than two years elapsed between that date and filing of suit, even leaving out period before plaintiff reached his majority, action was time barred. *Wallace v. Kato (2007) 549 U.S. 384, 127 S. Ct. 1091, 1094-1097, 166 L. Ed. 2d 973*

Questions closely related to limitations period, such as tolling, are governed by state law, unless application of state law would defeat goals of *42 U.S.C. § 1983*. *Hardin v. Straub (1989) 490 U.S. 536, 538-544, 109 S. Ct. 1998, 104 L. Ed. 2d 582*

When state law provides multiple statutes of limitations for personal injury actions, courts considering *42 U.S.C. § 1983* claims should borrow general or residual statute for personal injury actions. *Owens v. Okure (1989) 488 U.S. 235, 249-250, 109 S. Ct. 573, 102 L. Ed. 2d 594*

Characterization of *42 U.S.C. § 1983* actions as tort actions for purposes of choosing applicable statute of limitations minimizes risk that choice of statute of limitations will not fairly serve federal interests vindicated by § 1983. *Wilson v. Garcia (1985) 471 U.S. 261, 266-270, 276, 105 S. Ct. 1938, 85 L. Ed. 2d 254*

Claims under *42 U.S.C. § 1983* filed in 2005 based on California State Bar's publication of summary of plaintiff's disciplinary history were barred by California's one-year, rather than two-year, statute of limitations because cause of action was more than one year old as of effective date of two-year statute of limitations (January 1, 2003), where limitations period began to run plaintiff saw summary in print version of bar journal in 2000, and plaintiff knew or should have known that same summary appeared on Internet website per Bar's previously stated policy to post electronic version of Bar journal on its website; and where single publication gave rise to only one cause of action. *Canatella v. Van De Kamp (9th Cir. 2007) 486 F.3d 1128, 1132-1136*

In action alleging discrimination against predominantly Latino neighborhoods based on ethnicity or race by city's failure to provide adequate municipal services and to bring neighborhoods into city, with regard to continuing violation doctrine, district court correctly concluded plaintiffs had not shown existence of pattern or practice of discrimination but rather ongoing harm resulting from earlier discrete decisions. However, reenactment of master tax sharing agreement within limitations period preserved claim that exclusion chilled plaintiff's annexation attempts and district court erred in dismissing agreement as merely automatic renewal of past action, where agreement expressly altered some terms of former agreement and retained other terms, so that it was not merely inevitable consequence of earlier agreements. Although plaintiffs could not challenge earlier agreements, they could use those events as evidence to establish motive and to put their timely-filed claims in context. *Committee Concerning Community Improvement v. City of Modesto (9th Cir. 2009) 583 F.3d 690, 701-702*

Section 1983 claim based on alleged use of excessive force in making arrest in 1995, filed in 2000, was barred by one-year statute of limitations. Plaintiff did not allege he was imprisoned until 1997, so statute was not tolled by imprisonment, neither equitable tolling nor equitable estoppel applied, he did not provide advance notice of his claims to defendants before filing suit in 2000 so allowing lawsuit to proceed would have prejudiced defendants, and he did not claim to have been ignorant of applicable limitations period. However, claim based on alleged use of excessive force in making arrest in 1997, also filed in 2000, was not barred by one-year statute of limitations, because of statutory tolling, when he was in prison from his arrest in 1997 until August 1999, limitations period for claims based on 1997 incident began running on his release, and ended in August 2000, and he filed lawsuit in June 2000. *Guerrero v. Gates (9th Cir. 2006) 442 F.3d 697, 705-707*

Where substantive due process violation claim of landlords' association rested on provisions of rent control ordinance in effect since 1979, not on substantive amendments enacted in 2002 altering effect of ordinance on association, its 2004 complaint was filed well beyond California's two-year statute of limitations for § 1983 claims. Further, claim by one landlord that enforcement of rent ceilings for benefit of wealthy tenant was irrational was time-barred because rent ceiling was in effect continuously since 1979 and not substantively altered in 2002. *Action Apt. Ass'n v. Santa Monica Rent Control Opinion Bd. (9th Cir. 2007) 509 F.3d 1020, 1026*

Although civil detainee under Sexually Violent Predators Act could not invoke *Code Civ. Proc. § 352.1(a)*, which tolls limitations period for person imprisoned on criminal charge, trial court erred in failing to apply equitable tolling. Court found that to deny detainee same benefit disability tolling provision afforded to his criminally confined cellmates would yield arbitrary result that two individuals housed in same penal facility under same or similar conditions would have differing access to courts based solely on difference in label. Further, detainee alleged conditions of confinement that would have made filing of lawsuit practically impossible even for trained attorney. *Jones v. Blanas (9th Cir. 2004) 393 F.3d 918, 927-930*

In action by parents based on death of son at facility maintained by county, parents were not barred by statute of limitations under doctrine of equitable tolling, even though parents filed action after expiration of limitations period, when state tort claim and claim under *42 U.S.C. § 1983* were predicated on same wrong, so that district court should have applied California's three-pronged test to determine whether parents were entitled to equitable tolling during pendency of administrative proceedings under state's tort claims act. Defendants did not waive statute of limitations,

when county's notice rejecting administrative claim, although ambiguous, did not make statement revealing intention to waive statute of limitations for § 1983 claims, and defendants were not estopped from raising statute of limitations, when parents were represented by attorney, who should have been aware that six-month period referred to in rejection notice applied only to claims under state tort claims act and to extent counsel relied on rejection notice as giving parents six months from rejection of their state tort claim to file § 1983 action, such reliance was not reasonable. *Lucchesi v. Bar-O Boys Ranch (9th Cir. 2003) 353 F.3d 691, 694-697*

California landowner's § 1983 claims against county, county planning department, and county employees, for violations of *First Amendment* free expression rights and *Fourteenth Amendment* equal protection and procedural due process rights with regard to county actions in relation to his use of his land were time barred, except claims as to actions county had allegedly delayed and had not yet taken action on at time complaint was filed, when in California, applicable limitations period was one year and discrete discriminatory acts are not actionable when time barred even when they related to acts as to which action was timely filed, and landowner alleged number of discrete acts on county's part, each of which allegedly violated his constitutional rights, and all of which, except those acts as to which county had not yet taken action, occurred outside of one-year statute of limitations period. However, landowner could use time-barred acts as evidence to establish motive and put timely filed claims in context. *Carpinteria Valley Farms, Ltd. v. County of Santa Barbara (9th Cir. 2003) 334 F.3d 796, 800-801*

Action against city under *42 U.S.C. § 1983* filed two years to the day after alleged injury was timely filed under state statute of limitations prescribing two year period from time of injury, when although one of years was a leap year, trial court erroneously chose to apply state statute of limitations in state Tort Claims Act rather than statute of limitations for personal injuries and limitations period under personal injury statute did not expire until date plaintiffs filed their complaint. *Sain v. City of Bend (9th Cir. 2002) 309 F.3d 1134, 1139-1140*

Although nuisance abatement hearing began during limitations period, city commenced abatement action before limitations period when police chief sent letter to plaintiffs and their counsel giving formal notice of abatement of public nuisance or when city Examiner's Office sent letter to city and plaintiffs advising them of commencement date and format of hearing. City's continued prosecution of action within limitations period was not actionable because it was inevitable consequence of earlier initiation of abatement proceeding; however, withdrawal of settlement offer during limitations period was discrete act, which was actionable. *RK Ventures, Inc. v. City of Seattle (9th Cir. 2002) 307 F.3d 1045, 1058*

In action filed more than two years after seizure of medical laboratory's funds for alleged Medicaid fraud, based on alleged warrantless search of medical laboratory premises and seizure of papers and payments in violation of *Fourth Amendment* due process rights, trial court erred in holding that claims were barred by California's then one-year statute of limitations, since laboratory was entitled to equitable tolling, when by timely filing and diligently pursuing action in state court to challenge withholding, laboratory provided all defendants adequate notice; when there was no prejudice to defendants because they were on notice of possibility of federal court suit from time first state court suit was filed, and they could not plausibly claim prejudice in gathering or preservation of evidence because much of evidence relevant to federal suit was same as presented in state suits; and when laboratory acted reasonably and in good faith in waiting to file federal court complaint until defendants repeatedly refused to comply with orders in state litigation and state administrative and judicial proceedings were concluded. *Azer v. Connell (9th Cir. 2002) 306 F.3d 930, 935-938*

Action by attorney suing California Department of Corrections for denying her legal visitation and mail privileges with her inmate-husband and all other inmates was barred by one-year statute of limitations, where cause of action accrued when she received letter informing her of permanent and complete suspension of visiting and mail privileges as attorney in January 1996, but did not file her action until July 1997; continuing violation doctrine is inapplicable because attorney failed to establish that new violation occurs each time she is denied visitation or mail privileges; subsequent and repeated denials of privileges with her clients is merely continuing effect of original suspension. *Knox v. Davis (9th Cir. 2001) 260 F.3d 1009*

Trial court erroneously dismissed complaint on grounds that statute of limitations had run, when claim, that if successful would necessarily imply invalidity of conviction in pending criminal prosecution, does not accrue so long as potential for conviction in pending criminal prosecution continues to exist, and § 1983 action alleging illegal search and seizure of evidence on which criminal charges are based does not accrue until criminal charges have been dismissed or conviction overturned and evidence was essential element of crime of which plaintiff in § 1983 action was charged, and when plaintiff brought § 1983 action was filed less than three years after charges against him were dismissed, within statutory period. *Harvey v. Waldron (9th Cir. 2000) 210 F.3d 1008, 1012-1016*

Trial court properly dismissed prisoner's *42 U.S.C. § 1983* action based on alleged violation of *Eighth Amendment* for failure to treat leg injury, as time barred under retroactive application of *Code Civ. Proc. § 352.1*, which limits tolling of limitations periods to two years for prisoners incarcerated for less than life. *Fink v. Shedler (9th Cir. 1999) 192 F.3d 911, 914-916 , cert. denied, 529 U.S. 1117 (2000)*

Federal law, rather than state law, governs question of when particular cause of action accrues. *Fink v. Shedler (9th Cir. 1999) 192 F.3d 911, 914 , cert. denied, 529 U.S. 1117 (2000)* ; *TwoRivers v. Lewis (9th Cir. 1999) 174 F.3d 987, 991* ; *Cabrera v. City of Huntington Park (9th Cir. 1998) 159 F.3d 374, 379*

California prisoner's action under *42 U.S.C. § 1983* based on forcible taking of blood and urine samples during arrest was timely filed under tolling provision of *Code Civ. Proc. § 352.1*, despite amendment of that statute during prisoner's incarceration to limit tolling period to two years. *Ellis v. City of San Diego (9th Cir. 1999) 176 F.3d 1183, 1188-1191*

Federal and California courts have applied one-year limitations period of former *Code Civ. Proc. § 340(3)* to *42 U.S.C. § 1983* actions brought in *California. Ellis v. City of San Diego (9th Cir. 1999) 176 F.3d 1183, 1188-1189* ; *Trimble v. City of Santa Rosa (9th Cir. 1995) 49 F.3d 583, 585* ; *McDougal v. County of Imperial (9th Cir. 1991) 942 F.2d 668, 672-673* ; *City of Huntington Park v. Superior Court (1995) 34 Cal. App. 4th 1293, 1297, 41 Cal. Rptr. 2d 68 . Note:* Effective January 1, 2003, *Code Civ. Proc. § 340* was amended and *Code Civ. Proc. § 335.1* was added to provide that personal injury actions are now governed by a two-year statute of limitations.

Amendment to state tolling provision while prisoner's § 1983 action was pending did not apply retroactively so as to bar prisoner's action, and trial court erred in dismissing action as time barred. *TwoRivers v. Lewis (9th Cir. 1999) 174 F.3d 987, 993-997*

Gov. Code § 945.3, which tolls statute of limitations under certain circumstances during pendency of criminal charges, applies to § 1983 actions. *Cabrera v. City of Huntington Park (9th Cir. 1998) 159 F.3d 374, 379* ; *Trimble v. City of Santa Rosa (9th Cir. 1995) 49 F.3d 583, 585*

Under borrowing provision of *42 U.S.C. § 1988(a)*, state statute of limitations applies in § 1983 actions. *Cabrera v. City of Huntington Park (9th Cir. 1998) 159 F.3d 374, 379*

Code Civ. Proc. § 352.1(a), which tolls, for up to two years, limitations period for person "imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life," applies to toll limitations period in *42 U.S.C. § 1983* action for damages. *Martinez v. Gomez (9th Cir. 1998) 137 F.3d 1124, 1126*

Statute of limitations in *42 U.S.C. § 1983* action is not equitably tolled during pendency of state court proceeding arising out of same situation, when plaintiff had not acted in good faith by stringing out state proceedings until forced to brink of trial, and then abandoning those proceedings to initiate federal proceedings on precisely same claim. *Bacon v. City of Los Angeles (9th Cir. 1988) 843 F.2d 372, 374-375*

Code Civ. Proc. § 352(a), which tolls limitations period during plaintiff's minority, or for one who is insane, applies to

actions under *42 U.S.C. § 1983*. *May v. Enomoto (9th Cir. 1980) 633 F.2d 164, 166-167*

Notice to appear on specified misdemeanor charges inferentially served on defendant at time of his release commenced tolling of civil rights action under *42 U.S.C. § 1983* against law enforcement officers based on alleged use of excessive force during his arrest under *Gov Code § 945.3*, and criminal complaint was timely filed after service of notice to appear so that tolling period continued through final disposition of charges, so that civil rights complaint under § 1983 filed within one year under then-applicable statute of limitations was timely. *Schmidlin v. City of Palo Alto (2007) 157 Cal. App. 4th 728, 746-761, 69 Cal. Rptr. 3d 365*

Applicable statute of limitations for civil rights actions brought in California under *42 U.S.C. § 1983* is former one-year statute of limitations for personal injury actions provided in former *Code Civ. Proc. § 340(3)* [*now see Code Civ. Proc. § 335.1* (providing for two-year statute of limitations for personal injury actions)]. Section 1983 limitations period is not tolled by pursuing remedies under state Tort Claims Act [*see Gov. Code §§ 945.4* (requiring notice of claim to public agency before action can be brought against it), 945.6 (requiring filing of civil action within six months of agency's rejection)], since plaintiff does not have to file under Act before initiating § 1983 action. Thus, failure to assert § 1983 claim within one year of arrest on which claim was based barred claim. Limitations period was not tolled under doctrine of equitable tolling, when, even if plaintiff mistakenly believed satisfaction of Tort Claims Act was required before filing § 1983 action, he waited more than three and one half years after denial of Claims Act application before filing. *McMahon v. Albany Unif. Schl. Dist. (2003) 104 Cal. App. 4th 1275, 1291-1293, 129 Cal. Rptr. 2d 184*

Plaintiff's attempt to amend original complaint to include § 1983 action was barred by statute of limitations; although amended complaint may relate back to filing of original complaint and avoid bar of statute of limitations, recovery sought must be based on same general set of facts. *Newton v. County of Napa (1990) 217 Cal. App. 3d 1551, 1563-1565, 266 Cal. Rptr. 682*

[i] Survival of Actions

State law governs issue of survival of *42 U.S.C. § 1983* actions, unless survival law of forum state is inhospitable to federal law or inconsistent with purposes of federal law. *Robertson v. Wegmann (1978) 436 U.S. 584, 588, 98 S. Ct. 1991, 56 L. Ed. 2d 554* ; *County of Los Angeles v. Superior Court of Los Angeles County (Schonert) (1999) 21 Cal. 4th 292, 300-303, 87 Cal. Rptr. 2d 441, 981 P.2d 68*

In *42 U.S.C. § 1983* action, survivors of individual killed as a result of excessive use of force may assert *Fourth Amendment* claim on that individual's behalf if relevant state's law authorizes survival action. *Moreland v. Las Vegas Metro. Police Dep't (9th Cir. 1998) 159 F.3d 365, 369* ; *Smith v. City of Fontana (9th Cir. 1987) 818 F.2d 1411, 1416-1417 , cert. denied, 484 U.S. 935*

In California, *42 U.S.C. § 1983* claim survives, and personal representative or successor in interest of victim may bring the action. *Byrd v. Guess (9th Cir. 1998) 137 F.3d 1126, 1131 , cert. denied, 525 U.S. 963* ; *Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 173-174, 216 Cal. Rptr. 661, 703 P.2d 1*

[j] Absolute Immunity

Prosecutors were entitled to absolute immunity from claim of failure to provide potential impeachment information about jailhouse informant who testified against plaintiff at his murder trial that informant had previously received reduced sentences for providing prosecutors with favorable testimony in other cases, at least some prosecutors in district attorney's office knew about favorable treatment, office had not provided plaintiff's attorney with that information, and prosecution's failure to provide attorney with potential impeachment information had led to his erroneous conviction, where absolute immunity extended to claims prosecution failed to disclose impeachment material due to failure

properly to train prosecutors, failure properly to supervise prosecutors, or failure to establish information system containing potential impeachment material about informants. *Van De Kamp v. Goldstein (2009) -- U.S. --, 129 S. Ct. 855, 172 L. Ed. 2d 706, 714-718*

When official claiming immunity is prosecutor, courts will examine nature of function performed, not identity of actor who performed it, in deciding whether absolute immunity is available. *Kalina v. Fletcher (1997) 522 U.S. 118, 127, 118 S. Ct. 502, 139 L. Ed. 2d 471*

Prosecutor has only qualified immunity for investigative functions normally performed by detective or police officer; prosecutor has only qualified immunity when making statements to press at press conference. *Buckley v. Fitzsimmons (1993) 509 U.S. 259, 272-278, 113 S. Ct. 2606, 125 L. Ed. 2d 209*

Judges have no absolute immunity for nonjudicial actions, and for actions that, though judicial in nature, are taken in complete absence of all jurisdiction. *Mireles v. Waco (1991) 502 U.S. 9, 11-12, 112 S. Ct. 286, 116 L. Ed. 2d 9*

Prosecutors absolutely immune in initiating prosecution, presenting state's case, and participating in probable cause hearing; prosecutors entitled to only qualified immunity for giving legal advice to police in investigative phase of criminal case. *Burns v. Reed (1991) 500 U.S. 478, 487, 111 S. Ct. 1934, 114 L. Ed. 2d 547*

Public defender not immune from liability in action brought by criminal defendant who alleges that public defender conspired with state officials to deprive plaintiff of civil rights. *Tower v. Glover (1984) 467 U.S. 914, 916, 104 S. Ct. 2820, 81 L. Ed. 2d 758*

All witnesses, including police officers, who give testimony at criminal trial, have absolute immunity from civil suits for perjury brought under *42 U.S.C. § 1983* by person convicted in criminal suit. *Briscoe v. Lahue (1983) 460 U.S. 325, 335-336, 103 S. Ct. 1108, 75 L. Ed. 2d 96*

Absolute immunity generally applies to officials whose special functions or constitutional status require that level of protection. *Harlow v. Fitzgerald (1982) 457 U.S. 800, 807, 102 S. Ct. 2727, 73 L. Ed. 2d 396*

Executive branch officials, when participating in federal administrative agency's adjudicative process, are entitled to absolute immunity because they perform functions comparable to those of judges and prosecutors. *Butz v. Economou (1978) 438 U.S. 478, 512-513, 98 S. Ct. 2894, 57 L. Ed. 2d 895*

Judges are absolutely immune from liability for damages for violating constitutional rights of others when acting within scope of their duties. *Stump v. Sparkman (1978) 435 U.S. 349, 355, 98 S. Ct. 1099, 55 L. Ed. 2d 331*

State prosecutors are absolutely immune from liability under *42 U.S.C. § 1983* for conduct intimately associated with judicial phase of criminal process. *Imbler v. Pachtman (1976) 424 U.S. 409, 430-431, 96 S. Ct. 984, 47 L. Ed. 2d 128*

School board members are not entitled to absolute immunity. *Wood v. Strickland (1975) 420 U.S. 308, 321-322, 95 S. Ct. 992, 43 L. Ed. 2d 214*

Legislators are entitled to absolute immunity from liability under *42 U.S.C. § 1983* for their legislative activities. *Tenney v. Brandhove (1951) 341 U.S. 367, 372, 71 S. Ct. 783, 95 L. Ed. 1019*

Prosecutor was entitled to absolute immunity because she was acting as criminal prosecutor when she secured warrant for arrest of plaintiff, who was initially arrested on harassment charges while serving part of his sentence after conviction on sex offense on community placement, and arrested again day after he was released pursuant to bench warrant issued due to his failure to progress in his court-imposed sexual deviancy treatment program, where

prosecutor's motion for bench warrant applying law to facts alleged in supporting affidavits signed by witnesses essentially constituted initiation of new judicial proceedings against plaintiff for violating the terms of his community placement and not investigative act. *Waggy v. Spokane County Wash. (9th Cir. 2010) 594 F.3d 707, 711-713*

In action based on arrest of husband and wife for murder they did not commit, district attorney was entitled to absolute immunity for decision to charge them with murder and not release them, despite anonymous tips that they had not committed murder, but was not entitled to absolute immunity for advising officers to add book murder charges, because record did not support finding of absolute immunity. *Ewing v. City of Stockton (9th Cir. 2010) 588 F.3d 1218, 1232-1234*

In *Bivens* action based on plaintiff's arrest and detention under federal material witness warrant against former United States Attorney General, alleging the Attorney General unlawfully used federal material witness statute [*18 U.S.C. § 3144*] to investigate or preemptively detain him by promulgating policy by which FBI and DOJ would use federal material witness statute as pretext to arrest and detain terrorism suspects about whom they did not have sufficient evidence to arrest on criminal charges but wished to hold preventatively or to investigate further, Attorney General was not entitled to absolute immunity, where, although decision to seek material witness warrant to secure witness's testimony at trial is usually sufficiently related to judicial proceedings to be protected by absolute prosecutorial immunity, when prosecutor seeks material witness warrant to investigate or preemptively detain suspect, rather than to secure his testimony at another's trial, prosecutor is entitled at most to qualified, rather than absolute, immunity. al-*Kidd v. Ashcroft (9th Cir. 2009) 580 F.3d 949, 957-964*

Child protective services officer was not entitled to absolute quasi-judicial immunity for his alleged inclusion of false statements in affidavit seeking order to remove suspected child abuse victim from home and into protective custody, where alleged misrepresentation fell outside scope of absolute immunity afforded caseworkers, and where family's right to be free from judicial deception in securing removal order was clearly established at time of alleged misrepresentations to court. *Greene v. Camreta (9th Cir. 2009) 588 F.3d 1011, 1033-1036*

In former prisoner's *42 U.S.C. § 1983* complaint against, inter alia, former California Attorney General, in which he alleged he was wrongfully imprisoned for additional 19 months after California appellate court overturned statute under which he was incarcerated and Attorney General breached his alleged duties to monitor whether his sentence was void under invalidated statute and to take steps to effectuate his release, Attorney General was entitled to absolute prosecutorial immunity, where claims fell within scope of his duties as criminal prosecutor. *Cousins v. Lockyer (9th Cir. 2009) 568 F.3d 1063, 1068-1069*

In action by former prisoner premised on failure to release her per terms of plea agreement, trial court properly granted prosecutor absolute immunity to prosecutors who participated in her parole hearings, where parole decisions were continuation of sentencing process. Trial court also properly granted parole board members absolute immunity from liability for actions taken while processing parole applications. *Brown v. Cal. Dep't of Corr. (2009) 554 F.3d 747, 750-751*

Although California Constitution authorized governor to review state parole board's decision granting, denying, revoking, or suspending parole of person sentenced to indeterminate term on conviction of murder [*Cal. Const. art. V, § 8(b)*], former governor who erroneously twice reversed parole board's grant of parole to plaintiff, who had been convicted of conspiracy to murder, was entitled to absolute quasi-judicial immunity even though he erroneously extended his authority to review parole decisions, where governor's review of parole decisions regarding prisoners convicted of murder was functionally comparable to judge's role, and where, given close relationship between murder and conspiracy to commit murder, governor's review of parole decisions involving person convicted of conspiracy to commit murder was not clearly outside scope of his jurisdiction. *Miller v. Davis (9th Cir. 2008) 521 F.3d 1142, 1145-1148*

Social worker who investigated whether mother was abusing her son and supervisor who filed child dependency petition were not entitled to absolute immunity in mother's action under *42 U.S.C. § 1983* after dependency petition was denied, claiming much of information in three-page statement of facts included in petition was falsified, where social workers conducting investigations have no absolute immunity; and where, although social workers have absolute immunity when they make discretionary, quasi-prosecutorial decisions to institute court dependency proceedings to take custody away from parents, they are not entitled to absolute immunity from claims that they fabricated evidence during investigation or made false statements in dependency petition affidavit they signed under penalty of perjury, because those actions are not similar to discretionary decisions about whether to prosecute. *Beltran v. Santa Clara County (9th Cir. 2008) 514 F.3d 906, 908-909*

In § 1983 action alleging wrongful conviction against district attorney and chief deputy by man released on granting of petition for habeas corpus after serving 24 years in prison for murder, district attorney and deputy were not entitled to absolute immunity based on allegations they failed to develop policies and procedures and failed to adequately train and supervise their subordinates, to fulfill their constitutional obligation of ensuring that information regarding jailhouse informants was shared among prosecutors in their office, as result of which prosecutors did not share critical *Brady* impeachment information about jailhouse informant with defense counsel, where challenged conduct was administrative and not prosecutorial in function. *Goldstein v. City of Long Beach (9th Cir. 2007) 481 F.3d 1170, 1172-1176*

In action brought under *42 U.S.C. § 1983* against judge based on alleged resentencing to harsher sentence in violation of plaintiff's double jeopardy protection, judge was entitled to absolute immunity, when, although under state law, judge did not have jurisdiction to modify sentence after plaintiff had begun serving it, judge was immune from personal liability for sentencing party to greater punishment than authorized by law. *Sadoski v. Mosley (9th Cir. 2006) 435 F.3d 1076, 1079*

In action by housing corporation against city and city council members based on city council's failure to approve low income housing project, which approval was required by Tax Equity and Fiscal Responsibility Act, city council members were entitled to absolute legislative immunity, when, in actions and votes on council, council members were elected representatives acting on legislative decision affecting substantial area. *Affordable Hous. Dev. Corp. v. City of Fresno (9th Cir. 2006) 433 F.3d 1182, 1193*

Prosecutors were not entitled to absolute immunity for allegedly retaliating against former sheriff's office investigator by refusing to prosecute any case from school police department, by whom former investigator had become employed, in which former investigator did any investigation, when before adopting nonprosecution policy, prosecutors retaliated against him by telephoning school police department trying to sabotage his job prospects, which had no connection to judicial process, and when demands that he be barred from participating in any aspect of any investigation were not intimately tied to judicial process, but, rather, were administrative function; however, decision not to prosecute his cases and communication of decision was intimately tied to judicial process and entitled to absolute immunity. *Botello v. Gammick (9th Cir. 2005) 413 F.3d 971, 975-978*

In action under *42 U.S.C. §§ 1983* based on investigation and prosecution of plaintiff for homicide, trial court properly denied motion of deputy district attorney and investigator for summary judgment on grounds of absolute immunity, when investigator was engaged in police-type investigative work, not quasi-judicial advocacy, when he met with key witness at which he allegedly urged her to lie and when he performed other work associated with prosecution; and when there was sufficient evidence to support conclusion that deputy district attorney was actively directing investigator throughout his work on case. However, supervisory employees in district attorney's office were entitled to absolute immunity, when their conduct allegedly violating plaintiff's rights was closely related to prosecutorial decisions in trial phase and involved advocacy intimately associated with judicial phase of criminal process. *Genzler v. Longanbach (9th Cir. 2005) 410 F.3d 630, 637-644*

District attorney and deputy district attorney were entitled to absolute immunity to extent second search warrant sought evidence to prosecute crimes charged in indictment, because their review of warrant before submission was intimately associated with judicial process, when probable cause had been established by grand jury and prosecutors' actions were directed at upcoming trial. Investigator was entitled to absolute immunity for his reliance on second search warrant to gather evidence for prosecution, because investigator gathering evidence one month after indictment was filed to prepare prosecutor for trial was engaged in advocacy function intimately associated with judicial process and was entitled to same immunity afforded prosecutor. However, defendants were not entitled to absolute immunity to extent collateral investigation into whether plaintiff-company in civil rights action was permeated with fraud went beyond any legitimate preparation to prosecute one company owner for any crime in removal of storage tank or for other crimes charged in indictment. *KRL v. Moore (9th Cir. 2004) 384 F.3d 1105, 1110-1115*

State board of medicine, state board of professional discipline, individual members and counsel of both boards, and executive director of board of medicine were functionally comparable to judges and prosecutors and accordingly entitled to protections of absolute immunity for their quasi-judicial and quasi-prosecutorial acts in denying plaintiff reinstatement of her physician assistant's license which were directly related to their adjudicatory function and ultimate resolution of disciplinary dispute; allegation that avoided protections of immunity involved board of medicine's billing statement sent to plaintiff's counsel for costs and fees incurred with respect to public records request, because billing practices of board were not sufficiently comparable to judicial or prosecutorial functions to be accorded protections of absolute immunity. *Olsen v. Idaho State Board of Medicine (9th Cir. 2004) 363 F.3d 916, 922-929*

District attorney engaging in retaliatory employment-related actions based on deputy district attorney's exercise of *First Amendment* free speech rights was not immune under *Eleventh Amendment*, when district attorney was carrying out functions of county, not state. *Ceballos v. Garcetti (9th Cir. 2004) 361 F.3d 1168, 1182-1185*

District court properly dismissed § 1983 claims against state legislators based on enactment of legislation deregulating state power industry, because legislators have absolute immunity against civil suit for legislative acts. *Single Moms, Inc. v. Montana Power Company (9th Cir. 2003) 331 F.3d 743, 750*

Members of Maui County Council were not entitled to absolute legislative immunity in denying conditional use permit to allow use of beachfront property as commercial wedding venue, when, although act of voting to deny permit was formally legislative in character, weighing in favor of legislative immunity, it did not in itself decide issue; decision was ad hoc based on circumstances of particular case that did not effectuate policy or create binding rule of conduct because it affected only single permit and single parcel of land; very limited impact of conditional use permit as affecting only few individuals rather than public at large weighed against absolute immunity; and in denying single application for permit, Council did not change Maui's comprehensive zoning ordinance or policies underlying it, nor did it affect county's budgetary priorities or services county provides to residents. *Kaahumanu v. County of Maui (9th Cir. 2003) 315 F.3d 1215, 1219-1224*

County commissioners were not entitled to absolute legislative immunity for firing administrative assistant, when predominant circumstances surrounding termination suggested that it involved ad hoc decisionmaking rather than formulation of policy, since decision was not made in accordance with legislative requirements of state law, fact that his duties continued to be performed by other employees suggested that decision was not policy decision that position was no longer necessary, and commissioners terminated him several months before end of fiscal year and immediately escorted him from building and directed him not to return; and when decision initially affected only individual employee rather than large number of people, since resolution terminating position occurred 17 months after termination, so that decision to terminate employee appeared to have been made separately from decision to terminate position, which affected all county citizens. *Bechard v. Rappold (9th Cir. 2002) 287 F.3d 827*

County prosecutor who appended to bail revocation motion his own sworn affidavit reciting allegedly false and suspect allegations of plaintiff's ex-wife without investigation was not entitled to absolute immunity, where he stepped outside

prosecutorial role and into role of witness when he personally attested to truth of facts in affidavit. Prosecutor was also not entitled to absolute immunity as witness when he functioned as witness in ex parte rather than adversarial proceeding, atwhich plaintiff did not enjoy protections of adversary process, so as to be analogous to "complaining witness." *Cruz v. Kauai County (9th Cir. 2002) 279 F.3d 1064, 1067-1068*

Trial court did not err in denying summary judgment by determining that complaint contained some allegations against some individual police officer defendants who had testified in previous § 1983 action that would not be shielded by absolute immunity accorded to police witnesses, when complaint alleged nontestimonial conduct and conspiratorial conduct not inextricably tied to testimony; however, trial court should have granted summary judgment where record, fully developed after close of discovery, was entirely devoid of specific evidence connecting defendants to nontestimonial conspiracy to fabricate or suppress physical or documentary evidence or to suppress identities and testimony of other officers or civilian eyewitnesses to plaintiff's arrest. *Paine v. City of Lompoc (9th Cir. 2001) 265 F.3d 975*

Judge was absolutely immune from liability in action based on judge's alleged refusal to accommodate hearing impairment of litigant, when all of judge's actions in relation to claim were rulings on motions denying request for videotext display, and when ruling on motion is normal judicial function, as is exercising control over courtroom while court is in session; court ADA coordinator and court administrator was not entitled to summary judgment that she had absolute quasi-judicial immunity in refusing requests for videotext display, when type of decision-making authority exercised appeared to raise issue of material fact as to whether she was acting in administrative rather than quasi-judicial capacity. *Duvall v. County of Kitsap (9th Cir. 2001) 260 F.3d 1124, 1133*

State prosecutors were not absolutely immune for following acts: (1) knowingly obtaining false statements from witness for purposes of prosecution; (2) filing false crime report; (3) investigation after filing false report and before empaneling grand jury; and (4) making statements to media. Prosecutors were entitled to absolute immunity for (1) securing grand jury indictment; (2) reprosecuting via information after dismissal of indictment; (3) securing arrest warrant when prosecutors themselves did not personally swear to facts in criminal complaint; and (4) opposing reappointment of defense counsel. *Milstein v. Cooley (9th Cir. 2001) 257 F.3d 1004*

Although acts of members of state medical board closely associated with judicial process were entitled to absolute immunity, responding to inquiry from another state verifying practice of neurosurgeon was not. *Mishler v. Clift (9th Cir. 1999) 191 F.3d 998, 1008*

Prosecutors engaged in prosecutorial functions intimately associated with judicial phase of criminal process are absolutely immune. *Morley v. Walker (9th Cir. 1999) 175 F.3d 756, 759*

Judge not entitled to absolute immunity in action arising from firing of court administrator for conduct that was protected speech under *First Amendment*; hiring and firing of court personnel is nonjudicial act. *Nunez v. Davis (9th Cir. 1999) 169 F.3d 1222, 1229 n.3 , cert. denied, 528 U.S. 1115 (2000)*

Prosecutors entitled to absolute immunity for performing advocate's role after initiation of grand jury proceedings, when prosecutors had probable cause under state law to initiate proceedings. *Herb Hallman Chevrolet v. Nash-Holmes (9th Cir. 1999) 169 F.3d 636, 643 , cert. denied, 528 U.S. 870*

Prosecutors have absolute immunity for decisions to prosecute or not to prosecute. *Roe v. City and County of San Francisco (9th Cir. 1997) 109 F.3d 578, 583*

Judge loses absolute immunity only when he or she acts in clear absence of jurisdiction or performs act that is not judicial in nature. *Schucker v. Rockwood (9th Cir. 1988) 846 F.2d 1202, 1204 , cert. denied, 488 U.S. 995*

Social services worker entitled to absolute immunity in acting in quasi-prosecutorial role in child dependency proceedings. *Meyers v. Contra Costa County Dep't of Soc. Serv. (9th Cir. 1987) 812 F.2d 1154, 1157-1158 , cert. denied, 484 U.S. 829*

Prosecutor's exercise of independent judgment regarding existence of probable cause is rebuttable presumption; unless presumption is overcome, arresting officer is insulated from liability for harm suffered after prosecutor initiated formal prosecution. *Smiddy v. Varney (9th Cir. 1986) 803 F.2d 1469, 1471*

California sheriffs conducting criminal investigations and acting as state agents with final policymaking authority over complained-of actions act on behalf of state when performing law enforcement activities and are absolutely immune from liability under *42 U.S.C. § 1983* under *Eleventh Amendment*. *Venegas v. County of Los Angeles (2004) 32 Cal. 4th 820, 828-839*

In action against county by county jail inmate who received threats against his life by other inmates due to his national ancestry, ethnicity, origin, and race, and who, despite his repeated requests to be moved to another facility, suffered injuries inflicted by inmates when jail employees refused to move him, sheriff was carrying out law enforcement function in setting policies pertaining to placement of inmates at county jail and therefore was acting as state official so that county was immune from § 1983 liability. *Bougere v. County of Los Angeles (2006) 141 Cal. App. 4th 237, 241-248, 45 Cal. Rptr. 3d 711*

State Bar, its officials, and its employees are absolutely immune from liability in civil rights actions arising out of their conduct of attorney disciplinary and admission proceedings. *Rosenthal v. Vogt (1991) 229 Cal. App. 3d 69, 76, 280 Cal. Rptr. 1*

Social workers are absolutely immune from *42 U.S.C. § 1983* suits alleging improper removal of minor from parental home based on suspicion of child abuse, and instigation of dependency proceedings. *Alicia T. v. County of Los Angeles (1990) 222 Cal. App. 3d 869, 881, 271 Cal. Rptr. 513*

Prosecutor is protected by absolute immunity that extends beyond conducting trial or hearing, and includes actions that must be taken before initiation of prosecution. *Lebbos v. State Bar (1985) 165 Cal. App. 3d 656, 665-666, 211 Cal. Rptr. 847*

Allegation of conspiracy between prosecutor and others to file and pursue unfounded charges is not sufficient to overcome prosecutorial immunity. *Bach v. County of Butte (1983) 147 Cal. App. 3d 554, 567, 195 Cal. Rptr. 268*

[k] Qualified Immunity

Although 13-year-old student's *Fourth Amendment* right was violated when she was subjected to search of her bra and underpants by school officials acting on reasonable suspicion she had brought forbidden prescription and over-the-counter drugs to school, because there were no reasons to suspect drugs presented danger or were concealed in her underwear, however, officials who ordered and conducted unconstitutional search were entitled to qualified immunity from liability, where there was reason to question clarity with which right was established. *Safford Unified School Dist. v. Redding (2009) -- U.S. --, 129 S. Ct. 2633, 174 L. Ed. 2d 354*

In *Bivens* action by citizen of Pakistan, who was arrested on criminal charges in United States in wake of the September 11, 2001, terrorist attacks and detained by federal officials, former Attorney General and former Director of Federal Bureau of Investigation were entitled to qualified immunity as to allegations they adopted unconstitutional policy subjecting him to harsh conditions of confinement on account of his race, religion, or national origin, where complaint did not plead factual matter that, if taken as true, stated claim that defendants deprived him of his clearly

established constitutional rights by failing to plead sufficient facts to state claim for purposeful and unlawful discrimination. *Ashcroft v. Iqbal (2009) -- U.S. --, 129 S. Ct. 1937, 1947-1954, 173 L. Ed. 2d 868*

Saucier procedure should not be regarded as mandatory; police officers who arrested plaintiff without warrant and without exigent circumstances were entitled to qualified immunity because their entry into his home did not violate clearly established law, where when entry occurred, "consent-once-removed" doctrine had gained acceptance in lower courts and officers were entitled to rely on those cases, even though their own Federal Circuit had not yet ruled on "consent-once-removed" entries, so that unlawfulness of officers' conduct was not clearly established. *Pearson v. Callahan (2009) -- U.S. --, 129 S. Ct. 808, 172 L. Ed. 2d 565, 576-581*

Deputy sheriffs were entitled to qualified immunity for search of home under warrant, even though suspects had moved three months earlier and residents were of different race from suspects, where orders to residents to get out of bed unclothed and stand for one to two minutes, in context of lawful search, were permissible and perhaps necessary to protect safety of deputies and there was no allegation deputies prevented residents from dressing longer than necessary to protect their safety. *Los Angeles County v. Rettele (2007) 550 U.S. 609, 127 S. Ct. 1989, 1992-1994, 167 L. Ed. 2d 974*

Police officer's attempt to terminate dangerous high-speed car chase that threatens lives of innocent bystanders does not violate *Fourth Amendment*, even when it places fleeing motorist at risk of serious injury or death. Thus, in summary judgment motion in § 1983 action against law enforcement officer based on high-speed chase with plaintiff in which officer applied push bumper to rear of plaintiff's vehicle, resulting in plaintiff losing control of vehicle and crashing, officer was entitled to qualified immunity, where, with regard to factual issue whether plaintiff was driving in such fashion as to endanger human life, plaintiff's version of events was so utterly discredited by record that no reasonable jury could have believed him, and court should have viewed facts in light depicted by videotape of events; and where officer did not violate *Fourth Amendment* even though officer's decision to terminate car chase by ramming his bumper into plaintiff's vehicle constituted seizure, because officer's actions were reasonable. *Scott v. Harris (2007) 550 U.S.372 , 127 S. Ct. 1769, 1774-1779, 167 L. Ed. 2d 686*

In § 1983 action against police officer for use of excessive force in shooting suspect in back as he attempted to flee scene, officer was entitled to qualified immunity, when she made decision that, even if constitutionally deficient, reasonably misapprehended law governing circumstances she confronted, and when officer's actions fell in hazy border between excessive and acceptable force, and case law did not clearly establish that her conduct violated *Fourth Amendment*. *Brosseau v. Haugen (2004) 543 U.S. 194, 125 S. Ct. 596, 598-600, 160 L. Ed. 2d 583*

Federal Alcohol, Tobacco, and Firearms agent who executed invalid search warrant was not entitled to qualified immunity, because given that particularity requirement is set forth in text of federal constitution, no reasonable officer could believe that warrant that plainly did not comply with requirement was valid and warrant was so facially deficient in failing to particularize place to be searched or things to be seized that executing officer could not reasonably presume it to be valid, because agent himself prepared invalid warrant, he could not argue he reasonably relied on magistrate's assurance that warrant contained adequate description of things to be seized and was valid, and because guidelines of petitioner's own department placed him on notice he might be liable for executing manifestly invalid warrant. *Groh v. Ramirez (2004) 540 U.S. 551, 124 S. Ct. 1284, 1293-1294, 157 L. Ed. 2d 1068*

Alabama prison guards who handcuffed prisoner to "hitching post" for refusing to work or disrupting work squad were not entitled to qualified immunity, when attachment of prisoner to hitching post under circumstances alleged violated *Eighth Amendment* by knowingly subjecting prisoner to substantial risk of physical harm, to unnecessary pain caused by handcuffs and restricted position of confinement for 7-hour period, to unnecessary exposure to sun, to prolonged thirst and taunting, and to deprivation of bathroom breaks creating risk of particular discomfort and humiliation; and when violation was so obvious that Supreme Court *Eighth Amendment* cases gave guards fair warning that their conduct violated Constitution, and in light of binding Eleventh Circuit precedent, Alabama Department of Corrections regulation

(ADOC), and Department of Justice report informing ADOC of constitutional infirmity in its use of hitching post, guards' conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. *Hope v. Pelzer (2002) 536 U.S. 730, 122 S. Ct. 2508, 2515-2519, 153 L. Ed. 2d 666*

In *Bivens* action alleging use of excessive force against military police officer who arrested demonstrator on federal military base while Vice President of United States was giving public speech, officer was entitled to summary judgment on claim of qualified immunity, when circumstances of case disclosed substantial grounds for officer to have concluded he had legitimate justification for acting as he did, since officer did not know full extent of threat posed by demonstrator or how many other persons there might be who, in concert with demonstrator, posed threat to security of Vice President, and there was no clearly established rule that would prohibit using the force officer did to accomplish objectives of protecting Vice President by securing demonstrator and restoring order. *Saucier v. Katz (2001) 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272*

Although allowing media representatives to accompany law enforcement officers in execution of warrant in private home violated federal constitutional rights under *U.S. Const., amend. IV*, so that *Bivens* and *42 U.S.C. § 1983* actions were cognizable, law enforcement officers executing warrants were entitled to qualified immunity since right was not clearly established at time of execution of warrants. *Wilson v. Layne (1999) 526 U.S. 603, 614-618, 119 S. Ct. 1692, 143 L. Ed. 2d 818* ; *Hanlon v. Berger (1999) 526 U.S. 808, 809-810, 119 S. Ct. 1706, 143 L. Ed. 2d 978*

To determine immunity, court must accept allegations in plaintiff's complaint as true. *Kalina v. Fletcher (1997) 522 U.S. 118, 122, 118 S. Ct. 502, 139 L. Ed. 2d 471* ; *Buckley v. Fitzsimmons (1993) 509 U.S. 259, 261, 113 S. Ct. 2606, 125 L. Ed. 2d 209* ; *Morley v. Walker (9th Cir. 1999) 175 F.3d 756, 759*

The rationales for qualified immunity for public officials are not applicable to private parties. *Wyatt v. Cole (1992) 504 U.S. 158, 166, 112 S. Ct. 1827, 118 L. Ed. 2d 504* ; *Franklin v. Fox (9th Cir. 2002) 312 F.3d 423, 444* ; *Ellis v. City of San Diego (9th Cir. 1999) 176 F.3d 1183, 1191*

Official seeking immunity bears burden of demonstrating that immunity attaches to particular function. *Burns v. Reed (1991) 500 U.S. 478, 486, 111 S. Ct. 1934, 114 L. Ed. 2d 547* ; *Morley v. Walker (9th Cir. 1999) 175 F.3d 756, 759*

Qualified immunity protects all but those who are plainly incompetent or knowingly break law. *Anderson v. Creighton (1987) 483 U.S. 635, 639-640, 107 S. Ct. 3034, 97 L. Ed. 2d 523*

Qualified immunity is immunity from suit, not merely defense to liability; although denial of *Fed. R. Civ. Proc., Rule 12(b)(6)* motion is not ordinarily appealable, denial of such motion based on claim of immunity is appealable before final judgment under collateral order doctrine. *Mitchell v. Forsyth (1985) 472 U.S. 511, 525-527, 105 S. Ct. 2806, 86 L. Ed. 2d 411* ; *Morley v. Walker (9th Cir. 1999) 175 F.3d 756, 759*

Qualified immunity protects government officials performing discretionary functions insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald (1982) 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396*

Municipality not entitled to qualified immunity from liability by asserting good faith of municipal officials as defense. *Owen v. City of Independence (1980) 445 U.S. 622, 638, 100 S. Ct. 1398, 63 L. Ed. 2d 673*

District court properly denied summary judgment brought by police officers regarding whether they were entitled to qualified immunity in action alleging officers violated plaintiffs' decedent's *Fourth Amendment* rights by entering and searching apartment, using unreasonable force, and intentionally or recklessly provoking confrontation and fatally shooting plaintiffs' decedent, where there were genuine issues of fact regarding whether officers violated plaintiffs'

decedent's *Fourth Amendment* rights, and those unresolved issues of fact were also material to proper determination of reasonableness of officers' belief in legality of their actions. *Espinosa v. City & County of San Francisco (2010) 598 F.3d 528, 533-539*

Law enforcement officers accused of failing to investigate accident allegedly caused by perpetrator's drunk driving or to make arrest due to race of victim, which was Korean, and that of perpetrator, which was Micronesian, like officers, were not entitled to qualified immunity, where, although individuals do not have constitutional right to have police arrest others who have victimized them, plaintiff's equal protection claim was that officers exercised discretion in deciding whom to arrest in racially discriminatory fashion, and diminished police services offered to plaintiff did not satisfy government's obligation to provide services on non-discriminatory basis; and where right to non-discriminatory administration of protective services was clearly established. *Ae Ja Elliot-Park v. Manglona (9th Cir. 2010) 592 F.3d 1003, 1006-1009*

In action against police officers based on officers' warrantless entry into plaintiffs' home, arrest of husband and wife, and tasing of wife, police officers were entitled to qualified immunity on claim of use of excessive force in tasing of wife, where, although Taser stun was serious intrusion into core of interests protected by *Fourth Amendment* and wife's actions were not serious crime, there was no *Fourth Amendment* violation because there was risk to immediate safety of officers and officers had important interest in obtaining immediate control, so that force used against wife was reasonable. Further, even if officers had used excessive force, it would not have been clear to any reasonable officer at time that use of Taser in situation they confronted was constitutionally impermissible. *Mattos v. Agarano (9th Cir. 2010) 590 F.3d 1082, 1085-1090*

In action alleging excessive force against police officer based on his deploying Taser against plaintiff during traffic stop for seatbelt infraction, police officer was not entitled to qualified immunity, where force used was excessive because Taser constituted intermediate, significant level of force that had to be justified by strong government interest compelling employment of that force, and plaintiff did not pose immediate threat to officers or bystanders despite his unusual behavior so there was no substantial government interest in using significant force to effect plaintiff's arrest for minor misdemeanor violations and intermediate level of force employed by officer was excessive in light of governmental interests at stake; and where reasonable officer in those circumstances would have known it was unreasonable to deploy intermediate force. *Bryan v. McPherson (9th Cir. 2010) 590 F.3d 767, 772-782*

Police officers were entitled to qualified immunity in connection with their decision not to release husband and wife who had been arrested for murder, despite anonymous tips that they had not committed murder, where anonymous tips, standing alone, were entitled to little weight, no witness who was willing to identify himself identified real murderer, and officers had multiple identifications of wife and one weak identification of husband; and where there was no similar case in which constitutional violation was found, and plaintiffs did not establish that given conflicting evidence officers possessed, only plainly incompetent officer or one intent on knowingly violating the law would have concluded probable cause had dissipated. *Ewing v. City of Stockton (9th Cir. 2010) 588 F.3d 1218, 1231-1232*

Police officer was entitled to qualified immunity in § 1983 action by 14-year-old boy accused of sexual abuse by 4-year-old child, brought after charges were dismissed, where, although child's statements were not sufficiently reliable to establish probable cause to seize plaintiff and officer could not rely solely on uncorroborated, inconsistent statements of very young child to establish probable cause to arrest plaintiff, reasonable officer in his position could have believed that statements by child established probable cause, given that he personally interviewed child and determined she was credible before he seized plaintiff. However, officer was not entitled to qualified immunity for claim that he coerced confession from plaintiff in violation of *Fifth Amendment*, where at time of interrogation, officer was on notice under clearly established law that if he failed to provide plaintiff with appropriate *Miranda* warnings or physically or psychologically coerced statement from him, use of confessions could ripen into *Fifth Amendment* violation. *Stoot v. City of Everett (9th Cir. 2009) 582 F.3d 910, 918-922, 927-928*

In *Bivens* action based on plaintiff's arrest and detention under federal material witness warrant, against former United States Attorney General, alleging that Attorney General developed, implemented and set into motion policy or practice under which FBI and DOJ would use material witness statute to arrest and detain terrorism suspects about whom they did not have sufficient evidence to arrest on criminal charges but wished to hold preventively or to investigate further, Attorney General was not entitled to qualified immunity, where plaintiff's *Fourth Amendment* rights were violated because material witness arrest was seizure without suspicion of wrongdoing and material witness statute was not used for its intended purpose, and, although at time no case had squarely confronted question of whether misuse of material witness statute to investigate suspects violated federal constitution, plaintiff's right not to be arrested as material witness in order to be investigated or preemptively detained was clearly established. al- *Kidd v. Ashcroft (9th Cir. 2009) 580 F.3d 949, 964-973*

Indian tribal officers were entitled to qualified immunity in § 1983 action based on their actions in arresting and citing plaintiff for state law violations at roadblock, where probable cause supported arrest and citation of plaintiff for state law violations in refusing to show his driver's license and refusal to obey lawful order of officer, and where even if roadblock were to be determined unconstitutional and stop was determined to be unlawful and to taint probable cause for the arrest, this principle was not clearly established law at time of arrest. *Bressi v. Ford (9th Cir. 2009) 575 F.3d 891, 898-899*

Police officers were entitled to qualified immunity, where officers could constitutionally detain occupants of home during probation compliance search, and where, assuming probationer was at home, plaintiffs were detained during legal search of their home, detention was not violation of their clearly established constitutional rights, *Sanchez v. Canales (9th Cir. 2009) 574 F.3d 1169, 1173-1175*

Police officers were not entitled to qualified immunity in § 1983 action based on their entering plaintiff's house without warrant because they believed he was in or on brink of diabetic coma, arresting him without probable cause, and using excessive force, where officers had no objectively reasonable basis to believe there was medical emergency or other immediate risk to life or limb; officers did not have probable cause to believe plaintiff had been driving under influence of alcohol and immediate entry was necessary to obtain evidence of his blood alcohol content before alcohol in his bloodstream metabolized based on uncorroborated statement by witness had she been involved in extremely minor car accident with plaintiff, she smelled alcohol on his breath, and he appeared intoxicated; and where contours of both emergency and exigent circumstances exceptions to warrant requirement were clearly established at time of entry. However, officer who did not participate in entry into home was entitled to qualified immunity, where officer waited in yard interviewing witness and did not participate in unconstitutional search in any fashion. Officers were also not entitled to qualified immunity with respect to unlawful arrest claim based on arrest inside plaintiff's home, where arrest within his home violated his *Fourth Amendment* rights by arrest without warrant without emergency or exigent circumstances and law was clearly established, but officers were entitled to qualified immunity with respect to effectuating citizen's arrest for hit-and-run accident, because although they violated plaintiff's *Fourth Amendment* rights because they did not have sufficient independent probable cause to arrest for hit-and-run, requirement that police officer establish independent probable cause before taking individuals into custody solely on basis of citizen's arrest was not clearly established. Officers were not entitled to qualified immunity on claim that they employed excessive force in executing arrest inside his house, where it was clearly established that use of drawn firearms as excessive force in effecting seizure as violation of *Fourth Amendment* was clearly established, and officers were fully aware at all times plaintiff did not pose threat to anyone, officers outnumbered plaintiff, he was unarmed, and any putative crime officers might have been investigating was misdemeanor. *Hopkins v. Bonvicino (9th Cir. 2009) 573 F.3d 752, 762-777*

In action by two men who served nearly 13 years in state prison for murder of which both were declared factually innocent by courts, alleging that police officers withheld exculpatory evidence and manufactured and presented perjured testimony during investigation and prosecution of plaintiffs, district court properly denied officers' motion for summary judgment on basis of absolute and/or qualified immunity, where *Brady* imposed duty on police officers as well as prosecutors to disclose exculpatory evidence, and evidence indicated that officers acted with reckless indifference to

plaintiffs' due process rights, and placing notes regarding witness's statements in police file did not fulfill their duty to disclose exculpatory information to prosecutor. Officers were not entitled to qualified immunity for delay in disclosing confession by another man to murder, where inspectors received *Mirandized* confession by someone who had been named by reliable witness, known to officers, who recounted events surrounding murder in detail, and whose account contradicted that of prosecution's witnesses, so that it would have been clear to reasonable officer that such material should have been disclosed to defense. Issues of fact precluded summary judgment on issue of whether inspectors were entitled to qualified immunity with respect to their request for reward from Secret Witness Program to encourage witnesses to come forward with information about murder, about which they never notified district attorney or defense, where evidence regarding reward was not undisputed, and inspectors' placement of request in their file did not satisfy their obligation to disclose evidence to district attorney. *Tennison v. City & County of San Francisco (9th Cir. 2009) 570 F.3d 1078, 1087-1090*

In action by mother and child for violation of *Fourth Amendment* rights based on in-school seizure and two-hour interrogation of child without warrant, exigent circumstances or parental consent by child protective services officer and law enforcement officer, officers were entitled to qualified immunity, where, although *Fourth Amendment* rights were violated by seizure and interrogation, Ninth Circuit precedent did not clearly establish that in-school seizure of student suspected of being victim of child sexual abuse could be subject to traditional *Fourth Amendment* protections, and where, applying the lesser "special needs" standard that officers incorrectly thought applied, their actions were not so clearly invalid as to strip them of immunity. However, child protective services officer was not entitled to qualified immunity on claim under *Fourteenth Amendment* premised on his decision to exclude mother from her daughters' physical examinations to determine whether they had been sexually abused as violating mother's substantive due process right to be there for her children and daughter's right to have their mother there when they faced potentially traumatic events, where parents and children maintained clearly established familial rights to be with each other during potentially traumatic medical examinations unless there was valid reason to exclude family members from exam room during medical procedure, and mother was ordered to leave premises entirely, depriving her of any opportunity to comfort her children even after examinations had been completed, and mother's and daughter's rights were clearly established at that time. *Greene v. Camreta (9th Cir. 2009) 588 F.3d 1011, 1030-1033, 1036*

Sheriff's officer who removed child from mother's and stepfather's home without warrant and placed her in protective custody based on interview with child after she had returned home after running away was entitled to qualified immunity on claim that he violated non-custodial father's associational rights, where existing case law referred only to removal of a child from custody of its parent, court had previously not defined type of custody, and custody was commonly thought of as referring only to "physical" custody, so that reasonable officer would not have known that failure to contact non-custodial father, who did not have physical custody, was clearly unlawful. *Burke v. County of Alameda (9th Cir. 2009) 586 F.3d 725, 733-734*

In action against city, mayor and city council members alleging violation of *First Amendment* rights based on ejection of plaintiff from two city council meetings, mayor and council members were entitled to qualified immunity, where chair had great discretion in enforcing reasonable rules for orderly conduct of meetings, and, although discretion was not unlimited and rules could not be enforced in order to suppress particular viewpoint, plaintiff was ejected after giving Nazi salute in protest of chair's enforcing time limitations and in support of disruption that had just occurred in back of meeting room, not on account of any permissible expression of point of view; and where, even if court was to hold plaintiff's *First Amendment* rights were violated, it would not have been clear to reasonable person in mayor and council's position ejection was unlawful, given difficult circumstances and threat of disorder presented by disruptions. Further, plaintiff's refusal to comply with ejection order established probable cause for his arrest, where even if ejection violated his rights, there would have been no basis for reasonable police officer to believe he was defying anything other than lawful order. *Norse v. City of Santa Cruz (9th Cir. 2009) 586 F.3d 697, 699-700*

Police detective and deputy district attorney were not entitled to qualified immunity in pretrial detainee's action based on detective's forcefully extracting DNA sample from detainee, with approval of deputy district attorney, to put sample

in cold case data bank, after he was shackled and chained to metal bar, without warrant or court order authorizing taking of sample, and despite fact that detainee was not under any suspicion of a crime for which DNA sample might have been justified, where forcible taking of DNA sample violated detainee's clearly established *Fourth Amendment* rights, and law enforcement officers could not conduct suspicionless search on pretrial detainee for reasons other than prison security, and where *Fourth Amendment* right was clearly established at time of search and no reasonable detective or prosecutor could have thought search was justified under law at time of search. *Friedman v. Boucher (9th Cir. 2009) 568 F.3d 1119, 1124-1132*

In former prisoner's *42 U.S.C. § 1983* complaint against former director of California Department of Corrections and warden of prison in which he was incarcerated, in which he alleged he was wrongfully imprisoned for additional 19 months after California appellate court overturned statute under which he was incarcerated and officials breached their alleged duties to monitor whether his sentence was void under invalidated statute and to take steps to effectuate his release, officials were entitled to qualified immunity, where prisoner could not show that any federal constitutional right that may have been violated by officials was clearly established in law, because prisoner offered no decisional, statutory, or other legal basis to suggest that reasonable official standing in officials' shoes would have had any way of knowing that by failing to personally check all California appellate court decisions for changes in law, failing to apply those changes to individual inmates statewide, and then failing to contact appropriate sentencing courts, official was violating prisoner's constitutional rights. *Cousins v. Lockyer (9th Cir. 2009) 568 F.3d 1063, 1069-1071*

In § 1983 action arising out of nighttime search and seizure, denial of qualified immunity to city and two deputy sheriffs on scope of search warrant to cover evidence of gang affiliation and all firearms and firearms-related items was error, where, although warrant may have been overbroad, deputies could reasonably defer to review of warrant by deputy district attorney and judge, and they reasonably relied on approval of warrant by deputy district attorney and judge. *Millender v. County of L.A. (9th Cir. 2009) 564 F.3d 1143, 1148-1151*

Police officers were entitled to qualified immunity on claims of unlawful detention and arrest of plaintiff, where officer had reasonable suspicion to order plaintiff to step out of his car after finding plaintiff asleep at wheel of car in parking lot, because to officer, who had 80 hours of training in drug influence recognition, facts taken together amounted to reasonable suspicion that plaintiff was under influence of illegal stimulants, and officer could legally detain plaintiff by ordering him out of his vehicle to further investigate; where, in considering totality of circumstances, plaintiff's innocent explanations for his odd behavior could not eliminate suspicious facts from probable cause calculus for arrest, and objective facts known to officer when he ordered plaintiff out of his car, together with information officer obtained after plaintiff was out of his car, could have led reasonable officer confronted with same situation to believe probable cause existed to arrest plaintiff; where officers' impoundment of plaintiff's car for its safekeeping was reasonable under community caretaking doctrine. However, officer was not entitled to qualified immunity regarding pat-down search of plaintiff as violating *Fourth Amendment* because officer's only justification for pat-down search was conclusory reference to "officer safety," and officer failed to allege specific facts establishing reasonable suspicion that plaintiff was armed and dangerous and at the time of pat-down, it was clearly established that every pat-down was unreasonable unless supported by officer's reasonable suspicion that person to be frisked was armed and dangerous. *Ramirez v. City of Buena Park (9th Cir. 2009) 560 F.3d 1012, 1020-1025*

In action by residents of house shared with couple who operated house of prostitution, district court erred by denying police officer who obtained and executed search warrant, where officer's belief that probable cause existed to search home was not unreasonable, given police investigation indicating that business operated out of house served as house of prostitution; and where, although better warrant application would have explicitly stated that in officer's investigative experience, she knew that owners of prostitution houses often kept evidence of illegal businesses, including money from businesses, in their homes, officer's affidavit was not so lacking in indicia of probable cause as to render reasonable officer's belief in existence of probable cause unreasonable. *Johnson v. Walton (9th Cir. 2009) 558 F.3d 1106, 1110-1112*

In action under *42 U.S.C. § 1983* alleging police officers lacked probable cause to arrest plaintiff on suspicion of passing counterfeit bill, officers were entitled to qualified immunity, where it was not clearly established that evidence beyond tender of counterfeit bill was required for probable cause, and, assuming tender was enough to establish probable cause, officers' belief that bill was fake was reasonable, because bill looked odd and lacked many modern security features. *Rodis v. City and County of San Francisco (9th Cir. 2009) 558 F.3d 964, 968-971*

District attorney and members of district attorney's office were properly denied qualified immunity for actions taken in alleged retaliation against assistant district attorney in violation of his *First Amendment* rights, where assistant district attorney had personal constitutional interest in his own speech and in his attorney's interview with newspaper, where allegations demonstrated that assistant district attorney's *First Amendment* rights were violated with respect to both his own comments and his attorney's statements on his behalf to press, and where his rights were clearly established with respect to speech pursuant to his official employment duties and with respect to his attorney's speech to press. *Eng v. Cooley (9th Cir. 2009) 552 F.3d 1062, 1067-1076*

Deputy sheriff was not entitled to qualified immunity for violating plaintiffs' *Fourth Amendment* rights by entering and searching their home without warrant to look for parolee who did not live there, where plaintiffs' constitutional rights were clearly established at time of violation, because police could search residence for parolee without warrant only if their belief that parolee lived there was based on equivalent of probable cause, which deputy did not have, and, although there was inconsistency in language court used then to describe standard for deputy's behavior, however standard was described, his conduct fell well below it. *Cuevas v. De Roco (9th Cir. 2008) 531 F.3d 726, 735-736*

Detectives who arrested plaintiff without probable cause were not protected by qualified immunity, where in light of arguably suggestive photo array, witness's merely comparative identification six weeks after shooting, lack of direct evidence that plaintiff was member of gang, lack of physical evidence tying plaintiff to shooting, fact that plaintiff did not attempt to flee when detectives approached him, and lack of evidence third male passenger in car acted in concert with shooter with conscious disregard for human life, material issue of fact existed as to whether reasonable officer would have relied on information in detectives' possession without further verification. However, detective who was told by another detective that witness had identified plaintiff from photo array and who, because he was not shown witness's written statement on photo array, believed witness had positively identified Torres, was entitled to qualified immunity, where reasonable officer in his position would have believed he had probable cause to arrest plaintiff. *Torres v. City of Los Angeles (9th Cir. 2008) 548 F.3d 1197, 1210-1212*

In action under *42 U.S.C. § 1983* by parents for violation of their *Fourteenth Amendment* due process right to associate with their son, who was killed by defendant police officer, appropriate standard of culpability to apply to conduct of police officer was whether officer's behavior met shocks-the-conscience standard by showing that he acted with purpose to harm plaintiffs' decedent for reasons unrelated to legitimate law enforcement objectives, where approximately five-minute altercation between plaintiffs' decedent and officer that ended in plaintiffs' decedent's shooting was fast paced, quickly evolving and escalating, prompting repeated split-second decisions. Because standard was clearly established at time of shooting, facts suggesting that officer's own conduct created and agitated escalating situation and his reactions were disproportionate to situation he faced were more relevant to district court's determination on remand whether officer was entitled to qualified immunity or whether plaintiffs could show officer's purpose was to harm plaintiffs' decedent for reasons unrelated to legitimate law enforcement objectives. *Porter v. Osborn (9th Cir. 2008) 546 F.3d 1131, 1136-1142*

In action by owners of assisted living facilities for elderly for violation of *First Amendment* rights by state officials, owner's pursuit of administrative appeal of fine levied against one facility, legislative lobbying efforts to acquire license for another boarding home facility, advocacy related to his interpretation of building codes that would have permitted another facility to be grandfathered out of sprinkler installation requirements, statement to press after license revocation, and pursuit of both administrative review and court-ordered stay of summary revocation of his license fell within *First Amendment's* protection of rights of regulated entities to free speech and to petition for redress of grievances, and

defendants, who were state officials, were not entitled to qualified immunity, where relevant law was clearly established at time of alleged violation. *CarePartners LLC v. Lashway (9th Cir. 2008) 545 F.3d 867, 876-884*

Although it was clear sheriff's deputies could not apply time, place, or manner restriction on speech to plaintiffs' activities in driving around middle school in truck displaying large, graphic photographs of first-term aborted fetuses on sides of truck and in security vehicle by detaining them under *Cal. Pen. Code § 626.8*, prohibiting disruptive entry onto school grounds, without advancing any significant state interest by doing so, deputies could have made reasonable mistake in believing § 626.8 applied to plaintiffs' conduct and thus advanced significant state interest, entitling them to qualified immunity, where there was no case law determining whether § 626.8 applied to circumstances deputies faced, and where there was some question whether heckler's veto consideration applied when target audience consisted of children, so that court could not conclude law was sufficiently clear that reasonable officer would know it was unlawful to request plaintiffs to cease driving their truck around area. However, deputies were not entitled to qualified immunity on *Fourth Amendment* issues raised by detention of plaintiffs and search of security vehicle, where, as to detention, it was overly long, deputies' constitutional duty to act diligently and pursue means of investigation likely to confirm or dispel their suspicions quickly was clearly established on date of detention, and it should have been readily apparent to reasonable officer that *Cal. Pen. Code § 626.8* provided no basis for detention; and where, as to search, deputies acted under authority of *Cal. Veh. Code § 2806* and case law clearly warned that police could only search vehicle under § 2806 when there was reasonable cause to believe inspection could uncover evidence of either potentially dangerous conditions or more serious code violations, and entering vehicle to turn on lights was not likely to provide information about either. *Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dept. (9th Cir. 2008) 533 F.3d 780, 793-794, 798*

Although police officers violated plaintiff's *First Amendment* rights by arresting him, impounding his van and forcing him to remove political messages painted on van, they were entitled to qualified immunity, where in no case had court held on identical or closely comparable facts that speech was protected by *First Amendment*, because in May 2004, when officers acted, what might previously have been understood as relatively harmless talk might, in immediate aftermath of September 11, have been understood to constitute real threat; further, caller who alerted police to presence of van was clearly worried by language on van and by threat it or its owner might pose, and there was evidence police captain and sergeant felt van and its owner were making true threat, so that court could not conclude that at time of incident, all reasonable officers would have concluded that speech was protected by the *First Amendment*. *Fogel v. Collins (9th Cir. 2008) 531 F.3d 824, 833-834*

In § 1983 action for violation of *First* and *Fourth Amendment* rights by man arrested for threatening police sergeant and chief of police based on confrontation with them, sergeant and chief were not entitled to qualified immunity, where man was arrested in retaliation for his speech without probable cause; where, as to sergeant, reasonable official in his position would have understood that arresting individual in retaliation for protected speech was constitutionally impermissible and would have known that warrant application and criminal complaint were objectively unsupported by probable cause; and where, as to chief of police, who did not sign or prepare police report, criminal complaint, or declaration submitted to secure warrant, it should have been clear to him there was no probable cause to arrest yet he failed to do anything to stop process that led to arrest, but instead abetted it and threatened chamber of commerce members when they attempted to get involved. *Beck v. City of Upland (9th Cir. 2008) 527 F.3d 853, 870-872*

Although towing of car without notice to owner violated her due process rights, police officer who ordered towing was entitled to qualified immunity, where officer did not violate owner's clearly established right, where constitutional requirement at issue, i.e., that pre-towing notice be given before car with valid planned non-operation certificate could be removed from parking lot matching owner's address, was not clearly established at time of officer's actions, because, although due process generally requires notice before government may deprive citizen of property, case law recognizes many exceptions, and courts had never before held municipalities must always notify vehicle owners before towing. However, private towing company that actually towed vehicle could not assert qualified immunity because that defense is generally not available to private defendants in § 1983 lawsuits. *Clement v. City of Glendale (9th Cir. 2008) 518*

F.3d 1090, 1096

Highway patrol officer, deputy district attorney, and investigator employed by different county's district attorney's office were qualifiedly immune in action by partnership under *42 U.S.C. § 1983* based on their preparation, review and execution of one search warrant even though Ninth Circuit previously held both warrants lacked probable cause, violating plaintiffs' *Fourth Amendment* rights, where all defendants reasonably relied on warrant because reasonable minds could have viewed warrant as facially valid; although highway patrol officer and deputy district attorney were similarly entitled to qualified immunity for second warrant, which expanded temporal scope of first warrant, investigator was not, where, given his leadership role in overall investigation, investigator acted unreasonably when he relied on second warrant without first ensuring warrant was facially valid, because reasonable officer making such inquiry would have concluded that discovery of ledger and several checks predating allegedly fraudulent activity by five years did not provide sufficient probable cause to search for documents. *KRL v. Moore (9th Cir. 2008) 512 F.3d 1184, 1189-1193*

Police officer involved in high-speed chase was qualifiedly immune in § 1983 action by driver of car sideswiped by officer in course of chase, where intent to harm standard applies to all high-speed police chases, and officer did not act with requisite intent, even though his decision to join pursuit may have been ill-advised as well as his execution, because poor judgment alone in high-speed chase did not violate *Fourteenth Amendment*. *Bingue v. Prunchak (9th Cir. 2008) 512 F.3d 1169, 1174-1178*

Police officer who was called to home of plaintiff's son after son shot at departing party guests and who fatally shot son was entitled to qualified immunity in mother's action under *42 U.S.C. § 1983* for use of allegedly excessive deadly force, where officer's conduct met objective reasonableness standard because prior to taking fatal shot, officer had observed son's agitated behavior, heard him threaten to shoot police, observed him carrying 22-caliber rifle, and knew he had previously shot at car full of people and wounded two people in car earlier that night, so that when fellow officers radioed that son was yelling threats at them and then radioed that son was shooting at them, officer had probable cause to believe son posed an immediate danger to officers; and where there were multiple eyewitnesses and report that fairly accurately recorded SWAT team's activities on night of son's death. *Long v. City & County of Honolulu (9th Cir. 2007) 511 F.3d 901, 905-907*

Police officer who arrested female schoolteacher for allegedly molesting female student was qualifiedly immune from teacher's § 1983 action and entitled to summary judgment, where officer had probable cause for arrest based on student's allegations of teacher's misconduct against her, and his experience and special training in dealing with sexual abuse of children and advanced interviewing in evaluating student's story. *John v. City of El Monte (9th Cir. 2007) 505 F.3d 907, 910-913*

State secretary of state was entitled to qualified immunity for threatened criminal prosecution of owners of websites offering voters mechanisms for vote swapping and vote exchange, where, although he violated their *First Amendment* rights, application of *First Amendment* doctrine to vote swapping was not clearly established at time. *Porter v. Bowen (9th Cir. 2007) 496 F.3d 1009, 1018-1026*

Police officers were not entitled to qualified immunity for arrest and search of plaintiff, where officers did not have probably cause for arrest for trespass and reasonable officer would not have believed he had violated or was about to violate statute, and there was no probable cause to believe he had violated any other statute; and where reasonable jury could find officers strip searched plaintiff and violated his *Fourth Amendment* rights, because they did not have reasonable suspicion for search based on minor trespass, and no reasonable officer could have believed police station search as described by plaintiff at trial to be lawful. *Edgerly v. City & County of San Francisco (9th Cir. 2007) 495 F.3d 645, 651-657*

State highway patrol officer was not entitled to qualified immunity in parents' action under *42 U.S.C. § 1983* based on

officer's unauthorized chase and shooting of their son, which were in violation of department policy, when, on facts presented by parents and disciplinary report of highway patrol department itself, no officer acting reasonably in circumstances could have believed he could use deadly force to apprehend son. *Adams v. Speers (9th Cir. 2007) 473 F.3d 989, 993-994*

Employees of district attorney's office and county and police officer and city were not entitled to qualified immunity in § 1983 action by attorney based on judicial deception, based on wiretap interception of phone call from client to his office and then concealment of wiretap through "handoff" procedure, by which investigative unit that obtained wiretap order and conducted surveillance transmitted information to another unit without expressly stating delivering unit obtained information via wiretap, which executes arrest after observing illicit conduct to obtain independent probable cause, where attorney alleged facts showing that individual defendants violated his *Fourth Amendment* rights, pursuant to official policy, custom, or practice of city and county of Los Angeles, and contours of *Fourth Amendment* right against judicial deception were clearly established. *Whitaker v. Garcetti (9th Cir. 2007) 486 F.3d 572, 581-582*

Police officers were entitled to qualified immunity in § 1983 action for unlawful arrest, where officers had probable cause to arrest because they had probable cause to believe he was trespassing and prudent person would have believed he was trespassing; and where, even absent probable cause, law was not clearly established because there was no state case law specifically holding that previous, relatively recent, banishment from private property could not serve as requisite request to leave under trespassing statute. Officers were not entitled to qualified immunity as to excessive force claim, where there were genuine issues of material fact regarding use of gang tackling, use of hobble restraints, and one officer's punching, and state of law was clearly established at time of arrest and gave arresting officers sufficiently fair notice their conduct could have been unconstitutional. *Blankenhorn v. City of Orange (9th Cir. 2007) 485 F.3d 463, 475-481*

State troopers were not entitled to qualified immunity in § 1983 action based on their pulling plaintiff over on suspicion of having invalid license plates and then doing a pat-down search in which troopers allegedly used excessive force, where no reasonable officer could have concluded that individual suspected of license plate violation posed threat that would justify slamming him against hood of a car; plaintiff did not take swing at officers, nor did officers detect suspicious bulges or metallic glints on his person; plaintiff did not resist officers or flee; removal of 20 to 25 pens and pencils from plaintiff's person did not mean he posed immediate threat as pens and pencils have legitimate, non-violent uses; use of force was not justified because plaintiff carried firearm in his car because they were unaware of fact when they forced him onto hood of their car and he was well away from his vehicle and unable to access weapon; plaintiff was neither threatening nor physically abusive and even if he was adamant in his belief that he was not required to register his vehicle with state, which was mistake of law, attitude did not justify deliberate infliction of pain. Although troopers claimed they feared for their safety based on prior experiences with plaintiff, they pointed to no facts justifying such fear. Further, reasonable officer would have known that use of force here was excessive. *Winterrowd v. Nelson (9th Cir. 2007) 480 F.3d 1181, 1183-1186*

Police officer was not entitled to qualified immunity in action under *42 U.S.C. § 1983* for use of allegedly unreasonable and excessive force, where force used by officer was severe, crime committed was minor, danger to officer was minimal as was risk of flight, and there were many less abusive means through which officer could have accomplished his objective, so that weighing severity of force used against governmental interests at stake, facts at issue demonstrate that officer's actions were unreasonable, violating plaintiff's *Fourth Amendment* rights; and where reasonable officer in officer's position would have known his conduct constituted excessive force. *Davis v. City of Las Vegas (9th Cir. 2007) 478 F.3d 1048, 1053-1058*

Law enforcement officer was entitled to qualified immunity because plaintiff failed to establish violation of *Fourth Amendment* rights by officer's obtaining warrant and seizing still camera without probable cause, where, although federal court was not bound by state court's finding that probable cause did not exist because it occurred in case state filed against plaintiff and officer lacked privity with state, warrant provided substantial basis for conclusion plaintiff had

violated state law and evidence of violation was in his office. There was probable cause to seize still camera because affidavit provided substantial basis for believing it constituted or contained evidence of alleged crime. Further, officer was entitled to qualified immunity in his defense of claim that he retaliated against plaintiff for filing lawsuit against county and another officer, where, although searching office and seizing materials to chill or silence plaintiff demonstrated retaliation in violation of *First Amendment*, plaintiff was not required to plead absence of probable cause to state claim for retaliation, and plaintiff stated all elements necessary for retaliation claim, right to be free of police action motivated by retaliatory animus but for which there was probable cause was not clearly established at time of search. *Skoog v. County of Clackamas (9th Cir. 2006) 469 F.3d 1221, 1229-1235*

In *42 U.S. C. § 1983* action based on county law enforcement officers seeking and obtaining enhancement of bail after plaintiff was arrested on domestic violence charge, district court properly found that officers were entitled to qualified immunity, where plaintiff failed to establish triable issue of fact regarding whether his bail was unconstitutionally excessive because he failed to adduce evidence of reason for or motive behind enhancement of bail. Plaintiff could not demonstrate that officers were actual and proximate cause of bail enhancement, and law at time was not clearly established such that reasonable peace officer officers' position would have understood that conduct violated *Eighth Amendment*. *Galen v. County of Los Angeles (9th Cir. 2006) 468 F.3d 563, 569-576*

Police detective was entitled to qualified immunity on plaintiff's claims of excessive force and illegal arrest, when, despite government's concession of lack of probable cause so that arrest was unconstitutional, reasonable officer in detective's position would have believed he had probable cause to arrest plaintiff and use force in doing so based on particularized facts known by officers at time of encounter. Other detectives were entitled to qualified immunity, when although *Fed. R. Crim. P. 41(d)* required federal officers, absent exigent circumstances, to deliver warrant at outset of search and detectives commenced search after receiving telephonic confirmation but before physical delivery of warrant, officers were not federal officers. Further, even if Rule 41 applied to search, at that time failure to serve warrant at outset of search was not clearly established constitutional violation. Lastly, reasonable officer in detective's position would not have been on notice that plaintiff's girlfriend's consent to search apartment they shared was in any way involuntary. *Burrell v. McIlroy (9th Cir. 2006) 464 F.3d 853, 857-859*

In defending against motion for summary judgment on his *Bivens* claims, 11-year-old boy raised genuine issues of material fact regarding whether federal and state police officers' conduct violated his constitutional rights by alleging that individual defendants used excessive force when they pointed gun at his head and pointed guns at him for duration of incident involving arrest of both his parents, and that they subjected him to unreasonable detention. Reasonable officer would have known that force used against him violated his constitutional rights, and, further, detentions of child raised particular concerns to be assessed with other circumstances, and totality of circumstances supported conclusion that not only was boy's detention unreasonable, but reasonable officer would have known 11-year-old child who was unarmed, barefoot, vastly outnumbered, and not resisting arrest or attempting to flee should not have been kept in handcuffs for 15 to 20 additional minutes. *Tekle v. United States (9th Cir. 2006) 457 F.3d 1088, 1094-1100*

Police officer was entitled to qualified immunity in action alleging deprivation of mother's substantive due process rights based on his intervention in child custody and visitation dispute between parents, because no deprivation of constitutional right was alleged. Although mother, as non-custodial parent with court-ordered visitation rights, had liberty interest in companionship, care, custody, and management of child, it was lesser in magnitude than that of parent with full legal custody, and deprivation of mother's liberty interest in custody over child of single week period in long-running custody dispute did not rise to level of federal constitutional violation. Officer's actions were not conscience shocking as matter of law, because his interpretation of visitation order and decision to transfer child to father was objectively reasonable. Mother also failed to allege procedural due process violation by alleging lack of pre-deprivation hearing, because no pre-deprivation hearing was required before mother could be deprived of week of visitation and available state procedures were sufficient to satisfy requirements of due process. *Brittain v. Hansen (9th Cir. 2006) 451 F.3d 982, 987-1002*

In *Bivens* action based on violation of *Fourth Amendment* rights by false arrest and detention of resident alien for deportation by immigration officer on his arrival back in United States, officer was not entitled to qualified immunity. Officer had no basis for detaining plaintiff nor could she maintain she reasonably could have so believed at time given that immigration judge and BIA held plaintiff was not arriving alien as defined by INA, applicable regulations, and case law, and officer took plaintiff into custody under authority of expedited removal statute under which detention was valid only if plaintiff was arriving alien. Even if officer discovered at time that plaintiff's legalization applications were fraudulent, she could not have used information to remove him without breaking law. Further, under circumstances, it would have been clear to reasonable immigration officer that detaining plaintiff would violate his *Fourth Amendment* rights. *Sissoko v. Rocha (9th Cir. 2006) 440 F.3d 1145, 1164-1168*

Trial court properly denied motion for summary judgment by two deputy sheriffs asserting qualified immunity, when deputies learned that plaintiff was on parole and had outstanding arrest warrant only after searching and detaining him and existence of parole condition or outstanding bench warrant did not retroactively justify arrest and search. In addition, officers did not have reasonable suspicionbased on plaintiff's nervous behavior in high crime area. Plaintiff's constitutional rights when deputies conducted suspicionless search and seizure were clearly established and unlawfulness of deputies' conduct was apparent in light of preexisting law. *Moreno v. Baca (9th Cir. 2005) 431 F.3d 633, 638-643*

In *42 U.S.C. § 1983* action based on murder and attempted murder of mother and father after they warned police that they could be harmed by next door neighbor based on allegations that neighbor had molested their daughter, police officer was not entitled to qualified immunity, when officer violated constitutional rights because his affirmative actions placed family in situation of danger greater than they would have faced had he not acted at all and he acted with deliberate indifference to family's safety by failing to recognize obvious consequences of his actions, and when constitutional right violated by officer's conduct was clearly established at time of events. *Kennedy v. Ridgefield City (9th Cir. 2005) 411 F.3d 1134, 1141-1145*

Because deputies did not exceed constitutional limits on use of deadly force when they shot plaintiff, and because, even if their actions did violate plaintiff's constitutional rights, reasonable law enforcement officer in their position at time would not have known that shooting plaintiff was violation of clearly established law, deputies were entitled to qualified immunity. *Blanford v. Sacramento County (9th Cir. 2005) 406 F.3d 1110, 1114-1119*

District court properly denied qualified immunity to county officials who had applied for and executed search warrant by invading home in early morning, when there was no exigency because nothing in record indicated officers had reason to believe plaintiff would resist or flee or that plaintiffs would be armed, so they had no reason not to identify themselves before giving orders to plaintiffs; when officers stated no fact justifying their batteries of plaintiffs; when affidavit applying for search warrant could not be purged of lies and still be sufficient to justify issuance of warrant; and when there was no immunity for conspiracy to violate rights by lying to magistrate. *Baldwin v. Placer County (9th Cir. 2005) 405 F.3d 778, 781-782*

Police officers who seized "truckloads" of personal property, including numerous motorcycles and piece of concrete, for sole purpose of proving Hells Angels was gang, and deputy sheriff who instructed them to do so, were not entitled to qualified immunity, when seizure was unreasonable execution of search warrants in violation of *Fourth Amendment*, and at time searches were carried out, law was sufficiently clear to put reasonable officer on fair notice conduct was unlawful. Further, shooting dogs at residences was unreasonable seizure and unreasonable execution of search warrants in violation of *Fourth Amendment*, when exigent circumstances did not exist at either residence, as officers had one week to consider options and tactics available for encounter with dogs but failed to develop realistic plan for incapacitating dogs other than shooting them, and unlawfulness of conduct would have been apparent to reasonable officer at time officers planned for serving search warrants. *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose (9th Cir. 2005) 402 F.3d 962, 971-978*

In action under *42 U.S.C. § 1983* for violation of *Fourth* and *Fourteenth Amendments* based on repossession of automobile, police officers were entitled to qualified immunity because there was no violation of constitutional right, when officers were summoned to scene after breach of peace was in progress, officers heard conflicting stories as to whether repossessor had taken effective possession of car before breach, and both parties insisted on citizen's arrest of other party, and officers had little means to resolve dispute over possession of car at scene. Further, officers were entitled to qualified immunity because they could not have known they were violating plaintiffs' clearly established constitutional rights, when officers could not have determined at what point in middle of repossession they deprived plaintiff of her property without due process of law. *Meyers v. Redwood City (9th Cir. 2005) 400 F.3d 765, 770-774*

District court properly granted summary judgment to prison officials on basis of qualified immunity on claim that ban on non-subscription bulk mail and catalogs violated inmates' *First* and *Fourteenth Amendment* rights, because officials' actions did not violate clearly established law. Further, district court properly denied prison officials' motion for summary judgment based on qualified immunity regarding claim that department's policy for handling third-party legal materials violated constitutional rights, because court was required to accept as true allegations that prison officials applied policy so as to discriminate against plaintiff on basis of content of legal materials. *Prison Legal News v. Lehman (9th Cir. 2005) 397 F.3d 692, 701-703*

In civil rights action based on arrest under state's privacy law, police chief was not entitled to qualified immunity, when arrest based on videotaping of police chief's communications on his police radio was not violation of privacy law, and law was sufficiently established so that chief reasonably should have known that he had no lawful basis to arrest plaintiff. *Johnson v. Hawe (9th Cir. 2004) 388 F.3d 676, 681-685*

District attorney was entitled to qualified immunity in *42 U.S.C. § 1983* action based on his approval of search warrant, when although highway patrol officer's affidavit did not constitute probable cause to seize documents over 10-year period and district attorney's approval of invalid warrant led directly to search that violated plaintiffs' *Fourth Amendment* rights, approval of search warrant was reasonable. Investigator was not entitled to qualified immunity because investigator had greater responsibility for ensuring warrant was not defective and no reasonable officer could have concluded that discovery of 1990 ledger and several checks showed that plaintiff had been primarily engaged in fraudulent activity since 1990; fact that judge and prosecutor approved warrant does not make investigator's reliance on it reasonable. District attorney and investigator were entitled to qualified immunity based on another search warrant, because although reasonable official with knowledge of background of private citizen on whose accusations affidavit was partially based may have questioned citizen's reliability, highway patrol officer's affidavit indicated that he and investigator investigated and corroborated many of citizen's statements regarding alleged dumping with eyewitness whose reliability was not challenged by plaintiffs, and investigator had no role in preparation of search warrant or its execution. *KRL v. Moore (9th Cir. 2004) 384 F.3d 1105, 1115-1118*

Police officers who conducted parole search of home of gang member's girlfriend and their infant son while gang member was in custody were not entitled to qualified immunity, when warrantless search of girlfriend's home was unconstitutional because officers did not have reasonable grounds to believe gang member lived or was present at residence, and officers conducted search in unreasonable and harassing manner. Officer in training was entitled to qualified immunity, because he did not participate in search of home but remained behind house throughout, which was reasonable under circumstances. Officer who aimed gun at five-week-old infant not entitled to qualified immunity on claim of use of excessive force, when no reasonable officer could have believed that pointing gun at baby was reasonable during course of non-exigent and unconstitutional search. *Motley v. Parks (9th Cir. 2004) 383 F.3d 1058, 1065-1072*

Police chief was not entitled to qualified immunity in action by arrestee for violation of *Fourth Amendment* rights, for his arrest for violation of state's privacy act, when it was clearly established under state law at time of arrest that recording police officer in performance of his public duties was not violation of privacy act, and it was unreasonable for police chief to believe otherwise. Further, because police chief could not have had reasonable expectation of privacy in

communications by others over police radio dispatch system, which was basis for privacy act arrest, arrest violated *Fourth Amendment* right to be free of arrest without probable cause. *Johnson v. Hawe (9th Cir. 2004) 382 F.3d 944, 948-953*

In action by development company under *42 U.S.C. § 1983*, alleging that two employees of California Regional Water Quality Control Board subjected them to selective and overzealous regulatory oversight in violation of their constitutional rights to equal protection and substantive due process, district court properly granted summary judgment in favor of employees on ground of qualified immunity as to all claims but one, when there was no triable issue of material fact that constitutional violation had been committed. However, because development company presented evidence that one employee may have been motivated by personal animus, appellate court reversed grant of summary judgment as to "class of one" equal protection claim against that employee. *Squaw Valley Development Co. v. Goldberg (9th Cir. 2004) 375 F.3d 936, 943-950*

Federal Park Service employees were entitled to qualified immunity in *Bivens* action based on denial of march permit to protestors without concomitant promise on their part not to engage in civil disobedience and dispersal of prayer service that began as alternative to march, when before opinion of Ninth Circuit in reversing federal convictions involving same parties and same facts, contours of constitutional right violated by defendants' denial of permit were not sufficiently clear that reasonable official would have understood that what he was doing violated that right; and when as to dispersal of prayer service, although location restriction on prayer service was unconstitutional because dispersal of prayer service due to refusal to retreat to designated *First Amendment* area was not sufficiently narrowly tailored, law at time of events in question was not sufficiently clear that reasonable official would understand that what he was doing violated that right because although defendants were wrong in their assumption that terminating prayer service was narrowly tailored response to threatened governmental interests, their error was not unreasonable given law as clearly established at time. *Galvin v. Hay (9th Cir. 2004) 374 F.3d 739, 745-757*

In action by black inmate alleging claim for denial of equal protection by alleging that during three prison lockdowns resulting from racially related violence involving black inmates, he was not allowed to resume his prison job on critical-worker status until after similarly situated inmates of other races were, defendants were entitled to qualified immunity. While it was well-established that racial discrimination in assignment of prison jobs is unconstitutional, it was not clearly established that such race-based differentiation was unconstitutional in context of prisonwide lockdown instituted in response to gang- or race-based violence. *Walker v. Gomez (9th Cir. 2004) 370 F.3d 969, 974-978*

On motion for summary judgment based on official immunity, district court is not required or even allowed to assume challenged factual allegations in plaintiff's complaint are true, irrespective of evidentiary support, if defendant makes properly supported motion for summary judgment based on official immunity that would, on motion for summary judgment in any other civil case, require plaintiff to produce evidence in opposition. Thus, in § 1983 action based on falsification of evidence by district attorney and district attorney investigator leading to plaintiffs' convictions for murder, as to which California state court granted plaintiffs' habeas corpus petitions, because federal district court misunderstood evidentiary standard in granting defendants' motions for summary judgment based on official immunity by not ruling on admissibility of plaintiffs' evidence at summary judgment, but simply assuming factual allegations in complaint were true without regard to whether they had evidentiary support, appellate court vacated district court's ruling and remanded for further proceedings. District court's misunderstanding of evidentiary standard may have led it to be more restrictive in discovery it allowed plaintiffs than it would have been if it had properly understood standard, and court may have led plaintiffs to seek to discover and introduce less evidence they otherwise would have. *Butler v. San Diego Dist. Attorney's Office (9th Cir. 2004) 370 F.3d 956, 961-964*

In action by arrestee against county and deputy sheriff, trial court erred in finding deputy had qualified immunity and granting defendants summary judgment, when, if plaintiff's version of facts were believed, he was arrested without probable cause, arrest was accomplished by violence, and continuing restraint used excessive force, all in violation of *Fourth Amendment*. Further, on plaintiff's version of facts, reasonable officer would know arrest would be unlawful

under circumstances, but trial court, relying on defendants' statement of fact, decided several disputed issues of fact, including nature of plaintiff's conduct before police came, knowledge deputy had of any conduct justifying arrest, and information given deputy as to effect of handcuffs on plaintiff, and trial court omitted any findings as to violence of arrest as alleged by plaintiff. *Wall v. County of Orange (9th Cir. 2004) 364 F.3d 1107, 1110-1112*

In *Bivens* action against F.B.I. agent for arrest without probable cause in violation of *Fourth Amendment* based on agent's allegedly causing brother of national fugitive to be arrested under warrant agent allegedly knew was for fugitive under one of his aliases, trial court properly denied agent qualified immunity, when plaintiff presented evidence that in light of facts and circumstances confronting agent, agent actually knew that warrant applied to fugitive, not to plaintiff, which district court found presented genuine issue of material fact and knowingly arresting wrong person pursuant to facially valid warrant issued for someone else violates rights guaranteed by *Fourth Amendment*, and when no reasonable officer would believe that he or she is entitled knowingly to arrest wrong person pursuant to faciallyvalid warrant officer knows was issued for someone else. *Lee v. Gregory (9th Cir. 2004) 363 F.3d 931, 934-936*

In § 1983 action by public school special education teacher against school and district officials based on refusal to renew her contract, which teacher alleged was in retaliation for her exercise of *First Amendment* rights, magistrate judge erred in holding, despite jury verdict in teacher's favor, that teacher's supervisor and her supervisor's supervisor were entitled to qualified immunity. Jury was properly instructed as to showing required of defendants and given appropriate list of factors to consider in making this determination, and jury's verdict in teacher's favor necessarily reflected finding that any disruption her comments might have aroused was outweighed by her interest in free expression, so that magistrate judge should only have found defendants were protected by qualified immunity if it was quite clear jury reached seriously erroneous result, and jury's finding could not possibly be deemed seriously erroneous because of strong interest in allowing teacher to express herself and school district presented little evidence of disruption or other actual injury. Further, magistrate judge erred in concluding teacher's *First Amendment* rights were not clearly established. *Settlegoode v. Portland Public Schools (9th Cir. 2004) 362 F.3d 1118, 1125-1129*

District attorney and supervisory employees of district attorney's office were not entitled to qualified immunity on deputy district attorney's claim of adverse employment actions in retaliation for his exercise of his *First Amendment* free speech rights, when employee's speech addressed matter of public concern and employee's interest in expressing himself outweighed government's interests in promoting workplace efficiency and avoiding workplace disruption, when employee's *First Amendment* rights were clearly established, and when officials' retaliatory acts were not objectively reasonable. *Ceballos v. Garcetti (9th Cir. 2004) 361 F.3d 1168, 1172-1182*

United States Park Police officers were qualifiedly immune in *Bivens* action based on their refusal to issue permit to protestors without protestors agreeing they would not engage in civil disobedience, when, although they were mistaken on law under *First Amendment*, law on issue was not clearly established at time defendants determined to impose condition. Officers were also entitled to qualified immunity on claims based on their dispersal of prayer service to " *First Amendment*" area rather than allowing protestors to remain in area they chose despite absence of on-site audience because of significance of area itself, when, although requirement for protestors to use " *First Amendment* area" did burden speech to substantially greater degree than needed to achieve government's purposes thus violating protestors' *First Amendment* rights, law of "ample alternatives" in absence of audience was not clearly established at time officers imposed requirement. *Galvin v. Hay (9th Cir. 2004) 361 F.3d 1134, 1139-1151 , amended by 374 F.3d 739*

Trial court properly found police officers entitled to qualified immunity in action alleging violations of *Fourth Amendment* based on warrantless entry into home to check on welfare of occupant and alleged failure to knock and announce their presence as they entered, when "emergency aid" exception to warrant requirement was applicable so that officers did not violate constitutional right, because officers had reasonable grounds to believe there existed immediate need for their assistance, search was not motivated by intent to arrest or to seize evidence, and officers had reasonable basis for associating potential emergency with house. *Martin v. City of Oceanside (9th Cir. 2004) 360 F.3d 1078, 1081-1084*

FBI agent was entitled to qualified immunity in action by motorcycle association based on search warrant and subsequent federal administrative subpoena for items seized in execution of search warrant and alleged disclosure of subpoenaed items to public, when reasonable expectation of privacy in documents was substantially reduced by lawful seizure of documents by local police officials under earlier search warrant and privacy interest in seized documents was not substantial enough to require notice and opportunity to contest administrative subpoena, so that agent's subsequent search of documents resulted in no constitutional deprivation. *Hell's Angels Motorcycle Corp. v. McKinley (9th Cir. 2004) 360 F.3d 930, 933-934*

District court did not err in its determination that prison officials were entitled to qualified immunity because prison inmates had no clearly established right to receive commercial bulk mail at time officials rejected Green Lantern comic book subscription for inmate. *Bahrampour v. Lampert (9th Cir. 2004) 356 F.3d 969, 976-977*

Police officers were not entitled to qualified immunity on claims of false arrest and excessive force based on arrest of divorcing husband under protection order, when there was no viable reading of order pursuant to which husband was in violation so that officers had no objective basis to arrest him for violating order, and when any reasonably competent officer would have ascertained terms of protection order before arresting husband for failing to comply with it. *Beier v. City of Lewiston (9th Cir. 2004) 354 F.3d 1058, 1065-1072*

In action by relatives of police officer based on shooting of officer by fellow police officers alleging violation of slain officer's *Fourth Amendment* rights and of *due process clauses of Fifth* and *Fourteenth Amendments*, defendant officers were not entitled to summary judgment on issue of qualified immunity, when objective reasonableness of officers' conduct in using deadly force case turned on their mistake of fact with regard to slain officer's status as police officer and purpose at scene on night of slaying, and whether their mistake of fact was reasonable depended on which version of facts were accepted by jury. *Wilkins v. City of Oakland (9th Cir. 2003) 350 F.3d 949, 954-956*

Federal prison warden and food services administrator were entitled to qualified immunity on inmate's claim that requiring him to apply for prison food program to receive kosher meals violated his rights to religious freedom, when inmate did not challenge constitutionality of program and could not demonstrate that he was excused from applying because uncontroverted evidence indicated that application may not have been futile, when requiring prisoner to file standardized application before receiving kosher meals could not be said to violate his *First Amendment* rights, and when rather than failing to investigate and answer inmate's complaints about food program prison officials promised to work with him, once he filed proper form, to ensure problems he had with program were addressed. *Resnick v. Adams (9th Cir. 2003) 348 F.3d 763, 767-772*

In claims under *42 U.S.C. § 1983* related to proceedings based on child neglect and sexual abuse, in which court found child dependent of court and ordered custodial father to participate in family reunification plan, as result of which child remained out of his custody until he completed reunification services, county social worker was entitled to qualified immunity for claims based on social worker detaining child before dependency proceedings and referring her for medical sexual abuse examination without court order or parental consent, when maintaining child in temporary protective custody pending her detention hearing did not violate father's or child's constitutional rights because social worker had reasonable cause to believe child was neglected or abused and therefore in imminent danger and she complied with relevant California law regarding removal and detention of children when there were allegations of abuse or neglect; and when, although social worker violated child's right to privacy and father's right to guide, rear, and protect child by referring child for intrusive sexual abuse examination without parental consent or court order, it would not have been clear to reasonable social worker in her position that her action was unlawful. *Doe v. Lebbos (9th Cir. 2003) 348 F.3d 820, 826-831 , overruled on other grounds in Beltran v. County of Santa Clara (9th Cir. 2008) 514 F.3d 906, 908-909*

Police officer was entitled to qualified immunity in § 1983 action based on underlying sexual abuse investigation, on

claim of deliberate fabrication of evidence, when despite officer's use of overbearing tactics in interviewing children, plaintiff failed to show by independent evidence that officer knew or should have known his interview tactics would yield false information, and when although officer carelessly handled facts and investigation, plaintiff did not point to any facts showing officer knew plaintiff was innocent and record proved otherwise. Officer was also entitled to qualified immunity on *Sixth Amendment* claim of violation of plaintiff's right to compulsory process by using interview tactics making children recall misinformation, because officer did not deliberately fabricate the evidence; on *Fourth Amendment* claim, because, although portions of officer's affidavit in support of probable cause were exaggerated or inaccurate, officer had probable cause without considering inaccurate portions because officer had knowledge based on reasonably trustworthy information that plaintiff had committed criminal offense; and on claim of violation of *Due Process Clause of Fourteenth Amendment* by failing to preserve and gather exculpatory evidence, because plaintiff's evidence did not prove officer's bad faith. *Gausvik v. Perez (9th Cir. 2003) 345 F.3d 813, 816-818*

Police officer was entitled to qualified immunity on plaintiff's claim of coercive investigation of sexual abuse claims, when interrogation did not undermine plaintiff's free will, because, while interrogation lasted eight hours, officer did not refuse to give plaintiff break for food or water and never yelled or used violence or threat of violence, continuing to question plaintiff after plaintiff claimed he was innocent did not constitute coercion, officer's suggestion that plaintiff's cooperation could lead to treatment rather than prison was not coercive, officer's statement that he had put people in prison did not contribute to undermining plaintiff's free will, and denial of plaintiff's request to call therapist was not coercive or unconstitutional because there is no constitutional right to call therapist during investigation. Arrest did not lack probable cause because plaintiff's confession, coupled with daughter's allegations, gave officer probable cause, officer's interviews of plaintiff's daughters were not so coercive that he knew or should have known he would receive false information so as to violate plaintiff's right to be free from prosecution based on false evidence, and allegations of officer's failure to preserve or collect potential exculpatory evidence were not specific or compelling enough to show bad faith. *Cunningham v. City of Wenatchee (9th Cir. 2003) 345 F.3d 802, 810-812*

Prison officials were entitled to qualified immunity on inmate's claim under *Fifth Amendment Takings Clause* that inmate was required to foreswear his statutory right to accrued net interest on his trust account and his due process right to be free of unauthorized deductions from his account to maintain prison employment failed, where utter lack of precedent and standards was dispositive that law concerning unconstitutional condition predicated on procedural due process claim in prison setting was not clearly established. However, prison administrators failed to establish legitimate goal for retaliating against inmate by terminating his prison employment for refusing to sign waiver, because while they undoubtedly had interest in recouping costs and maintaining efficient prison system, interest did not extend to avoiding limits placed on them by state Legislature and failing to provide constitutionally adequate procedural protections, so that prison administrators unconstitutionally retaliated against inmate for refusing to waive his right to accrued net interest and to consent to use of unauthorized deductions, inmate was entitled to summary judgment on unconstitutional retaliation claim, and officials were not entitled to qualified immunity on claim. *Vance v. Barrett (9th Cir. 2003) 345 F.3d 1083, 1088-1094*

Prison official conducting disciplinary hearing that resulted in disabled inmate's being housed in segregated housing unit not suitable for disabled inmate was entitled to qualified immunity on inmate's claim of denial of due process for refusal to call inmate's witnesses because law at time of alleged constitutional violation was not clearly established, when, although at time it was clearly established that inmate facing disciplinary proceedings should be allowed to call witnesses, court had never before addressed contours of initial component of inmate's claim whether disabled inmate's freedom from restraint in facility not designed for disabled persons may, as matter of law, constitute protected liberty interest, and official did not have fair warning that his levying of punishment via failing to allow live witness testimony would deprive inmate of his constitutional right to be free from this type of restraint. *Serrano v. Francis (9th Cir. 2003) 345 F.3d 1071, 1080-1081*

District court properly denied IRS agent qualified immunity on claim that agent used excessive force in handcuffing plaintiff in search of her residence under warrant to search building for evidence of income tax violations, because

agent's conduct violated *Fourth Amendment* and reasonable agent in his position would have known that it did. Agent grabbed plaintiff by her arms, forcibly threw her to ground, and, twisting her arms, handcuffed her, after plaintiff loudly asked several times to see search warrant; plaintiff did not pose safety risk and made no attempt to leave property, and agent was investigating income tax related crimes, which, although felonies, are nonviolent offenses; plaintiff passively resisted handcuffing, but need for force, if any, was minimal at best. However, as to claim that detaining plaintiff in handcuffs during search was unlawful, totality of the circumstances did not justify her detention in that manner and agent violated *Fourth Amendment* because plaintiff was not serious impediment to search or threat and she made no attempt to flee, but, except for overly tight handcuffing that occurred during first 30 minutes, before court's holding it had not been clearly established that conduct would violate plaintiff's constitutional rights, so agent was entitled to qualified immunity as to that portion of claim. *Meredith v. Erath (9th Cir. 2003) 342 F.3d 1057, 1060-1064*

District properly denied police officer's motion for summary judgment based on qualified immunity in claim arising from traffic stop, when unlawful traffic stop, even if not racially-motivated, may give rise to § 1983 violation and under plaintiff's version of facts, which court must accept as true at summary judgment stage of litigation, there was no reasonable suspicion for officer to detain him; and when right not to be stopped without reasonable suspicion was clearly established. However, trial court properly granted summary judgment on issue of officer's qualified immunity with regard to arrest of plaintiff, when, although plaintiff was arrested for expired license violation, not for purpose of verifying outstanding felony warrant, and arrest for expired license violation violated *Veh. Code § 12801.5(e)*, prohibiting arrest of motorist over 16 solely on belief person is unlicensed driver, and law was clearly established at that time, reasonable officer could have believed plaintiff's detention for verification of warrant was lawful in light of clearly established law and information officer possessed. *Bingham v. City of Manhattan Beach (9th Cir. 2003) 341 F.3d 939, 946-953*

Police officer was entitled to qualified immunity in § 1983 action on claim of excessive force, in which plaintiff claimed that conduct of officer, inter alia, rendered him paraplegic during high speed car chase and its aftermath, which ensued after plaintiff and another man committed armed robbery of bank, when even though plaintiff was not actively resisting arrest when officer pulled him from car, force applied to remove him was patently reasonable and commensurate with what was needed, there was no indication to officer that plaintiff had suffered debilitating back injury, and need to quickly restrain plaintiff by removing him from car and handcuffing him was paramount; and when officer reasonably could have believed that his conduct was lawful under the circumstances. *Johnson v. County of Los Angeles (9th Cir. 2003) 340 F.3d 787, 791-794*

Police officer was not entitled to qualified immunity for shooting criminal suspect in violation of his *Fourth Amendment* rights, when use of deadly force violated suspect's *Fourth Amendment* rights as articulated in United States Supreme Court decision [*Tennessee v. Garner (1985) 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1]* because although officer had reason to believe suspect had committed drug crimes and burglary, which are serious offenses, under *Garner* officer did not have probable cause to believe suspect committed crime involving infliction or threatened infliction of serious physical harm, officer did not demonstrate objectively reasonable fear about potential weapon to justify her use of deadly force, officer did not offer any evidence to support claim that suspect posed significant risk of death or serious bodily injury to her, other people involved in incident, or fellow officers, and possibility of dangerous high-speed chase did not justify officer's use of deadly force; and when officer's mistake about requirements of *Fourth Amendment* was unreasonable and she had fair warning her conduct deprived suspect of constitutional right. *Haugen v. Brosseau (9th Cir. 2003) 339 F.3d 857, 862-874*

Police officer was entitled to qualified immunity in action based on his search of protester's back pack and his arrest, because, although officer's conduct violated protester's *Fourth Amendment* rights since officer had only reasonable suspicion but not probable cause to search or arrest, reasonable officer in same situation could have believed that circumstances carried enough weight to create probable cause when there was at least some individualized suspicion and law did not provide him clear guidance as to how much weight he could give explosively hostile circumstances of Nazi parade in making his probable cause assessment. *Graves v. City of Coeur D'Alene (9th Cir. 2003) 339 F.3d 828,*

840-848

Police officer was entitled to qualified immunity and summary judgment in § 1983 claim against him by man he arrested for robbery based on man's grabbing of land title documents from his sister, after which police were called, when officer was sent to house for domestic dispute, undisputed evidence established that family members were upset and angry, and there were language barriers between officer and witnesses; when, although there were factual disputes, including whether man in fact threatened force to obtain documents from his sister, dispute was not material to what officer knew at time of arrest, at which time officer had interviewed sister via her son, who was acting as interpreter, and she gave detailed account of incident, which, so far as officer knew, was corroborated, since he relied on son's translation of witnesses' testimony as well; when victim alleged that force or threat of force existed, so it was important for officer to err on side of safety for victim to prevent further violence and allow parties to cool down; when sister provided sufficiently detailed facts regarding incident to support finding that probable cause to arrest existed and officer also interviewed two more witnesses present during altercation; when inconsistencies in officer's testimony as to incidental facts were to be expected when different people were called on to remember startling events, and they were not material and did not establish that officer fabricated evidence; and when even if officer was mistaken about existence of probable cause to arrest, his mistake was objectively reasonable and he was entitled to qualified immunity. *Peng v. Hu (9th Cir. 2003) 335 F.3d 970, 975-980*

Prison officials were entitled to qualified immunity in prisoner's claim for violation of his due process rights by failing to have prison official other than one who made initial decision to withhold allegedly obscene material mailed to him review decision, when, although officials violated prisoner's due process rights because right to two-level review was established as general proposition, officials could have reasonably believed their own conduct did not violate his rights because they were acting under provisions of consent decree that did not clearly require type of appeal to which prisoner was constitutionally entitled. *Krug v. Lutz (9th Cir. 2003) 329 F.3d 692, 698-699*

School district officials were not entitled to qualified immunity for their alleged response or lack of response to complaints of student-to-student anti-homosexual harassment, which allegedly denied students equal protection, where students were members of identifiable class for equal protection purposes because they alleged discrimination on basis of sexual orientation, where defendants believed that under district policies harassment of any kind would not be tolerated, but there was evidence plaintiffs were harassed for years and defendants failed to enforce policies to protect them so that plaintiffs were treated differently, and there was sufficient evidence to raise inference of deliberate indifference as to each of administrator defendants. There was also evidence that defendants failed to adequately train teachers, students, and campus monitors about policies prohibiting harassment on basis of sexual orientation and that defendants inadequately communicated anti-harassment policies to students despite defendants' awareness of hostility toward homosexual students, and in some cases despite plaintiffs' requests to do so. Law was clearly established during relevant period because defendants were officers of state who had fair warning they could not accord homosexual and bisexual students less protection on account of students' sexual orientation.

Flores v. Morgan Hill Unif. Sch. Dist. (9th Cir. 2003) 324 F.3d 1130, 1134-1138

Administrative coroner and chief medical examiner were not entitled to qualified immunity based on 1993 termination of contract with private company to provide services for city's indigent dead, when it was clearly established in 1993 that state employees could not cause termination of two-year for-profit government contract in retaliation for contracting party's exercise of his *First Amendment* rights to speak out on matter of public concern, and when there was ample evidence from which jury reasonably could have concluded state employees caused termination of contract in retaliation for company president's whistle blowing. *Rivero v. City & County of San Francisco (9th Cir. 2002) 316 F.3d 857, 863-867*

When viewed in light most favorable to non-moving party, there was enough evidence for reasonable jury to conclude that reasonable police officers who conducted investigation leading to arrest and jailing of plaintiff on rape charges,

which were later dismissed, would not have acted as officers did in arresting him based on canine alert, eyewitness identifications, and his resemblance to general physical description, so that district court properly submitted issue of qualified immunity to jury and entered judgment on its verdict. *Grant v. City of Long Beach (9th Cir. 2002) 315 F.3d 1081, 1088-1090*

In *42 U.S.C. § 1983* action by father implicated in 20-year-old murder by his daughter, police detectives were entitled to qualified immunity on claim of lack of probable cause to arrest, when on its face, evidence available to police before arrest was reasonably trustworthy and sufficient for reasonable officer to conclude there was probable cause to arrest, and when plaintiff did not raise any issue of material disputed fact regarding reasonableness of detectives' belief in their probable cause to arrest him. Daughter was entitled to qualified immunity on claim of conspiracy to deprive father of his constitutional rights based on arrest without probable cause, when father failed to provide any evidence that detectives conspired to violate his constitutional rights, and when because officers had probable cause to arrest him, his claim against his daughter with regard to probable cause fails; even if probable cause did not exist, father offered no evidence to support finding daughter engaged in any sort of conspiracy with detectives that could expose her to liability. Prosecutor and police officer in charge of jail were entitled to qualified immunity on claim of violation of *Sixth Amendment* rights based on daughter's visit to him in jail to try to get him to confess, when although it is now matter of clearly established law in Ninth Circuit that facilitation of interrogation such as that provided by prosecutor is unlawful, at time prosecutor acted, official may have reasonably believed opposite to be true, and when, police officer, possessing information he had, that suspect's daughter wanted to visit him and she was to be treated as any other witness, he reasonably could have believed that arranging for non-visiting hours visit, service jail often provided to out-of-town visitors, did not violate suspect's *Sixth Amendment* rights. *Franklin v. Fox (9th Cir. 2002) 312 F.3d 423, 437-444*

In action under *42 U.S.C. § 1983* by family and estate of inmate who was killed by his cellmate, alleging violation of *Eighth Amendment* in that correctional officers were deliberately indifferent by double-celling plaintiffs' decedent with inmate who killed him, trial court erred in denying correctional officers summary judgment based on qualified immunity from suit, when information available to them did not make it clear that inmate who killed plaintiffs' decedent would harm him such that no reasonable officer could have agreed to allow them to be celled together. *Ford v. Ramirez-Palmer (9th Cir. 2002) 301 F.3d 1043, 1048-1053*

Lead law enforcement officers who executed search pursuant to defective warrant did not enjoy qualified immunity, when warrant was facially defective because it provided no description of evidence sought and did not refer to or incorporate application or affidavit and officer did not cure flaw by conversation with residents of searched home because he lacked authority to amend warrant, when invalid warrant deprived residents of means to be on lookout and challenge officers who might have exceeded limits imposed by magistrate, and when permitting officers to expand scope of warrant by oral statements would broaden area of dispute between parties in subsequent litigation. However, line officers were entitled to qualified immunity, when line officers were not required to read warrant, and line officers acted reasonably because they were told warrant had been obtained and learned through advance briefing what items could be seized. *Ramirez v. Butte-Silver Bow County (9th Cir. 2002) 298 F.3d 1022, 1026-1028 , aff'd sub nom Groh v. Ramirez (2004) 540 U.S. 551, 124 S. Ct. 1284, 157 L. Ed. 2d 1068*

Police officer was not entitled to qualified immunity, as matter of law, for seizing individual based on civil dispute, when facts alleged showed that officer violated plaintiff's right not to be arrested in absence of probable cause to believe plaintiff had committed crime, and that right was clearly established and would be known to reasonable officer in these circumstances. *Stevens v. Rose (9th Cir. 2002) 298 F.3d 880, 884-885*

In action based on police officer's shooting and killing of suspect, officer was entitled to qualified immunity, when deceased's estate failed to make out claim of violation of constitutional rights based on use of excessive force, since deceased actively, violently, and successfully resisted arrest and physically attacked officer and tried to turn officer's gun against him, and posed imminent threat of injury or death to officer and under the circumstances, reasonable officer would perceive substantial risk that deceased would seriously injure or kill him; none of officer's supposed errors before

fight occurred could be deemed intentional or reckless, much less unconstitutional, provocations causing deceased to attack him. *Billington v. City of Boise (9th Cir. 2002) 292 F.3d 1177, 1185, 1191*

Prison officials were entitled to qualified immunity on prisoner's claim that prison policy prohibiting prisoners from receiving publications as gifts violated *First Amendment*, when although two unpublished district court opinions held policy unconstitutional, no published cases held policy or similar policies constitutional, it was entirely reasonable that prison officials could have thought that policy would pass constitutional muster and policy's illegality was not so obvious that any prison official involved in enforcing it should have known he or she was breaking the law, and unpublished court opinions showed only that law was in process of becoming established. *Sorrels v. McKee (9th Cir. 2002) 290 F.3d 965, 970-972*

State motor vehicles investigator was not entitled to qualified immunity in action based on investigator's affidavit submitted in support of issuance of search warrant against plaintiff in criminal tax proceedings, when plaintiff made sufficient showing of judicial deception by investigator and failures and omissions were material and warrant was issued without probable cause. *Butler v. Elle (9th Cir. 2002) 281 F.3d 1014, 1023-1026*

County prosecutor was entitled to qualified immunity in action based on allegedly false statements in affidavit supporting motion to revoke plaintiff's bail based on statements made to prosecutor by plaintiff's ex-wife, when although plaintiff neither alleged nor offered evidence that prosecutor knew ex-wife's allegations were false, he did support claim that prosecutor submitted affidavit in reckless disregard of its falsity so as to present case that his *Fourth Amendment* rights were violated sufficient to survive summary judgment. *Cruz v. Kauai County (9th Cir. 2002) 279 F.3d 1064, 1068-1070*

State gaming control officer was not entitled to qualified immunity in § 1983 action based on agent's actions in arresting plaintiff for refusing to identify himself, where Ninth Circuit law is clear that police may not, consistent with *Fourth Amendment*, compel identification during investigatory stop and state statutes authorizing plaintiff's arrest for refusal to identify himself are unconstitutional; where search of plaintiff's shoes for cheating device was unreasonable as it was not incident to lawful arrest; and where reasonable officer in gaming control officer's position would have known that plaintiff had clearly established right not to identify himself and statutes were unconstitutional to extent they allowed plaintiff to be arrested for exercising his rights. *Carey v. Nevada Gaming Control Bd. (9th Cir. 2002) 279 F.3d 873, 878-882*

Police officers who pointed gun at head of apparently unarmed suspect were entitled to qualified immunity where, in 1995, when incident occurred, contours of general principle that pointing gun to head of apparently unarmed suspect during investigation could be violation of *Fourth Amendment*, especially when individual posed no particular danger so that law was not sufficiently established to override immunity claim. *Robinson v. Solano County (9th Cir. 2002) 278 F.3d 1007, 1015-1016*

Interim dean of students and security officer of public college were not entitled to qualified immunity against § 1983 claim of violation of *First Amendment* rights by pro-life demonstrator based on his arrest because of his violation of conditions imposed by dean on demonstration, including condition inconsistent with *First Amendment* free speech and free exercise of religion clauses that he limit his demonstration to secular content, when demonstrator's *First Amendment* rights were clearly established, when, as to dean, reasonable public official should have known that permitting him to express his views on abortion only so long as they were not religious in nature violated his *First Amendment* rights, and when, as to security officer, record was unclear as to whether he asked demonstrator to leave campus because he had violated religion condition or one of inoffensive conditions imposed by dean; however, police officers who arrested demonstrator were entitled to qualified immunity, when undisputed evidence indicated they arrested demonstrator not because of religious content of speech, but because they reasonably believed they had probable cause to arrest him for trespass and failure to disperse. *Orin v. Barclay (9th Cir. 2001) 272 F.3d 1207, 1216-1217*

Prison officials who allowed prisoner, whose inmate trust account was funded with payments of Veteran's Disability Benefits administered by federal Veterans Administration, to authorize withdrawal from empty account, advance goods and services requested, and then place holds on account until benefits paid back advances in effect allowed him to assign future benefits and then seized them to repay the prison system, in violation of *38 U.S.C. § 5301(a)*; however, they were entitled to qualified immunity when they reasonably but erroneously believed they were not violating statute, state court cases lent support to their position, and neither Ninth Circuit nor Supreme Court had ruled. *Nelson v. Heiss (9th Cir. 2001) 271 F.3d 891*

Police officer who conducted coercive, custodial interrogation of criminal suspect being treated for life-threatening, police-inflicted gunshot wounds in hospital emergency room without giving *Miranda* warnings was not entitled to qualified immunity, when officer's conduct violated suspect's *Fifth Amendment* and *Fourteenth Amendment* right against compulsory self-incrimination and those rights were clearly established by law and reasonable officer could not have believed that interrogation comported with *Fifth* and *Fourteenth Amendments*. *Martinez v. City of Oxnard (9th Cir. 2001) 270 F.3d 852*

Police officers were entitled to qualified immunity in § 1983 action alleging excessive force resulting from plaintiff's attempt to interfere with arrest of her son at barbecue in public park, when nature and quality of alleged intrusions in spraying plaintiff's hair with chemical irritant, pushing her to ground to handcuff her, and roughly pulling her up to feet during arrest in what plaintiff conceded was normal handcuffing procedure, and, while plaintiff was yelling at officer, rolling up windows in police car and turning up engine in July heat were minimal, and when plaintiff's interference with son's arrest posed immediate threat to officers' personal safety and ability to control group, so that force applied was reasonable and necessary to control rapidly evolving and escalating situation, and no *Fourth Amendment* violation occurred. *Jackson v. City of Bremerton (9th Cir. 2001) 268 F.3d 646, 650-653*

In action alleging discharge of firefighter in retaliation for reporting that fellow firefighters had downloaded large cache of hard core pornographic files on fire station's computers in violation of department policy, trial court correctly denied qualified immunity to defendant fire department commissioners, department chief and deputy chief, when defendants should have been aware that discharging him in retaliation for his truthful whistleblowing violated his constitutionally protected right to free speech, since his speech was matter of public concern protected by *First Amendment* and interests served by allowing him to express himself about downloading of pornographic material on department's computers outweighed department's interest in promoting workplace efficiency and avoiding workplace disruption; however, appellate court lacked jurisdiction over trial court's denial of qualified immunity on firefighter's claim that defendants violated his right to procedural due process when there were genuine issues of material fact as to whether firefighter received adequate procedural protection, precluding summary judgment on that issue. Finally, defendants were entitled to qualified immunity with respect to firefighter's claim that they violated his right to substantive due process, when because *First Amendment* explicitly covered claim, *First Amendment*, not *Fourteenth Amendment* guaranty of substantive due process, guided analysis of claims. *Hufford v. McEnaney (9th Cir. 2001) 249 F.3d 1142*

State officials sued in individual capacity for refusal to give out-of-state real estate appraiser proper application materials to apply for temporary and reciprocal appraisal license and not allowing appraiser to apply for licenses he sought were not entitled to qualified immunity since acts alleged are ministerial acts unshielded by qualified immunity, which protects only actions taken pursuant to discretionary functions. *Groten v. California (9th Cir. 2001) 251 F.3d 844, 851*

Local legislators are not entitled to qualified immunity if they implement their state-created power to indemnify police officers from punitive damage awards in bad faith, when based on prior case law, implementing indemnification procedures in bad faith violates clearly established constitutional right. *Navarro v. Block (9th Cir. 2001) 250 F.3d 729*

Members of board of elections were not entitled to qualified immunity in action alleging violation of § 1983 by

administering pre-election day voter challenge procedures which precluded certain class of voters from voting in election, when procedures employed by board violated fundamental right to vote, right to vote was clearly established at time of election, and reasonable board would have known its actions violated right to vote. *Charfauros v. Board of Elections (9th Cir. 2001) 249 F.3d 941*

Deputies entering residence to arrest resident on valid out-of-state felony warrant based on delinquencies in child support payments were entitled to qualified immunity, when reasonable officer could believe he could arrest resident on out-of-state warrant since state statutes provide for execution of out-of-state felony warrants within state borders without separate state warrant, when reasonable officer could believe that post-arrest conduct did not violate resident's constitutional rights, and when deputies' conduct during arrest was reasonable. *Case v. Kitsap County Sheriff's Dep't (9th Cir. 2001) 249 F.3d 921*

Genuine issue of material fact as to whether operation of integrated exercise yards at state prison constitutes deliberate indifference to excessive risk that inmate would be harmed when placed in integrated yard and thus cruel and unusual punishment precluded summary judgment on ground that defendant prison officials and correctional officers are entitled to qualified immunity. *Robinson v. Prunty (9th Cir. 2001) 249 F.3d 862*

Professor at state university who removed handbills publicizing appearance of former colleague at conference to be held on university campus is not entitled to qualified immunity, when removal of handbills constituted *First Amendment* violation since handbills were speech, university bulletin boards were public forum and professor removing handbills engaged in viewpoint discrimination because he sought only to silence speech by this particular speaker, and when there was no uncertainty in law at time of alleged conduct. *Giebel v. Sylvester (9th Cir. 2001) 244 F.3d 1182*

In action against police officer by emotionally disturbed county resident who threatened suicide for use of excessive force, based on being shot in face with lead-filled "beanbag round," without receiving warning and while unarmed, resulting in removal of one eye and lead shot being left implanted in resident's skull, police officer was not entitled to qualified immunity, when, while falling short of deadly force, force used was enough to cause grave physical injury, which is only to be used when strong governmental interest compels employment of so high a degree of force, and when officers were on resident's property to investigate his peculiar behavior in creating disturbance, resident did not pose immediate safety threat in that he responded to officers' instructions, did not attack anyone and threw down potential weapons when ordered to do so, and officer did not make split-second choice to fire, but had decided to shoot when resident came within certain range and fired without command to stop or warning that force would be employed, so that force was excessive compared to governmental interests at stake; court reached its conclusion both under Ninth Circuit test previously articulated in *Katz v. United States (9th Cir. 1999) 194 F.3d 962* , and the test as articulated by the *Fifth Circuit in Snyder v. Trepagnier (5th Cir. 1998) 142 F.3d 791* , adopted by the United States Supreme Court in *Saucier v. Katz (2001) 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272* , described *above*. *Deorle v. Rutherford (9th Cir. 2001) 272 F.3d 1272*

In action by prison inmate under § 1983 for violation of *Eighth Amendment* based on being wounded by rifle shot fired by correctional officer in course of emergency responses and prison security measures undertaken to control large-scale disturbance in prison yard, trial court erred in failing to grant motions of correctional officers, former warden and former director of corrections department based on qualified immunity, when law governing use of force in prison disturbances was clearly established, i.e., that when prison security measure is undertaken ostensibly for protection of prison officials and inmate population, force is deemed legitimate as long as it is applied in good faith effort to maintain or restore discipline and not maliciously and sadistically for very purpose of causing harm; when, as to correctional officers, inmate failed to present evidence showing that correctional officers acted purposely to injure him, inmate did not present evidence that one correctional officer's failure to act on rumors of violence before disturbance began to make out a case of deliberate indifference to substantial risk of serious harm, since officer's superiors made decision to order release of yard and there is no evidence officer should have done anything differently once decision was made, and inmate's allegations that officer's actions were racially motivated fell short of alleging that officer acted with

unconstitutional motive; when, as to director of corrections, inmate presented no evidence to establish how director's alleged actions in promulgating and maintaining policies regarding use of lethal force against prison inmates violating inmate's *Eighth Amendment* right to be free from cruel and unusual punishment contributed to his injuries, record established constitutional validity of use-of-force policy designed and implemented by director, none of alleged circumstances regarding training, supervision, or discipline of correctional officers supported conclusion that any inadequacy in department of correction's training program led to deliberate violation of *Eighth Amendment* rights by director; and when, as to former warden, it was warden's duty to implement department's shooting policy as there was no clearly established law prohibiting its use, and warden did not violate rights by creating unsafe and potentially volatile situation by housing inmates of various races and gang affiliations together in general population yard, since he complied with statewide housing practice and had no affirmative duty to change policy. *Jeffers v. Gomez (9th Cir. 2001) 267 F.3d 895*

Deputy superintendent of school district was not entitled to qualified immunity in action against him by former employees for retaliating against them by demoting them after they alerted Board of Education to his alleged misuse of money and after they complained about his employment evaluation practices, when employees' speech involved matter of public concern, and interests served by allowing them to express themselves outweighed state's interest in promoting workplace efficiency and avoiding workplace disruption; and when there was no evidence of actual disruption caused by their speech or of actual injury to other legitimate interests beyond disruption necessarily accompanying speech. *Keyser v. Sacramento City Unified Sch. Dist. (9th Cir. 2001) 265 F.3d 741*

Board of trustees and employees of community college district were entitled to qualified immunity under *42 U.S.C. § 1983* for their actions in terminating plaintiff's employment and barring him from future employment, when it was not well established and unlawfulness would not have been apparent to reasonable community college official that filing derogatory material and/or expunging plaintiff's employment file constituted violation of plaintiff's constitutional rights. *Llamas v. Butte Community College District (9th Cir. 2001) 238 F.3d 1123, 1131*

Trial court erroneously granted summary judgment to social worker who removed child from home without warrant on grounds of qualified immunity, when material issue of fact existed regarding whether there was reasonable cause to believe, on basis of information in possession of social worker at time of removal, that child faced imminent danger of serious bodily injury sufficient to justify warrantless entry to home and seizure of child. *Mabe v. San Bernardino County (9th Cir. 2001) 237 F.3d 1101, 1106-1109*

Private psychiatrist acting under color of state law was not entitled to qualified immunity in action under *42 U.S.C. § 1983* by individual detained for mental examination on order of psychiatrist, when there was no suggestion that state law had firmly rooted tradition of immunity for doctors asked by government to make decision to commit persons suspected of mental illness nor is there definitive common law history of immunity outside of state to support finding of qualified immunity; when private agency of which psychiatrist is part is engaged in complex administrative task, which cannot be credibly described as discrete public service task; and when threat of distraction created by legal action for private individuals in private firm is insufficient to find qualified immunity. *Jensen v. Lane County (9th Cir. 2000) 222 F.3d 570*

In action by environmental activists alleging that use of pepper spray during protests constituted excessive and unreasonable force in violation of *Fourth Amendment*, trial court erred in ruling that sheriff and deputy sheriff who authorized use of pepper spray were entitled to qualified immunity as matter of law, where law concerning use of excessive force was clearly established; even though police use of pepper spray on nonviolent protesters engaged in civil disobedience was unprecedented, sheriff and deputy were aware of law governing its use; essential historical facts as to amount of force used and circumstances that might justify amount of force used were in dispute, as well as facts relating to what sheriff and deputy knew and did when they authorized use of pepper spray. *Headwaters Forest Defense v. County of Humboldt (9th Cir. 2000) 211 F.3d 1121, 1140-1143*

Justice of peace who issued ex parte order for destruction or donation to city of gaming devices owned by owner of antique business seized after entry without invitation or search warrant and over owner's protests, was absolutely immune from liability under *42 U.S.C. § 1983*, when issuance of ex parte order is function that judge had jurisdiction to perform, even if order was erroneous and consequences may have been injurious, and irrespective of judge's claimed motivation. *Harvey v. Waldron (9th Cir. 2000) 210 F.3d 1008, 1012*

California Alcoholic Beverage Control officials not entitled to qualified immunity for threatening sanctions, including loss of liquor license, for renting premises to organization for display of erotic art. *LSO, Ltd. v. Stroh (9th Cir. 2000) 205 F.3d 1146, 1157-1160*

In action against police officers for illegal entry of home without warrant and use of excessive force during and after arrest, district court erroneously granted pretrial order extending qualified immunity to officers on illegal entry claim and erroneously granted judgment as matter of law granting officers qualified immunity on excessive force claim, where district court failed to evaluate facts in light most favorable to plaintiff and erred in resolving disputed issues of material fact, which should have been heard and decided by jury. *LaLonde v. County of Riverside (9th Cir. 2000) 204 F.3d 947, 953-962*

Police officers not entitled to qualified immunity for violation of strictures of *Miranda*, where *Miranda* rights cannot be viewed apart from constitutional right against self-incrimination they protect, and where holding in *Miranda* is clearly established law; fact that police departments may have trained police to violate *Miranda* rights does not provide defense for officers. *California Attorneys for Criminal Justice v. Butts (9th Cir. 1999) 195 F.3d 1039, 1045-1050 , cert. denied, 530 U.S. 1261 (2000)*

School officials were entitled to qualified immunity in action under *42 U.S.C. § 1983* for unreasonable search of high school student using dog, where, when search occurred, it was not clearly established that use of dog to sniff students in school setting constituted search. *B.C. v. Plumas Unified School Dist. (9th Cir. 1999) 192 F.3d 1260, 1268*

Executive officer of State of California Acupuncture Committee entitled to qualified immunity for refusing to renew acupuncturist's license based on refusal to supply social security number, when officer acted pursuant to duly enacted state statute, and at time of refusal there was no clear case law establishing that issuance of professional license may not be conditioned on licensee's disclosure of social security number, and when state statute did not authorize official conduct patently violative of fundamental constitutional principles. *Dittman v. State of California (9th Cir. 1999) 191 F.3d 1020, 1026-1027 , cert. denied, 530 U.S. 1261 (2000)*

City officials who told law firm that they would fire law firm serving as city attorney because of political activities of associate attorney at law firm and her family were entitled to summary judgment based on qualified immunity from suit, where associate attorney was in policymaking position with respect to city. *Biggs v. Best, Best & Krieger (9th Cir. 1999) 189 F.3d 989, 993-999*

Chief medical officer at state prison, during radiation experiments performed on prisoners, entitled to qualified immunity, where actions did not violate constitutional right of prisoners to be free from nonconsensual, nontherapeutic invasion of bodily integrity. *Bibeau v. Pacific Northwest Research Foundation (9th Cir. 1999) 188 F.3d 1105, 1112*

Physician not entitled to qualified immunity for warrantless forcible restraint and taking of blood sample by needle and urine sample by catheter from arrestee, when it was clearly established at time of arrest that blood and urine tests are searches subject to *Fourth Amendment*. *Ellis v. City of San Diego (9th Cir. 1999) 176 F.3d 1183, 1191-1192*

Doctor who forcibly medicated detainee in jail pending trial entitled to qualified immunity when, although doctor was wrong in interpretation of court order allowing detention of detainee pending return to compentence as allowing forcible medication, he was not unreasonable in interpretation, and reasonable belief that conduct was lawful is sufficient for

qualified immunity. *Kulas v. Valdez (9th Cir. 1998) 159 F.3d 453, 455-456 , cert. denied, 528 U.S. 1167 (2000)*

Lack of case law concerning constitutionality of using dogs to apprehend suspects when policies were formulated establishes qualified immunity for chief of police, trainers, and supervisors who established policies. *Chew v. Gates (9th Cir. 1994) 27 F.3d 1432, 1446-1450 , cert. denied, 513 U.S. 1148 (1995)*

Objective reasonableness of force used, by using police dog to apprehend suspect, precludes finding that conduct violated clearly established law; police officer entitled to qualified immunity. *Mendoza v. Block (9th Cir. 1994) 27 F.3d 1357, 1360-1363*

Attorney general opinion is not sufficient by itself to establish "clearly established law." *Price v. Akaka (9th Cir. 1993) 3 F.3d 1220, 1225-1226 , cert. denied, 511 U.S. 1070 (1994)*

Qualified immunity is defense to liability for damages only and does not bar actions for declaratory or injunctive relief. *American Fire, Theft & Collision Managers v. Gillespie (9th Cir. 1991) 932 F.2d 816, 818*

Although reliance on counsel's advice does not satisfy defendant's burden regarding claim of qualified immunity, it is evidence of defendant's good faith. *Lucero v. Hart (9th Cir. 1990) 915 F.2d 1367, 1371*

Cities not entitled to qualified immunity; cities cannot be held liable under theory of respondeat superior. *Los Angeles Police Protective League v. Gates (9th Cir. 1990) 907 F.2d 879, 889*

Police officers not entitled to qualified immunity from arrestee's civil rights suit when they lacked probable cause to arrest. *Kennedy v. Los Angeles Police Dep't (9th Cir. 1990) 901 F.2d 702, 706*

Denial of claim of qualified immunity is appealable final decision. *Merriman v. Walton (9th Cir. 1988) 856 F.2d 1333, 1334-1335 , cert. denied, 491 U.S. 905 (1989)*

In *42 U.S.C. § 1983* action arising out of rape and strangulation of state hospital patient by another patient with demonstrated homicidal propensities, in which complaint alleged violation of dead patient's constitutional right to reasonably safe conditions of confinement, denial of summary judgment motion based on qualified immunity was proper, when plaintiffs presented genuine issue of fact regarding defendants' substantial departure from accepted professional standards. *Estate of Conners v. O'Connor (9th Cir. 1988) 846 F.2d 1205, 1207-1209 , cert. denied, 489 U.S. 1065 (1989)*

In § 1983 action by physician against, inter alia, supervisor employed by California Medical Board based on Board's unsuccessful action to obtain consent of patient for whom physician had written letter under Compassionate Use Act (CUA) regarding patient's use of medical marijuana for attention deficit disorder to release his medical records to Board, supervisor was entitled to qualified immunity, where, notwithstanding passage of CUA, it remained federal crime to possess marijuana and there was no federal exemption for medical marijuana, so that any state law purporting to "legalize" marijuana, even for medical purposes, was not "clearly established"; where no facts were alleged that supervisor disregarded clearly established law in asking patient to consent to release of medical records or in directing Board investigators to issue subpoena in investigation based on park ranger report that physician might be violating law, and after Board medical consultant, after reviewing medical marijuana letter and park ranger report, opined that subpoena was required to determine whether physician was violating law and applicable standard of care in recommending medical use of marijuana; and where, although Court of Appeal reversed, Los Angeles Superior Court found good cause to produce medical records. *Bearman v. California Medical Board (2009) 176 Cal. App. 4th 1588, 1594-1595, 99 Cal. Rptr. 3d 60*

Trial court erred in determining that as matter of law search warrant was facially invalid and deputy sheriff was not

qualifiedly immune from suit, where strong case could be made that affidavit submitted in support of warrant was sufficient, and, in any case, deputy had qualified immunity from suit because reasonably well-trained officer would not have realized affidavit was defective and reasonably would have relied on warrant issued by magistrate to conduct search. Further, officer had probable cause to arrest plaintiff, where officer properly detained plaintiff while carrying out valid search pursuant to warrant, and, even though district attorney declined to prosecute, there was probably cause to arrest plaintiff and transport him to jail. *Wood v. Emmerson (2007) 155 Cal. App. 4th 1506, 1519-1526, 66 Cal. Rptr. 3d 847*

Law enforcement officers were not entitled to qualified immunity in action under *42 U.S.C. § 1983* arising from their execution of search warrant, where plaintiff introduced sufficient evidence of alleged facts that if proved showed violation of constitutional right because jury could reasonably conclude that plaintiff, wearing nothing but T-shirt leaving his genitals exposed, was detained outside for approximately one hour despite fact deputies determined within four minutes that neither plaintiff himself nor anything inside his house posed safety threat; and where it should have been clear to any reasonable officer that detention was unlawful. *Macias v. County of Los Angeles (2006) 144 Cal. App. 4th 313, 319-322, 50 Cal. Rptr. 3d 364*

Police were entitled to qualified immunity on claim of use of excessive force to handcuff man arrested for driving under influence in order to obtain blood draw, when even assuming violation of plaintiff's constitutional rights could otherwise be shown, under case law rights purportedly violated were not clearly established. *Ritschel v. City of Fountain Valley (2006) 137 Cal. App. 4th 107, 122-123, 40 Cal. Rptr. 3d 48*

In action by pretrial detainee for violation of civil rights based on arrest on probable cause for rape and later release, sheriff's deputies were entitled to qualified immunity, when there was no constitutional right to speedy laboratory testing to confirm probable cause for arrest and detention or any continuing duty of probable cause investigation. *Jimenez v. County of Los Angeles (2005) 130 Cal. App. 4th 133, 144, 29 Cal. Rptr. 3d 553*

Administrator of 4-H program was entitled to qualified immunity in action for violation of *First Amendment* free speech rights brought by club members and adult leader who had been suspended while administrator investigated whether members, who participated in making film depicting violent behavior, posed risk of violent behavior, when there was no federal constitutional violation. Adult leader had no part in filmmaking project, so that if administrator punished adult leader at all, punishment was unrelated to any speech or other expressive act by adult leader so that § 1983 claim did not allege violation of adult leader's constitutional right to free speech. As to members who had participated in film, administrator was shown expressive work of art raising concerns about possibility of future violence, and suspended plaintiffs for short period of time while she conducted investigation to determine whether they and other participants in project were threat to others, and temporary suspension did not violate plaintiffs' *First Amendment* rights. *Robbins v. Regents of University of California (2005) 127 Cal. App. 4th 653, 661-664, 25 Cal. Rptr. 3d 851*

Employees of California Medical Board qualifiedly immune from liability in action arising from investigation of physician, leading to physician's voluntary surrender of license for improperly prescribing drugs. *Bradley v. Medical Board (1997) 56 Cal. App. 4th 445, 457-462, 65 Cal. Rptr. 2d 483*

Public officer's unreasonable ignorance that he violated clearly established constitutional right precludes qualified immunity. *Conway v. Pasadena Humane Society (1996) 45 Cal. App. 4th 163, 178, 52 Cal. Rptr. 2d 777*

In actions under *42 U.S.C. § 1983*, law enforcement officials have qualified immunity for their actions in investigating cases of alleged child abuse; officer's conduct is judged by objective standard. *Elene H. v. County of Los Angeles (1990) 220 Cal. App. 3d 1445, 1453, 269 Cal. Rptr. 783*

[l] State-Law Immunities

Municipality may not raise as a defense in *42 U.S.C. § 1983* action an immunity granted to municipalities under state law. *Monell v. Dep't of Soc. Servs. (1978) 436 U.S. 658, 695 n.59, 98 S. Ct. 2018, 56 L. Ed. 2d 611* ; *Morrison v. Jones (9th Cir. 1979) 607 F.2d 1269, 1273 , cert. denied, 445 U.S. 962 (1980)*

State statutory immunity provisions do not apply to federal civil rights action. *Guillory v. County of Orange (9th Cir. 1984) 731 F.2d 1379, 1382*

Immunity provided by *Penal Code § 11172(a)* to specified persons who reasonably suspect and report child abuse to authorities provides immunity from claims under *42 U.S.C. § 1983*; state law defense is applicable to § 1983 claim if not inconsistent with intent and purpose of federal law; Congress impliedly authorized creation of reporting immunity by enactment of Child Abuse Prevention and Treatment Act (*42 U.S.C. § 5101 et seq.*). *Thomas v. Chadwick (1990) 224 Cal. App. 3d 813, 823-827, 274 Cal. Rptr. 128*

[l.1] Sovereign Immunity

Federal court's enforcement of consent decree entered into in action under *42 U.S.C. § 1983* by state officials concerning Medicaid was not barred by *Eleventh Amendment*. *Frew v. Hawkins (2004) 540 U.S. 431, 124 S. Ct. 899, 903-906, 157 L. Ed. 2d 855*

In action under *42 U.S.C. § 1983* based on behavior of private corporation contracted with district attorney to run bad check diversion program, corporation, as private entity, was not entitled to sovereign immunity. *Del Campo v. Kennedy (9th Cir. 2008) 517 F.3d 1070, 1075-1080*

42 U.S.C. § 1983 action by student against state university president, members of student election committee and others, seeking declaratory and injunctive relief for university's allegedly unconstitutional infringement of his right to freedom of speech based on spending limit on campaign for student office, was not barred by *Eleventh Amendment*, where injunctions sought to expunge university records of censure and denial of student senate seat, which could cause student present and future harm. *Flint v. Dennison (9th Cir. 2007) 488 F.3d 816, 824-825*

In action by unsuccessful candidates for student government positions at University of California Santa Cruz, against university administration, officers of student government, student government election commissioners, and Doe defendants, *Eleventh Amendment* precluded granting plaintiffs' request for new election because it was not request for prospective relief, but, rather, its purpose was to undo results of election that had already been given effect. *Students for a Conservative America v. Greenwood (9th Cir. 2004) 378 F.3d 1129, 1130*

[m] Res Judicata and Collateral Estoppel

State court judgment has claim preclusive effect in subsequent federal suit under *42 U.S.C. § 1983*, regarding federal issues litigant could have raised in state court proceedings, but did not. *Migra v. Warren City School Dist. Bd. of Education (1984) 465 U.S. 75, 83-85, 104 S. Ct. 892, 79 L. Ed. 2d 56*

Arbitration awards in proceedings brought pursuant to collective bargaining agreements not afforded res judicata or collateral estoppel effect in § 1983 actions. *McDonald v. West Branch (1984) 466 U.S. 284, 288, 292, 104 S. Ct. 1799, 80 L. Ed. 2d 302*

Doctrine of collateral estoppel may preclude relitigation in civil action of issues decided in prior criminal proceeding. *Allen v. McCurry (1980) 449 U.S. 90, 104, 101 S. Ct. 411, 66 L. Ed. 2d 308*

Determination of probable cause at preliminary hearing in criminal proceeding did not have collateral estoppel effect in action under *42 U.S.C. § 1983* brought after prosecution dismissed charges, when it was apparent from record that evidence presented at preliminary hearing was not same as evidence available to police officer at time of arrest. *McCutchen v. City of Montclair (1999) 73 Cal. App. 4th 1138, 1145-1147, 87 Cal. Rptr. 2d 95*

[n] Post-Deprivation Remedy for Procedural Due Process Claim

Parratt doctrine applied to deprivations of liberty. *Zinermon v. Burch (1990) 494 U.S. 113, 131-139, 110 S. Ct. 975, 108 L. Ed. 2d 100*

Parratt doctrine applied to intentional destruction of property; state Tort Claims Act constituted adequate post-deprivation remedy. *Hudson v. Palmer (1984) 468 U.S. 517, 530-534, 104 S. Ct. 3194, 82 L. Ed. 2d 393*

Parratt doctrine applied to random and unauthorized deprivations, not to losses resulting from application of established procedures. *Logan v. Zimmerman Brush Co. (1982) 455 U.S. 422, 435-436, 102 S. Ct. 1148, 71 L. Ed. 2d 265*

Adequate post-deprivation remedy provides due process in cases of negligent deprivations of property. *Parratt v. Taylor (1981) 451 U.S. 527, 543-544, 101 S. Ct. 1908, 68 L. Ed. 2d 420 , overruled in part, Daniels v. Williams (1986) 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662*

Parratt doctrine is inapplicable if plaintiff alleges violation of substantive due process right. *Wood v. Ostrander (9th Cir. 1989) 879 F.2d 583, 588-589 , cert. denied, 498 U.S. 938 (1990)*

Availability of state remedies defeated property owner's claim of denial of procedural due process against county supervisor. *Lake Nacimiento Ranch Co. v. County of San Luis Obispo (9th Cir. 1987) 841 F.2d 872, 879 , cert. denied, 488 U.S. 827 (1988)*

Substantive due process is violated at moment harm occurs, and existence of post-deprivation state remedy does not have any bearing on whether cause of action exists under *42 U.S.C. § 1983*. *Smith v. City of Fontana (9th Cir. 1987) 818 F.2d 1411, 1415 , cert. denied, 484 U.S. 935 , overruled in part, Hodgers-Durgin v. De La Vina (9th Cir. 1999) 199 F.3d 1037, 1040 n.1*

Availability of state tort remedy does not bar due process claim under § 1983 when plaintiff is challenging established state procedure; *Parratt* rule is only applicable to cases involving random and unauthorized acts. *Sanders v. Kennedy (9th Cir. 1986) 794 F.2d 478, 480-482*

[o] Exhaustion of Remedies

Exhaustion of state remedies not required before bringing action under *42 U.S.C. § 1983*. *Patsy v. Florida Board of Regents (1982) 457 U.S. 496, 516, 102 S. Ct. 2557, 73 L. Ed. 2d 172* ; *Monroe v. Pape (1961) 365 U.S. 167, 183, 81 S. Ct. 473, 5 L. Ed. 2d 492* (overruled on other grounds in *Monell v. Dep't of Soc. Servs. (1978) 436 U.S. 658, 663, 98 S. Ct. 2018, 56 L. Ed. 2d 611*)

Rule that exhaustion is not required is equally applicable to contractual and administrative remedies. Smith v. United Trans. Union Local No. 81 *(S.D. Cal. 1984) 594 F. Supp 96, 99*

[p] Jurisdiction

Trial court has no jurisdiction over purported *42 U.S.C. § 1983* claim that consists of collateral attack on prior state-court judgment. *Branson v. Nott (9th Cir. 1995) 62 F.3d 287, 291-292 , cert. denied, 516 U.S. 1009*

[q] Concurrent Jurisdiction

State courts exercise concurrent jurisdiction over civil rights actions under *42 U.S.C. § 1983*. *Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 173, 216 Cal. Rptr. 661, 703 P.2d 1* ; *Williams v. Horvath (1976) 16 Cal. 3d 834, 837, 129 Cal. Rptr. 453, 548 P.2d 1125* ; *Brown v. Pitchess (1975) 13 Cal. 3d 518, 522-523, 119 Cal. Rptr. 204, 531 P.2d 772* ; *County of Los Angeles v. Superior Court of Los Angeles County (Peters) (1998) 68 Cal. App. 4th 1166, 1170, 80 Cal. Rptr. 2d 860*

When concurrent jurisdiction enables plaintiff to bring simultaneous actions in state and federal court, final judgment by first court to decide matter bars other action under res judicata. *Weber v. Willard (1989) 207 Cal. App. 3d 1006, 1009, 255 Cal. Rptr. 165*

[r] Damages

Punitive damages may not be recovered against municipality. *Jefferson v. City of Tarrant (1997) 522 U.S. 75, 79, 118 S. Ct. 481, 139 L. Ed. 2d 433* ; *City of Newport v. Fact Concerts (1981) 453 U.S. 247, 271, 101 S. Ct. 2748, 69 L. Ed. 2d 616*

Abstract value or importance of constitutional right of which person was deprived may not form basis for damages under *42 U.S.C. § 1983*. *Memphis Community School Dist. v. Stachura (1986) 477 U.S. 299, 308-310, 106 S. Ct. 2537, 91 L. Ed. 2d 249*

For recovery of punitive damages, defendant's conduct must be motivated by evil motive or intent, or must involve reckless or callous indifference to federally protected rights of others; this threshold applies even when underlying standard of liability for compensatory damages is one of recklessness. *Smith v. Wade (1983) 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632*

Basic purpose of award of damages under *42 U.S.C. § 1983* is to compensate a person for injuries caused by deprivation of rights. *Carey v. Piphus (1978) 435 U.S. 247, 254-257, 98 S. Ct. 1042, 55 L. Ed. 2d 252*

In § 1983 action for false arrest and false imprisonment, trial court properly remitted jury's punitive damages award as violative of Due Process Clause based on jury's nominal damages award of $1 each on false arrest and false imprisonment claims, where trial court found that defendant's conduct in deliberately and illegally withholding relevant information from plaintiff, failing to translate and pressuring her to sign consent-to-search form, and illegally detaining plaintiff at police station was not so reprehensible as to justify punitive damages award because even though jury found defendant acted with reckless disregard for plaintiff's rights, there was no evidence he acted with malice, there was no evidence defendant had acted in same manner on any other occasion, and defendant's conduct did not pose any risk to plaintiff's bodily health or safety. Further, punitive damages award represented ratio of 125,000 to 1, which was considerably in excess of single-digit ratios United States Supreme Court deemed more likely to comport with due process than higher ratios. *Mendez v. County of San Bernardino (9th Cir. 2008) 540 F.3d 1109, 1120-1123*

In § 1983 action based on arrest and prosecution of police officers for allegedly planting gun on suspect, evidence presented at trial and viewed in the officers' favor justified jury's damages verdict of $5,000,001 for each officer, where record demonstrated that harms suffered by officers were similar in content and quality, where there was no indication jury improperly took other incidents into account and jury had substantial evidence to conclude on one incident-related

charges alone officers suffered harm and should be awarded damages, where jury's refusal to find that police chief acted with malice, fraud, or oppression belied argument jury was unduly inflamed, and where, although none of accused officers presented evidence of specific monetary damages, such as medical expenses or lost income, damage awards were not required to be supported by objective evidence. *Harper v. City of Los Angeles (9th Cir. 2008) 533 F.3d 1010, 1027-1030*

In § 1983 action by plaintiff who was unlawfully detained during search of her home, substantial evidence supported jury's award of punitive damages against police officers, when there was evidence indicating officers had disdain for house and its residents and evidence suggested officers recklessly disregarded plaintiff's constitutional rights under *Fourth Amendment*. *Mena v. City of Simi Valley (9th Cir. 2003) 332 F.3d 1255, 1270*

In action under § 1983 for racially discriminatory actions by landlord, trial court properly awarded punitive damages, when records showed landlord's conduct met at least reckless or callous indifference standard and was sufficient to satisfy and uphold court's award. *Fair Housing of Marin v. Combs (9th Cir. 2002) 285 F.3d 899*

Due process analysis employed by *United States Supreme Court in Pacific Mut. Life Ins. Co. v. Haslip (1991) 499 U.S. 1, 15-17, 111 S. Ct. 1032, 113 L. Ed. 2d 1* , applies to actions brought under *42 U.S.C. § 1983*, and any award of punitive damages must be product of procedures that meet those due process requirements. *Morgan v. Woessner (9th Cir. 1993) 997 F.2d 1244, 1254-1260 , cert. denied, 510 U.S. 1033 (1994)*

When individuals acquitted in state criminal proceedings bring *42 U.S.C. § 1983* action based on police violation of *Fourth Amendment* rights, attorney's fees expended by those individuals in defending themselves in state criminal proceedings are recoverable as compensatory damages. *Borunda v. Richmond (9th Cir. 1988) 885 F.2d 1384, 1389-1390*

Deterrence of future constitutional violations is important function of *42 U.S.C. § 1983* action; remedy is properly tailored to prevent defendant from being required to bear greater economic loss for inflicting injury than for inflicting death. *Roman v. City of Richmond (N.D. Cal. 1983) 570 F. Supp. 1554, 1556-1558*

[s] Abstention

When related state criminal proceedings are pending, federal court stays rather than dismisses federal civil rights claim for damages under *42 U.S.C. § 1983*. *Deakins v. Monaghan (1988) 484 U.S. 193, 199-204, 108 S. Ct. 523, 98 L. Ed. 2d 529*

Action under *42 U.S.C. § 1983* for damages as well as injunctive and declaratory relief and damages by land surveyor whose license to survey was revoked and not reinstated by state board of examiners was subject to abstention in light of pending state disciplinary proceeding, when constitutional issues in federal complaint went to heart of opposition to board's action in state proceeding and federal court's decision on merits of claims would have same practical effect on state proceeding as injunction, when ongoing disciplinary proceeding was proceeding of judicial nature implicating important state interest, and when constitutional claims could be litigated in state proceedings, and although monetary relief could not be awarded in ongoing state proceeding, that obstacle was obviated by federal court's staying, rather than dismissing, federal action. *Gilbertson v. Albright (9th Cir. 2004) 381 F.3d 965, 982-984*

In action by land surveyor under *42 U.S.C. § 1983* for money damages for retaliation for surveyor's exercise of *First Amendment* rights, violation of due process and denial of equal protection, based on revocation of license and refusal to reinstate license after which surveyor appealed to state court of appeals and filed federal action, *Younger* abstention was not appropriate when, although favorable ruling in federal court on due process and equal protection allegations necessarily would declare ongoing state proceeding to be constitutionally invalid, state administrative proceedings

implicated important state interests such as ensuring only competent land surveyors be licensed and state proceedings were ongoing at time federal action was commenced, providing opportunity to litigate due process and equal protection claims, there was no mechanism by which state court could award damages for legitimate claim; and when under *First Amendment* claim, federal court could award damages for unlawful motivation for license revocation and refusal to reinstate without invalidating either decision, since complaint did not ask that court order reinstatement of his license. *Gilbertson v. Albright (9th Cir. 2003) 350 F.3d 1030, 1032-1034*

District court properly dismissed claim of nationwide direct-mail marketing company for declaratory relief, *i.e.*, invalidation of state's trade practices statutes and declaration that state lacks jurisdiction to enforce them, under *42 U.S.C. § 1983* based on *Younger* abstention, when state has strong interest in protecting its consumers from fraud and in administering its consumer-fraud statutes smoothly, state proceedings were ongoing and had been pending since state attorney general sent notice of unlawful trade practices, and company could raise their federal claims as defenses in state proceeding. District court also properly dismissed, rather than stayed, claims for damages for selective enforcement of trade practices laws in violation of *Equal Protection Clause* and that state officials' plan to seek higher penalties in court if company did not submit Assurance of Voluntary Compliance was retaliation for company's exercise of *First* and *Fourteenth Amendment* rights to court hearing, when ruling that civil enforcement proceeding violated either *Equal Protection Clause* or *First* or *Fourteenth Amendment* would declare ongoing state proceeding to be constitutionally invalid, and when from face of complaint it was clear damages claims were merely incidental to claims for declaratory relief. *Am. Consumer Publ'g Ass'n v. Margosian (9th Cir. 2003) 349 F.3d 1122, 1126-1132*

Younger abstention required dismissal of horse trainer's § 1983 action to enjoin administrative proceedings resulting in suspension of his license to race horses in California, which he brought against state administrative agency and officials that had ordered suspension, when trainer filed federal action while his state administrative appeal was pending and granting of federal injunctive relief would interfere directly with state administrative proceedings that implicate important state interest of protecting integrity of horse racing; when state proceedings provided adequate opportunity to litigate trainer's constitutional claim by providing sufficient judicial review to constitute adequate forum to litigate federal constitutional issues; and when there was no bad faith or special circumstances to constitute exception to application of *Younger* abstention. *Baffert v. Cal. Horse Racing Board (9th Cir. 2003) 332 F.3d 613, 617-622*

District court abused its discretion by dismissing complaint seeking damages under *42 U.S.C. § 1983* with prejudice under *Younger* abstention principle, where *Younger* does not authorize dismissal with prejudice of federal plaintiff's complaint seeking money damages under § 1983, and when precluding plaintiff from arguing merits of claims in federal court contravened § 1983's purpose of providing remedy in situations in which states provide inadequate remedies and in instances in which state remedies, though theoretically adequate, are unavailable in practice, so that even if *Younger* elements were satisfied, district court was required to stay proceedings. *Adam v. Hawaii (9th Cir. 2000) 235 F.3d 1160*

[t] Effect of Prior Criminal Conviction

Heck v. Humphrey did not create rule of evidence exclusion and could not be used to bar evidence in § 1983 claim for excessive force by prisoner against guard in which prisoner alleged that guard punched him on entering his cell, where, even if district court determined that prisoner could not file § 1983 lawsuit relating to any injuries stemming from guard's alleged punch based on disciplinary proceeding against prisoner related to incident, prisoner was still entitled to tell jury entire story, including evidence and/or testimony that guard initiated physical confrontation in cell by punching him. *Simpson v. Thomas (9th Cir. 2008) 528 F.3d 685, 691-696*

Favorable termination rule of *Heck v. Humphrey (1994) 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383* applies to civil commitments under California's Sexually Violent Predators Act. However, although claims for damages and declaratory relief were barred, claim for injunctive relief was not barred. *Huftile v. Miccio-Fonseca (9th Cir. 2005) 410 F.3d 1136, 1139-1141*

Heck v. Humphrey did not apply to bar § 1983 action by attorney based on judicial deception, against employee's of district attorney's office and county, and police officers and city, based on wiretap interception of phone call from client to his office and then concealment of wiretap through "handoff" procedure, by which investigative unit that obtained wiretap order and conducted surveillance transmitted information to another unit without expressly stating delivering unit obtained information via wiretap, which executes arrest after observing illicit conduct to obtain independent probable cause, where seizure conducted pursuant to warrant obtained by judicial deception violated *Fourth Amendment*, attorney was arrested or charged with or convicted of crime. However, action by former criminal defendants based on same investigation, seeking damages and declaratory relief, was barred by *Heck*, where criminal defendants challenged search and seizure of evidence on which their criminal charges and convictions were based, and no "belated discovery" exception to *Heck* applied because some criminal defendants knew about handoff procedure less than eight months after they pleaded guilty, while either was in jail or on parole, and other criminal defendant knew about handoff before they pleaded guilty. *Whitaker v. Garcetti (9th Cir. 2007) 486 F.3d 572, 581, 583-585*

Challenge to extradition procedures under *42 U.S.C. § 1983* did not implicate validity of underlying conviction. *Weilburg v. Shapiro (9th Cir. 2007) 488 F.3d 1202, 1205-1207*

Action against police officers under *42 U.S.C. § 1983* alleging use of excessive force was not barred by plaintiff's voluntary guilty plea under *Pen. Code § 148(a)(1)* to willfully resisting, delaying, or obstructing peace officer in performance of his or her duties, when use of excessive force by police officer at time of arrest is not within performance of officer's duty, and when excessive force may have been employed against plaintiff after he engaged in conduct constituting basis for his conviction, so that § 1983 action neither demonstrated nor necessarily implied invalidity of conviction. *Smith v. City of Hemet (9th Cir. 2005) 394 F.3d 689, 695-699*

Unavailability of remedy in habeas corpus because of mootness permitted former prisoner to maintain *42 U.S.C. § 1983* action for damages, even though success in that action would imply invalidity of disciplinary proceeding that caused revocation of his good-time credits, when former prisoner had been released from incarceration, so that petition for writ of habeas corpus would have to be dismissed for lack of case or controversy because he fully served period of incarceration he is attacking. *Nonnette v. Small (9th Cir. 2002) 316 F.3d 872, 875-877*

District court properly concluded that § 1983 claims against police officers and other officials by man convicted of felony murder of cohort, attempted murder of police officers, burglary, and robbery were barred under *Heck v. Humphrey [(1994) 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383]* because § 1983 complaint disputed several factual issues state criminal trial jury had already resolved against him. Plaintiff's failure to timely pursue habeas remedies did not take his § 1983 claim out of *Heck*'s purview because he was not akin to person not in custody. Claims by parents of robber who was killed and never tried or convicted were not similarly barred, because although issues necessarily decided at criminal trial of first man were identical to issues in parents' § 1983 claims and trial resulted in judgment on merits, parents were not in privity with criminal defendant during his criminal trial, and felony murder conviction of other man did not on its face foreclose possibility police also contributed to their son's death. *Cunningham v. Gates (9th Cir. 2002) 312 F.3d 1148, 1153-1157*

In action under *42 U.S.C. § 1983* based on injuries suffered by plaintiff when police officer shot him as the officer and three other officers were trying to transport him to jail following his arrest for driving under influence of alcohol, after plaintiff, despite being in handcuffs and leg restraints, was struggling and threatening officers, as result of which plaintiff pleaded no contest to resisting, delaying, or obstructing officer in performance of officer's duties and then sued city and officer for damages under § 1983, claims were barred under *Heck* to extent they alleged officer was not entitled to use force at all because plaintiff's resistance justified officers' use of reasonable force in response, but because use of deadly force was not reasonable and conviction for resisting officer in performance of duties did not in itself justify use of deadly force, claims were not barred to extent they challenged officer use of deadly force. *Yount v. City of Sacramento (2008) 43 Cal. 4th 885, 893-901, 76 Cal. Rptr. 3d 787*

Civil rights action against sheriff's deputies alleging excessive force necessarily called into question plaintiff's conviction on guilty plea for violating *Pen. Code § 148(a)(1)* by willfully resisting, delaying, or obstructing deputies in discharge of duty, when plaintiff's refusal to obey lawful order to disrobe and shower and events that led to her injuries were part of unbreakable chain of events. *Truong v. Orange County Sheriff's Dept. (2005) 129 Cal. App. 4th 1423, 1427-1429, 29 Cal. Rptr. 3d 450*

[u] Ripeness

District court erred in ruling that landowner's timely filed claims of denial of equal protection and procedural due process and for retaliation for exercising *First Amendment* rights pertaining to residential building permit and polo field application on which county had not yet acted were not ripe for judicial review by determining that gravamen of complaint was "as applied" takings challenge to county's land use policies and requiring final agency decision on polo field application and residential building permit, when constitutional claims pertaining to polo field application and residential building permit were separate claims supported by allegations of discrete constitutional violations rather than "as applied" takings claims, because landowner alleged that county's requirements, conditions, delays, and fees were imposed in retaliation for his exercise of his *First Amendment* rights to publicly criticize county and access courts, so that he suffered harm and did not have to await further action by county, and when landowner alleged that acts relating to polo field application and residential building permit denied him equal protection of law because they imposed conditions on him not imposed on similarly situated property owners and not justified by conditions on his property, and he alleged he was denied procedural due process because county's decisions regarding his applications had either been delegated to non-governmental entities or been made by biased and unfair decision-makers motivated to retaliate against him. *Carpinteria Valley Farms, Ltd. v. County of Santa Barbara (9th Cir. 2003) 334 F.3d 796, 801-802*

[v] Evidence

In action alleging discrimination against predominantly Latino neighborhoods based on ethnicity or race by city's failure to provide adequate municipal services and to bring neighborhoods into city, plaintiffs presented evidence of discriminatory impact through statistical and other evidence, which, in turn, created sufficient inference of discriminatory intent to permit them to present their claim of intentional discrimination in exclusion of neighborhoods from master tax sharing agreement to fact finder. However, given lack of disparity in actual access to sewer services, plaintiffs' statistical evidence was insufficient to give rise to inference of discriminatory intent on claim that infrastructure condition, requiring county to install all infrastructure in neighborhood up to city standards before city would permit city voters to consider extending sewer services to neighborhood, was applied in discriminatory way. *Committee Concerning Community Improvement v. City of Modesto (9th Cir. 2009) 583 F.3d 690, 702-707*

[4] Conspiracy to Interfere with Rights: 42 U.S.C. § 1985

Some activities may be such irrational object of disfavor that, if targeted, and if they also are engaged in exclusively or predominantly by particular class of people, intent to disfavor that class can readily be presumed. *Bray v. Alexandria Clinic (1993) 506 U.S. 263, 270, 113 S. Ct. 753, 122 L. Ed. 2d 34*

42 U.S.C. § 1985(3) reaches conspiracies motivated by class-based, invidiously discriminatory animus, but not conspiracies motivated by economicor commercial animus. *United Brotherhood of Carpenters and Joiners v. Scott (1983) 463 U.S. 825, 830, 838, 103 S. Ct. 3352, 77 L. Ed. 2d 1049*

Actions under *42 U.S.C. § 1985(1)* and*(2)* do not require intent to deprive someone of equal protection of law, and proof of class-based animus is not necessary. *Kush v. Rutledge (1983) 460 U.S. 719, 724-727, 103 S. Ct. 1483, 75 L.*

Ed. 2d 413

Complaint based on refusal of board of medicine, board of professional discipline, individual members and counsel of both boards, and executive director of board of medicine to reinstate physician assistant's license failed to state cause of action under *42 U.S.C. § 1985* for conspiracy to violate civil rights, because complaint was devoid of discussion of agreement amongst defendants to violate plaintiff's constitutional rights. Further, plaintiff could not amend complaint to cure § 1985 defect, because to state claim for conspiracy under § 1985, a plaintiff must have cognizable claim under *42 U.S.C. § 1983*, and plaintiff's § 1983 claims were properly dismissed. *Olsen v. Idaho State Board of Medicine (9th Cir. 2004) 363 F.3d 916, 929-930*

District court properly entered summary judgment on claim under *42 U.S.C. § 1985(3)* contending conspiracy to retaliate against plaintiff for *First Amendment* activities and to deprive him of federal and state rights, when plaintiff alleged no racial or otherwise class-based invidious discriminatory animus behind defendants' conduct. *Butler v. Elle (9th Cir. 2002) 281 F.3d 1014, 1028*

Trial court properly dismissed claim of pro-life demonstrator arrested on public college campus during demonstration for violation of his rights under *42 U.S.C. § 1985(3)*, when, although his rights under *42 U.S.C. § 1983* may have been violated by imposition of condition inconsistent with *First Amendment* free speech and *free exercise clauses* that he limit demonstration to secular content, nothing in record indicated that any of defendant's actions were motivated by invidiously discriminatory animus. *Orin v. Barclay (9th Cir. 2001) 272 F.3d 1207, 1217*

African-American professional basketball player failed to state claim for racial discrimination under *42 U.S.C. § 1985(3)*, when arbitration award attached to complaint showed that punishment imposed for attack on coach was motivated solely by player's misconduct. *Sprewell v. Golden State Warriors (9th Cir. 2000) 231 F.3d 520, 529*

No violation of *42 U.S.C. § 1985(3)* was alleged against store that refused to sell Levi jeans to plaintiffs, when plaintiffs, who were of Arabic descent, knew of store's race-neutral policy of refusing to sell Levis to dealers, and intentionally misrepresented themselves as ultimate consumers when they were in fact agents of dealers. *Addisu v. Fred Meyer, Inc. (9th Cir. 2000) 198 F.3d 1130, 1141*

Vicarious liability can be imposed on defendant in action under *42 U.S.C. § 1985(3)*. *Scott v. Ross (9th Cir. 1998) 140 F.3d 1275, 1284 , cert. denied, 526 U.S. 1033 (1999)*

Military subordinates have no remedy under *42 U.S.C. § 1985(1)* against their military superiors. *Miller v. Newbauer (9th Cir. 1988) 862 F.2d 771, 774*

Properly pleaded claim under *42 U.S.C. § 1985(2)* must include allegation of racial or class-based animus; plaintiff who pleaded that racial slurs were directed against him adequately pleaded cause of action. *Usher v. City of Los Angeles (9th Cir. 1987) 828 F.2d 556, 561*

To establish claim under *42 U.S.C. § 1985(2)*, plaintiff must show conspiracy between two or more persons to deter witness by force, intimidation, or threat from attending court or testifying freely in any pending matter, resulting in injury to plaintiff. *David v. United States (9th Cir. 1987) 820 F.2d 1038, 1040*

One-year limitation period of former *Code Civ. Proc. § 340(3)* applied to actions under *42 U.S.C. § 1985(3)*. *McDougal v. County of Imperial (9th Cir. 1991) 942 F.2d 668, 673-674 . Note:* Effective January 1, 2003, *Code Civ. Proc. § 340* was amended and *Code Civ. Proc. § 335.1* was added to provide that personal injury actions are now governed by a two-year statute of limitations

Groups warranting protection from conspiracies under § 1985(3) are not limited to those based on racial or otherwise

suspect classifications. *Life Ins. Co. of North America v. Reichardt (9th Cir. 1979) 591 F.2d 499, 505*

42 U.S.C. § 1985(3) reaches purely private conspiracies aimed at depriving persons of constitutionally guaranteed right to travel. *Molko v. Holy Spirit Ass'n (1988) 46 Cal. 3d 1092, 1125-1126, 252 Cal. Rptr. 122, 762 P.2d 46 , cert. denied, 490 U.S. 1084 (1989)*

[5] Neglect to Prevent Conspiracy to Interfere with Rights: 42 U.S.C. § 1986

Cause of action under *42 U.S.C. § 1986* requires that there be valid claim under *42 U.S.C. § 1985*. *Trerice v. Pedersen (9th Cir. 1985) 769 F.2d 1398, 1403* ; *Washington v. Duty Free Shoppers (N.D. Cal 1988) 696 F. Supp. 1323, 1327*

Action available under § 1986 when police officers conspired to make false representations in effort to cover up facts regarding fatal shooting of arrestee. *Bell v. City of Milwaukee (7th Cir. 1984) 746 F.2d 1205, 1255-1260*

Cause of action stated under § 1986 when plaintiff alleged that police agreed not to respond to calls for assistance for 15 minutes, allowing vigilantes time to physically assault participants in " *Freedom Ride." Peck v. United States (S.D.N.Y. 1979) 470 F. Supp. 1003, 1012-1013*

[6] Attorney's Fees Under 42 U.S.C. § 1988

[a] Prevailing Party

Plaintiff who obtained preliminary injunction under *First Amendment* to allow nude display of artwork, but who was denied permanent injunction after dispositive hearing on motion for summary judgment, was not qualified as prevailing party under § 1988, where preliminary injunction hearing was necessarily hasty and abbreviated eventual ruling on merits for defendants, after both sides considered case fit for final adjudication, superseded preliminary ruling, and final decision rejected same claim she advanced in preliminary injunction motion that state law banning nudity in parks was unconstitutional as applied to expressive, nonerotic nudity. *Sole v. Wyner (2007) 551U.S.74, 127 S. Ct. 2188, 167 L. Ed. 2d 1069, 1076-1079*

Plaintiff prevails if actual relief on merits of claim materially alters legal relationship between parties by modifying defendant's behavior in way that directly benefits plaintiff. *Farrar v. Hobby (1992) 506 U.S. 103, 111, 113 S. Ct. 566, 121 L. Ed. 2d 494*

Bank holding company not prevailing party in appeal that held in its favor, when United States Supreme Court vacated judgment on basis of event that mooted controversy before judgment was issued. *Lewis v. Bank Corp. (1990) 494 U.S. 472, 483, 110 S. Ct. 1249, 108 L. Ed. 2d 400*

To be prevailing party under *42 U.S.C. § 1988*, plaintiff must personally benefit from relief. *Rhodes v. Stewart (1988) 488 U.S. 1, 4, 109 S. Ct. 202, 102 L. Ed. 2d 1*

Even if there is causal link between litigation and defendant's subsequent acts, plaintiff is not prevailing party unless he or she receives direct benefit from acts. *Hewitt v. Helms (1987) 482 U.S. 755, 763-764, 107 S. Ct. 2672, 96 L. Ed. 2d 654*

Plaintiff is considered prevailing party, and may recover attorney's fees, if he or she succeeds on any significant issue in litigation that achieves some of benefit sought in bringing suit. *Hensley v. Eckerhart (1983) 461 U.S. 424*

Prevailing defendant in civil rights action may recover attorney's fees only if suit was vexatious, frivolous, or brought

to harass or embarrass defendant. *Hensley v. Eckerhart (1983) 461 U.S. 424, 429* ; *Herb Hallman Chevrolet v. Nash-Holmes (9th Cir. 1999) 169 F.3d 636, 645 , cert. denied, 528 U.S. 870* ; *Bemis v. Edwards (9th Cir. 1995) 45 F.3d 1369, 1375* ; *Benigni v. Hemet (9th Cir. 1989) 879 F.2d 473, 480* ; *Gill v. Hughes (1991) 227 Cal. App. 3d 1299, 1312-1313, 278 Cal. Rptr. 306*

Although plaintiff obtained only nominal damages in § 1983 action and state wrongful death action, trial court properly awarded attorney's fees, where plaintiff's success in achieving liability verdict was significant, independent of any damage award, even though difference between damages sought and obtained somewhat disfavored award of attorney's fees. *Mahach-Watkins v. Depee (9th Cir. 2010) 593 F.3d 1054, 1059-1063*

In action by media companies in which district court granted preliminary and permanent injunctions sought by plaintiffs, denial of attorney's fees to plaintiff's under *42 U.S.C. § 1988* was vacated and remanded, where attorney's fees should have been denied only in unusual cases, and where district court's denial of fees did not identify special circumstances rendering award unjust using two-pronged test to determine whether special circumstances existed to justify denying attorney's fees, i.e., whether awarding fees would have furthered purposes of § 1988, and whether balance of equities favored or disfavored denial of fees. *American Broadcasting Companies v. Miller (9th Cir. 2008) 550 F.3d 786, 787-788*

In § 1983 action for false arrest and false imprisonment, although trial court acknowledged plaintiff was prevailing plaintiff and ordinarily entitled to reasonable attorneys' fee, trial court abused its discretion in denying plaintiff's request for costs and fees under *42 U.S.C. § 1988* in its entirety, finding that her request was so excessive it shocked the conscience and warranted denial of fees altogether, where jury found in plaintiff's favor on three claims against five parties, and plaintiff won both nominal and punitive damages awards, where there were no special circumstances sufficient to deny fees and costs entirely, and where Ninth Circuit has not adopted "shocks the conscience" standard. *Mendez v. County of San Bernardino (9th Cir. 2008) 540 F.3d 1109, 1124-1130*

Insurance companies and insurance trade association who sought to bar enforcement of California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA) [*Ins. Code § 13800 et seq.*], which requires disclosure of information pertaining to Holocaust-era insurance policies written in Europe, were prevailing parties entitled to attorney's fees under *42 U.S.C. § 1988*, when plaintiffs obtained all relief they sought, *i.e.*, permanent injunction enjoining enforcement of HVIRA, and when plaintiff prevailed under a fee-generating legal right, *i.e.*, Due Process Clause and Commerce Clause properly cognizable, fee-supporting claims under *42 U.S.C. § 1983*, and United States Supreme Court avoided resolution of fee-supporting federal claim. *Gerling Global Reinsurance Corp. of America v. Garamendi (9th Cir. 2005) 400 F.3d 803, 806-810*

Political party that prevailed against state's secretary of state in action under *42 U.S.C. § 1983* to eliminate state's "blanket primary" on ground that system was unconstitutional was entitled to attorney's fees for appeal under *42 U.S.C. § 1988*, when, although case was atypical because most § 1983 cases are prisoners' and arrestees' claims for damages, atypicality did not make case less suitable for award of fees. Fact that political parties probably had more money than typical § 1983 plaintiffs did not make fees unsuitable because people and entities whose civil rights had been unconstitutionally abridged were generally entitled to fees under § 1988 regardless of ability to pay attorneys. There was nothing wrong with asserting civil rights claim under § 1983 with purpose of obtaining attorneys' fees if claim succeeded. Fee application would not be denied because it did not demonstrate that work done was necessary and had extensive redactions, because court knew work was done and even with redactions application furnished enough information for court to form judgment on whether fees were legitimate and party was entitled to keep work product secret. *Democratic Party of Wash. State v. Reed (9th Cir. 2004) 388 F.3d 1281, 1285-1286*

Because there was legally enforceable settlement agreement between parties, district court erred when it denied plaintiffs attorney's fees and costs under ADA and *42 U.S.C. § 1988*. District court also erred when it denied plaintiffs prevailing party status based on their success in obtaining preliminary injunction preventing defendant developmental

services department from releasing development center residents into community placements unless certain conditions were met; however, district court did not err in denying plaintiffs prevailing party status based on their efforts to modify intervenors' permanent injunction. *Richard S. v. Dept. of Developmental Services of State of California (9th Cir. 2003) 317 F.3d 1080, 1086-1089*

In action by former deputy sheriff alleging county and various individual deputies violated his *Fourth*, *Fifth*, and *Fourteenth Amendment* rights by detaining him and compelling him to write incident report in which he was suspected of using excessive force and as result of which he was terminated, and by refusing to allow him to consult with lawyer or representative of his employee organization before writing report, with deputy's success in obtaining preliminary injunction enjoining county from using report at hearing on his appeal of his termination from sheriff's office, trial court's conclusion that deputy was prevailing party for purposes of award of attorney's fees under *42 U.S.C. § 1988*, even though he did not recover other relief sought, was not in error, when claim for permanent injunctive relief was not decided on merits and preliminary injunction was not dissolved for lack of entitlement, but, rather, claim for permanent injunction was rendered moot when employment termination hearing was over, after preliminary injunction had done its job. Further, court's award of fees based on all of time his lawyers spent on case, with exception of time spent by lawyers responding to motions to intervene filed by third parties (which district court denied), not just time allocable to preliminary injunction, was within court's discretion. *Watson v. County of Riverside (9th Cir. 2002) 300 F.3d 1092, 1095-1097*

Plaintiff who succeeded in obtaining court order incorporating agreement that included relief plaintiff sought in lawsuit, i.e., lifting of sanctions imposed by defendant on plaintiff, which resolved two of three administrative sanctions imposed, was prevailing party for purposes of attorney's fees award under *42 U.S.C. § 1988*. *Labotest v. Bonta (9th Cir. 2002) 297 F.3d 892, 894-895*

Original prevailing party who later defended consent decree against collateral attack in separate action is eligible for fees award under § 1988; however, trial court did not abuse its discretion in denying fees award in light of party's lack of success in its defense of consent decree and fact that some defendants already paid fees to plaintiffs in subsequent collateral attack and should not have been forced to finance both sides of litigation. *San Francisco NAACP v. San Francisco Unified Sch. Dist. (9th Cir. 2002) 284 F.3d 1163*

In action challenging results of election, plaintiffs were not entitled to attorney's fee award under *42 U.S.C. § 1988* even though state Legislature passed bill while litigation was pending granting new election, when plaintiffs sought award solely on "catalyst theory" and did not obtain material change in their favor through litigation, and catalyst theory is not permissible basis for award under § 1988. *Bennett v. Yoshina (9th Cir. 2001) 259 F.3d 1097, 1100-1101*

District court abused discretion in denying attorney's fees to defendant police officer in *42 U.S.C. § 1983* action, when officer satisfied high standard for awarding attorney's fees and costs to prevailing defendant under *42 U.S.C. § 1988*, by showing that action was groundless. *Saman v. Robbins (9th Cir. 1999) 173 F.3d 1150, 1157-1158*

District court erred in awarding attorney's fees to defendant prosecutors in action for "defamation-plus" under *42 U.S.C. § 1983*, when plaintiff adequately alleged elements of defamation-plus claim; when claim survived motion to dismiss; when state court order had implied that facts supported defamation-plus claim; and when plaintiff cited and relied on specific cases for principle that business goodwill is protected property right in Nevada. *Herb Hallman Chevrolet v. Nash-Holmes (9th Cir. 1999) 169 F.3d 636, 645 , cert. denied, 528 U.S. 870*

In finding implied private right of action in Indian Child Welfare Act (ICWA), *25 U.S.C. § 1911*, court implicitly held that Indian villages' claims under ICWA could be enforced through *42 U.S.C. § 1983*, and villages need only show that at least one of their claims fell within remedial scheme of § 1983 and remained sufficiently substantial throughout litigation, to trigger fee-shifting provision of *42 U.S.C. § 1988*. *Native Village of Venetie IRA Council v. Alaska (9th Cir. 1998) 155 F.3d 1150, 1152-1153*

Prevailing plaintiffs include those who have negotiated successful settlements. *Wakefield v. Mathews (9th Cir. 1988) 852 F.2d 482, 483*

Supplemental award of attorney's fees for work performed in monitoring consent decree was proper when work was performed on behalf of prevailing parties in underlying action. *Keith v. Volpe (9th Cir. 1987) 833 F.2d 850, 855-857*

Order awarding attorney's fees to plaintiffs as prevailing parties vacated when judgment on merits reversed on appeal. *Turner v. McMahon (9th Cir. 1987) 830 F.2d 1003, 1009 , cert. denied, 488 U.S. 818 (1988)*

Trial court abused its discretion in awarding fees under *42 U.S.C. § 1988* to plaintiff who won on state battery claim but lost federal claim for violation of civil rights by use of excessive force based on same conduct, when not every state claim for battery by police officer results in a constitutional violation; when two kinds of claims were treated separately at trial, pleaded separately in complaint, jury received separate instructions and instructions on deprivation of plaintiff's constitutional rights required jury to evaluate defendants' conduct based on standard of reasonable officer in light of totality of circumstances, including severity of crime, and jury was provided with special verdict form in which it had to decide battery claim and civil rights claims individually; and when jury found federal claim was not established and trial judge disregarded verdict in awarding fees because he perceived it as inconsistent, but no authority allowed judge to ignore verdict and award fees. *McFadden v. Villa (2001) 93 Cal. App. 4th 235, 113 Cal. Rptr. 2d 80*

In case brought under *42 U.S.C. § 1983*, in which one plaintiff recovered $3,380 in compensatory damages and $1,000 in punitive damages, and another plaintiff recovered $1,089 in compensatory damages and $250 in punitive damages, trial court properly denied plaintiffs' request for attorney's fees under *42 U.S.C. § 1988*; however, trial court erred in awarding attorney's fees to defendants. *Choate v. County of Orange (2000) 86 Cal. App. 4th 312, 322-327, 103 Cal. Rptr. 2d 339*

Plaintiff is prevailing party when relief is preliminary, and lawsuit need not proceed to completion; proper focus is whether plaintiff has been successful, as shown by fact that he or she obtained primary relief sought. *McMahon v. Lopez (1988) 199 Cal. App. 3d 829, 835, 245 Cal. Rptr. 172*

Successful ruling during course of litigation was insufficient to justify award of attorney's fees, when ruling is later reversed by legislative action and when trial court explicitly finds that plaintiff's civil rights claims are without merit. *Miller v. California Comm'n on Status of Women (1985) 176 Cal. App. 3d 454, 458-459, 222 Cal. Rptr. 225*

[b] Determination of Lodestar

Market rates for paralegals and law clerks, rather than their actual cost to attorney, properly used in calculating compensation for their work as part of fee award. *Missouri v. Jenkins (1989) 491 U.S. 274, 284-289, 109 S. Ct. 2463, 105 L. Ed. 2d 229*

Court properly awarded attorney's fees for time spent on administrative proceedings to enforce civil rights claim before litigation; even if purpose of that proceeding was not to enforce civil rights law listed in *42 U.S.C. § 1988*, fees are appropriate if work product is both useful and of type ordinarily necessary to advance civil rights litigation. *North Carolina DOT v. Crest Street Community Council, Inc. (1986) 479 U.S. 6, 15, 107 S. Ct. 336, 93 L. Ed. 2d 188*

Initial estimate of reasonable attorney's fee is properly calculated by multiplying number of hours reasonably expended on litigation times a reasonable hourly rate. *Blum v. Stenson (1984) 465 U.S. 886, 888, 104 S. Ct. 1541, 79 L. Ed. 2d 891* ; *Hensley v. Eckerhart (1983) 461 U.S. 424, 433*

District court's award of attorney's fees to plaintiff in § 1983 action would be remanded to permit district court to make necessary calculations and provide necessary explanations, where, other than stating that plaintiff's fee request was excessive, plaintiff failed to establish requested hourly rate, and hours expended were not justified by issues involved, district court provided no explanation for final number of hours allowed in its lodestar calculation or how it arrived at applicable hourly rate, and failure to provide explanation made meaningful review of its lodestar determinations impossible; and where, although district properly found that plaintiff did not fail to prevail on claims unrelated to claims on which he succeeded, court failed to properly analyze whether plaintiff achieved level of success making hours reasonably expended satisfactory basis for making fee award. *McCown v. City of Fontana (9th Cir. 2009) 550 F.3d 918, 922-925*

In action against city, police department, and police officers, after most claims were dismissed on summary judgment and remaining issue of excessive force was settled by parties for $20,000, district court erred in awarding plaintiff $200,000 in attorney's fees under § 1988 as reasonable in light of degree of success, overlapping issues involved, and public interest being served by prosecuting difficult case until very eve of trial, where district court provided no other explanation for final number of hours allowed in its lodestar calculation or how it arrived at applicable hourly rate, making meaningful review of its lodestar determinations impossible and requiring remand to permit district court to make necessary calculations and provide necessary explanations; and where, although district court did not abuse its discretion when it treated all claims, successful and unsuccessful, as arising out of common core of facts, it failed to address whether plaintiff achieved level of success making hours reasonably expended satisfactory basis for making fee award. *McCown v. City of Fontana (9th Cir. 2008) 550 F.3d 918, 922-925*

In § 1983 action against city and other defendants based on seizure and destruction of plaintiff's property without due process, trial court erred in calculating lodestar for award of attorney's fees to prevailing plaintiff under *42 U.S.C. § 1988*, where trial court's explanation was insufficient to sustain 25 percent cut in hours based on trial court's assessment of needless duplication; where trial court failed to adequately justify its reduction of time attorney spent performing interviews and investigation; and where, although trial court properly considered difficulty of trying case, rates charged by other attorneys in similar lawsuits, skill of plaintiff's counsel, that plaintiff obtained excellent results and that counsel was to be compensated only if lawsuit was successful, trial court went on to consider impermissible factors to reduce hourly rate, such as how other law firms could have staffed case differently, and erred by applying what appeared to be de facto policy of awarding specific hourly rate to civil rights cases and by double counting reduction in hourly rate for some tasks. *Moreno v. City of Sacramento (9th Cir. 2008) 534 F.3d 1106, 1111-1116*

In successful retaliation action under *42 U.S.C. § 1983* by kindergarten teacher against school district, trial court properly determined and awarded attorney's fees to plaintiff, when court first determined market rate of plaintiff's lawyers by adopting upper range of rates contained in defendant's opposition, given that plaintiff produced no evidence other than rates of her own attorneys; when court properly accepted number of hours submitted by plaintiff's attorneys, but deducted hours for, inter alia, time for new attorney to learn case; and when court multiplied hourly rate for each attorney by number of hours worked and then exercised its discretion to reduce award, given that plaintiff did not prevail on majority of her original claims. *Lytle v. Carl (9th Cir. 2004) 382 F.3d 978, 988-989*

In awarding attorney's fees against federal defendant pursuant to Equal Access to Justice Act (EAJA) [*28 U.S.C. § 2412*] and state defendants pursuant to *42 U.S.C. § 1988* following settlement of class action regarding determination of social security disability benefits claims, trial court erred in lowering hourly rate by unknown amount after finding that portions of fee request were documented inadequately and reflected duplicative efforts and excessive staffing to compensate for unspecified amount of overbilling and poor documentation; trial court did not abuse its discretion in refusing to reduce award for limited success, when court found that plaintiffs had achieved goal of class action; trial court did abuse its discretion in awarding fees against state defendants under § 1988 at hourly rate prescribed by EAJA rather than at prevailing market rates in relevant community as required by § 1988 without finding that hourly rate was market rate for plaintiffs' lawyers, when fees appeared to be considerably below market rate for some of plaintiffs' lawyers. *Sorenson v. Mink (9th Cir. 2001) 239 F.3d 1140*

Attorney's fees may be awarded under *42 U.S.C. § 1988* for fees incurred in successfully litigating application for fees. *Thompson v. Gomez (9th Cir. 1995) 45 F.3d 1365, 1366* ; *Clark v. City of Los Angeles (9th Cir. 1986) 803 F.2d 987, 992*

Attorney's fees may be awarded under § 1988 for representation on appeal, including work performed in defending or challenging fee award, if plaintiff prevails. *Bernardi v. Yeutter (9th Cir. 1991) 951 F.2d 971, 976* ; *Cabrales v. County of Los Angeles (9th Cir. 1991) 935 F.2d 1050, 1053*

Trial court did not abuse its discretion in calculating attorney's fees award under *42 U.S.C. § 1988*, even though there was palpable disparity between relatively small amount of damages ultimately recovered by successful plaintiff under *42 U.S.C. § 1983* and very large award of attorney's fees, where amount of damages was only one factor for court to consider, trial court properly made adjustments for related and unrelated claims for both trial and appeal, and trial court properly exercised its discretion by considering and then declining adjustment to lodestar to account for lack of overall success based on number of stated reasons. *Harman v. City & County of San Francisco (2007) 158 Cal. App. 4th 407, 419-428, 69 Cal. Rptr. 3d 750*

[c] Adjustment of Lodestar

Adjustment for delay in payment is appropriate in determination of reasonable attorney's fee. *Missouri v. Jenkins (1989) 491 U.S. 274, 289, 109 S. Ct. 2463, 105 L. Ed. 2d 229*

Once lodestar fee has been determined, amount may be increased or decreased on basis of certain factors in case that are not already reflected in lodestar. *Hensley v. Eckerhart (1983) 461 U.S. 424, 434*

Financial resources of plaintiff is one factor court must consider in determining amount of attorney's fees to award prevailing defendant. *Patton v. County of Kings (9th Cir. 1988) 857 F.2d 1379, 1382*

Upward adjustment of attorney's fee is appropriate in contingent fee case as acknowledgment of risk and delay involved in contingent fee arrangement. *Clark v. City of Los Angeles (9th Cir. 1986) 803 F.2d 987, 991-992* ; *Chalmers v. City of Los Angeles (9th Cir. 1986) 796 F.2d 1205, 1212-1213, 1215*

Attorney's fees not absolutely required to be proportionate to damages awarded. *Thorne v. City of El Segundo (9th Cir. 1986) 802 F.2d 1131, 1142-1143*

[d] Effect of Contingent Fee Agreement

Attorney's fee provided for in contingent fee arrangement does not serve as ceiling on fees recoverable under *42 U.S.C. § 1988*. *Blanchard v. Bergeron (1989) 489 U.S. 87, 91-96, 109 S. Ct. 939, 103 L. Ed. 2d 67*

District court does not abuse its discretion in finding that 40 percent contingent fee was reasonable because it reflected risk of nonrecovery, in case turning on resolution of difficult question of credibility, even though total statutory fee was approximately one-fourth that amount. *Venegas v. Skaggs (9th Cir. 1989) 867 F.2d 527, 534 , aff'd, 495 U.S. 82, 110 S. Ct. 1679 (1990)*

Reduction of attorney's fees because attorney's fee under contingency arrangement is less than reasonable hourly rate deprives civil rights attorneys of reasonable compensation. *Quesada v. Thomason (9th Cir. 1988) 850 F.2d 537, 543*

Failure to award attorney's fees because of contingent fee agreement is abuse of discretion. *Hamner v. Rios (9th Cir.*

1985) 769 F.2d 1404, 1408

[e] Procedure

Postjudgment request for award of attorney's fees does not constitute motion to alter or amend judgment subject to 10-day timeliness standard of *Fed. R. Civ. Proc., Rule 59(e).* *White v. New Hampshire Dep't of Empl. Sec. (1982) 455 U.S. 445, 452-454, 102 S. Ct. 1162, 71 L. Ed. 2d 325*

Denial of attorney's fees under *42 U.S.C. § 1988* is reviewed on appeal for abuse of discretion, elements of legal analysis and statutory interpretation are reviewed de novo, and factual findings underlying decision are reviewed for clear error. *Native Village of Venetie IRA Council v. Alaska (9th Cir. 1998) 155 F.3d 1150, 1151-1152*

Consideration of attorney's fees is strictly province of court in posttrial proceedings; it is error to inform or instruct jury as to plaintiff's possible recovery of attorney's fees. *Brooks v. Cook (9th Cir. 1991) 938 F.2d 1048, 1050-1053*

[f] Settlement Offers

[i] Under Fed. R. Civ. Proc., Rule 68

Application of *Fed. R. Civ. Proc., Rule 68* (plaintiff rejecting formal settlement offer must pay post-offer costs if he or she fails to obtain judgment more favorable than offer) results in defendant in civil rights action not being liable under *42 U.S.C. § 1988* for attorney's fees incurred after settlement offer. *Marek v. Chesny (1985) 473 U.S. 1, 8-11, 105 S. Ct. 3012, 87 L. Ed. 2d 1*

[ii] Other Settlement Offers

Attorney lacked standing to assert that county had custom, policy, or practice of settling civil rights cases only on lump sum, including all attorney's fees basis, contradicting federal policy and congressional intent to provide attorney's fees for civil rights victims as manifested in *42 U.S.C. § 1988*, and that county's conduct violated Supremacy Clause of United States Constitution [U.S. Const. art. VI, *cl. 2*]. Because right to seek attorney's fees under § 1988 belongs to clients, not to attorneys, county's alleged policy of settling claims only on lump sum, including all attorney's fees, did not directly deprive attorney of any right. Further, attorney's claim that he would have received greater fees than he actually did absent county's policy was inherently conjectural or hypothetical. *Pony v. County of L.A. (9th Cir. 2006) 433 F.3d 1138, 1145-1147*

In proceeding to obtain preliminary injunction against county's enforcement of its policy of settling civil rights cases only for lump sum, including all attorneys' fees, plaintiff showed enough evidence to meet burden as to whether county adopted uniform policy or practice that insisted on fee waiver as condition of settlement in civil rights litigation in conflict with federal statute authorizing fees for prevailing parties, including those who prevail by way of settlement. Lump sum policy would preclude payment of statutory attorneys' fees, because after reaching settlement with county plaintiff would no longer be able to petition court for independent fee award. Plaintiff also had at least fair chance of success on free-standing Supremacy Clause challenge based on conflict preemption. Despite dismissal of underlying civil rights action for which plaintiff allegedly could not obtain counsel, given serious questions plaintiff raised concerning county's policy and balance of hardships that tipped strongly in favor of removing obstacle to her obtaining trial counsel, pending her trial, plaintiff was entitled to narrow injunction barring application of county's alleged policy to her case alone. *Bernhardt v. County of Los Angeles (9th Cir. 2003) 339 F.3d 920, 922-932*

Because there was legally enforceable settlement agreement between parties, district court erred when it denied

plaintiffs attorney's fees and costs under ADA and *42 U.S.C. § 1988*. *Richard S. v. Dept. of Developmental Services of State of California (9th Cir. 2003) 317 F.3d 1080, 1086-1088* ; *Barrios v. California Interscholastic Federation (9th Cir. 2002) 277 F.3d 1128 , cert. denied, 537 U.S. 820*

Pro se plaintiff had standing to bring action under *42 U.S.C. § 1983* challenging county's alleged custom, practice, and policy in offering or accepting settlements in federal civil rights cases only for lump sum including attorney's fees by alleging that it deprived her of right to contract with attorney for representation in her civil rights action alleging excessive force, when inability to obtain counsel is concrete and particularized injury is sufficient to establish standing; when plaintiff's general factual allegations that her injury was fairly traceable to county's policy was sufficient to establish causation element required for standing; when, despite speculative nature of plaintiff's claim of redressability, she was entitled to have allegations accepted as true at this stage of litigation; and when plaintiff fell within zone of interests protected by § 1988. *Bernhardt v. County of Los Angeles (9th Cir. 2002) 279 F.3d 862, 869-871*

[g] Prison Litigation Reform Act

Section 803(d)(3) of Prison Litigation Reform Act of 1995 (PLRA), *42 U.S.C. § 1997e(d)(3)*, limits fees that may be awarded to attorneys who litigate prisoner lawsuits; with regard to postjudgment monitoring services, that legislation limits fees for services performed after PLRA's effective date, but not for postjudgment monitoring performed before effective date. *Martin v. Hadix (1999) 527 U.S. 343, 361, 119 S. Ct. 1998, 144 L. Ed. 2d 347*

42 U.S.C. § 1997e(d), part of Prison Litigation Reform Act (PLRA), limiting fees to maximum hourly rates and prohibiting payment of fees not "directly and reasonably" incurred in proving violation of prisoners' rights, applies with regard to services performed after PLRA's effective date but not for services performed before effective date. *Madrid v. Gomez (9th Cir. 1999) 190 F.3d 990, 994*

[h] Awards to Defendants

In action based on setting of bail in state criminal prosecution, district court erred in awarding defendants attorney's fees under *42 U.S.C. § 1988* after granting defendants summary judgment, where fact that plaintiff lost at summary judgment did not render his case per se frivolous, unreasonable, or without foundation, and in absence of controlling Ninth Circuit or Supreme Court authority, and given First Circuit's decision that lent support to his argument, plaintiff's perseverance in his suit was not unreasonable. However, district court did not abuse its discretion in holding that continuing litigation of *Monell* claim after completion of discovery was frivolous, where during discovery plaintiff failed to uncover any evidence indicating that county had policy or practice designed to ensure or resulting in setting of excessive bail, nor did plaintiff uncover any evidence of failure to train officers in proper bail setting procedures. *Galen v. County of Los Angeles (9th Cir. 2006) 468 F.3d 563, 576-578*

After dismissing plaintiff's claims under *42 U.S.C. § 1983*, trial court erred in awarding attorney's fees under *42 U.S.C. § 1988* to defendant-attorney who represented himself, when U.S. Supreme Court's holding in *Kay v. Ehrler (1991) 499 U.S. 432, 111 S. Ct. 1435, 113 L. Ed. 2d 486* , precluding attorney's fees award to successful pro se litigants in civil rights claims, applied to pro se defendant-attorney. Trial court also erred in awarding fees to state court judge, when claim against judge was dismissed under alternative grounds of judicial immunity and *Rooker-Feldman* doctrine, and *Rooker-Feldman* doctrine was jurisdictional ground for dismissal and precluded awarding of attorneys' fees. Dismissal of claims against other defendants under *Younger* abstention doctrine similarly precluded fee award, when dismissal signified court declined to exercise jurisdiction, making no comment on merits of the case, and not materially altering legal relationship between parties, so that neither defendant prevailed within the meaning of § 1988. However, dismissal of state Department of Justice (DOJ) based on *Eleventh Amendment* immunity entitled state to fee award. Dismissal based on *Eleventh Amendment* immunity was not dismissal for lack of subject matter jurisdiction, but instead rested on affirmative defense. Further, district court's finding of frivolousness was not abuse of discretion, given that plaintiff

continued to press her claim against DOJ even after court warned her it appeared to be frivolous and failed to amend her complaint or provide basis for overcoming *Eleventh Amendment* defense. Lastly, fee request submitted by attorney for state defendants, including DOJ, was not excessive. *Elwood v. Drescher (9th Cir. 2006) 456 F.3d 943, 946-949*

In action under *42 U.S.C. § 1983* by corporation that owned private jet against city and other defendants based on their denial of permission to land jet at municipal airport, district court did not err in awarding defendants attorney's fees under *42 U.S.C. § 1988* after dismissing plaintiff's claims on summary judgment, finding all but two bases of § 1983 claim were frivolous, and granting attorney's fees motion in part for fees and costs incurred in defending against frivolous claims, while denying motion with regard to fees and costs incurred in defending against non-frivolous claims. Plaintiff knew or should have known there was no factual basis for constitutional claims of violations of substantive and procedural due process, equal protection, impermissible burden on interstate commerce, and right to travel at outset of litigation. However, because district court failed adequately to explain how it arrived at amount of its award, appellate court remanded so district court could further elucidate its reasoning. *Tutor-Saliba Corp. v. City of Hailey (9th Cir. 2006) 452 F.3d 1055, 1060-1066*

District court erred in awarding attorneys' fees to defendant under Equal Access to Justice Act on ground that government was not "substantially justified" in defending Child Pornography Prevention Act, when multiple objective indicia supported reasonableness of government's position, including novelty of issue and government's string of successes in defending Act against constitutional attack, and when reasonable minds could have differed over Act's constitutionality, especially since four sister circuits, district court below, one member of Ninth Circuit panel, and three Ninth Circuit judges dissenting from denial of rehearing en banc all determined Act to be constitutional before Supreme Court ultimately struck two sections as unconstitutional. *Gonzales v. Free Speech Coalition (9th Cir. 2005) 408 F.3d 613, 618-621*

Trial court erred in awarding defendants attorney's fees after granting them summary judgment, when plaintiff's *Fourth Amendment* claims raised novel issue whether pretrial restrictions imposed on her as result of her release on own recognizance rose to level of seizure and in view of absence of Ninth Circuit authority on release restrictions issue, court could not say that resolution of argument against plaintiff was obvious or that claims were otherwise frivolous. Rejection of *First Amendment* retaliation claims, although closer question, also did not support award of attorney's fees when, although plaintiff failed to present evidence establishing genuine issue of material fact on causation element of claims, based on circumstances known to plaintiff at time she filed her complaint and preceding summary judgment proceedings *First Amendment* retaliation claims were not frivolous, unreasonable, or groundless within meaning of *42 U.S.C. § 1988*. *Karam v. City of Burbank (9th Cir. 2003) 352 F.3d 1188, 1195-1196*

In action by law firm pursuant to *42 U.S.C. § 1983*, against former client, school district, members of board of trustees, superintendent and former associate superintendent for violation of *First Amendment* rights under color of state law and conspiracy to violate rights, based on defendants' alleged reduction of use of plaintiffs' legal services and withdrawal of cases after plaintiffs filed government claim for damages in retaliation for refusal to support political campaigns of two members of board of trustees, trial court properly exercised discretion in granting attorney's fees to other members of board of trustees, where plaintiffs' counsel admitted there was no direct evidence tying them to any claimed violation of civil rights, there was no evidence at trial they had knowledge of alleged wrongdoing by other defendants prior to plaintiffs' submission of government claim, and plaintiffs continued to litigate claims against these defendants after it should have become obvious that claim was frivolous, unreasonable or groundless. *Jones & Matson v. Hall (2007) 155 Cal. App. 4th 1596, 1610-1611, 66 Cal. Rptr. 3d 872*

[i] Attorney's Collection of Fees

Where prevailing party did not exercise her rights to pursue attorney's fees, but, instead, waived them as condition of settlement with county, former attorney had no standing to pursue attorney's fees merely as result of his position as her

former attorney. Further, attorney had no standing under his retainer agreement with prevailing party, whereby she assigned her rights to apply for attorney's fees to him, where putative assignment to attorney was invalid because right to seek attorney's fees under *42 U.S.C. § 1988* is substantive cause of action which cannot be transferred contractually. *Pony v. County of L.A. (9th Cir. 2006) 433 F.3d 1138, 1142-1145*

[7] State Law Borrowing Provision of 42 U.S.C. § 1988

42 U.S.C. § 1983 is read in harmony with general principles of tort law rather than in derogation of them. *Imbler v. Pachtman (1976) 424 U.S. 409, 418, 96 S. Ct. 984, 47 L. Ed. 2d 128*

Borrowing provision of *42 U.S.C. § 1988* applied in a *42 U.S.C. § 1982* case in state court. *Sullivan v. Little Hunting Park (1969) 396 U.S. 229, 240-241, 90 S. Ct. 400, 24 L. Ed. 2d 386*

Question whether state law is inconsistent with federal Constitution or laws focuses on purpose and nature of federal right involved; in § 1983 case, question is whether state law is inconsistent with purposes of § 1983. *Felder v. Casey (1988) 487 U.S. 131, 139, 108 S. Ct. 2302, 101 L. Ed. 2d 123*

California Tort Claims Act (*Gov. Code § 810 et seq.*) is not applicable to *42 U.S.C. § 1983* actions. *Felder v. Casey (1988) 487 U.S. 131, 138, 108 S. Ct. 2302, 101 L. Ed. 2d 123* (addressing similar scheme under Wisconsin law); *Rossiter v. Benoit (1979) 88 Cal. App. 3d 706, 713, 717, 152 Cal. Rptr. 65*

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PART III. RESEARCH GUIDE

11-113 California Forms of Pleading and Practice--Annotated § 113.35

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Franklin, *The Civil Rights Acts of 1866 Revisited, 41 Hastings L.J. 1135 (1990)*

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[6] Neglect to Prevent Conspiracy to Interfere with Rights: 42 U.S.C. § 1986

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11-113 California Forms of Pleading and Practice--Annotated § 113.36

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11-113 California Forms of Pleading and Practice--Annotated §§ 113.37-113.49

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[Reserved]

§§ 113.37[Reserved]

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11-113 California Forms of Pleading and Practice--Annotated § 113.50

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§ 113.50 Complaint in Federal Court for Damages for Deprivation of Rights Under Color of State Law Pursuant to 42 U.S.C. § 1983--General Form

[1] FORM Complaint in Federal Court for Damages for Deprivation of Rights Under Color of State Law Pursuant to 42 U.S.C. § 1983--General Form

UNITED STATES DISTRICT COURT,
_____ DISTRICT OF CALIFORNIA

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(*42 U.S.C. § 1983*)
Defendant(s).	)	
	)	
	)	

_____

DEMAND FOR JURY TRIAL

Plaintiff alleges:

1. This is an action brought under *42 U.S.C. § 1983* to recover damages against defendant for violation of plaintiff's right _____ [*specify the federal constitutional or statutory right violated, e.g.,* to free speech and to petition for redress of grievances, guaranteed by the *First* and *Fourteenth Amendments to the United States Constitution*].

2. The jurisdiction of this Court is predicated on *28 U.S.C. §§ 1331* and *1343*.

3. Plaintiff, _____ [*name*], is, and at all times mentioned in this complaint was, a citizen of the United States, and a resident of _____ [*county*], California.

4. Defendant _____ [*name*] is, and at all times mentioned in this complaint was, _____ [*state residence of defendant, or other basis of venue, e.g.,* a resident of _____ (*county*), California]. Venue is therefore proper under *28 U.S.C. § 1391(b)*.

[5. A substantial part of the events giving rise to this action occurred in _____ (*county*), California. Venue is therefore proper under *28 U.S.C. § 1391(b)*.]

6. Defendant was, at all times mentioned in this complaint, _____ [*state facts showing defendant's capacity as a government agent, e.g.,* an agent of the State of California, employed as a California Highway Patrol officer].

7. Defendant was, at all times mentioned in this complaint, acting in the course and scope of _____ [his *or* her] employment _____ [*specify employer, e.g.,* with the California Highway Patrol].

8. Defendant was, at all times mentioned in this complaint, acting under color of state law.

9. Defendant is sued in _____ [his *or* her] individual capacity.

10. _____ [*Allege facts showing that defendant violated plaintiff's federal constitutional or statutory rights*.]

11. _____ [*Allege that defendant violated particular constitutional or statutory rights of plaintiff, e.g.,* In acting as alleged in this complaint, defendant violated plaintiff's right to free speech and to petition for redress of grievances, guaranteed by the *First* and *Fourteenth Amendments to the United States Constitution*.]

12. As a direct and proximate result of defendant's actions, described in this complaint, plaintiff has suffered _____ [injury, loss, *and/or* damage] in that _____ [*describe injury, loss, and/or damage*].

[13. In acting as is alleged in this complaint, defendant acted knowingly, willfully, and maliciously, and with reckless and callous disregard for plaintiff's federally protected rights.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For compensatory damages, in an amount to be determined according to proof at trial;

[2. For punitive damages, in an amount to be determined according to proof at trial;]

3. For reasonable attorney's fees, pursuant to *42 U.S.C. § 1988*;

4. For costs of suit incurred in this action; and

5. For such other and further relief as the Court deems proper.

_____ [*date*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

DEMAND FOR JURY TRIAL

Plaintiff _____ [*name*] hereby demands a jury trial.

_____ [*date*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The complaint in [1], *above*, is a general form for use in federal court in an action brought under *42 U.S.C. § 1983*. This form may be adapted for use in a wide variety of cases in which a person's federal constitutional or statutory rights have been violated by a person acting under color of state law. This form of complaint seeks recovery of damages, including punitive damages in an appropriate case.

PRACTICE TIP:

Filing § 1983 Actions. Attorneys should see the big picture before filing a § 1983 lawsuit. Section 1983 cases are common, outside of employment discrimination, in the field of civil rights. They are not the kind of cases where one should use a form to file a lawsuit and then discover the unique obstacles and traps unique to the § 1983 litigation. Thus, attorneys should use caution before "jumping" into § 1983 cases. Over the past 20 plus years the United States Supreme Court has made these cases significantly more difficult for plaintiffs to pursue. Attorneys need to know the hurdles and traps at the outset--before looking to a form to draft a complaint. Attorneys should seriously considering alternative state remedies and pursuing them in state court *or* as pendent claims to a § 1983 cause of action in federal court. *By John H. Scott*

[3] Allegations

The complaint in [1], *above*, alleges all of the following:

- That this action arises under *42 U.S.C. § 1983*, and is for violation of plaintiff's federal constitutional or statutory rights (Paragraph 1).

- That the court's jurisdiction is predicated on *28 U.S.C. §§ 1331* and *1343* (Paragraph 2).

- Plaintiff's name, United States citizenship, and residence (Paragraph 3). To bring an action under *42 U.S.C. § 1983*, the plaintiff must be "a citizen of the United States or other person within the jurisdiction thereof" [*42 U.S.C. § 1983*; *see Martinez v. City of Los Angeles (9th Cir. 1998) 141 F.3d 1373, 1382* (Mexican citizen, who was in Mexico at time of events in question, could not bring § 1983 action)].

- Defendant's residence, for purposes of establishing venue (Paragraph 4) [*see 28 U.S.C. § 1391(b)* (venue is proper in district where a defendant resides, if all defendants are from the same state)].

- An optional paragraph (Optional Paragraph 5) identifying a county in which a substantial part of the events giving rise to the action occurred. This paragraph is for use in a case when the plaintiff wants to establish venue in such county [*see 28 U.S.C. § 1391(b)* (venue is proper in district where a substantial part of events giving rise to action occurred)].

- That defendant was an agent of a government entity, and that defendant was acting in the course and scope of his or her agency (Paragraphs 6 and 7). These allegations establish background facts showing that defendant acted under color of state law.

- That defendant acted under color of state law (Paragraph 8). This is an element of the cause of action under *42 U.S.C. § 1983* [*see, e.g., Crumpton v. Gates (9th Cir. 1991) 947 F.2d 1418, 1420]* .

- That defendant is sued in his or her individual capacity (Paragraph 9). An action for recovery of money damages under *42 U.S.C. § 1983* may be brought against a person acting under color of law, sued in his or her individual capacity. If the suit is brought against the defendant in his or her official capacity, the action is considered to be the same as an action against the government entity employing the defendant, and, therefore, the requirements and limitations of such a suit would apply [*see § 113.14[7]*].

- Facts showing that defendant violated plaintiff's federal constitutional or statutory rights (Paragraph 10). This may take up several paragraphs, and make up the majority of the complaint. The allegations must be tailored to the constitutional or statutory right at issue, and should satisfy the legal requirements for a showing of a violation of that right.

- An allegation stating the particular federal constitutional or statutory right of plaintiff that was violated (Paragraph 11).

- That as a direct and proximate result of defendant's actions, plaintiff suffered injury, loss, and/or damage (Paragraph 12). This allegation also should describe the injury, loss, and/or damage.

- An optional allegation, that defendants acted knowingly, willfully, and maliciously, and with reckless and callous disregard for plaintiff's federally protected rights (Optional Paragraph 13). This optional allegation, if appropriate under the circumstances, would support recovery of punitive damages [*see Smith v. Wade (1983) 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632* ; *see also § 113.14[14][b]*].

[4] Prayer

The prayer in the form complaint in [1], *above*, seeks recovery of compensatory damages. Generally, the full range of compensatory damages recoverable in a tort action is recoverable in an action brought under *42 U.S.C. § 1983* [*see Memphis Community School Dist. v. Stachura (1986) 477 U.S. 299, 305-306, 106 S. Ct. 2537, 91 L. Ed. 2d 249]* .

The form of complaint in [1], *above*, also includes an optional prayer for punitive damages. In a case where the violation of plaintiff's rights was motivated by evil motive or intent, or involved reckless or callous indifference to the plaintiff's federally protected rights [*see Smith v. Wade (1983) 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632]* , punitive damages would be recoverable. If the facts do not involve evil motive or intent, or reckless or callous indifference to the plaintiff's federally protected rights, the optional punitive damages allegation (Optional Paragraph 13) and the optional prayer for punitive damages should not be used.

The prayer also includes a prayer for attorney's fees. *42 U.S.C. § 1988(b)* specifically provides for the recovery of attorney's fees in *42 U.S.C. § 1983* cases.

[5] Jury Demand

The form of complaint in [1], *above*, includes a demand for trial by jury. In a *42 U.S.C. § 1983* case in which damages are sought, the plaintiff will have a right to a jury trial [*U.S. Const., amend. VII*]. *Fed. R. Civ. Proc., Rule 38* governs demands for trial by jury. Under Rule 38, the demand for trial by jury may be served at any time after commencement of the action and not later than 10 days after service of the last pleading directed to the issue triable by jury. The rule provides further that "[s]uch demand may be indorsed upon a pleading of the party" [*Fed. R. Civ. Proc., Rule 38*]. Therefore, the demand for trial by jury may be included in the complaint, as is the case in the complaint in [1], *above*.

[6] Cross References

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms of jurisdictional allegations for use in federal court, and for discussion and forms relating to removal of actions to federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For alternative forms of prayers, see Ch. 420, *Prayers*

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11-113 California Forms of Pleading and Practice--Annotated § 113.51

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§ 113.51 Complaint for Damages and Injunctive Relief for Deprivation of Rights Under Color of State Law Pursuant to 42 U.S.C. § 1983--Unlawful Search and Seizure

[1] FORM Complaint for Damages and Injunctive Relief for Deprivation of Rights Under Color of State Law Pursuant to 42 U.S.C. § 1983--Unlawful Search and Seizure

UNITED STATES DISTRICT COURT,
_____ DISTRICT OF CALIFORNIA

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR PRELIMINARY AND PER-
_____ [*name*],	)	MANENT INJUNCTION, AND DAMAGES
Defendant(s).	)	(*42 U.S.C. § 1983*)
	)	
	)	

_____

DEMAND FOR JURY TRIAL

Plaintiff alleges:

1. This is an action brought under *42 U.S.C. § 1983* to obtain injunctive relief and recover damages against defendants for violation of plaintiff's right to be free of unreasonable searches and seizures under the *Fourth* and *Fourteenth Amendments to the United States Constitution*.

2. The jurisdiction of this Court is predicated on *28 U.S.C. §§ 1331* and *1343*.

3. Plaintiff, _____ [*name*], is, and at all times mentioned in this complaint was, a citizen of the United States, and a resident of _____ [*county*], California.

4. Defendant _____ [*name*] is, and at all times mentioned in this complaint was, _____ [*state residence of each defendant, or other basis of venue, e.g.*, a resident of _____ (*county*), California]. Venue is therefore proper under *28 U.S.C. § 1391(b)*.

[5. A substantial part of the events giving rise to this action occurred in _____ (*county*), California. Venue is therefore proper under *28 U.S.C. § 1391(b)*.]

6. Defendant _____ [*name*] was, at all times mentioned in this complaint, _____ [*state facts showing each defendant's capacity as a government agent, e.g.*, an agent of the Los Angeles Police Department, employed as a police officer].

7. Defendant _____ [*name*] was, at all times mentioned in this complaint, acting in the course and scope of _____ [his *or* her] employment _____ [*specify each defendant's employer, e.g.*, with the City of Los Angeles].

8. Defendant _____ [*name*] was, at all times mentioned in this complaint, acting under color of state law.

9. Defendant _____ [*name*] is sued in _____ [his *or* her] _____ [individual *and/or* official] capacity.

10. _____ [*Allege facts concerning the search and seizure, showing that defendants violated plaintiff's federal constitutional right to be free of unreasonable searches and seizures, e.g.*, At about _____ (*time*), on _____ (*date*), defendants wrongfully and unlawfully (a) entered plaintiff's residence; (b) displayed police badges and identification cards; (c) stated that they were police officers; (d) threatened to strike plaintiff and to place _____ (him *or* her) under arrest; (e) shoved, struck, and hit plaintiff and subjected _____ (him *or* her) to a search of _____ (his *or* her) person; (f) ordered and forced plaintiff to sit and remain in a chair in the residence; (g) searched through the rooms of the residence; (h) damaged various fixtures and furnishings in the process of the search; (i) seized and carried from the premises _____ (*describe property, e.g.*, a personal computer and a box of papers owned by plaintiff); and (j) damaged the _____ (*specify property damaged, e.g.*, plaintiff's personal computer) before the same was returned to plaintiff. Plaintiff did not consent to defendants' entry or subsequent conduct, but protested until

_____ (his *or* her) protests were overcome by defendants' threats and shows of force. Defendants had no search or arrest warrant, and they did not arrest plaintiff.]

11. In acting as alleged in this complaint, defendants _____ [*names*] violated plaintiff's right to be free of unreasonable searches and seizures under the *Fourth* and *Fourteenth Amendments to the United States Constitution*.

12. As a direct and proximate result of defendants' actions, described in this complaint, plaintiff has suffered injury, loss, and damage, including _____ [*describe injury, loss, and/or damage, e.g.*, loss of liberty, invasion of privacy, emotional distress, pain, suffering, and property damage].

[13. As a result of defendants' conduct, described in this complaint, plaintiff incurred medical expenses in the amount of $_____ (*amount*)].

[14. As a result of defendants' conduct, described in this complaint, plaintiff incurred property damage in _____ (the amount of $_____ [*amount*] *or* an amount to be determined according to proof at trial).]

[15. In acting as is alleged in this complaint, defendants acted knowingly, willfully, and maliciously, and with reckless and callous disregard for plaintiff's federally protected rights.]

16. As a result of defendants' actions, plaintiff has suffered and will continue to suffer extreme hardship and actual and impending irreparable _____ [injury, loss, *and/or* damage] in that _____ [*state specific and definite facts showing the impending irreparable injury, loss, and/or damage, e.g.,* plaintiff is informed and believes and thereon alleges that defendants' investigation of plaintiff is continuing, and that defendants may conduct another unlawful search and seizure of plaintiff's property at any time].

17. Plaintiff has no adequate or speedy remedy at law for the conduct of defendants described above. This action for injunctive relief is plaintiff's only means of securing prospective relief, preventing further unlawful searches and seizures of plaintiff's property.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a preliminary injunction ordering defendants, and their officers, agents, employees, successors, and attorneys, and all those in active concert or participation with defendants, to _____ [*describe conduct to be required or enjoined, e.g.,* return the property of plaintiff that was seized on _____ (*date*), and to refrain immediately and pending final hearing and resolution of this action from further searches and seizures of plaintiff's property without a search warrant and in the absence of exigent circumstances allowing a search without a search warrant under applicable law].

2. For a permanent injunction permanently enjoining and restraining defendants, and their officers, agents, employees, successors, and attorneys, and all those in active concert or participation with defendants, from _____ [*describe conduct to be enjoined*];

3. For compensatory damages, in an amount to be determined according to proof at trial;

[4. For punitive damages, in an amount to be determined according to proof at trial;]

5. For reasonable attorney's fees, pursuant to *42 U.S.C. § 1988*;

6. For costs of suit incurred in this action; and

7. For such other and further relief as the Court deems proper.

_____ [*date*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

DEMAND FOR JURY TRIAL

Plaintiff _____ [*name*] hereby demands a jury trial.

_____ [*date*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in federal court in an action brought under *42 U.S.C. § 1983* for violation of the plaintiff's right to be free of unreasonable searches and seizures. The complaint seeks recovery of damages, including punitive damages in an appropriate case, as well as injunctive relief.

[3] Allegations

The complaint in [1], *above*, alleges all of the following:

- That this action arises under *42 U.S.C. § 1983*, and is for violation of plaintiff's federal constitutional right to be free of unreasonable searches and seizures under the *Fourth* and *Fourteenth Amendments to the United States Constitution* (Paragraph 1).

- That the court's jurisdiction is predicated on *28 U.S.C. §§ 1331* and *1343* (Paragraph 2).

- Plaintiff's name, United States citizenship, and residence (Paragraph 3). To bring an action under *42 U.S.C. § 1983*, the plaintiff must be "a citizen of the United States or other person within the jurisdiction

thereof" [*42 U.S.C. § 1983*; *see Martinez v. City of Los Angeles (9th Cir. 1998) 141 F.3d 1373, 1382* (Mexican citizen, who was in Mexico at time of events in question, could not bring § 1983 action)].

- Defendant's residence, for purposes of establishing venue (Paragraph 4) [*see 28 U.S.C. § 1391(b)* (venue is proper in district where a defendant resides, if all defendants are from same state)].

- An optional paragraph (Optional Paragraph 5) identifying a county in which a substantial part of the events giving rise to the action occurred. This paragraph is for use in a case when the plaintiff wishes to establish venue in such county [*see 28 U.S.C. § 1391(b)* (venue is proper in district where a substantial part of events giving rise to action occurred)].

- That defendants were agents of government entities, and that defendants were acting in the course and scope of that agency (Paragraphs 6 and 7). These allegations establish background facts showing that defendants acted under color of state law. In cases involving multiple defendants, these allegations should be repeated for each defendant.

- That defendants acted under color of state law (Paragraph 8). This is an element of the cause of action under *42 U.S.C. § 1983* [*see, e.g., Crumpton v. Gates (9th Cir. 1991) 947 F.2d 1418, 1420]* . In cases involving multiple defendants, this allegation should be repeated for each defendant.

- That defendants are sued in their individual and/or official capacities, whichever is applicable (Paragraph 9). If only money damages are sought from a particular defendant, that defendant must be sued in his or her individual capacity. If only injunctive relief is sought against a particular defendant, that defendant must be sued in his or her official capacity. If both monetary and injunctive relief are sought against a particular defendant, that defendant must be sued in both his or her individual and official capacities [*see § 113.14[7]*]. In cases involving multiple defendants, this allegation should be repeated, in the appropriate form, for each defendant.

- Facts showing that defendant violated plaintiff's federal constitutional rights (Paragraph 10). This may take up several paragraphs, and make up the majority of the complaint.

- An allegation stating that defendants violated plaintiff's right to be free of unreasonable searches and seizures under the *Fourth* and *Fourteenth Amendments to the United States Constitution* (Paragraph 11).

- That as a direct and proximate result of defendants' actions, plaintiff suffered injury, loss, and/or damage (Paragraph 12). This allegation also should describe the injury, loss, and/or damage.

- An optional allegation stating the amount of medical expenses incurred as a result of the defendants' unlawful search and seizure (Optional Paragraph 13).

- An optional allegation stating the amount of property damages caused by defendants' unlawful search and seizure, or stating that the property damage is in an amount to be established by proof at trial (Optional Paragraph 14).

- An optional allegation, that defendants acted knowingly, willfully, and maliciously, and with reckless and callous disregard for plaintiff's federally protected rights (Optional Paragraph 15). This optional allegation, if appropriate under the circumstances, would support recovery of punitive damages [*see Smith v. Wade (1983) 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632* ; *see also § 113.14[14][b]*].

- That defendants' actions caused and will continue to cause plaintiff to suffer extreme hardship and actual and impending irreparable injury, loss, and/or damage, and an explanation of the impending irreparable injury, loss, and/or damage (Paragraph 16).

- That plaintiff has no adequate or speedy remedy at law (Paragraph 17).

[4] Prayer

The prayer in the form complaint in [1], *above*, seeks preliminary and permanent injunctive relief. The prayer also seeks recovery of compensatory damages. Generally, the full range of compensatory damages recoverable in a tort action is recoverable in an action brought under *42 U.S.C. § 1983* [*see Memphis Community School Dist. v. Stachura (1986) 477 U.S. 299, 305-306, 106 S. Ct. 2537, 91 L. Ed. 2d 249]* .

The complaint in [1], *above*, also includes an optional prayer for punitive damages. In a case when the violation of plaintiff's rights was motivated by evil motive or intent, or involved reckless or callous indifference to the plaintiff's federally protected rights [*see Smith v. Wade (1983) 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632]* , punitive damages would be recoverable. If the facts do not involve evil motive or intent, or reckless or callous indifference to the plaintiff's federally protected rights, the optional punitive damages allegation (Optional Paragraph 15) and the optional prayer for punitive damages should not be used.

The prayer also includes a prayer for attorney's fees. *42 U.S.C. § 1988(b)* specifically provides for the recovery of attorney's fees in § 1983 cases.

[5] Jury Demand

The form of complaint in [1], *above*, includes a demand for trial by jury. In a *42 U.S.C. § 1983* case in which damages are sought, the plaintiff will have a right to a jury trial [*U.S. Const., amend. VII*]. *Fed. R. Civ. Proc., Rule 38* governs demands for trial by jury. Under Rule 38, the demand for trial by jury may be served at any time after commencement of the action and not later than 10 days after service of the last pleading directed to the issue triable by jury. The rule provides further that "[s]uch demand may be indorsed upon a pleading of the party" [*Fed. R. Civ. Proc., Rule 38*]. Therefore, the demand for trial by jury may be included in the complaint, as is the case in the complaint in [1], *above*.

[6] Cross References

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms of jurisdictional allegations for use in federal court, and for discussion and forms relating to removal of actions to federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For discussion and forms relating to the procedure and forms required for seeking a temporary restraining order, preliminary injunction, and permanent injunction, see Ch. 303, *Injunctions*

For alternative forms of prayers, see Ch. 420, *Prayers*

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California Forms of Pleading and Practice--Annotated

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 113 CIVIL RIGHTS: THE POST-CIVIL WAR CIVIL RIGHTS STATUTES
PART IV. FORMS

11-113 California Forms of Pleading and Practice--Annotated § 113.52

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§ 113.52 Complaint for Damages for Deprivation of Rights Under Color of State Law Pursuant to 42 U.S.C. § 1983--Claim For Damages Against Local Government Entity

[1] FORM Complaint for Damages for Deprivation of Rights Under Color of State Law Pursuant to 42 U.S.C. § 1983--Claim For Damages Against Local Government Entity

UNITED STATES DISTRICT COURT,
_____ DISTRICT OF CALIFORNIA

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(*42 U.S.C. § 1983*)
Defendant(s).	)	
	)	
	)	

_____

DEMAND FOR JURY TRIAL

Plaintiff alleges:

1. This is an action brought under *42 U.S.C. § 1983* to recover damages against defendant _____ [*name of defendant government entity, e.g.*, County of Alameda] for violation of plaintiff's right _____ [*specify the federal constitutional or statutory right violated, e.g.*, to be free of unreasonable seizures under the *Fourth* and *Fourteenth Amendments to the United States Constitution*].

2. The jurisdiction of this Court is predicated on *28 U.S.C. §§ 1331* and *1343*.

3. Plaintiff, _____ [*name*], is, and at all times mentioned in this complaint was, a citizen of the United States, and a resident of _____ [*county*], California.

4. Defendant _____ [*name of defendant government entity, e.g.*, County of Alameda] is, and at all times mentioned in this complaint was, _____ [*allege capacity of defendant government entity, e.g.*, a county in the State of California, organized and existing under the laws of the State of California, with the capacity to sue and be sued].

5. A substantial part of the events giving rise to this action occurred in _____ (*county*), California. Venue is therefore proper under *28 U.S.C. § 1391(b)*.

6. Defendant _____ [*name of defendant government entity, e.g.*, County of Alameda] was, at all times mentioned in this complaint, acting under color of state law.

7. _____ [*Allege facts describing the violation of the plaintiff's federal constitutional or statutory rights*.]

8. Plaintiff [is informed and believes and thereon alleges that he *or* she] was subjected to a violation of _____ [*describe right violated, e.g.*, her right to be free of unreasonable seizures under the *Fourth* and *Fourteenth Amendments to the United States Constitution*], as a result of the customs, practices, and policies of defendant _____ [*name of defendant government entity, e.g.*, County of Alameda].

9. _____ [*Describe, on information and belief if appropriate, the customs, practices, and policies of defendant that led to the violation of the plaintiff's rights*.]

[10. The policy of _____ (*name of defendant government entity, e.g.*, County of Alameda), described in this complaint, was established on _____ (*date*) by a decision of _____ (*identify policy maker*).]

[11. The customs, practices, and policies of defendant _____ (*name of defendant government entity, e.g.*, County of Alameda) described in this complaint amounted to deliberate indifference to the rights of persons, such as the plaintiff, who _____ (*describe the class of persons endangered by the defendant's customs, practices, and policies, e.g.*, paid fines to the county in a timely manner).]

12. As a direct and proximate result of the customs, practices, and policies of defendant _____ [*name of defendant government entity, e.g.*, County of Alameda], described in this complaint, plaintiff has suffered injury, loss, and damage, including _____ [*describe injury, loss, and/or damage, e.g.*, loss of liberty, invasion of privacy, emotional distress, pain, and suffering].

[13. As a result of the customs, practices, and policies of defendant _____ (*name of defendant government entity, e.g.*, County of Alameda), described in this complaint, plaintiff incurred medical expenses in the amount of $_____ (*amount*)].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For compensatory damages, in an amount to be determined according to proof at trial;

2. For reasonable attorney's fees, pursuant to *42 U.S.C. § 1988*;

3. For costs of suit incurred in this action; and

4. For such other and further relief as the Court deems proper.

_____ [*date*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

DEMAND FOR JURY TRIAL

Plaintiff _____ [*name*] hereby demands a jury trial.

_____ [*date*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The form of complaint in [1], *above*, is a general form of complaint for use in federal court in an action brought under *42 U.S.C. § 1983* for money damages against a local government entity. The complaint seeks recovery of damages and attorney's fees.

[3] Allegations

The complaint in [1], *above*, alleges all of the following:

- That this action arises under *42 U.S.C. § 1983*, and is for violation of plaintiff's federal constitutional or statutory rights (Paragraph 1). This allegation also specifies the right violated.

- That the court's jurisdiction is predicated on *28 U.S.C. §§ 1331* and *1343* (Paragraph 2).

- Plaintiff's name, United States citizenship, and residence (Paragraph 3). To bring an action under *42 U.S.C. § 1983*, the plaintiff must be "a citizen of the United States or other person within the jurisdiction thereof" [*42 U.S.C. § 1983*; *see Martinez v. City of Los Angeles (9th Cir. 1998) 141 F.3d 1373, 1382* (Mexican citizen, who was in Mexico at time of events in question, could not bring § 1983 action)].

- The name and capacity of the defendant local government entity (Paragraph 4).

- An allegation identifying a county in which a substantial part of the events giving rise to the action occurred (Paragraph 5). This paragraph establishes venue in the federal district encompassing that county [*see 28 U.S.C. § 1391(b)* (venue is proper in district where a substantial part of events giving rise to action occurred)].

- That defendant acted under color of state law (Paragraph 6). This is an element of the cause of action under *42 U.S.C. § 1983* [*see, e.g., Crumpton v. Gates (9th Cir. 1991) 947 F.2d 1418, 1420]* .

- Facts showing the violation of plaintiff's federal constitutional or statutory rights (Paragraph 7). This may take up several paragraphs, and make up the majority of the complaint. The allegations must be tailored to the constitutional or statutory right at issue, and must satisfy the legal requirements for a showing of a violation of that right.

- An allegation, on information and belief if that is appropriate, that plaintiff was subjected to the violation of his or her rights because of customs, practices, and policies of the defendant government entity (Paragraph 8). A plaintiff may recover money damages against a local government entity under *42 U.S.C. § 1983* only if the violation of federal rights was caused by customs, practices, or policies of the government entity [*see Monell v. New York City Dep't of Soc. Servs. (1978) 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611]* .

- A description of the customs, practices, and policies of the defendant local government entity that caused the violation of the plaintiff's federal rights (Paragraph 9).

- An optional allegation that the policy that caused the violation of the plaintiff's federal rights was established on a particular date by a particular policymaker for the defendant local government entity (Optional Paragraph 10) [*see Pembaur v. Cincinnati (1986) 475 U.S. 469, 480, 106 S. Ct. 1292, 89 L. Ed. 2d 452* ; *Hammond v. County of Madera (9th Cir. 1988) 859 F.2d 797, 801]* .

- An optional allegation that the customs, practices, and policies of the defendant local government entity amounted to deliberate indifference to the rights of a class of persons of which the plaintiff was a

member (Optional Paragraph 11). This is an element of a claim for money damages against a local government entity under *42 U.S.C. § 1983*, in cases in which the custom, practice, or policy at issue is one of inaction, such as a failure to train employees [*see* Plumeau v. School Dist. No. 40 *(9th Cir. 1997) 130 F.3d 432, 438* ; *Oviatt By and Through Waugh v. Pearce (9th Cir. 1992) 954 F.2d 1470, 1474]* .

- That, as a direct and proximate result of defendant's customs, practices, and policies, plaintiff suffered injury, loss, and damage (Paragraph 12). This allegation also should describe the injury, loss, and/or damage.

- An optional allegation stating the amount of medical expenses incurred as a result of the defendant's denial of plaintiff's rights (Optional Paragraph 13).

[4] Prayer

The prayer in the form complaint in [1], *above*, seeks recovery of compensatory damages. Generally, the full range of compensatory damages recoverable in a tort action is recoverable in an action brought under *42 U.S.C. § 1983* [*see Memphis Community School Dist. v. Stachura (1986) 477 U.S. 299, 305-306, 106 S. Ct. 2537, 91 L. Ed. 2d 249]* .

The prayer does not include a prayer for punitive damages. Punitive damages are not recoverable against a local government entity in a *42 U.S.C. § 1983* case [*Newport v. Fact Concerts (1981) 453 U.S. 247, 271, 101 S. Ct. 2748, 69 L. Ed. 2d 616]* .

The prayer includes a prayer for attorney's fees. *42 U.S.C. § 1988(b)* specifically provides for the recovery of attorney's fees in § 1983 cases.

[5] Jury Demand

The form of complaint in [1], *above*, includes a demand for trial by jury. In a *42 U.S.C. § 1983* case in which damages are sought, the plaintiff will have a right to a jury trial [*U.S. Const., amend. VII*]. *Fed. R. Civ. Proc., Rule 38* governs demands for trial by jury. Under Rule 38, the demand for trial by jury may be served at any time after commencement of the action and not later than 10 days after service of the last pleading directed to the issue triable by jury. The rule provides further that "[s]uch demand may be indorsed upon a pleading of the party" [*Fed. R. Civ. Proc., Rule 38*]. Therefore, the demand for trial by jury may be included in the complaint, as is the case in the complaint in [1], *above*.

[6] Cross References

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms of jurisdictional allegations for use in federal court, and for discussion and forms relating to removal of actions to federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For alternative forms of prayers, see Ch. 420, *Prayers*

California Forms of Pleading and Practice--Annotated

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 114 CIVIL RIGHTS: PRISONERS' RIGHTS

11-114 California Forms of Pleading and Practice--Annotated 114.syn

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[1] FORM

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[6] Cross References

§ 114.73 Order for Removal of Prisoner From State Prison to Attend Court Proceedings Affecting Parental or Marital Rights [Penal Code § 2625]

[1] FORM

[2] Use of Form

[3] Cross References

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FOOTNOTES:
(n15)Footnote *.
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(n16)Footnote **.
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Chapter 114 CIVIL RIGHTS: PRISONERS' RIGHTS
PART I. SCOPE

11-114 California Forms of Pleading and Practice--Annotated § 114.01

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§ 114.01 Scope of Chapter

This chapter discusses the civil rights of prisoners under the United States and California constitutions, and under California statutes.

The federal civil rights of prisoners are generally enforced by a civil action under *42 U.S.C. § 1983* [*see* Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*]. This chapter discusses enforcement of prisoners' civil rights by means of *42 U.S.C. § 1983* actions.

This chapter contains the following forms:

- A complaint for damages for deprivation of rights under color of state law pursuant to *42 U.S.C. § 1983* based on the cruel and unusual punishment of a prisoner because of the use of excessive force [*see § 114.70*].

- A complaint for damages and injunctive relief for deprivation of rights under color of state law pursuant to *42 U.S.C. § 1983* based on the cruel and unusual punishment of a prisoner because of the failure to provide adequate medical care [*see § 114.71*].

- A declaration of a prisoner to be removed from prison to attend court proceedings affecting parental or marital rights [*Penal Code § 2625*; *see § 114.72*].

- An order for the removal of a prisoner from state prison to attend court proceedings affecting parental or marital rights [*Penal Code § 2625*; *see § 114.73*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawSection 1983 ActionsGeneral OverviewCivil Rights LawPrisoner RightsGeneral Overview

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PART I. SCOPE

11-114 California Forms of Pleading and Practice--Annotated § 114.02

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§ 114.02 Cross References

- For a comprehensive procedural guide that chronologically outlines the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions* .

- For discussion and forms relating to adoptions and termination of parental rights, see Ch. 12A, *Adoptions: Termination of Parental Rights* .

- For discussion and forms relating to discrimination in government-funded programs and activities, including discrimination against prisoners based on disability, see Ch. 112, *Civil Rights: Government-Funded Programs and Activities* .

- For discussion and forms relating to actions under *42 U.S.C. § 1983*, and the other post-Civil War civil rights statutes (*42 U.S.C. §§ 1981*, *1982*, *1985*, *1986*, and *1988*), see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

- For discussion and forms relating to employment discrimination, see Ch. 115, *Civil Rights: Employment Discrimination* .

- For discussion and forms relating to discrimination in business establishments, see Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

- For discussion and forms relating to housing discrimination, see Ch. 117, *Civil Rights: Housing Discrimination* .

- For discussion and forms relating to interference with civil rights by threats, intimidation, coercion, or violence, see Ch. 117A, *Civil Rights: Interference with Civil Rights by Threats, Intimidation, Coercion, or Violence* .

- For discussion and forms of jurisdictional allegations for use in federal court, and for discussion and forms relating to removal of actions to federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

- For discussion and forms relating to relief by writ of habeas corpus, see Ch. 292, *Habeas Corpus* .

- For discussion and forms relating to injunctions, see Ch. 303, *Injunctions* .

- For discussion and forms relating to the rights of insane persons, see Ch. 304, *Insane and Other Incompetent Persons* .

- For further discussion and forms relating to dependency proceedings in juvenile courts, see Ch. 328, *Juvenile Courts: Dependency Proceedings* .

- For discussion of name changes by prisoners, *see* Ch. 377, *Name, Change of.*

- For discussion of testing for AIDS-related diseases of persons charged with the commission of certain sex crimes or assaults on officers or emergency personnel, and of mandatory testing of persons convicted of certain sex crimes, see *Ch. 429, Privacy, § 429.60* et seq.

- For discussion and forms relating to civil rights actions arising from illegal searches and seizures, see *Ch. 429, Privacy, § 429.310* et seq.

- For discussion and forms relating to actions against public entities and officers based on state law, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewLabor & Employment LawDiscriminationGeneral OverviewCivil Rights LawSection 1983 ActionsGeneral OverviewCivil Rights LawConspiracyGeneral OverviewCriminal Law & ProcedureAppealsStandards of ReviewClearly Erroneous ReviewHabeas Corpus Relief

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PART I. SCOPE

11-114 California Forms of Pleading and Practice--Annotated §§ 114.03-114.09

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[Reserved]

§§ 114.03[Reserved]

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Chapter 114 CIVIL RIGHTS: PRISONERS' RIGHTS
PART II. LEGAL BACKGROUND

11-114 California Forms of Pleading and Practice--Annotated § 114.10

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§ 114.10 Governing Law

[1] Federal Law

Federal constitutional provisions that are significant to the civil rights of prisoners include *United States Constitution, Amendments I* (freedom of speech and religion), *IV* (searches and seizures), *VIII* (cruel and unusual punishment), *XIV* (due process and equal protection), and XIV § 2 (disenfranchisement) [*see Legal Services for Prisoners with Children v. Bowen (2009) 170 Cal. App. 4th 447, 452-464, 87 Cal. Rptr. 2d 869* (disenfranchisement allowed by section is not limited to felonies at common law)].

42 U.S.C. § 1983 provides a cause of action for violation of federal constitutional or statutory rights. *42 U.S.C. § 1985* provides a cause of action for a conspiracy to violate a person's federal rights. *42 U.S.C. § 1986* provides a cause of action for a failure to prevent a conspiracy to violate a person's federal rights. *42 U.S.C. § 1988* provides for recovery of attorney's fees in civil rights actions. For discussion and forms related to *42 U.S.C. §§ 1983, 1985, 1986, 1988*, and the other post-Civil War civil rights statutes, see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

Title II of the Americans with Disabilities Act of 1990 (ADA), *42 U.S.C. § 12131 et seq.*, which prohibits a public entity from discriminating against a qualified individual with a disability on account of the individual's disability, covers

inmates in state prisons [*Pennsylvania Dep't of Corrections v. Yeskey (1998) 524 U.S. 206, 208-213, 118 S. Ct. 1952, 141 L. Ed. 2d 215* ; *see Armstrong v. Davis (9th Cir. 2001) 275 F.3d 849* (facts established at trial demonstrated that State of California regularly discriminated against disabled prisoners and parolees during parole and parole revocation hearing processes in violation of ADA and Rehabilitation Act); *see also* Thompson v. Davis (9th Cir. 2002) *282 F.3d 780, 785-787* (Title II applies to parole decisions)]. Thus, prisoners may sue a state for money damages for violations of Title II that also violate constitutional rights. Insofar as Title II creates a private cause of action for damages against states for conduct that actually violates the *Fourteenth Amendment*, Title II validly abrogates state sovereign immunity [*see United States v. Georgia (2006) 546 U.S. 151, 126 S. Ct. 877, 880-882, 163 L. Ed. 2d 650*]. For discussion related to Title II of the ADA, see *Ch. 112, Civil Rights: Government-Funded Programs and Activities, § 112.15[2]*.

[2] State Law

State constitutional provisions that are significant to the civil rights of prisoners include *California Constitution, Article I, §§ 1* (inalienable rights), *2* (freedom of speech), *4* (freedom of religion), *7* (due process and equal protection), *13* (search and seizure), and *17* (cruel and unusual punishment), and *Article II, § 4* (disenfranchisement).

The principal California statutes relating to the civil rights of prisoners are *Penal Code §§ 2600* (rights lost during imprisonment), and *2601* (guaranteed rights of prisoners). *Penal Code § 2600* sets forth, generally, the extent to which a prisoner is deprived of civil rights during his or her incarceration. *Penal Code § 2601* is the principal California statute enumerating the rights of prisoners. The rights of prisoners set forth in *§ 2601* are fundamental guarantees that may not be infringed on arbitrarily [*In re Van Geldern (1971) 5 Cal. 3d 832, 836, 97 Cal. Rptr. 698, 489 P.2d 578* (decided under former *Penal Code § 2600*, enumerating rights of prisoners)].

Other California statutes relating to the rights of prisoners include *Penal Code §§ 636* (privileged conversation of prisoner), *2620-2625* (prisoners as witnesses), *2650-2657* (mistreatment of prisoners), *2670-2680* (organic therapy), *2684-2685* (disposition of insane prisoners), *2690-2692* (temporary removal of prisoners), *2700-2792* (employment of prisoners), *3403* (examination after commitment; care and treatment; confinement beyond term of commitment), *3405-3409* (family planning, birth control, pregnancy, abortions in prisons), *3521-3523* (prisoners' rights as research subjects), *4000-4030* (county jails), *4100-4305* (county industrial farms and road camps), *4350-4351* (blood donations), and *5069* (rehabilitation of injured prisoners); *Fam. Code § 7825* (freedom from custody and control of parent convicted of felony); and *Lab. Code §§ 3370, 3371* (workers' compensation).

PRACTICE TIP:

No Independent Basis for Damages. Attorneys should note that the California Constitution, with some very narrow exceptions, does not provide an independent basis for a damage claim [*see Carlsbad Aquafarm, Inc. v. Department of Health Services (2000) 83 Cal. App. 4th 809, 100 Cal. Rptr. 2d 87*]. However, *Civ. Code § 52.1* (regarding remedies for interference with exercise of civil rights) may provide a remedy in some situations, and attorney's fees to the prevailing party. There are significant immunities that exist under California state law. However, they are not insurmountable. *By John H. Scott*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewConstitutional LawBill of RightsFundamental RightsCriminal ProcessCruel & Unusual PunishmentConstitutional LawEqual ProtectionGeneral OverviewCivil Rights LawPrisoner RightsFreedom of SpeechCivil Rights LawPrisoner RightsFreedom of Religion

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11-114 California Forms of Pleading and Practice--Annotated § 114.11

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§ 114.11 Effect of Imprisonment on Civil Rights

A person sentenced to imprisonment in a state prison may during the period of confinement be deprived of only such rights as is reasonably related to legitimate penological interests [*Penal Code § 2600* (also requires certain procedures for involuntary administration of psychotropic medication to prisoners); *see Payne v. Superior Court (1976) 17 Cal. 3d 908, 913, 132 Cal. Rptr. 405, 553 P.2d 565* (although prisoners may forfeit significant rights and privileges that general citizenry enjoys, they retain those basic rights not incompatible with penal institution's operation)].

Although on its face *Penal Code § 2600* applies only to state prison inmates, based on equal protection principles the statute has been held to apply to all persons similarly situated, including (1) wards of the California Youth Authority [*In re Arias (1986) 42 Cal. 3d 667, 687, 230 Cal. Rptr. 505, 725 P.2d 664*], and (2) persons confined in local detention facilities [*De Lancie v. Superior Court (1982) 31 Cal. 3d 865, 872, 183 Cal. Rptr. 866, 647 P.2d 142*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPrisoner RightsDiscrimination

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PART II. LEGAL BACKGROUND

11-114 California Forms of Pleading and Practice--Annotated § 114.12

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§ 114.12 Standard of Review of Regulations Affecting Rights of Prisoners

[1] Constitutional Rights

Under the federal standard of review, a prison regulation that impinges on the constitutional rights of prisoners must be reasonably related to legitimate penological interests [*Shaw v. Murphy (2001) 532 U.S. 223, 121 S. Ct. 1475, 149 L. Ed. 2d 420, 424* ; *Turner v. Safley (1987) 482 U.S. 78, 89*]. Several factors are relevant in determining the reasonableness of the regulation [*Shaw v. Murphy (2001) 532 U.S. 223, 121 S. Ct. 1475, 149 L. Ed. 2d 420, 427* ; *Turner v. Safley (1987) 482 U.S. 78, 89-91* (ban on correspondence between inmates in different institutions reasonably related to legitimate security interests)]:

- Whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it;

- Whether there are alternative means of exercising the right that remain open to prison inmates;

- The impact that accommodation of the asserted constitutional right will have on guards and other inmates and on the allocation of prison resources generally; and

- The absence of ready alternatives.

Although all four factors are relevant to the analysis, the first of the factors constitutes a sine qua non [*Morrison v. Hall (9th Cir. 2001) 261 F.3d 896, 901* ; *Walker v. Sumner (9th Cir. 1990) 917 F.2d 382, 385*].

If the prisoner presents sufficient evidence refuting a common-sense connection between a legitimate objective and a prison regulation, the state must present enough counter-evidence to show that the connection is not so remote as to render the policy arbitrary or irrational [*Frost v. Symington (9th Cir. 1999) 197 F.3d 348, 357* ; *Mauro v. Arpaio (9th Cir. 1999) 188 F.3d 1054, 1060* , *cert. denied, 529 U.S. 1018 (2000)* , quoting *Turner v. Safley (1987) 482 U.S. 78, 89-90*]. If the prisoner does not present enough evidence to refute a common-sense connection between a prison regulation and the objective that government's counsel argues the policy was designed to further, presuming the governmental objective is legitimate and neutral, *Turner*'s first prong is satisfied [*Frost v. Symington (9th Cir. 1999) 197 F.3d 348, 357* ; *see also Thornburgh v. Abbott (1989) 490 U.S. 401, 414, 109 S. Ct. 1874, 104 L. Ed. 2d 459*].

The federal standard does not require the regulation to be the "least restrictive alternative" [*Turner v. Safley (1987) 482 U.S. 78, 90-91*]. This differs from the California standard, which does include a "least restrictive alternative" inquiry [*see* [2], *below*].

Although some earlier cases applied a different standard of review based on whether the regulation affects the constitutional rights of nonprisoners [*see, e.g., Procunier v. Martinez (1974) 416 U.S. 396, 409, 94 S. Ct. 1800, 40 L. Ed. 2d 224*], the distinction was later held to be inappropriate. The *Turner* standard applies to the review of all prison regulations [*Thornburgh v. Abbott (1989) 490 U.S. 401, 413-414, 109 S. Ct. 1874, 104 L. Ed. 2d 459*].

Not all prison regulations create constitutionally cognizable liberty interests. For example, California prison regulations governing inmate classification did not create cognizable *Eighth* or *Fourteenth Amendment* liberty interests [*Myron v. Terhune (9th Cir. 2007) 476 F.3d 716, 718-719* ; *see also Sandin v. Conner (1995) 515 U.S. 472, 486, 115 S. Ct. 2293, 132 L. Ed. 2d 418* (prisoner's discipline in segregated confinement did not present type of atypical, significant deprivation in which state might conceivably create liberty interest)]. Further, a California regulation allowing inmates to participate in the publication and distribution of an inmate publication only with the institution head's specific approval did not create a liberty interest importing the *Fourteenth Amendment* because a prison official's determination that a prisoner may not engage in the publication and distribution of an inmate publication does not present the type of atypical significant deprivation in which a state might conceivably create a liberty interest [*Myron v. Terhune (9th Cir. 2007) 476 F.3d 716, 719]* . Although prisoners have a right to the provision of proper nourishment while incarcerated, prisoners do not have a right to seek the enforcement of prison regulations regarding food service without a demonstration that the food service violated any of their constitutional or statutory rights [*see In re Cannon (2008) 168 Cal. App. 4th 910, 915-917, 85 Cal. Rptr. 3d 770*].

[2] Statutory Rights

Reviewing a claim that a prisoner's rights under *Penal Code § 2600* have been violated requires the following three-step inquiry [*In re Arias (1986) 42 Cal. 3d 667, 689-690, 230 Cal. Rptr. 505, 725 P.2d 664*]:

- Whether any "rights" are implicated;

- If rights are implicated, whether a "reasonable security" problem (or presumably, under the statutory language of the 1994 amendment to *Penal Code § 2600*, a "legitimate penological interest") exists that might permit a deprivation of rights under *§ 2600*; and

- The extent to which a deprivation of rights is necessary.

If a restriction is imposed on an inmate's civil rights protected by *Penal Code § 2600*, the availability of another less restrictive alternative to accomplish the goal of reasonable security weighs against the restriction [*In re Grimes (1989) 208 Cal. App. 3d 1175, 1181-1182, 256 Cal. Rptr. 690* ; *see In re Stone (1982) 130 Cal. App. 3d 922, 927, 182 Cal. Rptr. 79* (visitation rights under *Penal Code § 2601*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPrisoner RightsDiscrimination

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§ 114.13 Access to Courts

[1] Constitutional, Statutory, and Other Rights, Generally

[a] Constitutional Right to Access

A prisoner has a constitutional right of access to the courts under *U.S. Const., amend. XIV* [*Bounds v. Smith (1977) 430 U.S. 817, 821, 97 S. Ct. 1491, 52 L. Ed. 2d 72* ; *Wolff v. McDonnell (1974) 418 U.S. 539, 556, 94 S. Ct. 2963, 41 L. Ed. 2d 935*]. This right encompasses civil rights claims, as well as habeas corpus proceedings [*Storseth v. Spellman (9th Cir. 1981) 654 F.2d 1349, 1352* ; *see* *Ex parte Hull (1940) 312 U.S. 546, 549, 61 S. Ct. 640, 85 L. Ed. 1034* (prison may not edit, censor, or delay petitions for writs of habeas corpus)].

To show a denial of the constitutional right of access to the courts, a prisoner must show actual injury [*Lewis v. Casey (1995) 518 U.S. 343, 349-355, 116 S. Ct. 2174, 135 L. Ed. 2d 606* ; *Vandelft v. Moses (9th Cir. 1994) 31 F.3d 794, 796 , cert. denied, 516 U.S. 825 (1995)* ; *Johnson v. Moore (9th Cir. 1991) 948 F.2d 517, 521*]. "Actual injury" is defined as a specific instance in which an inmate was actually denied access to the courts [*Vandelft v. Moses (9th Cir. 1994) 31 F.3d 794, 796 , cert. denied, 516 U.S. 825 (1995)*].

[b] Statutory Right to Initiate Civil Actions

Prisoners have a statutory right to initiate civil actions, subject to a $3 filing fee to be collected by the Department of Corrections and any other fee authorized by law, and subject to *Code Civ. Proc. § 391 et seq.* (concerning vexatious litigants) [*Penal Code § 2601(d)*].

[c] Prisoner's Right to Attend Court Proceedings; Alternative Arrangements

Although prisoners do not ordinarily have the right to appear personally in court on civil matters [*Payne v. Superior Court (1976) 17 Cal. 3d 908, 926-927, 132 Cal. Rptr. 405, 553 P.2d 565*], a prisoner, other than one sentenced to death, does have the right to attend court proceedings (1) to terminate his or her parental rights or (2) to adjudicate his or her child a dependent of the court [*Penal Code § 2625(a)-(d)*]. A proceeding to identify the presumed father, which seeks merely to identify the man who has a legal entitlement to reunification services and/or custody, is neither of these, and the biological father does not have a right to attend the hearing in person [*In re Jesusa V. (2004) 32 Cal. 4th 588, 599-601, 10 Cal. Rptr. 3d 205, 85 P.3d 2*]. In other cases in which the parental or marital rights of a prisoner not under sentence of death are subject to adjudication, the court may order the prisoner's appearance [*Penal Code § 2625(e)-(g)*].

The prisoner's presence can also be ordered by the trial court in any case where his or her presence is necessary [*see Penal Code § 1567*] or in any case in which the prisoner is a material witness [*Payne v. Superior Court (1976) 17 Cal. 3d 908, 924-925, 132 Cal. Rptr. 405, 553 P.2d 565* ; *see Penal Code § 2621*]. Furthermore, in a civil case in which a prisoner is a defendant, failure to arrange to take the prisoner's testimony, when the court determines that the testimony is required, violates the prisoner's constitutional due process rights [*Payne v. Superior Court (1976) 17 Cal. 3d 908, 924-925, 132 Cal. Rptr. 405, 553 P.2d 565*].

When prisoners do not have a right to appear personally in court, courts are encouraged to devise alternative means to secure prisoners meaningful access to the courts [*Hoversten v. Superior Court of San Luis Obispo (1999) 74 Cal. App. 4th 636, 642, 88 Cal. Rptr. 2d 197* ; *Wantuch v. Davis (1995) 32 Cal. App. 4th 786, 792, 39 Cal. Rptr. 2d 47*]. There are several possible means for a court to secure access to the courts for a prisoner [*Hoversten v. Superior Court of San Luis Obispo (1999) 74 Cal. App. 4th 636, 642-643, 88 Cal. Rptr. 2d 197* ; *Wantuch v. Davis (1995) 32 Cal. App. 4th 786, 792-793, 39 Cal. Rptr. 2d 47*]:

- Deferring the action until the prisoner is released;
- Appointing counsel for the prisoner;
- Transferring the prisoner to court;
- Utilizing depositions in lieu of personal appearances;
- Holding trial in prison;
- Conducting status and settlement conferences, hearings on motions, and other pretrial proceedings by telephone;
- Propounding written discovery;
- Using closed circuit television or other modern electronic media;
- In child custody or visitation matters, utilizing the services of the family court mediator [*see Fam. Code § 3170(a)*]; and

- Implementing other innovative, imaginative procedures.

While a trial court may exercise its discretion in determining the appropriate manner by which access is provided, the court must make sure that whatever method is utilized actually provides meaningful access. For example, to the extent that the trial court elected to rely on telephonic hearings to provide an indigent inmate access, the court should have communicated itself, telephonically and/or by letter, with prison personnel to determine what logistical arrangements were necessary to enable an inmate to appear telephonically, and made sure both court staff and prison personnel made those arrangements. Thus, before the court could dismiss the action on the ground that the prisoner failed to appear telephonically at proceedings in the case, the trial court should have found, based on facts in the record, that the prisoner willfully failed to avail herself or himself of the right to appear telephonically [*Jameson v. Desta (2009) 179 Cal. App. 4th 672, 675, 678-684, 101 Cal. Rptr. 3d 345]* .

[d] Correspondence from Court

The right of privacy secured by the California Constitution [*Cal. Const., art. I, § 1*] prohibits a regulation that permits correspondence from a court to be opened without the prisoner present [*In re Short (1976) 55 Cal. App. 3d 268, 272, 127 Cal. Rptr. 498*].

[e] Right to Receive Fair Notice of Summary Judgment Procedures

Under the fair notice doctrine, the district court bears the responsibility of assuring that a pro se prisoner litigant receives meaningful notice of summary judgment procedures and requirements [*Solis v. County of Los Angeles (9th Cir. 2008) 514 F.3d 946, 951-953* ; *Wyatt v. Terhune (9th Cir. 2003) 315 F.3d 1108, 1111* ; *Rand v. Rowland (9th Cir. 1998) 154 F.3d 952, 960* (en banc); *see Klingele v. Eikenberry (9th Cir. 1988) 849 F.2d 409, 411-412* (district courts are obligated to advise prisoner pro per litigants of *Fed. R. Civ. P., Rule 56* requirements)]. The court must inform the pro se prisoner of each of the following [*Rand v. Rowland (9th Cir. 1998) 154 F.3d 952, 960-961* (en banc)]:

- The right to file counter-affidavits or other responsive evidentiary materials and the fact that the failure to do so might result in the entry of summary judgment against the prisoner.

- The effect of losing on summary judgment.

- That if the pro se prisoner fails to controvert the moving party with opposing counter-affidavits or other evidence, the moving party's evidence might be taken as the truth, and final judgment may be entered against the prisoner without a trial.

[f] Prison Delivery Rule

Under the prison-delivery rule, also referred to as the prison mailbox rule, a self-represented prisoner's notice of appeal in a criminal case is deemed timely filed if, within the relevant period set forth in the California Rules of Court, the notice is delivered to prison authorities pursuant to the procedures established for prisoner mail [*Silverbrand v. County of Los Angeles (2009) 46 Cal. 4th 106, 110, 92 Cal. Rptr. 3d 595, 205 P.3d 1047* ; *see In re Jordan (1992) 4 Cal. 4th 116, 13 Cal. Rptr. 2d 878, 840 P.2d 983*]. The prison-delivery rule also applies to a self-represented prisoner's filing of a notice of appeal in a civil case [*Silverbrand v. County of Los Angeles (2009) 46 Cal. 4th 106, 113-129, 92 Cal. Rptr. 3d 595, 205 P.3d 1047*].

In federal actions, the mailbox rule, under which a prisoner's notice of appeal is deemed to be filed at the time the prisoner delivered it to the prison authorities for forwarding to the court clerk, applies to a pro se prisoner's § 1983 complaint [*Douglas v. Noelle (9th Cir. 2009) 567 F.3d 1103, 1106-1109* ; *see Houston v. Lack (1988) 487 U.S. 266, 108 S. Ct. 2379, 101 L. Ed. 2d 245* (mailbox rule applied to prisoner's habeas corpus petition)].

[2] Access to Counsel or Other Assistance

The right of access to counsel is an essential component of the right of access to the courts [*Bounds v. Smith (1977) 430 U.S. 817, 822-823, 828, 97 S. Ct. 1491, 52 L. Ed. 2d 72* (prisoners must be provided assistance from persons trained in the law or access to adequate law libraries); *see Ching v. Lewis (9th Cir. 1990) 895 F.2d 608, 610* (arbitrary denial of contact visits with attorney violates prisoner's right of meaningful access to courts); *In re Grimes (1989) 208 Cal. App. 3d 1175, 1182-1183, 256 Cal. Rptr. 690* (installation of collect-call only telephones unconstitutionally deprived county jail inmates of access to public defenders)].

If a prisoner is a defendant in a civil case and is indigent, due process may in some circumstances require that counsel be appointed [*Payne v. Superior Court (1976) 17 Cal. 3d 908, 924-925, 132 Cal. Rptr. 405, 553 P.2d 565*]. However, conscription of unwilling and uncompensated counsel violates equal protection of the law, so that if pro bono counsel is not available to represent an indigent inmate and if the inmate's appearance in court is not feasible, the court must fashion another remedy [*Hoversten v. Superior Court of San Luis Obispo (1999) 74 Cal. App. 4th 636, 643, 88 Cal. Rptr. 2d 197* ; *Cunningham v. Superior Court (1986) 177 Cal. App. 3d 336, 356-357, 222 Cal. Rptr. 854* ; *see People v. Ortiz (1990) 51 Cal. 3d 975, 985-986, 275 Cal. Rptr. 191, 800 P.2d 547*].

A prisoner has a right to counsel if he or she appeals a criminal conviction that resulted in the prisoner's incarceration [*Douglas v. State of California (1963) 372 U.S. 353, 356-357, 83 S. Ct. 814, 9 L. Ed. 2d 811* ; *In re Banks (1971) 4 Cal. 3d 337, 343, 93 Cal. Rptr. 591, 482 P.2d 215*].

A prisoner does not have a right to retained or appointed counsel in prison disciplinary proceedings [*Baxter v. Palmigiano (1976) 425 U.S. 308, 315, 96 S. Ct. 1551, 47 L. Ed. 2d 810*].

Prison officials may not unreasonably interfere with legal assistance between prisoners [*Wolff v. McDonnell (1974) 418 U.S. 539, 579-580, 94 S. Ct. 2963, 41 L. Ed. 2d 935* ; *Johnson v. Avery (1969) 393 U.S. 483, 487-490, 89 S. Ct. 747, 21 L. Ed. 2d 718* ; *Brown v. Pitchess (1975) 13 Cal. 3d 518, 524-526, 119 Cal. Rptr. 204, 531 P.2d 772*]. However, prison authorities can implement reasonable restrictions on visits between an inmate and an attorney if necessary for prison security [*Small v. Superior Court (2000) 79 Cal. App. 4th 1000, 1010, 94 Cal. Rptr. 2d 550*].

There is no *Sixth Amendment* right to law library access when a *propria persona* criminal defendant is assisted by advisory counsel [*People v. Ringo (2005) 134 Cal. App. 4th 870, 876-877, 36 Cal. Rptr. 3d 444*]. When a criminal defendant has a lawyer acting as advisory counsel, his or her rights of access to courts are adequately protected [*People v. Ringo (2005) 134 Cal. App. 4th 870, 876, 36 Cal. Rptr. 3d 444*].

[3] Access to Law Libraries, Legal Services, and Legal Materials

Prisons must provide prisoners with adequate law libraries or adequate assistance from persons trained in the law [*Bounds v. Smith (1977) 430 U.S. 817, 822-825, 97 S. Ct. 1491, 52 L. Ed. 2d 72*]. This is not an independent right of prisoners, however; the question is whether the prisoner's right of access to the courts is infringed by any inadequacy of the library or legal assistance [*see Lewis v. Casey (1996) 518 U.S. 343, 349-355, 116 S. Ct. 2174, 135 L. Ed. 2d 606*].

In addition, prisons must not infringe on prisoners' right of access to the courts by denying items necessary to prepare legal documents [*Bounds v. Smith (1977) 430 U.S. 817, 822-825, 97 S. Ct. 1491, 52 L. Ed. 2d 72* (transcripts, paper, pens, notarial services, stamps); *Allen v. Sakai (9th Cir. 1994) 48 F.3d 1082, 1089-1090 , cert. denied, 514 U.S. 1065 (1995)* (photocopies, ink pens); *see Taylor v. List (9th Cir. 1989) 880 F.2d 1040, 1047* (right of self-representation under *U.S. Const., amend. VI*, includes right of access to law books, witnesses, and other tools necessary to prepare defense)]. This does not guarantee a particular methodology of access, but rather confers the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts [*Lewis v. Casey (1996) 518 U.S. 343, 356, 116 S. Ct. 2174, 135 L. Ed. 2d 606]* . Prisons must provide the tools the inmates need to attack their sentences,

directly or collaterally, and to challenge the conditions of their confinement; impairment of any other litigating capacity is an incidental and constitutional consequence of conviction and incarceration [*Lewis v. Casey (1996) 518 U.S. 343, 355, 116 S. Ct. 2174, 135 L. Ed. 2d 606* ; *see Lindquist v. Idaho State Board of Corrections (9th Cir. 1985) 776 F.2d 851, 856* (prison library need not contain Pacific Reporter 2d, Shepard's Citations, and other reference books)]. The resources must meet minimum constitutional standards sufficient to provide meaningful, though perhaps not ideal, access to the courts [*Lindquist v. Idaho State Board of Corrections (9th Cir. 1985) 776 F.2d 851, 856* (inmates had no right to typewriter to prepare legal documents, where court rules permitted pro se litigants to hand-write their pleadings); *compare Allen v. Sakai (9th Cir. 1994) 40 F.3d 1001, 1006* (outright denial of pen to complete notice of appeal deprived inmate of access to courts, where court rules required all handwritten entries on papers to be in black ink without exception)].

The inmate must also show causation, i.e., that official acts or omissions hindered efforts to pursue a non-frivolous legal claim [*Lewis v. Casey (1996) 518 U.S. 343, 351, 116 S. Ct. 2174, 135 L. Ed. 2d 606]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsCriminal ProcessAssistance of CounselCivil Rights LawPrisoner RightsAccess to Courts

California Forms of Pleading and Practice--Annotated

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11-114 California Forms of Pleading and Practice--Annotated § 114.14

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§ 114.14 Protection Against Cruel and Unusual Punishment

[1] Constitutional Restrictions on Punishment

[a] Unnecessary and Wanton Infliction of Pain Standard

Both the federal and state constitutions protect prisoners from cruel and unusual punishment [*U.S. Const., amend. VIII*; *Cal. Const., art. I, § 17*]. However, the California Constitution does not provide a private right of action for violation of its *cruel and unusual punishment clause* [*Giraldo v. Dept. of Corrections & Rehabilitation (2008) 168 Cal. App. 4th 231, 85 Cal. Rptr. 3d 371*].

A prisoner making a claim of cruel and unusual punishment must allege and prove unnecessary and wanton infliction of pain. This requirement imposes a subjective element on a prisoner's cruel and unusual punishment claim. For example, in a case involving the failure to provide care for a prisoner's serious illness or injury, a "deliberate indifference" standard applies [*Estelle v. Gamble (1976) 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251*].

Excessive force directed at one prisoner can also establish a cause of action for harm befalling other prisoners [*Clement v. Gomez (9th Cir. 2002) 298 F.3d 898, 903 n.3* ; *see Robins v. Meecham (9th Cir. 1995) 60 F.3d 1436, 1441-1442*].

If the security and safety of a prison and its staff in the face of a prison disturbance is involved, a deliberate indifference standard does not adequately account for the competing obligations of the prison administrators, or the hesitancy of courts to apply criticism of the administrators' difficult decisions in hindsight. Therefore, in cases involving security measures in emergency situations, the test is whether force was applied in a good faith effort to maintain or restore discipline, or, on the other hand, with such wantonness as to be tantamount to a knowing willingness to inflict unjustified harm [*Whitley v. Albers (1986) 475 U.S. 312, 318-321, 106 S. Ct. 1078, 89 L. Ed. 2d 251* ; *Clement v. Gomez (9th Cir. 2002) 298 F.3d 898, 903* ; *see Wilson v. Seiter (1991) 501 U.S. 294, 297-303, 111 S. Ct. 2321, 115 L. Ed. 2d 271*]. This standard necessarily involves a more culpable mental state than that required for excessive force claims arising under the *Fourth Amendment's* unreasonable seizures restriction. Under the *Eighth Amendment*, courts look for malicious and sadistic force, not merely objectively unreasonable force [*Clement v. Gomez (9th Cir. 2002) 298 F.3d 898, 903*].

The *Whitley* standard has been extended to all allegations of excessive force, not merely those resulting from security measures taken in emergency situations [*Hudson v. McMillian (1992) 503 U.S. 1, 6-7, 112 S. Ct. 995, 117 L. Ed. 2d 156*].

The extent of injury suffered by an inmate is only one factor in determining whether the force used was wanton and unnecessary. Additional factors include all of the following [*Hudson v. McMillian (1992) 503 U.S. 1, 7, 112 S. Ct. 995, 117 L. Ed. 2d 156* (prisoner able to maintain claim based on excessive force not resulting in serious injury)]:

- The need for application of force;
- The relationship between that need and the amount of force used;
- The threat reasonably perceived by responsible officials; and
- Any efforts made to temper the severity of a forceful response.

Judges and juries must defer to prison officials' expert judgments [*Bell v. Wolfish (1979) 441 U.S. 520, 547, 99 S. Ct. 1861, 60 L. Ed. 2d 447* ; *Norwood v. Vance (9th Cir. 2009) 572 F.3d 626, 629-630*]. Deference requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice [*Whitley v. Albers (1985) 475 U.S. 312, 322, 106 S. Ct. 1078, 89 L. Ed. 2d 251* ; *Norwood v. Vance (9th Cir. 2009) 572 F.3d 626, 630*]. Additional jury instruction regarding deference is required in cases involving security measures in emergency situations and applying the *Whitley* test to allegedly excessive force by prison officials [*Norwood v. Vance (9th Cir. 2009) 572 F.3d 626, 630*].

Under certain circumstances, dangerous prison working conditions can give rise to an *Eighth Amendment* claim, notwithstanding the fact that the prisoner initially obtained the specific employment assignment through a voluntary application process within the prison system. Once a prisoner is employed and not in a position to direct his or her own labor, the prisoner's supervisors are not free to visit cruel and unusual punishments on the prisoner [*Morgan v. Morgensen (9th Cir. 2006) 465 F.3d 1041, 1045-1047]* .

For related jury instructions on violation of a prisoner's federal civil rights under the *Eighth Amendment* for an action under *42 U.S.C. § 1983* in state court, see *Judicial Council Of California Civil Jury Instructions, CACI Nos. 3010, 3011* (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

PRACTICE TIP:

Qualified Immunity Defense. The defense of qualified immunity should be carefully examined before

pursuing an *Eighth Amendment* claim [*see Jeffers v. Gomez (9th Cir. 2001) 240 F.3d 845* ; *see also Ch. 113, § 113.14[11][b]*]. Notably, courts have been reluctant to apply qualified immunity to cases involving allegations of intentional discrimination based onrace or gender, and many prisons are hotbeds of racism and sexism. *By John H. Scott*

[b] Liability of Prison Officials for Injuries Suffered at Hands of Other Prisoners

With regard to injuries suffered by a prisoner at the hands of other prisoners, prison officials may be held liable only if two requirements are met. First, the deprivation must be, objectively, sufficiently serious; a prison official's act or omission must result in denial of the minimal civilized measure of life's necessities. In the case of a claim based on a failure to prevent harm, to satisfy this first requirement, the inmate must show that he or she was incarcerated under conditions posing a significant risk of serious harm. The second requirement is that the prison official was deliberately indifferent to inmate health or safety [*Farmer v. Brennan (1994) 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811* ; *Hearns v. Terhune (9th Cir. 2005) 413 F.3d 1036, 1040*]. To establish this state of mind, the plaintiff must show that the official knew of and disregarded an excessive risk to inmate health or safety; the official must have been aware of facts that could give rise to an inference that a substantial risk of harm existed, and the official must have drawn that inference [*Farmer v. Brennan (1994) 511 U.S. 825, 837, 114 S. Ct. 1970, 128 L. Ed. 2d 811*].

[c] Prison Overcrowding

Prison overcrowding, when rising to the level of wanton and unnecessary infliction of pain, or when grossly disproportionate to the severity of the crime warranting the imprisonment, may amount to cruel and unusual punishment [*Rhodes v. Chapman (1981) 452 U.S. 337, 347, 101 S. Ct. 2392, 69 L. Ed. 2d 59* ; *Balla v. Idaho State Bd. of Corrections (9th Cir. 1989) 869 F.2d 461, 470-473*].

[2] State Statutory Restrictions on Punishment

California has specific statutory restrictions on the punishment of prisoners. For example, by statute, the person of a prisoner sentenced to imprisonment in the state prison is under the protection of the law, and any injury to the prisoner, not authorized by law, is punishable in the same manner as if the prisoner were not convicted or sentenced [*Penal Code § 2650*].

No punishment, except as authorized by the Director of Corrections, may be inflicted, and then only by order and under direction of a prison warden [*Penal Code § 2651*].

An officer found guilty of willful inhumanity or oppression toward a prisoner in his or her care or custody may be fined as much as $4,000, and may be removed from office [*Penal Code § 147*].

It is unlawful to use in the jails or prisons cruel, corporal, or unusual punishment or to inflict any treatment or allow any lack of care that would injure or impair the health of the prisoner, inmate, or person confined. Punishment by the use of a neck chain, strait jacket, gag, thumb-screw, shower-bath, or the tricing up of prisoners, inmates, or persons confined is prohibited [*Penal Code §§ 673* (jails), *2652* (prisons), *2652.5* (neck chains)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsCriminal ProcessCruel & Unusual PunishmentCivil Rights LawSection 1983 ActionsLaw Enforcement OfficialsPrison OfficialsCivil Rights LawPrisoner RightsConfinement Conditions

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§ 114.14A Protection Against Use of Excessive Force on Jail Detainee

The *Fourth Amendment* sets the applicable constitutional limitations for considering claims of excessive force during pretrial detention [*Lolli v. County of Orange (9th Cir. 2003) 351 F.3d 410, 415* ; *Gibson v. County of Washoe (9th Cir. 2002) 290 F.3d 1175, 1185-1186*]. The court evaluates a pretrial detainee's claim of excessive force under the *Fourth Amendment's* objective reasonableness standard [*Lolli v. County of Orange (9th Cir. 2003) 351 F.3d 410, 415*]. The "reasonableness" inquiry in an excessive force case is objective: whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. In considering an excessive force claim, the court balances the nature and quality of the intrusion on the individual's *Fourth Amendment* interests against the countervailing governmental interests at stake [*Graham v. Connor (1989) 490 U.S. 386, 396-397, 109 S. Ct. 1865, 104 L. Ed. 2d 443*]. Because the balancing nearly always requires a jury to sift through disputed factual contentions and to draw inferences from them, summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly [*Lolli v. County of Orange (9th Cir. 2003) 351 F.3d 410, 415-416*].

Legal Topics:

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

Criminal Law & ProcedureSentencingCruel & Unusual PunishmentCivil Rights LawPrisoner RightsSafety

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§ 114.14B Searches of Jail Detainees

A blanket jail policy requiring strip searches of all arrestees classified for custodial housing in the general population is facially reasonable under the *Fourth Amendment*, notwithstanding the lack of individualized reasonable suspicion as to the individuals searched, if, for example, the procedures governing the scope and the manner of the searches limits searches to visual inspection, expressly prohibits tactile strip searches, and requires officials to conduct the strip searches in a professional manner and in a place that affords privacy. Because arrestees' use of body cavities as method of smuggling drugs, weapons, and items used to escape custody is an immediate and troubling problem for jail administrators, the policy is reasonable and reasonably related to the legitimate penological interests of the jail in maintaining security for inmates and employees by preventing contraband smuggling [*Bull v. City & County of San Francisco (9th Cir. 2010) 595 F.3d 964, 970-982]* .

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§ 114.15 Medical Care

[1] Failure to Provide Adequate Care

The failure to provide adequate medical care may be a violation of the prohibition against cruel and unusual punishment when the prisoner has already been tried and sentenced [*Estelle v. Gamble (1976) 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251*], or a violation of the right to due process of law in the case of pretrial detainees [*Frost v. Agnos (9th Cir. 1998) 152 F.3d 1124, 1128-1130*].

To establish a constitutional violation, prisoners must satisfy both the objective and subjective components of a two-part test [*Wilson v. Seiter (1991) 501 U.S. 294, 298-299, 111 S. Ct. 2321, 115 L. Ed. 2d 271* ; *Hallett v. Morgan (9th Cir. 2002) 287 F.3d 1193, 1205*]:

- They must prove that prison officials have deprived them of the minimal civilized measure of life's necessities; and
- They must demonstrate that prison officials acted with deliberate indifference.

A showing of mere negligent medical treatment is not sufficient. To show an *Eighth Amendment* violation, the prisoner must show that there was deliberate indifference to the prisoner's serious medical needs [*Estelle v. Gamble (1976) 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251* ; *Hallett v. Morgan (9th Cir. 2002) 287 F.3d 1193, 1205* (mere medical malpractice does not constitute cruel and unusual punishment); *Wakefield v. Thompson (9th Cir. 1999) 177 F.3d 1160, 1164-1165* ; *Ortiz v. City of Imperial (9th Cir. 1989) 884 F.2d 1312, 1314*]. Prison officials are deliberately indifferent to a prisoner's serious medical needs when they deny, delay, or intentionally interfere with medical treatment [*Hallett v. Morgan (9th Cir. 2002) 287 F.3d 1193, 1205* ; *Hamilton v. Endell (9th Cir. 1992) 981 F.2d 1062, 1066*]. The officials' conduct must constitute unnecessary and wanton infliction of pain before it violates the *Eighth Amendment* [*Estelle v. Gamble (1976) 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251* ; *Hallett v. Morgan (9th Cir. 2002) 287 F.3d 1193, 1205*].

If a person should have been aware of the risk, but was not, the person has not violated the *Eighth Amendment*, no matter how severe the risk [*Gibson v. Washoe County (9th Cir. 2002) 290 F.3d 1175, 1187* ; *Jeffers v. Gomez (9th Cir. 2001) 267 F.3d 895, 914*]. However, if a person is aware of a substantial risk of serious harm, a person may be liable for neglecting a prisoner's serious medical needs on the basis of either action or inaction [*Farmer v. Brennan (1994) 511 U.S. 825, 842, 114 S. Ct. 1970, 128 L. Ed. 2d 811* ; *Gibson v. Washoe County (9th Cir. 2002) 290 F.3d 1175, 1187*].

The prisoner need not prove a complete failure to treat, because access to medical care is meaningless unless the medical staff can render competent care [*Ortiz v. City of Imperial (9th Cir. 1989) 884 F.2d 1312, 1314* ; *Cabrales v. County of Los Angeles (9th Cir. 1988) 864 F.2d 1454, 1461* ; *see Gibson v. County of Washoe (9th Cir. 2002) 290 F.3d 1175, 1187* (to comply with duty not to engage in acts evidencing deliberate indifference to inmates' medical and psychiatric needs, prisons and jails must provide medical staff competent to deal with prisoners' problems)].

The duty to provide medical care encompasses psychiatric needs [*Gibson v. County of Washoe (9th Cir. 2002) 290 F.3d 1175, 1187* ; *Cabrales v. County of Los Angeles (9th Cir. 1988) 864 F.2d 1454, 1461 , vac'd, 490 U.S. 1087 (1989) , opinion reinstated, 886 F.2d 235 (9th Cir. 1989) , cert. denied, 494 U.S. 1091 (1990)*].

A city's failure to train its law enforcement officers or to implement policies on suicide prevention and reporting, and officers' subsequent failure to report an arrestee's suicidal ideation and actions, may result in liability for the city and the officers if their actions amount to a deliberate indifference to the serious medical need of an arrestee [*see Conn v. City of Reno (9th Cir. 2009) 572 F.3d 1047, 1054-1065*].

For a related jury instruction on violation of a prisoner's federal civil rights related to medical care for an action in state court, see *Judicial Council Of California Civil Jury Instructions, CACI No. 3012* (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

California statutory law requires that if a physician employed by the prison system certifies that a particular medical treatment is necessary to prevent serious and imminent harm to a prisoner's health, the order for that treatment may only be modified under strictly prescribed circumstances [*Penal Code § 2653*].

[2] Prisoner's Right to Refuse

[a] Constitutional Right

Under the federal Constitution, an individual has a significant constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs [*Riggins v. Nevada (1992) 504 U.S. 127, 134, 135, 112 S. Ct. 1810, 118 L. Ed. 2d 479*], but the federal due process clause permits the state to treat a prison inmate with a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or herself or others and the treatment is in the inmate's medical interest [*Washington v. Harper (1990) 494 U.S. 210, 221, 227, 110 S. Ct. 1028,*

108 L. Ed. 2d 178]. The Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges to render that defendant competent to stand trial, only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests [*Sell v. United States (2003) 539 U.S. 166, 123 S. Ct. 2174, 2183-2185, 156 L. Ed. 2d 197* ; *see also In re Qawi (2004) 32 Cal. 4th 1, 15-16, 7 Cal. Rptr. 3d 780, 81 P.3d 224* ; *Riggins v. Nevada (1992) 504 U.S. 127, 134, 135, 112 S. Ct. 1810, 118 L. Ed. 2d 479* ; *Washington v. Harper (1990) 494 U.S. 210, 221, 227, 110 S. Ct. 1028, 108 L. Ed. 2d 178*]. To order involuntary medication to render a defendant competent to stand trial, the court must find the following [*Sell v. United States (2003) 539 U.S. 166, 123 S. Ct. 2174, 2185, 156 L. Ed. 2d 197*]:

- Important governmental interests are at stake.
- Involuntary medication will significantly further those concomitant state interests.
- Involuntary medication is necessary to further those interests.
- Administration of the drugs is medically appropriate, i.e., in the patient's best medical interest in light of his or her medical condition.

Under the California constitution, prison officials may not force a prisoner to undergo medical treatment involuntarily if the prisoner is competent to refuse treatment, unless treatment is required by prison security or a similar countervailing state interest [*In re Qawi (2004) 32 Cal. 4th 1, 21-23, 7C* ; *People v. Kirkland (1994) 24 Cal. App. 4th 891, 907-908, 29 Cal. Rptr. 2d 863*].

A medication condition of probation or parole may not be equivalent to "forcible administration," but the underlying threat of incarceration renders a medication condition of supervised release sufficiently coercive to implicate the defendant's protected liberty interest under the *Fourteenth Amendment* [*United States v. Williams (9th Cir. 2004) 356 F.3d 1045, 1053-1055* & n.10]. Increased procedural protections are warranted under the federal supervised release statute to protect that liberty interest [*United States v. Williams (9th Cir. 2004) 356 F.3d 1045, 1055-1056*]. Under the federal statutes, a condition of supervised release ordinarily must be "reasonably related" to one or more of the statutory factors deemed to advance the goals of supervised release [*see 18 U.S.C. § 3583(d)(1)*]. In light of the significant liberty interest at stake in the context of coerced psychotropic medication, there is a stronger nexus between the need for medication and the goals of supervised release, requiring that the medication condition be "necessary" for the achievement of those goals, not simply "reasonably related" to them [*United States v. Williams (9th Cir. 2004) 356 F.3d 1045, 1052-1053, 1057*]. While imposition of most terms of supervised release do not require the court to articulate reasons on the record, requiring a defendant to take antipsychotic medications as a condition of supervised release requires an express finding that the condition involves no greater deprivation of liberty than is reasonably necessary for the purposes underlying the supervised release statute [*United States v. Williams (9th Cir. 2004) 356 F.3d 1045, 1053, 1056*]. The sentencing court must develop a "medically informed" record before imposing a medication requirement [*United States v. Williams (9th Cir. 2004) 356 F.3d 1045, 1056-1057*]. This applies to antipsychotic medications; the same procedural requirements may not apply to milder forms of psychotropic drugs, such as antidepressants and anxiolytics [*In re Luis F. (2009) 177 Cal. App. 4th 176, 186-187, 99 Cal. Rptr. 3d 174*].

A medical condition of probation or parole may also violate a defendant's *First Amendment* rights as vague and overbroad [*see In re Luis F. (2009) 177 Cal. App. 4th 176, 184, 99 Cal. Rptr. 3d 174* (if medication requirement of probation that minor continue to take all medications prescribed by his doctor were intended to be literally interpreted to subject him to future incarceration for failing to treat his toenail fungus as prescribed by doctor, it would be impermissibly overbroad, unreasonable, and arbitrary, but there was no indication he was taking prescribed medication to treat toenail fungus and no reason to believe order requiring him to "continue" taking prescribed medications would have such broad impact)].

[b] Mentally Disordered Offenders

A prisoner, even one committed under the Mentally Disordered Offender Act (MDO Act) [*Pen. Code § 2960 et seq.*], has the right to refuse antipsychotic medication unless the prisoner has been adjudicated incapable of refusing the treatment in a hearing held for that purpose [*Pen. Code § 2972(g)*; *Welf. & Inst. Code § 5325.2*; *In re Qawi (2004) 32 Cal. 4th 1, 23-28, 7 Cal. Rptr. 3d 780, 81 P.3d 224* ; *see Keyhea v. Rushen (1986) 178 Cal. App. 3d 526, 223 Cal. Rptr. 746* (state violated *Pen. Code § 2600* by subjecting prisoners to long-term involuntary medication without judicial determination of competency, assistance of counsel, right to personal appearance, and adherence to procedural requirements delineated in Lanterman-Petris-Short Act)]. Mentally disordered offenders who exercise their rights under the MDO Act to refuse treatment with medication remain subject to commitment and treatment proceedings under *Pen. Code §§ 2970* and *2972*, even if they are imprisoned after refusing to accept treatment as a condition of parole or after violating parole [*People v. Kirkland (1994) 24 Cal. App. 4th 891, 29 Cal. Rptr. 2d 863*]. However, a person committed to a state mental hospital for treatment following a judicial hearing in which the person is found not guilty by reason of insanity under *Pen. Code § 1026* is not entitled to a hearing to determine the person's competency to refuse treatment with antipsychotic medication because a person committed under § 1026 is presumed to be insane and incompetent [*In re Locks (2000) 79 Cal. App. 4th 890, 94 Cal. Rptr. 2d 495*].

A mentally disordered offender who is civilly committed after completing parole can be compelled to take antipsychotic medication in a nonemergency situation only if a court, at the time the offender is committed or recommitted or in a separate proceeding, makes one of two findings: (1) the offender is incompetent or incapable of making decisions about his or her medical treatment; or (2) the offender is dangerous within the meaning of *Welf. & Inst. Code § 5300*. However, the rights of these offenders to refuse medication can be further limited by State Department of Mental Health regulations necessary to provide security for inpatient facilities [*In re Qawi (2004) 32 Cal. 4th 1, 9-10, 14-28, 7 Cal. Rptr. 3d 780, 81 P.3d 224*].

The right to refuse necessary medical treatment, including antipsychotic drugs, is a liberty interest protected by the *due process clause of the Fifth Amendment to the United States Constitution* [*Sell v. United States (2003) 539 U.S. 166, 177, 123 S. Ct. 2174, 156 L. Ed. 2d 197*]. Although an MDO proceeding is civil, rather than criminal, in nature [*People v. Fisher (2009) 172 Cal. App. 4th 1006, 1013, 91 Cal. Rptr. 3d 609* ; *People v. Robinson (1998) 63 Cal. App. 4th 348, 350, 74 Cal. Rptr. 2d 52*], and it does not implicate all of the constitutional and procedural safeguards afforded to criminal defendants [*People v. Fisher (2009) 172 Cal. App. 4th 1006, 1013, 91 Cal. Rptr. 3d 609* ; *People v. Beeson (2002) 99 Cal. App. 4th 1393, 1407, 122 Cal. Rptr. 2d 384*], due process nevertheless guarantees the right to be present during the presentation of evidence regarding the forcible administration of medication absent personal waiver or demonstrated inability to attend [*People v. Fisher (2009) 172 Cal. App. 4th 1006, 1013, 91 Cal. Rptr. 3d 609* ; *see also In re Qawi (2004) 32 Cal. 4th 1, 15, n.4, 7 Cal. Rptr. 3d 780, 81 P.3d 224* ; *In re Watson (1979) 91 Cal. App. 3d 455, 461-462, 154 Cal. Rptr. 151* (proceeding to involuntarily commit person with dangerous developmental disability under former *Welf. & Inst. Code § 6500.1*)]. An attorney's authority to control procedural matters in a civil case does not authorize relinquishment of substantial rights, such as the right to be present, without the client's consent. Thus, for example, the constitutional right to a fair hearing regarding forcible medication of an MDO was violated because he did not personally waive his right to be present and was not unable to attend the hearing [*People v. Fisher (2009) 172 Cal. App. 4th 1006, 1013-1015, 91 Cal. Rptr. 3d 609*].

There is no federal or state constitutional right to jury trial on the question of involuntary psychotropic medication during MDO or LPS commitment [*People v. Fisher (2009) 172 Cal. App. 4th 1006, 1015, 91 Cal. Rptr. 3d 609* ; *see Washington v. Harper (1990) 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178* (decision by independent medical board to authorize involuntary administration of psychotropic medication satisfied federal substantive and procedural due process guarantees); *In re Qawi (2004) 32 Cal. 4th 1, 27, 7 Cal. Rptr. 3d 780, 81 P.3d 224* (decision to administer antipsychotic medication may be made by court)]. There is also no California statutory right to a jury [*People v. Fisher (2009) 172 Cal. App. 4th 1006, 1015-1016, 91 Cal. Rptr. 3d 609*].

In the case of the MDO, a forcible medication order must be supported by substantial evidence that either the MDO is incompetent to refuse medical treatment or the MDO is a danger to others within the meaning of *Welf. & Inst. Code § 5300* [*People v. Fisher (2009) 172 Cal. App. 4th 1006, 1016, 91 Cal. Rptr. 3d 609* ; *see also* *In re Qawi (2004) 32 Cal. 4th 1, 27, 7 Cal. Rptr. 3d 780, 81 P.3d 224*]. *Welf. & Inst. Code § 5300* requires a particularized showing that the person is a demonstrated danger and that he or she was recently dangerous [*People v. Fisher (2009) 172 Cal. App. 4th 1006, 1016, 91 Cal. Rptr. 3d 609* ; *see also* *In re Qawi (2004) 32 Cal. 4th 1, 27, 7 Cal. Rptr. 3d 780, 81 P.3d 224*]. In the case of an MDO, the commitment offense may establish demonstrated dangerousness, and recent dangerousness consists of violent or threatening acts specified in *Welf. & Inst. Code § 5300* within the year prior to the commitment or recommitment [*People v. Fisher (2009) 172 Cal. App. 4th 1006, 1016, 91 Cal. Rptr. 3d 609* ; *see also* *In re Qawi (2004) 32 Cal. 4th 1, 28 n.7, 7 Cal. Rptr. 3d 780, 81 P.3d 224*].

[c] Sexually Violent Predators

Persons adjudicated sexually violent predators (SVPs) under the Sexually Violent Predator Act [*Welf. & Inst. Code § 6600 et seq.*] have the same right to refuse antipsychotic drugs as mentally disordered offenders under the Mentally Disordered Offender Act [*see* [b], *above*]. Thus, an SVP can be compelled to take antipsychotic medication in a nonemergency situation only if a court, at the time the SVP is committed or recommitted, or in a separate proceeding, makes one of two findings [*In re Calhoun (2004) 121 Cal. App. 4th 1315, 1333-1347, 18 Cal. Rptr. 3d 315*]:

- That the SVP is incompetent or incapable of making decisions about medical treatment; or
- That the SVP is dangerous within the meaning of *Welf. & Inst. Code § 5300*.

The rights of SVPs to refuse medication can be further limited by State Department of Mental Health regulations necessary to provide security for inpatient facilities [*In re Calhoun (2004) 121 Cal. App. 4th 1315, 1322, 18 Cal. Rptr. 3d 315*]. Further, SVPs do not have a common law right to refuse antipsychotic medication [*In re Calhoun (2004) 121 Cal. App. 4th 1315, 1347, 18 Cal. Rptr. 3d 315*]. The federal Due Process Clause permits the involuntary medication of a competent SVP with antipsychotic drugs in the absence of an emergency, provided that the treatment is in the SVP's medical interest [*In re Calhoun (2004) 121 Cal. App. 4th 1315, 1348-1349, 18 Cal. Rptr. 3d 315*]. Involuntary medication with antipsychotic drugs does not violate an SVP's California constitutional right to privacy [*In re Calhoun (2004) 121 Cal. App. 4th 1315, 1350, 18 Cal. Rptr. 3d 315* ; *see Cal. Const., art. I, § 1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsCriminal ProcessCruel & Unusual PunishmentCivil Rights LawSection 1983 ActionsLaw Enforcement OfficialsPrison OfficialsCivil Rights LawPrisoner RightsMedical TreatmentHealthcare LawTreatmentFailures & Refusals to TreatPrisonersHealthcare LawActions Against Healthcare WorkersPrison Officials & Physicians

California Forms of Pleading and Practice--Annotated

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Chapter 114 CIVIL RIGHTS: PRISONERS' RIGHTS
PART II. LEGAL BACKGROUND

11-114 California Forms of Pleading and Practice--Annotated 114.16

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114.16 Exercise

A claim that a prisoner's *Eighth Amendment* right to be free of cruel and unusual punishment has been violated by denial of adequate exercise is subject to a two part test [*Allen v. Sakai (9th Cir. 1994) 48 F.3d 1082, 1087* , *cert. denied, 514 U.S. 1065 (1995)* ; *see Spain v. Procunier (9th Cir. 1979) 600 F.2d 189, 199-200*]:

- An objective requirement, in which the prisoner must show that the conduct of the prison officials failed to meet the minimal civilized measure of life's necessities; and

- A subjective component, in which the prisoner must show deliberate indifference on the part of prison officials.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPrisoner RightsConfinement Conditions

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§ 114.17 Equal Protection

[1] Prison Sentence Does Not Deprive Person of Equal Protection of Law

A prison sentence does not deprive a person of equal protection of the law [*U.S. Const., amend. XIV*; *Serrano v. Francis (9th Cir. 2003) 345 F.3d 1071, 1081* ; *see Wolff v. McDonnell (1974) 418 U.S. 539, 566, 94 S. Ct. 2963, 41 L. Ed. 2d 935* (prisoners are protected under *Equal Protection Clause* from invidious discrimination based on race)]. In addition, sound correctional administration requires that all inmates be treated equally [*see Saxbe v. Washington Post (1974) 417 U.S. 843, 849, 94 S. Ct. 2811, 41 L. Ed. 2d 514*].

[2] Racial Segregation or Discrimination Is Prohibited

Racial segregation or discrimination is forbidden in prisons and violates the *equal protection clause of the Fourteenth Amendment* [*see Lee v. Washington (1968) 390 U.S. 333, 333-334, 88 S. Ct. 994, 19 L. Ed. 2d 1212* ; *see also Johnson v. California (2005) 543 U.S. 499, 125 S. Ct. 1141, 1146-1152, 160 L. Ed. 2d 949* (strict scrutiny is proper standard of review for unwritten policy of racially segregating prisoners in double cells in reception centers each time they enter new correctional facility)]. For example, censorship of reading materials for racial content or opinion violated the *equal protection clause* [*see Jackson v. Godwin (5th Cir. 1968) 400 F.2d 529, 535*]. In addition, allegations that prison officials disbanded a prison boxing program for racially discriminatory reasons were held to state a cause of

action [*Moore v. Clarke (8th Cir. 1987) 821 F.2d 518, 519*].

However, prison officials may consider racial tensions in maintaining security, discipline, and order, so long as they act in good faith and in particularized circumstances [*Lee v. Washington (1968) 390 U.S. 333, 334, 88 S. Ct. 994, 19 L. Ed. 2d 1212* ; *Sockwell v. Phelps (5th Cir. 1994) 20 F.3d 187, 191*].

Thus, the state's use of race as a dominant factor in making housing assignments during an initial 60-day detention period to determine appropriate permanent housing for prison inmates does not constitute an impermissible racial classification that runs afoul of the *Equal Protection Clause* because the temporary housing policy is reasonably related to prison administrators' concern for increased racial violence [*Johnson v. California (9th Cir. 2003) 321 F.3d 791, 796-807*].

PRACTICE TIP:

Living in Prison. Prison officials are not entitled to qualified immunity for running "integrated yards" [*see Robinson v. Prunty (9th Cir. 2001) 249 F.3d 862, 866-867* ; *see also Ch. 113, § 113.14[11][b]*]. Prison gangs are a reality in prison--as are sex, drugs, and violence. Generally speaking, prison gangs are organized along racial lines. Accordingly, violence often occurs when rival gangs, different racial groups, and/or enemies are required to share the same space at the same time. Violence in prisons is foreseeable and often preventable. The *equal protection clause* may be a better and more appropriate theory to rely on in cases where it appears that blacks or other racial minority groups are being singled out for punishment. Often that "punishment" will be delivered from rival gangs or racial groups as staff intentionally or indifferently participate as catalysts or observers. Attorneys should determine the racial makeup of the prison population and compare it to the racial makeup of prison staff. *By John H. Scott*

[3] Gender Discrimination May Constitute Equal Protection Violation

Gender discrimination in prisons can also be an equal protection violation. Courts have held that the conditions in men's and women's prison facilities must be comparable, if the men and women are similarly situated [*see Pargo v. Elliott (S.D. Iowa 1995) 894 F. Supp. 1243, 1252-1265 , aff'd, 69 F.3d 280 (8th Cir. 1996) , cert. denied, 519 U.S. 831* ; *Canterino v. Wilson (W.D. Ky. 1982) 546 F. Supp. 174, 206*]. But the conditions need not be identical in men's and women's facilities; the needs and priorities might legitimately differ in the two facilities [*see Klinger v. Dep't of Corrections (8th Cir. 1994) 31 F.3d 727, 732 , cert. denied, 513 U.S. 1185 (1995)*].

Differences in privileges or treatment of inmates resulting from classification based on gender are suspect under the state constitution as well [*Inmates of Sybil Brand Inst. for Women v. Los Angeles County (1982) 130 Cal. App. 3d 89, 99-103, 181 Cal. Rptr. 599*].

Furthermore, under California statutory law, all California prisons must provide facilities and programs to female prisoners equal to those provided to male prisoners, unless funding for those programs would deprive the female prisoners of other, preferred facilities or programs [*Penal Code § 4029*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawEqual ProtectionGender & SexCivil Rights LawPrisoner RightsDiscriminationCivil Rights LawPrisoner RightsSegregation

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§ 114.18 Due Process of Law

[1] Prisoner Has More Restricted Right to Due Process

A prisoner is guaranteed due process of law; certain rights and privileges can be restricted or denied only after procedural due process has been satisfied [*see U.S. Const., amend. XIV*; *Burnsworth v. Gunderson (9th Cir. 1999) 179 F.3d 771, 774*].

However, although the due process clause protects every person from being deprived of life, liberty, or property without due process of law, a prisoner has a more limited sphere of liberty and property rights than an unimprisoned individual [*see Burnsworth v. Gunderson (9th Cir. 1999) 179 F.3d 771, 774* , quoting *Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 288, 118 S. Ct. 1244, 140 L. Ed. 2d 387 (1998)* (O'Connor, J., concurring) ("once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly")]. Therefore, a prisoner has a more restricted right to due process of law [*see Wolff v. McDonnell (1974) 418 U.S. 539, 555-556, 94 S. Ct. 2963, 41 L. Ed. 2d 935* (prisoners possess right to limited procedural due process before prison discipline is imposed); *see also* [3], *below*].

[2] Specific Situations in Which Prisoner Is Entitled to Some Due Process

Although the specific due process rights (for example, right to written notice, right to a hearing, or confrontation and cross examination of witnesses) may vary depending on the situation, a prisoner is entitled to some due process of law in the following situations:

- Before a parole revocation [*Morrissey v. Brewer (1972) 408 U.S. 471, 482, 92 S. Ct. 2593, 33 L. Ed. 2d 484*].

- Before a probation revocation [*Gagnon v. Scarpelli (1973) 411 U.S. 778, 782, 93 S. Ct. 1756, 36 L. Ed. 2d 656*].

- Before imposition of certain types of discipline in the prison, at least when the discipline imposed would present a dramatic departure from the basic conditions of the prisoner's sentence or would affect the duration of his or her sentence [*Sandin v. Conner (1995) 515 U.S. 472, 487, 115 S. Ct. 2293, 132 L. Ed. 2d 418* (placing prisoner in solitary confinement for 30 days for misconduct did not trigger due process rights because it was not dramatic departure from terms of his indeterminate life sentence and would not inevitably affect duration of sentence); *Superintendent v. Hill (1985) 472 U.S. 445, 455-457, 105 S. Ct. 2768, 86 L. Ed. 2d 356* (revocation of prisoner's good time credits); *Ponte v. Real (1985) 471 U.S. 491, 497-499, 105 S. Ct. 2192, 85 L. Ed. 2d 553* (rights at disciplinary hearing); *Wolff v. McDonnell (1974) 418 U.S. 539, 563-572, 94 S. Ct. 2963, 41 L. Ed. 2d 935* (right to counsel-substitute at disciplinary hearing); *Burnsworth v. Gunderson (9th Cir. 1999) 179 F.3d 771, 774-775* (increased security classification based on escape conviction not supported by evidence); *Bartholomew v. Watson (9th Cir. 1982) 665 F.2d 915, 915-918* (witnesses at disciplinary hearing)], or when the disciplinary action implicates a protected liberty interest in an "unexpected matter" or imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" [*Sandin v. Conner (1995) 515 U.S. 472, 484, 115 S. Ct. 2293, 132 L. Ed. 2d 418* ; *Serrano v. Francis (9th Cir. 2003) 345 F.3d 1071, 1078* ; *see also Ramirez v. Galaza (9th Cir. 2003) 334 F.3d 850, 860* (if hardship is sufficiently significant, court must determine whether procedures used to deprive liberty satisfied due process)], for which the court, rather than invoking a single standard for determining whether the hardship is atypical and significant, relies on a condition or combination of conditions or factors that requires case-by-case, fact-by-fact consideration [*Serrano v. Francis (9th Cir. 2003) 345 F.3d 1071, 1078* ; *Keenan v. Hall (9th Cir. 1996) 83 F.3d 1083, 1089*]. Specifically, the court looks to (1) whether the challenged condition mirrored conditions imposed on inmates in administrative segregation and protective custody, and thus comported with the prison's discretionary authority; (2) the duration of the condition and the degree of restraint imposed; and (3) whether the state's action will invariably affect the duration of the prisoner's sentence [*Sandin v. Conner (1995) 515 U.S. 472, 486-487, 115 S. Ct. 2293, 132 L. Ed. 2d 418* ; *Serrano v. Francis(9th Cir. 2003) 345 F.3d 1071, 1078* ; *Keenan v. Hall (9th Cir. 1996) 83 F.3d 1083, 1089*].

- Before transfer from a state prison to a state mental hospital [*see Vitek v. Jones (1980) 445 U.S. 480, 487-489, 493-497, 100 S. Ct. 1254, 63 L. Ed. 2d 552*].

- Before denial of visitation rights [*Taylor v. Armontrout (8th Cir. 1989) 894 F.2d 961, 963-965* ; *Laaman v. Helgemoe (D.N.H. 1977) 437 F. Supp. 269, 322*].

[3] When Due Process Protections Are Limited

Due process protections are generally very limited in the following situations:

- Before a transfer from one prison facility to another [*see Penal Code §§ 2910, 5080*; *Olim v. Wakinekona (1983) 461 U.S. 238, 248, 103 S. Ct. 1741, 75 L. Ed. 2d 813* ; *Meachum v. Fano (1976)*

427 U.S. 215, 224-225, 96 S. Ct. 2532, 49 L. Ed. 2d 451 ; *but see Vitek v. Jones (1980) 445 U.S. 480, 489, 100 S. Ct. 1254, 63 L. Ed. 2d 552* (transfer to mental hospital requires due process protections); *see also Penal Code § 2911* (for transfer of prisoner from state to federal prison, prisoner must sign consent and may consult with attorney before signing)].

- Before denial of parole [*Greenholtz v. Nebraska Penal Inmates (1979) 442 U.S. 1, 12-15, 99 S. Ct. 2100, 60 L. Ed. 2d 668* ; *In re McLain (1960) 55 Cal. 2d 78, 85, 9 Cal. Rptr. 824, 357 P.2d 1080* (statutory provisions for granting, suspending, or revoking parole that lack requirement of notice or hearing do not violate due process)].

- Before placing a prisoner in solitary confinement or administrative segregation, if the disciplinary action would not present a dramatic departure from the basic conditions of the prisoner's sentence and would not necessarily affect the duration of his or her sentence [*Sandin v. Conner (1995) 515 U.S. 472, 485-487, 115 S. Ct. 2293, 132 L. Ed. 2d 418* (solitary confinement); *Mujahid v. Meyer (9th Cir. 1995) 59 F.3d 931, 932* (disciplinary segregation); *but see Serrano v. Francis (9th Cir. 2003) 345 F.3d 1071, 1078-1079* (inmate's disability coupled with administrative segregation in segregated housing unit not designed for disabled persons gave rise to protected liberty interest, because conditions imposed on inmate by virtue of his disability constituted atypical and significant hardship on him)].

In emergency situations, the prison administration may institute a "lockdown" and confine the entire prison population to their cells for all or most of the time, without providing a hearing before or during the lockdown [*Hayward v. Procunier (9th Cir. 1980) 629 F.2d 599, 603 , cert. denied, 451 U.S. 937 (1981)* (procedural due process not violated by five-month lockdown without hearing following series of killings)].

[4] Due Process and Family Law Matters

Any order concerning child custody and visitation must comport with due process [*Hoversten v. Superior Court of San Luis Obispo (1999) 74 Cal. App. 4th 636, 641, 88 Cal. Rptr. 2d 197* ; *McLaughlin v. Superior Court (1983) 140 Cal. App. 3d 473, 483, 189 Cal. Rptr. 479*]. *Fam. Code § 3100(a)* requires the court to grant reasonable visitation rights to an incarcerated parent unless the visitation would be detrimental to the best interest of the child. Limiting parental contact between an inmate and his or her children to a few letters and telephone calls, even if the parent's criminal activity is egregious, should be used only as a last resort [*Hoversten v. Superior Court of San Luis Obispo (1999) 74 Cal. App. 4th 636, 641, 88 Cal. Rptr. 2d 197* ; *In re Brittany S. (1993) 17 Cal. App. 4th 1399, 1407, 22 Cal. Rptr. 2d 50*].

[5] Use of Long-Term Involuntary Medication

State officials may not subject prisoners to certain long-term involuntary medication without adhering to the procedural requirements contained in specified provisions of the Lanterman-Petris-Short Act (*Welf. & Inst. Code § 5000 et seq.*) [*see Keyhea v. Rushen (1986) 178 Cal. App. 3d 526, 530, 223 Cal. Rptr. 746* ; *see also Department of Corrections v. Office of Admin. Hearings (Holmes) (1998) 66 Cal. App. 4th 1100, 1102-1103, 1108-1109, 78 Cal. Rptr. 2d 473* (when substantive provision of *Keyhea* injunction conflicts with provision for involuntary commitments under Lanterman-Petris-Short Act, terms of injunction must prevail; permission for involuntary medication of mentally disordered prisoners based on danger to others may be renewed without showing of new threats since medication last approved)].

[6] Process Required in Disciplinary Proceedings

Due process requires procedural protections before a prison inmate can be deprived of a protected liberty interest in good time credits [*Wolff v. McDonnell (1974) 418 U.S. 539, 556-557, 94 S. Ct. 2963, 41 L. Ed. 2d 935* ; *In re Dikes*

(2004) 121 Cal. App. 4th 825, 830, 18 Cal. Rptr. 3d 9]. An inmate facing disciplinary proceedings should be allowed to call witnesses in the inmate's defense when permitting the inmate to do so would not be unduly hazardous to institutional safety or correctional goals [*Wolff v. McDonnell (1973) 418 U.S. 539, 566, 94 S. Ct. 2963, 41 L. Ed. 2d 935*]. Jail officials need not provide inmates an unfettered right to call witnesses; however, they must make the decision whether to allow witnesses on a case-by-case basis, examining the potential hazards that may result from calling a particular person [*Mitchell v. Dupnik (9th Cir. 1997) 75 F.3d 517, 525*]. A blanket denial of permission for an inmate to have witnesses physically present during disciplinary hearings is impermissible, even when jail authorities provide for interviewing witnesses outside the disciplinary procedure [*Serrano v. Francis (9th Cir. 2003) 345 F.3d 1071, 1079*].

State regulations require that requested witnesses be called unless the official conducting the hearing denies the request because (1) the appearance would endanger the witness, (2) the official determines that the witness has no relevant additional information, or (3) the witness is unavailable [*15 Cal. Code Reg. § 3315(e)(1)*]. Regulations also require the hearing official to document the reasons for the refusal if the inmate's request for a witness is denied [*15 Cal. Code Reg. § 3315(e)(2)*; *see Serrano v. Francis (9th Cir. 2003) 345 F.3d 1071, 1080* (hearing official's failure to document reasons for refusing to call inmate's witnesses was precisely reason inmate's disciplinary charge and punishment were later vacated and why inmate was removed from administrative segregation)].

However, although an inmate is afforded some due process in disciplinary proceedings, the standard courts apply in reviewing disciplinary proceedings is lower than that applied in reviewing criminal convictions. The requirements of due process in a prison disciplinary action are satisfied if "some evidence" supports the decision by the prison disciplinary board to revoke good time credits. In determining whether the evidentiary standard is satisfied, the relevant question is whether there is "any" evidence in the record that could support the conclusion reached by the disciplinary board. The determination does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Provided the record is not so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary, due process does not require courts to set aside decisions of prison administrators [*Superintendent v. Hill (1985) 472 U.S. 445, 454-456, 105 S. Ct. 2768, 86 L. Ed. 2d 356* ; *In re Dikes (2004) 121 Cal. App. 4th 825, 830, 18 Cal. Rptr. 3d 9*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedurePostconviction ProceedingsParoleConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionCivil Rights LawPrisoner RightsDisciplineCivil Rights LawPrisoner RightsTransfersCriminal Law & ProcedureSentencingAlternativesProbationRevocationDue Process

California Forms of Pleading and Practice--Annotated

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Chapter 114 CIVIL RIGHTS: PRISONERS' RIGHTS
PART II. LEGAL BACKGROUND

11-114 California Forms of Pleading and Practice--Annotated § 114.19

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§ 114.19 Good Time Credits

[1] No Constitutional Right to Receive Good Time Credits

Prisoners do not have a constitutional right to receive good time credits [*Sandin v. Conner (1995) 515 U.S. 472, 477-478, 115 S. Ct. 2293, 132 L. Ed. 2d 418* ; *Wolff v. McDonnell (1974) 418 U.S. 539, 557, 94 S. Ct. 2963, 41 L. Ed. 2d 935*]. However, once a prisoner has been awarded good time credits, the prisoner is entitled to minimal procedural safeguards under the due process clause of *U.S. Const., amend. XIV* to insure that they are not arbitrarily revoked [*Wolff v. McDonnell (1974) 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L. Ed. 2d 935*].

[2] Claim for Restoration of Credits Brought as Petition for Writ of Habeas Corpus

A prisoner's claim for restoration of good time credits is not actionable under *42 U.S.C. § 1983*, but, instead, must be brought as a petition for writ of habeas corpus [*Wolff v. McDonnell (1974) 418 U.S. 539, 554-555, 94 S. Ct. 2963, 41 L. Ed. 2d 935*].

[3] Worktime Credits

Pen. Code § 2933(d), as amended in 1995 and relettered in 2009 [see former *Pen. Code § 2933(c)*], gives the Director

of Corrections discretion to decline to restore worktime credits forfeited as a result of serious disciplinary infractions punishable by a credit loss of more than 90 days. Before the 1995 amendment, *§ 2933* required the Department under most circumstances to restore forfeited credits if the inmate completed a specified period of time free of disciplinary offenses. In response to the 1995 amendment, the Department of Corrections amended its regulations to provide that worktime credit could not be restored for serious disciplinary offenses punishable by a credit loss of more than 90 days, including specified offenses [*15 Cal. Code Reg. § 3327(a)(1)*].

However, application of former *Pen. Code § 2933(c)* and the regulations to preclude credit restoration for inmates whose acts of misconduct were committed before the statutory amendment and the promulgation of the regulations violated the ex post facto clauses of the federal and state constitutions [*In re Lomax (1998) 66 Cal. App. 4th 639, 642-648, 78 Cal. Rptr. 2d 220* , citing *Weaver v. Graham (1981) 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17* , and *Lynce v. Mathis (1997) 519 U.S. 433, 117 S. Ct. 891, 137 L. Ed. 2d 63* ; *see In re Winner (1997) 56 Cal. App. 4th 1481, 1486-1488, 66 Cal. Rptr. 2d 333* (because inmate committed misconduct after amendment of *Pen. Code § 2933*, no retrospective effect and thus no ex post facto violation)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPrisoner RightsConfinement ConditionsCriminal Law & ProcedurePostconviction ProceedingsImprisonment

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11-114 California Forms of Pleading and Practice--Annotated § 114.20

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§ 114.20 First Amendment Rights

[1] Freedom of Expression

[a] Reasonable Relation Standard of Review

Prisoners retain *First Amendment* rights, though somewhat limited, despite their incarceration [*Thornburgh v. Abbott (1989) 490 U.S. 401, 407, 109 S. Ct. 1874, 104 L. Ed. 2d 459* ; *Turner v. Safley (1987) 482 U.S. 78, 84*].

The reasonable relation standard of review generally applies to regulation of prisoners' *First Amendment* rights. A regulation limiting prisoners' freedom of expression will be upheld if it is reasonably related to legitimate penological interests [*Thornburgh v. Abbott (1989) 490 U.S. 401, 407-414, 109 S. Ct. 1874, 104 L. Ed. 2d 459* ; *Turner v. Safley (1987) 482 U.S. 78, 89-91* ; *see Shaw v. Murphy (2001) 532 U.S. 223, 121 S. Ct. 1475, 149 L. Ed. 2d 420, 424*]. The *First Amendment* requirement that a regulation be the "least restrictive alternative" is generally not applicable in the prison setting [*Thornburgh v. Abbott (1989) 490 U.S. 401, 411, 109 S. Ct. 1874, 104 L. Ed. 2d 459*].

For example, a prison regulation limiting prisoners' receipt of hardback books, unless mailed directly from publishers, book clubs, or bookstores, withstood a challenge based on the *First Amendment*, because it was a rational response to a clear security problem [*Bell v. Wolfish (1979) 441 U.S. 520, 550, 99 S. Ct. 1861, 60 L. Ed. 2d 447*]. Prison security

concerns also justified a prohibition on correspondence between inmates in different institutions [*Turner v. Safley (1987) 482 U.S. 78, 91-93*]. In addition, prison officials' concerns about coordinated disruptive conduct by prisoners arising out of the conclusions they draw about their fellow prisoners' beliefs, sexual orientation, or gang affiliations based on the outside publications they read justified a regulation allowing officials to ban certain incoming publications [*Thornburgh v. Abbott (1989) 490 U.S. 401, 403-417, 109 S. Ct. 1874, 104 L. Ed. 2d 459*]. However, a policy of the state Department of Corrections prohibiting receipt by prisoners of standard rate mail, as applied to subscription nonprofit organization mail, impermissibly infringed on the *First Amendment* rights of both inmates and publishers since it was not rationally related to any legitimate penological interest [*Prison Legal News v. Cook (9th Cir. 2001) 238 F.3d 1145, 1151-1152* ; *see Morrison v. Hall (9th Cir. 2001) 261 F.3d 896, 901-905* (same regulation unconstitutional as applied to prepaid, for-profit, subscription publications)].

[b] Stricter Scrutiny Applies When Regulating Outgoing Communications

A more strict scrutiny is applicable in the case of regulating outgoing communications from prisoners to civilians. In cases of outgoing communications, there must be a closer fit between the regulation and the purpose it serves [*Thornburgh v. Abbott (1989) 490 U.S. 401, 412, 109 S. Ct. 1874, 104 L. Ed. 2d 459* ; *see Procunier v. Martinez (1974) 416 U.S. 396, 413, 94 S. Ct. 1800, 40 L. Ed. 2d 224* , *overruled in part, Thornburgh v. Abbott (1989) 490 U.S. 401, 413-414, 109 S. Ct. 1874, 104 L. Ed. 2d 459*].

[c] Reasonable Restrictions on Time, Place, and Manner of Speech

Prison authorities may place reasonable restrictions on the time, place, and manner of communications between prisoners and media representatives, but may not prohibit such contacts [*Pell v. Procunier (1974) 417 U.S. 817, 823-824, 94 S. Ct. 2800, 41 L. Ed. 2d 495* ; *Johnson v. Stephan (10th Cir. 1993) 6 F.3d 691, 692* ; *Mujahid v. Sumner (D. Hawaii 1992) 807 F. Supp. 1505, 1508-1511* , *aff'd, 996 F.2d 1226 (9th Cir. 1993)*].

Operational realities and security interests permit prison authorities to forbid meetings of prisoners' unions and verbal or written solicitations to join those unions [*Jones v. North Carolina Prisoners' Union (1977) 433 U.S. 119, 133-134, 97 S. Ct. 2532, 53 L. Ed. 2d 629*].

[d] Regulations Limiting Prisoners' Choice of Clothing

Although prisoners' appearance and choice of personal clothing are aspects of liberty under *U.S. Const., amends. I* and *XIV*, and as such are entitled to protection against arbitrary state action, regulations limiting prisoners' choice of clothing are reasonable and not unduly burdensome when based on objectively reasonable security concerns, and are therefore constitutional [*In re Alcala (1990) 222 Cal. App. 3d 345, 368-377, 271 Cal. Rptr. 674*)].

Furthermore, prisoners have no statutory right in California to possess and wear personal civilian clothing in prison; a prison warden's deletions of specified types of personal clothing from the list of clothing approved for inmates does not violate prisoners' statutory rights [*In re Alcala (1990) 222 Cal. App. 3d 345, 364-372, 271 Cal. Rptr. 674* ; *see Penal Code § 2084* (prisoners must be provided with garments of substantial material and distinctive manufacture)].

[2] Freedom of Religion

[a] Constitutional Standards

Prison authorities may not deny prisoners a reasonable opportunity to exercise the religious freedom guaranteed by *U.S. Const., amends. I* and *XIV* [*Cruz v. Beto (1972) 405 U.S. 319, 322, 92 S. Ct. 1079, 31 L. Ed. 2d 263* ; *see In re Arias (1986) 42 Cal. 3d 667, 684-687, 230 Cal. Rptr. 505, 725 P.2d 664* (construing California statutory provision for religious freedom of persons in custody of youth authority, at *Welf. & Inst. Code § 1705*, in view of constitutional right of religious freedom established in *Cruz*)].

Under the *First Amendment*, prison regulations impinging on the rights of inmates to exercise their religion freely are valid if the regulations are reasonably related to legitimate penological interests [*O'Lone v. Estate of Shabazz (1987) 482 U.S. 342, 348-350, 107 S. Ct. 2400, 96 L. Ed. 2d 282*].

Under these standards, for example:

- Prison officials did not unconstitutionally infringe an inmate's *First Amendment* right to the free exercise of religion by requiring him to fill out a standard prison form to receive kosher food [*Resnick v. Adams (9th Cir. 2003) 348 F.3d 763, 767-772*];

- A prison regulation prohibiting prisoner-led religious services did not violate the *First Amendment* [*Anderson v. Angelone (9th Cir. 1997) 123 F.3d 1197, 1198-1199*];

- A jail policy prohibiting certain personal possessions, including rosaries and scapulars, did not violate the *First Amendment* rights of Roman Catholic prisoners [*Friend v. Kolodzieczak (9th Cir. 1991) 923 F.2d 126, 127-128*];

- A prison policy prohibiting facial hair did not violate Orthodox Jewish prisoners' *First Amendment* right to freedom of religion [*Friedman v. Arizona (9th Cir. 1990) 912 F.2d 328, 331-332 , cert. denied, 498 U.S. 1100 (1991)*]; and

- A prison regulation banning the wearing of headgear in a prison dining room did not violate the *First Amendment* rights of Native American prisoners [*Standing Deer v. Carlson (9th Cir. 1987) 831 F.2d 1525, 1528-1529*].

On the other hand, a policy of subjecting Muslim inmates to discipline for missing work to attend Friday Sabbath services will violate the inmates' religious freedom rights when the policy is not rationally related to a legitimate penological purpose [*Mayweathers v. Newland (9th Cir. 2001) 258 F.3d 930*].

[b] Religious Land Use and Institutionalized Persons Act of 2000

Under the Religious Land Use and Institutionalized Persons Act of 2000 [*42 U.S.C. § 2000cc* (RLUIPA)], no government may impose a substantial burden in a program or activity receiving federal financial assistance or affecting commerce, on the religious exercise of a person residing in or confined to an institution as defined in *42 U.S.C. § 1997*, even if the burden results from a rule of general applicability [*see, e.g.,* *Greene v. Solano County Jail (9th Cir. 2008) 513 F.3d 982, 986-988* (jail's policy of prohibiting maximum security prisoner from attending group religious worship services substantially burdened his ability to exercise his religion)], unless the government demonstrates that the imposition of the burden is in furtherance of a compelling governmental interest, and the least restrictive means of furthering that compelling governmental interest [*42 U.S.C. § 2000cc-1(a)(1)-(2)*; *see, e.g.,* *Greene v. Solano County Jail (9th Cir. 2008) 513 F.3d 982, 988-990* (there was genuine issue of material fact as to whether total ban on group religious worship by maximum security prisoners at jail was least restrictive means of maintaining jail security, making summary judgment in favor of sheriff inappropriate)]. A violation of the Act may be asserted as a claim or defense in a judicial proceeding [106 P.L. 274, § 4(a)], for which attorney's fees are available under *42 U.S.C. § 1988* [106 P.L. 274, § 4(d)].

The RLUIPA protects prisoners and other institutionalized people from government infringement on their practice of religion [*Mayweathers v. Newland (9th Cir. 2002) 314 F.3d 1062, 1065*]. It does not exceed Congressional authority under the Spending Clause [*Mayweathers v. Newland (9th Cir. 2002) 314 F.3d 1062, 1066-1067*]. It also does not violate the *Establishment Clause of the First Amendment* [*Cutter v. Wilkinson (2005) 544 U.S. 709, 125 S. Ct. 2113,*

2121-2125, 161 L. Ed. 2d 1020], the *Tenth* and *Eleventh Amendments*, the *Fourteenth Amendment*, or the principle of separation of powers [*Mayweathers v. Newland (9th Cir. 2002) 314 F.3d 1062, 1067-1070*].

Because federal complaints plead claims, not causes of action or statutes or legal theories, a prisoner's failure to specifically plead in the complaint a violation of RLUIPA does not bar the argument that the district court erred in not analyzing religious exercise claims under RLUIPA, which establishes a more protective standard than the *First Amendment* [*Alvarez v. Hill (9th Cir. 2008) 518 F.3d 1152, 1156-1159*].

[3] Right to File Prison Grievances

Of fundamental import to prisoners is their *First Amendment* right to file prison grievances [*Bruce v. Ylst (9th Cir. 2003) 351 F.3d 1283, 1288*]. Without that *First Amendment* right and the *First Amendment* right to pursue civil rights litigation in the courts [*Schroeder v. McDonald (9th Cir. 1995) 55 F.3d 454, 461* ; *see § 114.13*], inmates would be left with no viable mechanism to remedy prison injustices [*Rhodes v. Robinson (9th Cir. 2004) 380 F.3d 1123, 1130*]. Further, because purely retaliatory actions taken against a prisoner for having exercised those rights necessarily undermine those protections, retaliatory actions violate the federal constitution apart from any underlying misconduct they are designed to shield [*Rhodes v. Robinson (9th Cir. 2004) 380 F.3d 1123, 1130*].

[4] Retaliation

Within the prison context, a viable claim of *First Amendment* retaliation entails the following basic elements: (1) an assertion that a state actor took some adverse action against an inmate (2) because of (3) the inmate's protected conduct, the action (4) harmed the prisoner, and (5) the action was not narrowly tailored to advance a legitimate correctional goal [*Rhodes v. Robinson (9th Cir. 2004) 380 F.3d 1123, 1130*].

At the pleading stage, courts do not require a litigant to demonstrate a total chilling of *First Amendment* rights to perfect a retaliation claim; allegations of a chilling effect are not even strictly necessary to perfect such a claim [*Rhodes v. Robinson (9th Cir. 2004) 380 F.3d 1123, 1131]* . Any retribution visited upon a prisoner due to a decision to engage in protected conduct is sufficient to ground a claim of unlawful *First Amendment* retaliation, whether the detriment chills the plaintiff's exercise of *First Amendment* rights or not [*Rhodes v. Robinson (9th Cir. 2004) 380 F.3d 1123, 1131*]. An objective standard governs the chilling inquiry; a prisoner does not have to show that his or her speech was actually inhibited or suppressed, but rather that the adverse action would chill or silence a person of ordinary firmness from future *First Amendment* activities [*Brodheim v. Cry (9th Cir. 2009) 584 F.3d 1262, 1271]* . The mere threat of harm can be an adverse action, regardless of whether it is carried out because the threat itself can have a chilling effect. A threat of harm need not be explicit and specific to constitute an adverse action [*Brodheim v. Cry (9th Cir. 2009) 584 F.3d 1262, 1270-1271* (warning to inmate to be careful of what he wrote in grievance forms raised genuine issue of material fact as to adverse action)].

To prevail on a retaliation claim, a prisoner must show that his protected conduct was the "substantial" or "motivating" factor behind the defendant's conduct [*Brodheim v. Cry (9th Cir. 2009) 584 F.3d 1262, 1271]* . On a motion for summary judgment, the prisoner need only put forth evidence of retaliatory motive, that, taken in the light most favorable to the prisoner, presents a genuine issue of material fact as to the defendant's intent in taking the adverse action [*Brodheim v. Cry (9th Cir. 2009) 584 F.3d 1262, 1271* (undisputed that correctional officer's warning was motivated by inmate's protected conduct)].

A prisoner also must show that the challenged action did not reasonably advance a legitimate correctional goal [*Brodheim v. Cry (9th Cir. 2009) 584 F.3d 1262, 1271* ; *Rhodes v. Robinson (9th Cir. 2005) 408 F.3d 559, 568]* . The goal of "prohibiting disrespectful language" does not constitute a legitimate penological goal sufficient to impinge upon a prisoner's *First Amendment* rights [*Brodheim v. Cry (9th Cir. 2009) 584 F.3d 1262, 1271-1272* (no indication that language in inmate's written complaint posed substantial threat to prison's security and discipline); *see Bradley v. Hall*

(9th Cir. 1995) 64 F.3d 1276, 1280-1281 (correctional regulations prohibiting use of "hostile, sexual, abusive, or threatening language" in formal written grievances impermissibly substantially burdened prisoners' right of access to courts), *disapproved on other grounds, Shaw v. Murphy (2001) 532 U.S. 223, 230, 121 S. Ct. 1475, 149 L. Ed. 2d 420]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPrisoner RightsFreedom of SpeechConstitutional LawBill of RightsFundamental FreedomsFreedom to PetitionCivil Rights LawPrisoner RightsFreedom of Religion

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11-114 California Forms of Pleading and Practice--Annotated § 114.21

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§ 114.21 Privacy

Prisoners have limited constitutionally protected expectations of privacy [*see Hudson v. Palmer (1984) 468 U.S. 517, 526-528, 104 S. Ct. 3194, 82 L. Ed. 2d 393* (prisoners have no expectation of privacy in their cells); *United States v. Vallez (9th Cir. 1981) 653 F.2d 403, 406 , cert. denied, 454 U.S. 904* (prisoners have extremely limited *Fourth Amendment* rights); *People v. Loyd (2002) 27 Cal. 4th 997, 119 Cal. Rptr. 2d 360, 45 P.3d 296* (secretly monitoring and recording inmate's unprivileged jail conversations with visitors to gather evidence did not violate inmate's privacy rights); *People v. Collins (2004) 115 Cal. App. 4th 137, 152-155, 8 Cal. Rptr. 3d 731* (prison has compelling and uncontroverted interest in preventing introduction into or transporting throughout prison of contraband and in maintaining order in institution, prisoner has very limited reasonable expectation of privacy in regard to search of his person, and there is no requirement that search be supported by either probable cause or reasonable suspicion; relevant inquiry is whether under all circumstances search was reasonable and determination of reasonableness depends on specific facts presented)]. That is not to say, however, that prisoners have no constitutionally protected privacy rights at all.

Prisoners retain some constitutional privacy rights with regard to their bodies [*see, e.g., Bell v. Wolfish (1979) 441 U.S. 520, 559-560, 99 S. Ct. 1861, 60 L. Ed. 2d 447* (visual body cavity searches of inmates must be conducted in reasonable manner); *Walker v. Sumner (9th Cir. 1990) 917 F.2d 382, 386-388* (to justify forcing inmates to submit to

HIV blood tests, prison officials must identify specific penological interests justifying tests, and must demonstrate that those specific interests are the actual bases for tests); *Kennedy v. Los Angeles Police Department (9th Cir. 1989) 901 F.2d 702, 710-716* (city's blanket policy subjecting all felony arrestees to visual body cavity searches is unconstitutional)].

The Ninth Circuit Court of Appeals has held a regulation requiring male guards to perform random, nonemergency, suspicionless, clothed body searches of female prisoners to be cruel and unusual punishment in violation of *U.S. Const., amend. VIII* [*Jordan v. Gardner (9th Cir. 1993) 986 F.2d 1521, 1525-1531*].

In addition, searches conducted for purposes unrelated to security concerns, for punitive purposes only, for example, violate *U.S. Const., amend. IV*, and may violate *U.S. Const., amend. VIII* as well [*Tribble v. Gardner (9th Cir. 1988) 860 F.2d 321, 323-327*]. Moreover, the *Fourth Amendment* requires suppression of evidence of a prisoner's conversations with a spouse in circumstances that lulled the parties into believing their conversation was confidential [*North v. Superior Court (1972) 8 Cal. 3d 301, 311-312, 104 Cal. Rptr. 833, 502 P.2d 1305* ; *see People v. Hill (1974) 12 Cal. 3d 731, 765, 117 Cal. Rptr. 393, 528 P.2d 1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawSubstantive Due ProcessPrivacyGeneral OverviewCivil Rights LawPrisoner RightsGeneral Overview

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§ 114.22 Marriage

[1] Constitutional Right to Marry

A prisoner's right to marry is a federal constitutional right, and, although not an absolute right, it is subject only to restrictions reasonably related to penological interests [*Turner v. Safley (1987) 482 U.S. 78, 94-97*].

[2] State Statutory Right to Marry

In California, prisoners also have a statutory right to marry [*Penal Code § 2601(e)*]. Even if the prospective spouse has been implicated in smuggling contraband into the prison, the Department of Corrections may not prevent the marriage if other alternatives, such as the fiance's submission to a body search, are available to protect prison security [*In re Carrafa (1978) 77 Cal. App. 3d 788, 792-793, 143 Cal. Rptr. 848*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPrisoner RightsVisitationFamily LawMarriageGeneral OverviewCriminal Law & ProcedureSearch & SeizureGeneral Overview

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 114 CIVIL RIGHTS: PRISONERS' RIGHTS
PART II. LEGAL BACKGROUND

11-114 California Forms of Pleading and Practice--Annotated § 114.22A

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§ 114.22A Procreation

The right to procreate is inconsistent with incarceration [*Gerber v. Hickman (9th Cir. 2002) 291 F.3d 617, 620*]. Prisoners may not claim the protection of rights fundamentally inconsistent with their status as prisoners [*Gerber v. Hickman (9th Cir. 2002) 291 F.3d 617, 620* , citing *Hudson v. Palmer (1984) 468 U.S. 517, 523, 104 S. Ct. 3194, 82 L. Ed. 2d 393* (prisoners retain only those rights not inconsistent with status as prisoners or with legitimate penological objectives of corrections system)]. Incarceration, by its very nature, removes an inmate from society [*Pell v. Procunier (1974) 417 U.S. 817, 822-823, 94 S. Ct. 2800, 41 L. Ed. 2d 495*], and a necessary corollary is the separation of the prisoner from his or her spouse, loved ones, friends, family, and children [*Gerber v. Hickman (9th Cir. 2002) 291 F.3d 617, 620*]. During the period of confinement in prison, the loss of the right to intimate association, which protects the kinds of relationships attending the creation and sustenance of a family, i.e., marriage, childbirth, raising and education of children, and cohabitation with one's relatives [*see* *Roberts v. United States Jaycees (1984) 468 U.S. 609, 618-619, 104 S. Ct. 3244, 82 L. Ed. 2d 462*], is part of being imprisoned for conviction of a crime [*Gerber v. Hickman (9th Cir. 2002) 291 F.3d 617, 621*]. Although the basic right to marry survives imprisonment [*Turner v. Safley (1987) 482 U.S. 78, 96*], most of the attributes of marriage, including cohabitation, physical intimacy, and bearing and raising children, do not; incarceration is inconsistent with the vast majority of concomitants to marriage, privacy, and personal intimacy [*Gerber v. Hickman (9th Cir. 2002) 291 F.3d 617, 621* ; *see* *Kentucky Dep't of Corr. v. Thompson (1989) 490 U.S. 454, 460, 109 S. Ct. 1904, 104 L. Ed. 2d 506* (no due process right to unfettered

visitation); *Block v. Rutherford (1984) 468 U.S. 576, 585-588, 104 S. Ct. 3227, 82 L. Ed. 2d 438* (pretrial detainees have no constitutional due process right to contact visits); *Toussaint v. McCarthy (9th Cir. 1986) 801 F.2d 1080, 1113-1114* (denial of contact visits does not violate *Eighth Amendment*)]. Thus, an inmate has no right to procreate by artificially inseminating his wife [*Gerber v. Hickman (9th Cir. 2002) 291 F.3d 617, 621*].

The California constitution or statutes also do not afford a prisoner the right to procreate [*Gerber v. Hickman (9th Cir. 2002) 291 F.3d 617, 623* ; *see Penal Code § 2601* (enumeration of rights)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawSubstantive Due ProcessPrivacyGeneral OverviewFamily LawMarriageGeneral OverviewCivil Rights LawPrisoner RightsVisitation

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11-114 California Forms of Pleading and Practice--Annotated § 114.23

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§ 114.23 Visitation Rights

Visitation is among the *First Amendment* rights of prisoners. However, the visitation rights of prisoners may constitutionally be limited, for example:

- Restricting noncontact visitation to individuals on an approved visitor list, except qualified members of the clergy and attorneys on official business, including an unlimited number of immediate family members and 10 other individuals the prisoner designates, subject to some restrictions; disallowing minors under 18 unless they are the inmate's children, stepchildren, grandchildren, or siblings, disallowing children when an inmate's parental rights have been terminated, and requiring minors to be accompanied by an adult immediate family member of the child or of inmate or the child's legal guardian; prohibiting an inmate's placing of a former prisoner on the list unless the former prisoner is a member of the inmate's immediate family and the warden has given prior approval; and prohibiting prisoners who commit multiple substance-abuse violations from receiving any visitors except attorneys and members of the clergy bear rational relation to legitimate penological interests [*Overton v. Bazzetta (2003) 539 U.S. 126, 123 S. Ct. 2162, 2167-2170, 156 L. Ed. 2d 162*];

- Regulations containing a nonexhaustive list of categories of prison visitors who may be excluded

does not give prisoners a protected liberty interest in receiving visitors who are not in the listed categories [*Kentucky Dep't of Corrections v. Thompson (1989) 490 U.S. 454, 460-465, 109 S. Ct. 1904, 104 L. Ed. 2d 506*]; and

- A jail's blanket prohibition against contact visits between pretrial detainees and their family and friends is a reasonable response to legitimate security concerns [*Block v. Rutherford (1984) 468 U.S. 576, 585-592, 104 S. Ct. 3227, 82 L. Ed. 2d 438*].

Four factors are relevant in deciding whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge [*Overton v. Bazzetta (2003) 539 U.S. 126, 123 S. Ct. 2162, 2168, 156 L. Ed. 2d 162* ; *Turner v. Safley (1987) 482 U.S. 78, 89-91*]:

- Whether the regulation has a valid, rational connection to a legitimate governmental interest.
- Whether alternative means are open to inmates to exercise the asserted right.
- What impact an accommodation of the right would have on guards and inmates and prison resources.
- Whether there are ready alternatives to the regulation.

Inmates retain the right of reasonable visitation with their children [*Hoversten v. Superior Court of San Luis Obispo (1999) 74 Cal. App. 4th 636, 640, 88 Cal. Rptr. 2d 197* ; *In re Smith (1980) 112 Cal. App. 3d 956, 968-969, 169 Cal. Rptr. 564*]. Such visitation rights arise from the fact of parenthood and the constitutionally protected right to marry, establish a home, and bring up children [*Hoversten v. Superior Court of San Luis Obispo (1999) 74 Cal. App. 4th 636, 641, 88 Cal. Rptr. 2d 197* ; *see In re Julie M. (1999) 69 Cal. App. 4th 41, 49, 81 Cal. Rptr. 2d 354*]. Interference with a prisoner's right of visitation with his or her children may only be justified by some compelling necessity, such as a parent dangerously abusing a child [*Hoversten v. Superior Court of San Luis Obispo (1999) 74 Cal. App. 4th 636, 641, 88 Cal. Rptr. 2d 197* ; *In re Smith (1980) 112 Cal. App. 3d 956, 968-969, 169 Cal. Rptr. 564*].

Amendments to existing regulations and any future regulations adopted by the Department of Corrections that may impact the visitation of inmates must do all of the following [*Pen. Code § 6400*]:

- Recognize and consider the value of visiting as a means to improve the safety of prisons for both staff and inmates;
- Recognize and consider the important role of inmate visitation in establishing and maintaining a meaningful connection with family and community; and
- Recognize and consider the important role of inmate visitation in preparing an inmate for successful release and rehabilitation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPrisoner RightsVisitationConstitutional LawSubstantive Due ProcessPrivacyPersonal DecisionsCriminal Law & ProcedurePostconviction ProceedingsImprisonment

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11-114 California Forms of Pleading and Practice--Annotated § 114.24

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§ 114.24 Property Ownership

Prisoners may allege two different types of constitutional violations involving property ownership: (1) a *Fifth Amendment* right to just compensation for the "taking" of property; and (2) a *Fourteenth Amendment* due process right prohibiting prison officials from confiscating property without statutory authorization and process. Although these rights are similar and may arise from the same underlying government action, the protections afforded by each are distinct [*Vance v. Barrett (9th Cir. 2003) 345 F.3d 1083, 1088-1089*]. The *Fifth Amendment's Takings Clause* limits the government's ability to confiscate property without paying for it [*Armstrong v. United States (1960) 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554*]. The *Fourteenth Amendment's Due Process Clause* requires that the government provide appropriate procedural protections when taking property, with or without compensation [*see* *Cleveland Bd. of Educ. v. Loudermill (1985) 470 U.S. 532, 541, 105 S. Ct. 1487, 84 L. Ed. 2d 494* (Constitution requires constitutionally adequate procedures by which to deprive individuals of property interests)]. An inmate's argument that state officials exceeded their authority goes to the core of a due process claim, so that a takings analysis is logically confined to whether official actions are authorized by statute [*Vance v. Barrett (9th Cir. 2003) 345 F.3d 1083, 1089* (without statutory mandate, prison officials had no authority to confiscate inmates' property)].

A prisoner possesses the right, except as prohibited by *Civ. Code § 2225* (concerning proceeds from sale of story of felony by convicted felon), to inherit, own, sell, or convey real or personal property, including written and artistic

material produced or created by the prisoner during the period of imprisonment. However, to the extent authorized in *Penal Code § 2600*, the Department of Corrections may restrict or prohibit sales or conveyances for business purposes [*Penal Code § 2601(a)*]. In addition, with regard to *Civ. Code § 2225*, the California Supreme Court held that it is unconstitutional because it facially violates freedom of speech as guaranteed by *U.S. Const., Amend. I* and *Cal. Const., art. I, § 2(a)* [*Keenan v. Superior Court (Sinatra) (2002) 27 Cal. 4th 413, 435-436, 117 Cal. Rptr. 2d 1, 40 P.3d 718*].

Although California inmates are not allowed to possess money while in prison for security reasons [*see 15 Cal. Code Reg. § 3006(b)*], they have a protected property interest in the interest income earned on inmate trust accounts [*Vance v. Barrett (9th Cir. 2003) 345 F.3d 1083, 1089 n.6* (interest accrued on inmate accounts is constitutionally protected property right); *Schneider v. Cal. Dep't of Corrections (9th Cir. 1998) 151 F.3d 1194, 1198-1201* (Department of Corrections' policy of withholding from prisoners interest earned on inmate trust accounts contravenes *takings clause of Fifth Amendment*); *see Schneider v. Cal. Dep't of Corr. (9th Cir. 2003) 345 F.3d 716, 720* (under *per se* takings analysis, California's scheme of depositing interest earned on inmate trust accounts into Inmate Welfare Fund for benefit of entire prison population perpetrated a taking because it appropriated interest earned by accounts and allocated them for public use)]. However, state officials expenses may deduct from inmate accounts expenses incurred in creating and maintaining the accounts [*Vance v. Barrett (9th Cir. 2003) 345 F.3d 1083, 1089* (takings claim failed when inmate did not allege charges to trust account were unreasonable or unrelated to administration of his account)].

Prisoners are entitled to retain federal Social Security benefits that they receive, and may not be required to tender those benefits to the state to help defray the cost of maintaining the state's prison system [*Bennett v. Arkansas (1988) 485 U.S. 395, 397-398, 108 S. Ct. 1204, 99 L. Ed. 2d 455*].

For discussion and citations related to the remedies available for random and unauthorized deprivations of property by officials acting under color of state law, see *Ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes, §§ 113.14[11][e], 113.34[3][n]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawSubstantive Due ProcessEconomic InterestsConstitutional LawSubstantive Due ProcessScope of ProtectionCivil Rights LawPrisoner RightsFreedom of SpeechConstitutional LawBill of RightsFundamental RightsEminent Domain & TakingsConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral Overview

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§ 114.25 Correspondence and Mail

[1] Correspondence with Attorney

The Supreme Court has approved of prison policies under which mail from attorneys may be opened and inspected, but not read, in the presence of inmates [*Wolff v. McDonnell (1974) 418 U.S. 539, 577, 94 S. Ct. 2963, 41 L. Ed. 2d 935*].

Prisoners have a statutory right in California to correspond, confidentially, with any member of the State Bar or holder of public office, provided that prison authorities may open and inspect incoming mail to search for contraband [*Penal Code § 2601(b)*]. Regulations that permit institutional authorities to read letters to and from an attorney to search for "verbal contraband," or to read all "enclosures" in such letters, are invalid [*In re Jordan (1974) 12 Cal. 3d 575, 578, 116 Cal. Rptr. 371, 526 P.2d 523* ; *In re Jordan (1972) 7 Cal. 3d 930, 934, 103 Cal. Rptr. 849, 500 P.2d 873*].

The rationale for allowing confidential correspondence between a prisoner and a member of the State Bar also applies to correspondence with out-of-state attorneys [*In re Gonzales (1989) 212 Cal. App. 3d 459, 463, 260 Cal. Rptr. 506]* .

[2] Other Correspondence and Reading Material

[a] Constitutional Rights

Under the *First Amendment to the United States Constitution*, prisoners have the right to send and receive mail, subject to regulations reasonably related to legitimate penal interests [*Thornburgh v. Abbott (1989) 490 U.S. 401, 403-417, 109 S. Ct. 1874, 104 L. Ed. 2d 459* (upholding regulation allowing authorities to ban incoming publications found to be detrimental to prison security); *Turner v. Safley (1987) 482 U.S. 78, 91-93* (upholding prohibition on correspondence between inmates in different institutions); *Witherow v. Paff (9th Cir. 1995) 52 F.3d 264, 265-266* (upholding Nevada prison regulation permitting cursory visual inspection of contents of outgoing mail to check for offensive or dangerous materials)].

Prisoners also have a *Fourteenth Amendment* due process liberty interest in receiving notice that their incoming mail is being withheld by prison authorities [*Frost v. Symington (9th Cir. 1999) 197 F.3d 348, 353-354]* . However, failure to notify a prisoner that mail is being rejected by the prison authorities that is unauthorized and contrary to prison policy constitutes at most negligence and does not state a due process violation under *42 U.S.C. § 1983* [*Sorrels v. McKee (9th Cir. 2002) 290 F.3d 965, 973]* .

[b] State Statutory and Regulatory Provisions

In California, prisoners have a statutory right to purchase, receive, and read all newspapers, periodicals, and books accepted for distribution by the United States Post Office [*Penal Code § 2601(c)(1)*]. However, prison authorities may exclude any of the following [*Penal Code § 2601(c)(1)*]:

- Obscene publications or writings, and mail containing information concerning where, how, or from whom this matter may be obtained [*Penal Code § 2601(c)(1)(A)*];

- Any matter of a character tending to incite murder, arson, riot, violent racism, or any other form of violence [*Penal Code § 2601(c)(1)(B)*]; and

- Any matter concerning gambling or a lottery [*Penal Code § 2601(c)(1)(C)*].

Nothing in *Penal Code § 2601(c)* may be construed to limit the right of prison authorities to do both of the following [*Penal Code § 2601(c)(2)*]:

- Open and inspect all packages received by an inmate; and

- Establish reasonable restrictions on the number of newspapers, magazines, and books an inmate may have in his or her cell or elsewhere in the prison at one time.

Except when a communication is a confidential one addressed to an attorney, court, or public official, a prisoner has no expectation of privacy with regard to letters posted by the prisoner [*People v. Harris (2000) 83 Cal. App. 4th 371, 375, 99 Cal. Rptr. 2d 618* ; *People v. Garvey (1979) 99 Cal. App. 3d 320, 323, 160 Cal. Rptr. 73]* . All nonconfidential inmate mail is subject to being read in its entirety or in part by designated employees of the prison before it is mailed for or delivered to an inmate [*15 Cal. Code Reg. § 3134*].

Other regulations include the following:

- *15 Cal. Code Reg. § 3130*, which sets forth the California Department of Correction's policy of encouraging correspondence between inmates and persons outside correctional facilities;

- *15 Cal. Code Reg. § 3131*, which requires each warden to prepare and maintain a plan of operations for sending and receiving mail for inmates housed in the facility, and that correctional staff promptly

inform each new inmate regarding departmental regulations and local procedures governing inmate mail [*see In re Garcia (1998) 67 Cal. App. 4th 841, 844, 79 Cal. Rptr. 2d 357]* ; and

- *15 Cal. Code Reg. § 3139*, which governs correspondence between inmates, requires inmates in separate correctional institutions to obtain the prior approval of the warden of each facility in which the inmates are housed before they may correspond, and allows current inmates to correspond with former inmates with prior approval of the warden, superintendent, or person in charge of the correctional facility if the person was discharged from a facility within the past 12 months.

A prison policy making the warden's approval of correspondence of an inmate with an inmate in a different facility contingent on the other inmate being (1) a member of the inmate's immediate family, (2) the parent of the inmate's child, or (3) a coparty or witness in pending litigation, which otherwise met regulatory requirements regarding interinstitutional correspondence, did not violate the Administrative Procedure Act [*In re Garcia (1998) 67 Cal. App. 4th 841, 844-845, 79 Cal. Rptr. 2d 357]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPrisoner RightsGeneral OverviewCivil Rights LawPrisoner RightsFreedom of Speech

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§ 114.26 Other Rights Under California Statutes

Prisoners in California have a statutory right to create a power of appointment [*Penal Code § 2601(f)*].

Prisoners in California have a statutory right to make a will [*Penal Code § 2601(g)*].

Also, prisoners in California have a statutory right to receive benefits provided for in *Labor Code § 3370* (workers' compensation benefits), *Labor Code § 3371* (workers' compensation attorney), and *Penal Code § 5069* (rehabilitation and retraining services) [*Penal Code § 2601(h)*].

Under the Sexual Abuse in Detention Elimination Act, prison inmates have the right to be protected from sexual abuse while held in institutions operated by the Department of Corrections and Rehabilitation [*see Pen. Code § 2635 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPowers of AppointmentEstate, Gift & Trust LawWill ContestsTestamentary CapacityGeneral OverviewWorkers' Compensation & SSDICoverageGeneral OverviewWorkers' Compensation & SSDIBenefit

DeterminationsMedical BenefitsRehabilitationCivil Rights LawPrisoner RightsConfinement Conditions

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§ 114.27 Prisoners Not Entitled to Certain Civil Rights

There are certain civil rights and privileges that a prisoner is expressly excluded from holding.

Federal law mandates the suspension of a person's social security benefits if he or she is a convicted felon currently incarcerated in prison [*42 U.S.C. § 402(x)*; *see Butler v. Apfel (9th Cir. 1998) 144 F.3d 622, 624-625* (upholding statute as constitutional)].

Under the California constitution, a convicted felon serving a sentence or on parole is not entitled to vote [*Cal. Const., art. II, § 4*; *Elec. Code §§ 2201(c), 2212*; *Flood v. Riggs (1978) 80 Cal. App. 3d 138, 155, 145 Cal. Rptr. 573]* . However, *Cal. Const., art. II, § 4* does not apply to persons on felony probation. When the court suspends imposition of sentence and places a defendant on probation, the defendant has not suffered a conviction for purposes of *art. II, § 4*. In addition, when the court orders a probationer to serve time in a local facility because either imposition or execution of sentence has been suspended, the probationer has not been imprisoned for the conviction of a felony, but has been confined as a condition of probation. Finally, when by virtue of *Pen. Code § 18*, a felony offense is punishable by fine or imprisonment in county jail, and the trial court, pursuant to *Pen. Code § 17(b)(1)*, enters judgment imposing something other than imprisonment in state prison, the crime is a misdemeanor for purposes of art. II, § 4. Thus, individuals otherwise qualified to vote who are confined in local jails pursuant to sentences imposed under *Pen. Code*

§§ 17 and *18* or as a condition of felony probation are entitled to register and vote in elections [*League of Women Voters of California v. McPherson (2006) 145 Cal. App. 4th 1469, 1480-1485, 52 Cal. Rptr. 3d 585]* .

Under California statutes, a convict is barred from manufacturing, attempting to manufacture, or possessing certain kinds of weapons [*see Penal Code § 4502*].

A convict is also barred from inheriting property from one whose death he or she has feloniously and intentionally caused [*Prob. Code § 250*; *see* *Estate of Kramme (1978) 20 Cal. 3d 567, 574, 143 Cal. Rptr. 542, 573 P.2d 1369* (although husband had intentionally threatened wife's lover with loaded shotgun, he had not intended to shoot anyone and could therefore inherit his wife's property after accidentally killing her); *see also Prob. Code §§ 251-253* (related provisions regarding homicides)].

Further, a convict is not entitled to bring an action for the wrongful death of one whom he or she feloniously and intentionally killed, or to benefit from the action brought by the decedent's personal representative [*Prob. Code § 258*].

Under California statute, no person imprisoned in state prison and under the jurisdiction of the Director of Corrections is allowed to file a petition for change of name pursuant to California law, except as permitted at the discretion of the Director of Corrections [*Code Civ. Proc. § 1279.5(b)*]. For discussion of name changes by prisoners, *see* Ch. 377, *Name, Change of.*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsWrongful Death & Survival ActionsGeneral OverviewWorkers' Compensation & SSDISocial Security Disability InsuranceEligibilityCivil Rights LawPrisoner RightsVotingCivil Rights LawPrisoner RightsGeneral OverviewEstate, Gift & Trust LawEstate AdministrationSlayer Laws

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§ 114.28 Enforcement of Civil Rights of Prisoners Under 42 U.S.C. § 1983

[1] Generally

The federal civil rights of a prisoner, with regard to prison conditions, are enforceable by means of an action under *42 U.S.C. § 1983* [*Preiser v. Rodriguez (1973) 411 U.S. 475, 498-499, 93 S. Ct. 1827, 36 L. Ed. 2d 439]* .

On the other hand, if a prisoner seeks to challenge the fact or duration of his or her confinement, based on violations of his or her federally protected rights, that challenge must be made under the federal habeas corpus statute, *28 U.S.C. § 2254* [*Preiser v. Rodriguez (1973) 411 U.S. 475, 489-491, 93 S. Ct. 1827, 36 L. Ed. 2d 439]* .

An action challenging the constitutionality of the drug sequence a state likely would use to execute a prisoner by lethal injection, rather than challenging the validity of the death sentence, is a type of action that may proceed under *42 U.S.C. § 1983*. There is no requirement the claim be raised by petition for writ of habeas corpus [*Hill v. McDonough (2006) 547 U.S. ___, 165 L. Ed. 2d 44, 51-54*]. Filing an action that can proceed under § 1983 does not entitle the complainant to an order staying an execution as a matter of course. A stay of execution is an equitable remedy [*Hill v. McDonough (2006) 547 U.S. 573, 126 S. Ct. 2096, 165 L. Ed. 2d 44, 54]* .

Prisoners' actions under *42 U.S.C. § 1983* have some special characteristics and requirements, which are discussed in this section. For discussion and forms related to *42 U.S.C. § 1983*, and the other post-Civil War civil rights statutes, see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* f.

[2] Exhaustion of Remedies

Generally, in actions brought under *42 U.S.C. § 1983*, exhaustion of state tort remedies, such as the California Tort Claims Act, is not required [*Heck v. Humphrey (1994) 512 U.S. 477, 480, 114 S. Ct. 2364, 129 L. Ed. 2d 383* (exhaustion of state remedies generally not a prerequisite to action under § 1983); *Felder v. Casey (1988) 487 U.S. 131, 140-141, 108 S. Ct. 2302, 101 L. Ed. 2d 123* (state notice-of-claim statutes inapplicable to § 1983 suits); *Patsy v. Board of Regents (1981) 457 U.S. 496, 516, 102 S. Ct. 2557, 73 L. Ed. 2d 172* (exhaustion of state remedies should not be required as prerequisite to bringing action under § 1983)].

This is one of the most significant differences between a *42 U.S.C. § 1983* action and a habeas corpus petition. To obtain habeas corpus relief, a prisoner must first exhaust available state remedies [*Heck v. Humphrey (1994) 512 U.S. 477, 480-481, 114 S. Ct. 2364, 129 L. Ed. 2d 383* ; *Preiser v. Rodriguez (1973) 411 U.S. 475, 489-493, 93 S. Ct. 1827, 36 L. Ed. 2d 439* ; *Ramirez v. Galaza (9th Cir. 2003) 334 F.3d 850, 854]* .

However, under the "favorable termination rule," a prisoner suing under § 1983 with regard to the disciplinary process may be required to first invalidate a disciplinary conviction if alleged due process defects in the disciplinary process, if established, necessarily imply the invalidity of the deprivation of the prisoner's good-time credits and that result would decrease the length of the prisoner's confinement [*Edwards v. Balisok (1997) 520 U.S. 641, 643-645, 117 S. Ct. 1584, 137 L. Ed. 2d 906* ; *Heck v. Humphrey (1994) 512 U.S. 477, 478-489, 114 S. Ct. 2364, 129 L. Ed. 2d 383]* . The applicability of the favorable termination rule turns solely on whether a successful § 1983 action would necessarily render invalid a conviction, sentence, or administrative sanction that affected the length of the prisoner's confinement [*Ramirez v. Galaza (9th Cir. 2003) 334 F.3d 850, 856]* . The favorable termination rule does not apply to § 1983 suits challenging a disciplinary hearing or administrative sanction that does not affect the overall length of the prisoner's confinement. When the prison's alleged constitutional error does not increase the prisoner's total period of confinement, a successful § 1983 action would not necessarily result in an earlier release from incarceration, and hence, does not intrude on the heart of habeas jurisdiction [*Ramirez v. Galaza (9th Cir. 2003) 334 F.3d 850, 858]* .

Furthermore, in § 1983 actions brought by prisoners, there is a special exhaustion requirement. The Civil Rights of Institutionalized Persons Act, as amended by the Prison Litigation Reform Act (PLRA) in 1996, provides that a prisoner confined in any jail, prison, or other correctional facility may not bring an action with regard to prison conditions under *42 U.S.C. § 1983*, or any other federal law, until the prisoner has exhausted available administrative remedies [*42 U.S.C. § 1997e(a)*]. All available remedies must be exhausted; they need not meet federal standards or be "plain, speedy, and effective" [*Porter v. Nussle (2002) 534 U.S. 516, 122 S. Ct. 983, 988, 152 L. Ed. 2d 12]* . The exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or another wrong [*Porter v. Nussle (2002) 534 U.S. 516, 122 S. Ct. 983, 992, 152 L. Ed. 2d 12]* .

The exhaustion requirement in *42 U.S.C. § 1997e(a)* applies to prisoners held in prisons operated by private entities such as private corporations as well as to prisoners held in prisons operated by public entities, such as state or local governments or the federal government [*Roles v. Maddox (9th Cir. 2006) 439 F.3d 1016, 1017-1018]* .

The PLRA does not define "prison conditions." However, the term has been broadly construed [*see Roles v. Maddox (9th Cir. 2006) 439 F.3d 1016, 1018* (confiscation of magazines if condition to which PLRA applies); *see also Porter v. Nussle (2002) 534 U.S. 516, 532, 122 S. Ct. 983, 152 L. Ed. 2d 12* (PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong)]. The Ninth Circuit and other courts have treated various prisoner claims as

challenges to prison conditions requiring exhaustion, ranging from claims of harassment by prison officials [*Bennett v. King (9th Cir. 2002) 293 F.3d 1096]* , to complaints about the availability of Spanish language interpreters [*Castano v. Neb. Dep't of Corr. (8th Cir. 2000) 201 F.3d 1023]* , to complaints about the confiscation of magazines [*Roles v. Maddox (9th Cir. 2006) 439 F.3d 1016, 1018* (confiscation of magazines is condition to which PLRA applies); *see also Preiser v. Rodriguez (1973) 411 U.S. 475, 498-499, 93 S. Ct. 1827, 36 L. Ed. 2d 439* (characterizing confiscation of prisoner's legal materials as condition of prison life); *Gibson v. Goord (2d Cir. 2002) 280 F.3d 221* (requiring exhaustion for challenge to accumulation of water in cell and exposure to second-hand smoke); *Hartsfield v. Vidor (6th Cir. 1999) 199 F.3d 305* (allegation that prison officials violated prisoner's equal protection rights by treating him more roughly than they treated white inmate concerned prison condition)].

A district court must dismiss an action involving prison conditions when the plaintiff did not exhaust administrative remedies before filing suit but is in the process of doing so when a motion to dismiss is filed [*McKinney v. Carey (9th Cir. 2002) 311 F.3d 1198]* .

When a prison's grievance procedures are silent or incomplete as to factual specificity required, a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought. A grievance need not include legal terminology or legal theories, unless they are in some way needed to provide notice of the harm being grieved. A grievance also need not contain every fact necessary to prove each element of an eventual legal claim [*Griffin v. Arpaio (9th Cir. 2009) 557 F.3d 1117, 1120-1121*].

Administrative remedies must be exhausted even if they do not provide the type of relief sought by the prisoner, such as money damages [*Booth v. Churner (2001) 532 U.S. 731, 733, 121 S. Ct. 1819, 149 L. Ed. 2d 958]* . The requirement is mandatory when it applies [*Rumbles v. Hill (9th Cir. 1999) 182 F.3d 1064, 1066 , cert. denied, 528 U.S. 1074 (2000)]* . For example, federal prisoners suing under *Bivens* must first exhaust inmate grievance procedures just as state prisoners must exhaust administrative processes before instituting a § 1983 action [*Porter v. Nussle (2002) 534 U.S. 516, 122 S. Ct. 983, 988, 152 L. Ed. 2d 12]* . Trial courts must dismiss without prejudice prisoner complaints filed before exhaustion [*see Terrell v. Brewer (9th Cir. 1991) 935 F.2d 1015, 1019* (proper remedy for failure of prisoner to exhaust *Bivens* claim is dismissal without prejudice)].

When a prisoner's complaint contains exhausted and unexhausted claims, the court need not dismiss the entire action [*Jones v. Bock (2007) 549 U.S. 199 , 127 S. Ct. 910, 923-926, 166 L. Ed. 2d 798* (court rule requiring dismissal of entire action beyond judicial authority)]. When a prisoner files a mixed complaint and wishes to proceed with only the exhausted claims, the court should dismiss the unexhausted claims when the unexhausted claims are not intertwined with the properly exhausted claims. On the other hand, when a prisoner's mixed complaint includes exhausted and unexhausted claims that are closely related and difficult to untangle, dismissal of the defective complaint with leave to amend to allege only fully exhausted claims is the proper approach [*Lira v. Herrera (9th Cir. 2005) 427 F.3d 1164, 1169-1176*].

A prisoner cannot satisfy the Prison Litigation Reform Act's exhaustion requirement by filing an untimely or otherwise procedurally defective administrative grievance or appeal. Proper exhaustion of administrative remedies is necessary [*Woodford v. Ngo (2006) 548 U.S. 81, 126 S. Ct. 2378, 2384-2393* ; *165 L. Ed. 2d 368]* .

The prison system's requirements define the boundaries of proper exhaustion [*Marella v. Terhune (9th Cir. 2009) 562 F.3d 983, 985* ; *see Jones v. Bock (2007) 549 U.S. 199, 218, 127 S. Ct. 910, 166 L. Ed. 2d 798*]. In California, an inmate must submit an appeal within 15 working days of the event or decision being appealed. The appeals coordinator is only permitted to reject an appeal if time limits for submitting the appeal are exceeded and the appellant had the opportunity to file within the prescribed time constraints [*15 Cal. Code Regs. §§ 3084.6(c), 3084.3(c)(6)*]. Section 54100.8.1 of the California Department of Corrections and Rehabilitation Operating Manual directs the appeals coordinator to ensure that the inmate or parolee had, in fact, the opportunity to file in a timely manner. The prison's regulations explicitly create an exception to the timely filing requirement for an inmate who does not have the

opportunity to file in a timely manner [*Marella v. Terhune (9th Cir. 2009) 562 F.3d 983, 985* (if inmate who was in hospital and then administrative segregation following knife attack by fellow inmates of which he was complaining was unable to file within 15-day filing period, his failure to file timely would not defeat his § 1983 claim)].

The exhaustion requirement of *42 U.S.C. § 1997e(a)* is not jurisdictional [*Wyatt v. Terhune (9th Cir. 2003) 315 F.3d 1108, 1116-1119* ; *Rumbles v. Hill (9th Cir. 1999) 182 F.3d 1064, 1067-1068* , *cert. denied, 528 U.S. 1074 (2000)]* . A plaintiff is not required to plead exhaustion of remedies under § 1997e(a); Section 1997e(a) creates a defense, and defendants have the burden of raising and proving the absence of exhaustion [*Jones v. Bock (2007) 549 U.S. 199* , *127 S. Ct. 910, 918-922, 166 L. Ed. 2d 798* (circuit rule requiring prisoner to allege and demonstrate exhaustion in complaint not required by PLRA and crafting and imposing rule exceeded proper limits on judicial role); *Wyatt v. Terhune (9th Cir. 2003) 315 F.3d 1108, 1119]* . Failure to exhaust nonjudicial nonjurisdictional remedies should be treated as a matter in abatement, subject to an unenumerated Rule 12(b) motion rather than a motion for summary judgment. In deciding a motion to dismiss for a failure to exhaust nonjudicial remedies, the court may look beyond the pleadings and decide disputed issues of fact; if the court concludes that the prisoner has not exhausted nonjudicial remedies, the proper remedy is dismissal of the claim without prejudice [*Wyatt v. Terhune (9th Cir. 2003) 315 F.3d 1108, 1119-1120]* .

PLRA also does not require that prisoners identify in their initial grievance each defendant they later sue, and exhaustion is not *per se* inadequate simply because an individual later sued was not named in the grievance. The PLRA requires exhaustion of such administrative remedies as are available [*42 U.S.C. § 1997e(a)*], but nothing in the statute imposes a "name all defendants" requirement [*Jones v. Bock (2007) 549 U.S. 199* , *127 S. Ct. 910, 922-923, 166 L. Ed. 2d 798]* .

[3] Pleading

There are special rules regarding pleading in prisoners' civil rights actions brought under *42 U.S.C. § 1983*.

In cases brought by prisoners pro se, courts must construe the prisoners' papers liberally [*Hughes v. Rowe (1980) 449 U.S. 5, 9-10, 101 S. Ct. 173, 66 L. Ed. 2d 163* ; *Eldridge v. Block (9th Cir. 1987) 832 F.2d 1132, 1137* ; *see Draper v. Coombs (9th Cir. 1986) 792 F.2d 915, 924* (courts should treat pro se litigants with great leniency when evaluating compliance with technical rules of civil procedure)]. Allegations in the complaint of a pro se prisoner, "however inartfully pleaded," are held "to less stringent standards than formal pleadings drafted by lawyers" [*Hughes v. Rowe (1980) 449 U.S. 5, 9, 101 S. Ct. 173, 66 L. Ed. 2d 163* , *quoting Haines v. Kerner (1972) 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652]* .

Under the Prison Litigation Reform Act (PLRA), the court must, on its own motion or on the motion of a party, dismiss any action brought with regard to prison conditions under *42 U.S.C. § 1983*, or other federal law, by a prisoner, if the court is satisfied that the action is frivolous, malicious, fails to state a claim on which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief [*42 U.S.C. § 1997e(c)(1)*; *see 28 U.S.C. § 1915A* (courts to screen complaints filed by prisoners against governmental entities, officers, or employees)]. The court may dismiss such a claim by a prisoner without first requiring exhaustion of administrative remedies [*42 U.S.C. § 1997e(c)(2)*].

Another provision of the PLRA provides that any defendant may waive the right to reply to any action brought by a prisoner under *42 U.S.C. § 1983* or other federal law [*42 U.S.C. § 1997e(g)(1)*]. Notwithstanding any other law or rule of procedure, such a waiver does not constitute an admission of the allegations in the complaint [*42 U.S.C. § 1997e(g)(1)*]. No relief will be granted to the prisoner plaintiff unless a reply to the complaint has been filed [*42 U.S.C. § 1997e(g)(1)*]. The court may require any defendant to reply to a prisoner's complaint if the court finds that the plaintiff has a reasonable opportunity to prevail on the merits [*42 U.S.C. § 1997e(g)(2)*].

PLRA does not require that a prisoner plead and prove exhaustion of administrative remedies, and such a rule promulgated by a court would exceed judicial authority [*Jones v. Bock (2007) 549 U.S. 199 , 127 S. Ct. 910, 918-922, 166 L. Ed. 2d 798* (circuit rule requiring prisoner to allege and demonstrate exhaustion in complaint not required by PLRA and crafting and imposing rule exceeded proper limits on judicial role); for discussion of requirement of exhausting administrative remedies under PLRA generally, *see § 114.28[2], above*].

[4] Damages

[a] Required Proof

The interplay between actions under *42 U.S.C. § 1983* and habeas corpus petitions has given rise to an important limitation on prisoners' actions seeking recovery of damages. To recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been [*Heck v. Humphrey (1994) 512 U.S. 477, 486-487, 114 S. Ct. 2364, 129 L. Ed. 2d 383]* :

- Reversed on direct appeal;
- Expunged by executive order;
- Declared invalid by a state tribunal authorized to make such determination; or
- Called into question by a federal court's issuance of a writ of habeas corpus.

A claim for damages bearing that relationship to a conviction that has not been so invalidated is not cognizable under § 1983 [*Heck v. Humphrey (1994) 512 U.S. 477, 487, 114 S. Ct. 2364, 129 L. Ed. 2d 383]* . Thus, when a state prisoner seeks damages in a § 1983 suit, the court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his or her conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit [*Heck v. Humphrey (1994) 512 U.S. 477, 487, 114 S. Ct. 2364, 129 L. Ed. 2d 383]* .

[b] Prison Litigation Reform Act

The Prison Litigation Reform Act (PLRA) added another important limitation on prisoners' actions for damages. No federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury [*42 U.S.C. § 1997e(e)*]. Section 1997e(e) requires a prior showing of physical injury that need not be significant but must be more than *de minimis* [*Oliver v. Keller (9th Cir. 2002) 289 F.3d 623, 627* (but not importing standard used for *Eighth Amendment* excessive force claims, which examines whether use of physical force is more than *de minimis*)]. However, to the extent a prisoner has actionable claims for compensatory, nominal, or punitive damages premised on violations of *Fourteenth Amendment* rights, and not on alleged mental or emotional injuries, the claims are not barred by § 1997e(e) [*Oliver v. Keller (9th Cir. 2002) 289 F.3d 623, 630]* .

The limitation of *42 U.S.C. § 1997e(e)* is, however, inapplicable to *First Amendment* claims. The deprivation of *First Amendment* rights entitles a plaintiff to judicial relief wholly aside from any physical, mental, or emotional injury [*Canell v. Lightner (9th Cir. 1998) 143 F.3d 1210, 1213]* .

[5] Injunctive Relief

[a] Availability of Injunctive Relief, Generally

Under the Prison Litigation Reform Act (PLRA), a court may not grant or approve prospective relief regarding prison conditions unless it finds that the relief (1) is narrowly drawn, (2) extends no further than necessary to correct a violation of a federal right, and (3) is the least intrusive means necessary to correct the violation [*18 U.S.C. § 3626(a)(1)(A)*]. "Prospective relief" means all relief other than compensatory monetary damages [*18 U.S.C. § 3626(g)(7)*]. "Relief" means all relief in any form a court might grant or approve and includes consent decrees [*18 U.S.C. § 3626(g)(9)*]. A motion for extension of the court's jurisdiction under a consent decree is prospective relief within the meaning of and governed by the PLRA [*Hallett v. Morgan (9th Cir. 2002) 287 F.3d 1193, 1203-1204]* .

Before granting prospective relief, a trial court must make the findings mandated by the PLRA, and is required to give substantial weight to any adverse impact on public safety or on the operation of a criminal justice system caused by the relief [*18 U.S.C. § 3626(a)(1)(A*); *Oluwa v. Gomez (9th Cir. 1998) 133 F.3d 1237, 1239* (PLRA provision requiring court to make specific findings before granting prospective relief applied retroactively to pending case involving state prisoner's *42 U.S.C. § 1983* claim against prison officials alleging refusal to provide religiously mandated diet)].

The PLRA also includes a provision stating that, in a civil action with regard to civil conditions, a court must not order any prospective relief that requires or permits a government official to exceed his or her authority under state or local law or otherwise violates state or local law, unless all of the following conditions are satisfied [*18 U.S.C. § 3626(a)(1)(B)*]:

- Federal law requires such relief to be ordered in violation of state or local law;
- The relief is necessary to correct the violation of a federal right; and
- No other relief will correct the violation of the federal right.

With regard to preliminary injunctive relief in prison condition cases, the PLRA requires that such relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm [*18 U.S.C. § 3626(a)(2)*]. The court is to give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief, and must respect principals of comity [*18 U.S.C. § 3626(a)(2)*]. Preliminary injunctive relief automatically expires 90 days after its entry, unless the court makes certain findings and makes the order final before the expiration of the 90-day period [*18 U.S.C. § 3626(a)(2)*].

PRACTICE TIP:

Injunctive Relief. Situations where *Eighth Amendment* cases have been successful often involve claims for injunctive relief. In those situations, qualified immunity may not be asserted and state officials can be sued in their "official" capacities. Although there is a reluctance by courts to become involved in "running" prisons, cases that involve class-wide medical neglect, for example, have often been successful. The Prison Law Office has been particularly successful in bringing these types of cases. *By John H. Scott*

[b] Special Requirements Applicable to Prison Release Orders

The PLRA includes special requirements applicable to prisoner release orders [*18 U.S.C. § 3626(a)(3)*]. No court may enter a prisoner release order unless both of the following conditions are satisfied [*18 U.S.C. § 3626(a)(3)(A), (C)*]:

- A court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of federal rights; and

- The defendant has had a reasonable amount of time to comply with the previous court orders.

In any civil action in federal court with regard to prison conditions, a prisoner release order may be entered only by a three-judge court [*18 U.S.C. § 3626(a)(3)(B)*], and only if the court finds by clear and convincing evidence that [*18 U.S.C. § 3626(a)(3)(E)*]:

- Crowding is the primary cause of the violation of a federal right; and
- No other relief will remedy the violation.

The three-judge court may be requested by either a party seeking a prisoner release order or by a federal judge who believes that a prisoner release order should be considered in a case before him or her [*18 U.S.C. § 3626(a)(3)(C), (E)*].

Certain state or local officials, or governmental units, with responsibilities for prison facilities or prosecution or custody of prisoners, have standing to oppose the imposition or continuation of prisoner release orders [*18 U.S.C. § 3626(a)(3)(F)*].

[c] Provisions Regarding Termination of Prospective Relief

The PLRA includes provisions regarding the termination of prospective relief [*18 U.S.C. § 3626(b)*]. In any civil action regarding prison conditions, prospective relief is terminable [*18 U.S.C. § 3626(b)(1)(A)*]:

- Two years after the date the court granted or approved the relief;
- One year after the date the court denied termination of the relief on a motion; or
- Two years after April 26, 1996, in the case of relief ordered before that date.

Prospective relief is subject to immediate termination if the relief was approved or granted without a finding that the relief is narrowly drawn, extends no further than necessary to correct the violation of federal rights, and is the least intrusive means necessary to correct the violation [*18 U.S.C. § 3626(b)(2)*].

Prospective relief is not subject to termination if the court makes written findings, based on the record, that prospective relief (1) remains necessary to correct a current and ongoing violation of the federal right, (2) extends no further than necessary to correct the violation, and (3) is narrowly drawn and the least intrusive means to correct the violation [*18 U.S.C. § 3626(b)(3)*].

Nothing in these provisions prevents a party from moving for an earlier termination of the prospective relief, or from agreeing to an earlier termination of prospective relief [*18 U.S.C. § 3626(b)(1)(B), (4)*].

[d] Other Applicable Provisions

18 U.S.C. § 3626(c) sets forth provisions governing settlements and consent decrees in cases involving prison conditions.

18 U.S.C. § 3626(d) states that the limitations on remedies in § 3626 do not apply to relief entered by a state court based solely on claims arising under state law.

18 U.S.C. § 3626(e) provides special procedures applicable to motions affecting prospective relief.

18 U.S.C. § 3626(f) includes provisions regarding the appointment of special masters in cases involving prison conditions.

[6] Attorney's Fees

[a] Limitation on Recovery of Fees

The Prison Litigation Reform Act (PLRA) includes a provision limiting the sorts of prisoner's rights cases in which attorney's fees may be awarded. In an action brought by a prisoner, in which attorney's fees are authorized under *42 U.S.C. § 1988*, such fees may not be awarded, except to the extent that both of the following conditions are satisfied [*42 U.S.C. § 1997e(d)(1)*]:

- The fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under *42 U.S.C. § 1988*; and

- The amount of the fee is proportionately related to the court ordered relief for the violation, or the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

No fees will be awarded unless the fees were directly and reasonably incurred in proving an actual violation of the prisoner's rights. The plain meaning of "actual violation" excludes a violation that has not been proven in fact, but merely has been asserted. Thus, issuance of a temporary restraining order, without a finding on the merits that the prisoner's rights were violated, will not support an award of fees [*Siripongs v. Davis (9th Cir. 2002) 282 F.3d 755, 758]* .

PRACTICE TIP:

Effect of PLRA. It is very important to highlight the significance of the PLRA as it relates to *Eighth Amendment* litigation in particular. By significantly limiting the hourly rate that may be obtained as a prevailing party for attorney's fees *and* requiring prisoners to exhaust administrative remedies before bringing an action for damages or injunctive relief, there is not much incentive to take these cases unless it is out of the "goodness" in one's heart. In addition, the federal courts have raised the bar so high that it is increasingly difficult to get one of these cases (beyond summary judgment and qualified immunity) to trial. If you are fortunate enough to eventually get an *Eighth Amendment* case to a jury, the deck is still stacked against you. Nevertheless, there are still many cases that come out of prisons where the facts are so shocking and/or the injuries are so serious that verdicts do occur. *By John H. Scott*

[b] Source of Payment of Award

The PLRA governs the source of payment of an attorney's fee award. Whenever a monetary judgment is awarded in an action brought by a prisoner, in which attorney's fees are authorized under *42 U.S.C. § 1988*, a portion of the judgment (not to exceed 25 percent) must be applied to satisfy the amount of attorney's fees awarded against the defendant [*42 U.S.C. § 1997e(d)(2)*]. If the attorney's fee award is not greater than 150 percent of the judgment, the excess must be paid by the defendant [*42 U.S.C. § 1997e(d)(2)*].

The "whenever a monetary judgment is awarded" language of *42 U.S.C. § 1997e(d)(2)* caps attorneys' fees incurred for the sole purpose of securing the monetary judgment. By contrast, fees incurred to obtain injunctive relief, whether or not monetary relief was also obtained as a result of those fees, are not limited by this provision. Thus, § 1997e(d)(2) does not cap available fees when an inmate obtains injunctive relief in addition to monetary damages [*Dannenberg v. Valadez (9th Cir. 2003) 338 F.3d 1070, 1074-1075]* .

PRACTICE TIP:

Nominal Damage Awards. Many *Eighth Amendment* cases do not have economic damages and result in nominal damage awards. In other words, these cases can be very time consuming and costly with a substantial risk of not getting paid--even if you "win" at trial and get a nominal damage award. *By John H. Scott*

[c] Cap on Fees

The PLRA caps fees at a maximum hourly rate. In an action brought by a prisoner, in which attorney's fees are authorized under *42 U.S.C. § 1988*, no award of attorney's fees may be based on an hourly rate greater than 150 percent of the hourly rate established under *18 U.S.C. § 3006A* for payment of court-appointed counsel [*42 U.S.C. § 1997e(d)(3)*].

Nothing in *42 U.S.C. § 1997e(d)* prohibits a prisoner from entering into an agreement to pay attorney's fees in a greater amount, so long as the fee is paid by the individual rather than by the defendant pursuant to *42 U.S.C. § 1988* [*42 U.S.C. § 1997e(d)(4)*].

[d] PLRA Provisions Apply Only to Services Performed After PLRA's Effective Date

The PLRA provisions regarding attorney's fees apply with regard to services performed after the PLRA's effective date, but not with regard to services performed before the effective date [*Madrid v. Gomez (9th Cir. 1999) 190 F.3d 990, 994* ; *see* *Martin v. Hadix (1999) 527 U.S. 343, 119 S. Ct. 1998, 144 L. Ed. 2d 347, 362* (PLRA limits attorney's fees for postjudgment monitoring services performed after PLRA's effective date but not for postjudgment monitoring services performed before then)].

[7] Proceeding *In Forma Pauperis*

Under the Prison Litigation Reform Act (PLRA), a prisoner may not bring a civil action or appeal *in forma pauperis* if the prisoner has, on three or more occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim on which relief may be granted [*28 U.S.C. § 1915(g)*]. This is commonly known as the "three strikes" provision [*Andrews v. Cervantes (9th Cir. 2007) 493 F.3d 1047, 1049* ; *Andrews v. King (9th Cir. 2005) 398 F.3d 1113, 1116 n.1*].

The only exception is if the prisoner is under imminent danger of serious physical injury [*28 U.S.C. § 1915(g)*]. The exception applies if the danger existed at the time the prisoner filed the complaint [*Andrews v. Cervantes (9th Cir. 2007) 493 F.3d 1047, 1053* (prisoner's removal from California prison system after filing complaint was irrelevant to § 1915(g) analysis)]. Once a prisoner satisfies the exception to the three-strikes rule and otherwise qualifies for in forma pauperis status, the district court must docket the entire complaint and resolve all of its claims, without requiring the upfront payment of the filing fee [*Andrews v. Cervantes (9th Cir. 2007) 493 F.3d 1047, 1053-1055* (although number of claims in prisoner's suit unquestionably did not allege imminent danger of serious physical injury, complaint as whole should have proceeded IFP if his allegations about danger he faced from contagious diseases met requisite standard)]. A prisoner who alleges that prison officials continue with a practice that has injured the prisoner or others similarly situated in the past will satisfy the ongoing danger standard and meet the imminence prong of the three-strikes exception [*Andrews v. Cervantes (9th Cir. 2007) 493 F.3d 1047, 1051-1058* (although at time he filed complaint prisoner already had contracted hepatitis and did not allege he was presently confined with prisoner with another contagious disease, prisoner sufficiently alleged threat of imminent danger of serious physical injury by alleging ongoing policy of not screening inmates for communicable diseases and housing contagious inmates with others without regard to risk they pose)].

"Strikes" are prior cases or appeals, brought while the plaintiff was a prisoner, which were dismissed as frivolous,

malicious, or failing to state a claim [*Andrews v. King (9th Cir. 2005) 398 F.3d 1113, 1116 n.1*]. Not all unsuccessful cases qualify as a strike under § 1915(g). *28 U.S.C. § 1915(g)* should be used to deny a prisoner's *in forma pauperis* status only when, after careful evaluation of the order dismissing an action and other relevant information, the district court determines that the action was dismissed because it was frivolous, malicious, or failed to state a claim. The PLRA does not define "frivolous" or "malicious," nor does it define dismissals for failure to "state a claim upon which relief could be granted." However, a case is frivolous if it is of little weight or importance, having no basis in law or fact [*Andrews v. King (9th Cir. 2005) 398 F.3d 1113, 1121* , citing Webster's Third New International Dictionary 913 (1993); *see Goland v. United States (9th Cir. 1990) 903 F.2d 1247, 1258* (adopting definition of frivolous)]. A case is also malicious if it was filed with the intention or desire to harm another [*Andrews v. King (9th Cir. 2005) 398 F.3d 1113, 1121* , citing Webster's Third New International Dictionary 1367 (1993)]. The phrase "fails to state a claim on which relief may be granted," as used elsewhere in the PLRA, parallels the language of Fed. Rule *Civ. Proc. 12(b)(6)* [*Andrews v. King (9th Cir. 2005) 398 F.3d 1113, 1121* ; *see Barren v. Harrington (9th Cir. 1998) 152 F.3d 1193, 1194* (interpreting *28 U.S.C. § 1915(e)(2)(B)(ii)* and employing same *de novo* standard of review applied to Rule 12(b)(6) motions)].

The word "brought" is also not defined in the PLRA. However, in construing a related provision of the PLRA, the Ninth Circuit held that actions are "brought" for purposes of *42 U.S.C. § 1997e(a)* when the complaint is tendered to the district clerk, not when it is subsequently filed [*Vaden v. Summerhill (9th Cir. 2006) 449 F.3d 1047, 1050*]. The Ninth Circuit has found that this construction of the term "brought" is equally applicable to § 1915(g) [*O'Neal v. Price (9th Cir. 2008) 531 F.3d 1146, 1152*]. Thus, a plaintiff has "brought" an action for the purposes of § 1915(g) when the plaintiff submits a complaint and request to proceed in forma pauperis to the court [*see O'Neal v. Price (9th Cir. 2008) 531 F.3d 1146, 1152* (two prior actions were "brought" where plaintiff submitted to court complaint and request for in forma pauperis status in both)].

The PLRA also does not define the word "dismissed." The Ninth Circuit has concluded that a district court has "dismissed" a prisoner's case for purposes of § 1915(g) when the court denies the prisoner's application to file the action without prepayment of the filing fee on the ground that the complaint is frivolous, malicious, or fails to state a claim, and thereupon terminates the complaint [*O'Neal v. Price (9th Cir. 2008) 531 F.3d 1146, 1152-1155*]. The PLRA details a court's obligation to dismiss a plaintiff's in forma pauperis complaint in three separate but interrelated provisions [*see 28 U.S.C. §§ 1915A, 1915(e)(2), 42 U.S.C. § 1997e(c)*]. Read together, these provisions require a district court to dismiss an in forma pauperis complaint when it determines that the complaint meets the statutory criteria. Because the statutes impose a mandatory duty, a district court's termination of an in forma pauperis complaint during the screening process for a reason enumerated in one of the statutes is a dismissal pursuant to the applicable section, even if the district court uses alternative terminology [*O'Neal v. Price (9th Cir. 2008) 531 F.3d 1146, 1152-1153*]. A dismissal without prejudice counts as a strike, so long as the dismissal is made because the action is frivolous, malicious, or fails to state a claim [*O'Neal v. Price (9th Cir. 2008) 531 F.3d 1146, 1154-1155*].

A civil detainee is not a "prisoner" within the meaning of the PLRA [*Andrews v. King (9th Cir. 2005) 398 F.3d 1113, 1122*]. Thus, for example, dismissals of actions brought while a plaintiff was in the custody of the Immigration and Naturalization Service do not count as "strikes" within the meaning of *28 U.S.C. § 1915(g)*, so long as the detainee did not also face criminal charges [*Andrews v. King (9th Cir. 2005) 398 F.3d 1113, 1121-1122*].

When a defendant challenges a prisoner's right to proceed *in forma pauperis*, the defendant bears the burden of producing sufficient evidence to establish that § 1915(g) bars the plaintiff's *in forma pauperis* status. Once the defendant has made out a prima facie case, the burden shifts to the plaintiff to persuade the court that *28 U.S.C. § 1915(g)* does not apply [*Andrews v. King (9th Cir. 2005) 398 F.3d 1113, 1118-1120*].

Legal Topics:

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

Criminal Law & ProcedureHabeas CorpusExhaustion of RemediesGeneral OverviewCivil Rights LawSection 1983 ActionsLaw Enforcement OfficialsPrison OfficialsCivil Rights LawPrisoner RightsPrison Litigation Reform ActExhaustionCivil Rights LawPrisoner RightsPrison Litigation Reform ActJudicial ScreeningCriminal Law & ProcedureHabeas CorpusCognizable IssuesThreshold Requirements

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PART II. LEGAL BACKGROUND

11-114 California Forms of Pleading and Practice--Annotated § 114.29

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§ 114.29 Enforcement of Rights Under Other Statutes

As with claims under *42 U.S.C. § 1983* [*see § 114.28[2], above*], the Prison Litigation Reform Act ("PLRA") [*42 U.S.C. § 1997e et seq.*] requires prisoners to exhaust available administrative remedies before bringing claims under the Americans With Disabilities Act and the Rehabilitation Act [*O'Guinn v. Lovelock Correctional Center (9th Cir. 2007) 502 F.3d 1056, 1059-1062* ; *see 42 U.S.C. § 12101 et seq.*; *29 U.S.C. § 794 et seq.*].

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11-114 California Forms of Pleading and Practice--Annotated §§ 114.30-114.49

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[Reserved]

§§ 114.30[Reserved]

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11-114 California Forms of Pleading and Practice--Annotated § 114.50

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§ 114.50 Related Matthew Bender Publications

Cook, Sobieski, Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law--Prisons* (Matthew Bender)

Personal Injury--Actions, Defenses, Damages, vol. 22, *Prisons, Jails and Reformatories*, §§ 1-6 (Matthew Bender)

For related jury instructions regarding civil rights, see Judicial Council Of California Civil Jury Instructions (CACI), Series 3000 (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions

Legal Topics:

For related research and practice materials, see the following legal topics:
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11-114 California Forms of Pleading and Practice--Annotated § 114.51

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§ 114.51 Federal Constitution

Freedom of speech and religion. *U.S. Const., amend. I*

Right to be free from unreasonable searches and seizures. *U.S. Const., amend. IV*

Prohibition against cruel and unusual punishment. *U.S. Const., amend. VIII*

Sovereign immunity of states. *U.S. Const., amend. XI*

Due process and *equal protection clauses*, applicable to states. *U.S. Const., amend. XIV*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of ReligionFree Exercise of ReligionConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechGeneral OverviewConstitutional LawBill of

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11-114 California Forms of Pleading and Practice--Annotated § 114.52

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§ 114.52 State Constitution

Inalienable rights. *Cal. Const., art. I, § 1*

Freedom of speech. *Cal. Const., art. I, § 2*

Freedom of religion. *Cal. Const., art. I, § 4*

Due process and equal protection. *Cal. Const., art. I, § 7*

Freedom from unreasonable searches and seizures. *Cal. Const., art. I, § 13*

Prohibition against cruel and unusual punishment. *Cal. Const., art. I, § 17*

Deprivation of right to vote while imprisoned or on parole for conviction of felony. *Cal. Const., art. II, § 4*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of ReligionFree Exercise of ReligionConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewConstitutional LawBill of RightsFundamental RightsCriminal ProcessCruel & Unusual PunishmentConstitutional LawEqual ProtectionGeneral Overview

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§ 114.53 Federal Statutes

Limits on prospective relief regarding prison conditions. *18 U.S.C. § 3626(a)(1)*

Jurisdiction of United States District Courts in civil rights cases. *28 U.S.C. §§ 1331, 1343, 1344*

Federal habeas corpus remedy. *28 U.S.C. § 2254*

Equal rights under law. *42 U.S.C. § 1981*

Property rights of citizens. *42 U.S.C. § 1982*

Civil action for deprivation of civil rights under color of state law. *42 U.S.C. § 1983*

Conspiracy to interfere with civil rights. *42 U.S.C. § 1985*

Neglect to prevent conspiracy to interfere with civil rights. *42 U.S.C. § 1986*

State law applicable in federal civil rights actions. *42 U.S.C. § 1988(a)*

Recovery of attorney's fees in civil rights actions. *42 U.S.C. § 1988(b)*

Civil Rights of Institutionalized Persons Act. *42 U.S.C. § 1997 et seq.*

Attorney General's institution, and intervention in, actions concerning prisoners. *42 U.S.C. §§ 1997a, 1997b, 1997c, 1997h*

Prohibition of retaliation. *42 U.S.C. § 1997d*

Suits by prisoners. *42 U.S.C. § 1997e*

Prohibition of discrimination by public entities against qualified individuals with disabilities on account of disability. *42 U.S.C. § 12131 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPractice & ProcedureCosts & Attorney FeesGeneral OverviewCivil Rights LawContractual Relations & HousingEqual Rights Under the Law (sec. 1981)General OverviewCivil Rights LawContractual Relations & HousingProperty Rights (sec. 1982)General OverviewCivil Rights LawSection 1983 ActionsGeneral OverviewCivil Rights LawConspiracyGeneral Overview

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§ 114.54 State Statutes

Certificate of rehabilitation prevents denial of license because of conviction of crime. *Bus. & Prof. Code § 480(b)*

Freedom from violence or threat of violence because of protected characteristics. *Civ. Code § 51.7*

Damages for denial of right provided by *Civ. Code § 51.7. Civ. Code § 52(b)*

Protection from interference with rights by threats, intimidation, coercion, or violence. *Civ. Code § 52.1*

Criteria for declaring minor free from custody and control of convicted parent. *Fam. Code § 7825*

Prisoners eligible for workers' compensation benefits for injury or death. *Lab. Code §§ 3370, 3371*

Privileged conversation of prisoner. *Penal Code § 636*

Civil rights of prisoners. *Penal Code §§ 2600, 2601*

Prisoners as witnesses. *Penal Code §§ 2620-2625*

Sexual Abuse in Detention Elimination Act. *Pen. Code § 2635 et seq.*

Mistreatment of prisoners. *Penal Code §§ 2650-2657*

Prohibition of use of neck chains. *Penal Code § 2652.5*

Rights related to prisoners' medical care, pregnancy, and abortions. *Penal Code §§ 2656, 3405, 3406, 4023.6, 4028*; *Welf. & Inst. Code §§ 220, 222, 1773, 1774*

Organic therapy of prisoners. *Penal Code §§ 2670-2680*

Disposition of insane prisoners. *Penal Code §§ 2684-2685*

Temporary removal of prisoners. *Penal Code §§ 2690-2692*

Employment of prisoners. *Penal Code §§ 2700-2792*

Examination after commitment; care and treatment; confinement beyond term of commitment. *Penal Code § 3403*

Family planning, birth control, pregnancy, abortions in prisons. *Penal Code §§ 3405-3409*

Prisoners' rights as research subjects. *Penal Code §§ 3521-3523*

County jails. *Penal Code §§ 4000-4030*

Legislative intent that prisoners be afforded reasonable opportunity to exercise religious freedom. *Penal Code § 4027* (persons confined in local detention facilities), *Penal Code § 5009* (persons confined in state facilities); *Welf. & Inst. Code § 1705* (persons in custody of institution under supervision of the Department of the Youth Authority)

County industrial farms and road camps. *Penal Code §§ 4100-4305*

Blood donations. *Penal Code §§ 4350-4351*

Procedure for restoration of rights and application for pardon. *Penal Code § 4852.01 et seq.*

Rehabilitation of injured prisoners. *Penal Code § 5069*

Special facilities for incarceration of geriatric inmates and other inmates needing care in long-term skilled nursing facilities. *Pen. Code § 6267*

Requirements for regulations impacting visitation. *Pen. Code § 6400*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPrisoner RightsFreedom of ReligionCivil Rights LawPrisoner RightsMedical TreatmentCivil Rights LawPrisoner RightsVisitationCivil Rights LawPrisoner RightsGeneral OverviewFamily LawParental Duties &

RightsTermination of RightsInvoluntary TerminationIncarceration

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§ 114.55 State Regulations

Department of Corrections, rules and regulations of the Director of Corrections. 15 Cal. Code Reg. div. 3

Behavior of inmates. *15 Cal. Code Reg. § 3000 et seq.*

State-issued inmate clothing and linen. *15 Cal. Code Reg. § 3030 et seq.*

Inmate work and education. *15 Cal. Code Reg. § 3040 et seq.*

Credits. *15 Cal. Code Reg. § 3042 et seq.*

Inmate food services. *15 Cal. Code Reg. § 3050 et seq.*

Personal cleanliness of inmates. *15 Cal. Code Reg. § 3060 et seq.*

Intake, release, and discharge of inmates. *15 Cal. Code Reg. § 3075 et seq.*

Inmate appeals. *15 Cal. Code Reg. § 3084 et seq.*

Inmate resources. *15 Cal. Code Reg. § 3090 et seq.*

Prison libraries. *15 Cal. Code Reg. § 3120 et seq.*

Inmate mail. *15 Cal. Code Reg. § 3130 et seq.*

Inmate manuscripts. *15 Cal. Code Reg. § 3150 et seq.*

Legal documents of inmates. *15 Cal. Code Reg. § 3160 et seq.*

Visiting. *15 Cal. Code Reg. § 3170 et seq.*

Inmates' personal property. *15 Cal. Code Reg. § 3190 et seq.*

Inmate activities. *15 Cal. Code Reg. § 3200 et seq.*

General institution regulations. 15 Cal. Code Reg. chap. 1, subchap. 4

Parole. 15 Cal. Code Reg. chap. 1, subchap. 6

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 114.55A California Civil Jury Instructions (CACI)

For related jury instructions regarding civil rights, including instructions on, for example, the violation of a prisoner's federal civil rights under the *Eighth Amendment*, see Judicial Council Of California Civil Jury Instructions (CACI), Series 3000 (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions

Legal Topics:

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11-114 California Forms of Pleading and Practice--Annotated § 114.56

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§ 114.56 Decisions

[1] Access to Courts

State law divesting state courts of general jurisdiction of their jurisdiction over damages suits filed by prisoners against state correction officers, including those filed under *42 U.S.C. § 1983*, and requiring prisoners to pursue claims against state in state's court of claims, which was court of limited jurisdiction in which prisoner would not be entitled to attorney's fees, punitive damages, or injunctive relief, violated federal constitutional *Supremacy Clause*, where state's policy to shield narrow class of defendants from liability when sued for damages was contrary to Congress' judgment expressed in § 1983 that all persons who violate federal rights while acting under color of state law are liable for damages, and where, having made decision to create courts of general jurisdiction that regularly sit to entertain analogous suits, state was not at liberty to shut courthouse door to federal claims it considered at odds with its local policy. *Haywood v. Drown (2009) -- U.S. --, 129 S. Ct. 2108, 2114-2118, 173 L. Ed. 2d 920*

To show violation of right of access to courts based on inadequate law library, prisoners must show actual injury. *Lewis v. Casey (1996) 518 U.S. 343, 349-355, 116 S. Ct. 2174, 135 L. Ed. 2d 606*

Prisoners not constitutionally entitled to counsel while in administrative detention and before judicial proceedings are

initiated against them. *United States v. Gouveia (1984) 467 U.S. 180, 187-192, 104 S. Ct. 2292, 81 L. Ed. 2d 146*

Right of access to counsel is essential component of right of access to courts; prisoners must be provided assistance from persons trained in law or access to adequate law libraries. *Bounds v. Smith (1977) 430 U.S. 817, 822-823, 828, 97 S. Ct. 1491, 52 L. Ed. 2d 72*

Prisoner does not have right to retained or appointed counsel in prison disciplinary proceedings. *Baxter v. Palmigiano (1976) 425 U.S. 308, 315, 96 S. Ct. 1551, 47 L. Ed. 2d 810*

Prisoner has constitutional right of access to courts under *U.S. Const., amend. XIV*. *Wolff v. McDonnell (1974) 418 U.S. 539, 556, 94 S. Ct. 2963, 41 L. Ed. 2d 935*

State and its officers not allowed to abridge or impair prisoner's right to apply to federal court for writ of habeas corpus. *Johnson v. Avery (1969) 393 U.S. 483, 486, 89 S. Ct. 747, 21 L. Ed. 2d 718* ; *Ex parte Hull (1940) 312 U.S. 546, 549, 61 S. Ct. 640, 85 L. Ed. 1034*

Under federal mail box rule, under which pro se prisoner's action was deemed filed at time prisoner delivered it to prison authorities for forwarding to court clerk, state inmate's claim that during cell search during his time at county jail, deputy threw away inmate's religious materials was timely filed, where inmate complied with rule by depositing complaint in locked prison mailbox designated for legal mail within limitations period for claim, and where, because he was not indigent, he was required to deposit complaint in mailbox and could not have handed his legal mail directly to prison official to be mailed; and where declaration or notarized statement that he deposited complaint was unnecessary, because prison's own records showed complaint was sent to district court by registered mail within two-year limitations period. *Douglas v. Noelle (9th Cir. 2009) 567 F.3d 1103, 1106-1109*

In jail inmate's civil rights action against city, sheriff and deputy sheriffs resulting from his placement in jail's "gang module," district court erred in granting summary to defendants, where neither court nor defendants provided inmate with required fair notice of summary judgment procedure, since district court's instructions contained no instructions regarding either requirements of responding to or consequences of losing on summary judgment and did not alert inmate to fact that failure to file responsive evidentiary materials might result in entry of summary judgment against him and defendants did not provide in separate form as required any notice describing procedural requirements inmate had to meet in countering summary judgment motion or consequences of failing to meet those requirements, including fact that losing on summary judgment would mean effective termination of his case. However, inmate's claim under *42 U.S.C. § 1986* claim was untimely, so that summary judgment was proper. *Solis v. County of Los Angeles (9th Cir. 2008) 514 F.3d 946, 951-953*

State prisoner whose request to attend unrelated civil trial, in which he represented himself, in person was denied by superior court judge, resulting in default judgment against him in civil action, did not state claim for relief under § 1983, when civil claim was unrelated to criminal proceedings and prisoner has no constitutional right of access to courts to litigate unrelated civil claim. As to sheriff, as to whom he was pretrial detainee at time, plaintiff did not allege that reason for sheriff's failure to transport him to civil trial was to punish him and punitive intent could not be inferred from failure to transport. Plaintiff failed to state claim against state court judge who entered default since judge is absolutely immune for judicial acts and entry of default judgment in pending civil case is unquestionably judicial act, and plaintiff could not state claim against Sacramento County Superior Court (or its employees), because such suits are barred by *Eleventh Amendment*. Finally, plaintiff could not state claim against opposing party's counsel, because opposing counsel was lawyer in private practice not acting under color of state law, and plaintiff's conclusory allegations that lawyer was conspiring with state officers to deprive him of due process were insufficient. *Simmons v. Sacramento County Superior Court (9th Cir. 2003) 318 F.3d 1156, 1158-1161*

Summary judgment dismissed when magistrate judge served on parties copy of his findings of fact from different case

and directed defendants to file summary judgment motion without explaining to pro se prisoner-plaintiff significance of findings, that he intended to take judicial notice of findings in this case or whether or how prisoner could dispute findings in summary judgment process. *Wyatt v. Terhune (9th Cir. 2003) 315 F.3d 1108, 1111-1115*

28 U.S.C. § 1915(b), provision of Prison Litigation Reform Act (PLRA), requiring prisoners who file in forma pauperis civil actions to pay full amount of filing fee, allowing for monthly payments for those who cannot pay fee at time of filing, does not violate right of meaningful access to courts, since several provisions of PLRA decrease burden fee requirements place on indigent prisoners and safety-valve provision ensures prisoner cannot be barred from bringing civil action or appeal when prisoner does not have enough money to pay initial fee; however, court cannot dismiss prisoner's case based on failure to pay initial fee when failure to pay is due to lack of funds available to prisoner when payment is ordered. *Taylor v. Delatoore (9th Cir. 2002) 281 F.3d 844*

28 U.S.C. § 1915(g), a provision of Prison Litigation Reform Act (PLRA), prohibiting prisoner from bringing civil action or appeal in forma pauperis if prisoner has brought three or more actions dismissed as frivolous, malicious, or failing to state cause of action, unless prisoner is under imminent danger of serious physical injury, does not unconstitutionally infringe prisoner's right of access to courts. *Rodriguez v. Cook (9th Cir. 1998) 169 F.3d 1176, 1178-1182*

Prison regulations prohibiting disrespectful language by prisoners in grievances held to be violation of prisoners' constitutional right of access to courts. *Bradley v. Hall (9th Cir. 1995) 64 F.3d 1276, 1280-1281*

Prisons must provide photocopies and ink pens so that prisoners have access to courts. *Allen v. Sakai (9th Cir. 1994) 48 F.3d 1082, 1089-1090 , cert. denied, 514 U.S. 1065 (1995)*

To show denial of constitutional right to access to courts, prisoner must show actual injury. *Vandelft v. Moses (9th Cir. 1994) 31 F.3d 794, 796 , cert. denied, 516 U.S. 825 (1995) ; Johnson v. Moore (9th Cir. 1991) 948 F.2d 517, 521*

Arbitrary denial of contact visits with attorney violates prisoner's right to meaningful access to courts. *Ching v. Lewis (9th Cir. 1990) 895 F.2d 608, 610*

Right to self-representation under *U.S. Const., amend. VI* includes right of access to law books, witnesses, and other tools necessary to prepare defense. *Taylor v. List (9th Cir. 1989) 880 F.2d 1040, 1047*

Under prison-delivery rule, court of appeal erred in dismissing as untimely notice of appeal by state prison inmate of trial court's dismissal of his medical malpractice lawsuit as barred by statute of limitations, where inmate properly delivered notice of appeal to prison authorities before expiration of 60-day deadline for appealing judgment, even though notice was not received by Superior Court clerk until two days after last day to file notice of appeal had passed. *Silverbrand v. County of Los Angeles (2009) 46 Cal. 4th 106, 113-129, 92 Cal. Rptr. 3d 595, 205 P.3d 1047*

In hearing held in absence of incarcerated biological father, but in presence of biological father's counsel, juvenile court properly found mother's husband, not biological father, was child's presumed father. Proceeding to declare presumed father was not governed by *Pen. Code § 2625(a)-(d)*, which requires court to order prisoner-parent's temporary removal and production before court when proceeding seeks to terminate parental rights of prisoner under *Welf. & Inst. Code § 366.26* or *Fam. Code § 7800 et seq.* or to adjudicate child of prisoner dependent child, but by *Pen. Code § 2625(e)*, which gives court discretion whether to order prisoner produced in any other action or proceeding in which prisoner's parental or marital rights are subject to adjudication, and juvenile court did not abuse its discretion in proceeding without biological father's personal attendance at hearing, because when asked what testimony biological father could have provided, counsel's offer encompassed only evidence establishing his threshold qualifications for presumed father status, and court declared that both men or either of them could be found to be presumed fathers, so that testimony became unnecessary, and through his attorney, biological father had opportunity to call witnesses, cross-examine

adverse witnesses, and present his own testimony in written form. Under *Pen. Code § 2625(d)*, juvenile court erred in adjudicating child dependent of court without biological father's presence at proceeding or his waiver of that right, but error was harmless when father was not prejudiced by his absence because result would have been the same had he been present. *In re Jesusa V. (2004) 32 Cal. 4th 588, 599-603, 621-626, 10 Cal. Rptr. 3d 205, 85 P.3d 2*

In civil case in which prisoner is defendant, failure to arrange to take prisoner's testimony, when that testimony is required, violates prisoner's due process rights. *Payne v. Superior Court (1976) 17 Cal. 3d 908, 924-925, 132 Cal. Rptr. 405, 553 P.2d 565*

Under *U.S. Const., amend. VI*, right to absolute privacy in consultation with attorneys is part of right to be represented by counsel in one's defense. *In re Jordan (1972) 7 Cal. 3d 930, 941, 103 Cal. Rptr. 849, 500 P.2d 873* ; *In re Qualls (1943) 58 Cal. App. 2d 330, 331, 136 P.2d 341*

In action by indigent prison inmate against physician for allegedly negligent medical care at correctional facility, trial court abused its discretion by choosing drastic measure of dismissal based on ground prisoner did not appear telephonically at case management conference and subsequent hearing on order to show cause as to whether case should be dismissed, without first determining prisoner had been afforded meaningful access to courts and his failure to appear at required hearings was willful, and on remand, trial court was directed to ensure prisoner was provided meaningful access to courts. *Jameson v. Desta (2009) 179 Cal. App. 4th 672, 678-684, 101 Cal. Rptr. 3d 345*

Trial court abused its discretion in granting summary judgment motion and entering judgment in favor of all defendants without first ensuring indigent pro se prisoner's right to meaningful court access to prosecute bona fide civil claims was being protected, where prisoner vigorously pursued his claim at administrative, trial, and appellate levels to best of his ability, and, despite limitations of his status as prisoner, of which he advised court, consistent and reasonable, albeit often unsuccessful, efforts to effectuate service, to file timely motions and other legal documents, and to appear at hearings; where, when trial court clerk repeatedly declined to file his legal documents for failure to comply with applicable court rules and procedures, despite his good faith efforts to comply, he resubmitted them, often more than once, until they were properly filed; where, when hearings were scheduled, he not only provided notice to opposing counsel when required to do so, he repeatedly requested court orders to permit him to appear telephonically from prison, but it was not clear from record that trial court considered each of his requests and, perhaps not surprisingly, he was more often than not absent from hearings; and where he repeatedly requested in his case management statements and other legal documents that trial court consider his dire need for appointment of counsel to represent him. *Apollo v. Gyaami (2008) 167 Cal. App. 4th 1468, 1482-1487, 85 Cal. Rptr. 3d 127*

In propria persona criminal defendant failed to show denial of access to law library and to court, when defendant forfeited the issue by failing to raise it in trial court in timely fashion and failing to request remedy in trial court. Further, defendant had advisory counsel who adequately protecting his rights, cross-examined witnesses, made objections, argued *Pen. Code § 995* motion to dismiss information, and made closing argument. Thus, there is no *Sixth Amendment* right to law library access when *propria persona* defendant is assisted by advisory counsel. Defendant presented no competent evidence of deprivation of services necessary to provide access to court and made no showing of prejudice. *People v. Ringo (2005) 134 Cal. App. 4th 870, 876-877, 36 Cal. Rptr. 3d 444*

In government tort claim action by prisoner against prison officials, pro se civil complaint should have been deemed filed on date it was properly delivered to prison officials pursuant to prison's established procedures for prisoners' mail, which was within effective statute of limitations, rather than on date it was actually filed by clerk of court, which was after statute had expired. *Moore v. Twomey (2004) 120 Cal. App. 4th 910, 913-918, 16 Cal. Rptr. 3d 163*

Trial court erred in ordering prison to modify visiting area specially constructed for inmate charged with murder to visit with attorney, by removing glass between inmate and counsel, replacing it with wire mesh, by constructing pass-through at bottom of wire mesh for exchange of papers, and by further soundproofing room, when warden's

objective in having glass partition and secure mechanism for exchange of papers is to prevent introduction of contraband and thereby protect inmates, staff, and general public from possibility of assault, hostage-taking, and escape. *Small v. Superior Court (2000) 79 Cal. App. 4th 1000, 1010-1015, 94 Cal. Rptr. 2d 550*

Statutory right under *Pen. Code § 2625* for inmate to be present at hearings denying him reunification services with daughter does not equate with due process violation for failure to facilitate inmate's appearance; because inmate had appointed counsel present at hearings to represent his interests, he was afforded requisite due process rights. *In re Axsana S. (2000) 78 Cal. App. 4th 262, 92 Cal. Rptr. 2d 701*

In civil cases in which prisoners have no right to appear in court, courts are encouraged to devise alternative means to secure prisoners meaningful access to courts. *Hoversten v. Superior Court of San Luis Obispo (1999) 74 Cal. App. 4th 636, 642-643, 88 Cal. Rptr. 2d 197*

Installation of collect-call only telephones unconstitutionally deprived county jail inmates of access to public defenders. *In re Grimes (1989) 208 Cal. App. 3d 1175, 1182-1183, 256 Cal. Rptr. 690*

Right of privacy secured by *Cal. Const., art. I, § 1*, prohibits regulation that permits correspondence from court to be opened without prisoner present. *In re Short (1976) 55 Cal. App. 3d 268, 272, 127 Cal. Rptr. 498*

[2] Protection Against Cruel and Unusual Punishment

District court erred in requiring prisoner to show significant injury in order to state excessive force claim under *Eighth Amendment* prohibition of cruel and unusual punishment against corrections officers, where district court erred in giving decisive weight to purportedly de minimis nature of prisoner's injuries; to prevail, prisoner will ultimately have to prove that assault actually occurred and was carried out maliciously and sadistically rather than as part of a good-faith effort to maintain or restore discipline, and, even if he succeeds, relatively modest nature of his alleged injuries would no doubt limit damages he could recover. *Wilkins v. Gaddy (2010) -- U.S. --, 130 S. Ct. 1175, 1177-1180, 175 L. Ed. 2d 995*

Use of "cut-down" procedure to access prisoner's veins for purposes of lethal injection, under which prison personnel would make 2-inch incision in prisoner's arm or leg, procedure would take place one hour before scheduled execution, and only local anesthesia would be used, and there was no assurance physician would perform or even be present for procedure, which was necessary because due to years of drug abuse, prisoner had severely compromised peripheral veins which were inaccessible by standard techniques for gaining intravenous access such as needle, alleged violation of *Eighth Amendment* prohibition against cruel and unusual punishment, where prison officials conceded *42 U.S.C. § 1983* would be appropriate vehicle for inmate not facing execution to bring "deliberate indifference" challenge to constitutionality of cut-down procedure if used to gain venous access for purposes of providing medical treatment and there was no reason on face of complaint to treat claim differently solely because prisoner was condemned to die; and where cut-down was not statutorily mandated part of lethal injection protocol, and prisoner was able to present acceptable alternatives for gaining venous access. *Nelson v. Campbell (2004) 541 U.S. 637, 124 S. Ct. 2117, 2122-2125, 158 L. Ed. 2d 924*

Deliberate indifference standard applied when transsexual inmate was assaulted by another inmate after repeatedly requesting transfer to a different facility because of risk of harm. *Farmer v. Brennan (1994) 511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811*

Inmate exposed almost continuously to secondary tobacco smoke stated cause of action under *Eighth Amendment*. *Helling v. McKinney (1993) 509 U.S. 25, 35-37, 113 S. Ct. 2475, 125 L. Ed. 2d 22*

Prison officer's use of excessive force may constitute cruel and unusual punishment, even when inmate does not suffer

serious injury. *Hudson v. McMillian (1992) 503 U.S. 1, 7, 112 S. Ct. 995, 117 L. Ed. 2d 156*

Deliberate indifference standard applied to *Eighth Amendment* claims regarding conditions of confinement. *Wilson v. Seiter (1991) 501 U.S. 294, 297-303, 111 S. Ct. 2321, 115 L. Ed. 2d 271*

Shooting of inmate during attempt to stop prison riot is cruel and unusual punishment if undertaken maliciously and sadistically for very purpose of causing harm. *Whitley v. Albers (1986) 475 U.S. 312, 318-321, 106 S. Ct. 1078, 89 L. Ed. 2d 251*

Eighth Amendment protects persons convicted of crimes from cruel and unusual punishment; due process clause protects pretrial detainees from being subjected to conditions that constitute punishment; determining whether condition constitutes punishment requires consideration of whether it is reasonably related to legitimate government objective and whether there is proof of intent to punish. *Block v. Rutherford (1984) 468 U.S. 576, 583-585, 104 S. Ct. 3227, 82 L. Ed. 2d 438*

Overcrowding may amount to cruel and unusual punishment, if amounting to wanton and unnecessary infliction of pain or if grossly disproportionate to severity of crime. *Rhodes v. Chapman (1981) 452 U.S. 337, 347, 101 S. Ct. 2392, 69 L. Ed. 2d 59*

In action by prisoner for deprivation of exercise during lockdowns as violation of *Eighth Amendment*, trial court erred in granting summary judgment to prison officials, where cumulative total of the lockdowns amounted to much more than 30 days and facts justifying officials' exercise of discretion remained to be established at trial. *Richardson v. Runnels (9th Cir. 2010) 594 F.3d 666, 672*

In § 1983 action by state prison inmate alleging that he was beaten by his cellmate and prison officer was liable under *Eighth Amendment* for failing to abate known risk, instructions to jury that it could find for inmate only if jury concluded that officer took action so as to directly cause inmate's injuries misstated law, where direct causation by affirmative action was not necessary and officer could be held liable under *Eighth Amendment* if he knew inmate faced substantial risk of serious harm and disregarded risk by failing to take reasonable measures to abate it, and where failure to act instruction had foundation in evidence. Error was not harmless, because instructions added extra element to inmate's burden of proof, and because trial court never explained to jury what "deliberately indifferent" meant, despite that they were pivotal words on jury verdict form, and appellate court could not determine whether jury understood "deliberate indifference" to include affirmative act element, so that it could not say verdict would have been same without error. *Clem v. Lomeli (9th Cir. 2009) 566 F.3d 1177, 1181-1183*

Prisoner sufficiently alleged violation of his *Eighth Amendment* right to be free from cruel and unusual punishment when corrections officer deprived him of 16 meals over 23-day period to deny officer qualified immunity, where jury could find prisoner suffered sufficiently serious deprivation because food is one of life's basic necessities, and that officer was deliberately indifferent to obvious risk of harm; and where it was clearly established under *Eighth Amendment* that prison officials were obligated to provide inmates with nutritionally adequate meals on regular basis at time of deprivation of meals and reasonable corrections officer should have known that when inmate could have been fed without risk to officer's safety, as was assumed to be case here, officer could not arbitrarily deny inmate his meals. *Foster v. Runnels (9th Cir. 2009) 554 F.3d 807, 812-816*

California prison regulations governing inmate classification did not create cognizable *Eighth* or *Fourteenth Amendment* liberty interests, when classification of prisoners did not present type of atypical, significant deprivation in which state might conceivably create liberty interest. Further, California regulation allowing inmates to participate in publication and distribution of inmate publication only with institution head's specific approval did not create liberty interest importing *Fourteenth Amendment*, because prison official's determination that prisoner may not engage in publication and distribution of inmate publication also did not present type of atypical significant deprivation in which

state might conceivably create liberty interest. *Myron v. Terhune (9th Cir. 2007) 476 F.3d 716, 718-719*

Prisoner who was injured by defective printing press in course of his employment in prison print shop stated claim in action pursuant to *42 U.S.C. § 1983* for violation of *Eighth Amendment* prohibition against cruel and unusual punishment and for violation of *Fourteenth Amendment* prohibition of deprivation of liberty without due process by compelling him to work under dangerous conditions, resulting in his injury. Defendants were not entitled to qualified immunity on summary judgment motion, where evidence, viewed in light most favorable to prisoner, showed that supervisor violated prisoner's constitutional right not to be compelled to perform work that endangered his health and caused undue pain, and before injury, contours of right were sufficiently clear that reasonable prison official would or should have understood that compelling inmate to continue operating defective and dangerous prison work equipment would violate *Eighth Amendment*. *Morgan v. Morgensen (9th Cir. 2006) 465 F.3d 1041, 1045-1047*

Inmate sufficiently alleged failure-to-protect cause of action against prison personnel, when inmate alleged facts detailing religiously motivated violence and that prison officials knew violence and friction involved differences between prison's Muslim community over religious leadership and services at prison, yet did nothing to remedy situation, and facts that, when accepted as true and construed in light most favorable to inmate, raised inference prison officials created risk and then facilitated attacks against inmate. Inmate also sufficiently alleged cause of action for violation of *Eighth Amendment* in conditions by alleging serious health hazards in disciplinary segregation yard, including toilets that did not work, sinks that were rusted and stagnant pools of water infested with insects, and lack of cold water even though temperatures in yard exceeded 100 degrees, because in 100 degree plus weather, lack of drinkable water can be dangerous, precluding use of yard. *Hearns v. Terhune (9th Cir. 2005) 413 F.3d 1036, 1040-1043*

In prisoner's action alleging cruel and unusual punishment, trial court properly denied correctional officer's motion for summary judgment, when prisoner's handwritten declaration under oath in his opposition to officer's motion described vengeful acts of frustrated investigator, identifying officer's unconstitutional purpose and deeds, and to suppose any reasonable person, let alone trained prison officer, would not know that kicking helpless prisoner's genitals was cruel and unusual conduct was beyond belief. *Watts v. McKinney (9th Cir. 2005) 394 F.3d 710, 711*

Although prisoners have right to be free from sexual abuse, whether at hands of fellow inmates or prison guards, *Eighth Amendment's* protections do not necessarily extend to mere verbal sexual harassment. Thus, trial court properly dismissed inmate's claim of violation of *Eighth Amendment*, when guard was in elevated, glass-enclosed control booth where he allegedly exposed himself to inmate, isolated incident lasted for period of no more than 30 to 40 seconds, and guard never physically touched inmate, so that district court properly concluded incident was not sufficiently serious to constitute *Eighth Amendment* violation. *Austin v. Terhune (9th Cir. 2004) 367 F.3d 1167, 1171-1172*

District court properly rejected inmate's challenge to lethal injection as authorized and presumptive method of execution in California, based on alleged deficiencies in protocol, when court properly weighed undue delay in balance of equities since inmate was aware of potential for claim when he filed his first federal habeas petition, when Ninth Circuit had previously upheld constitutionality of lethal injection as method of execution, and when inmate failed to show he was subject to unnecessary risk of unconstitutional pain or suffering such that his execution by lethal injection under California's protocol must be restrained. *Cooper v. Rimmer (9th Cir. 2004) 358 F.3d 655, 656-659*

In inmate's action against prison guard for use of excessive force based on shooting inmate in leg during prison yard fight, guard was entitled to qualified immunity, when, although shooting passive, unarmed inmate standing near fight between other inmates, none of whom was armed, when no inmate was in danger of great bodily harm, would inflict unnecessary and wanton pain and governing law was clearly established at time of shooting, reasonable officer could have believed that shooting one inmate in leg to stop assault that could have seriously injured or killed another inmate was good-faith effort to restore order, and thus lawful. *Marquez v. Gutierrez (9th Cir. 2003) 322 F.3d 689*

Inmates in cells neighboring cell of two inmates who were fighting failed to establish that prison officials applied pepper spray maliciously and sadistically for purpose of causing harm in breaking up fight, when allegation that officials administered second application of pepper spray was dispensed after sounds of coughing and gagging were heard from cell alone does not lead to inference official used pepper spray maliciously and sadistically for purpose of causing harm, so that officials were protected by qualified immunity. *Clement v. Gomez (9th Cir. 2002) 298 F.3d 898, 903-904*

In class actions by prison inmates alleging violation of *U.S. Const., amend. VIII*, based on holding of inmates out-of-doors while prison officials searched prison facilities after quelling disturbances, trial court erroneously granted summary judgment to prison officials, when allegations in one action that inmates did not receive protection from elements sufficient to ward off heat-related illnesses, that inmates received inedible food and inadequate drinking water for four days, that inmates did not receive adequate access to toilets to avoid soiling themselves and were not allowed to clean themselves thereafter, and in the other action that inmates were exposed to subfreezing temperatures and lack of access to toilets, were sufficient to state claim under *Eighth Amendment*. *Johnson v. Lewis (9th Cir. 2000) 217 F.3d 726*

Prison officers acted with deliberate indifference to inmate's health and safety when inmate was forced to work without protection from asbestos exposure despite supervising officer's knowledge of potential exposure. *Wallis v. Baldwin (9th Cir. 1995) 70 F.3d 1074, 1076-1077*

Deliberate indifference is question of fact when plaintiff prisoner placed in cell with violent cellmate. *White v. Roper (9th Cir. 1990) 901 F.2d 1501, 1503-1506*

Complaint alleging unsanitary food handling and polluted water in prison sufficient to state *Eighth Amendment* claim. *Jackson v. Arizona (9th Cir. 1989) 885 F.2d 639, 641*

Prison overcrowding, requiring double and triple-celling, constituted *Eighth Amendment* violation. *Balla v. Idaho State Bd. of Corrections (9th Cir. 1989) 869 F.2d 461, 470-473*

Adequate lighting, plumbing, and fire prevention is required in prisons by *Eighth Amendment*. *Hoptowit v. Spellman (9th Cir. 1985) 753 F.2d 779, 783-784*

Eighth Amendment protection against cruel and unusual punishment does not attach unless there has been trial and sentencing; pretrial detainee protected by *due process clause of Fourteenth Amendment* rather than *Eighth Amendment*. *Ochoa v Superior Court (1985) 39 Cal. 3d 159, 174-175, 216 Cal. Rptr. 661, 703 P.2d 1*

There is no private right of action for damages for violation of *cruel or unusual punishment clause* of *Cal. Const., art. I, § 17*; thus, trial court properly dismissed claim of male-to-female transgender inmate based on defendants' alleged failure to take action on plaintiff's repeated complaints she was being beaten and raped by her cellmate at state prison. *Giraldo v. Dept. of Corrections & Rehabilitation (2008) 168 Cal. App. 4th 231, 253-257, 85 Cal. Rptr. 3d 371*

[3] Medical Care

Court of Appeals erred in concluding that prisoner's allegations concerning harm caused him by the termination of his medication to treat hepatitis C were too conclusory to establish for pleading purposes that prisoner had suffered cognizable independent harm as result of removal from hepatitis C treatment program, where Fed. Rule *Civ. Proc. 8(a)(2)* required only short and plain statement of claim showing pleader was entitled to relief; complaint alleged that decision to remove prisoner from prescribed hepatitis C medication was endangering his life, medication was withheld shortly after he had commenced treatment program that would take one year, he was still in need of treatment for

disease, and prison officials were refusing to provide treatment, which was enough to satisfy Rule 8(a)(2); and prisoner bolstered his claim by making more specific allegations in documents attached to complaint and in later filings. *Erickson v. Pardus (2007) 551 U.S. 89, 127 S. Ct. 2197, 2197-2200, 167 L. Ed. 2d 1081, 1083-1086*

In case of alleged failure to provide adequate medical care to prisoner, question is whether defendants acted with deliberate indifference to prisoner's serious medical needs. *Estelle v. Gamble (1976) 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251*

In action by pretrial detainee's parents under *42 U.S.C. § 1983* against mental health specialist, two sheriff's deputies, and the county, resulting detainee's suicide while in custody, alleging deliberate indifference to his serious medical needs, and county's established policies, its failure to train employees, and its ratification of the officials' illegal actions, district erred in granting summary judgment to mental health specialist on grounds of qualified immunity, where, viewing evidence in light most favorable to parents, rational jury could conclude she was "on notice" of detainee's suicidal condition and actually knew of his depressive, suicidal condition and need for mental health treatment and of risk of harm he faced if denied medical attention, so there was genuine issue of material fact as to whether she was deliberately indifferent to substantial risk of harm to him; and where, in light of her understanding that he was not "out of the woods" yet and of clearly established law at time, reasonable mental health professional could not have thought it was lawful to remove key suicide prevention measures put in place by prior mental health staff member. District court properly granted summary judgment to one deputy, where parents' evidence was insufficient to allow reasonable jury to conclude he knew detainee was subject to substantial risk of serious harm when he moved him to general population, and no evidence raised genuine issue of material fact demonstrating he was subjectively aware of risk to detainee. District court also properly granted summary judgment to other deputy, where record did not include sufficient direct or circumstantial evidence to create genuine issue of material fact as to whether deputy was subjectively aware of substantial risk of harm to deputy and he deliberately ignored that risk. District court did not err in granting summary judgment in favor of county, where, although reasonable jury could conclude custodial and mental health staff were deficient in their implementation of county's written policy because they failed to ensure they had approval of mental health staff before moving detainee, this did not create triable issue of fact on whether county itself was liable for deficiency, and there was no evidence county had longstanding custom or practice of moving detainees from observation cell into general population without consultation with mental health staff or contrary to their recommendations or of longstanding custom or practice of miscommunication between mental health staff and custodial staff, nothing indicated that improper transfers of suicidal inmates happened so frequently that need for corrective measures must have been plainly obvious to policymakers, and there was no material evidence on issue of county's knowledge or obviousness of problem; where parents failed to dispute county's evidence it was not deliberately indifferent to needs of mentally ill pretrial detainees, based on reasonable and well-established written policies for handling detainee mental health needs; where parents failed to adduce evidence that county was on actual or constructive notice of problem with mental health understaffing amounting to constitutional tort, and there was no evidence that alleged understaffing problem led to repeated violations of inmates' constitutional rights or county was aware of and acquiesced in pattern of constitutional violations; and where bare allegation of parents that county was liable for constitutional torts of its employees because it ratified employees' unconstitutional acts was insufficient to create triable issue of fact. *Clouthier v. County of Contra Costa (9th Cir. 2010) 591 F.3d 1232, 1240-1254*

District court erred in granting summary judgment and police officers could be liable to children of arrestee who committed suicide while in their custody, where children presented sufficient objective evidence of their mother's objective, serious medical need for reasonable jury to find in their favor; where children presented sufficient circumstantial evidence to create genuine issue of fact regarding officers' subjective awareness of her serious medical need and whether officers responded adequately to situation presented; where children presented sufficient evidence of actual and proximate causation to defeat summary judgment and give rise to jury question whether officers' omissions caused her eventual suicide; and where officers were not entitled to qualified immunity, because it was clearly established that *Eighth Amendment* protected against deliberate indifference to detainee's serious risk of suicide. With regard to liability of city, children established genuine issue of fact on question of city's failure to train its officers in

suicide prevention and identification of suicide risks, that failure to train officers produced highly predictable consequence that police officers would fail to respond to serious risks of suicide and constitutional violations will ensue, and that had city trained its officers, violation of arrestee's constitutional rights could have been avoided; and children also presented sufficient evidence of city's failure to adopt and implement suicide-prevention policies so as to give rise to jury question. However, there was no evidence city should have known or did know that one officer would have been likely to show deliberate indifference in these circumstances and causal link between city's failure to address his deficient performance in other aspects of his job and his failure to respond appropriately here was tenuous at best; further, failure to discipline officers was not separate ground for establishing municipal liability, but, rather, was evidence tending to establish absence of or failure to enforce policy on suicide prevention. *Conn v. City of Reno (9th Cir. 2009) 572 F.3d 1047, 1054-1065*

Wife of county jail inmate who suffered from congestive heart failure and who died in custody as result of cardiac arrest presented sufficient evidence to create triable issue regarding county's liability for her husband's death. Complaint raised genuine issue of triable fact regarding whether county medical facility staff acted with deliberate indifference to his serious medical needs in violation of *Eighth Amendment*, since evidence created triable issue of fact regarding whether county's policy of relying on medical professionals without training them how to implement proper procedures for documenting, monitoring, and assessing patients for medical instability within confines of medical facility amounted to deliberate indifference, as to which policy of hiring trained medical professionals did not insulate county from municipal liability as matter of law. Further, evidence created triable issue regarding whether county's failure to implement policy for responding to fall of medically unstable patient, policy providing for prompt medical assessment if patient refused necessary treatment, and transfer policy directing staff immediately to transfer patients no longer medically stable, amounted to deliberate indifference to inmate's constitutional rights. Lastly, evidence created triable issue as to whether county's policy deficiencies were moving force behind inmate's death. *Long v. County of Los Angeles (9th Cir. 2006) 442 F.3d 1178, 1185-1190*

District court erred in adopting magistrate judge's Findings and Recommendation to grant two prison doctors and warden summary judgment motion in inmate's action alleging defendants violated his constitutional rights by being deliberately indifferent to his serious medical needs in violation of the *Eighth Amendment* as result of treatment he received for fractured thumb. Inmate presented sufficient evidence to have finder of fact decide when first doctor knew of inmate's fractured thumb and his need to have it set and cast and whether care provided by doctor constituted deliberate indifference to inmate's serious medical need. As to second doctor and warden, as prison administrators they would be liable for deliberate indifference if they knowingly failed to respond to inmate's requests for help, and although in answers to interrogatories, both advised they were not aware of inmate's condition until lawsuit, inmate was entitled to inference at summary judgment stage that they received letters he swore he sent to them through institutional mail advising of his fractured thumb and need to see orthopedist. *Jett v. Penner (9th Cir. 2006) 439 F.3d 1091, 1096-1099*

Parents of inmate being treated for psychological disorders and withdrawal from crystal methamphetamine, who died from combined toxic effect of two prescribed drugs, failed to present triable issue of fact of physician's deliberate indifference to inmate's medical needs in violation of *Eighth Amendment* and district court property granted summary judgment in favor of physician. Record, viewed in light most favorable to parents, reflected that physician was consistently responsive to inmate's medical needs, and no genuine issue of fact was raised regarding physician's subjective knowledge and conscious disregard of substantial risk of serious injury to inmate. Court would not reach question of whether physician's responses were medically reasonable given inmate's medical condition and background. *Toguchi v. Chung (9th Cir. 2004) 391 F.3d 1051, 1058-1060*

District court properly dismissed inmate's claim of deliberate indifference to medical need, when there was no medical evidence to support inmate's contention that guard's alleged sexual harassment of inmate by exposing himself to inmate exacerbated inmate's mental health condition or that guard acted intentionally to deny, delay, or interfere with inmate's mental health treatment. *Austin v. Terhune (9th Cir. 2004) 367 F.3d 1167, 1172*

Diabetic pretrial detainee presented sufficient evidence of officers' deliberate indifference to his medical needs to overcome summary judgment motion, when officers near detainee in holding cell or present when detainee was carried to medical observation cell were on notice of diabetic condition and his need for food, and although there was no direct evidence officers knew risk of harm from diabetes, officers' indifference to detainee's extreme behavior, his obviously sickly appearance, and his explicit statements that he needed food because he was diabetic could easily lead jury to find officers consciously disregarded serious risk to his health. *Lolli v. County of Orange (9th Cir. 2003) 351 F.3d 410, 418-421*

In claim of deliberate indifference to medical needs of prison inmates based on prison officials not allowing inmates in secured housing unit to shower or have medical attention for four hours after administration of pepper spray to neighboring cell to stop two inmates from fighting, officials were not entitled to qualified immunity, when prisoners might be able to show officials were subjectively aware of risk of serious injury when they denied showers and medical attention for the inmates for four-hour period, since officers allegedly took turns stepping outside for fresh air and allegedly coughed and gagged in hall, and since prisoners allegedly made repeated requests for attention, complaining of breathing problems, pain, and asthma attacks, and officers' decision to open yard door and place industrial fan in doorway suggested pepper spray did not entirely dissipate at once and officers may have been aware of condition, and when general law regarding medical treatment of prisoners was clearly established at time of incident and it was also clearly established that officers could not intentionally deny or delay access to medical care. Further, inmates claimed supervisory officials failed to institute adequate prison policies for minimizing effects of pepper spray on bystander inmates. *Clement v. Gomez (9th Cir. 2002) 298 F.3d 898, 904-906*

Trial court erroneously granted summary judgment to county in *42 U.S.C. § 1983* action based on death of jail detainee who displayed symptoms of being in manic state, which included being combative and uncooperative, when record demonstrated that county's failure to respond to detainee's urgent need for medical attention was direct result of affirmative county medical screening policy that was deliberately indifferent to his need, based on policy to delay screening if inmate was combative, uncooperative, or unable to effectively answer questions due to intoxication, and there was evidence to support inference that if medical staff had evaluated him, prevented him from entering jail, and directed him to mental hospital, he almost certainly would have received care he needed, rather than face conditions that worsened heart condition leading to his death; and when plethora of circumstantial evidence could lead reasonable jury to infer that county was aware of risk its policies presented. Further, jury could find nurse who was on duty at jail on night of detainee's death was deliberately indifferent to his serious medical needs, that nurse's constitutional violation arguably resulted from omission in county's policy regarding handling of prescription medication by failing to suggest that nurse act on any information that medication might bear, even in event nurse was unable to perform medical evaluation because policy precluded medical evaluations when detainee is uncooperative, combative, or intoxicated, and that this omission was sufficiently likely to result in violation of detainee's right to medical care that county was deliberately indifferent to these needs. However, record did not support conclusion that individual defendant deputies who had contact with detainee after he was admitted to jail were deliberately indifferent to his mental health condition, when there was no evidenced deputies knew of his mental health condition. *Gibson v. County of Washoe (9th Cir. 2002) 290 F.3d 1175, 1187*

District court made extensive factual findings with regard to mental health and dental services and properly concluded that female inmates failed to prove that quality and availability of services fell below minimum required by *Eighth Amendment* in determining that PLRA prevented district court from granting their motion to extend consent decree. Plaintiffs failed to establish that dental care, including delays in providing treatment and lack of routine teeth cleaning, sanctions imposed by prison officials for self-harm behavior, a handful of incidents in which force was used on mentally ill prisoners in absence of consultations with mental health staff, low staffing levels, or policies with regard to prisoner transfers, mental health segregation, medication management, or Offender Health Plan showed deliberate indifference to prisoners' medical needs. *Hallett v. Morgan (9th Cir. 2002) 287 F.3d 1193*

Deliberate indifference to medical needs amounts to *Eighth Amendment* violation only if those needs are serious; serious medical needs exist if failure to treat prisoner's condition could result in further significant injury or "unnecessary and wanton infliction of pain." *McGuckin v. Smith (9th Cir. 1992) 974 F.2d 1050, 1059*

Even without denial of access to medical and psychiatric help, deliberate indifference to medical needs occurs when psychiatric staff is so inadequate that any psychological illness would go undiagnosed and untreated. *Cabrales v. County of Los Angeles (9th Cir. 1988) 864 F.2d 1454, 1461*

Violation of *Eighth Amendment* proscription against cruel and unusual punishment based on inadequate medical care requires deliberate indifference to serious medical needs of prisoners; mere negligence in diagnosing or treating medical condition, without more, does not violate prisoner's rights. *Hutchinson v. United States (9th Cir. 1988) 838 F.2d 390, 394*

Mentally disordered offenders civilly committed after completing parole can be compelled to take antipsychotic medication in nonemergency situation only if court, at time offender is committed or recommitted or in separate proceeding, finds offender is incompetent or incapable of making decisions about his or her medical treatment or offender is dangerous within meaning of *Welf. & Inst. Code § 5300*. *In re Qawi (2004) 32 Cal. 4th 1, 9-10, 14-28, 7 Cal. Rptr. 3d 780, 81 P.3d 224*

Medical condition of juvenile's probation that he continue to take medications prescribed by physician was not overbroad, where record showed trial court intended medication condition to have narrow scope and condition had to be construed as only requiring him to continue taking medications prescribed by his doctors for depression and social anxiety disorder. Condition did not violate juvenile's constitutional privacy or liberty rights, where there was no factual support that antidepressants and anxiolytics covered by condition would impair his ability to function, would produce wholesale personality changes, or would threaten life-altering side effects, and he reported no troubling side effects from medications; where independent medical input was supplied to satisfaction of juvenile and his family by their own chosen doctors, who had independently prescribed psychotropic medication and would continue, under condition of probation, to determine medically appropriate course of treatment; and where, because he was already taking psychotropic medications for depression and social anxiety disorder and apparently had no objection to continuing to do so, aspect of involuntary administration of unwanted mind-altering drugs did not come into play. *In re Luis F. (2009) 177 Cal. App. 4th 176, 184-192, 99 Cal. Rptr. 3d 174*

Appointment by federal district of receiver to provide leadership and executive management of California prison medical health care delivery system with goals of restructuring day-to-day operations and developing, implementing, and validating new, sustainable system to provide constitutionally adequate medical care as soon as practicable, under which receiver was given duty to control, oversee, supervise, and direct all administrative, personnel, financial, accounting, contractual, legal, and other operational functions of the medical delivery component of California Department of Corrections and Rehabilitation and to undertake immediate and/or short-term measures designed to improve medical care, did not divest California courts of their constitutional jurisdiction over matters raised through habeas corpus, and receiver was subject to jurisdiction, and both warden having physical custody of inmate and receiver were necessary and proper parties to respond in such actions. *In re Estevez (2008) 165 Cal. App. 4th 1445, 1457-1463, 83 Cal. Rptr. 3d 479*

Constitutional right of mentally disordered offender to fair hearing was violated by order authorizing state hospital to forcibly administer psychotropic medication issued at hearing at which he was absent, where he did not personally waive his right to be present and was not unable to attend hearing, but deprivation of his right to be present was harmless beyond reasonable doubt, because his counsel thoroughly cross-examined witness whose testimony was compelling and who testified offender was physically aggressive before medication was administered and he was responding to the medication and offender, who was thereafter present, was given full and fair opportunity to rebut testimony but did not do so. Offender was not denied right to jury trial, because there is no federal or state constitutional

or state statutory right to jury trial, and substantial evidence supported trial court's finding that he was danger to others within meaning of *Welf & Inst. Code § 5300*. *People v. Fisher (2009) 172 Cal. App. 4th 1006, 1012-1017, 91 Cal. Rptr. 3d 609*

[4] Exercise

In inmate's action alleging denial of outdoor exercise during lockdown periods, which were based on inmate violence toward guards, staff, and other inmates, jury instruction correctly stated deliberate indifference standard, but failure to give additional guidance on deference jury was required to give to expert judgment of prison officials rendered instruction incomplete and misleading, which was prejudicial, because if properly instructed, jurors might well have reached different conclusion. Further, prison officials were entitled to qualified immunity, where inmate's constitutional right to outdoor exercise was not absolute and indefeasible and did not trump all other considerations, and officials had substantial reasons for imposing lockdowns in attempting to restore order during series of brutal attacks, including some that were lethal or nearly so; and where great deal of violence took place during outdoor exercise, and, while denying outdoor exercise for extended periods carried some risk of harm, officials' judgment that there was greater risk of harm from allowing outdoor exercise was reasonable. *Norwood v. Vance (9th Cir. 2009) 572 F.3d 626, 630-633*

Appeals officer's handwritten statement warning inmate to be careful what he writes on grievance forms was sufficient to establish genuine issue of material fact as to whether it constituted adverse action in claim for retaliation for exercise of *First Amendment* right of filing grievances, where mere threat of harm could be adverse action regardless of whether it was carried out and threat of harm was not required to be explicit and specific to constitute an adverse action; where, despite any disrespectful language by inmate, it was undisputed that warning was motivated by protected conduct; where reasonable person may have been chilled by officer's warning; and where there was no indication that language in written complaint like one filed by inmate posed substantial threat to security and discipline in prison facility. *Brodheim v. Cry (9th Cir. 2009) 584 F.3d 1262, 1269-1273*

Trial court erred by terminating order in class action giving pretrial detainees in administrative segregation at county jail limited access to regular exercise, where showing that pretrial detainees in administrative segregation and other restrictive classifications, such as protective custody, were typically afforded, at best, only 90 minutes weekly in space equipped for exercise establish § 1983 violation, and where order requiring inmates in administrative segregation to be permitted exercise at least twice each week for total of not less than two hours per week was necessary to correct current and ongoing violation of federal right and was narrowly drawn and least intrusive means to correct violation. *Pierce v. County of Orange (9th Cir. 2008) 519 F.3d 985, 1005-1007*

Claim of cruel and unusual punishment based on deprivation of exercise requires that prison officials act with deliberate indifference, and fail to meet minimal civilized measure of life's necessities. *Allen v. Sakai (9th Cir. 1994) 48 F.3d 1082, 1087 , cert. denied, 514 U.S. 1065 (1995)*

[5] Equal Protection

Strict scrutiny is proper standard of review for California Department of Corrections' unwritten policy of racially segregating prisoners in double cells in reception centers for up to 60 days each time they enter new correctional facility. Court would not decide whether policy violated *Equal Protection Clause*. *Johnson v. California (2005) 543 U.S. 499, 125 S. Ct. 1141, 1146-1152, 160 L. Ed. 2d 949*

Racial segregation is forbidden in prisons and violates *equal protection clause of Fourteenth Amendment*. *Lee v. Washington (1968) 390 U.S. 333, 333-334, 88 S. Ct. 994, 19 L. Ed. 2d 1212*

In equal protection action by prisoner based on allegedly racially discriminatory lockdowns, resulting from assaults

believed to be perpetrated or planned by African-American prisoners, leading to lockdown of all African-American inmates in particular unit of prison, trial court erred in granting defendants summary judgment, where defendants apparently believed that without showing any linkage between perpetrators and prisoners subjected to lockdown, it was enough to assume that race alone tied together perpetrators and larger group, which was impermissible assumption grounded on race, and under strict-scrutiny standard for racial classifications in prisons, and even under reasonableness standard applied, assertion that it was sufficient for prison officials simply to believe there to be link between individual incident perpetrated by one or two inmates and risk of violence from all African-American prisoners in facility, with no evidentiary basis whatever indicated for belief, fell short. *Richardson v. Runnels (9th Cir. 2010) 594 F.3d 666, 670-672*

Black inmate alleged claim for denial of equal protection by alleging that during three prison lockdowns resulting from racially related violence involving black inmates, he was not allowed to resume his prison job on critical-worker status until after similarly situated inmates of other races were, when, although *Due Process Clause of Fourteenth Amendment* does not create property or liberty interest in prison employment, racial discrimination in assignment of jobs violates equal protection. Further, it was clear from defendants' evidence in support of summary judgment that they explicitly considered race in determining threshold ineligibility for critical-worker status so that inmate was not required to prove discriminatory intent. However, defendants were entitled to qualified immunity, when while it was well-established that racial discrimination in assignment of prison jobs is unconstitutional, it was not clearly established that such race-based differentiation was unconstitutional in context of prison-wide lockdown instituted in response to gang- or race-based violence. *Walker v. Gomez (9th Cir. 2004) 370 F.3d 969, 973-978*

Inmate alleged sufficient facts to convince reasonable trier of fact by preponderance of the evidence that prison hearing officer's decision not to allow live witness testimony in disciplinary proceeding was racially motivated, when, although officer's racial remarks came directly in response to inmate's own infusion of race into hearing, inmate alleged that officer made specific, racially tinged remarks during hearing, creating genuine issue of material fact as to whether officer's actions violated *Equal Protection Clause*. *Serrano v. Francis (9th Cir. 2003) 345 F.3d 1071, 1081*

Use of race as dominant factor in making housing assignments during initial 60-day detention period to determine appropriate permanent housing for prison inmates does not constitute impermissible racial classification because temporary housing policy is reasonably related to prison administrators' concern for increased racial violence. *Johnson v. California (9th Cir. 2003) 321 F.3d 791, 796-807*

Prison sentence does not deprive person of equal protection of law; censorship of reading materials for racial content or opinion violates *equal protection clause*. *Jackson v. Godwin (5th Cir. 1968) 400 F.2d 529, 532*

Any difference in privileges or treatment of inmates that results from classification based on gender is suspect under the state constitution. *Inmates of Sybil Brand Inst. for Women v. Los Angeles County (1982) 130 Cal. App. 3d 89, 99-103, 181 Cal. Rptr. 599*

Denial of access to minimum security jail facilities and privileges for male prisoners was denial of equal protection. *Molar v. Gates (1979) 98 Cal. App. 3d 1, 20, 159 Cal. Rptr. 239*

[6] Due Process of Law

Approval of forced medication solely to render criminal defendant competent to stand trial was erroneous, where defendant was not dangerous; experts conceded their proposed medications had "significant" side effects and in making their "cost-benefit" judgments, they primarily took into account his dangerousness, not need to bring him to trial and court could not tell whether side effects of antipsychotic medication were likely to undermine fairness of trial, and lower courts did not consider that he has already been confined for long period of time and his refusal to take

antipsychotic drugs could result in further lengthy confinement. *Sell v. United States (2003) 539 U.S. 166, 123 S. Ct. 2174, 2186-2187, 156 L. Ed. 2d 197*

Prisoner who was not allowed witnesses at disciplinary hearing was not denied due process of law, when result was neither atypical nor a significant hardship in relation to ordinary incidents of prison life. *Sandin v. Conner (1995) 515 U.S. 472, 485-487, 115 S. Ct. 2293, 132 L. Ed. 2d 418*

Forced administration of antipsychotic medication to criminal defendant during trial violated his *Fourteenth Amendment* due process rights, because state failed to make required showing of both overriding justification and determination of medical appropriateness. *Riggins v. Nevada (1992) 504 U.S. 127, 135, 112 S. Ct. 1810, 118 L. Ed. 2d 479*

Due process does not require judicial hearing before subjecting state prisoner to involuntary treatment with antipsychotic drugs; nonjudicial hearing before committee made up of psychiatrist, psychologist, and prison official, none of whom were involved in prisoner's treatment or diagnosis, sufficient protection for prisoner. *State of Washington v. Harper (1990) 494 U.S. 210, 219-226, 110 S. Ct. 1028, 108 L. Ed. 2d 178*

Judicial review of lock-up placement decision, for due process, limited to determining whether there is some evidence in record to support lock-up placement decision. *Superintendent v. Hill (1985) 472 U.S. 445, 455-457, 105 S. Ct. 2768, 86 L. Ed. 2d 356*

Due process clause of *U.S. Const., amend. XIV* does not require prison officials' reasons for refusal to call witnesses requested by inmate at his or her disciplinary hearing to appear in administrative record; explanation could later be entered in court record or introduced in court testimony. *Ponte v. Real (1985) 471 U.S. 491, 496-497, 105 S. Ct. 2192, 85 L. Ed. 2d 553*

Complaint alleging that prisoner was unnecessarily placed in segregation without prior hearing stated cause of action under *42 U.S.C. § 1983* for violation of due process rights. *Hughes v. Rowe (1980) 449 U.S. 5, 9-12, 101 S. Ct. 173, 66 L. Ed. 2d 163*

Involuntary transfer of state prisoner to state mental hospital without notice and adversary hearing violates *due process clause of Fourteenth Amendment*. *Vitek v. Jones (1980) 445 U.S. 480, 488-489, 100 S. Ct. 1254, 63 L. Ed. 2d 552*

Prisoners have right to minimum requirements of procedural due process (notice and hearing) in connection with discipline determinations involving serious misconduct. *Baxter v. Palmigiano (1976) 425 U.S. 308, 315, 96 S. Ct. 1551, 47 L. Ed. 2d 810* ; *Wolff v. McDonnell (1974) 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L. Ed. 2d 935*

Hearing before revocation of parole is due process requirement of *U.S. Const., amend. XIV*. *Morrissey v. Brewer (1972) 408 U.S. 471, 480-482, 92 S. Ct. 2593, 33 L. Ed. 2d 484* ; *People v. Vickers (1972) 8 Cal. 3d 451, 461-462, 105 Cal. Rptr. 305, 503 P.2d 1313*

In action by pretrial detainee against sheriff and sheriff's department officers in their official capacity, based on over-detention of the detainee, district court properly granted defendants summary judgment, where plaintiff failed to present evidence from which reasonable jury could find defendants had policy, practice, or custom of over-detaining inmates. District court also properly granted defendants summary judgment on claim defendants coerced him to execute involuntary waiver of his civil rights claim based on over-detention, where was no underlying constitutional right to be free of coercive waiver, and plaintiff could raise coercive nature of waiver in response to defendants' assertion of waiver as affirmative defense to civil rights claim; where defendants' actions did not interfere with plaintiff's access to the courts as he did file civil rights action and district court considered his claims on merits; and where, even if there were constitutional claim to be free from coerced waiver, in light of dearth of precedent so holding, defendants would have

been entitled to qualified immunity. District court properly dismissed claim of conspiracies to over-detain and to coerce settlement, because plaintiff's underlying claims for over-detention and coerced settlement were properly dismissed. *Avalos v. Baca (9th Cir. 2010) 596 F.3d 583, 587-592*

In action by pretrial detainees against sheriff in his official capacity for pursuing policy of deliberate indifference to their constitutional rights resulting in unlawful periods of over-detention in jail after court authorized their release, trial court properly granted sheriff summary judgment, where, although sheriff did not dispute he acted on behalf of official policy of county, evidence submitted did not support finding of deliberate indifference, because sheriff's department had undergone extensive revision of its process for releasing inmates, and, although there continued to be over-detentions, they were very small percentage of total number of inmate releases, which were due to employee negligence or honest mistakes, and given sheriff's department's many affirmative efforts to remedy problem, evidence would not support finding of policy of deliberate indifference and plaintiffs' evidence did not raise any material issue of fact. *Mortimer v. Baca (9th Cir. 2010) 594 F.3d 714, 722-723*

In action by prisoner for denial of due process based on his administrative segregation for 15 days as result of his suspected involvement with prison gang, trial court properly granted prison officials summary judgment, where this deprivation of liberty did not constitute atypical and significant hardship in relation to ordinary incidents of prison life. *Richard v. Runnels (9th Cir. 2010) 594 F.3d 666, 672-673*

In action by pretrial detainees against sheriff in his official capacity for pursuing policy of deliberate indifference to their constitutional rights resulting in unlawful periods of over detention in jail after court authorized their release from jail, trial court erred in granting summary judgment to sheriff, when detainees possessed constitutional right to freedom from imprisonment within reasonable time after they were judicially determined to be innocent of charges against them; existence of municipal policy was uncontested; and question of whether policies or lack of policies to expedite process amounted to policy of deliberate indifference to plaintiffs' constitutional rights was properly jury determination. *Berry v. Baca (9th Cir. 2004) 379 F.3d 764, 767-773*

Trial court erroneously dismissed claim by inmate alleging retaliation for filing grievance against discipline imposed on inmate, when although it was understandable that trial court did not focus on *First Amendment* aspects of retaliation claim because pleading was woefully inartful and complaint did not expressly refer to First Amendment, complaint did allege that inmate was punished for filing grievance, which, under Fed. Rule *Civ. Proc. 8*, was enough. Further, complaint at least minimally informed parties and court of retaliation claim, since jury could find that administrative segregation was natural and proximate result of guard's filing false report accusing inmate of violating prison rules and could also infer that guard intended that result, and acted only after inmate said he planned to report incident to prison officials. *Austin v. Terhune (9th Cir. 2004) 367 F.3d 1167, 1170-1171*

Inmate alleged facts sufficient to state claim for denial of due process based on transfer to secured housing unit ("SHU") that occurred after he successfully appealed rule violation order, when inmate alleged loss of privileges, confiscation of and damage to personal property and distance housing in SHU created between himself and friends and family and that transfer to SHU created major disruption in his environment when compared with conditions he experienced as part of general prison population. *Jackson v. Carey (9th Cir. 2003) 353 F.3d 750, 755-756*

Prison inmate was not denied due process of law by validation as a gang member, despite previous findings of insufficient evidence to validate him as gang member, when prison officials provided him with notice of charges against him and opportunity to present his views to prison official charged with deciding whether to transfer him to administrative segregation, and when there was evidence in record to support conclusion he had ties to gang, including Los Angeles Sheriff's Department report he was associate of gang and another gang, probation report noting his codefendant on his underlying conviction was also validated as member of same gang, and statement of confidential prison informant. *Bruce v. Ylst (9th Cir. 2003) 351 F.3d 1283, 1287-1288*

Although administrative segregation alone does not implicate protected liberty interest, inmate's disability coupled with administrative segregation in segregated housing unit not designed for disabled persons gave rise to protected liberty interest, when inmate wallowed in non-handicapped-accessible housing unit for nearly two months, 25 days of which immediately followed being sentenced to year-long term in unit; during his time in unit, inmate was denied use of his wheelchair, which he was permitted to use in general population; and inmate alleged he could not take proper shower, he could not use toilet without hoisting himself up by seat, he had to crawl into bed by his arms, he could not partake in outdoor exercise in yard, and he was forced to drag himself around vermin- and cockroach-infested floor. *Serrano v. Francis (9th Cir. 2003) 345 F.3d 1071, 1078-1079*

California's parole scheme gives rise to a cognizable liberty interest in release on parole; requirements of due process are satisfied if some evidence supports decision. *Biggs v. Terhune (9th Cir. 2003) 334 F.3d 910, 914-915* ; *McQuillion v. Duncan (9th Cir. 2002) 306 F.3d 895, 902-904*

Inmate's claimed loss of liberty interest in processing of his administrative appeals of disciplinary conviction did not satisfy standard that prison officials' action must deprive or restrain state-created liberty interest in some "unexpected manner," because inmates lack separate constitutional entitlement to specific prison grievance procedure. Further, court of appeal remanded issue of whether conditions of administrative segregation denied state prison inmate due process, when district court did not consider whether inmate's disciplinary segregation imposed atypical and significant hardship warranting additional due process protections during disciplinary hearing, inmate's objections included allegations that segregated unit was overcrowded and violent and isolation severed ties to his family, inmate alleged that during his segregation he was made patient of psychiatric programs, and inmate was segregated for a period of two years, and length of confinement could not be ignored in deciding whether confinement met constitutional standards. *Ramirez v. Galaza (9th Cir. 2003) 334 F.3d 850, 860-861*

Even though pretrial detainee made free and deliberate choice to ingest drugs in absence of intimidation and coercion, her understanding of what drugs she was taking and their potential side effects was essential for her consent to medication to be deemed voluntary, and jail staff's not disclosing any of this information to her could make her acceptance of prescribed medication involuntary in violation of due process clause. However, in light of detainee's training as practical nurse, her prior knowledge of drugs, her prior drug history, and fact she did not ask for further information regarding drugs she was taking, court properly decided her decision to ingest drugs was voluntary, and in this context, jail staff had no affirmative duty to volunteer information about the drugs. *Benson v. Terhune (9th Cir. 2002) 304 F.3d 874, 882-886*

Prison officials' denial to pretrial detainee of use of telephone because of fear he would tip off recently indicted cohorts did not violate detainee's procedural or substantive due process rights, when state statute regarding prisoners' phone use entitled prisoner to "reasonable access" to telephone and provided prison officials with discretion to determine what is reasonable access under circumstances so that detainee did not have state-created liberty interest in using telephone during his pretrial confinement, and when restriction was not based on express intent to inflict punishment and restriction was reasonably related to government's legitimate interest in ensuring safety of police officers when executing arrests and in preventing detainee from helping his co-conspirators elude arrest; further restriction was only in place for short time and only for as long as it served its stated purpose. *Valdez v. Rosenbaum (9th Cir. 2002) 302 F.3d 1039, 1044-1047*

Prisoner has a more limited sphere of liberty and property rights than an unimprisoned individual. *Burnsworth v. Gunderson (9th Cir. 1999) 179 F.3d 771, 774*

Due process requires that prisoner be allowed to present his or her views to decision maker regarding transfer to administrative segregation; due process not violated by use of polygraph examinations; 120-day periodic review of administrative segregation decision satisfied due process. *Toussaint v. McCarthy (9th Cir. 1990) 926 F.2d 800, 802-804 , cert. denied, 502 U.S. 874 (1991)*

Placement of prisoner in administrative segregation when only evidence was uncorroborated hearsay statements of confidential informant violated prisoner's due process rights. *Cato v. Rushen (9th Cir. 1987) 824 F.2d 703, 704-706*

Procedural due process not violated by five-month lockdown without hearing following series of killings. *Hayward v. Procunier (9th Cir. 1980) 629 F.2d 599, 603 , cert. denied, 451 U.S. 937 (1981)*

Trial court erroneously authorized involuntary administration of antipsychotic medications, where trial court's order was not supported by substantial evidence that it was substantially likely involuntary administration of medication would render him competent to stand trial. *People v. McDuffie (2006) 144 Cal. App. 4th 880, 886-888, 50 Cal. Rptr. 3d 794*

After finding criminal defendant facing violent felony charges incompetent to stand trial, trial court's authorization of state hospital to administer antipsychotic drugs against his will in effort to restore his competency violated defendant's due process liberty interest protecting against being involuntarily medicated. Only governmental interest identified by trial court was bringing defendant to trial, which was important consideration under constitutional standard, but trial court did not consider any facts or circumstances of particular case before it. In addition, even if brutal nature of crimes alleged were sufficient to satisfy constitutional and statutory elements, there was insufficient showing of existence of other factors to uphold order. *Carter v. Superior Court (2006) 141 Cal. App. 4th 992, 999-1005, 46 Cal. Rptr. 3d 507*

Sufficient evidence supported prison officials' finding of inmate guilty of possession of controlled substance based on THC-positive urinalysis result standing alone, because THC in urine sample was some evidence that he had possessed marijuana in violation of prison rules. *In re Dikes (2004) 121 Cal. App. 4th 825, 830-834, 18 Cal. Rptr. 3d 9*

Any order concerning child custody and visitation must comport with due process. *Hoversten v. Superior Court of San Luis Obispo (1999) 74 Cal. App. 4th 636, 641, 88 Cal. Rptr. 2d 197* ; *McLaughlin v. Superior Court (1983) 140 Cal. App. 3d 473, 483, 189 Cal. Rptr. 479*

State officials may not subject prisoners to certain long-term involuntary medication without adhering to procedural requirements contained in specified provisions of Lanterman-Petris-Short Act (*Welf. & Inst. Code § 5000 et seq.*). *Keyhea v. Rushen (1986) 178 Cal. App. 3d 526, 530, 223 Cal. Rptr. 746*

[7] Good Time Credits

Prisoners do not have constitutional right to receive good time credits, but are entitled to minimal due process of law when good time credits that have been awarded are revoked. *Wolff v. McDonnell (1974) 418 U.S. 539, 557-558, 94 S. Ct. 2963, 41 L. Ed. 2d 935*

Application of former *Pen. Code § 2933(c)* [*now see Pen. Code § 2933(d)*] and related regulations to preclude credit restoration for inmates whose acts of misconduct were committed before statutory amendment and promulgation of regulations violated ex post facto clauses of the federal and state constitutions. *In re Lomax (1998) 66 Cal. App. 4th 639, 642-648, 78 Cal. Rptr. 2d 220*

[8] First Amendment Rights

Trial court properly granted summary judgment to state in action alleging that prison policy denying newspapers, magazines, and photographs to specially dangerous and recalcitrant inmates violated *First Amendment*. Prison officials set forth adequate legal support for policy, including need to motivate better behavior on part of particularly difficult prisoners, minimize amount of property they controlled in their cells, and assure prison safety by, for example,

diminishing amount of material prisoner might use to start cell fire, and prisoner attacking policy failed to set forth specific facts warranting determination in his favor. *Beard v. Banks (2006) 548 U.S. 709, 126 S. Ct. 2572, 2578-2582* (plurality opinion)

Section 3 of Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) [*42 U.S.C. § 2000cc-1(a)(1)-(2)*], which provides that no government may impose substantial burden on religious exercise of person residing in or confined to institution unless burden furthers compelling governmental interest by least restrictive means, does not violate *First Amendment Establishment Clause*. Section 3 of RLUIPA does not, on its face, exceed limits of permissible government accommodation of religious practices. *Cutter v. Wilkinson (2005) 544 U.S. 709, 125 S. Ct. 2113, 2121-2125, 161 L. Ed. 2d 1020*

Reasonable relation standard of review applies to restrictions of prisoners' *First Amendment* rights; regulation limiting prisoners' freedom of expression will be upheld if it is reasonably related to legitimate penological interests. *Thornburgh v. Abbott (1989) 490 U.S. 401, 407-414, 109 S. Ct. 1874, 104 L. Ed. 2d 459*

Prison security concerns justified prohibition on correspondence between inmates in different institutions. *Turner v. Safley (1987) 482 U.S. 78, 91-93*

Under *First Amendment*, prison regulations impinging on rights of inmates to exercise their religion freely are valid if reasonably related to legitimate penological interests. *O'Lone v. Estate of Shabazz (1987) 482 U.S. 342, 348-350, 107 S. Ct. 2400, 96 L. Ed. 2d 282*

Prison regulation limiting prisoner's receipt of hardback books, unless mailed by publishers, book clubs, or book stores, upheld as rational response to clear security problem. *Bell v. Wolfish (1979) 441 U.S. 520, 550, 99 S. Ct. 1861, 60 L. Ed. 2d 447*

Operational realities and security interests permit prison authorities to forbid meetings of prisoners' unions and verbal or written solicitations to join those unions. *Jones v. North Carolina Prisoners' Union (1977) 433 U.S. 119, 133-134, 97 S. Ct. 2532, 53 L. Ed. 2d 629*

Prison authorities may place reasonable restrictions on time, place, and manner of prisoners' communications with media, but may not prohibit such contacts. *Pell v. Procunier (1974) 417 U.S. 817, 823-824, 94 S. Ct. 2800, 41 L. Ed. 2d 495*

Under *First Amendment*, prison authorities may not deny prisoners reasonable opportunity to exercise religious freedom guaranteed by *U.S. Const., amends. I* and *XIV*. *Cruz v. Beto (1972) 405 U.S. 319, 322, 92 S. Ct. 1079, 31 L. Ed. 2d 263*

Appeals officer's handwritten statement warning inmate to be careful what he writes on grievance forms was sufficient to establish genuine issue of material fact as to whether it constituted adverse action in claim for retaliation for exercise of *First Amendment* right of filing grievances, where mere threat of harm could be adverse action regardless of whether it was carried out and threat of harm was not required to be explicit and specific to constitute an adverse action; where, despite any disrespectful language by inmate, it was undisputed that warning was motivated by protected conduct; where reasonable person may have been chilled by officer's warning; and where there was no indication that language in written complaint like one filed by inmate posed substantial threat to security and discipline in prison facility. *Brodheim v. Cry (9th Cir. 2009) 584 F.3d 1262, 1269-1273*

Trial court erred by terminating order in class action giving pretrial detainees in administrative segregation at county jail limited access to religious worship, where detainee's placement in administrative segregation did not, standing alone, justify complete denial of opportunities to practice religion, and order remained necessary to ensure detainees in

administrative segregation were not denied access based on their classification alone. *Pierce v. County of Orange (9th Cir. 2008) 519 F.3d 985, 1002-1005*

Trial court erred in granting summary judgment to prison officials on Muslim inmate's claim that they violated *Free Exercise Clause* by denying his request for religious dietary accommodation by supplying vegetarian diet, which caused him gastrointestinal distress, and denying his request for kosher diet, which was supplied to Jewish inmates on their request, where, although inmate conceded that he was not required as Muslim to eat meat that was properly ritually slaughtered, district court failed to consider claim that gastrointestinal distress substantially burdened his religious activities and required him to find alternative protein source consistent with Islam; given his sincere belief that he was personally required to consume kosher meat to maintain his spirituality, prison's refusal to provide kosher meat diet implicated *Free Exercise Clause*, and district court failed to make sufficient findings as to whether refusal to provide him with kosher diet was rationally related to legitimate penological interests. Trial court also erred in granting summary judgment to prison officials under Religious Land Use and Institutionalized Persons Act, where there was factual dispute as to extent of burden on inmate's religious activities, extent of burden that would be created by accommodating his request, and existence of less restrictive alternatives. Finally, trial court erred in granting summary judgment on claim of violation of *Fourteenth Amendment's Equal Protection Clause* by providing only Jewish inmates with kosher meat diet, where district court erred in focusing on inmate's status as prisoner rather than as Muslim, applying wrong standard of review; and where it was not clear that prison's purported cost justification was valid given large expense it already undertook to provide Jewish inmates with costly kosher meals. *Shakur v. Schriro (9th Cir. 2008) 514 F.3d 878, 883-892*

Trial court erred in granting summary judgment to sheriff in civil rights action by maximum security jail prisoner alleging that jail's policy of prohibiting maximum security prisoners from participating in group worship was violation of his rights under Religious Land Use and Institutionalized Persons Act [*42 U.S.C. § 2000cc* (RLUIPA)], where policy substantially burdened prisoner's ability to exercise his religion, and there was genuine issue of material fact as to whether total ban on group religious worship by maximum security prisoners at jail was least restrictive means of maintaining jail security. *Greene v. Solano County Jail (9th Cir. 2008) 513 F.3d 982, 986-990*

Trial court erred in denying preliminary injunction to inmate who alleged violation of Religious Land Use and Institutionalized Persons Act of 2000 religious rights in prison's hair grooming policy requiring all male inmates to maintain hair no longer than three inches, to which inmate refused to adhere because of his sincere religious belief that he could cut his hair only on death of loved one, by constituting substantial burden on exercise of his religious beliefs, when because grooming policy intentionally put significant pressure on inmate to abandon religious beliefs by cutting his hair, policy imposed substantial burden on inmate's religious practice, and when, although prison security was compelling governmental interest, grooming policy was not least restrictive alternative available to reach compelling interest. *Warsoldier v. Woodford (9th Cir. 2005) 418 F.3d 989, 993-1001*

Inmate's complaints regarding confiscation, withholding, and destruction of his property, threat to transfer him, and assault in retaliation for his filing of prison grievances and grand jury complaints against officers, and that actions were not undertaken in narrowly tailored furtherance of legitimate penological purposes, satisfied pleading requirements for claim of retaliation of exercise of his *First Amendment* rights. Officers' argument that facts proven by complaint and accompanying documentation demonstrated that, notwithstanding his well-pleaded claim to contrary, inmate was not entitled to relief did not justify dismissal of complaint, because Prison Litigation Reform Act requires exhaustion of administrative remedies prior to prisoner bringing action with respect to prison conditions [*42 U.S.C. § 1997e(a)*], and rejecting suit on basis of inmate's having filed administrative grievances to vindicate his rights thus establish rule dictating that, by virtue of having fulfilled requirements necessary to pursue cause of action in federal court, inmate would be precluded from prosecuting very claim he was forced to exhaust. *Rhodes v. Robinson (9th Cir. 2004) 380 F.3d 1123, 1130-1132*

Trial court properly entered summary adjudication in favor of prison officials in Native American inmate's action under

42 U.S.C. § 1983 challenging prison hair length regulation as violating his rights under *First Amendment* to free exercise of his religious beliefs, when regulation was reasonably related to legitimate penological interests of preventing inmates from quickly changing their appearance, hiding weapons and contraband in their hair, displaying gang-related hairstyles, and maintaining safe and hygienic prison environment. *Henderson v. Terhune (9th Cir. 2004) 379 F.3d 709, 712-716*

Prison policy of not allowing inmates to receive mail containing material downloaded from Internet violated inmates' *First Amendment* rights, when state department of corrections failed to articulate rational or logical connection between policy and legitimate penological interests it asserted that permitting prisoners to receive material downloaded from Internet would drastically increase volume of mail prison had to process and that Internet-generated mail created security concerns because it is easier to insert coded messages into Internet material than into photocopied or handwritten material and because Internet communications are harder to trace than other, permitted communications, since prohibiting all Internet-generated mail was arbitrary way to achieve reduction in mail volume, and department did not support its assertion that coded messages were more likely to be inserted into Internet-generated materials than word-processed documents. Moreover, inmate submitted expert testimony that it is usually easier to determine origin of printed email than to track handwritten or typed mail. *Clement v. Cal. Dep't of Corr. (9th Cir. 2004) 364 F.3d 1148, 1151-1152*

Inmate presented sufficient evidence to overcome summary judgment motion by prison officials as to whether they violated inmate's *First Amendment* right to file prison grievances when they validated him as gang member in retaliation for his filing of several grievances, when inmate put forth evidence of retaliatory motive that presented genuine issue of material fact as to prison officials' intent in initiating his validation investigation given alleged statements of prison official combined with suspect timing of investigation and fact that stale evidence was used and inmate raised jury issue that stated penological goals were not legitimate because if in fact prison officials abused gang validation procedure as cover or a ruse to silence and punish inmate because he filed grievances, they could not assert that validation served valid penological purpose even though he may have arguably ended up where he belonged. *Bruce v. Ylst (9th Cir. 2003) 351 F.3d 1283, 1288-1290*

Prisoners have right to fair procedures governing prison's withholding of allegedly obscene materials sent by mail; thus, prisoner had constitutional right to two-level review, *i.e.*, review of exclusion decision by prison official other than official who made initial exclusion decision. *Krug v. Lutz (9th Cir. 2003) 329 F.3d 692, 696-698*

Prison officials did not unconstitutionally infringe inmate's *First Amendment* right to free exercise of religion by requiring him to fill out standard prison form application to receive kosher food because application was reasonably related to legitimate penological interests, and application would not have been futile. *Resnick v. Adams (9th Cir. 2003) 348 F.3d 763, 767-772*

Preventing federal pretrial detainee from using telephone because federal prosecutors believed he would tip off as-yet unarrested co-conspirators who had recently been indicted did not violate his *First Amendment* speech rights, when, although prisoners have right to communicate with persons outside prison walls and telephone use provides means of exercising that right, telephone restriction was rationally related to legitimate governmental interest, detainee had alternative means of exercising his right to communicate with persons outside prison walls through visitation, mail, and daily communication with attorney by telephone and in person, allowing detainee telephone access would have required prison officials to allocate additional resources to monitor his telephone conversations to ensure he did not try to tip off his cohorts, and there were no obvious, easy alternatives to telephone restriction which would indicate restriction was exaggerated response. *Valdez v. Rosenbaum (9th Cir. 2002) 302 F.3d 1039, 1047-1049*

District court erred in granting summary judgment on prisoner's claim of denial of *First Amendment* rights based on discipline imposed under regulation prohibiting involvement in disorderly conduct by coercing or attempting to coerce official action after prisoner refused to shave as required by prison regulation and asked for electric razor because of

medical condition causing his head to twist and jerk uncontrollably, and mentioned pending state court proceeding related to his seeking of medical treatment for his condition to guard, when, although coercion regulation on its face satisfies test of legitimate penological interest in consistent enforcement of prison rules and disciplining prisoners attempting to coerce guard into not enforcing prison rules is reasonably related to that interest, viewing evidence in record in light most favorable to prisoner, genuine dispute existed as to whether application of coercion regulation was unjustified and not rationally connected to legitimate security concerns and charging inmate with severe disciplinary infraction was exaggerated response to conduct that posed, at most, de minimis risk to security. *Hargis v. Foster (9th Cir. 2002) 312 F.3d 404, 409-412*

Policy of disciplining Muslim inmates for missing work to attend Jumu'ah (Friday Sabbath) services was not rationally related to legitimate penological interest, when although government has legitimate interest in making sure inmates attend work and education assignments, and punishing unexcused absences is validly connected to goal of high attendance, and although there is no substitute for attending Jumu'ah services, absence of alternatives does not require holding in inmates' favor because they retain ability to participate in other Muslim religious ceremonies, prison officials failed to show any ripple effect among inmates and staff from narrow scope of injunction allowing absences to be unexcused but disallowing punishment, since remedy does not require that Muslims receive preferential work assignments, and absence of Muslim inmates for about one hour on Fridays only will not disrupt operation of work incentive program, and, given that strength of Muslim inmates' claim is derived from fact that Jumu'ah attendance is compelled by Qur'an, it is not clear that many non-Muslim inmates will have successful claims. *Mayweathers v. Newland (9th Cir. 2001) 258 F.3d 930*

Prison regulation prohibiting possession of sexually explicit material does not unconstitutionally abridge prisoners' *First Amendment* rights; prisoners have due process liberty interest in receiving notice that incoming mail has been withheld. *Frost v. Symington (9th Cir. 1999) 197 F.3d 348, 353-354*

Policy issued by sheriff prohibiting jail inmates from possessing "sexually explicit material," adopted in response to male inmates' behavior with female detention officers, was reasonably related to legitimate penological interests and was valid restraint on inmates' *First Amendment* rights. *Mauro v. Arpaio (9th Cir. 1999) 188 F.3d 1054, 1058-1063 , cert. denied, 529 U.S. 1018 (2000)*

To reach level of constitutional violation, interference with prisoner's practice of religion must be more than inconvenience; burden must be substantial, and must be interference with tenet or belief that is central to religious doctrine. *Freeman v. Arpaio (9th Cir. 1997) 125 F.3d 732, 737*

Prison regulation prohibiting inmate-led religious services did not violate *First Amendment*. *Anderson v. Angelone (9th Cir. 1997) 123 F.3d 1197, 1198-1199*

Jail policy prohibiting certain personal possessions, including rosaries and scapulars, did not violate *First Amendment* rights of Roman Catholic inmates. *Friend v. Kolodzieczak (9th Cir. 1991) 923 F.2d 126, 127-128*

Department of Corrections' policy prohibiting facial hair did not infringe on Orthodox Jewish inmates' *First Amendment* right of freedom of religion. *Friedman v. Arizona (9th Cir. 1990) 912 F.2d 328, 331-332 , cert. denied, 498 U.S. 1100 (1991)*

Regulation banning wearing of headgear in prison dining room did not violate *First Amendment* rights of Native American prisoners. *Standing Deer v. Carlson (9th Cir. 1987) 831 F.2d 1525, 1528-1529*

Challenges to restrictions of *First Amendment* rights analyzed in terms of legitimate policies and goals of prison in preservation of internal order and discipline, maintenance of institutional security, and rehabilitation of prisoners; prisoner alleging cause of action for violation of *First Amendment* rights required to allege that action against him or her

did not advance legitimate goals or was not tailored narrowly enough to achieve those goals. *Rizzo v. Dawson (9th Cir. 1985) 778 F.2d 527, 532*

Prison policy prohibiting inmates from possessing or receiving materials showing frontal nudity of either gender and defining frontal nudity as including either exposed female breast(s) and/or genitalia of either gender [*15 Cal. Code Reg. § 3006(c)(17)*] did not violate inmate's federal *First Amendment* or state constitutional rights, when prison safety and security, rehabilitation, and prevention of sexual harassment were legitimate penological interests, regulation was enacted because sexually explicit materials had contributed to sexual advances towards and intimidation of female correctional staff and could lead to fights based on anatomical comparisons, which were unrelated to suppression of expression and related to enhancement of prison security, and there was rational connection between regulation and governmental interest; when inmates had alternative means of expression; when accommodation of asserted constitutional right would have had significant negative impact on prison guards, other inmates, and allocation of prison resources generally; and when regulation was not exaggerated response to concerns. *Snow v. Woodford (2005) 128 Cal. App. 4th 383, 390-393, 26 Cal. Rptr. 3d 862*

Although right to choose clothing and overall appearance are protected under *U.S. Const., amends. I* and *XIV*, and as such are entitled to protection against arbitrary state action, prisoners are subject to reasonable institutional regulations relating to clothing and grooming. *In re Alcala (1990) 222 Cal. App. 3d 345, 368-377, 271 Cal. Rptr. 674*

[8A] Fourth Amendment Rights

Blanket jail policy requiring strip searches of all arrestees classified for custodial housing in general population was facially reasonable under the *Fourth Amendment*, notwithstanding lack of individualized reasonable suspicion as to individuals searched, where procedures governing scope and manner of searches limited searches to visual inspection, expressly prohibited tactile strip searches, and required officials to conduct strip searches in professional manner and in place that afforded privacy, and arrestees' use of body cavities as method of smuggling drugs, weapons, and items used to escape custody was immediate and troubling problem for jail administrators, so that policy was reasonable and reasonably related to legitimate penological interests of jail in maintaining security for inmates and employees by preventing contraband smuggling. *Bull v. City & County of San Francisco (9th Cir. 2010) 595 F.3d 964, 970-982*

District court properly granted summary judgment to federal prison officials on prisoner's claim that unconsented strip search under federal Bureau of Prisons' policy authorizing periodic strip searches of inmates returning from outside work details violated his *Fourth Amendment* rights because "raffle" corrections officer used to select prisoner for strip search was exercise of standardless and unconstrained discretion, where prison regulation allowing for visual searches as implemented by BOP's policy was valid as reasonably related to legitimate penological interests, and where whether corrections officer targeted prisoner for search for non-penological reasons was irrelevant under *Fourth Amendment* to reasonableness of search. *Nunez v. Duncan (9th Cir. 2010) 591 F.3d 1217, 1226-1228*

[9] Privacy

Prison inmate does not have reasonable expectation of privacy in his or her prison cell entitling him or her to protection of *U.S. Const., amend. IV*, against unreasonable searches and seizures. *Hudson v. Palmer (1984) 468 U.S. 517, 525-530, 104 S. Ct. 3194, 82 L. Ed. 2d 393*

Visual body cavity searches of prisoners must be conducted in reasonable manner. *Bell v. Wolfish (1979) 441 U.S. 520, 559-560, 99 S. Ct. 1861, 60 L. Ed. 2d 447*

District court properly enjoined use of world-wide web cameras (webcams) to stream images from pretrial detention center over Internet, when inmates were harmed by having every moment of daily activities exposed to general and

world-wide scrutiny; when exposure to millions of strangers, friends, loved ones, co-workers and employers being booked, fingerprinted, and generally processed as arrestee, and as inmate sat, stood, or lay in holding cell constituted level of humiliation anyone would regard as profoundly undesirable and strive to avoid; and when webcams did not improve security of pretrial detention center when closed-circuit video cameras were already present. *Demery v. Arpaio (9th Cir. 2004) 378 F.3d 1020, 1028-1033*

Deliberate indifference standard applied to policy of having male guards search female inmates when there was no emergency or suspicion that inmate had contraband on her person; policy held unconstitutional. *Jordan v. Gardner (9th Cir. 1993) 986 F.2d 1521, 1525-1531*

To justify forcing inmates to submit to HIV blood tests, prison officials must identify specific penological interests justifying tests, and must demonstrate that those specific interests are the actual bases for tests. *Walker v. Sumner (9th Cir. 1990) 917 F.2d 382, 386-388*

City's blanket policy subjecting all felony arrestees to visual body cavity searches is unconstitutional. *Kennedy v. Los Angeles Police Department (9th Cir. 1989) 901 F.2d 702, 710-716*

Routine strip searches of inmates in hallways is constitutional, despite fact that strip searches of male inmates could be viewed by female correctional officers. *Michenfelder v. Sumner (9th Cir. 1988) 860 F.2d 328, 333-334*

Searches conducted for purposes unrelated to security concerns, for punitive purposes only, for example, violate *U.S. Const., amend. IV*, and may violate *U.S. Const., amend. VIII*. *Tribble v. Gardner (9th Cir. 1988) 860 F.2d 321, 323-327*

Prison policy requiring prisoners in administrative segregation to submit to visual strip and body cavity searches when leaving cells is constitutional. *Rickman v. Avaniti (9th Cir. 1988) 854 F.2d 327, 328-329*

Prisoners have extremely limited *Fourth Amendment* rights. *United States v. Vallez (9th Cir. 1981) 653 F.2d 403, 406*

Following 1994 amendment of *Pen. Code § 2600*, taping of criminal detainee's jail conversations with nonattorney visitors for purpose of gathering evidence for prosecution of detainee did not violate detainee's privacy rights. *People v. Loyd (2002) 27 Cal. 4th 997, 119 Cal. Rptr. 2d 360, 45 P.3d 296*

Penal Code § 636 bans nonconsensual eavesdropping regardless of motive, and prohibits monitoring of conversations between youth authority ward and religious adviser in locations traditionally used for that purpose. *In re Arias (1986) 42 Cal. 3d 667, 679-681, 230 Cal. Rptr. 505, 725 P.2d 664*

U.S. Const., amend. IV requires suppression of evidence of prisoner's conversations with spouse in circumstances that lulled parties into believing their conversation was confidential. *North v. Superior Court (1972) 8 Cal. 3d 301, 311-312, 104 Cal. Rptr. 833, 502 P.2d 1305*

Intended visual body cavity search of inmate was reasonable and constitutional, when search was to be conducted only after prison officials received two anonymous notes stating defendant was selling drugs in prison, second of which specifically stated defendant had drugs on his person, and given prison's uncontested right to find and destroy drugs as well as its obligation to avoid potentially volatile situations, information constituted more than sufficient and legitimate justification for search; fact that notes could not form basis of internal disciplinary action because they were anonymous and not from reliable sources was not dispositive, because case law makes clear prison search is not subject to calculus of probable cause or reasonable suspicion. Further, search was carried out in reasonable manner protecting inmate's sense of personal dignity, because he was escorted to private area in which he was asked to disrobe, two male officers observed him, and search of his rectal cavity was to be limited to visual inspection; he was requested only to bend over

and cough to facilitate observation, and neither officer attempted to touch his anus or insert fingers or any other object into his rectum. *People v. Collins (2004) 115 Cal. App. 4th 137, 152-155, 8 Cal. Rptr. 3d 731*

Prisoners do not have right to sexual privacy in jail. *People v. Santibanez (1979) 91 Cal. App. 3d 287, 291, 154 Cal. Rptr. 74*

[10] Marriage

Prisoner's right to marry is federal constitutional right, and is subject only to restrictions reasonably related to penological interests. *Turner v. Safley (1987) 482 U.S. 78, 95-97*

Even if prospective spouse has been implicated in smuggling contraband into prison, Department of Corrections may not prevent marriage if other alternatives, such as fiance's submission to body search, are available to protect prison security. *In re Carrafa (1978) 77 Cal. App. 3d 788, 792-793, 143 Cal. Rptr. 848*

[10A] Procreation

District court properly dismissed prisoner's action on ground that denial of his right to artificially inseminate his wife failed to state claim, because prisoner does not have constitutional right to procreate while incarcerated, since right to procreate is fundamentally inconsistent with incarceration. *Gerber v. Hickman (9th Cir. 2002) 291 F.3d 617, 620-621*

[11] Visitation

Restricting noncontact visitation to individuals on approved visitor list, except qualified members of clergy and attorneys on official business, including unlimited number of immediate family members and 10 other individuals prisoner designates, subject to some restrictions; disallowing minors under 18 unless they are inmate's children, stepchildren, grandchildren, or siblings, disallowing children when inmate's parental rights have been terminated, and requiring minors to be accompanied by adult immediate family member of child or inmate or child's legal guardian; prohibiting inmate's placing of former prisoner on list unless former prisoner is member of inmate's immediate family and warden has given prior approval; and prohibiting prisoners who commit multiple substance-abuse violations from receiving any visitors except attorneys and members of clergy do not violate prisoners' substantive due process rights under *Fourteenth Amendment*, or *First* or *Eighth Amendments* as applicable to states through *Fourteenth Amendment*. Challenged regulations bear rational relation to state's valid interests in maintaining internal security and protecting child visitors from exposure to sexual or other misconduct or from accidental injury; regulations promote internal security by reducing total number of visitors and by limiting disruption caused by children in particular. Requiring children to be accompanied by family member or legal guardian is reasonable to ensure visiting child is accompanied and supervised by those adults charged with protecting child's best interests. Prohibiting visitation by former inmates bears self-evident connection to state's interest in maintaining prison security and preventing future crimes. Restricting visitation for inmates with two substance-abuse violations, which may be removed after two years, serves legitimate goal of deterring use of drugs and alcohol within prisons and is not cruel and unusual condition of confinement in violation of *Eighth Amendment*. *Overton v. Bazzetta (2003) 539 U.S. 126, 123 S. Ct. 2162, 2167-2170, 156 L. Ed. 2d 162*

State regulation containing nonexhaustive list of types of prison visitors who "may" be excluded from visiting inmates does not give inmates, for purposes of *Fourteenth Amendment's Due Process Clause*, liberty interest in receiving visitors not on list. *Kentucky Dep't of Corrections v. Thompson (1989) 490 U.S. 454, 460-465, 109 S. Ct. 1904, 104 L. Ed. 2d 506*

Jail's blanket prohibition against contact visits between pretrial detainees and their family and friends was reasonable response to legitimate security concerns. *Block v. Rutherford (1984) 468 U.S. 576, 585-592, 104 S. Ct. 3227, 82 L. Ed. 2d 438*

Trial court erred in dismissing on pleadings, without requiring evidence corroborating rational connection between visitation policy prohibiting same-sex kissing and hugging during visitation except for prisoner's relatives and immediate family and correctional safety; state asserted that visitation policy protects inmates from being labeled as homosexuals and from being targeted for physical, sexual, or verbal abuse on account of such labeling, but policy does not possess common-sense connection to concern against homosexual labeling, since prisoners who are willing to display affection toward their same-sex partner during prison visit likely are already open about their sexual orientation. *Whitmire v. State of Arizona (9th Cir. 2002) 298 F.3d 1134, 1136-1137*

Prisoners retain right to reasonable visitation with their children. *Hoversten v. Superior Court of San Luis Obispo (1999) 74 Cal. App. 4th 636, 641-642, 88 Cal. Rptr. 2d 197*

[12] Property Ownership

In action by federal prisoner under Federal Tort Claims based on loss of personal property in his transfer from one federal prison to another, *28 U.S.C. § 2680(c)*, which provides that waiver of sovereign immunity does not apply to claims arising from detention of property by officer of customs or excise or any other law enforcement officer applied to bar action, where broad phrase "any other law enforcement officer" covered all law enforcement officers and Bureau of Prisons officers who allegedly lost prisoner's property qualified as "other law enforcement officers" within the meaning of § 2680(c). *Ali v. Fed. Bureau of Prisons (2008) 552 U.S. 214, 128 S. Ct. 831, 835-841, 169 L. Ed. 2d 680*

Prisoners entitled to retain federal Social Security benefits, and may not be required to tender those benefits to state to help defray cost of maintaining prison system. *Bennett v. Arkansas (1988) 485 U.S. 395, 397-398, 108 S. Ct. 1204, 99 L. Ed. 2d 455*

Parratt doctrine applied to intentional destruction of property; state Tort Claims Act constituted adequate post-deprivation remedy. *Hudson v. Palmer (1984) 468 U.S. 517, 530-534, 104 S. Ct. 3194, 82 L. Ed. 2d 393*

Parratt doctrine applied to random and unauthorized deprivations, not to losses resulting from application of established procedures. *Logan v. Zimmerman Brush Co. (1982) 455 U.S. 422, 435-436, 102 S. Ct. 1148, 71 L. Ed. 2d 265*

Adequate post-deprivation remedy provides due process in cases of negligent deprivations of property. *Parratt v. Taylor (1981) 451 U.S. 527, 543-544, 101 S. Ct. 1908, 68 L. Ed. 2d 420 , overruled in part, Daniels v. Williams (1986) 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662*

Seizure and inadvertent destruction of federal inmate's property by correctional officers did not give rise to cause of action against federal Bureau of Prisons under Federal Tort Claims Act [*28 U.S.C. § 2671 et seq.*], because seizure was "detention" of goods by federal law enforcement officers under exception to FTCA liability set forth in *28 U.S.C. § 2680(c)*. *Bramwell v. United States Bureau of Prisons (9th Cir. 2003) 348 F.3d 804, 806-807*

Inmate's claim under *Takings Clause* that inmate was required to foreswear his statutory right to accrued net interest on his trust account and his due process right to be free of unauthorized deductions from his account to maintain prison employment failed, when inmate did not allege that charges to account were unreasonable or unrelated to administration of his account. Claim under Due Process Clause was cognizable because without underlying authority and competent procedural protections, prison officials could not have constitutionally confiscated net accrued interest. However, prison

officials were entitled to qualified immunity on claim where utter lack of precedent and standards was dispositive that law concerning unconstitutional condition predicated on procedural due process claim in prison setting was not clearly established; but prison administrators failed to establish legitimate goal for retaliating against inmate by terminating his prison employment for refusing to sign waiver, because while they undoubtedly had interest in recouping costs and maintaining efficient prison system, interest did not extend to avoiding limits placed on them by state Legislature and failing to provide constitutionally adequate procedural protections, so that prison administrators unconstitutionally retaliated against inmate for refusing to waive his right to accrued net interest and to consent to use of unauthorized deductions, inmate was entitled to summary judgment on unconstitutional retaliation claim, and officials were not entitled to qualified immunity on claim. *Vance v. Barrett (9th Cir. 2003) 345 F.3d 1083, 1088-1094*

In action by inmates alleging that deposit of interest on inmate trust accounts into general inmate welfare fund rather than payment of interest to individual inmates constituted taking without just compensation, district court's inference that because aggregate gross interest and cost figures seemed to indicate inmate trust account funds as whole did not generate net interest, inmate could not have suffered taking without compensation could not be squared with required individualized *per se* takings analysis, when it was clear state statute effected taking of inmate interest and on record, court could not determine whether there was any just compensation owed to individual inmate, and when further factual development was needed to determine whether California's failure to pay interest to individual inmates on their trust account funds violated *Takings Clause*. *Schneider v. Cal. Dep't of Corr. (9th Cir. 2003) 345 F.3d 716, 720-722*

Prisoners have protected property interest in interest income earned on inmate trust accounts. *Schneider v. Cal. Dep't of Corrections (9th Cir. 1998) 151 F.3d 1194, 1198-1201*

Civ. Code § 2225, which appropriates all monies due convicted felon from expressive materials that include story of crime as compensation for crime victims, is unconstitutional as facially violating freedom of speech as guaranteed by *U.S. Const., Amend. I* and *Cal. Const., art. I, § 2(a)*; § 2225 imposes content-based financial penalties on protected speech, is overinclusive in seeking to serve compelling interests in preventing criminals from exploiting their crimes for profit and in compensating crime victims from profits of crime, is not narrowly tailored, and may chill free speech rightsof author as well as reciprocal constitutional right of audience of work to receive protected communication. *Keenan v. Superior Court (Sinatra) (2002) 27 Cal. 4th 413, 117 Cal. Rptr. 2d 1, 40 P.3d 718*

Charges assessed against inmate's profits from sale of manuscripts are invalid unless used for actual prison expenses or some purpose related to inmate authorship. In re van *Geldern (1971) 5 Cal. 3d 832, 837, 97 Cal. Rptr. 698, 489 P.2d 578*

Prisoners have right, under *Penal Code § 2600*, to maintain regular passbook savings accounts in banks and savings and loan institutions. *In re Parker (1984) 151 Cal. App. 3d 583, 588, 198 Cal. Rptr. 796*

[13] Correspondence and Mail

Inmate has no special right to provide legal advice to another inmate, and inmate-to-inmate correspondence that includes legal assistance does not receive more *First Amendment* protection than correspondence without legal assistance. *Shaw v. Murphy (2001) 532 U.S. 223, 121 S. Ct. 1475, 149 L. Ed. 2d 420*

Prisoners have *First Amendment* right to send and receive mail, subject to regulations reasonably related to legitimate penological interests. *Thornburgh v. Abbott (1989) 490 U.S. 401, 403-417, 109 S. Ct. 1874, 104 L. Ed. 2d 459*

Prison security concerns justify prohibition of correspondence between inmates in different institutions. *Turner v. Safley (1987) 482 U.S. 78, 91-93*

District court erred in dismissing prisoner's complaint unequivocally pleading facts alleging that prison censored his outgoing mail and punished him for its contents, where complaint stated claim clearly cognizable and district court was not in position to decide, on pleadings, whether state penitentiary's rules furthered important or substantial government interest or imposed limitations no greater than necessary or essential to protection of those interests, which went to merits of claim, not to whether he stated claim. *Barrett v. Belleque (9th Cir. 2008) 544 F.3d 1060, 1061-1062*

State department of corrections' prohibition against receipt by inmates of non-subscription bulk mail and catalogs violated inmates' *First* and *Fourteenth Amendment* rights when department's penological goals allegedly justifying ban were not rationally related to legitimate and neutral governmental objective. Because court recognized inmates' *First Amendment* rights to receive non-subscription bulk mail and catalogs, same procedural protections had to be afforded to inmates with regard to this mail as with first class, periodical, or subscription bulk rate mail. *Prison Legal News v. Lehman (9th Cir. 2005) 397 F.3d 692, 698-701*

In action by inmate challenging state correctional department's refusal to deliver mail to him that contained either sexually explicit or roleplaying or fantasy content, department's evidence adequately demonstrated that regulations supported legitimate penological interests of reducing prohibited behaviors such as sexual aggression and gambling and maintaining respect for legitimate authority. Further, inmate produced insufficient evidence to show that viewing evidence in light most favorable to him, any reasonable person would conclude that roleplaying magazine contained no roleplaying or fantasy content, or that other prohibited magazine contained no sexually explicit material. Regulations were constitutional because department presented evidence demonstrating rational connection between availability of sexually explicit materials and harmful inmate behavior such as rape and other forms of sexual predation and between roleplaying materials based on impact of simulated physical power used to obtain dominance over others, as opposed to reliance on legitimate authority, and harmful behavior that can result in prison, including gambling. *Bahrampour v. Lampert (9th Cir. 2004) 356 F.3d 969, 973-977*

Prison policy requiring books and magazines mailed to prison to have approved vendor label affixed to package unreasonably burdened inmate's *First Amendment* rights and was not rationally related to legitimate penological objective, when prison policy already required that books be sent directly from approved vendors and prison staff could easily determine whether packages had been sent directly by vendors or to third party first by checking address labels and invoices, when all personal property received by inmates by mail was searched before delivery and prison articulated no scenario in which book label policy provided measure of security not afforded by routine mandatory searches, and when, at least with regard to contraband, there was no rational basis for prison to impose approved vendor label requirement on books but not on other items and prison made no effort to explain why books were more susceptible to being used to deliver contraband than other items. *Ashker v. Cal. Dep't of Corrections (9th Cir. 2003) 350 F.3d 917, 922-924*

State prison mail regulation prohibiting bulk rate, third, and fourth class mail is unconstitutional as applied to pre-paid, for-profit, subscription publications; however, regulation requiring incoming mail to bear return address on front of envelope and be addressed to inmate using committed name and prison identification or SID number or as he/she can be identified as shown on records of Department of Corrections passed constitutional muster, when there was no evidence in record supporting inmate's assertion that regulation applied to deny inmates access to mail even when intended recipient could be clearly identified, and there was sufficient evidence to demonstraterational connection between requiring all incoming mail to include sender's complete name and address and goal of facilitating investigations, which in turn enhances prison security. *Morrison v. Hall (9th Cir. 2001) 261 F.3d 896, 906-907*

State prison ban on standard rate mail was unconstitutional as applied to subscription non-profit organization mail. *Prison Legal News v. Cook (9th Cir. 2001) 238 F.3d 1145, 1149-1153*

Trial court erred by not considering prisoner's *Fourteenth Amendment* due process claims, supported by unrebutted evidence that prisoner did not receive various issues of Penthouse and Gallery magazines, prisoner received notice that

magazines were being withheld long after prison received magazines, and that prisoner received magazines long after prison received magazines. *Frost v. Symington (9th Cir. 1999) 197 F.3d 348, 353-354*

Prison regulation permitting cursory visual inspection of contents of outgoing mail is proper as closely related to legitimate penological interests. *Witherow v. Paff (9th Cir. 1995) 52 F.3d 264, 265-266*

Withholding correspondence between prisoner and group advocating homosexual activity with juveniles is not unconstitutional because correspondence could constitute threat to prison security by leading to violence or setting back rehabilitation efforts. *Harper v. Wallingford (9th Cir. 1989) 877 F.2d 728, 733*

Complete prohibition on correspondence impermissibly restricts prisoner's *First Amendment* rights. *Storseth v. Spellman (9th Cir. 1981) 654 F.2d 1349, 1356*

Regulations that permit institutional authorities to read letters to and from attorney to search for "verbal contraband" or to read all "enclosures" are invalid. *In re Jordan (1974) 12 Cal. 3d 575, 578, 116 Cal. Rptr. 371, 526 P.2d 523* ; *In re Jordan (1972) 7 Cal. 3d 930, 934, 103 Cal. Rptr. 849, 500 P.2d 873*

Prison authorities had no authority to withhold from prisoners published material accepted for distribution by United States Post Office on ground it has adverse rehabilitative effect. *In re Harrell (1970) 2 Cal. 3d 675, 704, 87 Cal. Rptr. 504, 470 P.2d 640 , cert. denied, 401 U.S. 914 (1971)*

Rule prohibiting prisoners in maximum security prison from receiving e-mail or other materials downloaded from the internet, through regular mail, was reasonably related to legitimate prison security interests. *In re Collins (2001) 86 Cal. App. 4th 1176, 1181-1186, 104 Cal. Rptr. 2d 108*

Monitoring of prisoner's mail did not violate prisoner's right to privacy and admission of letter prisoner wrote admitting possession of controlled substances in prosecution for possession of marijuana and methamphetamine for sale was not error, when prisoner was aware of policy under *15 Cal. Code Reg. § 3138* that all nonconfidential mail is subject to being read by designated prison employees before mailing or delivery to inmate and warned friends that prison employees read all mail. *People v. Harris (2000) 83 Cal. App. 4th 371, 99 Cal. Rptr. 2d 618*

[14] Procedure in Prisoner's Rights Cases, Generally

Authorization of *28 U.S.C. § 636(b)(1)(B)*, permitting nonconsensual referral to magistrate for hearing and recommended findings on prisoner petition challenging conditions of confinement, includes cases alleging specific episodes of unconstitutional conduct by prison administrators. *McCarthy v. Bronson (1991) 500 U.S. 136, 137-144, 111 S. Ct. 1737, 114 L. Ed. 2d 194*

Pro se prisoner's notice of appeal held to be filed at moment of delivery to prison authorities for mailing to court. *Houston v. Lack (1988) 487 U.S. 266, 269-276, 108 S. Ct. 2379, 101 L. Ed. 2d 245*

Trial court properly declined to allow prisoner to proceed in forma pauperis after determining that three prior actions brought by prisoner constituted strikes for purposes of *28 U.S.C. § 1915(g)* as having been brought and dismissed within meaning of *28 U.S.C. § 1915(g)*, where district court disposed of two actions in forma pauperis complaints during screening process mandated by *28 U.S.C. §§ 1915A, 1915(e)(2)*, and *42 U.S.C. § 1997e(c)*, and in order to determine actions did not qualify for in forma pauperis status, district court necessarily reviewed complaints and assessed their merits, even though district court did not use word "dismiss" in its disposition of actions; and where district court dismissed complaint in third action both for failure to exhaust and for failure to state substantive claim for alleged deprivation of his medicine, so that it was clear from magistrate judge's reasoning, adopted by district court, that

he considered prisoner's failure to state claim to be fully sufficient condition for his recommendation for dismissal with prejudice. *O'Neal v. Price (9th Cir. 2008) 531 F.3d 1146, 1150-1156*

In action by prisoner alleging cause of action under *42 U.S.C. § 1983* for cruel and unusual punishment premised on the danger of contracting various communicable diseases, based on Department of Corrections and Rehabilitation's alleged ongoing policy of not screening inmates for communicable diseases and housing contagious inmates with others without regard to risk they posed, district court erred in finding that three-strikes rule under PLRA applied to prisoner, refusing his request to proceed IFP, and ordering case closed, where prisoner sufficiently alleged imminent danger of serious physical injury, even though at time he filed complaint prisoner already had contracted hepatitis and did not allege he was presently confined with prisoner with another contagious disease. *Andrews v. Cervantes (9th Cir. 2007) 493 F.3d 1047, 1051-1058*

Trial court erroneously dismissed prisoner's action under three strikes provision of *28 U.S.C. § 1915(g)*, prohibiting prisoner from proceeding *in forma pauperis* if prisoner has on three or more occasions, while incarcerated or detained in any facility, brought action or appeal that was dismissed on grounds it was frivolous, malicious, or failed to state claim on which relief could be granted, when state prison officials failed to meet burden of producing evidence that prisoner had brought required number of actions. Only one case plainly qualified as strike because docket record showed it was dismissed for failure to state claim under Fed. Rule *Civ. Proc. 12(b)(6)*. Determining that four other cases counted as strikes without considering underlying court orders or making independent assessment of whether prior cases were frivolous or malicious or failed to state claim was error. *Andrews v. King (9th Cir. 2005) 398 F.3d 1113, 1118-1121*

Trial court erred in dismissing pro se prisoner's civil rights action due to misspelling of defendant's name. *McGuckin v. Smith (9th Cir. 1992) 974 F.2d 1050, 1055-1063*

Prisoner's providing of notice of appeal of trial court's dismissal of declaratory relief action to prison authorities before due date for its filing was timely filing of notice of appeal, where prison-delivery rule, which deems notice of appeal filed as of date incarcerated pro se litigant delivers documents to prison authorities, applied not only to criminal appeals but also to civil appeals filed by incarcerated in propria persona litigant. *Shufelt v. Hall (2008) 163 Cal. App. 4th 1020, 1022-1026, 77 Cal. Rptr. 3d 900*

[15] Class Actions

Inmate seeking injunctive relief in class action challenging working conditions on chain gang at county jail had standing on appeal to argue district court erred in dismissing action as moot, though inmate was transferred to another jail; district court erroneously "postponed" ruling on motion for class certification. *Wade v. Kirkland (9th Cir. 1997) 118 F.3d 667, 669-670*

In action challenging conditions at county jail, prisoners had requisite community of interest for class action, even though complaint revealed questions of fact and law inapplicable to class as whole, because common questions substantially outweighed those applicable to separate categories of class. *Mendoza v. County of Tulare (1982) 128 Cal. App. 3d 403, 418, 180 Cal. Rptr. 347*

[16] Exhaustion of Remedies

Adoption by Sixth Circuit of rules requiring prisoner to allege and demonstrate exhaustion in complaint, permitting suit only against defendants identified by prisoner in initial grievance, and requiring courts to dismiss entire action if prisoner failed to satisfy exhaustion requirement as to any single claim in complaint are not required by PLRA, and crafting and imposing them exceeded proper limits on judicial role. *Jones v. Bock (2007) 549 U.S. 199 , 127 S. Ct. 910, 918-926, 166 L. Ed. 2d 798*

Prisoner who filed untimely grievance did not satisfy Prison Litigation Reform Act's exhaustion requirement, because proper exhaustion of administrative remedies is necessary. *Woodford v. Ngo (2006) 548 U.S. 81, 126 S. Ct. 2378, 2384-2393* ; *165 L. Ed. 2d 368*

Requirement in Prison Litigation Reform Act that inmate exhaust all available administrative remedies before bringing action with regard to prison conditions applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or another wrong. *Porter v. Nussle (2002) 534 U.S. 516, 122 S. Ct. 983, 152 L. Ed. 2d 12*

District court properly dismissed prisoner's *42 U.S.C. § 1983* action for damages based on violation of *Eighth Amendment's* prohibition of cruel and unusual punishment for failure to exhaust administrative remedies under *42 U.S.C. § 1997e(a),* even though prisoner sought only money damages and prison's administrative grievance system had no provision for recovery of money damages, since § 1997e(a) requires completion of any prison administrative process capable of addressing inmate's complaint and providing some form of relief, even if process does not specifically provide for monetary relief, and although prisoner had filed administrative grievance, he did not go beyond first step and never sought intermediate or final administrative review after prison authority denied relief. *Booth v. Churner (2001) 532 U.S. 731, 121 S. Ct. 1819, 149 L. Ed. 2d 958*

Exhaustion of state remedies generally not a prerequisite to action under *42 U.S.C. § 1983*. *Heck v. Humphrey (1994) 512 U.S. 477, 480, 114 S. Ct. 2364, 129 L. Ed. 2d 383* ; *Patsy v. Board of Regents (1981) 457 U.S. 496, 516, 102 S. Ct. 2557, 73 L. Ed. 2d 172*

State notice-of-claim statutes inapplicable to *42 U.S.C. § 1983* suits. *Felder v. Casey (1988) 487 U.S. 131, 140-141, 108 S. Ct. 2302, 101 L. Ed. 2d 123*

In *pro se Bivens* action by federal prisoner alleging various constitutional claims arising out of unconsented strip search, district court erred in granting summary judgment for defendants on *Fourth Amendment* claim for failure to exhaust administrative remedies under Prison Litigation Reform Act, where failure to exhaust administrative remedies was excused as to claim, because prisoner took reasonable and appropriate steps to exhaust claim and was precluded from exhausting, not through his own fault but by warden's mistake. However, assuming without deciding complaint alleged *First Amendment* claim, prisoner failed to exhaust administrative remedies as to that claim. *Nunez v. Duncan (9th Cir. 2010) 591 F.3d 1217, 1223-1226, 1228*

Magistrate judge (and district court by adopting magistrate judge's recommendations and report) erred in concluding that, as matter of law, although prison's regulations explicitly created exception to timely filing requirement if inmate did not have opportunity to file grievance during filing period, inmate's purported inability to file administrative grievance due to his time in hospital and administrative segregation following knife attack by fellow inmates of which he was complaining was not exception to timely filing requirement, where magistrate judge did not make factual findings as to whether inmate had access to necessary forms and ability to file during his stay in hospital and prison infirmary or during administrative lockdown. District court also erred in dismissing complaint for failure to exhaust administrative remedies beyond second level of prison appeals system, where inmate was not required to exhaust further levels of review once he had been reliably informed by administrator that no remedies are available. Finally, because order for supplemental briefing injected renewed uncertainty and complexity into summary judgment procedure, previously issued notice did not effectively give inmate fair notice he should have submitted evidence regarding exhaustion of remedies, and on remand, he should be allowed to submit evidence regarding exhaustion of remedies. *Marella v. Terhune (9th Cir. 2009) 562 F.3d 983, 985-986*

Although inmate properly appealed his grievance through all steps county jail held out, and his failure to specifically grieve deliberate indifference to his medical needs as *Eighth Amendment* violation did not invalidate his exhaustion

attempt concerning his unsatisfactory bunking situation, he failed to exhaust properly, where he did not provide notice of prison staff's alleged disregard of his lower bunk assignments, officials responding to his grievance reasonably concluded that nurse's order for lower bunk assignment solved his problem, and, rather than clarifying situation, inmate repeatedly demanded ladder, so that his grievance did not provide enough information to allow prison officials to take appropriate responsive measures. *Griffin v. Arpaio (9th Cir. 2009) 557 F.3d 1117, 1120-1121*

Prisoner failed to exhaust administrative remedies under PLRA by failing to timely appeal order barring him from participating in prison special programs under *15 Cal. Code Reg. § 3084.6(c)*, requiring appeal within 15 working days of order, where order determination did not result in continuing denial of constitutional rights to restart 15-day limitations period each day he was unable to participate in prison special programs, because determination was discrete act adverse to prisoner and limitations period began running against him on that date rather than on date he actually felt effects of order; and where prisoner had ample notice because restriction was presumptively permanent. *Ngo v. Woodford (9th Cir. 2008) 539 F.3d 1108, 1109-1111*

Prison Litigation Reform Act [*42 U.S.C. § 1997e et seq.*] requires prisoners to exhaust available administrative remedies before bringing claims under the Americans With Disabilities Act and the Rehabilitation Act. Prisoner did not exhaust remedies by repeated requests to move to bottom bunk due to poor balance resulting from previous brain injury, where lower bunk claims were not equivalent to claims of denial of mental health treatment in violation of ADA and Rehabilitation Act, and where complaint filed with DOJ alleging denial of mental health treatment did not exhaust prison's internal grievance process. *O'Guinn v. Lovelock Correctional Center (9th Cir. 2007) 502 F.3d 1056, 1059-1063*

PLRA's exhaustion requirement applies with equal force to prisoners held in private prisons; confiscation of magazines was prison condition to which exhaustion requirement applied. *Roles v. Maddox (9th Cir. 2006) 439 F.3d 1016, 1017-1018*

Prisoner who did not file internal grievance, but did participate in internal investigation regarding same incident, did not exhaust remedies under PLRA, when there was no genuine issue of material fact regarding prisoner's access to grievance process and when, although internal affairs investigation into officer's conduct resulted in adverse action against officer, prisoner did not allege that remedy was available to him through that process, and only potential remedies available to prisoner were through administrative grievance procedure, and he did not initiate or exhaust his administrative remedies through that procedure. *Panaro v. City of North Las Vegas (9th Cir. 2005) 432 F.3d 949, 952-953*

Appellate court remanded dismissal of prisoner's *42 U.S.C. § 1983* complaint to district court, when district court's dismissal turned on its implicit interpretation of complaint as presenting multiple claims regarding his validation as gang member, and it correlated number of grievances filed within prison system with number of claims within complaint, and did not regard complaint as presenting single due process claim challenging unavailability of evidence used against him and resulting in his placement and retention in administrative segregation. However, prisoner argued that complaint actually presented constellation of due process violations for validation as gang associate and placement and retention in administrative segregation amounting to a single, exhausted claim. District court's consideration was under misapprehension that dismissal of entire action was mandated if complaint was partially defective; if district judge again determined that due process claim consisted of intertwined exhausted and unexhausted claims, proper course of action would be to allow prisoner to amend complaint to refer only to fully exhausted grievance, and to consider on merits whether prisoner stated viable due process claim on basis of fully exhausted grievance. *Lira v. Herrera (9th Cir. 2005) 427 F.3d 1164, 1169-1177*

Trial court erred in dismissing state prisoner's action based on restrictions of rights after disciplinary action for failure to exhaust administrative remedies because his appeal of disciplinary action was time barred. Prisoner exhausted his appeals because he could go no further in prison's administrative system since no remedies remained available to him.

In addition, exhaustion requirement did not bar subsequent judicial consideration of exhausted administrative appeal denied on state procedural grounds. *Ngo v. Woodford (9th Cir. 2005) 403 F.3d 620, 624-631*

State prison inmate was not required to first successfully challenge disciplinary conviction in order to challenge procedures used in disciplinary hearing under § 1983, when successful § 1983 challenge would not necessarily shorten length of confinement because there was no showing by state that expungement of conviction that inmate sought was likely to accelerate his eligibility for parole; parole board would still have authority to deny inmate's request for parole on basis of any grounds presently available to it in evaluating request. *Ramirez v. Galaza (9th Cir. 2003) 334 F.3d 850, 859*

District court properly dismissed prisoner's action involving prison conditions without prejudice when plaintiff did not exhaust administrative remedies before filing suit but was in process of doing so when motion to dismiss was filed. *McKinney v. Carey (9th Cir. 2002) 311 F.3d 1198*

Exhaustion of administrative remedies under *42 U.S.C. § 1997e(a)* is not required when money damages is sole relief sought and remedy is not available through prison's administrative grievance process. *Rumbles v. Hill (9th Cir. 1999) 182 F.3d 1064, 1068-1069*

Exhaustion requirement in *42 U.S.C. § 1997e(a)*, effective April 26, 1996, does not apply retrospectively to cases brought before effective date. *Bishop v. Lewis (9th Cir. 1998) 155 F.3d 1094, 1095-1096*

In § 1983 action by two state prisoners alleging that they were classified as sex offenders in violation of federal constitutional due process and ex post facto guarantees, arguing that classification affected their eligibility for parole, inmates were not required to invalidate classification before bringing suit, because favorable judgment would in no way guarantee parole or necessarily shorten their prison sentences. *Neal v. Shimoda (9th Cir. 1997) 131 F.3d 818, 824*

District court's dismissal of prisoner's *42 U.S.C. § 1983* action for failure to exhaust administrative remedies was improper; court should have granted continuance to afford prisoner opportunity to pursue administrative remedies. *Francis v. Marquez (9th Cir. 1984) 741 F.2d 1127, 1128*

Trial court properly dismissed inmate's action alleging medical malpractice and failure to furnish adequate medical care for failure to exhaust administrative remedies, when prisoner did not complete administrative process provided by Department of Corrections, and although money damages were unavailable in administrative process, prisoner was required to exhaust administrative remedies before seeking judicial relief because exhaustion requirement furthered important interests of prison autonomy, mitigating damages, application of department expertise, and order in court system. *Wright v. State of California (2004) 122 Cal. App. 4th 659, 664-671, 19 Cal. Rptr. 3d 92*

[17] Pleading

Allegations in complaint of pro se prisoner, "however inartfully pleaded," are held to less stringent standards than formal pleadings drafted by lawyers. *Hughes v. Rowe (1980) 449 U.S. 5, 9, 101 S. Ct. 173, 66 L. Ed. 2d 163* ; *Haines v. Kerner (1972) 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652*

Requirement in Prison Litigation Reform Act that prisoner exhaust available administrative remedies is affirmative defense, and imposing technical pleading requirement would run contrary to liberal approach courts take to pleadings by pro se prisoners. Proper motion to raise failure to exhaust administrative remedies is Rule 12(b) motion rather than motion for summary judgment. *Wyatt v. Terhune (9th Cir. 2003) 315 F.3d 1108, 1116-1120*

In cases brought by prisoners pro se, courts must construe prisoners' papers liberally. *Eldridge v. Block (9th Cir. 1987)*

832 F.2d 1132, 1137

Courts should treat pro se litigants with great leniency when evaluating compliance with technical rules of civil procedure. *Draper v. Coombs (9th Cir. 1986) 792 F.2d 915, 924*

[18] Immunity Defenses

Members of federal prison's discipline committee who hear cases involving inmates charged with rules infractions are entitled to qualified, not absolute, immunity. *Cleavinger v. Saxner (1985) 474 U.S. 193, 206-208, 106 S. Ct. 496, 88 L. Ed. 2d 507*

Prisoner librarian was entitled to qualified immunity on claim that her refusal to give inmate access to comb-binding machine for inmate's petition for certiorari with United States Supreme Court, as result of which inmate did not timely file petition and it was denied as untimely, violated inmate's right of access to courts, where reasonable prison official would not have believed that denying access to comb-binding machine would have violated his right of meaningful access to United States Supreme Court in light of Supreme Court's flexible rules for pro se filings, which did not require and perhaps did not even permit comb-binding, and librarian was knowledgeable about filing requirements in courts; and where delay in time responding to inmate's request was not unreasonable based on information known to librarian, because request inmate sent to her did not indicate date which petition was due. *Phillips v. Hust (9th Cir. 2009) 588 F.3d 652, 655-659*

In inmate's action alleging denial of outdoor exercise during lockdown periods, which were based on inmate violence toward guards, staff, and other inmates, prison officials were entitled to qualified immunity, where inmate's constitutional right to outdoor exercise was not absolute and indefeasible and did not trump all other considerations, and officials had substantial reasons for imposing lockdowns in attempting to restore order during series of brutal attacks, including some that were lethal or nearly so; and where great deal of violence took place during outdoor exercise, and, while denying outdoor exercise for extended periods carried some risk of harm, officials' judgment that there was greater risk of harm from allowing outdoor exercise was reasonable. *Norwood v. Vance (9th Cir. 2009) 572 F.3d 626, 631-633*

Prisoner librarian was entitled to qualified immunity on claim that her refusal to give inmate access to comb-binding machine for inmate's petition for certiorari with United States Supreme Court, as result of which inmate did not timely file petition and it was denied as untimely, violated inmate's right of access to courts, where reasonable prison official would not have believed that denying access to comb-binding machine would have violated his right of meaningful access to United States Supreme Court in light of Supreme Court's flexible rules for pro se filings, which did not require and perhaps did not even permit comb-binding, and librarian was knowledgeable about filing requirements in courts; and where delay in time responding to inmate's request was not unreasonable based on information known to librarian, because request inmate sent to her did not indicate date which petition was due. *Phillips v. Hust (9th Cir. 2009) 588 F.3d 652, 655-659*

Parole officers were not entitled to absolute immunity from suits arising from conduct distinct from the decision to grant, deny, or revoke parole; thus, officers were not entitled to absolute immunity for actions related to investigation of suspected parole violations, ordering parolee's arrest pursuant to parole hold, and recommending initiation of parole revocation proceedings. *Swift v. State of California (9th Cir. 2004) 384 F.3d 1184, 1188-1193*

In prisoner's action against correctional officers for retaliation of exercise of his *First Amendment* rights to file prison grievances and grand jury complaints against officers, officers were not entitled to qualified immunity, when prohibition against retaliatory punishment was clearly established law in Ninth Circuit, infliction of harms other than total chilling effect could establish liability for such conduct, and harms allegedly visited on prisoner in response to his

exercise of *First Amendment* rights went well beyond marginal chilling of his rights. Officers' claim to immunity that it was not clearly established that prisoner had constitutional right to be free from retaliatory conduct that did not chill or deter exercise of constitutional rights was flatly inconsistent with concept of qualified immunity, because officers' argument shifted focus of qualified immunity inquiry from time of conduct to its aftermath and effect, and would make immunity hinge on kind of post hoc judgment doctrine was designed to avoid. *Rhodes v. Robinson (9th Cir. 2004) 380 F.3d 1123, 1132-1133*

Inmate's claim for damages under *42 U.S.C. § 1983* based on alleged conspiracy between governor and others to deny parole to inmates serving life sentences by abusing state statutes that authorized governor to be involved with parole was barred by collateral estoppel to extent he attempted to sue members of Board of Prison Terms. Earlier complaint that was dismissed sought compensatory and punitive damages from individual members of Board for unconstitutionally rescinding inmate's parole date, and present complaint sought same damages for same conduct by some of same defendants. Further, issue was fully and finally litigated when initial damages claim was dismissed due to absolute immunity and inmate had opportunity to appeal, so that earlier dismissal of damages claim was final determination on ground not altered by inmate's subsequent receipt of habeas relief, and district court's determination of issue was necessary to its judgment. However, collateral estoppel did not apply to whether inmate could seek damages against remaining defendants, because not all defendants in present action were members of Board and therefore not entitled to absolute immunity. *McQuillion v. Schwarzenegger (9th Cir. 2004) 369 F.3d 1091, 1096*

In inmate's action against prison guard for use of excessive force based on shooting inmate in leg during prison yard fight, guard was entitled to qualified immunity, when, although shooting passive, unarmed inmate standing near fight between other inmates, none of whom was armed, when no inmate was in danger of great bodily harm, would inflict unnecessary and wanton pain and governing law was clearly established at time of shooting, reasonable officer could have believed that shooting one inmate in leg to stop assault that could have seriously injured or killed another inmate was good-faith effort to restore order, and thus lawful. *Marquez v. Gutierrez (9th Cir. 2003) 322 F.3d 689*

State parole board officials absolutely immune from suits by prisoners for actions taken when processing parole applications. *Bermudez v. Duenas (9th Cir. 1991) 936 F.2d 1064, 1066*

Dental department of state prison is part of state Department of Corrections and is therefore rendered immune from *42 U.S.C. § 1983* suit in federal court by *Eleventh Amendment*. *Hunt v. Dental Dep't (9th Cir. 1989) 865 F.2d 198, 200-201*

Director of Arizona Department of Corrections not entitled to qualified immunity in *42 U.S.C. § 1983* action by prisoners arising out of unreasonable body cavity searches. *Vaughan v. Ricketts (9th Cir. 1988) 859 F.2d 736, 738-742 , cert. denied, 490 U.S. 1012 (1989)*

Absolute immunity of parole officials, when they act to grant, deny, or revoke parole, does not extend to knowing dissemination of false information concerning parolee. *Anderson v. Boyd (9th Cir. 1983) 714 F.2d 906, 909-910*

[19] Damages

Prisoner could maintain action against state for damages for violation of Title II of Americans With Disabilities Act to extent state's conduct violated prisoner's constitutional rights, where insofar as Title II created private cause of action for damages against state for conduct actually violating *Fourteenth Amendment*, including violations of *Eighth Amendment's* prohibition of cruel and unusual punishment, Title II validly abrogated state sovereign immunity. *United States v. Georgia (2006) 546 U.S. 151, 126 S. Ct. 877, 880-882, 163 L. Ed. 2d 650*

Prisoner's § 1983 action, alleging that prison official charged him with threatening behavior and subjected him to

mandatory prehearing lockup in retaliation for prior lawsuits and grievance proceedings against official, which did not challenge his conviction for insolence after disciplinary hearing or subsequent disciplinary action and sought no expungement of misconduct finding, and in which only relief sought was $10,000 in compensatory and punitive damages for physical, mental, and emotional injuries sustained during six days of prehearing detention mandated by charge of threatening behavior attributable to official's retaliatory motive, did not require favorable termination in state courts, when suit could not be construed as seeking judgment at odds with his conviction or with state's calculation of time to be served in accordance with underlying sentence, and prisoner raised no claim on which habeas relief could have been granted on any recognized theory, with consequence that favorable termination requirement was inapplicable. *Muhammad v. Close (2004) 540 U.S. 749, 124 S. Ct. 1303, 1304-1307, 158 L. Ed. 2d 32*

To recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a *42 U.S.C. § 1983* plaintiff must prove that conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by state tribunal authorized to make such determination, or called into question by federal court's issuance of writ of habeas corpus. *Heck v. Humphrey (1994) 512 U.S. 477, 486-487, 114 S. Ct. 2364, 129 L. Ed. 2d 383*

Former prisoner's claims against numerous city officials alleging wrongful arrest and malicious prosecution and conspiracy of "bad behavior" in violation of *42 U.S.C. § 1983*, based on two encounters with police, were barred under *Heck v. Humphrey*. Judgment in favor of plaintiff on those claims would necessarily have implied invalidity of his convictions, he could not show his convictions had already been invalidated, and no exception to *Heck*'s bar applied, since plaintiff's failure to achieve habeas corpus relief was self-imposed by his failure to timely pursue habeas corpus remedies. However, *Heck* did not bar § 1983 excessive force claim because claim did not necessarily imply invalidity of convictions or sentences, since alleged use of excessive force during arrest did not preclude possibility that plaintiff was still guilty of possession of narcotics. *Guerrero v. Gates (9th Cir. 2006) 442 F.3d 697, 703-705*

Inmate's successful habeas petition and subsequent release did not render moot claim for damages under *42 U.S.C. § 1983* based on alleged conspiracy between governor and others to deny parole to inmates serving life sentences by abusing state statutes that authorized governor to be involved with parole, when construing allegations in complaint as true, as appellate court was required to on review of dismissal under *Fed. R. Civ. Pro. Rule 12(b)(6)*, damages claims remained justiciable, subject to defenses. However, under *Heck v. Humphrey*, damages claims were not cognizable at time of district court's dismissal for failure to state claim on which relief could be granted, which came after Ninth Circuit's 2002 opinion granting inmate habeas relief, and, therefore, should have been dismissed. *McQuillion v. Schwarzenegger (9th Cir. 2004) 369 F.3d 1091, 1095, 1097-1098*

Under Prison Litigation Reform Act, *42 U.S.C. § 1997e(e)*, trial court properly dismissed action by prisoner for mental and emotional injury sought under *42 U.S.C. § 1983* for injuries allegedly suffered during lengthy detainment in jail cell, when prisoner alleged only *de minimis* physical injury, and when prisoner's deposition testimony portraying his injuries as not serious conflicted with his allegations of serious physical injury; however, prisoner's actionable claims for compensatory, nominal, or punitive damages premised on violations of his *Fourteenth Amendment* rights, and not on alleged mentalor emotional injuries, are not barred by § 1997e(e). *Oliver v. Keller (9th Cir. 2002) 289 F.3d 623, 627-630*

42 U.S.C. § 1997e(e), requiring prior showing of physical injury as prerequisite to recovery of damages for mental or emotional injury, is inapplicable to *First Amendment* claims; deprivation of *First Amendment* rights entitles plaintiff to judicial relief wholly aside from any physical, mental, or emotional injury. *Canell v. Lightner (9th Cir. 1998) 143 F.3d 1210, 1213*

[20] Injunctions

Inmate's successful habeas petition and subsequent release rendered moot claim for injunctive relief under *42 U.S.C. § 1983* based on alleged conspiracy between governor and others to deny parole to inmates serving life sentences by abusing state statutes that authorized governor to be involved with parole, when release extinguished inmate's legal interest in injunction because it would have had no effect on him. Claims of inmate's co-plaintiffs, who were still incarcerated, also failed to state claim for injunctive relief because, assuming co-plaintiffs had protected liberty interest in parole eligibility matters, prospective relief they sought was unattainable in § 1983 proceedings, when bias on part of Governor, Board of Prison Terms, and Attorney General could not be redressed by injunction ordering state officials to comply with state law, but effect of purportedly biased decision resulting in constitutional violation could be considered by federal court if contested in properly exhausted habeas petition, and when co-plaintiffs had alleged nothing to indicate challenged state statutes were facially unconstitutional because Governor had role in parole determinations or for any other reason. Remaining claims for prospective relief also could not proceed, because § 1983 does not vest federal courts with authority to enjoin administration of, or to declare invalid, state laws on grounds they are incompatible with other state laws, much less to rule that state laws are contrary to state Legislature's intent, and because federal court cannot put in place prophylactic rules of its own making when underlying state laws are not themselves contrary to federal law. *McQuillion v. Schwarzenegger (9th Cir. 2004) 369 F.3d 1091, 1095, 1098-1099*

18 U.S.C. § 3626, a provision of Prison Litigation Reform Act (PLRA), requiring court to make specfic findings before granting prospective relief, applied retroactively to pending case. *Oluwa v. Gomez (9th Cir. 1998) 133 F.3d 1237, 1239*

[21] Attorney's Fees

Prison Litigation Reform Act (PLRA) limits attorney's fees for post-judgment monitoring services performed after PLRA's effective date but not for post-judgment monitoring performed before then. *Martin v. Hadix (1999) 527 U.S. 343, 360-362, 119 S. Ct. 1998, 144 L. Ed. 2d 347*

Because prisoner obtained injunctive relief in addition to money damages and there was no showing that any portion of attorney's fees was incurred for sole purpose of obtaining monetary relief, district court did not err in ruling that no portion of fees was limited to 150 percent of money damages under *42 U.S.C. § 1997e(d)(2)*. However, because prisoner's causes of action for denial of medical treatment and access to the courts were decided against him by summary judgment, prisoner prevailed against four defendants but was unsuccessful against four others on his claim for retaliation, and prisoner obtained only fraction of damages sought and only part of desired injunctive relief, on record before court of appeal district court's determination that prisoner was entitled to full fees because he prevailed on his principal contention did not properly consider appellee's degree of success in arriving at reasonable fee award. *Dannenberg v. Valadez (9th Cir. 2003) 338 F.3d 1070, 1074-1076*

In action under Americans with Disabilities Act (ADA) [*42 U.S.C. § 12101*] and Rehabilitation Act (RA) [*29 U.S.C. § 794*] by class of prisoners challenging California's treatment of disabled inmates and parolees, trial court properly awarded attorney's fees to prevailing plaintiffs for work plaintiffs' counsel conducted in litigating another action before United States Supreme Court that protected plaintiffs' interests in this case by holding that ADA applies to prisoners. District court acted properly in declining to apply Prison Litigation Reform Act (PLRA) attorney's fees limits to present case, because ADA and RA have their own attorney's fees provisions, which are not limited by PLRA, and district court properly chose not to apply PLRA limits to tertiary *42 U.S.C § 1983* claim that required no additional discovery or witnesses at trial, and arguments supporting it so overlapped with ADA and RA claims as to make discrete time allocation and billing challenging. Finally, district court acted properly in approving various fees and expenses defendants believed were excessive or duplicative, or not properly compensable. *Armstrong v. Davis (9th Cir. 2003) 318 F.3d 965, 971-975*

District court did not err in awarding attorney's fees for services rendered by prisoner's attorneys in monitoring and

enforcing prior judgment and consent decree after effective date of PLRA, when Congress intended in PLRA that plaintiff be entitled to fees incurred in enforcing judgment entered on proof that plaintiff's constitutional rights had been violated, and when in holding that consent decree met requirements of PLRA in face of challenge seeking to terminate consent decree, district court found that decree corrected violations of prisoner's rights; district court did not abuse its discretion by applying PLRA rate cap to fees related to motions for contempt and discovery sanctions and to all fees incurred for attorney's services performed after PLRA's effective date, whether related to merits or postjudgment monitoring; district court adequately explained its reasons and did not abuse its discretion in setting different hourly rate for pre-PLRA postjudgment matters than it had applied in original litigation. However, court erred as matter of law in construing *42 U.S.C. § 1997e(d)(3)* and *18 U.S.C. § 3006A* in applying baseline hourly rate of $65 for in-court time and $45 for out-of-court time, which are rates actually paid to court-appointed counsel in district, rather than $75 as authorized by § 3006A; trial court also did not adequately explain its substantial reduction in prisoner's attorney's hours, since appellate court could not determine from record basis for court's determination that hours claimed were excessive. *Webb v. Ada County (9th Cir. 2002) 285 F.3d 829*

Trial court properly denied fees under PLRA to prisoner who had obtained temporary restraining order preventing his execution on complaint alleging that his due process rights were violated during clemency proceedings, when district court never finally adjudicated question of whether prisoner's rights were in fact violated, so that no actual violation of rights was proven. *Siripongs v. Davis (9th Cir. 2002) 282 F.3d 755*

PLRA provisions apply with regard to services performed after PLRA's effective date, but not for services performed before effective date. *Madrid v. Gomez (9th Cir. 1999) 190 F.3d 990, 994*

Code Civ. Proc. § 1021.5 authorizes award of attorney's fees to counsel who initiate proceedings on behalf of prison inmates to vindicate their rights. *In re Head (1986) 42 Cal. 3d 223, 226-233, 228 Cal. Rptr. 184, 721 P.2d 65*

Possible availability of public defender to conduct litigation on behalf of inmates based on *Gov. Code § 27706(g)* (discretion vested in public defender to represent indigent pretrial detainee regarding jail conditions) did not justify denial of attorney's fees under *Code Civ. Proc. § 1021.5*. *Daniels v. McKinney (1983) 146 Cal. App. 3d 42, 50-54, 193 Cal. Rptr. 842*

[22] Declaratory Relief

Inmate's successful habeas petition and subsequent release rendered moot claim for declaratory relief under *42 U.S.C. § 1983* based on alleged conspiracy between governor and others to deny parole to inmates serving life sentences by abusing state statutes that authorized governor to be involved with parole, when although in some instances declaratory relief may exist after injunctive relief becomes moot, inmate's claim for declaratory judgment could not proceed here after claim for injunctive relief was rendered moot because judicial pronouncement, as it would relate to inmate, would be advisory opinion, which Constitution prohibits, and when considered in conjunction with claim for damages, declaratory judgment without possibility of prospective effect would be superfluous. *McQuillion v. Schwarzenegger (9th Cir. 2004) 369 F.3d 1091, 1095*

[23] Religious Land Use and Institutionalized Persons Act

Summary judgment would have been inappropriate had district court applied Religious Land Use and Institutionalized Persons Act's standard prisoner's religious exercise claim rather than *First Amendment* standard, even though prisoner did not plead RLUIPA violation, where genuine issues of material fact existed as to whether prison officials' restrictions on his religious exercise were least restrictive means of maintaining prison security, and where complaint's omission of citation to RLUIPA did not preclude prisoner from advancing legal arguments based on that statute because complaint and subsequent filings provided appellees with fair notice of claim, even though statute was not cited in complaint itself,

because complaint contained factual allegations establishing plausible entitlement to relief under RLUIPA, which satisfied minimal notice pleading requirements of *Fed. R. Civ. P. 8.* *Alvarez v. Hill (9th Cir. 2008) 518 F.3d 1152, 1156-1159*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsCriminal ProcessCruel & Unusual PunishmentConstitutional LawEqual ProtectionGeneral OverviewCivil Rights LawPrisoner RightsFreedom of SpeechCivil Rights LawPrisoner RightsFreedom of ReligionCivil Rights LawPrisoner RightsMedical Treatment

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11-114 California Forms of Pleading and Practice--Annotated § 114.57

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§ 114.57 Law Reviews

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Comment, *A Prisoner's Right to Religious Diet Beyond the Free Exercise Clause* , *51 UCLA L. Rev. 1151 (2004)*

Quigley, *Symposium: Prison Work, Wages, and Catholic Social Thought: Justice Demands Decent Work For Decent Wages, Even for Prisoners*, *44 Santa Clara L. Rev. 1159 (2004)*

Comment, *Life-Term Inmates' Right to Procreate Via Artificial Insemination: Why So Much Fuss Over the Contents of a Plastic Cup? 33 McGeorge L. Rev. 521 (2002)*

Comment, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant To? 49 UCLA L. Rev. 1655 (2002)*

Branham, *Of Mice and Prisoners: The Constitutionality of Extending Prisoners' Confinement for Filing Frivolous Lawsuits*, *75 S. Cal. L. Rev. 1021 (2002)*

Note, *Presumed Dangerous: California's Selective Policy of Forcibly Medicating State Prisoners with Antipsychotic Drugs, 35 U.C. Davis L. Rev. 483 (2002)*

Comment, *State Sovereign Immunity and Stare Decisis: Solving the Prisoners' Dilemma Within the Court, 89 Cal. L. Rev. 1165 (2001)*

Branham, *Toothless in Truth? The Ethereal Rational Basis Test and the Prison Litigation Reform Act's Disparate Restrictions on Attorney's Fees, 89 Cal. L. Rev. 999 (2001)*

Comment, *Preventing Summary Judgment Against Inmates Who Have Been Sexually Assaulted by Showing that the Risk Was Obvious, 59 Md. L. Rev. 642 (2000)*

Comment, *The Price of Civil Rights: The Prison Litigation Reform Act's Attorney's Fee-Cap Provision as a Violation of Equal Protection of the Laws, 73 Temple L. Rev. 759 (2000)*

Comment, *County Liability for Poor Living Conditions and Inadequate Medical Care in California's County Jails, 33 U.C. Davis L. Rev. 677 (2000)*

Comment, *Past Wrongs, Present Futility, and the Future of Prisoner Relief: A Reasonable Interpretation of "Available" in the Context of the PLRA, 33 U.C. Davis L. Rev. 713 (2000)*

Comment, *Slamming the Prison Doors on Media Interviews: California's New Regulations Demonstrate the Need for a First Amendment Right of Access to Inmates, 30 McGeorge L. Rev. 125 (1998)*

Comment, *Cruel and Unusual Punishment of Female Inmates: The Need for Redress Under 42 U.S.C. § 1983 , 38 Santa Clara L. Rev. 555 (1998)*

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Comment, *Women and Children First: An Examination of the Unique Needs of Women in Prison, 16 Golden Gate U.L. Rev. 455 (1986)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPrisoner RightsAccess to CourtsConstitutional LawBill of RightsFundamental FreedomsFreedom of

ReligionFree Exercise of ReligionCriminal Law & ProcedurePostconviction ProceedingsImprisonmentCivil Rights LawPrisoner RightsFreedom of ReligionConstitutional LawBill of RightsFundamental FreedomsFreedom of ReligionGeneral Overview

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11-114 California Forms of Pleading and Practice--Annotated § 114.58

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§ 114.58 Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, § 58; vol. 7, *Constitutional Law*, §§ 246-247, 278; vol. 8, *Constitutional Law*, §§ 823, 825-827; vol. 10, *Parent and Child*, § 12 (10th ed. 2005)

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[Reserved]

§§ 114.59[Reserved]

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PART IV. FORMS

11-114 California Forms of Pleading and Practice--Annotated § 114.70

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§ 114.70 Complaint for Damages for Deprivation of Rights Under Color of State Law Pursuant to 42 U.S.C. § 1983--Cruel and Unusual Punishment of Prisoner by Use of Excessive Force

[1] FORM Complaint for Damages for Deprivation of Rights Under Color of State Law Pursuant to 42 U.S.C. § 1983--Cruel and Unusual Punishment of Prisoner by Use of Excessive Force

UNITED STATES DISTRICT COURT,
_____ DISTRICT OF CALIFORNIA

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], Defendant(s).	)	COMPLAINT FOR DAMAGES
	)	(*42 U.S.C. § 1983*)
	)	

_____

DEMAND FOR JURY TRIAL

Plaintiff alleges:

1. This is an action brought under *42 U.S.C. § 1983* to recover damages against defendant for violation of plaintiff's right to be free of cruel and unusual punishment, guaranteed by the *Eighth* and *Fourteenth Amendments to the United States Constitution*.

2. The jurisdiction of this Court is predicated on *28 U.S.C. §§ 1331* and *1343*.

3. Plaintiff, _____ [*name*], is, and at all times mentioned in this complaint was, a citizen of the United States, and a prisoner, in the custody of the California Department of Corrections, at _____ [*name of prison*], in _____ [*location of prison*], California.

4. Defendant _____ [*name*] is, and at all times mentioned in this complaint was, _____ [*state residence of defendant, or other basis of venue, e.g.*, a resident of _____ (*county*), California]. Venue is therefore proper under *28 U.S.C. § 1391(b)*.

[5. A substantial part of the events giving rise to this action occurred in _____ (*county*), California. Venue is therefore proper under *28 U.S.C. § 1391(b)*.]

6. Defendant was, at all times mentioned in this complaint, _____ [*state facts showing defendant's capacity as a government agent, e.g.*, an agent of the State of California, employed as a correctional officer at Mule Creek State Prison].

7. Defendant was, at all times mentioned in this complaint, acting in the course and scope of _____ [his *or* her] employment _____ [*specify employment, e.g.*, as a correctional officer at Mule Creek State Prison].

8. Defendant was, at all times mentioned in this complaint, acting under color of state law.

9. Defendant is sued in _____ [his *or* her] individual capacity.

10. _____ [*Allege facts concerning the infliction of cruel and unusual punishment on the plaintiff by specifying exact acts of excessive force*.]

11. In acting as alleged in this complaint, defendant subjected Plaintiff to unnecessary and wanton infliction of physical injury, pain, and emotional distress.

12. In acting as alleged in this complaint, defendant violated plaintiff's right to be free of cruel and unusual punishment, guaranteed by the *Eighth* and *Fourteenth Amendments to the United States Constitution*.

13. As a direct and proximate result of defendant's actions, described in this complaint, plaintiff has suffered injury, pain, and emotional distress in that _____ [*describe injury, pain, and emotional distress, and any other damage suffered by plaintiff as a result of the cruel and unusual punishment*].

[14. In acting as is alleged in this complaint, defendant acted knowingly, willfully, and maliciously, and with reckless and callous disregard for plaintiff's federally protected rights.]

[15. Plaintiff exhausted available administrative remedies, by _____ (*describe exhaustion of remedies*)].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For compensatory damages, in an amount to be determined according to proof at trial;

[2. For punitive damages, in an amount to be determined according to proof at trial;]

3. For reasonable attorney's fees, pursuant to *42 U.S.C. § 1988*;

4. For costs of suit incurred in this action; and

5. For such other and further relief as the Court deems proper.

_____ [*date*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

DEMAND FOR JURY TRIAL

Plaintiff _____ [*name*] hereby demands a jury trial.

_____ [*date*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in federal court in an action brought under *42 U.S.C. § 1983* for violation of a prisoner's right to be free of cruel and unusual punishment by the use of excessive force. The complaint seeks recovery of damages, including punitive damages in an appropriate case.

[3] Allegations

The form of complaint in [1], *above*, alleges all of the following:

- That this action arises under *42 U.S.C. § 1983*, and is for violation of plaintiff's federal constitutional right to be free of cruel and unusual punishment (Paragraph 1).

- That the court's jurisdiction is predicated on *28 U.S.C. §§ 1331* and *1343* (Paragraph 2).

- Plaintiff's name, United States citizenship, and incarceration (Paragraph 3). To bring an action under *42 U.S.C. § 1983*, the plaintiff must be "a citizen of the United States or other person within the jurisdiction thereof" [*42 U.S.C. § 1983*; *see Martinez v. City of Los Angeles (9th Cir. 1998) 141 F.3d 1373, 1382* (Mexican citizen, who was in Mexico at time of events in question, could not bring § 1983 action)].

- Defendant's residence, for purposes of establishing venue (Paragraph 4) [*see 28 U.S.C. § 1391(b)* (venue proper in district where a defendant resides, if all defendants are from same state)].

- An optional paragraph (Optional Paragraph 5) identifying a county in which a substantial part of the events giving rise to the action occurred. This paragraph is for use in a case when the plaintiff wishes to establish venue in such county [*see 28 U.S.C. § 1391(b)* (venue proper in district where substantial part of events giving rise to action occurred)].

- That defendant was an agent of a government entity, and that defendant was acting in the course and scope of his or her agency (Paragraphs 6 and 7). These allegations establish background facts showing that defendant acted under color of state law.

- That defendant acted under color of state law (Paragraph 8). This is an element of the cause of action under *42 U.S.C. § 1983* [*see, e.g., Crumpton v. Gates (9th Cir. 1991) 947 F.2d 1418, 1420]* .

- That defendant is sued in his or her individual capacity (Paragraph 9). An action for recovery of money damages under *42 U.S.C. § 1983* may be brought against a person acting under color of law, sued in his or her individual capacity. If the suit is brought against the defendant in his or her official capacity, the action is considered to be the same as an action against the government entity employing the defendant, and, therefore, the requirements and limitations of such a suit would apply [*see Ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes, § 113.14[7]*].

- Facts concerning the infliction of cruel and unusual punishment (Paragraph 10). This may take up several paragraphs, and make up the majority of the complaint.

- An allegation that defendant subjected plaintiff to unnecessary and wanton infliction of physical injury, pain, and emotional distress (Paragraph 11). This is the legal standard for a showing of cruel and unusual punishment by use of excessive force [*see Hudson v. McMillian (1992) 503 U.S. 1, 6-7, 112 S. Ct. 995, 117 L. Ed. 2d 156* ; *Wilson v. Seiter (1991) 501 U.S. 294, 297-303, 111 S. Ct. 2321, 115 L. Ed. 2d 271* ; *Whitley v. Albers (1986) 475 U.S. 312, 318-321, 106 S. Ct. 1078, 89 L. Ed. 2d 251]* .

- An allegation that defendant violated plaintiff's right to be free of cruel and unusual punishment, guaranteed by the *Eighth* and *Fourteenth Amendments to the United States Constitution* (Paragraph 12).

- That as a direct and proximate result of defendant's actions, plaintiff suffered injury, pain, and

emotional distress (Paragraph 13). This allegation also describes the injury, pain, and emotional distress, and any other damage suffered by plaintiff. Under the Prison Litigation Reform Act, enacted in 1996, a prisoner may not recover damages for mental or emotional injury without a prior showing of physical injury [*42 U.S.C. § 1997e(e)*].

- An optional allegation, that defendants acted knowingly, willfully, and maliciously, and with reckless and callous disregard for plaintiff's federally protected rights (Optional Paragraph 14). This allegation, if appropriate under the circumstances, would support recovery of punitive damages [*see Smith v. Wade (1983) 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632]* .

- An optional allegation, that plaintiff exhausted available administrative remedies (Optional Paragraph 15). In 1996, the Prison Litigation Reform Act added a requirement that a prisoner must exhaust available administrative remedies before bringing an action under *42 U.S.C. § 1983* or other federal law [*42 U.S.C. § 1997e(a)*; *see also Rumbles v. Hill (9th Cir. 1999) 182 F.3d 1064, 1066* , *cert. denied, 528 U.S. 1074 (2000)]* . However, the Ninth Circuit Court of Appeals has held that exhaustion of administrative remedies under § 1997e(a) is not required if (1) a prisoner's § 1983 claims seek only money damages and (2) the correctional facility's administrative grievance process does not allow for such an award [*Rumbles v. Hill (9th Cir. 1999) 182 F.3d 1064, 1068-1069* , *cert. denied, 528 U.S. 1074 (2000)]* . This holding conflicts with holdings of courts in other federal circuits [*see Perez v. Wisconsin Dep't of Corrections (7th Cir. 1999) 182 F.3d 532, 537-538* (exhaustion mandatory even if administrative process does not provide for remedy sought by plaintiff); *Alexander v. Hawk (11th Cir. 1998) 159 F.3d 1321, 1326* (same)]. The form of complaint in [1], *above*, therefore, includes an optional allegation regarding exhaustion, for use when exhaustion of administrative remedies is necessary, and/or when the prisoner has in fact exhausted such remedies.

[4] Prayer

The prayer in the form complaint in [1], *above*, seeks recovery of compensatory damages. Generally, the full range of compensatory damages recoverable in a tort action is recoverable in an action brought under *42 U.S.C. § 1983* [*see Memphis Community School Dist. v. Stachura (1986) 477 U.S. 299, 305-306, 106 S. Ct. 2537, 91 L. Ed. 2d 249]* . However, under the Prison Litigation Reform Act, enacted in 1996, a prisoner may not recover damages for mental or emotional injury without a prior showing of physical injury [*42 U.S.C. § 1997e(e)*].

The complaint in [1], *above*, also includes an optional prayer for punitive damages. In a case when the violation of plaintiff's rights was motivated by evil motive or intent, or involved reckless or callous indifference to the plaintiff's federally protected rights [*see Smith v. Wade (1983) 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632]* , punitive damages would be recoverable. If the facts do not involve evil motive or intent, or reckless or callous indifference to the plaintiff's federally protected rights, the optional punitive damages allegation (Paragraph 14 of the complaint) and the optional prayer for punitive damages should not be used.

The prayer also includes a prayer for attorney's fees. *42 U.S.C. § 1988(b)* specifically provides for the recovery of attorney's fees in *42 U.S.C. § 1983* cases.

[5] Jury Demand

The form of complaint in [1], *above*, includes a demand for trial by jury. In a *42 U.S.C. § 1983* case in which damages are sought, the plaintiff will have a right to a jury trial [*U.S. Const., amend. VII*]. *Fed. R. Civ. Proc., Rule 38* governs demands for trial by jury. Under Rule 38, the demand for trial by jury may be served at any time after commencement of the action and not later than 10 days after service of the last pleading directed to the issue triable by jury. The rule provides further that "[s]uch demand may be indorsed upon a pleading of the party" [*Fed. R. Civ. Proc., Rule 38*].

Therefore, the demand for trial by jury may be included in the complaint, as is the case in the form in [1], *above*.

[6] Cross References

For discussion and forms relating to actions under *42 U.S.C. § 1983* generally, see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms of jurisdictional allegations for use in federal court, and for discussion and forms relating to removal of actions to federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For alternative forms of prayers, see Ch. 420, *Prayers*

California Forms of Pleading and Practice--Annotated

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 114 CIVIL RIGHTS: PRISONERS' RIGHTS
PART IV. FORMS

11-114 California Forms of Pleading and Practice--Annotated § 114.71

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§ 114.71 Complaint for Damages and Injunctive Relief for Deprivation of Rights Under Color of State Law Pursuant to 42 U.S.C. § 1983--Cruel and Unusual Punishment of Prisoner by Provision of Inadequate Medical Care

[1] FORM Complaint for Damages and Injunctive Relief for Deprivation of Rights Under Color of State Law Pursuant to 42 U.S.C. § 1983--Cruel and Unusual Punishment of Prisoner by Provision of Inadequate Medical Care

UNITED STATES DISTRICT COURT,
_____ DISTRICT OF CALIFORNIA

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], Defendant(s).	)	COMPLAINT FOR PRELIMINARY AND PER-
	)	MANENT INJUNCTION, AND FOR DAMAGES
	)	(*42 U.S.C. § 1983*)

_____

DEMAND FOR JURY TRIAL

Plaintiff alleges:

1. This is an action brought under *42 U.S.C. § 1983* to obtain injunctive relief and recover damages against defendants for violation of plaintiff's right to be free of cruel and unusual punishment, guaranteed by the *Eighth* and *Fourteenth Amendments to the United States Constitution*.

2. The jurisdiction of this Court is predicated on *28 U.S.C. §§ 1331* and *1343*.

3. Plaintiff, _____ [*name*], is, and at all times mentioned in this complaint was, a citizen of the United States, and a prisoner, in the custody of the California Department of Corrections, at _____ [*name of prison*], in _____ [*location of prison*], California.

4. Defendant _____ [*name*] is, and at all times mentioned in this complaint was, _____ [*state residence of defendant, or other basis of venue, e.g.*, a resident of _____ (*county*), California]. Venue is therefore proper under *28 U.S.C. § 1391(b)*.

[5. A substantial part of the events giving rise to this action occurred in _____ (*county*), California. Venue is therefore proper under *28 U.S.C. § 1391(b)*.]

6. Defendant was, at all times mentioned in this complaint, _____ [*state facts showing defendant's capacity as a government agent, e.g.*, an agent of the State of California, employed as Chief Medical Officer at Folsom State Prison].

7. Defendant was, at all times mentioned in this complaint, acting in the course and scope of _____ [his *or* her] employment _____ [*specify employment, e.g.*, as Chief Medical Officer at Folsom State Prison].

8. Defendant was, at all times mentioned in this complaint, acting under color of state law.

9. Defendant is sued in _____ [his *or* her] individual and official capacities.

10. _____ [*Allege facts concerning plaintiff's medical needs and the defendant's provision of inadequate medical care*.]

11. In acting as alleged in this complaint, defendant acted with deliberate indifference to plaintiff's serious medical needs.

12. In acting as alleged in this complaint, defendant violated plaintiff's right to be free of cruel and unusual punishment, guaranteed by the *Eighth* and *Fourteenth Amendments to the United States Constitution*.

13. As a direct and proximate result of defendant's actions, described in this complaint, plaintiff has suffered injury, pain, and emotional distress in that _____ [*describe injury, pain, and emotional distress, and any other damage suffered by plaintiff as a result of defendant's provision of inadequate medical care*].

[14. In acting as is alleged in this complaint, defendant acted knowingly, willfully, and maliciously, and with reckless and callous disregard for plaintiff's federally protected rights.]

15. As a result of defendant's actions, plaintiff has suffered and will continue to suffer extreme hardship and actual and impending irreparable _____ [injury, pain, *and/or* emotional distress] in that _____ [*state specific and definite facts showing the impending irreparable injury, pain, and/or emotional distress that plaintiff will suffer*].

16. Plaintiff has no adequate or speedy remedy at law for the conduct of defendant described above. This action for injunctive relief is plaintiff's only means of securing prospective relief, preventing defendant from denying plaintiff necessary medical care.

17. Plaintiff exhausted available administrative remedies, by _____ [*describe exhaustion of remedies*].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a preliminary injunction ordering defendant, and defendant's officers, agents, employees, successors, and attorneys, and all those in active concert or participation with defendant, to _____ [*describe conduct to be required or enjoined*];

2. For a permanent injunction permanently enjoining and restraining defendant, and defendant's officers, agents, employees, successors, and attorneys, and all those in active concert or participation with defendant, from _____ [*describe conduct to be enjoined*];

3. For compensatory damages, in an amount to be determined according to proof at trial;

[4. For punitive damages, in an amount to be determined according to proof at trial;]

5. For reasonable attorney's fees, pursuant to *42 U.S.C. § 1988*;

6. For costs of suit incurred in this action; and

7. For such other and further relief as the Court deems proper.

_____ [*date*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

DEMAND FOR JURY TRIAL

Plaintiff _____ [*name*] hereby demands a jury trial.

_____ [*date*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in federal court in an action brought under *42 U.S.C. § 1983* for violation of a prisoner's right to be free of cruel and unusual punishment by the provision of inadequate medical care. This form of complaint seeks recovery of damages, including punitive damages in an appropriate case, and injunctive relief.

The form of complaint in [1], *above*, is for use against one defendant, against whom both damages and injunctive relief are sought. If there are more than one defendant in the case, the complaint should be modified in that respect. In adding further defendants, special attention must be paid to the capacity in which each defendant is sued [*see* Paragraph 9 of the complaint in [1], *above*]. A defendant must be sued (1) in his or her individual capacity, if only damages are sought against the defendant; (2) in his or her official capacity, if only injunctive relief is sought against the defendant; or (3) in both his or her individual and official capacities, if both damages and injunctive relief are sought against the defendant.

[3] Allegations

The form of complaint in [1], *above*, alleges all of the following:

- That this action arises under *42 U.S.C. § 1983*, and is for violation of plaintiff's federal constitutional right to be free of cruel and unusual punishment (Paragraph 1).

- That the court's jurisdiction is predicated on *28 U.S.C. §§ 1331* and *1343* (Paragraph 2).

- Plaintiff's name, United States citizenship, and incarceration (Paragraph 3). To bring an action under *42 U.S.C. § 1983*, the plaintiff must be "a citizen of the United States or other person within the jurisdiction thereof" [*42 U.S.C. § 1983*; *see Martinez v. City of Los Angeles (9th Cir. 1998) 141 F.3d 1373, 1382* (Mexican citizen, who was in Mexico at time of events in question, could not bring § 1983 action)].

- Defendant's residence, for purposes of establishing venue (Paragraph 4) [*see 28 U.S.C. § 1391(b)* (venue proper in district where a defendant resides, if all defendants are from same state)].

- An optional paragraph (Optional Paragraph 5) identifying a county in which a substantial part of the events giving rise to the action occurred. This paragraph is for use in a case when the plaintiff wishes to establish venue in such county [*see 28 U.S.C. § 1391(b)* (venue proper in district where substantial part of events giving rise to action occurred)].

- That defendant was an agent of a government entity, and that defendant was acting in the course and

scope of his or her agency (Paragraphs 6 and 7). These allegations establish background facts showing that defendant acted under color of state law.

- That defendant acted under color of state law (Paragraph 8). This is an element of the cause of action under *42 U.S.C. § 1983* [*see, e.g., Crumpton v. Gates (9th Cir. 1991) 947 F.2d 1418, 1420]* .

- That defendant is sued in his or her individual and official capacities (Paragraph 9). The defendant is sued in his or her individual capacity because damages are sought, and in his or her official capacity because injunctive relief is sought [*see Ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes, § 113.14[7]*].

- Facts concerning the plaintiff's medical needs and the defendant's provision of inadequate medical care (Paragraph 10). This may take up several paragraphs, and make up the majority of the complaint.

- An allegation that defendant acted with deliberate indifference to plaintiff's serious medical needs (Paragraph 11). This is the legal standard for a showing of cruel and unusual punishment by provision of inadequate medical care [*see Estelle v. Gamble (1976) 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251* ; *Wakefield v. Thompson (9th Cir. 1999) 177 F.3d 1160, 1164-1165* ; *Ortiz v. City of Imperial (9th Cir. 1989) 884 F.2d 1312, 1314]* .

- An allegation that defendant violated plaintiff's right to be free of cruel and unusual punishment, guaranteed by the *Eighth* and *Fourteenth Amendments to the United States Constitution* (Paragraph 12).

- That as a direct and proximate result of defendant's actions plaintiff suffered injury, pain, and emotional distress (Paragraph 13). This allegation also describes the injury, pain, and emotional distress, and any other damage suffered by plaintiff. Under the Prison Litigation Reform Act, enacted in 1996, a prisoner may not recover damages for mental or emotional injury without a prior showing of physical injury [*42 U.S.C. § 1997e(e)*].

- An optional allegation, that defendants acted knowingly, willfully, and maliciously, and with reckless and callous disregard for plaintiff's federally protected rights (Optional Paragraph 14). This allegation, if appropriate under the circumstances, would support recovery of punitive damages [*see Smith v. Wade (1983) 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632]* .

- That defendant's actions caused and will continue to cause plaintiff to suffer extreme hardship and actual and impending irreparable injury, pain, and/or emotional distress, and an explanation of the impending irreparable injury, pain, and/or emotional distress (Paragraph 15).

- That plaintiff has no adequate or speedy remedy at law (Paragraph 16).

- An allegation that plaintiff exhausted available administrative remedies (Paragraph 17). In 1996, the Prison Litigation Reform Act added a requirement that a prisoner must exhaust available administrative remedies before bringing an action under *42 U.S.C. § 1983* or other federal law [*42 U.S.C. § 1997e(a)*; *see Rumbles v. Hill (9th Cir. 1999) 182 F.3d 1064, 1066 , cert. denied, 528 U.S. 1074 (2000)]* .

[4] Prayer

The prayer in the form complaint in [1], *above*, seeks preliminary and permanent injunctive relief. The prayer also seeks recovery of compensatory damages. Generally, the full range of compensatory damages recoverable in a tort action is recoverable in an action brought under *42 U.S.C. § 1983* [*see Memphis Community School Dist. v. Stachura (1986)*

477 U.S. 299, 305-306, 106 S. Ct. 2537, 91 L. Ed. 2d 249] . However, under the Prison Litigation Reform Act, enacted in 1996, a prisoner may not recover damages for mental or emotional injury without a prior showing of physical injury [*42 U.S.C. § 1997e(e)*].

The form of complaint in [1], *above*, also includes an optional prayer for punitive damages. In a case when the violation of plaintiff's rights was motivated by evil motive or intent, or involved reckless or callous indifference to the plaintiff's federally protected rights [*see Smith v. Wade (1983) 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632]* , punitive damages would be recoverable. If the facts do not involve evil motive or intent, or reckless or callous indifference to the plaintiff's federally protected rights, the optional punitive damages allegation (Optional Paragraph 14 of the complaint) and the optional prayer for punitive damages should not be used.

The prayer also includes a prayer for attorney's fees. *42 U.S.C. § 1988(b)* specifically provides for the recovery of attorney's fees in § 1983 cases.

[5] Jury Demand

The form of complaint in [1], *above*, includes a demand for trial by jury. In a *42 U.S.C. § 1983* case in which damages are sought, the plaintiff will have a right to a jury trial [*U.S. Const., amend. VII*]. *Fed. R. Civ. Proc., Rule 38* governs demands for trial by jury. Under Rule 38, the demand for trial by jury may be served at any time after commencement of the action and not later than 10 days after service of the last pleading directed to the issue triable by jury. The rule provides further that "[s]uch demand may be indorsed upon a pleading of the party" [*Fed. R. Civ. Proc., Rule 38*]. Therefore, the demand for trial by jury may be included in the complaint, as is the case in the complaint in [1], *above*.

[6] Cross References

For discussion and forms relating to actions under *42 U.S.C. § 1983*, generally, see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms of jurisdictional allegations for use in federal court, and for discussion and forms relating to removal of actions to federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

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Chapter 114 CIVIL RIGHTS: PRISONERS' RIGHTS
PART IV. FORMS

11-114 California Forms of Pleading and Practice--Annotated § 114.72

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§ 114.72 Declaration of Prisoner for Removal From State Prison to Attend Court Proceedings Affecting Parental or Marital Rights [Penal Code § 2625]

[1] FORM Declaration of Prisoner for Removal From State Prison to Attend Court Proceedings Affecting Parental or Marital Rights [Penal Code § 2625]

[*Caption. Same as on papers previously filed in proceeding*.]

I, _____ [*name*], declare:

1. My _____ [parental *or* marital] rights are subject to adjudication in the above-entitled proceeding now pending before this court in that _____ [*specify*].

2. I am presently a _____ [prisoner at _____ (*name of state prison, county jail or* the California Rehabilitation Center) *or* ward of the California Youth Authority] in _____ [*city*], _____ County, California.

3. I request that this court order my removal from the above-named facility and my production before this court for the purpose of _____ [*specify, e.g.*, attending trial].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

The declaration and request in [1], *above*, is for use by a person who is a prisoner in the custody of a state prison, county jail, or the California Rehabilitation Center, or who is a ward of the California Youth Authority, to obtain temporary removal from the institution and production before the court in which an action is pending that will adjudicate the prisoner's marital or parental rights [*Penal Code § 2625*]. The form may be modified for use by a person confined in a state hospital for the care and treatment of the mentally disordered, or in any other public or private treatment facility, following a verdict or finding that the individual was insane at the time of committing an offense, or mentally incompetent to be tried or adjudged to punishment [*Penal Code § 2625(a)*].

Prisoners who have been sentenced to death do not have the right to attend proceedings in which their parental rights are subject to adjudication [*Penal Code § 2625(g)*].

[3] Contents of Declaration

The form declaration in [1], *above*, states all of the following:

- That the prisoner's parental or marital rights are subject to adjudication in a proceeding pending before the court (Paragraph 1).
- The name and location of the institution in which the prisoner is incarcerated (Paragraph 2).
- The prisoner's request that the court order his or her removal from the institution and his or her production before the court (Paragraph 3).

[4] When Judge Must Issue Order

Generally, an order is within the discretion of the judge. However, in any of the following proceedings, on receipt of a statement from the prisoner or his or her attorney indicating the prisoner's desire to be present during the court proceedings, the judge "shall issue" the order for temporary removal [*Penal Code § 2625(d)*]:

- To declare a minor free from custody and control of his or her parent [*Fam. Code § 7800 et seq.*];
- To adjudicate a minor dependent child of the court [*Welf. & Inst. Code § 300*]; or
- To terminate parental rights [*Welf. & Inst. Code § 366.26*].

[5] Notice of Proceeding to Prisoner

In any proceeding brought under *Fam. Code § 7800 et seq.*, *Welf. & Inst. Code § 300*, or *Welf. & Inst. Code § 366.26*, the superior court or a judge of the court must order that notice of the proceeding be transmitted to the prisoner. The notice is served in accordance with *Fam. Code § 7881* or *7882* or *Welf. & Inst. Code § 290.2*, *291*, or *294* [*Penal Code §*

2625(b), (c); *see* discussion of service requirements in *Ch. 12A, Adoptions: Termination of Parental Rights, § 12A.71,* and *Ch. 328, Juvenile Courts: Dependency Proceedings, §§ 328.20, 328.47,* and *328.171*].

No proceedings may be held under *Fam. Code § 7800 et seq., Welf. & Inst. Code § 300,* or *Welf. & Inst. Code § 366.26,* without the physical presence of the prisoner or his or her attorney, unless the court has before it a knowing waiver of the right of physical presence signed by the prisoner, or an affidavit signed by the warden, superintendent, or other person in charge of the institution or his or her designated representative stating that the prisoner has, by express statement or action, indicated an intent not to appear at proceedings [*Penal Code § 2625(d)*].

[6] Cross References

For discussion and forms relating to adoptions and termination of parental rights, see Ch. 12A, *Adoptions: Termination of Parental Rights*

For discussion and forms relating to dependency proceedings in juvenile courts, see Ch. 328, *Juvenile Courts: Dependency Proceedings*

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Chapter 114 CIVIL RIGHTS: PRISONERS' RIGHTS
PART IV. FORMS

11-114 California Forms of Pleading and Practice--Annotated § 114.73

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§ 114.73 Order for Removal of Prisoner From State Prison to Attend Court Proceedings Affecting Parental or Marital Rights [Penal Code § 2625]

[1] FORM Order for Removal of Prisoner From State Prison to Attend Court Proceedings Affecting Parental or Marital Rights [Penal Code § 2625]

[*Caption. Same as on papers previously filed in proceeding.*]

County of _____ [*specify county*].

The People of the State of California to the warden of _____ [*name of state prison*]:

An order having been made this day by me that _____ [*name of prisoner*] be produced in this court as a party in the case of _____ [*title of action or proceeding*], you are commanded to deliver _____ [*name of prisoner*] into the custody of _____ [*name*] for the purpose of _____ [*specify, e.g.,* attending trial].
Dated: _____

_____ [*signature*]

Judge

[2] Use of Form

The order in [1], *above*, is for use to direct the production of a prisoner before the court in which an action is pending that will adjudicate a prisoner's parental or marital rights [*see Penal Code § 2625*]. The form of the order is specified in *Penal Code § 2625(e)*.

Prisoners who have been sentenced to death do not have the right to attend proceedings in which their parental rights are subject to adjudication [*Penal Code § 2625(g)*].

A copy of the order is to be transmitted to the person in charge of the prisoner's institution not less than 15 days before the order is to be executed. The order is to be executed by the sheriff of the county in which it is made, whose duty it is to bring the prisoner before the proper court. The sheriff is to keep the prisoner safe, and, when his or her presence is no longer required, to return the prisoner to the facility from which he or she was taken. The expense of executing the order is a proper charge against, and is to be paid by, the county in which the order is made. A prisoner so removed remains in the constructive custody of the person in charge of the prisoner's institution [*Penal Code § 2625(e), (f)*].

[3] Cross References

For discussion and forms relating to adoptions and termination of parental rights, see Ch. 12A, *Adoptions: Termination of Parental Rights*

For discussion and forms relating to dependency proceedings in juvenile courts, see Ch. 328, *Juvenile Courts: Dependency Proceedings*

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 115 CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION

11-115 California Forms of Pleading and Practice--Annotated 115.syn

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.syn Synopsis to Chapter 115: CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION

§ 115.01 Scope of Chapter

§ 115.02 Cross References

§§ 115.03-115.09 [Reserved]

§ 115.10 Governing Statutes

[1] State Statutes

[a] California Fair Employment and Housing Act and Other Laws

[b] Preemption

[c] Actions Independent of FEHA

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California Forms of Pleading and Practice--Annotated

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 115 CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION
I SCOPE

11-115 California Forms of Pleading and Practice--Annotated § 115.01

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.01 Scope of Chapter

This chapter discusses state and federal law prohibiting employment discrimination by private employers. Specifically, this chapter discusses violations of state law under the California Fair Employment and Housing Act (FEHA) (*Gov. Code § 12900 et seq.*) [*see § 115.20*].

This chapter also discusses the following federal legislation that prohibits unlawful employment discrimination:

- Title VII of the federal Civil Rights Act of 1964 (Title VII) (*42 U.S.C. § 2000e et seq.*) [*see § 115.21[1]*].
- The Americans With Disabilities Act (ADA) (*42 U.S.C. § 12101 et seq.*) [*see § 115.21[2]*].
- The Age Discrimination in Employment Act of 1967 (ADEA) (*29 U.S.C. § 621 et seq.*) [*see § 115.21[3]*].
- The Civil Rights Act of 1866 (*42 U.S.C. § 1981*) [*see § 115.21[4]*].

This chapter contains a form of complaint for damages and injunctive relief for unlawful refusal to hire under FEHA [*see § 115.90*]. This chapter also includes alternative forms of allegations, for use in actions brought under FEHA based on the following:

- Failure to accommodate a person's religious beliefs [*see § 115.91*].
- Failure to accommodate a disability or medical condition [*see § 115.92*].
- Harassment [*see § 115.93*].

- Retaliation [*see § 115.94*].

This chapter also contains forms of allegations for the following affirmative defenses in FEHA cases:

- Undue hardship [*see § 115.100*].
- Bona fide occupational qualification [*see § 115.101*].
- Business necessity [*see § 115.102*].
- Job-relatedness [*see § 115.103*].
- Inability to perform job duties [*see § 115.104*].
- Danger to health or safety [*see § 115.105*].
- Waiver of employment claims [*see § 115.106*].
- Avoidable consequences [see *§ 115.107*].

This chapter also includes an illustrative copy of the Judicial Council Form Interrogatories for use in employment law litigation [*see § 115.120*].

For thorough discussion and forms relating to civil actions under Title VII, the ADA, the ADEA, *42 U.S.C. § 1981*, and other federal employment laws, see K. Wilcox, ed., California Employment Law (Matthew Bender), and A. Larson & L. Larson, Employment Discrimination (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawGeneral OverviewCivil Rights LawContractual Relations & HousingEqual Rights Under the Law (sec. 1981)General OverviewLabor & Employment LawDiscriminationAge DiscriminationGeneral OverviewLabor & Employment LawDiscriminationDisability DiscriminationGeneral OverviewLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964General Overview

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Chapter 115 CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION
I SCOPE

11-115 California Forms of Pleading and Practice--Annotated § 115.02

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.02 Cross References

- For a comprehensive procedural guide that chronologically outlines the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions* .

- For discussion and forms relating to discrimination in government-funded programs and activities, see Ch. 112, *Civil Rights: Government-Funded Programs and Activities* .

- For discussion and forms relating to actions under *42 U.S.C. §§ 1981* and *1983*, and the other post-Civil War civil rights statutes (*42 U.S.C. §§ 1982*, *1985*, *1986*, and *1988*), see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

- For discussion and forms relating to prisoners' rights, see Ch. 114, *Civil Rights: Prisoners' Rights* .

- For discussion and forms relating to discrimination in business establishments, see Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

- For discussion and forms relating to housing discrimination, see Ch. 117, *Civil Rights: Housing Discrimination* .

- For discussion and forms relating to interference with civil rights by threats, intimidation, coercion, or violence, see Ch. 117A, *Civil Rights: Interference with Civil Rights by Threats, Intimidation, Coercion, or Violence* .

- For discussion and forms relating to employers' liability for employees' torts, see Ch. 248, *Employer's Liability for Employee's Torts* .

- For discussion and forms relating to termination and discipline of employees, see Ch. 249,

Employment Law: Termination and Discipline .

- For discussion and forms relating to wage and hour disputes, see Ch. 250, *Employment Law: Wage and Hour Disputes* .

- For discussion and forms of jurisdictional allegations for use in federal court, and for discussion and forms relating to removal of actions to federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

- For discussion and forms relating to injunctions, see Ch. 303, *Injunctions* .

- For discussion and forms relating to civil rights actions arising from illegal searches and seizures, see *Ch. 429, Privacy, § 429.310* et seq.

- For discussion of deprivation of civil rights during an administrative investigation, see Ch. 471, *Investigations by Public Agencies* .

- For discussion of adjudication of cases before public agencies, see Ch. 473, *Public Agency Adjudication* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil Rights LawConspiracyGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingProperty Rights (sec. 1982)General OverviewCivil Rights LawSection 1983 ActionsGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 115 CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION
I SCOPE

11-115 California Forms of Pleading and Practice--Annotated §§ 115.03-115.09

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[Reserved]

§§ 115.03[Reserved]

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 115 CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION
PART II. LEGAL BACKGROUND
A. Governing Law

11-115 California Forms of Pleading and Practice--Annotated § 115.10

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.10 Governing Statutes

[1] State Statutes

[a] California Fair Employment and Housing Act and Other Laws

The principal California legislation prohibiting employment discrimination is the California Fair Employment and Housing Act (FEHA) (*Gov. Code § 12900 et seq.*).

FEHA is interpreted and implemented by administrative regulations and guidelines that also provide substantive equal employment opportunity rights [*2 Cal. Code Reg. § 7285.0 et seq.* (FEHA regulations)].

In addition to these statutes and regulations, there are numerous other state statutory and regulatory sources of antidiscrimination law, including the Unruh Civil Rights Acts (*Civ. Code § 51 et seq.*) [*see* Ch. 116, *Civil Rights: Discrimination in Business Establishments*] and *Gov. Code § 11135* (prohibiting discrimination in state departments and agencies). For additional discussion of these laws, see K. Wilcox, ed., California Employment Law (Matthew Bender), and A. Larson & L. Larson, Employment Discrimination (Matthew Bender).

The California Equal Pay Act [*Lab. Code § 1197.5*] prohibits wage discrimination based on sex [*see* Ch. 250, *Employment Law: Wage and Hour Disputes*]. For additional discussion of this statute, see K. Wilcox, ed., California Employment Law (Matthew Bender).

The California Constitution also protects equal employment opportunity rights [*see Cal. Const., art. I, §§ 7, 8*], but since its application generally requires "state action" [*see Sail'er Inn v. Kirby (1971) 5 Cal. 3d 1, 8, 95 Cal. Rptr. 329, 485 P.2d 529]* , it primarily covers public employment. For discussion of the equal employment opportunity rights of public employees, see A. Larson & L. Larson, Employment Discrimination (Matthew Bender).

PRACTICE TIP:

Public Employees. Because cases with public employees can raise both legal and practical issues that often do not arise in the private sector, attorneys should be aware of special considerations that arise in these cases. For example, punitive damages are not available against public employers [*City of Newport v. Fact Concerts, Inc. (1981) 453 U.S. 247, 271, 101 S. Ct. 2748, 69 L. Ed. 2d 616* (*42 U.S.C. § 1983* case); *see Gov. Code § 818*]. Further, public employees often have a potential administrative appeal to a Civil Service Commission or a State Personnel Board [*see Skelly v. State Personnel Board (1975) 15 Cal. 3d 194, 124 Cal. Rptr. 14, 539 P.2d 774]* . These proceedings are usually faster and less expensive than litigation. Sometimes unions will provide representation. It is not unusual for a public employee to be reinstated with back pay. However, general damages and attorneys' fees are not available. The doctrine of res judicata does not ordinarily preclude a public employee from pursuing both internal administrative civil service remedies and those available under FEHA, because those two procedures protect distinct rights: civil service remedies protect the right to continued employment, and FEHA protects the right to be free from invidious discrimination and retaliation for opposing discrimination [*George v. California Unemployment Ins. Appeals Bd. (2009) 179 Cal. App. 4th 1475, 1483-1484, 102 Cal. Rptr. 3d 431]* . But if an employee elects to pursue an administrative remedy and does not like the result, the doctrine of collateral estoppel might preclude a lawsuit if an issue decided in the administrative proceeding eliminates a necessary element of the employee's case [*see George v. California Unemployment Ins. Appeals Bd. (2009) 179 Cal. App. 4th 1475, 1486-1487, 102 Cal. Rptr. 3d 431]* . Note, however, that a public employee need not pursue such administrative remedies before looking to *42 U.S.C. § 1983*, Title VII, or FEHA for a remedy. *By John H. Scott*

[b] Preemption

Because the Legislature, in enacting FEHA, intended to "occupy the field of regulation of discrimination in employment" [*see Gov. Code § 12993(c)*], FEHA preempts laws banning employment discrimination enacted by any city, county, or other political subdivision of the state, even if the Legislature failed to outlaw discrimination based on the particular characteristic in issue [*Delaney v. Superior Fast Freight (1993) 14 Cal. App. 4th 590, 596-598, 18 Cal. Rptr. 2d 33* (Los Angeles municipal ordinance banning employment discrimination based on sexual orientation preempted)].

However, FEHA does not preempt other state laws, including the common law, that prohibit or restrict employment discrimination [*Rojo v. Kliger (1990) 52 Cal. 3d 65, 73-82, 276 Cal. Rptr. 130, 801 P.2d 373]* , unless those provisions provide less protection to the persons covered under FEHA [*Gov. Code § 12993(a)*]. Furthermore, although an employee must exhaust FEHA administrative remedies before bringing a civil action under FEHA or seeking any remedies provided by FEHA, exhaustion of FEHA administrative remedies is not required before filing a civil action for damages alleging nonstatutory causes of action [*Rojo v. Kliger (1990) 52 Cal. 3d 65, 82-88, 276 Cal. Rptr. 130, 801 P.2d 373]* .

[c] Actions Independent of FEHA

The California Supreme Court has held that *Cal. Const., art. I, § 8*, which provides that no person may be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin, sets forth a fundamental public policy against employment discrimination on those grounds, and may be the basis for a tort cause of action for wrongful termination in violation of public policy, independent of FEHA [*Rojo v. Kliger (1990) 52 Cal. 3d 65, 88-91, 276 Cal. Rptr. 130, 801 P.2d 373* ; *see Blom v. N.G.K. Spark Plugs (1992) 3 Cal. App. 4th 382, 386-388, 4 Cal. Rptr. 2d 139]* .

However, the reach of *Cal. Const., art. I, § 8* is not coextensive with that of FEHA. FEHA prohibits discrimination on a number of bases that are not covered by *Cal. Const., art. I, § 8*, including disability and age [*see Gov. Code §§ 12940, 12941*].

The California Supreme Court has held that when a plaintiff relies on a statutory prohibition to support a common-law tort cause of action for wrongful termination in violation of public policy, the common-law claim is subject to statutory limitations pertaining the nature and scope of the statutory prohibition [*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 66 Cal. Rptr. 2d 888, 941 P.2d 1157]* . For example, FEHA's prohibition against age discrimination cannot serve as the public-policy source underlying an employee's common-law tort action for wrongful discharge in violation of public policy against an employer who is exempt from FEHA because the employer employs fewer than five persons [*Jennings v. Marralle (1994) 8 Cal. 4th 121, 130-132, 32 Cal. Rptr. 2d 275, 876 P.2d 1074* ; *see Gov. Code § 12926(d)* (employers covered by FEHA)]. In such a case, however, the employee may rely on alternative sources of fundamental public policy in support of the claim of wrongful discharge [*Phillips v. St. Mary Reg'l Med. Ctr. (2002) 96 Cal. App. 4th 218, 230-238, 116 Cal. Rptr. 2d 770* (although employer was expressly exempt from FEHA, plaintiff alleging race and sex discrimination could rely on Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.*, and on *Cal. Const., art. I, § 8*, as sources of public policy to support claim of wrongful discharge in violation of public policy)]. For discussion of common-law causes of action for wrongful termination, see Ch. 249, *Employment Law: Termination and Discipline* .

[2] Federal Statutes

The principal federal statutes prohibiting employment discrimination are Title VII of the Civil Rights Act of 1964 (Title VII) (*42 U.S.C. § 2000e et seq.*), the Americans With Disabilities Act (ADA) (*42 U.S.C. § 12101 et seq.*), the Age Discrimination in Employment Act of 1967 (ADEA) (*29 U.S.C. § 621 et seq.*), and the Civil Rights Act of 1866 (*42 U.S.C. § 1981*).

Title VII, the ADA, and the ADEA are interpreted and implemented by administrative regulations and guidelines that also provide substantive equal employment opportunity rights [*see 29 C.F.R. § 1601.1 et seq.* (Title VII guidelines and ADEA regulations); *29 C.F.R. § 1630.1 et seq.* (ADA guidelines); *2 Cal. Code Reg. § 7285.0 et seq.* (FEHA regulations)].

In addition to these statutes and regulations, there are numerous other federal statutory and regulatory sources of antidiscrimination law, including the following:

- The Rehabilitation Act of 1973 (*29 U.S.C. § 701 et seq.*);
- The Vietnam Era Veterans Readjustment Assistance Act of 1974 (*38 U.S.C. § 4211 et seq.*);
- The Uniformed Services Employment and Reemployment Rights Act of 1994 [*38 U.S.C. § 4301 et seq.*];
- The Civil Rights Act of 1871 (*42 U.S.C. § 1983*); and
- Title VI of the Civil Rights Act of 1964 (*42 U.S.C. § 2000d et seq.*).

For discussion of these laws, see K. Wilcox, ed., California Employment Law (Matthew Bender), and A. Larson & L. Larson, Employment Discrimination (Matthew Bender).

The federal Equal Pay Act of 1963 [*29 U.S.C. § 206(d)*] prohibits wage discrimination based on sex. This statute is discussed in Ch. 250, *Employment Law: Wage and Hour Disputes* . For additional discussion of this statute, see K. Wilcox, ed., California Employment Law (Matthew Bender).

The United States Constitution also protects equal employment opportunity rights [*see U.S. Const., amends. V, XIV*],

but since its application generally requires "state action" [*see Rendell-Baker v. Kohn (1982) 457 U.S. 830, 837, 102 S. Ct. 2764, 73 L. Ed. 2d 418]* , it primarily covers public employment. For discussion of the equal employment opportunity rights of public employees, see A. Larson & L. Larson, Employment Discrimination (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationAge DiscriminationGeneral OverviewLabor & Employment LawDiscriminationDisability DiscriminationGeneral OverviewLabor & Employment LawDiscriminationReconstruction Statutes (secs. 1981, 1983 & 1985)Labor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964General Overview

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 115 CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION
PART II. LEGAL BACKGROUND
A. Governing Law

11-115 California Forms of Pleading and Practice--Annotated §§ 115.11-115.19

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

[Reserved]

§§ 115.11[Reserved]

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11-115 California Forms of Pleading and Practice--Annotated § 115.20

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.20 California Fair Employment and Housing Act

[1] Unlawful Employment Practices Under FEHA

FEHA provides that all of the following are unlawful employment practices, unless based on a bona fide occupational qualification or on applicable federal or California security regulations:

- For an employer to refuse to hire or employ a person, or refuse to select the person for a training program leading to employment, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation [*Gov. Code § 12940(a)*].

- For an employer to bar or discharge any person from employment, or from a training program leading to employment, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation [*Gov. Code § 12940(a)*].

- For an employer to discriminate against any person in compensation, or in terms, conditions, or privileges of employment, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation [*Gov. Code § 12940(a)*].

- For a labor organization, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, to exclude, expel, or restrict any person from its membership, or to provide only second-class or segregated membership, or to discriminate in the election of officers or in the selection of staff, or to discriminate in any other way against any of its members or against any employer, or against any person employed by an

employer [*Gov. Code § 12940(b)*].

- For a person to discriminate against any person in selection or training in any apprenticeship training program or any other training program leading to employment, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation [*Gov. Code § 12940(c)*].

- For an employer or employment agency to print or circulate, or cause to be printed or circulated, any publication, or to make any non-job-related inquiry of an employee or applicant, either verbal or through use of an application form, that expresses, directly or indirectly, any limitation, specification, or discrimination as to race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, or any intent to make any such limitation, specification, or discrimination [*Gov. Code § 12940(d)*]. However, this provision does not prohibit an employer or employment agency from inquiring into the age of an applicant, or from specifying age limitations, if the law compels or provides for that action [*Gov. Code § 12940(d)*].

- For an employer or employment agency to require any medical or psychological examination of an applicant, to make any medical or psychological inquiry of an applicant, to make any inquiry whether an applicant has a mental disability or physical disability or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition [*Gov. Code § 12940(e)(1)*]. This provision does not, however, prevent an employer or employment agency from inquiring into the ability of an applicant to perform job-related functions or from responding to an applicant's request for reasonable accommodation [*Gov. Code § 12940(e)(2)*]. Nor does this provision prevent an employer or employment agency from requiring a medical or psychological examination or making a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to the commencement of employment duties, provided that the examination or inquiry is job-related and consistent with business necessity and that all entering employees in the same job classification are subject to the same examination or inquiry [*Gov. Code § 12940(e)(3)*].

- For an employer or employment agency to require any medical or psychological examination of an employee, to make any medical or psychological inquiry of an employee, to make any inquiry whether an employee has a mental disability or physical disability or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition [*Gov. Code § 12940(f)(1)*]. Notwithstanding this provision, an employer or employment agency may require any examinations or inquiries that it can show to be job-related and consistent with business necessity, or conduct voluntary medical examinations, including voluntary medical histories which are part of an employee health program [*Gov. Code § 12940(f)(2)*].

- For any employer, labor organization, employment agency, or person, to discharge, expel, or otherwise discriminate against any person because the person has made a report pursuant to *Penal Code § 11161.8*, which prohibits retaliation against hospital employees who report suspected patient abuse by health facilities or community care facilities [*Gov. Code § 12940(g)*].

- For any employer, labor organization, employment agency, or person, to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under FEHA, or because the person has filed a complaint, testified, or assisted in any proceeding under FEHA [*Gov. Code § 12940(h)*].

- For a person to aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under FEHA, or to attempt to do so [*Gov. Code § 12940(i)*].

- For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, to harass an employee or applicant, or a person providing services pursuant to a contract, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, sexual orientation, or age [*Gov. Code § 12940(j)*].

- For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring [*Gov. Code § 12940(k)*].

- For an employer or other entity covered by FEHA to refuse to hire or employ a person, or to refuse to select a person for a training program leading to employment, or to bar or discharge a person from employment or from a training program leading to employment, or to discriminate against a person in compensation or in terms, conditions, or privileges of employment, because of a conflict between the person's religious belief or observance and any employment requirement, unless the employer or other entity covered by FEHA demonstrates that it has explored any available reasonable alternative means of accommodating the religious belief or observance, including the possibilities of excusing the person from those duties that conflict with his or her religious belief or observance or permitting those duties to be performed at another time or by another person, but is unable to reasonably accommodate the religious belief or observance without undue hardship on the conduct of the business [*Gov. Code § 12940* (*l*)].

- For an employer or other entity covered by FEHA to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee [*Gov. Code § 12940(m)*]. However, nothing in FEHA requires an accommodation that produces undue hardship to the operation of an employer or other covered entity [*Gov. Code § 12940(m)*].

- For an employer or other entity covered by FEHA to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition [*Gov. Code § 12940(n)*].

- For an employer or other entity covered by FEHA to subject, directly or indirectly, any employee, applicant, or other person to a test for the presence of a genetic characteristic [*Gov. Code § 12940(o)*].

- For an employer to adopt or enforce a policy that limits or prohibits the use of any language in the workplace, unless both (1) the language restriction is justified by a business necessity; and (2) the employer has notified its employees of the circumstances and the time when the language restriction is required to be observed, and of the consequences for violating the language restriction [*Gov. Code § 12951(a)*]. "Business necessity," for this purpose, means an overriding legitimate business purpose such that the language restriction is necessary to the safe and efficient operation of the business, the language restriction effectively fulfills the business purpose it is supposed to serve, and there is no alternative practice to the language restriction that would accomplish the business purpose equally well with a less-discriminatory impact [*Gov. Code § 12951(a)*].

It is a violation of FEHA to take any of the above actions against a person because of a perception that the person has, or is associated with one who has, any of the protected characteristics [*Gov. Code § 12926(m)*].

FEHA does not subject an employer to liability for, or prevent an employer from, refusing to hire or discharging an

employee with a physical or mental disability, or medical condition, where the employee, because of the disability or medical condition, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations [*Gov. Code § 12940(a)(1),(2)*].

FEHA's prohibition of age discrimination does not prevent an employer from refusing to employ an individual because of his or her age if the law compels or provides for that refusal. Also, the following employer actions do not, in and of themselves, constitute unlawful employment practices [*Gov. Code § 12940(a)(5)*]:

- Promotions within existing staff;
- Hiring and promotion on the basis of experience and training;
- Rehiring on the basis of seniority and prior service with the employer; and
- Hiring under an established recruiting program from high schools, colleges, universities, or trade schools.

For FEHA purposes, "age" refers to the chronological age of any individual who has reached his or her 40th birthday [*Gov. Code § 12926(b)*].

[2] Employers Subject to FEHA

[a] Scope of Employers and Entities

FEHA applies, with regard to certain of its provisions, to all of the following:

- Employers [*see Gov. Code § 12940(a),(d)-(h),(j)-(o)*; *see Vernon v. State (2004) 116 Cal. App. 4th 114, 121-131, 10 Cal. Rptr. 3d 121* (state is not joint employer of individual merely because individual's employer enforces allegedly discriminatory safety regulations promulgated by state agency)];
- Labor organizations [*see Gov. Code § 12940(b),(g),(h),(j)-(o)*; *see also Gov. Code § 12926(g)* ("labor organization" defined)];
- Apprenticeship and training programs [*see Gov. Code § 12940(c),(j)-(o)*];
- Employment agencies [*see Gov. Code § 12940(d)-(h),(j)-(o)*; *see also Gov. Code § 12926(e)* ("employment agency" defined); *Mathieu v. Norrell Corp. (2004) 115 Cal. App. 4th 1174, 1182-1184, 10 Cal. Rptr. 3d 52* (temporary employment agency and its client to which employee assigned are treated as employers for purposes of FEHA liability for sexual harassment and retaliation occurring while employee works for client)]; and
- Persons who engage in sexual harassment or retaliation or who aid or abet employment discrimination [*Gov. Code § 12940(h)-(j)*; *2 Cal. Code Reg. § 7287.7*; *see Vernon v. State (2004) 116 Cal. App. 4th 114, 131-133, 10 Cal. Rptr. 3d 121* (state is not aider or abettor of discrimination merely because plaintiff's employer enforces allegedly discriminatory safety regulations promulgated by state agency)].

[b] Private Employers

California private employers and their agents are covered by FEHA, including individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, receivers or other fiduciaries [*see Gov. Code § 12925(d)*], and nonprofit corporations or associations [*see 2 Cal. Code Reg. § 7286.5(a)(6)*; *Bohemian Club v. FEHC (1986) 187 Cal. App. 3d 1, 9, 231 Cal. Rptr. 769* (FEHA applies to social and nonreligious nonprofit organizations)], as well as the state, its subdivisions, cities, cities and counties, local agencies, and special districts [*see Gov. Code § 12926(d)*; *2 Cal. Code Reg. § 7286.5(a)(4)*].

Private employers are not covered by FEHA unless they employ five or more persons [*see Gov. Code § 12926(d)*; *2 Cal. Code Reg. § 7286.5(a)*], except when a discrimination claim involves harassment. In harassment cases, employers are covered if they employ one or more persons [*see Gov. Code § 12940(j)*]. Public employers are not subject to the five-employee requirement [*2 Cal. Code Reg. § 7286.5(a)(4)*].

In construing a similar number-of-employees threshold under federal antidiscrimination legislation [*see 42 U.S.C. § 12111(5)* (employer with fewer than 15 employees is not subject to ADA)], the United States Supreme Court has held that a shareholder-director of a professional corporation will count as an employee if the individual is subject to the corporation's control, based on all the circumstances of the relationship, including the following factors [*Gastroenterology Assocs., P.C. v. Wells (2003) 538 U.S. 440, 123 S. Ct. 1673, 155 L. Ed. 2d 615, 623-627]* :

- Whether the corporation can hire or fire the individual or set the rules and regulations of the individual's work;
- Whether and to what extent the corporation supervises the individual's work;
- Whether the individual reports to someone higher in the corporation;
- Whether and to what extent the individual is able to influence the corporation;
- Whether the corporation and the individual intend that the individual be an employee, as expressed in written agreements; and
- Whether the individual shares in the profits, losses, and liabilities of the corporation.

Former provisions making FEHA's provisions on mental disability discrimination inapplicable to private employers with fewer than 15 employees (until January 1, 2000) or 25 employees (until July 26, 1994) have been repealed [*see* former *Gov. Code §§ 12926(d)(2), 12940* (*l*)(2) (repealed effective January 1, 2000, by 1999 Stats., ch. 592, §§ 3.7, 7.5)].

[c] Parent and Subsidiary Corporations

For purposes of FEHA, a parent corporation is not treated as an employer of its subsidiary's employees unless the two corporations form an "integrated enterprise," based on interrelation of operations, common management, centralized control, and common ownership or financial control [*Laird v. Capital Cities/ABC (1998) 68 Cal. App. 4th 727, 737-741, 80 Cal. Rptr. 2d 454* (centralized control of labor relations is most important factor)].

[d] Religious Entities

FEHA's definition of "employer" generally excludes any religious association or corporation not organized for private profit [*Gov. Code § 12926(d)*; *see Gov. Code § 12926.2(a)* ("religious corporation" defined); *McKeon v. Mercy Healthcare Sacramento (1998) 19 Cal. 4th 321, 325-331, 79 Cal. Rptr. 2d 319, 965 P.2d 1189* (nonprofit religious organization need not be incorporated to qualify for FEHA exemption under *Gov. Code § 12926(d)*)].

Nevertheless, for most purposes a religious association or corporation is treated as an employer subject to the Act with respect to persons employed to perform nonreligious duties at a health-care facility it operates to provide health care not restricted to adherents of the religion that established the association or corporation [Gov. Code § 129626.2(c); *but see Gov. Code § 12940(j)(4)(B)* (anti-harassment provisions of FEHA inapplicable to religious associations and corporations not organized for private profit)]. Even at such a health-care facility, however, a religious corporation is exempt from the Act in the employment (including promotion) of an individual of a particular religion and in the application of the employer's religious doctrines, tenets, and teachings in any work connected with the provision of health care [*Gov. Code § 12926.2(d)*].

Notwithstanding any other provision of FEHA, an employer that is a religious corporation may restrict eligibility for employment in any position involving the performance of religious duties to adherents of the religion for which the corporation is organized [*Gov. Code § 12922*].

In addition to statutory exemptions for religious entities, there is a nonstatutory, constitutionally compelled "ministerial exception" to state and federal civil rights laws [*see, e.g.,* McClure v. Salvation Army (5th Cir. 1972) *460 F.2d 553, 559-561 (Title VII)* ; *Schmoll v. Chapman Univ. (1999) 70 Cal. App. 4th 1434, 1442-1444, 83 Cal. Rptr. 2d 426 (FEHA)]* . The ministerial exception reflects a policy, grounded in the *First Amendment*, that the law should not be construed to govern the relationship of a religious organization and its ministers [*Catholic Charities of Sacramento, Inc. v. Superior Court (2004) 32 Cal. 4th 527, 543-544, 10 Cal. Rptr. 3d 283, 85 P.3d 67]* . The exception applies to ministers and to nonordained employees with duties functionally equivalent to those of ministers. Generally, for an employee to be within the scope of the exception, the employee's primary duties must consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in a religious ritual and worship [*Hope Int'l Univ. v. Superior Court (2004) 119 Cal. App. 4th 719, 734, 14 Cal. Rptr. 3d 643]* .

In the context of educational duties, application of the ministerial exception depends on the circumstances of the case. The work of teaching religion for a church, as distinct from a school, clearly is within the ministerial exception. Also, if the role of the employee of a school is inherently a religious one, like a campus chaplain, the ministerial exception applies [*see, e.g.,* *Schmoll v. Chapman Univ. (1999) 70 Cal. App. 4th 1434, 1437, 83 Cal. Rptr. 2d 426]* . If the teacher's subject matter is the institution's own religion, the ministerial exception applies, regardless of whether the teacher is ordained or a member of a religious order. Moreover, if the school itself is a seminary (i.e., exclusively preoccupied with religion and the training of a religion's own clergy, as distinct from more general learning) the ministerial exception applies to faculty, ordained or not [*Hope Int'l Univ. v. Superior Court (2004) 119 Cal. App. 4th 719, 734-735, 14 Cal. Rptr. 3d 643]* .

In contrast, if neither the role of the employee nor the subject matter taught by that employee is necessarily religious, the applicability of the ministerial exception is less clear. A teacher of secular subjects at a religious or parochial school ordinarily does not come within the ministerial exception, even though incidentally the teacher may be a member of a religious order [*Hope Int'l Univ. v. Superior Court (2004) 119 Cal. App. 4th 719, 737-740, 14 Cal. Rptr. 3d 643* (whether nonordained professors of psychology teaching marriage and family counseling were within ministerial exception presented question of fact and could not be resolved on summary judgment)].

[e] Nonprofit Entities

A nonprofit public benefit corporation created to provide health care on behalf of a religious organization under the Nonprofit Public Benefit Corporation Law [*Corp. Code § 5110 et seq.*] is exempt from the Act with respect to the employment (including promotion) of an individual of a particular religion in an executive or pastoral-care position connected with the provision of health care [*Gov. Code § 12926.2(e)*].

A nonprofit public benefit corporation that is formed by, or affiliated with, a particular religion and that operates an

educational institution as its sole or primary activity generally may restrict employment (including promotion) in any or all employment categories to individuals of a particular religion [*Gov. Code § 12926.2(f)(1)*]. However, such an employer remains subject to all other antidiscrimination provisions of the FEHA and to the FEHA generally [*Gov. Code § 12926.2(f)(2)*].

[f] Federal Preemption

FEHA is limited in its application to employers that are subject to any federal law that preempts FEHA. For example, Section 8 of the National Bank Act of 1864 (codified as *12 U.S.C. § 24*) grants a national bank the power to dismiss any of its officers "at pleasure," ostensibly granting a national bank immunity from liability for a dismissal that would violate FEHA [*12 U.S.C. § 24*].

The Bank Act's "at pleasure" provision is inapplicable, however, unless the terminated employee is a bank "officer" meeting all of the following criteria: (1) he or she holds an office created by the board of directors and listed in the bank's bylaws; (2) he or she is appointed by the board of directors, either directly or pursuant to a delegation of board authority set forth in the bylaws; (3) he or she has express legal authority to bind the bank in its transactions with borrowers, depositors, customers, or other third parties by executing contracts or other legal instruments on the bank's behalf; and (4) his or her decision-making authority, however it might be limited by bank rule or policy, relates to fundamental banking operations in such a manner as to affect potentially the public's trust in the banking institution [*Wells Fargo Bank v. Superior Court (1991) 53 Cal. 3d 1082, 1091, 282 Cal. Rptr. 841, 811 P.2d 1025* (setting forth criteria); *Ramanathan v. Bank of America (2007) 155 Cal. App. 4th 1017, 66 Cal. Rptr. 3d 471* (employee designated "vice president" by bank's board of directors does not qualify as "officer" for purposes of *12 U.S.C. § 24* P 5 unless he or she meets all four criteria)].

The California Supreme Court held that Section 8 of the National Bank Act of 1864 preempts FEHA to the extent the two laws are in conflict. However, the Court also held that the actual scope of Section 8 has been limited since its original enactment in 1864. Reading federal law as a whole, the Court found that the National Bank Act has been impliedly amended by subsequently enacted federal civil rights laws. As impliedly amended by Title VII and the ADEA, Section 8 of the National Bank Act actually grants a national bank only a *limited* power to dismiss its officers, and that power does not extend to dismissal on the ground of race, color, religion, sex, national origin, or age. As so amended, Section 8 preempts FEHA, but only to the extent that FEHA confers on officers of a national bank a right against dismissal on grounds not mentioned in Title VII and the ADEA (for example, physical disability, mental disability, medical condition, or marital status) [*Peatros v. Bank of America (2000) 22 Cal. 4th 147, 173-175, 91 Cal. Rptr. 2d 659, 990 P.2d 539* ; *see Gov. Code § 12940(a)*; *see also Kroske v. US Bank Corp. (9th Cir. 2005) 432 F.3d 976, 981-989* (*12 U.S.C. § 24* does not preempt age-discrimination claims asserted under state laws that substantively mirror provisions of ADEA)].

[3] Employees Protected by FEHA

[a] Scope of Employees Covered

FEHA covers most California employees and to applicants for employment [*see Gov. Code § 12940(a)* (discrimination in employment, hiring, or selection for training leading to employment prohibited); *see also 2 Cal. Code Reg. §§ 7286.5(b)* ("employee" defined), (h) ("applicant" defined), 7287.3 (discrimination in considering employment applications prohibited)]. Generally, compensation of some sort is indispensable to the formation of an employment relationship; accordingly, a volunteer worker ordinarily is not an "employee" for FEHA purposes [*Mendoza v. Town of Ross (2005) 128 Cal. App. 4th 625, 634-637, 27 Cal. Rptr. 3d 452* (trial court properly dismissed FEHA action because plaintiff was unpaid, and complaint made no mention of any health, retirement, or other substantial benefits)].

[b] Family Employees

FEHA does not cover persons employed by a parent, spouse, or child, nor does it apply to persons employed under a special license in a nonprofit sheltered workshop or rehabilitation facility [*see Gov. Code § 12926(c)*; *2 Cal. Code Reg. § 7286.5(b)(2), (3)*].

[c] Independent Contractors

FEHA generally does not cover independent contractors [*2 Cal. Code Reg. § 7286.5(b)(1)*; *see Lab. Code § 3353* ("independent contractor" defined, in workers' compensation law)], except that FEHA's protection against harassment extends to independent contractors as well as to employees [*Gov. Code § 12940(j)(4), (5)*].

[d] Nonresidents

FEHA does not cover claims by employees who are not residents of California, whose employee duties were performed outside the state, and whose injuries occurred outside the state [*Campbell v. Arco Marine (1996) 42 Cal. App. 4th 1850, 1852, 50 Cal. Rptr. 2d 626]* .

[4] Employee Personal Liability for Violating FEHA

[a] Supervisor Liablity

A supervisor generally is not personally liable for his or her discriminatory acts under FEHA [*Reno v. Baird (1997) 18 Cal. 4th 640, 648, 76 Cal. Rptr. 2d 499, 957 P.2d 1333* ; *see Le Bourgeois v. Fireplace Manufacturing (1998) 68 Cal. App. 4th 1049, 1056-1057, 80 Cal. Rptr. 2d 660* (supervisor may not be sued individually for wrongful discharge in violation of public policy if basis of cause of action is alleged discrimination under FEHA)]. Similarly, a supervisor or other individual is not personally liable for his or her participation in retaliation prohibited by FEHA [*Jones v. Lodge at Torrey Pines P'ship (2008) 42 Cal. 4th 1158, 1162-1173, 72 Cal. Rptr. 3d 624, 177 P.3d 232* (reference to "person" in *Gov. Code § 12940(h)* does not subject nonemployer individuals to liability for retaliation under FEHA)].

[b] Liability for Harassment

Any employee of an entity subject to FEHA is personally liable for harassment in violation of FEHA perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action [*Gov. Code § 12940(j)(3)*; *see § 115.36[2][d]*; *see also McClung v. Employment Development Dept. (2004) 34 Cal. 4th 467, 475-476, 20 Cal. Rptr. 3d 428, 99 P.3d 1015* (*Gov. Code § 12940(j)(3)* does not apply retroactively to impose liability on nonsupervisors for conduct predating its enactment effective January 1, 2001); *Matthews v. Superior Court (1995) 34 Cal. App. 4th 598, 599-600, 605-606, 40 Cal. Rptr. 2d 350* (decided before enactment of *Gov. Code § 12940(j)(3)*; supervisor who has aided or abetted harassment may be held personally liable); *Page v. Superior Court (1995) 31 Cal. App. 4th 1206, 1213, 37 Cal. Rptr. 2d 529* (same)]. For FEHA purposes, a "supervisor" is an individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if the exercise of that authority is not of a merely routine or clerical nature but requires the use of independent judgment [*Gov. Code § 12926(r)*; *see Chapman v. Enos (2004) 116 Cal. App. 4th 920, 928-931, 10 Cal. Rptr. 3d 852* (trial court errs in instructing jury that to be deemed supervisor, individual must be fully accountable and responsible for employee's performance and work product)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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11-115 California Forms of Pleading and Practice--Annotated § 115.21

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.21 Federal Laws Prohibiting Discrimination in Employment

[1] Title VII of Civil Rights Act of 1964

Title VII provides that it is an unlawful employment practice for an employer to do either of the following [*42 U.S.C. § 2000e-2(a)*]:

- Fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of that individual's race, color, religion, sex, or national origin; or

- Limit, segregate, or classify employees in any way that would deprive or tend to deprive any individual of employment opportunities, or otherwise would adversely affect his or her status as an employee, because of the individual's race, color, religion, sex, or national origin.

Title VII also prohibits retaliation against any person for opposing any practice forbidden or made unlawful by Title VII or for testifying or otherwise participating in a proceeding under Title VII [*42 U.S.C. § 2000e-3(a)*]. This protection extends not only to an employee who reports discrimination on his or her own initiative but also to an employee who speaks out about discrimination in answering questions during an employer's internal investigation [*Crawford v. Metropolitan Gov't (2009) -- U.S. --, 129 S. Ct. 846, 172 L. Ed. 2d 650, 656-659* (employee can "oppose" employer's unlawful practice for purposes of *42 U.S.C. § 2000e-3(a)* simply by disclosing that practice)].

An aggrieved person may bring a suit under Title VII, after exhausting the administrative remedies, and may recover injunctive relief, and compensatory and punitive damages [*see 42 U.S.C. § 2000e-5(g)*]. The compensatory and punitive damages recoverable under Title VII are limited by statute to a maximum amount that varies depending on the size of the employer [*see 42 U.S.C. § 1981a(b)*; *Pavon v. Swift Transp. Co. (9th Cir. 1999) 192 F.3d 902, 910-911* ; *see also Lansdale v. Hi-Health Supermart Corp. (9th Cir. 2002) 314 F.3d 355, 357-359* (damages limitation of *42 U.S.C. §*

1981a(b)(3) does not violate constitutional separation of powers, *Seventh Amendment* right to jury trial, Due Process clause, or *Equal Protection clause*)]. The most that is recoverable, against employers with more than 500 employees, is $300,000 [*42 U.S.C. § 1981a(b)*; *but see 42 U.S.C. § 2000e-5(e)(3)(B)* (in addition to relief authorized by *42 U.S.C. § 1981a*, employee claiming discrimination in compensation may recover back pay for up to two years preceding filing of charge of discrimination, if unlawful employment practices that occurred during charge-filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside time for filing charge)].

Title VII applies to employers with at least 15 employees [*42 U.S.C. § 2000e(b)*]. The 15-employee threshold is not, however, a jurisdictional requirement. Rather, it is an element of the plaintiff's claim for relief, and a defendant employer's objection based on the plaintiff's failure to establish that element may be forfeited if not raised in a timely manner [*Arbaugh v. Y& H Corp. (2006) 546 U.S. 500, 126 S. Ct. 1235, 163 L. Ed. 2d 1097, 1107-1111]* . For discussion of employment practices prohibited by Title VII, see K. Wilcox, ed., California Employment Law, Ch. 41 (Matthew Bender). For discussion of employers and employees covered by Title VII, see K. Wilcox, ed., California Employment Law, Ch. 40 (Matthew Bender).

[2] Americans with Disabilities Act

The Americans With Disabilities Act (ADA) provides generally that no covered entity may discriminate against a qualified individual with a disability in job application procedures; the hiring, advancement, or discharge of employees; employee compensation; job training; or other terms, conditions, and privileges of employment, because of the individual's disability [*42 U.S.C. § 12112(a)*]. Unlawful "discrimination" includes, among other things, limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of the applicant or employee because of his or her disability [*42 U.S.C. § 12112(b)(1)*].

The ADA provisions purporting to abrogate the states' *Eleventh Amendment* immunity to private lawsuits were enacted under Congress's *Fourteenth Amendment* power [*see 42 U.S.C. §§ 12101(b)(4), 12202*]. However, the United States Supreme Court has held that Congress exceeded its power, because it subjected states to suit for monetary damages under the ADA without having first identified a pattern of irrational discrimination in employment against the disabled [*Board of Trustees v. Garrett (2001) 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed. 2d 866, 878-884]* . Nevertheless, the ADA standards applicable to state employers may be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief [*Board of Trustees v. Garrett (2001) 531 U.S. 356, 121 S. Ct. 955, 968 n.9, 148 L. Ed. 2d 866]* . A non-employee will lack standing to seek injunctive relief to prevent future discrimination, however, unless he or she is in the process of seeking reinstatement to a former position or seeking work from the state employer [*Walsh v. Nevada Dep't of Human Res. (9th Cir. 2006) 471 F.3d 1033, 1036-1037* ; *Freitag v. Ayers (9th Cir. 2006) 468 F.3d 528, 547-548]* .

The Ninth Circuit has held that individuals, such as supervisors working for employers subject to the ADA, may not be personally liable under the ADA [*Walsh v. Nevada Dep't of Human Res. (9th Cir. 2006) 471 F.3d 1033, 1037-1038* (ADA limitation on liability to employers with 15 or more employees, *42 U.S.C. § 12111(5)(a)*, means that Congress did not intend to impose liability on individuals under ADA)].

For discussion of employment practices prohibited by the ADA, see K. Wilcox, ed., California Employment Law, Ch. 41 (Matthew Bender). For discussion of the scope and application of the ADA, see K. Wilcox, ed., California Employment Law, Ch. 40 (Matthew Bender).

[3] Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA) protects persons who are at least 40 years old [*see 29 U.S.C. § 631(a)*]. The ADEA provides that it is unlawful for an employer to do any of the following [*29 U.S.C. § 623(a)*]:

- Fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his or her compensation, terms, conditions, or privileges of employment, because of the individual's age;

- Limit, segregate, or classify employees in any way that would deprive or tend to deprive any individual of employment opportunities, or otherwise would adversely affect the individual's status as an employee, because of the individual's age; and

- Reduce the wage rate of any employee to comply with the ADEA.

The ADEA also prohibits retaliation against any person for opposing any practice forbidden or made unlawful by the ADEA or for participating in proceedings under the ADEA [*see 29 U.S.C. § 623(d)*; *see also Gomez-Perez v. Potter (2008) 553 U.S. 474, 128 S. Ct. 1931, 1935-1936, 1943, 170 L. Ed. 2d 887, 893-894, 902* (*29 U.S.C. § 633a(a)*, ADEA's prohibition of "discrimination based on age" in federal employment, prohibits retaliation based on filing of age discrimination complaint)].

The ADEA provisions purporting to abrogate the states' *Eleventh Amendment* immunity to private lawsuits [*see 29 U.S.C. §§ 623(a)(1), 626(b), (c)(1)*] were beyond the *Fourteenth Amendment* power of Congress [*Kimel v. Florida Bd. of Regents (2000) 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522, 547]* . Thus, a state employer is immune from an ADEA suit unless the state consents to be sued [*see, e.g., Katz v. Regents of Univ. of Cal. (2000) 229 F.3d 831, 834-835* ; *see also Ahlmeyer v. Nevada Sys. of Higher Educ. (9th Cir. 2009) 555 F.3d 1051, 1057* (because ADEA provides exclusive federal remedy for age-discrimination claims, state employee may not assert age-discrimination claim under *42 U.S.C. § 1983*)].

For discussion of employment practices prohibited by the ADEA, see K. Wilcox, ed., California Employment Law, Ch. 41 (Matthew Bender). For discussion of employers and employees covered by the ADEA, see K. Wilcox, ed., California Employment Law, Ch. 40 (Matthew Bender).

[4] 42 U.S.C. § 1981

The Civil Rights Act of 1866 (*42 U.S.C. § 1981*) provides that all persons within the jurisdiction of the United States have the same right in every state and territory to make and enforce contracts, to sue, to be parties, to give evidence, and to receive the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens; and that all persons within the jurisdiction of United States are subject to the same punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other [*42 U.S.C. § 1981(a)*].

42 U.S.C. § 1981 provides an independent but overlapping federal remedy for intentional race discrimination in employment [*Miller v. Fairchild Indus. (9th Cir. 1989) 885 F.2d 498, 503 , cert. denied, 494 U.S. 1056 (1990)]* .

As used in *42 U.S.C. § 1981*, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship [*42 U.S.C. § 1981(b)*].

The definition of "make and enforce contracts" was added to *42 U.S.C. § 1981* by the Civil Rights Act of 1991 (CRA) [Pub. L. No. 102-166]. The apparent purpose of the provision was to overrule *Patterson v. McLean Credit Union (1989) 491 U.S. 164, 171 , superseded by statute as stated in 553 U.S. 442* , in which the United States Supreme Court had narrowly limited the application of *42 U.S.C. § 1981* to racially discriminatory conduct involving the formation of new contracts and their enforcement. Under *Patterson*, only discriminatory conduct involving the refusal to enter into an employment contract (i.e., hiring) or the ability to enforce contractual rights was actionable under § 1981, and

conduct involving the continuing employment relationship (for example, harassment) was not actionable. The CRA made clear that § 1981 applies to *all* phases and incidents of the contractual relationship. Thus, for example, a hostile-work-environment claim may be brought under § 1981 [*Manatt v. Bank of America (9th Cir. 2003) 339 F.3d 792, 797]* . If a claim is cognizable under *42 U.S.C. § 1981* by virtue of the CRA's expansion of the scope of § 1981, the claim is subject to the four-year federal "catchall" statute of limitations [*see 28 U.S.C. § 1658*], rather than any borrowed state statute of limitations [*Jones v. R.R. Donnelley & Sons Co. (2004) 541 U.S. 369, 124 S. Ct. 1836, 1841-1846, 158 L. Ed. 2d 645, 652-658* (hostile work environment, wrongful termination, and failure-to-transfer claims)].

42 U.S.C. § 1981 prohibits discrimination based on race [*see Johnson v. Railway Express Agency (1975) 421 U.S. 454, 459-460, 95 S. Ct. 1716, 44 L. Ed. 2d 295]* . Section 1981 also prohibits retaliation on the basis of race, including retaliation against a person for complaining about a violation of another person's rights under the statute [*CBOCS W., Inc. v. Humphries (2008) 553 U.S. 442, 128 S. Ct. 1951, 1954-1955, 1961, 170 L. Ed. 2d 864, 869, 877*].

Whether § 1981 applies to national origin discrimination is an open question [*compare Ortiz v. Bank of America (E.D. Cal. 1982) 547 F. Supp. 550, 568 , aff'd, 824 F.2d 692 (9th Cir. 1987)* (individual may assert *42 U.S.C. § 1981* claim based on national origin), *with Gradillas v. Hughes Aircraft Co. (D. Ariz. 1975) 407 F. Supp. 865, 867* (claims based solely on national origin not covered by *42 U.S.C. § 1981*)]. Generally, however, *42 U.S.C. § 1981* applies if there is a racial component to a national origin claim and racial discrimination is also alleged [*see, e.g., Saint Francis College v. Al-Khazraji (1987) 481 U.S. 604, 613, 107 S. Ct. 2022, 95 L. Ed. 2d 582* (United States citizen born in Iraq protected from racial discrimination under *42 U.S.C. § 1981* if proven that he was discriminated against because he was Arab, rather than solely because of his place or nation of origin); *Gonzalez v. Stanford Applied Engineering (9th Cir. 1979) 597 F.2d 1298, 1300* (national origin claim by Mexican-American, amended to include claim that discrimination was based on dark skin, is racial discrimination claim covered by *42 U.S.C. § 1981*)].

42 U.S.C. § 1981 does not apply to sex, age, or religious discrimination [*see Runyon v. McCrary (1976) 427 U.S. 160, 167, 96 S. Ct. 2586, 49 L. Ed. 2d 415* (dictum); *see also League of Academic Women v. Regents of Univ. of Cal. (N.D. Cal. 1972) 343 F. Supp. 636, 639* (*42 U.S.C. § 1981* not applicable to sex discrimination)].

42 U.S.C. § 1981 covers private employers [*see 42 U.S.C. § 1981(c)*; *Runyon v. McCrary (1976) 427 U.S. 160, 172, 96 S. Ct. 2586, 49 L. Ed. 2d 415* ; *Johnson v. Railway Express Agency (1975) 421 U.S. 454, 459-460, 95 S. Ct. 1716, 44 L. Ed. 2d 295]* , as well as local public employers [*see 42 U.S.C. § 1981(c)*; *see also Federation of African-Am. Contractors (9th Cir. 1996) 96 F.3d 1204, 1210*]. However, § 1981 does not create a private right of action against a state or an agency that acts as an arm of the state [*Pittman v. Oregon (9th Cir. 2007) 509 F.3d 1065, 1070-1074*]. Also, § 1981 does not cover federal employers, because the federal employment provision in Title VII [*see 42 U.S.C. § 2000e-16*] is the exclusive judicial remedy for employment discrimination claims by federal employees [*see Brown v. GSA (1976) 425 U.S. 820, 835, 96 S. Ct. 1961, 48 L. Ed. 2d 402]* .

For further discussion of *42 U.S.C. § 1981*, generally, see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

For thorough discussion of *42 U.S.C. § 1981*, see J. Cook & J. Sobieski, Civil Rights Actions (Matthew Bender). For additional discussion of *42 U.S.C. § 1981*, as applied to employment discrimination, see K. Wilcox, California Employment Law, Ch. 40 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationAge DiscriminationGeneral OverviewLabor & Employment LawDiscriminationDisability DiscriminationGeneral OverviewLabor & Employment

LawDiscriminationReconstruction Statutes (secs. 1981, 1983 & 1985)Labor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964General Overview

California Forms of Pleading and Practice--Annotated

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PART II. LEGAL BACKGROUND
B. Scope of Coverage, Protected Classifications, and Theories of Liability

11-115 California Forms of Pleading and Practice--Annotated § 115.22

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§ 115.22 Protected Classifications

[1] Generally

Federal and California equal employment opportunity laws prohibit employment discrimination on the following bases [*see 42 U.S.C. § 2000e-2* (Title VII); *29 U.S.C. §§ 623(a), 631(a)* (ADEA); *42 U.S.C. § 12112 (ADA)*; *Gov. Code §§ 12926, 12940(a)* (FEHA)]:

- Race.
- Color.
- National origin or ancestry.
- Sex.
- Marital status.
- Religion.
- Age (over 40 years).
- Physical and mental disability.
- Medical condition.

FEHA also prohibits discrimination on the basis of sexual orientation [*Gov. Code § 12940(a)*].

In addition, under FEHA, the protected characteristics include any perception that a person has, or is associated with one who has, any of those characteristics [*Gov. Code § 12926(m)*].

[2] Race and Color Discrimination

Title VII and FEHA prohibit employment discrimination based on race or color [*42 U.S.C. § 2000e-2* (Title VII); *Gov. Code § 12940(a)* (FEHA)]. *42 U.S.C. § 1981* also prohibits race discrimination [*see Runyon v. McCrary (1976) 427 U.S. 160, 168, 174-175, 96 S. Ct. 2586, 49 L. Ed. 2d 415* ; *see also CBOCS W., Inc. v. Humphries (2008) 553 U.S. 442, 128 S. Ct. 1951, 1954-1955, 1961, 170 L. Ed. 2d 864, 869, 877* (*42 U.S.C. § 1981* also prohibits retaliation on basis of race, including retaliation against person for complaining about violation of another person's rights under § 1981)].

"Race" discrimination involves identifiable classes of persons subject to discrimination solely because of their ancestry or ethnic characteristics [*see Saint Francis College v. Al-Khazraji (1987) 481 U.S. 604, 612-613, 107 S. Ct. 2022, 95 L. Ed. 2d 582* (groups such as Arabs, Jews, and Germans are not considered single race); *see also Sandhu v. Lockheed Missiles & Space Co. (1994) 26 Cal. App. 4th 846, 858, 31 Cal. Rptr. 2d 617* (allegation that plaintiff was subject to discrimination based on being East Indian was sufficient to raise claim of racial discrimination; following reasoning of *Al-Khazraji*)].

Title VII prohibits discriminatory preference for any group, minority, or majority [*see Griggs v. Duke Power Co. (1971) 401 U.S. 424, 431, 91 S. Ct. 849, 28 L. Ed. 2d 158]* , and therefore bars race discrimination against white persons as well as black persons [*see McDonald v. Santa Fe Trail Transp. Co. (1976) 427 U.S. 273, 280, 96 S. Ct. 2574, 49 L. Ed. 2d 493]* . White persons are also protected under *42 U.S.C. § 1981* [*see McDonald v. Santa Fe Trail Transp. Co. (1976) 427 U.S. 273, 286-287, 96 S. Ct. 2574, 49 L. Ed. 2d 493]* .

Employment discrimination based on association with people of a particular race is also prohibited [*see Gov. Code § 12926(m)* ("race" for FEHA purposes includes perception that person is, or is associated with one who is, member of particular race); Parr v. Woodmen of the World Life Ins. Co. (11th Cir. 1986) *791 F.2d 888, 891 (Title VII)* ; *see also 2 Cal. Code Reg. § 7287.9* (FEHA regulation)].

"Color" is rarely treated separately from "race." However, in one case, the Equal Employment Opportunity Commission (EEOC), in an enforcement proceeding involving a federal government employer, found unlawful "color" discrimination when an employer gave preference to a "light-complexioned" black applicant with "Caucasian features" over another black applicant who had a "dark complexion" and "Negroid features" [*see* EEOC Dec. No. 72-0454 (1971)].

PRACTICE TIP:

Race Discrimination. Racial discrimination cases are usually difficult to prove without direct evidence of discrimination or evidence of a pattern of discrimination involving several members of the same racial group. I could write a chapter just on this subject and would title it: "Why White Americans Are Reluctant to Find That One of Their Peers Discriminated Based on Race." This is especially true when the discrimination is covert and masked by pretext. *By John H. Scott*

[3] National Origin or Ancestry Discrimination

Both Title VII and FEHA prohibit national origin discrimination [*see 42 U.S.C. § 2000e-2* (Title VII); *Gov. Code § 12940(a)* (FEHA); *see also Gov. Code § 12926(m)* ("national origin" and "ancestry" for FEHA purposes include perception that person has, or is associated with one who has, particular national origin or ancestry)]. National origin discrimination also may be covered by *42 U.S.C. § 1981* [*see Manzanares v. Safeway Stores (10th Cir. 1979) 593 F.2d 968, 970-972* ; *Ortiz v. Bank of America (E.D. Cal. 1982) 547 F. Supp. 550, 568]* , particularly if pleadings are drafted

carefully to allege a racial component such as dark skin, and also to allege race discrimination [*see Saint Francis College v. Al-Khazraji (1987) 481 U.S. 604, 609, 613, 107 S. Ct. 2022, 95 L. Ed. 2d 582* ; *Gonzalez v. Stanford Applied Engineering (9th Cir. 1979) 597 F.2d 1298, 1300]* .

It generally is not unlawful to discriminate on the basis of citizenship or alienage, and employers may lawfully require employees to be United States citizens, or refuse to hire noncitizens [*see Espinoza v. Farah Mfg. Co. (1973) 414 U.S. 86, 92-96, 94 S. Ct. 334, 38 L. Ed. 2d 287]* . However, employers may not discriminate against aliens because of race, color, religion, sex, or national origin [*Espinoza v. Farah Mfg. Co. (1973) 414 U.S. 86, 95, 94 S. Ct. 334, 38 L. Ed. 2d 287]* , and an employer may not use a citizenship requirement as a pretext for national origin discrimination [*see Espinoza v. Farah Mfg. Co. (1973) 414 U.S. 86, 92, 94 S. Ct. 334, 38 L. Ed. 2d 287* ; *see also 29 C.F.R. § 1606.5*; *2 Cal. Code Reg. § 7289.5(f)*].

Under the FEHA, it is an unlawful employment practice for an employer to adopt or enforce a policy that limits or prohibits the use of any language in the workplace, unless both (1) the language restriction is justified by a business necessity; and (2) the employer has notified its employees of the circumstances and the time when the language restriction is required to be observed, and of the consequences for violating the language restriction [*Gov. Code § 12951(a)*; *see* 2001 Stats., ch. 295, § 1 (statutory prohibition against workplace language restriction intended to implement state's constitutional policy against discrimination on basis of national or ethnic origin, while recognizing policy that English is official language of California); *see also Cal. Const., art. I, § 8* (policy against discrimination on basis of national or ethnic origin); *Cal. Const., art. III, § 6* (policy that English is official language of California)]. "Business necessity," for this purpose, means an overriding legitimate business purpose making the language restriction necessary to the safe and efficient operation of the business, effective as a means of fulfilling the business purpose it is supposed to serve, and the only means of accomplishing the business purpose equally well with a less-discriminatory impact [*Gov. Code § 12951(a)*].

Employers may deny employment opportunities to illegal aliens or aliens who are not authorized to work in the United States [*see Hoffman Plastic Compounds, Inc. v. NLRB (2002) 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed. 2d 271, 283-284* (federal immigration policy precludes award of back pay for employment discrimination under National Labor Relations Act, *29 U.S.C. § 158(a)(3)*, to undocumented alien who has never been legally authorized to work in United States)]. In fact, it is unlawful for employers knowingly to hire, recruit, or refer for a fee, unauthorized aliens, or to continue to employ a person who is or becomes an unauthorized alien [*see 8 U.S.C. § 1324a(a)* (Immigration Reform and Control Act of 1986)]. "Unauthorized aliens" are aliens who, with respect to employment at a particular time, are not at that time either (1) lawfully admitted for permanent residence, or (2) authorized to be so employed by the Immigration and Nationality Act (*8 U.S.C. § 1101 et seq.*) or by the United States Attorney General [*see 8 U.S.C. § 1324a(h)(3)*]. For a detailed discussion relating to employer sanctions and verification requirements with respect to employment of illegal aliens, see C. Gordon & S. Mailman, Immigration Law And Procedure, Ch. 68 (Matthew Bender).

The California Legislature has declared that all protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in California [*Civ. Code § 3339(a)*; *Gov. Code § 7285(a)*; *Lab. Code § 1171.5(a)*]. Accordingly, for purposes of enforcing state labor, employment, and civil rights laws, a person's immigration status is irrelevant to the issue of liability; in proceedings or discovery undertaken to enforce those state laws, no inquiry may be made into a person's immigration status unless the person seeking to make the inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law [*Civ. Code § 3339(b)*; *Gov. Code § 7285(b)*; *Lab. Code § 1171.5(b)*].

The Ninth Circuit has ruled that these provisions of California law are not preempted by the federal Immigration Reform and Control Act (IRCA) [*see 8 U.S.C. § 1324a(a)(2)* (forbidding employers from knowingly employing unauthorized aliens)], at least not when the employer can comply with the IRCA without creating a conflict with

California law. There is clearly no conflict between California law and IRCA--and therefore no preemption--when an employer is required to terminate an employee by IRCA and does so in order to comply with that statute. Under those circumstances, the employer can obey both laws because compliance with IRCA provides good cause, as defined by California law, for terminating unauthorized aliens [*see Incalza v. Fendi N. Am., Inc. (9th Cir. 2007) 479 F.3d 1005, 1010]* .

Similarly, California law may impose liability on an employer for discharging an employee, even when the employer claims the discharge is required by the IRCA, when remedies short of discharge are permissible under the IRCA and its implementing regulations [*Incalza v. Fendi N. Am., Inc. (9th Cir. 2007) 479 F.3d 1005, 1010-1013* (IRCA and regulations authorized employer to place employee on unpaid leave without pay while employee obtained change in work visa to which employee was entitled under federal law)]. It remains an open question, however, whether California law and the IRCA conflict when an employer that is required by federal law to terminate an unlawful alien does so, but for reasons that are unlawful under California law [*see Incalza v. Fendi N. Am., Inc. (9th Cir. 2007) 479 F.3d 1005, 1010* (identifying issue but resolving case on other grounds)].

[4] Sex Discrimination

[a] Based Solely on Sex

Title VII and FEHA prohibit sex discrimination in employment [*see 42 U.S.C. § 2000e-2* (Title VII); *Gov. Code § 12940(a)-(d),(j)* (FEHA)].

"Sex discrimination" is a distinction based on gender [*see De Cintio v. Westchester County Medical Center (2d Cir. 1986) 807 F.2d 304, 306-307 , cert. denied, 484 U.S. 825 (1987)* (Title VII); *De Santis v. Pacific Tel. & Tel. Co. (9th Cir. 1979) 608 F.2d 327, 329-330* (Title VII); *see also 2 Cal. Code Reg. § 7290.7(a)* (construing "sex discrimination" prohibited by FEHA; "sex" as meaning applicant's or employee's gender)]. Both male and female employees are protected [*see Newport News Shipbuilding & Dry Dock Co. v. EEOC (1983) 462 U.S. 669, 682, 103 S. Ct. 2622, 77 L. Ed. 2d 89 (Title VII)]* .

For purposes of FEHA antidiscrimination provisions, "sex" includes, but is not limited to, pregnancy, childbirth, medical conditions related to pregnancy or childbirth, and gender [*Gov. Code § 12926(p)*]. "Gender" includes a person's gender identity and gender-related appearance and behavior, whether or not stereotypically associated with the person's assigned sex at birth [*Gov. Code § 12926(p)*; *Penal Code § 422.56(c)*].

Employment decisions that reflect gender-based stereotyping are also unlawful [*see Price Waterhouse v. Hopkins (1989) 490 U.S. 228, 250-251 (Title VII) , superseded by statute as stated in 129 S. Ct. 2343*]. For example, an employer violated Title VII when it delayed a female employee's promotion based in part on evaluation comments describing her as "macho" and advising her to "take a course in charm school" [*Price Waterhouse v. Hopkins (1989) 490 U.S. 228, 234-236 , superseded by statute as stated in 129 S. Ct. 2343*]. Similarly, FEHA's prohibition of sex discrimination outlaws gender-based stereotyping, since FEHA defines "sex" as including an employer's perception of an employee's or applicant's identity, appearance, or behavior [*see Gov. Code §§ 12926(p), 12940(a)-(d),(j)*; *Penal Code § 422.76*]. However, FEHA does not prevent an employer from requiring an employee to adhere to reasonable workplace appearance, grooming, and dress standards that are not precluded by other provisions of state or federal law, so long as the employer allows an employee to appear or dress consistently with the employee's gender identity [*Gov. Code § 12949*].

PRACTICE TIP:

Gender Based Discrimination. Gender based discrimination cases are usually easier to prove at trial than racial discrimination cases [*see* [2], *above*]. There is a good chance that your jury will be at least 50 percent female. In addition, there does not seem to be the same "stigma" attached to gender

discrimination in our country as compared to racial discrimination. Misogyny is still alive and well in many workplaces. Notably, many hostile work environment/harassment cases come out of situations where the offending conduct is not "sex" based, but rather, "gender" based. Women can be treated not only as sex objects, but also as inferior employees who are "less than" their male counterparts. This is still true in many fields traditionally dominated by men such as law enforcement, law, medicine, and construction. *By John H. Scott*

[b] Based on Same Sex

The Supreme Court has unequivocally stated that nothing in Title VII bars a claim of sex discrimination "merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex" [*Oncale v. Sundowner Offshore Services (1998) 523 U.S. 75, 79, 118 S. Ct. 998, 140 L. Ed. 2d 201* ; *see Castaneda v. Partida (1977) 430 U.S. 482, 499, 97 S. Ct. 1272, 51 L. Ed. 2d 498]* .

The prohibition against same sex discrimination encompasses sexual harassment if the offending behavior is severe and pervasive, and if the victim is harassed either in a sex-specific way or is exposed to treatment not directed at members of the other sex [*Oncale v. Sundowner Offshore Services (1998) 523 U.S. 75, 79-82, 118 S. Ct. 998, 140 L. Ed. 2d 201]* . Claims of same sex harassment are not limited to instances where the harasser is homosexual, although in such cases, courts and juries could draw a chain of inferences that the harasser's conduct involved explicit or implicit proposals of sexual activity [*Oncale v. Sundowner Offshore Services (1998) 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201]* . Thus, a physical sexual assault constitutes actionable discrimination "because of ... sex" under Title VII; the fact that the assault is also motivated by the victim's sexual orientation (not a protected classification under Title VII) is irrelevant [*Rene v. MGM Grand Hotel, Inc. (9th Cir. 2002) 305 F.3d 1061, 1065-1068* (en banc)].

California courts of appeal have similarly found same sex harassment to be actionable under FEHA [*Gov. Code § 12940*; *see Matthews v. Superior Court (1995) 34 Cal. App. 4th 598, 603, 40 Cal. Rptr. 2d 350* ; *Mogilefsky v. Superior Court (1993) 20 Cal. App. 4th 1409, 1416, 26 Cal. Rptr. 2d 116]* . In this context, harassment between members of the same sex can be "because of sex" if it involves an attack on the plaintiff's sexual identity [*see, e.g., Singleton v. United States Gypsum Co. (2006) 140 Cal. App. 4th 1547, 1561-1563, 45 Cal. Rptr. 3d 597* (plaintiff's male co-workers used attacks on plaintiff's identity as heterosexual male as tool of harassment)]. Moreover, there is no requirement that the motive for the harassment be sexual in nature. Sexual harassment occurs when sex is used as a weapon to create a hostile work environment [*Singleton v. United States Gypsum Co. (2006) 140 Cal. App. 4th 1547, 1564, 45 Cal. Rptr. 3d 597* (harasser's motive was that he was angry with plaintiff for having reported him)].

[c] Based on "Sex Plus"

Employment discrimination based on sex plus another characteristic, such as family responsibilities, is also unlawful [*see Phillips v. Marietta Corp. (1971) 400 U.S. 542, 544, 91 S. Ct. 496, 27 L. Ed. 2d 613]* . For example, under Title VII an employer may not refuse to hire women with preschool-age children, while at the same time hiring men with preschool-age children, even if the persons hired are predominantly female. Title VII prohibits different hiring policies for such similarly-situated women and men [*see Phillips v. Marietta Corp. (1971) 400 U.S. 542, 543-544, 91 S. Ct. 496, 27 L. Ed. 2d 613]* .

[d] Based on Sex-Related Traits

An employer may violate Title VII or FEHA by adopting facially neutral employment practices or criteria that in fact fall more harshly on one sex than another [*see Teamsters v. United States (1977) 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII; "disparate impact" analysis)]* . For discussion of the disparate impact analysis, see *§ 115.23[4]*.

Thus, employment policies that make distinctions based on traits exclusively or predominantly possessed by one sex, such as minimum height and weight requirements [*see Dothard v. Rawlinson (1977) 433 U.S. 321, 331, 97 S. Ct. 2720, 53 L. Ed. 2d 786 (Title VII)]* or physical agility tests [*see Berkman v. City of New York (E.D.N.Y. 1982) 536 F. Supp. 177 , aff'd, 705 F.2d 584 (2d Cir. 1983)* (firefighters)], may be unlawful if they are not job-related. For discussion of the "job-relatedness" defense, see *§ 115.54[5]*.

[e] Based on Pregnancy

Employment discrimination based on pregnancy, childbirth, or related medical conditions constitutes sex discrimination under Title VII [*42 U.S.C. § 2000e(k)*; *see Auto Workers v. Johnson Controls (1991) 499 U.S. 187, 199, 111 S. Ct. 1196, 113 L. Ed. 2d 158* ("fetal protection" policies that discriminate based on potential for pregnancy constitute intentional sex discrimination under Title VII); *29 C.F.R. § 1604.10(a)* (such discrimination is prima facie violation of Title VII); *but see AT&T Corp. v. Hulteen (2009) -- U.S. --, 129 S. Ct. 1962, 173 L. Ed. 2d 898, 906* ("Although adopting a service credit rule unfavorable to those out on pregnancy leave would violate Title VII today, a seniority system does not necessarily violate the statute when it gives current effect [in the calculation of pension benefits] to such rules that operated before the [Pregnancy Discrimination Act, which took effect on April 29, 1979]")].

FEHA also prohibits employment discrimination based on pregnancy, childbirth, or related medical condition [*Gov. Code §§ 12926(p), 12945*; *2 Cal. Code Reg. § 7291.2 et seq.* (regulations governing pregnancy discrimination and pregnancy disability leave); *see Carr v. Barnabey's Hotel Corp. (1994) 23 Cal. App. 4th 14, 17, 28 Cal. Rptr. 2d 127]* .

In this context, medical conditions "related" to pregnancy and childbirth do not include indirectly related conditions such as a "diagnostic hysterectomy" performed years after childbirth [*Williams v. MacFrugal's Bargains-Close-Outs, Inc. (1998) 67 Cal. App. 4th 479, 482-485, 79 Cal. Rptr. 2d 98* (same analysis applies to FEHA and Title VII)].

An employer's leave policy that differentiates between disabilities caused by occupational injuries and those that occur off the job does not impermissibly discriminate against pregnant employees, so long as it provides at least four months' leave for pregnancy disability [*Spaziano v. Lucky Stores (1999) 69 Cal. App. 4th 106, 110-113, 81 Cal. Rptr. 2d 378* (same analysis applies to FEHA and Title VII); *see Gov. Code § 12945(a)*].

In addition to prohibiting discrimination, FEHA requires that if an employer has a policy, practice, or collective bargaining agreement requiring or authorizing the transfer of temporarily disabled employees to less strenuous or hazardous positions for the duration of the disability, the employer may not refuse to transfer a pregnant female employee who so requests [*Gov. Code § 12945(b)(2)*].

[f] Based on Sexual Affiliation or Orientation

Generally, preferential treatment resulting from an ongoing, voluntary, romantic engagement is not sex discrimination under Title VII [*see De Cintio v. Westchester County Medical Center (2d Cir. 1986) 807 F.2d 304, 306-307* ; *but see King v. Palmer (D.C. Cir. 1985) 778 F.2d 878, 880* (implicitly recognizing Title VII action alleging discrimination premised on voluntary sexual relationship)]. Sex discrimination under Title VII does not include discrimination based on sexual orientation [*see De Santis v. Pacific Tel. & Tel. Co. (9th Cir. 1979) 608 F.2d 327, 330]* .

FEHA, on the other hand, does prohibit discrimination on the basis of sexual orientation [*Gov. Code § 12940(a)*]. For this purpose, "sexual orientation" means heterosexuality, homosexuality, or bisexuality, and it includes the perception that a person has, or is associated with one who has, a given sexual orientation [*Gov. Code § 12926(m),(q)*].

Local ordinances prohibiting sexual orientation discrimination in employment have been found to be preempted by FEHA because FEHA occupies the field of employment discrimination [*Delaney v. Superior Fast Freight (1993) 14 Cal. App. 4th 590, 596-598, 18 Cal. Rptr. 2d 33* (decided before FEHA amended to add sexual orientation to list of

prohibited bases of discrimination); *see Gov. Code § 12993(c)*].

Title VII and FEHA do not prohibit employment discrimination against a person on the basis of change of gender [*Holloway v. Arthur Andersen & Co. (9th Cir. 1977) 566 F.2d 659, 662 (Title VII)]* .

[5] Marital Status Discrimination

FEHA expressly prohibits discrimination based on marital status [*Gov. Code § 12940(a)-(d),(j)*; *see Gov. Code § 12940(m)* ("marital status" for FEHA purposes includes perception of person's marital status)]. "Marital status" is defined as an individual's state of marriage, non-marriage, divorce or dissolution, separation, widowhood, annulment, or other marital state [*2 Cal. Code Reg. § 7292.1(a)*]. The prohibition against marital status discrimination is not violated by conduct that is based on an employer's marriage-neutral animus directed against the employee's spouse. For example, denying a promotion to an employee based on the employer's political animus against the employee's spouse does not constitute marital status discrimination. In such a case, the marriage as such is irrelevant to the adverse action taken by the employer. Rather, the employer's focus was the substantive relationship between the employee and a particular other person, whether spouse, partner, or friend [*Chen v. County of Orange(2002) 96 Cal. App. 4th 926, 939-948, 116 Cal. Rptr. 2d 786* (if animus toward employee's spouse is not itself unlawful, adverse action based on that animus does not constitute marital status discrimination)].

No federal statute prohibits marital status discrimination, but EEOC guidelines on sex discrimination prohibit rules that forbid or restrict the employment of married women that are not applicable to married men [*see 29 C.F.R. § 1604.4(a)*]. Such rules constitute "sex discrimination," even if they are not directed against all females, but only against married females, as long as sex is a factor in their application [*see 29 C.F.R. § 1604.4(a)*].

[6] Religious Discrimination

[a] General Prohibition of Religious Discrimination

Both Title VII and FEHA prohibit employment discrimination based on religion [*see 42 U.S.C. § 2000e-2* (Title VII); *Gov. Code § 12940* (FEHA)]. Not only is religious discrimination in hiring, firing, compensation, and the terms, conditions, and privileges of employment unlawful [*see 42 U.S.C. § 2000e-2(a)* (Title VII); *Gov. Code § 12940(a)* (FEHA)], but there is an affirmative duty on the employer to accommodate an employee's religious beliefs or observances [*see 42 U.S.C. § 2000e(j)* (Title VII); *Gov. Code § 12940* (*l*) (FEHA)].

[b] "Religion" Defined

Under Title VII, the term "religion" includes all aspects of religious observance and practice, as well as belief [*42 U.S.C. § 2000e(j)*; *see Welsh v. United States (1970) 398 U.S. 333, 339-340, 90 S. Ct. 1792, 26 L. Ed. 2d 308]* (construing conscientious objector exemption to Universal Military and Training Service Act [*50 U.S.C. App. § 456(j)*]); *United States v. Seeger (1965) 380 U.S. 163, 176, 85 S. Ct. 850, 13 L. Ed. 2d 733* (same); *but see Yott v. North American Rockwell Corp. (9th Cir. 1979) 501 F.2d 398, 400 , cert. denied, 445 U.S. 928 (1980)* (refusing to hold that conscientious objector cases are similar, since no law requires plaintiff to work for employer that discharged plaintiff).

All forms and aspects of religion, however eccentric, are included in the definition of "religion," unless they cannot be, in practice and with honest effort, reconciled with a businesslike operation [*Cooper v. General Dynamics, Convair Aerospace Div. (5th Cir. 1976) 533 F.2d 163, 168-169 , cert. denied, 433 U.S. 908 (1977)]* . Thus, for example, all of the following have been held to be protected religious practices:

- Wearing beards [*Bhatia v. Chevron U.S.A. (9th Cir. 1984) 734 F.2d 1382, 1383]* ;

- Refusal to distribute draft registration materials [*American Postal Workers Union v. Postmaster General (9th Cir. 1986) 781 F.2d 772, 775]* ;

- Attendance at a spouse's religious conversion ceremony [*Heller v. EBB Auto Co. (9th Cir. 1993) 8 F.3d 1433, 1438-1439]* ; and

- Use of peyote [*Toledo v. Nobel-Sysco, Inc. (D.N.M. 1986) 651 F. Supp. 483 , rev'd on other grounds, 892 F.2d 1481 (10th Cir. 1989) , cert. denied, 495 U.S. 948 (1990)]* .

Under federal regulations, "religious practices" include moral or ethical beliefs about what is right and wrong that are sincerely held with the strength of traditional religious views [*29 C.F.R. § 1605.1*; *see Philbrook v. Ansonia Bd. of Educ. (2d Cir. 1985) 757 F.2d 476, 482 , aff'd, 479 U.S. 60, 107 S. Ct. 367, 93 L. Ed. 2d 305 (1986)* (necessary to differentiate between beliefs held as matter of conscience and those motivated by deception and fraud)].

Even if no religious group espouses such beliefs or the religious group to which the individual professes to belong does not accept those beliefs, the belief may still be a religious belief of the employee or prospective employee [*see 29 C.F.R. § 1605.1*]. Furthermore, Title VII may also protect atheistic beliefs [*see Young v. Southwestern Sav. & Loan Asso. (5th Cir. 1975) 509 F.2d 140, 144]* .

"Religious creed," as used in FEHA, includes any traditionally recognized religion, as well as beliefs, observances, or practices that an individual sincerely holds and that occupy in his or her life a place of importance parallel to that of traditionally recognized religions [*2 Cal. Code Reg. § 7293.1*; *see Gov. Code § 12926(o)*]. "Religious creed" also includes any perception that a person is a member, or is associated with one who is a member, of a particular religious creed [*Gov. Code § 12926(m)*]. In determining whether an employee's beliefs constitute a religious creed for FEHA purposes, a court will consider (1) whether the employee's beliefs address fundamental and ultimate questions having to do with deep and imponderable matters, such as the meaning of human existence and the purpose of life; (2) whether the beliefs are comprehensive in nature, consisting of a belief-system as opposed to an isolated teaching; and (3) whether the beliefs include certain formal and external signs, such as teachers or leaders, services or ceremonies, structure or organization, orders of worship or articles of faith, and holidays [*Friedman v. Southern Cal. Permanente Med. Group (2002) 102 Cal. App. 4th 39, 69-70, 125 Cal. Rptr. 2d 663* (veganism does not qualify as "religious creed")].

Under FEHA, "religious belief or observance" includes, but is not limited to, an observance such as a Sabbath or other religious holy day, and reasonable time necessary for travel before and after a religious observance [*Gov. Code § 12940* (*l*)].

A religion does not require formal organization or "written form" to be protected by equal employment opportunity laws [*see Brown v. Dade Christian Schools (5th Cir. 1977) 556 F.2d 310, 311-312 , cert. denied, 434 U.S. 1063 (1978)* (construing *42 U.S.C. § 1981*, and determining whether private school's policy of racial discrimination relating to admissions was protected by *free exercise clause* of *U.S. Const., amend. I*)].

However, some extreme personal beliefs or tenets may not be protected. For example, one court rejected an employee's claim that he suffered discrimination based on his "personal religious creed" that a cat food contributed to his well-being and work performance [*see Brown v. Pena (S.D. Fla. 1977) 441 F. Supp. 1382, 1385 , aff'd, 589 F.2d 1113 (5th Cir. 1979)* (employee's "personal religious creed" was mere personal preference beyond parameters of concept of religion protected by Title VII); *see also United States v. Seeger (1965) 380 U.S. 163, 176, 85 S. Ct. 850, 13 L. Ed. 2d 733* (construing conscientious objector exemption to Universal Military and Training Service Act [*50 U.S.C. App. § 456(j)*]; "religious training and belief" excludes merely personal moral code that is "in no way related to ... Supreme Being")].

Religious beliefs that are actually political or social in nature are also not protected. For example, Title VII protection was not extended to an employee alleging religious discrimination based on his membership in the Ku Klux Klan [*see Bellamy v. Mason's Stores (E.D. Va. 1973) 368 F. Supp. 1025, 1026 , aff'd, 508 F.2d 504 (4th Cir. 1974)* (ideology of Ku Klux Klan was "narrow, temporal and political" and thereby inconsistent with meaning of "religion" as used in Title VII)]. Similarly, Title VII does not protect an employee who, based on his or her religious beliefs, attempts to create a hostile and intolerant work environment by posting demeaning and degrading messages aimed at homosexual coworkers [*Peterson v. Hewlett-Packard Co. (9th Cir. 2004) 358 F.3d 599, 605]* .

[c] Prima Facie Case

An employee alleging religious discrimination under Title VII must establish a prima facie case by proving that (1) he or she had a bona fide religious belief, the practice of which conflicted with an employment duty; (2) the employee informed his or her employer of the belief and conflict; and (3) the employer threatened the employee with, or subjected him or her to, discriminatory treatment, including discharge, because of his or her inability to fulfill the job requirements [*Heller v. EBB Auto Co. (9th Cir. 1993) 8 F.3d 1433, 1438* ; *see Tiano v. Dillard Department Stores (9th Cir. 1998) 139 F.3d 679, 682-683* (prima facie case includes proof that temporal mandate was part of employee's bona fide religious belief, if employee contends that his or her belief required attendance at particular time and place, such as at particular pilgrimage)].

[d] Notice Requirement

Under Title VII, an employee must notify the employer of his or her religious conflict with his or her employment [*see Heller v. EBB Auto Co. (9th Cir. 1993) 8 F.3d 1433, 1439]* . The employee need only give the employer enough information about his or her religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirements [*see Heller v. EBB Auto Co. (9th Cir. 1993) 8 F.3d 1433, 1439]* . Any greater notice requirement would permit an employer to delve into the religious practices of an employee to determine whether religion mandated the employee's adherence, and neither courts nor employers may make such an inquiry [*Heller v. EBB Auto Co. (9th Cir. 1993) 8 F.3d 1433, 1439]* .

[e] Exemptions for Religious Educational Institutions

Under certain circumstances, religious educational institutions may be exempt from the prohibition against religious discrimination under Title VII. There are three exemptions available to religious educational institutions.

One exemption provides that the equal employment provisions of Title VII do not apply to employment by a "religious ... educational institution" of individuals of a particular religion to carry on its activities [*see 42 U.S.C. § 2000e-1(a)*]. To meet the requirements of that exemption, the religious characteristics of the school must be weighed against its secular characteristics to show that the school is *primarily* religious rather than secular, and not merely affiliated with a religious organization [*see EEOC v. Kamehameha Sch./Bishop Estate (9th Cir. 1993) 990 F.2d 458, 460 , cert. denied, 510 U.S. 963* ; *EEOC v. Townley Engineering & Mfg. Co. (9th Cir. 1988) 859 F.2d 610, 613 , cert. denied, 489 U.S. 1077 (1989)]* .

Title VII also provides a religious curriculum exemption for religious schools, which provides that it is not an unlawful employment practice for a school "to hire and employ employees of a particular religion ... if the curriculum of such school ... is directed toward the propagation of a particular religion" [*42 U.S.C. § 2000e-2(e)(2)*]. Although the statute does not define the terms "curriculum" or "propagate," the Ninth Circuit Court of Appeals has defined "propagate" as meaning to spread or instill particular religious values, and "curriculum" as being limited to coursework and required school activities [*EEOC v. Kamehameha Sch./Bishop Estate (9th Cir. 1993) 990 F.2d 458, 464 , cert. denied, 510 U.S. 963]* .

In addition to the two specific exemptions discussed above, Title VII provides that it is not an unlawful employment practice for an employer to hire and employ an individual on the basis of his or her religion in those instances in which religion is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the particular business [*42 U.S.C. § 2000e-2(e)(1)*]. Thus, a religious school might be able to argue that adherence to a particular religion is a BFOQ for teaching at the school. For discussion of the BFOQ defense with regard to religion, see *§ 115.54[4][b]*.

In addition to statutory exemptions for religious entities, there is a nonstatutory, constitutionally compelled "ministerial exception" to state and federal civil rights laws [*see, e.g.,* McClure v. Salvation Army (5th Cir.1972) *460 F.2d 553, 559-561 (Title VII)* ; *Schmoll v. Chapman Univ. (1999) 83 Cal. Rptr. 2d 426 (FEHA)]* . The ministerial exception reflects a policy, grounded in the *First Amendment*, that the law should not be construed to govern the relationship of a religious organization and its ministers [*Catholic Charities of Sacramento, Inc. v. Superior Court (2004) 32 Cal. 4th 527, 543-544, 10 Cal. Rptr. 3d 283, 85 P.3d 67]* . The exception applies to ministers and to nonordained employees with duties functionally equivalent to those of ministers. Generally, for an employee to be within the scope of the exception, the employee's primary duties must consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in a religious ritual and worship [*Hope Int'l Univ. v. Superior Court (2004) 119 Cal. App. 4th 719, 734, 14 Cal. Rptr. 3d 643]* . For further discussion of the ministerial exception, see *§ 115.20[2][d]*.

[7] Age Discrimination

The ADEA and FEHA prohibit age discrimination in employment [*see 29 U.S.C. § 623* (ADEA); *Gov. Code §§ 12940(a)-(d), (j), 12941, 12942* (FEHA)]. A person must be 40 years of age or older to be protected [*see 29 U.S.C. § 631(a)* (ADEA); *Gov. Code § 12926(b), (m)* (FEHA; "age" refers to chronological age of any individual who has reached his or her 40th birthday, and "age" includes perception of person's age); *Henn v. National Geographic Soc. (7th Cir. 1987) 819 F.2d 824, 827 , cert. denied, 484 U.S.964 (1987)* (ADEA; persons less than 40 years old are not protected from age discrimination)].

Effective January 1, 2003, FEHA was amended to repeal a separate provision prohibiting age discrimination [*see former Gov. Code § 12941*, repealed by 2002 Stats., ch. 525, § 2] and to add age to the regular list of bases of discrimination that constitute unlawful employment practices [*see Gov. Code § 12940(a)*, as amended by 2002 Stats., ch. 525, § 1]. The FEHA amendment eliminated an apparent gap in FEHA's protection that had been identified by the California Supreme Court when it interpreted the former age-discrimination provision as allowing employers to deny educational benefits on the basis of age [*see Esberg v. Union Oil (2002) 28 Cal. 4th 262, 269, 121 Cal. Rptr. 2d 203, 47 P.3d 1069]* . The amendment clarifies the Legislature's intent to make FEHA's protection against age discrimination coextensive with the protection provided against other forms of discrimination [*see* 2002 Stats., ch. 525, § 4]. However, the amendment does not apply to conduct predating January 1, 2003 [*Alch v. Superior Court (2004) 122 Cal. App. 4th 339, 396-400, 19 Cal. Rptr. 3d 29*].

The purpose of the ADEA is to protect a relatively old worker from discrimination that works to the advantage of the relatively young. Therefore, the ADEA does not prohibit an employer from favoring an older employee over a younger one. Thus, even if an employee is over age 40 and therefore covered by the ADEA, he or she is not protected against discrimination in favor of an older employee [*Gen. Dynamics Land Sys., Inc. v. Cline (2004) 540 U.S. 581, 124 S. Ct. 1236, 157 L. Ed. 2d 1094, 1103-1104* (employer may provide benefit to employees over age 50, while denying that benefit to employees over 40 but under 50)].

[8] Physical and Mental Disability and Medical Condition Discrimination

[a] Scope of Protection

FEHA expressly prohibits employment discrimination based on physical and mental disability and medical condition [*see Gov. Code § 12940(a)-(d),(j)*; *Green v. State (2007) 42 Cal. 4th 254, 260-264, 64 Cal. Rptr. 3d 390, 165 P.3d 118* (to qualify for protection, employee has burden of establishing his or her ability, with or without reasonable accommodation, to perform essential functions of job)]. In addition, the federal Americans With Disabilities Act of 1990 (ADA) [*42 U.S.C. § 12101 et seq.*] prohibits employment discrimination against disabled individuals [*42 U.S.C. § 12112(a),(b)(5)*; *see 42 U.S.C. § 12111(8)* (to qualify for protection, employee must be able, with or without reasonable accommodation, to perform essential functions of job)].

Federal sources of protection against handicap discrimination also include the Rehabilitation Act of 1973 [*29 U.S.C. § 701 et seq.*], which applies only to federal contractors and recipients of federal funds [*see 29 U.S.C. §§ 793, 794*], and the Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA) [*38 U.S.C. § 4211 et seq.*], which also covers federal contractors [*see 38 U.S.C. § 4212*]. For a general discussion relating to the scope and application of the Rehabilitation Act of 1973 and the VEVRAA, see K. Wilcox, ed., California Employment Law, Chs. 40 and 41 (Matthew Bender).

Most ADA and FEHA disability claims involve the duty to accommodate a disability. It is also possible, of course, to directly allege discriminatory treatment because of a disability. In such a case, the employer must know of the disability; an adverse action based on the person's performance without knowledge of the disability is not prohibited discrimination [*Brundage v. Hahn (1997) 57 Cal. App. 4th 228, 236-237, 66 Cal. Rptr. 2d 830]* . For example, it is not a FEHA violation for an employer to terminate an employee because of reading problems, if the actual diagnosis of a reading disorder is not made until after the termination occurs [*Pensinger v. Bowsmith, Inc. (1998) 60 Cal. App. 4th 709, 725, 70 Cal. Rptr. 2d 531]* .

[b] "Physical Disability" Under FEHA Defined

[i] Definitions

Under FEHA, "physical disability" includes, but is not limited to, the following [*Gov. Code § 12926(k)*]:

- Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following: (1) affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine; and (2) limits a major life activity;

- Any other health impairment not described in the first bulleted item, *above*, that requires special education or related services;

- Having a record or history of a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment as described in the first two bulleted entries, *above*, which is known to the employer or other covered entity;

- Being regarded or treated as having, or having had, any physical condition that makes achievement of a major life activity difficult [*see Gelfo v. Lockheed Martin Corp. (2006) 140 Cal. App. 4th 34, 52-53, 43 Cal. Rptr. 3d 874* (employer's belief need not be mistaken for employee to qualify as disabled under "regarded or treated as" prong of definition of disability)]; and

- Being regarded or treated as having, or having had, a disease, disorder, condition, cosmetic disfigurement, anatomical loss, or health impairment that has no present disabling effect but may become a physical disability as described in the first two bulleted entries, *above* [*see Gelfo v. Lockheed Martin*

Corp. (2006) 140 Cal. App. 4th 34, 52-53, 43 Cal. Rptr. 3d 874 (employer's belief need not be mistaken for employee to qualify as disabled under "regarded or treated as" prong of definition of disability)].

A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult [*Gov. Code § 12926(k)(1)(b)(ii)*]. Whether a major life activity is limited is to be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, orreasonable accommodations, unless the mitigating measure itself limits a major life activity [*Gov. Code §§ 12926(k)(1)(B)(i), 12926.1(c)*].

"Major life activity" is to be broadly construed and includes physical, mental, and social activities, and working [*Gov. Code §§ 12926(k)(1)(B)(iii), 12926.1(c)*; *see EEOC v. UPS (2005) 424 F.3d 1060, 1070-1077* (monocularity affects major life activities of seeing and working, but because it limits stereopsis and peripheral vision, prohibiting monocular persons from working as commercial delivery drivers is justified under safety-to-others defense)].

FEHA's list of "disabilities" is not restrictive; "physical disability" includes all physical conditions [*American National Ins. Co. v. FEHC (1982) 32 Cal. 3d 603, 608, 186 Cal. Rptr. 345, 651 P.2d 1151* ; *see, e.g., Nicolini v. County of Tuolumne (1987) 190 Cal. App. 3d 619, 633-636, 235 Cal. Rptr. 559* (migraine headaches)], including contagious diseases such as AIDS [*Raytheon Co. v. FEHC (1989) 212 Cal. App. 3d 1242, 1250, 261 Cal. Rptr. 197]* and hypersensitivity to tobacco smoke [*County of Fresno v. FEHC (1991) 226 Cal. App. 3d 1541, 1549-1550, 277 Cal. Rptr. 557]* . Physical disabilities include, but are not limited to, chronic or episodic conditions such as HIV/AIDS, hepatitis, epilepsy, seizure disorder, diabetes, multiple sclerosis, and heart disease [*Gov. Code § 12926.1(c)*].

The FEHA definition of "physical disability" also includes any perception that a person has, or is associated with one who has, a physical disability [*Gov. Code § 12926(m)*].

"Physical disability" under FEHA specifically excludes sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from the current unlawful use of controlled substances or other drugs [*Gov. Code § 12926(k)(6)*; *but see Lab. Code § 1025* (employer with 25 or more employees must reasonably accommodate employee's voluntary alcohol and drug rehabilitation efforts, in absence of undue hardship)].

[ii] Broader Protections Than ADA

The Legislature has enacted a statement of its intent in providing FEHA protection for disabilities. The protection afforded under FEHA is intended to be broader than that afforded under the federal ADA [*Gov. Code § 12926.1(a), (c), (d)*]. The ADA Amendments Act of 2008 (eff. Jan. 1, 2009) clarified that the ADA's definition of "disability" is to be construed in favor of broad coverage of individuals "to the maximum extent permitted by the terms of" the ADA [*42 U.S.C. § 12102(4)(A)*; *see* Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553-3554 (2008) (rejecting reasoning and standards applied by *Toyota Motor Mfg., Ky., Inc. v. Williams (2002) 534 U.S. 184, 122 S. Ct. 681, 151 L. Ed. 2d 615 , superseded by statute as stated in 614 F. Supp. 2d 73 (2009)* and *Sutton v. United Airlines (1999) 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 , superseded by statute as stated in 611 F. Supp. 2d 120* , as incorrectly narrowing broad scope of protection intended to be afforded by ADA)]. Still, FEHA affords broader protection than the ADA. For example, to constitute a physical disability under FEHA, an impairment that limits a major life activity need not pose a "substantial" limitation, as is required under the ADA [*Gov. Code § 12926.1(c), (d)* (overruling any contrary interpretation in *Cassista v. Community Foods (1993) 5 Cal. 4th 1050, 1060, 22 Cal. Rptr. 2d 287, 856 P.2d 1143*); *see Colmenares v. Braemar Country Club, Inc. (2003) 29 Cal. 4th 1019, 1028-1031* , Cal. Rptr. 2d 662, *63 P.3d 220* (*Gov. Code § 12926.1*, added effective January 1, 2001, to clarify existing law; language in Cassista v. Community Foods that may have conflicted with *Gov. Code § 12926.1* was dictum and did not accurately reflect California law)]. Thus, under the FEHA an impairment may be found to limit the specific major life activity of "working," if the actual or perceived working limitation implicates either a particular employment or a class or broad range of employments [*Gov. Code § 12926.1(c)*; *see Gov. Code § 12926(k)(1)(B)(iii)* ("major life activities" under FEHA includes working)]. The

ADA Amendments Act of 2008 added "working" to the ADA's nonexclusive list of major life activities [*see 42 U.S.C. § 12102(2)(A)* (eff. Jan. 1, 2009)]. However, the ADA still requires a *substantial* limitation on working before an impairment will qualify as a disability under the ADA [*42 U.S.C. § 12102(1)(A)*].

Under FEHA, regardless of any federal law, whether a condition limits a major life activity is to be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity [*Gov. Code §§ 12926(k)(1)(B)(i), 12926.1(c)*]. Similarly, under the ADA, the determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures such as (1) medication, medical supplies, equipment, or appliances, low-vision devices (other than ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; (2) the use of assistive technology; (3) reasonable accommodations or auxiliary aids or services; or (4) learned behavioral or adaptive neurological modifications [*42 U.S.C. § 12102(4)(E)*].

The FEHA definition of physical disability, as well as the definition of mental disability, is to be construed so that applicants and employees are protected from discrimination due to an actual or perceived impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling [*Gov. Code §§ 12926(k)(4), (5), 12926.1(b)*], and the protection of FEHA extends to persons who are erroneously or mistakenly believed to have any physical condition that limits a major life activity [*Gov. Code §§ 12926(k)(4), 12926.1(d)*].

If, on the other hand, the ADA definition of "disability" would provide broader protection to disabled individuals than the FEHA definition, then that broader ADA protection is deemed incorporated by reference into, and prevails over any conflicting provisions of, the definitions of mental and physical disability in *Gov. Code § 12926(i)* and*(k)* [*Gov. Code § 12926(l)*].

[c] "Mental Disability" Under FEHA Defined

[i] Definitions

Under FEHA, "mental disability" includes, but is not limited to, the following [*Gov. Code § 12926(i)*]:

- Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity.

- Any other mental or psychological disorder or condition not described in the first bulleted item, *above*, that requires special education or related services.

- Having a record or history of a mental or psychological disorder or condition described in the first two bulleted items, *above*, which is known to the employer or other covered entity.

- Being regarded or treated by the employer or other covered entity as having, or having had, any mental condition that makes achievement of a major life activity difficult [*see Gelfo v. Lockheed Martin Corp. (2006) 140 Cal. App. 4th 34, 52-53, 43 Cal. Rptr. 3d 874* (employer's belief need not be mistaken for employee to qualify as disabled under "regarded or treated as" prong of definition of disability)].

- Being regarded or treated by the employer or other covered entity as having or having had, a mental or psychological disorder or condition that has no present disabling effect, but that may become a mental disability described in either of the first two bulleted items, *above* [*see Gelfo v. Lockheed Martin Corp. (2006) 140 Cal. App. 4th 34, 52-53, 43 Cal. Rptr. 3d 874* (employer's belief need not be mistaken for employee to qualify as disabled under "regarded or treated as" prong of definition of disability)].

"Major life activity" is to be broadly construed and includes physical, mental, and social activities, and working [*Gov. Code §§ 12926(i)(1)(C), 12926.1(c)*]. Whether such an activity is "limited" is to be determined without regard to mitigating measures such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity [*Gov. Code §§ 12926(i)(1)(A), 12926.1(c)*]. A mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult [*Gov. Code § 12926(i)(1)(B)*].

"Mental disability" under FEHA includes clinical depression and bipolar disorder [*Gov. Code § 12926.1(c)*]. "Mental disability" under FEHA, however, does not include sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance disorders resulting from the current unlawful use of controlled substances or other drugs [*Gov. Code § 12926(i)*]. Alcoholism, however, could be a covered disability under FEHA [*see Gosvener v. Coastal Corp. (1996) 51 Cal. App. 4th 805, 813* ; *see also Lab. Code § 1025* (employer with 25 or more employees must reasonably accommodate employee's voluntary alcohol and drug rehabilitation efforts, in absence of undue hardship)]. Depending on its severity, posttraumatic stress disorder may meet the definition of a mental disability under FEHA [*Jensen v. Wells Fargo Bank (2000) 85 Cal. App. 4th 245, 259, 102 Cal. Rptr. 2d 55* (employee created triable issue as to whether she had mental disability because evidence showed that, after being victim of robbery, she suffered from posttraumatic stress disorder, including anxiety, nervousness, depression, lack of confidence, helpless feeling, humiliation, headaches, teeth-grinding, nightmares, sleeplessness, and panic attacks)].

The FEHA definition of "mental disability" also includes any perception that a person has, or is associated with one who has, a mental disability [*Gov. Code § 12926(m)*].

[ii] Broader Protections Than ADA

The Legislature has enacted a statement of its intent in providing FEHA protection for disabilities. The protection afforded under FEHA is intended to be broader than that afforded under the ADA [*Gov. Code § 12926.1(a), (c), (d)*]. The ADA Amendments Act of 2008 (eff. Jan. 1, 2009) clarified that the ADA's definition of "disability" is to be construed in favor of broad coverage of individuals "to the maximum extent permitted by the terms of" the ADA [*42 U.S.C. § 12102(4)(A)*; *see* Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553-3554 (2008) (rejecting reasoning and standards applied by *Toyota Motor Mfg., Ky., Inc. v. Williams (2002) 534 U.S. 184, 122 S. Ct. 681, 151 L. Ed. 2d 615 , superseded by statute as stated in 614 F. Supp. 2d 73 (2009)* and *Sutton v. United Airlines (1999) 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 , superseded by statute as stated in 611 F. Supp. 2d 120* , as incorrectly narrowing broad scope of protection intended to be afforded by ADA)]. Still, FEHA affords broader protection than the ADA. For example, to constitute a mental disability under FEHA, an impairment that limits a major life activity need not pose a "substantial" limitation, as is required under the ADA [*Gov. Code § 12926.1(c), (d)* (overruling any contrary interpretation in *Cassista v. Community Foods (1993) 5 Cal. 4th 1050, 1060, 22 Cal. Rptr. 2d 287, 856 P.2d 1143*); *see Colmenares v. Braemar Country Club, Inc. (2003) 29 Cal. 4th 1019, 1028-1031* (*Gov. Code § 12926.1*, added effective January 1, 2001, to clarify existing law; language in Cassista v. Community Foods that may have conflicted with *Gov. Code § 12926.1* was dictum and did not accurately reflect California law)]. Thus, under FEHA an impairment may be found to limit the specific major life activity of "working," if the actual or perceived working limitation implicates either a particular employment or a class or broad range of employments [*Gov. Code § 12926.1(c)*; *see Gov. Code § 12926(i)(1)(C)* ("major life activities" under FEHA includes working)]. The ADA Amendments Act of 2008 added "working" to the ADA's nonexclusive list of major life activities [*see 42 U.S.C. § 12102(2)(A)* (eff. Jan. 1, 2009)]. However, the ADA still requires a *substantial* limitation on working before an impairment will qualify as a disability under the ADA [*42 U.S.C. § 12102(1)(A)*].

Regardless of any federal law, under the FEHA, whether a condition limits a major life activity is to be determined without regard to mitigating measures such as medications, assistive devices, or reasonable accommodations, unless the mitigating measure itself limits a major life activity [*Gov. Code §§ 12926(i)(1)(A), 12926.1(c)*]. Similarly, under the

ADA, the determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures such as (1) medication, medical supplies, equipment, or appliances, low-vision devices (other than ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; (2) the use of assistive technology; (3) reasonable accommodations or auxiliary aids or services; or (4) learned behavioral or adaptive neurological modifications [*42 U.S.C. § 12102(4)(E)*].

The FEHA definition of mental disability, as well as the definition of physical disability, is to be construed so that applicants and employees are protected from discrimination due to an actual or perceived impairment that is disabling, potentially disabling, or perceived as disabling or potentially disabling [*Gov. Code §§ 12926(i)(4),(5), 12926.1(b)*]. Moreover, the protection of FEHA extends to persons who are erroneously or mistakenly believed to have any mental condition that limits a major life activity [*Gov. Code §§ 12926(i)(4), 12926.1(d)*].

If, on the other hand, the ADA definition of "disability" would provide broader protection to disabled individuals than the FEHA definition, then that broader ADA protection is deemed incorporated by reference into, and prevails over any conflicting provisions of, the definitions of mental and physical disability in *Gov. Code § 12926(i)* and *(k)* [*Gov. Code § 12926(l)*].

FEHA's provisions relating to mental disability apply to any employer or entity that is subject to FEHA generally [*see Gov. Code §§ 12926(d), 12940(a)-(f), (j), (m), (n)*].

[d] "Disability" Under ADA Defined

Under the ADA, "disability," with respect to an individual, means any of the following [*42 U.S.C. § 12102(1)*]:

- A physical or mental impairment that substantially limits one or more major life activities of the individual.

- A record of such an impairment.

- Being regarded as having such an impairment. An individual meets this requirement of "being regarded as having such an impairment" if the individual establishes that he or she has been subjected to an action prohibited under the ADA because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity [*42 U.S.C. § 12102(3)(A)*]. However, this requirement does not apply to impairments that are transitory (i.e., with an actual or expected duration of six months or less) and minor [*42 U.S.C. § 12102(3)(B)*].

Major life activities include (but are not limited to) caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working [*42 U.S.C. § 12102(2)(A)*]. Major life activities also include the operation of major bodily functions, including (but not limited to) functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions [*42 U.S.C. § 12102(2)(B)*].

The ADA's definition of "disability" is to be construed in favor of broad coverage of individuals under the ADA, to the maximum extent permitted by the terms of the ADA [*42 U.S.C. § 12102(4)(A)*]. The term "substantially limits" must be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008 [*42 U.S.C. § 12102(4)(B)*; *see* Pub. L. No. 110-325, 122 Stat. 3553 (2008)]. In the ADA Amendments Act of 2008, Congress expressly rejected the reasoning and standards enunciated by the Supreme Court in *Toyota Motor Mfg., Ky., Inc. v. Williams* [*Toyota Motor Mfg., Ky., Inc. v. Williams (2002) 534 U.S. 184, 122 S. Ct. 681, 151 L. Ed. 2d 615 , superseded by statute as stated in 614 F. Supp. 2d 73 (2009)*] and *Sutton v. United Airlines* [*Sutton v. United Airlines (1999) 527 U.S. 471,*

119 S. Ct. 2139, 144 L. Ed. 2d 450 , superseded by statute as stated in 611 F. Supp. 2d 120], and applied by numerous lower courts, as incorrectly narrowing the broad scope of protection intended to be afforded by ADA [Pub. L. No. 110-325, § 2(a)(4), (5), 122 Stat. 3553, 3553 (2008)]. In particular, Congress rejected the Supreme Court's statements that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives" [Pub. L. No. 110-325, § 2(b)(4), 122 Stat. 3553, 3554 (2008) (rejecting quoted passages from *Toyota Motor Mfg., Ky., Inc. v. Williams, (2002) 534 U.S. 184, 122 S. Ct. 681, 151 L. Ed. 2d 615 , superseded by statute as stated in 614 F. Supp. 2d 73 (2009)*)]. Congress also expressed its intent that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis [Pub. L. No. 110-325, § 2(b)(5), 122 Stat. 3553, 3554 (2008)].

An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability [*42 U.S.C. § 12102(4)(C)*]. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active [*42 U.S.C. § 12102(4)(D)*].

The determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures such as (1) medication, medical supplies, equipment, or appliances, low-vision devices (other than ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies; (2) the use of assistive technology; (3) reasonable accommodations or auxiliary aids or services; or (4) learned behavioral or adaptive neurological modifications [*42 U.S.C. § 12102(4)(E)(i)*; *see 42 U.S.C. § 12102(4)(E)(iii)(II)* ("low-vision devices" means devices that magnify, enhance, or otherwise augment a visual image)]. However, the ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses must be considered in determining whether an impairment substantially limits a major life activity [*42 U.S.C. § 12102(4)(E)(ii)*; *see 42 U.S.C. § 12102(4)(E)(iii)(I)* ("ordinary eyeglasses or contact lenses" means lenses that are intended to fully correct visual acuity or eliminate refractive error); *42 U.S.C. § 12103(1)* ("auxiliary aids and services" defined)].

Physical or mental impairment means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine. It also includes any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities [*45 C.F.R. § 84.3(j)(2)(i)* (Department of Health and Human Services regulation issued under Rehabilitation Act of 1973, *29 U.S.C. § 790 et seq.*); *see 29 C.F.R. § 1630.2(h)* (EEOC regulation interpreting ADA); *see also 42 U.S.C. § 12201(a)* (ADA expressly adopts regulations under Rehabilitation Act of 1973); Toyota Motor Mfg., Ky., Inc. v. Williams (2002) 534 U.S. 184, 193-194, 122 S. Ct. 681, 151 L. Ed. 2d 615 (ADA expressly adopts regulations under Rehabilitation Act but does not authorize any agency to issue further regulations interpreting "disability," so persuasive authority of EEOC regulations is less clear)].

All of the following are excluded from the ADA definition of disability [*42 U.S.C. § 12211(a), (b)*]:

- Homosexuality and bisexuality;

- Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

- Compulsive gambling, kleptomania, or pyromania; and

- Psychoactive substance use disorders resulting from current illegal use of drugs.

An individual seeking to establish disability under the ADA must provide affirmative proof as to the effect of the asserted impairment. For example, in the case of a person who can see out of only one eye, a court would require evidence of the person's loss of depth perception and visual field [*see Albertson's, Inc. v. Kirkingburg (1999) 527 U.S. 555, 566-567, 119 S. Ct. 2162, 144 L. Ed. 2d 518]* . The person must also show that the impairment prevents or severely restricts the use of his or her eyesight compared with how unimpaired individuals normally use their eyesight in daily life [*EEOC v. UPS (9th Cir. 2002) 306 F.3d 794, 802-803* , *modified, 311 F.3d 1132 (9th Cir. 2002)* (monocular individuals were not impaired, since they drove, read, used tools, and played sports)].

[e] Effect of Inconsistent Disability Claims in Different Proceedings

If an employee receives disability benefits (e.g., under workers' compensation or as a Social Security benefit), the employee may be judicially estopped from asserting a subsequent discrimination claim based on allegations that are inconsistent with representations made in obtaining the earlier disability benefits. The doctrine of judicial estoppel precludes a party from asserting a position in a judicial proceeding that is necessarily inconsistent with a position previously successfully asserted by that party in a prior proceeding [*Drain v. Betz Lab. (1999) 69 Cal. App. 4th 950, 955-956, 81 Cal. Rptr. 2d 864* ; *see Fredenburg v. Contra Costa County Dep't of Health Servs. (9th Cir. 1999) 172 F.3d 1176, 1179* (judicial estoppel will be applied only if party takes position that, in light of representations made in prior proceeding, is tantamount to knowing misrepresentation or fraud on court)].

For example, an employee who obtains a workers' compensation award on the basis of a sworn statement that he was totally disabled from "any occupation" will be estopped from claiming in a subsequent lawsuit that his employer discriminated against him by not making a reasonable accommodation that would have enabled him to continue working [*Drain v. Betz Lab. (1999) 69 Cal. App. 4th 950, 958-960, 81 Cal. Rptr. 2d 864]* . However, if the assertions made in the prior proceeding are not necessarily inconsistent with those made in the subsequent proceeding, judicial estoppel will be inapplicable [*see Fredenburg v. Contra Costa County Dep't of Health Servs. (9th Cir. 1999) 172 F.3d 1176, 1179-1180* (prior receipt of California temporary disability benefits (SDI) does not automatically bar employee from establishing that he or she is qualified person with disability under ADA); *Nunes v. Wal-Mart Stores (9th Cir. 1999) 164 F.3d 1243, 1246* (neither prior application for nor receipt of California temporary disability benefits (SDI) automatically bars employee from establishing that he or she is qualified person with disability under ADA); *Bell v. Wells Fargo Bank (1998) 62 Cal. App. 4th 1382, 1387-1388, 73 Cal. Rptr. 2d 354* (plaintiff's prior disability application was susceptible of varying interpretations, not all necessarily inconsistent with allegations of subsequent lawsuit); *Prilliman v. United Air Lines (1997) 53 Cal. App. 4th 935, 962-963, 62 Cal. Rptr. 2d 142* (plaintiff's earlier disability application had been based on inability to perform specific job function and was not clearly inconsistent with position taken in subsequent lawsuit, that plaintiff could have performed different job)].

The pursuit and receipt of Social Security Disability Insurance (SSDI) benefits does not automatically estop the recipient from establishing that his or her disability is also covered under the ADA. The SSDI program provides benefits to a person with a disability so severe that he or she is unable to do his or her previous work and cannot engage in "any other kind of substantial gainful work which exists in the national economy" [*see 42 U.S.C. § 423(d)(2)(A)*]. To prevail on an ADA claim, an employee must establish that his or her disability is such that he or she can perform the essential functions of his or her job, at least with "reasonable accommodation" [*see 42 U.S.C. § 12111(8)*]. Despite the appearance of conflict that arises from the governing statutory language, there are situations in which an SSDI claim and an ADA claim can both be sustained without any factual contradiction. For example, in deciding whether an individual is disabled for SSDI purposes, the Social Security Administration (SSA) does not take into account whether any reasonable accommodations can be made. Hence, an individual might qualify for SSDI under SSA's administrative rules and yet, due to special individual circumstances, remain capable of performing the essential functions of his or her job for ADA purposes. Accordingly, the Supreme Court held that trial courts should not apply any special presumption or judicial estoppel to prevent a claimant for or recipient of SSDI benefits from asserting that he or she is a qualified

individual with a disability under the ADA [*Cleveland v. Policy Management Sys. Corp. (1999) 526 U.S. 795, 119 S. Ct. 1597, 1600-1603, 143 L. Ed. 2d 966* ; *see Lujan v. Pacific Maritime Ass'n (9th Cir. 1999) 165 F.3d 738, 740* (because of different definitions of disability used by different agencies, it is possible for individual to qualify for SSDI benefits and to satisfy ADA's definition of qualified person with disability)].

However, the Supreme Court went on to state that despite the lack of inherent factual conflict between an SSDI claim and an ADA claim, in some cases a factual conflict might exist. For example, a plaintiff's sworn assertion in an application for SSDI benefits that he or she is "unable to work" will appear to negate an essential element of his or her ADA case (that he or she can, with or without reasonable accommodation, perform essential functions of his or her job), at least if the plaintiff does not offer a sufficient explanation. In such a case, summary judgment for the employer would be appropriate if the plaintiff fails to offer sufficient evidence to explain the apparent contradiction that arises out of the earlier SSDI claim. For this reason, when faced with plaintiff's previous sworn statement asserting "total disability," a trial court should require an explanation of any apparent inconsistency with necessary elements of the plaintiff's ADA claim [*Cleveland v. Policy Management Sys. Corp. (1999) 526 U.S. 795, 804-807, 119 S. Ct. 1597, 143 L. Ed. 2d 966]* .

[f] "Medical Condition" Under FEHA Defined

FEHA also prohibits discrimination based on "medical condition" [*see Gov. Code § 12940(a)*]. "Medical condition" means a genetic characteristic, or any health impairment related to or associated with a diagnosis of cancer or a record or history of cancer [*Gov. Code § 12926(h)*]. For this purpose, a "genetic characteristic" is either of the following [*Gov. Code § 12926(h)(2)*]:

- Any scientifically or medically identifiable gene or chromosome, or combination or alteration of genes or chromosomes, that is known to be a cause of a disease or disorder in a person or his or her offspring, or is determined to be associated with a statistically increased risk of development of a disease or disorder, and that is presently not associated with any symptoms of any disease or disorder; or

- Inherited characteristics that may derive from the individual or family member, that are known to be a cause of a disease or disorder in a person or his or her offspring, or that are determined to be associated with a statistically increased risk of development of a disease or disorder, and that are presently not associated with any symptoms of any disease or disorder.

Aside from genetic characteristics, the only health impairments meant by the term "medical condition" under FEHA are conditions associated with cancer. No other conditions are included, because the Legislature chose to use the word "means" in defining "medical condition," rather than the former words "includes" (until 2001) and "includes, but is not limited to" (until 1994) [*see Muller v. Automobile Club of Southern California (1998) 61 Cal. App. 4th 431, 444-446, 71 Cal. Rptr. 2d 573]* .

For FEHA purposes, a "medical condition" includes any perception that a person has, or is associated with one who has, a medical condition [*Gov. Code § 12926(m)*].

Legal Topics:

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 115 CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION
PART II. LEGAL BACKGROUND
B. Scope of Coverage, Protected Classifications, and Theories of Liability

11-115 California Forms of Pleading and Practice--Annotated § 115.23

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§ 115.23 Theories of Liability

[1] Generally

In general, a plaintiff may establish unlawful discrimination under FEHA, Title VII, the ADA, or the ADEA according to one of two basic theories of liability: disparate treatment or disparate impact. In some circumstances, a plaintiff, either individually or on behalf of a class, may establish liability by proving a "pattern or practice" of disparate treatment by an employer. These theories are discussed in [2]-[4], *below*.

[2] Disparate Treatment

[a] Scope and Application

Disparate treatment occurs when an employer treats some employees less favorably than others because of their race, color, religion, sex, national origin, or other protected characteristic [*Teamsters v. United States (1977) 431 U.S. 324, 335-336, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII)* ; *Moran v. Selig (9th Cir. 2006) 447 F.3d 748, 753-755* (disparate treatment in providing health benefits gives rise to Title VII claim only if those benefits are awarded on basis of *employment* relationship); *Mixon v. Fair Employment & Housing Com. (1987) 192 Cal. App. 3d 1306, 1317, 237 Cal. Rptr. 884 (FEHA)]* . The disparate treatment theory of liability applies to cases arising under most equal employment opportunity laws, including FEHA [*see University of Southern California v. Superior Court (1990) 222 Cal. App. 3d 1028, 1035, 272 Cal. Rptr. 264* ; *Mixon v. Fair Employment & Housing Com. (1987) 192 Cal. App. 3d 1306, 1316-1317, 237 Cal. Rptr. 884* ; *Ibarbia v. Regents of University of California (1987) 191 Cal. App. 3d 1318, 1327, 1328, 237 Cal. Rptr. 92]* , Title VII [*see McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668]* , the ADEA [*see* Gross v. FBL Fin. Servs., Inc. (2009) -- U.S. --, 129 S. Ct. 2343, 174 L. Ed. 2d 119, 127-129 (in disparate-treatment claim under ADEA, plaintiff has burden, pursuant to *29 U.S.C. § 623(a)(1)*, of proving that age was "but-for" cause of employer's adverse action)], and *42 U.S.C. § 1981* [*see De Horney v. Bank of America Nat'l Trust & Sav. Asso. (9th Cir. 1989) 879 F.2d 459, 467-468* ; *London v. Coopers & Lybrand (9th Cir. 1981) 644 F.2d 811, 818* ; *Tagupa v. Board of Directors (9th Cir. 1980) 633 F.2d 1309, 1312]* .

A disparate treatment case requires proof of intent to discriminate [*see* *Teamsters v. United States (1977) 431 U.S. 324, 335-336, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII)* ; *Mixon v. Fair Employment & Housing Com. (1987) 192 Cal. App. 3d 1306, 1317, 237 Cal. Rptr. 884 (FEHA)]* . Intent is established when an employer chooses a particular policy because of, not merely in spite of, its effect on members of a protected class; mere awareness of adverse consequences is insufficient [American Fed'n of State, County, and Municipal Employees v. State of Washington (9th Cir. 1985) *770 F.2d 1401, 1405 (Title VII)* ; *see* *Teamsters v. United States (1977) 431 U.S. 324, 335-336, 97 S. Ct. 1843, 52 L. Ed. 2d 396* ; *see also* *West v. Bechtel Corp. (2002) 96 Cal. App. 4th 966, 978-979, 117 Cal. Rptr. 2d 647* (because foreign government was employer's client and had power to require employer to engage in discriminatory conduct within that foreign country, client's discriminatory intent was not imputed to employer)].

The discussion of burden-shifting [*see* [b], *below*] that occurs when a plaintiff uses circumstantial evidence to establish a prima facie case of disparate treatment under Title VII and some other employment-discrimination statutes [*see* [b]-[d], *below*] does not apply to a claim brought under the ADEA. Title VII, for example, authorizes a discrimination claim in which an improper purpose was "a motivating factor" for an adverse employment decision, even if other, permissible factors also motivated the decision [*42 U.S.C. § 2000e-2(m)*]. The burden-shifting protocol described below thus applies when the employer had "mixed motives" for the adverse employment action that gave rise to a Title VII claim. The ADEA, in contrast, does not authorize mixed-motive age-discrimination claims; rather, the plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial) that age was the "but-for" cause of the employer's adverse action [*29 U.S.C. § 623(a)(1)*]. Thus, the burden of proof on an ADEA claim never shifts to the employer to show that it would have taken the adverse action regardless of age [Gross v. FBL Fin. Servs., Inc. (2009) -- U.S. --, 129 S. Ct. 2343, 174 L. Ed. 2d 119, 127-129].

[b] Prima Facie Proof

Disparate treatment may be established by evidence of discriminatory intent [*see* Ledbetter v. Goodyear Tire & Rubber Co. (2007) 550 U.S. 618, 127 S. Ct. 2162, 2167, 167 L. Ed. 2d 982, 990 (central element of disparate treatment is discriminatory intent); *see, e.g.,* *Trans World Airlines v. Thurston (1985) 469 U.S. 111, 121, 105 S. Ct. 613, 83 L. Ed. 2d 523* (employment policy of disqualifying airline captains at age 60 violates ADEA); *Cordova v. State Farm Insurance Companies (9th Cir. 1997) 124 F.3d 1145, 1148-1149* (Title VII; supervisor's reference to a coworker as "dumb Mexican" hired only because of his minority status); *Rosenfeld v. Southern Pacific Company (9th Cir. 1971) 444 F.2d 1219, 1223* (Title VII; express admission that woman denied employment assignment based on belief that women are not physically or biologically suited for assignment); *see also* *Ash v. Tyson Foods, Inc. (2006) 546 U.S. 454, 126 S. Ct. 1195, 1197, 163 L. Ed. 2d 1053* (per curiam) (use of word "boy" to refer to African-American may be evidence of discriminatory intent, depending on circumstances, including context, inflection, tone of voice, local custom, and historical usage)].

However, in most cases such direct evidence is unavailable, and intent can only be established by circumstantial evidence [*see* Ledbetter v. Goodyear Tire & Rubber Co. (2007) 550 U.S. 618, 127 S. Ct. 2162, 2171, 167 L. Ed. 2d 982, 994 ("In most disparate-treatment cases, much if not all of the evidence of intent is circumstantial."); *American Fed'n of State, County, and Municipal Employees v. State of Washington (9th Cir. 1985) 770 F.2d 1401, 1406 (Title VII)* ; *see also* *U.S. Postal Service Bd. of Govs. v. Aikens (1983) 460 U.S. 711, 714 n.3, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (Title VII)]* . In these cases, a plaintiff has the burden of establishing, by a preponderance of the evidence [*see* *Texas Dep't of Community Affairs v. Burdine (1981) 450 U.S. 248, 252-253, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (Title VII)* ; *American Fed'n of State, County, and Municipal Employees v. State of Washington (9th Cir. 1985) 770 F.2d 1401, 1406 (Title VII)]* , a prima facie case of employment discrimination by showing all of the following [*McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668]* :

- That he or she is a member of a protected class;

- That he or she applied and was qualified for a job (or other employment opportunity or benefit) for which an employer was seeking applicants;

- That, despite the plaintiff's qualifications, he or she was rejected; and

- That, after the plaintiff's rejection, the position remained open and the employer continued to seek applicants from persons with the plaintiff's qualifications (or to provide the benefit to other such persons).

A plaintiff need not show, as part of the prima facie case, that similarly-situated employees outside the protected class received the employment terms and conditions sought by the plaintiff [*Heard v. Lockheed Missiles & Space Co. (1996) 44 Cal. App. 4th 1735, 1754, 52 Cal. Rptr. 2d 620]* . For example, the fact that an employee over age 40 was replaced by an older employee does not by itself conclusively establish the absence of age discrimination. Although this evidence weighs against an inference that the first employee was terminated based on his or her age, it may be outweighed by other evidence that supports an inference of age discrimination [*Begnal v. Canfield & Assocs. (2000) 78 Cal. App. 4th 66, 72-76, 92 Cal. Rptr. 2d 611]* .

The above *McDonnell Douglas* test does not apply if direct evidence of discriminatory intent is available [*Trans World Airlines v. Thurston (1985) 469 U.S. 111, 121, 105 S. Ct. 613, 83 L. Ed. 2d 523* ; *but cf. Gross v. FBL Fin. Servs., Inc. (2009) -- U.S. --, 129 S. Ct. 2343, 174 L. Ed. 2d 119, 127-129* , *remanded, 588 F.3d 614 (2009)* (under ADEA, plaintiff retains burden of proof to show by direct or circumstantial evidence that age was "but-for" cause of employer's adverse action, *29 U.S.C. § 623(a)(1)*, and *McDonnell-Douglas* burden-shifting does not apply)]. Furthermore, it only applies in private, non-class actions [*McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792, 800, 93 S. Ct. 1817, 36 L. Ed. 2d 668]* .

The requisite degree of proof to establish a prima facie case is minimal since the plaintiff is only required to raise an inference that the discriminatory misconduct occurred [*see Messick v. Horizon Indus. (9th Cir. 1995) 62 F.3d 1227, 1229* ; *Warren v. City of Carlsbad (9th Cir. 1995) 58 F.3d 439, 442* , *cert. denied, 516 U.S. 1171 (1996)* ; *Wallis v. J.R. Simplot Co. (9th Cir. 1994) 26 F.3d 885, 889* ; *but see Ritter v. Hughes Aircraft Co. (9th Cir. 1995) 58 F.3d 454, 457* (vague evidence did not support prima facie case)]. However, if the plaintiff's evidence fails to support such an inference, the prima facie case is not made. Thus, if there is no evidence that the defendant was aware of the plaintiff's membership in the protected class, the plaintiff has failed to make a prima facie case of discriminatory intent. For example, in a case of alleged discrimination on the basis of pregnancy, if the pregnancy was not apparent at the time of the alleged discriminatory act, and the employee had not disclosed it to her employer, she must allege knowledge and present, as part of her prima facie case, evidence from which a rational jury could infer that the employer knew that she was pregnant [*Trop v. Sony Pictures Entm't Inc. (2005) 129 Cal. App. 4th 1133, 1145-1146, 29 Cal. Rptr. 3d 144]* .

The *McDonnell Douglas* framework is meant only as a burden-shifting tool and is not a subject on which the jury should be instructed [*Heard v. Lockheed Missiles & Space Co. (1996) 44 Cal. App. 4th 1735, 1758-1759, 52 Cal. Rptr. 2d 620* ; *Caldwell v. Paramount Unified School Dist. (1995) 41 Cal. App. 4th 189, 196, 48 Cal. Rptr. 2d 448]* . Rather, it is most useful at preliminary stages of the litigation, such as summary judgment and nonsuit, when the shifting burdens of proof and persuasion permit a sequential analysis of the parties' evidentiary offerings. Once the case is submitted to the jury, the *McDonnell Douglas* framework drops from the picture, and an appellate court will apply traditional standards of review to determine whether substantial evidence supports the jury's verdict [*Horsford v. Board of Trs. of Cal. State Univ. (2005) 132 Cal. App. 4th 359, 375-377, 33 Cal. Rptr. 3d 644]* .

The United States Supreme Court has stated that because the prima facie case under *McDonnell Douglas* was intended as an evidentiary standard, it does not serve as a pleading requirement. Thus, under the notice pleading system that exists in federal court, a plaintiff is not required to plead the elements of the *McDonnell Douglas* prima facie case in order to survive a motion to dismiss at the pleading stage [*Swierkiewicz v. Sorema N.A. (2002) 534 U.S. 506, 122 S.*

Ct. 992, 152 L. Ed. 2d 1, 9-10] . Under the federal notice pleading system, a complaint is deemed sufficient if it contains "a short and plain statement of the *claim* showing that the pleader is entitled to relief" [*Fed. R. Civ. P. 8(a)* (emphasis added)]. In contrast, California courts operate under a code pleading system (also called a fact pleading system), which requires that a complaint contain a "statement of the *facts* constituting the cause of action, in ordinary and concise language" [*Code Civ. Proc. § 425.10(a)* (emphasis added)]. Accordingly, it is unclear whether California courts may or should use the *McDonnell Douglas* prima facie case to test the sufficiency of a complaint to survive a general demurrer [*see Bach v. County of Butte (1983) 147 Cal. App. 3d 554, 561-563, 195 Cal. Rptr. 268* (rules of pleading in federal court generally differ from rules of pleading in California state courts, but California courts should apply federal standard to determine whether complaint pleads federal civil-rights cause of action under *42 U.S.C. § 1983* sufficient to survive general demurrer); *Diodes v. Franzen (1968) 260 Cal. App. 2d 244, 250, 67 Cal. Rptr. 19* ("The federal cases since the adoption of the federal rules are not helpful on the pleading questions in an action brought in a state court in California, because federal cases use 'notice pleading,' whereas California uses 'fact pleading' ")].

[c] Rebuttal of Prima Facie Proof

A *McDonnell Douglas* prima facie case establishes a rebuttable presumption of unlawful discrimination [*Texas Dep't of Community Affairs v. Burdine (1981) 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207* (Title VII); *see Diaz v. American Telephone & Telegraph (9th Cir. 1985) 752 F.2d 1356, 1359-1361* (Title VII); *Mixon v. Fair Employment & Housing Com. (1987) 192 Cal. App. 3d 1306, 1318, 237 Cal. Rptr. 884* (FEHA)]. The plaintiff's proof of the prima facie case shifts the burden to the employer to articulate some legitimate, nondiscriminatory reason for its challenged action [*Texas Dep't of Community Affairs v. Burdine (1981) 450 U.S. 248, 254-255, 101 S. Ct. 1089, 67 L. Ed. 2d 207* ; *McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668]* .

However, the ultimate burden of persuading the trier of fact that the employer discriminated remains at all times with the plaintiff [*St. Mary's Honor Center v. Hicks (1993) 509 U.S. 502, 507, 113 S. Ct. 2742, 125 L. Ed. 2d 407* (Title VII); *Texas Dep't of Community Affairs v. Burdine (1981) 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207* (Title VII); *Horsford v. Board of Trs. of Cal. State Univ. (2005) 132 Cal. App. 4th 359, 375-377, 33 Cal. Rptr. 3d 644* (plaintiff in racial discrimination action has burden of proving that plaintiff's race was substantial factor in adverse employment decision); *Muzquiz v. City of Emeryville (2000) 79 Cal. App. 4th 1106, 1116-1119, 94 Cal. Rptr. 2d 579* (once employer raises genuine issue of fact with regard to its legitimate nondiscriminatory reason for its action, entire framework for shifting burdens and presumptions drops from case, and only issue left to decide is whether employee lost his or her job because of discrimination)].

The employer's burden is one of "production" of evidence; it is sufficient if the employer raises a genuine issue of fact about whether it discriminated [*see Texas Dep't of Community Affairs v. Burdine (1981) 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207]* . Because the defendant's rebuttal burden is merely one of producing evidence, and because the burden of proof remains at all times with the plaintiff, the defendant's failure to *persuade* the factfinder that its proffered reason was the true reason for its action does not necessarily compel a judgment for the plaintiff as a matter of law, but it will permit the factfinder to make an inference of discrimination [*St. Mary's Honor Center v. Hicks (1993) 509 U.S. 502, 511, 113 S. Ct. 2742, 125 L. Ed. 2d 407* (Title VII)].

To rebut the plaintiff's prima facie case of disparate treatment, the employer need only offer a legitimate, nondiscriminatory reason or policy for its challenged action. It is not necessary for the employer to negate the possibility that its facially neutral employment practice has a disparate *impact*; evidence of disparate impact (*see* [4], *below*) is not relevant under the *McDonnell-Douglas* analytical framework for disparate-*treatment* claims [*Raytheon Co. v. Hernandez (2003) 540 U.S. 44, 124 S. Ct. 513, 157 L. Ed. 2d 357, 365-367]* .

[d] Proof of Pretext or "Mixed Motives"

Once the employer meets its burden of production, the plaintiff must have an opportunity to prove, by a preponderance

of the evidence, that the employer's "legitimate" reasons were not its true reasons, but were a pretext for discrimination [*see Texas Dep't of Community Affairs v. Burdine (1981) 450 U.S. 248, 253, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207* (Title VII); *McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792, 804, 93 S. Ct. 1817, 36 L. Ed. 2d 668* (Title VII); *see also Rodriguez v. General Motors Corp. (9th Cir. 1990) 904 F.2d 531, 533* (*42 U.S.C. § 1981*)]. The plaintiff may show pretext either directly, by showing that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the employer's proffered explanation is not believable [*Texas Dep't of Community Affairs v. Burdine (1981) 450 U.S. 248, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207* (Title VII); *Noyes v. Kelly Servs. (9th Cir. 2007) 488 F.3d 1163, 1170-1171* ; *Mixon v. Fair Employment & Housing Com. (1987) 192 Cal. App. 3d 1306, 1318-1319, 237 Cal. Rptr. 884* (FEHA)].

In the view of some courts, once a plaintiff has established a prima facie case, he or she need produce very little evidence of discriminatory motive to raise a genuine issue of fact as to pretext [*see McGinest v. GTE Serv. Corp. (9th Cir. 2004) 360 F.3d 1103, 1122-1124* (Title VII; racial harassment); *Warren v. City of Carlsbad (9th Cir. 1995) 58 F.3d 439, 442 , cert. denied, 516 U.S. 1171 (1996)* ; *Lindahl v. Air France (9th Cir. 1991) 930 F.2d 1434, 1437-1438* ; *see also Noyes v. Kelly Servs. (9th Cir. 2007) 488 F.3d 1163, 1170-1171* (at summary judgment stage, plaintiff need not prove that defendant's proffered nondiscriminatory explanation is false and that intentional discrimination is real reason for defendant's conduct); *Messick v. Horizon Indus. (9th Cir. 1995) 62 F.3d 1227, 1231* ; *Mamou v. Trendwest Resorts, Inc. (2008) 165 Cal. App. 4th 686, 715, 81 Cal. Rptr. 3d 406* ("[t]he central issue is and should remain whether the evidence as a whole supports a reasoned inference that the challenged action was the product of discriminatory or retaliatory animus... . Thus, citing a legitimate reason for the challenged action will entitle the employer to summary judgment only when the employee's showing, while sufficient to invoke the presumption [of improper motive], is *too weak* to sustain a reasoned inference in the employee's favor. That, and not 'pretext,' must be the focus of the judicial inquiry" [emphasis in original])]. However, a minimal showing that is sufficient to make a prima facie case may not be sufficient also to establish pretext. For example, proximity in time between the plaintiff's protected activity and an adverse employment action, although sufficient to raise a prima facie case, does not, without more, suffice also to satisfy the secondary burden borne by the plaintiff to show a triable issue as to pretext [*Loggins v. Kaiser Permanente Int'l (2007) 151 Cal. App. 4th 1102, 1112-1113, 60 Cal. Rptr. 3d 45* ; *see also Ritter v. Hughes Aircraft Co. (9th Cir. 1995) 58 F.3d 454, 457* (plaintiff provided insufficient evidence to raise genuine issue of material fact that employer's proffered reasons for its actions were pretextual)].

If the plaintiff's evidence of a discriminatory motive went beyond the *McDonnell Douglas* presumption, including direct or circumstantial evidence of discriminatory intent, that evidence may also be used to prove pretext, and will almost always suffice to preclude summary judgment for the defendant [*Cordova v. State Farm Ins. Cos. (9th Cir. 1997) 124 F.3d 1145, 1150* (Title VII); *see Washington v. Garrett (9th Cir. 1993) 10 F.3d 1421, 1433]* .

Thus, evidence that the employer's nondiscriminatory explanation of its action is unworthy of credence is one form of circumstantial evidence that is probative of intentional discrimination, and it may be sufficient to support a jury finding of intentional discrimination, depending on the particulars of the case [*Reeves v. Sanderson Plumbing Prods. (2000) 530 U.S. 133, 139-150, 120 S. Ct. 2097, 147 L. Ed. 2d 105* ; *see Chuang v. University of Cal. Davis (9th Cir. 2000) 225 F.3d 1115, 1127]* .

However, when the plaintiff presents only a minimal prima facie case and does not supply additional evidence to refute the employer's proffered explanation, summary judgment for the defendant may be appropriate [*Wallis v. J.R. Simplot Co. (9th Cir. 1994) 26 F.3d 885, 890* ; *King v. United Parcel Service, Inc. (2007) 152 Cal. App. 4th 426, 60 Cal. Rptr. 3d 359* (summary judgment was proper since plaintiff admitted falsifying timecard and offered no substantial evidence that violation of defendant's integrity policy was pretext for disability discrimination)].

Even if the trier of fact disbelieves the employer's proffered reasons, the plaintiff is not necessarily entitled to judgment as a matter of law. The trier of fact is *permitted* to infer discrimination under those circumstances but is not required to do so, and the plaintiff retains the ultimate burden of proving intentional discrimination [*St. Mary's Honor Center v.*

Hicks (1993) 509 U.S. 502, 507, 511, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (Title VII); *see Muzquiz v. City of Emeryville (2000) 79 Cal. App. 4th 1106, 1116-1119, 94 Cal. Rptr. 2d 579]* .

A showing that the defendant treated similarly situated employees outside the plaintiff's protected class more favorably would be probative of pretext [*Vasquez v. County of L.A. (9th Cir. 2003) 349 F.3d 634, 641* (Title VII)]. However, the plaintiff need not pursue any particular means of demonstrating pretext. For example, although a black plaintiff may prove pretext by showing that he or she was in fact better qualified than a similarly situated white employee [*see Ash v. Tyson Foods, Inc. (2006) 546 U.S. 454, 126 S. Ct. 1195, 1197-1198, 163 L. Ed. 2d 1053* ("qualifications evidence may suffice, at least in some circumstances, to show pretext")], he or she may also do so by presenting evidence of the employer's past discriminatory conduct toward the plaintiff [*see* Patterson v. McLean Credit Union (1989) 491 U.S. 164, 187-188 (*42 U.S.C. § 1981*)].

PRACTICE TIP:

"Pretext Plus" Cases. Although a plaintiff should be able to get by summary judgment by establishing a prima facie case along with evidence of "pretext," often this is not the reality. In disparate treatment cases the law requires proof of "intentional" discrimination, although courts have been very reluctant to define exactly what that means. Is proof required that the person discriminating consciously believed he/she was discriminating? Can a person "intentionally" discriminate subconsciously? Put another way, does proof of intentional discrimination require you to prove that the person who discriminated thought he/she was discriminating? It is clear that "intent" can be inferred by circumstantial evidence. However, the courts have never clearly defined exactly what the intent is that we are trying to prove. The reality is that most discrimination is something that is learned--at home, school, or through other forms of cultural conditioning. Many of us are "taught" to discriminate, yet, we are also "taught" that it is politically incorrect to discriminate.

Ironically, defendants may often try to defend discrimination cases by claiming that any discrimination that may have occurred was not "intentional," but rather negligent or accidental. It may be that the law remains "intentionally" ambiguous so that judges and juries have broad discretion to decide these cases. It is not quite as ill defined as the "I know it when I see it" approach to pornography. On the other hand, in a culture where most of us over 40 were "taught" or conditioned to discriminate based on race, many people, including well intentioned judges, have a difficult time confronting their own prejudices and biases. *By John H. Scott*

Employment decisions may result from a mixture of legitimate and illegitimate considerations ("mixed motives"). For example, an employer might make an adverse employment decision based on a female employee's evaluations that not only criticize her interpersonal skills (a permissible consideration), but also contain comments resulting from sex stereotyping (an impermissible consideration) [*see* Price Waterhouse v. Hopkins (1989) 490 U.S. 228, 234-235]. Title VII, as amended by the Civil Rights Act of 1991 [Pub. L. No. 102-166], provides that a decision based on such mixed motives is an unlawful employment practice [*see 42 U.S.C. § 2000e-2(m)*]. However, an employee's remedies are limited (to declaratory relief, certain types of injunctive relief, and attorney's fees and costs, but not damages, hiring, reinstatement, or promotion) if the employer can demonstrate that it would have taken the same action in the absence of the impermissible motivating factor [*42 U.S.C. § 2000e-5(g)(2)(B)*; *see Metoyer v. Chassman (9th Cir. 2007) 504 F.3d 919, 934* (claim under *42 U.S.C. § 1981* follows same legal principles as claim under Title VII, so mixed-motive defense does not protect defendant in § 1981 discrimination case from employee's limited remedies delineated under *42 U.S.C. § 2000e-5(g)(2)(B)*, but mixed-motive defense is available for retaliation claim brought under § 1981)]. The employer bears the burden of proving that it would have taken the same action in the absence of the impermissible motivating factor, but this burden does not come into play unless the employee has demonstrated (by direct or circumstantial evidence) that the impermissible factor played a motivating part in the employer's action [*Desert Palace, Inc. v. Costa (2003) 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84, 93-94* (plaintiff may rely on circumstantial evidence to meet burden of demonstrating impermissible motivating factor)].

[e] FEHC Test

Although, generally, California courts have applied the *McDonnell Douglas* test in FEHA litigation [*see, e.g., University of Southern California v. Superior Court (1990) 222 Cal. App. 3d 1028, 1035, 272 Cal. Rptr. 264* ; *Mixon v. Fair Employment & Housing Com. (1987) 192 Cal. App. 3d 1306, 1317, 237 Cal. Rptr. 884]* , the Fair Employment and Housing Commission (FEHC), the agency that enforces FEHA, does not [*see* DFEH v. Church's Fried Chicken (1987) FEHC Dec. No. 87-18, pp. 11-17].

Under the FEHC test, discrimination is established if a preponderance of all the evidence demonstrates a causal connection between an individual's protected status and an adverse employer action; it need not be shown that the protected status was the sole, or even the dominant, cause of the adverse treatment [DFEH v. Church's Fried Chicken (1987) FEHC Dec. No. 87-18, pp. 10, 12; *see Rose v. Wells Fargo & Co. (9th Cir. 1990) 902 F.2d 1417, 1425* (age discrimination claim fails under *Church's Fried Chicken* test when there is no evidence to suggest that age was factor in discharge decisions); *Watson v. Department of Rehabilitation (1989) 212 Cal. App. 3d 1271, 1290, 261 Cal. Rptr. 204* (citing *Church's Fried Chicken*, and stating that applicability of *McDonnell Douglas* test in FEHA disparate treatment cases is unsettled)].

The Ninth Circuit Court of Appeals has held that the *Church's Fried Chicken* test is only applicable in cases before the FEHC, and is not applicable in California courts [*Nesbit v. Pepsico (9th Cir. 1993) 994 F.2d 703, 704]* .

[3] Class-Wide or "Pattern or Practice" Discrimination Claims

[a] Generally

A "pattern or practice" of employment discrimination occurs when discrimination is an employer's standard operating procedure, the regular rather than the unusual practice [*Teamsters v. United States (1977) 431 U.S. 324, 336, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII)]* . Intent to discriminate may be inferred from a statistical showing of disparity between protected class members and comparably qualified members of the majority group [*Segar v. Smith (D.C. Cir. 1984) 738 F.2d 1249, 1265-1266 , cert. denied, 471 U.S. 1115 (1985)* (Title VII); *see EEOC v. General Telephone Co. of Northwest (9th Cir. 1989) 885 F.2d 575 , cert. denied, 498 U.S. 950 (1990)* (Title VII)].

Pattern or practice claims may be brought by private individuals, or as class actions [*see, e.g., Atonio v. Wards Cove Packing Co. (9th Cir. 1987) 810 F.2d 1477, 1480* (en banc), *returned to panel, 827 F.2d 439 , rev'd on other grounds, 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989)* (Title VII; pattern or practice class action by private individuals); *Segar v. Smith (D.C. Cir. 1984) 738 F.2d 1249, 1266, 1267 , cert. denied, 471 U.S. 1115 (1985)* (Title VII; pattern or practice action by individual plaintiffs and association, later certified as class action); *see also Gov. Code § 12961* (FEHA class actions)].

Pattern or practice claims may also be brought by the EEOC, if it has reasonable cause to believe that there is a pattern or practice of discrimination [*see 42 U.S.C. § 2000e-6(a)*; *Teamsters v. United States (1977) 431 U.S. 324, 360, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII)]* .

Most courts characterize pattern or practice claims as a type of disparate treatment claim because the ultimate issue is whether intentional discrimination existed [*see Segar v. Smith (D.C. Cir. 1984) 738 F.2d 1249, 1266 , cert. denied, 471 U.S. 1115 (1985)* (Title VII); *see also Teamsters v. United States (1977) 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII)]* . However, pattern or practice claims also have similarities to disparate impact actions [*see Segar v. Smith (D.C. Cir. 1984) 738 F.2d 1249, 1266, 1267 , cert. denied, 471 U.S. 1115 (1985)* (Title VII; both pattern or practice and disparate impact analyses attack employment practices that have systematic adverse effect on members of protected class)]. In fact, plaintiffs in pattern or practice actions typically assert both disparate treatment and disparate impact claims [*see, e.g., Atonio v. Wards Cove Packing Co. (9th Cir. 1987) 810 F.2d 1477, 1480* (en banc), *returned to*

panel, 827 F.2d 439 , rev'd on other grounds, 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989)] .

For discussion of procedural requirements for employment discrimination class actions, see *§ 115.52[4]*.

[b] Prima Facie Case

A plaintiff's initial burden in "pattern or practice" actions is to demonstrate, by a preponderance of the evidence, a regular procedure or policy of unlawful discrimination [*Teamsters v. United States (1977) 431 U.S. 324, 336, 358, 97 S. Ct. 1843, 52 L. Ed. 2d 396* (Title VII)]. This may be done by showing a disparity between the position of members of a protected class and the position of comparably qualified majority group members [*Segar v. Smith (D.C. Cir. 1984) 738 F.2d 1249, 1267 , cert. denied, 471 U.S. 1115 (1985)* (Title VII)]. It is not necessary to show that each person in the plaintiff class was a victim of the employer's discriminatory policy [*see Teamsters v. United States (1977) 431 U.S. 324, 360, 97 S. Ct. 1843, 52 L. Ed. 2d 396* (Title VII)]; rather, the existence of a discriminatory hiring pattern and practice establishes a prima facie case of discrimination against individual class members [*see Franks v. Bowman Transportation Co. (1976) 424 U.S. 747, 772, 96 S. Ct. 1251, 47 L. Ed. 2d 444]* .

Statistical evidence of disparity is an important source of proof in pattern or practice actions [*see Hazelwood School Dist. v. United States (1977) 433 U.S. 299, 307, 97 S. Ct. 2736, 53 L. Ed. 2d 768* (Title VII); *Teamsters v. United States (1977) 431 U.S. 324, 339, 97 S. Ct. 1843, 52 L. Ed. 2d 396* (Title VII)]. Statistical evidence alone may establish a prima facie case when there are "gross statistical disparities" [*Hazelwood School Dist. v. United States (1977) 433 U.S. 299, 307-308, 97 S. Ct. 2736, 53 L. Ed. 2d 768* (Title VII)]. However, statistical evidence is most often bolstered with anecdotal evidence relating specific instances of discrimination [*see Teamsters v. United States (1977) 431 U.S. 324, 338, 339, 97 S. Ct. 1843, 52 L. Ed. 2d 396* (Title VII); testimony regarding personal experiences tend to bring "cold numbers convincingly to life")].

[c] Rebuttal of Prima Facie Case

If the plaintiff establishes a prima facie case in a "pattern or practice" action, the burden shifts to the employer to rebut the showing [*see Teamsters v. United States (1977) 431 U.S. 324, 360, 97 S. Ct. 1843, 52 L. Ed. 2d 396* (Title VII)]. To do so, an employer may demonstrate that the plaintiff's proof is either inaccurate or statistically insignificant [*see Teamsters v. United States (1977) 431 U.S. 324, 360, 97 S. Ct. 1843, 52 L. Ed. 2d 396* (Title VII); *Segar v. Smith (D.C. Cir. 1984) 738 F.2d 1249, 1268 , cert. denied, 471 U.S. 1115 (1985)* (Title VII)]. Thus, an employer may show that an alleged disparity does not exist, or may challenge the integrity of the plaintiff's statistical data and the significance of the results shown [*see Segar v. Smith (D.C. Cir. 1984) 738 F.2d 1249, 1268 , cert. denied, 471 U.S. 1115 (1985)* (Title VII; employer may use alternative statistical analyses)].

The employer's proof not only must raise a genuine issue of material fact concerning the accuracy of the plaintiff's proof, it also must cast sufficient doubt on the proof to cause the trier of fact to conclude that the plaintiff has not proved discrimination by a preponderance of the evidence [*Segar v. Smith (D.C. Cir. 1984) 738 F.2d 1249, 1268 , cert. denied, 471 U.S. 1115 (1985)* (Title VII)]. It is usually not enough merely to point to possible flaws in the plaintiff's statistics, without showing that, if the flaws did not exist, the disparities established by the statistics would be eliminated [*see EEOC v. General Telephone Co. of Northwest (9th Cir. 1989) 885 F.2d 575, 579-581 , cert. denied, 498 U.S. 950 (1990)]* .

The employer may also attempt to provide a nondiscriminatory explanation for an apparently discriminatory result [*Teamsters v. United States (1977) 431 U.S. 324, 360 n.46, 97 S. Ct. 1843, 52 L. Ed. 2d 396* (Title VII); *see Segar v. Smith (D.C. Cir. 1984) 738 F.2d 1249, 1266, 1268 , cert. denied, 471 U.S. 1115 (1985)* (Title VII)]. Although the employer does not have the burden of persuasion on rebuttal, its explanation must cast sufficient doubt on the plaintiff's proof to permit the trier of fact to decline to draw an inference of discrimination [*see Segar v. Smith (D.C. Cir. 1984) 738 F.2d 1249, 1269 , cert. denied, 471 U.S. 1115 (1985)* (Title VII)]. In contrast to the rule in disparate treatment

cases generally, a mere articulation of a legitimate nondiscriminatory explanation is not enough to rebut a prima facie showing in a pattern or practice case [*see Segar v. Smith (D.C. Cir. 1984) 738 F.2d 1249, 1269 , cert. denied, 471 U.S. 1115 (1985)* (Title VII)].

[d] Proof of Pretext

In "pattern or practice" actions, a plaintiff's initial proof of discrimination may be sufficient to meet his or her ultimate burden if the employer's rebuttal attempts are inadequate [*see Vuyanich v. Republic Nat. Bank of Dallas (N.D. Tex. 1981) 521 F. Supp. 656, 662 , vacated on other grounds, 723 F.2d 1195 (5th Cir. 1984)* ; *see also Texas Dep't of Community Affairs v. Burdine (1981) 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207* (ultimate burden of persuasion remains at all times with plaintiff)]. Thus, if an employer's rebuttal fails, a trial court may conclude that a violation has occurred without any further evidence from the plaintiff [*see Teamsters v. United States (1977) 431 U.S. 324, 361, 97 S. Ct. 1843, 52 L. Ed. 2d 396]* .

However, the plaintiff is free to, and if the employer's rebuttal is sufficiently strong, may have to, introduce evidence to discredit the rebuttal [*see Segar v. Smith (D.C. Cir. 1984) 738 F.2d 1249, 1270 , cert. denied, 471 U.S. 1115 (1985)]* .

[4] Disparate Impact

[a] Scope and Application

The disparate impact theory applies to employment practices and criteria that are facially neutral but, in fact, fall more harshly on one group than another, and cannot be justified by business necessity [*Teamsters v. United States (1977) 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396* (Title VII)]. The theory may be used to establish liability under most equal employment opportunity laws, including FEHA (for most purposes) [*see City and County of San Francisco v. FEHC (1987) 191 Cal. App. 3d 976, 985-986, 236 Cal. Rptr. 716]* and Title VII [*see Griggs v. Duke Power Co. (1971) 401 U.S. 424, 425-426, 430-432, 91 S. Ct. 849, 28 L. Ed. 2d 158]* .

The United States Supreme Court has held that the disparate impact theory is available in ADEA cases [*Smith v. City of Jackson (2005) 544 U.S. 228, 125 S. Ct. 1536, 161 L. Ed. 2d 410, 416]* . However, the scope of disparate impact liability under the ADEA is narrower than under Title VII, because the ADEA permits any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age" [*29 U.S.C. § 623(f)(1)*]. For example, the disparate impact attributable to a city's decision to grant larger raises to lower-ranking police officers for the purpose of bringing salaries in line with those of police forces in surrounding cities is based on a reasonable factor other than age. In such a case, therefore, the disparate impact does not support a valid ADEA claim [*Smith v. City of Jackson (2005) 544 U.S. 228, 125 S. Ct. 1536, 161 L. Ed. 2d 410, 423]* .

The disparate impact theory is inapplicable to actions under *42 U.S.C. § 1981* [*see General Building Contractors v. Pennsylvania (1982) 458 U.S. 375, 388-389, 391, 102 S. Ct. 3141, 73 L. Ed. 2d 835* ; *Washington v. Davis (1976) 426 U.S. 229, 247-248, 96 S. Ct. 2040, 48 L. Ed. 2d 597]* .

A California court held that a disparate impact analysis may not be used to limit the use of salary as a criterion in personnel decisions, as long as it is not a pretext for a decision based on age itself [*Marks v. Loral Corp. (1997) 57 Cal. App. 4th 30, 66* (ADEA and FEHA; jury instructed that employer permitted to select lower-paid workers for retention during layoffs)]. However, FEHA was subsequently amended to specifically provide that the use of salary as a criterion when terminating employees may constitute age discrimination if the use of that criterion adversely impacts older workers [*Gov. Code § 12941* (expressly rejecting holding of *Marks*)].

Under the disparate impact theory, a challenged practice must adversely affect a protected group [*see Peters v. Lieuallen (9th Cir. 1984) 746 F.2d 1390, 1392* (Title VII); *Yartzoff v. State of Oregon, Emp. Div. (9th Cir. 1984) 745*

F.2d 557, 559 (ADEA)]. However, a member of the affected group may bring an individual disparate impact claim [*see, e.g., Lowe v. City of Monrovia (9th Cir. 1986) 784 F.2d 1407* (Title VII; black applicant for employment alleged that she was not hired because city's employment policy had disparate impact on blacks as a class)]. The theory generally does not apply to "ad hoc" or isolated practices affecting individuals when a protected class is not affected [*Peters v. Lieuallen (9th Cir. 1984) 746 F.2d 1390, 1392* (Title VII; theory may be used only in cases involving class-wide application of employment criteria)].

The disparate impact theory applies to "objective" employment practices [*see American Fed'n of State, County, and Municipal Employees v. State of Washington (9th Cir. 1985) 770 F.2d 1401, 1406* (Title VII); *Zahorik v. Cornell University (2d Cir. 1984) 729 F.2d 85, 95* (Title VII)]. Examples of practices to which the disparate impact analysis has been applied include the following:

- Education and intelligence tests [*see Griggs v. Duke Power Co. (1971) 401 U.S. 424, 431, 91 S. Ct. 849, 28 L. Ed. 2d 158]* ;

- Grooming rules [*see EEOC v. Trailways (D. Colo. 1981) 530 F. Supp. 54, 59]* ;

- Minimum height requirements [*see Boyd v. Ozark Air Lines (E.D. Mo. 1976) 419 F. Supp. 1061, 1064-1065 , aff'd, 568 F.2d 50 (8th Cir. 1977)]* ;

- Prior military service, training, and work experience [*see Bailey v. Southeastern Area Joint Apprenticeship Committee (N.D. W. Va. 1983) 561 F. Supp. 895, 911-912]* ; and

- Shareholder preference plans [*see Bonilla v. Oakland Scavenger Co. (9th Cir. 1982) 697 F.2d 1297, 1303-1304 , cert. denied, 467 U.S. 1251 (1984)]* .

Disparate impact analysis also applies to "subjective" employment practices [*Watson v. Ft. Worth Bank & Trust (1988) 487 U.S. 977, 991, 108 S. Ct. 2777, 101 L. Ed. 2d 827* (Title VII)], such as separate hiring channels for different types of employees, "word-of-mouth" recruitment, nepotism, and rehire policies [*see Atonio v. Wards Cove Packing Co. (9th Cir. 1987) 810 F.2d 1477, 1479* (en banc), *returned to panel, 827 F.2d 439 , rev'd on other grounds, 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989)]* .

For further discussion of "objective" and "subjective" employment criteria, see *§ 115.30[1][b]*.

[b] Sequence and Proof

The disparate impact theory does not require proof of discriminatory intent [*see Teamsters v. United States (1977) 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396* (Title VII); *Griggs v. Duke Power Co. (1971) 401 U.S. 424, 432, 91 S. Ct. 849, 28 L. Ed. 2d 158* (Title VII); *Clady v. County of Los Angeles (9th Cir. 1985) 770 F.2d 1421, 1427 , cert. denied, 475 U.S. 1109 (1986)* (Title VII); *City and County of San Francisco v. FEHC (1987) 191 Cal. App. 3d 976, 985, 236 Cal. Rptr. 716* (FEHA)]. The proof required and the procedural process is as follows:

- A plaintiff must establish a prima facie case by showing that a specific or particular facially neutral employment practice has a significant adverse impact on members of a protected class [*see 42 U.S.C. § 2000e-2(k)(1)(A)(i)* (Title VII); *State of Connecticut v. Teal (1982) 457 U.S. 440, 446, 102 S. Ct. 2525, 73 L. Ed. 2d 130 (Title VII)* ; *Albemarle Paper Co. v. Moody (1975) 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280* (Title VII)].

- The employer then has the burden either (a) to show that there is no disparate impact (by discrediting the plaintiff's statistical showing of adverse impact or by proffering statistics of its own) [*see* 42 U.S.C. §

2000-2(k)(1)(B)(ii) (Title VII; if employer demonstrates that practice did not cause disparate impact, it need not demonstrate that practice is justified by business necessity); *Rose v. Wells Fargo & Co. (9th Cir. 1990) 902 F.2d 1417, 1424* (ADEA)], or (b) to prove that the challenged employment practice was job-related, and therefore consistent with business necessity [*City and County of San Francisco v. FEHC (1987) 191 Cal. App. 3d 976, 989, 236 Cal. Rptr. 716* (FEHA); *2 Cal. Code Reg. § 7286.7(b)*; *2 Cal. Code Reg. § 7287.4(e)* ("job relatedness" defined); *42 U.S.C. § 2000e-2(k)(1)(A)(i)* (Title VII)].

- The burden then shifts back to the plaintiff to show that alternative practices with less adverse impact would also serve the employer's legitimate interest [*Albemarle Paper Co. v. Moody (1975) 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280* (Title VII); *see also 42 U.S.C. § 2000e-2(k)(1)(A)(ii)* (Title VII)].

[c] Prima Facie Showing of "Significant" Adverse Impact

In a disparate impact case, a plaintiff must make a prima facie showing that an employment practice or criterion has a "significant adverse impact" on a protected classification [*see State of Connecticut v. Teal (1982) 457 U.S. 440, 446, 102 S. Ct. 2525, 73 L. Ed. 2d 130* (Title VII); *Albemarle Paper Co. v. Moody (1975) 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280* (Title VII)].

The meaning of "significant" varies depending on the facts of a case, and among particular courts, but the showing need not rise to the level of "gross disparity" [*see Segar v. Smith (D.C. Cir. 1984) 738 F.2d 1249, 1278 , cert. denied, 471 U.S. 1115 (1985)* (Title VII); *see also City and County of San Francisco v. FEHC (1987) 191 Cal. App. 3d 976, 987, 236 Cal. Rptr. 716* (FEHA; statistics showing significant disparity alone may constitute prima facie proof of discrimination under disparate impact theory)].

Title VII, as amended by the Civil Rights Act of 1991 [Pub. L. No. 102-166], provides that a plaintiff must demonstrate that *each particular* challenged employment practice causes a disparate impact. Nevertheless, if the plaintiff can demonstrate that the elements of an employer's decision-making process are not capable of separation for analysis, the process may be analyzed as one employment practice [*42 U.S.C. § 2000e-2(k)(1)(B)(i)*].

A plaintiff may use reliable statistical data to show adverse impact [*see Wards Cove Packing Co. v. Atonio (1989) 490 U.S. 642, 647-650, 109 S. Ct. 2115, 104 L. Ed. 2d 733* (Title VII); *Clady v. County of Los Angeles (9th Cir. 1985) 770 F.2d 1421, 1427 , cert. denied, 475 U.S. 1109 (1986)* (Title VII)].

Statistical analyses used to show significant adverse impact are generally based on a comparison of labor pools. For example, when analyzing purely objective employment practices or criteria such as tests, the percentage of the protected class members who "pass" is usually compared with the success rate for majority group members ("pass-fail" rate data) [*see* A. Larson & L. Larson, Employment Discrimination, Ch. 22 (Matthew Bender)].

If a practice or criterion is both objective and subjective, the relevant comparison is between the composition of "at-issue" jobs (that is, those that are alleged to involve discrimination) and that of the qualified population in the relevant labor market [*see Wards Cove Packing Co. v. Atonio (1989) 490 U.S. 642, 650-651, 109 S. Ct. 2115, 104 L. Ed. 2d 733* (Title VII)]. Thus, the mere fact that each employee affected by an employer's practice or policy is also a member of a protected group does not establish a disparate impact. Rather, an employee claiming that the practice or policy has a disparate impact must present evidence of the composition of the employer's entire workforce, to allow a comparison of the adverse impact on the protected group as a whole with the adverse impact on employees not in the protected group [*Carter v. CB Richard Ellis, Inc. (2004) 122 Cal. App. 4th 1313, 1321-1326, 19 Cal. Rptr. 3d 519]* .

There are several statistical tools that are used to make the foregoing comparisons. For example, the EEOC and the FEHC use an "80 percent rule," in which a selection rate for protected class members that is less than 80 percent of the

rate for the group with the highest selection rate is considered to be a significant adverse impact [*see* 29 C.F.R. § 1607.4D (Title VII); *2 Cal. Code Reg. § 7287.4* (FEHA; incorporating EEOC's guidelines)].

Other statistical methods include the "standard deviation" standard, which compares the actual rate of selection in a work force with an expected rate of selection [*see Hazelwood School Dist. v. United States (1977) 433 U.S. 299, 308 n.14, 97 S. Ct. 2736, 53 L. Ed. 2d 768* (Title VII)], and the "regression analysis," which uses an algebraic formula to isolate the influence of a particular independent variable (for example, sex) on a dependent variable (for example, salary) [*see EEOC v. General Telephone Co. of Northwest (9th Cir. 1989) 885 F.2d 575, 577 , cert. denied, 498 U.S. 950 (1990)* (Title VII)]. Some courts rely on simple percentage comparisons without applying any set formula [*see Contreras v. City of Los Angeles (9th Cir. 1981) 656 F.2d 1267, 1272-1273 , cert. denied, 455 U.S. 1021 (1982)* (Title VII); *Craig v. County of Los Angeles (9th Cir. 1980) 626 F.2d 659, 661-662 , cert. denied, 450 U.S. 919 (1981)* (Title VII)].

For more detailed discussion of various statistical methods used to measure disparity, see K. Wilcox, ed., California Employment Law, Ch. 41 (Matthew Bender).

[d] Establishing Business Necessity

An employer may rebut a prima facie case of disparate impact by proving that the challenged practice is justified by business necessity [*see City and County of San Francisco v. FEHC (1987) 191 Cal. App. 3d 976, 989, 236 Cal. Rptr. 716* ; *2 Cal. Code Reg. § 7286.7(b),(c)*].

Under the Title VII "business necessity" standard, an employment practice or criterion with a discriminatory effect is lawful if it has a manifest relationship to the employment in question [*Griggs v. Duke Power Co. (1971) 401 U.S. 424, 431-432, 91 S. Ct. 849, 28 L. Ed. 2d 158]* . The focus of the business necessity test is "job-relatedness;" an employment practice or criterion must predict, or significantly correlate with, important methods of work behavior that comprise, or are relevant to, the job [*Clady v. County of Los Angeles (9th Cir. 1985) 770 F.2d 1421, 1430 , cert. denied, 475 U.S. 1109 (1986)* (Title VII); *Contreras v. City of Los Angeles (9th Cir. 1981) 656 F.2d 1267, 1276, 1278-1280 , cert. denied, 455 U.S. 1021 (1982)* (Title VII); *see also City and County of San Francisco v. FEHC (1987) 191 Cal. App. 3d 976, 989-990, 236 Cal. Rptr. 716* (FEHA); *2 Cal. Code Reg. §§ 7286.7(b),(c), 7287.4(e)*].

Thus, the employer must show that a practice or criterion such as a preemployment test actually measures the skills, knowledge, or ability required for successful performance of a particular job [*see Clady v. County of Los Angeles (9th Cir. 1985) 770 F.2d 1421, 1427-1428 , cert. denied, 475 U.S. 1109 (1986)* (Title VII)]. The greater the adverse impact of a practice or criterion, the higher the correlation required [*Clady v. County of Los Angeles (9th Cir. 1985) 770 F.2d 1421, 1432 , cert. denied, 475 U.S. 1109 (1986)* (Title VII); *Guardians Ass'n of New York City v. Civil Serv. (2d Cir. 1980) 630 F.2d 79, 105-106 , cert. denied, 452 U.S. 940 (1981)* (Title VII)].

Correlation is established by a process called "validation" [*Craig v. County of Los Angeles (9th Cir. 1980) 626 F.2d 659, 662 , cert. denied, 450 U.S. 919 (1981)* (Title VII)]. Statistical analysis is critical to validation, and several professionally acceptable techniques, including standards developed by the EEOC and the American Psychological Association (APA) Division of Organizational and Industrial Psychology (Division 14), may be used [*see Clady v. County of Los Angeles (9th Cir. 1985) 770 F.2d 1421, 1430-1432 , cert. denied, 475 U.S. 1109 (1986)* (Title VII; APA standard); *29 C.F.R. § 1607.14* (EEOC validation guideline)]. For a more detailed discussion of the various validation techniques, see K. Wilcox, ed., California Employment Law, Ch. 41 (Matthew Bender).

For discussion of the application of business necessity/job-relatedness as a defense under FEHA, see *§ 115.54[5]*. For a form of affirmative defense alleging that a challenged employment practice is justified by business necessity, for use in a civil action under FEHA, see *§ 115.102*. For a form of affirmative defense alleging that a challenged employment requirement is job-related, for use in a civil action under FEHA, see *§ 115.103*.

[e] Establishing "Pretext" or Alternative with Less Adverse Impact

If an employer establishes business necessity, a plaintiff may still prevail by showing that an employment practice or criterion was used as a pretext for discrimination [*State of Connecticut v. Teal (1982) 457 U.S. 440, 447, 102 S. Ct. 2525, 73 L. Ed. 2d 130* (Title VII); *Albemarle Paper Co. v. Moody (1975) 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280* (Title VII)].

Alternatively, if the employer shows that its practice or criterion was based on legitimate business reasons, the plaintiff may prevail by establishing that the employer has refused to adopt alternative employment practices that would have comparable business utility and less adverse impact [*see 42 U.S.C. § 2000e-2(k)(1)(A)(ii),(C)* (Title VII); *Clady v. County of Los Angeles (9th Cir. 1985) 770 F.2d 1421, 1428 , cert. denied, 475 U.S. 1109 (1986)* (Title VII); *see also Albemarle Paper Co. v. Moody (1975) 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280* (Title VII)]. However, higher costs may justify an employer's decision not to use such alternative procedures [*see Clady v. County of Los Angeles (9th Cir. 1985) 770 F.2d 1421, 1432 , cert. denied, 475 U.S. 1109 (1986)* (Title VII)].

The plaintiff has the burden of persuasion that there is a less discriminatory alternative [*see Contreras v. City of Los Angeles (9th Cir. 1981) 656 F.2d 1267, 1285 , cert. denied, 455 U.S. 1021 (1982)* (Title VII)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationDisparate ImpactCoverage & DefinitionsLabor & Employment LawDiscriminationDisparate ImpactProofBurden ShiftingLabor & Employment LawDiscriminationDisparate TreatmentCoverage & DefinitionsLabor & Employment LawDiscriminationDisparate TreatmentProofBurden ShiftingLabor & Employment LawDiscriminationDisparate TreatmentProofBurdens of Proof

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 115 CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION
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11-115 California Forms of Pleading and Practice--Annotated §§ 115.24-115.29

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[Reserved]

§§ 115.24[Reserved]

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Chapter 115 CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION
PART II. LEGAL BACKGROUND
C. Application of Equal Employment Opportunity Laws to Specific Employment Practices

11-115 California Forms of Pleading and Practice--Annotated § 115.30

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§ 115.30 Hiring

[1] Selection Criteria

[a] Limitations on Use of Selection Criteria

FEHA, Title VII, the ADA, and the ADEA provide that it is unlawful to fail or refuse to hire any individual based on membership in a protected classification [*see 42 U.S.C. §§ 2000e-2(a)(1)* (Title VII), *12112(a)* (ADA); *29 U.S.C. § 623(a)(1)* (ADEA); *Gov. Code § 12940(a)* (FEHA)]. Hiring generally involves the use of various selection procedures, such as tests, training programs, job requirements, and interviews [*see 29 C.F.R. § 1607.16(Q)*], that consider or measure various employment criteria [*see 29 C.F.R. § 1607.2(B)*]. Employers have the right to establish such criteria [*see Griggs v. Duke Power Co. (1971) 401 U.S. 424, 430, 434, 91 S. Ct. 849, 28 L. Ed. 2d 158]* , but employers may not base hiring decisions on unlawful criteria [*see Texas Dep't of Community Affairs v. Burdine (1981) 450 U.S. 248, 259, 101 S. Ct. 1089, 67 L. Ed. 2d 207]* . Thus, EEOC regulations, to which the FEHC expressly subscribes [*see 2 Cal. Code Reg. § 7287.4(a)*], prohibit any selection procedure that has an adverse impact on members of any race, sex, or ethnic group, unless (1) the procedure was validated under EEOC regulations [*see 29 C.F.R. § 1607.3(A)*]; (2) the employer chooses a lawful, job-related alternative [*see 29 C.F.R. §§ 1607.3(A), 1607.6(A)*]; or (3) validity studies cannot or need not be performed, and the employer uses a procedure that is as job-related as possible and that minimizes adverse impact [*see 29 C.F.R. §§ 1607.3(A), 1607.6(B)*].

FEHC regulations also generally prohibit any policy or practice that has an adverse impact on employment opportunities, unless the policy is job-related [*see 2 Cal. Code Reg. § 7287.4(a)*]. Specifically, FEHC regulations (1) prohibit discrimination in providing, accepting, and considering employment applications [*2 Cal. Code Reg. § 7287.3(c)(1)*; *see 2 Cal. Code Reg. § 7295.5* (prohibiting such discrimination with respect to individual over 40 years old)], and (2) require personal interviews to be free of discrimination and subject the entire interview process to review for adverse impact [*2 Cal. Code Reg. § 7287.3(d)*].

[b] Objective Versus Subjective Criteria

Employment criteria may be either "objective," such as test scores or height and weight requirements [*see American Fed'n of State, County, and Municipal Employees v. State of Washington (9th Cir. 1985) 770 F.2d 1401, 1405-1406* (Title VII); *Zahorik v. Cornell University (2d Cir. 1984) 729 F.2d 85, 95* (Title VII)], or "subjective" [*see Atonio v. Wards Cove Packing Co. (9th Cir. 1987) 810 F.2d 1477, 1479* (en banc), *returned to panel, 827 F.2d 439 , rev'd on other grounds, 490 U.S. 642 (1989)* (Title VII)], such as "attitude" or "supervisory ability."

Objective criteria are usually facially neutral, but they may be unlawful if they have a disparate impact on a protected group [*see, e.g., Griggs v. Duke Power Co. (1971) 401 U.S. 424, 431-433, 91 S. Ct. 849, 28 L. Ed. 2d 158* (Title VII; minimum education requirement)].

Examples of objective criteria that have been considered by the courts include the following:

- Education requirements [*see Griggs v. Duke Power Co. (1971) 401 U.S. 424, 429-434, 91 S. Ct. 849, 28 L. Ed. 2d 158* (Title VII; disparate impact analysis)].

- English fluency requirements [*see Garcia v. Rush-Presbyterian-St. Luke's Med. Center (7th Cir. 1981) 660 F.2d 1217, 1222-1226* (Title VII; disparate impact analysis); *see also 29 C.F.R. § 1606.6(b)(1)* (discrimination based on foreign accent or inability to communicate well in English as national origin discrimination)].

- Experience requirements [*see Chrisner v. Complete Auto Trans. (6th Cir. 1981) 645 F.2d 1251, 1263* (Title VII; disparate impact analysis); *Spurlock v. United Airlines (10th Cir. 1972) 475 F.2d 216, 219* (Title VII; same); *see also 29 C.F.R. § 1607.14(C)(6)* (employment experience "job-relatedness" defined); *2 Cal. Code Reg. § 7291.0(d)* (FEHC regulation; consideration of prior work experience)].

- Height and weight restrictions [*see Dothard v. Rawlinson (1977) 433 U.S. 321, 328-334, 97 S. Ct. 2720, 53 L. Ed. 2d 786* (Title VII; disparate impact analysis); *Blake v. City of Los Angeles (9th Cir. 1979) 595 F.2d 1367, 1373-1386 , cert. denied, 446 U.S. 928 (1980)* (Title VII; same); *Davis v. County of Los Angeles (9th Cir. 1977) 566 F.2d 1334, 1340-1342 , vacated and remanded on other grounds, 440 U.S. 625 (1979)* (Title VII; same); *see also 29 C.F.R. § 1606.6(a)(2)* (users of height and weight requirements expected to evaluate procedures for adverse impact); *2 Cal. Code Reg. §§ 7287.4(d)(2),(3)* (FEHC regulation; height and weight restrictions prohibited unless pursuant to permissible defense), *7291.0(b)(1)* (FEHC regulation; height and weight standards that discriminate against one sex or the other prohibited)].

Subjective criteria may involve disparate treatment [*see Atonio v. Wards Cove Packing Co. (9th Cir. 1987) 827 F.2d 439, 445-446 , rev'd on other grounds, 490 U.S. 642 (1989)* (Title VII)], as well as disparate impact [*see Watson v. Ft. Worth Bank & Trust (1988) 487 U.S. 977, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (Title VII) ; see also Atonio v. Wards Cove Packing Co. (9th Cir. 1987) 810 F.2d 1477, 1482* (en banc), *returned to panel, 827 F.2d 439 , rev'd on other grounds, 490 U.S. 642 (1989)* (Title VII)].

Examples of "subjective criteria" that have been considered by the courts include the following:

- Personality attributes [*see Nanty v. Barrows Co. (9th Cir. 1981) 660 F.2d 1327, 1334]* .

- Stable employment history, interview success, professional reputation, and the ability to "get along with people" [*see Frausto v. Legal Aid Society (9th Cir. 1977) 563 F.2d 1324, 1328]* .

- Employer's opinion as to which applicants are "the best for the job" [*see Atonio v. Wards Cove*

Packing Co. (9th Cir. 1987) 810 F.2d 1477, 1479 (en banc), *returned to panel, 827 F.2d 439 , rev'd on other grounds, 490 U.S. 642 (1989)* (Title VII)].

For a more detailed discussion of objective and subjective employment criteria, see K. Wilcox, ed., California Employment Law, Ch. 41 (Matthew Bender).

[2] Recruiting Methods

[a] Advertising

FEHA, Title VII, and the ADEA proscribe employment advertisements that indicate any preference, limitation, specification, or discrimination based on a protected classification, except when the classification is a bona fide occupational qualification (BFOQ) [*see 42 U.S.C. § 2000e-3(b)* (Title VII); *29 U.S.C. § 623(e)* (ADEA); *Gov. Code § 12940(d)* (FEHA); *see also 29 C.F.R. § 1630.4(a)* (under ADA, unlawful to discriminate in advertising)]. EEOC guidelines and FEHC regulations also prohibit discriminatory advertisements [*see 29 C.F.R. §§ 1604.2(a)(1)* (advertisement preferences based on sex and BFOQ defense), *1604.5* (advertisement preference based on sex violates Title VII), *1625.4(a)* (violation of ADEA for help wanted notices or advertisements to contain age-related labels); *2 Cal. Code Reg. § 7290.9(a)(2)* (separation of job listings into sex-based classifications violates FEHA)].

The types of advertisements prohibited are those that, by their expression of preference, effectively inhibit members of a protected classification from seeking employment. Although a person need not actually apply for an advertised job to be aggrieved, a mere casual reader is not aggrieved. A person must show that (1) he or she has a real, present interest in the type of job advertised, and (2) he or she was effectively deterred from applying for the job [*see Hailes v. United Air Lines (5th Cir. 1972) 464 F.2d 1006, 1008* (Title VII)].

[b] Channeling, Nepotism, and Word of Mouth

"Channeling" (the use of separate hiring channels for different job categories), nepotism (the practice of giving preference to relatives), and "word-of-mouth" recruiting (incumbent employees inform their friends and relatives about job vacancies) may be unlawful if they have an adverse impact on members of protected classifications [*see Atonio v. Wards Cove Packing Co. (9th Cir. 1987) 827 F.2d 439, 445-447 , rev'd on other grounds, 490 U.S. 642 (1989)* (Title VII); *Domingo v. New England Fish Co. (9th Cir. 1984) 727 F.2d 1429, 1435 , modified, 742 F.2d 520* (Title VII)].

For example, channeling had a discriminatory impact in a case in which an Alaskan employer recruited unskilled employees from a Filipino-dominated union and Alaskan native villages, but recruited employees for administrative and skilled jobs out-of-state by word of mouth from predominantly white superintendents, foremen, and captains [*see Domingo v. New England Fish Co. (9th Cir. 1984) 727 F.2d 1429, 1436 , modified, 742 F.2d 520* (Title VII)].

Courts have observed that nepotism necessarily has an adverse impact on protected classification members when those hiring are white, and word-of-mouth recruiting is discriminatory because of its tendency to perpetuate the all-white composition of the work force [*see Atonio v. Wards Cove Packing Co. (9th Cir. 1987) 827 F.2d 439, 445 , rev'd on other grounds, 490 U.S. 642 (1989)* (Title VII); *see also Bonilla v. Oakland Scavenger Co. (9th Cir. 1982) 697 F.2d 1297, 1303 , cert. denied, 467 U.S. 1251 (1984)* (Title VII; nepotistic practices that freeze discriminatory status quo are unlawful); *United States v. Georgia Power Co. (5th Cir. 1973) 474 F.2d 906, 925* (Title VII; since most incumbent employees were white, word of mouth hiring tended to isolate blacks from "web of information" concerning employment opportunities)].

[3] Applications and Interviews

FEHA prohibits any inquiry that is not job-related, either orally or through use of an application form, expressing, directly or indirectly, any limitation, specification, or discrimination relating to membership in a protected

classification, or any intent to make any such limitation, specification, or discrimination [*see Gov. Code § 12940(d)*; *2 Cal. Code Reg. § 7287.3(a)(2)*; *see also 2 Cal. Code Reg. § 7287.3(c)* (application forms may not discriminate), (d) (interviews may not discriminate)]. However, this prohibition does not prevent an employer or employment agency from inquiring into the age of an applicant, or from specifying age limitations, if the law compels or provides for that action [*Gov. Code § 12940(d)*].

Inquiries relating to facially neutral criteria such as education, experience, height, weight, veteran status and military discharge, and financial status are subject to analysis under the "disparate impact" theory of liability [*see* discussion at*§ 115.23[4]*].

EEOC and FEHC regulations expressly prohibit or limit the use of many formerly common preemployment inquiries. Among the types of inquiries prohibited or limited are the following:

- Age-related inquiries (such as "Date of Birth" or "Age") [*see 29 C.F.R. § 1625.5* (EEOC will closely scrutinize any such application request); *2 Cal. Code Reg. § 7295.5(a)* (FEHC regulation limiting inquiries that directly or indirectly identify persons on basis of age)].

- Marital status inquiries [*see 2 Cal. Code Reg. § 7292.4(a)* (FEHC regulation limiting marital status inquiries on applications)].

- Physical handicap or medical condition inquiries (for example, "Do you have any particular disabilities?") [*see 2 Cal. Code Reg. § 7294.0(b)(2)* (FEHC regulation prohibiting physical condition inquiries), (3) (FEHC regulation limiting medical history inquiries); *see also 29 C.F.R. § 1630.13(a)* (limitation on medical examination or inquiries regarding disability under ADA)].

- Pregnancy and family responsibility inquiries [*see 2 Cal. Code Reg. § 7290.9(b)(3)* (FEHC regulation limiting childbearing, pregnancy, birth control, or familial responsibilities inquiries)].

- Religious inquiries [*see 29 C.F.R. § 1605.3(b)(2)* (EEOC regulation limiting religious inquiries); *2 Cal. Code Reg. § 7293.4* (FEHC regulation providing that availability inquiries may not be used to determine applicant's religion)].

- Sex-based inquiries (such as "Male..., Female..."; "Mr., Mrs., Miss") [*see 29 C.F.R. § 1604.7* (EEOC regulation permitting sex-based inquiries if in good faith and for nondiscriminatory purpose; prohibiting such inquiries that express limitation, specification, or discrimination); *2 Cal. Code Reg. § 7290.9(b)(2)* (FEHC regulation limiting sex-based inquiries)].

FEHA provides generally that it is an unlawful employment practice for an employer to make any medical or psychological inquiry of an applicant, to make any inquiry whether an applicant has a mental disability or physical disability or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition [*Gov. Code § 12940(e)(1)*; *see Gov. Code § 12940(f)(1)* (similar limitation on inquiries employer can make regarding *existing* employees)]. However, an employer may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation [*Gov. Code § 12940(e)(2)*; *see Gov. Code § 12940(n)*]. Moreover, an employer may make a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to the commencement of employment duties, provided that (1) the examination or inquiry is job-related and consistent with business necessity, and (2) all entering employees in the same job classification are subject to the same examination or inquiry [*Gov. Code § 12940(e)(3)*; *see Gov. Code § 12940(f)(2)* (employer may require *existing* employees to undergo job-related inquiries and examinations that are consistent with business necessity)].

For a detailed discussion of these and other preemployment inquiries, see K. Wilcox, ed., California Employment Law, Ch. 41 (Matthew Bender).

[4] Preemployment Testing

[a] Permissible Testing

Under Title VII, an employer may give, and act on the results of, any professionally developed ability test, unless such a test, its administration, or action on the results, is designed, intended, or used to discriminate because of race, color, religion, sex, or national origin [*see 42 U.S.C. § 2000e-2(h)*; *see also 42 U.S.C. § 12112(b)(6)* (ADA; tests may not screen out disabled individuals, unless job-relatedness and business necessity criteria are satisfied)].

In addition, an employer may not, based on a protected classification, adjust the scores of, use different cutoff scores for, or otherwise alter the results of employment-related tests [*42 U.S.C. § 2000e-2* (*l*)].

Furthermore, an employer may not use employment tests that are discriminatory in effect unless the employer shows that a test requirement has a manifest relationship to the employment in question [*Albemarle Paper Co. v. Moody (1975) 422 U.S. 405, 425, 95 S. Ct. 2362, 45 L. Ed. 2d 280* ; *see* *Griggs v. Duke Power Co. (1971) 401 U.S. 424, 431-432, 436, 91 S. Ct. 849, 28 L. Ed. 2d 158]* .

An employer cannot be compelled by a job applicant to use a preemployment test that would benefit a protected group of which the applicant is a member, if there is substantial evidence that the test has an adverse impact on another protected group [*Harris v. Civil Service Comm'n (1998) 65 Cal. App. 4th 1356, 1368, 77 Cal. Rptr. 2d 366]* .

Under Title VII, before an employer can discard test results to avoid a disparate impact on minority candidates--an act that would itself constitute intentional race-based discrimination against those who did well on the test--the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action of discarding the test results [*Ricci v. DeStefano (2009) -- U.S. --, 129 S. Ct. 2658, 174 L. Ed. 2d 490, 507-511* (adopting "strong-basis-in-evidence" standard to resolve conflict between disparate-treatment and disparate-impact provisions of Title VII); *see 42 U.S.C. § 2000e-2(a)(1)* (prohibition of disparate treatment); *42 U.S.C. § 2000e-2(k)* (prohibition of disparate impact)].

[b] EEOC Guidelines

The FEHC has adopted EEOC guidelines on employee selection procedures [*see 2 Cal. Code Reg. § 7287.4(a)*] that consider preemployment tests to be discriminatory if they have an adverse impact on protected individuals, unless the procedures are validated in accordance with EEOC guidelines, or unless EEOC guidelines on nonvalidated selection procedures are followed [*see 29 C.F.R. §§ 1607.2(B), 1607.3(A), 1607.5, 1607.6, 1607.14* (EEOC guidelines); *2 Cal. Code Reg. § 7287.4(a)* (FEHC regulation; any test or selection procedure that has an adverse impact on individuals protected by FEHA is unlawful unless policy or practice is job-related), (e) ("job-relatedness" defined); *see also 29 C.F.R. §§ 1605.3(a)* (EEOC regulation on religious discrimination; scheduling tests or other selection procedures), *1606.6* (EEOC regulation on national origin discrimination; selection procedures)].

[c] Validation of Challenged Tests

An employer must show that a challenged test is job-related, usually by a process called "validation." Validation requires the employer to (1) specify the particular trait or characteristic that the test is being used to identify; (2) determine that the particular trait or characteristic is an important element of work behavior; and (3) demonstrate, by "professionally acceptable methods," that the test is "predictive of or significantly correlated" with the element of work behavior identified [*Association of Mexican-Am. Educators v. California (9th Cir. 2000) 231 F.3d 572, 584-590* (en banc) (California Basic Education Skills Test [CBEST] is properly validated for purposes of Title VII); *Craig v.*

County of Los Angeles (9th Cir. 1980) 626 F.2d 659, 662 , cert. denied, 450 U.S. 919 (1981) (Title VII)]. There are several professionally acceptable validation techniques [*Craig v. County of Los Angeles (9th Cir. 1980) 626 F.2d 659, 664 , cert. denied, 450 U.S. 919 (1981)]* . The American Psychological Association (APA) and the EEOC accept the following basic validation methods: (1) "empirical" or "criterion" validity, (2) "construct" validity, and (3) "content" validity [*see Washington v. Davis (1976) 426 U.S. 229, 247 n.13, 96 S. Ct. 2040, 48 L. Ed. 2d 597* (*42 U.S.C. § 1981*); *29 C.F.R. §§ 1607.5, 1607.14* (EEOC guidelines)]. These concepts are esoteric and complex, and generally require the practitioner to consult an industrial psychologist or other validation expert. For a detailed discussion of validation techniques, see K. Wilcox, ed., California Employment Law, Ch. 41 (Matthew Bender), and A. Larson & L. Larson, Employment Discrimination, Ch. 15 (Matthew Bender).

[5] Preemployment Medical Examinations

[a] Tests for Functional Limitations

FEHA provides generally that it is an unlawful employment practice for an employer to require any medical or psychological examination of an applicant, to make any medical or psychological inquiry of an applicant, to make any inquiry whether an applicant has a mental disability or physical disability or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition [*Gov. Code § 12940(e)(1)*; *see Gov. Code § 12940(f)(1)* (similar limitation on inquiries employer can make regarding *existing* employees)]. However, an employer may require a medical or psychological examination or make a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to the commencement of employment duties, provided that (1) the examination or inquiry is job-related and consistent with business necessity, and (2) all entering employees in the same job classification are subject to the same examination or inquiry [*Gov. Code § 12940(e)(3)*; *see Gov. Code § 12940(f)(2)* (employer may require *existing* employees to undergo job-related inquiries and examinations that are consistent with business necessity)]. In any event, FEHA specifically prohibits the direct or indirect testing of an employee or job applicant for the presence of any genetic characteristic [*Gov. Code § 12940(o)*].

FEHC regulations relating to disability discrimination permit an employer to condition an offer of employment on the results of a preemployment medical examination to determine fitness for the job in question, if the following conditions are satisfied [*2 Cal. Code Reg. § 7294.0(d)*; *see also 42 U.S.C. § 12112(d)(3)*; *29 C.F.R. § 1630.14(b)* (similar requirements under ADA)]:

- All entering employees in similar positions are subjected to such an examination;

- If the results in the examination would result in disqualification, an applicant or employee may submit independent medical opinions for consideration before final determination on disqualification is made; and

- The results are maintained on separate forms and afforded confidentiality, except that (a) supervisors and managers may be informed of restrictions on the work or duties of disabled individuals and necessary accommodations, and (b) first aid and safety personnel may be informed, when appropriate, that the condition may require emergency treatment.

Both FEHA and the ADA prohibit medical examinations and inquiries until after the employer has made an offer of employment [*see Gov. Code § 12940(e)(3)*; *42 U.S.C. § 12112(d)(3)*]. In effect, these provisions require an employer to complete its nonmedical investigation, including background checks, and make a conditional job offer before subjecting the job applicant to medical examinations and questioning. This statutorily mandated sequence serves in part to enable a job applicant to shield private medical information prior to being hired, unless unable to meet medical requirements; if the applicant is not hired, it also serves to make the true reason for the employer's decision transparent [*Leonel v. American Airlines, Inc. (9th Cir. 2005) 400 F.3d 702, 708-711]* .

Preemployment medical examinations may also raise issues regarding the right to privacy under the California Constitution [*see Cal. Const., art. I, § 1*]. A job applicant claiming an invasion of privacy must show (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) conduct by the employer that amounts to a serious invasion of that interest. If these threshold elements are established, the court must then conduct a balancing test, weighing the employer's justification for the conduct in question against the intrusion on the applicant's privacy resulting from the conduct [*Leonel v. American Airlines, Inc. (9th Cir. 2005) 400 F.3d 702, 712, 714]* . For example, as a matter of law, the drawing and testing of blood implicate a legally protected privacy interest. A job applicant who consents to preemployment blood testing has a reasonable expectation that the employer will not retrieve private medical information by performing blood tests outside the ordinary or accepted medical practice regarding general or preemployment medical examinations; an infringement of that reasonable expectation ordinarily would be a serious invasion of the applicant's privacy interest. Whether the testing violates the applicant's right to privacy usually depends on the reasonableness of the applicant's expectations, which requires a court to consider such matters as the customs, practices, and physical setting surrounding the blood tests, with particular emphasis on any notice provided or consent obtained [*Leonel v. American Airlines, Inc. (9th Cir. 2005) 400 F.3d 702, 712-713]* . For detailed discussion of privacy issues, see Ch. 429, *Privacy* , and K. Wilcox, ed., California Employment Law, Ch. 50 (Matthew Bender).

[b] Drug Tests

FEHA does not address drug testing, although one California case construing FEHC regulations suggests that drug tests must be applied uniformly [*see Wilkinson v. Times Mirror Corp. (1989) 215 Cal. App. 3d 1034, 1053, 264 Cal. Rptr. 194* (construing *2 Cal. Code Reg. § 7294.0*)].

The ADA is neutral on blanket drug testing of job applicants, stating that it does not encourage, prohibit, or authorize such tests or making employment decisions based on the results of such tests [*see 42 U.S.C. § 12114(d)(2)*; *see also 42 U.S.C. § 12210(b)*]. The ADA does expressly allow drug testing of *current* employees who are former drug abusers [*see 42 U.S.C. §§ 12114(b), 12210(b)*].

Apart from equal employment opportunity considerations, preemployment drug testing may raise issues regarding the constitutional right to privacy. For discussion of such privacy issues, see Ch. 429, *Privacy* , and K. Wilcox, ed., California Employment Law, Ch. 50 (Matthew Bender).

PRACTICE TIP:

Drug Testing. Drug tests involve the Constitutional right to privacy. The *Fourth Amendment* protection from unreasonable searches and seizures also applies. In addition, there is a line of cases that stand for the proposition that in some jobs/occupations it may be appropriate to test everyone, or randomly conduct drug tests. For example, this may apply to pilots, train engineers, etc. Outside of those areas, the employer must articulate a "reasonable suspicion" before subjecting an employee to a drug test [*see National Treasury Employees Union v. Von Raab (1989) 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685* ; *Jackson v. Gates (9th Cir. 1988) 975 F.2d 648, 653* ; *Kirkpatrick v. City of Los Angeles (9th Cir. 1986) 803 F.2d 485, 490]* .

This is an area that will become increasingly active in the future. Drugs seem to be "here to stay" in our culture. In addition, over the last 20 years we are seeing the dwindling away of individual rights in general, and particularly rights of privacy and related *Fourth Amendment* rights. The preservation of "freedom" and our need for "security" is being used to erode individual rights. This inevitably will impact in the work place as it relates to security issues including drug tests. *By John H. Scott*

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationGender & Sex DiscriminationEmployment PracticesDischargesLabor & Employment LawDiscriminationGender & Sex DiscriminationEmployment PracticesFailures to HireLabor & Employment LawDiscriminationRacial DiscriminationEmployment PracticesDemotions & PromotionsLabor & Employment LawDiscriminationRacial DiscriminationEmployment PracticesFailures to HireLabor & Employment LawDiscriminationRacial DiscriminationEmployment PracticesTesting

California Forms of Pleading and Practice--Annotated

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 115 CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION
PART II. LEGAL BACKGROUND
C. Application of Equal Employment Opportunity Laws to Specific Employment Practices

11-115 California Forms of Pleading and Practice--Annotated § 115.31

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§ 115.31 Compensation

[1] Theories of Liability

[a] "Substantial Identity" Standard

Compensation discrimination cases usually involve sex discrimination; the federal Equal Pay Act of 1963 (EPA) [*29 U.S.C. § 206(d)*] and the California Equal Pay Act [*Lab. Code § 1197.5*] are the primary sources of protection in such cases. The federal and California Equal Pay Acts are discussed in Ch. 250, *Employment Law: Wage and Hour Disputes* . For a comprehensive discussion of the scope and application of those statutes, see K. Wilcox, ed., California Employment Law, Chs. 40 and 41 (Matthew Bender).

FEHA and Title VII also prohibit compensation discrimination based on a protected classification, including sex [*see 42 U.S.C. § 2000e-2(a)(1)* (Title VII); *Gov. Code § 12940(a)* (FEHA); *International Union of Electrical, etc. v. Westinghouse Electric Corp. (3d Cir. 1980) 631 F.2d 1094, 1097 , cert. denied, 452 U.S. 967 (1981)* (Title VII)]. The ADEA prohibits discrimination in compensation based on age [*see 29 U.S.C. § 623(a)(1)* (ADEA)].

Like EPA cases, Title VII compensation discrimination cases often involve claims that a plaintiff was denied equal pay for equal work. In such cases, the EPA "substantial identity" standard is used to determine whether the work is "equal" [*see Di Salvo v. Chamber of Commerce (8th Cir. 1978) 568 F.2d 593, 596* ; *Orr v. Frank R. MacNeill & Son, Inc. (5th Cir. 1975) 511 F.2d 166, 170-171 , cert. denied, 423 U.S. 865* ; *see also 29 C.F.R. § 1620.27(a)* (EEOC guideline; in situations in which jurisdictional prerequisites of both EPA and Title VII are satisfied, any violation of EPA is also violation of Title VII)].

Under the substantial identity standard, jobs need not be identical, only substantially equal [*see 29 C.F.R. § 1620.13(a)*; *see also Shultz v. Wheaton Glass Co. (3d Cir. 1970) 421 F.2d 259, 265 , cert. denied, 398 U.S. 905* (EPA; Title VII)]. Actual job performance and content, not job titles, classifications, or descriptions, are determinative. It is the overall job, not its individual segments, that must form the basis of comparison. Because job duties vary so widely, such suits

are determined on a case-by-case basis [*Gunther v. County of Washington (9th Cir. 1979) 623 F.2d 1303, 1309* , *aff'd, 452 U.S. 161, 101 S. Ct. 2242, 68 L. Ed. 2d 751 (1981)* (EPA)]. For a detailed discussion of the substantial identity standard under the EPA, see K. Wilcox, ed., California Employment Law, Ch. 41 (Matthew Bender).

Title VII allows compensation differentials if they are authorized by the EPA [*see 42 U.S.C. § 2000e-2(h)*]. Thus, a Title VII compensation discrimination claim is subject to EPA affirmative defenses (for example, seniority systems, merit systems, systems that measure earnings by quantity or quality of production, differentials based on any factor other than sex) [*see County of Washington v. Gunther (1981) 452 U.S. 161, 168, 171, 101 S. Ct. 2242, 68 L. Ed. 2d 751* ; *see also 29 C.F.R. § 1604.8(b)* (EPA defenses available in Title VII wage discrimination proceedings)]. For a detailed discussion relating to EPA affirmative defenses, see K. Wilcox, ed., California Employment Law, Ch. 41 (Matthew Bender).

[b] Comparable Worth

Title VII sex-based compensation discrimination claims are not restricted to those that can also be brought under the EPA (that is, equal pay for equal work claims) [*see County of Washington v. Gunther (1981) 452 U.S. 161, 168, 178-180, 101 S. Ct. 2242, 68 L. Ed. 2d 751]* . Therefore, a "comparable worth" theory has developed, postulating that such discrimination exists if employees in job classifications occupied primarily by women are paid less than employees in job classifications filled primarily by men, and the jobs are of "equal value" to the employer, although otherwise dissimilar [*see* American Fed'n of State, County, and Municipal Employees v. State of Washington (9th Cir. 1985) *770 F.2d 1401, 1404* (Title VII)]. Although subject to much debate, most courts have rejected the "comparable worth" theory under Title VII [*see American Federation of State, etc. v. Washington (9th Cir. 1985) 770 F.2d 1401, 1405-1408*].

[2] Proof

Courts have held that the standard Title VII rules do not govern the allocation of evidentiary burdens in compensation discrimination cases [*see Kouba v. Allstate Ins. Co. (9th Cir. 1982) 691 F.2d 873, 875* ; *but see County of Washington v. Gunther (1981) 452 U.S. 161, 168, 170-171, 101 S. Ct. 2242, 68 L. Ed. 2d 751* (reserving judgment on issue)]. Thus, for example, although a Title VII plaintiff alleging sex discrimination generally bears the burden of persuasion at all times as to all issues [*see Texas Dep't of Community Affairs v. Burdine (1981) 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207]* , the employer bears the burden under both Title VII and the EPA to show that a compensation differential resulted from a "factor other than sex" [*Kouba v. Allstate Ins. Co. (9th Cir. 1982) 691 F.2d 873, 875]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationGender & Sex DiscriminationGeneral OverviewLabor & Employment LawDiscriminationGender & Sex DiscriminationEmployment PracticesCompensationLabor & Employment LawDiscriminationGender & Sex DiscriminationProofBurdens of ProofGeneral OverviewLabor & Employment LawDiscriminationGender & Sex DiscriminationProofBurdens of ProofEmployee Burdens

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11-115 California Forms of Pleading and Practice--Annotated § 115.32

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§ 115.32 Other Terms, Conditions, and Privileges of Employment

[1] "Terms, Conditions, and Privileges of Employment" Defined

Title VII, the ADA, the ADEA, and FEHA prohibit unlawful discrimination with respect to the "terms, conditions, or privileges of employment" [*29 U.S.C. § 623(a)(1)* (ADEA); *42 U.S.C. §§ 2000e-2(a)(1)* (Title VII), *12112(a)* (ADA); *Gov. Code § 12940(a)* (FEHA)].

FEHC regulations identify fringe benefits, harassment, physical appearance, grooming, dress standards, reasonable discipline, and seniority as matters involving terms, conditions, and privileges of employment [*see 2 Cal. Code Reg. § 7287.6*].

Federal courts construing Title VII consider terms, conditions, and privileges of employment to include all of the following:

- Preemployment physical examinations [*see Norman-Bloodsaw v. Lawrence Berkeley Lab. (9th Cir. 1998) 135 F.3d 1260, 1271-1273* (blacks and females singled out for certain nonconsensual testing done as part of physical examinations)];

- Opportunities for work and promotion, and layoff policies [*see United Transp. Union v. Norfolk & W. R.R. Co. (4th Cir. 1975) 532 F.2d 336, 340 , cert. denied, 425 U.S. 934 (1976)]* ;

- English-only rules [*see Garcia v. Spun Steak Co. (9th Cir. 1993) 998 F.2d 1480, 1485]* ; and

- Psychological benefits, such as working environment [*see Rogers v. EEOC (5th Cir. 1971) 454 F.2d 234, 238 , cert. denied, 406 U.S. 957 (1972)* (Title VII)].

Under the ADA, an employer is prohibited from discriminating on the basis of a disability against a qualified individual in regard to such factors as recruitment, hiring, promotion, layoff, termination, rates of pay, job assignment, seniority lists, leaves of absence, sick leave, fringe benefits, selection and financial support for training, and social and recreational activities [*29 C.F.R. § 1630.4*].

[2] Employer Rules and Requirements

[a] Generally

Employer rules or requirements relating to terms, conditions, and privileges of employment are subject to either "disparate treatment" or "disparate impact" analysis. For example, rules relating to the following have been subject to disparate treatment and disparate impact analysis, as is noted:

- Drug use [*see Davis v. City of Dallas (5th Cir. 1985) 777 F.2d 205, 223-225 , cert. denied, 476 U.S. 1116 (1986)* (Title VII; disparate impact)];

- Grooming or physical appearance [*see Gerdom v. Continental Airlines (9th Cir. 1982) 692 F.2d 602, 608 , cert. dismissed, 460 U.S. 1074 (1983)* (Title VII; disparate treatment); *see also 2 Cal. Code Reg. § 7287.6(c)* (FEHC regulation; grooming rule unlawful when it discriminates on basis enumerated in FEHA and significantly burdens person in his or her employment); *but see Gov. Code § 12949* (FEHA does not prevent employer from requiring employee to adhere to reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of state or federal law, so long as employer allows employee to appear or dress consistently with employee's gender identity)];

- Employee bankruptcy [*see Bell v. Citizens Fidelity Bank & Trust Co. (6th Cir. 1980) 636 F.2d 1119, 1121* (*42 U.S.C. §§ 1981, 1982*; disparate impact)];

- Wage garnishment [*see Johnson v. Pike Corp. of America (C.D. Cal. 1971) 332 F. Supp. 490, 494* (Title VII; disparate impact)];

- Nepotism [*see Bonilla v. Oakland Scavenger Co. (9th Cir. 1982) 697 F.2d 1297, 1303 , cert. denied, 467 U.S. 1251 (1984)* (Title VII; nepotistic practices unlawful if they perpetuate discriminatory status quo)]; and

- Requirements that only English be spoken at work [*see Garcia v. Spun Steak Co. (9th Cir. 1993) 998 F.2d 1480, 1485* (Title VII; disparate impact); *Jurado v. Eleven-Fifty Corp. (9th Cir. 1987) 813 F.2d 1406, 1412* (Title VII; same); *Garcia v. Gloor (5th Cir. 1980) 618 F.2d 264, 272 , cert. denied, 449 U.S. 1113 (1981)* (Title VII; same); *see also 2 Cal. Code Reg. § 7289.5(d)* (FEHC regulation)].

[b] "No-Spouse" Rules

"No-spouse" rules, prohibiting spouses from working in the same department, division, or facility, may be lawful under FEHA if they are imposed for reasons of supervision, safety, security, or morale [*see Gov. Code § 12940(a)(3)*; *2 Cal. Code Reg. § 7292.5(a)* (FEHC regulation)].

There is no express Title VII provision governing "no-spouse" rules, but like other employer rules, they are generally subject to "disparate impact" analysis [*see Thomas v. Metroflight (10th Cir. 1987) 814 F.2d 1506, 1509* ; *Harper v. Trans World Airlines (8th Cir. 1975) 525 F.2d 409, 414]* .

[3] Fringe Benefits

[a] Scope of Protection

Neither FEHA nor FEHC regulations define the term "fringe benefits," but according to EEOC guidelines, fringe benefits include medical, hospital, accident, and life insurance; retirement benefits; profit sharing and bonus plans; leaves of absence; and similar benefits [*see 29 C.F.R. § 1604.9(a)*]. Since they are "terms, conditions, or privileges of employment" [*see 2 Cal. Code Reg. § 7287.6* (FEHC regulation)], unlawful discrimination with respect to fringe benefits is generally prohibited [*see 29 U.S.C. § 623(a)(1)* (ADEA); *42 U.S.C. § 2000e-2(a)(1)* (Title VII); *Gov. Code § 12940(a)* (*FEHA); Wambheim v. J.C. Penney Co. (9th Cir. 1981) 642 F.2d 362, 365* , *cert. denied, 467 U.S. 1255 (1984)* (Title VII; prima facie liability if discrimination in health benefits based on gender); *see also 29 C.F.R. §§ 1604.9(b), 1620.11(b)* (EEOC guidelines; sex-based employment discrimination with regard to fringe benefits prohibited); *2 Cal. Code Reg. §§ 7291.1(b)(1), 7292.6(a)(1)* (FEHC regulations; FEHA prohibits conditioning availability of fringe benefits on employee's sex or marital status), *7294.2(a)* (same; conditioning employment decisions regarding disabled applicant or employee on waiver of any fringe benefit is prohibited)].

[b] "Bona Fide Employee Benefit Plan" Exemption

Fringe benefits, particularly retirement and health benefits, may raise issues regarding age and sex discrimination. The ADEA contains limited exemptions for age- and sex-based benefit differentials [*see 29 U.S.C. § 623(f)(2)*].

Formerly, the ADEA "bona fide employee benefit plan" exemption allowed employers to observe the terms of bona fide employee benefit plans, such as retirement, pension, or insurance plans, that are not a subterfuge to evade the purposes of the ADEA [*see 29 U.S.C. § 623(f)(2)*, prior to amendment by Pub. L. No. 101-433; *EEOC v. Orange County (9th Cir. 1988) 837 F.2d 420, 421* ; *EEOC v. Borden's, Inc. (9th Cir. 1984) 724 F.2d 1390, 1395* ; *see also Public Employees v. Betts (1989) 492 U.S. 158, 168, 109 S. Ct. 2854, 106 L. Ed. 2d 134* ("subterfuge" defined); *United Airlines v. McMann (1977) 434 U.S. 192, 203, 98 S. Ct. 444, 54 L. Ed. 2d 402* (same)].

In 1990, the ADEA exemption was revised by the Older Workers Benefit Protection Act (OWBPA) [*see* Pub. L. No. 101-433, §§ 101-105]. The OWBPA applies only to benefit plans established, modified, or otherwise affected on or after October 16, 1990 (the date the OWBPA was enacted) [*see* Pub. L. No. 101-433, § 105(a)]. Now, even if otherwise prohibited by the ADEA, it is not unlawful for an employer to observe the terms of a bona fide employee benefit plan if, (1) for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, or (2) the plan is a voluntary early retirement incentive plan consistent with the ADEA's purposes [*29 U.S.C. § 623(f)(2)(B)*; *29 C.F.R. § 1625.10(a)(1)*].

A "plan" covered by the ADEA exemption is one that is an integral part of a complex benefit scheme [*see EEOC v. Borden's, Inc. (9th Cir. 1984) 724 F.2d 1390, 1395]* . A "bona fide" plan is one that is genuine and actually pays substantial benefits [*Marshall v. Hawaiian Tel. Co. (9th Cir. 1978) 575 F.2d 763, 766* ; *see Public Employees Retirement System of Ohio v. Betts (1989) 492 U.S. 158, 166, 109 S. Ct. 2854, 106 L. Ed. 2d 134* ; *EEOC v. County of Orange (9th Cir. 1988) 837 F.2d 420, 422* ; *EEOC v. Borden's, Inc. (9th Cir. 1984) 724 F.2d 1390, 1395* ; *see also 29 C.F.R. § 1625.10(b)* ("bona fide employee benefit plan" defined)].

FEHA provides that its general prohibition against sex and medical condition discrimination does not affect bona fide retirement, pension, employee benefit, or insurance plans that are in accordance with customary and reasonable or actuarially sound underwriting practices [*Gov. Code § 12993(b)*]. A former FEHA exemption for age-based benefit differentials has been repealed effective January 1, 2003 [*see former Gov. Code § 12941(a), repealed by* 2002 Stats., ch. 525, § 2].

[c] Health Benefits

FEHA exempts insurance plans that are in accordance with customary and reasonable or actuarially sound underwriting

practices [*see Gov. Code § 12993(b)*; *but see 2 Cal. Code Reg. §§ 7291.1(b)(1), 7292.6(a)(1)* (FEHA prohibits conditioning availability of fringe benefits on employee's sex or marital status), *7294.2(a)* (conditioning employment decisions regarding disabled applicant or employee on waiver of any fringe benefit prohibited); *see also 29 C.F.R. § 1630.16(f)* (permitting health insurance plans to underwrite or classify risks under state law, unless used as subterfuge to discriminate under ADA)].

There is prima facie Title VII liability, however, if discrimination in health benefits is based on gender [*see Wambheim v. J.C. Penney Co. (9th Cir. 1981) 642 F.2d 362, 365 , cert. denied, 467 U.S. 1255 (1984)* ; *see also 29 C.F.R. § 1604.9(b)* (EEOC guideline); *2 Cal. Code Reg. § 7291.1(b)(1)* (FEHC regulation)]. For example, employers may not provide benefits for the spouses or families of employees of one gender if the same benefits are not provided for the spouses or families of employees of the opposite gender [*see Newport News Shipbuilding & Dry Dock Co. v. EEOC (1983) 462 U.S. 669, 682-683, 103 S. Ct. 2622, 77 L. Ed. 2d 89* ; *29 C.F.R. § 1604.9(d)* (EEOC guideline)]. It is not a defense that the cost of health benefits is greater with respect to one sex than another [*29 C.F.R. § 1604.9(e)* (EEOC guideline)].

Some employers may adopt facially neutral "head of household" rules whereby a married employee may only receive dependent coverage if the employee earns more than 50 percent of the combined income of the spouses [*see Wambheim v. J.C. Penney Co. (9th Cir. 1981) 642 F.2d 362, 364 , cert. denied, 467 U.S. 1255 (1984)]* . Although these rules may have a disparate impact on female employees [*see Wambheim v. J.C. Penney Co. (9th Cir. 1981) 642 F.2d 362, 365 , cert. denied, 467 U.S. 1255 (1984)* ; *29 C.F.R. § 1604.9(c)* (EEOC guideline; benefits based on "head of household" rules as prima facie violation of Title VII); *2 Cal. Code Reg. §§ 7291.1(b)(2), 7292.6(b)(2)* (FEHC regulation; "head of household" rules unlawful insofar as they discriminate against one sex or on the basis of marital status)], they are not unlawful if the employer demonstrates legitimate and overriding business justifications for the rule [*see Wambheim v. J.C. Penney Co. (9th Cir. 1983) 705 F.2d 1492, 1495 , cert. denied, 467 U.S. 1255 (1984)* (rule designed to benefit largest number of employees and those with greatest need); *but see EEOC v. Fremont Christian School (N.D. Cal. 1984) 609 F. Supp. 344, 351* (Title VII; justification based on religious beliefs not equivalent to business justification necessary to overcome presumption of discrimination)].

Both Title VII and FEHA prohibit discrimination on the basis of pregnancy [*see 42 U.S.C. §§ 2000e(k), 2000e-2(a)* (Title VII); *Gov. Code § 12945* (FEHA); *but see AT&T Corp. v. Hulteen (2009) -- U.S. --, 129 S. Ct. 1962, 173 L. Ed. 2d 898, 906* ("Although adopting a service credit rule unfavorable to those out on pregnancy leave would violate Title VII today, a seniority system does not necessarily violate the statute when it gives current effect [in the calculation of pension benefits] to such rules that operated before the [Pregnancy Discrimination Act, which took effect on April 29, 1979]")]. Thus, employers may not treat pregnancy-related conditions less favorably than other medical conditions for benefit purposes [*Morgan v. Safeway Stores (9th Cir. 1989) 884 F.2d 1211, 1213* (Title VII)]. For example, an employer may not provide maternity benefits for the wives of male employees, but fail to provide them to female employees [*29 C.F.R. § 1604.9(d)* (EEOC guideline)]. Nor may an employer provide more favorable maternity benefits for female employees than for spouses of male employees [*see Newport News Shipbuilding & Dry Dock Co. v. EEOC (1983) 462 U.S. 669, 683-684, 103 S. Ct. 2622, 77 L. Ed. 2d 89]* .

A distinction made by an employer-provided health-care plan that has a greater adverse impact on certain disabled individuals who require a particular form of treatment than on other persons with the same disability does not discriminate on the basis of disability. For example, if an employer-provided health-care plan provides all employees with the same coverage for infertility treatment, an exclusion of coverage for in vitro fertilization is not a disability-based distinction in violation of FEHA [*Knight v. Hayward Unified Sch. Dist. (2005) 132 Cal. App. 4th 121, 134-136, 33 Cal. Rptr. 3d 287]* .

[4] Training and Advancement

[a] Training Programs

FEHA prohibits discrimination in any apprenticeship training program, or any other training program leading to employment, because of membership in a protected classification [*see Gov. Code § 12940(c)*, (*l*); *2 Cal. Code Reg. § 7287.4(c)(2)* (FEHC regulation)].

Title VII and the ADA also prohibit unlawful discrimination in training programs [*see 42 U.S.C. §§ 2000e-2(d), 12112(a),(b)(1)*].

Federal cases have held that, under Title VII, an employer may not discriminatorily deny access to training [*see Thompson v. Sawyer (D.C. Cir. 1982) 678 F.2d 257, 283]* or discriminatorily fail to train an employee adequately [*see Shah v. Mt. Zion Hospital & Medical Center (9th Cir. 1981) 642 F.2d 268, 271]* . One case held that to establish a prima facie case of discriminatory training, a plaintiff must show that he or she was treated differently from other employees and that the employer was aware of the discrimination and failed to remedy it [*Shah v. Mt. Zion Hospital & Medical Center (9th Cir. 1981) 642 F.2d 268, 271]* .

[b] Promotion and Transfer

Title VII does not contain an express provision relating to promotions and transfers. However, Title VII generally prohibits depriving anyone of employment opportunities because of that person's membership in a protected classification [*see 42 U.S.C. § 2000e-2(a)(2)*; *see also Payne v. Travenol Laboratories (5th Cir. 1982) 673 F.2d 798, 827 , cert. denied, 459 U.S. 1038* (employer's failure to post notice of promotion openings, together with its reliance on supervisor recommendations and other factors, as discrimination under Title VII)].

The ADA prohibits discrimination in the advancement of disabled employees [*42 U.S.C. § 12112(a)*], including classifying a disabled employee in a way that adversely affects his or her opportunities [*42 U.S.C. § 12112(b)(1)*; *see 29 C.F.R. § 1630.4(b)* (prohibition against discrimination with regard to upgrading and promotion)].

FEHA, like Title VII, has no provision expressly relating to promotions and transfers. However, FEHC regulations prohibit restricting information on promotion and transfer opportunities to certain employees or classes of employees when the restriction has the effect of discriminating on a basis enumerated in FEHA [*see 2 Cal. Code Reg. § 7287.4(c)*]. The FEHC regulations also require employers to consider bids or other requests for promotion in a manner that does not discriminate on a basis enumerated in FEHA, unless it is pursuant to a permissible defense [*see 2 Cal. Code Reg. § 7287.4(c)(1)*].

Generally, employment practices relating to promotions and transfers may be subject to both "disparate treatment" and "disparate impact" analysis [*see, e.g., U.S. Postal Service Bd. of Govs. v. Aikens (1983) 460 U.S. 711, 714-715, 103 S. Ct. 1478, 75 L. Ed. 2d 403* (promotion); *Casillas v. United States Navy (9th Cir. 1984) 735 F.2d 338, 342* ; *Payne v. Travenol Laboratories (5th Cir. 1982) 673 F.2d 798, 826 , cert. denied, 459 U.S. 1038* (promotion); *Reed v. Lockheed Aircraft Corp. (9th Cir. 1980) 613 F.2d 757, 761* (promotion); *Peters v. Jefferson Chem. Co. (5th Cir. 1975) 516 F.2d 447, 450* (transfer)].

With respect to promotions, a plaintiff need not prove that he or she applied for promotion and was rejected, if a promotion policy does not require employee application or if promotion is initiated by the employer [*see Gifford v. Atchison, Topeka & Santa Fe R.R. Co. (9th Cir. 1982) 685 F.2d 1149, 1154* ; *Reed v. Lockheed Aircraft Corp. (9th Cir. 1980) 613 F.2d 757, 761]* . Moreover, a plaintiff is not required to prove that he or she applied for promotion if application would be futile [*see Gifford v. Atchison, Topeka & Santa Fe R.R. Co. (9th Cir. 1982) 685 F.2d 1149, 1154* ; *Reed v. Lockheed Aircraft Corp. (9th Cir. 1980) 613 F.2d 757, 761]* .

EEOC guidelines and FEHC regulations prohibit sex-based lines of progression that adversely affect any employee, unless sex is a bona fide occupational qualification (BFOQ) for the job. Thus, an employer may not prohibit a female

from applying for a job labeled "male" or for a job in a "male" line of progression, and vice versa [*29 C.F.R. § 1604.3(a)* (EEOC guideline); *2 Cal. Code Reg. § 7291.1(c)* (FEHC regulation); *see Wetzel v. Liberty Mut. Ins. Co. (W.D. Pa. 1974) 372 F. Supp. 1146, 1149 , aff'd, 508 F.2d 239 (3d Cir. 1975) , cert. denied, 421 U.S. 1011 (1975)* (Title VII; key factor when employees initially hired in jobs that do not have comparable lines of progression is employer's hiring policy, since original assignment in effect determined employee's future chances of promotion)].

[5] Seniority Systems

[a] "Bona Fide Seniority Systems" Exemption

Although FEHA contains no general exemption for seniority systems, it does provide that promotions within existing staff, hiring and promotion on the basis of experience and training, rehiring on the basis of seniority and prior service with the employer, or hiring under an established recruiting program from high schools, colleges, universities, or trade schools do not, in and of themselves, constitute unlawful employment practices [*Gov. Code § 12940(a)(5)*; *see 2 Cal. Code Reg. §§ 7295.7, 7295.8* (FEHC regulations)]. However, if candidates for hire have the same record of seniority or prior service with the employer, the employer may not refuse to select one of the candidates because he or she is over the age of 40 years [*see 2 Cal. Code Reg. § 7295.7(b)* (FEHC regulations)].

Title VII permits differences in compensation and terms, conditions, or privileges of employment pursuant to bona fide seniority systems, provided that the differentials are not the result of intentional discrimination [*see 42 U.S.C. § 2000e-2(h)*]. The ADEA also allows "bona fide seniority systems" as long as they are not intended to avoid the ADEA's purposes, and do not require or permit involuntary retirement based on age [*see 29 U.S.C. § 623(f)(2)*; *29 C.F.R. § 1625.9(a)(2)* (EEOC guideline); *Trans World Airlines v. Thurston (1985) 469 U.S. 111, 124, 105 S. Ct. 613, 83 L. Ed. 2d 523]* .

Under the Title VII exemption, otherwise neutral, legitimate seniority systems are not unlawful, even if they perpetuate past discrimination [*see Teamsters v. United States (1977) 431 U.S. 324, 353-354, 97 S. Ct. 1843, 52 L. Ed. 2d 396* ("departmental" seniority system)]. The Title VII exemption is not a defense; it is a provision that delineates which employment practices are illegal and thereby prohibited, and which are not [*Lorance v. AT&T Technologies (1989) 490 U.S. 900, 908, 109 S. Ct. 2261, 104 L. Ed. 2d 961*].

Seniority systems that intentionally discriminate are not "bona fide," however, and are not entitled to protection [*see Teamsters v. United States (1977) 431 U.S. 324, 353, 356, 97 S. Ct. 1843, 52 L. Ed. 2d 396]* .

EEOC guidelines and FEHC regulations prohibit sex-based seniority lists (that is, "male" and "female" lists) if such a practice adversely affects any employee, unless sex is a bona fide occupational qualification (BFOQ) for the job [*29 C.F.R. § 1604.3(a)* (EEOC guideline); *2 Cal. Code Reg. § 7291.1(c)* (FEHC regulation)]. Thus, for example, an employer may not prohibit a male scheduled for layoff from displacing a female on a "female" seniority list, and vice versa [*29 C.F.R. § 1604.3(a)(2)* (EEOC guideline); *2 Cal. Code Reg. § 7291.1(c)(1)(B)* (FEHC regulation)]. Nor may a seniority system distinguish between "light" and "heavy" jobs if it operates as a disguised form of classification by sex, or creates unreasonable sex-based advancement obstacles [*29 C.F.R. § 1604.3(b)* (EEOC guideline)].

[b] Proof of Discriminatory Seniority System

Since only seniority systems that intentionally discriminate are not "bona fide" [*see Teamsters v. United States (1977) 431 U.S. 324, 353, 356, 97 S. Ct. 1843, 52 L. Ed. 2d 396* (Title VII)], it is not enough to show that a seniority system has a discriminatory impact [*see 42 U.S.C. § 2000e-5(e)(2)*; *Lorance v. AT&T Technologies (1989) 490 U.S. 900, 908-909, 109 S. Ct. 2261, 104 L. Ed. 2d 961* ; *Firefighters v. Stotts (1984) 467 U.S. 561, 577-579, 104 S. Ct. 2576, 81 L. Ed. 2d 483* ; *American Tobacco Co. v. Patterson (1982) 456 U.S. 63, 65, 102 S. Ct. 1534, 71 L. Ed. 2d 748]* . The burden is on the plaintiff to show intent [*see Lorance v. AT&T Technologies (1989) 490 U.S. 900, 909, 109 S. Ct.*

2261, 104 L. Ed. 2d 961 ; *Black Law Enforcement Officers Ass'n v. City of Akron (6th Cir. 1987) 824 F.2d 475, 481]* . The basic issue is whether there is intentional discrimination in the establishment or continuation of a seniority system, and the totality of the circumstances should be examined [*see Bernard v. Gulf Oil Corp. (5th Cir. 1988) 841 F.2d 547, 555* ; *James v. Stockham Valves & Fittings Co. (5th Cir. 1977) 559 F.2d 310, 351-352* , *cert. denied, 434 U.S. 1034 (1978)]* .

Although a system that has a discriminatory impact is not unlawful, discriminatory impact may be an evidentiary consideration in reaching a finding on intent [*see Pullman-Standard v. Swint (1982) 456 U.S. 273, 289, 102 S. Ct. 1781, 72 L. Ed. 2d 66]* . Thus, proof that a work force is racially balanced or that it contains a disproportionately high percentage of minority employees may be relevant to determining whether a seniority system intentionally discriminates [*see Pullman-Standard v. Swint (1982) 456 U.S. 273, 289 n.18, 102 S. Ct. 1781, 72 L. Ed. 2d 66* ; *Furnco Construction Corp. v. Waters (1978) 438 U.S. 567, 580, 98 S. Ct. 2943, 57 L. Ed. 2d 957]* .

[6] Family Care and Medical Leave

[a] Governing Law

Both California's Moore-Brown-Roberti Family Rights Act (CFRA) [*Gov. Code §§ 12945.1, 12945.2,* 19701.3], which is a part of FEHA, and the federal Family and Medical Leave Act of 1993 (FMLA) [Pub. L. No. 103-3, codified at *29 U.S.C. § 2601 et seq.*; *see* 29 C.F.R. pt. 825 (FMLA regulations)] require employers with 50 or more employees to grant unpaid family care and medical leave under certain circumstances [*see Gov. Code § 12945.2(a),(d)*; *29 U.S.C. §§ 2611(4), 2612*]. As amended in 1993, the CFRA now largely conforms to the FMLA [*see Liu v. Amway Corp. (9th Cir. 2003) 347 F.3d 1125, 1132 n.4*]. This discussion focuses on the CFRA. For detailed discussion of the FMLA, see K. Wilcox, ed., California Employment Law, Ch. 41 (Matthew Bender).

It is an unlawful employment practice under FEHA for an employer to refuse to grant a request for family care and medical leave to which an employee is entitled under the CFRA [*see Gov. Code § 12945.2(a)*], or to refuse to hire, or to discharge, fine, suspend, expel, or discriminate against, any individual because of (1) the individual's exercise of the right to family care and medical leave under the CFRA, or (2) the individual's giving information or testimony regarding his or her own family care and medical leave, or another person's family care and medical leave, in any inquiry or proceeding related to rights guaranteed under the CFRA [*Gov. Code § 12945.2* (*l*); *see Dudley v. Department of Transp. (2001) 90 Cal. App. 4th 255, 261-265, 108 Cal. Rptr. 2d 739* (cognizable cause of action for retaliation in violation of CFRA if employer is covered under CFRA, employee is eligible for and exercises right to CFRA leave, and employee suffers adverse employment action as result)]. However, an employer may terminate an employee who misuses leave and is untruthful about it [*McDaneld v. E. Mun. Water Dist. Bd. (2003) 109 Cal. App. 4th 702, 705-708, 135 Cal. Rptr. 2d 267* (employee who took leave to care for father spent substantial amount of leave time playing golf and working on lawn sprinklers)].

An employee who requests CFRA leave or is on leave has no greater right to reinstatement or to other benefits and conditions of employment than an employee who remains at work [*Neisendorf v. Levi Strauss & Co. (2006) 143 Cal. App. 4th 509, 519, 49 Cal. Rptr. 3d 216* ; *see 2 Cal. Code Reg. § 7297.2(c)(1)*]. Thus, for example, an employer does not violate CFRA's guaranty of reinstatement by terminating an employee who is unable to return to work at the completion of the maximum available CFRA leave [*Neisendorf v. Levi Strauss & Co. (2006) 143 Cal. App. 4th 509, 517-520, 49 Cal. Rptr. 3d 216]* , or by terminating an employee as part of a legitimate workforce reduction [*Tomlinson v. Qualcomm, Inc. (2002) 97 Cal. App. 4th 934, 939-943, 118 Cal. Rptr. 2d 822]* .

[b] Permissible Purposes of Leave

For purposes of the CFRA, "family care and medical leave" means any of the following [*Gov. Code § 12945.2(c)(3)*]:

- Leave for (1) the birth of a child of the employee, (2) the placement of a child with an employee in connection with the adoption or foster care of the child by the employee, or (3) the serious health condition of a child of the employee [*see Marchisheck v. San Mateo County (9th Cir. 1999) 199 F.3d 1068, 1073-1076* (relocating employee's child to keep him or her safe from beatings by other children does not constitute "caring" for child with serious health condition under either CFRA or federal Family and Medical Leave Act)];

- Leave to care for a parent or spouse who has a serious health condition [*see Pang v. Beverly Hosp. (2000) 79 Cal. App. 4th 986, 995-999, 94 Cal. Rptr. 2d 643* (helping parent pack and move to new residence does not constitute "caring" for parent with serious health condition, even if move is made on account of and in order to accommodate parent's serious health condition)]; or

- Leave because of an employee's own serious health condition that makes the employee unable to perform the functions of the position of that employee, except for leave taken for disability on account of pregnancy, child birth, or related medical conditions, which is separately governed by *Gov. Code § 12945* [*see Gov. Code § 12945.2(o),(s)*; *see also* discussion regarding pregnancy leave in [7], *below*]. The focus in this context is on whether the condition makes the employee unable to perform the specific job assigned to him or her by the employer, as opposed to general job functions. Thus, the fact that an employee can do a similar job for a second employer does not necessarily establish that he or she is not incapacitated from performing the specific job assigned by the first employer [*Lonicki v. Sutter Health Cent. (2008) 43 Cal. 4th 201, 214*].

For these purposes, a "child" is defined as a biological, adopted, or foster child, a stepchild, or a child of a person standing *in loco parentis* who is either (1) under 18 years of age, or (2) an adult dependent child [*Gov. Code § 12945.2(c)(1)*]. A "parent" is defined as a biological, foster, or adoptive parent, a stepparent, or other person who stood *in loco parentis* to the employee when the employee was a child [*Gov. Code § 12945.2(c)(7)*].

A "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves either of the following [*Gov. Code § 12945.2(c)(8)*]:

- Inpatient care in a hospital, hospice, or residential health care facility; or

- Continuing treatment or continuing supervision by a health care provider.

The CFRA permits an employer to require that a request for leave based on a serious health condition be supported by certification, containing specified information, issued by a health care provider [*see Gov. Code § 12945.2(j),(k)*; *see also Gov. Code § 12945.2(c)(6)* ("health care provider" defined)]. In the case of leave requests based on the employee's *own* serious health condition, the CFRA provides a procedure by which an employer may challenge the validity of the certification provided by the employee [*see Gov. Code § 12945.2(k)(3)*]. This statutory dispute-resolution procedure is not mandatory, however, and the employer's failure to use the procedure does not bar the employer from contending in subsequent litigation that the employee did not have a serious health condition that made him or her unable to do the job [*Lonicki v. Sutter Health Cent. (2008) 43 Cal. 4th 201, 213*].

[c] Covered Employers and Employees

An employer under the CFRA is any person who directly employs 50 or more persons to perform services for a wage or salary, as well as the state, any political or civil subdivision of the state, and cities [*Gov. Code § 12945.2(c)(2)*].

An employee is not covered by the CFRA unless he or she has more than 12 months of service with the employer and at least 1,250 hours of service with the employer during the previous 12-month period [*Gov. Code § 12945.2(a)*].

Although employers with 50 or more employees are covered by the CFRA [*see Gov. Code § 12945.2(c)(2)(A)*], an employer is not required to grant a request for family care and medical leave by an employee if the employer employs fewer than 50 employees within 75 miles of the worksite where the employee is employed [*Gov. Code § 12945.2(b)*].

[d] Amount of Leave Entitlement; Relationship to Pregnancy and FMLA Leave

The maximum amount of family care and medical leave that an employee may take under the CFRA is a total of 12 workweeks during any 12-month period [*Gov. Code § 12945.2(a)*].

An employee is entitled to take, in addition to leave provided for under the CFRA, the pregnancy leave provided for in *Gov. Code § 12945* if the employee is otherwise qualified for that leave [*Gov. Code § 12945.2(s)*].

If both parents are employed by the same employer and qualify for leave under the CFRA, the employer need not provide family care leave in connection with the birth, adoption, or foster care placement of a child that would allow the parents leave that totals more than 12 workweeks in a 12-month period [*see Gov. Code § 12945.2(q)*].

Leave under the CFRA may be taken in one or more periods [*Gov. Code § 12945.2(p)*]. The FEHC is authorized to adopt regulations relating to the minimum duration for various types of family care and medical leave under the CFRA [*see Gov. Code § 12945.2(a)*; Stats. 1993, ch. 827, § 2]. However, the Legislature has directed the FEHC to allow any employee taking leave under the CFRA to take leave in increments of at least one day for recurring medical treatment certified by a health care provider [*see* Stats. 1993, ch. 827, § 2].

The FMLA does not supersede any provision of any state or local law that provides greater family or medical leave rights than the rights established by the FMLA [*29 U.S.C. § 2651(b)*]. However, under the CFRA, leave taken by an employee under the CFRA runs concurrently with any leave taken under the FMLA (except for leave taken under the FMLA for disability on account of pregnancy, childbirth, or related medical conditions). The aggregate amount of leave taken under the CFRA or the FMLA, or both (except for leave taken for disability on account of pregnancy, childbirth, or related medical conditions), may not exceed 12 workweeks in a 12-month period [*Gov. Code § 12945.2(s)*]. Furthermore, the 12-month period during which 12 workweeks of leave may be taken under the CFRA runs concurrently with the 12-month period under the FMLA and commences on the date that leave taken under the FMLA commences [*Gov. Code § 12945.2(p)*].

[e] Notice of Leave

If an employee's need for a leave under the CFRA is foreseeable, the employee must provide the employer with reasonable advance notice of the need for the leave [*Gov. Code § 12945.2(h)*]. If the need for leave is foreseeable due to a planned medical treatment or supervision, the employee must make a reasonable effort to schedule the treatment or supervision to avoid disruption to the operations of the employer, subject to the approval of the health care provider of the person requiring the treatment or supervision [*Gov. Code § 12945.2(i)*].

To trigger the employee's rights under the CFRA, the employee's notice need not expressly assert rights under CFRA or FMLA, or even mention CFRA or FMLA. However, the employee must state the reason for the requested leave that brings the request within the scope of the CFRA [*2 Cal. Code Reg. § 7297.4(a)(1)*]. Thus, for example, a notice on a hospital's preprinted form that an employee was hospitalized and unable to work may be sufficient to inform the employer that the employee might have suffered a serious medical condition under CFRA [*Avila v. Continental Airlines, Inc. (2008) 165 Cal. App. 4th 1237, 1257, 82 Cal. Rptr. 3d 440*]. However, a request for *vacation* time over the Christmas holiday to *visit* the employee's ailing parents does not constitute sufficient notice that the employee needs leave to *care* for the parents and does not trigger the protections of the CFRA [*Stevens v. Department of Corrections (2003) 107 Cal. App. 4th 285, 290-293, 132 Cal. Rptr. 2d 19]* .

[f] Substitution of Accrued Paid Leave

Generally, the CFRA does not require the employer to provide paid family care and medical leave [*see Gov. Code § 12945.2(d)*]. However, an employee taking leave permitted by the CFRA may elect, or an employer may require the employee, to substitute the employee's accrued vacation leave or other accrued time off, or any other paid or unpaid time off negotiated with the employer, for the leave allowed under the CFRA. If an employee takes a leave because of the employee's *own* serious health condition, the employee may also elect, or the employer may also require the employee, to substitute accrued sick leave during the period of the CFRA leave. An employee may not, however, use sick leave during the a period of leave taken in connection with the birth, adoption, or foster care of a child, or to care for a child, parent, or spouse with a serious health condition, unless mutually agreed to by the employer and employee [*Gov. Code § 12945.2(e)*].

[g] Continuation of Benefits During Leave

The employer is required to maintain and pay for coverage under a "group health plan" as defined in *I.R.C. § 5000(b)(1)* for the duration of any leave taken under the CFRA or the FMLA at the level and under the conditions that coverage would have been provided if the employee had continued in employment continuously for the duration of the leave. The continuation of health benefits is not required to exceed 12 workweeks in a 12-month period, commencing on the date that leave taken under the FMLA commences, although the employer is not prohibited from maintaining and paying for coverage under a group health plan beyond 12 workweeks [*Gov. Code § 12945.2(f)(1)*]. The employer is permitted to recover premiums paid for health benefits provided during family care and medical leave if (1) the employee fails to return to work after the period of leave to which the employee is entitled expires, and (2) the employee's failure to return from the leave is for a reason other than the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under the CFRA, or for other circumstances beyond the employee's control [*Gov. Code § 12945.2(f)(1)*].

An employee taking family care and medical leave is also entitled to participate in other employee benefit plans, including life, short-term or long-term disability, or accident insurance, pension and retirement plans, and supplemental unemployment benefit plans, to the same extent and under the same conditions as apply to an unpaid leave taken for any purpose other than family care and medical leave. In the absence of those conditions, the employee continues to be entitled to participate in these plans. In the case of health and welfare employee benefit plans, including group medical, life, short-term or long-term disability or accident insurance, or other similar plans, the employer may, at its discretion, require the employee, as a condition of continued coverage during the leave, to pay premiums at the group rate during the time not covered by any accrued vacation leave, any other accrued time off, or any other paid or unpaid time off negotiated with the employer. However, nonpayment of premiums does not constitute a break in service, for purposes of longevity, seniority under any collective bargaining agreement, or any employment benefit plan [*Gov. Code § 12945.2(f)(2)*].

In the case of pension and retirement plans, the employer is not required to make plan payments for an employee during the leave period, and the leave period is not required to be counted for purposes of time accrued under the plan. However, an employee covered by a pension plan may continue to make contributions in accordance with the terms of the plan during the period of the leave [*Gov. Code § 12945.2(f)(2)*].

For any period of family care and medical leave during which an employee is not covered by health benefits under *Gov. Code § 12945.2(f)(1)*, the rules governing other types of employee benefit plans apply to health plans, i.e., the employee is entitled to continue to participate to the same extent and under the same conditions as apply to unpaid leave taken for other purposes, and in the absence of those conditions the employee is entitled to participate, but the employer may require the employee to pay premiums at the group rate [*see Gov. Code § 12945.2(f)(2)*].

[h] Retention of Seniority and Restoration to Position

During a family care and medical leave period, the employee retains employee status with the employer, and the leave does not constitute a break in service, for purposes of longevity, seniority under any collective bargaining agreement, or any employee benefit plan. An employee returning from leave returns with no less seniority than the employee had when the leave commenced for purposes of layoff, recall, promotion, job assignment, and seniority-related benefits such as vacation [*see Gov. Code § 12945.2(g)*].

Generally, the employer is required, on granting the leave request, to provide the employee with a guarantee of employment in the same or a comparable position on termination of the leave [*Gov. Code § 12945.2(a)*; *see Gov. Code § 12945.2(c)(4)* (definition of "employment in the same or a comparable position")].

However, an employer may refuse to reinstate an employee returning from leave to the same or a comparable position if all of the following conditions apply [*Gov. Code § 12945.2(r)(1)*]:

- The employee is a salaried employee who is among the highest paid 10 percent of the employer's employees who are employed within 75 miles of the worksite at which the employee is employed.

- The refusal is necessary to prevent substantial and grievous economic injury to the operations of the employer.

- The employer notifies the employee of the intent to refuse reinstatement at the time the employer determines that the refusal is necessary under the previous paragraph.

If the leave has already commenced, the employer must give the employee a reasonable opportunity to return to work following the notice of intent to refuse reinstatement [*Gov. Code § 12945.2(r)(2)*].

An employee returning from CFRA leave has no greater right to reinstatement or to other benefits and conditions of employment than an employee who remained at work [*Neisendorf v. Levi Strauss & Co. (2006) 143 Cal. App. 4th 509, 519, 49 Cal. Rptr. 3d 216* ; *see 2 Cal. Code Reg. § 7297.2(c)(1)*]. Thus, for example, an employer does not violate CFRA's guaranty of reinstatement by terminating an employee who is unable to return to work at the completion of the maximum available CFRA leave [*Neisendorf v. Levi Strauss & Co. (2006) 143 Cal. App. 4th 509, 517-520, 49 Cal. Rptr. 3d 216]* , or by terminating an employee as part of a legitimate workforce reduction [*Tomlinson v. Qualcomm, Inc. (2002) 97 Cal. App. 4th 934, 939-943, 118 Cal. Rptr. 2d 822]* .

[7] Pregnancy Leave

Although Title VII prohibits pregnancy discrimination [*see 42 U.S.C. § 2000e(k)*; *but see AT&T Corp. v. Hulteen (2009) -- U.S. --, 129 S. Ct. 1962, 173 L. Ed. 2d 898, 906* ("Although adopting a service credit rule unfavorable to those out on pregnancy leave would violate Title VII today, a seniority system does not necessarily violate the statute when it gives current effect [in the calculation of pension benefits] to such rules that operated before the [Pregnancy Discrimination Act, which took effect on April 29, 1979]")], it does not provide for pregnancy leaves of absence.

Under FEHA, however, pregnant employees have the right to take a leave of absence for a reasonable period of time, not to exceed four months [*Gov. Code § 12945(a)*; *see California Federal Sav. & Loan Ass'n v. Guerra (1987) 479 U.S. 272, 292, 107 S. Ct. 683, 93 L. Ed. 2d 613* (predecessor of *Gov. Code § 12945(a)* not preempted by Title VII)]. However, an employer may not *require* an employee to go on pregnancy leave unless the employer can demonstrate a bona fide occupational qualification, or that the employee is disabled by the pregnancy [*see 2 Cal. Code Reg. § 7291.2(d)*].

A "reasonable period of time" is the period during which the employee is disabled on account of pregnancy, childbirth,

or related medical conditions [*Gov. Code § 12945(a)*]. The employee may also use any accrued vacation leave during that period of time [*Gov. Code § 12945(a)*; *see 2 Cal. Code Reg. § 7291.2(d)(3)(A)* (FEHC regulation)].

An employer may require any employee who plans to take a pregnancy leave to give the employer reasonable notice of the date the leave will commence and its estimated duration [*Gov. Code § 12945(a)*; *Gov. Code § 12945(b)(2)*; *2 Cal. Code Reg. § 7291.2(d)(3)(B)(1)* (FEHC regulation)].

The FEHC has promulgated comprehensive regulations governing pregnancy leaves of absence [*see 2 Cal. Code Reg. § 7291.2(d)(3)*]. For a detailed discussion of these regulations, see Wilcox, California Employment Law, Ch. 41 (Matthew Bender).

A female employee who is disabled by pregnancy, childbirth, or related medical conditions may also qualify for leave under the federal Family and Medical Leave Act of 1993 (FMLA) [Pub. L. No. 103-3, codified at *29 U.S.C. § 2601 et seq.*]. For a thorough discussion of the FMLA, see Wilcox, California Employment Law, Ch. 41 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationAge DiscriminationEmployment PracticesGeneral OverviewLabor & Employment LawDiscriminationDisability DiscriminationEmployment PracticesGeneral OverviewLabor & Employment LawDiscriminationGender & Sex DiscriminationEmployment PracticesGeneral OverviewLabor & Employment LawDiscriminationNational Origin DiscriminationEmployment PracticesGeneral OverviewLabor & Employment LawDiscriminationRacial DiscriminationEmployment PracticesGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 115 CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION
PART II. LEGAL BACKGROUND
C. Application of Equal Employment Opportunity Laws to Specific Employment Practices

11-115 California Forms of Pleading and Practice--Annotated § 115.33

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.33 Retirement or Pension Plans and Benefits

[1] Scope of Protection

Retirement or pension *plans* are "condition[s] or privilege[s] of employment." Retirement or pension *benefits*, and the contributions that maintain them, are considered "compensation" [*see Arizona Governing Committee v. Norris (1983) 463 U.S. 1073, 1079, 103 S. Ct. 3492, 77 L. Ed. 2d 1236* (Title VII); *Los Angeles, Dep't of Water & Power v. Manhart (1978) 435 U.S. 702, 712 n.23, 98 S. Ct. 1370, 55 L. Ed. 2d 657* (Title VII)]. For discussion of compensation, see *§ 115.31*. For discussion of "terms, conditions, or privileges of employment," see *§ 115.32*.

FEHC regulations define a "retirement or pension program" as any written plan, program, or policy of an employer that has been communicated to eligible or affected employees and that is intended to provide an employee with income on retirement [*see 2 Cal. Code Reg. § 7295.1(d)*].

[2] Age Discrimination

[a] Mandatory Retirement

FEHA requires an employer to permit an employee to continue the employee's employment beyond any retirement date contained in any private pension or retirement plan if the employee, within a reasonable time, indicates in writing a desire to continue working beyond the specified retirement date and can demonstrate the ability to continue working. The employment must continue as long as the employee demonstrates his or her ability to perform the functions of the job adequately and the employer is satisfied with the quality of the work performed [*see Gov. Code § 12942*; *see also 2 Cal. Code Reg. § 7296.0(a)* (FEHC regulation; mandatory retirement constitutes age discrimination under FEHA)].

FEHA excepts institutions of higher education [*see 20 U.S.C. § 1001* ("institution of higher education" defined)], which may impose a mandatory retirement policy for tenured faculty members who have attained 70 years of age, provided that the institution has a policy permitting reemployment of those individuals on a year-to-year basis [*see Gov. Code §*

12942(c)(2), (3)]. Thus, the institution of higher education must rehire those tenured faculty members over age 70 on a yearly basis if they are able to establish their competence [*Dubins v. Regents of University of California (1994) 25 Cal. App. 4th 77, 85-86, 30 Cal. Rptr. 2d 336]* .

Also, compulsory retirement is allowed for both of the following [*Gov. Code § 12942(c)(1)*]. *see 2 Cal. Code Reg. § 7296.0(c)*]:

- Physicians who attain 70 years of age and who are employed by professional medical corporations that have articles or bylaws providing for compulsory retirement; and

- Employees who (1) have attained the age of 65 years, (2) were employed in a bona fide executive or high policymaking position for the two-year period immediately before retirement, and (3) are entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of those plans, that equals, in the aggregate, at least $27,000.

Although the ADEA "bona fide employee benefit plan" exemption protects retirement plans that meet specified requirements, no such plan may require or permit the involuntary retirement of any person covered by the ADEA because of the age of that person [*29 U.S.C. § 623(f)(2)(B)*; *see 29 C.F.R. § 1625.9(a)(2)* (EEOC guideline); *see also Western Air Lines v. Criswell (1985) 472 U.S. 400, 403, 105 S. Ct. 2743, 86 L. Ed. 2d 321* (ADEA as generally prohibiting mandatory retirement)].

Mandatory retirement is expressly permitted under the ADEA with regard to an employee who (1) has attained the age of 65 years; (2) is employed in a bona fide executive or high policymaking position for the two-year period immediately before retirement; and (3) is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, that equals, in the aggregate, at least $44,000 [*see 29 U.S.C. § 631(c)(1)*].

[b] Voluntary Early Retirement

EEOC guidelines provide that retirement plans may permit individuals to elect early retirement at a specified age at their own option [*see 29 C.F.R. § 1625.9(d)*]. Furthermore, incentives to retire early do not constitute discrimination under the ADEA as long as the employee receiving the offer may choose to keep working [*Henn v. National Geographic Soc. (7th Cir. 1987) 819 F.2d 824, 828 , cert. denied, 484 U.S. 964]* .

Because of the magnitude of a decision to accept early retirement, however, employees must be given a reasonable amount of time to make a considered choice. The amount of time necessary to make such a choice varies depending on the circumstances of each case [*see Paolillo v. Dresser Industries (2d Cir. 1987) 821 F.2d 81, 84* (summary judgment improper where plaintiffs were given from less than 1 day to 14 days to make decision); *see also Bodnar v. Synpol, Inc. (5th Cir. 1988) 843 F.2d 190, 194 , cert. denied, 488 U.S. 908* (rejecting challenge to plan that gave employees 15 days to accept or reject)].

[c] Pension Vesting

An employer's decision to terminate an employee with a specified length of service because his or her pension is close to vesting does not constitute discriminatory treatment on the basis of age in violation of the ADEA because age and years of service are analytically distinct [*Hazen Paper Co. v. Biggins (1993) 507 U.S. 604, 609, 113 S. Ct. 1701, 123 L. Ed. 2d 338* ; *see Kentucky Ret. Sys. v. EEOC (2008) 554 U.S. 135, 128 S. Ct. 2361, 2364-2370, 171 L. Ed. 2d 322* (ADEA; because age and pension status are analytically distinct, state pension plan does not discriminate because of age simply because it (1) lawfully makes age part of conditions of pension eligibility and (2) treats workers differently in

light of their pension status)].

However, an employer might be liable under the ADEA if it targets employees with a particular pension status because they are likely to be older, if the employer's motivation to fire an employee is based both on pension status and on age, or if an employee's pension is about to vest because of his or her age, rather than years of service, and the employer fires the employee to prevent vesting [*see Hazen Paper Co. v. Biggins (1993) 507 U.S. 604, 612-613, 113 S. Ct. 1701, 123 L. Ed. 2d 338]* . Furthermore, terminating an employee to prevent vesting of pension benefits violates the Employee Retirement Income Security Act of 1974 (ERISA) [*see 29 U.S.C. § 1140*; *see also Ingersoll-Rand v. McClendon (1990) 498 U.S. 133, 142-143, 111 S. Ct. 478, 112 L. Ed. 2d 474]* .

[3] Sex Discrimination

[a] Contributions and Benefits

Although FEHA generally protects the terms or conditions of any bona fide retirement, pension, employee benefit, or insurance plan if they are in accordance with customary and reasonable or actuarially sound underwriting practices [*see Gov. Code § 12993(b)*], FEHC regulations interpret FEHA to prohibit (1) requiring unequal employee contributions to fringe benefit plans by similarly situated male and female employees, and (2) establishing different amounts of basic benefits for such employees under fringe benefit plans [*see 2 Cal. Code Reg. § 7291.1(b)(3)*].

Under Title VII, an employer may not require female employees to make larger contributions to receive the same monthly pension benefits as male employees simply because women, as a class, live longer than men [*see Arizona Governing Committee v. Norris (1983) 463 U.S. 1073, 1082, 103 S. Ct. 3492, 77 L. Ed. 2d 1236* ; *Los Angeles, Dep't of Water & Power v. Manhart (1978) 435 U.S. 702, 711, 98 S. Ct. 1370, 55 L. Ed. 2d 657]* . Nor may a female be paid lower monthly benefits on that basis [*see Arizona Governing Committee v. Norris (1983) 463 U.S. 1073, 1081, 1085, 103 S. Ct. 3492, 77 L. Ed. 2d 1236* (classification of employees on basis of sex as no more permissible at pay-out stage of retirement plan than at pay-in stage)]. Title VII prohibits discrimination with respect to individuals [*see 42 U.S.C. § 2000e-2(a)*] and, thus, precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. Even a true generalization about a class is an insufficient reason for discrimination against an individual [*see Los Angeles Dep't of Water & Power v. Manhart (1978) 435 U.S. 702, 707-708, 98 S. Ct. 1370, 55 L. Ed. 2d 657]* .

[b] Benefit Eligibility

FEHC regulations and EEOC guidelines prohibit pension or retirement plans that, with respect to benefits, establish different optional or compulsory retirement ages based on sex or that otherwise differentiate in benefits on the basis of sex [*see 29 C.F.R. § 1620.11(f)* (EEOC guideline); *2 Cal. Code Reg. § 7291.1(b)(4)* (FEHC regulation)].

For example, cases have held that an employer may not maintain a retirement plan that requires female employees to retire at an earlier age than male employees [*see Bartmess v. Drewrys U.S.A., Inc. (7th Cir. 1971) 444 F.2d 1186, 1190 , cert. denied, 404 U.S. 939]* or that permits female employees to retire with a full pension at an earlier age and with shorter length of service than male employees [*see Rosen v. Public Service Electric and Gas Co. (3d Cir. 1973) 477 F.2d 90, 95]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationAge DiscriminationEmployment PracticesEarly Retirement IncentivesLabor & Employment LawDiscriminationAge DiscriminationEmployment PracticesPension BenefitsLabor & Employment LawDiscriminationGender & Sex DiscriminationEmployment PracticesCompensation

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11-115 California Forms of Pleading and Practice--Annotated § 115.34

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.34 Discharge and Layoff

[1] Applicable Law

FEHA, Title VII, the ADA, and the ADEA all prohibit discharges and layoffs based on membership in a protected classification [*see 42 U.S.C. §§ 2000e-2(a)* (Title VII), *12112(a)* (ADA); *29 U.S.C. § 623(a)(1)* (ADEA); *Gov. Code § 12940(a)* (FEHA); *see also 29 C.F.R. § 1630.4(b)* (EEOC regulations under ADA)]. Although employers may discharge employees for violating work rules [*see McDonald v. Santa Fe Trail Transp. Co. (1976) 427 U.S. 273, 283, 285, 96 S. Ct. 2574, 49 L. Ed. 2d 493]* , punitive action must not differentiate on the basis of any protected classification [*see EEOC v. Brown & Root (5th Cir. 1982) 688 F.2d 338, 340* (Title VII)].

Under California law, FEHA does not preempt other state laws, including the common law, that govern termination of employment, unless those provisions provide less protection than FEHA [*Rojo v. Kliger (1990) 52 Cal. 3d 65, 73-82, 276 Cal. Rptr. 130, 801 P.2d 373]* . Thus, for example, *Cal. Const., art. I, § 8*, which provides that no person may be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin, sets forth a fundamental public policy against employment discrimination, and may be the basis for a cause of action for wrongful termination in violation of public policy, independent of FEHA [*see Rojo v. Kliger (1990) 52 Cal. 3d 65, 89-91, 276 Cal. Rptr. 130, 801 P.2d 373* ; *Phillips v. St. Mary Reg'l Med. Ctr. (2002) 96 Cal. App. 4th 218, 230-238, 116 Cal. Rptr. 2d 770* (although employer was expressly exempt from FEHA, plaintiff alleging race and sex discrimination could rely on Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.*, and on *Cal. Const., art. I, § 8*, as sources of public policy to support claim of wrongful discharge in violation of public policy); *Blom v. N.G.K. Spark Plugs, Inc. (1992) 3 Cal. App. 4th 382, 386-388, 4 Cal. Rptr. 2d 139]* . In such a non-FEHA wrongful discharge action, exhaustion of the FEHA administrative remedies is not required [*Rojo v. Kliger (1990) 52 Cal. 3d 65, 88, 276 Cal. Rptr. 130, 801 P.2d 373]* .

PRACTICE TIP:

Wrongful Termination in Violation of Public Policy. Courts have uniformly held that any wrongful termination based on unlawful discrimination will provide a basis for a wrongful termination lawsuit in

violation of public policy. Generally, this is not a preferable remedy, however, since attorneys' fees are not provided for by statute. Nevertheless, it may be an alternative remedy worth pursuing in some cases.
By John H. Scott

[2] Disparate Treatment

Most discrimination cases involving discipline and discharge of individual employees involve "disparate treatment" [*see, e.g., Texas Dep't of Community Affairs v. Burdine (1981) 450 U.S. 248, 252-256, 101 S. Ct. 1089, 67 L. Ed. 2d 207* (Title VII); *McDonald v. Santa Fe Trail Transp. Co. (1976) 427 U.S. 273, 281-285, 96 S. Ct. 2574, 49 L. Ed. 2d 493* (*42 U.S.C. § 1981*; Title VII); *Flowers v. Crouch-Walker Corp. (7th Cir. 1977) 552 F.2d 1277, 1281-1282* (Title VII)]. Cases relating to general work force reductions may involve both "disparate treatment" and "disparate impact" [*see, e.g., Rose v. Wells Fargo & Co. (9th Cir. 1990) 902 F.2d 1417, 1424-1425* (ADEA)].

In workforce reduction cases involving "disparate treatment," a failure to establish that a plaintiff was replaced by a nonclass member with equal or inferior qualifications "is not necessarily fatal" [*Rose v. Wells Fargo & Co. (9th Cir. 1990) 902 F.2d 1417, 1421* (ADEA; adapting *McDonnell Douglas* test)]. Instead, the circumstances of the plaintiff's discharge may give rise to an inference of discrimination [*see Kelly v. Stamps.com, Inc. (2005) 135 Cal. App. 4th 1088, 1098-1099, 38 Cal. Rptr. 3d 240* (employer's invocation of right to downsize does not resolve whether employer had discriminatory motive for cutting back its work force or engaged in intentional discrimination when deciding which individual workers to retain and which to release)]. Such an inference does not arise, however, if the plaintiff's position and duties were completely eliminated [*see Rose v. Wells Fargo & Co. (9th Cir. 1990) 902 F.2d 1417, 1421-1422* (ADEA)]. Nor does it arise if a significant amount of the plaintiff's duties were transferred to others over a period of time prior to discharge [*Ewing v. Gill Industries (1992) 3 Cal. App. 4th 601, 608-613, 4 Cal. Rptr. 2d 640* (FEHA)].

If discipline or discharge involves a specific offense, a plaintiff may establish a prima facie case of disparate treatment by showing simply that he or she was discharged and that a person who did not belong to the same protected classification was retained under apparently similar circumstances [*see* EEOC v. Brown & Root (5th Cir. 1982) *688 F.2d 338, 340* (Title VII); *Green v. Armstrong Rubber Co. (5th Cir. 1980) 612 F.2d 967, 968 , cert. denied, 449 U.S. 879* (*42 U.S.C. § 1981*; Title VII)]. If a prima facie case is established, the burden shifts to the employer to articulate a legitimate nondiscriminatory reason for its action [*Green v. Armstrong Rubber Co. (5th Cir. 1980) 612 F.2d 967, 968 , cert. denied, 449 U.S. 879 (1980)]* . If the employer articulates such a reason, the employee must prove, by a preponderance of the evidence, that an employer's articulated reason for the discharge was a pretext for discrimination [*cf. Texas Dep't of Community Affairs v. Burdine (1981) 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207]* .

For discussion of the "disparate treatment" and "disparate impact" theories of liability, see *§ 115.23[2]* and*[4]*.

[3] Constructive Discharge

In some cases, a plaintiff may be constructively discharged because of unlawful discrimination. "Constructive discharge" refers to situations in which the law will treat an employee's resignation from his or her employment as equivalent to an involuntary termination. For example, a plaintiff who advances a Title VII hostile-environment constructive discharge claim must show working conditions so intolerable that a reasonable person would have felt compelled to resign. Harassment so intolerable as to cause resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts [*Pennsylvania State Police v. Suders (2004) 542 U.S. 129, 124 S. Ct. 2342, 2351-2355, 159 L. Ed. 2d 204, 216-220]* .

Under California law, a constructive discharge requires that the plaintiff show that a reasonable person faced with the alleged intolerable working conditions or employer actions would have had no reasonable alternative except to quit, and that the employer had actual, rather than merely constructive, knowledge of the intolerable conditions [*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1248-1251, 32 Cal. Rptr. 2d 223*]. A constructive discharge in violation

of a fundamental public policy gives rise to a tort cause of action in favor of the terminated employee [*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1252, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* ; *see* Ch. 249, *Employment Law: Termination and Discipline*].

It is not necessary that the plaintiff have completely resigned from the job. It is sufficient if the plaintiff establishes that, because of intolerable conditions, he or she needed to remove himself or herself from the job and thus was *effectively* constructively discharged. For example, assuming that the other elements of a plaintiff's claim are established, an employer will not be relieved of liability by the fact that the plaintiff did not actually quit his or her job, but rather took a disability retirement [*see* *Colores v. Board of Trustees (2003) 105 Cal. App. 4th 1293, 1316-1318, 130 Cal. Rptr. 2d 347]* .

The standard set forth by the FEHC requires that the employer intended to make the employee's working conditions so intolerable that the employee was forced to quit. This intent must be shown by demonstrating either a conscious purpose on the part of the employer, or that the employer knew or should have known that its actions were likely to cause a reasonable employee to quit [DFEH v. Rosenberg (1990) FEHC Dec. No. 90-09, p. 9; DFEH v. Livermore Joe's, Inc. (1990) FEHC Dec. No. 90-07, p. 17; DFEH v. County of Madera (1990) FEHC Dec. No. 90-03, p. 31].

Whatever rule is relied on, a finding of constructive discharge must be based on more than the fact of discrimination [*Clark v. Marsh (D.C. Cir. 1981) 665 F.2d 1168, 1173* (Title VII)]. There must be a "continuous pattern of discriminatory treatment" [*Satterwhite v. Smith (9th Cir. 1984) 744 F.2d 1380, 1382* (*42 U.S.C. § 1981*; racial slurs); *Valdez v. City of Los Angeles (1991) 231 Cal. App. 3d 1043, 1052-1053, 282 Cal. Rptr. 726* (discriminatory promotion system)].

PRACTICE TIP:

Constructive Discharge. Under California law, a constructive discharge can occur without discrimination [*see* *Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223, 876 P.2d 1022]* . Note too that constructive discharge cases are becoming more common and more complex. Often they will arise in a situation where an employee has gone out on a "stress" leave and is pursuing a workers' compensation claim or is on disability leave. Typically, the employee's ability to "return to work" will require some accommodation by the employer and the employee should make an effort to return to work with accommodation. Sometimes this may only involve a transfer. A doctor's recommendation regarding accommodation can be important in these cases. The fact that a physician is requesting certain accommodations that are not granted does not necessarily mean that the employee's decision to resign because of "intolerable conditions" is "reasonable." The employer's failure to accommodate a request by an employee's physician, however, is not necessarily dispositive. In other words, the final analysis is whether the employee's working conditions were so intolerable that he or she was forced to resign. This is subject to the "reasonable person" test and should normally go to a jury if there is evidence of "intolerable" working conditions. *By John H. Scott*

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationAge DiscriminationEmployment PracticesDischarges & Failures to HireLabor & Employment LawDiscriminationDisability DiscriminationEmployment PracticesDischarges & Failures to HireLabor & Employment LawDiscriminationGender & Sex DiscriminationEmployment PracticesDischargesLabor & Employment LawDiscriminationNational Origin DiscriminationEmployment PracticesDischargesLabor & Employment LawDiscriminationRacial DiscriminationEmployment PracticesDischarges

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 115 CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION
PART II. LEGAL BACKGROUND
C. Application of Equal Employment Opportunity Laws to Specific Employment Practices

11-115 California Forms of Pleading and Practice--Annotated § 115.35

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§ 115.35 Accommodation

[1] Physical and Mental Disabilities

[a] Scope of Employer's Duty to Accommodate

FEHA requires employers reasonably to accommodate the physical or mental disabilities of any applicant or employee unless the employer can demonstrate that such an accommodation would result in undue hardship to the operation of the business [*see Gov. Code § 12940(m)*; *see Nadaf-Rahrov v. Neiman-Marcus Group, Inc. (2008) 166 Cal. App. 4th 952, 977, 83 Cal. Rptr. 3d 190* (employer is liable under *Gov. Code § 12940(m)* for failing to accommodate employee only if work environment could have been modified or adjusted in manner that would have enabled employee to perform essential functions of job)]. It is an unlawful employment practice for an employer to fail to engage in a timely, good-faith interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or medical condition [*Gov. Code § 12940(n)*; *see Gov. Code § 12926.1(e)* (legislative statement affirming importance of interactive process between applicant or employee and employer in determining reasonable accommodation, as that requirement has been articulated by EEOC in interpreting ADA)]. However, to prevail on a claim that the employer failed to engage in the interactive process, the employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred [*Scotch v. Art Inst. of Cal.-Orange County (2009) 173 Cal. App. 4th 986, 1018-1019, 93 Cal. Rptr. 3d 338* (unless, after litigation with full discovery, employee identifies reasonable accommodation that was objectively available when interactive process should have occurred, he or she has suffered no remediable injury from any violation of employer's duty to engage in interactive process); *Nadaf-Rahrov v. Neiman-Marcus Group, Inc. (2008) 166 Cal. App. 4th 952, 982, 83 Cal. Rptr. 3d 190* (employer is not liable under *Gov. Code § 12940(n)* for failing to engage in interactive process if no reasonable accommodation was possible)].

FEHA's definition of "disability" includes "[b]eing regarded or treated by the employer ... as having, or having had" a qualifying mental or physical condition [*Gov. Code § 12926(i)(4), (5), (k)(4), (5)*]. The employer's duty under FEHA to

accommodate and to engage in a good-faith interactive process to determine reasonable accommodations applies whether the applicant or employee is actually disabled or is "regarded as" disabled [*Gelfo v. Lockheed Martin Corp. (2006) 140 Cal. App. 4th 34, 54-62, 43 Cal. Rptr. 3d 874]* .

FEHA defines reasonable accommodation as either of the following: (1) making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities; or (2) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities [*Gov. Code § 12926(n)*]. If more than one effective accommodation is possible, the employer is not obligated to choose the best one or the one requested by the employee; rather, the employer has discretion to choose the least expensive or most convenient effective accommodation [*Hanson v. Lucky Stores (1999) 74 Cal. App. 4th 215, 228, 87 Cal. Rptr. 2d 487]* .

The duty to provide a reasonable accommodation ordinarily does not obligate an employer that has temporarily restructured an employee's position to transform that accommodation into a permanent position once the employee's temporary disability becomes permanent [*Raine v. City of Burbank (2006) 135 Cal. App. 4th 1215, 1224, 37 Cal. Rptr. 3d 899* ; *Watkins v. Ameripride Servs. (9th Cir. 2004) 375 F.3d 821, 828]* . Thus, although reasonable accommodation for an employee with a permanent disability would include job reassignment if a vacant position exists, the employer is not required to create a new position to accommodate that employee [*Raine v. City of Burbank (2006) 135 Cal. App. 4th 1215, 1227, 37 Cal. Rptr. 3d 899* (municipal employer not required to reclassify light-duty front-desk position from civilian position to sworn-officer position to accommodate officer whose disability has become permanent)]. In such a case, the creation of a new position just for the employee with a disability would not be a *reasonable* accommodation--at least when the employer does not regularly offer such assistance--and so would not be required by FEHA, even if creating a new position would not impose an undue hardship on the employer [*Raine v. City of Burbank (2006) 135 Cal. App. 4th 1215, 1227-1228, 37 Cal. Rptr. 3d 899]* .

When reassignment to a different position is necessary to accommodate an employee, it is not sufficient for the employer simply to advise the employee to check a job listing. Rather, the employer has a duty to take some kind of affirmative action, and the employer is relieved of such a duty only if reassignment would impose an undue hardship on the employer or if there is no vacant position for which the employee is qualified [*Spitzer v. Good Guys (2000) 80 Cal. App. 4th 1376, 1388-1390, 96 Cal. Rptr. 2d 236]* .

FEHA does not require an employer to accommodate an employee's medical use of marijuana by waiving the employer's policy requiring negative drug tests for new employees. The Compassionate Use Act of 1996 (Proposition 215) exempts certain medical users of marijuana from criminal liability under two specific California statutes [*see Health & Safety Code § 11362.5(d)* (providing defense against prosecution under *Health & Safety Code §§ 11357, 11358* for person who possesses or cultivates marijuana for medical purposes on recommendation or approval of physician)]. However, marijuana possession remains illegal under federal law, even for medical use [*21 U.S.C. §§ 812, 844(a)*; *Gonzales v. Raich (2005) 545 U.S. 1, 26-29, 125 S. Ct. 2195, 162 L. Ed. 2d 1*]. Moreover, the Compassionate Use Act is limited in scope: it merely exempts medical users and their primary caregivers from criminal liability under two specified state statutes, and it does not address the rights and obligations of employers and employees. Therefore, Compassionate Use Act cannot be read as requiring employers to accommodate medical marijuana use [*Ross v. RagingWire Telecommunications, Inc. (2008) 42 Cal. 4th 920, 932-933, 174 P.3d 200*].

Title VII does not prohibit disability discrimination or require accommodation. The ADA [*42 U.S.C. § 12101 et seq.*], which prohibits employment discrimination based on disability [*see 42 U.S.C. §§ 12111(2), 12112*], the Rehabilitation Act of 1973 [*29 U.S.C. § 701 et seq.*], which applies to federal contractors and recipients of federal funds [*see 29 U.S.C. §§ 793, 794*], and the Vietnam Era Veterans Readjustment Assistance Act of 1974 [VEVRAA; *38 U.S.C. § 4211 et seq.*], which covers federal contractors [*see 38 U.S.C. § 4212*], are the principal federal statutes that proscribe discrimination based on disability and require accommodation.

The ADA's definition of "disability" includes "being regarded as having" a qualifying impairment. An individual meets this requirement if he or she has been subjected to an action prohibited under the ADA because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity [*42 U.S.C. § 12102(3)(A)*]. However, this requirement does not apply to impairments that are transitory (i.e., with an actual or expected duration of six months or less) and minor [*42 U.S.C. § 12102(3)(B)*].

Once an employer becomes aware of the need for accommodation, the ADA imposes a mandatory obligation on the employer to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations [*Barnett v. U.S. Air, Inc. (9th Cir. 2000) 228 F.3d 1105, 1114* (en banc), *rev'd on other grounds, US Airways, Inc. v. Barnett (2002) 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589* ; *see US Airways, Inc. v. Barnett (2002) 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589, 605-606* (Stevens, J., concurring) (Ninth Circuit's holding that ADA imposes mandatory obligation to engage in interactive process was left undisturbed by Supreme Court's decision); *see also 29 C.F.R. § 1630.2(o)(3)*]. This obligation extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or when the employer is aware that the initial accommodation is failing and further accommodation is needed [*Humphrey v. Memorial Hosps. Ass'n (9th Cir. 2001) 239 F.3d 1128, 1137-1138]* . However, the ADA requires only *reasonable* accommodation. For example, an unpaid leave of absence may be a reasonable accommodation if it does not pose an undue hardship on the employer [*Nunes v. Wal-Mart Stores, Inc. (9th Cir. 1999) 164 F.3d 1243, 1247]* .

On the other hand, an employer ordinarily need not offer an accommodation that would violate the employer's bona fide, established seniority rules (whether those seniority rules were unilaterally adopted by the employer or were the result of collective bargaining). An accommodation that requires violating seniority rules is unreasonable as a matter of law, unless there are special circumstances that make it reasonable in a particular case [*US Airways, Inc. v. Barnett (2002) 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589, 597-598* (showing that requested accommodation conflicts with employer's unilaterally adopted seniority rules entitles employer to summary judgment, unless employee shows special circumstances making exception to seniority rules reasonable in particular case); *Willis v. Pac. Mar. Ass'n (9th Cir. 2001) 244 F.3d 675, 680-682* (accommodation that would require violation of bona fide seniority system maintained under terms of collective bargaining agreement is per se unreasonable)].

The employee's failure to participate in the interactive process may relieve the employer of the duty to engage in further attempts to identify and implement a reasonable accommodation. For example, if the employee requests an accommodation in the form of a job that, according to the existing medical documentation, he or she is not qualified to perform, the employee's failure to submit documentation of improved medical condition relieves the employer of any further obligation to investigate the appropriateness of the requested accommodation. Similarly, if the employee does not cooperate in skills testing to determine whether he or she is qualified for certain positions, the employer need not engage in a further job search for the employee [*Allen v. Pac. Bell (9th Cir. 2003) 348 F.3d 1113, 1116 (ADA)]* . The employee's obligation to participate in the interactive process of determining a reasonable accommodation ends when the employer and employee agree on a reasonable accommodation. At that point, the employer must provide the agreed-upon accommodation, and a failure to provide the accommodation will not be excused by an alleged failure by the employee to continue participating in an interactive process [*A.M. v. Albertsons, LLC (2009) 178 Cal. App. 4th 455, 463-464, 100 Cal. Rptr. 3d 449]* .

For more detailed discussion relating to the scope and application of the ADA, the Rehabilitation Act, and the VEVRAA, see K. Wilcox, ed., California Employment Law, Chs. 40, 41 (Matthew Bender).

For a form of allegation of failure to accommodate an employee's physical or mental disability, for use in a civil complaint under FEHA, see *§ 115.92*. For a form of affirmative defense alleging that accommodation of an employee's disability would impose undue hardship on the employer, see *§ 115.100*.

PRACTICE TIP:

Accommodation Issues and Worker's Compensation Claims. Accommodation issues can often interface with a worker's compensation claim. When that occurs it is very important to coordinate with the worker's compensation attorney. In some cases the worker's compensation remedies may be more certain or, in some ways, better than whatever remedy could come out of a discrimination claim. For example, vocational rehabilitation and "future medicals" are remedies that can be of extreme value to persons with career ending injuries that are job related. In addition, it is important to carefully review any settlement agreement in these cases to ensure that a worker's compensation settlement is not "waiving" or "releasing" other claims [*see Jefferson v. California Dep't of Youth Authority (2002) 28 Cal. 4th 299, 305-306, 121 Cal. Rptr. 2d 391, 48 P.3d 423]* (general release of all claims in workers' compensation proceeding ordinarily bars subsequent litigation of FEHA claim); *but see Claxton v. Waters (2004) 34 Cal. 4th 367, 376, 18 Cal. Rptr. 3d 246, 96 P.3d 496* (standard language of mandatory preprinted form used in settling workers' compensation claims [*see 8 Cal. Code Reg. § 10874*] releases only those claims that are within scope of workers' compensation system); *see also § 115.54[8]*]. On the other hand, it is also important when settling a "discrimination" claim to make sure you are not releasing or waiving (unknowingly) a potential worker's compensation remedy. *By John H. Scott*

[b] Notice to Employer of Disability

The employee generally bears the initial burden of notifying the employer of the disability, which then triggers the employer's obligation to participate with the employee in an effort to determine a reasonable accommodation [*Spitzer v. Good Guys (2000) 80 Cal. App. 4th 1376, 1384-1385, 96 Cal. Rptr. 2d 236]* . The key factor, however, is the employer's knowledge; if an employer knows of an employee's disability, the employer has an affirmative duty to accommodate, even if the employee does not request specific accommodation [*Prilliman v. United Air Lines (1997) 53 Cal. App. 4th 935, 950-951, 62 Cal. Rptr. 2d 142]* .

[c] Prima Facie Case of Failure to Accommodate Physical and Mental Disabilities

An employee establishes a prima facie case of failure to accommodate by proving (1) that he or she is qualified for the position (i.e., that he or she can, with reasonable accommodation, perform the essential functions of the job) [*see Gov. Code § 12940(a)(1)*; *Green v. State (2007) 42 Cal. 4th 254, 260-263, 64 Cal. Rptr. 3d 390, 165 P.3d 118* (employee has burden of establishing his or her ability, with reasonable accommodation, to perform essential functions); *Quinn v. City of Los Angeles (2000) 84 Cal. App. 4th 472, 480-484, 100 Cal. Rptr. 2d 914* (plaintiff police officer could not establish prima facie cause of action for failure to accommodate hearing disability because that disability disqualified plaintiff for employment as police officer)], (2) that he or she is disabled within the meaning of FEHA [*see § 115.22[8]*], and (3) that the employer has failed to accommodate the disability [*see A.M. v. Albertsons, LLC (2009) 178 Cal. App. 4th 455, 465, 100 Cal. Rptr. 3d 449* (single instance of failure to accommodate may be sufficient to establish violation)]. The burden is then on the employer to produce evidence demonstrating that it has not discriminated, by establishing that the accommodation would impose an undue hardship on its operations, for example [*see* [d], *below*]. The employee must then have a fair opportunity to prove that the reason given for failing to accommodate is a pretext for discrimination [*County of Fresno v. FEHC (1991) 226 Cal. App. 3d 1541, 1553, 277 Cal. Rptr. 557]* .

If the employee is disabled, the employee will withstand a motion for summary judgment on the failure-to-accommodate issue unless the employer establishes through undisputed facts that (1) reasonable accommodation was offered and refused; (2) there simply was no vacant position within the employer's organization for which the employee was qualified and that the employee was capable of performing, with or without accommodation; or (3) the employer did everything in its power to find a reasonable accommodation, but the informal, interactive process broke down because the employee failed to engage in discussions in good faith [*Jensen v. Wells Fargo Bank (2000) 85 Cal. App. 4th 245, 263, 102 Cal. Rptr. 2d 55]* . On the other hand, when the undisputed facts show that the

employer's accommodation is reasonable as a matter of law (even if insufficient to permit the employee to retain his or her position), the employee has not established a prima facie case [*Gosvener v. Coastal Corp. (1996) 51 Cal. App. 4th 805, 813]* .

In a failure-to-accommodate claim under the ADA, an employee with a qualifying disability has the initial burden of showing that the requested accommodation seems reasonable on its face (i.e., ordinarily, or in the run of cases). Once the employee has made this showing, the employer must show special circumstances demonstrating that the accommodation would impose an undue hardship on the employer's business [*US Airways, Inc. v. Barnett (2002) 535 U.S. 391, 402, 122 S. Ct. 1516, 152 L. Ed. 2d 589* ; *see 42 U.S.C. § 12112(a),(b)(5)(A)*]. The employer's showing typically will be based on case-specific circumstances. However, if the employee's requested accommodation would violate the employer's seniority rules, the employer need not introduce case-specific circumstances. Because ordinarily it would be unreasonable to require a violation of seniority rules, the employer need only establish that the requested accommodation would violate bona fide, established seniority rules. When the employer makes this showing, the burden shifts back to the employee to show case-specific special circumstances that make a violation of seniority rules reasonable in the particular case. If the employee fails to meet this burden, the requested accommodation is unreasonable as a matter of law, and the employer will be entitled to summary judgment [*US Airways, Inc. v. Barnett (2002) 535 U.S. 391, 402-406, 122 S. Ct. 1516, 152 L. Ed. 2d 589* (same analysis applies whether seniority rules are unilaterally adopted by employer or result of collective bargaining)]. Special circumstances that might make it reasonable to violate seniority rules include cases in which the employer has frequently exercised a retained right to make unilateral changes in the seniority rules, or in which the seniority system already has multiple exceptions [*US Airways, Inc. v. Barnett (2002) 535 U.S. 391, 405-406, 122 S. Ct. 1516, 152 L. Ed. 2d 589]* .

[d] Undue Hardship

FEHA expressly excuses employers from reasonable accommodation if accommodation imposes an undue hardship [*Gov. Code § 12940(m)*]. The employer has the burden of "demonstrating" that a particular accommodation would produce undue hardship to its operation [*see Gov. Code § 12940(m)*].

FEHA defines "undue hardship" to mean an action requiring significant difficulty or expense when considered in light of all of the following factors [*Gov. Code § 12926(s)*]:

- The nature and cost of the accommodation needed;

- The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations on the operation of the facility;

- The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities;

- The type of operations, including the composition, structure, and functions of the workforce of the entity; and

- The geographic separateness and administrative or fiscal relationship of the facility or facilities.

In addition, an employer is not liable for refusing to hire or for discharging an employee with a physical or mental disability or medical condition if the employee is unable to perform his or her "essential duties" with reasonable accommodations, or cannot perform them without endangering the health or safety of himself or herself or others, even with reasonable accommodation [*Gov. Code § 12940(a)(1),(2)*; *see Gov. Code § 12926(f)* (definition of "essential functions"); *see also* discussion in*§ 115.54[6]*].

The ADA also provides for the defense of undue hardship with respect to its accommodation requirements [*see 42 U.S.C. §§ 12111(10)* (undue hardship defined), *12112(b)(5)(A)* (accommodation required except on showing of undue hardship); *see also 29 C.F.R. §§ 1630.2(p)* (undue hardship defined), *1630.9(a)* (accommodation required except on showing of undue hardship), *1630.15(d)* (undue hardship as a defense)].

[2] Religion

[a] Scope of Employer's Duty to Accommodate

FEHA and Title VII require an employer to accommodate an individual's religious beliefs and practices, unless accommodation would impose an undue hardship on the employer [*see 42 U.S.C. § 2000e(j)* (Title VII); *Gov. Code § 12940* (*l*) (FEHA); *see also 29 C.F.R. § 1605.2(c)(1)* (refusal to accommodate is justified only when employer can demonstrate that undue hardship would result from each available accommodation alternative); *Toledo v. Nobel-Sysco, Inc. (10th Cir. 1989) 892 F.2d 1481, 1490 , cert. denied, 495 U.S. 948 (1990)* (Title VII; employer may prevail without making efforts to accommodate if it shows no accommodation could have been made without undue hardship)]. Failure reasonably to accommodate, absent undue hardship, is an unlawful employment practice [*Trans World Airlines v. Hardison (1977) 432 U.S. 63, 74, 97 S. Ct. 2264, 53 L. Ed. 2d 113* (Title VII); *29 C.F.R. § 1605.2(b)* (EEOC guideline)].

For example, an employer may reasonably accommodate under FEHA by allowing lateral transfers or changes of job assignments [*see Cook v. Lindsay Olive Growers (9th Cir. 1990) 911 F.2d 233, 241* ; *see also Gov. Code § 12940* (*l*); *2 Cal. Code Reg. § 7293.3(a)*].

[b] Notice to Employer and Employee's Duty to Cooperate

Under Title VII, the accommodation duty arises after an employee or prospective employee notifies an employer of his or her need for religious accommodation [*see 29 C.F.R. § 1605.2(c)(1)*]. The burden is then on the employer to undertake initial steps toward accommodation [*EEOC v. Townley Engineering & Mfg. Co. (9th Cir. 1988) 859 F.2d 610, 614-615 , cert. denied, 489 U.S. 1077 (1989)* ; *Proctor v. Consolidated Freightways Corp. (9th Cir. 1986) 795 F.2d 1472, 1475* ; *Anderson v. General Dynamics Convair Aerospace Div. (9th Cir. 1978) 589 F.2d 397, 401 , cert. denied, 442 U.S. 921 (1979)* ; *see also Toledo v. Nobel-Sysco, Inc. (10th Cir. 1989) 892 F.2d 1481, 1488 , cert. denied, 495 U.S. 948 (1990)* (employer must attempt accommodation before taking adverse action against employee)].

An employee is under no burden to propose specific means of accommodation [*see Brener v. Diagnostic Center Hospital (5th Cir. 1982) 671 F.2d 141, 145]* . However, the employee does have a duty to cooperate with the measures suggested by the employer [*Brener v. Diagnostic Center Hospital (5th Cir. 1982) 671 F.2d 141, 145* ; *Yott v. North American Rockwell Corp. (9th Cir. 1979) 602 F.2d 904, 908 , cert. denied, 445 U.S. 928 (1980)* ; *see 29 C.F.R. § 1605.2(c)(2)* (factors examined by EEOC to determine whether accommodation offered is reasonable when more than one method of accommodation available that would not cause undue hardship)]. The employee's duty to cooperate arises only *after* the employer has made its suggestions of possible accommodations, and if the employer does not make an effort to accommodate the employer prior to taking adverse action against the employee, the employee's duty of cooperation does not arise [*Heller v. EBB Auto Co. (9th Cir. 1993) 8 F.3d 1433, 1440-1441]* .

If both the employee and the employer propose a reasonable accommodation, the employer is not required to accept the employee's proposal [*see Ansonia Bd. of Educ. v. Philbrook (1986) 479 U.S. 60, 68, 107 S. Ct. 367, 93 L. Ed. 2d 305]* . However, if the employer's proposal does not eliminate the employee's religious conflict, the employer must either accept the employee's proposal or demonstrate that the proposal would cause an undue hardship [*EEOC v. Townley Engineering & Mfg. Co. (9th Cir. 1988) 859 F.2d 610, 615 , cert. denied, 489 U.S. 1077 (1989)]* .

For further discussion relating to specific religious conflicts that may arise, see K. Wilcox, ed., California Employment Law, Ch. 41 (Matthew Bender).

For a form of allegation of failure to accommodate an employee's religious beliefs or practices, for use in a civil complaint under FEHA, see *§ 115.91*.

[c] Prima Facie Case of Failure to Accommodate

Under Title VII, a plaintiff may establish a prima facie case of failure to accommodate by pleading and proving that (1) he or she has a bona fide religious belief [*see* discussion in *§ 115.22[6]*], (2) he or she informed the employer of the belief and that it conflicted with his or her employment responsibilities, and (3) an adverse employment action was taken against the plaintiff because of his or her observance of that belief [*see EEOC v. Hacienda Hotel (9th Cir. 1989) 881 F.2d 1504, 1512* ; *Proctor v. Consolidated Freightways Corp. (9th Cir. 1986) 795 F.2d 1472, 1475* ; *see also Tiano v. Dillard Department Stores (9th Cir. 1998) 139 F.3d 679, 682-683* (prima facie case includes proof that temporal mandate was part of employee's bona fide religious belief, if employee contends that his or her belief required attendance at particular time and place, such as at particular pilgrimage)].

The burden then shifts to the employer to show that it made good faith efforts to accommodate the employee's religious beliefs [*see EEOC v. Hacienda Hotel (9th Cir. 1989) 881 F.2d 1504, 1512* ; *Proctor v. Consolidated Freightways Corp. (9th Cir. 1986) 795 F.2d 1472, 1475* ; *Bhatia v. Chevron U.S.A. (9th Cir. 1984) 734 F.2d 1382, 1383* ; *Anderson v. General Dynamics Convair Aerospace Div. (9th Cir. 1978) 589 F.2d 397, 401 , cert. denied, 442 U.S. 921 (1979)]* .

If the employer's efforts to accommodate were unsuccessful, the employer must demonstrate that it was unable to reasonably accommodate without undue hardship [*Proctor v. Consolidated Freightways Corp. (9th Cir. 1986) 795 F.2d 1472, 1475* ; *Brener v. Diagnostic Center Hospital (5th Cir. 1982) 671 F.2d 141, 144* ; *see 42 U.S.C. § 2000e(j)*; *see also EEOC v. Hacienda Hotel (9th Cir. 1989) 881 F.2d 1504, 1512]* .

If the employer shows that it provided reasonable accommodation, however, it need not further show that each alternative accommodation would result in undue hardship [*see Ansonia Bd. of Educ. v. Philbrook (1986) 479 U.S. 60, 68, 107 S. Ct. 367, 93 L. Ed. 2d 305* ; *Hudson v. Western Airlines (9th Cir. 1988) 851 F.2d 261, 266]* .

If the employer does not suggest a reasonable method of accommodation, but the employee does, the employer must establish that the employee's suggestions for accommodation were not feasible [*Opuku-Boateng v. State of California (9th Cir. 1996) 95 F.3d 1461, 1469-1472 , cert. denied, 520 U.S. 1228 (1997)]* .

[d] Undue Hardship

The burden of proving undue hardship is on the employer [*see Bhatia v. Chevron U.S.A. (9th Cir. 1984) 734 F.2d 1382, 1383* (Title VII); *Brener v. Diagnostic Center Hospital (5th Cir. 1982) 671 F.2d 141, 144* (Title VII); *Anderson v. General Dynamics Convair Aerospace Div. (9th Cir. 1978) 589 F.2d 397, 401 , cert. denied, 442 U.S. 921 (1979)* (Title VII)].

To show undue hardship, there must be proof of actual imposition on coworkers or disruption of the work routine [*see Peterson v. Hewlett-Packard Co. (9th Cir. 2004) 358 F.3d 599, 606-608* (accommodation of employee's religious beliefs by allowing employee to post offensive messages directed at homosexual coworkers, or by excluding sexual orientation from employer's workplace diversity program, would constitute undue hardship by inhibiting employer's efforts to attract and retain qualified, diverse work force)]. Merely conceivable or hypothetical hardship, such as "spiritual hardship" [*see EEOC v. Townley Engineering & Mfg. Co. (9th Cir. 1988) 859 F.2d 610, 615 , cert. denied, 489 U.S. 1077 (1989)]* , morale problems or unsubstantiated conclusions that other employees would inundate the employer with requests for shift changes [*Opuku-Boateng v. State of California (9th Cir. 1996) 95 F.3d 1461,*

1469-1472 , cert. denied, 520 U.S. 1228 (1997)] , or possible increased liability [*see Toledo v. Nobel-Sysco, Inc. (10th Cir. 1989) 892 F.2d 1481, 1492 , cert. denied, 495 U.S. 948 (1990)]* , is insufficient.

Accommodation requiring the employer to bear more than a *de minimis* cost constitutes an undue hardship [*see Trans World Airlines v. Hardison (1977) 432 U.S. 63, 84, 97 S. Ct. 2264, 53 L. Ed. 2d 113* (costs involving lost efficiency or payment of higher wages were more than "de minimis"); *see also 29 C.F.R. § 1605.2(e)(1)* (EEOC guideline; determination of "de minimis" costs)].

FEHC regulations provide that, in determining undue hardship, the factors that may be considered include, but are not limited to, the following [*see 2 Cal. Code Reg. § 7293.3(b)*]:

- The size of the relevant establishment or facility with respect to the number of employees, the size of budget, and other such matters;

- The overall size of the employer or other covered entity with respect to the number of employees, number and type of facilities, and size of budget;

- The type of the establishment's or facility's operation, including the composition and structure of the workforce or membership;

- The type of the employer's or other covered entity's operation, including the composition and structure of the workforce or membership;

- The nature and cost of the accommodation involved;

- Reasonable notice to the employer or other covered entity of the need for accommodation; and

- Any available reasonable alternative means of accommodation.

Title VII permits an employer to operate a bona fide seniority system, provided that differences in treatment of employees under the system are not the result of an intent to discriminate because of religion or other impermissible grounds [*42 U.S.C. § 2000e-2(h)*]. However, the existence of a seniority system that complies with Title VII does not relieve the employer of the duty to reasonably accommodate its employees' religious beliefs, unless the accommodation cannot be accomplished without disrupting the seniority system or imposing more than a *de minimis* hardship on the employer [*Balint v. Carson City (9th Cir. 1999) 180 F.3d 1047, 1053-1054* (en banc)]. For example, it is an undue hardship to require an employer to accommodate an employee's religious need for time off if the only alternatives are to leave the employer short-handed or to infringe on the seniority system (by requiring a more senior employee to work in violation of his or her right to shift preference under the seniority system) [*Trans World Airlines v. Hardison (1977) 432 U.S. 63, 80-81, 97 S. Ct. 2264, 53 L. Ed. 2d 113* (collective bargaining agreement established seniority system); *see 29 C.F.R. § 1605.2(e)(2)*].

For a form of affirmative defense alleging that accommodation of an employee's religious beliefs or practices would impose undue hardship on the employer, see *§ 115.91*.

[3] Pregnancy

FEHA requires employers to make reasonable accommodations, for employees who request them, with the advice of health care providers, for pregnancy, childbirth, or related medical conditions [*Gov. Code § 12945(b)(1)*].

Also, FEHA requires employers who have a policy, practice, or collective bargaining agreement authorizing or

requiring the transfer of temporarily disabled employees to less strenuous or hazardous positions, also to transfer temporarily disabled pregnant employees to less strenuous or hazardous positions for the duration of the disability if the employee so requests [*Gov. Code § 12945(b)(2)*]. If the employer does not have such a policy, practice, or collective bargaining agreement provision, it is required to transfer a pregnant employee to a less strenuous or hazardous position for the duration of her pregnancy if the employee so requests, with the advice of her physician, and if the transfer can be reasonably accommodated [*see Gov. Code § 12945(b)(3)*]. However, employers are not required to meet this requirement by creating additional employment that would not otherwise have been created, by discharging any employee, by transferring any employee with more seniority, or by promoting any employee who is not qualified to perform the job [*see Gov. Code § 12945(b)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationDisability DiscriminationReasonable AccommodationGeneral OverviewLabor & Employment LawDiscriminationDisability DiscriminationReasonable AccommodationUndue HardshipLabor & Employment LawDiscriminationReligious DiscriminationDefenses & ExceptionsReasonable Accommodation & Undue Hardship

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 115 CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION
PART II. LEGAL BACKGROUND
C. Application of Equal Employment Opportunity Laws to Specific Employment Practices

11-115 California Forms of Pleading and Practice--Annotated § 115.36

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§ 115.36 Harassment

[1] Scope of Protection

[a] Acts Constituting Harassment

FEHA prohibits harassment of employees or applicants based on any classification protected by FEHA [*Gov. Code § 12940(j)*; *see 2 Cal. Code Reg. § 7287.6(b)(2)*; DFEH v. Livermore Joe's, Inc. (1990) FEHC Dec. No. 90-07, p. 12 (sexual harassment as discrimination "because of sex"); DFEH v. County of Madera (1990) FEHC Dec. No. 90-03, p. 19 (same)]. Federal equal employment opportunity statutes contain no express proscription against harassment, but the Supreme Court has held that harassment based on protected classifications violates Title VII [*see Burlington Industries v. Ellerth (1998) 524 U.S. 742, 764-765, 118 S. Ct. 2257, 141 L. Ed. 2d 633* ; *Faragher v. City of Boca Raton (1998) 524 U.S. 775, 780, 118 S. Ct. 2275, 141 L. Ed. 2d 662* ; *Harris v. Forklift Systems (1993) 510 U.S. 17, 21-23, 114 S. Ct. 367, 126 L. Ed. 2d 295* ; *Meritor Savings Bank v. Vinson (1986) 477 U.S. 57, 64-67, 106 S. Ct. 2399, 91 L. Ed. 2d 49]* .

Harassment includes, but is not limited to [*2 Cal. Code Reg. § 7287.6(b)(1)*]:

- Verbal harassment (for example, epithets, derogatory comments, or slurs);
- Physical harassment (for example, assault, impeding or blocking movement, or any interference with normal work or movement);
- Visual forms of harassment (for example, derogatory posters, cartoons, or drawings); and
- Sexual favors (for example, unwanted sexual advances that condition an employment benefit on an exchange of sexual favors).

Harassment is generally concerned with the message conveyed to an employee, and therefore with the social environment of the workplace, while discrimination is concerned with explicit changes in the terms or conditions of employment [*compare Gov. Code § 12940(j)(1)* (making it unlawful for employer "to harass" employee on basis of protected classification) *with Gov. Code § 12940(a)* (making it unlawful for employer "to discriminate [against employee] in compensation or in terms, conditions, or privileges of employment" on basis of protected classification)]. However, although harassment and discrimination are separate wrongs, they are sometimes closely interrelated and even overlapping, particularly with regard to proof. Thus, in some cases the hostile message that constitutes the harassment is conveyed through official employment actions, and therefore evidence that would otherwise be associated with a discrimination claim can form the basis of a harassment claim [*Roby v. McKesson Corp. (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749* ("[I]n analyzing the sufficiency of evidence in support of a harassment claim, there is no basis for excluding evidence of biased personnel management actions so long as that evidence is relevant to prove the communication of a hostile message.")].

Employers must take all reasonable steps to prevent harassment [*see Gov. Code § 12940(j),(k)*; *see* [6], *below*].

For a form of allegation of harassment, for use in a civil complaint under FEHA, see *§ 115.93*.

[b] Loss of Tangible Benefits

Loss of tangible benefits is not necessary to establish unlawful harassment [*Gov. Code § 12940(j)(1)*]. Thus, hostile or unwelcome sex-linked conduct that deprives an employee of a work environment free of harassment is unlawful, whether or not the conduct also results in the loss of some more tangible employment benefit, such as promotion, a pay increase, or employment itself [DFEH v. Rosenberg (1990) FEHC Dec. No. 90-09, p. 6; DFEH v. Livermore Joe's, Inc. (1990) FEHC Dec. No. 90-07, p. 12; *see 2 Cal. Code Reg. 7287.6(b)*].

Harassment may cause adverse employment decisions and the loss of tangible employment benefits [*see, e.g.*, *Bundy v. Jackson (D.C. Cir. 1981) 641 F.2d 934, 948-953]* , but it may also be unlawful even in the absence of economic loss if it creates a hostile work environment [*Burlington Industries v. Ellerth (1998) 524 U.S. 742, 764-765, 118 S. Ct. 2257, 141 L. Ed. 2d 633* ; *Faragher v. City of Boca Raton (1998) 524 U.S. 775, 807-808, 118 S. Ct. 2275, 141 L. Ed. 2d 662* ; *Meritor Savings Bank v. Vinson (1986) 477 U.S. 57, 64-67, 106 S. Ct. 2399, 91 L. Ed. 2d 49]* .

[2] Liability for Harassment

[a] Employer Liability for Supervisors and Agents

Under FEHA, employers are strictly liable for the harassing conduct of their agents and supervisors [*State Dep't of Health Servs. v. Superior Court (2003) 31 Cal. 4th 1026, 1040-1041, 6 Cal. Rptr. 3d 441, 79 P.3d 556* (hostile environment sexual harassment); *Kelly-Zurian v. Wohl Shoe Co. (1994) 22 Cal. App. 4th 397, 415-416, 27 Cal. Rptr. 2d 457* ; *Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal. App. 3d 590, 608 n.6, 262 Cal. Rptr. 842]* . In this context, a "supervisor" is an individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if the exercise of that authority is not of a merely routine or clerical nature but requires the use of independent judgment [*Gov. Code § 12926(r)*; *see* *Chapman v. Enos (2004) 116 Cal. App. 4th 920, 928-931, 10 Cal. Rptr. 3d 852* (trial court errs in instructing jury that to be deemed supervisor, individual must be fully accountable and responsible for employee's performance and work product)].

An employer is not liable, however, for off-duty, off-premises harassment by a supervisor if the facts show no sufficient nexus between the supervisor's conduct and his or her employment [*Myers v. Trendwest Resorts, Inc. (2007) 148 Cal. App. 4th 1403, 1421, 56 Cal. Rptr. 3d 501* (to avoid strict liability for supervisor's actions under FEHA, harassment must result from completely private relationship unconnected with employment; otherwise, employer is strictly liable

for supervisor's actions, regardless of whether supervisor acted as employer's agent); *Capitol City Foods v. Superior Court (1992) 5 Cal. App. 4th 1042, 1047-1050, 7 Cal. Rptr. 2d 418]* .

Under Title VII, an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with authority over the employee. If no tangible employment action is taken against the employee in conjunction with the harassment, the defending employer may raise an affirmative defense, subject to proof by a preponderance of the evidence. The defense comprises the following two necessary elements [*Burlington Industries v. Ellerth (1998) 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L. Ed. 2d 633* ; *Faragher v. City of Boca Raton (1998) 524 U.S. 775, 807-808, 118 S. Ct. 2275, 141 L. Ed. 2d 662]* :

- That the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and

- That the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment [*Burlington Industries v. Ellerth (1998) 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L. Ed. 2d 633* ; *Faragher v. City of Boca Raton (1998) 524 U.S. 775, 807-808, 118 S. Ct. 2275, 141 L. Ed. 2d 662]* . Also, a tangible employment action for this purpose occurs when the supervisor threatens the employee with discharge and, in order to avoid the discharge, the employee complies with the supervisor's demands that the employee engage in sexual activity [*Holly D. v. Cal. Inst. of Tech. (9th Cir. 2003) 339 F.3d 1158, 1167-1173]* . For further discussion, see *§ 115.54[3]*; *see also* K. Wilcox, ed., California Employment Law, Ch. 41 (Matthew Bender).

A constructive discharge (i.e., an abusive working environment so intolerable that the employee's resignation qualifies as a fitting response) does not by itself constitute a tangible employment action for this purpose. Thus, if a Title VII plaintiff alleges that he or she was constructively discharged, the employer may assert the *Burlington Industries*/*Faragher* affirmative defense unless the employee quit in reasonable response to an employer-sanctioned adverse action that would qualify as a tangible employment action (for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which the employee would face unbearable working conditions) [*Pennsylvania State Police v. Suders (2004) 542 U.S. 129, 124 S. Ct. 2342, 159 L. Ed. 2d 204, 216-223]* .

PRACTICE TIP:

Watch for Changes in Law. Practitioners should watch for possible changes in California law as it relates to adopting the affirmative defenses announced in *Burlington Industries* and *Faragher*. *By John H. Scott*

[b] Employer Liability for Non-Supervisors and Non-Employees

An employer may be liable under FEHA and Title VII for harassment by non-supervisory employees and non-employees when the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action [*see Gov. Code § 12940(j)(1)* (FEHA); *2 Cal. Code Reg. § 7287.6(b)(3)* (FEHC regulations); *29 C.F.R. §§ 1604.11(d), 1606.8(d)* (EEOC regulations under *Title VII); Carter v. California Dep't of Veterans Affairs (2006) 38 Cal. 4th 914, 44 Cal. Rptr. 3d 223, 229, 235-236, 135 P.3d 637* (2003 amendment of *Gov. Code § 12940(j)(1)*, stating employer is potentially liable when nonemployee sexually harasses employee, declared existing law and may be applied to case pending when amendment was enacted); *Freitag v. Ayers (9th Cir. 2006) 468 F.3d 528, 538-539* (correctional institution has legal obligation to take reasonable measures to protect its employees from hostile work environment resulting from sexual harassment by inmates); *McGinest v. GTE Serv. Corp. (9th Cir. 2004) 360 F.3d 1103, 1119* (Title VII; racial harassment); *Folkerson v. Circus*

Circus Enterprises (9th Cir. 1997) 107 F.3d 754, 756 (Title VII; dictum regarding sexual harassment by customers); *see also Davis v. Monsanto Chemical Co. (6th Cir. 1988) 858 F.2d 345, 349 , cert. denied, 490 U.S. 1110 (1989)* (Title VII; racial harassment); *Snell v. Suffolk County (2d Cir. 1986) 782 F.2d 1094, 1104* (same)]. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of those nonemployees shall be considered [*Gov. Code § 12940(j)(1)*].

EEOC guidelines provide that in cases involving harassment by non-employees, factors to be considered include the extent of the employer's control, and any other legal responsibility that the employer may have with respect to the non-employee's conduct [*see 29 C.F.R. §§ 1604.11(e), 1606.8(e)*].

[c] Employer Liability for Punitive Damages

Under FEHA, employers are not strictly liable for punitive damages for harassment by their supervisors; employers are liable for punitive damages based on the acts of supervisory employees pursuant to the standard set forth under *Civ. Code § 3294(b)*. Thus, an employer is liable for punitive damages for a supervisor's harassment of a subordinate only if the employer (1) had advance knowledge of the unfitness of the supervisor and employed him or her with conscious disregard for the rights or safety of others; (2) authorized or ratified the wrongful conduct; or (3) was itself guilty of oppression, fraud, or malice [*see Kelly-Zurian v. Wohl Shoe Co. (1994) 22 Cal. App. 4th 397, 419-420, 27 Cal. Rptr. 2d 457]* .

If the employer's conduct meets the criteria set forth in *Civ. Code § 3294(b)*, the assessment of punitive damages against the employer does not necessarily require an additional showing that the employer itself committed fraud, oppression, or malice [*Weeks v. Baker & McKenzie (1998) 63 Cal. App. 4th 1128, 1153-1154, 74 Cal. Rptr. 2d 510]* . However, to subject a corporate employer to liability for punitive damages in such a case, the conscious disregard, authorization, or ratification must have been performed by an officer, director, or managing agent of the corporation [*Civ. Code § 3294(b)*]. For this purpose, a "managing agent" is a corporate employee who exercises substantial independent authority and judgment in making decisions that ultimately determine corporate policy; the mere power to hire and fire employees is not sufficient to establish such authority [*White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 567, 573-577, 88 Cal. Rptr. 2d 19, 981 P.2d 944* (determination of managing-agent status is factual determination that must be made on case-by-case basis); *see Roby v. McKesson Corp. (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749* (supervisor in charge of four of corporation's 20,000 employees did not have kind of discretionary authority over formal corporate policies affecting substantial portion of corporation that would justify awarding punitive damages against corporation for that supervisor's conduct)]. For additional discussion of the standard for imposing punitive damage liability on an employer based on an employee's conduct, see Ch. 177, *Damages* , and Ch. 248, *Employer's Liability for Employee's Torts* .

Under Title VII, in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents when those decisions are "contrary to the employer's good-faith efforts to comply with Title VII" [*Kolstad v. American Dental Ass'n (1999) 527 U.S. 526, 545, 119 S. Ct. 2118, 144 L. Ed. 2d 494]* .

[d] Employee Personal Liability

California courts have long held individual supervisors personally liable for sexual harassment under FEHA if they participate personally in the harassment or aid or abet it by failing to investigate or remedy it [*Matthews v. Superior Court (1995) 34 Cal. App. 4th 598, 599-600, 605-606, 40 Cal. Rptr. 2d 350* ; *Page v. Superior Court (1995) 31 Cal. App. 4th 1206, 1213,37 Cal. Rptr. 2d 529* ; *but cf. Reno v. Baird (1998) 18 Cal. 4th 640, 645-647, 76 Cal. Rptr. 2d 499, 957 P.2d 1333* (individual supervisors not personally liable for other forms of discrimination under FEHA)].

Under the 2000 amendments to FEHA, any employee of an entity subject to FEHA is personally liable for harassment

in violation of FEHA perpetrated by the employee, regardless of whether the employer or covered entity knows or should have known of the conduct and fails to take immediate and appropriate corrective action [*Gov. Code § 12940(j)(3)*; *see McClung v. Employment Development Dept. (2004) 34 Cal. 4th 467, 475-476, 20 Cal. Rptr. 3d 428, 99 P.3d 1015* (*Gov. Code § 12940(j)(3)* does not apply retroactively to impose liability on nonsupervisors for conduct predating its enactment effective January 1, 2001)]. Moreover, the harassing coworker may also be personally liable to the harassment victim under other statutes or tort theories [*Carrisales v. Department of Corrections (1999) 21 Cal. 4th 1132, 1136-1137, 90 Cal. Rptr. 2d 804, 988 P.2d 1083* (decided prior to enactment of legislation imposing FEHA liability directly on harassing coworker)].

The Ninth Circuit Court of Appeal has ruled that supervisors and other employees are not personally liable for violations of Title VII [*Miller v. Maxwell's Int'l (9th Cir. 1993) 991 F.2d 583, 587-588 , cert. denied, 510 U.S. 1109 (1994)]* .

[e] Indemnification

Under *Lab. Code § 2802*, an employer may be required to indemnify a supervisor for legal costs, including attorney's fees, incurred in successfully defending against a harassment suit brought against the supervisor by a coworker if the conduct giving rise to the suit was within the course and scope of the supervisor's employment [*Jacobus v. Krambo Corp. (2000) 78 Cal. App. 4th 1096, 1100-1104, 93 Cal. Rptr. 2d 425* (course and scope of employment to be determined according to principles of respondeat superior)]. For further discussion of the employer's duty to indemnify employees under *Lab. Code § 2802*, see Ch. 248, *Employer's Liability for Employee's Torts* .

[3] National Origin Harassment

FEHA expressly prohibits harassment based on ancestry or national origin (or based on a perception that the employee has, or is associated with one who has, a particular ancestry or national origin) [*Gov. Code § 12940(j)(1)*; *see Gov. Code § 12926(m)*].

EEOC guidelines provide that national origin harassment is a violation of Title VII, and an employer has an affirmative duty to maintain a working environment free from such harassment [*29 C.F.R. § 1606.8(a)*].

Under the EEOC guideline, ethnic slurs and other verbal or physical conduct relating to an individual's national origin constitute harassment when this conduct [*29 C.F.R. § 1606.8(b)*]:

- Has the purpose or effect of creating an intimidating, hostile, or offensive working environment;
- Has the purpose or effect of unreasonably interfering with an individual's work performance; or
- Otherwise adversely affects an individual's employment opportunities.

[4] Racial Harassment

FEHA expressly prohibits racial harassment (including harassment based on a perception that the employee is, or is associated with one who is, of a particular race) [*Gov. Code § 12940(j)(1)*; *see Gov. Code § 12926(m)*]. To be actionable, however, the harassment must be severe or pervasive; liability cannot be founded on acts of racial harassment that are occasional, isolated, sporadic, or trivial [*Etter v. Veriflo Corp. (1998) 67 Cal. App. 4th 457, 466-467, 79 Cal. Rptr. 2d 33]* .

A racially hostile working environment also violates Title VII [*Snell v. Suffolk County (2d Cir. 1986) 782 F.2d 1094, 1102]* . A plaintiff must prove more than a few isolated incidents of racial enmity; casual comments or accidental or

sporadic conversation are insufficient [*Gregory v. Widnall (9th Cir. 1998) 153 F.3d 1071, 1074-1075* ; *Snell v. Suffolk County (2d Cir. 1986) 782 F.2d 1094, 1103]* . Allegations of a racially hostile workplace must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff [*see McGinest v. GTE Serv. Corp. (9th Cir. 2004) 360 F.3d 1103, 1115*]. The daily use of racial slurs and the proliferation of racially derogatory literature has been held to create a racially hostile environment under Title VII [*Snell v. Suffolk County (2d Cir. 1986) 782 F.2d 1094, 1103]* .

[5] Sexual Harassment

[a] Persons Protected

FEHA expressly prohibits harassment because of sex [*Gov. Code § 12940(j)(1)*; *see Gov. Code § 12926(m)*], which includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions [*Gov. Code § 12940(j)(4)(C)*].

FEHA also prohibits harassment based on an employee's sexual orientation or on the perception that the employee is, or is associated with one who is, of a particular sexual orientation [*Gov. Code § 12940(j)(1)*; *see Gov. Code § 12926(m)*].

Same-gender sexual harassment, as well as opposite-sex harassment, is prohibited by FEHA [*Matthews v. Superior Court (1995) 34 Cal. App. 4th 598, 603, 40 Cal. Rptr. 2d 350* ; *Mogilefsky v. Superior Court (1993) 20 Cal. App. 4th 1409, 1416, 26 Cal. Rptr. 2d 116]* . Harassment between members of the same sex can be "because of sex" if it involves an attack on the plaintiff's sexual identity [*see, e.g., Singleton v. United States Gypsum Co. (2006) 140 Cal. App. 4th 1547, 1561-1563, 45 Cal. Rptr. 3d 597* (plaintiff's male co-workers used attacks on plaintiff's identity as heterosexual male as tool of harassment)]. Moreover, there is no requirement that the motive for the harassment be sexual in nature. Sexual harassment occurs when sex is used as a weapon to create a hostile work environment [*Singleton v. United States Gypsum Co. (2006) 140 Cal. App. 4th 1547, 1564, 45 Cal. Rptr. 3d 597* (harasser's motive was that he was angry with plaintiff for having reported him)].

Although sexual harassment is not expressly proscribed by Title VII, courts have held that sexual harassment violates Title VII [*see Meritor Savings Bank v. Vinson (1986) 477 U.S. 57, 64-67, 106 S. Ct. 2399, 91 L. Ed. 2d 49* ; *see also 29 C.F.R. § 1604.11(a)* (EEOC guideline)].

[b] Types of Sexual Harassment

[i] In General

Harassment because of sex may take the form of verbal, physical, or visual harassment, as well as unwanted sexual advances [*2 Cal. Code Reg. § 7291.1(f)(1)* (FEHC regulations)].

Historically, there are two categories of sexual harassment: (1) "quid pro quo" harassment, and (2) "hostile work environment" harassment [*Hicks v. Gates Rubber Co. (10th Cir. 1987) 833 F.2d 1406, 1413* (Title VII); *Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal. App. 3d 590, 607, 262 Cal. Rptr. 842* (FEHA); *see Katz v. Dole (4th Cir. 1983) 709 F.2d 251, 254* (Title VII)]. Both types of sexual harassment are discussed in [ii] and [iii], *below*.

[ii] "Quid Pro Quo" Harassment

"Quid pro quo" harassment occurs when a plaintiff shows, by a preponderance of the evidence, that submission to sexual conduct was made a condition for receiving concrete employment benefits or for the avoiding of job detriment [*see Burlington Industries v. Ellerth (1998) 524 U.S. 742, 760-763, 118 S. Ct. 2257, 141 L. Ed. 2d 633* (significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits); *Heyne v. Caruso (9th Cir. 1995) 69 F.3d 1475,*

1478 (employer's proffered reasons for its detrimental actions were pretextual); *Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal. App. 3d 590, 607, 262 Cal. Rptr. 842* (FEHA); *see also 29 C.F.R. § 1604.11(a)* (EEOC guideline on sex discrimination)].

In Title VII "quid pro quo" actions, an employee may establish a prima facie case by a showing that (1) the plaintiff was a victim of a pattern or practice of sexual harassment attributable to his or her employer; and (2) the plaintiff applied for and was denied a benefit, such as a promotion, for which he or she was technically eligible, and of which he or she had a reasonable expectation. If a prima facie case is established, the employer bears the burden of showing, by clear and convincing evidence, that it had legitimate and nondiscriminatory reasons for denying the benefit. If the employer successfully rebuts the prima facie case, the plaintiff must have the opportunity to prove that the employer's purported reasons were pretextual [*see Bundy v. Jackson (D.C. Cir. 1981) 641 F.2d 934, 953]* .

[iii] "Hostile Work Environment" Harassment

A prima facie case of hostile work environment sexual harassment is established if the plaintiff establishes all of the following [*see Sheffield v. Los Angeles County (2003) 109 Cal. App. 4th 153, 161, 134 Cal. Rptr. 2d 492* ; *Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal. App. 3d 590, 608, 262 Cal. Rptr. 842* (FEHA); *see also EEOC v. Hacienda Hotel (9th Cir. 1989) 881 F.2d 1504, 1514-1515* (Title VII)]:

- He or she was subject to unwelcome sexual harassment;
- The harassment was based on sex;
- The harassment was sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment; and
- The relationship between the employer and the person or persons committing the acts of harassment is sufficient to impose liability on the employer under principles of respondent superior.

The FEHC uses a similar test, requiring the prima facie showing. The plaintiff must show that the harassing conduct led to the deprivation of an employment benefit or benefits [*see* DFEH v. Rosenberg (1990) FEHC Dec. No. 90-09, p. 6; DFEH v. Livermore Joe's, Inc. (1990) FEHC Dec. No. 90-07, p. 12; DFEH v. Madera County (1990) FEHC Dec. No. 90-03, p. 19]. FEHC regulations provide that a "discrimination-free workplace" (that is, a workplace free of harassment) is an employment benefit [*see 2 Cal. Code Reg. § 7286.5(f)(3)*].

To establish that harassment is based on sex, a plaintiff must show disparate treatment on the basis of sex; the mere discussion of sex or the use of vulgar language will not be sufficient. Thus, a hostile work environment sexual harassment claim is not established if a supervisor or coworker simply uses crude or inappropriate language in front of employees, makes lewd gestures, or draws a vulgar picture, without directing sexual innuendos or gender-related language toward the plaintiff or toward women in general. For example, the California Supreme Court has held that, in the context of a workplace where comedy writers were paid to create scripts highlighting adult-themed sexual humor and jokes, and where members of both sexes contributed and were exposed to the creative process spawning such humor and jokes, the writers' sexual antics and graphic discussions not aimed at the plaintiff or any other female employee did not contribute to an environment in which men and women were treated disparately [*Lyle v. Warner Bros. Television Prods. (2006) 38 Cal. 4th 264, 279-282, 286-288, 42 Cal. Rptr. 3d 2, 132 P.3d 211]* .

In determining whether the sexual conduct is sufficiently severe or pervasive to constitute a hostile work environment, the focus is on the perspective of a reasonable person with the same fundamental characteristics as the plaintiff [*Fuller v. City of Oakland (9th Cir. 1995) 47 F.3d 1522, 1527* (Title VII); *Ellison v. Brady (9th Cir. 1991) 924 F.2d 872, 878-879* (Title VII); *Lyle v. Warner Brothers Television Productions (2006) 38 Cal. 4th 264, 283-285* ; *Fisher v. San*

Pedro Peninsula Hospital (1989) 214 Cal. App. 3d 590, 609-610, 262 Cal. Rptr. 842 (FEHA)]. This inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target [*Lyle v. Warner Bros. Television Prods. (2006) 38 Cal. 4th 264, 283, 42 Cal. Rptr. 3d 2, 132 P.3d 211* ("[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensibility to social context, will enable courts and juries to distinguish between simple teasing or roughhousing... and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive"), quoting *Oncale v. Sundowner Offshore Servs., Inc. (1998) 523 U.S. 75, 81-82, 118 S. Ct. 998, 140 L. Ed. 2d 201*)].

PRACTICE TIP:

"Sex" vs. "Gender." The harassment need not be "sex" based to be actionable. There is a line of cases that stand for the proposition that "gender" based harassment is actionable, for example, in the case of misogyny [*see, e.g., Accardi v. Superior Court (1993) 17 Cal. App. 4th 341, 21 Cal. Rptr. 2d 292 ; Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal. App. 3d 590, 262 Cal. Rptr. 842]* . In other words, women can be harassed because they are not liked. That is different from "sex" harassment that is based on sexual conduct. *By John H. Scott*

To be actionable, harassment must be sufficiently severe or pervasive to alter the conditions of the plaintiff's employment and create an abusive environment [*Meritor Savings Bank v. Vinson (1986) 477 U.S. 57, 67, 106 S. Ct. 2399, 91 L. Ed. 2d 49* (Title VII); *Harris v. Forklift Systems (1993) 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295* ; *Lyle v. Warner Bros. Television Prods. (2006) 38 Cal. 4th 264, 278-279, 283-285, 42 Cal. Rptr. 3d 2, 132 P.3d 211* ; *Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal. App. 3d 590, 608-610, 262 Cal. Rptr. 842* (FEHA); *see Birschtein v. New United Motor Manufacturing, Inc. (2001) 92 Cal. App. 4th 994, 1000-1002, 112 Cal. Rptr. 2d 347* (FEHA; co-worker's repeated acts of staring at plaintiff, after plaintiff had complained to management of earlier overt acts of sexual harassment, could qualify as actionable sexual harassment)]. However, the harassment need not be so severe as to be psychologically injurious, to violate Title VII [*Harris v. Forklift Systems (1993) 510 U.S. 17, 22, 114 S. Ct. 367, 126 L. Ed. 2d 295]* .

Although a single instance of sexual harassment might be sufficient to establish a hostile work environment, the required showing of severity or seriousness of the conduct increases as the number of incidents decreases [*Brooks v. City of San Mateo (9th Cir. 2000) 229 F.3d 917, 926* (Title VII, FEHA; one incident of sexual harassment of coworker followed by perpetrator's termination by employer was not sufficiently severe to support hostile work environment cause of action)]. Whether an environment is sufficiently hostile or abusive must be judged by looking at all the circumstances, including (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether it unreasonably interferes with an employee's work performance [*Harris v. Forklift Systems (1993) 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295* ; *see Dee v. Vintage Petroleum, Inc. (2003) 106 Cal. App. 4th 30, 36-37, 129 Cal. Rptr. 2d 923* (reasonable trier of fact could infer hostile work environment from single racial slur plus other evidence of abuse by plaintiff's supervisor); *see also 29 C.F.R. § 1604.11(b)*]. For a single incident to establish a hostile work environment, it must be severe in the extreme and generally must include either physical violence or the threat of physical violence [*Herberg v. California Inst. of Arts (2002) 101 Cal. App. 4th 142, 151-154, 124 Cal. Rptr. 2d 1* (as matter of law, display of offensive artwork for 24-hour period does not constitute hostile work environment, since plaintiffs were not physically touched or subjected to any sort of verbal abuse); *see Sheffield v. Los Angeles County (2003) 109 Cal. App. 4th 153, 163-164, 134 Cal. Rptr. 2d 492* (finding of hostile work environment may be based on harassment occurring over seven-day span, if harassing conduct includes violence or threat of violence)]. Thus, simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment [*Clark County Sch. Dist. v. Breeden (2001) 532 U.S. 268, 121 S. Ct. 1508, 1510, 149 L. Ed. 2d 509* (per curiam) (as matter of law, Title VII was not violated by single incident in which employee's supervisor and another employee joked about sexual comment attributed to job applicant, when incident occurred during meeting to evaluate

job applicants, and employee conceded that reading applicant's comment did not bother or upset her)].

PRACTICE TIP:

Significance of *Brooks v. City of San Mateo*. *Brooks v. City of San Mateo (9th Cir. 2000) 229 F.3d 917* may, unfortunately, have added significance. It seems to announce a "one free bite" test. In *Brooks,* a supervisor grabbed a dispatcher's breast. It was an isolated act and the court determined that it was not sufficiently "severe" to constitute a violation of Title VII. The case also had troubling *dicta* to suggest that even a rape at the work place by a supervisor might not be sufficiently "severe" to constitute a violation of Title VII. This case seems to stand for the proposition that evidence of "pervasive" conduct is necessary in these cases. After all, we are referring to an "environment" of hostility. The court seems to be saying that one, isolated severe act does not create a hostile environment [*but see Little v. Windermere Relocation, Inc. (9th Cir. 2001) 265 F.3d 903, 910-912* (isolated rape *can* meet severe or pervasive test)]. ***By John H. Scott***

A plaintiff may claim environmental sexual harassment even if he or she was not the object of the harassment, if the harassing conduct permeated his or her work environment. The plaintiff must establish that he or she personally witnessed harassing conduct, and that it was in his or her immediate work environment [*Lyle v. Warner Bros. Television Prods. (2006) 38 Cal. 4th 264, 283-285, 42 Cal. Rptr. 3d 2, 132 P.3d 211* (claim by plaintiff who was not object of harassing conduct requires higher showing than claim by target of harassing conduct); *Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal. App. 3d 590, 610-611, 262 Cal. Rptr. 842]* . Moreover, when the plaintiff cannot point to a loss of tangible job benefits, he or she must make a commensurately higher showing that the harassing conduct was pervasive and destructive of the working environment [*Lyle v. Warner Bros. Television Prods. (2006) 38 Cal. 4th 264, 283-285, 42 Cal. Rptr. 3d 2, 132 P.3d 211]* . For example, the California Supreme Court has held that occasional graphic comments made by male employees about women other than the plaintiff, in the context of a creative workplace focused on generating scripts for an adult-oriented television comedy show featuring sexual themes, would not support a finding that those comments permeated the plaintiff's direct work environment or were pervasive and destructive of that environment [*Lyle v. Warner Bros. Television Prods. (2006) 38 Cal. 4th 264, 289-292, 42 Cal. Rptr. 3d 2, 132 P.3d 211]* .

The fact that sex-related conduct is "voluntary," in the sense that a plaintiff is not forced to participate against his or her will, is not a defense. The correct inquiry is whether a plaintiff, by his or her conduct, indicated that the alleged sexual advances were unwelcome. Thus, the plaintiff's sexually provocative speech or dress is relevant in determining whether particular sexual advances were unwelcome [*see Meritor Savings Bank v. Vinson (1986) 477 U.S. 57, 68-69, 106 S. Ct. 2399, 91 L. Ed. 2d 49* (Title VII); *29 C.F.R. § 1604.11(b)* (EEOC guideline; EEOC looks at totality of circumstances, including nature of sexual advances and context in which incidents occurred)].

An isolated instance of favoritism on the part of a supervisor toward a female employee with whom the supervisor is conducting a consensual sexual affair ordinarily would not constitute sexual harassment of other employees. However, when such sexual favoritism in a workplace is sufficiently widespread it may create a hostile work environment in which the demeaning message is conveyed to female employees that they are viewed by management as "sexual playthings" or that the way for women to get ahead in the workplace is by engaging in sexual conduct with their supervisors or managers. Such conduct is actionable by any employee, male or female, who finds it offensive and can establish that it is sufficiently severe or pervasive to alter his or her working conditions and create a hostile working environment [*Miller v. Department of Corr. (2005) 36 Cal. 4th 446, 466, 30 Cal. Rptr. 3d 797, 115 P.3d 77* (that supervisor engaged in consensual sexual affairs with three female employees, each of whom received preferential treatment in workplace, was sufficient to establish prima facie case of hostile work environment for other employees)].

[c] Persons Indirectly Harmed by Sexual Harassment

The EEOC guidelines provide that an employer may also be liable for unlawful sex discrimination against other persons

who were qualified for but denied an employment opportunity or benefit granted to someone because of his or her submission to sexual advances or requests for sexual favors [*see 29 C.F.R. § 1604.11(g)*]. To establish a prima facie case, the plaintiff in such an action must show that he or she was entitled to certain benefits or opportunities that he or she did not receive [*see Candelore v. Clark County Sanitation Dist. (9th Cir. 1992) 975 F.2d 588, 590]* . However, a coworker's consensual romantic relationship with a supervisor has been held not to be sex discrimination under Title VII [*see De Cintio v. Westchester County Medical Center (2d Cir. 1986) 807 F.2d 304, 307-308 , cert. denied, 484 U.S. 825 (1987)]* .

[6] Employer's Obligation to Prevent and Respond to Harassment

[a] Required Steps and Liability

FEHA requires employers to take all reasonable steps necessary to prevent unlawful harassment from occurring [*Gov. Code § 12940(j),(k)*]. In addition, FEHA requires employers to provide specified information to employees regarding the illegality of sexual harassment [*see Gov. Code § 12950*; *Myers v. Trendwest Resorts, Inc. (2007) 148 Cal. App. 4th 1403, 1421, 56 Cal. Rptr. 3d 501* (employer's institution of its own grievance procedure does not excuse violation of *Gov. Code § 12950*)]. Also, an employer having 50 or more employees must provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees in California. The training must include [*Gov. Code § 12950.1(a)*; *see Gov. Code § 12950.1(c)* ("employer" defined for purposes of training requirement)]:

- Information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against sexual harassment;
- The prevention and correction of sexual harassment; and
- The remedies available to victims of sexual harassment in employment.

Although FEHA creates an actionable tort for an employer's failure to take all reasonable steps to prevent unlawful discrimination and harassment [*Bihun v. AT&T Information Systems, Inc. (1993) 13 Cal. App. 4th 976, 1002, 16 Cal. Rptr. 2d 787 , disapproved in part, on other grounds, Lakin v. Watkins Associated Industries (1993) 6 Cal. 4th 644, 664, 25 Cal. Rptr. 2d 109, 863 P.2d 179]* , an employer cannot be held liable to an employee for failing to take reasonable steps to prevent unlawful harassment unless the employee actually suffered harassment [*Trujillo v. North County Transit Dist. (1998) 63 Cal. App. 4th 280, 286-289, 73 Cal. Rptr. 2d 596]* . Also, a claim that the training and education required for supervisory employees by FEHA [*see Gov. Code § 12950.1(d)*] did not reach a particular individual will not by itself result in the liability of the employer to any employee or applicant in any action alleging sexual harassment. Conversely, an employer's compliance with the training and education requirement will not insulate the employer from liability for the sexual harassment of any employee or applicant [*Gov. Code § 12950.1(a)*; *see Gov. Code § 12950.1(c)* ("employer" defined for purposes of training requirement)].

EEOC guidelines also encourage employers to take measures to prevent sexual harassment [*see 29 C.F.R. § 1604.11(f)*].

Under Title VII, employers who learn of sexual harassment by their employees must take remedial action that is reasonably calculated to end the harassment by imposing sufficient penalties to assure a workplace free from sexual harassment [*Ellison v. Brady (9th Cir. 1991) 924 F.2d 872, 882* ; *see Intlekofer v. Turnage (9th Cir. 1992) 973 F.2d 773, 777]* . Under the *Ellison* standard, the remedies must not only be reasonably calculated to end the harassment, but also disciplinary in nature [*Intlekofer v. Turnage (9th Cir. 1992) 973 F.2d 773, 778-779]* . Counseling or admonishing the offender, or assigning the offender to a different shift to avoid contact with the victim, may be an adequate "disciplinary" response, depending on the circumstances of the case [*Star v. West (9th Cir. 2001) 237 F.3d 1036, 1039* (employer need not label its actions as "discipline"; what is important is whether those actions are adequate to remedy

situation)]. More severe disciplinary measures must be taken if the preceding measures have not put a stop to the harassment [*Intlekofer v. Turnage (9th Cir. 1992) 973 F.2d 773, 778-779]* . No specific remedial options are required, but the remedy must be appropriate to the circumstances of the case, and progressive discipline must be applied until the harassment is stopped [*see Intlekofer v. Turnage (9th Cir. 1992) 973 F.2d 773, 777-781]* . An employer must take remedial action even after the harasser has stopped the harassment of his or her own accord [*Fuller v. City of Oakland (9th Cir. 1995) 47 F.3d 1522, 1528-1529]* .

[b] Affirmative Defense

In Title VII actions for "hostile environment" harassment by a supervisor, in which no tangible adverse employment action was taken against the employee, an employer may assert as an affirmative defense against liability or damages the fact that it has taken reasonable care to prevent and promptly correct harassing behavior which the plaintiff unreasonably failed to utilize [*Burlington Industries v. Ellerth (1998) 524 U.S. 742, 762-763, 118 S. Ct. 2257, 141 L. Ed. 2d 633, 655* ; *Faragher v. City of Boca Raton (1998) 524 U.S. 775, 807-808, 118 S. Ct. 2275, 141 L. Ed. 2d 662, 670]* . For further discussion, see *§ 115.54[3]*, and Wilcox, California Employment Law, Ch. 41 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 115 CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION
PART II. LEGAL BACKGROUND
C. Application of Equal Employment Opportunity Laws to Specific Employment Practices

11-115 California Forms of Pleading and Practice--Annotated § 115.37

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§ 115.37 Retaliation

[1] Opposition to Discrimination

[a] Types of Opposition

The FEHA, Title VII, the ADA, and the ADEA prohibit retaliation against any person for opposing any practice forbidden or made unlawful by those statutes [*see 29 U.S.C. § 623(d)* (ADEA); *42 U.S.C. §§ 1981(a), 2000e-3(a)* (Title VII), 12203(a) (ADA); *Gov. Code § 12940(h)* (FEHA); *CBOCS W., Inc. v. Humphries (2008) 553 U.S. 442, 128 S. Ct. 1951, 1954-1955, 1961, 170 L. Ed. 2d 864* (*42 U.S.C. § 1981* encompasses retaliation claims); *see also 29 C.F.R. § 1630.12* (EEOC regulations under ADA); *Chen v. County of Orange (2002) 96 Cal. App. 4th 926, 950, 116 Cal. Rptr. 2d 786* (FEHA antiretaliation provision does not protect against retaliation for opposing conduct that is not forbidden by FEHA)]. To assert a retaliation claim, the person opposing an employer's unlawful practice need not be a member of the class of persons victimized by that practice [*Barker v. Riverside County Office of Educ. (9th Cir. 2009) 584 F.3d 821, 824-828* (nondisabled public employee had standing to claim that she suffered retaliation after voicing concerns that employer was not in compliance with Rehabilitation Act and ADA)].

Protected "opposition" includes:

- Complaints or protests to an employer [*see Armstrong v. Index Journal Co. (4th Cir. 1981) 647 F.2d 441, 448* (Title VII)], including a complaint about a violation of another person's rights [*see CBOCS W., Inc. v. Humphries (2008) 553 U.S. 442, 128 S. Ct. 1951, 1954-1955, 1961, 170 L. Ed. 2d 864, 869, 877*].

- Meetings to discuss unlawful employment policies [*see Lindsey v. Mississippi Research & Dev. Ctr. (5th Cir. 1981) 652 F.2d 488, 492* (dicta)].

- Refusal to participate in unlawful employment practices [*see Yanowitz v. L'Oreal USA, Inc. (2005)*

36 Cal. 4th 1028, 1042-1045, 32 Cal. Rptr. 3d 436, 116 P.3d 1123 (FEHA; refusal to follow supervisor's order to terminate other employee); *Tidwell v. American Oil Co. (D. Utah 1971) 332 F. Supp. 424, 436* (Title VII; refusal to falsify minority race applicant's test score)].

- Speaking out about discrimination in answering questions during an employer's internal investigation, even if the employee answering the questions did not report the discrimination on his or her own initiative [*Crawford v. Metropolitan Gov't (2009) -- U.S. --, 129 S. Ct. 846, 172 L. Ed. 2d 650, 656-659* (employee can "oppose" employer's unlawful practice for purposes of Title VII anti-retaliation provision, *42 U.S.C. § 2000e-3(a)*, simply by disclosing that practice)].

There is no rigorous requirement of specificity in determining what is "opposition" [*see EEOC v. Crown Zellerbach Corp. (9th Cir. 1983) 720 F.2d 1008, 1013* (Title VII)]. However, a "reasonableness" standard has been developed that focuses on the context, rather than the nature, of an employee's act. Under this standard, courts balance the purpose of equal employment opportunity law in protecting reasonable opposition against the legislative desire not to interfere with employer personnel decisions [*see Hochstadt v. Worcester Found. for Experimental Biology (1st Cir. 1976) 545 F.2d 222, 231* (Title VII)].

FEHA requires employers to take all reasonable steps necessary to prevent unlawful retaliation from occurring [*Gov. Code § 12940(k)* (it is unlawful employment practice for employer to fail to take all reasonable steps necessary to prevent "discrimination" from occurring); *Taylor v. City of Los Angeles Dept. of Water & Power (2006) 144 Cal. App. 4th 1216, 1239-1240, 51 Cal. Rptr. 3d 206* (retaliation is form of "discrimination" actionable under *Gov. Code § 12940(k)*].

For a form for an allegation of retaliation, for use in a civil complaint under FEHA, see *§ 115.94*.

PRACTICE TIP:

Retaliation Generally. It is not unusual for juries to find liability on a retaliation claim while simultaneously finding no discrimination. There are probably interesting sociological and psychological reasons for this phenomenon. Practitioners should advise clients to complain internally to the employer before resorting to litigation. Attorneys must also be mindful of the one year "statute of limitations" to complain to FEHA and generally the 300-day requirement to bring a complaint to the Equal Employment Opportunity Commission. If the internal complaint is successful and/or results in some kind of resolution, the problem may be solved--at least temporarily. On the other hand, if the treatment of the employee gets worse and/or there is a subsequent adverse employment act, the employer has now created a retaliation case.

The requirement for pursuing a retaliation case is that the employee opposed conduct that he or she reasonably and in good faith believed to be discriminatory, whether or not the conduct is ultimately found to be in violation of the law [*Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal. 4th 1028, 1043, 32 Cal. Rptr. 3d 436, 116 P.3d 1123]* . Thus, the employee need not prove that unlawful discrimination did occur. Be prepared to discover that some judges do not understand this. *By John H. Scott*

Whistleblower Claims for Public Employees. Practitioners should note the possibility of a parallel remedy, for public employees, of a *First Amendment*/whistleblower claim under *42 U.S.C. § 1983*. The law is well settled that the discrimination prohibited by Title VII is considered a matter of public concern. Thus, retaliation for such complaints *may* be actionable under § 1983 [*see, e.g., Thomas v. City of Beaverton (9th Cir. 2004) 379 F.3d 802, 807-811]* . However, as a practical matter, it is much easier to plead and prove a retaliation case under Title VII or FEHA than it is under § 1983. There are a number of hurdles, including qualified immunity, that exist in the § 1983/whistleblower context that do not exist under Title VII or FEHA. For example, to maintain a *First Amendment* claim under § 1983, a public

employee must establish not only that he or she was speaking on a matter of public concern, but also that he or she was speaking as a citizen and not making a statement pursuant to his or her public duties [*Garcetti v. Ceballos (2006) 547 U.S. 410, 126 S. Ct. 1951, 1957-1960, 164 L. Ed. 2d 689* (when public employees make statements pursuant to their official duties, they are not speaking as citizens for *First Amendment* purposes, and Constitution does not insulate their communications from employer discipline); *see also Kaye v. Board of Trs. of San Diego County Pub. Law Library (2009) 179 Cal. App. 4th 48, 56-59, 101 Cal. Rptr. 3d 456* (discharge of public employee for statements made pursuant to official duties does not violate California free-speech clause, *Cal. Const. art. I, § 2(a)*)]. Thus, attorneys should avoid § 1983 in these situations and rely on Title VII or FEHA remedies. *By John H. Scott*

[b] Opposition to Employer and Other Persons

An act of opposition must refer to some particular practice by an employer that is allegedly unlawful under equal employment opportunity law [*see EEOC v. Crown Zellerbach Corp. (9th Cir. 1983) 720 F.2d 1008, 1008-1014* (Title VII; letter by minority employees addressed to school district protesting affirmative action award to be presented to their employer)]. The employment practice need not be demonstrably unlawful; there need only be a reasonable belief by the objecting person that the employer has engaged in unlawful practices [*see Moyo v. Gomez (9th Cir. 1994) 40 F.3d 982, 985 , cert. denied, 513 U.S. 1081(1995)* (Title VII); *EEOC v. Crown Zellerbach Corp. (9th Cir. 1983) 720 F.2d 1008, 1013* (Title VII); *Payne v. McLemore's Wholesale & Retail Stores (5th Cir. 1981) 654 F.2d 1130, 1140 , cert. denied, 455 U.S. 1000 (1982)* (Title VII); *Sias v. City Demonstration Agency (9th Cir. 1978) 588 F.2d 692, 695* (Title VII); *Miller v. Department of Corr. (2005) 36 Cal. 4th 446, 476, 30 Cal. Rptr. 3d 797, 115 P.3d 77* (employee's good-faith but mistaken belief that employer's conduct violates FEHA may be shown by reasonable mistake of fact or of law)]. Also, the objecting person need not elaborate to the employer on the legal theory underlying the complaints the objector is making [*Miller v. Department of Corr. (2005) 36 Cal. 4th 446, 475, 30 Cal. Rptr. 3d 797, 115 P.3d 77]* . Indeed, it is not necessary that the objecting employee *explicitly* inform the employer that he or she believes that a particular practice is discriminatory, so long as the circumstances are sufficient to establish the employer's knowledge that the employee's refusal to engage in the practice is based on the employee's reasonable belief that the practice is discriminatory [*Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal. 4th 1028, 1046, 32 Cal. Rptr. 3d 436, 116 P.3d 1123]* .

Under Title VII, opposition to discriminatory conduct by a coemployee is not protected unless the conduct can be legally attributed to the employer [*see Silver v. KCA, Inc. (9th Cir. 1978) 586 F.2d 138, 142 (Title VII)]* .

An employee may bring a retaliation claim based on opposition to conduct by someone other than the employer if the employee reasonably believes that the conduct is unlawful and attributable to the employer [*see Trent v. Valley Elec. Ass'n (9th Cir. 1994) 41 F.3d 524, 527* (Title VII; retaliation for opposition to discriminatory remarks by outside consultant)], or if the employer ratifies or acquiesces in another's harassing conduct when it knew or should have known of the conduct [*see Folkerson v. Circus Circus Enterprises (9th Cir. 1997) 107 F.3d 754, 756* (Title VII; dicta regarding sexual harassment by customers)]. However, the opposition must be to the employer's practice of acquiescence. In the absence of such acquiescence, there is no unlawful practice to oppose [*Folkerson v. Circus Circus Enterprises (9th Cir. 1997) 107 F.3d 754, 756* (Title VII; no protection for employee discharged for self-help opposition to customer's harassment, where employer had taken reasonable steps to protect her from such harassment)].

[2] Participation in Employment Discrimination Proceedings

FEHA, Title VII, the ADA, and the ADEA also prohibit retaliation against any person because he or she has filed a complaint; made a charge; or testified, assisted, or participated in any investigation, proceeding, hearing, or litigation under those statutes [*see 42 U.S.C. §§ 2000e-3(a)* (Title VII), *12203(a)* (ADA); *29 U.S.C. § 623(d)* (ADEA); *Gov. Code § 12940(h)* (FEHA); *see also 29 C.F.R. § 1630.12* (EEOC regulations under ADA)].

An employee who files a formal discrimination charge is clearly protected [*see Kauffman v. Sidereal Corp. (9th Cir.*

1982) 695 F.2d 343, 344-345 (Title VII)]. However, one Title VII case has held that the employee must also reasonably perceive the discrimination as violating Title VII and must at least allege a valid Title VII claim [*see Learned v. City of Bellevue (9th Cir. 1988) 860 F.2d 928, 932-933 , cert. denied, 489 U.S. 1079 (1989)]* .

Protection does not, however, necessarily require filing formal charges. In one case, a court held that an employer violated Title VII when it discharged an employee who wrote a letter to the EEOC complaining about its dismissal of his previous Title VII charge. Although the employee was allegedly discharged because the letter contained libelous and fraudulent statements, the court considered the letter to be a "good charge," notwithstanding the arguably malicious material [*see Pettway v. American Cast Iron Pipe Co. (5th Cir. 1969) 411 F.2d 998, 1007]* . Even contacting an employer's equal employment opportunity counselor to discuss whether grounds for a complaint might exist may be protected under Title VII [*Hashimoto v. Dalton (9th Cir. 1997) 118 F.3d 671, 680-681 , cert. denied, 523 U.S. 1122 (1998)]* .

A complaint or statement made by an employee in an official employment discrimination proceeding under FEHA, Title VII, the ADA, or the ADEA, is absolutely privileged, even if made maliciously, and cannot subject the employee to liability to the employer or to another employee [*Civ. Code § 47(b)*; *Cruey v. Gannett Co. (1998) 64 Cal. App. 4th 356, 367-368, 76 Cal. Rptr. 2d 670]* .

Also, a complaint or statement made by an employee to his or her employer, accusing another employee of harassment, is protected by a qualified privilege, even if the accusation is false [*Civ. Code § 47(c)*]. That is, the employee making the accusation will incur no liability to the falsely accused employee unless the accusation is made with malice [*Cruey v. Gannett Co. (1998) 64 Cal. App. 4th 356, 368-369, 76 Cal. Rptr. 2d 670]* .

For a form of allegation of retaliation, for use in a civil complaint under FEHA, see *§ 115.94*.

[3] Proof of Retaliation

[a] Prima Facie Case

Unlawful retaliation is essentially a form of disparate treatment [*see* Wrighten v. Metropolitan Hospitals (9th Cir. 1984) *726 F.2d 1346, 1354* (Title VII); *Williams v. Boorstin (D.C. Cir. 1980) 663 F.2d 109, 116-117 , cert. denied, 451 U.S. 985 (1981)* (Title VII); *cf. Miller v. Fairchild Indus. (9th Cir. 1989) 885 F.2d 498, 504 , cert. denied, 494 U.S. 1056 (1990)* (three-stage order and allocation of proof for disparate treatment cases set forth in *McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792, 802-804, 93 S. Ct. 1817, 36 L. Ed. 2d 668* governs actions for retaliatory discharge brought under Title VII, *42 U.S.C. § 1981*, and FEHA); *see also* discussion in*§ 115.23[2]*].

A prima facie case of retaliation may be established by showing all of the following [Wrighten v. Metropolitan Hospitals (9th Cir. 1984) *726 F.2d 1346, 1354* (Title VII); *Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal. App. 3d 590, 614, 262 Cal. Rptr. 842* (FEHA); *see also Dudley v. Department of Transp. (2001) 90 Cal. App. 4th 255, 261-265, 108 Cal. Rptr. 2d 739* (Moore-Brown-Roberti Family Rights Act (CFRA), *Gov. Code § 12945.2* (*l*)(1), part of FEHA)]:

- The plaintiff engaged in a protected activity;
- The plaintiff was thereafter subjected to adverse employment action by his or her employer; and
- There was a causal link between the two.

To qualify as an "adverse employment action" under FEHA, an employer's act must have a material effect on the terms, conditions, or privileges of employment; it is not sufficient that the act deter the plaintiff or other employees from

engaging in protected activities [*Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal. 4th 1028, 1050-1055, 32 Cal. Rptr. 3d 436, 116 P.3d 1123* (expressly rejecting "deterrence standard"); *see Taylor v. City of Los Angeles Dept. of Water & Power (2006) 144 Cal. App. 4th 1216, 1237, 51 Cal. Rptr. 3d 206* (finding that alleged conduct of defendant satisfied both "materiality test" of *Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal. 4th 1028, 1050-1055, 32 Cal. Rptr. 3d 436, 116 P.3d 1123* , and "deterrence test" of *Burlington N. & Santa Fe Ry. Co. v. White (2006) 548 U.S. 53, 126 S. Ct. 2405, 2410-2416, 165 L. Ed. 2d 345, 354-361) , disapproved on other grounds, Jones v. Lodge at Torrey Pines P'ship (2008) 42 Cal. 4th 1158, 1173-1174, 72 Cal. Rptr. 3d 624, 177 P.3d 232]* . In contrast, a deterrence standard applies in Title VII cases: an employer's action will support a Title VII retaliation claim if it is "materially adverse," that is, if it would likely have dissuaded a reasonable worker from engaging in the protected activity [*Burlington N. & Santa Fe Ry. Co. v. White (2006) 548 U.S. 53, 126 S. Ct. 2405, 2410-2416, 165 L. Ed. 2d 345, 354-361* (Title VII anti-retaliation provision, *42 U.S.C. § 2000e-3(a)*, extends beyond workplace-related or employment-related retaliatory acts and harm)].

The sorts of "adverse employment actions" on which a FEHA retaliation action may be based are not limited to actions involving loss or reduction of pay or monetary benefits, such as termination, demotion, refusal to hire, or refusal to promote. They can encompass other forms of adversity as well. For example, there may be an adverse job impact, even without any reduction in salary or benefits, in an employer's moving an employee's office to an undesirable location, transferring an employee to an isolated corner of the workplace, and requiring an employee to relocate his or her personal files while forbidding the employee to use the firm's stationery and support services. However, to be actionable, an adverse employment action must be both detrimental and substantial, resulting in a material change in the terms of employment, impairing employment in some cognizable manner, or showing some other employment injury. For example, one delayed paycheck, an early job change, and one unsent overtime paycheck are not sufficiently substantial and detrimental adverse employment actions to be actionable [*Thomas v. Dep't of Corrections (2000) 77 Cal. App. 4th 507, 510-512, 91 Cal. Rptr. 2d 770]* . Similarly, an employer's repeated criticisms are not sufficient to constitute an adverse employment action if the employee is not fired, demoted, or transferred; did not lose any benefits, bonuses or commissions; did not suffer any wage reduction; and did not experience any change in job duties or responsibilities [*Pinero v. Specialty Rests. Corp. (2005) 130 Cal. App. 4th 635, 641-647, 30 Cal. Rptr. 3d 348]* . An assignment to a less-preferred position by itself--with no change in pay, benefits, or promotional opportunities, and with no hostile environment--does not constitute an adverse employment action [*Malais v. Los Angeles City Fire Dept (2007) 150 Cal. App. 4th 350, 357-358, 58 Cal. Rptr. 3d 444]* . On the other hand, an unfavorable employee evaluation may be actionable if it eliminates a reasonable potential for promotion or materially delays a promotion [*Akers v. County of San Diego (2002) 95 Cal. App. 4th 1441, 1454-1457, 116 Cal. Rptr. 2d 602* (reduced opportunities for promotion may constitute adverse employment action, even if employee does not prove denial of specific promotional opportunity)].

In determining whether an employee has suffered an "adverse employment action," it is appropriate to examine the totality of the circumstances in light of the realities of the workplace. Thus, an adverse employment action may consist of a series of wrongful acts by the employer that are taken in response to the employee's protected conduct [*Taylor v. City of Los Angeles Dept. of Water & Power (2006) 144 Cal. App. 4th 1216, 1231-1232, 51 Cal. Rptr. 3d 206 , disapproved on other grounds, Jones v. Lodge at Torrey Pines P'ship (2008) 42 Cal. 4th 1158, 1173-1174, 72 Cal. Rptr. 3d 624, 177 P.3d 232*]. On the other hand, allegedly wrongful acts that are unrelated and are taken by different persons for different reasons, some of which have nothing to do with the employee's protected conduct, do not constitute an adverse employment action [*McRae v. Department of Corr. & Rehab. (2006) 142 Cal. App. 4th 377, 391, 48 Cal. Rptr. 3d 313]* .

A series of separate retaliatory acts collectively may constitute an "adverse employment action," even if some or all of the component acts might not be individually actionable [*Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal. 4th 1028, 1055-1056, 32 Cal. Rptr. 3d 436, 116 P.3d 1123]* . In determining whether retaliation has occurred in such a case, a court may apply the "continuing violation doctrine" and consider acts of the employer that took place outside the limitations period, if those acts are sufficiently linked to acts that took place within the limitations period [*Yanowitz v.*

L'Oreal USA, Inc. (2005) 36 Cal. 4th 1028, 1055-1059, 32 Cal. Rptr. 3d 436, 116 P.3d 1123 ("continuing violation doctrine," adopted in Richards v. CH2M *Hill, Inc. (2001) 26 Cal. 4th 798, 818-823, 111 Cal. Rptr. 2d 87, 29 P.3d 175* , applies not just to FEHA harassment claims and disability-accommodation claims, but also to FEHA retaliation claims); *but cf. AMTRAK v. Morgan (2002) 536 U.S. 101, 110-113, 122 S. Ct. 2061, 153 L. Ed. 2d 106* ("continuing violation doctrine" is inapplicable to Title VII claim based on discrete act of discrimination or retaliation)]. An employer's ongoing retaliatory conduct qualifies as a "continuing violation" if the employer's acts (1) are sufficiently similar in kind as to be part of the same course of conduct, recognizing that similar kinds of unlawful conduct may take different forms; (2) have occurred with reasonable frequency; and (3) have not acquired a degree of permanence [*Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal. 4th 1028, 1059, 32 Cal. Rptr. 3d 436, 116 P.3d 1123]* . For further discussion of the "continuing violation doctrine," see *§ 115.51[1][c]*.

The causal link between the plaintiff engaging in a protected activity and thereafter being subject to an adverse employment action by the employer may be established by direct evidence of retaliatory motive [*Miller v. Fairchild Indus. (9th Cir. 1986) 797 F.2d 727, 731* (Title VII)], such as an adverse employment action admittedly based on a protected activity [*see Sias v. City Demonstration Agency (9th Cir. 1978) 588 F.2d 692, 695* (Title VII)]. However, since such evidence is often unavailable [*see Gates v. Georgia-Pacific Corp. (D. Or. 1970) 326 F. Supp. 397, 399* , *aff'd, 492 F.2d 292 (9th Cir. 1974)* (Title VII)], causation may be inferred from circumstantial evidence [*Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal. App. 3d 590, 615, 262 Cal. Rptr. 842* (FEHA)]. For example, an employee may show that other employees did not suffer the same consequences for the same conduct [*cf. Acosta v. University of District of Columbia (D.D.C. 1981) 528 F. Supp. 1215, 1224* (Title VII; plaintiff professor did not present prima facie case when he did not show that other employees with same or lesser qualifications were given grants)], or that there was a proximity in time between the employer's knowledge of protected activities and the alleged retaliatory action [*see Miller v. Fairchild Indus. (9th Cir. 1986) 797 F.2d 727, 731* (Title VII); *Hochstadt v. Worcester Found. for Experimental Biology (D. Mass. 1976) 425 F. Supp. 318, 324* , *aff'd, 545 F.2d 222 (1st Cir. 1976)* (Title VII); *Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal. App. 3d 590, 615, 262 Cal. Rptr. 842* (FEHA)].

For mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action to constitute sufficient prima facie evidence of causation, the temporal proximity must be very close. Thus, for example, the passage of a year between an employee's protected activity of requesting reasonable accommodations and the demotion of the employee does not show a causal link between the two events [*Coons v. Secretary of United States Dep't of Treasury (9th Cir. 2004) 383 F.3d 879, 887]* . Likewise, a transfer of an employee 20 months after the employer learned of the employee's protected conduct is insufficient to establish a prima facie case of causation [*Clark County Sch. Dist. v. Breeden (2001) 532 U.S. 268, 121 S. Ct. 1508, 1510, 149 L. Ed. 2d 509* (per curiam) (allegedly retaliatory transfer occurred 20 months after employee filed EEOC complaint, notice of which was given to employer within 10 days of filing)]. Similarly, temporal proximity may be insufficient to support an inference of causation if uncontested facts negate that inference [*Chen v. County of Orange (2002) 96 Cal. App. 4th 926, 949-951, 116 Cal. Rptr. 2d 786* (trial court properly granted nonsuit on retaliation claim because evidence of causation consisted solely of chronological sequence--denial of promotion occurred after plaintiff had complained of discrimination--but remainder of evidence established good and legitimate reasons not to promote plaintiff)]. For example, the transfer of plaintiff one month after the employer learned of the employee's Title VII lawsuit does not support an inference that the transfer was made in retaliation for filing the suit, in light of the conceded fact that the employer had been contemplating the transfer before it learned of the suit [*Clark County Sch. Dist. v. Breeden (2001) 532 U.S. 268, 121 S. Ct. 1508, 1510, 149 L. Ed. 2d 509* (per curiam) ("Employers need not suspend previously planned transfers upon discovering that a Title VII suit has been filed, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality")].

Temporal proximity is not a necessary element of causation, although a lack of temporal proximity may make it more difficult to show causation [*Porter v. California Dep't of Corr. (9th Cir. 2004) 383 F.3d 1018, 1030]* .

So long as causation is established, the employee need not show that he or she was eligible to engage in the protected

activity at the time of the adverse employment action. For example, an employee who suffers retaliation for taking family care and medical leave under the Moore-Brown-Roberti Family Rights Act (CFRA) may state a cause of action for retaliation if the employee was eligible for leave when it was taken, even if the retaliatory action took place when the employee was no longer eligible [*Dudley v. Department of Transp. (2001) 90 Cal. App. 4th 255, 262, 108 Cal. Rptr. 2d 739* ; *see Gov. Code § 12945.2* (*l*)(1)].

A causal link between the employee's protected activity and the adverse employment action is not established if the evidence does not support an inference that the individuals who took the adverse action had knowledge that the employee had engaged in the protected activity [*see, e.g.,* *Morgan v. Regents of Univ. of Cal. (2000) 88 Cal. App. 4th 52, 74, 105 Cal. Rptr.2d 652* (without knowledge that employee had previously filed grievance against employer, decision-makers who imposed adverse action "could not have acted in retaliation for [employee's] filing of the grievance")]. However, ignorance of an employee's protected activity does not afford a categorical defense unless it extends to all corporate actors who contributed materially to the adverse employment decision. Thus, an employer may be liable for retaliatory discharge when the supervisor who initiates disciplinary proceedings acts with retaliatory animus, even if the cause for discipline is separately investigated and the ultimate decision to discharge the employee is made by a manager with no knowledge that the employee has engaged in protected activity, so long as the supervisor's retaliatory motive was an actuating, but-for cause of the dismissal [*Reeves v. Safeway Stores, Inc. (2004) 121 Cal. App. 4th 95, 107-110, 16 Cal. Rptr. 3d 717]* .

[b] Burden of Proof and Presumptions

Once a plaintiff makes out a prima facie case of retaliation, the burden shifts to the employer to articulate some legitimate, nonretaliatory reason for its adverse employment action [*Nidds v. Schindler Elevator Corp. (9th Cir. 1996) 113 F.3d 912, 919 , cert. denied, 522 U.S. 950 (1997)* (FEHA); *Wrighten v. Metropolitan Hospitals (9th Cir. 1984) 726 F.2d 1346, 1354* (Title VII); *Williams v. Boorstin (D.C. Cir. 1980) 663 F.2d 109, 116 , cert. denied, 451 U.S. 985 (1981)* (Title VII)].

To satisfy its burden, an employer need only produce admissible evidence that would allow the trier of fact to rationally conclude that the action was not motivated by discriminatory animus [*Miller v. Fairchild Indus. (9th Cir. 1986) 797 F.2d 727, 731* (Title VII; quoting *Texas Dep't of Community Affairs v. Burdine (1981) 450 U.S. 248, 257, 101 S. Ct. 1089, 67 L. Ed. 2d 207*)]. For example, an employer may show lack of qualifications or subsequent disqualification, or elimination of the plaintiff's job for other business purposes [*see* *Williams v. Boorstin (D.C. Cir. 1980) 663 F.2d 109, 116 , cert. denied, 451 U.S. 985 (1981)* (Title VII)].

If the employer's rebuttal is successful, the plaintiff must carry his or her ultimate burden of establishing by a preponderance of the evidence that retaliatory intent motivated the employer's action [*Perryman v. Johnson Prods. Co. (11th Cir. 1983) 698 F.2d 1138, 1142* (Title VII)]. This may be accomplished directly by showing that a retaliatory reason more likely motivated the employer's action. However, an employer's motivation may be difficult to prove directly and, thus, is most often indirectly established by showing that the employer's proffered reason was a pretext [*see* *Wrighten v. Metropolitan Hospitals (9th Cir. 1984) 726 F.2d 1346, 1354* (Title VII); *see also* *Stegall v. Citadel Broad. Co. (2003) 350 F.3d 1061, 1066* (Title VII; to survive motion for summary judgment, employee's circumstantial evidence of pretext must be specific and substantial)].

An employer's rebuttal often involves mixed motives (that is, retaliation plus a legitimate business purpose) [*see, e.g.,* *Williams v. Boorstin (D.C.Cir. 1980) 663 F.2d 109, 117 , cert. denied, 451 U.S. 985 (1981)* (Title VII)]. In such a case, the plaintiff proves a violation if a preponderance of the evidence (whether direct or circumstantial) establishes that protected activity was a motivating factor in the adverse employment action [*Desert Palace, Inc. v. Costa (2003) 539 U.S. 90, 123 S. Ct. 2148, 156 L. Ed. 2d 84, 93* ; *Stegall v. Citadel Broad. Co. (2003) 350 F.3d 1061, 1067-1068* (Title VII)].

If the plaintiff succeeds at the "pretext" stage, there is a presumption that the adverse employment action was the product of discriminatory intent [*Wrighten v. Metropolitan Hospitals (9th Cir. 1984) 726 F.2d 1346, 1354* (Title VII)]. The employer may rebut the presumption by showing, by a preponderance of the evidence, that the adverse action would have been taken even in the absence of discriminatory intent [*Wrighten v. Metropolitan Hospitals (9th Cir. 1984) 726 F.2d 1346, 1354* (Title VII); *but see Williams v. Boorstin (D.C. Cir. 1980) 663 F.2d 109, 117 , cert. denied, 451 U.S. 985 (1981)* (Title VII; employer must rebut presumption by "clear and convincing evidence")].

Expert testimony ordinarily is not admissible to show retaliatory intent; in the absence of unusual facts, it must be presumed that jurors are capable of deciding a party's motive for themselves and do not need an expert to tell them which finding on that issue the evidence supports [*Kotla v. Regents of Univ. of Cal. (2004) 115 Cal. App. 4th 283, 290-294, 8 Cal. Rptr. 3d 898* (expert's testimony that certain facts were "indications" or "evidence" of retaliatory motive invaded province of jury to draw its own conclusions from evidence, and testimony lacked any reliable foundation in expert's background and expertise)].

[c] Applicants and Former Employees

Retaliation cases usually involve termination, but unlawful retaliation may also occur if an employer refuses to hire a person because he or she engaged in protected activities [*see Ruggles v. California Polytechnic State University (9th Cir. 1986) 797 F.2d 782, 786* (Title VII; university allegedly retaliated against part-time instructor who filed EEOC complaint, by eliminating tenure-track position for which instructor applied)].

Taking action against a discharged employee can also be unlawful retaliation [*Robinson v. Shell Oil Co. (1997) 519 U.S. 337, 339, 117 S. Ct. 843, 136 L. Ed. 2d 808* (Title VII; negative reference provided when former employee who charged discharge was discriminatory sought new employment)], as can terminating an independent contractor's contract [*Sada v. Robert F. Kennedy Med. Ctr. (1997) 56 Cal. App. 4th 138, 161-162, 65 Cal. Rptr. 2d 112* (temporary nurse terminated after claiming discrimination in denial of application for regular employee status)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationRetaliationBurdens of ProofLabor & Employment LawDiscriminationRetaliationElementsAdverse Employment ActionsLabor & Employment LawDiscriminationRetaliationElementsCausal LinkLabor & Employment LawDiscriminationRetaliationElementsProtected ActivitiesLabor & Employment LawDiscriminationRetaliationRemediesGeneral Overview

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Chapter 115 CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION
PART II. LEGAL BACKGROUND
C. Application of Equal Employment Opportunity Laws to Specific Employment Practices

11-115 California Forms of Pleading and Practice--Annotated §§ 115.38-115.49

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

[Reserved]

§§ 115.38[Reserved]

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Chapter 115 CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION
PART II. LEGAL BACKGROUND
D. Civil Actions and Judicial Remedies

11-115 California Forms of Pleading and Practice--Annotated § 115.50

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.50 Subject Matter Jurisdiction

[1] Subject Matter Jurisdiction Over FEHA Actions

California superior courts have subject matter jurisdiction over FEHA cases [*Gov. Code § 12965(b)*]. The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Code Civ. Proc. §§ 85, 86(a)(1)*]. In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*]. For a discussion of subject matter jurisdiction in California civil actions, generally, see Ch. 324, *Jurisdiction: Subject Matter* .

Federal district courts generally may exercise supplemental jurisdiction over FEHA claims when those state claims arise from the same facts as federal claims [*see 28 U.S.C. § 1367(a)*; *see also 28 U.S.C. § 1367(b)* (limitations on supplemental jurisdiction when federal district court's original jurisdiction is based only on diversity of citizenship under *28 U.S.C. § 1332*)]. However, a federal court may decline to exercise supplemental jurisdiction in certain situations, such as when a FEHA claim raises a novel or complex issue of state law [*28 U.S.C. § 1367(c)*]. If a federal court declines to exercise supplemental jurisdiction over a FEHA claim, the federal statute provides that the limitations period for the claim will be tolled while it is pending in the federal court and for 30 days after it is dismissed by the federal court [*28 U.S.C. § 1367(d)* (state law may provide longer tolling period)]. This tolling does not apply, however, to a claim against the state government, if the claim is dismissed by the federal court on the ground of the state's sovereign immunity under the *Eleventh Amendment* [*Raygor v. Regents of Univ. of Minn. (2002) 534 U.S. 533, 122 S. Ct. 999, 152 L. Ed. 2d 27, 36-41]* .

PRACTICE TIP:

Bring FEHA Claim With Title VII Claim. Federal courts will take supplemental jurisdiction of state claims that arise out of the same nucleus of facts as the federal claims. It is always a good idea to bring a FEHA claim together with a Title VII claim. For federal employees, the Title VII remedy will be the

only remedy. Otherwise, FEHA is a parallel remedy and usually a better one than Title VII. *By John H. Scott*

The failure to exhaust FEHA administrative remedies deprives the court of subject matter jurisdiction [*see Miller v. United Airlines (1985) 174 Cal. App. 3d 878, 889-890, 220 Cal. Rptr. 684* ; *Bennett v. Borden, Inc. (1976) 56 Cal. App. 3d 706, 710, 128 Cal. Rptr. 627* ; *see also Carter v. Smith Food King (9th Cir. 1985) 765 F.2d 916, 921* (interpreting exhaustion of FEHA remedies, including filing of charge, as "jurisdictional prerequisite" to FEHA suit)]. For further analysis of the requirement to exhaust administrative remedies, see *§ 115.51*.

[2] Subject Matter Jurisdiction Over Title VII, ADA, ADEA, and 42 U.S.C. § 1981 Actions

State and federal courts have concurrent subject matter jurisdiction to hear Title VII, ADEA, ADA, and *42 U.S.C. § 1981* claims.

Federal courts do not have exclusive jurisdiction over civil actions brought under Title VII, because Congress did not divest the state courts of their concurrent authority to adjudicate federal claims [*Yellow Freight System v. Donnelly (1990) 494 U.S. 820, 821, 110 S. Ct. 1566, 108 L. Ed. 2d 834]* . Unlike a number of statutes in which Congress unequivocally stated that the jurisdiction of the federal courts is exclusive, Title VII contains no language expressly confining jurisdiction to federal courts or ousting state courts of their presumptive jurisdiction [*Yellow Freight System v. Donnelly (1990) 494 U.S. 820, 823, 110 S. Ct. 1566, 108 L. Ed. 2d 834]* .

However, a state court action alleging Title VII or other federal claims is subject to removal by the defendant to federal district court [*see 28 U.S.C. §§ 1331, 1441(a)*]. For discussion of removal generally, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

State and federal courts also appear to have concurrent subject matter jurisdiction over ADA cases [*Krouse v. American Sterilizer Co. (W.D. Pa. 1994) 872 F. Supp. 203, 205]* . The holding in *Yellow Freight System v. Donnelly* has been extended, explicitly and implicitly, to claims asserted under ADA [*Krouse v. American Sterilizer Co. (W.D. Pa. 1994) 872 F. Supp. 203, 205* ; *Jones v. Illinois Cent. R.R. Co. (N.D. Ill. 1994) 859 F. Supp. 1144, 1145* ; *see 42 U.S.C. § 12117(a)* (Title VII remedies apply to ADA)].

With regard to ADEA claims, state courts have concurrent subject matter jurisdiction with the federal courts [*Chapman v. City of Detroit (6th Cir. 1986) 808 F.2d 459, 463* ; *see 29 U.S.C. § 626(c)(1)* (person aggrieved may bring civil action in court of competent jurisdiction)].

State courts also have concurrent jurisdiction, with the federal courts, over cases brought under *42 U.S.C. § 1981* [*De Horney v. Bank of America Nat'l Trust & Sav. Ass'n (9th Cir. 1989) 879 F.2d 459, 462-463* (on rehearing), *modifying on other grounds 777 F.2d 440 (9th Cir. 1985)* ; *Filipino Accountants' Assn. v. State Bd. of Accountancy (1984) 155 Cal. App. 3d 1023, 1028 n.4, 204 Cal. Rptr. 913* (assuming state court jurisdiction over § 1981 actions)].

For discussion of actions under Title VII, the ADA, the ADEA, and *42 U.S.C. § 1981*, generally, see Cook and Sobieski, Civil Rights Actions (Matthew Bender). For additional discussion of actions under the ADA, see Ogletree, Deakins, Nash, Smoak & Stewart, Americans With Disabilities Act: Employee Rights And Employer Obligations (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral JurisdictionCivil

ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionSame Case & ControversyLabor & Employment LawDiscriminationGeneral Overview

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11-115 California Forms of Pleading and Practice--Annotated § 115.51

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.51 Exhaustion of Administrative Remedies

[1] Exhaustion of FEHA Claims

[a] Jurisdictional Requirement

An aggrieved person may bring a civil action to enforce FEHA rights, but must first exhaust the FEHA administrative process [*see Bagatti v. Department of Rehab. (2002) 97 Cal. App. 4th 344, 357, 118 Cal. Rptr. 2d 443* (plaintiff alleging failure to accommodate disability under *Gov. Code § 12940(m)* must first obtain right-to-sue notice under *Gov. Code § 12965*); *Bennett v. Borden, Inc. (1976) 56 Cal. App. 3d 706, 709-710, 128 Cal. Rptr. 627]* . Exhaustion of administrative remedies is a jurisdictional prerequisite to maintaining a FEHA suit; the failure to exhaust subjects the suit to summary judgment, demurrer, or even the reversal of a favorable judgment [*Hobson v. Raychem Corp. (1999) 73 Cal. App. 4th 614, 631, 86 Cal. Rptr. 2d 497* ; *Bennett v. Borden, Inc. (1976) 56 Cal. App. 3d 706, 709-710, 128 Cal. Rptr. 627* ; *see Okoli v. Lockheed Technical Operations Co. (1995) 36 Cal. App. 4th 1607, 1609, 43 Cal. Rptr. 2d 57* ; *Baker v. Children's Hospital Med. Ctr. (1989) 209 Cal. App. 3d 1057, 1062, 257 Cal. Rptr. 768* ; *Miller v. United Airlines (1985) 174 Cal. App. 3d 878, 890, 220 Cal. Rptr. 684]* .

A public employee who has exhausted the FEHA administrative process and obtained a right-to-sue letter from the DFEH need not also exhaust the employer's internal administrative procedures prior to filing an FEHA claim in superior court [*Schifando v. City of Los Angeles (2003) 31 Cal. 4th 1074, 1082, 6 Cal. Rptr. 3d 457, 79 P.3d 569*]. Similarly, a public employee who asserts both FEHA claims and related nonstatutory claims for wrongful termination in violation of public policy need not exhaust the internal administrative remedy provided by the employer with respect to those nonstatutory claims before filing a civil action, if the resolution of those claims would have a preclusive impact on the FEHA claim [*Williams v. Housing Auth. (2004) 121 Cal. App. 4th 708, 727-731, 17 Cal. Rptr. 3d 374]* . Also, exhaustion of internal procedures is not required if the procedures do not include a quasi-judicial hearing with sufficient due process to generate a legally binding result [*Ahmadi-Kashani v. Regents of Univ. of Cal. (2008) 159 Cal. App. 4th 449, 456-461, 71 Cal. Rptr. 3d 556*], or if the internal procedures are provided by a collective bargaining agreement rather than a statute [*Ortega v. Contra Costa Cmty. Coll. Dist. (2007) 156 Cal. App. 4th 1073, 1080-1086, 67 Cal.*

Rptr. 3d 832]. However, if the employee elects to pursue an employer's internal administrative process to a decision that is of a sufficiently judicial character to support collateral estoppel, the employee must pursue that process to completion, including exhausting any available judicial avenues for reversal of adverse findings. A failure to do so will result in any quasi-judicial administrative findings having binding, preclusive effect in later judicial proceedings [*McDonald v. Antelope Valley Cmty. Coll. Dist. (2008) 45 Cal. 4th 88, 113, 84 Cal. Rptr. 3d 734, 194 P.3d 1026* ; *Page v. Los Angeles County Probation Dept. (2004) 123 Cal. App. 4th 1135, 1143-1144, 20 Cal. Rptr. 3d 598* ; *see Miller v. City of L.A. (2008) 169 Cal. App. 4th 1373, 1382-1383, 87 Cal. Rptr. 3d 510* (having participated in evidentiary hearing and receiving hearing examiner's report and recommendation, employee was obligated to exhaust his judicial remedies, including seeking administrative mandamus, and employee's failure to do so resulted in administrative decision having collateral estoppel effect)].

A right-to-sue letter from the DFEH [*see* [c], *below*], gives the complainant a right to sue under the FEHA, but it does not satisfy the exhaustion of administrative remedies requirement for a federal claim. Thus, a claimant who wishes to assert a Title VII claim must obtain a right-to-sue letter from the Equal Employment Opportunity Commission [*Roman v. Countyof Los Angeles (2000) 85 Cal. App. 4th 316, 325-326, 102 Cal. Rptr. 2d 13]* .

[b] Administrative Agencies

FEHA provides an extensive administrative apparatus for determining employment discrimination complaints. The Department of Fair Employment and Housing (DFEH) and the Fair Employment and Housing Commission (FEHC) are the administrative bodies that enforce FEHA [*see Gov. Code §§ 12901, 12903, 12930-12933, 12935*; *see also State Personnel Bd. v. FEHC (1985) 39 Cal. 3d 422, 428-429, 217 Cal. Rptr. 16, 703 P.2d 354* (overview of respective roles of DFEH and FEHC)]. The DFEH is a "prosecutorial" body that investigates employment discrimination complaints, conducts discovery, accuses and prosecutes discriminatory conduct, and publishes the results of its investigations [*see Gov. Code §§ 12930, 12965*]. The FEHC is an "adjudicative" body that holds hearings on DFEH accusations and decides the issues raised in the accusations [*see Gov. Code §§ 12935, 12967-12972*; *2 Cal. Code Reg. §§ 7285.5, 7285.6* (FEHC regulations)].

For a detailed discussion of the administrative procedures under FEHA, see K. Wilcox, ed., California Employment Law, Ch. 42 (Matthew Bender).

PRACTICE TIP:

Exhaustion Requirement. A "joint filing" usually occurs between the Equal Employment Opportunity Commission (EEOC) and FEHA. However, it does not always occur, and one should not assume that because an employee complained at one agency a complaint was also referred to, or filed with, the other. It is also important to realize that simply because you are told by an employee that he or she visited an EEOC or a DFEH office and filled out forms, that a complaint was in fact made. Do not assume a complaint was officially made unless and until you see it with an accompanying charge number. There are cases in which persons have completed and signed complaints, delivered them to the EEOC or DFEH, and believed they had made a complaint when in fact the agency had no record of a complaint being made.

In addition, I have heard stories of intake workers at the EEOC and/or DFEH refusing to accept complaints because of someone's opinion that there was not sufficient evidence of discrimination or retaliation. In some cases this may be the correct decision. However, in others it would appear that persons with legitimate complaints are being prevented from "exhausting" the administrative remedy necessary to bring a lawsuit.

Thus, it is important to recognize that a person may accuse you of malpractice if you advise him or her to make a complaint with the EEOC or DFEH within a certain time and he or she fails to do so. Even if you

put the advice in writing, a potential "client" may still turn on you. If you are retained by a person before the administrative claim is made, you must make sure that the claim is timely filed. Do not rely on the client to do it. Alternatively, make sure you have written a letter to the potential client notifying him or her (1) that you are not representing them, and (2) that it is their responsibility to timely make a complaint with EEOC or DFEH. Make sure also to give notice of the time limits for making such a claim. *By John H. Scott*

[c] Filing of Complaint, Statute of Limitation, and "Right-to-Sue" Letter

An aggrieved party starts the administrative process by filing a complaint with the DFEH and obtaining a "right-to-sue" letter from the DFEH.

The administrative complaint must be verified [*Gov. Code § 12960(b)*], but the verification may be made by the complainant's attorney [*Blum v. Superior Court (2006) 141 Cal. App. 4th 418, 428, 45 Cal. Rptr. 3d 902* (attorney may verify by signing own name, not client's name, and should not verify complaint unless attorney believes allegations of complaint are true, penalties for perjury apply)].

After the administrative complaint is filed with the DFEH for investigation, the DFEH generally must serve the complaint on the employer, personally or by certified mail [*Gov. Code § 12962(a)*]. However, if the complainant hires or retains private counsel, then counsel must serve the complaint on the employer [*Gov. Code § 12962(b)*]. In either event, service must be made at the time of initial contact with the employer, or within 60 days, whichever comes first [*Gov. Code § 12962(c)*]. However, the need to serve the administrative complaint on the employer applies only if the complaint is filed with the DFEH "for investigation" [*Gov. Code § 12962(a)*]. Thus, if an aggrieved employee files an administrative complaint and immediately requests a right-to-sue letter, indicating that he or she does not wish the DFEH to investigate, the service requirement is no longer applicable. In such a case, the failure to serve the administrative complaint on the employer will not be a jurisdictional bar to the employee's eventual lawsuit against the employer [*Wasti v. Superior Court (2006) 140 Cal. App. 4th 667, 671-673, 44 Cal. Rptr. 3d 625]* .

The administrative complaint must be filed with the DFEH within one year of the employer's alleged unlawful conduct [*Gov. Code § 12960(b), (d)*]. This one-year period may be extended under the following circumstances [*Gov. Code § 12960(d)*]:

- The one-year period may be extended by up to 90 days, if the aggrieved person first obtains knowledge of the facts concerning the unlawful practice after the expiration of the one-year period [*see Williams v. City of Belvedere (1999) 72 Cal. App. 4th 84, 92-93, 84 Cal. Rptr. 2d 658* (court lacks equitable power to grant extension beyond that specifically provided by statute)].

- The one-year period may be extended by up to one year after rebuttal of the presumption that the aggrieved person's employer is the person or entity identified on the aggrieved person's W-2 form [*see Gov. Code § 12928*].

- If the grievance consists of an allegation of violence, intimidation, or threatened violence committed for reasons that constitute an unlawful basis for discrimination [*see Civ. Code § 51.7*], the one-year period may be extended by up to one year after the aggrieved person becomes aware of the identity of a person liable for the alleged violation; however, this extension may not exceed three years from the date of the alleged violation.

- The one-year period may be extended by up to one year after the date on which the aggrieved person reaches the age of majority (age 18) [*see Fam. Code § 6500*].

The one-year filing deadline is also subject to equitable exceptions, such as when a complainant reasonably is misled through no fault of his or her own as a result of inaccurate advice from the DFEH [*see, e.g., Holland v. Union Pac. R.R. Co. (2007) 154 Cal. App. 4th 940, 946, 65 Cal. Rptr. 3d 145* (employee was diligent in pursuit of his remedy, DFEH representative had assured him that completion of pre-complaint questionnaire would suffice to meet deadline, and his administrative complaint was only about two weeks late)].

The one-year deadline is also subject to equitable tolling while the complainant voluntarily pursues the employer's internal administrative remedy, even though such an internal remedy is optional and need not be exhausted before filing a FEHA action, and even if the complainant voluntarily terminates the internal proceeding before an administrative decision is rendered [*McDonald v. Antelope Valley Cmty. Coll. Dist. (2008) 45 Cal. 4th 88, 105-114, 84 Cal. Rptr. 3d 734, 194 P.3d 1026*].

If discriminatory treatment has occurred over a period of time, the entire course of discrimination may be actionable if the DFEH charge properly alleges a "continuing violation" and is filed within one year of the most recent act of discrimination [*City and County of San Francisco v. FEHC (1987) 191 Cal. App. 3d 976, 983, 236 Cal. Rptr. 716* ; *see Valdez v. City of Los Angeles (1991) 231 Cal. App. 3d 1043, 1052, 282 Cal. Rptr. 726]* . For example, in one case, a county failed to promote black firefighters because it relied on an eligibility list generated by a discriminatory test. The court held that the action was timely filed because promotions continued to be made from the eligibility list during the year preceding the filing of the administrative complaint [*City and County of San Francisco v. FEHC (1987) 191 Cal. App. 3d 976, 983, 236 Cal. Rptr. 716* ; *see Watson v. Dep't of Rehabilitation (1989) 212 Cal. App. 3d 1271, 1290-1291, 261 Cal. Rptr. 204]* .

In another case, the court of appeal applied the continuing violation doctrine in a sexual harassment case in which the plaintiff alleged an eleven-year pattern of discrimination [*Accardi v. Superior Court (1993) 17 Cal. App. 4th 341, 348-351, 21 Cal. Rptr. 2d. 292* ; *cf. Regents of University of California v. Superior Court (1995) 33 Cal. App. 4th 1710, 1718-1720, 39 Cal. Rptr. 2d 919* (on summary judgment, plaintiff must present evidence that discriminatory acts continued into the limitations period)].

The California Supreme Court has defined the elements of the "continuing violation" doctrine in the context of an employer's persistent failure to reasonably accommodate a disability or to eliminate a hostile work environment targeting a disabled employee [Richards v. CH2M *Hill, Inc. (2001) 26 Cal. 4th 798, 818-823, 111 Cal. Rptr. 2d 87, 29 P.3d 175* (surveying various formulations of doctrine adopted by federal courts under federal antidiscrimination statutes)]. This ongoing conduct qualifies as a "continuing violation" if the employer's unlawful actions (1) are sufficiently similar in kind as to be part of the same course of conduct (recognizing that similar kinds of unlawful conduct may take different forms), (2) have occurred with reasonable frequency, and (3) have not acquired a degree of permanence [Richards v. CH2M *Hill, Inc. (2001) 26 Cal. 4th 798, 823, 111 Cal. Rptr. 2d 87, 29 P.3d 175]* .

In the context of an ongoing process of accommodation of disability, or ongoing disability harassment, "permanence" means that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment would be futile [Richards v. CH2M *Hill, Inc. (2001) 26 Cal. 4th 798, 823, 111 Cal. Rptr. 2d 87, 29 P.3d 175]* . Thus, when an employer engages in a continuing course of unlawful conduct under FEHA by refusing reasonable accommodation of a disabled employee or engaging in disability harassment, the statute of limitations does not necessarily begin to run when the employee first believes his or her rights may have been violated. Rather, the limitations period begins to run either when the employer's course of conduct ends (as by cessation of the conduct or by the employee's resignation), or when the employee is on notice that further efforts to end the unlawful conduct will be in vain [Richards v. CH2M *Hill, Inc. (2001) 26 Cal. 4th 798, 823, 111 Cal. Rptr. 2d 87, 29 P.3d 175]* . At least one court of appeal has held that the same formulation of the continuing violation doctrine applies in FEHA sexual harassment cases [*see Birschtein v. New United Motor Manufacturing, Inc. (2001) 92 Cal. App. 4th 994, 1003-1006, 112 Cal. Rptr. 2d 347]* . This formulation of the continuing violation doctrine has also been applied in a sex-discrimination case under FEHA [*Cucuzza v. City of Santa Clara (2002) 104 Cal. App.*

4th 1031, 1040-1043, 128 Cal. Rptr. 2d 660] .

PRACTICE TIP:

"Continuing Violation" Doctrine. The "continuing violation" doctrine often becomes very significant in employment discrimination cases. In general, employers continue to advocate that the doctrine should be eliminated or severely restricted. However, the California Supreme Court's 2001 decision in *Richards v. CH2M Hill, Inc., discussed above*, reaffirms existing law. To the extent the continuing violation doctrine is narrowed in the future, employers should be careful of what they ask for because they might get it. A narrowing of the doctrine would require attorneys to advise employees to complain, as soon as possible, whenever they believe they are victims of discrimination. This in turn would lead to more internal complaints, more complaints under Title VII and FEHA, and potentially more lawsuits. It would also place more employees in the position of having a retaliation claim regarding any "adverse act" that occurs after they have complained of discrimination.

Conversely, a "liberal" continuing violation doctrine encourages employees to "stick it out" and wait for things to "get better" before complaining. If a manager is replaced or an employee is transferred, the problem may go away. Do we really want to encourage employees to complain of discrimination every time they hit a bump in the road? *By John H. Scott*

The continuing violation doctrine does not apply to bar a claim of ongoing, company-wide, systematic discrimination against a protected class [*Alch v. Superior Court (2004) 122 Cal. App. 4th 339, 367-377, 19 Cal. Rptr. 3d 29* (if employer enforced discriminatory policy during limitations period, claims are timely filed both by persons who applied unsuccessfully for jobs during that period and by persons who were deterred from applying for jobs during that period)].

After the filing of the complaint, the DFEH issues a "right-to-sue" letter at th e request of the complainant, if it has failed to issue an accusation within 150 days after the complaint was filed, or if it has determined before then that it will not issue an accusation [*Gov. Code § 12965(b)*]. If the complainant does not request a right-to-sue notice, the DFEH must issue the notice on completion of its investigation, and no later than one year after the complaint was filed [*Gov. Code § 12965(b)*]. Because the complainant's entitlement to a right-to-sue notice becomes unconditional one year after the filing of the administrative complaint, at that point the complainant will be deemed to have exhausted his or her administrative remedy, and a failure to request a right-to-sue letter will not bar a civil action [*Grant v. Comp USA, Inc. (2003) 109 Cal. App. 4th 637, 645-651, 135 Cal. Rptr. 2d 177]* .

The right-to-sue letter must inform the complainant that he or she has one year from the date of the letter to file a civil action [*see Gov. Code § 12965(b)*]. This one-year period may be tolled, however, if (1) the DFEH has deferred its investigation of the complaint to the EEOC; or (2) the EEOC, after an investigation by the DFEH, agrees to perform a substantial weight review of the DFEH determination or conducts its own investigation [*Gov. Code § 12965(d), (e)*; *see § 115.52[1]*].

For a detailed discussion of the administrative procedures under FEHA, see K. Wilcox, ed., California Employment Law, Ch. 42 (Matthew Bender).

PRACTICE TIP:

Requesting Immediate "Right-to-Sue" Letter. An employee/complainant can request an immediate "right-to-sue" letter from either EEOC or DFEH. This may or may not be advisable. Unless you are ready to promptly jump into litigation, it may be preferable to wait and see what the administrative "investigation" brings. Often it is months before investigations occur. Sometimes the investigations are thorough and well done. Other times they are not. The results of EEOC investigations are admissable, but not conclusive, in a subsequent Title VII lawsuit. *By John H. Scott*

[d] Burden of Proof and Administrative Remedies

An unlawful practice alone is not sufficient to sustain an award of actual damages; the DFEH is required to prove by a preponderance of the evidence that the complaining party has sustained actual injury, and specified evidence of the effects of the discrimination on the complaining party must be considered [*Gov. Code § 12970(b)*].

If the FEHC finds that employment discrimination exists, it must order the respondent to cease and desist and take actions including hiring, reinstatement, or upgrading of employees, with or without backpay [*Gov. Code § 12970(a)(1)*]. The FEHC may also order the respondent to pay compensatory damages for mental suffering and/or an administrative fine for conduct that would constitute grounds for punitive damages in a civil action, but there is a $150,000 limit on the total award of compensatory damages and an administrative fine [*see Gov. Code § 12970(a)(3), (c), (d)*].

[e] Judicial Review of Administrative Decisions

FEHC decisions are subject to judicial review by writ of mandate under *Code Civ. Proc. § 1094.5* [*Gov. Code §§ 11523, 12972*]. The substantial evidence standard of review applies to FEHC findings of unlawful discrimination [*see American National Ins. Co. v. FEHC (1982) 32 Cal. 3d 603, 607, 186 Cal. Rptr. 345, 651 P.2d 1151* ; *County of Fresno v. FEHC (1991) 226 Cal. App. 3d 1541, 1548, 277 Cal. Rptr. 557* ; *Raytheon Co. v. FEHC (1989) 212 Cal. App. 3d 1242, 1250-1251, 261 Cal. Rptr. 197]* . The independent judgment standard applies to findings that unlawful discrimination did not occur [*see Kerrigan v. Fair Employment Practice Comm'n (1979) 91 Cal. App. 3d 43, 51-52, 154 Cal. Rptr. 29 , cert. denied, 444 U.S. 930]* .

[f] Transfer to Court by Respondent

The respondent may elect to transfer the administrative proceedings to court if the accusation includes a prayer for damages for emotional injuries or administrative fines, or both. The respondent must serve notice of the election on all parties within 30 days after service of the accusation (or within 30 days after service of an amended accusation if the amendment was made for the purpose of adding a prayer for damages for emotional injuries, administrative fines, or both) [*Gov. Code § 12965(c)(1)*]. If the defendant makes such an election, the DFEH must dismiss the accusation and file (or elect to have the Attorney General file) the court action in its own name on behalf of the aggrieved person, who is the real party in interest in the civil action and, as such, has the right to participate as a party and be represented by counsel. Transferred actions are given priority by the court [*Gov. Code § 12965(c)(2)*]. A plaintiff in such an action has the same right to relief (including attorney's fees and costs recoverable by the prevailing party) as in an action filed under *Gov. Code § 12965(b)* [*Gov. Code § 12965(c)(3)*]. In addition, the relief granted may include a requirement that the employer conduct training for all employees, supervisors, and management on the requirements of FEHA and the employer's internal grievance procedures [*Gov. Code § 12965(c)(3)*].

[g] Actions Not Requiring Exhaustion of Adminstrative Remedies

Although an employee must exhaust FEHA administrative remedy before bringing a civil action under FEHA or seeking any remedies provided by FEHA, exhaustion of the administrative remedy is not required before filing a civil action for damages alleging nonstatutory causes of action [*Rojo v. Kliger (1990) 52 Cal. 3d 65, 88, 276 Cal. Rptr. 130, 801 P.2d 373]* . Thus, for example, exhaustion of FEHA administrative remedies is not a prerequisite to filing a civil action alleging a tort cause of action for wrongful termination in violation of public policy, which is independent of FEHA [*see Rojo v. Kliger (1990) 52 Cal. 3d 65, 88-91, 276 Cal. Rptr. 130, 801 P.2d 373]* . For discussion of common law causes of action for wrongful termination, see Ch. 249, *Employment Law: Termination and Discipline* .

On the other hand, if an employer provides a statutory internal grievance mechanism, a failure to exhaust its remedies precludes a subsequent nonstatutory civil action [*Palmer v. Regents of Univ. of Cal. (2003) 107 Cal. App. 4th 899, 903-906, 132 Cal. Rptr. 2d 567]* . Similarly, an employer's internal remedy generally must be exhausted before the

employee sues under a statutory provision that does not contain its own administrative remedy [*see Campbell v. Regents of Univ. of Cal. (2005) 35 Cal. 4th 311, 329-330, 25 Cal. Rptr. 3d 320, 333-335, 106 P.3d 976* (public employee must exhaust employer's internal remedy before suing for retaliation for statutorily protected "whistleblowing" activity under *Lab. Code § 1102.5*, which is silent on administrative remedy or exhaustion requirement)]. The exhaustion of internal grievance procedures is required not because of any contractual obligation, but because of compelling policy considerations. If an employer has the opportunity quickly to determine through the operation of its internal procedures that it has committed error, it may be able to minimize, and sometimes eliminate, any monetary injury to the employee by immediately reversing the initial action. An employee should not be permitted to increase damages by forgoing available internal remedies. Moreover, an exhaustion requirement reflects the courts' recognition of the "expertise" of the employer's quasi-judicial tribunal, permitting it to adjudicate the merits of the plaintiffs' claims in the first instance [*Campbell v. Regents of Univ. of Cal. (2005) 35 Cal. 4th 311, 322, 25 Cal. Rptr. 3d 320, 327-328, 106 P.3d 976* (requirement that internal remedy be exhausted serves salutary function of mitigating damages, recognizes quasi-judicial tribunal's expertise, and promotes judicial economy by unearthing relevant evidence and providing record should there be judicial review of case); *Palmer v. Regents of Univ. of Cal. (2003) 107 Cal. App. 4th 899, 905, 132 Cal. Rptr. 2d 567]* .

However, a failure to exhaust an employer's internal procedures will not preclude a civil action asserting a claim under the FEHA or another statutory scheme that contains its own exhaustion prerequisite. Thus, a public employee who has exhausted the FEHA administrative process and obtained a right-to-sue letter from the DFEH need not also exhaust internal administrative procedures provided by the employer prior to filing an FEHA claim in superior court [*Schifando v. City of Los Angeles (2003) 31 Cal. 4th 1074, 1081-1091, 6 Cal. Rptr. 3d 457, 79 P.3d 569*]. Similarly, a public employee who asserts both FEHA claims and related nonstatutory claims for wrongful termination in violation of public policy need not exhaust the internal administrative remedy provided by the employer with respect to those nonstatutory claims before filing a civil action, if the resolution of those claims would have a preclusive impact on the FEHA claim [*Williams v. Housing Auth. (2004) 121 Cal. App. 4th 708, 727-731, 17 Cal. Rptr. 3d 374]* . Also, exhaustion of internal procedures is not required if the procedures do not include a quasi-judicial hearing with sufficient due process to generate a legally binding result [*Ahmadi-Kashani v. Regents of Univ. of Cal. (2008) 159 Cal. App. 4th 449, 456-461, 71 Cal. Rptr. 3d 556*], or if the internal procedures are provided by a collective bargaining agreement rather than a statute [*Ortega v. Contra Costa Cmty. Coll. Dist. (2007) 156 Cal. App. 4th 1073, 1080-1086, 67 Cal. Rptr. 3d 832*]. However, if the employee elects to pursue an employer's internal administrative process to a decision that is of a sufficiently judicial character to support collateral estoppel, the employee must pursue that process to completion, including exhausting any available judicial avenues for reversal of adverse findings. A failure to do so will result in any quasi-judicial administrative findings having binding, preclusive effect in later judicial proceedings [*McDonald v. Antelope Valley Cmty. Coll. Dist. (2008) 45 Cal. 4th 88, 113, 84 Cal. Rptr. 3d 734, 194 P.3d 1026* ; *Page v. Los Angeles County Probation Dept. (2004) 123 Cal. App. 4th 1135, 1143-1144* , 20 Cal. Rptr. 3dd 598; *see Miller v. City of L.A. (2008) 169 Cal. App. 4th 1373, 1382-1383, 87 Cal. Rptr. 3d 510* (having participated in evidentiary hearing and receiving hearing examiner's report and recommendation, employee was obligated to exhaust his judicial remedies, including seeking administrative mandamus, and employee's failure to do so resulted in administrative decision having collateral estoppel effect)].

[2] Exhaustion of Title VII, ADA, and ADEA Claims

[a] Jurisdictional Requirement

Title VII, the ADA, and the ADEA have an administrative scheme that is distinct from, but related to, FEHA apparatus. The federal enforcement agency for these statutes is the Equal Employment Opportunity Commission (EEOC) [*see 29 U.S.C. § 626* (ADEA); *42 U.S.C. §§ 2000e-4, 2000e-5(a)* (Title VII); *see also 42 U.S.C. § 12117* (procedures set forth in *42 U.S.C. § 2000e-5* apply to ADA)].

Before filing a civil action under Title VII or the ADA, an aggrieved person must file a timely EEOC charge or DFEH

complaint, and must obtain an EEOC "right-to-sue" letter [*see 42 U.S.C. § 2000e-5(b), (c), (e), (f)*; *Zipes v. Trans World Airlines (1982) 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d 234* ; *Jasch v. Potter (9th Cir. 2002) 302 F.3d 1092, 1094-1096* (if EEOC reaches merits of employee's Title VII claim and issues right-to-sue letter, employee has sufficiently exhausted administrative remedies, even though employee did not fully cooperate with EEOC investigation); *see also 42 U.S.C. § 12117* (procedures set forth in *42 U.S.C. § 2000e-5* apply to ADA)]. A Title VII complainant generally has 180 days from the time of the alleged unlawful employment practice to file with the EEOC, but a 300-day filing period applies if the complainant institutes proceedings with a state or local agency, such as the DFEH, that has authority to grant or seek relief from unlawful employment practices [*42 U.S.C. § 2000e-5(e)(1)*; *see* [b], *below*]. The charge must be verified [*42 U.S.C. § 2000e-5(b)*]. However, an otherwise timely charge may be verified after the expiration of the time for filing [*29 C.F.R. § 1601.12(b)*; *Edelman v. Lynchburg Coll. (2002) 535 U.S. 106, 122 S. Ct. 1145, 152 L. Ed. 2d 188, 196-201* (upholding *29 C.F.R. § 1601.12(b)* as valid interpretation of *42 U.S.C. § 2000e-5*)].

The 180- or 300-day period for filing a Title VII charge based on a discrete act of discrimination or retaliation (e.g., termination, failure to promote, denial of transfer, or refusal to hire) generally begins to run when that act occurs [*AMTRAK v. Morgan (2002) 536 U.S. 101, 110-115, 122 S. Ct. 2061, 153 L. Ed. 2d 106*]. A plaintiff who does not file a timely charge under Title VII challenging the *adoption* of a discriminatory practice may assert a disparate-impact claim in a timely charge challenging the employer's later *application* of that practice [*Lewis v. City of Chicago (May 24, 2010) -- U.S. --, 130 S. Ct. 2191, 176 L. Ed. 2d 967, 2010 U.S. LEXIS 4165, at *10-*21* (after employer adopted practice of excluding employment applicants who did not achieve certain score on examination, each time employer selected applicants who took that examination constituted "use" of that employment practice under *42 U.S.C. § 2000e-2(k)(1)(A)(i)*, giving rise to disparate-impact claim by excluded applicant)].

If the alleged unlawful employment practice consists of discrimination in compensation [*see, e.g., 29 U.S.C. § 623(a)(1)* (ADEA); *42 U.S.C. § 2000e-2(a)(1)* (Title VII)], a discriminatory act occurs and triggers the filing period (1) when the discriminatory compensation decision or other practice is adopted; (2) when the employee becomes subject to the discriminatory compensation decision or other practice; and (3) when the employee is affected by application of the discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from that decision or other practice [*29 U.S.C. § 626(d)(3)* (ADEA); *42 U.S.C. § 2000e-5(e)(3)(A)* (Title VII) (overruling Ledbetter v. Goodyear Tire & Rubber Co. (2007) 550 U.S. 618, 127 S. Ct. 2162, 2167-2172, 167 L. Ed. 2d 982, 990-995 , which had held that employee's Title VII charge had to be filed within applicable 180 or 300 days after pay-raise decision and could not be based on mere fact that paychecks issued within limitations period entailed adverse effects resulting from past discriminatory pay-raise decisions)]. The employee in such a case may recover back pay for up to two years preceding the filing of the charge, if the unlawful employment practices that have occurred during the charge-filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge [*42 U.S.C. § 2000e-5(e)(3)(B)*]. These special rules governing claims of discrimination in compensation were enacted in 2009 but are effective as if enacted on May 28, 2007, and apply to all discriminatory-compensation claims pending on or after that date under Title VII, the ADEA, the ADA, and the Rehabilitation Act of 1973 [Pub. L. No. 111-2, §§ 5, 6 (Lilly Ledbetter Fair Pay Act of 2009); *see 29 U.S.C. §§ 791(g), 794(d), 794a(a)(1), (2)* (Rehabilitation Act of 1973); *42 U.S.C. § 2000e-16(f)* (Title VII federal employment; *42 U.S.C. § 12117(a) (ADA)*)].

A claim other than for discrimination in compensation or for harassment generally may impose liability on the employer only for events occurring within the limitations period, even if events occurring outside of the limitations period form part of a pattern extending to events that are not time-barred [*Raad v. Fairbanks N. Star Borough (9th Cir. 2003) 323 F.3d 1185, 1192* (discriminatory practice other than harassment remains divisible into discrete acts for purposes of limitations period, even if it extends over time)]. Furthermore, such a claim based on a discrete act of discrimination or retaliation occurring outside the limitations period is time-barred even if it was performed under an allegedly discriminatory policy that remained in effect during the limitations period [*see Cherosky v. Henderson (9th Cir. 2003) 330 F.3d 1243, 1245-1248* (claims under Rehabilitation Act, *29 U.S.C. § 701 et seq.*, are governed by same continuing

violations doctrine that applies to claims under Title VII)].

If the employee is asserting a hostile work environment claim, the filing period may be measured from the time of any act contributing to that hostile environment [*AMTRAK v. Morgan (2002) 536 U.S. 101, 115-122, 122 S. Ct. 2061, 153 L. Ed. 2d 106* (application of equitable doctrines may either limit or toll time period within which employee must file charge)].

The EEOC issues a right-to-sue letter (1) if an aggrieved person requests the letter at least 180 days after a charge is submitted or if the EEOC determines that it will be unable process the charge within 180 days; (2) if the EEOC is unable to obtain voluntary compliance from the employer; or (3) if the EEOC dismisses the charge [*see 42 U.S.C. § 2000e-5(f)(1)*; *29 C.F.R. § 1601.28* (EEOC guideline; notice of right to sue); *see also 42 U.S.C. § 12117* (procedures set forth in *42 U.S.C. § 2000e-5* apply to ADA); *29 C.F.R. § 1601.1* (EEOC procedural regulations apply to ADA)]. The exhaustion of administrative remedies requirement for a federal claim cannot be satisfied by obtaining a right-to-sue letter from the California Department of Fair Employment and Housing [*Roman v. County of Los Angeles (2000) 85 Cal. App. 4th 316, 325-326, 102 Cal. Rptr. 2d 13]* . The aggrieved person has 90 days from the date of the right to sue letter to initiate a civil action in court [*42 U.S.C. § 2000e-5(f)(1)*; *see O'Donnell v. Vencor Inc. (9th Cir. 2006) 466 F.3d 1104, 1111* (complaint filed after expiration of that 90-day period is barred, even if plaintiff previously filed timely complaint that was voluntarily dismissed without prejudice)].

Under the ADEA, an aggrieved person may bring his or her own civil action, but not until 60 days after filing an EEOC charge or DFEH complaint [*see 29 U.S.C. §§ 626(d), 633(b)*; *29 C.F.R. § 1626.7(b)* (EEOC guideline)]. However, under the ADEA, a person's private right of action terminates if the EEOC commences a civil action [*see 29 U.S.C. § 626(c)*]. A filing with the EEOC will constitute a "charge" that starts the running of the 60-day period under the ADEA if it alleges unlawful discrimination, specifies the name of the charged party, and can be reasonably construed as a request for the EEOC to take remedial action to protect the employee's rights or otherwise to settle a dispute between the employer and employee [*Federal Express Corp. v. Holowecki (2008) 552 U.S. 389, 128 S. Ct. 1147, 1156-1158, 170 L. Ed. 2d 10*].

If the claim made in an employee's lawsuit differs from the charge that the employee filed with the EEOC, the court will not find that the employee has exhausted administrative remedies unless a reasonable investigation of the charge filed with the EEOC would have encompassed the events alleged in the lawsuit. For example, an employee who has exhausted administrative remedies for a claim that his or her termination constitutes unlawful discrimination will be deemed to have exhausted a claim based on the employer's failure to reinstate the employee, since an EEOC investigation of either claim would necessarily have encompassed both claims [*Josephs v. Pacific Bell (9th Cir. 2006) 443 F.3d 1050, 1061-1062 (ADA)*]. On the other hand, a claim that the employer retaliated against the employee for filing a charge with the EEOC is not administratively exhausted by the charge filed with the EEOC, if that charge alleged harassment by one supervisor but the retaliation was allegedly conducted by another supervisor. In such a case, a reasonable investigation of the EEOC charge would not have encompassed the second supervisor's allegedly retaliatory acts [*Vasquez v. County of L.A. (9th Cir. 2003) 349 F.3d 634, 644-646* (Title VII)].

An equitable exception to the administrative-exhaustion requirement is available when an EEOC representative misleads the employee concerning his or her claim. Relief from the exhaustion requirement is available if the employee (1) diligently pursued his or her claim; (2) was misinformed or misled by the EEOC; (3) relied in fact on the misinformation or misrepresentations of the EEOC, causing the employee to fail to exhaust his or her administrative remedies; and (4) was acting pro se at the time [*Josephs v. Pac. Bell (9th Cir. 2006) 443 F.3d 1050, 1061* (employee was told by EEOC representative that he needed to retain counsel before filing claim, and delay caused by seeking out counsel caused employee to miss filing deadline)].

[b] Federal Process in Relation to State Agency

The federal administrative process is initiated by filing a written "charge" with the EEOC within 300 days after an alleged unlawful act or, if a complaint is filed with the DFEH first, within 30 days after the DFEH terminates its process, whichever occurs first [*29 U.S.C. § 626(d)* (ADEA); *42 U.S.C. § 2000e-5(a), (e)* (Title VII); *29 C.F.R. §§ 1601.7-1601.14, 1626.5-1626.8* (EEOC guidelines); *see also 42 U.S.C. § 12117* (procedures set forth in *42 U.S.C. § 2000e-5* apply to ADA)]. The charge filed with the EEOC must be verified [*42 U.S.C. § 2000e-5(b)*]. However, an otherwise timely charge may be verified after the expiration of the time for filing [*29 C.F.R. § 1601.12(b)*; *Edelman v. Lynchburg Coll. (2002) 535 U.S. 106, 122 S. Ct. 1145, 1148-1152, 152 L. Ed. 2d 188* (upholding *29 C.F.R. § 1601.12(b)* as valid interpretation of *42 U.S.C. § 2000e-5*)].

If the charge is based on Title VII or the ADA, state administrative proceedings must generally be initiated first; an EEOC charge may not be filed until 60 days after those proceedings are commenced, unless the state agency terminates its proceedings sooner [*see 42 U.S.C. § 2000e-5(c)*; *see also 42 U.S.C. § 12117* (procedures set forth in *42 U.S.C. § 2000e-5* apply to ADA)]. By contrast, an aggrieved person may file charges based on the ADEA with the DFEH and EEOC simultaneously [*Oscar Mayer & Co. v. Evans (1979) 441 U.S. 750, 756, 99 S. Ct. 2066, 60 L. Ed. 2d 609* ; *see 29 U.S.C. §§ 626(d), 633(b)*].

Generally, if an EEOC charge based on Title VII or the ADA is filed first, the EEOC will defer it to the state equal employment opportunity agency [*see 29 C.F.R. § 1601.13(a)(4)(i)* (EEOC guideline); *see also 29 C.F.R. §§ 1601.1* (EEOC procedural regulations apply to ADA), *1601.80* (DFEH is certified "deferral" or "FEP agency")]. However, the EEOC and DFEH have a work-sharing agreement whereby complaints or charges that are covered by both FEHA and Title VII may be processed first by the agency with which the complaint is originally filed [*see* EEOC Compliance Manual (CCH) § 5.4; *see also 42 U.S.C. §§ 2000e-4(g)(1)* (authorizing work-sharing agreements), *12117* (procedures set forth in *42 U.S.C. § 2000e-4* apply to ADA); *29 C.F.R. §§ 1601.1* (EEOC procedural regulations apply to ADA), *1601.13(c), 1626.10(a)*].

[c] Administrative Actions and Remedies

On the filing of a charge, the EEOC takes the following action:

- The EEOC investigates the charge [*see 29 U.S.C. § 626(a)* (ADEA); *42 U.S.C. §§ 2000e-5(b), 2000e-8, 2000e-9* (Title VII); *29 C.F.R. §§ 1601.15-1601.17, 1626.15, 1626.16* (EEOC guidelines); *see also 42 U.S.C. § 12117* (procedures set forth in *42 U.S.C. §§ 2000e-5, 2000e-8, 2000e-9* apply to ADA); *29 C.F.R. § 1601.1* (EEOC procedural regulations apply to ADA)].

- The EEOC may attempt informally to eliminate the alleged discrimination by conciliation [*see 29 U.S.C. § 626(d)* (ADEA); *42 U.S.C. § 2000e-5(b)* (Title VII); *29 C.F.R. §§ 1601.20, 1601.24, 1626.12, 1626.15(b)* (EEOC guidelines); *see also 42 U.S.C. § 12117* (procedures set forth in *42 U.S.C. § 2000e-5* apply to ADA); *29 C.F.R. § 1601.1* (EEOC procedural regulations apply to ADA)].

- The EEOC, if it is unable to obtain conciliation, may bring a civil action in federal court [*see 29 U.S.C. § 626(b)* (ADEA); *42 U.S.C. §§ 2000e-5(f)(1), 2000e-6(b)* (Title VII); *29 C.F.R. § 1601.27* (EEOC guideline); *see also 42 U.S.C. § 2000e-6(a),(c)*-(e) (EEOC civil actions in federal court if there is pattern or practice of discrimination), *12117* (procedures set forth in *42 U.S.C. §§ 2000e-5, 2000e-6* apply to ADA); *29 C.F.R. § 1601.1* (EEOC procedural regulations apply to ADA)]. In an ADA case, the United States Supreme Court held that the EEOC may bring its own enforcement action seeking relief for the aggrieved person, even if the aggrieved person has waived his or her right to pursue judicial enforcement by signing a mandatory arbitration agreement [*EEOC v. Waffle House, Inc. (2002) 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755, 764-770* ; *see § 115.55* (waiver of judicial remedies in arbitration clauses)].

Under Title VII and the ADA, an aggrieved person has the right to intervene in an EEOC civil action [*42 U.S.C. § 2000e-5(f)(1)*; *see 42 U.S.C. § 12117* (procedures set forth in *42 U.S.C. § 2000e-5* apply to ADA)].

For a detailed discussion of the administrative procedures under Title VII, the ADA, and the ADEA, see K. Wilcox, ed., California Employment Law, Ch. 42 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationAge DiscriminationExhaustion of RemediesLabor & Employment LawDiscriminationDisparate ImpactExhaustion of RemediesLabor & Employment LawDiscriminationDisparate TreatmentExhaustion of RemediesLabor & Employment LawDiscriminationGender & Sex DiscriminationExhaustion of RemediesLabor & Employment LawDiscriminationHarassmentRacial HarassmentExhaustion of Remedies

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 115 CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION
PART II. LEGAL BACKGROUND
D. Civil Actions and Judicial Remedies

11-115 California Forms of Pleading and Practice--Annotated § 115.52

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§ 115.52 Civil Actions under FEHA

[1] Statute of Limitations

After exhausting FEHA's administrative remedies and receiving a "right-to-sue" letter from the DFEH, an aggrieved person has one year from the date of the right to sue letter to file a civil action [*see Gov. Code § 12965(b)*]. This one-year filing requirement is a statute of limitations subject to equitable tolling, rather than a jurisdictional requirement [*see Salgado v. Atlantic Richfield Co. (9th Cir. 1987) 823 F.2d 1322, 1324-1325]* .

The one-year limitations period may be tolled if the following requirements are met [*Gov. Code § 12965(d)(1), (e)(1)*]:

> (1) A charge of discrimination or harassment was timely filed concurrently with the Equal Employment Opportunity Commission (EEOC) and the DFEH; and
>
> (2) Either (i) the DFEH issued a right-to-sue letter in conjunction with a decision to defer its investigation of the charge to the EEOC; or (ii) the EEOC deferred its investigation to the DFEH and then, after an investigation and determination by the DFEH, conducted its own investigation or agreed to perform a substantial weight review of the DFEH determination.

If the foregoing requirements are met, the complainant's time for commencing a civil action will expire when the federal right-to-sue period expires, or one year from the date of the DFEH right-to-sue letter, whichever is later [*Gov. Code § 12965(d)(1), (e)(1)*; *see Downs v. Department of Water & Power (1997) 58 Cal. App. 4th 1093, 1100-1102, 68 Cal. Rptr. 2d 590* ; *but see Mathieu v. Norrell Corp. (2004) 115 Cal. App. 4th 1174, 1189-1190, 10 Cal. Rptr. 3d 52* (employee's pursuit of administrative remedy under FEHA does not toll limitations period on common-law claim of wrongful termination in violation of public policy)].

If a plaintiff files a complaint alleging common law causes of action within the limitations period, a subsequent

amended complaint alleging FEHA causes of action that is filed after the limitations period has expired but that rests on the same facts and refers to the same incidents and injuries as the original complaint, will "relate back" to the initial complaint and will thereby be timely filed [*Goldman v. Wilsey Foods (1989) 216 Cal. App. 3d 1085, 1094-1095, 265 Cal. Rptr. 294]* .

California courts have concurrent jurisdiction with federal courts to hear Title VII claims [*Yellow Freight System v. Donnelly (1990) 494 U.S. 820, 821, 110 S. Ct. 1566, 108 L. Ed. 2d 834]* . Thus, a plaintiff may allege Title VII causes of action in state court along with his or her FEHA claims. To do so, however, the plaintiff must receive a right-to-sue letter from the EEOC, which is valid for only 90 days [*see 42 U.S.C. § 2000e-5(f)(1)*; *see O'Donnell v. Vencor Inc. (9th Cir. 2006) 466 F.3d 1104, 1111* (complaint filed after expiration of that 90-day period is barred, even if plaintiff previously filed timely complaint that was voluntarily dismissed without prejudice)]. Consequently, the plaintiff must file his or her complaint within that limitations period (as opposed to the one year limitations period for FEHA actions) or risk dismissal of his or her Title VII claims [*see Draper v. ECR Coeur Rochester, Inc. (9th Cir. 1998) 147 F.3d 1104, 1107-1109* (applying continuing violations doctrine in Title VII case)]. A defendant may remove state court actions that allege Title VII claims to federal court [*see 28 U.S.C. §§ 1331, 1441(a)*]. For a discussion of removal of actions to federal court, generally, see Ch. 265, *Federal Courts: Jurisdiction and Removal* . For a comprehensive discussion of Title VII civil actions, see K. Wilcox, ed., California Employment Law, Ch. 43 (Matthew Bender).

For a form of civil complaint seeking damages and equitable relief under FEHA, see *§ 115.90*.

[2] Venue

A FEHA civil action may be brought in any of the following places [*Gov. Code § 12965(b)*]:

- Any county in California in which the unlawful practice is alleged to have been committed;
- The county in which the records relevant to the practice are maintained and administered; or
- The county in which the aggrieved person would have worked but for the alleged unlawful practice.

However, if the defendant is not found within any such county, the action may be brought within the county of the defendant's residence or principal office [*Gov. Code § 12965(b)*].

FEHA plaintiffs may bring their actions wherever FEHA venue provision permits, even if they have other causes of action that would establish venue elsewhere [*see Brown v. Superior Court (1984) 37 Cal. 3d 477, 488-489, 208 Cal. Rptr. 724, 691 P.2d 272]* .

The FEHA venue statute, *Gov. Code § 12965(b)*, does not preclude a change of venue for the convenience of witnesses under *Code Civ. Proc. § 397(c)*, the general civil venue statute [*Richfield Hotel Management v. Superior Court (1994) 22 Cal. App. 4th 222, 226-227, 27 Cal. Rptr. 2d 161]* .

For a discussion of venue in California civil actions generally, see Ch. 571, *Venue* .

[3] Parties Not Named in Charge

A plaintiff may not bring a FEHA civil action against a defendant not named in the DFEH charge [*see Gov. Code § 12960*]. An individual defendant must be named in either the caption or the body of a DFEH charge in order for the plaintiff to bring a civil action against that individual [*Cole v. Antelope Valley Union High School Dist. (1996) 47 Cal. App. 4th 1505, 1515, 55 Cal. Rptr. 2d 443* ; *Saavedra v. Orange County Consol. Transp. Service Agency (1992) 11 Cal. App. 4th 824, 826-828, 14 Cal. Rptr. 2d 282* ; *Martin v. Fisher (1992) 11 Cal. App. 4th 118, 121-123, 13 Cal.*

Rptr. 2d 922] .

[4] Class Actions

The plaintiff may file a complaint on behalf of, and as a representative of, a group or class if the plaintiff alleges that an unlawful employment practice (1) adversely affects, in a similar manner, a group or class of persons of which the plaintiff is a member, or (2) raises questions of law or fact that are common to the group or class [*Gov. Code § 12961*].

Although there is little case law discussing the procedural requirements for FEHA class actions, class actions asserting claims under Title VII and other federal antidiscrimination laws have generally been subjected to the usual class action rules and procedures [*see, e.g.,* *General Tel. Co. of Southwest v. Falcon (1982) 457 U.S. 147, 160-161, 102 S. Ct. 2364, 72 L. Ed. 2d 740* ; *East Texas Motor Freight v. Rodriguez (1977) 431 U.S. 395, 399-406, 97 S. Ct. 1891, 52 L. Ed. 2d 453* ; *Bates v. UPS (9th Cir. 2007) 511 F.3d 974, 985* (en banc) (ADA: class must establish that at least one named plaintiff has standing); *Gay v. Waiters' and Dairy Lunchmen's Union (9th Cir. 1977) 549 F.2d 1330, 1331-1334]* . Since California class action rules are similar to federal class action rules [*see* *Collins v. Rocha (1972) 7 Cal. 3d 232, 238, 102 Cal. Rptr. 1, 497 P.2d 225]* , FEHA class actions are likely to be subject to the full range of California class action requirements.

Accordingly, there must be an ascertainable class with a well-defined community of interest in the questions of law and fact affecting the parties to be represented [*see Code Civ. Proc. § 382*; *Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 704, 63 Cal. Rptr. 724, 433 P.2d 732]* . The community of interest requirement is not satisfied if every class member would have to litigate numerous questions to establish his or her right to recover as a class member. For example, FEHA disability discrimination claims generally are not amenable to class treatment because they involve individualized, fact-specific inquiries, such as whether each employee is disabled for FEHA purposes and whether the employer has provided reasonable accommodation for each employee [*McCullah v. Southern Cal. Gas. Co. (2000) 82 Cal. App. 4th 495, 499-502, 98 Cal. Rptr. 2d 208]* . On the other hand, race, age, and gender-discrimination cases may be amenable to class treatment because the identification of class members is straightforward in such cases [*McCullah v. Southern Cal. Gas. Co. (2000) 82 Cal. App. 4th 495, 500, 98 Cal. Rptr. 2d 208]* .

If a class action involving a comparable claim of discrimination is pending in federal court, a FEHA class action may not be brought in California court against the same defendant [*Gov. Code § 12965(b)*]. This provision proscribes only concurrent (i.e., not successive) class actions, and therefore it does not bar a FEHA class action after the dismissal without prejudice of a class action in federal court [*Alch v. Superior Court (2004) 122 Cal. App. 4th 339, 362-367, 19 Cal. Rptr. 3d 29]* .

For a detailed discussion of the procedural requirements for class actions generally, see Ch. 120, *Class Actions* .

[5] Right to Jury Trial

There is a right to a jury trial in a civil action under FEHA [*see* *Asare v. Hartford Fire Ins. Co. (1991) 1 Cal. App. 4th 856, 868-869, 2 Cal. Rptr. 2d 452]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationAge DiscriminationStatutes of LimitationsLabor & Employment LawDiscriminationDisability DiscriminationDefenses & ExceptionsStatutes of LimitationsLabor & Employment LawDiscriminationDisparate ImpactStatutes of LimitationsLabor & Employment LawDiscriminationDisparate TreatmentStatutes of LimitationsLabor & Employment LawDiscriminationGender & Sex DiscriminationStatutes of Limitations

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11-115 California Forms of Pleading and Practice--Annotated § 115.53

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§ 115.53 Workers' Compensation Preemption

Several California courts of appeal have held that the exclusive remedy provisions of the Workers' Compensation Act (WCA) [*Lab. Code §§ 3600, 3602*] do not bar a civil damages action for sex, race, or other prohibited employment discrimination under FEHA [*see Flait v. North American Watch Corp. (1992) 3 Cal. App. 4th 467, 480, 4 Cal. Rptr. 2d 522* (retaliation for efforts to prevent sexual harassment); *Goldman v. Wilsey Foods (1989) 216 Cal. App. 3d 1085, 1095-1096, 265 Cal. Rptr. 294* (religious discrimination); *Meninga v. Raley's, Inc. (1989) 216 Cal. App. 3d 79, 84-91, 264 Cal. Rptr. 319* (sex discrimination); *Jones v. Los Angeles Community College Dist. (1988) 198 Cal. App. 3d 794, 807-808, 244 Cal. Rptr. 37* (race discrimination); *see also Murray v. Oceanside Unified Sch. Dist. (2000) 79 Cal. App. 4th 1338, 1362-1363, 95 Cal. Rptr. 2d 28* (cause of action for intentional infliction of emotional distress founded on sexual-orientation harassment not barred by exclusivity provisions of WCA)]. However, the exclusive remedy provisions may apply to a subsequent workplace injury incurred while carrying out the duties of a position in which the employee was placed for an alleged discriminatory reason. In such a case, a civil action is barred unless the discriminatory act was a substantial factor in causing the workplace injury [*Huffman v. Interstate Brands Cos. (2004) 121 Cal. App. 4th 679, 692-697, 17 Cal. Rptr. 3d 397* (emotional distress caused by subsequent work-related injury following alleged discriminatory act is not recoverable in civil action unless discriminatory act was substantial factor in causing the subsequent injury)].

If an employee is injured or killed by a third party in the course of the employee's employment solely because of the third party's personal beliefs relating to his or her perception of the employee's race, religious creed, color, national origin, age, gender, disability, sex, or sexual orientation, workers' compensation benefits may be available in addition to any action the employee or his or her survivors may have against the third party [*see Lab. Code § 3600(c)* (for purposes of determining whether to grant or deny workers' compensation claim, if employee is injured or killed by third party in course of employee's employment, no personal relationship or personal connection shall be deemed to exist between employee and third party based only on determination that third party injured or killed employee solely because of third party's personal beliefs relating to his or her perception of employee's race, religious creed, color, national origin, age, gender, disability, sex, or sexual orientation)].

Historically, California courts of appeal held that the WCA preempts a FEHA civil action by an industrially injured employee alleging discrimination on the basis of his or her resulting disability because *Lab. Code § 132a* provides the exclusive remedy for such discrimination [*see, e.g.,* *Angell v. Peterson Tractor, Inc. (1994) 21 Cal. App. 4th 981, 995, 26 Cal. Rptr. 2d 541* ; *Usher v. American Airlines (1993) 20 Cal. App. 4th 1520, 1526, 25 Cal. Rptr. 2d 335* ; *Denney v. Universal City Studios (1992) 10 Cal. App. 4th 1226, 1234-1236, 13 Cal. Rptr. 2d 170* ; *Pickrel v. General Telephone Co. (1988) 205 Cal. App. 3d 1058, 1064, 252 Cal. Rptr. 878]* . One Ninth Circuit Court of Appeals panel held that amendments to FEHA, including *Gov. Code § 12993(a)*, which were intended to strengthen FEHA to incorporate provisions of the ADA [*42 U.S.C. § 12101 et seq.*], did not eliminate the possibility of workers' compensation exclusivity [*Jimeno v. Mobil Oil Corp. (9th Cir. 1995) 66 F.3d 1514, 1530]* .

The California Supreme Court, however, has rejected the reasoning of these earlier cases, and has held that *Lab. Code § 132a* does not preclude an employee who becomes disabled by a workplace injury from pursuing FEHA and common law wrongful discharge remedies for discrimination on the basis of the disability resulting from the injury [*City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 1150-1161, 77 Cal. Rptr. 2d 445, 959 P.2d 752]* .

In *City of Moorpark*, the court of appeal had reached the same result as the Supreme Court, but had based its holding on the Legislature's 1993 amendment to FEHA, which provided, in part, that FEHA would not be deemed to repeal any laws of the state relating to disability discrimination "unless those provisions provide less protection to the enumerated classes of persons covered" [*see* *City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 1153-1154, 77 Cal. Rptr. 2d 445, 959 P.2d 752* ; *see also Gov. Code § 12993(a)*]. The California Supreme Court, however, reached its holding in *City of Moorpark* without regard to the 1993 amendments to FEHA. Rather, the Court distinguished the *Lab. Code § 132a* remedy from other remedies of the WCA [*see Lab. Code § 3600 et seq.*], noting that Section 132a addresses a breach of an employee's civil rights (compensation for discrimination based on work-related disability), and not compensation for medical injuries [*City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 1154-1158, 77 Cal. Rptr. 2d 445, 959 P.2d 752]* . Emphasizing the breadth of FEHA, the Court noted that it does not apply only to disabilities unrelated to work and expresses a legislative purpose that its provisions be construed broadly [*City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 1157, 77 Cal. Rptr. 2d 445, 959 P.2d 752]* . However, the Court also noted that "not every instance of disability discrimination in violation of Section 132a gives rise to a valid FEHA claim" [*City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 1158, 77 Cal. Rptr. 2d 445, 959 P.2d 752]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIRemedies Under Other LawsExclusivityGeneral OverviewWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityExceptions

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11-115 California Forms of Pleading and Practice--Annotated § 115.54

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.54 Substantive Defenses

[1] Affirmative Defenses Generally

Affirmative defenses to employment discrimination claims under FEHA include all of the following:

- Antiharassment policy [*Burlington Industries v. Ellerth (1998) 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L. Ed. 2d 633* ; *Faragher v. City of Boca Raton (1998) 524 U.S. 775, 807-808, 118 S. Ct. 2275, 141 L. Ed. 2d 662]* .

- Bona fide occupational qualification (BFOQ) [*Gov. Code § 12940*; *2 Cal. Code Reg. § 7286.7(a)* (FEHC regulation)].

- Business necessity/job relatedness [*2 Cal. Code Reg. §§ 7286.7(b),(c), 7287.4(e)* (FEHC regulations); *City and County of San Francisco v. FEHC (1987) 191 Cal. App. 3d 976, 989, 236 Cal. Rptr. 716]* .

- Inability to perform a job or to perform a job safely [*see Gov. Code § 12940(a)(1),(2)*; *2 Cal. Code Reg. § 7293.8(b)-(f)* (FEHC regulation); *Ackerman v. Western Elec. Co. (N.D. Cal. 1986) 643 F. Supp. 836, 848 , aff'd, 860 F.2d 1514 (9th Cir. 1988)* (construing FEHA)].

- Written release of claims.

- Compliance with security regulations established by the United States or by California [*Gov. Code § 12940*; *2 Cal. Code Reg. § 7286.7(d)* (FEHC regulation)].

- Compliance with nondiscrimination or affirmative action plans [*2 Cal. Code Reg. § 7286.7(e)*].

- Actions required by state or federal law [*2 Cal. Code Reg. § 7286.7(f)* (FEHC regulation)].

- The lawful regulation of spouses working together [*Gov. Code § 12940(a)(3)*; *2 Cal. Code Reg. § 7292.5(a)(1),(2)* (FEHC regulation)].

- Veteran's preferences [*Gov. Code § 12940(a)(4)*].

Several of these affirmative defenses are discussed in the following subsections [*see also* sample *forms in §§ 115.100 -115.107*].

For further discussion of these affirmative defenses, as well as affirmative defenses to claims brought under Title VII, the ADA, the ADEA, and other equal employment opportunity laws, see K. Wilcox, ed., California Employment Law (Matthew Bender).

[2] After-Acquired Evidence

An issue that has frequently arisen in employment discrimination claims is the extent to which evidence of employee misconduct that would have justified an employer's adverse employment action, but which was not discovered by the employer until *after* it took an allegedly discriminatory employment action (so-called "after-acquired evidence"), may act as a defense to a discrimination claim. A common factual context in which this issue arises involves an employer's discovery, usually after the commencement of litigation of a discrimination claim, that the employee had falsified his or her resume or employment application. Employers have argued in such cases that the plaintiff should not be entitled to recovery because the plaintiff would have been fired (or would not have been hired in the first place) had the employer known of the falsification.

The United States Supreme Court, resolving a conflict among the federal appellate courts, has held that after-acquired evidence of employee wrongdoing does not bar an employee from relief under the ADEA (and, by implication, other federal discrimination statutes) [*see McKennon v. Nashville Banner Publishing Co. (1995) 513 U.S. 352, 356-360, 115 S. Ct. 879, 130 L. Ed. 2d 852]* . The Court held, however, that the employee's misconduct, while not a complete bar to relief, is relevant to the remedies available in a particular case, since the employer's legitimate interests must be taken into account in fashioning an equitable remedy. Although leaving detailed resolution of the proper remedy to future decisions, the Court observed that as a general rule, neither reinstatement nor front pay is an appropriate remedy in cases of this type [*McKennon v. Nashville Banner Publishing Co. (1995) 513 U.S. 352, 360-362, 115 S. Ct. 879, 130 L. Ed. 2d 852]* . However, the Court rejected any absolute rule barring back pay, and stated that back pay should generally be calculated from the date of the unlawful discharge to the date that the new information was discovered, although in formulating a remedy the trial court can consider any extraordinary circumstances that affect the legitimate interests of either party [*McKennon v. Nashville Banner Publishing Co. (1995) 513 U.S. 352, 362, 115 S. Ct. 879, 130 L. Ed. 2d 852]* .

The Court in *McKennon* further stated that when an employer seeks to rely on after-acquired evidence of wrongdoing to limit relief, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge [*McKennon v. Nashville Banner Publishing Co. (1995) 513 U.S. 352, 362-363, 115 S. Ct. 879, 130 L. Ed. 2d 852]* .

A California court of appeal, in a case involving common-law wrongful termination and age discrimination claims, has also refused to adopt a blanket rule that after-acquired evidence of falsification of an employment application is a complete defense to a wrongful termination or employment discrimination claim [*Cooper v. Rykoff-Sexton, Inc. (1994) 24 Cal. App. 4th 614, 617-618, 29 Cal. Rptr. 2d 642]* . The court reasoned that an automatic forfeiture of all employment rights, regardless of the circumstances, was too harsh a penalty in many cases. The court further reasoned

that in cases in which an employer has fired a worker in violation of the statutory ban on discrimination, the purpose and effect of the discrimination statutes would be unacceptably undermined by a principle that would allow a fact that played no part in the firing decision to bar recovery [*Cooper v. Rykoff-Sexton, Inc. (1994) 24 Cal. App. 4th 614, 618-619, 29 Cal. Rptr. 2d 642]* . The court in that case did not discuss the potential effect of such after-acquired evidence on the amount of damages, because the issue was not before the court [*see Cooper v. Rykoff-Sexton, Inc. (1994) 24 Cal. App. 4th 614, 619 n.1, 29 Cal. Rptr. 2d 642]* .

Another California court of appeal has considered the application of the after-acquired evidence doctrine and the unclean hands doctrine in cases involving claims of both discrimination during employment and wrongful discharge. If after-acquired evidence establishes that the employee had engaged in misconduct that went to the heart of the employment relationship and related directly to the employee's wrongful-discharge claim, the unclean hands doctrine will bar that claim [*Camp v. Jeffer, Mangels, Butler & Marmaro (1995) 35 Cal. App. 4th 620, 638-639, 41 Cal. Rptr. 2d 329]* . Thus, if an employee who is disqualified from employment by government-imposed requirements nevertheless obtains a job by misrepresenting the pertinent qualifications, the employee will have no recourse for an alleged wrongful termination of employment [*Camp v. Jeffer, Mangels, Butler & Marmaro (1995) 35 Cal. App. 4th 620, 638-639, 41 Cal. Rptr. 2d 329]* . For example, if an employee obtained employment by using false resident alien and social security cards, the employee's claim for wrongful discharge will be barred by the unclean hands doctrine. Because the Immigration Reform and Control Act of 1986 prohibits employers from knowingly hiring or continuing to employ unauthorized aliens [*8 U.S.C. § 1324a*], an employee's misrepresentation of his or her entitlement to work in the United States goes to the heart of the employment relationship and deprives the employee of any right to complain about termination [*Murillo v. Rite Stuff Foods (1998) 65 Cal. App. 4th 833, 845, 77 Cal. Rptr. 2d 12* ; *see Hoffman Plastic Compounds, Inc. v. NLRB (2002) 535 U.S. 137, 150-151, 122 S. Ct. 1275, 152 L. Ed. 2d 271* (federal immigration policy precludes award of back pay for employment discrimination under National Labor Relations Act, *29 U.S.C. § 158(a)(3),* to undocumented alien who has never been legally authorized to work in United States)].

However, in such a case neither the after-acquired evidence doctrine nor the unclean hands doctrine will bar the employee's discrimination or harassment claims for acts occurring during employment. Although the employee cannot complain of having lost a job that he or she was never entitled to in the first place, the employee nonetheless was employed by the employer. The employee's misrepresentation did not void the employment contract; it merely rendered it voidable should the employer seek to rescind it. While employed, the employee was entitled to all the protections available under employment law. Barring the employee's claim for sexual harassment occurring during the employment relationship would not serve the primary purpose of FEHA and Title VII, which is to end employment discrimination. In such a case, the equities between employer and employee can be balanced by barring all portions of the employment discrimination claim that are tied to the employee's discharge. The employer will not be permitted to escape the consequences of discriminatory conduct that was not caused or justified by the employee's misrepresentation [*Murillo v. Rite Stuff Foods (1998) 65 Cal. App. 4th 833, 842, 77 Cal. Rptr. 2d 12]* .

The after-acquired evidence doctrine generally limits an employer's ability to rely on previously unknown wrongdoing of the employee to justify the employer's unlawful discrimination against the employee. However, if after-acquired evidence is offered to support the employer's originally proffered reason for an adverse employment action, the after-acquired evidence doctrine is inapplicable. Thus, for example, when an employee who has been terminated because of inability to perform the job alleges unlawful discrimination, the employer may offer after-acquired evidence to establish that the employee was in fact unable to do the job [*Finegan v. County of Los Angeles (2001) 91 Cal. App. 4th 1, 10-13, 109 Cal. Rptr. 2d 762]* .

After-acquired evidence of the employee's immigration status may have limited value in an action to enforce employment rights. The Legislature has declared that all protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in California [*Civ. Code § 3339(a)*; *Gov. Code § 7285(a)*; *Lab. Code § 1171.5(a)*]. Accordingly, for purposes of enforcing state labor, employment, and

civil rights laws, a person's immigration status is irrelevant to the issue of liability; in proceedings or discovery undertaken to enforce those state laws, no inquiry may be made into a person's immigration status unless the person seeking to make the inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law [*Civ. Code § 3339(b)*; *Gov. Code § 7285(b)*; *Lab. Code § 1171.5(b)*].

The Ninth Circuit has ruled that the foregoing provisions of California law are not preempted by the federal Immigration Reform and Control Act (IRCA), at least not when the employer can comply with the IRCA without creating a conflict with California law. The IRCA forbids employers from knowingly employing unauthorized aliens [*8 U.S.C. § 1324a(a)(2)*]. There is clearly no conflict between California law and IRCA--and therefore no preemption--when an employer is required to terminate an employee by IRCA and does so in order to comply with that statute. Under those circumstances, the employer can obey both laws because compliance with IRCA provides good cause, as defined by California law, for terminating unauthorized aliens [*see Incalza v. Fendi N. Am., Inc. (9th Cir. 2007) 479 F.3d 1005, 1010]* .

Similarly, California law may impose liability on an employer for discharging an employee, even when the employer claims the discharge is required by the IRCA, when remedies short of discharge are permissible under the IRCA and its implementing regulations [*Incalza v. Fendi N. Am., Inc. (9th Cir. 2007) 479 F.3d 1005, 1010-1013* (IRCA and regulations authorized employer to place employee on unpaid leave without pay while employee obtained change in work visa to which employee was entitled under federal law)]. It remains an open question, however, whether California law and the IRCA conflict when an employer that is required by federal law to terminate an unlawful alien does so, but for reasons that are unlawful under California law [*see Incalza v. Fendi N. Am., Inc. (9th Cir. 2007) 479 F.3d 1005, 1010* (identifying issue but resolving case on other grounds)].

[3] Antiharassment Policy

In *Burlington Industries* and *Faragher*, the Supreme Court established that in Title VII "hostile environment" sexual harassment cases an employer may be held vicariously liable for the conduct of a supervisor with immediate (or successively higher) authority over the victimized employee [*Burlington Industries v. Ellerth (1998) 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L. Ed. 2d 633* ; *Faragher v. City of Boca Raton (1998) 524 U.S. 775, 807-808, 118 S. Ct. 2275, 141 L. Ed. 2d 662]* . If the harassment has resulted in a tangible employment action, no affirmative defense is available to the employer [*see Burrell v. Star Nursery (9th Cir. 1999) 170 F.3d 951, 956]* . However, if no tangible employment action has been taken against the harassed employee, the employer may raise a two-part affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. First, the employer must prove that "it exercised reasonable care to prevent and correct promptly any sexually harassing behavior." Second, it must prove that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise" [*Burlington Industries v. Ellerth (1998) 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L. Ed. 2d 633* ; *Faragher v. City of Boca Raton (1998) 524 U.S. 775, 807-808, 118 S. Ct. 2275, 141 L. Ed. 2d 662]* .

A constructive discharge (i.e., an abusive working environment so intolerable that the employee's resignation qualifies as a fitting response) does not by itself constitute a tangible employment action for this purpose. Thus, if a Title VII plaintiff alleges constructive discharge, the employer may assert the *Burlington Industries*/*Faragher* affirmative defense unless the employee quit in reasonable response to an employer-sanctioned adverse action that would qualify as a tangible employment action (e.g., a humiliating demotion, extreme cut in pay, or transfer to a position in which the employee would face unbearable working conditions) [*Pennsylvania State Police v. Suders (2004) 542 U.S. 129, 124 S. Ct. 2342, 159 L. Ed. 2d 204, 216-223]* an antiharassment policy is not required in every case as a matter of law, but the need for such a policy may be addressed in any case litigating the first element of the defense. Similarly, while proof of the second element of the defense is not limited to showing that the employee unreasonably failed to use any complaint procedure, such proof "will normally suffice to satisfy the employer's burden" for that element of the defense [*Burlington Indus. v. Ellerth (1998) 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L. Ed. 2d 633* ; *Faragher v. City of*

Boca Raton (1998) 524 U.S. 775, 807-808, 118 S. Ct. 2275, 141 L. Ed. 2d 662] .

Similarly, the California Supreme Court has held that in a FEHA action against an employer for hostile environment sexual harassment by a supervisor, the employer may plead and prove a defense based on the "avoidable consequences" doctrine. In this context, the employer must prove the following to establish the defense: (1) that the employer took reasonable steps to prevent and correct workplace sexual harassment, (2) that the employee unreasonably failed to use the preventive and corrective measures that the employer provided, and (3) that reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered [*State Dep't of Health Servs. v. Superior Court (2003) 31 Cal. 4th 1026, 1043-1044, 6 Cal. Rptr. 3d 441, 79 P.3d 556*]. However, an employee's failure to avail himself or herself of available protections offered by the employer does not provide a complete defense. At most, it serves to reduce the damages recoverable, and only if, taking account of the employer's antiharassment policies and procedures and its past record of acting on harassment complaints, the employee acted unreasonably in not sooner reporting the harassment to the employer [*State Dept. of Health Servs. v. Superior Court (2003) 31 Cal. 4th 1026, 1043-1044, 6 Cal. Rptr. 3d 441, 79 P.3d 556* ; *Myers v. Trendwest Resorts, Inc. (2007) 148 Cal. App. 4th 1403, 1420-1421, 56 Cal. Rptr. 3d 501]* .

For a form of an antiharassment policy affirmative defense, see K. Wilcox, ed., California Employment Law, Ch. 43 (Matthew Bender).

[4] Bona Fide Occupational Qualification

[a] Scope of Defense

Under FEHA, Title VII, and the ADEA, a discriminatory employment practice is not unlawful if it is based on a bona fide occupational qualification (BFOQ) [*see 42 U.S.C. § 2000e-2(e)* (Title VII); *29 U.S.C. § 623(f)(1)* (ADEA); *Gov. Code § 12940* (FEHA); *Bohemian Club v. Fair Employment & Housing Com. (1986) 187 Cal. App. 3d 1, 19, 231 Cal. Rptr. 769* (FEHA)].

A BFOQ must involve objective, verifiable requirements that concern job-related skills and aptitudes; it must relate to the "essence," or to the "central mission of the employer's business" [*Auto Workers v. Johnson Controls (1991) 499 U.S. 187, 202-204, 111 S. Ct. 1196, 113 L. Ed. 2d 158* (Title VII); *see Western Air Lines v. Criswell (1985) 472 U.S. 400, 413-415, 105 S. Ct. 2743, 86 L. Ed. 2d 321* (ADEA); *Dothard v. Rawlinson (1977) 433 U.S. 321, 333, 97 S. Ct. 2720, 53 L. Ed. 2d 786* (Title VII)].

FEHC regulations and California cases provide that the employer must prove that an employment practice that excludes an entire group of persons protected by FEHA (for example, all women or all persons with lower back defects) is justified because all or substantially all of the excluded persons are unable to safely and efficiently perform the job in question and because the business operation would otherwise be undermined [*2 Cal. Code Reg. § 7286.7(a)*; *see Bohemian Club v. FEHC (1986) 187 Cal. App. 3d 1, 19, 231 Cal. Rptr. 769* (employer has burden of proof; relying on *Weeks v. Southern Bell Telephone & Telegraph Co. (5th Cir. 1969) 408 F.2d 228, 235* ; *County of Alameda v. FEHC (1984) 153 Cal. App. 3d 499, 505-506, 200 Cal. Rptr. 381* (same); *Sterling Transit Co. v. Fair Employment Practice Comm'n (1981) 121 Cal. App. 3d 791, 796-797, 175 Cal. Rptr. 548* (same)].

Like the Title VII BFOQ defense [*see 42 U.S.C. § 2000e-2(e)*], the FEHA BFOQ defense covers discrimination based on religion, national origin, and sex [*see Gov. Code § 12940*]. The FEHA BFOQ defense also expressly covers discrimination based on any other classification protected by that statute, including race [*see Gov. Code § 12940*].

By contrast, race is not a permissible BFOQ under Title VII because it was specifically excluded from the list of bases enumerated in that statute's BFOQ provision [*see Knight v. Nassau County Civil Service Comm'n (2d Cir. 1981) 649 F.2d 157, 162 , cert. denied, 454 U.S. 818* ; *42 U.S.C. § 2000e-2(e)*].

Also, federal cases have held that the Title VII BFOQ defense applies only to disparate treatment [*see Harriss v. Pan Am. World Airways (9th Cir. 1980) 649 F.2d 670, 674]* , and only to "hiring and employing," not to other terms and conditions of employment [*see 42 U.S.C. § 2000e-2(e)*; *EEOC v. Fremont Christian School (9th Cir. 1986) 781 F.2d 1362, 1367* (BFOQ defense not available when alleged discrimination consisted of employment policy of providing health insurance only to married men or single persons as heads of household, but not to married women)].

Generally, a FEHA BFOQ defense is narrowly construed [*Bohemian Club v. FEHC (1986) 187 Cal. App. 3d 1, 19, 231 Cal. Rptr. 769]* . Thus, for example, even if an employer can demonstrate that certain jobs can only be performed by members of one sex, the employer also has the burden of showing that because of the nature of its business operation it could not rearrange the job responsibilities in order to reduce the BFOQ necessity [*Bohemian Club v. FEHC (1986) 187 Cal. App. 3d 1, 19, 231 Cal. Rptr. 769* ; *see 2 Cal. Code Reg. § 7290.8(c)* (FEHC regulation)].

For a form of affirmative defense alleging that a challenged employment practice is a BFOQ, for use in a civil action under FEHA, see *§ 115.101*.

[b] Application to Religion

Religion is one of the bases of discrimination to which the BFOQ defense applies under both FEHA and Title VII [*see 42 U.S.C. § 2000e-2(e)* (Title VII); *Gov. Code § 12940* (FEHA)].

Although the use of religion as a BFOQ must be reasonably necessary to the normal operation of the employer's business, there is no requirement that the sole purpose of the employer be the promotion of religion or that the position be limited to the performance of religious functions [*see Pime v. Loyola University of Chicago (N.D. Ill. 1984) 585 F. Supp. 435, 443 , aff'd, 803 F.2d 351 (7th Cir. 1986)* (preferential hiring of Jesuit priests as teachers at Catholic-operated university upheld); *see also 42 U.S.C. § 2000e-2(e)(2)*].

For example, in one case in which a job required a helicopter pilot to fly over Mecca, the court held that a condition of employment requiring the pilot to convert to Islam, which was required under Saudi Arabian law, was covered by the BFOQ defense [*see Kern v. Dynalectron Corp. (N.D. Tex. 1983) 577 F. Supp. 1196, 1199, 1202 , aff'd, 746 F.2d 810 (5th Cir. 1984)]* .

However, in another case, the Ninth Circuit found that adherence to the Protestant faith was not a BFOQ for teaching at a school despite the fact that a testator's will that created and financed the school required that all teachers be Protestant. The court found that the central mission of the school was not merely to provide the native Hawaiian students with an education from the Protestant point of view, but to provide a solid education in traditional secular subjects, for which Protestant affiliation was largely irrelevant. The court stated that except for the school's religious education teachers, as to whom Protestant affiliation was conceded to be a BFOQ, there was nothing to suggest that adherence to the Protestant faith was essential to the teaching of secular subjects [*EEOC v. Kamehameha Sch./Bishop Estate (9th Cir. 1993) 990 F.2d 458, 465-467 , cert. denied, 510 U.S. 963]* .

[c] Application to Sex

Sex may be a BFOQ under FEHA and Title VII [*see 42 U.S.C. § 2000e-2(e)* (Title VII); *Gov. Code § 12940* (FEHA)].

At least with respect to Title VII, the BFOQ defense applies if the physical characteristics of one sex or the other are necessary for the position (for example, wet nurse), or if the hiring of one sex is necessary for purposes of authenticity (for example, acting role) [*see 29 C.F.R. § 1604.2(a)(2)* (EEOC guideline)].

Since the essence of some jobs, such as prison guards, is to provide security, some cases have held that sex may be a

BFOQ for those jobs when the risk to females, by their "very womanhood," undermines their capacity to provide that security [*see Dothard v. Rawlinson (1977) 433 U.S. 321, 335-336, 97 S. Ct. 2720, 53 L. Ed. 2d 786* ; *Robino v. Iranon (9th Cir. 1998) 145 F.3d 1109, 1110-1111* (policy of assigning only female guards to certain posts at women's correctional institution was reasonably necessary to reduce risk of sexual conduct between guards and inmates)].

In some jobs the BFOQ defense involves safety considerations; thus, for example, the Title VII BFOQ has been applied to policies requiring flight attendants to discontinue flying when they learn they are pregnant [*see, e.g., Harriss v. Pan American World Airways (9th Cir. 1980) 649 F.2d 670, 676* (Title VII); *Condit v. United Air Lines (4th Cir. 1977) 558 F.2d 1176, 1176-1177 , cert. denied, 435 U.S. 934 (1978)* (Title VII)]. Other courts, however, have held either that nonpregnancy is not a BFOQ for flight attendant jobs, or that it does not become one until a certain advanced point in the pregnancy [*see, e.g., Maclennan v. American Airlines (E.D. Va. 1977) 440 F. Supp. 466, 472* (Title VII; airline did not bear its burden of showing all pregnant flight attendants should be removed); *In re National Airlines (S.D. Fla. 1977) 434 F. Supp. 249, 263* (Title VII; no BFOQ until 20th week of pregnancy)].

Sex is not a BFOQ with respect to "fetal protection" policies that exclude fertile (as opposed to pregnant) female employees from hazardous jobs because of the possibility of harm to their potential unborn children. Both the United States Supreme Court and a California court of appeal have held that such a policy did not relate to the "essence" of the employer's business, because the employer did not show that there was a factual basis for believing that all or substantially all women would be unable to safely and efficiently perform the duties of the job [*Auto Workers v. Johnson Controls (1991) 499 U.S. 187, 206-207, 111 S. Ct. 1196, 113 L. Ed. 2d 158* (Title VII; fertile women, as far as the record showed, made batteries as efficiently as anyone else); *Johnson Controls v. FEHC (1990) 218 Cal. App. 3d 517, 542, 267 Cal. Rptr. 158* (FEHA; same)].

Title VII cases have held that the BFOQ defense is applicable when the hiring of one sex or the other is necessary to maintain a general standard of privacy or decency for the job in question (for example, restroom attendants) [*see Robino v. Iranon (9th Cir. 1998) 145 F.3d 1109, 1110-1111* (policy of assigning only female guards to certain posts at women's correctional institution was reasonably necessary to accommodate privacy of female inmates); *Norwood v. Dale Maintenance Systems (N.D. Ill. 1984) 590 F. Supp. 1410, 1423* (restroom cleaner); *Brooks v. ACF Industries (S.D.W. Va. 1982) 537 F. Supp. 1122, 1132* (female janitor in men's bath house)].

FEHC regulations interpreting FEHA state that privacy considerations may justify a BFOQ only under the following circumstances [*2 Cal. Code Reg. § 7290.8(b)*]:

- If the job requires an employee to observe other individuals in a state of nudity or to conduct body searches;

- It would be offensive to prevailing social standards to have an individual of the opposite sex present; and

- It is detrimental to the mental or physical welfare of individuals being observed or searched to have an individual of the opposite sex present.

According to FEHC regulations, the following situations will not justify application of the defense [*2 Cal. Code Reg. § 7290.8(a)*]:

- A correlation between individuals of one sex and physical agility or strength [*cf. Rosenfeld v. Southern Pacific Co. (9th Cir. 1971) 444 F.2d 1219, 1224* (Title VII; employer must establish whether or not employees are qualified for job based on whether they have individual capacity to perform job); *29 C.F.R. § 1604.2(a)(1)* (EEOC guideline; nondiscrimination principle requires consideration of individual capacities)];

- A correlation between individuals of one sex and height;

- Customer preference for employees of one sex [*cf. Fernandez v. Wynn Oil Co. (9th Cir. 1981) 653 F.2d 1273, 1276* (Title VII); *Diaz v. Pan Am. World Airways (5th Cir. 1971) 442 F.2d 385, 389 , cert. denied, 404 U.S. 950* (Title VII)];

- The necessity for providing separate facilities for one sex; or

- The fact that members of one sex have traditionally been hired to perform the particular type of job.

[d] Application to Age

FEHC regulations provide that, once a prima facie showing of age discrimination has been established, an employer may prove one or more of the defenses enumerated in the regulations, including the BFOQ defense [*see 2 Cal. Code Reg. § 7295.3(a)*].

The standard for applying the ADEA BFOQ defense requires an employer to establish that (1) the age qualifications are reasonably necessary to the essence of the business, and (2) the employer had reasonable cause to believe, on a factual basis, that all or substantially all persons over the age qualifications would be unable to perform the duties of the job safely and efficiently, or, alternatively, that individual testing of the employees is highly impractical or impossible [*Western Air Lines v. Criswell (1985) 472 U.S. 400, 413-415, 105 S. Ct. 2743, 86 L. Ed. 2d 321* ; *see 29 U.S.C. § 623(f)(1)* (ADEA); *see also 29 C.F.R. § 1625.6(b)*; *Usery v. Tamiami Trail Tours (5th Cir. 1976) 531 F.2d 224, 235-236* ; *EEOC v. Boeing Co. (9th Cir. 1988) 843 F.2d 1213, 1214, 1217-1220 , cert. denied, 488 U.S. 889]* .

[e] Application to Disability or Medical Condition

The BFOQ defense for disability is closely related to the defense that the employee, because of his or her disability or medical condition, is unable, even with reasonable accommodation, to perform his or her essential duties without endangering his or her own health or safety or that of others [*Gov. Code § 12940(a)(1),(2)*; *see* [6], *below*].

Lack of a disability may be a BFOQ under FEHA in certain circumstances [*see Gov. Code § 12940*]. For example, maximum weight requirements have been upheld when the employee held a job that was physically demanding and required strength, agility, and speed to meet the need for public safety and health concerns [*Hegwer v. Board of Civil Service Comm'rs (1992) 5 Cal. App. 4th 1011, 1025, 7 Cal. Rptr. 2d 389* (paramedics); *see McMillen v. Civil Service Comm'n (1992) 6 Cal. App. 4th 125, 130-131, 8 Cal. Rptr. 2d 548* (ambulance drivers)].

[5] Business Necessity and Job-Relatedness

FEHC regulations provide that, if an employer has a facially neutral employment practice that has a disparate impact on members of a classification protected by FEHA [*see* discussion of disparate impact at § 115.23[4]], the employer must prove that (1) there is an overriding legitimate business purpose that makes the practice necessary to the safe and efficient operation of the business, and (2) the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be impermissible if it is shown that there is an alternative practice that would accomplish the business purpose equally well with less discriminatory impact [*2 Cal. Code Reg. § 7286.7(b)*].

If there is a facially neutral selection device, such as a test, that has a disparate impact on persons protected by FEHA, the employer must show that the device is sufficiently related to an essential function of the job in question to warrant its use [*2 Cal. Code Reg. §§ 7286.7(c), 7287.4(e)*; *see Griggs v. Duke Power Co. (1971) 401 U.S. 424, 428, 431, 436, 91 S. Ct. 849, 28 L. Ed. 2d 158* (Title VII; scored test must measure whether person is suitable for particular position,

and not measure qualifications of person in abstract); *see also Albemarle Paper Co. v. Moody (1975) 422 U.S. 405, 431, 95 S. Ct. 2362, 45 L. Ed. 2d 280* (Title VII; discriminatory tests are impermissible unless shown, by professionally acceptable standards, to predict, or significantly to correlate with, job performance)].

ADA regulations provide that, if an employer is charged with discrimination on the ground that a uniformly applied standard, criterion, or policy has a disparate impact on a disabled individual, it may defend on the ground that the challenged procedure is job-related and consistent with business necessity *and* that the performance cannot be accomplished by reasonable accommodation required under the ADA [*29 C.F.R. § 1630.15(c)*]. The same defense is provided with regard to a charge that an employer used discriminatory qualification standards, tests, or selection criteria [*see 42 U.S.C. § 12113(a)*; *29 C.F.R. § 1630.15(b)*]. Under this defense, for example, an employer may screen out a disabled potential worker for health or safety risks that the worker would pose to others or to himself or herself [*29 C.F.R. § 1630.15(b)(2)*; *Chevron U.S.A. Inc. v. Echazabal (2002) 536 U.S. 73, 77-87, 122 S. Ct. 2045, 153 L. Ed. 2d 82]* .

To show that a qualification standard is job-related, an employer must demonstrate that the standard fairly and accurately measures the individual's actual ability to perform the essential functions of the job [*Bates v. UPS (9th Cir. 2007) 511 F.3d 974, 996* (en banc)]. To show that the qualification standard is consistent with business necessity, the employer must show that it substantially promotes the business's needs [*Bates v. UPS (9th Cir. 2007) 511 F.3d 974, 996* (en banc) ("business necessity" standard is quite high and is not to be confused with mere expediency)]. To show that sufficient job performance cannot be accomplished by reasonable accommodation, the employer must demonstrate either that no reasonable accommodation currently available would cure the performance deficiency or that such reasonable accommodation poses an undue hardship on the employer [*Bates v. UPS (9th Cir. 2007) 511 F.3d 974, 996-997* (en banc)].

California courts generally treat business necessity and job-relatedness interchangeably. Thus, once disparate impact is established, the burden of proof shifts to the defendant to prove that the practice is job-related by demonstrating a business necessity for its use [*City and County of San Francisco v. FEHC (1987) 191 Cal. App. 3d 976, 989, 236 Cal. Rptr. 716* ; *see § 115.23[4][d]*].

For a form of affirmative defense alleging that a challenged employment practice is justified by business necessity, for use in a civil action under FEHA, see *§ 115.102*. For a form of affirmative defense alleging that a challenged employment requirement is job-related, see *§ 115.103*.

[6] Inability to Perform Job or Danger to Health or Safety

FEHA generally proscribes employment discrimination based on physical or mental disability or medical condition [*see Gov. Code § 12940(a)*; *see also* discussion at*§ 115.22[8]*], but an employer may refuse to hire or may discharge a person with a physical or mental disability or medical condition if that person, because of the disability or medical condition, cannot perform the essential duties of the job or cannot perform those duties in a manner that would not endanger his or her health or safety or that of others, even with reasonable accommodation [*see Gov. Code § 12940(a)(1),(2)*; *2 Cal. Code Reg. § 7293.8(b)-(f)*; *see also Gov. Code § 12926(f)* ("essential duties" defined); *see, e.g., EEOC v. UPS (2005) 424 F.3d 1060, 1074-1077* (safety-of-others defense justifies refusal to hire as commercial delivery driver applicant with monocular vision who fails vision test that rests on objective and statistical evidence that monocular drivers are involved in more accidents than binocular drivers); *Quinn v. City of Los Angeles (2000) 84 Cal. App. 4th 472, 480-484, 100 Cal. Rptr. 2d 914* (plaintiff police officer could not establish prima facie cause of action for failure to accommodate hearing disability because that disability disqualified plaintiff for employment as police officer)].

The health and safety defense has a narrow scope [*Ackerman v. Western Elec. Co. (N.D. Cal. 1986) 643 F. Supp. 836, 848 , aff'd, 860 F.2d 1514 (9th Cir. 1988)]* . It must be tailored to the individual characteristics of each job applicant or

employee in relation to specific legitimate job requirements [*Sterling Transit Co. v. Fair Employment Practice Comm'n (1981) 121 Cal. App. 3d 791, 798, 175 Cal. Rptr. 548]* . Thus, an employer may not refuse to hire someone based simply on the possibility of future health problems if there is no past or present interference with the person's safe job performance [*see Gov. Code §§ 12926(k)(5), 12940(a)*; *2 Cal. Code Reg. § 7293.8(e)*; *Sterling Transit Co. v. Fair Employment Practice Comm'n (1981) 121 Cal. App. 3d 791, 799, 175 Cal. Rptr. 548]* .

Abstract medical generalizations regarding the possibility of future injury are insufficient as a matter of law to qualify as a defense [*Ackerman v. Western Elec. Co. (N.D. Cal. 1986) 643 F. Supp. 836, 851 , aff'd, 860 F.2d 1514 (9th Cir. 1988)]* . However, statistical studies and clinical measurements may be used to show that an employee cannot safely perform his or her job [*see McMillen v. Civil Service Comm'n (1992) 6 Cal. App. 4th 125, 130-131, 8 Cal. Rptr. 2d 548* (weight limitations for ambulance drivers); *Hegwer v. Board of Civil Service Comm'rs (1992) 5 Cal. App. 4th 1011, 1025, 7 Cal. Rptr. 2d 389* (weight limitations for paramedics)].

An employer has a duty reasonably to accommodate a person's physical or mental disability or medical condition, and failure to do so may negate the application of the health and safety defense [*see Gov. Code §§ 12926(n), 12940(a)(1),(2),(m)*; *2 Cal. Code Reg. § 7293.9*; *Fisher v. Superior Court (1986) 177 Cal. App. 3d 779, 783, 223 Cal. Rptr. 203]* . For discussion of employer's duty to accommodate physical or mental disabilities or medical conditions, see *§ 115.35[1]*.

Under the ADA, a qualified individual is defined as a disabled person who, with or without reasonable accommodation, can perform the essential functions of the position [*42 U.S.C. § 12111(8)*; *29 C.F.R. § 1630.2(n)*].

The ADA also includes a defense based on health risks if the disabled pers on has an infectious or communicable disease and the job involves handling food [*42 U.S.C. § 12113(d)*; *29 C.F.R. § 1630.16(e)*].

For forms of affirmative defenses alleging the plaintiff's inability to perform job duties and the plaintiff's inability to perform job duties without endangering his or her own health and safety or that of others, see *§§ 115.104* and *115.105*.

[7] Reasonable Factor Other Than Age

Under the ADEA, an employer may defend an age discrimination claim on the ground that the employer made a differentiation based on reasonable factors other than age [*see 29 U.S.C. § 623(f)(1)*; *see also 29 C.F.R. § 1625.7(e)* (EEOC guideline; employer bears burden of showing that reasonable factor exists)]. The existence of a reasonable factor other than age is an affirmative defense on which the employer bears the burden of proof [*Meacham v. Knolls Atomic Power Lab. U.S. (2008) -- U.S. --, 128 S. Ct. 2395, 2398, 2400-2402, 171 L. Ed. 2d 283 , on remand, 2009 U.S. Dist. LEXIS 36999 (Apr. 15, 2009)*].

An employer may base an employment decision on a factor that is empirically correlated with age if the decision is in fact motivated by a factor other than age. Thus, for example, at least in a disparate-treatment case, an employer's decision to terminate an employee based on years of service because his or her pension is close to vesting does not constitute discriminatory treatment on the basis of age in violation of the ADEA, even though years of service may be statistically correlated with age, because age and years of service are analytically distinct [*Hazen Paper Co. v. Biggins (1993) 507 U.S. 604, 612-613, 113 S. Ct. 1701, 123 L. Ed. 2d 338* ; *see Kentucky Ret. Sys. v. EEOC (2008) 554 U.S. 135, 128 S. Ct. 2361, 2364-2370, 171 L. Ed. 2d 322* (ADEA; because age and pension status are analytically distinct, state pension plan does not discriminate because of age simply because it (1) lawfully makes age part of conditions of pension eligibility and (2) treats workers differently in light of their pension status); *see also* discussion at *§ 115.33[2]*].

The use of salary as a criterion when terminating employees may constitute age discrimination under FEHA if use of that criterion adversely impacts older workers [*Gov. Code § 12941* (expressly rejecting holding of *Marks v. Loral*

Corp. (1997) 57 Cal. App. 4th 30, 63, 66, 68 Cal. Rptr. 2d 1)].

[8] Written Release of Claims

A written release of claims by an employee may be a valid defense against that employee's later claim of employment discrimination under FEHA [*see Skrbina v. Fleming Cos. (1996) 45 Cal. App. 4th 1353, 1366-1367, 53 Cal. Rptr. 2d 481]* . The California Supreme Court has held that the standard language of the mandatory preprinted form used in settling workers' compensation claims [*see 8 Cal. Code Reg. § 10874* (Workers' Compensation Appeals Board Form 15)] releases only those claims that are within the scope of the workers' compensation system, and it does not apply to claims asserted in separate civil actions. Moreover, extrinsic evidence is not admissible to show that the parties intended the preprinted release form to encompass claims outside the scope of the workers' compensation system [*Claxton v. Waters (2004) 34 Cal. 4th 367, 376-377, 18 Cal. Rptr. 3d 246, 96 P.3d 496* , (Supreme Court's decision to have prospective effect only, so that previously executed preprinted releases may be shown by extrinsic evidence to encompass claims outside scope of workers' compensation)]. After the Supreme Court's decision, the official workers' compensation settlement form was revised to provide expressly that "Execution of this form has no effect on claims that are not within the scope of the workers' compensation law or claims that are not subject to the exclusivity provisions of the workers' compensation law, unless otherwise expressly stated" [Workers' Compensation Appeals Board Form 15, 2, as revised eff. Oct. 2005].

The parties in a workers' compensation proceeding may prepare and execute their own general release that expressly purports to settle claims outside the scope of the workers' compensation system [*see Claxton v. Waters (2004); 34 Cal. 4th 367, 377, 18 Cal. Rptr. 3d 246, 96 P.3d 496]* . In such a case, for example, if the employee has knowledge of a potential FEHA claim against the employer at the time of executing a general release in a workers' compensation proceeding, and if the employee has not yet initiated litigation of that claim, the employee has the burden of expressly excepting the claim from the release.

In the absence of an express exception of the FEHA claim, and absent contrary extrinsic evidence, the general language releasing all claims will bar the employee from pursuing the FEHA claim [*Jefferson v. California Dep't of Youth Authority (2002) 28 Cal. 4th 299, 305-306, 121 Cal. Rptr. 2d 391, 48 P.3d 423]* . In another case, for example, an employee who signed a general release of all employment claims was held to have extinguished his right to later bring an action against his employer for disability and age discrimination. The court found that the language of the release could not have been plainer and that absent fraud, duress, deception, misrepresentation, or undue influence, a plaintiff's assertion that he or she did not intend to relinquish his or her rights to employment discrimination claims does not invalidate the release if the plaintiff read and willingly signed the release [*Skrbina v. Fleming Cos. (1996) 45 Cal. App. 4th 1353, 1366-1367, 53 Cal. Rptr. 2d 481]* .

In the absence of clear language releasing all claims, however, a release of one claim does not ordinarily operate to release other claims. If a release is ambiguous about its scope, extrinsic evidence may be admissible to show whether the parties intended the release to encompass claims not expressly mentioned [*Butler v. Vons Cos. (2006) 140 Cal. App. 4th 943, 947-950, 45 Cal. Rptr. 3d 151* (in context of settlement of labor grievance signed by union, employee, and employer, whether waiver of unknown claims was intended as release of employee's personal FEHA claims was question of fact)].

A release of claims that does not comply with the requirements of the Older Workers Benefits Protection Act [*29 U.S.C. § 626(f)(1)*] cannot bar a claim for age discrimination under the ADEA [*Oubre v. Entergy Operations (1998) 522 U.S. 422, 426-428, 118 S. Ct. 838, 139 L. Ed. 2d 849* (specific statutory requirements for release of ADEA claims foreclose application of general contract principles to make nonconforming release effective)].

PRACTICE TIP:

Carefully Review Written Release. This issue often arises in workers' compensation claims as well as

severance agreements. It is important to caution clients to have an attorney carefully review, and explain, any written release before it is signed because it is quite possible that an employee is being "tricked" into releasing claims he or she did not intend to release. *By John H. Scott*

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationAge DiscriminationDefenses & ExceptionsGeneral OverviewLabor & Employment LawDiscriminationDisability DiscriminationDefenses & ExceptionsGeneral OverviewLabor & Employment LawDiscriminationGender & Sex DiscriminationDefenses & ExceptionsGeneral OverviewLabor & Employment LawDiscriminationNational Origin DiscriminationDefenses & ExceptionsGeneral OverviewLabor & Employment LawDiscriminationRacial DiscriminationDefenses & ExceptionsGeneral Overview

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 115 CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION
PART II. LEGAL BACKGROUND
D. Civil Actions and Judicial Remedies

11-115 California Forms of Pleading and Practice--Annotated § 115.55

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§ 115.55 Waiver of Judicial Remedies in Arbitration Clauses

[1] Employment Subject to Arbitration

In a setting involving interstate commerce, employees may waive their statutory rights to judicial enforcement of at least some civil rights statutes by agreeing to arbitrate [*Gilmer v. Interstate/Johnson Lane Corp. (1991) 500 U.S. 20, 23, 111 S. Ct. 1647, 114 L. Ed. 2d 26* (ADEA); *EEOC v. Luce, Forward, Hamilton, & Scripps (9th Cir. 2003) 345 F.3d 742, 746-753* (en banc) (employer may require employee to sign agreement to arbitrate Title VII claims as condition of employment); *Spellman v. Securities, Annuities & Ins. Services (1992) 8 Cal. App. 4th 452, 462-463, 10 Cal. Rptr. 2d 427* (FEHA)]. However, there must be "at least a knowing agreement to arbitrate" [*Prudential Ins. Co. of America v. Lai (9th Cir. 1994) 42 F.3d 1299, 1304-1305 , cert. denied, 516 U.S. 812 (1995)* (insufficiency of employment form incorporating another document which did not explicitly mention employment disputes); *see Renteria v. Prudential Ins. Co. of America (9th Cir. 1997) 113 F.3d 1104, 1107* (same); *Mitri v. Arnel Mgmt. Co. (2007) 157 Cal. App. 4th 1164, 1170-1173, 69 Cal. Rptr. 3d 223* (employee handbook statement that "employees are required to sign an arbitration agreement" does not itself constitute arbitration agreement)]. The agreement must be express, with the employee explicitly being given the choice, and making the choice, whether he or she is willing to waive a specific statutory remedy [*Nelson v. Cyprus Bagdad Copper Corp. (9th Cir. 1997) 119 F.3d 756, 761-762 , cert. denied, 523 U.S. 1072 (1998)* (insufficiency of plaintiff's agreement to read employee handbook with new requirement of arbitration, with his continued employment thereafter)].

The exclusion of Section 1 of the Federal Arbitration Act, *9 U.S.C. § 1*, for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" is limited to contracts of transportation workers only. All other employment contracts "evidencing transactions involving commerce," *9 U.S.C. § 2*, are governed by the FAA [*Circuit City Stores, Inc. v. Adams (2001) 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234* (overruling Ninth Circuit minority position articulated in *Craft v. Campbell Soup Co. (9th Cir. 1998) 177 F.3d 1083*)].

PRACTICE TIP:

Advantages of Arbitration. In some cases mandatory arbitration may be a positive as opposed to a negative. Generally, cases can be arbitrated less expensively and more quickly. Accordingly, in some cases it may be advantageous for an aggrieved employee to obtain a faster and less expensive resolution of a dispute--even if it means giving up the right to a jury trial. *By John H. Scott*

[2] Requirements for Valid Arbitration Clause

The California Supreme Court has held that a mandatory arbitration agreement in an employment contract that encompasses unwaivable statutory rights (such as the employee's rights under FEHA) must effectively permit the employee to vindicate his or her statutory cause of action in the arbitration forum [*Armendariz v. Foundation Health Psychare Servs. (2000) 24 Cal. 4th 83, 90, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *see* *Pearson Dental Supplies, Inc. v. Superior Court (2010) 48 Cal. 4th 665, 680-682, 108 Cal. Rptr. 3d 171, 229 P.3d 83* (dictum: provision limiting access to administrative remedy for FEHA claims does not by itself render arbitration agreement unenforceable)]. Therefore, such an arbitration agreement is invalid unless it meets all the following standards [*Armendariz v. Foundation Health Psychcare Servs. (2000) 24 Cal. 4th 83, 99-113, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *see* *Blake v. Ecker (2001) 93 Cal. App. 4th 728, 740-741, 113 Cal. Rptr. 2d 422* (*Armendariz* applies retroactively to pending cases)]:

- The agreement provides for neutral arbitrators;

- The agreement provides for more than minimal discovery [*see* *Dotson v. Amgen, Inc. (2010) 181 Cal. App. 4th 975, 982-985, 104 Cal. Rptr. 3d 341* (arbitration provision that limits discovery but empowers arbitrator to order additional discovery on showing of need is not unconscionable); *Fitz v. NCR Corp. (2004) 118 Cal. App. 4th 702, 715-719, 13 Cal. Rptr. 3d 88* (minimum standards of fairness are not met by agreement that restricts discovery to depositions of two individuals and of experts expected to testify, plus exchange of hearing exhibits and witness lists, with no additional discovery unless arbitrator finds fair hearing would be impossible without additional discovery)];

- The agreement requires a written award that will reveal the essential findings and conclusions on which the award is based, so as to permit judicial review;

- The agreement provides for all of the types of relief that would otherwise be available in court; and

- The agreement does not require the employee to pay, as a condition of access to the arbitration forum, unreasonable costs or any arbitrators' fees or expenses, or any expense that the employee would not be required to bear if he or she brought the action in court. Therefore, a mandatory arbitration agreement that encompasses the arbitration of FEHA claims is not subject to the California Arbitration Act's general cost-sharing provision [*see Code Civ. Proc. § 1284.2*]. Rather, such an arbitration agreement impliedly obliges the employer to pay all types of costs that are unique to arbitration [*Armendariz v. Foundation Health Psychcare Servs. (2000) 24 Cal. 4th 83, 113, 99 Cal. Rptr. 2d 745, 6 P.3d 669]* .

The foregoing standards apply to any arbitration agreement that purports to encompass an employee's rights under any statute enacted "for a public reason," that is, for public purpose. Thus, for example, these standards apply in determining the validity of an agreement to arbitrate claims arising under *Labor Code Section 230.8* (which prohibits discrimination against an employee who has taken time off to participate in his or her child's school activities) or *Labor Code Section 970* (which prohibits employers from misrepresenting the terms and conditions of employment to induce a person to change residences to take the job) [*Mercuro v. Superior Court (2002) 96 Cal. App. 4th 167, 180, 116 Cal. Rptr. 2d 671]* .

The California Supreme Court has further held that, even as to claims other than unwaivable causes of action, an

arbitration provision is unconscionable and unenforceable if it is (1) procedurally unconscionable, and (2) substantively unconscionable [*Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83, 113-121, 99 Cal. Rptr. 2d 745, 6 P.3d 669]* . The procedural aspect of unconscionability focuses on oppression or surprise due to unequal bargaining power, and it generally takes the form of a contract of adhesion, imposed as a condition of employment with no opportunity for the employee to negotiate [*Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83, 113-114, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal. App. 4th 1267, 1280-1281, 16 Cal. Rptr. 3d 296* ; *see, e.g., Olvera v. El Pollo Loco, Inc. (2009) 173 Cal. App. 4th 447, 455-456, 93 Cal. Rptr. 3d 65* (procedural unconscionability was evidenced by inequality in bargaining power between low-wage employees and corporate employer, as well as by employer's inaccurate description of arbitration policy as requiring "mediation" rather than arbitration)]. Generally, if there truly is no element of procedural unconscionability in an arbitration provision, the provision will not be deemed unconscionable, no matter how one-sided the terms appear to be [*Gentry v. Superior Court (2007), 42 Cal. 4th 443, 469, 64 Cal. Rptr. 3d 773* (employer's failure to provide employees with material information about disadvantageous terms of arbitration agreement, combined with likelihood that employees felt pressure not to opt out of agreement, meant that agreement was not free from procedural unconscionability)].

The substantive aspect of unconscionability focuses on the terms of the agreement and whether those terms are so one-sided as to lack basic fairness and mutuality [*Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83, 114, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal. App. 4th 1267, 1280-1281, 16 Cal. Rptr. 3d 296* ; *see, e.g., Olvera v. El Pollo Loco, Inc. (2009) 173 Cal. App. 4th 447, 456-457, 93 Cal. Rptr. 3d 65* (class arbitration waiver was substantively unconscionable because it would preclude most effective or only way for low-wage employees to vindicate their statutory rights, particularly since many of those employees had limited English-language skills and were likely ill-informed of their statutory rights, and it would benefit only employer, which was unlikely to have any claim against its employees as class)]. For example, an arbitration provision imposed in an adhesive context lacks fairness and mutuality if it requires the employee, but not the employer, to arbitrate all claims arising out of the same transaction or occurrence. Also, an arbitration agreement is unconscionably one-sided if it restricts the full recovery of damages by the employee, while placing no such restriction on the employer [*Armendariz v. Foundation Health Psychcare Servs. (2000) 24 Cal. 4th 83, 113-121, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *see Stirlen v. Supercuts (1997) 51 Cal. App. 4th 1519, 1539-1540, 60 Cal. Rptr. 2d 138]* . Also unconscionable in a contract of adhesion is a provision giving the arbitrator exclusive authority to decide questions of enforceability, including questions of unconscionability [*Ontiveros v. DHL Express (USA), Inc. (2008) 164 Cal. App. 4th 494, 505, 79 Cal. Rptr. 3d 471* (when one party is "repeat player" in arbitration, arbitrator has self-interest in deciding that any given dispute is arbitrable)].

If an arbitration agreement is "permeated" by unconscionability--for example, if it contains more than one unlawful provision, or if there is no discrete unlawful provision that can be severed from the agreement--then the entire arbitration agreement is void and cannot be partially enforced [*Armendariz v. Foundation Health Psychcare Servs. (2000) 24 Cal. 4th 83, 121-127, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *see Civ. Code § 1598*; *see, e.g., Franco v. Athens Disposal Co. (2009) 171 Cal. App. 4th 1277, 1304, 90 Cal. Rptr. 3d 539* (because arbitration agreement contained two unlawful provisions--class arbitration waiver, and provision precluding employee from seeking civil penalties on behalf of other employees under *Lab. Code § 2698 et seq.*--agreement as whole was tainted with illegality and was therefore unenforceable); *Sanchez v. Western Pizza Enters., Inc. (2009) 172 Cal. App. 4th 154, 181, 90 Cal. Rptr. 3d 818* (arbitration agreement containing more than one unlawful provision--class arbitration waiver and unconscionable arbitrator-selection clause--was permeated by unlawful purpose and was therefore unenforceable)]. For example, if an arbitration agreement (1) addresses the kinds of claims that normally would be brought by the employee but not those that would be brought by the employer, (2) limits the employee's recovery to the amount of wages paid during the employee's last six months of work, (3) precludes recovery by the employee for statutory claims, (4) specifies a venue for arbitration that is convenient for the employer but not necessarily for the employee, and (5) requires that the employee initially pay all costs of arbitration, the agreement is unconscionable and so one-sided as to be unenforceable [*Pinedo v. Premium Tobacco Stores, Inc. (2000) 85 Cal. App. 4th 774, 781, 102 Cal. Rptr. 2d 435* (such arbitration

agreement "is at least equally unconscionable to the one presented in *Armendariz*")].

Similarly, an arbitration agreement is "permeated by an unlawful purpose," and therefore unenforceable in its entirety, if the terms of the agreement and the surrounding circumstances indicate a systematic effort to impose arbitration on an employee as an inferior forum that works to the employer's advantage [*Mercuro v. Superior Court (2002) 96 Cal. App. 4th 167, 185, 116 Cal. Rptr. 2d 671* (systematic effort to impose arbitration on employee as inferior forum was established by employer's threats and cajoling to get employee to sign agreement, lack of mutuality as to arbitrable claims, provision that unlawfully required employee to share burden of arbitrator's fee, and disadvantages to employee in using designated arbitrator)]. On the other hand, if the arbitration agreement contains a clause in which the parties expressly agree to allow a court or arbitrator to sever or modify any "unreasonable or unenforceable" provisions, the agreement as so modified may be enforceable [*Blake v. Ecker (2001) 93 Cal. App. 4th 728, 743-746, 113 Cal. Rptr. 2d 422* ; *see Civ. Code §§ 1599, 1670.5(a)*].

If the employer has afforded the employee a meaningful opportunity to opt out of an arbitration agreement, the agreement will not be deemed unconscionable [*Circuit City Stores, Inc. v. Ahmed (9th Cir. 2002) 283 F.3d 1198, 1199-1200* (arbitration agreement is not adhesive, and thus lacks procedural unconscionability, if employee is given opportunity to opt out)]. However, if the employee's failure to opt out is not an authentic informed choice, the agreement does have an element of unconscionability and faces judicial scrutiny to determine whether its terms are so one-sided or oppressive as to be substantively unconscionable [*Gentry v. Superior Court (2007) 42 Cal. 4th 443, 469, 64 Cal. Rptr. 3d 773* (employer's failure to provide employees with material information about disadvantageous terms of arbitration agreement, combined with likelihood that employees felt pressure not to opt out of agreement, meant that agreement was not free from procedural unconscionability); *Circuit City Stores, Inc. v. Mantor (9th Cir. 2003) 335 F.3d 1101, 1106-1107* (arbitration agreement is procedurally unconscionable if employee's opportunity to opt out is not meaningful, such as when employer pressures employee and threatens employee's job if he or she does not accept arbitration agreement)].

The waivability of federal statutory remedies depends on congressional intent in enacting the particular statute [*Nelson v. Cyprus Bagdad Copper Corp. (9th Cir. 1997) 119 F.3d 756, 760* (noting evidence of congressional intent to preclude waivers under ADA)].

A general arbitration provision in a collective bargaining agreement that does not explicitly incorporate statutory antidiscrimination requirements does not effectively waive individual employees' rights to a judicial forum for their statutory civil rights claims [*Wright v. Universal Maritime Serv. Corp. (1998) 525 U.S. 70, 119 S. Ct. 391, 142 L. Ed. 2d 361, 371-372* ; *see Gilmer v. Interstate/Johnson Lane Corp. (1991) 500 U.S. 20, 34-35, 111 S. Ct. 1647, 114 L. Ed. 2d 26* ; *Spellman v. Securities, Annuities & Ins. Services (1992) 8 Cal. App. 4th 452, 461, 10 Cal. Rptr. 2d 427]* . The Labor Management Relations Act's general presumption of the arbitrability of disputes arising under a collective bargaining agreement [*see 29 U.S.C. § 185*; *AT&T Technologies, Inc. v. Communications Workers of America (1986) 475 U.S. 643, 650, 106 S. Ct. 1415, 89 L. Ed. 2d 648*] is inapplicable to claims arising from civil rights statutes [*Wright v. Universal Maritime Serv. Corp. (1998) 525 U.S. 70, 119 S. Ct. 391, 142 L. Ed. 2d 361, 369-371]* .

A collective bargaining agreement provision that clearly and unmistakably requires union members to arbitrate statutory claims is enforceable [*14 Penn Plaza LLC v. Pyett (2009) -- U.S. --, 129 S. Ct. 1456, 173 L. Ed. 2d 398, 408-414* (enforcing collective bargaining agreement that expressly mandated grievance and arbitration procedure as "sole and exclusive remedy" for union members' claims of employment discrimination under state and federal statutes, including Age Discrimination in Employment Act, *29 U.S.C. § 621 et seq.*); *see Camargo v. California Portland Cement Co. (2001) 86 Cal. App. 4th 995, 1018-1021, 103 Cal. Rptr. 2d 841* (arbitration award not entitled to collateral estoppel effect in subsequent FEHA litigation because arbitration had been conducted under collective bargaining agreement that did not clearly and unmistakably provide for arbitration of FEHA claims, and arbitration procedures did not allow for full litigation and fair adjudication of FEHA claims); *Vasquez v. Superior Ct. (2000) 80 Cal. App. 4th 430, 433-436, 95 Cal. Rptr. 2d 294* (collective bargaining agreement did not specifically refer to ADA or FEHA, so there was no clear

and unmistakable waiver)].

In any event, an arbitration provision will not foreclose a civil action by the employee to collect unpaid wages [*Lab. Code § 229*]. Moreover, an arbitration agreement made between the employer and the employee will not bar the Equal Employment Opportunity Commission from pursuing judicial relief for the employee under the Americans With Disabilities Act [*EEOC v. Waffle House, Inc. (2002) 534 U.S. 279, 286-298, 122 S. Ct. 754, 151 L. Ed. 2d 755, 763-770* (ADA grants EEOC exclusive authority over choice of forum and prayer for relief in its own enforcement action, and that authority is not affected by employee's signing of mandatory arbitration agreement); *see 42 U.S.C. §§ 12101 et seq* ., 12117(a) (ADA)].

For detailed discussion of the enforceability of arbitration clauses, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

Even if a mandatory arbitration provision in an employment agreement is enforceable, a court must vacate an arbitration award made pursuant to the provision if a legal error in the award prevents the employee from obtaining a hearing on his or her FEHA claim or other claim based on unwaivable statutory rights. In such a case, vacatur is appropriate because the arbitrator exceeds his or her powers by making an award based on a legal error [*Pearson Dental Supplies, Inc. v. Superior Court (2010) 48 Cal. 4th 665, 675-680, 108 Cal. Rptr. 3d 171, 229 P.3d 83* (arbitrator erred in concluding that arbitration was time-barred, based on erroneous interpretation of *Code Civ. Proc. § 1281.12* tolling provision); *see Code Civ. Proc. § 1286.2(a)(4)* (vacatur is required when arbitrator exceeds his or her powers)]. Other grounds for vacatur under the California Arbitration Act include corruption, fraud, and prejudicial misconduct by the arbitrators [*see Code Civ. Proc. § 1286.2(a)*]. For detailed discussion of judicial enforcement and vacatur of arbitration awards, see Ch. 34, *Contractual Arbitration: Judicial Review* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityLabor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964RemediesAlternative Dispute Resolution

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 115 CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION
PART II. LEGAL BACKGROUND
D. Civil Actions and Judicial Remedies

11-115 California Forms of Pleading and Practice--Annotated § 115.56

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§ 115.56 Judicial Remedies

[1] Scope

Generally, the remedial goal of FEHA is to restore a plaintiff who proves discrimination or retaliation to the position or status he or she would have enjoyed but for the defendant's wrongful conduct [*Ackerman v. Western Elec. Co. (N.D. Cal. 1986) 643 F. Supp. 836, 852 , aff'd, 860 F.2d 1514 (9th Cir. 1988)* (construing FEHA)].

FEHA does not specifically set forth judicial remedies, other than to authorize a discretionary award of costs (including expert witness fees) and attorney's fees to the prevailing party [*see Gov. Code § 12965(b)*; *Commodore Home Systems v. Superior Court (1982) 32 Cal. 3d 211, 215, 185 Cal. Rptr. 270, 649 P.2d 912* ; *Ackerman v. Western Elec. Co. (N.D. Cal. 1986) 643 F. Supp. 836, 852 , aff'd, 860 F.2d 1514 (9th Cir. 1988)]* . However, it has been held that all relief generally available in noncontractual actions, including punitive damages, may be awarded in civil actions under FEHA [*Commodore Home Systems v. Superior Court (1982) 32 Cal. 3d 211, 221, 185 Cal. Rptr. 270, 649 P.2d 912]* .

For a form of civil complaint seeking damages and equitable relief under FEHA, see *§ 115.90*.

[2] Back Pay

Courts commonly award back pay in FEHA civil actions [*see, e.g.*, *American National Ins. Co. v. FEHC (1982) 32 Cal. 3d 603, 606, 186 Cal. Rptr. 345, 651 P.2d 1151* ; *Ackerman v. Western Elec. Co. (N.D. Cal. 1986) 643 F. Supp. 836, 855 , aff'd, 860 F.2d 1514 (9th Cir. 1988)]* .

FEHC administrative decisions define back pay as the amount that a plaintiff would have earned but for an employer's unlawful conduct, minus the amount that plaintiff did earn or could have earned if he or she had mitigated the loss by seeking or securing other comparable employment [*see* DFEH v. Rosenberg (1990) FEHC Dec. No. 90-07, p. 10; DFEH v. Livermore Joe's, Inc. (1990) FEHC Dec. No. 90-07, pp. 21-22; DFEH v. County of Madera (1990) FEHC Dec. No. 90-03, pp. 36-37; DFEH v. J. E. Robinson, D.D.S. (1989) FEHC Dec. No. 89-02, p. 14; DFEH v. Aluminum

Precision Products, Inc. (1988) FEHC Dec. No. 88-05, p. 9; *see also Ackerman v. Western Electric Co. (N.D. Cal. 1986) 643 F. Supp. 836, 855, 855 n.16 , aff'd, 860 F.2d 1514 (9th Cir. 1988)* (construing FEHA; amounts earned from other employment deducted from back pay award); *2 Cal. Code Reg. § 7286.9(a)(1)(A)* (FEHC regulation; mitigation of back pay awards)].

Back pay includes pension and profit-sharing contributions [*see* DFEH v. California State University--Sacramento (1988) FEHC Dec. No. 88-08, p. 25; *cf. Patterson v. American Tobacco Co. (4th Cir. 1976) 535 F.2d 257, 269 , cert. denied, 429 U.S. 920 (Title VII)]* , vacation pay, sick pay, overtime and shift differential pay [*see* DFEH v. California State University--Sacramento (1988) FEHC Dec. No. 88-08, p. 25; *cf.* Pettway v. American Cast Iron Pipe Company (5th Cir. 1974) *494 F.2d 211, 263 (Title VII)]* , fringe benefits (such as medical insurance) [*see County of Alameda v. FEHC (1984) 153 Cal. App. 3d 499, 509, 200 Cal. Rptr. 381]* , and all other compensation that would have been obtained but for the discrimination [*cf. Albemarle Paper Co. v. Moody (1975) 422 U.S. 405, 418-421, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (Title VII)]* .

Because back pay is a make-whole remedy, intended to restore the employee to the financial situation that would have existed but for the employer's wrongful conduct, an employee is not entitled to earnings he or she would not have received in any event. Thus, for example, an employer is not liable for back pay during a period that a wrongfully discharged employee is unavailable for work due to a disability that is not the result of the employer's wrongful conduct [*see Davis v. Los Angeles Unified Sch. Dist. Pers. Comm'n (2007) 152 Cal. App. 4th 1122, 1134-1135, 62 Cal. Rptr. 3d 69]* .

The plaintiff has the burden of demonstrating the amount of back pay [*see* DFEH v. Livermore Joe's, Inc. (1990) FEHC Dec. No. 90-07, pp. 21-22]. However, the burden is on the employer to prove, by a preponderance of the evidence, that no pay is due the plaintiff in some or all of the back pay period, and to prove any offsets to plaintiff's expected earnings [*see* DFEH v. County of Madera (1988) FEHC Dec. No. 90-03, p. 36].

If an employee is denied a promotion for a discriminatory reason that is prohibited by FEHA, and then voluntarily resigns, the employee is not precluded from recovering back pay for the period after the date of his or her resignation, even if the employee was not constructively discharged [*Cloud v. Casey (2000) 76 Cal. App. 4th 895, 905-908, 90 Cal. Rptr. 2d 757* (declining to adopt contrary federal rule); *but see Satterwhite v. Smith (9th Cir. 1984) 744 F.2d 1380, 1381 n.1* (under federal discrimination law, employee who has been discriminatorily denied promotion is precluded from recovering back pay for any period after date of resignation, unless employee was constructively discharged)].

[3] Front Pay or Future Lost Earnings

Courts have discretion to award "front pay" or "future lost earnings" under FEHA if, because of unlawful discrimination or retaliation, an applicant or employee has lost earnings he or she would have received beyond the judgment date [*see, e.g., Bihun v. AT&T Information Systems, Inc. (1993) 13 Cal. App. 4th 976, 995-997, 16 Cal. Rptr. 2d 787* ; *Ackerman v. Western Elec. Co. (N.D. Cal. 1986) 643 F. Supp. 836, 856 , aff'd, 860 F.2d 1514 (9th Cir. 1988)* (construing FEHA)]. Front pay may also be awarded when reinstatement is not feasible [*Ackerman v. Western Elec. Co. (N.D. Cal. 1986) 643 F. Supp. 836, 856 , aff'd, 860 F.2d 1514 (9th Cir. 1988)* (construing FEHA)].

Front pay is an equitable remedy designed to (1) compensate for lost reinstatement rights by allowing discharged employees to find comparable employment, (2) deter future improper employer action, or (3) make a discharged employee whole until he or she attains a level of earnings equivalent to the level at the time of termination [*Ackerman v. Western Elec. Co. (N.D. Cal. 1986) 643 F. Supp. 836, 856 , aff'd, 860 F.2d 1514 (9th Cir. 1988)* (construing FEHA)].

PRACTICE TIP:

Effect of Duty to Mitigate. The efforts to mitigate damages can have a significant impact on both "back

pay" that accrues before trial [*see* [2], *above*] and "front pay" that may be claimed. As noted, front pay is considered an equitable remedy in lieu of reinstatement. Normally, the employer will have the opportunity to elect to reinstate a terminated employee, or be exposed to front pay, in the event that there is finding of liability. *By John H. Scott*

[4] Compensatory Damages

Courts may award compensatory damages for discrimination under FEHA [*see Commodore Home Systems v. Superior Court (1982) 32 Cal. 3d 211, 221, 185 Cal. Rptr. 270, 649 P.2d 912* ; *Bihun v. AT&T Information Systems, Inc. (1993) 13 Cal. App. 4th 976, 995-997, 16 Cal. Rptr. 2d 787* ; *Garcia v. Los Angeles Unified School Dist. (1985) 173 Cal. App. 3d 701, 711, 219 Cal. Rptr. 544]* .

Thus, plaintiffs may recover damages for mental suffering and emotional distress resulting from discrimination, as well as for other resulting damages that are not included in the formulations of "back pay" and "front pay" [*see Commodore Home Systems v. Superior Court (1982) 32 Cal. 3d 211, 220-221, 185 Cal. Rptr. 270, 649 P.2d 912* ; *Bihun v. AT&T Information Systems, Inc. (1993) 13 Cal. App. 4th 976, 995-997, 16 Cal. Rptr. 2d 787* ; *Garcia v. Los Angeles Unified School Dist. (1985) 173 Cal. App. 3d 701, 711, 219 Cal. Rptr. 544* ; *cf. Alcorn v. Anbro Engineering (1970) 2 Cal. 3d 493, 498, 86 Cal. Rptr. 88, 468 P.2d 216* (damages for emotional distress due to discriminatory termination available under tort theory)].

[5] Punitive Damages

Punitive damages are available in civil actions under FEHA [*Commodore Home Systems v. Superior Court (1982) 32 Cal. 3d 211, 221, 185 Cal. Rptr. 270, 649 P.2d 912]* . Recovery of punitive damages is generally limited to FEHA violations that are accompanied by malice, oppression, or fraud [*see Civ. Code § 3294*; *see, e.g., Monge v. Superior Court (1986) 176 Cal. App. 3d 503, 511-512, 222 Cal. Rptr. 64* (plaintiffs who pleaded sexually hostile working environment were entitled to seek punitive damages under FEHA); *see generally* Ch. 177, *Damages*].

Punitive damages may be assessed against an employer based on the wrongful conduct of its employee if the employer [*Civ. Code § 3294(b)*]:

- Had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others;
- Authorized or ratified the wrongful conduct of the employee; or
- Was personally guilty of oppression, fraud, or malice.

Thus, the employer itself need not have committed fraud, oppression, or malice to be liable for punitive damages [*see Weeks v. Baker & McKenzie (1998) 63 Cal. App. 4th 1128, 1153-1154, 74 Cal. Rptr. 2d 510]* . However, to subject a corporate employer to liability for punitive damages in such a case, the conscious disregard, authorization, or ratification must have been performed by an officer, director, or managing agent of the corporation [*Civ. Code § 3294(b)*; *see § 115.36[2][c]* (discussion of employer liability for punitive damages due to acts of supervisors)]. For this purpose, a "managing agent" is a corporate employee who exercises substantial independent authority and judgment in making decisions that ultimately determine corporate policy; the mere power to hire and fire employees is not sufficient to establish such authority [*White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 567, 573-577, 88 Cal. Rptr. 2d 19, 981 P.2d 944* (determination of managing-agent status is factual determination that must be made on case-by-case basis)].

Evidence showing that the employer denied the employee his or her protected rights under FEHA, and then sought to hide what the employer had done with a false explanation, can meet the statutory definition of malice, which includes

despicable conduct intended to cause injury to the plaintiff carried on with a "willful and conscious disregard of the rights or safety of others" [*Cloud v. Casey (2000) 76 Cal. App. 4th 895, 911-912, 90 Cal. Rptr. 2d 757* ; *Civ. Code § 3294(d)(1)*].

Under Title VII, punitive damages are available to victims of workplace discrimination if the employee demonstrates that the employer has engaged in intentional discrimination and has done so "with malice or with reckless indifference to (the employee's) federally protected rights" [*42 U.S.C. § 1981a(b)(1)*]. However, the total of punitive damages plus compensatory damages for nonpecuniary and future pecuniary losses may not exceed a statutory cap [*42 U.S.C. § 1981a(b)(3)*; *see also Lansdale v. Hi-Health Supermart Corp. (9th Cir. 2002) 314 F.3d 355, 357-359* (damages limitation of *42 U.S.C. § 1981a(b)(3)* does not violate constitutional separation of powers, *Seventh Amendment* right to jury trial, Due Process clause, or *Equal Protection clause*); *but see 42 U.S.C. § 2000e-5(e)(3)(B)* (in addition to relief authorized by *42 U.S.C. § 1981a*, employee claiming discrimination in compensation may recover back pay for up to two years preceding filing of charge of discrimination, if unlawful employment practices that occurred during charge-filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside time for filing charge)]. To recover punitive damages under Title VII, a plaintiff must show that the employer had a "subjective consciousness" of the risk of injury or illegality. The employer's conduct need not be shown to be egregious, although evidence of egregious misconduct may be used to meet the plaintiff's burden of proof [*Kolstad v. American Dental Assoc. (1999) 527 U.S. 526, 119 S. Ct. 2118, 144 L. Ed. 2d 494, 506-507, 512]* . After a showing of the requisite intent by certain managerial employees, the employee must also show that the requisite mental state can be imputed to the employer [*Kolstad v. American Dental Assoc. (1999) 527 U.S. 526, 119 S. Ct. 2118, 144 L. Ed. 2d 494, 508-512]* . In Title VII cases, with respect to punitive damages, an employer may not be vicariously liable for the discriminatory conduct of its managerial agents when the agents' decisions are contrary to the employer's good-faith efforts to comply with Title VII (e.g., institution of a written sexual harassment policy) [*Kolstad v. American Dental Assoc. (1999) 527 U.S. 526, 119 S. Ct. 2118, 144 L. Ed. 2d 494, 512]* .

The *Due Process Clause of the Fourteenth Amendment to the United States Constitution* places constraints on state-court awards of punitive damages [*State Farm Mut. Auto Ins. Co. v. Campbell (2003) 538 U.S. 408, 416-418, 123 S. Ct. 1513, 155 L. Ed. 2d 585* ; *BMW of N. Am. v. Gore (1996) 517 U.S. 559, 568, 116 S. Ct. 1589, 134 L. Ed. 2d 809* ; *Roby v. McKesson Corp. (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749* ; *Simon v. San Paolo U.S. Holding Co., Inc. (2005) 35 Cal. 4th 1159, 1171, 29 Cal. Rptr. 3d 379, 113 P.3d 63*]. The United States Supreme Court has articulated three "guideposts" for courts reviewing punitive damages: (1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between and the punitive damages award and the actual or potential harm suffered by the plaintiff, (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases [*State Farm Mut. Auto Ins. Co. v. Campbell (2003) 538 U.S. 408, 418, 123 S. Ct. 1513, 155 L. Ed. 2d 585* ; *Roby v. McKesson Corp. (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749*]. The most important of these guideposts is the degree of reprehensibility of the defendant's conduct. On this question, courts must consider whether (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident [*State Farm Mut. Auto Ins. Co. v. Campbell (2003) 538 U.S. 408, 419, 123 S. Ct. 1513, 155 L. Ed. 2d 585* ; *Roby v. McKesson Corp. (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749* (one-to-one ratio between compensatory and punitive damages was federal constitutional limit in FEHA discrimination and harassment case involving relatively low degree of reprehensibility of defendant's conduct and substantial compensatory damages award, which included substantial amount of noneconomic damages, which itself may have included punitive component)].

[6] Injunctive Relief

Although FEHA does not expressly authorize a court to grant injunctive relief for unlawful discrimination, courts have awarded such relief, including (1) hiring, promotion, and reinstatement orders [*see, e.g., Johnson v. Civil Service*

Comm'n (1984) 153 Cal. App. 3d 585, 591, 200 Cal. Rptr. 289 (order directing city to employ petitioner as firefighter); *Fair Employment Practice Comm'n v. State Personnel Bd. (1981) 117 Cal. App. 3d 322, 331-332, 172 Cal. Rptr. 739* (promotion order); *International Union of Operating Engineers v. Fair Emp. Practice Comm'n (1969) 276 Cal. App. 2d 504, 510-511, 81 Cal. Rptr. 47 , cert. denied, 397 U.S. 1037 (1970)* (order to hire)], (2) orders granting retroactive seniority [*see, e.g., County of Alameda v. FEHC (1984) 153 Cal. App. 3d 499, 200 Cal. Rptr. 381* (retroactive seniority granted to black female denied position by county as jail cook)], (3) orders requiring removal of negative materials from work records and requiring employer to indicate voluntary departure from employment [*see Ackerman v. Western Elec. Co. (N.D. Cal. 1986) 643 F. Supp. 836, 857 , aff'd, 860 F.2d 1514 (9th Cir. 1988)* (construing FEHA)], and (4) orders directing employers to cease and desist from discriminatory policies or practices [*see* Herr v. Nestle *U.S.A., Inc. (2003) 109 Cal. App. 4th 779, 788-790, 135 Cal. Rptr. 2d 477* (age discrimination in violation of FEHA is unlawful employment practice that may be enjoined under Unfair Competition Law, *Bus. & Prof. Code § 17200 et seq.*); *Northern Inyo Hosp. v. Fair Employment Practice Comm'n (1974) 38 Cal. App. 3d 14, 17, 112 Cal. Rptr. 872* (construing former FEPA)].

In a FEHA suit in which the trier of fact has determined that the defendant committed racial harassment through the pervasive use of racially derogatory language, the court has the power to issue an injunction prohibiting the defendant's continued use of racial epithets in the workplace. Such an injunction is not an unconstitutional prior restraint on speech [*see U.S. Const., amend. I*; *Cal. Const., art. I, § 2*]. Rather, it is simply an order precluding the defendant from continuing unlawful conduct that has been judicially determined to violate FEHA and that is outside the scope of constitutional free-speech protection [*Aguilar v. Avis Rent A Car System (1999) 21 Cal. 4th 121, 133-142, 87 Cal. Rptr. 2d 132, 980 P.2d 846 , cert. denied, 529 U.S. 1138 (2000)]* .

[7] Prejudgment Interest

FEHA plaintiffs may recover prejudgment interest on awards of back pay and other tangible, easily ascertainable benefits [*see Civ. Code § 3287(a)*; *see also County of Alameda v. FEHC (1984) 153 Cal. App. 3d 499, 508, 200 Cal. Rptr. 381* (upholding without comment interest on back pay award)].

Prejudgment interest is also available under *Civ. Code § 3291*, which provides for recovery of prejudgment interest in "any action to recover damages for personal injury" from a defendant that is not a public employee or entity, if (1) the plaintiff made an offer pursuant to *Code Civ. Proc. § 998,(2)* the defendant did not accept the offer before trial or within 30 days, and (3) the plaintiff obtained a more favorable judgment. An action for damages for sexual harassment under FEHA constitutes an action for "personal injury" within the meaning of the statute, and therefore prejudgment interest under *Civ. Code § 3291* is available [*Bihun v. AT& T Information Systems, Inc. (1993) 13 Cal. App. 4th 976, 1004-1005, 16 Cal. Rptr. 2d 787]* .

[8] Attorney's Fees

Under FEHA, a court has discretion to award reasonable attorney's fees and costs (including expert witness fees) to the prevailing party [*Gov. Code § 12965(b)*; *see Flannery v. Prentice (2001) 26 Cal. 4th 572, 110 Cal. Rptr. 2d 809, 28 P.3d 860* (except to extent prevailing party has already paid his or her attorney, and unless contractual agreement provides otherwise, attorney's fee award under FEHA belongs to attorney, rather than to prevailing party)]. The court's discretion in deciding whether to award fees must be exercised in a manner that will best effectuate the purposes of FEHA, which is intended primarily to safeguard the right of Californians to seek, obtain, and hold employment without experiencing discrimination on account of the grounds specified by the Act [*Horsford v. Board of Trs. of Cal. State Univ. (2005) 132 Cal. App. 4th 359, 393-394, 33 Cal. Rptr. 3d 644]* .

In a FEHA action, a court should ordinarily award attorney's fees to a prevailing plaintiff unless special circumstances would render a fee award unjust [*Chavez v. City of Los Angeles (2010) 47 Cal. 4th 970, 976, 104 Cal. Rptr. 3d 710, 224 P.3d 41* ; *see Gov. Code § 12965(b)*]. However, if a FEHA action is not brought as a limited civil case, and the

plaintiff recovers an amount that could have been awarded in a limited civil case, the trial court has discretion to deny attorney's fees [*see Code Civ. Proc. § 1033(a)* (trial court may deny costs to prevailing plaintiff in unlimited civil case if judgment could have been recovered in limited civil case)]. In exercising that discretion, however, the trial court must give due consideration to the policies and objectives of the FEHA in general and of its fee-shifting provision in particular [*Chavez v. City of Los Angeles (2010) 47 Cal. 4th 970, 986989,104 Cal. Rptr. 3d 710, 224 P.3d 41* ; *see Gov. Code § 12965(b)*].

Attorney's fees and costs are not available if an action is filed by a public agency or a public official acting in an official capacity [*Gov. Code § 12965(b)*].

Although FEHA's fee-shifting provision expressly includes expert witness fees [*see Gov. Code § 12965(b)*], the United States Supreme Court has held that expert fees are not encompassed in federal fee-shifting statutes that authorize awards of attorney's fees "as part of the costs" [*Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy (2006) 548 U.S. 291, 126 S. Ct. 2455, 2458-2463, 165 L. Ed. 2d 526* ; *see 20 U.S.C. § 1415(i)(3)(B)* (attorney's fees in Individuals With Disabilities Education Act); *42 U.S.C. § 1988* (attorney's fees in civil rights actions)].

The standard governing the court's discretion to award attorney's fees under FEHA is the same as the standard under Title VII [*Cummings v. Benco Building Services (1992) 11 Cal. App. 4th 1383, 1386-1388, 15 Cal. Rptr. 2d 53]* . Title VII contains an attorney's fees provision that is similar to FEHA's provision [*see 42 U.S.C. § 2000e-5(k)*], and it has been observed that, because of the strong public interest in private enforcement of Title VII, attorney's fees should ordinarily be awarded to the prevailing plaintiff in all but special circumstances [*see Christiansburg Garment Co. v. EEOC (1978) 434 U.S. 412, 417, 98 S. Ct. 694, 54 L. Ed. 2d 648* ; *Albemarle Paper Co. v. Moody (1975) 422 U.S. 405, 415, 95 S. Ct. 2362, 45 L. Ed. 2d 280]* . By contrast, a prevailing defendant may recover attorney's fees only if he or she can show that the plaintiff's suit was frivolous, unreasonable, without foundation, or brought in bad faith [*Christiansburg Garment Co. v. EEOC (1978) 434 U.S. 412, 421, 98 S. Ct. 694, 54 L. Ed. 2d 648* ; *Delaney v. Superior Fast Freight (1993) 14 Cal. App. 4th 590, 600, 18 Cal. Rptr. 2d 33* ; *Cummings v. Benco Building Services (1992) 11 Cal. App. 4th 1383, 1387, 15 Cal. Rptr. 2d 53]* . Thus, for example, the fact that the plaintiff fails to present credible evidence of discriminatory conduct is not a sufficient basis to support an award of attorney's fees to the prevailing defendant. The proper standard is whether the plaintiff should have anticipated at the outset that none of the evidence of discriminatory conduct was credible [*EEOC v. Bruno's Restaurant (9th Cir. 1993) 13 F.3d 285, 290]* . On the other hand, a plaintiff who survives a motion for summary judgment or nonsuit is not automatically immune from an award of attorney's fees, if the evidence used to raise a triable issue of fact proves to be fabricated or spurious [*Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro (2001) 91 Cal. App. 4th 859, 866-867, 110 Cal. Rptr. 2d 903* (requirement of findings may not be waived)].

If a FEHA defendant is treated as the prevailing party by virtue of the plaintiff's rejection of an offer of judgment under *Code Civ. Proc. § 998* and the plaintiff's failure to obtain a judgment more favorable than the offer, that circumstance does not eliminate the substantive requirements for awarding attorney's fees to a prevailing FEHA defendant. Therefore, in such a case, a defendant seeking an award of attorney's fees must still show that the plaintiff's suit was frivolous, unreasonable, without foundation, or brought in bad faith [*Mangano v. Verity, Inc. (2008) 167 Cal. App. 4th 944, 948-951, 84 Cal. Rptr. 3d 526*].

The courts of appeal are in conflict on the question whether a prevailing FEHA defendant seeking to recover ordinary litigation costs (other than attorney's fees) must show that the plaintiff's suit was frivolous, unreasonable, without foundation, or brought in bad faith. The Second District, Division Seven, holds that such a showing is a prerequisite to the defendant's recovery of costs as well as attorney's fees [*Cummings v. Benco Building Services (1992) 11 Cal. App. 4th 1383, 1387, 15 Cal. Rptr. 2d 53]* . The First and Sixth Districts hold that although such a showing is necessary for the recovery of attorney's fees, it is not required for the recovery of costs [*Knight v. Hayward Unified Sch. Dist. (2005) 132 Cal. App. 4th 121, 134-136, 33 Cal. Rptr. 3d 287* ; *Perez v. County of Santa Clara (2003) 111 Cal. App. 4th 671, 679-682, 3 Cal. Rptr. 3d 867]* .

To be a prevailing party, a plaintiff has to win more than a mere finding that there was discrimination. However, he or she need not succeed on all or the majority of the claims made, or win monetary relief [*Hashimoto v. Dalton (9th Cir. 1997) 118 F.3d 671, 677-678 , cert. denied, 523 U.S. 1122 (1998)* ($31,000 in fees awarded for winning expungement of record and cease and desist order against employer in retaliation case)]. Moreover, if the suit consists of related claims, and the plaintiff has obtained substantial relief, the trial court has discretion to award all or substantially all of the plaintiff's fees, even if the court did not adopt each contention raised by the plaintiff [*Greene v. Dillingham Constr. N.A., Inc. (2002) 101 Cal. App. 4th 418, 423-424, 124 Cal. Rptr. 2d 250* (although plaintiff succeeded only on FEHA harassment claim, trial court properly awarded substantial fees relating to discrimination claim, given strong interrelationship of claims)].

Although fees are not reduced when a plaintiff prevails on only one of several factually related and closely intertwined claims, a reduced fee award is appropriate when a plaintiff achieves only limited success [*Chavez v. City of Los Angeles (2010) 47 Cal. 4th 970, 989990, 104 Cal. Rptr. 3d 710, 224 P.3d 41* ("Because [the plaintiff's] single successful claim apparently was not closely related to or factually intertwined with plaintiff's many unsuccessful claims, the trial court reasonably could ... conclude that plaintiff was not entitled to attorney fees for time spent litigating those unsuccessful claims.")]. Also, a fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny fees altogether [*Chavez v. City of Los Angeles (2010) 47 Cal. 4th 970, 990991, 104 Cal. Rptr. 3d 710, 224 P.3d 41]* .

If the court enters summary judgment in favor of the defendant because the plaintiff failed to exhaust administrative remedies, the defendant does not qualify as a prevailing party for purposes of recovering attorney's fees [*EEOC v. UPS (2005) 424 F.3d 1060, 1078* ; *Hon v. Marshall (1997) 53 Cal. App. 4th 470, 475, 62 Cal. Rptr. 2d 11]* .

Under the catalyst theory, a FEHA plaintiff may achieve sufficient success to be deemed a prevailing party even if the lawsuit does not result in a judgment in favor of the plaintiff. For example, the lawsuit may be dismissed after the defendant voluntarily ceases the conduct that is the subject of the suit. To obtain attorney's fees in the absence of a judicially recognized change in the legal relationship between the parties, the plaintiff must establish that (1) the lawsuit was a catalyst motivating the defendant to provide the primary relief sought; (2) the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense; and (3) the plaintiff reasonably attempted to settle the litigation prior to filing the lawsuit [*Tipton-Whittingham v. City of Los Angeles (2004) 34 Cal. 4th 604, 608-610, 21 Cal. Rptr. 3d 371, 101 P.3d 174* (California law generally continues to recognize catalyst theory and does not require judicially recognized change in legal relationship between parties as prerequisite for obtaining attorney fees under *Code Civ. Proc. § 1021.5* or *Gov. Code § 12965(b)*); *see Graham v. DaimlerChrysler Corp. (2004) 34 Cal. 4th 553, 594, 21 Cal. Rptr. 3d 331, 101 P.3d 140]* . Unless fees are sought under the catalyst theory, however, a prelitigation settlement demand is not a prerequisite to a fee award under the "private attorney general statute," *Code Civ. Proc. § 1021.5* [*Vasquez v. State of California (2008) 45 Cal. 4th 243, 85 Cal. Rptr. 3d 466, 195 P.3d 1049* (although not required for fee award outside context of catalyst theory, prelitigation settlement efforts may inform court's inquiry into whether necessity of litigation was such as to make fee award appropriate)].

If the defendant is a government agency, the catalyst theory will not be applied to allow the recovery of attorney's fees by a plaintiff whose lawsuit merely caused the acceleration of the issuance of government regulations or remedial measures, if the process of issuing those regulations or undertaking those measures was ongoing at the time the lawsuit was filed [*Tipton-Whittingham v. City of Los Angeles (2004) 34 Cal. 4th 604, 609, 21 Cal. Rptr. 3d 371, 101 P.3d 174* (if government agency had discretion as to timing of performing some action, mere fact that lawsuit may accelerate that performance does not establish eligibility for attorney fees); *Westside Cmty. for Indep. Living, Inc. v. Obledo (1983) 33 Cal. 3d 348, 354, 188 Cal. Rptr. 873, 657 P.2d 365]* .

In contrast, the United States Supreme Court has rejected the catalyst theory as a basis for determining that a plaintiff is a prevailing party under a federal fee-shifting statute. Rather, to be a prevailing party under federal statutes, a plaintiff

must have obtained a "judicial imprimatur" that alters the legal relationship of the parties, such as a judgment on the merits or a court-ordered consent decree. It is not enough for the plaintiff's lawsuit to have been a catalyst in causing a voluntary change in the defendant's conduct [Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res. (2001) 532 U.S. 598, 602-603, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (construing "prevailing party" language in Fair Housing Amendments Act of 1988, *42 U.S.C. § 3613(c)(2)*, and ADA, *42 U.S.C. § 12205*)].

If the trial court awards attorney's fees to a prevailing defendant in a FEHA case, the court must make written findings that the plaintiff's suit was sufficiently frivolous, unreasonable, or without foundation [*Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro (2001) 91 Cal. App. 4th 859, 867-868, 110 Cal. Rptr. 2d 903* (requirement of findings may not be waived)].

Attorney's fees recovered by an employee in a FEHA action, and paid to the employee's attorney, are deductible from the employee's gross income for income tax purposes [*I.R.C. § 62(a)(20),(e)(18)*].

PRACTICE TIP:

Multipliers. Under FEHA, a multiplier is available under certain circumstances [*see Flannery v. California Highway Patrol (1998) 61 Cal. App. 4th 629, 634, 71 Cal. Rptr. 2d 632]* . On the other hand, obtaining a multiplier in a Title VII action, or under *42 U.S.C. § 1983*, is virtually impossible [*see Perdue v. Kenny A. ex rel. Winn (2010) -- U.S. --, 130 S. Ct. 1662, 176 L. Ed. 2d 494, 501-508* (in calculating attorney's fee under federal fee-shifting statute, lodestar figure--number of hours worked multiplied by prevailing hourly rate--may be enhanced due to superior performance and results, but only in extraordinary circumstances and not on basis of factors subsumed in lodestar calculation); *City of Burlington v. Dague (1992) 505 U.S. 557, 112 S. Ct. 2638, 120 L. Ed. 2d 449] . By John H. Scott*

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11-115 California Forms of Pleading and Practice--Annotated §§ 115.57-115.69

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

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11-115 California Forms of Pleading and Practice--Annotated § 115.70

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

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Labor & Employment LawDiscriminationGeneral Overview

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 115 CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION
PART III. RESEARCH GUIDE

11-115 California Forms of Pleading and Practice--Annotated § 115.71

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§ 115.71 Federal Constitution

Due process clause, applicable to federal government. *U.S. Const., amend. V*

Sovereign immunity of states. *U.S. Const., amend. XI*

Privileges and immunities, due process, and *equal protection clauses*, applicable to states. *U.S. Const., amend. XIV*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewConstitutional LawEqual ProtectionScope of ProtectionConstitutional LawPrivileges & ImmunitiesGovernmentsFederal GovernmentClaims By & Against

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11-115 California Forms of Pleading and Practice--Annotated § 115.72

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.72 State Constitution

Prohibition against restrictions on entry into vocation, trade, profession, business, or employment based on sex, race, creed, color, or national or ethnic origin. *Cal. Const., art. I, § 8*

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11-115 California Forms of Pleading and Practice--Annotated § 115.73

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.73 Federal Statutes

[1] Title VII of Civil Rights Act of 1964

Title VII of Civil Rights Act of 1964. *42 U.S.C. § 2000e et seq.*

Definitions. *42 U.S.C. § 2000e*

Applicability. *42 U.S.C. § 2000e-1*

Unlawful employment practices; protected classifications; covered entities. *42 U.S.C. §§ 2000e-2, 2000e-3*

Equal Employment Opportunity Commission (EEOC). *42 U.S.C. § 2000e-4*

Enforcement provisions. *42 U.S.C. § 2000e-5*

Pattern or practice of discrimination; civil actions by Attorney General. *42 U.S.C. § 2000e-6*

Effect of Title VII on state equal employment opportunity laws. *42 U.S.C. § 2000e-7*

EEOC investigations. *42 U.S.C. § 2000e-8*

Conduct of EEOC hearings. *42 U.S.C. § 2000e-9*

Veterans' preference. *42 U.S.C. § 2000e-11*

EEOC authority to issue regulations. *42 U.S.C. § 2000e-12*

[2] Americans with Disabilities Act (ADA)

Americans with Disabilities Act. *42 U.S.C. § 12101 et seq.*

Congressional findings. *42 U.S.C. § 12101*

Definitions. *42 U.S.C. § 12102*

Discrimination prohibited. *42 U.S.C. § 12112*

Defenses. *42 U.S.C. § 12113*

Enforcement. *42 U.S.C. § 12117*

[3] Age Discrimination in Employment Act (ADEA)

Age Discrmination in Employment Act. *29 U.S.C. § 621 et seq.*

Congressional findings and purpose. *29 U.S.C. § 621*

Unlawful employment practices; covered entities. *29 U.S.C. § 623*

Enforcement. *29 U.S.C. § 626*

EEOC power to issue rules and regulations. *29 U.S.C. § 628*

Definitions. *29 U.S.C. § 630*

Covered persons. *29 U.S.C. § 631*

Effect of ADEA on state equal employment opportunity laws. *29 U.S.C. § 633*

[4] Miscellaneous

Jurisdiction of United States District Courts in civil rights cases. *28 U.S.C. §§ 1331, 1343, 1344*

Equal Pay Act of 1963. *29 U.S.C. § 206(d)*

Rehabilitation Act of 1973. *29 U.S.C. § 701 et seq.*

Vietnam Era Veterans Readjustment Assistance Act of 1974. *38 U.S.C. § 4211 et seq.*

Uniformed Services Employment and Reemployment Rights Act of 1994. *38 U.S.C. § 4301 et seq.*

Equal rights under law (Civil Rights Act of 1866). *42 U.S.C. § 1981*

Property rights of citizens. *42 U.S.C. § 1982*

Civil action for deprivation of civil rights under color of state law (Civil Rights Act of 1871). *42 U.S.C. § 1983*

Conspiracy to interfere with civil rights. *42 U.S.C. § 1985*

Failure to prevent conspiracy to interfere with civil rights. *42 U.S.C. § 1986*

State law applicable in federal civil rights actions. *42 U.S.C. § 1988(a)*

Recovery of attorney's fees in civil rights actions. *42 U.S.C. § 1988(b)*

Title VI of Civil Rights Act of 1964. *42 U.S.C. § 2000d et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawConspiracyGeneral OverviewCivil Rights LawSection 1983 ActionsGeneral OverviewLabor & Employment LawDiscriminationAge DiscriminationGeneral OverviewLabor & Employment LawDiscriminationDisability DiscriminationGeneral OverviewLabor & Employment LawDiscriminationTitle VII of the Civil Rights Act of 1964General Overview

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11-115 California Forms of Pleading and Practice--Annotated § 115.74

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.74 State Statutes

[1] Fair Employment and Housing Act (FEHA)

Fair Employment and Housing Act. *Gov. Code § 12900 et seq.*

Department of Fair Employment and Housing (DFEH). *Gov. Code §§ 12901, 12930*

Fair Employment and Housing Commission (FEHC). *Gov. Code §§ 12903, 12935*

California public policy with respect to equal employment opportunity. *Gov. Code § 12920*

Equal employment opportunity as civil right. *Gov. Code § 12921(a)*

Definitions. *Gov. Code §§ 12925, 12926, 12926.2*

Unlawful employment practices; protected classifications; covered entities; exceptions. *Gov. Code § 12940*

Unlawful age discrimination; exceptions; right to continue employment beyond normal retirement date. *Gov. Code §§ 12941, 12942*

Unlawful discrimination based on pregnancy, childbirth, or related medical condition. *Gov. Code § 12945*

Dress requirements for employees. *Gov. Code § 12947.5*

Unlawful workplace language restriction. *Gov. Code § 12951*

Procedure for filing DFEH complaint. *Gov. Code § 12960*

Class actions. *Gov. Code § 12961*

Service of DFEH complaint; time limit. *Gov. Code § 12962*

DFEH investigation. *Gov. Code § 12963*

Discovery in administrative proceedings. *Gov. Code §§ 12963.1-12963.5*

DFEH conference, conciliation, and persuasion. *Gov. Code §§ 12963.7, 12964*

DFEH accusation of discrimination; civil actions. *Gov. Code § 12965*

FEHC hearings; findings; remedies. *Gov. Code §§ 12967-12970*

Withdrawal of DFEH complaint. *Gov. Code § 12971*

DFEH compliance review. *Gov. Code § 12973*

Civil action for relief pending final DFEH disposition of complaint. *Gov. Code § 12974*

Construction of FEHA. *Gov. Code § 12993*

[2] Miscellaneous

Freedom from violence or threat of violence because of protected characteristics. *Civ. Code § 51.7*

Damages for denial of right provided by *Civ. Code § 51.7*. *Civ. Code § 52(b)*

Protection from interference with rights by threats, intimidation, coercion, or violence. *Civ. Code § 52.1*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewLabor & Employment LawDiscriminationActionable DiscriminationLabor & Employment LawDiscriminationGender & Sex DiscriminationCoverage & DefinitionsPregnancy & Parental Rights

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§ 115.75 Federal Administrative Regulations

Procedural regulations for carrying out Title VII. 29 C.F.R. pt. 1601

Guidelines on sex discrimination. 29 C.F.R. pt. 1604

Guidelines on religious discrimination. 29 C.F.R. pt. 1605

Guidelines on national origin discrimination. 29 C.F.R. pt. 1606

Guidelines on employee selection procedures. 29 C.F.R. pt. 1607

Affirmative action. 29 C.F.R. pt. 1608

Regulations implementing ADEA. 29 C.F.R. pts. 1625, 1626

Regulations implementing ADA. 29 C.F.R. pt. 1630

Legal Topics:

For related research and practice materials, see the following legal topics:
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11-115 California Forms of Pleading and Practice--Annotated § 115.76

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.76 State Administrative Regulations

California policy and purpose with respect to equal employment opportunity. *2 Cal. Code Reg. § 7286.3*

FEHC authority to issue regulations. *2 Cal. Code Reg. § 7286.4*

Definitions. *2 Cal. Code Reg. § 7286.5*

Employment discrimination principles. *2 Cal. Code Reg. § 7286.6*

Affirmative defenses. *2 Cal. Code Reg. § 7286.7*

Affirmative action. *2 Cal. Code Reg. § 7286.8*

Remedies. *2 Cal. Code Reg. § 7286.9*

Employment practices having effect of unlawful discrimination. *2 Cal. Code Reg. §§ 7287.1-7287.9*

National origin and ancestry discrimination. *2 Cal. Code Reg. §§ 7289.4, 7289.5*

Sex discrimination. *2 Cal. Code Reg. §§ 7290.6-7291.2*

Marital status discrimination. *2 Cal. Code Reg. §§ 7292.0-7292.6*

Religious discrimination. *2 Cal. Code Reg. §§ 7293.0-7293.4*

Physical or mental disability discrimination. *2 Cal. Code Reg. §§ 7293.5-7294.2*

Age discrimination. *2 Cal. Code Reg. §§ 7295.0-7296.4*

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationAge DiscriminationGeneral OverviewLabor & Employment LawDiscriminationDisability DiscriminationGeneral OverviewLabor & Employment LawDiscriminationGender & Sex DiscriminationGeneral OverviewLabor & Employment LawDiscriminationNational Origin DiscriminationGeneral OverviewLabor & Employment LawDiscriminationReligious DiscriminationGeneral Overview

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11-115 California Forms of Pleading and Practice--Annotated § 115.77

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.77 Decisions

[1] Coverage of Equal Employment Opportunity Laws

[a] Title VII

In punitive damages context, employer may not be vicariously liable for discriminatory employment decisions of its managerial agents when those decisions are contrary to employer's good-faith efforts to comply with *Title VII. Kolstad v. American Dental Assoc. (1999) 527 U.S. 526, 119 S. Ct. 2118, 144 L. Ed. 2d 494, 512*

Employer is subject to agency liability for discriminatory programs of third parties if employer affirmatively, actively participates in program and has some control over terms of program. *Morgan v. Safeway Stores (9th Cir. 1989) 884 F.2d 1211, 1214-1215*

Musician who performed concerts for school district, but was responsible for employing, equipping, transporting, and controlling the members of his group, is independent contractor not covered by Title VII. *Lutcher v. Musicians Union Local 47 (9th Cir. 1980) 633 F.2d 880, 883*

[b] ADA

In determining whether professional corporation has at least 15 employees thereby making it subject to ADA [*see 42 U.S.C. § 12111(5)*], shareholder- director of corporation will count as employee if that individual's work is subject to corporation's control. *Clackamas Gastroenterology Assocs., P.C. v. Wells (2003) 538 U.S. 440, 123 S. Ct. 1673, 155 L. Ed. 2d 615, 623-627*

ADA does not validly abrogate states' *Eleventh Amendment* immunity from private damages suits for employment discrimination against disabled persons. *Board of Trustees v. Garrett (2001) 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed.*

2d 866, 878-884

Pursuit and receipt of Social Security Disability Insurance (SSDI) benefits does not automatically estop recipient from establishing that his or her disability is also covered under ADA, since SSDI finding of severe disability does not necessarily conflict with showing that ADA claimant can perform job with "reasonable accommodation;" however, when faced with ADA plaintiff's previous sworn statement asserting "total disability," trial court should require explanation of any apparent inconsistency with necessary elements of ADA claim. *Cleveland v. Policy Management Sys. Corp. (1999) 526 U.S. 795, 119 S. Ct. 1597, 1600-1604, 143 L. Ed. 2d 966*

Employer requiring as job qualification that employee meet otherwise applicable federal safety standard need not justify enforcing that regulation solely because its standard may be waived in individual case, when waiver program is experimental. *Albertson's, Inc. v. Kirkingburg (1999) 527 U.S. 555, 119 S. Ct. 2162, 144 L. Ed. 2d 518, 525, 537-538*

ADA held not to cover employee with impairment that led to loss of job but did not substantially limit a major life activity or substantially limit her general employability (nurse with lifting restriction). *Thompson v. Holy Family Hosp. (9th Cir. 1997) 121 F.3d 537, 539-541*

[c] ADEA

ADEA does not validly abrogate states' *Eleventh Amendment* immunity from private damages suits. *Kimel v. Florida Bd. of Regents (2000) 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522, 547*

Complementary provisions of Title VII and ADEA are construed consistently. *Monce v. City of San Diego (9th Cir. 1990) 895 F.2d 560, 561*

ADEA claim against church for denying minister promotion to pastorship because of age violates *Free Exercise Clause* of *U.S. Const., amend. I*. *Minker v. Baltimore Annual Conference of United Methodist Church (D.C. Cir. 1990) 894 F.2d 1354, 1356-1358*

ADEA coverage not limited to rank-and-file "employees," but may also apply to stockholders, officers, and directors who are also "employees." *Hyland v. New Haven Radiology Associates (2d Cir. 1986) 794 F.2d 793, 797*

[d] 42 U.S.C. § 1981

Unlike Title VII (*see 42 U.S.C. § 2000e-16(c)*), *42 U.S.C. § 1981* has no waiver of sovereign immunity. *Ellis v. Naval Air Rework Facility (N.D. Cal. 1975) 404 F. Supp. 377, 380*

[e] FEHA

Student receiving athletic scholarship is not employee of university for purposes of FEHA. *Shephard v. Loyola Marymount Univ. (2002) 102 Cal. App. 4th 837, 842-847, 125 Cal. Rptr. 2d 829*

Depending on its severity, posttraumatic stress disorder may meet definition of mental disability under FEHA. *Jensen v. Wells Fargo Bank (2000) 85 Cal. App. 4th 245, 259, 102 Cal. Rptr. 2d 55*

Alcoholism is potentially a covered disability under FEHA. *Gosvener v. Coastal Corp. (1996) 51 Cal. App. 4th 805, 813*

FEHA prohibits discrimination based on protected classification; employer is not forbidden from perceiving difference between good employee and incompetent one, or good employee and better one. *Gonzales v. Metpath, Inc. (1989) 214 Cal. App. 3d 422, 426, 262 Cal. Rptr. 654*

[2] Civil Rights Act of 1991

Four-year federal "catchall" statute of limitations [*28 U.S.C. § 1658*] applies to hostile work environment, wrongful termination, and failure-to-transfer claims that are cognizable under *42 U.S.C. § 1981* by virtue of Civil Rights Act of 1991's expansion of scope of § 1981. *Jones v. R.R. Donnelley & Sons Co. (2004) 541 U.S. 369, 124 S. Ct. 1836, 158 L. Ed. 2d 645, 652-658*

Jury trial and expanded damages provisions of Civil Rights Act of 1991 (CRA) are not retroactively applicable to cases pending at time of enactment; each provision of CRA must be addressed separately with regard to issue of retroactivity. *Landgraf v. USI Film Products (1994) 511 U.S. 244, 247, 286, 114 S. Ct. 1483, 128 L. Ed. 2d 229*

Provision of Civil Rights Act of 1991 (CRA) expanding rights under *42 U.S.C. § 1981* to include right to enforce established employment contract is not applicable to cases not final prior to CRA's enactment. *Rivers v. Roadway Express (1994) 511 U.S. 298, 300, 313, 114 S. Ct. 1510, 128 L. Ed. 2d 274*

Punitive damages provision not applied retroactively to allegedly discriminatory conduct occurring before Civil Rights Act of 1991 passed. *McGinnis v. Kentucky Fried Chicken of California (9th Cir. 1994) 51 F.3d 805, 807-808*

Civil Rights Act of 1991 (CRA) provision overruling Price Waterhouse v. Hopkins (1989) 490 U.S. 228, 234-235 cannot be applied retroactively, nor may statute of limitations provision of CRA be applied retroactively to revive plaintiff's claim that would otherwise be barred under former statutory scheme. *Chenault v. United States Postal Service (9th Cir. 1994) 37 F.3d 535, 538-539*

[3] Disparate Treatment

[a] Prima Facie Case

Prima facie case under *McDonnell Douglas* is not pleading requirement under federal notice-pleading system; rather, it is evidentiary standard governing order and allocation of proof in a private, non-class employment discrimination suit. *Swierkiewicz v. Sorema N.A. (2002) 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1, 9*

Disparate treatment does not require malevolent motive; beneficence of employer's motive does not undermine finding of unlawful disparate treatment. *Auto Workers v. Johnson Controls (1991) 499 U.S. 187, 199-200, 111 S. Ct. 1196, 113 L. Ed. 2d 158* (Title VII)

Plaintiff must prove prima facie disparate treatment case by a preponderance of the evidence. *Texas Dep't of Community Affairs v. Burdine (1981) 450 U.S. 248, 252-253, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207*

McDonnell Douglas does not purport to create inflexible formulation; because facts necessarily vary in Title VII cases, *McDonnell Douglas* specification of required prima facie proof is not necessarily applicable in every respect to differing factual situations. *Teamsters v. United States (1977) 431 U.S. 324, 358, 97 S. Ct. 1843, 52 L. Ed. 2d 396*

To establish a prima facie disparate treatment case, plaintiff must show that he or she is a member of a protected class; that he or she applied and was qualified for a job (or other employment opportunity or benefit) for which an employer was seeking applicants; that, despite plaintiff's qualifications, he or she was rejected; and that, after plaintiff's rejection,

the position remained open and employer continued to seek applicants from persons with plaintiff's qualifications (or to provide the benefit to other such persons). *McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668*

Plaintiff was precluded by doctrine of judicial estoppel from bringing employment discrimination action against employer, because court found that sworn statements she had previously made for purposes of obtaining workers' compensation benefits, asserting she was unable to work, were inconsistent with later assertion in civil discrimination action that she was able to perform job satisfactorily. Rissetto v. Plumbers and Steamfitters Local 343 *(9th Cir. 1996) 94 F.3d 597, 601, 605-606*

Appearance of gender neutrality (e.g., roughly same number of men and women laid-off and not recalled) does not invalidate claim that layoffs and decision not to recall women were part of plan to get rid of female employees and therefore discriminatory. *EEOC v. Farmer Brothers Co. (9th Cir. 1994) 31 F.3d 891, 899-900*

Burden of establishing prima facie case only requires production of evidence that "suggests" that employment decision was based on protected classification. Rose v. Wells Fargo & Co. (9th Cir. 1990) *902 F.2d 1417, 1420* (ADEA)

Evidence that employer violated its own affirmative action plan is relevant to question of discriminatory intent. *Gonzales v. Police Dep't (9th Cir. 1990) 901 F.2d 758, 761* (Title VII)

When district court's findings did not specifically address *McDonnell Douglas/Burdine* burden and allocation of proof issues, court of appeals was unable to determine whether district court properly applied law to facts. *Norris v. City and County of San Francisco (9th Cir. 1990) 900 F.2d 1326, 1329, 1332* (Title VII)

Affirmative action or equal opportunity evidence is relevant to and probative of employer's intent not to discriminate. *EEOC v. General Tel. Co. of Northwest (9th Cir. 1989) 885 F.2d 575, 578* (Title VII)

Payment of wages according to prevailing market rates does not by itself support inference of intentional discrimination, even if market reflects historical pattern of lower wages to positions staffed predominantly by members of protected class. *American Federation of State, etc. v. Washington (9th Cir. 1985) 770 F.2d 1401, 1406-1407*

Statistical evidence substantiates inference of discriminatory intent, even if it is not directly probative of any particular element of *McDonnell Douglas* test. *Diaz v. American Telephone & Telegraph (9th Cir. 1985) 752 F.2d 1356, 1362-1363* (Title VII)

Statistical evidence alone is rarely sufficient to establish prima facie case of disparate treatment. *Gay v. Waiters' and Dairy Lunchmen's Union (9th Cir. 1982) 694 F.2d 531, 552-553* (Title VII)

Statistical evidence relevant, though not necessarily sufficient, to establishing prima facie case of disparate treatment. *Laborde v. Regents of University of California (9th Cir. 1982) 686 F.2d 715, 718 , cert. denied, 459 U.S. 1173 (1983)* (Title VII)

Trial court finding of discrimination was reasonable when black employees were fired for refusing to do work from which similarly situated white employee was excused. *Slack v. Havens (9th Cir. 1975) 522 F.2d 1091, 1095*

McDonnell Douglas test applies to provide standard of proof regarding prima facie case in FEHA action involving alleged denial of tenure on basis of race. *Clark v. Claremont University Center (1992) 6 Cal. App. 4th 639, 662-664, 8 Cal. Rptr. 2d 151*

[b] Rebuttal of Prima Facie Case

To rebut plaintiff's prima facie case of disparate treatment, employer need only offer legitimate, nondiscriminatory reason or policy for its challenged action; employer need not negate possibility that its facially neutral employment practice has disparate *impact*. *Raytheon Co. v. Hernandez (2003) 540 U.S. 44, 124 S. Ct. 513, 157 L. Ed. 2d 357, 365-367*

Purpose of requiring employer to articulate legitimate nondiscriminatory reason for its conduct is not only to rebut prima facie case, but also to frame factual issue with sufficient clarity so that plaintiff will have full and fair opportunity to demonstrate that employer's reason is pretext for discrimination. *Texas Dep't of Community Affairs v. Burdine (1981) 450 U.S. 248, 255-256, 101 S. Ct. 1089, 67 L. Ed. 2d 207*

Evidence showing that employer's work force is racially balanced or that it contains disproportionately high percentage of minority employees is relevant to employer's rebuttal of prima facie case of disparate treatment. *Furnco Constr. Corp. v. Waters (1978) 438 U.S. 567, 580, 98 S. Ct. 2943, 57 L. Ed. 2d 957*

Evidence of business downturn requiring layoffs and use of combination of factors (including seniority but not age) in determining whom to lay off was sufficient to rebut prima facie age discrimination case. *Nidds v. Schindler Elevator Corp. (9th Cir. 1996) 113 F.3d 912, 917-918 , cert. denied, 522 U.S. 950 (1997)* (FEHA)

Summary judgment for defendant is appropriate if plaintiff presents only minimal prima facie case and does not supply additional evidence to refute employer's proffered explanation. *Wallis v. J.R. Simplot Co. (9th Cir. 1994) 26 F.3d 885, 890*

When plaintiff presents prima facie case and then raises genuine factual issue regarding authenticity of employer's proffered reason for its action, summary judgment is inappropriate. *Washington v. Garrett (9th Cir. 1993) 10 F.3d 1421, 1433*

Statistical evidence that employer has good nondiscrimination record for period *after* discrimination claim is filed is irrelevant to merits of initial claim. Gonzales v. Police Dep't (9th Cir. 1990) *901 F.2d 758, 761-762 (Title VII)*

Employer is unable to use data acquired after time adverse employment decision was made to articulate hypothetical nondiscriminatory reason for decision. *Norris v. City and County of San Francisco (9th Cir. 1990) 900 F.2d 1326, 1329, 1331* (Title VII)

In case of defendant's motion for summary judgment or summary adjudication of issues, burden rests on defendant to negate plaintiff's prima facie case. *Valdez v. City of Los Angeles (1991) 231 Cal. App. 3d 1043, 1051, 282 Cal. Rptr. 726* (FEHA)

Employer sustained burden to rebut prima facie case of disparate treatment by offering declarations that employee was denied promotion based on neutral, nondiscriminatory criteria, together with transcripts of employee's deposition testimony stating that individuals who evaluated her did not act in sexually discriminatory manner. *University of Southern California v. Superior Court (1990) 222 Cal. App. 3d 1028, 1036, 272 Cal. Rptr. 264* (FEHA)

[c] Pretext or "Mixed Motive"

In Title VII "mixed-motive" case [*see 42 U.S.C. § 2000e-2(m)*], plaintiff may rely on circumstantial evidence to demonstrate that impermissible criterion was motivating factor in adverse employment action. *Desert Palace, Inc. v. Costa (2003) 539 U.S. 90, 123 S. Ct. 2148, 2153-2155, 156 L. Ed. 2d 84, 93-95*

Evidence that employer's nondiscriminatory explanation of its action is unworthy of credence is one form of circumstantial evidence that is probative of intentional discrimination, and it may be sufficient to support jury finding of intentional discrimination, depending on particulars of case. *Reeves v. Sanderson Plumbing Prods. (2000) 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105, 115-121*

Plaintiff's initial evidence, combined with effective cross examination of employer, may be sufficient to discredit employer's rebuttal. *Texas Dep't of Community Affairs v. Burdine (1981) 450 U.S. 248, 255 n.10, 101 S. Ct. 1089, 67 L. Ed. 2d 207*

Proof of pretext does not require employee to show that employer would have in any event taken discriminatory adverse action, without regard to employee's alleged deficiencies; employee's burden is to show that membership in protected classification was "but for" cause of employer's conduct. *McDonald v. Santa Fe Trail Transp. Co. (1976) 427 U.S. 273, 282 n.10, 96 S. Ct. 2574, 49 L. Ed. 2d 493* (Title VII and *42 U.S.C. § 1981*)

Pretext is proven by statistical evidence relating to employment policy and practice. *McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792, 805, 93 S. Ct. 1817, 36 L. Ed. 2d 668*

Plaintiff's pretext evidence, though present in record, was insufficient to survive defendant's summary judgment motion in age discrimination case. *Nidds v. Schindler Elevator Corp. (9th Cir. 1996) 113 F.3d 912, 918-919 , cert. denied, 522 U.S. 950 (1997)* (FEHA)

In analyzing pretext, court may not conclude that falsity of one proffered reason means other proffered reasons are false; court is required to decide whether employer actually had discriminatory motive, and is not allowed to substitute its judgment for employer's; employer has discretion to choose among equally qualified candidates. Odima v. Westin Tucson Hotel Co. (9th Cir. 1993) *991 F.2d 595, 600-602 (Title VII)*

Summary judgment for employer was inappropriate if employer's reasons for adverse employment actions were legitimate but inconsistent, because inconsistencies required credibility judgment by trier of fact. *Rodriguez v. General Motors Corp. (9th Cir. 1990) 904 F.2d 531, 533* (*42 U.S.C. § 1981*)

District court was required to evaluate plausibility of each of several explanations proffered by employer for repeated rejections of employee. Norris v. City and County of San Francisco (9th Cir. 1990) *900 F.2d 1326, 1330* (Title VII)

Employer's shifting rationales for adverse employment decision generated inference of pretext. *Norris v. City and County of San Francisco (9th Cir. 1990) 900 F.2d 1326, 1331* (Title VII)

Plaintiff employee's deposition testimony, in which she stated that she did not feel that she was terminated because of her physical limitation, negated requisite element of case, i.e., that the reason provided by the employer for plaintiff's termination was a pretext to mask illegal motive of disability discrimination. *Walker v. Blue Cross of California (1992) 4 Cal. App. 4th 985, 998, 6 Cal. Rptr. 2d 184*

Summary judgment for employer is appropriate if employer shows as matter of law that there was proper basis for adverse employment action, and no substantial responsive evidence is presented relating to pretext. *University of Southern California v. Superior Court (1990) 222 Cal. App. 3d 1028, 1039-1040, 272 Cal. Rptr. 264* (FEHA claim evaluated under federal law interpreting Title VII)

[4] Class-Wide or "Pattern or Practice" Claims

Trial court erred when it placed burden on each individual class member to prove that he or she was qualified for job

sought and that vacancy was available. *Franks v. Bowman Transp. Co. (1976) 424 U.S. 747, 772, 96 S. Ct. 1251, 47 L. Ed. 2d 444*

In large corporation with branch offices throughout country, discharge of seven older employees over 2-year period did not alone establish pattern or practice of discrimination. *Mundy v. Household Finance Corp. (9th Cir. 1989) 885 F.2d 542, 546* (ADEA)

"Pattern or practice" claims create "important point of convergence" between disparate treatment and disparate impact theories of liability. *Segar v. Smith(D.C. Cir. 1984) 738 F.2d 1249, 1266, 1267 , cert. denied, 471 U.S. 1115 (1985)* (Title VII)

[5] Disparate Impact

[a] Scope and Application

Under Title VII, before employer can discard test results to avoid disparate impact on minority candidates--conduct that would itself constitute intentional race-based discrimination against those who did well on the test--employer must have strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take race-conscious, discriminatory action of discarding test results. *Ricci v. DeStefano (2009) -- U.S. --, 129 S. Ct. 2658, 174 L. Ed. 2d 490, 507-511*

Private individuals may not sue to enforce disparate impact regulations promulgated under Title VI of Civil Rights Act of 1964, *42 U.S.C. § 2000d et seq.* *Alexander v. Sandoval (2001) 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517*

Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability. *Griggs v. Duke Power Co. (1971) 401 U.S. 424, 432, 91 S. Ct. 849, 28 L. Ed. 2d 158*

Analysis of multicomponent challenge to hiring system under disparate impact theory is proper. *Green v. USX Corp. (3d Cir. 1988) 843 F.2d 1511, 1521-1525*

Language in *42 U.S.C. § 2000e-2(a)(1)* making it unlawful for employers "to discriminate" against employees requires proof of intentional discrimination, while language in *42 U.S.C. § 2000e-2(a)(2)*, prohibiting practices that "tend to deprive" employees of opportunities or status, allows proof of disparate impact. *Colby v. J.C. Penney Co. (7th Cir. 1987) 811 F.2d 1119, 1126-1127* (Title VII)

Practices based on complex of factors outside employer's control, such as reliance on prevailing market wage rates, are not "single practice" subject to challenge under disparate impact analysis. *American Fed'n of State, County, and Municipal Employees v. State of Washington (9th Cir. 1985) 770 F.2d 1401, 1405-1406* (Title VII)

Black employment applicant failed to show that job requirement had disparate impact on blacks as class; although only small proportion of employees were black, there was no evidence that requirement was used to choose among applicants for positions other than one sought by plaintiff. *Peters v. Lieuallen (9th Cir. 1984) 746 F.2d 1390, 1392* (Title VII)

Court rejects employee's disparate impact claim because there was no evidence that employer applied disputed promotion criteria to anyone but her. *Yartzoff v. State of Oregon, Employment Div. (9th Cir. 1984) 745 F.2d 557, 559* (ADEA)

Disparate impact theory is appropriate in cases under either *42 U.S.C. § 2000e-2(a)(1)* (unlawful for employers "to discriminate" against employees) or *42 U.S.C. § 2000e-2(a)(2)* (prohibiting practices that "tend to deprive" employee of opportunities or status). *Wambheim v. J.C. Penney Co. (9th Cir. 1983) 705 F.2d 1492, 1494 , cert. denied, 467 U.S. 1255 (1984)*

[b] Prima Facie Case of "Significant" Adverse Impact

Statistical evidence must be substantial enough to raise inference of causation. *Rose v. Wells Fargo & Co. (9th Cir. 1990) 902 F.2d 1417, 1424* (ADEA)

Statistics showing that 55 percent of majority class members passed employment test compared to 29.4 percent of protected class members is not statistically significant. *Contreras v. City of Los Angeles (9th Cir. 1981) 656 F.2d 1267, 1272-1273 , cert. denied, 455 U.S. 1021 (1982)* (Title VII)

Statistics showing 33 percent failure rate in employment test for protected class members compared to 13 percent failure rate for majority class members establishes significant adverse impact. *Craig v. County of Los Angeles (9th Cir. 1980) 626 F.2d 659 , cert. denied, 450 U.S. 919 (1981)* (Title VII)

[c] Establishing Business Justification

"Manifest relationship" standard applies to cases in which employment practices are neither required by nor necessary to employer's legitimate interests. *New York City Transit Authority v. Beazer (1979) 440 U.S. 568, 587, 99 S. Ct. 1355, 59 L. Ed. 2d 587* (Title VII)

Requirement of certain number of years of job experience does not necessarily bear "manifest relationship" to job. *Lewis v. Bloomsburg Mills (4th Cir. 1985) 773 F.2d 561, 569-571* (Title VII)

Disparate impact is tolerable only if it is "incidental product" of selection device that genuinely predicts or significantly correlates with successful job performance. *Contreras v. City of Los Angeles (9th Cir. 1981) 656 F.2d 1267, 1277 , cert. denied, 455 U.S. 1021 (1982)* (Title VII); *City and County of San Francisco v. FEHC (1987) 191 Cal. App. 3d 976, 986, 236 Cal. Rptr. 716* (FEHA)

Employer's administrative convenience is not sufficient in itself to justify adverse impact. *Blake v. City of Los Angeles (9th Cir. 1979) 595 F.2d 1367, 1376 , cert. denied, 446 U.S. 928 (1980)* (Title VII)

[6] Protected Classifications

[a] Sex

Nothing in Title VII bars claim of sex discrimination because plaintiff and defendant are of same sex. *Oncale v. Sundowner Offshore Services (1998) 523 U.S. 75, 79, 118 S. Ct. 998, 140 L. Ed. 2d 201*

Employment decisions reflecting gender-based stereotyping are unlawful under Title VII. *Price Waterhouse v. Hopkins (1989) 490 U.S. 228, 250-251*

Male, as well as female, employees are protected by Title VII. *Newport News Shipbuilding & Dry Dock Co. v. EEOC (1983) 462 U.S. 669, 682, 103 S. Ct. 2622, 77 L. Ed. 2d 89* (Title VII)

Requirement of minimum height of 5 feet 2 inches, and minimum weight of 120 pounds, for prison guards, had discriminatory impact on women guards because requirement excluded 41 percent of women but only one percent of men. *Dothard v. Rawlinson (1977) 433 U.S. 321, 329-331, 97 S. Ct. 2720, 53 L. Ed. 2d 786* (Title VII)

Evidence of prior sexual harassment is admissible to prove gender discrimination. *EEOC v. Farmer Brothers Co. (9th Cir. 1994) 31 F.3d 891, 897-898*

With respect to sex discrimination, "sex" logically only refers to membership in class delineated by gender, rather than sexual activity regardless of gender. *De Cintio v. Westchester County Medical Center (2d Cir. 1986) 807 F.2d 304, 306 , cert. denied, 484 U.S. 825 (1987)*

Manifest purpose of Title VII with respect to sex discrimination is to ensure that men and women are treated equally. *Holloway v. Arthur Andersen & Co. (9th Cir. 1977) 566 F.2d 659, 663*

Title VII prohibition against sex discrimination does not encompass discrimination based on sexual orientation. *Voyles v. Ralph K. Davies Medical Ctr. (N.D. Cal. 1975) 403 F. Supp. 456, 457 , aff'd, 570 F.2d 354 (9th Cir. 1978)*

Employer fetal protection policy is "facial, blatant, overt gender-based job discrimination" that violates FEHA, unless warranted by *BFOQ. Johnson Controls v. FEHC (1990) 218 Cal. App. 3d 517, 267 Cal. Rptr. 158*

[b] Race or Color

Title VII bars race discrimination against white persons as well as black persons. *McDonald v. Santa Fe Trail Transp. Co. (1976) 427 U.S. 273, 280, 96 S. Ct. 2574, 49 L. Ed. 2d 493*

Title VII prohibits discriminatory preference for any group, minority, or majority. *Griggs v. Duke Power Co. (1971) 401 U.S. 424, 431, 91 S. Ct. 849, 28 L. Ed. 2d 158*

Allegation that plaintiff was subject to discrimination based on being East Indian was sufficient to raise claim of racial discrimination. *Sandhu v. Lockheed Missiles & Space Co. (1994) 26 Cal. App. 4th 846, 858, 31 Cal. Rptr. 2d 617*

[c] National Origin

Congress did not intend "national origin" to embrace citizenship requirements for employment. *Espinoza v. Farah Mfg. Co. (1973) 414 U.S. 86, 89-90, 94 S. Ct. 334, 38 L. Ed. 2d 287*

Provision of Immigration Reform and Control Act (*8 U.S.C. § 1324a(a)(1)*) requiring employers to verify legal immigration status of employees did not violate right to free exercise of religion by religious organization whose beliefs prohibit refusing work to prospective employees on ground they are aliens. *American Friends Service Committee v. Thornburgh (9th Cir. 1991) 941 F.2d 808, 809*

Adverse employment decision was properly predicated on individual's accent when accent interfered materially with job performance. *Fragante v. City and County of Honolulu (9th Cir. 1989) 888 F.2d 591, 596 , cert. denied, 494 U.S. 1081 (1990)* (Title VII)

[d] Religion

Prima facie case of discrimination includes proof that temporal mandate was part of employee's bona fide religious

belief, if employee contends that his or her belief required attendance at particular time and place, such as at particular pilgrimage. *Tiano v. Dillard Department Stores (9th Cir. 1998) 139 F.3d 679, 682-683*

Factors that indicate insincerity of religious belief include acting in manner inconsistent with belief, and material gain by fraudulently hiding secular interests behind veil of religious doctrine; size and history of particular religion is also relevant. *Philbrook v. Ansonia Bd. of Educ. (2d Cir. 1985) 757 F.2d 476, 482 , aff'd, 479 U.S. 60, 107 S. Ct. 367, 93 L. Ed. 2d 305 (1986)*

Private school's discriminatory policy based on members' sincere religious belief that racial socialization would lead to interracial marriage is social policy rather than free exercise of "religion," and therefore not protected by *U.S. Const., amend. I. Brown v. Dade Christian Schools (5th Cir. 1977) 556 F.2d 310, 311-312 , cert. denied, 434 U.S. 1063 (1978)*

[e] Disability or Medical Condition

Firing employees for drug misconduct at work does not violate ADA prohibition against discrimination on basis of drug addiction. *Collings v. Longview Fibre Company (9th Cir. 1995) 63 F.3d 828, 832-833*

Gov. Code § 12926.1, added effective January 1, 2001, clarified existing law that impairment need not *substantially* limit major life activity to constitute physical disability under FEHA, and contrary language in *Cassista v. Community Foods (1993) 5 Cal. 4th 1050, 1060, 22 Cal. Rptr. 2d 287, 856 P.2d 1143* was dictum that did not accurately reflect California law. *Colmenares v. Braemar Country Club, Inc. (2003) 29 Cal. 4th 1019, 1028-1031* , Cal. Rptr. 2d 662, *63 P.3d 220*

It is not FEHA violation for employer to terminate employee because of reading problems, if actual diagnosis of a reading disorder is not made until after termination occurs. *Pensinger v. Bowsmith, Inc. (1998) 60 Cal. App. 4th 709, 725, 70 Cal. Rptr. 2d 531*

Adverse action based on employee's performance without employer's knowledge of disability is not prohibited discrimination. *Brundage v. Hahn (1997) 57 Cal. App. 4th 228, 236-237, 66 Cal. Rptr. 2d 830*

Under pre-1993 amendment to definition of "physical handicap," truck driver with kidney disorder that prevented him from meeting employer's requirement of sleeping in cab of moving truck is not handicapped if he was physically able to work as truck driver generally. *Maloney v. ANR Freight Sys., Inc. (1993) 16 Cal. App. 4th 1284, 1287-1288*

Employees who were hypersensitive to tobacco smoke were "physically handicapped" because they suffered from respiratory disorders, and exposure to tobacco smoke substantially limited their ability to breathe. *County of Fresno v. FEHC (1991) 226 Cal. App. 3d 1541, 1549-1550, 277 Cal. Rptr. 557*

[f] Age

ADEA does not authorize mixed-motive age-discrimination claims; rather, under *29 U.S.C. § 623(a)(1)*, plaintiff must prove by preponderance of evidence (which may be direct or circumstantial) that age was "but-for" cause of employer's adverse action, and so burden of proof never shifts to employer to show that it would have taken adverse action regardless of age. *Gross v. FBL Fin. Servs., Inc. (2009) -- U.S. --, 129 S. Ct. 2343, 174 L. Ed. 2d 119, 127-129 , remanded, 588 F.3d 614 (2009)*

Because age and pension status are analytically distinct, state pension plan does not discriminate because of age in violation of ADEA simply because it (1) lawfully makes age part of conditions of pension eligibility and (2) treats

workers differently in light of their pension status. *Kentucky Ret. Sys. v. EEOC (2008) 554 U.S. 135, 128 S. Ct. 2361, 2364-2370, 171 L. Ed. 2d 322*

Disparate impact theory is applicable in ADEA cases. *Smith v. City of Jackson (2005) 544 U.S. 228, 125 S. Ct. 1536, 161 L. Ed. 2d 410, 416*

ADEA does not prohibit employer from favoring older employee over younger one, even if younger employee is over age 40. *Gen. Dynamics Land Sys., Inc. v. Cline (2004) 540 U.S. 581, 124 S. Ct. 1236, 1240-1249, 157 L. Ed. 2d 1094, 1104-1113*

Employer's decision to terminate employee because his or her pension is close to vesting did not constitute discriminatory treatment on basis of age in violation of ADEA. *Hazen Paper Co. v. Biggins (1993) 507 U.S. 604, 611-612, 113 S. Ct. 1701, 123 L. Ed. 2d 338*

Plaintiff class (pilots over age 60) had right to present evidence of executive memos showing that airlines' real reason for requiring pilots over age 60 to retire was based on age discrimination rather than longstanding safety policy. *Baker v. Delta Air Lines (9th Cir. 1993) 6 F.3d 632, 641*

State statute that prohibited hiring police officers over 29 years old was invalid under ADEA only insofar as it affected individuals over age of 40. *Hahn v. City of Buffalo (2d Cir. 1985) 770 F.2d 12, 14*

Public policy against age discrimination set forth in FEHA [*see Gov. Code § 12920*] was not intended to apply to small employers who are not subject to FEHA's substantive prohibitions [*see Gov. Code § 12926(d)*], and therefore may not serve as basis for public policy wrongful termination action against employers employing less than five employees. *Jennings v. Marralle (1994) 8 Cal. 4th 121, 124-125, 32 Cal. Rptr. 2d 275, 876 P.2d 1074*

[g] Pregnancy

Although adopting service-credit rule unfavorable to those out on pregnancy leave would violate Title VII, seniority system does not necessarily violate Title VII when it gives current effect in calculation of pension benefits to such rules that operated before Pregnancy Discrimination Act took effect on April 29, 1979. *AT&T Corp. v. Hulteen (2009) -- U.S. --, 129 S. Ct. 1962, 173 L. Ed. 2d 898, 906*

School board rules requiring pregnant teachers to take maternity leave were unconstitutional because rules created conclusive presumption that every pregnant teacher was physically incapable of continuing her duties. *Cleveland Bd. of Education v. LaFleur (1974) 414 U.S. 632, 643, 644, 646-647, 94 S. Ct. 791, 39 L. Ed. 2d 52*

Leave policy that differentiates between disabilities caused by occupational injuries and those that occur off the job does not impermissibly discriminate against pregnant employees, so long as it provides at least four months' leave for pregnancy disability. *Spaziano v. Lucky Stores (1999) 69 Cal. App. 4th 106, 110-113, 81 Cal. Rptr. 2d 378*

Plaintiff presented sufficient evidence under FEHA to support verdict for sex discrimination or pregnancy discrimination by showing that supervisor harassed her and ultimately discharged her from her position as hotel banquet manager because she was a woman and because she was pregnant. *Carr v. Barnabey's Hotel Corp. (1994) 23 Cal. App. 4th 14, 17, 28 Cal. Rptr. 2d 127*

[7] Hiring

"Subjective" employee selection criteria are not "precise and formal." *Watson v. Ft. Worth Bank & Trust (1988) 487*

U.S. 977, 982, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (Title VII)

"Subjective" employee selection criteria are often characterized by "lack of objective job qualifications" for particular job classifications. *Atonio v. Wards Cove Packing Co. (9th Cir. 1987) 810 F.2d 1477, 1479* (en banc), *ret'd to panel, 827 F.2d 439 , rev'd on other grounds, 490 U.S. 642 (1989)* (Title VII)

"Objective" selection criteria are generally specific, clearly delineated, quantifiable, objectively verified, and mechanically applied. American Fed'n of State, County, and Municipal Employees v. State of Washington (9th Cir. 1985) *770 F.2d 1401, 1405-1406 (Title VII)*

"Subjective" employee selection criteria lacked "well-defined" characteristics. *Heagney v. University of Washington (9th Cir. 1981) 642 F.2d 1157, 1163* (Title VII)

[8] Compensation

Denial of preliminary injunction for former head coach of university women's basketball team was correct because plaintiff failed to demonstrate fair chance of success on merits because difference between pay offered to her to renew contract and compensation paid to head coach of men's basketball team could have been attributable to lack of substantial similarity of jobs based on substantial differences in job responsibilities, working conditions, performance, and experience between men's coach and plaintiff. *Stanley v. University of Southern California (9th Cir. 1994) 13 F.3d 1313, 1321-1323*

[9] Other Terms, Conditions, and Privileges of Employment

[a] Employer Rules and Requirements

"No-spouse" rules in practice often result in discrimination against women, and are generally unjustified. *Thomas v. Metroflight (10th Cir. 1987) 814 F.2d 1506, 1509*

Grooming rules do not significantly deprive either sex of employment opportunities if they are even-handedly applied to employees of both sexes; Title VII is violated when special appearance rules are imposed on members of only one sex. *Gerdom v. Continental Airlines (9th Cir. 1982) 692 F.2d 602, 605-606 , cert. dismissed, 460 U.S. 1074 (1983)*

Rationale that garnishment rule "fosters employee productivity" is required to be proven by employer. *Wallace v. Debron Corp. (8th Cir. 1974) 494 F.2d 674, 677* (Title VII)

"Fetal protection" policy is unlawful "sex discrimination" under FEHA, and is not protected by BFOQ defense; "business necessity" defense does not apply to such policies. *Johnson Controls v. FEHC (1990) 218 Cal. App. 3d 517, 533-542, 267 Cal. Rptr. 158*

[b] Fringe Benefits

Employers may not provide benefits for spouses or families of employees of one gender when same benefits are not provided for spouses or families of employees of opposite gender. *Newport News Shipbuilding & Dry Dock Co. v. EEOC (1983) 462 U.S. 669, 682-683, 103 S. Ct. 2622, 77 L. Ed. 2d 89*

Employers may not treat pregnancy-related conditions less favorably than other medical conditions for benefit purposes. *Morgan v. Safeway Stores (9th Cir. 1989) 884 F.2d 1211, 1213* (Title VII)

There is prima facie Title VII liability if discrimination in health benefits is based on gender. *Wambheim v. J.C. Penney Co. (9th Cir. 1981) 642 F.2d 362, 365 , cert. denied, 467 U.S. 1255 (1984)*

[c] Training and Advancement

Employer's denial of employee's opportunity to enter entirely different career by virtue of promotion constitutes refusal to hire, which negates limitation on back pay in promotion cases. *Odima v. Westin Tucson Hotel (9th Cir. 1995) 53 F.3d 1484, 1494-1495*

Employee's allegation that application for promotion would have been futile because of employer's prior refusal to promote women was sufficient to state Title VII claim. *Gifford v. Atchison, Topeka & Santa Fe R.R. Co. (9th Cir. 1982) 685 F.2d 1149, 1154*

Plaintiff's failure to promote allegation was subject to summary judgment because employer had established that position was not in fact a promotion for plaintiff, she was not qualified for position, and another person was chosen for position before employer received plaintiff's application. *Addy v. Bliss & Glennon (1996) 44 Cal. App. 4th 205, 213, 51 Cal. Rptr. 2d 642*

[d] Seniority Systems

Seniority system is scheme that alone or in tandem with nonseniority criteria allots to employees ever-improving employment rights and benefits as their relative lengths of pertinent employment increase; principal feature is that preferential treatment is dispensed on basis of some measure of time served in employment. *California Brewers Ass'n v. Bryant (1980) 444 U.S. 598, 606, 100 S. Ct. 814, 63 L. Ed. 2d 55*

Seniority system was "bona fide" because (1) it applied equally to all races and ethnic groups; (2) placement of certain employees in separate bargaining unit from other employees was rational, in accord with industry practice, and consistent with NLRB precedents; (3) system did not have its genesis in racial discrimination; and (4) it was negotiated and maintained free from any illegal purpose. *Teamsters v. United States (1977) 431 U.S. 324, 355-356, 97 S. Ct. 1843, 52 L. Ed. 2d 396* (Title VII)

Existence of seniority system that complies with Title VII (*see 42 U.S.C. § 2000e-2(h)*) does not relieve employer of duty to reasonably accommodate employees' religious beliefs, unless accommodation cannot be accomplished without disrupting seniority system or imposing more than *de minimis* hardship on employer. *Balint v. Carson City (9th Cir. 1999) 180 F.3d 1047, 1053-1054* (en banc)

Seniority system was not "bona fide," because it penalized blacks more than whites, unequal treatment was not attributable to legitimate division of bargaining units, and it was originated and maintained for discriminatory purpose. *United States v. Georgia Power Co. (5th Cir. 1983) 695 F.2d 890, 892-893*

Union's seniority system was not "bona fide," because it was negotiated and maintained for illegal purpose of excluding blacks from membership, and with intent and effect of discriminating on basis of race. *Wattleton v. International Brotherhood of Boiler Makers (7th Cir. 1982) 686 F.2d 586, 593 , cert. denied, 459 U.S. 1208 (1983)*

[e] Pregnancy Leave

Pregnant employees have right to take leave of absence for reasonable period of time, not to exceed four months; Title

VII does not preempt *Gov. Code § 12945(b)(2)* [*now see Gov. Code § 12945(a)*]. *California Federal Sav. & Loan Ass'n v. Guerra (1987) 479 U.S. 272, 292, 107 S. Ct. 683, 93 L. Ed. 2d 613*

[f] Family Care and Medical Leave

Federal Family and Medical Leave Act [*29 U.S.C. § 2601 et seq.*] validly abrogates the states' *Eleventh Amendment* immunity by authorizing state employees to recover damages for denial of leave to care for sick family members. *Nevada Dep't of Human Res. v. Hibbs (2003) 538 U.S. 721, 726-740, 123 S. Ct. 1972, 155 L. Ed. 2d 953*

Statutory procedure under California's Moore-Brown-Roberti Family Rights Act to determine whether employee has serious health condition entitling him or her to medical leave of absence [*see Gov. Code § 12945.2(k)(3)*] is not mandatory; employer's failure to use that procedure does not bar employer from contending in subsequent litigation that employee did not have serious health condition that made him or her unable to perform job. *Lonicki v. Sutter Health Cent. (2008) 43 Cal. 4th 201, 209-214, 74 Cal. Rptr. 3d 570, 180 P.3d 321*

[10] Retirement or Pension Plans and Benefits

Title VII prohibits employer from offering option of receiving retirement benefits from one of several employer-selected companies that, based on sex-based mortality tables, pay female employees lower monthly benefits than male employees who make same contributions to deferred compensation plan. *Arizona Governing Committee v. Norris (1983) 463 U.S. 1073, 1089-1091, 103 S. Ct. 3492, 77 L. Ed. 2d 1236*

Benefit plan that reduces employee's disability benefits by amount of pension benefits when he or she reaches retirement age but does not retire violates ADEA because it coerces employee to involuntarily retire. *Kalvinskas v. California Inst. of Technology (9th Cir. 1996) 96 F.3d 1305, 1307-1308*

Giving severance pay to all terminated employees on plant closing, except those eligible for retirement because they had attained age 55, was not "plan" within meaning of ADEA "bona fide employee benefit plan" exemption because it was not integral part of complex benefit scheme, but was just one-time ad hoc cash payment. *EEOC v. Borden's, Inc. (9th Cir. 1984) 724 F.2d 1390, 1395*

Statutory exclusion of employees over age 60 from disability allowance under former *Educ. Code § 23902* constituted involuntary retirement in violation of ADEA. *Smith v. Alum Rock Union Elementary School Dist. (1992) 6 Cal. App. 4th 1651, 1655-1658, 8 Cal. Rptr. 2d 399*

[11] Discharge and Layoff

Plaintiff who advances Title VII hostile-environment constructive discharge claim must show working conditions so intolerable that reasonable person would have felt compelled to resign. *Pennsylvania State Police v. Suders (2004) 542 U.S. 129, 124 S. Ct. 2342, 159 L. Ed. 2d 204, 216-220*

Black postal employee who was discharged for losing her mailbox keys did not establish "pretext for discrimination" because, although she presented evidence that other employees who lost their keys were not discharged, she did not present evidence that she and other employees were similarly situated. *Talley v. United States Postal Service (8th Cir. 1983) 720 F.2d 505, 507 , cert. denied, 466 U.S. 952 (1984)* (Title VII)

Racial discrimination was inferred when plaintiff established that (1) he was member of racial minority, (2) he was qualified for job he was performing, (3) he was satisfying normal requirements in his work, (4) he was discharged, and

(5) after his discharge his employer assigned white employees to perform same work. *Flowers v. Crouch-Walker Corp. (7th Cir. 1977) 552 F.2d 1277, 1281-1282* (Title VII)

Under California law, constructive discharge requires that plaintiff show that a reasonable person faced with alleged intolerable working conditions or employer actions would have had no reasonable alternative except to quit, and that employer had actual, rather than merely constructive, knowledge of intolerable conditions. *Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1248-1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022*

Continuous pattern of discriminatory examinations, deprivation of training assignments, denial of opportune assignments, and other similar conduct justify trier of fact in concluding that there was constructive discharge. *Valdez v. City of Los Angeles (1991) 231 Cal. App. 3d 1043, 1057, 282 Cal. Rptr. 726* (FEHA)

[12] Accommodation

Under ADA, employer ordinarily need not offer accommodation that would violate employer's bona fide, established seniority rules, because such accommodation is not reasonable unless there are special circumstances that make it reasonable in particular case. *US Airways, Inc. v. Barnett (2002) 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed. 2d 589*

Employer is required to provide reasonable religious accommodation unless it would cause employer undue hardship, but employer is not required to provide accommodation of employee's choice; nor is employer required to show that employee's alternative accommodations would result in undue hardship. *Ansonia Bd. of Educ. v. Philbrook (1986) 479 U.S. 60, 68-69, 107 S. Ct. 367, 93 L. Ed. 2d 305* (Title VII)

Under ADA, individual who is regarded as having impairment that would constitute disability, but who does not in fact have that impairment, is not entitled to reasonable accommodation. *Kaplan v. City of N. Las Vegas (9th Cir. 2003) 323 F.3d 1226, 1231-1233*

Employer's obligation under ADA to engage in interactive process with employee extends beyond first attempt at accommodation and continues when employee asks for different accommodation or when employer is aware that initial accommodation is failing and further accommodation is needed. *Humphrey v. Memorial Hosps. Ass'n (9th Cir. 2001) 239 F.3d 1128, 1137-1139*

Employer need not offer or implement accommodation that would violate seniority system under collective bargaining agreement, because such accommodation would be unreasonable per se. *Willis v. Pac. Mar. Ass'n (9th Cir. 2001) 244 F.3d 675, 680-682*

Employee has no duty to cooperate with settlement offers that did not constitute accommodation attempts. *Toledo v. Nobel-Sysco, Inc. (10th Cir. 1989) 892 F.2d 1481, 1488-1489 , cert. denied, 495 U.S. 948 (1990)* (Title VII)

"Undue hardship" relates to gain-seeking employer exclusively concerned with preserving and promoting its economic efficiency. *EEOC v. Townley Engineering & Mfg. Co. (9th Cir. 1988) 859 F.2d 610, 616 , cert. denied, 489 U.S. 1077 (1989)* (Title VII)

Employer is required to provide means through which employee may eliminate his or her religious conflict while preserving his or her employment status. *Hudson v. Western Airlines (9th Cir. 1988) 851 F.2d 261, 266* (Title VII)

Employee not required to cooperate with accommodation attempt that required him to seek his own replacement for working on Sunday, when employee sincerely believed that working on Sunday was morally wrong and that inducing another to work was sin. *Smith v. Pyro Mining Co. (6th Cir. 1987) 827 F.2d 1081, 1085-1088 , cert. denied, 485 U.S.*

989 (1988) (Title VII)

Employer and union made good faith effort to accommodate employee's religious beliefs when they offered to permit employee to substitute payment to charity, including his own church, for payment of union dues under "security agreement." *Yott v. North American Rockwell Corp. (9th Cir. 1979) 602 F.2d 904, 907 , cert. denied, 445 U.S. 928 (1980)* (Title VII)

Employer was not permitted to excuse failure to accommodate by pointing to deficiencies in plaintiff's suggested accommodation. *Anderson v. General Dynamics Convair Aerospace Div. (9th Cir. 1978) 589 F.2d 397, 401 , cert. denied, 442 U.S. 921 (1979)* (Title VII)

Employer may consider present cost of proposed accommodation measures, but not anticipated future costs of employment, such as medical and disability benefits or leaves of absence. *Ackerman v. Western Elec. Co. (N.D. Cal. 1986) 643 F. Supp. 836, 851 , aff'd, 860 F.2d 1514 (9th Cir. 1988)* (FEHA; construing *2 Cal. Code Reg. § 7293.9*)

Employee who has disability and seeks accommodation under ADA or FEHA has burden of establishing his or her ability, with reasonable accommodation, to perform essential job functions. *Green v. State (2007) 42 Cal. 4th 254, 260-264, 64 Cal. Rptr. 3d 390, 165 P.3d 118*

Under FEHA, employer's duty to accommodate and to engage in good-faith interactive process to determine reasonable accommodations applies whether applicant or employee is actually disabled or is "regarded as" disabled. *Gelfo v. Lockheed Martin Corp. (2006) 140 Cal. App. 4th 34, 54-62, 43 Cal. Rptr. 3d 874*

Reasonable accommodation does not require employer to excuse failure to control a controllable disability or to give employee second chance to control disability in future. *Brundage v. Hahn (1997) 57 Cal. App. 4th 228, 239, 66 Cal. Rptr. 2d 830*

Duty of accommodation of disability includes affirmative duty to make known to employee other suitable job opportunities, whether or not employeerequests accommodation. *Prilliman v. United Air Lines (1997) 53 Cal. App. 4th 935, 950-951, 62 Cal. Rptr. 2d 142*

Accommodation of alcoholic employee held reasonable as matter of law when employer supported several attempts at rehabilitation and reassigned employee to less stressful position while continuing supervisorial pay rate, and employee continued to relapse and miss work while on drinking binges. *Gosvener v. Coastal Corp. (1996) 51 Cal. App. 4th 805, 808-813, 59 Cal. Rptr. 2d 339* (FEHA)

FEHC did not abuse its discretion in finding failure to reasonably accommodate because all measures employer took were unsuccessful, were not taken specifically to accommodate affected employees, or deprived affected employees of employment privileges. *County of Fresno v. FEHC (1991) 226 Cal. App. 3d 1541, 1555-1556, 277 Cal. Rptr. 557*

[13] Harassment

Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to hostile work environment. *Clark County Sch. Dist. v. Breeden (2001) 532 U.S. 268, 121 S. Ct. 1508, 1510, 149 L. Ed. 2d 509* (per curiam)

Whether sexual conduct complained of is sufficiently severe and pervasive to create a hostile work environment is determined by examining totality of circumstances; such finding is not limited to cases in which harasser's conduct causes tangible psychological injury. *Harris v. Forklift Systems (1993) 510 U.S. 17, 21-23, 114 S. Ct. 367, 126 L. Ed.*

2d 295

Repeated demands for sexual favors, public fondling, and forcible rape on several occasions, were plainly sufficient to state claim for "hostile environment" sexual harassment. *Meritor Savings Bank v. Vinson (1986) 477 U.S. 57, 67, 106 S. Ct. 2399, 91 L. Ed. 2d 49* (Title VII)

Testimony of other female employees who claimed to have been sexually harassed by employer is admissible in quid pro quo sexual harassment action for purpose of showing employer's motive in discharging plaintiff. *Heyne v. Caruso (9th Cir. 1995) 69 F.3d 1475, 1478*

Employer still has obligation to provide remedy for harassment even when harasser has stopped of his or her own accord. *Fuller v. City of Oakland (9th Cir. 1995) 47 F.3d 1522, 1528-1529* (Title VII)

Defendant's claim that accused harasser abused both men and women and people of other nationalities, as well as alleged female victim of sexual harassment, did not refute allegation of harassment because his abusive behavior towards women relied on sexual epithets and references to women's bodies. *Steiner v. Showboat Operating Co. (9th Cir. 1994) 25 F.3d 1459, 1463-1464 , cert. denied, 513 U.S. 1082 (1995)*

Female plaintiff states prima facie case of hostile environment sexual harassment under Title VII if she alleges conduct that reasonable woman would consider sufficiently severe or pervasive to alter conditions of employment and create abusive working environment; employer shields itself from liability for harassment by coworkers if its remedial actions are reasonably calculated to end harassment. *Ellison v. Brady (9th Cir. 1991) 924 F.2d 872, 879, 882*

Requisite elements for claim of racially hostile work environment are (1) "repeated slurs," and (2) employer tolerance and condonation. *Davis v. Monsanto Chemical Co. (6th Cir. 1988) 858 F.2d 345, 349 , cert. denied, 490 U.S. 1110 (1989)* (Title VII)

Trial court may aggregate evidence of racial hostility with evidence of sexual hostility to determine whether there is pervasive discriminatory atmosphere sufficient to establish "hostile work environment harassment." *Hicks v. Gates Rubber Co. (10th Cir. 1987) 833 F.2d 1406, 1416-1417* (Title VII)

Although harassment and discrimination are separate wrongs under FEHA, they are sometimes closely interrelated and even overlapping, particularly with regard to proof; thus, if hostile work environment is created through official employment actions that would ordinarily be associated with discrimination claim, those actions can also form basis of harassment claim. *Roby v. McKesson Corp. (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749*

Hostile work environment sexual harassment claim is not established (1) by coworker's crude language and lewd gestures that are not directing sexual innuendos or gender-related language toward plaintiff or toward women in general; or (2) by infrequent sexual comments directed at employees other than plaintiff, if those comments do not permeate and destroy plaintiff's work environment. *Lyle v. Warner Bros. Television Prods. (2006) 38 Cal. 4th 264, 279-282, 289-292, 42 Cal. Rptr. 3d 2, 132 P.3d 211*

Although isolated instance of favoritism on the part of supervisor toward female employee with whom supervisor is conducting consensual sexual affair ordinarily would not constitute sexual harassment of other employees, when such sexual favoritism in workplace is sufficiently widespread it may create hostile work environment in which demeaning message is conveyed to female employees that they are viewed by management as "sexual playthings" or that way for women to get ahead in workplace is by engaging in sexual conduct with their supervisors or managers. *Miller v. Department of Corr. (2005) 36 Cal. 4th 446, 466, 30 Cal. Rptr. 3d 797, 115 P.3d 77*

To be actionable, racial harassment must be severe or pervasive; liability cannot be founded on acts of racial

harassment that are occasional, isolated, sporadic, or trivial. *Etter v. Veriflo Corp. (1998) 67 Cal. App. 4th 457, 466-467, 79 Cal. Rptr. 2d 33*

Employer cannot be held liable to employee for failing to take reasonable steps to prevent unlawful harassment unless employee actually suffered harassment. *Trujillo v. North County Transit Dist. (1998) 63 Cal. App. 4th 280, 286-289, 73 Cal. Rptr. 2d 596*

Preferential treatment of coemployee who is romantically involved with supervisor, without further evidence of sexual harassment, is not actionable by other employees under FEHA. *Proksel v. Gattis (1996) 41 Cal. App. 4th 1626, 1631, 49 Cal. Rptr. 2d 322*

Individual supervisors may be liable for sexual harassment as "persons" under FEHA if they participate personally in harassment or aid or abet in harassment by failing to investigate or remedy it. *Matthews v. Superior Court (1995) 34 Cal. App. 4th 598, 599-600, 605-606, 40 Cal. Rptr. 2d 350*

Evidence of sexual harassment of other female employees by accused perpetrator was admissible, relevant, and not hearsay or unduly prejudicial to show employer's knowledge of perpetrator's reputation and conduct. *Bihun v. AT&T Information Systems, Inc. (1993) 13 Cal. App. 4th 976, 987-991, 16 Cal. Rptr. 2d 787* (FEHA)

Employer was liable for punitive damages when it fired employee after he complained to management about racial harassment by coworkers; employer violated FEHA obligation not to discriminate, which was independent of coworkers' conduct. *Roberts v. Ford Aerospace & Communications Corp. (1990) 224 Cal. App. 3d 793, 800, 274 Cal. Rptr. 139*

Whether sexual harassment is sufficiently pervasive to create hostile work environment is determined from totality of circumstances; factors that may be considered include (1) nature of unwelcome sexual conduct, (2) frequency of offensive encounters, (3) total number of days over which all offensive conduct occurs, and (4) context in which sexually-harassing conduct occurred. *Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal. App. 3d 590, 609-610, 262 Cal. Rptr. 842* (FEHA)

[14] Retaliation

Title VII anti-retaliation provision, *42 U.S.C. § 2000e-3(a)*, protects employee who opposes unlawful discrimination by speaking out about it in answering questions during employer's internal investigation, even if that employee did not report discrimination on his or her own initiative. *Crawford v. Metropolitan Gov't (2009) -- U.S. --, 129 S. Ct. 846, 172 L. Ed. 2d 650, 656-659*

42 U.S.C. § 1981 encompasses claims of retaliation on basis of race, including retaliation against person for complaining about violation of another person's rights under § 1981. *CBOCS W., Inc. v. Humphries (2008) 553 U.S. 442, 128 S. Ct. 1951, 1954-1955, 1961, 170 L. Ed. 2d 864, 869, 877*

29 U.S.C. § 633a(a), which prohibits "discrimination based on age" in federal employment, includes prohibition of retaliation based on filing of age-discrimination complaint. *Gomez-Perez v. Potter (2008) 553 U.S. 474, 128 S. Ct. 1931, 1935-1936, 1943, 170 L. Ed. 2d 887, 893-894, 902*

Employer's action will support Title VII retaliation claim if it is "materially adverse," that is, if it would likely have dissuaded reasonable worker from engaging in protected activity. *Burlington N. & Santa Fe Ry. Co. v. White (2006) 548 U.S. 53, 126 S. Ct. 2405, 2410-2416, 165 L. Ed. 2d 345, 354-361*

For mere temporal proximity between employer's knowledge of protected activity and adverse employment action to constitute sufficient prima facie evidence of retaliation, that temporal proximity must be very close. *Clark County Sch. Dist. v. Breeden (2001) 532 U.S. 268, 121 S. Ct. 1508, 1510, 149 L. Ed. 2d 509* (per curiam)

Former employee is "employee" within meaning of anti-retaliation provision of Title VII. *Robinson v. Shell Oil Co. (1997), 519 U.S. 337, 346, 117 S. Ct. 843, 136 L. Ed. 2d 808*

No protected activity when employee engaged in self-help opposition to customer's harassment after employer had taken reasonable steps to protect her from such harassment; in absence of employer's acquiescence there is no unlawful employer action to oppose (Title VII). *Folkerson v. Circus Circus Enterprises (9th Cir. 1997) 107 F.3d 754, 756*

Contacting government employer's equal employment opportunity counselor is protected participation in Title VII enforcement machinery. *Hashimoto v. Dalton (9th Cir. 1997) 118 F.3d 671, 680 , cert. denied, 523 U.S. 1122 (1998)*

Complaint must set forth sufficient factual basis to support legal conclusion of retaliation; terminations following soon after protected activity are sufficient. *Miller v. Fairchild Indus. (9th Cir. 1986) 797 F.2d 727, 732* (Title VII)

Plaintiff must show causal link between protected activity and retaliation. *Wrighten v. Metropolitan Hospitals (9th Cir. 1984) 726 F.2d 1346, 1354* (Title VII)

Requiring proof of actual unlawful employment practices in "opposition" cases chills legitimate assertion of employee rights under equal employment opportunity law. *Sias v. City Demonstration Agency (9th Cir. 1978) 588 F.2d 692, 695* (Title VII)

Opposition to coemployee's racial slur was not protected by Title VII when there was no evidence that employer authorized or approved remark, either before or after incident, and coemployee was reprimanded by employer on day of incident. *Silver v. KCA, Inc. (9th Cir. 1978) 586 F.2d 138, 142*

That employer with retaliatory motive takes action that is reasonably likely to deter plaintiff or other employees from engaging in protected activities does not constitute unlawful retaliation unless it materially affects terms, conditions, or privileges of employment. *Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal. 4th 1028, 1050-1055, 32 Cal. Rptr. 3d 436, 116 P.3d 1123*

Employee has cause of action for retaliation in violation of Moore-Brown-Roberti Family Rights Act (CFRA), *Gov. Code § 12945.2*(*l*)(1) (part of FEHA), if employer is covered under CFRA, employee is eligible for and exercises right to CFRA leave, and employee suffers adverse employment action as result. *Dudley v. Department of Transp. (2001) 90 Cal. App. 4th 255, 261-265, 108 Cal. Rptr. 2d 739*

Plaintiff who (1) engaged in protected activity and (2) was thereafter subjected to adverse action met first two requirements of prima facie case of retaliation but failed to meet third requirement of causal link between first two because employer alleged its adverse actions were based on plaintiff's failure to perform job. *Addy v. Bliss & Glennon (1996) 44 Cal. App. 4th 205, 215, 51 Cal. Rptr. 2d 642*

Employee established prima facie case of retaliation for reporting sexual harassment complaints from subordinate, when he was terminated by employer after reporting the complaints. *Flait v. North American Watch Corp. (1992) 3 Cal. App. 4th 467, 476-479, 4 Cal. Rptr. 2d 522*

Retaliatory failure to renew office lease affected condition of employment and was type of conduct proscribed by FEHA. *Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal. App. 3d 590, 617, 262 Cal. Rptr. 842*

[15] Jurisdiction over Civil Actions

Federal courts do not have exclusive jurisdiction over civil actions brought under Title VII, because Congress did not divest state courts of their concurrent authority to adjudicate federal claims. *Yellow Freight System v. Donnelly (1990) 494 U.S. 820, 821, 110 S. Ct. 1566, 108 L. Ed. 2d 834*

State and federal courts have concurrent jurisdiction over *42 U.S.C. § 1981* cases. *De Horney v. Bank of America Nat'l Trust and Sav. Ass'n (9th Cir. 1989) 879 F.2d 459, 463*

State courts have concurrent subject matter jurisdiction, with federal courts, over ADEA claims. *Chapman v. City of Detroit (6th Cir. 1986) 808 F.2d 459, 463*

[16] Exhaustion of Administrative Remedies

Discriminatory layoff claim was within scope of discriminatory failure to rehire claim for purposes of exhaustion of remedies under Title VII. *EEOC v. Farmer Brothers Co. (9th Cir. 1994) 31 F.3d 891, 898-899*

Title VII plaintiff may file civil action prior to receiving EEOC right-to-sue letter, as long as premature filing does not preclude state from performing administrative duties and defendant is not prejudiced. *Edwards v. Occidental Chemical Corp. (9th Cir. 1990) 892 F.2d 1442, 1445 n.1*

One-year FEHA statute of limitations, *Gov. Code § 12960(d)*, is subject to equitable tolling while employee voluntarily pursues employer's internal administrative remedy, even though internal remedy is optional and need not be exhausted before filing FEHA action, and even if employee voluntarily terminates internal proceeding before administrative decision is rendered. *McDonald v. Antelope Valley Cmty. Coll. Dist. (2008) 45 Cal. 4th 88, 105-114, 84 Cal. Rptr. 3d 734, 194 P.3d 1026*

Public employee must exhaust employer's internal remedy before suing for retaliation for protected "whistleblowing" activity under *Lab. Code § 1102.5*, which is silent on administrative remedy or exhaustion requirement. *Campbell v. Regents of Univ. of Cal. (2005) 35 Cal. 4th 311, 329-330, 25 Cal. Rptr. 3d 320, 333-335*

Employee who has exhausted FEHA administrative process and obtained right-to-sue letter from DFEH need not also exhaust internal administrative procedures provided by employer prior to filing FEHA claim in superior court. *Schifando v. City of Los Angeles (2003) 31 Cal. 4th 1074, 1082, 6 Cal. Rptr. 3d 457, 79 P.3d 569*

Although employee must exhaust administrative remedies before bringing civil action under FEHA, exhaustion of administrative remedies is not required before filing civil action for damages alleging nonstatutory causes of action. *Rojo v. Kliger (1990) 52 Cal. 3d 65, 86, 88, 276 Cal. Rptr. 130, 801 P.2d 373*

If employer establishes internal grievance mechanism, employee's failure to exhaust its remedies precludes any subsequent private civil action. *Palmer v. Regents of the University of California (2003) 107 Cal. App. 4th 899, 903-906, 132 Cal. Rptr. 2d 567*

Failure to name defendants in DFEH complaint is fatal to right to bring FEHA civil action against them in court. *Valdez v. City of Los Angeles (1991) 231 Cal. App. 3d 1043, 1061, 282 Cal. Rptr. 726*

[17] Limitations Periods

Plaintiff who does not file timely charge under Title VII challenging *adoption* of discriminatory practice may assert disparate-impact claim in timely charge challenging employer's later *application* of that practice. *Lewis v. City of Chicago (May 24, 2010) -- U.S. --, 130 S. Ct. 2191, 176 L. Ed. 2d 967, 2010 U.S. LEXIS 4165, at *10-*21*

Although *42 U.S.C. § 2000e-5(b)* requires verification of Title VII charge filed with EEOC, *29 C.F.R. § 1601.12(b)* validly allows otherwise timely charge to be verified after expiration of time for filing. *Edelman v. Lynchburg Coll. (2002) 535 U.S. 106, 122 S. Ct. 1145, 152 L. Ed. 2d 188, 196-201*

Tolling provision of federal supplemental jurisdiction statute, *28 U.S.C. § 1367(d)*, does not toll limitations period for state-law claim against state, if claim is dismissed by federal court on ground of state's sovereign immunity under *Eleventh Amendment*. *Raygor v. Regents of Univ. of Minn. (2002) 534 U.S. 533, 122 S. Ct. 999, 152 L. Ed. 2d 27, 37-41*

In determining whether employer unlawfully retaliated against employee, court may apply "continuing violation doctrine," considering acts of employer that took place outside limitations period, if those acts are sufficiently linked to acts that took place within limitations period. *Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal. 4th 1028, 1055-1059, 32 Cal. Rptr. 3d 436, 116 P.3d 1123*

Employer's persistent failure to reasonably accommodate disability or to eliminate hostile work environment targeting disabled employee constitutes "continuing violation" for purposes of FEHA limitations period, if employer's unlawful actions (1) are sufficiently similar in kind as to be part of same course of conduct, (2) have occurred with reasonable frequency, and (3) have not acquired degree of permanence that would make clear to employee that any further efforts at informal conciliation would be futile. *Richards v. CH2M Hill, Inc. (2001) 26 Cal. 4th 798, 823, 111 Cal. Rptr. 2d 87, 29 P.3d 175*

Although continuous, pervasive environmental harassment may be "continuing violation" for limitations purposes, plaintiff may be precluded from properly pleading environmental harassment if only isolated acts of harassment occurred within limitations period. *Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal. App. 3d 590, 610, 613, 262 Cal. Rptr. 842*

[18] Defenses

Existence of reasonable factor other than age that, under *29 U.S.C. § 623(f)(1)*, justifies act otherwise prohibited by ADEA is affirmative defense on which employer bears burden of proof. *Meacham v. Knolls Atomic Power Lab. U.S. (2008) 554 U.S. 8e, 128 S. Ct. 2395, 2398, 24002402, 171 L. Ed. 2d 283 , on remand*, 2009, U.S. Dist. LEXIS 36999 (Apr. 15, 2009)

Federal immigration policy, as expressed in Immigration Reform and Control Act of 1986, *8 U.S.C. § 1324a*, precludes award of back pay for employment discrimination under National Labor Relations Act, *29 U.S.C. § 158(a)(3)*, to undocumented alien who has never been legally authorized to work in *United States. Hoffman Plastic Compounds, Inc. v. NLRB (2002) 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed. 2d 271, 283-284*

Release of all claims against employer that does not comply with requirements of Older Workers Benefits Protection Act [*29 U.S.C. § 623(f)(1)(B),(F),(G)*] cannot bar claim for age discrimination under ADEA; specific statutory requirements for release of ADEA claims foreclose application of general contract principles to make nonconforming release effective. Oubre v. *Entergy Operations (1998) 522 U.S. 422, 426-428, 118 S. Ct. 838, 139 L. Ed. 2d 849* (ADEA)

BFOQ must apply to particular position in question. *Trans World Airlines v. Thurston (1985) 469 U.S. 111, 122, 105*

S. Ct. 613, 83 L. Ed. 2d 523 (ADEA)

Employer may refuse to hire individual because he or she is "overqualified," as long as that term is defined objectively and is not used as proxy for age. *EEOC v. Insurance Co. of North America (9th Cir. 1995) 49 F.3d 1418, 1420-1421*

Findings of fact for business justification are often relevant to BFOQ analysis, and various standards for establishing business justification are similar to those for determining BFOQ; accordingly, "manifest relationship" standard applied to BFOQ analysis. *Chambers v. Omaha Girls Club (8th Cir. 1987) 834 F.2d 697, 701, 704*

Salary savings that may be realized by replacing employee protected by ADEA with younger, lower-salaried employee do not constitute permissible, nondiscriminatory justification for replacement, particularly when employer does not pursue less-detrimental alternatives, such as offering older employee continued employment at lower salary or in different position. *Metz v. Transit Mix (7th Cir. 1987) 828 F.2d 1202, 1205-1208*

BFOQ defense inapplicable to medical school that excluded Jewish doctors from assignment to Saudi Arabia because college never tried to determine official Saudi policy regarding Jewish doctors working there, nor whether there would have been difficulty in obtaining visas for them. *Abrams v. Baylor College of Medicine (5th Cir. 1986) 805 F.2d 528, 533* (Title VII)

BFOQ defense possibly applicable to charges that Japanese company incorporated in United States violated Title VII by hiring only Japanese citizens in its management positions; court required to determine whether Japanese citizenship was BFOQ because of such factors as (1) Japanese linguistic and cultural skills; (2) knowledge of Japanese products, markets, customs, and business practices; (3) familiarity with personnel and workings of principal or parent enterprise in Japan; and (4) acceptability to those persons with whom company does business. *Avigliano v. Sumitomo Shoji America (2d Cir. 1981) 638 F.2d 552, 559* (Title VII)

BFOQ defense applicable to flight attendants who are forced to take maternity leave when they become pregnant. *Harriss v. Pan American World Airways (9th Cir. 1980) 649 F.2d 670, 677* (Title VII)

Employer's evidence of abstract medical generalizations regarding possibility of future injury was insufficient as a matter of law to qualify as defense. *Ackerman v. Western Elec. Co. (N.D. Cal. 1986) 643 F. Supp. 836, 851 , aff'd, 860 F.2d 1514 (9th Cir. 1988)* (FEHA)

Standard language of mandatory preprinted form used in settling workers' compensation claims--*see 8 Cal. Code Reg. § 10874*--releases only those claims that are within scope of workers' compensation system, and extrinsic evidence is not admissible to show that parties intended preprinted release form to encompass claims outside scope of workers' compensation system. *Claxton v. Waters (2004) 34 Cal. 4th 367, 376-377, 18 Cal. Rptr. 3d 246, 96 P.3d 496*

In FEHA action for hostile environment sexual harassment by supervisor, employer may establish "avoidable consequences" defense by proving (1) that employer took reasonable steps to prevent and correct workplace sexual harassment, (2) that employee unreasonably failed to use preventive and corrective measures employer provided, and (3) that reasonable use of employer's procedures would have prevented at least some of harm that employee suffered. *State Dept. of Health Servs. v. Superior Court (2003) 31 Cal. 4th 1026, 1043-1044, 79 P.3d 556*

If employee in workers' compensation proceeding has knowledge of potential FEHA claim against employer at time of executing general release that purports to settle all claims, including those outside scope of workers' compensation system, but employee has not yet initiated litigation of FEHA claim, employee has burden of expressly excepting that claim from release; in absence of such exception, and absent contrary extrinsic evidence, general language releasing all claims will bar employee from pursuing FEHA claim. *Jefferson v. California Dep't of Youth Auth. (2002) 28 Cal. 4th 299, 302-311, 121 Cal. Rptr. 2d 391, 48 P.3d 423*

After-acquired evidence doctrine does not prevent admission of after-acquired evidence that is offered to support employer's originally proffered reason for adverse employment action; thus, when employee who has been terminated because of inability to perform job alleges unlawful discrimination, employer may offer after-acquired evidence to establish that employee was in fact unable to do job. *Finegan v. County of Los Angeles (2001) 91 Cal. App. 4th 1, 10-13, 109 Cal. Rptr. 2d 762*

Employee's misrepresentation of his or her entitlement to work in United States goes to heart of employment relationship and deprives employee of any right to complain about termination; however, neither after-acquired evidence doctrine nor unclean-hands doctrine will bar employee's discrimination or harassment claims for acts occurring during employment. *Murillo v. Rite Stuff Foods (1998) 65 Cal. App. 4th 833, 842-845, 77 Cal. Rptr. 2d 12*

Delays by FEHC or DFEH in processing claim do not give rise to laches defense. *County of Fresno v. FEHC (1991) 226 Cal. App. 3d 1541, 1556, 277 Cal. Rptr. 557*

BFOQ defense inapplicable to male club that excluded women from employment based on privacy and male comradery concerns, because customer preference cannot be basis for exception and privacy concerns did not justify exclusion when enclosed shower and bathroom facilities were available. *Bohemian Club v. FEHC (1986) 187 Cal. App. 3d 1, 19-23, 231 Cal. Rptr. 769* (FEHA)

Speculation of possibility of future injury and fiscal restraint was insufficient to justify failure to hire plaintiff as firefighter because of spinal condition. *Johnson v. Civil Service Comm'n (1984) 153 Cal. App. 3d 585, 590-591, 200 Cal. Rptr. 289* (FEHA)

Evidence that plaintiff's condition created possibility of future health problems not sufficient to justify refusal to employ plaintiff, given strong policy for providing equal employment opportunities for disabled. *Sterling Transit Co. v. Federal Employment Practice Comm'n (1981) 121 Cal. App. 3d 791, 799, 175 Cal. Rptr. 548* (FEHA)

[19] Waiver of Judicial Remedies in Arbitration Clauses

Collective bargaining agreement provision that clearly and unmistakably requires union members to arbitrate statutory antidiscrimination claims is enforceable. *14 Penn Plaza LLC v. Pyett (2009) -- U.S. --, 129 S. Ct. 1456, 173 L. Ed. 2d 398, 408-414*

Collective bargaining agreement's general arbitration provision that does not explicitly refer to statutory antidiscrimination rights will not act as waiver of individual employees' rights to judicial forum for their statutory civil-rights claims. *Wright v. Universal Maritime Serv. Corp. (1998) 525 U.S. 70, 119 S. Ct. 391, 142 L. Ed. 2d 361, 371-372*

ADEA action was subject to compulsory arbitration pursuant to arbitration agreement contained in securities registration application. *Gilmer v. Interstate/Johnson Lane Corp. (1991) 500 U.S. 20, 23, 111 S. Ct. 1647, 114 L. Ed. 2d 26*

Employee's agreement to read employee handbook with new requirement of arbitration, with continued employment thereafter, when handbook stated that its procedures were exclusive ones for processing disputes, including those arising from statute, was insufficient to compel arbitration. *Nelson v. Cyprus Bagdad Copper Corp. (9th Cir. 1997) 119 F.3d 756, 761-762 , cert. denied, 523 U.S. 1072 (1998)*

Employment application incorporating another document, the latter amended to refer to arbitration of employment

disputes, was insufficient to preclude waiver of statutory right to go to court. *Renteria v. Prudential Ins. Co. of America (9th Cir. 1997) 113 F.3d 1104, 1107*

Title VII claim was subject to arbitration after voluntary initiation of arbitration by employee. *Nghiem v. NEC Electronic (9th Cir. 1993) 25 F.3d 1437, 1441 , cert. denied, 513 U.S. 1044 (1994)*

If employee subject to mandatory employment arbitration agreement is unable to obtain hearing on merits of his or her FEHA claims, or claims based on other unwaivable statutory rights, because of arbitration award based on legal error, trial court does not err in vacating award. *Pearson Dental Supplies, Inc. v. Superior Court (2010) 48 Cal. 4th 665, 675-680, 108 Cal. Rptr. 3d 171, 229 P.3d 83*

Requirements for validity of mandatory arbitration agreement in employment contract that encompasses unwaivable statutory rights such as employee's rights under FEHA. *Armendariz v. Foundation Health Psychcare Servs. (2000) 24 Cal. 4th 83, 99-113, 99 Cal. Rptr. 2d 745, 6 P.3d 669*

If arbitration agreement contains clause in which parties expressly agree to allow court or arbitrator to sever or modify any "unreasonable or unenforceable" provisions, agreement as so modified may be enforceable. *Blake v. Ecker (2001) 93 Cal. App. 4th 728, 743-746, 113 Cal. Rptr. 2d 422*

Federal Arbitration Act (*9 U.S.C. § 1 et seq.*) preempts FEHA judicial remedies for age discrimination and requires enforcement of agreement to arbitrate any claims, disputes, or controversies arising between plaintiff and his employer. *Hall v. Nomura Securities International (1990) 219 Cal. App. 3d 43, 48-51, 268 Cal. Rptr. 45*

[20] Judicial Remedies

Catalyst theory is not proper basis for determining that plaintiff is prevailing party under ADA fee-shifting provision, *42 U.S.C. § 12205*; to be prevailing party, plaintiff must have obtained "judicial imprimatur" that alters legal relationship of parties, such as judgment on merits or court-ordered consent decree, and it is not enough that plaintiff's lawsuit was catalyst in causing voluntary change in defendant's conduct. Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res. (2001) 532 U.S. 598, 605, 121 S. Ct. 1835, 149 L. Ed. 2d 855

Amount received in settlement of claim for back pay and liquidated damages for violation of ADEA constitutes taxable income. *Commissioner v. Schleier (1995) 515 U.S. 323, 327, 115 S. Ct. 2159, 132 L. Ed. 2d 294*

Punitive damages have no fixed formula, and therefore punitive damages in employment discrimination case set at 10 times amount of compensatory damages were permissible. *EEOC v. Farmer Brothers Co. (9th Cir. 1994) 31 F.3d 891, 902-905*

Back pay is available to undocumented alien employees who are subject to Title VII violations as long as they were not deported during and were available for employment throughout back pay period. *EEOC v. Hacienda Hotel (9th Cir. 1989) 881 F.2d 1504, 1516-1517*

Title VII attorney's fees provision does not authorize award of expert witness fees. *Denny v. Westfield State College (1st Cir. 1989) 880 F.2d 1465, 1468, 1471*

Compensatory damages were unwarranted when disabled plaintiff did not show that loss of employment led to undue suffering, relative to anyone involuntarily terminated from job, or need for professional psychological help, or that employer's conduct was abusive or outrageous. *Ackerman v. Western Elec. Co. (N.D. Cal. 1986) 643 F. Supp. 836, 856-857 , aff'd, 860 F.2d 1514 (9th Cir. 1988)* (FEHA)

If FEHA action is not brought as limited civil case, and plaintiff recovers amount that could have been awarded in limited civil case, trial court has discretion under *Code Civ. Proc. § 1033(a)* to deny attorney's fees, but in exercising that discretion, court must give due consideration to policies and objectives of FEHA in general and of its fee-shifting provision, *Gov. Code § 12965(b)*, in particular. *Chavez v. City of Los Angeles (2010) 47 Cal. 4th 970, 986989, 104 Cal. Rptr. 3d 710, 224 P.3d 41*

One-to-one ratio between compensatory and punitive damages was federal constitutional limit in FEHA discrimination and harassment case involving relatively low degree of reprehensibility of defendant's conduct and substantial compensatory damages award, which included substantial amount of noneconomic damages, which itself may have included punitive component. *Roby v. McKesson Corp. (2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749*

Under catalyst theory, plaintiff may obtain attorney's fees as "prevailing party" under FEHA fee-shifting provision, *Gov. Code § 12965(b)*, despite lack of favorable judgment, if (1) plaintiff's lawsuit was catalyst motivating defendant to provide primary relief sought; (2) lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense; and (3) plaintiff reasonably attempted to settle litigation prior to filing lawsuit. *Tipton-Whittingham v. City of Los Angeles (2004) 34 Cal. 4th 604, 608, 21 Cal. Rptr. 3d 371*

Except to extent prevailing party has already paid his or her attorney, and unless contractual agreement provides otherwise, attorney's fee award under FEHA belongs to attorney, rather than to prevailing party. *Flannery v. Prentice (2001) 26 Cal. 4th 572, 110 Cal. Rptr. 2d 809, 28 P.3d 860*

In FEHA racial harassment suit, court has power to issue injunction prohibiting defendant's continued use of racial epithets in workplace; such injunction is not unconstitutional prior restraint on speech if it simply precludes defendant from continuing unlawful conduct that has been judicially determined to violate FEHA. *Aguilar v. Avis Rent A Car System (1999) 21 Cal. 4th 121, 133-142, 87 Cal. Rptr. 2d 132, 980 P.2d 846 , cert. denied, 529 U.S. 1138 (2000)*

Employee who is denied promotion for discriminatory reason prohibited by FEHA, and who then voluntarily resigns, is not precluded from recovering back pay for period after date of resignation, even if employee was not constructively discharged. *Cloud v. Casey (2000) 76 Cal. App. 4th 895, 905-908, 90 Cal. Rptr. 2d 757*

FEHA action considered to be tort for purposes of former statutory provision barring recovery of attorney fees when rejected settlement offer exceeds final recovery, and when attorney fees were to be excluded from computation of final recovery in non-tort actions only. *Wilson v. Safeway Stores (1997) 52 Cal. App. 4th 267, 273-274, 60 Cal. Rptr. 2d 532*

Attorney's fee award of $450 per hour in sexual harassment action found to be at "high end," but not "off the scale," in light of record. *Bihun v. AT&T Information Systems, Inc. (1993) 13 Cal. App. 4th 976, 997, 16 Cal. Rptr. 2d 787* (FEHA)

Award of attorney's fees to prevailing employer, against plaintiff, was unjustified when plaintiff's age discrimination claim was not shown to be frivolous, unreasonable, or groundless. *Cummings v. Benco Building Services (1992) 11 Cal. App. 4th 1383, 1390, 15 Cal. Rptr. 2d 53* (FEHA)

[21] Preemption

Section 301(a) of Labor Management Relations Act (*29 U.S.C. § 185(a)*) did not preempt FEHA claim that employer applied terms of collective bargaining agreement in discriminatory manner, even though court would have to refer to agreement, because resolution of FEHA claim did not depend on *interpretation* of agreement. *Detabali v. St. Luke's*

Hosp. (9th Cir. 2007) 482 F.3d 1199, 1203

National Bank Act provision that empowers national banks to dismiss bank officers "at pleasure," *12 U.S.C. § 24, § 5,* does not preempt age-discrimination claims asserted under state laws that substantively mirror provisions of *Age Discrimination in Employment Act. Kroske v. US Bank Corp. (9th Cir. 2005) 432 F.3d 976, 981-989*

Section 301(a) of Labor Management Relations Act (*29 U.S.C. § 185(a)*) does not preempt FEHA claims that do not depend on meaning of collective bargaining agreement. *Jackson v. Southern California Gas Co. (9th Cir. 1989) 881 F.2d 638, 644*

National Bank Act provision that empowers national banks to dismiss bank officers "at pleasure," *12 U.S.C. § 24, § 5,* does not preempt FEHA claims alleging dismissal on ground of race, color, religion, sex, national origin, or age. *Peatros v. Bank of America (2000) 22 Cal. 4th 147, 173-175, 91 Cal. Rptr. 2d 659, 990 P.2d 539*

FEHA does not preempt other state laws, including common law, prohibiting or restricting employment discrimination. *Rojo v. Kliger (1990) 52 Cal. 3d 65, 73-82, 276 Cal. Rptr. 130, 801 P.2d 373*

Exclusive remedy provisions of workers' compensation law preempt FEHA claim of disability or handicap discrimination when disability resulted from industrial injury. *Langridge v. Oakland Unified School Dist. (1994) 25 Cal. App. 4th 664, 667-670, 31 Cal. Rptr. 2d 34*

Exclusive remedy provisions of worker's compensation law (*Lab. Code §§ 3600, 3601*) do not preclude FEHA actions, primarily because two statutes address different public policy concerns. *Goldman v. Wilsey Foods (1989) 216 Cal. App. 3d 1085, 1095-1096, 265 Cal. Rptr. 294*

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationAge DiscriminationGeneral OverviewLabor & Employment LawDiscriminationDisability DiscriminationGeneral OverviewLabor & Employment LawDiscriminationGender & Sex DiscriminationGeneral OverviewLabor & Employment LawDiscriminationNational Origin DiscriminationGeneral OverviewLabor & Employment LawDiscriminationReligious DiscriminationGeneral Overview

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 115 CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION
PART III. RESEARCH GUIDE

11-115 California Forms of Pleading and Practice--Annotated § 115.78

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§ 115.78 Administrative Decisions

In deciding whether to award compensatory damages for emotional injury, factors considered by FEHC include complainant's testimony; any corroborating testimony of friends and coemployees; nature, extent, duration, and egregiousness of conduct; and extent to which employer acted to rectify discrimination. DFEH v. Rosenberg (1990) FEHC Dec. No. 90-09, p. 11

Duty to prevent sexual harassment includes obligation to respond forcefully and effectively when employer learns of harassment. DFEH v. Livermore Joe's, Inc. (1990) FEHC Dec. No. 90-07, p. 20

Plaintiff establishes prima facie case of unlawful retaliation by proving, by preponderance of evidence, that (1) he or she engaged in protected activity, (2) he or she suffered reverse employment action, and (3) causal connection exists between protected activity and employer's adverse action; plaintiff need not show that retaliatory reason was sole or principal reason for adverse action. DFEH v. County of Madera (1990) FEHC Dec. No. 90-03, p. 33; DFEH v. California State University--Hayward (1988) FEHC Dec. No. 88-18, p. 21; DFEH v. California State University--Sacramento (1988) FEHC Dec. No. 88-08, p. 24

Length of maternity leave depends on period of actual physical disability, and may be greater than that provided to other temporarily disabled employees. DFEH v. J.E. Robinson, D.D.S. (1989) FEHC Dec. No. 89-02, p. 10

With respect to regulation of spouses working together, careful assessment required to be made of actual work setting to determine whether setting would pose, because of mutual concerns married couples are assumed to bear, potential conflict of interest or other hazard greater for married couples than for other employees. DFEH v. Insurance America Sales Agency (1988) FEHC Dec. No. 88-07, p. 6

FEHC able to compensate for pain, fear, emotional distress, shame, humiliation, and similar forms of injury suffered as a result of employment discrimination. DFEH v. Aluminum Precision Products, Inc. (1988) FEHC Dec. No. 88-05, p.

10

Nonprofit organization must be religious to be exempt from FEHA. DFEH v. Bohemian Club (1988) FEHC Dec. No. 88-01, pp. 12-15

"Marital status" defined. DFEH v. Community Hospital of San Gabriel (1986) FEHC Dec. No. 86-08

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationDisparate TreatmentFamily Status DiscriminationLabor & Employment LawDiscriminationHarassmentSexual HarassmentDefenses & ExceptionsAntiharassment PolicyLabor & Employment LawDiscriminationHarassmentSexual HarassmentRemediesCompensatory DamagesLabor & Employment LawDiscriminationRetaliationElementsGeneral OverviewLabor & Employment LawLeaves of AbsenceFamily & Medical Leave ActCoverage & DefinitionsAdoption & Maternity

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11-115 California Forms of Pleading and Practice--Annotated § 115.79

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.79 Law Reviews

Chow, *Sticks, Stones, and Simple Teasing: The Jurisprudence of Non-Cognizable Harassing Conduct in the Context of Title VII Hostile Work Environment Claims, 33 Loy. L.A. L. Rev. 133 (1999)*

Harper, *Employer Liability for Harassment under Title VII: A Functional Rationale for Faragher and Ellerth, 36 San Diego L. Rev. 41 (1999)*

Comment, *Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII, 87 Cal. L. Rev. 983 (1999)*

Note, *Defining Employer Liability: Toward a Precise Application of Agency Principles in Title VII Sexual Harassment Cases, 29 Golden Gate U.L. Rev. 235 (1999)*

Comment, *Considering Hybrid Sex and Age Discrimination Claims by Women: Examining Approaches to Pleading and Analysis--A Pragmatic Model, 28 Golden Gate U.L. Rev. 115 (1998)*

Comment, *Employment Discrimination After the 1993 Amendments to FEHA: A Change in the Once Settled Bargain?, 32 U.S.F. L. Rev. 433 (1998)*

Note, *What Is "Sex"? Heterosexual-Male-on-Heterosexual-Male Sexual Harassment Actions After Oncale v. Sundowner Offshore Services, Inc., 71 S. Cal. L. Rev. 1341 (1998)*

Franke, *What's Wrong with Sexual Harassment?, 49 Stan. L. Rev. 691 (1997)*

Comment, *Employer Discrimination on the Basis of Pregnancy: Righting the Power Imbalance*, 27 Golden Gate U.L. Rev. (1997)

Comment, *Same-Gender Sexual Harassment: Is It Sex Discrimination Under Title VII?, 36 Santa Clara L. Rev. 1147 (1996)*

Note, *Walking the Constitutional Tightrope: Balancing Title VII Hostile Environment Sexual Harassment Claims with Free Speech Defenses, 80 Minn. L. Rev. 979 (1996)*

Hadfield, *Rational Women: A Test for Sex-Based Harassment, 83 Cal. L. Rev. 1151 (1995)*

Note, *What's Sex Got To Do With It?, 47 Stan. L. Rev. 565 (1995)*

Burstein, *What is "Reasonable Accommodation" Under the Americans With Disabilities Act?*, 38(5) Prac. Law. 63 (1992)

Estrich, *Sex at Work, 43 Stan. L. Rev. 813 (1991)*

Kelman, *Concepts of Discrimination in "General Ability" Job Testing, 104 Harv. L. Rev. 1157 (1991)*

Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases, 43 Hastings L.J. 57 (1991)*

Kotkin, *Public Remedies for Private Wrongs: Rethinking the Title VII Back Pay Remedy, 41 Hastings L.J. 1301 (1990)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechGeneral OverviewLabor & Employment LawDiscriminationDisability DiscriminationReasonable AccommodationGeneral OverviewLabor & Employment LawDiscriminationGender & Sex DiscriminationProofBurdens of ProofGeneral OverviewLabor & Employment LawDiscriminationHarassmentSexual HarassmentCoverage & DefinitionsGeneral Overview

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11-115 California Forms of Pleading and Practice--Annotated § 115.80

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§ 115.80 Text References

Schlei & Grossman, Employment Discrimination Law (BNA 2d ed. 1983)

Witkin, Summary of California Law, vol. 8, *Constitutional Law*, §§ 855-878 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationGeneral Overview

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[Reserved]

§§ 115.81[Reserved]

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 115 CIVIL RIGHTS: EMPLOYMENT DISCRIMINATION
PART IV. FORMS
A. Complaint and Allegations for Violations of Fair Employment and Housing Act

11-115 California Forms of Pleading and Practice--Annotated § 115.90

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.90 Complaint for Damages and Preliminary and Permanent Injunction for Violation of Fair Employment and Housing Act--Refusal to Hire [Gov. Code §§ 12940, 12941, 12965]

[1] FORM Complaint for Damages and Preliminary and Permanent Injunction for Violation of Fair Employment and Housing Act--Refusal to Hire [Gov. Code §§ 12940, 12941, 12965]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES [AND INJUNCT-
_____ [*name*],	)	IVE RELIEF] FOR EMPLOYMENT DISCRIMINA-
[and DOES I through _____,]	)	TION
Defendant(s).	)	(Fair Employment and Housing Act)
	)	[Amount demanded (exceeds *or* does not exceed)
	)	$10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is _____ [*specify type of entity, e.g.*, a corporation organized and existing under the laws of the State of _____] and is subject to suit under the California Fair Employment and Housing Act, *Government Code Section 12900 et seq.* (FEHA), in that defendant _____ [*specify facts showing that defendant is subject to suit under FEHA (Gov. Code §§ 12926(d),(e),(g), 12940), e.g.*, regularly employs five or more persons].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by the aforementioned defendants.)]

[3. (Plaintiff is informed and believes and thereon alleges that) (A)t all times herein mentioned each of the defendants was the agent and employee of each of the remaining defendants and, in doing the things hereinafter alleged, was acting within the course and scope of such agency and employment.]

4. _____ [*Allege facts showing proper venue under Gov. Code § 12965(b), e.g.,* The unlawful employment practice(s) complained of herein occurred in _____ County].

5. Plaintiff _____ [*name*] is an adult person, and a resident of the County of _____, State of California.

6. Plaintiff is a _____ [*state plaintiff's membership in group protected by FEHA, e.g.,* black person].

[*Paragraphs 7-10, below, set forth specific allegations of discrimination based on refusal to hire. Other allegations of discrimination based on different grounds may be substituted or added here. See, e.g.,§§ 115.91 -115.94.*]

7. On _____ [*date*], plaintiff presented himself/herself at the personnel office of defendant _____ [*name of employer*] at _____ [*location*] to request employment as _____ [*specify position sought, e.g.,* a file clerk], but defendant refused to hire plaintiff.

[8. At all times herein mentioned, plaintiff was qualified for the position of _____ (*specify position sought, e.g.,* file clerk) with defendant _____ (*name of employer*) in that _____ (*specify facts indicating plaintiff's qualification for job, such as his/her education, training, and experience*).]

[*EITHER*]

9. Defendant's refusal to hire plaintiff constitutes disparate treatment in that it was based on the fact that plaintiff is a _____ [*specify protected characteristic on which claim of discrimination is based, e.g.,* black person]. Defendant intentionally refused to hire plaintiff because of plaintiff's _____ [*specify protected characteristic, e.g.,* race]. Plaintiff bases this conclusion on the fact that _____[*specify, e.g.,* defendant continued to seek applicants for the position of file clerk, and ultimately hired a white applicant with the same qualifications as plaintiff].

[*AND/OR*]

10. The defendant's policy or practice requiring employment applicants to _____ [*specify facially neutral employment policy, e.g.,* have earned a college degree] [also] caused plaintiff to be _____ [*specify loss caused by employment policy, e.g.,* denied the employment he/she desired]. This policy or practice has a disparate impact on plaintiff and other persons of his/her _____ [*specify protected characteristic, e.g.,* race], in that it causes persons of plaintiff's _____ [*specify protected characteristic, e.g.,* race] to be demonstrably disadvantaged, vis-a-vis _____ [*specify group that has advantage because of requirement, e.g.,* white] candidates seeking employment, in the following manner: _____ [*specify*

facts showing numerical disparity caused by defendant's employment policy or practice]. [Furthermore, defendant's policy or practice is not justified by any business necessity in that _____ (*specify, e.g.*, a college degree is neither necessary nor helpful to performance of the duties of the job for which plaintiff applied).]

[*CONTINUE*]

11. Defendant's discriminatory action(s) against plaintiff, as alleged above, constituted unlawful discrimination in employment on account of _____ [*specify protected characteristic, e.g.*, race], in violation of _____ [*specify relevant section(s) of FEHA that plaintiff claims were or are being violated, e.g., Government Code Section 12940(a)*].

12. As a proximate result of defendant's discriminatory action(s) against plaintiff, as alleged above, plaintiff has been harmed in that plaintiff has suffered the loss of the wages, salary, benefits, and additional amounts of money plaintiff would have received if _____ [*specify, e.g.*, plaintiff had been hired by defendant _____ (*name of employer*)]. As a result of such discrimination and consequent harm, plaintiff has suffered such damages _____ [in the amount of $_____ *or* in an amount according to proof].

[13. As a further proximate result of defendant's discriminatory action(s) against plaintiff, as alleged above, plaintiff has been harmed in that plaintiff has suffered the intangible loss of such employment-related opportunities as _____ (*specify, e.g.*, experience in the position sought by plaintiff). As a result of such discrimination and consequent harm, plaintiff has suffered such damages _____ (in the amount of $_____ *or* in an amount according to proof).]

[14. As a further proximate result of defendant's discriminatory action(s) against plaintiff, as alleged above, plaintiff has been harmed in that plaintiff has suffered humiliation, mental anguish, and emotional and physical distress, and has been injured in mind (and body) as follows: _____ (*describe injury*). As a result of such discrimination and consequent harm, plaintiff has suffered such damages _____ (in the amount of $_____ *or* in an amount according to proof).]

[15. The above-recited actions of defendant were done with malice, fraud, or oppression, and in reckless disregard of the plaintiff's rights under FEHA. Specifically, _____ (*set forth facts showing malice, fraud, or oppression, within the meaning of Civ. Code § 3294*).]

[16. No adequate remedy exists at law for the injuries suffered by plaintiff herein, insofar as the employment opportunity that defendant has denied to plaintiff cannot be secured absent injunctive relief. If this court does not grant injunctive relief of the type and for the purpose specified below, plaintiff will suffer irreparable injury. Therefore, plaintiff requests the following injunctive relief: _____ (*specify nature and extent of injunctive relief sought, e.g.*, requiring defendant _____ [*name of employer*] to hire plaintiff for the employment position plaintiff sought).]

17. On _____ [*date that appears on DFEH charge*], and _____ [within one year of the date of the discrimination committed by defendant *or specify circumstances extending period for filing DFEH charge*], plaintiff filed a charge of discrimination with the California Department of Fair Employment and Housing (DFEH). A copy of this charge is appended hereto, marked "Exhibit _____," and is incorporated by this reference as though fully set forth.

18. On _____ [*date that appears on right-to-sue letter issued by DFEH*], the DFEH issued to plaintiff a notice of right to bring a civil action based on the charge that is "Exhibit _____" to this complaint. A copy of this

notice of right of action is appended hereto, marked "Exhibit _____," and is incorporated by this reference as though fully set forth.

WHEREFORE, plaintiff prays for judgment as follows:

1. For back pay, front pay, and other monetary relief _____ [in the sum of $_____ *or* according to proof];

[2. For general damages _____ (in the sum of $_____ *or* according to proof);]

[3. For punitive damages in an amount appropriate to punish defendant for its wrongful conduct and set an example for others;]

4. For interest on the sum of damages awarded, calculated from _____ [*date that discrimination first began*] to the date of judgment;

[5. For preliminary and permanent injunctive relief as specified in Paragraph 16, *above*;]

6. For reasonable attorney's fees pursuant to *Government Code Section 12965(b)*;

7. For costs of suit herein incurred; and

8. For such other and further relief as the court deems proper.

_____ [*date*]
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date and place*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a plaintiff in an action for damages and injunctive relief against an employer who has discriminated based on a classification protected by FEHA [*see Gov. Code § 12965(b)*]. It is intended to be a generalized complaint containing the basic allegations required in any FEHA civil action. For illustrative purposes, the complaint alleges that an employer refused to hire plaintiff, a prospective employee, because of the plaintiff's race. However, the complaint may be adapted to allege any unlawful practice (for example, discriminatory

refusal to promote or transfer, discriminatory layoff, discriminatory discharge) based on membership in any protected classification (for example, religion, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, sexual orientation, age) [*see Gov. Code §§ 12940(a), 12941*]. For examples of such allegations, see *§§ 115.91* -119.94.

The form of complaint in [1], *above*, may be used to allege either disparate treatment or disparate impact, or both. Disparate treatment occurs when an employer intentionally treats some employees less favorably than others because of their race, color, religion, sex, national origin, or other protected characteristic [*see Teamsters v. United States (1977) 431 U.S. 324, 335-336, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII)* ; *Mixon v. Fair Employment & Housing Com. (1987) 192 Cal. App. 3d 1306, 1317, 237 Cal. Rptr. 884 (FEHA)]* . Disparate impact occurs when facially neutral employment practices and criteria (for example, preemployment tests, education requirements, experience requirements, height and weight requirements) fall more harshly on one group than another and cannot be justified by business necessity [*Teamsters v. United States (1977) 431 U.S. 324, 335 n.15, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (Title VII)]* . For discussion of these theories of liability, see *§ 115.23*.

For additional forms for use in FEHA cases or cases brought under other employment discrimination laws, see K. Wilcox, ed., California Employment Law (Matthew Bender).

[3] Allegations

The form of complaint in [1], *above*, alleges all of the following:

- An allegation that defendant is covered by FEHA (Paragraph 1) [*see Gov. Code §§ 12926(d), 12940*].

- An optional fictitious name ("DOE") allegation (Optional Paragraph 2).

- An optional agency allegation (Optional Paragraph 3).

- An allegation establishing venue (Paragraph 4) [*see Gov. Code § 12965(b)*].

- An allegation that plaintiff is an adult person, and an allegation of plaintiff's residence (Paragraph 5).

- An allegation that plaintiff is a member of a group protected by FEHA (Paragraph 6) [*see Gov. Code §§ 12940, 12941*].

- Allegations setting forth defendant's specific conduct violating FEHA (Paragraphs 7-11) [*see Gov. Code §§ 12940, 12941, 12945*], including a "disparate treatment" allegation (Paragraph 9), and a "disparate impact" allegation (Paragraph 10) [*see § 115.23[2],[4]*].

- Allegations that defendant's conduct proximately caused injury and damages to plaintiff (Paragraph 12 and Optional Paragraphs 13 and 14) [*see Commodore Home Systems v. Superior Court (1982) 32 Cal. 3d 211, 221, 185 Cal. Rptr. 270, 649 P.2d 912* (compensatory damages); *Ackerman v. Western Elec. Co. (N.D. Cal. 1986) 643 F. Supp. 836, 853, 856 , aff'd, 860 F.2d 1514 (9th Cir. 1988)* (back pay and front pay)].

- An optional allegation that the actions of defendants were done with malice, fraud, or oppression, and in reckless disregard of the plaintiff's rights under FEHA (Optional Paragraph 15). This optional allegation, if appropriate under the circumstances, would support recovery of punitive damages [*see Civ. Code § 3294*; *Commodore Home Systems v. Superior Court (1982) 32 Cal. 3d 211, 221, 185 Cal. Rptr.*

270, 649 P.2d 912] .

- An optional allegation supporting a request for injunctive relief, such as reinstatement or retroactive seniority (Optional Paragraph 16) [*see Johnson v. Civil Service Comm'n (1984) 153 Cal. App. 3d 585, 591, 200 Cal. Rptr. 289* (order directing city to employ petitioner as firefighter); *County of Alameda v. FEHC (1984) 153 Cal. App. 3d 499, 508-509, 200 Cal. Rptr. 381* (order granting retroactive seniority); *Fair Employment Practice Comm'n v. State Personnel Bd. (1981) 117 Cal. App. 3d 322, 332-333, 172 Cal. Rptr. 739* (order granting retroactive promotion); *International Union of Operating Engineers v. Fair Emp. Practice Comm'n (1969) 276 Cal. App. 2d 504, 510-511, 81 Cal. Rptr. 47 , cert. denied, 397 U.S. 1037 (1970)* (order to hire); *see generally Civ. Code §§ 3420-3423*; *Code Civ. Proc. §§ 526, 527*].

- Allegations that plaintiff exhausted FEHA's administrative remedies (Paragraphs 17 and 18) [*see Gov. Code §§ 12960, 12965(b)*; *see also* [6], *below*].

[4] Prayer

The prayer in the form complaint in [1], *above*, seeks preliminary and permanent injunctive relief.

In a limited civil case, the court may issue temporary restraining orders and preliminary injunctions, but not permanent injunctive relief unless authorized by statute; thus, if permanent injunctive relief is sought, the action cannot be brought as a limited civil case [*see Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*]. For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

The prayer also seeks back pay, front pay, and other monetary relief, as well as general damages.

The prayer includes an optional prayer for punitive damages. In a case where the violation of FEHA involves malice, fraud, oppression, or reckless disregard of the plaintiff's rights [*see Civ. Code § 3294*], the plaintiff might be able to recover punitive damages. If the facts do not involve malice, fraud, oppression, or reckless disregard of the plaintiff's rights, the optional punitive damages allegation (Optional Paragraph 15 of the form of complaint) and the optional prayer for punitive damages should not be used.

The prayer also includes a prayer for attorney's fees. *Gov. Code § 12965(b)* provides for recovery of attorney's fees in FEHA cases.

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* .

[6] Administrative Prerequisites and Procedural Requirements

Before filing a FEHA civil complaint, a plaintiff must exhaust the FEHA administrative process [*see Bennett v. Borden, Inc. (1976) 56 Cal. App. 3d 706, 709-710, 128 Cal. Rptr. 627]* , and the complaint must allege the exhaustion of those remedies. Thus, a FEHA civil complaint must allege that a timely DFEH complaint was filed and a DFEH "right-to-sue" letter was issued [*see Gov. Code §§ 12960, 12965(b)*], or the civil complaint may be dismissed [*see Myers v. Mobil Oil Corp. (1985) 172 Cal. App. 3d 1059, 1062-1064, 218 Cal. Rptr. 630]* . California cases generally hold the administrative prerequisites to be jurisdictional [*see Baker v. Children's Hospital Med. Ctr. (1989) 209 Cal. App. 3d 1057, 1062, 257 Cal. Rptr. 768* ; *see also Stache v. International Union of Bricklayers (9th Cir. 1988) 852 F.2d 1231, 1233* , *cert. denied, 493 U.S. 815 (1989)* ; *Carter v. Smith Food King (9th Cir. 1985) 765 F.2d 916, 921* ; *Bennett v. Borden, Inc. (1976) 56 Cal. App. 3d 706, 710, 128 Cal. Rptr. 627* ; *but see Grywczynski v. Shasta Beverages (N.D. Cal. 1984) 606 F. Supp. 61, 65-66* (administrative prerequisites operate as statutes of limitation on right to sue)]. For further discussion relating to FEHA administrative prerequisites, see *§ 115.51[1]*.

Once the plaintiff has exhausted FEHA administrative remedies (that is, a right-to-sue letter is issued), he or she generally has one year to file a civil complaint [*see Gov. Code § 12965(b)*; *but see Gov. Code § 12965(d), (e)* one-year period may be tolled under certain circumstances if charges were concurrently filed with DFEH and EEOC); *see also § 115.52[1]*].

The allegations in the civil complaint need not necessarily be identical to those set forth in the DFEH complaint, as long as they are "like or related to" the allegations in the DFEH complaint [*see Baker v. Children's Hospital Med. Ctr. (1989) 209 Cal. App. 3d 1057, 1062-1065, 257 Cal. Rptr. 768]* . However, the plaintiff may not name any person or entity as a defendant who was not previously named in the DFEH complaint [*Carter v. Smith Food King (9th Cir. 1985) 765 F.2d 916, 921* ; *see Gov. Code § 12965(b)*; *see also* discussion at*§ 115.52[3]*].

The plaintiff must serve a copy of the civil complaint on the principal DFEH and FEHC offices [*Gov. Code § 12965(b)*]. If the plaintiff fails to do so, he or she may be ordered to comply with this requirement [*Gov. Code § 12965(b)*].

Although an employee must exhaust the FEHA administrative remedy before bringing a civil action under FEHA or seeking any remedies provided by FEHA, exhaustion of the administrative remedy is not required before filing a civil action for damages alleging nonstatutory causes of action [*Rojo v. Kliger (1990) 52 Cal. 3d 65, 88, 276 Cal. Rptr. 130, 801 P.2d 373]* . Thus, for example, exhaustion of FEHA administrative remedies is not a prerequisite to filing a civil action alleging a tort cause of action for wrongful termination in violation of public policy, which is independent of FEHA [*see Rojo v. Kliger (1990) 52 Cal. 3d 65, 88-91, 276 Cal. Rptr. 130, 801 P.2d 373* ; *see also* Ch. 249, *Employment Law: Termination and Discipline* , for discussion and forms relating to common law causes of action for wrongful termination]. After the FEHA administrative process is exhausted and plaintiff has obtained a right-to-sue letter, the plaintiff may then move to amend his or her wrongful termination complaint to add causes of action under FEHA [*see Rojo v. Kliger (1990) 52 Cal. 3d 65, 88, 276 Cal. Rptr. 130, 801 P.2d 373]* .

[7] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Code Civ. Proc. §§ 85, 86(a)(1)*]. If the optional language in the form seeking permanent injunctive relief is used, the action cannot be brought as a limited civil case [*see Code Civ. Proc. §§ 85, 580(b)(2)* (court in limited civil case may not issue permanent injunction unless authorized by statute)].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9),(10)*].

[8] Cross References

For alternative forms of allegations for use in conjunction with this form, see *§§ 115.91 -115.94*

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For discussion and forms relating to amendment of pleadings for use when an unknown defendant is sued under a fictitious name, see Ch. 21, *Amended and Supplemental Pleadings*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages, see Ch. 177, *Damages*

For discussion and forms relating to temporary restraining orders, preliminary injunctions, and permanent injunctions, see Ch. 303, *Injunctions*

For discussion of jurisdiction in California courts, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For forms of allegations of infliction of emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons, see Ch. 518, *Service of Summons and Papers*

For forms of allegations establishing venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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11-115 California Forms of Pleading and Practice--Annotated § 115.91

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§ 115.91 Allegation for Use in FEHA Complaint--Refusal to Accommodate Employee's or Applicant's Religious Beliefs [Gov. Code § 12940(a), (*l*)]

[1] FORM Allegation for Use in FEHA Complaint--Refusal to Accommodate Employee's or Applicant's Religious Beliefs [Gov. Code § 12940(a), (*l*)]

1. Plaintiff's religious creed requires that _____ [*state sincerely held religious belief or creed that defendant failed to accommodate, e.g.,* plaintiff observe the Jewish Sabbath by going to temple on Saturdays].

2. On _____ [*date*], plaintiff informed defendant of the religious requirement set forth in Paragraph _____, above, and that plaintiff _____ [*specify conflict with employment responsibilities, e.g.,* would thereby be unable to work on Saturdays].

3. From _____ [*date*], until _____ [*date*], defendant _____ [*name of employer*] refused to accommodate plaintiff's religious beliefs and practices in the following manner: _____ [*state actions taken by defendant, or action defendant failed to take, that constituted refusal to accommodate religious creed, e.g.,* defendant insisted that plaintiff work on Saturdays and threatened to discharge plaintiff if he/she did not work then].

[2] Use of Form

The form allegations in [1], *above*, are for use when an employer violates FEHA by refusing to accommodate an employee's or applicant's religious creed [*see Gov. Code § 12940(a)*, (*l*); *Best v. California Apprenticeship Council (1984) 161 Cal. App. 3d 626, 634, 207 Cal. Rptr. 863* (employers and labor unions must reasonably accommodate sincerely held religious beliefs of any applicant or employee); *see also Gov. Code § 12926(o)* (religious creed defined); *2 Cal. Code Reg. § 7293.3*].

In an appropriate case, these allegations may be used in place of, or in addition to, the allegations in Paragraphs 7-10 of

the general complaint *set forth in § 115.90*.

For discussion of employers' duty to accommodate employees' religious beliefs, see *§§ 115.22[6], 115.35[2]*.

[3] Allegations

The form allegations in [1], *above*, state that:

- The plaintiff has a bona fide religious belief (Paragraph 1) [*see Gov. Code § 12926(o)*; *2 Cal. Code Reg. § 7293.1*].

- The plaintiff informed the defendant of the plaintiff's religious belief and that it conflicted with his or her employment responsibilities (Paragraph 2).

- An adverse employment action was taken against the plaintiff because of his or her observance of that religious belief (Paragraph 3) [*see Gov. Code § 12940(a)*, (*l*)].

If the plaintiff contends that he or she was required to attend a specific observance at a particular time and place, such as a particular pilgrimage, the complaint should allege that the plaintiff's bona fide religious belief included a mandate to be present at the particular observance [*see Tiano v. Dillard Department Stores (9th Cir. 1998) 139 F.3d 679, 682-683* (temporal mandate was part of employee's prima facie case)].

[4] Cross References

For a general form of FEHA complaint, see *§ 115.90*

For alternative forms of allegations for use in FEHA complaints, see *§§ 115.92- 115.94*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

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11-115 California Forms of Pleading and Practice--Annotated § 115.92

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§ 115.92 Allegation for Use in FEHA Complaint--Failure to Accommodate Physical or Mental Disability or Medical Condition [Gov. Code § 12940(a)]

[1] FORM Allegation for Use in FEHA Complaint--Failure to Accommodate Physical or Mental Disability or Medical Condition [Gov. Code § 12940(a)]

1. Plaintiff has the following _____ [physical disability *or* mental disability *or* medical condition]: _____ [*specify disability or medical condition that defendant failed to accommodate*].

2. Defendant _____ [*name*] was aware of plaintiff's _____ [physical disability *or* mental disability *or* medical condition] set forth in Paragraph _____, above, because _____ [*state reason defendant was aware of plaintiff's physical or mental disability or medical condition, e.g.,* plaintiff informed defendant of the _____ (physical disability *or* mental disability *or* medical condition) on _____ (*date*)].

3. From _____ [*date*], until _____ [*date*], defendant _____ [*name of employer*] failed reasonably to accommodate plaintiff's needs based on his/her physical disability *or* mental disability *or* medical condition] in the following manner: _____ [*state actions taken by defendant, or action defendant failed to take, that constituted failure to accommodate physical or mental disability or medical condition, e.g.,* Defendant would not accommodate plaintiff's need to leave work when necessary for treatment of the _____ (physical disability *or* mental disability *or* medical condition) set forth in Paragraph _____, above].

4. At all times mentioned herein, plaintiff was willing and able to perform the duties and functions of his/her position if such reasonable accommodation had been made by defendant. At no time would the performance of the functions of the employment position, with a reasonable accommodation for plaintiff's _____ [physical disability *or* mental disability *or* medical condition] have been a danger to plaintiff's or any other person's health or safety, nor would

it have created an undue hardship to the operation of defendant's business.

[2] Use of Form

The form allegations in [1], *above*, are for use when an employer violates FEHA by refusing to accommodate the needs of an employee having a physical or mental disability or medical condition [*see Gov. Code § 12940(a)*; *2 Cal. Code Reg. § 7293.9*].

In an appropriate case, these allegations may be used in place of, or in addition to, the allegations in Paragraphs 7-10 of the general complaint *set forth in § 115.90*.

The form may be adapted for use by an employee whose development of a disability disqualified him or her from the position currently held, if the employer, without undue hardship, could have restructured the job for the employee or found the employee a different, suitable position [*see Prilliman v. United Air Lines (1997) 53 Cal. App. 4th 935, 948-951, 62 Cal. Rptr. 2d 142]* .

For discussion of employers' duty to accommodate employees' physical or mental disabilities or medical conditions, see *§§ 115.22[8], 115.35[1]*.

[3] Allegations

The form allegations in [1], *above*, state that:

- The plaintiff has a physical or mental disability or medical condition (and is thereby protected by FEHA) (Paragraph 1) [*see Gov. Code § 12940(a)*; *see also Gov. Code § 12926(h),(i),(k)* ("medical condition," "mental disability," and "physical disability" defined)].

- The defendant knew about plaintiff's physical or mental disability or medical condition (Paragraph 2) [*see 2 Cal. Code Reg. § 7293.9*].

- The defendant failed reasonably to accommodate plaintiff's physical or mental disability or medical condition (Paragraph 3) [*see Gov. Code §§ 12926(n)* (definition of "reasonable accommodation"), *12940(m)*].

- The plaintiff is able to perform the duties of the job without endangering the health and safety of himself, herself, or others (Paragraph 4) [*see Gov. Code § 12940(a)(1),(2)*] or causing undue hardship to the operation of defendant's business [*see Gov. Code §§ 12926(s), 12940(m)*].

[4] Cross References

For a general form of FEHA complaint, see *§ 115.90*

For alternative forms of allegations for use in FEHA complaints, see *§ 115.91*, *115.93*, and *115.94*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

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§ 115.93 Allegation for Use in FEHA Complaint--Harassment, and Constructive Discharge Resulting from Harassment [Gov. Code § 12940(j), (k)]

[1] FORM Allegation for Use in FEHA Complaint--Harassment, and Constructive Discharge Resulting from Harassment [Gov. Code § 12940(j), (k)]

[*EITHER*]

1. _____ [Defendant _____ (*name of employer*) *and/or* Defendant's agent(s) and supervisor(s) _____ (*name(s)*)] engaged in the following actions with the intent of harassing plaintiff on account of his/her _____ [*specify protected group characteristic, e.g.*, race]: _____ [*specify in detail actions taken by defendant that constitute harassment*].

[*AND/OR*]

2. Defendant's employee(s) _____ [*name(s)*] engaged in the following actions with the intent of harassing plaintiff on account of his/her _____ [*specify protected group characteristic, e.g.*, race]: _____ [*specify in detail actions taken by defendant that constitute harassment*]. _____ [Defendant *and/or* Defendant's agent(s) and supervisor(s) _____ (*name(s)*)] knew or should have known of these harassing actions because _____ [*state basis of actual or constructive knowledge of defendant, its agents, and/or its supervisors*]. Despite defendant's _____ [actual *or* constructive] knowledge of the above mentioned harassment [, and the knowledge of his/her/its supervisors and agents], defendant failed to take immediate and appropriate corrective action to stop the harassment. [Furthermore, before the harassment occurred, defendant failed to take all reasonable steps to prevent such harassment from occurring.]

[*CONTINUE*]

[3. The actions alleged in Paragraph(s) _____, above, caused plaintiff to be constructively discharged from his/her employment, in that any reasonable person in plaintiff's position subject to those actions would have resigned or quit his/her employment, as plaintiff was compelled by those actions to do. Defendant had actual knowledge of the intolerable conditions caused by the acts of harassment alleged above, but failed to take any steps to end those conditions (for the purpose of causing plaintiff's resignation). Furthermore, defendant knew or should have known that plaintiff's resignation would result from his/her/its actions.]

[2] Use of Form

The form allegations in [1], *above*, are for use when an employee or applicant is harassed because of his or her race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age over 40 years [*Gov. Code § 12940(j),(k)*].

In an appropriate case, these allegations may be used in place of, or in addition to, the allegations in Paragraphs 7-10 of the general complaint set forth at § 115.90.

These allegations may be adapted for use by an employee who claims environmental harassment even though he or she was not the object of harassment. Since the plaintiff in such a case must establish that harassing conduct directed at others permeated his or her direct work environment, the plaintiff must allege that he or she personally witnessed the conduct, and that it was in his or her immediate work environment. The facts pleaded must establish a nexus between the alleged harassment of others, the plaintiff's observations of the harassing conduct, and the work context in which the harassment occurred [*see Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal. App. 3d 590, 610-613, 262 Cal. Rptr. 842]* .

For discussion of harassment as a violation of FEHA, see *§ 115.36*.

[3] Allegations

The form allegations in [1], *above*, state that:

- Defendant and/or its agents and supervisors harassed plaintiff based on a classification protected by FEHA (Paragraph 1) [*see Gov. Code § 12940(j),(k)*; *2 Cal. Code Reg. § 7287.6(b)(2)*].

- Plaintiff's coemployees harassed plaintiff, and defendant or its agents or supervisors knew or should have known of the harassment but failed to prevent it or take corrective action (Paragraph 2) [*see Gov. Code § 12940(j),(k)*; *2 Cal. Code Reg. § 7287.6(b)(3)*].

- Plaintiff was constructively discharged because of the harassment (Optional Paragraph 3) [*see Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1248-1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022]* .

[4] Liability for Harassment by Supervisors and Coworkers

An employer is strictly liable for discriminatory harassment by its agents and supervisory employees [*see Gov. Code § 12940(j)(1)*; *2 Cal. Code Reg. § 7287.6(b)(2)*; *Kelly-Zurian v. Wohl Shoe Co. (1994) 22 Cal. App. 4th 397, 415-416, 27 Cal. Rptr. 2d 457]* . An employer is also liable for discriminatory harassment by nonsupervisory employees if the

employer (or its agents or supervisors) knew or should have known of the harassment and failed to take immediate and appropriate corrective action [*Gov. Code § 12940(j)(1)*] or failed to take all reasonable steps to prevent the harassment [*Gov. Code § 12940(k)*].

Any employee, supervisor, or nonsupervisor, who harasses a coemployee is personally liable under FEHA for any harassment that he or she perpetrates, regardless of what the employer knows or does about the harassing conduct [*Gov. Code § 12940(j)(3)*; *see McClung v. Employment Development Dept. (2004) 34 Cal. 4th 467, 475-476, 20 Cal. Rptr. 3d 428, 99 P.3d 1015* (*Gov. Code § 12940(j)(3)* does not apply retroactively to impose liability on nonsupervisors for conduct predating its enactment effective January 1, 2001)]. In addition, the harassing coworker may be liable to the harassment victim under other statutes or tort theories [*see Carrisales v. Department of Corrections (1999) 21 Cal. 4th 1132, 1136-1137, 90 Cal. Rptr. 2d 804, 988 P.2d 1083* (decided prior to enactment of legislation imposing FEHA liability directly on harassing coworker)].

For further discussion of employer liability for supervisors, employees, and nonemployees, see *§ 115.36[2]*.

[5] Constructive Discharge

The form allegations in [1], *above*, contain an optional constructive discharge allegation (Optional Paragraph 3). A court will find a constructive discharge if a reasonable person in the plaintiff's position would have felt that he or she had no reasonable alternative except to quit, and that the employer had actual, rather than merely constructive, knowledge of the intolerable conditions [*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1248-1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022]* . Although constructive discharge often is alleged in conjunction with alleged unlawful harassment, this constructive discharge allegation may be adapted for use when a plaintiff is forced to quit because of any discriminatory treatment.

For further discussion of constructive discharge, see *§ 115.34[3]*.

[6] Cross References

For a general form of FEHA complaint, see *§ 115.90*

For alternative forms of allegations for use in FEHA complaints, see *§§ 115.91*, *115.92*, and *115.94*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

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AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.94 Allegation for Use in FEHA Complaint--Retaliation [Gov. Code § 12940(h)]

[1] FORM Allegation for Use in FEHA Complaint--Retaliation [Gov. Code § 12940(h)]

1. On _____ [*date*], plaintiff took the following action: _____ [*describe protected action taken by plaintiff for which employer allegedly retaliated, e.g.*, filed a charge of discrimination with the California Department of Fair Employment and Housing (DFEH)].

2. On _____ [*date*], defendant's employee(s) _____ [*name(s)*] took the following action(s) against plaintiff: _____ [*describe in detail retaliatory action(s) taken by defendant's employees, e.g.*, defendant's employee _____ (*name*) denied plaintiff a promotion to _____ (*position*), a position for which plaintiff was fully qualified]. The action(s) of defendant's employee(s) _____ [was *or* were] caused by and _____ [was *or* were] in retaliation for the protected activity of plaintiff set forth in Paragraph _____, above, in that _____ [*state all facts showing causal link between protected activity of plaintiff and alleged retaliatory action, e.g.*, plaintiff's promotion was denied the day after defendant's employee _____ (*name*) became aware that plaintiff had filed a DFEH charge].

[*If appropriate, add:*]

3. Despite defendant's _____ [actual or constructive] knowledge of the above-mentioned retaliation [, and the knowledge of his/her/its supervisors and agents], defendant failed to take immediate and appropriate corrective action to stop the retaliation. [Furthermore, before the retaliation occurred, defendant failed to take all reasonable steps to prevent such retaliation from occurring.]

[2] Use of Form

The form allegations in [1], *above*, are for use when an employer retaliates against an employee because the employee has opposed unlawful practices under FEHA or because the employee has filed a complaint, testified, assisted, or otherwise participated in any proceeding under FEHA [*see Gov. Code § 12940(h)*]. The form includes an optional allegation for use when the employer failed to take reasonable steps to prevent unlawful retaliation from occurring [*see Gov. Code § 12940(k)*].

In an appropriate case, these allegations may be used in place of, or in addition to, the allegations in Paragraphs 7-10 of the general complaint set forth at*§ 115.90*.

For discussion of retaliation as a violation of FEHA, see *§ 115.37*.

[3] Allegations

The form allegations in [1], *above*, state that:

- Plaintiff took an action protected by FEHA (that is, opposed unlawful discrimination or participated in FEHA administrative proceedings) (Paragraph 1) [*see Gov. Code § 12940(h)*].

- Defendant retaliated against plaintiff because of plaintiff's protected activity (Paragraph 2) [*see Wrighten v. Metropolitan Hospitals (9th Cir. 1984) 726 F.2d 1346, 1354* (Title VII; requirement of causal link between protected activity and retaliation); *see also Miller v. Fairchild Indus. (9th Cir. 1986) 797 F.2d 727, 732* (Title VII; complaint must set forth sufficient factual basis to support legal conclusion of retaliation; terminations following soon after protected activity are sufficient)].

- Defendant failed to take reasonable steps to prevent the retaliation (Optional Paragraph 3) [*see Gov. Code § 12940(k)* (it is unlawful employment practice for employer to fail to take all reasonable steps necessary to prevent "discrimination" from occurring); *Taylor v. City of Los Angeles Dept. of Water & Power (2006) 144 Cal. App. 4th 1216, 1239-1240, 51 Cal. Rptr. 3d 206* (retaliation is form of "discrimination" actionable under *Gov. Code § 12940(k), disapproved on other grounds, Jones v. Lodge at Torrey Pines P'ship (2008) 42 Cal. 4th 1158, 1173-1174, 72 Cal. Rptr. 3d 624, 177 P.3d 232*].

[4] Cross References

For a general form of FEHA complaint, see *§ 115.90*

For alternative forms of allegations for use in FEHA complaints, see *§§ 115.91 -115.93*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

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[Reserved]

§§ 115.95[Reserved]

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11-115 California Forms of Pleading and Practice--Annotated § 115.100

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.100 Affirmative Defense Allegation for Use in Answering FEHA Complaint--Accommodation Would Cause Undue Hardship [Gov. Code §§ 12926(s), 12940(*l*), (m)]

[1] FORM Affirmative Defense Allegation for Use in Answering FEHA Complaint--Accommodation Would Cause Undue Hardship [Gov. Code §§ 12926(s), 12940(*l*), (m)]

AS A _____ [*specify, e.g.*, FIRST] AFFIRMATIVE DEFENSE, defendant alleges that the accommodation sought by plaintiff for his/her _____ [physical disability *or* mental disability *or* medical condition *or* religious (belief *or* observance)] would impose an undue hardship on defendant in that such an accommodation would _____ [*specify, e.g.*, be unduly costly or burdensome *or* so restructure the position that essential functions would have to be performed by others].

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer to a complaint for damages and injunctive relief for employment discrimination in violation of FEHA. It is for use by a defendant who claims that it would cause undue hardship for the defendant to accommodate the plaintiff's disability, medical condition, or religious beliefs [*see Gov. Code §§ 12926(s), 12940* (*l*), (m); *2 Cal. Code Reg. §§ 7293.3, 7293.9*; *Ackerman v. Western Elec. Co. (N.D. Cal. 1986) 643 F. Supp. 836, 851-852 , aff'd, 860 F.2d 1514 (9th Cir. 1988)]* .

For discussion of undue hardship, see *§ 115.35[1][d],[2][d]*.

[3] Cross References

For forms of other affirmative defenses for use in answering FEHA complaints, see *§§ 115.101 -115.107*

For discussion of answers to complaints, including forms, see Ch. 26, *Answers*

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11-115 California Forms of Pleading and Practice--Annotated § 115.101

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.101 Affirmative Defense Allegation for Use in Answering FEHA Complaint--Bona Fide Occupational Qualification (BFOQ) [Gov. Code § 12940]

[1] FORM Affirmative Defense Allegation for Use in Answering FEHA Complaint--Bona Fide Occupational Qualification (BFOQ) [Gov. Code § 12940]

AS A _____ [*specify, e.g.*, FIRST] AFFIRMATIVE DEFENSE, defendant alleges that the practice alleged by plaintiff to be discriminatory is justified by a bona fide occupational qualification, in that _____ [*specify, e.g.*, all or substantially all (*specify protected class, e.g.*, women) could not perform the duties of the position of _____ (*specify*) in a safe and efficient manner because _____ (*specify reasons*), and the essence of defendant's business operation would therefore be undermined if defendant were required to employ _____ (*specify protected class, e.g.*, women) in such positions].

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer to a complaint for damages and injunctive relief for employment discrimination in violation of FEHA. It is for use by a defendant who claims that a bona fide occupational qualification (BFOQ) exists [*see Gov. Code § 12940*; *2 Cal. Code Reg. § 7286.7(a)*].

A defendant who discriminates against a protected group may assert the BFOQ defense if the defendant can show that all or substantially all of the excluded persons would not be able to perform the particular job safely and efficiently, and the business operation would thus be undermined [*see Gov. Code § 12940*; *2 Cal. Code Reg. § 7286.7(a)*; *Bohemian Club v. FEHC (1986) 187 Cal. App. 3d 1, 19-23, 231 Cal. Rptr. 769]* .

For discussion of the BFOQ defense, see *§ 115.54[4]*.

[3] Cross References

For forms of other affirmative defenses for use in answering FEHA complaints, see *§§ 115.100, 115.102 -115.107*

For discussion of answers to complaints, including forms, see Ch. 26, *Answers*

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PART IV. FORMS
B. Affirmative Defense Allegations for Use in Answering Fair Employment and Housing Act Complaints

11-115 California Forms of Pleading and Practice--Annotated § 115.102

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.102 Affirmative Defense Allegation for Use in Answering FEHA Complaint--Business Necessity [Gov. Code § 12940]

[1] FORM Affirmative Defense Allegation for Use in Answering FEHA Complaint--Business Necessity [Gov. Code § 12940]

AS A _____ [*specify, e.g.*, FIRST] AFFIRMATIVE DEFENSE, defendant alleges that the practice complained of by plaintiff, namely _____ [*specify practice alleged in complaint to be discriminatory*], is permissible and is not a violation of the Fair Employment and Housing Act, because an overriding legitimate business purpose exists, namely _____ [*specify business purpose*], which makes this practice necessary to the safe and efficient operation of defendant's business. This practice fulfills such a business purpose and is the only reasonable practice that could accomplish this purpose [, in that _____ (*add facts documenting necessity of practice, if desired*)].

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer to a complaint for damages and injunctive relief for employment discrimination in violation of FEHA. It is for use by a defendant who claims that a challenged employment policy or practice was justified by business necessity.

This defense applies to facially neutral employment policies or practices that are challenged under the disparate impact theory of liability. To assert the defense successfully under FEHA, a defendant must show that the policy or practice is necessary to the safe and efficient operation of the business and that no other policy with a lesser discriminatory impact would serve as well [*see 2 Cal. Code Reg. § 7286.7(b)*].

For discussion of the disparate impact theory of liability, see *§ 115.23[4]*. For discussion of the business necessity defense, see *§ 115.54[5]*.

[3] Cross References

For forms of other affirmative defenses for use in answering FEHA complaints, see *§§ 115.100, 115.101, 115.103 -115.107*

For discussion of answers to complaints, including forms, see Ch. 26, *Answers*

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11-115 California Forms of Pleading and Practice--Annotated § 115.103

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.103 Affirmative Defense Allegation for Use in Answering FEHA Complaint--Job-Relatedness [Gov. Code § 12940]

[1] FORM Affirmative Defense Allegation for Use in Answering FEHA Complaint--Job-Relatedness [Gov. Code § 12940]

AS A _____ [*specify, e.g.*, FIRST] AFFIRMATIVE DEFENSE, defendant alleges that defendant's practice of _____ [*specify testing or selection device claimed by plaintiff to have adverse impact on plaintiff*] is permissible under the Fair Employment and Housing Act because it is related to an essential function of the job in question, in that _____ [*state facts showing relationship of defendant's procedure to job*].

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer to a complaint for damages and injunctive relief for employment discrimination in violation of FEHA. It is for use by a defendant in a disparate impact case who claims that a facially neutral selection procedure or test was job-related. To establish this defense under FEHA, the defendant must show that the practice was sufficiently related to an essential function of the job in question to warrant its use [*see 2 Cal. Code Reg. §§ 7286.7(c), 7287.4(e)*].

For discussion of the disparate impact theory of liability, see *§ 115.23[4]*. For discussion of the job-relatedness defense, see *§ 115.54[5]*.

[3] Cross References

For forms of other affirmative defenses for use in answering FEHA complaints, see *§§ 115.100 -115.102, 115.104 -115.107*

For discussion of answers to complaints, including forms, see Ch. 26, *Answers*

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11-115 California Forms of Pleading and Practice--Annotated § 115.104

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.104 Affirmative Defense Allegation for Use in Answering FEHA Complaint--Employee or Applicant Cannot Perform Duties [Gov. Code § 12940(a)]

[1] FORM Affirmative Defense Allegation for Use in Answering FEHA Complaint--Employee or Applicant Cannot Perform Duties [Gov. Code § 12940(a)]

AS A _____ [*specify, e.g.*, FIRST] AFFIRMATIVE DEFENSE, defendant alleges that defendant _____ [refused to hire *or* discharged *or* reassigned] plaintiff because plaintiff, as a result of his/her _____ [physical disability *or* mental disability *or* medical condition], is unable to perform the essential duties of the position _____ [for which he/she applied *or* from which he/she was (discharged *or* transferred)], in that _____ [*specify facts showing plaintiff's inability to perform job duties*].

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer to a complaint for damages and injunctive relief for employment discrimination in violation of FEHA. It is for use in an answer to a complaint for damages and injunctive relief for physical or mental disability or medical condition discrimination in violation of FEHA [*Gov. Code § 12940(a)*]. It is for use by a defendant who claims that the plaintiff, because of the plaintiff's disability or medical condition, cannot perform the essential duties required of a particular position [*see Gov. Code §§ 12926(f), 12940(a)(1),(2)*].

For discussion of the defense that a disabled employee cannot perform his or her job, see *§ 115.54[6]*.

[3] Cross References

For forms of other affirmative defenses for use in answering FEHA complaints, see *§§ 115.101 -115.104, 115.106, 115.107*

For discussion of answers to complaints, including forms, see Ch. 26, *Answers*

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11-115 California Forms of Pleading and Practice--Annotated § 115.105

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.105 Affirmative Defense Allegation for Use in Answering FEHA Complaint--Employee or Applicant Is Danger to Health or Safety [Gov. Code § 12940(a)]

[1] FORM Affirmative Defense Allegation for Use in Answering FEHA Complaint--Employee or Applicant Is Danger to Health or Safety [Gov. Code § 12940(a)]

AS A _____ [*specify, e.g.*, FIRST] AFFIRMATIVE DEFENSE, defendant alleges that defendant _____ [refused to hire *or* discharged *or* reassigned] plaintiff because plaintiff, as a result of his/her _____ [physical disability *or* mental disability *or* medical condition], is unable to perform the essential duties of the position _____ [for which he/she applied *or* from which he/she was _____ (discharged *or* transferred)] in a manner that would not endanger plaintiff's health or safety or the health or safety of others, even with reasonable accommodation, because _____ [*specify facts showing danger to health and safety of plaintiff or others from plaintiff's performance of job duties*].

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer to a complaint for damages and injunctive relief for employment discrimination on the basis of disability or medical condition in violation of FEHA [*Gov. Code § 12940(a)*]. It is for use by a defendant who claims that the plaintiff, because of a physical or mental disability or medical condition, cannot perform the essential duties of the position for which he or she applied, or from which he or she was discharged, without endangering the health or safety of the plaintiff or others, even with reasonable accommodation [*see Gov. Code § 12940(a)(1),(2)*; *Ackerman v. Western Elec. Co. (N.D. Cal. 1986) 643 F. Supp. 836, 848-851 , aff'd, 860 F.2d 1514 (9th Cir. 1988)]* .

For discussion relating to the defense that a disabled employee cannot perform his or her job safely, see *§ 115.54[6]*.

[3] Cross References

For forms of other affirmative defenses for use in answering FEHA complaints, see *§§ 115.101 -115.104, 115.106, 115.107*

For discussion of answers to complaints, including forms, see Ch. 26, *Answers*

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11-115 California Forms of Pleading and Practice--Annotated § 115.106

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.106 Affirmative Defense Allegation for Use in Answering FEHA Complaint--Waiver of Employment Claims

[1] FORM Affirmative Defense Allegation for Use in Answering FEHA Complaint--Waiver of Employment Claims

AS A _____ [*specify, e.g.*, FIRST] AFFIRMATIVE DEFENSE, defendant alleges that plaintiff waived all employment-related claims against defendant by signing, on _____ [*date*], a written waiver extinguishing his/her right to later bring any action relating to employment against defendant.

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer to a complaint for damages and injunctive relief for employment discrimination in violation of FEHA. It is for use by a defendant who claims that the plaintiff signed a written waiver extinguishing all of the plaintiff's rights against the defendant with regard to any employment-related disputes [*see Skrbina v. Fleming Cos. (1996) 45 Cal. App. 4th 1353, 1366-1367, 53 Cal. Rptr. 2d 481]* . A general release that expressly purports to settle claims outside the scope of the workers' compensation system, for example, will ordinarily bar a FEHA claim based on the injury that gave rise to the workers' compensation claim [*Jefferson v. California Dep't of Youth Auth. (2002) 28 Cal. 4th 299, 302-311, 121 Cal. Rptr. 2d 391, 48 P.3d 423* ; *but see Claxton v. Waters (2004) 34 Cal. 4th 367, 376-377, 18 Cal. Rptr. 3d 246, 96 P.3d 496* (standard language of mandatory preprinted form used in settling workers' compensation claims--*see 8 Cal. Code Reg. § 10874*--releases only those claims that are within scope of workers' compensation system)].

For further discussion relating to the defense that an employee waived his or her right to bring a claim against the employer, see *§ 115.54[8]*.

[3] Cross References

For forms of other affirmative defenses for use in answering FEHA complaints, see *§§ 115.100-115.105*, *115.107*.

For discussion of answers to complaints, including forms, see Ch. 26, *Answers*

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11-115 California Forms of Pleading and Practice--Annotated § 115.107

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.107 Affirmative Defense Allegation for Use in Answering FEHA Complaint--Avoidable Consequences

[1] FORM Affirmative Defense Allegation for Use in Answering FEHA Complaint--Avoidable Consequences

AS A _____ [*specify, e.g.,* FIRST] AFFIRMATIVE DEFENSE, defendant alleges that at all relevant times, defendant took reasonable steps to prevent and correct workplace sexual harassment; that plaintiff unreasonably failed to use the preventive and corrective measures that defendant provided; and that reasonable use of those measures would have avoided the damages alleged by plaintiff.

[2] Use of Form

The form of affirmative defense in [1], above, is for use in an answer to a complaint for damages for hostile environment sexual harassment in violation of FEHA. It is for use to assert that all or part of the plaintiff's claimed damages could have been avoided if the plaintiff had used the procedures provided by the defendant to prevent or correct sexual harassment.

Under FEHA, an employer is liable for harassment by a nonsupervisory employee only if the employer was negligent, that is, if the employer knew or should have known of the harassing conduct and failed to take immediate and appropriate corrective action [*Gov. Code § 12940(j)(1)*]. In contrast, the employer is liable without negligence for harassment by a supervisory employee [*State Dep't of Health Servs. v. Superior Court (2003) 31 Cal. 4th 1026, 1041, 6 Cal. Rptr. 3d 441, 79 P.3d 556* ; see *Gov. Code § 12940(j)(1)*]. In either circumstance, however, the employer may assert the "avoidable consequences" defense. To establish this defense, the employer must prove (1) that the employer took reasonable steps to prevent and correct workplace sexual harassment, (2) that the employee unreasonably failed to use the preventive and corrective measures that the employer provided, and (3) that reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered [*State Dep't of Health Servs. v. Superior Court (2003) 31 Cal. 4th 1026, 1044, 6 Cal. Rptr. 3d 441, 79 P.3d 556*]. However, an employee's failure to avail himself or herself of available protections offered by the employer does not provide a complete defense. At most, it serves to reduce the damages recoverable, and only if, taking account of the employer's antiharassment policies and

procedures and its past record of acting on harassment complaints, the employee acted unreasonably in not sooner reporting the harassment to the employer [*State Dept. of Health Servs. v. Superior Court (2003) 31 Cal. 4th 1026, 1043-1044, 6 Cal. Rptr. 3d 441, 79 P.3d 556* ; *Myers v. Trendwest Resorts, Inc. (2007) 148 Cal. App. 4th 1403, 1420-1421, 56 Cal. Rptr. 3d 501]* .

For further discussion of employers' liability for sexual harassment, see *§ 115.36[5]*. For an allegation for use in a complaint for sexual harassment in violation of FEHA, see *§ 115.93*.

[3] Cross References

For forms of other affirmative defenses for use in answering FEHA complaints, see *§§ 115.100 -115.106*

For discussion of answers to complaints, including forms, see Ch. 26, Answers

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AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

[Reserved]

§§ 115.108[Reserved]

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11-115 California Forms of Pleading and Practice--Annotated § 115.120

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 115.120 Interrogatories for Employment Law Litigation [Cal. Judicial Council Form No. DISC-002]

[1] FORM Interrogatories for Employment Law Litigation [Cal. Judicial Council Form No. DISC-002]

Click here to view image.

[2] Use of Form

This form of interrogatories is an illustrative reproduction of Cal. Judicial Council Form No. DISC-002 adopted by the Judicial Council for optional use in employment litigation, including employment discrimination cases [*Code Civ. Proc. §§ 2033.710, 2033.740(a)*; *Cal. Rules of Ct., Rule 1.35*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Cross References

For discussion, a procedural checklist, and related forms, see Ch. 190, *Depositions and Discovery* .

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11-116 California Forms of Pleading and Practice--Annotated 116.syn

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

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§ 116.11 Discrimination Prohibited by Unruh Civil Rights Act

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§ 116.32 Discrimination in Granting Franchises

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§ 116.34 Discriminatory Restrictive Covenants

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§ 116.36 Disabled Persons

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[i] Applicability of Statute

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§ 116.80 Complaint for Damages and Preliminary and Permanent Injunction for Violation of Unruh Civil Rights Act--General Form [Civ. Code §§ 51, 52(a)]

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[4] Prayer

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§ 116.81 Allegations for Use in Complaints for Violation of Unruh Civil Rights Act--Refusal by Physician to Treat Child

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§ 116.90 Complaint for Damages for Sexual Harassment in Business, Service, or Professional Relationship [Civ. Code §§ 51.9, 52(b)]

[1] FORM

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§ 116.91 Cross Complaint for Declaratory Relief--Discriminatory Restriction on Real Property is Void [Civ. Code § 53]

[1] FORM

[2] Use of Form

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§ 116.100 Affirmative Defense Allegation for Use in Answering Complaints for Violation of Unruh Civil Rights Act--Action Required by Law

[1] FORM

[2] Use of Form

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§ 116.101 Affirmative Defense Allegation for Use in Answering Complaints for Violation of Unruh Civil Rights Act--Modification of Building Required

[1] FORM

[2] Use of Form

[3] Cross References

Dennis M. Farias
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(n24)Footnote *. John Houston Scott graduated from Suffield Academy, Suffield, Connecticut in 1966. In 1970 he received a Bachelor's Degree from the University of California at Santa Barbara, majoring in Religious Studies. He graduated from Golden Gate University School of Law in 1976.

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11-116 California Forms of Pleading and Practice--Annotated § 116.01

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.01 Scope of Chapter

This chapter discusses the Unruh Civil Rights Act, *Civ. Code § 51*, which prohibits discrimination by business establishments based on sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation [*see § 116.10* et seq.]. This chapter contains a complaint for damages and preliminary and permanent injunction for violation of the Unruh Civil Rights Act [*see § 116.80*].

In addition, this chapter contains the following forms of allegations for use in a complaint for violation of the Unruh Civil Rights Act:

- Refusal by physician to treat a child [*see § 116.81*].
- Exclusion or expulsion of a person from an association or club [*see § 116.82*].

This chapter also contains the following forms of affirmative defense allegations for use in answering complaints for violation of the Unruh Civil Rights Act, *Civ. Code § 51*:

- Action required by law [*see § 116.100*].
- Modification of building required [*see § 116.101*].

Further, this chapter discusses other state laws prohibiting the following kinds of discrimination by businesses:

- Discrimination in business transactions [*Civ. Code § 51.5*; *see § 116.31*].
- Discrimination in the granting of franchises [*Civ. Code § 51.8*; *see § 116.32*].
- Discriminatory restrictive covenants concerning real property [*Civ. Code § 53*; *see § 116.34*]. The

chapter contains a form of cross complaint for declaratory relief, seeking a declaration that a discriminatory restriction on real property is void, under *Civ. Code § 53* [*see § 116.91*].

- Sexual harassment in business and professional contexts [*Civ. Code § 51.9*; *see § 116.35*]. The chapter contains a form of complaint for damages for sexual harassment under *Civ. Code § 51.9* [*see § 116.90*].

- Discrimination against disabled persons by business entities [*Civ. Code §§ 54-55.1*; *Gov. Code §§ 4450-4458*; *Health & Safety Code §§ 19952-19954, 19955-19959*; *see § 116.36*].

- Discriminatory restraint of trade [*Bus. & Prof. Code § 16700 et seq.* (Cartwright Act); *see § 116.37*].

This chapter also discusses the following federal laws prohibiting discrimination in business establishments:

- Title II of the Civil Rights Act of 1964 [*42 U.S.C. §§ 2000a-2000a-6*; *see § 116.51*].

- Title III of the Americans with Disabilities Act of 1990 (ADA), as well as portions of the ADA dealing with telecommunications relay services for individuals with hearing or speech impairments [*42 U.S.C. § 12181 et seq.*; *47 U.S.C. § 225*; *see § 116.52*].

- The Air Carrier Access Act of 1986 (ACAA) [*49 U.S.C. § 41705*; *see § 116.53*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingGeneral Overview

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11-116 California Forms of Pleading and Practice--Annotated § 116.02

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.02 Cross References

- For a comprehensive procedural guide that chronologically outlines the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions* .

- For discussion and forms relating to discrimination in government-funded programs and activities, see Ch. 112, *Civil Rights: Government-Funded Programs and Activities* .

- For discussion and forms relating to actions under *42 U.S.C. § 1983*, and the other post-Civil War civil rights statutes, see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

- For discussion and forms relating to prisoners' rights, see Ch. 114, *Civil Rights: Prisoners' Rights* .

- For discussion and forms relating to employment discrimination, see Ch. 115, *Civil Rights: Employment Discrimination* .

- For discussion and forms relating to housing discrimination, see Ch. 117, *Civil Rights: Housing Discrimination* .

- For discussion and forms relating to interference with civil rights by threats, intimidation, coercion, or violence, see Ch. 117A, *Civil Rights: Interference with Civil Rights by Threats, Intimidation, Coercion, or Violence* .

- For discussion and forms of jurisdictional allegations for use in federal court, and for discussion and forms relating to removal of actions to federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

- For discussion and forms relating to injunctions, see Ch. 303, *Injunctions* .

- For discussion and forms relating to civil rights actions arising from illegal searches and seizures, see Ch. 429, *Privacy* .

- For discussion of deprivation of civil rights during an administrative investigation, see Ch. 471, *Investigations by Public Agencies* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawFederally Assisted ProgramsGeneral OverviewCivil Rights LawPrisoner RightsGeneral OverviewCivil Rights LawSection 1983 ActionsGeneral Overview

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Chapter 116 CIVIL RIGHTS: DISCRIMINATION IN BUSINESS ESTABLISHMENTS
PART I. SCOPE

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AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

[Reserved]

§§ 116.03[Reserved]

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Chapter 116 CIVIL RIGHTS: DISCRIMINATION IN BUSINESS ESTABLISHMENTS
PART II. LEGAL BACKGROUND
A. Unruh Civil Rights Act

11-116 California Forms of Pleading and Practice--Annotated § 116.10

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.10 Governing Statutes

The Unruh Civil Rights Act (the "Unruh Act" or the "Act") is set forth in *Civ. Code § 51* [*Civ. Code § 51(a)*]. *Civ. Code § 52* provides for actions for damages and other remedies for violation of the Unruh Act and certain other statutes prohibiting discrimination.

Related provisions concerning discrimination in business transactions and franchises are set forth in *Civ. Code §§ 51.5* and *51.8*, respectively. A prohibition on discriminatory restrictions relating to real property is contained in *Civ. Code § 53*. *Civ. Code §§ 54-55.1* set forth rights of persons with disabilities. Requirements regarding access to public buildings by individuals with disabilities are set forth in *Gov. Code §§ 4450-4458*. *Health & Safety Code §§ 19955-19959* set forth access requirements to public accommodations by persons with physical disabilities.

As noted, *Civ. Code § 51* is the Unruh Civil Rights Act. Nevertheless, many courts discussing related code sections refer to them as part of the Act [*see, e.g., Park Redlands Covenant Control Comm. v. Simon (1986) 181 Cal. App. 3d 87, 93, 226 Cal. Rptr. 199* (discussing *Civ. Code § 53*)]. This chapter uses the terms "Unruh Civil Rights Act," "Unruh Act," and "Act" in conformity with the technical definition, to refer to *Civ. Code § 51*. Code sections that are related to the Unruh Civil Rights Act are discussed separately, in Subpart B of this chapter [*see § 116.30*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingGeneral OverviewCivil Rights LawPublic FacilitiesGeneral OverviewCivil Rights LawPublic FacilitiesRemedies

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Chapter 116 CIVIL RIGHTS: DISCRIMINATION IN BUSINESS ESTABLISHMENTS
PART II. LEGAL BACKGROUND
A. Unruh Civil Rights Act

11-116 California Forms of Pleading and Practice--Annotated § 116.11

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.11 Discrimination Prohibited by Unruh Civil Rights Act

[1] Scope of Act

[a] Prohibited Discrimination

The Unruh Act provides that all persons within the jurisdiction of California are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever [*Civ. Code § 51(b)*]. Moreover, a violation of these rights of any individual under the federal Americans With Disabilities Act of 1990 (ADA) also constitutes a violation of the Unruh Act [*Civ. Code § 51(f)*; for discussion of Title III of the ADA, see *§ 116.52*]. For related jury instructions, see *Judicial Council of California Civil Jury Instructions, CACI No. 3020* et seq. (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

Discrimination in housing based on age is governed by *Civ. Code §§ 51.2-51.4* and *51.10-51.12* (County of Riverside only) [*see* Ch. 117, *Civil Rights: Housing Discrimination*].

[b] No Application to Employment Discrimination

The Unruh Civil Rights Act has no application to employment discrimination [*see Sprewell v. Golden State Warriors (9th Cir. 2000) 231 F.3d 520, 530* ; *Rojo v. Kliger (1990) 52 Cal. 3d 65, 77, 276 Cal. Rptr. 130, 801 P.2d 373]* . For discussion of statutes prohibiting employment discrimination, see Ch. 115, *Civil Rights: Employment Discrimination* .

[c] Interaction With Constitutional Protections

The rights of religious freedom and free speech, as guaranteed in both the federal and the California Constitutions, do not exempt a medical clinic's physicians from complying with the Unruh Civil Rights Act's prohibition against

discrimination based on a person's sexual orientation. Thus, for example, physicians employed by a clinic could not refuse fertility treatments to a lesbian on the basis of the physicians' religious beliefs regarding the particular type of treatment [*North Coast Women's Care Medical Group, Inc. v. Benitez (2008) 44 Cal. 4th 1145, 1153-1161, 81 Cal. Rptr. 3d 708*].

[2] Liberal Construction

[a] Generally

The Unruh Civil Rights Act is to be given a liberal construction with a view to effectuating its purposes [*Koire v. Metro Car Wash (1985) 40 Cal. 3d 24, 28, 219 Cal. Rptr. 133, 707 P.2d 195* ; *Jackson v. Superior Court (1994) 30 Cal. App. 4th 936, 941, 36 Cal. Rptr. 2d 207* ; *Winchell v. English (1976) 62 Cal. App. 3d 125, 128, 133 Cal. Rptr. 20]* . The primary purpose of the Act is to compel recognition of the equality of all persons in the right to the particular service offered by an organization or entity covered by the Act [*Curran v. Mount Diablo Council of the Boy Scouts (1983) 147 Cal. App. 3d 712, 733, 195 Cal. Rptr. 325 , appeal dismissed, 468 U.S. 1205 (1984) , on review after remand, 17 Cal. 4th 670, 72 Cal. Rptr. 2d 410, 952 P.2d 218 (1998)* (Boy Scouts not subject to Act for purposes of membership decisions)].

Thus, the Unruh Act prohibits all arbitrary discrimination by business establishments [*In re Cox (1970) 3 Cal. 3d 205, 216, 90 Cal. Rptr. 24, 474 P.2d 992]* . Arbitrary discrimination is not limited to exclusionary practices by businesses, but encompasses all forms of unequal treatment of patrons [*Koire v. Metro Car Wash (1985) 40 Cal. 3d 24, 29, 219 Cal. Rptr. 133, 707 P.2d 195* ; *see* discussion in [4], *below*]. The prohibition of all types of arbitrary discrimination precludes discriminatory treatment based on generalizations about the class to which a person belongs. Further, an exclusionary practice cannot be justified only on the ground that the presence of a class of persons does not accord with the nature of the organization or its facilities [*Curran v. Mount Diablo Council of the Boy Scouts (1983) 147 Cal. App. 3d 712, 733, 195 Cal. Rptr. 325 , appeal dismissed, 468 U.S. 1205 (1984) , on review after remand, 17 Cal. 4th 670, 72 Cal. Rptr. 2d 410, 952 P.2d 218 (1998)* (Boy Scouts not subject to Act for purposes of membership decisions); *but see* discussion regarding limited exception for specialized facilities in *§ 116.14[3][b]*].

[b] Persons Not Specifically Listed

In keeping with the liberal construction of the Unruh Act, the identification of particular bases of discrimination in the Act is illustrative rather than restrictive, and the Act has been construed to prohibit arbitrary discrimination against groups not specifically listed [*see* *In re Cox (1970) 3 Cal. 3d 205, 216, 90 Cal. Rptr. 24, 474 P.2d 992* ; *see also § 116.12*].

[c] Retaliation

The Unruh Act has been construed to prohibit discrimination that is an act of retaliation against an individual for having previously exercised his or her legal rights [*Vaughn v. Hugo Neu Proler Int'l (1990) 223 Cal. App. 3d 1612, 1617-1620, 273 Cal. Rptr. 426 (Div. 5, 2d Dist.)* ; *but see, contra,* *Gayer v. Polk Gulch, Inc. (1991) 231 Cal. App. 3d 515, 519-525, 282 Cal. Rptr. 556 (Div. 4, 1st Dist.)* (acknowledging different result in *Vaughn*, and attempting to make factual distinctions between the two cases)].

[d] Specific Acts of Individual

In deciding whether a violation of the Act has occurred, the overriding issue is always whether the denial of equal treatment is on an unjustified ground [*see* *Wynn v. Monterey Club (1980) 111 Cal. App. 3d 789, 797, 168 Cal. Rptr. 878]* . A person may not be discriminated against because of his or her status as a member of a particular class. Discriminatory treatment is not prohibited by the Act, however, if it is reasonably based on the individual conduct of the person [*Hubert v. Williams (1982) 184 Cal. Rptr. 161* ; *see § 116.14*].

[3] Intentional Discrimination Must Be Shown

A plaintiff seeking to establish a case under the Unruh Act must plead and prove *intentional* discrimination in violation of the Act. The disparate impact test, which permits a plaintiff to establish a prima facie case of discrimination by showing that a defendant's facially neutral policies or practices have a disproportionately adverse impact on a statutorily protected class of persons, does not apply to actions under the Unruh Act [*Harris v. Capital Growth Investors XIV (1991) 52 Cal. 3d 1142, 1170, 1175*]. Although a plaintiff may not establish discrimination in violation of the Unruh Act through use of the disparate impact test, relevant evidence of disparate impact is admissible on proper foundation and subject to the general rules of evidence [*Harris v. Capital Growth Investors XIV (1991) 52 Cal. 3d 1142* ; *see Everett v. Superior Court (2003) 104 Cal. App. 4th 388, 392-394, 128 Cal. Rptr. 2d 418* (grant of summary adjudication against plaintiff was improper because plaintiff presented statistical evidence sufficient to support inference that defendant amusement park's facially neutral line cutting policy was applied in discriminatory manner)].

However, a plaintiff who establishes a violation of the Americans With Disabilities Act need not prove intentional discrimination in order to obtain damages for disability discrimination under the Unruh Act in violation of *Civil Code § 51(f)* [*Munson v. Del Taco, Inc. (2009) 46 Cal. 4th 661, 667-678, 94 Cal. Rptr. 3d 685, 208 P.3d 623* , *approving Lentini v. California Center for the Arts (9th Cir. 2004) 370 F.3d 837, 846-847* , and *disapproving Gunther v. Lin (2006) 144 Cal. App. 4th 223, 50 Cal. Rptr. 3d 317 and Coronado v. Cobblestone Village Community Rentals, L.P. (2008) 163 Cal. App. 4th 831, 77 Cal. Rptr. 3d 883* , insofar as they hold to the contrary].

[4] Differential Treatment

[a] Broad Prohibitions

The Unruh Civil Rights Act prohibits all forms of stereotypical discrimination. It mandates equal provision of advantages, privileges, and services in business establishments [*Koire v. Metro Car Wash (1985) 40 Cal. 3d 24, 36, 38, 219 Cal. Rptr. 133, 707 P.2d 195]* . Thus, the protection of the Act is not limited to discriminatory exclusion, but encompasses all forms of differential treatment, including the following:

- Enforcement of a dress code for men but not for women [*see Hales v. Ojai Valley Inn & County Club (1977) 73 Cal. App. 3d 25, 28-29, 140 Cal. Rptr. 555]* .

- Charging women a lesser amount than men for admission or services [*see Koire v. Metro Car Wash (1985) 40 Cal. 3d 24, 36, 219 Cal. Rptr. 133, 707 P.2d 195* ; *but see Starkman v. Mann Theatres Corp. (1991) 227 Cal. App. 3d 1491, 1495-1501, 278 Cal. Rptr. 543* (age-based discounts not prohibited)].

- Seating only couples consisting of one male and one female in more desirable, semiprivate restaurant booths [*see Rolon v. Kulwitzky (1984) 153 Cal. App. 3d 289, 291-292, 200 Cal. Rptr. 217]* .

On the other hand, offering discount admission prices to "baby-boomers" to attend a musical about that generation does not involve an arbitrary class-based generalization protected by the Unruh Act [*Pizarro v. Lamb's Players Theatre (2006) 135 Cal. App. 4th 1171, 1174-1176, 37 Cal. Rptr. 3d 859]* .

[b] Distinctions Based on Economic Criteria

Although stereotypical discrimination is prohibited, distinctions made on the basis of economic criteria are not within the scope of the Unruh Act. In accordance with its legitimate interests, a business may justify such limitations on consumer access to its public accommodations so long as the limitations are applied uniformly and neutrally to all persons regardless of their personal characteristics [*Harris v. Capital Growth Investors XIV (1991) 52 Cal. 3d 1142,*

1161-1162, 1169]. For example, a landlord's policy of requiring that a prospective tenant have a gross monthly income of at least three times the rent was not arbitrary discrimination prohibited by the Act, even though it excluded some persons, mainly women, who were able to pay rent. Businesses, particularly landlords who may lose a substantial amount of money while pursuing eviction proceedings against a defaulting tenant, have an essential interest in obtaining full and timely payment for the goods and services they provide [*Harris v. Capital Growth Investors XIV (1991) 52 Cal. 3d 1142*].

Another court held that there was no violation in a case involving a commercial landlord's refusal to rent suites in an office building to anyone other than doctors. The court discussed the cases that have held that the Unruh Act prohibits "all arbitrary discrimination by business establishments," and concluded that in fact those cases prohibit only arbitrary discrimination based on personal, as opposed to economic, characteristics [*Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 539, 30 Cal. Rptr. 2d 706]* . The court found that the Act was not intended to prohibit legitimate business decisions, such as those of an operator of a commercial building who wishes to limit tenants to specific categories. As long as discrimination based on profession is not a stratagem designed to disguise discrimination based on personal characteristics, it is not prohibited under the Act [*Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 539, 30 Cal. Rptr. 2d 706]* .

[5] Association With Member of Group

The Unruh Act proscribes not only discrimination against an individual based directly on his or her status as a member of a particular group, but also discrimination against an individual for associating with a member of a particular group [*see* *Rotary Club of Duarte v. Bd. of Dirs. (1986) 178 Cal. App. 3d 1035, 1061, 224 Cal. Rptr. 213 , aff'd sub nom., Bd. of Dirs. of Rotary Int'l v. Rotary Club (1987) 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474* (association of local club with women); *Hubert v. Williams (1982) 184 Cal. Rptr. 161* (association with persons of homosexual orientation); *Winchell v. English (1976) 62 Cal. App. 3d 125, 129, 133 Cal. Rptr. 20* (association with African Americans); *see also In re Cox (1970) 3 Cal. 3d 205, 216, 90 Cal. Rptr. 24, 474 P.2d 992* (association with young male with long hair and unconventional dress)].

[6] Plaintiff Need Not Be Customer

A plaintiff need not necessarily be a customer of a business establishment to bring an action against that establishment for discrimination in violation of the Unruh Act [*see* *Jackson v. Superior Court (1994) 30 Cal. App. 4th 936, 940-942, 36 Cal. Rptr. 2d 207]* .

In one case, for example, the plaintiff, an African-American investment advisor, had recommended that two elderly clients invest in a particular mutual fund and had accompanied them to the defendant bank to facilitate the transaction. An employee of the bank, allegedly because of her prejudice against African Americans, told the plaintiff's clients that the plaintiff was trying to "pull a scam" on them and urged them not to undertake the transaction. As a result of the employee's statements, the clients left the bank and did not go through with the transaction. The court of appeal held that the plaintiff stated a cause of action for violation of the Unruh Act and rejected the defendant's argument that the plaintiff could not sue under the Act because he was not seeking the bank's services as a customer of the bank at the time of the acts alleged in the complaint. The court noted that the bank accommodated the public in many ways peripheral to its main functions of providing banking services, including allowing persons to accompany its customers and help them pursue their banking business. The court held that when the bank refuses an African American this courtesy because of his or her race, the bank is denying that person the full and equal accommodations, privileges, or services of the bank, inviolation of the Act [*Jackson v. Superior Court (1994) 30 Cal. App. 4th 936, 940-941, 36 Cal. Rptr. 2d 207]* .

However, a person must tender the purchase price for a business's services or products to have standing to sue it under the Unruh Civil Rights Act for alleged discriminatory practices relating to it [*Surrey v. TrueBeginnings, LLC (2008)*

168 Cal. App. 4th 414, 417-420, 85 Cal. Rptr. 3d 443] .

[7] Speech May Be Actionable

The Unruh Act may be violated by words alone. When the speech is meant to, and does, offend the law, although utterance of the words themselves may be constitutionally protected, the speaker will be subject to legal consequences [*Long v. Valentino (1989) 216 Cal. App. 3d 1287, 1297, 265 Cal. Rptr. 96* , *cert. denied, 498 U.S. 855 (1990)* ; *see Cal. Const., art. I, § 2(a)* (responsibility for abuse is part of right of freedom of speech)].

Words that amount to conduct designed to accomplish a direct violation of the law and that are not primarily a means of conveying an idea or point of view may be a violation of the Act [*Long v. Valentino (1989) 216 Cal. App. 3d 1287, 1297, 265 Cal. Rptr. 96* , *cert. denied, 498 U.S. 855 (1990)* (police officer was told he must leave assembly because he was police officer)]. However, speech that serves as mere incitement of another to commit a civil rights violation is not actionable under the Act [*Long v. Valentino (1989) 216 Cal. App. 3d 1287, 1293-1295, 265 Cal. Rptr. 96* , *cert. denied, 498 U.S. 855 (1990)]* .

[8] Single Instance of Discrimination Actionable

The Unruh Act prohibitions are not limited to discriminatory acts that are routinely committed, or to discriminatory acts that are a matter of policy. Although plaintiff's burden of persuasion may be easier if he or she can provide evidence that the defendant routinely discriminates against the class to which plaintiff belongs, liability under the Act may be established by pleading and proving a single violation [*see* *Jackson v. Superior Court (1994) 30 Cal. App. 4th 936, 942, 36 Cal. Rptr. 2d 207]* .

[9] Demand for Equal Treatment

In order to recover under the Unruh Act, plaintiffs who are discriminated against when they present themselves at a business establishment and pay the price of admission need not demand equal treatment and be refused [*Angelucci v. Century Supper Club (2007) 41 Cal. 4th 160, 168, 59 Cal. Rptr. 3d 142, 158 P.3d 718]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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11-116 California Forms of Pleading and Practice--Annotated § 116.12

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.12 Groups Protected From Discrimination

[1] Groups Specified in Act

The Unruh Act specifically prohibits discrimination on the basis of sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation [*Civ. Code § 51(b)*].

Moreover, because the identification of those particular bases of discrimination is illustrative rather than restrictive, any arbitrary discrimination against members of other groups is also prohibited [*see In re Cox (1970) 3 Cal. 3d 205, 216, 90 Cal. Rptr. 24, 474 P.2d 992* ; *but see Harris v. Capital Growth Investors XIV (1991) 52 Cal. 3d 1142, 1159-1161, 1175* (cautionary language suggesting that Court's preference is to limit scope of Act to groups specified in *Civ. Code § 51*); *see also § 116.12[4]*].

[2] Children, Families With Children, and Students

Children, and families with children, are protected classes shielded from discriminatory treatment by the Unruh Act [*Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 736-740, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858]* .

Children may not be arbitrarily excluded from most businesses. Thus, an ordinance allowing general merchants such as supermarkets, drug stores, and bookstores to exclude unaccompanied minors from their premises in an effort to shield them from the display of certain sexually explicit material violates the Unruh Act. Minors, whether or not accompanied by parents, cannot be denied access to retail establishments that sell a wide variety of literature or the necessities of life, simply because such establishments also sell some materials sought to be restricted [*American Booksellers Assn., Inc. v. Superior Court (1982) 129 Cal. App. 3d 197, 205, 181 Cal. Rptr. 33]* .

Similarly, differential treatment of students by fast food outlets and convenience stores violates the Act. Thus, excluding students from the premises, limiting the number of student patrons, restricting students to certain hours or

portions of the premises, or levying a minimum charge on student purchases are all unlawful discriminatory practices against students [*see Koire v. Metro Car Wash (1985) 40 Cal. 3d 24, 29-30, 219 Cal. Rptr. 133, 707 P.2d 195 , approving 59 Ops. Cal. Att'y Gen. 70 (1976)* , which interpreted Act to prohibit arbitrary discrimination against students)].

[3] Homosexuals

The Unruh Act prohibits arbitrary discrimination against homosexuals [*Curran v. Mount Diablo Council of the Boy Scouts (1983) 147 Cal. App. 3d 712, 734, 195 Cal. Rptr. 325 , appeal dismissed, 468 U.S. 1205 (1984) , on review after remand, 17 Cal. 4th 670, 72 Cal. Rptr. 2d 410, 952 P.2d 218 (1998)* ; *Hubert v. Williams (1982) 184 Cal. Rptr. 161* ; *see Rolon v. Kulwitzky (1984) 153 Cal. App. 3d 289, 292, 200 Cal. Rptr. 217* (reversing trial court's denial of preliminary injunction enforcing municipal ordinance prohibiting business discrimination on basis of sexual orientation)].

Note that some courts have treated what appears to be discrimination against homosexuals as a distinction drawn on the basis of marital status, and have denied relief under the Unruh Act on this basis [*see, e.g.*, *Beaty v. Truck Ins. Exchange (1992) 6 Cal. App. 4th 1455, 1461, 8 Cal. Rptr. 2d 593* (insurer's refusal to issue joint umbrella policy, reserved for married couples, to unmarried homosexual couple did not state claim for sexual orientation discrimination under Act, since homosexual couple was treated differently than married couple because they were unmarried rather than because they were homosexual); *but see Smith v. Fair Employment & Housing Com. (1996) 12 Cal. 4th 1143, 1210 n.7, 51 Cal. Rptr. 2d 700, 913 P.2d 909* (Kennard, J., concurring and dissenting) (acknowledging that homosexual couples' unmarried status is not matter of voluntary choice)].

The Unruh Civil Rights Act was amended by the Civil Rights Act of 2005 to specifically include both sexual orientation and marital status as prohibited bases of discrimination [*Civ. Code § 51(b)*; *see* 2005 Stats., ch. 420, § 2].

[4] Additional Groups

The Unruh Act has been construed to apply to several other smaller and more discrete groups not mentioned in the Act. Thus, the Act has been interpreted to prohibit arbitrary discriminatory treatment against any of the following:

- Persons reputed to have an immoral character [*see Orloff v. Los Angeles Turf Club (1951) 36 Cal. 2d 734, 740-741, 227 P.2d 449* (decided under predecessor to *Civ. Code § 51*)].

- Police officers [*see Long v. Valentino (1989) 216 Cal. App. 3d 1287, 1298, 265 Cal. Rptr. 96 , cert. denied, 498 U.S. 855 (1990)]* .

- Persons who receive, or are eligible to receive, public assistance benefits *[59 Ops. Cal. Att'y Gen. 223, 225 (1976)]* .

- Persons of a particular occupation or marital status *[58 Ops. Cal. Att'y Gen. 608, 613 (1975)]* .

- Persons with children, based on the number of children *[58 Ops. Cal. Att'y Gen. 608, 613 (1975)]* .

This list of groups is not necessarily exclusive, but may continue to expand as the Unruh Act is interpreted in additional situations.

Domestic partners registered under the California Domestic Partner Rights and Responsibilities Act of 2003 [*Fam. Code § 297 et seq.*], the current version of the domestic partnership law, are the equivalent of spouses for the purposes of the Unruh Act. A business that extends benefits to spouses it denies to registered domestic partners engages in

impermissible marital status discrimination. On the other hand, while the Unruh Act may also protect the rights of other unmarried couples and unmarried individuals to equal access to public accommodations under some circumstances, distinctions drawn by businesses between married couples and those unmarried couples and individuals that are supported by legitimate business reasons do not constitute impermissible marital status discrimination under the Unruh Act [*Koebke v. Bernardo Heights Country Club (2005) 36 Cal. 4th 824, 836-855, 31 Cal. Rptr. 3d 565, 115 P.3d 1212* (before effective date of Domestic Partner Act, country club's policy of denying same benefits to domestic partners granted to married couples was supported by legitimate business interests, and policy did not facially violate Unruh Act's proscription against sexual orientation discrimination; however, under facts disclosed by record, domestic partners may have had viable Unruh Act claim for discriminatory application of club's policy)]. However, a court of appeal, citing cautionary language in *Harris v. Capital Growth Investors XIV (1991) 52 Cal. 3d 1142, 1159-1161, 1175,* , has stated that future expansion of categories protected by the Unruh Act should be carefully weighed to ensure a result consistent with legislative intent [*see King v. Hofer (1996) 42 Cal. App. 4th 678, 681-684, 49 Cal Rptr. 2d 719* (Act does not afford protection for nonsmokers because Act not intended to address health and safety issues; nonsmoking is not the type of immutable characteristic usually protected by the Act; business owners might have legitimate business needs to discriminate against nonsmokers); *see also Beaty v. Truck Ins. Exchange (1992) 6 Cal. App. 4th 1455, 1461-1465, 8 Cal. Rptr. 2d 593* (insurer's refusal to issue joint umbrella policy to unmarried homosexual couple, as discrimination on basis of marital status, could be justified by strong state policy favoring marriage, its applicability alike to all persons, and its nonarbitrary nature)].

Another court of appeal found that courts have been reluctant to extend the scope of protection under the Unruh Act since the decision of the California Supreme Court in *Harris* [*see Brown v. Smith (1997) 55 Cal. App. 4th 767, 787, 64 Cal. Rptr. 2d 301]* . In *Brown*, the court found that the Unruh Act did not protect against sexual harassment [*Brown v. Smith (1997) 55 Cal. App. 4th 767, 786-788, 64 Cal. Rptr. 2d 301]* . However, in 1994, after the date of the events at issue in *Brown*, the Legislature enacted *Civ. Code § 51.9*, prohibiting sexual harassment in business, service, and professional relationships. For discussion of *Civ. Code § 51.9*, see *§ 116.35*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.13 Entities Prohibited From Discriminating

[1] "Business Establishments"

[a] Broad Construction

The Unruh Act prohibits discrimination in all business establishments of every kind whatsoever. Its use, in *Civ. Code § 51(b)*, of the words "all" and "of every kind whatsoever" in referring to business establishments leaves no doubt that the term "business establishments" should be interpreted in the broadest sense reasonably possible [*Isbister v. Boys' Club of Santa Cruz (1985) 40 Cal. 3d 72, 78, 219 Cal. Rptr. 150, 707 P.2d 212* ; *Burks v. Poppy Constr. Co. (1962) 57 Cal. 2d 463, 468, 20 Cal. Rptr. 609, 370 P.2d 313* ; *see Curran v. Mount Diablo Council of the Boy Scouts (1998) 17 Cal. 4th 670, 696, 72 Cal. Rptr. 2d 410, 952 P.2d 218* ; *Warfield v. Peninsula Golf & Country Club (1995) 10 Cal. 4th 594, 609-610, 42 Cal. Rptr. 2d 50, 896 P.2d 776]* .

The word "business" embraces everything about which one can be employed, and it is often synonymous with "calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain" [*Burks v. Poppy Constr. Co. (1962) 57 Cal. 2d 463, 468, 20 Cal. Rptr. 609, 370 P.2d 313]* .

The word "establishment," as broadly defined, includes not only a fixed location, such as the place where one is permanently fixed for residence or business, but also a permanent commercial force or organization or a permanent settled position as in life or business [*Burks v. Poppy Constr. Co. (1962) 57 Cal. 2d 463, 468-469, 20 Cal. Rptr. 609, 370 P.2d 313]* . Thus, "business establishment" includes rental housing [*Hubert v. Williams (1982) 184 Cal. Rptr. 161]* , and has been held to encompass a couple, not otherwise engaged in the real estate business, who rented out their triplex units for gain, even though they maintained no office and employed no persons to assist them in either the rental or maintenance of the property [*Swann v. Burkett (1962) 209 Cal. App. 2d 685, 694-695, 26 Cal. Rptr. 286]* .

Consistent with its broad interpretation, the term "business establishment" includes all commercial and noncommercial entities open to and serving the public [*see Curran v. Mount Diablo Council of the Boy Scouts (1983) 147 Cal. App. 3d*

712, 732-733, 195 Cal. Rptr. 325 , appeal dismissed, 468 U.S. 1205 (1984) , on review after remand, 17 Cal. 4th 670, 696-700, 72 Cal. Rptr. 2d 410, 952 P.2d 218 (1998) (Boy Scouts not a "business establishment" under Act for purposes of membership decisions, but is for purposes of business transactions with nonmembers)].

An organization's status as a nonprofit organization does not preclude it from being a business establishment within the meaning of the Unruh Act [*Rotary Club of Duarte v. Bd. of Dirs. (1986) 178 Cal. App. 3d 1035, 1051, 224 Cal. Rptr. 213 , aff'd sub nom. Bd. of Dirs. of Rotary Int'l v. Rotary Club (1987) 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474]* . Thus, "business establishment" has been held to include all of the following:

- A Rotary Club [*see Rotary Club of Duarte v. Bd. of Dirs. (1986) 178 Cal. App. 3d 1035, 1051, 224 Cal. Rptr. 213 , aff'd sub nom. Bd. of Dirs. of Rotary Int'l v. Rotary Club (1987) 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474]* .

- A boys' club [*see Isbister v. Boys' Club of Santa Cruz (1985) 40 Cal. 3d 72, 88-91, 219 Cal. Rptr. 150, 707 P.2d 212* (cautioning that finding was based on circumstances surrounding that particular club)].

- A country club [*see Warfield v. Peninsula Golf & Country Club (1995) 10 Cal. 4th 594, 621-623, 42 Cal. Rptr. 2d 50, 896 P.2d 776]* .

- Boy Scouts, with respect to transactions between the Boy Scouts and nonmembers at Boy Scouts retail stores and elsewhere [*see Curran v. Mount Diablo Council of the Boy Scouts (1998) 17 Cal. 4th 670, 696-700, 72 Cal. Rptr. 2d 410, 952 P.2d 218]* .

For further discussion of the application of the Unruh Act to associations and clubs, see [2], *below*.

For a form of allegation for use in a complaint alleging violation of the Unruh Act against a physician for refusal to treat a child, see *§ 116.81*. For a form of allegation for use in a complaint alleging violation of the Act by exclusion or expulsion from an association or club, see *§ 116.82*.

[b] Reasonable Construction

Although the term "business establishment" is construed in the broadest sense reasonably possible, the Unruh Act does not apply to organizations that are "truly private" [*Warfield v. Peninsula Golf & Country Club (1995) 10 Cal. 4th 594, 615-618, 42 Cal. Rptr. 2d 50, 896 P.2d 776* ; *Hart v. Cult Awareness Network (1993) 13 Cal. App. 4th 777, 786-793, 16 Cal. Rptr. 2d 705]* . Generally, when an organization is truly private, forcing it to adhere to the Unruh Act would impermissibly interfere with the *First Amendment* rights of its members [*see Hart v. Cult Awareness Network (1993) 13 Cal. App. 4th 777, 786-787, 16 Cal. Rptr. 2d 705]* .

Courts have a duty to construe the term "business establishment" in the broadest sense *reasonably* possible [*Hart v. Cult Awareness Network (1993) 13 Cal. App. 4th 777, 792, 16 Cal. Rptr. 2d 705* ; *see Curran v. Mount Diablo Council of the Boy Scouts (1998) 17 Cal. 4th 670, 697, 72 Cal. Rptr. 2d 410, 952 P.2d 218* ; *Randall v. Orange County Council, Boy Scouts of America (1998) 17 Cal. 4th 736, 744, 72 Cal. Rptr. 2d 453, 952 P.2d 261* (Boy Scouts could not reasonably be found to constitute business establishment for purposes of subjecting membership decisions to Act)]. As part of this duty, courts must avoid constitutional infirmity. Accordingly, when treating a group as a business establishment and subject to the Act would interfere with the members' *First Amendment* rights, or lead to some other constitutional infringement, the courts should not so treat the group [*Hart v. Cult Awareness Network (1993) 13 Cal. App. 4th 777, 792-793, 16 Cal. Rptr. 2d 705]* .

However, the mere fact that an organization calls itself "private" does not necessarily preclude it from being a "business

establishment" for purposes of the Unruh Act [*see, e.g., Warfield v. Peninsula Golf & Country Club (1995) 10 Cal. 4th 594, 618-619, 42 Cal. Rptr. 2d 50, 896 P.2d 776* ("private" country club that regularly transacted business with nonmembers on its premises was "business establishment" subject to Act)].

[2] Associations and Clubs

[a] Distinction Between Public and Private Associations

The Unruh Act will not be construed to apply to a "truly private" social club or organization [*see Warfield v. Peninsula Golf & Country Club (1995) 10 Cal. 4th 594, 615-618, 42 Cal. Rptr. 2d 50, 896 P.2d 776]* .

Put another way, the Act will not be construed to apply to an organization if the application of the Act would infringe on the members' constitutional right to freedom of association. The Constitution protects two separate types of associational interests: intimate and expressive. The intimate associational interest protects the freedom to form and preserve certain kinds of personal relationships or associations as a fundamental element of personal liberty. The expressive associational interest protects the right to associate for the purpose of engaging in those activities protected by *U.S. Const., amend. I*: speech, assembly, petition for redress of grievances, and the exercise of religion [*Roberts v. United States Jaycees (1984) 468 U.S. 609, 617-618, 104 S. Ct. 3244, 82 L. Ed. 2d 462* (construing *Minnesota Human Rights Act); Warfield v. Peninsula Golf & Country Club (1995) 10 Cal. 4th 594, 624-626, 42 Cal. Rptr. 2d 50, 896 P.2d 776* ; *see U.S. Const., amends. I, XIV*; *Cal. Const., art. I, § 3*].

For purposes of determining whether or not an association is in fact private, and constitutionally protected, rendering the proscriptions of the Unruh Act inapplicable, there is no single test; rather, several criteria are considered. The factors considered include purpose, selectivity of members, and relationship among members. Size, membership policies, and other characteristics are also considered if pertinent in a particular case [*Roberts v. United States Jaycees (1984) 468 U.S. 609, 620, 104 S. Ct. 3244, 82 L. Ed. 2d 462* (construing Minnesota Human Rights Act)].

The fact that an organization is not selective in its admission policies, and affords membership to a large segment of the public, is not itself sufficient to demonstrate that the organization reasonably can be characterized as the functional equivalent of a traditional place of public accommodation or amusement so as to make the organization's membership decisions subject to the Unruh Act [*Curran v. Mount Diablo Council of the Boy Scouts (1998) 17 Cal. 4th 670, 697-698, 72 Cal. Rptr. 2d 410, 952 P.2d 218]* . In *Curran v. Mount Diablo Council of the Boy Scouts*, the California Supreme Court found that because the Boy Scouts is an expressive social organization whose primary function is the inculcation of a specific set of values in its youth members, its small social group structure and activities are not comparable to those of a traditional place of public accommodation or amusement, and its recreational facilities and activities are complementary to that primary purpose, the Boy Scouts (at any level of the organizational hierarchy) could not be considered a "business establishment" within the meaning of the Act, and were thus not prohibited by the Act from excluding homosexuals from membership [*Curran v. Mount Diablo Council of the Boy Scouts (1998) 17 Cal. 4th 670, 696-700, 72 Cal. Rptr. 2d 410, 952 P.2d 218* ; *see also Randall v. Orange County Council, Boy Scouts of America (1998) 17 Cal. 4th 736, 744, 72 Cal. Rptr. 2d 453, 952 P.2d 261* (Boy Scouts may exclude atheists from membership without violating Act)]. Although the Boy Scouts engages in business transactions with nonmembers on a regular basis through the operation of retail shops and licensing of the use of its insignia, those activities are distinct from the core functions of the Boy Scouts and do not involve the sale of access to the basic activities or services offered by the organization, such as pack or troop meetings, overnight hikes, the national jamboree, or any portion of the extended training and educational process [*Curran v. Mount Diablo Council of the Boy Scouts (1998) 17 Cal. 4th 670, 699-700, 72 Cal. Rptr. 2d 410, 952 P.2d 218* (Unruh Act would apply and prohibit discrimination in business transactions with nonmembers in retail stores and elsewhere)].

The relationship among members may also be decisive. Relationships that are continuous, personal, and social are indicative of a private association. When the turnover in membership is high or the relationships are based on

commercial interests, the organization is not truly private [*Rotary Club of Duarte v. Bd. of Dirs. (1986) 178 Cal. App. 3d 1035, 1059, 224 Cal. Rptr. 213 , aff'd sub nom. Bd. of Dirs. of Rotary Int'l v. Rotary Club (1987) 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474]* .

Furthermore, the fact that a club or association regularly allows nonmembers access to its facilities, or transacts business with nonmembers on its premises, may undercut a claim that the club or association is "private" for purposes of the constitutional right of association [*see, e.g., Warfield v. Peninsula Golf & Country Club (1995) 10 Cal. 4th 594, 629, 42 Cal. Rptr. 2d 50, 896 P.2d 776]* .

For a form of allegations for use in a complaint alleging violation of the Unruh Act based on exclusion or expulsion of a person from an association or a club, see *§ 116.82*.

For further discussion and forms relating to the constitutional right to freedom of association and membership policies of associations, see Ch. 61, *Associations and Clubs* .

[b] Businesslike Attributes

If an association is organized for a businesslike purpose, it is not viewed as a private association for purposes of the Unruh Act. Thus, when an association is formed for the purpose of performing acts typically performed by a business, it is a business establishment within the meaning of the Act [*see O'Connor v. Village Green Owners Ass'n (1983) 33 Cal. 3d 790, 796, 191 Cal. Rptr. 320, 662 P.2d 427* (condominium homeowners' association)].

Similarly, when a group's revenues are dependent on its conducting fairly sophisticated business transactions, such as organizing conferences, granting licenses and collecting royalties, publishing magazines and other international publications, and maintaining a large central office, it is viewed as having sufficient businesslike attributes to render it a business establishment within the meaning of the Act [*Rotary Club of Duarte v. Bd. of Dirs. (1986) 178 Cal. App. 3d 1035, 1051-1055, 224 Cal. Rptr. 213 , aff'd sub nom. Bd. of Dirs. of Rotary Int'l v. Rotary Club (1987) 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474]* .

Whether or not substantial business benefits accrue to members, regardless of whether they are of a primary or secondary concern, is also considered in deciding whether an association is private and not bound by the Act [*Rotary Club of Duarte v. Bd. of Dirs. (1986) 178 Cal. App. 3d 1035, 1055, 224 Cal. Rptr. 213 , aff'd sub nom. Bd. of Dirs. of Rotary Int'l v. Rotary Club (1987) 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474]* . For example, when members receive a variety of goods, privileges, and services as a result of their membership in a club, such as receipt of various publications, the right to display the club emblem, and the right to attend business conferences at which the member learns helpful management techniques and has the opportunity to discuss business problems with experts in the field, those benefits are business benefits [*Rotary Club of Duarte v. Bd. of Dirs. (1986) 178 Cal. App. 3d 1035, 1059, 224 Cal. Rptr. 213 , aff'd sub nom. Bd. of Dirs. of Rotary Int'l v. Rotary Club (1987) 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474]* . Additionally, when business concerns are motivating factors for joining a club, as occurs when membership is limited to business and professional leaders in the community, thereby providing a forum that encourages business relations to grow and enhances the commercial advantages of its members, the association is not private [*Rotary Club of Duarte v. Bd. of Dirs. (1986) 178 Cal. App. 3d 1035, 1058, 224 Cal. Rptr. 213 , aff'd sub nom. Bd. of Dirs. of Rotary Int'l v. Rotary Club (1987) 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474]* .

Even if an association or club is not primarily organized for a business purpose, it may be treated as a "business establishment" subject to the Unruh Act if it regularly conducts business transactions on its premises with persons who are not members of the association or club [*Warfield v. Peninsula Golf & Country Club (1995) 10 Cal. 4th 594, 621-623, 42 Cal. Rptr. 2d 50, 896 P.2d 776]* .

[c] Examples of Public Associations

In *Isbister v. Boys' Club of Santa Cruz (1985) 40 Cal. 3d 72, 219 Cal. Rptr. 150, 707 P.2d 212* , the California Supreme Court found that a boys' club was a business establishment within the scope of the Unruh Act. The Court said the club was a place of public accommodation or amusement because its primary function was to operate a permanent physical plant offering established recreational facilities that patrons could use at their convenience during the hours the club was open. Moreover, the Court found the club was classically public in its operation. It opened its doors to the entire male youthful population without any attempt to select or restrict membership or access on the basis of personal, cultural, or religious affinity, as a private club might. Boys who joined had no power in club affairs and no control over who else could become members, and paid a small fee for the annually renewed membership. The club provided an atmosphere characterizing a public accommodation; relations with and among its members were of a kind that takes place more or less in public view and were of a relatively nongratuitous, noncontinuous, nonpersonal, and nonsocial sort [*Isbister v. Boys' Club of Santa Cruz (1985) 40 Cal. 3d 72, 81, 219 Cal. Rptr. 150, 707 P.2d 212]* .

The court in *Isbister* cautioned that its holding was specifically limited to that particular club, and arose out of its public nature, offering basic recreational facilities to a broad segment of the population (any local boys), and excluding only a particular group (girls) expressly recognized by the Act as a traditional target of discrimination [*Isbister v. Boys' Club of Santa Cruz (1985) 40 Cal. 3d 72, 84, 219 Cal. Rptr. 150, 707 P.2d 212]* .

In another case, a plaintiff challenged a "private" country club's practice of excluding women from proprietary membership in the club. The Supreme Court held that the defendant club was a "business establishment" within the meaning of the Unruh Act, because it regularly conducted business transactions on its premises with persons who were not members of the club [*Warfield v. Peninsula Golf & Country Club (1995) 10 Cal. 4th 594, 621-623, 42 Cal. Rptr. 2d 50, 896 P.2d 776]* . The court in *Warfield* observed that the defendant club (1) regularly permitted (on the average of once a week) nonmembers to use its facilities for a fee in connection with sponsored events; (2) obtained income on a regular basis from fees charged for the use of its facilities, and from the purchase of food and beverages on its premises, by nonmember "invited guests;" and (3) received a significant, albeit indirect, financial benefit from regular business transactions with nonmembers conducted at the club's golf and tennis pro shops located on the premises [*see* *Warfield v. Peninsula Golf & Country Club (1995) 10 Cal. 4th 594, 621-622, 42 Cal. Rptr. 2d 50, 896 P.2d 776]* .

[d] Examples of Private Associations

An organization comprised of former cult members, and selected others, devoted to informing the public about the harmful effects of mind control and unethical practices employed by cults was held to be private [*see* *Hart v. Cult Awareness Network (1993) 13 Cal. App. 4th 777, 786-793, 16 Cal. Rptr. 2d 705]* . The pertinent characteristics of the organization in *Hart* indicated that the *First Amendment* rights of its members would be infringed if the Unruh Act were applied to require it to accept as members anyone who applied. The organization at issue in *Hart* was small and had a highly restricted and carefully selected membership. The members had shared opinions, thoughts, and concerns regarding groups it considered to be cults. The organization's purpose was narrow. It did not offer any goods and services to the general public; instead, it offered counsel and support to its very selective membership. Finally, forcing the organization to open membership to groups such as Scientologists would seriously impede its ability to engage in protected activities and to disseminate its preferred views [*Hart v. Cult Awareness Network (1993) 13 Cal. App. 4th 777, 787-793, 16 Cal. Rptr. 2d 705* (membership was sought by members of Church of Scientology, which met group's definition of "cult")].

The Boy Scouts is a private association for purposes of membership decisions and thus not subject to the Unruh Act because (1) it is an expressive social organization whose primary function is the inculcation of a specific set of values in its youth members, (2) its small social group structure and activities are not comparable to those of a traditional place of public accommodation or amusement, and (3) its recreational facilities and activities are complementary to that primary purpose [*Curran v. Mount Diablo Council of the Boy Scouts (1998) 17 Cal. 4th 670, 696-700, 72 Cal. Rptr. 2d 410, 952 P.2d 218* (Boy Scouts may exclude homosexuals from membership without violating Act); *see also* *Randall v.*

Orange County Council, Boy Scouts of America (1998) 17 Cal. 4th 736, 744, 72 Cal. Rptr. 2d 453, 952 P.2d 261 (Boy Scouts may exclude atheists without violating Act)].

[3] Legislative Enactments By Governmental Bodies

Because the Unruh Act, by its terms, bars discrimination only by business establishments, it does not apply to legislative enactments by governmental bodies [*Burnett v. San Francisco Police Department (1995) 36 Cal. App. 4th 1177, 1191-1192* (Unruh Act inapplicable to city ordinance barring persons under 21 years from after-hours clubs)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingGeneral OverviewCivil Rights LawPublic FacilitiesGeneral Overview

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Chapter 116 CIVIL RIGHTS: DISCRIMINATION IN BUSINESS ESTABLISHMENTS
PART II. LEGAL BACKGROUND
A. Unruh Civil Rights Act

11-116 California Forms of Pleading and Practice--Annotated § 116.14

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§ 116.14 Defenses

[1] Limitations on Construction of Act

The Unruh Act will not be construed to confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation [*Civ. Code § 51(c)*; *see Beaty v. Truck Ins. Exchange (1992) 6 Cal. App. 4th 1455, 1463, 8 Cal. Rptr. 2d 593* (Act not intended to create right of insurance so long as insurer's policy is applicable alike to all persons)].

For a form of an affirmative defense allegation to a complaint under the Unruh Act based on the defense that the defendant's action is one required by law, see *§ 116.100*.

What the Act proscribes is any form of arbitrary discrimination. Certain types of discrimination have been denominated reasonable and, therefore, not arbitrary. Thus, a business establishment need not tolerate customers who damage property, injure others, or otherwise disrupt business [*Koire v. Metro Car Wash (1985) 40 Cal. 3d 24, 30, 219 Cal. Rptr. 133, 707 P.2d 195]* . Additionally, a business establishment may promulgate reasonable deportment rules that are rationally related to the services performed and the facilities provided [*In re Cox (1970) 3 Cal. 3d 205, 217, 90 Cal. Rptr. 24, 474 P.2d 992* ; *see Gatto v. County of Sonoma (2002) 98 Cal. App. 4th 744, 765-769, 120 Cal. Rptr. 2d 550* (county fair's enforcement of dress code to require patron to remove vest bearing insignia of Hell's Angels Motorcycle Club did not violate right to full and equal accommodations under Unruh Act); *Hessians Motorcycle Club v. J.C. Flanagans (2001) 86 Cal. App. 4th 833, 103 Cal. Rptr. 2d 552* (refusing entry to sports bar of motorcyclists wearing indicia of membership in particular motorcycle club did not violate Unruh Act as rationally related to prevention of barroom brawls between members of rival gangs)]. For additional discussion of reasonable business exceptions, see [3], *below*.

[2] Building Repairs or Modifications

Nothing in the Unruh Act requires any construction, alteration, repair (structural or otherwise), or modification of any sort whatsoever, beyond construction, alteration, repair, or modification that is otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure [*Civ. Code § 51(d)*].

The Unruh Act may not be construed to augment, restrict, or alter in any way the authority of the State Architect to require construction, alteration, repair, or modifications that he or she otherwise possesses pursuant to other provisions of the law [*Civ. Code § 51(d)*].

For a form of affirmative defense allegation, to be used in answering a complaint under the Unruh Act, based on the defense that modification of a building would be required, see *§ 116.101*.

[3] Reasonable Business Exceptions

[a] Nature of Business

[i] Reasonable Deportment Rules

Pursuant to the "nature-of-the-business" exception, a business may promulgate reasonable deportment rules that are rationally related to the nature of the business enterprise and the facilities provided. This exception is an acknowledgment that certain behavior may be appropriate in one setting, but inappropriate in another. Its application is very limited, and the few cases that have held discriminatory treatment to be nonarbitrary based solely on the nature of the business have emphasized the special nature of the business. Therefore, their application to other situations should be carefully and narrowly construed [*see Koire v. Metro Car Wash (1985) 40 Cal. 3d 24, 30-31, 219 Cal. Rptr. 133, 707 P.2d 195]* . Indeed, the exception was inapplicable when invoked by the owners of an ordinary apartment complex as a rationale to exclude children [*see Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 741, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858]* .

When the services rendered by a business are of a particularly sensitive or unique nature, the nature-of-the-business exception may allow them to exclude certain persons with impunity. For example, a cemetery may lawfully exclude persons who would damage property, injure others, or otherwise disrupt funeral services. The Unruh Act does not require the cemetery to admit these persons and wait until they cause a disruption before asking them to leave. Given the sensitive nature of the services offered by the cemetery, a policy permitting private funerals that preclude the attendance of uninvited persons is a reasonable regulation rationally related to the services performed [*Ross v. Forest Lawn Mem'l Park (1984) 153 Cal. App. 3d 988, 992-993, 203 Cal. Rptr. 468]* . Thus, a cemetery could safely exclude punk rockers from the funeral of a punk rocker whose mother, the cemetery's client, had requested that the funeral and burial services be private and that only family members and invited guests be permitted to attend [*Ross v. Forest Lawn Mem'l Park (1984) 153 Cal. App. 3d 988, 992-993, 203 Cal. Rptr. 468]* .

Similarly, the Act does not prohibit a gambling facility from refusing to admit a woman known to be a compulsive gambler, who had manifested a propensity to gamble beyond her means to the extent of committing what was possibly an illegal act, all of which was having a detrimental effect on her well-being as well as that of her husband. The nature of the business, a gambling establishment, was fundamentally different from other types of businesses in that it was not a form of harmless entertainment [*Wynn v. Monterey Club (1980) 111 Cal. App. 3d 789, 797, 168 Cal. Rptr. 878]* .

[ii] Customers with Improper or Disruptive Behavior

A business establishment need not tolerate customers who damage property, injure others, or otherwise disrupt business [*Koire v. Metro Car Wash (1985) 40 Cal. 3d 24, 30, 219 Cal. Rptr. 133, 707 P.2d 195]* . Additionally, a business establishment may promulgate reasonable deportment rules that are rationally related to the services performed and the facilities provided [*In re Cox (1970) 3 Cal. 3d 205, 217, 90 Cal. Rptr. 24, 474 P.2d 992]* .

Although businesses may protect their enterprises from improper and disruptive behavior, the Act requires them to do so directly by excluding those persons who are in fact disruptive. For example, a sports bar could refuse entry to motorcyclists wearing "colors" or patches indicating membership in a particular motorcycle gang, while otherwise admitting entry to those wearing full motorcycle regalia, without violating the Unruh Act, to prevent barroom fights between members of rival gangs [*Hessians Motorcycle Club v. J.C. Flanagans (2001) 86 Cal. App. 4th 833, 103 Cal. Rptr. 2d 552]* . Businesses may not pursue a broad status-based exclusionary policy that operates to deprive innocent individuals of the services of the business to which the Act grants all persons access [*Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 740, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858]* . The significance of the nature-of-the-business exception is that the person's conduct, as opposed to his or her status, may result in exclusion by the business [*Frantz v. Blackwell (1987) 189 Cal. App. 3d 91, 95-96, 234 Cal. Rptr. 178]* . Thus, a developer was within his rights to refuse to have further dealings with a real estate broker who had previously tried to profit at the developer's expense, despite a signed contract to the contrary. The exclusion did not single out an undefined group, and was not based on a generalization about a defined group; rather, it was personal, that is, aimed at a particular individual based on his conduct [*Frantz v. Blackwell (1987) 189 Cal. App. 3d 91, 95, 234 Cal. Rptr. 178]* .

[b] Specialized Facility

Nothing in the Unruh Act prohibits the exclusion of an entire class whose presence would not accord with the nature of the business enterprise and its facilities. Indeed, limitation of access to members of certain groups may operate in certain cases as a reasonable and permissible means of establishing and preserving specialized facilities for those particularly in need of those services or that environment. The social need served by such a specialized institution, however, must be well documented and established as a matter of public policy. The case for specialization is strengthened if the facility was designed to satisfy the particular concerns and characteristics of the needy group, making it less suitable for general use [*Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 741-743, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858]* .

In *Marina Point, Ltd. v. Wolfson*, the California Supreme Court first articulated this specialized-facility exception to the Act. The Court discussed the exception in terms of housing facilities reserved for older persons, emphasizing seniors' special concerns with the physical facilities and the requirement that the facilities be easily accessible, as well as seniors' special social and psychological needs and their financial limitations. A specialized institution designed to meet a special need is fundamentally different from a facility suitable for the general public that seeks to exclude a class based on no particular need [*Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 742-743, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858]* . For discussion of lawful and unlawful housing discrimination, see Ch. 117, *Civil Rights: Housing Discrimination* .

The specialized-facility defense was unsuccessful for a boys' club with a membership restricted to males between the ages of 8 and 18. The club argued that it was a specialized facility designed and operated solely to serve the particular social needs of boys, and that its primary purpose--to combat delinquency--is an important social interest best served by concentrating on male youth who are four times more likely than their female counterparts to get into trouble with the law. The Supreme Court was unpersuaded, stating that there was no indication that the crafts, games, counseling programs, and recreational facilities offered by the club were suited to or safe only for males. Additionally, there was no evidence that a sex-segregated drop-in recreational facility was more effective in combating juvenile delinquency than one open to both sexes, or that extension of membership to girls would cause an impractical net increase or decrease in membership [*Isbister v. Boys' Club of Santa Cruz (1985) 40 Cal. 3d 72, 88-89, 219 Cal. Rptr. 150, 707 P.2d 212]* . However, the Court cautioned that its holding was based on the particular nature and function of that club and that nothing it said necessarily requires a similar result in the case of other single-sex youth organizations [*Isbister v. Boys' Club of Santa Cruz (1985) 40 Cal. 3d 72, 91, 219 Cal. Rptr. 150, 707 P.2d 212]* .

[4] Public Policy Exception

[a] Compelling Societal Interest

Absent a compelling public social policy supporting differential treatment, discriminatory treatment violates the Unruh Act [*Koire v. Metro Car Wash (1985) 40 Cal. 3d 24, 38, 219 Cal. Rptr. 133, 707 P.2d 195]* . "Public policy" exceptions to the Act are rare and are based on a "compelling societal interest" as reflected in statutory enactments.

For example, it is permissible to exclude children from bars or adult bookstores, because it is illegal to serve alcoholic beverages or to distribute harmful matter to minors. This sort of discrimination is not arbitrary and therefore not prohibited by the Act [*Koire v. Metro Car Wash (1985) 40 Cal. 3d 24, 31, 219 Cal. Rptr. 133, 707 P.2d 195* ; *see Bus. & Prof. Code § 25658* (furnishing alcoholic beverages to person under 21 years of age); *Penal Code § 313.1* (distributing "harmful matter" to minor)].

The fundamental purpose of the Unruh Act is the elimination of antisocial discriminatory practices--not the elimination of socially beneficial ones [*Sargoy v. Resolution Trust Corp. (1992) 8 Cal. App. 4th 1039, 1049, 10 Cal. Rptr. 2d 889* (court recognized that not upholding preferential treatment for seniors could place in jeopardy discounts and benefits accorded seniors, thereby profoundly impacting their quality of life)].

The public-policy exception generally has a statutory basis. Arguments to apply it to instances without an applicable statute have been unsuccessful. For example, a private, nonprofit religious corporation that published yellow pages featuring advertisements only of "born-again" businesses and professional people argued that, for public policy reasons arising out of the compelling societal interest of protecting religious freedom, its actions were not prohibited by the Act. However, an appellate court rejected the argument, noting that there was no statutory underpinning, and characterized it as a constitutional argument in disguise [*Pines v. Tomson (1984) 160 Cal. App. 3d 370, 387, 206 Cal. Rptr. 866* ; *see Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 741, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858* (exclusion of children from apartment complex, unlike exclusion of children from bars or adult book stores, could not be defended by reference to any statutorily sanctioned restriction on activities of children)].

[b] Applicable to Children and Seniors

Thus far, the public policy exception to the Unruh Act has been restricted to minors and senior citizens [*see, e.g., Sargoy v. Resolution Trust Corp. (1992) 8 Cal. App. 4th 1039, 1048-1049, 10 Cal. Rptr. 2d 889* (seniors); *Starkman v. Mann Theatres Corp. (1991) 227 Cal. App. 3d 1491, 1495-1501, 278 Cal. Rptr. 543* (children); *see also Koire v. Metro Car Wash (1985) 40 Cal. 3d 24, 38, 219 Cal. Rptr. 133, 707 P.2d 195* (not applicable to women); *Pines v. Tomson (1984) 160 Cal. App. 3d 370, 387, 206 Cal. Rptr. 866* (not applicable to "born again" people)].

For example, price discounts for children or senior citizens are permitted, based on social policy considerations as exemplified by numerous statutes providing for different treatment of those groups, as well as a recognition of their frequently limited earning capacities [*Starkman v. Mann Theatres Corp. (1991) 227 Cal. App. 3d 1491, 1495-1501, 278 Cal. Rptr. 543* (policy does not perpetuate irrational stereotypes, and all members of society will be members of both groups); *see Koire v. Metro Car Wash (1985) 40 Cal. 3d 24, 37-38, 219 Cal. Rptr. 133, 707 P.2d 195]* . Moreover, this exception is not limited to price discounts, but extends to other preferential treatment of these groups [*Sargoy v. Resolution Trust Corp. (1992) 8 Cal. App. 4th 1039, 1045-1046, 10 Cal. Rptr. 2d 889* (preferential interest rates offered by savings and loan association to seniors)].

Sex-based price discounts, however, are unlawful. Rather than supporting different treatment of men and women, public policy strongly mandates the equal treatment of men and women. Although there are a few instances in which public policy warrants differential treatment for men and women, typically these are based on the constitutional right to personal privacy and involve a sex-segregated facility, such as a public restroom. A discriminatory pricing policy is in no way based on privacy considerations, nor is it justified by any other public policy that might warrant differential treatment based on sex [*Koire v. Metro Car Wash (1985) 40 Cal. 3d 24, 38, 219 Cal. Rptr. 133, 707 P.2d 195]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingGeneral OverviewCivil Rights LawPublic FacilitiesGeneral Overview

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Chapter 116 CIVIL RIGHTS: DISCRIMINATION IN BUSINESS ESTABLISHMENTS
PART II. LEGAL BACKGROUND
A. Unruh Civil Rights Act

11-116 California Forms of Pleading and Practice--Annotated § 116.15

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.15 Remedies

[1] Independent of Other Remedies

Civ. Code § 52 provides for actions for damages, sets forth penalties, and generally provides procedures for obtaining relief for violations of the Unruh Act. Actions brought pursuant to *Civ. Code § 52* are independent of any other actions, remedies, or procedures that may be available to an aggrieved party pursuant to any other law [*Civ. Code § 52(e)*; *see San Jose Country Club Apartments v. County of Santa Clara (1982) 137 Cal. App. 3d 948, 951-952, 187 Cal. Rptr. 493* (state law not preemptive of county ordinance)].

Civ. Code § 52 contains essentially the same limiting clause concerning modification of facilities as *Civ. Code § 51(d)* [*see Civ. Code § 52(g)*; *see also § 116.14[2]*].

The Attorney General, district attorney, or city attorney may intervene in any action for relief from the denial of equal protection of the laws on account of race, color, religion, sex, national origin, or disability if the attorney certifies the case to be of general public importance [*see Civ. Code § 52(d)*].

If parties to a contract agree to submit any dispute under the contract to arbitration, one party may not bring an independent action claiming that a contract provision violates the Unruh Act. The Act does not provide that parties may not agree to submit claims to arbitration [*Wolitarsky v. Blue Cross of California (1997) 53 Cal. App. 4th 338, 345-348, 61 Cal. Rptr. 2d 629* (claim that health insurance policy imposing additional deductible for maternity benefits illegally discriminated on basis of gender in violation of Act was subject to arbitration, when there was nothing in agreement to exclude claim from scope of arbitration agreement)]. For discussion of the enforceability of arbitration clauses, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

[2] Statute of Limitations

The limitations period for an action brought under the Unruh Act was the one-year limitations period specified in

former *Code Civ. Proc. § 340(3)* for personal injury actions [*West Shield Investigations & Sec. Consultants v. Superior Court (2000) 82 Cal. App. 4th 935, 953, 98 Cal. Rptr. 2d 612* ; *see* *Gatto v. County of Sonoma (2002) 98 Cal. App. 4th 744, 754-760, 120 Cal. Rptr. 2d 550* (limitations period for claims under *Civ. Code §§ 51, 52.1* is one-year; but there is problem created by lack of clarity as to which provisions of Civil Code actually comprise Unruh Act and Legislature's failure to specify statute or statutes of limitations applicable to provisions of Civil Code commonly thought to be components of Unruh Act); *Mitchell v. Sung (N.D. Cal. 1993) 816 F. Supp. 597, 602* (Unruh Act seeks to protect against personal injury, thus one-year limitations period must be applied to Unruh Act claim); *but see* *Olympic Club v. Underwriters at Lloyd's London (9th Cir. 1993) 991 F.2d 497, 501* (stating in dicta that statute of limitations for Unruh Act claims is three year period for actions based on statutory liability provided by *Code Civ. Proc. § 338(a)*); *Kramer v. Regents of the Univ. of California (N.D. Cal. 1999) 81 F. Supp. 2d 972, 977* (applicable statute of limitations for Unruh Act claims is three-year limitations period for statutory claims); *Independent Housing Servs. v. Fillmore Ctr. Assocs. (N.D. Cal. 1993) 840 F. Supp. 1328, 1359* (because there appeared to be no common law cause of action for lack of building access, court presumed three-year period of *Code Civ. Proc. § 338(a)* is proper limitations period for statutory claims other than Unfair Business Practice Act)]. Effective January 1, 2003, *Code Civ. Proc. § 340* was amended and *Code Civ. Proc. § 335.1* was added to provide that personal injury actions are now governed by a two-year statute of limitations.

When a request for damages from a government agency is not merely incidental to a transcendent interest in injunctive relief but is the primary relief sought, the claim is subject to the Government Claim Act [*Gov. Code § 910 et seq.*], and the statute of limitation is extended beyond the limitations period otherwise applicable [*Gatto v. County of Sonoma (2002) 98 Cal. App. 4th 744, 760-765, 120 Cal. Rptr. 2d 550]* .

[3] Damages for Unlawful Discrimination

Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to *Civ. Code §§ 51, 51.5*, or *51.6*, is liable for each and every such offense for the actual damages suffered by any person denied those rights [*Civ. Code § 52(a)*; for discussion of *Civ. Code § 51.5, see § 116.31*]. For purposes of *Civ. Code § 52*, "actual damages" means special and general damages [*Civ. Code § 52(h)*].

In addition to actual damages, the person discriminating is subject to liability for a penalty in any amount that may be determined by a jury or by a court sitting without a jury, up to a maximum of three times the amount of actual damage, but in no case less than $4,000 [*Civ. Code § 52(a)*]. Thus, any arbitrary discrimination by businesses is per se injurious, and, regardless of the amount of the successful plaintiff's actual damages, he or she is entitled to an award of the statutory minimum amount for every violation of *Civ. Code § 51* [*Koire v. Metro Car Wash (1985) 40 Cal. 3d 24, 33, 219 Cal. Rptr. 133, 707 P.2d 195]* .

Punitive damages are available when the defendant has been guilty of oppression, fraud, or malice [*see Civ. Code § 3294*]. The additional sum specified by *Civ. Code § 52* is a penalty that the law imposes in every case, regardless of the circumstances surrounding the discriminatory conduct; that penalty does not exclude the imposition of punitive damages under *Civ. Code § 3294* [*Greenberg v. Western Turf Ass'n (1903) 140 Cal. 357, 363-364, 73 P. 1050* , *aff'd, 204 U.S. 359, 27 S. Ct. 384, 51 L. Ed. 520 (1907)* (interpreting predecessor of the Act, Stats. 1893, ch. 185)]. For further discussion of punitive damages pursuant to *Civ. Code § 3294*, see Ch. 177, *Damages* .

Attorney's fees in an amount determined by the court are also available [*Civ. Code § 52(a)*]. A prevailing plaintiff in a *Civ. Code § 52* action is entitled to an attorney fee award as a matter of law [*Engel v. Worthington (1997) 60 Cal. App. 4th 628, 630-635, 70 Cal. Rptr. 2d 526]* . For a general discussion of attorney's fees, see Ch. 174, *Costs and Attorney's Fees* .

For a general form of complaint for damages and injunctive relief for violation of the Unruh Act, see *§ 116.80*. For a related jury instruction, see *Judicial Council of California Civil Jury Instructions, CACI No. 3026* (LexisNexis

Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

PRACTICE TIP:

Available Remedies. The Unruh Civil Rights Act is an often overlooked and very effective remedy in non-employment and non-public entity situations. However, in my experience the wrongs that this law was designed to remedy occur relatively infrequently in California. It is now unusual that a store, restaurant, etc. will refuse to provide service to individuals because of their race, gender, etc. In addition, in situations where this does occur, there are usually little, if any, economic damages. Nevertheless, statutory damages are available as well as injunctive relief, punitive damages, and attorneys' fees. *By John H. Scott*

[4] Preventive Relief

Whenever there is reasonable cause to believe that any person or group of persons is engaged in conduct of resistance to the full enjoyment of any of the rights described in *Civ. Code § 52*, and that the conduct is intended to deny the full exercise of those rights, any person aggrieved by that conduct may bring a civil action for preventive relief in the appropriate court [*Civ. Code § 52(c)* (action may also be brought by Attorney General or district or city attorney); *see Vargas v. Hampson (1962) 57 Cal. 2d 479, 481, 20 Cal. Rptr. 618, 370 P.2d 322* (aggrieved person may bring action on behalf of all persons similarly situated)]. The complaint should set forth facts pertaining to the conduct, and request preventive relief deemed necessary to ensure the full enjoyment of the rights described in *Civ. Code § 52*. The relief may include an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for the conduct [*Civ. Code § 52(c)*].

An action for preventive relief must be brought by an "aggrieved person"; the implication is that a public interest group would not have the requisite standing. Careful pleading, however, may enable such a group to seek injunctive relief under appropriate circumstances. For example, in an unfair competition action, an association acting for the interests of the general public had standing to bring an action for injunctive relief, and, unless otherwise expressly provided, the remedies and penalties are cumulative to the remedies or penalties available under all other laws [*see* former *Bus. & Prof. Code §§ 17204, 17205*]. Thus, a nonprofit organization of consumers had standing to bring an action for injunctive relief when alleging age discrimination by a housing development when it sued under *Bus. & Prof. Code § 17200 et seq.* (unfair competition statutes) and the Unruh Act. The plaintiff's standing under the unfair competition statutes enabled it to bring an action for an injunction to enforce the Act [*Consumers Union of United States v. Fisher Development, Inc. (1989) 208 Cal. App. 3d 1433, 1437-1444, 257 Cal. Rptr. 151* ; *see § 116.37*]. However, the voters of California by initiative amended *Bus. & Prof. Code § 17204*, effective January 1, 2005, to delete the provision that allowed an action under the unfair competition laws by any person acting for the interest of the general public, and substituted the requirement that an action may be brought by any person who has suffered injury in fact and has lost money or property as a result of the unfair competition [*Bus. & Prof. Code § 17204*]. Thus, unless it was able to show that it had suffered injury in fact under *Bus. & Prof. Code § 17200 et seq.*, the nonprofit organization of consumers that sued under the Unruh Act and *Bus. & Prof. § 17200 et seq.* would no longer have standing under the unfair competition statutes and therefore under the Unruh Act.

For a general form of complaint for damages and injunctive relief for violation of the Unruh Act, see *§ 116.80*.

[5] Optional Administrative Complaint

Any person claiming to be aggrieved by an alleged unlawful practice in violation of *Civ. Code § 51* may also file a verified complaint with the Department of Fair Employment and Housing (DFEH) pursuant to *Gov. Code § 12948* [*Civ. Code § 52(f)*]. The DFEH administers the California Fair Employment and Housing Act (FEHA), under which it is an unlawful practice to deny, or to aid, incite, or conspire in the denial of, rights created by *Civ. Code § 51* [*Gov. Code §*

12948; *see Gov. Code § 12900 et seq.* (FEHA)].

The DFEH has the power to receive, investigate, and conciliate complaints alleging a violation of *Civ. Code § 51*. The DFEH also is authorized to issue accusations and to prosecute those actions before the Fair Employment and Housing Commission (FEHC) [*Gov. Code §§ 12930(h), 12965*; *but see Wilson v. Fair Employment & Housing Com. (1996) 46 Cal. App. 4th 1213, 1220-1224, 54 Cal. Rptr. 2d 419* (FEHC lacks jurisdiction to determine merits of challenge to insurance underwriting decision alleged to violate Unruh Act)].

The remedies and procedures of FEHA are independent of any other remedy or procedure that might apply [*Gov. Code § 12930(f)(2)*]. Moreover, notwithstanding the Legislature's intent to occupy the field of regulation of discrimination in employment and housing encompassed by FEHA, nothing in FEHA will be construed, in any manner, to limit or restrict the application of *Civ. Code § 51* [*see Gov. Code § 12993(c)*].

Because it is generally understood that the Unruh Act does not apply to discrimination in employment [*see Alcorn v. Anbro Engineering (1970) 2 Cal. 3d 493, 500, 86 Cal. Rptr. 88, 468 P.2d 216]* , the type of unlawful practice most likely to prompt a complaint with the DFEH involves housing discrimination. It is unlawful for any person subject to the provisions of *Civ. Code § 51*, as it applies to housing accommodations, to discriminate against any person on the basis of specified characteristics [*see Gov. Code § 12955(d)*].

If, in addition to filing an action under *Civ. Code § 52*, a complaint has been filed and remedy pursued under FEHA, the DFEH will terminate proceedings on notification of the entry of the final judgment unless the judgment is a dismissal entered at the complainant's request [*see Gov. Code § 12980(a)*]. If, under the FEHA procedure, the FEHC finds that an unlawful practice has occurred, no remedy will be available to the aggrieved person unless he or she waives any and all rights or claims under *Civ. Code § 52* prior to receiving a remedy and signs a written waiver to that effect [*see Gov. Code § 12987(e)*].

For discussion of employment discrimination, and the procedures to be followed in pursuing remedies under FEHA for employment discrimination, see Ch. 115, *Civil Rights: Employment Discrimination* . For discussion of housing discrimination, and the procedures to be followed in pursuing remedies under FEHA for housing discrimination, see Ch. 117, *Civil Rights: Housing Discrimination* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

[Reserved]

§§ 116.16[Reserved]

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11-116 California Forms of Pleading and Practice--Annotated § 116.30

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.30 Governing Statutes

Civ. Code § 51.5 prohibits discrimination by business establishments in business transactions. *Civ. Code § 51.6* prohibits gender price discrimination. *Civ. Code § 51.8* prohibits discrimination in granting franchises. *Civ. Code § 53* prohibits discriminatory restrictive covenants in written instruments relating to real property.

Civ. Code § 51.9 prohibits sexual harassment in business, service, and professional relationships.

Civ. Code § 52 provides for damages actions and other remedies for violation of *Civ. Code §§ 51.5* and *51.9*, as well as *Civ. Code §§ 51* (Unruh Act) and *51.7* (interference with civil rights by threats, intimidation, coercion, or violence).

Civ. Code §§ 54 and *54.1* provide for equal access by individuals with disabilities or medical conditions to public accommodations and public places. *Civ. Code § 54.2* provides for access to public accommodations and public places for persons with assistance dogs.

Gov. Code §§ 4450-4458 govern access to public buildings by persons with disabilities. *Health & Safety Code §§ 19952-19954* govern access to places of public amusement and resort by persons with disabilities. *Health & Safety Code §§ 19955-19959* govern access to public accommodations by persons with disabilities.

The Cartwright Act, which governs combinations in restraint of trade, and which contains some provisions dealing with discriminatory business practices, is set forth in *Bus. & Prof. Code § 16700 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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11-116 California Forms of Pleading and Practice--Annotated § 116.31

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.31 Discrimination in Business Transactions

No business establishment of any kind whatsoever may discriminate against, boycott or blacklist, refuse to buy from, contract with, sell to, or trade with any person because of any characteristic listed or defined in *Civ. Code § 51(b)* or *(e)* of the person or of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers, because the person is perceived to have one or more of those characteristics, or because the person is associated with a person who has, or is perceived to have, any of those characteristics [*Civ. Code § 51.5(a)*; for discussion of *Civ. Code § 51(b), (e)*, see *§ 116.12*].

As used in *Civ. Code § 51.5*, the term "person" includes any person, firm, association, organization, partnership, business trust, corporation, limited liability company, or company [*Civ. Code § 51.5(b)*].

Civ. Code § 52 provides the remedies for violation of *Civ. Code § 51.5*. For discussion of the remedies provided by *Civ. Code § 52*, see *§ 116.15*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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11-116 California Forms of Pleading and Practice--Annotated § 116.31A

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.31A Gender Price Discrimination

Civ. Code § 51.6, the Gender Tax Repeal Act of 1995 [*see Civ. Code § 51.6(a)*], prohibits business establishments of any kind from discriminating against a person with regard to the price charged for services of a similar kind because of the person's gender [*Civ. Code § 51.6(b)*]. However, *Civ. Code § 51.6(b)* does not prohibit price differences based specifically on the amount of time, difficulty, or cost of providing the services [*Civ. Code § 51.6(c)*]. *Civ. Code § 51.6* also does not alter or affect the provisions of the Health and Safety Code, the Insurance Code, or other laws governing health care service plans or insurer underwriting or rating practices [*Civ. Code § 51.6(e)*]. *Civ. Code § 51.6* does require the following business establishments to clearly and conspicuously disclose to the customer in writing and as specified the pricing for each standard service provided [*Civ. Code § 51.6(f)*]:

- Tailors or businesses providing aftermarket clothing alterations;
- Barbers or hair salons; and
- Dry cleaners and laundries providing services to individuals.

Violations of the Gender Tax Repeal Act are governed by the same provision that applies to Unruh Civil Rights Act violations [*Civ. Code § 52(a)*], and claims under the Gender Tax Repeal Act are subject to the same analysis and outcome with respect to the issues of notice and injury [*Angelucci v. Century Supper Club (2007) 41 Cal. 4th 160, 166 n.5, 59 Cal. Rptr. 3d 142, 158 P.3d 718]* .

The remedies for a violation of *Civ. Code § 51.6* are those provided in *Civ. Code § 52(a)*. However, an action under *Civ. Code § 51.6* is independent of any other remedy or procedure available to the aggrieved party [*Civ. Code § 51.6(d)*; *see § 116.15* for discussion of remedies under *Civ. Code § 52*].

For related jury instructions, see *Judicial Council of California Civil Jury Instructions, CACI Nos. 3022, 3026*

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11-116 California Forms of Pleading and Practice--Annotated § 116.32

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.32 Discrimination in Granting Franchises

No franchisor may discriminate in the granting of franchises solely on account of any characteristic listed or defined in *Civ. Code § 51(b)* or *(e)* of the franchisee and the composition of a neighborhood or geographic area reflecting any characteristic listed or defined in *Civ. Code § 51(b)* or *(e)* in which the franchise is located [*Civ. Code § 51.8(a)*; for discussion of *Civ. Code § 51(b), (e)*, see *§ 116.12*]. However, nothing in *Civ. Code § 51.8* may be interpreted to prohibit a franchisor from granting a franchise to prospective franchisees as part of a program or programs to make franchises available to persons lacking the capital, training, business experience, or other qualifications ordinarily required of franchisees, or any other affirmative action program adopted by the franchisor [*Civ. Code § 51.8(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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11-116 California Forms of Pleading and Practice--Annotated § 116.33

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.33 Defense: Building Repairs or Modifications

Nothing in *Civ. Code § 51.5* or *51.8* (pertaining to business transactions and franchises, respectively) may be construed to require any construction, alteration, repair (structural or otherwise), or modification of any sort whatsoever, beyond that construction, alteration, repair, or modification otherwise required by other provisions of law, to any new or existing establishment, facility, building, improvement, or any other structure. In addition, nothing in *Civ. Code § 51.5* or *51.8* may be construed to augment, restrict, or alter in any way the authority the State Architect possesses under other laws to require construction, alteration, repair, or modifications [*Civ. Code §§ 51.5(c), 51.8(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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11-116 California Forms of Pleading and Practice--Annotated § 116.34

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.34 Discriminatory Restrictive Covenants

Every provision in a written instrument relating to real property is void if it purports to forbid or restrict the conveyance, encumbrance, leasing, or mortgaging of that real property to any person because of any characteristic listed or defined in *Civ. Code § 51(b)* or *(e)* [*Civ. Code § 53(a)*; *see Civ. Code § 782* (provision in deed of real property in California purporting to restrict right to sell, lease, rent, use, or occupy property to persons having any characteristic listed in *Gov. Code § 12955(a)* or *(d)*, by providing for payment of penalty, forfeiture, reverter, or otherwise, is void, with exception for familial status as applied to housing for older persons), *Civ. Code § 782.5* (deed or other written instrument relating to title to real property, or written covenant, condition, or restriction annexed or made part of deed or instrument, containing provision purporting to forbid, restrict, or condition right to sell, buy, lease, rent, use, or occupy property on account of any basis listed in *Gov. Code § 12955(a)* or *(d)* is deemed to be revised to omit provision, with exception for familial status as applied to housing for older persons); for discussion of *Civ. Code § 51(b), (e)*, see *§ 116.12*]. Every restriction or prohibition regarding the use or occupation of real property because of any characteristic listed or defined in *Civ. Code § 51(b)* or *(e)* is void [*Civ. Code § 53(a)*; for discussion of *Civ. Code § 51(b), (e)*, see *§ 116.12*].

Every restriction or prohibition, whether by way of covenant, or condition on use or occupation, or on transfer of title to real property, that directly or indirectly limits the acquisition, use, or occupation of that property because of any characteristic listed or defined in *Civ. Code § 51(b)* or *(e)* is void [*Civ. Code § 53(b)*; for discussion of *Civ. Code § 51(b), (e)*, see *§ 116.12*].

The scope of *Civ. Code § 53* is both broad and comprehensive. The all-encompassing nature of its language, and particularly the overlapping provisions of *Civ. Code § 53(a)* and *(b)*, indicate a legislative desire to ensure that no gaps in coverage exist. Moreover, even though not a part of the Unruh Act, *Civ. Code § 53* is interpreted in a similar manner to effectuate the same general goal of prohibiting arbitrary discrimination [*Taormina Theosophical Community v. Silver (1983) 140 Cal. App. 3d 964, 975, 190 Cal. Rptr. 38* ; *see Park Redlands Covenant Control Comm. v. Simon (1986) 181 Cal. App. 3d 87, 93, 226 Cal. Rptr. 199]* . In 2005, the Civil Rights Act of 2005 amended *Civ. Code § 53* to prohibit discrimination based on the characteristics specified in *Civ. Code § 51(b), (e)*, thus conforming § 53 with the

Unruh Act [*see* 2005 Stats., ch. 420].

For a form of cross complaint for declaratory relief to declare a discriminatory restriction on real property void, see *§ 116.91*.

For discussion and forms relating to restrictive covenants generally, see Ch. 184, *Deeds* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Forms of Pleading and Practice--Annotated

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 116 CIVIL RIGHTS: DISCRIMINATION IN BUSINESS ESTABLISHMENTS
PART II. LEGAL BACKGROUND
B. Other State Laws Prohibiting Discrimination in Business Establishments

11-116 California Forms of Pleading and Practice--Annotated § 116.35

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§ 116.35 Sexual Harassment

A person is liable under *Civ. Code § 51.9* for sexual harassment if the plaintiff proves all of the following:

- There is a business, service, or professional relationship between the plaintiff and defendant, including, but not limited to, any of the following persons [*Civ. Code § 51.9(a)(1)*]:
  - Physicians;
  - Psychotherapists, as defined in *Bus. & Prof. Code § 728(c)(1)*;
  - Dentists;
  - Attorneys;
  - Social workers (holders of masters' degrees in social work);
  - Real estate agents;
  - Real estate appraisers;
  - Accountants;
  - Bankers;
  - Trust officers;

- Financial planners;
- Loan officers;
- Persons involved in collection services;
- Building contractors;
- Escrow loan officers;
- Executors;
- Trustees;
- Administrators;
- Landlords;
- Property managers;
- Teachers; and
- Any person in a relationship with the plaintiff that is substantially similar to any of those listed *above*;

- The defendant made sexual advances, solicitations, sexual requests, or demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe [*Civ. Code § 51.9(a)(2)*];

- There is an inability by the plaintiff to easily terminate the relationship [*Civ. Code § 51.9*]; and

- The plaintiff has suffered or will suffer economic loss or disadvantage or personal injury as a result of the defendant's conduct, including, but not limited to, emotional distress or the violation of a statutory or constitutional right.

The definition of sexual harassment and the standards for determining liability set forth in *Civ. Code § 51.9* are limited to determining liability only with regard to causes of action brought under that statute [*Civ. Code § 51.9(d)*].

Damages are awarded as provided by *Civ. Code § 52(b)* [*Civ. Code § 51.9(b)*; *see § 116.15*].

Nothing in *Civ. Code § 51.9* limits the application of any other remedies provided under the law [*Civ. Code § 51.9(c)*; *see Brown v. Smith (1997) 55 Cal. App. 4th 767, 777-788, 64 Cal. Rptr. 2d 301* (discussing causes of action under FEHA and *Civ. Code § 51* (Unruh Act) for sexual harassment in rental housing)]. However, the Unruh Act, *Civ. Code § 51*, does not itself protect against sexual harassment [*Brown v. Smith (1997) 55 Cal. App. 4th 767, 788, 64 Cal. Rptr. 2d 301]* . *Civ. Code § 51.9* was enacted by the Legislature effective January 1, 1995, to plug that hole in California civil rights law [*Brown v. Smith (1997) 55 Cal. App. 4th 767, 787, 64 Cal. Rptr. 2d 301]* .

Civ. Code § 51.9 does not define "pervasive" or "severe." However, by its use of the words "pervasive or severe" in *Civ. Code § 51.9*, the Legislature intended to incorporate into § 51.9 the liability limitations governing workplace sexual

harassment suits brought under Title VII of the Civil Rights Act of 1964 and the FEHA [*Hughes v. Pair (2009) 46 Cal. 4th 1035, 1044-1051* ; for discussion of Title VII and FEHA and workplace sexual harassment, *see* Ch. 15, *Civil Rights: Employment Discrimination*]. To be pervasive, the sexually harassing conduct must consist of more than a few isolated incidents [*Hughes v. Pair (2009) 46 Cal. 4th 1035, 1048* ; *see also* *Lyle v. Warner Brothers Television Productions (2006) 38 Cal. 4th 264, 284, 42 Cal. Rptr. 3d 2, 132 P.3d 211*].

Because *Civ. Code § 51.9* prohibits "solicitations, sexual requests, [and] demands for sexual compliance," it allows a plaintiff to sue for the quid pro quo form of sexual harassment [*Hughes v. Pair (2009) 46 Cal. 4th 1035, 1049, 95 Cal. Rptr. 3d 636, 209 P.3d 963*]. To establish quid pro quo sexual harassment, a plaintiff must show that a tangible action resulted from a refusal to submit to sexual demands. However, a claim involving only unfulfilled threats should be categorized as a hostile work environment claim, which requires a showing of severe or pervasive conduct [*Hughes v. Pair (2009) 46 Cal. 4th 1035, 1049, 95 Cal. Rptr. 3d 636, 209 P.3d 963*].

Civ. Code § 51.9 does not require that the defendant have a fiduciary relationship with the plaintiff [*C.R. v. Tenet Healthcare Corp. (2009) 169 Cal. App. 4th 1094, 1107-1110, 87 Cal. Rptr. 3d 424*].

Principles of ratification apply to a section 51.9 cause of action. Thus, a business can be liable for sexual harassment under *Civ. Code § 51.9* based its ratification of the actions of its employees [*C.R. v. Tenet Healthcare Corp. (2009) 169 Cal. App. 4th 1094, 1110-1112, 87 Cal. Rptr. 3d 424*].

For a form complaint for a cause of action for sexual harassment in violation of *Civ. Code § 51.9*, see *§ 116.90*. For related jury instructions, see *Judicial Council of California Civil Jury Instructions, CACI Nos. 3024, 3027* (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

PRACTICE TIP:

Civ. Code § 51.9. Expect a lot of activity in the future surrounding *Civ. Code § 51.9* and sexual harassment outside of the work-place. There are few published decisions. One issue that is yet to be resolved is whether an employer (business establishment) can be vicariously liable for the sexual harassment of an employee. If so, the test that will be applied to establish vicarious liability and the extent to which employers will be required to indemnify employees are unresolved issues. *By John H. Scott*

Legal Topics:

For related research and practice materials, see the following legal topics:
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11-116 California Forms of Pleading and Practice--Annotated § 116.36

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§ 116.36 Disabled Persons

[1] Statutory Bases for Relief

The phrase "blindness or other physical disability" was added to *Civ. Code §§ 51, 51.5, 51.8, 52,* and *53* in 1987. At the same time, restrictive clauses were added to those code sections providing that no modification of facilities, generally, and no modification of real property was required to accommodate the blind and physically disabled. Those statutory amendments thereby entitled a blind or physically disabled person to a cause of action under *Civ. Code §§ 51, 51.5, 51.8, 52,* and *53,* so long as the action was not precluded by the limiting clauses. Consequently, the blind and physically disabled had the rights set forth in *Civ. Code §§ 51, 51.5, 51.8, 52,* and *53,* as well as in *Civ. Code §§ 54-55.1* (discussed *below*), and, when bringing an action for relief, could tailor their pleadings accordingly.

These code sections were subsequently amended further. The phrase "blindness or other physical disability" was changed to "disability," and the restrictive clause regarding modification of real estate was eliminated. "Medical condition" was added to the prohibited bases for discrimination in *Civ. Code §§ 51* and *51.5*. Other changes were also made to reflect the intent of the Legislature to strengthen California law in areas in which it was weaker than the Americans With Disabilities Act of 1990 (ADA) and to retain California law where it provides more protection for individuals with disabilities than the ADA [Stats. 1992, ch. 913, § 1; for discussion of Title III of the ADA, see *§ 116.52*; *see also Civ. Code § 51(f)* (violation of individual's rights under ADA is violation of Unruh Act)]. In 2005, the Civil Rights Act of 2005 amended *Civ. Code §§ 51.5, 51.8,* and *53* to prohibit discrimination under those sections based on the characteristics specified in *Civ. Code § 51(b), (e),* thus conforming those sections with the Unruh Act [*see* 2005 Stats., ch. 420].

As used in *Civ. Code § 51,* "disability" means any mental or physical disability as defined in *Gov. Code § 12926* [*Civ. Code § 51(e)(1)*].

"Medical condition" has the same meaning as defined in *Gov. Code § 12926(h)* [*Civ. Code § 51(e)(2)*]. For discussion

of *Gov. Code § 12926*, see Ch. 115, *Civil Rights: Employment Discrimination* .

[2] Civil Code §§ 54 and 54.1

[a] Protections

Individuals with disabilities or medical conditions have the same right as the general public to the full and free use of streets, highways, sidewalks, walkways, public buildings, medical facilities, including hospitals, clinics, and physicians' offices, public facilities, and other public places [*Civ. Code § 54(a)*].

Individuals with disabilities are entitled to as full and equal access as other members of the general public to accommodations, advantages, facilities, medical facilities, including hospitals, clinics, and physicians' offices, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motorbuses, streetcars, boats, or any other public conveyances or modes of transportation (whether private, public, franchised, licensed, contracted, or otherwise provided), and to telephone facilities, adoption agencies, private schools, hotels, lodging places, places of public accommodation, amusement, or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law, or by state or federal regulation, and applicable alike to all persons [*Civ. Code § 54.1(a)(1)*; *see Civ. Code § 54.1(a)(2), (3)* (defining "telephone facilities" and "full and equal access"); *City and County of San Francisco v. Grant Co. (1986) 181 Cal. App. 3d 1085, 1090, 227 Cal. Rptr. 154]* . However, violation of regulations designed to ensure access may not necessarily confer standing on a disabled plaintiff, if the regulations were not intended to prevent the type of injury suffered by the plaintiff [*see, e.g., Urhausen v. Longs Drug Stores California, Inc. (2007) 155 Cal. App. 4th 254, 261-266, 65 Cal. Rptr. 3d 838* (although disabled, plaintiff had no standing under *Civ. Code § 54.1* based on defendant's violation of disabled access regulations governing slope of parking spaces, where regulations were not intended to prevent type of accident plaintiff suffered)].

A blind (or otherwise visually impaired) pedestrian has all the rights and privileges conferred by law on other persons in any of the places, accommodations, or conveyances specified in *Civ. Code §§ 54* and *54.1*, notwithstanding the fact that the person is not carrying a predominantly white cane (with or without a red tip), or using a guide dog. Moreover, that person's failure to carry a cane or to use a guide dog does not constitute negligence per se [*Civ. Code § 54.4*].

[b] Definitions

For purposes of *Civ. Code § 54*, "disability" means any mental or physical disability as defined in *Gov. Code § 12926* [*Civ. Code § 54(b)(1)*]. "Medical condition" has the same meaning as defined in *Gov. Code § 12926(h)* [*Civ. Code § 54(b)(2)*]. For discussion of *Gov. Code § 12926*, see Ch. 115, *Civil Rights: Employment Discrimination* .

"Full and equal access," for purposes of *Civ. Code § 54.1(a)*, in its application to transportation, means access that meets the standards of Titles II and III of the ADA and federal regulations adopted pursuant to it, except that, if state law prescribes higher standards, it means access that meets those higher standards [*Civ. Code § 54.1(a)(3)*; for discussion of Title III of the ADA, *see § 116.52*].

[c] Intent

In contrast to the Unruh Civil Rights Act, a violation of *Civ. Code § 54.1(a)* does not require a showing of intent [*Hankins v. El Torito Restaurants (1998) 63 Cal. App. 4th 510, 520 n.4, 74 Cal. Rptr. 2d 684* ; *Donald v. Cafe Royale (1990) 218 Cal. App. 3d 168, 178-180, 266 Cal. Rptr. 804]* .

[d] Broad Application

Violation of a disability access standard is not a prerequisite for imposing liability under *Civ. Code § 54.1*. The public accommodation law applies to policies as well as to structural impediments. Thus, *Civ. Code § 54.1* is violated by

policies, not otherwise compelled by law, that deny disabled individuals full and fair access to public accommodations [*Hankins v. El Torito Restaurants (1998) 63 Cal. App. 4th 510, 521-524, 74 Cal. Rptr. 2d 684* (trial court finding that restaurant was in compliance with relevant structural access standards did not preclude finding of violation of *Civ. Code § 54.1(a)*); for discussion of public access standards, see [6][a], *below*].

[e] Standing

Civil Code § 54.3 imposes the standing requirement that the plaintiff have suffered an actual denial of equal access before any suit for damages can be brought. A plaintiff cannot recover damages under § 54.3 unless the violation actually denied him or her access to some public facility [*Reycraft v. Lee (2009) 177 Cal. App. 4th 1211, 1223, 99 Cal. Rptr. 3d 746* ; *Urhausen v. Longs Drug Stores California, Inc. (2007) 155 Cal. App. 4th 254, 265-266, 65 Cal. Rptr. 3d 838* (plaintiff's attempt to equate denial of equal access with violation of federal or state regulations would nullify standing requirement of § 54.3, since any disabled person could sue for statutory damages whenever he or she encountered noncompliant facilities, regardless of whether lack of compliance actually impaired plaintiff's access to those facilities and eliminate any distinction between cause of action for equitable relief under *Civ. Code § 55* and cause of action for damages under *Civ. Code § 54.3*)]. Standing under *Civ. Code § 54.3* is established when a disabled plaintiff can show he or she actually presented himself or herself to a business or public place with the intent of purchasing its products or utilizing its services in the manner in which those products and/or services are typically offered to the public and was actually denied equal access on a particular occasion [*Reycraft v. Lee (2009) 177 Cal. App. 4th 1211, 1224, 99 Cal. Rptr. 3d 746*]. If the business or public place does not allow admittance without a fee, a disabled plaintiff would need to show he or she presented himself or herself to the business or public place intending to patronize it and to pay the admission fee to gain admittance to the business or public place as any other customer would do but was actually denied equal access [*Reycraft v. Lee (2009) 177 Cal. App. 4th 1211, 1224, 99 Cal. Rptr. 3d 746*].

Civil Code § 55 of the CDPA provides the remedy of injunctive relief for deterrence claims, because it allows a disabled plaintiff who is aggrieved or potentially aggrieved to file an action to enjoin the violation [*Civ. Code § 55*]. *Civil Code § 54.3* of the CDPA does not include any express language that could be construed to include deterrence claims. Instead, a disabled plaintiff can file an action seeking actual damages against any person or business that denies or interferes with admittance to or enjoyment of public places [*Civ. Code § 54.3*]. The difference in the two statutes was intentional, and based on the differences, a court has concluded the statutes as written were intended to provide two distinct remedies to disabled plaintiffs depending on whether they were simply deterred, i.e., "potentially aggrieved" [*see Civ. Code § 55*], or actually denied equal access. Without more, the statutes when read together appear to provide disabled plaintiffs with a complete legal remedy to achieve the purpose of the CDPA to reduce or eliminate the physical impediments to participation in community life by the physically handicapped [*Reycraft v. Lee (2009) 177 Cal. App. 4th 1211, 1226-1227, 99 Cal. Rptr. 3d 746*].

[3] Guide Dogs

Every individual with a disability has the right to be accompanied by a specially trained guide dog, signal dog, or service dog, in any of the places specified in *Civ. Code § 54.1* without being required to pay an extra charge or security deposit for the dog. However, the individual is liable for any damage done to the premises or facilities by that dog [*Civ. Code § 54.2(a)*].

Visually impaired or blind persons and persons licensed to train guide dogs for individuals who are visually impaired or blind, and persons who are deaf or hearing impaired and persons authorized to train signal dogs for individuals who are deaf or hearing impaired, and other individuals with a disability and persons authorized to train service dogs for individuals with a disability, may take dogs, for the purpose of training them as guide dogs, signal dogs, or service dogs, in any of the places specified in *Civ. Code § 54.1* without being required to pay an extra charge for the dog. However, the individual is liable for any damage done to the premises or facilities by the dog. These persons must ensure the dog is on a leash and tagged as a guide dog, signal dog, or service dog by an identification tag issued by the county clerk,

animal control department, or other agency, as authorized by *Food & Agric. Code § 30850 et seq.* [*Civ. Code §§ 54.1(c), 54.2(b)* (also providing that violation of right under ADA also constitutes violation of these sections, and that these statutes are not to be construed to impose limitation to access in violation of the ADA); *see Civ. Code § 54.1(b)* (housing accommodations); *see also Bus. & Prof. Code § 7200 et seq.* (licensing of trainers of guide dogs)].

Notwithstanding any other provision of law, *Civ. Code §§ 54-55.1* do not require zoos or wild animal parks to allow guide dogs, signal dogs, or service dogs to accompany individuals with a disability in areas of the zoo or park where zoo or park animals are not separated from the public by a physical barrier [*Civ. Code § 54.7(a)* ("physical barrier" does not include automobile or other conveyance); *see also Civ. Code § 54.7(b)-(e)* (additional requirements for owners of zoos and wild animal parks)].

[4] Remedies

[a] Damages

Any person or persons, firm, or corporation who denies or interferes with admittance to or enjoyment of public facilities as specified in *Civ. Code §§ 54* and *54.1*, or who otherwise interferes with the rights of an individual with a disability under *Civ. Code §§ 54, 54.1*, and *54.2*, is liable for each offense for the actual damages suffered [*Civ. Code § 54.3(a)* (also defining "interfere" as including preventing or causing prevention of guide, signal, or service dog from carrying out its functions in assisting disabled person)]. In addition to actual damages, the person or entity engaging in the discrimination is subject to liability in an amount that may be determined by a jury or by the court sitting without a jury, up to a maximum of three times the amount of actual damages, but in no case less than $1,000 [*Civ. Code § 54.3(a)*]. Even when no actual damages have been sustained, if there has been a denial of equal access, the minimum statutory damages are available, regardless of the defendant's intent [*Donald v. Cafe Royale (1990) 218 Cal. App. 3d 168, 177, 266 Cal. Rptr. 804]* .

Attorney's fees in an amount determined by the court are also available [*Civ. Code § 54.3(a)*].

The remedies provided by *Civ. Code § 54.3* are nonexclusive, and are in addition to any other remedy provided by law, including, but not limited to, any action for injunctive or other equitable relief available to the aggrieved party or brought in the name of the people of California or the United States [*Civ. Code § 54.3(b)*]. However, a person may not be held liable for damages under both *§ 54.3* and *§ 52* for the same act or failure to act [*Civ. Code § 54.3(c)*; for discussion of damages under *Civ. Code § 52*, see *§ 116.15[3]*].

There is no federal-question jurisdiction over an action for damages under *Civ. Code § 54.1*, even though *Civ. Code § 54.1(d)* makes violation of the federal Americans with Disabilities Act (ADA) a violation of state law. Congress intended that there be no federal cause of action for damages for a violation of Title III of the ADA. To exercise federal-question jurisdiction in these circumstances would circumvent the intent of Congress [*Wander v. Kaus (9th Cir. 2002) 304 F.3d 856* ; *Pickern v. Best Western Timber Cove Lodge Marina Resort (E.D. Cal. 2002) 194 F. Supp. 2d 1128, 1131-1133]* .

[b] Injunctive Relief

Any person who is aggrieved or potentially aggrieved by a violation of *Civ. Code § 54* or *54.1, Gov. Code § 4450 et seq.* (access to public buildings), or *Health & Safety Code § 19955 et seq.* (access to public accommodations), may bring an action to enjoin the violation [*Civ. Code § 55*; *Donald v. Sacramento Valley Bank (1989) 209 Cal. App. 3d 1183, 1191, 260 Cal. Rptr. 49* (private injunctive relief for violation of *Civ. Code § 54.1*)]. For discussion of *Gov. Code § 4450 et seq.* and *Health & Safety Code § 19955 et seq.*, see [5] and [6], *below*.

The prevailing party in such an action is entitled to recover reasonable attorney's fees [*Civ. Code § 55*; *see Donald v.*

Cafe Royale (1990) 218 Cal. App. 3d 168, 184-185, 266 Cal. Rptr. 804] . A prevailing defendant may be entitled to an award of attorneys' fees under *Civ. Code § 55*. While other provisions of California's disability access statutes allow only a prevailing plaintiff to recover attorneys' fees [*see Civ. Code §§ 52, 54.3*], the plain language of *Civ. Code § 55* allows bilateral fee recovery. *Code Civ. Proc. § 1032(a)(4)* provides that the defendant is the prevailing party if dismissal is entered in its favor or if the plaintiff does not recover any relief against it, unless the context clearly requires otherwise. There is no requirement that the prevailing defendant be awarded fees only if plaintiff's claim was frivolous, unreasonable, or groundless [*Molski v. Arciero Wine Group (2008) 164 Cal. App. 4th 786, 790-791, 79 Cal. Rptr. 3d 574* (trial court acted within its discretion when it determined defendant was prevailing party, where plaintiff obtained none of relief he sought and defendant obtained judgment in its favor on every cause of action)]. However, attorneys' fees may not be awarded to a prevailing defendant if they are precluded by the ADA. To the extent *Civ. Code § 55* does authorize the award of fees to a prevailing defendant on nonfrivolous state claims under the California Disabled Persons Act that parallel nonfrivolous ADA claims, the ADA preempts *Civ. Code § 55* [*Hubbard v. SoBreck, LLC (9th Cir. 2008) 531 F.3d 983, 985-987*].

In addition to any remedies available under the ADA, or other provisions of law, an action to enjoin any violation of *Civ. Code § 54* or *54.1* may be brought by the district attorney, the city attorney, the Department of Rehabilitation acting through the Attorney General, or the Attorney General [*Civ. Code § 55.1*; *see 42 U.S.C. § 12102 (ADA)*].

[c] Optional Administrative Complaint

Any person claiming to be aggrieved by an alleged unlawful practice in violation of *Civ. Code §§ 54, 54.1*, or *54.2* may also file a verified complaint with the Department of Fair Employment and Housing (DFEH) pursuant to *Gov. Code § 12948* [*Civ. Code § 54.3(b)*]. The DFEH administers the California Fair Employment and Housing Act (FEHA) [*Gov. Code § 12900 et seq.*], under which it is an unlawful practice to deny, or to aid, incite, or conspire in the denial of, rights created by *Civ. Code §§ 54, 54.1*, or *54.2* [*Gov. Code § 12948*].

[d] Attorney's Fees

Civil Code Section 55, which allows any person aggrieved or potentially aggrieved by a violation of Civ. Code §§ 54 or 54.1, Gov. Code § 4450 et seq., or Health & Saf. Code § 19955 et seq. to bring an action to enjoin the violation, also mandates that the prevailing party in an action to enjoin a violation of disability access requirements be entitled to recover reasonable attorney's fees. The mandatory language in Civ. Code § 55 unambiguously authorizes "bilateral fee recovery" for both the prevailing plaintiffs and the prevailing defendants [Molski v. Arciero Wine Group (2008) 164 Cal. App. 4th 786, 790, 79 Cal. Rptr. 3d 574]. Thus, unlike under the ADA, a prevailing defendant under the CDPA may recover attorney's fees under § 55 regardless of whether the plaintiff's action was frivolous [Molski v. Arciero Wine Group (2008) 164 Cal. App. 4th 786, 792, 79 Cal. Rptr. 3d 574].

The Americans with Disabilities Act bars awards of attorney's fees to prevailing defendants unless plaintiff's action is frivolous [Hubbard v. SoBreck, LLC (9th Cir. 2009) 554 F.3d 742, 744]. However, when a plaintiff makes parallel claims for injunctive relief under the ADA and Civ. Code § 55, and the defendant prevails on the ADA claim for the same reasons defendant prevails on the CDPA claim, the mandatory language of Civ. Code § 55 requires an award of attorney's fees to the prevailing defendant whether or not plaintiff's claim was frivolous [Jankey v. Lee (2010) 181 Cal. App. 4th 1173, 1183-1187, 105 Cal. Rptr. 3d 290; *but see* Hubbard v. SoBreck, LLC (9th Cir. 2009) 554 F.3d 742, 745 (because proof required to establish violation of CDPA and ADA is identical, and it is impossible to distinguish fees necessary to defend against CDPA claim from those expended in defense of ADA claim, grant of fees on California cause of action is necessarily grant of fees as to ADA claim; because ADA bars fees to defendants for nonfrivolous actions, preemption principles preclude imposition of fees on plaintiff for bringing nonfrivolous claims under state law that parallel claims also filed pursuant to federal law)].

The normal standard of review regarding an attorney's fees award is abuse of discretion. However, discretion may not

be exercised whimsically, and reversal is required when there is no reasonable basis for the ruling or when the trial court has applied the wrong test to determine if the statutory requirements were satisfied [Jankey v. Lee (2010) 181 Cal. App. 4th 1173, 1179, 105 Cal. Rptr. 3d 290].

[5] Access to Public Buildings

[a] Building Standards

Gov. Code §§ 4450-4460 govern access to public buildings by persons with disabilities, and are intended to ensure that all buildings, structures, sidewalks, curbs, and related facilities constructed in California by the use of public monies are accessible to and usable by persons with disabilities.

The State Architect is required to develop and submit for approval proposed building standards, and develop other regulations for making buildings, structures, sidewalks, curbs, and related facilities accessible to and usable by persons with disabilities [*see Gov. Code § 4450(b)*; *see also Health & Safety Code § 18935 et seq.* (State Building Standards Code)]. In no case shall the State Architect's regulations and building standards prescribe a lesser standard of accessibility or usability than that provided by the Accessibility Guidelines prepared by the federal Access Board as adopted by the United States Department of Justice to implement the ADA [*Gov. Code § 4450(c)*; *cf. Berkeley Center for Independent Living v. Coyle (1996) 42 Cal. App. 4th 874, 878-879, 50 Cal. Rptr. 2d 39* (Department of Housing and Community Development regulation, defining "publicly funded" to not include loans, grants, guarantees, or other assistance from a public agency to finance privately owned buildings, violated *Gov. Code § 4450* requirement that all buildings constructed using public funds be accessible to disabled persons)].

Except as otherwise provided by law, buildings, structures, sidewalks, curbs, and related facilities subject to the provisions of *Gov. Code § 4450 et seq.* or *Health & Safety Code § 19955 et seq.* (access to public accommodations) must conform to the standards of the California Building Standards Code and other regulations for making buildings, structures, sidewalks, curbs, and related facilities accessible to and usable by persons with disabilities that are in effect on the date of an application for a building permit. With respect to buildings, structures, sidewalks, curbs, and related facilities not requiring a building permit, building standards published in the California Building Standards Code relating to access for persons with disabilities and other regulations adopted pursuant to *Gov. Code § 4450* in effect at the time construction is commenced are applicable [*Gov. Code § 4451(c)*; for discussion of *Health & Safety Code § 19955 et seq.*, see [6], *below*]. Until building standards are published in the California Building Standards Code and other regulations are developed by the State Architect and adopted by the California Building Standards Commission pursuant to *Gov. Code § 4450*, buildings, structures, sidewalks, curbs, and related facilities subject to the provisions of *Gov. Code § 4450 et seq.* or *Health & Safety Code § 19955 et seq.* must meet or exceed the requirements of the ADA [*Gov. Code § 4451(d)*].

[b] Enforcement

The provisions of *Gov. Code § 4450 et seq.* are enforced by both of the following entities [*Gov. Code § 4453*]:

- The Director of the Department of General Services, if state funds are utilized for any project or if funds of other public entities are utilized for the construction of school projects; and

- The governing bodies of the public entity whose funds are utilized, except for the construction of school projects.

The administrative authorities charged with enforcement may grant exceptions from the literal requirements of the applicable building standards or regulations, or permit the use of other methods or materials, but only when it is clearly evident that equivalent facilitation and protection that meets or exceeds the requirements under federal law are thereby

secured [*Gov. Code § 4451(f)*].

The district attorney, the county counsel if the district attorney does not bring an action, the city attorney, or the Attorney General may bring an action to enjoin a violation of *Gov. Code § 4450 et seq.* [*Gov. Code § 4458*].

Additionally, any person who is aggrieved or potentially aggrieved by a violation of *Gov. Code § 4450 et seq.* may seek injunctive relief [*Civ. Code § 55*, discussed in [4][b], *above*; *see also Health & Safety Code § 19953*, discussed in [7][b], *below*].

[6] Access to Public Accommodations

[a] Standards

Health & Safety Code §§ 19955-19959 govern access to public accommodations by persons with physical disabilities, and are intended to ensure that public accommodations or facilities constructed with private funds adhere to the provisions of *Gov. Code § 4450 et seq.* [*Health & Safety Code § 19955(a)*; *see* [5], *above*]. Any curb or sidewalk intended for public use, and all passenger vehicle service stations, shopping centers, offices of physicians and surgeons, and office buildings constructed with private funds must also adhere to those provisions [*see Health & Safety Code §§ 19955.5, 19956.5*].

All sanitary facilities made available for the public, clients, or employees in public accommodations or facilities, passenger vehicle service stations, shopping centers, offices of physicians and surgeons, and office buildings constructed with private funds must be made available for persons with disabilities [*Health & Safety Code §§ 19955(a), 19955.5*].

[b] Definitions

For purposes of *Health & Safety Code § 19955 et seq.*, "public accommodation or facilities" means a building, structure, facility, complex, or improved area that is used by the general public and includes auditoriums, hospitals, theaters, restaurants, hotels, motels, stadiums, and convention centers [*Health & Safety Code § 19955(a)* ("hospitals" includes, but is not limited to, hospitals, nursing homes, and convalescent homes); *see Donald v. Sacramento Valley Bank (1989) 209 Cal. App. 3d 1183, 1195, 260 Cal. Rptr. 49* (automatic teller machine as public facility)].

As used in *Health & Safety Code § 19955.5*, "office building" means a structure in which commercial activity or service is performed or a profession is practiced, or in which any combination thereof is performed or practiced in all or the majority of the building or structure [*Health & Safety Code § 19955.5*].

[c] Exemptions and Exceptions

In those public accommodations that are privately funded multistoried buildings, accessibility by ramp or elevator above and below the first floor is not required for either of the following [*Health & Safety Code § 19956*]:

- Multistoried office buildings, other than the professional office of a health care provider, and passenger vehicle service stations less than three stories high, or less than 3,000 square feet per story; or

- Any other privately funded multistoried building that is not a shopping center, shopping mall, or the professional office of a health care provider, and that is less than three stories high or less than 3,000 square feet per story if a reasonable portion of all facilities and accommodations normally sought and used by the public in such a building are accessible to and usable by persons with disabilities.

Every existing public accommodation constructed prior to July 1, 1970, that is not exempted by *Health & Safety Code §*

19956 is subject to the requirements of *Health & Safety Code § 19955 et seq.* when any alterations, structural repairs or additions are made. This requirement only applies to the area of specific alteration, structural repair, or addition; it does not mean that the entire building or facility is subject to *Health & Safety Code § 19955 et seq.* [*Health & Safety Code § 19959*].

In cases of practical difficulty, unnecessary hardship, or extreme differences, a building department responsible for the enforcement of *Health & Safety Code § 19955 et seq.* may grant exceptions from the literal requirements of the applicable standards and specifications or may permit the use of other methods or materials, but only if it is clearly evident that equivalent facilitations and protection are thereby secured [*Health & Safety Code § 19957*]. Granting an exception when there is no showing of practical difficulty, unnecessary hardship, extreme differences, or equivalent facilitation may be an abuse of discretion [*People ex rel. Deukmejian v. CHE, Inc. (1983) 150 Cal. App. 3d 123, 137*].

[d] Enforcement

Health & Safety Code § 19955 et seq., as well as *Gov. Code § 4450 et seq.*, as applied under *Health & Safety Code § 19955 et seq.*, are enforced by the building department of the city, county, or city and county within which the facility or structure is located [*see Health & Safety Code § 19958*]. Every city, county, or city and county may appoint a local appeals board to hear written appeals of any action taken by the local building department [*see Health & Safety Code § 19957.5*].

The district attorney, the county counsel if the district attorney does not bring an action, the city attorney, the Department of Rehabilitation acting through the Attorney General, or the Attorney General may bring an action to enjoin a violation of *Health & Safety Code § 19955 et seq.* [*Health & Safety Code § 19958.5*]. Additionally, any person who is aggrieved or potentially aggrieved by a violation of *Health & Safety Code § 19955 et seq.* may seek injunctive relief [*Civ. Code § 55*, discussed in [4][b], *above*; *see also Health & Safety Code § 19953*, discussed in [7][b], *below*].

[e] Construction-Related Accessibility Claims

[i] Applicability of Statute

The Construction-Related Accessibility Standards Compliance Act [*Civ. Code § 55.51 et seq.*], applies to any construction-related accessibility claim, including, but not limited to, any claim brought under *Civ. Code §§ 51, 54, 54.1*, or *55* [*Civ. Code § 55.51*]. It applies only to claims filed on or after January 1, 2009. Nothing in the Act is intended to affect litigation filed before that date [*Civ. Code §§ 55.54(o), 55.57(a)*]. Nothing in the Act is intended to affect existing law regarding class action requirements [*Civ. Code §§ 55.54(p), 55.57(b)*].

[ii] Definitions

For these purposes, a "construction-related accessibility claim" is any civil claim in a civil action with respect to a place of public accommodation, including, but not limited to, a claim brought under *Civ. Code §§ 51, 54, 54.1*, or *55*, based wholly or in part on an alleged violation of any construction-related accessibility standard [*Civ. Code § 55.52(1)*]. A "construction-related accessibility standard" is a provision, standard, or regulation under state or federal law requiring compliance with standards for making new construction and existing facilities accessible to persons with disabilities, including, but not limited to, any such provision, standard, or regulation set forth in *Civ. Code §§ 51, 54, 54.1*, or *55*, *Health & Safety Code § 19955.5*, the California Building Standards Code [Title 24 of Cal. Code Reg.], the Americans with Disabilities Act of 1990 [*42 U.S.C. § 12101 et seq.*], and the Americans with Disabilities Act Accessibility Guidelines [*Civ. Code § 55.52(6)*; s *ee* 28 C.F.R. Part 36, Appendix A]. "Place of public accommodation" has the same meaning as "public accommodation" in *42 U.S.C. § 12181(7)* and the federal regulations adopted pursuant to that section [*Civ. Code § 55.52(7)*], and "site" means a place of public accommodation [*Civ. Code § 55.52(9)*].

A "certified access specialist" or "CASp" is any person who has been certified pursuant to *Gov. Code § 4459.5* [*Civ.*

Code § 55.52(3)]. "CASp-inspected" means the site was inspected by a CASp and determined to meet all applicable construction-related accessibility standards [*Civ. Code § 55.52(4)*; *see Civ. Code § 55.53(a)(1)*]. "CASp determination pending" means the site was inspected by a CASp and is pending a determination by the CASp that the site meets applicable construction-related accessibility standards [*Civ. Code § 55.52(5)*; *see Civ. Code § 55.53(a)(2)*].

A "qualified defendant" is a defendant in an action that includes a construction-related accessibility claim asserted against a place of public accommodation meeting the requirements of "CASp-inspected" or "CASp determination pending" prior to the date the defendant was served with the summons and complaint in that action. To be a qualified defendant, the defendant is not required to have been the party who hired a CASp, so long as the basis of the alleged liability of the defendant is a construction-related accessibility claim. To determine whether a defendant is a qualified defendant, the court need not make a finding that the place of public accommodation complies with all applicable construction-related accessibility standards as a matter of law. The court need only determine that the place of public accommodation has a status of "CASp-inspected" or "CASp determination pending" [*Civ. Code § 55.52(8)*].

A "complaint" is a civil complaint filed or to be filed with a court and sent to or served upon a defendant on the basis of one or more construction-related accessibility claims [*Civ. Code § 55.3(a)(1)*]. A "demand for money" is a written document provided to a building owner or tenant, or an agent or employee of a building owner or tenant, containing a request for money on the basis of one or more construction-related accessibility claims [*Civ. Code § 55.3(a)(2)*]. A "construction-related accessibility claim" is a claim of a violation of any construction-related accessibility standard with respect to a place of public accommodation. "Construction-related accessibility claim" does not include a claim of interference with housing within the meaning of *Civ. Code § 54.1(b)(2)* or a claim of interference caused by something other than the construction-related accessibility condition of the property, including, but not limited to, the conduct of any person [*Civ. Code § 55.3(a)(3)*].

[iii] Service of Application Form, Notice, and Advisory

An attorney who causes a summons and complaint to be served in an action that includes a construction-related accessibility claim, including, but not limited to, a claim brought under *Civ. Code §§ 51*, *54*, *54.1*, or *55*, must, at the same time, cause to be served a copy of the application form [*see Civ. Code § 55.54(c)*], and a copy of the following notice to the defendant on separate papers that shall be served with the summons and complaint [*Civ. Code § 55.54(a)(1)*]:

NOTICE TO DEFENDANT

YOU MAY BE ENTITLED TO ASK FOR A STAY (TEMPORARY STOPPAGE) AND EARLY EVALUATION CONFERENCE IN THIS LAWSUIT.

If the construction-related accessibility claim pertains to a site that has been inspected by a Certified Access Specialist (CASp) and you have an inspection report for that site, you may make an immediate request for a court stay and early evaluation conference in the construction-related accessibility claim by filing the attached application form with the court. You may be entitled to the court stay and early evaluation conference regarding the accessibility claim only if ALL of the statements in the application form are true.

The court will schedule the conference to be held within 50 days after you file the attached application form. The court will also issue an immediate stay of the proceedings unless the plaintiff has obtained a temporary restraining order in the construction-related accessibility claim. At your option, you may be, but need not be, represented by an attorney to file the application to request the early evaluation conference. You may obtain a copy of the application form, filing instructions, and additional information about the stay and early evaluation conference through the Judicial Council Internet Web

site at http://www.courtinfo.ca.gov/selfhelp/.

You may file the application after you are served with a summons and complaint, but no later than your first court pleading or appearance in this case, which is due within 30 days after you receive the summons and complaint. If you do not have an attorney, you will need to file the application within 30 days after you receive the summons and complaint to request the stay and early evaluation conference. If you do not file the application, you will still need to file your reply to the lawsuit within 30 days after you receive the summons and complaint to contest it. You may obtain more information about how to represent yourself and how to file a reply without hiring an attorney at http://www.courtinfo.ca.gov/selfhelp/. If a plaintiff representing himself or herself hires an attorney after the case is filed, you will have 30 days to file an application for a court stay and early evaluation conference after you receive a Notice of Substitution of Counsel, unless an early evaluation conference or settlement conference has already been held.

You may file the application form without the assistance of an attorney, but it may be in your best interest to immediately seek the assistance of an attorney experienced in disability access laws when you receive a summons and complaint. You may make an offer to settle the case, and it may be in your interest to put that offer in writing so that it may be considered under *Civil Code Section 55.55*.

An attorney who files a Notice of Substitution of Counsel to appear as counsel for a plaintiff who, acting in propria persona, previously filed a complaint in an action that includes a construction-related accessibility claim, must, at the same time, cause to be served a copy of the application form and a copy of the notice upon the defendant on separate pages attached to the Notice of Substitution of Counsel [*Civ. Code § 55.54(a)(2)*].

An attorney must provide a written advisory with each demand for money or complaint sent to or served by the attorney upon a defendant, in the prescribed form, on a page or pages that are separate and clearly distinguishable from the demand for money or complaint, as follows [*Civ. Code § 55.3(b)*]:

IMPORTANT INFORMATION FOR BUILDING OWNERS AND TENANTS

This form is available in English, Spanish, Chinese, Vietnamese, and Korean through the Judicial Council of California. Persons with visual impairments can get assistance in viewing this form through the Judicial Council Internet Web site at http://www.courtinfo.ca.gov.

Existing law requires that you receive this information because the demand for money or complaint you received with this document claims that your building or property does not comply with one or more existing construction-related accessibility laws or regulations protecting the civil rights of persons with disabilities to access public places.

YOU HAVE IMPORTANT LEGAL OBLIGATIONS. Compliance with disability access laws is a serious and significant responsibility that applies to all California building owners and tenants with buildings open for business to the public. You may obtain information about your legal obligations and how to comply with disability access laws through the Division of the State Architect. Commencing September 1, 2009, information will also be available from the California Commission on Disability Access Internet Web site.

YOU HAVE IMPORTANT LEGAL RIGHTS. You are not required to pay any money unless and until a court finds you liable. Moreover, RECEIPT OF THIS ADVISORY DOES NOT NECESSARILY MEAN YOU WILL BE FOUND LIABLE FOR ANYTHING.

> You may wish to promptly consult an attorney experienced in this area of the law to get helpful legal advice or representation in responding to the demand for money or complaint you received. You may contact the local bar association in your county for information on available attorneys in your area. If you have insurance, you may also wish to contact your insurance provider. You have the right to seek assistance or advice about this demand for money or complaint from any person of your choice, and no one may instruct you otherwise. Your best interest may be served by seeking legal advice or representation from an attorney.
>
> If a complaint has been filed and served on you and your property has been inspected by a Certified Access Specialist (CASp; see www.dsa.dgs.ca.gov/casp), you may have the right to a court stay (temporary stoppage) and early evaluation conference to evaluate the merits of the construction-related accessibility claim against you pursuant to *Civil Code Section 55.54*. At your option, you may be, but need not be, represented by an attorney to file a reply and to file an application for a court stay and early evaluation conference. If you choose not to hire an attorney to represent you, you may obtain additional information about how to represent yourself and how to file a reply without hiring an attorney through the Judicial Council Internet Web site at http://www.courtinfo.ca.gov/selfhelp/. You may also obtain a form to file your reply to the lawsuit, as well as the form and information for filing an application to request the court stay and early evaluation conference at that same Web site.
>
> If you choose to hire an attorney to represent you, the attorney who sent you the demand for money or complaint is prohibited from contacting you further unless your attorney has given the other attorney permission to contact you. If the other attorney does try to contact you, you should immediately notify your attorney.

The advisory requirement applies only to a demand for money or complaint made by an attorney, and nothing in *Civ. Code § 55.3* is intended to affect the right to file a civil complaint under any other law or regulation protecting the physical access rights of persons with disabilities. Nothing in *Civ. Code § 55.3* requires a party acting in propria persona to provide or send a demand for money to another party before proceeding against that party with a civil complaint [*Civ. Code § 55.3(d)*]. *Civ. Code § 55.3* does not apply to any action brought by the Attorney General, or by a district attorney, city attorney, or county counsel [*Civ. Code § 55.3(e)*].

The Judicial Council will adopt a form that may be used by attorneys to comply with the advisory requirements. The form will be in substantially the same format and include all of the text set forth above. The form will be available in English, Spanish, Chinese, Vietnamese, and Korean, and include a statement that the form is available in additional languages, and the Judicial Council Internet web site address where the different versions of the form may be located. The form will include Internet web site information for the Division of the State Architect and, when operational, the California Commission on Disability Access [*Civ. Code § 55.3(c)*].

[iv] Early Evaluation Conference and Stay

Upon being served with a summons and complaint asserting a construction-related accessibility claim, a qualified defendant may file a request for a court stay and early evaluation conference prior to or simultaneous with the defendant's responsive pleading or other initial appearance in the action that includes the claim. If the defendant filed a timely request for stay and early evaluation conference before a responsive pleading was due, the period for filing a responsive pleading will be tolled until the stay is lifted. Any responsive pleading filed simultaneously with a request for stay and early evaluation conference may be amended without prejudice, and the period for filing that amendment will be tolled until the stay is lifted [*Civ. Code § 55.54(b)(1)*].

If the plaintiff had acted in propria persona in filing a complaint that includes a construction-related accessibility claim, the qualified defendant who is served with a Notice of Substitution of Counsel has 30 days to file an application for a

stay and an early evaluation conference. The application may be filed prior to or after the defendant's filing of a responsive pleading or other initial appearance in the action that includes the claim, except that an application may not be filed in a claim in which an early evaluation conference or settlement conference has already been held on the claim [*Civ. Code § 55.54(b)(2)*].

An application for an early evaluation conference and stay must include a signed declaration that declares both that the site identified in the complaint has been CASp-inspected or is CASp determination pending and, if the site is CASp-inspected, there have been no modifications completed or commenced since the date of inspection that may impact compliance with construction-related accessibility standards to the best of the defendant's knowledge; and that an inspection report pertaining to the site has been issued by a CASp. The inspection report must be provided to the court and the plaintiff at least 15 days prior to the court date set for the early evaluation conference [*Civ. Code § 55.54(c)(1)*]. The Legislature has provided a provisional request form to be used and filed by a qualified defendant until a form is adopted by the Judicial Council [*Civ. Code § 55.54(c)(2)*]. The Judicial Council will prepare and post on its Internet web site instructions and a form for a qualified defendant to use to file an application for stay and early evaluation conference and a form for the court's notice of stay and early evaluation conference. Until those forms are adopted, the Judicial Council will post on its Internet web site the provisional forms [*Civ. Code § 55.54*(*l*)(1)]. The Judicial Council will also prepare and post on its Internet web site instructions and a cover page to assist plaintiffs and defendants, respectively, to comply with their filing responsibilities. The cover page will also provide for the party's declaration of proof of service of the pertinent document served under the court order [*Civ. Code § 55.54*(*l*)(2)].

Upon the filing of an application for stay and early evaluation conference by a qualified defendant, the court must immediately issue an order that does all of the following:

- Grants a 90-day stay of the proceedings with respect to the construction-related accessibility claim, unless the plaintiff has obtained temporary injunctive relief that is still in place for the construction-related accessibility claim [*Civ. Code § 55.54(d)(1)*].

- Schedules a mandatory early evaluation conference for a date as soon as possible from the date of the order, but in no event later than 50 days after issuance of the order, and in no event earlier than 21 days after the filing of the request [*Civ. Code § 55.54(d)(2)*].

- Directs the parties, and any other person whose authority is required to negotiate and enter into settlement, to appear in person at the time set for the conference. Appearance by counsel does not satisfy the requirement that the parties or those with negotiation and settlement authority personally appear, provided, however, that the court may allow a party who is unable to attend in person due to a disability to participate in the hearing by telephone or other alternative means or through a representative authorized to settle the case [*Civ. Code § 55.54(d)(3)*].

- Directs the defendant to file with the court under seal and serve on the plaintiff a copy of any relevant CASp inspection report at least 15 days before the date of the conference. The CASp inspection report is confidential and is available only as set forth in *Civ. Code § 55.54(d)(5), (e)(4)* [*Civ. Code § 55.54(d)(4)*].

- Directs the parties that the CASp inspection report may be disclosed only to the court, the parties to the action, the parties' attorneys, individuals employed or retained by the attorneys to assist in the litigation, and insurance representatives or others involved in the evaluation and settlement of the case [*Civ. Code § 55.54(d)(5)*].

- Directs the plaintiff to file with the court and serve on the defendant at least 15 days before the date of the conference a statement that includes, to the extent reasonably known, for use solely for the

purpose of the early evaluation conference, all of the following [*Civ. Code § 55.54(d)(6)*]:

1. An itemized list of specific conditions on the subject premises that are the basis of the claimed violations of construction-related accessibility standards in the plaintiff's complaint.

2. The amount of damages claimed.

3. The amount of attorneys' fees and costs incurred to date, if any, that are being claimed [*see* [v], *below*].

4. Any demand for settlement of the case in its entirety.

The court may schedule additional conferences and may extend the 90-day stay for good cause shown, but not to exceed one additional 90-day extension [*Civ. Code § 55.54(h)*].

A party failing to comply with any court order may be subject to court sanction at the court's discretion [*Civ. Code § 55.54(e)(1)*]. The court will lift the stay when the defendant has failed to file and serve the CASp inspection report prior to the early evaluation conference and has failed also to produce the report at the time of the early evaluation conference, unless the defendant shows good cause for that failure [*Civ. Code § 55.54(e)(2)*]. The court may lift the stay at the conclusion of the early evaluation conference upon a showing of good cause by the plaintiff. Good cause may include the defendant's failure to make reasonably timely progress toward completion of corrections noted by a CASp [*Civ. Code § 55.54(e)(3)*].

The CASp inspection report filed and served pursuant to *Civ. Code § 55.54(d)* must remain confidential throughout the stay and will continue to be confidential until the conclusion of the claim, whether by dismissal, settlement, or final judgment, unless there is a showing of good cause by any party. Good cause may include the defendant's failure to make reasonably timely progress toward completion of corrections noted by a CASp. The confidentiality of the inspection report will terminate upon the conclusion of the claim, unless the owner of the report obtains a court order pursuant to the California Rules of Court to seal the record [*Civ. Code § 55.54(e)(4)*; *see Cal. Rules Ct., Rule 3.907*].

All discussions at the early evaluation conference are subject to *Evid. Code § 1152*, protecting disclosures made in mediation [*Civ. Code § 55.54(f)*; *see* Ch. 31, *Mediation*]. The Legislature has stated its intent that the purpose of the evaluation conference include, but not be limited to, evaluation of all of the following [*Civ. Code § 55.54(f)*]:

1. Whether the defendant is entitled to the 90-day stay for some or all of the identified issues in the case, as a qualified defendant.

2. The current condition of the site and the status of any plan of corrections, including whether the qualified defendant has corrected or is willing to correct the alleged violations, and the timeline for doing so.

3. Whether the case, including any claim for damages or injunctive relief, can be settled in whole or in part.

4. Whether the parties should share other information that may facilitate early evaluation and resolution of the dispute.

Early evaluation conferences must be conducted by a superior court judge or commissioner, or a court early evaluation conference officer. A commissioner will not be qualified to conduct early evaluation conferences unless he or she has

received training regarding disability access requirements imposed by the Americans with Disabilities Act, state laws that govern access to public facilities, and federal and state regulations adopted pursuant to those laws [*Civ. Code § 55.54(i)*]. For these purposes, a "court early evaluation conference officer" is an attorney employed by the court who has received training regarding disability access requirements imposed by the Americans with Disabilities Act of 1990, state laws that govern access to public facilities, and federal and state regulations adopted pursuant to those laws. Attorneys serving in this capacity may also be utilized by the court for other purposes not related to these proceedings [*Civ. Code § 55.54(i)*].

Nothing in the Act precludes any party from making an offer to compromise pursuant to *Code Civ. Proc. § 998* [*Civ. Code § 55.54(g)*]. Nothing in the Act may be deemed to make any inspection report, opinion, statement, or other finding or conclusion of a CASp binding on the court, or to abrogate in any manner the ultimate authority of the court to make all appropriate findings of fact and law. The CASp inspection report and any opinion, statement, finding, or conclusion therein will be given the weight the trier of fact finds that it deserves [*Civ. Code § 55.54(j)*]. Nothing in the Act may be construed to invalidate or limit any California construction-related accessibility standard that provides greater or equal protection for the rights of individuals with disabilities than is afforded by the Americans with Disabilities Act and the federal regulations adopted pursuant to the ADA [*Civ. Code § 55.54(k)*].

The stay provisions do not apply to a construction-related accessibility claim in which the plaintiff has been granted temporary injunctive relief that remains in place [*Civ. Code § 55.54(m)*]. The early conference and stay provisions also do not apply to an action brought by the Attorney General, or by a district attorney, city attorney, or county counsel [*Civ. Code § 55.54(n)*].

[v] Attorney's Fees and Damages

In determining an award of reasonable attorney's fees and recoverable costs with respect to a construction-related accessibility claim, the court may consider, along with other relevant information, written settlement offers made and rejected by the parties. However, this does not affect or modify the inadmissibility of evidence regarding offers of compromise pursuant to *Evid. Code § 1152*, including, but not limited to, inadmissibility to prove injury or damage [*Civ. Code § 55.55*].

Statutory damages under either *Civ. Code §§ 52(a)* or *54.3(a)* may be recovered in a construction-related accessibility claim against a place of public accommodation only if a violation or violations of one or more construction-related accessibility standards denied the plaintiff full and equal access to the place of public accommodation on a particular occasion [*Civ. Code § 55.56(a)*]. A plaintiff is denied full and equal access only if the plaintiff personally encountered the violation on a particular occasion, or the plaintiff was deterred from accessing a place of public accommodation on a particular occasion [*Civ. Code § 55.56(b)*]. A violation personally encountered by a plaintiff may be sufficient to cause a denial of full and equal access if the plaintiff experienced difficulty, discomfort, or embarrassment because of the violation [*Civ. Code § 55.56(c)*].

A plaintiff demonstrates that he or she was deterred from accessing a place of public accommodation on a particular occasion only if both of the following apply [*Civ. Code § 55.56(d)*]:

1. The plaintiff had actual knowledge of a violation or violations that prevented or reasonably dissuaded the plaintiff from accessing a place of public accommodation that the plaintiff intended to use on a particular occasion.

2. The violation or violations would have actually denied the plaintiff full and equal access if the plaintiff had accessed the place of public accommodation on that particular occasion.

Statutory damages may be assessed based on each particular occasion that the plaintiff was denied full and equal access,

and not upon the number of violations of construction-related accessibility standards identified at the place of public accommodation where the denial of full and equal access occurred. If the place of public accommodation consists of distinct facilities that offer distinct services, statutory damages may be assessed based on each denial of full and equal access to the distinct facility, and not upon the number of violations of construction-related accessibility standards identified at the place of public accommodation where the denial of full and equal access occurred [*Civ. Code § 55.56(e)*]. These provisions do not alter the applicable law for the awarding of injunctive or other equitable relief for a violation or violations of one or more construction-related accessibility standards, nor alter any legal obligation of a party to mitigate damages [*Civ. Code § 55.56(f)*].

[vi] Inspection and Certification of Site

Upon completion of the inspection of a site, a certified access specialist ("CASp") [*see Civ. Code § 55.52(3)*] must comply with the following: For a CASp-inspected site, if the CASp determines the site meets all applicable construction-related accessibility standards, the CASp will provide a written inspection report to the requesting party that includes both an identification and description of the inspected structures and areas of the site and a signed and dated statement of compliance that includes both a statement that, in the opinion of the CASp, the inspected structures and areas of the site meet construction-related accessibility standards, which clearly indicates whether the determination of the CASp includes an assessment of readily achievable barrier removal, and, if corrections were made as a result of the CASp inspection, an itemized list of all corrections and dates of completion [*Civ. Code § 55.53(a)(1)*]. For a CASp determination pending site, if the CASp determines that corrections are needed to the site in order for the site to meet all applicable construction-related accessibility standards, the CASp will provide a signed and dated written inspection report to the requesting party that includes all of the following [*Civ. Code § 55.53(a)(2)*]:

- An identification and description of the inspected structures and areas of the site.

- A statement that, in the opinion of the CASp, the inspected structures and areas of the site need correction to meet construction-related accessibility standards, clearly indicating whether the determination of the CASp includes an assessment of readily achievable barrier removal.

- An identification and description of the structures or areas of the site that need correction and the correction needed.

- A schedule of completion for each of the corrections within a reasonable time frame.

In determining whether the site meets applicable construction-related accessibility standards when there is a conflict or difference between a state and federal provision, standard, or regulation, the state provision, standard, or regulation applies unless the federal provision, standard, or regulation is more protective of accessibility rights [*Civ. Code § 55.53(b)*].

Every CASp who conducts an inspection of a place of public accommodation must, upon completing the inspection of the site, provide the building owner or tenant who requested the inspection with the following notice, which the State Architect must make available as a form on the State Architect's Internet web site [*Civ. Code § 55.53(c)*]:

NOTICE TO PRIVATE PROPERTY OWNER/TENANT:

YOU ARE ADVISED TO KEEP IN YOUR RECORDS ANY WRITTEN INSPECTION REPORT AND ANY OTHER DOCUMENTATION CONCERNING YOUR PROPERTY SITE THAT IS GIVEN TO YOU BY A CERTIFIED ACCESS SPECIALIST.

IF YOU BECOME A DEFENDANT IN A LAWSUIT THAT INCLUDES A CLAIM

CONCERNING A SITE INSPECTED BY A CERTIFIED ACCESS SPECIALIST, YOU MAY BE ENTITLED TO A STAY (TEMPORARY STOPPAGE) OF THE CLAIM AND AN EARLY EVALUATION CONFERENCE.

IN ORDER TO REQUEST THE STAY AND EARLY EVALUATION CONFERENCE, YOU WILL NEED TO VERIFY THAT A CERTIFIED ACCESS SPECIALIST HAS INSPECTED THE SITE THAT IS THE SUBJECT OF THE CLAIM. YOU WILL ALSO BE REQUIRED TO PROVIDE THE COURT AND THE PLAINTIFF WITH THE COPY OF A WRITTEN INSPECTION REPORT BY THE CERTIFIED ACCESS SPECIALIST, AS SET FORTH IN *CIVIL CODE SECTION 55.54*. THE APPLICATION FORM AND INFORMATION ON HOW TO REQUEST A STAY AND EARLY EVALUATION CONFERENCE MAY BE OBTAINED AT http://www.courtinfo.ca.gov/selfhelp/.

YOU ARE ENTITLED TO REQUEST, FROM A CERTIFIED ACCESS SPECIALIST WHO HAS CONDUCTED AN INSPECTION OF YOUR PROPERTY, A WRITTEN INSPECTION REPORT AND OTHER DOCUMENTATION AS SET FORTH IN *CIVIL CODE SECTION 55.53*. YOU ARE ALSO ENTITLED TO REQUEST THE ISSUANCE OF A DISABILITY ACCESS INSPECTION CERTIFICATE, WHICH YOU MAY POST ON YOUR PROPERTY.

In addition, upon a determination that the site either meets applicable construction-related accessibility standards or is "CASp determination pending," every CASp who completes an inspection of a place of public accommodation must provide the building owner or tenant requesting the inspection with a numbered disability access inspection certificate indicating that the site has been inspected by a certified access specialist [*Civ. Code § 55.53(e)(1)*].

Commencing July 1, 2010, a local agency must employ or retain at least one building inspector who is a certified access specialist, who provides provide consultation to the local agency, permit applicants, and members of the public on compliance with state construction-related accessibility standards [*Civ. Code § 55.53(d)(1)*]. If a permit applicant or member of the public requests consultation from a certified access specialist, the local agency may charge an amount limited to a reasonable hourly rate, an estimate of which will be provided upon request in advance of the consultation [*Civ. Code § 55.53(d)(3)*].

A CASp inspection by a building inspector who is a certified access specialist is treated equally for legal and evidentiary purposes as an inspection conducted by a private CASp, and nothing in the Act precludes permit applicants or any other person with a legal interest in the property from retaining a private CASp at any time [*Civ. Code § 55.53(d)(3)*]. However, nothing in the Act is intended to require a property owner or tenant to hire a CASp. A property owner's or tenant's election not to hire a CASp is not admissible to prove that person's lack of intent to comply with the law [*Civ. Code § 55.53(f)*].

[7] Access to Public Amusements and Resorts

[a] Accommodations

Health & Safety Code §§ 19952-19954 govern access to places of public amusement and resort by persons who are physically disabled. Any person, public or private firm, organization, or corporation that owns or manages places of public amusement and resort, including theaters, concert halls, and stadiums, must provide seating or accommodations for persons with physical disabilities in a variety of locations within the facility, to the extent that such variety can be provided while meeting fire and panic safety requirements of the State Fire Marshal, so as to provide those persons a choice of admission prices otherwise available to members of the general public [*Health & Safety Code § 19952(a)*].

This requirement applies to publicly and privately owned facilities or to structures for which a building permit or a building plan for new construction was issued on or after January 1, 1985 [*Health & Safety Code § 19952(c)*; *see Health & Safety Code § 19952(d)* (*Health & Safety Code § 19952* should not be construed to prescribe lesser standards of

accessibility or usability than the Accessibility Guidelines prepared by the federal Access Board and adopted by the United States Department of Justice to implement the ADA)].

[b] Enforcement

Any person who is aggrieved or potentially aggrieved by a violation of *Health & Safety Code §§ 19952-19954* (or *Gov. Code §§ 4450-4460* or *Health & Safety Code §§ 19955-19959*) may bring an action to enjoin the violation [*Health & Safety Code § 19953*]. The prevailing party in the action is entitled to recover reasonable attorney's fees [*Health & Safety Code § 19953*]. The district attorney, the county counsel if the district attorney does not bring an action, the city attorney, the Department of Rehabilitation acting through the Attorney General, or the Attorney General also may bring an action to enjoin a violation of *Health & Safety Code §§ 19952-19954* [*Health & Safety Code § 19954*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesInjunctionsGeneral OverviewCivil Rights LawContractual Relations & HousingGeneral Overview

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11-116 California Forms of Pleading and Practice--Annotated § 116.37

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§ 116.37 Restraint of Trade

[1] Discrimination Prohibited

The Cartwright Act, which governs combinations in restraint of trade, is set forth at *Bus. & Prof. Code § 16700 et seq.* Although most of its provisions deal with general restraints of trade or competition, the Cartwright Act does contain some provisions that deal with discriminatory business practices.

Discrimination in business transactions based on a policy requiring discrimination against a person on the basis of any characteristic listed or defined in the Unruh Act [*Civ. Code § 51(b)* or *(e)*; *see § 116.12, above*] or that person's conducting of business in a particular location, is prohibited [*see Bus. & Prof. Code § 16721*; *Pines v. Tomson (1984) 160 Cal. App. 3d 370, 381-383, 206 Cal. Rptr. 866]* . However, nothing in *Bus. & Prof. Code § 16721* prohibits any person, on the basis of his or her individual ideology or preferences, from doing business or refusing to do business with any other person consistent with law [*Bus. & Prof. Code § 16721(d)*].

It is an unlawful trust and an unlawful restraint of trade for any person to grant or accept a letter of credit, contract, or similar business document that requires discrimination against an individual on the basis of any characteristic listed or defined in the Unruh Act [*Civ. Code § 51(b)* or *(e)*; *see § 116.12, above*] or against that person's lawful business associations [*see Bus. & Prof. Code § 16721.5(a)(1)*; *see also Bus. & Prof. Code § 16721.5(d)* ("person" includes, but is not limited to, individuals, firms, partnerships, associations, corporations, and governmental agencies)]. It is similarly an unlawful trust and an unlawful restraint of trade to refuse to grant or accept a letter of credit, contract, or similar business document that does not contain such a discriminatory provision [*see Bus. & Prof. Code § 16721.5(a)(2)*]. However, the prohibition against discrimination on the basis of a person's association does not include the requiring of association with particular employment or a particular group as a prerequisite to obtaining group rates or discounts on insurance, recreational activities, or other similar benefits [*Bus. & Prof. Code § 16721.5(c)*]. The provisions of *Bus. & Prof. Code § 16721.5* do not apply to any letter of credit, contract, or other document containing a provision pertaining to a labor dispute or an unfair labor practice if the other provisions of that letter of credit, contract, or other document do

not otherwise violate the provisions of § 16721.5 [*Bus. & Prof. Code § 16721.5(b)*].

The Legislature expressed its intent that *Bus. & Prof. Code §§ 16721* and *16721.5* be interpreted and applied so as not to conflict with federal law with respect to transactions in the interstate or foreign commerce of the United States to the extent, if any, not preempted by the Export Administration Act of 1969 and any regulations promulgated under it [*Bus. & Prof. Code § 16721.6*]. Because the Export Administration Act of 1969, pursuant to its terms, was terminated on September 30, 1979, presumably the Legislature's intent applies with equal force to the successor statutory scheme concerning export regulation set forth in *50 U.S.C. App. § 2401 et seq.* [*see 50 U.S.C. App. § 2418*; *see also 50 U.S.C. App. § 2407* (foreign boycotts)].

[2] Relief

Any person who is injured in his or her business or property by a violation of *Bus. & Prof. Code § 16721* or *16721.5* may bring suit in any court having jurisdiction in the county in which the defendant or any agent resides or is found or in which service may be obtained, without respect to the amount in controversy. An injured person may recover three times the damages sustained, interest on actual damages, and preliminary or permanent injunctive relief, and shall be awarded a reasonable attorney's fee together with the costs of the suit [*see Bus. & Prof. Code § 16750*; *see also Bus. & Prof. Code § 16761* (prejudgment interest)]. The action may be brought by any injured person, regardless of whether that person dealt directly or indirectly with the defendant [*see Bus. & Prof. Code § 16750(a)*].

For discussion of the Cartwright Act and its remedies, as well as a general form of complaint for damages and injunctive relief, see Ch. 565, *Unfair Competition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawPrice Fixing & Restraints of TradeGeneral OverviewCivil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesDamagesPunitive DamagesCivil ProcedureRemediesInjunctionsGeneral OverviewCivil Rights LawContractual Relations & HousingGeneral Overview

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[Reserved]

§§ 116.38[Reserved]

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11-116 California Forms of Pleading and Practice--Annotated § 116.50

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.50 Governing Statutes

Title II of the Civil Rights Act of 1964, *42 U.S.C. §§ 2000a-2000a-6*, prohibits discrimination or segregation in places of public accommodation, as well as discrimination or segregation required by state law, and interference with the exercise of any of the rights it secures.

The Americans With Disabilities Act of 1990 (ADA) prohibits discrimination against persons with disabilities in the areas of employment [*see 42 U.S.C. § 12111 et seq.* (Title I of the ADA)], public services and transportation [*see 42 U.S.C. § 12131 et seq.* (Title II of the ADA)], public accommodations [*see 42 U.S.C. § 12181 et seq.* (Title III of the ADA)], and telecommunications [*see 47 U.S.C. § 225*].

The Air Carrier Access Act of 1986 (ACAA), *49 U.S.C. § 41705*, provides that in providing air transportation, an air carrier, including a foreign air carrier, may not discriminate against an otherwise qualified individual with a disability.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawProtection of Disabled PersonsAmericans With Disabilities ActGeneral OverviewCivil Rights LawPublic FacilitiesGeneral OverviewTransportation LawAir TransportationCommercial AirlinesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesDuty to Provide Service

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11-116 California Forms of Pleading and Practice--Annotated § 116.51

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§ 116.51 Title II of Civil Rights Act of 1964

[1] Scope of Act

Title II of the Civil Rights Act of 1964 is set forth in *42 U.S.C. §§ 2000a-2000a-6*. Broad in its scope, Title II prohibits discrimination or segregation in places of public accommodation, as well as discrimination or segregation required by state law [*42 U.S.C. §§ 2000a(a), 2000a-1*]. Additionally, Title II prohibits interference with the exercise of any of the rights it secures [*42 U.S.C. § 2000a-2*].

Title II does not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of that establishment are made available to the customers or patrons of an establishment within the scope of *42 U.S.C. § 2000a(b)* [*42 U.S.C. § 2000a(e)*; *see* [2], *below*]. Membership practices determine whether or not an organization is a private club. Generally, if membership is more or less automatically available to any defined group, the organization is not a private club [*see, e.g., Tillman v. Wheaton-Haven Recreation Ass'n (1973) 410 U.S. 431, 438, 93 S. Ct. 1090, 35 L. Ed. 2d 403* (swimming pool association with membership available, as a practical matter, to all who purchased homes in surrounding geographical areas was not private club)].

For detailed coverage of Title II, see J. Cook & J. Sobieski, Civil Rights Actions (Matthew Bender).

[2] Prohibition Against Discrimination in Places of Public Accommodation

All persons are entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation without discrimination or segregation on the ground of race, color, religion, or national origin [*42 U.S.C. § 2000a(a)*].

The following establishments that serve the public are places of public accommodation if their operations affect commerce, or if discrimination or segregation by them is supported by state action [*42 U.S.C. § 2000a(b)*]:

- An inn, hotel, motel or other establishment that provides lodging for transient guests, except for an owner-occupied facility with no more than five rooms for rent;

- A restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on its premises, including, but not limited to, any such facility located on the premises of any retail establishment, or a gasoline station;

- A motion picture house, theater, concert hall, sports arena, stadium, or other place of exhibition or entertainment; and

- An establishment that holds itself out as serving patrons of an otherwise covered establishment, when it is located within the premises of the covered establishment, or the covered establishment is located within its premises.

The construction given to the phrase "operations of an establishment affect commerce" is very broad and all-encompassing. Thus, the operations of an establishment affect commerce if it is an establishment providing lodging for transient guests, if it serves interstate travelers, if a substantial portion of the products it sells have moved in commerce, if it presents sources of entertainment that move in commerce, or if it is physically located within the premises of, or there is physically located within its premises, an establishment whose operations affect commerce [*see 42 U.S.C. § 2000a(c)*]. "Commerce" is also very broadly defined, and generally means travel, trade, traffic, commerce, transportation, or communication that crosses state lines [*see 42 U.S.C. § 2000a(c)*].

Discrimination or segregation by an establishment is supported by state action if that discrimination or segregation [*42 U.S.C. § 2000a(d)*]:

- Is carried on under color of any law, statute, ordinance, or regulation;

- Is carried on under color of any custom or usage required or enforced by officials of a State or any of its political subdivisions; or

- Is required by action of a State or any of its political subdivisions.

[3] Discrimination Required by State Law

All persons are entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if that discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or an agency or political subdivision of a state [*42 U.S.C. § 2000a-1*].

[4] Interference With Exercise of Right

It is unlawful for any person to do or attempt to do any of the following with regard to any right or privilege secured by *42 U.S.C. § 2000a* or *2000a-1* [*42 U.S.C. § 2000a-2*]:

- Withhold, deny, or deprive any person of any such right or privilege;

- Intimidate, threaten, or coerce any person with the purpose of interfering with any such right or privilege; or

- Punish any person for exercising or attempting to exercise any such right or privilege.

[5] Injunctive Relief

Whenever a person has violated, or there are reasonable grounds to believe a person is about to violate, Title II, an aggrieved person may file a civil action in district court for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order [*42 U.S.C. § 2000a-3(a)* (Attorney General may intervene); *see 42 U.S.C. § 2000a-6(a)* (district court jurisdiction); *see also 42 U.S.C. § 2000a-5* (injunctive action brought by Attorney General based on pattern or practice of resistance to full enjoyment of protected rights)]. The aggrieved party need not exhaust any administrative or other remedy that may be provided by law [*42 U.S.C. § 2000a-6(a)*]. In certain circumstances the court may appoint an attorney for the complainant and may authorize the commencement of the action without the payment of fees, costs, or security [*42 U.S.C. § 2000a-3(a)*].

If the alleged violation of Title II occurs in a state, or in a political subdivision of a state, that has a law prohibiting that act or practice and authorizing a state or local authority to grant or seek relief from that practice or to institute criminal proceedings, written notice of that alleged act or practice must be given to the appropriate state or local authority. No civil action under Title II may be brought before the expiration of 30 days after that notice has been given, provided that the court may stay proceedings pending termination of the state or local enforcement proceedings [*see 42 U.S.C. § 2000a-3(c)*]. If the alleged violation of Title II occurs in a political entity without such a law, there is no similar waiting period before a civil action under Title II may be brought. However, the court may refer the matter to the Community Relations Service for up to 120 days, if it believes there exists a reasonable possibility of securing voluntary compliance [*see 42 U.S.C. § 2000a-3(d)*; *see also 42 U.S.C. § 2000a-4* (investigations by Community Relations Service)].

In its discretion, the court may allow the prevailing party in a Title II action, other than the United States, a reasonable attorney's fee as part of the costs [*42 U.S.C. § 2000a-3(b)*].

[6] Exclusive Means of Enforcement

The remedies provided in Title II are the exclusive means of enforcing the rights based on Title II. However, nothing in Title II precludes any individual or any state or local agency from asserting any right based on any other federal or state law not inconsistent with Title II, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, that may be available for the vindication or enforcement of that right [*42 U.S.C. § 2000a-6(b)*].

Additional federal causes of action for discrimination by places of public accommodation are available under *42 U.S.C. §§ 1981* (abridgment of right to contract on basis of race), *1983* (action under color of state law that causes deprivation of any right, privilege, or immunity secured by federal Constitution or laws), and *1985(3)* (conspiracy to deny individual right to equal protection of laws). For discussion of these causes of action, see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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11-116 California Forms of Pleading and Practice--Annotated § 116.52

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§ 116.52 Title III of Americans With Disabilities Act of 1990

[1] Generally

The Americans With Disabilities Act of 1990 (ADA) is a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities [*42 U.S.C. § 12101(b)(1)*]. It prohibits discrimination against persons with disabilities in all of the following areas:

- Employment [*see 42 U.S.C. § 12111 et seq.* (Title I of the ADA)];
- Public services and transportation [*see 42 U.S.C. § 12131 et seq.* (Title II of the ADA)];
- Public accommodations [*see 42 U.S.C. § 12181 et seq.* (Title III of the ADA)]; and
- Telecommunications [*see 47 U.S.C. § 225*].

The provisions of the ADA applicable to employment (Title I) are discussed in Ch. 115, *Civil Rights: Employment Discrimination* . The provisions of the ADA applicable to public services and transportation (Title II) are discussed in Ch. 112, *Civil Rights: Government Funded Programs and Activities*

Compensatory damages are recoverable under the ADA only on proof of discriminatory intent [*Ferguson v. City of Phoenix (1998) 157 F.3d 668, 673-676 , cert. denied, 526 U.S. 1159 (1999)* (remedies for violations of ADA must be construed as remedies under Title VI of Civil Rights Act of 1964, and in absence of proof of discriminatory intent, compensatory relief should not be allowed under Title VI, citing *Guardians Ass'n v. Civil Service Comm'n of the City of New York (1983) 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed. 2d 866*)].

The ADA prohibits retaliation against any individual for opposing any unlawful practice or because he or she has made

a charge or participated in an investigation or proceeding under the ADA. It also prohibits coercion, intimidation, threats, or interference with any person's rights under the ADA [*42 U.S.C. § 12203*]. Nothing in the ADA may be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit that that individual chooses not to accept [*42 U.S.C. § 12201(d)*].

Although they are not intended to be used as a subterfuge to evade the purposes of the ADA, there are some provisions specific to insurers and health care providers that permit them to underwrite, classify, and administer risks that are based on or not inconsistent with state law [*see 42 U.S.C. § 12201(c)*; for discussion of insurance generally, see Ch. 308, *Insurance*].

The use of alternative means of dispute resolution to resolve disputes is encouraged [*see 42 U.S.C. § 12212*].

The prevailing party in a proceeding under the ADA may be awarded attorney's fees [*see 42 U.S.C. § 12205*], unless the defendant voluntarily changes its conduct before plaintiff obtains judicial relief [*see Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources (2001) 532 U.S. 598, 121 S. Ct. 1835, 1841-1843, 149 L. Ed. 2d 855]* .

Except as otherwise provided, the ADA does not apply a lesser standard than the standards or regulations applicable under the Rehabilitation Act [*see Zukle v. Regents of the Univ. of California (9th Cir. 1999) 166 F.3d 1041, 1045* (no significant difference in analysis of rights and obligations created by *ADA and Rehabilitation Act); Ferguson v. City of Phoenix (1998) 157 F.3d 668, 673* , *cert. denied, 526 U.S. 1159 (1999)* (by statute, remedies for violations of ADA and Rehabilitation Act are coextensive)].

Further, the ADA does not invalidate or limit other laws, including state laws, that provide greater or equal protection of the rights of persons with disabilities [*42 U.S.C. § 12201*].

A plaintiff must have constitutional standing under U.S. Const. Art. III to bring an action under the Americans with Disabilities Act. Constitutional standing has three elements [*Skaff v. Meridien North America Beverly Hills (9th Cir. 2007) 506 F.3d 832, 837* ; *see also Lujan v. Defenders of Wildlife (1992) 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351*]:

- The plaintiff must have suffered an injury in fact that is concrete, particularized, and actual or imminent.
- There must be a causal link between the injury and the conduct of which the plaintiff complains.
- It must be likely that a favorable decision will redress the plaintiff's injury.

An ADA plaintiff has suffered an injury in fact sufficient to give that plaintiff standing to challenge barriers in a public accommodation under the ADA when the plaintiff has actually encountered those barriers [*D'Lil v. Best Western Encina Lodge & Suites (9th Cir. 2008) 538 F.3d 1031, 1036* ; *Skaff v. Meridien North America Beverly Hills (9th Cir. 2007) 506 F.3d 832, 838* ; *Pickern v. Holiday Quality Foods Inc. (9th Cir. 2002) 293 F.3d 1133, 1138-39*]. Thus, a plaintiff who has suffered an injury in fact that is concrete, particularized, actual, and imminent has constitutional standing under U.S. Const. Art. III to bring suit challenging accessibility barriers under Title III of the Americans with Disabilities Act [*Doran v. 7-Eleven, Inc. (9th Cir. 2007) 506 F.3d 1191, 1195-1196*]. An ADA plaintiff who has Art. III standing as a result of at least one barrier at a place of public accommodation may, in one suit, permissibly challenge all barriers in that public accommodation that are related to his or her specific disability [*Doran v. 7-Eleven, Inc. (9th Cir. 2007) 506 F.3d 1191, 1197-1202*]. However, a plaintiff does not have standing based on unencountered barriers unless the plaintiff can show that those barriers had a deterrent effect on that plaintiff personally re-entering the defendant's business [*Chapman v. Pier 1 Imports (U.S.) Inc. (9th Cir. 2009) 571 F.3d 853, 857-859*].

The ADA does not require either that plaintiffs give defendants pre-suit notice that they intend to sue, or that plaintiffs give defendants an opportunity to cure the alleged violation or violations before filing suit as a prerequisite to recovering attorneys' fees [*Skaff v. Meridien North America Beverly Hills (9th Cir. 2007) 506 F.3d 832, 844-845*].

[2] Definition of "Disability"

The term "disability," with respect to an individual, means any of the following [*42 U.S.C. § 12102(2)*]:

- A physical or mental impairment that substantially limits one or more of the major life activities of that individual;
- A record of such impairment; or
- Being regarded as having such an impairment.

Thus, for example, the United States Supreme Court determined that human immunodeficiency virus (HIV) is a "physical impairment" within the meaning of *42 U.S.C. § 12102(2)*, from the moment of infection throughout every stage of the disease, as a physiological disorder with a constant detrimental effect on an infected person's hemic and lymphatic systems. This is so even when the infection has not yet progressed to the symptomatic phase [*Bragdon v. Abbott (1998) 524 U.S. 624, 631-641, 118 S. Ct. 2196, 141 L. Ed. 2d 540* (HIV is physical impairment substantially limiting major life activity of reproduction)].

The United States Supreme Court has also held that mentally retarded persons are within the definition of "disability" for the purposes of the ADA [*Olmstead v. L.C. (1999) 527 U.S. 581, 119 S. Ct. 2176, 144 L. Ed. 2d 540, 551 n.2* (two mentally retarded women, one also diagnosed with schizophrenia and other with personality disorder)].

"Disability" does not include any of the following [*42 U.S.C. § 12211(b)*]:

- Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
- Compulsive gambling, kleptomania, or pyromania; or
- Psychoactive substance use disorders resulting from current illegal use of drugs.

An individual currently engaging in the illegal use of drugs is not an individual with a disability when the entity to which the ADA applies acts on the basis of that use [*42 U.S.C. § 12210(a)*]. Nevertheless, an individual may not be denied health services or services provided in connection with drug rehabilitation on the basis of the current illegal use of drugs if the individual is otherwise entitled to those services [*42 U.S.C. § 12210(c)*].

Homosexuality and bisexuality are not impairments and, thus, are not disabilities [*42 U.S.C. § 12211(a)*].

[3] Public Accommodations and Services Offered by Private Entities

Title III of the ADA, *42 U.S.C. §§ 12181-12189*, governs public accommodations and services operated by private entities. The protections provided by Title III of the ADA to individuals with disabilities are significant and broad in scope. Much of the language used is similar to the language of Title II of the Civil Rights Act of 1964 (*42 U.S.C. § 2000a et seq.*) [*see 42 U.S.C. §§ 12181(7)* (definition of "public accommodation"), *12187* (private club and religious organizations exemptions)]. Moreover, the remedies and procedures set forth in Title II of the Civil Rights Act of 1964

are the remedies and procedures available to any person subjected to discrimination in violation of Title III of the ADA or who has reasonable grounds to believe he or she is about to be subjected to such discrimination [*42 U.S.C. § 12188(a)*]. For discussion of Title II of the Civil Rights Act of 1964, see Ch. 112, *Civil Rights: Government Funded Programs and Activities* .

The ADA prohibits discrimination against an individual on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation [*42 U.S.C. § 12182(a)*].

The ADA's general prohibition of discriminatory denial of the opportunity to participate in or benefit from goods, services, facilities, privileges, advantages, or accommodations of an entity [*42 U.S.C. § 12182(b)(1)(A)(i)*] has been interpreted broadly to include denial of the right to participate in PGA golf tours and their qualifying rounds [*PGA Tour, Inc. v. Martin (2001) 532 U.S. 661, 121 S. Ct. 1879, 149 L. Ed. 2d 904]* , as well as denial of life insurance [*see Cloutier v. Prudential Ins. Co. of America (N.D. Cal. 1997) 964 F. Supp. 299, 301-302* (applicant for life insurance had standing to pursue claim against insurer under ADA after being denied coverage based on his partner's infection with human immunodeficiency virus)].

With regard to foreign-flag cruise ships, a clear statement of congressional intent is necessary before a general statutory requirement can interfere with matters that concern a vessel's internal affairs and operations, as contrasted with statutory requirements that concern the security and well-being of United States citizens or territory. Thus, although the clear statement rule could limit the application of Title III to foreign-flag cruise ships in some instances, when it requires removal of physical barriers, except insofar as Title III regulates a vessel's internal affairs, it would appear the rule is inapplicable to many other duties Title III might impose [*Spector v. Norwegian Cruise Line Ltd. (2005) 545 U.S. 119, 125 S. Ct. 2169, 2174-2175, 162 L. Ed. 2d 97]* .

Goods, services, facilities, privileges, advantages, and accommodations must be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual [*42 U.S.C. § 12182(b)(1)(B)*].

Title III of the ADA prohibits places of public accommodation from discriminating against disabled persons by, among other things, failing to remove architectural barriers to their businesses or, if removal is not readily achievable, using alternative methods for providing disabled persons with access to their goods, services, and facilities [*Snyder v. San Diego Flowers (S.D. Cal. 1998) 21 F. Supp. 2d 1207, 1208* ; *see 42 U.S.C. § 12182(a), (b)*]. A plaintiff who is disabled within the meaning of the ADA and who has actual knowledge of illegal barriers at a public accommodation to which he or she desires access need not engage in the futile gesture of attempting to gain access in order to show actual injury during the limitations period. A plaintiff who seeks injunctive relief against an ongoing violation is not barred from seeking relief either by the statute of limitations or by lack of standing [*Pickern v. Holiday Quality Foods Inc. (9th Cir. 2002) 293 F.3d 1133, 1134]* .

The ADA defines public accommodation to include numerous types of private entities for which the word "public" reflects the entity's use in commerce, not its ownership [*42 U.S.C. § 12181(7)*]. The ADA applies to establishments that fall within any of 12 categories [*42 U.S.C. § 12181(7)*; 28 C.F.R. § 36, appen. B (2008)]:

- Places of lodging.
- Establishments serving food or drink.
- Places of exhibition or entertainment.
- Places of public gathering.

- Sales or rental establishments.
- Service establishments.
- Stations used for specified public transportation.
- Places of public display or collection.
- Places of recreation.
- Places of education.
- Social service center establishments.
- Places of exercise or recreation.

The ADA gives the following examples of private entities considered public accommodations, if the operations of the entities affect commerce [*42 U.S.C. § 12181(7)*]:

- An inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of the establishment as the residence of the proprietor.
- A restaurant, bar, or other establishment serving food or drink.
- A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment.
- An auditorium, convention center, lecture hall, or other place of public gathering.
- A bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment.
- A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment.
- A terminal, depot, or other station used for specified public transportation.
- A museum, library, gallery, or other place of public display or collection.park, zoo, amusement park, or other place of recreation.
- A park, zoo, amusement park, or other place of recreation.
- A nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education.
- A day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment.
- A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

Although the 12 categories of public accommodations listed in the ADA are exclusive, the illustrative examples for each category are not. Within each category only a few examples are given. The category of sales or rental establishments, for example, would include an innumerable array of facilities sweeping far beyond the few examples given in the regulation. Retail or wholesale establishments selling or renting items, such as bookstores, videotape rental stores, car rental establishment, pet stores, and jewelry stores would also be covered under this category, even though they are not specifically listed [28 C.F.R. § 36, appen. B (2008)]. In deciding whether an establishment is a public accommodation even in the absence of an express designation, courts ask whether its inclusion furthers the ADA's purpose [*Nicholls v. Holiday Panay Marina, L.P. (2009) 173 Cal. App. 4th 966, 970-971, 93 Cal. Rptr. 3d 309* (identifying private marina as included rental establishment subject to ADA furthered ADA's purpose)].

Restricted access does not, by itself, make an accommodation nonpublic. Selectivity in choosing who among members of the public may enter or use an accommodation does not necessarily defeat its public character [*Martin v. PGA Tour, Inc. (9th Cir. 2000) 204 F.3d 994, 998* ; *Nicholls v. Holiday Panay Marina, L.P. (2009) 173 Cal. App. 4th 966, 972, 93 Cal. Rptr. 3d 309*]. Many facilities classified as public accommodations under the ADA are open only to specific invitees [*Nicholls v. Holiday Panay Marina, L.P. (2009) 173 Cal. App. 4th 966, 972, 93 Cal. Rptr. 3d 309* ; *Independent Living Resources v. Oregon Arena Corp. (D. Or. 1997) 982 F. Supp. 698, 759* (private executive suites in sports arena were public accommodation); *see, e.g., 42 U.S.C. §§ 12181(7)(J)* (private schools); 12181(7)(L) (gymnasiums, health spas, and golf courses); 12181(7)(C) (theaters, concert halls, and stadiums)].

A "private club" is exempt under the ADA [*42 U.S.C. § 12181(7)*; *see, e.g., Jankey v. Twentieth Century Fox Film Corp. (C.D. Cal. 1998) 14 F. Supp. 2d 1174, 1179* ; *United States v. Lansdowne Swim Club (E.D. Pa. 1989) 713 F. Supp. 785, 796-797*]. Features that tend to make an organization a private club include the following [*Nicholls v. Holiday Panay Marina, L.P. (2009) 173 Cal. App. 4th 966, 969 n.2, 93 Cal. Rptr. 3d 309* ; *see also Jankey v. Twentieth Century Fox Film Corp. (C.D. Cal. 1998) 14 F. Supp. 2d 1174, 1179* ; *United States v. Lansdowne Swim Club (E.D. PA. 1989) 713 F. Supp. 785, 796-797*]:

- Selectivity in membership.
- Restriction of nonmembers' use of facilities.
- The degree of member control of the organization's operations.
- The purpose of the organization's existence.
- Advertisement to the public.
- Substantial membership fees.
- The organization's profit or nonprofit status.

Under the regulations, wheelchair areas must be an integral part of any fixed seating plan and provided so as to provide people with physical disabilities a choice of admission prices and lines of sight comparable to those for members of the general public [*see 28 C.F.R. § 36.406* & Appendix A; *see also* Dept. of Justice Technical Assistance Manual § 4.33.3 (in addition to requiring companion seating and dispersion of wheelchair locations, ADA Accessibility Guidelines (ADAAG) requires that wheelchair locations provide people with disabilities lines of sight comparable to those for members of general public)]. In assembly areas where spectators can be expected to stand during an event or show being viewed, wheelchair locations must provide lines of sight over spectators who stand [*Miller v. Cal. Speedway Corp. (9th Cir. 2008) 536 F.3d 1020, 1027-1033* , *citing* Dept. of Justice Technical Assistance Manual § 4.33.3].

Under regulations, a disabled individual can be denied an accommodation when the individual poses a direct threat to the health or safety of others [*28 C.F.R. § 36.208*; *see Lockett v. Catalina Channel Express, Inc. (9th Cir. 2007) 496 F.3d 1061, 1065-1067* (single decision by ticket seller of ferry operator to ask blind passenger to ride in general passenger area with her guide dog, rather than in more expensive lounge area, was reasonable judgment under *28 C.F.R. § 36.208*, where ferry operator had adopted policy excluding animals from lounge based on another passenger's alleged allergy, and there is no suggestion that the person had any training to evaluate the possible effect on an allergic passenger of the presence of a service animal in the Commodore Lounge. With the ferry scheduled to depart, selling Lockett a ticket for the general passenger area was a reasonable judgment. It allowed CCE to provide Lockett with transportation to Catalina Island, as she requested, albeit without the benefits and the cost of the Commodore Lounge)].

42 U.S.C. § 12188(a) incorporates the requirements of *42 U.S.C. § 2000a-3(c)*, for civil actions under the ADA, so that disabled persons suing under *42 U.S.C. § 12182* are required to exhaust administrative remedies [*Snyder v. San Diego Flowers (S.D. Cal. 1998) 21 F. Supp. 2d 1207, 1208-1211]* .

Regulations to implement Title III of the ADA have been promulgated by the Attorney General and are set forth at *28 C.F.R. § 36.101 et seq.* Guidelines issued by the Architectural and Transportation Barriers Compliance Board pertaining to standards for accessible design in places of public accommodations and commercial facilities are set forth in 36 C.F.R. Appendix A.

[4] Telecommunication Relay Services

The Federal Communications Commission (FCC) is charged with ensuring that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to individuals who have a hearing or speech impairment [*47 U.S.C. § 225(b)(1)*]. For purposes of administering and enforcing *47 U.S.C. § 225*, the FCC has the same authority, power, and functions with respect to intrastate carriers as it has with respect to interstate carriers. Regardless of whether the carrier engages in interstate or intrastate communications, violation of *47 U.S.C. § 225* is subject to the same remedies, penalties, and procedures applicable to a violations of the Communications Act of 1934 (*47 U.S.C. § 151 et seq.*) [*see 47 U.S.C. § 225(b)(2)*; *see also 47 U.S.C. § 609*].

Every common carrier providing telephone service was required to provide telecommunications relay service in compliance with the FCC regulations pertaining to telecommunications services for hearing-impaired and speech-impaired individuals by July 26, 1993 [*see 47 U.S.C. § 225(c)*].

"Telecommunications relay service" means telephone transmission services that provide the ability for an individual who has a hearing or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing or speech impairment to communicate using voice communication services by wire or radio. It includes services that enable two-way communication between an individual who uses a telecommunications device for the deaf (TDD) or other nonvoice terminal device and an individual who does not use such a device [*47 U.S.C. § 225(a)(3)*]. *47 U.S.C. § 225* is applicable to common carriers engaged in interstate or intrastate communication by wire or radio [*see 47 U.S.C. § 225(a)(1)*; *see also 47 U.S.C. §§ 152(b), 153, 221(b)*].

Except when a state establishes an approved program to implement and enforce regulations concerning intrastate common carriers, the FCC has the responsibility of enforcing Section 225 and related regulations. Complaints alleging violations should be made to the FCC [*see 47 U.S.C. § 225(e), (f), (g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawProtection of Disabled PersonsAmericans With Disabilities ActAccommodationCivil Rights

LawProtection of Disabled PersonsAmericans With Disabilities ActLegislative PurposeCivil Rights LawProtection of Disabled PersonsAmericans With Disabilities ActScopeCommunications LawFederal ActsGeneral Overview

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11-116 California Forms of Pleading and Practice--Annotated § 116.53

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.53 Air Carrier Access Act of 1986

The Air Carrier Access Act of 1986 (ACAA), provides that in providing air transportation, an air carrier may not discriminate against an otherwise qualified individual on any of the following grounds [*49 U.S.C. § 41705*]:

- The individual has a physical or mental impairment that substantially limits one or more major life activities;
- The individual has a record of such an impairment; or
- The individual is regarded as having such an impairment.

Air carrier personnel may refuse to provide transportation to a passenger on the basis of safety [*14 C.F.R. § 382.31*], and a carrier may require a medical certificate for a qualified individual with a disability under certain circumstances, including where the individual's medical condition is such that there is reasonable doubt that the individual can complete the flight safely, without requiring extraordinary medical assistance during the flight [*14 C.F.R. § 382.53*]. However, a decision to refuse passage must be assessed in light of facts and circumstances known to the airline at the time the decision was made, and the decision to refuse passage cannot be unreasonable or irrational [*Newman v. American Airlines (9th Cir. 1999) 176 F.3d 1128, 1131]* .

Each individual act of discrimination in violation of the ACAA constitutes a separate offense punishable by a civil penalty [*49 U.S.C. § 46301(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawGeneral OverviewTransportation LawAir TransportationAirline Deregulation ActGeneral

OverviewTransportation LawCarrier Duties & LiabilitiesDuty to Provide Service

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[Reserved]

§§ 116.54[Reserved]

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11-116 California Forms of Pleading and Practice--Annotated § 116.60

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.60 Related Matthew Bender Publications

For thorough discussion of federal civil rights legislation and actions, see J. Cook & J. Sobieski, Civil Rights Actions (Matthew Bender)

For related jury instructions regarding civil rights, see Judicial Council of California Civil Jury Instructions (CACI), Series 3000 (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview

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11-116 California Forms of Pleading and Practice--Annotated § 116.61

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.61 Federal Constitution

Due process clause, applicable to federal government. *U.S. Const., amend. V*

Sovereign immunity of states. *U.S. Const., amend. XI*

Privileges and immunities, due process, and *equal protection clauses*, applicable to states. *U.S. Const., amend. XIV*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewConstitutional LawEqual ProtectionScope of ProtectionConstitutional LawPrivileges & ImmunitiesGovernmentsFederal GovernmentClaims By & Against

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11-116 California Forms of Pleading and Practice--Annotated § 116.62

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.62 State Constitution

Prohibition against restrictions on entry into vocation, trade, profession, business, or employment based on sex, race, creed, color, or national or ethnic origin. *Cal. Const., art. I, § 8*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawGeneral Overview

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11-116 California Forms of Pleading and Practice--Annotated § 116.63

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.63 Federal Statutes

Jurisdiction of United States District Courts in civil rights cases. *28 U.S.C. §§ 1331, 1343, 1344*

Equal rights under law. *42 U.S.C. § 1981*

Property rights of citizens. *42 U.S.C. § 1982*

Civil action for deprivation of civil rights under color of state law. *42 U.S.C. § 1983*

Conspiracy to interfere with civil rights. *42 U.S.C. § 1985*

Neglect to prevent conspiracy to interfere with civil rights. *42 U.S.C. § 1986*

State law applicable in federal civil rights actions. *42 U.S.C. § 1988(a)*

Recovery of attorney's fees in civil rights actions. *42 U.S.C. § 1988(b)*

Discrimination in public accommodations. *42 U.S.C. § 2000a et seq.* (Title II of Civil Rights Act of 1964)

Discrimination in public facilities; civil action by Attorney General if individual complainants are certified unable to maintain action. *42 U.S.C. § 2000b et seq.*

Discrimination against disabled persons. *42 U.S.C. § 12111 et seq.* (Americans With Disabilities Act of 1990)

Access to telecommunications relay services for individuals with hearing and speech impairments. *47 U.S.C. § 225*

Discrimination against disabled persons by air carriers. *49 U.S.C. § 41705* (Air Carrier Access Act of 1986)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawConspiracyGeneral OverviewCivil Rights LawContractual Relations & HousingEqual Rights Under the Law (sec. 1981)General OverviewCivil Rights LawContractual Relations & HousingProperty Rights (sec. 1982)General OverviewCivil Rights LawPractice & ProcedureCosts & Attorney FeesGeneral OverviewCivil Rights LawSection 1983 ActionsGeneral Overview

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11-116 California Forms of Pleading and Practice--Annotated § 116.64

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.64 State Statutes

[1] Associations and Facilities with Discriminatory Policies

State funds may not be used for payments or contributions to private organizations with discriminatory membership policies. *Gov. Code § 11015*

State and local agencies prohibited from conducting any function in any facility with discriminatory admittance policy. *Gov. Code §§ 11131, 54961*

[2] Business Discrimination

Licensee under Business and Professions Code subject to disciplinary action for discrimination against persons on basis of any characteristic listed or defined in Unruh Act [*Civ. Code § 51(b)* or *(e)*]. *Bus. & Prof. Code § 125.6*

Discrimination in certain business transactions prohibited. *Bus. & Prof. Code §§ 16721, 16721.5, 16721.6*

Certain forms of discrimination prohibited by Automobile Dealers Anti-Coercion Act. *Bus. & Prof. Code §§ 18400-18413*

Persons not to be excluded from race tracks by rules of California Horse Racing Board on account of any characteristic listed or defined in Unruh Act [*Civ. Code § 51(b)* or *(e)*]. *Bus. & Prof. Code § 19572*

Social clubs licensed to serve alcoholic beverages that engage in discriminatory membership practices engage in unlawful activity and may be denied license. *Bus. & Prof. Code §§ 23428.5, 23428.18-23428.28*

Certain expenses of alcoholic beverage club licensee that discriminates in membership or use of its services or facilities

nondeductible for tax purposes. *Bus. & Prof. Code § 23438*

Equal rights in business establishments. *Civ. Code § 51* (Unruh Civil Rights Act)

Discrimination or boycott in business transactions prohibited. *Civ. Code § 51.5*

Franchisors prohibited from discriminating in granting of franchises. *Civ. Code § 51.8*

Damages for denial of equal rights in business establishments. *Civ. Code § 52*

State trust monies may not be invested in entities engaging in discriminatory business practices in furtherance or compliance with Arab League's economic boycott of Israel. *Gov. Code § 16649.80 et seq.*

[3] Disabled Persons

[a] Access for Disabled Persons

Disabled persons have right to full and free use of, and equal access to, public facilities. *Civ. Code §§ 54, 54.1*

Injunctive relief available to person aggrieved by violation of *Civ. Code §§ 54, 54.1*; *Gov. Code § 4450 et seq.*; and *Health & Safety Code § 19955 et seq.*; *Civ. Code § 55*

District attorney, county counsel if district attorney does not bring action, city attorney, Department of Rehabilitation, or Attorney General authorized to sue to enforce disabled persons' right of access to public places and conveyances. *Civ. Code § 55.1*; *Health & Safety Code §§ 19954, 19958.5*

Construction-Related Accessibility Standards Compliance Act. *Civ. Code §§ 55.3, 55.51 et seq.*

Access to public buildings by disabled persons. *Gov. Code §§ 4450-4460*

Access to fixed route transit equipment and public transit structures by individuals with disabilities. *Gov. Code § 4500*

Toilet facilities for disabled persons in public buildings. *Gov. Code §§ 7250-7252*

Public officers and employees prohibited from coercing disabled persons with regard to joining organization or preventing discussion of legislation. *Gov. Code §§ 8312, 8313*

State agency parking facility required to reserve parking spaces for physically disabled persons. *Gov. Code § 14679*

Discrimination at public beaches or public access to beaches prohibited. *Gov. Code §§ 54091, 54092*

California Building Standards Law. *Health & Safety Code § 18901 et seq.*

Membership of physically disabled on California Building Standards Commission. *Health & Safety Code § 18921*

California Building Standards Code. *Health & Safety Code § 18935 et seq.*

State Historical Building Code. *Health & Safety Code § 18950 et seq.*

Access to historical buildings by physically disabled. *Health & Safety Code §§ 18953, 18954, 18956*

Access to places of public amusement and resort by physically disabled persons. *Health & Safety Code §§ 19952-19954*

Access to public accommodations by physically disabled persons. *Health & Safety Code §§ 19955-19959*

Reduced transit fares and accessibility of dial-a-ride and paratransit services to individuals with disabilities. *Pub. Util. Code §§ 99155, 99155.5*

[b] Insurance for Disabled Persons

Health care services plan prohibited from unnecessary discrimination against physically or mentally impaired persons. *Health & Safety Code § 1367.8*

Disabled persons do not automatically lose coverage under parents' health care service plan on reaching specified limiting age. *Health & Safety Code § 1373(d)*

Extension of medical benefits to person who became totally disabled while enrolled in plan. *Health & Safety Code § 1399.62*

Disability insurance required to be offered to physically handicapped members of group under same terms and conditions as others. *Ins. Code § 10122.1*

Self-insured employee welfare benefit plan required to offer coverage to physically handicapped persons under same terms and conditions as others. *Ins. Code § 10123.2*

Discrimination against blind motor vehicle owners or disabled persons prohibited in motor vehicle liability insurance. *Ins. Code §§ 11628.5, 11628.7*

[c] Public Programs for Disabled Persons

Shared housing for elderly and disabled persons. *Health & Safety Code §§ 19902-19904*

Community Redevelopment Law prohibits discrimination on specified grounds. *Health & Safety Code §§ 33050, 33051*

Special housing programs for disabled. *Health & Safety Code § 50680 et seq.*

California Children's Services Act, including services for physically handicapped minors. *Health & Safety Code § 123800 et seq.*

Genetically Handicapped Person's Program. *Health & Safety Code § 125125 et seq.*

[d] Miscellaneous Protections and Rights for Disabled Persons

Discrimination against blind persons in social work profession prohibited. *Bus. & Prof. Code § 4992.6*

Certain legal service projects benefitting disabled persons entitled to funds from Funds for Provision of Legal Services to Indigent Persons. *Bus. & Prof. Code §§ 6210-6228*

Service station refueling service for disabled persons. *Bus. & Prof. Code § 13660*

Additional penalties applicable to violation of unfair competition law perpetrated against disabled persons. *Bus. & Prof. Code § 17206.1*

Assistive listening or computer-aided transcription systems required in courts. *Civ. Code § 54.8*

Requirement that on and after January 1, 2005, whenever transit operator improves or replaces ticket vending machine at public transit station to include video instructions, transit operator must equip ticket vending machine with audio instructions enabling visually impaired persons to follow visual prompts. *Pub. Util. Code § 99163*

[4] Insurance

Discrimination in contract coverage by health care service plan prohibited. *Health & Safety Code § 1365.5*

Discriminatory practices by certain admitted insurers prohibited. *Ins. Code §§ 679.70-679.73*

Sex-based differentials in rates, dividends, or benefits. *Ins. Code § 790.03(f)*

Insurance business subject to California laws applicable to any other business, including Unruh Civil Rights Act. *Ins. Code § 1861.03(a)*

Discrimination in life and disability insurance forbidden. *Ins. Code §§ 10140-10145.3*

Discrimination in motor vehicle liability insurance forbidden. *Ins. Code §§ 11628, 11628.5, 11628.7, 11629, 11629.5*

Discrimination by insurers in bonding contractors prohibited. *Ins. Code §§ 12095-12097*

[5] Real Estate Transactions

Discriminatory restrictions on ownership or use of real property are void. *Civ. Code § 53*

Restrictions in deeds on basis of characteristics listed in Fair Employment and Housing Act (FEHA) are void. *Civ. Code § 782*

Restrictions in deeds on basis of characteristics listed in FEHA are omitted. *Civ. Code § 782.5*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawGeneral OverviewHealthcare LawInsurancePreexisting ConditionsPublic Health & Welfare LawHousing & Public BuildingsAccessibility, Construction & DesignPublic Health & Welfare LawSocial ServicesDisabled & Elderly PersonsGeneral OverviewReal Property LawRestrictive CovenantsGeneral Overview

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AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.64A California Civil Jury Instructions (CACI)

For related jury instructions regarding civil rights, including instructions addressing, for example, the Unruh Civil Rights Act, see Judicial Council of California Civil Jury Instructions (CACI), Series 3000, Civil Rights (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions

Legal Topics:

For related research and practice materials, see the following legal topics:
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11-116 California Forms of Pleading and Practice--Annotated § 116.65

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.65 Decisions

[1] Unruh Civil Rights Act

Application of Unruh Act to associations does not violate rights of members guaranteed by *U.S. Const., amend. I*, when it does not interfere unduly with members' freedom of private association and does not violate right of expressive association. *Bd. of Dirs. of Rotary Int'l v. Rotary Club (1987) 481 U.S. 537, 547-549, 107 S. Ct. 1940, 95 L. Ed. 2d 474*

Unlike Americans with Disabilities Act as interpreted by United States Supreme Court, definition of disability under Unruh Act does not require plaintiff to show she is regarded as having *present* limitation of major life activity, which as California Legislature clarified, was state of California law when insurance company refused to issue policy to plaintiff, so that insurance company was not entitled to summary judgment on claim under Unruh Act for disability discrimination for refusing to issue disability income insurance policy based on plaintiff's diagnosis of and treatment for adjustment disorder with mixed anxiety and depressed mood and company's underwriting policy to deny coverage for applicants with adjustment disorder until at least one year after cessation of treatment. *Goldman v. Standard Ins. Co. (9th Cir. 2003) 341 F.3d 1023, 1026-1034*

Unruh Act is intended to proscribe arbitrary discrimination, or blanket exclusion of class of persons; Act does not compel creation of separate but equal Olympic track events for women. *Martin v. Int'l Olympic Comm. (9th Cir. 1984) 740 F.2d 670, 675-677*

Plaintiff who establishes violation of Americans With Disabilities Act need not prove intentional discrimination in order to obtain damages for disability discrimination in violation of *Civ. Code § 51(f)*. *Munson v. Del Taco, Inc. (2009) 46 Cal. 4th 661, 667-678, 94 Cal. Rptr. 3d 685, 208 P.3d 623*

Rights of religious freedom and free speech guaranteed in both federal and California Constitutions did not exempt medical clinic's physicians from complying with Unruh Civil Rights Act's prohibition against discrimination based on

person's sexual orientation, so that physicians employed by clinic could not refuse fertility treatments to lesbian on basis of physicians' religious beliefs regarding particular type of treatment, where *First Amendment's* right to free exercise of religion did not exempt physicians from conforming their conduct to Unruh Act's antidiscrimination requirements even if compliance posed incidental conflict with their religious beliefs, and where to avoid conflict between their religious beliefs and Unruh Act's antidiscrimination provisions, physicians could simply refuse to perform medical procedure at issue for any patient of clinic or, because they would incur liability under Act if they infringed on right to full and equal services of clinic's medical practice, they could avoid conflict by ensuring that every patient requiring procedure received full and equal access to procedure through clinic physician lacking their religious objections. *North Coast Women's Care Medical Group, Inc. v. Benitez (2008) 44 Cal. 4th 1145, 1153-1161, 81 Cal. Rptr. 3d 708*

To state claims under Unruh Act and Gender Tax Repeal Act, men who alleged that they patronized club on several occasions and were charged admission fee higher than fee charged to women were not required to request nondiscriminatory treatment and be refused, where Unruh Act did not establish as condition of instituting lawsuit that defendant have been given notice and opportunity to correct asserted violation, and price discrimination on basis of gender constituted injury under *Unruh Act. Angelucci v. Century Supper Club (2007) 41 Cal. 4th 160, 168, 59 Cal. Rptr. 3d 142, 158 P.3d 718*

Although domestic partners registered under California Domestic Partner Rights and Responsibilities Act of 2003 [*Fam. Code § 297 et seq.*] are equivalent of spouses for purposes of Unruh Act, before effective date of Domestic Partner Act, country club's policy of denying to domestic partners of members same benefits granted to spouses of members did not violate Unruh Act as impermissible marital status discrimination, and was not impermissible sexual orientation discrimination. However, lesbian domestic partners were entitled to opportunity to prove viable Unruh Act claim for discriminatory application of club's policy. *Koebke v. Bernardo Heights Country Club (2005) 36 Cal. 4th 824, 836-855, 31 Cal. Rptr. 3d 565, 115 P.3d 1212*

Unruh Act does not apply to membership decisions of Boy Scouts, because Boy Scouts is expressive social organization whose primary function is inculcation of specific set of values in its youth members, its small social group structure and activities are not comparable to those of traditional place of public accommodation or amusement, and its recreational facilities and activities are complementary to primary purpose; however, business transactions with nonmembers through operation of retail shops and elsewhere, and licensing of use of its insignia, are covered by *Act. Curran v. Mount Diablo Council of the Boy Scouts (1998) 17 Cal. 4th 670, 696-700, 72 Cal. Rptr. 2d 410, 952 P. 2d 218* ; *Randall v. Orange County Council, Boy Scouts of America (1998) 17 Cal. 4th 736, 744, 72 Cal. Rptr. 2d 453, 952 P.2d 261*

Concepts of "arbitrary discrimination" and "reasonable" regulations are questions of law decided on demurrer or summary judgment when business policy or practice is valid on its face because it bears reasonable relation to commercial objectives appropriate to enterprise serving public. *Harris v. Capital Growth Investors XIV (1991) 52 Cal. 3d 1142, 1164-1165, 1169*

Boys' club was business establishment under Unruh Act and its male-only membership policy was prohibited, arbitrary form of discrimination based on findings regarding nature and function of particular defendant club; relevant evidence regarding particular club included suitability of its programs, services, and facilities for both sexes, that value and effectiveness of programs would not be diminished by inclusion of both sexes, and absence of proof that female membership would cause serious permanent damage to club's funding or to its relationship with parent national organization. *Isbister v. Boys' Club of Santa Cruz (1985) 40 Cal. 3d 72, 88-91, 219 Cal. Rptr. 150, 707 P.2d 212*

Sex-based price discounts (typically in form of "Ladies' Day") are prohibited by *Unruh Act. Koire v. Metro Car Wash (1985) 40 Cal. 3d 24, 38, 219 Cal. Rptr. 133, 707 P.2d 195*

Age restriction in covenants, conditions, and restrictions of condominium development excluding minor children

violate *Unruh Act. O'Connor v. Village Green Owners Ass'n (1983) 33 Cal. 3d 790, 793, 794, 191 Cal. Rptr. 320, 662 P.2d 427*

Blanket exclusion of all families with minor children from apartment complex is violation of *Unruh Act. Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 741-743, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858*

Injunctive relief as well as damages available in action under *Civ. Code §§ 51* and *52*. *Burks v. Poppy Constr. Co. (1962) 57 Cal. 2d 463, 470, 20 Cal. Rptr. 609, 370 P.2d 313*

Recreational common areas within common interest development that were fenced trails with various entry points spread over common area, entry points included architectural barriers to access by vehicles, trails were linked to larger web of privately owned and publicly owned trails in county, trails were accessible to general public because homeowners' association followed custom of not precluding members of general public from utilizing trails, and association did not charge fees to members of general public for utilizing its trails or otherwise attempt to commercially exploit trails, did not constitute public accommodation under ADA, CPDA, and Unruh Act, where trails would not be public accommodation if association actively excluded general public from using them and private trails did not transform into public accommodations merely because association does not actively exclude members of public from using trails; and where there was no evidence suggesting trails were built for anyone other than association members, association encourages public use of its trails through advertising or otherwise, or that association charges fees to members of public for using trails or benefits in other ways from public's use of trails. *Carolyn v. Orange Park Community Assn. (2009) 177 Cal. App. 4th 1090, 1097-1106, 99 Cal. Rptr. 3d 699*

Bank did not act arbitrarily in violation of Unruh Act when it required United States citizens to provide Social Security number to open credit card account, while allowing foreign nationals to open one using alternative form of identification, where federal regulations specifically required bank to obtain Social Security number from any United States citizen who opened account but specified that when individual customer was not United States citizen, bank could obtain either Social Security number or alternative identification. Bank did not violate Unruh Act by applying minimum identification standards imposed by federal law to both foreign nationals and United States citizens seeking to obtain a credit account, where distinction between types of identification numbers required for United States citizens and foreign nationals was created by federal law and for bank to depart from federally required minimums by imposing stricter requirements on foreign nationals, but not on United States citizens, might have itself appeared discriminatory in context of regulatory scheme and might subject bank to litigation, and even if litigation were not successful, bank had strong incentive to avoid expense and controversy associated with defending such claim. *Howe v. Bank of America N.A. (2009) 179 Cal. App. 4th 1443, 1452-1454, 102 Cal. Rptr. 3d 506*

In action under Unruh Act by students expelled allegedly for having lesbian relationship, private religious high school was not "business establishment" subject to Act, where primary function of school was inculcation of religious values in its youth members, and admission to school was effectively selective and based on Lutheran religious values; where, although fact that school was nonprofit was not controlling, inculcation of specific set of values with programs designed to teach moral principles to which school subscribed prevented school from being considered business establishment whose student admission practices were subject to Act; where former students' complaint regarding their dismissal from school went to heart of reason for existence of school; where school could charge fees without being subject to Act, because otherwise private organization can engage in some business transactions with members without risk of becoming "business enterprise" for purposes of Unruh Civil Rights Act; and where teaching of garden-variety secular subjects in addition to religious topics did not make it business establishment because school's religious message was inextricably intertwined with its secular functions. *Doe v. California Lutheran High School Assn. (2009) 170 Cal. App. 4th 828, 834-841, 88 Cal. Rptr. 3d 475*

In action under Unruh Act and ADA by organization representing disabled individuals against operator of retail department stores for maintaining narrow pathways between merchandise display racks that blocked shoppers with

wheelchairs and other mobility aids from reaching merchandise, although trial court properly found that retailer denied access to disabled individuals and that widening merchandise pathways to allow access was not legally mandated because wider pathways would cause significant loss of selling space and profit, trial court erred in concluding that retailer provided adequate alternative method for making its merchandise available to disabled individuals by designing new and remodeled stores to be physically accessible, where, although sufficient evidence supported trial court's finding that removal of barriers to access was not readily achievable and thus not legally mandated, retailer did not meet its obligation to make its merchandise available to disabled individuals denied access to retailer's existing stores by constructing new and geographically distant stores that were accessible, and trial court needed on remand to consider appropriate alternative means for making merchandise available to disabled individuals who denied physical access. *Californians for Disability Rights v. Mervyn's LLC (2008) 165 Cal. App. 4th 571, 582-601, 81 Cal. Rptr. 3d 144*

Baseball team's Mother's Day giveaway of tote bags did not unlawfully violate Unruh Act by giving tote bags to women, where team's intent was to honor mothers on Mother's Day and due to volume of attendees and time pressure, it would have been impracticable for team to make sure each woman who received tote bag was in fact mother, so that team adopted practical approach of giving tote bags to all females over 18 years of age, so that intended discrimination was not female versus male, but rather mothers versus rest of the population, which was not violation of Act as unreasonable, arbitrary or invidious discrimination. *Cohn v. Corinthian Colleges (2008) 169 Cal. App. 4th 523, 527-530, 86 Cal. Rptr. 3d 401*

Plaintiff who presented himself to Internet matchmaking service business with intent of purchasing its services, but became aware of business's practice of charging different amounts for such services based on gender and did not purchase services, was not aggrieved by practice so as to have standing to sue for violations of *Unruh Civil Rights Act. Surrey v. TrueBeginnings (2008) 168 Cal. App. 4th 414, 417-420, 85 Cal. Rptr. 3d 443*

Unruh Act did not require accommodations for individuals with learning disabilities and other conditions affecting their ability to read when taking Medical College Admission Test (MCAT), where, in administering MCAT, defendant maintained facially neutral testing policy with disparate impact on persons with learning and reading-related disabilities, requiring accommodations under Unruh Act to extent they were required under ADA, and there was no allegation defendant failed to comply with ADA in considering requests for accommodations on MCAT. *Turner v. Assn. of American Medical Colleges (2008) 167 Cal. App. 4th 1401, 1407-1411, 85 Cal. Rptr. 3d 94*

In action by disabled person against restaurant owner under Unruh Civil Rights Act and Disabled Persons Act, alleging that he was refused service and subjected to ridicule and harassment at restaurant in retaliation for his efforts to ensure that restaurant was accessible for use by disabled under Americans with Disabilities Act of 1990, trial court erred in granting summary judgment to restaurant owner after finding that plaintiff failed to establish prima facie case of unlawful retaliation because retaliatory action allegedly taken by restaurant against him was too trivial to be judicially cognizable, where plaintiff's claims, if found true, were sufficient to allow fact finder to conclude, employing both subjective and objective tests, that he was subjected to materially adverse acts of retaliation by restaurant owner, and where plaintiff produced sufficient evidence to establish number of material adverse acts intentionally directed at him that interfered with his full and equal use of restaurant, which was place of public accommodation. *Wilson v. Murillo (2008) 163 Cal. App. 4th 1124, 1132-1139, 78 Cal. Rptr. 3d 214*

In action by paraplegic plaintiff who sued owners of apartment complex in which he lived, trial court properly determined that Unruh Civil Rights Act was not violated by lack of curb ramp, which would have required structural modification to property, which Unruh Act specifically did not require, and where cause of action under *Civ. Code § 51* premised on existence of structural barrier depended on whether lack of wheelchair ramp at curb constituted intentional violation of another provision of law relating to disability access, and none of statutes referred to by plaintiff as source of such structural access standards was applicable to residential and common areas of apartment complex, even though leasing office within facility was. *Coronado v. Cobblestone Village Community Rentals, L.P. (2008) 163 Cal. App. 4th 831, 840-851, 77 Cal. Rptr. 3d 883*

Cable service provider's practice of packaging FM or music service together with television programming or refusing to provide FM or music service by itself did not as matter of law violate Unruh Act, because policy applied equally to sighted and blind subscribers, and contention that policy, despite equal application to all subscribers, had adverse impact on blind persons failed to state violation of Act. Further, blind plaintiff could not show denial of access to place of public accommodation in violation of ADA, because as matter of law, cable services are not place of public accommodation. *Belton v. Comcast (2007) 151 Cal. App. 4th 1224, 1237-1239, 60 Cal. Rptr. 3d 631*

Disabled plaintiff in wheelchair who proved restaurant owner's concededly unintentional violations of Americans With Disabilities Act and hence Unruh Act [*Civ. Code § 51(f)*] could not recover damages, where he could have sued based on unintentional ADA violations but recovered smaller statutory minimum penalty under *Civ. Code § 54.3*, but he elected to try to obtain larger statutory minimum penalty under *Civ. Code § 52* and failed to present evidence defendant intentionally discriminated against him as required by *Civ. Code § 52*. *Gunther v. Lin (2006) 144 Cal. App. 4th 223, 226-256, 50 Cal. Rptr. 3d 317*

Plain language of *Civ. Code § 52(a)* makes clear that only those who deny rights guaranteed by *Civ. Code § 51, 51.5*, or *51.6* are liable for attorney's fees. Thus, trial court erred in awarding plaintiff attorney's fees for bringing disability discrimination action under Unruh Act. Plaintiff accepted defendant's offer to compromise under *Code Civ. Proc. § 998*, so there was no finding defendant denied, aided, or incited denial, or made any discrimination or distinction contrary to § 51, 51.5, or 51.6, and judgment based on compromise settlement did not constitute finding of liability. *Doran v. North State Grocery, Inc. (2006) 137 Cal. App. 4th 484, 488-492, 39 Cal. Rptr. 3d 922*

Theater company's offer of discount admission prices to "baby-boomers" to attend musical about that generation did not involve arbitrary class-based generalization protected by *Unruh Civil Rights Act. Pizarro v. Lamb's Players Theatre (2006) 135 Cal. App. 4th 1171, 1174-1176, 37 Cal. Rptr. 3d 859*

Physician pleaded sufficient facts to state valid cause of action against hospital pursuant to Unruh Civil Rights Act, when he specifically alleged that hospital operated as business enterprise offering its facilities to qualified physicians who were not its employees in exchange for fees and other considerations, Unruh Act applied to prevent business entities from discriminating in provision of their facilities on basis of race, and physician's allegation he was denied access was properly cognizable under Unruh Act. *Payne v. Anaheim Memorial Medical Center (2005) 130 Cal. App. 4th 729, 745-749, 30 Cal. Rptr. 3d 230*

Man over 60 years of age who was allowed to speak on call-in radio show but then not allowed to speak on issue of age failed to state age discrimination claim under Unruh Act that would likely prevail on merits, when although certain aspects of operating and publishing commercial syndicated talk show might qualify for treatment under Unruh Act, production and airing of talk show involving public discourse of necessity involved free speech component calling into play *First Amendment*, requiring additional scrutiny, and state had no compelling interest to justify application of the Unruh Act in face of defendant's *First Amendment* rights. *Ingels v. Westwood One Broadcasting Services, Inc. (2005) 129 Cal. App. 4th 1050, 1068-1074, 28 Cal. Rptr. 3d 933*

In Unruh Act case by African-American man against amusement park based on plaintiff's ejection from park for alleged line cutting, trial court's grant of summary adjudication against plaintiff was improper, when he presented statistical evidence sufficient to support inference that park's facially neutral line cutting policy was applied in discriminatory manner. *Everett v. Superior Court (2003) 104 Cal. App. 4th 388, 392-394, 128 Cal. Rptr. 2d 418*

County fair's enforcement of dress code to require patron to remove vest bearing insignia of Hell's Angels Motorcycle Club did not violate right to full and equal accommodations under *Unruh Act. Gatto v. County of Sonoma (2002) 98 Cal. App. 4th 744, 765-769, 120 Cal. Rptr. 2d 550*

Policy of sports bar of refusing entry to motorcyclists wearing "colors" or patches indicating membership in particular motorcycle club, while admitting entry to patrons in casual attire including full motorcycle regalia, did not violate Unruh Act, when policy was not unlawful discrimination based on unconventional appearance since motorcyclists wearing full regalia were admitted to bar and only part of outfit for which plaintiffs were refused entry was patch signifying allegiance to particular club and when "no colors" rule was policy applicable alike to all persons regardless of race, color, sex, religion, etc., bar possessed legitimate business interest in excluding plaintiffs to prevent barroom brawls between members of rival gangs, and allowing discrimination claim of this nature would lead to endless, increasingly frivolous challenges to dress codes and other neutral admission policies common in many restaurants and retail establishments. *Hessians Motorcycle Club v. J.C. Flanagans (2001) 86 Cal. App. 4th 833, 103 Cal. Rptr. 2d 552*

Trial court properly dismissed survivor's action on behalf of estate of long-term mental patient alleging violation of Unruh Act, based on violation of the Americans with Disabilities Act of 1990, for violating implementing regulation requiring public entities to place disabled individuals in setting enabling them to interact with nondisabled persons to fullest extent possible ("integration mandate"), where on closing of state hospital in which decedent had lived, transfer of decedent to community institutional facility rather than another state hospital may have been medically inappropriate but was not violation of integration mandate. *Black v. Dep't of Mental Health (2000) 83 Cal. App. 4th 739, 100 Cal. Rptr. 2d 39*

Unruh Act not violated by car rental agencies' requirement of minimum age for rental where *Civ. Code § 1936* regulates rental car contracts, and language of Section 1936(a)(3) anticipates and expressly approves adoption of minimum age requirements by car rental companies and is unambiguous and does not contain reasonableness requirement. *Lazar v. Hertz Corp. (1999) 69 Cal. App. 4th 1494, 1503, 82 Cal. Rptr. 2d 368*

Police officers are persons entitled to protections of Unruh Act; police officers may bring actions for violations of Act even though their injuries have arisen in some way related to performance of their duties. *Long v. Valentino (1989) 216 Cal. App. 3d 1287, 1298, 265 Cal. Rptr. 96 , cert. denied, 498 U.S. 855 (1990)*

Proprietor of hotel is not permitted to expel guest because of guest's alleged "anti-gay" philosophy; hotel owners are prohibited under Unruh Act from isolating guests according to perceived social or political philosophies. *Gray v. Kircher (1987) 193 Cal. App. 3d 1069, 1075, 236 Cal. Rptr. 891*

Unruh Act seeks to remedy arbitrary discrimination, not discrimination based on purely personal grounds. *Frantz v. Blackwell (1987) 189 Cal. App. 3d 91, 96, 234 Cal. Rptr. 178*

When organization is business enterprise rather than private association, membership is clearly advantage or privilege under Unruh Act, and exclusion from or termination of membership arbitrarily on basis of protected characteristic is prohibited. *Rotary Club of Duarte v. Bd. of Dirs. (1986) 178 Cal. App. 3d 1035, 1059, 224 Cal. Rptr. 213 , aff'd sub nom., Bd. of Dirs. of Rotary Int'l v. Rotary Club (1987) 481 U.S. 537*

Segregation on premises of patrons between ages of 18 and 21 is not arbitrary if required to ensure compliance with *Cal. Const., art. XX, § 22* (ban on sale of alcoholic beverages to persons under 21), and is permissible if underage drinking cannot otherwise be controlled on premises, and thus does not violate *Act. Reilly v. Stroh (1984) 161 Cal. App. 3d 47, 52-53, 207 Cal. Rptr. 250*

Practice of requiring oath or affirmation of particular religious belief by advertiser before publication of advertisement in religiously oriented business telephone directory is improper. *Pines v. Tomson (1984) 160 Cal. App. 3d 370, 383-386, 206 Cal. Rptr. 866*

Medical practices and physician services are within meaning of "business establishment" under Unruh Act; hospital's arbitrary refusal to provide medical services to individual violates Act. *Leach v. Drummond Med. Group (1983) 144*

Cal. App. 3d 362, 371-372, 192 Cal. Rptr. 650

Allegations of community of interest insufficient when complaint for violation of Unruh Act brought on behalf of nine subclasses of patrons alleged separate arbitrary bases for exclusion. *Bartlett v. Hawaiian Village, Inc. (1978) 87 Cal. App. 3d 435, 438-440, 151 Cal. Rptr. 392*

Ordinance purporting to give owner of private property arbitrary power to exclude anyone, under penalty of criminal prosecution, is interference with civil rights guaranteed by *Civ. Code §§ 51* and *52*. *Ames v. City of Hermosa Beach (1971) 16 Cal. App. 3d 146, 152, 93 Cal. Rptr. 786*

[2] Other State Laws

[a] Disabled Persons

Because award of attorney's fees to prevailing party is mandatory under Civ. Code § 55, and because no finding that plaintiff's claim was frivolous is required under Civ. Code § 55, nor is Civ. Code § 55 preempted by Americans with Disabilities Act, trial court properly awarded prevailing defendant attorney's fees. Jankey v. Lee (2010) 181 Cal. App. 4th 1173, 1183-1187, 105 Cal. Rptr. 3d 290

In action under ADA and California Disabled Persons Act, award of attorney's fees to prevailing defendants was preempted by ADA, even though CDPA authorized fees to "prevailing party," where trial court found that plaintiffs' claims were not frivolous and fees were not warranted under ADA, and violation of federal ADA constituted violation of CDPA so that to extent *Civ. Code § 55* mandated imposition of fees on losing plaintiff who brought both nonfrivolous ADA action and parallel action under CDPA, fee award under CDPA would be inconsistent with ADA; and where proof required to show violation of CDPA and of ADA was identical, so that it was impossible to distinguish fees necessary to defend against CDPA claim from those expended in defense against ADA claim, and grant of fees on California cause of action was necessarily grant of fees as to ADA claim. *Hubbard v. SoBreck, LLC (9th Cir. 2008) 531 F.3d 983, 985-987*

Action for damages for alleged violation of Disabled Persons Act because countertops in defendant's business establishments were allegedly too high to allow wheelchair access was not barred by res judicata based on consent decree in class action lawsuit against same defendant BFRC in United States District Court in Florida, which alleged defendant's facilities denied equal access to disabled persons in violation of federal Americans with Disabilities Act, because Florida federal case was resolved by consent decree expressly reserving any damage claims under state law. *Louie v. BFS Retail & Commercial Operations, LLC (2009) 178 Cal. App. 4th 1544, 1553-1562, 101 Cal. Rptr. 3d 441*

Disabled Persons Act ("DPA") did not require accommodations for individuals with learning disabilities and other conditions affecting their ability to read when taking Medical College Admission Test ("MCAT"), where focus of DPA is on physical access to public places and equal physical access to nontangible location such as Internet site, and DPA could not be read to require accommodations for learning and reading-related disabilities on standardized test, and where, like Unruh Civil Rights Act, DPA incorporates ADA to extent violation of right of individual under ADA also constitutes a violation of DPA, but plaintiffs made no allegation or showing that defendant violated ADA. *Turner v. Assn. of American Medical Colleges (2008) 167 Cal. App. 4th 1401, 1411-1413, 85 Cal. Rptr. 3d 94*

Mobile home park was place of public accommodation under California Disabled Persons Act, where general public was invited to park on daily, weekly, or monthly basis, as long as they paid rent or fees and followed rules, and whether plaintiff actually paid rent or other fees and followed rules was not relevant to determining whether park fell within CDPA's broad definition of places required to afford full and equal access to individuals with disabilities. However, trial court properly held that plaintiff did not have standing to sue for monetary damages under *Civ. Code § 54.3* based on

noncompliance of park's swimming pool with American With Disabilities Act Accessibility Guidelines, where plaintiff failed to register as guest and pay guest fee, so that plaintiff was unable to show she actually presented herself to business, as any other customer or guest would do, with intent of paying guest fee to gain admittance to park or to use swimming pool; and where stipulated facts were not specific enough to show actual denial or interference with access on particular occasion, as opposed to merely becoming aware of discriminatory conditions in pool area of park. *Reycraft v. Lee (2009) 177 Cal. App. 4th 1211, 1217-1227, 99 Cal. Rptr. 3d 746*

Recreational common areas within common interest development that were fenced trails with various entry points spread over common area, entry points included architectural barriers to access by vehicles, trails were linked to larger web of privately owned and publicly owned trails in county, trails were accessible to general public because homeowners' association followed custom of not precluding members of general public from utilizing trails, and association did not charge fees to members of general public for utilizing its trails or otherwise attempt to commercially exploit trails, did not constitute public accommodation under ADA, CPDA, and Unruh Act, where trails would not be public accommodation if association actively excluded general public from using them and private trails did not transform into public accommodations merely because association does not actively exclude members of public from using trails; and where there was no evidence suggesting trails were built for anyone other than association members, association encourages public use of its trails through advertising or otherwise, or that association charges fees to members of public for using trails or benefits in other ways from public's use of trails. *Carolyn v. Orange Park Community Assn. (2009) 177 Cal. App. 4th 1090, 1097-1106, 99 Cal. Rptr. 3d 699*

In action under *Civ. Code § 55*, trial court acted within its discretion when it determined defendant was prevailing party, where plaintiff obtained none of relief he sought and defendant obtained judgment in its favor on every cause of action, and there was no requirement that prevailing defendant be awarded fees only if plaintiff's claim was frivolous, unreasonable, or groundless; and where any violations were remediated by defendant before action was filed, and plaintiff did not voluntarily dismiss his groundless claim for injunctive relief. *Molski v. Arciero Wine Group (2008) 164 Cal. App. 4th 786, 790-793, 79 Cal. Rptr. 3d 574*

In action by disabled person against restaurant owner under Unruh Civil Rights Act and Disabled Persons Act, alleging that he was refused service and subjected to ridicule and harassment at restaurant in retaliation for his efforts to ensure that restaurant was accessible for use by disabled under Americans with Disabilities Act of 1990, trial court erred in granting summary judgment to restaurant owner after finding that plaintiff failed to establish prima facie case of unlawful retaliation because retaliatory action allegedly taken by restaurant against him was too trivial to be judicially cognizable, where plaintiff's claims, if found true, were sufficient to allow fact finder to conclude, employing both subjective and objective tests, that he was subjected to materially adverse acts of retaliation by restaurant owner, and where plaintiff produced sufficient evidence to establish number of material adverse acts intentionally directed at him which interfered with his full and equal use of restaurant, which was place of public accommodation. *Wilson v. Murillo (2008) 163 Cal. App. 4th 1124, 1132-1139, 78 Cal. Rptr. 3d 214*

In action by paraplegic plaintiff who sued owners of apartment complex in which he lived, trial court properly determined that Disabled Persons Act was not violated by lack of curb ramp, where cause of action under Disabled Persons Act premised on existence of structural barrier depended on whether lack of wheelchair ramp at curb constituted intentional violation of another provision of law relating to disability access, and none of statutes referred to by plaintiff as source of such structural access standards was applicable to residential and common areas of apartment complex, even though leasing office within facility was. *Coronado v. Cobblestone Village Community Rentals, L.P. (2008) 163 Cal. App. 4th 831, 842-851, 77 Cal. Rptr. 3d 883*

Although disabled, plaintiff had no standing under *Civ. Code § 54.1* based on defendant's violation of disabled access regulations governing slope of parking spaces, where regulations were not intended to prevent type of accident plaintiff suffered by falling; failure of access aisle to comply with applicable regulations did not deny her equal access to store, because there was no reason to believe plaintiff would have been unable to reach store entrance had she taken

prescribed route. *Urhausen v. Longs Drug Stores California, Inc. (2007) 155 Cal. App. 4th 254, 261-266, 65 Cal. Rptr. 3d 838*

Concrete trash container on path to south entrance of defendant restaurant was violation of Americans with Disabilities Act, and hence violation of *Civ. Code § 54* even though restaurant had one other accessible entrance, where obstacle such as concrete trash container, blocking accessible route of travel to entrance, presented breach of duty under ADA. *Madden v. Del Taco, Inc. (2007) 150 Cal. App. 4th 294, 301-304, 58 Cal. Rptr. 3d 313*

No federal-question jurisdiction over action for damages under California's Disabled Person's Act [*Civ. Code § 54.1*]. *Wander v. Kaus (9th Cir. 2002) 304 F.3d 856* ; *Pickern v. Best Western Timber Cove Lodge Marina Resort (E.D. Cal. 2002) 194 F. Supp. 2d 1128, 1131-1133*

Taken together, *Civ. Code § 54 et seq.* (equal access to public facilities), *Gov. Code § 4450 et seq.* (access to public buildings), and *Health & Safety Code § 19955 et seq.* (access to public accommodations) provide for two-fold procedure: public agency or individual may bring injunctive action to enforce compliance with access standards, and individual may bring action for damages when able to establish that he or she was denied equal access on particular occasion. *Donald v. Cafe Royale (1990) 218 Cal. App. 3d 168, 183, 266 Cal. Rptr. 804*

Office building making major renovations on seventh floor was required by *Gov. Code § 4456* and *Health & Safety Code § 19955* to make restrooms on that floor accessible to physically handicapped; limited exception to accessibility requirements for multistoried public accommodations provided by *Health & Safety Code § 19956* was not applicable to office building. *Wilshire Financial Tower v. City of Los Angeles (1990) 217 Cal. App. 3d 119, 122-124, 265 Cal. Rptr. 685*

City ordinance prohibiting discrimination against persons with AIDS by business establishments, except those engaged in exchange of products containing blood or sperm, was not unconstitutional when applied to manicure establishment. *Jasperson v. Jessica's Nail Clinic (1989) 216 Cal. App. 3d 1099, 1109-1112, 265 Cal. Rptr. 301*

Scope of *Civ. Code § 54.1*, applicable to "places to which the general public is invited," is broader than that of *Health & Safety Code § 19955*. *Donald v. Sacramento Valley Bank (1989) 209 Cal. App. 3d 1183, 1195, 260 Cal. Rptr. 49*

Civ. Code § 55.1 authorized both city and state to bring action to enjoin violation of *Civ. Code § 54.1*; state was empowered to bring action, even if city was estopped from acting, when city was not acting as arm or agent of state. *City and County of San Francisco v. Grant Co. (1986) 181 Cal. App. 3d 1085, 1089-1092, 227 Cal. Rptr. 154*

[b] Other Discrimination

Alleged comments made by trustee to mother of trust beneficiary during single telephone conversation and brief statement to mother in person later same day during social event at museum failed to establish "severe" or "pervasive" conduct necessary to pursue claim of hostile environment sexual harassment under *Civ. Code § 51.9*, as those terms are interpreted under Title VII and FEHA in decisions pertaining to sexual harassment in workplace, where conduct could not have been pervasive because it was not so egregious as to alter conditions of underlying professional relationship; and where conduct could not have been severe because, although it was vulgar and highly offensive, remark made in presence of other people attending private showing at museum could not plausibly be construed by reasonable trier of fact as threat to commit sexual assault on plaintiff. Mother also failed to allege facts establishing violation of *Civ. Code § 51.9* based on quid pro quo form of sexual harassment, where allegation that trustee's crude statement, considered in context in which it allegedly was made, was threat that, unless mother granted him sexual favors, he would use his authority as trustee to deny her requests for funds, amounted at most to unfulfilled threats, given that mother did not allege that because she rejected his sexual overtures, trustee followed through on his alleged threat by using his

authority to cause financial injury or hardship to mother or to her son. *Hughes v. Pair (2009) 46 Cal. 4th 1035, 1041-1050, 95 Cal. Rptr. 3d 636, 209 P.3d 963*

Patient at medical center sufficiently alleged cause of action against medical center under *Civ. Code § 51.9* by alleging that she was sexually molested by certified nursing assistant, who was one of center's employees, where patient satisfied requirement of business or professional relationship by alleging that nursing assistant, as center's employee or agent, had responsibilities substantially similar to those provided by physician; and where center could be liable for sexual abuse of patient under *Civ. Code § 51.9* based on sufficient allegations it ratified nursing assistant's alleged sexual misconduct. *C.R. v. Tenet Healthcare Corp. (2009) 169 Cal. App. 4th 1094, 1107-1112, 87 Cal. Rptr. 3d 424*

Person must tender purchase price for business's services or products to have standing to sue it for alleged discriminatory practices relating to it. Thus, plaintiff who presented himself to Internet matchmaking service business with intent of purchasing its services, but became aware of business's practice of charging different amounts for such services based on gender and did not purchase services, was not aggrieved by practice so as to have standing to sue for violations of *Gender Tax Repeal Act. Surrey v. TrueBeginnings (2008) 168 Cal. App. 4th 414, 417-420, 85 Cal. Rptr. 3d 443*

Minor's causes of action for interference with civil rights under *Civ. Code § 52.1* and for sexual harassment under *Civ. Code § 51.9* were time-barred as matter of law; applicable statute of limitations was one year period provided by former *Code Civ. Proc. § 340(3)*, and complaint was not filed within one year period following emancipation; minor's tolling provision of *Code Civ. Proc. § 352(a)* was not applicable after minor was emancipated. *West Shield Investigations & Sec. Consultants v. Superior Court (2000) 82 Cal. App. 4th 935, 98 Cal. Rptr. 2d 612 . Note:* Effective January 1, 2003, *Code Civ. Proc. § 340* was amended and *Code Civ. Proc. § 335.1* was added to provide that personal injury actions are now governed by a two-year statute of limitations.

Nonprofit corporation organized for purpose of securing equal housing opportunities for all persons had standing under former *Bus. & Prof. Code § 17204* (unfair business practices) to maintain action for injunctive relief for alleged violations of Unruh Act, regardless of its standing under Unruh Act; party is permitted to bring suit under Unfair Business Practices Act to enforce other statutes under which that party would otherwise lack standing. *Midpeninsula Citizens for Fair Housing v. Westwood Investors (1990) 221 Cal. App. 3d 1377, 1389-1393, 271 Cal. Rptr. 99*

Restrictive covenant limiting residents of tract housing development to those aged 45 and over invalid under *Civ. Code § 53*. *Park Redlands Covenant Control Comm. v. Simon (1986) 181 Cal. App. 3d 87, 93, 226 Cal. Rptr. 199*

Exclusion of men from "Ladies Only" show featuring male dancers was impermissible gender-based discrimination in violation of *Bus. & Prof. Code § 125.6* and *Civ. Code § 51*. *Easebe Enterprises v. Rice (1983) 141 Cal. App. 3d 981, 985-987, 190 Cal. Rptr. 678*

Inclusion of religion in *Civ. Code § 53* indicative that manner in which person approaches spiritual matters is improper and irrelevant criterion for denying access to land; covenant restricting occupancy to members of society similar to religion is void. *Taormina Theosophical Community v. Silver (1983) 140 Cal. App. 3d 964, 976, 190 Cal. Rptr. 38*

[3] Title II of Civil Rights Act of 1964

Swimming pool association with membership available, as a practical matter, to all who purchased homes in surrounding geographical areas was not private club. *Tillman v. Wheaton-Haven Recreation Ass'n (1973) 410 U.S. 431, 438, 93 S. Ct. 1090, 35 L. Ed. 2d 403*

[4] Americans With Disabilities Act

Barrier removal required by Title III of Americans With Disabilities Act that would bring foreign-flag cruise vessel into noncompliance with International Convention for Safety of Life at Sea (SOLAS) [32 U.S. T. 47, T. I. A. S. No. 9700], or any other international legal obligation, and would create serious difficulties for vessel and have substantial impact on its operation, would not be readily achievable. Whether barrier modification is readily achievable must take into consideration modification's effect on shipboard safety. Thus, structural modification is not readily achievable within meaning of *42 U.S.C. § 12181(9)* if it would pose direct threat to health or safety of others. *Spector v. Norwegian Cruise Line Ltd. (2005) 545 U.S. 119, 125 S. Ct. 2169, 2180-2181, 162 L. Ed. 2d 97*

Americans With Disabilities Act by its plain terms prohibits PGA from denying disabled professional golfer equal access to its tours and qualifying rounds on basis of his disability by prohibiting him from using golf cart, where tours and qualifying rounds occur on golf courses, which are the types of places specifically identified as public accommodation, and at all relevant times, PGA leases and operates golf courses to conduct qualifying rounds and tours; and when allowing him to use golf cart and waiving "walking rule," which prohibits use of golf carts in tours and final qualifying rounds, is not modification that would fundamentally alter nature of tours or qualifying rounds, since walking rule is neither essential attribute of game itself nor indispensable feature of tournament golf; further, even if walking rule is "outcome affecting" because fatigue may adversely affect performance, refusal to consider disabled player's personal circumstances violated ADA requirement that individualized inquiry be conducted, since disabled player endures greater fatigue with cart than able-bodied competitors do by walking. *PGA Tour, Inc. v. Martin (2001) 532 U.S. 661, 121 S. Ct. 1879, 149 L. Ed. 2d 904*

When state Legislature eliminated former requirement of "self-preservation" for resident s of care homes providing assisted living after filing of lawsuit under Fair Housing Amendments Act of 1988, 42 U.S.C. § 3600 et seq. and Americans with Disabilities Act, plaintiffs were not entitled to attorney's fees award under "catalyst theory," under which plaintiff is prevailing party if it achieves desired result because lawsuit brought about voluntary change in defendant's conduct, since state's voluntary change lacked necessary judicial *imprimatur*. *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources (2001) 532 U.S. 598, 121 S. Ct. 1835, 1841-1843, 149 L. Ed. 2d 855*

HIV is physical impairment substantially limiting major life activity of reproduction. *Bragdon v. Abbott (1998) 524 U.S. 624, 631-641, 118 S. Ct. 2196, 141 L. Ed. 2d 540*

Plaintiff did not have standing to pursue claims of violation of ADA, where plaintiff could not show that he suffered injury in fact as to unencountered barriers, because he did not personally encounter alleged barriers, and where he could not show deterrent effect, given that, although his unverified complaint alleged that barriers he claimed to have encountered deterred him from reentering defendant's store, he testified otherwise in his depositions and admitted that encountered alleged barriers did not deter him from visiting store or using restroom, he intended to return to store in future, and he may already have done so. *Chapman v. Pier 1 Imports (U.S.) Inc. (9th Cir. 2009) 571 F.3d 853, 857-859*

District court erred in finding that paraplegic plaintiff did not have standing to seek attorney's fees in action under Title II of ADA against hotel because she failed to introduce evidence of her intent to return to hotel at time that she filed her complaint, where her intent to return to area was evidenced by regularity with which she visited city before, during, and after her stay at hotel, and where her desire to stay at hotel on future trips if it were made accessible was also well supported by evidence she submitted at each successive stage of litigation; district court erred in relying on plaintiff's approximately sixty prior ADA suits to question sincerity of her intent to return to hotel, where record contained no evidence of whether those places had been made accessible, such that plaintiff could have safely returned if she so wished. *D'Lil v. Best Western Encina Lodge & Suites (9th Cir. 2008) 538 F.3d 1031, 1036-1040*

After district court dismissed case pursuant to settlement agreement, plaintiff was prevailing party entitled to attorney's fees award under ADA and district court erred in denying fees, where plaintiff had authority to require defendants to

construct accessible restroom under and only because of settlement agreement; where ADA did not allow district court to consider lack of prelitigation notice as factor in its special-circumstances analysis in determining whether request for attorney's fees under ADA would be unjust because ADA does not require prelitigation notice; and where district court erred in denying fees because it found plaintiff unreasonably protracted litigation, which was reason to reduce fees, not deny them altogether. However, district court had discretion to reduce plaintiff's fee award based on plaintiff's protraction of litigation, but, in its protraction analysis, could not consider whether plaintiff provided prelitigation notice, where it was evident that lack of prelitigation notice did not result in incurring of any unnecessary fees during litigation. *Jankey v. Poop Deck (9th Cir. 2008) 537 F.3d 1122, 1129-1134*

In assembly areas where spectators can be expected to stand during an event or show being viewed, wheelchair locations must provide lines of sight over spectators who stand. *Miller v. Cal. Speedway Corp. (9th Cir. 2008) 536 F.3d 1020, 1027-1033*

In action by government against nationwide movie theater owners to require them to provide full and equal enjoyment to disabled moviegoers in 96 stadium-style multiplexes located across United States, trial court abused its discretion in ordering modifications to multiplexes designed or built before government gave fair notice of its interpretation of pertinent guideline drafted by Architectural and Transportation Barriers Board and adopted by Attorney General as part of Standards for Accessible Design [28 C.F.R. pt. 36, app. A, § 4.33.3], requiring theaters to provide viewing angle for wheelchair seating within range of angles offered to general public in stadium-style seats, where injunction violated due process. District court also abused its discretion in issuing nationwide injunction neglecting comity concerns pertaining to Fifth Circuit's existing, less stringent interpretation of § 4.33.3. *United States v. AMC Entertainment, Inc. (9th Cir. 2008) 549 F.3d 760, 762-774*

In action by disabled plaintiff who used wheelchair, alleging violations of ADA based on barriers to access in retail store, district court properly granted summary judgment to store on alleged ADA violations plaintiff encountered or of which he had personal knowledge, where, although plaintiff had standing to challenge barriers at store even though it was store was far away from his home, given that he had personally suffered discrimination as result of barriers, evidence on which he relief to show store's aisle width violated ADA did not raise genuine issue of material fact as to width of aisle; and where exclusion of disabled plaintiff from employees-only restroom did not violate ADA. However, district court erred in concluding that plaintiff did not have standing to challenge other barriers related to his disability and identified in his expert's site inspections, where it was not essential prerequisite of plaintiff's standing that he prove that deterrence caused by previously encountered violations was reason particular violation was not discovered and hence alleged in his complaint, and uncertainty about whether store contained barriers other than those personally known to plaintiff was itself actual, concrete and particularized injury under deterrence framework of ADA standing. *Doran v. 7-Eleven, Inc. (9th Cir. 2008) 524 F.3d 1034, 1039-1049*

In action against winery that was designated historic property by county, by paraplegic who encountered discriminatory barriers to access when he visited winery, district court properly ordered barrier removal within building, but erred in determining that it would not be readily achievable to make accessible ramp to entrance by refusing to apply *28 C.F.R. § 36.405*, providing procedure for businesses to seek alternative requirements for historic properties, and Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities [28 C.F.R. § 36 App. A 4.1.7], which was incorporated by § 36.405, when evaluating whether accessible ramp would be readily achievable; winery's provision of all relevant services on wheelchair-accessible gazebo was not appropriate alternative accommodation, because it did not change winery's obligation to make readily available changes to enable maximum participation possible for those able to access interior of wine-tasting room. *Molski v. Foley Estates Vineyard (9th Cir. 2008) 531 F.3d 1043, 1046-1050*

Plaintiff who suffered injury in fact that was concrete, particularized, actual, and imminent had constitutional standing under U.S. Const. Art. III to bring suit against store challenging accessibility barriers under Title III of Americans with Disabilities Act and could, in one suit, permissibly challenge all barriers in public accommodation related to his specific disability. However, district court did not err in granting summary judgment to store on issues of whether store's aisle

width and refusal to allow him to access employees-only restroom were ADA violations, where plaintiff introduced no evidence as to actual width of aisles and exclusion of disabled plaintiff from employees-only restroom did not violate ADA. *Doran v. 7-Eleven, Inc. (9th Cir. 2007) 506 F.3d 1191, 1197-1203*

Hotel's initial mistake in assigning room with bathtub rather than roll-in shower caused no cognizable damage under ADA, because it was immediately corrected by reassignment to room with roll-in shower as plaintiff had requested. Similarly, initial absence of shower chair was promptly corrected, and plaintiff had chair he could use in roll-in shower by next morning so he suffered no cognizable injury concerning shower because hotel promptly corrected its errors. However, plaintiff pled injuries that gave him standing to pursue case by alleging encounters with accessibility barriers, other than barrier of inaccessible showers, at hotel, including "path of travel," guestroom, bathroom, telephone, elevator, and signage barriers to access, all in violation of federal and state law and regulation. Finally, because ADA did not require plaintiff to give hotel pre-suit notice that he intended to sue or give hotel opportunity to cure alleged violations before filing suit as pre-requisite to recovering attorney's fees, district court erred when it denied plaintiff's motion for attorney's fees and costs. *Skaff v. Meridien North America Beverly Hills (9th Cir. 2007) 506 F.3d 832, 837-846*

Single decision by ticket seller of ferry operator to ask blind passenger to ride in general passenger area with her guide dog, rather than in more expensive lounge area, was reasonable judgment under *28 C.F.R. § 36.208*, where ferry operator had adopted policy excluding animals from lounge based on another passenger's alleged allergy and, with ferry scheduled to depart, selling plaintiff ticket for general passenger area allowed ferry operator to provide plaintiff with transportation, as she requested, albeit without benefits and the cost of lounge. *Lockett v. Catalina Channel Express, Inc. (9th Cir. 2007) 496 F.3d 1061, 1065-1067*

In action by wheelchair-bound restaurant patron against restaurant for violations of ADA, trial court abused its discretion in denying plaintiff new trial after jury concluded that restaurant did not fail to identify and remove architectural barriers at restaurant, where testimony of plaintiff and investigator established laundry list of architectural barriers, restaurant's vice president acknowledged continued existence of violations and flatly admitted no one at restaurant had attempted to identify or remove architectural barriers, and only issue about which there was disagreement was whether removal of barriers was readily achievable under *42 U.S.C. § 12182(b)(2)(A)(iv)*, which was separate from whether restaurant identified and removed barriers. District court's conclusion that jury determined that plaintiff, who had been deemed vexatious litigant for his history of ADA lawsuits, was not "individual" under ADA, but was business and could not recover was unreasonable and legally flawed, where explanation was inconsistent with plain language, structure, and spirit of ADA, and neither district court nor defendant provided support for concluding that person could be considered business and not individual because of history of litigiousness. *Molski v. M.J. Cable, Inc. (9th Cir. 2007) 481 F.3d 724, 731-734*

Under Title III of ADA, two private entities staging National Finals Rodeo at publicly owned arena in Las Vegas operate arena during rodeo and are responsible for assuring compliance with ADA's public accommodation physical accessibility requirements, when Title III applies to private entity operating facility owned by public entity. However, suit could proceed without participation of public university, which was owner of arena. *Disabled Rights Action Committee v. Las Vegas Events, Inc. (9th Cir. 2004) 375 F.3d 861, 872-884*

In action by wheelchair-bound quadriplegic, based on her ejection from performing arts center with her service dog, district court properly ordered defendants to modify policies to give persons with disabilities "broadest feasible access" to center and not to exclude service animal who made noise on previous occasion, even if behavior was disruptive, if noise was made and intended to serve as means of communication for benefit of disabled owner or if behavior would otherwise be acceptable to center if engaged by humans. Modification was both reasonable and necessary and ordered modification would not cause fundamental alteration of services and facility provided by center. District court also properly found one employee, director of sales and event services, individually liable because he had requisite authority to qualify as operator under Title III, having ability to instruct center staff on who could or could not be admitted to theater, and actively participated in discriminatory acts. *Lentini v. California Center for the Arts, Escondido (9th Cir.*

2004) 370 F.3d 837, 843-846, 849

District court did not abuse its discretion in concluding current and future Medi-Cal patients with special needs requiring medical services offered at county hospital dedicated primarily to providing inpatient and outpatient rehabilitative care to disabled individuals established likelihood of success on merits of ADA claim for injunctive relief to prevent closure of hospital, when plaintiffs were qualified individuals with disabilities, when as public entity county's health care program is covered by ADA, and when services plaintiffs would lose with closure fell within scope of care county must provide consistent with ADA. *Rodde v. Bonta (9th Cir. 2004) 357 F.3d 988, 995-998*

Because there was legally enforceable settlement agreement between parties, district court erred when it denied plaintiffs attorney's fees and costs under ADA and *42 U.S.C. § 1988*. District court also erred when it denied plaintiffs prevailing party status based on their success in obtaining preliminary injunction preventing defendant developmental services department from releasing development center residents into community placements unless certain conditions were met. District court did not err, however, in denying plaintiffs prevailing party status based on their efforts to modify intervenors' permanent injunction. *Richard S. v. Dept. of Developmental Services of State of California (9th Cir. 2003) 317 F.3d 1080, 1086-1089*

Trial court erroneously dismissed action under ADA by paraplegic plaintiff who uses wheelchair, alleging that because defendant grocery stores are "public accommodations" within meaning of ADA [*42 U.S.C. § 12181(7)(E)*], defendant is required to remove architectural barriers making it difficult for plaintiff to gain access to one of defendant's stores on ground that plaintiff had not attempted to enter store during limitations period so that claim was time-barred and he did not have standing, when plaintiff who is disabled within meaning of ADA and who has actual knowledge of illegal barriers at public accommodation to which he or she desires access need not engage in futile gesture of attempting to gain access to show actual injury during limitations period, and plaintiff who seeks injunctive relief against ongoing violation is not barred from seeking relief either by statute of limitations or by lack of standing. *Pickern v. Holiday Quality Foods Inc. (9th Cir. 2002) 293 F.3d 1133, 1134*

Plaintiff "prevails" and is entitled to attorney's fees and costs when plaintiff enters into legally enforceable settlement agreement with defendant under ADA and *42 U.S.C. § 1988*. *Barrios v. California Interscholastic Federation (9th Cir. 2002) 277 F.3d 1128, 1134 , cert. denied, 537 U.S. 820*

Only owner, lessee, lessor, or operator of noncompliant public accommodation can be liable under Title III of ADA for "design and construct" discrimination described in *42 U.S.C. § 12183(a)*; thus, architect may not be held liable for failure to design and construct movie theater complex in manner compliant with ADA. *Lonberg v. Sanborn Theaters Inc. (9th Cir. 2001) 2001 U.S. App. LEXIS 21065*

Disabled persons suing under Americans with Disabilities Act for failure to remove architectural barriers or use alternative methods for providing disabled persons with access to their goods, services, and facilities (*see 42 U.S.C. § 12182(a), (b)*) must exhaust administrative remedies before suing. *Snyder v. San Diego Flowers (S.D. Cal. 1998) 21 F. Supp. 2d 1207, 1208-1211*

Applicant for life insurance had standing to pursue claim against insurer under ADA after being denied coverage based on his partner's infection with human immunodeficiency virus. *Cloutier v. Prudential Ins. Co. of America (N.D. Cal. 1997) 964 F. Supp. 299, 301-302*

Recreational common areas within common interest development that were fenced trails with various entry points spread over common area, entry points included architectural barriers to access by vehicles, trails were linked to larger web of privately owned and publicly owned trails in county, trails were accessible to general public because homeowners' association followed custom of not precluding members of general public from utilizing trails, and association did not charge fees to members of general public for utilizing its trails or otherwise attempt to commercially

exploit trails, did not constitute public accommodation under ADA, CPDA, and Unruh Act, where trails would not be public accommodation if association actively excluded general public from using them and private trails did not transform into public accommodations merely because association does not actively exclude members of public from using trails; and where there was no evidence suggesting trails were built for anyone other than association members, association encourages public use of its trails through advertising or otherwise, or that association charges fees to members of public for using trails or benefits in other ways from public's use of trails. *Carolyn v. Orange Park Community Assn. (2009) 177 Cal. App. 4th 1090, 1097-1106, 99 Cal. Rptr. 3d 699*

In action under ADA by paraplegic plaintiff who leased slip at marina and sued marina for lack of wheelchair access, trial court erred in finding private marina was not public accommodation subject to ADA, where marina was on its face rental establishment subject to ADA, ADA's failure to mention marinas that leased boat slips to public as covered did not preclude marinas from being rental establishments to which it applied, and including marina as public accommodation even in absence of express designation furthered ADA's purpose to integrate persons with disabilities into economic and social mainstream of American life; where fact that marina did not allow within marina any functions open to general public was not dispositive, because restricted access by itself did not make accommodation nonpublic and selectivity in choosing who among members of public could enter or use an marina did not necessarily defeat its public character; and where trial court erroneously miscast the marina as permanent lodging exempt from ADA, because there was no evidence any marina tenants lived at the marina or regularly slept overnight on their boats. *Nicholls v. Holiday Panay Marina, L.P. (2009) 173 Cal. App. 4th 966, 970-975, 93 Cal. Rptr. 3d 309*

In action under Unruh Act and ADA by organization representing disabled individuals against operator of retail department stores for maintaining narrow pathways between merchandise display racks that blocked shoppers with wheelchairs and other mobility aids from reaching merchandise, although trial court properly found that retailer denied access to disabled individuals and that widening merchandise pathways to allow access was not legally mandated because wider pathways would cause significant loss of selling space and profit, trial court erred in concluding that retailer provided adequate alternative method for making its merchandise available to disabled individuals by designing new and remodeled stores to be physically accessible, where, although sufficient evidence supported trial court's finding that removal of barriers to access was not readily achievable and thus not legally mandated, retailer did not meet its obligation to make its merchandise available to disabled individuals denied access to retailer's existing stores by constructing new and geographically distant stores that were accessible, and trial court needed on remand to consider appropriate alternative means for making merchandise available to disabled individuals who denied physical access. *Californians for Disability Rights v. Mervyn's LLC (2008) 165 Cal. App. 4th 571, 582-601, 81 Cal. Rptr. 3d 144*

[5] Air Carrier Access Act of 1986

Decision to refuse passage must be assessed in light of facts and circumstances known to airline at time decision was made, and decision to refuse passage cannot be unreasonable or irrational. *Newman v. American Airlines (9th Cir. 1999) 176 F.3d 1128, 1131*

[6] Preemption

Blind passenger's claim against airline under *Civ. Code § 54.1* based on airline's insistence that he sit in front row of passenger section of aircraft was preempted by former 49 U.S.C. § 1305(a)(1) of *Federal Aviation Act. Hingson v. Pacific Southwest Airlines (9th Cir. 1984) 743 F.2d 1408, 1415-1416*

Civ. Code § 2103, requiring common carriers to treat passengers with civility, is preempted with respect to air carriers by Federal Aviation Act (49 U.S.C. § 1305(a)(1)); *Civ. Code § 51* is not similarly preempted because it applies generally to all business establishments and does not relate to services of air carriers in particular. *Abou-Jaoude v. British Airways (1991) 228 Cal. App. 3d 1137, 1141-1145, 281 Cal. Rptr. 150*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewCivil Rights LawGeneral OverviewCivil Rights LawPublic FacilitiesGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of Association

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 116 CIVIL RIGHTS: DISCRIMINATION IN BUSINESS ESTABLISHMENTS
PART III. RESEARCH GUIDE

11-116 California Forms of Pleading and Practice--Annotated § 116.66

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.66 Attorney General Opinions

Homeowners' association may prohibit children from using one of two swimming pools if restriction is reasonable and does not create inequity for families with children. *75 Ops. Cal. Att'y Gen. 219 (1992)*

Department of Alcoholic Beverage Control is authorized to revoke license of private club because of discriminatory membership practices on determination for good cause that continuance would be contrary to public welfare or morals. *70 Ops. Cal. Att'y Gen. 75 (1987)*

Businesses not in violation of *Civ. Code § 51* when establishing regulations relating to services performed and facilities provided, so long as restrictions not arbitrary and there is evidence of disruption to business and patrons by identified group of persons constituting significant proportion of identifiable class. *61 Ops. Cal. Att'y Gen. 320 (1978)*

Bus. & Prof. Code § 16721.5 not applicable to clauses in letters of credit related to confiscation or war risk or primary boycotts (as opposed to secondary or tertiary boycotts) of one nation directly against another. *59 Ops. Cal. Att'y Gen. 592, 596 (1976)*

Specific restrictions made by business establishments such as convenience stores and fast-food outlets and aimed exclusively at students and not general public are arbitrary discrimination. *59 Ops. Cal. Att'y Gen. 70 (1976)*

Pedestrian overcrossings constructed with public funds are "sidewalks" within meaning of *Gov. Code § 4450*, and must be made accessible to and usable by physically handicapped. *58 Ops. Cal. Att'y Gen. 512, 515 (1975)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawGeneral Overview

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11-116 California Forms of Pleading and Practice--Annotated § 116.67

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.67 Law Reviews

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Comment, *A Measure of Our Progress: Testing for Race Discrimination in Public Accommodations*, *44 UCLA L. Rev. 1207 (1997)*

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Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawProtection of Disabled PersonsGeneral OverviewCivil Rights LawProtection of Disabled PersonsAmericans With Disabilities ActGeneral OverviewCivil Rights LawProtection of Disabled PersonsAmericans With Disabilities ActAccommodationCivil Rights LawPublic FacilitiesGeneral OverviewLabor & Employment LawDiscriminationGender & Sex DiscriminationCoverage & DefinitionsSexual Orientation

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§ 116.68 Text References

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§§ 116.69[Reserved]

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PART IV. FORMS
A. Unruh Civil Rights Act

11-116 California Forms of Pleading and Practice--Annotated § 116.80

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§ 116.80 Complaint for Damages and Preliminary and Permanent Injunction for Violation of Unruh Civil Rights Act--General Form [Civ. Code §§ 51, 52(a)]

[1] FORM Complaint for Damages and Preliminary and Permanent Injunction for Violation of Unruh Civil Rights Act--General Form [Civ. Code §§ 51, 52(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES [AND PRELIMIN-
_____ [*name*],	)	ARY AND PERMANENT INJUNCTION]
[and DOES I through _____,]	)	(Unruh Civil Rights Act)
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.*, a resident of _____ County, California, *or* a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), _____ County, California].

[2. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and

capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.)]

[3. (Plaintiff is informed and believes and thereon alleges that,) (A)t all times herein mentioned, defendant _____ (*name*) was the agent of defendant _____ (*name*) and, in doing the things hereinafter alleged,was acting within the course and scope of such agency and with the permission and consent of his/her codefendant.]

4. _____ [*Allege that defendant is a business establishment within the meaning of the Unruh Civil Rights Act, e.g.*, At all times herein mentioned, defendant _____ (*name*) was the _____ (*specify, e.g.*, owner *or* proprietor *or* lessor *or* lessee *or* operator) of a business establishment engaged in the business of _____ (*specify, e.g.*, a public establishment for the sale of food and drink to be consumed on the premises) commonly known and designated as _____ (*name of business*), situated in _____ (*city*), _____ County, California].

5. _____ [*Allege act(s) of discrimination, e.g.*, On _____ (*date*), plaintiff entered _____ (*name of business*) with the intention and purpose of purchasing food and drink to be consumed on the premises. Plaintiff requested defendant _____ (*name*), one of defendant's employees, to take his/her order and to serve him/her the selected food and drink. Plaintiff's request was refused. During the time plaintiff was on the above-mentioned premises, food and drink such as he/she wished to order were served and sold to other patrons of defendant's establishment who arrived before and after plaintiff].

6. _____ [*Allege protected characteristic of plaintiff enumerated in Act or which is an arbitrary basis for discrimination, e.g.*, Plaintiff is _____ (a person of the African American race *or* a member of the Peace and Freedom Party)].

7. _____ [*Allege that plaintiff's characteristic was the reason for the act of discrimination, e.g.*, (Plaintiff is informed and believes and thereon alleges that) (D)efendants, and each of them, denied to plaintiff the services, advantages, accommodations, facilities, and privileges provided to other persons, as alleged above, on account of plaintiff's _____ (sex *or* race *or* color *or* religion *or* ancestry *or* national origin *or* disability *or* marital status *or* sexual orientation *or* medical condition, *or state other characteristic that was an arbitrary basis for discrimination, e.g.*, political affiliation [*state explanation if necessary, e.g.*, in that plaintiff, as a member of the Peace and Freedom Party, was in possession of political literature on entering defendant's establishment])].

[8. _____ (*Allege that defendant's wrongful conduct is continuing, e.g.*, Defendant's wrongful conduct is continuing in that defendant continues to deny plaintiff and all persons of plaintiff's _____ [sex *or* race *or* color *or* religion *or* ancestry *or* national origin *or* disability *or* medical condition *or* marital status *or* sexual orientation, *or state other characteristic that is an arbitrary basis for discrimination, e.g.*, political affiliation] the full and equal accommodations, advantages, facilities, privileges, and services of the above-mentioned business establishment).]

[9. Unless defendant _____ (*name*) is restrained by a preliminary and permanent injunction of this court, plaintiff's injury will be great and irreparable. Plaintiff has no plain, speedy, and adequate remedy at law because _____ (*specify facts that show pecuniary compensation would not afford adequate relief, that it would be extremely difficult to ascertain the amount of compensation that would afford adequate relief, and/or that restraint is necessary to prevent a multiplicity of proceedings, e.g.*, it will be impossible for plaintiff to determine the precise amount of damage that he/she will suffer if defendant's conduct is not restrained *or* plaintiff will be forced to institute a multiplicity of suits to obtain adequate compensation if defendant's conduct is not restrained).]

[10. _____ (*Set forth any actual damages sustained as a proximate result of defendants' refusal to serve plaintiff*).]

11. As a proximate result of the wrongful act of defendants, plaintiff is [in addition] entitled to recover statutory damages of _____ [*specify amount up to three times the amount of actual damages or* $4,000], plus attorney's fees, as provided in *Civil Code Section 52*.

[12. The above-recited actions of defendant(s) were done with malice, fraud, or oppression, and in reckless disregard of the plaintiff's rights. Specifically, _____ (*set forth facts showing malice, fraud, or oppression, within the meaning of Civ. Code § 3294*).]

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

1. For a preliminary injunction and a permanent injunction enjoining defendant and defendant's agents, servants, and employees, and all persons acting under, in concert with, or for defendant from denying, and aiding and inciting such denial, and from making any discrimination, distinction, or restriction in providing full and equal accommodations, advantages, facilities, and services in defendant's business establishment;

2. For general damages in the sum of $_____;

3. For statutory damages in the sum of $_____ [*if actual damages are $1,333.34 or more, specify amount three times actual damages, otherwise* $4,000] pursuant to *Civil Code Section 52*;

4. For attorney's fees pursuant to *Civil Code Section 52*;

[5. For exemplary and punitive damages;]

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.

_____ [*date*]
Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This complaint is a general form for use by a plaintiff seeking damages for violation of the Unruh Civil Rights Act (*Civ. Code § 51*).

Any violation of the Unruh Act is per se injurious, entitling the victim to a statutory award of at least $4,000 [*Civ. Code § 52(a)*]. If the victim sustains actual damages, the damages may be recovered, in addition to an award of up to three times that amount [*Civ. Code § 52(a)*; *see Civ. Code § 52(h)* ("actual damages" means special and general damages); *see also* Optional Paragraph 10].

Injunctive relief is also available when a person or group of persons is engaged in conduct of resistance to the full enjoyment of the rights secured by the Unruh Act [*Civ. Code § 52(c)*; *see* Optional Paragraphs 8 and 9].

With appropriate modifications, this form may be used to state a complaint for violation of *Civ. Code § 51.5*, which prohibits discrimination in business transactions on the basis of the characteristics protected by the Unruh Act, and which entitles the plaintiff to the same remedies [*see Civ. Code § 52*].

With appropriate modifications, this form may also be used to state a complaint for violation of *Civ. Code § 51.7*, which prohibits violence or the threat of violence against persons or property based on the same protected characteristics as the Unruh Act [*see Civ. Code § 52(b)*]. In modifying the form, note that there is no $4,000 minimum on tripled actual damages, and that the complaint should include a request for the $25,000 civil penalty [*see Civ. Code § 52(b)*]. For discussion of *Civ. Code § 51.7*, see Ch. 117A, *Civil Rights: Interference with Civil Rights by Threats, Intimidation, Coercion, or Violence* .

[3] Allegations

The form of complaint in [1], *above*, alleges all of the following:

- Defendant's capacity and basis for venue (Paragraph 1).

- An optional fictitious name ("DOE") allegation (Optional Paragraph 2) [*see* Civ. Code § 474; *see also* Ch. 20, *Allegations Commonly Used*].

- An optional agency allegation (Optional Paragraph 3) [*see* Ch. 427, *Principal and Agent*].

- Facts showing that defendant is a business establishment within the meaning of the Act (Paragraph 4).

- The nature of defendant's wrongful conduct (Paragraph 5).

- The characteristic of plaintiff that is a protected characteristic enumerated in the Act or an arbitrary basis for discrimination (Paragraph 6) [*see Civ. Code § 51(b)*].

- The relationship between defendant's wrongful conduct and plaintiff's characteristic (Paragraph 7).

- An optional paragraph alleging the continuing nature of defendant's wrongful conduct (Optional Paragraph 8). This paragraph should be used if plaintiff seeks injunctive relief.

- An optional paragraph alleging facts showing why plaintiff lacks an adequate remedy at law and will suffer great and irreparable injury (Optional Paragraph 9) [*Civ. Code § 3422(1)-(3)*; *Code Civ. Proc. § 526(a)(2)-(6)*; *see Wind v. Herbert (1960) 186 Cal. App. 2d 276, 285, 8 Cal. Rptr. 817]* . This paragraph should be used if plaintiff seeks injunctive relief.

- An optional paragraph alleging any actual damages plaintiff incurred (Optional Paragraph 10) [*see Civ. Code § 3333*].

- Plaintiff's right to recover statutory damages and attorney's fees (Paragraph 11) [*see Civ. Code § 52*].

- An optional allegation that the actions of defendants were done with malice, fraud, or oppression, and in reckless disregard of the plaintiff's rights (Optional Paragraph 12). This optional allegation, if appropriate under the circumstances, would support recovery of punitive damages [*see Civ. Code § 3294*].

[4] Prayer

The prayer in the form complaint in [1], *above*, seeks preliminary and permanent injunctive relief.

In a limited civil case, the court may issue temporary restraining orders and preliminary injunctions, but not permanent relief; thus, if permanent injunctive relief is sought, the action cannot be brought as a limited civil case [*see Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*]. For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order, preliminary injunction, or permanent injunction, see Ch. 303, *Injunctions* .

The prayer also seeks both general and statutory damages.

The prayer includes an optional prayer for punitive damages. In a case where the violation of the Unruh Act involves malice, fraud, oppression, or reckless disregard of the plaintiff's rights [*see Civ. Code § 3294*], the plaintiff might be able to recover punitive damages. If the facts do not involve malice, fraud, oppression, or reckless disregard of the plaintiff's rights, the optional punitive damages allegation (Optional Paragraph 12 of the form of complaint) and the optional prayer for punitive damages should not be used.

The prayer also includes a prayer for attorney's fees. *Civ. Code § 52* provides for recovery of attorney's fees in Unruh Act cases.

[5] Temporary Restraining Order

If a temporary restraining order is also sought without notice, it must be shown either by verified complaint or by affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) that great or irreparable injury would result to the applicant before the matter can be heard on notice. The plaintiff's attorney is also required to certify under oath that certain steps were taken and reasons existed for the lack of formal notice [*see Code Civ. Proc. § 527(a)*; *Cal. Rules of Ct., Rule 3.1204(b)*]. If a temporary restraining order is granted, it will issue with an order to show cause, on the hearing of which the court will determine whether to grant a preliminary injunction [*see Code Civ. Proc. § 527(a)*]. For further discussion and forms regarding temporary restraining orders, see Ch. 303, *Injunctions* .

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil

case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

Moreover, if the plaintiff states in his or her complaint facts showing that the action has been commenced in a proper place for trial of the action, and no affidavit or declaration is filed stating those facts, the complaint must be verified [*see Civ. Code § 1812.10*; *Code Civ. Proc. § 396a*].

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . In a limited civil case, the court may issue temporary restraining orders and preliminary injunctions, but not permanent injunctive relief; thus, if permanent injunctive relief is sought, the action cannot be brought as a limited civil case [*see Code Civ. Proc. §§ 85, 86(a)(8)*]. Therefore, if the optional language for permanent injunctive relied is used, the complaint may not be brought as a limited civil case [*Code Civ. Proc. § 580(b)(2)*]. For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order, preliminary injunction, or permanent injunction, see Ch. 303, *Injunctions* .

[7] Cross References

For alternative forms of allegations for use in conjunction with this form, see *§§ 116.81* and *116.82*

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For discussion and forms relating to amendment of pleadings for use when an unknown defendant is sued under a fictitious name, see Ch. 21, *Amended and Supplemental Pleadings*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages, see Ch. 177, *Damages*

For discussion and forms relating to temporary restraining orders, preliminary injunctions, and permanent injunctions, see Ch. 303, *Injunctions*

For discussion of jurisdiction in California courts, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For forms of allegations of infliction of emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons, see Ch. 518, *Service of Summons and Papers*

For forms of allegations establishing venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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Chapter 116 CIVIL RIGHTS: DISCRIMINATION IN BUSINESS ESTABLISHMENTS
PART IV. FORMS
A. Unruh Civil Rights Act

11-116 California Forms of Pleading and Practice--Annotated § 116.81

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.81 Allegations for Use in Complaints for Violation of Unruh Civil Rights Act--Refusal by Physician to Treat Child

[1] FORM Allegations for Use in Complaints for Violation of Unruh Civil Rights Act--Refusal by Physician to Treat Child

1. At all times herein mentioned, defendant _____ [*name*] was engaged in the business of the practice of medicine [commonly known and designated as _____ (*name of professional corporation or clinic, if appropriate*)] situated _____ [*city*], _____ County, California.

2. On _____ [*date*], plaintiff _____ [*name*] entered into an oral agreement with defendant whereby defendant agreed to render medical services to plaintiff's minor child _____ [*name*]. Pursuant to that agreement, plaintiff went to the office of defendant with the intent and purpose of obtaining medical treatment for _____ [*briefly describe type of illness or medical symptoms*]. At that time, plaintiff _____ [*name*] requested medical services from defendant for plaintiff's minor child _____ [*name*], but defendant failed and refused to provide such services. At all times herein mentioned and prior and subsequent thereto, defendant provided medical services to other persons similar to those requested by plaintiff.

[2] Use of Form

The form allegations in [1], *above*, are for use by a parent in an action for violation of the Unruh Civil Rights Act (*Civ. Code § 51*) based on a physician's refusal to treat the plaintiff's minor child. These allegations may be substituted for Paragraphs 4 and 5 of the complaint in § 116.80[1].

These form allegations are based on the fact situation in *Washington v. Blampin (1964) 226 Cal. App. 2d 604, 38 Cal. Rptr. 235* . In *Washington*, a father entered into an agreement with a physician whereby the physician was to render medical services to the plaintiff's minor child. The court found that the services sought were services both to the father

and to the child in that it is the legal duty of a parent to provide necessary medical care for his or her child. Thus, a complaint based on those allegations states a cause of action both on behalf of the father and on behalf of the child [*Washington v. Blampin (1964) 226 Cal. App. 2d 604, 608, 38 Cal. Rptr. 235* (judgment on pleadings for defendant reversed; court did not discuss recovery to which either father or son may be entitled)]. When medical service is refused by reason of a protected characteristic of the plaintiff, the personal nature of the physician-patient relationship creates no obstacle to recovery of damages [*Washington v. Blampin (1964) 226 Cal. App. 2d 604, 608, 38 Cal. Rptr. 235]* .

[3] Cross References

For a general form of complaint under the Unruh Act, see *§ 116.80*

For an alternative form of allegations for use in Unruh Act complaints, see *§ 116.82*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

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11-116 California Forms of Pleading and Practice--Annotated § 116.82

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.82 Allegation for Use in Complaints for Violation of Unruh Civil Rights Act--Exclusion or Expulsion of Person From Association or Club

[1] FORM Allegation for Use in Complaints for Violation of Unruh Civil Rights Act--Exclusion or Expulsion of Person From Association or Club

1. At all times herein mentioned, defendant _____ [*name of association or club, e.g.*, Boys' Club of Santa Cruz] was a nonprivate association or club in that _____ [*specify characteristics indicating public nature of association or club, e.g.*, it was open to the general public, it had a large membership, and was without any limits on membership or specific standards for admissibility].

2. At all times herein mentioned, defendant _____ [*name of association or club*] was a business establishment within the meaning of the Unruh Civil Rights Act in that it was a _____ [commercial *or* noncommercial] entity open to and serving the general public.

[*EITHER*]

3. On or about _____ [*date*], plaintiff applied for membership with _____ [*name of association or club*] [*set forth procedures required for membership, if any, e.g.*, by tendering membership dues and a completed application form].

[*OR*]

3. Plaintiff joined _____ [*name of association or club*] on _____ [*date*], and was a member in good standing until plaintiff was expelled from defendant _____ [association *or* club].

[*CONTINUE*]

4. On or about _____ [*date*], plaintiff was notified that he/she would [not be admitted to *or* be expelled from] membership in defendant _____ [*name of association or club*] for the reason that _____ [*specify protected characteristic of plaintiff enumerated in Act or reason that is an arbitrary basis for discrimination, e.g.*, plaintiff is homosexual], and for no other reason, in contravention of *Civil Code Section 51*.

[2] Use of Form

The form allegations in [1], *above*, are for use by a plaintiff in an action against an association or a club for violation of the Unruh Act, *Civ. Code § 51*, by excluding a prospective member or expelling a member of the association or club for a discriminatory reason. The allegations set forth facts showing that the association or club is a business establishment within the meaning of the Act, because it is not truly a private club, but is in fact open to the public, and without an exclusive membership [*see Isbister v. Boys' Club of Santa Cruz (1985) 40 Cal. 3d 72, 88-91, 219 Cal. Rptr. 150, 707 P.2d 212* ; *see also § 116.13[2]*]. These allegations may be substituted for Paragraphs 4 and 5 of the complaint in *§ 116.80[1*].

[3] Cross References

For a general form of complaint under the Unruh Act, see *§ 116.80*

For an alternative form of allegations for use in Unruh Act complaints, see *§ 116.81*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

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11-116 California Forms of Pleading and Practice--Annotated §§ 116.83-116.89

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[Reserved]

§§ 116.83[Reserved]

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11-116 California Forms of Pleading and Practice--Annotated § 116.90

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.90 Complaint for Damages for Sexual Harassment in Business, Service, or Professional Relationship [Civ. Code §§ 51.9, 52(b)]

[1] FORM Complaint for Damages for Sexual Harassment in Business, Service, or Professional Relationship [Civ. Code §§ 51.9, 52(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Sexual Harassment in Business, Service, or Profes-
through _____,] Defendant(s).	)	sional Relationship)
	)	[Amount demanded (exceeds *or* does not exceed)
	)	$10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[*Allege venue, EITHER*]

1. _____ [*If defendant is an individual, allege defendant's residence, e.g.,* Defendant _____ (*name*) resides in _____ County, California.]

[*AND/OR*]

1. _____ [*If defendant is a business entity, allege type of entity and principal place of business (or other venue), e.g.*, Defendants _____ (*name*) and _____ (*name*) are, and at all times herein mentioned were, partners engaged in property management under the common name of _____ (*name of partnership*), having their principal place of business at _____ (*address*), _____ (*city*), California, and are sued herein individually and by such common name.]

[*AND/OR*]

1. _____ [*If defendant is a corporation, allege capacity and principal place of business (or other venue), e.g.*, Defendant _____ (*name*) is, and at all times herein mentioned was, a limited liability professional corporation organized and existing under the laws of California, engaged in property management, with its principal place of business at _____ (*address*), _____ (*city*), California.]

[*CONTINUE*]

[2. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.)]

[3. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned each of the defendants, including all defendants sued under fictitious names, was the agent and employee of each of the remaining defendants, and in doing the things herein alleged, was acting within the scope of his/her agency and employment.]

4. At all times herein mentioned, there was [and is] a _____ [*allege nature of relationship between plaintiff and defendant, e.g.*, business *or* service *or* professional] relationship between plaintiff and defendant[s] in that defendant is a _____ [*allege the nature of the business, service, or profession in which defendant engages, e.g.*, property manager] and plaintiff is _____ [*allege plaintiff's role in the business, service, or professional relationship, e.g.*, a tenant in an apartment building that was at all times herein mentioned managed by defendant, which is located at 1234 Main Street, in the City of Farallones, County of Pacific, State of California].

5. On or about _____ [*date*], defendant _____ [made *or* began making] _____ [sexual advances *or* solicitations *or* sexual requests *or* demands for sexual compliance by the plaintiff] that were unwelcome and _____ [pervasive *or* severe]. _____ [*Allege the specific facts showing the defendant's sexual advances, solicitations, sexual requests, or demands for sexual compliance by plaintiff.*]

[*EITHER*]

6. Plaintiff cannot easily terminate plaintiff's relationship with defendant without tangible hardship because _____ [*allege facts showing how termination of the relationship would cause plaintiff tangible hardship, e.g.*, since defendant continues to manage the property at 1234 Main Street, Farallones, California, which includes the apartment that is plaintiff's current residence, plaintiff would have to move to a different residence, which

would involve the time and expense of finding a new residence and incurring all of the expenses involved in moving. Further, plaintiff cannot afford to move at this time.]

[*OR*]

6. On or about _____ [*date*], plaintiff terminated the relationship with defendant with tangible hardship. _____ [*Allege facts showing how termination of the relationship caused plaintiff tangible hardship, e.g.*, Since defendant continued to manage the property at 1234 Main Street, Farallones, California, which included the apartment that was plaintiff's residence, plaintiff had to move to a different residence, incurring the hardship of spending the time and expense of finding a new residence and incurring all of the expenses involved in moving. Further, plaintiff could not afford to move and was forced to borrow the money to move.]

[*CONTINUE*]

7. As a direct and proximate result of defendant's conduct, plaintiff was _____ [*state damage caused*], all to his/her damage in an amount according to proof.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For damages in an amount according to proof;

2. For exemplary damages;

3. For attorney's fees and costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*date*]
Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 116.80[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a victim of sexual harassment in a business, service, or professional relationship pursuant to *Civ. Code § 51.9*. On plaintiff's proof of all the required elements under *Civ. Code § 51.9*, damages are recoverable as provided in *Civ. Code § 52(b)* [*Civ. Code § 51.9(b)*].

For discussion of sexual harassment and *Civ. Code § 51.9*, see *§ 116.35*.

For related jury instructions, see *Judicial Council of California Civil Jury Instructions, CACI Nos. 3024, 3027* (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

[3] Allegations

The form of complaint in [1], *above*, alleges all of the following:

- Defendant's capacity and basis for venue (alternative versions of Paragraph 1).

- An optional fictitious name ("DOE") allegation (Optional Paragraph 2) [*see* Civ. Code § 474; *see also* Ch. 20, *Allegations Commonly Used*].

- An optional agency allegation (Optional Paragraph 3) [*see* Ch. 427, *Principal and Agent*].

- A business, service, or professional relationship between the plaintiff and the defendant (Paragraph 4);

- The nature of the sexually harassing conduct or behavior by defendant that forms the basis for the cause of action, and the nature of the conduct as unwelcome and pervasive or severe (Paragraph 5);

- Plaintiff's inability to easily terminate the relationship without tangible hardship or the tangible hardship caused to plaintiff in terminating the relationship (alternate versions of Paragraph 6); and

- That plaintiff has suffered or will suffer economic loss or disadvantage or personal injury as a result of the harassing conduct (Paragraph 7).

[4] Prayer

The complaint seeks an award of damages in an amount according to proof [*see Civ. Code §§ 51.9, 52(b)*].

The complaint also includes a prayer for exemplary damages and for attorney fees as provided under *Civ. Code § 52(b)* [*Civ. Code § 51.9(b)* (damages will be awarded as provided by *Civ. Code § 52(b)*)].

[5] Venue

The county in which the defendants or some of them reside at the commencement of the action is the proper county for the trial of the action [*Code Civ. Proc. § 395(a)*].

A corporation has a residence where its principal office or place of business is established [*Code Civ. Proc. § 395.5*].

[6] No Action for Conduct Before January 1, 1995

Civ. Code § 51.9 was enacted in 1994, effective January 1, 1995. It is prospective in application only and does not apply to conduct before January 1, 1995 [*see Brown v. Smith (1997) 55 Cal. App. 4th 767, 788, 64 Cal. Rptr. 2d 301]* . Further, the Unruh Act itself, *Civ. Code § 51*, does not protect against sexual harassment [*see Brown v. Smith (1997) 55 Cal. App. 4th 767, 786-788, 64 Cal. Rptr. 2d 301]* .

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For discussion and forms relating to amendment of pleadings for use when an unknown defendant is sued under a

fictitious name, see Ch. 21, *Amended and Supplemental Pleadings*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages, see Ch. 177, *Damages*

For discussion of jurisdiction in California courts, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For forms of allegations of infliction of emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons, see Ch. 518, *Service of Summons and Papers*

For forms of allegations establishing venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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11-116 California Forms of Pleading and Practice--Annotated § 116.91

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.91 Cross Complaint for Declaratory Relief--Discriminatory Restriction on Real Property is Void [Civ. Code § 53]

[1] FORM Cross Complaint for Declaratory Relief--Discriminatory Restriction on Real Property is Void [Civ. Code § 53]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	
_____ [*name*], [and DOES I through _____,] Defendant(s).	)	NO. _____
_____ [*name*], Cross Complainant,	)	CROSS COMPLAINT FOR DECLARATORY RELIEF
vs.	)	(Discriminatory Restriction on Real Property Is Void)
_____ [*name*], [and DOES I through _____,] Cross Defendant(s).	)	

_____

Cross complainant alleges:

[1. _____ (*Allege capacity and residence(s) of cross defendant(s), if appropriate. See form of complaint in § 116.80[1], Paragraph 1*).]

2. Cross complainant is, and at all times herein mentioned was, _____ [*specify cross complainant's*

interest in real property, e.g., the owner in fee simple] of certain real property _____ [*describe property, e.g.*, identified as lot number _____ in that tract of land known as _____ (*name of subdivision*)]. Cross complainant's lot is known as _____ [*street address*], _____ County, California, and more particularly described as follows: _____ [*give legal description*].

3. Cross defendant is the owner of, or claims some interest in, real property _____ [*describe property, e.g.*, identified as lot number _____ in the tract of land described above], which lot is known as _____ [*street address*], _____ County, California, and is more particularly described as follows: _____ [*give local description*].

[4. Cross defendants DOES I through _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to cross complainant. When their true names and capacities are ascertained, cross complainant will amend this cross complaint by inserting their true names and capacities herein. (Cross complainant is informed and believes and thereon alleges that each of the fictitiously named cross defendants claims some right, title, estate, lien, or interest in the property described above and that each of them is responsible in some manner for the (threatened) wrongful conduct herein alleged.)]

5. _____ [*Set forth existence of discriminatory restriction relating to real property, e.g.*, _____ (*Name of subdivision*) is divided into lots on which a Declaration of Restrictions was executed by _____ (*name of original owner who drew up restrictions*) on _____ (*date*), and recorded in the office of the County Recorder of _____ County, on _____ (*date*), in Book _____, page _____, a copy of which is attached hereto as Exhibit A and made a part hereof].

6. _____ [*Set forth general terms of restriction that discriminates against a person on the basis of sex, race, color, religion, ancestry, national origin, and/or disability, e.g.*, The Declaration of Restrictions specifies that ownership of all lots within the above-described tract of land is restricted to persons who have been members of the Fundamental Theology Society for at least three years and that, if the owner chooses to sublease, all sublessees must be members of the Fundamental Theology Society, and have been so for at least three years. To impose the same restrictions on all lots in the tract, the former owner adopted and used a form of conveyance for sale of the lots that incorporated the Declaration of Restrictions and designated the tract described above as the dominant tenement].

7. This discriminatory restriction is void according to *Civil Code Section 53* in that it _____ [*set forth how discriminatory restriction violates Civ. Code § 53, e.g.*, purports to forbid the conveyance and leasing of that real property to any person not of a specified religious group].

8. An actual controversy has arisen and now exists between cross complainant and cross defendants in that cross complainant contends that the restrictions described above are void, whereas cross defendants dispute these contentions and contend that the restrictions are valid and enforceable.

9. Cross complainant desires a judicial determination of his/her rights and duties and a declaration as to whether the restrictions described above are void.

10. A judicial declaration is necessary and appropriate at this time under the circumstances in order that cross complainant may ascertain his/her rights and duties under the written instrument.

WHEREFORE, cross complainant prays judgment against cross defendants as follows:

1. For a declaration by the court that the restriction described above is, by reason of *Civil Code Section 53*, void and not binding or enforceable;

2. For costs of suit incurred herein; and

3. For such other further relief as the court may deem proper.
_____ [*date*]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Cross Complainant _____ [*name*]

[*Verification, if desired. See § 116.80[1].*]

[2] Use of Form

This form of cross complaint is for use by a landowner to secure a judicial declaration that a discriminatory restriction relating to real property is void because it violates *Civ. Code § 53*.

An action for declaratory relief is not the cross complainant's only remedy; he or she may choose another appropriate method of relief, such as canceling the discriminatory restriction [*see Civ. Code § 3414* (partial cancellation of instruments); *see also* Ch. 107, *Cancellation of Instruments*].

This form is presented as a cross complaint to exemplify the situation in which one party seeks to enforce a restrictive condition and the other party responds by cross complaint to declare the restriction void [*see, e.g., Taormina Theosophical Community. v. Silver (1983) 140 Cal. App. 3d 964, 190 Cal. Rptr. 38]* .

According to *Civ. Code § 53*, a provision in a written instrument relating to real property that purports to forbid or restrict the conveyance, encumbrance, leasing, or mortgaging of that property to any person any characteristic listed or defined in *Civ. Code § 51(b)* or *(e)* is void. Additionally, every restriction or prohibition regarding the use or occupation of real property because of any characteristic listed or defined in *Civ. Code § 51(b)* or *(e)* is also void [*Civ. Code § 53(a)*]. Further, every restriction or prohibition, whether by way of covenant, condition on use, occupation, or transfer of title, which restriction or prohibition directly or indirectly limits the acquisition, use, or occupation of that property because of any characteristic listed or defined in *Civ. Code § 51(b)* or *(e)* is similarly void [*Civ. Code § 53(b)*; *see § 116.34*; for discussion of *Civ. Code § 51(b), (e)*, see *§ 116.12*].

If the discriminatory restriction is based on a characteristic listed in the Fair Employment and Housing Act (FEHA) [*see Gov. Code § 12955(a), (d)*, as defined in *Gov. Code §§ 12926, 12926.1(m), (p)(1), 12955.2*], counsel may modify this form to include allegations based on *Civ. Code §§ 782* and *782.5*. *Civ. Code § 782* renders void any deed provisions that purport to restrict the right to use property to persons of a characteristic listed in FEHA by providing for payment of a penalty, forfeiture, reverter, or otherwise. *Civ. Code § 782.5* provides that restrictions in deeds or other written instruments that purport to restrict use of the property on the basis of a characteristic listed in FEHA are deemed omitted from the deed or instrument. For further discussion and forms relating to restrictive covenants, see Ch. 184, *Deeds* .

[3] Allegations

The form of cross complaint in [1], *above*, alleges all of the following:

- The capacity and residence of each cross defendant, if appropriate (Paragraph 1).
- Cross complainant's and cross defendant's ownership of lots in the same tract (Paragraphs 2, 3).

- An optional fictitious name ("DOE") allegation (Optional Paragraph 4) [*see* Civ. Code § 474; *see also* Ch. 20, *Allegations Commonly Used*].

- The existence of a Declaration of Restrictions (Paragraph 5).

- The discriminatory nature of those restrictions (Paragraph 6).

- That the discriminatory nature of the restrictions renders them void (Paragraph 7) [*see Civ. Code § 53*].

- That an actual controversy exists relating to the legal rights and duties of the parties and that cross complainant desires a judicial determination that is necessary and appropriate (Paragraphs 8-10) [*see Code Civ. Proc. § 1060*; *see also* Ch. 182, *Declaratory Relief*].

[4] Prayer

The complaint seeks a declaration by the court that the discriminatory restriction is, by reason of *Civ. Code § 53,* void and not binding or enforceable.

[5] Judicial Notice

In any action to declare that a restriction or prohibition specified in *Civ. Code § 53(a)* or *(b)* is void, the court must take judicial notice of the recorded instrument or instruments containing the prohibitions or restrictions in the same manner that it takes judicial notice of the matters listed in *Evid. Code § 452* [*Civ. Code § 53(c)*; for discussion regarding judicial notice, see Ch. 551, *Trial*].

[6] Venue

An action for the determination of a right or interest in real property is local and must be tried in the county in which the real property is located [*Code Civ. Proc. § 392(a)(1)*; for discussion regarding venue, see Ch. 571, *Venue*].

[7] Cross References

For alternative allegations as to capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For discussion and forms relating to amendment of pleadings for use when an unknown defendant is sued under a fictitious name, see Ch. 21, *Amended and Supplemental Pleadings*

For discussion of the procedures in an action for cancellation of a written instrument, as well as of a form of judgment for cancellation of a deed, see Ch. 107, *Cancellation of Instruments*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating generally to actions for declaratory relief, and for a form of judgment, see Ch. 182, *Declaratory Relief*

For discussion of interpretation of deeds and forms relating to restrictive covenants, see Ch. 184, *Deeds*

For discussion of jurisdiction in California courts, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion, procedure, and forms relating generally to actions to quiet title, see Ch. 482, *Quieting Title*

For discussion and forms relating to service of summons, see Ch. 518, *Service of Summons and Papers*

For forms of allegations establishing venue, see Ch. 571, *Venue*

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 116 CIVIL RIGHTS: DISCRIMINATION IN BUSINESS ESTABLISHMENTS
PART IV. FORMS
B. Other Statutory Actions

11-116 California Forms of Pleading and Practice--Annotated §§ 116.92-116.99

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

[Reserved]

§§ 116.92[Reserved]

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 116 CIVIL RIGHTS: DISCRIMINATION IN BUSINESS ESTABLISHMENTS
PART IV. FORMS
C. Affirmative Defenses

11-116 California Forms of Pleading and Practice--Annotated § 116.100

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.100 Affirmative Defense Allegation for Use in Answering Complaints for Violation of Unruh Civil Rights Act--Action Required by Law

[1] FORM Affirmative Defense Allegation for Use in Answering Complaints for Violation of Unruh Civil Rights Act--Action Required by Law

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that there has been no violation of the Unruh Civil Rights Act, in that _____ [*describe alleged discriminatory conduct and set forth how it is required by law or is applicable alike to all persons, e.g.,* defendant's allegedly discriminatory conduct in refusing to admit persons under 21 years of age into its premises is not an arbitrary policy, but is required by law, which mandates that such persons not be admitted into bars].

[2] Use of Form

This form of affirmative defense is for use by a defendant in an answer to a complaint alleging a violation of the Unruh Civil Rights Act when the allegedly discriminatory conduct is required by law. The Act does not confer any right or privilege on a person that is conditioned or limited by law or that is applicable alike to persons of every sex, color, race, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation [*Civ. Code § 51(c)*].

The fact situation serving as the basis for this form is the defendant's status as a bar or tavern. Not only is a bar not required to admit persons under 21 years of age, but, if it does so, it may be guilty of a misdemeanor [*see Bus. & Prof. Code § 25665*; *see generally Bus. & Prof. Code § 23000 et seq.* (Alcoholic Beverage Control Act)].

[3] Cross References

For a form of another affirmative defense for use in answering Unruh Act complaints, see *§ 116.101*

For discussion of answers to complaints, including forms, see Ch. 26, *Answers*

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Chapter 116 CIVIL RIGHTS: DISCRIMINATION IN BUSINESS ESTABLISHMENTS
PART IV. FORMS
C. Affirmative Defenses

11-116 California Forms of Pleading and Practice--Annotated § 116.101

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 116.101 Affirmative Defense Allegation for Use in Answering Complaints for Violation of Unruh Civil Rights Act--Modification of Building Required

[1] FORM Affirmative Defense Allegation for Use in Answering Complaints for Violation of Unruh Civil Rights Act--Modification of Building Required

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that there has been no violation of the Unruh Civil Rights Act, in that his/her/its refusal to admit plaintiff into his/her/its business establishment is not discriminatory, but is caused by the structure of the building and by the fact that admittance of plaintiff _____ [*briefly set forth how special needs of plaintiff prevent his or her admission to the building without construction, alteration, or modification, e.g.,* to the building as it is presently constructed is impossible because plaintiff uses a wheelchair and all the doorways are too narrow to accommodate a wheelchair and] would require construction, alteration, repair, or modification of the building in which defendant's business establishment is located that is not required by other provisions of law.

[2] Use of Form

This form of affirmative defense is for use by a defendant in an answer to a complaint alleging a violation of the Unruh Civil Rights Act when the refusal to admit the plaintiff is based on the limitations of the facility in which the defendant's business is located. The Act does not require any construction, alteration, repair (structural or otherwise), or modification of any sort whatsoever to any new or existing establishment, facility, building, improvement, or any other structure, beyond construction, alteration, repair, or modification otherwise required by other provisions of law [*Civ. Code § 51(d)*].

Counsel should note that, although the Act does not require modification of any type to a building unless the modification is required by other provisions of law, if modifications are made to places of public accommodation or public amusement, compliance with accessibility standards may be required [*see § 116.36[6]* and *[7]*].

[3] Cross References

For a form of another affirmative defense for use in answering Unruh Act complaints, see *§ 116.100*

For discussion of answers to complaints, including forms, see Ch. 26, *Answers*

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 117 CIVIL RIGHTS: HOUSING DISCRIMINATION

11-117 California Forms of Pleading and Practice--Annotated 117.syn

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§ 117.82 Allegations for Use in Complaints for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Exclusion or Expulsion From Apartment Complex or Condominium Association

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§ 117.95 Allegations for Use in Complaints for Violation of Federal Fair Housing Act [42 U.S.C. §§ 3604-3606]--Discrimination in Brokerage Services [42 U.S.C. § 3606]

[1] FORM

[2] Use of Form

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FOOTNOTES:

(n27)Footnote *.

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(n28)Footnote **.

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Volume 11: Carriers thru Civil Service-Chs.109-118

Chapter 117 CIVIL RIGHTS: HOUSING DISCRIMINATION
PART I. SCOPE

11-117 California Forms of Pleading and Practice--Annotated § 117.01

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§ 117.01 Scope of Chapter

This chapter discusses state and federal laws prohibiting housing discrimination. In particular, the chapter discusses the California Fair Employment and Housing Act (FEHA) (*Gov. Code § 12900 et seq.*) as it relates to discrimination in housing [*see §§ 117.10 -117.18*].

This chapter also includes discussion of all of the following:

- The application of the Unruh Civil Rights Act (*Civ. Code § 51*) to housing discrimination [*see § 117.31*].

- *Civ. Code § 51.9*, which prohibits sexual harassment by landlords and property managers, and others in the housing context [*see § 117.32*].

- Housing for senior citizens [*see § 117.33*] and disabled persons [*see § 117.35*], as well as state laws prohibiting discriminatory restrictive covenants [*see § 117.34*], and discrimination in real estate financing [*see § 117.36*].

- The decision in *Mulkey v. Reitman (1966) 64 Cal. 2d 529, 50 Cal. Rptr. 881, 413 P.2d 825 , aff'd, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967)* , in which the California Supreme Court held that the state may not enact laws that promote discrimination in housing [*see § 117.37*].

- The federal Fair Housing Act (FHA), *42 U.S.C. § 3601 et seq.* [*see § 117.51*], as well as *42 U.S.C. § 1982*, which prohibits discrimination in the conveyance of real and personal property [*see § 117.52*].

This chapter contains the following forms:

- A form of complaint for use in state court in an action for damages and preliminary and permanent injunction for violation of the California Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*) by refusal to rent or sell real property [*see § 117.80*].

- An allegation for use in a complaint for violation of the Unruh Civil Rights Act (*Civ. Code § 51*) based on the refusal of realtors, and contractors or a condominium association, to rent or sell real property [*see § 117.81*].

- An allegation for use in a complaint for violation of the Unruh Civil Rights Act (*Civ. Code § 51*) based on the exclusion or expulsion from an apartment complex or condominium association [*see § 117.82*].

- A form of complaint for use in a United States District Court in an action for damages and injunctive relief for violation of the federal Fair Housing Act (FHA) (*42 U.S.C. § 3601 et seq.*) by discrimination in the sale or rental of housing [*see § 117.90*].

- Alternative forms of allegations for use in complaints for violation of the federal Fair Housing Act (FHA) (*42 U.S.C. § 3601 et seq.*) based on the following:

  - Discrimination in advertising [*see § 117.91*];

  - Discrimination by false representation that a building is not available [*see § 117.92*];

  - Discrimination by inducing a sale or rental based on a representation that persons of a particular characteristic are moving into a neighborhood [*see § 117.93*];

  - Discrimination in residential real estate-related transactions [*see § 117.94*]; and

  - Discrimination in brokerage services [*see § 117.95*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsFair Housing ActCivil Rights LawContractual Relations & HousingFair Housing RightsProhibited ActsCivil Rights LawContractual Relations & HousingProperty Rights (sec. 1982)General Overview

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Chapter 117 CIVIL RIGHTS: HOUSING DISCRIMINATION
PART I. SCOPE

11-117 California Forms of Pleading and Practice--Annotated § 117.02

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§ 117.02 Cross References

- For a comprehensive procedural guide that chronologically outlines the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions* .

- For discussion and forms relating to discrimination in government-funded programs and activities, see Ch. 112, *Civil Rights: Government-Funded Programs and Activities* .

- For discussion and forms relating to actions under *42 U.S.C. § 1983*, and the other post-Civil War civil rights statutes (*42 U.S.C. §§ 1981*, *1982*, *1985*, *1986*, and *1988*), see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

- For discussion and forms relating to prisoners' rights, see Ch. 114, *Civil Rights: Prisoners' Rights* .

- For discussion and forms relating to employment discrimination, see Ch. 115, *Civil Rights: Employment Discrimination* .

- For discussion and forms relating to discrimination in business establishments, see Ch. 116, *Civil*

Rights: Discrimination in Business Establishments .

- For discussion and forms relating to interference with civil rights by threats, intimidation, coercion, or violence, see Ch. 117A, *Civil Rights: Interference with Civil Rights by Threats, Intimidation, Coercion, or Violence* .

- For discussion and forms of jurisdictional allegations for use in federal court, and for discussion and forms relating to removal of actions to federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

- For discussion and forms relating to injunctions, see Ch. 303, *Injunctions* .

- For discussion and forms relating to civil rights actions arising from illegal searches and seizures, see *Ch. 429, Privacy, § 429.310* et seq.

- For discussion of deprivation of civil rights during an administrative investigation, see Ch. 471, *Investigations by Public Agencies* .

- For discussion of adjudication of cases before public agencies, see Ch. 473, *Public Agency Adjudication* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawGeneral OverviewCivil Rights LawContractual Relations & HousingProperty Rights (sec. 1982)General OverviewCivil Rights LawContractual Relations & HousingProperty Rights (sec. 1982)Public Discrimination

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 117 CIVIL RIGHTS: HOUSING DISCRIMINATION
PART I. SCOPE

11-117 California Forms of Pleading and Practice--Annotated §§ 117.03-117.09

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[Reserved]

§§ 117.03[Reserved]

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PART II. LEGAL BACKGROUND
A. California Fair Employment and Housing Act

11-117 California Forms of Pleading and Practice--Annotated § 117.10

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§ 117.10 Governing Statutes

The California Fair Employment and Housing Act (FEHA) is set forth in *Gov. Code § 12900 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral Overview

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PART II. LEGAL BACKGROUND
A. California Fair Employment and Housing Act

11-117 California Forms of Pleading and Practice--Annotated § 117.11

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§ 117.11 Introduction to California Fair Employment and Housing Act

The California Fair Employment and Housing Act (FEHA), *Gov. Code § 12900 et seq.*, is administered by the Department of Fair Employment and Housing (DFEH or "Department").

FEHA declares that discrimination in housing accommodations is against public policy and that its design is to eliminate discrimination [*Gov. Code § 12920*]. FEHA prohibits discrimination based on race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income, and disability [*Gov. Code §§ 12920, 12955*]. However, the provision of housing for homeless youth is not considered unlawful age discrimination, notwithstanding *Gov. Code §§ 12920* and *12955* [*Gov. Code § 11139.3*].

As used in *Gov. Code § 12955* (prohibiting housing discrimination), the definition of the terms "race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income, or disability" includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics [*Gov. Code § 12955(m)*].

The terms "religious creed," "religion," "religious observance," "religious belief," and "creed" include all aspects of

religious belief, observance, and practice [*Gov. Code § 12926(o)*].

FEHA protects against sexual harassment as a form of sexual discrimination in housing [*Gov. Code § 12955(a)*; *Brown v. Smith (1997) 55 Cal. App. 4th 767, 782, 64 Cal. Rptr. 2d 301]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsFamily Status DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsGender & Sex DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsLeasing & SalesCivil Rights LawContractual Relations & HousingFair Housing RightsNational Origin DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsRacial Discrimination

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A. California Fair Employment and Housing Act

11-117 California Forms of Pleading and Practice--Annotated § 117.12

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§ 117.12 Relationship to Other Civil Rights Laws

The provisions of FEHA are construed liberally for the accomplishment of its stated purposes. Nothing contained in FEHA is deemed to repeal any of the provisions of the Civil Rights Law or any other state law relating to discrimination because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, unless those provisions provide less protection to the enumerated classes of persons covered under FEHA [*Gov. Code § 12993(a)*].

Although the Legislature intended to occupy the field of regulation of discrimination in housing encompassed by FEHA, exclusive of all other laws banning discrimination in housing by any city, city and county, county, or other political subdivision of the state, nothing contained in FEHA is construed in any manner or way to limit or restrict the application of *Civ. Code § 51* (the Unruh Act) [*Gov. Code § 12993(c)*; *see Citizens for Uniform Laws v. County of Contra Costa (1991) 233 Cal. App. 3d 1468, 1473-1475, 285 Cal. Rptr. 456* (county ordinance prohibiting discrimination against persons who test positive for HIV was not preempted by FEHA, at least in part because purpose of two laws was different; decided before FEHA applied to disability); for discussion of *Civ. Code § 51*, as it relates to housing, *see § 117.31[2]*].

The filing of a complaint and the pursuit of an administrative remedy with the Department of Fair Employment and Housing (DFEH) under FEHA does not prejudice the complainant's right to pursue judicial relief under other applicable laws. However, if a civil action has been filed under *Civ. Code § 52*, DFEH will terminate proceedings on notification of entry of final judgment, unless the judgment is a dismissal entered at the complainant's request [*Gov. Code § 12980(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsGeneral Overview

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A. California Fair Employment and Housing Act

11-117 California Forms of Pleading and Practice--Annotated § 117.13

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§ 117.13 Definitions Under FEHA

[1] "Aggrieved Person"

As used in FEHA in connection with housing accommodations, unless a different meaning clearly appears from the context, the term "aggrieved person" includes any person who claims to have been injured by a discriminatory housing practice or believes that he or she will be injured by a discriminatory housing practice that is about to occur [*Gov. Code § 12927(g)*]. "Aggrieved person" under the FEHA could include a nonprofit fair housing organization [*see Sisemore v. Master Financial, Inc. (2007) 151 Cal. App. 4th 1386, 1424-1426, 60 Cal. Rptr. 3d 719]* .

[2] "Disability"

For purposes of FEHA, "disability" includes, but is not limited to, any physical or mental disability as defined in *Gov. Code § 12926* [*Gov. Code § 12955.3*]. Depression and its related manifestations can meet the definition of disability under antidiscrimination laws [*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Comm. (2004) 121 Cal. App. 4th 1578, 1592-1593, 18 Cal. Rptr. 3d 669]* . For discussion of *Gov. Code § 12926*, see Ch. 115, *Civil Rights: Employment Discrimination* .

[3] "Discrimination"

As used in FEHA in connection with housing accommodations, unless a different meaning clearly appears from the context, the term "discrimination" is very broadly defined, and includes all of the following [*Gov. Code § 12927(c)(1)*]:

- Refusal to sell, rent, or lease housing accommodations;
- Refusal to negotiate for the sale, rental, or lease of housing accommodations;
- Making an untrue representation that housing accommodations are not available for inspection, sale, or rental;
- Denial or withholding of housing accommodations;
- Provision of inferior terms, conditions, privileges, facilities, or services in connection with housing accommodations;
- Harassment in connection with housing accommodations;
- Cancellation or termination of a sale or rental agreement;
- Provision of separated or segregated housing conditions;
- Refusal to permit, at the expense of a disabled person, reasonable modifications of existing premises occupied or to be occupied by the disabled person if the modifications may be necessary to afford that person full enjoyment of the premises. In the case of a rental, however, the landlord may, if reasonable to do so, condition modification on the renter's agreeing to restore the interior of the premises to the premodification condition (other than for reasonable wear and tear); and
- Refusal to make reasonable accommodations in rules, policies, practices, or services if accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling.

The refusal to rent or lease a portion of an owner-occupied, single-family residence to a person as a roomer or boarder living within the household is not discrimination, so long as no more than one roomer or boarder will live within the household, and so long as the owner complies with *Gov. Code § 12955(c)*, which prohibits discriminatory notices, statements, and advertisements [*Gov. Code § 12927(c)(2)(A)*]. In addition, when the sharing of living areas in a single dwelling unit is involved, the use of words stating or tending to imply that the housing being advertised is available only to persons of one sex does not constitute discrimination [*Gov. Code § 12927(c)(2)(B)*].

[4] "Familial Status"

For purposes of FEHA, "familial status" means one or more minors who reside with one of the following persons [*Gov. Code § 12955.2*]:

- A parent;
- Another person with care and legal custody of that minor;
- A person who has been given care and custody of that minor by a state or local governmental child

welfare agency; or

- The designee of the parent or other person with legal custody of a minor by written consent of the parent or designated custodian.

The protections afforded by FEHA against discrimination on the basis of familial status also apply to any individual who is [*Gov. Code § 12955.2*]:

- Pregnant;
- In the process of securing legal custody of any minor; or
- In the process of being given care and custody of any minor by a state or local governmental agency responsible for the welfare of children.

[5] "Housing Accommodation"

As used in FEHA in connection with housing accommodations, unless a different meaning clearly appears from the context, the term "housing accommodation" means any building, structure, or portion of one, that is occupied as, or intended for occupancy as, a residence by one or more families. "Housing accommodation" includes any vacant land that is offered for sale or lease for the construction of a building, structure, or part of one, intended for residential occupation [*Gov. Code § 12927(d)*].

[6] "Marital Status"

FEHA prohibits inquiry regarding, or discrimination on the basis of, the "marital status" of a person seeking to rent or lease any housing accommodation [*Gov. Code § 12955(a), (b)*]. This protection includes unmarried cohabiting couples [*Smith v. Fair Employment & Housing Com. (1996) 12 Cal. 4th 1143, 1160, 51 Cal. Rptr. 2d 700, 913 P.2d 909]* .

[7] "Owner"

As used in FEHA in connection with housing accommodations, unless a different meaning clearly appears from the context, the term "owner" generally means any person having any legal or equitable right of ownership or possession or the right to rent or lease housing accommodations, and includes a lessee, sublessee, assignee, managing agent, and real estate broker or salesperson, as well as the state and any of its political subdivisions and agencies [*Gov. Code § 12927(e)*; *see* [5], *above* ("housing accommodation" defined)].

[8] "Person"

The term "person" includes one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries [*Gov. Code § 12925(d)*; *see Gov. Code § 12927(f)* ("person" includes all individuals and entities described in *42 U.S.C. § 3602(d)* and in the definition of "owner" in *Gov. Code § 12927(e)*, and all institutional third parties, including the Federal Home Loan Mortgage Corporation)].

[9] "Real Estate-Related Transactions"

As used in FEHA in connection with housing accommodations, unless a different meaning clearly appears from the context, the term "real estate-related transactions" includes any of the following [*Gov. Code § 12927(h)*]:

- The making or purchasing of loans or providing other financial assistance for use in purchasing,

constructing, improving, repairing, or maintaining a dwelling, or that is secured by residential real estate;

- The selling, brokering, or appraising of residential real property; and

- The use of territorial underwriting requirements, for the purpose of requiring a borrower in a specific geographic area to obtain earthquake insurance, required by an institutional third party on a loan secured by residential real property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsDisability DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsGender & Sex DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsNational Origin DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsRacial Discrimination

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11-117 California Forms of Pleading and Practice--Annotated § 117.14

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§ 117.14 Unlawful Practices Under FEHA

[1] By Any Person

It is unlawful under FEHA for any person [*see Gov. Code §§ 12925(d), 12927(f)* and § 117.13[8]] to do any of the following:

- Make, print, or publish, or cause to be made, printed, or published, any notice, statement, or advertisement relating to the sale or rental of a housing accommodation that indicates any preference, limitation, or discrimination based on a protected characteristic [*Gov. Code § 12955(c)*];

- Aid, abet, incite, compel, or coerce the performance of any act or practice prohibited by *Gov. Code § 12955*, or attempt to do so [*Gov. Code § 12955(g)*];

- Induce for profit any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person possessing a protected characteristic [*Gov. Code § 12955(h)*];

- Discriminate based on a protected characteristic against any person in making available a real estate-related transaction or in the terms and conditions of such a transaction [*Gov. Code § 12955(i)* (applicable to persons, organizations, or entities whose business involves real estate-related transactions)];

- Deny a person access to, or membership or participation in, a multiple-listing service, real estate brokerage organization, or other service because of a protected characteristic [*Gov. Code § 12955(j)*];

- Make unavailable or deny a dwelling based on discrimination because of a protected characteristic [*Gov. Code § 12955(k)*]; or

- Discriminate on the basis of a protected characteristic through public or private land use practices, decisions, and authorizations [*Gov. Code § 12955*(*l*)].

Discrimination under *Gov. Code § 12955*(*l*) includes, but is not limited to, restrictive covenants, zoning laws, denials of use permits, and other actions authorized under the Planning and Zoning Law (*Gov. Code § 65000 et seq.*), that make housing opportunities unavailable [Gov. Code § 12955(*l*)]. Effective January 1, 2001, discrimination under *Gov. Code § 12955*(*l*) also includes the existence of a restrictive covenant, regardless of whether accompanied by a statement that the restrictive covenant is repealed or void [*Gov. Code § 12955*(*l*)]. One court of appeal gave retroactive application to *Gov. Code § 12955*(*l*) [*Hall v. Butte Home Health, Inc. (1997) 60 Cal. App. 4th 308, 313-323, 70 Cal. Rptr. 2d 246* (no evidence that retroactive application of *Gov. Code § 12955*(*l*) to restrictive covenants that would have prohibited group homes for elderly disabled effected substantial impairment of contractual arrangements in violation of federal or state contract clause, when neighbors seeking to enforce covenants failed to show discernible impact on property rights, and state had significant, legitimate public purpose of providing suitable housing for disabled)].

If financial assistance is provided for the purchase, organization, or construction of any housing accommodation, it is unlawful for any person, bank, mortgage company, or other financial institution to discriminate against any person or group of persons in the terms, conditions, or privileges relating to the receipt or use of the financial assistance because of a protected characteristic [*Gov. Code § 12955(e)*; *see* [3], *below* (unlawful practices by financial institution)].

It is unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of that person having exercised or enjoyed, or on account of that person having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by *Gov. Code § 12955* or *12955.1* [*Gov. Code § 12955.7*; for discussion of *Gov. Code § 12955.1*, see [4], *below*].

Unlawful housing discrimination under FEHA includes a refusal to make reasonable accommodations in rules, policies, practices, or services when those accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling [*Gov. Code § 12927(c)(1)*]. Mental disabilities fall within the purview of this provision and include a physical or mental impairment that substantially limits one or more of a person's major life activities [*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Comm. (2004) 121 Cal. App. 4th 1578, 1592, 18 Cal. Rptr. 3d 669* ; *see Gov. Code § 12955.3* (explicitly stating that "disability" includes any physical or mental disability as defined in *Gov. Code § 12926*); *see also Gov. Code § 12926(i)(1)* (defining "mental disability" to include any mental or psychological disorder or condition limiting major life activity, *i.e.*, making achievement of major life activity difficult)]. "Major life activities" is to be broadly construed and includes physical, mental, and social activities and working [*Gov. Code § 12926(i)(1)(C)*]. To establish discrimination based on a refusal to provide reasonable accommodations, a party must establish all of the following [*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Comm. (2004) 121 Cal. App. 4th 1578, 1592, 18 Cal. Rptr. 3d 669* ; *see Gov. Code § 12927(c)*]:

- He or she suffers from a disability as defined in FEHA;

- The discriminating party knew of, or should have known of, the disability;
- Accommodation is necessary to afford an equal opportunity to use and enjoy the dwelling; and
- The discriminating party refused to make this accommodation.

A substantial limitation on use and enjoyment does not require an individual to be incapable of any use and enjoyment of his or her home. To say that no one is disabled under FEHA unless the person is unable to use and enjoy the home would render all the provisions in FEHA governing reasonable accommodations entirely empty of meaning [*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Comm. (2004) 121 Cal. App. 4th 1578, 1595, 18 Cal. Rptr. 3d 669]* .

If a person is subject to the provisions of *Civ. Code § 51* (Unruh Act) as it applies to housing accommodations, it is unlawful for that person to discriminate in the provision of housing against any person because of sex, sexual orientation, color, race, religion, ancestry, national origin, familial status, marital status, disability, source of income, or on any other basis prohibited by *Civ. Code § 51* [*Gov. Code § 12955(d)*; for discussion of the applicability of *Civ. Code § 51* to housing, see *§ 117.31*].

[2] By Owner

It is unlawful under FEHA for an owner to do any of the following:

- Discriminate against or harass any person because of a protected characteristic [*Gov. Code § 12955(a)*];
- Make or cause any written or oral inquiry concerning a protected characteristic of any person who seeks to purchase, rent, or lease a housing accommodation [*Gov. Code § 12955(b)*]; or
- Harass, evict, or otherwise discriminate against any person in the sale or rental of housing accommodations when the owner's dominant purpose is retaliation against a person who has opposed practices unlawful under *Gov. Code § 12955*, informed law enforcement agencies of practices believed unlawful under § 12955, testified or assisted in any proceeding under FEHA, or aided or encouraged a person to exercise or enjoy the rights secured by FEHA [*Gov. Code § 12955(f)*]. Nothing in *Gov. Code § 12955(f)* is intended to cause or permit the delay of an unlawful detainer action [*Gov. Code § 12955(f)*].

Additionally, the acts discussed in [1], *above*, as being unlawful when performed by any "person" are unlawful when performed by an owner.

[3] By Financial Institution

It is unlawful for any person, bank, mortgage company, or other financial institution that provides financial assistance for the purchase, organization, or construction of any housing accommodation to discriminate in the terms, conditions, or privileges relating to the obtaining or use of that financial assistance against any person or group of persons because of a protected characteristic [*Gov. Code § 12955(e)*; *see Health & Safety Code § 35811*; *see also § 117.36*].

[4] Inaccessible Multifamily Dwellings

[a] Definitions

For purposes of *Gov. Code § 12955*, "discrimination" includes, but is not limited to, a failure to design and construct a

covered multifamily dwelling in a manner that allows access to and use by persons with disabilities [*see Gov. Code § 12955.1*]. At a minimum, an accessible dwelling must have at least one building entrance on an accessible route, unless it is impracticable to do so because of the terrain or unusual characteristics of the site. The burden of establishing impracticability is on the person who designed or constructed the facility [*Gov. Code § 12955.1(a)*].

To be accessible, all covered multifamily dwellings with a building entrance on an accessible route must be designed and constructed in a manner that complies with all of the following [*Gov. Code § 12955.1(b)*]:

- The public and common areas are readily accessible to and useable by handicapped persons;

- All the doors designed to allow passage into and within all premises are sufficiently wide to allow passage by persons in wheelchairs; and

- All premises within covered multifamily dwelling units contain the following features of adaptable design:

  - An accessible route into and through the covered dwelling unit;

  - Light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

  - Reinforcements in bathroom walls to allow later installation of grab bars around the toilet, tub, shower stall, and shower seat, if those facilities are provided; and

  - Useable kitchens and bathrooms so that an individual in a wheelchair can maneuver about the space.

For purposes of *Gov. Code § 12955.1*, "covered multifamily dwellings" means buildings consisting of four or more dwelling units if the buildings have one or more elevators. Ground floor dwelling units in other buildings consisting of four or more dwelling units are also "covered multifamily dwellings." Dwelling units within a single structure separated by firewalls do not constitute separate buildings [*Gov. Code § 12955.1(c)*].

[b] Building Standards

Notwithstanding *Gov. Code § 12935* (functions, powers, and duties of Fair Employment and Housing Commission), regulations adopting building standards necessary to implement, interpret, or make specific the provisions of *Gov. Code § 12955.1* are to be developed by the office of the State Architect for public housing and by the Department of Housing and Community Development for all other residential occupancies, and are to be adopted pursuant to the State Building Standards Code (*Health & Safety Code § 18935 et seq.*) [*Gov. Code § 12955.1(d)*]. The building standard requirements must meet or exceed the requirements under the federal Fair Housing Amendments Act of 1988 and its implementing regulations, and the existing state law building standards contained in Title 24 of the California Code of Regulations [*Gov. Code § 12955.1(f)*; *see 42 U.S.C. § 3601 et seq.*; *24 C.F.R. 100.1 et seq.*].

The building standards contained in Title 24 of the California Code of Regulations are applied by the Department in investigating discrimination complaints to determine whether a covered multifamily dwelling is designed and constructed for access to and use by persons with disabilities in accordance with *Gov. Code § 12955.1* [*Gov. Code § 12955.1(e)*].

Before the effective date of regulations promulgated under *Gov. Code § 12955.1*, existing federal accessibility standards will apply if they provide to persons with disabilities greater protections than existing state accessibility regulations [

Gov. Code § 12955.1(d)]. After promulgation of regulations pursuant to *Gov. Code § 12955.1*, the state regulations will apply only if they provide to persons with disabilities the same or greater protections as the federal standards [*Gov. Code § 12955.1(d)*]. If particular federal regulations provide greater protections than state regulations, the federal regulations will apply [*Gov. Code § 12955.1(d)*].

[5] Unlawful Restrictive Covenants

[a] Required Cover Page or Stamp Statement

A county recorder, title insurance company, escrow company, real estate broker, real estate agent, or association that provides a copy of a declaration, governing document, or deed to any person must place a cover page or stamp on the first page of the previously recorded document or documents stating, in at least 14-point boldface type, the following [*Gov. Code § 12956.1(b)(1)*]:

> **If this document contains any restriction based on race, color, religion, sex, sexual orientation, familial status, marital status, disability, national origin, source of income as defined in *Gov. Code § 12955(p)*, or ancestry, that restriction violates state and federal fair housing laws and is void, and may be removed pursuant to *Section 12956.1 of the Government Code*. Lawful restrictions under state and federal law on the age of occupants in senior housing or housing for older persons shall not be construed as restrictions based on familial status.**

The requirements of *Gov. Code § 12956.1(b)(1)* do not apply to documents submitted for recordation to a county recorder [*Gov. Code § 12956.1(b)(2)*].

Any person who records a document for the express purpose of adding a racially restrictive covenant is guilty of a misdemeanor. However, the county recorder will not incur any liability for recording the document [*Gov. Code § 12956.1(c)*]. Notwithstanding any other provision of law, a prosecution for a violation of *Gov. Code § 12956.1(c)* must commence within three years after the discovery of the document's recording [*Gov. Code § 12956.1(c)*].

As used in *Gov. Code § 12956.1*, the terms "association," "governing documents," and "declaration" have the same meanings as in *Civ. Code § 1351* [*Gov. Code § 12956.1(a)*; for discussion of *Civ. Code § 1351*, see Ch. 124, *Condominiums and Other Common Interest Developments*].

[b] Filing Restrictive Covenant Modification to Remove Racially Restrictive Covenant

A person who holds an ownership interest of record in property he or she believes is the subject of an unlawfully restrictive covenant in violation of *Gov. Code § 12955*(*l*) may record a document titled "Restrictive Covenant Modification" [*Gov. Code § 12956.2(a)*]. However, this provision does not apply to persons holding an ownership interest in property that is part of a common interest development as defined in *Civ. Code § 1351(c)* if the board of directors of that common interest development is subject to the requirements of *Civ. Code § 1352.5(b)* [*Gov. Code § 12956.2(g)*].

The county recorder will make available to the public Restrictive Covenant Modification forms [*Gov. Code § 12956.2(e)*]. The modification document must include a complete copy of the original document containing the unlawfully restrictive language with the unlawfully restrictive language stricken [*Gov. Code § 12956.2(a)*].

The county recorder may choose to waive the fee prescribed for recording and indexing instruments pursuant to *Gov. Code § 27361* in the case of the modification document [*Gov. Code § 12956.2(a)*]. The modification document will be indexed in the same manner as the original document being modified. It must contain a recording reference to the original document in the form of a book and page or instrument number, and date of the recording [*Gov. Code § 12956.2(c)*].

Before recording the modification document, the county recorder submits it and the original document to the county counsel, who determines whether the original document contains an unlawful restriction based on race, color, religion, sex, sexual orientation, familial status, marital status, disability, national origin, source of income as defined in *Gov. Code § 12955(p)*, or ancestry. The county counsel returns the documents and informs the county recorder of the determination. The county recorder will refuse to record the modification document if the county counsel finds that the original document does not contain an unlawful restriction [*Gov. Code § 12956.2(b)*].

Subject to covenants, conditions, and restrictions recorded after the recording of the original document containing the unlawfully restrictive language, and subject to covenants, conditions, and restrictions that will be recorded after the Restrictive Covenant Modification, the restrictions in the Restrictive Covenant Modification, once recorded, are the only restrictions having effect on the property. The effective date of the terms and conditions of the modification document are the same as the effective date of the original document [*Gov. Code § 12956.2(d)*].

If the holder of an ownership interest of record in property causes to be recorded a modified document that contains modifications not authorized by *Gov. Code § 12956.2*, the county recorder will not incur liability for recording the document. The liability that may result from the unauthorized recordation is the sole responsibility of the holder of the ownership interest of record who caused the modified recordation [*Gov. Code § 12956.2(f)*].

For discussion of restrictive covenants generally, see Ch. 184, *Deeds* .

[6] Income Discrimination

Gov. Code § 12955 prohibits all types of housing discrimination on the basis of source of income [*see, e.g., Gov. Code § 12955(a)* (unlawful for owner of housing accommodation to discriminate against any person because of source of income)]. For purposes of § 12955, "source of income" is defined as lawful, verifiable income paid directly to a tenant or paid to a representative of a tenant [*Gov. Code § 12955(p)(1)*]. It is not discrimination based on source of income to make a written or oral inquiry concerning the level or source of income [*Gov. Code § 12955(p)(2)*].

The following acts based on income are also specifically prohibited by FEHA:

- To use a financial or income standard in renting housing that fails to account for the aggregate income of persons residing together or proposing to reside together on the same basis as the aggregate income of married persons residing together or proposing to reside together [*Gov. Code § 12955(n)*].

- When there is a government rent subsidy, to use a financial or income standard in assessing eligibility for the rental of housing that is not based on the portion of the rent to be paid by the tenant [*Gov. Code § 12955(o)*].

The prohibition against discrimination on the basis of source of income in the FEHA is not limited to rental housing. It includes, for example, discrimination on the basis of a person's source of income in assessing eligibility for a mortgage loan [*Sisemore v. Master Financial, Inc. (2007) 151 Cal. App. 4th 1386, 1410-1417, 60 Cal. Rptr. 3d 719]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsDisability DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsEconomic DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsGender & Sex DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsNational Origin DiscriminationCivil Rights LawContractual Relations & HousingFair

Housing RightsRacial Discrimination

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 117 CIVIL RIGHTS: HOUSING DISCRIMINATION
PART II. LEGAL BACKGROUND
A. California Fair Employment and Housing Act

11-117 California Forms of Pleading and Practice--Annotated § 117.15

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§ 117.15 Limitations on FEHA

[1] Good Faith Purchaser

Nothing contained in FEHA relating to discrimination in housing may be construed to affect the title or other interest of a person who purchases, leases, or takes an encumbrance on a housing accommodation in good faith and without either knowledge or actual notice of the filing of a complaint with the Department of Fair Employment and Housing (DFEH) or the filing of a civil action [*Gov. Code § 12995(a)(1)*].

[2] Religion

Nothing in FEHA prohibits a religious organization, association or society, or any nonprofit institution or organization operated, supervised, or controlled by or in conjunction with a religious organization, association, or society from limiting the sale, rental, or occupancy of dwellings that it owns or operates for other than a commercial purpose to persons of the same religion or from giving preference to those persons, unless membership in that religion is restricted on account of race, color, or national origin [*Gov. Code § 12955.4*].

However, an individual whose religious beliefs do not permit him or her to comply with FEHA because of a religious

proscription against renting housing to unmarried cohabiting couples does not have a valid claim to an exemption from FEHA under the *First Amendment free exercise clause*, the Religious Freedom Restoration Act (*42 U.S.C. § 2000bb et seq.*), or *Cal. Const., art. I, § 4* [*Smith v. Fair Employment & Housing Com. (1996) 12 Cal. 4th 1143, 1161-1179, 51 Cal. Rptr. 2d 700, 913 P.2d 909]* .

[3] Educational Organizations

Nothing contained in FEHA relating to discrimination in housing may be construed to prohibit a postsecondary educational institution, whether private or public, from providing housing accommodations reserved for male or female students so long as no individual is denied equal access to housing accommodations, or from providing separate housing accommodations reserved primarily for married students or students with minor dependents who reside with them [*Gov. Code § 12995(a)(2)*].

[4] Other Limitations on FEHA

Nothing contained in FEHA relating to discrimination in housing may be construed to prohibit selection based on factors other than race, color, religion, sex, marital status, national origin, ancestry, familial status, disability, or other basis prohibited by the Unruh Civil Rights Act [*Gov. Code § 12995(a)(3)*]. Although this provision permits consideration of nonprotected characteristics, it does not excuse the owners of an apartment complex from complying with their duty under a contract with a city to accept applications from very low income households qualified for federal housing assistance [*Zakaria v. Lincoln Property Co. (1986) 185 Cal. App. 3d 500, 509-510, 229 Cal. Rptr. 669]* .

Nothing contained in FEHA relating to discrimination in housing may be construed to promote housing accommodations on a preferential or quota basis [*Gov. Code § 12995(a)(4)*].

Nothing contained in FEHA relating to discrimination in housing affects the nondiscriminatory enforcement of state and local public nuisance laws, provided that those laws do not otherwise conflict with the provisions of FEHA [*Gov. Code § 12995(b)*].

Nothing contained in FEHA precludes the government from establishing programs to collect information relating to discriminatory housing practices [*Gov. Code § 12955.5*].

[5] Construction of Rights and Remedies Under FEHA

Nothing in FEHA may be construed to afford to the classes protected under FEHA fewer rights or remedies than the federal Fair Housing Act (*42 U.S.C. § 3601 et seq.*) and its implementing regulations (*24 C.F.R. 100.1 et seq.*), or state law relating to fair housing as it existed before January 1, 1993 [*Gov. Code § 12955.6(a)*; for discussion of the federal Fair Housing Act, *see § 117.51*].

Any state law that purports to require or permit any action that would be an unlawful practice under FEHA is to that extent invalid [*Gov. Code § 12955.6*].

The Act may be construed to afford greater rights and remedies to an aggrieved person than those afforded by federal law and other state laws [*Gov. Code § 12955.6*]. Thus, the provisions of FEHA relating to discrimination in housing are intended to conform to the general requirements of federal law, and may provide greater protection [*Brown v. Smith (1997) 55 Cal. App. 4th 767, 780-782, 64 Cal. Rptr. 2d 301* ; *see Hall v. Butte Home Health, Inc. (1997) 60 Cal. App. 4th 308, 320-321, 70 Cal. Rptr. 2d 246* (addition of *Gov. Code § 12955.6* was designed to bring California into conformity with federal law)].

For example, relying on appellate court decisions interpreting *42 U.S.C. § 3604(b)*, a provision of the federal Fair

Housing Act, as prohibiting sexual harassment in housing as a form of sex discrimination, a California appellate court likewise construed FEHA to prohibit sexual harassment, even though FEHA does not explicitly so provide [*Brown v. Smith (1997) 55 Cal. App. 4th 767, 780-782, 64 Cal. Rptr. 2d 301* , citing *Honce v. Vigil (10th Cir. 1993) 1 F.3d 1085* and *DiCenso v. Cisneros (7th Cir. 1996) 96 F.3d 1004]* .

Similarly, a court of appeal interpreted *Gov. Code § 12955.6* in tandem with *Gov. Code § 12955*(*l*), to invalidate facially neutral restrictive covenants that would have the effect of prohibiting group homes for the disabled elderly, based on the court's finding that the federal Fair Housing Act is broadly applied to reach all practices, including facially neutral restrictive covenants, that interfere with the exercise of rights under federal fair housing laws [*Hall v. Butte Home Health, Inc. (1997) 60 Cal. App. 4th 308, 320-321, 70 Cal. Rptr. 2d 246* , citing *United States v. City of Hayward (9th Cir. 1994) 36 F.3d 832, 835 , cert. denied, 516 U.S. 813 (1985)]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsEconomic DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsGender & Sex DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsRacial DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsRemediesReal Property LawTitle QualityGeneral Overview

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PART II. LEGAL BACKGROUND
A. California Fair Employment and Housing Act

11-117 California Forms of Pleading and Practice--Annotated § 117.16

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§ 117.16 Administrative Remedy

[1] Filing Complaint

Any person claiming to be aggrieved by an alleged violation of *Gov. Code § 12955, 12955.1,* or *12955.7* may file with the Department of Fair Employment and Housing (DFEH or "Department") a verified written complaint [*Gov. Code § 12980(a)*].

The complaint must (1) state the name and address of the person alleged to have committed the violation, and (2) set forth the particulars of the violation and any other information required by DFEH [*Gov. Code § 12980(a)*; *see Gov. Code § 12980(b)* (Attorney General or Director of DFEH may also file complaint)].

The complaint must be filed within one year from the date on which the alleged violation occurred or terminated [*Gov. Code § 12980(b)*].

[2] Department of Fair Employment and Housing Proceedings

[a] General Investigative Procedures

[i] Initial Steps--Serving Notice of Complaint and Commencing Proceedings

The DFEH may proceed on a complaint in the same manner and with the same powers as in *Gov. Code § 12960 et seq.* (enforcement and hearing procedures in cases involving unlawful employment practices), except that when the provisions of *Gov. Code § 12980 et seq.* (enforcement and hearing procedures in cases involving housing discrimination) provide greater rights and remedies, those provisions prevail [*Gov. Code § 12980(c)*]. For discussion of enforcement and hearing procedures before DFEH in cases involving unlawful employment practices, see Ch. 115, *Civil Rights: Employment Discrimination* .

On the filing of a complaint, the Department must serve notice on the complainant of the time limits, rights of the parties, and choice of forums provided for under the law [*Gov. Code § 12980(d)*].

Within 10 days of its filing, the Department must cause a copy of the complaint to be served on or mailed to the respondent alleged to have committed the violation, and must advise the respondent in writing of his or her procedural rights and obligations [*Gov. Code § 12986*]. The respondent may file an answer to the complaint [*Gov. Code § 12986*].

The Department must commence proceedings with regard to a complaint within 30 days of its filing [*Gov. Code § 12980(e)*].

On notice that a verified complaint against him or her has been filed under FEHA, an owner of housing accommodations must maintain and preserve any and all rental records or any other written materials relevant to the complaint until the complaint is fully and finally disposed of and all appeals or related proceedings terminated [*Gov. Code § 12956*].

Whenever a person against whom a complaint has been filed is contacted by the Department, a member of the Department's staff, or a commissioner of the Fair Employment and Housing Commission (FEHC or "Commission"), he or she must be informed whether the purpose of the contact is investigation or conference, conciliation, or persuasion [*Gov. Code § 12985*]. If the contact is for the purpose of conference, conciliation, or persuasion, the person must be informed that all matters relating to the contact are privileged [*Gov. Code § 12985*].

An investigation of allegations contained in any complaint filed with the Department must be completed within 100 days after its receipt, unless it is impracticable to do so. If the investigation is not completed within 100 days, the complainant and respondent must receive written notice of the Department's reasons for not doing so [*Gov. Code § 12980(f)*].

[ii] Issuance and Service of Subpoenas and Discovery Requests

The Department may issue and serve subpoenas to require the attendance and testimony of witnesses as well as the production of books, records, documents, and physical materials [*see Gov. Code § 12963.1*]. It also has the power to issue and serve written interrogatories [*see Gov. Code § 12963.2*], and requests for production of physical materials [*see Gov. Code § 12963.4*], as well as the power to conduct depositions [*see Gov. Code § 12963.3*]. If a person or organization fails to comply with any discovery method, DFEH may file with the superior court a petition for an order compelling compliance [*see Gov. Code § 12963.5*; *see Department of Fair Employment and Housing v. Superior Court (Keller) (2002) 99 Cal. App. 4th 896, 904-905, 121 Cal. Rptr. 2d 615* (DFEH investigating claim of housing discrimination entitled to disclosure of rental applications and agreements from landlord's agent; Department's interest in prohibiting discrimination in housing outweighs any privacy interest of applicants for denied housing or accepted as renters); *DFEH v. Superior Court (1981) 116 Cal. App. 3d 149, 151-152, 171 Cal. Rptr. 863* (trial court erred in failing to issue order to compel respondent to respond to interrogatories)].

[iii] Preparation of Final Investigative Report

On the conclusion of each investigation, DFEH must prepare a final investigative report containing all of the following [*Gov. Code § 12980(g)*]:

- The names of any witnesses and the dates of any contacts with those witnesses;
- A summary of the dates of any correspondence or other contacts with the aggrieved persons or the respondent;
- A summary of witness statements;
- Answers to interrogatories; and
- A summary description of other pertinent records.

A final investigative report may be amended if additional evidence is later discovered [*Gov. Code § 12980(g)*].

[iv] Withdrawal or Dismissal of Complaint

If, at any time during any DFEH proceedings, a complaint is withdrawn by the complainant or dismissed by DFEH, or an investigation is terminated or closed by DFEH, notice of this fact must be given to the respondent and complainant without undue delay [*Gov. Code § 12971*].

[v] Settlement Agreements

All agreements reached in settlement of any housing discrimination complaint filed pursuant to *Gov. Code § 12980* must be agreements between the respondent and complainant, and such agreements are subject to approval by DFEH [*Gov. Code § 12980(j)*]. All such agreements must be made public, unless otherwise agreed by the complainant and respondent, and DFEH determines that the disclosure is not required to further the purposes of FEHA [*Gov. Code § 12980(i)*].

[b] Class Actions

Since DFEH may proceed on a complaint in the same manner and with the same powers as in *Gov. Code § 12960 et seq.* (enforcement and hearing procedures in cases involving unlawful employment practices) [*Gov. Code § 12980(c)*], the provisions governing the use of class actions apparently also apply in the context of housing discrimination complaints. Thus, if a violation alleged in a verified complaint adversely affects, in a similar manner, a group of persons of which the aggrieved person filing the complaint is a member, or if the violation raises questions of law or fact that are common to that group, the aggrieved person or the Director of DFEH may file the complaint on behalf of and as representative of that group [*Gov. Code § 12961*]. Any complaint so filed may be investigated as a class complaint and, if the Director considers that circumstances warrant it, will be treated as such for purposes of conciliation and accusation [*Gov. Code § 12961*; *see Gov. Code § 12965(a)* (determination by Director must be made and communicated in writing to each respondent within one year after complaint was filed)].

When an accusation is issued as a class accusation, the case will be treated as a class case for all other purposes of FEHA, including, but not limited to, hearing, determination, reconsideration, and judicial proceedings [*see Gov. Code § 12961*]. Any accusation issued as a result of a class complaint must be issued within two years after the filing of the complaint [*Gov. Code § 12965(a)*].

[3] Conciliation Agreement and Enforcement

If, after investigation, DFEH determines that a complaint is valid, it will immediately endeavor to eliminate the unlawful practice by conference, conciliation, and persuasion. The DFEH staff is prohibited from disclosing what transpires in the course of those endeavors [*Gov. Code § 12963.7(a)*; *see Gov. Code § 12963.7(b)* (improper disclosure is misdemeanor)].

Except as provided in *Gov. Code § 12980* (agreements are made public), all matters connected with conference, conciliation, or persuasion efforts resulting from the filing of an administrative complaint are privileged and may not be received in evidence [*Gov. Code § 12984* (DFEH members or employees who make impermissible disclosures are guilty of misdemeanor or subject to disciplinary action)].

Any agreement reached by conference, conciliation, and persuasion must be written, signed by all parties, and approved by the Director of the DFEH, or the Director's authorized representative. Any agreement resolutions may be in the nature of, but are not limited to, types of remedies that might be ordered after accusation and hearing [*Gov. Code § 12964*; *see* [7], *below* (Fair Employment and Housing Commission orders)].

Within one year of its effective date, DFEH must conduct a compliance review to determine whether the agreement has been fully obeyed and implemented [*Gov. Code § 12964*]. The DFEH may bring an action for appropriate injunctive relief whenever evidence indicates that a violation is occurring or is about to occur [*Gov. Code § 12964*]. Whenever DFEH has reasonable cause to believe that a respondent has breached a conciliation agreement, it will refer the matter to the Attorney General with a recommendation that a civil action be filed for the enforcement of the agreement [*Gov. Code § 12981(e)*].

[4] Temporary Injunctive Relief

After a complaint has been filed, if DFEH determines that there is probable cause to believe that the allegations are true and constitute a violation of FEHA, it may bring an action to enjoin the owner of the property from taking further action with regard to the rental, lease, or sale of the property, and to require compliance with *Gov. Code § 12956* (retention of records by owner), until DFEH has completed its investigation and made its determination [*Gov. Code § 12983*; *see Gov. Code § 12974* (similar provisions applicable in cases involving unlawful employment practices)]. The Department may also elect to have the Attorney General bring the action [*Gov. Code § 12983*].

In such a case, the superior court may enter an order awarding a temporary restraining order or a preliminary or final injunction in accordance with *Code Civ. Proc. § 527* [*Gov. Code § 12983*; for discussion of *Code Civ. Proc. § 527, see* Ch. 303, *Injunctions*].

Any temporary restraining order so obtained must not be in effect for more than 20 days [*Gov. Code § 12983*].

[5] Accusation

[a] Issuance

In the case of a failure to eliminate a violation of *Gov. Code § 12955*, *12955.1*, or *12955.7* that has occurred, or is about to occur, through conference, conciliation, and persuasion, or in advance thereof if circumstances warrant, the Director of DFEH must cause a written accusation to be issued in the name of DFEH, notwithstanding *Gov. Code § 12971*, in the same manner and with the same powers as provided in *Gov. Code § 12965* [*Gov. Code § 12981(a)*]. However, when the provisions of *Gov. Code § 12980 et seq.* provide greater rights and remedies, those provisions prevail [*Gov. Code § 12981(a)*].

An accusation alleging an unfair housing practice must be issued within 100 days after the filing of a complaint, unless it is impracticable to do so [*Gov. Code § 12981(a)*].

The accusation, together with a copy of the verified complaint, as amended, must be served on the respondent [*Gov. Code § 12965(a)*; *see Gov. Code § 12966* (when respondent is state contractor, copy of accusation must be sent to appropriate state agency)].

The accusation will require the person accused (the respondent) to answer the charges at an administrative hearing or civil trial, as elected by the parties under *Gov. Code § 12989* [*Gov. Code § 12981(a)*; for discussion of the election under *Gov. Code § 12989*, *see* [b], *below*]. Any aggrieved person may intervene as a matter of right in the proceeding and in the appeal or other judicial review of the proceeding [*Gov. Code § 12981(a)*].

If DFEH determines that an allegation concerns the legality of a zoning or other land use law or ordinance, DFEH or the Attorney General must take appropriate action with regard to the complaint according to the procedures in FEHA for other complaints of housing discrimination [*Gov. Code § 12981(b)*].

[b] Election After Issuance of Accusation

If an accusation is issued, a complainant, a respondent, or an aggrieved person on whose behalf a complaint is filed may elect, in lieu of an administrative proceeding, to have the charges adjudicated in a civil action [*Gov. Code § 12989(a)*]. Any such election may be made within 20 days after the service of the accusation, and not later than 20 days after service of the complaint to the respondent [*Gov. Code § 12989(b)*].

A notice of election must be filed with DFEH, and DFEH must serve a copy of the notice on the Director, the respondent, and the aggrieved person on whose behalf the complaint is filed. The notice must be filed and served in accordance with the procedures of *Gov. Code § 12962* [*Gov. Code § 12989(b)*].

If either party serves a notice of election, DFEH will, within 30 days after service of that notice, dismiss the accusation [*Gov. Code § 12989(c)*].

If such an election is not made, the director must maintain an administrative proceeding [*Gov. Code § 12989(e)*; *see* [6], *below*].

[c] Denial of Accusation

If DFEH determines that no accusation will issue, or if it fails to issue an accusation within 100 days after the complaint is filed, DFEH must promptly notify the person claiming to be aggrieved [*Gov. Code § 12980(h)*]. In any event, this notice must be issued no more than 30 days after the date of the determination, or 30 days after the date of the expiration of the 100-day period, whichever occurs first [*Gov. Code § 12980(h)*].

The notice must inform the person claiming to be aggrieved that he or she may bring a civil action against the person named in the verified complaint and that any such action must be brought within the time period specified in *Gov. Code § 12989.1* [*Gov. Code § 12980(h)*; *see § 117.17[1]*]. The notice must also indicate, unless DFEH has determined that no accusation will be issued, that the person claiming to be aggrieved has the option of continuing to seek redress through the procedures of DFEH if he or she chooses not to file a civil action [*Gov. Code § 12980(h)*].

[6] Hearing by Commission

When an accusation is issued, and the complainant elects not to have the charges adjudicated in a civil action, a hearing is held by the Fair Employment and Housing Commission (FEHC or "Commission") for the purpose of determining the issues [*Gov. Code §§ 12967, 12981(c)*]. That hearing must be held within 90 days after the issuance of the accusation [*Gov. Code § 12968*].

The case supporting the accusation is presented by attorneys of DFEH [*Gov. Code § 12969*].

Except as provided in *Gov. Code § 12980*, the content of discussions or endeavors at conciliation are not received in evidence at the hearing [*Gov. Code §§ 12969, 12984*].

The Commission must conduct all actions and procedures in accordance with its procedural regulations [*Gov. Code § 12972(a)*]. If the Commission does not have a procedural regulation on a particular issue, it must rely on pertinent provisions of the Administrative Procedure Act (APA) [*Gov. Code § 12972(b)(1)*; *see Gov. Code § 11370 et seq.* (APA)]. Notwithstanding *Gov. Code § 12972(b)(1)*, the Administrative Adjudication *Bill of Rights* in *Gov. Code § 11425.10 et seq.* and the rules for judicial review in *Gov. Code § 11523* apply to the Commission as well [*Gov. Code § 12972(b)(2)*].

In addition to the discovery available to each party under *Gov. Code § 12972(a)* and *(b)*, DFEH and the respondent may each cause a single deposition to be taken in the manner prescribed for depositions in civil actions [*Gov. Code § 12972(c)*; *see* Ch. 190, *Depositions and Discovery*].

The DFEH must make final administrative disposition of the complaint within one year of the date of its filing, unless it is impracticable to do so. If DFEH is unable to make final administrative disposition of a complaint within one year, it must provide written notice to the complainant and the respondent of its reasons for not doing so [*Gov. Code § 12981(c)*].

[7] Commission Orders

[a] Unlawful Practices

After a hearing, if the Commission finds that the respondent has engaged in any unlawful practice as defined in FEHA, it will state its finding of fact and will issue a cease and desist order to be served on the respondent, and take those actions that, in the judgment of the Commission, will effectuate the purpose of FEHA, including, but not limited to, any of the following [*see Gov. Code §§ 12970(a), 12987(a)*]:

- If the housing accommodation is still available, its sale or rental [*Gov. Code § 12987(a)(1)*].

- The sale or rental of like housing accommodation, if available [*Gov. Code § 12987(a)(1)*].

- The provision of financial assistance, terms, conditions, or privileges previously denied, for the purchase, organization, or construction of the housing accommodation, if available [*Gov. Code § 12987(a)(1)*].

- Affirmative or prospective relief, including injunctive or other equitable relief [*Gov. Code §§ 12970(a)(5), 12987(a)(2)*].

- The payment to the complainant of a civil penalty against any named respondent, not to exceed $10,000, unless either of the following occurs [*Gov. Code § 12987(a)(3)* (penalties will be collected by DFEH)]:

  - The respondent, in a separate accusation, has been adjudged to have intentionally committed a prior violation of *Gov. Code § 12955* within five years of the complaint (if so, the penalty may exceed $10,000, but may not exceed $25,000); or

- The respondent, in separate accusations, has been adjudged to have intentionally committed two or more prior violations of *Gov. Code § 12955* within seven years of the complaint (if so, the penalty may exceed $25,000, but may not exceed $50,000).

- The payment of actual damages to the complainant [*Gov. Code § 12987(a)(4)*].

- An award of reasonable attorney's fees and costs, including expert witness fees, to a prevailing party other than the state, against any party other than the state [*Gov. Code § 12987(a)(3)*].

In determining whether to assess a civil penalty pursuant to *Gov. Code § 12987*, the Commission must find that the respondent has been guilty of oppression, fraud, or malice, expressed or implied [*Gov. Code § 12987(b)*; *see Civ. Code § 3294*]. In determining the amount of a civil penalty, the Commission must consider *Gov. Code § 12955.6* and relevant evidence of, including, but not limited to, the following [*Gov. Code § 12987(b)*]:

- Willful, intentional, or purposeful conduct.

- Refusal to prevent or eliminate discrimination.

- Conscious disregard for fair housing rights.

- Commission of unlawful conduct.

- Intimidation or harassment.

- Conduct without just cause or excuse.

- Multiple violations of FEHA.

With regard to what may be awarded as "actual damages" by the Commission, *Gov. Code § 12987* is valid insofar as it authorizes the Commission to award quantifiable out-of-pocket restitutive damages, but is invalid under the judicial powers clause (*Cal. Const., art. VI, § 1*) insofar as it authorizes the award of nonquantifiable general compensatory damages for emotional distress and other intangible injury [*Walnut Creek Manor v. FEHC (1991) 54 Cal. 3d 245, 255-267, 284 Cal. Rptr. 718, 814 P.2d 704* (restitutive damages includes out-of-pocket expenditures for increased rent and utilities)]. However, amendments to the Fair Employment and Housing Act (FEHA) since *Walnut Creek Manor* was decided, in particular the judicial option provision which gives both sides in a FEHA administrative proceeding the choice to adjudicate the matter in court [*Gov. Code § 12989*], have remedied separation of powers concerns over the Commission's authority to award emotional distress damages, and the Commission can award such damages as actual damages under *Gov. Code § 12987(a)(4)* [*Konig v. Fair Employment and Housing Commission (2002) 28 Cal. 4th 743, 747-758, 123 Cal. Rptr. 2d 1, 50 P.3d 718]* .

Multiple acts of discrimination against the same complainant on the same unlawful basis establish only a single unlawful practice, and warrant the imposition of punitive damages based on a single act [*Walnut Creek Manor v. FEHC (1991) 54 Cal. 3d 245, 267-273, 284 Cal. Rptr. 718, 814 P.2d 704* (substantial multiple cumulative awards for punitive damages for single course of discriminatory conduct against one complainant are unreasonable)].

No remedy is available to the aggrieved person unless he or she waives any and all rights or claims under *Civ. Code § 52* before receiving a remedy, and signs a written waiver to that effect [*Gov. Code § 12987(e)*].

If the respondent is licensed or granted a privilege by a state agency and the Commission finds the respondent has engaged in an unlawful practice and that the violation occurred in connection with the license or privilege, the

Commission must provide the licensing or privilege-granting agency with a copy of its order [*Gov. Code § 12970(f)*].

If the Commission finds that the respondent has engaged in an unlawful practice under FEHA, and the respondent is licensed or granted a privilege by an agency of the state or the federal government to do business, provide a service, or conduct activities, and the unlawful practice is determined to have occurred in connection with the exercise of that license or privilege, the Commission must provide the licensing or privilege granting agency with a copy of its decision or order [*Gov. Code § 12987(c)*]. If the Commission finds that the respondent has engaged in an unlawful practice under FEHA and is liable for actual damages or a civil penalty, any amount due to the respondent by a state agency may be offset to satisfy the Commission's final order or decision [*Gov. Code § 12987(d)*].

If the Commission finds that a respondent has engaged in an unlawful practice and the practice apparently consisted of certain criminal acts, the Commission, with the complainant's consent, will provide the local district attorney's office with a copy of its decision and order [*Gov. Code § 12970(j)*; *see Penal Code §§ 243.4, 261, 262, 286, 288, 288a, 289* (criminal acts referred to in *Gov. Code § 12970(j)* include various sexual assaults and batteries, rape, and lewd or lascivious acts involving children)].

The Commission and the Department may engage in affirmative actions with property owners in furtherance of the purposes of FEHA [*see Gov. Code § 12988*; *see also Gov. Code § 12970(a)(5)*]. Additionally, the Commission may require a report of the manner of compliance [*Gov. Code §§ 12970(a)(6), 12987(f)*].

[b] No Unlawful Practice

If the Commission finds that a respondent has not engaged in any violation of FEHA, it will state its findings of fact and issue an order dismissing the accusation against the respondent [*Gov. Code § 12987(g)*; *see Gov. Code § 12970(g)*].

[c] Orders Generally

The Commission must cause any order it issues to be served on the party against whose interests the order has been made [*Gov. Code § 12987(a), (g)*]. Any order issued must have printed on its face references to the provisions of the Administrative Procedure Act, which prescribe the rights of appeal of any party to the proceeding to whose position the order is adverse [*Gov. Code § 12987(h)*; *see Gov. Code § 12970(i)*; *see also* Ch. 473, *Public Agency Adjudication* , et seq.].

Any findings and determination made, or any order issued, must be written and indicate the identity of the members of the Commission who participated [*Gov. Code § 12970(h)*].

[d] Judicial Review of Order

The party to whose position the Commission's order is adverse may apply for a writ of mandate under *Code Civ. Proc. § 1094.5* [*Gov. Code § 12987.1*]. The superior court, in reviewing the Commission's final order, may award the following relief [*Gov. Code § 12987.1(b)*]:

- Grant to the petitioner, or any other party, temporary relief, including, but not limited to, a restraining order, or other order as the court deems just and proper.

- Affirm, modify, or set aside, in whole or in part, the order, or remand the order for further proceedings, and enforce the order to the extent that it is affirmed or modified.

Any party to the proceeding before the Commission or any aggrieved person may intervene as a matter of right in the superior court proceeding [*Gov. Code § 12987.1(c)*].

The petition for a writ of mandate must be filed within 30 days after the last day on which reconsideration can be ordered, although the right to petition will not be affected by the failure to seek reconsideration [*Gov. Code § 11523*; *see Gov. Code § 11521* (reconsideration)]. The complete record of the proceedings, or those parts of it that are designated by the petitioner, will be prepared by the Office of Administrative Hearings or by the agency and delivered to the petitioner, within 30 days after a request for it, on the payment of the specified fees and costs. The record of the proceedings will be prepared only on request of the petitioner [*see Gov. Code § 11523*]. The complete record includes the pleading, all notices and orders issued by the agency, any proposed decision by an administrative law judge, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence, and any other papers in the case. If the petitioner, within 10 days after the last day on which reconsideration can be ordered, requests that the agency prepare all or any part of the record, the time within which a petition may be filed must be extended until 30 days after its delivery to him or her [*see Gov. Code § 11523*].

The court's inquiry will extend to the following questions [*Code Civ. Proc. § 1094.5(b)*]:

- Whether the Department proceeded without or in excess of jurisdiction;
- Whether there was a fair trial; and
- Whether there was any prejudicial abuse of discretion.

Abuse of discretion is established if (1) DFEH has not proceeded in the manner required by law, (2) the order or decision is not supported by the findings, or (3) the findings are not supported by the evidence [*Code Civ. Proc. § 1094.5(b)*; *see Hess v. Fair Employment & Housing Com. (1982) 138 Cal. App. 3d 232, 235 n.3, 187 Cal. Rptr. 712* (court observed that party seeking review never specified proper standard for review of Commission's decision, but found that Commission's findings were supported by evidence under both independent judgment and substantial evidence tests)].

Notwithstanding *Gov. Code § 12987.1(a)-(d)*, when the reviewing court denies a petition for writ of mandate seeking review of a Commission order or decision, the court must enter judgment denying the petition and enforcing the Commission's order or decision [*Gov. Code § 12987.1(e)*].

For discussion of judicial review of administrative adjudications by petition for writ of mandate under *Code Civ. Proc. § 1094.5*, and forms for use in those proceedings, see Ch. 474, *Availability of Judicial Review of Agency Decisions* .

[e] Compliance Review by Department

Within one year of the effective date of every final order or decision issued pursuant to FEHA, DFEH will conduct a compliance review to determine whether the order or decision has been fully obeyed and implemented [*Gov. Code § 12981(d)*; *see Gov. Code § 12973(a)* (same provision in employment context)].

If the time for judicial review of a final Commission order or decision has lapsed, or if all means of judicial review have been exhausted, DFEH may apply to the superior court in any county in which an action could have been brought under *Gov. Code § 12965(b)* for the enforcement of the order, or decision, or order as modified in accordance with a decision on judicial review [*Gov. Code § 12981(f)*; *see Gov. Code § 12987.1(d)* (provides for petition to court for decree enforcing Commission's order after time for petitioning for review of that order has expired) and *Gov. Code § 12973(b)* (same provision in employment context); for discussion of venue, see *§ 117.17[1][a]*].

If, after a hearing, the court determines that an order or decision has been issued by the Commission and that either the time limits for judicial review have lapsed or the order or decision was upheld in whole or in part on judicial review, the

court will issue a judgment and order enforcing the order, or decision, or order as modified in accordance with a decision on judicial review [*Gov. Code § 12981(f)*]. The court will not review the merits of the order or decision. Its judgment is nonappealable and has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action [*Gov. Code § 12981(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedureSettlementsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsRemedies

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 117 CIVIL RIGHTS: HOUSING DISCRIMINATION
PART II. LEGAL BACKGROUND
A. California Fair Employment and Housing Act

11-117 California Forms of Pleading and Practice--Annotated § 117.17

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§ 117.17 Civil Actions

[1] After Denial of Accusation

[a] General Procedure

An aggrieved person may bring a civil action under FEHA against the respondent when DFEH declines to issue an accusation. Such an action must be brought within the time period specified in *Gov. Code § 12989.1* [*Gov. Code § 12980(h)*; for discussion of *Gov. Code § 12989.1*, *see* [3], *below*].

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Gov. Code § 12980(h)*; *see Gov. Code § 12965(b)* (same provision in employment context); *see also Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86*].

The action may be brought in the county in which the alleged violation was committed or in which the relevant records are maintained and administered. If the defendant is not found within that county, the action may be brought within the county of the defendant's residence or principal office [*Gov. Code § 12980(h)*].

A copy of the complaint must be served on the principal offices of DFEH and the Commission [*Gov. Code § 12980(h)* (remedy for failure to do so is order to do so)].

[b] Remedies

Other than an award of attorney's fees, *Gov. Code § 12980(h)* does not state what remedies the court may provide. Presumably, compensatory damages and punitive damages, if warranted by the circumstances, are available [*see Civ. Code § 3281 et seq.*; *see also* Ch. 177, *Damages*]. If, however, the court is limited to the remedial powers of the Commission, then recovery is limited to actual damages, a civil penalty, and reasonable attorney's fees and costs [*see Gov. Code § 12987(a)*].

Arguably, the remedial orders a court may make in actions brought under *Gov. Code § 12989* or *12989.1* should also be available in this type of action [*see* [4], *below*].

For a general form of complaint for damages and injunctive relief for violation of FEHA, see *§ 117.80*.

[2] Based on Election After Issuance of Accusation

When DFEH issues an accusation under *Gov. Code § 12981*, a complainant, respondent, or aggrieved person may elect, in lieu of an administrative proceeding, to have the charges adjudicated in a civil action [*Gov. Code § 12989(a)*; for discussion of *Gov. Code § 12981*, *see § 117.16[5]*]. Within 30 days of receiving the notice of election, DFEH will itself or, at its election through the Attorney General, file a civil action with the superior court in its name or on behalf of the aggrieved person as a real party in interest [*Gov. Code § 12989(c)*].

Such an action may be filed in the county in which the unlawful practice is alleged to have been committed, in the county in which the records relevant to that practice are maintained and administered, or in the county in which the aggrieved person would have resided in the housing accommodation. If the respondent is not found within that county, the action may be filed in the county of the respondent's residence or principal office [*Gov. Code § 12989(c)*].

Any person aggrieved with regard to the issues to be determined may intervene as of right in the civil action [*Gov. Code § 12989(d)*].

[3] Separate From FEHA Complaint

An aggrieved person may commence a civil action in an appropriate court within two years after the occurrence or the termination of an alleged discriminatory housing practice or after the breach of a conciliation agreement, whichever occurs last, to obtain appropriate relief with regard to the discriminatory housing practice or breach [*Gov. Code § 12989.1*]. The computation of the two-year period does not include any time during which an administrative proceeding under FEHA was pending [*Gov. Code § 12989.1*]. An action may be commenced whether or not a complaint under FEHA was filed and without regard to the status of any such complaint [*Gov. Code § 12989.1*].

Any person who is aggrieved with regard to the issues to be determined in a civil action filed under FEHA may intervene in such a civil action [*Gov. Code § 12989.1*]. However, an aggrieved person who has been party to a conciliation agreement may not bring an action with regard to the practice that forms the basis for the complaint, except for the purpose of enforcing the terms of that agreement [*Gov. Code § 12989.1*].

Additionally, an aggrieved person may not commence a civil action with regard to an alleged discriminatory practice that forms the basis of an accusation issued by DFEH if DFEH has commenced a hearing on the accusation [*Gov. Code § 12989.1*].

[4] Available Relief

In an action brought under *Gov. Code § 12989* or *12989.1*, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award the plaintiff or complainant actual and punitive damages and may grant other relief, including the issuance of a temporary or permanent injunction, temporary restraining order, or other order, as it deems appropriate, to prevent any defendant from engaging in or continuing to engage in an unlawful practice. The court may, at its discretion, award the prevailing party, other than the state, reasonable attorney's fees and costs, including expert witness fees, against any party other than the state [*Gov. Code § 12989.2(a)*; for discussion of *Gov. Code § 12989, see* [2], *above*; for discussion of *Gov. Code § 12989.1, see* [3], *above*]. However, notwithstanding any other provision of law, the Commission is not liable for the attorney's fees of parties to the administrative adjudication of cases brought before the Commission, including proceedings under *Gov. Code §§ 11523* and *12987.1* and administrative mandamus proceedings under *Code Civ. Proc. § 1094.5* [*Gov. Code § 12989.2(b)*].

[5] Standing

FEHA protects independent contractors in the context of housing discrimination. A party that can maintain an action for retaliation under the federal Fair Housing Act (FHA) [*see § 117.51* et seq.] has standing to bring a retaliation claim under FEHA [*see Walker v. City of Lakewood (9th Cir. 2001) 263 F.3d 1005, 1015* (independent fair housing services provider engaged in advocacy efforts had standing under FHA and FEHA to bring retaliation claims against city)].

[6] Disparate Impact Theory

A facially neutral practice may have a disparate impact on a protected class under FEHA. A FEHA housing discrimination claim may be founded on a disparate impact theory. *Gov. Code § 12955.8(b)* authorizes a claim for housing discrimination irrespective of intent, when the alleged act or omission has the effect of discriminating on the basis of race, color, religion, sex, sexual orientation, familial status, marital status, disability, national origin, or ancestry. Further, the Legislature sought to make the FEHA substantially equivalent to the federal Fair Housing Act and its amendments [*42 U.S.C. § 3601 et seq.*; *see § 117.51*; *see also Konig v. Fair Employment & Housing Com. (2002) 28 Cal. 4th 743, 749, 123 Cal. Rptr. 2d 1, 50 P.3d 718* ; *Broadmoor San Clemente Homeowners Assn. v. Nelson (1994) 25 Cal. App. 4th 1, 6-7, 8, 30 Cal. Rptr. 2d 316]* , and federal authority plainly authorizes disparate impact housing discrimination claims under the federal Fair Housing Act [*Sisemore v. Master Financial, Inc. (2007) 151 Cal. App. 4th 1386, 1420, 60 Cal. Rptr. 3d 719* ; *see Betsey v. Turtle Creek Associates (4th Cir. 1984) 736 F.2d 983, 986* ; *Keith v. Volpe (9th Cir. 1988) 858 F.2d 467, 482]* .

To present a prima facie disparate impact case under the federal Fair Housing Act, a plaintiff must show at least that the defendant's actions had a discriminatory effect. Discriminatory effect means that the conduct of the defendant actually or predictably results in prohibited discrimination [*Sisemore v. Master Financial, Inc. (2007) 151 Cal. App. 4th 1386, 1420, 60 Cal. Rptr. 3d 719* ; *Keith v. Volpe (9th Cir. 1988) 858 F.2d 467, 482* , quoting *United States v. City of Black Jack, Missouri (8th Cir. 1974) 508 F.2d 1179]* . The plaintiff need not show a discriminatory intent to establish a disparate impact claim. [*Sisemore v. Master Financial, Inc. (2007) 151 Cal. App. 4th 1386, 1420, 60 Cal. Rptr. 3d 719* ; *Pfaff v. United States HUD (9th Cir. 1996) 88 F.3d 739, 745-746]* . Rather, the essential premise of an FHA disparate impact claim is that some housing practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination [*Sisemore v. Master Financial, Inc. (2007) 151 Cal. App. 4th 1386, 1420, 60 Cal. Rptr. 3d 719* ; *Mountain Side Mobile Estates v. Secretary of HUD (10th Cir. 1995) 56 F.3d 1243, 1250-1251]* .

By alleging that a mortgage lender's policies of not lending for a home that operates a day care center if the income is included to qualify for the loan, plaintiffs alleged an adequate foundation for a disparate impact claim under the FEHA. They asserted that the lender's policies disproportionately affected women and families with children because those two protected classes comprised a higher percentage of daycare home operators in the relevant county than the percentages

of those groups found generally in the county. The lender could ultimately disprove the allegations that its policies had a disparate impact on women or families with children by, for example, establishing that its lending policy was justified by business necessity [*Sisemore v. Master Financial, Inc. (2007) 151 Cal. App. 4th 1386, 1417-1423, 60 Cal. Rptr. 3d 719]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesDamagesPunitive DamagesCivil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsCosts & Attorney Fees

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Chapter 117 CIVIL RIGHTS: HOUSING DISCRIMINATION
PART II. LEGAL BACKGROUND
A. California Fair Employment and Housing Act

11-117 California Forms of Pleading and Practice--Annotated § 117.18

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§ 117.18 Actions by Attorney General

[1] Commencement of Civil Actions

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of denying to others the full enjoyment of any of the rights granted by *Gov. Code § 12980 et seq.*, or that any group of persons has been denied any of those rights, and that denial raises an issue of general public importance, the Attorney General will commence a civil action [*Gov. Code § 12989.3(a)*]. The Attorney General may also bring actions on referral from DFEH under *Gov. Code § 12981(b)* with regard to discriminatory housing practices [*Gov. Code § 12989.3(b)*].

The Attorney General must commence such actions within 18 months of the occurrence or termination of the alleged discriminatory housing practice [*Gov. Code § 12989.3(c)*].

The Attorney General also will bring civil actions with regard to breaches of conciliation agreements referred by DFEH. Such actions must be commenced within 90 days after the referral of the alleged breach [*Gov. Code § 12989.3(d)*].

[2] Relief Available

In actions brought by the Attorney General, the court may award preventive relief, other relief as it deems appropriate, including monetary damages to persons aggrieved, and a civil penalty of up to $50,000 for a first violation and $100,000 for any subsequent violation [*see Gov. Code § 12989.3(f)*].

The court may also award to a prevailing party, other than the state, attorney's fees and costs, including expert witness fees, against any party other than the state [*Gov. Code § 12989.3(g)*].

In addition, the Attorney General enforces subpoenas issued at the request of DFEH or other party under the provisions of FEHA [*Gov. Code § 12989.3(e)*].

[3] Intervention

On timely application, any person may intervene in an action brought by the Attorney General if it involves (1) an alleged discriminatory practice with regard to which that person is an aggrieved person, or (2) a conciliation agreement to which that person is a party. The court may grant, as appropriate, relief to any intervening party that is authorized to be granted to a plaintiff under *Gov. Code § 12989.2* [*Gov. Code § 12989.3(h)*; for discussion of *Gov. Code § 12989.2*, *see § 117.17[4]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesDamagesPunitive DamagesCivil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsCosts & Attorney FeesCivil Rights LawContractual Relations & HousingFair Housing RightsRemedies

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PART II. LEGAL BACKGROUND
A. California Fair Employment and Housing Act

11-117 California Forms of Pleading and Practice--Annotated §§ 117.19-117.29

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[Reserved]

§§ 117.19[Reserved]

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Chapter 117 CIVIL RIGHTS: HOUSING DISCRIMINATION
PART II. LEGAL BACKGROUND
B. Other State Laws Relating to Housing Discrimination

11-117 California Forms of Pleading and Practice--Annotated § 117.30

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§ 117.30 Governing Statutes

The Unruh Civil Rights Act is set forth in *Civ. Code § 51*.

Related provisions concerning age-based housing restrictions are set forth in *Civ. Code § 51.2*. Other provisions concerning housing specially designed for senior citizens are set forth in *Civ. Code §§ 51.3, 51.4*, and *51.10-51.12*.

Sexual harassment in a business, service, or professional relationship, including sexual harassment by a landlord or property manager, is prohibited by *Civ. Code § 51.9*.

Discriminatory restrictions on the ownership or use of real property are prohibited by *Civ. Code §§ 53, 782*, and *782.5*.

The rights of individuals with disabilities to full and equal access to housing accommodations are set forth in *Civ. Code § 54.1(b)*.

The Holden Act, setting forth the law prohibiting discrimination in the provision of financial assistance for housing accommodations, is contained in *Health & Safety Code § 35800 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsLeasing & Sales

California Forms of Pleading and Practice--Annotated

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 117 CIVIL RIGHTS: HOUSING DISCRIMINATION
PART II. LEGAL BACKGROUND
B. Other State Laws Relating to Housing Discrimination

11-117 California Forms of Pleading and Practice--Annotated § 117.31

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§ 117.31 Unruh Civil Rights Act

[1] Statutory Rule

The Unruh Civil Rights Act (or "Unruh Act") provides that all persons in California, no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation, are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever [*Civ. Code § 51(b)*].

[2] Applicable to Housing

The provisions of the Unruh Act apply with full force to the business of renting housing accommodations [*Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 731, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858]* , as well as to other real estate transactions [*Lee v. O'Hara (1962) 57 Cal. 2d 476, 478, 20 Cal. Rptr. 617, 370 P.2d 321* ; *see Sisemore v. Master Financial, Inc. (2007) 151 Cal. App. 4th 1386, 1402-1409, 60 Cal. Rptr. 3d 719* (allegation of discrimination in mortgage lending against operation of day center stated claim under Unruh Act)].

The Unruh Act is applicable regardless of the characteristics of the real estate business. Thus, the Act has been applied

to all of the following:

- The owners of an apartment complex, as well as to a real estate broker [*see, e.g.,* *Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 730-736, 180 Cal. Rptr. 496, 640 P.2d 115* , *cert. denied, 459 U.S. 858* (owners); *Lee v. O'Hara (1962) 57 Cal. 2d 476, 478, 20 Cal. Rptr. 617, 370 P.2d 321* (brokers)];

- A married couple, not otherwise engaged in the real estate business, who were renting their triplex unit for gain, even though they maintained no office and employed no persons to assist them in the rental or maintenance of the property [*Swann v. Burkett (1962) 209 Cal. App. 2d 685, 686-687, 694-695, 26 Cal. Rptr. 286]* ; and

- Nonprofit homeowners' associations [*see* *O'Connor v. Village Green Owners Ass'n (1983) 33 Cal. 3d 790, 795-797, 191 Cal. Rptr. 320, 662 P.2d 427* (condominiums); *Park Redlands Covenant Control Comm. v. Simon (1986) 181 Cal. App. 3d 87, 93, 226 Cal. Rptr. 199* (tract houses)].

In addition, the Unruh Act is applicable when individuals serve in more than one capacity in a real estate transaction or when several individuals act in conjunction with each other in a real estate transaction. Thus, the Unruh Act has been applied to the builders, owners, subdividers, sellers, and promoters of a housing tract [*see* *Burks v. Poppy Constr. Co. (1962) 57 Cal. 2d 463, 470, 20 Cal. Rptr. 609, 370 P.2d 313* ; *Don Wilson Builders v. Superior Court (1963) 220 Cal. App. 2d 77, 78, 33 Cal. Rptr. 621]* .

If a real estate transaction involves multiple parties, however, the discriminatory practices of one party will not be imputed to an innocent party. Thus, a real estate broker who in good faith does all within his or her power to serve a member of a protected class is not liable if the broker's failure to complete the transaction is due solely to the owner's refusal to sell because of the buyer's membership in a protected class [*see* *Vargas v. Hampson (1962) 57 Cal. 2d 479, 481, 20 Cal. Rptr. 618, 370 P.2d 322* ; *Wagner v. O'Bannon (1969) 274 Cal. App. 2d 121, 130-131, 79 Cal. Rptr. 44]* .

The Unruh Act may also apply to a bank, based on an agreement between the bank and real estate brokers to impose special restrictions on the sale, financing, and occupancy of real property on the sole ground of the race, creed, or color of the purchaser [*see* *Holmes v. Bank of America (1963) 216 Cal. App. 2d 529, 535-536, 30 Cal. Rptr. 917* (reversed dismissal following demurrer)].

It is the denial of equal accommodations, privileges, and services that is actionable under *Civ. Code § 51*. *Civ. Code § 51* does not require affirmative action by a real estate business. Thus, a failure affirmatively to seek out buyers in a protected class and to advertise affirmatively that such buyers are invited to purchase is not a violation. Under certain circumstances, however, mere quiescence could amount to discrimination. For example, a failure to show a home to black purchasers seeking property in that style and price range could warrant the inference of discrimination [*Crowell v. Isaacs (1965) 235 Cal. App. 2d 755, 757, 45 Cal. Rptr. 566]* .

Remedies under the Unruh Act are available only to those discriminated against and those whose rights are denied. Thus, white sellers who alleged only that real estate agents failed to show their home to black purchasers failed to show they were persons entitled to a remedy under the Unruh Act when they alleged nothing to show discrimination against them [*Crowell v. Isaacs (1965) 235 Cal. App. 2d 755, 757-758, 45 Cal. Rptr. 566]* .

For forms of allegations for use in actions under the Unruh Act based on housing discrimination, see *§ 117.81*.

[3] Age-Based Restrictions

In *Marina Point, Ltd. v. Wolfson*, the California Supreme Court held that the Unruh Act prohibited an apartment

complex from refusing to rent to families with children [*Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 736-740, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858]* . The landlord had excluded children based on the belief that children are rowdier, noisier, more mischievous, and more boisterous than adults, and from the desire to preserve an all-adult living environment that included facilities not geared for children. The Court disallowed the total exclusion of children, noting that nothing in the nature of an ordinary apartment complex is incompatible with the presence of families with children [*Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 736-740, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858]* . In *O'Connor v. Village Green Owners Ass'n*, the Court reiterated this holding and held that an age restriction in the covenants, conditions, and restrictions of a condominium development that limited residency to persons over the age of 18 years violated the Unruh Act [*O'Connor v. Village Green Owners Ass'n (1983) 33 Cal. 3d 790, 796-797, 191 Cal. Rptr. 320, 662 P.2d 427]* .

Although the *Marina Point* Court disallowed the total exclusion of children from an ordinary apartment complex, it made a sharp distinction between the exclusion of children from an ordinary apartment complex and the age-based admission policies of retirement communities or housing complexes reserved for older citizens. The Court observed that those facilities are designed for the elderly and generally have particular appurtenances and exceptional arrangements for their specified purposes, and concluded that age qualifications concerning a housing facility reserved for older citizens can operate as a reasonable and permissible means of establishing and preserving specialized facilities for those particularly in need of such services or environment [*Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 741-743, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858]* .

Civ. Code §§ 51.2 and *51.10* (applicable only to Riverside County), enacted after the *Marina Point* and *O'Connor* decisions, clarify and expand on the concept of specialized housing for the elderly [*see also Civ. Code §§ 51.3, 51.4*; § 117.33].

Additionally, the Unruh Act prohibits only unreasonable, arbitrary, or invidious discrimination, not differential treatment based on actual characteristic differences or differences in the needs of users. Thus, if an age-based housing restriction is reasonable, it may be permissible, even in an ordinary living environment [*Sunrise Country Club Assn. v. Proud (1987) 190 Cal. App. 3d 377, 381, 235 Cal. Rptr. 404]* . For example, when a condominium development specified areas as either adult or family areas, and restricted children under the age of 16 years to residence in family areas and recreation in family facilities, that division was held not to constitute an unreasonable or arbitrary age discrimination. The court reasoned that, first and foremost, there was no blanket exclusion of children under the age of 16 years. The absence of a total exclusion and the reasonable provision of housing and recreational facilities for families with children made the case fundamentally distinguishable from *Marina Point* and *O'Connor*, in which the exclusion was complete and absolute [*Sunrise Country Club Assn. v. Proud (1987) 190 Cal. App. 3d 377, 382, 235 Cal. Rptr. 404]* . The court was also persuaded by additional policy concerns such as the surplus of family housing accommodations in the area, the reduced danger of injury to children playing in the streets of the family area, the promotion of children's welfare and health by prohibiting them from using the adult jacuzzis, and the fact that the adult areas were largely populated by retired or semiretired adults [*Sunrise Country Club Assn. v. Proud (1987) 190 Cal. App. 3d 377, 382, 235 Cal. Rptr. 404]* .

The provision of housing for homeless youth is not considered unlawful age discrimination, notwithstanding any other provision of law, including *Civ. Code §§ 51, 51.2*, and *51.10* [*Gov. Code § 11139.3*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsAge DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsLeasing & Sales

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11-117 California Forms of Pleading and Practice--Annotated § 117.32

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§ 117.32 Sexual Harassment

[1] Statutory Liability

Under *Civ. Code § 51.9*, a landlord or property manager can be held liable for sexual harassment [*Civ. Code § 51.9(a)(1)(D)*]. Real estate agents, real estate appraisers, bankers, loan officers, building contractors, and escrow loan officers are also liable for sexual harassment under *Civ. Code § 51.9* [*Civ. Code § 51.9(a)(1)(B)*]. Moreover, others may be liable for sexual harassment in the housing context if they are in a business, service, or professional relationship with the plaintiff that is substantially similar to the relationships listed in *Civ. Code § 51.9* [*Civ. Code § 51.9(a)(1)(F)*].

The elements of proof of sexual harassment are set forth in *Civ. Code § 51.9(a)* and are discussed in Ch. 116, *Civil Rights: Discrimination in Business Establishments* . For a related jury instruction, see *Judicial Council Of California Civil Jury Instructions, CACI No. 3024* (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

[2] Prospective Application of Civ. Code § 51.9

In *Brown v. Smith (1997) 55 Cal. App. 4th 767, 64 Cal. Rptr. 2d 301* , the court of appeal held that before the

enactment of *Civ. Code § 51.9*, which was effective January 1, 1995, the Unruh Act [*Civ. Code § 51*] did not protect against sexual harassment by a landlord. In *Brown*, a male landlord had made comments to a female tenant of an offensive, sexual nature and had engaged in other harassing behavior. The tenant and her husband sued under the California Fair Employment and Housing Act (FEHA) and the Unruh Act. The jury awarded damages under FEHA and the Unruh Act. The court of appeal reversed the award under the Unruh Act. The court found that courts had been reluctant to extend the scope of protection of the Unruh Act since the California Supreme Court's decision in *Harris v. Capital Growth Investors XIV (1991) 52 Cal. 3d 1142, 278 Cal. Rptr. 614, 805 P.2d 873* , which held that the Unruh Act does not prohibit all arbitrary discrimination by businesses. The court in *Brown* held that in 1991, when the acts of harassment took place, the Unruh Act did not protect against sexual harassment [*Brown v. Smith (1997) 55 Cal. App. 4th 767, 788, 64 Cal. Rptr. 2d 301]* .

The enactment of *Civ. Code § 51.9* plugged that hole in the civil rights law, but § 51.9 applied only prospectively, not retrospectively [*Brown v. Smith (1997) 55 Cal. App. 4th 767, 787-788, 64 Cal. Rptr. 2d 301]* .

Protection against discrimination in housing under the Fair Employment and Housing Act is discussed in *§§ 117.10 -117.18*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGender & Sex Discrimination

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§ 117.33 Senior Citizen Housing

[1] Exception to Age Discrimination Prohibition

The Unruh Act prohibits a business establishment from discriminating in the sale or rental of housing based on age [*see Civ. Code § 51*]. Nevertheless, if accommodations are designed to meet the physical and social needs of senior citizens, a business establishment may establish and preserve that housing for senior citizens pursuant to *Civ. Code § 51.3* [*Civ. Code § 51.2(a)*; *see* [2], *below*]. Additionally, if accommodations constructed before February 8, 1982, meet the criteria for senior citizen housing specified in *Civ. Code § 51.3*, except housing as to which § 51.3 is preempted by the prohibition in the federal Fair Housing Amendments Act of 1988 [P.L. 100-430] and implementing regulations against discrimination on the basis of familial status, a business establishment may establish and preserve that housing for senior citizens without the housing development being designed to meet physical and social needs of senior citizens [*Civ. Code § 51.2(a)*; *see* [3], *below*].

Civ. Code § 51.2, enacted in 1984, was intended to clarify the holdings in *Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 180 Cal. Rptr. 496, 640 P.2d 115* , and *O'Connor v. Village Green Owners Ass'n (1983) 33 Cal. 3d 790, 191 Cal. Rptr. 320, 662 P.2d 427* , which suggested an exception based on the special housing needs of senior citizens [

Civ. Code § 51.2(b); *see* discussion at *§ 117.31[3]*].

Civ. Code §§ 51.2-51.4 do not apply to the County of Riverside. Rather, with regard to the County of Riverside only, those provisions are supplanted by *Civ. Code §§ 51.10-51.12*, which provide that a business establishment may establish and preserve housing for senior citizens, even if the housing is not specially designed to meet the physical and social needs of senior citizens.

[2] Specially Designed Housing

[a] Statutory Requirements Generally

The provisions of *Civ. Code § 51.3* are essential for the establishment and preservation of specially designed accessible housing for senior citizens. There is an inadequate supply of housing to accommodate all the senior citizens who require special living environments and services [*Civ. Code § 51.3(a)*].

To qualify as a housing development designed for senior citizens, the condominium, stock cooperative, limited-equity housing cooperative, planned development, or multiple-family residential rental property must have been developed for, and initially put to use as, housing for senior citizens, or substantially rehabilitated or renovated for, and immediately afterward put to use as, housing for senior citizens [*Civ. Code § 51.3(f)*; *see, e.g., Huntington Landmark Adult Community Assn. v. Ross (1989) 213 Cal. App. 3d 1012, 1018, 261 Cal. Rptr. 875]* .

Civ. Code § 51.3 has been construed to apply to any residential development regardless of the actual purpose for which it was originally designed or constructed, so long as its physical characteristics meet the needs of seniors. Thus, if a housing development was constructed before *Civ. Code § 51.3* came into effect and its design is already suited to seniors, rehabilitation or renovation of existing structures is not required [*Bliler v. Covenant Control Com. (1988) 205 Cal. App. 3d 18, 26-27, 252 Cal. Rptr. 50]* . The holding of *Bliler* has been reinforced by amendment of *Civ. Code § 51.3*, providing that no housing development constructed before January 1, 1985, will fail to qualify as a senior citizen housing development because it was not originally developed for or originally put to use for occupancy by senior citizens [*Civ. Code § 51.3(f)*; *see also Civ. Code § 51.2(a)*].

Civ. Code § 51.11, which is applicable to the County of Riverside only, contains less stringent requirements than *Civ. Code § 51.3* for the preservation of housing for senior citizens.

[b] Specific Design Requirements

There is no established design required for housing designed for the needs of seniors. Although seniors may have different physical needs, housing designed to accommodate those needs is not restricted to housing designed for the disabled. Factors that suggest housing designed with senior citizens in mind include individual units that are small in size, one story, and require no yard work, and the grouping of those units around extensive communal recreational and educational facilities [*Huntington Landmark Adult Community Assn. v. Ross (1989) 213 Cal. App. 3d 1012, 1018-1019, 261 Cal. Rptr. 875]* . More and wider sidewalks and well-lighted walkways and halls are also characteristics of housing designed for senior citizens [*Bliler v. Covenant Control Com. (1988) 205 Cal. App. 3d 18, 27, 252 Cal. Rptr. 50]* .

[c] Definitions

[i] "Qualifying Resident" or "Senior Citizen"

For purposes of *Civ. Code § 51.3*, "qualifying resident" or "senior citizen" means a person 62 years of age or older, or 55 years of age or older in a senior citizen housing development [*Civ. Code § 51.3(b)(1)*].

For special definitions applicable to the preservation of housing for senior citizens in Riverside County, *see Civ. Code § 51.11(b).*

[ii] "Qualified Permanent Resident"

For purposes of *Civ. Code § 51.3,* "qualified permanent resident" means a person who meets both of the following requirements [*Civ. Code § 51.3(b)(2)*; *see Huntington Landmark Adult Community Assn. v. Ross (1989) 213 Cal. App. 3d 1012, 1021, 261 Cal. Rptr. 875* (person must comply with all requirements to qualify as qualified permanent resident)]:

- Was residing with the qualifying resident or senior citizen prior to the death, hospitalization, or other prolonged absence of, or the dissolution of marriage with, the qualifying resident or senior citizen; and

- Was 45 years of age or older, or was a spouse, cohabitant, or person providing primary physical or economic support to the qualifying resident or senior citizen.

"Qualified permanent resident" also means a "disabled" person or person with a disabling illness or injury who is a child or grandchild of the senior citizen or a qualified permanent resident as defined in *Civ. Code § 51.3(b)(2)* who needs to live with the senior citizen or qualified permanent resident because of the disabling condition, illness, or injury. For these purposes, "disabled" means a person who has a disability as defined in *Civ. Code § 54(b)*. "Disabling injury or illness" means an illness or injury which results in a condition meeting the definition of disability in *Civ. Code § 54(b)* [*Civ. Code § 51.3(b)(3)*; for discussion of *Civ. Code § 54(b)*, see Ch. 116, *Civil Rights: Discrimination in Business Establishments*].

If a qualified permanent resident's disabling condition ends, the owner, board of directors, or other governing body may require the formerly disabled resident to cease residing in the development on receipt of six months' written notice, provided that the owner, board of directors, or other governing body may allow the person to remain a resident for up to one year after the disabling condition ends [*Civ. Code § 51.3(b)(3)(A)*]. The owner, board of directors, or other governing body may take action to prohibit or terminate occupancy by a qualified permanent resident if the owner, board or directors, or other governing body finds, based on credible and objective evidence, that the person is likely to pose a significant threat to the health or safety of others that cannot be ameliorated by a reasonable accommodation, provided that the prohibition or termination of occupancy may be taken only after both of the following are done [*Civ. Code § 51.3(b)(3)(B)*]:

- Reasonable notice and an opportunity to be heard are provided for the disabled person whose occupancy is being challenged and reasonable notice is provided to the coresident parent or grandparent of that person; and

- Due consideration is given to the relevant, credible, and objective information provided in the hearing, at which evidence is taken and held in a confidential manner, pursuant to a closed session, by the owner, board of directors, or other governing body to preserve the privacy of the affected persons.

The affected persons are entitled to have present at the hearing an attorney or any other person authorized by them to speak on their behalf or to assist them in the matter [*Civ. Code § 51.3(b)(3)(B)*].

[iii] "Senior Citizen Housing Development"

For purposes of *Civ. Code § 51.3,* "senior citizen housing development" means a residential development developed, substantially rehabilitated, or substantially renovated for, senior citizens that has at least 35 dwelling units. Any senior citizen housing development required to obtain a public report under *Bus. & Prof. Code § 11010*, which submits its

application for a public report after July 1, 2001, is required to have been issued a public report as a senior citizen housing development under *Bus. & Prof. Code § 11010.05*. No housing development constructed before January 1, 1985, will fail to qualify as a senior citizen housing development because it was not originally developed or put to use for occupancy by senior citizens [*Civ. Code § 51.3(b)(4)*].

[iv] "Dwelling Unit" or "Housing"

For purposes of *Civ. Code § 51.3*, "dwelling unit" or "housing" means any residential accommodation other than a mobilehome [*Civ. Code § 51.3(b)(5)*].

[v] "Cohabitant"

For purposes of *Civ. Code § 51.3*, "cohabitant" refers to persons who live together as husband and wife, or who are domestic partners within the meaning of *Fam. Code § 297* [*Civ. Code § 51.3(b)(6)*].

[vi] "Permitted Health Care Resident"

For purposes of *Civ. Code § 51.3*,"permitted health care resident" means a person hired to provide live-in, long-term, or terminal health care to a qualifying resident, or a qualifying resident's family member providing that care. For these purposes, the care provided by a permitted health care resident must be substantial in nature and must provide either assistance with necessary daily activities or medical treatment, or both [*Civ. Code § 51.3(b)(7)*]. A permitted health care resident is entitled to continue his or her occupancy, residency, or use of the dwelling unit as a permitted resident in the absence of the senior citizen only if both of the following are applicable [*Civ. Code § 51.3(b)(7)*]:

- The senior citizen became absent from the dwelling due to hospitalization or other necessary medical treatment and expects to return to the residence within 90 days from the date the absence began; and

- The absent senior citizen or an authorized person acting for the senior citizen submits a written request to the owner, board of directors, or governing board stating that the senior citizen desires that the permitted health care resident be allowed to remain in order to be present when the senior citizen returns to reside in the development.

On written request by the senior citizen or an authorized person acting for the senior citizen, the owner, board of directors, or governing board has the discretion to allow a permitted health care resident to remain for a time period longer than 90 days from the date the senior citizen's absence began, if it appears that the senior citizen will return within a period of time not to exceed an additional 90 days [*Civ. Code § 51.3(b)(7)*].

[d] Covenants, Conditions, and Restrictions

The covenants, conditions, and restrictions, and other documents or written policy of a senior citizen housing development must set forth the limitations on occupancy, residency, or use on the basis of age. Any such limitation must not be more exclusive than to require that one person in residence in each dwelling unit may be required to be a senior citizen and that each other resident in the same dwelling unit may be required to be a qualified permanent resident, a permitted health care resident, or a person under 55 years of age whose occupancy is permitted under *Civ. Code § 51.3(h)* or *Civ. Code § 51.4(b)*. The limitation may be less exclusive, but must at least require that the persons commencing occupancy include a senior citizen who intends to reside in the unit as his or her primary residence on a permanent basis. Application of the rules in *Civ. Code § 51.3(c)* regarding limitations on occupancy may result in less than all of the dwellings being actually occupied by a senior citizen [*Civ. Code § 51.3(c)*].

The covenants, conditions, and restrictions, or other documents or written policy, must permit temporary residency, as a guest of a senior citizen or qualified permanent resident, by a person of less than 55 years of age for specified periods of

time not less than 60 days in a year [*Civ. Code § 51.3(d)*]. Moreover, the policy documents must permit the occupancy of a dwelling unit by a permitted health care resident during any period that the person is actually providing live-in, long-term, or hospice health care to a qualifying resident for compensation. "For compensation" includes provision of lodging and food in exchange for care [*Civ. Code § 51.3(i)*].

The covenants, conditions, and restrictions, or other documents or written policy, applicable to any condominium, stock cooperative, limited-equity housing cooperative, planned development, or multiple-family residential property that contained age restrictions on January 1, 1984, are enforceable only to the extent permitted by *Civ. Code § 51.3*, notwithstanding lower age restrictions contained in those documents or policies [*Civ. Code § 51.3(g)*; for special requirements for covenants, conditions, and restrictions applicable to the preservation of housing for senior citizens in Riverside County, *see Civ. Code § 51.11*].

[e] Continued Right of Occupancy

On the death or dissolution of marriage, or on hospitalization or other prolonged absence, of the qualifying resident, any qualified permanent resident, but not a permitted health care resident, may continue occupancy, residency, or use of the dwelling unit as a permitted resident [*Civ. Code § 51.3(e)*; for provision applicable to Riverside County, *see Civ. Code § 51.11(e)*].

Any person who had the right to reside in, occupy, or use the housing or an unimproved lot subject to *Civ. Code § 51.3* on January 1, 1985, may not be deprived of the right to continue that residency, occupancy, or use as the result of the enactment of *Civ. Code § 51.3* [*Civ. Code § 51.3(h)*; for provision applicable to Riverside County, *see Civ. Code § 51.11(g)*].

[3] Exemption From Special-Design Requirement

A housing development constructed before February 8, 1982, is exempt from the Unruh Act's prohibition of discrimination in housing, if it meets all the criteria for senior citizen housing specified in *Civ. Code § 51.3*, even though the housing development was not designed to meet the physical and social needs of senior citizens [*Civ. Code § 51.2(a)*].

The requirements for senior housing under *Civ. Code §§ 51.2* and *51.3* are more stringent than those required under the federal Fair Housing Act. This was done intentionally in recognition of the acute shortage of housing for families with children in California [*Civ. Code § 51.4(a)*; for discussion of the federal Fair Housing Act, see *§ 117.51*]. The requirement for specially designed accommodations in senior housing provides important benefits to senior citizens and also ensures that housing exempt from the prohibition of age discrimination is carefully tailored to meet the compelling societal interest in providing senior housing. However, the special-design requirements for senior housing may pose a hardship to some housing developments that were constructed before the *Marina Point* decision [*Civ. Code § 51.4(a)*; *see Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858* , discussed in *§ 117.31[3]*]. Therefore, the Legislature permitted a narrow, time-limited exception to the strict design requirement; that exception was set forth at former *Civ. Code § 51.4(b)*. Any person who resided in, occupied, or used, before January 1, 1990, a dwelling in a senior citizen housing development which relied on the exemption to the special design requirement provided by *Civ. Code § 51.4* before January 1, 2001, may not be deprived of the right to continue the residency, occupancy, or use as the result of the changes made to *Civ. Code § 51.4* by the enactment of Senate Bills 1382 or 2011 at the 1999-2000 regular session of the Legislature [*Civ. Code § 51.4(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsAge DiscriminationCivil Rights LawContractual

Relations & HousingFair Housing RightsExemptions

California Forms of Pleading and Practice--Annotated

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 117 CIVIL RIGHTS: HOUSING DISCRIMINATION
PART II. LEGAL BACKGROUND
B. Other State Laws Relating to Housing Discrimination

11-117 California Forms of Pleading and Practice--Annotated § 117.34

AUTHOR: Dennis M. Farias Revision Author Dennis M. Farias is a graduate of the University of Colorado School of Law, and an attorney licensed in California, Colorado, and Nevada. He has practiced extensively in the field of civil rights law. Mr. Farias is a staff attorney for the United States District Court for the District of Nevada, assisting the court primarily with civil rights and habeas corpus cases. John H. Scott Editorial Consultant John Houston Scott graduated from Suffield Academy, Suffield, Connecticut in 1966. In 1970 he received a Bachelor's Degree from the University of California at Santa Barbara, majoring in Religious Studies. He graduated from Golden Gate University School of Law in 1976. Mr. Scott has been in private practice in San Francisco since 1977 specializing in civil rights litigation with an emphasis on police misconduct, prisoner and patient rights issues, and employment discrimination. He is currently a partner in the law firm of Prentice & Scott, 433 Turk Street, San Francisco, California, 94102. He has tried in excess of 100 cases to verdict throughout the State of California. In addition, he has been attorney of record in a variety of published decisions in both state and federal courts.

§ 117.34 Discriminatory Restrictive Covenants Regarding Real Property

Every provision in a written instrument relating to real property that purports to forbid or restrict the conveyance, encumbrance, leasing, or mortgaging of that real property to any person because of any characteristic listed or defined in *Civ. Code § 51(b)* or *(e)* is void. Further, every restriction or prohibition regarding the use or occupation of real property because of any characteristic listed or defined in *Civ. Code § 51(b)* or *(e)* is also void [*Civ. Code § 53(a)*; for discussion of *Civ. Code § 51(b), (e)*, see *Ch. 116, Civil Rights: Discrimination in Business Establishments, § 116.12*].

Additionally, every restriction or prohibition, whether by way of covenant, condition on use or occupation, or on transfer of title to real property, that directly or indirectly limits the acquisition, use, or occupation of that property because of any characteristic listed or defined in *Civ. Code § 51(b)* or *(e)* is void [*Civ. Code § 53(b)*].

Although not part of the Unruh Civil Rights Act (Civ. Code *§ 51), Civ. Code* § 53 clearly was enacted to effectuate the same general goals [*see Park Redlands Covenant Control Comm. v. Simon (1986) 181 Cal. App. 3d 87, 93, 226 Cal. Rptr. 199* (applying principles of *Civ. Code § 51* in analysis of restrictive covenant)].

The scope of *Civ. Code § 53* is both broad and comprehensive: it interdicts discrimination in leasing and mortgaging, as

well as in conveyancing, and forbids indirect as well as direct restraints [*Taormina Theosophical Community, Inc. v. Silver (1983) 140 Cal. App. 3d 964, 975, 190 Cal. Rptr. 38]* .

A restrictive reading of the prohibited bases of discrimination in *Civ. Code § 53* would be at odds with the all-inclusive scope of its coverage. Accordingly, *Civ. Code § 53(b)* has been interpreted to prohibit all covenants on land that would discriminate on bases similar to those listed [*Taormina Theosophical Community, Inc. v. Silver (1983) 140 Cal. App. 3d 964, 975, 190 Cal. Rptr. 38]* . For example, when a nonprofit organization established a retirement community for Theosophists and restricted ownership and occupancy to persons who had been members of their society for three years, or had been approved by the board of trustees, the court found that restriction sufficiently close to a restriction based on religion to be void. The court found Theosophy to be like a religion in its concern with spiritual matters and the common beliefs of its members. The restriction operated like a religious restriction in that it discriminated based on a person's sympathy to a set of ideas that was spiritual in nature [*Taormina Theosophical Community, Inc. v. Silver (1983) 140 Cal. App. 3d 964, 976, 190 Cal. Rptr. 38]* .

For a form of cross complaint for declaratory relief declaring a restriction on real property to be void because it is discriminatory, see *Ch. 116, Civil Rights: Discrimination in Business Establishments, § 116.91*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsLeasing & SalesReal Property LawRestrictive CovenantsGeneral Overview

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§ 117.35 Disabled Persons

[1] Equal Access to Housing Accommodations

Individuals with disabilities are entitled to full and equal access, like other members of the general public, to all housing accommodations offered for rent, lease, or compensation, subject to the conditions and limitations established by law, or by state or federal regulation, and applicable alike to all persons [*Civ. Code § 54.1(b)(1)*; *see Civ. Code § 54.1(b)(2)* (defining "housing accommodations")].

Any person renting, leasing, or otherwise providing real property for compensation may not refuse to permit an individual with a disability, at that person's expense, to make reasonable modifications of the existing rented premises if the modifications are necessary to afford the person full enjoyment of the premises. However, any modifications under this paragraph may be conditioned on the disabled tenant entering into an agreement to restore the interior of the premises to the condition existing before the modifications. No additional security may be required on account of an election to make modifications to the rented premises under this paragraph, but the lessor and tenant may negotiate, as part of the agreement to restore the premises, a provision requiring the disabled tenant to pay an amount into an escrow account, not to exceed a reasonable estimate of the cost of restoring the premises [*Civ. Code § 54.1(b)(3)(A)*].

Any person renting, leasing, or otherwise providing real property for compensation may not refuse to make reasonable accommodations in rules, policies, practices, or services, when those accommodations may be necessary to afford individuals with a disability equal opportunity to use and enjoy the premises [*Civ. Code § 54.1(b)(3)(B)*].

It is a denial of equal access to housing accommodations for any person, firm, or corporation to refuse to lease or rent housing accommodations to an individual who is blind or visually impaired, an individual who is deaf or hearing impaired, or other individual with a disability on the basis that the individual with a disability is partially or wholly dependent on the income of his or her spouse, if the spouse is a party to the lease or rental agreement. However, a lessor or landlord is not prohibited from considering the aggregate financial status of an individual with a disability and his or her spouse [*Civ. Code § 54.1(b)(7)*].

[2] Qualifications on Equal Access

"Housing accommodations" means any real property, or portion of real property, that is used or occupied, or is intended, arranged, or designed to be used or occupied, as the home, residence, or sleeping place of one or more human beings. However, "housing accommodations" does not include any accommodations included within *Civ. Code § 54.1(a)* (public facilities), or any single-family residence in which the occupants rent, lease, or furnish for compensation only one room [*Civ. Code § 54.1(b)(2)*].

Nothing in *Civ. Code § 54.1(b)* requires any person renting, leasing, or providing for compensation real property to modify his or her property in any way or to provide a higher degree of care for an individual with a disability than for an individual who is not disabled [*Civ. Code § 54.1(b)(4)*].

[3] Provisions Applicable to Guide, Signal, and Service Dogs

It is a denial of equal access to housing accommodations for any person, firm, or corporation to refuse to lease or rent housing accommodations to any of the following individuals [*Civ. Code § 54.1(b)(6)(A)*; *see Civ. Code § 54.1(b)(6)(C)* ("guide dog," "signal dog," and "service dog" defined)]:

- An individual who is blind or visually impaired on the basis that the individual uses the services of a guide dog;
- An individual who is deaf or hearing impaired on the basis that the individual uses the services of a signal dog; or
- An individual with any other disability on the basis that the individual uses the services of a service dog.

It is also a denial of equal access to housing accommodations to refuse to permit any of the following [*Civ. Code § 54.1(b)(6)(A)*]:

- An individual who is blind or visually impaired to keep a guide dog;
- An individual who is deaf or hearing impaired to keep a signal dog; or
- An individual with a physical disability to keep a service dog on the premises.

Except in the normal performance of duty as a mobility or signal aid, *Civ. Code § 54.1(b)(6)* may not be construed to prevent the owner of a housing accommodation from establishing terms in a lease or rental agreement that reasonably

regulate the presence of guide dogs, signal dogs, or service dogs on the premises of a housing accommodation. Nor will *Civ. Code § 54.1(b)(6)* be construed to relieve a tenant from any liability otherwise imposed by law for real and personal property damages caused by a guide, signal, or service dog when proof of same exists [*Civ. Code § 54.1(b)(6)(B)*].

Civ. Code § 54.1(b)(6) sets forth the exclusive circumstances under which *Civ. Code §§ 54-55.1* require any person renting, leasing, or providing for compensation real property to accept as a tenant an individual with a disability who has a dog, if that person refuses to accept any tenants who have dogs [*Civ. Code § 54.1(b)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsDisability Discrimination

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§ 117.36 Financing for Housing

[1] Purposes of Holden Act

The Holden Act, *Health & Safety Code § 35800 et seq.*, sets forth the law prohibiting discrimination in the provision of financial assistance for housing accommodations [*see Health & Safety Code § 35800*]. The purposes of the Holden Act include the following [*Health & Safety Code § 35802(a)*; *see Health & Safety Code § 35801* (Legislative findings and declarations)]:

- To prevent discrimination in the provision of financial assistance for financing or refinancing the purchase, construction, rehabilitation, or improvement of housing accommodations because of conditions, characteristics, or trends in the neighborhood or geographic area surrounding the security property.

- To encourage increased lending in neighborhoods or geographic areas in which conventional residential mortgage financing has been unavailable.

- To increase the availability of housing accommodations to creditworthy persons.
- To ensure the supply of decent, safe housing.
- To prevent the abandonment and decay of neighborhoods and geographic areas.

The provisions of the Holden Act will be liberally construed to effectuate its purposes [*Health & Safety Code § 35832*]. Rules, regulations, guidelines, and orders issued under the Holden Act must not be in any manner contrary to, or inconsistent with, the Act's purposes [*Health & Safety Code § 35831*].

[2] Financing Discrimination Prohibited

No financial institution may discriminate in the availability of, or the provision of, financial assistance for the purpose of purchasing, constructing, rehabilitating, improving, or refinancing housing accommodations because of, in whole or in part, the consideration of conditions, characteristics, or trends in the neighborhood or geographic area surrounding the housing accommodation [*Health & Safety Code § 35810(a)*]. However, such consideration may be permitted in a particular case if the financial institution demonstrates that it is necessary to avoid an unsafe and unsound business practice [*see Health & Safety Code § 35810(a)*].

Furthermore, this provision does not prohibit a financial institution from establishing a special loan program designed to engender equality in housing in accordance with the federal Fair Housing Act (*42 U.S.C. § 3601 et seq.*), or similar state and federal laws, so long as the program promotes housing opportunities in ethnic minority or low-income neighborhoods [*Health & Safety Code § 35810(b)*].

No financial institution may discriminate in the availability or provision of financial assistance for the purpose of purchasing, constructing, rehabilitating, improving, or refinancing housing accommodations because of, in whole or in part, the consideration of any basis listed in *Gov. Code § 12955(a)* or *(d)*, as those bases are defined in *Gov. Code §§ 12926*, *12926.1(m)*, *12955(p)(1)*, and *12955.2*, with an exception for familial status as applied to housing for older persons [*Health & Safety Code § 35811*; *see § 117.11* et seq. for discussion of characteristics in *Gov. Code § 12955*, and for discussion of characteristics in *Gov. Code § 12926*, see Ch. 115, *Civil Rights: Employment Discrimination*].

In appraising a housing accommodation, or in determining whether or not, and under what terms and conditions, to provide financial assistance for the purpose of purchasing, constructing, rehabilitating, improving, or refinancing a housing accommodation, no financial institution may consider the racial, ethnic, religious, or national origin composition of a neighborhood or geographic area surrounding a housing accommodation, or whether or not that composition is undergoing change or expected to undergo change [*Health & Safety Code § 35812*]. No financial institution may utilize appraisal practices that are inconsistent with the provisions of the Holden Act [*Health & Safety Code § 35812*].

[3] Limitations

Nothing in the Holden Act requires a financial institution to provide financial assistance if it is clearly evident that occupancy of the housing accommodation would create an imminent threat to the health or safety of the occupant [*Health & Safety Code § 35813*]. Moreover, nothing in the Act precludes a financial institution from considering the fair market value of the property that will secure the proposed loan [*Health & Safety Code § 35813*].

The provisions of the Holden Act, including rules, regulations, guidelines, and orders issued under it, do not affect the validity of any prohibitions or requirements pertaining to the activity of financial institutions that arise from other provisions of law relating to discrimination in lending [*Health & Safety Code § 35831*].

With regard to federal savings and loan associations, the procedural aspects of the Holden Act are preempted by federal law. The regulatory control of the federal Bank Board over federal savings and loan associations is so pervasive that it leaves no room for state regulatory control. Thus, if rights granted by the Holden Act are to be enforced against a federal savings and loan association, such enforcement must be by the Bank Board [*Conference of Federal Sav. & Loan Ass'ns v. Stein (9th Cir. 1979) 604 F.2d 1256, 1260 , aff'd, 445 U.S. 921, 100 S. Ct. 1304, 63 L. Ed. 2d 754 (1980)]* .

[4] Definitions

[a] "Agency" and "Secretary"

For purposes of the Holden Act, "agency" means the Business, Transportation and Housing Agency [*Health & Safety Code § 35805(a)*]. "Secretary" means the Secretary of the Business, Transportation, and Housing Agency [*Health & Safety Code § 35805(e)*].

[b] "Fair Market Value"

For purposes of the Holden Act, "fair market value" means the most probable price that a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is notaffected by undue stimulus. The use of this definition by a financial institution in an appraisal made at any time on or after July 1, 1986, does not violate the provisions of the Holden Act [*Health & Safety Code § 35805(b)*].

[c] "Financial Institution"

For purposes of the Holden Act, "financial institution" includes any bank, savings and loan association, or other institution in the state, including a public agency, that regularly makes, arranges, or purchases loans for the purchase, construction, rehabilitation, improvement, or refinancing of housing accommodations [*Health & Safety Code § 35805(c)*].

[d] "Housing Accommodation"

For purposes of the Holden Act, "housing accommodation" includes any improved or unimproved real property, or portion of real property, that satisfies all of the following requirements [*Health & Safety Code § 35805(d)*]:

- It is used or is intended to be used as a residence;
- It is or will be occupied by the owner; and
- It contains not more than four dwelling units.

"Housing accommodation" also includes any residential dwelling containing not more than four dwelling units when the owner thereof, whether or not he or she will occupy the property, applies or has applied for a secured home improvement loan from a financial institution, the proceeds of which will be used to improve the security property [*Health & Safety Code § 35805(d)*].

[5] Powers of Secretary

[a] Issuance of Rules, Regulations, Guidelines, and Orders

The Secretary will issue rules, regulations, guidelines, and orders that are necessary to interpret and enforce the

provisions of the Holden Act and to affirmatively further its provisions [*Health & Safety Code § 35814*].

[b] Adoption of Regulations

The Secretary will adopt regulations applicable to all persons who are in the business of originating residential mortgage loans, including, but not limited to, insurers, mortgage bankers, investment bankers, and credit unions, and who are not depository institutions within the meaning of the federal Home Mortgage Disclosure Act (*12 U.S.C. § 2801 et seq.*) [*Health & Safety Code § 35816*]. The regulations for residential mortgage loans will impose substantially the same reporting requirements by geographic area and loan product as are imposed by the federal Home Mortgage Disclosure Act [*Health & Safety Code § 35816*]. *Health & Safety Code § 35816* does not apply to subsidiaries of depository institutions or subsidiaries of depository institution holding companies that are currently reporting to a federal or state regulatory agency as provided by the federal Home Mortgage Disclosure Act or that are subject to substantially the same reporting requirements by geographic area and loan product pursuant to an act of a federal or state regulatory agency [*Health & Safety Code § 35816*].

[c] Monitoring and Investigation of Lending Patterns and Practices

The Secretary will monitor and investigate the lending patterns and practices of financial institutions for compliance with the Holden Act, including the lending patterns and practices for housing accommodations that are not occupied by the owner. If a finding is made that those patterns or practices violate the Act, the Secretary will take action to effectuate the purposes of the Act. In addition to other remedies provided by the Holden Act or other provisions of law, the Secretary may recommend to the Treasurer that state funds not be deposited in a financial institution when the Secretary has made a finding that the financial institution has engaged in a lending pattern and practice that violates the Holden Act [*Health & Safety Code § 35815(a)*].

[6] Notice of Rights

Financial institutions must notify all applicants at the time of written application for financial assistance of the prohibitions enumerated in the Holden Act, and of their right of review. That notice, which must be in at least 10-point type and posted in a conspicuous place for public inspection, must include the address of the Secretary, and where complaints may be filed and questions asked [*Health & Safety Code § 35830*].

[7] Complaint

Any applicant for a real estate loan in connection with a housing accommodation claimed to be aggrieved by an alleged violation of the Holden Act, or of any rule or regulation adopted under the Act, may file a complaint with the Secretary [*Health & Safety Code § 35820*].

Immediately on receipt of the complaint, the Secretary will endeavor to eliminate any alleged unlawful practice by conference, conciliation, or persuasion [*Health & Safety Code § 35821*; *see Health & Safety Code § 35815(a)* (Secretary may take action after finding practices of financial institution that violate Act)].

[8] Department Action on Complaint

If, in accordance with the established procedures, and within 30 days of receiving the complaint, the Secretary finds that a financial institutionhas engaged in any unlawful practice, the Secretary will so state in a written decision and will issue a cease and desist order. That order may require the financial institution to take either of the following steps that, in the judgment of the Secretary, will effectuate the purposes of the Act [*see Health & Safety Code § 35822*]:

- Providing financial assistance or providing it on nondiscriminatory terms; or

- Paying damages to the complainant in an amount not to exceed $1,000, if the Secretary finds that effective relief in the form of financial assistance is no longer available.

The Secretary may also require a report of the manner of compliance [*Health & Safety Code § 35822*].

If the Secretary finds that the financial institution has not engaged in any practice that constitutes a violation, the Secretary will issue a written decision incorporating his or her findings of fact and will cause a copy of the decision to be served on the complainant and the financial institution [*Health & Safety Code § 35822*].

[9] Administrative Hearing

The Secretary's decision will be final unless, within 10 days after receipt of that decision, either the complainant or financial institution files a written request with the Secretary for a formal administrative hearing [*Health & Safety Code § 35823*]. On receiving such a request, the Secretary will file a copy of the request with the Office of Administrative Hearings [*Health & Safety Code § 35823*].

Within 20 days of receiving the request, the Office of Administrative Hearings will commence a hearing on the merits in accordance with the provisions of the Administrative Procedures Act, except that the decision of the hearing officer will be a final decision that is binding on the Secretary [*Health & Safety Code § 35823*; for discussion of the Administrative Procedures Act (*Gov. Code § 11500 et seq.*), *see* Ch. 473, *Public Agency Adjudication* et seq.]. If the Secretary's decision was in favor of the complainant, the Secretary will represent the complainant at the hearing [*Health & Safety Code § 35823*].

The decision of the hearing officer must be in accordance with the provisions of *Health & Safety Code § 35822* [*see* [8], *above*] and must be rendered within 45 days of receipt by the Office of Administrative Hearings of the request for a hearing [*Health & Safety Code § 35823*].

[10] Judicial Review

Either the complainant or the financial institution may obtain judicial review of the administrative decision by filing a petition for writ of mandate under *Code Civ. Proc. § 1094.5* [*Health & Safety Code § 35823*].

In any such proceeding, the court may exercise its independent judgment on the evidence included in the record of the administrative hearing and may additionally consider evidence that was improperly excluded, as well as any other relevant evidence not included in the record of the administrative hearing that the court finds the offering party could not, in the exercise of reasonable diligence, have produced at that hearing [*Health & Safety Code § 35823*].

The court may in its discretion award costs or reasonable attorney's fees, or both, to the complainant if the complainant is the prevailing party, without regard to whether such judicial action is brought by the complainant or by the financial institution [*Health & Safety Code § 35823*].

For discussion, procedural checklists, and forms for use in petitioning a court to review an administrative decision under *Code Civ. Proc. § 1094.5*, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawFederal ActsFair Housing & National Housing ActsCivil Rights LawContractual Relations & HousingFair Housing RightsGeneral Overview

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§ 117.37 State May Not Promote Discrimination

The state is generally free to enact laws proscribing discrimination in housing, and has done so to a great extent through the California Fair Employment and Housing Act (FEHA) (*Gov. Code § 12900 et seq.*) [*see §§ 117.10 -117.18*] and the Unruh Civil Rights Act (*Civ. Code § 51*) [*see § 117.31*] and its related provisions. The state is not free, however, to enact laws or otherwise become involved in actions that would promote discrimination.

For example, in 1964, Proposition 14, an initiative measure enacting *Cal. Const., art. I, § 26*, was approved by the voters. Proposition 14 provided that neither the state nor any of its subdivisions or agencies shall deny, limit, or abridge, directly or indirectly, the right of any person who is willing or desires to sell, lease, or rent any part or all of his or her real property, or to decline to sell, lease, or rent that property to those persons as he or she, in his or her absolute discretion, chooses. Proposition 14 was enacted with the clear intent to overturn state laws that bore on the right of private sellers and lessors to discriminate, and to forestall future state action that might circumscribe that right [*Mulkey v. Reitman (1966) 64 Cal. 2d 529, 534-535, 50 Cal. Rptr. 881, 413 P.2d 825 , aff'd, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967)]* .

Proposition 14 was held to be unconstitutional as a denial of the equal protection of the laws as guaranteed by the

Fourteenth Amendment to the federal constitution, and was held void [*see Mulkey v. Reitman (1966) 64 Cal. 2d 529, 545, 50 Cal. Rptr. 881, 413 P.2d 825* , *aff'd, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967)* (*Cal. Const., art. I, § 26* was repealed in 1974)]. In reaching its decision, the Court noted that among the civil rights protected from discriminatory state action are the rights to acquire, enjoy, own, and dispose of property [*Mulkey v. Reitman (1966) 64 Cal. 2d 529, 535, aff'daff'd, 387 U.S. 369, 87 S. Ct. 627, 18 L. Ed. 2d 830 (1967)*]. The Court characterized Proposition 14 as an attempt to establish a constitutional right to privately discriminate on grounds that would be unavailable if state action was involved. The Court ultimately concluded that state action was involved, because state action has been consistently found when the state, in any meaningful way, has lent its processes to the achievement of discrimination even though that goal was not within the state's purposes. As a result of Proposition 14, the state would have affirmatively acted to change its existing laws from a situation in which the discrimination practiced was legally restricted to one in which it was encouraged, and at the very least, would have become a partner in the act of discrimination [*see Mulkey v. Reitman (1966) 64 Cal. 2d 529, 536-538, 542-543, 50 Cal. Rptr. 881, 413 P.2d 825* , *aff'd, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967)* ; *see also Peyton v. Barrington (1966) 64 Cal. 2d 880, 50 Cal. Rptr. 905, 413 P.2d 849* ; *Thomas v. Goulis (1966) 64 Cal. 2d 884, 50 Cal. Rptr. 910, 413 P.2d 854* (memorandum cases in which judgments were reversed after Proposition 14 was held unconstitutional)].

Under *Gov. Code § 11135*, no person in California may, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, be unlawfully denied full and equal access to the benefits of, or unlawfully subjected to discrimination under, any program or activity conducted, operated, or administered by the state or by any state agency, funded directly by the state, or receiving financial assistance from the state [*Gov. Code § 11135(a)*; *see* Ch. 112, *Civil Rights: Government-Funded Programs and Activities*]. However, the provision of housing for homeless youth is not considered unlawful age discrimination, notwithstanding any other provision of law, including *Gov. Code § 11135* [*Gov. Code § 11139.3*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingGeneral OverviewCivil Rights LawContractual Relations & HousingEqual Rights Under the Law (sec. 1981)General OverviewConstitutional LawEqual ProtectionGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 117 CIVIL RIGHTS: HOUSING DISCRIMINATION
PART II. LEGAL BACKGROUND
B. Other State Laws Relating to Housing Discrimination

11-117 California Forms of Pleading and Practice--Annotated §§ 117.38-117.49

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[Reserved]

§§ 117.38[Reserved]

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11-117 California Forms of Pleading and Practice--Annotated § 117.50

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§ 117.50 Governing Statutes

The federal Fair Housing Act (FHA) is set forth in *42 U.S.C. § 3601 et seq.*

42 U.S.C. § 1982 provides that all citizens have equal property rights.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingProperty Rights (sec. 1982)General Overview

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§ 117.51 Federal Fair Housing Act

[1] Prohibition Against Discrimination in Housing; Claims of Disparate Treatment and Disparate Impact

The federal Fair Housing Act (FHA), set forth in *42 U.S.C. §§ 3601-3631,* was originally enacted as Title VIII of the Civil Rights Act of 1968. The FHA implements the policy of the United States to provide for fair housing within constitutional limits throughout the nation, and is administered by the Department of Housing and Urban Development (HUD) [*42 U.S.C. §§ 3601, 3608(a)*]. The Secretary of HUD ordinarily commands considerable deference in interpreting the FHA [*Harris v. Itzhaki (9th Cir. 1999) 183 F.3d 1043, 1051]* .

The FHA prohibits discrimination in housing based on race, color, religion, sex, familial status, or national origin [*see 42 U.S.C. § 3604*]. Some provisions of the Act include handicap as an additional protected characteristic [*see, e.g., 42 U.S.C. §§ 3604(c)-(f), 3605, 3606*]. The language of the FHA is to be treated as broad and inclusive [*Trafficante v. Metropolitan Life Ins. Co. (1972) 409 U.S. 205, 209, 93 S. Ct. 364, 34 L. Ed. 2d 415* ; *Walker v. City of Lakewood (9th Cir. 2001) 263 F.3d 1005, 1018]* .

The courts apply a Title VII discrimination analysis in examining claims of discrimination brought under the FHA [

Gamble v. City of Escondido (9th Cir. 1997) 104 F.3d 300, 304] . A plaintiff can establish a claim of discrimination under the FHA under a theory of disparate treatment or disparate impact [*Gamble v. City of Escondido (9th Cir. 1997) 104 F.3d 300, 304-305]* .

A claim of disparate treatment is analyzed under Title VII's three-stage test, and requires proof of discriminatory motive [*Gamble v. City of Escondido (9th Cir. 1997) 104 F.3d 300, 305 , citing McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668]* .

However, the three-stage test in *McDonnell Douglas* is inapplicable to Fair Housing Act challenges to a facially discriminatory policy [*Community House, Inc. v. City of Boise (9th Cir. 2006) 468 F.3d 1118, 1124* , citing *Bangerter v. Orem City Corp. (10th Cir. 1995) 46 F.3d 1491, 1501 n.16* ; *Reidt v. County of Trempealeau (7th Cir. 1992) 975 F.2d 1336, 1341]* . The appropriate approach in facial discrimination cases is the one for employment discrimination cases in which the challenged policy is facially discriminatory. In that situation, the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. The appropriate test is whether the characteristic on which the discrimination is made is a "bona fide occupational qualification" ("BFOQ") [*Community House, Inc. v. City of Boise (9th Cir. 2006) 468 F.3d 1118, 1124* ; *see Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc. (1991) 499 U.S. 187, 197, 199, 200, 111 S. Ct. 1196, 113 L. Ed. 2d 158]* . Thus, a plaintiff makes out a prima facie case of intentional discrimination under the Fair Housing Act merely by showing that a protected group has been subjected to explicitly differential, *i.e.* discriminatory, treatment [*Community House, Inc. v. City of Boise (9th Cir. 2006) 468 F.3d 1118, 1124* (plaintiffs established prima facie case of facial discrimination under Fair Housing Act because they were explicitly excluded from housing for homeless based on their gender and familial status)]. To justify facial discrimination under the Fair Housing Act, a defendant must show either: (1) that the restriction benefits the protected class or (2) that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes [*Community House, Inc. v. City of Boise (9th Cir. 2006) 468 F.3d 1118, 1125* (plaintiffs raised serious questions as to whether asserted justifications of safety concerns or policy allowing transfer of homeless men from one shelter to another to convert shelter into shelter for women and children satisfy standards for permissible discrimination under Fair Housing Act)].

A disparate impact claim requires a showing of discriminatory effect to establish a prima facie case [*Gamble v. City of Escondido (9th Cir. 1997) 104 F.3d 300, 306]* . After the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the action. The defendant is only required to set forth a legally sufficient explanation. Assuming the defendant can successfully rebut the presumption of discrimination, the burden shifts back to the plaintiff to raise a genuine factual question as to whether the proffered reason is pretextual. A plaintiff may succeed in persuading the court that he or she has been a victim of intentional discrimination directly, by persuading the court that a discriminatory reason more likely motivated the defendant, or indirectly, by showing that the defendant's proffered explanation is unworthy of credence. The trier of fact may consider the same evidence the plaintiff introduced to establish a prima facie case in determining whether the defendant's explanation is merely pretext. Once the plaintiff establishes a prima facie case, summary judgment for the defendant will ordinarily not be appropriate on any ground relating to the merits, because the crux of a discrimination claim is the elusive factual question of intentional discrimination [*Harris v. Itzhaki (9th Cir. 1999) 183 F.3d 1043, 1051]* .

For discussion of the disparate treatment and disparate impact theories, see Ch. 115, *Civil Rights: Employment Discrimination* .

[2] Prohibited Practices

[a] Renting and Selling

It is unlawful for any person to discriminate on the basis of a protected characteristic by refusing to sell or rent after the making of a bona fide offer, or by refusing to negotiate for the sale or rental of, or by otherwise making unavailable or

denying, a dwelling to any person [*42 U.S.C. § 3604(a)*]. This prohibition is limited to bona fide purchasers; there is no violation when a party discriminated against is a "tester," rather than a bona fide purchaser [*see Havens Realty Corp. v. Coleman (1982) 455 U.S. 363, 374, 102 S. Ct. 1114, 71 L. Ed. 2d 214]* .

It is also unlawful for any person to discriminate on the basis of a protected characteristic in the terms, conditions, or privileges of a sale or rental of a dwelling, or in the provision of related services or facilities [*42 U.S.C. § 3604(b)*].

For a general form of complaint for damages and injunctive relief under the FHA on the basis of discrimination in the sale and rental of housing, see *§ 117.90*.

It is unlawful for any person to discriminate on the basis of a protected characteristic by making, printing, or publishing, or causing the making, printing, or publishing of, any notice, statement, or advertisement, with regard to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on a protected characteristic or an intention to make such a preference, limitation, or discrimination [*42 U.S.C. § 3604(c)* (includes handicap as additional protected characteristic)]. For a form of allegation alleging housing discrimination based on discrimination in advertising, see *§ 117.91*.

It is unlawful for any person to discriminate on the basis of a protected characteristic by representing falsely that a dwelling is not available for inspection, sale, or rental [*42 U.S.C. § 3604(d)* (includes handicap as additional protected characteristic)]. This prohibition is applicable to "testers." Thus, a "tester" who has been subjected to unlawful misrepresentations under *42 U.S.C. § 3604(d)* has standing to sue under the FHA [*Havens Realty Corp. v. Coleman (1982) 455 U.S. 363, 373-374, 102 S. Ct. 1114, 71 L. Ed. 2d 214]* . For a form of allegation alleging housing discrimination based on such a false representation, see *§ 117.92*.

It is unlawful for any person to discriminate on the basis of a protected characteristic by making, for profit, representations regarding entry into the neighborhood of persons of a particular protected characteristic in order to induce or attempt to induce the sale or rental of a dwelling [*42 U.S.C. § 3604(e)* (includes handicap as additional protected characteristic); *see 24 C.F.R. § 100.85* (refers to this activity as "blockbusting")]. For a form of allegation alleging housing discrimination based on such a representation, see *§ 117.93*.

It is unlawful for any person to discriminate on the basis of a protected characteristic by denying or placing conditions on access to, membership in, or participation in a multiple-listing service, organization, facility, or other form of brokerage service relating to the selling or renting of dwellings [*42 U.S.C. § 3606* (includes handicap as additional protected characteristic)]. For a form of allegation alleging housing discrimination based on discrimination in brokerage services, see *§ 117.95*.

It is unlawful for any person to discriminate in the sale or rental of, or to otherwise make unavailable or deny, a dwelling to any buyer or renter or to discriminate in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of related services or facilities, because of a handicap of that buyer or renter, a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available, or any person associated with that buyer or seller [*42 U.S.C. § 3604(f)(1), (2)*]. For purposes of *42 U.S.C. § 3604(f)*, discrimination is widely defined and encompasses refusal to make reasonable modifications and accommodations [*see 42 U.S.C. § 3604(f)(3)*]. Statutory compliance, however, does not require actions that would constitute a direct threat to the health or safety of individuals or that would result in substantial physical damage to property [*42 U.S.C. § 3604(f)(9)*]. *42 U.S.C. § 3604(f)* permits states and local entities to require dwellings to provide greater access than it requires [*see 42 U.S.C. § 3604(f)(8)*].

Testers and testing organizations have standing to sue to enforce the provisions of *42 U.S.C. § 3604(f)(2)* even if (1) the tester has no interest in renting or purchasing the property, and (2) the organization cannot demonstrate that any of its members has an interest in renting or purchasing the property [*Smith v. Pacific Properties & Dev. Corp. (9th Cir. 2004) 358 F.3d 1097, 1101-1104]* . Further, an organization can show standing in its own right by showing that it was

required to divert scarce resources from other efforts to promote awareness of and compliance with federal and state accessibility laws and to benefit the disabled community in other ways [*Smith v. Pacific Properties & Dev. Corp. (9th Cir. 2004) 358 F.3d 1097, 1104-1106]* .

[b] Residential Real Estate-Related Transactions

It is unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, on the basis of a protected characteristic [*42 U.S.C. § 3605(a)* (includes handicap as additional protected characteristic); for definition of "residential real estate-related transaction," see *§ 117.51[3]*].

The FHA's ban on racial discrimination extends to the underwriting of homeowners' property insurance [*Ojo v. Farmers Group, Inc. (9th Cir. 2009) 565 F.3d 1175, 1181* ; *see Nationwide Mut. Ins. Co. v. Cisneros (6th Cir. 1995) 52 F.3d 1351, 1359* (no Congressional intent precludes application of Fair Housing Act to insurance underwriting practices); *NAACP v. Am. Family Mut. Ins. Co. (7th Cir. 1992) 978 F.2d 287, 293* (Fair Housing Act applies to discriminatory denials of insurance and discriminatory pricing that effectively preclude ownership of housing because of race of applicant); *Nat'l Fair Hous. Alliance, Inc. v. Prudential Ins. Co. of Am. (D. D.C. 2002) 208 F. Supp. 2d 46, 57* (application of FHA to homeowners insurance is fully consistent with statute's purpose in eliminating discrimination resulting in segregated housing and lack of equal housing opportunities, citing *Trafficante v. Metropolitan Life Ins. Co. (1972) 409 U.S. 205, 211-212, 93 S. Ct. 364, 34 L. Ed. 2d 415*)]. However, while the FHA applies to cases involving discriminatory denials of homeowners' insurance to persons based on race, it is not specifically directed at insurance regulation [*Ojo v. Farmers Group, Inc. (9th Cir. 2009) 565 F.3d 1175, 1181* ; *see Nationwide Mut. Ins. Co. v. Cisneros (6th Cir. 1995) 52 F.3d 1351, 1360-1361* (because FHA does not mention insurance, it is covered by McCarran-Ferguson Act and cannot be construed to invalidate, impair or supersede state law enacted to regulate business of insurance); *NAACP v. Am. Family Mut. Ins. Co. (7th Cir. 1992) 978 F.2d 287, 298* (recognizing that FHA does not mention insurers)].

For a form of allegation alleging housing discrimination based on discrimination in a residential real estate-related transaction, see *§ 117.94*.

[c] Government Actions Related to Use of Property

A person may invoke the FHA to challenge governmental actions related to use of property, such as failure to grant a conditional use permit [*see, e.g., Gamble v. City of Escondido (9th Cir. 1997) 104 F.3d 300, 305-307* (complaint for handicap discrimination in refusing to grant conditional use permit to build residence and adult day care facility failed to state claim for disparate treatment, disparate impact, or municipality's failure to make reasonable accommodation)].

A person may sue under the FHA and the Fair Housing Act Amendments (FHAA), *42 U.S.C. § 3604(f)(3)(B)*, if a local municipality refuses to make reasonable accommodations for handicapped housing [*Gamble v. City of Escondido (9th Cir. 1997) 104 F.3d 300, 305, 307]* .

[d] Acts of Interference, Coercion, or Intimidation

It is unlawful for any person to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or aided or encouraged another to exercise or enjoy, any right granted or protected by the FHA [*see 42 U.S.C. § 3617*; *see, e.g., Walker v. City of Lakewood (9th Cir. 2001) 263 F.3d 1005, 1015* (FHA prevents employers from canceling at-will employment contracts in retaliation for fair housing advocacy; failure to renew annual contract in retaliation for fair housing advocacy actionable); *United States v. City of Hayward (9th Cir. 1994) 36 F.3d 832, 835-836 , cert. denied, 516 U.S. 813 (1995)* (city's action in ordering rent reduction after mobilehome park ended its adults-only policy constituted "interference" with mobilehome park's attempt

to comply with FHA in violation of *42 U.S.C. § 3617*); *Smith v. Stechel (9th Cir. 1975) 510 F.2d 1162, 1163-1164* (action by apartment complex employees charging employer with terminating their employment because they rented apartments to members of ethnic minority groups)]. Section 3617 does not require a showing of force or violence for coercion, interference, intimidation, or threats to give rise to liability [*Walker v. City of Lakewood (9th Cir. 2001) 263 F.3d 1005, 1018]* . "Interference," in particular, has been broadly applied to reach all practices having the effect of interfering with the exercise of rights under the federal fair housing laws [*Walker v. City of Lakewood (9th Cir. 2001) 263 F.3d 1005, 1018* ; *United States v. Hayward (9th Cir. 1994) 36 F.3d 832, 835]* .

To state a claim for retaliation under the FHA, a plaintiff must show all of the following [*Walker v. City of Lakewood (9th Cir. 2001) 263 F.3d 1005, 1017* ; *see San Pedro Hotel Co. v. City of Los Angeles (9th Cir. 1998) 159 F.3d 470, 477* ; *see also 42 U.S.C. § 3617*]:

- The plaintiff engaged in a "protected activity";
- Defendant subjected plaintiff to an adverse action, or defendant's subsequent activities were causally linked with the plaintiff's exercise of a protected activity; and
- Plaintiff suffered some resulting damage.

Termination of a contract can be an adverse action even if plaintiff was not making a profit on the contract. Loss of profit is only relevant at the damages stage [*Walker v. City of Lakewood (9th Cir. 2001) 263 F.3d 1005, 1019 n.6*].

If the plaintiff presents a prima facie retaliation claim, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for its decision. If the defendant articulates a legitimate, nondiscriminatory reason, the plaintiff bears the ultimate burden of demonstrating that the reason was merely a pretext for a discriminatory motive [*Walker v. City of Lakewood (9th Cir. 2001) 263 F.3d 1005, 1017]* .

[e] Refusal to Accommodate Disability

Unlawful discrimination against disabled persons in housing includes a refusal to make reasonable accommodations in rules, policies, practices, or services, when accommodations may be necessary to afford disabled persons equal opportunity to use and enjoy a dwelling [*42 U.S.C. § 3604(f)(3)(B)*]. The Fair Housing Act imposes an affirmative duty on landlords to reasonably accommodate the needs of disabled persons [*United States v. California Mobile Home Park Mgmt. Co. (9th Cir. 1994) 29 F.3d 1413, 1416]* , not only with regard to physical accommodations [*see 42 U.S.C. § 3604(f)(3)(A), (C)*], but also with regard to the administrative policies governing rentals [*Giebeler v. M&B Assocs. (9th Cir. 2003) 343 F.3d 1143, 1146-1147]* .

To make out a claim of discrimination based on failure to reasonably accommodate, a plaintiff must demonstrate each of the following [*McGary v. City of Portland (9th Cir. 2004) 386 F.3d 1259, 1261* ; *Giebeler v. M&B Assocs. (9th Cir. 2003) 343 F.3d 1143, 1147* ; *United States v. California Mobile Home Park Mgmt. Co. (9th Cir. 1997) 107 F.3d 1374, 1380]* :

- He or she suffers from a handicap as defined by the FHA;
- Defendants knew or reasonably should have known of the plaintiff's handicap;
- Accommodation of the handicap may be necessary to afford plaintiff an equal opportunity to use and enjoy the dwelling; and
- Defendants refused to make such accommodation.

[f] Post-Acquisition Discrimination

The federal Fair Housing Act applies to post-acquisition discrimination; the reach of the statute encompasses claims regarding services or facilities perceived to be wanting after the owner or tenant has acquired possession of the dwelling. The regulations implementing the FHA, promulgated by the Department of Housing and Urban Development, support permitting post-acquisition claims [*Committee Concerning Community Improvement v. City of Modesto (9th Cir. 2009) 583 F.3d 690, 713-714* ; *see 24 C.F.R. § 100.65* (prohibiting failing or delaying maintenance or repairs of sale or rental dwellings and limiting use of privileges, services or facilities associated with dwelling)].

[3] Definitions

"Aggrieved person" includes any person who claims to have been injured by a discriminatory housing practice or who believes that he or she will be injured by a discriminatory housing practice that is about to occur [*42 U.S.C. § 3602(i)*].

"Dwelling" means any building, structure, or portion of a building or sturcture, that is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land offered for sale or lease for the construction or location of such a building, structure, or portion of building or structure [*42 U.S.C. § 3602(b)*].

"Familial status" means one or more minors being domiciled with his or her parent or another person having legal custody of that minor or the designee of his or her parent or legal custodian. The familial status protections also apply to any person who is pregnant or in the process of securing legal custody of any minor [*see 42 U.S.C. § 3602(k)*].

"Handicap" means a person with a physical or mental impairment that substantially limits one or more of that person's major life activities, a person with a record of having such an impairment, or a person who is regarded as having such an impairment. "Handicap" does not include the current, illegal use of or addiction to a controlled substance [*42 U.S.C. § 3602(h)*].

"Person" includes individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 of the United States Code, receivers, and fiduciaries [*see 42 U.S.C. § 3602(d)*].

"Rental" includes leasing, subleasing, letting, and any other grant for a consideration of the right to occupy premises not owned by the occupant [*see 42 U.S.C. § 3602(e)*].

As used in *42 U.S.C. § 3605*, "residential real estate-related transaction" means the making or purchasing of loans or providing other financial assistance (1) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or (2) secured by residential real estate. It also means the selling, brokering, or appraising of residential real property [*42 U.S.C. § 3605(b)*].

"Steering" is the practice of directing prospective home buyers or renters interested in equivalent properties to different areas according to their race [*see Gladstone, Realtors v. Bellwood (1979) 441 U.S. 91, 94, 99 S. Ct. 1601, 60 L. Ed. 2d 66* ; *TOPIC v. Circle Realty (9th Cir. 1976) 532 F.2d 1273, 1274 , cert. denied, 429 U.S. 859]* .

"Testers" are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful practices [*see Havens Realty Corp. v. Coleman (1982) 455 U.S. 363, 373, 102 S. Ct. 1114, 71 L. Ed. 2d 214]* .

[4] Defenses

[a] Owner Exemptions

The provisions of *42 U.S.C. § 3604*, other than the prohibition set forth in *42 U.S.C. § 3604(c)* regarding advertisements, may not apply to the sale or rental of a single-family house by its owner. Specifically, an owner is exempt from those provisions when the owner owns three or fewer such houses, when the sale or rental occurs without any use of sale or rental facilities, without the services of any real estate broker, and without the publication or mailing of any advertisement or written notice in violation of *42 U.S.C. § 3604(c)* [*42 U.S.C. § 3603(b)(1)*]. Moreover, the exemption applies only when the owner does not own any interest in, or possess any right to any portion of the proceeds from the sale or rental of more than three such single family houses at any one time [*see 42 U.S.C. § 3603(b)(1)*]. If the owner does not reside in the house at the time of sale, this exemption applies only to one such sale within any two-year period [*see 42 U.S.C. § 3603(b)(1)*].

This exemption has been construed very narrowly, and is solely applicable to owners. Accordingly, it is not available to lessees seeking to sublease the premises [*Singleton v. Gendason (9th Cir. 1976) 545 F.2d 1224, 1226* ("owner" given its plain meaning)].

Additionally, the provisions of *42 U.S.C. § 3604*, other than the prohibition set forth in *42 U.S.C. § 3604(c)* regarding advertisements, do not apply to the rental of rooms or units in an owner-occupied building with separate living quarters for no more than four families [*see 42 U.S.C. § 3603(b)(2)*].

[b] Private Organization Exemptions

Nothing in the FHA prohibits a religious organization and its nonprofit affiliate from limiting the sale, rental, or occupancy of dwellings that it owns and operates for noncommercial purposes to persons of the same religion, or from giving preference to those persons, unless membership in that religion is restricted on the basis of race, color, or national origin [*see 42 U.S.C. § 3607(a)*].

Nothing in the FHA prohibits a truly private club, one that as an incident to its primary purposes provides lodgings that it owns and operates for noncommercial purposes, from limiting the rental or occupancy of those lodgings to its members or from giving preference to its members [*see 42 U.S.C. § 3607(a)*].

[c] Other Defenses

The FHA does not limit the applicability of any reasonable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling [*42 U.S.C. § 3607(b)(1)*; *but see City of Edmonds v. Oxford House (1995) 514 U.S. 725, 732-737, 115 S. Ct. 1776, 131 L. Ed. 2d 801* (zoning ordinance that limited occupancy to "single family" and defined relationships that qualify as a "family" did not qualify as a maximum occupancy restriction for purposes of *42 U.S.C. § 3607(b)(1)* exemption)].

The FHA does not prohibit conduct against a person because of his or her conviction of the illegal manufacture or distribution of a controlled substance [*42 U.S.C. § 3607(b)(4)*; *see 21 U.S.C. § 802* (definition of "controlled substance")].

Nothing in the FHA prohibits a person engaged in the business of furnishing appraisals of real property from considering factors other than protected characteristics [*42 U.S.C. § 3605(c)*].

No person who has previously recovered under the Equal Credit Opportunity Act (*15 U.S.C. § 1691 et seq.*) for the same prohibited transaction may recover under the FHA [*see 15 U.S.C. § 1691e(i)*].

[5] Housing for Older Persons

No provision of the FHA regarding familial status applies to housing for older persons [*42 U.S.C. § 3607(b)(1)*; *see 42 U.S.C. §§ 3604(a)-(e), 3605(a), 3606* (pertaining to familial status)].

As used in *42 U.S.C. § 3607*, "housing for older persons" means any of the following kinds of housing [*see 42 U.S.C. § 3607(b)(2)*]:

- Housing provided under any state or federal program that HUD determines is specifically designed and operated to assist elderly persons;

- Housing intended for, and solely occupied by, persons 62 years of age or older; and

- Housing intended and operated for occupancy by persons 55 years of age or older, so long as:

  - At least 80 percent of the occupied units are occupied by at least one person who is 55 years of age or older;

  - The housing facility or community publishes and adheres to policies and procedures that demonstrate the intent required under this provision; and

  - The housing facility or community complies with rules issued by HUD for verification of occupancy, which must provide for verification by reliable surveys and affidavits, and which must include examples of the types of policies and procedures relevant to a determination of compliance.

Housing will not fail to meet these requirements by reason of persons residing in that housing as of September 13, 1988, who do not meet the age requirements, provided that new occupants of that housing meet the age requirements. Neither will housing fail to meet these requirements by reason of unoccupied units, provided that those units are reserved for occupation by persons who meet the age requirements [*see 42 U.S.C. § 3607(b)(3)*].

[6] Administrative Remedy

[a] Complaint Process

[i] Filing of Civil Action

An aggrieved person may (1) pursue administrative enforcement, or (2) file a direct civil action [*see 42 U.S.C. § 3613(a)(2)*]. The two-year filing period for civil actions without exhaustion of the administrative remedy runs concurrently with the administrative filing period, but if an administrative remedy is sought, the civil action filing period does not include the time during which administrative procedures are pending [*42 U.S.C. § 3613(a)(1)(B)*]. For discussion of direct civil actions, see [7][d], *below*.

An aggrieved person seeking an administrative remedy may, not later than one year after an alleged discriminatory housing practice has occurred or terminated, file a complaint alleging the discriminatory housing practice [*42 U.S.C. § 3610(a)(1)(A)(i)*; *24 C.F.R. § 103.35*]. If the complaint indicates that there was more than one act of discrimination, or that the discrimination is continuing, the complaint must be filed within one year of the last incident of discrimination [*24 C.F.R. § 103.35*]. The complaint must be written and signed under oath, and must contain the information required by HUD [*42 U.S.C. § 3610(a)(1)(A)(ii), (D)*; *see 24 C.F.R. § 103.25* (contents of complaint)]. The complaint may be reasonably and fairly amended at any time [*42 U.S.C. § 3610(a)(1)(D)*].

Complaints are submitted to the Department of Housing and Urban Development (HUD). The complaint may be filed

by mail or telephone with any of HUD's Offices of Fair Housing and Equal Opportunity or with any state or local agency that HUD has certified to receive complaints. A complainant can call or go to any other HUD office for help in filing a complaint, and those offices will send the complaint to HUD's Office of Fair Housing and Equal Opportunity, which will contact the complainant about the complaint's filing [*24 C.F.R. § 103.30*].

[ii] Notice

After a complaint is filed, HUD will serve an acknowledgment on the aggrieved person advising him or her of the time limits and options available [*see 42 U.S.C. § 3610(a)(1)(B)(i)*]. HUD will also notify the respondent of the complaint within 10 days of its filing [*42 U.S.C. § 3610(a)(1)(B)(ii)*]. The respondent has 10 days after receipt of this notice to file a sworn answer, but may subsequently amend the answer [*42 U.S.C. § 3610(a)(1)(B)(iii), (D)*].

[iii] Joining Additional or Substitute Persons

A person not originally named as respondent, but who is identified as a respondent in the course of investigation, may be joined as an additional or substitute respondent on written notice to that person from HUD. That notice must comply with the original notice requirements and must explain the basis for the joinder [*42 U.S.C. § 3610(a)(2)*].

[b] Referral to State Agency by HUD

Whenever a complaint alleges a discriminatory practice within the jurisdiction of a state or local public agency and concerning which that agency has been certified by HUD, HUD will refer the complaint to that agency [*42 U.S.C. § 3610(f)(1)*]. Except with the consent of the certified agency, HUD will take no further action after referral, unless the agency fails to commence proceedings on the complaint within 30 days, fails to carry forward its proceedings with reasonable promptness, or no longer qualifies for certification [*42 U.S.C. § 3610(f)(2)*].

[c] Referral to Attorney General by HUD

At any time after the complaint is filed, HUD may do either of the following [*42 U.S.C. § 3610(e)*]:

- Authorize a civil action by the Attorney General for appropriate temporary or preliminary relief pending final disposition of the complaint. The commencement of such an action does not affect any administrative proceedings; or

- Transmit information to the Attorney General or to the appropriate licensing or supervisory authorities pertaining to patterns or practices of resistance, enforcement of subpoenas, or licensing or supervision.

[d] Investigation

HUD will make and complete an investigation within 100 days after the filing of the complaint (or provide written notice of its reasons for not doing so) [*42 U.S.C. § 3610(a)(1)(B)(iv), (C)*]. After its investigation HUD will prepare a final report, which may later be amended if additional evidence is discovered [*see 42 U.S.C. § 3610(b)(5)*].

Within 100 days after the complaint's filing, HUD will make its determination of whether there is reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur [*42 U.S.C. § 3610(g)(1)*].

Based on its determination, HUD will do one of the following three things:

- If the Secretary determines that reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Secretary will issue a charge on behalf of the aggrieved

person for further proceedings under *42 U.S.C. § 3612* [*42 U.S.C. § 3610(g)(2)(A)*]. HUD may not issue a charge after the beginning of the trial of a civil action based on that violation commenced by the aggrieved party [*42 U.S.C. § 3610(g)(4)*]. HUD will serve a copy of the charge on each party and provide information about how to make an election under *42 U.S.C. § 3612(a)*, together with a notice of opportunity for a hearing, unless that election is made [*42 U.S.C. § 3610(h)*].

- If the Secretary determines that the matter involves the legality of any state or local zoning or other land use regulation, the Secretary will refer the matter to the Attorney General for appropriate action under *42 U.S.C. § 3614* [*42 U.S.C. § 3610(g)(2)(C)*].

- If the Secretary determines that no reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, the Secretary will promptly dismiss the complaint, and make public disclosure of that dismissal [*42 U.S.C. § 3610(g)(3)*].

When a charge is filed by HUD, a complainant, a respondent, or an aggrieved person on whose behalf the complaint was filed may elect to have the claims decided in a civil action under *42 U.S.C. § 3612(o)* in lieu of a hearing under *42 U.S.C. § 3612(b)*. The election must be made within 20 days after the electing party is served with a copy of the charge [*see 42 U.S.C. § 3612(a)*].

Notwithstanding the confidentiality of the conciliation process, HUD will make available to the parties any information discovered during its investigation, as well as its final report [*42 U.S.C. § 3610(d)(2)*].

[e] Conciliation

During the time between the filing of the complaint and the filing of a charge or a dismissal, HUD will, to the extent feasible, engage in conciliation regarding the complaint [*42 U.S.C. § 3610(b)(1)*; *see 24 C.F.R. § 103.300 et seq.* (conciliation procedures)].

Any conciliation agreement is an agreement between the parties, subject to approval by HUD [*42 U.S.C. § 3610(b)(2)*].

If a conciliation agreement provides for binding arbitration of the dispute, any resulting arbitration may award appropriate relief, including monetary relief [*42 U.S.C. § 3610(b)(3)*].

Whenever HUD has reasonable cause to believe that a respondent has breached a conciliation agreement, it will refer the matter to the Attorney General for enforcement [*42 U.S.C. § 3610(c)*].

Nothing said or done in the course of the conciliation process may be made public or used as evidence in a subsequent proceeding without the written consent of the parties [*42 U.S.C. § 3610(d)(1)*].

[f] Hearing

If no election is made by a complainant, respondent, or aggrieved person to have the claims decided in a civil action in lieu of an administrative hearing, HUD must provide an opportunity for a hearing [*42 U.S.C. § 3612(b)*; *see 42 U.S.C. § 3612(a)* (election); *see also* [7][a], *below*]. The hearing must commence within 120 days after the charge is issued [*see 42 U.S.C. § 3612(g)(1)*]. HUD will delegate the conduct of the hearing to an administrative law judge, who will conduct the hearing at a place in the vicinity in which the discriminatory practice allegedly occurred [*see 42 U.S.C. § 3612(b)*].

At the hearing each party may appear, be represented by counsel, present evidence, cross examine witnesses, and obtain the issuance of subpoenas. Any aggrieved person may intervene as a party in the proceedings [*42 U.S.C. § 3612(c)*].

If the trial of a civil action involving the same housing practice has commenced, the hearing proceeding will not continue [*42 U.S.C. § 3612(f)*].

The administrative law judge must make findings of fact and conclusions of law within 60 days after the end of the hearing [*see 42 U.S.C. § 3612(g)(2)*]. Depending on his or her findings, the administrative law judge may do any of the following:

- Issue an order for appropriate relief, which may include actual damages and injunctive or other equitable relief, as well as a civil penalty against the respondent to vindicate the public interest [*see 42 U.S.C. § 3612(g)(3)* (amount of civil penalty, up to specified maximums, may vary, depending on whether or not respondent has committed prior discriminatory practices); *see also 42 U.S.C. § 3612(g)(6)* (HUD will send copy of order to Attorney General in case of repeat offenders)];

- Recommend appropriate disciplinary action to the governmental licensing or regulation agency if the violation occurs in course of a business subject to licensing [*see 42 U.S.C. § 3612(g)(5)*]; or

- Dismiss the charge and make public disclosure of the dismissal [*42 U.S.C. § 3612(g)(7)*].

However, no order will affect any contract, sale, encumbrance, or lease consummated before the issuance of that order and involving a bona fide purchaser, encumbrance, or tenant without actual notice of the charge [*42 U.S.C. § 3612(g)(4)*].

The administrative law judge may award reasonable attorney's fees and costs to the prevailing party [*42 U.S.C. § 3612(p)*].

HUD may review any finding, conclusion, or order issued by the administrative law judge. That review must be completed within 30 days after the judge's holding; otherwise, it becomes final [*42 U.S.C. § 3612(h)(1)*].

HUD is responsible for service of the order on each party [*see 42 U.S.C. § 3612(h)(2)*].

Any party aggrieved by a final order may petition for judicial review [*42 U.S.C. § 3612(i)*]. If no petition for review is filed within 45 days after the order, the findings of fact of the administrative law judge will be conclusive in connection with any petition for enforcement [*see 42 U.S.C. § 3612*(*l*)].

[g] Review or Enforcement by Court

Any party aggrieved by a final order may petition for review within 30 days after that order is entered [*see 42 U.S.C. § 3612(i)*; *see also 28 U.S.C. § 2341 et seq.* (review of orders of federal agencies)].

HUD may petition for the enforcement of the order and for appropriate temporary relief or restraining order [*42 U.S.C. § 3612(j)(1)*].

Any party to the proceeding before the administrative law judge may intervene in the court proceeding [*42 U.S.C. § 3612(k)(1), (2)*].

On the filing of a petition, whether by an aggrieved party or HUD, the court may do any or all of the following [*42 U.S.C. § 3612(k)(1)*]:

- Grant such temporary relief, restraining order, or other order as it deems just and proper;

- Affirm, modify, or set aside, in whole or in part, the order, or remand the order for further proceedings; and/or

- Enforce the order.

If no petition for review has been filed, and HUD has not sought enforcement of the order, any person entitled to relief under the order may petition for enforcement of the order within 60 days after it is entered [*42 U.S.C. § 3612(m)*].

[7] Judicial Remedies

[a] Action Under 42 U.S.C. § 3612(o)

After a charge has been filed, an election may be made by a complainant, respondent, or aggrieved person to have the claims decided in a civil action in lieu of a hearing [*42 U.S.C. § 3612(a)*; *see* [6][f], *above*]. If an election is made to have the claims decided in a civil action, the action will be authorized by the Secretary to be brought in federal district court by the Attorney General on behalf of the aggrieved person. The action must be commenced within 30 days after the election is made [*42 U.S.C. § 3612(o)(1)*]. Any aggrieved person may intervene as of right in the action [*42 U.S.C. § 3612(o)(2)*].

If the court finds that a discriminatory housing practice has occurred or is about to occur, the court may grant any relief that a court could grant with regard to that practice under *42 U.S.C. § 3613* [*42 U.S.C. § 3612(o)(3)*; *see* [d], *below*].

If monetary relief is sought for the benefit of a nonintervening aggrieved person, no relief will be awarded to that person unless he or she has complied with discovery orders entered by the court [*42 U.S.C. § 3612(o)(3)*].

[b] Action Under 42 U.S.C. § 3614

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by the FHA, or that any group of persons has been denied any of those rights and that denial raises an issue of general public importance, the Attorney General may bring a civil action in federal district court [*42 U.S.C. § 3614(a)*]. The Attorney General may also bring such an action based on a referral by HUD [*42 U.S.C. § 3614(b)*]. On timely application, any aggrieved person may intervene in an action commenced by the Attorney General under these provisions [*42 U.S.C. § 3614(e)*].

In response to the action, the court may do any or all of the following [*see 42 U.S.C. § 3614(d)(1)*]:

- Award such preventive relief, including a permanent or temporary injunction, restraining order, or other order as is necessary to assure the full enjoyment of the rights granted by the FHA;

- Award such other relief as the court deems appropriate, including monetary damages to persons aggrieved; and/or

- Assess a civil penalty to vindicate the public interest, up to specified maximums.

Despite the use of the word "may" in *42 U.S.C. § 3614(d)(1)(B)*, the Ninth Circuit Court of Appeals has held that an award of compensatory damages under that section is mandatory, not discretionary, if a party has proven unlawful discrimination and actual damages [*see United States v. City of Hayward (9th Cir. 1994) 36 F.3d 832, 839-840 , cert. denied, 516 U.S. 813 (1995)]* .

The court may also grant to an intervening party appropriate relief, such as that authorized to be granted to a plaintiff in

an action under *42 U.S.C. § 3613* [*42 U.S.C. § 3614(e)*; *see* [d], *below*].

In its discretion, the court may allow the prevailing party, other than the United States, reasonable attorney's fees and costs [*see 42 U.S.C. § 3614(d)(2)*].

[c] Action Under 42 U.S.C. § 3608(d), (e)

All executive departments and agencies, including HUD, are required to administer their programs and activities relating to housing and urban development in a manner that affirmatively furthers the purposes of the FHA [*42 U.S.C. § 3608(d), (e)*].

A civil action may be brought in federal court to require action that carries out these affirmative duties or to enjoin an action that violates them [*see Young v. Pierce (E.D. Tex. 1982) 544 F. Supp. 1010, 1018-1019* ; *see also NAACP v. Secretary of Housing and Urban Dev. (1st Cir. 1987) 817 F.2d 149, 157-160* (judicial review of claim that HUD failed to comply with *42 U.S.C. § 3608(e)(5)*)].

Jurisdiction for this type of action exists under either *28 U.S.C. § 1343(a)(4)*, which provides for enforcement of any act of Congress for the protection of civil rights, or under *28 U.S.C. § 1331*, which provides for original federal court jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

[d] Action Under 42 U.S.C. § 3613

[i] Commencement of Action

An aggrieved person may commence a civil action for appropriate relief whether or not an administrative complaint has been filed under *42 U.S.C. § 3610*, and without regard to the status of any such complaint [*42 U.S.C. § 3613(a)(2)*]. When based on an alleged discriminatory housing practice, the action must be brought no later than two years after the occurrence or the termination of that practice. The action may be brought in an appropriate federal district court or in state court [*42 U.S.C. § 3613(a)(1)(A*); *see 42 U.S.C. § 3613(e)* (Attorney General may intervene in that action)]. The two-year period does not include any time during which a related administrative proceeding was pending [*42 U.S.C. § 3613(a)(1)(B)*].

If the action is based on breach of a conciliation agreement, the action must be filed no later than two years after the breach [*42 U.S.C. § 3613(a)(1)(A)*]. In that case, the purpose of the action must be to enforce the terms of the agreement [*42 U.S.C. § 3613(a)(2)*].

In a private civil action based on a design-and-construction claim under the Fair Housing Act, the two-year statute of limitations begins to run at the conclusion of the design-and-construction phase, which occurs on the date the last certificate of occupancy is issued [*Garcia v. Brockway (9th Cir. 2007) 503 F.3d 1092, 1095-1101]* .

No action may be commenced once a hearing has commenced on a charge issued by HUD [*42 U.S.C. § 3613(a)(3)*].

On application by either party, the court may appoint an attorney for that party or authorize the commencement or continuation of an action without the payment of fees, costs, or security, if in the opinion of the court that person is unable to bear the costs of that action [*42 U.S.C. § 3613(b)*].

[ii] Relief Available

In a civil action under *42 U.S.C. § 3613*, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award actual damages and punitive damages [*42 U.S.C. § 3613(c)(1)*]. The court may also award, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order

(including an order enjoining the defendant from engaging in that practice or ordering appropriate affirmative action) [*42 U.S.C. § 3613(c)(1)*]. If a violation of the Fair Housing Act is established, it will be presumed that the plaintiff has suffered irreparable injury from the fact of the violation; the plaintiff does not have the burden of establishing a reasonable likelihood that the defendant will continue to violate the Act [*Silver Sage Partners v. City of Desert Hot Springs (9th Cir. 2001) 251 F.3d 814, 827]* . The court is not permitted to grant relief that will interfere with any contract, sale, encumbrance, or lease consummated before the issuance of any court order and involving a bona fide purchaser, encumbrancer, or tenant, without actual notice of the existence of the filing of a complaint or civil action [*42 U.S.C. § 3613(d)*].

The court may award the prevailing party, other than the United States, reasonable attorney's fees and costs. The United States is liable for such fees and costs to the same extent as a private person [*42 U.S.C. § 3613(c)(2)*]. However, the plaintiff is not entitled to attorney's fees if the defendant voluntarily changes its conduct before plaintiff obtains judicial relief [*see Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources (2001) 532 U.S. 598, 121 S. Ct. 1835, 1841-1843, 149 L. Ed. 2d 855]* .

[iii] Jury Trial

When an action for damages is brought in federal courts, *U.S. Const., amend. VII* requires the availability of a jury trial. If equitable remedies are also sought, the jury will decide issues common to both sets of claims. If only equitable relief is requested, a jury is not required [*Curtis v. Loether (1974) 415 U.S. 189, 195-196, 94 S. Ct. 1005, 39 L. Ed. 2d 260* (decided under former *42 U.S.C. § 3612*)].

[e] Standing

The only requirement for standing to sue under the FHA is the U.S. Const., art. III requirement of injury in fact. As long as the plaintiff alleges distinct and palpable injuries that are fairly traceable to the defendant's actions, the injury in fact requirement is satisfied [*Havens Realty Corp. v. Coleman (1982) 455 U.S. 363, 375-376, 102 S. Ct. 1114, 71 L. Ed. 2d 214* ; *see Walker v. City of Lakewood (9th Cir. 2001) 263 F.3d 1005, 1012* (independent fair housing services provider engaged in advocacy efforts had standing to bring retaliation claims under FHA and FEHA, when it met minimal requirements of U.S. Const., art. III)]. Courts do not have the authority to create and apply new standing requirements [*Walker v. City of Lakewood (9th Cir. 2001) 263 F.3d 1005, 1012* (court erroneously applied "rule of reason" barring FHA suits between parties to contract)]. There are three requirements for standing under Article III [*Lujan v. Defenders of Wildlife (1992) 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351* ; *Walker v. City of Lakewood (9th Cir. 2001) 263 F.3d 1005, 1013]* :

- The plaintiff must have suffered an "injury in fact," that is, an invasion of a legally protected interest that is concrete and particularized, and actual or imminent;

- There must be a causal connection between the injury and the conduct of which the plaintiff complains; and

- It must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Pursuit of litigation alone does not constitute an injury sufficient to establish standing under Article III. Thus, standing must be established independent of the lawsuit filed by the plaintiff [*Walker v. City of Lakewood (9th Cir. 2001) 263 F.3d 1005, 1013 n.3*].

Claims brought under the FHA are to be judged under a very liberal standing requirement; unlike actions brought under other provisions of civil rights law, the plaintiff need not allege that he or she was a victim of discrimination [*San*

Pedro Hotel Co. v. City of Los Angeles (9th Cir. 1998) 159 F.3d 470, 475 ; *see Gladstone Realtors v. Village of Bellwood (1979) 441 U.S. 91, 115, 99 S. Ct. 1601, 60 L. Ed. 2d 66* (caucasian residents have standing under FHA to challenge racial discrimination against African-Americans in their neighborhood)]. A plaintiff need only allege that as a result of the defendant's discriminatory conduct, the plaintiff suffered a distinct and palpable injury [*Havens Realty Corp. v. Coleman (1982) 455 U.S. 363, 375-376, 102 S. Ct. 1114, 71 L. Ed. 2d 214* ; *San Pedro Hotel Co. v. City of Los Angeles (9th Cir. 1998) 159 F.3d 470, 475]* .

Under the FHA, any person harmed by discrimination, whether or not the target of the discrimination, can sue to recover for his or her own injury, even when no housing has actually been denied to persons protected under the Act [*San Pedro Hotel Co. v. City of Los Angeles (9th Cir. 1998) 159 F.3d 470, 475* ; *see Walker v. City of Lakewood (9th Cir. 2001) 263 F.3d 1005* (independent fair housing services provider engaged in advocacy efforts had standing to bring retaliation claims for injury in its ability to carry out its purposes to eliminate housing discrimination); *Smith v. Stechel (9th Cir. 1975) 510 F.2d 1162, 1164* (real estate agent fired for renting apartments to minorities); *Trafficante v. Metropolitan Life Ins. Co. (1972) 409 U.S. 205, 212, 93 S. Ct. 364, 34 L. Ed. 2d 415]* .

Standing to sue under the FHA is not restricted to persons in protected classes who are the direct victims of discrimination. For example, when nonminority plaintiffs reside in a neighborhood from which racial minorities are steered, they may successfully allege that those steering practices have deprived them of the right to important social, professional, business and economic, political, and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices. Standing under this concept, however, has been upheld only within a relatively compact neighborhood [*Havens Realty Corp. v. Coleman (1982) 455 U.S. 363, 376-378, 102 S. Ct. 1114, 71 L. Ed. 2d 214* ; *Gladstone, Realtors v. Bellwood (1979) 441 U.S. 91, 112-115, 99 S. Ct. 1601, 60 L. Ed. 2d 66* ; *see also TOPIC v. Circle Realty (9th Cir. 1976) 532 F.2d 1273, 1275 , cert. denied, 429 U.S. 859* (purported plaintiffs were spread out over such a wide metropolitan area that role played by racial steering was so attenuated as to negate existence of any injury in fact)].

Similarly, a minority person can maintain an action based solely on an indirect injury if he or she alleges a distinct and palpable injury resulting from the differential treatment [*Harris v. Itzhaki (9th Cir. 1999) 183 F.3d 1043, 1050]* .

In the case of discrimination against the disabled, the FHA does not restrict the right to bring an action to persons "associated" with a disabled persons. It allows anyone sustaining an actual injury from an alleged discriminatory housing practice to file suit [*San Pedro Hotel Co. v. City of Los Angeles (9th Cir. 1998) 159 F.3d 470, 475* ; *Growth Horizons, Inc. v. Delaware County, Pa. (3d Cir. 1993) 983 F.2d 1277, 1282 n.7* (corporation providing community living arrangements for mentally ill had standing to bring suit under FHA for county's alleged discriminatory refusal to assume its leases)]. All the plaintiff need show is that the defendant interfered with the housing rights of the disabled and that, as a result, the plaintiff suffered an actual injury [*San Pedro Hotel Co. v. City of Los Angeles (9th Cir. 1998) 159 F.3d 470, 475-476* (plaintiffs who were potential sellers of property and were unable to sell their property because of City's allegedly improper interference with HUD loan had standing to sue under FHA); *see Dirden v. HUD (8th Cir. 1996) 86 F.3d 112, 114* (landowner attempting to sell property allowed to state claim under FHA alleging discriminatory intent in city housing authority's refusal to negotiate); *Oak Ridge Care Ctr. v. Racine County (E.D. Wis. 1995) 896 F. Supp. 867, 873* (seller of elderly care facility under existing nonconforming use agreement had standing under *FHA); United States v. Scott (D. Kan. 1992) 788 F. Supp. 1555, 1561* (sellers of property who lost sale because of discriminatory practices had standing)].

If a plaintiff has suffered an actual injury, he or she may be permitted to prove that the rights of another are also infringed [*Halet v. Wend Inv. Co. (9th Cir. 1982) 672 F.2d 1305, 1309* (white male with child denied housing at "no children" apartment complex had standing and could allege that apartment's policy discriminated against Hispanics and blacks, who tend to have more children)].

Sufficient injury for standing under the FHA may be shown through discriminatory acts excluding low-income persons

of a minority race from a specified housing project. This is not a generalized grievance if it focuses on a particular project and is not dependent on speculation about possible actions of third parties not before the court, and when if relief were granted there would be a substantial probability that the plaintiff would be provided the housing sought [*Arlington Heights v. Metro. Housing Corp. (1977) 429 U.S. 252, 264, 97 S. Ct. 555, 50 L. Ed. 2d 450* ; *Keith v. Volpe (9th Cir. 1988) 858 F.2d 467, 483 , cert. denied, 493 U.S. 813 (1989)*].

A district court's conclusion that a party does not have standing to sue under the FHA is reviewed de novo on appeal [*Walker v. City of Lakewood (9th Cir. 2001) 263 F.3d 1005, 1012* ; *San Pedro Hotel Co. v. City of Los Angeles (9th Cir. 1998) 159 F.3d 470, 474-475]* .

[f] Proof

To establish a prima facie case of withholding of housing for an unlawful reason under the FHA, a plaintiff must show at least that the defendant's actions had a discriminatory effect. Discriminatory effect means that the conduct of the defendant actually or predictably results in prohibited discrimination. The plaintiff need not make any showing that the action resulting in racial discrimination was racially motivated. The Ninth Circuit has not decided whether discriminatory effect alone is sufficient to establish a prima facie case [*Keith v. Volpe (9th Cir. 1988) 858 F.2d 467, 482 , cert. denied, 493 U.S. 813 (1989)* ; *see Halet v. Wend Inv. Co. (9th Cir. 1982) 672 F.2d 1305, 1311* (showing of discriminatory effects may be sufficient to state cause of action)].

[8] Prevention of Intimidation

42 U.S.C. § 3631 sets forth penalties in the form of fines and imprisonment to prevent persons from intimidating other persons from exercising specified rights. Those penalties apply to whoever, whether or not acting under color of state law, by force or threat of force, attempts to or does willfully injure, intimidate, or interfere with any of the following persons [*see 42 U.S.C. § 3631* (handicap as additional protected characteristic)]:

- Any person because of a protected characteristic and because he or she is or has been selling, purchasing, renting, financing, occupying, contracting, or negotiating for the sale, purchase, rental, financing, or occupation of any dwelling, or applying for or participating in any service, organization, or facility relating to the business of selling or renting dwellings.

- Any person because he or she is or has been, or in order to intimidate that person or any other person or any class of persons from, participating, without discrimination on account of a protected characteristic in any of the activities, services, organizations, or facilities described above; or affording another person or class of persons opportunity or protection to so participate.

- Any citizen because he or she is or has been, or in order to discourage that citizen or any other citizen from, lawfully aiding or encouraging other persons to participate, without discrimination on account of a protected characteristic in any of the activities, services, organizations, or facilities described *above*, or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate.

"Threats" under *42 U.S.C. § 3631* are considered in light of the entire factual context, including the surrounding events and the reaction of the listeners. The fact that a threat is subtle does not make it less of a threat. If a threat is a "true threat," an individual may be convicted under *42 U.S.C. § 3631*, even if he or she did not actually intend to carry out the threat [*United States v. Gilbert (9th Cir. 1989) 884 F.2d 454, 457-458 , cert. denied, 493 U.S. 1082 (1990)* (provisions of *42 U.S.C. § 3631* are applicable to work of adoption agencies)].

The penalties take the form of a fine, or imprisonment for not more than one year, or both. If bodily injury results, or if

the violation includes the use or attempted use of a dangerous weapon, explosives, or fire, the penalty is a fine, or imprisonment for not more than 10 years, or both. If death results, or if the violation includes kidnapping, attempted kidnapping, aggravated sexual abuse, attempted aggravated sexual abuse, or any attempt to kill, the violator will be subject to a fine, or imprisonment for any term of years or for life, or both [*see 42 U.S.C. § 3631*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediationsCivil Rights LawContractual Relations & HousingFair Housing RightsAge DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsExemptionsCivil Rights LawContractual Relations & HousingFair Housing RightsLeasing & SalesCivil Rights LawContractual Relations & HousingFair Housing RightsRacial Discrimination

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C. Federal Laws Relating to Housing Discrimination

11-117 California Forms of Pleading and Practice--Annotated § 117.52

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§ 117.52 Actions Under 42 U.S.C. § 1982

[1] Generally

42 U.S.C. § 1982 provides that all citizens of the United States have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

The federal Fair Housing Act (FHA) (*42 U.S.C. §§ 3601-3631*) and *42 U.S.C. § 1982* are separate housing laws, and the significance of each is in no way diminished by the existence of the other [*see Sullivan v. Little Hunting Park (1969) 396 U.S. 229, 237, 90 S. Ct. 400, 24 L. Ed. 2d 386* ; *Jones v. Mayer Co. (1968) 392 U.S. 409, 415, 88 S. Ct. 2186, 20 L. Ed. 2d 1189]* .

42 U.S.C. § 1982 is not a comprehensive open housing law. It deals only with racial discrimination and does not address discrimination on grounds of religion or national origin, nor does it deal specifically with discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling [*Jones v. Mayer Co. (1968) 392 U.S. 409, 413-414, 88 S. Ct. 2186, 20 L. Ed. 2d 1189]* .

For coverage of *42 U.S.C. § 1982* actions generally, see Chapter 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

[2] Broadly Construed

42 U.S.C. § 1982 bars all racial discrimination, private as well as public, in the sale or rental of property [*Memphis v. Greene (1981) 451 U.S. 100, 120-121, 101 S. Ct. 1584, 67 L. Ed. 2d 769* ; *Jones v. Mayer Co. (1968) 392 U.S. 409, 413, 88 S. Ct. 2186, 20 L. Ed. 2d 1189]* .

Section 1982 was intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Although the definition of race and the identification of various racial groups have changed since the time of the enactment of § 1982, it is the definition of the racial groups in effect at that time that governs the application of § 1982 today [*Shaare Tefila Congregation v. Cobb (1987) 481 U.S. 615, 617, 107 S. Ct. 2019, 95 L. Ed. 2d 594* (Jews and Arabs are protected races)].

To effectuate its remedial purposes, the language of *42 U.S.C. § 1982* has been broadly construed to protect not merely the enforceability of property interests acquired by black citizens, but also their right to acquire and use property on an equal basis with white citizens. Thus, private covenants imposing racial restrictions on the sale of property have been held unenforceable. *42 U.S.C. § 1982* encompasses every racially motivated refusal to sell or rent [*Memphis v. Greene (1981) 451 U.S. 100, 120-122, 101 S. Ct. 1584, 67 L. Ed. 2d 769]* .

Additionally, the property rights protected by § 1982 have been broadly defined. When an organization, such as a swim club, links membership benefits to residency in a narrow geographical area, those benefits are part of the rights for which an individual pays when buying or leasing within the area. Thus, § 1982 guarantees a nonwhite resident, who purchases, leases, or holds that property, the same rights as are enjoyed by a white resident [*Memphis v. Greene (1981) 451 U.S. 100, 120-122, 101 S. Ct. 1584, 67 L. Ed. 2d 769* ; Tillman v. Wheaton- *Tillman (1973) 410 U.S. 431, 437, 93 S. Ct. 1090, 35 L. Ed. 2d 403]* . It is immaterial whether that membership is considered realty or personal property, as § 1982 covers both [*Sullivan v. Little Hunting Park (1969) 396 U.S. 229, 236, 90 S. Ct. 400, 24 L. Ed. 2d 386]* .

[3] Order and Burden of Proof

The elements of a prima facie case under *42 U.S.C. § 1982* require that a plaintiff prove all of the following [*Phiffer v. Proud Parrot Motor Hotel (9th Cir. 1980) 648 F.2d 548, 551* ; *Barber v. Rancho Mortgage & Inv. Corp. (1994) 26 Cal. App. 4th 1819, 1833, 32 Cal. Rptr. 2d 906]* :

- That he or she is a member of a racial minority;
- That he or she applied for and was qualified to rent or purchase certain real property or housing;
- That he or she was rejected; and
- That the housing or rental opportunity remained available thereafter.

One California court of appeal has applied the rules governing proof of "disparate treatment" in employment discrimination cases [*see* Ch. 115, *Civil Rights: Employment Discrimination*] to actions for racial discrimination in housing under *42 U.S.C. § 1982* [*see* *Barber v. Rancho Mortgage & Inv. Corp. (1994) 26 Cal. App. 4th 1819, 1833-1835, 32 Cal. Rptr. 2d 906]* . Thus, the court held that once a plaintiff establishes a prima facie case of racial discrimination, a presumption of discrimination is created, and the burden shifts to the defendant to rebut the presumption by producing evidence of a legitimate, nondiscriminatory reason for its actions. The defendant's burden is

only one of producing evidence; the burden of persuasion remains on the plaintiff. If the defendant rebuts the presumption by introducing admissible evidence that is sufficient to raise a genuine issue of fact as to whether the defendant discriminated against the plaintiff, the plaintiff may then attempt to demonstrate that the defendant's proffered reason was not the true reason for the defendant's decision. Plaintiff may succeed in this either (1) directly by persuading the trier of fact that a discriminatory reason more likely motivated the defendant or (2) indirectly by showing that the defendant's proffered explanation is unworthy of credence [*Barber v. Rancho Mortgage & Inv. Corp. (1994) 26 Cal. App. 4th 1819, 1834-1835, 32 Cal. Rptr. 2d 906* (relying on *Texas Dep't of Community Affairs v. Burdine (1981) 450 U.S. 248, 254-256, 101 S. Ct. 1089, 67 L. Ed. 2d 207*); *see Green v. Rancho Santa Margarita Mortgage Co. (1994) 28 Cal. App. 4th 686, 694, 33 Cal. Rptr. 2d 706]* . However, the mere fact that the jury disbelieves the defendant's explanation does not compel a verdict in the plaintiffs favor. In other words, the plaintiff retains the burden of proving actual discrimination [*see Green v. Rancho Santa Margarita Mortgage Co. (1994) 28 Cal. App. 4th 686, 694-695, 33 Cal. Rptr. 2d 706* (relying on *St. Mary's Honor Center v. Hicks (1993) 509 U.S. 502, 514-515, 113 S. Ct. 2742, 125 L. Ed. 2d 407*)].

The extent to which a racially discriminatory motive need be shown is unclear. One Ninth Circuit decision has stated that racial motivation is not an element of the prima facie case; only a racial impact need be shown. The court reasoned that § 1982 represents an exercise of the power of Congress to eliminate the badges and incidents of slavery under the *Thirteenth Amendment*; it is not an attempt to effectuate the *equal protection clause of the Fourteenth Amendment*. Thus, courts may not analogize to equal protection cases [*see Phiffer v. Proud Parrot Motor Hotel (9th Cir. 1980) 648 F.2d 548, 551-552]* . Although it may be true that proof of racial motivation is not needed to establish a prima facie case, it is not clear that intent to discriminate is entirely irrelevant, or that discriminatory impact alone is sufficient to establish the right to relief under *42 U.S.C. § 1982*. Under the Title VII "disparate treatment" cases to which the courts have analogized actions under § 1982, the plaintiff must ultimately establish an intent to discriminate, although such intent may be established by circumstantial evidence [*see, e.g., American Federation of State, etc. v. Washington (9th Cir. 1985) 770 F.2d 1401, 1406]* .

[4] Owner's Liability for Acts of Rental Agent

Discriminatory conduct on the part of a rental agent is attributable to the owner of a motel, apartment complex, or other housing facility. The duty of an owner to obey the laws relating to racial discrimination has been held to be nondelegable [*Phiffer v. Proud Parrot Motor Hotel (9th Cir. 1980) 648 F.2d 548, 552]* .

[5] Remedies

Federal courts have jurisdiction to award damages or equitable relief under any act of Congress providing for the protection of civil rights [*see 28 U.S.C. § 1343(a)(4)*]. Thus, although *42 U.S.C. § 1982* is couched in declaratory terms, and provides no explicit method of enforcement, a federal court has the power to fashion an effective equitable remedy. Moreover, that federal remedy for the protection of a federal right is available in a state court, if the state court is empowered to grant injunctive relief generally [*Sullivan v. Little Hunting Park (1969) 396 U.S. 229, 238, 90 S. Ct. 400, 24 L. Ed. 2d 386]* .

Further, the existence of a statutory right implies the existence of all necessary and appropriate remedies. The choice of law regarding compensatory damages for deprivation of federal civil rights is governed by federal standards, as provided in *42 U.S.C. § 1988(a)*. Federal or state rules regarding damages may be utilized, whichever better serves the policies expressed in the federal statutes [*Sullivan v. Little Hunting Park (1969) 396 U.S. 229, 239-240, 90 S. Ct. 400, 24 L. Ed. 2d 386]* .

In awarding compensatory damages based on racial discrimination, the plaintiff's humiliation and emotional distress should be the basis for the award; the defendant's "politeness" does not justify a minimal award [*see Johnson v. Hale (9th Cir. 1994) 13 F.3d 1351, 1354* ($250 compensatory damages award remanded with orders to award at least $3,500

plus costs and attorney's fees)].

When an individual is wrongfully denied commercial office space, the damages available include damages from wages lost while arranging different office space, as well as damages for emotional distress and humiliation [*Phiffer v. Proud Parrot Motor Hotel (9th Cir. 1980) 648 F.2d 548, 552-553]* .

Punitive damages are also available for violations of *42 U.S.C. § 1982*. Actual malice is unnecessary to support such an award; rather, it need only be shown that the defendant acted "with such conscious and deliberate disregard of the consequences of his or her actions to others that his or her conduct is wanton" [*Phiffer v. Proud Parrot Motor Hotel (9th Cir. 1980) 648 F.2d 548, 553* (repeated refusal to rent available office space was sufficient to establish wanton nature of defendant's conduct when coupled with proof that the space was offered to white applicant); *but see Fountila v. Carter (9th Cir. 1978) 571 F.2d 487, 495* (award of $5,000 in punitive damages could not stand when award of actual damages was only $1); *see also Jones v. Mayer Co. (1968) 392 U.S. 409, 414 n.14, 88 S. Ct. 2186, 20 L. Ed. 2d 1189* (plaintiff not entitled to punitive damages when injunctive relief enabled him to buy home at market price at time of wrongful refusal, which was substantially less than current market value)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesDamagesCompensatory DamagesCivil Rights LawContractual Relations & HousingProperty Rights (sec. 1982)Private DiscriminationCivil Rights LawContractual Relations & HousingProperty Rights (sec. 1982)Protected RightsCivil Rights LawContractual Relations & HousingProperty Rights (sec. 1982)Remedies

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PART II. LEGAL BACKGROUND
C. Federal Laws Relating to Housing Discrimination

11-117 California Forms of Pleading and Practice--Annotated §§ 117.53-117.59

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[Reserved]

§§ 117.53[Reserved]

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11-117 California Forms of Pleading and Practice--Annotated § 117.60

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§ 117.60 Related Matthew Bender Publications

For thorough discussion of federal civil rights legislation and actions, see J. Cook & J. Sobieski, Civil Rights Actions (Matthew Bender)

For related jury instructions regarding FEHA and civil rights generally, see Judicial Council Of California Civil Jury Instructions (CACI), Series 2500 and 3000 (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions

Legal Topics:

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11-117 California Forms of Pleading and Practice--Annotated § 117.61

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§ 117.61 Federal Constitution

Due process clause, applicable to federal government. *U.S. Const., amend. V*

Sovereign immunity of states. *U.S. Const., amend. XI*

Privileges and immunities, due process, and *equal protection clauses*, applicable to states. *U.S. Const., amend. XIV*

Legal Topics:

For related research and practice materials, see the following legal topics:
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11-117 California Forms of Pleading and Practice--Annotated § 117.62

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§ 117.62 State Constitution

Prohibition against restrictions on entry into vocation, trade, profession, business, or employment based on sex, race, creed, color, or national or ethnic origin. *Cal. Const., art. I, § 8*

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§ 117.63 Federal Statutes

Home Owners' Loan Act. *12 U.S.C. § 1461 et seq.*

Home Mortgage Disclosure Act of 1975. *12 U.S.C. § 2801 et seq.*

Equal Credit Opportunity Act. *15 U.S.C. § 1691 et seq.*

Jurisdiction of United States District Courts in civil rights cases. *28 U.S.C. §§ 1331, 1343, 1344*

Equal rights under law. *42 U.S.C. § 1981*

Property rights of citizens. *42 U.S.C. § 1982*

Civil action for deprivation of civil rights under color of state law. *42 U.S.C. § 1983*

Conspiracy to interfere with civil rights. *42 U.S.C. § 1985*

Neglect to prevent conspiracy to interfere with civil rights. *42 U.S.C. § 1986*

State law applicable in federal civil rights actions. *42 U.S.C. § 1988(a)*

Recovery of attorney's fees in civil rights actions. *42 U.S.C. § 1988(b)*

Discrimination prohibited in federally assisted programs. *42 U.S.C. §§ 2000d-2000d-6* (Title VI of Civil Rights Act of 1964)

Federal Fair Housing Act. *42 U.S.C. §§ 3601-3631* (Titles VIII and IX of Civil Rights Act of 1968)

Discrimination prohibited in programs and activities receiving community development funds. *42 U.S.C. § 5309*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawFederal ActsHome Mortgage Disclosure ActCivil Rights LawContractual Relations & HousingEqual Rights Under the Law (sec. 1981)General OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingProperty Rights (sec. 1982)General OverviewCivil Rights LawSection 1983 ActionsGeneral Overview

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§ 117.64 State Statutes

Unruh Civil Rights Act. *Civ. Code § 51*

Housing discrimination based on age prohibited. *Civ. Code § 51.2*

Housing for senior citizens. *Civ. Code §§ 51.3, 51.4*

Freedom from violence or threat of violence because of protected characteristics. *Civ. Code § 51.7*

Remedies for discrimination. *Civ. Code § 52*

Action for injunctive relief from interference with rights by threats, intimidation, coercion, or violence. *Civ. Code § 52.1*

Discriminatory restrictions on ownership or use of real property void. *Civ. Code § 53*

Right of disabled persons to full and equal access to housing accommodations. *Civ. Code § 54.1(b)*

Restrictions in deeds based on characteristic listed in Fair Employment and Housing Act (FEHA) are void. *Civ. Code § 782*

Restrictions in deeds or other documents based on characteristic listed in FEHA are deemed omitted by law. *Civ. Code § 782.5*

Mobilehome Residency Law. *Civ. Code § 798 et seq.*

Refusal to rent to tenant with waterbed in conformance with standards prohibited. *Civ. Code § 1940.5*

California Fair Employment and Housing Act (FEHA). *Gov. Code § 12900 et seq.*

Discrimination prohibited in local planning and zoning. *Gov. Code § 65008*

Licensed foster family home may not be prohibited from family portion of mobilehome park. *Health & Safety Code § 1566.8*

Discrimination prohibited in community redevelopment projects. *Health & Safety Code § 33050*

Leases pertaining to community redevelopment projects must contain nondiscrimination clauses. *Health & Safety Code §§ 33337, 33435, 33436*

Prohibition of discrimination in financing of housing. *Health & Safety Code § 35800 et seq.*

Allocation of portion of state-financed low-income housing for occupancy by elderly. *Health & Safety Code § 51230*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesInjunctionsGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsAge DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsDisability Discrimination

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§ 117.65 Federal Regulations

Fair Housing Home Loan Data System. *12 C.F.R. § 27.1 et seq.*

Fair housing loans by banks. *12 C.F.R. § 338.1 et seq.*

Equal housing lending by savings and loan associations. *12 C.F.R. § 528.1 et seq.*

Discrimination prohibited in federally assisted programs of the Department of Housing and Urban Development under Title VI. *24 C.F.R. § 1.1 et seq.*

Accessibility standards for publicly owned residential structures. *24 C.F.R. §§ 40.1-40.7*

Policies and procedures for enforcement of accessibility requirements. *24 C.F.R. §§ 41.1-41.6*

Discriminatory conduct under Fair Housing Act. *24 C.F.R. § 100.1 et seq.*

Complaint processing under Fair Housing Act. *24 C.F.R. § 103.1 et seq.*

Nondiscrimination and equal opportunity in housing under Executive Order 11063. *24 C.F.R. § 107.10 et seq.*

Compliance procedures for affirmative fair housing marketing. *24 C.F.R. § 108.1 et seq.*

Fair housing posters. *24 C.F.R. § 110.1 et seq.*

Certification and funding of state and local fair housing enforcement agencies. *24 C.F.R. § 115.100 et seq.*

Fair housing initiatives program. *24 C.F.R. § 125.103 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawDepository InstitutionsFederal Savings AssociationsCivil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsEnforcementCivil Rights LawContractual Relations & HousingFair Housing RightsFair Housing ActCivil Rights LawContractual Relations & HousingFair Housing RightsLeasing & Sales

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§ 117.66 State Regulations

Real estate licensees prohibited from engaging in discrimination and panic selling. *10 Cal. Code Reg. §§ 2780-2782*

Discrimination in providing financing for housing. *21 Cal. Code Reg. § 7100 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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11-117 California Forms of Pleading and Practice--Annotated § 117.66A

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§ 117.66A California Civil Jury Instructions (CACI)

For related jury instructions in cases involving the Fair Employment and Housing Act, see Judicial Council Of California Civil Jury Instructions (CACI), Series 2500 (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions

For related jury instructions regarding civil rights actions generally, see Judicial Council Of California Civil Jury Instructions (CACI), Series 3000 (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview

California Forms of Pleading and Practice--Annotated

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PART III. RESEARCH GUIDE

11-117 California Forms of Pleading and Practice--Annotated § 117.67

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§ 117.67 Decisions

[1] California Fair Employment and Housing Act

African-American home buyer and her real estate agent, who was also African-American, failed to make prima facie case of housing discrimination under FEHA based on race or disability against Caucasian home seller and Caucasian listing agents, where seller refused to engage in seller carryback provision, and, because neither plaintiff attempted to meet seller's terms, they could not be considered qualified for purposes of establishing prima facie case; where, because offer included seller carryback provision notwithstanding purchase price 10 percent above list price, buyer could not say she was similarly situated to Caucasian who eventually purchased house for just under list price amount; and where, despite allegations of awkwardness or lack of enthusiasm, neither plaintiff produced evidence that listing agents disparaged buyer or agent on account of their race or treated only African-American or disabled individuals as they treated buyer, and there was no evidence that ultimate buyer was aided by or customer of listing agents. Fact that ultimate buyer and plaintiff were of different races was not enough to establish prima facie case of discrimination where there was no evidence both of them were clients of same listing agents. *McDonald v. Coldwell Banker (9th Cir. 2008) 543 F.3d 498, 503-505*

Independent fair housing services provider engaged in advocacy efforts, which had standing to bring retaliation claim

against city under FHA, had standing to bring retaliation claim under *FEHA. Walker v. City of Lakewood (9th Cir. 2001) 263 F.3d 1005*

Amendments to Fair Employment and Housing Act (FEHA), in particular judicial option provision which gives both sides in FEHA administrative proceeding choice to adjudicate matter in court [*Gov. Code § 12989*], give Commission authority to award emotional distress damages under *Gov. Code § 12987(a)(4).* *Konig v. Fair Employment and Housing Commission (2002) 28 Cal. 4th 743, 747-758, 123 Cal. Rptr. 2d 1, 50 P.3d 718*

Unmarried cohabiting couples protected from housing discrimination by *Smith v. Fair Employment & Housing Com. (1996) 12 Cal. 4th 1143, 1160, 51 Cal. Rptr. 2d 700, 913 P.2d 909*

Allegation that mortgage lender refused to lend on homes operating day care centers stated claim under FEHA for intentional discrimination on basis of source of income, and claim for violation of FEHA on disparate impact theory under *Gov. Code § 12955.8* by alleging that mortgage lender's policies disproportionately affected women and families with children, because those two protected classes comprised higher percentage of daycare home operators in relevant county than percentages of those groups found generally in county. Nonprofit housing corporation had standing to sue as "aggrieved person" under FEHA because it alleged it was required to divert scarce resources to address lender's alleged wrongful conduct. *Sisemore v. Master Financial, Inc. (2007) 151 Cal. App. 4th 1386, 1402-1426, 60 Cal. Rptr. 3d 719*

Condominium homeowners association failed to make reasonable accommodation of disabilities of condominium owners by not making exception to rule prohibiting dogs as companion animals, when owners were disabled within meaning of FEHA, including suffering from depression, their disabilities interfered with use and enjoyment of their home and having companion dog improved situation, and conclusion that companion dog in this case constituted reasonable accommodation for disabilities was supported by substantial evidence. Further, if homeowners association needed additional information about medical condition or need to keep companion dog, association was obligated to request it, and it could not simply sit back and deny request for reasonable accommodation because it did not think sufficient information had been presented or that condominium owners had spoken magic words required to claim protections of FEHA. *Auburn Woods I Homeowners Ass'n v. Fair Employment & Housing Comm. (2004) 121 Cal. App. 4th 1578, 1590-1599, 18 Cal. Rptr. 3d 669*

Trial court erred in denying petition by DFEH for order compelling compliance with investigative discovery seeking rental applications and rental agreements from landlord's agent accused of discrimination on basis of race and marital status; subpoena was properly served, information was sought with sufficient particularity to permit response, information was reasonably relevant to complaint, and Department's interest in prohibiting housing discrimination outweighed any privacy interest of applicants denied housing or accepted as renters. *Department of Fair Employment and Housing v. Superior Court (Keller) (2002) 99 Cal. App. 4th 896, 904-905, 121 Cal. Rptr. 2d 615*

FEHA prohibits sexual harassment. *Brown v. Smith (1997) 55 Cal. App. 4th 767, 782, 64 Cal. Rptr. 2d 301*

County ordinance prohibiting discrimination against persons who test positive for HIV not preempted by FEHA, at least in part because purpose of two laws is different. *Citizens for Uniform Laws v. County of Contra Costa (1991) 233 Cal. App. 3d 1468, 1473-1475, 285 Cal. Rptr. 456* (decided before FEHA applied to disability)

Refusal to rent to unmarried couple impermissible discrimination on basis of marital status. *Hess v. Fair Employment & Housing Com. (1982) 138 Cal. App. 3d 232, 234-237, 187 Cal. Rptr. 712*

[2] Unruh Civil Rights Act

Condominium owners' association is a business establishment that may not discriminate against children by imposition of age restriction. *O'Connor v. Village Green Owners Ass'n (1983) 33 Cal. 3d 790, 795-797, 191 Cal. Rptr. 320, 662 P.2d 427*

Apartment complex is a business establishment that may not discriminate against children by imposition of age restriction. *Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 731, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858*

Person aggrieved by violation of Unruh Act entitled to injunctive relief, and may bring action for such relief on behalf of all persons similarly situated. *Vargas v. Hampson (1962) 57 Cal. 2d 479, 481, 20 Cal. Rptr. 618, 370 P.2d 322*

Liability of real estate brokers for refusal to rent to plaintiff on basis of race. *Lee v. O'Hara (1962) 57 Cal. 2d 476, 478, 20 Cal. Rptr. 617, 370 P.2d 321*

Allegation that mortgage lender rejected mortgage application because it did not lend on homes operating day care for profit stated claim under Unruh Act, because arbitrary occupational discrimination is prohibited under Act. *Sisemore v. Master Financial, Inc. (2007) 151 Cal. App. 4th 1386, 1402-1409, 60 Cal. Rptr. 3d 719*

Enforcement of restrictive covenant, which limited use of property to single family residences, against residential care facility for elderly, which, through operation of *Health & Safety Code § 1566.5*, was not inconsistent with single family residential use, did not constitute age discrimination under Unruh Act, when thrust of restrictions was prohibition of multiple family dwellings and nonresidential use, not prohibition of residence of elderly. *Barrett v. Lipscomb (1987) 194 Cal. App. 3d 1524, 1533-1534, 240 Cal. Rptr. 336*

Division of condominium complex into "adult" and "family" regions, and exclusion of children under 16 years of age from residing in adult region and from using adult pools, was not unreasonable or arbitrary age discrimination, but was reasonable differential treatment based on differences in needs of users. *Sunrise Country Club Assn. v. Proud (1987) 190 Cal. App. 3d 377, 380-382, 235 Cal. Rptr. 404*

Real estate broker did not have cause of action under Unruh Act against real estate developer who refused to do business with him when broker was speculator who had previously tried to profit at developer's expense despite signed contract to contrary; developer's action was personal, based on individual conduct of broker, rather than arbitrary. *Frantz v. Blackwell (1987) 189 Cal. App. 3d 91, 95, 234 Cal. Rptr. 178*

Restrictive covenant limiting residents of housing development to those aged 45 years and over was invalid. *Park Redlands Covenant Control Comm. v. Simon (1986) 181 Cal. App. 3d 87, 93, 226 Cal. Rptr. 199*

County ordinance prohibiting discrimination in rental housing on basis of age, parenthood, pregnancy, or presence of minor child was not preempted by Unruh Act; *Civ. Code § 52(e)* expressly provides that actions under Unruh Act are independent of any other remedies or procedures that may be available to aggrieved party. *San Jose Country Club Apartments v. County of Santa Clara (1982) 137 Cal. App. 3d 948, 951-952, 187 Cal. Rptr. 493*

"Business establishment" includes rental housing. *Hubert v. Williams (1982) 133 Cal. App. 3d Supp. 1, 3 , 184 Cal. Rptr. 161*

Unruh Act prohibits owners of mobile home park from discriminating against tenants for associating with and subrenting their mobile home space to blacks. *Winchell v. English (1976) 62 Cal. App. 3d 125, 129, 133 Cal. Rptr. 20*

Civ. Code § 52 imposes liability on anyone who aids or incites denial of equal privileges protected by *Civ. Code § 51*; if realty board was party to agreement or concerted action to deny rights under Unruh Act, common law rules applicable

to joint tortfeasors apply to impose liability on it. *Wagner v. O'Bannon (1969) 274 Cal. App. 2d 121, 132, 79 Cal. Rptr. 44*

Unruh Act is applicable to builders and sellers of houses in housing tract. *Don Wilson Builders v. Superior Court (1963) 220 Cal. App. 2d 77, 78-82, 33 Cal. Rptr. 621*

Renting triplex is "business enterprise" under *Unruh Act. Swann v. Burkett (1962) 209 Cal. App. 2d 685, 694-695, 26 Cal. Rptr. 286*

[3] Senior Citizen Housing

Blanket exclusion of all families with minor children from apartment complex is violation of Unruh Act; however, age qualifications in housing facility reserved for older citizens is permissible. *Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 741-743, 180 Cal. Rptr. 496, 640 P.2d 115 , cert. denied, 459 U.S. 858*

Factors that suggest housing designed with senior citizens in mind include individual units that are small in size, one story, and require no yard work, and the grouping of such units around extensive communal recreational and educational facilities. *Huntington Landmark Adult Community Assn. v. Ross (1989) 213 Cal. App. 3d 1012, 1018-1019, 261 Cal. Rptr. 875*

If housing development was constructed before *Civ. Code § 51.3* came into effect and its design is already suited to seniors, rehabilitation or renovation of existing structures will not be required. *Bliler v. Covenant Control Com. (1988) 205 Cal. App. 3d 18, 26-27, 252 Cal. Rptr. 50*

[4] Discriminatory Restrictive Covenants Regarding Real Property

Civ. Code § 53 was enacted to effectuate same general goals as *Unruh Act. Park Redlands Covenant Control Comm. v. Simon (1986) 181 Cal. App. 3d 87, 93, 226 Cal. Rptr. 199*

Restrictive reading of prohibited bases of discrimination in *Civ. Code § 53* would be at odds with all-inclusive scope of its coverage; nonprofit organization violated § 53 by establishing retirement community for Theosophists and restricting ownership and occupancy to persons who had been members of their society for three years, or had been approved by board of trustees. *Taormina Theosophical Community, Inc. v. Silver (1983) 140 Cal. App. 3d 964, 975, 190 Cal. Rptr. 38*

[5] Financing for Housing

If state-conferred rights granted by Holden Act are to be enforced against federal savings and loan associations by any regulatory body, enforcement must be by *Bank Board. Conference of Federal Sav. & Loan Ass'ns v. Stein (9th Cir. 1979) 604 F.2d 1256, 1260 , aff'd, 445 U.S. 921, 100 S. Ct. 1304, 63 L. Ed. 2d 754 (1980)*

[6] State Promotion of Discrimination

Proposition enacted with clear intent to overturn state laws that prohibited discrimination by private sellers and lessors of real property, and to forestall future state action that might circumscribe such discrimination, held unconstitutional as violation of *equal protection clause of federal constitution*. *Mulkey v. Reitman (1966) 64 Cal. 2d 529, 534-535, 50 Cal. Rptr. 881, 413 P.2d 825 , aff'd, 387 U.S. 369, 87 S. Ct. 1627, 18 L. Ed. 2d 830 (1967)*

[7] Federal Fair Housing Act

Fair Housing Act (FHA) is governed by traditional vicarious liability rules and tort principles and did not create non-delegable duty not to discriminate based on race. Thus, sole owner and president of realty company could not be held liable for discriminatory actions of broker in his office based on FHA-derived non-delegable duty or as designated officer/broker of realty company based solely on his right to control broker. *Meyer v. Holley (2003) 537 U.S. 280, 285-290, 123 S. Ct. 824, 154 L. Ed. 2d 753*

When state Legislature eliminated former requirement of "self-preservation" for residents of care homes providing assisted living after filing of lawsuit under Fair Housing Amendments Act of 1988, 42 U.S.C. § 3600 et seq. and Americans with Disabilities Act, plaintiffs were not entitled to attorney's fees award under "catalyst theory," under which plaintiff is prevailing party if it achieves desired result because lawsuit brought about voluntary change in defendant's conduct, since state's voluntary change lacked necessary judicial *imprimatur*. *Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources (2001) 532 U.S. 598, 121 S. Ct. 1835, 1841-1843, 149 L. Ed. 2d 855*

District court's imposition of contempt sanction against two city council members for failing to vote in favor of legislation implementing consent decree earlier approved by city after it had been found liable for intentionally enhancing racial segregation in housing in violation of Fair Housing Act was abuse of discretion. *Spallone v. United States (1990) 493 U.S. 265, 273-280, 110 S. Ct. 625, 107 L. Ed. 2d 644*

Fair Housing Act requires town to strike zoning provision that restricts private multifamily housing projects to urban renewal area with cluster of minority population. *Town of Huntington v. NAACP (1988) 488 U.S. 15, 16-18, 109 S. Ct. 276, 102 L. Ed. 2d 180*

Nonprofit housing corporation has standing under Fair Housing Act when defendant's steering practices have perceptibly impaired its ability to provide counseling and referral services for low and moderate income homeseekers; concrete and demonstrable injury to organization's activities with resultant drain on its resources constitutes more than simple setback to its abstract social interests. *Havens Realty Corp. v. Coleman (1982) 455 U.S. 363, 378-379, 102 S. Ct. 1114, 71 L. Ed. 2d 214*

Caucasian residents have standing under FHA to challenge racial discrimination against African-Americans in their neighborhood. *Gladstone Realtors v. Village of Bellwood (1979) 441 U.S. 91, 115, 99 S. Ct. 1601, 60 L. Ed. 2d 66*

FHA applied to post-acquisition discrimination, and district court erred in dismissing in its entirety claim under FHA against city alleging discrimination in provision of services to existing homeowners and renters in specific neighborhoods on basis of race or ethnicity. However, to extent complaint alleged violations related to certain municipal services, plaintiffs were bound by agreement limiting their claims regarding services to areas of sewer access, police services, and bilingual assistance, and plaintiffs failed to put forth evidence of disparate impact with regard to provision of sewer services or infrastructure, so that remanding those claims would have been futile because evidence of FHA violations would have been same statistical evidence rejected in course of resolving equal protection claims, and reinstatement of FHA claims was thus limited to those regarding timely provision of law-enforcement personnel. *Committee Concerning Community Improvement v. City of Modesto (9th Cir. 2009) 583 F.3d 690, 713-715*

District court erred in dismissing class action by African-American homeowners' insurance policy owner against homeowners' insurance company alleging that he and other minorities received less favorable pricing than Caucasians as result of discriminatory credit evaluative and scoring system developed and administered by insurer in violation of FHA, where court read complaint as challenging credit scoring per se, when in fact it challenged only use of undisclosed factors in credit scoring and disparate impact that resulted, so that district court erroneously concluded that

claim "impaired" state law because it challenged credit scoring per se. Court also erred in interpreting state's credit scoring law as permitting disparate impact race discrimination despite evidence state legislature intended to prohibit insurers from engaging in unfair discrimination so that federal FHA claim was not reverse-preempted by *McCarran-Ferguson Act. Ojo v. Farmers Group, Inc. (9th Cir. 2009) 565 F.3d 1175, 1183*

African-American home buyer and her real estate agent, who was also African-American, failed to make prima facie case of housing discrimination under FHA based on race or disability against Caucasian home seller and Caucasian listing agents, where seller refused to engage in seller carryback provision, and, because neither plaintiff attempted to meet seller's terms, they could not be considered qualified for purposes of establishing prima facie case; and where, because offer included seller carryback provision notwithstanding purchase price 10 percent above list price, buyer could not say she was similarly situated to Caucasian who eventually purchased house for just under list price amount. *McDonald v. Coldwell Banker (9th Cir. 2008) 543 F.3d 498, 505-506*

Town did not violate Federal Fair Housing Act by refusing to grant special use permit to develop to build senior retirement community that did not comply with the applicable zoning ordinances, where developer failed to raise genuine dispute of fact with respect to first element of prima facie case of disparate treatment as to whether community would house individuals with disabilities, because potential residents did not presently qualify as disabled under FHAA simply because some of them would become disabled as they aged, and developer did not set forth evidence to create triable issue of fact fourth element, i.e., whether town approved special use permit for similarly situated party during period relatively near time it denied developer special use permit; where developer failed to present prima facie case of disparate impact, because developer set forth no evidence from which the court could conclude that the town's permit practices had disproportionate impact on disabled or there was triable issue of fact as to impact of town's permit practices on disabled; and where developer failed to present triable issue of fact as to town's failure to make reasonable accommodation, because undisputed facts did not support that potential residents suffered from handicap as defined by FHAA and there was insufficient evidence to establish that community's amenities were necessary to house disabled seniors. *Budnick v. Town of Carefree (9th Cir. 2008) 518 F.3d 1109, 1113-1120*

In private civil actions based on design-and-construction claim under Fair Housing Act, district court properly granted defendants summary judgment, where two-year statute of limitations began to run at conclusion of design-and-construction phase, which occurred on date last certificate of occupancy was issued, which occurred long before plaintiffs brought suit. *Garcia v. Brockway (9th Cir. 2007) 503 F.3d 1092, 1095-1101*

City's men-only policy at homeless shelter was facially discriminatory regarding women and families, and plaintiffs raised serious questions regarding merits of city's proffered justifications for men-only policy, so that there was no dispute balance of hardships tipped in plaintiffs' favor. District court abused its discretion by denying plaintiffs' request under Fair Housing Act for preliminary injunction requiring reinstatement of shelter residents excluded by men-only policy. However, plaintiffs did not raise prima facie case of disparate treatment based on disability, where record showed both former residents of shelter who were moved out and former residents of other shelter who were moved in had substantial numbers of disabled individuals in their ranks. While there may be lower percentage of disabled persons among new residents, factual finding was not clearly erroneous and there was no evidence any plaintiffs were treated differently because of their disability. District court did not abuse its discretion by denying preliminary injunction regarding disability discrimination claims. *Community House, Inc. v. City of Boise (9th Cir. 2006) 468 F.3d 1118, 1123-1128*

District court properly dismissed action under FHA by condominium owner against condominium association for failure to accommodate disability based on association's alleged failure to allow service dog to help alleviate owner's roommate's depression. Association granted owner and roommate temporary exemption from bylaw precluding animals and never required dog to leave and thus never refused to make requested accommodation. *Dubois v. Association of Apartment Owners (9th Cir. 2006) 453 F.3d 1175, 1178-1179*

By proving that city's decision to deny approval for low income housing project disparately impacted minorities and families with children, housing corporation still failed to establish liability for discrimination under FHA. Although it made prima facie showing of discrimination, city rebutted showing by demonstrating that it executed its congressionally mandated duties under Tax Equity and Financial Responsibility Act in denying bond financing approval by holding public hearing and vote on bond financing approval question and deciding after considering local residents' views, city priorities and housing needs, wisdom of preferential financing for project, and other relevant considerations to which elected representatives normally give weight in executing their office. Further, jury found that city's decision was not motivated by hostility to race, ethnicity, or family size, city had legitimate nondiscriminatory reasons, and housing corporation did not demonstrate that reasons were sham or pretextual. *Affordable Housing Dev. Corp. v. City of Fresno (9th Cir. 2006) 433 F.3d 1182, 1193-1196*

Because California law makes designated real estate broker of real estate corporation personally responsible for supervision of corporation's salespersons, real estate office's designated real estate broker was personally responsible for supervision of salespersons, and when broker delegated responsibility to sales agent, he created agency relationship between himself and agent, which made broker vicariously liable as principal for discriminatory actions of agent under Fair Housing Act. Further, agent acted within scope of agency when he committed act of discrimination, because alleged discrimination occurred when agent was supervising another agent, which was broker's duty under California law and therefore within scope of duty broker delegated to agent. *Holley v. Crank (9th Cir. 2005) 400 F.3d 667, 671-674*

Given broad remedial scope of Fair Housing Act and liberal pleading requirements for housing discrimination claims, plaintiff with AIDS made out claim under Fair Housing Amendments Act for failure to accommodate his disability by denying his request for additional time to clean up his yard to comply with city's nuisance abatement ordinance. *McGary v. City of Portland (9th Cir. 2004) 386 F.3d 1259, 1261-1264*

History and language of FHA and FHAA make clear that testers fall within protected group of persons that may enforce rights created by *42 U.S.C. § 3604(f)(2)* when they are violated by discriminatory housing conditions, so that district court's denial of reconsideration and leave to amend to tester who had no actual rental or purchase interest in property was abuse of discretion. Disability rights organization also made sufficient showing to support its claim of organizational standing to withstand dismissal. *Smith v. Pacific Properties & Dev. Corp. (9th Cir. 2004) 358 F.3d 1097, 1101-1106*

Standards for pleading housing discrimination claims under FHA are no higher than relaxed notice pleading standard of Fed. R. *Civ. Proc. 8(a), i.e.,* short and plain statement of claim showing pleader is entitled to relief. Trial court erred in dismissing complaint under FHA which, on fair reading, alleged that plaintiff put mobile home park on notice that she believed it attempted to intimidate, threaten, or interfere with her for having aided or encouraged women tenants to complain about discrimination in terms, conditions, or privileges of sale or rental of dwelling because of sex, alleged that all other tenants in her section of park were offered long-term leases at time she was denied one, *i.e.,* that mobile home park took action directed specifically towards her, hoping to coerce her into ceasing her activism on behalf of women tenants claiming sex discrimination, thus adequately setting forth gravamen of plaintiff's claim under *42 U.S.C. § 3617*. *Edwards v. Marin Park, Inc. (9th Cir. 2004) 356 F.3d 1058, 1061-1063*

Fair Housing Amendments Act (FHAA) [*42 U.S.C. § 3601 et seq.*] required apartment owners reasonably to accommodate disability of man with AIDS by assessing individually risk of non-payment created by his specific proposed financial arrangement, i.e., having his mother pay rent for him, rather than inflexibly applying rental policy that forbids cosigners, because direct causal link existed between man's impairment, his inability to work, and his inability to comply with defendants' minimum income requirement relying solely on his individual income, and accommodation requirement reaches adjustments in means of proving financial responsibility. *Giebeler v. M&B Assocs. (9th Cir. 2003) 343 F.3d 1143, 1146-1159*

Community fair housing organization had standing to sue landlord for racial discrimination under federal Fair Housing Act after receiving complaints that landlord was racially discriminating against black tenants and black potential tenants and conducting two sets of controlled tests which indicated landlord discriminated against black applicants, when organization showed drain on its resources from both diversion of its resources and frustration of its mission. *Fair Housing of Marin v. Combs (9th Cir. 2002) 285 F.3d 899*

Independent fair housing services provider engaged in advocacy efforts had standing to bring retaliation claims against city by showing direct and immediate injuries at least indirectly attributable to city's actions, when provider alleged facts showing that city delayed payments under contract, attempted to interfere with investigation of fair housing complaints, failed to renew contract, filed retaliatory and frivolous third-party complaint against provider and its executive director, and made negative comments to at least one city administrator from another city regarding provider's performance under its contract so as to attempt to interfere with provider's attempt to renew its contract with that city; provider stated cognizable claim against city for retaliation under FHA, when provider alleged that in response to protected advocacy, city engaged in series of actions designed to coerce and intimidate provider into changing or ceasing their activities; because FHA explicitly preempts any state law purporting to require or permit action that would be discriminatory housing practice, court could not defer to state contract law principles. Trial court erroneously granted summary judgment to city, when provider presented prima facie case of retaliation, city met its burden of articulating legitimate, nondiscriminatory reasons for its actions, and provider presented sufficient evidence to show disputed issue of material fact as to whether city's articulated reasons were pretextual. *Walker v. City of Lakewood (9th Cir. 2001) 263 F.3d 1005*

Nothing in Housing and Community Development Act (HCDA) suggests that aggrieved party may not proceed under FHA, which explicitly provides for private right of action [*42 U.S.C. § 3613*], if defendant's use of HCDA funds violates FHA; because HCDA was enacted after FHA, to hold otherwise would be to work highly-disfavored repeal by implication. *Walker v. City of Lakewood (9th Cir. 2001) 263 F.3d 1005*

In action by partnership organized to purchase and develop low-income housing at mobilehome park against city, alleging violation of *42 U.S.C. § 3604* of Federal Fair Housing Act for city's refusal to consent to partnership's development of low-income housing at mobilehome park, trial court erroneously conditioned denial of city's motion for new trial after jury verdict awarding damages in amount of $3,040,439 on partnership's acceptance of remittitur to $388,146.20, when jury verdict was not against clear weight of evidence; further, trial court erroneously excluded amount of damages based on partnership's failure to mitigate, when there is no legal authority to support proposition that party harmed by another's violation of Fair Housing Act has duty to mitigate, and, even assuming partnership had duty to mitigate, purchasing park without benefit of state housing program mortgage, which city refused to approve, was not reasonable option; finally, trial court abused its discretion in denying permanent injunction from further violation of Fair Housing Act by shifting burden of proving irreparable injury to partnership, when because partnership established city's violation of Act, future violation should be presumed. *Silver Sage Partners v. City of Desert Hot Springs (9th Cir. 2001) 251 F.3d 814*

African-American was aggrieved person within meaning of Fair Housing Act, and had standing to sue former landlords for damages based on both indirect and direct injuries, when she alleged she suffered distinct and palpable injury resulting from differential treatment of African-Americans, and when she claimed she was injured directly by eviction notices given contrary to established policy and claimed injury from manager's discriminatory statements. *Harris v. Itzhaki (9th Cir. 1999) 183 F.3d 1043, 1051-1055*

To state claim for retaliation under FHA, plaintiff must show (1) that he/she engaged in "protected activity," (2) that defendant's subsequent activities were causally linked with plaintiff's exercise of protected activity, and (3) that plaintiff suffered some resulting damage. *San Pedro Hotel Co. v. City of Los Angeles (9th Cir. 1998) 159 F.3d 470, 477*

Courts apply Title VII discrimination analysis in examining claims of discrimination brought under *FHA. Gamble v.*

City of Escondido (9th Cir. 1997) 104 F.3d 300, 304

Award of compensatory damages under *42 U.S.C. § 3614(d)(1)(B)* is mandatory, not discretionary, if party has proven unlawful discrimination and actual damages. *United States v. City of Hayward (9th Cir. 1994) 36 F.3d 832, 839-840 , cert. denied, 516 U.S. 813 (1995)*

Fair Housing Act is applicable to municipalities. *Keith v. Volpe (9th Cir. 1988) 858 F.2d 467, 482 , cert. denied, 493 U.S. 813 (1989)*

Consent decree establishing affirmative action plan specific to blacks who had been discriminated against, without joining as necessary parties nonblack minorities who had also been discriminated against, was inequitable. *Shimkus v. Gersten Cos. (9th Cir. 1987) 816 F.2d 1318, 1320-1322*

Action brought under *42 U.S.C. § 3617* has different limitation period than action brought under *42 U.S.C. § 3610* or *3612*; importance of unusual promptness in resolving disputes concerning rights to housing does not exist if grievance is not loss or lack of housing but is, instead, injury resulting from wrongful interference or retaliation. *Smith v. Stechel (9th Cir. 1975) 510 F.2d 1162, 1164*

[8] Actions Under 42 U.S.C. § 1982

Definition of racial groups in effect at time of enactment of *42 U.S.C. § 1982* governs its application today. *Shaare Tefila Congregation v. Cobb (1987) 481 U.S. 615, 617, 107 S. Ct. 2019, 95 L. Ed. 2d 594*

42 U.S.C. § 1982 bars all racial discrimination, private as well as public, in sale or rental of property. *Memphis v. Greene (1981) 451 U.S. 100, 120-121, 101 S. Ct. 1584, 67 L. Ed. 2d 769*

Fair Housing Act (*42 U.S.C. § 3601 et seq.*) and *42 U.S.C. § 1982* are separate housing laws, and significance of each is in no way diminished by existence of other. *Sullivan v. Little Hunting Park (1969) 396 U.S. 229, 237, 90 S. Ct. 400, 24 L. Ed. 2d 386*

42 U.S.C. § 1982, barring racial discrimination with regard to citizens' property rights, properly read together with Fair Housing Act (FHA) (*42 U.S.C. § 3601 et seq.*) so as not to preempt local housing legislation that more detailed FHA explicitly preserves. *Hunter v. Erickson (1969) 393 U.S. 385, 388, 89 S. Ct. 557, 21 L. Ed. 2d 616*

42 U.S.C. § 1982 deals only with racial discrimination and does not address discrimination on grounds of religion or national origin; nor does § 1982 deal specifically with discrimination in provision of services or facilities in connection with sale or rental of a dwelling. *Jones v. Mayer Co. (1968) 392 U.S. 409, 413-414, 88 S. Ct. 2186, 20 L. Ed. 2d 1189*

In awarding compensatory damages based on racial discrimination, plaintiff's humiliation and emotional distress should be basis for award; defendant's "politeness" does not justify minimal award. *Johnson v. Hale (9th Cir. 1994) 13 F.3d 1351, 1354*

Elements of prima facie case under *42 U.S.C. § 1982* require that plaintiff prove (1) that he or she is a member of a racial minority, (2) that he or she applied for and was qualified to rent or purchase certain real property or housing, (3) that he or she was rejected, and (4) that housing or rental opportunity remained available thereafter. *Phiffer v. Proud Parrot Motor Hotel (9th Cir. 1980) 648 F.2d 548, 551* ; *Barber v. Rancho Mortgage & Inv. Corp. (1994) 26 Cal. App. 4th 1819, 1833, 32 Cal. Rptr. 2d 906*

Award of $5,000 in punitive damages could not stand in *42 U.S.C. § 1982* case, when award of actual damages was

only $1. *Fountila v. Carter (9th Cir. 1978) 571 F.2d 487, 495*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsAge DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsDisability DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsFamily Status DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsGender & Sex DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsLeasing & Sales

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Chapter 117 CIVIL RIGHTS: HOUSING DISCRIMINATION
PART III. RESEARCH GUIDE

11-117 California Forms of Pleading and Practice--Annotated § 117.68

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§ 117.68 Attorney General Opinions

Prohibition against unauthorized use for housing of registered sex offender identifying information obtained from California "Megan's Law" web site [*Pen Code § 290.46(k)*] does not in itself qualify registered sex offenders as "protected class" for purposes of housing discrimination under *Fair Employment and Housing Act. 05 Ops. Cal. Att'y Gen. 301 (2006)*

Notwithstanding prohibition against age discrimination in Planning and Zoning Law [*Gov. Code § 65000 et seq.*], a city may adopt zoning ordinance or issue conditional use permit that limits specified parcel of land to use as mobilehome park for senior citizens pursuant to *Health & Safety Code § 18300(g)(1). 87 Ops. Cal. Att'y Gen. 148 (2004)*

City may not prohibit "adults only" mobilehome parks. *65 Ops. Cal. Att'y Gen. 559 (1982)*

Refusal to rent or termination of tenancy based solely on tenant's receipt of welfare benefits prohibited arbitrary discrimination. 59 Ops. Cal. Att'y Gen. 223 (1976)

Discrimination in provision of housing on basis of occupation, marital status, or number of children prohibited by Unruh Act. 58 Ops. Cal. Att'y Gen. 608 (1975)

Real estate broker's response to inquiry from prospective buyer regarding ethnic composition of neighborhood permitted if response is factual and given in good faith. *58 Ops. Cal. Att'y Gen. 155 (1975)*

Unruh Act is applicable to persons who sell, rent, or lease housing accommodations. *56 Ops. Cal. Att'y Gen. 546 (1973)*

Real estate broker's response to inquiry from owner regarding ethnic background of prospective buyer prohibited. *53 Ops. Cal. Att'y Gen. 196 (1970)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsEconomic DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsFamily Status DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsGender & Sex DiscriminationCivil Rights LawContractual Relations & HousingFair Housing RightsLeasing & SalesCivil Rights LawContractual Relations & HousingFair Housing RightsNational Origin Discrimination

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§ 117.69 Law Reviews

Godschalk, *Protected Petitioning or Unlawful Retaliation? The Limits of First Amendment Immunity for Lawsuits Under the Fair Housing Act, 27 Pepp. L. Rev. 477 (2000)*

Comment, *Rethinking Conciliation Under the Fair Housing Act, 67 Tenn. L. Rev. 425 (2000)*

Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment, 45 UCLA L. Rev. 1401 (1998)*

Comment, *Residential Zoning Regulations and the Perpetuation of Apartheid, 43 UCLA L. Rev. 1689 (1996)*

Note, *The Religious Landlord and the Conflict Between Free Exercise Rights and Housing Discrimination Laws--Which Interest Prevails?, 47 Hastings L.J. 1669 (1996)*

Symposium, *A Fair Housing Enforcement Symposium: A Focus on Special Issues Affecting the Disabled, Families with Children, and the First Amendment , 29 J. Marshall L. Rev. 315 (1996)*

Williams, *Can Government Limit Tenant Blacklisting?, 24 Sw. U. L. Rev. 1077 (1995)*

Field, *Why Our Fair Share Housing Laws Fail, 34 Santa Clara L. Rev. 35 (1993)*

Comment, *When the Medium Becomes the Message: A Proposal for Principal Media Liability for the Publication of Racially Exclusionary Real Estate Advertisements, 40 UCLA L. Rev. 199 (1992)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsEnforcementCivil Rights LawContractual Relations & HousingFair Housing RightsFair Housing ActPublic Health & Welfare LawHousing & Public BuildingsFair HousingReal Property LawZoning & Land UseBuilding & Housing Codes

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11-117 California Forms of Pleading and Practice--Annotated § 117.70

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§ 117.70 Text References

California Residential Landlord-Tenant Practice, ch. 2, *Selection of Tenants*; ch. 8, *Mobilehome Tenancies* (Cal. C.E.B. 1986)

Miller and Starr, California Real Estate, vol. 5, *Estates; Restraints; Discrimination* (2d ed. 1989)

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

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11-117 California Forms of Pleading and Practice--Annotated §§ 117.71-117.79

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[Reserved]

§§ 117.71[Reserved]

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Chapter 117 CIVIL RIGHTS: HOUSING DISCRIMINATION
PART IV. FORMS
A. Complaint and Allegations in State Court

11-117 California Forms of Pleading and Practice--Annotated § 117.80

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§ 117.80 Complaint in State Court for Damages and Preliminary and Permanent Injunction for Violation of California Fair Employment and Housing Act--Refusal to Rent or Sell [Gov. Code §§ 12927(c), 12955(a), 12980(h)]

[1] FORM Complaint in State Court for Damages and Preliminary and Permanent Injunction for Violation of California Fair Employment and Housing Act--Refusal to Rent or Sell [Gov. Code §§ 12927(c), 12955(a), 12980(h)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff, vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DAMAGES AND PRELIMIN-
[and DOES I through _____,]	)	ARY AND PERMANENT INJUNCTION
Defendant(s).	)	(California Fair Employment and Housing Act)
	)	
	)	

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, _____ [*state capacity and residence of defendant, e.g.*, a resident of _____ County, California, *or* a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), _____ County, California].

[2. _____ (*Allege facts establishing venue; otherwise, venue will be based on defendant's residence as alleged in Paragraph 1, e.g.*, Defendant denied accommodations to plaintiff in _____ County, in violation of the California Fair Employment and Housing Act, as alleged below *or* The relevant records pertaining to defendant's violation of the California Fair Employment and Housing Act, as alleged below, are maintained and administered in _____ County).]

3. _____ [*Specify facts showing how defendants are subject to the California Fair Employment and Housing Act, e.g.*, Defendant _____ (*name*) is the owner of the housing accommodation located at _____ (*address*), _____ (*city*), California, and defendant _____ (*name*) is the managing agent with authority to _____ (rent *or* sell) this housing accommodation.]

[4. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.)]

5. [Plaintiff is informed and believes and thereon alleges that,] [A]t all times herein mentioned, defendant _____ [*name*] was the managing agent of defendant _____ [*name*] and defendants _____ [*names*] were employees of the managing agent, and the managing agent and these employees [in doing the things hereinafter alleged] were acting within the course and scope of such agency and with the permission and consent of defendant _____ [*name*].

6. On or about _____ [*date*], plaintiff _____ [made an offer *or* offered to negotiate] to _____ [rent *or* buy] the housing accommodation at _____ [*street address*], _____ [*city*], California.

[*EITHER*]

7. Plaintiff's offer was refused by defendants, and defendants made the dwelling unavailable to plaintiff and denied plaintiff all opportunity to _____ [rent *or* buy] the housing accommodation.

[*OR*]

7. Defendants responded to plaintiff's offer to negotiate by refusing to negotiate for the _____ [rental *or* sale] of the housing accommodation.

[*OR*]

7. Defendant _____ [*name*] represented that the housing accommodation was not available for _____ [rental *or* sale] when in fact it was so available.

[*OR*]

7. Defendants agreed to _____ [rent *or* sell] the housing accommodation, but, on or about _____ [*date*], defendants _____ [canceled *or* terminated] the _____ [rental *or* sale] agreement.

[*OR*]

7. Defendants' response to plaintiff's offer was _____ [to impose on the transaction the following _____ (terms *or* conditions) *or* to provide in connection with the transaction the following _____ (privileges *or* facilities *or* services)] that were inferior to the _____ [terms *or* conditions *or* privileges *or* facilities *or* services] offered to other members of the public, that is: _____ [*specify terms, conditions, privileges, facilities, or services*].

[*OR*]

7. Defendant's response to plaintiff's offer was to deny or withhold housing accommodations by _____ [*specify method of denial or withholding, e.g.*, referring plaintiff to a financial institution that would delay the transaction until past the date when plaintiff was expected to obtain financial assistance *or* the use of an income-to-rent ratio that unrealistically required the rent to be no more than one fourth of plaintiff's income].

[*OR*]

7. Defendant agreed to rent the housing accommodation, but denied plaintiff's request for permission _____ [*specify reasonable modification of existing premises necessary to afford plaintiff full enjoyment of the premises, e.g.*, to remove all doors from the interior of the house to enable plaintiff, who uses a wheelchair, easier access to the rooms], even though plaintiff intended to make this accommodation at his/her own expense and _____ [*include facts indicating agreement to restore the premises to the premodification condition on vacating the premises, e.g.*, agreed to rehang all doors when she moved].

[*OR*]

7. Defendant agreed to rent the housing accommodation, but denied plaintiff's request for _____ [*specify reasonable accommodation in rules, policies, practices, or services necessary to afford plaintiff full enjoyment of the premises, e.g.*, permission to park a van in the parking spot assigned to his unit, because of a rule prohibiting vans in the covered parking structure, even though plaintiff, who uses a wheelchair, must drive a van to accommodate his wheelchair].

[*CONTINUE*]

8. Plaintiff filed a complaint with the Department of Fair Employment and Housing pursuant to *Government Code*

Section 12980(a) on _____ [*date*], but _____ [after 100 days, plaintiff's complaint had not been resolved and the Department had not issued a written accusation against defendants *or* within 100 days, the Department determined not to issue a formal complaint against defendants].

9. At all times herein mentioned, plaintiff was [a person of] _____ [*specify characteristic protected from discrimination, e.g.*, the black race *or* Chinese ancestry *or* the female sex *or* unmarried].

10. [Plaintiff is informed and believes and thereon alleges that] [D]efendants' actions in response to plaintiff's _____ [offer *or* offer to negotiate] was because of plaintiff's _____ [race *or* color *or* religion *or* sex *or* sexual orientation, *or* marital status *or* national origin *or* ancestry *or* familial status *or* source of income *or* disability].

11. Defendant's wrongful conduct is continuing in that defendants _____ [*specify actions constituting continuing wrongful conduct as alleged above*].

12. Unless defendant _____ [*name*] is restrained by a preliminary and permanent injunction of this court, plaintiff's injury will be great and irreparable. Plaintiff has no plain, speedy, and adequate remedy at law because the housing accommodations at _____ [*street address*], _____ [*city*], California, that plaintiff offered to _____ [rent *or* purchase] from defendants and that defendants refused and still refuse to _____ [rent *or* sell] to plaintiff will be _____ [rented *or* sold] to others to the exclusion of plaintiff.

13. _____ [*Set forth any actual damages sustained as a proximate result of defendants' action*.]

[14. The above-recited actions of defendant(s) were done with malice, fraud, or oppression, and in reckless disregard of the plaintiff's rights. Specifically, _____ (*set forth facts showing malice, fraud, or oppression, within the meaning of Civ. Code § 3294*).]

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

1. For general damages [in the sum of $_____];

[2. For special damages _____ (in the sum of $_____ *or* according to proof);]

3. For attorney's fees pursuant to *Government Code Section 12980(h)*;

[4. For punitive damages;]

5. For a preliminary injunction and a permanent injunction enjoining defendants and defendants' agents, servants, and employees and all persons acting under, in concert with, or for defendants, from _____ [*specify, e.g.*, disposing of the housing accommodation to any other person];

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.

_____ [*date*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a plaintiff in an action for damages and preliminary and permanent injunctive relief for violation of the California Fair Employment and Housing Act based on refusal to rent or sell a housing accommodation [*see Gov. Code §§ 12927(c), 12955(a), 12980(h)*]. The complaint is for use after the Department of Fair Employment and Housing (DFEH) declines to issue an accusation [*see Gov. Code § 12980(h)*].

With appropriate modifications, this form may be used in either of the following circumstances [*see Gov. Code §§ 12989, 12989.1*]:

- When the action is the result of the complainant's election to have the complaint judicially adjudicated rather than resolved through the administrative proceeding; or

- When the action is filed in lieu of filing a complaint with the Department of Fair Employment and Housing (DFEH).

[3] Allegations

The complaint in [1], *above*, alleges all of the following:

- The defendant's capacity and basis for venue (Paragraph 1 and Optional Paragraph 2) [*see Gov. Code § 12980(h)*].

- Facts showing that the defendant is subject to the Fair Employment and Housing Act (Paragraph 3) [*see Gov. Code § 12927(d), (e)*].

- An optional fictitious name ("DOE") allegation (Optional Paragraph 4) [*see* Civ. Code § 474; *see also* Ch. 20, *Allegations Commonly Used*].

- An agency allegation (Paragraph 5) [*see* Ch. 427, *Principal and Agent*].

- Facts showing the nature of the defendants' wrongful conduct (Paragraph 6 and alternative versions of Paragraph 7) [*see Gov. Code §§ 12927(c), 12955(a)*].

- Facts showing the plaintiff's compliance with jurisdictional requirements (Paragraph 8) [*see Gov. Code § 12980(a), (h)*].

- Any characteristics of the plaintiff that are protected (Paragraph 9) [*see Gov. Code § 12955(a)*].

- The relationship between the defendants' wrongful conduct and the plaintiff's protected characteristics (Paragraph 10).

- The continuing nature of the defendants' wrongful conduct (Paragraph 11).

- Facts showing why the plaintiff lacks an adequate remedy at law and that the plaintiff will suffer great and irreparable injury (Paragraph 12) [*Civ. Code § 3422(1)-(3)*; *Code Civ. Proc. § 526(a)(2)-(6)*; *see Wind v. Herbert (1960) 186 Cal. App. 2d 276, 285, 8 Cal. Rptr. 817]* .

- Any damages incurred by the plaintiff (Paragraph 13) [*see Civ. Code § 3333*].

- An optional allegation that the actions of the defendants were done with malice, fraud, or oppression, and in reckless disregard of the plaintiff's rights (Optional Paragraph 14). This optional allegation, if appropriate under the circumstances, would support recovery of punitive damages [*see Civ. Code § 3294*].

[4] Prayer

Other than an award of attorney's fees, *Gov. Code § 12980(h)* does not state what remedies the court may provide. The complaint in [1], *above*, assumes that damages provided by *Civ. Code §§ 3294* and *3333* for breach of an obligation not arising from contract apply to this cause of action. If, however, the court is limited to the remedial powers of the Fair Employment and Housing Commission stated in *Gov. Code § 12987*, then recovery is limited to actual damages, a civil penalty, and reasonable attorney's fees and costs.

[5] Temporary Restraining Order

If a temporary restraining order is sought without notice, it must be shown either by verified complaint or by affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) that great or irreparable injury would result to the applicant before the matter can be heard on notice. The plaintiff's attorney is also required to certify under oath that certain steps were taken and reasons existed for the lack of formal notice [*see Code Civ. Proc. § 527(a)*; *see also Cal. Rules of Ct., Rule 3.1204(b)*]. If a temporary restraining order is granted, it will issue with an order to show cause, on the hearing of which the court will determine whether to grant a preliminary injunction [*see Code Civ. Proc. § 527(a)*]. For further discussion and forms regarding temporary restraining orders, see Ch. 303, *Injunctions* .

[6] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d*

369, 373, 106 P.2d 1 ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . Otherwise, verification is not required.

For discussion, a procedural checklist, and forms necessary to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

Verification of the complaint requires the defendant to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446*] and precludes a general denial in superior court and some limited civil cases [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[7] Statute of Limitations

An aggrieved person may bring a civil action against the respondent when DFEH declines to issue an accusation. The action must be brought within the time period specified in *Gov. Code § 12989.1* [*Gov. Code § 12980(h)*; for discussion of *Gov. Code § 12989.1, see § 117.17[3]*].

[8] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For discussion and forms relating to amendment of pleadings for use when an unknown defendant is sued under a fictitious name, see Ch. 21, *Amended and Supplemental Pleadings*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages, see Ch. 177, *Damages*

For discussion and forms relating to temporary restraining orders, preliminary injunctions, and permanent injunctions, see Ch. 303, *Injunctions*

For discussion of jurisdiction in California courts, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For forms of allegations of infliction of emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons, see Ch. 518, *Service of Summons and Papers*

For forms of allegations establishing venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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PART IV. FORMS
A. Complaint and Allegations in State Court

11-117 California Forms of Pleading and Practice--Annotated § 117.81

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§ 117.81 Allegations for Use in Complaints for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Refusal of Realtors, and Contractors or Condominium Association, to Rent or Sell

[1] FORM Allegations for Use in Complaints for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Refusal of Realtors, and Contractors or Condominium Association, to Rent or Sell

1. At all times herein mentioned, defendants _____ [*names*] were real estate brokers with offices at _____ [*street address*], _____ [*city*], California, and their services as real estate brokers were retained to _____ [rent *or* sell] the premises at _____ [*street address*], _____ [*city*], California.

[2. At all times herein mentioned, defendants _____ (*names of contractors or condominium association*) maintained, operated, and controlled a business establishment within California for the (rental *or* sale) of housing accommodations in a _____ (tract *or* development) known as _____ (*name*) in _____ (*city*), California, and offered _____ (houses *or* condominiums) for _____ (rent *or* sale) to the public.]

[*EITHER, if alleging discrimination by brokers only*]

3. Defendants _____ [*names of real estate brokers*], as real estate brokers, were authorized and empowered to render their services to plaintiff and all members of the public in connection with the _____ [rental *or* sale *or* offering for rent or sale] of the above-specified premises. Prior to and on _____ [*date*], plaintiff sought and requested the services of defendants to procure for plaintiff the possession of those premises as _____ [tenant *or* purchaser] on the terms and conditions on which those premises were offered for _____ [occupancy *or* sale]. On _____ [*date*], defendants, and each of them, refused plaintiff their services and refused to _____ [rent *or* sell] to plaintiff or to arrange for plaintiff to _____ [rent *or* buy] those premises _____ [*if the discriminatory act was not the refusal to rent or sell to plaintiff, but the imposition of additional conditions or requirements, specify, e.g.*, unless plaintiff paid a security deposit of 10 times the amount of the monthly rent].

[*OR, if alleging discrimination by brokers as agents*]

3. Defendants _____ [*names of real estate brokers*], as real estate brokers, at all times herein mentioned, were engaged in the business of real estate brokers, were the agents and employees of defendants _____ [*names of contractors or condominium association*], and were acting in the course and scope of their authority as such and pursuant to the instructions given to them. On _____ [*date*], defendants, and each of them, refused plaintiff their services and refused to _____ [rent *or* sell] to plaintiff or to arrange for plaintiff to _____ [rent *or* buy] those premises _____ [*if the discriminatory act was not the refusal to rent or sell to plaintiff, but the imposition of additional conditions or requirements, specify, e.g.*, unless plaintiff paid a security deposit of 10 times the amount of the monthly rent].

[2] Use of Form

The allegations in [1], *above*, are for use by a plaintiff in an action for damages for violation of the Unruh Civil Rights Act because of discrimination by a real estate broker in refusing to rent or sell [*Civ. Code § 51*]. These allegations may be used in conjunction with the form complaint in Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.80 (Complaint for Damages and Preliminary and Permanent Injunction for Violation of Unruh Civil Rights Act--General Form).

Optional Paragraph 2 is for use when the real estate broker is acting as the agent of a contractor or condominium association. The alternative forms of Paragraph 3 are for use to allege discrimination by brokers only or by brokers who are acting as agents.

[3] Application of Unruh Civil Rights Act

Although the California Fair Employment and Housing Act (FEHA) (*Gov. Code § 12900 et seq.*) prohibits housing discrimination and provides for proceedings before the Fair Employment and Housing Commission in cases of alleged housing violations, nothing contained in FEHA is construed to limit or restrict, in any manner or way, the application of the Unruh Civil Rights Act [*Gov. Code § 12993(c)*].

Although *Civ. Code § 51(b)* prohibits discrimination on the basis of disability, the Unruh Civil Rights Act does not require construction, alteration, repair (structural or otherwise), or modification of any sort whatsoever to any new or existing establishment, facility, building, improvement, or any other structure, beyond construction, alteration, repair, or modification that is otherwise required by other provisions of law [*Civ. Code § 51(d)*].

[4] Cross References

For a general form of complaint under the Unruh Act, see *Ch. 116, Civil Rights: Discrimination in Business Establishments, § 116.80*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

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Chapter 117 CIVIL RIGHTS: HOUSING DISCRIMINATION
PART IV. FORMS
A. Complaint and Allegations in State Court

11-117 California Forms of Pleading and Practice--Annotated § 117.82

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§ 117.82 Allegations for Use in Complaints for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Exclusion or Expulsion From Apartment Complex or Condominium Association

[1] FORM Allegations for Use in Complaints for Violation of Unruh Civil Rights Act [Civ. Code § 51]--Exclusion or Expulsion From Apartment Complex or Condominium Association

1. At all times herein mentioned, defendant was the _____ [owner *or* association of owners] of _____ [*name of apartment complex or description of real property, or name of condominium association*], a business establishment engaged in the business of _____ [renting and managing apartments to *or* maintaining and managing condominium units for] members of the public.

[*EITHER*]

2. On or about _____ [*date*], plaintiff made application with defendant to _____ [rent *or* buy] a(n) _____ [apartment *or* condominium unit] located at _____ [*street address*], _____ [*city*], California.

3. _____ [Tenancy *or* Ownership] in defendant's [apartments *or* condominium units] at _____ [*street address*], _____ [*city*], California, is restricted _____ [*describe discriminatory restriction in contravention of Unruh Act, e.g.*, to persons 21 years of age or older].

[*OR*]

2. From _____ [*date*] until _____ [*date*], plaintiff lived in the _____ [apartment *or* condominium units] located at _____ [*street address*], _____ [*city*], California.

3. On _____ [*date*], defendant _____ [*name of owner or association of owners*] placed a restriction on all _____ [apartments *or* condominium units] at _____ [*street address*], _____ [*city*], California, restricting the _____ [rental *or* ownership] of all _____ [apartments *or* condominium units] to _____ [*describe discriminatory restriction in contravention of Unruh Act, e.g.*, all persons 21 years of age or older].

[*CONTINUE*]

4. The restriction placed on the above-mentioned _____ [apartments *or* condominium units] discriminated against plaintiff in that _____ [*specify, e.g.*, plaintiff has children aged seven and nine], causing plaintiff to be _____ [excluded *or* expelled] from living in the above-mentioned _____ [apartment *or* condominium unit].

[2] Use of Form

The allegations in [1], *above*, are for use by a plaintiff in an action for damages for violation of the Unruh Civil Rights Act based on prohibited discrimination by an apartment owner or condominium owners' association [*see Civ. Code § 51*; *O'Connor v. Village Green Owners Ass'n (1983) 33 Cal. 3d 790, 795-797, 191 Cal. Rptr. 320, 662 P.2d 427* ; *Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 731, 180 Cal. Rptr. 496, 640 P.2d 115* , *cert. denied*, *459 U.S. 858]* .

The allegations set forth that the defendant is a business establishment within the meaning of the Unruh Act (Paragraph 1), and that the plaintiff was expelled or excluded from the apartment complex or condominium because of defendant's imposition of an arbitrary and discriminatory restriction (Paragraphs 2-4).

These allegations may be used in conjunction with the *form in Ch. 116, Civil Rights: Discrimination in Business Establishments, § 116.80* (Complaint for Damages and Preliminary and Permanent Injunction for Violation of Unruh Civil Rights Act--General Form).

[3] Cross References

For a general form of complaint under the Unruh Act, see *Ch. 116, Civil Rights: Discrimination in Business Establishments, § 116.80*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

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PART IV. FORMS
A. Complaint and Allegations in State Court

11-117 California Forms of Pleading and Practice--Annotated §§ 117.83-117.89

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[Reserved]

§§ 117.83[Reserved]

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B. Complaint and Allegations in Federal Court

11-117 California Forms of Pleading and Practice--Annotated § 117.90

AUTHOR: Dennis M. Farias Revision Author Dennis M. Farias is a graduate of the University of Colorado School of Law, and an attorney licensed in California, Colorado, and Nevada. He has practiced extensively in the field of civil rights law. Mr. Farias is a staff attorney for the United States District Court for the District of Nevada, assisting the court primarily with civil rights and habeas corpus cases. John H. Scott Editorial Consultant John Houston Scott graduated from Suffield Academy, Suffield, Connecticut in 1966. In 1970 he received a Bachelor's Degree from the University of California at Santa Barbara, majoring in Religious Studies. He graduated from Golden Gate University School of Law in 1976. Mr. Scott has been in private practice in San Francisco since 1977 specializing in civil rights litigation with an emphasis on police misconduct, prisoner and patient rights issues, and employment discrimination. He is currently a partner in the law firm of Prentice & Scott, 433 Turk Street, San Francisco, California, 94102. He has tried in excess of 100 cases to verdict throughout the State of California. In addition, he has been attorney of record in a variety of published decisions in both state and federal courts.

§ 117.90 Complaint in United States District Court for Damages and Injunction for Violation of Federal Fair Housing Act--Discrimination in Sale or Rental of Housing [42 U.S.C. § 3604(a), (b)]

[1] FORM Complaint in United States District Court for Damages and Injunction for Violation of Federal Fair Housing Act--Discrimination in Sale or Rental of Housing [42 U.S.C. § 3604(a), (b)]

UNITED STATES DISTRICT COURT,
_____ DISTRICT OF CALIFORNIA

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], Defendant(s).	)	COMPLAINT AND DEMAND FOR JURY TRIAL
	)	(Federal Fair Housing Act) [*42 U.S.C. §§ 3604(a), (b), 3613(a),* (c)]
	)	

_____

DEMAND FOR JURY TRIAL

Plaintiff alleges:

[1. This is an action for racial discrimination in housing brought pursuant to Title VIII of the Civil Rights Act of 1968, as amended and set forth in *42 United States Code Section 3604*, for remedies for housing discrimination against plaintiff because of plaintiff's _____ (*allege prohibited basis for discrimination under Title VIII, e.g.*, race) by defendant(s) _____ (*name(s)*). Plaintiff _____ (*name*) alleges that defendant(s) _____ (has *or* have) (*allege adverse housing action, e.g.*, denied housing) to plaintiff because of _____ (*specify protected characteristic, e.g.*, her race). By this action plaintiff seeks all legal and equitable relief to which he/she may be entitled, including, but not limited to compensatory and punitive damages, attorney's fees and costs, prejudgment interest, and injunctive relief against defendant(s) _____ (*name(s)*).]

2. Plaintiff _____ [*name*] is _____ [*specify race, color, religion, sex, familial status, or national origin, e.g.*, a member of the black race].

3. Plaintiff is an adult person who resides in the County of _____, State of California.

4. Defendant _____ [*name*] is, and at all times herein mentioned was, _____ [*specify capacity, e.g.*, a corporation], engaged in the business of _____ [*specify, e.g.*, constructing and selling homes]. Defendant _____ [*name*] is, and at all times herein mentioned was, _____ [*specify, e.g.*, vice-president and sales manager] of defendant _____ [*name*].

5. On or about _____ [*date*], defendant _____ [*name*] had possession, as _____ [*specify, e.g.*, owner], of the dwelling located at _____ [*street address*], _____ [*city*], California. The dwelling was vacant and was being offered for _____ [sale *or* rental] on the following terms and conditions: _____ [*specify terms*].

6. On or about _____ [*date*], plaintiff _____ [made a bona fide offer *or* offered to negotiate] to _____ [buy *or* rent] the above-described dwelling. The offer was made to defendant _____ [*name*] in the following manner: _____ [*specify*].

7. Jurisdiction of the subject matter of this action is established in this court under Title VIII of the Civil Rights Act of 1968, as amended and set forth in *42 United States Code Section 3613(a)*.

[*EITHER*]

8. Plaintiff's offer was refused by defendants and defendants made the dwelling unavailable to plaintiff and denied plaintiff all opportunity to _____ [buy *or* rent] the dwelling.

[*OR*]

8. Defendants responded to plaintiff's offer by imposing the following terms and conditions on, and by restricting the

following privileges in, the transaction: _____ [*specify*].

[*OR*]

8. Defendants responded to plaintiff's offer by restricting and denying the following services and facilities in connection with residing in that dwelling as _____ [an owner *or* a tenant]: _____ [*specify*].

[*CONTINUE*]

9. Defendants' treatment of plaintiff in _____ [refusing to deal with him/her *or* imposing additional terms and conditions in the transaction *or* denying services and facilities related to the residence] was discriminatory because it was based on plaintiff's _____ [*specify protected characteristic, e.g.*, race].

10. As a proximate result of defendants' action against plaintiff, as alleged above, plaintiff has been harmed in that plaintiff _____ [*specify damages incurred, e.g.*, has been forced to reside in a city 50 miles from where she works, and has been forced to pay a higher rent and suffered commuting costs]. As a result of such discrimination and consequent harm, plaintiff has suffered damages _____ [in the amount of $_____ *or* in an amount according to proof].

[11. As a further proximate result of defendant's discriminatory action against plaintiff, as alleged above, plaintiff has been harmed in that plaintiff has suffered _____ (*specify any special damages incurred*). As a result of such discrimination and consequent harm, plaintiff has suffered damages _____ (in the amount of $_____ *or* in an amount according to proof).]

[12. As a further proximate result of defendant's discriminatory action against plaintiff, as alleged above, plaintiff has been harmed in that plaintiff has suffered humiliation, mental anguish, and emotional and physical distress, and has been injured in mind (and body) as follows: _____ (*describe injury*). As a result of such discrimination and consequent harm, plaintiff has suffered damages _____ (in the amount of $_____ *or* in an amount according to proof).]

[13. The above-recited action of defendant in _____ (*specify e.g.*, denying plaintiff housing) was done with malice, fraud, oppression, or in reckless disregard of the rights of plaintiff under *42 United States Code Section 3604*. Specifically, _____ (*set forth all facts on which the claim of malice, fraud, oppression, or reckless disregard is based*).]

[14. No adequate remedy exists at law for the injuries suffered by plaintiff herein, insofar as the housing opportunity that defendant has denied to plaintiff cannot be secured absent injunctive relief. If this court does not grant injunctive relief of the type and for the purpose specified below, plaintiff will suffer irreparable injury. Therefore, plaintiff requests the following injunctive relief: _____ (*specify nature and extent of injunctive relief sought, e.g.*, that defendant be restrained from selling the above described dwelling to anyone other than plaintiff, and be ordered to accept plaintiff's offer, which complies with all of the defendants' requirements and on which plaintiff remains ready, willing, and able to perform).]

WHEREFORE, plaintiff requests judgment as follows:

1. For general damages _____ [in the amount of $_____ *or* in an amount according to proof];

[2. For special damages _____ (in the amount of $_____ *or* in an amount according to proof);]

[3. For punitive damages in an amount appropriate to punish defendants for their wrongful conduct and set an example for others;]

[4. For injunctive relief as specified in Paragraph 14, above;]

5. For reasonable attorney's fees pursuant to *42 United States Code Section 3613(c)*;

6. For costs of suit herein incurred pursuant to *42 United States Code Section 3613(c)*; and

7. For such other and further relief as the court deems proper.

_____ [*date*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

DEMAND FOR JURY TRIAL

Plaintiff _____ [*name*] hereby demands a jury trial.

_____ [*date*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a plaintiff in an action for damages and preliminary and permanent injunction for violation of the federal Fair Housing Act (FHA) (*42 U.S.C. § 3601 et seq.*) based on discrimination in the sale or rental of housing [*see 42 U.S.C. § 3604(a), (b)*].

No action may be commenced once a hearing has commenced on a charge issued by the Department of Housing and

Urban Development (HUD) [*42 U.S.C. § 3613(a)(3)*].

Although actual and punitive damages, as well as permanent and temporary injunctive relief, are available, any relief granted will not affect any contract, sale, encumbrance, or lease consummated before the granting of that relief and involving a bona fide purchaser, encumbrancer, or tenant, without actual notice of the filing of an administrative complaint or a civil action [*42 U.S.C. § 3613(c)(1), (d)*].

[3] Allegations

The form of complaint in [1], *above*, contains all of the following:

- An introductory paragraph stating generally the substance of the complaint (Paragraph 1).

- The identity, protected characteristic, and residence of the plaintiff (Paragraphs 2 and 3), and the identity and capacity of the defendant (Paragraph 4) [*see 42 U.S.C. § 3604(a), (b)*].

- The factual background of the discrimination (Paragraphs 5 and 6) [*see 42 U.S.C. §§ 3603(a)(2), 3604(a), (b)*].

- The federal court's jurisdiction (Paragraph 7) [*Fed. R. Civ. P., Rule 8(a)*].

- The defendant's discriminatory conduct (alternative forms of Paragraphs 8) [*see 42 U.S.C. § 3604(a), (b)*].

- The relationship between the conduct and the plaintiff's protected characteristics (Paragraph 9).

- Actual damages incurred by the plaintiff (Paragraph 10) [*see 42 U.S.C. § 3613(c)(1)*].

- Optional paragraphs to allege special damages, emotional distress, and physical injury (Optional Paragraphs 11 and 12) [*see 42 U.S.C. § 3613(c)(1)*].

- The plaintiff's right to punitive damages (Optional Paragraph 13) [*see 42 U.S.C. § 3613(c)(1)*].

- Facts showing that the plaintiff is entitled to injunctive relief (Optional Paragraph 14) [*see 42 U.S.C. § 3613(c)(1)*].

[4] Prayer

The prayer in the form complaint in [1], *above*, seeks preliminary and permanent injunctive relief. The prayer also seeks recovery of compensatory damages, including special damages, and damages for emotional distress and physical injury.

The complaint in [1], *above*, also includes an optional prayer for punitive damages. In a case when the violation of plaintiff's rights was motivated by evil motive or intent, or involved reckless or callous indifference to the plaintiff's federally protected rights [*see Smith v. Wade (1983) 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632* (*42 U.S.C. § 1983* case)], punitive damages would be recoverable. If the facts do not involve evil motive or intent, or reckless or callous indifference to the plaintiff's federally protected rights, the optional punitive damages allegation (Optional Paragraph 13) and the optional prayer for punitive damages should not be used.

Moreover, the prayer includes a prayer for attorney's fees. *42 U.S.C. § 3613(c)* specifically provides for the recovery of attorney's fees in FHA cases.

[5] Statute of Limitations

When based on an alleged discriminatory housing practice, an action based on the FHA must be brought no later than two years after the occurrence or the termination of that practice [*42 U.S.C. § 3613(a)(1)(A)*]. The two-year period does not include any time during which a related administrative proceeding is pending [*42 U.S.C. § 3613(a)(1)(B)* (not applicable to action arising from breach of conciliation agreement)].

If the action is based on breach of a conciliation agreement, the action must be filed no later than two years after the breach [*42 U.S.C. § 3613(a)(1)(A)*]. In that case, the purpose of the action must be to enforce the terms of that agreement [*42 U.S.C. § 3613(a)(2)*].

[6] Jurisdiction and Venue

The action may be brought in an appropriate federal district court or state court [*42 U.S.C. § 3613(a)(1)(A)*].

The form of complaint in [1], *above*, is for use in a federal district court; if the complaint is filed in a state court, the caption must be modified, and Paragraph 7 and the demand for a jury trial should be deleted.

[7] Cross References

For alternative forms of allegations for use in Fair Housing Act complaints, see *§§ 117.91 -117.95*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms of jurisdictional allegations for use in federal court, and for discussion and forms relating to removal of actions to federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For alternative forms of prayers, see Ch. 420, *Prayers*

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11-117 California Forms of Pleading and Practice--Annotated § 117.91

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§ 117.91 Allegations for Use in Complaints for Violation of Federal Fair Housing Act [42 U.S.C. §§ 3604-3606]--Discrimination in Advertising [42 U.S.C. § 3604(c)]

[1] FORM Allegations for Use in Complaints for Violation of the Federal Fair Housing Act [42 U.S.C. §§ 3604-3606]--Discrimination in Advertising [42 U.S.C. § 3604(c)]

1. On or about _____ [*date*], defendant _____ [*name*] [caused to be] _____ [made *or* printed *or* published] a _____ [notice *or* statement *or* advertisement] with respect to the _____ [sale *or* rental] of the above-described dwelling that indicated [an intention to make] a _____ [preference *or* limitation *or* discrimination] based on _____ [race *or* color *or* religion *or* sex *or* handicap *or* familial status *or* national origin]. A copy of the _____ [notice *or* statement *or* advertisement] is attached hereto as Exhibit A and made a part hereof.

2. The _____ [preference *or* limitation *or* discrimination] is applicable only to persons of plaintiff's _____ [race *or* color *or* religion *or* sex *or* handicap *or* familial status *or* national origin] in that _____ [*specify*].

[2] Use of Form

The form allegations in [1], *above*, are for use by a plaintiff in an action for damages and injunctive relief for violation of the federal Fair Housing Act (FHA) (*42 U.S.C. § 3601 et seq.*) based on discrimination in advertising [*42 U.S.C. § 3604(c)*]. These allegations may be substituted for Paragraphs 6 and 8 in the form complaint at § 117.90.

If the allegations include someone other than the owner as committing the unlawful discrimination (for example, a newspaper company), an additional paragraph identifying that defendant should be added.

The scope of *42 U.S.C. § 3604(c)* is wider than *42 U.S.C. § 3604(a)* and *(b)* in that it includes handicap as a protected characteristic. "Handicap" is defined in *42 U.S.C. § 3602(h)*. If the complaint alleges discrimination on the basis of handicap, Paragraphs 2 and 9 in the form of complaint in § 117.90 should specify that as the protected characteristic.

[3] Cross References

For a general form of complaint under the Fair Housing Act, see *§ 117.90*

For alternative forms of allegations for use in Fair Housing Act complaints, see *§§ 117.92 -117.95*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

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11-117 California Forms of Pleading and Practice--Annotated § 117.92

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§ 117.92 Allegations for Use in Complaints for Violation of the Federal Fair Housing Act [42 U.S.C. §§ 3604-3606]--Discrimination by False Representation That Building Is Not Available [42 U.S.C. § 3604(d)]

[1] FORM Allegations for Use in Complaints for Violation of Federal Fair Housing Act [42 U.S.C. §§ 3604-3606]--Discrimination by False Representation That Building Is Not Available [42 U.S.C. § 3604(d)]

1. On or about _____ [*date*], plaintiff _____ [*specify action of plaintiff that led to false representation, e.g.*, went to defendant's office, stated an interest in _____ (renting *or* purchasing) the dwelling, and requested that he/she be allowed to inspect it].

2. Defendant _____ [*name*] then stated and represented to plaintiff that the dwelling was not available for inspection and _____ [rental *or* sale] when in fact the dwelling was then available.

[2] Use of Form

The form allegations in [1], *above*, are for use by a plaintiff in an action for damages and injunctive relief for violation of the federal Fair Housing Act (FHA) (*42 U.S.C. § 3601 et seq.*) based on discrimination by false representations that a dwelling is not available for inspection, sale, or rental. These allegations may be substituted for Paragraphs 6 and 8 in

the form of complaint in § 117.90.

The scope of *42 U.S.C. § 3604(d)* is wider than *42 U.S.C. § 3604(a)* and *(b)* in that it includes handicap as a protected characteristic. "Handicap" is defined in *42 U.S.C. § 3602(h)*. If the complaint alleges discrimination on the basis of handicap, Paragraphs 2 and 9 in the form of complaint in § 117.90 should specify that as the protected characteristic.

[3] Cross References

For a general form of complaint under the Fair Housing Act, see *§ 117.90*

For alternative forms of allegations for use in Fair Housing Act complaints, see *§§ 117.91*, *117.93 -117.95*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

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11-117 California Forms of Pleading and Practice--Annotated § 117.93

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§ 117.93 Allegations for Use in Complaints for Violation of Federal Fair Housing Act [42 U.S.C. §§ 3604-3606]--Discrimination by Inducing Sale or Rental Based on Representation That Persons of Particular Characteristic Moving Into Neighborhood [42 U.S.C. § 3604(e)]

[1] FORM Allegations for Use in Complaints for Violation of the Federal Fair Housing Act [42 U.S.C. §§ 3604-3606]--Discrimination by Inducing Sale or Rental Based on Representation That Persons of Particular Characteristic Moving Into Neighborhood [42 U.S.C. § 3604(e)]

1. Defendant _____ [*name*] is, and at all times herein mentioned was, _____ [*specify capacity, e.g.*, a corporation] engaged in the business of _____ [*specify, e.g.*, real estate brokerage]. Defendant _____ [*name*] is, and all times herein mentioned was, _____ [*specify, e.g.*, vice-president and sales manager] of defendant _____ [*name*].

2. Plaintiff is _____ [*specify plaintiff's interest in property, e.g.*, the owner] of _____ [*specify neighborhood, e.g.*, the residence at _____ (*street address*), within the neighborhood commonly known as Bernal Heights] in _____ [*city*], California.

3. From about _____ [*date*] to the present, defendant _____ [*name*], for profit, has repeatedly [attempted to] induce[d] _____ [*specify third person, e.g.*, homeowner *or* real estate broker *or* real estate agent] to _____ [sell *or* rent] dwellings in the aforementioned neighborhood by representations regarding the [prospective] entry of persons _____ [*specify particular characteristic protected from discrimination, e.g.*, of the black race *or* of the Jewish religion *or* of the female sex *or* confined to a wheelchair *or* who are unmarried *or* of Chinese ancestry] into that neighborhood.

4. The aforementioned representations made by defendant to _____ [*specify third persons, e.g.*, homeowners *or* real estate brokers *or* real estate agents] are discriminatory because the representations pertain only to persons of a particular _____ [*specify, e.g.*, race *or* color *or* religion *or* sex *or* handicap *or* familial status *or* national origin], and because _____ [*specify, e.g.*, when the _____ (*specify third person to whom the representation is made, e.g.*, homeowner) is of the white race, defendant represents that persons of _____ (*specify protected characteristic of persons is different, e.g.*, the black race) are entering the neighborhood].

[2] Use of Form

The form allegations in [1], *above*, are for use by a plaintiff in an action for damages and injunctive relief for violation of the federal Fair Housing Act (FHA) (*42 U.S.C. § 3601 et seq.*) based on discrimination by inducing individuals, for profit, to sell or rent their dwellings through representations regarding the entry into the neighborhood of persons with protected characteristics [*42 U.S.C. § 3604(e)*]. These allegations may be substituted for Paragraphs 2-6, 8, and 9 in the form of complaint in § 117.90.

The scope of *42 U.S.C. § 3604(e)* is wider than *42 U.S.C. § 3604(a)* and *(b)* in that it includes handicap as a protected characteristic. "Handicap" is defined in *42 U.S.C. § 3602(h)*.

[3] Cross References

For a general form of complaint under the Fair Housing Act, see *§ 117.90*

For alternative forms of allegations for use in Fair Housing Act complaints, see *§§ 117.91, 117.92, 117.94, 117.95*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

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Chapter 117 CIVIL RIGHTS: HOUSING DISCRIMINATION
PART IV. FORMS
B. Complaint and Allegations in Federal Court

11-117 California Forms of Pleading and Practice--Annotated § 117.94

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§ 117.94 Allegations for Use in Complaints for Violation of Federal Fair Housing Act [42 U.S.C. §§ 3604-3606]--Discrimination in Residential Real Estate-Related Transactions [42 U.S.C. § 3605]

[1] FORM Allegations for Use in Complaints for Violation of the Federal Fair Housing Act [42 U.S.C. §§ 3604-3606]--Discrimination in Residential Real Estate-Related Transactions [42 U.S.C. § 3605]

1. Defendant _____ [*name*] is, and at all times herein mentioned was, _____ [*specify capacity, e.g.*, a corporation] engaged in the business of making residential real estate-related transactions. Defendant _____ [*name*] is, and at all times herein mentioned was, _____ [*specify, e.g.*, vice-president and sales manager] of defendant _____ [*name*].

2. On or about _____ [*date*], _____ [*name*] had possession, as _____ [*specify interest in property, e.g.*, owner] of a dwelling located at _____ [*street address*], _____ [*city*], California. The dwelling was vacant and was offered for sale on the following terms and conditions: _____ [*specify terms and conditions*].

3. On or about _____ [*date*], plaintiff made application to defendant _____ [*name*]

for _____ [*specify residential real estate-related transaction, e.g.*, a loan for purchasing the dwelling offered for sale by _____ (*name*)].

[*EITHER*]

4. Plaintiff's application for _____ [*specify residential real estate-related transaction, e.g.*, financial assistance in the form of a loan] was refused by defendants and plaintiff was _____ [*specify result of defendants' refusal, e.g.*, denied all opportunity to purchase the dwelling].

[*OR*]

4. Defendants responded to plaintiff's application by imposing the following terms and conditions on the _____ [*specify residential real estate-related transaction, e.g.*, loan]: _____ [*specify*].

[*CONTINUE*]

5. Defendants' treatment of plaintiff in _____ [refusing to deal with him/her *or* imposing additional terms and conditions in the transaction] was discriminatory because it was based on plaintiff's _____ [*specify protected characteristic, e.g.*, handicap].

[2] Use of Form

The form allegations in [1], *above*, are for use by a plaintiff in an action for damages and injunctive relief for violation of the federal Fair Housing Act (FHA) (*42 U.S.C. § 3601 et seq.*) based on discrimination in a residential real estate-related transaction [*42 U.S.C. § 3605*; *see 42 U.S.C. § 3605(b)* ("residential real estate-related transaction" defined)]. These allegations may be substituted for Paragraphs 4-6, 8, and 9 in the form of complaint in § 117.90.

The scope of *42 U.S.C. § 3605* is wider than *42 U.S.C. § 3604(a)* and *(b)* in that it includes handicap as a protected characteristic. "Handicap" is defined in *42 U.S.C. § 3602(h)*.

[3] Cross References

For a general form of complaint under the Fair Housing Act, see *§ 117.90*

For alternative forms of allegations for use in Fair Housing Act complaints, see *§§ 117.91 -117.93, 117.95*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

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11-117 California Forms of Pleading and Practice--Annotated § 117.95

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§ 117.95 Allegations for Use in Complaints for Violation of Federal Fair Housing Act [42 U.S.C. §§ 3604-3606]--Discrimination in Brokerage Services [42 U.S.C. § 3606]

[1] FORM Allegations for Use in Complaints for Violation of the Federal Fair Housing Act [42 U.S.C. §§ 3604-3606]--Discrimination in Brokerage Services [42 U.S.C. § 3606]

1. Defendant _____ [*name*] is, and at all times herein mentioned was, _____ [*specify capacity, e.g.,* a corporation] engaged in the business of _____ [*specify service relating to the business of selling or renting dwellings, e.g.,* multiple listing services *or* real estate brokerage]. Defendant _____ [*name*] is, and at all times herein mentioned was, _____ [*specify, e.g.,* vice-president and sales manager of defendant (*name*)].

2. On or about _____ [*date*], defendant _____ [*name*] operated _____ [*specify service, e.g.,* a multiple listing service that included dwellings for sale or rental in the city of Elderwood, California].

3. On or about _____ [*date*], plaintiff made application for _____ [access to *or*

membership in *or* participation in] defendant's _____ [*specify service, e.g.*, multiple listing service] for the purpose of seeking information concerning the _____ [*specify, e.g.*, possible _____ (sale *or* rental) of a home].

[*EITHER*]

4. Plaintiff's application for _____ [access to *or* membership in *or* participation in] defendant's _____ [*specify service, e.g.*, multiple listing service] was refused in that _____ [*specify acts of defendant refusing plaintiff access to the service*].

[*OR*]

4. Plaintiff's application for _____ [access to *or* membership in *or* participation in] defendant's _____ [*specify service, e.g.*, multiple listing service] was accepted with the following restrictions in connection with the service: _____ [*specify terms or conditions of such access, membership, or participation*].

[2] Use of Form

The form allegations in [1], *above*, are for use by a plaintiff in an action for damages and injunctive relief for violation of the federal Fair Housing Act (FHA) (*42 U.S.C. § 3601 et seq.*) based on discrimination in the provision of brokerage services [*42 U.S.C. § 3606*]. These allegations may be substituted for Paragraphs 3-6 and 8 in the form of complaint in § 117.90.

The scope of *42 U.S.C. § 3606* is wider than *42 U.S.C. § 3604(a)* and *(b)* in that it includes handicap as a protected characteristic. "Handicap" is defined in *42 U.S.C. § 3602(h)*.

[3] Cross References

For a general form of complaint under the Fair Housing Act, see *§ 117.90*

For alternative forms of allegations for use in Fair Housing Act complaints, see *§§ 117.91 -117.94*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

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Chapter 117A CIVIL RIGHTS: INTERFERENCE WITH CIVIL RIGHTS BY THREATS, INTIMIDATION, COERCION, OR VIOLENCE

11-117A California Forms of Pleading and Practice--Annotated 117A.syn

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§ 117A.syn Synopsis to Chapter 117A: CIVIL RIGHTS: INTERFERENCE WITH CIVIL RIGHTS BY THREATS, INTIMIDATION, COERCION, OR VIOLENCE

§ 117A.01 Scope of Chapter

§ 117A.02 Cross References

§§ 117A.03-117A.09 [Reserved]

§ 117A.10 Governing Statutes

§ 117A.11 Interference with Civil Rights By Threats, Intimidation, or Coercion

[1] Civil Remedies

[a] Statutory Provisions

[b] Protected Classes

[c] Damages

[d] State Action Requirement

[e] Elements of Cause of Action

[f] Defenses

[2] Speech as Basis for Action

[3] Injunctions Prohibiting Violation of Civil Code § 52.1

§ 117A.12 Freedom From Intimidation or Violence Because of Protected Characteristics

[1] Civil Remedies

[2] Criminal Penalties

[a] Force or Threat of Force, or Damage to Property, to Intimidate or Interfere with Rights, Because of Protected Characteristics

[b] Other Crimes Committed to Intimidate or Interfere with Rights Because of Protected Characteristics

[i] Application of Penal Code § 422.7

[ii] Proof of Specific Intent to Deprive Individual of Right

[c] Hate Crimes Generally

[d] Penalty Enhancements for Crimes Committed Because of Protected Characteristics

[e] Penalty Enhancements Are Constitutional

§ 117A.13 Standing in Bane Act Cases

§§ 117A.14-117A.29 [Reserved]

§ 117A.30 Related Matthew Bender Publications

§ 117A.31 Federal Constitution

§ 117A.32 State Constitution

§ 117A.33 Federal Statutes

§ 117A.34 State Statutes

§ 117A.34A California Civil Jury Instructions (CACI)

§ 117A.35 Decisions

§ 117A.35A Attorney General Opinions

§ 117A.36 Law Reviews

§ 117A.37 Text References

§§ 117A.38-117A.49 [Reserved]

§ 117A.50 Complaint for Damages and Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction for Interference with Exercise of Civil Rights [Civ. Code § 52.1]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Prayer

[5] Verification

[6] Jurisdiction and Venue

[7] Cross References

§ 117A.51 Order Granting Preliminary Injunction Enjoining Interference with Exercise of Civil Rights [Civ. Code § 52.1]

[1] FORM

[2] Use of Form

[3] Service of Order

[4] Cross References

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FOOTNOTES:
(n31)Footnote *. Dennis M. Farias is a graduate of the University of Colorado School of Law, and an attorney licensed in California, Colorado, and Nevada. He has practiced extensively in the field of civil rights law. Mr. Farias is a staff attorney for the United States District Court for the District of Nevada, assisting the court primarily with civil rights and habeas corpus cases.

(n32)Footnote *. John Houston Scott graduated from Suffield Academy, Suffield, Connecticut in 1966. In 1970 he received a Bachelor's Degree from the University of California at Santa Barbara, majoring in Religious Studies. He graduated from Golden Gate University School of Law in 1976.

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PART I. SCOPE

11-117A California Forms of Pleading and Practice--Annotated § 117A.01

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§ 117A.01 Scope of Chapter

This chapter discusses the interference or threatened interference with the constitutional or statutory rights of another through the use of threats, intimidation, coercion, or violence. This subject is governed by the Tom Bane Civil Rights Act which, in 1987, amended *Civ. Code § 51.7*, and added *Civ. Code § 52.1* and *Penal Code § 422.6 et seq.*

This chapter contains the following forms:

- A form of complaint for damages and temporary restraining order, preliminary injunction, and permanent injunction, for interference with the exercise of civil rights in violation of *Civ. Code § 52.1* [*see § 117A.50*].

- A form of order granting a preliminary injunction enjoining interference with the exercise of civil rights in violation of *Civ. Code § 52.1* [*see § 117A.51*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil Rights LawPractice & ProcedureCriminal PenaltiesCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsCoercionGeneral Overview

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11-117A California Forms of Pleading and Practice--Annotated § 117A.02

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§ 117A.02 Cross References

- For a comprehensive procedural guide that chronologically outlines the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions* .

- For discussion and forms relating to discrimination in government-funded programs and activities, see Ch. 112, *Civil Rights: Government-Funded Programs and Activities* .

- For discussion and forms relating to actions under *42 U.S.C. § 1983*, and the other post-Civil War civil rights statutes (*42 U.S.C. §§ 1981, 1982, 1985, 1986*, and *1988*), see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

- For discussion and forms relating to prisoners' rights, see Ch. 114, *Civil Rights: Prisoners' Rights* .

- For discussion and forms relating to employment discrimination, see Ch. 115, *Civil Rights: Employment Discrimination* .

- For discussion and forms relating to discrimination in business establishments, see Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

- For discussion and forms relating to housing discrimination, see Ch. 117, *Civil Rights: Housing Discrimination* .

- For discussion and forms relating to injunctions, see Ch. 303, *Injunctions* .

- For discussion and forms relating to civil rights actions arising from illegal searches and seizures, see *Ch. 429, Privacy, § 429.310* et seq.

- For discussion of deprivation of civil rights during an administrative investigation, see Ch. 471, *Investigations by Public Agencies* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawConspiracyGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual Relations & HousingProperty Rights (sec. 1982)General OverviewCivil Rights LawContractual Relations & HousingProperty Rights (sec. 1982)Public DiscriminationCivil Rights LawSection 1983 ActionsGeneral Overview

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PART I. SCOPE

11-117A California Forms of Pleading and Practice--Annotated §§ 117A.03-117A.09

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[Reserved]

§§ 117A.03[Reserved]

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PART II. LEGAL BACKGROUND

11-117A California Forms of Pleading and Practice--Annotated § 117A.10

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 117A.10 Governing Statutes

Interference with the constitutional or statutory rights of another through the use of threats, intimidation, coercion, or violence is governed by the Tom Bane Civil Rights Act ("Bane Act"), which is codified at *Civ. Code §§ 51.7* and *52.1*, and *Penal Code § 422.6 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawCivil Rights ActsGeneral OverviewCivil Rights LawPractice & ProcedureCriminal PenaltiesCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsCoercionGeneral Overview

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PART II. LEGAL BACKGROUND

11-117A California Forms of Pleading and Practice--Annotated § 117A.11

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 117A.11 Interference with Civil Rights By Threats, Intimidation, or Coercion

[1] Civil Remedies

[a] Statutory Provisions

If a person or persons, whether or not acting under color of law, interferes or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or rights secured by the Constitution or laws of California, the state Attorney General or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief, in the name of the people of the state of California, to protect the peaceable exercise or enjoyment of those rights [*Civ. Code § 52.1(a)*; *see Olympic Club v. Superior Court (1991) 229 Cal. App. 3d 358, 360-361, 282 Cal. Rptr. 1* (authorization of public attorneys to bring action under *Civ. Code § 52.1* on behalf of people of state of California is indication that enforcement of law should not depend on willingness of individual victims to come forward; victims are often reluctant to become involved for reasons that spring from the very practice of discrimination)]. An action by the Attorney General, a district attorney, or a city attorney may also seek a civil penalty of $25,000, which, if requested, must be assessed individually against each person determined to have violated *Civ. Code § 52.1*. The penalty will be awarded to each individual whose rights under § 52.1 are determined to have been violated [*Civ. Code § 52.1(a)*].

Any individual whose rights are so threatened may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under *Civ. Code § 52*, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise and enjoyment of the rights secured [*Civ. Code § 52.1(b)*]. Nothing in *Civ. Code § 52.1* requires any showing of actual intent to discriminate [*Venegas v. County of Los Angeles (2004) 32 Cal. 4th 820, 841, 11 Cal. Rptr. 3d 692, 87 P.3d 1]* .

An action brought under *Civ. Code § 52.1* is independent of any other action, remedy, or procedure that may be available to an aggrieved individual under any other provision of law, including, but not limited to, an action, remedy, orprocedure brought pursuant to *Civ. Code § 51.7* (regarding freedom from violence) [*Civ. Code § 52.1(g)*].

In addition to any damages, injunction, or other equitable relief awarded in an action under *Civ. Code § 52.1(b)*, the court may award the petitioner or plaintiff reasonable attorney's fees [*Civ. Code § 52.1(h)*].

PRACTICE TIP:

Definitions. Surprisingly, there have been few, if any, decisions defining what constitutes "threats, intimidation, or coercion." Speech alone may often be protected by the *First Amendment*. However, there have been a number of recent decisions involving criminal cases where individuals have been prosecuted for unlawful "threats." I suspect that if the courts broadly define "threats" under parallel criminal statutes that these definitions will be applicable to *Civ. Code § 52.1*. *By John H. Scott*

PRACTICE TIP:

Excessive Force and False-Arrest Cases. Section 52.1 may often be applicable to the garden-variety excessive force and false-arrest cases. It remains to be seen to what extent the courts will hold that certain conduct (as opposed to "speech") constitutes "intimidation or coercion" within the meaning of § 52.1. Arguably, in many cases involving excessive force and/or false-arrest there is an element of "intimidation or coercion." *By John H. Scott*

For a form of complaint seeking damages and injunctive relief based on interference with the exercise of civil rights, under *Civ. Code § 52.1*, and a form of order granting such relief, see *§§ 117A.50* and *117A.51*. For a related jury instruction, see *Judicial Council of California Civil Jury Instructions, CACI No. 3025* (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

[b] Protected Classes

Civ. Code § 52.1 does not include any language limiting its protection to plaintiffs in protected classes. Nonetheless, California Courts of Appeal, in the mid and late 1990's, held that § 52.1 must be read in conjunction with *Civ. Code § 51.7*, and that an action brought under § 52.1 must allege that the interference with the plaintiff's rights that is the subject of the action was due to the plaintiff's race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute [*see Cabesuela v. Browning-Ferris Indus. (1998) 68 Cal. App. 4th 101, 110-111, 80 Cal. Rptr. 2d 60* ; *Boccato v. City of Hermosa Beach (1994) 29 Cal. App. 4th 1797, 1808-1809, 35 Cal. Rptr. 2d 282]* .

However, in 2000, the California Legislature declared as follows [Stats. 2000, ch. 98, § 1]:

> "Section 1. (a) The Legislature hereby finds and declares all of the following:
>
> (1) *Section 52.1 of the Civil Code* guarantees the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state without regard to his or her membership in a protected class identified by its race, color, religion, or sex, among other things.
>
> (2) The decision in *Boccato v. City of Hermosa Beach (1994) 29 Cal. App. 4th 1797* misconstrued *Section 52.1 of the Civil Code* to require that an individual who brings an action, or on whose behalf an action is brought, pursuant to that section, be a member of one of those specified protected classes.
>
> (b) It is the intent of the Legislature in enacting this act to clarify that an action brought pursuant to *Section 52.1 of the Civil Code* does not require the individual whose rights are secured by the Constituion or laws of the United States, or of the rights secured by the Constitution or laws of California to be a member of a protected class identified by its race, color, religion, or sex, among other things."

It appears, then, that *Civ. Code § 52.1* will no longer be construed to require that a plaintiff must be a member of a protected class.

PRACTICE TIP:

Protected Classes. Anyone can now bring an action under § 52.1 regardless of race, color, religion, ancestry, political affiliation, sex, sexual orientation, age, etc. The sole issue under § 52.1 is whether someone's civil rights were violated and the deprivation involved "threats, intimidation, or coercion." Thus, this section can be applied against any public or private defendant for a violation of civil rights so long as the deprivation involves "threats, intimidation, or coercion." A prevailing plaintiff will be entitled to statutory damages of $25,000 in many cases, attorneys' fees, injunctive relief, etc. *and* there is no defense of "qualified immunity" and no right to an interlocutory appeal. *By John H. Scott*

[c] Damages

The reference in *Civ. Code § 52.1(b)* to damages under *Civ. Code § 52* is somewhat ambiguous. *Civ. Code § 52* contains two different damage provisions [*see Civ. Code § 52(a)* and *(b)*]. Apparently, *Civ. Code § 52.1(b)* refers to *Civ. Code § 52(b)*, which permits a larger award of damages [for discussion of the damages available under *Civ. Code § 52(b), see § 117A.12[1]*]. *Civ. Code § 52(a)* applies to the denial of rights under *Civ. Code §§ 51* and *51.5*. *Civ. Code § 52(b)* applies to the denial of rights under *Civ. Code §§ 51.7* and *51.9*. *Civ. Code § 51.7*, like *Civ. Code § 52.1*, is part of the Tom Bane Civil Rights Act. The interests protected by *Civ. Code § 52.1* are more closely aligned with the interests protected by *Civ. Code § 51.7* than those protected by *Civ. Code § 51* or *51.5* [*see generally* Legis. Counsel's Dig., Sen. Bill No. 98, Stats. 1992, ch. 607 (Reg. Sess.)].

PRACTICE TIP:

Damages. The damages available under *Civ. Code § 52.1* require careful analysis in that § 52.1 provides that damages are available as specified under *Civ. Code § 52*. *Civ. Code § 52(b)(2)* provides for damages that include a statutory penalty of $25,000 for denials of rights secured by *Civ. Code § 51.7*. The question then becomes whether this statutory penalty is available in all cases brought under § 52.1 or just those cases brought on behalf of a class of persons identified in *Civ. Code § 51.7*. *By John H. Scott*

Although a public entity is not liable for damages imposed primarily for the sake of example and by way of punishing the defendant [*Gov. Code § 818*], a public entity can be liable for the $25,000 statutory penalty for denial of rights under *Civ. Code §§ 51.7, 52(b)(2)* [*Los Angeles County Metro. Transp. Auth. v. Superior Court (2004) 123 Cal. App. 4th 261, 266-276, 20 Cal. Rptr. 3d 92]* .

[d] State Action Requirement

Although *Civ. Code § 52.1* does not require state action on the part of the defendant to state a claim, it does require an attempted or completed act of interference with a legal right, accompanied by coercion. Therefore, if the right at issue is one that may only be violated by state action, it may be that there can only be a § 52.1 claim if state actors are somehow involved in the facts of the case [*Jones v. Kmart Corp. (1998) 17 Cal. 4th 329, 333-334, 70 Cal. Rptr. 2d 844, 949 P.2d 941]* . Thus, for example, a plaintiff suing a private defendant for interfering with the plaintiff's right to be free from unreasonable government search and seizure must assert and prove that the private defendant's conduct somehow interfered with the plaintiff's ability to assert rights under that constitutional guaranty [*see Jones v. Kmart Corp. (1998) 17 Cal. 4th 329, 334, 70 Cal. Rptr. 2d 844, 949 P.2d 941]* .

[e] Elements of Cause of Action

The elements of a cause of action under *Civil Code section 52.1* are [*CACI No. 3025*; *Austin B. v. Escondido Union Sch. Dist. (2007) 149 Cal. App. 4th 860, 882, 57 Cal. Rptr. 3d 454]* :

- The defendant interfered with or attempted to interfere with the plaintiff's constitutional or statutory right by threatening or committing violent acts.

- The plaintiff reasonably believed that if he or she exercised his or her constitutional right, the defendant would commit violence against him or her or his or her property.

- The defendant injured the plaintiff or the plaintiff's property to prevent the plaintiff from exercising his or her constitutional right or to retaliate against the plaintiff for having exercised his or her constitutional right.

- The plaintiff was harmed.

- The defendant's conduct was a substantial factor in causing the plaintiff's harm.

Civil Code § 52.1 requires an attempted or completed act of interference with a legal right, accompanied by a form of coercion [*Jones v. Kmart Corp. (1998) 17 Cal.4th 329, 334, 70 Cal. Rptr. 2d 844, 949 P.2d 941* ; *Austin B. v. Escondido Union Sch. Dist. (2007) 149 Cal. App. 4th 860, 882, 57 Cal. Rptr. 3d 454]* . To obtain relief under *Civ. Code § 52.1*, a plaintiff need not allege the defendant acted with discriminatory animus or intent. A defendant is liable if the defendant interfered with the plaintiff's constitutional rights by the requisite threats, intimidation, or coercion [*Venegas v. County of Los Angeles (2004) 32 Cal. 4th 820, 841-843, 11 Cal. Rptr. 3d 692, 87 P.3d 1* ; *Austin B. v. Escondido Union Sch. Dist. (2007) 149 Cal. App. 4th 860, 882, 57 Cal. Rptr. 3d 454]* .

The word "interferes" as used in the Bane Act means "violates" [*Austin B. v. Escondido Union Sch. Dist. (2007) 149 Cal. App. 4th 860, 883, 57 Cal. Rptr. 3d 454* ; *see Jones v. Kmart Corp. (1998) 17 Cal.4th 329, 338, 70 Cal. Rptr. 2d 844, 949 P.2d 941* ; *City of Simi Valley v. Superior Court (2003) 111 Cal. App. 4th 1077, 4 Cal. Rptr. 3d 468]* . The essence of a Bane Act claim is that the defendant, by the specified improper means, i.e., threats, intimidation or coercion, tried to or did prevent the plaintiff from doing something the plaintiff had the right to do under the law or to force the plaintiff to do something the plaintiff was not required to do under the law [*Jones v. Kmart Corp. (1998) 17 Cal. 4th 329, 334, 70 Cal. Rptr. 2d 844, 949 P.2d 941* ; *Austin B. v. Escondido Union Sch. Dist. (2007) 149 Cal. App. 4th 860, 883, 57 Cal. Rptr. 3d 454]* .

The constitutional right with which the defendant interferes can include the right to a free public education embodied in *Cal. Const., art. IX, § 5* [*Austin B. v. Escondido Union Sch. Dist. (2007) 149 Cal. App. 4th 860, 882, 57 Cal. Rptr. 3d 454]* .

[f] Defenses

The doctrine of qualified immunity which applies to federal civil rights actions under *42 U.S.C. § 1983* does not apply to California civil rights actions under *Civil Code § 52.1* [*Venegas v. County of Los Angeles (2007) 153 Cal. App. 4th 1230, 1239-1247, 63 Cal. Rptr. 3d 741* (because county and law enforcement officer argued no other grounds for immunity, summary adjudication in their favor reversed because there were triable issues of fact as to whether officer interfered by threats, intimidation or coercion with plaintiffs' exercise or enjoyment of their rights under *Fourth Amendment* to United States Constitution and *Cal. Const., art. I, § 13*)].

Statutory immunity for governmental entities and employees, such as prosecutorial immunity, can apply to bar actions against public employees and entities brought under *Civ. Code § 52.1* [*see County of Los Angeles v. Superior Court (2009) 181 Cal. App. 4th 218, 227-232, 104 Cal. Rptr. 3d 230* (district attorney and county were entitled to summary adjudication because district attorney's investigatory staff, district attorney himself, and county were immune to claims of violation of *Civ. Code § 52.1* under *Gov. Code §§ 821.6* [establishing that public employee is not liable for injury caused by instituting or prosecuting judicial or administrative proceeding within scope of employment, even if

employee acts maliciously and without probable cause], 820.8 [immunizing public employees from liability for injuries caused by another], 815.2(b) [providing that, except as otherwise provided by statute, public entity is not liable for injury resulting from act or omission of employee of public entity when employee is immune from liability], 815.6, 820.2 [providing general immunity from liability for acts of public employees in exercise of discretion vested in them])]. For discussion of statutory immunity for governmental entities and employees generally, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[2] Speech as Basis for Action

Speech alone is not sufficient to support an action under *Civ. Code § 52.1*, except on a showing (1) that the speech itself threatens violence against a specific person or group of persons, (2) that the persons against whom the threat is directed reasonably fear that, because of the speech, violence will be committed against them or their property, and (3) that the person threatening violence had the apparent ability to carry out the threat [*Civ. Code § 52.1(j)*].

No order issued in a case brought under *Civ. Code § 52.1* will restrict the content of any person's speech. An order restricting the time, place, or manner of any person's speech will do so only to the extent reasonably necessary to protect the peaceable exercise or enjoyment of constitutional or statutory rights, consistent with the constitutional rights of the person sought to be enjoined [*Civ. Code § 52.1(k)*; *see* Ch. 59, *Assemblies, Meetings, and Demonstrations* , for discussion of restrictions on time, place, and manner regulations].

[3] Injunctions Prohibiting Violation of Civil Code § 52.1

If a court issues a temporary restraining order or a preliminary or permanent injunction in an action brought pursuant to *Civ. Code § 52.1(a)* or *(b)*, ordering a defendant to refrain from conduct or activities, the order issued must include the following statement [*Civ. Code § 52.1(d)*; *see § 117A.51* for form of order]:

> VIOLATION OF THIS ORDER IS A CRIME PUNISHABLE UNDER SECTION 422.77 OF THE PENAL CODE.

An order or injunction may not be issued under *Civ. Code § 52.1* if the order or injunction would be prohibited under *Code Civ. Proc. § 527.3* (regarding specified acts in labor disputes)[*Civ. Code § 52.1(f)*].

Violation of a temporary restraining order or a preliminary or permanent injunction ordering the defendant to refrain from conduct or activities may be punished either by prosecution under *Penal Code § 422.77*, or by a proceeding for contempt brought pursuant to *Code Civ. Proc. § 1209 et seq.*

In a contempt proceeding, if it is determined that the person proceeded against is guilty of the contempt charged, in addition to any other relief, a fine may be imposed in an amount not to exceed $1,000, or the person may be imprisoned in the county jail for a period not to exceed six months, or both a fine and imprisonment may be imposed [*Civ. Code § 52.1(i)*]. For discussion and forms relating to contempt proceedings under *Code Civ. Proc. § 1209 et seq.*, see Ch. 135, *Contempt* .

Any willful and knowing violation of an order issued under *Civ. Code § 52.1* is a misdemeanor punishable by a fine of not more than $1,000, or by imprisonment in the county jail for not more than six months, or by both the fine and imprisonment [*Penal Code § 422.77(a)*]. Repeat violations on charges separately brought and tried are punishable by imprisonment in the county jail for not more than one year [*Penal Code § 422.77(b)*]. Subject to the court's discretion, the prosecution may present witnesses and relevant evidence at the time of the sentencing [*Penal Code § 422.77(b)*]. The prosecuting agency of each county has the primary responsibility for the enforcement of orders issued pursuant to *Civ. Code § 52.1*[*Penal Code §§ 422.77(c), 422.78*]. The court may order a defendant convicted of a hate crime to perform a minimum of community service, not to exceed 400 hours, to be performed over a period not to exceed 350

days, during a time other than his or her hours of employment or school attendance [*Penal Code § 422.77(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil Rights LawCivil Rights ActsGeneral OverviewCivil Rights LawPractice & ProcedureCriminal PenaltiesCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsCoercionGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 117A CIVIL RIGHTS: INTERFERENCE WITH CIVIL RIGHTS BY THREATS, INTIMIDATION, COERCION, OR VIOLENCE
PART II. LEGAL BACKGROUND

11-117A California Forms of Pleading and Practice--Annotated § 117A.12

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§ 117A.12 Freedom From Intimidation or Violence Because of Protected Characteristics

[1] Civil Remedies

All persons within the jurisdiction of California have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of their political affiliation, or on account of any characteristic listed or defined in *Civ. Code § 51(b)* or *(e)*, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics [*Civ. Code § 51.7(a)*; for discussion of *Civ. Code § 51(b), (e)*, see *Ch. 116, Civil Rights: Discrimination in Business Establishments, § 116.12*]. The identification of these particular bases of discrimination is illustrative rather than restrictive [*Civ. Code § 51.7(a)*; *see McCalden v. California Library Ass'n (9th Cir. 1992) 955 F.2d 1214, 1221 , cert. denied, 504 U.S. 957* ("holocaust revisionist" protected under statute)].

Civ. Code § 51.7 does not apply to statements concerning positions in a labor dispute that are made during otherwise lawful labor picketing [*Civ. Code § 51.7(b)*].

The proscription on intimidation by threat of violence has survived a *First Amendment* challenge [*see McCalden v. California Library Ass'n (9th Cir. 1992) 955 F.2d 1214, 1222 , cert. denied, 504 U.S. 957]* .

Whoever denies, or aids, incites, or conspires in a denial of, rights provided by *Civ. Code § 51.7* is liable for each and every such offense for the actual damages suffered by any person denied such rights [*Civ. Code § 52(b)*]. For purposes of *Civ. Code § 52*, "actual damages" means special and general damages [*Civ. Code § 52(h)*]. In addition to actual damages, the wrongdoer is liable in an amount as may be determined by a jury, or by a court sitting without a jury, for exemplary damages, plus a civil penalty of $25,000, to be awarded to the person denied the rights, in any action brought by that person or by the Attorney General, a district attorney, or a city attorney [*Civ. Code § 52(b)*].

Injunctive relief is also available in an action brought under *Civ. Code § 51.7* if there is reasonable cause to believe that

any person or persons are engaged in conduct of resistance to the full enjoyment of a person's rights under *Civ. Code § 51.7*[*see Civ. Code § 52(c)*; *see also* Stats. 1991, ch. 839, § 3 (Legislature intended to modify prerequisite for injunctive relief in 1991 amendment to *Civ. Code § 52(c)*; by providing civil remedy for classes of persons specifically identified in *Civ. Code §§ 51.7* and *52*, Legislature did not intend to limit availability of injunctive relief for any other form of discrimination prohibited by *Civ. Code §§ 51.7* and *52*)].

Attorney's fees in an amount determined by the court are also recoverable [*Civ. Code § 52(b)*].

An action under *Civ. Code § 51.7*, including an action for the civil penalty provided in *Civ. Code § 52(b)(2)* to be awarded to the person denied the right provided by *Civ. Code § 51.7* in an action brought by the person denied the right or by the Attorney General, a district attorney, or a city attorney, must be commenced within three years of the alleged practice [*Civ. Code § 52(b)(2)*; *Code Civ. Proc. § 338(n)*].

A civil damages action under *Civ. Code § 52* for violation of *Civ. Code § 51.7* is barred by the discretionary immunity of *Gov. Code § 845* to the extent that the action is premised on an alleged failure to provide sufficient police protective services [*see Gates v. Superior Court (1995) 32 Cal. App. 4th 481, 508-513, 38 Cal. Rptr. 2d 489]* . For full discussion of liabilities and immunities of public entities and employees, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

Any person claiming to be aggrieved by an alleged unlawful practice in violation of *Civ. Code § 51.7* may also file a verified complaint with the Department of Fair Employment and Housing (DFEH) pursuant to *Gov. Code § 12948*[*Civ. Code § 52(f)*].

For a general form of complaint for damages and injunctive relief for violation of the Unruh Civil Rights Act, which may be adapted for use to allege a cause of action pursuant to *Civ. Code § 51.7*, see *Ch. 116, Civil Rights: Discrimination in Business Establishments, § 116.80*. For a related jury instruction, see Judicial Council of California Civil Jury Instructions, CACI No. 3023 (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

[2] Criminal Penalties

[a] Force or Threat of Force, or Damage to Property, to Intimidate or Interfere with Rights, Because of Protected Characteristics

No person, whether or not acting under color of law, may by force or threat of force willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States or of California because of the other person's disability, gender, nationality, race or ethnicity, religion, sexual orientation, or association with a person or group with one or more of these actual or perceived characteristics, or because the first person perceives the other person to have one or more of those characteristics [*Penal Code § 422.6(a)*; *see Penal Code § 422.55(a)* (listing protected characteristics)]. No person may be convicted of violating *Penal Code § 422.6(a)* based on speech alone, except on a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat [*Penal Code § 422.6(c)*].

If a perpetrator commits a sexual assault wholly or partly because of the victim's gender, a hate crime has not been committed unless the perpetrator also acts on some animosity or other bias motivation toward the victim's gender. If a perpetrator commits a crime wholly or partly because the perpetrator perceives that the victim's disability, gender, or other protected characteristic makes the victim more vulnerable to the commission of the crime, a hate crime has not been committed unless the perpetrator also acts on some animosity or other bias motivation toward the victim's disability, gender, or other protected characteristic. If a perpetrator commits a crime wholly or partly because the victim

is under the care of the perpetrator for a disability, a hate crime has not been committed unless the perpetrator also acts on some animosity or other bias motivation toward the victim's disability *[04 Ops. Cal. Att'y Gen. 1104 (2005)]* .

The definition of "hate crime" to be applied by a local law enforcement agency in reporting hate crimes to the Department of Justice is the same as the definition contained in *Pen. Code § 422.55*, as further clarified by *Pen. Code § 422.56(d)*, namely, a criminal offense committed in part due to the perpetrator's bias motivation against the victim's actual or perceived disability, gender, nationality, race or ethnicity, religion, sexual orientation, or association with a person or group with one or more of such actual or perceived characteristics *[04 Ops. Cal. Att'y Gen. 1104 (2005)]* .

No person, whether or not acting under color of law, may knowingly deface, damage, or destroy the real or personal property of another person for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States or of California, in whole or in part, because of the person's disability, gender, nationality, race or ethnicity, religion, sexual orientation, or association with a person or group with one or more of these actual or perceived characteristics, or because the first person perceives the other person to have one or more of those characteristics [*Penal Code § 422.6(b)*; *see Penal Code § 422.55(a)* (listing protected characteristics)].

Violation of *Penal Code § 422.6(a)* or *(b)* is punishable by imprisonment in the county jail for a period not to exceed one year, by a fine not to exceed $5,000, or by both the fine and imprisonment [*Penal Code § 422.6(c)*]. In addition, the court must order the defendant to perform community service, not to exceed 400 hours, to be performed over a period not to exceed 350 days, at a time other than during the defendant's hours of employment or school attendance [*Penal Code § 422.6(c)*]. Conduct that violates *Penal Code § 422.6* and any other provision of law, including, but not limited to, an offense described in *Penal Code § 11410 et seq.* relating to terrorizing, may be charged under all applicable provisions. However, an act or omission punishable in different ways by *Penal Code § 422.6* and other provisions of law may not be punished under more than one provision, and the penalty to be imposed is determined under *Penal Code § 654*[*Penal Code § 422.6(d)*].

Except as otherwise required by law, nothing in *Penal Code § 422.6 et seq.* may be construed to prevent or limit the prosecution of any person pursuant to any provision of law [*Penal Code § 422.8*].

[b] Other Crimes Committed to Intimidate or Interfere with Rights Because of Protected Characteristics

[i] Application of Penal Code § 422.7

Penal Code § 422.7 applies in cases other than those involving persons punished under *Penal Code § 422.6*. It provides that, except in the case of a person punished under *Penal Code § 422.6*, any hate crime not made punishable by imprisonment in the state prison is punishable by imprisonment in the state prison or in a county jail not to exceed one year, by a fine not to exceed $10,000, or by both imprisonment and fine. The crime must be committed against the person or property of another for the purpose of intimidating or interfering with that other person's free exercise or enjoyment of any right secured to that person by the California Constitution or laws or by the federal Constitution or laws under any of the following circumstances, which must be charged in the accusatory pleading [*Penal Code § 422.7*]:

- The crime against the person of another either includes the present ability to commit a violent injury or causes actual physical injury.

- The crime against property causes damage in excess of $950.

- The person charged with a crime under *Penal Code § 422.7* has been convicted previously of a violation of *Penal Code § 422.6(a)* or *(b)* or of a conspiracy to commit a crime described in *Penal Code*

§ 422.6(a) or *(b)*.

[ii] Proof of Specific Intent to Deprive Individual of Right

Both *Penal Code §§ 422.6* and *422.7* require proof of a specific intent to deprive an individual of a right secured by federal or state law. The mere reckless use of force, even if motivated by ill will, is not sufficient. The defendant must act with the specific purpose of depriving another of his or her civil rights. Knowledge of particular provisions of state or federal law is not necessary, however; it is sufficient if the right is clearly defined and that the defendant intended to invade interests protected by constitutional or statutory authority [*People v. Lashley (1991) 1 Cal. App. 4th 938, 947-951, 2 Cal. Rptr. 2d 629 , cert. denied, 506 U.S. 842 (1992)]* .

[c] Hate Crimes Generally

All state and local agencies must use the definition of "hate crime" in *Penal Code § 422.55(a)* exclusively, except as other explicit provisions of state or federal law may require otherwise [*Penal Code § 422.9*]. *Penal Code § 422.55(a)* defines "hate crime" as a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim:

- Disability.
- Gender.
- Nationality.
- Race or ethnicity.
- Religion.
- Sexual orientation.
- Association with a person or group with one or more of these actual or perceived characteristics.

"Hate crime" includes, but is not limited to, a violation of *Penal Code § 422.6* [*Penal Code § 422.55(b)*; *see* [a], *above*]. *Penal Code § 422.56* defines each of the terms in the bulleted list above, as well as the terms "in whole or in part because of" and "victim."

The court in which a criminal proceeding stemming from a hate crime or alleged hate crime is filed must take all actions reasonably required, including granting restraining orders, to safeguard the health, safety, or privacy of the alleged victim, or of a person who is a victim of, or at risk of becoming a victim of, a hate crime [*Penal Code § 422.88(a)*]. Restraining orders may include provisions prohibiting or restricting the photographing of a person who is a victim of, or at risk of becoming a victim of, a hate crime when reasonably required to safeguard the health, safety, or privacy of that person [*Penal Code § 422.88(b)*].

It is California public policy that the principal goals of sentencing for hate crimes are the following [*Penal Code § 422.86(a)*]:

- Punishment for the hate crimes committed.
- Crime and violence prevention, including prevention of recidivism and prevention of crimes and violence in prisons and jails.

- Restorative justice for the immediate victims of the hate crimes and for the classes of persons terrorized by the hate crimes.

[d] Penalty Enhancements for Crimes Committed Because of Protected Characteristics

Except in the case of a person punished under *Penal Code § 422.7* [*see* [b], *above*], a person who commits a felony that is a hate crime or attempts to commit a felony that is a hate crime, may receive an additional term of imprisonment at the court's discretion [*Penal Code § 422.75(a)*]. In addition, except in the case of a person punished under *Penal Code § 422.7* or *Penal Code § 422.75(a)*, any person who commits a felony that is a hate crime, or attempts to commit a felony that is a hate crime, and who voluntarily acted in concert with another person, either personally or by aiding and abetting another person, may receive an additional term of imprisonment at the court's discretion [*Penal Code § 422.75(b)*]. For the purpose of imposing the additional term, it is a factor in aggravation that the defendant personally used a firearm in the commission of the offense, and nothing in *Penal Code § 422.75(c)* precludes a court from also imposing a sentence enhancement under *Penal Code § 12022.5*, *12022.53*, or *12022.55*, or any other law [*Penal Code § 422.75(c)*]. Any additional term imposed pursuant to *Penal Code § 422.75* is in addition to any other punishment provided by law [*Penal Code § 422.75(f)*].

A person punished in accordance with *Penal Code § 422.75* will also receive an additional term of one year in state prison for each prior felony conviction on charges brought and tried separately in which it was found by the trier of fact or admitted by the defendant that the crime was a hate crime. This additional term only applies when a sentence enhancement is not imposed pursuant to *Penal Code § 667* or *667.5*[*Penal Code § 422.75(d)*].

The court may not impose any additional term authorized by *Penal Code § 422.75* unless the allegation is charged in the accusatory pleading and admitted by the defendant or found to be true by the trier of fact [*Penal Code § 422.75(e)*].

Notwithstanding any other provision of law, the court may strike any additional term imposed by *Penal Code § 422.75* if the court (1) determines that there are mitigating circumstances, and (2) states on the record the reasons for striking the additional punishment [*Penal Code § 422.75(g)*].

Except when the court imposes additional punishment under *Penal Code § 422.75* or in a case involving a person convicted of an offense subject to *Penal Code § 1170.8* (activity within or against church), the fact that a person committed a felony, or attempted to commit a felony, that is a hate crime, must be considered a circumstance in aggravation of the crime in imposing a term of imprisonment [*Penal Code § 422.76*; *see Penal Code § 1170(b)* (determination of term of imprisonment)].

As used in *Penal Code § 422.75*, "because of" means the bias motivation must be a cause in fact of the offense, regardless of whether other causes also exist. When multiple concurrent motives exist, the prohibited bias must be a substantial factor in bringing about the particular result [*Penal Code § 422.75(i)(1)*]. The Legislature expressly stated that the definition of "because of" in *Penal Code § 422.75(i)(1)* does not constitute a change in existing law, but rather is declaratory of the law as interpreted by the California Supreme Court in *In re M.S. (1995) 10 Cal. 4th 698, 42 Cal. Rptr. 2d 355, 896 P.2d 1365* and *People v. Superior Court (Aishman) (1995) 10 Cal. 4th 735, 42 Cal. Rptr. 2d 377, 896 P.2d 1387* [*Penal Code § 422.75(i)(2)*].

For purposes of *Penal Code §§ 422.6*, *422.7*, *422.75*, and *422.76*, "gender" means the victim's sex and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth, unless an explicit provision of law or the context clearly requires a different meaning [*Penal Code §§ 422.56(c)*, *422.57*].

In the case of a person convicted of any offense against the person or property of another individual, private institution,

or public agency, committed because of the victim's actual or perceived race, color, ethnicity, religion, nationality, country of origin, ancestry, disability, gender, or sexual orientation, including, but not limited to, offenses defined in *Penal Code § 302, 423.2, 594.3, 11411, 11412,* or *11413,* or for any hate crime, the court, absent compelling circumstances stated on the record, must make an order protecting the victim, or known immediate family or domestic partner of the victim, from further acts of violence, threats, stalking, or harassment by the defendant, including any stay-away conditions the court deems appropriate, and make obedience of that order a condition of the defendant's probation [*Penal Code § 422.85(a)*]. The court may also order that the defendant be required to do one or more of the following as a condition of probation [*Penal Code § 422.85(a)*]:

- Complete a class or program on racial or ethnic sensitivity, or other similar training in the area of civil rights, or a one-year counseling program intended to reduce the tendency toward violent and antisocial behavior if that class, program, or training is available and was developed or authorized by the court or local agencies in cooperation with organizations serving the affected community.

- Make payments or other compensation to a community-based program or local agency that provides services to victims of hate violence.

- Reimburse the victim for reasonable costs of counseling and other reasonable expenses that the court finds are the direct result of the defendant's acts.

Any payments or other compensation ordered under *Penal Code § 422.85* are in addition to restitution payments required under *Penal Code § 1203.04,* and must be made only after that restitution is paid in full [*Penal Code § 422.85(b)*].

For discussion of criminal law generally, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice (Matthew Bender).

[e] Penalty Enhancements Are Constitutional

The constitutionality of penalty enhancements when the perpetrator is motivated by a specific protected characteristic of the victim has been upheld by the United States Supreme Court [*Wisconsin v. Mitchell (1993) 508 U.S. 476, 488-490, 113 S. Ct. 2194, 124 L. Ed. 2d 436* (considered Wisconsin statute similar to California's)], as well as California courts [*see In re M.S. (1995) 10 Cal. 4th 698, 709-726* ; *People v. MacKenzie (1995) 34 Cal. App. 4th 1256, 1267-1272, 40 Cal. Rptr. 2d 793* ; *In re Joshua H. (1993) 13 Cal. App. 4th 1734, 1742-1753, 17 Cal. Rptr. 2d 291]* .

The contention that the enhancement statutes violate the perpetrator's *First Amendment* free speech rights has been rejected [*see Wisconsin v. Mitchell (1993) 508 U.S. 476, 483-490, 113 S. Ct. 2194, 124 L. Ed. 2d 436* ; *In re Joshua H. (1993) 13 Cal. App. 4th 1734, 1742-1753, 17 Cal. Rptr. 2d 291]* . The *First Amendment* does not protect acts of violence [*In re Joshua H. (1993) 13 Cal. App. 4th 1734, 1743, 17 Cal. Rptr. 2d 291]* . Although some conduct is expressive, and entitled to protection under the *First Amendment,* to be protected the activity must be sufficiently imbued with elements of communication. The violent conduct proscribed by the enhancement statutes is not so imbued with elements of communication. What these statutes punish is acting on bigoted thoughts [*In re Joshua H. (1993) 13 Cal. App. 4th 1734, 1746-1747, 17 Cal. Rptr. 2d 291]* . The enhancement statutes are narrowly drawn to protect a compelling state interest and are not likely to chill protected speech [*In re Joshua H. (1993) 13 Cal. App. 4th 1734, 1742-1753, 17 Cal. Rptr. 2d 291* ; *cf. R.A.V. v. St. Paul (1992) 505 U.S. 377, 391-396, 112 S. Ct. 2538, 120 L. Ed. 2d 305* (ordinance that made display of symbols that arouse anger in others on basis of race, color, creed, religion, or gender a misdemeanor was facially unconstitutional)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil Rights LawCivil Rights ActsGeneral OverviewCivil Rights LawPractice & ProcedureCriminal PenaltiesCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsCoercionGeneral OverviewCriminal Law & ProcedureSentencingGuidelinesAdjustments & EnhancementsGeneral Overview

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11-117A California Forms of Pleading and Practice--Annotated § 117A.13

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 117A.13 Standing in Bane Act Cases

The Bane Act provides for a personal cause of action for the victim of a hate crime [*Civ. Code §§ 51.7, 52.1*]. Its remedies are limited to those who themselves have been the subject of threats, intimidation, coercion, or violence.

Thus, for example, parents of a child who was allegedly killed because of his race had no standing to sue on their own behalf under *Civ. Code § 52.1*[*see Bay Area Rapid Transit Dist. v. Superior Court (1995) 38 Cal. App. 4th 141, 144-145, 44 Cal. Rptr. 2d 887]* . Similarly, a plaintiff who was a witness to an assault of his intimate male friend did not have standing to bring his own action under *Civ. Code § 51.7*[*Coon v. Joseph (1987) 192 Cal. App. 3d 1269, 1277, 237 Cal. Rptr. 873]* .

PRACTICE TIP:

"Hate Crimes." Although these statutes are designed, in part, to give a remedy for persons who are victims of "hate crimes," in many of those instances the private wrongdoer is without assets and judgment proof. In general, it is the criminal law that must often be relied on to prosecute the people who commit violent crimes or property damage. On the other hand, *Civ. Code § 52.1* may well become an important option to *42 U.S.C. § 1983* in many instances involving excessive force or other types of police misconduct. Practitioners should thus bring a § 52.1 claim, whenever possible, instead of or in addition to a § 1983 cause of action to avoid qualified immunity and the foreseeable interlocutory appeal. *By John H. Scott*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil Rights LawCivil Rights ActsGeneral OverviewConstitutional LawThe JudiciaryCase or ControversyStandingThird Party Standing

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AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

[Reserved]

§§ 117A.14[Reserved]

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11-117A California Forms of Pleading and Practice--Annotated § 117A.30

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 117A.30 Related Matthew Bender Publications

For thorough discussion of federal civil rights legislation and actions, see J. Cook & J. Sobieski, Civil Rights Actions (Matthew Bender)

For related jury instructions, see Judicial Council of California Civil Jury Instructions, Series 3000 (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions

Legal Topics:

For related research and practice materials, see the following legal topics:
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11-117A California Forms of Pleading and Practice--Annotated § 117A.31

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 117A.31 Federal Constitution

Freedom of speech and religion. *U.S. Const., amend. I*

Due process clause, applicable to federal government. *U.S. Const., amend. V*

Sovereign immunity of states. *U.S. Const., amend. XI*

Privileges and immunities, due process, and *equal protection clauses*, applicable to states. *U.S. Const., amend. XIV*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of ReligionGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewConstitutional LawEqual ProtectionScope of ProtectionConstitutional LawPrivileges & Immunities

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AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 117A.32 State Constitution

Freedom of speech. *Cal. Const., art. I, § 2*

Freedom of religion. *Cal. Const., art. I, § 4*

Due process and equal protection. *Cal. Const., art. I, § 7*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of ReligionGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of FreedomConstitutional LawEqual ProtectionScope of Protection

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AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 117A.33 Federal Statutes

Criminal sanctions for interference with civil rights of another. *18 U.S.C. § 241 et seq.*

Jurisdiction of United States District Courts in civil rights cases. *28 U.S.C. §§ 1331, 1343, 1344*

Equal rights under law. *42 U.S.C. § 1981*

Property rights of citizens. *42 U.S.C. § 1982*

Civil action for deprivation of civil rights under color of state law. *42 U.S.C. § 1983*

Conspiracy to interfere with civil rights. *42 U.S.C. § 1985*

Neglect to prevent conspiracy to interfere with civil rights. *42 U.S.C. § 1986*

State law applicable in federal civil rights actions. *42 U.S.C. § 1988(a)*

Recovery of attorney's fees in civil rights actions. *42 U.S.C. § 1988(b)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 117A.34 State Statutes

Freedom from intimidation or violence because of protected characteristics. *Civ. Code § 51.7*

Damages for denial of rights provided by *Civ. Code § 51.7*. *Civ. Code § 52(b)*

Statute of limitations for action under *Civ. Code § 51.7* is three years. *Civ. Code § 52(b)(2)*; *Code Civ. Proc. § 338(n)*

Protection from interference with constitutional or statutory rights by threats, intimidation, or coercion. *Civ. Code § 52.1*

Crimes against civil rights of another. *Penal Code § 422.6 et seq.*

Sentencing for crimes committed because of specified beliefs or characteristics of victim. Penal Code § 1107.75

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesCompensatory DamagesCivil Rights LawGeneral OverviewCivil Rights LawPractice & ProcedureCriminal PenaltiesCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsCoercionGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 117A.34A California Civil Jury Instructions (CACI)

For related jury instructions regarding civil rights, including instructions on, for example, the essential factual elements in Ralph Act and Bane Act cases, see Judicial Council of California Civil Jury Instructions, Series 3000 (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 117A.35 Decisions

Plaintiff in action under *Civ. Code § 52.1* must allege that defendant interfered with his or her legal rights because of plaintiff's race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute. *Nelson v. City of Irvine (9th Cir. 1998) 143 F.3d 1196, 1206-1207 , cert. denied, 525 U.S. 981*

"Holocaust revisionist," who questioned historical accuracy of accepted portrayal of holocaust, stated claim under *Civ. Code § 51.7* by alleging that defendants intended to disrupt his presentation at library association's annual conference by creating demonstration that would produce reasonable probability of property damage and violence against him. *McCalden v. California Library Ass'n (9th Cir. 1992) 955 F.2d 1214, 1220-1222 , cert. denied, 504 U.S. 957*

Cause of action under *Civ. Code § 51.7* is not preempted by state *Fair Employment and Housing Act. Diem v. City and County of San Francisco (N.D. Cal. 1988) 686 F. Supp. 806, 812*

Plaintiffs adequately stated cause of action under *Civ. Code § 52.1* for unconstitutional search and seizure violations extending far beyond ordinary tort claims, where plaintiffs were not required to allege defendants acted with discriminatory animus or intent, so long as acts were accompanied by requisite threats, intimidation, or coercion. *Venegas v. County of Los Angeles (2004) 32 Cal. 4th 820, 841-843, 11 Cal. Rptr. 3d 692, 87 P.3d 1*

Plaintiff suing private defendant under *Civ. Code § 52.1* for interfering with plaintiff's right to be free from unreasonable government search and seizure must assert and prove that private defendant's conduct somehow interfered with plaintiff's ability to assert rights under that constitutional guaranty. *Jones v. Kmart Corp. (1998) 17 Cal. 4th 329, 334, 70 Cal. Rptr. 2d 844, 949 P.2d 941*

Hate crime sentencing statutes (*Penal Code §§ 422.6* and *422.7*) are not unconstitutionally overbroad or vague. *In re*

M.S. (1995) 10 Cal. 4th 698, 709-726, 42 Cal. Rptr. 2d 355, 896 P.2d 1365

In action against county and district attorney alleging civil rights violations under *Civ. Code, § 52.1*, breach of involuntary bailment, civil rights violations under *42 U.S.C. § 1983*, and waste of taxpayer funds arising from a seizure of property, based on seizure of property after criminal investigation, trial court erred in denying defendants' motion for summary adjudication on grounds of prosecutorial immunity under *Gov. Code §§ 821.6, 820.8, 815.2(b), 815.6, 820.2*, on ground that prosecutorial immunity applied only to actions taken in preparation for formal proceedings, where prosecutorial immunity applied more broadly to acts causally connected to investigation and prosecution, even after decision not to file charges, because all acts of which property owners complained were triggered by allegations of criminal activity and were part of investigation and prosecution process; by operation of *Gov. Code §§ 820.2, 820.8*, district attorney also was immune. *County of Los Angeles v. Superior Court (2009) 181 Cal. App. 4th 218, 227-232, 104 Cal. Rptr. 3d 230*

Doctrine of qualified immunity which applies to federal civil rights actions under *42 U.S.C. § 1983* does not apply to California civil rights actions under *Civ. Code § 52.1*, so that because county and county sheriff's deputy argued no other grounds for immunity, summary adjudication in their favor was reversed because there were triable issues of fact as to whether deputy interfered by threats, intimidation or coercion with plaintiffs' exercise or enjoyment of their rights under *Fourth Amendment* and *Cal. Const., art. I, § 13*. However, city and city police officer were entitled to summary adjudication on *Civ. Code § 52.1* cause of action because undisputed evidence showed officer did not violate any of plaintiffs' constitutional rights. *Venegas v. County of Los Angeles (2007) 153 Cal. App. 4th 1230, 1239-1248, 63 Cal. Rptr. 3d 741*

In action brought under Bane Act based on arrest and detention of high school basketball coach for allegedly sexually molesting member of basketball team, there was no probable cause to arrest coach, where based on totality of circumstances, information known to police at time of detention was not sufficiently consistent, specific, or reliable to cause reasonable person to believe accusations of sexual molestation, particularly in light of exculpatory nature of coach's statements in recordings and comments by vice principal, and accuser's strong antipathy toward coach based on his treatment of her as player on basketball team. *Gov. Code § 821.6* does not provide defense to Bane Act claim based on arrest without probable cause, and *Gov. Code § 820.2* did not provide defense, because decision to arrest coach was not basic policy decision, but only operational decision by police purporting to apply law. *Gillan v. City of San Marino (2007) 147 Cal. App. 4th 1033, 1044-1047, 1050-1051, 55 Cal. Rptr. 3d 158*

Trial court did not err in granting nonsuit on Ralph Act claim that preschool teacher abused autistic students, where there was no evidence creating even inference that teacher's motivation in allegedly abusing students was fact that they were disabled children or that he took alleged actions because he was biased against or had animus against disabled children. Further, trial court did not err in granting motion for nonsuit on Bane Act claim that teacher's acts constituted intimidation or coercion, he need not have had discriminatory motivation, and he interfered with students' exercise and enjoyment of going to school, where there was no evidence teacher's actions caused students not to attend school or that he attempted to achieve this result, and there was no evidence of acts that could be construed as threats, violence or intimidation that actually caused loss of their right to education or that attempted to do so. *Austin B. v. Escondido Union Schl. Dist. (2007) 149 Cal. App. 4th 860, 880-883, 57 Cal. Rptr. 3d 454*

There was no basis for reinstatement of claim for violation of *Civ. Code § 52.1*, alleging excessive force by police in use of dog on plaintiff, who was criminal suspect, after trial court had dismissed claim based on plaintiff's failure to allege discriminatory animus. Jury concluded that plaintiff's rights were not violated, and without violation, there was no conduct on which to base claim under *Civ. Code § 52.1*. *Thompson v. County of Los Angeles (2006) 142 Cal. App. 4th 154, 172-173, 47 Cal. Rptr. 3d 702*

In action against community college district and district law enforcement officers, alleging violation of constitutional rights of free speech and assembly by requiring plaintiffs to obtain permit before speaking and distributing literature on

campus concerning plaintiffs' opposition to abortion, whether or not officers' conduct in demanding that plaintiffs leave campus and arresting one plaintiff after he refused to discontinue his activities constituted "coercion" under Bane Act, and whether or not permit policy imposed unconstitutional restraint on plaintiffs' free speech rights, defendants were entitled to immunity from liability under Bane Act (*Gov. Code § 820.6*). Immunity applied to action under Bane Act and district's permit policy was "enactment" within meaning of § 820.6. Further, evidence established officers acted in good faith in enforcing permit requirement and did not act with malice. Action against district was also without merit, when district, as public entity, was not liable under *Gov. Code § 815.2(b)* for employees' acts because employees were immune from liability under state law. *O'Toole v. Superior Court (2006) 140 Cal. App. 4th 488, 501-509, 44 Cal. Rptr. 3d 531*

Despite *Gov. Code § 818*, providing that public entity is not liable for damages imposed primarily for sake of example and by way of punishing defendant, county transportation authority could be liable for $25,000 penalty under *Civ. Code §§ 51.7, 52(b)(2)* based on attack by bus driver on passenger under circumstances showing discrimination based on sexual orientation, when statutory penalty under *Civ. Code § 52(b)(2)* established separate remedial category distinct from exemplary damages provided for in *Civ. Code § 52(b)(1)*, when because of important nonpunitive remedial functions served by *Civ. Code § 52(b)(2)*, it does not fall within scope of government immunity under *Gov. Code § 818*, and when statutory penalty imposed by *Civ. Code § 52(b)(2)* is not primarily punitive, since it was designed to insure plaintiff would receive at least minimum amount of compensation, even though there were little or no actual damages sustained. *Los Angeles County Metro. Transp. Auth. v. Superior Court (2004) 123 Cal. App. 4th 261, 266-276, 20 Cal. Rptr. 3d 92*

Arrest for disruption of school board meeting held in school cafeteria by dumping trash on floor did not violate Constitution and was beyond scope of *Civ. Code §§ 52* and *52.1*, which along with other statutes, were enacted in coordinated effort to combat hate crimes. Arrest and subsequent brief confinement was not hate crime, and was no crime at all. Further, insofar as plaintiff equated adjournment of public meeting with infringement on his *First Amendment* right of free speech, plaintiff's own conduct in dumping trash in school cafeteria caused adjournment of meeting, not expression of his views. *McMahon v. Albany Unif. Schl. Dist. (2003) 104 Cal. App. 4th 1275, 1293-1294, 129 Cal. Rptr. 2d 184*

To state claim under *Civ. Code § 52.1* there must be violence or threat of violence, which is due to plaintiff's membership in protected class within meaning of *Civ. Code § 51.7*. *Cabesuela v. Browning-Ferris Indus. (1998) 68 Cal. App. 4th 101, 110-111, 80 Cal. Rptr. 2d 60*

Parents of child who was allegedly killed because of his race had no standing to sue on their own behalf under *Civ. Code § 52.1*. *Bay Area Rapid Transit Dist. v. Superior Court (1995) 38 Cal. App. 4th 141, 144-145, 44 Cal. Rptr. 2d 887*

Civ. Code § 52.1 must be read in conjunction with *Civ. Code § 51.7*; plaintiff in action under § 52.1 must allege that interference with right was because of plaintiff's membership in protected class within meaning of § 51.7. *Boccato v. City of Hermosa Beach (1994) 29 Cal. App. 4th 1797, 1808-1809, 35 Cal. Rptr. 2d 282*

Bane Act and related statutes dealing with discriminatory threats and violence are California's response to alarming increase in hate crimes. *In re Joshua H. (1993) 13 Cal. App. 4th 1734, 1748 n.9, 17 Cal. Rptr. 2d 291*

Penal Code §§ 422.6 and *422.7* require proof of specific intent to deprive individual of right secured by federal or state law; knowledge of particular provisions of state or federal law is not necessary, however; it is sufficient if right is clearly defined and defendant intended to invade interests protected by constitutional or statutory authority. *People v. Lashley (1991) 1 Cal. App. 4th 938, 947-951, 2 Cal. Rptr. 2d 629 , cert. denied, 506 U.S. 842 (1992)*

Authorization of public attorneys to bring action under *Civ. Code § 52.1* on behalf of people of state of California is

indication that enforcement of lawshould notdepend on willingness of individual victims of discrimination to come forward; individual victims are often reluctant to become involved for reasons that spring from the very practice of discrimination. *Olympic Club v. Superior Court (1991) 229 Cal. App. 3d 358, 363-364, 282 Cal. Rptr. 1*

No cause of action is stated under *Civ. Code § 51.7* if no violence or intimidation was committed or threatened toward plaintiff, who witnessed abuse of intimate and exclusive life-partner. *Coon v. Joseph (1987) 192 Cal. App. 3d 1269, 1277-1278, 237 Cal. Rptr. 873*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingThird Party StandingCivil Rights LawGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of FreedomConstitutional LawBill of RightsFundamental RightsCriminal ProcessRight to Jury TrialTortsDamagesPunitive DamagesConduct Supporting Awards

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AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 117A.35A Attorney General Opinions

If perpetrator commits sexual assault wholly or partly because of victim's gender, hate crime has not been committed unless perpetrator also acts on some animosity or other bias motivation toward victim's gender. If perpetrator commits crime wholly or partly because perpetrator perceives that victim's disability, gender, or other protected characteristic makes victim more vulnerable to commission of crime, hate crime has not been committed unless perpetrator also acts on some animosity or other bias motivation toward victim's disability, gender, or other protected characteristic. If perpetrator commits crime wholly or partly because victim is under perpetrator's care for a disability, hate crime has not been committed unless perpetrator also acts on some animosity or other bias motivation toward victim's disability. Definition of "hate crime" to be applied by local law enforcement agency in reporting hate crimes to Department of Justice is same as definition contained in *Pen. Code § 422.55*, as further clarified by *Pen. Code § 422.56(d)*, namely, a criminal offense committed in part due to perpetrator's bias motivation against victim's actual or perceived disability, gender, nationality, race or ethnicity, religion, sexual orientation, or association with person or group with one or more of such actual or perceived characteristics. *04 Ops. Cal. Atty Gen. 1104 (2005)*

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AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 117A.36 Law Reviews

Minow, *Regulating Hatred: Whose Speech, Whose Crimes, Whose Power? An Essay for Kenneth Karst, 47 UCLA L. Rev. 1253 (2000)*

Harel and Parchomovsky, *On Hate and Equality, 109 Yale L.J. 507 (1999)*

Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation are Wrong, 40 B.C. L. Rev. 739 (1999)*

Wang, *The Transforming Power of "Hate": Social Cognition Theory and the Harms of Bias-Related Crime, 71 S. Cal. L. Rev. 47 (1997)*

Ward, *Hate Crimes, 32 Gonz. L. Rev. 511 (1997)*

Note, *Treating Male Violence Against Women as a Bias Crime, 76 B.U. L. Rev. 575 (1996)*

Adelman and Moorshead, *Bad Laws Make Hard Cases: Hate Crime Laws and the Supreme Court's Opinion in Wisconsin v. Mitchell, 30 Gonz. L. Rev. 1 (1994)*

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§ 117A.37 Text References

Witkin, Summary of California Law, vol. 8, *Constitutional Law*, § 895 (10th ed. 2005)

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§§ 117A.38[Reserved]

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AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 117A.50 Complaint for Damages and Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction for Interference with Exercise of Civil Rights [Civ. Code § 52.1]

[1] FORM Complaint for Damages and Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction for Interference with Exercise of Civil Rights [Civ. Code § 52.1]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff, vs.	)	NO. _____
	)	COMPLAINT FOR DAMAGES AND TEMPOR-
_____ [*name*],	)	ARY RESTRAINING ORDER, AND PRELIMIN-
[and DOES I through _____,]	)	ARY AND PERMANENT INJUNCTIONS
Defendant(s).	)	(Tom Bane Civil Rights Act)
	)	

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.*, a resident of _____ County, California *or* a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), _____ County, California].

[2. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this

complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged.)]

[3. (Plaintiff is informed and believes and thereon alleges that) (A)t all times herein mentioned defendant _____ (*name*) was the agent of defendant _____ (*name*), and (in doing the things hereinafter alleged) was acting within the course and scope of such agency and with the permission and consent of his/her codefendant.]

4. _____ [*Allege act(s), involving violence or threats of violence, that interfered with, or were attempts to interfere with, plaintiff's exercise of his or her rights, e.g.*, Defendant _____ (*name*), a grocery store owner, has refused and continues to refuse to allow plaintiff, a member of the Hare Krishna religion, to enter his/her store, and has posted signs in his/her store window and made comments and gestures to plaintiff threatening violence against plaintiff and other persons belonging to the Hare Krishna religion].

5. _____ [*Set forth nature of right(s) secured to plaintiff by Constitution or laws of the United States or Constitution or laws of California, e.g.*, Under *Civ. Code § 51*, plaintiff has the right to full and equal accommodation and service in all business establishments within the state, and may not be refused entry or service because of his/her religion].

6. _____ [*Allege that the plaintiff's race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute, was the reason for the defendant's actions, e.g.*, While barring plaintiff from entering his/her grocery store, defendant held up a wooden club, and yelled at plaintiff, "I will use this club to keep you Hare Krishnas out of my store!"].

7. As a proximate result of the _____ [*allege prohibited conduct by defendant, e.g.*, interference with plaintiff's right to full and equal accommodations and service in defendant's business establishment] by defendant[s, and each of them,] plaintiff has suffered damages [in the sum of $_____ *and/or continue with any other allegations of general or special damages, as appropriate*].

8. As a proximate result of the wrongful act of defendants, plaintiff is in addition entitled to recover a statutory civil penalty of $25,000, as provided in *Civ. Code § 52(b)*.

[9. The above-recited actions of defendants were done with malice, fraud, or oppression, and in reckless disregard of the plaintiff's rights. Specifically, _____ (*set forth facts showing malice, fraud, or oppression, within the meaning of Civ. Code § 3294*).]

10. Defendant's [threatened] wrongful conduct, unless and until enjoined and restrained by order of this court, will cause great and irreparable injury to plaintiff in that _____ [*specify particular facts that will constitute great and irreparable injury, e.g.*, defendant's grocery store is the only grocery store within five miles of plaintiff's house, and traveling the distance to the next closest store for groceries on a regular basis would cause great hardship to plaintiff].

11. Plaintiff has no adequate remedy at law for the injuries _____ [currently being suffered *or* that are threatened] in that _____ [*specify facts in addition to those previously alleged that tend to show the inadequacy of any legal remedy, e.g.*, plaintiff will be forced to institute a multiplicity of suits to protect himself/herself against the ongoing interference with his/her legal rights].

12. Plaintiff has incurred attorney's fees in the amount of $_____ for _____ [*describe nature of fees, e.g.*, retention of counsel to advise him/her of his/her rights and prepare this complaint]. [Plaintiff expects to incur additional attorney's fees in the amount of $_____ by the conclusion of this action for _____ [*describe nature of attorney's fees anticipated, e.g.*, the preparation and conduct of trial.]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For actual damages in the amount of $_____;

2. For a statutory civil penalty in the sum of $25,000, pursuant to *Civ. Code § 52(b)*;

[3. For exemplary and punitive damages;]

4. For an order requiring defendant[s, and each of them,] to show cause why he/she/they should not be enjoined as hereinafter set forth, during the pendency of this action;

5. For a temporary restraining order, preliminary injunction, and permanent injunction, all enjoining defendant[s, and each of them,] [and his/her/their agents, servants, and employees, and all persons acting under, in concert with, or for him/her/them]:

a. From _____ [*specify each of the acts, courses of conduct, and conditions defendant(s) are to be prohibited from doing, commencing, continuing, or maintaining, e.g.*, continuing to prohibit plaintiff from entering and purchasing items in defendant's grocery store];

b. To _____ [*specify each of the acts, courses of conduct, and conditions defendant(s) are to be commanded to do or undertake, e.g.*, remove signs posted in defendant's store window that are threatening towards persons belonging to the Hare Krishna religion];

6. For attorney's fees in the amount of $_____;

7. For costs of suit herein incurred; and

8. For such other and further relief as the court deems proper.

_____ [*signature*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____

_____ [*signature*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a plaintiff to bring an action for damages and for a temporary restraining order and preliminary and permanent injunctions to protect his or her peaceable exercise or enjoyment of any right secured by the Constitution or laws of the United States or of California [*see Civ. Code § 52.1(b)*].

Civ. Code § 52.1(b) allows an individual to institute a civil action for damages, including, but not limited to, damages under *Civ. Code § 52*, injunction, and other appropriate equitable relief [*Civ. Code § 52.1(b)*].

An action brought in accordance with *Civ. Code § 52.1* is independent of any other action, remedy, or procedure that may be available to an aggrieved individual under any other provision of law, including, but not limited to, an action, remedy, or procedure brought under *Civ. Code § 51.7*[*Civ. Code § 52.1(g)*]. Thus, for example, counsel might combine an action under *Civ. Code § 52.1* with an action alleging deprivation of rights under color of state law or an action alleging violation of the Unruh Civil Rights Act [*see* Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* and Ch. 116, *Civil Rights: Discrimination in Business Establishments*].

PRACTICE TIP:

Proving Claim May Be Difficult. *Civ. Code § 52.1* should always be considered as an option, instead of a claim under *42 U.S.C. § 1983*[*see* Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*], if there is a factual basis on which to prove that the constitutional deprivation included "threats, intimidation or coercion." It is one thing to plead it--it may be another to prove it. I suspect that this issue will arise in motions for summary judgment, special verdicts, and appeal. In most cases it should be left to the jury to decide whether a constitutional violation occurred *and* whether it was accompanied by "threats, intimidation or coercion." Notably, *BAJI 7.90* specifically deals with violations of *Civ. Code § 52.1*. *By John H. Scott*

[3] Allegations

The form of complaint in [1], *above*, alleges all of the following:

- The defendant's capacity and basis for venue (Paragraph 1).

- An optional fictitious name ("DOE") allegation (Optional Paragraph 2)[*see* Civ. Code § 474; *see also* Ch. 20, *Allegations Commonly Used*].

- An optional agency allegation (Optional Paragraph 3)[*see* Ch. 427, *Principal and Agent*].

- Acts on the part of the defendant, involving violence or threats of violence, that interfered with, or were attempts to interfere with, the plaintiff's exercise of his or her rights (Paragraph 4)[*see Cabesuela v. Browning-Ferris Indus. (1998) 68 Cal. App. 4th 101, 110-111, 80 Cal. Rptr. 2d 60* (to state claim under *Civ. Code § 52.1* there must be violence or threat of violence)].

- That the defendant's wrongful conduct interfered with or attempted to interfere with a right of the plaintiff secured by the Constitution or laws of the United States or of California (Paragraph 5)[*see Civ. Code § 52.1(b)*].

- That the defendant interfered, or attempted to interfere, with the plaintiff's rights because of the plaintiff's race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute (Paragraph 6)[*see Cabesuela v. Browning-Ferris Indus. (1998) 68 Cal. App. 4th 101, 110-111, 80 Cal. Rptr. 2d 60* ; *Boccato v. City of Hermosa Beach (1994) 29 Cal. App. 4th 1797, 1808-1809, 35 Cal. Rptr. 2d 282]* .

- Damages proximately caused by the defendant's conduct (Paragraph 7)[*see Civ. Code §§ 52.1(b), 3333*].

- The plaintiff's right to recover a statutory civil penalty (Paragraph 8)[*see Civ. Code § 52(b)*; *see also § 117A.11[1]*].

- An optional allegation that the actions of the defendant were done with malice, fraud, or oppression, and in reckless disregard of the plaintiff's rights (Optional Paragraph 9). This optional allegation, if appropriate under the circumstances, would support recovery of punitive damages [*see Civ. Code § 3294*].

- Facts showing why the defendant's conduct will constitute great and irreparable injury (Paragraph 10)[*see Code Civ. Proc. §§ 526, 527(a)*; *E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1]* .

- Facts showing why the plaintiff lacks an adequate remedy at law (Paragraph 11)[*see Civ. Code § 3422*; *Code Civ. Proc. § 526*].

- The basis for an award of attorney's fees (Paragraph 12)[*see Civ. Code § 52.1(h)*].

[4] Prayer

The prayer in the form of complaint in [1], *above*, seeks recovery of actual damages and a statutory civil penalty in the sum of $25,000 pursuant to *Civ. Code § 52(b)*. The prayer also includes an optional claim for punitive damages. If the facts of the case do not support this claim, this paragraph of the prayer, and Optional Paragraph 9 in the body of the form complaint, should not be used.

In addition, the prayer seeks a temporary restraining order, a preliminary injunction, and a permanent injunction.

Lastly, the prayer seeks attorney's fees. Recovery of attorney's fees is authorized in a case such as this by *Civ. Code § 52.1(h)*.

[5] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on an affidavit (or declaration under *Code Civ. Proc. § 2015.5*)[*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . Otherwise, verification is not required.

For discussion, a procedural checklist, and forms necessary to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

Verification of the complaint requires the defendant to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446*] and precludes a general denial in superior court and some limited civil cases [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[6] Jurisdiction and Venue

A *Civ. Code § 52.1(b)* action must be filed in superior court. Such an action may be brought in either the county in which the conduct occurred or in the county in which the defendant resides or has his or her place of business [*see Civ. Code § 52.1(c)* (includes provision governing venue in action by Attorney General under *Civ. Code § 52.1(a)*)].

[7] Cross References

For a court order granting injunctive relief preventing interference with exercise of civil rights under *Civ. Code § 52.1*, see *§ 117A.51*

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For discussion and forms relating to amendment of pleadings for use when an unknown defendant is sued under a fictitious name, see Ch. 21, *Amended and Supplemental Pleadings*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages, see Ch. 177, *Damages*

For discussion and forms relating to temporary restraining orders, preliminary injunctions, and permanent injunctions, see Ch. 303, *Injunctions*

For discussion of jurisdiction in California courts, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For forms of allegations of infliction of emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons, see Ch. 518, *Service of Summons and Papers*

For forms of allegations establishing venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 117A CIVIL RIGHTS: INTERFERENCE WITH CIVIL RIGHTS BY THREATS, INTIMIDATION, COERCION, OR VIOLENCE
PART IV. FORMS

11-117A California Forms of Pleading and Practice--Annotated § 117A.51

AUTHOR: Dennis M. Farias Revision Author John H. Scott Editorial Consultant

§ 117A.51 Order Granting Preliminary Injunction Enjoining Interference with Exercise of Civil Rights [Civ. Code § 52.1]

[1] FORM Order Granting Preliminary Injunction Enjoining Interference with Exercise of Civil Rights [Civ. Code § 52.1]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], [and DOES I	)	ORDER
through _____,] Defendant(s).	)	
	)	

_____

The _____ [application *or* motion] of plaintiff for the preliminary injunction made herewith came on regularly for hearing by the court this date pursuant to _____ [an order to show cause issued by this court on _____ (*date*) *or* plaintiff's motion for a preliminary injunction]. Plaintiff appeared by counsel _____ [*name*]; defendant[s, and each of them,] appeared by counsel _____ [*name(s)*].

On proof made to the satisfaction of the court, and good cause appearing therefor,

IT IS ORDERED that during the pendency of this action the above-named defendant[s, and each of them,] [and their officers, agents, employees, representatives, and all persons acting in concert or participating with them], shall be and _____ [he is *or* she is *or* they are] hereby enjoined and restrained from engaging in, committing, or

performing, directly or indirectly, by any means whatsoever, any of the following acts:

1. _____ [*Specify the various acts and lines of conduct that are prohibited with sufficient clarity to apprise all of the persons enjoined of what they are prohibited from doing, e.g.*, Continuing to prohibit plaintiff from entering defendant _____'s (*name*) grocery store at _____ (*address of store*) and continuing to threaten plaintiff through the use of threatening signs];

2. _____ [*Continue with specifications as needed*].

IT IS FURTHER ORDERED that before the above order shall take effect, plaintiff herein shall file a written undertaking in the sum of $_____, as required by *Code of Civil Procedure Section 529*, for the purpose of indemnifying defendant[s, and each of them,] for such damages as he/she/they may sustain by reason of this preliminary injunction if the court finally decides that plaintiff is not entitled thereto.

IT IS FURTHER ORDERED that the preliminary injunction as set forth above shall issue on plaintiff's filing a written undertaking in the sum specified above.

IT IS FURTHER ORDERED that the _____ [plaintiff or plaintiff's attorney deliver *or* clerk of the court mail] two copies of this order to _____ [*specify local law enforcement agency with jurisdiction over plaintiff's residence and any other local law enforcement agencies with jurisdiction over any other locations where violence against plaintiff is likely to occur*] by the close of the business day today.

The court reserves jurisdiction to modify this injunction as the ends of justice may require.

VIOLATION OF THIS ORDER IS A CRIME PUNISHABLE UNDER SECTION 422.77 OF THE PENAL CODE.
Dated: _____

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form of order in [1], *above*, should be prepared by counsel for a plaintiff when counsel has persuaded the court to issue a preliminary injunction in an action brought under *Civ. Code § 52.1(b)*. The order contains both prohibitory and mandatory allegations. It may be modified for use when the court has granted a temporary restraining order.

The language warning that violation of the order is a crime is mandatory [*Civ. Code § 52.1(d)*].

For general discussion of the requirements and procedures controlling preliminary injunctions, and additional forms, see Ch. 303, *Injunctions* .

[3] Service of Order

The court will order that two copies of any order, extension, modification, or termination thereof granted pursuant to *Civ. Code § 52.1* be delivered by the plaintiff or the plaintiff's attorney, or be mailed by the county clerk, to each local law enforcement agency having jurisdiction over the plaintiff's residence and any other locations in which the court determines that acts of violence against the plaintiff are likely to occur. The plaintiff or the plaintiff's attorney designates those law enforcement agencies that are to receive copies of the order. The order, extension, modification, or termination must be delivered or mailed by the close of the business day on which it was granted [*Civ. Code § 52.1(e)*].

Each appropriate law enforcement agency receiving an order, extension, or modification of an order issued pursuant to *Civ. Code § 52.1* is required to serve forthwith a copy thereof on the defendant [*Civ. Code § 52.1(e)*]. The law enforcement agencies are also required to provide to any law enforcement officer responding to the scene of reported violence information regarding the existence of, terms, and current status of, any order issued pursuant to *Civ. Code § 52.1*[*Civ. Code § 52.1(e)*].

[4] Cross References

For form of complaint seeking injunctive relief preventing interference with exercise of civil rights under *Civ. Code § 52.1*, see *§ 117A.50*

For discussion and forms relating to temporary restraining orders, preliminary injunctions, and permanent injunctions, see Ch. 303, *Injunctions*

For discussion of jurisdiction in California courts, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

California Forms of Pleading and Practice--Annotated

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 118 CIVIL SERVICE

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[6] Decisions

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§ 118.145 Allegations--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Review Decision of State Personnel Board or Local Civil Service Commission and to Compel Board or Commission to Certify for Appointment for Eligible List to Civil Service Position

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] State Statutes

[5] Decisions

§ 118.146 Allegations--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Review Decision of State Personnel Board or Local Civil Service Commission and to Compel Board or Commission to Conduct Promotional Examination

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] State Statutes

[5] Decisions

§ 118.147 Complaint for Damages [Civ. Code § 3333; Gov. Code § 8547.8(c)] for Retaliation Against State Employee or Applicant for State Employment for Disclosure Protected by California Whistleblower Protection Act [Gov. Code § 8547.8(c)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Reimbursement of Defense Costs

[5] Related Liabilities

[a] State Civil Service System

[b] Local Civil Service Systems

[6] Venue

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§ 118.01 Scope of Chapter

This chapter discusses the state civil service system and proceedings involving civil service employees in state civil service agencies, including the following topics:

- The appointment process.
- Special rules regarding the hiring of disabled persons.
- Prohibited discrimination in state employment.
- Promotional rights.
- Layoff procedures.
- Demotions and transfers.
- Disciplinary proceedings.
- Protection against retaliation for disclosing improper government activities (whistle-blowing).
- Reinstatement rights.
- Grievance procedures within a department or agency.
- Investigations and hearings by the State Personnel Board.
- Judicial review of the Board's decisions.
- Special rights and remedies afforded to peace officers.

City and county civil service systems are discussed in general terms by way of comparison with or contrast to the state system.

This chapter contains a procedural checklist of administrative appeal procedures for attacking actions against employees in the state civil service system.

This chapter contains a form of appeal from a notice of adverse action [§ 118.140] and a general form of appeal from an agency action [§ 118.141], which are to be filed with the State Personnel Board.

The chapter also includes forms of petition for a writ of mandate to review a decision of the State Personnel Board [§ 118.142] or of a local civil service agency [§ 118.143] imposing adverse action on an employee. Allegations for the following purposes, which may be used in either of those forms, are also provided:

- To permit the petitioner to take an examination [§ 118.144].
- To certify the petitioner for appointment from eligible lists [§ 118.145].
- To require a promotional examination to be held [§ 118.146].

In addition, the chapter contains a form of complaint for damages for use by a whistle-blowing state employee or applicant for state employment who has been retaliated against for disclosing improper government activities [§ 118.147].

For discussion of administrative adjudication and judicial review of administrative action, see Ch. 473, *Public Agency Adjudication* , et seq., and Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq. However, that discussion emphasizes the Administrative Procedure Act [*Gov. Code § 11370 et seq.*], which is not generally applicable to proceedings before the State Personnel Board.

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§ 118.02 Cross References

For discussion and forms relating to mandate proceedings for review of or relief from administrative decisions, see Ch. 358, *Mandate and Prohibition* , and Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

For discussion and forms relating to proceedings before administrative agencies generally, see Ch. 473, *Public Agency Adjucication* , et seq.

For discussion and forms relating to mandate proceedings to compel public officers to act, see Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Enemies* .

For discussion and forms relating to petitions for writs of review (certiorari), see Ch. 492, *Review (Certiorari), Writ of.*

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[Reserved]

§§ 118.03[Reserved]

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§ 118.10 Governing Law

The civil service system of the State of California is authorized by the constitution [*Cal. Const., art. VII, § 1*] and implemented by the State Civil Service Act [*Gov. Code § 18500 et seq.*] and regulations under the Act [*2 Cal. Code Reg. § 1 et seq.*]. The State Personnel Board is created and empowered by the constitution to enforce the State Civil Service Act [*Cal. Const., art. VII, §§ 2, 3*]. Nothing in the constitution requires that all civil service rules apply to all public employees, and nothing prohibits the Legislature from experimenting to treat certain employees under different rules, provided the merit principle is not infringed [*Alexander v. State Personnel Board (2000) 80 Cal. App. 4th 526, 536-537, 95 Cal. Rptr. 2d 324* ; *see Gov. Code § 19600 et seq.* (authorizing State Personnel Board to conduct and evaluate demonstration projects to determine whether changes in policies or procedures would result in improved state personnel management)].

County civil service systems are authorized by the constitution [*Cal. Const., art. XI, §§ 1, 3, 4*] and implemented by the County Civil Service Enabling Law [*Gov. Code § 31100 et seq.*].

City civil service systems are authorized by the constitution [*Cal. Const., art. XI, §§ 2, 3, 5*] and implemented by statute [*Gov. Code § 45000 et seq.*]. Local civil service regulations are contained in local charters and ordinances.

City and county civil service laws are generally enforced by a local civil service commission appointed by the city council or county board of supervisors [*see Gov. Code §§ 31110, 45004*].

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§ 118.11 Nature and Purpose of Civil Service Systems

[1] State System

The state civil service system is intended to promote and increase economy and efficiency in state service [*Gov. Code § 18500(b)*]. It has the following characteristics:

- Positions involving comparable duties and responsibilities are similarly classified and compensated [*Gov. Code § 18500(c)(1)*].

- Appointments are based on merit, and fitness is ascertained through practical and competitive examinations [*Gov. Code § 18500(c)(2)*; *see § 118.17*].

- State civil service employment is made a career by providing for security of tenure and the advancement of employees within the service insofar as this is consistent with the best interests of the state [*Gov. Code § 18500(c)(3)*].

- The rights of state civil service employees are given consideration insofar as this is consistent with the best interests of the state [*Gov. Code § 18500(c)(4)*].

- Applicants and employees are treated in an equitable manner without regard to political affiliation, race, color, sex, religious creed, national origin, ancestry, marital status, age, sexual orientation, disability, political or religious opinions, or non-job-related factors [*Gov. Code § 18500(c)(5)*].

- The tenure of civil service employment is subject to good behavior, efficiency, the necessity of the performance of the work, and the appropriation of sufficient funds [*Gov. Code § 18500(c)(6)*].

[2] City and County Civil Service Systems

Counties and cities may adopt a civil service system, by ordinance, that is adaptable to their size and type and that

covers any or all appointed officers and employees [*see Gov. Code §§ 31102, 31104, 45000, 45001*].

[3] Public Employment Determined by Law and Not by Contract

In California, the terms and conditions of public employment are determined by law, not contract [*Miller v. State of California (1977) 18 Cal. 3d 808, 813-814, 135 Cal. Rptr. 386, 557 P. 2d 970]* . Because public employment is held by statute, rather than by contract, a public employee who has been discharged cannot state a cause of action for breach of contract or for breach of an implied covenant of good faith and fair dealing [*Shoemaker v. Myers (1990) 52 Cal. 3d 1, 23-24, 276 Cal. Rptr. 303, 801 P.2d 1054* ; *Kim v. Regents of Univ. of Cal. (2000) 80 Cal. App. 4th 160, 164-165, 95 Cal. Rptr. 2d 10]* . In cases of public employment by counties, cities, and the like, where a civil service system is created by ordinance, certain "unclassified" employees may be terminated at will [*Hill v. City of Long Beach (1995) 33 Cal. App. 4th 1684, 1692-1694, 40 Cal. Rptr. 2d 125* ; *see also Portman v. County of Santa Clara (9th Cir. 1993) 995 F.2d 898, 905* (there can be no implied contract to defeat the statutory terms of public employment)].

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§ 118.12 Persons Covered by Civil Service Systems

[1] State Officers and Employees

The state civil service includes every officer and employee of the state except officers and employees that are excluded by the constitution or statutes [*Cal. Const., art. VII, § 1(a)*]. The constitution excludes the following officers and employees from civil service coverage [*Cal. Const., art. VII, § 4*]:

- Officers and employees appointed or employed by the legislature or the judiciary.
- Officers elected by the people and a deputy and employee selected by each elected officer.
- Members of boards and commissions.
- A deputy or employee selected by each board or commission appointed by the governor or authorized by statute.
- State officers appointed by the governor, employees of the governor's office, and employees of the lieutenant governor's office directly appointed or employed by the lieutenant governor.
- A deputy or employee selected by each officer, except members of boards and commissions.
- Officers and employees of the University of California and the California State Colleges.
- The teaching staff of schools under the jurisdiction of the Department of Education or the superintendent of public instruction.
- Member, inmate, and patient help in state homes, charitable, or correctional institutions, and state facilities for mentally retarded persons.

- Members of the militia while engaged in military service.
- Deputies of the attorney general.
- Certain employees of district agricultural associations.

In addition, the governor may designate exempt managerial positions in the executive agencies over which the governor has line responsibility and that have civil service exempt officers and employees [*Gov. Code § 12010.6*].

In general, a person who is employed by a department that is exempt from civil service coverage is also exempt from coverage, while a person who is employed by a department within the civil service system whose services are of such a nature that they could be performed by an employee selected under civil service provisions is covered by those provisions [*State Compensation Ins. Fund v. Riley (1937) 9 Cal. 2d 126, 135, 69 P.2d 985* ; *California State Employees Asso. v. Trustees of California State Colleges (1965) 237 Cal. App. 2d 541, 543, 47 Cal. Rptr. 81]* .

[2] County Officers and Employees

A county civil service system may cover any or all county officers and employees, except elective officers [*Gov. Code § 31104*]. The ordinance creating the civil service system must designate the appointive officers and employees who are covered by the system [*Gov. Code § 31106*].

[3] City Officers and Employees

A city civil service system may cover any or all appointive officers and employees [*Gov. Code § 45001*], including library officers and employees [*Gov. Code § 45002*]. The ordinance creating the civil service system must designate the departments, and the officers and employees, who are covered by the system [*Gov. Code § 45005*]. By subsequent ordinance, a city may add departments, officers, and employees to the original list [*Gov. Code § 45006*]. Departments, officers, and employees may not be withdrawn from the system, by repeal of the civil service ordinance or otherwise, unless the withdrawal is approved by a two-thirds vote of the electors voting on the proposition [*Gov. Code § 45007*]. There is an exception to this rule for regular full-time city department heads, who may withdraw from the system on a majority vote of the city council [*Gov. Code § 45007*].

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§ 118.13 Due Process Rights

[1] Based on Property Interest in Employment

The *Due Process Clause of the Fourteenth Amendment* protects a public employee's right to a property interest in employment [*see Board of Regents v. Roth (1972) 408 U.S. 564, 576-577, 92 S. Ct. 2701, 33 L. Ed. 2d 548]* . The California Constitution provides similar protection [*see Cal. Const., art. I, § 7*]. Public employees may not waive their due process rights in a collective bargaining agreement [*Phillips v. State Personnel Bd. (1986) 184 Cal. App. 3d 651, 660, 229 Cal. Rptr. 502* (disapproved on other grounds in *Coleman v. Department of Personnel Administration (1991) 52 Cal. 3d 1102, 1123, 278 Cal. Rptr. 346, 805 P.2d 300*)].

[2] When Property Interest in Employment Exists

A statutory scheme that confers on an individual the status of permanent employee gives that employee an enforceable right to continued employment and, thereby, grants the employee a property interest in his or her employment [*Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 206-208, 124 Cal. Rptr. 14, 539 P.2d 774]* . In contrast, a scheme that gives an employee's superiors full freedom to take away an assigned position creates no property interest and, accordingly, makes due-process standards inapplicable [*Campbell v. State Personnel Bd. (1997) 57 Cal. App. 4th 281, 293-294, 66 Cal. Rptr. 2d 722* (no procedural protections against loss of high-level state "career executive assignment" established under *Gov. Code § 18547*)]. The Government Code grants permanent status to any state civil service employee who satisfactorily completes the statutory probationary period [*Gov. Code § 18528*; *Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 197, 124 Cal. Rptr. 14, 539 P.2d 774]* . A public agency's rules that classify an employee as a permanent or career employee, as distinguished from a temporary or probationary employee, is another example of a scheme that entitles an employee to due process protection [*Mendoza v. Regents of University of California (1978) 78 Cal. App. 3d 168, 173-175, 144 Cal. Rptr. 117]* . Even seasonal employees, if entitled to be considered for employment for the same season the next year, have a protected property interest [*Williams v. County of Los Angeles (1978) 22 Cal. 3d 731, 735-736, 150 Cal. Rptr. 475, 586 P.2d 956]* .

A probationary employee is entitled to have the applicable statutory procedures for dismissal strictly followed. For example, a city must strictly comply with its own charter provision that automatically grants an employee tenure unless

a termination notice is delivered to the civil service commission prior to the expiration of the employee's probationary period. If the city fails to deliver such a notice concerning a particular employee, that failure results in the employee becoming a permanent employee with a property interest in continued employment. Accordingly, the subsequent termination of that employee without a full hearing would be a denial of due process [*Zeron v. City of Los Angeles (1998) 67 Cal. App. 4th 639, 643-646, 79 Cal. Rptr. 2d 130]* . On the other hand, if a city charter provision allows an employee's probationary period to be extended to reflect sick time taken by the employee, an employee on such extended probation is not entitled to a property interest in continued employment, even if the city has failed through inadvertence to uniformly apply such extensions to all probationary employees who take sick time [*Cilderman v. City of Los Angeles (1998) 67 Cal. App. 4th 1466, 1470-1471, 80 Cal. Rptr. 2d 20* (in absence of evidence of intentional or purposeful discrimination, mere laxity of enforcement does not amount to denial of equal protection); *but see Winter v. City of Los Angeles (2002) 96 Cal. App. 4th 1058, 1062-1066, 117 Cal. Rptr. 2d 679* (under terms of city charter, officer's placement on inactive duty did not qualify as "absence" that would extend probationary period; hence, inactive officer became tenured at expiration of initial probationary period)].

In the absence of a statutory scheme giving an employee a protected property interest, a mutually explicit understanding between the employee and the public employer can support the employee's claim of entitlement to the position [*Perry v. Sindermann (1972) 408 U.S. 593, 601-602, 92 S. Ct. 2694, 33 L. Ed. 2d 570]* .

An at-will employee has no property interest entitling him or her to due process protections [*Bogacki v. Board of Supervisors (1971) 5 Cal. 3d 771, 782-783, 97 Cal. Rptr. 657, 489 P.2d 537 , cert. denied, 405 U.S. 1030* ; *Hill v. California State University, San Diego (1987) 193 Cal. App. 3d 1081, 1088, 238 Cal. Rptr. 799]* . However, an at-will employee does have a right to a hearing before being discharged based on charges of dishonesty, because those charges would affect the employee's liberty interests by damaging his or her reputation and limiting his or her ability to obtain future employment. However, an at-will employee whose liberty interests are at stake is entitled only to a hearing at which he or she can personally present his or her side of the story; there is no requirement that such a hearing include live witnesses or the opportunity to cross-examine adverse witnesses [*Holmes v. Hallinan (1998) 68 Cal. App. 4th 1523, 1530-1533, 81 Cal. Rptr. 2d 174]* .

If an employee is subject to discharge only for cause, he or she has a property interest that is entitled to constitutional protection [*Williams v. County of Los Angeles (1978) 22 Cal. 3d 731, 736, 150 Cal. Rptr. 475, 586 P.2d 956* ; *Figueroa v. Housing Authority (1982) 131 Cal. App. 3d 528, 533, 182 Cal. Rptr. 497]* .

In determining whether an employee has a protected property interest, the courts look to the totality of the pertinent statutes, rules, and express or implied contracts [*Bush v. California Conservation Corps (1982) 136 Cal. App. 3d 194, 200-202, 185 Cal. Rptr. 892* ; *see Seidler v. Municipal Court (1993) 12 Cal. App. 4th 1229, 1233-1238, 16 Cal. Rptr. 2d 90]* .

Local public employees have property rights in their employment going beyond mere expectation. An employee is entitled to due process on termination if (1) the legislature has required the employing agency to adopt procedures for the removal of employees, (2) the employee has permanent status, and (3) the agency's personnel policy is that all employment relationships are based on merit [*Figueroa v. Housing Authority (1982) 131 Cal. App. 3d 528, 533, 182 Cal. Rptr. 497]* . Local public employees who are not subject to discharge except for cause have a property interest in their employment, which is entitled to constitutional protection [*Davis v. Civil Service Com. (1979) 93 Cal. App. 3d 417, 421, 155 Cal. Rptr. 650]* .

Minimal standards of due process require that local public employees receive, before the imposition of discipline, (1) notice of the proposed action, (2) notice of the grounds for the action, (3) notice of the charges and materials on which the action is based, and (4) an opportunity to respond in opposition to the proposed action. To be meaningful, the right to respond must afford the employee the opportunity to present his or her side of the controversy before a reasonably impartial and uninvolved reviewer having authority to recommend final disposition of the matter [*Titus v. Civil*

Service Com. (1982) 130 Cal. App. 3d 357, 362, 181 Cal. Rptr. 699] .

Although a tenured civil service employee's actual job is property, the prospect or expectancy of a promotion is not in the same category. Until the employee actually receives a promotion, or at least a binding assurance of a forthcoming promotion, he or she cannot claim a property interest in that promotion. Therefore, constitutional substantive due process standards are inapplicable to protect a civil service employee's expectation of a promotion [*Nunez v. City of Los Angeles (9th Cir. 1998) 147 F.3d 867, 871-873]* .

Even if an individual is not a tenured public employee, a state must afford due process when it seeks to bar that individual forever from public employment, makes a charge of "dishonesty," or attaches a "stigma" to an employment decision concerning that individual [*Board of Regents v. Roth (1972) 408 U.S. 564, 573, 92 S. Ct. 2701, 33 L. Ed. 2d 548]* . However, this right to due process is not triggered by a ban on employment with a specific public employer, so long as the individual remains free to seek employment with other public entities [*Llamas v. Butte County Cmty. Coll. Dist. (9th Cir. 2001) 238 F.3d 1123, 1128]* .

[3] Preremoval Procedural Safeguards

Civil service employees having a statute-based property interest in continued employment may not be deprived of their employment without due process [*Cleveland Bd. of Educ. v. Loudermill (1985) 470 U.S. 532, 538-541, 105 S. Ct. 1487, 84 L. Ed. 2d 494]* . Before a state civil service employee can be deprived of employment, the employee must be given prior notice of any proposed disciplinary action and the reasons for it, a copy of the charges and materials on which the action is based, and the right to respond either orally or in writing to the official imposing the discipline [*Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 215, 124 Cal. Rptr. 14, 539 P.2d 774]* . These requirements have given rise to an administrative procedure known as a *Skelly* hearing, in which an employee has the opportunity to respond to the charges on which the proposed discipline is based [*Flippin v. Los Angeles City Bd. of Civil Serv. Comm'rs (2007) 148 Cal. App. 4th 272, 280, 55 Cal. Rptr. 3d 458]* . The *Skelly* hearing and related rights are preremoval safeguards that are required even if the employer provides a full evidentiary hearing after imposing the discipline [*Kirkpatrick v. Civil Serv. Comm'n (1978) 77 Cal. App. 3d 940, 945, 144 Cal. Rptr. 51* ; *see Flippin v. Los Angeles City Bd. of Civil Serv. Comm'rs (2007) 148 Cal. App. 4th 272, 281-283, 55 Cal. Rptr. 3d 458* (at least when additional levels of administrative review are present, conduct of *Skelly* hearing by manager who initially recommended discharge does not violate employee's due-process rights)]. These procedures also apply to public employees other than state civil service employees, if they have a property interest in their continued employment [*Davis v. Civil Service Com. (1979) 93 Cal. App. 3d 417, 421-422, 155 Cal. Rptr. 650* (county employee)].

Each of these safeguards must be given at a meaningful time and in a meaningful manner [*Kempland v. Regents of University of California (1984) 155 Cal. App. 3d 644, 649-650, 202 Cal. Rptr. 275]* . An employee must be given an effective opportunity to rebut the reasons for the discipline sought to be imposed, and informal procedures will not validate a disciplinary action if there was insufficient advance notice of a predisciplinary hearing [*Barber v. State Personnel Bd. (1976) 18 Cal. 3d 395, 403, 134 Cal. Rptr. 206, 556 P.2d 306]* .

When a public agency determines that it must lay off employees because of a fiscal crisis, with the layoffs based on seniority, a permanent employee who accepts a demotion in lieu of being laid off does not have a due-process right to a predemotion hearing. In that instance, a postdemotion right to appeal the layoff decision is sufficient to meet the requirements of due process [*Duncan v. Department of Personnel Admin. (2000) 77 Cal. App. 4th 1166, 1175-1183, 92 Cal. Rptr. 2d 257]* .

[4] Posttermination Hearing; Right to Reinstatement and Back Pay

When an employee having a property interest in continued public employment is being discharged, due process requires that a posttermination, evidentiary hearing must be held within a reasonable time after the discharge, and the employee

must have the right to reinstatement with back pay when the discharge is without good cause [Townsel v. San Diego *Metro. Transit Dev. Board (1998) 65 Cal. App. 4th 940, 949-950, 77 Cal. Rptr. 2d 231* (due process requirement of evidentiary hearing applies to any public employee who has constitutionally protected property interest in continued employment, regardless of whether employee is in civil service system or is subject to statutory scheme that specifically provides required evidentiary hearing); *Kristal v. State Personnel Bd. (1975) 50 Cal. App. 3d 230, 240, 123 Cal. Rptr. 512* (disapproved on other grounds in *Barber v. State Personnel Bd. (1976) 18 Cal. 3d 395, 405, 134 Cal. Rptr. 206, 556 P.2d 306*)]. When a full evidentiary hearing is held and a factual issue is in dispute, due process requires that both the burden of producing evidence and the burden of proof must rest on the employer [*Curia v. Civil Service Com. (1981) 126 Cal. App. 3d 994, 1008-1009, 179 Cal. Rptr. 476* (disapproved on other grounds in *Coleman v. Department of Personnel Administration (1991) 52 Cal. 3d 1102, 1123, 278 Cal. Rptr. 346, 805 P.2d 300*)].

The remedy for denial of due process is back pay for the period during which discipline was improperly imposed [*Barber v. State Personnel Bd. (1976) 18 Cal. 3d 395, 402, 134 Cal. Rptr. 206, 556 P.2d 306* ; *San Diego County Sheriffs Assn. v. San Diego County Civil Service Com. (1998) 68 Cal. App. 4th 1084, 1086, 1094-1096, 80 Cal. Rptr. 2d 712* (award of wrongly withheld backpay must include interest under *Civ. Code § 3287(a)*); *Summers v. City of Cathedral City (1990) 225 Cal. App. 3d 1047, 1060-1061, 275 Cal. Rptr. 594]* . If the employee is provided due process at a hearing after the discharge, and good cause is found for the discharge, the employee is not entitled to reinstatement based on the employer's denial of due process at the predisciplinary stage [*Kirkpatrick v. Civil Service Com. (1978) 77 Cal. App. 3d 940, 945, 144 Cal. Rptr. 51]* .

[5] Suspensions

A suspension from employment is generally considered a relatively minor deprivation of property necessitating fewer procedural safeguards than are required for a discharge. However, by statute, any permanent state civil service employee is entitled to the predisciplinary safeguards *outlined in § 118.13[3]*, before the effective date of any adverse action, including suspension [*see Gov. Code §§ 19574, 19590* (nonmanagerial employees; managerial employees)]. When an employer imposes a short disciplinary suspension on any other employee, the employer need not comply with those predisciplinary requirements; however, the employer must provide similar procedures during the suspension period or within a reasonable time after it [*Gilbert v. Homar (1997) 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120, 129-130* ; *Civil Service Asso. v. San Francisco (1978) 22 Cal. 3d 552, 564, 150 Cal. Rptr. 129, 586 P.2d 162]* .

Because a permanent, classified employee of a school district cannot be suspended without reasonable cause [*Educ. Code §§ 45302, 45304(a)*], the district must comply with procedural due process before imposing a short-term suspension on the employee. Generally, procedural due process requires that the employee be given a presuspension hearing, although a balancing of the employee's interest, the district's interest, and the risk of an erroneous suspension and probable value of the hearing may justify proceeding without a presuspension hearing in some cases [*Bostean v. Los Angeles Unified School Dist. (1998) 63 Cal. App. 4th 95, 112-118, 73 Cal. Rptr. 2d 523* (court treated seven-month involuntary, unpaid illness leave as suspension because of its effect on employee's receipt of salary and benefits)].

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§ 118.14 Appointments in General

Positions in the state civil service are filled by appointment [*Cal. Const., art. VII, § 1(b)*; *Gov. Code § 19050*; *see Gov. Code § 18525* ("appointment" defined)]. In general, appointments to vacant positions must be made from employment lists established as a result of competitive written or oral examinations [*Gov. Code § 19050*; *see Gov. Code § 18900*; *see also Gov. Code §§ 18532-18537, 18902-18906* (various types of employment lists)]. All appointments, transfers, reinstatements, promotions, and demotions must be made in strict accordance with the State Civil Service Act and regulations under the Act [*Gov. Code § 19050*].

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§ 118.15 Qualifications for Positions

The State Personnel Board has authority to establish minimum criteria for determining the fitness and qualifications of employees for each class of position in the state civil service [*Gov. Code § 18931*; *see 2 Cal. Code Reg. §§ 171.1-172.1*]. The board may require an applicant to provide documentary evidence of citizenship, honorable discharge from the U.S. armed forces, possession of a valid license for the position (if required), or other evidence of identification, fitness, and qualification [*Gov. Code § 18931*]. The board also may require certificates of physicians, public officers, or other persons having knowledge of the applicant [*Gov. Code § 18931*]. An applicant may be required to furnish certain medical information [*2 Cal. Code Reg. § 173*].

For the purpose of making an appointment to the state civil service, the agency having the power to make the appointment may investigate the character, personality, education, and experience of an applicant [*Gov. Code § 18930*].

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§ 118.16 Psychological Screening for Peace Officer Positions

[1] Psychological Standards

Candidates for peace officer positions in the state civil service must undergo mandatory psychological screening as part of the application process [*2 Cal. Code Reg. § 172.4*]. To be certified as a peace officer, a candidate must be found to be free from any job-relevant psychological, emotional, or mental traits, characteristics, or conditions that might adversely affect the performance of the duties and powers of a peace officer [*2 Cal. Code Reg. § 172.7(1)*].

[2] Screening Procedures

The State Personnel Board has the responsibility of psychologically screening candidates, although it may delegate authority to an appointing department or agency [*2 Cal. Code Reg. § 172.6*]. Except as otherwise authorized by law, no appointing department or agency may conduct any psychological screenings without prior Board approval [*2 Cal. Code Reg. § 172.6*]. Any psychological screening by an appointing department or agency must be conducted in accordance with the procedures prescribed for screenings conducted by the Board [*2 Cal. Code Reg. § 172.6*; *see 2 Cal. Code Reg. §§ 172.7-172.10*].

As part of the psychological screening, each candidate must take a minimum of two written psychological tests (sometimes called "inventories") consistent with the requirements of the California Commission on Peace Officer Standards and Training (POST) [*2 Cal. Code Reg. § 172.7(2)*]. In addition, each candidate must have a face-to-face evaluation interview conducted by a qualified professional selected by the Board's Psychological Officer. The interviewing qualified professional must have prior access to [*2 Cal. Code Reg. § 172.7(3)*]:

- All psychological screening tests and questionnaire data;
- Summaries of available prior screening reports;
- Summaries of any available prior mental health evaluation and treatment records and salient medical records; and

- A summary of the appointing department or agency's background investigation report.

The interviewing qualified professional must submit to the Board's Psychological Officer a recommendation as to whether the candidate meets the minimum psychological standards for appointment as a peace officer, together with a detailed report of findings and opinions that explain and support the recommended decision [*2 Cal. Code Reg. § 172.7(4)*].

A "qualified professional" in this context is either of the following [*2 Cal. Code Reg. § 172.5*; *see Gov. Code § 1-31(f)(2)*]:

- ☐ A physician and surgeon who:
  - ☐ Holds a valid California license to practice medicine;
  - ☐ Has successfully completed a postgraduate medical residency education program in psychiatry accredited by the Accreditation Council for Graduate Medical Education;
  - ☐ Has at least the equivalent of five full-time years of experience in the diagnosis and treatment of emotional and mental disorders, including the equivalent of three full-time years accrued after completion of the psychiatric residency program; and
  - ☐ Has met any applicable education and training procedures set forth by the POST Commission for the conduct of preemployment psychological screening of peace officers.
- ☐ A psychologist licensed by the California Board of Psychology who has at least the equivalent of five full-time years of experience in the diagnosis and treatment of emotional and mental disorders, including the equivalent of three full-time years accrued postdoctorate, and who has met any applicable education and training procedures set forth by the POST Commission for the conduct of preemployment psychological screening of peace officers.

The Board's Psychological Officer must determine whether candidates should be certified as meeting the psychological standards for appointment as peace officers, subject to the right of appeal to the Board. In determining whether a candidate meets the psychological standards for appointment as a peace officer, the Board's Psychological Officer must consider the qualified professional's report of findings, written psychological test data, and substantiating behavioral evidence derived from one or more of the following sources: prior evaluation and treatment records, background investigation or other information collected by the appointing power or the board, the candidate's self-report of personal history, and behavior manifested in the evaluation interview [*2 Cal. Code Reg. § 172.7(5)*].

[3] Disqualification Based on Screening

The State Personnel Board may withhold or withdraw from certification, before appointment, any candidate who does not meet these minimum psychological standards [*2 Cal. Code Reg. § 172.8*; *see 2 Cal. Code Reg. § 172.7(1)* (minimum psychological standards); *see also* [1], *above*].

A candidate who is withheld or withdrawn from certification based on the psychological screening may appeal to the State Personnel Board. An appeal must be in writing, filed within 30 days after the candidate is notified that he or she

had been withheld or withdrawn from certification. On receipt of the written appeal, the Board's Appeals Division will forward to the candidate instructions for obtaining an evaluation from an outside qualified professional selected by the candidate, including a release form to be signed by the candidate authorizing the release of psychological screening records to the qualified outside professional. The appeal may be dismissed if the candidate fails to return the signed authorization prior to obtaining an evaluation from the outside professional. The qualified outside professional selected by the candidate must, within 90 days of the date that the appeal is filed, submit a signed written report stating an opinion as to whether the candidate meets the minimum psychological standards for appointment as a peace officer, together with the documentation of findings that explain and support that opinion. The appeal may be dismissed if the selected outside professional does not submit the requisite report within the 90-day period. The appeal must be dismissed if the qualified professional selected by the candidate does not submit an evaluation report recommending that the candidate meets the minimum psychological standards for appointment as a peace officer. On timely receipt of a positive evaluation opinion and report from the selected outside professional, the appeal will be scheduled for review [*2 Cal. Code Reg. § 172.9*].

[4] Confidentiality

All psychological screening testing materials, written reports, and related records are the exclusive property of the State Personnel Board, which must retain them for a minimum of five years [*2 Cal. Code Reg. § 172.10*]. The confidentiality of these materials and related information must be maintained, consistent with the Information Practices Act of 1977 [*see Civ. Code § 1798 et seq.*], the Confidentiality of Medical Information Act [*see Civ. Code § 56 et seq.*], and all other laws governing the collection, maintenance, and release of medical and psychological information [*2 Cal. Code Reg. § 172.10*].

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§ 118.17 Examinations

[1] Requirement

Permanent employment and promotion in the state civil service are obtained through a general merit system based on employment lists established as a result of competitive examinations [*Cal. Const., art. VII, § 1(b)*]. The examinations test qualifications, fitness, and ability to perform the duties of the various classes of positions in the state civil service [*Gov. Code § 18930*].

Nothing in the constitution requires that all civil service rules apply to all public employees, and nothing prohibits the Legislature from experimenting to treat certain employees under different rules [*Alexander v. State Personnel Board (2000) 80 Cal. App. 4th 526, 536-537, 95 Cal. Rptr. 2d 324* ; *see Gov. Code § 19600 et seq.* (authorizing State Personnel Board to conduct and evaluate demonstration projects to determine whether changes in policies or procedures would result in improved state personnel management)]. However, in any such experiment or demonstration project, the merit principle must not be infringed. Therefore, the examination process, including the grading of the test and the ranking and comparing of applicants based on test scores, must be retained [*Alexander v. State Personnel Board (2000) 80 Cal. App. 4th 526, 540-544, 95 Cal. Rptr. 2d 324* ; *see Professional Eng'rs in Cal. Gov't v. State Personnel Bd. (2001) 90 Cal. App. 4th 678, 689-706* (career executive assignment program does not violate constitutional merit principle, but regulations allowing employees to transfer into program without competitive examination are invalid); *see also Gov. Code § 19889*].

[2] Open Examinations

In general, examinations are open to all persons who meet the minimum qualifications for the pertinent position, as prescribed by the specifications for the class or by rule of the State Personnel Board, and who may lawfully be appointed to the position; however, the board may limit the size of candidate groups in entry-level and nonpromotional examinations when doing so would be in the best interest of the state and effective competition can occur among a smaller number of applicants [*Gov. Code § 18900*]. Examinations for peace officers and for many types of managerial positions must be held on an open basis unless the agency having the power to make the appointments determines otherwise [*Gov. Code § 18930*].

[3] Types of Examinations

Examinations may be written or oral, or in the form of a demonstration of skill, or any combination of these [*Gov. Code § 18930*; *see* discussion § 118.17[14]]. In addition, any tests that the State Personnel Board deems appropriate may be used for testing intelligence, capacity, technical knowledge, manual skill, or physical fitness [*Gov. Code § 18930*].

[4] Age Limitations

Minimum and maximum age limits for civil service examinations are prohibited, except for trainee positions and for positions involving public health or safety or having the powers and duties of a peace officer [*Gov. Code § 18932*].

[5] Announcement of Examination

An examination must be announced or advertised for a reasonable period before the scheduled date [*Gov. Code § 18933*]. The announcement must state (1) the date and place of the examination, (2) the minimum qualifications, (3) the general scope of the examination, and (4) the relative weights of the several parts if more than one type of test will be used [*Gov. Code § 18933*]. The announcement also must state (1) the title, salary range, and where appropriate, the duties of the class of position, (2) the method of evaluating the education, experience, and personal qualifications of the competitors and (3) any additional information the State Personnel Board may deem proper [*2 Cal. Code Reg. § 171*].

The State Personnel Board may cancel any examination at any time before the establishment of the employment list [*2 Cal. Code Reg. § 171*].

[6] Application for Examination

Every applicant for an examination must file a formal, signed application at the place, within the time, in the manner, and on the form specified in the examination announcement [*Gov. Code § 18934*; *2 Cal. Code Reg. § 174*]. Blank application forms are available, without charge, to all persons requesting them [*Gov. Code § 18934*]. A separate application must be filed for each examination unless the announcement states otherwise [*2 Cal. Code Reg. § 174*]. There is no examination fee [*2 Cal. Code Reg. § 173*].

An application is filed within the time specified in the examination announcement if it is postmarked by the postal service, or date-stamped at one of the offices of the State Personnel Board or the appropriate office of the agency administering the examination, by the date specified. Under certain conditions, specified by board rule, a late application may be accepted [*2 Cal. Code Reg. § 174*].

Each applicant must be notified of the approval or disapproval of his or her application, and of his or her authorization to take the examination [*2 Cal. Code Reg. § 175*].

All applications will remain on file for at least two years. Applications for examinations in progress will not be returned to applicants under any circumstances [*2 Cal. Code Reg. § 174*].

[7] Conduct of Examination

Written examinations must be managed so that the identity of any applicant is concealed from the persons responsible for determining a passing score, except in examinations in which the papers are scored objectively and both the key answers and the passing score have been predetermined [*2 Cal. Code Reg. § 179*]. Any applicant who places any identifying mark on an examination paper, except as instructed by the examination proctor, may be deprived of all benefits under the examination [*2 Cal. Code Reg. § 180*]. Evidence of copying or collusion by an applicant may result in the cancellation of his or her examination and debarment from future state civil service examinations of any kind [*2 Cal. Code Reg. § 178*].

[8] Results of Examination; Employment List

All examination papers must be marked and graded in accordance with the examination announcement. When, in the course of grading, it becomes apparent that an applicant would receive less than the minimum percentage required for eligibility on all or any portion of the examination, the grading of the examination need not be completed, and the applicant is considered as having been disqualified [*2 Cal. Code Reg. § 185*].

When the employment list resulting from an examination has been established, each competitor must be notified in writing of the results of the examination [*Gov. Code § 18938.5*; *2 Cal. Code Reg. § 209*; *see Gov. Code § 18575(a)*]. Competitors who are unsuccessful in an oral examination are entitled to a specification of the reasons why they were unsuccessful, if they request it in writing [*Gov. Code § 18938.5*].

Each competitor's final earned rating must be determined by the weighted average of the earned ratings on all parts of the examination, according to the weights for each part established in advance of the examination and published in the announcement. Minimum qualifying ratings may be set for each part of an examination, and competitors who fail to achieve the minimum rating in any part are disqualified from any further participation in the examination [*Gov. Code § 18936*].

The passing mark for an examination may be other than the true percentage or average published as a part of the announcement of the examination when this is justified to provide an adequate employment list or to adjust for the apparent difficulty of an examination [*Gov. Code § 18937*].

The names of the persons who attained the passing mark for the examination must be placed on the employment list in the order of their final earned ratings, except that the order may be modified by the application of veterans' preferences [*see § 118.17[11]*]. When the order of names has been determined, the number of names to be placed on the employment list may be limited to suit the needs of the state civil service [*Gov. Code § 18937*].

[9] Certificates of Competence

Candidates who demonstrate a particular knowledge, ability, or skill that is to be tested by a part of an examination may be issued a certificate of competence, which will be accepted as evidence of the candidate's competence in lieu of participation in that part of the examination [*Gov. Code § 18938*].

[10] Continuous Examinations

For certain classes of positions, applications may be received, examinations may be conducted, and employment lists may be created continuously. The names of competitors who took the same or a comparable examination on different dates may be ranked in the order of their final earned ratings, except that this order may be modified by the application of veterans' preferences [*see § 118.17[11]*]. Eligibility based on a continuous examination may be deemed established as of the date of the examination [*Gov. Code § 18939*].

[11] Veterans' Preference

Veterans, widows or widowers of veterans, and spouses of 100-percent disabled veterans, who attain a passing mark on an entrance examination are entitled to an additional 10 points [*Gov. Code § 18973(b)*]. Disabled veterans whom the Veterans Administration has determined to be 10-percent or more disabled as a result of their service are entitled to an additional 15 points [*Gov. Code § 18973(a)*]. These credits are added to the percentage attained by the applicant in the examination, in order to determine his or her ranking on the employment list [*Gov. Code § 18974*; *see 2 Cal. Code Reg. § 210* (veterans' preference in case of tie)]. The veterans' preference must be requested, and proof of eligibility must be submitted to the department conducting the examination [*Gov. Code § 18976*].

Veterans with more than three months' service who attain a passing mark on an entrance examination for police officers are entitled to be placed ahead of all nonveterans on the employment list [*Gov. Code § 18971*].

General or individual preference in ratings may be allowed to permanently disabled veterans for specific state civil service positions [*Gov. Code § 18972*].

[12] Appeal From Written Examination

Within seven days after a written examination has been held, an applicant may file a written appeal that the State Personnel Board review items in the examination and determine whether they are incorrectly or improperly keyed on the scoring key. The examination may not be scored until all disputed items have been reviewed and any necessary adjustments have been made either by correcting the scoring key or eliminating the disputed items [*2 Cal. Code Reg. § 190*].

An applicant also may file a written appeal charging fraud or clerical error in the scoring of the examination. The appeal must be filed within 60 days after notice of the result of the examination was mailed to the applicant [*2 Cal. Code Reg. § 190*].

[13] Confidentiality; Inspection Rights

All filed applications for an examination and all other examination materials, including examination questions and booklets, belong to the State Personnel Board and are confidential records open to inspection only if and as provided by board rule [*Gov. Code § 18934*].

An applicant's examination papers are open to inspection only by the applicant, the applicant's attorney authorized in writing by the applicant, and the appointing agency to which the applicant has been certified [*2 Cal. Code Reg. § 188*; *see Gov. Code § 18938.6*]. An applicant is entitled to compare his or her answer sheets with the scoring key for the examination, upon written request filed with the board within 60 days after notice of the result of the examination [*2 Cal. Code Reg. § 187*].

Copying questions or answers contained in written examination papers, making erasures or alterations in the markings on the papers, and mutilating the papers are forbidden. Evidence that an applicant or his or her attorney has engaged in any of these actions may result in the applicant's debarment from competition in future examinations and the cancellation of the applicant's eligibility for employment in state civil service [*2 Cal. Code Reg. § 189*].

Candidates for civil service employment are not entitled to review the interviewers' worksheets prepared during oral examinations and are not entitled to obtain a verbatim transcription of interviewers' comments. The appointing agency has a legitimate interest in protecting the privacy of the interviewers. Therefore, candidates are entitled to know only the substance of interviewers' comments in summary form [*Brutsch v. City of Los Angeles (1992) 3 Cal. App. 4th 354, 359-360, 4 Cal. Rptr. 2d 456]* .

All applications for state civil service employment must remain on file for at least two years but then may be destroyed by order of the board's executive officer. In no circumstances will applications for examinations in progress or examinations be returned to applicants. The names of applicants for state civil service employment may not be made public [*2 Cal. Code Reg. § 174*].

[14] Qualifications Appraisal Interview

An applicant's eligibility for state civil service employment may be determined on the basis of a qualifications appraisal

interview in lieu of an examination. The applicant's education, experience, and personal qualifications are rated after the interview and any investigations that may be necessary [*2 Cal. Code Reg. § 194*]. Ratings of education, experience, and personal qualifications must be made on a competitive basis. Each applicant must be rated in relation to the minimum qualifications for the class of position in question and in relation to the comparable qualifications of other competitors. Personal qualifications include all personality traits and personal, moral, and physical characteristics necessarily comprehended by the minimum qualifications established for the class. When rating an applicant's education and experience, interviewers must consider the quality, length, and pertinence of, and the degree to which, the applicant's total education and work histories represent suitable preparation for the work of the class [*2 Cal. Code Reg. § 198*].

An applicant must receive a minimum rating of 70 percent in order to be eligible for appointment [*2 Cal. Code Reg. § 199*]. An applicant who receives a disqualifying rating after a qualifications appraisal interview may appeal to the State Personnel Board to review his or her rating within 30 days after notice of the rating. The appeal must be based on the ground that the rating was the result of a failure to follow prescribed rating standards or procedures, or the result of an erroneous interpretation or application of the minimum qualifications prescribed for the class, or the result of fraud, discrimination, or other improper acts or circumstances [*2 Cal. Code Reg. § 202(c)*].

In considering an appeal, the board has four options [*2 Cal. Code Reg. § 202(d)*]:

- Sustain the rating.

- Grant the appeal and give a rating equal to that of the lowest eligible on the list.

- If the rating was the result of fraud or discrimination, give the applicant a passing rating; or cancel part or all of the interview ratings given, arrange for reexamination of the applicant and other affected competitors, and withhold part or all of the eligible list from certification until the reexamination is completed.

- Make a referral of the request for review of the rating either to the original panel or to a new qualifications appraisal panel, with instructions appropriate for reconsideration of the applicant's rating; then, following the panel's recommendation, either sustain the original rating, or give the applicant the revised recommended rating, or give the applicant a rating equal to that of the lowest eligible person on the list.

[15] Ineligibility or Disqualification

The State Personnel Board may refuse to examine an applicant or, after examination, may refuse to declare an applicant eligible for appointment to a position in the state civil service, if the applicant satisfies any of the following conditions [*Gov. Code § 18935*; *see 2 Cal. Code Reg. § 211* (following factors may be considered in board's review of dismissed employee's request to participate in examination)]:

(1) Lacks any of the requirements established by the board for the examination or the position for which the applicant applied.

(2) At the time of the examination, has permanent status in a position equal to or higher than the class of the examination or position for which he or she has applied.

(3) Is physically or mentally disabled to perform the duties of the position to which he or she seeks appointment.

(4) Is addicted to the use of intoxicating beverages to excess or to the use of controlled substances.

(5) Has been convicted of a felony or convicted of a misdemeanor involving moral turpitude.

(6) Has been guilty of infamous or notoriously disgraceful conduct.

(7) Has been dismissed from any position for any cause that would be a cause for dismissal from state service.

(8) Has resigned from any position not in good standing or in order to avoid dismissal.

(9) Has intentionally attempted to practice any deception or fraud in his or her application or examination or in obtaining his or her eligibility.

(10) Has waived appointment three times after certification from the same employment list.

(11) Has failed to reply within a reasonable time, as specified by the board, to communications concerning his or her availability for employment.

(12) Has made himself or herself unavailable for employment by requesting that his or her name be withheld from certification.

(13) Is found to be unsuited or not qualified for employment, in accordance with board rule.

(14) Has engaged in unlawful reprisal or retaliation against a state employee or other person in violation of the California Whistleblower Protection Act [*see Gov. Code § 8547 et seq.*], as determined by the State Personnel Board or a court.

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§ 118.18 City and County Civil Service Examinations

Examinations may be given for appointment and promotion in county and city civil service systems [*see Gov. Code §§ 31103, 31114, 31115, 45008, 45200, 45201*]. Minimum qualifications and standards for these examinations are established by statutes and county and city charters. Charters generally determine the conditions and the scope of the examinations [*see Gov. Code § 31007*; *Terry v. Civil Service Commission (1952) 108 Cal. App. 2d 861, 868, 240 P.2d 691]* . If authorized by the charter, a civil service commission may establish a screening committee to select a group of individuals who will undergo a civil service examination. The screening committee may consider the education, training, and work experience of a group of individuals meeting certain minimum qualifications, then select a number of individuals from that group to undergo testing [*Social Services Union v. City and County of San Francisco (1991) 234 Cal. App. 3d 1093, 1101-1102, 285 Cal. Rptr. 905]* .

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§ 118.19 Filling Vacant Positions

[1] Certification of Eligible Persons

When a vacancy in any position is to be filled otherwise than by transfer, demotion, or reinstatement, the employing agency must submit to the State Personnel Board a statement of the duties of the position, the necessary and desired qualifications of the person to be appointed, and the salary and location of the position, along with a request that the names of persons eligible for appointment to the position be certified by the board [*Gov. Code § 19052*; *2 Cal. Code Reg. § 251*].

The order of preference in certifying the names of persons eligible for appointment depends on the type of employment list on which the names appear. In general, the order of preference in certifying persons eligible for appointment is as follows [*Gov. Code § 19054*]:

(1) The person whose name is highest on one of the following lists, in this order [*Gov. Code § 19056*]:

(a) Subdivisional reemployment list.

(b) Departmental reemployment list.

(2) The three persons whose names are highest on a general reemployment list [*Gov. Code § 19056.5*].

(3) The three persons with the highest standing on the list for the class in which the position belongs and who have indicated their willingness to accept appointment under the conditions of employment specified, drawn from the following lists in this order [*Gov. Code § 19057*]:

(a) Subdivisional promotional list.

(b) Departmental promotional list.

(c) Multidepartmental promotional list.

(d) Service-wide promotional list.

(4) The person whose name is highest on the departmental eligible list.

(5) The person whose name is highest on the general eligible list.

Special certification procedures apply in the case of professional, scientific, or administrative positions [*see Gov. Code § 19057.1*; *2 Cal. Code Reg. §§ 254-254.2*], management positions [*see Gov. Code § 19057.2*], positions in the Department of Corrections [*see Gov. Code § 19057.3*], and supervisory positions [*see Gov. Code § 19057.4*].

In making a hiring decision, the employing agency must select one of the persons certified, but it generally need not select the one with the highest ranked score [*see Gov. Code § 19057*; *see, e.g., 2 Cal. Code Reg. § 254*]. However, the merit principle underlying the state civil-service system [*see Cal. Const. art. VII, § 1(b)*] remains applicable at the hiring stage. Accordingly, the Legislature may not adopt or approve a program that imposes an absolute seniority-based preference at the hiring phase [*California State Personnel Bd. v. California State Employees Assn., Local 1000, SEIU, AFL-CIO (2005) 36 Cal. 4th 758, 768-776, 31 Cal. Rptr. 3d 201, 115 P.3d 506* (collective-bargaining agreements approved by Legislature impermissibly required hiring decisions to be made solely on basis of seniority)].

Statutory provisions require each state agency to establish an equal opportunity program to ensure the implementation of California's policy of providing equal access to state jobs, work assignments, training, and other employment-related opportunities for all qualified job applicants and employees, based on merit and nondiscrimination in every aspect of personnel policies and employment practices [*see Gov. Code § 19790 et seq.*]. Former provisions that required state agencies to develop affirmative action programs were held unconstitutional and have been repealed [*see Connerly v. State Pers. Bd. (2001) 92 Cal. App. 4th 16, 53-57, 112 Cal. Rptr. 2d 5* ; *see* also former *Gov. Code § 19790 et seq.* (repealed by 2005 Stats., ch. 644)].

[2] Response by Eligible Person

A person who is eligible for appointment is required to respond within a reasonable time to an inquiry about his or her interest in appointment to a particular position [*see 2 Cal. Code Reg. § 258* (what constitutes reasonable response time)]. If he or she fails to do so, or fails to appear for a job interview or for work, his or her name must be placed on inactive status for the class of position involved, and he or she is deemed to have waived certification [*2 Cal. Code Reg. § 260*].

[3] Waiver of Certification and Appointment

The State Personnel Board may ascertain from each person eligible for appointment the salary, tenure, location, and other pertinent conditions of employment under which he or she will accept appointment. Such a statement constitutes an automatic waiver of certification to positions having other conditions of employment. The person may change his or her statement at any time, but in that event, the person is not entitled to be considered for appointment to any position for which certification has already been forwarded to the employing agency [*2 Cal. Code Reg. § 261*].

After three waivers of certification to positions in any given class and under the conditions of employment acceptable to the person eligible for appointment, that person's name will not be certified to future vacancies for that class except in the case of a promotional or reemployment list [*2 Cal. Code Reg. § 262*].

[4] Promotions

[a] Promotional Lists

Vacancies in positions must be filled insofar as consistent with the best interests of the state from among employees holding positions in appropriate classes, and appropriate promotional lists must be established to facilitate this purpose [*Gov. Code § 18950*; *see 2 Cal. Code Reg. § 154* (transfer of promotional list eligibility); *see also 2 Cal. Code Reg. §§ 231-241* (promotional lists and examinations in general)]. Any employee who feels aggrieved at any action taken by any superior or fellow employee in discouraging or in any manner hindering or preventing the employee from taking any examination or any other action that the employee deems beneficial to himself or herself may appeal to the State Personnel Board, in writing [*Gov. Code § 18952*; *2 Cal. Code Reg. § 548.61*]. Any appeal or communication in connection with an appeal is confidential and may not be disclosed without the employee's consent [*Gov. Code § 18952*]. Immediately after receiving an appeal, the board must investigate and take any action it deems necessary [*Gov. Code § 18952*].

[b] Employee Development Appraisal

In promotional examinations, the development and fitness of a competitor for performance of the duties of the promotional class may be rated through a process known as employee development appraisal. Appraisal reports on each competitor must be made by persons who know the competitor's work and development [*2 Cal. Code Reg. § 203*]. An employee development appraisal rating must be expressed as a percentage, with 70 percent being the minimum qualifying rating [*2 Cal. Code Reg. § 203.3*].

A competitor whose employment development appraisal rating was "not qualified" may request a revision of the rating on the ground that it was the result of failure to follow the prescribed rating standards or procedures, or the result of an erroneous interpretation or application of the minimum qualifications prescribed for the class, or the result of fraud, discrimination, or other improper acts or circumstances [*2 Cal. Code Reg. § 203.5(a)*].

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§ 118.20 Probationary Status

[1] State Employees

[a] Performance Reviews

Employees in the state civil service serve a probationary period of between six months and one year following most appointments, promotions, and reinstatements after permanent separation [*Gov. Code §§ 19170, 19171*; *see 2 Cal. Code Reg. §§ 321, 322*]. During the probationary period, the employee's work and efficiency are evaluated [*Gov. Code § 19172*]. The employee must receive periodic reports of his or her performance, which must be sufficient to keep the employee adequately informed of his or her progress on the job. A written appraisal of the employee's performance must be made to the director of the Department of Personnel Administration within 10 days after the end of each third of the probationary period [*2 Cal. Code Reg. § 599.795*].

[b] Rejection During Probationary Period

An employee may be rejected by the appointing power during the probationary period for reasons relating to the employee's qualifications, the good of the service, or the employee's failure to demonstrate merit, efficiency, fitness, and moral responsibility [*Gov. Code § 19173*; *see 2 Cal. Code Reg. §§ 324, 325*]. An employee may not be rejected, however, for any cause constituting prohibited discrimination under the State Civil Service Act [*Gov. Code § 19173*; *see § 118.45* et seq.]. An employee who is rejected on this basis may file a complaint of discrimination in accordance with the procedures for seeking State Personnel Board review of the reasons for rejection [*see Gov. Code § 19702(f)*; *see also § 118.37*].

A rejection during the probationary period is effected by service on the employee of a written notice of rejection, which must include an effective date for the rejection, which may not be later than the last day of the probationary period, and a statement of the reasons for the rejection. Service of the final notice must be made at least five working days before the effective date of the rejection and the conclusion of the probationary period, and service must be in compliance with the rules of the State Personnel Board governing service of notices in adverse actions [*Gov. Code § 19173*; *2 Cal. Code Reg. § 52.3*; *see § 118.44*]. The probationary period may be extended when necessary to provide the required period of

notice [*Gov. Code § 19173*]. Dismissal of a probationary employee is invalid if the rejection is not completed within the probationary period [*Wiles v. State Personnel Board (1942) 19 Cal. 2d 344, 351-352, 121 P.2d 673]* or if the notice of rejection states no reasons [*Nilsson v. State Personnel Board (1938) 25 Cal. App. 2d 699, 705, 78 P.2d 467]* or insufficient reasons as the grounds for the rejection [*Bryant v. State Personnel Board (1950) 96 Cal. App. 2d 423, 426, 215 P.2d 512]* .

[c] Investigation of Reasons for Rejection

A rejected employee may file a written request with the State Personnel Board to investigate the reasons for the rejection. The request must be filed within 15 days after the effective date of the rejection. The board may investigate the reasons for the rejection, with or without a hearing, and then may take any of the following four steps [*Gov. Code § 19175*; *see 2 Cal. Code Reg. § 52(a)(3)* (assignment of appeal of rejection to hearing office for hearing); *but see Gov. Code § 19175(e)* (appeal procedures inapplicable to employees in State Bargaining Unit 5)]:

(1) Affirm the action of the appointing power.

(2) Modify the action of the appointing power.

(3) Restore the employee's name to the employment list for certification to any position within the class, except that the employee's name may not be certified to the rejecting agency unless it concurs in the certification [*see 2 Cal. Code Reg. § 326*].

(4) Appoint the employee to the position from which he or she was rejected.

The employee may be appointed only if the board determines, after hearing, that there is no substantial evidence to support the reasons for rejection, or that the rejection was made in fraud or bad faith. The employee has the burden of proof at the hearing. Subject to rebuttal by the employee, it will be presumed that the rejection was free from fraud and bad faith and that the statement of reasons for the rejection in the notice of rejection is true [*Gov. Code § 19175(d)*].

[d] Hearings

A probationary employee does not have a constitutional right to a hearing, but the right may be granted or denied by statute [*Jean v. Civil Service Commission (1977) 71 Cal. App. 3d 101, 109, 139 Cal. Rptr. 303* ; § 118.20[2][b]]. If a probationary employee receives a notice of termination during his or her probationary period, but the notice states that the termination is to take effect on a date after the employee acquires permanent status, the employee is entitled to the procedural protections afforded to permanent employees, including the right to a hearing [*Birdsall v. Carrillo (1991) 231 Cal. App. 3d 1426, 1431-1433, 282 Cal. Rptr. 504* ; *see § 118.13*]. In addition, an employee is entitled to a hearing in which to answer charges if the rejection is based on alleged misconduct that stigmatizes the employee's reputation, impairs the employee's opportunity to earn a living, or damages the employee's standing in the community [*Wilkerson v. City of Placentia (1981) 118 Cal. App. 3d 435, 441-442, 173 Cal. Rptr. 294]* .

Before scheduling a hearing on the rejection, the board may require, or any party may request, a prehearing or settlement conference. The administrative law judge presiding at the settlement conference may not preside at any subsequent hearing on the rejection unless both parties agree on the matter [*Gov. Code § 19581.5*].

[e] Back Pay

If the board appoints the employee to the position for which he or she was rejected, it must direct the payment of salary to the employee for the period the rejection was improperly in effect. Any amount that the employee earned or might reasonably have earned in private or public employment during the period must be deducted from the amount of salary

to be paid, and salary may not be authorized or paid for any portion of a period of rejection when the employee was not ready, able, and willing to perform the duties of the position for which the employee was rejected [*Gov. Code § 19180*].

[f] Cancellation or Withdrawal of Notice of Rejection

An agency may cancel or withdraw a notice of rejection by filing with the State Personnel Board a written notice of cancellation or withdrawal up to 30 days after the effective date of rejection [*2 Cal. Code Reg. § 327*; *see Gov. Code § 19175.1*]. The notice must state the reasons for the cancellation or withdrawal and may be filed only with the concurrence of the board's executive officer. An employee whose rejection is cancelled or withdrawn is entitled to payment of salary less legal offsets, if any, and to credit for seniority, sick leave, vacation, and merit salary adjustment for such time as the executive officer determines is necessary to prevent injustice to the employee. A cancellation or withdrawal is without prejudice to further rejection, adverse action, or disciplinary proceedings for the same or other reasons [*2 Cal. Code Reg. § 327*].

[2] County and City Employees

Although local civil service systems generally follow the state system of probation, municipal and county charters or ordinances may designate shorter or longer periods of probation or review or may provide for appeal rights not available to state probationary employees [*see Jean v. Civil Service Commission (1977) 71 Cal. App. 3d 101, 106-110, 139 Cal. Rptr. 303* ; *see § 118.20[1]*]. A probationary employee has no vested rights with respect to the terms of employment stated at the date of hiring. Terms of employment created by local provisions are not vested rights, and are not immune from modification by the electorate [*Hinchliffe v. City of San Diego (1985) 165 Cal. App. 3d 722, 725-727, 211 Cal. Rptr. 560]* .

Although a probationary employee has no vested rights in continued employment, he or she is entitled to have the applicable local procedures for dismissal strictly followed [*Zeron v. City of Los Angeles (1998) 67 Cal. App. 4th 639, 643, 79 Cal. Rptr. 2d 130]* . For example, a city must strictly comply with its own charter provision that automatically grants an employee tenure unless a termination notice is delivered to the civil service commission prior to the expiration of the employee's probationary period. If the city fails to deliver such a notice concerning a particular employee, that failure results in the employee becoming a permanent employee with a property interest in continued employment. Accordingly, the subsequent termination of that employee without a full hearing would be a denial of due process [*Zeron v. City of Los Angeles (1998) 67 Cal. App. 4th 639, 643-646, 79 Cal. Rptr. 2d 130]* . On the other hand, if a city charter provision allows an employee's probationary period to be extended to reflect sick time taken by the employee, an employee on such extended probation is not entitled to a property interest in continued employment, even if the city has failed through inadvertence to uniformly apply such extensions to all probationary employees who take sick time [*Cilderman v. City of Los Angeles (1998) 67 Cal. App. 4th 1466, 1470-1471, 80 Cal. Rptr. 2d 20* (in absence of evidence of intentional or purposeful discrimination, mere laxity of enforcement does not amount to denial of equal protection); *but see Winter v. City of Los Angeles (2002) 96 Cal. App. 4th 1058, 1062-1066, 117 Cal. Rptr. 2d 679* (under terms of city charter, officer's placement on inactive duty did not qualify as "absence" that would extend probationary period; hence, inactive officer became tenured at expiration of initial probationary period)].

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§ 118.21 Limited-Term Appointments

State agencies may make limited-term appointments for temporary staffing needs [*Gov. Code §§ 19080, 19080.3*; *see 2 Cal. Code Reg. §§ 151-152* (limited term appointment lists)]. In general, these appointments are limited to a period of one year, but the period may be extended by the State Personnel Board [*see Gov. Code §§ 19080.3-19080.5*]. The time served in a limited-term appointment is not counted toward the acquisition of permanent status in any position [*2 Cal. Code Reg. § 281*].

A limited-term employee may be terminated at any time before expiration of the term. The termination may be effected by telling the employee, either orally or in writing, of the termination. A limited-term employee may not be terminated except for cause if emergency or temporary employees in limited-term positions remain employed in the same class and the same layoff subdivision. Cause includes failure to demonstrate merit, efficiency, fitness, and moral responsibility. When an employee is terminated for cause, the agency must give the employee written notice of the termination, stating the reasons for the termination, on or before the termination date. The only ground for appeal of the termination is that temporary or emergency employees remain employed in the same class in the same layoff subdivision, and the employee was not terminated for cause. The State Personnel Board may not again certify for limited-term employment in the same class the name of a person who has been terminated for cause unless, after investigation, the board determines that the reason for the termination should not bar the person from further employment [*2 Cal. Code Reg. § 282*].

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§ 118.22 Transfers

[1] Voluntary and Involuntary

In general, state civil service employees are permitted to transfer voluntarily from a position in one agency to a position in another agency if the transfer is to a position in the same class or in another class with substantially the same salary range [*see Gov. Code § 19050.3*; *2 Cal. Code Reg. §§ 425, 430-433.1*]. An employee may be required to demonstrate in an examination that he or she has additional or different qualifications that are included in the minimum qualifications of the class to which he or she is transferring [*Gov. Code § 19050.4*]. When an employee's transfer between classes is not voluntary, the transfer must be approved by the State Personnel Board [*2 Cal. Code Reg. § 434*].

[2] Transfer of Agency Function

Whenever a function or the administration of a law is transferred between state agencies, all persons serving in the state civil service and engaged in the performance of the function or the administration of the law must be transferred to the receiving agency; however, the agency is not required to retain any unnecessary officers or employees. A transferred person retains his or her status, position, and rights [*Gov. Code § 19050.9*].

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§ 118.23 Temporary Assignments

Temporary assignments or loans of state civil service employees within an agency or between agencies may be made for up to two years, or up to four years between jurisdictions, in order to provide training to employees, enable an agency to obtain expertise needed to meet a compelling program or management need, or facilitate the return of injured employees to work [*Gov. Code § 19050.8*; *see 2 Cal. Code Reg. §§ 426, 427*]. Employees under temporary assignment or loan are limited to duties consistent with their class of position. Time served on a temporary assignment or loan may be used to meet minimum requirements for promotional examinations [*Gov. Code § 19050.8*].

An employee who participates in a temporary assignment or loan has an absolute right to return to his or her former position, and any temporary assignment or loan made to enable an agency to obtain expertise needed to meet a compelling program or management need may be made only with the employee's voluntary consent [*Gov. Code § 19050.8*]. Any participating agency or employee may terminate the assignment at any time for any reason. An employee on temporary assignment is considered as an employee of the agency from which he or she is assigned, except that the employee's salary may be paid in the manner agreed on by the participating agencies [*2 Cal. Code Reg. §§ 426, 427*].

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§ 118.24 Qualification for Changed Position

Whenever any position is changed by the adoption of new, different, or additional machines or processes, while the purpose or product is the same or similar in nature, any state civil service employee affected must be given reasonable opportunity, without change in class, status, or salary, to learn to do the work with the new machine or process and to qualify for status in the different class of position required for the work. An employee is not entitled, however, to be promoted to a higher class of position by virtue of this provision. An employee who qualifies for appointment in the different class is deemed to have the education, experience, and other qualifications for that class and must be appointed to the different class with the same status and seniority that he or she last had in his or her previous class [*Gov. Code § 19050.7*].

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§ 118.25 Layoffs

[1] State Employees

An agency may lay off employees whenever it is necessary because of lack of funds or work or whenever it is advisable in the interests of state economy to reduce the staff of the agency [*Gov. Code § 19997*]. Layoffs of state employees who are compensated on a monthly basis are made by notifying the affected employee in writing at least 30 days before the date of layoff, stating the reason for the layoff [*Gov. Code § 19997.13(a)*]. Layoffs are generally made in accordance with the relative seniority of the employees in the laid-off class, although layoffs of professional, scientific, administrative, management, and executive classes are determined by combining efficiency with seniority [*Gov. Code § 19997.3*].

An employee who is laid off because the agency adopted new, different, or additional machines or processes must be given the same opportunity to qualify for appointment to any vacancy in the same class or any new class created because of the change as any other employee affected by the change who was not laid off [*Gov. Code § 19050.7*].

When a public agency determines that it must lay off employees because of a fiscal crisis, with the layoffs based on seniority, a permanent employee who accepts a demotion in lieu of being laid off does not have a due-process right to a predemotion hearing. A postdemotion right to appeal the layoff decision is sufficient to meet the requirements of due process [*Duncan v. Department of Personnel Admin. (2000) 77 Cal. App. 4th 1166, 1175-1183, 92 Cal. Rptr. 2d 257* ; *see* discussion in *§ 118.13*].

[2] City Employees

If a city's civil service commission determines that a reduction in personnel is necessary for economy reasons, it must observe the seniority rule in putting the reduction into effect [*Gov. Code § 45100*].

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§ 118.26 Reinstatement

[1] In General

An agency may, in its discretion, reinstate any person having probationary or permanent status who was separated from his or her position in any of the following manners [*Gov. Code § 19140(a)*]:

- By resignation.
- By retirement.
- By termination from limited-term, temporary, career-executive, or exempt appointment.
- Under *Gov. Code § 19996.2* for having been absent without leave.
- Without a break in continuity of state service to accept another civil service or exempt appointment.

Reinstatement may be made to the class vacated or from which the employee was separated, or to a lower class in the same series, or to another class to which the employee could transfer or demote [*Gov. Code § 19140(f)*]. Special reinstatement rights are afforded to permanent employees or employees who previously had permanent status and who, since receiving that status, have had no break in continuity of service due to a permanent separation. They may be entitled to reinstatement if terminated from a temporary or limited-term appointment, rejected during probation, or demoted from a managerial position [*Gov. Code § 19140.5*; *see Hulings v. State Dep't of Health Care Servs. (2008)159 Cal. App. 4th 1114, 1120-1125, 72 Cal. Rptr. 3d 81* (reinstatement to peace officer position pursuant to *Gov. Code § 19140.5* may not be conditioned on employee's submission to background investigation under *Gov. Code § 1031(d)*] or if they vacated a civil service position to accept an appointment to an exempt position [*Gov. Code §§ 19141, 19141.1*].

Every person accepts and holds his or her position in the state civil service subject to the mandatory reinstatement of

another person. On reinstatement of a person, any necessary separations are to be made under the provisions of law governing layoff and demotion [*see Gov. Code § 19997.3*], except that an employee who is not to be separated from state service need not receive advance notification [*see Gov. Code § 19997.13* (advance notification of separation)], and seniority may not be counted when this would result in the layoff of the person who has the reinstatement right. In that case, qualifying service in classes at substantially the same or a higher salary level is the only state service that may be counted for purposes of determining who is to be separated [*Gov. Code § 19142*].

Unless some other reinstatement right is specified for a particular separation by the Civil Service Act or by State Personnel Board Regulations, an employee is entitled to be reinstated to his or her former position, as defined in *Gov. Code § 18522*, at the termination of any temporary separation, except termination of a permanent or probationary employee by layoff, or termination by displacement, as defined in board regulation [*Gov. Code § 19143*].

[2] County Employees After Election to Office

Any person who previously had permanent status in a civil service system of any county and who vacated his or her position to accept appointment to an elective position must be reinstated to his or her former position in the same county, if he or she so desires, at the termination of the elective appointment or term of office [*Gov. Code § 31117*].

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§ 118.27 Appointment

[1] Good Faith Requirements

To be valid, a civil service appointment must be made and accepted in good faith under the civil service statutes and regulations of the State Personnel Board [*2 Cal. Code Reg. § 8*; *see 2 Cal. Code Reg. § 548.123* (applicability of good faith provisions to career executive positions)]. To make an appointment in good faith, an agency and all officers or employees to whom it delegates appointment authority must meet the following requirements [*2 Cal. Code Reg. § 8(a)*]:

- Intend to observe the spirit and intent of the law.
- Make a reasonable and serious attempt to determine how the law should be applied.
- Ensure that positions are properly classified.
- Ensure that appointees have appropriate civil service appointment eligibility.
- Intend to employ the appointee in the class, tenure, and location to which appointed under the conditions reflected by the appointment document.
- Make a reasonable and serious attempt to provide the reference materials, training, and supervision necessary to avoid any mistakes of law or fact by the persons responsible for the personnel transactions.
- Act in a manner that does not improperly diminish the rights and privileges of other persons affected by the appointment, including other eligible persons.

Any officer or employee who fails to meet these requirements, or any officer or employee in a position of authority who directs another officer or employee to disregard these requirements, is subject to civil or criminal sanctions as well as adverse action [*2 Cal. Code Reg. § 8(a)*].

To accept an appointment in good faith, an employee must [*2 Cal. Code Reg. § 8(b)*]:

- Intend to serve in the class to which the employee is being appointed under the tenure, location, and other elements of the appointment as reflected by the appointment document.

- Provide the agency with complete, factual, and truthful information necessary for a proper appointment.

- Make a reasonable attempt to seek correction of any aspects of the appointment that the employee knows are illegal.

An employee's violation of any of these provisions is cause for adverse action [*2 Cal. Code Reg. § 8(b)*; *see § 118.40* et seq.].

[2] Appointment Contrary to Law

When the appointment of an employee has been made and accepted in good faith, and the appointment would not have been made but for some mistake of law or fact that, if known to the parties, would have rendered the appointment unlawful when made, the State Personnel Board must take corrective action up to and including voiding the appointment [*Gov. Code § 19257.5*; *2 Cal. Code Reg. § 266(a)*; *see 2 Cal. Code Reg. § 548.124* (applicability to career executive positions)]. The board may not take corrective action on any appointment that has been in effect one year if both the agency and the employee acted in good faith [*Gov. Code § 19257.5*; *2 Cal. Code Reg. § 266(a)*]. The board may not take corrective action on any appointment that has been in effect five years unless the employee did not act in good faith or the board determines that the rights of another employee are significantly endangered by the appointment in question [*2 Cal. Code Reg. § 266(b)*].

An employee who acted in good faith is entitled to retain the compensation as provided in § 118.27[3]. An employee who did not act in good faith must reimburse all compensation resulting from the appointment, unless the board provides otherwise [*2 Cal. Code Reg. § 266*].

[3] Entitlement to Compensation

Even if an appointment was contrary to the State Civil Service Act or the regulations under the Act, a person who acted in good faith in accepting an appointment or employment must be paid by the agency the compensation the agency promised (or if no compensation was promised, the actual value of any service rendered and expense incurred in good faith under the attempted appointment or employment) [*Gov. Code § 19257*; *see 2 Cal. Code Reg. § 9* ("compensation" defined); *see also 2 Cal. Code Reg. § 548.121* (applicability to career executive positions)]. The person has a cause of action against the agency for this compensation [*Gov. Code § 19257*].

[4] Notice and Appeal Rights

At least 15 days before the board takes corrective action on an unlawful appointment, the board must notify the employee and the agency of the proposed action. The notice must state the reasons for the proposed action and notify the employee and the agency of their rights to respond to the notice within 15 days, either orally or in writing [*2 Cal. Code Reg. § 266.2*].

When corrective action is taken, the employee and the agency may file a written appeal with the board within 30 days after the date of notification of the board's final decision to take the corrective action [*2 Cal. Code Reg. § 266.3*].

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§ 118.28 Prohibited Acts and Offenses

Every person who violates any provision of the State Civil Service Act is guilty of a misdemeanor. In addition, adverse action may be taken by an agency, or the State Personnel Board may file charges, against any state employee who violates any of the provisions of the Act [*Gov. Code § 19682*; *see § 118.40* et seq.]. It is unlawful for any person to do any of the following:

- Defeat, deceive, or obstruct any person with respect to that person's right of examination, application, or employment under the Act or rules of the board [*Gov. Code § 19680(a)*].

- Willfully and falsely mark, grade, estimate, or report on the examination or proper standing of any person examined or certified under the Act or board rule, or make any false representation concerning the same or the person examined [*Gov. Code § 19680(b)*].

- Willfully furnish to any person any special or secret information for the purpose of either improving or injuring the prospects or chances of any person examined, certified, or to be examined or certified under the Act or rules of the board [*Gov. Code § 19680(c)*].

- Practice any deception or fraud with regard to his or her identity in connection with any examination, application, or request to be examined [*Gov. Code § 19681(a)*].

- Obtain examination questions or other examination materials, except by specific authorization, either before or during or after an examination, or use or purport to use any examination questions or materials for the purpose of preparing candidates for examinations [*Gov. Code § 19681(b)*].

- Use any unfair means to cause or attempt to cause any eligible person to waive any rights obtained under the Act [*Gov. Code § 19681(c)*].

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§ 118.29 Ethnicity, Sex, and Disability Information

The State Personnel Board may gather and maintain information regarding the success or failure in state civil service examinations of applicants for employment by ethnic group, disability, and sex [*Gov. Code § 19705*; *2 Cal. Code Reg. § 174.6*]. This information may be voluntarily provided by an applicant on a detachable section of the application [*2 Cal. Code Reg. § 174.6*].

Ethnicity, sex, and disability information may not be used in a discriminatory manner in the selection process but may be used (1) for research and statistical analysis, in order to assess the fairness of the selection process, (2) to provide a basis for corrective action, and (3) to evaluate the state's affirmative action programs [*2 Cal. Code Reg. § 174.7*].

Ethnicity, sex, and disability information is accessible only to authorized persons, and ethnicity and disability information on an individual applicant may not be made available to any member of an oral interview panel or performance testing panel, or to the agency before an offer of an appointment [*2 Cal. Code Reg. § 174.8*].

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§ 118.30 Grievance Procedures

The Department of Personnel Administration has provided by rule for a system of adjusting employee grievances, which is to be administered within state departments and agencies before recourse is had to any remedy provided by the State Civil Service Act [*see Gov. Code § 18714(a)*; *2 Cal. Code Reg. § 599.859*]. To file a grievance with a particular state department or agency, the rules of that department or agency should be consulted.

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§ 118.31 Reasonable Accommodation Requirements

Disabled persons must be employed in state service on the same terms and conditions as the nondisabled, except when it is shown that a particular disability is job-related [*Gov. Code § 19230(b)*; *see, e.g.,* *Quinn v. City of Los Angeles (2000) 84 Cal. App. 4th 472, 480-484, 100 Cal. Rptr. 2d 914* (plaintiff police officer could not establish prima facie cause of action for failure to accommodate hearing disability because that disability disqualified plaintiff for employment as police officer)]. State agencies are required to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program [*see* *Raine v. City of Burbank (2006) 135 Cal. App. 4th 1215, 1227-1228, 37 Cal. Rptr. 3d 899* (requirement of "reasonable accommodation," as defined by *Gov. Code § 12926(n)* for purposes of Fair Employment and Housing Act, does not obligate city to reclassify light-duty front-desk position from civilian position to sworn-officer position to accommodate police officer whose disability has become permanent, because such reclassification would not be *reasonable* accommodation)]. An agency may not deny any employment opportunity to a qualified applicant or employee with a disability if the basis for the denial is the need to make reasonable accommodation to the applicant's or employee's physical or mental limitations [*Gov. Code § 19230(c)*].

A "disability" for these purposes is a physical or mental disability as defined in the Fair Employment and Housing Act (FEHA) [*Gov. Code § 19231*; *see Gov. Code § 12926*(*i*), (k) (FEHA definitions)]. For detailed discussion of the FEHA, see Ch. 115, *Civil Rights: Employment Discrimination* .

An agency must respond to a request for accommodation within 20 days after receiving it. The response must be in writing and must state that there is a right of appeal to the State Personnel Board within 30 days after receipt of the agency's response. An agency's failure to respond within 20 days is deemed a denial of the request, and an appeal may be filed directly with the board. Any appeal must be filed within 30 days after expiration of the 20-day period [*2 Cal. Code Reg. § 53.2*].

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§ 118.32 Affirmative Action Plan

Each state agency is required to establish an effective affirmative action plan to ensure that disabled individuals have access to positions in state service on an equal and competitive basis with the general population. Each agency must develop and implement an affirmative action plan for the disabled, which must include specific goals and timetables. The goals and timetables must be made available to the public on request [*Gov. Code § 19232*].

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§ 118.33 Correction of Underrepresentation

The State Personnel Board is required to establish guidelines, by job category, for state agencies to set goals and timetables to improve the representation of disabled individuals in the state work force [*Gov. Code § 19233(c)*]. Each state agency is required to review, on an annual basis, its hiring activities designed to achieve the employment objectives of the board's guidelines, in order to determine whether any category of disabled individuals has been disproportionately excluded from employment on a non-job-related basis. If any category has been so excluded, the agency must correct the underrepresentation [*Gov. Code § 19234*].

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§ 118.34 Limited Examination and Appointment Program

[1] Alternative to Traditional Processes

Persons with disabilities may be appointed to positions in state civil service under the limited examination and appointment program, as an alternative to the traditional civil service examination and appointment process [*see Gov. Code § 19240*; *see 2 Cal. Code Reg. § 547.50 et seq.*]. Examination appointments may be made to a particular position for the purpose of completing a job performance evaluation in lieu of an examination [*see Gov. Code §§ 19242, 19242.1*]. Examination appointments are made on a temporary, provisional basis, to allow candidates to demonstrate their ability to perform the duties of the position [Gov. Code § 19242.4]. Candidates serving in positions under the program do not acquire permanent civil service status but receive the same salary and benefits to which other state employees in temporary positions are entitled [*Gov. Code § 19242.6*].

The agency making the appointment must prepare written evaluations of the candidate's performance during the job examination period. The final evaluation must contain a recommendation as to whether the candidate should be appointed to an appropriate position where civil service status may accumulate [*Gov. Code § 19242.8*]. If the agency making the appointment fails to terminate the candidate's appointment within 30 days after the end of the job examination period, it is presumed that the candidate has qualified in the examination [*Gov. Code § 19242.9*].

[2] Appeal Rights

Applicants for and candidates in the limited examination and appointment program may appeal any of the following actions [*Gov. Code § 19244*]:

- Refusal to certify eligibility to participate in the program.
- Rejection of an application to participate in an examination.
- Disqualification by an interview panel or by any other selection method used.

- Denial of a request for reasonable accommodation during the job examination period.
- Termination of a candidate's appointment during a job examination period.

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§ 118.35 Discriminatory Acts

Discrimination in violation of state or federal law is prohibited in state employment practices [*2 Cal. Code Reg. § 547*; *see Gov. Code § 19702.1* (hiring and promotion in state civil service must conform to federal Civil Rights Act)]. The State Civil Service Act prohibits discrimination against any person on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation [*Gov. Code § 19702(a)*; *see Gov. Code §§ 12926, 12926.1, 12940(a)*]. It also prohibits discrimination against any person because of his or her age [*Gov. Code § 19700*] but provides that minimum and maximum age limits may be established for trainee positions and in cases of positions involving public health or safety or having the powers and duties of a peace officer [*Gov. Code § 18932*]. A person may not be discriminated against because of total or partial blindness unless normal eyesight is absolutely indispensable to do the physical acts to be performed [*Gov. Code § 19701*]. In addition, a person may not be retaliated against because he or she has opposed any unlawful employment practice or made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the State Civil Service Act [*Gov. Code § 19702(a)*; *see § 118.40* et seq.].

For purposes of the antidiscrimination provisions of the State Civil Service Act, discrimination includes harassment [*Gov. Code § 19702(b)*].

Courts will require an administrative agency evaluating a claim of discrimination to apply the same standards of proof that are applicable in actions brought in court [*see Los Angeles County Office of the Dist. Attorney v. Civil Service Com. (1997) 55 Cal. App. 4th 187, 200-202, 63 Cal. Rptr. 2d 661]* . For a discussion of those standards, see Ch. 115, *Civil Rights: Employment Discrimination* .

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§ 118.36 Cease and Desist Orders

If the State Personnel Board finds that discrimination has occurred in violation of the State Civil Service Act, the board must issue and cause to be served on the agency an order requiring it to cause the discrimination to cease and desist and to take any action (including, but not limited to, hiring, reinstatement, or upgrading of employees, with or without back pay, and compensatory damages) that, in the board's judgment, will effectuate the purposes of the Act. The order must also include requirements for the agency to report the manner of its compliance [*Gov. Code § 19702(d)*].

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§ 118.37 Procedure

[1] Written Complaint

Any person who claims discrimination within the state civil service may submit a written complaint stating the particulars, the name of the agency, the persons alleged to have committed the unlawful discrimination, and any other information that may be required by the State Personnel Board [*Gov. Code § 19702(e)*]. Alternatively, if the discrimination violates the Fair Employment and Housing Act [*Gov. Code § 12900 et seq.*] the employee may seek redress through the Department of Fair Employment and Housing [*Ruiz v. Department of Corrections (2000) 77 Cal. App. 4th 891, 896-900, 92 Cal. Rptr. 2d 139* ; *see* Ch. 115, *Civil Rights: Employment Discrimination*].

[2] Filing With Agency

A complaint about an agency's action, decision, policy, or condition must be filed with the agency if the agency has authority to consider the complaint and resolve the issues [*2 Cal. Code Reg. § 547.1*]. The agency's complaint review process must conform to the following standards [*2 Cal. Code Reg. § 54.2*]:

(1) Provide for a minimum of formal procedural requirements, by having the complaint handled at an organizational level closest to the employee concerned.

(2) Give the employee an opportunity to receive counseling on a confidential basis by another employee who is qualified to give counseling in matters pertaining to discrimination.

(3) Ensure that no influence will be used to dissuade an employee from airing a complaint, that no complaint will be suppressed, and that no employee will be subject to reprisal for voicing a complaint or participating in the complaint procedure.

(4) Ensure that an employee's complaint will receive preferred, timely, and full consideration at each level of review, that investigation into the circumstances surrounding the complaint will be performed by qualified and impartial persons, and that the employee will be informed of all rights at each step of the process, including the right of appeal to

the State Personnel Board and the right to proceed in the appropriate state or federal agency or court having jurisdiction.

[3] Filing With State Personnel Board

A complaint of discrimination that the agency cannot resolve or has no authority to resolve must be filed with the State Personnel Board as an appeal [*2 Cal. Code Reg. § 547.1*; *see 2 Cal. Code Reg. § 54*]. The executive officer of the board may attempt to resolve a complaint informally or may refer it to the board for hearing [*2 Cal. Code Reg. § 547.1*; *see § 118.59* et seq.].

[4] Time Limitation for Filing Complaint

Complaints generally must be filed within one year after the alleged unlawful discrimination occurred. This period may be extended up to 90 days if the employee first knew of the facts more than one year after the occurrence of the alleged discrimination [*Gov. Code § 19702(f)(1)*]. A much shorter period is prescribed when an employee receives a notice of adverse action [*see Gov. Code § 19575*; *see § 118.46*], or a probationary employee is rejected [*see Gov. Code § 19175*; *see § 118.20[1][c]*], and the employee charges unlawful discrimination [*Gov. Code § 19702(f)(1)*].

[5] Assistance From State Personnel Board

When any employee of the agency refuses, or threatens to refuse, to cooperate in the investigation of a complaint of discrimination, the agency may seek assistance from the State Personnel Board, which may provide for direct investigation or hearing of the complaint, the use of subpoenas, or any other action that will effect the purposes of the State Civil Service Act [*Gov. Code § 19702(g)*].

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§ 118.38 Prohibited Testing or Evaluation Methods

Educational prerequisites, or testing or evaluation methods, that are not job-related may not be used as part of the hiring or promotional practices in state civil service employment unless there is no adverse effect [*Gov. Code § 19702.2*]. This does not limit the authority of the State Personnel Board regarding the state merit selection and examining program under the constitution [*see* Cal. Const., art. VII] and the State Civil Service Act [*Gov. Code § 19702.2*].

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§ 118.39 Family Care Leave Rights

An agency may not refuse to hire, and may not discharge, suspend, expel, or discriminate against, any individual because that individual exercised the right to family care leave [*see Gov. Code § 12945.2(a)*] or gave information or testimony as to his or her own family care leave or that of another person in any inquiry or proceeding related to these rights [Gov. Code §§ 12942.5(l), *19702.3(a)*].

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§ 118.40 Authority to Take Adverse Action

An agency may take adverse action, against any employee or person whose name appears on any employment list, for any cause for discipline specified in the State Civil Service Act [*Gov. Code § 19571*; *see § 118.41*]. Adverse action may be dismissal, demotion, suspension, or other disciplinary action [*Gov. Code § 19570*]. Special procedures apply to adverse action taken against managerial employees [*Gov. Code § 19570*; *see Gov. Code § 19590 et seq.*; *see also § 118.51*].

The State Civil Service Act merely restricts state agencies' authority to discharge or take other adverse action against an employee. Agencies have absolute authority to take adverse action except as specifically restricted by law [*Department of Parks & Recreation v. State Personnel Bd. (1991) 233 Cal. App. 3d 813, 824-825, 284 Cal. Rptr. 839]* . Under the Act, employees have the substantive right to continued employment during good behavior and the guarantee that no adverse action will be taken without cause [*see Gov. Code §§ 19571, 19572, 19996*]. Employees have as well specified procedural rights in order to vindicate their substantive employment rights, and the procedural requirements for the imposition of discipline must afford employees due process of law [*Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 208, 124 Cal. Rptr. 14, 539 P.2d 774* ; *Department of Parks & Recreation v. State Personnel Bd. (1991) 233 Cal. App. 3d 813, 825, 284 Cal. Rptr. 839* ; *see § 118.13[1]*].

Under the State Civil Service Act's scheme for employee discipline, the employing agency has the initial authority to determine and impose appropriate discipline [*Gov. Code § 19574*], and the State Personnel Board has the authority to review the agency's action [*Gov. Code §§ 19576, 19578*; *Department of Parks & Recreation v. State Personnel Bd. (1991) 233 Cal. App. 3d 813, 827, 284 Cal. Rptr. 839* ; *see § 118.48[1]*].

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§ 118.41 Causes for Discipline

Each of the following constitutes cause for discipline of an employee or of a person whose name appears on an employment list [*Gov. Code § 19572*]:

(1) Fraud in obtaining appointment.

(2) Incompetency.

(3) Inefficiency.

(4) Inexcusable neglect of duty.

(5) Insubordination.

(6) Dishonesty.

(7) Drunkenness on duty.

(8) Intemperance.

(9) Addiction to the use of controlled substances.

(10) Inexcusable absence without leave.

(11) Conviction of a felony or of a misdemeanor involving moral turpitude (a plea or verdict of guilty, or a conviction following a plea of nolo contendere, being deemed a conviction).

(12) Immorality.

(13) Discourteous treatment of the public or other employees.

(14) Improper political activity.

(15) Willful disobedience.

(16) Misuse of state property.

(17) Violation of the State Civil Service Act or a rule of the State Personnel Board.

(18) Engagement in any employment, activity, or enterprise that is clearly inconsistent, incompatible, or in conflict with, or inimical to, the employee's duties [*see Gov. Code § 19990*].

(19) Refusal to take and subscribe any oath or affirmation required by law in connection with the employment.

(20) Other failure of good behavior, either during or outside duty hours, of such a nature that it causes discredit to the agency or the person's employment.

(21) Any negligence, recklessness, or intentional act that results in the death of a patient of a state hospital serving the mentally or developmentally disabled.

(22) Use during duty hours, for training or target practice, of any material that is not authorized for that use by the agency.

(23) Unlawful discrimination, including harassment, on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, against the public or other employees while acting in the capacity of a state employee [*see Gov. Code § 12940(a)* (prohibited bases of discrimination); *see also Gov. Code §§ 12926, 12926.1* (definitions)].

(24) Unlawful retaliation against any state officer or other state employee or member of the public who, in good faith, reports, discloses, divulges, or otherwise brings to the attention of the attorney general, or any other appropriate authority, any facts or information relative to actual or suspected violation of any state or federal law occurring on the job or directly related to the job [*see § 118.55* et seq.].

The same instance of conduct can serve as the basis for more than one disciplinary action. For example, in one case a probationary police officer fled the scene of a collision and lied about it; as a result, he was released from his probationary appointment. After being reinstated, the officer failed to meet the conditions of his reinstatement and was eventually terminated, in part because of the original hit-and-run incident. The court of appeal held that the fact that the officer had already been disciplined for the incident did not preclude his subsequent termination for the same incident; the police department was free to determine that its earlier disciplinary action had been too lenient [*Ziegler v. City of South Pasadena (1999) 73 Cal. App. 4th 391, 397-398, 86 Cal. Rptr. 2d 424* (constitutional concept of double jeopardy does not apply to employment decisions)].

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§ 118.42 Forced Leave of Absence Pending Investigation

Pending the agency's investigation of accusations of an employee's misappropriation of public funds or property, drug addiction, mistreatment of persons in a state institution, immorality, or acts that would constitute a felony or misdemeanor involving moral turpitude, the agency may order the employee on a leave of absence for up to 15 days. The agency may terminate the leave by giving 48 hours' notice, in writing, to the employee. If adverse action is not taken on or before the date the leave is terminated, the leave must be with pay. If adverse action is taken on or before the date the leave is terminated, it may be made retroactive to any date on or after the date the employee went on leave. The adverse action is valid if written notice is served on the employee and filed with the State Personnel Board within 15 days after the employee is notified of the action [*Gov. Code § 19574.5*].

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§ 118.43 Limitation Period

No adverse action is valid against any state employee for any cause for discipline based on any civil service law of this state unless notice of the adverse action is served within three years after the cause for discipline first arose on which the notice is based. Adverse action based on fraud, embezzlement, or the falsification of records is valid if notice of the action is served within three years after discovery of the fraud, embezzlement, or falsification [*Gov. Code § 19635*; for discussion of the notice, *see § 118.44*].

Even if the three-year limitations period for imposing discipline for the underlying misconduct has expired, a state employee may be disciplined based on a dishonest denial of the underlying misconduct if the denial occurred within the limitations period [*California Dept. of Corrections v. California State Personnel Bd. (2007) 147 Cal. App. 4th 797, 806-809, 54 Cal. Rptr. 3d 665* (dishonesty is separate act that does not merge with underlying offense)].

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§ 118.44 Notice of Adverse Action

Adverse action is valid only if a written final notice is served on and received by the employee at least five working days before the effective date of the action and filed with the State Personnel Board within 15 days after the effective date of the action [*Gov. Code § 19574*; *2 Cal. Code Reg. § 52.3*; *Coburn v. State Personnel Bd. (1978) 83 Cal. App. 3d 801, 805, 148 Cal. Rptr. 134* (employee must actually receive notice five days before hearing; merely serving notice five days before hearing is not sufficient)]. The notice must be served either (1) on the employee personally; (2) by the United States mail, using either certified mail with return receipt requested or Express Mail; or (3) by overnight delivery by an express service carrier, with the employee or the employee's representative required to acknowledge receipt at the time of delivery [*Gov. Code § 18575(b)(2)*]. The notice must state the following [*Gov. Code § 19574(a)*]:

- Nature of the adverse action.
- Effective date of the action.
- Reasons for the action, in ordinary language.
- Employee's right to answer the notice, orally or in writing.
- Time within which an appeal must be filed.

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§ 118.45 Discovery

[1] Inspection of Documents and Interview of Other Employees

An employee who has been served with notice of adverse action, or a representative designated by the employee, has the right to inspect any documents in the possession or under the control of the agency, that are relevant to the adverse action or could constitute relevant evidence [*Gov. Code § 19574.1(a)*; *see Evid. Code § 210* (relevant evidence)]. The employee, or a designated representative, also has the right to interview other employees having knowledge of the acts or omissions on which the adverse action is based. These interviews and inspections must be at times and places reasonable for the employee and the agency [*Gov. Code § 19574.1(a)*]. The agency must make all reasonable efforts necessary to ensure the cooperation of any interviewed employees [*Gov. Code § 19574.1(b)*].

[2] Compelling Discovery

[a] Administrative Proceeding

Any party claiming that a request for discovery pursuant to *Gov. Code § 19574.1(b)* [*see* § *118.45[1]*] has not been complied with may serve and file an administrative petition to compel discovery, naming as a respondent the party refusing or failing to comply with the discovery request. The petition is filed in the hearing office of the State Personnel Board [*Gov. Code § 19574.2(a)*]. The petition must state facts showing that the respondent failed or refused to comply with the request for discovery, a description of the matters sought to be discovered, the reasons why these matters are discoverable [*see Gov. Code § 19574.1*], and the grounds of respondent's refusal in so far as the petitioner knows [*Gov. Code § 19574.2(a)*].

The petition must be served on the respondent and filed within 14 days after the respondent first evidenced a failure or refusal to comply with the discovery request, or within 30 days after the request was made and the respondent failed to reply, whichever period is longer. No petition may be filed within 15 days of the date set for commencement of the administrative hearing on the adverse action, except on leave granted by the administrative law judge for good cause. In determining good cause, the administrative law judge must consider the necessity and reasons for the discovery, the moving party's diligence or lack of diligence, whether granting the petition will delay the commencement of the

administrative hearing on the date set, and the possible prejudice to any party [*Gov. Code § 19574.2(b)*].

The respondent may file a written response to the petition, in the hearing office of the State Personnel Board, and serve the response on the petitioner, within 15 days after service of the petition [*Gov. Code § 19574.2(b)*].

Unless otherwise stipulated by the parties, the administrative law judge will review the petition and response and issue a decision within 20 days. If the administrative law judge orders an evidentiary hearing, the decision must be issued within 20 days after the close of the hearing [*Gov. Code § 19574.2(b)*].

[b] Review in Superior Court

A party aggrieved by the decision of the administrative law judge may, within 30 days of service of the decision, file a petition to compel discovery in the superior court for the county in which the administrative hearing will be held or in the county in which the headquarters of the appointing power is located. The petition must be filed within 30 days after service of the decision and must be served on the respondent [*Gov. Code § 19574.2(b)*]. If the court is satisfied that the petition states good cause for relief, the court must issue an order to show cause directed to the respondent; otherwise, the court must deny the petition. The order to show cause must be served on the respondent and the respondent's attorney of record in the administrative proceeding by personal delivery or certified mail. The order must be returnable no earlier than 10 days after the date it was issued and no later than 30 days after the petition was filed. The respondent may serve and file a written answer or other response to the petition and order to show cause [*Gov. Code § 19574.2(c)*].

The court may, in its discretion, order the administrative proceeding stayed until the show-cause hearing and, if necessary, for a reasonable time after the hearing, in order to afford the parties time to comply with the court's order [*Gov. Code § 19574.2(d)*]. When the respondent asserts that the petitioner seeks to discover what is not discoverable or is privileged against disclosure, the court may conduct an examination in chambers [*Gov. Code § 19574.2(e)*; *see Evid. Code § 915*]. The court must decide the case on the basis of any examination in chambers, the papers filed by the parties, and any oral argument and additional evidence allowed by the court [*Gov. Code § 19574.2(f)*].

The court must file an order denying or granting the petition within 45 days after the petition is filed, unless the parties stipulate otherwise. For good cause, the court may extend this time an additional 45 days. The order granting or denying the petition must be in writing and state what the petitioner is entitled to discover [*Gov. Code § 19574.2(g)*]. The court may award court costs and reasonable attorney's fees to a party if it finds that the opposing party or the opposing party's attorney, without substantial justification, failed or refused to comply with the statutory discovery requirements, filed a petition to compel discovery, or failed to comply with any order of the court concerning discovery [*Gov. Code § 19574.2*(*i*)]. The clerk must serve a copy of the order on the parties, by mail. When the order grants the petition, in whole or in part, the order is not effective until 10 days after the date it is served. When the order denies the petition, it is effective on the date of service [*Gov. Code § 19574.2(g)*]. The court may compel compliance with the order by contempt proceedings [*Gov. Code § 19574.2*(*i*)].

[c] Appellate Review

The order is appealable by a petition for a writ of mandate filed in the court of appeal within 30 days after service of the order. When the order allows discovery, the order and the administrative proceedings are stayed by the filing of the mandate petition. The appellate court may, however, dissolve or modify the stay. When the order denies discovery, neither the order nor the administrative proceedings may be stayed by the court of appeal except on a clear showing of probable error [*Gov. Code § 19574.2(h)*].

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§ 118.46 Answer to Notice of Adverse Action

Within 30 days after the effective date of the adverse action, the employee may file with the State Personnel Board a written answer to the notice of adverse action [*Gov. Code § 19575*; *see § 118.140*]. The answer is deemed to be a denial of all allegations in the notice that are not expressly admitted, as well as a request for a hearing or investigation by the board. An employee may file an amended answer with the board's consent. The board must promptly give a copy of the answer and any amended answer to the agency [*Gov. Code § 19575*].

By filing an answer, the employee triggers a review by the board of the adverse action [*see Gov. Code §§ 19576, 19578*; *Department of Parks & Recreation v. State Personnel Bd. (1991) 233 Cal. App. 3d 813, 827, 284 Cal. Rptr. 839* ; *see § 118.48[1]* et seq.]. If the employee fails to answer within the time specified, or withdraws his or her appeal after answering, the adverse action is considered final [*Gov. Code § 19575*].

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§ 118.47 Amended or Supplemental Notice of Adverse Action

At any time before an employee's appeal is submitted to the State Personnel Board for decision, the agency may, with the board's consent, serve on the employee and file with the board an amended or supplemental notice of adverse action. If the amended or supplemental notice presents new causes or allegations, the employee must be afforded a reasonable opportunity to prepare a defense but is not entitled to file a further answer without leave from the board. Any new causes or allegations are deemed to be controverted, and any objections may be made orally at the hearing or investigation and must be noted in the record [*Gov. Code § 19575.5*].

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§ 118.48 Investigation and Hearing

[1] By State Personnel Board

The State Personnel Board is empowered by the constitution to review disciplinary actions by agencies [*Cal. Const., art. VII, § 3(a)*]. This provision of the Constitution precludes the Legislature from authorizing an entity other than State Personnel Board (such as a "board of adjustment" created as part of a grievance procedure specified in a memorandum of understanding for a particular state employee bargaining unit) to review disciplinary actions taken against state civil-service employees [*State Personnel Bd. v. Department of Personnel Admin. (2005) 37 Cal. 4th 512, 523, 36 Cal. Rptr. 3d 142, 123 P.3d 169*) (holding former *Gov. Code § 18670(c)-(e)* unconstitutional); *see Cal. Const., art. VII, § 3(a)* (board "shall ... review disciplinary actions")].

In reviewing disciplinary action, the board acts in an adjudicatory capacity, much as a trial court would in an ordinary judicial proceeding. The board is entitled to make factual findings and to exercise its discretion on matters within its jurisdiction. It may weigh the evidence and exercise discretion in determining the sufficiency of the charges [Department of Parks & Recreation v. State *Personnel Bd. (1991) 233 Cal. App. 3d 813, 823, 824, 827, 284 Cal. Rptr. 839]* .

[2] Hearing Requirement

When an answer to an adverse action is filed by an employee who has been suspended without pay for up to five days or who has received a formal reprimand or reduction in pay up to one step for up to four months, the board must make an investigation, with or without a hearing as it deems necessary [*Gov. Code § 19576*]. In all other cases in which an employee files an answer, the board must hold a hearing within a reasonable time [*Gov. Code §§ 19576, 19578*; *see 2 Cal. Code Reg. § 52(a)(2)* (appeal of adverse action must be assigned to hearing office of board for hearing)]. If these statutory provisions concerning whether a hearing should be held are in conflict with the provisions of a memorandum of understanding reached under the State Employer-Employee Relations Act [*see Gov. Code § 3512 et seq.*], the memorandum of understanding is controlling without further legislative action unless the expenditure of funds is required [*Gov. Code § 19576*].

[3] Notice and Conduct of Hearing

When a hearing is required, the board must notify the parties of the time and place of the hearing [*Gov. Code § 19578*]. Although the Administrative Procedure Act [*Gov. Code § 11500 et seq.*] is not generally applicable to hearings before the State Personnel Board, the evidence rules of the act [*see Gov. Code § 11513*] are incorporated by reference in the State Civil Service Act [*Gov. Code § 19578*; for discussion of those rules, *see* Ch. 473, *Public Agency Adjudication* , et seq.]. The hearing before the board must be conducted in accordance with those evidence rules, except that the employee and other persons may be examined in accordance with the provisions of the Evidence Code governing the examination of adverse witnesses [*see Evid. Code § 776*], and the parties may submit all proper and competent evidence against or in support of the causes [*see Gov. Code §§ 19578, 19580*]. The board must issue subpoenas for the employee's witnesses on his or her written request and at his or her cost [*Gov. Code § 19581*]. The board may require the costs to be prepaid [*Gov. Code § 19581*].

In an administrative disciplinary proceeding, the employing agency ordinarily is not barred from considering evidence that was illegally obtained by another agency in an unrelated investigation [*Department of Transp. v. State Pers. Bd. (2009) 178 Cal. App. 4th 568, 575-579, 100 Cal. Rptr. 3d 516* (exclusionary rule did not bar Caltrans and State Personnel Board from considering, in administrative disciplinary proceeding, evidence that had been illegally seized by California Highway Patrol in separate criminal investigation)]. The exclusionary rule does apply, however, to prevent the consideration of evidence unconstitutionally seized by an employee of the agency imposing discipline. In such a case, a judicial determination in a related criminal proceeding that evidence was seized unconstitutionally is binding on the board under the doctrine of collateral estoppel [*Dyson v. State Personnel Bd. (1989) 213 Cal. App. 3d 711, 722, 727-728, 262 Cal. Rptr. 112]* .

The board may consider postdismissal evidence of a disciplined employee's rehabilitation for the purposes of determining whether the penalty assessed by the agency was appropriate under all of the circumstances. This does not mean, however, that the board may modify a dismissal or other disciplinary action solely on a consideration of the postdismissal evidence; rather, the board may consider this evidence along with all other circumstances of the case in determining whether the penalty is just and proper. The fact that the penalty was appropriate at the time it was imposed does not prevent the board from finding that the penalty is now excessive when all of the circumstances of the case are considered [*Department of Parks & Recreation v. State Personnel Bd. (1991) 233 Cal. App. 3d 813, 828-829, 284 Cal. Rptr. 839]* .

All state employees have the right to communicate with members and employees of the legislature. A state employee may raise this right as a defense at the hearing when he or she believes that the basis for the adverse action is retaliation for that communication [*Gov. Code § 19251.5*].

[4] Failure to Proceed at Hearing

The failure of either party, or either party's representatives, to proceed at the hearing will be deemed a withdrawal of the action or appeal unless the hearing is continued by the parties' mutual agreement or on a showing of good cause [*Gov. Code § 19579*].

[5] Settlement Conference

Before scheduling a contested adverse action for hearing, the State Personnel Board may require, or any party may request, a prehearing or settlement conference. The administrative law judge who presides over the settlement conference may not preside over any subsequent hearing on the contested adverse action except by agreement of the parties [*Gov. Code § 19581.5*].

[6] Motion for Dismissal

During a hearing, after the agency has completed its opening statement or presentation of evidence, the employee may move for a dismissal of the charges, without waiving his or her right to offer evidence if the motion is not granted. If it appears that the evidence presented supports the granting of the motion as to some but not all of the issues involved, the State Personnel Board must grant the motion as to those issues, and the action must proceed as to the remaining issues. A judgment may not be entered before a final determination of the action on the remaining issues, and this judgment is subject to final review and approval by the board [*Gov. Code § 19582(a)*].

[7] Decision

[a] Requirements

The hearing on an adverse action may be held by the State Personnel Board or by any authorized representative, but the board must render the decision that in its judgment is just and proper [*Gov. Code § 19582(a)*; for discussion of the procedure if a representative hears the case, *see § 118.48[7][b]*]. The decision must be rendered within a reasonable time after the hearing or investigation [*Gov. Code § 19583*].

In arriving at a decision or a proposed decision, the board or its representative may consider any prior suspension of the employee by authority of any agency, or any prior disciplinary proceedings against the employee under the State Civil Service Act [*Gov. Code § 19582(d)*].

The board's decision must be in writing and must contain findings of fact and the adverse action, if any. The findings may be stated in the language of the pleadings or by reference to them [*Gov. Code § 19582(e)*]. The findings must explicitly or implicitly rest on a cause of discipline set forth in the notice of adverse action [*see Negrete v. State Personnel Bd. (1989) 213 Cal. App. 3d 1160, 1170, 262 Cal. Rptr. 72]* . Copies of the decision must be served on the parties personally or by mail [*Gov. Code § 19582(e)*].

The board may designate certain of its decisions as precedents [*Gov. Code § 19582.5*].

[b] Proposed Decision by Representative

If the case is heard by an authorized representative, he or she must prepare a proposed decision in a form that may be adopted by the board as the decision in the case. Within 10 days after a proposed decision is filed, the board must file a copy of the proposed decision as a public record and must furnish a copy to each party. The board may adopt the proposed decision in its entirety, may remand the proposed decision, or may reduce the adverse action in the proposed decision and adopt the balance of the decision [*Gov. Code § 19582(b)*].

If the proposed decision is not remanded or adopted, each party must be so notified, and the board may decide the case on the record, including the transcript, with or without taking any additional evidence. The board may refer the case to the same or another authorized representative for the purpose of taking additional evidence. The representative to whom the case is assigned must prepare a proposed decision on the additional evidence, and the transcript and other papers that are part of the record of the prior hearing. A copy of the proposed decision must be furnished to each party. The board may not decide a case without affording the parties the opportunity to present oral and written argument before the board. When additional oral evidence is introduced before the board, aboard member may vote on the matter only if he or she heard the additional oral evidence [*Gov. Code § 19582(c)*].

[c] Standards of Proof and Review

An adverse action must be supported by a preponderance of the evidence to be sustained by the board [*Pereyda v. State Personnel Board (1971) 15 Cal. App. 3d 47, 52, 92 Cal. Rptr. 746]* . In its review of that action, the board has broad authority to consider mitigating factors in determining the sufficiency of the cause for discipline. However, the

board has no discretion to impose any disciplinary punishment on a public employee unless it finds, on the basis of substantial evidence, that grounds for adverse action have been established [*Department of Parks & Recreation v. State Personnel Bd. (1991) 233 Cal. App. 3d 813, 829, 831, 284 Cal. Rptr. 839]* .

If the board finds that the causes for which the adverse action was imposed were insufficient or not sustained, or that the employee was justified in the course of conduct on which the causes were based, the board may modify or revoke the adverse action and may order the employee returned to his or her position with appropriate restoration of back pay and lost benefits either as of the date of the adverse action or as of a later date specified by the board [*Gov. Code § 19583*]. Thus, there are three bases for modification or revocation of an agency's imposition of discipline: (1) the evidence does not establish the fact of the alleged cause for discipline; (2) the employee was justified; or (3) the cause for discipline is proved but is insufficient to support the level of adverse action taken. Unless one of these factors is present, the agency's action must stand [*Department of Parks & Recreation v. State Personnel Bd. (1991) 233 Cal. App. 3d 813, 827, 284 Cal. Rptr. 839]* .

[8] Remedy if Action Is Revoked or Modified

If the board revokes or modifies the adverse action and orders the employee returned to his or her position, it must direct the payment of salary, with accrued interest, and the reinstatement of all benefits that otherwise would have normally accrued, for the period of time that the board finds the adverse action was improperly in effect [*Gov. Code § 19584*]. These benefits include, but are not limited to, retirement, medical, dental, and seniority benefits under a memorandum of understanding for that classification of employee [*Gov. Code § 19584*; *see Lowe v. California Resources Agency (1991) 1 Cal. App. 4th 1140, 1144 n.3, 2 Cal. Rptr. 2d 558]* . However, compensation is not payable for overtime pay that a reinstated employee would have earned during the period of involuntary discharge [*Swepston v. State Personnel Bd. (1987) 195 Cal. App. 3d 92, 97-98, 240 Cal. Rptr. 470]* . Moreover, salary may not be authorized or paid for any portion of a period of adverse action during which the employee was not ready, able, and willing to perform the duties of his other position, whether or not the adverse action is valid or the facts on which it is based are sufficient to constitute cause for discipline. Any compensation that the employee earned, or might reasonably have earned, during any period commencing more than six months after the initial date of the suspension must be deducted from the amount of any salary that is due [*Gov. Code § 19584*].

[9] Petition for Rehearing

Within 30 days after service of a copy of the State Personnel Board's decision, either party may apply for a rehearing by filing a written petition with the board [*Gov. Code § 19586*; *2 Cal. Code Reg. § 51.7*]. Within 30 days after the petition for rehearing is filed, the board must serve notice of the petition on the other parties to the proceeding by mailing to each party a copy of the petition [*Gov. Code § 19586*]. Within 60 days after service of notice of the petition, the board must either grant or deny the petition, in whole or in part [*Gov. Code § 19586*; *2 Cal. Code Reg. § 51.7*]. Failure to act on a petition for rehearing within the 60-day period constitutes a denial of the petition [*Gov. Code § 19586*].

If the petition for rehearing is granted, the matter must be set for hearing by the board or its authorized representative. If the matter is set for hearing before an authorized representative, the hearing must be conducted as to the matters on which the petition was granted in substantially the same manner and under like rules of procedure as an original hearing on the adverse action. If the matter is set for hearing before the board, the board may give the parties an opportunity to provide written or oral argument and may decide the case on the record, including the transcript, with or without taking additional evidence [*Gov. Code § 19587*].

If a petition for rehearing is not duly filed, the decision of the board becomes final 30 days after service of a copy of the decision on the parties [*2 Cal. Code Reg. § 51.6*].

[10] Right to Pursue Judicial Remedy

The right to petition a court for a writ of mandate, or to bring or maintain any action or proceeding based on or related to any state civil service law, is not affected by the failure to file a petition for rehearing with the board [*Gov. Code § 19588*]. As an alternative or in addition to filing a petition for rehearing, an employee may seek judicial review of the board's decision [*Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 204-205, 124 Cal. Rptr. 14, 539 P.2d 774* ; *see § 118.68* et seq.].

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§ 118.49 Effect of Employee's Dismissal From Civil Service

Unless the State Personnel Board orders otherwise, an employee's dismissal from state civil service (1) constitutes a dismissal as of the same date from any and all positions that the employee holds in the state civil service, (2) results in automatic removal of the employee's name from any and all employment lists on which it appears, and (3) terminates the employee's salary as of the date of dismissal, except that the employee must be paid any due and unpaid salary and must be paid for any unused and accumulated vacation and any accumulated compensating time off or overtime credited to the employee as of the dismissal date [*Gov. Code § 19583.1*]. An employee who is dismissed from state employment by adverse action or as the result of disciplinary proceedings generally may not take any state civil service examination or be certified from an eligible list to any position in the state service without the prior consent of the executive officer of the State Personnel Board [*2 Cal. Code Reg. § 211*]. However, the board may grant a blanket waiver of this requirement that would allow a dismissed employee who meets standards set by the board to apply for any civil service examination, so that he or she would not need a separate waiver for each examination [*2 Cal. Code Reg. § 211*; *see Gov. Code § 18941(b)(1)*].

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§ 118.50 Filing of Charges by Third Party

Any person, except a current inmate of the Department of Corrections and Rehabilitation [*see Penal Code § 5055*], a ward of the Division of Juvenile Facilities of the Department of Corrections and Rehabilitation [*see Penal Code § 6001*], or a current patient of a facility operated by the State Department of Mental Health, may file charges against a state civil service employee requesting that adverse action be taken against the employee for one or more causes for discipline specified in the State Civil Service Act. These charges may be filed only with the consent of the State Personnel Board or the agency, and any request to file charges must be filed within one year of the event or events that led to the filing [*Gov. Code § 19583.5(a)*].

The request must be in writing and must be accompanied by the proposed charges in the form of a sworn statement. The statement must clearly state the facts constituting the causes for adverse action in such detail as is reasonably necessary to enable the accused employee to prepare a defense to the charges. When it does not appear that the material facts alleged are within the complainant's personal knowledge, the board may require the complainant to present supporting affidavits of persons having actual knowledge of the facts. Once the board has approved the request to file charges, any alleged failure to follow the prescribed procedure will not invalidate subsequent proceedings [*2 Cal. Code Reg. § 51.9*].

The employee against whom the charges are filed has the right to answer the charges, as in the case of a notice of adverse action served on the employee by the agency [*Gov. Code § 19583.5(a)*; *see § 118.46*]. A hearing must be conducted by the hearing office of the board [*2 Cal. Code Reg. § 52(a)(1)*], as in the case of an appeal of any adverse action taken by an agency [*see § 118.48[1]*]. If the board finds that the charges are true, it may take any adverse action that in its judgment is just and proper [*Gov. Code § 19583.5(a)*; *see Department of Parks & Recreation v. State Personnel Bd. (1991) 233 Cal. App. 3d 813, 824 , 284 Cal. Rptr. 839* (board in this situation has original jurisdiction rather than appellate jurisdiction)].

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§ 118.51 Action Against Tenured Managerial Employees

Special requirements apply to adverse action taken against a tenured managerial employee [*see Gov. Code § 19590 et seq.*; *see also Gov. Code §§ 3513(e), 19592* (persons designated as managerial employees; applicability of general provisions concerning adverse action)]. Such an employee may be demoted, dismissed, or otherwise disciplined for any of the causes for discipline that are applicable to state civil service employees generally [*see § 118.41*] but may not be disciplined for any cause constituting prohibited discrimination [*Gov. Code § 19590(a)*; *see § 118.35*].

At least 20 days before the effective date of the disciplinary action, the agency must give the employee written notice of the proposed action setting forth the reasons for the action, the effective date of the action, the employee's right to answer the notice orally or in writing within 10 days after receipt of the notice, and the employee's appeal rights [*Gov. Code § 19590(b)*]. The agency must file a copy of the disciplinary action with the State Personnel Board within 15 days after the effective date of the action [*Gov. Code § 19590(b)*].

At the written request of the employee filed within 30 days after the employee's receipt of the notice of disciplinary action, the board may investigate the reasons for the action, with or without a hearing [*Gov. Code § 19590(c)*]. If the adverse action taken was a disciplinary action other than demotion or dismissal, the board must, after investigation or hearing, affirm, reduce, or overturn the action [*Gov. Code § 19590(c)*]. If the adverse action taken was a demotion or dismissal, the board must, after investigation or hearing, affirm or reduce the action, restore the employee to the position from which he or she was demoted, or reinstate the employee to the position from which he or she was dismissed or to a position to which he or she could have transferred [*Gov. Code § 19590(c)*; *see Gov. Code § 19592.5*].

The board may modify the agency's action only if the board determines that there is no substantial evidence to support the reasons for the action, or that the action was made in fraud or bad faith. The employee has the burden of proof, and, subject to rebuttal by the employee, it is presumed that the action was free from fraud and bad faith and that the statement of reasons in the notice of disciplinary action is true [*Gov. Code § 19590(c)*].

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§ 118.52 Local Public Employees

[1] In General

Cities and counties are obligated to follow their own rules and regulations when imposing discipline [*Birdsall v. Carrillo (1991) 231 Cal. App. 3d 1426, 1431, 282 Cal. Rptr. 504* ; *Vollstedt v. City of Stockton (1990) 220 Cal. App. 3d 265, 272, 269 Cal. Rptr. 404* ; *see Zeron v. City of Los Angeles (1998) 67 Cal. App. 4th 639, 643-646, 79 Cal. Rptr. 2d 130* (city's failure to follow its own procedure for termination of probationary employee results in employee becoming permanent employee with property interest in continued employment); *but see Cilderman v. City of Los Angeles (1998) 67 Cal. App. 4th 1466, 1470-1471, 80 Cal. Rptr. 2d 20* (in absence of evidence of intentional or purposeful discrimination, city's inconsistent enforcement of city charter provision allowing extension of employee's probationary period to reflect sick time taken by employee does not amount to denial of equal protection)]. Unless an ordinance or charter provision requires a hearing before suspension, a short-term suspension may be imposed for disciplinary reasons without a prior hearing. The suspended employee is entitled, however, to notice of the charges on which the suspension is based, must be afforded an opportunity to respond orally or in writing to the charges, and is entitled to a hearing during or after the suspension period [*Civil Service Asso. v. San Francisco (1978) 22 Cal. 3d 552, 558-565, 150 Cal. Rptr.129, 586 P.2d 162]* . The right to be represented at disciplinary proceedings by a recognized union [*see Gov. Code § 3503*] extends to this type of hearing [*Civil Service Asso. v. San Francisco (1978) 22 Cal. 3d 552, 565-568, 150 Cal. Rptr. 129, 586 P.2d 162]* . When the late filing of an appeal from an agency decision to terminate an employee is not specifically addressed by an ordinance, the local civil service commission must exercise its discretion to grant an extension of time for good cause shown when the employee has a fundamental and vested right of employment [*Civil Service Com. v. Velez (1993) 14 Cal. App. 4th 115, 121, 17 Cal. Rptr. 2d 490]* .

Many California city and county charters require the reinstatement of and payment of back pay to wrongfully discharged employees [*see Currieri v. City of Roseville (1975) 50 Cal. App. 3d 499, 502, 123 Cal. Rptr. 314* ; *Carroll v. Civil Service Com. (1973) 31 Cal. App. 3d 561, 566, 107 Cal. Rptr. 557]* . A wrongfully discharged employee has a duty to mitigate damages, however, by making a reasonable effort to seek other employment [*Currieri v. City of Roseville (1975) 50 Cal. App. 3d 499, 505, 123 Cal. Rptr. 314]* . Also, an employer is not liable for back pay during a period that a wrongfully discharged employee is unavailable for work due to a disability that is not the result of the

employer's wrongful conduct [*Davis v. Los Angeles Unified Sch. Dist. Pers. Comm'n (2007) 152 Cal. App. 4th 1122, 1134-1135, 62 Cal. Rptr. 3d 69]* . The burden of proof on questions of mitigation and unavailability of the employee rests with the employer [*Davis v. Los Angeles Unified Sch. Dist. Pers. Comm'n (2007) 152 Cal. App. 4th 1122, 1140-1141, 62 Cal. Rptr. 3d 69* ; *Carroll v. Civil Service Com. (1973) 31 Cal. App. 3d 561, 565, 107 Cal. Rptr. 557]* .

When a local ordinance provides that the civil service commission may modify an order of discipline, the commission is not authorized to change an order of suspension, which merely interrupts employment, to one of termination, which is the most extreme penalty that can be imposed in the employment context. Moreover, such an action by a local civil service commission violates due process when the employee, after receiving notice of and an opportunity to respond to the proposed suspension, receives no opportunity to respond to the proposed termination [*Paoli v. Civil Service Com. (1993) 12 Cal. App. 4th 1073, 1076-1078, 15 Cal. Rptr. 2d 874]* .

[2] Required Provisions of County Ordinance

Any county ordinance adopted pursuant to the County Civil Service Enabling Law must include certain provisions relating to dismissal, suspension, or reduction in rank of county civil service employees [*see Gov. Code § 31108*]. In general, the ordinance must provide that an employee must be given notice of any order of dismissal, suspension, or reduction in rank, an opportunity to reply to the order in writing, and the right to appeal the order to the county civil service commission and to have the matter heard by the commission [*see Gov. Code § 31108(a)*]. Alternatively, the ordinance may provide that an employee who is dismissed, suspended, or reduced in rank or compensation may elect to appeal under the terms of any grievance procedure established pursuant to any legally binding memorandum of understanding between the local agency governing board and an employee organization recognized under applicable law [*Gov. Code § 31108(b)*].

[3] Effect of Collective Bargaining Agreement

The Meyers-Milias-Brown Act [*Gov. Code § 3500 et seq.*] generally requires local governments to "meet and confer in good faith" with employee representatives about matters that fall within the "scope of representation," including wages, hours, and other terms and conditions of employment [*Gov. Code §§ 3504, 3505*]. Thus, an employer ordinarily must bargain with employee representatives if its action or policy has a significant and adverse effect on the wages, hours, or working conditions of the bargaining-unit employees [*Building Material & Constr. Teamsters' Union v. Farrell (1986) 41 Cal. 3d 651, 659-660, 224 Cal. Rptr. 688, 715 P.2d 648]* . For example, a local government's procedures for disciplining its employees are a mandatory subject of collective bargaining [*see Cerini v. City of Cloverdale (1987) 191 Cal. App. 3d 1471, 1480-1481, 237 Cal. Rptr. 116* ; *Vernon Fire Fighters v. City of Vernon (1980) 107 Cal. App. 3d 802, 816 n.14, 817, 165 Cal. Rptr. 908]* .

However, the "scope of representation" for purposes of the Meyers-Milias-Brown Act does not include consideration of the "merits, necessity, or organization of any service or activity provided by law or executive order" [*Gov. Code § 3504*]. Thus, even if a local government's action or policy has a significant and adverse effect on the bargaining unit's wages, hours, and working conditions, the employer may be excepted from bargaining requirements if its action or policy amounts to a fundamental managerial or policy decision [*Building Material & Constr. Teamsters' Union v. Farrell (1986) 41 Cal. 3d 651, 660, 224 Cal. Rptr. 688, 715 P.2d 648]* . Examples of such fundamental managerial or policy decisions include changing the policy regarding a police officer's use of deadly force [*see San Jose Peace Officer's Ass'n v. City of San Jose (1978) 78 Cal. App. 3d 935, 947, 144 Cal. Rptr. 638*], and permitting a member of the citizen's police review commission to attend police department hearings regarding citizen complaints and sending a department member to review commission meetings [*Berkeley Police Ass'n. v. City of Berkeley (1977) 76 Cal. App. 3d 931, 937, 143 Cal. Rptr. 255*].

In this context, the California Supreme Court has drawn a distinction between an employer's fundamental managerial or policy decision and the implementation and effects of that decision. For example, a city's decision to take measures

against racial profiling by its police [*see Penal Code § 13519.4(e)* ("racial profiling" is practice of detaining suspect based on broad set of criteria that casts suspicion on entire class of people without any individualized suspicion of particular person being stopped)] is a fundamental managerial or policy decision that is not required to be the subject of bargaining [*Claremont Police Officers Ass'n v. City of Claremont (2006) 39 Cal. 4th 623, 632, 47 Cal. Rptr. 3d 69*]. Depending on the circumstances, however, the implementation and effects of that policy might be the subject of mandatory bargaining. If the action taken to implement the policy does not have a significant and adverse effect on the wages, hours, or working conditions of the employees, bargaining is not required. But if the implementation action does have a significant and adverse effect, whether the action must be the subject of bargaining depends on the outcome of a balancing test: bargaining is required if the employer's need for unencumbered decision-making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question [*Claremont Police Officers Ass'n v. City of Claremont (2006) 39 Cal. 4th 623, 637, 47 Cal. Rptr. 3d 69*]. For example, a city's implementation of a study to determine whether its police were engaging in racial profiling was found by the Supreme Court not to be a mandatory subject of bargaining, where the study's only impact on working conditions--requiring police officers to spend an additional 8 to 12 minutes per shift filling out forms--was de minimis [*Claremont Police Officers Ass'n v. City of Claremont (2006) 39 Cal. 4th 623, 634, 637-638, 47 Cal. Rptr. 3d 69*] (different result might follow if implementation of city's study gives rise to issues regarding officer discipline, privacy rights, and other potential effects, which were not before Court in this case)].

A union may agree to the applicability of disciplinary rules that are different from the civil service rules that would ordinarily apply, as long as the agreed-on rules do not deprive the union members of their right to a hearing on the charges against them or otherwise waive the members' rights of due process [*McMillen v. Civil Service Com. (1992) 6 Cal. App. 4th 125, 132, 8 Cal. Rptr. 2d 548]* . For full discussion of bargaining rights of public employees and their unions, see California Public Sector Labor Relations (Matthew Bender).

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§ 118.53 Failure to Pass Required Medical Examination

[1] Basis for Transfer, Demotion, or Termination

A state agency may require an employee to submit to a medical examination by a physician designated by the agency to evaluate the employee's capacity to perform the work of his or her position [*Gov. Code § 19253.5(a)*; *2 Cal. Code Reg. § 172.3*; *see 2 Cal. Code Reg. § 548.122* (applicability to career executive positions)]. The agency must pay the fees for the examination and for the services of medical specialists or technicians, if necessary. The employee may submit medical or other evidence to the examining physician or to the agency. The examining physician must make a written report of the examination to the agency, which must provide a copy to the physician designated by the employee [*Gov. Code § 19253.5(b)*].

If, after considering the results of the medical examination and other pertinent information, the agency concludes that the employee is unable to perform the work of his or her present position but is able to perform the work of another position, including one of less than full time, the agency may demote or transfer the employee to that position [*Gov. Code § 19253.5(c)*]. If the agency concludes that the employee is unable to perform the work of any position in the agency, it may terminate the employee [*Gov. Code § 19253.5(d)*]. In such a case, if the employee is eligible and does not waive the right to retire for disability, the agency must file an application for disability retirement on behalf of the employee [*Gov. Code § 19253.5(i)* (on agency's filing of application for disability retirement, agency may place employee on involuntary leave status)].

The agency may demote, transfer, or terminate an employee without requiring the employee to submit to a medical examination, when the agency relies on a written statement submitted by the employee as to his or her condition or on medical reports submitted by the employee [*Gov. Code § 19253.5(e)*].

[2] Notice; Appeal Rights

The employee must be given written final notice of any demotion, transfer, termination, or decision to file for disability retirement based on a medical examination, at least 15 days before the effective date of the demotion, transfer, or termination, or 15 days before the filing date of the application for disability retirement [*Gov. Code § 19253.5(f), (i)(1)*;

2 Cal. Code Reg. § 52.3(a); *see Newman v. State Personnel Bd. (1992) 10 Cal. App. 4th 41, 48, 12 Cal. Rptr. 2d 601* (notice must be sent to proper address to be effective)].

The agency's decision to file for disability retirement is not appealable to State Personnel Board, although the agency must provide the employee with an opportunity to respond to the agency regarding the decision to file for retirement [*Gov. Code § 19253.5(i)(1)*].

The employee has the right to appeal a demotion, transfer, or termination to the State Personnel Board within 15 days after service of the notice. The board is required to hold a hearing and may sustain, disapprove, or modify the demotion, transfer, or termination [*Gov. Code § 19253.5(f)*]. In the proceedings before the board, the agency has the burden of proving the employee's inability to perform the work of his or her position or any other available position [*Newman v. State Personnel Bd. (1992) 10 Cal. App. 4th 41, 49, 12 Cal. Rptr. 2d 601]* . If the board revokes or modifies the agency's action, it must direct the agency to pay to the employee all accrued salary with interest and to reinstate to the employee all benefits that otherwise would have normally accrued [*Gov. Code §§ 19253.5(g), 19584*].

Information about the employee's medical fitness for work that the agency receives after proper service of a notice of termination but before the effective date of the termination does not affect the its decision to terminate but is relevant to the question of reinstatement only [*Newman v. State Personnel Bd. (1992) 10 Cal. App. 4th 41, 48, 12 Cal. Rptr. 2d 601]* .

[3] Right to Reinstatement

On the request of an agency or the petition of the employee who was terminated, demoted, or transferred for medical reasons under *Gov. Code § 19253.5*, the State Personnel Board must reinstate the employee to an appropriate vacant position in the same class, in a comparable class, or in a lower-related class, if the board determines that the employee is no longer incapacitated for duty. Reinstatement to a position in a different agency may be made only with the concurrence of that agency. In approving or ordering reinstatement, the board may require the employee to complete satisfactorily a new probationary period. If there is no vacant position to which the employee can be appointed, the employee's name must be placed on any appropriate reemployment lists [*Gov. Code § 19253.5(h)*].

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§ 118.54 Failure to Meet Requirements for Continuing Employment

[1] Nondisciplinary Termination, Demotion, or Transfer

An agency may terminate, demote, or transfer an employee who fails to meet requirements for continuing employment in the class of position to which the employee is appointed. Alternatively, the agency may grant the employee a leave of absence [*Gov. Code § 19585(b)*;§ 118.54[2]].

The employee must receive at least five days' written notice of termination, demotion, or transfer, and has the right to appeal the action to the State Personnel Board [*Gov. Code § 19585(f)*]. Any action taken is considered nondisciplinary for the purposes of the State Civil Service Act and the board's rules [*Gov. Code § 19585(h)*]. If the employee subsequently meets the requirements for continuing employment, he or she must be reinstated [*Gov. Code § 19585(g)*; *see Gov. Code § 19140(a)*].

[2] Permissible Requirements

Requirements for continuing employment must be limited to the acquisition or retention of specified licenses, certificates, registrations, or other professional qualifications, education, or eligibility for continuing employment or advancement to the fully qualified level within a particular class or series. Such requirements may not include medical, physical ability, work, or academy performance standards [*Gov. Code § 19585(d)*]. An employee who has filed a proper and timely application for renewal of a required license, registration, or certificate must be considered as having maintained the license, registration, or certificate, unless it is subsequently denied, revoked, or suspended [*Gov. Code § 19585(e)*].

An employee may be terminated if he or she fails to meet the employment eligibility requirements of the federal Immigration Reform and Control Act of 1986 [*Gov. Code § 19585(c)*].

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§ 118.55 Prohibited Retaliation

A state employee [*see Gov. Code § 8547.2(a)*] may not directly or indirectly use, or attempt to use, his or her official authority or influence for the purpose of intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command any person for the purpose of interfering with that person's right to make a protected disclosure under the California Whistleblower Protection Act [*Gov. Code § 8547.3(a)*; *see Gov. Code § 8547 et seq.*].

A "protected disclosure" under the Act is any good-faith communication, including any communication based on, or when carrying out, job duties, that discloses or demonstrates an intention to disclose information that may evidence (1) improper governmental activity or (2) any condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose is made for the purpose of remedying that condition [*Gov. Code § 8547.2(d)*]. "Protected disclosure" specifically includes any good faith communication to the Bureau of State Audits alleging an improper governmental activity and any evidence delivered to the Bureau of State Audits in support of the allegation [*Gov. Code § 8547.2(d)*]. "Improper governmental activity" is any activity by a state agency or employee that is undertaken in the performance of the employee's duties, undertaken inside a state office, or, if undertaken outside a state office by the employee, directly relates to state government, regardless of whether the activity is within the scope of his or her employment, and that (1) violates any state or federal law or regulation or (2) is economically wasteful or involves gross misconduct, incompetency, or inefficiency. Activity in violation of a state or federal law or regulation includes, but is not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, and willful omission to perform duty [*Gov. Code § 8547.2(b)*].

Use of official authority or influence includes (1) conferring a benefit or effecting a reprisal, or promising to do either; and (2) taking, or directing others to take, recommending, processing, or approving any personnel action, including, but not limited to, appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action [*Gov. Code § 8547.3(b)*].

The statutory prohibition against the use or attempted use of an employee's official authority or influence to interfere with a person's right to make a protected disclosure does not authorize an individual to disclose information otherwise

prohibited by or under law [*Gov. Code § 8547.3(d)*].

Special provisions are applicable in cases involving retaliation against employees of the University of California and of California State University who make protected disclosures [*Gov. Code §§ 8547.10-8547.12*].

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§ 118.56 Grounds for Adverse Action and Other Penalties

A state civil service employee who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts, against another state employee or an applicant for state employment for making a protected disclosure is subject to discipline by adverse action [*Gov. Code § 8547.8(b)*; *see Gov. Code § 19683(d)*; *see also Gov. Code § 19572(x)*]. If the agency does not take adverse action against the employee, the State Personnel Board may do so [*Gov. Code §§ 8547.8(b), 19683(e)*; *see Gov. Code § 19583.5* (procedure for filing charges); *see also § 118.50*].

In addition, any person who intentionally engages in prohibited retaliatory acts is subject to a fine and incarceration in the county jail [*Gov. Code § 8547.8(b)*].

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§ 118.57 Administrative Procedure

[1] Complaint

A state employee or applicant for state employment who files a written complaint with his or her supervisor or manager or the agency, alleging actual or attempted acts of reprisal, retaliation, threats, coercion, or similar acts prohibited by statute, may file a copy of the complaint with the State Personnel Board [*Gov. Code § 8547.8(a)*].

The complaint filed with the board must be accompanied by a sworn statement, under penalty of perjury, that the contents of the complaint are true or are believed by the affiant to be true. The complaint must be filed with the board within 12 months after the most recent act of reprisal described in the complaint [*Gov. Code § 8547.8(a)*].

[2] Board Investigation or Hearing of Complaint

The State Personnel Board must conduct a hearing or investigation of a complaint of reprisal or retaliation within 10 working days after the filing date. The board's executive officer must complete findings of the hearing or investigation within 60 working days and must provide a copy of the findings to the complainant and to his or her supervisor or manager or the agency. When the allegations of a complaint are the same as, or similar to, those contained in another appeal, the executive officer may consolidate the appeals into the most appropriate format, and the time limitations described in this paragraph do not apply [*Gov. Code § 19683(a)*].

If the executive officer finds that there were acts of misconduct by the supervisor, manager, or agency, the supervisor, manager, or agency may request a hearing before the board regarding the findings [*Gov. Code § 19683(b)*]. The request for a hearing, and any subsequent determination by the board, must be made in accordance with the board's normal rules governing appeals, hearings, and investigations [*see § 118.55* et seq.], and disciplinary proceedings [*Gov. Code § 19683(b)*; *see § 118.40* et seq.].

In any administrative proceeding under the California Whistleblower Protection Act, once it has been demonstrated by a preponderance of the evidence that an activity protected by the Act was a contributing factor in the alleged retaliation against the complainant, the burden of proof will be on the supervisor, manager, or state agency to demonstrate by clear

and convincing evidence that the action allegedly constituting retaliation would have occurred for legitimate, independent reasons even if the complainant had not engaged in protected activity [*Gov. Code § 8547.8(e)* (if supervisor, manager, or state agency fails to meet this burden of proof, complainant has complete affirmative defense to any adverse action based on protected disclosure); *see Gov. Code §§ 8547.10(e), 8547.12(e)* (similar burden of proof in proceedings brought by employees of University of California and California State University)].

[3] Remedy

If, after the hearing, the board determines that prohibited retaliation occurred, or if no hearing is requested and the executive officer finds that improper activity occurred, the board may order any appropriate relief, including, but not limited to, reinstatement, back pay, restoration of lost service credit, compensatory damages, and the expungement of any adverse records about the complainant [*Gov. Code § 19683(c)*]. If the board determines that a manager, supervisor, or employee named in the complaint was guilty of prohibited retaliation, and that violation constitutes legal cause for discipline under *Gov. Code § 19572*, it must impose a just and proper penalty and cause an entry to that effect to be made in the manager's, supervisor's, or employee's official personnel records [*Gov. Code § 19683(d)*; *see § 118.56, see also § 118.40* et seq.]. If the board determines that a manager, supervisor, or employee who is not named a party in the retaliation complaint may have engaged in or participated in prohibited retaliation, the board must notify the manager's, supervisor's, or employee's employing agency, which may then impose an adverse action on that manager, supervisor, or employee [*Gov. Code § 19683(e)*].

An employee who prevails before the board on his or her complaint must be reimbursed for all costs incurred [*Gov. Code § 19683.5*].

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§ 118.58 Civil Action

Any person who intentionally engaged in acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment for having made a protected disclosure is liable to the injured party for damages [*Gov. Code § 8547.8(c)*; *see Gov. Code §§ 8547.10(c), 8547.12(c)* (damages recoverable by employees of University of California and California State University); *see also § 118.147*]. A "person" includes the state, an individual, corporation, trust, association, local government, or an agency or instrumentality of any of the foregoing [*Gov. Code § 8547.2(c)*].

An employee complaining of whistleblower retaliation may bring an action for damages in superior court, but only after the employee files a complaint with the State Personnel Board and the board has issued or failed to issue findings [*Gov. Code § 8547.8(c)*; *State Bd. of Chiropractic Examiners v. Superior Court (2009) 45 Cal. 4th 963, 978, 89 Cal. Rptr. 3d 576, 201 P.3d 457*]. If the plaintiff is a California State University employee, an action for damages may not be brought unless the state university has failed to reach a decision on the employee's administrative complaint within the time limits established for that purpose by the trustees or has failed to address the complaint to the employee's satisfaction within 18 months [*Gov. Code § 8547.12(c)* ("Nothing in this section is intended to prohibit the injured party from seeking a remedy if the university has not satisfactorily addressed the complaint within 18 months."); *Runyon v. Board of Trs. of Cal. State Univ. (2010) 48 Cal. 4th 760, 767-773, 108 Cal. Rptr. 3d 557, 229 P.3d 985* ("satisfactorily addressed" in *Gov. Code § 8547.12(c)* refers to satisfaction of complaining employee, rather than satisfaction of good-faith standard for investigation of complaint)]. If the plaintiff is an employee of the University of California, an action for damages may be brought only if the university's administrative remedy failed to result in a timely decision; if the university reached a timely decision, even one in its own favor, the employee has no cause of action for damages [*Gov. Code § 8547.10(c)*; *Miklosy v. Regents of Univ. of Cal. (2008) 44 Cal. 4th 876, 888-898, 80 Cal. Rptr. 3d 690, 188 P.3d 629*].

The plaintiff's failure to exhaust his or her administrative remedy is a jurisdictional defect that may be raised by the parties or the court at any time [*Hood v. Hacienda La Puente Unified School District (1998) 65 Cal. App. 4th 435, 439-441, 76 Cal. Rptr. 2d 448]* . As long as the Board has issued findings, however, or the deadline for issuing findings has passed, the employee may proceed with a damages action in superior court regardless of whether the Board's

findings are favorable or unfavorable to the employee. Once the Board has issued findings, the employee need not pursue additional administrative remedies and need not challenge the findings by way of a petition for a writ of administrative mandate [*State Bd. of Chiropractic Examiners v. Superior Court (2009) 45 Cal. 4th 963, 978, 89 Cal. Rptr. 3d 576, 201 P.3d 457 , disapproving California Pub. Employees' Ret. Sys. v. Superior Court (2008)160 Cal. App. 4th 174, 180-185, 72 Cal. Rptr. 3d 561*]. Similarly, if a California State University employee has complied with the university's internal complaint and investigation requirements and received an adverse decision from the university, the employee need not seek to overturn the university's decision through a petition for a writ of administrative mandate before filing a civil action [*Runyon v. Board of Trs. of Cal. State Univ. (2010) 48 Cal. 4th 760, 773-775, 108 Cal. Rptr. 3d 557, 229 P.3d 985]* .

In a civil damages action, once it has been demonstrated by a preponderance of the evidence that an activity protected by the California Whistleblower Protection Act was a contributing factor in the alleged retaliation against the plaintiff, the burden of proof will be on the supervisor, manager, or state agency to demonstrate by clear and convincing evidence that the action allegedly constituting retaliation would have occurred for legitimate, independent reasons even if the plaintiff had not engaged in protected activity [*Gov. Code § 8547.8(e)*; *see Gov. Code §§ 8547.10(e), 8547.12(e)* (similar burden of proof in actions brought by employees of University of California and California State University)].

The plaintiff may recover punitive damages if the defendant acted maliciously. If the plaintiff prevails, the plaintiff also may recover reasonable attorney's fees, as provided by law. The remedy of a civil action is in addition to all other penalties provided by law [*Gov. Code § 8547.8(c)*].

The fact that an employee or applicant may have a cause of action as described here does not prevent an agency, manager, or supervisor from taking, directing others to take, recommending, or approving any personnel action, or from taking or failing to take a personnel action, regarding the employee or applicant if the agency, manager, or supervisor reasonably believes that the action or inaction is justified by evidence separate and apart from the fact that the employee or applicant has disclosed improper governmental activities [*Gov. Code § 8547.8(d)*].

The immunity of public employees from malicious prosecution actions [*see Gov. Code § 821.6*] does not shield an agency and its officers from civil liability to an employee who was discharged in retaliation for disclosing improper governmental activities [*Shoemaker v. Myers (1992) 2 Cal. App. 4th 1407, 1423-1425, 4 Cal. Rptr. 2d 203]* .

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§ 118.59 Authority to Hold Hearings and Make Investigations

The State Personnel Board derives adjudicatory power from the constitution [*Cal. Const., art. VII, §§ 2, 3*; *Department of Parks & Recreation v. State Personnel Bd. (1991) 233 Cal. App. 3d 813, 823, 284 Cal. Rptr. 839]* . The board is authorized to hold hearings and make investigations concerning all matters relating to the enforcement and effect of the State Civil Service Act and the board's rules under that Act [*Gov. Code § 18670*; *see 2 Cal. Code Reg. § 51 et seq.* (regulations applicable to hearings and appeals before board)].

The Constitution precludes the Legislature from authorizing an entity other than State Personnel Board (such as a "board of adjustment" created as part of a grievance procedure specified in a memorandum of understanding for a particular state employee bargaining unit) to review disciplinary actions taken against state civil-service employees [*State Personnel Bd. v. Department of Personnel Admin. (2005) 37 Cal. 4th 512, 523, 36 Cal. Rptr. 3d 142, 123 P.3d 169*) (holding former *Gov. Code § 18670(c)-(e)* unconstitutional); *see Cal. Const., art. VII, § 3(a)* (board "shall ... review disciplinary actions")].

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§ 118.60 Proceedings Initiated by Petition or Appeal

The State Personnel Board is required to make investigations and hold hearings on the petition or appeal of an employee or a citizen concerning the enforcement and effect of the State Civil Service Act, and to enforce the observance of the Act and the rules made under the Act [*Gov. Code § 18670*; *see 2 Cal. Code Reg. § 51.1(c)* ("appeal" means any written request for relief or review and includes "application," "petition," "protest," and "complaint")]. All appeals filed with the board must be in writing and must clearly state the facts that form the basis for the appeal and identify all known respondents [*2 Cal. Code Reg. § 51.2(a), (b)*; *see § 118.141*]. Except as otherwise provided in the Act or the board's rules, an appeal must be filed with the board within 30 days after the appellant has been served with the notice, report, or document from which the appeal is taken, or within 30 days after the event on which the appeal is based [*2 Cal. Code Reg. § 51.2(e)*; *see Gov. Code § 19575* (appeal from adverse action must be filed 30 days after effective date of adverse action)]. The executive officer of the board may grant a 30-day extension for good cause [*2 Cal. Code Reg. § 51.2(e)(3)*]. The board's filing requirements are subject to the rule of strict compliance, which means that an appeal may be disregarded if it is not timely filed [*Sheehy v. State Personnel Bd. (1978) 83 Cal. App. 3d 907, 912, 148 Cal. Rptr. 230]* .

The appeals division of the board will mail a copy of the appeal to, or serve a copy of the appeal on, the respondent [*2 Cal. Code Reg. § 51.2(d)*].

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§ 118.61 Time for Investigation or Hearing

A hearing or investigation in regard to an employee's appeal must be commenced within a reasonable time after the petition or appeal is filed, and the board must render a decision within a reasonable time after the conclusion of the hearing or investigation. The period from the filing of the appeal to the decision by the board may not exceed six months or 90 days from the time of the submission, whichever period is shorter, except that the board may extend the six-month period up to 45 days. The board must publish substantial reasons for any extension in its calendar before the conclusion of the six-month period. Submission occurs on the last day of the hearing when no other documents are to be filed, or on the last day designated for the filing of briefs or other evidence necessary to complete the record [*Gov. Code § 18671.1*].

The employee may waive the six-month and 90-day periods for a decision, but absent a waiver, the board failure to render a timely decision is an exhaustion of all available administrative remedies [*Gov. Code § 18671.1*].

In cases involving complaints of discrimination, harassment, or retaliation, when the executive officer of the board renders a decision, the decision must be rendered within four months after the filing of the appeal [*Gov. Code § 18671.1*].

In any case, an appeal assigned for hearing will be dismissed if it is not brought to hearing within three years after it was filed with the board, unless the parties have filed a written stipulation specifically extending the three-year period [*2 Cal. Code Reg. § 52.2*].

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§ 118.62 Conduct of Hearing or Investigation

The hearing or investigation may be conducted by the board or by any member or authorized representative of the board [*Gov. Code § 18671*]. The following types of appeals must be assigned to the hearing office of the board for hearing [*2 Cal. Code Reg. § 52(a)*]:

(1) Approved requests to file charges against a state civil service employee [*see § 118.50*].

(2) Appeal of an adverse action [*see § 118.40* et seq.].

(3) Appeal of rejection during probationary period [*see § 118.20[1][a]*].

(4) Any other appeal deemed appropriate by the board or its executive officer or president.

In any case in which the proceeding has been assigned to the hearing office, that office is the authorized representative of the board and is fully authorized and empowered to grant or refuse extensions of time, to set the proceedings for hearing, to conduct a hearing, and to perform all other acts in connection with the proceedings that are authorized by the State Civil Service Act or the board's regulations [*2 Cal. Code Reg. § 52(b)*].

The person conducting the hearing or investigation may administer oaths, subpoena and require the attendance of witnesses and the production of books or papers, and cause the depositions of witnesses to be taken in the manner prescribed by law for depositions in civil cases in the superior court [*Gov. Code § 18671*; *see Gov. Code §§ 18672-18674* (subpoena of witnesses, depositions, witness fees)]. When ordered to testify or produce a book or paper, a person is not excused from testifying or producing any book or paper in the investigation or hearing on the ground of self-incrimination if the person is granted immunity [*Gov. Code § 18676*]. Immunity from prosecution may be granted in an appropriate case [*see Gov. Code § 18677*]. However, a public employer need not provide a formal grant of criminal-use immunity before it can discipline and even dismiss a public employee for refusing to answer the employer's job-related questions on grounds of the constitutional privilege against self-incrimination, so long as the employee is not required to waive or surrender his or her constitutional protection against criminal use of the statements

thus obtained, at least where the employee is specifically advised that he or she retains that protection [*Spielbauer v. County of Santa Clara (2009) 45 Cal. 4th 704, 725-730, 88 Cal. Rptr. 3d 590, 199 P.3d 1125*].

The person conducting the hearing has the authority to exclude witnesses from the hearing room on the motion of any party [*2 Cal. Code Reg. § 52.1*].

In conducting the hearing or investigation, any informality in the proceedings or in the manner of taking testimony will not invalidate any order, decision, or rule made, approved, or confirmed by the board [*Gov. Code § 18675(a)*].

Any party is entitled to be represented by counsel or any other person or organization of the party's choice in any hearing or investigation conducted by the board [*2 Cal. Code Reg. § 51.5*].

The board's assignment of a case for hearing to the hearing office does not preclude the board from recalling the proceedings for hearing by the board [*2 Cal. Code Reg. § 52(c)*].

Within 10 days after filing an appeal from a dismissal, an appellant may file with the board and serve on the respondent a written request that the hearing on the appeal be expedited for good cause. The appellant's request must be supported by documentary evidence or sworn declarations. Within seven days after service of the appellant's request, the respondent must file and serve a written response to the request. The appellant's request may be granted if either the respondent concurs in the request or the administrative law judge determines that good cause exists. The administrative law judge may impose any orders for expedited discovery that the administrative law judge deems necessary or appropriate. If the appellant's request is granted, the matter will be set for hearing within 15 days, and the administrative law judge must prepare the proposed decision within five working days of the hearing for submittal to the board at its next meeting [*2 Cal. Code Reg. § 52.4*].

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§ 118.63 Reference to Laws and Decisions

During the investigation or hearing of an employee's complaint of discrimination, harassment, or retaliation, and in arriving at a recommended decision, the hearing officer or investigator must give due consideration to current laws and decisions applicable to the state civil service. The recommended decision of the hearing officer and the board must include references to the laws and decisions applied [*Gov. Code § 18675(b)*].

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§ 118.64 Findings

Whenever any employee, department, or other person is actively interested in a matter before the board, in connection with which the board is holding a hearing, the employee, department, or other person may request that the board make findings. The board must do so if the request is made at any time before the board takes the matter under submission [*Gov. Code § 18682*].

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§ 118.65 Transcript of Hearing

An employee, department, or other person, actively interested in the matter may request the board to prepare a transcript of the hearing [*see Gov. Code § 18683(a)*]. The board may charge a fee for the preparation, production, and dissemination of the transcript, not exceeding actual cost [*Gov. Code § 18683*].

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§ 118.66 Settlement or Adjustment of Dispute

When the parties to the dispute agree on a settlement or adjustment of the matter, the terms of the settlement or adjustment may be submitted to the board. On approval by the board, the disposition of the matter in accordance with those terms is final and binding on the parties [*Gov. Code § 18681*].

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§ 118.67 Orders and Decisions of Board

[1] Binding Effect

All orders and decisions of the State Personnel Board made pursuant to the State Civil Service Act must be obeyed by and are binding on state civil service agencies and their employees, regardless of whether the agency agrees or disagrees with the order or decision. All orders and decisions, other than orders or decisions of the board itself, must be reviewed by the board's executive officer or an employee of the board designated by the executive officer [*Gov. Code § 18710*].

[2] Enforcement

If a state civil service agency refuses or neglects to comply with an order or decision of the board, the board may, after investigation with or without a hearing, do any of the following [*Gov. Code § 18710*]:

- Issue further findings interpreting or clarifying the decision.
- Issue further findings as to whether the agency has or has not complied with the order or decision.
- Issue an order, directed to the agency, to show cause why the board should not seek a writ of mandate to compel the agency to comply with the order or decision.

If the board finds that no good cause exists for the refusal or neglect to comply with the order or decision, it may either issue a further order or decision consistent with its findings, or file a petition for a writ of mandate. This procedure for the enforcement of the board's orders and decisions is in addition to any other means or procedure provided by law, and it does not prevent any party to the board proceeding from seeking judicial enforcement of the board's order or decision [*Gov. Code § 18710*].

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§ 118.68 Writ of Review or Mandate

[1] Available Procedures

Because the State Personnel Board's adjudicatory power is derived directly from the constitution [*Cal. Const., art. VII, § 3*; *Bodenschatz v. State Personnel Board (1971) 15 Cal. App. 3d 775, 778, 93 Cal. Rptr. 471]* , either a writ of review (certiorari) or a writ of mandate may be issued to review the board's decisions after administrative remedies are exhausted [*Boren v. State Personnel Board (1951) 37 Cal. 2d 634, 637-638, 234 P.2d 981* ; *see Morton v. Superior Court (1970) 9 Cal. App. 3d 977, 982, 88 Cal. Rptr. 533* (exhaustion of administrative remedies); *but see Glendale City Employees' Assn., Inc. v. City of Glendale (1975) 15 Cal. 3d 328, 343, 124 Cal. Rptr. 513, 540 P.2d 609* (no requirement to exhaust administrative remedies that would be ineffective)]. A writ of review may be issued when the board exceeded its jurisdiction [*see Code Civ. Proc. §§ 1068(a), 1074*]. A writ of mandate may be issued when (1) the board exceeded its jurisdiction, (2) an employee was denied a fair trial, or (3) there was a prejudicial abuse of discretion [*see Code Civ. Proc. § 1094.5(b)*].

A proceeding in administrative mandate [*see Code Civ. Proc. § 1094.5*] is the preferred remedy since more issues can be raised in a mandate proceeding than in a review (certiorari) proceeding [*see* Comments and References to § 118.142]. Administrative mandate is available to review administrative proceedings involving a statutorily required hearing concerning discipline or discharge of a state civil service employee [*Taylor v. State Personnel Bd. (1980) 101 Cal. App. 3d 498, 505, 161 Cal. Rptr. 677]* . In certain cases administrative mandate is unavailable because the board is not required to hold an evidentiary hearing, such as in cases of suspension of up to five days [*see Gov. Code § 19576*]. In those cases, the employee may seek review by traditional mandate [*see Code Civ. Proc. § 1085*] if the board's action constituted an abuse of discretion [*Coelho v. State Personnel Bd. (1989) 209 Cal. App. 3d 968, 971, 257 Cal. Rptr. 557]* .

An employee's failure to seek available judicial review of adverse administrative findings will result in those findings having issue-preclusive effect in subsequent litigation involving a wrongful-termination claim or a claim under the Fair Employment and Housing Act [*see Risam v. County of Los Angeles (2002) 99 Cal. App. 4th 412, 419-420, 121 Cal. Rptr. 2d 267* ; *Castillo v. City of Los Angeles (2001) 92 Cal. App. 4th 477, 481-486, 111 Cal. Rptr. 2d 870]* .

[2] Standard of Review

In a proceeding for a writ of review, the court exercises its independent judgment to determine whether the board has regularly pursued its authority [*see Code Civ. Proc. § 1074*]. In a proceeding for a writ of mandate, the court determines questions of law, such as the construction of a statute, by exercising its independent judgment and using a weight-of-the-evidence test [*see Code Civ. Proc. § 1094.5(c)*; *Bodinson Mfg. Co. v. California E. Com. (1941) 17 Cal. 2d 321, 325-327, 109 P.2d 935* ; IBEW, Local 889 v. *International Bhd. of Electrical Workers (1996) 42 Cal. App. 4th 861, 868-870, 50 Cal. Rptr. 2d 1]* .

As to other issues, the standard of review by the trial court differ greatly depending on the issues involved. If the administrative decision substantially affects a fundamental vested right, the trial court must exercise its independent judgment on the evidence, determining whether the weight of the evidence supports the administrative findings. If, on the other hand, the administrative decision neither involves nor substantially affects a fundamental vested right, the trial court's review is limited to determining whether the administrative findings are supported by substantial evidence [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 32, 112 Cal. Rptr. 805, 520 P.2d 29* ; *Wences v. City of Los Angeles (2009) 177 Cal. App. 4th 305, 313-316, 99 Cal. Rptr. 3d 199* (independent-judgment standard of judicial review applied when challenged discipline was reprimand of police officer, as opposed to more severe penalty, because presence of reprimand could hinder officer's future career advancement)].

Generally, with respect to culpability (that is, whether the employee in fact committed the misconduct alleged), the trial court has extensive powers to review the administrative record and may exercise its independent judgment on the evidence [*see Deegan v. City of Mountain View (1999) 72 Cal. App. 4th 37, 45, 84 Cal. Rptr. 2d 690* ; *see also Code Civ. Proc. § 1094.5(c)*]. On appeal from the trial court's judgment, the court of appeal will not disturb the trial court's determination of culpability if it is supported by substantial evidence [*Barber v. State Personnel Bd. (1976) 18 Cal. 3d 395, 404, 134 Cal. Rptr. 206, 556 P.2d 306* ; *see Deegan v. City of Mountain View (1999) 72 Cal. App. 4th 37, 45, 84 Cal. Rptr. 2d 690* ; *Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 35, 112 Cal. Rptr. 805, 520 P.2d 29* (substantial evidence review even if fundamental vested right is involved)].

With respect to the penalty imposed by the board, the powers of review of the trial court (and later, of the court of appeal) are limited and are exercised only with great deference to the board's findings. Thus, the court is required to uphold the penalty imposed by the board if there is any reasonable basis for it; the penalty will not be disturbed unless a manifest abuse of discretion is shown. An abuse of discretion exists only if reasonable minds cannot disagree that the penalty is excessive [*Barber v. State Personnel Bd. (1976) 18 Cal. 3d 395, 404, 134 Cal. Rptr. 206, 556 P.2d 306* ; *see Deegan v. City of Mountain View (1999) 72 Cal. App. 4th 37, 46-47, 84 Cal. Rptr. 2d 690* ; *see also Pegues v. Civil Service Comm'n (1998) 67 Cal. App. 4th 95, 106, 78 Cal. Rptr. 2d 705* (there is no requirement that public agency impose identical penalties for similar charges; therefore, the mere fact that agency imposes different punishments in similar cases does not establish reversible abuse of discretion)].

[3] Limitation Periods

No action or proceeding may be brought by any person having or claiming to have a cause of action or complaint or ground for issuance of any complaint or legal remedy for wrongs or grievances based on or related to any civil service law in California, unless the action or proceeding is commenced and service is made within one year after the cause of action or complaint or ground for issuance of any writ or legal remedy first arose. The plaintiff or petitioner may not be compensated for the period after the date the cause or ground arose unless the action or proceeding is filed and service is made within 90 days after the cause or ground arose [*Gov. Code § 19630*].

When an appeal is taken from a decision of the board, the cause of action does not arise until the final decision of the board [*Gov. Code § 19630*]. The time for commencing an action or proceeding does not run while the matter is before the board, pursuant to the petition of the person involved, and final action has yet to be taken by the board [*Gov. Code §*

19631].

Laches may bar review of a personnel decision of a public agency if that review is not sought promptly. For example, if an employee unreasonably delays seeking administrative mandate, and the delay prejudices the employer, the petition for mandate will be barred by laches. Such prejudice might exist if during the delay the employer divided the employee's former duties among several other employees and would incur double payments (back wages to the employee and salaries to the other employees) if the requested relief were granted [*see Johnson v. City of Loma Linda (2000) 24 Cal. 4th 61, 68-69, 99 Cal. Rptr. 2d 316, 5 P.3d 874]* .

[4] Service on Board or Member or Employee of Board

Process directed to any officer or employee of the board, or to the board itself or its members, in any action or proceeding, must be served on the office of the chief counsel of the board [*Gov. Code § 19632*].

[5] Judgment

The judgment in a review (certiorari) proceeding may affirm, annul, or modify the board's action [*see Code Civ. Proc. § 1075*]. The judgment in a mandate proceeding may deny the writ or order the board to set aside its order or decision. When the judgment commands the board to set aside its order or decision, the judgment may order reconsideration of the case in light of the court's opinion and judgment and may order the board to take such further action as is specifically enjoined on the board by law. The judgment may not, however, limit or control the discretion legally vested in the board [*see Code Civ. Proc. § 1094.5(f)*]. In a mandate proceeding, any award of costs or attorney's fees or both to the petitioner must be borne by the real party in interest and may not be assessed against the board, unless there is no real party in interest [*Gov. Code § 19633* (not to be construed as authority for award of attorney's fees)].

A party dissatisfied with the judgment in a review or mandate proceeding may seek a new trial [*Code Civ. Proc. § 1110*; *see Pollak v. State Personnel Bd. (2001) 88 Cal. App. 4th 1394, 1405-1408, 107 Cal. Rptr. 2d 39* (supplemental petition for mandate not sufficient to require court to readjudicate issues because petitioner did not comply with procedures for seeking new trial under *Code Civ. Proc. §§ 655-663.2*)]. For discussion of the procedures for seeking a new trial, see Chapter 371, *Motions After Trial* .

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§ 118.69 Local Civil Service Commission Decisions

A petition for a writ of mandate is the appropriate remedy to challenge a final decision of a city or county civil service commission [*see Code Civ. Proc. § 1094.6*; *Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 42, 112 Cal. Rptr. 805, 520 P.2d 29* ; *see also § 118.143*]. In such a case, a civil suit challenging the civil service decision is not an available remedy, unless the employee or job applicant is making a claim of unlawful discrimination (for example, under Title VII of the Federal Civil Rights Act or the California Fair Employment and Housing Act) [*DeCuir v. Los Angeles County (1998) 64 Cal. App. 4th 75, 80-83, 75 Cal. Rptr. 2d 102* (commission's discretionary denial of hearing is reviewable on petition for writ of mandate); see *42 U.S.C. § 2000e et seq.* (Title VII); *Gov. Code § 12900 et seq.* (Fair Employment and Housing Act)]. Even in an unlawful discrimination case, the employee should seek direct judicial review of an adverse civil service decision by petitioning for a writ of mandate. A failure to exhaust judicial remedies for the adverse civil service decision will result in the civil service decision having an issue-preclusive effect in any subsequent litigation alleging unlawful discrimination [*Castillo v. City of Los Angeles (2001) 92 Cal. App. 4th 477, 481-486, 111 Cal. Rptr. 2d 870]* .

Administrative mandate [*see Code Civ. Proc. § 1094.5*] is available to review administrative proceedings involving a statutorily required evidentiary hearing concerning discipline or discharge of a local public employee [*Chavez v. Civil Service Com. (1978) 86 Cal. App. 3d 324, 331-332, 150 Cal. Rptr. 197]* . Ordinary mandate [*see Code Civ. Proc. § 1085(a)*] is available to correct an abuse of discretion when an evidentiary hearing is not required. The fact that an administrative hearing has not been held does not preclude review by administrative mandate if a hearing is required by law. Likewise, when a hearing is not explicitly required by law but is compelled by due process considerations, administrative mandate is an appropriate remedy [*Civil Service Com. v. Velez (1993) 14 Cal. App. 4th 115, 118, 17 Cal. Rptr. 2d 490* ; *see § 118.13[1]*].

Where it is contended that an administrative agency's order is not supported by substantial evidence, and a fundamental vested right of the petitioner was affected, the trial court independently reviews the agency's factual findings [*Davis v. Civil Service Com. (1997) 55 Cal. App. 4th 677, 686, 64 Cal. Rptr. 2d 121* (termination of permanent employee); *Lake v. Civil Service Commission (1975) 47 Cal. App. 3d 224, 227, 120 Cal. Rptr. 452* (termination of employee entitled to not be terminated without cause)], determining whether the party challenging the administrative determination of

culpability (that is, whether employee in fact committed misconduct alleged) has met the burden of showing that the evidence preponderates in his or her favor [*Deegan v. City of Mountain View (1999) 72 Cal. App. 4th 37, 45, 84 Cal. Rptr. 2d 690* (trial court has extensive powers to review administrative agency's determination of culpability and may exercise its independent judgment on evidence); *Chamberlain v. Ventura County Civil Service Com. (1977) 69 Cal. App. 3d 362, 371, 138 Cal. Rptr. 155* (demotion of county employee)].

Where the question is not substantiality of the evidence to support the factual findings, but whether those findings justify the agency's order imposing punishment, the issue is whether there was an abuse of discretion [*Deegan v. City of Mountain View (1999) 72 Cal. App. 4th 37, 46-47, 84 Cal. Rptr. 2d 690* (with respect to penalty, trial court's powers of review are limited and are exercised only with great deference to agency's findings); *Davis v. Civil Service Com. (1997) 55 Cal. App. 4th 677, 686, 64 Cal. Rptr. 2d 121]* . The mere fact that an agency imposes different punishments in similar cases does not establish an abuse of discretion; there is no requirement that a public agency impose identical penalties for similar charges [*Pegues v. Civil Service Comm'n (1998) 67 Cal. App. 4th 95, 106, 78 Cal. Rptr. 2d 705]* . If the agency is challenging an administrative decision in favor of an employee whom the agency has attempted to discipline, the agency does not have a substantial vested interest in the discipline of the employee. The standard of review is the substantial-evidence test [*Lowe v. Civil Service Com. (1985) 164 Cal. App. 3d 667, 674-676, 210 Cal. Rptr. 673]* .

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§ 118.70 Public Safety Officers Procedural Bill of Rights Act

Public safety officers are afforded certain additional rights and remedies under the Public Safety Officers Procedural *Bill of Rights* Act [*Gov. Code § 3300 et seq.*]. For purposes of the Act, any peace officer specified in particular Penal Code sections [*see Pen. Code §§ 830.1-830.5*]--that is, virtually any peace officer--with two exceptions [*see Pen. Code §§ 830.33(e), 830.35(c)* (railroad policeman; coroner or deputy coroner)], is a public safety officer [*Gov. Code § 3301*]. Probationary and at-will peace officers, including police chiefs who serve at the pleasure of the appointing agency, are public safety officers and therefore are entitled to the protection of the Act [*Gray v. City of Gustine (1990) 224 Cal. App. 3d 621, 627, 273 Cal. Rptr. 730* ; *Browning v. Block (1985) 175 Cal. App. 3d 423, 428, 220 Cal. Rptr. 763]* , as well as public safety officers employed by charter cities [*Baggett v. Gates (1982) 32 Cal. 3d 128, 140, 185 Cal. Rptr. 232, 649 P.2d 874]* . However, probationary peace officers do not enjoy the same level of protection as tenured peace officers under the Act [*Riveros v. City of Los Angeles (1996) 41 Cal. App. 4th 1342, 1357-1360* (probationary police officers not entitled to pre-termination hearing or to be fired only for cause); *but see Winter v. City of Los Angeles (2002) 96 Cal. App. 4th 1058, 1062-1066, 117 Cal. Rptr. 2d 679* (under terms of city charter, officer's placement on inactive duty did not qualify as "absence" that would extend probationary period; hence, inactive officer became tenured at expiration of initial probationary period)]. Police academy recruits generally are not considered public safety officers [*Burden v. Snowden (1992) 2 Cal. 4th 556, 569-570, 7 Cal. Rptr. 2d 531, 828 P.2d 672]* . A fire chief who sometimes works on arson investigations, but whose primary duty is not law enforcement, is not a public safety officer [*Gauthier v. City of Red Bluff (1995) 34 Cal. App. 4th 1441, 1445-1447, 41 Cal. Rptr. 2d 35]* .

It is unlawful for any public safety department to deny or refuse any public safety officer the rights and protections guaranteed to the officer under the Act [*Gov. Code § 3309.5(a)*]. However, any public agency that has adopted, through the governing body or an official designee, any procedure that, at a minimum, provides to peace officers the same rights or protections provided by the Act, is not subject to the Act with regard to such a procedure [*Gov. Code § 3310*].

Protections similar to those of the Public Safety Officers Procedural *Bill of Rights* Act extend to police employees [*Gov. Code § 3508.1*]. For this purpose, the term "police employee" includes the civilian employees of the police department of any city, but it does not include any public safety officer within the meaning of *Gov. Code § 3301* [*Gov. Code § 3508.1(a)*].

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§ 118.71 Punitive Actions to Which Act Applies

A public safety officer may not be subjected to punitive action, denied promotion, or threatened with any such treatment because of the officer's lawful exercise of the rights granted under the Act or the exercise of any rights under an administrative grievance procedure [*Gov. Code § 3304(a)*]. For purposes of the Act, a punitive action is any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment [*Gov. Code § 3303*]. It includes any reduction in salary, even one occasioned by a transfer or reassignment that is not for the purposes of punishment [*Baggett v. Gates (1982) 32 Cal. 3d 128, 141, 185 Cal. Rptr. 232, 649 P.2d 874* ; *White v. County of Sacramento (1982) 31 Cal. 3d 676, 680-684, 183 Cal. Rptr. 520, 646 P.2d 191* ("reassign[ment of] a peace officer to a lower paying position is per se disciplinary, or punitive in nature")], and any loss of skill pay or hazard pay [*McManigal v. City of Seal Beach (1985) 166 Cal. App. 3d 975, 979-980, 212 Cal. Rptr. 733]* . It encompasses rejection from promotional probation that results in a return to a previously held position [*Henneberque v. City of Culver City (1983) 147 Cal. App. 3d 250, 254, 194 Cal. Rptr. 869]* .

A report issued by a county citizens' law enforcement review board may constitute punitive action for these purposes, even if the report results in no immediate disciplinary measures and the board has no power to establish policy or impose any disciplinary measures. For example, in one case a county citizens' law enforcement review board issued a report containing findings of serious misconduct on the part of certain deputy sheriffs, but the report made no recommendation concerning discipline of the deputies. The sheriff's department made its own investigation of the incidents involved, finding that no misconduct had occurred. The citizens' law enforcement review board had been established by the county charter as an advisory body, with no power to establish policy or impose any disciplinary measures. After the civil service commission denied the deputies' request for an administrative appeal of the board report, they petitioned for mandamus. The trial court denied the petition, ruling that the deputies were not entitled to an administrative appeal because they had suffered no injury. The court of appeal reversed, holding that the report of the citizens' law enforcement review board itself constituted punitive action, entitling the deputies to an administrative appeal [*see Gov. Code §§ 3303, 3304(b)*]. Although the deputies had been subjected to no disciplinary measures as a result of the board report or the incidents involved, the testimony of sheriff's department's head of human resources established that the existence of the negative report could have an adverse effect on the deputies' career advancement. *Gov. Code § 3303* defines "punitive action" that triggers a right to an administrative appeal as any action that *may* lead

to dismissal, demotion, or other adverse employment consequences. Therefore, even though the deputies had suffered no immediate punishment from the report, the court of appeal concluded that they were entitled to an administrative appeal because the report could lead to adverse employment consequences in the future [*Caloca v. County of San Diego (1999) 72 Cal. App. 4th 1209, 1220-1223, 85 Cal. Rptr. 2d 660]* .

Similarly, a "summary of conference" memorandum, memorializing a meeting between an officer and a supervisor, may come within the definition of a "punitive action" if it contains adverse comments that could lead to punitive action in the future. For example, such a memorandum qualifies as a punitive action if it contains a warning that "continued failure [to follow a particular departmental policy] could lead to future disciplinary action." On the other hand, if the tenor and contents of the memorandum indicate that its mention of shortcomings in an officer's performance is not a criticism for fault, but rather an educational reminder, the memorandum is not a punitive action [*Otto v. Los Angeles Unified Sch. Dist. (2001) 89 Cal. App. 4th 985, 998-999, 107 Cal. Rptr. 2d 664]* .

The following actions do not constitute punitive action:

(1) A routine performance evaluation containing a comment that the officer needs to raise his or her performance to a satisfactory level, otherwise he or she will be disciplined [*Turturici v. City of Redwood City (1987) 190 Cal. App. 3d 1447, 1449-1451, 236 Cal. Rptr. 53]* .

(2) Temporary assignment to a desk job while an internal affairs investigation of the officer is pending [*Crupi v. City of Los Angeles (1990) 219 Cal. App. 3d 1111, 1119, 268 Cal. Rptr. 875]* .

(3) A transfer to compensate for performance deficiencies [*Orange County Employees Assn. v. County of Orange (1988) 205 Cal. App. 3d 1289, 1294-1295, 253 Cal. Rptr. 584]* .

(4) Denial of a merit step increase [*Howitt v. County of Imperial (1989) 210 Cal. App. 3d 312, 314, 258 Cal. Rptr. 384* ; *but see Sanchez v. City of Santa Ana Police Department (9th Cir. 1990) 915 F.2d 424, 429-430 , cert. denied, 502 U.S. 815* (retraction of previously granted merit increase as punitive action)].

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§ 118.72 Limitation Period and Deadline for Notice of Decision

For alleged misconduct occurring on or after January 1, 1998, there is a one-year limitation period for deciding to take punitive action against an officer (or denying promotion on grounds other than merit) because of an act, omission, or other allegation of misconduct. The period commences with the discovery, by the disciplining public agency through a person authorized to initiate an investigation, of the pertinent allegation [*Gov. Code § 3304(d)(1)*; *see Benefield v. California Department of Corrections Rehabilitation (2009) 171 Cal. App. 4th 469, 476477, 89 Cal. Rptr. 3d 608* (discovery by agency employee who is not authorized to initiate investigation does not constitute "discovery" by agency so as to trigger running of one-year period under *Gov. Code § 3304(d)*); *Haney v. City of Los Angeles (2003) 109 Cal. App. 4th 1, 8-11, 134 Cal. Rptr. 2d 411* (knowledge of officer's acts does not trigger limitations period until discovery of information that those acts constitute misconduct)]. If the agency determines that discipline may be taken, it must complete its investigation and notify the officer of its proposed discipline within the one-year limitation period [*Gov. Code § 3304(d)(1)*; *see Crawford v. City of Los Angeles (2009) 175 Cal. App. 4th 249, 256-258, 95 Cal. Rptr. 3d 550* (officer's false statement during investigation constitutes separate wrongful act that triggers its own one-year period for investigation and notification of proposed discipline); *Alameida v. State Pers. Bd. (2004) 120 Cal. App. 4th 46, 62, 15 Cal. Rptr. 3d 383* (alleged dishonesty of officer in denying original charge, after expiration of limitation period for original charge, does not start new one-year limitation period)]. The notification of proposed discipline must be made in a Letter of Intent or Notice of Adverse Action articulating the proposed discipline [*Gov. Code § 3304(d)(1)*]. The notice need not identify the person who made the decision to take disciplinary action [*Benefield v. California Department of Corrections Rehabilitation (2009) 171 Cal. App. 4th 469, 477, 89 Cal. Rptr. 3d 608*]. The agency is not required to impose the discipline within the one-year period [*Gov. Code § 3304(d)(1)*].

In addition, if the agency decides to impose discipline, the agency must, within 30 days of that decision, formally notify the officer in a writing that specifies the date that the discipline will be imposed, unless the officer is unavailable for discipline [*Gov. Code § 3304(f)*]. The time for any predisciplinary response or grievance procedure is not affected by the limitation period [*Gov. Code § 3304(e)*].

The one-year period is tolled during the time of a criminal investigation or prosecution of the act, omission, or other allegation of misconduct on the part of an officer [*Gov. Code § 3304(d)(2)(A)*]. If the alleged misconduct involves more than one officer, this tolling applies during the investigation and any ensuing prosecution, even as to an officer whose conduct is investigated but who is not prosecuted [*Parra v. City & County of S.F. (2006) 144 Cal. App. 4th 977, 993-994, 50 Cal. Rptr. 3d 822]* . The one-year period is also tolled during the period specified in any written waiver of time by the officer [*Gov. Code § 3304(d)(2)(B)*], and during the pendency of any civil action against the officer that arises out of the matter being investigated [*Gov. Code § 3304(d)(2)(F)*; *see Bettencourt v. City & County of San Francisco (2007) 146 Cal. App. 4th 1090, 1098-1101, 53 Cal. Rptr. 3d 402* (civil action against peace officer has tolling effect even if it does not impede public agency's investigation, so long as investigation and civil action involve same incident); *Breslin v. City & County of San Francisco (2007) 146 Cal. App. 4th 1064, 1081, 55 Cal. Rptr. 3d 14* (civil action has no tolling effect as to officer who is not named as defendant)]. Additionally, if the alleged misconduct involves a matter in criminal litigation in which the complainant is a criminal defendant, the one-year period is tolled during the period of that defendant's criminal investigation and prosecution [*Gov. Code § 3304(d)(2)(G)*]. The one-year period is also tolled during any time that the officer is discharged from service as a public safety officer [*Melkonians v. Los Angeles County Civil Serv. Comm'n (2009) 174 Cal. App. 4th 1159, 1174, 95 Cal. Rptr. 3d 415* (officer who had been discharged for previous violation and then reinstated was not entitled to protections of Public Safety Officers Bill or Rights Act while he was not public safety officer, so one-year period under *Gov. Code § 3304(d)* was tolled during period of his discharge)]..

The one-year period is extended for a reasonable time if the investigation involves more than one employee or is a multijurisdictional investigation requiring coordination of the involved agencies, and additional time is required for that reason [*Gov. Code § 3304(d)(2)(C), (D), (4)*; *see, e.g., Parra v. City & County of S.F. (2006) 144 Cal. App. 4th 977, 995-998, 50 Cal. Rptr. 3d 822* (extension of up to eight months was reasonable in complex case involving investigation of numerous officers, including at one point or another chief of police, chief's assistant, various deputy chiefs, and many other ranking officers); *but see Breslin v. City & County of San Francisco (2007) 146 Cal. App. 4th 1064, 1083-1085, 55 Cal. Rptr. 3d 14* (that two city agencies--police department and office of citizen complaints--were investigating incident did not render investigation "multijurisdictional" under *former Gov. Code § 3304(d)(3)* [*now see Gov. Code § 3304(d)(2)(C)*], since city's police commission had power to control and coordinate both agencies' investigative activities)]. Furthermore, the one-year period is inapplicable altogether if the investigation involves an employee who is incapacitated or otherwise unavailable, or if it involves an allegation of workers' compensation fraud on the part of the officer [*Gov. Code § 3304(d)(2)(E), (H), (8)*].

An investigation may be reopened notwithstanding the one-year limitation period if significant new evidence that is likely to affect the outcome of the investigation is discovered and either (1) the evidence could not reasonably have been discovered in the normal course of investigation without the agency's resorting to extraordinary measures, or (2) the evidence resulted from the officer's predisciplinary response or procedure [*Gov. Code § 3304(g)*].

The statute of limitations defense is forfeited if the officer raises it for the first time by way of petition for administrative writ of mandate, and the issue was not raised at the administrative hearing and was not the subject of a separate proceeding under *Gov. Code § 3309.5* to enjoin the violation of the officer's rights under the Public Safety Officers Procedural *Bill of Rights* Act [*Moore v. City of Los Angeles (2007) 156 Cal. App. 4th 373, 384-385, 67 Cal. Rptr. 3d 218*].

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§ 118.73 Investigations and Interrogations

[1] Rights if Punitive Action May Result

When any public safety officer is under investigation and subjected to interrogation by his or her commanding officer or any other member of the public safety agency, and the result could be punitive action, the interrogation must be conducted under the conditions prescribed in the Public Safety Officers Procedural *Bill of Rights* Act [*Gov. Code § 3303*]. The protections of the Act apply, for example, when an officer is required by his or her employer to appear for interrogation or a fact-finding hearing before a municipal commission charged with investigating citizen complaints [*Berkeley Police Assn. v. City of Berkeley (2008) 167 Cal. App. 4th 385, 406, 410, 84 Cal. Rptr. 3d 130* (commission also must maintain confidentiality of officer's personnel records pursuant to *Penal Code § 832.7*)].

The protections of the Act do not apply, however, to any interrogation of an officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer [*Gov. Code § 3303(i)*; *see Steinert v. City of Covina (2006) 146 Cal. App. 4th 458, 461-466, 53 Cal. Rptr. 3d 1* (routine communication between supervisor and subordinate officer regarding minor mistake did not trigger officer's rights under *Gov. Code § 3303(c)*, since supervisor had no intent to reprimand officer at that time and had no information that officer had committed any misconduct that would warrant punitive action)]. The protections of the Act are also inapplicable to an investigation concerned solely and directly with alleged criminal activities [*Gov. Code § 3303(i)*; *Van Winkle v. County of Ventura (2007) 158 Cal. App. 4th 492, 497-498, 69 Cal. Rptr. 3d 809* (Act's protections do not apply to officer subject to bona fide criminal investigation conducted by employing agency)].

The protections of the Act do not apply if an officer is interviewed by an outside agency in the course of that agency's criminal investigation of another officer [*Alhambra Police Officers Assn. v. City of Alhambra Police Dept. (2003) 113 Cal. App. 4th 1413, 1421-1422, 7 Cal. Rptr. 3d 432]* .

[2] Time of Interrogation

An interrogation must be conducted at a reasonable hour, preferably at a time when the officer is on duty or during the

officer's normal waking hours, unless the seriousness of the investigation requires otherwise. If the interrogation is conducted during the officer's off-duty time, he or she must be compensated for this time in accordance with regular department procedures and may not be released from employment for any work missed [*Gov. Code § 3303(a)*].

The interrogating session must be for a reasonable period, taking into consideration the gravity and complexity of the issue being investigated. The officer being interrogated must be allowed to attend to his or her own personal physical necessities [*Gov. Code § 3303(d)*].

[3] Interrogating Officers

The officer must be informed, before the interrogation, of the rank, name, and command of the officer in charge of the interrogation, each interrogating officer, and any other person who will be present during the interrogation [*Gov. Code § 3303(b)*].

[4] Right to Be Informed About Investigation

The officer must be informed of the nature of the investigation before any interrogation [*Gov. Code § 3303(c)*].

[5] Conduct of Interrogation

The officer may not be subjected to offensive language or threatened with punitive action. However, the officer may be informed that any failure to answer questions directly related to the investigation or interrogation may result in punitive action [*Gov. Code § 3303(e)*]. Administrative discipline of an officer who refuses to cooperate in an investigatory interrogation is not precluded, even though the officer is not compelled to respond to potentially incriminating questions, and even though his or her refusal to speak cannot be used against him or her in a criminal proceeding. However, any administrative disciplinary action must be set aside if the officer is not advised that any statements he or she makes cannot be used against him or her in any subsequent criminal proceedings [*Lybarger v. City of Los Angeles (1985) 40 Cal. 3d 822, 825-828, 221 Cal. Rptr. 529, 710 P.2d 329* ; *see Spielbauer v. County of Santa Clara (2009) 45 Cal. 4th 704, 725-730, 88 Cal. Rptr. 3d 590, 199 P.3d 1125* (public employer need not provide formal grant of criminal-use immunity before it can discipline or dismiss public employee for refusal to answer job-related questions on grounds of constitutional privilege against self-incrimination, so long as employee is not required to waive or surrender his or her constitutional protection against criminal use of statements thus obtained, at least where employee is specifically advised that he or she retains that protection)].

No promise of reward may be made as an inducement to answering any question [*Gov. Code § 3303(e)*]. All questions directed to the officer must be asked by and through no more than two interrogators at a time [*Gov. Code § 3303(b)*].

The agency may not cause the officer to be subjected to visits by the press or news media without the officer's express consent and may not give the press or news media the officer's home address or photograph without his or her express consent [*Gov. Code § 3303(e)*].

No statement made during interrogation by a public safety officer under duress, coercion, or threat of punitive action is admissible in any subsequent civil proceeding [*Gov. Code § 3303(f)*]. However, this limitation is subject to specific qualifications [*Gov. Code § 3303(f)(1)-(4)*]:

> (1) It does not limit the use of statements made by a public safety officer when the employing public safety department is seeking civil sanctions against any public safety officer, including disciplinary action brought under Section 19572.
>
> (2) It does not prevent the admissibility of statements made by the public safety officer under

interrogation in any civil action, including administrative actions, brought by that public safety officer, or that officer's exclusive representative, arising out of a disciplinary action.

(3) It does not prevent statements made by a public safety officer under interrogation from being used to impeach the testimony of that officer after an in camera review to determine whether the statements serve to impeach the testimony of the officer.

(4) It does not otherwise prevent the admissibility of statements made by a public safety officer under interrogation if that officer subsequently is deceased.

[6] *Miranda* Warning and Related Information

If, before or during the interrogation, it is deemed that the officer may be charged with a criminal offense, the officer must be immediately informed of his or her constitutional rights [*Gov. Code § 3303(h)*]. The officer must be informed of his or her *Miranda* rights [*see Miranda v. Arizona (1966) 384 U.S. 436, 467-468*], including the right to remain silent, the right to presence and assistance of counsel, and an admonition that any statements the officer makes may be used against him or her in a court of law. The officer must be informed further that his or her silence could be deemed insubordination leading to administrative discipline [*see § 118.74*] and that any statement made under compulsion of threat or administrative discipline cannot be used against the officer in any subsequent criminal proceeding [*Williams v. City of Los Angeles (1988) 47 Cal. 3d 195, 199-200, 252 Cal. Rptr. 817* ; *Lybarger v. City of Los Angeles (1985) 40 Cal. 3d 822, 829, 221 Cal. Rptr. 529, 710 P.2d 329* ; *but see Gwillim v. City of San Jose (9th Cir. 1991) 929 F.2d 465, 468* (officer's immunized statement to departmental investigators may be made available to district attorney)].

An officer must be informed of these rights whenever [*Lybarger v. City of Los Angeles (1985) 40 Cal. 3d 822, 828-829, 221 Cal. Rptr. 529, 710 P.2d 329]* :

(1) A criminal investigation of the officer's unit is pending,

(2) The number of officers conducting the investigation suggests that the agency has focused on the officer as a likely criminal suspect, and

(3) The officer's attorney characterizes, and the interrogating officers do not correct the attorney's view of, the purpose of the proceeding as investigating criminal charges against the officer.

An officer who has not been adequately advised of his or her constitutional rights cannot be discharged for failing to answer the questions [*Lybarger v. City of Los Angeles (1985) 40 Cal. 3d 822, 829-830, 221 Cal. Rptr. 529, 710 P.2d 329]* . However, although an officer must be advised of his or her right to be informed concerning the effects of answering potentially incriminating questions during the interrogation, an officer who chooses to answer these questions without being informed of his or her rights, and who is discharged on the basis of the information provided, is not entitled to reinstatement or the exclusion of his or her statements at any disciplinary hearing [*Williams v. City of Los Angeles (1988) 47 Cal. 3d 195, 203-204, 252 Cal. Rptr. 817, 763 P.2d 480]* .

[7] Representation

On the filing of a formal written statement of charges, or whenever an interrogation focuses on matters that are likely to result in punitive action, the officer, at his or her request, has the right to be represented by any person of the officer's choice, who may be present at all times during the interrogation. The representative may not be a person who is a subject of the same investigation, however. The representative may not be required to disclose, and may not be subjected to any punitive action for refusing to disclose, any information received from the officer under investigation for noncriminal matters [*Gov. Code § 3303*(*i*)]. This provision protecting the officer's representative does not apply,

however, if the officer is under investigation for a criminal matter [*Alhambra Police Officers Assn. v. City of Alhambra Police Dept. (2003) 113 Cal. App. 4th 1413, 1422 , 7 Cal. Rptr. 3d 432]* . Further, even in an investigation of noncriminal misconduct, the provision protecting the officer's representative does not immunize the representative from being disciplined for disturbing or removing documentary evidence pertaining to the alleged misconduct of the represented officer [*Alhambra Police Officers Assn. v. City of Alhambra Police Dept. (2003) 113 Cal. App. 4th 1413, 1422-1424, 7 Cal. Rptr. 3d 432]* .

This right to have representation does not extend to any investigation of an officer in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer. The right also does not extend to an investigation concerned solely and directly with alleged criminal activities [*Gov. Code § 3303*(*i*)].

An officer who is denied this right to representation and is discharged has a cause of action against the agency for wrongful discharge in violation of public policy [*Shoemaker v. Myers (1992) 2 Cal. App. 4th 1407, 1421, 4 Cal. Rptr. 2d 203]* .

[8] Record of Interrogation

The complete interrogation may be recorded. If a tape recording is made, the officer must be given access to the tape if any further proceedings are contemplated or before any further interrogation at a subsequent time. The officer is entitled to a transcribed copy of any notes made by a stenographer and to copies of any reports or complaints made by investigators or other persons, except those that are deemed to be confidential by the investigating agency [*Gov. Code § 3303(g)*]. The officer's right to disclosure applies even if the discipline imposed is no greater than a written reprimand [*Hinrichs v. County of Orange (2004) 125 Cal. App. 4th 921, 929, 23 Cal. Rptr. 3d 186]* . The material to be disclosed includes documents created prior to the formal interrogation of the officer [*Hinrichs v. County of Orange (2004) 125 Cal. App. 4th 921, 929-930, 23 Cal. Rptr. 3d 186]* . However, the disclosure need not be made until after the officer is interrogated [*Pasadena Police Officers Assn. v. City of Pasadena (1990) 51 Cal. 3d 564, 579, 273 Cal. Rptr. 584, 797 P.2d 608]* . No notes or reports that are deemed to be confidential may be entered in the officer's personnel file [*Gov. Code § 3303(g)*].

The officer has the right to use his or her own recording device to record any and all aspects of the interrogation [*Gov. Code § 3303(g)*].

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§ 118.74 Insubordination

The head of the employing agency may order a public safety officer to cooperate with other agencies involved in criminal investigations. If an officer fails to comply with such an order, the agency may charge the officer with insubordination [*Gov. Code § 3304(a)*].

An officer's refusal to respond to questions asked during a lawful interrogation, after the appropriate admonitions have been given [*see § 118.73[6]*], may be deemed insubordination warranting disciplinary action by the agency [*Lybarger v. City of Los Angeles (1985) 40 Cal. 3d 822, 827, 221 Cal. Rptr. 529, 710 P.2d 329]* .

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§ 118.75 Temporary Reassignments

A public safety officer may not be lent or temporarily reassigned to a location or duty assignment if a sworn member of the officer's agency would not normally be sent to that location or be given that duty assignment under similar circumstances [*Gov. Code § 3303(j)*]. To establish a violation of this proscription, the officer must document a statistically significant number of incidents in which agency members in similar circumstances were not reassigned [*Crupi v. City of Los Angeles (1990) 219 Cal. App. 3d 1111, 1119-1120, 268 Cal. Rptr. 875]* . The transfer of an officer to a different position is not in itself punitive and does not warrant an administrative hearing when the transfer is made to compensate for a deficiency in the officer's performance [*Orange County Employees Assn. v. County of Orange (1988) 205 Cal. App. 3d 1289, 1294, 253 Cal. Rptr. 584]* .

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§ 118.76 Adverse Comments in Personnel File

No comment adverse to a public safety officer's interest may be entered in his or her personnel file, or any other file used for any personnel purposes by the agency, unless the officer first read and signed the instrument containing the adverse comment, to indicate that he or she is aware of the comment. Such an entry may be made if, after reading the instrument, the officer refuses to sign it. The officer's refusal to sign must be noted on the instrument, and the officer must sign or initial that notation [*Gov. Code § 3305*]. In this context, a file "used for personnel purposes" includes an internal affairs file pertaining to an officer, since the internal affairs section of the agency investigates complaints and incidents to determine officers' fitness to continue to serve [*Sacramento Police Officers Assn. v. Venegas (2002) 101 Cal. App. 4th 916, 928-930, 124 Cal. Rptr. 2d 666]* .

Adverse comment includes a citizen's complaint alleging police brutality. The placement of such a complaint in a separate "citizen complaint" file does not excuse noncompliance with the required procedures [*Aguilar v. Johnson (1988) 202 Cal. App. 3d 241, 249-251, 247 Cal. Rptr. 909]* . Similarly, a law enforcement agency's background investigation of a peace officer during probationary employment, even if it involves a matter that occurred prior to the commencement of employment, is a personnel matter subject to the procedures mandated by the *Bill of Rights* Act [*County of Riverside v. Superior Court (2002) 27 Cal. 4th 793, 118 Cal. Rptr. 2d 167, 174, 42 P.3d 1034* (question remains open whether pre-employment background investigation subject to requirements of *Bill of Rights* Act)]. An officer's right to read an adverse comment applies as long as the comment is entered in a file used for a personnel purpose, whether or not it resulted in any personnel action against the officer [*Sacramento Police Officers Assn. v. Venegas (2002) 101 Cal. App. 4th 916, 925-926, 124 Cal. Rptr. 2d 666* (even if it does not directly result in punitive action, adverse comment has potential of creating adverse impression that could influence future personnel decisions concerning officer)].

An officer may file a written response to any adverse comment entered in the officer's personnel file, within 30 days. This written response must be attached to and accompany the adverse comment [*Gov. Code § 3306*]. An officer who has voluntarily resigned, however, has no right to challenge a negative separation report placed in his or her personnel file following the resignation [*Haight v. City of San Diego (1991) 228 Cal. App. 3d 413, 417-418, 278 Cal. Rptr. 334]* .

To help effectuate an officer's right to respond to adverse comments, the employing agency must, at reasonable times and at reasonable intervals, permit the officer to inspect personnel files that are used or have been used to determine that officer's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action [*Gov. Code § 3306.5(a), (b)*; *see* McMahon v. City of Los Angeles (2009) 172 Cl. App. 4th 1324, 1332-1338, *92 Cal. Rptr. 3d 68* (agency not required to disclose materials not used for personnel purposes listed in *Gov. Code § 3306.5(a)*)]. If, after examination of the personnel file, the officer believes that any portion of the material is mistakenly or unlawfully placed in the file, the officer may request in writing that the mistaken or unlawful portion be corrected or deleted; the request must include a statement by the officer describing the requested corrections or deletions and the reasons supporting those corrections or deletions [*Gov. Code § 3306.5(c)* (statement describing requested corrections or deletions and reasons therefor will become part of officer's personnel file)]. Within 30 calendar days of receipt of the officer's request for corrections or deletions, the agency must either grant the request or notify the officer of the decision to refuse to grant the request. If the agency refuses to grant the request, in whole or in part, the employer must state in writing the reasons for refusing the request [*Gov. Code § 3306.5(d)* (statement describing reasons for refusing officer's request will become part of officer's personnel file)].

The adverse-comment procedure need not be followed if there is a different and more protective procedure in place, such as placement in an officer's personnel file of material that is part of the notice for another disciplinary action for which an appeal is available [*Crupi v. City of Los Angeles (1990) 219 Cal. App. 3d 1111, 1120-1121, 268 Cal. Rptr. 875]* . Also, the procedure does not apply to unfavorable comments made in connection with a promotional examination [*Brutsch v. City of Los Angeles (1992) 3 Cal. App. 4th 354, 360, 4 Cal. Rptr. 2d 456]* .

A law enforcement agency cannot routinely require, as a condition of employment, that all applicants prospectively waive the foregoing requirements of the *Bill of Rights* Act. However, the California Supreme Court has approved a waiver in very limited circumstances: an officer who is already employed as a peace officer and is merely applying to transfer from one agency to another may make a waiver if (1) the waiver applies only to material generated by an investigation of matters that arose prior to employment with the new employer, (2) the waiver expires after one year, and (3) the waiver was made with full awareness of its consequences (e.g., that other prospective employers might see the officer's personnel file under *Gov. Code § 1031.1*, even though the subject officer would be barred from seeing it) [*County of Riverside v. Superior Court (2002) 27 Cal. 4th 793, 118 Cal. Rptr. 2d 167, 176-178, 42 P.3d 1034* (leaving open question whether limited waiver may also be made by officer seeking transfer to another department within same agency)].

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§ 118.77 Lie Detector Tests

No public safety officer may be compelled to submit to a lie detector test against his or her will [*Gov. Code § 3307(a)*; *see Civil Service Assn. v. Civil Service Com. (1983) 139 Cal. App. 3d 449, 458, 188 Cal. Rptr. 806* (disapproved on other grounds in Long Beach City Employees Assn. v. City of *Long Beach (1986) 41 Cal. 3d 937, 951 n.18, 227 Cal. Rptr. 90, 719 P.2d 660* ; rational basis exists for protecting only peace officers and not other public employees from agency-administered polygraph tests)]. For this purpose, a "lie detector" is a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device, whether mechanical or electrical, that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual [*Gov. Code § 3307(b)*]. No disciplinary action or other recrimination may be taken against the officer, and no comment may be entered anywhere in the investigator's notes or anywhere else that the officer refused to take a lie detector test. No testimony or evidence to the effect that the officer refused to take a lie detector test is admissible at any subsequent judicial or administrative hearing, trial, or proceeding [*Gov. Code § 3307(a)*].

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§ 118.78 Financial Disclosures

No public safety officer may be required or requested, for purposes of job assignment or other personnel action, to disclose any item of his or her property, income, assets, source of income, debts, or personal or domestic expenditures, unless this information either is obtained or required under state law or proper legal procedure, or tends to indicate a conflict of interest with respect to the performance of the officer's duties, or is necessary for the employing agency to ascertain the desirability of assigning the officer to a specialized unit in which there is a strong possibility that bribes or other improper inducements may be offered [*Gov. Code § 3308*].

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§ 118.79 Searches

No public safety officer's locker, or other space for storage that may be assigned to him or her, may be searched except in his or her presence or with his or her consent, unless a valid search warrant has been obtained or the officer has been notified that a search will be conducted. This prohibition applies only to lockers or storage spaces that are owned or leased by the employing agency [*Gov. Code § 3309*].

When an officer's refusal to consent to a search of his or her person or property is cited as a ground for discipline, the validity of the discipline depends on the validity of the search. For example, an officer may not be disciplined for refusing to allow an unconstitutional search of his or her home [*Los Angeles Police Protective League v. Gates (9th Cir. 1990) 907 F.2d 879, 886]* . An officer may not be disciplined for refusing to submit to drug testing unless there is a factual basis for a reasonable suspicion of drug abuse [*Jackson v. Gates (9th Cir. 1992) 975 F.2d 648, 653 , cert. denied, 125 L. Ed. 2d 690]* .

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§ 118.80 Administrative Appeal

No punitive action or denial of promotion on grounds other than merit may be undertaken in the case of a public safety officer by the employing agency after the officer's successful completion of any probationary period that the agency required, unless the officer has been afforded an opportunity for an administrative appeal [*Gov. Code § 3304(b)*]. For example, a transfer to a lower-paying position is a punitive action, and the officer is entitled to an administrative appeal [*Runyan v. Ellis (1995) 40 Cal. App. 4th 961, 964-967, 47 Cal. Rptr. 2d 356* (meeting with city manager not sufficient to meet administrative appeal requirements of *Gov. Code § 3304*); *Baggett v. Gates (1982) 32 Cal. 3d 128, 141, 185 Cal. Rptr. 232, 649 P.2d 874* ; *McManigal v. City of Seal Beach (1985) 166 Cal. App. 3d 975, 980, 212 Cal. Rptr. 733]* , even if the action was taken for alleged deficiency of performance rather than for punitive reasons [*White v. County of Sacramento (1982) 31 Cal. 3d 676, 682-683, 183 Cal. Rptr. 520, 646 P.2d 191]* . An officer is not entitled to an administrative appeal of the agency's failure to give the officer a merit increase because of an unfavorable evaluation [*Howitt v. County of Imperial (1989) 210 Cal. App. 3d 312, 314-315, 258 Cal. Rptr. 384]* . An officer is not entitled to an administrative appeal when the officer is terminated during a probationary period [*Swift v. County of Placer (1984) 153 Cal. App. 3d 209, 215-216, 200 Cal. Rptr. 181]* .

No chief of police may be removed by a public agency or appointing authority, without providing the chief with written notice and the reasons for removal and an opportunity for administrative appeal. For purposes of this provision, the removal of a chief of police for the purpose of implementing the goals or policies of the public agency or appointing authority, for reasons such as incompatibility of management styles or as a result of a change in administration, is sufficient to constitute "reason or reasons." This provision is not to be construed to create a property interest, if one does not exist by rule or law, in the job of chief of police [*Gov. Code § 3304(c)*].

The employing agency is generally required to set up the procedural requirements for implementing the obligation to provide an administrative appeal [*see* *Hunter v. Los Angeles County Civil Serv. Comm'n (2002) 102 Cal. App. 4th 191, 194, 124 Cal. Rptr. 2d 924* (remedy for absence of procedure is writ compelling agency to create procedure); *Binkley v. City of Long Beach (1993) 16 Cal. App. 4th 1795, 1806, 20 Cal. Rptr. 2d 903* ; *Browning v. Block (1985) 175 Cal. App. 3d 423, 429, 220 Cal. Rptr. 763]* . As long as the procedures are constitutional, they may be enforced [*see* *Binkley v. City of Long Beach (1993) 16 Cal. App. 4th 1795, 1806, 20 Cal. Rptr. 2d 903* ; *Burrell v. City of Los Angeles (1989)*

209 Cal. App. 3d 568, 584-585, 257 Cal. Rptr. 427 , cert. denied, 493 U.S. 1043] . The particular administrative appeal procedures may be tailored to the due-process need in the particular case. For example, an officer need not be afforded the right to confront and cross-examine witnesses during a hearing on the officer's challenge to a memorandum placed in his or her personnel file that has not resulted in any demotion, transfer, pay reduction, or other adverse consequence [*James v. City of Coronado (2003) 106 Cal. App. 4th 905, 910-913, 131 Cal. Rptr. 2d 85* (placement of written memorandum in officer's personnel file for consideration in future performance review is lowest level of discipline employer can impose, triggering minimal due-process requirements)].

On the other hand, if the administrative appeal concerns more serious disciplinary measures, due process requires that an officer be accorded the following: written notice of the grounds for the disciplinary measures, disclosure of the evidence supporting the disciplinary grounds, the right to present witnesses and to confront adverse witnesses, the right to be represented by counsel, a fair and impartial decision-maker, and a written statement from the fact-finder listing the evidence relied upon and the reasons for the determination made. Also, if the administrative appeal hearing is the first evidentiary inquiry into the facts giving rise to the punitive action, the burden of proving the charges must be placed on the employing agency that is making the charges [*Brown v. City of Los Angeles (2002) 102 Cal. App. 4th 155, 174-175, 125 Cal. Rptr. 2d 474]* .

If the employing agency has not performed its duty to establish a forum for administrative appeals [*see Gov. Code §§ 3304(b), 3304.5, 3309.5*], writ relief is available to compel the agency to do so [*see Code Civ. Proc. § 1095*; *Hunter v. Los Angeles County Civil Serv. Comm'n (2002) 102 Cal. App. 4th 191, 194-198, 124 Cal. Rptr. 2d 924* (when no administrative appeal procedure was provided for peace officers employed by county, and county civil service commission lacked jurisdiction to hear appeal, officer's appropriate remedy was to seek writ compelling county to adopt procedures for administrative appeals); *see also § 118.81*].

Whether the administrative appeal is provided through the employing agency or through a separate appeal commission, the records of the appeal are treated as confidential employment records pursuant to the California Public Records Act and Penal Code provisions protecting peace-officer personnel records [*Copley Press, Inc. v. Superior Court (2006) 39 Cal. 4th 1272, 1287* Cal. Rptr. 3d 183; *see Gov. Code § 6254(c),(k)*; *Penal Code §§ 832.7, 832.8*]. For detailed coverage of the confidentiality of personnel records of peace officers and other public employees, see Ch. 470C, *Public Records Act* .

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§ 118.81 Judicial Enforcement of Rights

The superior court has initial jurisdiction of any proceeding brought by any public safety officer against a public agency for alleged violations of the Public Safety Officers Procedural *Bill of Rights* Act [*Gov. Code § 3309.5(c)*]. A peace officer who elects to proceed to binding arbitration under an employees' association memorandum of understanding, rather than to pursue administrative remedies under civil service system procedures, waives the right to seek judicial relief for alleged violations of *Gov. Code § 3309.5* [*Zazueta v. County of San Benito (1995) 38 Cal. App. 4th 106, 112-113, 44 Cal. Rptr. 2d 678]* . Similarly, an officer may not agree to discipline as part of a negotiated settlement and then seek judicial relief from it [*Alhambra Police Officers Assn. v. City of Alhambra Police Dept. (2003) 113 Cal. App. 4th 1413, 1420-1421, 7 Cal. Rptr. 3d 432]* .

In any case in which the superior court finds that an agency has violated any provisions of the Act, the court must render appropriate injunctive or other extraordinary relief to remedy the violation and to prevent future violations of a like or similar nature, including, but not limited to, the granting of a temporary restraining order or a preliminary or permanent injunction prohibiting the agency from taking any punitive action against the officer [Gov. Proc. § 3309.5(d)(1); *see* *Williams v. City of Los Angeles (1988) 47 Cal. 3d 195, 203, 252 Cal. Rptr. 817, 763 P.2d 480]* .

An officer may obtain injunctive or extraordinary relief by filing a petition for a writ of mandate [*Henneberque v. City of Culver City (1985) 172 Cal. App. 3d 837, 843-844, 218 Cal. Rptr. 704* (writ of mandate to award back pay for period during which officer was unlawfully demoted)]. In addition, he or she may seek to file a concurrent action for injunctive relief, under *Gov. Code § 3309.5*, separate from a petition for a writ of mandate, for a judicial determination of whether the public employer violated the officer's rights under the act [*Gales v. Superior Court (1996) 47 Cal. App. 4th 1596, 1602-1603, 55 Cal. Rptr. 2d 460]* . A mandamus action, by contrast, is brought pursuant to *Code Civ. Proc. § 1094.5* and involves inquiry into the validity of the final administrative decision made by the employer [*Gales v. Superior Court (1996) 47 Cal. App. 4th 1596, 1602-1603, 55 Cal. Rptr. 2d 460]* . The petition will also be considered as one seeking a mandatory injunction [*Aguilar v. Johnson (1988) 202 Cal. App. 3d 241, 253-254, 247 Cal. Rptr. 909]* . An officer is not required to exhaust administrative remedies before seeking relief in the superior court from alleged violations of the Act [*Aguilar v. Johnson (1988) 202 Cal. App. 3d 241, 251-252, 247 Cal. Rptr. 909* ; *Mounger v. Gates (1987) 193 Cal. App. 3d 1248, 1257, 239 Cal. Rptr. 18]* .

If the court finds that the public agency or its agents maliciously violated the Act with the intent to injure the officer, the officer may recover actual damages, and a civil penalty of up to $25,000 for each violation, plus reasonable attorney's fees [*Gov. Code § 3309.5(e)*]. If money damages and the civil penalty are the primary relief sought, and not merely incidental to a claim for injunctive or other extraordinary relief, the officer must comply with the claim-filing requirements of the Government Claims Act (also called the Tort Claims Act) [*Lozada v. City & County of San Francisco (2006) 145 Cal. App. 4th 1139, 1153-1173, 52 Cal. Rptr. 3d 209* ; *see Gov. Code §§ 905, 911.2, 945.4* (claim-filing requirements under Government Claims Act); *see also* Ch. 464 *Public Entities and Officers: California Tort Claims Act*].

Even if the public agency or its agents did not act maliciously, an officer may be entitled to receive attorney's fees under the "private attorney general statute" [*Code Civ. Proc. § 1021.5*]. That statute authorizes an award of fees if (1) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons; (2) the necessity and financial burden of private enforcement are such as to make the award appropriate; and (c) the fees should not in the interest of justice be paid out of the recovery, if any [*Code Civ. Proc. § 1021.5*; *see Henneberque v. City of Culver City (1985) 172 Cal. App. 3d 837, 846-847, 218 Cal. Rptr. 704* (fee award under *Code Civ. Proc. § 1021.5* is appropriate when public benefit resulting from officer's prosecution of writ proceeding is out of proportion to his or her personal stake in case)]. The fee-shifting provision of the Public Safety Officers *Bill of Rights* Act [*Gov. Code § 3309.5(e)*] does not supplant the private attorney general statute, and the two are not mutually exclusive. Rather, the two statutes afford different grounds for an award of fees, and either or both may be applicable under the circumstances of a particular case [*Riverside Sheriff's Assn. v. County of Riverside (2007) 152 Cal. App. 4th 414, 420, 61 Cal. Rptr. 3d 295]* .

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[Reserved]

§§ 118.82[Reserved]

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§ 118.90 Firefighters Procedural Bill of Rights Act

The Firefighters Procedural *Bill of Rights* Act prescribes rights of firefighters related to, among other things, interrogation, punitive action, and administrative appeals [*Gov. Code § 3250 et seq.*]. It is unlawful for any employing department or licensing or certifying agency to deny or refuse to any firefighter the rights and protections guaranteed by the Act [*Gov. Code § 3260(a)*].

For purposes of the Act, a "firefighter" is any firefighter employed by a public agency, including any firefighter who is a paramedic or emergency medical technician, irrespective of rank. "Firefighter" does not include any public safety officer subject to the Public Safety Officers Procedural Rights Act [*Gov. Code § 3300 et seq.*; *see §§ 118.70 -118.81*], or any inmate of a state or local correctional agency who performs firefighting or related duties [*Gov. Code § 3251(a)*]. The rights and protections of the Act apply only to a firefighter during events and circumstances involving the performance of his or her official duties [*Gov. Code § 3262*].

A "punitive action" under the Firefighters Procedural *Bill of Rights* Act is any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment [*Gov. Code § 3251(c)*].

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§ 118.91 Investigation and Interrogation of Firefighter

When any firefighter is under investigation and subjected to interrogation by his or her commanding officer, or any other member designated by the employing department or licensing or certifying agency, that could lead to punitive action, the interrogation must be conducted under the following conditions [*Gov. Code § 3253*]:

- The interrogation must be conducted at a reasonable hour, at a time when the firefighter is on duty, unless an imminent threat to the safety of the public requires otherwise. If the interrogation does occur during off-duty time of the firefighter being interrogated, the firefighter must be compensated for any off-duty time in accordance with regular department procedures. The firefighter's compensation may not be reduced as a result of any work missed while being interrogated [*Gov. Code § 3253(a)*].

- The firefighter under investigation must be informed, prior to the interrogation, of the rank, name, and command of the officer or other person in charge of the interrogation, the interrogating officer, and all other persons to be present during the interrogation. All questions directed to the firefighter under interrogation must be asked by and through no more than two interrogators at one time [*Gov. Code § 3253(b)*].

- The firefighter under investigation must be informed of the nature of the investigation prior to any interrogation [*Gov. Code § 3253(c)*].

- The interrogating session must be for a reasonable period, taking into consideration the gravity and complexity of the issue being investigated. The firefighter under interrogation must be allowed reasonable breaks to attend to his or her own personal physical necessities [*Gov. Code § 3253(d)*].

- The firefighter under interrogation must not be subjected to offensive language or threatened with punitive action. A promise of reward may not be made as an inducement to answering any question. The employer must provide to, and obtain from, an employee a formal grant of immunity from criminal prosecution, in writing, before the employee may be compelled to respond to incriminating questions in

an interrogation. Subject to that grant of immunity, a firefighter refusing to respond to questions or submit to interrogations must be informed that the failure to answer questions directly related to the investigation or interrogation may result in punitive action [*Gov. Code § 3253(e)(1)*].

- The employer must not cause the firefighter under interrogation to be subjected to visits by the press or news media without his or her express written consent free of duress, and the firefighter's photograph, home address, telephone number, or other contact information must not be given to the press or news media without his or her express written consent [*Gov. Code § 3253(e)(2)*].

- A statement made during interrogation by a firefighter under duress, coercion, or threat of punitive action is not admissible in any subsequent judicial proceeding, subject to the following qualifications [*Gov. Code § 3253(f)*]:

- This limitation does not apply to the use of statements otherwise made by a firefighter when the employing fire department is seeking civil-service sanctions against any firefighter, including disciplinary action brought under *Gov. Code § 19572*.

- This limitation does not prevent the admissibility of statements otherwise made by the firefighter under interrogation in any civil action, including administrative actions, brought by that firefighter, or that firefighter's exclusive representative, arising out of a disciplinary action.

- The complete interrogation of a firefighter may be recorded. If a recording is made of the interrogation, the firefighter must have access to the recording if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The firefighter is entitled to a transcribed copy of any notes made by a stenographer and to any reports or complaints made by investigators or other persons, except those portions that are otherwise required by law to be kept confidential. Notes or reports that are deemed to be confidential must not be entered in the firefighter's personnel file. The firefighter being interrogated has the right to bring his or her own recording device and record any and all aspects of the interrogation [*Gov. Code § 3253(g)*].

- If, prior to or during the interrogation of a firefighter, it is contemplated that he or she may be charged with a criminal offense, he or she must be immediately informed of his or her constitutional rights [*Gov. Code § 3253(h)*].

- On the filing of a formal written statement of charges, or whenever an interrogation focuses on matters that may result in punitive action against any firefighter, that firefighter, at his or her request, has the right to be represented by a representative of his or her choice, who may be present at all times during the interrogation. The representative must not be a person subject to the same investigation. The representative must not be required to disclose, or be subject to any punitive action for refusing to disclose, any information received from the firefighter under investigation for noncriminal matters. This provision does not apply to counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other firefighter [*Gov. Code § 3253(i)*].

- A firefighter must not be loaned or temporarily reassigned to a location or duty assignment if a firefighter in his or her department would not normally be sent to that location or would not normally be given that duty assignment under similar circumstances [*Gov. Code § 3253(j)*].

A firefighter may not be compelled to submit to a lie detector test against his or her will [*Gov. Code § 3257(a)*]. Disciplinary action or other recrimination may not be taken against a firefighter for refusing to submit to a lie detector test [*Gov. Code § 3257(a)(1)*], and no comment may be entered anywhere in the investigator's notes or anywhere else

that the firefighter refused to take, or did not take, a lie detector test [*Gov. Code § 3257(a)(2)*]. Testimony or evidence to the effect that the firefighter refused to take, or was subjected to, a lie detector test is not admissible at a subsequent hearing, trial, or proceeding, judicial or administrative [*Gov. Code § 3257(a)(3)*]. For these purposes, a "lie detector" means a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device, whether mechanical or electrical, that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual [*Gov. Code § 3257(b)*].

A firefighter may not be required or requested for purposes of job assignment or other personnel action to disclose any item of his or her property, income, assets, source of income, debts, or personal or domestic expenditures, including those of any member of his or her family or household, unless that information is otherwise required to be furnished under state law or obtained pursuant to court order [*Gov. Code § 3258*].

A firefighter may not have his or her locker or other space for storage that may be assigned to him or her searched except in his or her presence, or with his or her consent, or unless a valid search warrant has been obtained or unless he or she has been notified that a search will be conducted. This requirement applies only to lockers or other space for storage that are owned or leased by the employing department or licensing or certifying agency [*Gov. Code § 3259*].

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§ 118.92 Punitive Action

[1] Restrictions on Punitive Action

A firefighter must not be subjected to punitive action, or denied promotion, or be threatened with that treatment, because of the lawful exercise of the rights granted under the Firefighters Procedural *Bill of Rights* Act, or the exercise of any rights under any existing administrative grievance procedure [*Gov. Code § 3254(a)*].

Punitive action or denial of promotion on grounds other than merit must not be undertaken by any employing department or licensing or certifying agency against any firefighter who has successfully completed the probationary period, without providing the firefighter with an opportunity for administrative appeal [*Gov. Code § 3254(b)*].

A fire chief may not be removed by a public agency or appointing authority without providing that person with written notice, the reason or reasons for removal, and an opportunity for administrative appeal. In this context, the purpose of implementing the goals or policies, or both, of the public agency or appointing authority, or reasons including, but not limited to, incompatibility of management styles or as a result of a change in administration, are sufficient reasons. This provision does not create a property interest, if one does not otherwise exist by rule or law, in the job of fire chief [*Gov. Code § 3254(c)*].

[2] Limitation Period for Imposing Punitive Action

Punitive action or denial of promotion on grounds other than merit may not be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of discovery by the employing fire department or licensing or certifying agency [*Gov. Code § 3254(d)* (one-year limitation period applies only if discovery of act, omission, or other misconduct occurred on or after January 1, 2008)]. If the employing department or licensing or certifying agency determines that discipline may be taken, it must complete its investigation and notify the firefighter of its proposed disciplinary action within that year, except in any of the following circumstances [*Gov. Code § 3254(d)*]:

- If the firefighter voluntarily waives the one-year time period in writing, the time period will be tolled

for the period of time specified in the written waiver.

- If the act, omission, or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation or criminal prosecution is pending will toll the one-year time period.

- If the investigation is a multijurisdictional investigation that requires a reasonable extension for coordination of the involved agencies.

- If the investigation involves an employee who is incapacitated or otherwise unavailable.

- If the investigation involves a matter in civil litigation in which the firefighter is named as a party defendant, the one-year time period will be tolled while that civil action is pending.

- If the investigation involves a matter in criminal litigation in which the complainant is a criminal defendant, the one-year time period will be tolled during the period of that defendant's criminal investigation and prosecution.

- If the investigation involves an allegation of workers' compensation fraud on the part of the firefighter.

If a predisciplinary response or grievance procedure is required or utilized, the time for that response or procedure is not governed by the one-year limitation described above [*Gov. Code § 3254(e)*].

If, after investigation and any predisciplinary response or procedure, the employing department or licensing or certifying agency decides to impose discipline, that agency must notify the firefighter in writing of its decision to impose discipline within 30 days of its decision, but not less than 48 hours prior to imposing the discipline [*Gov. Code § 3254(f)*].

Notwithstanding this one-year time period, an investigation may be reopened against a firefighter if both of the following circumstances exist [*Gov. Code § 3254(g)*]:

- Significant new evidence has been discovered that is likely to affect the outcome of the investigation.

- Either (1) the evidence could not reasonably have been discovered in the normal course of investigation without resorting to extraordinary measures by the agency, or (2) the evidence resulted from the firefighter's predisciplinary response or procedure.

[3] Administrative Appeal

An administrative appeal instituted by a firefighter under the Firefighters Procedural *Bill of Rights* Act must shall be conducted in conformance with rules and procedures adopted by the employing department or licensing or certifying agency that are in accordance with *Gov. Code § 11500 et seq.* [*Gov. Code § 3254.5*].

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§ 118.93 Personnel Records

No comment adverse to a firefighter's interest may be entered in his or her personnel file, or any other file used for any personnel purposes by his or her employer, without the firefighter having first read and signed the instrument containing the adverse comment, indicating he or she is aware of the comment [*Gov. Code § 3255*]. However, the entry may be made if after reading the instrument the firefighter refuses to sign it. That fact must be noted on that document, and signed or initialed by the firefighter [*Gov. Code § 3255*].

A firefighter has 30 days within which to file a written response to any adverse comment entered in his or her personnel file. The written response must be attached to, and must accompany, the adverse comment [*Gov. Code § 3256*].

Every employer must, at reasonable times and at reasonable intervals, on the request of a firefighter, permit that firefighter to inspect personnel files that are used or have been used to determine that firefighter's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action. The inspection must be permitted during usual business hours and with no loss of compensation to the firefighter, [*Gov. Code § 3256.5(a)*]. The employer must keep each firefighter's personnel file, or a true and correct copy of it, and must make the file or copy available within a reasonable period of time after a request by the firefighter [*Gov. Code § 3256.5(b)*].

If, after examination of his or her personnel file, the firefighter believes that any portion of the material is mistakenly or unlawfully placed in the file, the firefighter may request, in writing, that the mistaken or unlawful portion be corrected or deleted. The request must include a statement by the firefighter describing the corrections or deletions from the personnel file requested and the reasons supporting those corrections or deletions. The statement will become part of the personnel file of the firefighter [*Gov. Code § 3256.5(c)*]. Within 30 calendar days of receipt of the firefighter's request to correct or delete a portion of the file, the employer must either grant the firefighter's request or notify the firefighter of the decision not to grant the request. If the employer refuses to grant the request, in whole or in part, the employer must state in writing the reasons for denying the request, and that written statement will become part of the personnel file of the firefighter [*Gov. Code § 3256.5(c)*].

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§ 118.94 Judicial Enforcement of Firefighter's Rights

The superior court has initial jurisdiction over any proceeding brought by any firefighter against any employing department or licensing or certifying agency for alleged violations of the Public Safety Officers Procedural Rights Act [*Gov. Code § 3260(b)*]. If the court finds that the employing department or licensing or certifying agency has violated any of the provisions of the Act, the court must render appropriate injunctive or other extraordinary relief to remedy the violation and to prevent future violations of a like or similar nature. Such relief may include the granting of a temporary restraining order or preliminary or permanent injunction prohibiting the employing department or licensing or certifying agency from taking any punitive action against the firefighter [*Gov. Code § 3260(c)(1)*].

If the court finds that a bad faith or frivolous action or a filing for an improper purpose has been brought pursuant to the Act, the court may order sanctions against the party filing the action, the party's attorney, or both [*Gov. Code § 3260(c)(1)*; see *Code Civ. Proc. §§ 128.6, 128.7*]. Those sanctions may include reasonable expenses, including attorney's fees, incurred by a fire department as the court deems appropriate [*Gov. Code § 3260(c)(2)*].

In addition, on a finding by a superior court that a fire department, its employees, agents, or assigns, with respect to acts taken within the scope of employment, maliciously violated any provision of the Act with the intent to injure the firefighter, the fire department will, for each and every violation, be liable for a civil penalty of up to $25,000, to be awarded to the firefighter whose right or protection was denied, and for reasonable attorney's fees as may be determined by the court. If the court so finds, and there is sufficient evidence to establish actual damages suffered by the firefighter whose right or protection was denied, the fire department will also be liable for the amount of the actual damages [*Gov. Code § 3260(d)*]. Notwithstanding these provisions, a fire department may not be required to indemnify a contractor for the contractor's liability pursuant to this subdivision if there is, within the contract between the fire department and the contractor, a "hold harmless" or similar provision that protects the fire department from liability for the actions of the contractor [*Gov. Code § 3260(d)*].

An individual may not be held liable for any act for which a fire department is liable under the Public Safety Officers Procedural Rights Act [*Gov. Code § 3260(d)*].

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[Reserved]

§§ 118.95[Reserved]

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§ 118.100 California Points and Authorities

For memoranda of points and authorities relating to issues affecting civil service, see California Points and Authorities, Ch. 36, *Civil Service* (Matthew Bender)

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§ 118.101 Forms of Discovery

For forms of interrogatories for use in actions by civil service employees concerning their rights under civil service laws, see Bender's Forms Of Discovery, *Civil Service* (Matthew Bender)

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§ 118.102 State Constitution

State civil service system authorized. Cal. Const., art. VII

County civil service system authorized. *Cal. Const., art. XI, §§ 1, 3, 4*

City civil service system authorized. *Cal. Const., art. XI, §§ 2, 3, 5*

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§ 118.103 State Statutes

[1] Local Civil Service Systems

County Civil Service Enabling Law. *Gov. Code § 31100 et seq.*

City Civil Service Enabling Law. *Gov. Code § 45000 et seq.*

Local civil service systems required to implement veterans' preference system. *Gov. Code § 50088*

Disclosure of improper local agency activities. *Gov. Code §§ 53296-53299*

[2] State Civil Service System

Civil Service Act. *Gov. Code § 18500 et seq.*

Definitions. *Gov. Code § 18520 et seq.*

Inspection of records of State Personnel Board. *Gov. Code § 18573*

Service of notices, papers, and documents. *Gov. Code § 18575*

State Personnel Board. *Gov. Code § 18650 et seq.*

Investigations and hearings. *Gov. Code § 18670 et seq.*

Employment forms. *Gov. Code § 18720 et seq.*

Classification of civil service positions. *Gov. Code § 18800 et seq.*

Employment lists. *Gov. Code § 18900 et seq.*

Examinations. *Gov. Code § 18930 et seq.*

Promotions. *Gov. Code § 18950 et seq.*

Veterans' preference. *Gov. Code §§ 18971-18979*

Legislative employees' eligibility to apply for promotional civil service examinations. *Gov. Code § 18990*

Executive branch employees' eligibility to apply for promotional civil service examinations. *Gov. Code § 18992*

Transfers. *Gov. Code §§ 19050.2-19050.9*

Temporary appointments. *Gov. Code §§ 19058, 19059*

Public assistance recipients' entitlement to priority consideration for seasonal class positions. *Gov. Code §§ 19063-19063.8*

Reinstatement. *Gov. Code § 19140 et seq.*

Probationary status. *Gov. Code § 19170 et seq.*

Disciplinary proceedings. *Gov. Code § 19570 et seq.*

Letters of reprimand. *Gov. Code § 19589*

Tenure of managerial employees. *Gov. Code § 19590 et seq.*

Actions. *Gov. Code § 19630 et seq.*

Discrimination. *Gov. Code § 19700 et seq.*

Department of Personnel Administration. *Gov. Code § 19815 et seq.*

Layoffs and demotions. *Gov. Code §§ 19997-19997.14*

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§ 118.104 Administrative Regulations

Definitions. *2 Cal. Code Reg. § 1 et seq.*

State Personnel Board administration. *2 Cal. Code Reg. § 31 et seq.*

Hearings. *2 Cal. Code Reg. § 51 et seq.*

Employment lists. *2 Cal. Code Reg. § 151 et seq.*

Examinations. *2 Cal. Code Reg. § 171 et seq.*

Drug testing. *2 Cal. Code Reg. § 213 et seq.*

Promotions. *2 Cal. Code Reg. § 231 et seq.*

Appointments. *2 Cal. Code Reg. § 251 et seq.*

Limited-term appointments. *2 Cal. Code Reg. §§ 281, 282*

Probationary period. *2 Cal. Code Reg. § 321 et seq.*

Transfers. *2 Cal. Code Reg. § 425 et seq.*

Temporary assignments. *2 Cal. Code Reg. § 438 et seq.*

Layoffs and demotions. *2 Cal. Code Reg. §§ 450 et seq., 599.840 et seq.*

Discrimination. *2 Cal. Code Reg. § 547 et seq.*

Limited examination and appointment program. *2 Cal. Code Reg. § 547.50 et seq.*

Career executive assignment rules. *2 Cal. Code Reg. §§ 548 et seq., 599.978 et seq.*

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§ 118.105 Decisions

[1] Administrative Procedure

[a] City Employment

City council of general law city as empowered by statute to terminate appointed officials or employees, or to delegate that power to civil service commission. *Cerini v. City of Cloverdale (1987) 191 Cal. App. 3d 1471, 1477-1478, 237 Cal. Rptr. 116*

Provisions of San Francisco charter as superseding civil service commission rule restricting period during which civil service candidates may protest examination ratings. *Stuart v. Civil Service Com. (1985) 174 Cal. App. 3d 201, 206, 219 Cal. Rptr. 770*

City as empowered to dismiss employees only in conformity with procedures it adopted, and dismissed police chief as entitled to arbitration hearing when arbitration was part of adopted grievance procedure. *Santos v. City of Brawley (1984) 162 Cal. App. 3d 203, 207, 208 Cal. Rptr. 297*

Failure to exhaust administrative remedies as not precluding discharged city employee's petition for writ of mandate to compel civil service hearing, when administrative remedies are unavailable or inadequate. *Farmer v. City of Inglewood (1982) 134 Cal. App. 3d 130, 137, 185 Cal. Rptr. 9*

Administrative mandate as available to review commission's decision regarding probationary employee when commission's rules require informal hearing and that requirement is reasonable interpretation of city charter. *Jean v. Civil Service Commission (1977) 71 Cal. App. 3d 101, 105-110, 139 Cal. Rptr. 303*

Right to appeal dismissal from employment as conferred solely by San Francisco charter, and designated procedure as required to be followed. *Smith v. City & County of San Francisco (1970) 11 Cal. App. 3d 606, 610, 89 Cal. Rptr. 878*

Civil service employee as having right to review by courts when commission acted arbitrarily, even though city charter provided that finding of civil service commission is final and conclusive. *Austin v. Board of Civil Service Comrs. (1942) 50 Cal. App. 2d 436, 438, 123 P.2d 119*

[b] County Employment

In appeal by employee of sheriff's department from transfer and suspension without pay, county counsel's office as not precluded from representing both the department and the appeals board, where county counsel can demonstrate adequate screening of lawyers advising board from lawyers advising department. *Howitt v. Superior Court (1992) 3 Cal. App. 4th 1575, 1579-1587, 5 Cal. Rptr. 2d 196* (county counsel as required to screen lawyers who advise board from lawyers performing advocacy functions of office)

[c] Due Process Rights

Requirement of postseverance evidentiary hearing as not applicable if employee is discharged under statute that treats employee's unexcused absence from work for specified number of consecutive days as automatic resignation. *Coleman v. Department of Personnel Administration (1991) 52 Cal. 3d 1102, 1119, 278 Cal. Rptr. 346, 805 P.2d 300*

Due process requires that at-will public employee have hearing before being discharged based on charges of dishonesty, because those charges would affect employee's liberty interests by damaging employee's reputation and limiting his or her ability to obtain future employment; however, there is no requirement that such hearing include live witnesses or opportunity to cross-examine adverse witnesses. *Holmes v. Hallinan (1998) 68 Cal. App. 4th 1523, 1530-1533, 81 Cal. Rptr. 2d 174*

Due process principle that one who decides must hear as requiring that, once local civil service commission holds hearing at employee's request and recommends action, city manager cannot take contrary action based on evidence that was not introduced at hearing or without reviewing record to sufficient extent to enable him or her to make informed judgment. *Vollstedt v. City of Stockton (1990) 220 Cal. App. 3d 265, 269, 276, 269 Cal. Rptr. 404*

Public employee subject to short-term suspension as required to be afforded right to respond either during suspension or within reasonable time thereafter; administrative appeal to county civil service commission after suspension by sheriff as sufficient; indefinite suspension as short-term when employee had power to end it by showing he had recovered from post-traumatic-stress disorder. *Sienkiewicz v. County of Santa Cruz (1987) 195 Cal. App. 3d 134, 139-141, 240 Cal. Rptr. 451*

Dismissal as unlawful when employee was not given minimal predismissal due process, because employer failed to allow reasonable time for employee to respond orally to charges in notice of intention to dismiss and did not consider employee's written response to charges. *Kempland v. Regents of University of California (1984) 155 Cal. App. 3d 644, 648-650, 202 Cal. Rptr. 275*

Employee's termination for medical reasons as complying with preremoval due process requirements when, before

termination, employee had discussions with supervisors and received several written warnings regarding absences and was advised of opportunity to respond. *Broussard v. Regents of University of California (1982) 131 Cal. App. 3d 636, 640, 184 Cal. Rptr. 460*

Agency's failure to require witnesses to be sworn at grievance hearing as not denying employee right to fair hearing, when evidence was undisputed, and witnesses had no motive to testify untruthfully. *Broussard v. Regents of University of California (1982) 131 Cal. App. 3d 636, 640-642, 184 Cal. Rptr. 460*

Constitutional requirements and preremoval safeguards as met by report of performance evaluation and plan of improvement, which rated job performance, specified improvement that was required, warned of possible discharge in event of failure to improve, and provided for conferences to discuss report and progress. *Bussey v. Los Angeles County Civil Service Com. (1977) 72 Cal. App. 3d 912, 920-922, 140 Cal. Rptr. 394*

County civil service commission's consideration of employee's promotional examination score appeal, by reviewing written materials submitted rather than holding hearing, as not unconstitutional denial of due process. *Fuchs v. Los Angeles County Civil Service Com. (1973) 34 Cal. App. 3d 709, 715, 110 Cal. Rptr. 311*

[d] Evidence

Employee as denied fair hearing concerning discharge from civil service when board's determination was based on investigation report in board's files but not introduced into evidence at hearing. *La Prade v. Department of Water & Power (1945) 27 Cal. 2d 47, 51-53, 162 P.2d 13*

Penal Code § 1016, which prevents use of nolo contendere plea to misdemeanor charge to be used in any civil suit, extends to administrative actions and thus cannot be used against civil service employee in subsequent disciplinary hearing. *County of Los Angeles v. Civil Service Commission (1995) 39 Cal. App. 4th 620, 632, 46 Cal. Rptr. 2d 256*

Evidence obtained by government employer in search of employee's private briefcase as not required to be excluded from disciplinary hearing, because search was not predicated on employee misconduct but arose from need to prepare office for move, and application of exclusionary rule would not deter such searches in future. *Finkelstein v. State Personnel Bd. (1990) 218 Cal. App. 3d 264, 268-272, 267 Cal. Rptr. 133*

Letter of reprimand to employee as properly introduced in evidence at hearing to show that employee was forewarned that certain types of behavior were inappropriate and would not be tolerated; statutory requirement that letter of reprimand be removed from employee's personnel file and destroyed within three years after written as not precluding evidence of reprimand at hearing. *Anderson v. State Personnel Bd. (1987) 194 Cal. App. 3d 761, 770-771, 239 Cal. Rptr. 824*

Evidence of misdemeanor conviction as admissible at disciplinary hearing if relevant on issue of credibility or as tending to prove or disprove material fact in issue. *Coburn v. State Personnel Bd. (1978) 83 Cal. App. 3d 801, 809, 148 Cal. Rptr. 134*

[e] Hearing Officer

Mere fact that at-will employee's pretermination hearing was before representative of employer is insufficient to establish existence of bias that would constitute denial of due process. *Holmes v. Hallinan (1998) 68 Cal. App. 4th 1523, 1533, 81 Cal. Rptr. 2d 174*

In absence of evidence of bias, due process held not violated simply because employer selected and paid hearing officer who presided over dismissal hearing of police officer who had been suspended for lying to superior. *Linney v. Turpen (1996) 42 Cal. App. 4th 763, 775-776, 49 Cal. Rptr. 2d 813*

Hearing by executive director of agency on appeal from dismissal, required by agency's personnel policy, as nondelegable exercise of authority, and later ratification of assistant director's action by executive director as impermissible and void. *Civil Service Assn. v. Redevelopment Agency (1985) 166 Cal. App. 3d 1222, 1226-1227, 213 Cal. Rptr. 1*

[2] Arbitration of Wage Dispute

Police officer was not entitled to arbitrate department's decision to transfer officer to different assignment with reduced pay scale because city ordinance and memorandum of understanding between city and police union provided that transfers were not subject to arbitration. *Los Angeles Police Protective League v. City of Los Angeles (2001) 94 Cal. App. 4th 77, 80-85, 113 Cal. Rptr. 2d 909*

Union employees of municipal public works department may compel arbitration of employee grievances claiming entitlement to "premium pay" under Administrative Code for employees working in high-noise areas, where agreement between city and union provided for arbitration of disputes over departmental rules, personnel policies, and working conditions, with doubts to be resolved in favor of arbitration. SEIU, Local 347 v. *City of Los Angeles (1996) 42 Cal. App. 4th 1546, 1551-1553, 50 Cal. Rptr. 2d 216*

Private settlement of pending dispute providing for withdrawal of adverse action without State Personnel Board's approval is permissible under *Gov. Code §§ 18681*, 19549. *Larson v. State Personnel Board (1994) 28 Cal. App. 4th 265, 280-281, 33 Cal. Rptr. 2d 412*

[3] Damages

Damages for violation of civil service employee's right to notice and opportunity to respond before dismissal as not punitive but as compensatory, for wages lost during period when discharge was invalid, and evidence on issue of mitigation of damages as admissible. *Coleman v. Regents of University of California (1979) 93 Cal. App. 3d 521, 526-527, 155 Cal. Rptr. 589*

[4] Disabilities

Conduct of alcoholic employee who knowingly drove state car while driver's license had been suspended (for lapses of consciousness) and who abandoned state vehicle with keys in ignition was so egregious as to render employee not "otherwise qualified" within meaning of *Gov. Code § 19230(c)* and hence not entitled to receive "reasonable accommodation" for disability. *Gonzalez v. State Personnel Board (1995) 33 Cal. App. 4th 422, 434-435, 39 Cal. Rptr. 2d 282*

[5] Discrimination

"Class-of-one" equal-protection theory--under which employee alleges that he or she was arbitrarily treated differently from other similarly situated employees, with no assertion that differential treatment was based on employee's membership in any protected class--is inapplicable in public-employment context. *Engquist v. Oregon Dep't of Agric. (2008) 553 U.S. 591, 128 S. Ct. 2146, 170 L. Ed. 2d 975, 981, 983-990*

Public employee who is not member of protected class has standing under *42 U.S.C. §§ 1983, 1985* to sue for retaliation for asserting rights of members of protected class. *Maynard v. City of San Jose (9th Cir. 1994) 37 F.3d 1396, 1403*

Fair Employment and Housing Act as applicable to civil service employees and as intended to supplement, not supplant, existing antidiscrimination remedies to provide employees with maximum opportunity to vindicate their civil rights against discrimination. *State Personnel Bd. v. Fair Employment & Housing Com. (1985) 39 Cal. 3d 422, 429-431, 217 Cal. Rptr. 16, 703 P.2d 354* (relying on definition of "employer" in *Gov. Code § 12926*, and record keeping exception for State Personnel Board in *Gov. Code § 12946*); *MacPhail v. Court of Appeal (1985) 39 Cal. 3d 454, 457, 217 Cal. Rptr. 36, 703 P.2d 374*

Antidiscrimination provision of False Claims Act, *Gov. Code § 12653(b)*, applies to prevent governmental agencies from discharging or otherwise discriminating against their employees who engage in lawful activity to assist in enforcement of *False Claims Act. LeVine v. Weis (1998) 68 Cal. App. 4th 758, 763-766, 80 Cal. Rptr. 2d 439*

[6] Eligibility Lists

Legislature may not adopt program, or approve collectively bargained program, that violates merit principle by requiring application of absolute seniority-based preference when employing agency chooses among persons certified as eligible. *California State Personnel Bd. v. California State Employees Assn., Local 1000, SEIU, AFL-CIO (2005) 36 Cal. 4th 758, 768-776, 31 Cal. Rptr. 3d 201, 115 P.3d 506*

Former statutory provisions authorizing State Personnel Board to implement affirmative action programs [*see* former *Gov. Code § 19790 et seq.*, repealed by 2005 Stats., ch. 644] were generally unconstitutional as violative of equal protection principles and Proposition 209. *Connerly v. State Pers. Bd. (2001) 92 Cal. App. 4th 16, 53-57, 112 Cal. Rptr. 2d 5*

State Personnel Board's supplemental certification policy (which would add to list of eligible applicants members of underutilized class, such as minorities and women who would not otherwise merit placement on list) violates constitutional and statutory requirements that appointment and promotion be based on merit. *Kidd v. State of California (1998) 62 Cal. App. 4th 386, 400-411, 72 Cal. Rptr. 2d 758*

Los Angeles commission's rule as following classic "rule of three," which permits appointing authority to choose any one of top three candidates from certified eligibility list to fill civil service vacancy. *Sharp v. Civil Service Com. (1993) 14 Cal. App. 4th 1507, 1511, 18 Cal. Rptr. 2d 407*

When individuals on eligibility list are found by their superiors to be of equal ability, appointing authority as having clear right to choose from among them without respect to their ranking. *Sharp v. Civil Service Com. (1993) 14 Cal.*

App. 4th 1507, 1511, 18 Cal. Rptr. 2d 407

In filling civil service vacancy from eligible list, appointing authority as not required to justify or explain choice to candidates not chosen. *Sharp v. Civil Service Com. (1993) 14 Cal. App. 4th 1507, 1510-1512, 18 Cal. Rptr. 2d 407*

County civil service commission as having implied power to invalidate promotional eligibility list that was based on examination tainted by unidentifiable cheating by examinees. *Cox v. Kern County Civil Service Com. (1984) 156 Cal. App. 3d 867, 871-876, 203 Cal. Rptr. 94*

All persons on current eligibility lists as being preferred for appointments. *Fair Employment Practice Com. v. State Personnel Bd. (1981) 117 Cal. App. 3d 322, 332, 172 Cal. Rptr. 739*

[7] Examinations

Oral interview as satisfying charter requirement for open, competitive civil service examinations. *Almassy v. L.A. County Civil Service Com. (1949) 34 Cal. 2d 387, 398, 210 P.2d 503*

State Personnel Board as within statutory discretion to limit promotional examinations to employees within the department. *Paule v. State Personnel Board (1974) 38 Cal. App. 3d 32, 36, 113 Cal. Rptr. 38*

[8] Exhaustion of Administrative Remedies

Provision of *Gov. Code § 8547.12(c)* authorizing California State University employee to file suit on whistleblower retaliation claim if university has not "satisfactorily addressed" employee's administrative complaint within 18 months refers to satisfaction of complaining employee; employee need not seek to overturn adverse administrative decision through petition for writ of administrative mandate before filing civil action. *Runyon v. Board of Trs. of Cal. State Univ. (2010) 48 Cal. 4th 760, 767-775, 108 Cal. Rptr. 3d 557, 229 P.3d 985*

Once State Personnel Board has issued findings on state employee's claim under California Whistleblower Protection Act [*see Gov. Code § 8547.8(c)*] (or deadline for issuing findings has passed), employee may proceed with damages action whether board's findings are favorable or unfavorable, and employee need not pursue additional administrative remedies or challenge findings by way of petition for writ of administrative mandate. *State Bd. of Chiropractic Examiners v. Superior Court (2009)45 Cal. 4th 963, 971-978, 89 Cal. Rptr. 3d 576, 201 P.3d 457*

Public employer is equitably estopped from asserting defense of failure to exhaust administrative remedies if employer's actions negligently led terminated employee to believe that no administrative recourse was available. *Shuer v. County of San Diego (2004) 117 Cal. App. 4th 476, 486-487, 11 Cal. Rptr. 3d 776*

Employee's failure to exhaust judicial remedies for adverse civil service decision by seeking writ of mandate will result in civil service decision having issue-preclusive effect in any subsequent litigation alleging unlawful discrimination. *Castillo v. City of Los Angeles (2001) 92 Cal. App. 4th 477, 481-486, 111 Cal. Rptr. 2d 870*

County employee as having exhausted administrative remedies when she filed appeal of her termination with county civil service commission, and commission determined that appeal was not timely. *Civil Service Com. v. Velez (1993)*

14 Cal. App. 4th 115, 118-119, 17 Cal. Rptr. 2d 490

Aggrieved civil service employee having claim for breach of implied covenant of good faith and fair dealing under civil service administrative procedures as required to pursue it administratively before resorting to courts. *Watson v. Department of Rehabilitation (1989) 212 Cal. App. 3d 1271, 1287-1288, 261 Cal. Rptr. 204*

State civil service system as requiring good faith and fair dealing in resolution of conflicts in employment relationship and as providing remedies to aggrieved employee for redress of wrongs; aggrieved civil service employee as required to use all agency administrative procedures, including available appellate review, before resorting to courts. *Valenzuela v. State of California (1987) 194 Cal. App. 3d 916, 919-920, 240 Cal. Rptr. 45* .

Administrative remedies as required to be exhausted before resorting to the judicial process. *Morton v. Superior Court (1970) 9 Cal. App. 3d 977, 982, 88 Cal. Rptr. 533*

[9] Grounds for Discipline

[a] Absence Without Leave

Employee, discharged under statutory rule that absence without leave for five consecutive working days is deemed automatic resignation, as entitled to pretermination notice and opportunity to respond but, unlike employee discharged for cause, not entitled to posttermination evidentiary hearing. *Coleman v. Department of Personnel Administration (1991) 52 Cal. 3d 1102, 1108-1109, 278 Cal. Rptr. 346, 805 P.2d 300*

City employee as terminated under civil service commission rule providing for abandonment or constructive resignation of position; sole issue in hearing as whether employee's unauthorized absence was excusable or justified; burden of proof as on employee, who knows reason for absence. *Baker v. Wadsworth (1970) 6 Cal. App. 3d 253, 263, 85 Cal. Rptr. 880*

Absence without leave as sufficient cause for discharge by appointing officer when public employees having no right to strike went on "strike," and county charter and rules of civil service commission authorized discharge for absence without leave. *Almond v. County of Sacramento (1969) 276 Cal. App. 2d 32, 35-36, 80 Cal. Rptr. 518*

[b] Discourteous Treatment of Public or Other Employees

Charge of discourteous treatment of public and other failure of good behavior, based on correctional officer assaulting man at former girlfriend's house and breaking into girlfriend's house and brandishing gun, as having rational relationship to employment and as of character that can reasonably result in impairment or disruption of public service, because ability to make calm, reasoned judgments under pressure is required of correctional officers. *Gray v. State Personnel Bd. (1985) 166 Cal. App. 3d 1229, 1232-1233, 213 Cal. Rptr. 5*

Off-duty conduct as constituting discourteous treatment of public or other employees if it bears rational relationship to employment and is of such character that it can reasonably result in impairment or disruption of public service. *Blake v. State Personnel Board (1972) 25 Cal. App. 3d 541, 550, 102 Cal. Rptr. 50*

Oral threats and gun-pointing by supervising deputy labor commissioner, against two state employed attorneys attending state bar convention on state per diem, concerning their association with female state attorney with whom commissioner had romantic attachment, as involving sufficient nexus between misconduct and employment to support inference that misconduct had deleterious effect on public service. *Blake v. State Personnel Bd. (1972) 25 Cal. App. 3d 541, 551, 102 Cal. Rptr. 50*

Industrial Accident Commission referee's conduct in threatening attorney for applicant as conduct constituting discourteous treatment of public. *Neely v. California State Personnel Bd. (1965) 237 Cal. App. 2d 487, 490-491, 47 Cal. Rptr. 64*

[c] Dishonesty

Dismissal of California Highway Patrol motorcycle officer, for misappropriation of state-owned motorcycle parts, use of dealer's name to order wholesale parts without dealer's consent, and later denial of acts, as not abuse of discretion because CHP officers are held to highest standard of credibility, and honesty of officer is essence of function. *Ackerman v. State Personnel Bd. (1983) 145 Cal. App. 3d 395, 400-401, 193 Cal. Rptr. 190*

Dismissal of person employed as "General Auditor III" in Department of Justice, for dishonesty before state employment, as within power of attorney general and *State Personnel Board. Gee v. California State Personnel Bd. (1970) 5 Cal. App. 3d 713, 720, 85 Cal. Rptr. 762*

[d] Felony or Misdemeanor Involving Moral Turpitude

Misdemeanor involving moral turpitude as meaning any misdemeanor that by the manner of its commission involves moral turpitude. *Padilla v. State Personnel Bd. (1992) 8 Cal. App. 4th 1136, 1140, 10 Cal. Rptr. 2d 849*

Order granting probation on plea of nolo contendere as constituting a conviction following plea of nolo contendere, whether or not sentence is imposed. *Padilla v. State Personnel Bd. (1992) 8 Cal. App. 4th 1136, 1142-1145, 10 Cal. Rptr. 2d 849*

Dismissal of police officer for child molestation and refusal to cooperate in investigation of molestation charges as not abuse of discretion. *Fout v. State Personnel Bd. (1982) 136 Cal. App. 3d 817, 821-822, 186 Cal. Rptr. 452*

Nexus between ground for discipline and duties of employment as not required to be shown when reason for discipline is conviction of crime involving moral turpitude. *Wilson v. State Personnel Bd. (1974) 39 Cal. App. 3d 218, 221-222, 114 Cal. Rptr. 134*

[e] Inefficiency

Excessive delay in performing duties of office as sufficient to show inefficiency, and agency as not required to prove that employee's behavior violated specific agency rule. *Wilson v. State Personnel Bd. (1976) 58 Cal. App. 3d 865, 880-881, 130 Cal. Rptr. 292*

Low level of enforcement activity as sufficient to show inefficiency of highway patrol officer. *Bodenschatz v. State Personnel Board (1971) 15 Cal. App. 3d 775, 781-783, 93 Cal. Rptr. 471*

Small work output of attorney as sufficient to show inefficiency. *Sweeney v. State Personnel Board (1966) 245 Cal. App. 2d 246, 250-252, 53 Cal. Rptr. 766*

[f] Inexcusable Neglect of Duty

Physician on call in prison who was informed that inmate exhibited symptoms and signs of heart attack as properly dismissed for leaving inmate in prison infirmary with inadequate instructions and equipment, when physician should have either gone to prison to view patient personally or had him transported immediately to hospital. *Pan v. State Personnel Bd. (1986) 180 Cal. App. 3d 351, 361-362, 225 Cal. Rptr. 682*

Injury to psychiatric patient caused by restraints as insufficient to establish neglect of duty by hospital technician who applied the restraints; regulation did not prohibit restraints, which were examined and approved by staff doctors. *Peters v. Mitchell (1963) 222 Cal. App. 2d 852, 861-862, 35 Cal. Rptr. 535*

[g] Insubordination

Public employee as properly disciplined for insubordination because of refusal to cooperate with investigation into whether he should be disciplined for other cause. *Kelly v. State Personnel Bd. (1979) 94 Cal. App. 3d 905, 911, 156 Cal. Rptr. 795*

Conduct of dismissed police officer, including verbal altercation with assistant district attorney, disparaging comments about new commander, negative attitude about work, frequent absences and schedule changes, failure to keep accurate records, and complaints and derogatory remarks about immediate commanding officer, as constituting inefficiency, inexcusable neglect of duty, insubordination, or willful disobedience. *Hosford v. State Personnel Bd. (1977) 74 Cal. App. 3d 302, 312, 141 Cal. Rptr. 354*

Insubordination as being general course of mutinous, disrespectful, or contumacious conduct by employee who knows and intends to do what he or she is doing. *Coomes v. State Personnel Board (1963) 215 Cal. App. 2d 770, 775, 30 Cal. Rptr. 639*

[h] Other Failure of Good Behavior

City personnel rule prohibiting "conduct unbecoming an employee of the City Service" as sufficiently specific to warrant discharge of off-duty city police officer who engaged in patently unlawful and reckless conduct by leading other officers on a late-night, non-duty-related automobile chase at high speed over wet and slippery streets, in mechanically and structurally unsound car. *Cranston v. City of Richmond (1985) 40 Cal. 3d 755, 769-772, 221 Cal. Rptr. 779, 710 P.2d 845*

Failure of good behavior as constituting conduct that may cause discredit to employee or employment, whether or not known to any portion of the public. *Nightingale v. State Personnel Board (1972) 7 Cal. 3d 507, 513-514, 102 Cal.*

Rptr. 758, 498 P.2d 1006

Referee's attempts to expedite friend's workers' compensation case by contacting assistant referee in charge of case and deputy attorney general in charge of fund from which compensation was sought as conduct constituting failure of good behavior likely to bring discredit to employer. *Nightingale v. State Personnel Board (1972) 7 Cal. 3d 507, 512-513, 102 Cal. Rptr.758, 498 P.2d 1006*

Deputy sheriff's discharge for failing to report meeting with individual seeking unlawful access to department records in violation of department rules was proper, despite claims by deputy that disputed rules were overbroad and thus violated *First Amendment* right to free association, where meeting did not contain "significant 'expressive' component." *Arellanes v. Los Angeles County Civil Service Commission (1996) 41 Cal. App. 4th 1208, 1217-1218, 49 Cal. Rptr. 2d 73*

Sheriff's employee's remarks to press criticizing sheriff's management of department, although arguably addressing matters of public concern, were unduly disruptive to efficient management of department and therefore not protected speech under *First Amendment*. *Gray v. County of Tulare (1995) 32 Cal. App. 4th 1079, 1094-1096, 38 Cal. Rptr. 2d 317*

State Personnel Board as authorized to reduce discipline of employee (who admitted he had sexually molested his stepdaughter) from dismissal to suspension without pay for two-and-a-half years, based on posttermination evidence of employee's rehabilitation. *Department of Parks & Recreation v. State Personnel Bd. (1991) 233 Cal. App. 3d 813, 833-834, 284 Cal. Rptr. 839*

Police department rule prohibiting officers from "continuous association with felons" as not unconstitutionally vague as applied to police officer who continued associating with felon despite knowledge of this rule and in violation of supervisor's direct and specific order. *Bailey v. City of National City (1991) 226 Cal. App. 3d 1319, 1328-1330, 277 Cal. Rptr. 427*

Public act of masturbation by Department of Youth Authority counselor while off-duty as misconduct establishing sufficient nexus with counselor's employment to justify termination, and State Personnel Board as authorized to order termination despite counselor's discipline-free service record. *Ramirez v. State Personnel Bd. (1988) 204 Cal. App. 3d 288, 293-294, 251 Cal. Rptr. 9*

Conviction of crime or performance of illegal activity as not required for failure of good behavior; highway patrol officer's appearing nude within sight of neighbors, including children, as failure of good behavior in that such behavior was offensive to neighbors and brought embarrassment and discredit to highway patrol by harming its reputation and undermining effectiveness of relations of that officer with fellow officers. *Anderson v. State Personnel Bd. (1987) 194 Cal. App. 3d 761, 768-770, 239 Cal. Rptr. 824*

Rule that employee could be dismissed for conduct causing discredit on public service as not unconstitutionally vague when employee worked at county welfare office and was convicted of misdemeanor welfare fraud. *Martinez v. County of Tulare (1987) 190 Cal. App. 3d 1430, 1435-1436, 235 Cal. Rptr. 851*

Evidence that male officer of correctional facility had been observed near his residence wearing female undergarments on off-duty hours as insufficient to justify dismissal, when that conduct was not criminal, officer was cooperative and had otherwise good record, and there was no evidence that his continued employment would impair or disrupt public service. *Yancey v. State Personnel Bd. (1985) 167 Cal. App. 3d 478, 487, 213 Cal. Rptr. 634*

County civil service employee as properly discharged for participation in primary election as candidate for state senate because candidacy violated statutory prohibition against civil service employees running for political office. *Lee v. Civil Service Com. (1982) 129 Cal. App. 3d 9, 14, 180 Cal. Rptr. 822*

Possession of large quantity of marijuana as sufficient justification for termination on ground of failure of good behavior when employee worked as group supervisor at vocational training institution for rehabilitation of youthful offenders. *Parker v. State Personnel Bd. (1981) 120 Cal. App. 3d 84, 86-87, 174 Cal. Rptr. 333*

Possession of marijuana as failure of good behavior rationally related to employee's job as correctional officer, justifying disciplinary action. *Hooks v. State Personnel Bd. (1980) 111 Cal. App. 3d 572, 577, 168 Cal. Rptr. 822*

Threatening to jeopardize job of subordinate who reported incident in which supervisor was brutal to mental patient as properly punishable even though threats were within range of behavior protected by *First Amendment*. *Stanton v. State Personnel Bd. (1980) 105 Cal. App. 3d 729, 743, 164 Cal. Rptr. 557*

Highway patrol officer's dismissal as not based solely on his transvestite homosexual preferences; critical question as not whether officer's conduct violated mores of public or of California Highway Patrol but as whether conduct indicated unfitness for employment as CHP officer. *Warren v. State Personnel Bd. (1979) 94 Cal. App. 3d 95, 104, 156 Cal. Rptr. 351*

Failure of good behavior as required to bear rational relationship to employment and be of such character that it can easily result in impairment or disruption of public service. *Warren v. State Personnel Bd. (1979) 94 Cal. App. 3d 95, 104, 156 Cal. Rptr. 351*

Failure of good behavior as being catchall phrase intended to include situations and acts that do not easily fit into specifically described causes; failure of good behavior as required to be of such nature that it reflects on employee's job; behavior as not violating this prohibition merely because agency considers it improper. *Vielehr v. State Personnel Bd. (1973) 32 Cal. App. 3d 187, 191-192, 107 Cal. Rptr. 852*

Possession of marijuana in off-duty hours as not establishing sufficient probative nexus between failure of good behavior and finding of discredit to agency or employment to justify disciplinary action when convicted employee was tax representative trainee. *Vielehr v. State Personnel Bd. (1973) 32 Cal. App. 3d 187, 194-195, 107 Cal. Rptr. 852*

Dismissal of public employee for exercise of constitutional rights as not permissible without showing that restraint on rights was justified by compelling public necessity; discipline of public employee based on private life as not permissible unless conduct impairs public service or discredits employer. *Blake v. State Personnel Board (1972) 25 Cal. App. 3d 541, 552, 102 Cal. Rptr. 50*

Statutory provision authorizing discipline of state employees for failure of good behavior as not unconstitutionally void for uncertainty. *Gee v. California State Personnel Bd. (1970) 5 Cal. App. 3d 713, 720-721, 85 Cal. Rptr. 762*

[i] Physical Inability

Physical inability to perform duties of position as firefighter as sufficient cause for discharge under city charter provision. *Hostetter v. Alderson (1952) 38 Cal. 2d 499, 503-505, 241 P.2d 230*

[j] Willful Disobedience

Willful disobedience as connoting specific violation of particular command or prohibition. *Peters v. Mitchell (1963) 222 Cal. App. 2d 852, 862, 35 Cal. Rptr. 535*

[10] Judicial Review

Laches may bar judicial review of personnel decision of public agency, if unreasonable delay in seeking review causes prejudice to adverse party. *Johnson v. City of Loma Linda (2000) 24 Cal. 4th 61, 68-69, 99 Cal. Rptr. 2d 316, 5 P.3d 874*

Delay of almost 11 months in filing petition for writ of mandate and scheduling it for hearing as not sufficient to support defense of laches without proof of prejudice to public agency that had discharged employee who was seeking reinstatement. *Conti v. Board of Civil Service Commissioners (1969) 1 Cal. 3d 351, 362, 82 Cal. Rptr. 337, 461 P.2d 617*

Community college governing board has discretion under *Educ. Code § 88013* to impose more severe penalty than that recommended by hearing officer, and abuse of that discretion must appear very clearly before courts will interfere. *Spanner v. Rancho Santiago Cmty. Coll. Dist. (2004) 119 Cal. App. 4th 584, 589-591, 15 Cal. Rptr. 3d 1*

If local agency's decision imposing adverse action on employee is required to be in writing by applicable statute, charter, or rule, employee's 90-day period to petition for writ of mandate under *Code Civ. Proc. § 1094.6(b)* will not begin to run until agency mails its decision to employee, together with copy of affidavit or certificate of mailing; omission of affidavit or certificate of mailing means 90-day period will not begin to run. *Donnellan v. City of Novato (2001) 86 Cal. App. 4th 1097, 1102-1107, 103 Cal. Rptr. 2d 882*

Standards of trial court's review of agency's disciplinary action differ greatly depending on issues involved: as to culpability (that is, whether employee in fact committed misconduct alleged), trial court has extensive powers to review agency's determination and may exercise its independent judgment on evidence; as to penalty, however, trial court's powers of review are limited and are exercised only with great deference to agency's findings, which will not be disturbed unless manifest abuse of discretion is shown. *Deegan v. City of Mountain View (1999) 72 Cal. App. 4th 37, 45-47, 84 Cal. Rptr. 2d 690*

If local agency's written decision imposing adverse action on employee is required by applicable statute, charter, or rule to be in writing, employee's 90-day period to petition for writ of mandate under *Code Civ. Proc. § 1094.6(b)* will not

begin to run until agency's written decision is mailed to employee; mailing decision to employee's attorney will not suffice to trigger running of time to petition for writ of mandate. *Herman v. Los Angeles County Metro. Transp. Auth. (1999) 71 Cal. App. 4th 819, 824-830, 84 Cal. Rptr. 2d 144 .*

Civil service commission's finding of racial discrimination against employee is subject to reversal by mandamus if not supported by substantial evidence, using tests evolved in federal civil-rights cases. *Los Angeles County Office of Dist. Attorney v. Civil Service Comm'n (1997) 55 Cal. App. 4th 187, 200-202, 63 Cal. Rptr. 2d 661*

Public employer is free to impose more severe penalty than that recommended by hearing officer, and employer's decision cannot be disturbed absent manifest abuse of discretion. *Boctor v. Los Angeles County MTA (1996) 48 Cal. App. 4th 560, 574-575, 55 Cal. Rptr. 2d 861*

New trial may be ordered on petition for writ of administrative mandate if superior court failed to fulfill its duty to independently review credibility of conflicting testimony presented before civil service commission. *Barber v. Long Beach Civil Service Commission (1996) 45 Cal. App. 4th 652, 658-659, 53 Cal. Rptr. 2d 4*

Trial court reviewing administrative agency decision determines whether agency's factual findings are supported by substantial evidence in light of entire record; however, conclusions of law are reviewed by court independently. IBEW, Local 889 v. *International Bhd. of Electrical Workers (1996) 42 Cal. App. 4th 861, 868-870, 50 Cal. Rptr. 2d 1*

On review of civil service commission's discharge or discipline of probation officer, neither appellate court nor trial court may substitute its discretion for that of administrative agency concerning degree of punishment imposed on public employee, and absent abuse of discretion, penalty will not be disturbed in mandamus proceeding. *Cummings v. Civil Service Commission (1995) 40 Cal. App. 4th 1643, 1652, 47 Cal. Rptr. 2d 775*

Terminated police officer reinstated by civil service commission pursuant to administrative hearing, after shooting and almost killing motorist following minor driving incident while off duty, held to be abuse of agency discretion, manifesting indifference to public safety and welfare. *Hankla v. Long Beach Civil Service Commission (1995) 34 Cal. App. 4th 1216, 1222-1223, 40 Cal. Rptr. 2d 583*

Under both California law and federal common law, factual and legal preclusion obtains, preventing assertion of new and different legal theories, if public employee does not seek superior court mandamus review of administrative adjudications. *Miller v. County of Santa Cruz (9th Cir. 1994) 39 F.3d 1030, 1032-1034*

Trial court, in granting county civil service employee's petition for writ of administrative mandate to compel county civil service commission to hear late-filed appeal of termination, as properly reconciling employee's right to have appeal heard on merits with commission's concern for orderly process, since employee had property interest in continued permanent employment, delay in filing was short and caused by inadvertence, and commission asserted no prejudice. *Civil Service Com. v. Velez (1993) 14 Cal. App. 4th 115, 119-123, 17 Cal. Rptr. 2d 490*

When decision of State Personnel Board is reviewed on petition for writ of administrative mandate, reviewing court and trial court as applying same standard of review, that is, substantial evidence rule; factual determination of board as upheld if supported by substantial evidence, and all reasonable and legitimate inferences as required to be drawn in

support of board's findings. *Newman v. State Personnel Bd. (1992) 10 Cal. App. 4th 41, 46, 12 Cal. Rptr. 2d 601* ; *Pan v. State Personnel Bd. (1986) 180 Cal. App. 3d 351, 357, 225 Cal. Rptr. 682*

On review, decisions of State Personnel Board as entitled to judicial deference; record as required to be viewed in light most favorable to board's decision; factual findings of board as required to be upheld if supported by substantial evidence; and board's exercise of discretion as required to be upheld unless it abuses that discretion. *Department of Parks & Recreation v. State Personnel Bd. (1991) 233 Cal. App. 3d 813, 823, 284 Cal. Rptr. 839*

Decisions of State Personnel Board as entitled to judicial deference only if board acts within its legal jurisdiction. *Department of Parks & Recreation v. State Personnel Bd. (1991) 233 Cal. App. 3d 813, 824, 284 Cal. Rptr. 839*

Appellate court as not interfering with civil service commission's imposition of penalty of dismissal merely because court's evaluation of circumstances indicates penalty may be too harsh; court as properly interfering with commission's imposition of penalty only when penalty exceeds bounds of reason. *Paulino v. Civil Service Com. (1985) 175 Cal. App. 3d 962, 970, 221 Cal. Rptr. 90*

In mandate proceeding to review administrative order of State Personnel Board, determination of penalty imposed by board as not disturbed on appeal in absence of manifest abuse of discretion, which, in context of public employee discipline, involves assessment of factors such as risk of repeated harm to public service, circumstances of misconduct, and likelihood of recurrence. *Flowers v. State Personnel Bd. (1985) 174 Cal. App. 3d 753, 761, 220 Cal. Rptr. 139* ; *Ackerman v. State Personnel Bd. (1983) 145 Cal. App. 3d 395, 399, 193 Cal. Rptr. 190*

Trial court as abusing discretion in refusing to issue writ of mandate ordering city to grant administrative appeal when police officer who was demoted claimed that he was discriminated against for exercising statutory rights by being president of police officers' employee organization. *Henneberque v. City of Culver City (1983) 147 Cal. App. 3d 250, 253-255, 194 Cal. Rptr. 869*

Use of administrative mandate to review discharge of public employee as condition precedent to filing complaint for damages based on substance of discharge hearing. *Logan v. Southern Cal. Rapid Transit Dist. (1982) 136 Cal. App. 3d 116, 123-124, 185 Cal. Rptr. 878*

State Personnel Board's interpretation of State Civil Service Act as accorded great weight and to be followed unless clearly erroneous. *Fowler v. State Personnel Bd. (1982) 134 Cal. App. 3d 964, 972, 185 Cal. Rptr. 292* ; *overruled on other grounds by Madera Police Officers Assn. v. City of Madera (1984) 36 Cal. 3d 403, 204 Cal. Rptr. 422, 682 P.2d 1087*

On writ of mandate to review State Personnel Board's findings, court's function as drawing all reasonable and legitimate inferences in support of findings, not to reweigh evidence. *Fair Employment Practice Com. v. State Personnel Bd. (1981) 117 Cal. App. 3d 322, 333, 172 Cal. Rptr. 739*

Judicial review by administrative mandate as not available for review of highway patrol officer's suspension for 10 days or less, even though hearing before suspension may have been required by due process. *Taylor v. State Personnel Bd. (1980) 101 Cal. App. 3d 498, 505, 161 Cal. Rptr. 677*

[11] Layoff

When employee terminated "in the interest of economy," specific facts as not required to be outlined in notice of layoff. *Peradotto v. State Personnel Board (1972) 25 Cal. App. 3d 30, 37, 101 Cal. Rptr. 595*

[12] Penalties

Propriety of penalty imposed by administrative agency as resting in sound discretion of agency, which may not be disturbed on appeal in absence of abuse of discretion. *Cranston v. City of Richmond (1985) 40 Cal. 3d 755, 772, 221 Cal. Rptr. 779, 710 P.2d 845*

Dismissal of doctor having status of permanent civil service employee as excessive penalty when based on his numerous 5-to-15-minute extensions of one-hour lunch break and twice leaving his office for several hours without permission; petitioner's minor deviations from prescribed time schedule as not adversely affecting the public service. *Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 218, 124 Cal. Rptr. 14, 539 P.2d 774*

There is no requirement that public agency impose identical penalties for similar charges; mere fact that agency imposes different punishments in similar cases does not establish reversible abuse of discretion. *Pegues v. Civil Service Comm'n (1998) 67 Cal. App. 4th 95, 106, 78 Cal. Rptr. 2d 705*

Factors to be considered in determining whether penalty is excessive as including nature of profession in issue, extent to which employee's conduct resulted in, or if repeated is likely to result in, harm to public service, circumstances surrounding misconduct, and likelihood of recurrence; absence of past discipline problems as not sufficient to overturn dismissal of correctional officer who committed serious offense when officer had been employed for less than two years at time of incident. *Thompson v. State Personnel Bd. (1988) 201 Cal. App. 3d 423, 429-430, 247 Cal. Rptr. 210* ; *Anderson v. State Personnel Bd. (1987) 194 Cal. App. 3d 761, 771-772, 239 Cal. Rptr. 824*

Dismissal of county welfare aide convicted of committing welfare fraud was not excessive penalty because there was more than rational connection between employee's conduct and her employment, and her conduct cast discredit on employer. *Martinez v. County of Tulare (1987) 190 Cal. App. 3d 1430, 1438-1440, 235 Cal. Rptr. 851*

[13] Persons Covered

Attorney engaged by agency in civil service system as included in civil service coverage even though called an independent contractor, when services contracted for could be performed by person selected under civil service provisions. *State Compensation Ins. Fund v. Riley (1937) 9 Cal. 2d 126, 69 P.2d 985*

Corps members in California Conservation Corps as not civil service employees. *Bush v. California Conservation Corps (1982) 136 Cal. App. 3d 194, 201, 185 Cal. Rptr. 892*

Public employee on leave of absence as not thereby ceasing to be public employee. *Crowley v. City and County of San Francisco (1978) 83 Cal. App. 3d 776, 779, 146 Cal. Rptr. 264*

Architect as not civil service employee when employed by state college that was exempt from civil service system. *California State Employees Asso. v. Trustees of California State Colleges (1965) 237 Cal. App. 2d 541, 543, 47 Cal. Rptr. 81*

[14] Persons Authorized to Take Adverse Action

State agency may delegate power to take adverse action against its employee to managerial agent outside agency; power of delegation is limited only if there are express statutory prohibitions. *Camarena v. State Personnel Board (1997) 54 Cal. App. 4th 698, 702, 62 Cal. Rptr. 2d 775*

[15] Probationary Period

Probationary municipal employee is entitled to have applicable local procedures for dismissal strictly followed; city's failure to follow its own procedure for termination of probationary employee results in employee becoming permanent employee with property interest in continued employment. *Zeron v. City of Los Angeles (1998) 67 Cal. App. 4th 639, 643-646, 79 Cal. Rptr. 2d 130*

In absence of evidence of intentional or purposeful discrimination, city's uneven of enforcement of city charter provision allowing extension of employee's probationary period to reflect sick time taken by employee does not amount to denial of equal protection. *Cilderman v. City of Los Angeles (1998) 67 Cal. App. 4th 1466, 1470-1471, 80 Cal. Rptr. 2d 20*

Extension of employee's probationary period by personnel director as authorized by charter and not improper even if extension means that employee may be terminated during extension without same rights as permanent employee. *Cox v. County of San Diego (1991) 233 Cal. App. 3d 300, 309-310, 284 Cal. Rptr. 266*

Discharge of probationary employee with consent of county civil service commission as final unless employee alleges extrinsic fraud in procurement of commission's consent. *Oppenheimer v. Arnold (1950) 99 Cal. App. 2d 872, 873-874, 222 P.2d 940*

[16] Procedural Rights of Peace Officers

Probationary police officer as having no property interest entitling him to due process hearing before being denied permanent position on ground that he failed to complete probation satisfactorily, when no charge of misconduct was made against him. *Fleisher v. City of Signal Hill (9th Cir. 1987) 829 F.2d 1491, 1494-1495 , cert. denied, 485 U.S. 961*

Peace officer who is already employed and is merely applying to transfer from one agency to another may waive right to see personnel file if (1) waiver applies only to material generated by investigation of matters that arose prior to employment with new employer, (2) waiver expires after one year, and (3) waiver was made with full awareness of its consequences. *County of Riverside v. Superior Court (2002) 27 Cal. 4th 793, 118 Cal. Rptr. 2d 167, 176-178, 42 P.3d 1034*

If county does not provide administrative appeal procedure for its peace officers under *Gov. Code § 3304(b)*, and county civil service commission lacks jurisdiction to hear appeal, officer's appropriate remedy is to seek writ compelling county to adopt procedures for administrative appeals. *Hunter v. Los Angeles County Civil Serv. Comm'n (2002) 102 Cal. App. 4th 191, 194-198, 124 Cal. Rptr. 2d 924*

To meet minimum constitutional due-process standards, administrative appeal for disciplined peace officer under *Gov. Code § 3304(b)* must require that officer be accorded written notice of grounds for disciplinary measures, disclosure of evidence supporting disciplinary grounds, right to present witnesses and to confront adverse witnesses, right to be represented by counsel, fair and impartial decision-maker, and written statement from fact-finder listing evidence relied upon and reasons for determination made; also, if administrative appeal hearing is first evidentiary inquiry into facts giving rise to disciplinary action, burden of proving charges must be placed on employing agency that is making those charges. *Brown v. City of Los Angeles (2002) 102 Cal. App. 4th 155, 174-175, 125 Cal. Rptr. 2d 474*

Officer has right under *Gov. Code §§ 3305* and *3306* to read and respond to adverse comment entered in file used for personnel purpose, including internal-affairs file, even if comment did not directly result in any personnel action against officer. *Sacramento Police Officers Assn. v. Venegas (2002) 101 Cal. App. 4th 916, 925-930, 124 Cal. Rptr. 2d 666*

Report of citizens' review board containing findings of misconduct by peace officer may constitute punitive action that entitles officer to administrative appeal under *Gov. Code §§ 3303, 3304(b)*, even if board has no power to establish policy or impose any disciplinary measures, if existence of negative report could have adverse effect on officer's career advancement. *Caloca v. County of San Diego (1999) 72 Cal. App. 4th 1209, 1220-1223, 85 Cal. Rptr. 2d 660*

Officers voluntarily seeking transfer or promotion to sensitive assignments may be required to take polygraph examinations focused on work performed in prospective reassignment. *Los Angeles Police Protective League v. City of Los Angeles (1995) 35 Cal. App. 4th 1535, 1544, 42 Cal. Rptr. 2d 23*

In case involving police chief who was terminable at will, *Gov. Code § 3304(b)* (Public Safety Officers Procedural *Bill of Rights*) and constitutional due process require only notice and opportunity to respond to charges at post-termination "name-clearing" hearing before neutral fact-finder; due process is not violated by denial opportunity for police chief to confront and cross-examine adverse witnesses at hearing or by city manager's retention of final decision-making authority. *Binkley v. City of Long Beach (1993) 16 Cal. App. 4th 1795, 1807-1811, 20 Cal. Rptr. 2d 903*

Appeal of written reprimand in meeting with police chief as sufficient administrative appeal, when officer was given time to consult counsel, present evidence, and make argument. *Stanton v. City of West Sacramento (1991) 226 Cal. App. 3d 1438, 1443, 277 Cal. Rptr. 478*

Due process as requiring that person or agency hearing officer's administrative appeal must not be one that originally imposed discipline. *Gray v. City of Gustine (1990) 224 Cal. App. 3d 621, 631-632, 273 Cal. Rptr. 730*

Suppression of officer's statements as appropriate when violation of officer's procedural rights potentially affected content of officer's statements to investigators, as well as investigators' version of officer's statements. *Hanna v. City of Los Angeles (1989) 212 Cal. App. 3d 363, 375, 260 Cal. Rptr. 782*

Police department's failure to investigate citizen's complaint against police officer as violation of written police department manual; department's delay in providing officer with notice and opportunity to respond to complaint as violation of governing statute. *Aguilar v. Johnson (1988) 202 Cal. App. 3d 241, 247-251, 247 Cal. Rptr. 909*

Civil service rule that notice of appeal from probationary dismissal must be in writing and contain specific, detailed information on which appeal is based as inherently reasonable. *Browning v. Block (1985) 175 Cal. App. 3d 423, 429, 220 Cal. Rptr. 763*

In administrative hearing in which city manager upheld police chief's decision to terminate police officer on ground that officer used excessive force during arrest, city as denying police officer procedural due process when city never assumed burden of proving charges; burden as not devolving on police officer because no evidence was produced at previous hearing before police chief. *Parker v. City of Fountain Valley (1981) 127 Cal. App. 3d 99, 113, 179 Cal. Rptr. 351*

Tenured city police officer as denied procedural due process when, subsequent to hearing, police chief considered new witness statements and written materials that had not been provided to officer and to which officer had no opportunity to respond. *Parker v. City of Fountain Valley (1981) 127 Cal. App. 3d 99, 107, 179 Cal. Rptr. 351*

Although police chief was wrongfully discharged without notice and hearing, statutory right to opportunity for administrative appeal as not entitling chief to reinstatement pending hearing; chief's failure to attend hearing before city council on ground of lack of reinstatement and alleged bias of council as failure to exhaust administrative remedies so that discharge was upheld with sole remedy being back pay for wrongful termination. *Doyle v. City of Chino (1981) 117 Cal. App. 3d 673, 677-681, 172 Cal. Rptr. 844*

County as required to make administrative appeal available to public safety officers as vehicle by which review of punitive actions may be had, but appeal need not be completed before implementation of punitive action. *Butler v. County of Los Angeles (1981) 116 Cal. App. 3d 633, 640, 172 Cal. Rptr. 244*

[17] Public Employment

Public employer need not provide formal grant of criminal-use immunity before it can discipline and even dismiss public employee for refusing to answer employer's job-related questions on grounds of constitutional privilege against self-incrimination, so long as employee is not required to waive or surrender constitutional protection against criminal use of statements thus obtained, at least where employee is specifically advised that he or she retains that protection. *Spielbauer v. County of Santa Clara (2009) 45 Cal. 4th 704, 725-730, 88 Cal. Rptr. 3d 590, 199 P.3d 1125*

Names and salaries of public employees are not exempt from public disclosure under California Public Records Act, *Gov. Code § 6250 et seq.*, and names and salaries of peace officers do not qualify as "personal data" exempt from disclosure under *Penal Code §§ 832.7, 832.8*, unless in particular case disclosure would endanger officer's safety. *International Fed'n of Prof'l & Technical Eng'rs, Local 21 v. Superior Court (2007) 42 Cal. 4th 319, 343*

Names, employing departments, and hiring and termination dates of California peace officers included in database of Commission on Peace Officer Standards and Training are not exempt from public disclosure under California Public Records Act, *Gov. Code § 6250 et seq.*, unless safety or efficacy of particular officer would be jeopardized by disclosure; such information does not constitute confidential "personnel records" protected from disclosure under *Penal*

Code §§ 832.7, 832.8. Commission on Peace Officer Standards & Training v. Superior Court (2007) 42 Cal. 4th 278, 294

Public employee of civil service system created by ordinance may be "unclassified" and therefore have neither property interest in continued employment nor contractual right to employment. *Hill v. City of Long Beach (1995) 33 Cal. App. 4th 1684, 1692-1694, 40 Cal. Rptr. 2d 125*

Civil service employee as having no vested contractual right to continue in employment beyond time or contrary to terms and conditions fixed by law. *Shoemaker v. Myers (1990) 52 Cal. 3d 1, 23-24, 276 Cal. Rptr. 303, 801 P.2d 1054* ; *Seidler v. Municipal Court (1993) 12 Cal. App. 4th 1229, 1233, 16 Cal. Rptr. 2d 90*

Workers' compensation act as not preempting tort action for wrongful termination of civil service employee under "whistleblowing" statute. *Shoemaker v. Myers (1990) 52 Cal. 3d 1, 21-23, 276 Cal. Rptr. 303, 801 P.2d 1054*

Public employee as not deprived of fundamental privacy rights by virtue of his or her public employment. *Long Beach City Employees Ass'n v. City of Long Beach (1986) 41 Cal. 3d 937, 951, 227 Cal. Rptr. 90, 719 P.2d 660* .

Public employee as having no absolute right to refuse to answer potentially incriminating question posed by agency; self-incrimination rights as deemed adequately protected by precluding any use of employee's statements at subsequent criminal proceedings. *Lybarger v. City of Los Angeles (1985) 40 Cal. 3d 822, 827, 221 Cal. Rptr. 529, 710 P.2d 329*

Public employment as held under statute rather than by contract. *Sharp v. Civil Service Com. (1993) 14 Cal. App. 4th 1507, 1510, 18 Cal. Rptr. 2d 407* ; *Seidler v. Municipal Court (1993) 12 Cal. App. 4th 1229, 1233, 16 Cal. Rptr. 2d 90*

No contractual right as conferred on public employee; statutory provisions controlling terms and conditions of civil service employment as not to be circumvented by purported contracts in conflict with statutes. *Kemmerer v. County of Fresno (1988) 200 Cal. App. 3d 1426, 1432, 246 Cal. Rptr. 609*

Factors unconnected with responsibilities of employment as invalid reason for denial of government employment. *Burdick v. Board of Retirement (1988) 200 Cal. App. 3d 1248, 1253, 246 Cal. Rptr. 555*

Individuals as not having constitutional right, express or implied, to public employment. *Civil Service Assn. v. Civil Service Com. (1983) 139 Cal. App. 3d 449, 456, 188 Cal. Rptr. 806*

Terms and conditions of public employment, including term of service, as fixed by statute, rules, or regulations creating it, not by contract, even if one is involved. *Williams v. Department of Water & Power (1982) 130 Cal. App. 3d 677, 680, 181 Cal. Rptr. 868*

Public employee serving at pleasure of appointing authority as subject to removal without judicially recognized good cause. *Williams v. Department of Water & Power (1982) 130 Cal. App. 3d 677, 681, 181 Cal. Rptr. 868*

[18] Reinstatement and Payment of Back Salary

Period for measuring amount of back pay due as beginning at time discipline was actually imposed and ending on date State Personnel Board filed its decision, if employee was not given earlier opportunity to present arguments to agency initially imposing discipline. *Barber v. State Personnel Bd. (1976) 18 Cal. 3d 395, 403, 134 Cal. Rptr. 206, 556 P.2d 306*

Reinstatement and payment of salary relating back to time of dismissal as subjecting employee to discipline for behavior during time between dismissal and reinstatement. *Hooks v. State Personnel Bd. (1980) 111 Cal. App. 3d 572, 576-577, 168 Cal. Rptr. 822*

[19] Resignation

Unless valid enactment provides otherwise, civil service employee as entitled to withdraw resignation if he or she does so before its effective date, before it has been accepted, and before agency acts in reliance on resignation. *Armistead v. State Personnel Board (1978) 22 Cal. 3d 198, 206, 149 Cal. Rptr. 1, 583 P.2d 744*

Statutory requirement that petition to set aside resignation must be submitted within 30 days as mandatory and as subject neither to tolling on ground of incapacity nor to defense of estoppel. *Bidwell v. State of California ex rel. Dep't of Youth Authority (1985) 164 Cal. App. 3d 213, 218-220, 210 Cal. Rptr. 381*

[20] State Personnel Board

Cal. Const., art. VII, § 3(a) precludes Legislature from authorizing entity other than State Personnel Board (such as "board of adjustment" created as part of grievance procedure specified in memorandum of understanding for state employee bargaining unit) to review disciplinary actions taken against state civil-service employees; therefore, former *Gov. Code § 18670(c)-(e)* [repealed eff. Jan. 1, 2009, by 2008 Stats., ch. 150, § 4] was unconstitutional. *State Personnel Bd. v. Department of Personnel Admin. (2005) 37 Cal. 4th 512, 523*

State Employer-Employee Relations Act, which established collective bargaining process, as not conflicting with general merit principle of civil service employment embodied in constitution or with powers assigned exclusively to *State Personnel Board. Pacific Legal Foundation v. Brown (1981) 29 Cal. 3d 168, 174-175, 172 Cal. Rptr. 487, 624 P.2d 1215*

While CHP has supervisory authority over traffic officers, State Personnel Board as having ultimate decision about appropriate punitive sanctions in employee disciplinary actions if CHP's determination is disputed by employee. *Colombo v. State of California (1991) 3 Cal. App. 4th 594, 598, 5 Cal. Rptr. 2d 567*

State Personnel Board as created by, and deriving adjudicatory power from, constitution. *Department of Parks & Recreation v. State Personnel Bd. (1991) 233 Cal. App. 3d 813, 823, 284 Cal. Rptr. 839* ; *Kristal v. State Personnel Bd. (1975) 50 Cal. App. 3d 230, 236-237, 123 Cal. Rptr. 512* ; *Gee v. California State Personnel Bd. (1970) 5 Cal. App. 3d 713, 717, 85 Cal. Rptr. 762*

State Personnel Board as body of special and limited jurisdiction deriving its powers from constitution and implementing statutory law. *Department of Parks & Recreation v. State Personnel Bd. (1991) 233 Cal. App. 3d 813, 824, 284 Cal. Rptr. 839*

State Personnel Board as enjoined from exercising discretion in arbitrary, capricious, or fraudulent manner and from making decisions with no reasonable basis in law or substantial basis in fact. *Power v. State Personnel Bd. (1973) 35 Cal. App. 3d 274, 276, 110 Cal. Rptr. 698*

Statutory time limit for administrative decision is directory rather than mandatory, and agency maintains jurisdiction over matter in which it has failed to render timely decision; however, statutory consequence of delay is that employee will be deemed to have exhausted administrative remedies. *California Correctional Peace Officers Ass'n v. State Personnel Board (1995) 10 Cal. 4th 1133, 1145-1146, 43 Cal. Rptr. 2d 693, 899 P.2d 79*

[21] Transfers

Civil service employee as entitled by statute to administrative hearing on whether transfer was made to discipline or harass her, despite fact that transfer did not involve change in residence. *Johnston v. Department of Personnel Administration (1987) 191 Cal. App. 3d 1218, 1226, 236 Cal. Rptr. 853*

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§ 118.106 Attorney General Opinions

1999 addition of *Lab. Code § 96(k)*, which requires Labor Commissioner to take assignments of claims for loss of wages resulting from demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours, did not abrogate existing law that permits disciplining of peace officers for off-duty conduct occurring away from place of employment that is otherwise lawful but that conflicts with their duties as police officers. *83 Ops. Cal. Att'y Gen. 226 (2000)*

California law enforcement agency may destroy peace office internal investigation files after five-year retention period and peace officer personnel records five years after officer has terminated employment if destruction is solely matter of administrative routine and no other factors are present that would establish "bad faith." *83 Ops. Cal. Att'y Gen. 103 (2000)*

Employees serving in office of chancellor of California Community Colleges under interjurisdictional exchange program as eligible to serve on qualifications appraisal panels for hiring and promotion of state civil service employees. *75 Ops. Cal. Att'y Gen. 251 (1992)*

Charter city as allowed to prohibit former and retired city employees from serving on civil service commission without violating equal protection, due process, and freedom of expression provisions of constitution. *74 Ops. Cal. Att'y Gen. 181 (1991)*

County affirmative action officer as prohibited from furnishing copy of completed investigation report to complainant who is not peace officer, with respect to employment discrimination complaint filed against county employee who is peace officer. *73 Ops. Cal. Att'y Gen. 90 (1990)*

City manager and citizens' review board as having right to inspect citizens' complaints against city police officers on file in internal affairs division of police department. *71 Ops. Cal. Att'y Gen. 1 (1988)*

Officers in student affairs class series at California Maritime Academy as included in state civil service system. *70 Ops. Cal. Att'y Gen. 139 (1987)*

Public Safety Officers Procedural *Bill of Rights* Act as applying to police chiefs and sheriffs. *63 Ops. Cal. Att'y Gen. 829 (1980)*

State employee subject to layoff as permitted to elect demotion to previously held class with same or higher (but not substantially higher) salary than class of layoff. *63 Ops. Cal. Att'y Gen. 521 (1980)*

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§ 118.107 Law Reviews

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PART IV. PROCEDURAL CHECKLIST

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§ 118.120 Contesting State Civil Service System Actions and Decisions

NOTE:
This checklist is a general outline of administrative procedures for contesting actions and decisions in the state civil service system.

[1] Oral Civil Service Examination

1. NOTICE: Written notice of results of examination are required to be given as soon as scoring of examination is completed and eligible list is established [*Gov. Code § 18938.5*; *2 Cal. Code Reg. § 209*].

2. REQUEST: Unsuccessful competitor is entitled to specification of reasons for lack of success, on written request [*Gov. Code § 18938.5*].

3. APPEAL: Written appeal must be filed with State Personnel Board within 30 days after competitor is served with notice of results [*Gov. Code § 18938.5*; *see 2 Cal. Code Reg. § 51.2(e)(1), (3)* (30-day extension may be allowed for good cause)].

[2] Written Civil Service Examination

1. Appeal from scope of examination (range of subjects covered) or scoring of keyed copy (sample answers) [*2 Cal. Code Reg. § 190*].

a. INSPECTION: Within 7 days after the examination is held, any competitor has the right to inspect a keyed copy of examination questions for the purpose of requesting review of items the competitor believes were incorrectly or improperly keyed [*2 Cal. Code Reg. § 190*].

b. APPEAL: Within this 7-day period, the competitor may file a written appeal with the State Personnel Board from any part of the examination, citing the items against which appeal is directed and reasons for the appeal [*2 Cal. Code Reg. § 190*].

2. Appeal from scoring of individual examination [*2 Cal. Code Reg. §§ 187, 190*].

a. NOTICE: Written notice of the results of an examination are required to be given as soon as scoring of the examination is completed and the list of eligible persons is established [*2 Cal. Code Reg. § 209*].

b. INSPECTION: On written request filed with the State Personnel Board within 60 days after notice of the results of an examination is mailed, any competitor may compare his or her answer sheets with the scoring key to determine whether his or her answers have been accurately scored [*2 Cal. Code Reg. § 187*].

c. APPEAL: Within this 60-day period, the competitor may file a written appeal with the State Personnel Board, from the results of the examination, on the ground of fraud or clerical error in scoring [*2 Cal. Code Reg. § 190*].

[3] Qualifications Appraisal Panel Rating

NOTE:

A qualifications appraisal panel rating is a rating of education, experience, and personal qualifications established through an interview process [2 Cal. Code Reg. § 1942 Cal. Code Reg. §§ 203, 203.5

1. NOTICE: Written notice of the results of an examination are required to be given as soon as scoring of the examination is completed and the list of eligible persons is established [*2 Cal. Code Reg. § 209*].

2. APPEAL: Written appeal for review of a competitor's appraisal panel rating must be filed with the State Personnel Board within 30 days after notice of the results of the examination have been mailed, stating the facts, information, or circumstances on which the appeal is based [*2 Cal. Code Reg. § 202(a)*].

3. GROUNDS [*2 Cal. Code Reg. § 202(a)*]:

a. Failure to follow prescribed rating standards or procedures.

b. Erroneous interpretation or application of minimum qualifications prescribed for the class.

c. Fraud.

d. Discrimination on the basis of sex, race, religious creed, color, national origin, ancestry, marital status, or political opinion or affiliation.

e. Other improper acts or circumstances.

4. BOARD ACTION [*2 Cal. Code Reg. § 202(b)*]:

a. Sustain rating.

b. Grant the appeal and give a rating of 70 percent on education, experience, and personal

qualifications.

c. If the rating resulted from fraud or discrimination, give the competitor a passing rating, or cancel part or all of the interview ratings given by the panel, arrange for reexamination of the appellant and other affected competitors by a different panel, and withhold all or part of the list of eligible persons from certification until reexamination is completed.

d. Refer the request for review to the original or a new qualifications appraisal panel for reconsideration of the competitor's rating, then sustain the original rating or give the competitor a 70-percent rating or the revised rating recommended by the qualifications appraisal panel.

[4] Ineligibility to Take Examination or Be Certified

ELIGIBILITY: The State Personnel Board may refuse to examine or, after examination, may refuse to declare as eligible or may withhold or withdraw from certification, prior to appointment, any person who fits any of the following descriptions [*Gov. Code § 18935*]:

1. Lacks any of the requirements established by the board for the examination or position for which he or she applies.

2. At the time of examination has permanent status in a position of equal or higher class than the examination or position for which he or she applies.

3. Is physically or mentally so disabled as to be rendered unfit to perform the duties of the position to which he or she seeks appointment.

4. Is addicted to the use of intoxicating beverages to excess.

5. Is addicted to the use of controlled substances.

6. Has been convicted of a felony, or convicted of a misdemeanor involving moral turpitude.

7. Has been guilty of infamous or notoriously disgraceful conduct.

8. Has been dismissed from any position for any cause which would be a cause for dismissal from the state service.

9. Has resigned from any position not in good standing or in order to avoid dismissal.

10. Has intentionally attempted to practice any deception or fraud in his or her application, in his or her examination, or in securing his or her eligibility.

11. Has waived appointment three times after certification from the same employment list.

12. Has failed to reply within a reasonable time, as specified by the board, to communications concerning his or her availability for employment.

13. Has made himself or herself unavailable for employment by requesting that his or her name be withheld from certification.

14. Is, in accordance with rule of the board, found to be unsuited or not qualified for employment.

15. Has engaged in unlawful reprisal or retaliation against a state employee or other person in violation of the California Whistleblower Protection Act [*see Gov. Code § 8547 et seq.*], as determined by the board or a court.

[5] Disadvantaged Employee

1. APPEAL: Employee disadvantaged by any action taken by a superior or fellow employee in discouraging, hindering, or preventing the employee from taking any examination, or who alleges discrimination in state employ ment, may appeal to the State Personnel Board in writing [*Gov. Code § 18952*; *2 Cal. Code Reg. § 548.61*].

2. BOARD ACTION: The board must investigate an appeal immediately after receipt and take necessary action [*2 Cal. Code Reg. § 548.61*].

[6] Rejection During Probationary Period

1. NOTICE: Written final notice of rejection must be served on or before the effective date of rejection, stating [*Gov. Code § 19173*; *see 2 Cal. Code Reg. § 52.3*]:

a. Effective date of rejection (not later than last day of probationary period).

b. Reasons for rejection.

2. APPEAL: Written request to the State Personnel Board to investigate reasons for rejection may be filed within 15 days after the effective date of the rejection [*Gov. Code § 19175*].

NOTE:
The appeal procedures specified in *Gov. Code § 19175* do not apply to employees in State Bargaining Unit 5 [*Gov. Code § 19175(e)*].

3. GROUNDS [*Gov. Code §§ 19173, 19175*]:

a. Improper rejection procedure.

b. Reasons stated in the notice of rejection are untrue.

c. Discrimination on the basis of age, blindness, color blindness, sex, race, religious creed, color, national origin, ancestry, marital status, or physical handicap.

d. Fraud or bad faith.

4. BOARD ACTION:

a. State Personnel Board may require, or any party may request, a prehearing or settlement conference [*Gov. Code § 19581.5*].

b. Following an investigation, with or without a hearing, the board may [*Gov. Code § 19175*]:

(1) Affirm the rejection.

(2) Modify agency action.

(3) Restore the name of the rejected probationer to the employment list.

(4) Restore the rejected probationer to the position from which rejected, if no substantial evidence supports rejection or rejection was made as a result of bad faith or fraud (and the board must direct payment of salary to the employee for the period rejection was in effect) [*Gov. Code § 19180*].

[7] Corrective Action on Unlawful Appointment

1. NOTICE: State Personnel Board must give the employee and employing agency at least 15 days' notice of proposed corrective action [*2 Cal. Code Reg. § 266.2*]:

a. Stating reasons for the proposed action.

b. Notifying the employee and agency of the right to respond to the notice within 15 days, either orally or in writing.

2. APPEAL: Employee and agency may file written appeals with the board within 30 days after the date of notification of the board's final decision to take corrective action [*2 Cal. Code Reg. § 266.3*].

3. BOARD ACTION: Board may take corrective action up to and including voiding the appointment, and may require an employee not acting in good faith to reimburse compensation resulting from appointment [*Gov. Code § 19257.5*; *2 Cal. Code Reg. § 266*].

[8] Request for Reasonable Accommodation

1. REQUEST: Disabled individual may file a request for reasonable accommodation, with the employing agency, to obtain, retain, or advance to a position in state civil service employment [*2 Cal. Code Reg. § 53.2*].

2. RESPONSE: Agency must respond, in writing, to the request within 20 days after receipt, and inform the complainant of the right to appeal to the board [*2 Cal. Code Reg. § 53.2*].

3. APPEAL: Individual may file an appeal with the board within 30 days [*2 Cal. Code Reg. § 53.2*]:

a. After receipt of the agency's response.

b. After expiration of the 20-day response period, if the agency does not respond.

[9] Discrimination

1. COMPLAINT: Any person claiming discrimination in state civil service may file a written complaint with [*Gov. Code § 19702(g)*; *2 Cal. Code Reg. § 547.1*]:

a. Employing agency, if the agency has authority to resolve the matter.

b. State Personnel Board if the agency cannot resolve the matter.

2. TIME LIMITATIONS: Complaint generally must be filed within one year after alleged discrimination [*Gov. Code § 19702(f)*].

3. BOARD ACTION: State Personnel Board's executive officer may attempt to resolve the complaint informally or may refer the complaint to the board for hearing [*2 Cal. Code Reg. § 547.1*].

[10] Adverse Action

1. NOTICE: Employing agency must give an employee written final notice at least 5 working days before the effective date of adverse action [*Gov. Code § 19574(a)*; *2 Cal. Code Reg. § 52.3*]:

a. By one of following methods [*Gov. Code § 18575(b)(2)*]:
(1) Personal delivery.

(2) United States mail, either:
(a) Certified mail with return receipt requested.

(b) Express Mail.

(3) Overnight delivery by express service carrier, with employee or employee's representative required to acknowledge receipt at time of delivery.

b. Stating:

(1) Nature of the adverse action.

(2) Reasons for the action.

(3) Employee's right to respond to the notice.

(4) Employee's right to be represented in proceedings.

(5) Time for filing appeal.

2. INSPECTION: After service of a notice, the employee has the right to [*Gov. Code § 19574.1(a)*]:

a. Inspect documents in the possession of or under the control of the agency that are relevant to the adverse action or could constitute relevant evidence.

b. Interview other employees having knowledge of acts or omissions on which the adverse action is based.

3. COMPEL COMPLIANCE WITH INSPECTION:

a. Petition to compel discovery may be filed with the State Personnel Board's hearing office within 14 days after a failure to comply with a discovery request, or within 30 days after a request and failure to respond, whichever period is longer [*Gov. Code § 19574.2(a), (b)*].

b. Petition may not be filed within 15 days of the date set for commencement of the administrative hearing, except for good cause [*Gov. Code § 19574.2(b)*].

c. Written answer to the petition may be filed within 15 days after service of the petition [*Gov. Code § 19574.2(b)*].

d. Administrative law judge may [*Gov. Code § 19574.2(b)*]:

(1) Review the petition and response and issue a decision within 20 days after the petition was filed.

(2) Order a hearing and issue a decision within 20 days after the hearing.

e. Party aggrieved by the administrative law judge's decision may file a petition in the superior court within 30 days after service of the decision [*Gov. Code § 19574.2(b)*].

f. Court may issue an order to show cause directed to the agency or enter an order denying petition [*Gov. Code § 19574.2(c)*].

g. Court may order the administrative proceeding stayed during the pendency of judicial proceedings [*Gov. Code § 19574.2(d)*].

h. Court must file an order within 45 days after the petition was filed [*Gov. Code § 19574.2(g)*].

i. Party aggrieved by the court's order may file a petition with the court of appeal within 30 days after service of the order [*Gov. Code § 19574.2(h)*].

4. ANSWER: Employee may file a written answer to a notice with the State Personnel Board within 30 days after the effective date of the adverse action [*Gov. Code § 19575*].

5. BOARD ACTION:

a. In general, the State Personnel Board must hold a hearing within a reasonable time [*Gov. Code §§ 19576, 19578*].

b. Board may require, or any party may request, a prehearing or settlement conference [*Gov. Code § 19581.5*].

c. Board may sustain, modify, or revoke the adverse action [*Gov. Code § 19583*].

d. When the adverse action is modified or revoked, the board may order restoration of the employee's position, with back pay and lost benefits [*Gov. Code §§ 19583, 19584*].

e. Board's decision must be served on the parties personally or by mail [*Gov. Code § 19582(e)*].

6. REHEARING: Party may file a written petition with the board for a rehearing within 30 days after receipt of the board's decision [*Gov. Code § 19586*; *2 Cal. Code Reg. § 51.7*].

[11] Failure to Pass Employer-Required Medical Examination

1. NOTICE: Employee must be given a written notice of demotion, transfer, or termination at least 15 days before the effective date of the action [*Gov. Code § 19253.5(f)*; *2 Cal. Code Reg. § 52.3(a)*; *see Gov. Code § 19253.5*(*i*)(1) (agency's decision to file for disability retirement on employee's behalf is not appealable to State Personnel Board, although agency must provide employee with 15 days' notice of intent to file application and opportunity to respond to agency)].

2. APPEAL: Employee may appeal to the State Personnel Board within 15 days after service of the notice [*Gov. Code § 19253.5(f)*].

3. BOARD ACTION:

a. State Personnel Board must hold a hearing and may sustain, disapprove, or modify the action [*Gov. Code § 19253.5(f)*].

b. If the action is modified or revoked, the board must order restoration of the employee's position, with back pay and lost benefits [*Gov. Code §§ 19253.5(g), 19584*].

c. Board must order reinstatement of the employee to a vacant position in the same, a comparable, or a lower-rated class if the employee is no longer incapacitated for duty [*Gov. Code § 19253.5(h)*].

[12] Protection of Whistle-Blowers

1. COMPLAINT: State employee or an applicant for state employment may file a written complaint [*Gov. Code § 8547.8(a)*]:

a. Within 12 months after the most recent act of reprisal complained of.

b. With his or her supervisor, manager, or the employing agency, and with the State Personnel Board.

c. Containing a sworn statement, under penalty of perjury, that the contents of the complaint are true or believed by the affiant to be true.

2. BOARD ACTION:

a. State Personnel Board must initiate a hearing or investigation of the complaint within 10 working days after its submission [*Gov. Code § 19683(a)*].

b. Board's findings must be provided to the complainant and his or her supervisor or manager, or the employing agency, within 60 working days thereafter [*Gov. Code § 19683(a)*].

c. If the findings show misconduct, the supervisor or manager, or the employing agency, may request a hearing by the board regarding the findings [*Gov. Code § 19683(b)*].

d. Board may order reinstatement and back pay if improper activity occurred [*Gov. Code § 19683(c)*].

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PART IV. PROCEDURAL CHECKLIST

11-118 California Forms of Pleading and Practice--Annotated §§ 118.121-118.139

[Reserved]

§§ 118.121[Reserved]

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Volume 11: Carriers thru Civil Service-Chs.109-118
Chapter 118 CIVIL SERVICE
PART V. FORMS

11-118 California Forms of Pleading and Practice--Annotated § 118.140

§ 118.140 Answer and Appeal From Notice of Adverse Action [Gov. Code § 19575; 2 Cal. Code Reg § 51.2]

[1] FORM Answer and Appeal From Notice of Adverse Action [Gov. Code § 19575; 2 Cal. Code Reg § 51.2]

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the matter of _____ [*name of appellant*] in answer to and appeal from _____ [*adverse action appealed from*]	))))))	NO. _____ ANSWER AND APPEAL AND REQUEST FOR HEARING

_____ [*Name of employee*] appeals from the adverse action taken against appellant by _____ [*name of person or agency taking action*] in appellant's position as _____ [*title of position*] with the _____ [*name of employing agency*] located at _____ [*address*].
[*If appropriate:* Appellant admits the following allegations contained in the notice of adverse action: _____ (*list admitted allegations*)]. Appellant denies _____ [all *or* all other] allegations of the notice of adverse action, alleges that the _____ [*specify adverse action, e.g.,* discharge] is improper, and requests a hearing.
[*DESCRIBE specific objections to the notice of adverse action, e.g.:*]

1. Appellant objects to the notice of adverse action on the ground that it does not state acts or omissions on which adverse action may be based.

2. Appellant objects to the form of the notice of adverse action on the ground that it is so indefinite and uncertain that appellant cannot identify the basis for the action and prepare an appeal.

[*CONTINUE*]
Appellant's mailing address is _____ [*address*].
Dated: _____.

_____ [*signature*]
[*typed name*]
Appellant
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Appellant _____ [*name*]

[2] Use of Form

This form of answer to and appeal from a notice of adverse action is for use by an aggrieved state civil service employee, to obtain review of and a hearing regarding adverse action taken against the employee by the employing agency.

[3] Contents

The answer and appeal must be in writing. Although an answer is deemed to be a denial of all allegations in the notice of adverse action not expressly admitted and deemed to be a request for an investigation and hearing [*see Gov. Code § 19575*], this form makes this explicit, as a precautionary measure. The appeal must clearly identify the facts that form the basis for the appeal and identify all respondents known to the appellant [*2 Cal. Code Reg. § 51.2(b)*]. Unless the appeal names some other respondent, the appellant's employing agency will be considered the only respondent [*2 Cal. Code Reg. § 51.2(c)*].

[4] Time Limits

The employee has 30 calendar days after the effective date of the adverse action to file with the board a written answer to the notice of adverse action [*Gov. Code § 19575*].

[5] Copy to Agency

The State Personnel Board must promptly give a copy of the answer to the employing agency [*Gov. Code § 19575*; *2 Cal. Code Reg. § 51.2(d)*].

[6] Cross References

For general discussion of forms for use in administrative trials, *see* Ch. 473, *Public Agency Adjudication* , et seq.

[7] State Statutes

Answer to notice of adverse action. *Gov. Code § 19575*

Amendment of answer. *Gov. Code § 19575*

Finality of adverse action if employee fails to answer or withdraws answer. *Gov. Code § 19575*

Investigation and hearing by State Personnel Board. *Gov. Code §§ 19576, 19578*

[8] Administrative Regulations

Requirements for filing appeal with State Personnel Board. *2 Cal. Code Reg § 51.2*

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Volume 11: Carriers thru Civil Service-Chs.109-118
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PART V. FORMS

11-118 California Forms of Pleading and Practice--Annotated § 118.141

§ 118.141 Appeal, Application, Petition, Protest--Action Other Than Adverse Action--General Form [2 Cal. Code Reg. § 51.2]

[1] FORM Appeal, Application, Petition, Protest--Action Other Than Adverse Action--General Form [2 Cal. Code Reg. § 51.2]

BEFORE THE STATE PERSONNEL BOARD OF THE
STATE OF CALIFORNIA

In the matter of	)	NO. _____
_____ [*name of appellant*]	)	APPEAL AND
in appeal from	)	REQUEST FOR
_____ [*adverse action appealed from*]	)	HEARING
	)	

_____ [*Name of employee*] is employed in the position of _____ [*title of position*] with the _____ [*name of employing agency*] located at _____ [*address*], and appeals from _____ [*action appealed from, e.g.,* a layoff notice effective _____ (*date*)] and requests a hearing.

_____ [*Describe specific objections or assertions, e.g.,* Appellant asserts that his/her layoff did not follow the proper procedure in that the layoff was not made according to seniority as required by *Government Code Section 19997.3*].

Appellant's mailing address is _____ [*address*].

Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Appellant_____[*name*]

[2] Use of Form

The foregoing form of appeal is for use by an aggrieved state civil service employee, to obtain review of and a hearing regarding action taken by the employing agency. This is a general form for use in appealing nonadverse actions. It may be modified for use as an application, a petition, or a protest, by making minor changes in the wording of the form [*see 2 Cal. Code Reg §§ 51.1(c), 51.2(a), (b)*]. For descriptions of specific situations in which the form could be used, see the Procedural Checklist at § 118.120.

[3] Time Limits

Generally, appeals must be filed with the State Personnel Board, or with the employing agency in some cases [*see 2 Cal. Code Reg. § 53.1*], within 30 days after the appellant has been served with the notice, report, or document from which the appeal is taken [*2 Cal. Code Reg. § 51.2(e)(1)*]. If there has been no service and none is required, the appeal must be filed within 30 days after the event on which the appeal is based [*2 Cal. Code Reg. § 51.2(e)(2)*]. For good cause, the executive officer of the board may allow an appeal to be filed within 30 days after the end of the period within which the appeal should have been filed, unless the period for filing is otherwise limited by statute [*2 Cal. Code Reg. § 51.2(e)(3)*].

[4] Cross Reference

For a form of answer and appeal from a notice of adverse action, *see § 118.140*.

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Volume 11: Carriers thru Civil Service-Chs.109-118
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PART V. FORMS

11-118 California Forms of Pleading and Practice--Annotated § 118.142

§ 118.142 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of State Personnel Board Imposing Adverse Action on Employee [Gov. Code § 19583] and to Compel Reinstatement and Compensation [Gov. Code § 19584]

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of State Personnel Board Imposing Adverse Action on Employee [Gov. Code § 19583] and to Compel Reinstatement and Compensation [Gov. Code § 19584]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
	)	
vs.	)	
	)	NO. _____
STATE PERSONNEL	)	PETITION FOR WRIT OF [ADMINISTRATIVE]
BOARD OF	)	MANDATE
CALIFORNIA and	)	
_____ [*name*],	)	
Respondents.	)	
	)	
	)	

_____

Petitioner respectfully represents:

1. At all times mentioned in this petition, petitioner was a permanent civil service employee of the _____ [*name of employing agency, e.g.,* Department of Public Works] of the State of California, classified as a _____ [*specify title of position*], regularly engaged in the performance of the duties of this position at a salary duly fixed and payable in accordance with the salary schedule adopted by the State Personnel

Board for this position.

2. Respondent State Personnel Board (hereinafter "the Board") is a board created, organized, and existing under and by virtue of the constitution and statutes of the State of California for the purpose of carrying out the constitutional and statutory provisions of the State of California with reference to classified civil service employees of the state.
3. Respondent _____ [*name of employing agency, e.g.,* Department of Public Works] of the State of California is an agency of the state government.

4. The Board has discretion to determine whether a ground exists for the adverse action taken by an agency against an employee. The Board is required to hold a hearing and take evidence in its proceedings for the determination of those facts.
5. On _____ [*date*], at _____ [*specify meeting place*], a hearing was held _____ [*state facts regarding holding of hearing, e.g.,* to receive evidence on the issue of whether a ground exists for _____ (*specify adverse action taken against petitioner, e.g.,* the discharge of petitioner)]. The hearing was held by a duly appointed hearing officer, and evidence was introduced at the hearing by _____ [*name of employing agency, e.g.,* the Department of Public Works] and by petitioner, and the matter was submitted for decision. The transcript of the hearing is attached as Exhibit _____ and made a part hereof.
6. On _____ [*date*] petitioner received the Board's decision and order _____ [*specify effect of decision and order, e.g.,* affirming petitioner's discharge] on the grounds that _____ [*specify, e.g.,* petitioner was guilty of insubordination]. A copy of the notice of decision is attached as Exhibit _____ and made a part hereof.
[7. _____ (*If request for rehearing was filed, allege facts of petition for rehearing and either denial of petition by board or holding of rehearing by board and adverse result).*]

8. The Board's decision and order are invalid for the following reasons:

a. The hearing officer found that _____[*state all findings*]. The Board does not have authority to impose adverse action based on any of these findings, in that the findings do not constitute _____ [*specify statutory ground, e.g.,* insubordination].

b. At the hearing, petitioner tried to offer evidence to show that _____ [*specify facts to which evidence relates*]. This evidence is in the form of _____ [*specify, e.g.,* the testimony of _____ (*name*)]. The hearing officer ruled that this evidence was not admissible, and it was not received. The evidence was admissible and should have been received.

c. The hearing officer found that _____[*state specific findings*]. The evidence received at the hearing does not support these findings, as petitioner alleges more particularly hereinafter.
9. The evidence does not support the findings for the following reasons: _____ [*specify*].
10. Petitioner has the following relevant evidence that was not presented at the hearing: _____ [*describe evidence*]. This evidence could not be produced at the hearing because _____ [*specify why, in the exercise of reasonable diligence, petitioner could not produce evidence and why, if appropriate, evidence could not be produced on rehearing*]. This evidence tends to show that _____ [*state what evidence will prove*].
11. As an incident of bringing and maintaining this proceeding, petitioner has become and is obligated personally to pay to petitioner's counsel, _____[*name*], attorney's fees _____ [exceeding $7,500 *or* in the sum of $_____].

12. Petitioner has exhausted all administrative remedies, and the decision of the Board has become final.

13. Petitioner has no plain, speedy, or adequate remedy at law because the law provides no cause of action by which

petitioner can require respondents to reinstate petitioner in petitioner's civil service position and reimburse petitioner for the pay lost during the period of petitioner's unlawful discharge.

WHEREFORE, petitioner prays judgment as follows:
[1. For an alternative writ of mandate directing the Board to set aside its order of _____ (*date*), _____(*specify effect of order, e.g.,* discharging petitioner), or in the alternative to show cause why a peremptory writ of mandate to the same effect should not be issued.]
2. For judgment setting aside and vacating the Board's _____ [disciplinary order *or* affirmance of the disciplinary order] and directing the issuance of a peremptory writ of mandate commanding respondents to reinstate petitioner in petitioner's position as _____ [*specify title of position*] and to order that petitioner be paid petitioner's salary from _____[*date*] to the date of reinstatement, together with interest on this amount, and that all benefits that otherwise would have accrued to petitioner be reinstated.

3. For reasonable attorney's fees, in addition to any other relief granted or other costs awarded.
4. For costs of suit herein incurred _____ [*add, if appropriate:* including $_____ for preparation of the administrative record].

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Use of Form

The foregoing form of petition for a writ of administrative mandate is for use by an aggrieved state civil service employee, to obtain judicial review of a decision and resulting order of the State Personnel Board imposing adverse action on the employee and to compel reinstatement of the employee and payment of back salary, plus interest, as well as the reinstatement of all benefits that would have normally accrued. The form may not be used to review a decision resulting from a proceeding in which an evidentiary hearing is not required [*see Code Civ. Proc. § 1094.5*; *see, e.g., Gov. Code § 19576* (no hearing for suspension of up to five days)]. In such cases, an employee may seek judicial review in a traditional mandate proceeding [*see Code Civ. Proc. § 1085(a)*; *Coelho v. State Personnel Bd. (1989) 209 Cal. App. 3d 968, 971 n.2, 257 Cal. Rptr. 557]* . This form can be modified for use in seeking a traditional writ if mandate by removing the allegations regarding the State Personnel Board's authority to conduct an evidentiary hearing (Paragraphs 4 and 5). If the petition states a ground for issuance of a traditional writ of mandate, the court has the power to grant the petition, even if the petition erroneously seeks a writ if administrative mandate [*see Coelho v. State Personnel Bd. (1989) 209 Cal. App. 3d 968, 971, 257 Cal. Rptr. 557]* .

[3] Allegations

The petition must state facts tending to show the following:

(1) Discretion to determine certain relevant facts is vested in the State Personnel Board (Paragraph 4) [*see Code Civ. Proc. § 1094.5(a)*].

(2) By law a hearing is required to be held for the purpose of determining those facts (Paragraph 4) [*see Code Civ. Proc. § 1094.5(a)*].

(3) Evidence is required to be taken at the hearing (Paragraph 4) [*see Code Civ. Proc. § 1094.5(a)*].

(4) A final administrative decision was made as a result of that hearing and the determination of those facts (Paragraph 6) [*see Code Civ. Proc. § 1094.5(a)*]. The form includes optional language for use to state the board's denial of or action on rehearing if rehearing was requested (Paragraph 7).

(5) The petitioner is beneficially interested in the writ, that is, he or she has standing to sue (Paragraph 6) [*see Code Civ. Proc. § 1086*].

(6) The decision is invalid for stated reasons (Paragraphs 8-10) [*see Code Civ. Proc. § 1094.5(b)*].

(7) The petitioner has exhausted his or her administrative remedies (Paragraph 12) [*see Morton v. Superior Court (1970) 9 Cal. App. 3d 977, 982, 88 Cal. Rptr. 533]* .

(8) The petitioner has no plain and speedy remedy in the ordinary course of law (Paragraph 13) [*see Code Civ. Proc. § 1086*].

[4] Verification

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Proof of service on each respondent and real party in interest of a copy of a petition that seeks an alternative writ must accompany the petition when it is offered for filing except when, in its discretion and for good cause, the court has granted the application for the writ ex parte [*Code Civ. Proc. § 1107*; for discussion of serving the petition, *see* Ch. 358, *Mandate and Prohibition*]. Points and authorities also customarily accompany a petition filed in a superior court, although they do not appear to be expressly required by statute. When no alternative writ is sought, proof of service of a copy of the petition need not accompany the application, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

[5] Attorney's Fees

In a civil action to appeal or review a determination of the State Personnel Board, when it is shown that the determination was the result of arbitrary or capricious action or conduct by a public entity or by an officer of a public entity in his or her official capacity, the complainant, if he or she prevails in the civil action, may collect reasonable attorney's fees not exceeding $7,500, if he or she is personally obligated to pay these fees, from the public entity, in addition to any other relief granted or other costs awarded [*Gov. Code § 800*; *see Olson v. Hickman (1972) 25 Cal. App. 3d 920, 922-924, 102 Cal. Rptr. 248* (attorney's fees allowed in successful appeal from arbitrary and capricious discharge from local civil service)].

[6] Enforcement of Judgment

For discussion of the enforcement of judgments against the state [*see Gov. Code § 965 et seq.*], see Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities* .

[7] Cross References

For additional forms for use in administrative mandate proceedings and for a more complete discussion of forms used in administrative mandate proceedings, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

[8] California Points and Authorities

For a memorandum in support of a petition for a writ of mandate to compel reinstatement of a civil service employee and payment of back salary, see California Points And Authoritites Ch. 36, *Civil Service* (Matthew Bender)

[9] State Statutes

Procedure for review of administrative decision by mandate proceedings. *Code Civ. Proc. § 1094.5*

Disciplinary proceedings. *Gov. Code § 19570 et seq.*

[10] Decisions

Due process requirements for discharge of tenured government employee. *Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 215, 124 Cal. Rptr. 14, 539 P.2d 774*

Attorney's fees as awardable in case involving appeal from finding or award or other determination of administrative proceeding but not in case of appeal from superior court judgment denying petition for writ of mandate to compel reinstatement of temporary, part-time employee (not in civil service) who was discharged from employment without hearing. *Williams v. Department of Water & Power (1982) 130 Cal. App. 3d 677, 685, 181 Cal. Rptr. 868*

Writ of mandate to review administrative proceeding involving statutorily required hearing concerning discipline or discharge of state civil service employee. *Taylor v. State Personnel Bd. (1980) 101 Cal. App. 3d 498, 505, 161 Cal. Rptr. 677*

Administrative remedies as required to be exhausted before judicial review of State Personnel Board decision is sought. *Morton v. Superior Court (1970) 9 Cal. App. 3d 977, 982, 88 Cal. Rptr. 533*

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11-118 California Forms of Pleading and Practice--Annotated § 118.143

§ 118.143 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086, 1094.5, 1094.6] to Review Administrative Decision of Local Civil Service Commission Imposing Adverse Action on Employee and Compel Reinstatement and Payment of Back Salary

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086, 1094.5, 1094.6] to Review Administrative Decision of Local Civil Service Commission Imposing Adverse Action on Employee and Compel Reinstatement and Payment of Back Salary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
	)	
vs.	)	NO. _____
	)	PETITION FOR WRIT OF [ADMINISTRATIVE]
_____ [*names*],	)	MANDATE
Respondents.	)	
	)	
	)	

Petitioner respectfully represents:

1. At all times mentioned in this petition, petitioner was a permanent civil service employee of _____ [*name of employing agency, e.g.,* the Board of Public Works] of the _____ [City *or* County *or* City and County] of _____ [*name*] in the position of _____ [*specify title of position*]. Petitioner was continuously and regularly employed by _____ [*name of employing agency, e.g.,* the Board of Public Works] from _____[*date*] to _____ [*date*]. Petitioner's position as _____ [*specify title of position*] was, at all times mentioned in this petition, a position in the classified civil service of the _____ [City *or* County *or* City and County] of _____ [*name*],

with a salary of $_____ a month.
2. Respondent _____ [*name, e.g.,* Board of Civil Service Commissioners of the _____ (City *or* County *or* City and County) of _____ (*name*)] is authorized and exists under and by virtue of the provisions of the _____[*specify, e.g.,* charter] of the _____ [City *or* County *or* City and County] of _____ [*name*]. Respondent _____ [*name of employing agency, e.g.,* Board of Public Works] is authorized and exists under and by virtue of the provisions of the _____ [charter *or* an ordinances] of the _____[City *or* County *or* City and County] of _____[*name*].
3. Under _____ [*specify charter provision or ordinance*], respondent _____ [*e.g.,* Board of Civil Service Commissioners] has discretion to determine whether a ground exists for the adverse action taken by an agency against an employee. Pursuant to _____[*specify charter provision or ordinance*] respondent _____ [*e.g.,* Board of Civil Service Commissioners] is required to hold a hearing and take evidence in its proceedings for the determination of those facts.

4. [*Facts regarding holding of hearing. See § 118.142, Paragraph 5.*]

5. [*Facts regarding decision, notification of petitioner, and effect of decision on petitioner (petitioner's standing to sue). See § 118.142, Paragraph 6.*]

6. [*If request for rehearing was filed, facts concerning rehearing. See § 118.142, Paragraph 7.*]

7. [*Reasons for invalidity of decision. See § 118.142, Paragraphs 8-10.*]

8. [*If attorney's fees are claimed, facts of claim. See § 118.142, Paragraph 11.*]

9. [*Facts concerning exhaustion of administrative remedies and finality of decision affecting petitioner. See § 118.142, Paragraph 12.*]
10. The governing board of _____ [*name of employing agency*] adopted a resolution making Government Code Section 1094.6 applicable, and petitioner filed this petition within the time limits specified in that code provision. The petition was filed _____[*date*], within the 90-day period ending _____[*date*].
10. Petitioner filed this petition _____[*date*], within the period established by _____[*specify charter provision, ordinance, or statute*], which ended _____ [*date*].

11. Petitioner has no plain, speedy, or adequate remedy at law because the law provides no cause of action by which petitioner can require respondents to reinstate petitioner in petitioner's civil service position and reimburse petitioner for the pay lost during the period of the unlawful discharge.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Use of Form

The foregoing form of petition for a writ of administrative mandate is for use by an aggrieved local civil service employee, to obtain judicial review of a decision and order of a local civil service commission imposing adverse action on the employee and to compel reinstatement of the employee and payment of back salary [*see Code Civ. Proc. §§ 1094.5, 1094.6*]. *Code Civ. Proc. § 1094.6* imposes special requirements, including a time limit, when a local agency decision is to be reviewed under *Code Civ. Proc. § 1094.5*. For discussion, see Ch. 474, *Availability of Judicial Review*

of Agency Decisions , et seq.

[3] Identity of Respondent

If the local civil service board or commission does not have authority over the claim being advanced, the petition should include as parties the local officials who have this authority (such as the city treasurer or comptroller) [*see Goldsmith v. Board of Education (1923) 63 Cal. App. 141, 147, 148, 218 P. 296* (trial court could direct local board of education to issue warrant for unpaid salary on reinstatement of petitioner when board, rather than local agency, had authority to do so)].

A public official cannot be compelled to draw a warrant to pay any monetary judgment that may be won unless the petition alleges and proof is made that sufficient funds are available to pay it. Counsel may wish to add such an allegation to the foregoing petition, but this may not be necessary given the statutory provisions for the payment of judgments. Indeed, it might be premature to allege this until the public official refuses to pay the judgment [*see Gov. Code §§ 970.2* (mandate available), 970.4, 970.5 (payment when sufficient funds available); *Tevis v. City & County of San Francisco (1954) 43 Cal. 2d 190, 200, 272 P.2d 757* (judgment properly directed city officials to certify and approve payrolls showing employees' right to payment, but officials could not be compelled to draw warrant for payment because petition did not allege, and proof was not made, that money was available)]. For discussion of the enforcement of judgments against public entities, see Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities* .

[4] State Statutes

Mandate proceedings appropriate to review local agency decision. *Code Civ. Proc. § 1094.6*

Dismissal from county civil service. *Gov. Code § 31108*

[5] Decisions

If local agency's decision imposing adverse action on employee is required to be in writing by applicable statute, charter, or rule, employee's 90-day period to petition for writ of mandate under *Code Civ. Proc. § 1094.6(b)* will not begin to run until agency mails its decision to employee, together with copy of affidavit or certificate of mailing; omission of affidavit or certificate of mailing means 90-day period will not begin to run. *Donnellan v. City of Novato (2001) 86 Cal. App. 4th 1097, 1102-1107, 103 Cal. Rptr. 2d 882*

If local agency's written decision imposing adverse action on employee is required by applicable statute, charter, or rule to be in writing, employee's 90-day period to petition for writ of mandate under *Code Civ. Proc. § 1094.6(b)* will not begin to run until agency's written decision is mailed to employee; mailing decision to employee's attorney will not suffice to trigger running of time to petition for writ of mandate. *Herman v. Los Angeles County Metro. Transp. Auth. (1999) 71 Cal. App. 4th 819, 824-830, 84 Cal. Rptr. 2d 144*

Local agency's award of wrongly withheld backpay must include interest under *Civ. Code § 3287(a)*. *San Diego County Sheriffs Assn. v. San Diego County Civil Service Com. (1998) 68 Cal. App. 4th 1084, 1086, 1094-1096, 80 Cal. Rptr. 2d 712*

Cities and counties as required to follow own rules and regulations when imposing discipline. *Birdsall v. Carrillo (1991) 231 Cal. App. 3d 1426, 1431, 282 Cal. Rptr. 504*

Writ of mandate as proper to review local civil service order. *Chavez v. Civil Service Com. (1978) 86 Cal. App. 3d*

324, 331-332, 150 Cal. Rptr. 197

[6] Cross Reference

For a form of petition for writ of mandate, *see § 118.142*.

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11-118 California Forms of Pleading and Practice--Annotated § 118.144

§ 118.144 Allegations--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Review Decision of State Personnel Board or Local Civil Service Commission and to Compel Board or Commission to Permit Petitioner to Take Examination

[1] FORM Allegations--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Review Decision of State Personnel Board or Local Civil Service Commission and to Compel Board or Commission to Permit Petitioner to Take Examination

1. On or about _____ [*date*], respondents published an official examination announcement for the civil service position of _____ [*specify*], an exact copy of which is attached as Exhibit _____ and made a part of hereof. The minimum requirements listed in this announcement are as follows: _____ [*describe*].

2. After the announcement and before the closing date for filing applications, petitioner filed an application with respondents to take the examination and submitted with the application _____ [*list required credentials*].

3. Petitioner's application to take the examination was rejected by respondents for the following reasons: _____ [*describe*].

4. The minimum requirements for the examination for the position of _____ [*specify*] are arbitrary, unreasonable, discriminatory, and harsh in the limitations imposed, when considered in relation to the duties of the position of _____ [*specify*], as set forth in the examination announcement, and the limitations are contrary to the standards established in _____ [*specify relevant Government Code or city or county charter section, e.g., Government Code Section 18930*].

5. In refusing to allow petitioner to take the examination on _____ [*date*] respondents have unreasonably discriminated against petitioner by denying petitioner the equal rights guaranteed by the state and federal constitutions, by adopting a regulation that resorts to favoritism, and by making civil service positions available otherwise than equally and alike to all citizens, beyond the discretion given to respondents under civil service provisions set forth in _____ [the State Civil Service Act *or* the charter of the _____ (City *or* County *or* City and County) of _____ (*name*)].

[2] Use of Form

The foregoing allegations are for use in a petition for a writ of mandate by an aggrieved applicant for civil service

employment, to compel the State Personnel Board or a local civil service commission to allow the applicant to take a civil service examination [*see Terry v. Civil Service Commission (1952) 108 Cal. App. 2d 861, 870, 240 P.2d 691* (San Francisco civil service commission requirement limiting right to take examination to graduates of colleges accredited by either of only two associations as arbitrary and discriminatory when other accrediting associations use same standards; affirming issuance of writ to compel commission to allow applicants to take test)].

[3] Examination Standards

Examinations in the state civil service system are competitive and of such character as to fairly test and determine the qualifications, fitness, and ability of competitors to perform the duties of the positions for which they seek appointment [*Gov. Code §§ 18900, 18930*].

[4] California Points and Authorities

For a memorandum of points and authorities for use in a mandate proceeding to compel a civil service commission to permit the petitioner to take an examination, see Clifornia Points And Authorities Ch. 36, *Civil Service* (Matthew Bender)

[5] State Statutes

Administration of state civil service examinations. *Gov. Code § 18930 et seq.*

Right of appeal by state civil service employee hindered from taking examination. *Gov. Code § 18952*

Discrimination in employment in state civil service. *Gov. Code § 19700 et seq.*

Establishment of minimum standards for entrance into county civil service. *Gov. Code §§ 31005-31009, 31107*

Establishment of minimum standards for entrance into city civil service. *Gov. Code §§ 45050-45054, 45200*

[6] Decisions

Rules of civil service boards as not interfered with as long as they are reasonable and not arbitrary and capricious; time in grade requirement when city charter calls for board to provide for promotion on basis of merit, experience, and record as valid; reversing grant of writ to compel board to accept application of employee with less time in grade to take promotional examination. *Waters v. Civil Service Board (1955) 133 Cal.App. 2d 733, 736, 284 P.2d 919*

Under city charter making civil service commission sole judge of adequacy of tests for rating applicants, commission as empowered to impose additional requirements for positions beyond minimum requirements set in charter. *Cotter v. Wolff (1948) 88 Cal. App. 2d 376, 378, 198 P.2d 950*

Charter allowing civil service board to make rules regulating method of examination as not empowering board to make rules setting qualifications to take examinations. *Bruce v. Civil Service Board (1935) 6 Cal. App. 2d 633, 637, 45 P.2d 419*

[7] Cross Reference

For forms of petitions for writ of mandate, *see § 118.142* and *118.143*.

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§ 118.145 Allegations--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Review Decision of State Personnel Board or Local Civil Service Commission and to Compel Board or Commission to Certify for Appointment for Eligible List to Civil Service Position

[1] FORM Allegations--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Review Decision of State Personnel Board or Local Civil Service Commission and to Compel Board or Commission to Certify for Appointment for Eligible List to Civil Service Position

1. On _____ [*date*] petitioner was _____ [*specify position, e.g.,* at the head of the promotional employment list of eligible persons] for appointment to the position of _____ [*specify*] in the civil service system of the _____ [State of California *or* _____ (City *or* County *or* City and County) of _____(*name*)]. The list of eligible persons had been adopted regularly by respondent _____ [Board *or* Commission] pursuant to the provisions of _____ [the State Civil Service Act *or* the charter of the _____ (City *or* County *or* City and County) of _____ (*name*)].

2. On or about _____ [*date*] a vacancy occurred in the position of employment designated as _____[*specify*], and the _____ [Board *or* Commission] certified _____ [*name*] to the position. By virtue of petitioner's position _____ [*specify position, e.g.,* at the head of the promotional employment list], petitioner was entitled to notice of this vacancy and to be certified by respondent _____ [Board *or* Commission] for appointment to the position.

3. _____ [*Allege statutory or charter requirement for certification of person in petitioner's position on the eligible list, e.g.,* Under *Government Code Section 19057,* respondent Board is required to certify to the agency the names and addresses of the three persons standing highest on the promotional employment list for the class in which the position belongs who have indicated their willingness to accept appointment under the conditions of employment specified].

[2] Use of Form

The foregoing allegations are for use in a petition for writ of mandate by an aggrieved employee to compel the State Personnel Board or a local civil service commission to certify the employee for appointment to a civil service position. The form may be used whether the case is one of original appointment, transfer, reinstatement, promotion, or demotion [*see Gov. Code § 19050*; *Ballf v. Civil Service Commission (1941) 43 Cal. App. 2d 211, 215, 110 P.2d 478* (writ of

mandate affirmed to extent it compelled certification for employment)].

[3] California Points and Authorities

For a memorandum of points and authorities for use in a mandate proceeding to compel appointment of the petitioner from a list of eligible persons to civil service position, see Clifornia Points And Authorities Ch. 36, *Civil Service* (Matthew Bender)

[4] State Statutes

Certification and appointment from list of eligible persons in state civil service. *Gov. Code § 19050 et seq.*

[5] Decisions

Appointment of highest ranking eligible person as mandatory when charter so states. *Ballf v. Civil Service Commission (1941) 43 Cal. App. 2d 211, 215, 110 P.2d 478*

In mandate proceeding to compel appointment from list of eligible persons, petitioner as not entitled to retroactive salary increase for new position, but petitioner as entitled to rights of seniority as of date his name should have been certified for appointment. *Ballf v. Civil Service Commission (1941) 43 Cal. App. 2d 211, 216, 110 P.2d 478*

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11-118 California Forms of Pleading and Practice--Annotated § 118.146

§ 118.146 Allegations--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Review Decision of State Personnel Board or Local Civil Service Commission and to Compel Board or Commission to Conduct Promotional Examination

[1] FORM Allegations--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Review Decision of State Personnel Board or Local Civil Service Commission and to Compel Board or Commission to Conduct Promotional Examination

1. Petitioner is now and has been since _____[*date*] employed in _____ [*name of employing agency*].
2. Since _____ [*date*] the position of _____ [*specify*] has been unfilled [except by temporary appointment]. This position is subject to the civil service provisions of _____ [*Government Code Section 18950 or specify relevant provision of charter or ordinance*], which requires that vacant civil service positions be filled by means of a promotional examination when practicable [and in the best interests of the state].
3. Petitioner desires to take a promotional examination for the position of _____ [*specify*]. Petitioner is fully competent and qualified to perform all of the duties of that position and is fully qualified to take a promotional examination on the basis of ascertained merit and records of service, and also on the basis of any other qualification that may reasonably be required by respondent as a prerequisite for taking a promotional examination for the position.

4. It is practicable [and in the interests of the state] to create a list of eligible persons for this position by holding a promotional examination and to fill the position as the result of that promotional examination.
5. On _____ [*date*] respondent _____ [Commission *or* Board] gave notice that commencing on _____ [*date*] an examination would be held for the position of _____ [*specify*], and contrary to law, respondent did not make the examination promotional but provided that the examination would be open and competitive as follows: _____ [*specify requirements for taking examination*].
6. In failing to make the examination promotional from the next lowest rank, respondent violated the rights of petitioner under _____ [*Government Code Section 18950 or specify relevant provision of charter or ordinance*].

[2] Use of Form

The foregoing allegations are for use in a petition for writ of mandate by a state or local civil service employee, to

review a decision of a state or local civil service agency and to compel the agency to conduct a promotional examination.

Managerial positions are excepted from the rule that vacancies in civil service positions must be filled from promotional lists of civil service employees holding positions in appropriate classes. Managerial positions are filled from a list of applicants who have taken an open examination and are ranked in accordance with the score received [*Gov. Code § 18950*; *see Gov. Code §§ 18930, 19054.1*].

[3] California Points and Authorities

For a memorandum in support of a petition for a writ of mandate to compel a civil service agency to hold a promotional examination rather than an open examination, see Clifornia Points And Authorities, Ch. 36, *Civil Service* (Matthew Bender)

[4] State Statutes

Conditions for promotional examination in state civil service. *Gov. Code §§ 18950-18955*

[5] Decisions

When charter provision requires promotional examinations when practicable, discretion of local civil service boards as limited in determining practicability. *Rhodehamel v. Civil Service Board (1941) 18 Cal. 2d 709, 712, 117 P.2d 349* ; *Allen v. McKinley (1941) 18 Cal. 2d 697, 700, 117 P.2d 342*

City charter provision that all vacancies be filled by promotion on competitive examination unless approved by personnel board for exceptional circumstances as proper until legislature decides otherwise or supreme court rejects determination that city employees can be given preference for vacancies. *Santa Monica Mun. Employees Assn. v. City of Santa Monica (1987) 191 Cal. App. 3d 1538, 1546, 237 Cal. Rptr. 185*

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11-118 California Forms of Pleading and Practice--Annotated § 118.147

§ 118.147 Complaint for Damages [Civ. Code § 3333; Gov. Code § 8547.8(c)] for Retaliation Against State Employee or Applicant for State Employment for Disclosure Protected by California Whistleblower Protection Act [Gov. Code § 8547.8(c)]

[1] FORM Complaint for Damages [Civ. Code § 3333; Gov. Code § 8547.8(c)] for Retaliation Against State Employee or Applicant for State Employment for Disclosure Protected by California Whistleblower Protection Act [Gov. Code § 8547.8(c)]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Retaliation for Disclosure Protected by California
[and DOES I through _____,]	)	Whistleblower Protection Act)
Defendants.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:
1. Plaintiff is, and at all times mentioned in this complaint was, an _____ [employee of *or* applicant for employment with] _____ [*specify state agency*] [located in _____ (*city*), _____ County, California].
2. Defendant _____ [*name*] is, and at all times mentioned in this complaint was, _____ [*allege identity and capacity of defendant, e.g.,* plaintiff's immediate supervisor and] a resident of _____ County, California.
[3. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will

amend this complaint by inserting their true names and capacities herein. Plaintiff is informed and believes, and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.]
4. _____ [*Describe plaintiff's disclosure of improper governmental activity or other protected disclosure, e.g.,* On _____ (*date*) plaintiff filed a complaint with the State Auditor alleging that several employees in the Department of _____ (*specify*) were appropriating motor vehicles owned by the State of California to their own personal uses without permission or authorization to do so].
5. On _____ [*date*], in retaliation for plaintiff's disclosures, defendant intentionally _____ [*allege defendant's intentional acts of retaliation against plaintiff, e.g.,* caused plaintiff to be transferred from his/her supervisory position to a clerical position at a substantially reduced rate of pay].
6. On _____ [*date*], plaintiff filed a written complaint with _____ [*specify manager, supervisor, or agency, e.g.,* defendant], alleging defendant's retaliatory acts as described above. On _____ [*date*], plaintiff filed _____ [a copy of the complaint filed with defendant *or* a written complaint] with the State Personnel Board, alleging defendant's retaliatory acts as described above.
7. On or about _____ [*date*], the State Personnel Board commenced an investigation of plaintiff's complaint. The Board _____ [has issued findings *or* has failed to issue findings] pursuant to *Government Code Section 19683*.
8. As a proximate result of defendant's retaliatory acts, as described above, plaintiff _____ [*specify detriment suffered by plaintiff and resulting damages, e.g.,* has been unable to support himself/herself and his/her family because of his/her inability to obtain employment of a kind and at a salary level comparable to the position from which he/she was transferred, all to plaintiff's damage in the sum of $_____].
[9. As a further proximate result of defendant's retaliatory acts, _____ (*describe any further detriment and resulting damages, e.g.,* plaintiff has become emotionally distressed and physically ill, all to plaintiff's damage in the sum of $_____).]

[10. Defendant's retaliatory acts, as described above, were done maliciously and willfully and were intended to cause injury to plaintiff. Plaintiff therefore requests an award of punitive damages in an amount appropriate to punish defendant for his/her/its misconduct and to deter others from engaging in similar misconduct.]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:
1. For compensatory damages in the sum of $_____;

[2. For punitive damages in an amount appropriate to punish defendant for his/her/its misconduct and to deter others from engaging in similar misconduct;]

3. For plaintiff's reasonable attorney's fees expended in this action.

4. For costs of suit incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Use of Form

This form is for use by a state employee or applicant for state employment, to bring an action for damages against any

person who intentionally engaged in acts of reprisal, retaliation, threats, coercion, or similar acts, against the employee or applicant for having made a protected disclosure under the California Whistleblower Protection Act [*Gov. Code § 8547.3(a)*; *see Gov. Code § 8547 et seq.*]. A "protected disclosure" under the Act is any good-faith communication, including any communication based on, or when carrying out, job duties, that discloses or demonstrates an intention to disclose information that may evidence (1) improper governmental activity or (2) any condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose is made for the purpose of remedying that condition [*Gov. Code § 8547.2(d)*; *see Gov. Code § 8547.2(b)* ("improper governmental activity" defined)]. As a prerequisite to bringing the action, the injured party must have first filed a complaint with the State Personnel Board [*see Gov. Code § 8547.8(a)*], and the board must have issued, or failed to issue, findings pursuant to *Gov. Code § 19683* [*Gov. Code § 8547.8(c)*].

The form may be modified to allege retaliation against an employee of the University of California or the California State University who makes protected disclosures [*Gov. Code §§ 8547.10-8547.12*]. Paragraph 6 should specify the university supervisor, manager, or designated officer with whom the administrative complaint was filed. If the defendant is the California State University, Paragraph 7 should allege that the university failed to reach a decision on the plaintiff's administrative complaint within the time established for that purpose by the trustees, or did not within 18 months address the administrative complaint to the plaintiff's satisfaction [*see Gov. Code § 8547.12(a), (c)*; *Runyon v. Board of Trs. of Cal. State Univ. (2010) 48 Cal. 4th 760, 767-773, 108 Cal. Rptr. 3d 557, 229 P.3d 985]* . If the defendant is the University of California, Paragraph 7 should allege that the university failed to reach a decision on the plaintiff's administrative complaint within the time established for that purpose by the regents [*see Gov. Code § 8547.10(a), (c)*]. In the case of a claim against the University of California, any timely decision by the university on the administrative claim--even a decision in its own favor--bars an action for damages [*Gov. Code § 8547.10(c)*; *Miklosy v. Regents of Univ. of Cal. (2008) 44 Cal. 4th 876, 888-898, 80 Cal. Rptr. 3d 690, 188 P.3d 629*].

[3] Allegations

This form alleges the following:

- Plaintiff's status as a state employee or applicant for state employment (Paragraph 1) [*Gov. Code § 8547.8(c)*];

- Plaintiff's protected disclosure of improper governmental activities (Paragraph 4) [*Gov. Code § 19683(e)*; *see Gov. Code §§ 8547.3(a), 8547.8(c)*];

- Defendant's acts of reprisal, retaliation, threats, coercion, or similar acts against plaintiff for having made the disclosure (Paragraph 5) [*Gov. Code § 8547.8(c)*];

- Plaintiff's filing of a complaint with his or her manager, supervisor, or agency, and with the State Personnel Board, alleging defendant's retaliatory acts (Paragraph 6) [*Gov. Code § 8547.8(a), (c)*];

- The board's issuance of, or failure to issue, findings regarding that complaint pursuant to *Gov. Code § 19683* (Paragraph 7) [*Gov. Code § 8547.8(c)*];

- Detriment to the plaintiff proximately caused by defendant's acts, together with resulting damages (Paragraphs 8 and, 9) [*see Gov. Code § 8547.8(c)*].

The form includes an optional allegation to obtain punitive damages (Paragraph 10) [*Gov. Code § 8547.8(c)*].

[4] Reimbursement of Defense Costs

A state employee who provides his or her own defense in an action brought for retaliation against a whistle-blower must be reimbursed by the public entity for any costs incurred in the defense if it is established that no violation of the governing law [*see Gov. Code §§ 8547.3, 8547.8*] occurred. Conversely, if the public entity provides the defense, and a violation is found, the public employee must reimburse the public entity [*Gov. Code § 995.3*].

[5] Related Liabilities

[a] State Civil Service System

In addition to the liability alleged in this complaint, any state employee who uses, or attempts to use, his or her official authority or influence to, or to attempt to, intimidate, threaten, coerce, or command any person for the purpose interfering with that person's right to disclose improper governmental activities to the State Auditor, may be liable in an action for civil damages brought against the employee by the injured person [*Gov. Code § 8547.3(c)*].

[b] Local Civil Service Systems

Any local officer, manager, or supervisor [*see Gov. Code § 53296*] who has been found by a court to have taken a reprisal action [*see Gov. Code § 53296(j)*], with malicious intent, against any local agency employee or applicant for employment for disclosing improper governmental activities [*see Gov. Code § 53296(c)*] is individually liable for damages in an action by the injured employee [*Gov. Code § 53298.5(b)*].

[6] Venue

The county in which the cause of action arose is the proper venue for an action against either (a) a public officer or person especially appointed to execute his or her duties for an act done by him or her in virtue of his office or (b) a person who, by his or her command or in his or her aid, does anything touching the duties of the public officer [*Code Civ. Proc. § 393(b)*].

[7] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

A public entity need not verify its answer even though the complaint is verified [*see Code Civ. Proc. § 446*]. The verification of a complaint against a public entity does, however, preclude a general denial in superior court cases of unlimited jurisdiction and in some limited civil cases [*see Code Civ. Proc. § 431.30(d)*].

[8] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, § 177.40* et seq.

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For discussion and forms for use in actions against public employees and public entities generally, see Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue* , Pt. I

For alternative forms of verification, see Ch. 572, *Verification*

[9] California Employment Law

For discussion of other statutory and common-law protections against wrongful termination of employment, see Wilcox, California Employment Law, Ch. 60 (Matthew Bender)

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Chapter 119 CLAIM AND DELIVERY

12-119 California Forms of Pleading and Practice--Annotated 119.syn

AUTHOR: Hon. Robert H. O'BrienEdythe L. Bronston, Esq.Alan M. Mirman, Esq.David J. Pasternak, Esq. Contributing Editors Part II of this chapter was adapted from California Practice Handbook: Provisional Remedies (Matthew Bender), Litigation Section, Los Angeles County Bar Association, Handbook Editor; Hon. Robert H. O'Brien, Edythe L. Bronston, Alan M Mirman, David J. Pasternak, Contributing Editors. Judge O'Brien is a judge of the Los Angeles County Superior Court, conducting both civil and criminal trials. Ms. Bronston is a partner with Fierstein & Sturman in Los Angeles, practicing mainly in the area of creditors' rights. Mr. Mirman is a partner in Horgan, Rosen, Beckham & Coren, located in the Toluca Lake area of Los Angeles, and specializes in the representation of financial institutions. Mr. Pasternak is a partner with the firm of Appleton, Pasternak & Pasternak in Los Angeles, practicing in all aspects of business litigation, including appointments as a receiver, referee, and corporate appraiser.

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FOOTNOTES:
(n34)Footnote *.
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PART I. SCOPE

12-119 California Forms of Pleading and Practice--Annotated § 119.01

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§ 119.01 Scope

This chapter discusses [*see § 119.20* et seq.] and includes forms [*see § 119.100* et seq.] relating to the action for possession of personal property.

The chapter also discusses [*see § 119.40* et seq.] and provides forms [*see § 119.110* et seq.] relating to the provisional remedy of claim and delivery. It also contains a procedural checklist for plaintiff [*see § 119.90*] and defendant [*see § 119.91*] for the provisional remedy of claim and delivery.

The chapter also discusses the distinction between the action and the remedy [*see § 119.10* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesReplevins

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PART I. SCOPE

12-119 California Forms of Pleading and Practice--Annotated § 119.02

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§ 119.02 Cross References

[1] Generally Related Topics

For related topics, see the following chapters:

- For discussion and forms relating to actions involving conditional sales of motor vehicles, see Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* .

- For discussion and forms relating to bailments of personal property, see Ch. 93, *Bailments* .

- For discussion, procedures, and forms for use in seeking damages for conversion, see Ch. 150, *Conversion* .

- For discussion and forms relating to the obligation, created by negotiable and nonnegotiable documents of title, to deliver goods covered by the documents, see Ch. 213, *Documents of Title* .

- For discussion, procedures, and forms relating to the transfer of escheated property to its rightful owner, see Ch. 252, *Escheat (Unclaimed Property*).

- For discussion and forms relating to setting aside fraudulent transfers of personal property, see Ch. 270, *Fraudulent Conveyances* .

- For discussion and forms relating to the garnishment of deposit accounts and personal property in safe deposit boxes, see Ch. 276, *Garnishment* .

- For discussion and a form relating to the recovery of a gift made in contemplation of marriage, see Ch. 278, *Gifts* .

- For discussion and forms relating to disposition of personal property remaining on landlord's premises, see Ch. 332, *Landlord and Tenant: The Tenancy* .

- For discussion and forms relating to the enforcement of liens generally, see Ch. 342, *Liens and Wage Preferences* .

- For discussion and forms relating to lost and unclaimed property, see Ch. 355, *Lost and Unclaimed Property* .

- For discussion and forms relating to actions arising from sales or contracts to sell goods under Division 2 of the Commercial Code [*Com. Code § 2101 et seq.*], see Ch. 500, *Sales: Sales Under the Commercial Code* .

- For discussion and forms relating to remedies under the Unruh Act [*Civ. Code § 1801 et seq.*], which governs retail installment sales transactions, see Ch. 501, *Sales: Retail Installment Sales* .

- For discussion and forms relating to actions arising out of transactions secured by personal property or fixtures, see Ch. 503, *Sales: Secured Transactions* .

[2] Action for Possession of Personal Property

For discussion and forms relating to deposits in court, see Ch. 211, *Deposit in Court* .

[3] Provisional Remedy of Claim and Delivery

For other provisional remedies, see the following chapters:

- For discussion and forms relating to the provisional remedy of attachment, see Ch. 62, *Attachment* .

- For discussion and forms relating to third party claims under Enforcement of Judgments Law (*Code Civ. Proc. § 720.010 et seq.*), see *Ch. 254, Executions and Enforcement of Judgments, § 254.310* et seq.

- For discussion, procedures, and forms relating to temporary restraining orders, see Ch. 303, *Injunctions* .

For procedures relating to claim and delivery, see the following chapters:

- For discussion and forms relating to motions and orders generally, see Ch. 372, *Motions and Orders* .

- For discussion and forms relating to sureties' rights and liabilities and to actions on bonds and

undertakings, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGarnishmentsContracts LawTypes of ContractsBailmentsEstate, Gift & Trust LawPersonal GiftsGeneral OverviewTortsBusiness TortsFraud & MisrepresentationConstructive FraudGeneral OverviewTortsIntentional TortsConversionGeneral Overview

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12-119 California Forms of Pleading and Practice--Annotated §§ 119.03through 119.09

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[Reserved]

§§ 119.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Distinction Between Action and Remedy

12-119 California Forms of Pleading and Practice--Annotated § 119.10

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§ 119.10 Action and Remedy

[1] Distinguished

Although courts and attorneys often and confusingly use the term "claim and delivery" with respect to both an action for specific recovery of property and the provisional remedy of claim and delivery, the two are fundamentally different [*McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 590, 33 Cal. Rptr. 389* ; *see Goldie v. Bauchet Properties (1975) 15 Cal. 3d 307, 320 n.9, 124 Cal. Rptr. 161, 540 P.2d 1* (defendants erred in arguing that plaintiff was barred from recovering under certain provisions of claim and delivery law that had been held unconstitutional when plaintiff's action was substantive action for recovery of specific property and not provisional remedy of claim and delivery)].

[2] Action for Possession of Personal Property

A person who is entitled to the possession of personal property held by another may bring an action for the specific recovery of that property [*McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 590, 33 Cal. Rptr. 389]* . This action for the recovery of specific personal property is the equivalent of the common law writ of replevin [*Berry v. Bank of Bakersfield (1918) 177 Cal. 206, 209, 170 P. 415]* .

[3] Claim and Delivery as Auxiliary Remedy

Code Civ. Proc. §§ 511.010-516.050 (claim and delivery of personal property) provide an auxiliary remedy by which a person bringing an action to recover personal property may claim the property and have it immediately delivered to him or her upon or at any time after the commencement of the action without waiting for trial [*see Faulkner v. First National Bank (1900) 130 Cal. 258, 263, 62 P. 463* (discussing former *Code Civ. Proc. §§ 509-521*, now *Code Civ. Proc. §§ 511.010-516.050*)]. The remedy is available in any action in which a plaintiff asserts a present right to the possession of personal property [*Ananda Church of Self-Realization v. Massachusetts Bay Insurance Co. (2002) 95 Cal. App. 4th 1273, 1281-1282, 116 Cal. Rptr. 2d 370]* , if immediate possession of the personal property is important to the plaintiff [*McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 590, 33 Cal. Rptr. 389]* . The remedy cannot be employed independently (*McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 590, 33 Cal. Rptr. 389]* .

[4] Claim and Delivery as Provisional Remedy

The remedy of claim and delivery gives only temporary possession to a plaintiff. The title and right to possession are determined by the final judgment in the independent action from which the remedy of claim and delivery arose [*McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 590, 33 Cal. Rptr. 389]* .

Legal Topics:

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A. Distinction Between Action and Remedy

12-119 California Forms of Pleading and Practice--Annotated § 119.11

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§ 119.11 Stay of Proceedings Under Servicemembers Civil Relief Act

In proceedings for either an action for possession or the provisional remedy of claim and delivery, if the defendant is in military service, the court may have the discretion to stay the proceedings under the Servicemembers Civil Relief Act (*50 U.S.C. App. § 501 et seq.*) [*50 U.S.C. App. §§ 522, 524*]. Additionally, if the action for claim and delivery is based on nonpayment of an installment or other breach of an installment contract to purchase property, the court may order repayment of prior installments or deposits, or any part thereof, as a condition of terminating the contract and resuming possession of the property [*see 50 U.S.C. App. §§ 532, 534*; *see also 50 U.S.C. App. §§ 511* (definitions), 514, 516, 538 (additional persons protected by act)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesReplevinsContracts LawTypes of ContractsInstallment ContractsMilitary & Veterans LawServicemembersGeneral Overview

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Chapter 119 CLAIM AND DELIVERY
PART II. LEGAL BACKGROUND
A. Distinction Between Action and Remedy

12-119 California Forms of Pleading and Practice--Annotated §§ 119.12through 119.19

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[Reserved]

§§ 119.12[Reserved]

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Chapter 119 CLAIM AND DELIVERY
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B. Action for Possession of Personal Property

12-119 California Forms of Pleading and Practice--Annotated § 119.20

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§ 119.20 Scope of Subpart

This part discusses the action for possession of personal property. Part V includes the following forms for use in an action for possession of personal property:

- Complaint for the possession of personal property [§ 119.100[1]].
- An allegation for use in such a complaint [§ 119.101[1]].
- Demurrer [§ 119.102[1]].
- Answer [§ 119.103[1]].
- Judgment for plaintiff after a nonjury trial [§ 119.104]].

Legal Topics:

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

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12-119 California Forms of Pleading and Practice--Annotated § 119.21

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§ 119.21 Governing Statutes

Civ. Code § 3379 gives statutory recognition to the action for possession of personal property and *Civ. Code § 3380* provides specific relief in the form of compelling the delivery of personal property to the person entitled to immediate possession of it. Court orders for the deposit in court or delivery to the owner of personal property pending suit are governed by *Code Civ. Proc. § 572* and *Code Civ. Proc. § 574*. The requirements of a verdict and a judgment in an action for the possession of personal property are provided by *Code Civ. Proc. § 627* and *Code Civ. Proc. § 667*, respectively; the enforcement of such a judgment is governed by *Code Civ. Proc. §§ 712.010-712.070, 714.010-714.030*.

Legal Topics:

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

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12-119 California Forms of Pleading and Practice--Annotated § 119.22

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§ 119.22 Purpose and Nature of Action

[1] To Obtain Possession

The purpose of an action for possession of personal property is to enforce a plaintiff's right to the present possession of a chattel against a defendant who detains the chattel without right [*Commercial & Sav. Bk. v. Foster (1930) 210 Cal. 76, 79, 290 P. 583* ; *Simms v. NPCK Enterprises, Inc. (2003) 109 Cal. App. 4th 233, 243, 134 Cal. Rptr. 2d 557* (claim and delivery is proper remedy to recover possession of collateral)].

The action, thus, is a possessory action [*Feigin v. Kutchor (1951) 105 Cal. App. 2d 744, 747, 234 P.2d 264]* that specifically compels any person having the possession or control of a particular article of personal property of which he or she is not the owner to deliver it to the person entitled to its immediate possession [*Civ. Code § 3380*].

[2] Distinguished From Conversion

An action for possession of personal property should be distinguished from an action for conversion [*Commercial & Sav. Bk. v. Foster (1930) 210 Cal. 76, 79, 290 P. 583]* . In an action for possession of personal property, a plaintiff never ceases to claim the property as his or her own. Instead, the plaintiff seeks to obtain the property rather than its value and may also seek the value of the property's use while he or she is unlawfully deprived of it. In an action for conversion, however, a plaintiff concedes a change in title, recognizes the defendant's ownership, and seeks damages for

the value of the property at the time of its taking by defendant [*Tucker v. Hagerty (1918) 37 Cal. App. 789, 792-793, 174 P. 908* ; *see Civ. Code § 3336* (damages for conversion of personalty)]. Thus, an action for possession of personal property seeks recovery of the property itself while an action for conversion seeks recovery of damages for the alleged conversion [*Commercial & Sav. Bk. v. Foster (1930) 210 Cal. 76, 79, 290 P. 583]* . For discussion and forms relating to actions for conversion, see Ch. 150, *Conversion* .

[3] Distinguished From Consumer Protection Statutes

Almost all of the cases involving an action for possession of personal property predate various consumer protection statutes and other legislation (identified *below*) that regulate personal property transactions andinclude provisions governing disputes. In many cases, the statutory schemes provide for repossession and other remedies and impose related notice, venue, and verification requirements. The statutes and the cases decided under them do not expressly indicate whether the statutory provisions, when applicable, supplant the traditional claim and delivery cause of action, or whether these two sets of remedies may coexist in some way. However, most of the statutory requirements are mandatory when applicable. Thus, as a practical matter, the statutory remedies will be pursued when available, and the traditional cause of action will be utilized only in relatively simple transactions when the dispute is outside the statutory schemes. Examples of these simple transactions may include disputes between or among housemates or relatives, and a sales transaction that does not involve a "transaction in goods" [*see Com. Code § 2102*; *see also Com. Code § 2101 et seq.*] or an installment contract or a lien. The scope of this chapter is limited to coverage of the traditional cause of action. For comprehensive coverage of potentially applicable statutory remedies, the reader should refer to the chapters identified *below*.

The following is a list of significant statutory provisions that may apply to a dispute involving the possession of personal property:

(1) Division 2 of the Commercial Code [*Com. Code § 2101 et seq.*], which governs sales or contracts to sell goods [for coverage of actions arising from these sales or contracts, *see* Chapter 500, *Sales: Sales Under the Commercial Code*].

(2) Division 9 of the Commercial Code [*Com. Code § 9101 et seq.*], which regulates transactions secured by personal property (including fixtures) [*see* Ch. 503, *Sales: Secured Transactions*].

(3) The Unruh Act [*Civ. Code § 1801 et seq.*], also known as the Retail Installment Sales Act, which governs retail installment sales transactions and includes provisions governing repossession and resale [*see Civ. Code §§ 1812.2-1812.5*; Ch. 501, *Sales: Retail Installment Sales*].

(4) The Rees-Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 2981 et seq.*], which regulates sales of motor vehicles under conditional sale contracts [*see* Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* .

Other statutes that may relate to disputes governing the possession of personal property include (1) *Civ. Code § 1590*, which covers the recovery of gifts made in contemplation of marriage [*see* Ch. 278, *Gifts*] (2) statutory provisions governing various miscellaneous liens, including artisans' and jewelers' liens [*see Civ. Code § 3046 et seq.*; *see also* Ch. 342, *Liens and Wage Preferences*]; (3) Division 10 of the Commercial Code [*Com. Code § 10101 et seq.*], regulating personal property leases [*see* Ch. 413, *Personal Property Leases* ; *see also Civ. Code §§ 1925-1935, 1955-1959* (regulating bailments for hire, which generally are personal property leases made or first effective before 1990)]; and *Civ. Code § 1965*, providing for the return of a tenant's personal property left on the premises after the tenant has vacated the premises [*see* Ch. 332, *Landlord and Tenant: The Tenancy*].

Legal Topics:

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

Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationCivil ProcedureRemediesProvisional RemediesReplevinsTortsIntentional TortsConversionGeneral Overview

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12-119 California Forms of Pleading and Practice--Annotated § 119.23

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§ 119.23 Who May Bring Action

An action for possession of personal property can be brought only by a person who is entitled to immediate possession of the property [*see Civ. Code § 3379*]. The person need not be the absolute owner of the property [*Commercial & Sav. Bk. v. Foster (1930) 210 Cal. 76, 79-80, 290 P. 583]* , or be vested with legal title [*Feigin v. Kutchor (1951) 105 Cal. App. 2d 744, 747, 234 P.2d 264]* so long as the person holds some qualified interest in the property that entitles him or her to its possession [*International Airports, Inc. v. Finn (1955) 132 Cal. App. 2d 293, 297, 282 P.2d 102* (possessory aircraft lien [*Code Civ. Proc. § 1208.61*] on plane for value of work and materials furnished)].

However, an owner in common of a chattel cannot bring an action for the possession of personal property against his or her co-owner in possession when the property was not lost or destroyed, nor removed from the state, and the interests of plaintiff and defendant are indivisible. Thus, for example, a person deprived of the use and control of a tractor by his co-owner was entitled to only a pro rata share of the tractor's rental value during the period of his ouster, but was not entitled to bring an action for its possession [*Estergren v. Sager (1940) 39 Cal. App. 2d 401, 403, 103 P.2d 177]* . Similarly, a person in possession of a chattel cannot bring the action while continuing in possession of it [*Ramacciotti v. Galiano (1943) 59 Cal. App. 2d 8, 12, 137 P.2d 722* (plaintiffs not entitled to bring action for possession of personal property when they were in possession of the property on their ranch, although defendants refused to permit them to remove property from ranch)].

In addition, the action cannot be brought if there is any preliminary act or condition precedent to be performed before the unqualified right to possession attaches. Thus, an action for possession cannot be maintained by the holder of a possessory interest in the property that is acquired after the commencement of the action [*see Teater v. Good Hope Dev. Corp. (1939) 14 Cal. 2d 196, 209, 93 P.2d 112]* .

Legal Topics:

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

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12-119 California Forms of Pleading and Practice--Annotated § 119.24

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§ 119.24 Property Recoverable

[1] Some Tangible Form Required

Property that may be recovered in an action for possession of personal property must exist in some concrete or tangible form that is capable of identification and seizure [*Ashton v. Heydenfeldt (1899) 124 Cal. 14, 16, 56 P. 624* ; *Lamus v. Engwicht (1919) 39 Cal. App. 523, 528-529, 179 P. 435]* .

Shares of corporate stock are recoverable only if the action seeks to recover the certificates that represent the shares [*Ashton v. Heydenfeldt (1899) 124 Cal. 14, 16, 56 P. 624* ; *Lamus v. Engwicht (1919) 39 Cal. App. 523, 529, 179 P. 435]* . Similarly, money cannot be the subject of an action for possession of personal property unless it is marked or designated in some way so as to make it specifically identifiable [*Hillyer v. Eggers (1917) 32 Cal. App. 764, 766, 164 P. 27]* .

[2] Recovery From Law Enforcement Officers

If property seized by law enforcement officers is not returned but a criminal action is not commenced, the owner of the property can obtain possession of the property by a civil action for possession of the property against the law enforcement officers [*Ligda v. Edmunds (1971) 16 Cal. App. 3d 715, 718, 94 Cal. Rptr. 234]* . If such an action is filed, the claim and other requirements of the Tort Claims Act [*Gov. Code § 810 et seq.*] must be met. For a discussion

of this act, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

If a criminal action is filed, the owner of the property can obtain possession of the property by a motion in that action for return of the seized property, even if the seized property was not introduced in evidence [*see Penal Code §§ 1536, 1538.5, 1540*; *People v. Superior Court (1972) 28 Cal. App. 3d 600, 607-612, 104 Cal. Rptr. 876* ; *see* *Ligda v. Edmunds (1971) 16 Cal. App. 3d 715, 716-717, 94 Cal. Rptr. 234* (motion not proper if no action filed)]. For discussion, see *California Criminal Defense Practice, § 23.04* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-119 California Forms of Pleading and Practice--Annotated § 119.25

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§ 119.25 Possession by Defendant Required

An action for possession of personal property may be maintained only if a defendant has the possession of the property or the power to deliver it to the plaintiff in satisfaction of a judgment for its return [*Stockton M.P. Co. v. Mariposa County (1950) 99 Cal. App. 2d 210, 215, 221 P.2d 232 ; see Lueter v. State of California (2002) 94 Cal. App. 4th 1285, 1300, 115 Cal. Rptr. 2d 68]* . The requirement of possession may be satisfied by either actual or constructive possession of the property [*Lamus v. Engwicht (1919) 39 Cal. App. 523, 529, 179 P. 435]* . Thus, an action is proper against a defendant who has control over the property or is able to deliver the property to the plaintiff even if the defendant does not have actual physical possession of it [*Taylor v. Bernheim (1922) 58 Cal. App. 404, 408, 209 P. 55]* .

In addition, a defendant must be in possession at the time the action is commenced, even if the defendant does not have possession of the property after commencement of the suit [*Law v. Heiniger (1955) 132 Cal. App. 2d Supp. 898, 901 , 282 P.2d 607* (finding that defendant did not have possession of disputed property after commencement of suit as immaterial)]. However, when the original taking by a defendant is lawful and its subsequent detention wrongful, possession of the property by the defendant at the time of the commencement of the action is not required [*Faulkner v. First National Bank (1900) 130 Cal. 258, 264-266, 62 P. 463]* . Subject to this exception, wrongful possession by a defendant at the time of commencement of an action for possession of personal property is an ultimate fact to be pleaded and proved if a plaintiff is to recover the property. Therefore, nonpossession of the property by a defendant

constitutes a complete defense to the action [*Stockton M.P. Co. v. Mariposa County (1950) 99 Cal. App. 2d 210, 213, 215, 221 P.2d 232* ; *but see* Faulkner v. First National Bank (1900) 130Cal. 258, 264-266, *62 P. 463* (nonpossession not a defense when bailee wrongfully disposed of property)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-119 California Forms of Pleading and Practice--Annotated § 119.26

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§ 119.26 Demand

[1] Required When Possession Originally Lawful

When a person obtains possession of personal property rightfully or lawfully, he or she cannot be sued for possession of the property until a demand is made on him or her for delivery of the property [*Commercial & Sav. Bk. v. Foster (1930) 210 Cal. 76, 82, 290 P. 583* ; *Home Payment Jewelry Co. v. Smith (1914) 24 Cal. App. 486, 488, 141 P. 933]* . When demand is required it is a condition precedent to the accrual of the cause of action for possession of personal property [*First Nat'l Bank v. Thompson (1943) 60 Cal. App. 2d 79, 82, 140 P.2d 75* ; *see Commercial & Sav. Bk. v. Foster (1930) 210 Cal. 76, 82, 290 P. 583]* that is wrongfully detained by a person originally coming into possession lawfully [*see Latta v. Tutton (1898) 122 Cal. 279, 283, 54 P. 844* (lienor becoming purchaser under void sale)].

Ordinarily, some formal demand is required [*see Commercial & Sav. Bk. v. Foster (1930) 210 Cal. 76, 82, 290 P. 583]* . It may be oral, such as in the form of conversations [*Rathbun v. Hill (1933) 129 Cal. App. 601, 605, 19 P.2d 64]* , or it may be by letter, telegram [*Law v. Heiniger (1955) 132 Cal. App. 2d Supp. 898, 900 , 282 P.2d 607]* , or a valid tender of the amount due to the person in possession of the property [*Bogue v. Roeth (1929) 98 Cal. App. 257, 261, 276 P. 1071]* . However, a mere notice of default or notice of sale does not constitute a legal demand for return of the property [*Commercial & Sav. Bk. v. Foster (1930) 210 Cal. 76, 82, 290 P. 583]* .

[2] When Demand Not Required

Demand is not required when a defendant's possession is wrongful from the outset [*First Nat'l Bank v. Thompson (1943) 60 Cal. App. 2d 79, 82, 140 P.2d 75* (tortious taking)] or when a formal demand would be useless or unavailing [*Commercial & Sav. Bk. v. Foster (1930) 210 Cal. 76, 82, 290 P. 583]* , for example, when the defendants deny the right of a plaintiff to the possession of the property [*Rathbun v. Hill (1933) 129 Cal. App. 601, 605, 19 P.2d 64]* , assert their own ownership or right to possession [*Drinkhouse v. Van Ness (1927) 202 Cal. 359, 373, 260 P. 869* ; *Cline v. Smith (1929) 96 Cal. App. 703, 704, 274 P. 763* (erroneous refusal by trial court to instruct that demand unnecessary when defendant asserts title and right to possession in himself or herself)], or stipulate that the plaintiff is entitled to possession [*Fran-Well Heater Co. v. Robinson (1960) 182 Cal. App. 2d 125, 128, 5 Cal. Rptr. 900]* .

Legal Topics:

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§ 119.27 Deposit or Delivery Pending Suit

When it is admitted by the pleading or shown on examination of a party to the action that the person has in his or her possession or under his or her control any money or other thing capable of delivery that, being the subject of the litigation, is held by the person as trustee for another person, belongs to another person, or is due to another person, or that should, under the circumstances of the case, be held by the court pending final disposition of the action, the court may order the property to be deposited in court or delivered to the other person pending suit on the motion of a party to the action [*Code Civ. Proc. § 572*]. For discussion and forms for use in seeking a deposit in court pending suit, see Ch. 211, *Deposit in Court* .

Legal Topics:

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

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
Chapter 119 CLAIM AND DELIVERY
PART II. LEGAL BACKGROUND
B. Action for Possession of Personal Property

12-119 California Forms of Pleading and Practice--Annotated § 119.28

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§ 119.28 Jury Finding of Value of Property

[1] Requirement

In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff and the jury's verdict is in the plaintiff's favor, the jury must find the value of the property [*Code Civ. Proc. § 627*; *see Webster v. Mountain Monarch G.M. Co. (1935) 6 Cal. App. 2d 450, 454, 44 P.2d 646]* . Similarly, if the defendant claims a return of the property in his or her answer and the jury's verdict is in defendant's favor and finds that he or she is entitled to a return of the property, the jury must find the value of the property [*Code Civ. Proc. § 627*]. The finding of the value of the property is not a finding of damages sustained by the prevailing party. Rather, it is a substitute for, or a precise equivalent of, the property itself in the event the property cannot be returned [*Nelson v. Yonge (1925) 73 Cal. App. 704, 710, 239 P. 67* ; *see Drinkhouse v. Van Ness (1927) 202 Cal. 359, 374, 260 P. 869]* , and forms the basis on which to render an alternative judgment for its value [*Webster v. Mountain Monarch G.M. Co. (1935) 6 Cal. App. 2d 450, 454, 44 P.2d 646* ; *see Code Civ. Proc. § 667*; *see also* the *discussions under §§ 119.29, 119.30*].

Because the finding of value is solely for the benefit of the prevailing party in the action [*Griffith v. Reddick (1919) 41 Cal. App. 458, 461, 182 P. 984]* , only the prevailing party cancomplain of the omission to find the value of the property [*see Peterson v. First Nat. Bank (1929) 101 Cal. App. 532, 540, 281 P. 1104]* .

[2] Value of Special Interest in Property

In an action by a general owner of property against a defendant holding a special interest in the property, the value to be recovered by the defendant when the verdict is in his or her favor is the value of his or her special, or limited, interest [*Rathbun v. Hill (1933) 129 Cal. App. 601, 608, 19 P.2d 64]* , and if so instructed, the jury must find the value of the specific portions of the property [*Code Civ. Proc. § 667*].

[3] Time of Valuation

The value found is ordinarily the value of the property at the commencement of the trial [*Nelson v. Yonge (1925) 73 Cal. App. 704, 710-711, 239 P. 67]* . However, if the property is not in existence at the time of trial, the jury may return a verdict finding the value of the property at the time it was taken. For instance, when a horse died after it was taken by a defendant, the jury properly returned a verdict which found the value of the animal at the time of its detention [*Drinkhouse v. Van Ness (1927) 202 Cal. 359, 375-376, 260 P. 869]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsProvince of Court & JuryCivil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesProvisional RemediesReplevins

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B. Action for Possession of Personal Property

12-119 California Forms of Pleading and Practice--Annotated § 119.29

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§ 119.29 Alternative Judgment

[1] Possession of Property or Payment of its Value

In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession of the property or its value, in case it cannot be returned, and damages for the detention. Similarly, if the property has been delivered to the plaintiff and defendant claims return of the property, judgment for the defendant may be for return of the property or its value, if it cannot be returned, and damages for the detention [*Code Civ. Proc. § 667*; for discussion of damages, *see § 119.30*]. An alternative judgment does not give the prevailing party the privilege of either redelivery or payment of the value of the property at the other party's option. Rather, the other party is required to return the property if it is within his or her power to do so [*Griffith v. Reddick (1919) 41 Cal. App. 458, 462, 182 P. 984]* .

[2] When Alternative Judgment Not Required

A judgment that is not in the alternative pursuant to *Code Civ. Proc. § 667* is not necessarily void. For example, if a prevailing plaintiff has already obtained possession of the property in dispute, a judgment for its value is not required [*Erreca v. Meyer (1904) 142 Cal. 308, 310, 75 P. 826]* because the question of value is immaterial to the plaintiff, and a finding of value would be surplusage [*Webster v. Mountain Monarch G.M. Co. (1935) 6 Cal. App. 2d 450, 454, 44 P.2d 646]* . Similarly, if a prevailing defendant has retained possession of the property in dispute, a judgment for its value is not required. Conversely, a judgment for the return of property is not required when it is shown that judgment

for delivery of the property will be unavailing [*Erreca v. Meyer (1904) 142 Cal. 308, 310, 75 P. 826]* , such as when it appears that the property in dispute has been destroyed [*De Thomas v. Witherby (1882) 61 Cal. 92, 97]* or sold [*Moskovitz v. Le Francois (1932) 121 Cal. App. 310, 314, 8 P.2d 1049* (plaintiff sold furniture obtained with writ of possession to son pending trial); *Peterson v. First Nat. Bank (1929) 101 Cal. App. 532, 540, 281 P. 1104* (defendant sold disputed bonds)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesProvisional RemediesReplevins

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B. Action for Possession of Personal Property

12-119 California Forms of Pleading and Practice--Annotated § 119.30

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§ 119.30 Damages for Taking or Detention of Property

[1] Recoverable

At the same time the jury finds the value of the property, the jury may assess the damages claimed in the complaint or answer that the prevailing party has sustained because of the taking or detention of the property [*Code Civ. Proc. § 627*]. Similarly, judgment for the plaintiff may include damages for the detention of the property, and judgment for the defendant may include damages for taking and withholding the property [*Code Civ. Proc. § 667*].

The damages for detention or taking and withholding are the same whether the prevailing party recovers the property itself or its value [*Nelson v. Yonge (1925) 73 Cal. App. 704, 710, 239 P. 67]* . The prevailing party is entitled to such damages as will compensate him or her for all the detriment proximately caused [*Livestock G.P. Co. v. Union etc. Co. (1896) 114 Cal. 447, 450, 46 P. 286* ; *Ruzanoff v. Retailers Credit Asso. (1929) 97 Cal. App. 682, 686, 276 P. 156* ; *see Civ. Code § 3333* (damages for torts or wrongs as proximately caused detriment)]. Damages, therefore, must be reasonable [*see Civ. Code § 3359*]. The damages allowed in the action must approach the actual, usable, orreasonable value of the property to its owner while it was detained [*Bonestell v. Automotive F. Corp. (1924) 69 Cal. App. 719, 727, 232 P. 734]* .

[2] Interest or Rental Value

Ordinarily, loss of use and other injuries resulting from the taking and withholding of personal property may be fully compensated for by allowing the successful party to recover interest [*Civ. Code § 1915* (interest defined)] on the value of the property from the time of its taking [*Drinkhouse v. Van Ness (1927) 202 Cal. 359, 379, 260 P. 869]* or of demand to the date of the verdict [*Brandenburger v. Hanner (1929) 96 Cal. App. 396, 399, 274 P. 390]* .

However, if the value for the use of the detained property exceeds the interest computed for the deprivation of the property, the successful party is not limited to recovering interest. Rather, he or she may recover the reasonable value of the use of the property during the time he or she was wrongfully deprived of it up to the time of judgment [*Drinkhouse v. Van Ness (1927) 202 Cal. 359, 379, 260 P. 869]* , provided the value is not disproportionate to the gross value of the property itself [*Bonestell v. Automotive F. Corp. (1924) 69 Cal. App. 719, 727, 232 P. 734]* . However, damages for detention should not be computed at a flat rate based solely on the gross rental value of a chattel; rather, the correct measure of damages is the net usable value of the property less the expenses of keeping the property up [*Fran-Well Heater Co. v. Robinson (1960) 182 Cal. App. 2d 125, 132-133, 5 Cal. Rptr. 900]* .

[3] Depreciation

When property sought to be recovered diminishes in value while it is wrongfully detained, the depreciation in the value of the property is a proper element of damages [*Morris v. Allen (1911) 17 Cal. App. 684, 688, 121 P. 690* ; *Anglo-California Trust Co. v. Collins (1923) 192 Cal. 315, 317, 219 P. 982]* . Damages for depreciation are general damages because depreciation can be anticipated by the detaining party [*Berry v. Bank of Bakersfield (1918) 177 Cal. 206, 210, 170 P. 415]* . *Morris v. Allen (1911) 17 Cal. App. 684, 688, 121 P. 690]* , and, thus, they need not be specially pleaded in order to be recovered [*Morris v. Allen (1911) 17 Cal. App. 684, 688, 121 P. 690]* .

[4] Deterioration and Business Loss

Deterioration is a proper element of damages for the detention of personal property [*Anglo-California Trust Co. v. Collins (1923) 192 Cal. 315, 317, 219 P. 982* ; *McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 589, 33 Cal. Rptr. 389]* , as are business losses under the appropriate circumstances. For instance, a prevailing party is entitled to recover for the damage to and destruction of greeting cards during the course of their detention [*see McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 589-591, 33 Cal. Rptr. 389]* or for damages for the loss of provisions, merchandise, profits, and salary while store fixtures and groceries were wrongfully detained [*Ruzanoff v. Retailers Credit Asso. (1929) 97 Cal. App. 682, 686-687, 276 P. 156]* .

[5] Award of Exemplary Damages

When there is clear and convincing proof of oppression, fraud, or malice, the prevailing party may be awarded exemplary damages [*see Civ. Code § 3294*] in an action for possession of personal property [*Livestock G.P. Co. v. Union etc. Co. (1896) 114 Cal. 447, 450, 46 P. 286* ; *Tucker v. Hagerty (1918) 37 Cal. App. 789, 795, 174 P. 908]* . For discussion of exemplary damages, see *Ch. 177, Damages, § 177.40* et seq.

[6] Attorney's Fees Not Recoverable

Attorney's fees are not recoverable in an action for possession of personal property, in the absence of express contractual authority, because there is no express statutory authority for their allowance [*Spellens v. Spellens (1957) 49 Cal. 2d 210, 233, 317 P.2d 613* ; *LeFave v. Dimond (1956) 46 Cal. 2d 868, 870, 299 P.2d 858]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesDamagesPunitive DamagesCivil

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12-119 California Forms of Pleading and Practice--Annotated §§ 119.31through 119.39

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[Reserved]

§§ 119.31[Reserved]

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C. Provisional Remedy of Claim and Delivery

12-119 California Forms of Pleading and Practice--Annotated § 119.40

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§ 119.40 Scope

This part discusses the provisional remedy of claim and delivery of personal property and the procedures required to obtain that remedy. Part IV provides procedural checklists for plaintiff [§ 119.90] and defendant [§ 119.90]. Part V includes following forms for use in relation to the provisional remedy of claim and delivery:

- Notice of application [*see § 119.110*], application [*see § 119.111*], and order for a writ of possession [*see § 119.112*], and a writ [*see § 119.113*].

- Application for a temporary restraining order [*see § 119.111*], supporting declaration [*see § 119.114*], and an order [*see § 119.115*].

- Application [*see § 119.111*] and declaration for obtaining an ex parte writ of possession [*see § 119.116*].

- Application and notice of hearing for quashing an ex parte writ of possession [*see § 119.117*].

- Order for release and redelivery of property when an ex parte writ is quashed [*see § 119.118*].

For discussion, procedures, and forms relating to this part, see Ch. 62, *Attachment* and Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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C. Provisional Remedy of Claim and Delivery

12-119 California Forms of Pleading and Practice--Annotated § 119.41

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§ 119.41 Governing Statutes

The provisional remedy of claim and delivery is governed by *Code Civ. Proc. §§ 511.010-516.050*. Although it has not done so, the Judicial Council may provide rules for practice and procedure in claim and delivery proceedings [*Code Civ. Proc. § 516.010*]. In addition, the Judicial Council must prescribe the form for applications, notices, orders, and other documents required in claim and delivery proceedings [*Code Civ. Proc. § 516.020*; *see § 119.110* et seq., Judicial Council forms for use in claim and delivery proceedings].

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-119 California Forms of Pleading and Practice--Annotated § 119.42

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§ 119.42 Claim and Delivery of Personal Property

The provisional remedy of claim and delivery may be asserted to secure possession of personal property pending the outcome of an action [*see Sea Rail Truckloads, Inc. v. Pullman, Inc. (1982) 131 Cal. App. 3d 511, 514-515, 182 Cal. Rptr. 560* ; *Code Civ. Proc. § 512.010(a)*]. Courts and practitioners commonly refer to this remedy as one for a writ of possession.

To obtain provisional possession of personal property, the plaintiff must generally provide an undertaking and establish the probable validity of his or her claim to that property [*see Code Civ. Proc. § 512.060*; for further discussion, *see § 119.43[8][c]*].

Possession of the property is obtained by levying execution of a writ of possession [*see § 119.43, below*]. California courts may issue writs only if they are to be executed by a levying officer within California [*see Code Civ. Proc. §§ 17(b)(6)* (defining "process"), 71 (process of superior court extends through state) and *discussion under § 119.43[9]*].

PRACTICE TIP:

Advising Client of Costs. Before proceeding with the remedy, plaintiff's counsel should advise his or her client of the costs involved, which include not only the costs of obtaining the writ of possession, but of executing it [*see Code Civ. Proc. § 514.030(a)(1)* and *discussion under § 119.45[1]*]. The costs of

levy, installing a keeper, or storage of the property are expensive and may in some cases be prohibitive.

Legal Topics:

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12-119 California Forms of Pleading and Practice--Annotated § 119.43

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§ 119.43 Obtaining Writ of Possession

[1] Time Requirement

A plaintiff may apply for a writ of possession by filing a written application at the following times [*Code Civ. Proc. § 512.010(a)*]:

- At the time the complaint is filed.
- At any later time.

For the purposes of this provision, "plaintiff " includes a cross complainant and "complaint" includes a cross complaint [*Code Civ. Proc. §§ 511.020, 511.080*].

[2] Notice of Application

[a] Notice Generally Required

With specified exceptions, a plaintiff generally may not apply for a writ of possession ex parte; usually the writ will issue only after a noticed motion and hearing [*Code Civ. Proc. § 512.020(a)*]. Because the remedy of claim and delivery

is essentially a prejudgment seizure of personal property, the notice and hearing are necessary to satisfy constitutional due process requirements [*see Blair v. Pitchess (1971) 5 Cal. 3d 258, 283, 96 Cal. Rptr. 42, 486 P.2d 1242]* .

[b] Contents of Notice

The notice of application and hearing must inform the defendant of the following:

- That a hearing will be held on plaintiff's application at a time and place specified in the notice [*Code Civ. Proc. § 512.040(a)*; *see also* discussion regarding hearing date under § 119.43[5]].

- That the writ will be issued if the court finds that the plaintiff's claim is probably valid and the other requirements for issuing the writ are established. The hearing is not for the purpose of determining whether the claim is actually valid. The determination of the actual validity of the claim will be made in subsequent proceedings in the action andwill not be affected by the decision at the hearing on the application for the writ [*Code Civ. Proc. § 512.040(b)*].

- That, if the defendant desires to oppose the issuance of the writ, he or she must file either (1) an affidavit (or declaration) providing evidence sufficient to defeat the plaintiff's right to issuance of the writ or (2) an undertaking to stay the delivery of the property [*Code Civ. Proc. § 512.040(c)*; for discussion regarding opposing affidavits and undertakings, *see § 119.43[7]*].

The notice of application and hearing must also include the following statement [*Code Civ. Proc. § 512.040(d)*]:

> "If you believe the plaintiff may not be entitled to possession of the property claimed, you may wish to seek the advice of an attorney. Such attorney should be consulted promptly so that he or she may assist you before the time set for the hearing."

The Judicial Council form of Notice of Application for Writ of Possession and Hearing complies with these requirements. Although the Judicial Council forms for claim and delivery were approved for optional use, their use is standard.

For an illustration of the Judicial Council form of Notice of Application for Writ of Possession and Hearing, see *§ 119.110*. For discussion regarding service and filing of the notice and other moving papers, see *§ 119.43[5]*.

[3] Contents of Application

The application for a writ of possession must include all of the following:

- A showing of the basis of the plaintiff's claim and that the plaintiff is entitled to possession of the property claimed. If the basis of the plaintiff's claim is a written instrument, a copy of the instrument must be attached to the application [*Code Civ. Proc. § 512.010(b)(1)*].

- A showing that the property is wrongfully detained by the defendant and of the manner in which the defendant came into possession of the property [*Code Civ. Proc. § 512.010(b)(2)*].

- The reason for the detention according to the plaintiff's best knowledge, information, and belief [*Code Civ. Proc. § 512.010(b)(2)*].

- A particular description of the property and a statement of its value [*Code Civ. Proc. § 512.010(b)(3)*]. This description and statement must be completed with specificity.

- A statement of the location of the property according to the plaintiff's best knowledge, information, and belief. If the property or some part of it is within a private place, which may have to be entered to take possession, the application must include a showing that there is probable cause to believe that the property is located there [*Code Civ. Proc. § 512.010(b)(4)*; *see also Blair v. Pitchess (1971) 5 Cal. 3d 258, 274, 96 Cal. Rptr. 42, 486 P.2d 1242]* .

- A statement that the property has not been taken for a tax, assessment, or fine pursuant to a statute, and that it has not been seized under execution against plaintiff's property. If the property has been seized under an execution against plaintiff's property, the application must include a statement that the property is statutorily exempt from the seizure [*Code Civ. Proc. § 512.010(b)(5)*].

The application for a writ of possession must be executed under oath [*Code Civ. Proc. § 512.010(b)*; *see also Code Civ. Proc. § 2015.5* (use of declaration in lieu of oath)].

These requirements may be satisfied by affidavit (or declaration under *Code Civ. Proc. § 2015.5*) filed with the application [*see Code Civ. Proc. § 512.010(c)* and *discussion under § 119.43[4]*].

The Judicial Council form of Application for Writ of Possession complies with these requirements. Although the Judicial Council forms for claim and delivery were approved for optional use, their use is standard.

For an illustration of the Judicial Council form of Application for Writ of Possession, see *§ 119.111*. For discussion regarding service and filing of the application, see *§ 119.43[5]*.

[4] Supporting Declarations or Affidavits

The showing required to be included in an application for writ of possession (*discussed under § 119.43[3]*) may be satisfied by one or more affidavits (or declarations under *Code Civ. Proc. § 2015.5*) filed with the application [*Code Civ. Proc. § 512.010(c)*].

Any affidavit or declaration must set out facts with particularity. Except when matters are specifically permitted to be stated on information and belief, each affidavit or declaration in a claim and delivery proceeding must affirmatively show that the affiant or declarant, if sworn as a witness, can testify competently to the facts stated in the affidavit or declaration. The affiant or declarant may be any person who has knowledge of the facts whether or not he or she is a party to the action [*Code Civ. Proc. § 516.030*].

A verified complaint that meets the foregoing requirements may be used in lieu of or in addition to an ordinary affidavit or declaration [*Code Civ. Proc. § 516.030*].

PRACTICE TIP:

Avoid Reliance on Verified Complaint. Counsel for plaintiff should avoid relying on a verified complaint and whenever possible should use declarations instead, which set out the proper foundation and admissible evidence. A verified complaint is more likely to fall short of the requirements of *Code Civ. Proc. § 516.030*, for example, when the complaint has been verified by an officer on behalf of a corporate plaintiff or by plaintiff's attorney [*see Code Civ. Proc. § 446*].

[5] Service

Prior to the hearing on the application for a writ of possession, the plaintiff must serve the defendant with the following:

- A copy of the summons and complaint [*Code Civ. Proc. § 512.030(a)(1)*].

- A Notice of Application and Hearing (*discussed under § 119.43[2]*) [*Code Civ. Proc. § 512.030(a)(2)*].

- A copy of the application (*discussed under § 119.43[3]*) [*Code Civ. Proc. § 512.030(a)(3)*].

- A copy of any supporting affidavits or declarations (*discussed under § 119.43[4]*) [*Code Civ. Proc. § 512.030(a)(3)*].

- A copy of any supporting memorandum [*see Code Civ. Proc. § 512.050* (service required "within the time prescribed by rule")].

The Notice of Application and Hearing must be served on the defendant and filed within the notice period prescribed by *Code Civ. Proc. § 1005(b)* [*Code Civ. Proc. § 1005(a)(2)*].

NOTE:

Service of Application and Other Papers. *Code Civ. Proc. § 1005(a)(2)* refers only to the Notice of Application and Hearing. However, it is recommended that the application and any supporting declarations and supporting memorandum of points and authorities also be served with the notice. They must be served before the hearing in any event, and the time periods of *Code Civ. Proc. § 1005(b)* apply generally to "all moving and supporting papers."

If the defendant has not already been served with the a copy of the summons and complaint, the summons and complaint, together with the notice, application, and all other moving papers, should be served on defendant in the manner required for service of summons and complaint under *Code Civ. Proc. § 413.10 et seq.*].

Under *Code Civ. Proc. § 1005(b)*, all moving and supporting papers must be served and filed at least 16 court days before the hearing date [*Code Civ. Proc. § 1005(b)*; *see also Cal. Rules of Ct., Rule 3.1300*].

If service is by mail, the 16-day notice period is increased as follows [*Code Civ. Proc. § 1005(b)*]:

- By five calendar days if the place of mailing and the place of address are within the State of California.

- By 10 calendar days if either the place of mailing or the place of address is outside the State of California but within the United States.

- By 20 calendar days if either the place of mailing or the place of address is outside the United States.

If service is by facsimile transmission (fax), Express Mail, or overnight delivery, the 16-day period is increased by two calendar days [*Code Civ. Proc. § 1005(b)*]. An extension of two court days, as opposed to two calendar days, may apply in case of electronic service [*see Code Civ. Proc. § 1010.6(a)(6)*; for discussion, *see Ch. 518, Service of Summons and Papers, § 518.41[8]*].

The court, or a judge of the court, may prescribe a shorter time for notice [*Code Civ. Proc. § 1005(b)*; *see also Cal. Rules of Ct., Rule 3.1300(b)*].

PRACTICE TIP:

Selecting Hearing Date. When selecting a hearing date for the application, counsel must allow sufficient time to comply with the foregoing notice requirements, but should also consult local practice. Some courts require that the hearing date be cleared with the clerk.

[6] Filing

The application and related papers are filed with the court in which the action is brought [*Code Civ. Proc. § 512.010(a)*]. Filing must be accomplished at least 21 calendar days before the hearing date, and possibly earlier depending on the manner of service [*see Code Civ. Proc. §§ 1005(b), 1010.6(a)(6)*; *see also discussions under § 119.43[1], [5]*].

Proof of service of the moving papers must be filed no later than five court days before the hearing date [*Cal. Rules of Ct., Rule 3.1300(c)*].

PRACTICE TIP:

Consult Local Practice. Counsel should consult local rule or practice, which may specify where proof of service is to be filed.

[7] Opposing Papers

The defendant must file with the court and serve on the plaintiff any opposing affidavits (or declarations under *Code Civ. Proc. § 2015.5*) and memorandum that he or she intends to be relied on at the hearing [*see Code Civ. Proc. § 512.050*]. Service and filing must be accomplished no later than 9 court days before the hearing date [*see Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(a)*; *see also Code Civ. Proc. § 1010.6(a)(6)* (extension of time to respond in case of electronic service; for discussion, *see Ch. 518, Service of Summons and Papers, § 518.41[8]*)].

PRACTICE TIP:

Service by Overnight, Fax, or Personal Delivery. Somelocal rules require that service be completed in a manner that ensures receipt by other parties in sufficient time to submit a reply or prepare for the hearing, e.g., by personal service or overnight mail within 24 hours of filing. Opposing counsel should therefore consider sending papers by messenger service (or sending a courtesy copy by fax transmission) to avoid a continuance on ground that opposing papers were not received before the hearing [*see, e.g.*, Los Angeles Co. Super. Ct. Rules, Rule 7.12(b) (service on opposing counsel should be by personal delivery or fax when service by mail will prejudice the opposing party)].

For discussion of the requirements applicable to affidavits under *Code Civ. Proc. § 516.030*, see *§ 119.43[4]*.

[8] Hearing on Application for Writ

[a] Evidence Considered

At the hearing, the court makes its determination on the basis of the pleadings and other papers in the record (i.e., the application and the supporting and opposing declarations, points and authorities, etc.) [*Code Civ. Proc. § 512.050*].

On a showing of good cause, however, the court may do the following [*Code Civ. Proc. § 512.050*]:

- Receive and consider additional evidence and authority produced at the hearing.

- Continue the hearing either for the production of additional oral or documentary evidence or for the filing of additional affidavits or points and authorities.

[b] Failure to Oppose Application

A defendant's failure to oppose the issuance of a writ of possession or to rebut any evidence produced by the plaintiff in proceedings to obtain the writ does not constitute a waiver of any defense to plaintiff's claim in the action or any other action and does not have any effect on the defendant's right to produce or exclude evidence at the trial of any action [*Code Civ. Proc. § 512.100*].

[c] Conditions for Issuing Writ

A writ of possession is issued at the hearing only if the following are found:

- The plaintiff has established the probable validity of his or her claim to possession of the property [*Code Civ. Proc. § 512.060(a)(1)*]. A claim has probable validity when it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim [*Code Civ. Proc. § 511.090*].

- The plaintiff has provided an undertaking [*Code Civ. Proc. § 512.060(a)(2)*; *see Code Civ. Proc. § 515.010*; for discussion, *see § 119.47*].

- In the case of a writ directing the levying officer to enter a private place to take possession of property, the plaintiff has established that there is probable cause to believe that the property is located there [*Code Civ. Proc. § 512.060(b)*].

[9] Contents of Writ

A writ of possession must do all the following:

- Be directed to a levying officer in the jurisdiction where the property is located [*Code Civ. Proc. § 512.080(a)*].

- Describe the specific property to be seized [*Code Civ. Proc. § 512.080(b)*].

- Specify any private place that may be entered to take possession of part or all of the property [*Code Civ. Proc. § 512.080(c)*].

- Direct the levying officer to levy on the property if the property is found and to retain it in his or her custody until released or sold [*Code Civ. Proc. § 512.080(d)*].

- Inform the defendant that he or she has the right to object to the plaintiff's undertaking, a copy of which must be attached to the writ, or to obtain redelivery of the property by filing an undertaking [*Code Civ. Proc. § 512.080(e)*; *see Code Civ. Proc. § 515.020* and *discussion under § 119.47*].

For discussion regarding execution of the writ, see *§ 119.45*.

[10] Turnover Order

If a writ of possession is issued, the court may also issue an order directing the defendant to transfer possession of the property to the plaintiff. Such an order must include a notice to the defendant that failure to turn over possession of the property to plaintiff may subject the defendant to contempt [*Code Civ. Proc. § 512.070*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesWritsGeneral Overview

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Chapter 119 CLAIM AND DELIVERY
PART II. LEGAL BACKGROUND
C. Provisional Remedy of Claim and Delivery

12-119 California Forms of Pleading and Practice--Annotated § 119.44

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§ 119.44 Obtaining Temporary Restraining Order

[1] Available to Prevent Transfer of Property

At or after the time a plaintiff files his or her application for a writ of possession, the plaintiff may also apply for a temporary restraining order to prevent the defendant from transferring any interest in the property or from otherwise disposing of or encumbering the property [*see Code Civ. Proc. § 513.010*]. The law governing temporary restraining orders ingeneral (*see Code Civ. Proc. § 525 et seq.*) applies, unless otherwise provided in the claim and delivery provisions discussed below [*Code Civ. Proc. § 513.010(a)*]. For discussion of the general provisions governing temporary restraining orders, see Ch. 303, *Injunctions* .

[2] Grounds Justifying Ex Parte Issuance

The plaintiff must set forth in the application a statement of the grounds justifying the ex parte order [*Code Civ. Proc. § 513.010(a)*]. A court may issue a temporary restraining order ex parte if the plaintiff does the following [*Code Civ. Proc. § 513.010(b)*]:

- Establishes the probable validity of his or her claim to possession of the property (*see discussion under § 119.43[8][c]*).

- Provides an undertaking (*see discussion under § 119.43[8][c]* and *§ 119.47*).

  PRACTICE TIP:
  Prior Arrangement for Bond. Plaintiff's counsel should make prior arrangements with a bonding company for the immediate issuance of a bond.

- Establishes the probability that there is an immediate danger that the property claimed may be transferred, concealed, removed, or substantially impaired in value, and thus, unavailable to levy.

The Judicial Council form of Application for Writ of Possession, which includes an application for a temporary restraining order, and the Judicial Council form of Declaration for Temporary Restraining Order comply with these requirements. Although the Judicial Council forms for claim and delivery were approved for optional use, their use is standard.

For illustrations of the Judicial Council forms of Application for Writ of Possession and Declaration for Temporary Restraining Order, see *§§ 119.111, 119.114*

[3] Acts That May Be Restrained

A temporary restraining order may prohibit the defendant from doing any of the following:

- Transferring any interest in the property by sale, pledge, or grant of security interest [*Code Civ. Proc. § 513.020(a)*].

- Otherwise disposing of, or encumbering, the property [*Code Civ. Proc. § 513.020(a)*].

- Concealing or otherwise removing the property in a manner likely to make it less available to seizure by the levying officer [*Code Civ. Proc. § 513.020(b)*].

- Impairing the value of the property by destroying it or by failing to care for it in a reasonable manner [*Code Civ. Proc. § 513.020(c)*].

If the property is farm products held for sale or lease or is inventory, the temporary restraining order may not prohibit the defendant from transferring the property in the ordinary course of business. The order may instead impose appropriate restrictions on the disposition of the proceeds from any such transfer [*Code Civ. Proc. § 513.020(a)*]. For the purposes of this provision, the following definitions apply:

- "Farm products" mean crops, livestock, supplies used or produced in farming operations, or products of crops or livestock in their unmanufactured state (such as ginned cotton, wool clip, maple syrup, honey, milk, and eggs) while in the possession of a defendant engaged in raising, fattening, grazing, or other farming operations [*Code Civ. Proc. § 511.040*].

- "Inventory" means tangible personal property in the possession of a defendant who holds it for sale or lease or to be furnished under contracts of service [*Code Civ. Proc. § 511.050*].

[4] Period of Effectiveness

At the hearing on the application, the court must dissolve the temporary restraining order if the court finds that the plaintiff is not entitled to the writ. If the court finds that the plaintiff is entitled to the writ, it may issue a preliminary injunction to take the place of the temporary restraining order, which may remain in effect until the property claimed is

seized under the writ [*Code Civ. Proc. § 513.010(c)*].

Thus, the temporary restraining order is generally effective only until the hearing on the application. The hearing must generally be set within 15 days of issuance of the TRO, unless the courts sets the hearing up to 20 days after issuance for good cause, or the parties stipulate to a later date [*see Code Civ. Proc. § 527(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureRemediesProvisional RemediesGeneral Overview

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PART II. LEGAL BACKGROUND
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12-119 California Forms of Pleading and Practice--Annotated § 119.45

AUTHOR: Hon. Robert H. O'BrienEdythe L. Bronston, Esq.Alan M. Mirman, Esq.David J. Pasternak, Esq. Contributing Editors Part II of this chapter was adapted from California Practice Handbook: Provisional Remedies (Matthew Bender), Litigation Section, Los Angeles County Bar Association, Handbook Editor; Hon. Robert H. O'Brien, Edythe L. Bronston, Alan M Mirman, David J. Pasternak, Contributing Editors. Judge O'Brien is a judge of the Los Angeles County Superior Court, conducting both civil and criminal trials. Ms. Bronston is a partner with Fierstein & Sturman in Los Angeles, practicing mainly in the area of creditors' rights. Mr. Mirman is a partner in Horgan, Rosen, Beckham & Coren, located in the Toluca Lake area of Los Angeles, and specializes in the representation of financial institutions. Mr. Pasternak is a partner with the firm of Appleton, Pasternak & Pasternak in Los Angeles, practicing in all aspects of business litigation, including appointments as a receiver, referee, and corporate appraiser.

§ 119.45 Execution of Writ

[1] Levy of Property by Levying Officer

On receipt of a writ of possession, the levying officer must search for and take custody of the specified property in the possession of the defendantor the defendant's agent by removing the property to a place of safekeeping or by installing a keeper [*Code Civ. Proc. § 514.010(a)*; *see Code Civ. Proc. § 511.060* (defining levying officer)].

If the specified property is used as a dwelling, such as a mobilehome or boat, levy is made by placing a keeper in charge of the property for two days at the plaintiff's expense. After two days, the levying officers must remove the occupants and any contents not specified in the writ and take exclusive possession [*Code Civ. Proc. § 514.010(b)*].

If the specified property or any part of it is in a private place, the levying officer must announce his or her identity, purpose, and authority at the time he or she demands possession of the property. If the property is not voluntarily delivered, the levying officer may cause any building or enclosure where the property may be located to be broken open in a manner he or she reasonably believes will cause the least damage. The levying officer may call on the power of the county to aid and protect him or her in entering and seizing the property [*Code Civ. Proc. § 514.010(c)*]. However, if the levying officer reasonably believes that entry and seizure of the property will involve a substantial risk of death or serious bodily harm to any person, he or she must refrain from seizing the property and promptly make a return to the

court from which the writ issued. The return must set forth the reasons for his or her belief that the risk exists, and the court may make any appropriate orders [*Code Civ. Proc. § 514.010(c)*].

[2] Search of Private Place Not Specified in Writ

A levying officer is not authorized to enter or search any private place not specified in the writ of possession or other court order [*Code Civ. Proc. § 514.010(d)*]. However, the plaintiff may apply ex parte in writing for an endorsement on the writ directing the levying officer to seize the property at a private place not specified in the writ. The court is required to make such an endorsement if the plaintiff establishes by affidavit that there is probable cause to believe that some or all or the property may be found at that place [*Code Civ. Proc. § 512.090*].

[3] Delivery or Service of Copy of Writ

At the time of levy, the levying officer must deliver to the person in possession of the property a copy of the writ of possession with a copy of the plaintiff's undertaking attached, if any, and a copy of the order for issuance of the writ [*Code Civ. Proc. § 514.020(a)*]. If no one is in possession of the property at the time of levy, the levying officer must serve the writ and attached undertaking on the defendant. If the defendant has appeared in the action, service may be made in the manner of notices or other papers [*Code Civ. Proc. § 514.020(b)*; *see Code Civ. Proc. § 1010 et seq.*]. If the defendant has not yet appeared (i.e., if the writ was issued ex parte) service must be in the manner of a summons and complaint [Code*Civ. Proc. § 514.020(b)*; *see Code Civ. Proc. § 415.10 et seq.*]. For discussion of these manners of service, see Ch. 518, *Service of Summons and Papers* .

[4] Disposition of Property by Levying Officer

After taking possession of property under a writ of possession, the levying officer must keep the property in a secure place. Except as provided under *Code Civ. Proc. § 512.020* (*discussed under § 119.46[4]*) and *Code Civ. Proc. § 514.050* (*discussed under § 119.49*), the property held by the levying officer is disposed of as follows:

- If the levying officer does not receive, within 10 days after levy of the writ of possession, a notice from defendant of either the filing of an undertaking for redelivery or an objection to plaintiff's undertaking, the levying officer must deliver the property to the plaintiff on receiving his or her fees for taking and necessary expenses for keeping the property [*Code Civ. Proc. § 514.030(a)(1)*; *see Security Pacific Nat. Bank v. Goodman (1972) 24 Cal. App. 3d 131, 134, 100 Cal. Rptr. 763]* .

- If the levying officer receives, within 10 days after levy of the writ of possession, a notice from defendant of the filing of an undertaking for redelivery, and the defendant's undertaking is not objected to, the levying officer must redeliver the property to the defendant on the expiration of the time for plaintiff's objection, on receiving from defendant any additional fees for taking and keeping the property that have not already been paid or advanced by the plaintiff [*Code Civ. Proc. § 514.030(a)(2)*].

- If the levying officer receives, within 10 days after levy of the writ of possession, a notice from defendant of objection to plaintiff's undertaking or of the filing of an undertaking for redelivery, and the plaintiff makes a timely objection to the defendant's undertaking, the levying officer must not deliver or redeliver the property until the court has determined the sufficiency of the defendant's undertaking [*Code Civ. Proc. § 514.030(a)(3)*; *see Code Civ. Proc. § 515.030*].

For further discussion regarding the filing and determination of sufficiency of undertakings by the plaintiff and defendant, see *§ 119.48*.

Notwithstanding these provisions, the court may order that the property be sold and the proceeds deposited in the court

to abide the judgment in the action, when the property is perishable or will greatly deteriorate or depreciate in value or, for some other reason, the interests of the parties will be best served by the sale [*Code Civ. Proc. § 514.030(b)*]. An order to sell may not issue, however, if a contract provides otherwise or if an undertaking for redelivery has been filed [*Code Civ. Proc. § 514.030(b)*].

PRACTICE TIP:

Sale of Property. If plaintiff obtains delivery of the property,and its sale is permitted under contract, plaintiff's counsel should nonetheless apply for an order permitting sale under *Code Civ. Proc. § 514.030(b)*, particularly if the property is nonperishable. If sold, the plaintiff will be unable to return the property to defendant in the event that plaintiff fails to obtain judgment [*see discussion under § 119.49*].

[5] Return of Writ

The levying officer must return the writ of possession, together with his or her proceedings on the writ, to the court in which the action is pending within 30 days after the levy but not more than 60 days after the writ is issued [*Code Civ. Proc. § 514.040*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesWritsGeneral Overview

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12-119 California Forms of Pleading and Practice--Annotated § 119.46

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§ 119.46 Ex Parte Application for Writ

[1] Conditions for Ex Parte Issuance of Writ

Although a defendant must generally be afforded notice and an opportunity for a hearing before he or she is deprived of any significant property interest, a writ of possession may be issued ex parte if probable cause appears that any of the following conditions exist:

- The defendant has gained possession of the property by feloniously taking it from the plaintiff, except when the defendant has fraudulently appropriated property entrusted to him or her or has obtained possession of it by false or fraudulent representation, pretense, or embezzlement [*Code Civ. Proc. § 512.020(b)(1)*].

- The property is a credit card [*Code Civ. Proc. § 512.020(b)(2)*].

- The defendant acquired possession of the property in the ordinary course of his or her trade or business and all the following are shown [*Code Civ. Proc. § 512.020(b)(3)*; *see Blair v. Pitchess (1971) 5 Cal. 3d 258, 278-279, 96 Cal. Rptr. 42, 486 P.2d 1242* (due process limitations on claim and delivery; former California statute held unconstitutional)]:

- The property is not necessary for the support of defendant or his or her family.

- There is an immediate danger that the property will become unavailable to levy because it will be transferred, concealed, or removed from California or that the property will become substantially impaired in value because of acts of destruction or the failure to take care of the property in a reasonable manner.

- The ex parte issuance of a writ of possession is necessary to protect the property.

[2] Requirements

The plaintiff's application for an ex parte writ of possession must satisfy the requirements for applications for writs of possession under *Code Civ. Proc. § 512.010* [*Code Civ. Proc. § 512.020(b)*; for discussion regarding *Code Civ. Proc. § 512.010, see § 119.43[3]* and *§ 119.43[4]*].

The application must, in addition, satisfy the requirements warranting ex parte issuance [*Code Civ. Proc. § 512.020(b)*; *see discussion under § 119.46[1]*].

The Judicial Council form of Application for Writ of Possession and the Judicial Council form of Declaration for Ex Parte Writ of Possession comply with these requirements. Although the Judicial Council forms for claim and delivery were approved for optional use, their use is standard.

For illustrations of the Judicial Council forms of an Application for Writ of Posession and a Declaration for Ex Parte Writ of Possession, see *§§ 119.111*, *119.116*.

[3] Issuance

A court may issue a writ of possession on ex parte application only if it finds the following [*Code Civ. Proc. § 512.020(b)*]:

- Conditions warranting ex parte relief under *Code Civ. Proc. § 512.020(b)* exist (*discussed under § 119.46[1]*).

- The other requirements for issuance under *Code Civ. Proc. § 512.060* are met (*discussed under § 119.43[8][c]*).

PRACTICE TIP:
Issuance on Ex Parte Application Is Not Routine. Supporting evidence must clearly show the need for ex parte relief. In many courts such relief is rarely issued, as the issuance of a temporary restraining order is deemed to provide adequate protection pending a noticed hearing.

[4] Service of Papers

When an ex parte writ is issued, the plaintiff must serve the following on the defendant or any other person required to be served under *Code Civ. Proc. § 514.020* (*discussed under § 119.45[3]*) [*Code Civ. Proc. § 512.020(b)*]:

- A copy of the summons and complaint.

- A copy of the application for the writ.

- Any supporting affidavits (or declarations under *Code Civ. Proc. § 2015.5*).

- A notice that satisfies the requirements of *Code Civ. Proc. § 512.040(c)* and *(d)* (*discussed under § 119.43[2][b]*).

[5] Motion to Quash Writ

Any defendant whose property has been taken under an ex parte writ of possession may apply for an order to quash the writ and release the property levied on. The application must be made by noticed motion, and the provisions of *Code Civ. Proc. § 512.050* apply [*Code Civ. Proc. § 512.020(b)*]. *Code Civ. Proc. § 512.050* requires each party to serve and file, within the time prescribed by rule, supporting or opposing affidavits and points and authorities [*see also discussion under § 119.43[5]*]. Pending the hearing on the motion, the court may order that delivery of any property previously levied on be stayed [*Code Civ. Proc. § 512.020(b)*].

The Judicial Council form of Application and Notice of Application and Hearing for Order to Quash Ex Parte Writ of Possession complies with these requirements. Although the Judicial Council forms for claim and delivery were approved for optional use, their use is standard. For an illustration of the Judicial Council form of Application and Notice of Application and Hearing for an Order to Quash an Ex Parte Writ of Possession, see *§ 119.117*. If the court determines that the plaintiff is not entitled to a writ of possession, it must quash the ex parte writ and order the release and redelivery of any property previously levied on. The court also must award the defendant any damages sustained by him or her which were proximately caused by the levy of the writ of possession and the loss of possession of the property under the levy [*Code Civ. Proc. § 512.020(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesWritsGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral Overview

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PART II. LEGAL BACKGROUND
C. Provisional Remedy of Claim and Delivery

12-119 California Forms of Pleading and Practice--Annotated § 119.47

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§ 119.47 Undertakings

[1] Required Undertaking by Plaintiff

A court may not issue a temporary restraining order or a writ of possession until the plaintiff has filed a written undertaking with the court [*Code Civ. Proc. § 515.010*]. The primary purpose of the undertaking is to indemnify the defendant against the consequence of a taking that may later be adjudged to be wrongful [*see Symes Cadillac, Inc. v. Insurance Co. of North America (1977) 66 Cal. App. 3d 905, 909, 136 Cal. Rptr. 356* (decided under former *Code Civ. Proc. § 512*)].

The undertaking must provide that the sureties are bound to the defendant for the return of the property to the defendant if return of the property is ordered, and for payment to the defendant of any sum recovered against plaintiff [*Code Civ. Proc. § 515.010*].

The undertaking must be in an amount not less than twice the value of defendant's interest in the property. The value of the defendant's interest in the property is determined by the market value of the property less the amount due and owing on any conditional sales contract or security agreement and all liens and encumbrances of the property, and such other factors as may be necessary to determine the defendant's interest in the property [*Code Civ. Proc. § 515.010*].

CAUTION:

Avoid Minimal Undertakings. If the debt owed exceeds the fair market value of the property, a "zero" undertaking theoretically complies with *Code Civ. Proc. § 515.010*. Plaintiffs should, however, avoid a minimal undertaking, because in such a case the defendant may obtain redelivery by filing an undertaking equal to plaintiff's undertaking [*see discussion under § 119.47[2]*]. Plaintiff must therefore post a substantial bond or be prepared to seek an order requiring a higher redelivery bond.

The defendant may object to the plaintiff's undertaking not later than 10 days after levy of the writ of possession by mailing notice of objection to the levying officer [*Code Civ. Proc. § 515.030(a)*; *see Code Civ. Proc. § 995.910 et seq.*].

If the court determines that the plaintiff's undertaking is insufficient and a sufficient undertaking is not filed within the time required by statute (*see Code Civ. Proc. § 995.960(b)(1)*), the court must vacate the temporary restraining order or preliminary injunction, if any, and the writ of possession. If levy has occurred, the court must also order the levying officer or the plaintiff to return the property to the defendant. If the court determines that the plaintiff's undertaking is sufficient, the court must order the levying officer to deliver the property to the plaintiff [*Code Civ. Proc. § 515.030(c)*].

If the defendant does not object to the undertaking, he or she waives all objections except on a showing of good cause for failure to make the objection within the time required by statute or of changed circumstances [*Code Civ. Proc. § 995.930(c)*].

[2] Optional Undertaking by Defendant

The defendant may prevent the plaintiff from taking possession of property under a writ of possession or may regain possession of property so taken by filing with the court in which the action was brought an undertaking in an amount equal to the plaintiff's undertaking or in an amount determined by the court pursuant to *Code Civ. Proc. § 515.010(b)* [*Code Civ. Proc. § 515.020(a)*; *see discussion under § 119.47[1]*]. The undertaking must state that if the plaintiff recovers judgment on the action, the defendant will pay all costs awarded to the plaintiff and all damages that the plaintiff may sustain by reason of the loss of possession of the property. The damages recoverable by the plaintiff include all damages proximately caused by the plaintiff's failure to gain or retain possession [*Code Civ. Proc. § 515.020(a)*].

The defendant may file the undertaking at any time before or after the levy of the writ of possession. The defendant must mail a copy of the undertaking to the levying officer and to the plaintiff and must prepare anaffidavit (or declaration under *Code Civ. Proc. § 2015.5*) stating that these copies have been mailed. The affidavit or declaration is filed with the court at the time the undertaking is filed [*Code Civ. Proc. §§ 515.020(b), 995.340, 995.370*].

If an undertaking for redelivery is filed and the defendant's undertaking is not objected to, the levying officer must deliver the property to the defendant, or, if the plaintiff has previously been given possession of the property, the plaintiff must deliver the property to the defendant [*Code Civ. Proc. § 515.020(d)*].

The plaintiff may object to the defendant's undertaking not later than 10 days after the defendant's undertaking is filed, by mailing notice of objection to the levying officer [*Code Civ. Proc. § 515.030(b)*; *see Code Civ. Proc. § 995.910 et seq.*].

If the court determines that the defendant's undertaking is insufficient and a sufficient undertaking is not filed within the time required by statute (*see Code Civ. Proc. § 995.960(b)(1)*), the court must order the levying officer to deliver the property to plaintiff, or if the plaintiff has previously been given possession of the property, the plaintiff may retain possession. If the court determines that the defendant's undertaking is sufficient, the court must order the levying officer or the plaintiff to deliver the property to the defendant [*Code Civ. Proc. § 515.030(d)*].

If the plaintiff does not object to the undertaking, he or she waives all objections except on a showing of good cause for

failure to make the objection within the time required by statute or of changed circumstances [*Code Civ. Proc. § 995.930(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesWritsGeneral Overview

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12-119 California Forms of Pleading and Practice--Annotated § 119.48

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§ 119.48 Third-Party Claims

When the property taken pursuant to a writ of possession is claimed by a third person, the rules and proceedings applicable in cases of third-party claims (*Code Civ. Proc. § 720.010 et seq.*) apply [*Code Civ. Proc. § 514.050*]. For discussion of third-party claims under *Code Civ. Proc. § 720.010 et seq.*, see Ch. 254, *Executions and Enforcement of Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesGeneral OverviewCivil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesWritsGeneral Overview

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12-119 California Forms of Pleading and Practice--Annotated § 119.49

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§ 119.49 Redelivery by Plaintiff on Failure to Obtain Judgment

A plaintiff failing to recover judgment in an action must redeliver the property to the defendant [*Code Civ. Proc. § 512.120*]. In addition, the plaintiff is liable for all damages sustained by the defendant which are proximately caused by any of the following [*Code Civ. Proc. § 512.120*]:

- The operation of the temporary restraining order and preliminary injunction, if any.
- The levy of the writ of possession.
- The loss of possession of the property under the levy of the writ of possession or an order directing transfer of the property to the plaintiff.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesProvisional RemediesGeneral Overview

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12-119 California Forms of Pleading and Practice--Annotated § 119.50

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§ 119.50 Relevance of Court's Determinations to Other Actions

The court's determinations in claim and delivery proceedings under *Code Civ. Proc. § 511.010 et seq.* have no effect on the determination of any issues other than issues relevant to the claim and delivery proceedings. In addition, the court's determinations in claim and delivery proceedings do not affect the rights of any party in any other action arising out of the same claim. Indeed, the court's determinations cannot be given in evidence and cannot be referred to in the trial of the action [*Code Civ. Proc. § 512.110*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral OverviewCivil ProcedureRemediesProvisional RemediesGeneral Overview

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12-119 California Forms of Pleading and Practice--Annotated §§ 119.51through 119.59

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[Reserved]

§§ 119.51[Reserved]

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A. Distinction Between Action and Remedy

12-119 California Forms of Pleading and Practice--Annotated § 119.60

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§ 119.60 Federal Statutes

Definitions under Servicemembers Civil Relief Act (*50 U.S.C. App. § 501 et seq.*). *50 U.S.C. App. § 511*

Application of act to states. *50 U.S.C. App. § 512*

Additional persons protected. *50 U.S.C. App. §§ 514, 516, 538*

Stays. *50 U.S.C. App. §§ 522, 525*

Restrictions on repossession under installment sales contract. *50 U.S.C. App. §§ 532, 534*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesReplevinsContracts LawTypes of ContractsInstallment ContractsMilitary & Veterans LawServicemembersGeneral Overview

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12-119 California Forms of Pleading and Practice--Annotated §§ 119.61through 119.69

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[Reserved]

§§ 119.61[Reserved]

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B. Action for Possession of Personal Property

12-119 California Forms of Pleading and Practice--Annotated § 119.70

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§ 119.70 State Statutes

[1] Right of Possession

Right of person entitled to immediate possession of personal property to recover it. *Civ. Code § 3379*

Compelling delivery of personal property to person entitled to its immediate possession. *Civ. Code § 3380*

[2] Judgment for Recovery

Verdict in action for possession of personal property as required to find value of property. *Code Civ. Proc. § 627*

Entry of judgment in conformity with court's decision. *Code Civ. Proc. § 664*

Judgment in action for possession of personal property in alternative for possession or value. *Code Civ. Proc. § 667*

[3] Statement of Decision

Request for statement of decision. *Code Civ. Proc. § 632*

[4] Damages

Damages for taking or detention. *Code Civ. Proc. §§ 627, 667*

Interest on awarded damages. *Civ. Code § 3287*

Interest as damages. *Civ. Code § 3288*

Exemplary and punitive damages. *Civ. Code § 3294*

Damages as proximately caused detriment. *Civ. Code § 3333*

[5] Statute of Limitations

Actions for specific recovery of personal property and for taking, detaining, or injuring of goods or chattels as required to be brought within three years. *Code Civ. Proc. § 338(c)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesDamagesPunitive DamagesCivil ProcedureRemediesProvisional RemediesReplevinsGovernmentsLegislationStatutes of LimitationsTime Limitations

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12-119 California Forms of Pleading and Practice--Annotated § 119.71

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§ 119.71 Decisions

[1] Who May Bring Action

Plaintiff as not having right to bring action to recover possession of personal property against defendant when property at issue is in possession of defendant's adult daughter. *Simonian v. Patterson (1994) 27 Cal. App. 4th 773, 783, 32 Cal. Rptr. 2d 722*

If contract gives mortgagee right to take possession of property in event of default, mortgagee as entitled to use action for possession of personal property on default to secure its possession. *Podrat v. Oberndorff (1929) 207 Cal. 457, 459, 278 P. 1035* ; *Elmore Jameson Co. v. Smith (1939) 34 Cal. App. 2d 609, 613, 93 P.2d 1063*

Plaintiff as not having right to bring action for possession of personal property against defendant who has lien on property that is dependent on possession. *Sutton v. Stephan (1894) 101 Cal. 545, 548, 36 P. 106*

[2] Action for Possession of Personal Property

Complaint in action for possession of personal property as insufficient if it does not allege plaintiff's ownership and

right to possession at time of commencement of action. *Vanalstine v. Whelan (1901) 135 Cal. 232, 233, 67 P. 125* ; *Harris v. Smith (1901) 132 Cal. 316, 317, 64 P. 409* ; *Bane v. Peerman (1899) 125 Cal. 220, 221, 57 P. 885* ; *Truman v. Young (1898) 121 Cal. 490, 491, 53 P. 1073*

Allegation that demand was made by plaintiff as not showing either general or special ownership or any right to possession in plaintiff. *Truman v. Young (1898) 121 Cal. 490, 491, 53 P. 1073*

Writ of possession, not injunction, is appropriate remedy for a secured party to obtain possession of collateral. *Simms v. NPCK Enterprises, Inc. (2003) 109 Cal. App. 4th 233, 243, 134 Cal. Rptr. 2d 557*

Defendant as required to deny that plaintiff is entitled to immediate possession of personal property or plaintiff is entitled to judgment on the pleadings. *Feigin v. Kutchor (1951) 105 Cal. App. 2d 744, 747, 234 P.2d 264* (holding, however, that plaintiff was not entitled to reversal of judgment when plaintiff failed to raise issue of defect of defendant's answer)

Essential allegations in complaint for possession of personal property as (1) title in plaintiff to property demanded; (2) right to possession in plaintiff when action commenced; (3) actual possession of property by defendant; and (4) demand for possession and refusal to deliver when defendant's possessioninitially lawful. *Stockton M.P. Co. v. Mariposa County (1950) 99 Cal. App. 2d 210, 213, 221 P.2d 232*

Complaint as not required to state grounds forming basis for allegations of ultimate facts of plaintiff's ownership of chattel, plaintiff's right to possession when action commenced, and defendant's wrongful possession of chattel. *Stockton M.P. Co. v. Mariposa County (1950) 99 Cal. App. 2d 210, 213, 221 P.2d 232*

[3] Action by Lienholder

Lien on property as extinguished when pledgee, while making no objection to amount of tender, refuses to accept it and does not surrender the pledge. *Latta v. Tutton (1898) 122 Cal. 279, 283, 54 P. 844*

Duly made tender of amount of obligation discharging lien given as collateral security for it. *Wagner v. Shoemaker (1938) 29 Cal. App. 2d 654, 657, 85 P.2d 229*

Valid tender of full amount due to defendants as discharging lien and entitling plaintiff to prompt delivery of property. *Bogue v. Roeth (1929) 98 Cal. App. 257, 261, 276 P. 1071*

Failure to comply with demand for delivery as creating liability against defendants for all damages accruing as a result. *Bogue v. Roeth (1929) 98 Cal. App. 257, 261, 276 P. 1071*

Specific allegation of tender of money as sufficient against answer or demurrer which merely denies plaintiff's right to possession. *Bogue v. Roeth (1929) 98 Cal. App. 257, 262, 276 P. 1071*

[4] Property Recoverable

Former corporate employee's complaint alleging that specific stock certificates held as pledge for debt had been wrongfully withheld by defendant corporation after plaintiff had offered to repay debt and seeking their redelivery as stating claim for recovery of personal property [*Civ. Code § 3380*] and not for specific performance [*Civ. Code § 3384*] of employment contract. *Englert v. IVAC Corp. (1979) 92 Cal. App. 3d 178, 185, 154 Cal. Rptr. 804*

[5] Description of Property

Rules that personal property be described with reasonable degree of certainty in actions involving personal property as especially applicable to actions for possession of personal property because property is to be specifically returned to plaintiff. *Hawley v. Kocher (1898) 123 Cal. 77, 82, 55 P. 696* ; *Hillyer v. Eggers (1917) 32 Cal. App. 764, 766, 164 P. 27*

Description of personal property claimed by plaintiff as "sundries," without averment of quality, quantity, value, or price and without lump description of property as situated in a certain building or at a certain place, as insufficient. *Hawley v. Kocher (1898) 123 Cal. 77, 83, 55 P. 696*

Objection to complaint on ground of defects in describing 110 paintings alleged to be held wrongfully by defendant as required to be raised by demurrer for uncertainty and not by appeal from judgment for plaintiff. *Orchardson v. Christie (1916) 30 Cal. App. 8, 9, 157 P. 547*

[6] Damages For Taking or Retention of Property

Compensatory damages based on value of reasonable use of wrongfully detained automobile as valid when those damages were reasonable and provable even though in excess of value of automobile. *Harris v. Dixon Cadillac Co. (1982) 132 Cal. App. 3d 485, 492, 183 Cal. Rptr. 299*

[7] Judgment for Posession of Personal Property

Code Civ. Proc. § 667 as providing for judgment for recovery of personal property to be in alternative. *Brandenburger v. Hanner (1929) 96 Cal. App. 396, 399, 274 P. 390*

Code Civ. Proc. § 664 as requiring that, when jury's verdict is in alternative, judgment is also to be in alternative. *Benson v. Olender (1926) 77 Cal. App. 287, 289, 246 P. 345*

Under *Code Civ. Proc. § 667*, value of property to be delivered and damages for its detention as constituting separate and independent items. *Morris v. Allen (1911) 17 Cal. App. 684, 688, 121 P. 690*

[8] Statute of Limitations

Former *Code Civ. Proc. § 338(3)* (now *Code Civ. Proc. § 338(c)*) requiring actions for specific recovery of personal property or for detention of personal property to be brought within three years as applicable to actions for possesion of personal property. *Latta v. Tutton (1898) 122 Cal. 279, 284, 54 P. 844*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesDamagesPunitive DamagesCivil ProcedureRemediesProvisional RemediesReplevinsGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 119.72 Text References

[1] Claim and Delivery

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 651-659 (4th ed. 1997)

[2] Conversion

Witkin, California Procedure, Vol. 3, *Actions*, §§ 567-573 (4th ed. 1996)

[3] Judgment and Recovery

Witkin, California Procedure, Vol. 7, *Judgment*, §§ 32, 89 (4th ed. 1997)

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B. Action for Possession of Personal Property

12-119 California Forms of Pleading and Practice--Annotated §§ 119.73through 119.79

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[Reserved]

§§ 119.73[Reserved]

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C. Provisional Remedy of Claim and Delivery

12-119 California Forms of Pleading and Practice--Annotated § 119.80

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§ 119.80 State Statutes

[1] Definitions

Complaint. *Code Civ. Proc. § 511.020*

Defendant. *Code Civ. Proc. § 511.030*

Farm products. *Code Civ. Proc. § 511.040*

Inventory. *Code Civ. Proc. § 511.050*

Levying officer. *Code Civ. Proc. § 511.060*

Person. *Code Civ. Proc. § 511.070*

Plaintiff. *Code Civ. Proc. § 511.080*

Probable validity. *Code Civ. Proc. § 511.090*

Public entity. *Code Civ. Proc. § 511.100*

[2] Writ of Possession

Conditions for issuance of ex parte writ. *Code Civ. Proc. § 512.020(b)*

Conditions for issuance of writ generally. *Code Civ. Proc. § 512.060*

Issuance of order directing transfer of property to plaintiff. *Code Civ. Proc. § 512.070*

Direction and contents of writ. *Code Civ. Proc. § 512.080*

Ex parte application for endorsement on writ. *Code Civ. Proc. § 512.090*

Writ as issuing in name of people of state. *Gov. Code § 100*

[3] Temporary Restraining Order

Grounds for issuance. *Code Civ. Proc. § 513.010*

Ex parte issuance of temporary restraining order. *Code Civ. Proc. § 513.010(b)*

Period of effectiveness of temporary restraining order. *Code Civ. Proc. § 513.010(c)*

Acts prohibited. *Code Civ. Proc. § 513.020*

Other injunctive relief as not precluded. *Code Civ. Proc. § 516.050*

Procedure to obtain temporary restraining order. *Code Civ. Proc. § 527*

[4] Application for Writ of Possession

Contents of application for writ. *Code Civ. Proc. § 512.010*

Necessity for hearing on noticed motion for issuance of writ. *Code Civ. Proc. § 512.020(a)*

Ex parte application for writ. *Code Civ. Proc. § 512.020(b)*

Documents to be served prior to hearing. *Code Civ. Proc. § 512.030*

Notice of application and hearing. *Code Civ. Proc. § 512.040*

Service of affidavits and points and authorities prior to hearing. *Code Civ. Proc. § 512.050*

[5] Hearing on Application

Necessity for hearing on application for writ. *Code Civ. Proc. § 512.020(a)*

Production of evidence at hearing and continuances. *Code Civ. Proc. § 512.050*

Effect of defendant's failure to oppose issuance of writ or to rebut evidence. *Code Civ. Proc. § 512.100*

Effect of court's determination on action. *Code Civ. Proc. § 512.110*

Effect of plaintiff's failure to recover judgment in action. *Code Civ. Proc. § 512.120*

[6] Affidavits

Contents of affidavits. *Code Civ. Proc. § 516.030*

Affidavits to verify papers on motions. *Code Civ. Proc. § 2009*

[7] Undertaking

Provisions to be included in plaintiff's undertaking. *Code Civ. Proc. § 515.010*

Provisions to be included in defendant's undertaking. *Code Civ. Proc. § 515.020*

Exception to and justification of sureties. *Code Civ. Proc. § 515.030*

[8] Levy and Custody

Removal of property by levying officer. *Code Civ. Proc. § 514.010*

Service of writ of possession by levying officer. *Code Civ. Proc. § 514.020*

Disposition of property after levy. *Code Civ. Proc. § 514.030*

Return of writ to court by levying officer. *Code Civ. Proc. § 514.040*

Property claimed by third party. *Code Civ. Proc. § 514.050*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesWritsGeneral Overview

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12-119 California Forms of Pleading and Practice--Annotated § 119.81

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§ 119.81 Decisions

Hearing prior to seizure of chattels as required to provide real test aimed at establishing probable validity of underlying claim against alleged debtor before debtor deprived of property. *Fuentes v. Shevin (1972) 407 U.S. 67, 97, 92 S. Ct. 1983, 32 L. Ed. 2d 556*

Where danger exists that debtor may abscond with property or that property will be destroyed, summary procedure as recognized as being consonant with constitutional principles. *Blair v. Pitchess (1971) 5 Cal. 3d 258, 278, 96 Cal. Rptr. 42, 486 P.2d 1242*

Exceptional situations as possibly existing in which creditor or state interest justifies summary claim and delivery procedure. *Blair v. Pitchess (1971) 5 Cal. 3d 258, 282, 96 Cal. Rptr. 42, 486 P.2d 1242*

Prejudgment remedy as required to provide for determination of probable cause by magistrate and for hearing prior to seizure of personal property in order to be constitutional. *Blair v. Pitchess (1971) 5 Cal. 3d 258, 283, 96 Cal. Rptr. 42, 486 P.2d 1242*

Individual as required to be afforded notice and opportunity for hearing before being deprived of any significant

property interest and exceptions to this requirement as justified only in extraordinary circumstances. *Damazo v. MacIntyre (1972) 26 Cal. App. 3d 18, 24, 102 Cal. Rptr. 609*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesPrejudgment RemediesHearingsCivil ProcedureRemediesProvisional RemediesGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral Overview

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12-119 California Forms of Pleading and Practice--Annotated § 119.82

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§ 119.82 Law Reviews

Trost, *Revival of Pre-Judgment Remedies in California: The New Attachment and Claim and Delivery Statutes*, 48 State BJ 26 (1973)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsRevival of Judgments

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12-119 California Forms of Pleading and Practice--Annotated § 119.83

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§ 119.83 Text References

California Civil Actions: Pleading And Practice, Chs. 40, 78, Pt. H (Matthew Bender)

Witkin, California Procedure, vol. 6, *Provisional Remedies*, §§ 247-248, 275 (4th ed. 1997)

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12-119 California Forms of Pleading and Practice--Annotated §§ 119.84through 119.89

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[Reserved]

§§ 119.84[Reserved]

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12-119 California Forms of Pleading and Practice--Annotated § 119.90

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§ 119.90 Plaintiff's Checklist for Provisional Remedy of Claim and Delivery

NOTE:

Common Procedures Illustrated. This checklist is for use by a plaintiff in seeking the provisional remedy of claim and delivery. It is illustrative of procedures commonly used and is not intended to be exhaustive. Procedures not mentioned in this checklist may be required in a given action.

[1] Obtain Necessary Facts and Documents

NOTE:

Collection of Facts. Not all of the following facts will be ascertainable from the client in the initial interview. Subsequent interviews may be required, or it may be necessary to ascertain the facts from others, including potential defendants, by use of discovery proceedings.

☐ Obtain facts relating to plaintiff:

☐ Name, address, and telephone number of plaintiff.

☐ Capacity of plaintiff to sue.

☐ Additional facts, as desired, relating to plaintiff's stability, financial status and solvency, employment status, prior residences, credit, banks, and personal references.

☐ Obtain facts relating to each potential defendant:

☐ Name, address, and telephone number of each potential defendant.

☐ Capacity of each potential defendant, i.e., whether individual or legal entity (e.g., corporation).

☐ Occupation, including name and address of employer, of each individual defendant.

☐ Status of each individual defendant, such as agent, officer of corporation, etc.

☐ Obtain facts relating to property sought to be recovered:

☐ Specific description of personal property sought to be recovered, including type, nature, and physical appearance of property.

☐ Plaintiff's interest in property, giving plaintiff right to immediate possession of property.

☐ Date, place, and time at which defendant obtained possession of property and date, place, and time at which such possession became wrongful.

☐ Value of property for purpose of assessing damages in event property is not capable of delivery to plaintiff.

☐ Location of property and whether any of it is kept in a private place.

☐ Whether defendant gained possession of the property by feloniously taking it from plaintiff.

☐ Whether the defendant acquired possession of the property in ordinary course of trade or business for commercial purposes.

☐ Obtain Necessary Documents:

☐ Written statements, if any, of parties or witnesses.

☐ Diagrams, photographs, or other descriptions of personal property involved.

☐ If claim is based on written instrument, the written instrument itself or a copy of it.

[2] Determine Whether to Proceed by Noticed Hearing or Ex Parte

☐ Ex parte proceeding is available in following cases:

☐ Defendant gained property feloniously, other than by fraud or embezzlement.

☐ Property is credit card.

☐ Defendant acquired property in ordinary course of trade or business for commercial purposes and all the following apply:

☐ Property not needed for support of defendant or his or her family.

☐ Immediate danger of loss of property.

☐ Ex parte issuance necessary to protect property.

[3] Prepare Application for Writ and Supporting Papers

☐ If complaint has not been filed, prepare complaint and summons [*see Code Civ. Proc. § 512.010(a)*].

☐ Prepare application for writ of possession [*see § 119.111*, Judicial Council form of application for writ of possession].

☐ Prepare affidavits or declarations, if desired.

☐ Obtain statements from and then prepare affidavits or declarations supporting plaintiff's claim to the property [*see Code Civ. Proc. § 512.010(b)*].

☐ Obtain signatures on affidavits or declarations. If affidavits are used, have them notarized.

☐ Prepare memorandum.

☐ If proceeding by noticed hearing, prepare a notice of application and hearing [*see § 119.110*, Judicial Council form of notice of application for writ of possession and hearing].

☐ If proceeding ex parte, prepare the following papers:

☐ Declaration for ex parte writ of possession [*see § 119.116*, Judicial Council form of declaration for ex parte writ of possession].

☐ Notice that satisfies *Code Civ. Proc. § 512.040(c)-(d)* and that informs defendant of his or her rights under *Code Civ. Proc. § 512.020(b)* [*see Code Civ. Proc. § 512.020(b)*].

☐ Declaration showing notification, attempt to notify, or reason for not notifying opposing party or opposing counsel [*Cal. Rules of Ct., Rule 3.1204*; *see* Ch. 372, *Motions and Orders*].

☐ If seeking temporary restraining order [*see Code Civ. Proc. § 513.010*], prepare the following papers:

☐ Application for temporary restraining order along with application for writ of possession [*see § 119.111*, Judicial Council form of application for writ of possession and for temporary restraining order].

☐ Declaration for temporary restraining order [*see § 119.114*, Judicial Council form of declaration for temporary restraining order].

☐ Temporary restraining order [*see § 119.115*, Judicial Council form of temporary restraining order].

☐ Prepare proposed order for writ of possession [*see § 119.112*, Judicial Council form of order for writ of possession].

☐ Prepare writ of possession [*see § 119.113*, Judicial Council form of writ of possession].

☐ Make prior arrangements to have undertaking issue promptly if courtgrants motion [*Code Civ. Proc. § 515.010*; *see Code Civ. Proc. § 995.320*]. For Judicial Council form of undertaking by personal sureties that may be used in claim and delivery proceeding, see Ch. 62, *Attachment* ; for additional forms, see *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.40* et seq.

[4] Noticed Hearing Procedure

☐ If circumstances do not justify ex parte application [*see* (D), *below*], comply with the procedure for a noticed hearing on the application.

☐ If not done so previously, file complaint, pay filing fees, and have summons issued.

☐ Serve on defendant and file with court following papers at least 16 court days before the hearing or any longer or shorter period required or allowed by *Code Civ. Proc. §§ 1005(b), 1010.6* [*Code Civ. Proc. §§ 512.030, 512.050, 1005(a)(2)*]:

☐ Copy of summons and complaint [*Code Civ. Proc. § 512.030(a)(1)*].

☐ Notice of Application and Hearing [*Code Civ. Proc. §§ 512.030(a)(2), 1005(a)(2)*].

☐ Copy of application [*Code Civ. Proc. § 512.030(a)(3)*].

☐ Copies of any supporting affidavits or declarations [*Code Civ. Proc. § 512.030(a)(3)*].

☐ Copy of any supporting memorandum of points and authorities.

☐ Prepare proof of service [*see* Ch. 518, *Service of Summons and Papers*].

☐ File original of notice of application and hearing and proof of service with the court.

☐ Appear at hearing.

☐ On prevailing, present order for writ of possession.

NOTE:

Notice of Order or Decision Required. When a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order must be given by the prevailing party to all other parties or their attorneys, in the manner provided in *Code Civ. Proc. § 1010 et seq.* (*see* Ch. 518, *Service of Summons and Papers*), unless notice is waived by all parties in open court and is entered in the minutes [*Code Civ. Proc. § 1019.5(a)*]. For a form of notice, see Ch. 372, *Motions and Orders* .

☐ Obtain and present undertaking.

☐ Present writ of possession.

☐ Attach copy of undertaking to each copy of writ of possession for levying officer to serve on defendant [*Code Civ. Proc. § 512.080(e)*] or any other person in possession of the property [*Code Civ. Proc. § 514.020*].

[5] Ex Parte Procedure for Issuance of Writ

☐ If not done so previously, file complaint, pay filing fees, and have summons issued.

☐ Ascertain in which department, if relevant, and at what time of day, if restricted, applications for

writs of possession are considered.

☐ Present the following papers to the court:

☐ Summons and complaint.

☐ Application for writ of possession.

☐ Declaration for an ex parte writ of possession.

☐ Affidavit or declaration showing notification, attempt to notify, or reason for not notifying opposing party or opposing counsel.

☐ Any additional supporting affidavits or declarations.

☐ Any supporting memorandum of points and authorities.

☐ Notice that meets the requirements of *Code Civ. Proc. § 512.040(c)* and *(d)* and informs the defendant of his or her rights under *Code Civ. Proc. § 512.020(b)*.

☐ Make oral argument to the appropriate court.

☐ Present order for writ of possession.

☐ Obtain and present undertaking.

☐ Present writ of possession.

☐ Serve defendant with the following papers [*Code Civ. Proc. § 512.020(b)*]:

☐ Copy of summons and complaint.

☐ Copy of application.

☐ Copies of supporting affidavits or declarations.

☐ Copy of any supporting memorandum of points and authorities.

☐ Notice which meets the requirements of *Code Civ. Proc. § 514.040(c), (d)* and informs the defendant of his or her rights under *Code Civ. Proc. § 512.020(b)*.

☐ Copy of writ of possession [*Code Civ. Proc. § 512.020(b)*] with copy of undertaking attached [*Code Civ. Proc. § 512.080(e)*].

☐ Attach copy of undertaking to each copy of writ of possession for levying officer to serve on defendant [*Code Civ. Proc. § 512.080(e)*] or any other person in possession of the property [*Code Civ. Proc. § 514.020*].

[6] Endorsement of Writ to Seize Property in Place Not Specified in Writ

☐ Determine whether probable cause exists to believe property or part of it is in private place not specified in writ [*Code Civ. Proc. § 512.090(a)*].

☐ Prepare written ex parte application for endorsement on writ specifying that private place [*Code Civ. Proc. § 512.090(a)*; for a skeletal form of ex parte application, *see* Ch. 372, *Motions and Orders*].

☐ Prepare affidavits or declarations which establish Section 512.090(a) probable cause requirement [*Code Civ. Proc. § 512.090(b)*].

☐ Ascertain in which department, if relevant, and at what time of day, if restricted, ex parte applications are considered.

☐ Present ex parte application and affidavits or declarations to court.

[7] Objection to Defendant's Undertaking

☐ Determine whether to object to defendant's undertaking.

NOTE:
Time for Objecting. The plaintiff may object to the defendant's undertaking not later than 10 days after the defendant's undertaking is filed [*Code Civ. Proc. §§ 515.030(b), 995.930(b)*].

☐ Prepare notice of exception to undertaking [*see Code Civ. Proc. §§ 515.030(b), 995.930(a)*].

☐ Prepare affidavit or declaration under *Code Civ. Proc. § 2015.5* stating that copies of notice of motion objecting to undertaking have been mailed to levying officer and to defendant at address set out in his or her undertaking [*see Code Civ. Proc. §§ 515.030(b), 995.030, 1013a*].

☐ File notice of motion objecting to undertaking and affidavit or declaration of mailing with court [*see Code Civ. Proc. §§ 515.030(b), 995.930-995.950, 1010-1013a*].

☐ Mail copies of notice of objection to the undertaking and affidavit or declaration to following:

☐ Levying officer [*Code Civ. Proc. § 515.030(b)*].

☐ Each defendant at the address set out in defendant's undertaking [*see Code Civ. Proc. §§ 515.030(b), 995.030, 995.320(a)(2), 1010-1013a*].

☐ Be prepared for hearing not less than two nor more than five days after service of notice of motion [*Code Civ. Proc. § 995.950(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesPrejudgment RemediesHearingsCivil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsGeneral Overview

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12-119 California Forms of Pleading and Practice--Annotated § 119.91

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§ 119.91 Defendant's Checklist for Provisional Remedy of Claim and Delivery

NOTE:

Consult Local Rules and Practice. This checklist is for use to defend against an application for the provisional remedy of claim and delivery. It is, however, illustrative only of the basic procedural steps which counsel should follow. Counsel defending against an application for the provisional remedy of claim and delivery should investigate local practice and local court rules for further particular requirements.

[1] Appearance to Oppose Application for Writ

☐ Prepare opposing papers:

☐ Any affidavits or declarations under *Code Civ. Proc. § 2015.5* intended to be relied on at the hearing to defeat plaintiff's right to issuance of writ [*Code Civ. Proc. §§ 512.040(c), 512.050*].

☐ Any memorandum of points and authorities intended to be relied on at the hearing [*see Code Civ. Proc. § 512.050*].

☐ Serve opposing papers on plaintiff and file with court at least 9 court days before the hearing [*Code Civ. Proc. §§ 512.050, 1005(a)(2), (b)*; *see also Code Civ. Proc. § 1010.6(a)(6)* (extension of time to respond in case of electronic service; for discussion, *see Ch. 518, Service of Summons and Papers, § 518.41[8]*)].

☐ Appear at hearing of application.

[2] Noticed Hearing to Quash Ex Parte Writ of Possession

NOTE:

Order May Be Quashed and Property Released. Any defendant whose property is taken pursuant to an ex parte writ of possession may apply for an order that the writ be quashed and any property levied on pursuant to the writ be released [*Code Civ. Proc. § 512.020(b)*].

☐ Prepare moving papers:

☐ Application and notice of application and hearing for order to quash ex parte writ [*Code Civ. Proc. § 512.020(b)*; *see § 119.117*, Judicial Council form of application and notice of application and hearing for order to quash ex parte writ of possession].

☐ Any affidavits or declarations under *Code Civ. Proc. § 2015.5* intended to be relied on at the hearing [*see Code Civ. Proc. §§ 512.020(b), 512.050*].

☐ Any memorandum of points and authorities intended to be relied on at the hearing [*see Code Civ. Proc. §§ 512.020(b), 512.050*].

☐ Prepare order for release and redelivery of property [*see § 119.118*, Judicial Council form of order for release and redelivery of property].

☐ Serve on plaintiff and file with court moving papers at least 16 court days before the hearing or any longer or shorter period required or allowed by *Code Civ. Proc. §§ 1005(b), 1010.6(a)(6)* [*see Code Civ. Proc. §§ 512.020(b), 512.050, 1005(a)(13)*].

☐ Appear at hearing of application.

☐ On prevailing, present order for release and redelivery of property.

NOTE:

Notice of Order or Decision Required. When a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order must be given by the prevailing party to all other parties or their attorneys, in the manner provided in *Code Civ. Proc. § 1010 et seq.* (*see* Ch. 518, *Service of Summons and Papers*), unless notice is waived by all parties in open court and is entered in the minutes [*Code Civ. Proc. § 1019.5(a)*]. For a form of notice, see Ch. 372, *Motions and Orders* .

[3] Undertaking to Stay Delivery of Property

☐ Prepare undertaking [*see Code Civ. Proc. §§ 515.020, 995.310-995.330*]. For form of undertaking by personal sureties that may be used in claim and delivery proceeding, see Ch. 62, *Attachment* . For additional forms relating to undertakings, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

☐ Prepare affidavit or declaration *Code Civ. Proc. § 2015.5* stating that copies of undertaking have been mailed to levying officer and to plaintiff [*Code Civ. Proc. §§ 515.020(c), 995.370*].

☐ Mail copies of the undertaking and affidavit or declaration to the following:

☐ The levying officer [*Code Civ. Proc. § 515.020(c)*].

☐ Each plaintiff [*Code Civ. Proc. §§ 515.020(c), 995.370*].

☐ File undertaking and affidavit or declaration of mailing with court [*Code Civ. Proc. § 515.020(a)*].

NOTE:
Time to File Undertaking. The defendant's undertaking may be filed at any time before or after levy of the writ of possession [*Code Civ. Proc. § 515.020(c)*].

[4] Objection to Plaintiff's Undertaking

☐ Determine whether to object to plaintiff's undertaking.

NOTE:
Time for Objecting. The defendant may object to the plaintiff's undertaking not later than 10 days after the plaintiff's undertaking is filed [*Code Civ. Proc. §§ 515.030(a), 995.930(b)*].

☐ Prepare notice of exception to undertaking [*see Code Civ. Proc. §§ 515.030(a), 995.930(a)*].

☐ Prepare affidavit or declaration under *Code Civ. Proc. § 2015.5* stating that copies of notice of motion objecting to undertaking have been mailed to levying officer and to plaintiff at address set out in his or her undertaking [*see Code Civ. Proc. §§ 515.030(a), 995.030, 1013a*].

☐ File notice of motion objecting to undertaking and affidavit or declaration of mailing with court [*see Code Civ. Proc. §§ 515.030(a), 995.930-995.950, 1010-1013a*].

☐ Mail copies of notice of objection to the undertaking and affidavit or declaration to following:

☐ Levying officer [*Code Civ. Proc. § 515.030(a)*].

☐ Each plaintiff at the address set out in defendant's undertaking [*see Code Civ. Proc.*

§§ 515.030(a), 995.030, 995.320(a)(2), 1010-1013a].

☐ Be prepared for hearing not less than two nor more than five days after service of notice of motion [*Code Civ. Proc. § 995.950(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesPrejudgment RemediesHearingsCivil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsGeneral Overview

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
Chapter 119 CLAIM AND DELIVERY
PART IV. PROCEDURAL CHECKLIST

12-119 California Forms of Pleading and Practice--Annotated §§ 119.92through 119.99

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[Reserved]

§§ 119.92[Reserved]

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
Chapter 119 CLAIM AND DELIVERY
PART V. FORMS
A. Action For Possession of Personal Property

12-119 California Forms of Pleading and Practice--Annotated § 119.100

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§ 119.100 Complaint for Possession of Personal Property or Its Value and for Damages for Its Wrongful Detention [Civ. Code §§ 667, 3379, 3380; Code Civ. Proc. § 667]--General Form

[1] FORM Complaint for Possession of Personal Property or Its Value and for Damages for Its Wrongful Detention [Civ. Code §§ 667, 3379, 3380; Code Civ. Proc. § 667]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR POSSESSION OF PERSONAL
_____ [*name*], [and DOES I	)	PROPERTY AND FOR DAMAGES

through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California [, in the _____ (*name*) _____ (Municipal Court *or* Judicial) District] [*or allege other basis of venue as appropriate*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants is responsible in some manner for the acts or omissions herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by the acts or omissions.)]

3. Plaintiff is, and at all times herein mentioned was, the _____ [owner of *or describe plaintiff's other qualified interest in personal property that entitles plaintiff to its immediate possession*] personal property described and valued as follows: _____ [*describe, or list, each item of personal property claimed by plaintiff and its value or the value of plaintiff's qualified interest in it*].

4. Plaintiff is, and at all times herein mentioned was, entitled to the immediate [and exclusive] possession of the personal property described above.

[*EITHER, if original taking of property was unlawful*]

5. On or about _____ [*date*], defendant wrongfully and without plaintiff's consent took possession of the personal property described above. Since that time defendant has been, and now is, in wrongful possession of the property in violation of plaintiff's right to immediate [and exclusive] possession.

[*OR, if original taking of property was lawful, allege plaintiff's demand and defendant's wrongful detention after demand*]

5. On or about _____ [*date*], _____ [*describe manner in which defendant lawfully obtained possession, e.g.*, plaintiff deposited with defendant the personal property described above so that defendant, pursuant to an oral agreement between the parties, could store the property for plaintiff until _____ (date)]. On _____ [*date*], plaintiff demanded that defendant return the property to him/her. Defendant _____ [refused *or* failed] to return the property after plaintiff's demand and continues to withhold possession of it from plaintiff in violation of plaintiff's right to immediate [and exclusive] possession of it.

[*CONTINUE*]

6. During, and as a proximate result of, defendant's wrongful possession and detention of the personal property described above, plaintiff suffered the loss of the use and enjoyment of his/her personal property.

_____ [*State basis for computing damages for loss of use, e.g.*, The reasonable value of use of the property is (approximately) $_____ per _____(*specify, e.g.*, day), which constitutes _____ (*specify, e.g.*, interest at the rate of _____ percent per annum on the value of *or* reasonable rental value on) the property]. Therefore, plaintiff has suffered damages _____ [in the sum of $_____ *or* according to proof].

[7. During, and as a further proximate result of, defendant's wrongful possession and detention of the personal property described above, plaintiff suffered the loss of the depreciation of his/her personal property to his/her damage _____ (in the sum of $_____ *or* according to proof).]

[8. During, and as a (further) proximate result of, defendant's wrongful possession and detention of the personal property described above, plaintiff suffered _____ (*specify, e.g.*, deterioration *or* business loss) of his/her personal property to his/her damage _____ (in the sum of $_____ *or* according to proof).]

[9. In taking, wrongfully possessing, and detaining the property described above, defendant's conduct was willful and was intended to cause injury to the plaintiff (in that _____ (*state facts showing oppression, fraud, or malice*)). Plaintiff is therefore entitled to an award of exemplary or punitive damages.]

WHEREFORE, plaintiff prays judgment as follows:

1. For possession of the personal property described above or, if the property cannot be delivered, for its value [in the sum of $_____];

2. For damages _____ [in the sum of $_____ *or* according to proof];

[3. For damages for depreciation _____ (in the sum of $_____ *or* according to proof);]

[4. For damages for _____ (*specify, e.g.*, deterioration *or* business loss) _____ (in the sum of $_____ *or* according to proof);]

[5. For exemplary and punitive damages;]

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*ADD Verification, if desired or required. See [6], below*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The general form of complaint in [1], *above*, is for use by a plaintiff who is entitled to the immediate possession of personal property in an action to recover that property or its value and damages for its detention from a defendant who is wrongfully withholding possession of the property. For a discussion of the elements of a cause of action to recover personal property from a person wrongfully withholding it, see Part II, Subpart B, § 119.20 et seq.

[3] Allegations

The complaint alleges:

- Defendant's capacity and residence (Paragraph 1);

- Fictitious name allegation, if appropriate (Paragraph 2);

- Plaintiff's interest in the personal property (Paragraph 3) [*see Rathbun v. Hill (1933) 129 Cal. App. 601, 604, 19 P.2d 64* (although better practice, complaint is not required to allege plaintiff's interest and the value of it)];

- A description of the property with a reasonable degree of certainty (Paragraph 3) [*Hawley v. Kocher (1898) 123 Cal. 77, 82, 55 P. 696* (affirming sustaining of demurrer for uncertainty by trial court based on insufficient description of property)];

- The value of plaintiff's property (Paragraph 3) [*Murphy v. Kelly (1955) 137 Cal. App. 2d 21, 30, 289 P.2d 565* (to enable plaintiff's damages to be assessed if restoration of the property proves impossible); *see Code Civ. Proc. § 627* (verdict for property or its value), *Code Civ. Proc. § 667* (judgment for property or its value)];

- Plaintiff's right to immediate possession of the property (Paragraph 4) [*Truman v. Young (1898) 121 Cal. 490, 53 P. 1073* (demurrer erroneously overruled when complaint failed to allege plaintiff was owner or entitled to possession of property); *Stockton M.P. Co. v. Mariposa County (1950) 99 Cal. App. 2d 210, 213, 221 P.2d 232* (plaintiff's right to immediate possession of property as essential allegation)];

- Defendant's unlawful taking and detention of the property (Paragraph 5) [*see First Nat'l Bank v. Thompson (1943) 60 Cal. App. 2d 79, 82, 140 P.2d 75* (tortious taking)] or defendant's lawful taking and unlawful detention after demand by the plaintiff (Paragraph 5) [*Home Payment Jewelry Co. v. Smith (1914) 24 Cal. App. 486, 488, 141 P. 933* (allegation of demand required when original possession by

defendant lawful); *see also Faulkner v. First National Bank (1900) 130 Cal. 258, 262-263, 62 P. 463* (allegation of plaintiff's deposit of notes with defendant, plaintiff's demand for their return, and defendant's refusal to return them found sufficient)];

- Defendant's wrongful possession of the property at the time of commencement of the action (Paragraph 5) [*Stockton M.P. Co. v. Mariposa County (1950) 99 Cal. App. 2d 210, 213, 221 P.2d 232* (defendant's wrongful possession at time of commencement of action is essential allegation); *Lamus v. Engwicht (1919) 39 Cal. App. 523, 529, 179 P. 435* (allegation of defendant's adverse claim to property insufficient absent allegation of defendant's actual or constructive possession of property); *see Faulkner v. First Nat'l Bank (1900) 130 Cal. 258,264-266, 130 Cal. 258, 266, 62 P. 463* (possession of property by defendant at time action commenced where possession originally lawful and subsequent detention and disposition wrongful)];

- General damages caused by defendant's wrongful detention of the property (Paragraph 6) [*see Code Civ. Proc. §§ 627, 667*];

- Special damages caused by the detention, such as depreciation (Paragraph 7) [*see Morris v. Allen (1911) 17 Cal. App. 684, 688, 121 P. 690* (holding, however, that depreciation may be proved as element of general damages)] and deterioration or business loss (Paragraph 8); and

- Exemplary and punitive damages (Paragraph 9) [*see Civ. Code § 3294*], if appropriate. If facts showing oppression, fraud, and malice are not included in the earlier allegations in the complaint, they should be included in this paragraph.

[4] Venue

[a] In General

Venue for an action for possession of personal property is not specifically provided for and, therefore, is governed generally by *Code Civ. Proc. § 395(a)*. Thus, generally, the county in which the defendants or some of them reside at the commencement of the action is the proper county for the trial of the action except as discussed below. If, in addition to seeking possession of the property, an action seeks recovery for actual physical injury to the property, either the county where the injury occurred or the county in which the defendants or some of them reside at the commencement of the action is the proper county for the trial of the action [*Code Civ. Proc. § 395(a)*; *see Spangenberg v. Spangenberg (1932) 123 Cal. App. 387, 391, 11 P.2d 408* ; *see also Haurat v. Superior Court (1966) 241 Cal. App. 2d 330, 333, 50 Cal. Rptr. 520* (residence of defendant as proper county for trial for personal torts not involving physical injury, such as conversion)].

[b] Action Based on Certain Obligations

If the action for possession of personal property is founded on a contractual obligation, the action may be brought in the county in which the obligation is to be performed, in which it was entered, or in which a defendant resides at the commencement of the action [*Code Civ. Proc. § 395(a)*].

If the action for possession of personal property is founded on an obligation for goods, services, loans, or extension of credit intended primarily for personal, family, or household use, other than an obligation described in *Civ. Code § 1812.10* (Unruh Retail Installment Sales Act) or*Civ. Code § 2984.4* (Rees-Levering Motor Vehicles Sales and Finance Act), or an action arising from a transaction consummated as a proximate result of an unsolicited telephone call made by a seller engaged in the business of consummating transactions of that kind or a telephone call or electronic transmission made by the buyer or lessee in response to a seller's solicitation, the county in which the defendant signed

the contract, in which he or she resided at the time the contract was entered, or in which he or she resided at the commencement of the action is the proper county for the trial of the action [*Code Civ. Proc. § 395(b)*]. If the action is subject to the Unruh Retail Installment Sales Act [*Civ. Code § 1801 et seq.*] or the Rees-Levering Automotive Sales Act [*Civ. Code § 2981 et seq.*], or is a limited civil case that is subject to *Code Civ. Proc. § 395(b)* (discussed *above*), additional and/or alternative venue requirements apply [*see Code Civ. Proc. § 396a*]. For coverage of those requirements, which will not apply in most claim and delivery actions, see Ch. 20, *Allegations Commonly Used* , Chapter 83, *Automobiles: Bringing the Action*, and Chapter 510, *Sales: Retail Installment Sales*.

If the defendant is a corporation or association, it may be sued in the county in which the contract was made or is to be performed, in which the obligation or liability arises, in which the breach occurs, or in which its principal place of business is situated [*Code Civ. Proc. §§ 395.2, 395.5*].

[5] Statute of Limitations

Actions for possession of personal property must be commenced within three years of the accrual of the cause of action, such as when the defendant first wrongfully claims ownership of the plaintiff's property [*Latta v. Tutton (1898) 122 Cal. 279, 284, 54 P. 844* (applying three-year limitation of *Code Civ. Proc. § 338(c)* to actions for possession of personal property)] or refuses to surrender the property on demand by the rightful owner [*see Rose v. Dunk-Harbison Co. (1935) 7 Cal. App. 2d 502, 506, 46 P.2d 242]* .

[6] Verification

Verification of the complaint is not required except when the action is subject to *Civ. Code §§ 1812.10* (retail installment sales), 2984.4 (motor vehicle sales), or *Code Civ. Proc. § 395(b)* (other consumer obligations) [for discussion, *see* [4][b], *above*]. However, verification of the complaint requires the defendant to file a verified answer in a superior court action unless the action is a limited civil case [*Code Civ. Proc. §§ 92(a), 446*] and precludes a general denial in superior court and in some limited civil cases [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion, procedures, and forms relating to conversion actions, see Ch. 150, *Conversion*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to the deposit of property with the court pending trial, see Ch. 211, *Deposit in Court*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Service nd Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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A. Action For Possession of Personal Property

12-119 California Forms of Pleading and Practice--Annotated § 119.101

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§ 119.101 Allegations For Use in Complaint for Possession of Personal Property By Owner Against Lienholder Refusing Tender [Civ. Code §§ 3379, 3380]

[1] FORM Allegations For Use in Complaint for Possession of Personal Property By Owner Against Lienholder Refusing Tender [Civ. Code §§ 3379, 3380]

1. On or about _____ [*date*], plaintiff transferred possession of the personal property described above to defendant as _____ [*specify terms of lien, e.g.,* collateral security for defendant's loan of $_____ (at an interest rate of _____ percent per annum) to plaintiff].

2. On _____ [*date*], plaintiff tendered $_____ as the full amount [of principal and interest] due to defendant and demanded possession of the personal property described above. Defendant refused to accept the tender by plaintiff and refused to return the property to plaintiff.

3. Since that time defendant has been, and now is, in wrongful possession of the property in violation of plaintiff's right to immediate [and exclusive] possession.

[2] Use of Form

The allegations in [1], *above*, are for use in a complaint for possession of personal property by a plaintiff owning

personal property which is in the defendant's possession and subject to the defendant's liens when the defendant refuses to accept the plaintiff's tender or to return the property to the plaintiff. These allegations may be substituted for Paragraphs 4 and 5 of § 119.100[1], complaint for possession of personal property or its value and damages for its wrongful detention.

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A. Action For Possession of Personal Property

12-119 California Forms of Pleading and Practice--Annotated § 119.102

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§ 119.102 Demurrer to Complaint for Possession of Personal Property for Insufficient Description of Property Sought to Be Recovered [Civ. Code §§ 3379, 3380; Code Civ. Proc. § 430.10(f)]

[1] FORM Demurrer to Complaint for Possession of Personal Property for Insufficient Description of Property Sought to Be Recovered [Civ. Code §§ 3379, 3380; Code Civ. Proc. § 430.10(f)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	DEMURRER TO COMPLAINT FOR POSSES-
Plaintiff,	)	SION OF PERSONAL PROPERTY
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____

) Trial Date: None Set
) [Amount demanded _____
) (exceeds *or* does not exceed) $10,000]
[LIMITED CIVIL CASE]

_____

Defendant demurs to the complaint herein on the ground that the complaint is uncertain in that it fails to provide a sufficient description of the property sought to be recovered by plaintiff from defendant.

WHEREFORE, defendant prays that this demurrer be sustained [without leave to amend], that plaintiff take nothing by his/her complaint, that defendant have judgment for his/her costs, and for all other relief the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Use of Form

The form of demurrer in [1], *above*, is for use by a defendant in an action for possession of personal property to object to the complaint's failure to describe with reasonable certainty the personal property sought to be recovered [*see Code Civ. Proc. § 430.10(f)*]. The form may be adapted for use by a cross defendant when the cause of action for possession of personal property is raised by a cross complaint.

A memorandum in support of each ground of the demurrer must be served and filed with the demurrer. The court may construe the absence of a memorandum as an admission that the special demurrer is not meritorious and as a waiver of all grounds not supported by the memorandum [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[3] Cross References

For discussion, procedures, and forms relating to demurrers generally, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

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12-119 California Forms of Pleading and Practice--Annotated § 119.103

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§ 119.103 Answer to Complaint for Possession of Personal Property Denying Plaintiff's Right to Possession and Asserting Defendant's Right to Possession [Civ. Code §§ 3379, 3380]

[1] FORM Answer to Complaint for Possession of Personal Property Denying Plaintiff's Right to Possession and Asserting Defendant's Right to Possession [Civ. Code §§ 3379, 3380]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	ANSWER TO COMPLAINT FOR POSSESSION
_____ [*name*],	)	OF PERSONAL PROPERTY
Defendant.	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Defendant answers the complaint herein as follows;

1. Admits _____ [*set forth admissions*].

2. Denies, generally and specifically, each and every allegation of Paragraph _____ [*specify number of paragraph in complaint alleging plaintiff's right to immediate possession of personal property, e.g.*, 4] and alleges that defendant is, and at all times mentioned in the complaint was, entitled to the immediate [and exclusive] possession of the personal property described in the complaint.

WHEREFORE, defendant prays that plaintiff take nothing by his/her complaint, and that defendant have judgment for his/her costs, and for all other relief the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Use of Form

The form of answer in [1], *above*, is for use by a defendant in an action for possession of personal property to deny the plaintiff's asserted right to possession and to allege the defendant's right to possession of the property in dispute. The form may be adapted for use by a cross defendant when the cause of action for possession of personal property is raised by a cross complaint.

[3] Affirmative Relief

Although a defendant does not ordinarily pray for affirmative relief in his or her answer [*see Code Civ. Proc. § 430.30(b)*], it appears that affirmative relief is also available to a prevailing defendant. There is express statutory authority that a verdict or judgment in favor of a defendant not in possession of the property may be for a return of the property or its value and damages for its taking and withholding [*Code Civ. Proc. §§ 627, 667*].

[4] Cross References

For discussion, procedures, and forms relating to answers generally, see Ch. 26, *Answers*

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
Chapter 119 CLAIM AND DELIVERY
PART V. FORMS
A. Action For Possession of Personal Property

12-119 California Forms of Pleading and Practice--Annotated § 119.104

AUTHOR: Hon. Robert H. O'BrienEdythe L. Bronston, Esq.Alan M. Mirman, Esq.David J. Pasternak, Esq. Contributing Editors Part II of this chapter was adapted from California Practice Handbook: Provisional Remedies (Matthew Bender), Litigation Section, Los Angeles County Bar Association, Handbook Editor; Hon. Robert H. O'Brien, Edythe L. Bronston, Alan M Mirman, David J. Pasternak, Contributing Editors. Judge O'Brien is a judge of the Los Angeles County Superior Court, conducting both civil and criminal trials. Ms. Bronston is a partner with Fierstein & Sturman in Los Angeles, practicing mainly in the area of creditors' rights. Mr. Mirman is a partner in Horgan, Rosen, Beckham & Coren, located in the Toluca Lake area of Los Angeles, and specializes in the representation of financial institutions. Mr. Pasternak is a partner with the firm of Appleton, Pasternak & Pasternak in Los Angeles, practicing in all aspects of business litigation, including appointments as a receiver, referee, and corporate appraiser.

§ 119.104 Judgment for Plaintiff After Nonjury Trial for Possession of Personal Property or Its Value and for Damages for Its Detention [Civ. Code §§ 3379, 3380; Code Civ. Proc. §§ 664, 667]

[1] FORM Judgment for Plaintiff After Nonjury Trial for Possession of Personal Property or Its Value and for Damages for Its Detention [Civ. Code §§ 3379, 3380; Code Civ. Proc. §§ 664, 667]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	JUDGMENT
Defendant.	)	
	)	
	)	

_____

This cause came on regularly for trial on _____ [*date*], in [_____ (Department *or* Division) _____ of] the above-entitled court, the Honorable _____ [*name*], Judge, presiding, sitting without a jury. Plaintiff appeared by his/her attorney _____ [*name*] and defendant appeared by his/her attorney _____ [*name*]. Evidence, both oral and documentary, having been presented by both parties, the cause having been submitted for decision, and _____ [the court having caused to be made and filed its written statement of decision *or* a statement of decision not having been requested];

NOW, THEREFORE, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that plaintiff _____ [*name*] recover from defendant [*name*] possession of the following personal property: _____ [*describe or list each item of personal property to which plaintiff is found entitled*].

IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that, in the event that a delivery of this property cannot be had, plaintiff recover from defendant the value of the property. The value of the property is [fixed at] $_____ [, which constitutes the aggregate of the value of the following property: _____ (*list each item of personal property and its value or the value of plaintiff's qualified interest in it*)].

IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that plaintiff recover from defendant the sum of $_____ damages for detention of the property together with $_____ interest to the date of this judgment and $_____ costs.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of judgment in [1], *above*, is for use in a nonjury trial in an action for possession of personal property when the decision is for the plaintiff.

[3] When Judgment Entered

When a trial has been had by court, judgment must be entered by the clerk in conformity to the decision of the court immediately on the filing of the decision. A judgment is not effective for any purpose until entered [*Code Civ. Proc. § 664*].

[4] Cross References

For discussion, procedures, and forms for use in recovering costs, see Ch. 174, *Costs and Attorney's Fees*

For discussion and forms for use in requesting a statement of decision, see Ch. 529, *Statement of Decision*

For discussion and forms for use in obtaining and entering judgments, see Ch. 318, *Judgments*

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12-119 California Forms of Pleading and Practice--Annotated §§ 119.105-119.109

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[Reserved]

§§ 119.105[Reserved]

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B. Provisional Remedy of Claim and Delivery

12-119 California Forms of Pleading and Practice--Annotated § 119.110

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§ 119.110 Notice of Application for Writ of Possession and Hearing [Code Civ. Proc. § 512.040]--Judicial Council Form CD-110

[1] FORM Notice of Application for Writ of Possession and Hearing [Code Civ. Proc. § 512.040]--Judicial Council Form CD-110

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustration of Judicial Council Form CD-110, Notice of Application For Writ of Possession and Hearing. The notice is for use by a plaintiff to notify a defendant of a hearing on an application for a writ of possession [*see Code Civ. Proc. § 512.040*]. This form is adopted for mandatory use [*Cal. Rules of Court, Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

The notice of application and hearing must provide the defendant with all the information required by *Code Civ. Proc. § 512.040* [*see Code Civ. Proc. § 512.040*; for discussion, *see § 119.43[2][b]*].

For a list of the papers that must accompany the notice, see *§ 119.111[8]*.

[3] Service of Notice

A notice of application and hearing is required to be served on the defendant prior to the hearing [*Code Civ. Proc. § 512.030(b)(2)*]. This notice is required to be given as prescribed in *Code Civ. Proc. § 1005(b)* [*Code Civ. Proc. § 1005(a)(2)*]. For discussion, see *§ 119.43[5]*.

[4] Cross References

For the judicial council form of an application for writ of possession and a temporary restraining order and a discussion of its use see *§ 119.111*

For discussion, procedures, and forms relating to serving papers, see Ch. 518, *Service of Summons and Papers*

For discussion, procedures, and forms relating to shortening time for notice, see Ch. 524, *Shortening and Extension of Time*

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12-119 California Forms of Pleading and Practice--Annotated § 119.111

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§ 119.111 Application for Writ of Possession and for Temporary Restraining Order [Code Civ. Proc. §§ 512.010, 513.010]--Judicial Council Form CD-100

[1] FORM Application for Writ of Possession and for Temporary Restraining Order [Code Civ. Proc. §§ 512.010, 513.010]--Judicial Council Form CD-100

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustration of Judicial Council Form CD-100, Application for Writ of Possession. The application is for use by a plaintiff to apply for a writ of possession, either after a hearing or ex parte. It may also be used to request a temporary restraining order.

This form is adopted for mandatory use [*Cal. Rules of Court, Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Application for Writ of Possession

The plaintiff may apply for a writ of possession by filing a written application for the writ in the court in which the action is brought. The application may be made when the complaint is filed or at any time thereafter [*Code Civ. Proc. § 512.010(a)*]. The application must include a showing of all the elements required by *Code Civ. Proc. § 512.010(b)* [*see Code Civ. Proc. § 512.010(b)*; *see also* discussion in *§ 119.43[3]*].

[4] Ex Parte Application

If an ex parte writ is sought, the application must also include a showing of all of the elements required by *Code Civ. Proc. § 512.020(b)* [*see Code Civ. Proc. § 512.020(b)*; *see also* discussion in *§ 119.46[1]*]. These requirements may be satisfied by one or more affidavits (or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*]) filed with the application [*see Code Civ. Proc. §§ 512.010(c), 516.030*; *see also* discussion in *§ 119.43[4]*]. For an illustration of the Judicial Council form of declaration, see *§ 119.116[1]*.

[5] Notice Requirements for Ex Parte Application

If an application for an order is made ex parte, an affidavit or declaration must be prepared showing (1) that within a reasonable time before the application was made the opposing party or the opposing party's attorney was informed of when and where it would be made; (2) that there was a good faith attempt to inform the opposing party and the opposing party's attorney but the party was unable to do so, specifying the efforts made to inform them; or (3) that for reasons specified the party should not be required to inform the opposing party or the opposing party's attorney [*Cal. Rules of Ct., Rule 3.1204*]. The party seeking the ex parte order must notify all parties no later than 10:00 a.m. the court day before the ex parte appearance, absent exceptional circumstances [*Cal. Rules of Ct., Rule 3.1203*].

For further discussion or the declaration requirement and a form of ex parte application including this declaration, see *Ch. 372, Motions and Orders, §§ 372.19* and *372.68*.

[6] Temporary Restraining Order

At or after the time he or she files an application for a writ of possession, the plaintiff may apply for a temporary restraining order [*Code Civ. Proc. § 513.010(a)*; *see* discussion in *§ 119.44[2]*, and *§ 119.115*].

[7] Oath or Declaration Under Penalty of Perjury

The application is executed under oath or penalty of perjury [*Code Civ. Proc. § 512.010(b)*; *see Code Civ. Proc. § 2015.5*]. The declaration printed on the form is adequate only if the form is signed in California. If the form is signed outside the state, the declaration must be modified to read as follows [*see Code Civ. Proc. § 2015.5*]:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

[8] Accompanying Papers

Prior to the hearing required by *Code Civ. Proc. § 512.020(a)*, the defendant must be served with all of the following [*Code Civ. Proc. § 512.030*]:

- A copy of the summons and complaint,
- A notice of application and hearing, and

- A copy of the application and any affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) in its support.

If the basis of the plaintiff's claim is a written instrument, a copy of the instrument must be attached to the application for a writ of possession [*Code Civ. Proc. § 512.010(b)(1)*].

The person filing the application is also required to file and serve any affidavits (or declarations under *Code Civ. Proc. § 2015.5*) intended to be relied on at the hearing [*Code Civ. Proc. § 512.050*].

Any paper on which the application is to be based which has not been previously served on the person to be notified and was not filed by him or her must accompany the notice [*Code Civ. Proc. § 1010*].

A memorandum of points and authorities must also accompany the notice [*Code Civ. Proc. § 512.050*; *Cal. Rules of Ct., Rules 3.1113(a)*].

NOTE:

Points and Authorities Required Under Rules. Under the statutes governing claim and delivery, each party is permitted, but not required, to file and serve points and authorities prior to the hearing [*see Code Civ. Proc. § 512.050*]. However, because an application is a motion [*Code Civ. Proc. § 1003*], the California Rules of Court appear to require the plaintiff to serve and file a memorandum of supporting points and authorities with the notice of application [*see Cal. Rules of Ct., Rules 3.1113(a)*].

[9] Cross References

For a Judicial Council form of notice of application for writ of possession and hearing and a discussion of its use see *§ 119.110*

For discussion, procedures, and forms relating to temporary restraining orders generally, see Ch. 303, *Injunctions*

For discussion, procedures, and forms relating to motions generally, see Ch. 372, *Motions and Orders*

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12-119 California Forms of Pleading and Practice--Annotated § 119.112

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§ 119.112 Order for Writ of Possession [Code Civ. Proc. §§ 512.060, 512.070]--Judicial Council Form CD-120

[1] FORM Order for Writ of Possession [Code Civ. Proc. §§ 512.060, 512.070]--Judicial Council Form CD-120

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustration of Judicial Council Form CD-120, Order for Writ of Possession. The order is for use when the court grants an application for the issuance of a writ of possession either after a hearing or ex parte [*see Code Civ. Proc. §§ 512.020(b), 512.060*].

This form is adopted for mandatory use [*Cal. Rules of Court, Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

For Judicial Council forms of a notice of application for a writ of possession and an application for a writ of possession and discussions of their uses see *§§ 119.110, 119.111*.

[3] Issuance of Writ

For discussion of when a writ of possession is issued, see the discussion in *§ 119.43[8][c]*.

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12-119 California Forms of Pleading and Practice--Annotated § 119.113

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§ 119.113 Writ of Possession [Code Civ. Proc. §§ 512.080, 512.090]--Judicial Council Form CD-130

[1] FORM Writ of Possession [Code Civ. Proc. §§ 512.080, 512.090]--Judicial Council Form CD-130

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustration of Judicial Council Form CD-130, Writ of Possession. The writ is for use to direct a levying officer to levy on and retain in his or her custody specified property until the property is either released or sold and to enter specified private places to take possession of the property [*see Code Civ. Proc. § 512.080*].

This form is adopted for mandatory use [*Cal. Rules of Court, Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

For Judicial Council forms of a notice of application, an application, and an order for a writ of possession and discussions of their uses, see *§ 119.110*.

[3] Requirements for Writ

The writ of possession must meet all of the requirements specified by *Code Civ. Proc. § 512.080* [*see Code Civ. Proc. § 512.080*; *see also* discussion in *§ 119.43*].

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12-119 California Forms of Pleading and Practice--Annotated § 119.114

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§ 119.114 Declaration for Temporary Restraining Order [Code Civ. Proc. § 513.020]--Judicial Council Form CD-190

[1] FORM Declaration for Temporary Restraining Order [Code Civ. Proc. § 513.020]--Judicial Council Form CD-190

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustration of Judicial Council Form CD-190, Declaration for Temporary Restraining Order. The declaration is for use by a plaintiff to support an application for a temporary restraining order [*see Code Civ. Proc. §§ 513.010, 513.020*; for discussion, *see § 119.44*; for an illustration of the form of application, *see § 119.110[1]*].

This form is adopted for mandatory use [*Cal. Rules of Court, Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Affidavits and Declarations

For a discussion of the use of affidavits and declarations in claim and delivery proceedings, see the discussion in *§ 119.43[4]*.

[4] Cross References

For a Judicial Council form of application for writ of possession and for temporary restraining order and a discussion of its use see *§ 119.111*

For forms of affidavits and declarations generally, see Ch. 15, *Affidavits, Certificates, and Declarations*

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12-119 California Forms of Pleading and Practice--Annotated § 119.115

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§ 119.115 Temporary Restraining Order [Code Civ. Proc. §§ 513.010, 513.020]--Judicial Council Form CD-200

[1] FORM Temporary Restraining Order [Code Civ. Proc. §§ 513.010, 513.020]--Judicial Council Form CD-200

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustration of Judicial Council Form CD-200, Temporary Restraining Order. The order is for use when the court grants an application for an order temporarily restraining a defendant from taking certain actions with respect to the personal property which is the subject of the suit [*see Code Civ. Proc. § 513.020*; for discussion, *see § 119.44[3]*].

This form is adopted for mandatory use [*Cal. Rules of Court, Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

For Judicial Council forms of an application for writ of possession and for temporary restraining order and a declaration for temporary restraining order and discussions of their uses see *§§ 119.111, 119.114*.

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12-119 California Forms of Pleading and Practice--Annotated § 119.116

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§ 119.116 Declaration for Ex Parte Writ of Possession [Code Civ. Proc. § 512.020(b)]--Judicial Council Form CD-180

[1] FORM Declaration for Ex Parte Writ of Possession [Code Civ. Proc. § 512.020(b)]--Judicial Council Form CD-180

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustration of Judicial Council Form CD-180, Declaration for Ex Parte Writ of Possession. The declaration is for use by a plaintiff to support an application for an ex parte writ of possession [*see Code Civ. Proc. § 512.020(b)*; for an illustration of the form of application, *see § 119.110*].

This form is adopted for mandatory use [*Cal. Rules of Court, Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Ex Parte Writ of Possession

For discussion of the circumstances required for ex parte issuance of a writ of possession, see the discussions in *§ 119.46*.

[4] Affidavits and Declarations

For a discussion of the use of affidavits and declarations in claim and delivery proceedings, see the discussion in *§ 119.43[4]*.

[5] Declaration Regarding Notice of Ex Parte Application

The applicant for an ex parte order is required to provide an additional declaration regarding notice of the application to the opposing party [*see Cal. Rules of Ct., Rule 3.1204*; for discussion of the notice requirements for an ex parte application, *see § 119.111[5]*].

[6] Cross References

For Judicial Council forms of a notice of application for a writ of possession, an application for a writ of possession, an order for a writ of possession, and a writ of possession and discussions of their uses see *§§ 119.110 -119.113*

For forms of affidavits and declarations generally, see Ch. 15, *Affidavits, Certificates, and Declarations*

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12-119 California Forms of Pleading and Practice--Annotated § 119.117

AUTHOR: Hon. Robert H. O'BrienEdythe L. Bronston, Esq.Alan M. Mirman, Esq.David J. Pasternak, Esq. Contributing Editors Part II of this chapter was adapted from California Practice Handbook: Provisional Remedies (Matthew Bender), Litigation Section, Los Angeles County Bar Association, Handbook Editor; Hon. Robert H. O'Brien, Edythe L. Bronston, Alan M Mirman, David J. Pasternak, Contributing Editors. Judge O'Brien is a judge of the Los Angeles County Superior Court, conducting both civil and criminal trials. Ms. Bronston is a partner with Fierstein & Sturman in Los Angeles, practicing mainly in the area of creditors' rights. Mr. Mirman is a partner in Horgan, Rosen, Beckham & Coren, located in the Toluca Lake area of Los Angeles, and specializes in the representation of financial institutions. Mr. Pasternak is a partner with the firm of Appleton, Pasternak & Pasternak in Los Angeles, practicing in all aspects of business litigation, including appointments as a receiver, referee, and corporate appraiser.

§ 119.117 Application and Notice of Application and Hearing for Order to Quash Ex Parte Writ of Possession [Code Civ. Proc. § 512.020(b)]--Judicial Council Form CD-160

[1] FORM Application and Notice of Application and Hearing for Order to Quash Ex Parte Writ of Possession [Code Civ. Proc. § 512.020(b)]--Judicial Council Form CD-160

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustration of Judicial Council Form CD-160, Application and Notice of Application and Hearing for Order to Quash Ex Parte Writ of Possession. The form is for use by a defendant to apply for an order to quash an ex parte writ of possession and to notify a plaintiff of a hearing on the application [*see Code Civ. Proc. § 512.020(b)*].

This form is adopted for mandatory use [*Cal. Rules of Court, Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Motion to Quash

A defendant whose property has been taken pursuant to an ex parte writ of possession may apply for an order that the writ be quashed and any property levied on pursuant to the writ be released [*see Code Civ. Proc. § 512.020(b)*; *see also* discussion in *§ 119.46[5]*].

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Chapter 119 CLAIM AND DELIVERY
PART V. FORMS
B. Provisional Remedy of Claim and Delivery

12-119 California Forms of Pleading and Practice--Annotated § 119.118

AUTHOR: Hon. Robert H. O'BrienEdythe L. Bronston, Esq.Alan M. Mirman, Esq.David J. Pasternak, Esq. Contributing Editors Part II of this chapter was adapted from California Practice Handbook: Provisional Remedies (Matthew Bender), Litigation Section, Los Angeles County Bar Association, Handbook Editor; Hon. Robert H. O'Brien, Edythe L. Bronston, Alan M Mirman, David J. Pasternak, Contributing Editors. Judge O'Brien is a judge of the Los Angeles County Superior Court, conducting both civil and criminal trials. Ms. Bronston is a partner with Fierstein & Sturman in Los Angeles, practicing mainly in the area of creditors' rights. Mr. Mirman is a partner in Horgan, Rosen, Beckham & Coren, located in the Toluca Lake area of Los Angeles, and specializes in the representation of financial institutions. Mr. Pasternak is a partner with the firm of Appleton, Pasternak & Pasternak in Los Angeles, practicing in all aspects of business litigation, including appointments as a receiver, referee, and corporate appraiser.

§ 119.118 Order for Release and Redelivery of Property [Code Civ. Proc. § 512.020(b)]--Judicial Council Form CD-170

[1] FORM Order for Release and Redelivery of Property [Code Civ. Proc. § 512.020(b)]--Judicial Council Form CD-170

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustration of Judicial Council Form CD-170, Order for Release and Redelivery of Property. The form is for use when the court grants a motion to quash an ex parte writ of possession and to release and redeliver the personal property described in the writ [*see Code Civ. Proc. § 512.020(b)*].

This form is adopted for mandatory use [*Cal. Rules of Court, Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Order

If the court determines that the plaintiff is not entitled to a writ of possession, the court quashes the writ of possession orders the release and redelivery of any property previously levied on, and awards the defendant any damages sustained by him or her which were proximately caused by the levy of the writ of possession and the loss of possession of the property pursuant to the levy [*Code Civ. Proc. § 512.020(b)*].

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Chapter 120 CLASS ACTIONS *
PART I. SCOPE

12-120 California Forms of Pleading and Practice--Annotated § 120.01

§ 120.01 Scope of Chapter

This chapter discusses and contains forms for use in class actions brought in California courts. It covers the basic requirements for the maintenance of a class action [*see §§ 120.12, 120.41[1]*]; special requirements for interstate class actions [*see § 120.14*]; the requirements applicable to the named class representatives [*see §§ 120.15, 120.40[2]*]; the unique procedural requirements of class actions [*see §§ 120.17 -120.20, 120.41*], including procedures for settlement [*see § 120.21*]; and the recovery of attorney's fees in class actions [*see § 120.24*].

This chapter also includes coverage of relevant provisions of the federal Class Action Fairness Act of 2005, which facilitates the removal of class actions from state court to federal court [*see §§ 120.13, 120.21[2], 120.40[3]*].

This chapter includes a basic form of complaint for use in a class action [*see § 120.50*]; a notice of motion for an order [*see § 120.51*] and an order [*see § 120.52*] determining class issues such as the satisfaction of the basic requirements for maintenance of the action as a class action or the ability of the named plaintiffs to represent the class; a notice of motion for an order [*see § 120.53*] and an order [*see § 120.54*] to notify potential class members of the pending action; a notice of the pendency of a class action [*see § 120.55*]; a petition for a writ of mandate to review nonappealable determinations of class issues [*see § 120.56*]; and a request for dismissal of a class action [*see § 120.57*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass CounselFeesCivil ProcedureClass ActionsClass MembersNamed MembersCivil ProcedureClass ActionsCompromises

* Portions of this chapter have been adapted from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).

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§ 120.02 Cross References

- For a form of class action complaint for declaratory relief by members of an association against the association and its officer-members, see Ch. 61, *Associations and Clubs* .

- For discussion and forms relating to consolidation of action, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

- For allegations establishing jurisdiction in federal district court, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

- For procedures and forms for use in the joinder of parties and intervention, see Ch. 395, *Parties* .

- For a discussion of the applicability of class actions to environmental actions, see Ch. 418, *Pollution and Environmental Matter* .

- For discussion of class actions under the Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*], see Ch. 504, *Sales: Consumers Legal Remedies Act* .

- For a form of class action complaint for declaratory relief to have a welfare regulation declared invalid and petition for writ of mandate to compel payment of benefits, see Ch. 527, *Social Services* .

- For discussion of certification issues in the context of restraints of trade and fluid class recovery, see Ch. 565, *Unfair Competition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsGeneral OverviewCivil

ProceduresPretrial MattersConsolidation of Actions

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[Reserved]

§§ 120.03[Reserved]

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12-120 California Forms of Pleading and Practice--Annotated § 120.10

§ 120.10 Governing Law

[1] California Law

Class actions are governed generally by *Code Civ. Proc. § 382*, which provides that if the question is one of a common or general interest or of many persons, or if the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all. Class actions brought under the Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*] are governed by *Civ. Code §§ 1780-1784*. Special procedures for the management of class actions in California trial courts are set forth in *Cal. Rules of Ct., Rule 3.760 et seq.*

State or local laws may restrict the availability of class actions in certain contexts. For example, state law does not authorize class actions for the refund of vehicle license fees [*Woosley v. State (1992) 3 Cal. 4th 758, 790, 13 Cal. Rptr. 2d 30, 838 P.2d 758* (*Veh. Code § 42231* requires that any "person" seeking refund of license fee must file application for refund before filing suit, and "person" does not include class)]. Similarly, a local ordinance may disallow the use of class actions to claim refunds of local taxes [*see, e.g., Batt v. City & County of San Francisco (2007) 155 Cal. App. 4th 65, 74-79, 65 Cal. Rptr. 3d 716* (trial court properly sustained demurrer to class action seeking refund of local hotel tax, based on local ordinance that expressly disallowed class claims for tax refunds)].

The Judicial Council has preempted local rules relating to pleadings, demurrers, ex parte applications, motions, discovery, provisional remedies, and the form and format of papers. Thus, all local rules concerning these procedures are null and void unless otherwise permitted or required by statute or Judicial Council rule [*Cal. Rules of Ct., Rule 3.20(a)*]. There are some exceptions, most significantly for local rules enacted under the Trial Court Delay Reduction Act [*Cal. Rules of Ct., Rule 3.20(b)*; *see Gov. Code § 68600 et seq.*].

[2] Federal Law

Procedures in class actions brought in federal district courts are governed by *Fed. R. Civ. P. 23* [*see Shady Grove Orthopedic Assocs. v. Allstate Ins. Co. (2010) -- U.S. --, 130 S. Ct. 1431, 176 L. Ed. 2d 311, 317-325* (diversity suit that meets requirements of *Fed. R. Civ. P. 23* may proceed as class action in federal court, even though state law prohibits class actions on kinds of claims asserted in case)]. A California superior court may look to the federal rule for guidance as to procedural matters not covered by California law [*see Richmond v. Dart Industries, Inc. (1981) 29 Cal. 3d 462,*

469-470 n.7, 174 Cal. Rptr. 515, 629 P.2d 23 ; *see also § 120.17[1]*].

The Class Action Fairness Act of 2005 provides special rules for federal courts' exercise of diversity jurisdiction over interstate class actions, adds new provisions to facilitate the removal of class actions from state court, and imposes new consumer-protection requirements for the settlement of class actions [*see* Pub. L. No. 109-2, 119 Stat. 4]. These provisions should be considered in deciding whether to file an interstate class action in California superior court and whether to remove a superior court action to federal district court [*see §§ 120.13, 120.21[2]*].

Federal law may prevent California courts from adjudicating certain class claims, even if asserted solely on the basis of state law. For example, the Securities Litigation Uniform Standards Act of 1998 (SLUSA) provides that no "covered class action" based on the statutory or common law of any state may be maintained in any state or federal court by any private party alleging fraud in connection with the purchase, sale, or holding of a "covered security" [*15 U.S.C. § 78bb(f)(1)*; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit (2006) 547 U.S. 71, 126 S. Ct. 1503, 164 L. Ed. 2d 179, 190-194* (SLUSA's preemption of state-law class actions alleging fraud "in connection with the purchase or sale" of securities bars state-law claims not just by purchasers and sellers of securities, but also by holders of securities, even though holders lack standing to pursue private securities-fraud claims under federal law)]. A "covered class action" for SLUSA purposes is a lawsuit in which damages are sought on behalf of more than 50 people [*15 U.S.C. § 78bb(f)(5)(B)*]. A "covered security" is a security traded nationally and listed on a regulated national exchange [*15 U.S.C. § 78bb(f)(5)(E)*]. SLUSA exempts from its operation certain class actions based on the law of the state in which the issuer of the covered security is incorporated, actions brought by a state agency or state pension plan, actions under contracts between issuers and indenture trustees, and derivative actions brought by shareholders on behalf of a corporation [*15 U.S.C. § 78bb(f)(3)(A)-(C), (5)(C)*]. SLUSA also expressly preserves state jurisdiction over state agency enforcement proceedings [*15 U.S.C. § 78bb(f)(4)*]. After SLUSA is found applicable, the court may allow the plaintiffs to amend the complaint to assert state-law claims for a group of fewer than 50 plaintiffs or to exclude allegations that trigger SLUSA preclusion [*Wells Fargo Bank, N.A. v. Superior Court (2008)159 Cal. App. 4th 381, 394, 71 Cal. Rptr. 3d 506*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationCivil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesGeneral OverviewSecurities LawLiabilityPrivate Securities LitigationFederal Preemption

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12-120 California Forms of Pleading and Practice--Annotated § 120.11

§ 120.11 Nature of Class Action

[1] Virtual Representation

A class action is an action that is prosecuted or defended by one or more representative plaintiffs or defendants on behalf of themselves and a specified group of persons similarly situated who have agreed to be bound by the result of the action [*see Code Civ. Proc. § 382*]. The class action device is designed to serve the interests of necessity, convenience, and justice [*City of San Jose v. Superior Court (1974) 12 Cal. 3d 447, 458, 115 Cal. Rptr. 797, 525 P.2d 701*] by providing an economical and effective group remedy [*Diamond v. General Motors Corp. (1971) 20 Cal. App. 3d 374, 381, 97 Cal. Rptr. 639*].

Class actions are a means of preventing a failure of justice in the judicial system. By permitting the simultaneous resolution of the claims of many individuals, such actions eliminate the possibility of repetitious litigation and provide a method of obtaining redress for small claims. Generally, a class action is proper if numerous parties suffer injury of insufficient size to warrant individual action and if denial of class relief would result in unjust advantage to the wrongdoer. However, a class action also has the potential to create injustice, and trial courts must carefully weigh respective benefits and burdens and allow class actions only if substantial benefits accrue to both litigants and the courts [*Linder v. Thrifty Oil Co. (2000) 23 Cal. 4th 429, 434-435, 97 Cal. Rptr. 2d 179, 2 P.3d 27*].

The statutory provisions authorizing class actions [*Civ. Code § 1781*; *Code Civ. Proc. § 382*; *Fed. R. Civ. P. 23*] are based on the equitable doctrine of virtual representation [*Daar v. Yellow Cab Co. (1976) 67 Cal. 2d 695, 703-704, 63 Cal. Rptr. 724, 433 P.2d 732* ; *see Salton City Etc. Owners Assn. v. M. Penn Phillips Co. (1977) 75 Cal. App. 3d 184, 189, 141 Cal. Rptr. 895*].

[2] Class Action Distinguished From Other Representative Actions

One court suggested that although all class suits are representative in nature, not all representative suits are class actions [*Tenants Assn. of Park Santa Anita v. Southers (1990) 222 Cal. App. 3d 1293, 1299 n.5, 272 Cal. Rptr. 361* ; *Residents of Beverly Glen, Inc. v. City of Los Angeles (1973) 34 Cal. App. 3d 117, 129, 109 Cal. Rptr. 724*]. Nevertheless, courts have not clearly defined the nature of the distinction between class actions and other representative actions [*see Residents of Beverly Glen, Inc. v. City of Los Angeles (1973) 34 Cal. App. 3d 117, 129, 109 Cal. Rptr. 724*

]. One type of action that is frequently referred to as a representative action rather than a class action is an action brought by an association, such as a tenants' or owners' association, on behalf of its members. These actions, which have also been called "class actions on behalf of a self-defined class" [*Salton City Etc. Owners Assn. v. M. Penn Phillips Co. (1977) 75 Cal. App. 3d 184, 188, 141 Cal. Rptr. 895*], differ from ordinary class actions in that the association is not a representative member of the class [*see § 120.15[1]*], but an entity specifically formed to represent the interests of the class. Because the association is not a member of the represented class, these cases often give rise to issues of the association's standing to sue [*see, e.g., National Solar Equipment Owners' Assn. v. Grumman Corp. (1991) 235 Cal. App. 3d 1273, 1278, 1 Cal. Rptr. 2d 325* ; *Tenants Assn. of Park Santa Anita v. Southers (1990) 222 Cal. App. 3d 1293, 1299-1304, 272 Cal. Rptr. 361* ; *Twain Harte Homeowners Assn. v. Patterson (1987) 193 Cal. App. 3d 184, 186-188, 239 Cal. Rptr. 316*]. For further discussion of association standing issues, see *§ 120.15[4]*.

Another example of a representative action that is not a class action is a suit brought under the Labor Code Private Attorneys General Act of 2004 [*see Lab. Code § 2698 et seq.*]. Under the Act, an aggrieved employee may bring a civil action personally and on behalf of other current or former employees to recover civil penalties for Labor Code violations [*Lab. Code § 2699(a)*; *see Lab. Code § 2699(c)* ("aggrieved employee" is "any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed"); *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court (2009) 46 Cal. 4th 993, 1001-1005, 195 Cal. Rptr. 3d 605, 209 P.3d 937* (plaintiff has standing to bring action under Labor Code Private Attorneys General Act of 2004 only if plaintiff suffered injury from unlawful action, so labor union lacks standing to sue as assignee or association of injured members)]. Of the civil penalties recovered, 75 percent goes to the Labor and Workforce Development Agency and 25 percent goes to the aggrieved employees [*Lab. Code § 2699(i)*]. The Act imposes special procedural requirements before an employee can bring an action to recover civil penalties. The employee must provide written notice of the alleged Labor Code violation to the employer and the Labor and Workforce Development Agency, and the employee may not sue unless the agency decides not to investigate, fails to respond to the notice within 33 days after notice, decides not to issue a citation, or fails to issue a citation within 158 days after the postmark date of the employee's notice [*Lab. Code § 2699.3(a)*]. An aggrieved employee's action under the Act functions as a substitute for an enforcement action brought by the government and need not satisfy generally applicable class action requirements [*Arias v. Superior Court (2009) 46 Cal. 4th 969, 975, 980-987, 95 Cal. Rptr. 3d 588, 209 P.3d 923*].

[3] Class Action Distinguished From Coordinated Actions

If two or more civil actions sharing a common question of fact or law are pending in different courts, the actions may be coordinated provided certain standards are met [*Code Civ. Proc. §§ 404, 404.1*; *see Cal. Rules of Ct., Rule 3.501 et seq.*]. Coordinated actions are similar to class actions because they seek to promote justice and convenience; efficient utilization of judicial facilities and personnel; and avoidance of duplicative and inconsistent rulings, orders, and judgments [*Code Civ. Proc. § 404.1*]. Nevertheless, coordinated actions do not involve virtual representation. The parties generally participate in the litigation to the same extent as parties in ordinary civil litigation and are represented by their own counsel.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsPrerequisitesGeneral Overview

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§ 120.12 Requirements for Maintenance of Class Action

[1] Predominance of Common Issues

The ultimate question concerning the propriety of maintaining a class action, given an ascertainable class [*see* [3], *below*], is whether the issues that may be jointly tried, compared to those requiring separate adjudication, are so numerous or substantial that maintenance of the action as a class action would be advantageous to the judicial process and the litigants [*Collins v. Rocha (1972) 7 Cal. 3d 232, 238, 102 Cal. Rptr. 1, 497 P.2d 225* ; *Brown v. Regents of University of California (1984) 151 Cal. App. 3d 982, 989, 198 Cal. Rptr. 916*]. The specific requirements for maintaining a class action are discussed in [2]-[4], *below*.

For further coverage of the requirements for maintaining a class action, see Cabraser, California Class Actions and Coordinated Proceedings (Second Edition), Ch. 3, *California's Class Action Statute* (Matthew Bender).

[2] Community of Interest

[a] Factors to Be Considered

A class action may be sustained only if the class members have a well-defined community of interest in questions of law and fact involved in action [*Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 704, 63 Cal. Rptr. 724, 433 P.2d 732* ; *see Stephens v. Montgomery Ward & Co. (1987) 193 Cal. App. 3d 411, 421, 238 Cal. Rptr. 602]* . The community of interest requirement embodies three factors [*Richmond v. Dart Industries, Inc. (1981) 29 Cal. 3d 462, 470, 174 Cal. Rptr. 515, 629 P.2d 23* ; *Baltimore Football Club, Inc. v. Superior Court (1985) 171 Cal. App. 3d 352, 358, 215 Cal. Rptr. 323]* :

(1) Predominant common questions of law or fact;

(2) Class representatives with claims or defenses typical of the class; and

(3) Class representatives who can adequately represent the class.

The requirement will not be satisfied if the common questions are not the predominant questions in the case [*see Classen v. Weller (1983) 145 Cal. App. 3d 27, 46, 192 Cal. Rptr. 914]* .

A common recovery may be one way to satisfy the community of interest requirement, but it is not a necessary element of the requirement [*Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 707-709, 63 Cal. Rptr. 724, 433 P.2d 732*].

Antagonism among members of the potential class is not, by itself, inconsistent with a finding of community of interest. The California Supreme Court has noted that, in such a case, dissidents' views may be asserted within the lawsuit by intervening or creating subclasses [*Richmond v. Dart Industries, Inc. (1981) 29 Cal. 3d 462, 479, 174 Cal. Rptr. 515, 629 P.2d 23*]. Nevertheless, community of interest will be found to be lacking if the enforcement of a right in favor of some members of the class would adversely affect the substantial interests of others [*Knox v. Streatfield (1978) 79 Cal. App. 3d 565, 571, 145 Cal. Rptr. 39*].

[b] Predominant Questions

The "predominant common questions" factor does not require that all class members have uniform or identical claims. Rather, determining whether common questions predominate in any given case requires the court to compare the costs and benefits of adjudicating the plaintiffs' claims in a class action with the costs and benefits of proceeding by numerous separate actions [*Sav-on Drug Stores, Inc. v. Superior Court (2004) 34 Cal. 4th 319, 339 n.10, 17 Cal. Rptr. 3d 906, 96 P.3d 194*]. Thus, a class action is not inappropriate simply because each member of the class may at some point be required to make an individual showing of eligibility for recovery or the amount of each individual's damages [*Sav-on Drug Stores, Inc. v. Superior Court (2004) 34 Cal. 4th 319, 332-333, 17 Cal. Rptr. 3d 906, 96 P.3d 194* (in action to recover overtime compensation based on alleged misclassification of class of nonexempt employees, trial court did not abuse its discretion in finding that common issues predominated, even though each class member would have to offer individual proof of damages); *see also Parra v. Bashas', Inc. (9th Cir. 2008) 536 F.3d 975, 979* ("[T]he Plaintiffs here establish commonality even though their individual fact situations differ because they all seek a common legal remedy for a common wrong. ... The claimed difficulties in the calculations of damages, as they affected the various class members, do not preclude class certification."); *Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal. 4th 554, 575-576, 67 Cal. Rptr. 3d 468, 169 P.3d 889* (in putative class action seeking reimbursement for employees' business expenses, lower courts abused their discretion in framing class-certification issue as whether each employee had agreement with employer regarding manner of reimbursement, since employer contended that it had adopted reimbursement policy applicable to all employees who would be members of putative class); *Lee v. Dynamex, Inc. (2008) 166 Cal. App. 4th 1325, 1334, 83 Cal. Rptr. 3d 241* ("A class is not inappropriate merely because each member at some point may be required to make an individual showing as to eligibility for recovery")].

Similarly, the fact that the court may fashion different remedies for individual class members based on equitable defenses such as fraud and unclean hands does not prevent class certification on the question of the defendant's liability, if those equitable defenses are not relevant to liability. For example, in an action alleging that an insurer had unlawfully engaged in postclaims underwriting [*see Ins. Code § 10384*], the insurer was barred from asserting class members' alleged misrepresentations in their insurance applications as a defense to liability, because the applications were not endorsed on or attached to the policies as required by law [*see Ins. Code §§ 10113, 10381.5* (insured not bound by statements made in application that has not been attached to or endorsed on policy)]. Therefore, even though equitable defenses of fraud or unclean hands on the part of individual class members could be considered by the court in fashioning class members' remedies, those defenses did not outweigh the common issues of liability [*Ticconi v. Blue Shield of Cal. Life & Health Ins. Co. (2008) 160 Cal. App. 4th 528, 543-547, 72 Cal. Rptr. 3d 888*].

The use of "anecdotal" evidence about particular class members does not mean that individual facts predominate over common issues if the anecdotal evidence is relevant to establish a matter that relates to the class as a whole [*see, e.g., Estrada v. FedEx Ground Package System, Inc. (2007) 154 Cal. App. 4th 1, 13-14, 64 Cal. Rptr. 3d 327* (anecdotal evidence of employer's treatment of class members was relevant to common issues--whether class members were

employees, and whether their expenditures were therefore reimbursable under *Lab. Code § 2802*)]. For example, a plaintiff may show that the defendant's conduct relates to the class as a whole by presenting anecdotal evidence of particular instances of the defendant's conduct, as well as pattern-and-practice evidence such as statistics, sampling, policies, and administrative practices [*Dukes v. Wal-Mart Stores, Inc. (9th Cir. 2010) 603 F.3d 571, 612* (en banc); *Capitol People First v. Department of Developmental Servs. (2007) 155 Cal. App. 4th 676, 695-696, 66 Cal. Rptr. 3d 300*].

The fact that separate transactions are involved does not in itself preclude a finding of the required predominance of common questions, as long as each member of the class would not be required to litigate numerous and substantial questions determining his or her individual right to recovery following a judgment determining issues common to the class [*City of San Jose v. Superior Court (1974) 12 Cal. 3d 447, 460, 115 Cal. Rptr. 797, 525 P.2d 701* ; *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 809, 94 Cal. Rptr. 796, 484 P.2d 964*]. For example, in government-benefits cases in which class members had to make individual showings as to eligibility for benefits and amount of damages, there nevertheless was a sufficient predominance of common issues among persons alleging wrongful denial of benefits [*Employment Development Dept. v. Superior Court (1981) 30 Cal. 3d 256, 265-266, 178 Cal. Rptr. 612, 636 P.2d 575* ; *Reyes v. Board of Supervisors (1987) 196 Cal. App. 3d 1263, 1270, 242 Cal. Rptr. 339* (class action is "peculiarly appropriate vehicle" for trying cases concerning denial of government benefits)]. In another case, the claim was that, in reliance on the defendant's deceptive conduct, consumers purchased an illegal product they would not otherwise have purchased. The action did not seek actual damages, but instead sought restitution. The court of appeal concluded that common questions predominated: if the plaintiff could show that material misrepresentations about the legality of the product were made to the class members, at least an inference of reliance--i.e., causation and injury--would arise as to the entire class [*Steroid Hormone Prod. Cases (2010) 181 Cal. App. 4th 145, 156-157, 104 Cal. Rptr. 3d 329]* .

Nevertheless, the requirement of predominant common questions generally will not be satisfied if each class member's right to recover is based on a separate set of facts applicable only to that person [*City of San Jose v. Superior Court (1974) 12 Cal. 3d 447, 459, 115 Cal. Rptr. 797, 525 P.2d 701* ; *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 809, 94 Cal. Rptr. 796, 484 P.2d 964* ; *Kavruck v. Blue Cross of Cal. (2003) 108 Cal. App. 4th 773, 786, 134 Cal. Rptr. 2d 152* (common questions did not predominate in insurance-fraud action because plaintiffs' reliance on oral representations by defendant's agents would have required proof on subscriber-by-subscriber basis, rather than common set of facts for entire class)]. In one case, for example, the trial court denied class treatment of an action seeking overtime compensation based on a claim that a putative class of grocery managers had been misclassified as executive employees exempt from the overtime wage laws. The court of appeal affirmed, noting that the trial court's decision was based not on the mere presence of individual liability issues (i.e., the need to establish that each manager had been misclassified as an executive), but on the nature of those issues. Specifically, the significant variation in the managers' work from store to store, and from week to week, required particularized individual liability determinations that predominated over common issues [*Dunbar v. Albertson's, Inc. (2006) 141 Cal. App. 4th 1422, 1431-1432, 47 Cal. Rptr. 3d 83]* . Another case involved claims of actual damages suffered by class members who had purchased a certain medication believing it to be safe and more effective than a less expensive generic medication, based on misleading information from the defendant. The court of appeal held that common issues did not predominate, because each class member's claim--including the materiality of, and the class member's reliance on, the alleged misrepresentations--was dependent on a showing of the class member's specific medical needs and history [*In re Vioxx Class Cases (2009) 180 Cal. App. 4th 116, 133-134, 103 Cal. Rptr. 3d 83]* .

Even if a case presents many common questions of law, it may not proceed as a class action if the individual issues are too complex, numerous, diverse, or substantial [*Osborne v. Subaru of America, Inc. (1988) 198 Cal. App. 3d 646, 653-654, 243 Cal. Rptr. 815* ; *Bozaich v. State (1973) 32 Cal. App. 3d 688, 694-695, 108 Cal. Rptr. 392*]. For example, in a negligence action seeking medical monitoring of persons affected by the defendants' discharge of toxic chemicals that allegedly contaminated drinking water, the Supreme Court found that individual questions predominated, making class certification inappropriate. The Court reasoned that although questions of duty and breach could be

determined on the basis of common proof, the issues of proximate causation and damage would require individual proof for each potential claimant. Given that the putative class consisted of an estimated 50,000 to 100,000 people, the Supreme Court concluded that individual questions were clearly predominant [*Lockheed Martin Corp. v. Superior Court (2003) 29 Cal. 4th 1096, 1108-1111, 131 Cal. Rptr. 2d 1, 63 P.3d 913*].

[c] Typicality of Claims

In a class action against multiple defendants, the action may be maintained as to defendants against whom the class representative has a cause of action. Without such a personal cause of action, the prerequisite that the claims of the representative party be typical of the class cannot be met [*Hart v. County of Alameda (1999) 76 Cal. App. 4th 766, 775-776, 90 Cal. Rptr. 2d 386*]. If the plaintiff class representative has a personal cause of action against only one defendant and never had a claim of any kind against the remaining defendants, the representative's claim is not typical of the class. The typicality requirement is not fulfilled merely because the plaintiff alleges injuries similar to those suffered by other parties at the hands of other defendants [*Hart v. County of Alameda (1999) 76 Cal. App. 4th 766, 775-776, 90 Cal. Rptr. 2d 386*].

An exception to this rule occurs, however, if a plaintiff, as class representative, alleges that multiple defendants acted in a conspiracy or that multiple defendants are jointly responsible for the plaintiffs' injuries [*Hart v. County of Alameda (1999) 76 Cal. App. 4th 766, 775-776, 90 Cal. Rptr. 2d 386*].

A named plaintiff who is vulnerable to defenses not generally applicable to class members may fail to satisfy the typicality requirement, particularly if those defenses are likely to become the focus of the litigation [*Seastrom v. Neways, Inc. (2007) 149 Cal. App. 4th 1496, 1502-1503, 57 Cal. Rptr. 3d 903* (in action against manufacturer of product allegedly sold illegally without prescription, upper-level distributors of product did not meet typicality test to represent class of purchasers, since distributors were subject to defenses based on their probable knowledge that product could not be sold without prescription)].

[d] Lack of Community Interest in Mass Tort Actions

Personal injury tort actions generally are not maintainable as class actions. The very personal nature of tort injuries, the wide variety of theories of liability and causation, the disparities in damages, and the fact that most tort plaintiffs prefer to be represented by counsel of their own choice make these actions inappropriate for class action treatment [*Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1123, 245 Cal. Rptr. 658, 751 P.2d 923* (action by "DES baby" against drug manufacturers); *Brown v. Regents of University of California (1984) 151 Cal. App. 3d 982, 991, 198 Cal. Rptr. 916* (medical malpractice action concerning standard of coronary care provided at particular hospital); *Rose v. Medtronics, Inc. (1980) 107 Cal. App. 3d 150, 155, 166 Cal. Rptr. 16* (action by persons having had defective pacemakers implanted)]. The policy of reluctance to extend class-action treatment to personal-injury tort actions governs even those types of claims that contain many common questions of law [*Brown v. Regents of University of California (1984) 151 Cal. App. 3d 982, 991, 198 Cal. Rptr. 916*].

Under the federal Class Action Fairness Act of 2005, a "mass action" may be treated as a class action for purposes of removal to federal court [*see 28 U.S.C. § 1332(d)(11)*]. For further discussion, see *§ 120.13[4]*.

[e] Examples of Community of Interest Determinations

A sufficient community of interest to support a class action was found to exist in the following actions:

- An action seeking construction of standard contract provisions [*MacManus v. A. E. Realty Partners (1987) 195 Cal. App. 3d 1106, 1115-1116, 241 Cal. Rptr. 315*].

- An action alleging company-wide discriminatory policies and practices in hiring and promotions, even though the company contended that each store hired and promoted its own personnel [*Stephens v. Montgomery Ward & Co. (1987) 193 Cal. App. 3d 411, 421, 238 Cal. Rptr. 602*].

- An action by limited partners against a general partner, alleging the use of written materials containing fraudulent misrepresentations and nondisclosures to induce investment, even though disparate oral representations as well as the common written representations were made to the various plaintiffs [*Danzig v. Jack Grynberg & Associates (1984) 161 Cal. App. 3d 1128, 1137 n.5, 208 Cal. Rptr. 336*].

- An action by prisoners challenging conditions at a county jail, even though the complaint revealed some questions of fact and law inapplicable to the class as a whole [*Mendoza v. County of Tulare (1982) 128 Cal. App. 3d 403, 418, 180 Cal. Rptr. 347*].

- An action alleging price-fixing, even if not every class member has purchased every product whose price was fixed [*In re Cipro Cases I & II (2004) 121 Cal. App. 4th 402, 410-411, 17 Cal. Rptr. 3d 1* (class treatment is usually appropriate if defendants are alleged to have engaged in collusive, anti-competitive conduct resulting in artificially high market-wide prices for product, since existence of conspiracy and its legality generally present common questions of law and fact that predominate over any questions affecting only individual class members); *B.W.I. Custom Kitchen v. Owens-Illinois, Inc. (1987) 191 Cal. App. 3d 1341, 1348-1355, 235 Cal. Rptr. 228* (price-fixing by glass manufacturers and distributors); *Rosack v. Volvo of America Corp. (1982) 131 Cal. App. 3d 741, 763, 182 Cal. Rptr. 800* (price-fixing by automobile manufacturer and distributors)].

- An action by former limited partners of six real estate limited partnerships that consolidated into a single corporate entity, alleging fraudulently induced approval of the consolidation and the dissemination of false and misleading information [*Daniels v. Centennial Group, Inc. (1993) 16 Cal. App. 4th 467, 472-473, 21 Cal. Rptr. 2d 1* (no strict requirement that named plaintiff have interest in each individual partnership)].

An insufficient community of interest to support a class action was found in the following actions:

- An action alleging concealment and misrepresentation in the course of medical treatment, comprised of numerous and substantial individual questions of fact based on particular medical conditions and methods of treatment [*Brown v. Regents of University of California (1984) 151 Cal. App. 3d 982, 989, 198 Cal. Rptr. 916*].

- An action by passengers of a cruise ship against the cruise corporation, seeking damages for physical illness and emotional distress, in which each passenger's individual testimony would be required to establish liability as to him or her [*D'Amico v. Sitmar Cruises, Inc. (1980) 109 Cal.App. 3d 323, 326, 167 Cal. Rptr. 254*].

- An action by a nationwide class of purchasers of a certain model of automobile, alleging defective design of the automobile, requiring numerous individual adjudications of fact and the trial court's need to apply numerous different rules of law from several states [*Osborne v. Subaru of America, Inc. (1988) 198 Cal. App. 3d 646, 654-656, 243 Cal. Rptr. 815*].

- An action filed by two persons alleging they represented a class consisting of people wrongly and unjustifiably attacked by police dogs used by a sheriff's department, in which issues requiring separate adjudication predominated over common questions because the reasonableness of a particular use of force is judged by examining the totality of the circumstances [*Silva v. Block (1996) 49 Cal. App. 4th*

345, 351, 56 Cal. Rptr. 2d 613].

[3] Ascertainable Class

A definitely ascertainable class is necessary to the maintenance of any class action [*Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 809, 94 Cal. Rptr. 796, 484 P.2d 964* ; *Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 704, 63 Cal. Rptr. 724, 433 P.2d 732*]. Generally, a class is considered ascertainable if both of the following requirements are satisfied [*Reyes v. Board of Supervisors (1987) 196 Cal. App. 3d 1263, 1274-1275, 1280, 242 Cal. Rptr. 339*]:

- Under the criteria for class membership, the members are clearly identifiable and the size of the class reasonably controlled.

- The members can be located and notified of the action through a reasonable expenditure of time and money.

For example, a class consisting of all county welfare recipients whose benefits were terminated under a challenged workfare program was deemed to be an ascertainable class because sufficient records existed to identify the class members at the remedial stage of the proceeding, and the defendant county failed to show that the administrative costs of managing the action would be disproportionate to the potential benefits of the action to class members individually and to the class as a whole [*Reyes v. Board of Supervisors (1987) 196 Cal. App. 3d 1263, 1274-1275, 1280, 242 Cal. Rptr. 339*]. Similarly, in an action alleging unlawful discrimination in hiring and promoting employees, a class consisting of one segment of the defendant employer's workforce was held to be an ascertainable class [*Stephens v. Montgomery Ward & Co. (1987) 193 Cal. App. 3d 411, 420, 238 Cal. Rptr. 602*].

Conversely, a class defined as all state residents who, during a specified period, purchased eggs from a particular grocery store chain was determined not to be an ascertainable class, because no single member of the class could prove he or she purchased a carton of eggs containing one or more contaminated eggs during the specified period [*Collins v. Safeway Stores, Inc. (1986) 187 Cal. App. 3d 62, 71, 231 Cal. Rptr. 638*].

A class is not ascertainable unless the class definition is precise and objective. Thus, class certification is not appropriate when the proposed class definition is not based on objective criteria, but instead requires a merits-based determination in order to establish whether a particular person is a member of the class. When the class definition is framed as a legal conclusion, the trial court has no way of ascertaining whether a given person is a member of the class until after a determination of ultimate liability as to that person is made. The members of such a class are not readily identifiable so as to permit appropriate notice to be given [*Sony Elecs. Inc. v. Superior Court (2006) 145 Cal. App. 4th 1086, 1094-1097, 52 Cal. Rptr. 3d 139* (class definition was not objective, since proposed class consisted not of all purchasers of defendant's product, but only of those purchasers who received defective products)].

Although the class must be ascertainable, there is no requirement that every member of the class be identified from the outset of the case [*Estrada v. FedEx Ground Package System, Inc. (2007) 154 Cal. App. 4th 1, 14, 64 Cal. Rptr. 3d 327* (citing *Daar v. Yellow Cab Co. (1976) 67 Cal. 2d 695, 706, 63 Cal. Rptr. 724, 433 P.2d 732*)].

Ordinarily, the plaintiff has the burden of identifying class members and establishing their number. However, circumstances may be presented in which a court may find it equitable to require the defendant to share the costs of notification with plaintiff for the purposes of identifying potential class members [*State of California ex rel. Dept. of Motor Vehicles v. Superior Court (1998) 66 Cal. App. 4th 421, 438, 78 Cal. Rptr. 2d 88*].

[4] Use of Subclasses

A party may propose the use of subclasses and other innovative procedural tools to obtain certification of a manageable

class [*Occidental Land, Inc. v. Superior Court (1976) 18 Cal. 3d 355, 364 n.3, 134 Cal. Rptr. 388, 556 P.2d 750* (trial court has obligation to consider proposal); *La Sala v. American Sav. & Loan Ass'n (1971) 5 Cal. 3d 864, 875 n.10, 97 Cal. Rptr. 849, 489 P.2d 1113* ; *see also Fed. R. Civ. P. 23(c)(4)*]. A trial court may decline to adopt a proposal to use subclasses, however, if the parties who seek certification fail "to provide the trial court with a concrete proposal describing how such subclasses would be defined, how they would be administered, or how they would help the court deal with the complexities inherent in the proposed class" [*Block v. Major League Baseball (1998) 65 Cal. App. 4th 538, 546* ; *see Dunbar v. Albertson's, Inc. (2006) 141 Cal. App. 4th 1422, 1431-1432, 47 Cal. Rptr. 3d 83* (it is not sufficient simply to mention procedural tool--such as use of subclasses, exemplar plaintiffs, or survey results to manage individual issues--party seeking class certification must explain how the procedure will effectively manage issues in question)].

[5] Superiority of Class Action as Method of Adjudicating Dispute

[a] Basis of Requirement in Federal Rule

To sustain an action as a class action, the plaintiff must show that the class action method is superior to other available methods for the fair and efficient adjudication of the controversy [*Sav-on Drug Stores, Inc. v. Superior Court (2004) 34 Cal. 4th 319, 332, 17 Cal. Rptr. 3d 906, 96 P.3d 194*]. This requirement, which is expressly set forth in *Fed. R. Civ. P. 23(b)(3)*, has been held to apply to class actions brought under *Code Civ. Proc. § 382*, as well as to federal actions brought under Rule 23 [*Schneider v. Vennard (1986) 183 Cal. App. 3d 1340, 1345, 228 Cal. Rptr. 800* ; *see § 120.17[1]*].

[b] Relevant Factors

In determining whether a class action is superior to other methods of adjudicating a case, the trial court must consider various interests, including those of (1) the judicial system, (2) potential class members, (3) the present plaintiff, (4) the attorneys for the litigants, (5) the public at large, and (6) the defendant. The legal and practical issues presented by the case must also be considered for their bearing on the superiority of the class action method [*Sav-on Drug Stores, Inc. v. Superior Court (2004) 34 Cal. 4th 319, 327, 17 Cal. Rptr. 3d 906, 96 P.3d 194* (to determine whether maintenance of class action would be advantageous to judicial process and litigants, court must consider whether theory of recovery advanced by proponents of certification is, as analytical matter, likely to prove amenable to class treatment)]. For example, in a case involving the allegedly wrongful termination of government benefits, the practical consideration that the proposed class members would be unlikely to seek or obtain redress through individual suits because they were too poor, their claims were too small, and the legal issues involved were too arcane for them to obtain private counsel was relevant to the determination of the superiority of the class action method for adjudicating the dispute [*see Reyes v. Board of Supervisors (1987) 196 Cal. App. 3d 1263, 1279-1280, 1280, 242 Cal. Rptr. 339*].

The extent and nature of other litigation already commenced by members of the class may be a factor in determining the superiority of the class action method. For example, when a class action between the same parties for the same cause was already pending in federal court and would have provided the plaintiffs with all the remedies available in a state court, the trial court properly determined that a state-court class action was not the superior method of adjudicating the controversy and that permitting the state court action to proceed would not serve the interests of judicial economy and efficiency [*Schneider v. Vennard (1986) 183 Cal. App. 3d 1340, 1345, 1347, 228 Cal. Rptr. 800*].

Practical difficulties, such as the administrative cost of the action, difficulties associated with the size of the class, and the fact that not all the class members purchased the same defective product or sustained the same amount of damages, do not necessarily preclude a finding that a class action is the superior method for fairly and efficiently adjudicating the controversy. The court should consider the availability of procedures such as bifurcation and subclassing prior to determining that the difficulties make a fair and efficient class action impracticable [*Rosack v. Volvo of America Corp. (1982) 131 Cal. App. 3d 741, 762, 182 Cal. Rptr. 800*]. In general, unless the unmanageability of the class action is

essentially without dispute or clearly established, class certification should not be foreclosed based on such concerns [*see Reyes v. Board of Supervisors (1987) 196 Cal. App. 3d 1263, 1275, 242 Cal. Rptr. 339*].

[6] Enforceability of Contractual Waiver of Class Action

A contractual provision waiving the right to pursue a class remedy for disputes arising under the contract is not necessarily unenforceable. However, at least some class-action waivers in consumer contracts are unconscionable and unenforceable. The doctrine of unconscionability has both a procedural element, which generally takes the form of a contract of adhesion and focuses on oppression or surprise, and a substantive element, which focuses on overly harsh or one-sided results [*Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 160-161, 30 Cal. Rptr. 3d 76, 85, 113 P.3d 1100*]. For example, an amendment to a credit-card agreement waiving cardholders' right to pursue class remedies presents an element of procedural unconscionability if it is presented to cardholders as a "bill-stuffer" to be deemed accepted by cardholders who do not close their accounts. Such a waiver is also substantively unconscionable if it operates as an exculpatory provision, effectively insulating the card issuer from liability by virtue of the fact that individual claims would be too small to pursue [*see Civ. Code § 1688* (exculpatory contract clauses are contrary to public policy)]. Under the circumstances, such a waiver of class remedies is unconscionable and unenforceable [*Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 160-163, 30 Cal. Rptr. 3d 76, 85-87, 113 P.3d 1100*].

As another example, a class-action waiver contained in an agreement between a provider of internet service and its customers is procedurally unconscionable if it is presented on a "take it or leave it" basis, either through installation of the software or through materials included in the package mailed with the software, with no opportunity to opt out. This kind of waiver is also substantively unconscionable if it is combined with a scheme to cheat numerous consumers out of small sums of money through deliberate behavior, such as by charging customers for the internet service as soon as they ordered it, even though the provider knows that the service would not be available until after the necessary equipment is delivered, some weeks later [*Aral v. Earthlink, Inc. (2005) 134 Cal. App. 4th 544, 556-557, 36 Cal. Rptr. 3d 229*].

Similarly, a class-action waiver was held procedurally unconscionable in a case in which the waiver was presented as a "bill-stuffer" to satellite-television customers, who could reject the amendment only by closing their accounts, an act that could incur termination fees. The waiver in that case was also substantively unconscionable, since it involved a scheme to cheat numerous customers out of small sums of money. Even though the sums involved might have been as much as $1,000 per customer, the court of appeal in that case found the amounts were still sufficiently small that the class action was likely the only effective way to redress the defendant's alleged conduct in depriving the customers of the full high-definition television services for which they were paying. The court also noted that, for this purpose, there is no conceptual difference between a case in which the defendant overcharges customers for services provided and a case in which the defendant noticeably reduces the quality of the services in relation to the quality for which customers have paid [*Cohen v. DirecTV, Inc. (2006) 142 Cal. App. 4th 1442, 1451-1455, 48 Cal. Rptr. 3d 813* (scheme to deprive customers of small amounts of money or services need not be "hidden" or "secret" to be proper subject of class action)].

As noted above, if a consumer contract contains a mandatory arbitration provision that includes a waiver of the right to pursue class arbitration, the waiver may be found unconscionable and unenforceable if it operates to insulate a party from liability that otherwise would be imposed under California law [*Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 162-163, 30 Cal. Rptr. 3d 76, 85-87, 113 P.3d 1100*]. Such a finding is not preempted by Section 2 of the Federal Arbitration Act (FAA), which provides that arbitration agreements are valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract" [*9 U.S.C. § 2*]. The principle that class-action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally. Thus, application of the principle is not preempted by the FAA, since the principle applies equally to class action waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements [*Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 163-167, 30 Cal. Rptr. 3d 76, 87-95, 113 P.3d 1100*].

Similar principles apply when an employer relies on a class-arbitration waiver in an employment arbitration agreement to preclude class arbitration by employees whose unwaivable statutory rights to overtime pay [*see Lab. Code §§ 500 et seq., 1194*] have allegedly been violated. A class-arbitration waiver in such an agreement will not be enforced if the trial court determines that class arbitration would be a significantly more effective way of vindicating the unwaivable statutory rights of affected employees than individual arbitration. To make this determination, the court must consider (1) the modest size of the potential individual recovery; (2) the potential for retaliation by the employer against class members who bring individual arbitration claims; (3) the fact that absent members of the class may be ill-informed about their rights; and (4) other real-world obstacles to the vindication of class members' right to overtime pay through individual arbitration. If the court concludes, based on those factors, that a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and finds that the disallowance of the class arbitration will likely lead to a less comprehensive enforcement of overtime laws for the affected employees, the court must invalidate the class-arbitration waiver to ensure that the employees can vindicate their unwaivable rights in an arbitration forum [*Gentry v. Superior Court (Aug. 30, 2007) 42 Cal. 4th 443, 456-463, 64 Cal. Rptr. 3d 773, 165 P.3d 556* (depending on circumstances, class-arbitration waiver can have exculpatory effect by making it very difficult for injured employees to pursue their remedies, thereby undermining enforcement of statutory right to overtime pay)].

The trial court may rely on declarations of counsel to support factual findings in determining whether a class-action waiver is unconscionable and unenforceable. In one case, for example, the court of appeal held that declarations of plaintiff's counsel stating that class members would have difficulty securing legal representation for individual cases because of the relatively small sums involved, and that class actions were necessary to deter employers like the defendant from misclassifying employees so as to avoid paying overtime, constituted substantial evidence supporting the trial court's factual finding that a class-action waiver had an exculpatory effect and was therefore substantively unconscionable [*Murphy v. Check 'N Go of Cal., Inc. (2007) 156 Cal. App. 4th 138, 148, 67 Cal. Rptr. 3d 120* (class-action waiver was exculpatory and therefore substantively unconscionable under *Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 161, 163, 30 Cal. Rptr. 3d 76, 113 P.3d 1100*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsClass MembersNamed MembersCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesCommonalityCivil ProcedureClass ActionsPrerequisitesTypicalityTortsNegligenceGeneral Overview

* Portions of this chapter have been adapted from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).

California Forms of Pleading and Practice--Annotated

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
Chapter 120 CLASS ACTIONS *
PART II. LEGAL BACKGROUND

12-120 California Forms of Pleading and Practice--Annotated § 120.13

§ 120.13 Federal Jurisdiction Over Interstate Class Actions

[1] Class Action Fairness Act of 2005

[a] Importance of Act

The Class Action Fairness Act of 2005 (CAFA) provides special rules for federal courts' exercise of diversity jurisdiction over class actions, adds new provisions to facilitate the removal of class actions from state court, and imposes new consumer-protection requirements for the settlement of class actions [*see* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4]. CAFA was signed into law on February 18, 2005, and it applies to all class actions commenced in any court on or after that date [Pub L. No. 109-2, § 9]. Thus, CAFA does not apply to a case commenced in state court before February 18, 2005 [*see Pritchett v. Office Depot, Inc. (10th Cir. 2005) 404 F.3d 1232, 1235-1238* (class action is "commenced" for CAFA purposes when it is filed in state court, not when it is removed to federal court); *see also McAtee v. Capital One (9th Cir. 2007) 479 F.3d 1143, 1146* (action filed in California state court is commenced for purposes of CAFA when complaint is filed, irrespective of any later amendment to add new causes of action or to add or replace plaintiffs or defendants, including substitution of named defendant for fictitiously sued defendant)].

Under CAFA, a class action filed in superior court may be removed to, and ultimately adjudicated in, federal district court, even if the complaint asserts only state-law claims and complete diversity of citizenship among the parties is lacking [*see 28 U.S.C. §§ 1332(d), 1453*]. For discussion of the removal of class actions to federal court, see [2], [3], *below*. For discussion of CAFA's consumer-protection requirements, see *§ 120.21[2]*.

For thorough coverage of the removal of class actions under CAFA, see Cabraser, California Class Actions Practice and Procedure, Ch. 11, *Removal and Remand of Class Actions Filed in State Court* (Matthew Bender).

[b] Purposes of Act

The Class Action Fairness Act of 2005 is designed to address abuses of the class action device that have arisen in the past decade. As identified by Congress, those abuses include large fees received by plaintiffs' lawyers, while class members are left with coupons or other awards of little or no value; unjustified awards being made to some plaintiffs at

the expense of other class members; and the publication of confusing notices that prevent class members from being able to fully understand and effectively exercise their rights [Pub L. No. 109-2, § 2(a)(2), (3)]. Congress noted that these abuses, and the handling of interstate class actions by state courts, undermine the national judicial system because state courts are keeping cases of national importance out of federal court, making judgments that impose their view of the law on other states, and sometimes acting in ways that demonstrate bias against out-of-state defendants [Pub L. No. 109-2, § 2(a)(4)].

In response to these abuses, CAFA includes measures intended to assure fair and prompt recoveries for class members with legitimate claims; to restore the intent of the framers of the Constitution by providing for federal-court consideration of interstate cases of national importance under diversity jurisdiction; and to benefit society by encouraging innovation and lowering consumer prices [Pub L. No. 109-2, § 2(b)].

PRACTICE TIP:

The Congressional findings and statement of the purposes accompanying CAFA should be taken into account in every class certification decision. Congress has now publicly endorsed the utility of class certification, making the certification of classes a matter of national policy. Given the multistate provisions of CAFA, this national policy includes the certification of appropriate multistate classes. Therefore, even state courts should consider the national policy when exercising their discretion in making class certification decisions. *Commentary from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).*

For further discussion, see Cabraser, California Class Actions Practice and Procedure, Ch. 1, *History and Overview* , and Ch. 11, *Removal and Remand of Class Actions Filed in State Court* (Matthew Bender).

[2] Removal to Federal Court

The Class Action Fairness Act of 2005 authorizes the removal of a class action to federal court by any defendant, without regard to whether any defendant is a citizen of the state in which the action was filed, and without the consent of other defendants [*28 U.S.C. § 1453(b)*; *see United Steel, Paper & Forestry, Rubber Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union v. Shell Oil Co. (9th Cir. 2008) 549 F.3d 1204, 1208-1209* (one defendant's timely notice of removal pursuant to CAFA accomplishes removal of entire case and is not vitiated by another defendant's untimely notice of removal)]. Removal of a case from California superior court under this provision generally must be made within 30 days after the defendant's receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief. If the case stated by the initial pleading is not removable, removal may be accomplished within 30 days after the defendant's receipt of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is or has become removable [*28 U.S.C. § 1446(b)*].

CAFA makes the usual one-year limit on removal inapplicable to the removal of a class action [*28 U.S.C. § 1453(b)*; *see 28 U.S.C. § 1446(b)*]. Also, CAFA eliminates the need for unanimous consent of all defendants for the removal of a class action [*28 U.S.C. § 1453(b)*]; unanimous consent continues to be required for the removal of other actions [*see 28 U.S.C. § 1441(a)*].

CAFA does not change the long-standing general rule that a removing defendant has the burden of establishing federal jurisdiction [*Abrego Abrego v. Dow Chem. Co. (9th Cir. 2006) 443 F.3d 676, 685-686* (per curiam) (plaintiff is not required to establish lack of federal jurisdiction); *see also Guglielmino v. McKee Foods Corp. (9th Cir. 2007) 506 F.3d 696, 699* (if state-court complaint is unclear or ambiguous about amount in controversy, removing defendant must show by preponderance of evidence that amount in controversy exceeds jurisdictional threshold); *Lowdermilk v. United States Bank Nat'l Ass'n (9th Cir. 2007) 479 F.3d 994, 1000* (if state-court complaint affirmatively alleges that amount in controversy is less than jurisdictional threshold, removing defendant has burden to prove with legal certainty that jurisdictional amount is met)].

However, once the removing defendant has met its initial burden of establishing federal jurisdiction under CAFA's minimal-diversity provision [*see 28 U.S.C. § 1332(d)(2)*; *see* [3][a], *below*], a plaintiff seeking remand has the burden of showing that a statutory exception to minimal-diversity jurisdiction applies [*Serrano v. 180 Connect, Inc. (9th Cir. 2007) 478 F.3d 1018, 1021-1024* (party seeking remand has burden of proving applicability of "local controversy" and "home-state controversy" exceptions to minimal-diversity jurisdiction under *28 U.S.C. § 1332(d)(4)*; *see also* [3][c], *below*].

The CAFA removal provision does not apply to any class action that solely involves [*28 U.S.C. § 1453(d)*]:

> (1) A claim concerning a covered security as defined under Section 16(f)(3) of the Securities Act of 1933 *15 U.S.C. § 78p(f)(3)* and Section 28(f)(5)(E) of the Securities Exchange Act of 1934 [*15 U.S.C. § 78bb(f)(5)(E)*];
>
> (2) A claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the state in which the corporation or business enterprise is incorporated or organized; or
>
> (3) A claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security, as defined under Section 2(a)(1) of the Securities Act of 1933 [*15 U.S.C. § 77b(a)(1)*] and the regulations issued under that provision.

PRACTICE TIP:

The ability of any defendant to remove a class action against the wishes of other defendants certainly protects the defendants with the most at stake, but it also places great disruptive power in the hands of any defendant, even one with little to lose. CAFA does not require that the defendant removing the case have much at stake, let alone that it be a primary defendant [*see 28 U.S.C. § 1453(b)*]. All defendants with significant stakes in the controversy may be content with the state court, but any defendant with a lesser stake can demand whatever the market will bear from co-defendants as the price of not removing the action to federal court. *Commentary from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).*

For further discussion of removal of class actions under CAFA, see Cabraser, California Class Actions Practice and Procedure, Ch. 11, *Removal and Remand of Class Actions Filed in State Court* (Matthew Bender).

[3] Minimal-Diversity Jurisdiction of Federal Court

[a] Federal Jurisdiction Generally May Be Based on Minimal Diversity

Facilitated removal under the Class Action Fairness Act of 2005 is available only if the federal court would have original subject-matter jurisdiction of the action [*see 28 U.S.C. §§ 1441(a), 1446(a), (b), 1453(b)*]. The federal court's jurisdiction generally may be based either on the presence of a federal question or on the diversity of citizenship of the parties [*see 28 U.S.C. §§ 1331, 1332*]. If the claims asserted in a case are all based on state law, therefore, the case can be removed to federal court only if the case satisfies the requirements of diversity jurisdiction.

In most cases, a federal court may exercise subject-matter jurisdiction based on diversity of citizenship only if there is complete diversity (that is, only if no plaintiff and defendant are citizens of same state) and if the amount in controversy exceeds $75,000, exclusive of costs [*28 U.S.C. § 1332(a), (c)*; *Ruhrgas AG v. Marathon Oil Co. (1999) 526 U.S. 574, 580 n.2, 119 S. Ct. 1563, 143 L. Ed. 2d 760*]. Prior to the enactment of CAFA, therefore, diversity jurisdiction over a class action did not exist unless there was complete diversity of citizenship between all named representatives of the

plaintiff class and all defendants [*see Exxon Mobil Corp. v. Allapattah Servs., Inc. (2005) 545 U.S. 546, 125 S. Ct. 2611, 2619, 162 L. Ed. 2d 502* ; *State Farm Fire & Casualty Co. v. Tashire (1967) 386 U.S. 523, 530-531, 87 S. Ct. 1199, 18 L. Ed. 2d 270*].

CAFA added a new subsection to the federal diversity jurisdiction statute, allowing federal courts to exercise jurisdiction over certain class actions based on minimal diversity [*see 28 U.S.C. § 1332(d)*]. Under the new provision, federal district courts generally have original jurisdiction over any class action in which [*28 U.S.C. § 1332(d)(2)*]:

(1) The matter in controversy exceeds $5 million, exclusive of interest and costs; and

(2) Either:

(a) Any member of a plaintiff class and any defendant are citizens of different states;

(b) Any member of a plaintiff class is a foreign state, or a citizen or subject of a foreign state, and any defendant is a citizen of a state; or

(c) Any member of a plaintiff class is a citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state.

For purposes of minimal-diversity jurisdiction, citizenship of the members of the proposed plaintiff classes is determined as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to federal jurisdiction, as of the date of service by the plaintiffs of an amended pleading, motion, or other paper that indicates the existence of federal jurisdiction [*28 U.S.C. § 1332(d)(7)*]. CAFA does not specify a time for determining the citizenship of defendants; thus, it appears that the citizenship of a defendant will be ascertained at the time the lawsuit is commenced and again at the time of removal, in accordance with the general rule applicable in non-class actions [*see Pullman Co. v. Jenkins (1939) 305 U.S. 534, 537, 59 S. Ct. 347, 83 L. Ed. 334* ; *Thiel v. Southern Pac. Co. (9th Cir. 1942) 126 F.2d 710, 712*].

For purposes of minimal-diversity jurisdiction, an unincorporated association is deemed a citizen of the state where it has its principal place of business and the state under whose laws it is organized [*28 U.S.C. § 1332(d)(10)*]. Outside the context of a class action, an unincorporated association is deemed to have the citizenship of each of its members [*United Steel Workers v. R.H. Bouligny, Inc. (1965) 382 U.S. 145, 146-150*].

If otherwise applicable, minimal-diversity jurisdiction can be exercised before or after the entry of a class-certification order [*28 U.S.C. § 1332(d)(8)*].

Class members' claims may be aggregated for purposes of determining whether the $5 million threshold is met [*28 U.S.C. § 1332(d)(6)*]. Before the enactment of CAFA, in cases in which the class members' rights were not joint in nature, plaintiff class members could not aggregate their claims to meet the generally applicable $75,000 amount-in-controversy threshold [*Snyder v. Harris (1969) 394 U.S. 332, 339-340, 89 S. Ct. 1053, 22 L. Ed. 2d 319* ; *see 28 U.S.C. § 1332(a)* (generally applicable amount-in-controversy requirement)]. Shortly after the enactment of CAFA, the United States Supreme Court clarified that, under pre-CAFA law, if at least one named plaintiff satisfied the $75,000 amount-in-controversy requirement, a federal court could exercise supplemental jurisdiction over other plaintiffs (including unnamed class members) whose claims were for less than the jurisdictional minimum [*Exxon Mobil Corp. v. Allapattah Servs., Inc. (2005) 545 U.S. 546, 125 S. Ct. 2611, 2620, 162 L. Ed. 2d 502* (resolving circuit split); *see 28 U.S.C. § 1367* (supplemental jurisdiction)]. The availability of supplemental jurisdiction remains relevant in smaller class actions (i.e., those in which the aggregate claims of the class do not exceed $5 million) in which there is complete diversity of citizenship [*see Exxon Mobil Corp. v. Allapattah Servs., Inc. (2005) 545 U.S. 546, 125 S. Ct. 2611, 2628, 162 L. Ed. 2d 502* (many future instances of supplemental jurisdiction, even in class-action context, will be

outside scope of CAFA)].

PRACTICE TIP:

By allowing diversity jurisdiction based on the citizenship of any unnamed class member prior to class certification [*28 U.S.C. § 1332(d)(1)(b), (2)*], CAFA significantly departs from the traditional understanding of Article III of the Constitution [*see State Farm Fire & Casualty Co. v. Tashire (1967) 386 U.S. 523, 531, 87 S. Ct. 1199, 18 L. Ed. 2d 270* (approving minimal-diversity for statutory interpleader actions based on citizenship of formal parties)].

CAFA does not allocate the burden of persuasion on the issue of federal-court jurisdiction. Ordinarily, a party asserting federal jurisdiction has the burden of establishing the facts necessary to jurisdiction [*Prize Frize, Inc. v. Matrix (U.S.) Inc., 167 F.3d 1261, 1265 (9th Cir. 1999)] . Commentary from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).*

For further discussion federal diversity jurisdiction in class actions, see Cabraser, California Class Actions Practice and Procedure, Ch. 11, *Removal and Remand of Class Actions Filed in State Court* (Matthew Bender).

[b] Exceptions to Minimal Diversity

Minimal-diversity jurisdiction pursuant to CAFA is inapplicable under several circumstances. For example, minimal-diversity jurisdiction is not available in any class action in which (1) the primary defendants are states, state officials, or other governmental entities against which the federal district court may be foreclosed from ordering relief (i.e., because of *Eleventh Amendment* immunity); or (2) there are fewer than 100 members of all proposed plaintiff classes in the aggregate [*28 U.S.C. § 1332(d)(5)*].

PRACTICE TIP:

CAFA does not define the term "primary defendants" [*see 28 U.S.C. § 1332(d)(5)*], although it may be that the category of "primary defendants" includes those defendants from which "significant" relief is sought and whose alleged conduct forms a "significant" basis for the class claims [*see 28 U.S.C. § 1332(d)(4)(A)(i)(II)*; *see also* [c], *below*]. *Commentary from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).*

For further discussion of minimal diversity, see Cabraser, California Class Actions Practice and Procedure, and Ch. 11, *Removal and Remand of Class Actions Filed in State Court* (Matthew Bender).

Minimal-diversity jurisdiction is also inapplicable to any class action that solely involves a claim (1) concerning a covered security as defined under Section 16(f)(3) of the Securities Act of 1933 [*15 U.S.C. § 78p(f)(3)*] and Section 28(f)(5)(E) of the Securities Exchange Act of 1934 [*15 U.S.C. § 78bb(f)(5)(E)*]; (2) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the state in which the corporation or business enterprise is incorporated or organized; or (3) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security, as defined under Section 2(a)(1) of the Securities Act of 1933 [*15 U.S.C. § 77b(a)(1)*] and the regulations issued under that provision [*28 U.S.C. § 1332(d)(9)*].

[c] When Federal Court Must or May Decline to Exercise Minimal-Diversity Jurisdiction

A federal district court must decline to exercise minimal-diversity jurisdiction if two thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the state in which the action was originally filed [*28 U.S.C. § 1332(d)(4)(B)*; *see Serrano v. 180 Connect, Inc. (9th Cir. 2007) 478 F.3d 1018, 1021-1024* (party seeking remand to state court has burden of proving applicability of "home-state controversy" exception to minimal-diversity jurisdiction under *28 U.S.C. § 1332(d)(4)(B)*)]. The court must also decline to exercise

minimal-diversity jurisdiction if (1) more than two thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the state in which the action was originally filed; (2) at least one defendant from whom significant relief is sought and whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class is a citizen of the state in which the action was originally filed; (3) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the state in which the action was originally filed; and (4) during the three years preceding the filing of the class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons [*28 U.S.C. § 1332(d)(4)(A)*; *see Serrano v. 180 Connect, Inc. (9th Cir. 2007) 478 F.3d 1018, 1021-1024* (party seeking remand to state court has burden of proving applicability of "local controversy" exception to minimal-diversity jurisdiction under *28 U.S.C. § 1332(d)(4)(A)*)]. In this context, it is not clear from the text of the Class Action Fairness Act whether a "primary" defendant [*see 28 U.S.C. § 1332(d)(4)(B)*] is the same as a defendant "from whom significant relief is sought" and "whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class" [*see 28 U.S.C. § 1332(d)(4)(A)*].

A federal district court has discretion, in the interests of justice and looking at the totality of the circumstances, to decline to exercise minimal-diversity jurisdiction if more than a third but less than two thirds of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the state in which the action was originally filed [*28 U.S.C. § 1332(d)(2)*]. In deciding whether to decline to exercise jurisdiction, the court must consider [*28 U.S.C. § 1332(d)(3)*]:

> (1) Whether the claims asserted involve matters of national or interstate interest;
>
> (2) Whether the claims asserted will be governed by the laws of the state in which the action was originally filed or by the laws of other states;
>
> (3) Whether the class action has been pleaded in a manner that seeks to avoid federal jurisdiction;
>
> (4) Whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
>
> (5) Whether the number of citizens of the state in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other state, and the citizenship of the other members of the proposed class is dispersed among a substantial number of states; and
>
> (6) Whether, during the three years preceding the filing of the class action, one or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

In ascertaining whether the one-third or two-thirds threshold is met, the court will count the number of class members, without regard to the amount of damages claimed by each class member [*see 28 U.S.C. § 1332(d)(3), (4)*].

[4] Diversity Jurisdiction Over "Mass Actions"

Special rules apply to a "mass action," which is any civil action, other than a class action [*see 28 U.S.C. § 1711(2)*], in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact [*28 U.S.C. § 1332(d)(11)(B)(i)*]. For purposes of minimal-diversity jurisdiction and removal to federal court, a mass action is treated as a class action, except that in a mass action minimal-diversity jurisdiction does not exist over any plaintiff whose individual claim does not satisfy the generally applicable $75,000 jurisdictional minimum for diversity jurisdiction [*28 U.S.C. § 1332(d)(11)(A), (B)(i)*]. A "mass action" for this purpose does not include any civil action in which (1) all of the claims arise from an alleged event or

occurrence in the state in which the action was filed, with the allegedly resulting injuries in that state or in states contiguous to that state; (2) the claims are joined on motion of a defendant; (3) all claims in the action are asserted on behalf of the general public, and not on behalf of individual claimants or members of a purported class, pursuant to a state statute specifically authorizing such an action [*see, e.g., Bus. & Prof. Code § 17204*]; or (4) the claims have been consolidated or coordinated solely for pretrial proceedings [*28 U.S.C. § 1332(d)(11)(B)(ii)*].

A mass action may be removed to federal court based on minimal diversity [*28 U.S.C. § 1332(d)(11)(A)*], but thereafter it may not ordinarily be transferred to any other court for consolidated or coordinated pretrial proceedings [*see 28 U.S.C. § 1407*], unless a majority of the plaintiffs in the action request transfer for that purpose [*28 U.S.C. § 1332(d)(11)(C)(i)*]. This apparently would prevent the Judicial Panel on Multidistrict Litigation from transferring such a mass action for consolidated treatment with other similar cases. However, this restriction on transfer does not apply if the mass action has been certified as a class action under *Fed. R. Civ. P. 23*, or if the plaintiffs propose that the action proceed as a class action under Rule 23 [*28 U.S.C. § 1332(d)(11)(C)(ii)*]. The limitations periods on any claims asserted in a mass action that is removed to federal court based on minimal diversity are tolled while the action is pending in federal court [*28 U.S.C. § 1332(d)(11)(D)*].

PRACTICE TIP:

A "mass action" is a broader concept than a "mass tort action," although the two could overlap. For example, the state-law claims of sex discrimination in promotions of 100 or more female employees in California and noncontiguous states could be filed and tried together, without any effort to certify the claims as a class action. The joint trial may be an appropriate means of amassing stakes high enough to show a pattern of discrimination, making it easier for each plaintiff to prove her claim. Under *28 U.S.C. § 1332(d)(11)*, such a consolidated set of claims would fit within the expanded federal-court jurisdiction for original filings and removals. *Commentary from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).*

For further discussion of mass actions, see Cabraser, California Class Actions Practice and Procedure, Ch. 11, *Removal and Remand of Class Actions Filed in State Court* and Ch. 18, *Class Certification of Mass Tort Actions* (Matthew Bender).

PRACTICE TIP:

Careful pleading may prevent a state-court action from qualifying as a mass action and being removed to federal court. For example, a case does not qualify as a mass action if there are fewer than 100 plaintiffs or if all of the claims arise from an event or occurrence in the forum state, resulting in injuries in that state or contiguous states [*28 U.S.C. § 1332(d)(11)(B)(i), (ii)(I)*]. Thus, if a hamburger stand at a highway rest stop sold tainted meat that sickened or killed hundreds of consumers, a consolidated case could remain in California superior court if there are fewer than 100 plaintiffs, or if the plaintiffs are limited to residents of California and adjoining states. Other actions could be filed for residents of noncontiguous states. If the defendant then moved to consolidate the cases, they would not be removable to federal court [*28 U.S.C. § 1332(d)(11)(B)(ii)(II)*]. *Commentary from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).*

For further discussion of mass actions, see Cabraser, California Class Actions Practice and Procedure, Ch. 11, *Removal and Remand of Class Actions Filed in State Court* , and Ch. 18, *Class Certification of Mass Tort Actions* (Matthew Bender).

[5] Federal Appellate Review of Remand Orders

If a removed class action is remanded to state court, the general prohibition against appellate review of remand orders [*see 28 U.S.C. § 1447(d)*] does not apply. Thus, the federal court of appeals has discretion to hear an appeal from the

grant or denial of a remand order, if an application is made to the court of appeals not more than 10 days after the entry of the order [*28 U.S.C. § 1453(c)(1)*, as amended eff. Dec. 1, 2009)].

If the court accepts the appeal, it is ordinarily required to complete its review and enter judgment within 60 days after the date of the order granting leave to appeal [*28 U.S.C. § 1453(c)(2)* (requiring court of appeals to render judgment no later than 60 days after "appeal was filed"); *see Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc. (9th Cir. 2006) 435 F.3d 1140, 1144-1145* (petition for permission to appeal under *28 U.S.C. § 1453(c)* is subject to *Fed. R. App. P. 5(d)(2)*, which provides that entry of order granting permission to appeal serves as filing of appeal for all timing issues)]. The court may extend the 60-day period for an additional 10 days if good cause is shown and the extension is in the interests of justice, or for any additional period if all parties agree to the extension [*28 U.S.C. § 1453(c)(3)*]. If the court of appeals fails to enter a final judgment on the appeal within the 60 days, plus any extensions, the appeal will be deemed denied [*28 U.S.C. § 1453(c)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureRemovalGeneral OverviewCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsAppellate ReviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

* Portions of this chapter have been adapted from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).

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Chapter 120 CLASS ACTIONS *
PART II. LEGAL BACKGROUND

12-120 California Forms of Pleading and Practice--Annotated § 120.14

§ 120.14 Interstate Class Actions in California Courts

[1] Importance of Choice of Law

The choice-of-law determination is of "central importance to issues of predominance and manageability if certification of a nationwide class is sought" [*Washington Mutual Bank v. Superior Court (2001) 24 Cal. 4th 906, 915, 103 Cal. Rptr. 2d 320, 15 P.3d 1071*].

If claims of nonresident class members will require adjudication under the laws of the members' home states, the trial court must ascertain the degree of complexity arising from the need to apply those laws, in order to make an informed decision on certification [*Washington Mutual Bank v. Superior Court (2001) 24 Cal. 4th 906, 915, 103 Cal. Rptr. 2d 320, 15 P.3d 1071* ; *Clothesrigger, Inc. v. GTE Corp. (1987) 191 Cal. App. 3d 605, 619, 236 Cal. Rptr. 605*]. The trial court should deny certification if it determines that such complexity results in common legal questions not predominating or makes nationwide class litigation unmanageable [*Washington Mutual Bank v. Superior Court (2001) 24 Cal. 4th 906, 915, 103 Cal. Rptr. 2d 320, 15 P.3d 1071* ; *see Canon U.S.A., Inc. v. Superior Court (1998) 68 Cal. App. 4th 1, 7, 79 Cal. Rptr. 2d 897* (permitting resolution at pleading stage)]. Conversely, the court may certify a nationwide class despite such complexity if it determines the legal questions are sufficiently similar to be manageable and all other requirements for certification are satisfied [*Washington Mutual Bank v. Superior Court (2001) 24 Cal. 4th 906, 915, 103 Cal. Rptr. 2d 320, 15 P.3d 1071* ; *Clothesrigger, Inc. v. GTE Corp. (1987) 191 Cal. App. 3d 605, 619, 236 Cal. Rptr. 605*].

As discussed in [2] and [3], *below*, different tests are applied depending whether the dispute involves an enforceable choice-of-law clause. For further coverage of choice of law in interstate class actions, see Cabraser, California Class Actions Practice and Procedure, Ch. 7, *Choice of Law* (Matthew Bender).

[2] Effect of Choice-of-Law Agreement

[a] Scope of Agreement

If the parties have an agreement that another jurisdiction's law will govern their disputes, the trial court must undertake a two-part inquiry regarding the scope of the choice-of-law clause and its enforceability [*see* [b], *below*].

The trial court should first examine the choice-of-law clause and ascertain whether the advocate of the clause has met its burden of establishing that the various claims of putative class members fall within its scope [*Washington Mutual Bank v. Superior Court (2001) 24 Cal. 4th 906, 916, 103 Cal. Rptr. 2d 320, 15 P.3d 1071* ; *see* *Nedlloyd Lines B.V. v. Superior Court (1992) 3 Cal. 4th 459, 468-470, 11 Cal. Rptr. 2d 330, 834 P.2d 1148*]. Generally, if a rational businessperson enters into an agreement establishing a transaction or relationship and provides that disputes arising from the agreement will be governed by the law of an identified jurisdiction, the logical conclusion is that he or she intended that law to apply to all disputes arising out of the transaction or relationship [*Nedlloyd Lines B.V. v. Superior Court (1992) 3 Cal. 4th 459, 469, 11 Cal. Rptr. 2d 330, 834 P.2d 1148* (clause negotiated by sophisticated business entities was phrased broadly enough to encompass plaintiff's fiduciary duty claim)].

[b] Enforceability of Agreement

If the trial court finds that the class claims fall within the scope of a choice-of-law clause [*see* [a], *above*], it must next evaluate the clause's enforceability according to the approach reflected in *Restatement Second of Conflict of Laws, § 187(2).*

The court must first consider the following [*Washington Mutual Bank v. Superior Court (2001) 24 Cal. 4th 906, 916, 103 Cal. Rptr. 2d 320, 15 P.3d 1071* ; *see* *Nedlloyd Lines B.V. v. Superior Court (1992) 3 Cal. 4th 459, 468-470, 11 Cal. Rptr. 2d 330, 834 P.2d 1148*]:

- Whether the chosen state has a substantial relationship to the parties or their transaction; or
- Whether there is any other reasonable basis for the parties' choice of law.

If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law. If, however, either test is met, the court must next determine whether the chosen state's law is contrary to a fundamental policy of California. If there is no such conflict, the court must enforce the parties' choice of law [*Washington Mutual Bank v. Superior Court (2001) 24 Cal. 4th 906, 916, 103 Cal. Rptr. 2d 320, 15 P.3d 1071* ; *see* *Nedlloyd Lines B.V. v. Superior Court (1992) 3 Cal. 4th 459, 468-470, 11 Cal. Rptr. 2d 330, 834 P.2d 1148*].

If there is a fundamental conflict with California law, the court must then determine whether California has a materially greater interest than the chosen state in the determination of the particular issue. If California has a materially greater interest than the chosen state, the choice of law will not be enforced [*Washington Mutual Bank v. Superior Court (2001) 24 Cal. 4th 906, 916-917, 103 Cal. Rptr. 2d 320, 15 P.3d 1071* ; *see* *Nedlloyd Lines B.V. v. Superior Court (1992) 3 Cal. 4th 459, 468-470, 11 Cal. Rptr. 2d 330, 834 P.2d 1148*]. For example, one court of appeal found a fundamental conflict between Delaware law, which generally permits the enforcement of class-action waivers, and California law, which holds a class-action waiver unconscionable and unenforceable when it is alleged that a bank with superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money. In that case, the court of appeals found that California had a materially greater interest in the litigation than did Delaware, because the putative class was composed solely of California residents with California statutory claims, while Delaware's interest lay in more general matters of corporate regulation. Accordingly, the court of appeal declined to enforce the parties' choice of Delaware law [*Klussman v. Cross Country Bank (2005) 134 Cal. App. 4th 1283, 1292-1300, 36 Cal. Rptr. 3d 728*].

On the other hand, if California does not have a materially greater interest than the chosen state, the choice-of-law agreement will be enforced. In one case, for example, although the named plaintiff was a California resident, he asserted claims only under Delaware law, on behalf of a putative nationwide class, against a bank that was domiciled in Delaware. Under the circumstances, the court of appeal found that Delaware's interest in the case was demonstrably greater than California's. Therefore, the court enforced the parties' contractual choice of Delaware law and the parties'

class-action waiver, which was enforceable under Delaware law. The court explained that Delaware's demonstrably greater interest in the case required the enforcement of the class-action waiver, even if that result would be contrary to a fundamental policy of California [*Discover Bank v. Superior Court (2005) 134 Cal. App. 4th 886, 894-895, 36 Cal. Rptr. 3d 456*].

[3] Choice of Law in Absence of Enforceable Agreement

[a] Significant-Contacts Test

A forum state may apply its own substantive law to the claims of a nationwide class without violating the federal Due Process Clause [*U.S. Const., amend. XIV*] or Full Faith and Credit Clause [U.S. *Const., art. IV, § 1*] if the state has a significant contact or significant aggregation of contacts to the claims of each class member such that application of the forum law is not arbitrary or unfair [*Phillips Petroleum Co. v. Shutts (1985) 472 U.S. 797, 821-822, 105 S. Ct. 2965, 86 L. Ed. 2d 628* ; *see* *Washington Mutual Bank v. Superior Court (2001) 24 Cal. 4th 906, 917, 103 Cal. Rptr. 2d 320, 15 P.3d 1071*].

Even if its own law may be constitutionally applied, however, California follows a governmental interest analysis [*Washington Mutual Bank v. Superior Court (2001) 24 Cal. 4th 906, 919, 103 Cal. Rptr. 2d 320, 15 P.3d 1071* ; *see* [b], *below*], to address conflict-of-laws claims and ascertain the most appropriate law applicable to the issues if there is no effective choice-of-law agreement.

[b] Governmental-Interest Test

[i] General Rule Favoring Forum Law

In the absence of an effective choice-of-law agreement to the contrary, California law may be used on a classwide basis as long as its application is not arbitrary or unfair with respect to nonresident class members [*Phillips Petroleum Co. v. Shutts (1985) 472 U.S. 797, 821-822, 105 S. Ct. 2965, 86 L. Ed. 2d 628*]. In addition, the interests of other states may not outweigh California's interest in having its law applied [*Washington Mutual Bank v. Superior Court (2001) 24 Cal. 4th 906, 922, 103 Cal. Rptr. 2d 320, 15 P.3d 1071*].

Generally speaking, the forum will apply its own rule of decision unless a litigant timely invokes the law of a foreign state. In that event, the litigant must demonstrate that the foreign state's rule of decision will further the interest of the foreign state and therefore that it is an appropriate one for the forum to apply to the case before it [*Washington Mutual Bank v. Superior Court (2001) 24 Cal. 4th 906, 919, 103 Cal. Rptr. 2d 320, 15 P.3d 1071* ; *Bernhard v. Harrah's Club (1976) 16 Cal. 3d 313, 317-318, 128 Cal. Rptr, 215, 546 P.2d 719*].

[ii] Three-Step Analysis

Under the first step of the governmental-interest approach, the proponent of foreign law must identify the applicable rule of law in each potentially concerned state and must show it materially differs from the law of California [*Washington Mutual Bank v. Superior Court (2001) 24 Cal. 4th 906, 919, 103 Cal. Rptr. 2d 320, 15 P.3d 1071*].

The fact that two or more states are involved does not in itself indicate there is a conflict-of-laws problem [*Washington Mutual Bank v. Superior Court (2001) 24 Cal. 4th 906, 919-920, 103 Cal. Rptr. 2d 320, 15 P.3d 1071*]. Indeed, if the laws of the relevant states are identical, there is no problem and the trial court may apply California law to class claims [*Washington Mutual Bank v. Superior Court (2001) 24 Cal. 4th 906, 920, 103 Cal. Rptr. 2d 320, 15 P.3d 1071*].

If, however, the trial court finds the laws of the relevant states are materially different, it must proceed to the second step and determine what interest, if any, each state has in having its own law applied to the case. Even if the laws are

materially different, there is still no problem in choosing the applicable rule of law if only one of the states has an interest in having its law applied. This means the trial court may properly find California law applicable without proceeding to the third step in the analysis if the proponent of foreign law fails to identify any actual conflict or to establish the other state's interest in having its own law applied [*Washington Mutual Bank v. Superior Court (2001) 24 Cal. 4th 906, 920, 103 Cal. Rptr. 2d 320, 15 P.3d 1071*]. Even if the fundamental purpose of the other state's law would not be furthered by applying it to the particular circumstances of the case, the other state may still have an interest in having its law apply. One case, for example, involved alleged privacy violations resulting from a Georgia business's recording of its telephone conversations with California residents. A Georgia statute prohibited such recording without the consent of at least one party to the conversation. The California Supreme Court held that, although the case did not implicate any privacy interests protected by Georgia's statute (the only persons whose privacy rights were allegedly violated were California residents), Georgia nevertheless had an interest in having its law applied. The Court reasoned that Georgia had a legitimate interest in not having liability imposed on Georgia persons or businesses that had acted in reasonable reliance on the Georgia statute [*Kearney v. Salomon Smith Barney, Inc. (2006) 39 Cal. 4th 95, 123, 45 Cal. Rptr. 3d 730, 137 P.3d 914*].

Only if the trial court determines that the laws are materially different and that each state has an interest in having its own law applied, thus reflecting an actual conflict, must the court take the final step and select the law of the state whose interests would be more impaired if its law were not applied. In making this comparative-impairment analysis, the trial court must determine the relative commitment of the respective states to the laws involved and consider the history and current status of the states' laws and the function and purpose of those laws. These rules apply whether the dispute arises out of contract or tort, and a separate conflict-of-laws inquiry must be made with respect to each issue in the case [*Washington Mutual Bank v. Superior Court (2001) 24 Cal. 4th 906, 920, 103 Cal. Rptr. 2d 320, 15 P.3d 1071*].

In conducting the third step of this analysis--the evaluation of comparative impairment--the court does not weigh the conflicting governmental interests in the sense of determining which conflicting law manifests the "better" or the "worthier" social policy on the specific issue. Such an attempted balancing of conflicting state policies in that sense would conflict with the principle of federalism that, within constitutional limits, states are empowered to establish their own public policies. Instead, the comparative impairment analysis is better described as an accommodation of conflicting state policies that attempts to achieve the maximum attainment of underlying purpose by all governmental entities. Thus, true conflicts between states' interests are resolved by applying the law of the state whose interest would be the more impaired if its law were not applied [*Kearney v. Salomon Smith Barney, Inc. (2006) 39 Cal. 4th 95, 123-124, 45 Cal. Rptr. 3d 730, 137 P.3d 914*].

In an appropriate case, the comparative-impairment analysis might result in the application of one state's law to past conduct and another state's law to future conduct. For example, in a case involving alleged privacy violations resulting from a Georgia business's recording of its telephone conversations with California residents, the California Supreme Court concluded that California law (which prohibits recording without the consent of all participants [*see Penal Code §§ 632-632.7*]), rather than Georgia law (which allowed recording with the consent of one participant), generally should apply to determine whether injunctive relief should issue. However, the Court found that Georgia law should be applied to determine the defendant's liability for past conduct. The Court reasoned that, particularly since no previous decision had held California law applicable to the circumstances of this case, the application of California law to establish liability for past conduct would unduly impair Georgia's interest in protecting persons who acted in Georgia in reasonable reliance on Georgia law from being subjected to liability on the basis of such action [*Kearney v. Salomon Smith Barney, Inc. (2006) 39 Cal. 4th 95, 128-131, 45 Cal. Rptr. 3d 730, 137 P.3d 914* (after Supreme Court's decision in this case, out-of-state companies are on notice that, with regard to future conduct, they are subject to California law with regard to recording of telephone conversations made to or received from California, and that full range of civil sanctions afforded by California law may be imposed for future violations)].

[4] Suitability of Class Action If Laws of Other States Apply

A class action proponent must make a thorough analysis of the applicable state laws and credibly demonstrate that variations in state law will not swamp common issues and defeat predominance [*Washington Mutual Bank v. Superior Court (2001) 24 Cal. 4th 906, 926, 103 Cal. Rptr. 2d 320, 15 P.3d 1071*].

Additionally, the proponent's presentation must be sufficient to permit the trial court, at the time of certification, to make a detailed assessment of how any state law differences could be managed fairly and efficiently at trial, for example, through the creation of a manageable number of subclasses [*Washington Mutual Bank v. Superior Court (2001) 24 Cal. 4th 906, 926, 103 Cal. Rptr. 2d 320, 15 P.3d 1071*].

Trial courts, in assessing the propriety of nationwide class certification, must consider these factors, as well as all the other factors relevant to certification, including the potential recovery of each individual claimant and whether theproposed class suit is the only effective way to redress the alleged wrongdoing or to prevent unjust advantage to the defendant [*Washington Mutual Bank v. Superior Court (2001) 24 Cal. 4th 906, 926, 103 Cal. Rptr. 2d 320, 15 P.3d 1071*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedureFederal & State InterrelationshipsChoice of LawGovernmental InterestsCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesCommonalityContracts LawContract Conditions & ProvisionsForum Selection Clauses

* Portions of this chapter have been adapted from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
Chapter 120 CLASS ACTIONS *
PART II. LEGAL BACKGROUND

12-120 California Forms of Pleading and Practice--Annotated § 120.15

§ 120.15 Class Representative and Unnamed Class Members

[1] Representative Must Be Member of Class

A plaintiff seeking to maintain a class action is required to be a member of the alleged class, at least at the time the action is commenced [*Anthony v. General Motors Corp. (1973) 33 Cal. App. 3d 699, 704, 109 Cal. Rptr. 254* ; *see La Sala v. American Sav. & Loan Ass'n (1971) 5 Cal. 3d 864, 875, 97 Cal. Rptr. 849, 489 P.2d 1113* (plaintiffs not members of class alleged in complaint must have opportunity to amend pleading); *Ticconi v. Blue Shield of Cal. Life & Health Ins. Co. (2008) 160 Cal. App. 4th 528, 548, 72 Cal. Rptr. 3d 888* (defendant's payment of plaintiff's damages after suit is filed does not necessarily prevent plaintiff from adequately representing class in seeking equitable relief); *LaLiberte v. Pacific Mercantile Bank (2007) 147 Cal. App. 4th 1, 6-8, 53 Cal. Rptr. 3d 745* (if named plaintiff is not within class definition but shares community of interest in the law and facts involved in case, court should permit amendment of class allegations to include plaintiff)]. The trial court has discretion to allow a named plaintiff to act in the dual roles of class representative and attorney for the class [*McGhee v. Bank of America (1976) 60 Cal. App. 3d 442, 451, 131 Cal. Rptr. 482*]. However, most courts find an insurmountable conflict of interests in such an arrangement, because of the temptation for the attorney for the class to recommend settlement on terms less favorable to class members when a large fee is part of the bargain, particularly when the potential recovery for each class member (including the named plaintiff) is small [*Apple Computer, Inc. v. Superior Court (2005) 126 Cal. App. 4th 1253, 1264-1279, 24 Cal. Rptr. 3d 818; see Best Buy Stores, L.P. v. Superior Court (2006) 137 Cal. App. 4th 772, 776-779, 40 Cal. Rptr. 3d 575* (if conflict of interest prevents lawyer from serving as class representative and counsel for class, court may allow precertification discovery for purpose of seeking new class representative)]. For further discussion, see Cabraser, California Class Actions Practice and Procedure, Ch. 6, *Class Certification Practice and Procedure* (Matthew Bender).

To have standing to bring a class action under the Consumers Legal Remedies Act, a representative plaintiff must be a consumer and must have suffered "any damage" as a result of the defendant's violation of the Act [*Civ. Code § 1780(a)*]. The statutory reference to "any damage" in this context indicates a category that includes, but is greater than, actual pecuniary damages. Thus, a representative plaintiff who has not suffered pecuniary damages may nevertheless have standing to sue if he or she has incurred transaction costs or opportunity costs as a result of an alleged violation of the Act [*Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 640* & n.1, *88 Cal. Rptr. 3d 859, 200 P.3d 295*

(transaction costs are costs associated with forming, maintaining, and enforcing contracts; opportunity costs are benefits forgone by entering contract, such as forgone opportunity to make contract with third party)]. However, the existence of a violation of the Act (e.g., the inclusion of an unconscionable term in a consumer contract [*see, e.g., Civ. Code § 1770(a)(14), (19)*]) does not by itself constitute a form of damage. Therefore, the existence of a violation, without more, will not confer standing on a consumer exposed to the violation (e.g., a consumer who enters into a contract that includes an unconscionable term), unless some kind of damage has resulted [*Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 641-643, 88 Cal. Rptr. 3d 859, 200 P.3d 295* (plaintiff suffered no damage because defendant had not attempted to enforce allegedly unconscionable contract term)]. For further discussion of the Consumers Legal Remedies Act, see Ch. 504, *Sales: Consumers Legal Remedies Act* .

To have standing to bring a class action under California's statutory unfair competition and false advertising laws [*Bus. & Prof. Code §§ 17200 et seq., 17500 et seq.*], a private plaintiff must have suffered injury in fact and have lost money or property as a result of the alleged unfair competition or false advertising [*Bus. & Prof. Code §§ 17203, 17204, 17535*; *see Californians for Disability Rights v. Mervyn's, LLC (2006) 39 Cal. 4th 223, 227, 46 Cal. Rptr. 3d 57, 138 P.3d 207* (standing requirements of *Bus. & Prof. Code §§ 17203, 17204*, and *17535*, which took effect with passage of Proposition 64 on November 2, 2004, apply to cases pending on that date); *see also Branick v. Downey Savings & Loan Assn. (2006) 39 Cal. 4th 235, 239, 46 Cal. Rptr. 3d 66, 138 P.3d 214* (amendment of class-action complaint to add representative plaintiff who meets standing requirements of *Bus. & Prof. Code §§ 17203, 17204*, and *17535* is subject to ordinary rules governing pleading amendments and their relation back)].

For example, a labor union that has not suffered actual injury under the Unfair Competition Law lacks standing to bring a representative action as the assignee of employees who suffered injuries or as an association whose members have suffered injuries [*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court (2009) 46 Cal. 4th 993, 1002, 195 Cal. Rptr. 3d 605, 209 P.3d 937*]. The requirement that a class representative have suffered injury in fact and have lost money or property "as a result of" alleged unfair competition [*see Bus. & Prof. Code § 17204*] means, in the context of an alleged fraudulent business practice, that the class representative must demonstrate actual reliance on the allegedly deceptive or misleading statements of the defendant, in accordance with settled principles regarding the element of reliance in ordinary fraud actions. Thus, the representative plaintiff need not plead or prove with an unrealistic degree of specificity that the plaintiff relied on particular misrepresentations or false statements when the alleged unfair practice is an extensive and long-term advertising campaign [*In re Tobacco II Cases (2009) 46 Cal. 4th 298, 306, 324-328, 93 Cal. Rptr. 3d 559, 207 P.3d 20* (if named plaintiff lacks standing, proper procedure is not to decertify class but to grant leave to amend to redefine class or add new class representative)]. These standing requirements apply only to the class representative, and unnamed class members need not show injury in fact or actual loss of money or property [*In re Tobacco II Cases (2009) 46 Cal. 4th 298, 306, 314-324, 93 Cal. Rptr. 3d 559, 207 P.3d 20* ; *see also Arias v. Superior Court (2009) 46 Cal. 4th 969, 975, 977-980, 95 Cal. Rptr. 3d 588, 209 P.3d 923* (employee who sues employer on behalf of self and other employees under unfair competition law, *Bus. & Prof. Code § 17200 et seq.*, must satisfy class-action requirements)].

An involuntary disposition of a named plaintiff's individual claim--such as when the defendant offers the named plaintiff all of the individual relief claimed--does not prevent the named plaintiff from continuing as class representative if he or she retains an economic interest in the case [*Deposit Guaranty Nat'l Bank v. Roper (1980) 445 U.S. 326, 332-333, 100 S. Ct. 1166, 63 L. Ed. 2d 427* ; *Watkins v. Wachovia Corp. (2009) 172 Cal. App. 4th 1576, 1590-1592, 92 Cal. Rptr. 3d 409*]. Such an interest may exist, for example, if the named plaintiff seeks to shift the cost of the litigation to the class [*Deposit Guaranty Nat'l Bank v. Roper (1980) 445 U.S. 326, 336, 338* & n.9, *100 S. Ct. 1166, 63 L. Ed. 2d 427*]. In contrast, a class representative who voluntarily settles his or her individual claim no longer retains an economic interest in the case. If the class ultimately obtains a recovery, the voluntarily settling plaintiff cannot share in it, having released his or her claim and having already received a complete recovery. Thus, a voluntarily settling plaintiff lacks standing to proceed as class representative, even if the settlement purports to reserve a right to pursue a "class claim" [*Watkins v. Wachovia Corp. (2009) 172 Cal. App. 4th 1576, 1589, 1592, 92 Cal. Rptr. 3d 409* ("That the plaintiff has undertaken to also sue 'for the benefit of all' does not mean that the plaintiff has somehow obtained a 'class

claim' for relief that can be asserted independent of the plaintiff's own claim. ... Thus, a class representative's voluntary settlement of her individual claim constitutes a voluntary settlement of her *only* claim, and moots her right to proceed on appeal."); *cf.* Larner v. Los Angeles Doctors Hosp. Assocs., LP v. *(2008) 168 Cal. App. 4th 1291, 1300-1304, 86 Cal. Rptr. 3d 324* (dismissing appeal of voluntarily settling plaintiff as moot despite express reservation of right to appeal, because plaintiff had retained no continuing interest in case, such as interest in shifting attorney's fees to class members)].

[2] Representative Must Adequately Represent Class

The named plaintiffs in a class action must fairly and adequately represent and protect the interests of the class [*La Sala v. American Sav. & Loan Ass'n (1971) 5 Cal. 3d 864, 871, 97 Cal. Rptr. 849, 489 P.2d 1113* ; *Classen v. Weller (1983) 145 Cal. App. 3d 27, 46, 192 Cal. Rptr. 914* ; *see Civ. Code § 1781(b)(4)* (requirement under Consumers Legal Remedies Act, *Civ. Code § 1750 et seq.*)]. To represent the class fairly and adequately, the named plaintiffs must have claims or defenses that are typical of the claims or defenses of the class [*Stephens v. Montgomery Ward & Co. (1987) 193 Cal. App. 3d 411, 422, 238 Cal. Rptr. 602* ; *see Fed. R. Civ. P. 23(a)* (requirement under federal rule)].

The ability to provide adequate class representation is not necessarily precluded if the named plaintiffs have not personally incurred all of the damages suffered by each class member [*Wershba v. Apple Computer, Inc. (2001) 91 Cal. App. 4th 224, 238, 110 Cal. Rptr. 2d 145*]. However, an individual cannot fairly and adequately represent a class if there is a conflict of interest between the individual and the class; for example, a conflict may exist if the defendants offer the named plaintiff special treatment not offered to the unnamed class members [*see* *La Sala v. American Sav. & Loan Ass'n (1971) 5 Cal. 3d 864, 872-874, 97 Cal. Rptr. 849, 489 P.2d 1113*]. Similarly, fair and adequate representation does not exist if the vast majority of the class members perceive their interests to be diametrically opposed to that of the named representatives [*Richmond v. Dart Industries, Inc. (1981) 29 Cal. 3d 462, 471, 174 Cal. Rptr. 515, 629 P.2d 23*]. Generally, if the named plaintiffs are members of the class they seek to represent [*see* [1], *above*] and have claims typical of the claims of the class, they will be considered adequate class representatives unless, within the class, there is a conflict of interest or an overwhelming disapproval of the lawsuit that would defeat the purpose of the class action [*see* *Richmond v. Dart Industries, Inc. (1981) 29 Cal. 3d 462, 474, 475, 174 Cal. Rptr. 515, 629 P.2d 23* ; *Seastrom v. Neways, Inc. (2007) 149 Cal. App. 4th 1496, 1502, 57 Cal. Rptr. 3d 903* (named representatives will not fairly and adequately protect interests of class if they are potential defendants in action)].

Denial of class certification may be an inappropriate remedy to resolve a potential conflict between the class representatives and the class. For example, in one case, class-action plaintiffs sought money damages and, in the alternative, rescission of a consolidation of various partnerships. Although most putative class members could no longer seek rescission, the appropriate remedy was to certify a damages class, not dismiss the whole action. In such a case, if conflicts arise, the trial court can create subclasses or exclude any members seeking the conflicting relief [*Daniels v. Centennial Group, Inc. (1993) 16 Cal. App. 4th 467, 471-472, 21 Cal. Rptr. 2d 1*].

The party seeking class certification has the burden of proving that its named representative can fairly and adequately represent and protect the interests of the class [*Richmond v. Dart Industries, Inc. (1981) 29 Cal. 3d 462, 470, 174 Cal. Rptr. 515, 629 P.2d 23*].

A trial court properly denies class certification if it finds that the proposed class representative is a "professional plaintiff," meaning one whose name is lent to a suit that is controlled entirely by the attorney for the putative class [*Howard Gunty Profit Sharing Plan v. Superior Court (2001) 88 Cal. App. 4th 572, 577-580, 105 Cal. Rptr. 2d 896* (remanding with instructions that trial court determine propriety of class certification and whether, and under what conditions, to allow precertification communication with potential class members)].

For further discussion of adequate representation, see Cabraser, California Class Actions Practice and Procedure, Ch. 6, *Class Certification Practice and Procedure* (Matthew Bender).

[3] Fiduciary Duty of Representative Toward Class

The named plaintiff in a class action suit assumes a fiduciary obligation to the members of the plaintiff class and surrenders any right to compromise the groupaction in return for an individual gain [*La Sala v. American Sav. & Loan Ass'n (1971) 5 Cal. 3d 864, 871, 97 Cal. Rptr. 849, 489 P.2d 1113*].

For further discussion, see Cabraser, California Class Actions Practice and Procedure, Ch. 6, *Class Certification Practice and Procedure* (Matthew Bender).

[4] Association's Standing to Represent Class

Actions by associations on behalf of their members are representative actions similar to class actions but with the essential difference that the party bringing the suit is not a representative member of the class with claims typical to those of the class [*see § 120.11[2]*]. Associations are usually found to have standing to bring representative actions on behalf of their membership despite their lack of these qualities, which are required for individual class representatives [*see, e.g., National Solar Equipment Owners' Assn. v. Grumman Corp. (1992) 235 Cal. App. 3d 1273, 1278, 1 Cal. Rptr. 2d 325* ; *Tenants Assn. of Park Santa Anita v. Southers (1990) 222 Cal. App. 3d 1293, 1299-1304, 272 Cal. Rptr. 361* ; *Twain Harte Homeowners Assn. v. Patterson (1987) 193 Cal. App. 3d 184, 186-188, 239 Cal. Rptr. 316*]. The problems inherent in allowing a class action to be maintained by an individual who is not a representative member of the class are not typically present in association actions because an association ordinarily does not purport to represent anyone but its own membership and does not have interests of its own that are antithetical to the interests of its members. The fact that the association is not a representative member of the class does not create difficulty in identifying the class or its community of interest because membership in the association and the nature of the rights and interests secured by such membership are easily determinable [*Twain Harte Homeowners Assn. v. Patterson (1987) 193 Cal. App. 3d 184, 187, 239 Cal. Rptr. 316*].

A representative plaintiff in an action under the unfair competition law must have suffered injury in fact and have lost money or property as a result of the alleged unfair competition [*see Bus. & Prof. Code § 17204*]. Therefore, a labor union that has not suffered actual injury under the unfair competition law lacks standing to bring a representative action as the assignee of employees who suffered injuries or as an association whose members have suffered injuries [*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court (2009) 46 Cal. 4th 993, 1002, 195 Cal. Rptr. 3d 605, 209 P.3d 937*]. For further discussion of standing requirements under the Unfair Competition Law, see [1], *above*.

At least one court has held that an association does not have standing to sue for tort damages on behalf of its members. The court found that such injuries are too intangible and too inherently personal reasonably to constitute a community of interest among the association's members [*Tenants Assn. of Park Santa Anita v. Southers (1990) 222 Cal. App. 3d 1293, 1304, 272 Cal. Rptr. 361*].

For further discussion, see Ch. 61, *Associations and Clubs* , and Ch. 124, *Condominiums and Other Common Interest Developments* . Detailed coverage of associational standing may be found in Cabraser, California Class Actions Practice and Procedure, Ch. 6, *Class Certification Practice and Procedure* (Matthew Bender).

[5] Replacement of Representative

It is within the trial court's discretion to determine, based on the facts and circumstances of the case, that an action should not be continued as a class action with the named party representatives [*Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 710, 63 Cal. Rptr. 724, 433 P.2d 732*]. If the trial court determines that the named plaintiffs can no longer suitably represent the class, it should afford the plaintiff class the opportunity to amend the complaint to redefine the class or to add new individual plaintiffs, or both, in order to establish a suitable representative [*La Sala v. American Sav. & Loan Ass'n (1971) 5 Cal. 3d 864, 872, 97 Cal. Rptr. 849, 489 P.2d 1113* ; *Scott v. City of Indian Wells (1972)*

6 Cal. 3d 541, 550, 99 Cal. Rptr. 745, 492 P.2d 1137]. If the class is unable to redefine the class or to name a suitable representative, the court may dismiss the action [*La Sala v. American Sav. & Loan Ass'n (1971) 5 Cal. 3d 864, 872-873, 97 Cal. Rptr. 849, 489 P.2d 1113* ; *see § 120.17[4]*].

Once the court has determined that the named representative may not represent the class, the court has discretion to allow discovery to ascertain a suitable class representative. This discovery may include precertification communication with potential class members, provided that the court acts to protect the privacy rights of the potential class members (for example, by having a third person contact the potential class members and by informing them that those who do not affirmatively respond will not have their names disclosed to the parties) [*Best Buy Stores, L.P. v. Superior Court (2006) 137 Cal. App. 4th 772, 778-779, 40 Cal. Rptr. 3d 575*]. The court may authorize precertification discovery designed to ascertain a suitable class representative even if the original named plaintiffs lack standing to prosecute the action [*CashCall, Inc. v. Superior Court (2008) 159 Cal. App. 4th 273, 284-291, 71 Cal. Rptr. 3d 441* ; *see Safeco Ins. Co. of Am. v. Superior Court (2009) 173 Cal. App. 4th 814, 828-833, 92 Cal. Rptr. 3d 814* (in ruling on motion to compel precertification discovery for purposes of identifying class representative, court must identify any potential abuses of class action procedure that may be created if discovery is permitted, and must weigh danger of such abuses against rights of parties under circumstances)].

The pendency of an appeal does not deprive the trial court of its authority to determine whether the named plaintiff is a suitable representative of the class and to substitute a new named plaintiff if necessary [*Mallick v. Superior Court (1979) 89 Cal. App. 3d 434, 437, 152 Cal. Rptr. 503*].

For further discussion, see Cabraser, California Class Actions Practice and Procedure, Ch. 6, *Class Certification Practice and Procedure* (Matthew Bender).

[6] Individual Representation

Both *Fed. R. Civ. P. 23* and the Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*] provide that any class member who does not request exclusion from the class on receiving notice of the pendency of the class action may enter an appearance in the action through his or her counsel [*Fed. R. Civ. P. 23(c)(2)(B)*; *Civ. Code § 1781(e)*; *see also § 120.17[1]*].

For further discussion, see Cabraser, California Class Actions Practice and Procedure, Ch. 6, *Class Certification Practice and Procedure* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass CounselGeneral OverviewCivil ProcedureClass ActionsClass MembersNamed MembersContracts LawContract InterpretationFiduciary Responsibilities

* Portions of this chapter have been adapted from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).

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12-120 California Forms of Pleading and Practice--Annotated § 120.16

§ 120.16 Special Concerns for Defendant Classes

Although plaintiff class actions are more common, a court may also certify a defendant class action if the procedure will save time and minimize costs [*see* *Kaye v. Mount La Jolla Homeowners Assn. (1988) 204 Cal. App. 3d 1476, 1489-1490, 1494-1495, 252 Cal. Rptr. 67* (denial of certification of proposed class of vicariously liable defendants because primarily liable defendant had sufficient insurance to satisfy liability)]. Because defendant class actions involve the serious danger of fraudulent or calculated selection of defendants who might not fully and fairly represent the interests of the class, a defendant class should be certified and a defendant class action tried only after the most careful scrutiny is given to preserving the safeguards of adequate representation, notice, and standing. Failure to ensure any one of these essentials will require reversal of a judgment against the defendant class [*Simons v. Horowitz (1984) 151 Cal. App. 3d 834, 844-845, 199 Cal. Rptr. 134*]. To use the class action procedure to sue a group of defendants, a plaintiff must have actually been injured by each defendant in the class [*Simons v. Horowitz (1984) 151 Cal. App. 3d 834, 845, 199 Cal. Rptr. 134*].

A class action against a class of defendants for declaratory relief is improper if no affirmative relief is sought against the class members, and the class members have no power to grant any affirmative relief. In one case, for example, a landlord that had unsuccessfully sought authority for a rent increase from a county rent control board brought a proceeding for mandate and for declaratory relief against the rent control board. In the declaratory relief action, the plaintiff landlord also sought to join as defendants four tenants who had spoken in opposition to the proposed rent increase during proceedings before the board. The four tenants were named both as individual defendants and as representatives of a class consisting of all of the plaintiff's tenants. The court of appeal affirmed the dismissal of the action as to the tenants following the trial court's sustaining of their demurrers. The court held that the tenants could not be made parties to the action because they had no power to grant plaintiff the relief it sought (i.e., approval for the rent increase). The court further reasoned that to permit the plaintiff to make the tenants unwilling parties to an action in which no affirmative relief was sought against them and to require them to represent the interests of all similarly situated tenants would have a chilling effect on the provision of the rent control ordinance that permitted interested parties to participate in rent increase hearings [*see* *Pinnacle Holdings, Inc. v. Simon (1995) 31 Cal. App. 4th 1430, 1436-1437, 37 Cal. Rptr. 2d 778*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsClass MembersDefendantsCivil ProcedureDeclaratory Judgment ActionsGeneral Overview

* Portions of this chapter have been adapted from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).

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12-120 California Forms of Pleading and Practice--Annotated § 120.17

§ 120.17 General Procedural Issues in Class Actions

[1] Applicability of Consumer Legal Remedies Act and Federal Procedures

Procedural rules for the management of class actions in California trial courts are set forth in *Cal. Rules of Ct., Rule 3.760 et seq.* The rules apply in class actions brought under *Code Civ. Proc. § 382* (authorizing class actions generally) and in class actions brought under the Consumers Legal Remedies Act [*Cal. Rules of Ct., Rule 3.760(a)*; *see Civ. Code § 1750 et seq.* (Consumers Legal Remedies Act)].

As to matters not covered by the California Rules of Court, the statutory procedures for class actions under the Consumers Legal Remedies Act [*see Civ. Code § 1781*] and the rule governing class actions in federal courts, *Fed. R. Civ. P. 23*, may be used as procedural guidelines to ensure fairness in class action suits generally [*see Richmond v. Dart Industries, Inc. (1981) 29 Cal. 3d 462, 469-470 n.7, 174 Cal. Rptr. 515, 629 P.2d 23* ; *see also B.W.I. Custom Kitchen v. Owens-Illinois, Inc. (1987) 191 Cal. App. 3d 1341, 1347, 235 Cal. Rptr. 228* ; for discussion of procedure under the Consumers Legal Remedies Act, *see* Ch. 504, *Sales: Consumers Legal Remedies Act*]. Absent controlling California authority, federal cases construing *Fed. R. Civ. P. 23* are particularly persuasive authority if the California rule involved is identical to the rule construed in the federal case [*Danzig v. Superior Court (1978) 87 Cal. App. 3d 604, 610, 151 Cal. Rptr. 185*].

For thorough coverage of certification procedure, see Cabraser, California Class Actions Practice and Procedure, Ch. 6, *Class Certification Practice and Procedure* (Matthew Bender).

[2] Statute of Limitations

Under *Fed. R. Civ. P. 23*, the timely filing of a class action suit tolls the statute of limitations for all members of the purported class until the final determination regarding the propriety of class certification is made [*American Pipe & Construction Co. v. Utah (1974) 414 U.S. 538, 553-554, 94 S. Ct. 756, 38 L. Ed. 2d 713*].This rule has been held to apply to class actions filed under *Code Civ. Proc. § 382* [*Bangert v. Narmco Materials, Inc. (1984) 163 Cal. App. 3d 207, 210-212, 209 Cal. Rptr. 438* ; *but see Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1125-1126, 245 Cal. Rptr. 658, 751 P.2d 923* (questioning application of rule)].

One court of appeal has held that the federal rule regarding tolling of the statute of limitations applies to a class member who opts out of a previously filed federal class action. Thus, the statute of limitations on the former class member's individual state-law cause of action is tolled from the date of filing until the date that the class member opts out of the class action, whether the class member opts out before or after the class is certified [*see San Francisco Unified School Dist. v. W.R. Grace & Co. (1995) 37 Cal. App. 4th 1318, 1336-1340, 44 Cal. Rptr. 2d 305*].

For thorough coverage of the effect of a class action on statutes of limitation, see Cabraser, California Class Actions Practice and Procedure, Ch. 10, *Effect of Class Action on Statutes of Limitation* (Matthew Bender).

Under the Class Action Fairness Act of 2005 (CAFA), the limitations periods on any claims asserted in a "mass action" that is removed to federal court based on minimal diversity are tolled while the action is pending in federal court [*28 U.S.C. § 1332(d)(11)(D)*].

For discussion of the treatment of "mass actions" under CAFA, see *§ 120.13[4]*.

[3] Personal Jurisdiction Over Nonresidents

A forum state may exercise jurisdiction over the claim of an absent class action plaintiff, even though the plaintiff may not possess the minimum contacts with the forum that would support personal jurisdiction over a defendant. This is because the Due Process Clause [*U.S. Const., amend. XIV*] does not afford absent class plaintiffs as much protection from state-court jurisdiction as it does absent defendants in nonclass actions. Nevertheless, if the forum state wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice and an opportunity either to be heard and participate in the litigation or to remove himself or herself from the class [*Phillips Petroleum Co. v. Shutts (1985) 472 U.S. 797, 811-812, 105 S. Ct. 2965, 86 L. Ed. 2d 628*]. For discussion of the broad principles of jurisdiction, see Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* .

A stricter rule applies if the case involves out-of-state defendants and events governed by the laws of another state. Thus, a trial court's assumption of jurisdiction over a class action brought by season ticket holders against the National Football League franchises and involving out-of-state claimants, out-of-state defendants, and a dispute governed by foreign law and about which California had no interest was held to be an abuse of discretion [*Baltimore Football Club, Inc. v. Superior Court (1985) 171 Cal. App. 3d 352, 364-365, 215 Cal. Rptr. 323]* .

[4] Dismissal of Action

A dismissal of an entire class action, or of any party or cause of action in a class action, requires court approval. The court may not grant a request to dismiss a class action if the court has entered judgment following final approval of a settlement. A request for dismissal must be accompanied by a declaration setting forth the facts on which the party relies. The declaration must clearly state whether consideration, direct or indirect, is being given for the dismissal and must describe the consideration in detail [*Cal. Rules of Ct., Rule 3.770(a)*; *see § 120.57* (form of declaration)].

The court may grant the request without a hearing. If the request is disapproved, notice of tentative disapproval must be sent to the attorneys of record. Within 15 calendar days of the service of the notice, any party may seek a hearing on the request. If no hearing is sought within that period, the request for dismissal will be deemed denied [*Cal. Rules of Ct., Rule 3.770(b)*].

If the court dismisses an action after certifying a class, and notice of the pendency of the action has been provided to class members, notice of the dismissal must be given to the class in the manner specified by the court [*Cal. Rules of Ct., Rule 3.770(c)*; *see La Sala v. American Sav. & Loan Ass'n (1971) 5 Cal. 3d 864, 872-873, 97 Cal. Rptr. 849, 489 P.2d 1113* (if class action is dismissed because named plaintiffs are not suitable representatives and plaintiff class has not

redefined class or added new and suitable named plaintiffs, dismissal requires prior notice to class; decided before adoption of predecessor of *Cal. Rules of Ct., Rule 3.770(c)*); *see also Simons v. Horowitz (1984) 151 Cal. App. 3d 834, 841-843, 199 Cal. Rptr. 134*]. If the court has not ruled on class certification, or if notice of the pendency of the action has not been provided to class members in a case in which such notice was required, notice of the proposed dismissal may be given in the manner and to those class members specified by the court, or the action may be dismissed without notice to the class members if the court finds that the dismissal will not prejudice them [*Cal. Rules of Ct., Rule 3.770(c)*].

For further discussion of the dismissal of class actions, see Cabraser, California Class Actions and Coordinated Proceedings (Second Edition), Ch. 6, *Class Certification Procedure* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsCivil ProcedureClass ActionsJudicial DiscretionCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTolling

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§ 120.18 Procedure to Certify Class Action

[1] Burden on Party Seeking Class Certification

A determination that an action may proceed as a class action is ordinarily made early in the proceedings, pursuant to the plaintiff's motion to certify the class action or the defendant's motion to declare the class action inappropriate [*see Cal. Rules of Ct., Rule 3.764*; *but see In re BCBG Overtime Cases (2008) 163 Cal. App. 4th 1293, 1299, 78 Cal. Rptr. 3d 257* (that either party may initiate class-certification process); *see also § 120.51*]. At the certification hearing, the named plaintiff has the burden of proving that the requirements for maintenance of a class action are satisfied [*Occidental Land, Inc. v. Superior Court (1976) 18 Cal. 3d 355, 360, 134 Cal. Rptr. 388, 556 P.2d 750* ; *see Stephens v. Montgomery Ward & Co. (1987) 193 Cal. App. 3d 411, 418, 238 Cal. Rptr. 602*].

The plaintiff's motion to certify the class action [*see § 120.51*], or a sua sponte motion of the court to certify the class action, must be a noticed motion, subject to the right of an opposing party to submit evidence in opposition [*see Cal. Rules of Ct., Rule 3.764(c)* (format and filing of motion and opposition)]. Each party should have an opportunity to conduct discovery for purposes of the motion [*Carabini v. Superior Court (1994) 26 Cal. App. 4th 239, 241-244, 31 Cal. Rptr. 2d 520* (evidence presumably would be presented in form of declarations or affidavits; court indicated it was not suggesting that trial court is required to hear testimony)].

To obtain certification of a class action, a party must establish the existence of both an ascertainable class and a well-defined community of interest among the class members [*Linder v. Thrifty Oil Co. (2000) 23 Cal. 4th 429, 435, 97 Cal. Rptr. 2d 179, 2 P.3d 27* ; *see § 120.12*]. The showing required in a plaintiff's motion to certify a class action is within the discretion of the trial court, provided that the court applies the correct criteria [*Occidental Land, Inc. v. Superior Court (1976) 18 Cal. 3d 355, 361, 134 Cal. Rptr. 388, 556 P.2d 750* ; *Stephens v. Montgomery Ward & Co. (1987) 193 Cal. App. 3d 411, 418, 238 Cal. Rptr. 602*]. Expert evidence may be offered to establish that the requirements for class treatment are met, provided that the expert opinion is based on relevant, probative facts, as opposed to mere guess work, surmise, or conjecture [*In re Cipro Cases I & II (2004) 121 Cal. App. 4th 402, 411-412, 17 Cal. Rptr. 3d 1*].

The party seeking class certification need only present substantial evidence that the class requirements are met.

However, there is no rule that conflicting evidence or inferences must be disregarded. Thus, the trial court may consider the totality of the evidence offered by both sides in making its discretionary determination of whether substantial evidence supports class certification [*Quacchia v. DaimlerChrysler Corp. (2004) 122 Cal. App. 4th 1442, 1447-1448, 19 Cal. Rptr. 3d 508*].

The plaintiff is not required to prove the existence and identity of the members of the class at the certification stage of the proceedings [*Stephens v. Montgomery Ward & Co. (1987) 193 Cal. App. 3d 411, 419, 238 Cal. Rptr. 602*].

For thorough coverage of certification procedure, see Cabraser, California Class Actions and Coordinated Proceedings (Second Edition), Ch. 6, *Class Certification Procedure* (Matthew Bender).

[2] Timing of Certification

A motion for class certification should be filed when practicable [*Cal. Rules of Ct., Rule 3.764(b)*], and the propriety of permitting the action to proceed as a class action should be decided at an early stage of the proceedings [*Cal. Rules of Ct., Rule 3.764(b)*; *see Cal. Rules of Ct., Rules 3.762, 3.763* (case conference)]. Any such deadline must take into account discovery proceedings that may be necessary to the filing of the motion [*Cal. Rules of Ct., Rule 3.764(b)*]. Indeed, it is an abuse of discretion for the court to decide whether class action treatment is appropriate without giving the parties a full opportunity to conduct discovery on class-certification issues and to brief the issues and present evidence [*Stern v. Superior Court (2003) 105 Cal. App. 4th 223, 232-233, 129 Cal. Rptr. 2d 275* ; *see In re BCBG Overtime Cases (2008) 163 Cal. App. 4th 1293, 1300-1301, 78 Cal. Rptr. 3d 257* (trial court did not err in granting motion to strike class allegations 22 months after filing of plaintiffs' coordinated complaint, since discovery on class-certification issues "had been going on for some time, although plaintiffs' efforts had apparently been thwarted by adverse rulings from the court"); *but see Dukes v. Wal-Mart Stores, Inc. (9th Cir. 2010) 603 F.3d 571, 600* (en banc) (trial court has discretion to cut off discovery to avoid mini-trial on merits at certification stage)].

Ordinarily, certification of the class action must occur before trial of the substantive issues in the case [*Home Sav. & Loan Ass'n v. Superior Court (1974) 42 Cal. App. 3d 1006, 1014, 117 Cal. Rptr. 485* ; *see Civ. Code § 1781(c)(1)* (provision for certification determination under Consumers Legal Remedies Act); *see also Fed. R. Civ. P. 23(c)(1)(A)* (certification determination to be made "at an early practicable time" in federal case)]. The purpose of resolving procedural class-certification issues first is to protect the defendant from "one-way intervention," under which potential class members could elect to stay in the class after a favorable merits ruling but opt out after an unfavorable merits ruling [*see Fireside Bank v. Superior Court (2007) 40 Cal. 4th 1069, 1074, 1081, 56 Cal. Rptr. 3d 861, 155 P.3d 268]* . It has even been said that the defendant has a due-process right to avoid one-way intervention [*Fireside Bank v. Superior Court (2007) 40 Cal. 4th 1069, 1083, 56 Cal. Rptr. 3d 861, 155 P.3d 268* ; *Home Sav. & Loan Assn. v. Superior Court (1976) 54 Cal. App. 3d 208, 214, 126 Cal. Rptr. 511]* . The general requirement that procedural class-certification issues be resolved first is not rigid, however, and is subject to the following rules [*Fireside Bank v. Superior Court (2007) 40 Cal. 4th 1069, 1083, 56 Cal. Rptr. 3d 861, 155 P.3d 268]* :

- First, a defendant must actively preserve its protection against one-way intervention by objecting to any adjudication of the merits before class certification. If the defendant fails to timely object, or affirmatively seeks resolution of the merits before certification, it will be deemed to have waived its rights [*see, e.g., Employment Development Dept. v. Superior Court (1981) 30 Cal. 3d 256, 262, 262-265, 178 Cal. Rptr. 612, 636 P.2d 575* ; *Civil Service Employees Ins. Co. v. Superior Court (1978) 22 Cal. 3d 362, 373-374, 149 Cal. Rptr. 360, 584 P.2d 497* ; *Colwell Co. v. Superior Court (1975) 50 Cal. App. 3d 32, 34-35, 123 Cal. Rptr. 228]* .

- Second, plaintiffs should seek certification before moving for any resolution of the merits [*see Cal. Rules of Ct., Rule 3.764(b)* ("A motion for class certification should be filed when practicable")]. If the plaintiffs seek certification after seeking resolution of the merits, then in the absence of a waiver by the

defendant, they must demonstrate changed circumstances or other good cause justifying the belated motion before the trial court may consider it.

- Third, in the absence of a waiver by the defendant, the trial court should not resolve the merits in a putative class action before resolving class certification and notice issues, absent a compelling justification for doing so (such as when the plaintiff makes a belated motion for class certification based on a change in circumstances occurring after a merits determination).

For further discussion of the timing of class certification, see Cabraser, California Class Actions and Coordinated Proceedings (Second Edition), Ch. 6, *Class Certification Procedure* (Matthew Bender).

[3] Altering or Amending Certification

Fed. R. Civ. P. 23(c)(1)(C) provides that certification orders may be altered or amended before final judgment. This rule is applicable to class actions brought in state court under *Code Civ. Proc. § 382* [*Occidental Land, Inc. v. Superior Court (1976) 18 Cal. 3d 355, 360, 134 Cal. Rptr. 388, 556 P.2d 750*].

[4] Certification Decision Does Not Address Substantive Merits

The question of certification is essentially a procedural one that does not ask whether an action is legally or factually meritorious [*Linder v. Thrifty Oil Co. (2000) 23 Cal. 4th 429, 439-440, 97 Cal. Rptr. 2d 179, 2 P.3d 27*]. However, determining whether the requirements for class certification are met will sometimes require looking behind the pleadings to issues overlapping with the merits of the underlying claims [*Dukes v. Wal-Mart Stores, Inc. (9th Cir. 2010) 603 F.3d 571, 594* (en banc) (determinations made at class certification stage do not bind court on merits as litigation progresses)].

Certification of a class generally should not be conditioned on a showing that the class claims for relief are likely to prevail [*Linder v. Thrifty Oil Co. (2000) 23 Cal. 4th 429, 442-443, 97 Cal. Rptr. 2d 179, 2 P.3d 27*]. The rule against evaluating the merits of the plaintiff's claims in deciding whether class treatment is appropriate does not mean that a trial court must deny certification because it cannot reach the merits; rather, the court must evaluate whether the theory of recovery advanced by the plaintiff is likely to prove amenable to class treatment [*Ghazaryan v. Diva Limousine, Ltd. (2008) 169 Cal. App. 4th 1524, 1531, 87 Cal. Rptr. 3d 518*].

Early disposition on the merits should, if possible, be accomplished by means of proceedings designed for that purpose, such as proceedings on demurrer or dispositive pretrial motions [*see Linder v. Thrifty Oil Co. (2000) 23 Cal. 4th 429, 443, 97 Cal. Rptr. 2d 179, 2 P.3d 27* ; *see also § 120.20[1]*].

Trial courts do retain flexibility in class action proceedings, and a court may consider the merits of an action in a certification proceeding in an exceptional case, if the defense has no other reasonable pretrial means to challenge the merits of a claim to be asserted by a proposed class. In such a situation the trial court must first give the parties notice and an opportunity to brief the merits, and after doing so the court may deny class certification because the claim lacks merit as a matter of law. The court may also consider the merits in a certification proceeding if the parties jointly request that it do so [*Linder v. Thrifty Oil Co. (2000) 23 Cal. 4th 429, 443, 97 Cal. Rptr. 2d 179, 2 P.3d 27* ; *see, e.g., Conley v. Pacific Gas & Electric Co. (2005) 131 Cal. App. 4th 260, 268, 31 Cal. Rptr. 3d 719* (on appeal from denial of class certification, court of appeal addressed merits of putative class's claim "because the parties have requested that we do so for their further guidance, and because the issue raised is one of continuing importance")].

[5] Appellate Review of Certification Decision

[a] Final-Judgment Rule

To prevent piecemeal litigation through appeals from orders that dispose of less than an entire action, the "final judgment rule," as codified in *Code Civ. Proc. §§ 904.1* and *904.2*, generally allows an appeal only from a final judgment or from an order that has been expressly made appealable by statute [*see Stephen v. Enterprise Rent-A-Car (1991) 235 Cal. App. 3d 806, 811, 1 Cal. Rptr. 2d 130*]. An order denying certification is not made appealable by statute. It is, however, appealable if it is deemed by the courts to be equivalent to a final judgment. Thus, the denial of certification to an entire class is an appealable order [*Linder v. Thrifty Oil Co. (2000) 23 Cal. 4th 429, 435, 97 Cal. Rptr. 2d 179, 2 P.3d 27* (citing *Richmond v. Dart Industries, Inc. (1981) 29 Cal. 3d 462, 470, 174 Cal. Rptr. 515* and *Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 698-699, 63 Cal. Rptr. 724, 433 P.2d 732*)]. An appeal is allowed in such a case under the "death knell" doctrine, because the denial of class certification is "tantamount to a dismissal of the action as to all members of the class other than plaintiff," effectively sounding the "death knell" of the action as to the putative class members [*Farwell v. Sunset Mesa Property Owners Assn., Inc. (2008) 163 Cal. App. 4th 1545, 1547, 78 Cal. Rptr. 3d 666* (quoting *Daar*); *Stephen v. Enterprise Rent-A-Car (1991) 235 Cal. App. 3d 806, 811, 1 Cal. Rptr. 2d 130* (quoting *Daar*); *but see Haro v. City of Rosemead (2009) 174 Cal. App. 4th 1067, 1078, 94 Cal. Rptr. 3d 874* (denial of class certification in action for wages under Fair Labor Standards Act is not appealable because such action must proceed as collective opt-in action under *29 U.S.C. § 216(b)* and rules specifically applicable to such actions; as matter of law such action cannot proceed as class action)].

In contrast, an order denying class certification that does not dispose of all the causes of action between the parties is not appealable until final judgment. For example, an order sustaining a demurrer but granting leave to amend is not appealable under the "death knell" doctrine, because it does not have the effect of terminating the class action, since the complaint can be amended in a way that would permit class certification [*Farwell v. Sunset Mesa Property Owners Assn., Inc. (2008) 163 Cal. App. 4th 1545, 1551-1552, 78 Cal. Rptr. 3d 666*]. In these cases, however, review by writ of mandate has generally been available [*see Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 820-821, 94 Cal. Rptr. 796, 484 P.2d 964* ; *Rosack v. Volvo of America Corp. (1982) 131 Cal. App. 3d 741, 748-749, 182 Cal. Rptr. 800* ; *see also* [b], *below*]. Similarly, an order granting class certification but limiting or restricting the class is not immediately appealable, because it can be fully reviewed on appeal from a final judgment on the class claims [*Estrada v. RPS, Inc. (2005) 125 Cal. App. 4th 976, 985-986, 23 Cal. Rptr. 3d 261* (order dismissing putative class members who failed to respond to questionnaires designed to help ascertain class is class-certification decision that is not appealable until final judgment)].

An order certifying a statewide, rather than a national, class has also been held to be not appealable in that this type of order does not have a "death knell" effect of making further proceedings in the action impractical because of the denial of class action status [*In re Cipro Cases I & II (2004) 121 Cal. App. 4th 402, 409, 17 Cal. Rptr. 3d 1* (order certifying class is interlocutory and not appealable except after final judgment, but order is reviewable by petition for writ of mandate); *General Motors Corp. v. Superior Court (1988) 199 Cal. App. 3d 247, 250-251, 244 Cal. Rptr. 776* ; *but see Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 866-867, 251 Cal. Rptr. 530* (order sustaining demurrer to complaint held to be appealable to extent that it alleged statewide rather than nationwide class); *Clothesrigger, Inc. v. GTE Corp. (1987) 191 Cal. App. 3d 605, 609-611, 619, 236 Cal. Rptr. 605* (refusal to certify nationwide class reversed on appeal without discussion of whether order was appealable)].

For further discussion of appellate review of class certification decisions, see Cabraser, California Class Actions and Coordinated Proceedings (Second Edition), Ch. 6, *Class Certification Procedure* (Matthew Bender).

[b] Mandate Review of Interlocutory Orders

Interlocutory (i.e., nonfinal) orders concerning class certification that do not dispose of the entire action or have the effect of a "death knell," are reviewable by mandate and prohibition proceedings [*Dean Witter Reynolds, Inc. v. Superior Court (1989) 211 Cal. App. 3d 758, 763, 259 Cal. Rptr. 789*]. Generally, if the trial court's order permits the class action to proceed, that order is reviewable by mandate and prohibition proceedings [*see Chance v. Superior Court (1962) 58 Cal. 2d 275, 278, 23 Cal. Rptr. 761, 373 P.2d 849*]. For example, a mandate proceeding is appropriate

to review an order that dismisses one of several class causes of action but allows the others to stand [*Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 806-807, 94 Cal. Rptr. 796, 484 P.2d 964*].

For a form of a mandate petition, *see § 120.56*.

[c] Standard of Review

Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification. In the absence of other error, a trial court order ruling on certification, if supported by substantial evidence, will not be disturbed unless the trial court used improper criteria or erroneous legal assumptions [*Sav-on Drug Stores, Inc. v. Superior Court (2004) 34 Cal. 4th 319, 339 n.10, 17 Cal. Rptr. 3d 906, 96 P.3d 194* (reviewing court is not authorized to overturn certification order merely because it finds record evidence of predominance of common issues less than determinative or conclusive; relevant question on review is whether such evidence is substantial)]. Conversely, if such an order is based on improper criteria or incorrect assumptions, it is subject to reversal even though there may otherwise be substantial evidence to support it. In examining the trial court's reasons for denying certification, any valid pertinent reason stated by the trial court will be sufficient for the reviewing court to uphold the order [*Linder v. Thrifty Oil Co. (2000) 23 Cal. 4th 429, 435-436, 97 Cal. Rptr. 2d 179, 2 P.3d 27* ; *see also Schneider v. Vennard (1986) 183 Cal. App. 3d 1340, 1345, 228 Cal. Rptr. 800*]. The appellate court will not consider the merits of the case but will restrict its inquiry to whether the plaintiff met his or her burden of establishing the requirements for a class action [*Stephens v. Montgomery Ward & Co. (1987) 193 Cal. App. 3d 411, 418, 238 Cal. Rptr. 602*].

[6] Decertification of Class

If a change of circumstances occurring after a class has been certified calls into question the appropriateness of continuing the action as a class action, a motion to decertify the class action may be brought [*Cal. Rules of Ct., Rule 3.764(a)(4)*; *Danzig v. Jack Grynberg & Associates (1984) 161 Cal. App. 3d 1128, 1136, 208 Cal. Rptr. 336*]. The trial court has the power to decertify a class if it appears individual issues dominate in the action or that a class action is otherwise not an appropriate vehicle for adjudicating the controversy [*see MacManus v. A. E. Realty Partners (1987) 195 Cal. App. 3d 1106, 1117, 241 Cal. Rptr. 315*]. The showing required for a decertification order is within the trial court's discretion, if the court applies the proper certification criteria [*see § 120.12*] and its action has a rational basis [*Grogan-Beall v. Ferdinand Roten Galleries, Inc. (1982) 133 Cal. App. 3d 969, 975, 184 Cal. Rptr. 411*].

Ordinarily, a decertification motion must be brought before a decision is rendered on the merits of the action [*Danzig v. Jack Grynberg & Associates (1984) 161 Cal. App. 3d 1128, 1136, 208 Cal. Rptr. 336*]. A decertification motion may be entertained after a decision on the merits, however, if the motion is based on changed circumstances and the moving party adduces new evidence that became available only after the merits of the case were decided [*Green v. Obledo (1981) 29 Cal. 3d 126, 148, 172 Cal. Rptr. 206, 624 P.2d 256*].

The court should afford the plaintiff class the opportunity to amend the complaint to redefine the class or to add new individual plaintiffs, or both, prior to decertifying the class and dismissing the class action [*La Sala v. American Sav. & Loan Ass'n (1971) 5 Cal. 3d 864, 872, 97 Cal. Rptr. 849, 489 P.2d 1113* ; *see § 120.15[5]*].

A mandate proceeding, rather than an appeal, is the appropriate proceeding to review an order denying a motion to decertify a class [*see Occidental Land, Inc. v. Superior Court (1976) 18 Cal. 3d 355, 359, 134 Cal. Rptr. 388, 556 P.2d 750* ; *see also Green v. Obledo (1981) 29 Cal. 3d 126, 149 n.18, 172 Cal. Rptr. 206, 624 P.2d 256* (order for partial decertification as not appealable if portion of class that was decertified was not separate and distinct from portion that remained in case, and, therefore, cross appeal from final judgment on that issue was both proper and timely); *see also* [5][a], above].

For further coverage of decertification, see Cabraser, California Class Actions and Coordinated Proceedings (Second Edition), Ch. 6, *Class Certification Procedure* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersNamed MembersCivil ProcedureClass ActionsJudicial DiscretionCivil ProcedureClass ActionsPrerequisitesCommonalityEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

* Portions of this chapter have been adapted from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).

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§ 120.19 Notice Requirements

[1] When Notice Is Required

If a class is certified, the court may require either party to notify the class of the action in the manner specified by the court [*Cal. Rules of Ct., Rule 3.766(a)*; *see Civ. Code § 1781(d), (e)* (notice requirements under Consumers Legal Remedies Act)]. On certification of the class, or as soon thereafter as practicable, the court must make an order determining whether notice is necessary, and if so, the time, manner, and content of the notice, and the parties responsible for the cost of notice [*Cal. Rules of Ct., Rule 3.766(c)*; *see Hernandez v. Vitamin Shoppe Indus. Inc. (2009) 174 Cal. App. 4th 1441, 1454-1461, 95 Cal. Rptr. 3d 734* (trial court did not abuse its discretion by enjoining class member's attorney from unilaterally contacting other class members, after attorney sent argumentative letters to class members urging them to opt out of class, after court had reviewed proposed settlement and counsel's arguments, preliminarily approved settlement and conditionally certified class, and ordered claims administrator to send notice to class)]. By requiring the court to determine whether notice to class members is necessary, *Cal. Rules of Ct., Rule 3.766(c)(1)* implies that the court may decide not to require class notice. Before the adoption of the predecessor of *Cal. Rules of Ct., Rule 3.766*, which applies to all class actions, the California Supreme Court had held that *Civ. Code § 1781(d), (e)*, which requires class notice in class actions under the Consumers Legal Remedies Act, was generally applicable to other class actions in California [*Civil Service Employees Ins. Co. v. Superior Court (1978) 22 Cal. 3d 362, 376, 149 Cal. Rptr. 360, 584 P.2d 497*]. Presumably, that holding has been superseded by the subsequent adoption of Rule 3.766, and the trial court may now decide to forgo class notice in an appropriate case.

In deciding whether notice is necessary, the court may look to the rule governing class actions in federal courts for guidance [*see Richmond v. Dart Industries, Inc. (1981) 29 Cal. 3d 462, 469-470 n.7, 174 Cal. Rptr. 515, 629 P.2d 23*]. Under *Fed. Rule Civ. P., Rule 23*, notice is required if the class action is based on predominant common questions of law or fact, but not if the action seeks injunctive or declaratory relief or is based on the need to avoid inconsistent or varying adjudications, incompatible standards of conduct for the party opposing the class, or adjudications that would as a practical matter dispose of or impair the interests of nonparties [*Fed. R. Civ. P. 23(b), (c)(2)*]. Doubts as to whether an action should be classified under the federal rule as requiring mandatory notice or permitting discretionary notice should be resolved in favor of discretionary notice [*Frazier v. City of Richmond (1986) 184 Cal. App. 3d 1491, 1501, 228 Cal. Rptr. 376*].

For forms relating to approval of the notice, and a form of notice, see *§§ 120.53 -120.55*. For thorough coverage of notice requirements, see Cabraser, California Class Actions And Coordinated Proceedings (Second Edition), Ch. 8, *Class Action Notice* (Matthew Bender).

There is no general authorization for, or requirement of, pre-certification notice to prospective class members. However, if prospective class members' identifying information is disclosed in pre-certification discovery, it may be appropriate for the court to order that notice be provided to prospective class members so that they may take steps to protect their privacy [*see, e.g.,* *Pioneer Elecs. (USA) Inc. v. Superior Court (2007) 40 Cal. 4th 360, 373-375, 53 Cal. Rptr. 3d 513, 150 P.3d 198* (approving trial court's order to notify defendant's customers and giving them opportunity to object to transmission of their identifying information in discovery); *Belaire-West Landscape, Inc., v. Superior Court (2007) 149 Cal. App. 4th 554, 561-562, 57 Cal. Rptr. 3d 197* (in employees' putative class action alleging wage violations, trial court properly conditioned discovery of potential class members' names and contact information on pre-certification notice that gave potential class members chance to prevent disclosure of their information by opting out of class action)].

If class certification has been denied, the trial court cannot order notification of former potential class members of their possible legal claims. After a class-certification motion has been denied, the plaintiff represents himself or herself only, not putative class members; moreover, in non-class litigation, it is not the court's role to order notification to third parties of their possible legal claims [*Experian Info. Solutions, Inc. v. Superior Court (2006) 138 Cal. App. 4th 122, 131-132, 41 Cal. Rptr. 3d 219*].

[2] Content of Notice

The format and content of the notice are to be regulated by the trial court [*Cal. Rules of Ct., Rule 3.766(d)*; *Gainey v. Occidental Land Research (1986) 186 Cal. App. 3d 1051, 1057-1058, 231 Cal. Rptr. 249* ; *Frazier v. City of Richmond (1986) 184 Cal. App. 3d 1491, 1499-1503, 228 Cal. Rptr. 376*]. One of the purposes of the court's supervisory role is to assure that the notice be "neutral and objective in tone, neither promoting nor discouraging the assertion of claims" [*Gainey v. Occidental Land Research (1986) 186 Cal. App. 3d 1051, 1057-1058, 231 Cal. Rptr. 249*].

If the court decides that class members are to be given the right to request exclusion from the class [*see Cal. Rules of Ct., Rule 3.766(c)(2)* (on certification of class, as soon thereafter as practicable, court must determine whether class members may exclude themselves)], the notice must include all of the following [*Cal. Rules of Ct., Rule 3.766(d)*]:

- A brief explanation of the case, including the basic contentions or denials of the parties;
- A statement that the court will exclude the member from the class if the member so requests by a specified date;
- A procedure for the member to follow in requesting exclusion from the class;
- A statement that the judgment, whether favorable or not, will bind all members who do not request exclusion; and
- A statement that any member who does not request exclusion may, if the member so desires, enter an appearance through counsel.

For forms relating to approval of the notice, and a form of notice, see *§§ 120.53 -120.55*.

[3] Method of Giving Notice

In determining the manner of the notice, the court must consider all of the following [*Cal. Rules of Ct., Rule 3.766(e)*]:

- The interests of the class;
- The type of relief requested;
- The stake of the individual class members;
- The cost of notifying class members;
- The resources of the parties;
- The possible prejudice to class members who do not receive notice; and
- The res judicata effect on class members.

If personal notification is unreasonably expensive or the stake of individual class members is insubstantial, or if it appears that all members of the class cannot be notified personally, the court may order a means of notice reasonably calculated to apprise the class members of the pendency of the action. In such a case, for example, appropriate means of notice may consist of publication in a newspaper or magazine; broadcasting on television, radio, or the Internet; or posting or distribution through a trade or professional association, union, or public interest group [*Cal. Rules of Ct., Rule 3.766(d)*].

The foregoing list of possibilities is not exclusive; the court has substantial room for creativity in designing an effective means of notifying class members. For example, although it is ordinarily the plaintiff's responsibility to provide the notice and bear the expense of doing so, the court has discretion to require the defendant to provide or pay for notice if the defendant's conduct has unnecessarily complicated the problems of identifying and notifying the class, or if the defendant possesses the ability to provide class notice easily and at little cost [*Hypertouch, Inc. v. Superior Court (2005) 128 Cal. App. 4th 1527, 1551-1555, 27 Cal. Rptr. 3d 839*].

The difficulty of notifying individual class members does not authorize the court to require that class members--even those with a substantial stake in the case--acknowledge personal notification by affirmatively requesting inclusion in the class. Such an "opt-in" procedure is permitted only after liability has been determined, as a means of apportioning the class's recovery [*Hypertouch, Inc. v. Superior Court (2005) 128 Cal. App. 4th 1527, 1542 n.5, 1546-1547 nn.9, 10* (after liability is determined, court may require class members to establish their entitlement to portions of recovery by filing proofs of claim)]. However, before the determination of liability, an "opt-in" procedure is not required by constitutional due-process principles [*Hypertouch, Inc. v. Superior Court (2005) 128 Cal. App. 4th 1527, 1537-1543, 27 Cal. Rptr. 3d 839* (difficulty of providing notice may be reason to deny class certification, but once class is certified, due process does not require use of opt-in procedure to limit class to those who have received actual notice)], and it is not permitted by the applicable federal or California court rules, which require only the best notice practicable under the circumstances [*Hypertouch, Inc. v. Superior Court (2005) 128 Cal. App. 4th 1527, 1544-1550, 27 Cal. Rptr. 3d 839* ; *see Fed. R. Civ. P. 23(c)(2)*; *Cal. Rules of Ct., Rule 3.766(f)*].

In contrast, the federal Fair Labor Standards Act (FLSA) expressly requires that additional plaintiffs may opt into an action seeking unpaid minimum wages or overtime compensation [*29 U.S.C. § 216(b)*]. Such an action is termed a "collective action," as opposed to a class action, and it is governed by rules specifically applicable to such actions, rather than by federal or state statutes and rules that govern true class actions [*Haro v. City of Rosemead (2009) 174 Cal. App. 4th 1067, 1074-1077, 94 Cal. Rptr. 3d 874* (FLSA actions, which are predicated on additional plaintiffs opting in, are not class actions and, in California courts, are not governed by *Code Civ. Proc. § 382* or *Cal. Rules of Ct.,*

Rule 3.760 et seq.)].

For forms relating to approval of the notice, and a form of notice, see *§§ 120.53 -120.55*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsNotices

* Portions of this chapter have been adapted from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).

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§ 120.20 Attacking Class Actions

[1] Motions for Pretrial Disposition

The California Supreme Court has indicated that it is appropriate to weed out meritless class action claims at the pretrial stage through the use of demurrer proceedings or pretrial dispositive motions [*Linder v. Thrifty Oil Co. (2000) 23 Cal. 4th 429, 440-441, 97 Cal. Rptr. 2d 179, 2 P.3d 27*].

A class action may properly be disposed of by demurrer if the complaint on its face fails to allege facts sufficient to establish a community of interest in the elements of the class claims. An evidentiary hearing on the issue of certification under these circumstances would be a waste of time and judicial resources [*Clausing v. San Francisco Unified School Dist. (1990) 221 Cal. App. 3d 1224, 1234, 271 Cal. Rptr. 72* ; *see also* *Linder v. Thrifty Oil Co. (2000) 23 Cal. 4th 429, 440-441, 97 Cal. Rptr. 2d 179, 2 P.3d 27* (may be more appropriate to mount pretrial challenge to merits of class action by demurrer or dispositive motion than by challenge on the merits in pretrial certification proceeding); *Alvarez v. May Dept. Stores Co. (2006) 143 Cal. App. 4th 1223, 1231, 49 Cal. Rptr. 3d 892* (it is generally proper at pleading stage to strike class allegations if face of complaint and other matters subject to judicial notice reveal invalidity of class allegations)].

Some courts have indicated that demurrers to class actions are disfavored in California [*see* *Arce v. Kaiser Found. Health Plan, Inc. (2010) 181 Cal. App. 4th 471, 487, 104 Cal. Rptr. 3d 545* ("It is often premature for a trial court to make determinations pertaining to class suitability on demurrer"); *Prince v. CLS Transp., Inc. (2004) 118 Cal. App. 4th 1320, 1325-1328, 13 Cal. Rptr. 3d 725* (apparently inconsistent cases can be reconciled if facts reveal that only in mass tort actions, or other actions equally unsuited to class-action treatment, should class suitability be determined at pleading stage; in other cases, e.g., wage and hour claims, class suitability should not be determined by demurrer)]. California's judicial policy is to allow potential class-action plaintiffs to have their actions measured on their merits to determine whether trying their suits as class actions will bestow the required benefits on litigants and the judicial process to justify class action litigation.

Absent a strong factual showing that negates the possibility of amending the complaint to plead a class action that will survive a demurrer [*see, e.g.,* *Newell v. State Farm General Ins. Co. (2004) 118 Cal. App. 4th 1094, 1101-1106, 13*

Cal. Rptr. 3d 343 (in action against homeowners' insurance carriers regarding claims for policy benefits for earthquake damage, plaintiffs could not possibly satisfy requirements for class treatment because ability of each member of putative class to recover clearly depended on individual and separate sets of facts)], all that is normally required for a complaint to survive a demurrer to the propriety of class litigation is that the complaint allege facts that tend to show an ascertainable class of plaintiffs and questions of law and fact that are common to the class [*Prince v. CLS Transp., Inc. (2004) 118 Cal. App. 4th 1320, 1325-1326, 13 Cal. Rptr. 3d 725* ; *Beckstead v. Superior Court (1971) 21 Cal. App. 3d 780, 783-784, 98 Cal. Rptr. 779*]. If there is a reasonable possibility that the named plaintiff can establish the requisite community of interest among the members of the class, the preferred course is to defer a decision on the propriety of the class action until an evidentiary hearing has been held [*Arce v. Kaiser Found. Health Plan, Inc. (2010) 181 Cal. App. 4th 471, 487, 496, 104 Cal. Rptr. 3d 545* (because there was reasonable possibility that plaintiff could demonstrate predominance of common issues, trial court erred in sustaining demurrer); *Brown v. Regents of University of California (1984) 151 Cal. App. 3d 982, 988, 198 Cal. Rptr. 916*]. If there is a real and genuine dispute over whether the complaint alleges facts sufficient to establish the elements necessary for maintenance of a class action, the trial court may not summarily dispose of the demurrer. Instead, before the court makes a ruling, the parties are entitled to an oral hearing [*TJX Cos., Inc. v. Superior Court (2001) 87 Cal. App. 4th 747, 749-754, 104 Cal. Rptr. 2d 810* (party who demurs to complaint is entitled to oral hearing unless issues are so obvious and well-settled that oral argument would amount to empty gesture)].

Other dispositive motions would include, for example, motions for summary judgment and motions to strike. Such proceedings, the California Supreme Court has held, are generally the preferred way to raise merit-based challenges to class actions, as distinguished from raising such challenges in a pretrial certification proceeding [*Linder v. Thrifty Oil Co. (2000) 23 Cal. 4th 429, 440-441, 97 Cal. Rptr. 2d 179, 2 P.3d 27*]. For discussion of exceptional cases in which it may be proper to address merit-based challenges in certification proceedings, see *§ 120.18[4]*. For example, a motion to strike is proper to have class suit allegations stricken from the complaint [*see* *Stilson v. Reader's Digest Assn. (1972) 28 Cal. App. 3d 270, 273-275, 104 Cal. Rptr. 581*]. A motion to strike may be combined with a demurrer [*see* *Weaver v. Pasadena Tournament of Roses (1948) 32 Cal. 2d 833, 835, 198 P.2d 514* ; *see also* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* . Ch. 375, *Motions to Strike: Pleadings*].

Important interests of fairness and efficiency sometimes may be served better if class causes of action are screened for legal sufficiency, via demurrer or pretrial dispositive motion, *before* the matter of certification is decided [*Linder v. Thrifty Oil Co. (2000) 23 Cal. 4th 429, 440, 97 Cal. Rptr. 2d 179, 2 P.3d 27*]. This does mean, however, that a trial court is required to hear merit-based challenges prior to certification; it retains the discretion to determine whether it is more appropriate in a given case to allow pretrial challenges on the merits before, or after, class certification proceedings [*Linder v. Thrifty Oil Co. (2000) 23 Cal. 4th 429, 443, 97 Cal. Rptr. 2d 179, 2 P.3d 27*].

[2] Appellate Review

An order sustaining a demurrer to the class action allegations of a complaint, without leave to amend, may be appealed. Such an order is tantamount to a dismissal of the action as to the unnamed class members. As such, it is in legal effect a final judgment [*Prince v. CLS Transp., Inc. (2004) 118 Cal. App. 4th 1320, 1322 n.2, 13 Cal. Rptr. 3d 725* ; *Brown v. Regents of University of California (1984) 151 Cal. App. 3d 982, 986 n.1, 198 Cal. Rptr. 916* ; *see* *Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 866-867, 251 Cal. Rptr. 530* (order sustaining demurrer to complaint to extent that it alleged statewide rather than nationwide class held to be appealable)]. For further coverage of the application of the final-judgment rule to rulings in class actions, see *§ 120.18[5][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProceduresClass ActionsAppellate

ReviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsPrerequisitesCommonality

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§ 120.21 Settlement of Class Actions

[1] Settlement in California Court

A settlement or compromise of an entire class action, or of a cause of action in a class action, or as to a party, requires the approval of the superior court after a hearing [*Cal. Rules of Ct., Rule 3.769(a)*; *see Marcarelli v. Cabell (1976) 58 Cal. App. 3d 51, 53, 129 Cal. Rptr. 509* (named plaintiff in class action is not permitted to settle action without court approval)]. If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court [*see Martorana v. Marlin & Saltzman (2009) 175 Cal. App. 4th 685, 694-698, 96 Cal. Rptr. 3d 172* (once court's order approving settlement notice procedure becomes final, class member may not maintain malpractice action against class counsel for failure to negotiate different settlement notice procedure or failure to give class member more notice than that required by judicially approved notice procedure)]. The notice must contain an explanation of the proposed settlement and procedures for class members to follow in filing written objections to it and in arranging to appear at the settlement hearing to state any objections to the proposed settlement [*Cal. Rules of Ct., Rule 3.769(f)*]. The notice must include an unambiguous class definition, so that persons receiving the notice will be able to determine whether they are members of the class [*Cho v. Seagate Tech. Holdings, Inc. (2009) 177 Cal. App. 4th 734, 745-748, 99 Cal. Rptr. 3d 436* (vacating order approving settlement so that trial court could provide unambiguous definition of class and renotice settlement)].

The trial court has broad discretion to determine whether a proposed settlement is fair and just [*see Cal. Rules of Ct., Rule 3.769(g)* (before final approval, court must conduct inquiry into fairness of proposed settlement)]. In making this determination, the court should consider the following factors [7- *Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal. App. 4th 1135, 1146, 102 Cal. Rptr. 2d 777*]:

- The strength of the plaintiffs' case;
- The risk, expense, complexity, and likely duration of further litigation;
- The risk of maintaining class-action status through the trial;

- The amount offered in settlement;
- The extent of discovery completed and the stage of the proceedings;
- The experience and views of counsel; and
- The reaction of the class members to the proposed settlement.

This list of factors is not exhaustive and should be tailored to each case. A presumption of fairness applies if the settlement has been reached under the following conditions [7- *Eleven Owners for Fair Franchising v. Southland Corp. (2000) 85 Cal. App. 4th 1135, 1146, 102 Cal. Rptr. 2d 777*]:

- There has been arm's-length bargaining;
- Investigation and discovery have been sufficient to allow counsel and the court to act intelligently;
- Counsel is experienced in similar litigation; and
- The percentage of class members who object to the settlement is small.

A class-action settlement should be scrutinized more carefully if the settlement has been proposed prior to an adversarial class-certification determination. This heightened scrutiny is required to adequately protect unnamed class members against fraud and collusion [*Wershba v. Apple Computer, Inc. (2001) 91 Cal. App. 4th 224, 240, 110 Cal. Rptr. 2d 145*].

As a general rule, settlements including broad general releases should be avoided [*see Trotsky v. Los Angeles Fed. Sav. & Loan Ass'n (1975) 48 Cal. App. 3d 134, 149, 121 Cal. Rptr. 637*].

A "coupon" settlement (in which class members would receive a coupon, voucher, or discount that would partly defray the cost of making a new purchase of goods or services from the defendant) is not inherently suspect or improper. Thus, if the factors supporting a presumption of fairness are present, the fact that the settlement might be classified as a coupon settlement does not, by itself, overcome the presumption [*see Chavez v. Netflix, Inc. (2008) 162 Cal. App. 4th 43, 53-55, 75 Cal. Rptr. 3d 413* (settlement in this case did not meet classic definition of coupon settlement, since class members were offered discount that did not require them to make new purchases)]. For discussion of the treatment of coupon settlements under the federal Class Action Fairness Act of 2005, see [2], *below*.

A person who opted out of the class action before the specified deadline is not barred by a settlement in that action from pursuing his or her own remedies against the class action defendant [*Lemer v. Boise Cascade, Inc. (1980) 107 Cal. App. 3d 1, 7-9, 165 Cal. Rptr. 555*].

For thorough coverage of class action settlements, see Cabraser, California Class Actions and Coordinated Proceedings (Second Edition), Ch. 14, *Class Action Settlements* (Matthew Bender).

[2] Consumer Protection in Federal Court

[a] Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions

The Class Action Fairness Act of 2005 (CAFA) includes the Consumer Class Action *Bill of Rights* and Improved Procedures for Interstate Class Actions [*see 28 U.S.C. §§ 1711-1715*]. This portion of CAFA, which applies to class actions filed in or removed to federal district court [*see 28 U.S.C. § 1711(2)*; *see also § 120.13* (federal jurisdiction over

interstate class actions to federal court)], contains special requirements for attorney's fees and court approval of "coupon settlements," in which the class recovery consists of an award of coupons to class members [*28 U.S.C. § 1712*; *see* [b], [c], *below*], as well as other provisions designed to protect individual class members when a class action is settled [*28 U.S.C. §§ 1713-1715*; *see* [d], [e], *below*].

The Consumer Class Action *Bill of Rights* and Improved Procedures for Interstate Class Actions applies to any "proposed settlement," which is defined as an agreement regarding a class action that is subject to federal-court approval and that, if approved, would be binding on some or all class members [*28 U.S.C. § 1711(6)*]. Therefore, since court approval of a settlement is required only after class certification [*Fed. R. Civ. P. 23(e)*], these requirements are inapplicable to pre-certification settlements.

[b] Judicial Approval of Coupon Settlements

In a proposed settlement of a federal class action under which class members would be awarded coupons, the federal court may approve the settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members [*28 U.S.C. § 1712(e)*]. The court has discretion, on the motion of a party, to receive expert testimony on the actual value to the class members of the coupons that are redeemed [*28 U.S.C. § 1712(d)*]. The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to charitable or governmental organizations, as agreed to by the parties. The distribution and redemption of any proceeds to such organizations may not be used to calculate attorney's fees under the settlement [*28 U.S.C. § 1712(e)*].

PRACTICE TIP:

28 U.S.C. § 1712 does not define the term "coupon," but presumably it uses the term in its ordinary sense of offering a discount on a future purchase of an item or services from the entity offering the coupon [*see Chavez v. Netflix, Inc. (2008) 162 Cal. App. 4th 43, 53, 75 Cal. Rptr. 3d 413* ("In a pure coupon settlement, the class members would receive a coupon, voucher, or discount that would *partly* defray the cost of making a *new* purchase of goods or services from the defendant.")]. There are also settlements that provide class members with certificates, sometimes for substantial amounts, that are redeemable for cash at face value. Indeed, there can be consumer class actions arising from the failure to honor coupons, in which complete relief is provided by requiring the defendant to honor the previously rejected coupons. Whether the latter two situations fit within this provision is a matter for future litigation.

28 U.S.C. § 1712(e) does not make clear whether it refers only to the grant of final approval, or whether it also refers to the grant of preliminary approval. It requires a hearing whether or not there are any objections to the proposed settlement, but its standard for approval does not represent any change in existing law. Section 1712(e) will discourage *cy pres* awards of unclaimed coupons by providing that *cy pres* awards will not be considered in calculating attorney's fees. However, this provision will encourage *cy pres* awards of unclaimed funds in all other settlements and judgments, because by implication the *cy pres* awards in non-coupon cases will bear their proportionate shares of the fees and expenses that made the awards possible. *Commentary from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).*

For discussion of cy pres awards in general, see *§ 120.22*. For further discussion of coupon settlements under CAFA, see Cabraser, California Class Actions Practice and Procedure, Ch. 14, *Class Action Settlements* (Matthew Bender).

[c] Attorney's Fees in Coupon Settlements

If a tentative settlement in a federal class action provides for an award of coupons to class members, the portion of any

attorney's fee award to class counsel that is attributable to the award of coupons must be based on the value to class members of the coupons that are actually redeemed [*28 U.S.C. § 1712(a), (c)*].

If a proposed settlement provides for an award of coupons to class members, and a portion of the award of coupons is not used to determine the attorney's fee to be paid to class counsel, any fee award must be based on the amount of time class counsel reasonably expended working on the action. Any fee under this provision is subject to court approval and must include an appropriate attorney's fee, if any, for obtaining equitable relief, including an injunction, if applicable. This provision does not prohibit the application of a lodestar with a multiplier method of determining attorney's fees [*28 U.S.C. § 1712(b), (c)*].

PRACTICE TIP:

28 U.S.C. § 1712(a) bases the fee award in a coupon settlement "on the value to class members of the coupons that are redeemed." One means of complying with this provision is to use some system to track the redemption of coupons by class members, to postpone the fee award until the end of the period in which class members can exercise coupons or to make the award in stages based on partial redemptions, and to award fees based on actual redemptions to date. Because *28 U.S.C. § 1712(d)* expressly allows expert testimony "on the actual value to class members of the coupons that are redeemed," the statute also contemplates fee awards at the time of settlement, based on estimated redemption rates.

28 U.S.C. § 1712(b) and *(c)* explicitly recognize that different forms of relief may justify different approaches in the award of fees. A court is required to award fees for prospective relief that does not create a common fund, and the court may award a multiplier of the lodestar if such prospective relief is obtained. These provisions encourage plaintiffs' attorneys to seek such relief. *Commentary from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).*

For further discussion of coupon settlements and attorney's fees under CAFA, see Cabraser, California Class Actions Practice and Procedure, Ch. 14, *Class Action Settlements* (Matthew Bender).

[d] Judicial Approval of Other Settlements

The Consumer Class Action *Bill of Rights* and Improved Procedures for Interstate Class Actions contains two additional provisions that limit the federal court's power to approve settlements. If a proposed settlement would obligate any class member to pay sums to class counsel that would result in a net loss to the class member, the court may approve the settlement only if the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss [*28 U.S.C. § 1713*].

PRACTICE TIP:

By implication, *28 U.S.C. § 1713* may lend support to injunctive class actions for abatement of nuisances, particularly those injurious to health or that diminish the value of property, in which the court assesses class members for an appropriate amount to pay their shares of reasonable fees and costs in abating the nuisance. *Commentary from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).*

For further discussion, see Cabraser, California Class Actions Practice and Procedure, Ch. 14, *Class Action Settlements* (Matthew Bender).

Also, the federal court lacks authority to approve any proposed settlement that provides for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court [*28 U.S.C. § 1714*].

PRACTICE TIP:

Class-action practitioners are hard-pressed to think of cases in which awards were based on geographic proximity to the court. The legislative history does not identify a single case. *Commentary from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).*

For further discussion, see Cabraser, California Class Actions Practice and Procedure, Ch. 14, *Class Action Settlements* (Matthew Bender).

[e] Notice to Government Officials of Proposed Settlement

[i] General Notice Requirement

The Consumer Class Action *Bill of Rights* and Improved Procedures for Interstate Class Actions imposes special notice requirements for the settlement of federal class actions. Not later than 10 days after a proposed settlement of a class action is filed in federal court, each defendant that is participating in the proposed settlement must serve on the appropriate state official of each state in which a class member resides, and on the appropriate federal official, a notice of the proposed settlement [*28 U.S.C. § 1715(b)*]. For this purpose, the "appropriate state official" is the person in the state who has primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the state, if some or all of the matters alleged in the class action are subject to regulation by that person. If there is no primary regulator, supervisor, or licensing authority, or the matters alleged in the class action are not subject to regulation or supervision by that person, then the "appropriate state official" is the state's attorney general [*28 U.S.C. § 1715(a)(2)*]. The "appropriate federal official" in a case in which the defendant is a federal or state depository institution, a depository institution holding company, a foreign bank, or a nondepository institution subsidiary of the foregoing [*see 12 U.S.C. § 1813*], is the person who has the primary federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person [*28 U.S.C. § 1715(a)(1)(B)*]. In all other cases, the "appropriate federal official" is the Attorney General of the United States [*28 U.S.C. § 1715(a)(1)(A)*].

An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate federal official and the appropriate state official are served with the required notice [*28 U.S.C. § 1715(d)*].

A class member generally may refuse to comply with, and may choose not to be bound by, a settlement agreement or consent decree, if the class member demonstrates that the required notice to the appropriate federal and state officials was not given [*28 U.S.C. § 1715(e)*].

PRACTICE TIP:

Defendants bear the workload burden of *28 U.S.C. § 1715*, which requires them to identify the appropriate officials, gather the necessary papers and other information, determine the residence of class members, perform state-by-state calculations of the relief for class members, and make duplicate reports to the officials. Defendants also suffer the penalty for any mistakes in providing such notice: "opt outs" by any or all class members long after the time for normal "opt outs" has expired. The new provision governing coupon settlements does not impose any outer time limit on such "opt outs," and it does not expressly require a class member "opting out" to return the member's share of the settlement proceeds [*see 28 U.S.C. § 1712(e)*; *see also* [b], *above*].

Section 1715 does not state what the notified officials are to do with this information. It creates no express statutory right of objection or intervention, but officials may feel that they are entitled to do something with the information and the 90-day stay, and they may seek to object or intervene in any case in which they see something they do not like, or in which it seems politically advantageous to do so. The real parties in interest may suffer from Section 1715's turning every settlement into a potential political

football. *Commentary from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).*

For further discussion, see Cabraser, California Class Actions Practice and Procedure, Ch. 14, *Class Action Settlements* (Matthew Bender).

PRACTICE TIP:

Because final approval of a settlement is delayed until 90 days after the required notices have been given [*see 28 U.S.C. § 1715(d)*], plaintiffs' attorneys should negotiate for the proceeds to be placed in a trust account if that would not trigger adverse tax consequences for the fund, or to be held by the defendants if they are fiscally stable, with interest on the settlement fund to be paid to the class. *Commentary from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).*

For further discussion, see Cabraser, California Class Actions Practice and Procedure, Ch. 14, *Class Action Settlements* (Matthew Bender).

[ii] Notice Requirement If Defendant Is Depository Institution or Related Entity

If the defendant is a federal depository institution, a depository institution holding company, a foreign bank, or a non-depository institution subsidiary of the foregoing, the notice requirement is satisfied by serving the notice on the person who has the primary federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person. In such a case, notice need not be served on a state official [*28 U.S.C. § 1715(c)(1)*].

If the defendant is a state depository institution [*see 12 U.S.C. § 1813(c)(5)* ("state depository institution" defined)], the notice requirement is satisfied by serving the notice on the state bank supervisor [*see 12 U.S.C. § 1813(r)* ("state bank supervisor" defined)] of the state in which the defendant is incorporated or chartered, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person, and on the appropriate Federal official [*28 U.S.C. § 1715(c)(2)*].

[iii] Contents of Notice to Appropriate Officials

The notice sent to the appropriate state and federal officials must include all of the following [*28 U.S.C. § 1715(b)*]:

- A copy of the complaint, any materials filed with the complaint, and any amended complaints (except these materials need not be served if they materials are made electronically available through the Internet and the notice explains how to get electronic access to the materials);

- Notice of any scheduled judicial hearing in the class action;

- Any proposed or final notification to class members of the proposed settlement and of class members' rights to request exclusion from the class action, or a statement that no such right exists;

- Any proposed or final class action settlement;

- Any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;

- Any final judgment or notice of dismissal;

- Any written judicial opinion relating to the settlement or hearing on the settlement; and

- In a notice sent to a state official, the names of class members (or, if providing names is not feasible, a reasonable estimate of the number of class members) who reside in that state, and the estimated proportionate share of the claims of those members to the entire settlement.

PRACTICE TIP:

The requirement that the notice include contemporaneous side agreements between class counsel and defense counsel [*see 28 U.S.C. § 1715(b)(5)*] might result in public disclosure of such agreements. There is no confidentiality provision in the statute, and it is not at all clear that the court has the power to impose confidentiality constraints on nonparties.

Ascertaining the class members who live in a state [*see 28 U.S.C. § 1715(b)(7)*] may be difficult to perform in advance of the filing of proof-of-claim forms. Mailed notices to class members are frequently returned undelivered, and their current addresses then must be researched and identified. *Commentary from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).*

For further discussion, see Cabraser, California Class Actions Practice and Procedure, Ch. 14, *Class Action Settlements* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass CounselFeesCivil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsJudicial DiscretionCivil ProcedureClass ActionsOpt-Out Provisions

* Portions of this chapter have been adapted from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).

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§ 120.22 Assessment and Payment of Damages

[1] Fluid Recovery Method

In many class actions, particularly those involving consumer lawsuits, individual damages are too small to make traditional methods of proof worthwhile or feasible. Because it would be inequitable in such cases to permit defendants to retain their gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts, courts frequently use the *cy pres* or "fluid recovery" method to assess and distribute damages. The implementation of fluid recovery involves three steps [*State v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 472-473, 479, 490, 224 Cal. Rptr. 605, 715 P.2d 564*]:

(1) Payment of the defendant's total damage liability into a class fund;

(2) An opportunity for individual class members to collect their individual shares by proving their particular damages, usually under a lowered standard of proof; and

(3) Distribution of the residue [*see* [2], *below*].

Another acceptable manner of calculating damages that may be used in the trial court's sound discretion is to apply reliable statistical sampling methods to arrive at an average damage figure that can then be applied to each class member [*Bell v. Farmers Ins. Exch. (2004) 115 Cal. App. 4th 715, 746-751, 9 Cal. Rptr. 3d 544* (reliable statistical inference may be basis for determining class damages for unpaid overtime compensation)].

Alternative methods of distributing damages in consumer class actions established by case law include (1) rollbacks of the defendant's prices, (2) escheat to a governmental body for either specified or general purposes, (3) establishment of a consumer trust fund, and (4) claimant fund sharing. In determining which method to employ, a court should consider all of the following [*State v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 473, 224 Cal. Rptr. 605, 715 P.2d 564*]:

- The amount of compensation provided to class members, including nonclaiming members;

- The proportion of class members sharing in the recovery;

- The extent to which benefits will "spill over" to nonclass members and the degree to which the spillover benefits will effectuate the purposes of the underlying substantive law; and

- The costs of administration.

Under appropriate circumstances, fluid recovery may result in the entire recovery being distributed to charitable, governmental, and nonprofit organizations, with no direct payments to any class member. Distribution of the recovery in this manner may be appropriate, for example, if the distribution and administration costs for class members' claims will exceed the recovery [*In re Vitamin Cases (2003) 107 Cal. App. 4th 820, 826-832, 132 Cal. Rptr. 2d 425*].

[2] Procedures for Distribution of Residue

Generally, before the entry of any judgment in a class action established pursuant to *Code Civ. Proc. § 382*, the court must determine the total amount that will be payable to all class members, if all class members are paid the amount to which they are entitled pursuant to the judgment. The court must then set a date on which the parties must report to the court the total amount that was actually paid to the class members [*Code Civ. Proc. § 384(b)*].

After the report is received, the court must amend the judgment to direct the defendant to pay the sum of the unpaid residue, plus interest on that sum at the legal rate of interest from the date of entry of the initial judgment, to one or more of the following [*Code Civ. Proc. § 384(b)*]:

- Nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action;

- Child advocacy programs; and

- Nonprofit organizations providing civil legal services to the indigent.

The court must ensure that the distribution of any unpaid residue derived from multistate or national cases brought under California law provides substantial or commensurate benefit to California consumers [*Code Civ. Proc. § 384(b)*].

The foregoing statutory procedures for the distribution of the residue do not apply to any class action brought against any "public entity" or "public employee," as these terms are defined by statute [*see Gov. Code §§ 811.2, 811.4*]. Also, the statutory procedures for distribution of the residue do not abrogate any equitable *cy pres* remedy that may be available in any class action with regard to all or part of the residue [*Code Civ. Proc. § 384(c)*].

In enacting the statutory procedures for distribution of the residue, the Legislature intended to ensure that the unpaid residuals in class action litigation are distributed, to the extent possible, in a manner designed either to further the purposes of the underlying causes of action, or to promote justice for all Californians. The use of funds collected by the State Bar pursuant to this statutory procedure for these purposes has been declared by the Legislature to be in the public interest, a proper use of funds, and consistent with essential public and governmental purposes [*Code Civ. Proc. § 384(a)*].

These statutory distribution-of-residue procedures address only a situation in which a "residue" of a class settlement fund remains after the distribution to class members is completed [*see Code Civ. Proc. § 384(b)*; *see Cundiff v. Verizon Cal., Inc. (2008) 167 Cal. App. 4th 718, 726-729, 84 Cal. Rptr. 3d 377* ("residue" subject to distribution under *Code Civ. Proc. § 384(b)* includes undeliverable or uncashed checks issued pursuant to "claims-made" settlement); *see also*

[1], *above*]. Therefore, the procedures need not be followed in a case in which the court approves a settlement that provides for the distribution of the entire settlement fund to charitable, governmental, and nonprofit organizations. Such a settlement might be approved, for example, in a case in which the distribution and administration costs for class members' claims would exceed the recovery. In a case in which there is no direct distribution to class members, there would be no residue whose distribution was not disclosed in advance to the class, and the statutory residue-distribution procedures would have no application [*In re Vitamin Cases (2003) 107 Cal. App. 4th 820, 826-832, 132 Cal. Rptr. 2d 425* (declining to interpret *Code Civ. Proc. § 384* as requiring individual payments to class members in every case)].

Similarly, the foregoing statutory procedures are inapplicable to a judgment approving a settlement agreement that includes its own provisions for distribution of any unpaid residue. However, in such a case the trial court must scrutinize the agreement and approve it only after determining that it is fair, adequate, and reasonable. In making this determination, the court must further consider whether the proposed distribution of unpaid residue is useful in fulfilling the purposes of the underlying cause of action [*In re Microsoft I--V Cases (2006) 135 Cal. App. 4th 706, 716-722* (*Code Civ. Proc. § 384(b)* is limited to judgment that awards some form of direct compensation to plaintiff class members yet requires subsequent amendment because it does not itself provide for calculation and distribution of any unpaid residue of that direct compensation)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsCompromisesCivil ProcedureRemediesDamagesCompensatory Damages

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§ 120.23 Judgment

[1] Content and Notice of Judgment

The judgment in an action maintained as a class action must include and describe those whom the court finds to be members of the class [*Cal. Rules of Ct., Rule 3.771(a)*]. If the judgment is the result of a court-approved settlement agreement, the judgment must also include a provision for the retention of the court's jurisdiction over the parties to enforce the terms of the judgment [*Cal. Rules of Ct., Rule 3.769(h)*]. The court may not enter an order dismissing the action at the same time as, or after, entry of judgment [*Cal. Rules of Ct., Rule 3.769(h)*].

Notice of any judgment in a class action must be given to the class in the manner specified by the court [*Cal. Rules of Ct., Rule 3.771(b)*].

[2] Effect on Class Members' Individual Claims

The judgment in a class action binds all class members who were properly notified of the action [*see* [1], *above*] and did not opt out of the action before the specified deadline [*see Long Beach Police Officers Assn. v. City of Long Beach (1985) 171 Cal. App. 3d 317, 319, 217 Cal. Rptr. 207*]. The judgment is also res judicata as to claims of persons in privity with members of the class [*Frazier v. City of Richmond (1986) 184 Cal. App. 3d 1491, 1497-1499, 1503, 228 Cal. Rptr. 376*]. The doctrine of res judicata does not preclude subsequent actions by persons whose rights to recover are based on different facts from those on which the class action was based [*Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 704-705, 63 Cal. Rptr. 724, 433 P.2d 732*].

A judgment denying class certification in one action will preclude relitigation of the class-certification issue in a subsequent action brought by a different plaintiff, if (1) the issue is identical to the one decided in the earlier case, (2) the issue was actually litigated in the earlier case, (3) the issue was necessarily decided in the earlier case, (4) the earlier decision is final and was rendered on the merits, and (5) the plaintiff in the current was in privity with or virtually represented by the plaintiff in the earlier case [*Alvarez v. May Dept. Stores Co. (2006) 143 Cal. App. 4th 1223, 1233, 49 Cal. Rptr. 3d 892]* .

Thus, if the elements of issue preclusion are satisfied, the fact that the prior judgment did not result in certification of a

class does not prevent that judgment from binding absent putative class members on the issue actually litigated and decided in that prior action--whether class treatment is appropriate [*Alvarez v. May Dept. Stores Co. (2006) 143 Cal. App. 4th 1223, 1233-1239, 49 Cal. Rptr. 3d 892* (plaintiffs in prior action were "virtual representatives" of plaintiffs in present case: interested parties, their claims, and their counsel were same in both cases, and plaintiffs in prior action had same interest and motive as plaintiffs in present case to present same claims)].

A judgment denying class certification in one action will not preclude litigation of the class-certification issue in a subsequent action in which the class-certification issues are not identical to those presented in the earlier action [*Johnson v. GlaxoSmithKline, Inc. (2008) 166 Cal. App. 4th 1497, 1512-1517, 83 Cal. Rptr. 3d 607]* . For example, a denial of class certification will not preclude litigation of the class-certification issue in a subsequent action involving a narrower class, if the narrowed class definition attempts to correct flaws identified in the earlier action, with the result that the issues presented on class certification are different [*Bufil v. Dollar Fin. Group, Inc. (2008) 162 Cal. App. 4th 1193, 1202-1204, 76 Cal. Rptr. 3d 804*].

[3] Appeals by Unnamed Class Members

Any class member who is bound by the judgment [*see* [2], *above*] has standing to appeal it on behalf of the class. An unnamed class member need not obtain permission to intervene or be designated a named plaintiff prior to pursuing an appeal [*Simons v. Horowitz (1984) 151 Cal. App. 3d 834, 842-843, 199 Cal. Rptr. 134* ; *see* *Wershba v. Apple Computer, Inc. (2001) 91 Cal. App. 4th 224, 235, 110 Cal. Rptr. 2d 145* (unnamed class members who appear at final fairness hearing and object to proposed settlement have standing to appeal)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass MembersNonnamed MembersCivil ProcedureClass ActionsCompromisesCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

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§ 120.24 Attorney's Fees

[1] In General

If the parties have entered into any express or implied agreement concerning the payment of attorney's fees or the submission of an application for the approval of attorney's fees, that agreement must be set forth in full in any application for approval of the dismissal or settlement of an action that has been certified as a class action [*Cal. Rules of Ct., Rule 3.769(b)*; *see* *Mark v. Spencer (2008) 166 Cal. App. 4th 219, 228-229, 82 Cal. Rptr. 3d 569* (failure to disclose attorneys' fee-splitting agreement in conjunction with class-action settlement bars later action to enforce that agreement)]. In the absence of an agreement concerning attorney's fees, there is no basis for an award of fees in a class action if no determination of composition of class has been made and the action has not been pursued to judgment or settled as far as the class is concerned [*Anthony v. Superior Court (1976) 59 Cal. App. 3d 760, 771, 130 Cal. Rptr. 758*].

Common theories on which attorney's fees may be awarded in class actions are discussed in [2]-[4], *below*. For discussion of limitations on attorney's fee awards in coupon settlements of class actions in federal court, see *§ 120.21[2][c]*. For discussion of attorney's fees in actions based on contract, see Ch. 140, *Contracts* . Recovery of attorney's fees is discussed generally in Ch. 174, *Costs and Attorney's Fees* .

For thorough coverage of attorney's fees in class actions, see Cabraser, California Class Actions Practice and Procedure, Ch. 15, *Attorney's Fees* (Matthew Bender).

[2] "Common Fund" Theory

If a number of persons are entitled in common to a specific fund and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, the plaintiff or plaintiffs may be awarded attorney's fees out of the fund under the "common fund" principle [*Serrano v. Priest (1977) 20 Cal. 3d 25, 34-38, 141 Cal. Rptr. 315, 569 P.2d 1303* (holding theory inapplicable in case before it)].

[3] "Private Attorney General" Theory

An award of attorney's fees to class action plaintiffs is proper under a "private attorney general" theory. On motion, a court may award attorney's fees to a successful party against one or more opposing parties in any action that has resulted in the enforcement of an important right affecting the public interest, if all of the following requirements are satisfied [*Code Civ. Proc. § 1021.5*; *see Serrano v. Priest (1977) 20 Cal. 3d 25, 46-47, 141 Cal. Rptr. 315, 569 P.2d 1303* (applying common-law private attorney general theory before enactment of *Code Civ. Proc. § 1021.5*)]:

- A significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons;

- The necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate; and

- The fees should not in the interest of justice be paid out of the recovery, if any.

A class representative may recover fees under the "private attorney general statute" [*Code Civ. Proc. § 1021.5*] even if the representative was primarily motivated by his or her own financial interests. Such personal motivation does not preclude a fee award as long as the class action affected the public interest and resulted in a significant benefit to a large class of persons [*Estrada v. FedEx Ground Package System, Inc. (2007) 154 Cal. App. 4th 1, 16-17, 64 Cal. Rptr. 3d 327* (class action vindicated 209 employees' right to reimbursement for business expenses under *Lab. Code § 2802*)].

Prelitigation efforts to resolve a dispute may inform the court's inquiry into whether the necessity of litigation makes a fee award appropriate [*see Code Civ. Proc. § 1021.5*]. However, a prelitigation settlement demand is not a prerequisite to an award under the "private attorney general statute" unless the award is made pursuant to the catalyst theory [*Vasquez v. State (2008) 45 Cal. 4th 243, 85 Cal. Rptr. 3d 466, 195 P.3d 1049*].

Under the "catalyst" theory, attorney's fees may be awarded to a plaintiff class under the "private attorney general" statute [*Code Civ. Proc. § 1021.5*] even if the class action does not result in a judicial resolution or a judicially recognized change in the parties' legal relationship, such as when the action is dismissed after the defendant voluntarily ceases the complained-of conduct [*see Vasquez v. State (2008) 45 Cal. 4th 243, 85 Cal. Rptr. 3d 466, 195 P.3d 1049*] (action is not catalyst case if parties stipulate to injunction that is entered as judgment, thereby bringing about judicially recognized change in parties' legal relationship)].. In such a case, attorney's fees may be awarded if (1) the class action was a catalyst motivating the defendant to provide the primary relief sought; (2) the class action had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense; and (3) the plaintiffs reasonably attempted to settle the litigation before filing the class action [*Tipton-Whittingham v. City of Los Angeles (2004) 34 Cal. 4th 604, 608, 21 Cal. Rptr. 3d 371, 101 P. 3d 174* ; *Graham v. DaimlerChrysler Corp. (2004) 34 Cal. 4th 553, 561, 21 Cal. Rptr. 3d 331* ; *but see Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Human Res. (2001) 532 U.S. 598, 603-604, 121 S. Ct. 1835, 149 L. Ed. 2d 855* (to qualify as prevailing party under federal fee-shifting statutes, plaintiff must obtain judgment on merits, court-ordered consent decree, or other judicial recognition of change in legal relationship between parties; that action was catalyst in causing voluntary change in defendant's conduct is not sufficient)]. If the defendant is a government agency, however, this "catalyst" theory will not be applied to allow the recovery of attorney's fees by a plaintiff whose lawsuit merely caused the acceleration of the issuance of government regulations or remedial measures, if the process of issuing those regulations or undertaking those measures was ongoing at the time the lawsuit was filed [*Tipton-Whittingham v. City of Los Angeles (2004) 34 Cal. 4th 604, 609, 21 Cal. Rptr. 3d 371, 101 P.3d 174* (if government agency is given discretion as to timing of performing some action, mere fact that lawsuit may accelerate that performance does not establish eligibility for attorney fees); *Westside Cmty. for Indep. Living, Inc. v. Obledo (1983) 33 Cal. 3d 348, 354, 188 Cal. Rptr. 873, 657 P.2d 365*].

With respect to class actions involving public entities, the "private attorney general" statute [*Code Civ. Proc. § 1021.5*] generally applies to allowances against, but not in favor of, public entities [*Code Civ. Proc. § 1021.5*].

An unnamed member of a putative class who successfully objects to class certification and approval of a proposed classwide settlement agreement is not entitled to an award of attorney fees under the "private attorney general" statute. The statute makes fees available only if the *action* results in the enforcement of an *important public right* [*Code Civ. Proc. § 1021.5*], and the purpose of the statute is to create an incentive for private citizens to bring *lawsuits* enforcing important public rights. An objector's success in defeating class certification and a proposed classwide settlement does not meet this requirement; it is the objective of the *lawsuit* that is critical to recovering fees, not the success of an ancillary part of the action [*Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc. (2005) 127 Cal. App. 4th 387, 401-403, 25 Cal. Rptr. 3d 514*]. Further, if the proposed settlement would afford class members the right to "opt out" of the settlement, the objector's success in defeating the proposed settlement does not qualify as the enforcement or protection of an important public right, since class members could have achieved the same result simply by choosing not to be bound by the settlement [*Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc. (2005) 127 Cal. App. 4th 387, 403-404, 25 Cal. Rptr. 3d 514*].

[4] "Substantial Benefit" Theory

The "substantial benefit" theory is an extension of the "common fund" theory [*see* [2], *above*]. It applies when no common fund has been created, but a concrete and significant benefit has nonetheless been conferred on an ascertainable class [*Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc. (2005) 127 Cal. App. 4th 387, 397-398, 25 Cal. Rptr. 3d 514*].

Under the "substantial benefit theory," if a litigant proceeding in a representative capacity obtains a decision that has the result of conferring a substantial benefit (usually of a pecuniary nature) on others, the court may decree that those receiving the benefit should be required to yield some of those benefits in the form of an award of attorney's fees [*Serrano v. Priest (1977) 20 Cal. 3d 25, 34, 38-42, 141 Cal. Rptr. 315, 569 P.2d 1303* (declining to apply theory to case before it)]. The theory rests on the principle that those who have been unjustly enriched at another's expense should under some circumstances bear their fair share of the attorney's fees entailed in producing the benefits they have obtained [*Woodland Hills Residents Assn., Inc. v. City Council of Los Angeles (1979) 23 Cal. 3d 917, 943, 154 Cal. Rptr. 503, 593 P.2d 200*]. Accordingly, the substantial benefit theory may be applied if the litigation generates a substantial benefit in favor of an ascertainable class of persons (for example, the citizens of a city), and the defendant (for example, the city) is in a position to spread the cost of obtaining the benefit among the members of the class [*see Woodland Hills Residents Assn., Inc. v. City Council of Los Angeles (1979) 23 Cal. 3d 917, 944* ; *Serrano v. Priest (1977) 20 Cal. 3d 25, 34, 40 n.10, 141 Cal. Rptr. 315, 569 P.2d 1303*]. For thorough coverage of the substantial benefit theory, see Ch. 174, *Costs and Attorney's Fees* .

An unnamed member of a putative class who objects to a proposed classwide settlement agreement and persuades the court not to approve the settlement may be entitled to attorney's fees under the equitable "common fund" theory or "substantial benefit" theory, but only if the objector subsequently demonstrates that he or she has actually benefited the class (i.e., if the ultimate class recovery exceeds what would have been achieved under the proposed settlement). However, if the objector simply defeats class certification, even if he or she thereby confers some concrete benefit on absent members of the putative class, the objector cannot be awarded attorney's fees under these equitable theories, because there is no one before the court from whom such fees can properly be recovered [*Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Markets, Inc. (2005) 127 Cal. App. 4th 387, 396-400, 25 Cal. Rptr. 3d 514*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass CounselFeesCivil ProcedureClass ActionsClass MembersNonnamed MembersCivil ProcedureClass ActionsCompromises

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§§ 120.25[Reserved]

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§ 120.30 Related Matthew Bender Publications

For forms of memoranda related to class and representative actions, see California Points and Authorities, Ch. 41, *Class and Representative Actions* (Matthew Bender)

For thorough coverage of California class actions, see Cabraser, California Class Actions Practice and Procedure (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral Overview

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§ 120.31 Statutes

[1] Federal

Federal diversity jurisdiction over interstate class actions and mass actions. *28 U.S.C. § 1332(d)*

Removal of interstate class actions from state court to federal court. *28 U.S.C. § 1453*

Consumer Class Action *Bill of Rights* and Improved Procedures for Interstate Class Actions. *28 U.S.C. § 1711 et seq.*

[2] State

Class actions under Consumers Legal Remedies Act (*Civ. Code § 1750 et seq.*). *Civ. Code §§ 1752, 1780-1784*

Availability of punitive damages award in class action involving violations of Consumer Credit Reporting Agencies Act (*Civ. Code § 1785.1 et seq.*). *Civ. Code § 1785.31(c)*

Damages in class actions for violations of provisions governing credit transactions regarding married and unmarried women (*Civ. Code §§ 1812.30-1812.35*). *Civ. Code § 1812.31(c)*

Relevant factors for court to consider in determining amount of award in class action involving violations of Vehicle Leasing Act (*Civ. Code § 2985.7 et seq.*). *Civ. Code § 2988.5(b)*

Limited civil cases. *Code Civ. Proc. § 86*

Class actions generally. *Code Civ. Proc. § 382*

Distribution of unpaid residuals in class action litigation. *Code Civ. Proc. § 384*

Coordination of civil actions that share common question of fact or law. *Code Civ. Proc. § 404 et seq.*

Availability of precertification restraining orders and injunctions in class actions. *Code Civ. Proc. § 527(b)*

Appeal from superior court judgment, other than in limited civil case. *Code Civ. Proc. § 904.1*

Attorney's fees in class actions resulting in enforcement of important rights affecting the public interest. *Code Civ. Proc. § 1021.5*

Consolidation of actions or issues involving common questions of fact or law. *Code Civ. Proc. § 1048(a)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureRemovalGeneral OverviewCivil ProcedureClass ActionsClass CounselFeesCivil ProcedurePretrial MattersConsolidation of ActionsCivil ProcedureRemediesDamagesPunitive Damages

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§ 120.32 Rules of Court

[1] Federal

Class actions. *Fed. R. Civ. P. 23*

[2] State

Management of class actions. *Cal. Rules of Ct., Rule 3.760 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral Overview

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§ 120.33 Decisions

[1] Access to Potential Class Members

Precertification communication with potential class members, like pre-filing communication, is constitutionally protected speech, and blanket requirement of judicial approval for such communications would constitute impermissible prior restraint on speech; however, court may issue protective order limiting precertification communications based on specific showing of abuse of class action procedure. *Parris v. Superior Court (2003) 109 Cal. App. 4th 285, 292-300, 135 Cal. Rptr. 2d 90*

Defendant corporation in class action as having right of access to potential, but as yet unapproached, class members, and such communication as not constituting violation of Cal. Rules Prof. Conduct, former Rule 7-103 (*now see Cal. Rules Prof. Conduct, Rule 2-100*), which prohibits communication with party known to be represented by counsel, without counsel's consent. *Atari, Inc. v. Superior Court (1985) 166 Cal. App. 3d 867, 872-873, 212 Cal. Rptr. 773*

[2] Arbitration

Party may not be compelled to submit to class arbitration unless there is contractual basis for concluding that party agreed to do so. *Stolt-Nielsen S.A. v. AnimalFeeds Intl Corp. (2010) 130 S. Ct. 1758, 176 L. Ed. 2d 605*

Under Federal Arbitration Act, whether contractual arbitration provision includes agreement on availability of class arbitration is for arbitrator, not court, to decide, at least if contract provides for arbitration of all disputes arising from or relating to contract. *Green Tree v. Bazzle (2003) 539 U.S. 444, 449-454, 123 S. Ct. 2402, 156 L. Ed. 2d 414* (plurality opinion)

If parties' contract mandates arbitration but does not mention class arbitration, whether arbitration may proceed on classwide basis is for arbitrator to decide. *Cable Connection, Inc. v. DIRECTV, Inc. (2008) 44 Cal. 4th 1334, 1364-1366, 82 Cal. Rptr. 3d 229, 190 P.3d 586*

Class-arbitration waiver in employment arbitration agreement is not enforceable to preclude class arbitration by employees whose unwaivable statutory rights to overtime pay [*see Lab. Code §§ 500 et seq., 1194*] have allegedly been violated, if trial court determines that class arbitration would be significantly more effective way of vindicating employees' rights than individual arbitration. *Gentry v. Superior Court (2007) 42 Cal. 4th 443, 456-463, 64 Cal. Rptr. 3d 773, 165 P.3d 556*

Section 2 of Federal Arbitration Act [*9 U.S.C. § 2*] does not prevent California court from refusing to enforce waiver of class arbitration if circumstances are such that waiver operates as unlawful exculpatory provision [*see Civ. Code § 1688*], since principle that class-action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is principle of California law that does not specifically apply to arbitration agreements, but to contracts generally. *Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 163-167, 30 Cal. Rptr. 3d 76, 87-95, 113 P.3d 1100*

Class claims for damages under Consumers Legal Remedies Act [*see Civ. Code § 1750 et seq.*], Unfair Competition Law [*see Bus. & Prof. Code § 17200* et seq.], and False Advertising Law [*see Bus. & Prof. Code § 17500 et seq.*], including equitable claims for restitution or disgorgement, as well as common-law claims for unjust enrichment, are subject to arbitration under otherwise valid arbitration agreement. *Cruz v. PacifiCare Health Sys., Inc. (2003) 30 Cal. 4th 303, 320, 133 Cal. Rptr. 2d 58, 66 P.3d 1157*

Classwide arbitration is available in class action involving adhesion contract containing arbitration provision. *Keating v. Superior Court (1982) 31 Cal. 3d 584, 594-595, 183 Cal. Rptr. 360, 645 P.2d 1192*

Arbitration agreement in credit card holder agreement prohibiting classwide arbitration is unconscionable, and therefore unenforceable, because it was offered by card issuer to customers on "take-it-or-leave-it" basis and unfairly deprived customers of remedy for small amounts they might be owed, while card issuer suffered no similar detriment to its rights. *Szetela v. Discover Bank (2003) 97 Cal. App. 4th 1094, 1099-1102, 118 Cal. Rptr. 2d 862*

[3] Attorney's Fees

Although prelitigation efforts to resolve dispute may inform court's inquiry into whether necessity of litigation make a fee award appropriate under *Code Civ. Proc. § 1021.5*, prelitigation settlement demand is not prerequisite to fee award unless award is made pursuant to catalyst theory. *Vasquez v. State (2008) 45 Cal. 4th 243, 85 Cal. Rptr. 3d 466, 195 P.3d 1049*

Fees pursuant to *Code Civ. Proc. § 1021.5* may be awarded to plaintiff class despite lack of favorable judgment, if (1) action was catalyst motivating defendant to provide primary relief sought; (2) action had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense; and (3) plaintiffs reasonably attempted to settle litigation before filing action. *Tipton-Whittingham v. City of Los Angeles (2004) 34 Cal. 4th 604, 608, 21 Cal. Rptr. 3d 371, 101 P.3d 174* ; *Graham v. DaimlerChrysler Corp. (2004) 34 Cal. 4th 553, 561, 21 Cal. Rptr. 3d 331, 101 P.3d 140*

Fees pursuant to *Code Civ. Proc. § 1021.5* as properly awarded if plaintiff obtained partial summary judgment in class action against State for failure to provide required transportation plan for Medi-Cal recipients, because issue involved important right affecting substantial number of people. *Bingham v. Obledo (1983) 147 Cal. App. 3d 401, 407, 195 Cal. Rptr. 142*

Attorney whose client is plaintiff in class action suit is entitled to attorney's fees from all members of class benefited if fund is obtained, protected, and brought into court. *Melendres v. City of Los Angeles (1975) 45 Cal. App. 3d 267, 272, 119 Cal. Rptr. 713*

[4] Certification of Class

General rule that class-certification issues should be decided before substantive issues is subject to following qualifications: (1) defendant must object to any adjudication of merits before class certification, or be deemed to have waived right to have class certification decided first; (2) in absence of waiver by defendant, plaintiffs may seek class certification after seeking resolution of merits only if there are changed circumstances or other good cause; and (3) in absence of waiver by defendant, court should not resolve merits before resolving class certification and notice issues, unless there is compelling justification for doing so. *Fireside Bank v. Superior Court (2007) 40 Cal. 4th 1069, 1083, 56 Cal. Rptr. 3d 861, 155 P.3d 268*

Class action is not inappropriate simply because each class member may at some point be required to make individual showing of eligibility for recovery or amount of damages; rather, determining whether common questions predominate requires court to compare costs and benefits of adjudicating plaintiffs' claims in class action with costs and benefits of proceeding by numerous separate actions. *Sav-on Drug Stores, Inc. v. Superior Court (2004) 34 Cal. 4th 319, 339 n.10, 17 Cal. Rptr. 3d 906, 96 P.3d 194*

Class certification was inappropriate in negligence action seeking medical monitoring of persons affected by defendants' discharge of toxic chemicals that allegedly contaminated drinking water, even though questions of duty and breach could be determined on basis of common proof, because individual questions of proximate causation and damage predominated for putative class of estimated 50,000 to 100,000 people. *Lockheed Martin Corp. v. Superior Court (2003) 29 Cal. 4th 1096, 1108-1111, 131 Cal. Rptr. 2d 1, 63 P.3d 913*

Generally, certification should not be conditioned upon a showing that class claims for relief are likely to prevail on the merits; merit-based challenges should be considered in certification proceedings only in an exceptional case, if the defense has no other reasonable pretrial means to challenge the merits of a claim to be asserted by a proposed class, and the trial court has given the parties notice and an opportunity to brief the merits question. *Linder v. Thrifty Oil Co. (2000) 23 Cal. 4th 429, 443, 97 Cal. Rptr. 2d 179, 2 P.3d 27*

Showing required for certification of class is within trial court's discretion provided correct criteria are employed. *Occidental Land, Inc. v. Superior Court of Orange County (1976) 18 Cal. 3d 355, 361, 134 Cal. Rptr. 388, 556 P.2d 750*

Although party seeking class certification need only present substantial evidence that class requirements are met, trial court may consider totality of evidence offered by both sides deciding whether substantial evidence supports class certification. *Quacchia v. DaimlerChrysler Corp. (2004) 122 Cal. App. 4th 1442, 1447-1448, 19 Cal. Rptr. 3d 508*

Trial court did not abuse discretion in denying class certification if damages would have been insignificant, defendant's practices had ceased, persons with claims would have been too numerous and difficult to find, individual remedies for statutory violations were available, and class treatment would have clogged courts; further, plaintiff failed to demonstrate that his claims were typical of class members' claims given that under facts, he was not misled in manner that class was allegedly deceived; thus, individual issues involving existence and nature of any material misrepresentation would have predominated over common issues. *Caro v. Procter & Gamble Co. (1993) 18 Cal. App. 4th 644, 657-669, 22 Cal. Rptr. 2d 419*

Trial court's denial of motion to modify certified class definition was reversible if court bases denial on erroneous legal assumptions or uses improper criteria. *Clothesrigger, Inc. v. GTE Corp. (1987) 191 Cal. App. 3d 605, 612, 236 Cal. Rptr. 605*

Rejection of motion to increase class from statewide to nationwide was improper if trial court apparently based its

denial solely on conclusion that plaintiffs from other 49 states might become involved in lawsuit, thus making lawsuit unmanageable; trial court was required to determine whether California law may constitutionally apply to claims of proposed nonresident class members and, if it may apply, whether it will likely apply under California choice of law rules. *Clothesrigger, Inc. v. GTE Corp. (1987) 191 Cal. App. 3d 605, 613, 619, 236 Cal. Rptr. 605*

[5] Class Representatives

Representative plaintiff who has not suffered pecuniary damages may nevertheless have standing to sue under Consumers Legal Remedies Act, *Civ. Code § 1750 et seq.*, if he or she has incurred some damage, such as transaction costs or opportunity costs, as result of alleged violation of Act; however, existence of violation of Act is not itself "damage" and will not, by itself, confer standing on consumer exposed to violation (such as consumer who enters into contract that includes unconscionable term that is never enforced). *Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 640-643, 88 Cal. Rptr. 3d 859, 200 P.3d 295*

Trial court properly denies class certification if proposed class representative is "professional plaintiff," who is simply lending his or her name to suit controlled entirely by attorney for putative class. *Howard Gunty Profit Sharing Plan v. Superior Court (2001) 88 Cal. App. 4th 572, 577-580, 105 Cal. Rptr. 2d 896*

Association whose members purchased solar equipment for investment purposes was adequate class representative even though some of its members helped sell program as financial planners as well as investing in equipment. *National Solar Equipment Owners' Assn. v. Grumman Corp. (1991) 235 Cal. App. 3d 1273, 1285, 1 Cal. Rptr. 2d 325*

Absent conspiracy between all defendants, class action was able to be maintained only against defendants as to whom class representative has cause of action; typicality requirement was not fulfilled merely because plaintiffs allege they suffered injuries similar to those of other parties caused by other defendants. *Baltimore Football Club, Inc. v. Superior Court (1985) 171 Cal. App. 3d 352, 359, 215 Cal. Rptr. 323*

Fact that members of plaintiff class purchased automobiles at widely variant prices had bearing on plaintiff's burden of proving existence of price-fixing scheme but had no bearing on named plaintiff's ability to represent class. *Rosack v. Volvo of America Corp. (1982) 131 Cal. App. 3d 741, 763, 182 Cal. Rptr. 800*

Requirement that class representatives adequately represent class was met by two retired city employees and widows of two former city employees who petitioned for writ of mandate to compel defendants to include certain fringe benefits in salary base from which retirement pension allowances were computed. *Rose v. City of Hayward (1981) 126 Cal. App. 3d 926, 932-935, 179 Cal. Rptr. 287*

Under *Code Civ. Proc. § 382*, homeowners' association has standing to bring representative action on behalf of individual members against developer for damages caused by defects in individually owned units. *Raven's Cove Townhomes, Inc. v. Knuppe Development Co., Inc. (1981) 114 Cal. App. 3d 783, 793-796, 171 Cal. Rptr. 334*

[6] Costs

Court order in class action imposing costs on pro rata basis on entire class of plaintiffs, named and unnamed, was abuse of discretion. *Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 869, 251 Cal. Rptr. 530*

[7] Damages

Fact that class action involves cost of maintaining real property was no obstacle to determination of damages on class

basis if class seeks compensation for diminution in value of homes resulting from overall reduction and increased cost of maintenance services. *Occidental Land, Inc. v. Superior Court (1976) 18 Cal. 3d 355, 364, 134 Cal. Rptr. 388, 556 P.2d 750*

Variance in purchase prices paid by class members was no obstacle to certification; court was empowered to divide class into subclasses. *MacManus v. A. E. Realty Partners (1987) 195 Cal. App. 3d 1106, 1117, 241 Cal. Rptr. 315*

No ascertainable class exists if no class member can prove damages; fluid class recovery is used to fulfill purposes of underlying cause of action and not as substitute for proof of damage element of cause of action. *Collins v. Safeway Stores, Inc. (1986) 187 Cal. App. 3d 62, 71-72, 74, 231 Cal. Rptr. 638*

Fluid class recovery or cy pres method of distributing damages to class members after individual claims filed is not per se improper in class actions, but specific law underlying substantive claim may preclude use of damage distribution device. *Bruno v. Superior Court (1981) 127 Cal. App. 3d 120, 130, 179 Cal. Rptr. 342*

[8] Discovery

In putative class action alleging violations of wage and hour laws, defendant was not entitled to discovery of names of putative class members who contacted plaintiffs' counsel; class members' privacy rights outweighed defendant's interest in learning their names, because (1) class members contacted plaintiffs' counsel in response to letter from neutral third party that did not ask if recipients had relevant information, but simply advised them they could contact counsel for more information; (2) defendant already knew identity of all class members, who were its current and former employees; and (3) defendant already knew relevant facts in case, which involved compensation paid by defendant and whether defendant allowed its employees proper meal and rest breaks. *Tien v. Superior Court (2006) 139 Cal. App. 4th 528, 539-540, 43 Cal. Rptr. 3d 121*

If conflict of interest prevents lawyer from serving as class representative and counsel for class, court may allow precertification discovery for purpose of seeking new class representative as long as court acts to protect privacy rights of potential class members. *Best Buy Stores, L.P. v. Superior Court (2006) 137 Cal. App. 4th 772, 778-779, 40 Cal. Rptr. 3d 575*

When ruling on motion of potential class representative to compel discovery of names and addresses of potential class members, in addition to applying normal rules governing discovery motions, trial court must also expressly identify any potential abuses of class-action procedure that may be created if discovery is permitted, and court must weigh danger of such abuses against rights of parties under circumstances. *Parris v. Superior Court (2003) 109 Cal. App. 4th 285, 300-301, 135 Cal. Rptr. 2d 90*

Defendant in class action has due process statutory right to reasonable discovery; right is not subject to being totally diminished by granting blanket immunity to unnamed class members to be free of obligation to respond to proper interrogatories; such interrogatories, however, are subject to limitation and protective orders in appropriate cases. *Spoon v. Superior Court (1982) 130 Cal. App. 3d 735, 746, 182 Cal. Rptr. 44*

[9] Dismissal

Dismissal of class action, without prejudice, at class members' request is not required but is equitable in order to protect class from having suit dismissed for failure to bring it to trial within five years of filing date. *Malibu Outrigger Bd. of Governors v. Superior Court (1980) 103 Cal. App. 3d 573, 579, 165 Cal. Rptr. 1*

[10] Notice

Fed. R. Civ. P. 23 requires plaintiff initially to bear cost of notice to all class members who can be identified through reasonable effort. *Eisen v. Carlisle & Jacquelin (1974) 417 U.S. 156, 177, 94 S. Ct. 2140, 40 L. Ed. 2d 732*

Refusal by Postal Service to mail class action refund notices at special class bulk mailing rates is proper. *Deukmejian v. United States Postal Service (9th Cir. 1984) 734 F.2d 460, 462-463*

Although pre-certification notice to prospective class members is not generally authorized or required, if prospective class members' identifying information is disclosed in precertification discovery, it may be appropriate for court to order that notice be provided to prospective class members so that they may take steps to protect their privacy. *Pioneer Elecs. (USA) Inc. v. Superior Court (2007) 40 Cal. 4th 360, 373-375, 53 Cal. Rptr. 3d 513, 150 P.3d 198*

Difficulty of notifying individual class members does not authorize court to require that class members acknowledge personal notification by affirmatively requesting inclusion in class; such "opt-in" procedure is neither required by constitutional due-process principles nor permitted by *Fed. R. Civ. P. 23(c)(2)* or applicable California rule [*now see Cal. Rules of Ct., Rule 3.766(f)*]. *Hypertouch, Inc. v. Superior Court (2005) 128 Cal. App. 4th 1527, 1537-1550, 27 Cal. Rptr. 3d 839*

Motion to certify class, whether by plaintiff or by court on own motion, is required to be noticed motion; parties entitled to discovery for purposes of motion, and to present evidence at hearing, presumably in form of declarations and affidavits rather than live testimony. *Carabini v. Superior Court (1994) 26 Cal. App. 4th 239, 241-244, 31 Cal. Rptr. 2d 520*

Defendant's right to communicate with class members is restricted once content of notice has been approved by court. *Gainey v. Occidental Land Research (1986) 186 Cal. App. 3d 1051, 1058, 231 Cal. Rptr. 249*

Class action judgment determining that holiday pay and uniform allowances were not "salary" is res judicata as to that issue in subsequent class action even if plaintiffs in second action were not given notice prior to determination on merits in first action; notice is not required in first action under *Fed. R. Civ. P. 23(b)(2), (c)(2), (3)* since action was primarily one for declaratory relief. *Frazier v. City of Richmond (1986) 184 Cal. App. 3d 1491, 1499-1502, 228 Cal. Rptr. 376*

[11] Procedure

Trial court should, at pleading stage, consider factors set forth in *Osborne v. Subaru of America, Inc. (1988) 198 Cal. App. 3d 646, 243 Cal. Rptr. 815* , whether certification of nationwide class would require trial court to adjudicate issues by application of numerous different rules of law from various states, and whether California has "special obligation" to undertake litigation. *Canon U.S.A., Inc. v. Superior Court (1998) 68 Cal. App. 4th 1, 8, 79 Cal. Rptr. 2d 897*

Representatives' declarations under former Los Angeles Co. Super. Ct., Man. for Pretrial Proceedings in Class Actions, § 427.4 (*now see* Los Angeles Co. Super. Ct. Rules, Rule 15.18), are useless to the extent representatives were expected to know how their claims differed legally from other class members. *Daniels v. Centennial Group, Inc. (1993) 16 Cal. App. 4th 467, 472 n.6, 21 Cal. Rptr. 2d 1*

Trial court is not required to make findings in denial of class action, even if motion for certification is based on evidence and resulting order is appealable. *Stephens v. Montgomery Ward & Co. (1987) 193 Cal. App. 3d 411, 418, 238 Cal. Rptr. 602*

Court as improperly sustaining demurrer on basis that class action was not proper if defendants did not raise any class action issues in demurrer; determination of whether proper class alleged as required to be made at hearing as provided

by class action manual adopted by *Los Angeles Superior Court. Wechsler v. Laskey-Weil, Inc. (1974) 42 Cal. App. 3d 728, 730-731, 117 Cal. Rptr. 237*

Demurrer is proper if plaintiff failed to allege facts showing he or she was member of class he or she purported to represent. *Phillips v. Crocker-Citizens Nat. Bank (1974) 38 Cal. App. 3d 901, 910, 113 Cal. Rptr. 688*

[12] Res Judicata

Order denying certification of class action as independently appealable and not reviewable on appeal from subsequent judgments on individual causes of action; failure to appeal certification decision at time made as rendering decision final and binding. *Reich v. Club Universe (1981) 125 Cal. App. 3d 965, 970, 178 Cal. Rptr. 473*

[13] Review

Trial court's discretion as to whether class action should be mandatory or permissive as considerable and not subject to reversal absent abuse of discretion. *Bell v. American Title Ins. Co. (1991) 226 Cal. App. 3d 1589, 1603, 277 Cal. Rptr. 583*

Defendant in class action who is voluntarily dismissed ex parte as having standing to appeal judgment on own behalf because ex parte dismissal would effectively frustrate defendant class's right to appeal adverse judgment. *Simons v. Horowitz (1984) 151 Cal. App. 3d 834, 841-842, 199 Cal. Rptr. 134*

Petition for writ of mandate as proper procedure to compel review of interlocutory class certification order; appeal from interlocutory order as violating "final judgment rule" of *Code Civ. Proc. § 904.1* unless order disposes of entire action. *Rosack v. Volvo of America Corp. (1982) 131 Cal. App. 3d 741, 749, 182 Cal. Rptr. 800*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsCertificationCivil ProcedureClass ActionsClass CounselFeesCivil ProcedureClass ActionsClass MembersNamed MembersCivil ProcedureClass ActionsNoticesCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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Karas, *The Role of Fluid Recovery in Consumer Protection Litigation: Kraus v. Trinity Management Services, 90 Calif. L. Rev. 959 (2002)*

Cabraser, *Life After Achem: The Class Struggle Continues, 31 Loy. L.A.L. Rev. 373 (1998)*

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Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationCivil ProcedureClass ActionsClass CounselFeesCivil ProcedureClass ActionsClass MembersNamed MembersCivil ProcedureClass ActionsCompromisesCivil ProcedureClass ActionsOpt-Out Provisions

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§ 120.35 Text References

Witkin, California Procedure, vol. 4, *Pleadings*, § 246 et seq. (4th ed. 1997)

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[Reserved]

§§ 120.36[Reserved]

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§ 120.40 Preliminary Determinations

[1] Suitability of Class Action

1. Determine whether ascertainable class exists [*see Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 810-811, 94 Cal. Rptr. 796, 484 P.2d 964* ; *see also § 120.12[3]*].

a. Identify characteristics on which class membership will be based, such as following:
(1) Purchase of certain consumer articles or services.

(2) Ownership of home or land in affected area.

(3) Membership in protected class.

(4) Entitlement to government benefits.

(5) Status as job applicant, employee, or pensioner.

(6) Status as patient.

(7) Status as inmate.

(8) Ownership of stock.

b. Verify that class members can be clearly identified.

NOTE:
In appropriate cases, the trial court may order the defendant to identify potential class members through its business records or to disclose to the plaintiff those portions of such records necessary to identify potential class members [*see, e.g.,* *Reyes v. Board of Supervisors (1987) 196 Cal. App. 3d 1263, 1274-1275, 1280, 242 Cal. Rptr. 339*].

c. Determine that size of class can be reasonably controlled, considering factors that may be used to limit class to manageable size, such as following:

(1) Geographic boundaries.

NOTE:
The need to apply numerous different rules of law from various states or other political subdivisions may be a factor in determining that a class action is not a suitable vehicle for adjudicating a particular dispute [*Osborne v. Subaru of America, Inc. (1988) 198 Cal. App. 3d 646, 654-656, 243 Cal. Rptr. 815*].

(2) Dates.

(3) Specific article purchased, contract signed, treatment received, etc.

d. Determine that class members can be located and notified of action through reasonable expenditure of time and money.

2. Determine whether well-defined community of interest in questions of law and fact exists among potential class members, considering following factors [*see Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 704, 63 Cal. Rptr. 724, 433 P.2d 732* ; *see also § 120.12[2]*]:

a. Whether common questions of law and fact predominate.

b. Whether claims or defenses of class representatives are typical of those of class members.

c. Whether class representative can adequately represent class.

3. Determine whether class action is superior method of adjudicating dispute, considering the following factors [*see § 120.12[4]*]:

a. Interests of those affected, including following [*Schneider v. Vennard (1986) 183 Cal. App. 3d 1340, 1347, 228 Cal. Rptr. 800*]:

(1) Judicial system.

(2) Potential class members.

(3) Present named plaintiff.

(4) Attorneys for litigants.

(5) Public at large.

(6) Defendant.

b. Desirability of establishing single standard of conduct for defendant class.

c. Likelihood and practicality of individual suits to obtain redress [*see Reyes v. Board of Supervisors*

(1987) 196 Cal. App. 3d 1263, 1280, 242 Cal. Rptr. 339].

d. Extent and nature of other litigation already commenced by potential class members [*see Schneider v. Vennard (1986) 183 Cal. App. 3d 1340, 1347, 228 Cal. Rptr. 800*].

e. Availability of procedures such as bifurcation and subclassing to make class action manageable [*see Rosack v. Volvo of America Corp. (1982) 131 Cal. App. 3d 741, 762, 182 Cal. Rptr. 800*].

4. Consider whether action is of type typically suited to class action treatment, such as any of following:

a. Action for wrongfully withheld or terminated government benefits [*see, e.g., Employment Development Dept. v. Superior Court (1981) 30 Cal. 3d 256, 178 Cal. Rptr. 612, 636 P.2d 575* ; *Reyes v. Board of Supervisors (1987) 196 Cal. App. 3d 1263, 1276-1279, 242 Cal. Rptr. 339*].

b. Action alleging price-fixing [*see B.W.I. Custom Kitchen v. Owens-Illinois, Inc. (1987) 191 Cal. App. 3d 1341, 235 Cal. Rptr. 228* ; *Rosack v. Volvo of America Corp. (1982) 131 Cal. App. 3d 741, 763, 182 Cal. Rptr. 800*].

c. Action involving legality or interpretation of standard contract or contract provisions [*see MacManus v. A. E. Realty Partners (1987) 195 Cal. App. 3d 1106, 1115-1116, 241 Cal. Rptr. 315*].

d. Land ownership rights [*see, e.g., Twain Harte Homeowners Assn. v. Patterson (1987) 193 Cal. App. 3d 184, 239 Cal. Rptr. 316*].

e. Unlawful discrimination [*see, e.g., Stephens v. Montgomery Ward & Co. (1987) 193 Cal. App. 3d 411, 238 Cal. Rptr. 602*].

f. Unlawful contract activities [*see, e.g., McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1983) 33 Cal. 3d 816, 191 Cal. Rptr. 458, 662 P.2d 916*].

g. Unlawful activities by an employer.

h. Fraudulent dealings [*see, e.g., Danzig v. Jack Grynberg & Associates (1984) 161 Cal. App. 3d 1128, 208 Cal. Rptr. 336*].

i. Violations of specific act or statutory scheme, such as:

(1) Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*; *see § 120.17[1]*].

(2) Consumer Credit Reporting Agencies Act [*Civ. Code § 1785.1 et seq.*].

(3) Provisions governing credit transactions involving married and unmarried women [*Civ. Code § 1812.30 et seq.*].

(4) Vehicle Leasing Act [*Civ. Code § 2985.7 et seq.*].

(5) Unfair Competition Law [*Bus. & Prof. Code § 17200 et seq.*; *see Cruz v. PacifiCare Health Sys., Inc. (2003) 30 Cal. 4th 303, 320, 133 Cal. Rptr. 2d 58, 66 P.3d 1157*].

(6) False Advertising Law [*Bus. & Prof. Code § 17500 et seq.*; *see Cruz v. PacifiCare Health Sys., Inc. (2003) 30 Cal. 4th 303, 320, 133 Cal. Rptr. 2d 58, 66 P.3d 1157*].

NOTE:
Tort actions to recover for personal injuries are not ordinarily permitted to proceed as class actions [*see, e.g.,* *Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 245 Cal. Rptr. 658, 751 P.2d 923*]. Thus, if a tort action for personal injuries is involved, consider how to distinguish it from the line of cases disallowing class actions for tort personal injuries [***see*** *§ 120.12[2][d]*].

5. If action involves defendant class rather than plaintiff class, determine whether following special requirements for defendant class actions are met:

a. Procedure will save time and minimize costs [*Kaye v. Mount La Jolla Homeowners Assn. (1988) 204 Cal. App. 3d 1476, 1489-1490, 1495-1496, 252 Cal. Rptr. 67*].

b. Judgment will be protected from due process challenges, in that [*see Simons v. Horowitz (1984) 151 Cal. App. 3d 834, 844-847, 199 Cal. Rptr. 134*]:

(1) Sufficient information and resources are available to provide timely and adequate notice to all class members;

(2) Named party defendant truly represents interests of class; and

(3) Attorney for named party defendant will provide adequate representation for class.

c. Plaintiff was actually injured by each defendant in class [*Simons v. Horowitz (1984) 151 Cal. App. 3d 834, 845, 199 Cal. Rptr. 134*].

d. Affirmative relief is sought against, or can be granted by, defendant class members [*see Pinnacle Holdings, Inc. v. Simon (1995) 31 Cal. App. 4th 1430, 1436-1437, 37 Cal. Rptr. 2d 778* ; *see also § 120.16*].

6. If class action is not suitable method of adjudicating dispute, consider following alternatives:

a. Action by association [*see §§ 120.11[2], 120.15[4]*].

b. Other type of representative action, combining suitable elements of class action and suitable elements of individual action.

c. Coordinated action [*see Code Civ. Proc. § 404 et seq.*; *see also § 120.11[3]*].

[2] Suitability of Class Representative

1. Ascertain that class representative satisfies all of following criteria [*see § 120.15[1] -[3]*]:

a. Is actual member of class [*La Sala v. American Sav. & Loan Ass'n (1971) 5 Cal. 3d 864, 875, 97 Cal. Rptr. 849, 489 P.2d 1113*].

b. Can fairly and adequately represent and protect interests of class [*La Sala v. American Sav. & Loan Ass'n (1971) 5 Cal. 3d 864, 871, 97 Cal. Rptr. 849, 489 P.2d 1113*].

c. Has claims or defenses that are typical of those of class [*Stephens v. Montgomery Ward & Co. (1987) 193 Cal. App. 3d 411, 422, 238 Cal. Rptr. 602*].

d. Has no conflict of interest or potential conflict of interest with class [*see La Sala v. American Sav. & Loan Ass'n (1971) 5 Cal. 3d 864, 872-874, 97 Cal. Rptr. 849, 489 P.2d 1113*].

e. Is not perceived by many class members to have interests incompatible with those of class [*Richmond v. Dart Industries, Inc. (1981) 29 Cal. 3d 462, 470, 174 Cal. Rptr. 515, 629 P.2d 23*].

f. Has not received special consideration from opposing party that does not accrue to class as whole [*see La Sala v. American Sav. & Loan Ass'n (1971) 5 Cal. 3d 864, 872-874, 97 Cal. Rptr. 849, 489 P.2d 1113*].

2. Prepare for possibility that named representative will be determined to be unsuitable [*see § 120.15[5]*] or will become unable to continue with suit by:

a. Choosing alternate or replacement representative; or

b. Considering criteria to be used to choose replacement representative.

[3] Federal Jurisdiction

1. Determine whether interstate class action will be within subject-matter jurisdiction of federal district court.

NOTE:

For purposes of federal jurisdiction, a mass action will be treated as a class action. A "mass action" is any civil action, other than a class action [*see* *28 U.S.C. § 1711(2)*], in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact [*28 U.S.C. § 1332(d)(11)(B)(i)*]. For purposes of minimal-diversity jurisdiction and removal to federal court, a mass action is treated as a class action, except that in a mass action minimal-diversity jurisdiction does not exist over any plaintiff whose individual claim does not satisfy the generally applicable $75,000 jurisdictional minimum for diversity jurisdiction [*28 U.S.C. § 1332(d)(11)(A),(B)(i)*]. For further discussion of mass actions, see *§ 120.13[4]*.

a. Determine whether class action presents federal question [*28 U.S.C. § 1332*].

b. If action does not present federal question, determine whether class action generally meets requirements for federal "minimal-diversity" jurisdiction, with more than $5 million in controversy (exclusive of interest and costs) and either [*28 U.S.C. § 1332(d)(2)*; *see § 120.13[3][a]*]:

(1) Any member of plaintiff class and any defendant are citizens of different states.

(2) Any member of plaintiff class is foreign state, or citizen or subject of foreign state, and any defendant is citizen of state.

(3) Any member of plaintiff class is citizen of state and any defendant is a foreign state or citizen or subject of foreign state.

c. Verify that class action is not within any of following exceptions to minimal-diversity jurisdiction [*see § 120.13[3][b]*]:

(1) Class action in which primary defendants are states, state officials, or other governmental entities against which federal district court may be foreclosed from ordering relief (i.e., because of *Eleventh Amendment* immunity) [*28 U.S.C. § 1332(d)(5)*].

(2) Class action in which there are fewer than 100 members of all proposed plaintiff classes in the aggregate [*28 U.S.C. § 1332(d)(5)*].

(3) Class action that solely involves claim concerning covered security as defined under *15 U.S.C. §§ 78p(f)(3)* and *78bb(f)(5)(E)* [*28 U.S.C. § 1332(d)(9)(A)*].

(4) Class action that solely involves claim relating to internal affairs or governance of corporation or other form of business enterprise and that arises under or by virtue of laws of state in which corporation or business enterprise is incorporated or organized [*28 U.S.C. § 1332(d)(9)(B)*].

(5) Class action that solely involves claim relating to rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security, as defined under *15 U.S.C. § 77b(a)(1)* and regulations issued under that provision [*28 U.S.C. § 1332(d)(9)(C)*].

d. Verify that class action is not one of following kinds of cases, of which federal court would be required to decline jurisdiction [*28 U.S.C. § 1332(d)(4)*; *see § 120.13[3][c]*]:

NOTE:

If the class action fits in one of the following categories, the federal district court must decline to exercise minimal-diversity jurisdiction [*28 U.S.C. § 1332(d)(4)*]. Even if the case does not fit in one of the following categories, the federal court may have discretion to decline to exercise its minimal-diversity jurisdiction [*28 U.S.C. § 1332(d)(3)*]. For discussion, see *§ 120.13[3][c]*.

(1) Class action in which two thirds or more of the members of all proposed plaintiff classes in aggregate, and primary defendants, are citizens of California [*28 U.S.C. § 1332(d)(4)(B)*].

(2) Class action in which more than two thirds of members of all proposed plaintiff classes in aggregate are citizens of California; at least one defendant from whom significant relief is sought and whose alleged conduct forms significant basis for class claims is citizen of California; principal injuries resulting from alleged conduct or any

related conduct of each defendant were incurred in California; and during three years preceding filing of class action, no other class action has been filed asserting same or similar factual allegations against any of defendants on behalf of any persons [*28 U.S.C. § 1332(d)(4)(A)*].

2. If class action is within federal district court's original jurisdiction, determine whether action, if filed in California superior court, is likely to be removed to federal court.

NOTE:

The Class Action Fairness Act of 2005 authorizes the removal of a class action to federal court by any defendant, without regard to whether any defendant is a citizen of the state in which the action was filed, and without the consent of other defendants [*28 U.S.C. § 1453(b)*]. For further discussion, see *§ 120.13[2]*.

3. If class action is likely to be removed to federal district court, consider commencing class action in federal district.

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationCivil ProcedureClass ActionsClass MembersDefendantsCivil ProcedureClass ActionsClass MembersNamed MembersCivil ProcedureClass ActionsPrerequisitesAdequacy of RepresentationCivil ProcedureClass ActionsPrerequisitesCommonality

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§ 120.41 Pleadings and Procedure

[1] Complaint

NOTE:
For a skeletal form of complaint containing allegations for use in a class action, see *§ 120.50*.

1. If action is for or against class party, designate action as class action in caption, by placing words "CLASS ACTION," in capital letters on first page of complaint, immediately below case number but above description of nature of complaint [*Cal. Rules of Ct., Rule 3.761(a)*].

2. Under separate heading entitled "CLASS ACTION ALLEGATIONS," include following allegations describing how requirements for class certification are met [*Cal. Rules of Ct., Rule 3.761(b)*; *see § 120.40[1]*]:

a. Stating that plaintiff brings action on behalf of self and all other persons similarly situated.

b. Describing class or specifying facts from which class can be ascertained.

c. Showing well-defined community of interest in questions of law and fact among potential class members, specifying any common issues to be litigated.

d. Specifying facts that illustrate the superiority of class action as method for fair and efficient adjudication of controversy, such as:
(1) Class is so numerous that joinder is impracticable.

(2) Individual damages are so small that individual actions or other individual remedies are impracticable.

(3) Class members are too poor to initiate individual suits.

(4) Legal issues posed by case are so arcane that obtaining private counsel is impracticable.

(5) Burden imposed on judicial system by multiple actions would outweigh any burdens imposed on system by class action.

(6) Multiple actions would result in inconsistent standards of conduct for defendant.

(7) Individual action would have practical effect of disposing of or impairing interests of other members of class.

(8) Public interest would be served by obtaining definitive answers to questions posed by case.

e. Specifying facts to show suitability of each named plaintiff or defendant to represent class [*see § 120.40[2]*]:

(1) Plaintiff or defendant has claims or defenses typical of class members.

(2) Plaintiff or defendant will fairly and adequately represent interests of class.

[2] Case Conference

NOTE:

One or more conferences between the court and counsel for the parties may be held to discuss class issues, the conduct and scheduling of discovery, scheduling of hearings, and other matters. No evidence may be presented at the conference, but counsel must be fully prepared to discuss class issues and must possess authority to enter into stipulations [*Cal. Rules of Ct., Rule 3.762(a)*]. Any party or the court may give notice of a conference [*Cal. Rules of Ct., Rule 3.762(b), (c)*].

1. If conference is desired:

a. Select date for conference [*Cal. Rules of Ct., Rule 3.762(e)*]:

(1) Select date after first defendant has entered appearance in case.

(2) Obtain prior approval of date from clerk of department assigned to hear case.

(3) Make reasonable efforts to accommodate schedules of all parties entitled to receive notice [*see* P b, *below*].

b. File and serve notice of conference at least 20 calendar days before scheduled date of conference [*Cal. Rules of Ct., Rule 3.762(d)*].

(1) If conference is called by a named plaintiff, serve notice on all named parties [*Cal. Rules of Ct., Rule 3.762(b)*].

(2) If conference is called by defendant, serve notice on all parties who have appeared in

case [*Cal. Rules of Ct., Rule 3.762(b)*].

NOTE:
If a defendant serves notice of the conference, within 10 calendar days after receiving notice the named plaintiff must serve a copy on each named party who has not appeared in the action and must submit a declaration of service. If the plaintiff is unable to serve any party, the plaintiff must submit a declaration stating the reasons for the failure of service [*Cal. Rules of Ct., Rule 3.762(b)*].

2. If representing named plaintiff, and conference is called by court, serve copy of notice on other parties as follows [*Cal. Rules of Ct., Rule 3.762(c)*]:

a. Within 10 calendar days after receipt of court's notice, serve copy of notice on all parties who have been served in action, whether they have appeared or not.

b. Submit either declaration of service or, if unable to serve any party, declaration stating reasons for failure of service.

3. Attend conference.

NOTE:
At the conclusion of the conference, the court may make an order (1) approving any stipulations of the parties, (2) establishing a schedule for discovery, (3) setting the date for the hearing on class certification, (4) setting the dates for any subsequent conferences, and (5) addressing any other matters related to management of the case [*Cal. Rules of Ct., Rule 3.763*].

[3] Motion for Class Certification or for Determination of Other Issues

1. Identify class issues to be determined, such as:

a. Whether class should be certified [*see §§ 120.12, 120.18, 120.40[1]*].

b. Whether named plaintiff or defendant is suitable class representative [*see §§ 120.15, 120.40[2]*].

c. Identities or identifying characteristics of class members [*see § 120.12[3]*].

2. Prepare moving papers [*Cal. Rules of Ct., Rule 3.764(c)(3)*]:

NOTE:
A party opposing the motion may submit a responding memorandum, evidentiary materials, and requests for judicial notice [*Cal. Rules of Ct., Rule 3.764(c)(3)*].

a. Notice of motion [*see § 120.51*].

b. Memorandum in support of motion.

NOTE:
The opening memorandum on a motion for class certification may not exceed 20 pages. Otherwise,

the memorandum is subject to the requirements that generally apply to memoranda [*Cal. Rules of Ct., Rule 3.764(c)(2)*; *see* *Cal. Rules of Ct., Rule 3.1113* (general requirements)]. For memoranda supporting motions relating to class issues, see California Points and Authorities, Ch. 41, ***Class and Representative Actions*** (Matthew Bender).

c. Evidence in support of motion, in form of declarations of counsel, class representatives, or other appropriate declarants.

d. If applicable, any request for judicial notice.

e. If available, statement regarding class notice and proposed notice [*see Cal. Rules of Ct., Rule 3.766(b)*; *see also* [6], *below*].

f. Proof of service.

NOTE:

For forms of proof of service of papers [*Code Civ. Proc. § 1013*], see Ch. 518, *Service of Summons and Papers* .

g. Proposed order, including [*see § 120.52*].

(1) Description of class and any subclasses [*Cal. Rules of Ct., Rule 3.765*].

(2) If appropriate, specification of particular issues as to which class is certified [*see Cal. Rules of Ct., Rule 3.765(b)*].

(3) If appropriate, provisions for notice to class members [*see Cal. Rules of Ct., Rule 3.766(c)*; *see also* [6], *below*].

3. Serve and file papers at least 28 calendar days prior to date appointed for hearing [*see Cal. Rules of Ct., Rule 3.764(c)(1)*; *see also* Ch. 518, *Service of Summons and Papers*].

NOTE:

A motion for class certification should be filed when practicable [*Cal. Rules of Ct., Rule 3.764(b)*], and ordinarily must be decided before the court makes any decision on the substantive merits of the case [*Fireside Bank v. Superior Court (2007) 40 Cal. 4th 1069, 1083, 56 Cal. Rptr. 3d 861, 155 P.3d 268* ; *see* *§ 120.18[2]*]. In its discretion, the court may establish a deadline for the filing of the motion, as part of the case conference or as part of other case management proceedings [*Cal. Rules of Ct., Rule 3.764(b)*; ***see*** *Cal. Rules of Ct., Rules 3.762, 3.763* (case conference); ***see also*** [2], ***above***]. Any such deadline must take into account discovery proceedings that may be necessary to the filing of the motion [*Cal. Rules of Ct., Rule 3.764(b)*]. It is an abuse of discretion for the court to make a class-certification decision without giving the parties a full opportunity to conduct discovery on class-certification issues and to brief the issues and present evidence [*Stern v. Superior Court (2003) 105 Cal. App. 4th 223, 232-233, 129 Cal. Rptr. 2d 275]* .

4. Review papers filed in opposition to motion, and file reply if desired.

NOTE:

A responding memorandum on a motion for class certification must not exceed 20 pages and must be served and filed at least 14 calendar days before the noticed or continued hearing, unless the

court for good cause orders otherwise [*Cal. Rules of Ct., Rule 3.764(c)(1), (2)*]. A reply memorandum must not exceed 15 pages and must be served and filed at least 5 calendar days before the noticed or continued date of the hearing, unless the court for good cause orders otherwise [*Cal. Rules of Ct., Rule 3.764(c)(1), (2)*]. For memoranda relating to class issues, see California Points and Authorities, Ch. 41, *Class and Representative Actions* (Matthew Bender).

5. Prior to hearing, confer with opposing counsel to try to resolve any uncontroverted issues by written stipulation [*Cal. Rules of Ct., Rule 3.764(e)*].

NOTE:
If all class issues are resolved by stipulation of the named parties and approved by the court before the hearing, no hearing on class certification is necessary [*Cal. Rules of Ct., Rule 3.764(e)*].

6. Attend hearing [*Cal. Rules of Ct., Rule 3.764(d)*; *see Cal. Rules of Ct., Rule 3.1306(b)* (procedures to obtain permission to present oral testimony at hearing)].

[4] Motion for Decertification of Class

1. Identify changed circumstances or new information constituting grounds for decertifying action, such as any of following:

a. Community of interest no longer exists among class members, because of any of following:
(1) Discovery or information disclosed at trial has shown that common questions of law and fact do not predominate.

(2) Individual questions of law and fact now predominate because circumstances have changed.

(3) Claims or defenses of class representatives are no longer typical of those of class members.

(4) Class representative is no longer able to represent class adequately.

b. Potential class has become too large to be manageable by court.

c. Plaintiff has not succeeded in defining ascertainable class.

d. Barriers to individual suits have been disproved or removed.

2. Follow procedures applicable to preparing, filing, and serving motion for class certification [*see Cal. Rules of Ct., Rule 3.764(a)(4), (c)-(e)*; *see also* [3], *above*].

[5] Motion for Removal of Class Representative

1. Identify change in circumstances or new information that makes class representative unsuitable, such as any of following:

a. Class representative is no longer member of class.

b. Claims or defenses of class representative are no longer typical of those of class.

c. Class representative can no longer fairly and adequately represent class because either:
(1) Class representative has received special consideration from opposing party that does not accrue to class as whole.

(2) Conflict of interest between class representative and class has been discovered.

(3) Majority of class views class representative's interests as incompatible with those of class.

2. Prepare, file, and serve papers [*see* [3], *above*].

NOTE:
Although there are no specific procedures prescribed for a motion to remove a class representative, the procedures for the various motions concerning class certification may serve as a guideline [*see* *Cal. Rules of Ct., Rule 3.764*; *see also* [3], *above*].

[6] Notice to Potential Class Members

1. Determine whether notice of pending class action is necessary, considering following:

NOTE:
Although pre-certification notice to prospective class members is not generally authorized or required, if prospective class members' identifying information is disclosed in precertification discovery, it may be appropriate for court to order that notice be provided to prospective class members so that they may take steps to protect their privacy [*Pioneer Elecs. (USA) Inc. v. Superior Court (2007) 40 Cal. 4th 360, 373-375, 53 Cal. Rptr. 3d 513, 150 P.3d 198]* .

a. Notice generally will be required in any case in which class members will be given right to request exclusion from class [*see Cal. Rules of Ct., Rule 3.766(d)*].

NOTE:
By requiring the court to determine whether notice to class members is necessary, *Cal. Rules of Ct., Rule 3.766(c)(1)* implies that the court may decide not to require class notice. Before the adoption of the predecessor of Rule 3.766, which applies to all class actions, the California Supreme Court had held that *Civ. Code § 1781(d), (e),* which requires class notice in class actions under the Consumers Legal Remedies Act, was generally applicable to other class actions in California [*Civil Service Employees Ins. Co. v. Superior Court (1978) 22 Cal. 3d 362, 376, 149 Cal. Rptr. 360, 584 P.2d 497]* . Presumably, that holding has been superseded by the subsequent adoption of Rule 3.766, and the trial court may now decide to forgo class notice in an appropriate case.

b. In federal court, notice would be mandatory if class action is based on predominant common questions of law or fact, but not if action seeks injunctive or declaratory relief or is based on need to avoid inconsistent or varying adjudications, incompatible standards of conduct for party opposing class, or adjudications that would as practical matter dispose of or impair interests of nonparties [*see Fed. Rule Civ. P., Rule 23(b), (c)(2)*].

2. Determine how class members should be identified and located, such as:

a. Through defendant's business records.

b. Through news releases concerning class action.

c. Through private investigative efforts.

3. Determine appropriate method of giving notice of class action, considering following factors [*Cal. Rules of Ct., Rule 3.766(e)*]:

NOTE:

**If personal notification is unreasonably expensive or the stake of individual class members is insubstantial, or if it appears that all members of the class cannot be notified personally, the court may order a means of notice reasonably calculated to apprise the class members of the pendency of the action. In such a case, for example, appropriate means of notice may consist of publication in a newspaper or magazine; broadcasting on television, radio, or the Internet; or posting or distribution through a trade or professional association, union, or public interest group [*Cal. Rules of Ct., Rule 3.766(f)*]. The difficulty of notifying individual class members does not, however, authorize the court to require that class members--even those with a substantial stake in the case--acknowledge personal notification by affirmatively requesting inclusion in the class. Such an "opt-in" procedure is neither required by constitutional due-process principles nor permitted by the applicable court rules [*Hypertouch, Inc. v. Superior Court (2005) 128 Cal. App. 4th 1527, 1537-1550, 27 Cal. Rptr. 3d 839* ; *see* *Fed. R. Civ. P. 23(c)(2), Cal. Rules of Ct., Rule 3.766(e)*]. For further discussion of the court's options when personal notice is impracticable, see *§ 120.19[3]*.

a. Interests of class.

b. Type of relief requested.

c. Stake of individual class members [*see* *Cooper v. American Sav. & Loan Ass'n (1976) 55 Cal. App. 3d 274, 285, 127 Cal. Rptr. 579*].

d. Cost of notifying class members.

e. Resources of parties.

f. Possible prejudice to class members who do not receive notice.

g. Res judicata effect on class members.

4. Prepare necessary papers:

a. If representing class proponent, prepare statement regarding class notice, including all of following items [*Cal. Rules of Ct., Rule 3.766(b)*]:

(1) Whether notice is necessary.

(2) Whether class members may exclude themselves from action.

(3) Time and manner in which notice should be given.

(4) Proposal for which parties should bear costs of notice.

(5) If cost shifting or sharing is proposed, estimate of cost involved in giving notice.

b. If representing class proponent, prepare proposed class notice, including following items [*Cal. Rules of Ct., Rule 3.766(d)*]:

(1) Brief explanation of case, including basic contentions or denials of parties.

(2) Statement that court will exclude member from class if member so requests by specified date.

(3) Procedure for member to follow in requesting exclusion from class.

(4) Statement that judgment, whether favorable or not, will bind all members who do not request exclusion.

(5) Statement that any member who does not request exclusion may, if member so desires, enter appearance through counsel.

c. Prepare proposed order, including all of following items [*Cal. Rules of Ct., Rule 3.766(c)*]:

(1) Whether notice to class members is necessary.

(2) Whether class members may exclude themselves from action.

(3) Time and manner of notice.

(4) Content of notice.

(5) Parties responsible for cost of notice.

d. If not part of motion to certify class, prepare motion for order approving proposed notice, along with supporting documentation [*Cal. Rules of Ct., Rule 3.766(c), (d)*].

5. File and serve papers, either as part of motion for class certification, or as separate motion.

NOTE:

Although there are no specific procedures prescribed for filing and serving a separate motion to approve a class notice, the procedures for the various motions concerning class certification may serve as a guideline [*see* *Cal. Rules of Ct., Rule 3.764*; *see also* [3], *above*].

[7] Settlement of Class Action

NOTE:

A settlement or compromise of an entire class action, or of a cause of action in a

class action, or as to a party, requires the approval of the court after a hearing [*Cal. Rules of Ct., Rule 3.769(a)*].

1. Prepare, file, and serve notice of motion and motion for preliminary approval of settlement, including all of following [*Cal. Rules of Ct., Rule 3.769(c)*]:

a. Settlement agreement.

b. Any agreement, express or implied, that has been entered into with respect to payment of attorney's fees or submission of application for approval of attorney's fees [*Cal. Rules of Ct., Rule 3.769(b)*].

c. Proposed notice to class members of final approval hearing, including both of following [*Cal. Rules of Ct., Rule 3.769(f)*]:

NOTE:
If the court has certified the action as a class action, notice of the final approval hearing must be given to the class members in the manner specified by the court [*Cal. Rules of Ct., Rule 3.769(f)*].

(1) Explanation of proposed settlement.

(2) Procedures for class members to follow in filing written objections to proposed settlement and in arranging to appear at settlement hearing and state any objections to proposed settlement.

d. If applicable, proposed order certifying provisional settlement class [*Cal. Rules of Ct., Rule 3.769(d)*].

e. Proposed order granting preliminary approval of settlement, including all of following [*Cal. Rules of Ct., Rule 3.769(e)*]:

NOTE:
The proposed order must be lodged with the motion, rather than filed [*Cal. Rules of Ct., Rule 3.769(c)*].

(1) Time, date, and place of final approval hearing.

(2) Notice to be given to class.

(3) Any other matters deemed necessary for proper conduct of final settlement hearing.

2. If court grants preliminary approval:

a. If ordered to do so by court, notify class of final settlement approval hearing [*Cal. Rules of Ct., Rule 3.769(e)*].

b. Attend final settlement approval hearing.

NOTE:

If the court approves the settlement agreement after the final approval hearing, the court must issue and enter judgment. The judgment must include a provision for the retention of the court's jurisdiction over the parties to enforce the terms of the judgment [*Cal. Rules of Ct., Rule 3.769(h)*]. The court may not enter an order dismissing the action at the same time as, or after, entry of judgment [*Cal. Rules of Ct., Rule 3.769(h)*].

[8] Dismissal of Class Action

1. File request with court to obtain dismissal of either [*Cal. Rules of Ct., Rule 3.770(a)*]:

NOTE:

A dismissal of an entire class action, or of a party or cause of action in a class action, requires court approval. The court may not grant a request to dismiss a class action if the court has entered judgment following final approval of a settlement [*Cal. Rules of Ct., Rule 3.770(a)*].

a. Entire action.

b. Any party.

c. Any cause of action.

2. Include declaration setting forth following [*Cal. Rules of Ct., Rule 3.770(a)*]:

a. Facts on which petitioner relies.

b. Whether consideration, direct or indirect, is being given for dismissal.

c. If consideration is being given for dismissal, detailed description of consideration.

3. If court issues notice of tentative disapproval, seek hearing within 15 calendar days after service of notice [*Cal. Rules of Ct., Rule 3.770(b)*].

NOTE:

If no hearing is requested within 15 days of service of the notice of tentative disapproval, the request for dismissal will be deemed denied [*Cal. Rules of Ct., Rule 3.770(b)*].

4. If ordered to do so by court, notify class members of dismissal [*Cal. Rules of Ct., Rule 3.770(c)*.

NOTE:

If the court dismisses an action after certifying a class, and notice of the pendency of the action has been provided to class members, notice of the dismissal must be given to the class in the manner specified by the court [*Cal. Rules of Ct., Rule 3.770(c)*. If the court has not ruled on class certification, or if notice of the pendency of the action has not been provided to class members in a case in which such notice was required, notice of the proposed dismissal may be given in the manner and to those class members specified by the court, or the action may be dismissed without notice

to the class members if the court finds that the dismissal will not prejudice them [*Cal. Rules of Ct., Rule 3.770(c)*].

[9] Petition for Writ of Mandate to Review Certification Order or Other Interlocutory Order

1. Choose appropriate review proceeding [*see § 120.18[5]*].

NOTE:
For a form of petition for a writ of mandate, see *§ 120.56*. For a checklist for bringing a petition for a writ of mandate, see the procedural guide in Ch. 358, *Mandate and Prohibition*, for a checklist for procedure on appeal, see Ch. 40, ***Appeal: An Overview*** .

a. Seek writ of mandate if review is sought for interlocutory orders that do not dispose of entire action, such as:
(1) Denial of class certification that operates only against class and not against named plaintiff [*Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 820-821, 94 Cal. Rptr. 796, 484 P.2d 964* ; *Rosack v. Volvo of America Corp. (1982) 131 Cal. App. 3d 741, 748-749, 182 Cal. Rptr. 800*].

(2) Order certifying statewide rather than nationwide class [*General Motors Corp. v. Superior Court (1988) 199 Cal. App. 3d 247, 249, 250-252, 244 Cal. Rptr. 776*].

(3) Order dismissing fewer than all class causes of action [*Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 806-807, 94 Cal. Rptr. 796, 484 P.2d 964*].

(4) Order denying motion to decertify class [*see Occidental Land, Inc. v. Superior Court (1976) 18 Cal. 3d 355, 359-360, 134 Cal. Rptr. 388, 556 P.2d 750*].

b. Pursue appeal rather than writ of mandate if order is denial of class certification that sounds "death knell" of class action, effectively dismissing action as to all members of class other than plaintiff [*see Farwell v. Sunset Mesa Property Owners Assn., Inc. (2008) 163 Cal. App. 4th 1545, 1547, 1551-1552, 78 Cal. Rptr. 3d 666* ("death knell" doctrine does not authorize appeal of order sustaining demurrer with leave to amend complaint); *Stephen v. Enterprise Rent-A-Car (1991) 235 Cal. App. 3d 806, 811, 1 Cal. Rptr. 2d 130* ; *see also § 120.18[5][a]*].

2. If uncertain whether writ of mandate or appeal is appropriate, take following steps:

a. File both appeal and petition for writ of mandate.

b. Include following information in mandate petition [*Cal. Rules of Ct., Rule 8.486(a)(3)*]:

(1) Notation "Related Appeal Pending" in title of petition.

(2) Title, superior court docket number, and appellate court docket number, if any, of pending appeal in first paragraph.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureRemovalGeneral OverviewCivil ProcedureClass ActionsClass MembersNamed MembersCivil ProcedureClass ActionsDecertificationCivil ProcedureClass ActionsPrerequisitesAdequacy of Representation

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Chapter 120 CLASS ACTIONS *
PART IV. PROCEDURAL CHECKLIST

12-120 California Forms of Pleading and Practice--Annotated §§ 120.42-120.49

[Reserved]

§§ 120.42[Reserved]

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PART V. FORMS

12-120 California Forms of Pleading and Practice--Annotated § 120.50

§ 120.50 Class Action Complaint--Skeletal Form

[1] FORM Class Action Complaint--Skeletal Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Individually and on behalf of all others similarly situated,	)	NO. _____
Plaintiff,	)	CLASS ACTION COMPLAINT FOR
vs.	)	_____ [*specify, e.g.,* DAMAGES]
_____ [*name*],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant[s].	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

CLASS ACTION ALLEGATIONS

1. Plaintiff brings this action on his/her own behalf and on behalf of all persons similarly situated. The class that plaintiff represents is composed of _____ [*specify facts from which class can be ascertained*]. The persons in the class are so numerous[, consisting of approximately _____ individuals,] that the joinder of all such persons is impracticable and that the disposition of their claims in a class action rather than in individual actions will benefit the parties and the court.

2. There is a well-defined community of interest in the questions of law and fact involved affecting the plaintiff class in

that _____ [*specify common questions of law and fact to be litigated*]. These questions of law and fact predominate over questions that affect only individual class members. [Proof of a common or single state of facts will establish the right of each member of the class to recover.] The claims of the plaintiff are typical of those of the class and plaintiff will fairly and adequately represent the interests of the class.

[3. There is no plain, speedy, or adequate remedy other than by maintenance of this class action since plaintiff is informed and believes that the damage to each plaintiff is relatively small (, in that _____ [*specify type and amount of damages*]), making it economically unfeasible to pursue remedies other than a class action. Consequently, there would be a failure of justice but for the maintenance of the present class action.]

[4. The prosecution of individual remedies by members of the plaintiff class would tend to establish inconsistent standards of conduct for the defendant and to result in the impairment of class members' rights and the disposition of their interests through actions to which they were not parties.]

[FIRST] CAUSE OF ACTION

5. [*In this and subsequent paragraphs, identify defendants and their capacity, including fictitious defendants, and allege their acts and other facts, including performance of conditions precedent, that give rise to plaintiff's cause of action.*]

6. Plaintiff has incurred and, during the pendency of this action, will incur expenses for attorney's fees and costs herein. Such attorney's fees and costs are necessary for the prosecution of this action and will result in a benefit to each of the members of the class. The sum of $_____ is a reasonable amount for attorney's fees herein.

WHEREFORE, plaintiff prays judgment as follows:

1. For damages _____ in the sum of $_____;

[2. For interest from and after _____ [*date*], at the legal rate;]

[3. For exemplary and punitive damages in the sum of $_____;]

4. For the payment of plaintiff's attorney's fees out of the moneys recovered for the joint benefit of the members of the class;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the individual plaintiff in this action. I have read the foregoing complaint and

know its contents. The complaint is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form is a general form of complaint for use in a class action involving a plaintiff class [*see Code Civ. Proc. §§ 382, 425.10*]. It includes allegations relating to the class action aspects of a complaint and excludes substantive allegations of a cause or causes of action. The allegations of this complaint should be combined with a form of complaint for a specific cause of action. For such forms, see the chapter relating to the subject of the complaint.

[3] Class Action Allegations

A complaint in a class action must contain a separate heading, entitled "CLASS ACTION ALLEGATIONS," under which the plaintiff describes how the requirements for class certification are met [*Cal. Rules of Ct., Rule 3.761(b)*]. The complaint form in [1], *above*, contains allegations establishing the necessary prerequisites to the maintenance of a class action under *Code Civ. Proc. § 382*:

- An ascertainable class (Paragraph 1).
- A community of interest (Paragraph 2).
- The superiority of the class action method for adjudicating the dispute (Paragraphs 1, 3, 4) [*Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 704, 63 Cal. Rptr. 724, 433 P.2d 732* ; *Schneider v. Vennard (1986) 183 Cal. App. 3d 1340, 1345, 228 Cal. Rptr. 800]* .

Paragraph 1 establishes the superiority of the class action method by stating that the class is so large that both joinder and individual actions are impracticable.

Optional Paragraph 3 may be included in the complaint if the damage to each plaintiff is so small that the only remedy available to class members is a class action [*see Reyes v. Board of Supervisors (1987) 196 Cal. App. 3d 1263, 1274-1275, 1280, 242 Cal. Rptr. 339*].

Optional Paragraph 4 may be included if the prosecution of individual actions would impair the rights of class members who were not parties to such actions and would establish inconsistent standards of conduct for the defendant.

The complaint also alleges that the named plaintiff's claims are typical of those of the class and that the named plaintiff will fairly and adequately represent the plaintiff class (Paragraph 2).

[4] Caption

A complaint for or against a class party must include in the caption the designation "CLASS ACTION," in capital letters on the first page of the complaint, immediately below the case number but above the description of the nature of the complaint [*Cal. Rules of Ct., Rule 3.761(a)*].

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and it will preclude a general denial even in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Attorney's Fees

An award of attorney's fees to class action plaintiffs may be proper under several theories, including the "private attorney general" theory [*see Code Civ. Proc. § 1021.5*; *see also Serrano v. Priest (1977) 20 Cal. 3d 25, 46-47, 141 Cal. Rptr. 315, 569 P.2d 1303*]. For further discussion, see *§ 120.24*.

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For a form of class action complaint for declaratory relief by members of an association against the association and its officer-members, see Ch. 61, *Associations and Clubs*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For a form of class action complaint for use in an action for damages under the Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*], based on an unlawful practice in the sale of consumer goods or services, see Ch. 504, *Sales: Consumers Legal Remedies Act*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For a form of class action complaint for declaratory relief to have a welfare regulation declared invalid and petition for writ of mandate to compel payment of benefits, see Ch. 527, *Social Services*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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Chapter 120 CLASS ACTIONS *
PART V. FORMS

12-120 California Forms of Pleading and Practice--Annotated § 120.51

§ 120.51 Notice of Motion to Determine Issues for Class Action

[1] FORM Notice of Motion to Determine Issues for Class Action

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
individually and on behalf of all others similarly situated,	)	NOTICE OF MOTION AND MOTION TO DETERMINE ISSUES FOR CLASS ACTION
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*], [*et al.*,]	)	Location: _____
Defendant[s].	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To each party and to the attorney of record for each party herein:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* plaintiff _____ (*name*)] will, and hereby does, move for an order that _____ [*specify issues to be determined, e.g.,* the action be certified as a class action and that _____ (*name*) be determined to be a suitable class representative]. The motion will be made on the grounds that _____ [*specify, e.g.,* there is an ascertainable class, there are common, similar, and unique questions of fact and law, the class action is superior to other available methods for the fair and efficient adjudication of the controversy, and the class representative is a member of the class and is able fairly and adequately to protect the

interest of the class].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This notice of motion is for use by a class action plaintiff or defendant to establish certain issues concerning the class action, such as [*see Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 820, 94 Cal. Rptr. 796, 484 P.2d 964* ; *see also Cal. Rules of Ct., Rule 3.767*]:

- The existence and constitution of an ascertainable class.
- The existence of common, similar, and unique questions of fact and law.
- The superiority of the class action to other available methods for the fair and efficient adjudication of the controversy.
- The membership of the class representative in the class.
- The ability of the class representative fairly and adequately to protect the interest of the class.

This form may be used to notice a motion for a class certification order [*see Cal. Rules of Ct., Rule 3.764*; *see also § 120.18[1]*]. A motion for class certification should be filed when practicable [*Cal. Rules of Ct., Rule 3.764(b)*], and ordinarily must be decided before the court makes any decision on the substantive merits of the case [*Fireside Bank v. Superior Court (2007) 40 Cal. 4th 1069, 1083, 56 Cal. Rptr. 3d 861, 155 P.3d 268* ; *see § 120.18[2]*]. For detailed coverage of the procedure for making motions for class certification and related orders, see *§ 120.41[3]*.

This form may be modified for use as a notice of a case conference [*see Cal. Rules of Ct., Rule 3.762(b)*]. For detailed coverage of the procedure for calling case conferences, see *§ 120.41[2]*.

A memorandum in support of the motion must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.764(c)(2), (3)*; *see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113*].

[3] Cross References

For procedures and forms for use in making motions generally, see Ch. 372, *Motions and Orders*

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12-120 California Forms of Pleading and Practice--Annotated § 120.52

§ 120.52 Order Determining Issues for Class Action

[1] FORM Order Determining Issues for Class Action

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
individually and on behalf of all others similarly situated,	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	
_____ [*name*], [*et al.*,]	)	
Defendant[s].	)	
	)	

The motion of _____ [*identify party, e.g.*, plaintiff] for an order came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED as follows:

1. _____ [*Specify, e.g.*, An ascertainable class exists composed of _____ (*specify facts identifying the constitution of the class*)].

2. _____ [*Specify, e.g.*, The issues of fact and law that are common to all class members in this action are _____ (*specify*)].

3. _____ [*Specify, e.g.*, The issues of fact and law that are similar for all class members in this action are _____ (*specify*)].

4. _____ [*Specify, e.g.*, The issues of fact and law that are unique to each class member in this action are _____ (*specify*)].

5. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

6. The class _____ [representative is a member *or* representatives are members] of the class and is/are able fairly and adequately to protect the interests of the class.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is for use with a motion for determination of class issues [*see § 120.51*]. If the issues are not all considered at the same hearing, the form may be modified to address only those issues addressed at one hearing [*see Cal. Rules of Ct., Rule 3.767*].

If the form is used for an order denying certification or otherwise determining that the action cannot proceed as a class action, it may include an order dismissing the action if certain requirements have been met [*see Cal. Rules of Ct., Rule 3.770*; *see also Code Civ. Proc. § 581*]. For discussion of issues pertaining to the dismissal of class actions, see *§ 120.17[4]*. For detailed coverage of the procedure for dismissal of a class action, see *§ 120.41[8]*.

[3] Cross References

For alternative forms of orders, see Ch. 372, *Motions and Orders*

For a selection of orders actually entered in class actions, see Cabraser, California Class Actions Practice and Procedure, *Appendix* (Matthew Bender)

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12-120 California Forms of Pleading and Practice--Annotated § 120.53

§ 120.53 Notice of Motion to Approve Notice to Class Members

[1] FORM Notice of Motion to Approve Notice to Class Members

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
individually and on behalf of all others similarly situated,	)	NOTICE OF MOTION AND MOTION FOR ORDER TO NOTIFY CLASS MEMBERS OF PENDING ACTION
Plaintiff,	)	
vs.	)	Date: _____
_____ [*name*], [*et al.*,]	)	Time: _____
Defendant[s].	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To each party and to the attorney of record for each party herein:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party*, *e.g.*, plaintiff _____ (*name*)] will, and hereby does, move for an order requiring _____ [defendant *or* plaintiff] to notify each member of the class of the pendency of this action. The motion will be made on the ground that _____ [personal *or* published] notice of the pendency of this action is necessary to adjudicate the claims of the class.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This notice of motion is for use by a class action plaintiff or defendant to obtain an order requiring one of the parties to give notice to the members of the class of the pendency of the action [*Cal. Rules of Ct., Rule 3.766*]. For detailed coverage of the procedure for class notice, see *§ 120.41[6]*.

This form may be combined with a notice of a case conference or a notice of motion for a class certification order [*see Cal. Rules of Ct., Rules 3.762(b), 3.764*; *see also § 120.51*]. For detailed coverage of the procedure for calling case conferences, see *§ 120.41[2]*. For detailed coverage of the procedure for making motions for class certification and related orders, see *§ 120.41[3]*.

A statement regarding class notice, as well as a memorandum in support of the motion, must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.766(b)*; *see Cal. Rules of Ct., Rule 3.764(c)(2), (3)*; *see also Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113*].

[3] Cross References

For procedures and forms for use in making motions generally, see Ch. 372, *Motions and Orders*

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12-120 California Forms of Pleading and Practice--Annotated § 120.54

§ 120.54 Order on Motion to Approve Notice to Class Members

[1] FORM Order on Motion to Approve Notice to Class Members

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
individually and on behalf of all others similarly situated,	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	
_____ [*name*], [*et al.*,]	)	
Defendant[s].	)	
	)	

The motion of _____ [*identify party, e.g.*, plaintiff] for an order came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

THE COURT FINDS the following:

1. Notice to class members is necessary, and

2. Class members _____ [may *or* may not] exclude themselves from this action.

ACCORDINGLY, IT IS ORDERED as follows:

1. Notice shall be given to the class members identified herein by _____ [*specify manner of notice, e.g.,* personal service of the notice on each class member *or* mailing a copy of the notice by first-class mail, postage prepaid, to each class member at his or her last known address (as supplied by defendant's business records) *or* publication of the notice as specified in *Government Code Section 6064*]. _____ [Plaintiff *or* Defendant] shall be responsible for providing notice as specified herein and shall file an affidavit with the court on compliance with this order, setting forth the manner in which notice was provided and _____ [showing proof of service for each class member *or* giving the names and addresses of those notified *or* giving the name of the newspaper in which the notice was published and the dates of publication, and showing proof of publication]. The cost of providing the notice shall be borne by _____ [*specify, e.g.,* plaintiff and defendant in equal portions].

2. The notice of pendency of class action shall be in the form of the notice attached to this order.

3. The date specified in the notice relating to a request for exclusion will be a date specified by plaintiff which shall be not less than _____ or more than _____ days from the date of _____ [service *or* mailing *or* publication] of the notice.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is for use with a motion to approve notice of a class action to class members [*see § 120.53*]. A copy of the approved notice [*see § 120.55*] should be attached.

[3] Determination of Necessity of Notice

On certification of the class, or as soon thereafter as practicable, the court must make an order determining whether notice is necessary, and whether class members may exclude themselves from the action. If notice is necessary, the court's order must also determine the time, manner, and content of the notice, and the parties responsible for the cost of notice [*Cal. Rules of Ct., Rule 3.766(c)*]. For detailed coverage of the procedure for class notice, see *§ 120.41[6]*.

[4] Cross References

For alternative forms of orders, see Ch. 372, *Motions and Orders*

For a selection of orders actually entered in class actions, see Cabraser, California Class Actions Practice and Procedure, Appendix (Matthew Bender)

* Portions of this chapter have been adapted from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
Chapter 120 CLASS ACTIONS *
PART V. FORMS

12-120 California Forms of Pleading and Practice--Annotated § 120.55

§ 120.55 Notice of Pendency of Class Action

[1] FORM Notice of Pendency of Class Action

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
individually and on behalf of all others similarly situated,	)	NO. _____
Plaintiff,	)	NOTICE OF PENDENCY OF CLASS ACTION
vs.	)	
_____ [*name*], [*et al.*,]	)	
Defendant[s].	)	
	)	

NOTICE IS HEREBY GIVEN THAT:

1. The plaintiffs named below have brought an action in this court against the following defendant(s): _____ [*names*].

The plaintiffs who are named in this action are as follows: _____ [*names*].

2. The named plaintiffs allege that this action is brought not only on behalf of themselves but on behalf of all _____ [*identify class*].

3. On _____ (*date*), this court certified this action to proceed as a class action.

4. The named plaintiffs allege that _____ [*set forth allegations and contentions of plaintiff in narrative*

form]. The plaintiffs' action therefore requests _____ [*specify relief sought*].

Defendant(s) contends/contend _____ [*set forth contentions of defendant(s), including denials, in narrative form*].

5. If you do not wish to be considered a member of this class and to be represented by the plaintiffs named above, you may be excluded from the action by mailing a letter requesting exclusion from the class to _____ [*name, title, and address of court clerk*], which must be postmarked on or before _____ [*date*]. The letter should include the name and number of the case (_____ [*case name and number*]), your name and address, and a clear statement that you do not wish to be considered a member of the class and do not wish to be bound by the judgment in the action.

Under the rule of res judicata, also known as claim preclusion, the judgment--whether favorable or not--will include all class members who do not request exclusion by a letter, as described above, postmarked on or before _____ [*date*].

6. If you do not request exclusion from the class, you may be subjected to a cross complaint or to some other affirmative action by defendants.

7. You are further notified that, although this action is pending, defendants are not prevented in any way from exercising all remedies available by contract and law.

8. If you do not request exclusion, this action will be maintained on your behalf by the attorney(s) mentioned above. If you wish, you may enter an appearance in the case through counsel. In addition, you may move the court for permission to appear as a named class corepresentative. You may also move to associate additional counsel to represent the class.

9. The estimated total amount of recovery in the action is $_____. The anticipated fee that will be sought by counsel for the class is $_____, and the anticipated other expenses and costs to the class that will be paid from the funds recovered before distribution of the net proceeds to class members are $_____. The estimated net amount to be recovered by each member if the action is successful is _____ [*specify dollar amount or formula to be used to determine amount of individual recovery*]. No fees or costs will be assessed against class members if the plaintiffs do not prevail in the action.

10. Further information concerning this action may be obtained by contacting the attorneys for the parties in this action who are as follows:

1. Attorney for Plaintiffs:

_____ [*name*]

_____ [*firm name, if any*]

_____ [*address*]

_____ [*telephone*]

2. Attorney for Defendants:

_____ [*name*]

_____ [*firm name, if any*]

_____ [*address*]

_____ [*telephone*]

You are also encouraged to consult your own attorney concerning this action, particularly if there is any part of this notice you do not understand.

11. It should be understood that the court in this action does not at present express any opinion as to the merits of the action.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is for use in a class action to notify the members of the class of the pendency of the action. For a form of notice of motion and order approving the notice, see *§§ 120.53, 120.54*.

[3] Contents of Notice

The content of the class notice is subject to court approval. If the court decides that class members are to be given the right to request exclusion from the class, the notice must include the following [*Cal. Rules of Ct., Rule 3.766(d)*]:

- A brief explanation of the case, including the basic contentions or denials of the parties;
- A statement that the court will exclude the member from the class if the member so requests by a specified date;
- A procedure for the member to follow in requesting exclusion from the class;
- A statement that the judgment, whether favorable or not, will bind all members who do not request exclusion; and
- A statement that any member who does not request exclusion may, if the member so desires, enter an appearance through counsel.

The foregoing form of notice identifies the parties to the action (Paragraph 1) and their attorneys (Paragraph 10), states that the action is being brought by named plaintiffs on behalf of all members of the class (Paragraph 2), and describes the cause of action and the relief requested (Paragraph 4). The notice states that the court will exclude the member

notified from the class if he or she so requests by a specified date (Paragraph 5), that other consequences may follow as a result of being a member (Paragraphs 6, 7), and that any member who does not request exclusion may enter an appearance through counsel and may move the court for permission to appear as a named class corepresentative and to associate additional counsel to represent the class (Paragraph 8). Additionally, the notice states the estimated total recovery in the action; the net amount to be recovered by each member of the class; and the anticipated attorney's fees, other expenses, and costs (Paragraph 9). It also states that the court does not express any opinion as to the merits of the action (Paragraph 11).

For further discussion of notice requirements, see *§ 120.19*. For detailed coverage of the procedure for class notice, see *§ 120.41[6]*.

* Portions of this chapter have been adapted from Cabraser, California Class Actions Practice and Procedure (Matthew Bender).

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
Chapter 120 CLASS ACTIONS *
PART V. FORMS

12-120 California Forms of Pleading and Practice--Annotated § 120.56

§ 120.56 Petition for Writ of Mandate to Review Certification Order or Other Interlocutory Order

[1] FORM Petition for Writ of Mandate to Review Certification Order or Other Interlocutory Order

COURT OF APPEAL,
_____ APPELLATE DISTRICT
STATE OF CALIFORNIA
[*or other as appropriate*]

_____ [*name*],	)	
individually and on behalf of all others similarly situated,	)	
Petitioner,	)	NO. _____
vs.	)	PETITION FOR WRIT OF MANDATE [*if related appeal is pending, add:* RELATED APPEAL PENDING]
THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____,	)	
Respondent.	)	
_____ [*name*],	)	
Real Party in Interest.	)	

TO _____ [*specify, e.g.,* THE HONORABLE PRESIDING JUSTICE AND THE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE _____ APPELLATE DISTRICT, DIVISION _____ (*number*)], STATE OF CALIFORNIA:

Petitioner alleges:

[1. A related appeal is pending in the case entitled _____ (*title of case*), No. _____ in the Superior Court of _____ County and No. _____ in the _____ (*specify appellate court and appellate court docket number, if any*).]

2. This is an action brought to compel the respondent court _____ [*specify nature of writ sought, e.g.,* to allow petitioners to continue a class cause of action for _____ (*specify, e.g.,* damages) alleging _____ (*specify, e.g.,* discriminatory employment practices by _____ (*name*), real party in interest)].

3. The class action was brought by _____ [petitioners *or* _____ (*name*), real party in interest], on behalf of themselves and other _____ [*specify facts constituting class, e.g.,* women employed by _____ (*name*) between the dates of _____, and _____, who were wrongfully and illegally denied promotional opportunities].

4. On _____ [*date*], respondent court _____ [*describe order giving rise to writ petition, e.g.,* decertified the class action and dismissed the action as to the unnamed class members, because _____ (*summarize grounds for respondent court's order*)]. A copy of that order is attached as Exhibit A and made a part hereof. Copies of all documents and exhibits submitted to respondent court supporting and opposing petitioners' position, copies of other documents submitted to respondent court, and a transcript of the proceedings leading to the respondent court's order are attached as Exhibits B--D and made a part hereof.

5. Petitioners are beneficially interested in the issuance of a writ by virtue of the fact that _____ [*specify, e.g.,* each petitioner will have to litigate his/her damages action against _____ (*defendant's name*) individually if a class action is not allowed].

[*ALLEGE facts showing petitioner's entitlement to requested relief in as many paragraphs as necessary, for example:*]

6. Petitioners are entitled to maintain the action as a class action because of the following:

a. There is a community of interest among the class members in that (1) the following common questions of law and fact predominate in the action: _____ [*specify common questions*]; (2) the _____ [claims *or* defenses] of _____ and _____ [*names of class representatives*] are typical of the class in that _____ [*set forth facts showing typicality of claims or defenses of representatives*]; and (3) _____ [*name of class representative*] can therefore adequately represent the class.

b. There is an ascertainable class consisting of _____ [*specify facts constituting class, e.g.,* women employed by _____ (*name*) between the dates of _____, and _____, who were wrongfully and illegally denied promotional opportunities]. The names and addresses of all the members of the class can be definitely ascertained from the books and records of _____ [*defendant's name*].

7. There are also important policy reasons for allowing the action to proceed as a class action, as follows:

a. Individual class members lack the economic resources to mount individual lawsuits.

b. Allowance of a class suit will deter _____ [*name*] from continuing its illegal and discriminatory employment practices.

c. The issues that may be jointly tried, when compared with those requiring separate adjudication, are so numerous or

substantial that maintenance of the action as a class action would be advantageous to the judicial process and the litigants.

[*CONTINUE*]

8. Petitioners have no plain, speedy, and adequate remedy at law by appeal from the _____ [*date*], order of respondent court because _____ [*specify, e.g.,* the order of the court is not a final judgment and therefore is not appealable within the terms of *Code of Civil Procedure Section 904.1*, which allows appeal from final judgments and certain interlocutory orders of the Superior Court].

9. Respondent court has a duty _____ [*specify nature of duty, e.g.,* to allow a class action to proceed if there is an ascertainable class with a community of interest in predominant questions of law and fact, and adjudication of the controversy by way of a class action will substantially benefit the litigants and the court]. At all times herein mentioned, respondent court could perform its duty. Nevertheless, respondent court will not _____ [*specify, e.g.,* allow petitioners to continue their class cause of action for _____ (*specify, e.g.,* damages) until this court rules that such an action is permissible and in fact required in California under the circumstances pleaded in petitioner's complaint].

WHEREFORE, petitioners pray judgment as follows:

1. That this court issue its alternative writ of mandate commanding respondent

a. To vacate [that portion of] its order of _____ [*date*] that _____ [*specify, e.g.,* decertified action No. _____ as a class action and dismissed the action as to the unnamed class members]; and

b. To order respondent _____ [*specify, e.g.,* to allow petitioners to continue to maintain action No. _____ as a class action on behalf of women employed by _____ (*defendant's name*) between the dates of _____, and _____, who were wrongfully and illegally denied promotional opportunities] or to show cause before this court at a specified time and place why it has not done so and why a peremptory writ should not issue;

2. That, on the hearing of this petition and the return thereto, if any, this court issue its peremptory writ of mandate commanding respondent

a. To vacate [that portion of] its order of _____ [*date*] that _____ [*specify, e.g.,* decertified action No. _____ as a class action and dismissed the action as to the unnamed class members]; and

b. _____ [*Specify, e.g.,* To allow petitioners to continue to maintain action No. _____ as a class action on behalf of women employed by _____ (*defendant's name*) between the dates of _____, and _____, who were wrongfully and illegally denied promotional opportunities].

3. For costs incurred in this proceeding; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of petition for a writ of mandate is for use to obtain review of an nonappealable (for example, nonfinal) order of the trial court in a class action. It may be used by the plaintiff, for example, to obtain an order compelling the trial court to allow the action to proceed as a class action. It may also be used by the defendant to obtain an order compelling the court to decertify the class or remove the named class representatives.

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Generally, proof of service on each respondent and real party in interest of a copy of a petition that seeks an alternative writ must accompany the petition when it is offered for filing. However, the court may, in its discretion and for good cause, grant the application for the writ ex parte [*Code Civ. Proc. § 1107*; *see* Ch. 358, *Mandate and Prohibition*]. If no alternative writ is sought, proof of service of a copy of the petition need not accompany the application, but proof of service of a copy of the filed petition must be lodged with the court before a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

Because the petition seeks review of a trial court ruling, it must also be accompanied by a record adequate to permit review, including (1) copies of the ruling from which the petition seeks relief, (2) copies of all documents and exhibits submitted to the trial court supporting and opposing the petitioner's position, and (3) any other documents or portions of documents submitted to the trial court that are necessary for a complete understanding of the case and the ruling under review [*Cal. Rules of Ct., Rule 8.486(b)(1)(A)-(C)*; *see Cal. Rules of Ct., Rule 8.486(c)* (form of supporting documents)]. In exigent circumstances, these documents may be omitted if counsel (or the petitioner, if unrepresented) files a declaration explaining the urgency and the circumstances making the documents unavailable and fairly summarizing their substance [*Cal. Rules of Ct., Rule 8.486(b)(2)*].

The record must also include a reporter's transcript of the oral proceedings that resulted in the ruling under review [*Cal. Rules of Ct., Rule 8.486(b)(1)(D)*]. If a reporter's transcript is unavailable, the record must include a declaration by counsel (or the petitioner, if unrepresented) stating that a transcript has been ordered and is expected to be filed on a certain date, or if no transcript is available, explaining its unavailability and fairly summarizing the proceedings, including the parties' arguments and any statement by the court supporting its ruling [*Cal. Rules of Ct., Rule 8.486(b)(3)*]. If the petitioner does not submit the required record or explanations, or does not present facts sufficient to excuse the failure to submit them, the court may summarily deny the petition [*Cal. Rules of Ct., Rule 8.486(b)(4)*].

The petition must also be accompanied by a Certificate of Interested Entities or Persons [*see Cal. Rules of Ct., Rule 8.208*]. Generally, if the petitioner knows of any other person or entity that has a financial or other interest in the

outcome of the proceeding that the petitioner reasonably believes the justices of the appellate court should consider in determining whether to disqualify themselves under the Code of Judicial Ethics, the petitioner's certificate must list that entity or person and identify the nature of the interest of the person or entity [*Cal. Rules of Ct., Rule 8.208(e)(2)*; *see also Cal. Rules of Ct., Rule 8.208(e)(1)* (if party is entity as defined by *Cal. Rules of Ct., Rule 8.208(c)(2)*, that party's certificate must list any other entity or person that party knows has ownership interest of 10 percent or more in that party)]. If the petitioner knows of no entity or person that must be listed, the petitioner must so state in the certificate [*Cal. Rules of Ct., Rule 8.208(e)(3)*].

[3] Contents of Petition

A petition for a writ of mandate should allege facts showing (1) that the petitioner is a beneficially interested party (Paragraph 5) [*Funeral Directors Asso. v. Board of Funeral Directors & Embalmers (1944) 67 Cal. App. 2d 311, 313, 154 P.2d 39]* ; (2) that proper grounds exist (Paragraphs 6-9) [*see* Code Civ. Proc. § 1085] compelling performance of an act that the law specially enjoins; and (3) that the petitioner has no plain, speedy, and adequate remedy in the ordinary course of law (Paragraph 8) [*see Code Civ. Proc. § 1086*].

If the petition seeks review of trial court proceedings that are also the subject of a pending appeal, the title of the petition must include the notation "Related Appeal Pending," and the first paragraph must set forth the title, superior court docket number, and appellate court docket number, if any, of the pending appeal [*Cal. Rules of Ct., Rule 8.486(a)(3)*]. This information is provided in Paragraph 1 of this form.

[4] Alternative Writ

The wording of the alternative writ of mandate is dictated by the court and the writ is usually prepared by the court. For a form of alternative writ of mandate, if counsel is requested to prepare the writ, see Ch. 358, *Mandate and Prohibition* .

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Chapter 120 CLASS ACTIONS *
PART V. FORMS

12-120 California Forms of Pleading and Practice--Annotated § 120.57

§ 120.57 Declaration in Support of Motion to Dismiss Class Action--Settlement of Underlying Dispute

[1] FORM Declaration in Support of Motion to Dismiss Class Action--Settlement of Underlying Dispute

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
individually and on behalf of all others similarly situated,	)	DECLARATION OF _____ [*name*] IN SUPPORT OF MOTION FOR DISMISSAL OF CLASS ACTION
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
[*et al.*,]	)	Judge: _____
Defendant[s].	)	Date Action Filed: _____
	)	Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ [*identify moving party or make other statement as appropriate*].

2. _____ [*Set forth facts of settlement, e.g.*, On _____ (*date*), plaintiff and defendant in the above-entitled action reached agreement under which defendant will pay to plaintiff $_____ as a class fund for distribution to class members as shall be determined by the Court. In consideration of this amount, plaintiff agreed to dismiss the above-entitled action against defendant (with prejudice). A copy of the settlement

agreement is attached to this declaration and incorporated by reference as though fully set forth herein.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form is for use to support a motion requesting dismissal of a class action on the grounds that the parties have settled the underlying dispute [*see Code Civ. Proc. § 2015.5* (format for declaration under penalty of perjury)]. The declaration is intended to accompany the mandatory Judicial Council form of a request for voluntary dismissal [*see Code Civ. Proc. § 581*]. For an illustration of that form and discussion of dismissal generally, see Ch. 212, *Dismissal* .

[3] Contents of Declaration

The declaration must clearly state whether consideration, direct or indirect, is being given for the dismissal and must describe the consideration in detail [*Cal. Rules of Ct., Rule 3.770(a)*]. The court may grant the request without a hearing. If the request is disapproved, notice of tentative disapproval must be sent to the attorneys of record, and any party may seek a hearing on the request within 15 calendar days of the service of the notice of tentative disapproval. If no hearing is sought within that period, the request for dismissal is deemed denied [*Cal. Rules of Ct., Rule 3.770(b)*].

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
Chapter 121 COMMON COUNTS

12-121 California Forms of Pleading and Practice--Annotated 121.syn

§ 121.syn Synopsis to Chapter 121: COMMON COUNTS

§ 121.01 Scope

§ 121.02 Cross References

§§ 121.03-121.09 [Reserved]

§ 121.10 Governing Law

§ 121.11 History and Definition

§ 121.12 Generic Types of Common Counts

§ 121.13 Effect of Express Contract

[1] When Common Counts May be Pleaded

[2] When Common Counts May Not be Pleaded

[3] When Defendant's Obligation Is Conditional

[4] When Plaintiff's Obligation Is to Fulfill Condition Precedent Before Pleading

§ 121.14 Waiver of Tort and Use of Common Counts to Sue on Implied Contract

[1] In General

[2] Particular Count Elected Affects Amount of Recovery

§ 121.15 Statute of Limitations

§ 121.16 Allegations in Complaint

[1] In General

[2] Demand

[3] Consideration and Promise

[4] Date of Indebtedness

[5] When Fraud Is Pleaded as Common Count

[6] When Claim Is Based on Express Contract

§ 121.17 Answer

[1] When General Denial Is Sufficient

[2] When Special Pleading Is Required

§ 121.18 Consolidation of Actions

§ 121.19 Joinder of Common and Specifically Pleaded Counts

§ 121.20 Demurrers to Common Counts

§ 121.21 Evidence

[1] Implied Contract as Evidence

[2] Special Contract as Evidence

§ 121.22 Burden of Proof; Defenses

§ 121.23 Particular Counts Generally

§ 121.24 Indebitatus Counts (Counts for Fixed Amount)

[1] Money Had and Received

[a] In General

[b] When Action Is Available

[c] Allegations When Pleading Money Had and Received; When Demand Is Required

[d] Defenses

[2] Money Lent

[3] Money Paid

[4] Money Lent and Money Paid Distinguished

[5] Work and Labor (Services)

[a] In General

[b] Allegations When Pleading Work and Labor (Services)

[6] Goods Sold and Delivered

§ 121.25 Quantum Counts (Counts for Reasonable Value)

[1] In General

[2] Quantum Meruit (Services)

[a] In General

[b] When Action Is Available

[c] Allegations When Pleading Quantum Meruit (Services)

[d] Defenses

[3] Quantum Valebant (Goods Sold)

§ 121.26 Bill of Particulars

[1] In General

[2] When Procedure Is Available

[3] Distinguished From Discovery

[4] Effect of Bill

[5] Procedure to Obtain Bill

[a] Defendant's Demand

[b] Form and Contents

[c] Delivery of Account by Plaintiff

[6] Motion for Further Bill of Particulars

[7] Motion to Preclude Introduction of Evidence at Trial for Failure to Deliver Bill

§§ 121.27-121.39 [Reserved]

§ 121.40 California Points and Authorities

§ 121.41 State Statutes

§ 121.42 Decisions

[1] Governing Law

[2] Nature of Common Count Action

[3] Effect of Express Contract

[a] When Common Counts May Be Pleaded

[b] When Common Counts May Not Be Pleaded

[c] When Defendant's Obligation Is Conditional

[4] Waiver of Tort and Use of Common Counts to Sue on Implied Contract

[5] Mistake of Fact

[6] Statute of Limitations

[7] Allegations in Complaint

[8] Answer

[9] Consolidation of Actions

[10] Joinder of Common and Specifically Pleaded Counts

[11] Demurrers

[12] Evidence

[13] Burden of Proof

[14] Measure of Damages

[15] Defenses

[a] In General

[b] Statute of Limitations

[16] Indebitatus Counts (Counts for Fixed Amount)

[a] Goods Sold and Delivered

[b] Money Had and Received

[c] Money Lent

[d] Money Paid

[e] Work and Labor (Services)

[17] Quantum Counts (Counts for Reasonable Value)

[a] Quantum Meruit

[b] Quantum Valebant

[18] Book Account

[19] Bill of Particulars

§ 121.43 Law Reviews

§ 121.44 Text References

§§ 121.45-121.49 [Reserved]

§ 121.50 Judicial Council Trial Court Pleading Form [Cal. Rules of Ct., Rule 1.45(a)]

[1] FORMS

[a] Complaint Based on Contract [Cal. Rules of Ct., Rule 1.45(a), (b); Judicial Council Form PLD-C-001]

[b] Common Counts Cause of Action (Attachment to Complaint on Contract) [Cal. Rules of Ct., Rule 1.45(a), (b); Judicial Council Form PLD-C-001(2)]

[2] Use of Forms

[3] Use of Judicial Council Form Optional

[4] Attachment of Common Counts Cause of Action to Complaint

[5] Prayer

[6] Statutes of Limitations in Common Counts Attachment

[7] Appropriate Count on Common Counts Attachment

[8] Amount Due and Prejudgment Interest

[9] Attorney's Fees

[10] Other Allegations

[11] Verification

[12] Cross References

§ 121.51 Complaint for Money Had and Received (Indebitatus Assumpsit)

[1] FORM

[2] Use of Form

[3] Allegations

[4] Joinder of Counts

[5] Jurisdiction

[6] Verification

[7] Venue

[8] Special Rules for Actions Involving Installment Sales, Automotive Sales, and Other Consumer Obligations

§ 121.52 Complaint to Recover Amount of Overpayment Made Under Mistake of Fact; First Count Based on Implied Contract, Second Count Based on Common Count for Money Had and Received [Civ. Code § 1577]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 121.53 Complaint for Money Lent (Indebitatus Assumpsit)

[1] FORM

[2] Use of Form

[3] Allegations

§ 121.54 Complaint for Money Paid (Indebitatus Assumpsit)

[1] FORM

[2] Use of Form

[3] Allegations

§ 121.55 Complaint for Work, Labor, Services and Materials at Agreed Price (Indebitatus Assumpsit)

[1] FORM

[2] Use of Form

[3] Allegations

[4] Amount of Recovery

§ 121.56 Complaint for Goods Sold and Delivered at Agreed Price (Indebitatus Assumpsit)

[1] FORM

[2] Use of Form

[3] Allegations

§ 121.57 Complaint for Reasonable Value of Work, Labor, and Services (Quantum Meruit)

[1] FORM

[2] Use of Form

[3] Allegations

[4] Recovery under Quantum Meruit

§ 121.58 Complaint for Reasonable Value of Goods Sold and Delivered (Quantum Valebant)

[1] FORM

[2] Use of Form

[3] Allegations

§ 121.59 Demand for Bill of Particulars [Code Civ. Proc. § 454]

[1] FORM

[2] Use of Form

[3] Availability of Bill of Particulars

[4] Time for Making Demand for Bill of Particulars

[5] Form of Demand

[6] Demand Generally Not Filed With Court

§ 121.60 Bill of Particulars [Code Civ. Proc. § 454]

[1] FORM

[2] Use of Form

[3] Considerations in Furnishing Bill of Particulars

[4] Verification

[5] Bill Generally Not Filed With Court

§ 121.61 Notice of Motion for Further Bill of Particulars [Code Civ. Proc. § 454]

[1] FORM

[2] Use of Form

[3] Cross References

§ 121.62 Declaration Under Penalty of Perjury in Support of Notice of Motion for Further Bill of Particulars [Code Civ. Proc. § 454]

[1] FORM

[2] Use of Form

[3] Cross References

§ 121.63 Order for Further Bill of Particulars [Code Civ. Proc. § 454]

[1] FORM

[2] Use of Form

[3] Cross References

§ 121.64 Notice of Motion to Preclude Introduction of Evidence for Failure to Provide Bill of Particulars [Code Civ. Proc. § 454]

[1] FORM

[2] Use of Form

[3] Cross References

§ 121.65 Declaration Under Penalty of Perjury in Support of Notice of Motion for Order to Preclude Introduction of Evidence for Failure to Furnish Bill of Particulars [Code Civ. Proc. § 454]

[1] FORM

[2] Use of Form

[3] Cross References

§ 121.66 Declaration Under Penalty of Perjury in Opposition to Notice of Motion for Order to Preclude

Introduction of Evidence for Failure to Provide Bill of Particulars [Code Civ. Proc. § 454]

[1] FORM

[2] Use of Form

[3] Cross References

§ 121.67 Order to Preclude Introduction of Evidence for Failure to Provide Bill of Particulars [Code Civ. Proc. § 454]

[1] FORM

[2] Use of Form

[3] Cross References

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Chapter 121 COMMON COUNTS

PART I. SCOPE

12-121 California Forms of Pleading and Practice--Annotated § 121.01

§ 121.01 Scope

This chapter discusses the various forms for use in actions pleaded on the common counts. The chapter focuses on the common counts for money lent, money paid, money had and received, goods sold and delivered, and recovery of an agreed sum or of the reasonable value of work, labor, services, and materials. In addition to those common counts discussed in this chapter, the common counts also include counts for account stated and on open account. These counts are covered in Ch. 8, *Accounts Stated and Open Accounts* .

This chapter includes illustrations of the Judicial Council forms for a complaint based on contract and for a cause of action based on the common counts, to be attached to that complaint [§ 121.50]. It also includes the following drafted forms:

- Complaint for money had and received (indebitatus assumpsit) [§ 121.51].
- Complaint to recover money paid by mistake [§ 121.52].
- Complaints for money lent and money paid (indebitatus assumpsit) [§§ 121.53, 121.54].
- Complaint for work, labor, services, and materials at an agreed price (indebitatus assumpsit) [§ 121.55].
- Complaint for goods sold and delivered at an agreed price (indebitatus assumpsit) [§ 121.56].
- Complaint for the reasonable value of services (quantum meruit) [§ 121.57].
- Complaint for the reasonable value of goods sold and delivered (quantum valebant) [§ 121.58].

Other forms include the following:

- Demand of a bill of particulars [§ 121.59].

- Bill of particulars [§ 121.60].

- Notice of motion [§ 121.61] and supporting declaration [§ 121.62] for an order requiring a further bill of particulars.

- Order to provide, or denying the motion for, a further bill of particulars [§ 121.63].

- Notice of motion to preclude the introduction of evidence at trial for failure to furnish a bill or further bill of particulars [§ 121.64] and supporting [§ 121.65] and opposing [§ 121.65] declarations.

- Order to preclude the introduction of evidence at trial for failure to furnish a bill of particulars [§ 121.67].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesEquitable AccountingsGeneral OverviewContracts LawBreachCauses of ActionAssumpsitContracts LawBreachCauses of ActionMoney Had & Received

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12-121 California Forms of Pleading and Practice--Annotated § 121.02

§ 121.02 Cross References

For discussion of the common count of account stated and open book account, see Ch. 8, *Accounts Stated and Open Accounts*

For alternative allegations of the parties' capacity, residence, fictitious name, and agency relationships, see Ch. 20, *Allegations Commonly Used*

For discussion of the effect of verification of a complaint on the answer, refer to Ch. 26, *Answers*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For general information relating to the use of Judicial Council complaint forms, see Ch. 123, *Complaints and Cross Complaints* .

For discussion of the Judicial Council form *Complaint--Contract*, and instructions on how to complete the form, see Ch. 140, *Contracts*

For discussion of attorney's fees awards pursuant to a contract and forms for their recovery, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

For alternative forms of prayers, see Ch. 420, *Prayers*

For coverage of burden of proof, see Ch. 551, *Trial*

For alternative forms of verification, see Ch. 572, *Verification*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedureRemediesEquitable AccountingsGeneral Overview

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12-121 California Forms of Pleading and Practice--Annotated §§ 121.03-121.09

[Reserved]

§§ 121.03[Reserved]

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12-121 California Forms of Pleading and Practice--Annotated § 121.10

§ 121.10 Governing Law

As an exception to the principles of modern code pleading [*see § 121.11*], common counts are pleadings generally governed by case law [*Pike v. Zadig (1915) 171 Cal. 273, 276, 152 P. 923]* . Many of the precedent decisions on common count pleadings are quite old. However, caution should be exercised in relying on older authorities, even if a particular case has not been overruled, because there may have been developments in the law, or in public policy, that would cause a modern court to find the implications of the case to be obsolete [*see, e.g.,* *Earhart v. William Low Co. (1979) 25 Cal. 3d 503, 506, 514, 158 Cal. Rptr. 887, 600 P.2d 1344]* (rejecting notion that compliance with defendant's request, when defendant is not direct beneficiary, is insufficient to support recovery on quantum meruit)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewContracts LawBreachCauses of ActionAssumpsitContracts LawBreachCauses of ActionMoney Had & Received

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12-121 California Forms of Pleading and Practice--Annotated § 121.11

§ 121.11 History and Definition

The common counts were historically used in the common law action of assumpsit (or promise) to plead an indebtedness. An action of assumpsit was brought on a contract implied by law, rather than on an express contract, to require a defendant to pay to a plaintiff what was in good conscience owed the plaintiff [*see* Corbin on Contracts, vol. 1, § 20].

A "common count" is an abbreviated, stereotyped statement to the effect that the defendant is indebted to the plaintiff for a particular sum, for a particular reason, such as "money had and received," "goods sold and delivered," "work and labor done," or "materials furnished" [*see Philpott v. Superior Court (1934) 1 Cal. 2d 512, 518, 36 P.2d 635]* . Thus, a common count claim alleges the indebtedness not by stating the specific facts of the case, but by stating generalized facts that imply a legal conclusion.

Courts generally use the terms "assumpsit" and "common counts" interchangeably [*see* Corbin on Contracts, vol. 1, §§ 19, 20; vol. 2, § 330].

The form of the common count does not appear to conform to the requirements of code pleading [*see Code Civ. Proc. § 425.10(a)(1)* (requirements that facts constituting cause of action be stated in ordinary and concise language)]. Nevertheless, California courts, recognizing the familiarity of lawyers with this abbreviated form of pleading, have expressly sanctioned its continued use [*see, e.g., Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 793, 256 P.2d 947* ; *Pike v. Zadig (1915) 171 Cal. 273, 276, 152 P. 923]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionAssumpsitContracts LawBreachCauses of ActionMoney Had & ReceivedContracts LawTypes of ContractsGeneral Overview

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12-121 California Forms of Pleading and Practice--Annotated § 121.12

§ 121.12 Generic Types of Common Counts

There are two generic types of counts: (1) indebitatus counts, or counts for fixed amounts; and (2) quantum counts, or counts for the reasonable value of services or materials. Indebitatus counts include money had and received, money lent or paid, work and labor, and goods sold and delivered. Indebitatus counts also include counts for account stated and on open account. These counts are detailed in Ch. 8, *Accounts Stated and Open Accounts* and are not discussed here. Quantum counts include quantum meruit ("as much as he deserves") and quantum valebant ("as much as they were worth") [*see* Black's Law Dictionary 1119 (5th ed. 1979)].

The particular types of common counts in general use are *discussed under §§ 121.23 -121.25*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesEquitable AccountingsGeneral OverviewContracts LawBreachCauses of ActionAssumpsitContracts LawBreachCauses of ActionMoney Had & ReceivedContracts LawRemediesEquitable ReliefQuantum Meruit

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12-121 California Forms of Pleading and Practice--Annotated § 121.13

§ 121.13 Effect of Express Contract

[1] When Common Counts May be Pleaded

The general rule that a common count ordinarily cannot be used in an action on an express contract is misleading. The extensive use of common counts in actions for strict quasi-contractual recovery confirms a more realistic rule that a common count is proper whenever the plaintiff has performed an obligation to an express contract and what remains is the defendant's obligation to pay a sum of money due (as an indebtedness in a certain sum or for the reasonable value of services or goods furnished). It is immaterial whether the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract [*Kawasho Internat. (U.S.A.), Inc. v. Lakewood Pipe Service, Inc. (1983) 152 Cal. App. 3d 785, 793, 201 Cal. Rptr. 640* ; *see Castagnino v. Balletta (1889) 82 Cal. 250, 258, 23 P. 127* (express contracts); *see also Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 793, 256 P.2d 947* (implied-in-fact contracts)].

The use of a common count pleading is appropriate with an express contract when the contract is no longer executory (that is, it has been fully performed) and the only remaining obligation is the defendant's duty to pay a sum certain [*Ferro v. Citizens Nat. Trust & Sav. Bank (1955) 44 Cal. 2d 401, 282 P.2d 849* ; *see, generally,* King, *The Use of the Common Counts in California, 14 S. Cal. L. Rev. 288 (1941)*].

A common count also may be used when complete performance has been prevented by the defendant, or when the contract has been modified or deviated from by consent of the parties, and the plaintiff has fully performed [*Rains v. Arnett (1961) 189 Cal. App. 2d 337, 343-344, 11 Cal. Rptr. 299]* . A common count is also used in an action for restitution based on rescission for innocent misrepresentation [*Crocker-Anglo Nat. Bank v. Kuchman (1964) 224 Cal. App. 2d 490, 496, 36 Cal. Rptr. 806]* .

In California, contrary to the general rule that common counts may be used only for the recovery of money [*see § 121.13[2]*], when property has been converted, the plaintiff may elect to waive the tort and sue in assumpsit, even if the defendant has not sold or converted the property into money [*Los Angeles Drug Co. v. Superior Court (1936) 8 Cal. 2d 71, 74, 63 P.2d 1124* ; *see § 121.14[1]*].

[2] When Common Counts May Not be Pleaded

Common counts may not be used in an action based on an express contract when the contract remains "executory," that is, when the contract has not been fully performed by the plaintiff [*Castagnino v. Balletta (1889) 82 Cal. 250, 258, 23 P. 127]* . Similarly, common counts may not be used when the recovery sought is something other than the payment of money [*Allen v. Merchants Elec. Co. (1960) 54 Cal. 2d 67, 69, 4 Cal. Rptr. 527, 351 P.2d 799* ; *see Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 793, 256 P.2d 947* (plaintiff sought specific performance); *King v. San Jose Pacific Bldg. & Loan Asso. (1940) 41 Cal. App. 2d 705, 708, 107 P.2d 442* (plaintiff sought damages for breach)].

When the relief sought varies as slightly as delivery of a promissory note instead of money, use of the common counts also is improper [*Willett & Burr v. Alpert (1919) 181 Cal. 652, 659-660, 185 P. 976* ; *but see Los Angeles Drug Co. v. Superior Court (1936) 8 Cal. 2d 71, 74, 63 P.2d 1124* ; *see also § 121.13[1]*].

Further, even though an express contract was fraudulently procured, no action in implied contract will lie until the express contract is disaffirmed [*Bechtel v. Chase (1909) 156 Cal. 707, 712, 106 P. 81* (plaintiff induced by fraud to part with personal property in exchange for worthless stock may not proceed on common count for goods sold and delivered for agreed sum of money); *see Lloyd v. Williams (1964) 227 Cal. App. 2d 646, 649, 38 Cal. Rptr. 849* (discussion of fraud as basis for disaffirmation of contract and action in assumpsit on implied promise in return for consideration)].

When a contract is illegal and unenforceable, the guilty party generally may not recover the consideration due it on a quasi-contract or common count [*see, e.g., Donaldson v. Abot (1987) 194 Cal. App. 3d 817, 820-821, 239 Cal. Rptr. 801* (failure to comply with Automotive Repair Act requirement for written estimate); *Bennett v. Hayes (1975) 53 Cal. App. 3d 700, 703-704, 125 Cal. Rptr. 825* (failure to comply with Automotive Repair Act requirement for written estimate)]. However, when services are rendered under a contract that is unenforceable as against public policy, but those services are not themselves prohibited, quantum meruit may be allowed [*Huskinson & Brown v. Wolf (2004) 32 Cal. 4th 453, 463, 9 Cal. Rptr. 3d 693, 84 P.3d 379]* . For example, although an action for breach of contract was unavailing because it was based on a contract that was partly illegal and consequently wholly unenforceable (specifically, plaintiff was operating as an unregistered attorney referral service in violation of *Bus. & Prof. Code § 6155*), the plaintiff could recover quantum meruit for lawful services (that is, services other than attorney referrals) performed pursuant to that contract [*Selten v. Hyon (2007) 152 Cal. App. 4th 463, 471-472, 60 Cal. Rptr. 3d 896* (recovery could not exceed amount that plaintiff would have recovered under contract if it had been enforceable, and since contract entitled plaintiff to fee only if referred lawyer won other party's case, plaintiff's quantum meruit recovery could be paid only from whatever judgment or settlement proceeds that lawyer obtained for other party)].

[3] When Defendant's Obligation Is Conditional

Some early authority suggests that a common count cannot be used when the defendant's obligation is conditional [*see Davisson v. East Whittier Land Etc. Co. (1908) 153 Cal. 81, 84-85, 96 P. 88* (failure to initiate arbitration as required by specific contract clause held to be failure of condition precedent, thereby preventing action on common counts for work performed); *Roche v. Baldwin (1902) 135 Cal. 522, 528, 65 P. 459* (action in quantum meruit to recover for legal services rendered dismissed when defendant's fixing compensation due plaintiff was found to be condition precedent to contract)]. Other early decisions also upheld the use of common counts in actions when the defendant's obligation to perform was conditioned on third party approval, such as architect's or engineer's certificates, even when the plaintiff failed to aver waiver or compliance of the conditions [*Castagnino v. Balletta (1889) 82 Cal. 250, 260-261, 23 P. 127* ; *Donegan v. Houston (1907) 5 Cal. App. 626, 631, 90 P. 1073]* .

More recent decisions are also divided. Certain decisions have criticized the necessity of pleading any special facts in an action on the common counts, including satisfaction of condition precedents [*see Oliver v. Campbell (1954) 43 Cal. 2d 298, 305, 273 P.2d 15* (cases enumerated); *Brooks v. Van Winkle (1958) 161 Cal. App. 2d 734, 739-740, 327 P.2d 151* (criticizing *Roche v. Baldwin (1902) 135 Cal. 522, 528, 65 P. 459*)]. Other decisions have upheld the requirement that the plaintiff allege and prove compliance with a condition precedent [*Draper v. Patterson (1958) 156 Cal. App. 2d*

606, 608-609, 319 P.2d 694 see Sunniland Fruit, Inc. v. Verni (1991) 233 Cal. App. 3d 892, 899, 284 Cal. Rptr. 824 ; *Jeschke v. Lamarr (1965) 234 Cal. App. 2d 506, 511, 44 Cal. Rptr. 416* (if agreement expressly states that existence of fund is condition precedent to obligation of repayment, and if, through no fault of promisor, fund does not materialize, promisor is not obligated to pay)].

[4] When Plaintiff's Obligation Is to Fulfill Condition Precedent Before Pleading

A special situation that requires pleading the condition precedent in an action brought on the common counts arises in actions against governmental agencies when the filing of a claim is a statutory condition precedent to an action. In a suit against a county, it has been held that although an action for money had and received would otherwise be sufficient, the typical common count would not suffice in this situation because the filing of the claim is an essential element of the cause of action [*Union Bk. & Tr. Co. v. Los Angeles Co. (1934) 2 Cal. App. 2d 600, 606, 38 P.2d 442]* . The same reasoning applies to an action against an estate when the filing of the claim is a statutory prerequisite [*Parker v. Solomon (1959) 171 Cal. App. 2d 125, 136-137, 340 P.2d 353* (filing of proper creditor's claim is prerequisite to action in quantum meruit seeking to recover reasonable value of services allegedly rendered decedent)]. Thus, if the relevant statute specifies the filing of a claim before bringing suit against the government, the condition precedent should be pleaded in an action brought on the common counts. For general evidentiary and proof considerations in pleading the common counts, see *§§ 121.21, 121.22*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsConditions PrecedentContracts LawBreachCauses of ActionAssumpsitContracts LawBreachCauses of ActionMoney Had & ReceivedContracts LawTypes of ContractsExpress ContractsGovernmentsLocal GovernmentsClaims By & Against

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12-121 California Forms of Pleading and Practice--Annotated § 121.14

§ 121.14 Waiver of Tort and Use of Common Counts to Sue on Implied Contract

[1] In General

In some circumstances, a plaintiff may elect to waive a cause of action in tort and instead proceed on a contract implied by law on the part of the tortfeasor to pay a just remuneration for damages sustained by the plaintiff [*Gold v. Los Angeles Democratic League (1975) 49 Cal. App. 3d 365, 376, 122 Cal. Rptr. 732* (common count is defective if it does not allege any consideration moving from plaintiff to defendant)].

Although there has been some opposition to the use of common counts in waiver of tort cases, the right seems firmly established in California [*see, e.g.,* *McCall v. Superior Court (1934) 1 Cal. 2d 527, 530-531, 36 P.2d 642* (plaintiff may waive tort and sue on common counts of indebitatus assumpsit or quantum valebant for return of consideration paid as result of fraudulent representations); *Philpott v. Superior Court (1934) 1 Cal. 2d 512, 525, 36 P.2d 635* (plaintiff may waive action in tort for fraud and sue in assumpsit on promise implied by law for return of consideration paid)].

Which common count is appropriate depends on the nature of the defendant's act. For example, the common count for money had and received is appropriate when there is fraud [*Minor v. Baldridge (1898) 123 Cal. 187, 189-190, 55 P. 783]* . It is also proper if money has been paid under a mistake of fact or constructive fraud [*County of Santa Cruz v. McLeod (1961) 189 Cal. App. 2d 222, 228, 11 Cal. Rptr. 249]* . The count for goods sold and delivered may be used when the defendant has converted goods and the plaintiff elects to treat the theft as a contract of sale and sue on a fictitious promise to pay the value of the property [*Bank of America Nat'l Trust & Sav. Asso. v. Hill (1937) 9 Cal. 2d 495, 498-499, 71 P.2d 258* ; *Hallidie v. Enginger (1917) 175 Cal. 505, 508, 166 P. 1]* . However, the common count may not be used if there is no basis for restitution [*Gold v. Los Angeles Democratic League (1975) 49 Cal. App. 3d 365, 376-377, 122 Cal. Rptr. 732* (no repayment could be implied in tortious interference with prospective advantage)].

[2] Particular Count Elected Affects Amount of Recovery

If the plaintiff elects to proceed using common counts, it is essential to determine which count affords the maximum recovery. For example, in a case of conversion in which the plaintiff relies on the count for goods sold and delivered, the plaintiff may recover the value of the property [*Chittenden v. Pratt (1891) 89 Cal. 178, 184, 26 P. 626]* .

However, if the plaintiff elects the count for money had and received, recovery is limited to the defendant's actual proceeds from the sale of the property [*French v. Robbins (1916) 172 Cal. 670, 679, 158 P. 188]* , after deducting necessary charges and commissions [*Lubert v. Chauviteau (1853) 3 Cal. 458, 463* ; *Shahood v. Cavin (1957) 154 Cal. App. 2d 745, 750, 316 P.2d 700* (in action in assumpsit for proceeds of sale of converted property, it was error to award plaintiff present value of balance due on sale contract, in addition to amount collected by defendant from buyer)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionAssumpsitContracts LawBreachCauses of ActionMoney Had & ReceivedContracts LawRemediesElection of RemediesContracts LawTypes of ContractsImplied-in-Law ContractsTortsProcedureGeneral Overview

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12-121 California Forms of Pleading and Practice--Annotated § 121.15

§ 121.15 Statute of Limitations

The statute of limitations relating to actions of assumpsit, rather than tort, generally applies when there is a waiver of tort and an action in assumpsit [*Ponti v. Farrell (1961) 194 Cal. App. 2d 676, 682-683, 15 Cal. Rptr. 500]* . However, a determination of the appropriate limitation period may depend on the substance of the action and the nature of the right violated, rather than on the form of the action [*Ponti v. Farrell (1961) 194 Cal. App. 2d 676, 683, 15 Cal. Rptr. 500]* .

A four-year statute of limitations applies to an open book account and to an account stated based on an account in a writing, between the plaintiff and defendant, in which it was agreed that the defendant was indebted to plaintiff [*Code Civ. Proc. § 337*; *see Code Civ. Proc. § 337a* (book account defined)].

The indebitatus counts for money had and received, work and labor (services and materials), goods sold and delivered, money lent, money paid, and the quantum counts for the reasonable value of services or goods sold are subject to a four-year statute of limitations if the obligation is founded on a writing [*Code Civ. Proc. § 337*]. They are subject to a two-year statute of limitations if the obligation is oral or implied in fact [*Code Civ. Proc. § 339*; *see Maglica v. Maglica (1998) 66 Cal. App. 4th 442, 452-454, 78 Cal. Rptr. 2d 101* (claim of unmarried cohabitant who sought to recover reasonable value of services rendered to business solely owned by other cohabitant was held not to accrue until relationship ended for purposes of *Code Civ. Proc. § 337*)].

The statute of limitations for an action in assumpsit generally begins to run when the defendant receives the money from the plaintiff [*Tabata v. Murane (1944) 24 Cal. 2d 221, 226, 148 P.2d 605]* . However, if a demand is necessary [*see § 121.16[2]*], the statute begins to run when the demand is made [*Rose v. Foord (1892) 96 Cal. 152, 154 , see Thomas v. Pacific Beach Co. (1896) 115 Cal. 136, 142-143, 46 P. 899* (requiring that demand be made within reasonable time)]. Further, in an action based on the right to recover money under an executory contract because the other party failed to perform, the statute of limitations does not begin to run until the injured party elects to no longer rely on the contract and to sue for the money paid under it [*Richter v. Union Land and Stock Co. (1900) 129 Cal. 367, 375, 62 P. 39]* . In cases involving fraud or mistake, the statute of limitations does not begin to run until the aggrieved party discovers the facts constituting the fraud or mistake [*Code of Civ. Proc. § 338(d)*], although when failure to discover fraud is due to lack of diligence, the statute begins to run from the time the fraud should have been discovered

[*Snow v. A.H. Robins Co. (1985) 165 Cal. App. 3d 120, 129, 211 Cal. Rptr. 271* ; *see Graham v. Hansen (1982) 128 Cal. App. 3d 965, 972-973, 180 Cal. Rptr. 604]* .

For discussion of the statute of limitations as a defense to an action on the common counts, see *§ 121.22*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionAssumpsitContracts LawBreachCauses of ActionMoney Had & ReceivedGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsProcedureGeneral Overview

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12-121 California Forms of Pleading and Practice--Annotated § 121.16

§ 121.16 Allegations in Complaint

[1] In General

Under current law there are three essential allegations for a common count [*First Interstate Bank v. State of California (1987) 197 Cal. App. 3d 627, 635, 243 Cal. Rptr. 8* ; *Allen v. Powell (1967) 248 Cal. App. 2d 502, 510, 56 Cal. Rptr. 715]* :

- A statement of indebtedness in a certain sum.
- Consideration given (that is, goods sold or services provided).
- Nonpayment.

Under some circumstances, nonpayment need not be directly alleged. For example, if the allegation of nonpayment is implied, or alleged in the form of a conclusion, it is sufficient absent a special demurrer that specifically points out the defect [*Fancher v. Brunger (1949) 94 Cal. App. 2d 727, 730-731, 211 P.2d 633]* . A complaint that alleges that no part of the amount sued for has been paid by the defendant also is sufficient [*Arocena v. Sawyer (1923) 60 Cal. App. 581, 585, 213 P. 523]* .

Although the courts have upheld common count pleadings that allege only indebtedness, consideration, and nonpayment, it is recommended that the allegations include the additional elements *discussed in § 121.16[2]* et seq. Specific allegations required in particular counts are detailed in the discussions of those counts, under §§ 121.23-121.25.

The California Judicial Council has approved a pleading form for a common count cause of action [*Cal. Rules of Ct., Rule 1.45(a), (b)*; Judicial Council Form PLD-C-001(2); *see § 121.50* (judicial council pleading form)].

[2] Demand

Although customarily alleged, a demand for payment is not required in the ordinary case; the complaint itself is the

demand [*Quimby v. Lyon (1883) 63 Cal. 394, 395* (money had and received); *Samuels v. Larrimore (1909) 11 Cal. App. 337, 339, 104 P. 1001* (money lent)]. When a demand for payment is required, the following demand was held to be sufficient: "[A]lthough often requested to do so, the defendant has neglected, failed, and refused to pay the plaintiff" [*Thresher v. Lopez (1921) 52 Cal. App. 219, 221, 198 P. 419]* . For discussion of when a demand is required, see *§ 121.24[1][c]*.

[3] Consideration and Promise

Under the code system of pleading, it is necessary only to allege the facts that constitute the cause of action. It is not necessary to allege either the consideration or the promise if either is implied as a legal conclusion from the facts pleaded [*McFarland v. Holcomb (1898) 123 Cal. 84, 86, 55 P. 761* ; *see* *Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 793, 256 P.2d 947* (allegation of promise to pay unnecessary as part of common count under code system of pleading); *but see* Smith v. Bentson (1932) (promise must be alleged if the facts do not justify implication of promise)]. Thus, allegations of goods sold and delivered to the defendant, services performed for the defendant, or money paid at the defendant's request, are sufficient for code pleading [*Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 793, 256 P. 2d 947]* .

However, a common count must directly state the legal relationship or principleon which the defendant's promise to pay to plaintiff is based when it cannot be implied from the facts or when the consideration was given to someone other than the defendant [*Vaughn v. Certified Life Ins. Co. (1965) 238 Cal. App. 2d 177, 181, 47 Cal. Rptr. 619]* .

In addition, when the plaintiff, having an action in tort, elects to waive the tort and sue in assumpsit [*see § 121.14[1]*], a common count must allege the consideration given by the plaintiff to the defendant on which to base an implied promise to repay, or the complaint will be defective [*Gold v. Los Angeles Democratic League (1975) 49 Cal. App. 3d 365, 376-377, 122 Cal. Rptr. 732* (common count may not be used if there is no basis for restitution, as in case of interference with prospective advantage); *see* *Enterprise Leasing Corp. v. Shugart Corp. (1991) 231 Cal. App. 3d 737, 748-749, 282 Cal. Rptr. 620* (common count based on unjust enrichment must show something moving to defendant)].

[4] Date of Indebtedness

It is not necessary to specify the times at which the indebtedness accrued [*Pleasant v. Samuels (1896) 114 Cal. 34, 38, 45 P. 998* ; *see* *Pike v. Zadig (1915) 171 Cal. 273, 277* (money had and received); *Moya v. Northrup (1970) 10 Cal. App. 3d 276, 280, 88 Cal. Rptr. 783* (money lent and money paid)]. In addition, it is not necessary to specify the date when services were rendered in an action to recover their reasonable value. Nevertheless, it is customary to specify the date or periods of indebtedness to establish the timeliness of the action under the statute of limitation [*Evans v. Zeigler (1949) 91 Cal. App. 2d 226, 230, 204 P.2d 902* ; *see § 121.15*]. However, any uncertainty or ambiguity in such an allegation may be attacked by demurrer [*Miller v. Brown (1951) 107 Cal. App. 2d 304, 307, 237 P.2d 320* ; *but see Moya v. Northrup (1970) 10 Cal. App. 3d 276, 283-284, 88 Cal. Rptr. 783* (special demurrer will not be sustained if there is no patent ambiguity; *Miller* distinguished on its facts)].

For discussion of allegations of other items of indebtedness, including receipt of money or value of services, see *§§ 121.24[1][c], 121.25[2][c]*.

[5] When Fraud Is Pleaded as Common Count

When a cause of action based on fraud or misrepresentation is pleaded as a common count, a complaint is sufficient when it pleads only the common count. However, this practice is contrary to the principle that the facts constituting an alleged fraud must be set forth with particularity [*J. C. Peacock, Inc. V. Hasko (1961) 196 Cal. App. 2d 353, 361-362, 16 Cal. Rptr. 518* (fraud may be proved under complaint for common count)].

[6] When Claim Is Based on Express Contract

When a cause of action under a common count is based on an express contract, the allegations must specify whether the contract was written or oral [*Moya v. Northrup (1970) 10 Cal. App. 3d 276, 283-284, 88 Cal. Rptr.783]* . However, former *Code Civ. Proc. § 430* [*see Code Civ. Proc. § 430.10(g)* (subjecting complaint to demurrer for failure to state whether contract on which action is based is oral or written)] was held not to apply to an action based on the common counts when the complaint was without ambiguity on its face [*Moya v. Northrup (1970) 10 Cal. App. 3d 276, 284, 88 Cal. Rptr. 783]* .

Apparently, an action brought under a common count as a result of deviation from the terms of the express contract should allege the contract, the modifications, and the plaintiff's performance under the contract, as modified [*see, e.g., Daley v. Russ (1890) 86 Cal. 114, 116-117, 24 P. 867]* . However, the complaint is not subject to demurrer for uncertainty if it shows clearly and with certainty the terms of the contract as modified [*White v. Soto (1890) 82 Cal. 654, 657, 23 P. 210]* .

Further, a complaint that does not show whether the plaintiff relies on an express contract for specified compensation or on an implied contract for the reasonable value of services is subject to demurrer for uncertainty [*Shade v. Sisson M. & L. Co. (1896) 115 Cal. 357, 367, 47 P. 135]* .

Legal Topics:

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§ 121.17 Answer

[1] When General Denial Is Sufficient

If the complaint is in the form of a common count, the defendant need not deny the allegations in the answer in any more specific language than that used by the plaintiff [*McDonald v. Pacific Debenture Co. (1905) 146 Cal. 667, 669, 80 P. 1090]* . Thus, for example, an answer may, but is not required to, specifically take issue with the indebtedness alleged by the plaintiff [*McDonald v. Pacific Debenture Co. (1905) 146 Cal. 667, 669, 80 P. 1090]* . Moreover, a general denial is sufficient to raise almost any defense, including some defenses that customarily require special pleading [*Interstate Group Administrators, Inc. v. Cravens, Dargan & Co. (1985) 174 Cal. App. 3d 700, 706, 220 Cal. Rptr. 250* (setoff)].

[2] When Special Pleading Is Required

Certain affirmative defenses must be specially pleaded. These include, for example, the defense of the statute of limitations [*McFarland v. Holcomb (1898) 123 Cal. 84, 87, 55 P. 761]* or estoppel and lack of capacity to sue [*Grove v. Charles W. Barrett Co. (1927) 87 Cal. App. 165, 168, 261 P. 739]* , as well as any new matter relied on by the defendant that was not put in issue by the plaintiff [*see Interstate Group Administrators, Inc. v. Cravens, Dargan & Co. (1985) 174 Cal. App. 3d 700, 706-707, 220 Cal. Rptr. 250]* .

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§ 121.18 Consolidation of Actions

The plaintiff may unite in the same complaint a cause of action for the breach of an express contract and a cause of action on a common count [*see Olmstead v. Dauphiny (1894) 104 Cal. 635, 640, 38 P. 505* (action to recover money under mistake of fact united with action on express contract for recovery of rent)]. However, only damages may be sought as a remedy under common counts.

Legal Topics:

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§ 121.19 Joinder of Common and Specifically Pleaded Counts

The plaintiff may elect to plead a single cause of action specifically on the facts or generally on the common counts [*Castagnino v. Balletta (1889) 82 Cal. 250, 258, 23 P. 127]* . Alternatively, the plaintiff may plead a cause of action as both a common count and a count on an express contract, without having to elect between them [*Philpott v. Superior Court (1934) 1 Cal. 2d 512, 518, 36 P.2d 635* ; *Leoni v. Delany (1948) 83 Cal. App. 2d 303, 308-309, 189 P.2d 517* (separately pleading both express agreement to compensate and common count for services rendered); *see Carnation Co. v. Marcevich (1960) 186 Cal. App. 2d 618, 620, 9 Cal. Rptr. 80* (plaintiff may plead count expressly facts, joined with common count based on same facts and seeking same recovery)]. When a common count is joined with one on the contract, it is up to the trier of fact to determine which count (if any) is supported by the evidence [*Haggerty v. Warner (1953) 115 Cal. App. 2d 468, 474-475, 252 P.2d 373]* .

Diverse common counts alleging different causes of action cannot be united in one count [*Buckingham v. Waters (1859) 14 Cal. 146, 147-148]* . However, a single cause of action may be pleaded in alternative counts [*Leeke v. Hancock (1888) 76 Cal. 127, 130, 17 P. 937* ; *see Hirschberg v. Rose (1934) 136 Cal. App. 653, 656, 29 P.2d 785* (when pleaded as separate counts, plaintiff may allege as many counts as desired to meet any possible phase of the evidence)]. Further, when the same cause of action is pleaded on several common counts, findings for the plaintiff on one count, without finding on the others, are sufficient to support a judgment for the plaintiff [*Leeke v. Hancock (1888) 76 Cal. 127, 130, 17 P. 937]* .

If a plaintiff pleads a specific count and a common count in the same action, and the specific count is defective, it is proper to sustain a demurrer to the common count as well [*Zumbrun v. University of Southern California (1972) 25 Cal. App. 3d 1, 14, 101 Cal. Rptr. 499* ; *see Hays v. Temple (1937) 23 Cal. App. 2d 690, 695, 73 P.2d 1248]* .

On the other hand, the plaintiff may seek recovery of more than one debt in a single common count [*see, e.g., Farwell v. Murray (1894) 104 Cal. 464, 466, 38 P. 199* (complaint to recover specified sum for work done and goods sold not demurrable for uncertainty for failure to distinguish amounts attributable to work and to goods); *McFarland v. Holcomb (1898) 123 Cal. 84, 86-87, 55 P. 761* (complaint on single cause of action for various services not demurrable for failure to state how much was due for each service)]. A defendant's remedy, if more particularity is desired, is to demand a bill of particulars [*Pike v. Zadig (1915) 171 Cal. 273, 277* ; *Lewin v. Merck & Co. (1962) 209 Cal. App. 2d*

131, 25 Cal. Rptr. 619 ; *see § 121.26*].

Although the practice of seeking recovery of more than one debt in a single common count is apparently permissible, it is not recommended. In one case, the court of appeals sustained the special demurrers of the defendants, stating that while the common count for work and labor had been properly pleaded, it should have been pleaded separately from the common count of money had and received [*Zumbrun v. University of Southern California (1972) 25 Cal. App. 3d 1, 9, 101 Cal. Rptr. 499* (interests of justice and its orderly administration required plaintiff to set forth separate theories in separate counts to facilitate their adjudication); *see § 121.20*].

Legal Topics:

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§ 121.20 Demurrers to Common Counts

Generally, a common count is not subject to demurrer [*McFarland v. Holcomb (1898) 123 Cal. 84, 87, 55 P. 761* (common counts good against general and special demurrers as to uncertainty, ambiguity, or failure to specify services rendered, times of performance, or amounts claimed)]. Thus, a common count for indebtedness for work done and material furnished defendant is sufficient against a demurrer even when it is not ascertainable which part of the claim is for labor and which part is for materials [*Jensen v. Dorr (1911) 159 Cal. 742, 746, 116 P. 553]* .

However, if the common count clearly appears to be based on the same cause of action as an insufficient specific count in an alternative pleading, the entire complaint is demurrable [*Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 793, 256 P.2d 947* ; *see also § 121.19*].

This exception to the general rule does not apply, however, to a demurrer on a common count based on the same facts as the specific count if the general demurrer to the specific count is on the ground of the statute of frauds [*White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 346, 438 P.2d 345]* . The common counts in violation of statute of frauds are permitted on the basis of the courts' distinction between counts that fail to establish the existence of valid contract and those that are unenforceable because they are not in writing [*see White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 346, 438 P.2d 345]* . That is, although the plaintiff's remedy on the contract is barred by the statute of frauds, the plaintiff's alternative remedy is distinct and unaffected by the statute [*Leoni v. Delany (1948) 83 Cal. App. 2d 303, 306-307, 188 P.2d 765]* . Thus, for example, if a specially pleaded count and a count in quantum meruit, based on the same facts, are stricken for failure to comply with the statute of frauds, amendment is permitted to allow the plaintiff to state facts showing that services were actually rendered and that there is a basis for recovery, despite the deficiency of the special count [*see Shabrick v. Moore (1961) 195 Cal. App. 2d 56, 63, 15 Cal. Rptr. 310]* .

Further, a common count is not subject to demurrer when it merely incorporates by reference certain preliminary allegations of a defective count [*Auckland v. Conlin (1928) 203 Cal. 776, 778, 265 P. 946]* , or when the facts in the common count (although similar to those in a defective special count) are substantially identical to those alleged in another count sufficiently stating a cause of action [*see, e.g., Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 793, 256 P.2d 947]* .

Thus, although the joinder of common and specially pleaded counts based on the same facts is permitted, caution should be exercised in using this practice, since the risk of this joinder (except when the special count is barred by the statute of frauds) is that a defective specific count will render the entire complaint demurrable [*Hays v. Temple (1937) 23 Cal. App. 2d 690, 695, 73 P.2d 1248]* . Applying this principle, an entire complaint has been found demurrable when a common count was set forth on the same facts as a defective specially pleaded count, even after the specific count was excluded by subsequent amendment [*Neal v. Bank of America (1949) 93 Cal. App. 2d 678, 681-682, 209 P.2d 825* ; *see Henderson v. Superior Court (1978) 77 Cal. App. 3d 583, 590, 142 Cal. Rptr. 478* (citing *Neal v. Bank of America*); *see also Filmservice Laboratories, Inc. v. Harvey Bernhard Enterprises, Inc. (1989) 208 Cal. App. 3d 1297, 1307-1308, 256 Cal. Rptr. 735* (amended common count is defective if insufficiencies in specific count not corrected)]. Mere withdrawal of the original complaint, once alleged, does not preclude the court from considering the original complaint in ruling on the sufficiency of the amended pleading [*see Neal v. Bank of America National Trust & Savings Assn. (1949) 209 P.2d 825]* .

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§ 121.21 Evidence

[1] Implied Contract as Evidence

Because an action based on a common count is quasi-contractual, recovery of compensation does not require proof of an express promise [*see Pacific Fruit Exch. v. F. E. Booth Co. (1930) 103 Cal. App. 54, 55, 283 P. 944]* .

In cases in which the recovery of compensation depends on an implied contract that arises and is inferrable from the situation and relation of the parties, evidence is admissible to prove any fact that would throw light on the relation and tend to show the intention of the parties [*McCarthy v. Mt. Tecarte L. & W. Co. (1896) 111 Cal. 328, 338-339, 43 P. 956]* . Thus, for example, any facts, circumstances, or dealings from which it appears that the defendant is in possession of the plaintiff's money that the defendant should, in justice, pay to the plaintiff are admissible evidence to support an action for money had and received [*County of San Bernardino v. Sapp (1958) 156 Cal. App. 2d 550, 556, 319 P.2d 649* ; *see § 121.24[1]*]. Similarly, while the facts that a couple live together, hold themselves out as married, and act as companions and confidants toward each other do not by themselves show an implied agreement to share property, those facts, when taken together and in conjunction with other facts bearing more directly on the alleged arrangement to share property, can show an implied agreement to share property [*Maglica v. Maglica (1998) 66 Cal. App. 4th 442, 454-457, 78 Cal. Rptr. 2d 101* (error to not to instruct jury accordingly)].

[2] Special Contract as Evidence

When a contract has been fully performed and only payment by the defendant remains, the special contract is admissible as evidence of the standard of value or any other fact necessary to recovery, and should be allowed to go to the jury whenever it can aid the jury in reaching a sound conclusion [*Castagnino v. Balletta (1889) 82 Cal. 250, 259, 23 P. 127* ; *see Tsarnas v. Bailey (1960) 179 Cal. App. 2d 332, 338, 3 Cal. Rptr. 629* ; *Foye v. Board of Trade (1936) 11 Cal. App. 2d 734, 738, 54 P.2d 761]* . Thus, in actions to recover in quantum meruit, for example, evidence of the written contract is admissible as evidence of the reasonable value of services rendered [*Hermann v. Littlefield (1895) 109 Cal. 430, 432, 42 P. 443* ; *see § 121.24[1][d]*].

Further, an agreed price set forth in an unenforceable or invalid contract is relevant as evidence of the reasonable value of services rendered [*George v. Double-D Foods, Inc. (1984) 155 Cal. App. 3d 36, 42, 201 Cal. Rptr. 870]* . However,

to qualify as an "agreed price," a promise that does not state a sum of money must assign a dollar value to the property with which the performing party is to be compensated, or provide a formula by which an ultimate, agreed on sum is ascertainable [*George v. Double-D Foods, Inc. (1984) 155 Cal. App. 3d 36, 42, 201 Cal. Rptr. 870]* . Moreover, a contract price that reflects the reasonable value of services performed under the contract may be used as evidence for figuring the reasonable basis of additional work [*Ferrier v. Commercial Steel Corp. (1956) 142 Cal. App. 2d 424, 426-427, 298 P.2d 555]* . If the services rendered are not those specified in the contract, however, the contract price is not admissible as evidence of reasonable value [*H.F. Fites Co. v. Harris Mfg. Co. (1928) 89 Cal. App. 427, 434-435, 264 P. 799]* .

Legal Topics:

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§ 121.22 Burden of Proof; Defenses

A plaintiff pleading on the common counts has the same burden of proof as a plaintiff pleading on the facts. That is, a plaintiff pleading a common count has the burden to prove each of the elements of the cause of action [*Foye v. Board of Trade (1936) 11 Cal. App. 2d 734, 738, 54 P.2d 761]* . For further discussion of burden of proof, see Ch. 551, *Trial* .

Defendants under a general denial to an action pleaded on the common counts may present any defense tending to show that the plaintiff has no right to recover [*Aetna Carpet Co. v. Penzner (1951) 102 Cal. App. 2d 859, 228 P.2d 347]* . Refusal to allow a defendant to introduce evidence regarding alleged offsets or counterclaims is proper, however, when that matter is not placed in issue by the pleadings [*Carranza v. Noroian (1966) 240 Cal. App. 2d 481, 487-488* , 49 Cal. Rtpr. 629].

Although the statute of frauds is not a defense in an action on the common counts [*see § 121.20*], the statute of limitations does constitute a valid defense [*McFarland v. Holcomb (1898) 123 Cal. 84, 87, 55 P. 761]* . The defense of the statute of limitations is properly raised by demurrer to an action on the common counts when it affirmatively appears on the face of the complaint that the action is barred [*see Evans v. Zeigler (1949) 91 Cal. App. 2d 226, 230, 204 P.2d 902]* . Further, if the bar of the statute of limitations does not affirmatively appear on the face of the complaint, it is still proper to demur specially on the basis of ambiguity or uncertainty to ascertain true dates [*Miller v. Brown (1951) 107 Cal. App. 2d 304, 307, 237 P.2d 320]* . Amendment to conform the pleadings to the proof after the statute of limitations has run may be permitted, for example, when a common count for money had and received is pleaded originally and one for goods sold and delivered is more appropriate and the two causes are similar with common origins [*see Ben-Hur Mfg. Co. v. Empire Factors (1960) 181 Cal. App. 2d 123, 129, 5 Cal. Rptr. 181]* .

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§ 121.23 Particular Counts Generally

As noted in § 121.12, there are two basic types of counts: indebitatus counts (counts for fixed amounts), and quantum counts (counts for the reasonable value of services or materials). The indebitatus counts of money had and received, money lent or paid, work and labor, and goods sold and delivered are *discussed under § 121.24*. The quantum counts of quantum meruit and quantum valebant are *discussed under § 121.25*.

Specific allegations required in particular counts are detailed in the discussions of those counts in specific subsections. Otherwise, for a discussion of allegations generally required in a complaint on any common count, refer to § 121.16.

Legal Topics:

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§ 121.24 Indebitatus Counts (Counts for Fixed Amount)

[1] Money Had and Received

[a] In General

A count for money had and received states that the defendant is indebted to the plaintiff for money had and received by the defendant for the use of the plaintiff [*Pike v. Zadig (1915) 171 Cal. 273, 276, 152 P. 923]* . The count is not appropriate when the defendant never received any part of the money or equivalent thing sued for [*Rains v. Arnett (1961) 189 Cal. App. 2d 337, 344, 11 Cal. Rptr. 299* ; *but see Strutzel v. Williams (1952)109 Cal. App. 2d 512, 514-515, 240 P.2d 988* (defendant's direct receipt of money not necessary; action will lie if money is expended for defendant's benefit, with defendant's knowledge)]. Rather, the count is used when one party has in its possession money which in equity and good conscience belongs to another [*Rains v. Arnett (1961) 189 Cal. App. 2d 337, 344, 11 Cal. Rptr. 299* ; for forms of common count complaints for money had and received *see §§ 121.50 -121.52*]. Since the action is equitable in nature, no privity of contract is necessary, other than that resulting from operation by law from one party having the money of another that he or she has no right to retain [*Coombs v. Minor (1943) 60 Cal. App. 2d 645, 649, 141 P.2d 491]* .

[b] When Action Is Available

Money had and received is the most widely pleaded of the common counts and is appropriate in a variety of situations, the most important of which are enumerated below.

An action in the form of the count for money had and received is an appropriate pleading to recover money from the defendant on an express contract when the plaintiff has fully performed and nothing remains to be done except payment of money by the defendant [*Ferro v. Citizens Nat. Trust & Sav. Bank (1955) 44 Cal. 2d 401, 409, 282 P.2d 849]* . Similarly, a count for money had and received is available when an express contract is voidable for mistake or fraud and has been rescinded by the plaintiff or is void [*Crocker-Anglo Nat. Bank v. Kuchman (1964) 224 Cal. App.2d 490, 496-497, 36 Cal. Rptr. 806* (contract voidable for innocent misrepresentation or fraud); *Smith v. Randall (1942) 51 Cal. App. 2d 195, 197-198, 124 P.2d 334* (contract void)]. The count is also appropriate if no contractual relationship exists but equity requires that the plaintiff receive payment on a quasi-contractual theory [*Minor v. Baldridge (1898)*

123 Cal. 187, 190-191, 55 P. 783 ; *see Weiss v. Marcus (1975) 51 Cal. App. 3d. 590, 599, 124 Cal. Rptr. 297* (settlement proceeds paid to defendants belonged to plaintiff under attorney's lien); *Coombs v. Minor (1943) 60 Cal. App. 2d 645, 649, 141 P.2d 491* (action against administrator to recover money delivered to defendant for safekeeping)].

[c] Allegations When Pleading Money Had and Received; When Demand Is Required

As with other common counts, the indebtedness need not be set out with specificity [*Pike v. Zadig (1915) 171 Cal. 273, 277* ; *see § 121.16[4]*]. The defendant's remedy, if he or she desires more particularity, is to demand a bill of particulars [*Pike v. Zadig (1915) 171 Cal. 273, 277* ; *Lewin v. Merck & Co. (1962) 209 Cal. App. 2d 131, 133, 25 Cal. Rptr. 619* ; *see also § 121.26*].

Although a count for money had and received should allege that the money sued for was received for the use of the plaintiff, that fact need not be alleged directly; it may be shown by necessary implication [*see, e.g., Shahabian v. Najarian (1936) 14 Cal. App. 2d 435, 440-441, 58 P.2d 396]* . However, the allegation that the defendant is or became indebted to the plaintiff is a conclusion of law and is insufficient to state a cause of action in the absence of supporting facts [*Smith v. Bentson (1932) 127 Cal. App. Supp. 789, 793, 15 P.2d 910]* .

Ordinarily, it is not necessary to allege (or to prove) the making of a demand in an action for money had and received before suit [*Quimby v. Lyons (1883) 63 Cal. 394, 395* ; *Twining v. Thompson (1945) 68 Cal. App. 2d 104, 113-114, 156 P.2d 29 see § 121.16[2]*]. In an action to recover money the defendant allegedly agreed to pay the plaintiff at any time on demand, the suit itself is a sufficient demand [*Ex parte Horwitz (1906) 2 Cal. App. 752, 754, 84 P. 229]* .

A demand, however, is required where the debtor does not know that he or she owes the creditor money [*see Twining v. Thompson (1945) 68 Cal. App. 2d 104, 114, 156 P.2d 29* ; *Thresher v. Lopez (1921) 52 Cal. App. 219, 221, 198 P. 419]* . A demand is also required when, until the demand is made, the payee's retention of the money is lawful [*see Rose v. Foord (1892) 96 Cal. 152, 154, 30 P. 1114* (demand required when money was paid on account to purchase stock to be issued in future and stock was not issued within reasonable time)].

Although the courts have upheld common count pleadings that do not allege a demand, it is recommended that the allegations include a demand even when it is not required.

[d] Defenses

Defenses to an action for money had and received include proving that the defendant does not have money that in equity and good conscience belongs to the plaintiff [*see § 121.24[1][a]*]; that the defendant is legally or equitably entitled to retain the money received from the plaintiff [*Weiner v. Roof (1942) 19 Cal. 2d 748, 752-753, 122 P.2d 896* (receipt of money as bona fide purchaser is defense to action for money had and received); *Lavaysse v. Superior Court of San Francisco (1944) 63 Cal. App. 2d 223, 228-229, 146 P.2d 686* (it is defense that defendant has no money that in equity and good conscience belongs to plaintiff)]; that the plaintiff has no interest in the money sought to be recovered [*Wilhelm v. Rush (1937) 18 Cal. App. 2d 366, 367-368, 63 P.2d 1158]* ; or that the money sued for has been paid to the plaintiff [*Whyte v. Rosencrantz (1899) 123 Cal. 634, 639-640, 56 P. 436* ; *see Bastanchury v. Times-Mirror Co. (1945) 68 Cal. App. 2d 217, 236, 156 P.2d 488* (disbursement of money in regular course of business between plaintiff and defendant deemed defense)]. Further, if the right of the defendant to retain the money is equal to that of the plaintiff, the defendant will prevail [*Bastanchury v. Times-Mirror Co. (1945) 68 Cal. App. 2d 217, 236, 156 P.2d 488]* .

The statute of limitations is also a defense to an action for money had and received [*see § 121.15*].

[2] Money Lent

The count of money lent alleges indebtedness for money lent by the plaintiff to the defendant [*Pleasant v. Samuels (1896) 114 Cal. 34, 36-37, 45 P. 998* ; *Moya v. Northrup (1970) 10 Cal. App. 3d 276, 278, 88 Cal. Rptr. 783* ; for form of complaint for money lent *see § 121.53*]. However, payment voluntarily made to a third party for use of another cannot be recovered from the latter as money lent [*see Deicher v. Corkery (1962) 205 Cal. App. 2d. 654, 657, 23 Cal. Rptr. 270* (co-venturers accepting benefits of sale of real estate with no attempt to rescind contract liable for money advanced by joint venturer on behalf of venture)]. The distinction between the common counts of money lent and money paid is *discussed under § 121.24[4]*.

[3] Money Paid

The common count for money paid, expended, or laid out lies when one expends money at the request of another [*Deicher v. Corkery (1962) 205 Cal. App 2d. 654, 661, 23 Cal. Rptr. 270]* . When money is paid out for the benefit of another, the law implies a promise and the legal liability of the defendant to repay on demand [*Rains v. Arnett (1961) 189 Cal. App. 2d 337, 344, 11 Cal. Rptr. 299* ; for form of complaint for money paid *see § 121.54*].

An action for money paid may be brought by one who is legally compelled to pay money that another is obliged to pay, or by one who pays money, not officiously, that another person should have paid to save himself or herself from damage [*Langford v. Eckert (1970) 9 Cal. App. 3d 439, 443, 88 Cal. Rptr. 429* ; *see Pioneer Title Ins. Co. v. Guttman (1959) 175 Cal. App. 2d 116, 120, 345 P.2d 577* (mere existence of legal liability is sufficient to prompt payment; payment need not be coerced by legal action)].

Conversely, a party who voluntarily pays out money for the use and benefit of another, without receiving any promise to repay, cannot recover in an action for money paid [*McGlew v. McDade (1905) 146 Cal. 553, 554, 80 P. 695]* . In addition, to recover in an action for money paid, there must be proof, either directly or presumptively from the circumstances, that the defendant requested that the plaintiff pay out the money for the defendant's use [*Moulton v. Loux (1877) 52 Cal. 81, 83]* .

[4] Money Lent and Money Paid Distinguished

Courts appear to make a distinction with respect to the sufficiency of a common count that should have been pleaded as a count for money lent but was instead pleaded as one for money had and received. If the trial court determines that the variance in pleading is not prejudicial, judgment is not reversed simply because a count for money lent would have been more appropriate than one for money had and received [*Rains v. Arnett (1961) 189 Cal. App. 2d 337, 344, 11 Cal. Rptr. 299]* . If, however, the trial court finds for the defendant on the grounds that the plaintiff failed to plead the proper common count, there is authority that the appellate court will refuse to reverse the judgment [*see Jones v. Re-Mine Oil Co. (1941) 47 Cal. App. 2d 832, 843, 119 P.2d 219* (dictum that count for money had and received improper form when money was lent)].

[5] Work and Labor (Services)

[a] In General

The count for work and labor (services) states that the defendant is indebted to the plaintiff for a certain sum for work and labor done or services performed for the defendant, or at the defendant's request [*see Haggerty v. Warner (1953) 115 Cal. App. 2d 468, 475, 252 P.2d 373]* .

An action in the form of the count for work and labor is an appropriate pleading to recover money from the defendant on an express contract when the plaintiff has fully performed work and labor, including personal services, and nothing remains to be done except payment of money by the defendant [*Higgins v. Desert Braemar, Inc. (1963) 219 Cal. App. 2d 744, 751, 33 Cal. Rptr. 527* (recovery is limited to amount agreed to be paid); *see § 121.55*, form of complaint for work, labor, services, and materials at agreed price]. However, if the plaintiff seeks the reasonable value of his or her

services, rather than a fixed sum, an action in quantum meruit is appropriate [*see § 121.25[2][a]*; for a form of complaint for reasonable value of work, labor, and services].

[b] Allegations When Pleading Work and Labor (Services)

A common count seeking recovery for various services performed need not itemize either the time or the particular services [*McFarland v. Holcomb (1898) 123 Cal. 84, 87, 55 P. 761]* . Moreover, a common count for work done and material plaintiff furnished defendant is sufficient even though it fails to specify which of the liquidated debt sums are for labor and which are for materials [*Jensen v. Dorr (1911) 159 Cal. 742, 746-747, 116 P. 553]* . However, such a complaint may be attacked for uncertainty or ambiguity, in which case the plaintiff will need to amendment the complaint to show specifics [*Evans v. Zeigler (1949) 91 Cal. App. 2d 226, 229, 204 P.2d 902]* .

Although it is customary to allege that the work and labor (or services) was performed at the defendant's request, such an allegation is not required, since the request is implied from the allegation of the service performed [*McFarland v. Holcomb (1898) 123 Cal. 84, 86, 55 P. 761]* . Further, although it is not necessary to specify the work done or the agreed price, courts generally allow some elaboration on the typical work and labor count [*Donegan v. Houston (1907) 5 Cal. App. 626, 629, 90 P. 1073]* . For discussion of allegations in general, refer to § 121.16.

[6] Goods Sold and Delivered

The count of goods sold and delivered alleges the indebtedness, in a certain sum, for goods sold and delivered by the plaintiff to the defendant [*Abadie v. Carrillo (1867) 32 Cal. 172, 175-176* ; for form of complaint for goods sold and delivered at agreed price *see § 121.56*]. However, if the plaintiff seeks the reasonable value of goods sold and delivered, rather than a specific sum, an action in quantum valebant is appropriate [*see § 121.25[3]*].

It is not necessary to allege a promise to pay or that the goods delivered were of any particular value [*Abadie v. Carrillo (1867) 32 Cal. 172, 173-175]* or even that the goods were delivered [*Johnson v. Dixon Farms Co. (1915) 29 Cal. App. 52, 56, 155 P. 134]* . Moreover, an original complaint stating a count for money had and received may be amended to state one for goods sold and delivered [*see Ben-Hur Mfg. Co. v. Empire Factors (1960) 181 Cal. App. 2d 123, 131, 5 Cal. Rptr. 181* (amendment after statute of limitations ran permitted due to similarity of counts and consequent lack of elements of prejudice or surprise to defendant)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsContracts LawBreachCauses of ActionAssumpsitContracts LawBreachCauses of ActionMoney Had & Received

California Forms of Pleading and Practice--Annotated

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12-121 California Forms of Pleading and Practice--Annotated § 121.25

§ 121.25 Quantum Counts (Counts for Reasonable Value)

[1] In General

If the defendant is not liable in a fixed sum, or the plaintiff is permitted to elect to sue for the reasonable value of services or materials, the quantum counts may be used [*see § 121.25[2]*].

[2] Quantum Meruit (Services)

[a] In General

The count in quantum meruit alleges the performance of work and labor or services by the plaintiff for the defendant, at the defendant's request, and is used to recover the reasonable value of the services rendered when the defendant is not liable in a fixed sum [*McFarland v. Holcomb (1898) 123 Cal. 84, 86-87 55 P. 761* ; for complaint for reasonable value of work, labor, and services, *see § 121.57*], or when the plaintiff has the election of suing for the reasonable value of services [*see, e.g.,* *Haggerty v. Warner (1953) 115 Cal. App. 2d 468, 475, 252 P.2d 373* (when plaintiff renders personal services to defendant at defendant's request, plaintiff may elect to plead either on express contract or in quantum meruit for reasonable value of services); *see also § 121.25[2][b]*].

Quantum meruit refers to the well-established principle that the law infers a promise to pay for services received in circumstances disclosing that the services were not gratuitously rendered. To recover in quantum meruit, a claimant must show that the services were rendered under an understanding or expectation, by both parties, that compensation was to be paid [*Huskinson & Brown v. Wolf (2004) 32 Cal. 4th 453, 458, 9 Cal. Rptr. 3d 693, 84 P.3d 379* ; *Miller v. Campbell, Warburton, Fitzsimmons, Smith, Mendel & Pastore (2008) 162 Cal. App. 4th 1331, 1344, 76 Cal. Rptr. 3d 649*].

Quantum meruit also may be the basis for an action to recover the reasonable value of the plaintiff's services when a statutory scheme (1) requires the plaintiff to provide the services without regard to the recipient's ability to pay, and (2) requires the defendant to "reimburse" the plaintiff for providing the services. For example, in California an emergency room physician generally is required, by law, to provide medical treatment to anyone in a public emergency room, regardless of the person's ability to pay, up to the point of rendering the person medically stable [*see Health & Safety*

Code §§ 1317, 1317.1, 1371.4], and a for-profit health care service plan is required, by law, to reimburse emergency health care providers for the mandated emergency services rendered to the plan's enrollees [*see Health & Safety Code §§ 1317, 1371.4*]. Under this arrangement, a service plan is bound to pay a reasonable and customary amount (instead of whatever amount the plan determines it will pay) for the services rendered. An emergency room physician may sue in quantum meruit to enforce that obligation [*Bell v. Blue Cross of California (2005) 131 Cal. App. 4th 211, 216-221, 31 Cal. Rptr. 3d 688]* .

Recovery under quantum meruit is quasi-contractual; it is based on an implied contract for the payment of services to satisfy the ends of justice [*see Maglica v. Maglica (1998) 66 Cal. App. 4th 442, 449-450, 78 Cal. Rptr. 2d 101* (underlying basis for quantum meruit is policy against unjust enrichment); *Lazzarevich v. Lazzarevich (1948) 88 Cal. App. 2d 708, 721, 200 P.2d 49* (defendant's promise and obligation imposed by law, regardless of any agreement); *Estate of O'Donnell (1948) 85 Cal. App. 2d 1, 6-7, 192 P.2d 94* (contract implied in law for payment by incompetent for reasonable value of services rendered, even without express contract)]. Quantum meruit allows recovery for the value of beneficial services, not the value by which someone benefits from those services [*Maglica v. Maglica (1998) 66 Cal. App. 4th 442, 449-452, 78 Cal. Rptr. 2d 101* (holding that court erred in allowing jury to measure recovery on basis of impact of unmarried cohabitant's services on business of other cohabitant)]. In order to recover under a quantum meruit theory, a plaintiff must establish both (1) that he or she was acting pursuant to either an express or implied request for those services from the defendant, and (2) that the services rendered were intended to and did benefit the defendant [*Day v. Alta Bates (2002) 98 Cal. App. 4th 243, 248-249, 119 Cal. Rptr. 2d 606* (holding that plaintiff's attorney in medical malpractice action was not requested to and did not perform legal services on behalf of hospital that filed hospital lien; malpractice action never went past liability phase and thus hospital received nothing by virtue of lien or action)].

Quantum meruit was recognized as a form of the common law writ of assumpsit--that is, an action at law--long before 1850, and the parties to a quantum meruit action consequently have a right to a jury trial [Jogani v. Superior Court (2008) 165 Cal. App. 4th 901, 907, 81 Cal. Rptr. 3d 503].

[b] When Action Is Available

The count of quantum meruit is one of the most frequently (and successfully) used forms of the common counts. It is proper in a variety of situations, the most important of which are discussed below.

When services are rendered under a contract that does not specify the compensation to be paid, an action in quantum meruit is appropriate [*Meredith v. Marks (1963) 212 Cal. App. 2d 265, 272-273, 27 Cal. Rptr. 737]* . The plaintiff may also recover the reasonable value of services rendered when the express contract includes a method for calculating the compensation that cannot be followed under the circumstances [*Miller v. San Francisco Church Exten. Soc. (1932) 125 Cal. App. 85, 94, 13 P.2d 824]* . However, if the plaintiff has fully performed under a contract and the defendant's debt is liquidated or calculable, the plaintiff is limited to the liquidated debt sum and cannot alternatively seek the reasonable value of the services [*see Higgins v. Desert Braemar, Inc. (1963) 219 Cal. App. 2d 744, 751, 33 Cal. Rptr. 527]* .

When the terms of a contract have been modified by mutual agreement, the action for the amount due for work and labor should be in the form of a common count in quantum meruit, for the reasonable value of the benefit conferred on the defendant, rather than on the express contract [*Castagnino v. Balletta (1889) 82 Cal. 250, 258, 23 P. 127* ; *see Dodge v. Harbor Boat Bldg. Co. (1950) 99 Cal. App. 2d 782, 791, 222 P.2d 697* (work agreed on could not be separated from work ultimately required); *Cooney v. Glide (1929) 97 Cal. App. 77, 83-84, 275 P. 257* (express contract abandoned by mutual consent after part performance by plaintiff)].

An action in quantum meruit also is appropriate when a plaintiff, working under an express contract, performs additional work, at the defendant's request, that is not specified in the contract [*Combs v. California Cotton Mills Co.*

(1952) 112 Cal. App. 2d 781, 786-787, 247 P.2d 382 ; *but see Katsura v. City of San Buenaventura (2007) 155 Cal. App. 4th 104, 109-110, 65 Cal. Rptr. 3d 762* (public entity generally cannot be liable on quantum meruit theory to pay for contractor's additional work done in connection with performing express contract)].

If services rendered by a party to a void contract are not illegal, the plaintiff may recover in quantum meruit, although he or she could not recover on the contract [*Sims v. Petaluma Gas Light Co. (1901) 131 Cal. 656, 660, 63 P. 1011]* . Thus, when one party to a void contract has rendered services and the other party has failed to perform, the party who rendered the services may recover their reasonable value even though the illegality of the promised consideration precludes an action for breach of the express contract [*Lawn v. Camino Heights, Inc. (1971) 15 Cal. App. 3d 973, 980-983, 93 Cal. Rptr. 621* (even though employment contract called for illegal payment in stock of employer corporation, plaintiff may recover on value of contract when object of contract not illegal)]. Likewise, a law firm that is barred from dividing legal fees with another law firm pursuant to a fee-sharing agreement, due to the absence of written client consent to the agreement required by *Cal. Rules Prof. Conduct, Rule 2-200*, may recover from the other firm in quantum meruit for the reasonable value of services it rendered on the client's behalf [*Huskinson & Brown, LLP v. Wolf (2004) 32 Cal. 4th 453, 464, 9 Cal. Rptr. 3d 693, 84 P.3d 379* (court emphasized holding did not increase attorney fees paid or owed by client)].

The plaintiff may also be entitled to recover the reasonable value of services after part performance on an express contract [*see Oliver v. Campbell (1954) 43 Cal. 2d 298, 302, 273 P.2d 15* (party injured by breach may rescind and recover in quantum meruit for part performance); *Jennings v. Azhderian (1956) 140 Cal. App. 2d 374, 377-378, 295 P.2d 40* (work abandoned, with defendant's consent, due to unexpected contingencies); *see also Roseleaf Corp. v. Radis (1953) 122 Cal. App. 2d 196, 207, 264 P.2d 964* (perfect performance not required if plaintiff renders services in good faith and defendant accepts them)]. However, full performance does not make restitution unavailable if any part of the consideration due from the defendant is something other than a liquidated debt. Thus, in a case in which a legal publisher breached an author agreement by rejecting a completed manuscript solely for commercial reasons and not because of any defect, the author was entitled to sue for restitution for the time and effort he reasonably invested in writing the manuscript [*Chodos v. West Publishing Co, Inc. (9th Cir. 2002) 292 F.3d 992, 1001-1002* (entitlement to percentage of revenues from book was not "liquidated debt" under California law)].

[c] Allegations When Pleading Quantum Meruit (Services)

A count in quantum meruit is sufficiently pleaded if the complaint alleges that the plaintiff performed certain services for the defendant, their reasonable value, that they were rendered at the request of the defendant, and that they are unpaid [*Haggerty v. Warner (1953) 115 Cal. App. 2d 468, 475, 252 P.2d 373* , citing *Brown v. Crown Gold Milling Co. (1907) 150 Cal. 376, 382, 89 P. 86]* . A count in quantum meruit is sufficiently pleaded even though the plaintiff fails to state when the defendant became indebted to him or her, or the nature of the services rendered [*Evans v. Zeigler (1949) 91 Cal. App. 2d 226, 230, 204 P.2d 902]* . Moreover, although a count on quantum meruit usually alleges that the work was performed at the defendant's request and that the defendant promised to pay reasonable value, these allegations are not necessary, since the request and the promise to pay are implied from the allegation of the service performed [*see McFarland v. Holcomb (1898) 123 Cal. 84, 86, 55 P. 761]* . Finally, no demand for payment before instituting the action is required [*McDonald v. Filice (1967) 252 Cal. App. 2d 613, 623, 60 Cal. Rptr. 832* (action itself is only demand necessary when it is defendant's unconditional duty to perform act or pay sum of money)].

[d] Defenses

A count is defective if the action in quantum meruit is not premised on any services actually rendered to the defendant that might serve as a basis of recovery for the plaintiff [*Parker v. Solomon (1959) 171 Cal. App. 2d 125, 135, 340 P.2d 353]* . Further, a plaintiff cannot recover the reasonable value of services if there is no evidence of their value [*Hocker v. Glover (1931) 113 Cal. App. 152, 156*]. However, it is not required that a specific sum be stated in the testimony as being the reasonable value [*Kimes v. Davidson Inv. Co. (1929) 101 Cal. App. 382, 388, 281 P. 639]* .

When the defendant neither accepts services nor derives a benefit from them, there is nothing from which a contract may be implied [*Spurgeon v. Buchter (1961) 192 Cal. App. 2d 198, 206, 207, 13 Cal Rptr. 354]* . It is not a defense, however, that the defendant received no benefit if the failure to benefit was caused by the defendant's negligence [*Boyd v. Bargagliotti (1909) 12 Cal. App. 228, 237, 107 P. 150]* . Moreover, although an early case held that recovery on quantum meruit is available only when the defendant has received a direct benefit and that compliance with the defendant's request was insufficient to support recovery [*see Rotea v. Izuel (1939) 14 Cal. 2d 605, 611, 95 P.2d 927]* , a later case held that compensation for performance should be paid by the person whose request induced the performance, and proof that the defendant requested the plaintiff to perform services and furnish materials and that the plaintiff reasonably believed the defendant would pay for the services would support recovery on quantum meruit [*Earhart v. William Low Co. (1979) 25 Cal. 3d 503, 507, 158 Cal. Rptr. 887, 600 P.2d 1344]* .

Additional defenses to an implied promise to pay for services rendered include [*Gjurich v. Fieg (1913) 164 Cal. 429, 431, 129 P. 464* ; *Miller v. Campbell, Warburton, Fitzsimmons, Smith, Mendel & Pastore (2008) 162 Cal. App. 4th 1331, 1344, 76 Cal. Rptr. 3d 649* (affirmative defenses as to which recipient of services has burden of proof)]:

- Proof of a special agreement to pay a particular amount or in a particular manner;
- Proof that the services were intended to be gratuitous; or
- Proof that particular circumstances exist from which the law will raise a counter presumption that the services were not intended to be a charge against the person benefited.

The statute of frauds, however, does not render defective a common count for the reasonable value of services even though the contract itself may be unenforceable [*Leoni v. Delany (1948) 83 Cal. App. 2d 303, 307, 188 P.2d 765]* .

[3] Quantum Valebant (Goods Sold)

The common count in quantum valebant is similar to the count in quantum meruit [*see § 121.25[2]*], except that it is used to recover the reasonable value of goods sold and delivered [*Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 792-794, 256 P.2d 947]* . The count is based on the legal fiction that when goods are delivered by one to another, at the latter's request, there is an implied promise to pay (even if the latter never intended to pay for them) [*Hallidie v. Enginger (1917) 175 Cal. 505, 508, 166 P. 1]* . However, there is no action in quantum valebant for goods sold and delivered when the defendant refuses to accept the goods [*Hallidie v. Sutter S. R. Co. (1883) 63 Cal. 575, 577]* , or when the defendant has not used the property for his or her benefit in a manner and under circumstances such that the law will impose a duty of compensation for that use [*Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 794, 256 P.2d 947]* .

Recovery in quantum valebant is limited to the reasonable value of an item, or the portion of it that is used [*Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 792-793, 256 P.2d 947]* .

A complaint in quantum valebant is not subject to special demurrer for uncertainty when the plaintiff does not clearly specify whether the action is based on an express contract or for the reasonable value of the goods [*Preston v. Central Cal. etc. Irr. Co. (1909) 11 Cal. App. 190, 196-197, 104 P. 462]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsContracts LawDefensesIllegal BargainsContracts LawRemediesEquitable ReliefQuantum Meruit

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§ 121.26 Bill of Particulars

[1] In General

When pleading on the common counts, a plaintiff need not specify the items of the account alleged in the pleadings [*McFarland v. Holcomb (1889) 123 Cal. 84, 87, 55 P. 761]* . However, under *Code Civ. Proc. § 454*, the defendant has the right to demand a bill of particulars in order to be apprised of the specific claim against him or her [*Auzerais v. Naglee (1887) 74 Cal. 60, 64, 15 P. 371* ; *see § 121.60*, (form for bill of particulars)]. This is so that the defendant will not be taken by surprise and can intelligently present defenses [*Halagan v. Ohanesian (1967) 257 Cal. App. 2d 14, 17, 64 Cal. Rptr. 792]* . This procedure, known as a bill of particulars, forces the plaintiff to itemize the total amount on which the complaint is based. Under the statute, the term "bill of particulars" is apparently used interchangeably with the terms "account" and "copy of the account" [*see Burton v. Santa Barbara Nat. Bank (1966) 247 Cal. App. 2d 427, 432, 55 Cal. Rptr. 529* ; *Code Civ. Proc. § 454*].

[2] When Procedure Is Available

A demand for a bill of particulars is apparently restricted to an action on "an account" [*see Code Civ. Proc. § 454*]. An action on account has been interpreted broadly to cover almost any kind of contract action for a claim of money that consists of more than one item [*see Long Beach City School Dist. v. Dodge (1902) 135 Cal. 401, 407, 67 P. 499* (term "account" applied to almost every claim on contract consisting of several items); *Distefano v. Hall (1963) 218 Cal. App. 2d 657, 677, 32 Cal. Rptr. 770]* .

In addition to actions on a book account [*see Code Civ. Proc. § 337a* ("book account" defined); *see also* Ch. 8, *Accounts Stated and Open Accounts*], a bill of particulars is demanded most frequently in an action on the common counts [*see Kawasho Internat., U.S.A., Inc. v. Lakewood Pipe Service, Inc. (1983) 152 Cal. App. 3d 785, 793, 201 Cal. Rptr. 640]* . The procedure is used most often in actions for services and materials under a contract [*see, e.g., Jensen v. Dorr (1911) 159 Cal. 742, 746-747* . 553], or in actions in quantum meruit (seeking quasi-contractual recovery for services rendered at the request of the defendant) [*see, e.g., McFarland v. Holcomb (1893) 123 Cal. 84, 87, 55 P. 761* ; *Caruso v. Snap-Tite, Inc. (1969) 275 Cal. App. 2d 211, 212-213, 79 Cal. Rptr. 642]* . Actions for money had and received [*Firpo v. Pacific Mut. Life Ins. Co. (1926) 80 Cal. App. 122, 251 P. 657]* , money lent or money paid [*Moya v. Northrup (1970) 10 Cal. App. 3d 276, 88 Cal. Rptr. 783]* , and goods sold and delivered [*Ben-Hur Mfg. Co. v. Empire Factors*

(1960) 181 Cal. App. 2d 123, 132, 5 Cal. Rptr. 181] are also within the bill of particulars statute.

A bill of particulars may be requested in a variety of situations in actions on the common counts, including, for example, when the defendant seeks an itemization of services rendered [*see Baroni v. Musick (1934) 3 Cal.App. 2d 419, 421, 39 P.2d 435]* or a differentiation of services rendered and materials furnished [*see Jensen v. Dorr (1911) 159 Cal. 742, 746-747, 116 P. 553]* .

It has been held, however, that no bill of particulars may be demanded in an action on an account stated *Distefano v. Hall (1963) 218 Cal. App. 2d 657, 677, 32 Cal. Rptr. 770* ; *see Jones v. Wilton (1938) 10 Cal. 2d 493, 498, 75 P.2d 593* ("account stated" is new agreement that supersedes original contract and account)]. Nor may a bill of particulars be requested to itemize damages in action based on negligent failure to perform duties according to the contract [*Distefano v. Hall (1963) 218 Cal. App. 2d 657, 677-678, 32 Cal. Rptr. 770]* .

[3] Distinguished From Discovery

Discovery proceedings [*see Code Civ. Proc. § 2016.010 et seq.*] serve the same general objectives of a bill of particulars: to provide information about a claim and to protect against surprise. However, discovery, which is available to both the plaintiff and the defendant, is designed to produce evidence for use at trial, while a bill of particulars is designed to clarify or amplify the complaint to make it easier for the defendant to prepare a responsive pleading [*Dobbins v. Hardister (1966) 51 Cal. Rptr. 866]* .

Although it has been contended that modern discovery devices make the bill of particulars an obsolete procedure, as a practical matter, a demand for a bill of particulars is usually less costly than discovery proceedings, because formal discovery takes more of counsel's time and may require, in the case of depositions, the payment of a court reporter fee.

[4] Effect of Bill

Although the bill of particulars is not a pleading and cannot be answered [*Chamberlain v. Loewenthal (1902) 138 Cal. 47, 49, 70 P. 932* ; *Weiner v. Davies (1967) 248 Cal. App. 2d 387, 391, 56 Cal. Rptr. 546]* , the bill is an amplification of the complaint and is to be considered as incorporated into the complaint, as originally filed, for the purpose of determining the plaintiff's right of recovery and the admissibility of evidence in support of the claim [*Kurokawa v. Saroyan (1928) 95 Cal. App. 772, 775, 273 P. 613]* . Accordingly, the items specified in the bill limit the nature and amount of the recovery that might otherwise be permissible under the allegations of the original complaint [*Abbott v. Limited Mut. Comp. Ins. Co. (1938) 30 Cal. App. 2d 157, 161, 85 P.2d 961]* and the plaintiff's evidence at trial [*Gough v. Security Trust & Sav. Bank (1958) 162 Cal. App. 2d 90, 94, 327 P.2d 555]* .

[5] Procedure to Obtain Bill

[a] Defendant's Demand

The bill of particulars statute does not specify that the demand take any particular form, other than that the demand be made to the plaintiff in writing [*see Code Civ. Proc. § 454*; *see § 121.59*, form of demand for bill of particulars]. It should, however, be signed by the party making the demand, or contain some other indication that the party making the demand is the party against whom the account is pleaded [*see Elmore v. Tingley (1926) 78 Cal. App. 460, 467, 248 P. 706]* .

Further, the statute does not require that the demand be made at any particular time [*see Code Civ. Proc. § 454*]. However, since the making of a demand does not extend the defendant's time to answer the complaint [*Dobbins v. Hardister (1966) 51 Cal. Rptr. 866]* , if the defendant needs the additional information provided by a bill of particulars to answer the complaint, the defendant should request additional time by stipulation or court order, unless so doing would violate local court rules.

The statute does not mandate that the bill be served; therefore, ordinary delivery or mailing appears to be sufficient [*see Code Civ. Proc. § 454*]. However, the usual (and recommended) practice is to serve the bill with proof of service, to establish the commencement of the plaintiff's 10-day period to furnish the bill [*see Code Civ. Proc. § 454*].

[b] Form and Contents

The statute does not specify the level of detail required in a bill of particulars [*see Code Civ. Proc. § 454*]. Items in a bill must be set forth, in good faith, as precisely and as definitely as possible [*Meredith v. Marks (1963) 212 Cal. App. 2d 265, 270, 27 Cal. Rptr. 737]* . The court determines whether the plaintiff's response to a demand for a bill of particulars is sufficient [*Butler Bros. v. Connolly (1962) 204 Cal. App. 2d 22, 26, 22 Cal. Rptr. 175* ; *see § 121.26[6]*].

The bill must be verified if the complaint is verified [*Code Civ. Proc. § 454*].

[c] Delivery of Account by Plaintiff

When a defendant makes a demand in writing, the plaintiff must deliver a copy of the account to the defendant within ten days of the request [*Code Civ. Proc. § 454*]. As a practical matter, it seems that the bill must be delivered to the defendant within 10 days after the date of service of the demand [*see Edelman v. McDonell (1899) 126 Cal. 210, 213, 58 P. 528]* .

[6] Motion for Further Bill of Particulars

If the account delivered is too general, or in any way defective, the court may order a further account to be delivered [*Code Civ. Proc. § 454*; *see § 121.63*, form of order for further bill of particulars]. A demand for a further bill of particulars is made on a notice of motion [*Burton v. Santa Barbara Nat. Bank (1966) 247 Cal. App. 2d 427, 433, 55 Cal. Rptr. 529* ; *see §§ 121.61, 121.62* (forms for notice of motion for further bill of particulars and declaration in support of notice of motion for further bill of particulars)]. If the defendant fails to demand a further account by the motion, the defendant is deemed to have waived the insufficiency of the bill and may not later at trial make this motion [*Burton v. Santa Barbara Nat'l Bank (1966) 247 Cal. App. 2d 427, 433]* . In response to the notice of motion or a court order based on the noticed motion, the plaintiff may deliver a further bill, or amended bill, or both [*see Ames v. Bell (1907) 5 Cal. App. 1, 3-4, 89 P. 619]* .

[7] Motion to Preclude Introduction of Evidence at Trial for Failure to Deliver Bill

The adverse party must deliver a bill of particulars within 10 days after a demand in writing or be precluded from giving evidence with respect to the account [*Code Civ. Proc. § 454*]. This penalty, however, has not been strictly applied by the courts [*see McCarthy v. Tecarte L. & W. Co. (1896) 110 Cal. 687, 692-693, 43 P. 391* (interpreting 10-day time frame as discretionary when bill is delivered shortly thereafter, without defendant's being prejudiced)].

To obtain a ruling to preclude the introduction of evidence, the defendant must bring a noticed motion [Burton v. Santa Barbara Nat. Bank (1966) *247 Cal. App. 2d, 427, 433* , *55 Cal. Rptr. 529]* . Moreover, even when the plaintiff fails to furnish a bill of particulars and the information requested by the defendant is not within the defendant's knowledge, the defendant must move to and obtain an order before trial to preclude the introduction of evidence by the plaintiff [*see* Burton v. Santa Barbara Nat. Bank (1966) *247 Cal. App. 2d, 427, 433* , *55 Cal. Rptr. 529* ; *see also §§ 121.64 -121.67* (forms relating to notice of motion and order to preclude introduction of evidence for failure to provide bill of particulars)]. The court may properly deny a motion to preclude evidence when it is made for the first time at trial [*Conner v. Hutchinson (1861) 17 Cal. 279, 282]* . Although the statute does not specify a time to bring the motion, the court may deny "eleventh-hour" motions, particularly if the defendant waits until the time of trial [*see, e.g., Banchero v. Coffis (1950) 96 Cal. App. 2d 717, 721, 216 P.2d 151]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsBills of ParticularsCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresSanctionsContracts LawBreachCauses of ActionAssumpsitContracts LawBreachCauses of ActionMoney Had & Received

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
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[Reserved]

§§ 121.27[Reserved]

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12-121 California Forms of Pleading and Practice--Annotated § 121.40

§ 121.40 California Points and Authorities

For memoranda of points and authorities supporting and opposing general and special demurrers to complaints pleaded on common counts; supporting and opposing motions for orders related to bills of particulars; and supporting and opposing motions for summary judgments related to actions on common counts, see California Points and Authorities, Ch. 43, *Common Counts and Bills of Particulars* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresSummary JudgmentOppositionGeneral Overview

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§ 121.41 State Statutes

"Book account" defined. *Code Civ. Proc. § 337a*

"Detriment" defined. *Civ. Code § 3282*

"Mistake of fact" defined. *Civ. Code § 1577*

"Motion" defined. *Code Civ. Proc. § 1003*

"Order" defined. *Code Civ. Proc. § 1003*

Provision for attorney's fees and costs in action on contract. *Civ. Code § 1717*

Attorney's fees and costs recoverable in action on book account. *Civ. Code § 1717.5*

Jurisdiction and venue in actions involving retail installment sales. *Civ. Code § 1812.10*

Jurisdiction and venue in actions involving motor vehicle sales. *Civ. Code § 2984.4*

Interest on awarded damages. *Civ. Code § 3287(b)*

Measure of damages for breach of contract. *Civ. Code § 3300*

Money due with interest. *Civ. Code § 3302*

Statute of limitations on obligation founded on an instrument in writing. *Code Civ. Proc. § 337*

Statute of limitations on open book account and account stated in a writing. *Code Civ. Proc. § 337(2)*

Statute of limitations in cases involving fraud or mistake. *Code Civ. Proc. § 338(d)*

Statute of limitations on oral obligations. *Code Civ. Proc. § 339*

Venue in certain cases involving consumer obligations. *Code Civ. Proc. §§ 395(b), 396a*

Contents of complaint. *Code Civ. Proc. § 425.10*

Judicial Council approved forms for complaint. *Code Civ. Proc. § 425.12*

Effect of verification of complaint on answer. *Code Civ. Proc. § 431.30(d)*

Verification of pleadings. *Code Civ. Proc. § 446*

Bill of particulars. *Code Civ. Proc. § 454*

Application for order or motion. *Code Civ. Proc. § 1003*

Notices and papers: form, contents, service on party. *Code Civ. Proc. § 1010*

Measure and mode of attorney compensation. *Code Civ. Proc. § 1021*

Unsworn statements. *Code Civ. Proc. § 2015.5*

Discovery proceedings. *Code Civ. Proc. § 2016.010 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesEquitable AccountingsGeneral OverviewContracts LawDefensesStatutes of Limitations

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§ 121.42 Decisions

[1] Governing Law

As exception to modern principles of code pleading, common counts are generally governed by case law. *Pike v. Zadig (1915) 171 Cal. 273, 276, 152 P. 923*

[2] Nature of Common Count Action

Plaintiff's right to recover in assumpsit is governed by principles of equity, although action is one at law. *Philpott v. Superior Court (1934) 1 Cal. 2d 512, 521-522, 36 P.2d 635*

Assumpsit, as modern day quasi-contractual relief, is available when money is paid by mistake, when consideration fails, or when imposition, extortion, oppression, or undue advantage is taken of plaintiff. *Philpott v. Superior Court (1934) 1 Cal. 2d 512, 519, 36 P.2d 635*

Common counts are proper whenever plaintiff claims sum of money due, either as indebtedness in sum certain or for reasonable value of services or goods furnished, whether original transaction is express contract, contract implied in fact, or quasi-contract. *Kawasho Internat. (U.S.A.), Inc. v. Lakewood Pipe Service, Inc. (1983) 152 Cal. App. 3d 785, 793, 201 Cal. Rptr. 640*

[3] Effect of Express Contract

[a] When Common Counts May Be Pleaded

Common count for money had and received is proper if plaintiff owes no further performance under contract, and nothing remains to be done except payment of money by defendant. *Ferro v. Citizens Nat. Trust & Sav. Bank (1955) 44 Cal. 2d 401, 282 P.2d 849* ; *Rains v. Arnett (1961) 189 Cal. App. 2d 337, 343-344, 11 Cal. Rptr. 299*

Common count is proper whenever plaintiff claims sum of money due (as indebtedness in certain sum or for reasonable value of services or goods furnished), regardless of whether original transaction is express contract, implied-in-fact contract, or quasi-contract. *Castagnino v. Balletta (1889) 82 Cal. 250, 258, 23 P. 127* (express contract); *Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 793, 256 P.2d 947* (implied-in-fact contract)

Common count is proper when services rendered by one party under void contract are not intrinsically illegal and other party fails to perform. *Lawn v. Camino Heights, Inc. (1971) 15 Cal. App. 3d 973, 982, 93 Cal. Rptr. 621*

Action for work and labor is appropriate when entire performance of special contract is prevented by one party or when terms of express contract have been varied by agreement of both parties. *Overland Machined Products, Inc. v. Swingline, Inc. (1968) 263 Cal. App. 2d 642, 646, 69 Cal. Rptr. 852*

Common count is proper in action for restitution based on rescission for innocent misrepresentation. *Crocker-Anglo Nat. Bank v. Kuchman (1964) 224 Cal. App. 2d 490, 496, 36 Cal. Rptr. 806*

Action for work and labor is appropriate to recover money from defendant on express contract when the plaintiff has fully performed work and labor, including personal services, and nothing remains to be done except payment of money by defendant. *Higgins v. Desert Braemar, Inc. (1963) 219 Cal. App. 2d 744, 751, 33 Cal. Rptr. 527* .

Common count is proper when complete performance has been prevented by defendant, or when contract has been modified or deviated from by consent of parties, and plaintiff has fully performed. *Rains v. Arnett (1961) 189 Cal. App. 2d 337, 343-344, 11 Cal. Rptr. 299*

In action on rejected claim against estate for work and labor performed and services rendered to decedent, plaintiff is entitled to declare specially on contract or generally on common count when plaintiff has fully executed his or her part of agreement. *Lucy v. Lucy (1937) 22 Cal. App. 2d 629, 631-632, 71 P.2d 949*

[b] When Common Counts May Not Be Pleaded

Common count is improper in action seeking refund of taxes; such action is specific statutory claim. *Title Ins. Co. v. State Bd. of Equalization (1992) 4 Cal. 4th 715, 731, 14 Cal. Rptr. 2d 822, 842 P.2d 121*

Common count is improper in action based on express contract when recovery sought is something other than payment of money. *Allen v. Merchants Elec. Co. (1960) 54 Cal. 2d 67, 69, 4 Cal. Rptr. 527, 351 P.2d 799* ; *Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 793, 256 P.2d 947* (plaintiff sought specific performance); *Willett & Burr v. Alpert (1919) 181 Cal. 652, 659, 185 P. 976* ; King v. San Jose Pacific B. & L. Assn. (1940) 41Cal. App. 2d 705, 708, *107 P.2d 442* (plaintiff sought damages for breach)

Common count is improper when relief sought varies as slightly as delivery of promissory note instead of money. *Willett & Burr v. Alpert (1919) 181 Cal. 652, 659-660, 185 P. 976*

Even if express contract were fraudulently procured, no action in implied contract will lie until express contract is disaffirmed. *Bechtel v. Chase (1909) 156 Cal. 707, 712, 106 P. 81*

Common count is improper when contract remains "executory," that is, not fully performed by plaintiff. *Castagnino v. Balletta (1889) 82 Cal. 250, 258, 23 P. 127*

When contract is illegal and unenforceable, guilty party generally may not recover consideration due on quasi-contract or common count. *Donaldson v. Abot (1987) 194 Cal. App. 3d 817, 820-821, 239 Cal. Rptr. 801* ; *Bennett v. Hayes*

(1975) 53 Cal. App. 3d 700, 703-704, 125 Cal. Rptr. 825

[c] When Defendant's Obligation Is Conditional

Criticism of necessity of pleading any special facts, including satisfaction of condition precedent, in action on common counts. *Oliver v. Campbell (1954) 43 Cal. 2d 298, 305, 273 P.2d 15* ; *Brooks v. Van Winkle (1958) 161 Cal. App. 2d 734, 739-740, 327 P.2d 151* (criticizing *Roche v. Baldwin (1902) 135 Cal. 522, 528, 65 P. 459*

When contract contains arbitration clause to determine true value of work performed in case of dispute, arbitration is condition precedent to any action on common counts for work performed. *Davisson v. East Whittier Land Etc. Co. (1908) 153 Cal. 81, 84-85, 96 P. 88*

Common count may not be used when defendant's obligation is conditional. *Roche v. Baldwin (1902) 135 Cal. 522, 528, 65 P. 459*

Where defendant's obligation to pay plaintiff is conditioned on third party approval, action on common count is appropriate even though satisfaction of condition precedent is not specifically alleged. *Castagnino v. Balletta (1889) 82 Cal. 250, 258-261, 23 P. 127*

If parties' agreement expressly limits obligation to pay monies out of specific fund or source, existence of fund is condition precedent to obligation of repayment; and if, through no fault of promisor, fund does not materialize, promisor is not obligated to pay. *Sunniland Fruit, Inc. v. Verni (1991) 233 Cal. App. 3d 892, 899, 284 Cal. Rptr. 824* ; *Jeschke v. Lamarr (1965) 234 Cal. App. 2d 506, 511, 44 Cal. Rptr. 416*

When filing proper creditor's claim is statutory condition precedent to action against decedent's estate, condition precedent must be pleaded in action brought on common counts. *Parker v. Solomon (1959) 171 Cal. App. 2d 125, 136-137,340 P.2d 353*

When duty to pay is conditioned on existence of specific fund, plaintiff is required to allege and prove that condition has been complied with. *Draper v. Patterson (1958) 156 Cal. App. 2d 606, 608-609, 319 P.2d 694*

When filing claim is statutory condition precedent to action brought against governmental agency, condition precedent must be pleaded in action brought on common counts. *Union Bk. & Tr. Co. v. Los Angeles Co. (1934) 2 Cal. App. 2d 600, 606, 38 P.2d 442*

[4] Waiver of Tort and Use of Common Counts to Sue on Implied Contract

Waiver of tort and suit on count for goods sold and delivered based on conversion is proper. *Bank of America N.T. & S. Assn. v. Hill (1937) 9 Cal. 2d 495, 498-499, 71 P.2d 258* ; *Hallidie v. Enginger (1917) 175 Cal. 505, 508, 166 P. 1*

Contrary to general rule that common counts may be used only for recovery of money, waiver of tort and suit in assumpsit for conversion of property is proper even if defendant has not sold or converted property into money. *Los Angeles Drug Co. v. Superior Court (1936) 8 Cal. 2d 71, 74, 63 P.2d 1124* ; *Glantz v. Freedman (1929) 100 Cal. App. 611, 614, 280 P. 704*

Plaintiff may generally waive cause of action in tort and sue in assumpsit. *Philpott v. Superior Court (1934) 1 Cal. 2d 512, 524-525, 36 P.2d 635* ; *Gold v. Los Angeles Democratic League (1975) 49 Cal. App. 3d 365, 376, 122 Cal. Rptr. 732*

Waiver of tort and use of common count of indebitatus assumpsit or quantum valebant is proper when basis of complaint is fraud. *McCall v. Superior Court (1934) 1 Cal. 2d 527, 530-531, 36 P.2d 642*

In action for money had and received based on conversion of property, recovery is limited to defendant's actual proceeds from sale of property. *French v. Robbins (1916) 172 Cal. 670, 679, 158 P. 188*

In action for goods sold and delivered based on conversion, recovery is limited to value of property. *Chittenden v. Pratt (1891) 89 Cal. 178, 184, 26 P. 626*

Waiver of tort and use of common count for money had and received is proper when basis of complaint is fraud. *Minor v. Baldridge (1898) 123 Cal. 187, 189-190, 55 P. 783*

In action for money had and received based on conversion of property, recovery is limited to defendant's actual proceeds from sale of property less necessary charges and commissions. *Lubert v. Chauviteau (1853) 3 Cal. 458, 463*

Waiver of tort and suit in assumpsit is improper when there is no basis for restitution. *Gold v. Los Angeles Democratic League (1975) 49 Cal. App. 3d 365, 376-377, 122 Cal. Rptr. 732*

Waiver of tort and use of common count for money had and received is proper when basis of complaint is constructive fraud or mistake of fact. *County of Santa Cruz v. McLeod (1961) 189 Cal. App. 2d 222, 228, 11 Cal. Rptr. 249*

Waiver of tort and action in assumpsit is proper when profit is wrongfully obtained. *Adams v. Harrison (1939) 34 Cal. App. 2d 288, 299-300, 93 P.2d 237*

[5] Mistake of Fact

Failure of bank customer to examine account statements, although this duty is imposed by statute [*see Com. Code § 4406(c)*], is not neglect of legal duty barring recovery for mistake. Sun'N Sand, Inc. v. United California Bank (l978) *21 Cal. 3d 671, 700, 148 Cal. Rptr. 329*

Money paid by mistake may be recoverable, no matter how negligent plaintiff was, as long as defendant/payee has not changed position in reliance on payment. *National Bank of California v. Miner (1914) 167 Cal. 532, 537, 140 P. 27* ; Frontier Refining Co. v. Home Bank (l969) *272 Cal. App. 2d 630, 636, 77 Cal. Rptr. 641*

Action for recovery of payments made under mistake of fact may be based on implied contract. *Olmstead v. Dauphiny (1894) 104 Cal. 635, 640, 38 P. 505*

Common count for money had and received is proper remedy for recovery of money paid by mistake. *Firpo v. Pacific Mut. Life Ins. Co. (1926) 80 Cal. App. 122, 125, 251 P. 657*

[6] Statute of Limitations

Statute of limitations for action in assumpsit generally begins to run when defendant receives money from plaintiff. *Tabata v. Murane (1944) 24 Cal. 2d 221, 226, 148 P.2d 605*

In action based on right to recover money under executory contract based on defendant's failure to perform, statute of limitations does not begin to run until injured party elects to no longer rely on contract and to sue for money paid under it. *Richter v. Union Land and Stock Co. (1900) 129 Cal. 367, 375, 62 P. 39*

If demand is necessary, statute of limitations begins to run when demand is made. *Rose v. Foord (1892) 96 Cal. 152, 154*

Statute of limitations relating to actions of assumpsit (rather than tort) generally applies when there is waiver of tort and suit in assumpsit. *Ponti v. Farrell (1961) 194 Cal. App. 2d 676, 682-683, 15 Cal. Rptr. 500*

Determination of appropriate statute of limitations when there is waiver of tort and suit in assumpsit may depend on substance of action and nature of right violated, rather than on form of action. *Ponti v. Farrell (1961) 194 Cal. App. 2d 676, 683, 15 Cal. Rptr. 500*

[7] Allegations in Complaint

Allegations of consideration or promise to pay are not required when implied as legal conclusion from facts pleaded. *Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 793, 256 P. 2d 947* ; *McFarland v. Holcomb (1898) 123 Cal. 84, 86, 55 P. 761*

Failure to set forth date of indebtedness in action for money had and received is remedied by demand for bill of particulars. *Pike v. Zadig (1915) 171 Cal. 273, 278, 152 P. 923*

Allegation of demand for payment is not ordinarily required. *Samuels v. Larrimore (1909) 11 Cal. App. 337, 339, 104 P. 1001* (money lent); *Quimby v. Lyon (1883) 63 Cal. 394, 395* (money had and received)

Essential allegations of a common count are statement of indebtedness in certain sum, consideration, and nonpayment. *First Interstate Bank v. State of California (1987) 197 Cal. App. 3d 627, 635, 243 Cal. Rptr. 8* ; *Allen v. Powell (1967) 248 Cal. App. 2d 502, 510, 56 Cal. Rptr. 715*

When cause of action on common count is based on express contract, allegations must specify whether contract was written or oral, unless complaint is without ambiguity on its face. *Moya v. Northrup (1970) 10 Cal. App. 3d 276, 283-284, 88 Cal. Rptr. 783*

Failure to allege facts that would estop defendant from pleading statute of frauds renders allegation demurrable, even if plaintiff has pleaded essential allegations of common count. *Allen v. Powell (1967) 248 Cal. App. 2d 502, 512, 56 Cal. Rptr. 715*

Direct statement of legal relationship or principle on which defendant's promise to pay is predicated is required when it cannot be implied from facts or when consideration was given to someone other than defendant. *Vaughn v. Certified Life Ins. Co. (1965) 238 Cal. App. 2d 177, 181, 47 Cal. Rptr. 619*

In action in assumpsit, two essential elements in pleading indebtedness are allegations of nonpayment and that services were rendered at defendant's request. *Division of Labor Law Enforcement v. Barnes (1962) 205 Cal. App. 2d 337, 349, 23 Cal. Rptr. 55 , disapproved in part on other grounds in White Lightning Co. v. Wolfson (1968) 68 Cal. 2d 336, 351 n.9, 66 Cal. Rptr. 697, 438 P.2d 345*

Allegation of promise to pay must be alleged if the facts do not justify implication of promise. *Smith v. Bentson (1932) 127 Cal. App. Supp. 789, 793, 15 P.2d 910*

In action in indebitatus assumpsit, allegations of indebtedness and that services were performed at defendant's request are unnecessary when consideration and promise to pay are implied from nature of transaction. *Donegan v. Houston (1907) 5 Cal. App. 626, 629-630, 90 P. 1073*

[8] Answer

General denial is sufficient to raise most defenses to action on common counts, except defendant's answer must raise any new matter relied on that is not put in issue by plaintiff. *Title Ins. Co. v. State Bd. of Equalization (1992) 4 Cal. 4th 715, 731, 14 Cal. Rptr. 2d 822, 842 P.2d 121* (dicta, as action for refund was not common count); *McDonald v. Pacific Debenture Co. (1905) 146 Cal. 667, 669, 80 P. 1090*

Special pleading is required for certain affirmative defenses. *McFarland v. Holcomb (1898) 123 Cal. 84, 87, 55 P. 761* (statute of limitations); *Interstate Group Administrators, Inc. v. Cravens, Dargan & Co. (1985) 174 Cal. App. 3d 700, 706-707, 220 Cal. Rptr. 250* (any new matter relied on by defendant not put in issue by plaintiff); *Grove v. Charles W. Barrett Co. (1927) 87 Cal. App. 165, 168, 261 P. 739* (estoppel and lack of capacity to sue)

General denial is sufficient to raise almost any defense, including some defenses that customarily require special pleading. *Interstate Group Administrators, Inc. v. Cravens, Dargan & Co. (1985) 174 Cal. App. 3d 700, 706, 220 Cal. Rptr. 250* (setoff)

[9] Consolidation of Actions

Plaintiff may unite in one complaint cause of action for the breach of an express contract and cause of action on common count. *Olmstead v. Dauphiny (1894) 104 Cal. 635, 640, 38 P. 505*

[10] Joinder of Common and Specifically Pleaded Counts

Plaintiff may plead cause of action as both common count and count on express contract, without having to elect between them. *Philpott v. Superior Court (1934) 1 Cal. 2d 512, 518, 36 P.2d 635* ; *Carnation Co. v. Marcevich (1960) 186 Cal. App. 2d 618, 620, 9 Cal. Rptr. 80* ; *Leoni v. Delany (1948) 83 Cal. App. 2d 303, 308-309, 188 P.2d 765*

Plaintiff may seek recovery of more than one debt in single common count. *McFarland v. Holcomb (1898) 123 Cal. 84, 86-87, 55 P. 761* ; *Farwell v. Murray (1894) 104 Cal. 464, 466, 38 P. 199*

Plaintiff may elect to plead single cause of action specifically on facts or generally on common counts. *Castagnino v. Balletta (1889) 82 Cal. 250, 258, 23 P. 127* ; *Higgins v. Desert Braemar, Inc. (1963) 219 Cal. App. 2d 744, 751, 33 Cal. Rptr. 527*

Single cause of action may be pleaded in alternative counts. *Leeke v. Hancock (1888) 76 Cal. 127, 130, 17 P. 937* ; *Hirschberg v. Rose (1934) 136 Cal. App. 653, 656, 29 P.2d 785*

When same cause of action is pleaded on several common counts, findings for plaintiff on one count, without finding on others, are sufficient to support judgment for plaintiff. *Leeke v. Hancock (1888) 76 Cal. 127, 130, 17 P. 937*

Diverse common counts alleging different causes of action cannot be united in one count. *Buckingham v. Waters (1859) 14 Cal. 146, 147-148*

Common count for work and labor should be pleaded separately from common count of money had and received; interests of justice and its orderly administration required plaintiff to set forth separate theories in separate counts to facilitate their adjudication. *Zumbrun v. University of Southern California (1972) 25 Cal. App. 3d 1, 9, 101 Cal. Rptr. 499*

When common count is joined with one on the contract, trier of fact will determine which count (if any) is supported by evidence. *Haggerty v. Warner (1953) 115 Cal. App. 2d 468, 474-475, 252 P.2d 373*

Count for money had and received does not depend on showing of express privity of contract. *Coombs v. Minor (1943) 60 Cal. App. 2d 645, 649, 141 P.2d 491*

Action for money had and received is properly joinable with other common counts. *Hirschberg v. Rose (1934) 136 Cal. App. 653, 656, 29 P.2d 785*

[11] Demurrers

When specifically pleaded count in contract is unenforceable due to statute of frauds, action on common counts is still permitted. *White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 346, 66 Cal. Rptr. 697, 438 P.2d 345* ; *Leoni v. Delany (1948) 83 Cal. App. 2d 303, 307, 188 P.2d 765*

Common count is not subject to demurrer when its facts, although similar to those in defective special count, are substantially identical to those alleged in another count that sufficiently states cause of action. *Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 793, 256 P.2d 947*

If common count clearly appears to be based on same cause of action as insufficient specific count in alternative pleading, entire complaint is demurrable *Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 793, 256 P.2d 947* ; *Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal. App. 3d 593, 601, 176 Cal. Rptr. 824*

When original specific complaint is defective, amended common count is sufficient when amendment, though based on same facts, obviates defect of original specific count by alleging different theory of recovery. *Overholser v. Glynn (1968) 267 Cal. App. 2d 800, 806-807, 73 Cal. Rptr. 628*

Entire complaint is demurrable when common count is set forth on same facts as defective specially pleaded count, even if specific count is excluded by subsequent amendment. *Henderson v. Superior Court (1978) 77 Cal. App. 3d 583, 590* al. Rptr. 478; *Neal v. Bank of America National Trust & Savings Assn. (1949) 93 Cal. App. 2d 678, 681-682, 209 P.2d 825*

Mere withdrawal of original complaint, once alleged, does not preclude court from considering it in ruling on sufficiency of amended pleading. *Neal v. Bank of America National Trust & Savings Assn. (1949) 93 Cal. App. 2d 678*

Common count is not subject to demurrer when it merely incorporates by reference certain preliminary allegations of a defective specific count. *Auckland v. Conlin (1928) 203 Cal. 776, 778, 265 P. 946*

Cause of action pleaded in form of common count is sufficient against general or special demurrer on grounds of uncertainty. *Pike v. Zadig (1915) 171 Cal. 273, 276-277, 152 P. 923*

Action on common counts for work done and materials furnished is sufficient against demurrer even though it cannot be ascertained which part of claim is for labor and which part for materials. *Jensen v. Dorr (1911) 159 Cal. 742, 746, 116 P. 553*

Action on common counts is not demurrable for uncertainty or ambiguity for failure to specify services rendered, times of performance, or amounts claimed for different services when these items may be obtained by demanding bill of particulars. *McFarland v. Holcomb (1898) 123 Cal. 84, 87, 55 P. 761*

Action on common counts is not subject to demurrer pursuant to former *Code Civ. Proc. § 430* (*see Code Civ. Proc. § 430.10(g)*) for failure to state whether contract on which action is based is oral or written when complaint unambiguous on face. *Moya v. Northrup (1970) 10 Cal. App. 3d 276, 285, 88 Cal. Rptr. 783*

[12] Evidence

In action in assumpsit to recover reasonable value of services, evidence of written contract is admissible. *Hermann v. Littlefield (1895) 109 Cal. 430, 432, 42 P. 443*

Although general rule forbids admitting special contract in evidence in action pleaded on common count, special contract is admissible as evidence when nothing remains to be done except payment by defendant. *Castagnino v. Balletta (1889) 82 Cal. 250, 259, 23 P. 127* ; *Tsarnas v. Bailey (1960) 179 Cal. App. 2d 332, 338, 3 Cal. Rptr. 629*

Agreed price set forth in unenforceable or invalid contract is relevant as evidence of reasonable value of services rendered if agreed price assigns dollar value to promised performance or provides formula by which ultimate sum is readily ascertainable. *LuMetta v. U.S. Robotics, Inc. (9th Cir. 1987) 824 F.2d 768, 770* (diversity case applying California law); *George v. Double-D Foods, Inc. (1984) 155 Cal. App. 3d 36, 42, 201 Cal. Rptr. 870*

Value of benefit conferred is evidence of reasonable value of services rendered under implied contract. *Lu Metta v. United States Robotics, Inc. (9th Cir. 1987) 824 F.2d 768, 770* (diversity case applying California law); *Ferrier v. Commercial Steel Corp. (1956) 142 Cal. App. 2d 424, 426-427, 298 P.2d 555*

Declaration in support of motion to preclude evidence should show that plaintiff's failure to provide adequate bill has prejudiced defense. *Ernest W. Hahn, Inc. v. Nort-Cet Corp. (1973) 34 Cal. App. 3d 171, 172-173, 109 Cal. Rptr. 709*

Value of benefit conferred is evidence of reasonable value of services rendered under quantum meruit count, as is agreed price under terminated express agreement of parties. *Watson v. Wood Dimension, Inc. (1989) 209 Cal. App. 3d 1359, 1365-1366, 257 Cal. Rptr. 816*

In action on common counts for balance due for labor done, defendant may not introduce evidence regarding alleged offset or counterclaim on subsequent contract with plaintiff when that evidence was not pleaded in defendant's answer. *Carranza v. Noroian (1966) 240 Cal. App. 2d 481, 487-488, 49 Cal. Rptr. 629*

Facts alleged in verified original complaint on common counts are not withdrawn from court consideration simply by omitting facts from amended pleading without explanation. *Parker v. Solomon (1959) 171 Cal. App. 2d 125, 135, 340 P.2d 353*

Contract price reflecting reasonable value of services performed under contract may be used as evidence for determining reasonable basis of additional work. *Ferrier v. Commercial Steel Corp. (1956) 142 Cal. App. 2d 424, 426-427, 298 P.2d 555*

Defendants under general denial to action pleaded on common counts may present any defense tending to show that plaintiff has no right to recover, including any matter at issue in pleadings. *Aetna Carpet Co. v. Penzner (1951) 102 Cal. App. 2d 859, 860* , P.2d 347

Pleading on common counts does not alter plaintiff's burden of proof. *Foye v. Board of Trade (1936) 11 Cal. App. 2d 734, 738, 54 P.2d 761*

Plaintiff may plead as many different common counts as he or she chooses to meet any possible phase of evidence. *Hirschberg v. Rose (1934) 136 Cal. App. 653, 656* , P.2d 785

Recovery in assumpsit does not require proof of express promise. *Pacific Fruit Exch. v. F. E. Booth Co. (1930) 103 Cal. App. 54, 55, 283 P. 944*

Good faith effort to obtain records needed to prepare adequate bill, including use of discovery, required by plaintiff. *Burton v. Santa Barbara Nat. Bank (1966) 247 Cal. App. 2d 427, 433, 55 Cal. Rptr. 529*

Exclusion of evidence is inappropriate when plaintiff prevented by defendant from having access to written records needed to prepare bill. *Butler Bros. v. Connolly (1962) 204 Cal. App.2d 22, 25-26, 22 Cal. Rptr. 175*

No prejudice is shown, and evidence should, thus, not be excluded, if information demanded is within defendant's knowledge or is available to defendant. *Sadik v. Wallberg Mining Corp. (1936) 11 Cal. App. 2d 379, 381, 53 P.2d 981*

[13] Burden of Proof

Plaintiff pleading on common counts has same burden of proof as plaintiff pleading on facts. *Foye v. Board of Trade (1936) 11 Cal. App. 2d 734, 738, 54 P.2d 761*

[14] Measure of Damages

Recovery on count in quantum valebant as limited solely to reasonable value of item or portion of item that is used. *Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 794, 256 P.2d 947*

In action for money had and received based on conversion of property, recovery is limited to defendant's actual proceeds from sale of property. *French v. Robbins (1916) 172 Cal. 670, 679, 158 P. 188*

In action for goods sold and delivered based on conversion, recovery is limited to value of property. *Chittenden v. Pratt (1891) 89 Cal. 178, 184, 26 P. 626*

In action for money had and received based on conversion of property, recovery is limited to defendant's actual proceeds from sale of property less necessary charges and commissions. *Lubert v. Chauviteau (1853) 3 Cal. 458, 463*

In action in quantum meruit, recovery is based on agreed rate of compensation under terminated express agreement of parties and on value of benefit conferred on defendant. *Watson v. Wood Dimension, Inc. (1989) 209 Cal. App. 3d 1359, 1363-1366, 257 Cal. Rptr. 816*

In action on common counts, tort damages and damages for breach of express contract are excluded. *Zumbrun v. University of Southern California (1972) 25 Cal. App. 3d 1, 14, 101 Cal. Rptr. 499*

Rule that party pleading on common count is limited to contract price as measure of damages does not apply to plaintiff seeking reasonable value of extra services rendered on implied contract when express contract is shown to be inapplicable. *Benson Elec. Co. v. Hale Bros. Assoc., Inc. (1966) 246 Cal. App. 2d 686, 697* , 55 Cal. Rtpr 73

In action on common counts to recover value of services rendered by plaintiff pursuant to express contract, recovery is limited to contract price when plaintiff's services were fully rendered and debt liquidated. *Higgins v. Desert Braemar, Inc. (1963) 219 Cal. App. 2d 744, 752, 33 Cal. Rptr. 527*

In action on common counts for proceeds of sale of converted property, recovery is limited to money in defendant's possession that rightfully belongs to plaintiff; plaintiff is not entitled to present value of balance due on sale contract, in addition to amount collected by defendant from buyer. *Shahood v. Cavin (1957) 154 Cal. App. 2d 745, 750, 316 P.2d 700*

[15] Defenses

[a] In General

Statute of frauds is not defense in action on common counts. *McFarland v. Holcomb (1898) 123 Cal. 84, 87, 55 P. 761*

Guilty party cannot recover consideration due it under common count if contract is illegal and unenforceable. *Donaldson v. Abot (1987) 194 Cal. App. 3d 817, 820-821, 239 Cal. Rptr. 801* ; *Bennett v. Hayes (1975) 53 Cal. App. 3d 700, 703-704, 125 Cal. Rptr. 825*

Setoff must ordinarily be affirmatively pleaded as defense; however, in response to common count, setoff is raised by general denial. *Interstate Group Administrators, Inc. v. Cravens, Dargan & Co. (1985) 174 Cal. App. 3d 700, 706-709, 220 Cal. Rptr. 250*

Common count is defective if it does not allege any consideration moving from plaintiff to defendant. *Gold v. Los Angeles Democratic League (1975) 49 Cal. App. 3d 365, 376-377, 122 Cal. Rptr. 732*

Defendants under general denial to action on common counts may present any defense tending to show that plaintiff has no right to recover, including any matter at issue in pleadings. *Carranza v. Noroian (1966) 240 Cal. App. 2d 481, 487-488* , 49 Cal. Rtpr. 629; *Aetna Carpet Co. v. Penzner (1951) 102 Cal. App. 2d 859, 860* , P.2d 347

[b] Statute of Limitations

Statute of limitations is defense in action on common counts. *McFarland v. Holcomb (1898) 123 Cal. 84, 87, 55 P. 761*

Amendment to conform pleadings to proof after statute of limitations has run may be permitted, for example, when common count for money had and received is pleaded originally and one for goods sold and delivered is more appropriate and two causes are similar with common origins. *Ben-Hur Mfg. Co. v. Empire Factors (1960) 181 Cal. App. 2d 123, 129, 5 Cal. Rptr. 181*

If bar of statute of limitations does not affirmatively appear on face of complaint, it is still proper to demur specially based on ambiguity or uncertainty to ascertain true dates. *Miller v. Brown (1951) 107 Cal. App. 2d 304, 307, 237 P.2d 320*

Defense of statute of limitations is properly raised by demurrer to action on common counts when it affirmatively appears on face of complaint that action is barred. *Evans v. Zeigler (1949) 91 Cal. App. 2d 226, 230, 204 P.2d 902*

[16] Indebitatus Counts (Counts for Fixed Amount)

[a] Goods Sold and Delivered

Common count for goods sold and delivered is used when defendant is indebted, in certain sum, for goods sold and delivered by plaintiff to defendant. *Abadie v. Carrillo (1867) 32 Cal. 172, 175-176*

Count for goods sold and delivered is sufficient even if plaintiff fails to allege promise to pay by defendant or particular value of goods delivered. *Abadie v. Carrillo (1867) 32 Cal. 172, 173-175*

Count for goods sold and delivered is sufficient even if it fails to state that goods were delivered. *Johnson v. Dixon Farms Co. (1915) 29 Cal. App. 52, 56, 155 P. 134*

Original complaint stating count for money had and received may be amended to state one for goods sold and delivered, due to similarity of counts and consequent lack of elements of prejudice or surprise to defendant. *Ben-Hur Mfg. Co. v. Empire Factors (1960) 181 Cal. App. 2d 123, 131, 5 Cal. Rptr. 181*

Count for goods sold and delivered is not demurrable for uncertainty even if plaintiff fails to clearly specify in pleadings whether action is expressly on contract or for reasonable value of goods. *Preston v. Central Cal. etc. Irr. Co. (1909) 11 Cal. App. 190, 196-197, 104 P. 462*

[b] Money Had and Received

Action for money had and received is appropriate when money was paid by mistake, extortion, oppression, undue advantage, or when consideration fails. *Minor v. Baldridge (1898) 123 Cal. 187, 191, 55 P. 783*

Common count for money had and received is proper when no contractual relationship exists, but equity requires that plaintiff receive payment on quasi-contractual theory. *Minor v. Baldridge (1898) 123 Cal. 187, 190-191, 55 P. 783*

Demand is required when, until demand is made, payee's retention of money is lawful. *Rose v. Foord (1892) 96 Cal. 152, 154, 30 P. 1114*

Allegation of making of demand ordinarily not necessary in action for money had and received. *Quimby v. Lyon (1883) 63 Cal. 394, 395* ; *Twining v. Thompson (1945) 68 Cal. App. 2d 104, 113-114, 156 P.2d 29*

Action for money had and received is appropriate to recover money obtained by fraud, misrepresentation, duress, undue influence, or mistake of fact. *City Bank of San Diego v. Ramage (1968) 266 Cal. App. 2d 570, 585, 72 Cal. Rptr. 273*

Action for money had and received is appropriate when express contract is voidable due to innocent misrepresentation or fraud. *Crocker-Anglo Nat. Bank v. Kuchman (1964) 224 Cal. App. 2d 490, 496-497, 36 Cal. Rptr. 806*

Action for money had and received is not appropriate when defendant never received any part of money or equivalent thing being sued for. *Rains v. Arnett (1961) 189 Cal. App. 2d 337, 344, 11 Cal. Rptr. 299*

Action for money had and received is appropriate when one party possesses money that in equity and good conscience belongs to another. *Rains v. Arnett (1961) 189 Cal. App. 2d 337, 344, 11 Cal. Rptr. 299*

When count is pleaded as count for money had and received, but should have been pleaded as count for money lent, reversal of judgment is not required if variance is not prejudicial. *Rains v. Arnett (1961) 189 Cal. App. 2d 337, 344, 11 Cal. Rptr. 299*

Action for money had and received based on express contract is proper if plaintiff has fully performed and nothing

remains to be done, except payment of money by defendant. *Ferro v. Citizens Nat. Trust & Sav. Bank (1955) 44 Cal. 2d 401, 409, 282 P.2d 849*

Action for money had and received is generally limited to money or article treated as or converted to money. *Canepa v. Sun Pacific, Inc. (1954) 126 Cal. App. 2d 706, 712, 272 P.2d 860*

Demand is required when debtor does not know that he or she owes creditor money. *Twining v. Thompson (1945) 68 Cal. App. 2d 104, 114, 156 P.2d 29* ; *Thresher v. Lopez (1921) 52 Cal. App. 219, 221, 198 P. 419*

Action for money had and received does not depend on showing express privity of contract. *Coombs v. Minor (1943) 60 Cal. App. 2d 645, 649, 141 P.2d 491*

Action for money had and received is appropriate when express contract is void. *Smith v. Randall (1942) 51 Cal. App. 2d 195, 197-198, 124 P.2d 334*

Allegation that the money sued for was received for use of plaintiff may be shown by necessary implication. *Shahabian v. Najarian (1936) 14 Cal. App. 2d 435, 440-441, 58 P.2d 396*

[c] Money Lent

Count for money lent is appropriate to allege indebtedness for money lent by plaintiff to defendant. *Pleasant v. Samuels (1896) 114 Cal. 34, 36-37, 45 P. 998* ; *Moya v. Northrup (1970) 10 Cal. App. 3d 276, 278, 88 Cal. Rptr. 783*

In common count for money lent, allegation specifying times at which indebtedness accrued or when items were lent are not necessary. *Moya v. Northrup (1970) 10 Cal. App. 3d 276, 280, 88 Cal. Rptr. 783*

When count is pleaded as count for money had and received, but should have been pleaded as count for money lent, reversal of judgment is not required if variance is nonprejudicial. *Rains v. Arnett (1961) 189 Cal. App. 2d 337, 344, 11 Cal. Rptr. 299* ; *Jones v. Re-Mine Oil Co. (1941) 47 Cal. App. 2d 832, 843, 119 P.2d 219*

Action for money lent is appropriate when joint venture is terminated and one associate seeks to recover advances made in excess of his or her share from other associates. *Barlin v. Barlin (1956) 145 Cal. App. 2d 390, 393, 302 P.2d 457*

Count for money lent is inappropriate when payment was voluntarily made to third party for benefit of another. *Curtin v. Black Oak Development Co. (1917) 35 Cal. App. 1, 5, 168 P. 1157* ; *Deicher v. Corkery (1962) 205 Cal. App. 2d. 654, 657, 23 Cal. Rptr. 270*

[d] Money Paid

Action for money paid may not be brought by party who voluntarily pays out money for use of another without receiving any promise to repay. *McGlew v. McDade (1905) 146 Cal. 553, 554, 80 P. 695*

In common count for money paid, allegation of when plaintiff loaned money to and for defendant, date of indebtedness, items of account, or when defendant requested advance are not necessary. *Pleasant v. Samuels (1896) 114 Cal. 34, 38, 45 P. 998*

Recovery in action for money paid requires proof, either directly or impliedly from circumstances, that defendant requested that plaintiff pay out money for defendant's use. *Moulton v. Loux (1877) 52 Cal. 81, 83*

Action for money paid may be brought by one legally compelled to pay money that another is obliged to pay, or by one who pays money, not officiously, that another person should have paid to save himself or herself from damage. *Langford v. Eckert (1970) 9 Cal. App. 3d 439, 443, 88 Cal. Rptr. 429* ; *Pioneer Title Ins. Co. v. Guttman (1959) 175 Cal. App. 2d 116, 120, 345 P.2d 577*

Common count for money paid is appropriate when one expends money at request of another. *Deicher v. Corkery (1962) 205 Cal. App. 2d. 654, 661, 23 Cal. Rptr. 270*

Count for money paid, not count for money lent, is appropriate when one person voluntarily pays out money for use by third person. *Deicher v. Corkery (1962) 205 Cal. App. 2d 654, 661, 23 Cal. Rptr. 270*

When money is paid out for another's benefit at his or her request, law implies promise and legal liability of defendant to repay plaintiff on demand. *Rains v. Arnett (1961) 189 Cal. App. 2d 337, 344, 11 Cal. Rptr. 299*

[e] Work and Labor (Services)

In action for reasonable value of services, plaintiff is not entitled to interest before verdict or judgment. *Swinnerton v. Argonaut L. & D. Co. (1896) 112 Cal. 375, 379, 44 P. 719*

Allegation that work and labor were performed at defendant's request is not required, since request is implied from allegation of service performed. *McFarland v. Holcomb (1898) 123 Cal. 84, 86, 55 P. 761*

Common count for work done and materials furnished is sufficient even if it fails to specify which of liquidated debt sums are for labor and which are for materials. *Jensen v. Dorr (1911) 159 Cal. 742, 746-747, 116 P. 553*

Action for work and labor is appropriate when entire performance of special contract is prevented by one party, or when terms of express contract have been varied by agreement of both parties. *Overland Machined Products, Inc. v. Swingline, Inc. (1968) 263 Cal. App. 2d 642, 646, 69 Cal. Rptr. 852*

Action for work and labor is appropriate to recover money from defendant on express contract when plaintiff has fully performed work and labor, including personal services, and nothing remains to be done except payment of money by defendant. *Higgins v. Desert Braemar, Inc. (1963) 219 Cal. App. 2d 744, 751, 33 Cal. Rptr. 527*

Recovery under count for work and labor on express contract is limited to amount agreed to be paid. *Higgins v. Desert Braemar, Inc. (1963) 219 Cal. App. 2d 744, 751, 33 Cal. Rptr. 527*

Count for services rendered is sufficiently pleaded if it alleges that services were performed at defendant's request and that defendant promised but failed to pay for services. *Haggerty v. Warner (1953) 115 Cal. App. 2d 468, 475*

In common count for services rendered, allegations that services were performed at defendant's request and that defendant promised to pay for services but failed to do so are sufficient. *Haggerty v. Warner (1953) 115 Cal. App. 2d 468, 475*

Count for work and labor performed and materials furnished is not demurrable on special grounds by reason of inclusion of allegation that defendant agreed to pay for work and labor "on special contract." *Lehner v. McLennan (1921) 54 Cal. App. 491, 492-493, 202 P. 41*

[17] Quantum Counts (Counts for Reasonable Value)

[a] Quantum Meruit

Full performance does not make restitution unavailable if any part of consideration due from defendant is something other than a liquidated debt; when legal publisher breached author agreement by rejecting completed manuscript solely for commercial reasons and not because of any defect, author was entitled to sue for restitution for time and effort he reasonably invested in writing the manuscript; entitlement to percentage of revenues from book was not "liquidated debt" under California law. *Chodos v. West Publishing Co, Inc. (9th Cir. 2002) 292 F.3d 992, 1001-1002*

Law firm that was barred from recovering under fee-sharing agreement with another firm, due to absence of written client consent to agreement required by *Cal. Rules Prof. Conduct, Rule 2-200*, held entitled to recover from other firm in quantum meruit for reasonable value of services it rendered on client's behalf. *Huskinson & Brown, LLP v. Wolf (2004) 32 Cal. 4th 453, 464, 9 Cal. Rptr. 3d 693, 84 P.3d 379*

Action in quantum meruit is appropriate when party expends funds and performs services at another's request, under reasonable belief that requesting party will compensate him or her for those services, even if expenditures and services do not directly benefit requesting party. *Earhart v. William Low Co. (1979) 25 Cal. 3d 503, 505, 510-515, 158 Cal. Rptr. 887, 600 P.2d 1344* (disapproving *Rotea v. Izuel (1939) 14 Cal. 2d 605, 611, 95 P.2d 927*)

Lawyer who was barred from recovering under fee-sharing agreement with firm, due to absence of written client consent to agreement required by Cal. Rules Prof. Conduct, Rule 2-200, could not recover in quantum meruit from client but could recover from firm under rule of *Huskinson & Brown, LLP v. Wolf, above*. Strong v. Beydoun (2008) 166 Cal. App. 4th 1398, 1404, 83 Cal. Rptr. 3d 632

Count in quantum meruit is sufficient if it alleges that plaintiff performed certain services for defendant, their reasonable value, that they were rendered at defendant's request, and that they are unpaid. *Brown v. Crown Gold Milling Co. (1907) 150 Cal. 376, 382, 89 P. 86* ; *Haggerty v. Warner (1953) 115 Cal. App. 2d 468, 475, 252 P.2d 373*

Action in quantum meruit is appropriate if services rendered by one party to void contract are not illegal. *Sims v. Petaluma Gas Light Co. (1901) 131 Cal. 656, 660, 63 P. 1011* ; *Lawn v. Camino Heights, Inc. (1971) 15 Cal. App. 3d 973, 980-983, 93 Cal. Rptr. 621*

Action in quantum meruit is appropriate to recover reasonable value of services rendered when defendant is not liable in a fixed sum. *McFarland v. Holcomb (1898) 123 Cal. 84, 86-87 55 P. 761* ; *Meredith v. Marks (1963) 212 Cal. App. 2d 265, 272-273, 27 Cal. Rptr. 737*

Action in quantum meruit is appropriate when terms of a contract have been modified by mutual agreement. *Castagnino v. Balletta (1889) 82 Cal. 250, 258, 23 P. 127* (action on express contract inappropriate in this case); *Dodge v. Harbor Boat Bldg. Co. (1950) 99 Cal. App. 2d 782, 791, 222 P.2d 697*

In matters regarding written agreements or licensure, a party may not recover in quantum meruit for that which cannot be recovered on contract. *Castillo v. Barrera (2007) 146 Cal. App. 4th 1317, 1328, 53 Cal. Rptr. 3d 494* (denying recovery to unlicensed boxing manager, following cases with same result for unlicensed talent agents and unlicensed contractors)

Claim in quantum meruit is appropriate to recover reasonable value of services rendered by unmarried cohabitant to business solely owned by other cohabitant; recovery is for value of beneficial services, not value by which someone benefits from those services; claim did not accrue until relationship ended for purposes of statute of limitations. *Maglica v. Maglica (1998) 66 Cal. App. 4th 442, 452-454, 78 Cal. Rptr. 2d 101*

County is not liable for quantum meruit claim absent statute authorizing or requiring payment. *Union of American Physicians & Dentists v. County of Santa Clara (1983) 149 Cal. App. 3d 45, 49-52, 196 Cal. Rptr. 602*

Action in quantum meruit is appropriate to recover reasonable value of services after part performance on express contract. *Mayo v. Pacific Project Consultants, Inc. (1969) 1 Cal. App. 3d 1013, 1018-1019, 82 Cal. Rptr. 117* ; *Oliver v. Campbell (1954) 43 Cal. 2d 298, 302, 273 P.2d 15*

Action in quantum meruit is inappropriate when plaintiff has fully performed under contract and defendant's debt is liquidated or calculable; plaintiff limited to liquidated debt sum and cannot alternatively seek reasonable value of services. *Higgins v. Desert Braemar, Inc. (1963) 219 Cal. App. 2d 744, 751, 33 Cal. Rptr. 527*

Count in quantum meruit is improper when action is not premised on any services rendered defendant that serve as basis of recovery for plaintiff. *Parker v. Solomon (1959) 171 Cal. App. 2d 125, 135, 340 P.2d 353*

Action in quantum meruit is appropriate to recover reasonable value of services after imperfect performance if services are rendered in good faith and defendant accepts them. *Roseleaf Corp. v. Radis (1953) 122 Cal. App. 2d 196, 207, 264 P.2d 964*

Action in quantum meruit is appropriate when plaintiff, under express contract, performs other work not specified in contract at defendant's request. *Combs v. California Cotton Mills Co. (1952) 112 Cal. App. 2d 781, 786-787, 247 P.2d 382*

Action in quantum meruit is appropriate when express contract provides method for calculating compensation that cannot be followed under circumstances. *Miller v. San Francisco Church Exten. Soc. (1932) 125 Cal. App. 85, 94, 13 P.2d 824*

[b] Quantum Valebant

Action in quantum valebant is improper when defendant has not used property for his or her benefit such that the law will impose duty of compensation for that use. *Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 794, 256 P.2d 947*

Count in quantum valebant is proper to recover reasonable value of goods sold and delivered. *Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 792-794, 256 P.2d 947*

Recovery in quantum valebant is limited to reasonable value of item, or portion used. *Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 792-793, 256 P.2d 947*

Action in quantum valebant for goods sold and delivered is improper when defendant refuses to accept goods. *Hallidie v. Sutter S. R. Co. (1883) 63 Cal. 575, 577*

[18] Book Account

Open book account may be pleaded in alternative along with other common counts. *Biltmore Press v. Usadel (1970) 6 Cal. App. 3d 896, 898, 86 Cal. Rptr. 233*

Open book account is detailed statement kept in book, in nature of debit and credit, that arises out of contract or some fiduciary relationship, and shows against whom and in favor of whom charges are made. *Block v. D.W. Nicholson Corp. (1947) 77 Cal. App. 2d 739, 746, 176 P.2d 739*

Pleading open book account does not avoid two-year statute of limitations on oral contract when there is insufficient evidence to establish existence of that account. *Biltmore Press v. Usadel (1970) 6 Cal. App. 3d 896, 900, 86 Cal. Rptr. 233*

Loose pages and records kept in other than book form are sufficient to constitute book account and are binding on appeal if evidence supports trial judge's finding. *Foothill D. Co. v. Wallace Ranch W. Co. (1938) 25 Cal. App. 2d 555, 566-567, 78 P.2d 215*

[19] Bill of Particulars

"Account stated" is defined as new agreement by parties that supersedes original contract and account. *Jones v. Wilton (1938) 10 Cal. 2d 493, 498, 75 P.2d 593*

Bill of particulars is not a pleading and cannot be answered. *Chamberlain v. Loewenthal (1902) 138 Cal. 47, 49, 70 P. 932* ; *Weiner v. Davies (1967) 248 Cal. App. 2d 387, 391, 56 Cal. Rptr. 546*

Action on account covers almost any kind of contract action for money consisting of more than one item. *Long Beach City School Dist. v. Dodge (1902) 135 Cal. 401, 407, 67 P. 499* ; *Distefano v. Hall (1963) 218 Cal. App. 2d 657, 677, 32 Cal. Rptr. 770*

Bill must be delivered to defendant within 10 days after date of service of demand. *Edelman v. McDonell (1899) 126 Cal. 210, 213, 58 P. 528*

"Account" within meaning of *Code Civ. Proc. § 454* includes services alleged in seeking quasi-contractual recovery. *McFarland v. Holcomb (1898) 123 Cal. 84, 87, 55 P. 761* ; *Caruso v. Snap-Tite, Inc. (1969) 275 Cal. App. 2d 211, 213, 79 Cal. Rptr. 642*

Plaintiff in action for services is not required to specify items of account in pleadings. *McFarland v. Holcomb (1898) 123 Cal. 84, 87, 55 P. 761*

Provisions of *Code Civ. Proc. § 454* regarding time period within which bill of particulars must be delivered to defendant on proper written request is liberally construed by court when delivery beyond statutory deadline is not prejudicial to defendant. *McCarthy v. Tecarte L. & W. Co. (1896) 110 Cal. 687, 692-693, 43 P. 391*

Defendant desiring more specificity in common count is required to make demand for bill of particulars. *Farwell v. Murray (1894) 104 Cal. 464, 465-466, 38 P. 199*

Demand for bill of particulars is appropriate in action for goods sold and delivered when complaint does not set out items of account. *Farwell v. Murray (1894) 104 Cal. 464, 466-467, 38 P. 199*

Demand for bill of particulars is appropriate in action for work and labor performed when complaint does not set out items of account. *Farwell v. Murray (1894) 104 Cal. 464, 466-467, 38 P. 199*

Party who intends to preclude evidence of adversary on grounds that latter failed to meet demand for bill of particulars must apply for motion to exclude evidence before trial. *Conner v. Hutchinson (1861) 17 Cal. 279, 282* ; Burton v. Santa Barbara Nat. Bank (1966) *247 Cal. App. 2d, 427, 433 , 55 Cal. Rptr. 529*

"Account" within meaning of *Code Civ. Proc. § 454* includes money lent or money paid. *Moya v. Northrup (1970) 10 Cal. App. 3d 276, 88 Cal. Rptr. 783*

Purpose of bill of particulars is to provide information so that defendant will not be taken by surprise and can intelligently present defenses. *Halagan v. Ohanesian (1967) 64 Cal. Rptr. 792*

If furnished bill of particulars is too general, defendant's remedy is further bill of particulars. *Burton v. Santa Barbara Nat. Bank (1966) 247 Cal. App. 2d 427, 433, 55 Cal. Rptr. 529*

Motion to exclude on failure to provide bill of particulars must be made before trial. *Burton v. Santa Barbara Nat. Bank (1966) 247 Cal. App. 2d 427, 433, 55 Cal. Rptr. 529*

Terminology "bill of particulars," "account," and "copy of account" are apparently used interchangeably by courts within meaning of *Code Civ. Proc. § 454*. *Burton v. Santa Barbara Nat. Bank (1966) 247 Cal. App. 2d 427, 432, 55 Cal. Rptr. 529*

When plaintiff furnishes inadequate bill of particulars, defendant must demand further account by noticed motion or be deemed to have waived insufficiency of bill. *Burton v. Santa Barbara Nat. Bank (1966) 247 Cal. App. 2d 427, 433, 55 Cal. Rptr. 529*

Demand for bill of particulars does not extend time in which to answer. *Dobbins v. Hardister (1966) 242 Cal. App. 2d 787, 794, 51 Cal. Rptr. 866*

Primary purpose of bill of particulars is to amplify complaint to help defendant prepare pleading. *Dobbins v. Hardister (1966) 242 Cal. App. 2d 787, 794-795, 51 Cal. Rptr. 866*

No bill of particulars may be demanded in action on account stated. *Distefano v. Hall (1963) 218 Cal. App. 2d 657, 677, 32 Cal. Rptr. 770*

Items in bill of particulars must be set forth, in good faith, as precisely and as definitely as possible. *Meredith v. Marks (1963) 212 Cal. App. 2d 265, 270, 27 Cal. Rptr. 737*

Court determines whether plaintiff's response to demand for bill of particulars is sufficient. *Butler Bros. v. Connolly (1962) 204 Cal. App. 2d 22, 26, 22 Cal. Rptr. 175* ; *Glogau v. Hagan (1951) 107 Cal. App. 2d 313, 321, 237 P.2d 329*

"Account" within meaning of *Code Civ. Proc. § 454* includes goods sold and delivered. *Ben-Hur Mfg. Co. v. Empire Factors (1960) 181 Cal. App. 2d 123, 132, 5 Cal. Rptr. 181*

Motion to exclude on failure to provide sufficient bill of particulars will be denied if motion was not made before trial. *Glogau v. Hagan (1951) 107 Cal. App. 2d 313, 321, 237 P.2d 329*

Items specified in bill of particulars limits nature and amount of recovery that might otherwise be permissible under allegations of original complaint. *Abbott v. Limited Mut. Comp. Ins. Co. (1938) 30 Cal. App. 2d 157, 161, 85 P.2d 961*

Bill of particulars for legal services rendered is deemed incorporated into complaint. *Baroni v. Musick (1934) 3 Cal. App. 2d 419, 421 39 P.2d 435*

Bill of particulars is regarded as amplification of complaint and considered incorporated into complaint as originally filed for purpose of determining plaintiff's right of recovery or admissibility of evidence in support of claim. *Kurokawa v. Saroyan (1928) 95 Cal. App. 772, 774, 273 P. 613*

"Account" within meaning of *Code Civ. Proc. § 454* includes money had and received. *Firpo v. Pacific Mut. Life Ins.*

Co. (1926) 80 Cal. App. 122, 251 P. 657

Code Civ. Proc. § 454 does not require any specific form of demand, other than writing requirement, but demand should be signed by party requesting bill of particulars or contain clear indication of party's entitlement to account. *Elmore v. Tingley (1926) 78 Cal. App. 460, 468, 248 P. 706*

"Account" within meaning of *Code Civ. Proc. § 454* includes services or materials furnished defendant pursuant to contract. *Jensen v. Dorr (1911) 159 Cal. 742, 746, 116 P. 553*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewContracts LawBreachCauses of ActionAssumpsitContracts LawBreachCauses of ActionMoney Had & ReceivedContracts LawTypes of ContractsExpress ContractsGovernmentsLegislationStatutes of LimitationsTime Limitations

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12-121 California Forms of Pleading and Practice--Annotated § 121.43

§ 121.43 Law Reviews

Note, *Restitution for Money Paid Under Mistake of Law, 19 Hastings L.J. 1225 (1968)*

Note, *Restitution: Mistake of Fact: Recovery of Insurance Payments, 2 UCLA L. Rev. 285 (1955)*

Notes and Recent Decisions, *Conversion: Waiver of Tort; Effect of Statute of Limitations, 31 Calif. L. Rev. 584 (1943)*

King, *The Use of the Common Counts in California, 14 S. Calif. L. Rev. 288 (1941)*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsWaiversTortsIntentional TortsConversionDefensesTortsIntentional TortsConversionRemedies

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§ 121.44 Text References

Corbin on Contracts, vol. 1, §§ 19, 20; vol. 2, § 330

Witkin, California Procedure, vol. 4, *Pleading* §§ 460-471, 514-532 (4th ed. 1997)

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[Reserved]

§§ 121.45[Reserved]

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12-121 California Forms of Pleading and Practice--Annotated § 121.50

§ 121.50 Judicial Council Trial Court Pleading Form [Cal. Rules of Ct., Rule 1.45(a)]

[1] FORMS

[a] Complaint Based on Contract [Cal. Rules of Ct., Rule 1.45(a), (b); Judicial Council Form PLD-C-001] Complaint Based on Contract [Cal. Rules of Ct., Rule 1.45(a), (b); Judicial Council Form PLD-C-001]

Click here to view image.

[b] Common Counts Cause of Action (Attachment to Complaint on Contract) [Cal. Rules of Ct., Rule 1.45(a), (b); Judicial Council Form PLD-C-001(2)] Common Counts Cause of Action (Attachment to Complaint on Contract) [Cal. Rules of Ct., Rule 1.45(a), (b); Judicial Council Form PLD-C-001(2)]

Click here to view image.

[2] Use of Forms

The forms in [1][a] and [b], *above,* are illustrations of two Judicial Council forms for use in an action based on a common count. The first form is the Judicial Council form for a complaint on a contract (Form PLD-C-001); the second form is an attachment to the first and indicates that the cause of action is based on a common count (Form PLD-C-001(2)); These forms are for use in any action based on a common count [*see Code Civ. Proc. § 425.12*; *Cal. Rules of Ct., Rule 1.45(a), (b)*; Judicial Council Forms PLD-C-001, PLD-C-001(2)].

A complete set of Judicial Council trial court pleading forms is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

For general information relating to the use of Judicial Council complaint forms, see Ch. 123, *Complaints and Cross Complaints* . For discussion of the Judicial Council form for a complaint on a contract, and instructions on completing that form, see Ch. 140, *Contracts* . Additional information specifically related to the common counts needed to

complete the complaint for contract actions/contract complaint form is discussed in [4] and [5], *below*. Information required to complete the common count attachment is discussed in [6]-[11], *below*.

[3] Use of Judicial Council Form Optional

These Judicial Council forms have been approved for optional use [*Code Civ. Proc. § 425.12*; *Cal. Rules of Ct., Rule 1.45(a), (b)*].

[4] Attachment of Common Counts Cause of Action to Complaint

The Common Counts box is Paragraph 9 of this form, and should be checked to indicate that the Common Counts Cause of Action (Judicial Council Form PLD-C-001(2), reproduced in [1][b], *above*, is attached.

[5] Prayer

The prayer in Paragraph 10 of the complaint contains several alternatives relating to the type of relief requested, including damages, interest on damages, attorney's fees, and other relief.

If requesting interest, this paragraph must indicate whether interest is sought according to proof or at a certain rate, which must be specified. The date from which interest is requested must also be stated. For further discussion of interest, see [8], *below*.

If attorney's fees are requested, this paragraph must indicate whether attorney's fees are sought according to proof or in a specified amount. Except as provided by statute, the measure and mode of compensation of attorneys is based on the express or implied agreement of the parties [*Code Civ. Proc. § 1021*]. Thus, attorney's fees ordinarily are unavailable in an action based on a common count unless the party requesting fees presents proof of an implied agreement providing for these fees. However, attorney's fees may be recovered by the prevailing party in certain contract actions based on a book account as defined in *Code Civ. Proc. § 337a*, entered into on or after January 1, 1987 [*Civ. Code § 1717.5*; *see Civ. Code § 1717*]. For further discussion, see Ch. 8, *Accounts Stated and Open Accounts* and Ch. 174, *Costs and Attorney's Fees* , § 174.50 et seq.

[6] Statutes of Limitations in Common Counts Attachment

This attachment groups the common counts according to the governing statute of limitations. A four-year statute of limitations applies to an open book account and to an account stated in a writing, between the plaintiff and defendant, in which it was agreed that the defendant was indebted to plaintiff [*Code Civ. Proc. § 337*; *see Code Civ. Proc. § 337a* ("book account" defined)].

The indebitatus counts for money had and received, work and labor (services and materials), goods sold and delivered, money lent, money paid, and the quantum counts for the reasonable value of services or goods sold are subject to a four-year statute of limitations if the obligation is founded on a writing [*Code Civ. Proc. § 337*] and to a two-year statute of limitations if the obligation is oral or implied in fact [*Code Civ. Proc. § 339*].

[7] Appropriate Count on Common Counts Attachment

The appropriate common count must be selected from among the counts enumerated in Paragraph CC-1.b:

- Money had and received by defendant for the use and benefit of plaintiff [*see § 121.24[1][b]*; *see also §§ 121.51, 121.52* (forms for complaints for money had and received)];

- Work, labor, services, and materials rendered at the special instance and request of defendant and for

which defendant promised to pay plaintiff either a specific sum or the reasonable value [*see §§ 121.24[5], 121.25[2]*; *see §§ 121.55* (form for complaint for work, labor, services, and materials at agreed price), 121.57 (form for complaint for reasonable value of work, labor, and services)];

- Goods, wares, and merchandise sold and delivered to defendant and for which defendant promised to pay plaintiff either a specific sum or the reasonable value [*see §§ 121.24[6], 121.25[3]*; *see also §§ 121.56* (form for complaint for goods sold and delivered at agreed price), § 121.58 (form for complaint for reasonable value of goods sold and delivered)];

- Money lent by plaintiff to defendant at defendant's request [*see § 121.24[2]*; *see also § 121.53* (form for complaint for money lent)];

- Money paid, laid out, and expended to or for defendant at defendant's special instance and request *see § 121.24[3]*; *see also § 121.54* (form for complaint for money paid)]; and

- Any other common count not described above.

[8] Amount Due and Prejudgment Interest

The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due under the terms of the obligation, with interest on the principal amount due [*Civ. Code § 3302*; *see Civ. Code § 3287(a)* (interest on damages certain or capable of being made certain by calculation)]. Accordingly, the plaintiff in an action based on an indebitatus count would generally be able to recover prejudgment interest since the amount owed was certain at the time plaintiff's right became vested. In contrast, when a claim is unliquidated, as in an action on the quantum counts, interest from the date the principal became due is not permitted. However, a court, in its discretion, may award interest on the principal amount, but no earlier than the date the action was filed [*see Civ. Code § 3287(b)*; *see also Lewis C. Nelson & Sons, Inc. v. Clovis Unified School District (2001) 90 Cal. App. 4th 64, 73, 108 Cal. Rptr. 2d 715* (holding that *Civ. Code § 3287(b)* is applicable to the public entities described in *Civ. Code § 3287(a)*)].

[9] Attorney's Fees

Attorney's fees may be available based on a provision in the contract on which the action is predicated [*Civ. Code § 1717*], or in certain contract actions based on a book account [*Civ. Code § 1717.5*; *see Code Civ. Proc. § 337a* ("book account" defined)]. For further discussion of attorney's fees in an action on the common counts, see [5], *above.* For further discussion of attorney's fees based on book accounts, see Ch. 8, *Accounts Stated and Open Accounts* , and Ch. 174, *Costs and Attorney's Fees* , § 174.50 et seq.

[10] Other Allegations

The space marked "Other" in Paragraph CC-4 may be used to allege facts for which no other space has been provided. For example, the form might state on information and belief that the fictitiously named defendants are liable for the occurrences alleged in the complaint.

[11] Verification

Counsel may attach a verification to this complaint, if desired or if necessary [for form of verification attached to form of complaint for money had and received, *see § 121.51*]. Verification of the complaint is not required except when the action is subject to *Civ. Code § 1812.10* (retail installment sales), *Civ. Code § 2984.4* (motor vehicle sales), or *Code Civ. Proc. § 395(b)* (other consumer obligations). However, verification of the complaint requires the defendant to file a verified answer in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a

claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[12] Cross References

For complaints on specific common counts and discussion of those common counts see *§§ 121.51 -121.58*

For discussion of the common count of account stated and open book account, see Ch. 8, *Accounts Stated and Opens Accounts*

For alternative allegations of the parties' capacity, residence, fictitious name, and agency relationships, see Ch. 20, *Allegations Commonly Used*

For discussion of the effect of verification of a complaint on the answer, refer to Ch. 26, *Answers*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms for prayers, see Ch. 420, *Prayers*

For alternative forms for verification, see Ch. 572, *Verification*

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§ 121.51 Complaint for Money Had and Received (Indebitatus Assumpsit)

[1] FORM Complaint for Money Had and Received (Indebitatus Assumpsit)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONEY HAD AND RE-
_____ [*name*],	)	CEIVED
Defendant.	)	(COMMON COUNT)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[*EITHER, if defendant is a domestic corporation*]

1. Defendant _____ [*name*] is now, and at all times mentioned in this complaint was, a corporation duly organized under the laws of California, with its principal executive office located in _____ County, California.

[*OR, if defendant is a foreign corporation governed by Corp. Code § 2115*]

1. Defendant _____ [*name*] is now, and at all times mentioned in this complaint was, a foreign

_____ [corporation transacting intrastate business in California *or* parent corporation], subject to *Section 2115 of the California Corporations Code* and to which Section _____ [*specify relevant statutory sections*] of the Corporations Code is applicable to the exclusion of law of the jurisdiction of its incorporation.

[*OR, if defendant is a natural person*]

1. Defendant _____ [*name*] is an individual and is now, and at all times mentioned in this complaint was, a resident of _____ [*city*], _____ [*county*], California [*or continue with other basis of venue, e.g., county where contract was made*].

[*CONTINUE with fictitious name allegation, if appropriate*]

[2. Plaintiff is ignorant of the true names and capacities of defendants sued in this complaint as DOES I-_____, inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff believes that each of the fictitiously named defendants is indebted to plaintiff as alleged in this complaint, and that plaintiff's rights against the fictitiously named defendants arise from this indebtedness.)]

[*ADD, if action is subject to Civ. Code § 1812.10 (retail installment sales) or Civ. Code § 2984.4 (motor vehicle sales), or Code Civ. Proc. § 395(b) (other consumer obligations), allegation of facts showing proper venue, unless these facts are stated in an affidavit filed with complaint*]

3. This action is subject to the provisions of Section _____ [1812.10 of the Civil Code *or 2984.4 of the Civil Code or 395(b) of the Code of Civil Procedure*] because _____ [*state facts*].

[*CONTINUE*]

4. _____ [Within the last _____ (two *or* four) years *or* On or about _____ (*date*)], at _____ [*city*], California, defendant became indebted to plaintiff in the sum of $_____ for money had and received by defendant for the use and benefit of plaintiff.

5. Plaintiff has repeatedly demanded payment from defendant. The last demand was made on _____ [*date*].

[*EITHER, if no payment has been made*]

6. No payment has been made by defendant to plaintiff, and there is now owing the sum of $_____, with interest on that amount at the rate of _____ percent per year from _____ [*date*].

[*OR, if partial payment has been made*]

6. Defendant has paid only the sum of $_____ to the plaintiff, leaving a balance due of $_____, with interest on that amount at the rate of _____ percent per year from

_____ [*date*].

[*CONTINUE, if requesting attorney's fees based on contract provision*]

7. The contract on which this action is based provides that in the event legal action is taken to enforce collection, the prevailing party is entitled to recover reasonable attorney's fees. Plaintiff believes that the amount of $_____ constitutes a reasonable attorney's fee for the prosecution of this action.

[*OR, if requesting attorney's fees based on contract on a book account as defined in Code Civ. Proc. § 337a*]

7. The contract on which this action is based is a contract on a book account. *Section 337a of the Code of Civil Procedure* provides that in the event legal action is taken to enforce collection, the prevailing party on the contract is entitled to recover reasonable attorney's fees. Plaintiff believes that the amount of $_____ constitutes a reasonable attorney's fee for the prosecution of this action.

[*CONTINUE*]

WHEREFORE, plaintiff prays judgment against defendant[s and each of them,] as follows:

1. For the [principal] sum of $_____;

2. For interest [on the (principle) sum at _____ percent per year from _____ (*date*) *or* as allowed by law];

3. For costs of suit incurred; and

4. For any further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The complaint in [1], *above,* is on the common count for money had and received. In general, the count is used to recover either on an express contract when the plaintiff has fully performed and nothing remains to be done except payment by the defendant, or when the defendant has in his or her possession money that in equity and good conscience belongs to the plaintiff [*see Ferro v. Citizens Nat. Trust & Sav. Bank (1955) 44 Cal. 2d 401, 409, 282 P.2d 849* ; *Rains v. Arnett (1961) 189 Cal. App. 2d 337, 344, 11 Cal. Rptr. 299]* .

For general discussion of a complaint based on contract with a common counts cause of action attached see *§ 121.50*.

[3] Allegations

The complaint alleges:

- The capacity and principal office of the corporation [*see Corp. Code § 1304(a)* (venue of action in superior court of proper county); *see also Corp. Code § 177*], or the capacity and residence of the individual defendant, as appropriate (Paragraph 1);

- The existence of fictitious defendants (Optional Paragraph 2);

- Proper venue if the action is subject to *Civ. Code § 1812.10* (retail installment sales) or *Civ. Code § 2984.4* (motor vehicle sales), or *Code Civ. Proc. § 395(b)* (other consumer obligations) (Optional Paragraph 3);

- The date of the indebtedness, or the time within which the indebtedness arose (Paragraph 4) [*see §§ 121.15, 121.16[4]*];

- The amount of the plaintiff's consideration (Paragraph 4) [*see Allen v. Powell (1967) 248 Cal. App. 2d 502, 510, 56 Cal. Rptr. 715* ; *see also § 121.16[3]*];

- That the plaintiff has demanded payment (Paragraph 5), (although no longer deemed essential by courts addressing the issue, a demand has been alleged in seminal cases [*see, e.g., Division of Labor Law Enforcement v. Barnes (1962) 205 Cal. App. 2d 337, 349, 23 Cal. Rptr. 55* , *disapproved in part on other grounds in White Lightning Co. v. Wolfson (1968) 68 Cal. 2d 335, 351 n.9, 66 Cal. Rptr. 697, 438 P.2d 345* ; *see also § 121.16[2], 121.24[1][c]*];

- Nonpayment or part payment and amount owing (Paragraph 6) [*see First Interstate Bank v. State of California (1987) 197 Cal. App. 3d 627, 635, 243 Cal. Rptr. 8* ; *see also § 121.16[1]*; *Allen v. Powell (1967) 248 Cal. App. 2d 502, 510, 56 Cal. Rptr. 715* (although traditional form of pleading money had and received required allegation that no part of sum owed has been paid, allegation of nonpayment of part apparently is sufficient)];

- Interest due on the unpaid sum (Paragraph 6) [*see Civ. Code § 3287(a)* (interest from date principal became due permitted in action on the agreed price, but not in an action on the quantum counts, except as provided in *Civ. Code § 3287(b)*; for form of complaint based on contract with common counts attachment *see § 121.50*]; and

- The existence of an attorney's fee provision, or that the action is based on a book account, and the reasonable value of the attorney's services (Optional Paragraph 7) [*see Civ. Code §§ 1717* (attorney's fees available based on provision in contract on which action is based), 1717.5 (attorney's fees available in

certain contract actions based on book account); *see also Code Civ. Proc. § 337a* ("book account" defined)].

This last allegation is not strictly necessary [*see Civ. Code § 1717(a)* (attorney's fees pursuant to contract provision as element of costs); *see also Ganey v. Doran (1987) 191 Cal. App. 3d 901, 911,912, 236 Cal. Rptr. 787* (contract provision for attorney's fees need not be pleaded if contract is made part of complaint)]. Reasonable attorney's fees are fixed by the court on notice and motion of a party [*Civ. Code § 1717(a)*]. For discussion of attorney's fees awards pursuant to a contract provision, and forms and procedures for their recovery, see Ch. 174, *Costs and Attorney's Fees* . For additional discussion of attorney's fees in actions on the common counts, see *§ 121.50*.

A promise by the defendant to pay the plaintiff is necessary when the promise cannot be implied from the alleged facts, or when the defendant is one other than person to whom the consideration was given [*Vaughn v. Certified Life Ins. Co. (1965) 238 Cal. App. 2d 177, 181, 47 Cal. Rptr. 619* ; *see § 121.16[3]*].

For a detailed discussion of the necessary and recommended allegations when pleading on the common counts, see *§§ 121.16, 121.24[1][c]*.

[4] Joinder of Counts

When the basis of the action is that the defendant obtained the benefit of goods or services furnished by the plaintiff, a count for money had and received is often joined with a count on an open book account and with one for goods sold and delivered or for work and labor, as appropriate. If the transaction involved an account stated, a count on an account stated may also be joined [*see Hirschberg v. Rose (1934) 136 Cal. App. 653, 656* ; *see also* Ch. 8, *Accounts Stated and Open Accounts*].

Further, a common count for money had and received may be joined with a specially pleaded count based on the same facts and seeking the same recovery [*Philpott v. Superior Court (1934) 1 Cal. 2d 512, 518, 36 P.2d 635* ; *Leoni v. Delany (1948) 83 Cal. App. 2d 303, 308-309, 188 P.2d 765* (separately pleading both express agreement to compensate and common count for services rendered); *see Carnation Co. v. Marcevich (1960) 186 Cal. App. 2d 618, 620, 9 Cal. Rptr. 80* (plaintiff may plead count expressly on facts, joined with common count based on same facts and seeking same recovery)]. This practice is common, particularly if the express contract may prove to be unenforceable or if the recovery on the express contract may fail for lack of proof or another defect that would not preclude recovery based on the common count. For further discussion of joinder, see *§ 121.19*.

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[6] Verification

Verification of this complaint is not required, except when the action is subject to *Civ. Code § 1812.10* (retail installment sales) or *Civ. Code § 2984.4* (motor vehicle sales), or *Code Civ. Proc. § 395(b)* (other consumer obligations). However, verification of the complaint requires the defendant to file a verified answer in a superior court

action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*].

For further discussion of the effect that verifying a complaint has on the answer, refer to Ch. 26, *Answers*. For discussion of the verification requirements in actions involving installment, automotive sales, or consumer obligations, see [8], *below*.

[7] Venue

In actions on the common counts not subject to the special venue provisions discussed in [8], *below* [*see Civ. Code §§ 1801 et seq., 2981 et seq.*; *Code Civ. Proc. § 395(b)*], the regular provisions governing venue apply [*see Code Civ. Proc. § 395(a)*]. Thus, in an action on a common count based on contract, venue would properly lie in the county in which the obligation is to be performed or the contract was entered into, or in the county in which any defendant resides at the time of commencement of the action [*see Code Civ. Proc. § 395(a)*]. However, if one of two common counts pleaded in the same cause of action entitles a defendant to a change of venue, it is immaterial that the other count is sufficient for venue in the county in which the action was originally filed [*see Tringali v. Vest (1951) 106 Cal. App. 2d 720, 721, 236 P.2d 171* (permitting change of venue in action alleging two counts, one of which was on account stated, when plaintiff's failure to allege county in which agreement was made provided grounds for change of venue to county of defendant's residence)].

[8] Special Rules for Actions Involving Installment Sales, Automotive Sales, and Other Consumer Obligations

In any action or proceeding that is subject to the Unruh Retail Installment Sales Act [*Civ. Code § 1801 et seq.*] or the Rees-Levering Automotive Sales Act [*Civ. Code § 2981 et seq.*], and in cases subject to *Code Civ. Proc. § 395(b)* (other consumer obligations), the plaintiff must state facts in the complaint, or in an affidavit or declaration under penalty of perjury filed with the complaint, showing that the action has been commenced in the proper court and that the action is subject to the provisions of the *Civ. Code § 1812.10* or *2984.4* (proper courts for commencing actions under Unruh Retail Installment Sales Act or Rees-Levering Automotive Sales Act), or to the provisions of *Code Civ. Proc. § 395(b)* (proper courts for commencing actions related to other consumer obligations). If the facts are stated in the complaint, it must be verified by the oath of the plaintiff or the plaintiff's attorney. If an affidavit or declaration under penalty of perjury is used, it similarly may be by either the plaintiff or the plaintiff's attorney [*Civ. Code §§ 1812.10(c), 2984.4(c)*; *Code Civ. Proc. § 396a(a)*; *see Code Civ. Proc. § 2015.5* (use of unsworn statements)].

When the affidavit (or declaration) is filed with the complaint, a copy must be served with the summons [*Civ. Code §§ 1812.10(c), 2984.4(c)*; *Code Civ. Proc. § 396a(a)*]. If the plaintiff fails to file the affidavit (or declaration) or to state facts in a verified complaint, as required by statute, the action must be dismissed without prejudice, unless the court, on terms as may be just, permits the affidavit (or declaration) to be filed after the complaint is filed [*Code Civ. Proc. § 396a(a)*; *see Civ. Code §§ 1812.10(c), 2984.4(c)*; *Code Civ. Proc. § 395(b)*; *see also* Ch. 20, *Allegation Commonly Used*].

For more detailed discussion of the Rees-Levering Act and Unruh Act, see Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* , and Ch. 501, *Sales: Retail Installment Sales* , respectively.

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12-121 California Forms of Pleading and Practice--Annotated § 121.52

§ 121.52 Complaint to Recover Amount of Overpayment Made Under Mistake of Fact; First Count Based on Implied Contract, Second Count Based on Common Count for Money Had and Received [Civ. Code § 1577]

[1] FORM Complaint to Recover Amount of Overpayment Made Under Mistake of Fact; First Count Based on Implied Contract, Second Count Based on Common Count for Money Had and Received [Civ. Code § 1577]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO RECOVER MONEY PAID BY
_____ [*name*],	)	MISTAKE
Defendant.	)	(COMMON COUNT)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

FIRST COUNT
(Implied Contract)

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 121.51[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 121.51[1], Paragraph 2.*]

[3. *Allegation that action is subject to Civ. Code § 1812.10 or 2984.4 or to Code Civ. Proc. § 395(b), if appropriate.*

See § 121.51[1], Paragraph 3.]

4. On or about _____ [*date*], defendant rendered to plaintiff an account in writing based on _____ [former transactions between the parties *or describe particular transaction out of which account arose*]; that statement of account showed a balance due from plaintiff to defendant in the sum of $_____.

5. Plaintiff, reasonably relying on the statement of account [by reason of the long-standing business relationship existing between the parties], and believing the statement to be correct, on or about _____ [*date*], paid to defendant the full amount stated in the account.

6. After making this payment, and on or about _____ [*date*], plaintiff discovered that the account was overstated by the sum of $_____, resulting in an overpayment by plaintiff of that amount.

7. [*Demand allegation. See § 121.51[1], Paragraph 5.*]

8. [*Allegation of nonpayment and amount owing. See § 121.51[1], Paragraph 6.*]

SECOND COUNT
(Common Count)

1. Plaintiff incorporates _____ [Paragraph 1 *or* Paragraphs 1 and _____ (2 *or* 3) *or* Paragraphs 1, 2, and 3] of his/her first cause of action by reference.

2. [*Money had and received allegation. See § 121.51[1], Paragraph 4.*].

3. [*Demand allegation. See § 121.51[1], Paragraph 5.*]

4. [*Allegation of nonpayment and amount owing. See § 121.51[1], Paragraph 6.*]

[*Prayer. See § 121.51[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 121.51[1]. For discussion, see § 121.51[6].*]

[2] Use of Form

The complaint in [1], *above,* is for use by a payor to recover money paid by mistake as a result of an incorrect statement of account rendered by the payee/defendant. It contains one count based on the implied contract and a second count stating a common count for money had and received.

If the account is a retail installment account or credit card account, other damages, including attorney's fees and in some cases treble damages for willful violations, may be authorized by both state and federal statutes, if the claim of error

was first asserted in accordance with statutory billing error procedures and the defendant card issuer or retailer did not correct the error [*see Civ. Code §§ 1747.50* (Song-Beverly Credit Card Act of 1971), 1811.1, 1812.7, 1812.9 (Unruh Act); *15 U.S.C. § 1640(a)* (federal Truth in Lending Act)].

For discussion and forms relating to California's Song-Beverly Credit Card Act of 1971 [*Civ. Code §§ 1747-1748.7*], refer to Ch. 127, *Consumer Contracts and Loans*. For discussion and forms relating to Unruh or Act [*Civ. Code §§ 1801-1812.20*] and the federal Truth in Lending Act [*15 U.S.C. §§ 1601-1667e*], refer to Ch. 501, *Sales: Retail Installment Sales*.

[3] Allegations

When a claim based on fraud or misrepresentation is pleaded as a common count, it is sufficient to plead only the common count [*J. C. Peacock, Inc. v. Hasko (1961) 196 Cal. App. 2d 353, 16 Cal. Rptr. 518]* , even though this practice of pleading on the common counts runs counter to the principle that facts constituting the alleged fraud must be set forth with particularity [*Minor v. Baldridge (1898) 123 Cal. 187, 190-191, 55 P. 783]* .

For further discussion of necessary and recommended allegations in a count for money had and received, see *§ 121.51* (form of complaint for money had and received. For discussion of the joinder of counts, refer to § 121.19, and to § 121.51. For discussion of admissible evidence in cases in which recovery depends on an implied contract, see *§ 121.21[1]*.

[4] Cross References

For further discussion of the requirements of a complaint on common counts, see *§ 121.51*

See, generally, Ch. 140, *Contracts*

See, generally, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*

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12-121 California Forms of Pleading and Practice--Annotated § 121.53

§ 121.53 Complaint for Money Lent (Indebitatus Assumpsit)

[1] FORM Complaint for Money Lent (Indebitatus Assumpsit)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONEY LENT
_____ [*name*],	)	(COMMON COUNT)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 121.51[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 121.51[1], Paragraph 2.*]

[3. *Allegation that action is subject to Civ. Code § 1812.10 or 2984.4 or to Code Civ. Proc. § 395(b), if appropriate. See § 121.51[1], Paragraph 3.*]

4. _____ [Within the last _____ (two *or* four) years *or* On or about _____ (*date*)], at _____ [*city*], California, defendant became indebted to plaintiff in the sum of $_____ for money lent by plaintiff to defendant at his/her request.

5. [*Demand allegation. See § 121.51[1], Paragraph 5.*]

6. [*Allegation of nonpayment and amount owing. See § 121.51[1], Paragraph 6.*]

[7. *Request for attorney's fees, if appropriate. See § 121.51[1], Paragraph 7.*].

[*Prayer. See § 121.51[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 121.51[1]. For discussion, see § 121.51[6].*]

[2] Use of Form

The complaint in [1], *above*, is on the common count for money lent to defendant. For a discussion of the distinctions between the counts of money lent and money paid, see *§ 121.24[4]*.

For a more detailed discussion of the requirements of a complaint on common counts see *§ 121.51*.

[3] Allegations

The complaint alleges:

- The capacity and defendants' residences or other allegations for venue (Paragraph 1);

- The existence of fictitious defendants (Optional Paragraph 2);

- Proper venue if the action is subject to *Civ. Code § 1812.10* (retail installment sales) or 2984.4 (motor vehicle sales), or *Code Civ. Proc. § 395(b)* (other consumer obligations) (Optional Paragraph 3);

- The date of the indebtedness, or the time within which the indebtedness arose (Paragraph 4) [*see §§ 121.15, 121.16[4]*];

- The plaintiff's consideration (Paragraph 4) [*see Allen v. Powell (1967) 248 Cal. App. 2d 502, 510, 56 Cal. Rptr. 715* ; *see also § 121.16[3]*];

- A demand for payment (Paragraph 5), (although no longer deemed essential by courts addressing the issue [*see Samuels v. Larrimore (1909) 11 Cal. App. 337, 339, 104 P. 1001* (no demand required in action for money lent)], a demand has been alleged in seminal cases [*see, e.g., Division of Labor Law Enforcement v. Barnes (1962) 205 Cal. App. 2d 337, 349, 23 Cal. Rptr. 55,]* ;

- Nonpayment and amount owing (Paragraph 6) [*see First Interstate Bank v. State of California (1987) 197 Cal. App. 3d 627, 635, 243 Cal. Rptr. 8* ; *Allen v. Powell (1967) 248 Cal. App. 2d 502, 510, 56 Cal. Rptr. 715* ; *see also § 121.16[1]*];

- The existence of an attorney's fee provision and the reasonable value of the attorney's services

(Paragraph 7) [*see Civ. Code §§ 1717* (attorney's fees available based on provision in contract on which action is based), 1717.5 (attorney's fees available in certain contract actions based on book account); *see also Code Civ. Proc. § 337a* ("book account" defined)].

For further discussion of necessary and recommended allegations when pleading on the common counts, see *§ 121.16[1]* and *§ 121.51* (complaint for money had and received).

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12-121 California Forms of Pleading and Practice--Annotated § 121.54

§ 121.54 Complaint for Money Paid (Indebitatus Assumpsit)

[1] FORM Complaint for Money Paid (Indebitatus Assumpsit)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONEY PAID
_____ [*name*],	)	(COMMON COUNT)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 121.51[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 121.51[1], Paragraph 2.*]

[3. *Allegation that action is subject to Civ. Code § 1812.10 or 2984.4, or to Code Civ. Proc. § 395(b), if appropriate. See § 121.51[1], Paragraph 3.*]

4. _____ [Within the last _____ (two *or* four) years *or* On or about _____ (*date*)], at _____ [*city*], California, defendant became indebted to plaintiff in the sum of $_____ for money paid by plaintiff for defendant at his/her request.

5. [*Demand allegation. See § 121.51[1], Paragraph 5.*]

6. [*Allegation of nonpayment and amount owing. See § 121.51[1], Paragraph 6.*]

[7. *Request for attorney's fees, if appropriate. See § 121.51[1], Paragraph 7.*].

[*Prayer. See § 121.51[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 121.51[1]. For discussion, see § 121.51[6].*]

[2] Use of Form

The complaint in [1], *above*, on the common count for money paid is appropriate when one expends money at the request of another [*Deicher v. Corkery (1962) 205 Cal. App. 2d 654, 661, 23 Cal. Rptr. 270]* . For a discussion of the distinctions between the counts of money lent and money paid, refer to § 121.24[4].

For further discussion of the requirements of a complaint on common counts see *§ 121.51*.

[3] Allegations

For discussion of necessary and recommended allegations when pleading on the common counts, refer to § 121.16[1], and to § 121.51, complaint for money had and received.

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12-121 California Forms of Pleading and Practice--Annotated § 121.55

§ 121.55 Complaint for Work, Labor, Services and Materials at Agreed Price (Indebitatus Assumpsit)

[1] FORM Complaint for Work, Labor, Services and Materials at Agreed Price (Indebitatus Assumpsit)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR WORK, LABOR, SERVICES
_____ [*name*],	)	[AND MATERIALS]
Defendant.	)	(COMMON COUNT)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 121.51[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 121.51[1], Paragraph 2.*]

[3. *Allegation that action is subject to Civ. Code § 1812.10 or 2984.4, or to Code Civ. Proc. § 395(b), if appropriate. See § 121.51[1], Paragraph 3.*]

[*EITHER, if action is based on work, labor, and services provided by plaintiff to defendant*]

4. _____ [Within the last _____ (two *or* four) years *or* On or about _____ (*date*)], at _____ [*city*], California, defendant became indebted to plaintiff in the agreed sum of $_____ for work,labor, and services performed by the plaintiff _____ [for defendant *or* at the special request of defendant].

[*OR, if action is based on work, labor, and materials furnished by plaintiff to defendant*]

4. _____ [Within the last _____ (two *or* four) years *or* On or about _____ (*date*)], at _____ [*city*], California, defendant became indebted to plaintiff in the agreed sum of $_____ for services and materials provided by plaintiff _____ [to defendant *or* at the special request of defendant].

[*CONTINUE*]

5. [*Demand allegation. See § 121.51[1], Paragraph 5.*]

6. [*Allegation of nonpayment and amount owing. See § 121.51[1], Paragraph 6.*]

[7. *Request for attorney's fees, if appropriate. See § 121.51[1], Paragraph 7.*].

[*Prayer. See § 121.51[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 121.51[1]. For discussion, see § 121.51[6].*]

[2] Use of Form

The complaint in [1], *above,* is to be used when services, or services and materials, are furnished for an agreed price by the plaintiff to the defendant or at the defendant's special request. This count in indebitatus assumpsit should not be confused with the count in quantum meruit, for the reasonable value of services [*see § 121.57,* form of complaint for reasonable value of work labor and services (quantum meruit)].

For further discussion of the requirements of a complaint on common counts see *§ 121.51*.

[3] Allegations

Older cases hold that a complaint on the common count of work and labor (or services) is sufficient to state a cause of action even if it does not itemize either the time (Paragraph 4) or the particular services, if more than one type of service was provided [*see McFarland v. Holcomb (1898) 123 Cal. 84, 87, 55 P. 761]* . Further, although it is customary to allege that the work and labor (or services) were performed at the defendant's request (Paragraph 4), such an allegation is not required, since the request is implied from the allegation of the service performed [*McFarland v. Holcomb (1898) 123 Cal. 84, 86, 55 P. 761]* . Moreover, a common count for work done and materials that plaintiff furnished defendant has been held to be sufficient even though it fails to specify which of the liquidated debt sums are for labor and which are for materials [*Jensen v. Dorr (1911) 159 Cal. 742, 746-747, 116 P. 553]* .

Although it is not necessary to specify the work done or the agreed price, courts generally allow some elaboration on the typical work and labor count [*Donegan v. Houston (1907) 5 Cal. App. 626, 629, 90 P. 1073* ; *see Math v. Crescent Hill Gold Mines Co. (1916) 31 Cal. App. 636, 640, 161 P. 140* (in count for work and labor, terms of express contract under which work was performed need not be set forth)].

However, despite the holdings mentioned above, the additional allegations in this form are both customary and recommended [*see § 121.51*, form of complaint for money had and received; *see also § 121.16*].

[4] Amount of Recovery

If the action is to recover for work and labor rendered by the plaintiff pursuant to a contract, the plaintiff has fully performed, and the amount owed is calculable, the amount of recovery is limited to the liquidated debt and not the reasonable value of services [*Higgins v. Desert Braemar, Inc. (1963) 219 Cal. App. 2d 744, 751-754, 33 Cal. Rptr. 527]* .

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12-121 California Forms of Pleading and Practice--Annotated § 121.56

§ 121.56 Complaint for Goods Sold and Delivered at Agreed Price (Indebitatus Assumpsit)

[1] FORM Complaint for Goods Sold and Delivered at Agreed Price (Indebitatus Assumpsit)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR GOODS SOLD AND DE-
_____ [*name*],	)	LIVERED AT AGREED PRICE
Defendant.	)	(COMMON COUNT)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 121.51[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 121.51[1], Paragraph 2.*]

[3. *Allegation that action is subject to Civ. Code § 1812.10 or 2984.4, or to Code Civ. Proc. § 395(b), if appropriate. See § 121.51[1], Paragraph 3.*]

4. _____ [Within the last _____ (two *or* four) years *or* On or about _____ (*date*)], at _____ [*city*], California, defendant became indebted to plaintiff in the sum of $_____ for goods sold and delivered to defendant.

5. [*Demand allegation. See § 121.51[1], Paragraph 5.*]

6. [*Allegation of nonpayment and amount owing. See § 121.51[1], Paragraph 6.*]

[7. *Request for attorney's fees, if appropriate. See § 121.51[1], Paragraph 7.*].

[*Prayer. See § 121.51[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 121.51[1]. For discussion, see § 121.51[6].*]

[2] Use of Form

The complaint in [1], *above*, is to be used when the goods sold and delivered, but not paid for, were for a fixed price. The complaint alleges the indebtedness, in a certain sum, for goods sold and delivered by the plaintiff to the defendant [*see Abadie v. Carrillo (1867) 32 Cal. 172, 175-176]* . However, if the plaintiff seeks the reasonable value of goods sold and delivered, rather than a specific sum, an action in quantum valebant is appropriate [*see § 121.58*, form of complaint for reasonable value of goods sold and delivered].

For further discussion of the requirements of a complaint on common counts see *§ 121.51*.

[3] Allegations

A common count for goods sold and delivered is sufficient when it avers defendant's indebtedness to plaintiff in a certain sum (Paragraph 4), delivery at the request of the defendant (Paragraph 4), and nonpayment (Paragraph 6), even when the plaintiff fails to allege a promise by the defendant to pay or the particular value of the goods [*Abadie v. Carrillo (1867) 32 Cal. 172, 173-175]* , or even that the goods were delivered [*Johnson v. Dixon Farms Co. (1915) 29 Cal. App. 52, 56, 155 P. 134]* .

The additional allegations in this form are both customary and recommended [*see § 121.51[3]*; *see also § 121.16*].

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§ 121.57 Complaint for Reasonable Value of Work, Labor, and Services (Quantum Meruit)

[1] FORM Complaint for Reasonable Value of Work, Labor, and Services (Quantum Meruit)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR REASONABLE VALUE OF
_____ [*name*],	)	WORK, LABOR, AND SERVICES
Defendant.	)	(COMMON COUNT IN QUANTUM MERUIT)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 121.51[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 121.51[1], Paragraph 2.*]

[3. *Allegation that action is subject to Civ. Code § 1812.10 or 2984.4, or to Code Civ. Proc. § 395(b), if appropriate. See § 121.51[1], Paragraph 3.*]

[*EITHER*]

4. _____ [Within the last _____ (two *or* four) years *or* On or about

_____ (*date*)], at _____ [*city*], California, plaintiff performed _____ [*type of services performed*] services [for defendant *or* at the special request of defendant]. [Defendant knew that these services were being provided and promised to pay their reasonable value *or* defendant accepted, used, and enjoyed the services provided by plaintiff].

[*OR, if quantum meruit recovery is being sought under statutory scheme by which defendant is required to pay reasonable value of defendant's services, allege ultimate facts under statutory scheme by which plaintiff is entitled to claim, and defendant is obligated to pay, reasonable value of services rendered by plaintiff, e.g.*]

4. Plaintiff is an emergency-room physician. Defendant is a for-profit health care service plan. By law, plaintiff is required to provide medical treatment to anyone in a public emergency room, regardless of the person's ability to pay, up to the point of rendering the person medically stable. Also by law, defendant is required to reimburse emergency health-care providers for the mandated emergency services rendered to the plan's enrollees. As described in detail in Exhibit A attached to this complaint, during the period from _____ (*date*) through _____ (*date*), plaintiff provided emergency services, as mandated by law, to numerous persons who were enrolled in defendant's service plan. Plaintiff is entitled to be paid the reasonable and customary fees for those services, without regard to the amounts that defendant's service plan would otherwise reimburse to those services.]

[*CONTINUE*]

5. [*Demand allegation. See § 121.51[1], Paragraph 5.*]

6. The fair and reasonable value of the services provided to the defendant is at least $_____.

[*EITHER, if no payment has been made*]

7. No payment has been made by defendant to plaintiff, and there is now owing the sum of [at least] $_____.

[*OR, if partial payment has been made*]

7. Defendant has paid only the sum of $_____ to the plaintiff, leaving a balance due of [at least] $_____.

[*OR, if quantum meruit recovery is being sought under statutory scheme by which defendant is required to pay reasonable value of defendant's services*]

7. Defendant has failed and refused, and continues to fail and refuse, to reimburse defendant for the reasonable and customary value of defendant's services as required by law, but instead has maintained, and continues to maintain, that it is obligated to reimburse defendant only for _____ [*specify, e.g.,* the amounts that defendant's health care service plan specifies will be reimbursed for the types of services provided by defendant]. [A copy of defendant's plan, containing its reimbursement schedule, is attached as Exhibit B to this complaint.]

[*CONTINUE*]

[8. *Request for attorney's fees, if appropriate. See § 121.51[1], Paragraph 7.*].

WHEREFORE, plaintiff prays judgment against defendant[s and each of them,] as follows:

1. For compensatory damages according to the proof;

2. For interest as allowed by law;

3. For costs of suit incurred; and

4. For any further relief the court deems proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 121.51[1]. For discussion, see § 121.51[6].*]

[2] Use of Form

The complaint in quantum meruit in [1], *above,* alleges the performance of work and labor or services by the plaintiff for the defendant, at the defendant's request, and may be used to recover the reasonable value of the services rendered when the defendant is not liable in a fixed sum [*McFarland v. Holcomb (1898) 123 Cal. 84, 86-87, 55 P. 761]* , or when the plaintiff has the election of suing for the reasonable value of services [*see, e.g., Haggerty v. Warner (1953) 115 Cal. App. 2d 468, 475, 252 P.2d 373* (when plaintiff renders personal services to defendant at defendant's request, plaintiff may elect to plead either on express contract or in quantum meruit for reasonable value services); *see also § 121.25[2][b]*]. This count in quantum meruit should not be confused with the count in indebitatus assumpsit [*see § 121.55*, complaint for work, labor, services, and materials at agreed price (indebitatus assumpsit)].

The second optional Paragraph 4 and the third optional Paragraph 7 in this complaint may be used when the quantum meruit claim arises from a statutory scheme that (1) requires the plaintiff to provide the services without regard to the recipient's ability to pay, and (2) requires the defendant to "reimburse" the plaintiff for providing the services [*see, e.g., Bell v. Blue Cross of California (2005) 131 Cal. App. 4th 211, 216-221, 31 Cal. Rptr. 3d 688* (by statute, emergency-room physicians generally must provide medical care to anyone in public emergency room, without regard to person's ability to pay, and for-profit health-care service plan must reimburse emergency health-care providers for mandated services rendered to plan enrollees); *see also § 121.25[2][a]*].

For further discussion of the requirements of a complaint on common counts see *§ 121.51*.

[3] Allegations

Older cases hold that a complaint in quantum meruit is sufficient to state a cause of action if it alleges that [*see Haggerty v. Warner (1953) 115 Cal. App. 2d 468, 475, 252 P.2d 373 , citing Brown v. Crown Gold Milling Co. (1907) 150 Cal. 376, 382, 89 P. 86]* :

- The plaintiff performed certain services for the defendant (Paragraph 4).

- The reasonable value of those services (Paragraph 6).

- That the services were rendered at the request of the defendant (Paragraph 6).
- That the services are unpaid (Paragraph 7).

Other cases also hold that a count in quantum meruit is sufficiently pleaded even though the plaintiff fails to state when the defendant became indebted to him or her (Paragraph 4), or the nature of the services rendered (Paragraph 4) [*see Evans v. Zeigler (1949) 91 Cal. App. 2d 226, 230, 204 P.2d 902]* . Moreover, although a count on quantum meruit usually alleges that the work was performed at the defendant's request (Paragraph 4) and that the defendant promised to pay reasonable value (Paragraph 4), older cases hold that these allegation are not necessary, since the request and the promise to pay are implied from the allegation of the service performed [*see McFarland v. Holcomb (1898) 123 Cal. 84, 86, 55 P. 761]* . It has also been held that no demand for payment before instituting the action (Paragraph 5) is required [*see McDonald v. Filice (1967) 252 Cal. App. 2d 613, 623, 60 Cal. Rptr. 832* (action itself is only demand necessary when it is defendant's unconditional duty to perform act or pay sum of money)].

Interest from the date that the principal sum became due is not permitted in an action in quantum meruit, except at the court's discretion, but in no event earlier than the date the action was filed [*see Civ. Code § 3287(b)*; *see Lewis C. Nelson & Sons, Inc. v. Clovis Unified School District (2001) 90 Cal. App. 4th 64, 73, 108 Cal. Rptr. 2d 715* (holding that *Civ. Code § 3287(b)* is applicable to the public entities described in *Civ. Code § 3287(a)*)].

Although the additional allegations in this form appear to be unnecessary, their use is both customary and recommended [*see § 121.51[3]*; *see also § 121.16*].

[4] Recovery under Quantum Meruit

Recovery under quantum meruit is quasi-contractual; it is based on an implied contract for the payment of services, to meet the ends of justice [*see Lazzarevich v. Lazzarevich (1948) 88 Cal. App. 2d 708, 721, 200 P.2d 49* (defendant's promise and obligation imposed by law, regardless of any agreement); *Estate of O'Donnell (1948) 85 Cal. App. 2d 1, 6-7, 192 P.2d 94* (contract implied in law for payment by incompetent for reasonable value of services rendered, even without express contract)]. In a case in which an unmarried cohabitant sought to recover the reasonable value of services rendered to a business solely owned by the other cohabitant, quantum meruit allowed recovery for the value of beneficial services, not the value by which the business owner benefitted from those services [*Maglica v. Maglica (1998) 66 Cal. App. 4th 442, 449-452* (holding that court erred in allowing jury to measure recovery on basis of impact of unmarried cohabitant's services on business of other cohabitant)]. In that situation, the claim was held not to accrue until the relationship ended for purposes of the statute of limitations [*Maglica v. Maglica (1998) 66 Cal. App. 4th 442, 452-454, 78 Cal. Rptr. 2d 101* ; *see Code Civ. Proc. § 339* (two-year statute of limitations)].

In order to recover under a quantum meruit theory, a plaintiff must establish both that (1) he or she was acting pursuant to either an express or implied request for those services from the defendant, and (2) that the services rendered were intended to and did benefit the defendant [*Day v. Alta Bates (2002) 98 Cal. App. 4th 243, 248-249, 119 Cal. Rptr. 2d 606* (holding that plaintiff's attorney in medical malpractice action was not requested to and did not perform legal services on behalf of hospital that filed hospital lien; malpractice action never went past liability phase and thus hospital received nothing by virtue of lien or action)].

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12-121 California Forms of Pleading and Practice--Annotated § 121.58

§ 121.58 Complaint for Reasonable Value of Goods Sold and Delivered (Quantum Valebant)

[1] FORM Complaint for Reasonable Value of Goods Sold and Delivered (Quantum Valebant)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR REASONABLE VALUE OF
_____ [*name*],	)	GOODS SOLD AND DELIVERED
Defendant.	)	(COMMON COUNT IN QUANTUM VALEBANT)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 121.51[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 121.51[1], Paragraph 2.*]

[3. *Allegation that action is subject to Civ. Code § 1812.10 or 2984.4, or to Code Civ. Proc. § 395(b), if appropriate. See § 121.51[1], Paragraph 3.*]

4. _____ [Within the last _____ (two *or* four) years *or* On or about _____ (*date*)], at _____ [*city*], California, plaintiff sold and delivered certain goods at the special request of defendant; and defendant agreed to pay plaintiff the reasonable value of those goods.

5. [*Demand allegation. See § 121.51[1], Paragraph 5.*]

6. At the time of the sale and delivery, the fair and reasonable value of the goods was at least _____ [*amount*].

7. [*Allegations of nonpayment (or partial payment) and amount owing. See § 121.57[1], Paragraph 7.*]

[8. *Request for attorney's fees, if appropriate. See § 121.51[1], Paragraph 7.*].

[*Prayer. See § 121.57[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 121.51[1]. For discussion, see § 121.51[6].*]

[2] Use of Form

The complaint on the common count of quantum valebant in [1], *above*, is for use when the plaintiff seeks the reasonable value of goods sold and delivered. However, if the plaintiff seeks to recover a specific sum, rather than the reasonable value of goods sold and delivered, an action on the common count of goods sold and delivered (indebitatus assumpsit) is appropriate [*see § 121.56*, complaint for goods sold and delivered at agreed upon price (indebitatus assumpsit)].

For further discussion of the requirements of a complaint on common counts see *§ 121.51*. For a discussion of recovery under quantum meruit see *§ 121.57[4]*.

[3] Allegations

A complaint in quantum valebant is not subject to special demurrer for uncertainty when the plaintiff does not clearly specify whether the action was on the express contract or for the reasonable value of the goods [*Preston v. Central Cal. etc. Irr. Co. (1909) 11 Cal. App. 190, 196-197, 104 P. 462]* .

For discussion of necessary and recommended allegations when pleading on the common counts, see *§§ 121.16* and *121.51*.

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12-121 California Forms of Pleading and Practice--Annotated § 121.59

§ 121.59 Demand for Bill of Particulars [Code Civ. Proc. § 454]

[1] FORM Demand for Bill of Particulars [Code Civ. Proc. § 454]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DEMAND FOR BILL OF PARTICULARS
Defendant.	)	
	)	
	)	

_____

To plaintiff and to _____ [*name*], plaintiff's attorney of record:

PLEASE BE ADVISED that, pursuant to *Code of Civil Procedure Section 454*, defendant demands that you provide a bill of particulars, setting forth _____ [*specify, e.g.,* the items of account *or* the type of services rendered by plaintiff to defendant] on which _____ [this action *or* the cause of action alleged in Paragraph _____ of plaintiff's complaint] is based. The bill of particulars must be delivered to defendant within 10 days after service of this demand.

[*INCLUDE, if more specific information is sought*]

In particular, demand is made on you to provide _____ [*specify, e.g.,* the dates when the services were rendered and the specific charges for the services *or* the date and place of the performance of the services alleged in the complaint; the date when each item is claimed to have been delivered; and the sale price of each item].

[*CONTINUE*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[*INCLUDE verification, if desired*]

VERIFICATION

I, _____ [*name*], am the defendant in the above entitled action. I have read the foregoing demand for bill of particulars and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above,* is a demand for use by the defendant to require the plaintiff to furnish a copy of the account (a "bill of particulars") on which the complaint is based [*see Code Civ. Proc. § 454*]. Although it is not necessary for the plaintiff to specify the items of account when pleading on the common counts, the defendant, nevertheless, has the right to demand in writing a copy of the account [*Code Civ. Proc. § 454*].

[3] Availability of Bill of Particulars

In demanding a bill of particulars, the defendant should consider whether or not the bill is available. A bill of particulars is available in an action on any of the following:

- "An account" [*Code Civ. Proc. § 454*], including an action on a book account [*see Code Civ. Proc. § 337a* ("book account" defined)];

- The common counts [*see Kawasho Internat., U.S.A., Inc. v. Lakewood Pipe Service, Inc. (1983) 152 Cal. App. 3d 785, 793, 201 Cal. Rptr. 640]* ;

- A quasi-contract [*McFarland v. Holcomb (1898) 123 Cal. 84, 87, 55 P. 761* ; *Caruso v. Snap-Tite, Inc. (1969) 275 Cal. App. 2d 211, 212-213, 79 Cal. Rptr. 642]* ;

- A contract [*see Long Beach City School Dist. v. Dodge (1902) 135 Cal. 401, 407, 67 P. 499]* ; or

- A money claim made up of more than one item [*see Firpo v. Pacific Mut. Life Ins. Co. (1926) 80*

Cal. App. 122, 251 P. 657] .

A bill of particulars is not available in an action on an account stated [*Distefano v. Hall (1963) 218 Cal. App. 2d 657, 677, 32 Cal. Rptr. 770* ; *see Jones v. Wilton (1938) 10 Cal. 2d 493, 498, 75 P.2d 593* ("account stated" defined as new agreement superseding old agreement)], or in an action based on negligent failure to perform duties according to the contract [*Distefano v. Hall (1963) 218 Cal. App. 2d 657, 677-678, 32 Cal. Rptr. 770]* .

For further discussion of the availability of a bill of particulars, see *§ 121.26*. For a discussion of alternative procedures, see *§ 121.26[3]*.

[4] Time for Making Demand for Bill of Particulars

A demand for a bill of particulars may be made at any time [*see Code Civ. Proc. § 454*]. However, the making of a demand does not extend the defendant's time to answer [*Dobbins v. Hardister (1966) 51 Cal. Rptr. 866]* . For further discussion of timing, see *§ 121.26[5][a]*.

[5] Form of Demand

A demand for a bill of particulars must be in writing [*Code Civ. Proc. § 454*] and signed by the party making the demand. In lieu of signature, the demand may contain some other indication that the party making the demand is the party against whom the account is pleaded [*see Elmore v. Tingley (1926) 78 Cal. App. 460, 467, 248 P. 706]* .

[6] Demand Generally Not Filed With Court

The demand for a bill of particulars is not filed with the court [*Cal. Rules of Ct., Rule 3.250(a)(19)*], unless it is relevant to the determination of an issue in a law and motion proceeding [*Cal. Rules of Ct., Rule 3.250(a)*].

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12-121 California Forms of Pleading and Practice--Annotated § 121.60

§ 121.60 Bill of Particulars [Code Civ. Proc. § 454]

[1] FORM Bill of Particulars [Code Civ. Proc. § 454]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	BILL OF PARTICULARS
Defendant.	)	
	)	
	)	

To defendant and to _____ [*name*], defendant's attorney of record:

[*EITHER, if action is on a book account*]

In compliance with defendant's demand for a bill of particulars, plaintiff, _____ [*name*] submits the following copy of the account on which this action is based. [*Attach copy of book or ledger account.*]

[*OR, if action is on a common count, use:*]

In compliance with defendant's demand for a bill of particulars, plaintiff, _____ [*name*] sets forth the following items on which this action is based: _____ [*set out individual items of account in separately numbered statements, e.g., dates, services or materials provided, or value or cost*].

[*CONTINUE*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*INCLUDE, if demand was verified*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing bill of particulars and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a bill of particulars for use by a plaintiff, in compliance with a defendant's demand for a written account itemizing the total amount on which the complaint is based [*Code Civ. Proc. § 454*].

For discussion of a demand for a bill of particulars see *§ 121.59*.

[3] Considerations in Furnishing Bill of Particulars

In furnishing a bill of particulars, the plaintiff must note that the information in a bill must be itemized, in good faith, as precisely and as definitely as possible [*see Meredith v. Marks (1963) 212 Cal. App. 2d 265, 270, 27 Cal. Rptr. 737]* . The plaintiff must deliver a copy to the defendant within 10 days after the demand [*Code Civ. Proc. § 454*], which, as a practical matter, is apparently within 10 days after the date of service of the demand [*Edelman v. McDonell (1899) 126 Cal. 210, 213, 58 P. 528]* . For discussion of the consequences of a failure to deliver the bill, see *§§ 121.26[7], 121.64*.

[4] Verification

If the complaint is verified, the bill of particulars must be verified by affidavit (or declaration under penalty of perjury) [*Code Civ. Proc. § 454*; *see Code Civ. Proc. § 2015.5*].

[5] Bill Generally Not Filed With Court

The bill of particulars is not filed with the court [*Cal. Rules of Ct., Rule 3.250(a)(19)*], unless it is relevant to the

determination of an issue in a law and motion proceeding or is ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)*].

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12-121 California Forms of Pleading and Practice--Annotated § 121.61

§ 121.61 Notice of Motion for Further Bill of Particulars [Code Civ. Proc. § 454]

[1] FORM Notice of Motion for Further Bill of Particulars [Code Civ. Proc. § 454]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR FUR-
Plaintiff,	)	THER BILL OF PARTICULARS
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
_____		

To plaintiff and to _____ [*name*], plaintiff's attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in _____ [Department *or* Division) _____ (*number*)] of this court, located at _____ [*address*], defendant will, and hereby does, move for an order requiring plaintiff to furnish a further bill of particulars in response to the defendant's demand made on _____ [*date*]. This motion is made under *Section 454 of the Code of Civil Procedure* on the grounds that the bill provided by the plaintiff is _____ [*specify, e.g.,* too general to inform the defendant of the items of account on which the complaint is allegedly based *or* is defective in that it does not specify _____ (*describe specific items of account required)*].

The motion will be based on this notice of motion, the demand for a further bill of particulars served with this notice, on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

The form in [1], *above,* is a notice of motion for a further bill of particulars on the ground that the information supplied in the bill of particulars is too general or is otherwise defective [*see Code Civ. Proc. § 454*], and states the time and place the motion will be made and the grounds on which it is based [*see Code Civ. Proc. § 1010*]. A supporting memorandum must be served and filed with the motion [*Cal. Rules of Ct., Rule 3.1113*; for discussion and forms, *see* Ch. 417, *Points and Authorities*].

If the defendant fails to demand a further account by noticed motion, the defendant is deemed to have waived the insufficiency of the bill. The defendant is thus precluded from making this motion at trial [*Burton v. Santa Barbara Nat'l Bank (1966) 247 Cal. App. 2d 427, 433]* .

It has been suggested that the better practice, instead of requesting a further bill of particulars on noticed motion, is to come to an agreement, if possible, with opposing counsel about further particulars [*see Ernest W. Hahn, Inc. v. Nort-Cet Corp. (1973) 34 Cal. App. 3d 171, 173-174, 109 Cal. Rptr. 709* (describing conflicts over further bills of particular as outdated "procedural punctilio")].

[3] Cross References

For a form for a demand for a bill of particulars, see *§ 121.59*

For discussion of law and motion practice and general requirements, see Ch. 372 *Motions and Orders*

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12-121 California Forms of Pleading and Practice--Annotated § 121.62

§ 121.62 Declaration Under Penalty of Perjury in Support of Notice of Motion for Further Bill of Particulars [Code Civ. Proc. § 454]

[1] FORM Declaration Under Penalty of Perjury in Support of Notice of Motion for Further Bill of Particulars [Code Civ. Proc. § 454]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF NOTICE OF MOTION FOR
_____ [*name*],	)	FURTHER BILL OF PARTICULARS
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Trial Date: _____

_____

I, _____ [*name*], declare:

[*EITHER, if defendant is making this declaration, use:*]

1. I am the defendant in this action and have personal knowledge of the facts stated in this declaration.

[*OR, if attorney of record is making this declaration, use:*]

1. I am an attorney at law, duly licensed to practice in the state of California, and am the attorney of record for defendant _____ [*name*] in this action.

[*CONTINUE*]

2. On _____ [*date*], I served on plaintiff a written demand for a bill of particulars in this action. A copy of that demand is attached to this declaration as Exhibit _____ and is made a part hereof.

[*EITHER, iIf plaintiff has failed to provide a bill*]

3. Although required to do so by *Code of Civil Procedure Section 454*, plaintiff has failed to provide a bill of particulars in response to my written demand.

[*OR, if plaintiff has delivered a defective bill, use:*]

3. On _____ [*date*], plaintiff delivered a bill of particulars that is defective for the following reason(s): _____[*specify reasons*]. A copy of that bill is attached as Exhibit _____.

[*CONTINUE*]

4. Plaintiff's failure to provide a _____ [bill of particulars *or* sufficient bill of particulars] has prejudiced my ability to prepare an adequate defense because: _____ [*specify reasons*].

[*INCLUDE, if plaintiff or plaintiff's attorney was notified by letter that no bill or a defective bill had been received*]

5. On _____ [*date*], I sent a letter to _____ [plaintiff *or* plaintiff's attorney], stating that _____ [no bill *or* a defective bill] had been received, and that I would seek a motion for a further bill, if _____ [no bill *or* no sufficient bill] was provided by _____ [*date*]. No bill has been provided in response to that letter.

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form in [1], *above,* is for use as a declaration in support of a notice of motion for a further bill of particulars. It alleges that a bill of particulars has not been provided or that the bill of particulars provided by the plaintiff is so defective and insufficient that it does not permit defendant to properly prepare a defense.

The caption of the declaration or affidavit must state the name of the declarant or affiant and must specifically identify the motion or other proceeding that it supports or opposes [*Cal. Rules of Ct., Rule 3.1115*].

[3] Cross References

For a form and discussion of a notice of motion for a further bill of particulars, see *§ 121.61*.

For discussion and general forms for declarations, see Ch. 15, *Affidavits, Certificates, and Declarations* .

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12-121 California Forms of Pleading and Practice--Annotated § 121.63

§ 121.63 Order for Further Bill of Particulars [Code Civ. Proc. § 454]

[1] FORM Order for Further Bill of Particulars [Code Civ. Proc. § 454]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of defendant _____ [*name*] for an order for a further bill of particulars in this action came on for hearing before me on _____ [*date*].

[*EITHER, if requesting that the motion be granted*]

On proof being made to the satisfaction of the court, I find that the bill of particulars provided by the plaintiff to the defendant is insufficient to allow the defendant to prepare an adequate defense.

IT IS ORDERED, therefore, that the motion be granted and that plaintiff provide, within _____ [

number] days from this date, a further bill of particulars, setting forth in detail the following matters: _____ [*specify*].

[*OR, if requesting that the motion be denied*]

On proof being made to the satisfaction of the court, I find that the bill of particulars provided by the plaintiff to the defendant is sufficient to allow the defendant to prepare an adequate defense.

IT IS ORDERED, therefore, that the defendant's motion for a further bill of particulars be denied.

[*CONTINUE*]

Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form in [1], *above,* is a proposed order for use to grant or deny the defendant's request for a further bill of particulars [*see Code Civ. Proc. § 454*]. If the plaintiff is ordered to provide a more complete bill of particulars, the order specifies the matters to be set forth in greater detail and the number of days within which the plaintiff must provide a further bill. For a form and discussion of the notice of motion for a further bill of particulars see *§ 121.61*.

If the plaintiff fails to comply within the allotted time for making a response, the defendant may move to preclude the introduction of evidence at trial relating to the account to which the demand for a bill of particulars was directed [*Code Civ. Proc. § 454*; *see § 121.64,* form for notice of motion to preclude introduction of evidence for failure to provide a bill of particulars].

[3] Cross References

For discussion and general forms for orders, see Ch. 372, *Motions and Orders* .

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12-121 California Forms of Pleading and Practice--Annotated § 121.64

§ 121.64 Notice of Motion to Preclude Introduction of Evidence for Failure to Provide Bill of Particulars [Code Civ. Proc. § 454]

[1] FORM Notice of Motion to Preclude Introduction of Evidence for Failure to Provide Bill of Particulars [Code Civ. Proc. § 454]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION TO PRECLUDE INTRO-
vs.	)	DUCTION OF EVIDENCE
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Trial Date: _____

_____

To plaintiff and to _____ [*name*], plaintiff's attorney of record:

[*EITHER, if plaintiff has failed to provide a bill*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in _____ [Department *or* Division) _____ (

number)] of this court, located at _____ [*address*], defendant will move for an order precluding the plaintiff from introducing at trial any evidence concerning the _____ [account *or* indebtedness] alleged in the [_____ cause of action of the] complaint on file in this case. This motion is made under *Code of Civil Procedure Section 454* on the grounds that plaintiff failed to deliver a bill of particulars in response to defendant's written demand. A copy of defendant's demand is attached as Exhibit _____ to the declaration that accompanies this motion.

[*OR, if plaintiff has delivered a defective bill*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in _____ [Department *or* Division) _____ (*number*)] of this court, located at _____ [*address*], defendant will move for an order precluding the plaintiff from introducing at trial any evidence concerning the _____ [account *or* indebtedness] alleged in the [_____ cause of action of the]complaint on file in this case. This motion is made under *Code of Civil Procedure Section 454* on the grounds that plaintiff failed to provide a further bill of particulars, as ordered by the court on _____ [*date*], in response to defendant's written demand. A copy of the court's order requiring a further bill of particulars is attached as Exhibit _____ to the declaration that accompanies this motion.

[*CONTINUE*]

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

The notice of motion in [1], *above*, is for use by the defendant to secure an order precluding the introduction of evidence at trial. It states (1) either plaintiff's failure to provide a bill of particulars or a further bill, as ordered [*see Code Civ. Proc. § 454*]; (2) the time and place the motion will be made; and (3) the grounds on which the motion is based [*see Code Civ. Proc. § 1010*].

When the plaintiff fails to provide an adequate bill of particulars, the trial court is authorized to enter an order precluding the plaintiff's introduction at trial of any evidence relating to the account at which the bill of particulars was directed [*Code Civ. Proc. § 454*].

Failure to demand an adequate account subsequent to plaintiff's furnishing a bill of particulars is deemed a waiver of the insufficiency or inadequacy [*see Burton v. Santa Barbara Nat. Bank (1966) 247 Cal. App. 2d 427, 433, 55 Cal. Rptr. 529]* .

A supporting memorandum must be served and filed. The court may construe the absence of a memorandum as an admission that the motion is not meritorious and cause for its denial [*Cal. Rules of Ct., Rule 3.1113(a)*].

[3] Cross References

For a form for a demand for a bill of particulars, see *§ 121.59*.

For a form for a notice of motion for a further bill of particulars, see *§ 121.61*.

For discussion of law and motion practice and general requirements, see Ch. 372, *Motions and Orders* .

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Chapter 121 COMMON COUNTS
PART IV. FORMS

12-121 California Forms of Pleading and Practice--Annotated § 121.65

§ 121.65 Declaration Under Penalty of Perjury in Support of Notice of Motion for Order to Preclude Introduction of Evidence for Failure to Furnish Bill of Particulars [Code Civ. Proc. § 454]

[1] FORM Declaration Under Penalty of Perjury in Support of Notice of Motion for Order to Preclude Introduction of Evidence for Failure to Furnish Bill of Particulars [Code Civ. Proc. § 454]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	DECLARATION OF _____ [*name*]
Plaintiff,	)	IN SUPPORT OF MOTION FOR ORDER TO PRE-
vs.	)	CLUDE INTRODUCTION OF EVIDENCE
_____ [*name*],	)	(Failure to Provide [Further] Bill of Particulars)
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Trial Date: _____

_____

I, _____ [*name*], declare:

[*EITHER, if defendant is making this declaration, use:*]

1. I am the defendant in this action and have personal knowledge of the facts stated in this declaration.

[*OR, if attorney of record is making this declaration, use:*]

1. I am an attorney at law, duly licensed to practice in the state of California, and am the attorney of record for defendant _____ [*name*] in this action.

[*CONTINUE*]

2. On _____ [*date*], I served on plaintiff a written demand for a bill of particulars in this action. A copy of that demand is attached to this declaration as Exhibit _____ and incorporated by reference.

[*EITHER, if plaintiff has failed to provide a bill*]

3. Although required to do so by *Code of Civil Procedure Section 454*, plaintiff has failed to provide a bill of particulars in response to my written demand.

[*OR, if plaintiff has failed to provide a further bill*]

3. On _____ [*date*], plaintiff delivered a bill of particulars that is defective for the following reason(s): _____ [*specify reasons*]. A copy of that bill is attached as Exhibit _____. On _____ [*date*], on a duly noticed motion, this court ordered plaintiff to provide a further bill of particulars. A copy of that order is attached to this declaration as Exhibit _____ and is incorporated by this reference. Plaintiff has failed to provide a further bill of particulars in response to that order.

[*CONTINUE*]

4. Plaintiff's failure to provide a _____ [bill *or* further bill] has prejudiced my ability to prepare an adequate defense because: _____ [*specify reasons*].

[*INCLUDE, if plaintiff or plaintiff's attorney was notified by letter that defendant would seek this motion to preclude evidence, if no (further) bill were provided*]

5. On _____ [*date*], I sent a letter to _____ [plaintiff *or* plaintiff's attorney], stating that no [further] bill had been provided, as required, and that I would seek a motion to preclude evidence if no [further] bill was provided by _____ [*date*]. No [further] bill has been provided in response to that letter.

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form in [1], *above,* is for use as a declaration in support of a notice of motion for an order to preclude evidence for plaintiff's failure to furnish a bill of particulars subsequent to a proper demand [*see Code Civ. Proc. § 454*]. This declaration should show that the plaintiff's failure to provide either a bill of particulars or a further bill has prejudiced the defendant's ability to provide an adequate defense [*see Ernest W. Hahn, Inc.v. Nort-Cet Corp. (1973) 34 Cal. App. 3d 171, 172-173, 109 Cal. Rptr. 709]* .

Although a demand for a bill of particulars and the bill provided in response are normally not permitted to be filed with the court, they may be attached to the declarations or the memorandum in support of the motion to preclude introduction of evidence [*see Cal. Rules of Ct., Rule 3.250(a)*].

[3] Cross References

For a form and discussion of the notice of motion to preclude introduction of evidence for failure to furnish a bill of particulars, see *§ 121.64*.

For discussion and general forms for declarations, see Ch. 15, *Affidavits, Certificates, and Declarations* .

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12-121 California Forms of Pleading and Practice--Annotated § 121.66

§ 121.66 Declaration Under Penalty of Perjury in Opposition to Notice of Motion for Order to Preclude Introduction of Evidence for Failure to Provide Bill of Particulars [Code Civ. Proc. § 454]

[1] FORM Declaration Under Penalty of Perjury in Opposition to Notice of Motion for Order to Preclude Introduction of Evidence for Failure to Provide Bill of Particulars [Code Civ. Proc. § 454]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	DECLARATION OF _____ [*name*]
Plaintiff,	)	IN OPPOSITION TO MOTION FOR ORDER TO
vs.	)	PRECLUDE INTRODUCTION OF EVIDENCE
_____ [*name*],	)	(Failure to Provide [Further] Bill of Particulars)
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

[*EITHER, if plaintiff is making this declaration, use:*]

1. I am the plaintiff in this action and have personal knowledge of the facts stated in this declaration.

[*OR, if attorney of record is making this declaration, use:*]

1. I am an attorney at law, duly licensed to practice in the state of California, and am the attorney of record for plaintiff _____ [*name*] in this action.

[*CONTINUE*]

2. On _____ [*date*], defendant served on me a written demand for a bill of particulars in this action.

3. _____ [*Specify reasons for failure to provide bill, e.g.,* Plaintiff possesses no written copy of the account on which this action is based because defendant has retained all invoices].

4. Plaintiff's failure to provide a _____ [bill *or* further bill] has not prejudiced defendant's ability to prepare an adequate defense because: _____ [*specify reasons*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is for use as a declaration in opposition to a notice of motion for an order to preclude the introduction of evidence at trial as a result of the plaintiff's failure to furnish a bill of particulars subsequent to a proper demand [*see Code Civ. Proc. § 454*]. This declaration should allege a justification for the plaintiff's failure to provide either a bill of particulars or a sufficient bill of particulars [*see, e.g., Butler Bros. v. Connolly (1962) 204 Cal. App. 2d 22, 25-26, 22 Cal. Rptr. 175* (exclusion of evidence inappropriate when plaintiff prevented by defendant from having access to written records needed to prepare bill); *see also Burton v. Santa Barbara Nat. Bank (1966) 247 Cal. App. 2d 427, 433, 55 Cal. Rptr. 529* (good faith effort to obtain records needed to prepare adequate bill required by plaintiff)]. The declaration should also allege the reasons that the defendant's ability to provide an adequate defense is not prejudiced by the plaintiff's failure to provide a bill of particulars [*see Sadik v. Wallberg Mining Corp. (1936) 11 Cal. App. 2d 379, 381-382, 53 P.2d 981* (no prejudice shown, and evidence not excludable, if information demanded is within defendant's knowledge or is available to defendant)].

[3] Cross References

For a form and discussion of the notice of motion to preclude introduction of evidence for failure to furnish a bill of particulars, see *§ 121.64*.

For a form and discussion of a declaration in support of the motion, see *§ 121.65*.

For discussion and general forms of declaration, see Ch. 15, *Affidavits, Certificates, and Declarations* .

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12-121 California Forms of Pleading and Practice--Annotated § 121.67

§ 121.67 Order to Preclude Introduction of Evidence for Failure to Provide Bill of Particulars [Code Civ. Proc. § 454]

[1] FORM Order to Preclude Introduction of Evidence for Failure to Provide Bill of Particulars [Code Civ. Proc. § 454]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of defendant _____ [*name*] for an order precluding plaintiff from introducing evidence of the account on which _____ [the _____ (*number*) cause of action of plaintiff's complaint *or* this action] is based came up on hearing before me on _____ [*date*].

On proof being made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the plaintiff be precluded from introducing any evidence at trial relating to the _____ [account *or* indebtedness] on which the [_____ (*number*)] cause of action of plaintiff's complaint is based.
Dated: _____.

_____ [*signature*]
Judge of the_____ Court

[2] Use of Form

The form of order in [1], *above*, is used to grant the defendant's request to preclude the introduction of evidence related to the account on which the plaintiff's complaint is based. The order is based on the plaintiff's failure to furnish an adequate bill of particulars. In order for evidence of the account to be excluded, the defendant must present a motion to preclude the introduction of evidence on failure to provide a bill of particulars before trial [*see* Burton v. Santa Barbara Nat. Bank (1966) 247 Cal. App. 2d 427, 433, *55 Cal. Rptr. 529* ; § 121.64, form of notice of motion to preclude introduction of evidence for failure to provide a bill of particulars].

For a discussion of a notice of motion to preclude the introduction of evidence for failure to provide a bill of particulars see *§ 121.64*. For discussion of a declaration in support of the notice of motion see *§ 121.65*. For a form of declaration opposing the notice of motion see *§ 121.66*.

[3] Cross References

For discussion and general forms of order, see Ch. 372, *Motions and Orders* .

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Chapter 122 COMMUNITY PROPERTY

12-122 California Forms of Pleading and Practice--Annotated 122.syn

§ 122.syn Synopsis to Chapter 122: COMMUNITY PROPERTY

§ 122.01 Scope of Chapter

§ 122.02 Cross References

§§ 122.03-122.09 [Reserved]

§ 122.10 Governing Statutes

§§ 122.11-122.29 [Reserved]

§ 122.30 Importance of Characterization

[1] When Characterization Issues Arise

[2] Summary of Characterization Factors

§ 122.31 Nature of Community and Separate Property

[1] "Community Property" Defined

[a] General Definition

[b] As Extending to Out-of-State Real Property

[c] "Community Estate" Distinguished

[d] Incidents of Community Property

[e] "Quasi-Community Property" Distinguished

[f] "Quasi-Marital Property" Distinguished

[2] "Separate Property" Defined

[a] In General

[b] Incidents of Separate Property

[c] Inventory of Separate Property Under Prior Law

[d] Right of Spouses to Hold Property as Joint Tenants and Tenants in Common

[i] Joint Tenancy

[ii] Tenancy in Common

[3] Spouses' Date of Separation and Property

[a] Significance of Date of Separation

[b] Determining Date of Separation

[i] Concept of "Living Separate and Apart"

[ii] Multiple Separation Periods

§ 122.32 Effect of Time of Acquisition

[1] Overview of Acquisition Issues

[a] General Considerations

[b] Determining Time of Acquisition

[i] Equitable Versus Legal Right to Property

[ii] Leasehold Interests Renewed or Extended During Marriage

[iii] Future or Contingent Rights

[iv] Nonpension Employment Rights

[c] Apportionment

[2] Scope of Community Presumption From Acquisitions During Marriage

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[b] Exceptions Resulting in Separate Characterization

[c] Acquisitions by Wife Before January 1, 1975

[d] Property Held at Death and Acquired During Previous Marriage

[3] Application to Salaries, Wages, and Other Earnings

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[b] Earnings While Parties Separated

[i] Controlling Principles

[ii] Earnings and Accumulations

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§ 122.33 Effect of Form of Title

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[a] An Overview

[b] Common-Law Presumption That Title Reflects Ownership

[2] Effect of Sole Title

[a] Resolving Potential Conflict in Presumptions

[b] Gift in Sole Title

[c] Rule for Wife's Pre-1975 Acquisitions

[3] Community Presumption From "Husband and Wife" Title

[4] Community Presumption From Joint Title Form

[a] Overview of Statutory Presumption

[i] Nature of Presumption

[ii] Relationship to Reimbursement Statute

[iii] Operative Dates and Retroactivity

[iv] Effect of Spouse's Death During Proceeding

[b] Operation of Presumption in General

[c] Application to Joint Tenancy Property

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[5] Community Property With Right of Survivorship

§ 122.34 Transmutation of Property

[1] Nature of Transmutation

[2] Transmutations Prior to January 1, 1985

[a] Written or Oral Agreement Permitted

[b] Transmutation Based on Circumstances

[c] Oral Transmutations of Real Property in General

[d] Effect of Joint Title Presumption

[e] Statements in Wills

[3] Transmutations on or After January 1, 1985

[a] General Requirement of Writing

[b] Express Declaration Requirement

[c] Effect on Third Parties

[d] Statements in Wills

§ 122.35 Commingling and Tracing

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[2] Tracing Methods

[a] Direct Tracing

[b] Family Expense Tracing

[3] Exceptions to Tracing

[a] Form of Title Presumptions

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§ 122.36 Credit Purchases and Borrowed Money

[1] Overview

[2] Use of "Intent of Lender" Analysis

[a] When Needed

[b] Unsecured Transactions

[c] Credit Secured by One Type of Property

[d] Credit Secured by Both Separate and Community Property

[e] Evidence in Particular Cases

[3] Wife's Pre-January 1, 1975, Property

§ 122.37 Community Property Transferred to Trust

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§ 122.50 Management and Control of Separate Property

[1] Sole Province of Owner Spouse

[2] Separate Interests Held by Spouses as Joint Tenants or Tenants-in-Common

[3] Management and Control by Nonowner Spouse

[a] Applicability of Agency and Trust Principles

[b] Standard of Care When Separate Property Character is Clear

[c] Standard of Care When Separate Property Character is Unclear

§ 122.51 Management and Control of Community Personal Property

[1] Equal Management and Control Rule

[2] Prior Law and Retroactive Application of Rule

[3] Exceptions and Qualifications to Rule

[4] Good Faith Requirements

[a] Fiduciary Duty

[b] Applicability to Postseparation Activities

[c] Questions Regarding Current Statutes

[5] Good Faith Requirements Under Prior Law

[a] Changing Nature of Good Faith Duty

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[c] Post-1974 Law

[6] Gifts of Community Personal Property

[a] Consent Requirements

[b] Determining Fair and Reasonable Value

[c] Valuable-Consideration Requirement of Prior Law

[d] Ratification of Previous Gift

[e] Consent by Conservator of Nondonor Spouse

[7] Setting Aside of Improper Gifts by Nondonor Spouse

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[b] Survival of Right to Set Aside Gift

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[a] Policy Purchased With Community Funds

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[c] Fair and Reasonable Value Given for Beneficiary Designation

[d] Spouse Named as One of Beneficiaries

[9] Household Furnishings and Clothes

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[b] Remedy for Violation of Prohibition

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[10] Management and Control of Community Property Business

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§ 122.52 Management and Control of Community Real Property

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[4] Exceptions to Joint Execution Rule

[a] Short-Term Leases and General Management Decisions

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[5] Presumptions of Validity of Instruments

[a] Instrument Executed by Either Spouse on or After January 1, 1975

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[c] Evidence to Rebut Presumptions of Validity of Instruments

§ 122.53 Remedies for Breach of Management and Control Duties

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[a] Scope of Action

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[c] Nature and Types of Remedies

[d] Statute of Limitations and Related Defenses

[2] Action to Set Aside Unauthorized Transfer of Community Real Property

[a] Right of Action in Nonconsenting Spouse

[b] Statute of Limitations

[c] Limitations on Relief

[d] Effect of Consideration

[e] Estoppel to Assert Invalidity of Conveyance

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§ 122.54 Criminal Penalties for Transferor of Community Real Property

§ 122.55 Alternatives to Equal Management and Control

[1] Revocable Power of Attorney

[2] Revocable Trust

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§ 122.56 Nonprobate Transfers of Community Property

[1] Overview

[2] Effective Date of Transfer Provisions

[3] Matters Affecting Parties' Rights

[4] Effect of Provisions on "Holders" of Property

[5] Effect of Lack of Consent to Transfer

[6] Consent to Transfer and Transmutation Distinguished

[7] Effect of Modified Transfer on Spousal Consent and Interests

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§§ 122.57-122.69 [Reserved]

§ 122.70 State Statutes

[1] Alternatives to Equal Management and Control

[2] Credit Rating Based on Management and Control of Property

[3] Gifts of Community Property to Third Parties

[4] Good Faith Required of Spouses

[5] Interest of Each Spouse in Community Property

[6] Management and Control of Community Personal Property

[7] Management and Control of Community Real Property

[8] Management and Control of Separate Property

[9] Management and Disposition of Community Property When Spouse or Spouses Incompetent

[10] Remedies for Violations of Management and Control Rules

[11] Spouses as Joint Tenants

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§ 122.71 Decisions

[1] Community Property Transferred to Trust

[2] Fiduciary Duty

[3] Gifts of Community Property

[4] Good Faith Required of Spouses

[5] Management and Control of Community Business

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[7] Prohibition on Unilateral Transfers of Community Real Property

[8] Separate Property of Non-Debtor Spouse

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§ 122.72 Law Reviews

§ 122.73 Text References

§§ 122.74-122.89 [Reserved]

§ 122.90 Petition to Establish Spousal Claim to Community Estate [Fam. Code § 1101]

[1] FORM

[2] Use of Form

[3] Governing Law

[4] Tacking of Allegations and Consolidation of Actions

[5] Verification

[6] Cross References

[7] State Statutes

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[1] FORM

[2] Use of Form

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[4] Extent of Recovery

[5] Verification

[6] Cross References

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§ 122.92 Complaint to Cancel Instrument and to Quiet Title to Community Real Property [Civ. Code § 3412; Fam. Code § 1102(a)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Parties to Action

[5] Lis Pendens

[6] Cross References

[7] State Statutes

§ 122.93 Complaint to Recover One-Half of Proceeds of Life Insurance Policy When Premiums Paid Out of Community Property [Fam. Code § 1100(b); Prob. Code §§ 100, 6101, 6103]--By Surviving Spouse Against Insurance Company and Designated Beneficiary

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[2] Use of Form

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[8] State Statutes

[9] Decisions

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PART I. SCOPE

12-122 California Forms of Pleading and Practice--Annotated § 122.01

§ 122.01 Scope of Chapter

This chapter discusses the characterization of property as separate or community property and the day-to-day management and control of property held by married persons, including separate property, community personal property, and community real property. The discussion covers basic characterization rules, transmutation, and tracing of commingled property. It also covers liability and remedies for mismanagement of community property and other violations of the fiduciary duty owed by spouses toward each other in the management of their property. The forms in this chapter include a petition to establish a spouse's claim to community property assets [*see § 122.90*], as well as complaints to recover community personal property and community real property conveyed by one spouse without the other's consent [*see §§ 122.91 -122.92*].

For discussion of the division of property on termination of marriage, and the effect of the death of one spouse on the surviving spouse's property rights, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* . For discussion of the effect of premarital agreements on the property rights and management and control rights of spouses, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Chs. 200- 216 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Duties & RightsProperty RightsCharacterizationSeparate PropertyReal Property LawEstatesPresent EstatesMarital EstatesCommunity Property

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12-122 California Forms of Pleading and Practice--Annotated § 122.02

§ 122.02 Cross References

For discussion, procedures, and forms for use in a spouse's action against the other spouse for an accounting of profits from separate property, see Ch. 7, *Accounting, Action for*

For discussion, procedures, and forms relating to the setting aside of unauthorized conveyances of community real property, Ch. 107, *Cancellation of Instruments*, and Ch. 482, *Quieting Title*

For discussion, procedures, and forms to be used by a spouse seeking the return of community personal property transferred to a third person without his or her consent, see Ch. 119, *Claim and Delivery*

For discussion, procedures, and forms relating to property of the community at dissolution, see Ch. 221, *Dissolution of Marriage: Procedure* .

For discussion and forms for use in recovering community personal property transferred by spouse to satisfy a gambling debt, see Ch. 272, *Gambling*

For discussion, procedures, and forms relating to managing the property of an incompetent spouse, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* , and Ch. 289, *Guardianship and Conservatorship: Management of Community Property*

For discussion and forms for use in declaring or abandoning a homestead, see Ch. 294, *Homesteads*

For discussion and forms relating to spouses holding property as joint tenants, see Ch. 316, *Joint Tenancy and Tenancy in Common*

For discussion, procedures, and forms relating to property rights in putative marriages, nonmarital relationships, and cohabitation, see Ch. 387, *Nonmarital Cohabitation*

For discussion and forms relating to private voluntary trusts, see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesEquitable AccountingsGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewFamily LawGuardiansGeneral OverviewReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipTenancies in Common

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12-122 California Forms of Pleading and Practice--Annotated §§ 122.03-122.09

[Reserved]

§§ 122.03[Reserved]

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PART II. LEGAL BACKGROUND
A. In General

12-122 California Forms of Pleading and Practice--Annotated § 122.10

§ 122.10 Governing Statutes

The characterization of property is governed by *Fam. Code § 760 et seq.* Transmutation of property is governed by *Fam. Code § 850 et seq.* Nonprobate transfer of community property at death is governed by *Prob. Code § 5010 et seq.*, and by the general provisions of *Prob. Code § 5000 et seq.*

Rules governing the management and control of community property are set out in *Fam. Code §§ 1100-1103*. The fiduciary standards to which spouses must adhere in their property dealings with each another are set out in *Fam. Code § 721(b)* and *Corp. Code §§ 15019-15022* [*Fam. Code § 721(b)*]. *Fam. Code § 770(b)* and *Prob. Code § 6101*, respectively, govern the rights of married persons to dispose of separate property and community property by will, except that the right of testators who died before January 1, 1985, to dispose of community property by will is governed by former *Prob. Code § 220* [*Prob. Code § 6103*]. Special rules contained in *Prob. Code §§ 5010-5032* govern nonprobate transfers of community property intended to become effective on the transferor's death.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationMarital PropertyReal Property LawEstatesPresent EstatesMarital EstatesCommunity Property

California Forms of Pleading and Practice--Annotated

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
Chapter 122 COMMUNITY PROPERTY
PART II. LEGAL BACKGROUND
A. In General

12-122 California Forms of Pleading and Practice--Annotated §§ 122.11-122.29

[Reserved]

§§ 122.11[Reserved]

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
Chapter 122 COMMUNITY PROPERTY
PART II. LEGAL BACKGROUND
B. General Characterization Principles

12-122 California Forms of Pleading and Practice--Annotated § 122.30

§ 122.30 Importance of Characterization

[1] When Characterization Issues Arise

"Characterization" of property, for the purpose of community property law, refers to the process of classifying property as separate, community, or quasi-community, or as having attributes of some combination of these kinds. Characterization is required in order to determine the rights and liabilities of the parties with respect to a particular asset or obligation [*In re Marriage of Haines (1995) 33 Cal. App. 4th 277, 291, 39 Cal. Rptr. 2d 673]* . Problems involving characterization generally arise in the context of:

- Determining interspousal rights of management and control of property during marriage, as discussed in *§ 122.50* et seq.;

- Dividing property on marital dissolution, legal separation, or annulment (nullity) of marriage, as discussed in this part;

- Distributing property on the death of one or both spouses, as discussed in Ch. 441, *Probate: Disposition Without Administration* ; or

- Determining the rights of third party creditors with respect to property, either during marriage or on the termination of marriage, as discussed in Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

[2] Summary of Characterization Factors

The four major factors affecting property characterization are the following:

- Time of the property's acquisition [*see § 122.32*];

- Operation of various presumptions, particularly presumptions arising from the form of title [*see §*

122.33];

- Transmutation agreements [*see § 122.34*]; and

- Actions of the parties, including the commingling of separate and community property [*see § 122.35*].

Although the foregoing factors are discussed separately in this subpart, they do not necessarily operate independently. In a particular case, it may be necessary to apply two or more factors to determine the correct characterization of the property involved. Other specialized rules also affect characterization, such as the "intent of the lender" analysis in regard to credit transactions, which is discussed in *§ 122.36*.

For discussion of specialized principles applicable in apportioning interests in real property and discussion of characterizing specific personal property interests, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* . For discussion of property agreements between spouses, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, Chs. 200- 216 (Matthew Bender 2d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationMarital PropertyFamily LawMarital Duties & RightsProperty RightsCharacterizationSeparate PropertyReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawEstatesPresent EstatesMarital EstatesSeparate Property

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12-122 California Forms of Pleading and Practice--Annotated § 122.31

§ 122.31 Nature of Community and Separate Property

[1] "Community Property" Defined

[a] General Definition

Community property is generally defined under current law as "all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in [California]," except as otherwise provided by statute [*Fam. Code § 760*; *see Civ. Code § 687*; *Fam. Code § 65*; *see also Fam. Code § 761*]. This definition supersedes both a prior statutory definition and the first paragraph of the prior statutory presumption regarding community property [*see Civ. Code § 687* (prior version); former *Civ. Code § 5110*]. It is not an exclusive statement that describes all property that is classified as community property, but rather is a general statement of the basic rule that all property acquired during marriage is community property unless it comes within a specified exception [*see* Cal. L. Revision Comm'n Comment to *Fam. Code § 760*], such as that for separate property [*Fam Code §§ 130, 770*].

The concept of community property includes both assets and obligations [*see Cal. Rules of Ct., Rule 5.10(d)*; *see also Fam. Code § 902*]. This is of particular significance in characterizing debts incurred by the parties, both from the standpoint of third party creditors' rights, and from the standpoint of dividing debts on marital dissolution or legal separation, as discussed in Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

[b] As Extending to Out-of-State Real Property

This general definition also differs somewhat from the law that existed before enactment of the Family Code as it pertains to community real property. It embraces not only the substance of the long-standing community presumption of former *Civ. Code § 5110*, which referred to community real property in terms of "all real property situated in this state," but also includes real property situated *outside* California [*Fam. Code § 760*]. The effect of defining community property in this manner, according to the California Law Revision Commission, is that California courts will treat out-of-state real property as community property for *all* purposes, including management and control, as well as for the purposes of liability for debts and division on dissolution or legal separation (as under former law) [*see* Cal. L. Revision Comm'n Comment to *Fam. Code § 760*; *see also Fam. Code § 2660* (division of out-of-state real property)]. Note that

the Probate Code sets forth another definition of community property for the purpose of property disposition on the death of a spouse [*see Prob. Code § 28*; *cf. Prob. Code § 3002* (definition of community property for purposes of management or disposition when one spouse lacks legal capacity)].

[c] "Community Estate" Distinguished

The term "community estate" is defined by statute to include both community property and quasi-community property [*Fam. Code § 63*]. It is used primarily with reference to dividing property (assets and obligations) on dissolution of marriage or on legal separation, as discussed in Ch. 222, *Dissolution of Marriage: Property Division and Valuation* [*see Fam. Code §§ 2550, 2551*; *see also* former *Civ. Code § 4800(a)*]. For discussion of quasi-community property, see *§ 122.31[1][e]*.

[d] Incidents of Community Property

Community property has special characteristics or "incidents" that distinguish it from other types of property interests. The most important incidents include the following:

- Only spouses may acquire and hold property as community property, and their interests in such property during marriage are "present, existing, and equal" [*Fam. Code § 751*; *see Fam. Code §§ 750, 760*; *see, e.g., State Board of Equalization v. Woo (2000) 82 Cal. App. 4th 481, 485, 98 Cal. Rptr. 2d 206* (husband had present community property interest in wife's potential future earnings)];

- Community interests may be shown to exist in property even if title is held in another form, or if the property originally was the separate property of a spouse, assuming that sufficient evidence is presented to overcome any special presumption raised by the form of title or to establish an effective transmutation, respectively [*see Fam. Code §§ 850, 2580*];

- Community interests may exist in both tangible and intangible property [*see In re Fietz (9th Cir. 1988) 852 F.2d 455, 458* (right to bring suit; cause of action in context of bankruptcy proceeding); *In re Marriage of Worth (1987) 195 Cal. App. 3d 768, 774-775, 241 Cal. Rptr. 135* (copyright)];

- With limited exception, community real and personal property is subject to equal management and control by both spouses during marriage [*Fam. Code §§ 1100* (personal property), 1102 (real property); *see § 122.51* et seq.];

- Except as otherwise expressly provided by statute, the community estate is liable for a debt incurred by either spouse before or during marriage, keeping in mind that this does not include debts incurred in the period during which spouses are living separate and apart prior to a judgment of marital dissolution or legal separation [*Fam. Code § 910*; *see Fam. Code § 902*];

- Community property is either primarily or secondarily liable for the torts of either spouse during marriage, depending on the circumstances [*Fam. Code § 1000*]

- The community estate is subject to equal division between the spouses on dissolution of marriage or legal separation [*Fam. Code § 2550*];

- A surviving spouse is entitled to one-half of the community (or quasi-community) property if one spouse dies testate [*see Prob. Code §§ 100, 101, 6101(b), (c)*];

- A surviving spouse is entitled to all of the community (quasi-community) property if one spouse dies

intestate [*see Prob. Code §§ 100, 101, 6401*]; and

- Each spouse has testamentary power over one half of the community property [*see Prob. Code §§ 100, 101, 6101(b), (c)*; *Estate of Murphy (1976) 15 Cal. 3d 907, 912, 126 Cal. Rptr. 820, 544 P.2d 956* (decided under former *Prob. Code § 201*)].

A married person's right to dispose of his or her community property interest in specified property may be restricted. For example, anti-alienation provisions in an employee spouse's pension plan may prohibit the non-employee spouse who predeceases the employee spouse from bequeathing his or her community property interest in the plan [see *Regents of University of California v. Benford (2005) 128 Cal. App. 4th 867, 875-877, 27 Cal. Rptr. 3d 441]* .

In addition, note that special statutory provisions affect the disposition on death of community funds held in bank, savings, and similar accounts [*see Prob. Code § 5100 et seq.*] and other provisions govern certain nonprobate transfers of community property on the death of the transferor spouse [*see Prob. Code § 5100 et seq.*]. For discussion of spouses holding title as "community property with right of survivorship," *see § 122.33[5]*. For discussion, *see § 122.56* and Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

[e] "Quasi-Community Property" Distinguished

For the purpose of family law proceedings, the term "quasi-community property" refers to all real or personal property, wherever situated, acquired before or after January 1, 1994, in the following ways [*Fam. Code § 125*]:

- By either spouse while domiciled elsewhere that would have been community property if the spouse who acquired the property had been domiciled in California at the time of its acquisition; or

- In exchange for real or personal property, wherever situated, that would have been community property if the spouse who acquired the property so exchanged had been domiciled in California at the time of its acquisition.

The quasi-community property concept permits treatment of certain types of property as community property for purposes of its disposition on death [*see Prob. Code § 66*] and, as set forth in the foregoing definition, on marital dissolution or legal separation [*see Fam. Code § 125*]. Current law also treats quasi-community property as community property for the purpose of determining liability of marital property for debts, as discussed in Ch. 222, *Dissolution of Marriage: Property Division and Valuation* . [*see Fam. Code § 912*].

Although the quasi-community property concept is an established part of California family law, it has posed constitutional issues. Prior to the enactment of the current statute that defines quasi-community property [*see Fam. Code § 125*], which continues the substance of the definition under former law [*see* Cal. L. Revision Comm'n Comment to *Fam. Code § 125*], certain of its predecessor statutes were upheld as constitutional [*see Addison v. Addison (1965) 62 Cal. 2d 558, 563-570, 43 Cal. Rptr. 97, 399 P.2d 897* ; *In re Miller (1947) 31 Cal. 2d 191, 187 P.2d 722* ; *see also* Comment, *Marital Property and the Conflict of Laws: The Constitutionality of the "Quasi-Community Property" Legislation, 54 Cal. L. Rev. 252 (1966)*]. However, based on prior decisional law, in order constitutionally to apply the *Fam. Code § 125* definition of quasi-community property to the property of out-of-state domicilaries who have moved to California, the following requirements must be met [*In re Marriage of Roesch (1978) 83 Cal. App. 3d 96, 103-104, 147 Cal. Rptr. 586* (construing former *Civ. Code § 4803*)]:

- Both parties to the marriage must have changed their domiciles to California; and

- After the change of domicile, the spouses must seek legal alteration of their marital status in a California court.

Unless both of these conditions exist, the interest of California in the status of the spouses' property is insufficient to justify its reclassification as quasi-community property without violating the *due process clause of the Fourteenth Amendment* [*U.S. Const., amend. XIV*] and the privileges and immunities clause of U.S. *Const., art. IV, § 2* [*In re Marriage of Roesch (1978) 83 Cal. App. 3d 96, 103-104, 147 Cal. Rptr. 586]* . Nevertheless, as noted above, quasi-community property is currently treated as *community*, and not separate, property for purposes of debt liability, even in the absence of proceedings to alter the spouse's marital status [*see Fam. Code § 912*], leaving open a possible challenge to such treatment on constitutional grounds.

For purposes of this chapter, unless otherwise stated, discussion of community property is intended to include quasi-community property.

[f] "Quasi-Marital Property" Distinguished

"Quasi-marital" property is property acquired by parties to a void or voidable marriage that at least one of the parties entered into in the good faith belief that the marriage was valid [*see Fam. Code § 2251(a)*; *see also In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 156-157, 242 Cal. Rptr. 649* ; *Patillo v. Norris (1976) 65 Cal. App. 3d 209, 217 n.4, 135 Cal. Rptr. 210* ; *Estate of Vargas (1975) 36 Cal. App. 3d 714, 717, 111 Cal. Rptr. 779]* . Property acquired during such a union that would have been community or quasi-community property if the union had been a valid marriage is divided in the proceeding to terminate the marriage as if it were community property [*see Fam. Code §§ 2251, 2550 et seq.*]. The property so divided is liable for debts of the parties to the same extent as if the property had been community or quasi-community property [*Fam. Code § 2252*].

For discussion of property rights arising out of a nonmarital relationship, see Ch. 387, *Nonmarital Cohabitation* . For discussion of property rights in a putative marriage, and of grounds for terminating void and voidable marriages through nullity proceedings, see Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights* . Property rights arising from nonmarital family relationships are discussed in Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Chs. 1, 2 (Matthew Bender).

[2] "Separate Property" Defined

[a] In General

In general, all property owned by a spouse that is not classifiable as community property is considered to be that spouse's separate property [*see Siberell v. Siberell (1932) 214 Cal. 767, 770, 7 P.2d 1003]* , except in the circumstances in which it is appropriate to classify particular property as "quasi-community property." More specifically, separate property of a married person includes the following, as provided by statute [*Fam. Code §§ 130, 770(a)*; *Cal. Const., art. I, § 21*; *see, e.g., California Maryland Funding, Inc. v. Lowe (1995) 37 Cal. App. 4th 1798, 1803, 44 Cal. Rptr. 2d 784]* :

- All property owned by the person before marriage;
- All property acquired by the person after marriage by gift, bequest, devise, or descent; and
- The rents, issues, and profits of the foregoing property.

Other statutory provisions also classify particular property as separate property. For example, the earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse [*Fam. Code § 771*]. Similarly, after entry of a judgment of legal separation, the earnings and accumulations of each party are the separate property of the acquiring

party [*Fam. Code § 772*]. A special statutory provision also sets forth the circumstances under which personal injury damages can be considered separate property, as discussed in Ch. 222, *Dissolution of Marriage: Property Division and Valuation* . [*see Fam. Code § 781*].

In addition, statutes specify the manner by which interests in community property or one spouse's separate property can be changed, or "transmuted," into the separate property of the other spouse, as discussed in *§ 122.34* [*see Fam. Code § 850 et seq.*]. Moreover, in some cases, the form of title to property will give rise to a common law presumption that the parties each hold a separate property interest in it [*see § 122.33*]. Thus, in a particular case, the characterization of property as separate property may require considerable analysis.

[b] Incidents of Separate Property

Separate property has special characteristics or "incidents" that distinguish it from other types of property. These generally include the following:

(1) Each spouse may, without the consent of the other, convey or otherwise transfer his or her separate property, whether inter vivos, or by will [*see Fam. Code § 770(b)*; *Prob. Code § 6101(a)*; *California Maryland Funding, Inc. v. Lowe (1995) 37 Cal. App. 4th 1798, 1803, 44 Cal. Rptr. 2d 784* (husband had right, during marriage, to transfer his premarital separate property residence to himself and children of former marriage); *but c.f. Fam. Code § 754* (on recording of *lis pendens* regarding pending family law proceeding, real property may not be transferred, encumbered, or otherwise disposed of for three months without court order)];

(2) The interest, if any, of a surviving spouse in the separate property of a deceased spouse who died leaving a will executed after marriage is limited to that set forth in the will [*see Fam. Code § 770(b)*; *Prob. Code § 6101(a)*];

(3) The separate property of a married person is subject to special statutory provisions governing liability for debts incurred before or during marriage, as discussed in Ch. 222, *Dissolution of Marriage: Property Division and Valuation* . [*see, e.g., Fam. Code § 913(a)* (married person's separate property is liable for debt incurred by that person before or during marriage); *see generally Fam. Code § 910 et seq.*]; and

(4) The separate property of a married person may be "transmuted" to community property or to the other spouse's separate property by a qualifying agreement [*see Fam. Code § 850 et seq.*; *see also, § 122.34*].

In general, neither spouse has any interest in the other's separate property, except as otherwise provided by statute [*Fam. Code § 752*]. However, despite this rule, neither spouse ordinarily may be excluded from the other's dwelling, subject to special statutory provisions for restraining orders, including dwelling exclusion orders [*Fam. Code §§ 753, 2045 et seq., 6218(b), 6321*], as discussed in Ch. 221, *Dissolution of Marriage: Procedure* , and Ch. 293, *Harassment and Domestic Violence* .

Moreover, when marital dissolution, legal separation, or nullity proceedings have been commenced and a notice of the pendency of these proceedings (*lis pendens*) is recorded in any county in which a husband or wife resides on real property that is the separate property of the other, that property must not afterwards be transferred, encumbered, or otherwise disposed of voluntarily or involuntarily for a period of three months without the joinder of both spouses, unless a court otherwise orders [*Fam. Code § 754*; *see Code Civ. Proc. § 405.20*].

[c] Inventory of Separate Property Under Prior Law

Former *Civil Code Section 5114* permitted the recording of an inventory of either spouse's separate personal property in

the office of the recorder of the county in which the spouses resided [former *Civ. Code § 5114*]. Pursuant to former *Civil Code Section 5115*, the filing of such an inventory was notice and prima facie evidence of the title of the party filing the inventory.

Operative January 1, 1994, however, Sections 5114 and 5115 were repealed and not replaced in the Family Code, apparently on the ground that they were obsolescent. Nevertheless, it would appear that any inventory recorded prior to that date would be valid for the purpose stated in the former statute [*see* former *Civ. Code § 5115*].

[d] Right of Spouses to Hold Property as Joint Tenants and Tenants in Common

[i] Joint Tenancy

Spouses may hold property between themselves as joint tenants [*Fam. Code § 750*; *cf. Civ. Code § 682* (describing general forms of multiple ownership of property)], and many married persons, in fact, hold title to both real and personal property in joint tenancy. The interest of each spouse in true joint tenancy property is that of an undivided, one-half, *separate* property interest [*see Fry v. Bihr (1970) 6 Cal. App. 3d 248, 252, 85 Cal. Rptr. 742* ; *Kaupe v. Kaupe (1955) 131 Cal. App. 2d 511, 513, 280 P.2d 856* ; *see also Civ. Code § 683*; *In re Marriage of Hilke (1992) 4 Cal. 4th 215, 219, 14 Cal. Rptr. 2d 371, 841 P.2d 891* (discussing effect of joint tenancy title before enactment of special presumption for purposes of marital dissolution)].

Traditionally, spouses have chosen to place title to property in joint tenancy for two principle reasons: probate avoidance and limitation of liability. The probate avoidance feature arises because the major incident of joint tenancy is the right of survivorship [*see Siberell v. Siberell (1932) 214 Cal. 767, 771, 7 P.2d 1003* ; *see also Estate of Wilson (1976) 64 Cal. App. 3d 786, 797, 134 Cal. Rptr. 749]* , under which ownership of the entire property vests on the death of one joint tenant in the surviving joint tenant by operation of law, and without the necessity of probate administration [*Goldberg v. Goldberg (1963) 217 Cal. App. 2d 623, 628, 32 Cal. Rptr. 93]* . Because, under current law, community property willed by one spouse to the other is not required to be administered in probate [*see Prob. Code §§ 13500, 13502, 13503*], probate avoidance is no longer a compelling reason for spouses to choose joint tenancy ownership over community property ownership. Furthermore, because different "basis" rules generally apply on the death of a spouse with respect to joint tenancy property as opposed to property held as community property, there may be significant tax consequences connected with the manner in which the spouses take title [*see I.R.C. § 1014(b)(6)*]. Spouses may now also hold property as community property with a right of survivorship, as discussed in *§ 122.33[6]* [*Civ. Code § 682.1*; *Fam. Code § 750*].

The limitation of liability aspect of true joint tenancy title derives from the fact that the interest of each joint tenant is that of a separate property half interest. Thus, unlike a levy on community property, which may subject the entire property to execution for a spouse's debt, a levy on true joint tenancy property subjects to execution only the interest of the spouse whose separate property is liable for payment of the debt involved [*see Abbett Electric Corp. v. Storek (1994) 22 Cal. App. 4th 1460, 1466-1467, 27 Cal. Rptr. 2d 845* ; *Kane v. Huntley Financial (1983) 146 Cal. App. 3d 1092, 1097, 1097 n.2, 194 Cal. Rptr. 880* ; *Schoenfeld v. Norberg (1970) 11 Cal. App. 3d 755, 764, 90 Cal. Rptr. 47* ; *but see Dieden v. Schmidt (2002) 104 Cal. App. 4th 645, 651-652, 128 Cal. Rptr. 2d 365* (judgment lien was placed on real property when it was held as tenancy in common and survived both title change to joint tenancy and death of debtor joint tenant; therefore, lien was enforceable against surviving joint tenant-spouse)]. In bankruptcy, only the debtor's separate property half interest in joint tenancy property is included in the bankruptcy estate [*see In re Summers (9th Cir. 2003) 332 F.3d 1240, 1242-1244* (true joint tenancy property acquired during marriage with community funds)].

In addition to the foregoing considerations, a general community property presumption concerning property acquired during marriage in joint form, including joint tenancy, may apply for purposes of dividing property on dissolution of marriage or legal separation, as discussed in *§ 122.33[4]* [*see Fam. Code §§ 2580, 2581*; *In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1217-1218, 44 Cal. Rptr. 2d 155, 899 P.2d 1349* ; *In re Marriage of Hilke (1992) 4 Cal. 4th*

215, 221-224, 14 Cal. Rptr. 2d 371, 841 P.2d 891] . Moreover, special characterization rules apply with respect to accounts held by married persons in joint tenancy in banks and similar financial institutions. These rules provide for a community presumption in certain cases, as discussed in Ch. 222, *Dissolution of Marriage: Property Division and Valuation* [*see Prob. Code §§ 5203, 5305-5307*; *see also Estate of Fisher (1988) 198 Cal. App. 3d 418, 427-429, 244 Cal. Rptr. 5* (discussing creation of "Totten trust" accounts under prior law)]. Finally, because of the public policy that favors community property as the form of ownership between spouses [*see Fam. Code § 760* (general presumption regarding community property)], the requirements for creation of a joint tenancy between spouses are strictly construed.

For a general discussion and forms of action related to joint tenancy titles, see Ch. 316, *Joint Tenancy and Tenancy in Common* .

[ii] Tenancy in Common

As in the case of joint tenancy, spouses are expressly permitted by statute to hold property between themselves as tenants in common [*Fam. Code § 750*; *cf. Civ. Code §§ 682*, (describing general forms of multiple ownership of property), 686 (general effect of tenancy among several persons)]. The interest of each spouse in true tenancy in common property is that of an undivided *separate* property interest [*see In re Marriage of Rico (1992) 10 Cal. App. 4th 706, 710, 12 Cal. Rptr. 2d 659* ; Estate ofAdams *(1964) 228 Cal. App. 2d 264, 266, 39 Cal. Rptr. 522* ; *see also Siberell v. Siberell (1932) 214 Cal. 767, 771, 7 P.2d 1003* ; *Estate of Horn (1951) 102 Cal. App. 2d 635, 640, 228 P.2d 99* ; *see, e.g., In re McFall (Bankr. 9th Cir. 1990) 112 Bankr. 336, 338-341* (spouses held title to residence as tenants in common)].

The only requirement for the creation and continued existence of a tenancy in common is the so-called "unity of possession" [*Estate of Horn (1951) 102 Cal. App. 2d 635, 639, 228 P.2d 99]* , under which each tenant in common is equally entitled to share in the possession of the entire property, and no cotenant may exclude any other from any part of the property [*Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 548, 176 P.2d 1]* . Tenants in common need not have equal ownership interests in the property, although the existence of a tenancy in common raises a presumption of equal ownership [*see In re Marriage of Rico (1992) 10 Cal. App. 4th 706, 710, 12 Cal. Rptr. 2d 659* (parties purchased property as tenants in common before marriage, and converted to joint tenancy on refinancing during marriage)]. Note that many, if not most, spousal tenancies in common are composed of equal interests.

A tenancy in common may result from the severance of, or failure to meet the requirements for, a joint tenancy. For example, a conveyance of the interest of one joint tenant to a third party, followed by a reconveyance of the interest from the third party to the original tenant, severs the original joint tenancy and results in a tenancy in common [*Estate of Baglione (1966) 65 Cal. 2d 192, 195, 53 Cal. Rptr. 139, 417 P.2d 683* ; *see Estate of Baumann (1988) 201 Cal. App. 3d 927, 936, 247 Cal. Rptr. 532]* . Furthermore, if the interest of one joint tenant is purchased at an execution sale, the joint tenancy is severed and the purchaser and the other joint tenant or tenants become tenants in common [*Russell v. Lescalet (1967) 248 Cal. App. 2d 310, 312, 56 Cal. Rptr. 399]* .

Like property held in joint tenancy, property held in a true tenancy in common is subject to division, at the request of a party, in proceedings to divide property on marital dissolution or legal separation [*see Fam. Code § 2650*]. However, for the purpose of dividing property on dissolution of marriage or legal separation, property acquired by the spouses during marriage in joint form, including tenancy in common, is rebuttably presumed to be community property [*see Fam. Code §§ 2580, 2581*], as discussed in *§ 122.33[4]*.

Furthermore, special rules governing accounts in banks and similar financial institutions affect the characterization of tenancies in common involving such accounts [*see Prob. Code §§ 5100 et seq., 5203(a)(6), 5306*]. For a discussion of multiple-party accounts, see Ch. 222, *Dissolution of Marriage: Property Division* . For discussion of former spouses holding unadjudicated community assets as tenants in common following a marital dissolution [*see In re Marriage of Graves (1988) 198 Cal. App. 3d 1047, 1050, 1052, 244 Cal.Rptr. 110]* , see Ch. 222, *Dissolution of Marriage: Property*

Division . For a general discussion of tenancies in common, see Ch. 316, *Joint Tenancy and Tenancy in Common* .

[3] Spouses' Date of Separation and Property

[a] Significance of Date of Separation

Married persons are subject to special rules concerning the characterization of assets they acquire and debts they incur throughout the period of marriage, including the principle that assets (including earnings) they acquire and debts they incur *after a marital separation* generally are the separate property and responsibility, respectively, of the spouse making the acquisition or incurring the debt [*see Fam. Code §§ 771, 910(b)*; *see also Fam. Code § 772* (acquisitions after entry of judgment of legal separation)]. As a result, the parties' *date of separation* has critical significance in characterizing property as separate or community. A full discussion of property characterization principles is included in this part, below. Debt liability is discussed in Ch. 222, *Property Division and Valuation* .

[b] Determining Date of Separation

[i] Concept of "Living Separate and Apart"

Courts have traditionally determined the date of separation of spouses by establishing when the spouses commenced living "separate and apart." Framing the inquiry in these terms is essential given the provision of *Fam. Code § 771*, declaring "earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse" to be the acquiring spouse's separate property [*see Fam. Code § 910(b)* (for purposes of community property liability for debts incurred "during marriage," term "during marriage" does not include period during which spouses are living separate and apart before judgment of dissolution of marriage or legal separation of the parties"); *see also § 122.32[3][b]*; *but see Fam. Code § 771(b)* (preserving minor's earnings under certain entertainment and sports contracts as property of minor)].

However, "living separate and apart" is a term of art, and means that the parties' physical separation is the result of a breakdown in the marital relationship. Courts have held that, in the context of *Fam. Code § 771*, "living separate and apart" refers not to a case in which spouses are residing temporarily in different places because of economic or social reasons [*In re Marriage of Marsden (1982) 130 Cal. App. 3d 426, 434-436, 181 Cal. Rptr. 910* ; *Kerr v. Kerr (1960) 182 Cal. App. 2d 12, 17-18, 5 Cal. Rptr. 630]* , but only to that condition in which spouses have come to a parting of the ways with no present intention of resuming marital relations [*In re Marriage of Imperato (1975) 45 Cal. App. 3d 432, 435-436, 119 Cal. Rptr. 590* , , and in which there is conduct evidencing a *complete and final break* in the marital relationship [In re Marriage of von der *Nuell (1994) 23 Cal. App. 4th 730, 732, 734-736, 28 Cal. Rptr. 2d 447]* .

The threshold requirement of "living separate and apart" is not satisfied until two conditions are present *simultaneously*: at least one spouse must have the subjective intent to end the marriage, and there must be objective evidence of conduct furthering that intent [*In re Marriage of Norviel (2002) 102 Cal. App. 4th 1152, 1158-1159, 126 Cal. Rptr. 2d 148]* . Therefore, living apart physically in different places is an indispensable threshold requirement to separation [*In re Marriage of Norviel (2002) 102 Cal. App. 4th 1152, 1162, 126 Cal. Rptr. 2d 148]* . However, the fact that the spouses may live in separate residences is not determinative. As the courts have noted, under modern conditions many married couples work in different places for economic reasons, seeing each other only on weekends, and yet they are not "living apart" within the meaning of the statute because there has been no marital rupture [*Kerr v. Kerr (1960) 182 Cal. App. 2d 12, 18, 5 Cal. Rptr. 630]* .

The critical inquiry is whether the parties' conduct evidences a *complete and final break* in the marital relationship [*In re Marriage of von der Nuell (1994) 23 Cal. App. 4th 730, 732, 734-736, 28 Cal. Rptr. 2d 447* (*citing In re Marriage of Baragry (1977) 73 Cal. App. 3d 444, 448, 140 Cal. Rptr. 779*)]. "Separation" occurs when "either spouse does not intend to resume the marriage and his or her actions bespeak the finality of the marital relationship"; or, phrased another way, when either party perceives (or both parties perceive) the rift in their relationship as being final [*In re Marriage*

of Hardin (1995) 38 Cal. App. 4th 448, 451, 453, 45 Cal. Rptr. 2d 308] . Proof of the separation date by a preponderance of the evidence is sufficient, given that the parties have identical economic interests at risk in ruling on the issue [*In re Marriage of Peters (1997) 52 Cal. App. 4th 1487, 1489, 1491, 61 Cal. Rptr. 2d 493]* .

All factors bearing on either party's intentions "to return or not to return to the other spouse" are to be considered, and no particular facts are per se determinative. The ultimate test is the parties' *subjective* intent, the best evidence of which is revealed by their words and actions. Accordingly, the parties' respective subjective intents are to be *objectively* determined from all of the evidence reflecting their words and actions during the time period at issue, in order to ascertain when during that period the rift in their relationship became final [*In re Marriage of Hardin (1995) 38 Cal. App. 4th 448, 452-453, 45 Cal. Rptr. 2d 308]* .

Leading cases illustrate the type of fact analysis required to determine whether "separation" has occurred. In one case, the only evidence of a final break in the marital relationship was the absence of an active sexual relationship between the parties, and the husband's cohabitation elsewhere with another woman. The husband continued to eat dinner with his family, take his wife on vacations, file joint tax returns, bring his laundry home, and otherwise participate in family life. During the four years that this state of affairs continued, the husband and wife were not considered to be living separate and apart within the meaning of the statute [*In re Marriage of Baragry (1977) 73 Cal. App. 3d 444, 448, 140 Cal. Rptr. 779]* . Similarly, another court found that "separation" had not occurred as of the time a wife first asked her husband to move out of the family home when, during the nearly four years thereafter in which they lived apart, the husband voluntarily paid the wife monthly support, the couple maintained joint checking accounts, credit cards, filed joint tax returns, acquired joint title in a vehicle, engaged in sexual relations, went out socially, and made some attempts at reconciliation. Their ongoing economic, emotional, sexual, and social ties demonstrated that a complete and final break in their marital relationship had not yet occurred [*In re Marriage of von der Nuell (1994) 23 Cal. App. 4th 730, 732, 734-736, 28 Cal. Rptr. 2d 447]* . Yet another court found that "separation" did not occur on the day that a husband informed his wife that their marriage was ended and they agreed he would move into a rental house they were buying, but on the day when the rental house was ready for occupancy and he finally moved out of the family residence. The husband and wife had been living together as "roommates" for some time, so the husband's actual move was the only conduct demonstrating a physical separation contemporaneous with his intent to separate [*In re Marriage of Norviel (2002) 102 Cal. App. 4th 1152, 1164-1165, 126 Cal. Rptr. 2d 148]* .

The issue of the date of separation can be bifurcated for trial apart from other issues in a proceeding for marital dissolution or legal separation, if resolution of that issue is likely to simplify the determination of other issues [*see* Cal. Rules of Ct., Rule 1269(b); *see, e.g.,* *In re Marriage of von der Nuell (1994) 23 Cal. App. 4th 730, 733, 28 Cal. Rptr. 2d 447]* .

[ii] Multiple Separation Periods

In common parlance, "separation" is typically regarded as a single event in which the spouses physically live apart and do not resume living together in the marital household. However, in a given instance, parties may actually separate and resume living together a number of times, either with or without completely reconciling. This situation complicates determining the date of separation because, as discussed in *§ 122.31[3][b][i]*, living "separate and apart" within the statutory meaning essentially requires a complete and final break in the marital relationship with no intention of resuming that relationship [In re Marriage of von der *Nuell (1994) 23 Cal. App. 4th 730, 732, 734-736, 28 Cal Rptr. 2d 447]* . Whether any particular period of physical sensation before a "final separation" can amount to "living separate and apart" is problematic from the standpoint of characterizing assets acquired or debts incurred [*see Fam. Code § 771* (successor to former *Civ. Code § 5118*); Fam. code § 910(b) (for purposes of community property liability for debts incurred "during marriage," term "during marriage" does not include period during which spouses are living separate and apart before a judgment of dissolution of marriage or legal separation of the parties)] during the separation period.

Even if more than one period of separation is recognized, the parties' conduct during a reconciliation must also be

examined to determine whether, following the reconciliation, any agreements were made respecting property acquired during the separation period, or actual transfers of such property were made that would negate a separate property claim. For discussion of transmuting the character of property from separate to community, or otherwise, see *§ 122.34*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationMarital PropertyFamily LawMarital Duties & RightsProperty RightsCharacterizationSeparate PropertyReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawEstatesPresent EstatesMarital EstatesSeparate Property

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
Chapter 122 COMMUNITY PROPERTY
PART II. LEGAL BACKGROUND
B. General Characterization Principles

12-122 California Forms of Pleading and Practice--Annotated § 122.32

§ 122.32 Effect of Time of Acquisition

[1] Overview of Acquisition Issues

[a] General Considerations

The time at which property is acquired is significant for characterization purposes primarily because classification of property as separate or community is ordinarily determined as of its acquisition date [*see In re Marriage of Fabian (1986) 41 Cal. 3d 440, 445, 224 Cal. Rptr. 333, 715 P.2d 253* ; *see also Grappo v. Coventry Financial Corp. (1991) 235 Cal. App. 3d 496, 505, 286 Cal. Rptr. 714]* by applying the various characterization principles established by statute and case law then in force, although some enactments or amendments may apply retroactively [*see In re Marriage of Fabian (1986) 41 Cal. 3d 440, 448-449, 224 Cal. Rptr. 333, 715 P.2d 253* ; *In re Marriage of Bouquet (1976) 16 Cal. 3d 583, 591-594, 128 Cal. Rptr. 427, 546 P.2d 1371* ; *Trimble v. Trimble (1933) 219 Cal. 340, 343, 26 P.2d 477]* . "Time of acquisition" issues generally involve consideration of when property was acquired in relation to the commencement or termination of marriage, or to the spouses' cohabitation during marriage.

In characterizing property by reference to the time of acquisition, it is useful to first ascertain the relationship between the acquisition time and the status of the parties as husband and wife, as discussed below, and then to apply the relevant legal principles in force as of that time. This is perhaps the most basic factor to consider, given the general presumption that property acquired during marriage by a person domiciled in California is community property, except as otherwise provided by statute [*see Fam. Code § 760*; *In re Marriage of Haines (1995) 33 Cal. App. 4th 277, 291, 39 Cal. Rptr. 2d 673]* . The philosophy of the community property system is that a community interest can be acquired only during the time of the marriage [*In re Marriage of Fortier (1973) 34 Cal. App. 3d 384, 388, 109 Cal. Rptr. 915* ; *see Fam. Code § 760*].

Accordingly, property acquired by either spouse before marriage [*see Fam. Code § 770*; *In re Marriage of Jafeman (1972) 29 Cal. App. 3d 244, 255, 105 Cal. Rptr. 483]* , or while the spouses are still married but living separate and apart with no present intention of resuming marital relations [*see Fam. Code § 771*; *In re Marriage of Marsden (1982) 130 Cal. App. 3d 426, 434, 181 Cal. Rptr. 910]* , or after a judgment of legal separation or marital dissolution, or after a spouse's death [*see Fam. Code § 772*; *In re Estate of Nelson (1930) 104 Cal. App. 613, 619-620, 286 P. 439* ; *In re*

Spencer (1889) 82 Cal. 110, 113, 23 P. 37] is ordinarily the separate property of the acquiring spouse unless the property was acquired with community funds or with funds traceable to community property [*see Estate of Rattray (1939) 13 Cal. 2d 702, 707, 91 P.2d 1042]* .

Nevertheless, the "time of acquisition" factor does not operate in isolation from other characterization principles. Therefore, counsel must examine the nature of the property, the transaction by which it was acquired, and any other actions taken by the parties in relation to the property to determine whether any other applicable characterization principles apply.

For discussion of special considerations in determining when property was acquired, see *§ 122.32[1][b]*. For discussion of the general presumption that property acquired during marriage is community property, including a summary of exceptions to that presumption, *see § 122.32[2]*.

[b] Determining Time of Acquisition

[i] Equitable Versus Legal Right to Property

In determining when property was acquired for characterization purposes, courts generally look to when an *equitable* interest in the property was acquired, not to when formal legal title passed. For example, if an equitable right in property, such as the right to purchase real property, is acquired by a spouse before marriage, the property is considered to be that spouse's separate property [*Vieux v. Vieux (1926) 80 Cal. App. 222, 226-230, 251 P. 640]* , although the community may be entitled to reimbursement for any nongift improvements made on the property with community funds, or to an apportioned interest when nongift community funds are used to help purchase the property [*see In re Marriage of Jafeman (1972) 29 Cal. App. 3d 244, 254-256, 105 Cal. Rptr. 483]* . For discussion of apportioning real property interests, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

If acquisition of property is begun during marriage but not completed until after the marriage has been terminated, the property generally is considered community property [*see Waters v. Waters (1946) 75 Cal. App. 2d 265, 269-270, 170 P.2d 494]* . However, in some instances, such as when an acquisition that was begun during marriage has been completed after termination of the marriage using separate property, an apportionment between community and separate property may be required, as discussed in *§ 122.32[1][c]*.

[ii] Leasehold Interests Renewed or Extended During Marriage

Leaseholds are subject to the general presumption of community property if acquired during marriage [*see Fam. Code § 760*], but characterization questions may arise if the leasehold is extended or renewed during marriage. For example, a lease that is one spouse's separate property may remain separate property if the lease is merely extended during marriage. However, *renewal* during marriage of a leasehold gives rise to a new tenancy in which the community may acquire an interest if, for example, a new lease agreement is executed. In one case, when a separate property leasehold was merely extended during marriage the community acquired no interest, even though the extension was pursuant to an option to renew, because the extension related back to the date the option was given [*In re Marriage of Joaquin (1987) 193 Cal. App. 3d 1529, 1534, 239 Cal. Rptr. 175]* .

Note that for characterization purposes, a leasehold interest in real property is considered real property and not personal property [*Fam. Code § 700* (applying its definition of leasehold to all of Division 4 of Family Code, *Fam. Code § 700 et seq.*)].

[iii] Future or Contingent Rights

Time of acquisition may be at issue if a party acquires only a "contingent" or future interest in a right to property during marriage. The issue might arise, for example, in the context of dividing rights to contingent fees, work in progress in a

professional practice, royalties, or *qui tam* actions, as well as in the employment contract and similar contexts. In general, the fact that an interest is contingent, nonvested, or nonmatured, or involves intangible property, will not preclude it from characterization as community property if the right to the interest was acquired during marriage and before separation [*see generally In re Marriage of Brown (1976) 15 Cal. 3d 838, 844-847, 126 Cal. Rptr. 633, 544 P.2d 561* ; *Biddle v. Biddle (In re Biddle) 52 Cal. App. 4th 396, 398, 400, 60 Cal. Rptr. 2d 569]* .

[iv] Nonpension Employment Rights

Rights derived from a contract between an employer and employee to receive certain benefits are not considered mere expectancies. They may be subject to community property laws when the employee's right to receive contract benefits is subject only to conditions within the employee's control [*see In re Marriage of Skaden (1977) 19 Cal. 3d 679, 685-688, 139 Cal. Rptr. 615, 566 P.2d 249* (right of insurance agent to receive benefits based on amount of policies sold); *In re Marriage of Fonstein (1976) 17 Cal. 3d 738, 745-746, 131 Cal. Rptr. 873, 552 P.2d 1169* (law partner's contractual right to receive payments on voluntary withdrawal from firm); *In re Marriage of Horn (1986) 181 Cal. App. 3d 540, 547-548, 226 Cal. Rptr. 666* (right of football player to receive severance pay); *In re Marriage of Wicks (1978) 80 Cal. App. 3d 329, 333-334, 145 Cal. Rptr. 496* (military incentive pay received during marriage related to services to be performed after marriage)]. For further discussion of such contractual rights, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

[c] Apportionment

Property may have to be apportioned between separate and community interests if acquisition occurred during overlapping periods in which the parties' marital status and living arrangements changed, such as, for example, when acquisition began before the parties married and concluded during marriage, or after the parties separated [*see, e.g., In re Marriage of Marsden (1982) 130 Cal. App. 3d 426, 436-440, 181 Cal. Rptr. 910]* .

If the property in question is a business or professional practice, the court may choose between the apportionment rules established by the *Pereira* and *Van Camp* cases, as appropriate to the facts [*see Pereira v. Pereira (1909) 156 Cal. 1, 7-8, 103 P. 488* ; *Van Camp v. Van Camp (1921) 53 Cal. App. 17, 27-29, 199 P. 885]* . If a business or practice was commenced during marriage and continued after separation, a reverse application of the *Pereira/Van Camp* rules may be required [*see In re Marriage of Imperato (1975) 45 Cal. App. 3d 432, 438-439, 119 Cal. Rptr. 590]* . Division of small businesses and professional practices is fully discussed in Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

Similarly, special rules concerning apportionment apply to acquisitions of real property, particularly the family residence. Community improvements to a spouse's separate real property, down payments from separate property on community property, or separate property improvements to community property all will require application of specialized apportionment or reimbursement principles [*see, e.g., Fam. Code § 2640* (reimbursement for separate property contributions to acquisition of community property)]. In addition, valuation of real property is frequently made more complex because this property is subject to market fluctuations and other changes that are not directly attributable to the parties' contributions. Apportionment of interests in real property is discussed in Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

Furthermore, contingent rights that are acquired partially during marriage and partially before or after marriage, such as pensions, bonuses, and stock options, may be at issue. Courts generally apportion these rights using time-based formulas [*see In re Marriage of Walker (1989) 216 Cal. App. 3d 644, 648, 650-651, 265 Cal. Rptr. 32* ; *In re Marriage of Nelson (1986) 177 Cal. App. 3d 150, 154-155, 222 Cal. Rptr. 790* ; *In re Marriage of Adams (1976) 64 Cal. App. 3d 181, 186-187, 134 Cal. Rptr. 298]* . Income tax issues may be raised by a particular apportionment, and counsel should be prepared to demonstrate any "immediate and specific" consequences to the court [*see In re Marriage of Fonstein (1976) 17 Cal. 3d 738,747-751, 17 Cal. 3d 738, 751, 131 Cal. Rptr. 873, 552 P.2d 1169* ; *In re*

Marriage of Nelson (1986) 177 Cal. App. 3d 150, 156 , 222 Cal. Rtptr. 790]. Finally, contingent fees, such as those obtained in a professional practice may be at issue [*see, e.g., In re Marriage of Kilbourne (1991) 232 Cal. App. 3d 1518, 1522, 1524 n.5, 284 Cal. Rptr. 201]* . Apportionment of such fees is discussed in Ch. 222, *Dissolution of Marriage: Property Division and Valuation* , along with discussion of dividing pension, retirement, and disability benefits.

[2] Scope of Community Presumption From Acquisitions During Marriage

[a] General Rule

One of the basic principles of the community property system is recognition of the contribution of both spouses to the marriage. The system gives both spouses rights in the property accumulated during marriage, although both may not have been directly responsible for acquisition of the property. Thus, all property acquired during marriage by either husband or wife or both while domiciled in California is presumed to be community property, except as otherwise provided by statute [*see Fam. Code § 760*].

Although the community presumption applies regardless of the duration of a marriage, at least one older decision has suggested that the presumption has "greater force" if the marriage has been of long duration [*see Estate of Ney (1963) 212 Cal. App. 2d 891, 895, 28 Cal. Rptr. 442* (presumption applied to property acquired during 14-year marriage)]. This does not mean that a different characterization standard applies to long, as opposed to short, marriages, and in fact there is no modern authority for a court to apply a different standard. However, as a practical matter, some courts may simply scrutinize more closely claims of purported separate property acquired during marriage when the parties have developed a pattern of community property acquisitions over a long period of time.

The presumption that property acquired during marriage is community property may be overcome by evidence that the disputed property is actually separate property [*In re Marriage of Mix (1975) 14 Cal. 3d 604, 611-612, 122 Cal. Rptr. 79, 536 P.2d 479* ; See v. See *(1966) 64 Cal. 2d 778, 783, 51 Cal. Rptr. 888, 415 P.2d 776* ; *see also In re Marriage of Joaquin (1987) 193 Cal. App. 3d 1529, 1534, 239 Cal. Rptr. 175]* . In general, overcoming the community presumption may be accomplished by the following [*see generally In re Marriage of Wall (1973) 30 Cal. App. 3d 1042, 1047-1048, 106 Cal. Rptr. 690]* :

- Evidence of an agreement between the parties that the property is separate despite the time of acquisition or form of title (*see* Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, chs. 200- 216 (Matthew Bender 2d ed.)), or evidence of an agreement actually changing ("transmuting") community to separate property (*see § 122.34*);

- Tracing the property to a separate property source, except when this is inappropriate, such as with respect to property held in joint title form (*see* the discussions in *§§ 122.33* and *122.35*);

- Applying presumptions relating to the form of title by which the property is held, as discussed in *§ 122.33*; or, by

- Evidence that the acquisition was by gift, will, or inheritance, or that it was made after the parties separated, or that it otherwise comes within one or more of the exceptions to community characterization discussed in *§ 122.32[2][b]*.

In addition, other statutory provisions control the liability of property for debts incurred during marriage and the assignment of responsibility for payment of debts on dissolution of marriage [*see Fam. Code § 910 et seq.*, § 2620 et seq.], as discussed in Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

[b] Exceptions Resulting in Separate Characterization

The general presumption that property acquired during marriage is community property is inapplicable to certain property, as set forth by statute [*see Fam. Code § 760*; *see also Estate of Jolly (1925) 196 Cal. 547, 553, 238 P. 353* (construing former *Civ. Code § 164*)]. Accordingly, as discussed further below, the following property acquired during marriage is separate property because of statutory exceptions to the general presumption:

- Property acquired by either spouse by gift, bequest, devise, or descent [*Fam. Code § 770(a)(2)*].

- The rents, issues, and profits of a spouse's separate property [*Fam. Code § 770(a)(3)*].

- Money or other property received in satisfaction of a claim for personal injury: (a) by one spouse against the other for a cause of action that arose during marriage, and (b) by one spouse against a third party if the cause of action arose after the rendition of a judgment of legal separation or of marital dissolution, or while either spouse, if he or she is the injured person, is living separate and apart from the other spouse [*see Fam. Code § 781*]. For example, a wife's recovery in her settlement of her legal malpractice action against the couple's former attorney was held to be her separate property, even though two necessary elements of her cause of action--duty and breach--occurred during marriage, when she did not suffer any loss or injury until after separation, and when it was the husband's actions, with the attorney's aid, in transferring funds offshore that resulted in the injury the wife claimed in the malpractice action. Although the attorney was negligent in representing the wife, it was the husband who benefited from that negligence. Under these circumstances, it would be inequitable for the husband to benefit by sharing in the wife's settlement proceeds [see *In re Marriage of Klug (2005) 130 Cal. App. 4th 1389, 1393-1403, 31 Cal. Rptr. 3d 327]* .

- Property to which legal or equitable title is held by a person at the time of his or her death, if the marriage during which the property was acquired was terminated by dissolution more than four years before that death [*Fam. Code § 802*].

- Any real or personal property interest acquired by a wife by written instrument before January 1, 1975, subject to other special presumptions [*Fam. Code § 803*].

- Earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse [*Fam. Code § 771*].

- Earnings and accumulations of a party after the rendition of a judgment of legal separation [*Fam. Code § 772*].

- In general, debts incurred while spouses are living separate and apart prior to a judgment of marital dissolution or legal separation [*Fam. Code § 910*; *see* Ch. 222, *Dissolution of Marriage: Property Division and Valuation*].

In addition to these statutory exceptions, case law has established that property acquired by a sale on credit or by a loan should be characterized as separate property, despite acquisition of the property during marriage, when the intent of the lender or seller is to rely on the separate property of the purchaser [*see Bank of California v. Connolly (1973) 36 Cal. App. 3d 350, 375, 111 Cal. Rptr. 468]* , as discussed in *§ 122.36*. Furthermore, parties may choose to designate property acquired during marriage as separate property by agreement, as discussed in *§ 122.34* and in Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, chs. 200- 216 (Matther Bender).

[c] Acquisitions by Wife Before January 1, 1975

The presumption in favor of characterizing property acquired during marriage as community property does not apply to any real property (including leaseholds) [*see Fam. Code § 700*], personal property, or interest in or encumbrance on such property acquired by a married woman by written instrument executed before January 1, 1975. The property or interest so acquired is presumed to be the woman's separate property [*Fam. Code § 803(a)*; *see, e.g., In re Marriage of Ashodian (1979) 96 Cal. App. 3d 43, 46-47, 157 Cal. Rptr. 555* (properties acquired in connection with wife's real estate business and proceeds from their sale)]. If the property was acquired with any person other than her spouse, she is presumed to take her interest as a tenant in common unless a different intention is expressed in the written instrument [*Fam. Code § 803(b)*]. This separate property presumption does not apply to property acquired on or after January 1, 1975, because on that date wives acquired joint management and control of all community property [*see generally In re Marriage of Mix (1975) 14 Cal. 3d 604, 610 fn. 6, 611, 122 Cal. Rptr. 79, 536 P.2d 479]* .

To rebut the presumption that property purchased by a married woman by written instrument prior to 1975 is her separate property, it is sufficient to trace the source of the purchase to community funds, if the husband did not acquiesce in the form of title in the instrument of purchase. If the husband consented to the form of title, it is presumed that he intended a gift to the wife. It then becomes necessary to rebut the presumption of a gift in addition to tracing the source of the purchase. The husband's testimony that he did not intend a gift has been held sufficient to rebut the presumption of a gift [*In re Marriage of Rives (1982) 130 Cal. App. 3d 138, 162-163, 181 Cal. Rptr. 572]* .

The presumption that any interest in property acquired by a married woman in writing before January 1, 1975, is her separate property does not apply if the wife acquired the property with her husband and the instrument of transfer described them as husband and wife. In this situation, unless the instrument of transfer expresses a different intention, the property acquired is presumed to be community property [*Fam. Code § 803(c)*]. This presumption in favor of community property is not rebuttable by merely tracing separate property used in the purchase, but can only be rebutted by evidence of an agreement or understanding regarding the retention of a separate property interest [*In re Marriage of Cademartori (1981) 119 Cal. App. 3d 970, 973-976, 174 Cal. Rptr. 292]* . For further discussion of this "husband and wife" presumption, *see § 122.33[3]*.

The foregoing presumptions are *conclusive* in favor of any person dealing in good faith and for valuable consideration with a wife or with her legal representatives or successors in interest, notwithstanding any change in her marital status after acquisition of the property [*Fam. Code § 803*]. A conclusive presumption may not be rebutted by other evidence [*see Williams v. Moon (1950) 98 Cal. App. 2d 214, 217, 219 P.2d 902]* .

[d] Property Held at Death and Acquired During Previous Marriage

The presumption that property acquired during marriage is community property (§ 122.32[3][a]) does not apply to any property to which a person holds legal or equitable title at the time of his or her death if the property was acquired during a marriage that was terminated by dissolution more than four years before the death [*Fam. Code § 802*].

[3] Application to Salaries, Wages, and Other Earnings

[a] Earnings While Parties Living Together

Under the general rule that the time of acquisition of property governs its character (§ 122.32[3]), the earnings of each spouse before marriage are separate property and the earnings of both spouses during marriage while living together are community property [*Fam. Code §§ 760, 770*; *Odone v. Marzocchi (1949) 34 Cal. 2d 431, 437-438, 211 P.2d 297* ; *but see Fam. Code § 911* (prescribing conditions under which married person's earnings will not be liable for spouse's premarital debts, as discussed in Ch. 222, *Dissolution of Marriage: Property Division and Valuation*)]. Thus, money earned before, but collected after, marriage is separate property of the spouse earning it [*Thomasset v. Thomasset (1953) 122 Cal. App. 2d 116, 123, 264 P.2d 626]* . Fringe benefits of employment, such as veteran's education benefits,

are also separate property if they are earned entirely by employment before marriage, even if they are received after marriage [*In re Marriage of Shea (1980) 111 Cal. App. 3d 713, 716-717, 169 Cal. Rptr. 490]* . Similarly, money earned during marriage and represented by accounts receivable at the time of separation constitutes community property and is subject to division on dissolution [*In re Marriage of House (1975) 50 Cal. App. 3d 578, 579-580, 123 Cal. Rptr. 451* ; *Winn v. Winn (1956) 143 Cal. App. 2d 184, 189, 299 P.2d 721* ; for discussion of dividing businesses and professional practices, *see* Ch. 222, *Dissolution of Marriage: Property Division and Valuation*].

The character of earnings as community property is not controlled by their form. Thus, for example, stock given in lieu of salary [*Pope v. Pope (1951) 102 Cal. App. 2d 353, 365, 227 P.2d 867]* , as well as more traditional forms, such as salary or wages, constitute community property when earned during marriage.

The parties to a marriage may contract to treat the earnings of either or both as separate property of the earning spouse [*see Fam. Code §§ 721, 850, 1500, 1620, 3580*; *see generally § 122.34[1]*, for discussion of factors affecting validity of transmutation of community to separate property]. Such an agreement may be evidenced by a formal written premarital contract, by a formal interspousal contract, by a marital termination agreement in contemplation of marital dissolution or legal separation, or, at least before January 1, 1985, by acts or conduct of a spouse relinquishing his or her community property right in the other spouse's earnings and indicating that the spouse does not regard the earnings of the other as community property [*In re Marriage of Jafeman (1972) 29 Cal. App. 3d 244, 260, 105 Cal. Rptr. 483* ; *Sbarbaro v. Rosa (1941) 48 Cal. App. 2d 584, 587, 120 P.2d 151* ; *see Fam. Code § 852*]. For discussion of agreements respecting property, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, chs. 200- 216 (Matthew Bender).

[b] Earnings While Parties Separated

[i] Controlling Principles

The earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are separate property [*Fam. Code § 771*; *see In re Marriage of Bouquet (1976) 16 Cal. 3d 583, 591-594, 128 Cal. Rptr. 427, 546 P.2d 1371* (holding former *Civ. Code § 5118* retroactive); *but see Fam. Code § 771(b)* (preserving minor's earnings under certain entertainment and sports contracts as property of minor)]. Thus, for example, when a wife's contract with her employer called for seven yearly payments, the payments made for the years after the parties separated were the wife's separate property [*Garfein v. Garfein (1971) 16 Cal. App. 3d 155, 159, 93 Cal. Rptr. 714]* . Similarly, variable incentive pay awarded to a husband in exchange for his promise to remain in the Army constituted his separate property because it was paid after the parties separated as compensation for services to be performed in the future [In re Marriage of Wicks (1978) (*80 Cal. App. 3d 329, 333-334, 145 Cal. Rptr. 496]* . However, income generated after separation as the result of a spouse's skill, efforts, and industry during marriage is not a spouse's separate property, but is equitably apportioned to the community [*see In re Marriage of Zaentz (1990) 218 Cal. App. 3d 154, 164-167, 267 Cal. Rptr. 31* ; for further discussion, *see* Ch. 222, *Dissolution of Marriage: Property Division and Valuation*].

Nevertheless, although the earnings of a separated spouse are generally treated as that spouse's separate property, the court, in enforcing an order for spousal support is required by statute to resort first to the earnings, income, or accumulations of either spouse, while living separate and apart from the other spouse, which would have been community property if the spouses were living together [*Fam. Code § 4338(a)*; *cf. Fam. Code § 4008* (property that may be subject to satisfaction for child support obligation)]. This rule became effective January 1, 1975, and support payments for which a spouse is obligated after that date are chargeable first to that spouse's separate earnings, income, or accumulations [*In re Marriage of Tammen (1976) 63 Cal. App. 3d 927, 933, 134 Cal. Rptr. 161]* .

[ii] Earnings and Accumulations

"Earnings" is broader in scope than wages and salary. It can include income derived from carrying on a business as a sole proprietor when the income is the fruit or reward for the spouse's labor and services without the aid of capital [*In re Marriage of Imperato (1975) 45 Cal. App. 3d 432, 437, 119 Cal. Rptr. 590* ; *see Sukoff v. Lemkin (1988) 202 Cal. App. 3d 740, 746, 249 Cal. Rptr. 42]* . It also has been held that payments due a spouse under a "play or pay" contract, under which the spouse was paid to refrain from performing for anyone except his or her employer during the period of the contract, constituted earnings [*Garfein v. Garfein (1971) 16 Cal. App. 3d 155, 159, 93 Cal. Rptr. 714]* .

If the parties own community property shares in a corporation and the corporation increases in value due to the efforts of a spouse and other employees in the corporation, ordinarily any increase in the value of the shares after separation will be considered to be earnings of the corporation and not the spouse. Thus, the postseparation increase in the value of the shares will be divided as community property at trial [*In re Marriage of Aufmuth (1979) 89 Cal. App. 3d 446, 463-464, 152 Cal. Rptr. 668* , disapproved in part, *In re Marriage of Lucas (1980) 27 Cal. 3d 808, 815, 166 Cal. Rptr. 853, 614 P.2d 285]* .

If, however, one spouse is the sole shareholder of a community property corporation and there is evidence that the corporation had not been treated by the parties as a separate entity, the court may disregard the corporate entity and treat the business as a sole proprietorship. Thus, the increase in the corporation's net worth from the time of separation to the time of trial would be treated as the shareholder spouse's separate property [*In re Marriage of Imperato (1975) 45 Cal. App. 3d 432, 437-440, 119 Cal. Rptr. 590]* . For discussion of small businesses and professional practices, including closely held corporations, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

"Accumulations" means any property that a person acquires and retains, without regard to the means by which it is obtained [*Union Oil Co. v. Stewart (1910) 158 Cal. 149, 156, 110 P. 313]* . The term "accumulation" includes proceeds of a postseparation loan, unless the loan is obtained in exchange for community property. For example, proceeds of a postseparation loan obtained from a community corporation and secured by a community pension trust were held not to be a postseparation accumulation. The court ruled that the proceeds were sufficiently related to community assets to be community property. In addition, the promissory note for the loan did not limit recourse by the creditor to the debtor's separate property [*In re Marriage of Stephenson (1984) 162 Cal. App. 3d 1057, 1084-1085, 209 Cal. Rptr. 383]* .

[iii] Living Separate and Apart

As contemplated by *Family Code Section 771*, "living separate and apart" refers not to a case in which spouses are residing temporarily in different places because of economic or social reasons [*In re Marriage of Marsden (1982) 130 Cal. App. 3d 426, 434-436, 181 Cal. Rptr. 910* ; *Kerr v. Kerr (1960) 182 Cal. App. 2d 12, 17-18, 5 Cal. Rptr. 630]* , but only to that condition in which spouses have come to a parting of the ways with no present intention of resuming marital relations, and in which there is conduct evidencing a complete and final break in the marital relationship [In re Marriage of von der *Nuell (1994) 23 Cal. App. 4th 730, 732, 734-736, 28 Cal. Rptr. 2d 447* ; *In re Marriage of Imperato (1975) 45 Cal. App. 3d 432, 435-436, 119 Cal. Rptr. 590]* .

For further discussion of this concept, *see* § 122.21[3][b][i].

[iv] Parties Legally Separated

After entry of a judgment of legal separation of the parties, the earnings or accumulations of each spouse are the separate property of the spouse acquiring the earnings or accumulations [*Fam. Code § 772*]. However, this rule apparently does not apply when the spouses reconcile instead of living separate and apart after the judgment [*see Cochran v. Cochran (1970) 13 Cal. App. 3d 339, 352, 91 Cal. Rptr. 630* (spouses reconciled after then-applicable interlocutory judgment was entered)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationMarital PropertyFamily LawMarital Duties & RightsProperty RightsCharacterizationSeparate PropertyReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawEstatesPresent EstatesMarital EstatesSeparate Property

California Forms of Pleading and Practice--Annotated

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
Chapter 122 COMMUNITY PROPERTY
PART II. LEGAL BACKGROUND
B. General Characterization Principles

12-122 California Forms of Pleading and Practice--Annotated § 122.33

§ 122.33 Effect of Form of Title

[1] Relevance of Title to Characterization

[a] An Overview

Title, or record ownership, of property is a relevant consideration in its characterization. However, the significance of title is evaluated in the context of other applicable characterization principles, as well as in the context of actions the spouses may have taken to alter the property's character [*see, e.g., In re Marriage of Grinius (1985) 166 Cal. App. 3d 1179, 1189-1190, 212 Cal. Rptr. 803* (presumption from sole title was superseded by general community presumption after premarital agreement lapsed)]. The characterization issues concerning title that are most frequently disputed include the following:

(1) The extent to which the common law presumption that title reflects actual ownership should apply in the face of another applicable characterization principle, such as the community presumption arising from acquisition of property during marriage [*see Fam. Code § 760*; for discussion, *see § 122.33[1][b]*];

(2) The presumption of undue influence that arises between persons--such as spouses--who share a confidential relationship, when one person *gains an advantage* over the other in a transaction [*see In re Marriage of Delaney (2003) 111 Cal. App. 4th 991, 995, 998-999, 4 Cal. Rptr. 3d 378* ; *In re Marriage of Haines (1995) 33 Cal. App. 4th 277, 287, 293-294, 39 Cal. Rptr. 2d 673]* .

(3) The "joint form-community property" presumption set forth by statute [*see Fam. Code §§ 2580, 2581*], as discussed in *§ 122.33[4]*; and

(4) The "joint tenancy residence-community property" presumption set forth under prior law, as discussed in *§ 122.35[4][c][i]* et seq. [*see* former *Civ. Code § 5110*].

Because many of the rules governing title have developed in the context of, and been applied specifically to, real property transactions, the discussion hereafter frequently makes reference to real property. However, unless otherwise

indicated, the discussion should also apply to personal property, to the extent that ownership of such property is evidenced by written title.

Special statutory provisions generally govern accounts of married persons in bank, savings, and similar accounts in financial institutions [*see Prob. Code § 5100 et. seq.*; *Prob. Code § 5305*; see Ch. 222, *Dissolution of Marriage: Property Division and Valuation*]. Other provisions may affect property titles and ownership concern nonprobate transfers of community property on the death of a married person [*see generally Fam. Code § 853*; *Prob. Code § 5014(a)*; *see also Prob. Code § 5010 et seq.*; *see § 122.56*].

[b] Common-Law Presumption That Title Reflects Ownership

A common-law presumption that may affect property characterization is that title to property reflects its actual ownership; or, stated conversely, that the ownership interest is as stated in the title [*see In re Marriage of Lucas (1980) 27 Cal. 3d 808, 813, 166 Cal. Rptr. 853, 614 P.2d 285* ; *see also Evid. Code § 662*; *In re Marriage of Hilke (1992) 4 Cal. 4th 215, 222-224, 14 Cal. Rptr. 2d 371, 841 P.2d 891* ; *In re Marriage of Brooks & Robinson (2008) 169 Cal. App. 4th 176, 184-192, 86 Cal. Rptr. 3d 624* ; *In re Marriage of Haines (1995) 33 Cal. App. 4th 277, 291-292, 39 Cal. Rptr. 2d 673* ; *cf. Estate of Petersen (1994) 28 Cal. App. 4th 1742, 1747, 34 Cal. Rptr. 2d 449* ; *Estate of England (1991) 233 Cal. App. 3d 1, 5, 284 Cal. Rptr. 361* (application of presumption on death of spouse)]. Before the enactment of statutory presumptions regarding the ownership of property in jointly held title, which apply only for the purpose of marital dissolution or legal separation [*see* former *Civ. Code § 5110* (regarding joint tenancy residence); *Fam. Code §§ 2580, 2581*], a "common law form of title" presumption was raised when title to property specified a form of coownership, such as joint tenancy, between the spouses. Courts said that the "affirmative act of specifying a form of ownership in the conveyance of title" removes the property from the more general community presumption [*see Fam. Code § 760*] that arises from acquisition of property during marriage [*see In re Marriage of Lucas (1980) 27 Cal. 3d 808, 813-815, 166 Cal. Rptr. 853, 614 P.2d 285]* .

Accordingly, when dissolution or legal separation proceedings are not involved, such as in proceedings on the death of a spouse or with respect to third party creditors during an ongoing marriage, this "common law form of title" presumption may be raised [*see, e.g., In re Marriage of Brooks & Robinson (2008) 169 Cal. App. 4th 176, 184-192, 86 Cal. Rptr. 3d 624* (proceeding to set aside conveyance to third party); *Estate of Gallio (1995) 33 Cal. App. 4th 592, 596, 39 Cal. Rptr. 2d 470* (probate proceeding); *Estate of Petersen (1994) 28 Cal. App. 4th 1742, 1747, 34 Cal. Rptr. 2d 449* (probate proceeding); *Estate of Blair (1988) 199 Cal. App. 3d 161, 167, 244 Cal. Rptr. 627* (probate proceeding)]. For discussion of possible application of this presumption to property acquired during marriage in sole title, *see § 122.33[2][a]* et seq.

[2] Effect of Sole Title

[a] Resolving Potential Conflict in Presumptions

A spouse's acquisition of property in sole title during marriage presents a potential conflict in legal presumptions [*see In re Marriage of Haines (1995) 33 Cal. App. 4th 277, 287, 292, 39 Cal. Rptr. 2d 673]* . The "common law form of title" presumption raises a presumption of separate ownership in the titleholder [*see In re Marriage of Lucas (1980) 27 Cal. 3d 808, 813, 166 Cal. Rptr. 853, 614 P.2d 285* ; *see also Evid. Code § 662* (owner of legal title is presumed to be owner of full beneficial title); *In re Marriage of Brooks & Robinson (2008) 169 Cal. App. 4th 176, 184-192, 86 Cal. Rptr. 3d 624* (proceeding to set aside conveyance to third party); *Estate of Gallio (1995) 33 Cal. App. 4th 592, 597, 39 Cal. Rptr. 2d 470* (probate proceeding)]. Conversely, the general statutory presumption applicable to property acquired during marriage provides that this property is presumed to be community property [*see Fam. Code § 760*].

The act of taking title to property in the name of one spouse during marriage *with the other spouse's consent* effectively removes that property from the general community property presumption, and the property is presumably the separate

property of the spouse in whose name title is taken [*In re Marriage of Brooks & Robinson (2008) 169 Cal. App. 4th 176, 186-187, 86 Cal. Rptr. 3d 624* (form-of-title presumption does not apply when spouse who is not record title holder was unaware that title was taken solely in other spouse's name)]. The party asserting that title is other than as stated in the deed has the burden of proving that fact by clear and convincing evidence. The form-of-title presumption can be overcome only by clear and convincing evidence of an agreement or understanding between the parties that the title specified in the deed is not what the parties intended [*In re Marriage of Brooks & Robinson (2008) 169 Cal. App. 4th 176, 189-190, 86 Cal. Rptr. 3d 624]* . The presumption is not overcome by tracing the source of the funds used to purchase the property to community earnings, by the fact that the parties were married at the time one spouse acquired the property, by the other spouse's unilateral belief that the property belonged to both of them, or by an assertion that title was taken in one spouse's name only to facilitate financing of the property [*In re Marriage of Brooks & Robinson (2008) 169 Cal. App. 4th 176, 190-192, 86 Cal. Rptr. 3d 624]* .

However, when one spouse gains *an advantage* over the other in a property transaction--thereby raising a presumption of undue influence--it is improper to apply the common-law form of title presumption in order to characterize the property. For example, when a husband refused to cosign an automobile loan until his wife deeded to him (in sole title) her share of the parties' jointly held real property, the common law form of title presumption was held inapplicable and the deed transferring the real property was ordered set aside. Such a purported transmutation is subject to the fiduciary standards to which spouses are bound as a matter of law, and public policy dictates that the common-law form of title presumption, and its "clear and convincing" standard of proof [*see Evid. Code § 662*], not be applied when it conflicts with the presumption that the parties must deal fairly with each other [*In re Marriage of Haines (1995) 33 Cal. App. 4th 277, 287, 301, 39 Cal. Rptr. 2d 673]* .

In the absence of undue influence, some courts have used the common-law form of title presumption to characterize property conveyed in sole title *between the spouses* during marriage [*see, e.g.,* *In re Marriage of Broderick (1989) 209 Cal. App. 3d 489, 496-497, 257 Cal. Rptr. 397* (quitclaim deed from wife raised presumption from form of title that husband owned home as separate property); *In re Marriage of Stitt (1983) 147 Cal. App. 3d 579, 585, 195 Cal. Rptr. 172* (deed to wife "as an unmarried woman" raised rebuttable presumption that spouses intended property to be held as of record title, but presumption was overcome by understanding about reconveyance)]. The common-law title presumption may also apply in actions between a spouse and a third party, such as a creditor, assuming that the property has not been placed in sole title to defraud that party [*cf.* *Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 371-375, 125 Cal. Rptr. 804* (joint tenancy presumption raised by title was overcome by evidence that property was actually community; whether husband's quitclaim to wife effectively transferred his interest depended on his intention to defraud third party creditor); *see § 122.34[1]* et seq.].

In addition, if one spouse has acquired legal title under circumstances that otherwise make the acquisition separate property, the "common-law form of title presumption" may apply. For example, the presumption that title reflects ownership was raised when title to a residence that a spouse acquired before marriage in joint tenancy with her parents ripened into sole title after both parents died [*see* *In re Marriage of Weaver (1990) 224 Cal. App. 3d 478, 486, 273 Cal. Rptr. 696* (court applied *Evid. Code § 662* presumption that legal titleholder is full beneficial owner and its rebuttal standard to determine whether marital transmutation occurred); *but see* *In re Marriage of Haines (1995) 33 Cal. App. 4th 277, 300, 39 Cal. Rptr. 2d 673* (disagreeing with *Weaver*'s implied holding that *Evid. Code § 662* applies to marital proceedings regardless of any conflict with statutes imposing fiduciary duty in spousal transactions)]. Similar treatment of gift property is discussed in *§ 122.33[2][b]*.

For a general discussion of property transmutation [*see generally Fam. Code § 850 et seq.* (applicable to transmutations on and after January 1, 1985)], see *§ 122.34*.

[b] Gift in Sole Title

If, during marriage, a "gift, devise, or bequest" of property is made to one spouse in sole title, the recipient may assert

the separate nature of that interest [*Fam. Code § 770(a)(2)*]. In that situation, the donative nature of the transfer confers separate ownership [*see Fam. Code § 770(a)(2)*]. The recipient's form of title is also consistent with separate ownership to the extent that the "common-law form of title" presumption would otherwise apply. When the transferor is someone other than a spouse, such as a parent of the transferee, donative intent often is not disputed, particularly if the transfer is by will.

However, when the transferor is a spouse, the issue of whether a transfer in sole title during marriage was actually intended to be a gift may be more problematic. Courts have held that when a spouse uses either community property or his or her own separate property to purchase property in the name of the other spouse alone, this gives rise to a rebuttable presumption of a gift to that spouse. However, the form of the instrument of title is not conclusive and rebuttal evidence may be introduced to establish a gift was not intended [*see In re Marriage of Frapwell (1975) 49 Cal. App. 3d 597, 600-601 , appeal after remand 53 Cal. App. 3d 479* ; *see also In re Marriage of Lucas (1980) 27 Cal. 3d 808, 818, 166 Cal. Rptr. 853, 614 P.2d 285* (discussing motor home); *De Boer v. De Boer (1952) 111 Cal. App. 2d 500, 505, 244 P.2d 953]* .

While this view of presumptive donative intent appears to remain valid, the underlying case law was established before the enactment of the current statutes governing property transmutations (*see § 122.34[1]* et seq.), and the effect of these statutes on the gift presumption discussed above is presently unclear. If the transmutation statutes are held applicable, evidence of a qualifying *written* declaration by a transferor spouse may need to be presented to raise the gift presumption when a spouse uses community property or his or her own separate property to purchase property in the other spouse's name alone. For example, an automobile that the wife purchased during the marriage with her separate property funds, which she gifted to her husband, was *not* transmuted to the husband's separate property by virtue of the gift. It was not made in writing as required by *Fam. Code § 852(a)* for a valid transmutation, and it did not come within the exception to the writing requirement provided by *Fam. Code § 852(c)* for gifts that are tangible articles of a personal nature and are not substantial in value [*In re Marriage of Buie & Neighbors (2009) 179 Cal. App. 4th 1170, 1173-1174, 102 Cal. Rptr. 3d 387]* .

[c] Rule for Wife's Pre-1975 Acquisitions

When property has been acquired by a married woman before January 1, 1975, in her own name by an instrument in writing, a statutory presumption exists that the property is her separate property, unless a different intention was expressed in the instrument, or other exceptions apply [*see Fam. Code § 803*; In re Marriage of *Ashodian (1979) 96 Cal. App. 3d 43, 46-47, 157 Cal. Rptr. 555]* . For discussion of this presumption, see *§ 122.32[3][c]*.

[3] Community Presumption From "Husband and Wife" Title

Pursuant to statute, property acquired by spouses during marriage by an instrument in which the spouses are described as husband and wife is presumed to be community property, unless a different intention is expressed in the instrument [*Fam. Code § 803(c)*; *see Estate of Petersen (1994) 28 Cal. App. 4th 1742, 1747, 34 Cal. Rptr. 2d 449* (in probate case, when title was held in spouses' names as "husband and wife, as joint tenants," community presumption arising from "husband and wife" title was rebutted by joint tenancy form of title); *cf. Fam. Code § 11* (stating, in general, effect of references to husbands and wives)]. This "husband and wife" presumption applies both as between the spouses in domestic relations proceedings, and as between either or both spouses and a third party creditor [*see Abbett Electric Corp. v. Storek (1994) 22 Cal. App. 4th 1460, 1466-1467, 27 Cal. Rptr. 2d 845* (designation of parties as joint tenants, in addition to designation as husband and wife, showed "different intention," in action by third party creditor)]. The presumption is set forth in the statute following language that concerns property acquired by a married woman in her own name before January 1, 1975. It is one of three express presumptions pertaining to such property [*see Fam. Code § 803*], as discussed in *§ 122.32[3][c]*.

However, courts have not strictly limited the application of the "husband and wife" presumption to pre-January 1, 1975,

property. Therefore, it appears to provide an independent basis for raising a community presumption with respect to a particular acquisition during marriage, in the absence of another controlling presumption [*see In re Marriage of Cairo (1988) 204 Cal. App. 3d 1255, 1260, 251 Cal. Rptr. 731* ; *In re Marriage of Witt (1987) 197 Cal. App. 3d 103, 105, 108, 242 Cal. Rptr. 646* ; *see also In re Marriage of Fabian (1986) 41 Cal. 3d 440, 446, 224 Cal. Rptr. 333, 715 P.2d 253]* .

Before the enactment of the statutory "joint form-community property" presumption [*see Fam. Code §§ 2580, 2581*], courts held that the "husband and wife" presumption could be rebutted by evidence of a contrary written or oral understanding or agreement of the parties [*see In re Marriage of Fabian (1986) 41 Cal. 3d 440, 446, 224 Cal. Rptr. 333, 715 P.2d 253* ; *In re Marriage of Buol (1985) 39 Cal. 3d 751, 762, 218 Cal. Rptr. 31, 705 P.2d 354* ; *In re Marriage of Cademartori (1981) 119 Cal. App. 3d 970, 975-976, 174 Cal. Rptr. 292]* . Currently, the "joint form-community property" presumption applies in proceedings to divide property on marital dissolution or legal separation when title is held in tenancy in common, joint tenancy, tenancy by the entirety, or as community property [*see Fam. Code §§ 2580, 2581*]. Arguably, this "joint form-community property" presumption may subsume transfers in which the parties are described only as "husband and wife" without any other expression of co-ownership, although this has not been addressed in the reported cases. If the "joint form-community property" presumption in fact applies, it must be rebutted by proof either that the parties made a written agreement that the property is separate property, or that there is a clear statement in the deed or other documentary evidence of title that the property is separate [*see Fam. Code § 2581*].

However, even if this argument is accepted, there are circumstances in which the "joint form-community property presumption" of *Fam. Code § 2581*] is not otherwise applicable, either because of decisional law or its own statutory limitations [*see Fam. Code §§ 2580, 2581*; *In re Marriage of Hilke (1992) 4 Cal. 4th 215, 222-223, 14 Cal. Rptr. 2d 371, 841 P.2d 891]* , or because the proceedings do not involve dissolution--such as the proceeding involving spouses and a third party creditor, or the death of a spouse during marriage--in which the community presumption from title simply as "husband and wife" may still be subject to rebuttal by evidence of a common understanding or agreement. The reported cases have not yet ruled definitively on this issue.

In any event, many spouses may have acquired property with respect to which the "joint form-community property" presumption applies, and who have taken title that specifies both one of the enumerated "joint forms" and describes the titleholders as "husband and wife." For example, title may have been taken during marriage as "husband and wife, as joint tenants." Arguably, in such cases, the "joint form-community property" presumption [*see Fam. Code §§ 2580, 2581*] will apply on dissolution or legal separation, irrespective of the presence of the "husband and wife" designation, or of whether this designation alone is a "joint form" under the statute [*see Fam. Code §§ 2580, 2581*; *In re Marriage of Cairo (1988) 204 Cal. App. 3d 1255, 1260, 251 Cal. Rptr. 731* ; *see also Estate of Petersen (1994) 28 Cal. App. 4th 1742, 1747, 34 Cal. Rptr. 2d 449* (in probate case, when title was held in spouses' names as "husband and wife, as joint tenants," community presumption arising from "husband and wife" title was rebutted by joint tenancy form of title)].

[4] Community Presumption From Joint Title Form

[a] Overview of Statutory Presumption

[i] Nature of Presumption

Current law establishes a presumption for the purpose of *dividing* property on dissolution of marriage or legal separation that property acquired by the spouses during marriage in joint form, including any of the joint titles specified below, is community property. The presumption is one affecting the burden of proof and may be rebutted by either: (1) a clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate, and not community, property; or (2) proof that the parties have made a written agreement that the property is separate property [*see Fam. Code § 2581*; *see also* former *Civ. Code § 4800.1*; *In re Marriage of Heikes (1995) 10*

Cal. 4th 1211, 1216-1217, 1221 n.8, 44 Cal. Rptr. 2d 155, 899 P.2d 1349] . Neither tracing, nor an oral or implied agreement, is sufficient to rebut the presumption [*In re Marriage of Weaver (2005) 127 Cal. App. 4th 858, 865, 26 Cal. Rptr. 3d 121* ; *In re Marriage of Haines (1995) 33 Cal. App. 4th 277, 291, 39 Cal. Rptr. 2d 673* ; *see In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1217, 44 Cal. Rptr. 2d 155, 899 P.2d 1349* (discussing trial court's finding that there was no agreement that joint tenancy realty in dispute was husband's separate property)].

This presumption is raised by acquisition of property by the spouses during marriage in any of the following joint title forms [*see Fam. Code § 2581*; *see also* former *Civ. Code § 4800.1*; *In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1225 n.10, 44 Cal. Rptr. 2d 155, 899 P.2d 1349]* :

- Joint tenancy, as discussed in *§ 122.33[4][d]*;
- Tenancy in common;
- Community property;
- Community property with a right of survivorship; or
- Tenancy by the entirety, a common law title form that is not available in California, but one that may have been included in the statutory presumption to account for ownership of out-of-state property in that form [*see Civ. Code § 682*; *Swan v. Walden (1909) 156 Cal. 195, 196-197, 103 P. 931* ; *accord, Delanoy v. Delanoy (1932) 216 Cal. 23, 26, 13 P.2d 513* ; *Tischhauser v. Tischhauser (1956) 142 Cal. App. 2d 252, 256, 298 P.2d 551]* .

The "joint form-community property" presumption does not preclude spouses from holding property as true joint tenants or tenants in common [*see Fam. Code § 750*]. In fact, when division of the property in family law litigation *is not* in issue, the "joint form-community property" presumption does not apply [*see Fam. Code § 2581*], and, in general, the law rebuttably presumes that the parties' interests are as set forth in the title. This affects the ability of third party creditors to reach the property, and has implications for probate proceedings on the death of a spouse [*see generally Estate of Blair (1988) 199 Cal. App. 3d 161, 167, 244 Cal. Rptr. 627* ; *see also Dorn v. Solomon (1997) 57 Cal. App. 4th 650, 652-653, 67 Cal. Rptr. 2d 311* ; *Abbett Electric Corp. v. Storek (1994) 22 Cal. App. 4th 1460, 1466-1467, 27 Cal. Rptr. 2d 845* (in third party creditor's action, fact that residence held in joint tenancy was previously listed as community property in "status" only dissolution, did not preclude finding that residence was joint tenancy of parties, with each party having one-half separate property interest); *Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 372, 125 Cal. Rptr. 804]* .

However, in litigating the division of such jointly titled property, a spouse who claims that the property is entirely his or her own separate property, or that he or she has a separate half interest in true joint tenancy or tenancy in common property, must overcome the "joint form-community property" presumption [*see Fam. Code § 2581*]. Even if any community presumption is overcome, courts have jurisdiction to divide true joint tenancy or tenancy in common property, on a party's request, in marital dissolution or legal separation proceedings [*see Fam. Code § 2650*], as discussed in Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

Note additionally that, apart from the foregoing general presumption regarding property held in joint form, a special community presumption may apply to bank, savings, and similar accounts held by spouses in various forms of common ownership [*see Prob. Code §§ 5203(a)(4), (6), 5305*], which is discussed in Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

For discussion of the applicability of the "joint form-community property" presumption, including circumstances under which *prior* law may apply and other limitations, *see § 122.33[4][a][iii]*. Operation of the presumption is generally

discussed in *§ 122.33[4][b]*, and application of the presumption specifically to joint tenancy property is discussed in *§ 122.33[4][c]*. For discussion of statutory provisions for separate property *reimbursement* for contributions to the acquisition of community property, *see § 122.33[4][a][ii]*, and Ch. 222, *Dissolution of Marriage: Property Division and Valuation* , [*see Fam. Code § 2640*]. For discussion of the effect of a spouse's death during dissolution or legal separation proceedings on the application of the presumption, § 122.33[4][a][iv].

[ii] Relationship to Reimbursement Statute

In dividing the parties' community property on marital dissolution or legal separation, a court is required to order reimbursement for separate property contributions to the acquisition of the community property at issue, unless the contributing party has made a written waiver of the reimbursement right or signed a writing that has the effect of a waiver [*see Fam. Code § 2640(a), (b)*; former *Civ. Code § 4800.2*]. This reimbursement right arises regardless of whether the court determines that the property is community on the basis of the "joint form-community property" presumption [*see Fam. Code §§ 2580, 2581*] or by applying some other characterization principle [*see Fam. Code § 2640(a), (b)*; former *Civ. Code § 4800.2*]. In other words, it applies to all community property on division [*In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1225, 44 Cal. Rptr. 2d 155, 899 P.2d 1349* ; *In re Marriage of Weaver (2005) 127 Cal. App. 4th 858, 865, 26 Cal. Rptr. 3d 121* (even if property held in joint tenancy loses its separate property characterization under *Fam. Code § 2581*, spouse who contributed separate property to acquisition of property held in joint title has right to reimbursement on dissolution, absent written waiver of right to reimbursement); *but see In re Marriage of Koester (1999) 73 Cal. App. 4th 1032, 1036-1037, 87 Cal. Rptr. 2d 76* (*Fam. Code § 2640* was not meant to apply to separate property businesses incorporated during marriage)].

For example, when a husband contributes his separate property interest in real property, which he acquired by gift during the marriage, to the parties' acquisition of their community property, joint tenancy interest in the property, the husband is entitled to reimbursement for the equity value of his separate property contribution on dissolution of the marriage. The husband and wife are each entitled to one-half of the value of the remaining community property interest in the property [*In re Marriage of Weaver (2005) 127 Cal. App. 4th 858, 861, 869, 26 Cal. Rptr. 3d 121]* . In Weaver, the appellate court noted that by adding his wife's name to the deed for the property, the husband indicated his intent to waive his separate property interest and to transmute the separate interest to community property. Allowing reimbursement in these circumstances makes the community property presumption of *Fam. Code § 2581* meaningless, because the effect of allowing reimbursement under *Fam. Code § 2640* is to negate the transfer of title to joint tenancy and the Section 2581 community property presumption. In effect, the joint tenancy deed becomes illusory in the event of dissolution of the marriage. Nevertheless, the court determined that it was compelled to construe *Fam. Code § 2640* broadly to allow for real property contributions, unless there is a written statement, apart from a joint tenancy deed, which specifically waives the right to reimbursement [*In re Marriage of Weaver (2005) 127 Cal. App. 4th 858, 870, 26 Cal. Rptr. 3d 121]* .

However, the statute requiring reimbursement for contributions to acquisition of community property [*Fam. Code § 2640(a), (b)*] was first enacted as part of legislation [*see* Stats. 1983, ch. 342] that also included a "joint tenancy/community property" presumption [*see* former *Civ. Code § 4800.1* (as originally enacted)], which became the predecessor of the current "joint form-community property" presumption [*see Fam. Code § 2581*]. The original legislation was popularly known as "anti-*Lucas*" legislation, because it was enacted primarily in response to the Supreme Court's *Lucas* decision [*see In re Marriage of Lucas (1980) 27 Cal. 3d 808, 166 Cal. Rptr. 853, 614 P.2d 285]* , and it became the subject of numerous constitutional challenges to provisions it contained for retroactive application. Because of this common history and extensive litigation over the application of both statutes, they are frequently referred to together by courts and commentators. The proceedings to which both statutes apply and the circumstances under which prior law may apply are fully discussed in *§ 122.33[4][iii]*. For discussion of the substantive requirements for application of the reimbursement provisions, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

[iii] Operative Dates and Retroactivity

Subject to the limitations discussed below, the current versions of both the "joint form-community property" presumption [*Fam. Code §§ 2580, 2581*] and the statute requiring reimbursement for separate property contributions to acquisitions of community property [*Fam. Code § 2640(b)*] apply to all proceedings for marital dissolution or legal separation commenced on or after January 1, 1984 [*Fam. Code § 2580(c)*]. Conversely, neither applies with respect to property settlement agreements executed before January 1, 1987, or to proceedings in which judgments were rendered before January 1, 1987, regardless of whether those judgments have become final [*Fam. Code § 2580(c)*; *see also In re Marriage of Fabian (1986) 41 Cal. 3d 440, 450, 224 Cal. Rptr. 333, 715 P.2d 253* ; *In re Marriage of Buol (1985) 39 Cal. 3d 751, 757, 218 Cal. Rptr. 31, 705 P.2d 354]* . In addition, the separate property reimbursement statute [*Fam. Code § 2640(b)*; *see* former *Civ. Code § 4800.2*.] may not be applied with respect to property acquired before January 1, 1984 [*In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1225, 44 Cal. Rptr. 2d 155, 899 P.2d 1349]* .

However, as discussed hereafter, the "joint form-community property" presumption [*Fam. Code §§ 2580, 2581*] may be applied with respect to property *acquired before* January 1, 1984, so long as such retroactive application involves only an unvested right of survivorship [*see In re Marriage of Hilke (1992) 4 Cal. 4th 215, 222-223, 14 Cal. Rptr. 2d 371, 841 P.2d 891]* .

These and other limitations [*see Fam. Code § 2580(c)*] on retroactive application of the statutory provisions developed following their original enactment. To facilitate understanding of these limitations, a brief examination of their chronological development is presented below.

The current "joint form-community property" presumption [*Fam. Code §§ 2580, 2581*] and the separate property reimbursement statute [*Fam. Code § 2640(a), (b)*] were first enacted in 1983 as *Civ. Code §§ 4800.1* and *4800.2*, respectively. At that time, former *Civ. Code § 4800.1* only addressed joint tenancy property. It was later amended, operative January 1, 1987, to apply not only to joint tenancies, but to other jointly titled property acquired during marriage, and this "joint form" aspect of the presumption was continued in the Family Code version [*see Fam. Code § 2581*].

As originally enacted, both former *Civ. Code §§ 4800.1* and *4800.2* applied to proceedings commenced on or after January 1, 1984, but the enacting legislation also provided that they applied to proceedings commenced before January 1, 1984, to the extent that proceedings on the division of property were not yet final on that date [*see* Stats. 1983, ch. 342, § 4]. However, the California Supreme Court held that retroactive application of both sections to proceedings commenced before January 1,1984, unconstitutionally impaired vested property rights without due process of law [*see In re Marriage of Fabian (1986) 41 Cal. 3d 440, 450, 224 Cal. Rptr. 333, 715 P.2d 253* ; *In re Marriage of Buol (1985) 39 Cal. 3d 751, 757, 218 Cal. Rptr. 31, 705 P.2d 354* ; *see also In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1213, 44 Cal. Rptr. 2d 155, 899 P.2d 1349* ; *In re Marriage of Hilke (1992) 4 Cal. 4th 215, 222-223, 14 Cal. Rptr. 2d 371, 841 P.2d 891]* .

The Legislature then enacted urgency legislation, operative April 10, 1986, providing that (now former) *Civ. Code §§ 4800.1* and *4800.2* applied "to proceedings commenced on or after January 1, 1984, regardless of the date of acquisition of property subject to the proceedings or the date of any agreement affecting the property" [Stats. 1986, ch. 49, § 1]. This legislation was also held unconstitutional when retroactively applied to property acquired before January 1, 1984 [*see In re Marriage of Griffis (1986) 187 Cal. App. 3d 156, 166, 231 Cal. Rptr. 510* ; *see In re Marriage of Hopkins & Axene (1987) 199 Cal. App. 3d 288, 289, 245 Cal. Rptr. 433]* .

In August 1986, the Legislature again amended former *Civ. Code § 4800.1* to provide that *Civ. Code §§ 4800.1* and *4800.2*, in the forms operative on January 1, 1987, "shall apply to all property held in joint title regardless of the date of acquisition of the property or the date of any agreement affecting the character of the property," and that the sections would apply to proceedings begun after January 1, 1984, unless property settlements or judgments had already been

executed before January 1, 1987 [former *Civ. Code § 4800.1(a)(3)*, as amended by Stats. 1986, ch. 539]. In 1988, appellate courts held this legislation unconstitutional as applied to property *acquired* before January 1, 1984 [*In re Marriage of Bankovich (1988) 203 Cal. App. 3d 49, 54-56, 249 Cal. Rptr. 713* ; *see also In re Marriage of Lockman (1988) 204 Cal. App. 3d 782, 786-787, 251 Cal. Rptr. 434* ; *In re Marriage of Cairo (1988) 204 Cal. App. 3d 1255, 1262-1266, 251 Cal. Rptr. 731]* . Moreover, in 1990, former *Civ. Code § 4800.2* was held unconstitutional as applied to quasi-community property acquired before January 1, 1984 [*In re Marriage of Craig (1990) 219 Cal. App. 3d 683, 686-687, 268 Cal. Rptr. 396* (reimbursement for separate property contributions to out-of-state residence denied)].

However, the California Supreme Court, in *In re Marriage of Hilke* [*In re Marriage of Hilke (1992) 4 Cal. 4th 215, 14 Cal. Rptr. 2d 371, 841 P.2d 891]* , later upheld the retroactive application of former *Civ. Code § 4800.1* to property acquired before January 1, 1984, in a proceeding involving joint tenancy property that was commenced after that date. The Court rejected the claim that such a retroactive application impairs a vested property right without due process of law. It reasoned that a vested property right is one not subject to a condition precedent, and a joint tenant's survivorship interest is subject to the condition precedent that he or she survive the other joint tenant. It concluded that a joint tenant has no present vested interest in being a surviving joint tenant [*see In re Marriage of Hilke (1992) 4 Cal.4th 215, 222-223, 223 n.4, 14 Cal. Rptr. 2d 371, 841 P.2d 891* ; *see also In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1217-1218, 44 Cal. Rptr. 2d 155, 899 P.2d 1349]* .

Thus, it appears that so long as the retroactive application of the "joint form-community property" presumption only affects an *unvested right*, such as a right of survivorship, it may be applied to property acquired before January 1, 1984 [*see In re Marriage of Hilke (1992) 4 Cal. 4th 215, 222-223, 223 n.4, 14 Cal. Rptr. 2d 371, 841 P.2d 891]* .

The Court in *Hilke* did not address former *Civ. Code § 4800.2*'s applicability to property acquired before January 1, 1984 [*see In re Marriage of Hilke (1992) 4 Cal. 4th 215, 222-224, 14 Cal. Rptr. 2d 371 ,, 841 P.2d 891]* . However, in *In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 44 Cal. Rptr. 2d 155, 899 P.2d 1349* , the Court held that former *Civ. Code § 4800.2* and its Family Code successor [*Fam. Code § 2640(a), (b)*] may not constitutionally be applied to property acquired before January 1, 1984 [*In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1225, 44 Cal.Rptr. 2d 155, 899 P.2d 1349]* , thereby validating a number of prior appellate decisions that had forbidden retroactive application of the reimbursement statute [*see, e.g., In re Marriage of Bankovich (1988) 203 Cal. App. 3d 49, 54-56, 249 Cal. Rptr. 713]* . Thus, a spouse who made a separate property contribution to the acquisition of community property before 1984 may not seek reimbursement for the contribution unless there was a qualifying reimbursement agreement, as provided under pre-1984 law [*see In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1218, 44 Cal. Rptr. 2d 155, 899 P.2d 1349* ; *In re Marriage of Lucas (1980) 27 Cal. 3d 808, 816, 166 Cal. Rptr. 853, 614 P.2d 285]* .

Note that the current Family Code provision purporting to govern retroactivity of the "joint-form-community property presumption" and the reimbursement statute [*see Fam. Code §§ 2581, 2640(a), (b)*] retains language from its (repealed) Civil Code predecessor that the California Supreme Court has now partially invalidated, as discussed above [*see Fam. Code § 2580(c)* (purporting to apply to all property held in joint title regardless of the date of acquisition of the property); *see generally, In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1225, 44 Cal. Rptr. 2d 155, 899 P.2d 1349]* . Accordingly, counsel should apply the Family Code version with the above limitations in mind.

The Family Code also continues the substance of the former Civil Code provision, operative January 1, 1987, that the "joint form-community property" presumption and reimbursement statute apply to all property held in joint title "regardless of the date of any agreement affecting the character of the property"; except that these sections do not apply to property settlement agreements executed before January 1, 1987, or proceedings in which judgments were rendered before January 1, 1987, regardless of whether those judgments have become final [*see Fam. Code § 2580(c)*; former *Civ. Code § 4800.1(a)(3)* (containing somewhat different language); *In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1221 n.8, 44 Cal. Rptr. 2d 155, 899 P.2d 1349* (noting existence of provision, but not ruling on it)].

[iv] Effect of Spouse's Death During Proceeding

The death of a spouse during a family law proceeding *abates* a cause of action for marital dissolution, but the court generally retains jurisdiction to take action to enforce rights actually adjudicated before the party's death [*see McClenny v. Superior Court (1962) 62 Cal. 2d 140, 145, 41 Cal. Rptr. 460, 396 P.2d 916* ; *In re Marriage of Lisi (1995) 39 Cal. App. 4th 1573, 1575, 46 Cal. Rptr. 2d 623]* . Thus, for example, a party's death after a court has rendered a judgment of marital dissolution and retained jurisdiction to determine collateral property rights does not deprive the court of the power to divide the parties' property [*see In re Marriage of Hilke (1992) 4 Cal. 4th 215, 220, 14 Cal. Rptr. 2d 371, 841 P.2d 891* ; *Kinsler v. Superior Court (1981) 121 Cal. App. 3d 808, 811-812, 175 Cal. Rptr. 564* ; *see also Fam. Code § 2337(c)*]. Thus, if a spouse dies while the proceeding is pending, the court will nevertheless be required to apply the "joint form-community property" presumption [*Fam. Code §§ 2580, 2581*] to qualifying jointly titled property if both of the conditions set forth below are met [*see In re Marriage of Hilke (1992) 4 Cal. 4th 215, 220-221, 14 Cal. Rptr. 2d 371, 841 P.2d 891* ; *In re Marriage of Allen (1992) 8 Cal. App. 4th 1225, 1226-1227, 1230-1231, 10 Cal. Rptr. 2d 916* ; *cf. Fam. Code § 2040(c)*]:

(1) The proceeding has been bifurcated, as discussed in Ch. 221, *Dissolution of Marriage: Procedure* , and the parties' marital status has already been dissolved; and

(2) The court has reserved jurisdiction over the matter of dividing the property [*see Fam. Code § 2337(c)* (judgment dissolving marriage must expressly reserve jurisdiction for later determination of other pending issues)].

On the other hand, if a spouse dies after the filing of a petition for marital dissolution but before the parties' marital status has been terminated and the court's jurisdiction to decide collateral property rights reserved, the proceeding abates. In that instance, if the property at issue was held in *joint tenancy* title between the spouses, the interest of the deceased spouse would pass by operation of law to the survivor, absent an effective transmutation [*In re Marriage of Hilke (1992) 4 Cal. 4th 215, 220, 14 Cal. Rptr. 2d 371, 841 P.2d 891* ; *see Estate of Blair (1988) 199 Cal. App. 3d 161, 167, 244 Cal. Rptr. 627* (wife died before entry of judgment respecting parties' marital status)].

One reported decision has held that even if marital status has been terminated and the court's jursidiction reserved to determine property rights, a probate court may determine that property titled in joint tenancy passes by operation of law under survivorship principles, because a "status-only dissolution" does not sever a joint tenancy title. However, that case involved parties who left their property in joint tenancy title for many years after their marital status was terminated and both parties had died before probate proceedings were brought to adjudicate rights in the property. No attempt had been made to substitute estate representatives as parties into the underlying family law case [*Estate of Layton (1996) 44 Cal. App. 4th 1337, 1342-1344, 52 Cal. Rptr. 2d 251]* . Although its ruling that a status-only dissolution judgment does not sever joint tenancy title seems uncontrovertible, commentators have criticized the case for its anomalous result in the light of *In re Marriage of Hilke* [*see* 1996 Cal.Fam.Law Monthly 147-148 (commentary of Prof. Grace Ganz Blumberg and Hon. James H. Libbey); *see also In re Marriage of Hilke (1992) 4 Cal. 4th 215, 220-221, 14 Cal. Rptr. 2d 371, 841 P.2d 891]* , and it does not presently appear to be a strong basis for deviating from the analysis otherwise set forth above.

In view of these considerations, counsel may wish to advise his or her client to sever any joint tenancies, particularly in real property [*see Civ. Code § 683.2*], on commencing a family law proceeding to avoid the possible unintended passage of the client's interest to the other spouse.

Accounts held in joint tenancy in banks and similar financial institutions have additional specialized presumptions and rules that should be considered in relation to passage of title on death, as discussed in Ch. 222, *Dissolution of Marriage: Property Division and Valuation* [*see Prob. Code §§ 5203(a)(4), (6), 5305*].

[b] Operation of Presumption in General

The "joint form-community property presumption [*Fam. Code §§ 2580, 2581*] applies only for the purpose of dividing property on marital dissolution or legal separation. In general, it will apply for that purpose to property that was originally acquired during marriage in one of the qualifying joint title forms, as well as to property that was converted to joint title during marriage from another form, such as sole title [*see In re Marriage of Rico (1992) 10 Cal. App. 4th 706, 710, 12 Cal. Rptr. 2d 659* ; *In re Marriage of Taylor (1984) 160 Cal. App. 3d 471, 473-474, 206 Cal. Rptr. 557* ; *In re Marriage of Anderson (1984) 154 Cal. App. 3d 572, 577, 579, 201 Cal. Rptr. 498* (both *Taylor* and *Anderson* disapproved on other grounds in *In re Marriage of Buol (1985) 39 Cal. 3d 751, 764 n.10, 218 Cal. Rptr. 31, 705 P.2d 354* , and *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253*)]. The presumption will not arise, however, with respect to property that was acquired *before* marriage in one of the non-community property joint title forms, such as joint tenancy [*see In re Marriage of Leversee (1984) 156 Cal. App. 3d 891, 896-897, 203 Cal. Rptr. 481]* . In other words, the taking of a qualifying joint title, whether as part of an original property transfer or a conversion of title, must have occurred during marriage in order for the transaction to constitute an acquisition during marriage that raises the presumption.

The motive for changing title to one of the joint title forms will not prevent the presumption from arising [*see, e.g., In re Marriage of Martinez (1984)156 Cal. App. 3d 20, 29-31, 202 Cal. Rptr. 646* (joint tenancy created to obtain construction loan; disapproved on other grounds in *In re Marriage of Buol (1985) 39 Cal. 3d 751, 764 n.10, 218 Cal. Rptr. 31, 705 P.2d 354* , and *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253*); *cf. In re Marriage of Perkal (1988) 203 Cal. App. 3d 1198, 1201, 250 Cal. Rptr. 296* (conversion to joint tenancy "for a gift" was not a waiver of separate property reimbursement right)], nor will the fact that one spouse's separate property was used to finance the purchase of the property [*see, e.g., In re Marriage of Taylor (1984) 160 Cal. App. 3d 471, 473-474, 206 Cal. Rptr. 557* (disapproved on other grounds in *In re Marriage of Buol (1985) 39 Cal. 3d 751, 764 n.10, 218 Cal. Rptr. 31, 705 P.2d 354* , and *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253*)]. For discussion of apportioning separate and community interests in the family home, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

[c] Application to Joint Tenancy Property

[i] Effect of Prior Law

The presumptions that have applied on marital dissolution or legal separation to property held in joint tenancy title have changed since the 1960's, when the first specialized presumption pertaining to such property was enacted [*compare Fam. Code §§ 2580, 2581 with* former *Civ. Code §§ 164, 4800.1, 5110*]. Because there are circumstances under which prior law may still apply, as discussed hereafter, an understanding of this law remains important.

Before mid-1965, based on the "common law presumption that title reflects ownership," courts had held that joint tenancy title in real or personal property raised a rebuttable presumption for all purposes, including divorce, that the parties intended a true joint tenancy form of ownership, even if the property had been purchased with community funds. Joint tenancy title thus raised a presumption that each spouse had a one-half interest in *separate* property. The form of title could be rebutted by evidence that the parties had a common understanding or agreement (written or oral) that their interests were other than as stated in the instrument of title. This presumption created characterization problems on divorce or legal separation, because a court could not award a house so held to one spouse for use as a family residence for that spouse and children, unless the presumption from joint tenancy title could be rebutted by evidence of an agreement or understanding [*see In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1215-1216, 44 Cal. Rptr. 2d 155, 899 P.2d 1349* ; *In re Marriage of Hilke (1992) 4 Cal. 4th 215, 219, 14 Cal. Rptr. 2d 371, 841 P.2d 891* ; *In re Marriage of Lucas (1980) 27 Cal. 3d 808, 813-814, 166 Cal. Rptr. 853, 614 P.2d 285* ; *see also Socol v. King (1950) 36 Cal. 2d 342, 346, 223 P.2d 627* ; *Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 373, 125 Cal. Rptr. 804]* .

Accordingly, in 1965, legislation created a statutory presumption that *single family residences* acquired in joint tenancy

during marriage were community property, for the "purpose of division of such property upon divorce or separate maintenance only" [Former *Civ. Code § 164*]. After passage of the Family Law Act [former *Civ. Code § 4000 et seq.*], this "joint tenancy residence-community property" presumption was set forth substantially unaltered in another Civil Code provision [*see* former *Civ. Code § 5110*]. The California Supreme Court has noted that the effect of this legislation was to change the presumptive form of ownership to that more closely matching the intent and assumptions of most spouses who acquire and hold their residences in joint tenancy. However, there was no indication that the Legislature intended to change the rules regarding the strength and type of evidence necessary to overcome the presumption arising from the form of title, namely, an agreement or understanding [*In re Marriage of Lucas (1980) 27 Cal. 3d 808, 813-814, 166 Cal. Rptr. 853, 614 P.2d 285]* .

Therefore, the "joint tenancy residence-community property presumption" of former law [former *Civ. Code § 5110*] was rebuttable by what came to be known as a "Lucas agreement," that is, by evidence that the parties had an express or implied oral or written understanding or agreement to the contrary. It was not rebuttable by merely tracing the source of funds used to acquire the property [*see* *In re Marriage of Lucas (1980) 27 Cal. 3d 808, 814-815, 166 Cal. Rptr. 853, 614 P.2d 285]* .

Conversely, if the parties did have an agreement or understanding that the contributing party would retain a separate interest in the property, the courts developed a formula that allowed the contributing party to receive a portion of any appreciation in the property's value. Under a formula derived from *In re Marriage of Aufmuth* [*In re Marriage of Aufmuth (1979) 89 Cal. App. 3d 446, 456-457, 152 Cal. Rptr. 668* (disapproved in part in *In re Marriage of Lucas (1980) 27 Cal. 3d 808, 815, 166 Cal. Rptr. 853, 614 P.2d 285]* , a spouse who made a separate property down payment on a residence, for example, would receive a separate property interest in the property in the proportion that the down payment bore to the purchase price; the community would acquire that percentage interest that the community loan bore to the purchase price [*see* *In re Marriage of Lucas (1980) 27 Cal. 3d 808, 816, 816 n.3, 166 Cal. Rptr. 853, 614 P.2d 285* (applying formula of *In re Marriage of Aufmuth (1979) 89 Cal. App. 3d 446, 456-457, 152 Cal. Rptr. 668*)]. For further discussion of *Aufmuth* apportionment, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

In applying the joint tenancy presumption under this prior law, at least one court of appeal has noted that the law is unclear whether "property acquired by the parties during marriage" includes property to which only title was changed to joint tenancy for survivorship purposes, as opposed to an outright purchase during marriage. It appeared to imply that mere record title change does not constitute "acquisition" for purposes of this former statute, but it did not hold definitively on this issue [*In re Marriage of Scherr (1986) 177 Cal. App. 3d 314, 318, 318 n.5, 222 Cal. Rptr. 872]* . By contrast, courts interpreting the current "joint form-community property presumption" have generally found a change of record ownership during marriage to be an "acquisition," as discussed in *§ 122.33[4][b]*.

In 1983, primarily in response to *In re Marriage of Lucas* [*In re Marriage of Lucas (1980) 27 Cal. 3d 808, 166 Cal. Rptr. 853, 614 P.2d 285]* , the Legislature enacted (now former) *Civ. Code § 4800.1*, which expanded the joint tenancy/community property presumption from single family residences to *all* property held in joint tenancy, for purposes of its division on dissolution of marriage or legal separation; but it required specified *written* evidence to overcome the presumption. This section was amended in 1986 to apply to all property acquired in "joint form," as discussed in *§ 122.33[4][iii]* [*see Fam. Code §§ 2580, 2581*]. The 1983 legislation also enacted (now former) *Civ. Code § 4800.2*, which provided for reimbursement for separate property contributions to the acquisition of community property [*see Fam. Code § 2640(a), (b)*]. Both statutes were generally applicable to proceedings commenced on or after January 1, 1984, and case law indicated that neither could be applied retro 1996 Cal.Fam.Law Monthly 147-148 In re Marriage of Hilke (1992) 4 Cal. 4th 215, 220-221, 14 Cal. Rptr. 2d 371, 841 P.2d 891] Civ. Code § 683.2 Ch. 222, *Dissolution of Marriage: Property Division and Valuation* Prob. Code §§ 5203(a)(4) Fam. Code §§ 2580 In re Marriage of Rico (1992) 10 Cal. App. 4th 706, 710, 12 Cal. Rptr. 2d 659 In re Marriage of Taylor (1984) 160 Cal. App. 3d 471, 473-474, 206 Cal. Rptr. 557 In re Marriage of Anderson (1984) 154 Cal. App. 3d 572, 577, 579, 201 Cal. Rptr. 498 In re Marriage of Buol (1985) 39 Cal. 3d 751, 764 n.10, 218 Cal. Rptr. 31, 705 P.2d 354 In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253 In re Marriage of Leversee (1984) 156 Cal. App. 3d 891,

896-897, 203 Cal. Rptr. 481] In re Marriage of Martinez (1984)156 Cal. App. 3d 20, 29-31, 202 Cal. Rptr. 646 In re Marriage of Buol (1985) 39 Cal. 3d 751, 764 n.10, 218 Cal. Rptr. 31, 705 P.2d 354 In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253 In re Marriage of Perkal (1988) 203 Cal. App. 3d 1198, 1201, 250 Cal. Rptr. 296 In re Marriage of Taylor (1984) 160 Cal. App. 3d 471, 473-474, 206 Cal. Rptr. 557 In re Marriage of Buol (1985) 39 Cal. 3d 751, 764 n.10, 218 Cal. Rptr. 31, 705 P.2d 354 In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253 Ch. 222, *Dissolution of Marriage: Property Division and Valuation* Fam. Code §§ 2580 In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1215-1216, 44 Cal. Rptr. 2d 155, 899 P.2d 1349 In re Marriage of Hilke (1992) 4 Cal. 4th 215, 219, 14 Cal. Rptr. 2d 371, 841 P.2d 891 In re Marriage of Lucas (1980) 27 Cal. 3d 808, 813-814, 166 Cal. Rptr. 853, 614 P.2d 285 Socol v. King (1950) 36 Cal. 2d 342, 346, 223 P.2d 627 Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 373, 125 Cal. Rptr. 804] In re Marriage of Lucas (1980) 27 Cal. 3d 808, 813-814, 166 Cal. Rptr. 853, 614 P.2d 285] In re Marriage of Lucas (1980) 27 Cal. 3d 808, 814-815, 166 Cal. Rptr. 853, 614 P.2d 285] In re Marriage of Aufmuth (1979) 89 Cal. App. 3d 446, 456-457, 152 Cal. Rptr. 668 In re Marriage of Lucas (1980) 27 Cal. 3d 803, 815, 166 Cal. Rptr. 853, 614 P.2d 285] In re Marriage of Lucas (1980) 27 Cal. 3d 808, 816, 816 n.3, 166 Cal. Rptr. 853, 614 P.2d 285 In re Marriage of Aufmuth (1979) 89 Cal. App. 3d 446, 456-457, 152 Cal. Rptr. 668 Ch. 222, *Dissolution of Marriage: Property Division and Valuation* In re Marriage of Scherr (1986) 177 Cal. App. 3d 314, 318, 318 n.5, 222 Cal. Rptr. 872] § 122.33[4][b] In re Marriage of Lucas (1980) 27 Cal. 3d 808, 166 Cal. Rptr. 853, 614 P.2d 285] Civ. Code § 4800.1 § 122.33[4][iii] Fam. Code §§ 2580 Civ. Code § 4800.2 Fam. 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However, the California Supreme Court has applied (now former) *Civ. Code § 4800.1* retroactively to joint tenancy property acquired before January 1, 1984. The Court found that such an application did not deprive a spouse of a vested property interest, because the spouse had a contingent survivorship interest as a joint tenant [*see In re Marriage of Hilke (1992) 4 Cal. 4th 215, 222-224, 14 Cal. Rptr. 2d 371, 841 P.2d 891]* . Thus, if a proceeding is commenced on or after January 1, 1984, the current "joint form-community property presumption" that superseded *Civ. Code § 4800.1* will generally apply, even if the joint tenancy property was acquired before that date, so long as such retroactive application affects only an unvested right of survivorship.

Nevertheless, because the Supreme Court has held that the separate property reimbursement statute [*see Fam. Code § 2640(a), (b)*; former *Civ. Code § 4800.2*], may not be applied with respect to property acquired before January 1, 1984, the *Aufmuth* apportionment method discussed above may apply in a particular case to property acquired before that date. In addition, if the current "joint form-community property presumption" is applied, proof of a writing that meets the requirements of that statute would first have to be presented to overcome the community presumption raised by the joint tenancy title, rather than an "oral agreement or understanding" [*In re Marriage of Lucas (1980) 27 Cal. 3d 808, 813, 166 Cal. Rptr. 853, 614 P.2d 285]* as determined under former law.

[ii] Application of Current Statutory Presumption

The current "joint form-community property presumption" that applies in dividing property on dissolution of marriage or legal separation is an "umbrella" statute that applies not only to property held in joint tenancy, but also to property held in other joint forms, including community property, tenancy in common, and tenancy by the entirety, as discussed in *§ 122.33[4][a][i]*. This community presumption may only be rebutted by either (1) a clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate, and not community property, or (2) proof that the parties have made a written agreement that the property is separate property [*Fam. Code § 2581*].

With respect to real property, the current presumption applies without regard to whether the property is a single family residence, is unimproved, or otherwise [*see In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1215-1218, 44 Cal. Rptr. 2d 155, 899 P.2d 1349]* . Of primary concern to counsel has been the long-term controversy over the retroactivity of this statutory presumption and its companion separate property reimbursement statute [*see Fam. Code § 2640(a), (b)*; former *Civ. Code § 4800.2*] which resulted in amendments to the presumption and in many court decisions [*see, e.g., In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1225, 44 Cal. Rptr. 2d 155, 899 P.2d 1349* ; *In re Marriage of*

Fabian (1986) 41 Cal. 3d 440, 450, 224 Cal. Rptr. 333, 715 P.2d 253 ; *In re Marriage of Buol (1985) 39 Cal. 3d 751, 757, 218 Cal. Rptr. 31, 705 P.2d 354* ; *In re Marriage of Bankovich (1988) 203 Cal. App. 3d 49, 54-56, 249 Cal. Rptr. 713]* . For a complete discussion of the resolution to date of the retroactivity issue, see *§ 122.33[4][a][iii]*.

For discussion of additional statutory limitations on the application of the "joint form-community property presumption, *see § 122.33[4][a]*. For discussion of the effect of a spouse's death during proceedings for marital dissolution on the application of the presumption, see *§ 122.33[4][a][iv]*.

Accounts held in joint tenancy in banks and similar financial institutions have additional specialized presumptions and rules that should be considered, as discussed in Ch. 222, *Dissolution of Marriage: Property Division and Valuation* , [*see Prob. Code §§ 5203(a)(4), (6), 5305*].

[5] Community Property With Right of Survivorship

As of July 1, 2001, spouses may hold title as "community property with right of survivorship," by a written instrument made on or after that date [*Civ. Code § 682.1(c)*; *Fam. Code § 750*]. Community property, when expressly declared in a transfer document to be community property with a right of survivorship, and which may be accepted in writing on the face of the document by a statement signed or initialed by the grantees, passes to the survivor on death of one of the spouses without administration under the terms of the instrument, subject to the same procedures that apply to property held in joint tenancy [*Civ. Code § 682.1(a)*]. Before the death of either spouse, the right of survivorship may be terminated under the same procedures by which a joint tenancy may be severed [*Civ. Code § 682.1(a)*].

The passage of community property with a right of survivorship without administration is subject to Probate Code provisions regarding (1) nonprobate tranfers, (2) the right of the surviving spouse to dispose of community property, (3) liability for the debts of the deceased spouse, and (4) liability for the decedent's property [*Civ. Code § 682.1(a)*; *see Prob. Code §§ 5000 et seq., 13540 et seq., 13550 et seq., 13560 et seq.*]. The provisions regarding community property with a right of survivorship do not apply to joint accounts in financial institutions governed by *Prob. Code § 5100 et seq.* [*Civ. Code § 682.1(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationMarital PropertyFamily LawMarital Duties & RightsProperty RightsCharacterizationSeparate PropertyReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawEstatesPresent EstatesMarital EstatesSeparate Property

California Forms of Pleading and Practice--Annotated

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
Chapter 122 COMMUNITY PROPERTY
PART II. LEGAL BACKGROUND
B. General Characterization Principles

12-122 California Forms of Pleading and Practice--Annotated § 122.34

§ 122.34 Transmutation of Property

[1] Nature of Transmutation

"Transmutation" denotes a conversion of the character of property from separate to community, or vice versa, or from one spouse's separate property to the other spouse's separate property, by means of transfer or agreement of the spouses [*see Fam. Code § 850*]. Transmutation requirements apply to interspousal transactions or agreements, rather than to spousal acquisitions of property from third parties [*In re Summers (9th Cir. 2003) 332 F.3d 1240, 1244-1245* (federal bankruptcy decision)].

Subject to the limitations imposed by statute and case law discussed in *§§ 122.34[2]* and *122.34[3]*, married persons may transmute the character of their property in any of the following ways:

(1) From community to separate property of either spouse [*Fam. Code § 850(a)*; *see also Fam. Code § 852* (rules applicable to transmutations made on or after January 1, 1985); See v. See *(1966) 64 Cal. 2d 778, 783, 51 Cal. Rptr. 888, 415 P.2d 776* (applying law prior to January 1, 1985); *In re Marriage of Broderick (1989) 209 Cal. App. 3d 489, 496-497, 257 Cal. Rptr. 397* (transfer of family residence by quitclaim deed); *In re Marriage of Stoner (1983) 147 Cal. App. 3d 858, 864, 195 Cal. Rptr. 351* (applying law prior to January 1, 1985)];

(2) From separate property of either spouse to community property [*Fam. Code § 850(b)*; *see also Fam. Code § 852* (rules applicable to transmutations made on or after January 1, 1985); *In re Marriage of Holtemann (2008) 166 Cal. App. 4th 1166, 1172-1175, 83 Cal. Rptr. 3d 385* ; *Buzgheia v. Leasco Sierra Group (1994) 30 Cal. App. 4th 766, 770-771, 36 Cal. Rptr. 2d 144* ; *In re Marriage of Jafeman (1972) 29 Cal. App. 3d 244, 255, 105 Cal. Rptr. 483* (decided under law prior to January 1, 1985)];

(3) From separate property of one spouse to separate property of the other spouse [*Fam. Code § 850(c)*; *see also Fam. Code § 852* (rules applicable to transmutations made on or after January 1, 1985)].

The validity of a transmutation depends on a number of general factors. First, for most transmutations made on or after January 1, 1985, a writing is required by statute, along with other restrictions [*see Fam. Code § 850 et seq.* (discussed in *§ 122.34[3]*)], but transmutations made before then continue to be governed by former law [*Fam. Code § 852(e)* (discussed in *§ 122.34[2]*)]. Second, spouses are subject to special standards of disclosure towards one another with respect to property, which derive from the confidential and fiduciary relationship spouses occupy, and these standards apply in determining whether a transmutation has occurred [*see Fam. Code §§ 721, 1100(e)*; *In re Marriage of Delaney (2003) 111 Cal. App. 4th 991, 995-1000, 4 Cal. Rptr. 3d 378* (court may set aside purported gift of spouse's separate property to other spouse if transfer resulted from undue influence); *In re Marriage of Barneson (1999) 69 Cal. App. 4th 583, 588, 81 Cal. Rptr. 2d 726* ; *In re Marriage of Haines (1995) 33 Cal. App. 4th 277, 293, 39 Cal. Rptr. 2d 673* (competence of spouses to engage in transactions with each other is subject to the circumstances "being pleasing to the fiduciary standard"); for general discussion of spousal fiduciary duties, *see § 122.51[4]*]. Third, spouses are not permitted to transmute property to defraud creditors [*see Fam. Code § 851*; *see Civ. Code § 3439.04(a)*; *cf. State Board of Equalization v. Woo (2000) 82 Cal. App. 4th 481, 485, 98 Cal. Rptr. 2d 206* (wife's attempt to transmute her community property earnings to separate property after tax assessment against her husband was fraudulent transfer); *Bailey v. Leeper (1956) 142 Cal. App. 2d 460, 465-466, 298 P.2d 684* (transfer of property from husband to wife)]. Fourth, the transmuting spouse must have an immediately enforceable interest in the property at the time of transmutation [*see United States v. Chavez (9th Cir. 2003) 323 F.3d 1216, 1219* (property forfeiture divested spouse of ownership before transmutation took effect under terms of express declaration)]. Finally, under current law, a transmutation of real property, unless it is recorded, is not effective with respect to *third parties* who do not have notice of the transmutation, as discussed in *§ 122.34[3]* [*Fam. Code § 852(b)* (applicable to transmutations made on or after January 1, 1985)].

Transmutations accomplished to qualify one or both spouses for certain state benefits, such as health care benefits, may be subject to special statutes. These must be consulted before a transmutation agreement is drafted to determine the effect of the agreement on eligibility for benefits [*see, e.g., Welf. & Inst. Code § 14006.2 et seq.* (eligibility for Medi-Cal benefits)]. In addition, special rules that apply generally to nonprobate transfers of community property made before, on, or after January 1, 1993, on the death of a married person, may also need to be considered in determining whether a transmutation has occurred, as discussed in *§ 122.56* [*see Fam. Code § 853(c)*; *Prob. Code § 5014(a)*; *see also Prob. Code § 5010 et seq.*].

For discussion of written agreements that may include provisions for transmutations of property during marriage, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Chs. 200-216 (Matthew Bender).

[2] Transmutations Prior to January 1, 1985

[a] Written or Oral Agreement Permitted

Transmutations of property made before January 1, 1985, are still governed by the law that existed before that date [*Fam. Code § 852(e)*]. Under that former law, a transmutation could be made by written or oral agreement [*Estate of Wieling (1951) 37 Cal. 2d 106, 108, 230 P.2d 808* ; *see Woods v. Security-First Nat. Bank (1956) 46 Cal. 2d 697, 701, 299 P.2d 657* ; *Grappo v. Coventry Financial Corp. (1991) 235 Cal. App. 3d 496, 508, 286 Cal. Rptr. 714* (parties had express oral agreement that property purchased during marriage in own names would be separate property of spouse in whose name it was purchased); *In re Marriage of Vanderbeek (1986) 177 Cal. App. 3d 224, 230, 222 Cal. Rptr. 832* (agreement to "share and share alike" all property, including husband's stock and stock options acquired before marriage); *but see In re Marriage of Shaban (2001) 88 Cal. App. 4th 398, 406-407, 105 Cal. Rptr. 2d 863* (statute of frauds provisions existed for premarital agreements regardless of whether they were made before or after January 1, 1985, and parol evidence could not be received to provide material terms omitted in written agreement)]. No particular formalities were required for an effective transmutation agreement, except that the agreement must have been fair and based on full disclosure of the relevant facts [*see Fam. Code § 721*; *Estate of Wilson (1976) 64 Cal. App. 3d 786, 798,*

134 Cal. Rptr. 749] . The mutual consent of the spouses constituted sufficient consideration to support the transmutation [*Estate of Wilson (1976) 64 Cal. App. 3d 786, 798, 134 Cal. Rptr. 749]* .

[b] Transmutation Based on Circumstances

Even in the absence of an express written or oral agreement, a court may find that a transmutation of property occurred under pre-January 1, 1985, law if the circumstances clearly demonstrate that one spouse intended to effect a change in the status of his or her property [*Beam v. Bank of America (1971) 6 Cal. 3d 12, 25, 98 Cal. Rptr. 137, 490 P.2d 257* ; *In re Marriage of Jafeman (1972) 29 Cal. App. 3d 244, 255, 105 Cal. Rptr. 483* ; *see In re Marriage of Broderick (1989) 209 Cal. App. 3d 489, 496-497, 257 Cal. Rptr. 397* (transfer of family residence by quitclaim deed)]. Conversely, when no intention to transmute the character of particular property has been established by the declarations or conduct of the parties, the property retains its original character [*see In re Marriage of Jafeman (1972) 29 Cal. App. 3d 244, 257, 105 Cal. Rptr. 483* ; *In re Marriage of Sparks (1979) 97 Cal. App. 3d 353, 356, 158 Cal. Rptr. 638]* .

[c] Oral Transmutations of Real Property in General

Under prior law, despite the general requirement that transfers of interests in real property be made by written instrument [*Civ. Code § 1091*], an apparent "judicial exception to the statute of frauds" permitted spouses to orally transmute interests in real property [*In re Marriage of Schoettgen (1986) 183 Cal. App. 3d 1, 5-9, 227 Cal. Rptr. 748, 227 Cal. Rptr. 758* ; Branca and Steinberg, *Antenuptial Agreements Under California Law: An Examination of Current Law and In re Marriage of Dawley, 11 U.S.F. L. Rev. 317, 323 n.25 (1977)*]. An oral transmutation agreement was not effective to create a joint tenancy between the spouses in either community property or in the separate property of one spouse [*see California Trust Co. v. Bennett (1949) 33 Cal. 2d 694, 697-698, 204 P.2d 324]* , because the creation of a joint tenancy in either real or personal property requires a writing [*see Civ. Code § 683*]. A party could, however, orally transmute his or her separate real property into community property [*In re Marriage of Schoettgen (1986) 183 Cal. App. 3d 1, 5-9, 227 Cal. Rptr. 748, 227 Cal. Rptr. 758]* .

For example, under prior law, one court held that substantial evidence supported a trial court's finding that a husband orally transmuted his interest in his deceased parents' real property from separate to community property. The parties had referred to the property as "ours," lived on it for many years, treated it as jointly owned property, and had gone to a county office in an aborted attempt to place title in both names [*In re Marriage of Schoettgen (1986) 183 Cal. App. 3d 1, 5-9, 227 Cal. Rptr. 748, 227 Cal. Rptr. 758]* .

However, if one party holds legal title to property as his or her separate property and the other party claims that the property was orally transmuted to community property before 1985, the party claiming oral transmutation must prove it by "clear and convincing" evidence, as opposed to a "preponderance of the evidence" [*In re Marriage of Weaver (1990) 224 Cal. App. 3d 478, 485-487, 273 Cal. Rptr. 696* ; *see Evid. Code § 662* (owner of legal title rebuttably presumed to be owner of full beneficial title to property)]

[d] Effect of Joint Title Presumption

The writing requirement imposed by former *Civ. Code § 4800.1* and its Family Code successor [*Fam. Code §§ 2580, 2581*] to rebut the community presumption raised by acquisition of property during marriage in joint title form may affect the law regarding transmutation of property, at least for purposes of proceedings for marital dissolution or legal separation. This writing requirement [§ 122.33[4]], which was first operative January 1, 1984, but applied in certain cases to property acquired before that date [*see In re Marriage of Hilke (1992) 4 Cal. 4th 215, 222-223, 14 Cal. Rptr. 2d 371, 841 P.2d 891]* , may preclude a claim that property acquired during marriage in joint title form was *orally* transmuted before January 1, 1985, to another character.

However, if no family law proceeding for division of the property is involved, and a third-party creditor during marriage

is seeking to attach or enforce a judgment against the property, the "joint form-community property" presumption raised by former *Civ. Code § 4800.1* and its successor [*Fam. Code §§ 2580, 2581*] would not apply. Arguably, therefore, a purported oral transmutation prior to January 1, 1985, could be effective with regard to a third-party creditor if it was not undertaken to defraud the creditor. Similarly, the "joint form-community property presumption" ordinarily would not apply if a spouse died before dissolution of the parties' marital status [*see In re Marriage of Hilke (1992) 4 Cal. 4th 215, 221, 14 Cal. Rptr. 2d 371, 841 P.2d 891* (former *Civ. Code § 4800.1* applied when, in bifurcated proceedings, court had terminated parties' marital status and reserved jurisdiction to determine property rights); *Estate of Blair (1988) 199 Cal. App. 3d 161, 169-170, 244 Cal. Rptr. 627]* . Thus, a purported pre-January 1, 1985, oral transmutation of jointly held property might be given effect in a probate proceeding [*cf. In re Marriage of Hilke (1992) 4 Cal. 4th 215, 220, 14 Cal. Rptr. 2d 371, 841 P.2d 891* (noting that if former *Civ. Code § 4800.1* had not applied to the proceeding, the presumption arising from form of title was that parties were joint tenants and surviving husband would succeed to property by right of survivorship, absent a transmutation)].

[e] Statements in Wills

Prior to January 1, 1985, courts had held that a statement in a joint or companion will executed by a spouse, declaring all of the couple's property to be community, was effective to transmute the spouse's separate property to community [*see In re Marriage of Lotz (1981) 120 Cal. App. 3d 379, 174 Cal. Rptr. 618* ; *Estate of Wilson (1976) 64 Cal. App. 3d 786, 794, 134 Cal. Rptr. 749]* . However, in 1990, a court of appeal ruled such a statement inadmissible as proof of transmutation in any proceeding commenced before the testator's death [*In re Marriage of Weaver (1990) 224 Cal. App. 3d 478, 489-490, 273 Cal. Rptr. 696* (retroactively applying former *Civ. Code § 5110.740*, effective Jan. 1, 1985)]. This rule is now set forth by statute for transmutations, operative January 1, 1985 [*see Fam. Code § 853(a)* (continuing former *Civ. Code § 5110.740(a)*); *Estate of Gallio (1995) 33 Cal. App. 4th 592, 598, 39 Cal. Rptr. 2d 470]* , as discussed in *§ 122.34[3]*.

[3] Transmutations on or After January 1, 1985

[a] General Requirement of Writing

With limited exception, transmutations of real or personal property on or after January 1, 1985, must be made in writing by an express declaration [*Fam. Code § 852(a)* (discussed in *§ 122.34[3][b]*); *see, e.g., In re Marriage of Cross (2001) 94 Cal. App. 4th 1143, 1147-1148, 114 Cal. Rptr. 2d 839* (no transmutation of wife's separate property residence to which husband made improvements)]. A transmutation may be made by the parties' agreement or transfer, with or without consideration [*Fam. Code § 850*].

However, an exception to the writing requirement exists for some interspousal gifts. Under the exception, the writing requirement does not apply to a gift between the spouses of clothing, wearing apparel, jewelry, or other tangible articles of a personal nature that are used solely or principally by the spouse to whom the gift is made and that are not substantial in value, taking into account the circumstances of the marriage [*Fam. Code § 852(c)*; *see In re Marriage of Steinberger (2001) 91 Cal. App. 4th 1449, 1456, 111 Cal. Rptr. 2d 521* (diamond ring purchased with community funds was found to be substantial in value and was *not* the wife's separate property absent written transmutation)].

Furthermore, the writing does not affect the law governing characterization of property in which separate property and community property are commingled or otherwise combined [*Fam. Code § 852(d)*]. For discussion of commingling, *see § 122.35*. For further discussion of the writing requirement in the context of making an "express written declaration," *see § 122.34[3][b]*.

[b] Express Declaration Requirement

To satisfy the statutory requirements for a transmutation made on or after January 1, 1985, the required writing must be in the form of an "express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in

the property is adversely affected" [*Fam. Code § 852(a)*; *see* *Estate of Bibb (2001) 87 Cal. App. 4th 461, 470, 104 Cal. Rptr. 2d 415* (DMV printout showing vehicle registered in names of husband and wife lacked any signatures of parties and did not meet statutory requirements for transmutation)]. *The California Supreme Court, in Estate of MacDonald (1990) 51 Cal. 3d 262, 264, 272 Cal. Rptr. 153, 794 P.2d 911* , held that to be an "express declaration", the writing must contain language that *expressly* states that a change in the characterization or ownership of the property is being made. Although this does not require use of the term "transmutation" or any other particular term, it must be clear, without resort to extrinsic evidence, that the characterization or ownership of property is being changed [*see* *Estate of MacDonald (1990) 51 Cal. 3d 262, 264, 272-273, 272 Cal. Rptr. 153, 794 P.2d 911* ; *In re Marriage of Holtemann (2008) 166 Cal. App. 4th 1166, 1172-1173, 83 Cal. Rptr. 3d 385* (word "transmutation" was stated repeatedly and pointedly in parties' agreement, leaving no doubt that, with advice of counsel, parties chose this unique and specific term of art); *see, e.g.,* *Estate of Bibb (2001) 87 Cal. App. 4th 461, 468-470, 104 Cal. Rptr. 2d 415* (deed by husband of "grant" of separate property interest in real property to himself and wife as joint tenants *was* valid transmutation, but unsigned DMV printout showing that vehicle previously registered in husband's name alone was reregistered in names of husband and wife was not valid transmutation); *In re Marriage of Campbell (1999) 74 Cal. App. 4th 1058, 1062-1065, 88 Cal. Rptr. 2d 580* (extrinsic evidence not admissible to establish oral transmutation; doctrine of equitable estoppel may not be invoked to circumvent writing requirement); *In re Marriage of Barneson (1999) 69 Cal. App. 4th 583, 588, 81 Cal. Rptr. 2d 726* (husband's direction to "transfer" stock into wife's name and "journal" stock into wife's account were not transmutations); *Estate of Petersen (1994) 28 Cal. App. 4th 1742, 1749, 34 Cal. Rptr. 2d 449* (account designation failed to satisfy "express declaration" requirement for transmutation of property)].

The California Supreme Court recently reaffirmed its decision in MacDonald, and held that there is no exception from the "express declaration" requirement of *Fam. Code § 852(a)* for partial performance of an agreement to transmute property [*In re Marriage of Benson (2005) 36 Cal. 4th 1096, 1104-1111, 32 Cal. Rptr. 3d 471, 116 P.3d 1152]* . It noted that *Fam. Code § 852(a)* is stated in the negative--i.e., an agreement to change the character of marital property is not valid unless it is in writing, contains an express declaration by which the transmutation is made, and is accepted in some fashion by the adversely affected spouse--as though all intendments weigh against finding compliance with the requirements for transmutation in the usual case. It also noted that no exception to the requirement of an "express" written declaration appears in *Fam. Code § 852(a)*. Viewed as a whole, the Court concluded that these features suggest the legislature envisioned a standard for transmutations from which married couples could not freely depart [*In re Marriage of Benson (2005) 36 Cal. 4th 1096, 1109-1110, 32 Cal. Rptr. 3d 471, 116 P.3d 1152]* . The Court also concluded the writing requirement of *Fam. Code § 852(a)* cannot be satisfied when there is no writing at all about the subject property, and when a transmutation would have to be inferred from acts surrounding the parties' purported agreement [*In re Marriage of Benson (2005) 36 Cal. 4th 1096, 1110-1111, 32 Cal. Rptr. 3d 471, 116 P.3d 1152]* .

Nonprobate community property transfers that are to be effective on the transferor spouse's death are governed by *Prob. Code §§ 5010-5023*, which operate independently of the Family Code transmutation statutes. Under these Probate Code sections:

> (1) A spouse's written consent to a provision for a nonprobate transfer of community property on death generally is not a transmutation of the consenting spouse's interest in the property [*see Prob. Code § 5022(a)*; *see* *Estate of Petersen (1994) 28 Cal. App. 4th 1742, 1752-1753, 34 Cal. Rptr. 2d 449* (language in certain annuity contracts sufficed to establish nonprobate transfer, and not transmutation; but money market account description met neither "express declaration" requirement for transmutation, nor did it establish effective nonprobate transfer)];
>
> (2) A waiver of a right to a joint and survivor annuity or survivor's benefits under the federal Retirement Equity Act of 1984 [Pub. L. 98-397] is not a transmutation of the community property rights of the person executing the waiver [*Fam. Code § 853(b)*].

However, the legislation further provides that a written joinder or written consent to a nonprobate transfer of community

property on death that satisfies the statute setting forth the transmutation writing requirements [*see Fam. Code § 852*] *is a transmutation*, and is governed by the law applicable to transmutations and not by the Probate Code sections that govern nonprobate transfers [*see Fam. Code § 853(c)*; *Prob. Code § 5022(b)*]. For further discussion of nonprobate transfers on death, *see § 122.56*.

In determining whether a writing is a valid transmutation of property under *MacDonald*, an examination must be made of whether the rules governing fiduciary relationships between spouses have been complied with. Thus, although the requirements of *Fam. Code § 852* are prerequisites to a valid transmutation, they do not alone necessarily determine whether a valid transmutation has occurred. The court must consider any issues relating to undue influence [*In re Marriage of Barneson (1999) 69 Cal. App. 4th 583, 588, 81 Cal. Rptr. 2d 726* ; *In re Marriage of Haines (1995) 33 Cal. App. 4th 277, 293-294, 39 Cal. Rptr. 2d 673]* . In one court's view, for example, the *MacDonald* interpretation of the "express declaration" requirement "can be viewed as effectively creating a 'presumption' that transactions between spouses are not 'transmutations,' rebuttable by evidence the transaction was documented with a writing containing the requisite language [of *Fam. Code § 852(a)*]." Under this view, when the writing involves a transfer of an asset, such as stock, into a different name the transfer does not necessarily connote an intention to change beneficial ownership; there must be a clear indication in the writing of an intention to change ownership or characterization of the property. This could be done, that court concluded, by language "indicating [the transferor] was giving his interest in the [property (here, stocks)] to [the transferee]; ... even [by directing that the property be] transferred into [the transferee's] name 'as [the transferee's] sole and separate property' " [*In re Marriage of Barneson (1999) 69 Cal. App. 4th 583, 593-594, 81 Cal. Rptr. 2d 726]* .

Similarly, it was held in another case that a DMV printout reflecting that a vehicle previously registered in a husband's name alone and reregistered in the names of husband and wife, did not contain a "clear and unambiguous expression of [the transferor's] intent to transfer his interest in the subject property." Therefore, it was not a valid transmutation [*Estate of Bibb (2001) 87 Cal. App. 4th 461, 470, 104 Cal. Rptr. 2d 415]* .

Likewise in *In re Marriage of Starkman*, the court held that a clause in a trust agreement, which provided that the property transferred to the trust was community property unless the transferor spouse identified it as separate property, was insufficient to create a transmutation to community property of the husband's separate property which he transferred to the trust and did not identify as separate property [*In re Marriage of Starkman (2005) 129 Cal. App. 4th 659, 663-665, 28 Cal. Rptr. 3d 639]* . Neither this provision, nor any other provision of the trust agreement, unambiguously established that the husband was effecting a change of ownership of his separate property by transferring it to the trust without designating it has his separate property. A transmutation might have been held to occur if the trust agreement had provided that any property a spouse transferred to the trust "becomes" or is "changed into" community property or if the trust agreement had provided that a purpose of the trust was to effect the transmutation of the parties' separate estates to community property [*In re Marriage of Starkman (2005) 129 Cal. App. 4th 659, 665, 28 Cal. Rptr. 3d 639]* .

Similarly, incorporation of a separate property business during marriage, does not, alone, transmute it into a community asset, because incorporation is a mere change in the legal *form* of the business [*In re Marriage of Koester (1999) 73 Cal. App. 4th 1032, 1036-1038, 87 Cal. Rptr. 2d 76* ; *Kenney v. Kenney (1950) 97 Cal. App. 2d 60, 65, 217 P.2d 151]* .

In *In re Marriage of Holtemann*, however, the court found that the Transmutation Agreement and Trust at issue established that the husband intended to, and did, transmute from separate to community property the property that was identified in an incorporated exhibit. The agreement unambiguously stated that "Husband agrees that the character of the property described in Exhibit A (including any future rents, issues, profits, and proceeds of that property) *is hereby transmuted from his separate property to the community property of both parties.* The attached exhibit repeated the term "transmutation" numerous times, and the court aptly noted that "[a] clearer statement of a transmutation is difficult to imagine" [*In re Marriage of Holtemann (2008) 166 Cal. App. 4th 1166, 1172-1173, 83 Cal. Rptr. 3d 385*]. The court concluded that regardless of the motivations underlying the documents, they contain the requisite express, unequivocal

declarations of a present transmutation and reflect that the husband was fully informed of the legal consequences of his actions [*In re Marriage of Holtemann (2008) 166 Cal. App. 4th 1166, 1173, 83 Cal. Rptr. 3d 385*]. The court rejected the husband's contention that a transmutation, once effected, can be limited in purpose or otherwise rendered conditional or temporary. It held that once the character of the property has been changed, a "retransmutation" can only be effected by an express agreement to that effect that independently satisfies the requirements of *Fam. Code § 852(a)* [*In re Marriage of Holtemann (2008) 166 Cal. App. 4th 1166, 1174, 83 Cal. Rptr. 3d 385*].

Whether there can be any exception to the general writing requirement for a transmutation (apart from the interspousal gifts of personalty permitted by statute discussed in *§ 122.34[3][a]*) is somewhat unclear. Thus, for example, although the doctrine of equitable estoppel is an exception to the statute of frauds, a spouse who asserts an interest in the other spouse's separate property may not similarly invoke the doctrine of equitable estoppel to circumvent the requirement that there be an *express written declaration* of the other spouse's intent to transmute the property. To do so would require the consideration of extrinsic evidence, which is inadmissible to prove a transmutation [*In re Marriage of Campbell (1999) 74 Cal. App. 4th 1058, 1063-1064, 88 Cal. Rptr. 2d 580* (wife who loaned husband substantial sums to improve his separate property home, allegedly in reliance on his unfulfilled promise to place her name on property title, could not prove transmutation)]. Similarly, although parol evidence may be received to interpret a term of art found in a contract, it cannot be used to supply essential terms that were omitted in the written document, thereby circumventing the statute of frauds requirement that the writing must state with reasonable certainty what the terms and conditions of the contract are [*In re Marriage of Shaban (2001) 88 Cal. App. 4th 398, 399-401, 105 Cal. Rptr. 2d 863* (one-page document written in Arabic was "hopelessly uncertain" as to its terms and conditions, and husband's expert witness was not allowed to testify that it indicated the couple's intention to have their property relations at divorce governed by "Islamic law")].

[c] Effect on Third Parties

The statutes governing transmutations that take place on or after January 1, 1985, make reference to third party rights in the following contexts:

> (1) A transmutation is subject to the laws governing fraudulent transfers [*Fam. Code § 851*; *see Civ. Code § 3439 et seq.*]; thus, spouses cannot utilize the device of transmuting property in order to defraud creditors [*see Civ. Code § 3439.04*; *Fam. Code § 851*; *see, e.g.,* *Mejia v. Reed (2003) 31 Cal. 4th 657, 661, 3 Cal. Rptr. 3d 390, 74 P.3d 166* (Uniform Fraudulent Transfer Act applied to marital settlement agreement involving transfer of husband's interest in real estate to wife in return for wife's interest in medical practice); *State Board of Equalization v. Woo (2000) 82 Cal. App. 4th 481, 485, 98 Cal. Rptr. 2d 206* (wife's attempt to transmute her community earnings to separate property after knowing of creditor's intent to garnish her wages to satisfy husband's tax debt was fraudulent transfer)]; and
>
> (2) A transmutation of real property is not effective with respect to third parties who do not have notice of the transmutation unless it is recorded [*Fam. Code § 852(b)*].

For related discussion of transmutations involving fraudulent transfers, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* . For discussion of fraudulent transfer law [Uniform Fraudulent Transfer Act-- *Civil Code § 3439 et seq.*], see Ch. 270, *Fraudulent Conveyances* .

[d] Statements in Wills

By legislation operative January 1, 1985, a statement in a will of the character of property is inadmissible as evidence of a transmutation of the property in any proceeding commenced *before* the testator's death [*Fam. Code § 853(a)* (continuing former *Civ. Code § 5110.740(a)*); *Estate of Gallio (1995) 33 Cal.App. 4th 592, 598, 39 Cal. Rptr. 2d 470]* . This statute has been applied retroactively in at least one instance [*see* *In re Marriage of Weaver (1990) 224 Cal.*

App. 3d 478, 489-490, 273 Cal. Rptr. 696 (applying former *Civ. Code § 5110.740*, as discussed in *§ 122.34[2][e]*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationTransmutationReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawEstatesPresent EstatesMarital EstatesSeparate Property

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
Chapter 122 COMMUNITY PROPERTY
PART II. LEGAL BACKGROUND
B. General Characterization Principles

12-122 California Forms of Pleading and Practice--Annotated § 122.35

§ 122.35 Commingling and Tracing

[1] Effect of Commingling on Characterization

In general, the "commingling"--mixing or combining--of separate and community property into one whole does not destroy the character of its respective components if their amounts can be ascertained [*In re Marriage of Mix (1975) 14 Cal. 3d 604, 611, 122 Cal. Rptr. 79* ; *Hicks v. Hicks (1962) 211 Cal. App. 2d 144, 154, 27 Cal. Rptr. 307]* . However, when property is so commingled that the separate and community components cannot be traced and identified, the general presumption in favor of community property [*see Fam. Code § 760*] requires that all of the commingled property be characterized as community [*see In re Marriage of Mix (1975) 14 Cal. 3d 604, 611, 122 Cal. Rptr. 79* ; see *In re Marriage of Weaver (2005) 127 Cal. App. 4th 858, 870-871, 26 Cal. Rptr. 3d 121* (property that spouses purchased before marriage, which was therefore their separate property, was transmuted to community property due to commingling of their separate property interest with community property used to pay for mortgage and improvements during marriage)].

If a community presumption thus arises, the burden is on the spouse asserting that the property is separate to overcome the community presumption by *tracing* the funds to a separate source, assuming that tracing is permissible in a particular case [*In re Marriage of Mix (1975) 14 Cal. 3d 604, 611, 122 Cal. Rptr. 79* ; *In re Marriage of Higinbotham (1988) 203 Cal. App. 3d 322, 328, 249 Cal. Rptr. 798]* .

There are two independent methods of tracing that generally may be used to establish that commingled, presumptively community property is actually separate property, as discussed in *§ 122.35[2]*. They are "direct tracing"and "family expense" tracing [*In re Marriage of Mix (1975) 14 Cal. 3d 604, 612, 122 Cal. Rptr. 79* ; See v. See *(1966) 64 Cal. 2d 778, 783, 51 Cal. Rptr. 888, 415 P.2d 776* ; *In re Marriage of Higinbotham (1988) 203 Cal. App. 3d 322, 329, 249 Cal. Rptr. 798* ; *In re Marriage of Frick (1986) 181 Cal. App. 3d 997, 1010, 1011, 226 Cal. Rptr. 766]* . Exceptions to the use of tracing to establish characterization are discussed in *§ 122.35[3]*.

Family Code Section 852(a), which provides that a transmutation of property is not valid unless it is made in writing by an express declaration [see *§ 122.34[3][b]*], does not apply to the commingling of separate and community property [

Fam. Code § 852(d)].

Commingling and tracing issues typically arise with respect to characterization and division of separate and community funds combined in a single account, such as a bank account, or of property purchased with such commingled funds. As with other characterization matters, commingling and tracing issues may require resolution in the following contexts:

(1) Proceedings for marital dissolution or legal separation [*see In re Marriage of Mix (1975) 14 Cal. 3d 604, 612, 122 Cal. Rptr. 79]* ;

(2) Actions involving the claims of third party creditors [*see Fam. Code § 910 et seq.*; *see also* Ch. 222, *Dissolution of Marriage: Property Division and Valuation*]; and

(3) Probate proceedings on the death of one or both spouses [*see Estate of Murphy (1976) 15 Cal. 3d 907, 918, 126 Cal. Rptr. 820, 544 P.2d 956* ; *Estate of Luke (1987) 194 Cal. App. 3d 1006, 1019-1020, 240 Cal. Rptr. 84]* .

The tracing discussion in this part focuses on proceedings for marital dissolution or legal separation. For discussion of property transmutation, which also may be at issue in a particular case, *see § 122.34[1]*.

[2] Tracing Methods

[a] Direct Tracing

Under the method known as "direct tracing," the separate property status of money withdrawn from a commingled fund, such as an account, may be established in the following circumstances [*In re Marriage of Mix (1975) 14 Cal. 3d 604, 612, 122 Cal. Rptr. 79* ; *In re Marriage of Frick (1986) 181 Cal. App. 3d 997, 1010, 1011, 226 Cal. Rptr. 766]* :

(1) Separate funds deposited with community funds continue to be on deposit when the withdrawal is made; and

(2) The drawer intends to withdraw separate funds.

The party claiming a separate interest in the funds withdrawn or in property purchased with those funds bears the burden of establishing that the interest is separate. The burden of establishing a separate interest in presumptive community property is not simply that of presenting proof at the time of litigation, but also of keeping adequate records [*see In re Marriage of Frick (1986) 181 Cal. App. 3d 997, 1010-1011, 226 Cal. Rptr. 766]* . Furthermore, evidence that merely establishes the availability of separate funds on particular dates without also showing any disposition of the funds is not sufficient proof of tracing to overcome the presumption in favor of community property [*Estate of Murphy (1976) 15 Cal. 3d 907, 918, 126 Cal. Rptr. 820, 544 P.2d 956* ; *In re Marriage of Johnson (1983) 143 Cal. App. 3d 57, 61, 191 Cal. Rptr. 545]* .

Chronological records showing every deposit and every expenditure must be presented. A party's oral testimony of intent combined with evidence that separate property expenditures did not exceed separate property deposits during a particular time period are insufficient to directly trace the property to a separate source [*In re Marriage of Frick (1986) 181 Cal. App. 3d 997, 1011, 226 Cal. Rptr. 766* ; *In re Marriage of Stoll (1998) 63 Cal. App. 4th 837, 841-843, 74 Cal. Rptr. 2d 506* (distinguishing tracing requirements for bank accounts and valuing separate property ownership in realty transmuted to community property); *but see In re Marriage of Mix (1975) 14 Cal. 3d 604, 614-615, 122 Cal. Rptr. 79, 536 P.2d 479* (while wife's itemized schedule, prepared by herself and accountant, would ordinarily have been inadequate to establish her claim, when coupled with her testimony trial court was warranted in finding she directly traced certain properties to separate funds)]. If periodic payments have been made, the evidence must show that each

payment was made when separate property funds were present in the account and each withdrawal was accompanied by an intent to use separate funds [*In re Marriage of Higinbotham (1988) 203 Cal. App. 3d 322, 329, 249 Cal. Rptr. 798]* . It is not sufficient to present specific excerpts from the accounts [*In re Marriage of Frick (1986) 181 Cal. App. 3d 997, 1011, 226 Cal. Rptr. 766]* , summaries of the accounts [*In re Marriage of Mix (1975) 14 Cal. 3d 604, 612, 122 Cal. Rptr. 79]* , or evidence that separate funds were available in a separate account when purchases were made but the purchase money is not specifically traced to that account rather than to a community account [*In re Marriage of Marsden (1982) 130 Cal. App. 3d 426, 442-443, 181 Cal. Rptr. 910]* .

At least one commentator has suggested that an additional element of a successful tracing is that the intent to acquire separate property has been communicated to the other spouse [*see* Wagner, *To Disclose or Not to Disclose? That Is the Question, 5 Cal.Fam.* Law Monthly 1 (August 1988) (Matthew Bender)]. The premise behind this suggestion is that during marriage each spouse owes to the other a fiduciary duty analogous to that of a business partner [*see Fam. Code § 721(b*); *see also* *Weinberg v. Weinberg (1967) 67 Cal. 2d 557, 563, 63 Cal. Rptr. 13, 432 P.2d 709* ; *Vai v. Bank of America (1961) 56 Cal. 2d 329, 339, 15 Cal. Rptr. 71, 364 P.2d 247]* . Although this view has not specifically been adopted in the tracing context since the enactment of legislation imposing broad disclosure requirements on spouses [*see Fam. Code §§ 721(b), 1100(e)*], counsel may wish to raise the issue in opposition to a separate property claim.

[b] Family Expense Tracing

The method known as "family expense tracing," or "recapitulation," is based on the presumption that family expenses are paid from community funds before they are paid from separate funds. If at the time of acquisition of the property, it can be shown that all community income in the commingled account has been exhausted by family expenses, then all funds remaining in the account at the time the property was purchased were necessarily separate funds. However, the recapitulation method may be employed only when, through no fault of the spouse asserting a separate property interest, it is impossible to ascertain the balance of income and expenditures at the time the property was acquired [See v. See *(1966) 64 Cal. 2d 778, 783, 51 Cal. Rptr. 888, 415 P.2d 776* ; *In re Marriage of Higinbotham (1988) 203 Cal. App. 3d 322, 329, 249 Cal. Rptr. 798]* .

The evidence must be sufficient to establish the actual amounts of community income and expenses over the course of the marriage. Evidence that only establishes the availability of separate funds on particular dates without also showing any disposition of the funds is not sufficient proof of tracing to overcome the presumption in favor of community property [*In re Marriage of Higinbotham (1988) 203 Cal. App. 3d 322, 330, 249 Cal. Rptr. 798]* .

[3] Exceptions to Tracing

[a] Form of Title Presumptions

The form of title to property that has been commingled, such as an account, or to property purchased with commingled funds, may significantly affect whether tracing principles may be used in characterizing the property. In general, if title or record ownership of an account or other property is acquired in the name of only one spouse during marriage, and no other special circumstances exist or characterization principles apply [*see, e.g., Fam. Code § 770(a)(2)* (property acquired by gift as separate property); *see also* *In re Marriage of Weaver (1990) 224 Cal. App. 3d 478, 486, 273 Cal. Rptr. 696]* , the broad community presumption that arises from acquisition of property during marriage [*Fam. Code § 760*] will apply in property disputes between spouses, as discussed in *§ 122.33[3]*, and this more general presumption may be overcome by tracing [*see* See v. See *(1966) 64 Cal. 2d 778, 783, 51 Cal. Rptr. 888, 415 P.2d 776* ; *cf.* *In re Marriage of Higinbotham (1988) 203 Cal. App. 3d 322, 327-329, 249 Cal. Rptr. 798* (each party had separate account containing commingled funds; tracing principles were applicable, though husband failed to successfully trace disputed amounts to separate property); *but see* *In re Marriage of Broderick (1989) 209 Cal. App. 3d 489, 496-497, 257 Cal. Rptr. 397* (quitclaim deed from wife raised presumption from title that husband owned home as separate property; this presumption could not be overcome solely by tracing)].

By contrast, if the disputed property was acquired during marriage in joint title, a community presumption arises from the title for purposes of dividing the property on marital dissolution or legal separation, and this presumption cannot be overcome by mere tracing. The presumption can only be overcome by a writing that meets statutory requirements [*see Fam. Code §§ 2580, 2581*; *In re Marriage of Hilke (1992) 4 Cal. 4th 215, 223-224, 14 Cal. Rptr. 2d 371, 841 P.2d 891]* . However, whether this "joint form-community property" presumption, or any other title presumption, is applicable to the proceeding depends on a number of factors, as discussed in *§ 122.33[4]*.

Nevertheless, if the "joint form-community property" presumption applies and is not rebutted, or the property is otherwise found to be community property, the court must apply a special reimbursement rule, at least if the property was acquired on or after January 1, 1984, and the family law proceeding was commenced on or after that date [*see In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1216-1217, 1221 n.8, 44 Cal. Rptr. 2d 155, 899 P.2d 1349* ; *In re Marriage of Bankovich (1988) 203 Cal. App. 3d 49, 54-56, 249 Cal. Rptr. 713* ; *see also Fam. Code §§ 2580, 2581, 2640(a), (b)*]. Under this rule, the court is required to order reimbursement to any party who has made separate property contributions to the acquisition of the community property to the extent that he or she can *trace* these to a separate source, unless this reimbursement right has been waived in writing [*Fam. Code § 2640(b)*]. For further discussion of this rule, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

Furthermore, special statutory provisions now generally govern accounts of married persons in bank, savings, and similar accounts in financial institutions [*see Prob. Code §§ 5100 et seq., 5201*]. Although the application of these statutes to marital dissolution proceedings is presently unclear (see Ch. 222, *Dissolution of Marriage: Property Division and Valuation*), they should at least control for purposes of ownership in proceedings between the spouses and a third party creditor, or in probate proceedings [*see Prob. Code § 5201*; *see also Estate of Petersen (1994) 28 Cal. App. 4th 1742, 1750-1751, 1754, 34 Cal. Rptr. 2d 449* (probate case)]. Among these is *Prob. Code Section 5305*. It provides, in part, that if parties to an account are married to one another, their net contribution to the account is generally presumed to be community property [*Prob. Code Section 5305(a)*]. However, notwithstanding *Fam. Code §§ 2581* and *2640*, this presumption is one affecting the burden of proof and may be rebutted by proof of either of the following [*see Prob. Code § 5305(b)*; *see, e.g., Estate of Castiglioni (1995) 40 Cal. App. 4th 367, 383-385, 47 Cal. Rptr. 2d 288* (construing statute in context of murder of joint tenant-spouse). *Estate of Petersen (1994) 28 Cal. App. 4th 1742, 1754, 34 Cal. Rptr. 2d 449* (mere designation of account as "joint tenants," without unambiguous statement of right of survivorship, did not, as matter of law, overcome community presumption raised by account statute, but reference to joint tenancy in account statement raised triable issue of fact on form of ownership and control of funds)]:

> (1) The sums on deposit that are claimed to be separate property can be traced from separate property, unless it is proved that the spouses made a written agreement expressing their clear intent that such sums be their community property; or
>
> (2) The spouses made a written agreement, separate from the deposit agreement, expressly providing that the sums on deposit, which are claimed not to be community property, were not to be community property.

Other related statutes describe "joint accounts of husband and wife" and "community property accounts of husband and wife" [*see Prob. Code § 5203(a)(4), (5)*]. For further discussion of these provisions, see the discussion in Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

[b] Increase in Property's Value Due to Spouse's Efforts

Through a particular application of tracing principles, the general rule has developed that the "rents, issues, and profits" of separate property are separate property [*see Fam. Code § 770(a)(3)*], and the "rents, issues, and profits" of community property are community property [*Beam v. Bank of America (1971) 6 Cal. 3d 12, 17, 98 Cal. Rptr. 137,*

490 P.2d 257 ; *see Boyd v. Oser (1944) 23 Cal. 2d 613, 621, 145 P.2d 312* ; *see also Estate of Rattray (1939) 13 Cal. 2d 702, 707, 91 P.2d 1042]* . However, when a spouse's skills and effort, a community asset, are invested in his or her separate property, such as a business, the community may be entitled to an interest in the resulting increased value and profits [*see Beam v. Bank of America (1971) 6 Cal. 3d 12, 17, 98 Cal. Rptr. 137, 490 P.2d 257]* . Accordingly, this possible entitlement to an apportioned interest forms the basis for another "exception" to tracing rules concerning commingled property.

Under this exception, a portion of the increased value and profits of a spouse's separate property due to that spouse's expenditure of skill, efforts, and industry during marriage will be allocated as community property, and divided in the family law proceeding [*See Beam v. Bank of America (1971) 6 Cal. 3d 12, 17, 98 Cal. Rptr. 137, 490 P.2d 257* ; *Weinberg v. Weinberg (1967) 67 Cal. 2d 557, 567-568, 63 Cal. Rptr. 13, 432 P.2d 709* ; *In re Marriage of House (1980) 106 Cal. App. 3d 434, 438, 165 Cal. Rptr. 145]* . Two alternative formulas have been developed by the courts to divide separate and community interests in a separate property interest on dissolution, and are referred to as the *Pereira* and *Van Camp* approaches. Application of these formulas do not require tracing of the commingled property, but involve an apportionment formula [*Pereira v. Pereira (1909) 156 Cal. 1, 103 P. 488* ; *Van Camp v. Van Camp (1921) 53 Cal. App. 17, 199 P. 885]* . For further discussion, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 122.36 Credit Purchases and Borrowed Money

[1] Overview

Characterization of property acquired through a seller's extension of credit or by the use of loan proceeds requires consideration of the seller's or lender's intention to rely on separate or community property in satisfying the debt. Although the property, if acquired during marriage, otherwise is subject to the general community presumption of *Fam. Code § 760*, the "intent of the lender" must be analyzed because case law has established this as a more specific characterization principle with respect to credit or loan acquisitions [*see Gudelj v. Gudelj (1953) 41 Cal. 2d 202, 210-211, 259 P.2d 656* ; *but see In re Marriage of Grinius (1985) 166 Cal. App. 3d 1179, 1186-1187, 212 Cal. Rptr. 803* (discussing application of intent of lender test)].

However, a showing of lender intent will not conclusively characterize the property if, for example, the parties have otherwise agreed to hold the property in a particular way. Accordingly, use of the lender's intent analysis does not preclude the application of other relevant characterization principles [*see, e.g., In re Marriage of Dawley (1976) 17 Cal. 3d 342, 357-358, 131 Cal. Rptr. 3, 551 P.2d 323* (the--now former--Family Law Act presumptions do not govern status of marital property if there is prenuptial agreement containing stipulations to the contrary)]. Moreover, characterization of a debt that results from acquiring property through a loan or on credit may require the application of further specialized rules, because in some instances the asset might be of one character and the debt, another, such as in the context of a gift. For a general discussion of characterizing debts, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

[2] Use of "Intent of Lender" Analysis

[a] When Needed

Analysis of the "intent of the lender" is essential when (1) credit is extended or a loan is made without other property as security; (2) credit or a loan is secured only by separate or only by community property; or (3) credit or a loan is secured by both separate and community property.

[b] Unsecured Transactions

In the case of an unsecured transaction, a seller or lender is presumed to have relied on the personal credit of the spouse who obtained the credit or loan; thus, characterization of that personal credit as separate or community raises a similar presumption with respect to the property acquired. Case law has established that the personal credit of a spouse is a community asset if the transaction occurred during marriage [*see In re Marriage of Stitt (1983) 147 Cal. App. 3d 579, 585, 195 Cal. Rptr. 172* ; *Ford v. Ford (1969) 276 Cal. App. 2d 9, 13, 80 Cal. Rptr. 435]* . Conversely, a spouse's personal credit would be a separate asset if the transaction took place before marriage [*see generally Bank of California v. Connolly (1973) 36 Cal. App. 3d 350, 375-376, 111 Cal. Rptr. 468* ; *see also Fam. Code §§ 770, 771*].

[c] Credit Secured by One Type of Property

In the case of a credit or loan transaction secured by property of one type only (separate or community), a presumption is raised that the seller or lender relied on the property secured in extending credit or in loaning funds. Thus, for example, funds borrowed by a hypothecation (pledge) of a spouse's separate property, even if carried out during marriage, are presumed to be separate property [*see Bank of California v. Connolly (1973) 36 Cal. App. 3d 350, 375-376, 111 Cal. Rptr. 468]* . If it were not for the "intent of the lender" analysis, the general community presumption for property acquired during marriage would apply [*see Fam. Code § 760*].

[d] Credit Secured by Both Separate and Community Property

If the credit or loan transaction occurs during marriage and involves both separate and community property, a more complex analysis must be made to determine the creditor's or lender's intent. Generally, absent evidence tending to prove that the seller or lender primarily relied on the purchaser's separate property in extending credit or granting the loan, the property purchased or money borrowed is presumed to be community property, when it was acquired during marriage. With regard to the rebuttable presumption that property acquired on credit during marriage is community property, the California Supreme Court in one case held that in the absence of evidence tending to prove that the seller primarily relied on the purchaser's separate property in extending credit, the trial court must find in accordance with the presumption [*Gudelj v. Gudelj (1953) 41 Cal. 2d 202, 210-211, 259 P.2d 656]* . However, if a loan is secured by a specific separate property asset, this generally implies that the lender intended to look mainly to that asset as security for the loan. Funds borrowed by hypothecation of a spouse's separate property generally are separate property [*see Estate of Abdale (1946) 28 Cal. 2d 587, 592, 170 P. 2d 918]* .

However, at least one reported decision has questioned this formulation of the rule, as set forth in *Gudelj*. An appellate court has noted that earlier cases had examined whether separate property was solely relied on as the basis for extending credit. Later cases, while nominally following the "primary reliance" analysis, had not made a separate property finding unless there was evidence of sole reliance. Accordingly, this appellate court restated the applicable rule as follows: loan proceeds acquired during marriage are presumptively community property; however, this presumption may be overcome by showing that the lender intended to rely solely on a spouse's separate property and did in fact do so. Without satisfactory evidence of the lender's intent, the general presumption prevails [*see In re Marriage of Grinius (1985) 166 Cal. App. 3d 1179, 1186-1187, 212 Cal. Rptr. 803]* . Nevertheless, long-standing Supreme Court authority favors the *Gudelj* rule that looks to the lender's or creditor's "primary" intent [*Gudelj v. Gudelj (1953) 41 Cal. 2d 202, 210-211, 259 P.2d 656* ; *cf. Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 455, 20 Cal. Rptr. 321, 369 P.2d 937* (application of *stare decisis* to inferior tribunals)].

[e] Evidence in Particular Cases

When a general community presumption regarding property has been raised, the presumption may be overcome by evidence that the property or funds were obtained by the hypothecation of a spouse's separate property. This requires a showing that the property hypothecated was in fact separate property, and the fact that the borrowing spouse holds

record title to the hypothecated property may not be enough to rebut the community presumption [*see Guerin v. Guerin (1957) 152 Cal. App. 2d 696, 708, 313 P.2d 902]* .

Conversely, the fact that both spouses join in signing notes and security instruments to obtain a loan does not automatically mean that the funds obtained are community property [*see, e.g., In re Marriage of Dawley (1976) 17 Cal. 3d 342, 357-358, 131 Cal. Rptr. 3, 551 P.2d 323* (parties' premarital agreement controlled characterization)]. The signature of either or both spouses during marriage is evidence the lender intended to rely on the personal credit of one or both spouses. Such personal credit is community property [*see In re Marriage of Stitt (1983) 147 Cal. App. 3d 579, 585-586, 195 Cal. Rptr. 172]* . The most important factor is the character of the property on the faith and credit of which the loan is made, rather than who signed the loan documents [*Kenney v. Kenney (1954) 128 Cal. App. 2d 128, 137-139, 274 P.2d 951 , disapproved on other grounds, (1966) 64 Cal. 2d 778, 785, 51 Cal. Rptr. 888, 415 P.2d 776*)].

However, when a loan is secured by separate property of one spouse, and both spouses have signed the loan documents, the parties' signatures may imply the use of community credit. It is the lender's predominant intent that determines the characterization of loan proceeds. The mere fact that the other spouse signed the loan documents does not change the separate property character of the loan proceeds when funds are secured by giving the other spouse's separate property as security [*see Ford v. Ford (1969) 276 Cal. App. 2d 9, 13, 80 Cal. Rptr. 435]* . Another appellate court upheld a trial court's finding that a loan made to a husband shortly after marriage was based on his separate property credit, when the husband's community earnings were not of paramount importance, and his separate property estate exceeded $500,000 [*see Hicks v. Hicks (1962) 211 Cal. App. 2d 144, 27 Cal. Rptr. 307]* .

Similarly, when a residence is purchased during marriage with a separate property down payment of one spouse and a loan for the balance of the purchase price, the balance paid by the loan is community property when the lender clearly relied on the other spouse's earnings in approving the loan [*see In re Marriage of Aufmuth (1979) 89 Cal. App. 3d 446, 455-456, 152 Cal. Rptr. 668* (disapproved in part, in *In re Marriage of Lucas (1980) 27 Cal. 3d 808, 815, 166 Cal. Rptr. 853, 614 P.2d 285]* . For discussion of special rules on the apportionment of interests in a family residence and discussion of reimbursement for separate property contributions to the acquisition of community property [*see Fam. Code § 2640*], see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

[3] Wife's Pre-January 1, 1975, Property

In determining the character of property acquired with borrowed funds or purchased on credit, an additional factor to be considered is the presumption contained in *Fam. Code § 803* concerning property acquired by a married woman before January 1, 1975. Under that statute, any real or personal property, or interest therein or encumbrance thereon, acquired before January 1, 1975, by a married woman by a written instrument is presumed to be her separate property. An additional presumption concerns such property acquired by a married woman and any other person. These presumptions are exceptions to the general presumption that property acquired during marriage is community property [*see Fam. Code § 760*].

Case law has established that if a wife borrowed funds before January 1, 1975, taking title in her own name, but using community property as security, the presumption that the funds are her separate property may be overcome by a showing that (1) the loan was made on the security of the community property, and (2) there was no intent on the part of the husband to make a gift of his community property interest in the funds obtained [*Hogevoll v. Hogevoll (1943) 59 Cal. App. 2d 188, 196, 138 P.2d 693]* . For a related discussion of pre-January 1, 1975, property of a married woman, *see § 122.32[2][c]*

Legal Topics:

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

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§ 122.37 Community Property Transferred to Trust

Fam. Code § 761 sets forth provisions governing the treatment of community property that is transferred to a trust. *Fam. Code § 761(a)* provides that, unless the trust instrument or instrument of transfer expressly provides otherwise, community property that is transferred in trust remains community property during the marriage, regardless of the identity of the trustee, in the following circumstances:

> (1) The trust, originally or as amended before or after the transfer, provides that the trust is revocable with respect to that property during the marriage; and
>
> (2) The power, if any, to modify the trust with respect to the rights and interests in that property during the marriage may be exercised only with the joinder or consent of both spouses.

According to the California Law Revision Commission, this provision is intended to be consistent with *Rev. Rul. 66-283* in order to obtain community property income tax treatment for the trust property under the Internal Revenue Code [*see I.R.C. § 1014(b)(6)*], but whether the terms of a particular trust are sufficient to obtain such treatment is ultimately a matter of federal law [Cal. L. Revision Comm'n Comment to *Fam. Code § 761*].

The statute further states that, unless the trust instrument expressly provides otherwise, a power to revoke with respect to community property may be exercised by either spouse acting alone [*see Estate of Powell (2000) 83 Cal. App. 4th 1434, 100 Cal. Rptr. 2d 501* (revocation of trust by one spouse is effective as to entire community property trust corpus; but revocation is effective only as to revoking party's share in separate property in trust)]. Community property, including any income or appreciation, that is distributed or withdrawn from a trust by revocation, power of withdrawal, or otherwise, remains community property unless there is a valid transmutation of the property at or before the time of distribution or withdrawal [*Fam. Code § 761(b)*; *see Estate of Powell (2000) 83 Cal. App. 4th 1434, 100 Cal. Rptr. 2d 501* (under Probate Code, spouse's death transmutes community property interests in trust to separate property; therefore, revocation of trust by surviving spouse was only effective as to his half of trust corpus, which was his separate property)].

Furthermore, the trustee may convey and otherwise manage and control the trust property in accordance with the provisions of the trust without the joinder or consent of the husband or wife unless the trust expressly requires the joinder or consent of one or both spouses [*Fam. Code § 761(c)*]. In other words, the trustee may manage the trust community property in the same manner as other trust assets, free from the general limitations on disposition of community property imposed on spouses, unless the trust expressly provides such limitations [Cal. L. Revision Comm'n Comment to *Fam. Code § 761*].

The foregoing rules, which were first established by the predecessor to *Fam. Code § 761* [*see* former *Civ. Code § 5110.150*], apply with respect to a transfer made before, on, or after July 1, 1987. Note that nothing in *Fam. Code § 761* affects the community character of property that is transferred before, on, or after July 1, 1987, in any manner or to a trust other than described in that section [*Fam. Code § 761(d), (e)*]. In other words, according to the California Law Revision Commission, *Fam. Code § 761* "does not provide the exclusive means by which community property may be held in trust without loss of its community character" [Cal. L. Revision Comm'n Comment to *Fam. Code § 761*].

Further comments by the Commission indicate the following additional points about this statute [*see* Cal. L. Revision Comm'n Comment to *Fam. Code § 761*]:

> (1) A transfer in trust by a married person is not exempt from the general limitations on transfers and transmutations by married persons acting alone [*see Fam. Code §§ 850-853, 1100, 1102*];
>
> (2) One consequence of retention of its community character is that the trust property is subject to the claims of creditors and to division at dissolution to the same extent as any other community property [*see Fam. Code § 910 et seq.* (general liability rules); *Prob. Code § 18200* (creditor's rights against revocable trust during settlor's lifetime); and
>
> (3) The interest of the decedent in the community property is subject to testamentary disposition at death, unless a contrary method of disposition is provided in the trust instrument, "as is typically the case" [*see Prob. Code § 104*]. In that situation, the spouses' traditional community property right of testamentary disposition is substantially preserved by the unilateral power of revocation [*see Fam. Code § 761(b)*]; and when the trust requires joint action for revocation, the trust "could preserve the power of testamentary disposition by granting the first spouse to die a testamentary power of modification, appointment, or disposition as to the spouse's share of the community property."

In addition, note that a transfer of community and quasi-community property to a revocable trust is presumed to be an agreement that those assets retain their character in the aggregate for purposes of any division provided by the trust [*Prob. Code § 104.5*]. There may also be collateral consequences to title being held by a trust [*cf. Heaps v. Heaps (2004) 124 Cal. App. 4th 286, 288, 290-292, 21 Cal. Rptr. 3d 239* (overly broad clause of revocable living trust caused proceeds of sale of spouses' residence to remain in trust that became irrevocable upon spouse's death); *Fisch, Spiegler, Ginsburg & Ladner v. Appel (1992) 10 Cal. App. 4th 1810, 1813, 13 Cal. Rptr. 2d 471* (placing title in revocable living trust did not preclude homeowners from availing themselves of homestead exemption)].

Legal Topics:

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

§§ 122.38[Reserved]

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§ 122.50 Management and Control of Separate Property

[1] Sole Province of Owner Spouse

The management and control of separate property is the sole province of the owning spouse, and the nonowner-spouse has no inherent authority to deal in any way with the separate property of the owner. This principle is evidenced by statutes which declare that the owner-spouse may, without consent of the other spouse, convey his or her separate property [*Fam. Code § 770(b)*] and that, except as otherwise provided by statute, neither husband nor wife has any interest in the separate property of the other [*Fam. Code § 752*; *see Foote v. Foote (1959) 170 Cal. App. 2d 435, 439, 339 P.2d 188* (citing former Civ. Code § 157)]. The owner of separate property cannot be prevented by the other spouse from dealing with his or her separate property as he or she sees fit, including resorting to whatever legal process is necessary to protect his or her interest in the property [*Foote v. Foote (1959) 170 Cal. App. 2d 435, 439, 339 P.2d 188]* .

[2] Separate Interests Held by Spouses as Joint Tenants or Tenants-in-Common

Consistent with the general rule cited in § 122.50, if husband and wife own property as true tenants in common or as true joint tenants [*see Fam. Code § 750* (husband and wife may hold property as joint tenants or tenants in common), *Fam. Code § 2580(c)* (property acquired by married persons after specified dates in joint tenancy form or other joint form presumed to be community property)], each has sole control of his or her interest in the property, subject to the duties imposed on all tenants in common and joint tenants [*see Code Civ. Proc. § 732* (action against joint tenant or tenant in common for waste)]. For discussion of these duties, see California Real Estate Law And Practice, Ch. 345 (Matthew Bender).

As with all joint tenants or tenants in common, neither spouse can convey the interest of the other without the other's consent. Such consent cannot be implied from the manner in which the property is used, nor from the relationship of the spouses. Thus, when a third party buyer deals solely with one spouse and is on notice of the other spouse's interest in property held by the spouses as tenants in common, the buyer cannot take any interest in the property greater than that of the dealer-spouse without the other spouse's consent [*see Williams v. Tam (1900) 131 Cal. 64, 66-67, 63 P. 133]* . Conversely, either spouse can convey his or her own interest without consent of the other.

As with any other joint tenancy, if a spouse holding property with the other spouse as joint tenants conveys his or her interest in the property, the conveyance destroys the joint tenancy. The resulting relationship between the remaining owner-spouse and the grantee of the transferring spouse is a tenancy in common [*see Estate of Baglione (1966) 65 Cal. 2d 192, 195, 53 Cal. Rptr. 139, 417 P.2d 683]* .

[3] Management and Control by Nonowner Spouse

[a] Applicability of Agency and Trust Principles

By express or implied agreement, one spouse may grant the other power to manage and control his or her separate property. When this occurs, the relationship between the spouses is governed either by principles of agency [*Estate of Nelson (1930) 104 Cal. App. 613, 621, 286 P. 439]* or by the presumption that the managing spouse holds the property in trust for the owner-spouse as a fiduciary [*Dyment v. Nelson (1913) 166 Cal. 38, 40, 134 P. 988]* , depending on the certainty with which the subject property can be characterized as the separate property of the nonmanaging spouse.

[b] Standard of Care When Separate Property Character is Clear

An agency relationship between the owning spouse and the managing spouse will be found when title to the subject property is in the name of the owning spouse. In such a case, the character of the property as separate property is clear, and the role of the nonowner-spouse as manager is apparent [*see Estate of Nelson (1930) 104 Cal. App. 613, 621, 286 P. 439]* .

[c] Standard of Care When Separate Property Character is Unclear

When the character of the subject property as the separate property of the nonmanaging spouse is not clear, the managing spouse is bound to the higher standard of care required of a fiduciary in a trust relationship. This situation may arise, for example, when the bare legal title is in the name of the nonowner-spouse, or when the property's character can be determined only through tracing the source of the funds used to acquire it. The greater risk of mismanagement in this situation justifies the higher standard of care imposed on the managing spouse [*see Dyment v. Nelson (1913) 166 Cal. 38, 40, 134 P. 988]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 122.51 Management and Control of Community Personal Property

[1] Equal Management and Control Rule

With certain exceptions (§ 122.51[3]), either spouse has management and control of community personal property [*Fam. Code § 1100(a)*]. This rule applies regardless of whether the property was acquired before, on, or after January 1, 1975, the effective date of the equal management and control statute [*Fam. Code § 1100(a)*; Stats. 1973, ch. 987]. The grant of equal management and control gives each spouse the same power of disposition, other than testamentary, as he or she has of his or her separate property [*Fam. Code § 1100(a)*]. As a corollary to equal management and control, the community property is generally liable for the debts and torts of both spouses [*Fam. Code § 910(a)* (debts), 1000(b) (torts); for further discussion, *see* Ch. 359, *Marriage*].

The equal management and control rule makes husbands and wives true economic partners in the eye of the law [*see Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 35, 283 Cal. Rptr. 584, 812 P.2d 931* (equal management and control called "a radical and significant change in community property law" and "a landmark step toward recognizing equality of the spouses")]. A related statute recognizes this equality by providing that a married woman is entitled to obtain credit in her own name based on the assets of the community to the same extent that a married man managing and controlling the same amount of property would be entitled to obtain credit [*see Civ. Code § 1812.30*].

One problem with equal management and control is the potential for conflicting independent decisions made by each spouse concerning specific community property. The exceptions to and qualifications of the equal management and control rule (§ 122.51[3]) may mitigate this potential problem. Alternatives to equal management and control are *set forth in § 122.55*.

[2] Prior Law and Retroactive Application of Rule

The equal management and control rule was effective January 1, 1975 [Stats. 1973, ch. 987], and applies to all community personal property whether acquired before, on, or after that date [*Fam. Code § 1100(a)*]. However, this is the extent of its retroactivity. The rule of equal management and control does not extend to property transactions or management and control decisions which occurred before January 1, 1975. The validity of these transactions and

decisions is governed by the law in effect at the time the transaction or decision occurred [In re Marriage of *Coffin (1976) 63 Cal. App. 3d 139, 154-155, 133 Cal. Rptr. 583]* . Therefore, the former management and control statutes and cases decided under them still have direct relevance to management and control decisions made before January 1, 1975.

Before January 1, 1975, the husband had primary responsibility for the management and control of community personal property [former *Civ. Code § 5125*]. The wife had only limited management and control of community personal property earned by her or received by her in satisfaction of a judgment for damages for personal injuries suffered by her [former *Civ. Code § 5124*]. The only restrictions on the husband's management and control powers were his responsibilities as a fiduciary vis-a-vis the wife when negotiating a marital termination agreement [*see In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 154-155, 133 Cal. Rptr. 583]* , and the provision that he could not, without his wife's written consent [former *Civ. Code § 5125*],

(1) Make a gift of community personal property;

(2) Dispose of community personal property without a valuable consideration; or

(3) Sell, convey, or encumber the furniture, furnishings or fittings of the home, or the clothing or wearing apparel of the wife or minor children.

Under the equal management and control rule, the restrictions listed above are carried over from the prior law and made applicable to both spouses [*see Fam. Code § 1100(b), (c)*]. Therefore, decisions concerning the application of these restrictions in transactions occurring before January 1, 1975 are relevant to the validity of transactions occurring after January 1, 1975.

[3] Exceptions and Qualifications to Rule

The major qualification to the equal management and control rule is the rule that each spouse must act with respect to the other spouse in the management and control of the community property in accordance with the general rules governing fiduciary relationships which control the actions of persons having relationships of personal confidence [*Fam. Code § 1100(e)*; see *Fam. Code § 721*]. This rule is discussed in *§ 122.51[4]*.

To limit potential conflicts stemming from the equal right to manage and control community personal property, the Legislature has also established these specific exceptions to the equal management and control rule:

(1) A spouse may not make a gift of community personal property or dispose of such property for less than fair and reasonable value without the written consent of the other spouse, subject to special nonprobate transfer rules [*Fam. Code § 1100(b)*; *see Prob. Code § 5010 et seq.*]. This exception is discussed in *§ 122.51[6]*.

(2) A spouse may not sell, convey, or encumber community personal property used as the family dwelling, or the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children which is community personal property, without the written consent of the other spouse [*Fam. Code § 1100(c)*]. This exception is discussed in *§ 122.51[9]*.

(3) Subject to the restrictions set out in (1) and (2), above, a spouse who is operating or managing a business or an interest in a business that is all or substantially all community personal property has the primary management and control of the business or interest [*Fam. Code § 1100(d)*]. This exception is discussed in *§ 122.51[10]*.

(4) Community property transferred to a revocable trust that conforms to statutory requirements is

exempt from equal management and control [*see Fam. Code § 761*].

(5) Equal management and control is not applicable when one or both spouses are incompetent [*see Fam. Code § 1103*; *see also Prob. Code § 3000 et seq.*]. Generally, a spouse's right to manage and control community property is not affected by the lack or alleged lack of legal capacity [*see Prob. Code § 3012*] of the other spouse [*Prob. Code § 3051(a)*]. Moreover, when one spouse has a conservator of the estate and thus lacks legal capacity [*see Civ. Code § 40*; *Prob. Code § 3012*], the spouse who has legal capacity has the exclusive management and control of the community property, and the community property is not included in the conservatorship estate unless the competent spouse consents in writing to such inclusion [*Prob. Code § 3051(b), (c)*]. However, if an act of management and control normally requires the consent of both spouses under *Family Code Section 1100*, for example to validate a gift of community property, the spouse with legal capacity must obtain the joinder or consent of the conservator of the other spouse [*Prob. Code § 3071(a), (b)*].

[4] Good Faith Requirements

[a] Fiduciary Duty

As of January 1, 1991, each spouse must act with respect to the other spouse in the management and control of the community property in accordance with the general rules that govern fiduciary relationships between persons who have confidential relations with each other [*Fam. Code §§ 721(b), 1100(e)*; Stats. 1991, ch. 1026]. The statement of legislative intent concerning this directive declares that spouses occupy a confidential and fiduciary relationship with each other in which each spouse places trust and confidence in the integrity, honesty, and fairness of the other [*see* Stats. 1991, ch. 1026, § 2].

In transactions between themselves, spouses have a duty to act with the highest good faith and fair dealing, and neither spouse may take any unfair advantage of the other [*Fam. Code § 721(b)*]. The fiduciary relationship between spouses is subject to the same rights and duties as those applicable to nonmarital business partners [*see Fam. Code § 721(b)*; *Corp. Code §§ 16403, 16404, 16503*; *see also In re Marriage of Walker (2006) 138 Cal. App. 4th 1408, 1427-1428, 42 Cal. Rptr. 3d 325* (2002 amendment to *Fam. Code § 721*, which based scope of spousal fiduciary duty on duties that did not exist before 2002 amendment, makes *Fam. Code § 721* retroactive, to extent that *Corp. Code §§ 16403, 16404*, and *16503* impose greater duties on partners than did former *Corp. Code §§ 15019-15022*)] which include but are not limited to the following:

(1) Providing each spouse access at all times to any books kept regarding a transaction for the purposes of inspection and copying [*Fam. Code § 721(b)(1)*];

(2) Rendering, on request, true and full information of all things affecting any transaction that concerns the community property, although no duty is imposed on either spouse to keep detailed books and records of community property transactions [*Fam. Code § 721(b)(2)*]; and

(3) Accounting to the spouse, and holding as a trustee, any benefit or profit derived from any transaction that concerns community property and that is made by one spouse without the consent of the other spouse [*Fam. Code § 721(b)(3)*].

A spouse can be subject to a statutory breach of fiduciary duty under *Fam. Code § 721(b)* for mismanagement of separate property, as well as community property. No distinction is made between a spouse's duty to deal fairly and in good faith with separate property and a spouse's duty to deal fairly and in good faith with community property [*In re Marriage of Walker (2006) 138 Cal. App. 4th 1408, 1419, 42 Cal. Rptr. 3d 325]* .

With respect to management and control of community property, the fiduciary relationship is presumed to exist until the property is divided by the parties or a court, and is subject to the standards set forth in *Fam. Code § 721* [*Fam. Code § 1100(e)*; *see Worton v. Worton (1991) 234 Cal. App. 3d 1638, 1648, 286 Cal. Rptr. 410* ; *see also In re Marriage of Varner (1997) 55 Cal. App. 4th 128, 144, 63 Cal. Rptr. 2d 894* ; *cf. In re Stanifer (9th Cir. B.A.P. 1999) 236 B.R. 709* (former husband had fiduciary duty to disclose receipt of pension benefits to former wife and his debt to her for pension benefits received by him before court-ordered division of benefits was nondischargeable in bankruptcy)]. Accordingly, even after the parties separate a spouse can be held accountable for breach of fiduciary duty in managing community assets [*see In re Marriage of Quay (1993) 18 Cal. App. 4th 961, 972-973, 22 Cal. Rptr. 2d 537* (risky loan assigned to husband who violated fiduciary duty while managing community assets)].

The fiduciary duties of a spouse are not limited to those enumerated in *Family Code Section 721(b)*. When a court, relying on the absence of the words "but not limited to," construed the statute as excluding duties not specifically included [*see In re Marriage of Duffy (2001) 91 Cal. App. 4th 923, 940, 111 Cal. Rptr. 2d 160* (spouse did not breach any fiduciary duty by investing community assets in risky stocks)], the legislature promptly added the missing phrase and stated its intent to abrogate the court's ruling and to clarify that the fiduciary relationship between spouses includes all of the same rights and duties in the management of community property as the rights and duties of unmarried business partners managing partnership property [Stats. 2002, ch. 310].

The fiduciary duty regarding management and control includes the obligation to disclose fully all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and all debts for which the community is or may be liable. Each spouse must also provide the other, on request, with equal access to all information, records, and books that pertain to the value and character of those assets and debts [*Fam. Code § 1100(e)*; *In re Marriage of Walker (2006) 138 Cal. App. 4th 1408, 1421, 42 Cal. Rptr. 3d 325* (on request, spouse must make full disclosure of all material facts regarding valuation of community assets *and* must provide access to all records pertaining to those values); *see Schnabel v. Superior Court (1994) 5 Cal. 4th 704, 715, 21 Cal. Rptr. 2d 200, 854 P.2d 1117* ; *but see In re Marriage of Duffy (2001) 91 Cal. App. 4th 923, 937-939, 111 Cal. Rptr. 2d 160* (husband he did not breach duty of full disclosure on certain investments); *In re Marriage of Reuling (1994) 23 Cal. App. 4th 1428, 1435-1437, 28 Cal. Rptr. 2d 726* (husband had no duty under *Fam. Code § 1100(e)* to disclose "insider" information about stock value, because federal laws governing insider trading preempt state disclosure laws)].

Finally, because spouses occupy confidential relations with one another, when an interspousal transaction creates an advantage for one spouse over the other, a presumption of undue influence arises, and the burden of overcoming this presumption rests with the spouse who has obtained the advantage [*In re Marriage of Haines (1995) 33 Cal. App. 4th 277, 297, 39 Cal. Rptr. 2d 673* ; *see In re Marriage of Balcof (2006) 141 Cal. App. 4th 1509, 1519-1522, 47 Cal. Rptr. 3d 183* (presumption of undue influence was not rebutted when wife secured husband's agreement to transfer 20 percent of his separate property corporation and his share of marital residence to her as result of her threats and numerous instances of verbal and physical abuse directed at husband); *In re Marriage of Delaney (2003) 111 Cal. App. 4th 991, 996, 4 Cal. Rptr. 3d 378* (deed transfer of separate property home to joint tenancy in conjunction with bank loan gave rise to presumption of undue influence by wife); *In re Marriage of Lange (2002) 102 Cal. App. 4th 360, 364-365, 125 Cal. Rptr. 2d 379* (husband's promissory note giving wife advantage in community property transaction was unenforceable); *In re Marriage of Friedman (2002) 100 Cal. App. 4th 65, 72-73, 122 Cal. Rptr. 2d 412* (postnuptial agreement was "free of taint by fraud or compulsion"); *but cf. In re Marriage of Burkle (2006) 139 Cal. App. 4th 712, 717, 43 Cal. Rptr. 3d 181* (presumption of undue influence does not arise in interspousal transaction unless one spouse obtains unfair advantage or obtains property for which no or clearly inadequate consideration has been given, and does not apply to postmarital agreement in which both spouses obtain advantages, both are represented by counsel, each is offered full access to other's records relating to marital assets, and both acknowledge in agreement that neither has obtained unfair advantage from agreement); *In re Marriage of Kieturakis (2006) 138 Cal. App. 4th 56, 84-85, 87, 90, 41 Cal. Rptr. 3d 119* (presumption of undue influence applies to unequal marital settlement agreements, but not to marital settlement agreements reached through mediation, agreements in which parties acknowledge that no undue

influence was exercised, or when undue influence is alleged with respect to judgment that has long been final); *In re Marriage of Campbell (1999) 74 Cal. App. 4th 1058, 1065, 88 Cal. Rptr. 2d 580* (declining to apply presumption of undue influence when validity of transmutation had not first been established, in case involving spouse's premarital property held in that spouse's name alone)]. If applicable presumptions conflict, the presumption of undue influence prevails over the presumption based on record title and the presumption that property acquired in joint tenancy by a married couple is community property [*In re Marriage of Delaney (2003) 111 Cal. App. 4th 991, 997-999, 4 Cal. Rptr. 3d 378* ; *see Evid. Code § 662*; *Fam. Code § 2581*].

Generally, a spouse obtains an advantage if that spouse's position is improved, he or she obtains a favorable opportunity, or he or she otherwise gains, benefits, or profits [*In re Marriage of Mathews (2005) 133 Cal. App. 4th 624, 629, 35 Cal. Rptr. 3d 1]* . For example, a husband receives an advantage or benefit from his wife's execution of a quitclaim deed to real property in his favor, so that the property becomes his separate property. The husband has the burden of establishing that the wife's execution of the quitclaim deed was freely and voluntarily made, with full knowledge of all the facts, and with a complete understanding of its effect of making the property the husband's separate property [*In re Marriage of Mathews (2005) 133 Cal. App. 4th 624, 630, 35 Cal. Rptr. 3d 1]* . The evidentiary standard required to rebut a presumption of undue influence is a preponderance of the evidence, not clear and convincing evidence [*In re Marriage of Mathews (2005) 133 Cal. App. 4th 624, 630-632, 35 Cal. Rptr. 3d 1]* .

For a detailed discussion of the fiduciary duty between spouses, see Gray & Wagner, Complex Issues in California Family Law, Vol. A: *Fiduciary Duties--Nature and Effect: Understanding Interspousal Fiduciary Duties in Current Family Law Practice;* Vol. B: *Fiduciary Duties--A Practical Approach: Handling Fiduciary Duty Issues in the Day-to-Day Practice of Family Law* (Matthew Bender).

[b] Applicability to Postseparation Activities

In addition to their general fiduciary duty toward one another, which applies until "the property is divided by the parties or by a court" [*Fam. Code § 1100(e)*], separated spouses have a specific duty of disclosure imposed by statute [*Fam. Code §§ 2102, 2113* (operative January 1, 1993, and applicable to any proceeding commenced on or after that date)]. The statutory requirements reflect a strong public policy in favor of full disclosure between the spouses of community, quasi-community, and separate assets and liabilities, and the related policy that protects a spouse's interest on dissolution in obtaining a fair division of assets, fair attorney's fees, and fair child and spousal support awards [*see Schnabel v. Superior Court (1994) 5 Cal. 4th 704, 711, 21 Cal. Rptr. 2d 200, 854 P.2d 1117* (discussing requirement of disclosure of information between spouses].

From the date of separation to the date of the distribution of the community or quasi-community asset or liability in question, each party is subject to the standards set forth in *Fam. Code § 721*, concerning all activities that affect the property rights of the other party, including, but not limited to, the following activities [*Fam. Code § 2102*]:

> (1) The accurate and complete disclosure of all assets and liabilities in which the party has or may have an interest or obligation and all current earnings, accumulations, and expenses, including an immediate, full, and accurate update or augmentation to the extent there have been any material changes;
>
> (2) The accurate and complete written disclosure of any investment opportunity, business opportunity, or other income-producing opportunity that presents itself after the date of separation, but that results from any investment, significant business activity outside the ordinary course of business, or other income-producing opportunity of either spouse from the date of marriage to the date of separation, inclusive. The written disclosure must be made in sufficient time for the other spouse to make an informed decision as to whether he or she desires to participate in the investment opportunity, business, or other potential income-producing opportunity, and for the court to resolve any dispute regarding the right of the other spouse to participate in the opportunity; and

(3) The operation or management of a business or an interest in a business in which the community may have an interest.

These standards may compel the disclosure of information in which third parties have a privacy interest, such as financial and tax documents of a closely-held corporation, if on balance a spouse's need for the information is determined to outweigh the third party's privacy interests [*Schnabel v. Superior Court (1992) 5 Cal. 4th 704, 715-723, 21 Cal. Rptr. 2d 200, 854 P.2d 1117]* .

With respect to an investment, business, or other income-producing opportunity, as described above, in the event of its nondisclosure, the division of any gain resulting from that investment opportunity will be governed by the standard set forth in *Fam. Code § 2556* [*Fam. Code § 2102(a)(2)*]. That section authorizes a postjudgment motion or order to show cause to divide a previously unadjudicated community asset or debt, and requires a court to equally divide the asset or debt unless the court finds on good cause shown that the interests of justice require an unequal division [*see Fam. Code § 2556*].

With regard to all activities that affect the assets or liabilities of the other party, each party continues to be subject to the standards provided in *Fam. Code § 721* from the date that a valid, enforceable, and binding resolution of the disposition of the asset or liability in question is reached, until the asset or liability has *actually been distributed*. Once a particular asset or liability has been distributed, the duties and standards set forth in Section 721 ends [*Fam. Code § 2102(b)*; *see In re Marriage of Hixson (2003) 111 Cal. App. 4th 1116, 1125, 4 Cal. Rptr. 3d 483* (former husband's duty to share investment opportunities expired when community's existing investments were distributed)].

With regard to all issues relating to child or spousal support and professional fees, each party is subject to the standards provided in *Fam. Code § 721*, including immediate, full, and accurate disclosure of all material facts and information regarding the income and expenses of the party from the date of separation to the date of a valid, enforceable, and binding *resolution* of the issues [*Fam. Code § 2102(c)*].

Notwithstanding these statutory disclosure requirements, the spousal duty of "good faith" does not require parties to expose themselves to criminal prosecution through the violation of a penal statute, or to incur the civil liability attendant to a violation of the securities laws. Thus, for example, even though a spouse may acquire information as a corporate "insider" about stock in which the community has an interest, state disclosure laws cannot require that spouse to violate federal securities laws that prohibit the release of information about the stock from the "insider" [*see In re Marriage of Reuling (1994) 23 Cal. App. 4th 1428, 1435-1437 , 28 Cal. Rptr. 2d 726* (husband had no duty under *Fam. Code § 1100(e)* to disclose "insider" information about stock value, because federal laws governing insider trading preempt state disclosure laws)]. Furthermore, after separation, although one party may not prevent the other from discovering the true value of a community asset, he or she can apparently take a position on the value of that asset that is favorable to that party [*see In re Marriage of Melton (1994) 28 Cal. App. 4th 931, 938, 33 Cal. Rptr. 2d 761* (court distinguished "sharp practice" from extrinsic fraud)].

Finally, the disclosure statutes provide for the payment of reasonable attorney's fees or costs incurred, or both, as a result of "the failure to comply with any provision of this chapter [of the Family Code]," unless a court finds that the noncomplying party acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Fam. Code § 2107(c)*]. This language appears to apply to the above disclosure provisions, though it follows a provision dealing with specific property disclosure procedures during family law proceedings. For discussion of these special procedures, which apply in proceedings commenced on or after January 1, 1993 [*see Fam. Code §§ 2100 et seq., 2113*], see Ch. 221, *Dissolution of Marriage: Procedure* .

[c] Questions Regarding Current Statutes

As with previous versions of the "good faith" statutes (discussed in *§ 122.51[5]*), the current versions of *Fam. Code §§ 721* and *1100* raise several questions concerning the fiduciary or confidential duty between spouses.

First, the amendments setting forth the current versions of *Fam. Code §§ 721* and *1100* became operative January 1, 1992, but the extent to which they may apply retroactively to transactions occurring before that date is unclear, especially in light of the stated legislative intent to "clarify" existing law [*see* Stats. 1991, ch. 1026, § 2; Stats. 1992, ch. 162 (repealing former *Civ. Code §§ 5103* and *5125* and reenacting them, without substantive changes, as *Fam. Code §§ 721* and *1100*, effective January 1, 1994); *In re Marriage of Reuling (1994) 23 Cal. App. 4th 1428, 1435-1437, 28 Cal. Rptr. 2d 726* (dicta discussing meaning of intent "to clarify" management standards of *Fam. Code §§ 721, 1100*); *see also In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 91, 260 Cal. Rptr. 403* (1986 amendments to former *Civ. Code § 5125(e)* were considered retroactive)]. One court has suggested, in dicta, however, that the statutes are not retroactive, because they impose new obligations and thus do more than simply reiterate or "clarify" existing law [*In re Marriage of Reuling (1994) 23 Cal. App. 4th 1428, 1438-1441, 28 Cal. Rptr. 2d 726* ; *but cf. In re Marriage of Quay (1993) 18 Cal. App. 4th 961, 972-973, 22 Cal. Rptr. 2d 537* (newer fiduciary standard, which became effective during parties' dissolution proceedings, held to apply, given particular circumstances of case)].

Second, the statutes refer to "fiduciary relationship" and "confidential relationship" interchangeably [*see Fam. Code § 721(b)* ("[t]his confidential relationship is a fiduciary relationship"), *Fam. Code § 1100(e)* ("Each spouse shall act ... in accordance with the general rules governing fiduciary relationships which control ... persons having relationships of personal confidence")]. However, case law has distinguished between these two relationships. The courts have defined a "confidential relationship" as the reposing of trust and confidence by one person in another who is aware thereof [*see, e.g., Vai v. Bank of America (1961) 56 Cal. 2d 329, 337-338, 15 Cal. Rptr. 71, 364 P.2d 247]* . A confidential relationship ends when the party who trusted and confided in the other withdraws that reliance [*see, e.g., Vai v. Bank of America (1961) 56 Cal. 2d 329, 338, 15 Cal. Rptr. 71, 364 P.2d 247]* . In contrast, a "fiduciary relationship" exists when one person controls another's property, and the relationship continues so long as the fiduciary may exercise that control [*Vai v. Bank of America (1961) 56 Cal. 2d 329, 338, 15 Cal. Rptr. 71, 364 P.2d 247* ; *In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 150-155, 133 Cal. Rptr. 583]* . These two relationships may exist simultaneously or separately [*Vai v. Bank of America (1961) 56 Cal. 2d 329, 337-338, 15 Cal. Rptr. 71, 364 P.2d 247* ; *see Estate of Cover (1922) 188 Cal. 133, 143, 204 P. 583* (confidential relationship existed without fiduciary one); *In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 150-155, 133 Cal. Rptr. 583* (confidential relationship ceased but fiduciary duties continued)]. Under the current statutes, the standard to apply to the relationship between spouses remains unclear because of the failure to recognize the legal distinction between confidential and fiduciary relationships.

Third, the current statutes have completely eliminated references to trust law contained in previous versions [*see* former *Civ. Code §§ 5103, 5125*], but they have continued the reference to spouses as trustees. *Fam. Code § 721(b)(3)* provides that a spouse holds as trustee any benefit or profit derived from any transaction concerning community property made without the consent of the other spouse. This provision is similar to the partnership statute on accounting for benefits and profits [*see Corp. Code § 15021* (repealed, operative January 1, 1999); *cf. Corp. Code § 16404*], and therefore may be interpreted accordingly to the duties owed by partners [*see, e.g., Leff v. Gunter (1983) 33 Cal. 3d 508, 514-518, 189 Cal. Rptr. 377, 658 P.2d 740]* . However, it could also create confusion in light of the uncertainties expressed in prior case law over application of trust laws to the marital relationship.

Fourth, the current statutes do not define the parameters of fiduciary or confidential relationships, but merely specify some of the obligations that are included. Thus, a spouse must fully disclose information on any transaction that concerns community property on request [*see Fam. Code § 721(b)(2)*], but the spouse may still dispose of certain community property without the other's consent, subject to the trustee provisions discussed in *§ 122.51[4][a]* [*see Fam. Code § 721(b)(3)*], unless otherwise prohibited by statute [*see* Fam. Code §§ 1100(b), (c) (personal property), *Fam. Code § 1102(a)* (real property)]. Although a spouse's disposal of community property is limited by the requirement that he or she act with the highest good faith and to avoid taking unfair advantage of the other spouse, along with other statutory limitations, the extent of these duties remains undefined [*see Fam. Code § 721(b)*]. For example, a spouse who

receives inadequate but legal consideration for community property may have acted with the highest good faith, and therefore may not be liable for a breach of the statutory fiduciary duty even if the other spouse were harmed. Similarly, a spouse who negligently mismanages community property may nevertheless have acted with the highest good faith and without taking unfair advantage of the other spouse.

A final concern with the interpretation of *Fam. Code §§ 721* and *1100* is the connection between partnership laws and marital rights and duties. *Fam. Code § 721(b)* sets forth rights and duties that are included within the fiduciary or confidential relationship, suggesting that there are others not mentioned. The specified rights and duties closely follow the partnership statutes referred to in *Fam. Code § 721(b)*, with changes that reflect the status of the parties as spouses instead of business partners. *Fam. Code § 721(b)(3)* includes among the rights and duties (of nonmarital business partners) imposed on spouses an accounting of benefits or profits derived from a transaction lacking consent that concerns community property, though an accounting is also available as one of the more general remedies authorized under *Fam. Code § 1101*. In light of the repetition of these rights and duties in *Fam. Code § 721(b)*, the legislative intent in also making the partnership laws applicable is unclear. The effect, however, may be to make case law related to the rights and duties of partners applicable to the relationship between spouses.

[5] Good Faith Requirements Under Prior Law

[a] Changing Nature of Good Faith Duty

The general principle that a duty of good faith is presumed to exist between spouses is of long standing. However, the nature of that duty has been variously interpreted by the courts in light of different legislative enactments [*see In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 90-91, 260 Cal. Rptr. 403* (historical review of good-faith duty); *In re Marriage of Alexander (1989) 212 Cal. App. 3d 677, 682-684, 261 Cal. Rptr. 9]* . The current standards for managing and controlling community property, discussed in *§ 122.51[4][a]*, do not extend to management and control activities that occurred while different statutory standards were in effect [*In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 154-155, 133 Cal. Rptr. 583]* .

[b] Pre-1975 Law

The validity of pre-1975 management and control activities is governed by the pre-1975 version of former *Civ. Code § 5103*, which provided that in transactions between themselves, spouses occupied confidential relations with each other, as defined by the laws governing trustees [*see* former *Civ. Code § 5103*; Stats. 1969, ch. 1608 (reenacting without substantive change former Civ. Code § 158, enacted 1872); *see also* former *Civ. Code § 2215 et seq.* (*now see Prob. Code § 15000 et seq.*)]. The courts interpreted the confidential relationship between spouses as imposing fiduciary duties with respect to each other in the management and control of community property [*see, e.g., In re Marriage of Modnick (1983) 33 Cal. 3d 897, 905, 191 Cal. Rptr. 629, 663 P.2d 187* (discussing pre-1975 transaction); *Vai v. Bank of America (1961) 56 Cal. 2d 329, 337, 15 Cal. Rptr. 71, 364 P.2d 247* ; *Estate of Cover (1922) 188 Cal. 133, 143, 204 P. 583]* . For example, the managing spouse was required to make full disclosure to the other spouse regarding the existence and use of community property [*see, e.g., In re Marriage of Modnick (1983) 33 Cal. 3d 897, 905-906, 191 Cal. Rptr. 629, 663 P.2d 187* (discussing pre-1975 transaction); *Williams v. Williams (1971) 14 Cal. App. 3d 560, 566-568, 92 Cal. Rptr. 385]* .

The courts tended to reject strict application in a community property context of the trustee statutes that required prudent business practices in the management of trust property and absolute loyalty to the beneficiary's interests [*see* former *Civ. Code § 2215 et seq.*; *see, e.g., Marsh v. Home Fed. Sav. & Loan Assn. (1977) 66 Cal. App. 3d 674, 684, 136 Cal. Rptr. 180* ; *MacIsaac v. Pozzo (1947) 81 Cal. App. 2d 278, 285, 183 P.2d 910]* . These standards were found inappropriate because a spouse, unlike a trustee, may use the property for his or her own advantage, as well as that of the other spouse, and should be free to transfer personal property without the burden of ensuring prudent management. Thus, the courts generally refused to hold the managing spouse liable as a fiduciary for negligent mismanagement of

community funds, provided no unfair advantage was taken of the other spouse [*see Bank of California v. Connolly (1973) 36 Cal. App. 3d 350, 377-378, 111 Cal. Rptr. 468* ; *Williams v. Williams (1971) 14 Cal. App. 3d 560, 567, 92 Cal. Rptr. 385]* . The managing spouse also had no fiduciary duty while dissolution proceedings were pending to provide the other spouse with information that was readily accessible through discovery or public sources [*see, e.g., In re Marriage of Connolly (1979) 153 Cal. Rptr. 423, 591 P.2d 911* (value of stock); *Boeseke v. Boeseke (1974) 10 Cal. 3d 844, 849-850, 112 Cal. Rptr. 401, 519 P.2d 161* (value of property)]. This case law remains applicable to management and control decisions made before 1975 [*see* Stats. 1973, ch. 987; *see also In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 154-155, 133 Cal. Rptr. 583]* .

[c] Post-1974 Law

Effective January 1, 1975, former *Civ. Code § 5125* was amended to give spouses equal rights in the management and control of community property and to impose a duty of good faith on the spouses in that regard. The amendment was not retroactive, and therefore it affected management and control decisions made only after that date [*see* Stats. 1973, ch. 987]. The amendment did not indicate whether the good-faith duty it imposed was connected with the confidential relations presumed to exist under former *Civ. Code § 5103* [*see* former *Civ. Code § 5125(e)*, as amended by Stats 1973, ch. 987; *see also In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 90, 260 Cal. Rptr. 403]* .

The courts of appeal conflicted in their interpretation of the 1975 amendment to former *Civ. Code § 5125(e)*. In 1983, one appellate court declared that a husband, who had sole management and control of community property since 1980, had a good-faith duty as a fiduciary under *Civ. Code § 5125(e)*. The court analogized to the fiduciary duties owed by business partners [*see In re Marriage of Munguia (1983) 146 Cal. App. 3d 853, 859, 195 Cal. Rptr. 199* (citing *Leff v. Gunter (1983) 33 Cal. 3d 508, 514-518, 189 Cal. Rptr. 377, 658 P.2d 740*)]. However, in 1984, another appellate court determined that the good-faith duty imposed by former *Civ. Code § 5125(e)* with respect to management and control decisions was less than the fiduciary duty developed in the case law related to former *Civ. Code § 5103* [*In re Marriage of Stevenot (1984) 154 Cal. App. 3d 1051, 1068,202 Cal. Rptr. 116* ; *see In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 90, 260 Cal. Rptr. 403* ; *see also In re Marriage of Cairo (1988) 204 Cal. App. 3d 1255, 1261, 251 Cal. Rptr. 731* (following *Stevenot*)].

The Legislature subsequently amended former *Civ. Code § 5125(e)*, effective July 1, 1987, to provide that spouses were subject to the rules that control persons who have confidential relationships, as specified in former *Civ. Code § 5103*. This duty included an obligation to fully disclose the existence of community assets and debts [*see* former *Civ. Code § 5125(e)*, as amended by Stats. 1986, ch. 1091; *now see Fam. Code § 721(b)*]. Certain remedies were available for transactions or events that occurred in breach of the duty on or after July 1, 1987 [*see* former *Civ. Code § 5125.1(d)(4)*; *now see Fam. Code § 1101(a), (d)(4)*].

This amendment resulted in further confusion over whether to apply trust law to interpret the extent of the confidential relations between spouses [*compare In re Marriage of Alexander (1989) 212 Cal. App. 3d 677, 682-684, 261 Cal. Rptr. 9 , with In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 91, 260 Cal. Rptr. 403]* . Effective July 1, 1987, the provisions of the Civil Code governing trustees [*see* former *Civ. Code § 2215 et seq.*] were repealed when the Trust Law was enacted as part of the Probate Code [*see Prob. Code § 15000 et seq.*]. To conform to the repeal, former *Civ. Code § 5103* was amended to delete the reference to the former trustee statutes. Because the California Law Revision's comments regarding this amendment stated that the amendment was not intended to affect the law substantively [*see* Cal. L. Revision Comm'n Comment to former *Civ. Code § 5103*], it was arguable that the statutory duties of trustees under the new Trust Law would apply to relations between spouses [*see, e.g., Prob. Code §§ 16002* (loyalty), 16004 (conflicts of interest)]. However, the 1986 amendment to former *Civ. Code § 5125(e)*, also effective July 1, 1987, specifically provided that the confidential relations between spouses in management and control of community property were to be interpreted in accordance with the case law related to former *Civ. Code § 5103*, but not with case law applicable to the former trustee statutes. Moreover, the standard of care was to be interpreted as not less than that of good faith in confidential relations, but not as high as that established by the former trustee statutes [*see In re*

Marriage of Czapar (1991) 232 Cal. App. 3d 1308, 1318, 285 Cal. Rptr. 479 ; former *Civ. Code § 5125(e)*, as amended by Stats. 1986, ch. 1091].

The 1986 amendment did not increase the good-faith obligation to any large extent [*see In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 89-91, 260 Cal. Rptr. 403* ; *see also In re Marriage of Alexander (1989) 212 Cal. App. 3d 677, 682-684, 261 Cal. Rptr. 9]* . The amendment merely extended the good-faith duty between spouses to post-separation management and control until the parties or the court divided the community property [*see In re Marriage of Alexander (1989) 212 Cal. App. 3d 677, 682-684, 261 Cal. Rptr. 9]* .

[6] Gifts of Community Personal Property

[a] Consent Requirements

A spouse may not make a gift of community personal property, or otherwise dispose of community personal property for less than fair and reasonable value, without the written consent of the other spouse. However, neither fair and reasonable value nor written consent is required if the gift is mutually given by both spouses to third parties. Moreover, these restrictions do not apply to gifts of community personal property given by one spouse to the other [*Fam. Code § 1100(b)*].

In addition, the fact that a statute permits a person to designate someone other than his or her surviving spouse as the recipient on death of property in which that spouse may have a community interest, such as unpaid wages earned during marriage, does not necessarily preclude the surviving spouse from asserting an otherwise valid community claim to the property [*see Willis v. State of California (1994) 22 Cal. App. 4th 287, 292, 27 Cal. Rptr. 2d 413* (right to last wages of deceased state employee)].

If the gift involves a nonprobate transfer of community property that is intended to become effective on the death of the donor spouse, special rules concerning the nondonor spouse's consent may also be applicable in a particular case [*see Prob. Code § 5010 et seq.*; for discussion, *see § 122.56*].

Before January 1, 1992, a spouse could not give away or otherwise dispose of community personal property without a valuable consideration, as discussed in *§ 122.51[6][c]*, unless the consent of the other spouse was obtained [*see* former *Civ. Code § 5125(b)*; *see also In re Marriage of Stephenson (1984) 162 Cal. App. 3d 1057, 1071, 209 Cal. Rptr. 383]* .

[b] Determining Fair and Reasonable Value

The appellate courts have not yet construed the term "fair and reasonable value" in the context of the requirement of *Fam. Code § 1100(b)* that a spouse disposing of community personal property obtain either fair and reasonable value for the property or the other spouse's consent to the disposition. Apparently, the 1991 legislative amendment substituting "fair and reasonable value" for "valuable consideration" was intended to prevent a spouse from incurring a loss to the marital community from which the nondonor spouse would have no recourse by unilaterally disposing of community personal property for valuable but inadequate consideration [*see Bank of California v. Connolly (1973) 36 Cal. App. 3d 350, 377, 111 Cal. Rptr. 468* ("valuable consideration" requirement of former *Civ. Code § 5127* as not requiring adequate consideration)].

[c] Valuable-Consideration Requirement of Prior Law

Before January 1, 1992, a spouse making a unilateral disposition of personal property was required to obtain either the other spouse's consent to the disposition or "valuable consideration" for the property [former *Civ. Code § 5125(b)*, prior to amendment by Stats. 1991, ch. 1026]. The case law interpreting the pre-1992 statute should remain applicable to transfers made before 1992.

"Valuable consideration" has been consistently equated with "good consideration," which is defined by *Civil Code Section 1605* as any benefit conferred, or agreed to be conferred, on the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he or she is at the time of consent lawfully bound to suffer, as an inducement to the promisor [*Gantner v. Johnson (1969) 274 Cal. App. 2d 869, 877, 79 Cal. Rptr. 381]* . Thus, "valuable consideration" does not mean "adequate consideration," that is, consideration substantially equal in value, measured in terms of money, to the value of the property allegedly given [*Bank of California v. Connolly (1973) 36 Cal. App. 3d 350, 377, 111 Cal. Rptr. 468* ; *see Willis v. Board of Administration (1986) 181 Cal. App. 3d 779, 782-783, 226 Cal. Rptr. 567* (husband's election to increase lifetime disability retirement benefits with resulting decrease in survivor benefits was made for valuable consideration in that husband received more income for his family during his lifetime)]. Apparently, the statutory amendment replacing "valuable consideration" with "fair and reasonable value" was intended to prevent spouses from unilaterally disposing of community personal property for inadequate consideration.

Valuable consideration may include the discharge of a legal obligation, such as the discharge of a premarital debt of one of the spouses [*see, e.g.,* *Burgart v. Burgart (1970) 5 Cal. App. 3d 409, 412-413, 85 Cal. Rptr. 122]* . For example, in one case, the husband used community property to pay debts and to discharge liabilities incurred in connection with the property settlement agreement which accompanied the termination of his first marriage. The court of appeal rejected the second wife's contention that in using community property to pay his premarital debt to his first wife the husband was making an unauthorized gift of community property of the second marriage [*Burgart v. Burgart (1970) 5 Cal. App. 3d 409, 412-413, 85 Cal. Rptr. 122]* .

A contrary result is reached, however, if community funds are used to discharge an illegal, and thus unenforceable, obligation incurred by one of the spouses, such as a gambling debt. Such a transfer is entirely without valuable consideration and may be set aside in its entirety during the transferor-spouse's lifetime [*Novo v. Hotel Del Rio (1956) 141 Cal. App. 2d 304, 307-308, 295 P.2d 576]* .

Receipt of tax benefits by the nondonor-spouse as the result of a gift does not alone constitute valuable consideration. In a decision involving savings accounts for minors under the former Uniform Gifts to Minors Act [former *Civ. Code § 1154 et seq.*; *now see Prob. Code § 3900 et seq.* (Uniform Transfers to Minors Act)], one court of appeal held that receipt of tax benefits attributable to the accounts did not destroy their status as gifts. The court permitted the nondonor-spouse to void transfers of community property made to the accounts without her written consent [*In re Marriage of Stephenson (1984) 162 Cal. App. 3d 1057, 1073, 209 Cal. Rptr. 383]* .

[d] Ratification of Previous Gift

A spouse may give written consent to a gift of community property after the gift has been made as well as before [*see Spreckels v. Spreckels (1916) 172 Cal. 775, 787-788, 158 P. 537]* . Consent given after the gift was made is referred to as "ratification."

In one instance, ratification occurred when a husband made substantial gifts of community assets to three of five children, and the wife subsequently provided in her will that the remainder of the estate was to go to the other two children because their father had already provided for the three donee-children. This will clause was construed as ratification of the husband's prior gift of community property [*Spreckels v. Spreckels (1916) 172 Cal. 775, 787-788, 158 P. 537]* .

[e] Consent by Conservator of Nondonor Spouse

If one spouse has legal capacity and the other spouse has a conservator of the estate, the consent requirement is satisfied if the court-approved joinder and consent of the conservator [*see Prob. Code § 3072*] and the joinder or consent of the spouse with legal capacity are obtained [*Prob. Code § 3071(a), (b)*]. A somewhat different situation is presented when a

spouse is incapable of giving consent to a gift of community property because of incompetency, and the donor-spouse is the conservator of the incompetent spouse. As conservator he or she has some power to deal with the property of the conservatee, although the general rule is that a conservator does not have the power to dispose of the conservatee's property by way of gift. To overcome this rule, the conservator-donor must show either that court permission has sanctioned the gift of the incompetent's community interest or that the incompetent spouse would have approved the gifts had he or she been competent at the time [*Harris v. Harris (1962) 57 Cal. 2d 367, 370-371, 19 Cal. Rptr. 793, 369 P.2d 481* (decided under prior law); *see Prob. Code § 2580 et seq.* (substituted judgment doctrine), 3072 (consent of conservator of estate)].

[7] Setting Aside of Improper Gifts by Nondonor Spouse

[a] Showing Required

If one spouse gives community personal property to third parties, the other spouse must show both of the following to have the gift set aside [*see Fam. Code § 1100(b)*; *see also Metzger v. Vestal (1935) 2 Cal. 2d 517, 522, 42 P.2d 67* ; *Gantner v. Johnson (1969) 274 Cal. App. 2d 869, 877, 79 Cal. Rptr. 381]* :

(1) A lack of written or mutual consent to the gift; and

(2) A lack of fair and reasonable value in exchange for the property.

[b] Survival of Right to Set Aside Gift

The present interest of a spouse in the community property [*see Fam. Code § 751*] and his or her right to dispose of one half of the community property by will [*see Prob. Code § 6101*] are property rights that are invaded by the other spouse's gift of community property without his or her consent. The cause of action for the violation of a property right survives the death of the owner of the right [*Code Civ. Proc. §§ 366.1, 377.20*; *Prob. Code §§ 7000, 7001*]. Thus, the right to set aside unilateral gifts of community property survives the death of the nonconsenting spouse and may be exercised by his or her personal representative [*Harris v. Harris (1962) 57 Cal. 2d 367, 370, 19 Cal. Rptr. 793, 369 P.2d 481* ; *cf. Prob. Code § 5010 et seq.* (nonprobate transfers of community property intended to be effective on death)].

[c] Relief From Estate of Deceased Donor Spouse

It appears that under certain circumstances a surviving spouse seeking relief from an unauthorized gift of community property made during the decedent's lifetime may proceed directly against the donor-spouse's estate, rather than bringing an action against the donee. In a case involving suit by a surviving spouse against the estate of her husband, the court, in holding that a cause of action was stated, drew an analogy to the right of a beneficiary of a trust to elect to hold the trustee personally liable for dissipation of trust funds [*Fields v. Michael (1949) 91 Cal. App. 2d 443, 447, 205 P.2d 402]* . The court said that a spouse whose community property rights have been violated is entitled to pursue whatever course is best calculated to give effective relief. When the amount of the gifts and the identity of the donees are known and the property can be readily reached, suit against the donees to recover the plaintiff's community share of the gift may be more advantageous to the plaintiff-spouse than an action against the estate of the donor-spouse, because the assets of the latter may be insufficient to satisfy a judgment. On the other hand, when recourse against the donees would be ineffective--as when donees are no longer living, are living in diverse places, or have dissipated the gifts--a denial of a right to proceed against the donor's estate would amount to a concession that the law is powerless to accord to the plaintiff's community interest the full protection that *Fam. Code § 1100(b)* was designed to ensure [*see Fields v. Michael (1949) 91 Cal. App. 2d 443, 448-449, 205 P.2d 402* (construing former *Civ. Code § 172*)].

The court expressly found it unnecessary to decide whether the plaintiff spouse had a direct cause of action against the decedent spouse before his death, but indicated its belief that such a cause of action did in fact exist, based on a tort

theory that the decedent spouse was guilty of wrongful acts for which the plaintiff spouse was entitled to redress [*Fields v. Michael (1949) 91 Cal. App. 2d 443, 451, 205 P.2d 402* ; *see Wilcox v. Wilcox (1971) 21 Cal. App. 3d 457, 459, 98 Cal. Rptr. 319* (husband as stating cause of action against wife for purposely secreting $30,000 worth of community property)]. Factors that may have justified barring an action during the decedent spouse's lifetime when the case was decided in 1949 (the public policy to forbid vexatious and unnecessary litigation between spouses, and the fact that during the marriage the husband had control and management of the community property, of which he could be divested only by statutory procedure) are less compelling today, because statutory changes have provided for equal management and control of community property [*see* Stats. 1973, ch. 987].

The general principles discussed above are subject to special rules governing nonprobate transfers of community property that are intended to become effective on the death of the donor spouse [*see Prob. Code § 5010 et seq.*; for discussion, *see § 122.56[1]*].

[d] Estoppel to Set Aside Gift

A spouse may be estopped from challenging a gift of community property made by the other spouse without his or her consent if the nondonor spouse would be unjustly enriched by an order voiding the gift, or if the donee has changed position because of the gift so as to be unconscionably injured if the gift is voided [*In re Marriage of Stephenson (1984) 162 Cal. App. 3d 1057, 1072, 209 Cal. Rptr. 383* ; *see In re Marriage of Stallworth (1987) 192 Cal. App. 3d 742, 753, 237 Cal. Rptr. 829* (evidence that spouse knew of or participated in opening of savings account for minor was insufficient as basis for waiver or estoppel)].

[e] Nondonor Spouse as One of Donees

Cases in which the nondonor-spouse is one of the recipients of the gift pose special problems. It has been unsuccessfully argued that in such a case, the donee-spouse is entitled to that portion of the property given to him or her and is further entitled to one-half of the property given to the other donees. Courts analyzing this situation have held that the donee-spouse must elect at the time of the gift either to accept the offered portion of the gift, thereby precluding further objection, or to attack the entire gift and assert his or her lack of consent as a basis for the attack. If the latter course is chosen, the rule applies that if the gift is made during the lifetime of the donor-spouse, the entire gift is set aside, and the community property which was the subject of the gift is restored to its community status. If the gift is made after death of the donor-spouse, the gift is avoided to the extent of the donee-spouse's community interest [*see Lahaney v. Lahaney (1929) 208 Cal. 323, 327-328, 281 P. 67* ; *see also Mazman v. Brown (1936) 12 Cal. App. 2d 272, 273-277, 55 P.2d 539]* .

[8] Life and Other Insurance Proceeds

[a] Policy Purchased With Community Funds

If the premiums on a life insurance policy are paid with community funds, the proceeds from the policy after the death of the insured are community property [*Grimm v. Grimm (1945) 26 Cal. 2d 173, 175, 157 P.2d 841]* .

If a married person designates someone other than his or her spouse as the named beneficiary of a life insurance policy paid for with community funds, without receiving fair and reasonable value (or, for transactions before January 1, 1992, valuable consideration (former *Civ. Code § 5125(b)*, prior to amendment by Stats. 1991, ch. 1026)) or the spouse's consent, on the death of the insured spouse the other spouse is entitled to set aside the gift of proceeds to the named beneficiary to the extent of one half of the community interest in the proceeds [*Tyre v. Aetna Life Ins. Co. (1960) 54 Cal. 2d 399, 404, 6 Cal. Rptr. 13, 353 P.2d 725* ; *Patillo v. Norris (1976) 65 Cal. App. 3d 209, 217, 135 Cal. Rptr. 210* ; *see Fam. Code § 1100(b)*; *see § 122.93*]. The theory is that the insured spouse has the power to give his or her half of the community property proceeds to the named beneficiary, but not the other spouse's half. However, a change in life insurance beneficiaries to fulfill existing support obligations is not a gift, particularly when ordered by a court [

Burgart v. Burgart (1970) 5 Cal. App. 3d 409, 412-413, 85 Cal. Rptr. 122 ; *In re Marriage of O'Connell (1992) 8 Cal. App. 4th 565, 580, 10 Cal. Rptr. 2d 334]* . Thus, in a case in which the court ordered a spouse to name his former wife and a minor child of that marriage as beneficiaries of a life insurance policy purchased with community property of his second marriage, his second wife could not have the designation set aside as an unauthorized gift of community property [*In re Marriage of O'Connell (1992) 8 Cal. App. 4th 565, 580, 10 Cal. Rptr 2d 334]* .

The rule that the surviving spouse has a right to set aside one half of an unauthorized gift of the proceeds of a community property life insurance policy applies to policies issued under the Federal Employees' Group Life Insurance Program [*Carlson v. Carlson (1974) 11 Cal. 3d 474, 476, 113 Cal. Rptr. 722, 521 P.2d 1114 , cert. denied, 419 U.S. 1105]* . In addition, the Ninth Circuit Court of Appeals has held that the Employee Retirement Income Security Act of 1974 (ERISA-- *29 U.S.C. § 1001 et seq.*) does not preempt the portion of California community property law that requires distribution of insurance proceeds from a community property-funded insurance policy to a person other than the beneficiary named by the insured (ERISA plan participant), and does not preempt California's law of constructive trusts. Thus, the Court upheld the right of a surviving spouse to seek at least one-half of the proceeds of a term life insurance policy (under an ERISA-regulated employee welfare benefit plan) maintained during marriage through payment of premiums from community funds, even though the decedent's former spouse remained the named beneficiary of the policy [*Emard v. Hughes Aircraft Co. (9th Cir. 1998) 153 F.3d 949, 952, 957 , cert. denied, 142 L. Ed. 2d 902 (1999)]* .

However, the set aside rule does not apply to National Service Life Insurance policies, even if the premiums are paid with community property [*Wissner v. Wissner (1950) 338 U.S. 655, 658-659, 70 S. Ct. 398, 94 L. Ed. 424* ; *In re Marriage of Milhan (1974) 13 Cal. 3d 129, 131-133, 117 Cal. Rptr. 809, 528 P.2d 1145 , cert. denied, 421 U.S. 976]* .

The foregoing principles are also subject to special rules governing nonprobate transfers of community property that are intended to become effective on the death of the donor spouse [*see Prob. Code § 5010 et seq.*; for discussion, *see § 122.56[1]*].

[b] Policy Purchased With Separate Property Funds

To the extent that the premiums were paid with the insured's separate property, the insured is free to name the beneficiary without regard to the other spouse's wishes. If the proceeds are attributable in part to community property and in part to separate property, it is the duty of the trial court, in an action to set aside the gift, to make an appropriate allocation of the proceeds [*Biltoft v. Wootten (1979) 96 Cal. App. 3d 58, 62, 157 Cal. Rptr. 581* ; *Patillo v. Norris (1976) 65 Cal. App. 3d 209, 217, 135 Cal. Rptr. 210]* .

[c] Fair and Reasonable Value Given for Beneficiary Designation

If fair and reasonable value (or, for transactions before January 1, 1992, valuable consideration (former *Civ. Code § 5125(b)*, prior to amendment by Stats. 1991, ch. 1026)) was paid for the designation of a beneficiary on a policy purchased with community funds, the surviving spouse has no cause of action, even though he or she did not consent to the designation. In one case, a husband agreed to designate his former wife as the beneficiary of life insurance policies as part of their marital termination agreement. The policies were paid for with community property from his second marriage. The designation of the former wife as beneficiary was pursuant to a legal obligation incurred by the husband in the marital termination agreement that he signed with his former wife. Discharging this legal obligation constituted valuable consideration. Thus, the second wife could not recover any of the proceeds after the husband's death on the theory that they constituted an unauthorized gift of community property [*Burgart v. Burgart (1970) 5 Cal. App. 3d 409, 412-413, 85 Cal. Rptr. 122* (decided under former *Civ. Code § 5125(b)*); *see In re Marriage of O'Connell (1992) 8 Cal. App. 4th 565, 576-580, 10 Cal. Rptr. 2d 334* (no unauthorized gift of community property and no requirement of prior notice to current wife when former wife and minor child were added as beneficiaries on husband's life insurance policy pursuant to court order)].

[d] Spouse Named as One of Beneficiaries

When the donor-spouse attempts to dispose of his or her spouse's share of the insurance proceeds as well as his or her own share, and names the surviving spouse as one of the takers, the survivor must elect between community property rights and the donor's gift. If the gift is chosen, all inconsistent claims must be relinquished. Conversely, if the survivor elects to stand on community rights, he or she is disqualified as the beneficiary of the gift of insurance proceeds [*Tyre v. Aetna Life Ins. Co. (1960) 54 Cal. 2d 399, 406, 6 Cal. Rptr. 13, 353 P.2d 725]* .

If the surviving spouse elects to stand on community property rights, the claim for proceeds of the policy should be filed with the insurer before it pays the designated beneficiary. *Ins. Code § 10172* specifically discharges the insurer from liability for claims filed under the policy once the designated beneficiary has been paid unless the insurer receives written notice at its home office of any inconsistent claims before making payment. The insurer has no duty to give notice to potential claimants other than the named beneficiary or even to allow a reasonable time for the assertion of opposing claims to the proceeds of a policy. This is not a denial of due process [*Leonard v. Occidental Life Ins. Co. (1973) 31 Cal. App. 3d 117, 120-124, 106 Cal. Rptr. 899]* .

[9] Household Furnishings and Clothes

[a] Prohibition on Unilateral Conveyance

A spouse is prohibited from selling, conveying, or encumbering community personal property used as the family dwelling, or the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children that is community personal property, without the written consent of the other spouse [*Fam. Code § 1100(c)*]. If one spouse has legal capacity and the other spouse has a conservator of the estate, the consent requirement is satisfied if both the court-approved [*see Prob. Code § 3072*] joinder or consent of the conservator of the estate and the joinder or consent of the spouse having legal capacity are obtained [*Prob. Code § 3071(a), (b)*; *see Prob. Code § 2580 et seq.* (substituted judgment doctrine)]. Furthermore, unlike the rule respecting unilateral transfers of other types of community property [*see Fam. Code § 1100(b)*; discussion in *§ 122.51[6][a]*], payment of fair and reasonable value (or, for transactions before January 1, 1992, valuable consideration (former *Civ. Code § 5125(b)*, prior to amendment by Stats. 1991, ch. 1026)) will not validate a unilateral transfer of household furnishings and clothes [*see Fam. Code § 1100(b), (c)*]. This limitation on a spouse's power to manage and control community personal property was carried over from former *Civ. Code § 5125(c)*.

In the case of household furniture, there is no requirement that the furniture be located in any particular place. The test is whether it is furniture of the home as distinguished from furniture that might be used in commercial pursuits. Thus, even though household furniture is temporarily stored in a warehouse, its status as household furniture is not changed [*Matthews v. Hamburger (1939) 36 Cal. App. 2d 182, 184, 97 P.2d 465]* .

[b] Remedy for Violation of Prohibition

When a unilateral transfer of household furnishings or clothes that are community personal property takes place, the nonconsenting spouse has a right to have the property or its value restored to the community by the transferee [*see Dynan v. Gallinatti (1948) 87 Cal. App. 2d 553, 556-557, 197 P.2d 391]* . Ordinarily, the appropriate remedy would be a claim and delivery action under *Code Civ. Proc. § 667* [*see Civ. Code § 3379*]. A form of petition for such an action is set forth in *see § 122.91*. For additional forms and procedure, see Ch. 119, *Claim and Delivery* .

In a case involving an action by a wife whose husband had deserted her and sold household furnishings stored in a warehouse, the court held the wife was entitled to recover the full value of the property from the defendant-transferee. The holding was based on the rule that a gift of community property without the consent of the nonmanaging spouse may be set aside in its entirety during the lifetime of the managing spouse and as to one-half after his or her death [

Matthews v. Hamburger (1939) 36 Cal. App. 2d 182, 184-185, 97 P.2d 465] . The application of this rule was erroneous in this case since a sale and not a gift of community property was involved. However, the holding was correct.

A preferable rationale for this result was suggested in a case involving the encumbrance of household furnishings by a husband who forged his wife's signature on both the note and mortgage, and had both signatures acknowledged before a notary public. The wife became aware of the encumbrance only when the mortgage was recorded after the husband's death. The mortgage holder subsequently filed a claim against the husband's estate, which the executrix wife rejected as a secured claim but accepted as an unsecured claim. The mortgagee then filed an action to foreclose the mortgage. In holding that the mortgage was void, the court rejected the mortgagee's contention that the rule for recovery for unauthorized gifts of community property should apply in this case and the wife should be permitted to set aside only half of the furnishings used to secure the loan. The court held that the clear purpose of the statutory limitation on the husband's power to control and manage community property is to render the furnishings of the home and the wearing apparel of the wife and minor children completely immune from execution or sale. The court also found that the property protected by this limitation was necessary for the maintenance of the surviving family--more necessary, in fact, after the death of the husband than during his lifetime when he would have been able to make proper provision for the support of the family [*Dynan v. Gallinatti (1948) 87 Cal. App. 2d 553, 556-557, 197 P.2d 391]* .

[c] Criminal Penalties for Destruction of Household Property

A husband or wife may be held criminally liable for intentionally causing harm to property in which the other spouse has an interest, whether the property is individual or marital, and whether the harm occurs inside or outside the marital home [*People v. Wallace (2004) 123 Cal. App. 4th 144, 149, 19 Cal. Rptr. 3d 790]* .

In one case [*People v. Wallace (2004) 123 Cal. App. 4th 144, 19 Cal. Rptr. 3d 790]* , a husband received a 25-to-life sentence for felony vandalism [*see Penal Code § 594*] after he caused more than $9,000 damage to his wife's house, in which he had acquired a small community property interest, and more than $6,000 damage to his wife's furniture and furnishings. The husband argued that a cohabiting spouse could not be guilty of vandalizing community or separate property inside the marital home. In affirming the husband's conviction, the appellate court broadened the holding of an earlier case [*People v. Kahanic (1987) 196 Cal. App. 3d 461, 466, 241 Cal. Rptr. 722]* that the vandalism statute applied to community property because "the essence of the crime is in the physical acts against the ownership interest of another" [*People v. Wallace (2004) 123 Cal. App. 4th 144, 147-151, 19 Cal. Rptr. 3d 790]* .

[10] Management and Control of Community Property Business

A spouse who is operating or managing a business or an interest in a business that is all or substantially all community personal property has the primary management and control of the business or interest [*Fam. Code § 1100(d)*]. The term "primary management and control" means that the managing spouse may act alone in all transactions but must give prior written notice to the other spouse of any sale, lease, exchange, encumbrance, or other disposition of all or substantially all of the personal property used in the operation of the business (including personal property used for agricultural purposes), whether or not title to that property is held in the name of one spouse only [*Fam. Code § 1100(d)*]. Written notice is not required, however, when prohibited by the law otherwise applicable to the transaction [*Fam. Code § 1100(d)*]. In addition, a change in the form of a business is not subject to the notice requirement [*see Fam. Code § 1100(d)*]. The rules regarding primary management and control of a community business are subordinate to the rules regarding the sale or leasing of community real property [*see Fam. Code § 1102*, discussed in *§ 122.52[3]*], gifts of community property [*see Fam. Code § 1100(b)*, discussed in *§ 122.51[6]*], and disposition of household furnishings and clothes [*Fam. Code § 1100(d)*; *see Fam. Code § 1100(c)*, discussed in *§ 122.51[9][a]*].

Before July 1, 1987, a spouse who was managing or operating a business or an interest in a business that was community personal property had "sole" powers of management and control of the business or interest [former *Civ. Code § 5125(d)* (prior to amendment by Stats. 1986, ch. 1091)]. The sole management and control rule continues to

apply to management and control decisions made before July 1, 1987 [*see* Stats. 1986, ch. 1091, § 4].

Remedies for the failure of a managing spouse to give prior written notice to the other spouse as required by *Fam. Code § 1100(d)* are limited to those remedies specified in *Fam. Code § 1101* [*Fam. Code § 1100(d)*; *see Fam. Code § 1101*]. The failure to give prior written notice does not adversely affect the validity of a transaction nor of any interest transferred [*Fam. Code § 1100(d)*].

The above rules do not appear to change the character of the business as community personal property for purposes of division on dissolution. However, they do express a policy in favor of preventing community ownership rights from interfering with the efficient conduct of the business by the spouse who originated or developed it. Thus, in one case, relying in part on the pre-July 1, 1987, version of former *Civ. Code § 5125(d)* (*now see Fam. Code § 1100(d)*), the court of appeal refused to permit a former wife to revoke a voting trust agreement that allowed the former husband to continue in sole control of a business that he had developed during the marriage, even after ownership of stock in the company was divided between the parties on dissolution [*Goss v. Edwards (1977) 68 Cal. App. 3d 264, 270, 137 Cal. Rptr. 252]* . Nevertheless, a court is not necessarily required to award a community property business to the operating spouse [*see In re Marriage of Kozen (1986) 185 Cal. App. 3d 1258, 1263, 230 Cal. Rptr. 304* (awarding more profitable of two fast-food franchises to nonoperating spouse and distinguishing *Goss v. Edwards (1977) 68 Cal. App. 3d 264, 137 Cal. Rptr. 252*)].

A spouse who is actually managing a community business has a duty to act in good faith towards the other spouse in the management and control of the business, just as with respect to any other community personal property being managed and controlled by a spouse [*Fam. Code § 1100(e)*, discussed in *§ 122.71[2]*]. A spouse who, for example, wastes community assets in the management of a community business may be required to reimburse the community for abusing the exercise of the right to management and control [*see In re Marriage of Czapar (1991) 232 Cal. App. 3d 1308, 1318, 285 Cal. Rptr. 479* (managing husband had business purchase car, make charitable contributions without wife's consent, and hire his girlfriend; decided under a prior good-faith standard, but holding on reimbursement apparently not abrogated by 1991 legislation concerning standard of care); *see also In re Marriage of Quay (1993) 18 Cal. App. 4th 961, 972-973, 22 Cal. Rptr. 2d 537* (risky loan assigned to husband who violated fiduciary duty while managing community assets)].

Furthermore, even after spouses separate, there is a continuing duty imposed by statute. From the date of separation to the date of the distribution of the community or quasi-community asset or liability in question, each party is subject to the standards set forth in *Fam. Code § 721(b)* with respect to all activities that affect the assets and liabilities, as well as issues relating to child or spousal support and professional fees of the other party, including the operation or management of a business, or an interest in a business, in which the community may have an interest [*Fam. Code §§ 2102, 2113* (operative January 1, 1993, and applicable to any proceeding commenced on or after that date); *see Schnabel v. Superior Court (1992) 5 Cal. 4th 704, 715-723, 21 Cal. Rptr. 2d 200, 854 P.2d 1117* (closely held corporation in which community has an interest may be required to disclose financial and tax information, notwithstanding privacy considerations, if spouse's need for the information outweighs corporation's privacy concerns)]. For further discussion, *see § 122.51[4][b]*.

[11] Court Order Dispensing With Consent Requirements

In any transaction affecting community property in which the consent of both spouses is required, one spouse may move to dispense with the requirement of the other's consent [*Fam. Code § 1101(e)*]. The court may grant such a motion if both of the following requirements are met:

(1) The proposed transaction is in the best interest of the community [*Fam Code § 1101(e)(1)*]; and

(2) Consent has been arbitrarily refused or cannot be obtained due to the physical incapacity, mental

incapacity, or prolonged absence of the nonconsenting spouse [*Fam. Code § 1101(e)(2)*].

A proceeding to dispense with consent may be brought in conjunction with an action for dissolution of marriage, legal separation, or nullity, or without filing such an action [*Fam. Code § 1101(f)*].

Legal Topics:

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California Forms of Pleading and Practice--Annotated

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§ 122.52 Management and Control of Community Real Property

[1] Equal Management and Control Rule

With the exception of property held in trust [*see Fam. Code § 761*; *see also § 122.55[2]*] or belonging to spouses one or both of whom are incompetent [*see Fam. Code § 1103*], either spouse has management and control of the community real property [*Fam. Code § 1102(a)*]. This rule applies regardless of whether the property was acquired before, on, or after January 1, 1975, the effective date of the equal management and control statute [*Fam. Code § 1102(a)*; Stats. 1973, ch. 987].

A major qualification to the equal management and control rule for community real property requires that both spouses, either personally or by duly authorized agent, must join in executing any instrument by which community real property or any interest in it is sold, conveyed, encumbered, or leased for more than one year [*Fam. Code § 1102(a)*; *see Andrade Development Co. v. Martin (1982) 138 Cal. App. 3d 330, 333, 187 Cal. Rptr. 863* ; *but see Fam. Code § 2033* (authorizing unilateral encumbrance of community realty to secure payment of attorney's fees in dissolution, nullity, or legal separation proceeding)]. This qualification is discussed in *§ 122.52[3]*.

Perhaps even more than with community personal property, problems are likely to arise when both spouses take an active role in the management and control of their community real property. It is conceivable, for example, that each spouse could lease the same community realty for less than a one year term without consulting the other spouse. These types of problems could adversely affect third persons such as a tenant on a short-term lease, or a person who has been hired to repair or improve the property. Practical alternatives to equal management and control, which may be utilized to prevent these problems, are discussed in *§ 122.70[1]*.

[2] Relevance of Prior Law

The equal management and control rule applies to all community real property whether acquired before, on, or after the January 1, 1975, effective date of the equal management and control statue [*Fam. Code § 1102(a)*; *see* Stats. 1973, ch. 987]. However, this is the extent of its retroactivity. The rule of equal management and control does not extend to property transactions which occurred before January 1, 1975. The validity of these transactions is governed by the law

in effect at the time the transaction occurred [*In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 154-155, 133 Cal. Rptr. 583]* . Therefore, the former management and control statutes and cases decided under them still have direct relevance to pre-1975 property transactions.

The statutory requirement that both spouses join in sales, conveyances, encumbrances, or leases for more than one year (*see § 122.52[3]*) [*see Fam. Code § 1102(a)*] is a continuation of the restrictions placed on the husband's management and control under prior law [*see* former *Civ. Code § 5127*, before amendment by Stats. 1973, ch. 987]. Therefore, decisions concerning the application of these restrictions in transactions occurring before January 1, 1975, are relevant to the validity of transactions occurring after January 1, 1975.

[3] Joint Execution Rule

Subject to two rebuttable presumptions (*see § 122.52[5]*) and certain exceptions (*see § 122.52[4]*), both spouses, either personally or by a duly authorized agent, must execute any instrument by which community real property or any interest in that property is sold, encumbered, conveyed, or leased for more than one year [*Fam. Code § 1102(a)*; *see Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 30, 38, 46, 283 Cal. Rptr. 584, 812 P.2d 931* ; *In re Marriage of Brooks & Robinson (2008) 169 Cal. App. 4th 176, 183, 86 Cal. Rptr. 3d 624* ; *Andrade Development Co. v. Martin (1982) 138 Cal. App. 3d 330, 333, 187 Cal. Rptr. 863* ; *see also Wolfe v. Lipsy (1985) 163 Cal. App. 3d 633, 642-643, 209 Cal. Rptr. 801* (under former *Civ. Code § 1242*, if a spouse attempted to encumber community realty that was jointly homesteaded before passage of Enforcement of Judgments Law, the encumbrance would be void; other portions of case may have been impliedly abrogated by *Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 36, 283 Cal. Rptr. 584, 812 P.2d 931*)]. Consequently, when a spouse, during the marriage, makes a timely challenge to the other spouse's unilateral sale, encumbrance, conveyance, or lease for more than one year of any community real property or real property interests, the transaction is voidable in its entirety [*Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 30, 283 Cal. Rptr. 584, 812 P.2d 931* ; *In re Marriage of Brooks & Robinson (2008) 169 Cal. App. 4th 176, 183, 86 Cal. Rptr. 3d 624]* . Limitations on voidability *after* a marital dissolution or a transferor spouse's death are discussed in *§ 122.53[2][c]*.

Because such a unilateral transaction is voidable rather than void, and may be invalidated only by the nonconsenting spouse or his or her personal representative, a violation of *Fam. Code § 1102(a)* does not provide a means by which a third party creditor may challenge and void instruments signed by only one of the spouses [*see Clar v. Cacciola (1987) 193 Cal. App. 3d 1032, 1036-1037, 238 Cal. Rptr. 726* (former *Civil Code § 5127, now see Fam. Code § 1102(a)*, was designed to protect *spouse* from unauthorized alienation or encumbering of community property by other spouse)]. However, the spousal right to set aside the transfer does not extinguish an underlying debt, change its character, or necessarily preclude execution against community property by a judgment creditor who has a lien against the property [*Lezine v. Security Pacific Financial Services, Inc. (1996) 14 Cal. 4th 56, 58 Cal. Rptr. 2d 76, 925 P.2d 1002* ; *see § 122.53[2][c]*]. Apart from the voidability of the transaction in whole or in part, as discussed in *§ 122.53[2][c]*, remedies for a nonconsensual transfer of community real property may include, for example, reimbursment to the community at the time of dissolution of the marriage [*see In re Marriage of Lister (1984) 152 Cal. App. 3d 411, 417, 199 Cal. Rptr. 321]* . Alternatively, if the transfer is discovered after the dissolution the nonconsenting spouse may seek modification of the dissolution judgment to equalize the community property division in light of the transfer, on equitable grounds or otherwise when the court has reserved its jurisdiction to make orders concerning that property [*see Hyatt v. Mabie (1994) 24 Cal. App. 4th 541, 545-546, 29 Cal. Rptr. 2d 447* ; *see generally Fam. Code § 2120 et seq.*; *In re Marriage of Ols (1994) 24 Cal. App. 4th 1702, 1706-1707, 30 Cal. Rptr. 2d 306]* . For discussion of significant, related statutory remedies for breach of the spousal fiduciary duty regarding joint execution of instruments of transfer under *Fam. Code § 1102*, which results in impairment of a spouse's one-half interest in the community estate, see *§ 122.53[1]* [*see Fam. Code § 1101*]. For discussion of setting aside an unconsented to transfer, see *§ 122.53[2]*.

If one spouse has legal capacity and the other spouse has a conservator of the estate, the joinder requirement is satisfied if both the court-approved [*see Prob. Code § 3072*] joinder of the conservator of the estate and the joinder of the spouse

having legal capacity are obtained [*Prob. Code § 3071(a), (b)*].

The joint execution requirement does not apply to leases, mortgages, conveyances, or transfers of community real property between husband and wife [*Fam. Code § 1102(b)*]. Therefore, a spouse can convey his or her interest in community real property to the other spouse in a deed signed by himself or herself alone [*see MacKay v. Darusmont (1941) 46 Cal. App. 2d 21, 26, 115 P.2d 221]* , or, for that matter, by an agreement or other transfer meeting transmutation requirements [*see Beam v. Bank of America (1971) 6 Cal. 3d 12, 25, 98 Cal. Rptr. 137, 490 P.2d 257]* .

The joint execution requirement also does not apply when one spouse does not have an interest in the property as a matter of law [*In re Marriage of Brooks & Robinson (2008) 169 Cal. App. 4th 176, 184, 86 Cal. Rptr. 3d 624]* . For example, a husband is not required to join in a conveyance of real property when the wife took title to the property solely in her name. As a result, a presumption arose that the property was her separate property. The fact that the property was acquired during marriage does not rebut the form-of-title presumption. The act of taking title to property in the name of one spouse during marriage with the other spouse's consent effectively removes that property from the general community property presumption, and the property is presumably the separate property of the spouse in whose name title is taken [*In re Marriage of Brooks & Robinson (2008) 169 Cal. App. 4th 176, 186-187, 86 Cal. Rptr. 3d 624]* . The party asserting that title is other than as stated in the deed has the burden of proving that fact by clear and convincing evidence. The form-of-title presumption can be overcome only by clear and convincing evidence of an agreement or understanding between the parties that the title specified in the deed is not what the parties intended [*In re Marriage of Brooks & Robinson (2008) 169 Cal. App. 4th 176, 189-190, 86 Cal. Rptr. 3d 624]* . The presumption is not overcome by tracing the source of the funds used to purchase the property to community earnings, by the fact that the parties were married at the time one spouse acquired the property, by the other spouse's unilateral belief that the property belonged to both of them, or by an assertion that title was taken in one spouse's name only to facilitate financing of the property [*In re Marriage of Brooks & Robinson (2008) 169 Cal. App. 4th 176, 190-192, 86 Cal. Rptr. 3d 624]* .

Special rules govern nonprobate transfers of community real property intended to be effective on death [*see Prob. Code § 5010 et seq.*; for discussion, *see § 122.56[1]*].

[4] Exceptions to Joint Execution Rule

[a] Short-Term Leases and General Management Decisions

The joint execution requirement of *Fam. Code § 1102(a)* does not apply to leases of community realty for a term of less than one year. Similarly, the joint execution requirement does not apply to management and control decisions which do not involve a sale, conveyance, or encumbrance of community realty [*see Fam. Code § 1102(a)*]. Such decisions might include the following:

(1) Contracts with third parties to manage community income property;

(2) Contracts with third parties for the upkeep of community realty;

(3) Agreements to settle disputes with third parties not involving title to the property (*e.g.*, a boundary dispute with a neighboring landowner) [*see Janes v. Le Deit (1964) 228 Cal. App. 2d 474, 487, 39 Cal. Rptr. 559]* ; and

(4) Listing agreements with real estate brokers to sell community realty [*see Tamimi v. Bettencourt (1966) 243 Cal. App. 2d 377, 378-380, 52 Cal. Rptr. 273]* .

Even though both spouses need not execute a written listing agreement to sell the property, a broker seeking to recover

a commission under the listing agreement may be limited to recourse against the spouse who executed the agreement [*see McDonald v. Bernard (1927) 87 Cal. App. 717, 718-719, 262 P. 430* ; *see also Schurz v. Gelber (1953) 117 Cal. App. 2d 681, 685, 256 P.2d 634]* because the statute of frauds makes enforceability of a listing agreement conditioned on the signature of the party to be charged [*Civ. Code § 1624(d)*].

[b] Encumbrance for Attorney's Fees in Marital Termination Proceeding

There is a special exception to the joint execution rule for encumbrances made to pay attorneys' fees in a proceeding to terminate the parties' marriage. Either spouse may, without the consent of the other spouse, encumber his or her interest in community real property for the purpose of paying reasonable attorney's fees to retain or maintain legal counsel in a proceeding for dissolution of marriage, nullity of marriage, or legal separation [*Fam. Code § 2033(a)* (abrogating *Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 283 Cal. Rptr. 584, 812 P.2d 931* , with respect to its holding on encumbrances to pay attorney's fees, but apparently leaving intact its general analysis of consent issues); *see Fam. Code § 1102(e)*; *see Fam. Code § 2040(a)(2)* (providing for restraining order in family law summons on property transfers, and advising that party who uses community property or quasi-community property, or property that turns out to be other party's separate property, to pay attorney's retainer for fees and costs must account to community for use of such property)]. The encumbrance, which is known as a "family law attorney's real property lien," attaches only to the encumbering party's interest in the community real property [*Fam. Code § 2033(a)*]. An attorney who obtains a family law attorney's real property lien must comply with the provisions of the California Rules of Professional Conduct pertaining to adverse interests [*Fam. Code § 2033(e)*; *see Cal. Rules Prof. Conduct, Rule 3-300* (prohibiting attorney from acquiring interest adverse to client unless specified disclosures made and client's written consent obtained)].

Specific statutory requirements for giving notice of the lien to the nonencumbering party must be met before the lien is recorded. These include a declaration that addresses matters set forth by statute regarding the property and lien, as well as a notice period within which service of the notice on the other party or his or her attorney of record must occur at least 15 days before the lien's recordation [*Fam. Code § 2033(b)*].

The nonencumbering party may file an ex parte objection to the lien. The objection must contain a declaration that addresses matters set forth by statute regarding the property and lien and must include, among other things, a request to stay recordation until further notice from the court as well as a copy of the lien notice received [*Fam. Code § 2033(c)*].

In addition, on the application of either party, the court may deny a family law attorney's real property lien. The court may base the denial on a finding that the encumbrance would likely result in an unequal division of property because it would impair the encumbering party's ability to meet his or her fair share of the community obligations or would otherwise be unjust under the circumstances. The court may also for good cause limit the amount of the lien, but such a limitation is not to be construed as a determination of reasonable attorney's fees [*Fam. Code § 2034(a)*].

Furthermore, if the court receives an objection to establishment of a family law attorney's real property lien, it may on its own motion determine whether the case involves complex or substantial issues of fact or law related to property rights, visitation, custody, or support [*Fam. Code § 2034(b)*]. If such issues are found by the court to be involved, it may direct the implementation of a case management plan [*Fam. Code § 2034(b)*; *see Fam. Code § 2032(d)*]. Finally, the court has jurisdiction to resolve any dispute arising from the existence of a family law attorney's real property lien [*Fam. Code § 2034(c)*].

[c] Court Order Dispensing With Joint Execution Requirement

As discussed in *§ 122.51[11]*, either spouse may file a motion to dispense with the requirement that both spouses join in the sale, conveyance, encumbrance, or lease for more than one year of a parcel of community real property or a community interest in real property [*Fam. Code § 1101(e)*; *see Gantner v. Johnson (1969) 274 Cal. App. 2d 869, 876, 79 Cal. Rptr. 381]* . Although *Fam. Code § 1101(e)* applies to "any transaction affecting community property in which

the consent of both spouses is required," and *Fam. Code § 1102(a)* requires that both spouses "join in executing" rather than consent to certain instruments affecting community real property, *Fam. Code § 1101(e)* can apparently be used to force a spouse to join in executing such an instrument. When a spouse joins in executing a conveyance of real property, the legal effect is an expression of consent to the transfer by the other spouse [*Gantner v. Johnson (1969) 274 Cal. App. 2d 869, 876, 79 Cal. Rptr. 381]* . Arguably, a spouse seeking to dispense with the joint execution requirement should be required to make a more persuasive showing that the proposed transaction is in the best interests of the community and that the nonjoining spouse's refusal to participate in the transaction is arbitrary, given the unique nature of realty and the traditional importance of real property rights.

[5] Presumptions of Validity of Instruments

[a] Instrument Executed by Either Spouse on or After January 1, 1975

If either spouse holds record title to community real property in his or her name alone, any of the following conveyances executed by that spouse alone on or after January 1, 1975, is presumed valid if the transferee acts in good faith and without knowledge of the marriage relationship [*Fam. Code § 1102(c)(2)*]:

(1) A lease;

(2) A contract of sale;

(3) A mortgage; or

(4) A deed [*In re Marriage of Brooks & Robinson (2008) 169 Cal. App. 4th 176, 183, 86 Cal. Rptr. 3d 624* (bona fide purchaser for value that acquires its interest in real property without notice of other spouse's asserted rights in that property takes it free of these unknown rights)].

For discussion of the limitations period for bringing an action to avoid one of the foregoing transfers, see *§ 122.53[2][b]*.

[b] Instrument Executed by Husband Before January 1, 1975

If, before January 1, 1975, the husband held record title to community real property in his name alone, and executed a lease, contract, mortgage, or deed to the property without joining the wife, the lease, contract, deed, or encumbrance is presumed to be valid if the lessee, purchaser, or encumbrancer acted in good faith without knowledge of the marriage relation [*Fam. Code § 1102(c)(1)*]. For discussion of the limitations period for bringing an action to avoid one of the foregoing transfers, see *§ 122.54[2][b]*.

[c] Evidence to Rebut Presumptions of Validity of Instruments

The presumptions described above are not conclusive in favor of a transferee acting in good faith without knowledge of the marriage. They are rebuttable, and thus will not always prevent the nonconsenting spouse from recovering the transferred property. To overcome the presumptions, the nonconsenting spouse must present evidence showing that he or she [*Mark v. Title Guar. & Trust Co. (1932) 122 Cal. App. 301, 309, 9 P.2d 839* (construing former *Civ. Code § 172a*)]

(1) Did not join in the execution of the instrument of transfer; and

(2) Did not consent to, or acquiesce in, the execution of the instrument.

To prevent injustice to a good faith transferee with no knowledge of the marriage, the transferee should be entitled to be

restored to his or her former position if the community property unilaterally transferred or the value thereof is returned to the community [*see Mark v. Title Guar. & Trust Co. (1932) 122 Cal. App. 301, 312-313, 9 P.2d 839]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
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PART II. LEGAL BACKGROUND
C. Management And Control

12-122 California Forms of Pleading and Practice--Annotated § 122.53

§ 122.53 Remedies for Breach of Management and Control Duties

[1] Statutory Action

[a] Scope of Action

Under *Fam. Code § 1101(a)*, a spouse has a claim against the other spouse for breach of a fiduciary duty that results in impairment to the claimant spouse's present undivided one-half interest in the community estate. The claim may involve, but is not limited to, a single transaction or a pattern or series of transactions that have caused or will cause a detrimental impact to the claimant spouse's undivided one-half interest in the community estate [*Fam. Code § 1101(a)*]. It may be brought without filing an action for dissolution of marriage, legal separation, or nullity, in conjunction with such an action, or on the death of a spouse [*Fam. Code § 1101(f)*].

The remedies provided by *Fam. Code § 1101(a)* are in addition to other remedies provided by law, rather than exclusive [*Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 39-40 n.10, 283 Cal. Rptr. 584, 812 P.2d 931* (decided under former Civ. Code § 5127.1 (*now see Fam. Code § 1101*))].

For a petition to establish a claim to community property under *Fam. Code § 1101, see § 122.90*.

[b] Transactions Affected

Remedies provided under *Fam. Code § 1101(a)* apply only to transactions or events occurring on or after July 1, 1987, except with respect to actions authorized by *Fam. Code § 1100(d)(2)* [*Fam. Code § 1101(d)(4)*]. *Fam. Code § 1101(d)(2)* provides that an action may be commenced on the death of a spouse or in conjunction with an action for legal separation, dissolution of marriage, or nullity without regard to certain time limitations. These time limitations are discussed in *§ 122.53[2][b]*.

[c] Nature and Types of Remedies

In connection with a spouse's claim concerning the other spouse's breach of fiduciary duties in the management and

control of community property, the court may order an accounting of the property and obligations of the parties to the marriage. The court may determine the rights of ownership in, the beneficial enjoyment of, or access to, community property, and the classification of all property of the parties [*Fam. Code § 1101(b)*]. Furthermore, a court may order the name of a spouse added to community property that was originally in the name of the other spouse alone [*Fam. Code § 1101(c)*]. It may also order that title to community property held in some other form of title be reformed to reflect its community character, except with respect to any of the following [*Fam. Code § 1101(c)*]:

(1) A partnership interest held by the other spouse as a general partner;

(2) An interest in a professional corporation or professional association;

(3) An asset of an unincorporated business if the other spouse is the only spouse involved in operating and managing the business; or

(4) Any other property, if the revision would adversely affect the rights of a third person.

The court may also award a percentage of the asset at issue to the claimant spouse. If the cause of action arises from a breach of fiduciary duty imposed by *Fam. Code §§ 721* and *1100*, the claimant spouse must be awarded 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty, plus attorney's fees and court costs. The value of the asset must be determined to be its highest value at the date of the breach of the fiduciary duty, the date of the sale or disposition of the asset, or the date of the award by the court [*Fam. Code § 1101(g)*; *see In re Marriage of Hokanson (1998) 68 Cal. App. 4th 987, 993, 80 Cal. Rptr. 2d 699]* . If the breach is within the scope of *Civ. Code § 3294* (exemplary damages for oppression, fraud, or malice), the claimant spouse must at least be awarded 100 percent, or an amount equal to 100 percent, of any asset undisclosed or transferred in breach of the fiduciary duty, but the court may make an additional award over that of the entire asset at issue [*Fam. Code § 1101(h)*; *In re Marriage of Murray (2002) 101 Cal. App. 4th 581, 601-604, 124 Cal. Rptr. 2d 342* (sufficiency of evidence under "clear and convincing" standard); *see In re Marriage of Hokanson (1998) 68 Cal. App. 4th 987, 993, 80 Cal. Rptr. 2d 699]* .

In one case, a wife intentionally concealed lottery winnings that were a significant community asset, by consulting with the Lottery Commission on how to deprive her husband of a share of the prize, using her mother's address for all communications with the lottery, and failing to disclose the winnings in the dissolution proceedings. The court held that this supported a finding of fraud within the meaning of *Civ. Code § 3294*, and the husband was entitled to 100 percent of the lottery winnings under *Fam. Code § 1101(h)* [*In re Marriage of Rossi (2001) 90 Cal. App. 4th 34, 108 Cal. Rptr. 2d 270]* .

The language of *Fam. Code § 1101(g)* requiring a fee award is *mandatory* and unambiguous. Thus, if the court finds a breach of the fiduciary duty imposed by *Fam. Code § 721* (but not falling within the scope of *Civ. Code § 3294*), the court does not have discretion to deny an award of fees and costs. By contrast, when the breach falls within the reach of *Civ. Code § 3294* (requiring exemplary damages), language in *Fam. Code § 1101(h)*providing that the remedies "shall include, *but not be limited to*" 100 percent, or amount equal to 100 percent, of the asset involved, means that an award of fees is discretionary in that instance, over and above the mandatory award of the entire asset [*In re Marriage of Hokanson (1998) 68 Cal. App. 4th 987, 993, 80 Cal. Rptr. 2d 699* (emphasis added); *see also In re Marriage of Rossi (2001) 90 Cal. App. 4th 34, 42, 108 Cal. Rptr. 2d 270* (trial court had discretion *not* to award attorney's fees in addition to penalty of 100 percent of undisclosed asset)].

[d] Statute of Limitations and Related Defenses

Any action under *Fam. Code § 1101(a)* must normally be commenced within three years after the petitioning spouse acquires actual knowledge that the transaction or event for which the remedy is being sought occurred [*Fam. Code §*

1101(d)(1)]. However, an action may be commenced under this section on the death of a spouse or in conjunction with an action for legal separation, dissolution of marriage, or nullity without regard to this time limitation [*Fam. Code § 1101(d)(2)*].

The defense of laches may be raised in any action brought under *Fam. Code § 1101* [*Fam. Code § 1101(d)(3)*; *see § 122.53[3][e]*].

[2] Action to Set Aside Unauthorized Transfer of Community Real Property

[a] Right of Action in Nonconsenting Spouse

A nonconsenting spouse may bring an action to avoid a unilateral transfer of community realty by his or her spouse [*see Fam. Code § 1102(d)*; *Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 30, 283 Cal. Rptr. 584, 812 P.2d 931]* . Only the nonconsenting spouse has this right. A third party creditor, for example, has no right under *Fam. Code § 1102(d)* to challenge an instrument conveying real property interests. The joint execution statute was designed to protect nonconsenting spouses from unauthorized alienation or encumbering of community property, and the rights established under the statute are personal to the nonconsenting spouse [*see Clar v. Cacciola (1987) 193 Cal. App. 3d 1032, 1036-1037, 238 Cal. Rptr. 726* ; *Jack v. Wong Shee (1939) 33 Cal. App. 2d 402, 415, 92 P.2d 449]* .

Because an unauthorized transfer of community real property by one spouse without the consent of the other is voidable rather than void [*see Trimble v. Trimble (1933) 219 Cal. 340, 344, 26 P.2d 477* ; *Gantner v. Johnson (1969) 274 Cal. App. 2d 869, 877, 79 Cal. Rptr. 381]* , any conveyance of such property is regarded as valid (unless otherwise void) until a successful action to set aside the conveyance is brought by the nonconsenting spouse [*see Jack v. Wong Shee (1939) 33 Cal. App. 2d 402, 415, 92 P.2d 449]* .

Special limitation periods for bringing an action to avoid a unilateral transfer apply if title to the real property involved was held in the name of one spouse alone [*see Fam. Code § 1102(d)*]. In addition, whether the transfer may be set aside entirely or, only with respect to the nonconsenting spouse's one-half community interest, is affected by when the action is brought in relation to the termination of the marriage by dissolution or the death of the transferor spouse [*see Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 35, 283 Cal. Rptr. 584, 812 P.2d 931* ; *Hyatt v. Mabie (1994) 24 Cal. App. 4th 541, 545-547, 29 Cal. Rptr. 2d 447]* . A nonconsenting spouse may have significant additional remedies under *Fam. Code § 1101* for a breach of the fiduciary duty that results in impairment to the nonconsenting spouse's one-half community interest [*see Fam. Code § 1101(a)*; *see also Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 39 n.10, 283 Cal. Rptr. 584, 812 P.2d 931]* . For discussion of remedies under *Fam. Code § 1101, see § 122.53[1]*.

A complaint to set aside an unauthorized conveyance of community real property is set forth in *see § 122.92*.

[b] Statute of Limitations

An action to avoid any instrument affecting real property standing of record in the name of either spouse alone, which was executed on or after January 1, 1975, must be commenced within one year from the filing for record of the instrument in the recorder's office in the county in which the land is located [*Fam. Code § 1102(d)*].

An action to avoid any instrument mentioned in *Fam. Code § 1102(a)* affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record before January 1, 1975, in the recorder's office in the county in which the land is located, was required to have been commenced before January 1, 1976. Thus, if the instrument was executed by the husband before January 1, 1975, and filed for record before that date, any cause of action to set aside the conveyance was barred as of January 1, 1976 [*see* former *Civ. Code § 5127*]. The one-year limitation period of former *Civ. Code § 5127* only protects bona fide transferees with no knowledge of the

marriage relation who have no reason to suspect that another signature is required on an instrument. The limitation period is not a bar to assertion of a community property interest in transferred property when the transfer takes place without the knowledge or consent of the nonsigning spouse and the transferee has knowledge of the marital relationship [*Byrd v Blanton (1983) 149 Cal. App. 3d 987, 990, 993, 197 Cal. Rptr. 190]* .

The statute of limitations starts to run when the deed or other instrument of conveyance is properly recorded, rather than when the nonconsenting spouse receives actual notice that the unauthorized conveyance has taken place [*Fam. Code § 1102(d)*]. However, actual knowledge of the unauthorized transfer and failure to act promptly to set it aside may estop the nonconsenting spouse from setting aside the conveyance even if the statute of limitations has not run, as discussed in *§ 122.53[3][e]*.

The right to contest an unauthorized transfer of community property can be waived either by an agreement not to contest, or by failure to bring an action within the limitations period [*see Rice v. McCarthy (1925) 73 Cal. App. 655, 664-665, 239 P. 56]* . If the nonconsenting spouse fails to take steps to avoid the conveyance within the one-year period, it ripens into an effective conveyance of that spouse's one-half interest in the property [*Gantner v. Johnson (1969) 274 Cal. App. 2d 869, 877, 79 Cal. Rptr. 381]* .

[c] Limitations on Relief

The time at which an action to avoid a unilateral transfer of community real property is brought affects the degree to which the transfer may be set aside by the nonconsenting spouse. When a nonconsenting spouse during the marriage timely challenges a transfer made in violation of *Fam. Code § 1102(a)*, the transfer may be invalidated in its entirety. However, if the action to avoid the transfer is brought after the transferor-spouse's death or after dissolution of the marriage, the set-aside normally is limited to the nonconsenting spouse's one-half community interest, as discussed further hereafter [*see Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 30, 35, 46, 283 Cal. Rptr. 584, 812 P.2d 931* ; *Hyatt v. Mabie (1994) 24 Cal. App. 4th 541, 545-547, 29 Cal. Rptr. 2d 447]* .

Following the 1975 Civil Code amendments that created equal rights of management and control between the spouses [*see* Stats. 1974, ch. 1206, § 5], a split of appellate court authority developed on the extent of relief available when a nonconsenting spouse brought an action to avoid a unilateral transfer of community real property during the marriage. One line of decisions held that unilateral transfers were voidable to the extent of the nonconsenting spouse's one-half interest, regardless of when the action was brought [*see Mitchell v. American Reserve Ins. Co. (1980) 110 Cal. App. 3d 220, 223, 167 Cal. Rptr. 760* ; *Head v. Crawford (1984) 156 Cal. App. 3d 11, 17-18, 202 Cal. Rptr. 534]* . Other decisions held that if relief were sought during marriage, the entire transfer should be set aside [*see Andrade Development Co. v. Martin (1982) 138 Cal. App. 3d 330, 336-337, 187 Cal. Rptr. 863* ; *see also In re Jones (C.D. Cal. 1985) 51 Bankr. 834, 839]* .

The California Supreme Court resolved this conflict in *Droeger v. Friedman, Sloan & Ross* [*Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 283 Cal. Rptr. 584, 812 P.2d 931]* . *Droeger* held that such an unconsented transfer may be invalidated in its entirety by a timely action brought during the marriage by the nonconsenting spouse [*Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 30, 283 Cal. Rptr. 584, 812 P.2d 931]* . The *Droeger* Court's specific application of this holding to a unilateral encumbrance of community realty to secure attorney's fees in a dissolution action [*see Droeger v. Friedman, Sloan, & Ross (1991) 54 Cal. 3d 26, 30, 283 Cal. Rptr. 584, 812 P.2d 931]* has since been abrogated by legislation permitting such an encumbrance, as discussed in *§ 122.52[4][b]* [*see Fam. Code §§ 2033-2034*]. However, the Court's underlying analysis of the consent required under former *Civ. Code § 5127* (*now see Fam. Code § 1102*) and its holding concerning the ability of a nonconsenting spouse, in general, to void an unconsented transfer in its entirety by a timely action during marriage appears to remain valid. In addition, the principle remains valid that if the nonconsenting spouse fails to discover the transfer and take legal action until *after* the marriage and community have been terminated by dissolution or death, he or she may seek to void the transfer to the extent of only his or her *one-half* interest [*see Hyatt v. Mabie (1994) 24 Cal. App. 4th 541, 545-547, 29 Cal. Rptr. 2d 447]* . To

obtain relief, the nonconsenting spouse must not have otherwise waived his or her right to seek relief, whether he or she is seeking a complete or partial set aside of the transfer, or some other remedy [*see Hyatt v. Mabie (1994) 24 Cal. App. 4th 541, 545-547, 29 Cal. Rptr. 2d 447* (plaintiff former wife waived rights)].

Despite the broad implications of *Droeger, the California Supreme Court, in Lezine v. Security Pacific Financial Services, Inc. (1996) 14 Cal. 4th 56,58 Cal. Rptr. 2d 76, 925 P.2d 1002* , subsequently clarified that the set aside remedy available to a spouse who does not join in a transfer of community property *does not* extinguish an underlying debt created by the transferring spouse, and does not change the character of that debt, or necessarily preclude execution against community property by a judgment creditor who has a lien against the property. Thus, even if a nonconsenting (nontransferring) spouse succeeds in having a unilateral transfer, such as an encumbrance, of community property set aside, if the underlying debt is a community debt and the creditor obtains a judgment for the debt, the creditor may still record a lien and potentially execute against the property, because a creditor who loses its security interest (by the set aside) retains the rights of any other unsecured creditor to resort to the community property to satisfy the underlying debt. Accordingly, in *Lezine*, the Supreme Court upheld the right of a creditor with a money judgment against a husband who had obtained a loan by unilaterally encumbering community realty to maintain its judgment lien against the property, even though the nonconsenting wife had obtained a civil judgment setting aside the encumbrance in its entirety, as well as a later family court judgment awarding her the property as her sole and separate property and assigning the underlying debt to the husband. Construing both former *Civ. Code § 5127* (now *Fam. Code § 1102*) and provisions of the Code of Civil Procedure governing liens, the Court reasoned that neither *Droeger* nor former *Civ. Code § 5127* carve out an exception to rules governing the liability of community real property for enforcement of a money judgment against a debtor spouse, or the enforceability of a judgment lien that has attached to community realty for satisfaction of a money judgment. A creditor who has previously forfeited a security interest in community realty under former *Civ. Code § 5127* is placed in the position of any other unsecured creditor entitled to seek a judgment against the debtor spouse, and to enforce its judgment against the community estate. The creditor's recordation of an abstract of judgment creates a judgment lien that attaches to the community realty and may be enforced to satisfy the lien [*Lezine v. Security Pacific Financial Services, Inc. (1996) 14 Cal. 4th 56, 58 Cal. Rptr. 2d 76, 925 P.2d 1002]* .

The ability of the creditor in *Lezine* to reach the property by way of execution on a judgment lien might have differed had the wife been awarded the property in the dissolution action *before* the creditor recorded an abstract of judgment, because of the operation of the debt liability statutes [*see Fam. Code § 916* (liability of property after division of assets and assignment of debts in dissolution); *Lezine v. Security Pacific Financial Services, Inc. (1996) 14 Cal. 4th 56, 58 Cal. Rptr. 2d 76, 925 P.2d 1002]* . However, such a result is problematic because the dissolution court, theoretically, could also have taken the creditor's interests into consideration in dividing the underlying debt. Also, a nonconsenting spouse is not left completely without a remedy because, according to the Court, he or she could still seek reimbursement against the debtor spouse to the extent the property is applied in satisfaction of the lien; and in the *Lezine* case, the Court said its holding was "without prejudice to the [wife's right] to seek a reallocation of the community property concerning as to which the [dissolution] court retained jurisdiction" [*Lezine v. Security Pacific Financial Services, Inc. (1996) 14 Cal. 4th 56, 58 Cal. Rptr. 2d 76, 925 P.2d 1002* ; *see Fam. Code § 916(b)*]. For a related discussion of estoppel principles, see *§ 122.53[2][e]*.

[d] Effect of Consideration

Neither the applicable statute [*Fam. Code § 1102*] nor its predecessor [former *Civ. Code §§ 172a, 5127*] make any mention of the effect of consideration on the conveyance of community real property by one spouse without consent of the other. Under the former law, which gave the husband sole management and control of community real property [former *Civ. Code § 172a*], it was held that a deed of community real property for valuable consideration, executed without the wife's consent, was ineffective as to her interest, but was valid and binding as to the husband's half interest [*Gantner v. Johnson (1969) 274 Cal. App. 2d 869, 876-877, 79 Cal. Rptr. 381* ; *see Heuer v. Heuer (1949) 33 Cal. 2d 268, 271, 201 P.2d 385]* .

However, in other cases under former law in which the transferee paid substantial consideration in good faith for the conveyance of community real property by the husband without the wife's consent, the relief granted to the nonconsenting spouse was return of the entire property to the community, not merely return of her half interest [*see Mark v. Title Guar. & Trust Co. (1932) 122 Cal. App. 301, 310-311, 9 P.2d 839]* . In *Mark v. Title Guar. & Trust Co.*, return of the property in its entirety to the community was conditioned on the refund of the amount paid for it by the innocent purchasers.

Modernly, if a spouse's unilateral transfer is set aside, a return of amounts paid by an innocent purchaser may still be required in a particular case, with the refund amount dependent at least in part on the degree to which the transaction is set aside [*cf. Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 30, 35, 46, 283 Cal. Rptr. 584, 812 P.2d 931* (abrogated by *Fam. Code § 2033(a)*, regarding its holding on encumbrances to pay *attorney's fees*, but apparently still controlling on its general analysis of consent issues and ability to invalidate other unilateral transfers made without a spouse's consent); *accord Hyatt v. Mabie (1994) 24 Cal. App. 4th 541, 546-547, 29 Cal. Rptr. 2d 447]* . In addition, as discussed in *§ 122.53[3][c]*, the spousal right to set aside the transfer does not extinguish the underlying debt, change its character, or necessarily preclude execution against community property by a judgment creditor who has a lien against the property [*Lezine v. Security Pacific Financial Services, Inc. (1996) 14 Cal. 4th 56, 58 Cal. Rptr. 2d 76, 925 P.2d 1002]* .

As discussed in *§ 122.53[3][c]*, the relevant analysis of the parties' rights with respect to setting aside a unilateral transfer of community real property appears to turn on the time, in relation to the existence of the marital community, when an action is brought to avoid the transfer, rather than on the existence of consideration for the transfer. Thus, under *Droeger*, when a nonconsenting spouse, during the marriage, timely challenges a transfer made in violation of *Fam. Code § 1102(a)*, the transfer may be invalidated in its entirety. Conversely, if the action to avoid the transfer is brought after the transferor-spouse's death or after dissolution of the marriage, the long-standing rule that the set-aside is limited to the nonconsenting spouse's one-half community interest still appears valid [*see Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 30, 35, 46, 283 Cal. Rptr. 584, 812 P.2d 931* (abrogated by *Fam. Code § 2033(a)*, regarding its holding on encumbrances to pay attorney's fees, but apparently still controlling on its general analysis of consent issues and ability to invalidate other unilateral transfers made without a spouse's consent); *accord Hyatt v. Mabie (1994) 24 Cal. App. 4th 541, 546-547, 29 Cal. Rptr. 2d 447]* .

When alternative remedies are sought under *Fam. Code § 1101(a)* for a violation of *Fam. Code § 1102(a)*, additional factors may need to be considered, as discussed in *§ 122.53[1]*

[e] Estoppel to Assert Invalidity of Conveyance

If the nonconsenting spouse does not come into court with clean hands, he or she may be estopped from asserting the invalidity of the other spouse's unilateral transfer of community real property [*see MacKay v. Darusmont (1941) 46 Cal. App. 2d 21, 26, 115 P.2d 221* (wife estopped under former *Civ. Code § 172a*)]. Evidence that has led courts to find that the nonconsenting spouse was estopped from setting aside a conveyance of community real property by the other spouse has included the following:

(1) Knowledge of the transaction on the part of the nonconsenting spouse and failure to assert a community interest in the property [*see MacKay v. Darusmont (1941) 46 Cal. App. 2d 21, 27, 115 P.2d 221]* ;

(2) Participation in, and apparent approval of, the negotiations leading up to the transfer [*see Bush v. Rogers (1941) 42 Cal. App. 2d 477, 480-481, 109 P.2d 379]* ; and

(3) Receipt, acceptance, and use of payments of consideration from the sale or transfer of interest [*see Rice v. McCarthy (1925)73 Cal. App. 655, 658, 239 P. 56* ; *cf. Hyatt v. Mabie (1994) 24 Cal. App. 4th*

541, 546-547, 29 Cal. Rptr. 2d 447 (nonconsenting spouse permitted escrowee to pay off holder of unconsented to encumbrance on real property from property's sales proceeds, thereby waiving her postdissolution remedies regarding property)].

[3] Remedies of Transferee of Community Real Property

If a prohibited unilateral transfer is contracted for, but is not consummated, the transferee is not entitled to specific enforcement of the contract [*Janssen v. Davis (1934) 219 Cal. 783, 790, 29 P.2d 196]* , even as to the interest owned by the contracting spouse [*see Waldeck v. Hedden (1928) 89 Cal. App. 485, 492-493, 265 P. 340* ; *see also Harper v. Raya (1984) 154 Cal. App. 3d 908, 911, 201 Cal. Rptr. 563* (spouse's oral agreement to convey life estate in community realty without other spouse's consent did not entitle donee with knowledge of marital relationship to specific performance or damages); *Andrade Development Co. v. Martin (1982) 138 Cal. App. 3d 330, 334, 187 Cal. Rptr. 863]* . However, the contracting spouse may be liable for damages, especially where it is found he or she acted in bad faith [*see Wilson v. Bidwell (1948) 88 Cal. App. 2d 832, 837-838, 199 P.2d 439]* .

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12-122 California Forms of Pleading and Practice--Annotated § 122.54

§ 122.54 Criminal Penalties for Transferor of Community Real Property

A married person who falsely and fraudulently represents himself or herself as competent to sell or mortgage community real property, and does in fact willfully convey or mortgage the same, is guilty of a felony when the validity of the sale or mortgage requires the assent or concurrence of the other spouse [*Penal Code § 534*]. A person convicted of the felony is subject to imprisonment in state prison for 16 months or two or three years [*Penal Code §§ 18, 534*].

Legal Topics:

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§ 122.55 Alternatives to Equal Management and Control

[1] Revocable Power of Attorney

A married couple who find that equal responsibility for management and control, as prescribed by *Fam. Code §§ 1100* and *1102*, does not suit their situation may make other arrangements between themselves for the management and control of their community real and personal property [*see* Kahn & Frimmer, *Management, Probate and Estate Planning Under California's New Community Property Laws*, 49 Cal. St. B.J. 516, 519-521 (1974)]. One possible method of handling management and control is the execution of a revocable power of attorney by one spouse giving the other authority to deal with community property on his or her behalf. A uniform statutory power of attorney form, which may be used for this purpose, is set forth in *Prob. Code § 4401*. For further discussion, see Ch. 427, *Principal and Agent* .

[2] Revocable Trust

A husband and wife may also handle the management and control of their community real and/or personal property by establishing a revocable trust funded with community property. Unless the trust instrument or the instrument of transfer expressly provides otherwise, community property that is transferred in trust remains community property during the marriage, regardless of the identity of the trustee, if the trust, originally or as amended before or after the transfer, provides the following [*Fam. Code § 761(a)*]:

(1) The trust is revocable as to that property during the marriage; and

(2) The power, if any, to modify the trusts as to the rights and interests in that property during the marriage may be exercised only with the joinder or consent of both spouses.

Unless the trust instrument expressly provides otherwise, a power to revoke as to community property may be exercised by either spouse acting alone. Community property, including any income or appreciation, that is distributed or withdrawn from a trust by revocation, power of withdrawal, or otherwise, remains community property unless there is a valid transmutation of the property at the time of distribution or withdrawal [*Fam. Code § 761(b)*]. The trustee may

convey and otherwise manage and control the trust property in accordance with the provisions of the trust without the joinder or consent of the husband or wife unless the trust expressly requires the joinder or consent of one or both spouses [*Fam. Code § 761(c)*].

[3] Written Management and Control Agreement

A husband and wife may execute a written agreement allocating management and control responsibilities between the spouses. When spouses contract between themselves concerning their community and separate property, they stand in a confidential and fiduciary relationship to one another with respect to their agreement [*Fam. Code § 721(b)*; *see § 122.51[4]*, for discussion of the specific rights and duties imposed by this confidential and fiduciary relationship]. Thus, the spouse who yields management and control responsibilities to the other pursuant to such an agreement is entitled to protection from improper self-dealing by the other spouse.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 122.56 Nonprobate Transfers of Community Property

[1] Overview

Nonprobate transfers of community property by a spouse to a third party that are intended to become effective on the death of the transferor spouse are subject to special Probate Code provisions governing the effect of consent, or lack of consent, to the transfer by the other spouse, including the circumstances under which consent is revocable. The Probate Code confers authority for these transfers, pursuant to a written instrument, despite a lack of compliance with the formalities required for execution of a will [*see Prob. Code §§ 5000(a), 5010 et seq.*].

However, the issue of the nontransferor spouse's consent to the transfer must be addressed in determining the transfer's legal effect [*cf. Fam. Code §§ 1100, 1102* (spousal duties in connection with management and control of community property)]. At stake is whether some portion of the property transferred will have to be set aside in favor of the nontransfering spouse (§ 122.56[5]) [*see Prob. Code § 5021*]. A related question is whether a transfer to which consent is given amounts to a transmutation of community property, which is discussed in *§ 122.56[6]* [*see Prob. Code § 5022*].

Legislation operative January 1, 1993, clarifies these issues with respect to nonprobate transfers of community property, taking into consideration the question of whether a nontransferor spouse has given or revoked consent. It also specifies the rights of "holders" of property under nonprobate transfer instruments. "Holders" are those persons or entities having the obligation of holding, receiving, or transferring the property (*see § 122.56[4]*) [*see Prob. Code § 5010 et seq.*; *see also Prob. Code §§ 5002-5003*].

For discussion of specialized rules pertaining to bank and savings accounts [*see Prob. Code § 5100 et seq.*], see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

[2] Effective Date of Transfer Provisions

In general, the legislation applies to a provision for a nonprobate transfer of community property on the death of a married person, regardless of whether the provision for transfer was executed by the person, or written consent was given by the person's spouse, before, on, or after January 1, 1993. However, revocation of a written consent given by a

spouse who died before January 1, 1993, is not governed by *Prob. Code§ 5030(c),* which provides for irrevocability of written consent on the death of either spouse, but is governed by the applicable law in effect on the date of death [*Prob. Code § 5014*].

[3] Matters Affecting Parties' Rights

The parties' rights in a nonprobate transfer of community property on death are subject to the following [*see Prob. Code § 5011*]:

(1) The terms of the instrument under which the transfer is made;

(2) Any contrary state statute specifically applicable to the instrument under which the transfer is made; and

(3) Any "written expression of intent of a party" in a property transfer provision or in a written consent [*see Prob. Code § 5010* ("written consent" includes written joinder in nonprobate transfer)] to the provision.

The Probate Code provisions governing spousal rights relating to nonprobate transfers of community property on death apply only to controversies between the spouses and their successors. They do not affect the obligation of a holder of community property under an instrument of a type described in *Prob. Code § 5000* (insurance policies, employment contracts, bonds, mortgages, promissory notes, securities, account agreements, custodial or deposit agreements, compensation, pension, or individual retirement plans, employee benefit plans, trusts, conveyances, deeds of gift, and marital property agreements) to hold, receive, or transfer the property in compliance with a provision for a nonprobate transfer on death, or the protection provided to the holder by *Prob. Code § 5003* (§ 122.56[4]) [*see Prob. Code § 5012*]. The above itemization is an illustrative, rather than exclusive, listing of instruments subject to the nonprobate transfer rules. Note that certain instruments that come within the definition of "account agreements," for purposes of *Prob. Code § 5000,* include accounts that are also subject to the Multiple-Party-Accounts Law. Instruments subject to both the nonprobate transfer rules and the Multiple-Party-Accounts Law [*Prob. Code § 5100 et seq.*; *see* Ch. 222, *Dissolution of Marriage: Property Division and Valuation*] could include, for example, annuity contracts or money market fund accounts if these involve a deposit of funds between a depositor and "financial institution"--as that term is broadly construed [*see Estate of Petersen (1994) 28 Cal. App. 4th 1742, 1751, 1754 . 34 Cal. Rptr. 2d 449* (language in certain annuity contracts sufficed to establi nonprobate transfer, and not transmutation; but money market account description met neither "express declaration" requirement for transmutation, nor did it establish effective nonprobate transfer)].

None of the nonprobate transfer provisions limit the effect of a surviving spouse's waiver of rights in community property or under some other instrument or agreement that affects a married person's interest in community property [*see Prob. Code § 5013*; *see also Prob. Code § 141(a)(10)* (waiver of rights in community property)].

Finally, nothing in the special provisions limits the application of principles of fraud, undue influence, duress, mistake, or other invalidating cause to a written consent to a provision for a nonprobate transfer of community property on death [*Prob. Code § 5015*].

[4] Effect of Provisions on "Holders" of Property

Persons or entities designated to receive, hold, or transfer property under the terms of a nonprobate transfer instrument are provided with statutory guidelines concerning whether they need to comply with the transfer provisions. These "holders" are relieved from the obligation of making the transfer under certain conditions. Specifically, holders of property under instruments described in *Prob. Code § 5000* (§ 122.56[3]) are not required to receive, hold, or transfer property in compliance with a provision for a nonprobate transfer on death executed by a person having an interest in

the property, if either [*Prob. Code § 5002*]:

(1) The person is not authorized by the terms of the instrument to execute a provision for transfer of the property, or

(2) The provision for transfer of the property does not otherwise satisfy the terms of the instrument.

A holder may comply with a nonprobate transfer provision that satisfies the terms of the instrument, regardless of whether the transfer is consistent with the beneficial ownership of the property as between the person who executed the provision for transfer and other persons having an interest in the property or their successors, and whether or not the transfer is consistent with the rights of the person named as beneficiary [*Prob. Code § 5003(a)*]. In that situation, the holder's transfer does not affect the rights of the transferor and other persons having an interest in the property or their successors in disputes among themselves concerning the beneficial ownership of the property [*Prob. Code § 5003(c)*].

The protection provided to holders of property by the foregoing rules does not extend to a transfer made after either (1) the holder has been served with a contrary court order, or (2) the holder has been served with a written notice of a person claiming an adverse interest in the property, but this second provision does not apply to a pension plan to the extent that the transfer is a periodic payment pursuant to the plan [*see Prob. Code § 5003(b)*]. Otherwise, no notice or other information shown to have been available to the holder affects the rights of the holder to the protection discussed above [*see Prob. Code § 5003(b)*; *see also Prob. Code § 5003(d)* (protection of that section is not exclusive of any protection provided the holder by any other provision of law)]. A person must not serve notice of adverse interest in bad faith. If the court in an action relating to the right of the parties determines that a person has served a notice in bad faith, the court must award against the person the cost of the action, including a reasonable attorney's fee, and the damages caused by the service [*Fam. Code § 5003(e)*].

[5] Effect of Lack of Consent to Transfer

A nonprobate transfer of community property on death that is executed by a married person without the written consent of that person's spouse (1) is not effective with regard to the nonconsenting spouse's interest in the property, and (2) does not affect a nonconsenting spouse's disposition on death of his or her interest by will, intestate succession, or nonprobate transfer [*Prob. Code § 5020*].

Accordingly, in proceedings to set aside transfers lacking the requisite consent, trial courts are required to set the transfers aside with regard to the nonconsenting spouse's interest in the property, subject to terms and conditions or other remedies that appear equitable under the circumstances of the case, taking into account the rights of all interested persons [*Prob. Code § 5021(a)*; *Estate of Miramontes-Najera (2004) 118 Cal. App. 4th 750, 758-759, 13 Cal. Rptr. 3d 240]* . This does not affect any additional remedy the nonconsenting spouse may have against the transferor's estate for a nonprobate transfer made without written spousal consent [*Prob. Code § 5021(b)*].

[6] Consent to Transfer and Transmutation Distinguished

In general, a spouse's written consent to a provision for a nonprobate transfer of community property on death is not a transmutation of the consenting spouse's interest in the property [*Prob. Code § 5022(a)*; *Estate of Petersen (1994) 28 Cal. App. 4th 1742, 1752-1753, 34 Cal. Rptr. 2d 449]* . However, a written consent to a nonprobate transfer of community property on death that satisfies *Fam. Code § 852* is a transmutation and is governed by the law applicable to transmutations, rather than by *Prob. Code § 5010 et seq.* [*see Prob. Code § 5022(b)*; *see also Fam. Code § 853(c)*].

"Written consent" in this context includes a written joinder in a provision for a nonprobate transfer [*see Prob. Code § 5010*]. For discussion of transmutations of community property, *see § 122.34*.

[7] Effect of Modified Transfer on Spousal Consent and Interests

If a married person executes a provision for a nonprobate transfer of community property on death with his or her spouse's written consent, but later executes a modification of the transfer provision without the spouse's written consent, the modified transfer is effective with respect to the transferor's community property. However, the modified transfer has the following effect on the other spouse's interest in the community property [*Prob. Code § 5023(b)(1), (2)*]:

(1) If the modification is executed during the spouse's lifetime, the modification revokes the spouse's previous written consent to the provision for transfer of the property; or

(2) If the modification is executed after the spouse's death, the modification does not affect the spouse's previous written consent to the provision for transfer of the property, and the spouse's interest in the community property is subject to the nonprobate transfer on death as consented to by the spouse.

Despite these modification rules, if a written expression of a party's intent in an original transfer provision or spouse's written consent to a transfer provision authorizes a transferor spouse to execute a modification after the consenting spouse's death, then the consenting spouse's community property interest is deemed transferred to the transferor spouse on the consenting spouse's death, and the modification is effective as to both spouses' interests in the community property [*Prob. Code § 5023(b)(3)*].

The term "modification," as used above, means revocation of a provision for a nonprobate transfer on death in whole or part, designation of a different beneficiary, or election of a different benefit or payment option. It does not include the exercise of a power of appointment under a trust [*Prob. Code § 5023(a)*]. Special provisions governing revocation are discussed in *§ 122.56[8]*.

[8] Revocation of Consent

A spouse's written consent to a nonprobate transfer of community property on death is revocable during marriage [*Prob. Code § 5030(a)*]. It is also revocable on termination of the marriage by dissolution, or on legal separation, and the community property is then subject to division under *Fam. Code § 2500 et seq.*, or to other disposition on order within the court's jurisdiction [*Prob. Code § 5030(b)*]. However, the written consent is irrevocable on the death of either spouse [*Prob. Code § 5030(c)*; *see Prob. Code § 5014(b)* (if consenting spouse died before January 1, 1993, revocation is governed by applicable law at time of death, not by *Prob. Code § 5030(c)*)].

Revocation of written consent may be accomplished by a writing, including a will, that identifies the provision for transfer of the property being revoked, and that is served on the transferor before his or her death [*Prob. Code § 5031(a)*].

However, revocation of consent does not affect a holder's authority under Prob. Code § 5003 (§ 122.56[4]) to transfer property in compliance with the nonprobate transfer provision [*Prob. Code § 5031(b)*].

Once a spouse revokes consent to the nonprobate transfer of community property on death, the property passes as if consent were never given [*Prob. Code § 5032*].

Legal Topics:

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

§§ 122.57[Reserved]

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
Chapter 122 COMMUNITY PROPERTY
PART III. RESEARCH GUIDE

12-122 California Forms of Pleading and Practice--Annotated § 122.70

§ 122.70 State Statutes

[1] Alternatives to Equal Management and Control

Agency and powers of attorney. *Prob. Code § 4000 et seq.*

Community property placed in trust as remaining community property. *Fam. Code § 761*

Motion for order dispensing with requirement of spousal consent to community property transaction. *Fam. Code § 1101(e)*

[2] Credit Rating Based on Management and Control of Property

Prohibition against denying credit to woman when man managing and controlling same property would be entitled to credit. *Civ. Code § 1812.30*

[3] Gifts of Community Property to Third Parties

Survival of action to set aside unauthorized gift of community property. *Code Civ. Proc. §§ 366.1-366.2, 377.20*; *Prob. Code §§ 7000-7001*

Prohibition against one spouse's gift of community personal property without other spouse's written consent. *Fam. Code § 1100(b)*

Requirement that both spouses execute instrument by which gift of community realty to third party is made. *Fam. Code § 1102(a)*

Nonliability of insurer for payment of community property proceeds of life insurance policy to named beneficiary

rather than to insured's spouse. *Ins. Code § 10172*

California Uniform Transfers to Minors Act. *Prob. Code §§ 3900-3925*

Nonprobate transfers of community property intended to become effective on transferor's death. *Prob. Code §§ 5010-5132*

[4] Good Faith Required of Spouses

Rules governing fiduciary relationships of persons occupying confidential relations with each other. *Corp. Code §§ 16403, 16404, 16503*; *Fam. Code § 721(b)*

Husband and wife as required to adhere to rules governing fiduciary relationships of persons occupying confidential relations with each other in managing and controlling community property. *Fam. Code §§ 721(b), 1100(e)*

Disclosure duties of separated spouses. *Fam. Code §§ 2100-2113*

[5] Interest of Each Spouse in Community Property

Present, existing, and equal interest of each spouse in community property during marriage. *Fam. Code § 751*

Right of each spouse to dispose of one half of community property by will. *Prob. Code § 6101*

[6] Management and Control of Community Personal Property

Equal management and control of community personal property by spouses. *Fam. Code § 1100(a)*

Requirement that spouse transferring community personal property to third party without other spouse's consent obtain fair and reasonable value for property. *Fam. Code § 1100(b)*

Prohibition against selling, conveying, or encumbering family dwelling, furniture or furnishings of home, or clothing of other spouse or spouses' minor children without written consent of other spouse. *Fam. Code § 1100(c)*

Management and control of community property business. *Fam. Code § 1100(d)*

[7] Management and Control of Community Real Property

Equal management and control of community real property by spouses; prohibition against unilateral sale, conveyance, encumbrance, or lease for term longer than one year. *Fam. Code § 1102(a)*

Presumptions affecting validity of leases, contracts, mortgages, and deeds executed by one spouse alone. *Fam. Code § 1102(c)*

Spouse's unilateral right to encumber community real property to pay attorney's fees in dissolution, nullity, or legal separation proceeding. *Fam. Code §§ 2033-2034*

[8] Management and Control of Separate Property

Spouse as having no interest in separate property of other spouse. *Fam. Code § 752*

Right to convey separate property without spouse's consent. *Fam. Code § 770(b)*

[9] Management and Disposition of Community Property When Spouse or Spouses Incompetent

Judicial determination of unsound mind as precluding conveyances, contracts, delegations of power, and waivers of rights by person so adjudged; establishment of conservatorship as constituting such judicial determination. *Civ. Code § 40*

Management and disposition of community property when one or both spouses has conservator of estate or lacks capacity to manage property. *Fam. Code § 1103*

Substituted judgment doctrine. *Prob. Code §§ 2580-2586*

Procedure for managing and disposing of community property when spouse lacks legal capacity. *Prob. Code §§ 3000-3154*

[10] Remedies for Violations of Management and Control Rules

Exemplary damages for breach of fiduciary duty that involves oppression, fraud, or malice. *Civ. Code § 3294*; *Fam. Code § 1101(h)*

Requirement that plaintiff seeking to recover real property or possession of real property be seised or possessed of property within five years before commencement of action. *Code Civ. Proc. § 318*

Judgment for value of personal property when possession cannot be had. *Code Civ. Proc. § 667*

Quiet title actions. *Code Civ. Proc. §§ 761.010(b), 761.020*

Exclusivity of statutory remedies for failure to give prior written notice of disposition of community personal property used in operation of community property business. *Fam. Code § 1100(d)*

Claim against other spouse for breach of fiduciary duty in managing and controlling community property. *Fam. Code § 1101(a), (g)*

Court-ordered accounting of property and obligations of parties to marriage. *Fam. Code § 1101(b)*

Court order requiring that title to community property be reformed or that name of spouse to be added to property. *Fam. Code § 1101(c)*

Statutory remedy as available either in conjunction with dissolution, legal separation, or nullity action, or not in conjunction with such action. *Fam. Code § 1101(f)*

Award of portion of assets undisclosed or transferred in breach of fiduciary duty to spouse harmed by nondisclosure or transfer. *Fam. Code § 1101(g)*

Criminal penalties for fraudulently conveying or encumbering community real property without consent or joinder of

spouse. *Penal Code §§ 18, 534*

[11] Spouses as Joint Tenants

Spouses as permitted to hold property as joint tenants. *Fam. Code § 750*

Spouses as permitted to hold property as community property with right of survivorship. *Civ. Code § 682.1*; *Fam. Code § 750*

Presumption that property held by spouses as joint tenants is community property. *Fam. Code §§ 2581, 2580(c)*

[12] Statutes of Limitations

Three-year statute for claim against spouse for breach of fiduciary duty that results in impairment to claimant's present, undivided one-half interest in community estate. *Fam. Code § 1101(d)*

One-year statute for action to avoid spouse's unilateral sale, conveyance, encumbrance, or lease for more than one year of community realty. *Fam. Code § 1102(d)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Duties & RightsProperty RightsCharacterizationSeparate PropertyReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawEstatesPresent EstatesMarital EstatesSeparate Property

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§ 122.71 Decisions

[1] Community Property Transferred to Trust

Unilateral revocation of community property trust agreements as ineffective because, based on trust terms, settlors (spouses) intended that revocation be mutual. *Estate of Khan (1985) 168 Cal. App. 3d 270, 273-274, 214 Cal. Rptr. 109*

[2] Fiduciary Duty

Close corporation as required to produce certain tax and financial documents relevant to shareholder's marital dissolution action when marital community had interest in corporation and, on balance, spouse's need for information outweighed corporation's privacy interests. *Schnabel v. Superior Court (1992) 5 Cal. 4th 704, 715-723, 854 P.2d 1117*

Spouse can be subject to statutory breach of fiduciary duty under *Fam. Code § 721(b)* for mismanagement of separate property, as well as community property; no distinction is made between spouse's duty to deal fairly and in good faith with separate property and spouse's duty to deal fairly and in good faith with community property. *In re Marriage of Walker (2006) 138 Cal. App. 4th 1408, 1419, 42 Cal. Rptr. 3d 325*

[3] Gifts of Community Property

Court-ordered change of beneficiary designation on husband's community property life insurance policy to include former wife and minor child as not constituting unauthorized gift of community property. *In re Marriage of O'Connell (1992) 8 Cal. App. 4th 565, 579-580, 10 Cal. Rptr. 2d 334*

Husband's election to receive maximum disability retirement income at expense of survivor benefits as not gift or transfer of community property without consideration within meaning of former *Civ. Code § 5125(b)* (*now see Fam. Code § 1100(b)*) despite wife's lack of consent, because election did not defeat wife's community interest and actually

provided community with increased income during husband's lifetime. *Willis v. Board of Administration (1986) 181 Cal. App. 3d 779, 782-783, 226 Cal. Rptr. 567*

[4] Good Faith Required of Spouses

Trial court as properly finding that wife used undue influence in causing mentally disabled husband to transfer insurance and other funds to her as her separate property. *In re Marriage of Saslow (1985) 40 Cal. 3d 848, 862-865, 221 Cal. Rptr. 546, 710 P.2d 346*

To support showing of undue influence, spouse must show existence of marital relationship and such unfairness of transaction as will tend to establish that spouse made wrongful use of confidence reposed for purpose of gaining unreasonable advantage over mate. *In re Marriage of Saslow (1985) 40 Cal. 3d 848, 864-865, 221 Cal. Rptr. 546, 710 P.2d 346*

Transactions between spouses as subject to general rules that control actions of persons occupying confidential relation to each other. *In re Marriage of Saslow (1985) 40 Cal. 3d 848, 864, 221 Cal. Rptr. 546, 710 P.2d 346*

Presumption of undue influence does not arise in interspousal transaction unless one spouse obtains unfair advantage or obtains property for which no or clearly inadequate consideration has been given, and does not apply to postmarital agreement in which both spouses obtain advantages, both are represented by counsel, each is offered full access to other's records relating to marital assets, and both acknowledge in agreement that neither has obtained unfair advantage from agreement. *In re Marriage of Burkle (2006) 139 Cal. App. 4th 712, 717, 43 Cal. Rptr. 3d 181*

Presumption of undue influence applies to unequal marital settlement agreements, but not to marital settlement agreements reached through mediation, agreements in which parties acknowledge that no undue influence was exercised, or when undue influence is alleged with respect to judgment that has long been final. *In re Marriage of Kieturakis (2006) 138 Cal. App. 4th 56, 84-85, 87, 90, 41 Cal. Rptr. 3d 119*

Each spouse as having duty to inform the other spouse of existence of community assets, and duty of disclosure as continuing until marriage dissolved and community property divided. *Worton v. Worton (1991) 234 Cal. App. 3d 1638, 1648, 286 Cal. Rptr. 410* (decided before enactment of *Fam. Code §§ 2100-2113*, which codified post-separation disclosure duties)

Historical review of statutory duty of good faith as supporting conclusion that obligations of confidential relationship are not terminated by separation when one party exerts continued control over another. *In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 89-91, 260 Cal. Rptr. 403* (decided before enactment of *Fam. Code §§ 2100-2113*, which codified post-separation disclosure duties)

Conveyance of community real property in consideration for cancellation of one spouse's premarital debts without knowledge of other spouse as breach of marital fiduciary obligation and abuse of power of management and control, entitling community to reimbursement at time of dissolution. *In re Marriage of Lister (1984) 152 Cal. App. 3d 411, 416, 199 Cal. Rptr. 321*

Husband with management and control of community business as having fiduciary duty (former *Civ. Code § 5125(e)* (*now see Fam. Code § 1100(e)*) to maximize value of business; duty as not terminating on separation of parties. *In re Marriage of Munguia (1983) 146 Cal. App. 3d 853, 859, 195 Cal. Rptr. 199*

[5] Management and Control of Community Business

Trial court as permitted to award more profitable of two community businesses (fast-food franchises) to nonoperating spouse because of evidence that she had equal operating ability after initial training, she needed business income for benefit of children, and there was no way to "cash her out" in overall property division. *In re Marriage of Kozen (1986) 185 Cal. App. 3d 1258, 1263, 230 Cal. Rptr. 304*

[6] Management and Control of Pension Plan

Wife as not continuing to accrue community property interest in husband's pension after couple moved to common law state. *In re Marriage of Moore & Ferrie (1993) 14 Cal. App. 4th 1472, 1482-1483, 18 Cal. Rptr. 2d 543*

[7] Prohibition on Unilateral Transfers of Community Real Property

Instrument transferring community real property to third party executed by one spouse alone as voidable in its entirety by other spouse during marriage. *Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 47, 283 Cal. Rptr. 584, 812 P.2d 931* , abrogated on other grounds by enactment of *Fam. Code § 2033(a)*

In action to avoid transfer of community real property by one spouse acting alone brought after death of transferor-spouse or dissolution of marriage, transfer as voidable only as to nonconsenting spouse's one-half community interest. *Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 46, 283 Cal. Rptr. 584, 812 P.2d 931* , abrogated on other grounds by enactment of *Fam. Code § 2033(a)*

Applying rationale of former *Civ. Code § 5127* (*now see Fam. Code § 1102*) even though that section is not directly applicable to oral agreements, oral agreement by one spouse to convey life estate in community real property without other spouse's consent is not specifically enforceable by donee who knew of marriage relationship, and damages are not recoverable for breach of agreement. *Harper v. Raya (1984) 154 Cal. App. 3d 908, 911-913, 201 Cal. Rptr. 563*

Wife's joinder in conveyance of community real property as nonconsensual when husband misrepresented purpose of conveyance and misappropriated asset to satisfy obligations incurred before marriage. *In re Marriage of Lister (1984) 152 Cal. App. 3d 411, 416, 199 Cal. Rptr. 321*

In action by buyer against husband and wife for breach of contract to sell community real property in which buyer sought specific performance or damages, trial court as properly entering judgment in favor of defendants when contract not signed by wife, husband did not represent himself as wife's agent, and buyer was aware that property was owned by defendants as husband and wife. *Andrade Development Co. v. Martin (1982) 138 Cal. App. 3d 330, 334-339, 187 Cal. Rptr. 863*

[8] Separate Property of Non-Debtor Spouse

Judgment creditor of husband as not permitted to levy against wife's wages which were designated as her separate property by valid premarital agreement, even though such wages were sole income of family and debt was incurred during marriage. *Leasefirst v. Borrelli (1993) 13 Cal. App. 4th Supp. 28, 30-31, 17 Cal. Rptr. 2d 114 , 17 Cal. Rptr. 2d 114*

[9] Statutes of Limitation

One-year limitation period of former *Civ. Code § 5127* (*now see Fam. Code § 1102(d)*] as not barring assertion of community property interest in transferred property when transfer took place without knowledge or consent of

nonsigning spouse and transferee has knowledge of marital relationship. *Byrd v. Blanton (1983) 149 Cal. App. 3d 987, 990, 993, 197 Cal. Rptr. 190*

[10] Transmutation of Community Property

Parties may not execute a conditional transmutation. *In re Marriage of Lund (2009) 174 Cal. App. 4th 40, 55, 94 Cal. Rptr. 3d 84*

Transmutation, once effected, cannot be limited in purpose or otherwise rendered conditional or temporary. *In re Marriage of Holtemann (2008) 166 Cal. App. 4th 1166, 1174, 83 Cal. Rptr. 3d 385*

Express declaration must unambiguously indicate change in character of ownership of property, and transmutation cannot occur by accident. *In re Marriage of Starkman (2005) 129 Cal. App. 4th 659, 664, 28 Cal. Rptr. 3d 639*

Wife's scheduling of community personal property as exempt in bankruptcy petition as not transmuting property from community to separate property, and wife's discharge in bankruptcy as not depriving family law court of jurisdiction to divide exempted property at dissolution. *In re Marriage of Seligman (1993) 14 Cal. App. 4th 300, 307-310*

Legal Topics:

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§ 122.72 Law Reviews

Bruch, *Management Powers and Duties Under California's Community Property Laws: Recommendations for Reform, 34 Hast. L.J. 229 (1982)*

Mennell, *Survivorship Rights in Community Property*, 1 Community Prop. J. 5 (1984)

Comment, *Survey: Women and California Law--Community Property, 16 Golden Gate U.L. Rev. 574 (1986)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawEstatesPresent EstatesMarital EstatesCommunity Property

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§ 122.73 Text References

California Community Property With Tax Analysis, chs. 2-4 (Matthew Bender)

Gray & Wagner, Complex Issues in California Family Law, Vol. A: *Fiduciary Duties--Nature and Effect: Understanding Interspousal Fiduciary Duties in Current Family Law Practice;* Vol. B: *Fiduciary Duties--A Practical Approach: Handling Fiduciary Duty Issues in the Day-to-Day Practice of Family Law* (Matthew Bender)

Powell on Real Property, Ch. 53 (Matthew Bender)

Witkin, Summary of California Law, vol. 11, *Community Property* (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyTortsIntentional TortsBreach of Fiduciary DutyGeneral Overview

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12-122 California Forms of Pleading and Practice--Annotated §§ 122.74-122.89

[Reserved]

§§ 122.74[Reserved]

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12-122 California Forms of Pleading and Practice--Annotated § 122.90

§ 122.90 Petition to Establish Spousal Claim to Community Estate [Fam. Code § 1101]

[1] FORM Petition to Establish Spousal Claim to Community Estate [Fam. Code § 1101]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____[*name*],	)	PETITION TO ESTABLISH SPOUSAL CLAIM TO
Respondent.	)	COMMUNITY ESTATE, OBTAIN ACCOUNTING
	)	OF COMMUNITY PROPERTY, AND RECOVER
	)	DAMAGES FOR BREACH OF FIDUCIARY DUTY

_____

Petitioner alleges:

1. Petitioner is now and at all times herein mentioned was a resident of _____ County, California [*or allege other basis for venue*].

2. Respondent is now and at all times herein mentioned was a resident of _____ County, California [*or allege other basis for venue*].

3. Petitioner and respondent were married to each other on _____ [*date*], in _____ [*city*], _____ [*state*], and are presently living together as a married couple.

4. Since _____ [*date*], petitioner and respondent have owned a _____ [*describe general nature of business*] business, known as _____ [*name of business*] ("the business"). The business is located at _____ [*complete address of business*]. [The business is, and at all times

mentioned herein was, a corporation organized and existing under the laws of the State of California].

5. Since _____ [*date*], the business has been primarily managed and controlled by respondent.

6. On or about _____ [*date*], respondent sold substantially all of the personal property used in the operation of the business to _____ [*name of transferee*], located at _____ [*complete address of transferee*], for $_____. The property sold consisted of _____ [*describe property*].

7. Respondent sold all of the above-described property without prior written notice to petitioner, in violation of *Family Code Section 1100(d)*.

8. Petitioner had no knowledge of the sale of the above-described property until after the property had been sold and delivered to _____ [*name of transferee*].

9. Petitioner did not consent to the sale of the above-described property, either at the time of sale or thereafter.

10. Petitioner did not ratify the sale of the above-described property and has not waived any right to claim any interest in the proceeds of sale, or any other rights to community property.

11. All of the above-described property sold by respondent was purchased in _____ [*year*] with community property funds and was community property.

12. On or about _____ [*date*], respondent placed the above-described $_____ sale proceeds in an account in his/her name alone, at _____ [*name of financial institution*], located at _____ [*complete address of financial institution*].

13. On or about _____ [*date*], petitioner asked respondent to place the above-described $_____ sale proceeds in a joint savings account with her/him. On that same date, respondent refused, and thereafter has continued to refuse, to comply with this request.

14. Respondent's actions as described above constitute a violation of his/her fiduciary duty imposed by *Family Code Sections 721(b)* and *1100(d)* and *(e)* to give prior written notice to petitioner of any sale or disposition of the community personal property used in the operation of the business and to act with the highest good faith and fair dealing and to avoid taking any unfair advantage of petitioner in the management and control of community property.

15. As a result of respondent's conduct, petitioner's present undivided one-half interest in the parties' community estate has been impaired.

16. Petitioner has the right, pursuant to *Family Code Section 1101(a)*, to establish a claim for his/her community interest in the above-described $_____ sale proceeds and to be awarded her/his court costs and attorney's fees.

WHEREFORE, petitioner prays that this court grant the following relief:

1. Declare that the above-described business and related assets were the community property of petitioner and respondent.

2. Determine petitioner's community property interest in the $ _____ proceeds of the above-described sale of community property assets by respondent.

3. Order respondent to add petitioner's name to the account containing the $_____ proceeds of the above-described sale of community property assets by respondent.

4. Order respondent to change the title of the above-described account to reflect that funds held within it are community property.

5. Award to petitioner 50 percent, or an amount equal to 50 percent, of any asset of the above-described community property business that the court finds was transferred by respondent in breach of his/her fiduciary duty, as authorized by *Family Code Section 1101(g)*.

6. Award to petitioner court costs and reasonable attorney's fees incurred in this action, as authorized by *Family Code Section 1101(g)*.

7. Such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner_____[*name*]

VERIFICATION

I, _____ [*name of petitioner*], am the petitioner in the above-entitled matter. I have read the foregoing petition to establish a spousal claim to the community estate, and know the contents thereof. The same are true of my own knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date and place*]

_____[*signature*]

[2] Use of Form

This form is a petition that may be used by one spouse to assert a claim through an independent action against the other for breach of one or more of the duties imposed by *Fam. Code § 1100* or *1102*. The petition is brought pursuant to *Fam. Code § 1101(a)* and alleges that the breach of duty has resulted in impairment to the claimant's present undivided one-half interest in the community estate. For illustration only, the petition recites that a spouse managing a community business has breached the duty to give written notice to the other spouse of a sale of substantially all of the personal property used in the business [*see Fam. Code § 1100(d)*, discussed in *§ 122.51[10]*].

If the alleged breach involved oppression, malice, or fraud [*see Civ. Code § 3294*], the petition should be amended to state the facts supporting such claims and the prayer for relief should be amended to request an award of 100 percent, or

an amount equal to 100 percent, of the undisclosed or transferred assets [*see Fam. Code § 1101(h)*, discussed in *§ 122.53[1][c]*].

Pursuant to *Cal. Rules of Ct., Rule 5.22*, the pleading is designated as a petition and the parties as petitioner and respondent.

[3] Governing Law

The superior court has jurisdiction over this action [*Fam. Code § 200*], and the action is governed by the provisions of law applicable to civil actions generally [Cal. Rules of Ct., Rule 1207].

[4] Tacking of Allegations and Consolidation of Actions

If a *Fam. Code § 1101(a)* action is brought in conjunction with an action for dissolution of marriage, legal separation, or nullity of marriage, it is unclear whether the *Fam. Code § 1101(a)* action must be filed separately or may be included among the allegations of the petition in the family law proceeding by "tacking." Local rules of court should be carefully considered to determine whether there is a preferred procedure. If the local rules permit "tacking," that is, adding allegations to the existing Judicial Council form, it is suggested that the claim under *Fam. Code § 1101(a)* be "tacked" when the dissolution or other action is filed or, if it already has been filed, by amending the filed pleading. If the local rules require a separate action, however, the separate action should be brought and then consolidated with the family law action [*see Fam. Code § 1101(f)*; *Code Civ. Proc. § 1048(a)*].

If a *Fam. Code § 1101(a)* action is brought in conjunction with a dissolution, nullity, or legal separation proceeding and a party dies during the pendency of the underlying proceeding, it appears that the family law court would lose jurisdiction over the proceeding [*see Estate of Blair (1988) 199 Cal. App. 3d 161, 167, 244 Cal. Rptr. 627* ; *In re Marriage of Shayman (1973) 35 Cal. App. 3d 648, 651, 111 Cal. Rptr. 11* (death of party to dissolution generally abates proceeding)], and the *Fam. Code § 1101(a)* claim would come under the jurisdiction of the probate court [*see Fam. Code § 1101(f)* (§ 1101(a) action may be brought on death of spouse); *see generally Prob. Code §§ 7000, 7001*]. However, in a bifurcated proceeding for dissolution, nullity, or legal separation, the death of a party does not deprive the family law court of its retained jurisdiction to determine collateral property rights if the judgment terminating the marriage was entered before the party's death [*In re Marriage of Hilke (1992) 4 Cal. 4th 215, 220, 14 Cal. Rptr. 2d 371, 841 P.2d 891]* .

[5] Verification

The petition must be verified [*Fam. Code § 212*]. The response, if any, must be filed within 30 days after service upon the respondent of the summons and a copy of the petition [*Cal. Rules of Ct., Rule 5.22*], and must also be verified [*Fam. Code § 212*].

[6] Cross References

For discussion of actions for accounting in general, see Ch. 7, *Accounting, Action for*

For discussion of the rules for filing and service of pleadings generally, see Ch. 26, *Answers* ; Ch. 123, *Complaints and Cross Complaints* ; and Ch. 518, *Service of Summons and Papers*

[7] State Statutes

Exemplary damages for breach of fiduciary duty involving oppression, malice, or fraud. *Civ. Code § 3294*; *Fam. Code*

§ 1101(h)

Consolidation of actions. *Code Civ. Proc. § 1048(a)*

Jurisdiction of superior court over family law actions. *Fam. Code § 200*

Fiduciary duties of spouses toward one another. *Fam. Code §§ 721(b), 1100(e)*

Requirement that spouse managing community business give prior written notice to other spouse of disposition of all or substantially all personal property used in operation of business. *Fam. Code § 1100(d)*

Action against spouse for breach of fiduciary duties that results in impairment to claimant spouse's interest in community estate. *Fam. Code § 1101(a)*

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12-122 California Forms of Pleading and Practice--Annotated § 122.91

§ 122.91 Complaint to Recover Personal Property and Damages [Code Civ. Proc. § 667; Fam. Code § 1100(b)]

[1] FORM Complaint to Recover Personal Property and Damages [Code Civ. Proc. § 667; Fam. Code § 1100(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names of donor-spouse*	)	COMPLAINT TO RECOVER PERSONAL PROP-
and donee],	)	ERTY AND DAMAGES
Defendants.	)	
	)	
	)	

Plaintiff alleges:

1. Defendant _____ [*name of donor-spouse*] is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other basis of venue as appropriate*].

2. Defendant _____ [*name of donee*] is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other basis of venue as appropriate*].

3. Plaintiff and defendant _____ [*name of donor-spouse*] are, and at all times herein mentioned were, a married couple.

4. During their marriage plaintiff and defendant _____ [*name of donor-spouse*] acquired as community property certain personal property described as follows: _____.

5. The value of the above-described property is now, and at all times herein mentioned was, $_____.

6. On or about _____ [*date*], defendant _____ [*name of donor-spouse*] transferred the above-described property to defendant _____[*name of donee*] for less than fair and reasonable value and without the express or implied consent of plaintiff. Defendant _____ [*name of donee*] now has possession of the property.

7. As a proximate result of the wrongful transfer of the property by defendant _____ [*name of donor-spouse*] and the wrongful possession of the property by defendant _____ [*name of donee*], plaintiff has suffered damages in the sum of $_____, as follows: _____ [*describe connection between damages and loss of described property*].

WHEREFORE, plaintiff prays judgment as follows:

1. _____ [*If action is commenced during lifetime of donor-spouse,* For possession of the above-described property in its entirety *or, if action is commenced after death of donor-spouse,* For possession of plaintiff's one-half interest in the above-described property] or for its value in the sum of $_____ if possession cannot be obtained.

2. For damages in the sum of $_____.

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification. See § 122.90.*]

[2] Use of Form

This form is a complaint by a spouse seeking to recover community personal property given by his or her spouse to a third party for less than fair and reasonable value and without the plaintiff's written consent. The right to such an action is established in *Fam. Code § 1100(b)*, which provides that a spouse may not make a gift of community personal property or dispose of community personal property for less than fair and reasonable value, unless the other spouse consents in writing.

The complaint names the donor-spouse and the donee of the property as defendants.

Gifts of community personal property are discussed in *§ 122.51[6]*.

[3] Claim and Delivery Actions

The procedural format of the form is an action for claim and delivery pursuant to *Code Civ. Proc. § 667*, which allows a plaintiff to recover possession of personal property, or its value in case possession cannot be returned, and damages for the detention. Section 667 applies to unauthorized gifts of community personal property under *Civ. Code § 3379*, which states that a person entitled to the immediate possession of specific personal property may recover it in the manner provided by the Code of Civil Procedure.

The essential allegations for a claim and delivery action are the following:

(1) The plaintiff is the spouse of the donor (Paragraph 3).

(2) The property is community property (Paragraph 4).

(3) The property was given or transferred to the donee-defendant for less than fair and reasonable value (Paragraph 6).

(4) The plaintiff did not consent to the gift or transfer (Paragraph 6).

(5) The donee-defendant is in possession of the property (Paragraph 6).

(6) The property has a specified value (to allow an alternative judgment in the event possession cannot be recovered) (Paragraph 5).

[4] Extent of Recovery

The plaintiff is entitled to recover the gift or its value if both spouses are living [*see In re Marriage of Stephenson (1984) 162 Cal. App. 3d 1057, 1071-1073, 209 Cal. Rptr. 383]* . However, if the community has been dissolved by death of the donor, the plaintiff may only recover a one-half interest in the property or the equivalent value [*see Odone v. Marzocchi (1949) 34 Cal. 2d 431, 439, 211 P.2d 297]* .

[5] Verification

Verification of this complaint is not required, but verification of the complaint requires the defendant to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446*] and precludes a general denial [*Code Civ. Proc. § 431.30(d)*].

[6] Cross References

For discussion and forms relating to claim and delivery actions generally, see Ch. 119, *Claim and Delivery*

For a related form, see *§ 122.90*.

[7] State Statutes

Claim and delivery actions. *Civ. Code § 3379*; *Code Civ. Proc. § 667*

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
Chapter 122 COMMUNITY PROPERTY
PART IV. FORMS

12-122 California Forms of Pleading and Practice--Annotated § 122.92

§ 122.92 Complaint to Cancel Instrument and to Quiet Title to Community Real Property [Civ. Code § 3412; Fam. Code § 1102(a)]

[1] FORM Complaint to Cancel Instrument and to Quiet Title to Community Real Property [Civ. Code § 3412; Fam. Code § 1102(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names of grantor spouse*	)	COMPLAINT TO CANCEL INSTRUMENT AND
and grantee], and all persons unknown, claiming any	)	TO QUIET TITLE TO COMMUNITY REAL PROP-
legal or equitable right, title, estate, lien, or interest in	)	ERTY
the property described in the complaint adverse to	)	
plaintiff's title, or any cloud on plaintiff's title thereto,		
named as DOES I-X, inclusive,		
Defendants.		

_____

Plaintiff alleges:

1. Defendants are, and at all times herein mentioned were, residents of _____ County, California.

2. Defendants DOES I-X, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants claims some legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title. These claims constitute a cloud on plaintiff's title to that property and are

without any right whatever.

3. Plaintiff and defendant _____ [*name of grantor spouse*] are, and at all times herein mentioned were, a married couple.

4. On or about _____ [*date*], during the existence of their marriage, plaintiff and defendant _____ [*name of grantor spouse*] acquired as community property certain real property situated in _____ County, California, known and described as _____ [*legal description of property*]. The street address of the property is _____ [*address, including city*], California.

5. The basis of plaintiff's title is _____[*describe basis of plaintiff's title, e.g.,* a deed from _____ (*name of grantor*) granting the above-described property in fee simple to plaintiff and to defendant _____ (*name of grantor spouse*) dated _____, and recorded in the Official Records of the County of _____, Book _____, page _____].

6. Plaintiff was seized and possessed of the above-described property within five years of the commencement of this action.

7. On or about _____ [*date*], in _____ County, California, defendant _____ [*name of grantor spouse*] _____ [*specify, e.g.,* leased for a longer period than one year *or* sold *or* conveyed *or* encumbered] [an interest in] the above-described property to defendant _____ [*name of grantee*], by an instrument executed by defendant _____ [*name of grantor spouse*]. This instrument, though it appears to be valid on its face, is invalid and voidable as to plaintiff, in that it was executed by defendant _____ [*name of grantor spouse*] alone without the knowledge or consent of plaintiff and without joining him/her therein.

[8. On or about _____ [*date*] and within one year of the commencement of this action, the above-described instrument was recorded in the Official Records of the County of _____, Book _____, page _____.]

9. By virtue of the above-described instrument, defendant _____ [*name of grantee*] claims an interest in the above-described property adverse to plaintiff. Defendant _____ [*name of grantor spouse*] claims, adversely to plaintiff, that the property was and is her/his sole and separate property. These claims are without any right whatever.

10. The above-described instrument and defendants' claims constitute a cloud on plaintiff's interest in the above-described property and cause plaintiff to be deprived of his/her community property rights in the property.

11. Plaintiff seeks to quiet title to the above-described property, against the claims of the defendants as described above, as of _____ [*date*]. [*If the date is a date other than the date the complaint is filed, allege why a determination as of that date is sought.*]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. That defendants, and each of them, be made to set forth the nature of their claims, if any.

2. That defendants' claims be adjudged to be of no effect and void.

3. That the property be declared to be the community property of plaintiff and defendant _____ [*name of grantor spouse*].

4. That defendant _____ [*name of grantee*] be declared to have no interest in the property, and that the instrument executed by defendant _____ [*name of grantor spouse*] to defendant _____ [*name of grantee*] be ordered delivered up and canceled by this court.

5. For costs of suit herein incurred.

6. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____[*name*]

[*Verification. See § 122.90.*]

[2] Use of Form

The foregoing form is a complaint by one spouse to avoid his or her spouse's sale, conveyance, encumbrance, or lease for more than one year of community real property when the plaintiff was not joined in and did not consent to the transaction as required by *Fam. Code § 1102(a)*. The purpose of the action is to restore and quiet title to the property in the community, and to procure cancellation of the transaction. For discussion of *Fam. Code § 1102(a)* and the limited exceptions to its prohibition on unilateral sales, conveyances, encumbrances, and leases for more than one year of community realty, see *§ 122.52[3], [4]*.

[3] Allegations

To state a cause of action for a violation of *Fam. Code § 1102(a)*, the complaint must allege the following:

(1) The marriage between plaintiff and defendant spouse (Paragraph 3);

(2) The status of the real property as community property (Paragraph 4);

(3) The defendant-spouse's execution of the instrument conveying, leasing, or encumbering the property without plaintiff's knowledge, consent, or joinder (Paragraph 7); and

(4) Defendants' adverse claim and the resulting cloud on the title of the property jeopardizing plaintiff's community interest and entitling him or her to have the instrument canceled pursuant to *Civil Code Section 3412* (Paragraphs 9, 10).

A complaint to quiet title must be verified and must include the following [*Code Civ. Proc. § 761.020*]:

(1) A description of the property that is the subject of the action. In the case of real property, the description must include both its legal description and its street address or common designation, if any (Paragraph 4);

(2) The plaintiff's title, as to which a determination is sought, and the basis of the title (Paragraph 5);

(3) The adverse claims to the title of the defendant against whom a determination is sought (Paragraph 9);

(4) The date as of which the determination is sought (Paragraph 11); and

(5) A prayer for the determination of the title of the plaintiff against the adverse claims.

If a quiet title action is one for the recovery of real property or its possession, it is subject to *Code Civ. Proc. § 318*, which requires the plaintiff to have been seized or possessed of the property within five years prior to the commencement of the action (Paragraph 6). This limitation period does not run against a party in possession [*Muktarian v. Barmby (1965) 63 Cal. 2d 558, 560, 47 Cal. Rptr. 483, 407 P.2d 659]* .

[4] Parties to Action

To bind the transferor-spouse to the judgment as to the character of the property and to facilitate a complete determination of the controversy, the transferor-spouse should be joined as a necessary party to the plaintiff-spouse's action [*see Code Civ. Proc. § 389*; *Vanasek v. Pokorny (1925) 73 Cal. App. 312, 319-321, 238 P. 798]* . To make the judgment binding against all the world, unknown defendants should be joined in the manner set forth in the complaint [*Code Civ. Proc. §§ 762.020, 762.060, 764.030*]. If such defendants are named, service must be made by publication and posting [*Code Civ. Proc. §§ 763.010(b), 763.020, 763.030*].

[5] Lis Pendens

A lis pendens must be filed when the complaint to cancel the instrument and quiet title is filed [*Code Civ. Proc. § 761.010(b)*].

[6] Cross References

For a related form, see *§ 122.90*.

For further discussion and forms relevant to setting aside unauthorized conveyances of community real property, see Ch. 107, *Cancellation of Instruments* , and Ch. 482, *Quieting Title*

For the requirements and procedure for service by publication and posting, see Ch. 482, *Quieting Title* , and Ch. 518, *Service of Summons and Papers*

[7] State Statutes

Quiet title actions. *Civ. Code § 3412*; *Code Civ. Proc. §§ 761.010(b), 761.020*

Necessary parties. *Code Civ. Proc. § 389*

Joinder of unknown defendants. *Code Civ. Proc. §§ 762.020, 762.060, 762.030*

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Chapter 122 COMMUNITY PROPERTY
PART IV. FORMS

12-122 California Forms of Pleading and Practice--Annotated § 122.93

§ 122.93 Complaint to Recover One-Half of Proceeds of Life Insurance Policy When Premiums Paid Out of Community Property [Fam. Code § 1100(b); Prob. Code §§ 100, 6101, 6103]--By Surviving Spouse Against Insurance Company and Designated Beneficiary

[1] FORM Complaint to Recover One-Half of Proceeds of Life Insurance Policy When Premiums Paid Out of Community Property [Fam. Code § 1100(b); Prob. Code §§ 100, 6101, 6103]--By Surviving Spouse Against Insurance Company and Designated Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s) of known defendant(s)*], [and DOES I through_____,]	)	COMPLAINT TO RECOVER PROCEEDS OF COMMUNITY PROPERTY LIFE INSURANCE POLICY
	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. On or about _____ [*date*], plaintiff and _____ [*name of insured*] married and at all times herein mentioned were husband and wife.

[*EITHER*]

2. [*Capacity and residence of individual defendant named as beneficiary of life insurance policy. See § 122.91, Paragraph 2.*]

[*AND/OR*]

2. _____ [*Allege capacity and authority of insurer, e.g.,* Defendant _____ (*name of insurer*) is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California (, with its principal place of business in this state situated in _____ County,) and authorized (by the California Insurance Commissioner) to transact, and is transacting, business in this state as a life insurer].

[3. Defendants DOES I-_____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants claims some right, title, or other interest in the hereinafter-described property adverse to plaintiff's title; and that each of them is responsible in some manner for the wrongful conduct herein alleged.]

4. On or about _____ [*date*], in consideration of the payment and agreement to pay specified premiums, [defendant] _____ [*name of insurer*], by its duly authorized agents, executed and delivered to _____ [*name of insured*] in _____ [*city, county, and state*] a written policy of insurance, number _____, under which the life of _____ [*name of insured*] was insured in the amount of $ _____ [, payable to plaintiff as the beneficiary]. A copy of the insurance policy is attached hereto as Exhibit A and made a part hereof.

5. Premiums on the policy were fully paid with community funds of plaintiff and _____ [*name of insured*]. The policy became community property of plaintiff and _____ [*name of insured*] at the time it was executed and delivered.

[*EITHER*]

6. At the time the policy was executed and delivered, _____ [*name of insured*] designated defendant _____ [*name of designated beneficiary*] as beneficiary under the policy, for less than fair and reasonable value and without obtaining plaintiff's written consent.

[*OR*]

6. Subsequent to execution and delivery of the policy, _____ [*name of insured*] changed the designation of beneficiary from plaintiff to defendant _____ [*name of designated beneficiary*], for less than fair and reasonable value and without obtaining plaintiff's written consent.

[*CONTINUE*]

7. On or about _____ [*date*], while the policy was in full force and effect, _____ [*name of insured*] died in _____ [*city, county, and state*].

[*EITHER, if insurer is a defendant and payment of proceeds has not been made*]

8. On or about _____ [*date*], plaintiff gave written notice of a claim in the proceeds of the policy to defendant _____ [*name of insurer*] at its home office, _____ [*specify address of insurer*]. Payment under the policy has not been made.

[*OR, if insurer is a defendant and payment has been made or if designated beneficiary is sole defendant*]

8. On or about _____ [*date*], [defendant] _____ [*name of insurer*] paid the amount of $_____[, the entire proceeds of the policy,] to defendant _____ [*name of designated beneficiary*]. [Prior to payment, plaintiff gave written notice of a claim in the proceeds to the defendant _____ (*name of insurer*) at its home office, _____ (*specify address of insurer*).]

[*CONTINUE*]

9. Plaintiff [and _____ (*name of insured*)] performed all conditions of the policy required on his/her/their part to be performed, and, in accordance with the terms of the policy, plaintiff gave [defendant] _____ [*name of insurer*] due and timely notice and proof of death.

10. Plaintiff has demanded from defendant(s) _____ [*name(s) of insurer or designated beneficiary or both*] payment of $_____, one-half the amount for which the life of _____ [*name of insured*] was insured, but defendant(s) _____ [*name(s) of insurer or designated beneficiary or both*] [has *or* have] failed and refused, and continue(s) to fail and refuse, to pay the whole [or any part] of that amount. The amount of $_____ is now due and owing from defendant(s) _____ [*name(s) of insurer or designated beneficiary or both*] to plaintiff because of plaintiff's community property interest in the proceeds of the policy.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For the sum of $_____, representing the amount of plaintiff's one-half interest in the proceeds of the policy, with interest thereon at the legal rate from and after _____ [*date*];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____[*name*]

[*Verification. See § 122.90.*]

[2] Use of Form

This form of complaint may be used by a surviving spouse to recover one-half of the proceeds of a community property life insurance policy when the decedent designated a third person as beneficiary for less than fair and reasonable value and without the plaintiff's written consent [*see Fam. Code § 1100(b)*; *Tyre v. Aetna Life Ins. Co. (1960) 54 Cal. 2d 399, 402, 404, 6 Cal. Rptr. 13, 353 P.2d 725* ; *see also Prob. Code §§ 100, 6101, 6103*; for related discussion, *see § 122.51[8]*].

If the spouse also desires to sue the estate of the decedent for damages arising from the decedent's breach of fiduciary duty [*see Fam. Code § 1101*], this form may be adapted for use as one of the causes of action in the complaint [*see* Ch. 123, *Complaints and Cross Complaints*]. For a form stating a cause of action for breach of fiduciary duty, see *§ 122.90*.

[3] Joinder of Designated Beneficiary

It is recommended that counsel always include any designated beneficiaries under the policy as defendants in the action, even if the insurer has not paid the policy proceeds. A designated beneficiary is a person who claims an interest relating to the subject of the action and should be joined as a party under *Code Civ. Proc. § 389(a)(2)*. See additional discussion of compulsory joinder in Ch. 395, *Parties*.

[4] Consideration for Transfer

After 1991, an unauthorized transfer of community personal property may be set aside if made for less than fair and reasonable value [*see Fam. Code § 1100(b)*], as alleged in this form. Prior to 1992, such a transfer could be set aside if made without valuable consideration [*see* former *Civ. Code § 5125(b)*]. Thus, if the transfer at issue occurred before January 1, 1992, this form should be changed to state that the transfer was made without valuable consideration. For discussion of what constitutes valuable consideration, see *§ 122.51[6][c]*.

[5] Notice to Insurer

When the plaintiff seeks to recover his or her community share of the proceeds of a life insurance policy from the insurer, written notice of the plaintiff's claim must be given to the insurer prior to payment of the proceeds to the named beneficiary. Unless it receives written notice at its home office before payment, the insurer is fully discharged from all claims under the policy [*Ins. Code § 10172*]. When the proper notice is not given, the plaintiff may bring an action only against the designated beneficiary who received payment under the policy.

The first alternative version of Paragraph 8 of the complaint states the proper allegation when the insurance company has not made payment and plaintiff has given notice of his or her claim in the proceeds. When payment has been made and the insurer is not a party because the plaintiff failed to give notice before payment, counsel should allege the first sentence of the second alternative version of Paragraph 8. When payment has been made and the insurer is a party because plaintiff gave proper notice, counsel should allege both sentences in the second alternative version of Paragraph 8.

[6] Verification

Verification of this complaint is not required, but verification of the complaint requires the defendant to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446*] and precludes a general denial. [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[7] Cross References

For additional discussion and forms relating to actions against insurance companies to recover insurance benefits, see Ch. 308, *Insurance* .

[8] State Statutes

Interest as recoverable on damages certain, or capable of being made certain by calculation, from day right to recover is vested. *Civ. Code § 3287(a)*

Payment or refund under employee benefit plan as fully discharging plan sponsor, administrator, trustee, or insurance company unless written notice of claim is received before payment. *Fam. Code § 755*

Spouse as not allowed to make gift of community personal property or to dispose of community personal property for less than fair and reasonable value, unless other spouse gives written consent. *Fam. Code § 1100(b)*

On death of spouse, one-half of community property as belonging to surviving spouse and other half as subject as subject to testamentary disposition of decedent. *Prob. Code §§ 100, 6101, 6103*

[9] Decisions

Designation or change of beneficiary by insured spouse under life insurance policy purchased with community funds as voidable by excluded spouse if the designation or change is made without valuable consideration, unless excluded spouse consents in writing; surviving spouse as entitled to maintain action for his or her community share of proceeds of policy. *Tyre v. Aetna Life Ins. Co. (1960) 54 Cal. 2d 399, 404, 6 Cal. Rptr. 13, 353 P. 2d 725* ; *Grimm v. Grimm (1945) 26 Cal. 2d 173, 175, 157 P. 2d 841* (both decided prior to legislation changing term "valuable consideration" to "fair and reasonable value" in predecessor to *Fam. Code § 1100(b)*)

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Chapter 123 COMPLAINTS AND CROSS COMPLAINTS

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[6] Acceptance for Filing

[7] Actions Involving Installment or Automotive Sales, Consumer Obligations, or Unlawful Detainer

[8] Cross References

§ 123.62 Body of Complaint or Cross Complaint [Code Civ. Proc. § 425.10(a)]--Skeletal Form--Multiple Causes of Action and Counts

[1] FORM

[2] Use of Form

[3] Multiple Causes of Action

[a] General Considerations

[b] Cause of Action Distinguished From Count

[c] Numbering Causes of Action, Counts, and Paragraphs

[d] Identification of Cause of Action or Count

[4] Allegations

[5] Allegations on Information and Belief

[6] Signature

[7] Cross References

§ 123.63 Body of Complaint or Cross Complaint [Code Civ. Proc. § 425.10(a)]--Skeletal Form--Multiple Parties

[1] FORM

[2] Use of Form

[3] Multiple Parties

[a] Joinder

[b] Identification of Parties and Causes of Action

[4] Allegations

[5] Allegations on Information and Belief

[6] Prayer

[7] Signature

[8] Verification

[9] Cross References

§ 123.64 Notice of Motion for Leave to File Permissive Cross Complaint After Time for Filing Without Leave of Court Has Expired [Code Civ. Proc. § 428.50(c)]

[1] FORM

[2] Use of Form

[3] Proposed Cross Complaint

[4] Grounds

[5] Court's Discretion

[6] Form of Motion

[7] Cross References

§ 123.65 Declaration in Support of Motion for Leave to File Permitted Cross Complaint [Code Civ. Proc. § 428.50]

[1] FORM

[2] Use of Form

[3] Compulsory Cross Complaint

[4] Cross References

§ 123.66 Order on Motion for Leave to File Cross Complaint [Code Civ. Proc. §§ 426.50, 428.50]

[1] FORM

[2] Use of Form

[3] Cross References

§ 123.67 Notice of Motion for Leave to File Compulsory Cross Complaint After Answer Is Filed [Code Civ. Proc. § 426.50]

[1] FORM

[2] Use of Form

[3] Proposed Cross Complaint

[4] Grounds

[5] Declaration in Support and Order

[6] Memorandum

[7] Cross References

§ 123.68 Stipulation and Order to File Cross Complaint

[1] FORM

[2] Use of Form

[3] Cross References

§ 123.69 Confidential Reference List of Identifiers--Judicial Council Form MC-120 [Cal. Rules of Ct., Rule 1.20(b)]

[1] Form

[2] Use of Form

[3] Cross References

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12-123 California Forms of Pleading and Practice--Annotated § 123.01

§ 123.01 Scope of Chapter

This chapter discusses complaints and cross complaints in California state courts [*see § 123.10* et seq.] and includes a Research Guide [*see § 123.50*].

This chapter also includes the following forms:

- An illustration of the Judicial Council form of Case Cover Sheet [*see § 123.60*].
- Illustrations of the format of complaints and cross complaints [*see §§ 123.61 -123.63*].
- Notices of motion for leave to file a permissive [*see § 123.64*] or mandatory [*see § 123.67*] cross complaint, and a supporting declaration [*see § 123.65*] and order [*see § 123.66*].
- A form of stipulation to file a cross complaint [*see § 123.68*].
- A form of stipulation to transfer an action to a court having jurisdiction over a cross complaint [*see § 123.69*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProceduresPleading & PracticePleadingsComplaintsRequirements

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12-123 California Forms of Pleading and Practice--Annotated § 123.02

§ 123.02 Cross References

For more detailed discussion and forms relating to specific parts of complaints, see the following chapters:

- For allegations commonly used in pleadings, see Ch. 20, *Allegations Commonly Used* .
- For forms for use in proceedings to amend a complaint, see Ch. 21, *Amended and Supplemental Pleadings* .
- For forms of captions and introductions, see Ch. 108, *Captions and Introductions* .
- For forms for use in proceedings for joinder or substitution of parties, see Ch. 395, *Parties* .
- For forms of prayers for use in complaints, see Ch. 420, *Prayers* .
- For procedures and forms for use in service of summons and other papers, see Ch. 518, *Service of Summons and Papers* .
- For forms for use in small claims court, see Ch. 526, *Small Claims* .
- For forms of verification, see Ch. 572, *Verification* .
- See generally Ch. 26, *Answers* ,, Ch. 206, *Motions for Judgment on the Pleadings* , Ch. 375, *Motions to Strike: Pleadings* , Ch. 376, *Motions to Strike: Anti-SLAPP* , and Ch. 389, *Motions for Nonsuit and Judgment* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsCivil ProcedurePleading &

PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedureParties General Overview

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[Reserved]

§§ 123.03[Reserved]

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12-123 California Forms of Pleading and Practice--Annotated § 123.10

§ 123.10 Governing Law

Pleadings in civil actions generally are governed by *Code Civ. Proc. §§ 420-475*. Complaints and cross complaints are specifically governed by *Code Civ. Proc. §§ 425.10-429.40*.

General rules of pleading are set forth in *Code Civ. Proc. §§ 452-465*, and verification is governed by *Code Civ. Proc. § 446*. Signatures on pleadings, and the certification of pleadings by presenting them to court are governed by *Code Civ. Proc. § 128.7*, which is patterned on *Fed. R. Civ. P. 11* [*see Code Civ. Proc. § 128.7(i)* (application of Section 128.7 to actions filed on or after January 1, 1995); *see also Code of Civ. Proc. § 128.5* (applicable to actions filed before 1995)].

The form and format of papers filed in California courts are governed by *Cal. Rules of Ct., Rule 2.100 et seq.* The requirement that actions must be prosecuted in the name of the real party in interest is set forth in *Code Civ. Proc. § 367*, and exceptions in *Code Civ. Proc. §§ 369* and 1368.3.

Objections to pleadings, denials, and defenses are governed by *Code Civ. Proc. §§ 430.10-432.10*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProceduresPleading & PracticePleadingsImpleader

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12-123 California Forms of Pleading and Practice--Annotated § 123.11

§ 123.11 Definitions

[1] Pleadings in General

Pleadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the court [*Code Civ. Proc. § 420*]. Complaints and cross complaints are two of the four permissible pleadings in civil actions [*see Code Civ. Proc. § 422.10*]. They are the only pleadings by which a party to a civil action (Part Two of the Code of Civil Procedure, *Code Civ. Proc. § 307 et seq.*) may seek affirmative relief [*see Code Civ. Proc. §§ 425.10, 431.30(c)*]. In a civil action, the party complaining is known as the plaintiff and the adverse party is known as the defendant [*Code Civ. Proc. § 308*].

[2] Papers

The word "papers" as defined in *Cal. Rules of Ct., Rule 2.3(2)* includes all documents, except exhibits or copies of documents, that are offered for filing in any case; but it does not include Judicial Council and local court forms, records on appeal in limited civil cases, or briefs filed in the appellate divisions.

[3] Complaint, Cross Complaint, Related Cause of Action

As used in the provisions dealing with compulsory cross complaint [*Code Civ. Proc. §§ 426.30-426.60*], "complaint" means a complaint or cross complaint, "plaintiff" means a person who files a complaint or cross complaint, and "related cause of action" means a cause of action that arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action that the plaintiff alleges in his or her complaint [*Code Civ. Proc. § 426.10*].

[4] Third-Party Plaintiff and Defendant

As used in *Code Civ. Proc. § 428.70* (rights of third parties to actions), the term "third-party plaintiff" means a person against whom a cause of action has been asserted in a complaint or cross complaint who claims the right to recover all or part of any amounts for which he or she may be held liable on such cause of action from a third person and who files a cross complaint stating such claim as a cause of action against the third person [*Code Civ. Proc. § 428.70(a)(1)*].

The term "third-party defendant" means the person who is alleged in a cross complaint filed by a third-party plaintiff to be liable to the third-party plaintiff if the third-party plaintiff is held liable on the claim against him or her [*Code Civ. Proc. § 428.70(a)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProcedurePleading & PracticePleadingsImpleader

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12-123 California Forms of Pleading and Practice--Annotated § 123.12

§ 123.12 Function and Purpose of Complaint and Cross Complaint

A civil action is commenced by filing a complaint with the court [*see Code Civ. Proc. §§ 350, 411.10, 411.20*]. Its function and purpose is to present and define the issues, to form the foundation of and to limit the proof to be submitted, and to advise the court and the adverse party as to what is relied on as a cause of action [*Roth v. Cottrell (1952) 112 Cal. App. 2d 621, 624, 246 P.2d 958]* . In addition, because a civil action is commenced by filing a complaint, it is critical to consideration of the applicable statutes of limitations [*see Code Civ. Proc. § 312*; *see generally* Ch. 345, *Limitation of Actions*]. On the other hand, the fundamental purpose of the cross complaint is to have a complete determination of the controversy among the parties in one action, thus avoiding a circuity of action [*White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 351 n.10, 66 Cal. Rptr. 697, 438 P.2d 345* ; *Bewley v. Riggs (1968) 262 Cal. App. 2d 188, 192, 68 Cal. Rptr. 520* ; for discussion of cross complaints, *see § 123.29*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticePleadingsComplaintsCross-ComplaintsGovernmentsLegislationStatutes of LimitationsGeneral Overview

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12-123 California Forms of Pleading and Practice--Annotated § 123.13

§ 123.13 Causes of Action and Counts Distinguished

[1] Confusion of Terms

Confusion as to the meaning of the terms "causes of action" and "counts" exists in California because the former phrase is often used to mean counts as well as to mean what it says [*Eichler Homes of San Mateo, Inc. v. Superior Court (1961) 55 Cal. 2d 845, 846, 13 Cal. Rptr. 194, 361 P.2d 914]* .

[2] Cause of Action Defined

A cause of action consists of the primary right possessed by plaintiff, the corresponding primary duty devolving on the defendant, and the wrong done by the defendant [*Jenkins v. Pope (1990) 217 Cal. App. 3d 1292, 1299, 1299 n.2, 266 Cal. Rptr. 557]* . Under the "primary right" theory of pleading followed in California, a cause of action is based on the injury suffered by the plaintiff, regardless of the particular legal theory or theories on which plaintiff seeks redress. Under this theory, even if the plaintiff has various forms of relief or theories of relief available, violation of a single primary right gives rise to only one cause of action. For example, a complaint alleging fraud and negligent misrepresentation involves one primary right because the harm to the plaintiff is the same whether the alleged misrepresentations were made intentionally or negligently [*Jenkins v. Pope (1990) 217 Cal. App. 3d 1292, 1299, 1299 n.3, 266 Cal. Rptr. 557]* .

If more than one primary right has been invaded and the theory of liability of each is different, the complaint, will normally set forth multiple causes of action, in which case each must be separately numbered [*Cal. Rules of Ct., Rule 2.112(1)*]. If several causes of action arise out of a single happening or event or series of events and the theory of liability for each is the same (for example, negligence), the causes of action are normally combined and stated as a single cause of action seeking recovery of damages for invasion of each of the primary rights pleaded. A common illustration is an automobile accident in which the plaintiff suffers personal injury and property damage, two separate primary rights.

Whether a complaint in fact asserts one or more causes of action for pleading purposes depends on whether it alleges invasion of one or more primary rights. The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action [*Hindin v. Rust (2004) 118 Cal. App. 4th*

1247, 1257, 13 Cal. Rptr. 3d 668 , relying on *Crowley v. Katleman (1994) 8 Cal. 4th 666, 34 Cal. Rptr. 2d 386, 881 P.2d 1083]* .

The manner in which a plaintiff elects to organize his/her claims within the body of the complaint is irrelevant to determining the number of causes of action alleged under the primary right theory. A complaint that states several purported causes of action which allege an invasion of the same primary right, actually states only one cause of action; alternatively, a complaint that alleges that the defendant's single wrongful act invaded two different primary rights has stated two causes of action, even if the two invasions are pleaded in a single count of the complaint [*Hindin v. Rust (2004) 118 Cal. App. 4th 1247, 1258, 13 Cal. Rptr. 3d 668* , relying on *Skrbina v. Fleming Companies (1996) 45 Cal. App. 4th 1353, 53 Cal. Rptr. 2d 481]* .

Mislabeling a cause of action is not a fatal defect [*Gagne v. Bertran (1954) 43 Cal. 2d 481, 487, 275 P.2d 15]* .

[3] Count Defined

A cause of action (invasion of one primary right) may give rise to two or more legal theories on which liability can be predicated. For example, in a case arising out of injuries sustained from a defective product, liability might be predicated on the theory of negligence, strict liability in tort, breach of warranty, or on all or any combination of these or other theories. Separate counts are merely the separate theories of liability based on the same cause of action [*Eichler Homes of San Mateo, Inc. v. Superior Court (1961) 55 Cal. 2d 845, 846-847, 13 Cal. Rptr. 194, 361 P.2d 914]* , even if each count must allege different facts to establish plaintiff's right to the remedy created by the theory on which the count is based [*see* *Zumbrun v. University of Southern California (1972) 25 Cal. App. 3d 1, 9, 101 Cal. Rptr. 499]* .

The complaint in such a case will state a separate "count" for each separate legal theory relied on. Each count must state facts sufficient to constitute a cause of action if it is to withstand a general demurrer [*see Code Civ. Proc. § 430.10(e)*; *Warren v. Atchison, T. & S.F. Ry. Co. (1971) 19 Cal. App. 3d 24, 41, 96 Cal. Rptr. 317]* . If separate counts are stated, each must be separately numbered [*Cal. Rules of Ct., Rule 2.112(1)*]. Stating a separate count for each separate theory of liability, rather than combining them in a single count or cause of action, is done to avoid confusion in the framing of the issues to be tried and to avoid the rule against inconsistent pleading in the same cause of action [*see* *Steiner v. Rowley (1950) 35 Cal. 2d 713, 715-716, 718-719, 221 P.2d 9* ; *Zumbrun v. University of Southern California (1972) 25 Cal. App. 3d 1, 9, 101 Cal. Rptr. 499* (in interests of justice to both sides and of orderly administration of justice, plaintiff should set forth separate theories in separate counts to facilitate the adjudication of their validity)]. But stating a cause of action in separate counts does not make each count a separate cause of action where only one primary right has been invaded [*see* *Peiser v. Mettler (1958) 50 Cal. 2d 594, 604-605, 328 P.2d 953]* .

[4] Liberal Construction

In the construction of a pleading for the purpose of determining its effect, its allegations must be liberally construed with a view to substantial justice to the parties [*Code Civ. Proc. § 452*; *Smith v. Kern County Land Co. (1958) 51 Cal. 2d 205, 206, 331 P.2d 645]* . The policy of the law in this respect is to permit cases to be tried on their merits rather than disposed of on technicalities. An action cannot be defeated merely because of a mistaken label or a confusion of legal theories; if the complaint states a cause of action on any theory, the plaintiff is entitled to introduce evidence thereon [*Porten v. University of San Francisco (1976) 64 Cal. App. 3d 825, 833, 134 Cal. Rptr. 839]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticePleadingsRule Application & Interpretation

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12-123 California Forms of Pleading and Practice--Annotated § 123.14

§ 123.14 Format

[1] Filing Requirements

[a] California Rules of Court

The format requirements for papers filed in court are set forth in the California Rules of Court. The word "papers" as used in the rules on format include complaints and cross complaints [*see Cal. Rules of Ct., Rule 2.100*].

The clerk of the court is not permitted to accept for filing or file any papers that do not comply with Tit. 2, Div.2, Ch. 1 of the Cal. Rules of Ct., [*Cal. Rules of Ct., Rule 2.118(a)*]. However, for good cause shown, the court may permit the filing of papers that do not comply with Tit. 2, Div.2, Ch. 1 of the Cal. Rules of Ct., [*Cal. Rules of Ct., Rule 2.118(c)*]. Additionally, a clerk cannot reject a paper for filing solely on the ground that it is handwritten or handprinted or that the handwriting or handprinting is in a color other than blue-black or black [*Cal. Rules of Ct., Rule 2.118(a)*], or solely on the ground that it does not contain an attorney's or a party's fax number or e-mail address on the first page [*Cal. Rules of Ct., Rule 2.118(b)*].

Cal. Rules of Ct., Rule 3.110(c) requires that a cross complaint against a party who has appeared in the action be accompanied by proof of service of the cross complaint at the time it is filed; if the cross complaint adds new parties, the cross complaint must be served on all parties and proofs of service on the new parties must be filed within thirty days of the filing of the cross-complaint.

[b] Effect of Local Rules

A local superior court may not condition the filing of a complaint on local rule requirements. So long as a complaint complies with state requirements, the clerk has a ministerial duty to file. In legal effect, a complaint is "filed" when it is presented to the clerk for filing in the form required by state law, i.e., in a form that complies with Tit. 2, Div.2, Ch. 1 of the Cal. Rules of Ct. Thus, it has been held that a clerk lacks authority to enforce a local rule requiring a Certificate of Assignment by rejecting papers that comply with the Cal. Rules of Ct., but fails to include such a certificate [*Carlson v. Department of Fish & Game (1998) 68 Cal. App. 4th 1268, 1270-1276, 1281, 80 Cal. Rptr. 2d 601* (plaintiff's complaint effectively filed when first presented to clerk and thus statute of limitations did not elapse)]. After a paper is

filed, the court may use its power to impose sanctions (*Code Civ. Proc. § 575.2, Cal. Rules of Ct., Rule 2.30*, and other authorization) to redress local rule violations [*Carlson v. Department of Fish & Game (1998) 68 Cal. App. 4th 1268, 1281-1282, 80 Cal. Rptr. 2d 601]* .

[2] Paper and Print

Complaints and cross complaints must be presented on opaque, unglazed paper, white or unbleached, of standard quality not less than 20-pound weight, 81/2 by 11 inches in size [*Cal. Rules of Ct., Rule 2.103*]. Recycled paper must be used for all original papers filed with the court and all copies of papers, documents, and exhibits filed with the court or served on other parties. The attorney, party, or other person filing or serving a document certifies, by the act of filing or service, that the document was produced on paper purchased as recycled [*Cal. Rules of Ct., Rule 2.101(b)*].

All papers must be typewritten or printed or prepared by a photocopying or other duplication process that will produce clear and permanent copies equally legible to printing. The type cannot be smaller than 12 points. The type face must be essentially equivalent to Courier, Times Roman, or Helvetica. The color of print must be blue-black or black [*Cal. Rules of Ct., Rule 2.106*].

[3] Line Spacing and Numbering

Only one side of the paper may be used, and the lines on each page are one and one half spaced or double spaced and numbered consecutively. Descriptions of real property may be single spaced. Footnotes, quotations, and printed forms of corporate surety bonds and undertakings may be single spaced and have unnumbered lines if they comply generally with the space requirements of Rule 2.111 [*Cal. Rules of Ct., Rule 2.108(3)*].

The left margin must be at least one inch from the left edge of the paper and the right margin at least one-half inch from the right edge of the paper. Line numbers must be placed at the left margin and separated from the text of the paper by a vertical column of space at least one-fifth inch wide or a single or double vertical line. The line number either must be placed on the same line as a line of type or must be evenly spaced vertically on the page. Line numbers must be consecutively numbered beginning with the number "1" on each page. There must be at least three line numbers for every vertical inch on the page [*Cal. Rules of Ct., Rule 2.108(4)*].

[4] Page Numbering, Hole Punching, and Exhibits

Each page must be numbered consecutively at the bottom. Each page must consist entirely of original pages without riders and must be firmly bound together at the top. Exhibits may be fastened to pages of the specified size and, if prepared by a machine copying process, must be equal to typewritten material in legibility and permanency of image. Each paper presented for filing must contain two prepunched normal size holes, centerd 21/2 inches apart and 5/8 inch from the top of the paper [*Cal. Rules of Ct., Rule 2.115*].

Except for exhibits, each paper filed with the court must have a footer in the bottom margin of each page, placed below the page number and divided from the rest of the document by a printed line. The footer must contain the title of the paper or some clear and concise abbreviation in at least 10-point type [*Cal. Rules Ct., Rule 2.110(a)*]. One example given in the rules is simply "Complaint" [*see Cal. Rules Ct., Rule 2.110(b)*].

[5] First Page

The first page of complaints and cross complaints are in the following form:

> (1) In the space commencing 1 inch from the top of the page with line 1, to the left of the center of the page, the name, office address or, if none, residence address, telephone number, fax number and e-mail address, if available, and State Bar membership number, either of the attorney for the party in whose

behalf the paper is presented or of the party if he or she is appearing in person; inclusion of a fax number or e-mail address does not constitute consent to service by fax or e-mail unless otherwise provided by law [*Cal. Rules of Ct., Rule 2.111(1)*].

(2) The first 2 inches of space between lines 1 and 7 to the right of the center of the page is left blank for the use of the clerk [*Cal. Rules of Ct., Rule 2.111(2)*].

(3) On or below 31/3 inches from the top of the paper, at line 8, the title of the court [*Cal. Rules of Ct., Rule 2.111(3)*; *see Code Civ. Proc. § 422.30(a)*; *Ex parte Fil Ki (1889) 79 Cal. 584, 586-587, 21 P. 974* (misnaming court in complaint as nonfatal defect)].

(4) Below the title of the court, in the space to the left of the center of the page, the title of the case [*Cal. Rules of Ct., Rule 2.111(4)*]. In the title of the case on each initial complaint or cross-complaint, the name of each party must commence on a separate line beginning at the left margin or the page [*Cal. Rules of Ct., Rule 2.111(4)*]. On any subsequent pleading or paper, it is sufficient in the title of the case to (1) state the name of the first party on each side, with appropriate indication of other parties (usually by the abbreviation "et al." meaning "and others"), and (2) state that a cross-action or cross-actions are involved, if applicable [*Cal. Rules of Ct., Rule 2.111(4)*; *see Code Civ. Proc. §§ 422.30, 422.40*; *McDonough v. Waxman (1930) 103 Cal. App. 169, 172-173, 284 P. 482* (incorrect description of party in caption of complaint as nonfatal defect)].

(5) To the right of and opposite the title, the number of the case (in a complaint, a blank line should be used since the case number is stamped or written in by the court clerk; in a cross complaint, the number of the case is typed in [*Cal. Rules of Ct., Rule 2.111(5)*]).

(6) Below the number of the case, the nature of the paper and the character of the action or proceeding [*Cal. Rules of Ct., Rule 2.111(6)*].

(7) Below the nature of the paper or the character of the action or proceeding, the name of the judge and department, if any, to which the case is assigned [*Cal. Rules of Ct., Rule 2.111(7)*].

(8) In a limited civil case, immediately below the character of the action or proceeding, either "Amount demanded exceeds $10,000" or "Amount demanded does not exceed $10,000" [*Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9)*], and in a limited civil case, it must specify "Limited Civil Case" as required by *Code Civ. Proc. § 422.30(b)* [*Cal. Rules of Ct., Rule 2.111(10)*].

(9) If a case is reclassified by an amended complaint, cross-complaint, amended cross-complaint, or other pleading under *Code Civ. Proc. § 403.020* or *403.030*, the caption must indicate that the action or proceeding is reclassified by this pleading [*Cal. Rules of Ct., Rule 2.111(11)*]. The caption or title must state that the case is a limited civil case reclassified as an unlimited civil case, or an unlimited civil case reclassified as a limited civil case, or other words to that effect [*Cal. Rules of Ct., Rule 2.111(11)*].

A party or attorney whose address changes while an action is pending must serve on all parties and file written notice of the change of address [*Cal. Rules of Ct., Rule 2.200*].

[6] Additions, Deletions, Interlineations, and Copies

Any additions, deletions, or interlineations must be initialed by the clerk or judge at the time of filing [*Cal. Rules of Ct., Rule 2.116*]. All copies served must conform to the original filed, including the numbering of lines, pagination, additions, deletions, and interlineations [*Cal. Rules of Ct., Rule 2.117*].

[7] Cases Governed by Trial Court Delay Reduction Programs

Superior courts in all California counties are required to implement trial court delay reduction programs for limited civil cases [*Gov. Code §§ 68605.5, 68620*].

Counties may require a plaintiff to file additional documents with the complaint [*see Hartford Acc. & Indem. Co. v. Gonzalez (1994) 31 Cal. App. 4th 51, 56, 36 Cal. Rptr. 2d 769* (upholding local rule in Ventura County requiring case information sheet to be filed with complaint)].

For further coverage of the act and local delay reduction rules, see Ch. 552, *Trial Court Delay Reduction* .

[8] Numbering Causes of Action, Counts, and Paragraphs

Each separately stated cause of action or count must be separately numbered[*Cal. Rules of Ct., Rule 2.112(1)*; for further discussion, *see § 123.13*]. Each separate cause of action in a pleading must be specifically identified with all of the following information [*Cal. Rules of Ct., Rule 2.112*]:

- Its number (*e.g.*, "First Cause of Action").
- Its nature (*e.g.*, "for Fraud").
- The party asserting it, if more than one party is represented in the pleading (*e.g.*, "by Plaintiff Jones").
- The party or parties to whom it is directed (*e.g.*, "against Defendant Smith").

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticePleadingsComplaintsCross-ComplaintsGovernmentsCourtsRule Application & Interpretation

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§ 123.15 Incorporation by Reference

If the complaint sets up more than one cause of action or count, it is unnecessary for a party to repeat at length in each of succeeding counts the facts stated in preceding counts [*Treweek v. Howard (1895) 105 Cal. 434, 441-442, 39 P. 20]* . Allegations of a preceding count may be incorporated by reference into subsequent alleged counts [*Clark v. Berlin Realty Co. (1917) 33 Cal. App. 50, 53, 164 P. 333]* . Use of incorporation by reference will not be subject to serious objection so long as the reference is definite and certain [*Treweek v. Howard (1895) 105 Cal. 434, 442, 39 P. 20]* . Nevertheless, each count must be complete in itself and must contain all the facts necessary to constitute a cause of action; its defects cannot be supplied from other statements unless those statements are expressly referred to and adopted as a part of it [*Priola v. Paulino (1977) 72 Cal. App. 3d 380, 383, 140 Cal. Rptr. 186]* .

When incorporating into a count allegations from other counts, the pleader should be cautious not to incorporate conflicting facts and thereby render the pleading uncertain and subject to demurrer [*see Code Civ. Proc. § 430.10(f)*].

Courts differ over the desirability of a "chain letter" or cumulative type of pleading in which the plaintiff incorporates by reference entire causes of action. The Second District Court of Appeal, for example, has stated that this type of pleading should be avoided as it tends to cause ambiguity and creates redundancy [*Kelly v. General Telephone Co. (1982) 136 Cal. App. 3d 278, 285, 186 Cal. Rptr. 184]* . The Fourth District Court of Appeal, on the other hand, has stated that a civil plaintiff may for the sake of convenience incorporate by reference previous portions of his or her pleading for informational purposes only [*Cal-West Nat. Bank v. Superior Court (1986) 185 Cal. App. 3d 96, 101, 229 Cal. Rptr. 431]* .

A complaint may also incorporate by reference a document that is attached as an exhibit, in order to supply material facts to comprise a cause of action. This practice is consistent with the obligation of the courts to construe pleadings liberally with a view to attaining substantial justice among the parties [*Del Mar Beach Club Owners Assn. v. Imperial Contracting Co. (1981) 123 Cal. App. 3d 898, 908, 176 Cal. Rptr. 886* ; *see also Ludgate Ins. Co. v. Lockheed Martin Corp. (2000) 82 Cal. App. 4th 592, 609, 98 Cal. Rptr. 2d 277* (trial court abused discretion in not allowing cross complainant to amend its fifth amended cross complaint to add words "incorporated by reference")].

A willful misconduct claim under *Code Civ. Proc. § 337.15(f)* may be made in a cross-complaint by way of

incorporating by reference allegations contained in the complaint [*Pine Terrace Apartments, LP v. Windscape, LLC (2009) 170 Cal. App. 4th 1, 4, 87 Cal. Rptr. 3d 630*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 123.16 Permissive Joinder of Actions

A plaintiff who, in a complaint, alone or with coplaintiffs, alleges a cause of action against one or more defendants may unite with that cause any other causes that he or she has, either alone or with any coplaintiffs, against any of such defendants. Causes of action may be joined in a cross complaint in accordance with *Code Civ. Proc. §§ 428.10* and *428.30*, *Code Civ. Proc. § 427.10*; *see also Code Civ. Proc. §§ 378, 379* (permissive joinder of parties generally), 428.20 (permissive joinder of parties by cross complaint)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 123.17 Statement of Facts Constituting Cause of Action

A complaint or cross complaint contains a statement of the facts constituting the cause of action, in ordinary and concise language [*Code Civ. Proc. § 425.10*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-123 California Forms of Pleading and Practice--Annotated § 123.18

§ 123.18 Pleading Facts

[1] Language

A complaint or cross complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language [*Code Civ. Proc. § 425.10(a)(1)*]. It is not to be tested for literary excellence [*Dillon v. Haskell (1947) 78 Cal. App. 2d 814, 816, 178 P.2d 462]* . The nature of a cause of action is determined by the facts pleaded in it and not by the title ascribed to it by the pleader [*see Nymark v. Heart Fed. Savings & Loan Assn. (1991) 231 Cal. App. 3d 1089, 1093 n.2, 283 Cal. Rptr. 53* ; *Luckey v. Superior Court (1930) 209 Cal. 360, 366, 287 P. 450]* .

[2] Ultimate Facts

Ultimate facts, rather than evidentiary facts or conclusions of law, must be alleged [*Krug v. Meeham (1952) 109 Cal. App. 2d 274, 277, 240 P.2d 732* ; *see also Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal. App. 3d 1371, 1390, 272 Cal. Rptr. 387* (improper and insufficient simply to plead evidence by which plaintiff hopes to prove ultimate facts); *Lopez v. City of San Diego (1987) 190 Cal. App. 3d 678* . 681, *235 Cal. Rptr. 583* (function of complaint is to plead facts, not legal conclusions)]. An allegation of ultimate fact usually involves one or more conclusions of fact [*In re Estate of Bixler (1924) 194 Cal. 585, 589, 229 P. 704]* . Distinguishing ultimate facts from evidentiary facts and conclusions of law is often difficult and involves a matter of degree [*Burks v. Poppy Construction Co. (1962) 57 Cal. 2d 463, 473, 20 Cal. Rptr. 609, 370 P.2d 313]* .

Ultimate facts have been said to be logical conclusions deduced from certain primary facts evidentiary in character. If, from evidentiary facts, the allegations can be reached by that process of natural reasoning adopted in the investigation of truth, they are ultimate facts [*Rhode v. Bartholomew (1949) 94 Cal. App. 2d 272, 279, 210 P.2d 768]* .

As indicated above, the concept of ultimate facts is easier to state than to apply practically. In the practical realm, the pleader should consider a balance between being so specific that the proof of very particular facts may be difficult and being so general that the complaint may be demurrable for failure to state a cause of action or for uncertainty. Nevertheless, the complaint is not subject to a demurrer without leave to amend when it can be amended to state a cause of action.

However, a demurrer sustained with leave to amend requires an amendment which results in delay and additional work and may result in some embarrassment to the attorney or client, or both, and may give a psychological advantage to the defendant [*see Youngman v. Nevada Irrigation Dist. (1969) 70 Cal. 2d 240, 245, 74 Cal. Rptr. 398, 449 P.2d 462* ; *Smith v. Kern County Land Co. (1958) 51 Cal. 2d 205, 206, 331 P.2d 645* (liberal construction of complaints)].

In determining whether a complaint alleges facts sufficient to state a cause of action, a court of appeal will treat a demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. A court of appeal also considers matters of which the court may or must take judicial notice [*Dubin v. Robert Newhall Chesebrough Trust (2002) 96 Cal. App. 4th 465, 471-472, 116 Cal. Rptr. 2d 872]* .

[3] Examples

Courts have permitted allegations that obviously included conclusions of law and have termed them ultimate facts or conclusions of fact, such as, one is the "owner" of property, an act was "negligently" done, or an employee was "acting within the scope of his or her employment" [*see Burks v. Poppy Construction Co. (1962) 57 Cal. 2d 463, 473-474, 20 Cal. Rptr. 609, 370 P.2d 313]* . The simple allegation that "the defendant executed a promissory note" involves several conclusions of fact based on the evidentiary facts of the signing of the instrument, the intent with which that act was performed, the manual or constructive delivery of the instrument, and the intent with which that act was performed. The allegation that "the defendant by his attorney in fact thereunto duly authorized executed a promissory note" thus involves conclusions of both fact and law. Yet, under the rules of pleading, it is regarded as an allegation of ultimate fact [*Estate of Bixler (1924) 194 Cal. 585, 589, 229 P. 704]* . All that is required of a plaintiff, as a matter of pleading, is that the complaint set forth the essential facts of the case with reasonable precision and with sufficient particularity to acquaint the defendant with the nature, source, and extent of the cause of action [*Rannard v. Lockheed Aircraft Corp. (1945) 26 Cal. 2d 149, 156-157, 157 P.2d 1* (noting that defendant may be assumed to possess at least equal, if not superior, knowledge in a negligence action)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 123.19 Pleading Particular Matters

[1] Description of Land

In an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer, on execution, to identify it [*Code Civ. Proc. § 455*].

[2] Judgment or Court Determination

In pleading a judgment or other determination of a court, officer, or board, it is not necessary to state the facts conferring jurisdiction, but the judgment or determination may be stated to have been duly given or made and to have become final [*Code Civ. Proc. § 456*].

[3] Performance of Conditions

In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing the performance, but it may be stated generally that the party duly performed all the conditions on his or her part [*Code Civ. Proc. § 457*].

[4] Statute or Ordinance

In pleading a private statute or an ordinance of a county or municipal corporation, or a right derived therefrom, it is sufficient to refer to the statute or ordinance by its title and the day of its passage. If an action is based on a statute, it is ordinarily sufficient to frame the pleading in the language of the statute [*Quinn v. Mathiassen (1935) 4 Cal. 2d 329, 332, 49 P.2d 284]* . For discussion and forms relating to pleading statutes and ordinance, see Ch. 531, *Statutes and Ordinances* .

In pleading the performance of conditions precedent under a statute or an ordinance, or of a right dervied therefrom, it is not necessary to state the facts showing the performance, but if may be stated generally that the party duly performed all the conditions on his or her part required thereby [*Code Civ. Proc. § 459*].

[5] Privacy Protections: Redacting Social Security Numbers and Financial Account Numbers and Use of Confidential Reference List

Parties or their attorneys must not include, or must redact, certain identifiers from documents or records filed with the court do not apply to documents or records that by court order or operation of law are filed in their entirety either confidentially or under seal [*Cal. Rules of Ct., Rule 1.20(b)(1)*]. To protect personal privacy and other legitimate interests, parties and their attorneys must not include, or must redact where inclusion is necessary, the following identifiers from all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)(2)*]:

- Social security numbers. If an individual's social security number is required in a pleading or other paper filed in the public file, only the last four digits of that number may be used.

- Financial account numbers. If financial account numbers are required in a pleading or other paper filed in the public file, only the last four digits of these numbers may be used.

The responsibility for excluding or redacting identifiers identified above from all documents filed with the court rests solely with the parties and their attorneys. The court clerk will not review each pleading or other paper for compliance with this provision [*Cal. Rules of Ct., Rule 1.20(b)(3)*].

If the court orders on a showing of good cause, a party filing a document containing identifiers listed above may file, along with the redacted document that will be placed in the public file, a reference list. The reference list is confidential. For that purpose, a party filing a confidential reference list must use Judicial Council Form MC-120, Confidential Reference List of Identifiers. The confidential list must identify each item of redacted information and specify an appropriate reference that uniquely corresponds to each item of redacted information listed. All references in the case to the redacted identifiers included in the confidential reference list will be understood to refer to the corresponding complete identifier. A party may amend its reference list as of right [*Cal. Rules of Ct., Rule 1.20(b)(4)*].

For a form of Judicial Council Form MC-120, Confidential Reference List of Identifiers, see *§ 123.69*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 123.20 Information and Belief

Allegations as to matters that are peculiarly within the knowledge of the opposite party and that the pleader can learn only from statements made by him or her to others may properly be based on information and belief. One may not, however, allege in this manner facts presumably within his or her knowledge [*Hall v. James (1926) 79 Cal. App. 433, 435-436, 249 P. 876]* , such as facts that are a matter of public record [*People v. Birch Securities Co. (1948) 86 Cal. App. 2d 703, 708, 196 P.2d 143]* .

Care must be taken in pleading on information and belief. Operative January 1, 1995, the pleader is certifying to the court that there is evidentiary support for the allegations and other factual contentions made in the complaint or, if specifically so identified, that the allegations and other factual contentions are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery [*Code Civ. Proc § 128.7(b)(3)*; *see Code Civ. Proc § 128.7(i)*]. For discussion of this and other certifications made by presenting a complaint to the court, see *§ 123.23[2], below*. For forms of allegations, see *§§ 123.62* and *123.63*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 123.21 Body of Complaint

[1] Format and Content

The body of the complaint cannot be described specifically without reference to particular parties and particular causes of action. Generally, however, although not required by statute or court rule, a complaint or cross complaint begins with an introduction, such as "Plaintiff alleges:" or "Cross complainant alleges:" [for forms of introductions, *see* Ch. 108, *Captions and Introductions*].

Although separate causes of action or counts need not be separately stated, if the complaint or cross complaint sets forth two or more separately stated causes of action or counts, each must be separately numbered [*Cal. Rules of Ct., Rule 2.112(1)*].

[2] Identification of Plaintiff

The first paragraphs usually are an identification of the parties. These allegations involve the status or capacity of the parties. An action must be prosecuted in the name of the real party in interest [*Code Civ. Proc. § 367*], but, if the plaintiff is an individual, usually no identifying statement is used. An individual party may sue or be sued in any name in which he or she is known and recognized, even if that is an assumed name [*see Emery v. Kipp (1908) 154 Cal. 83, 84, 97 P. 17* ; *Cabrera v. McMullen (1988)204 Cal. App. 3d 1, 3-4, 251 Cal. Rptr. 34* (plaintiff using assumed name)]. If the plaintiff is other than an individual, such as, a corporation, it is customary to identify it as such and, if the plaintiff is doing business under a fictitious name and brings the action in that name, an allegation to that effect and showing compliance with publication of a fictitious name statement should be included [*see Bus. & Prof. Code §§ 17913, 17918*]. If the status or capacity of the plaintiff affects the action, an allegation of plaintiff's status or capacity must be included [*see, e.g., Bus. & Prof. Code § 7031(a)* (relating to building contractor's licenses)].

[3] Identification of Defendant

[a] To Obtain Admission

An allegation of the status, capacity, and residence of the defendant is usually included to obtain an admission by way

of answer as to these items and to allege venue [*see Code Civ. Proc. § 395(a)* (venue in county of defendant's residence)].

[b] Required in Certain Consumer and Unlawful Detainer Litigation

Moreover, in the instances listed below, the plaintiff must state facts in the complaint, verified by his or her oath or the oath of his or her attorney, showing that the action or proceeding has been commenced in the proper court for trial and showing that the action or proceeding is subject to the provisions of one of the laws listed below [*Code Civ. Proc. § 396a*]. Alternatively, those facts may be stated by an affidavit (or declaration under penalty of perjury (*Code Civ. Proc. § 2015.5*)) of the plaintiff or of his or her attorney filed with the complaint [*Code Civ. Proc. § 396a*].

This requirement applies to [*Civ. Code §§ 1812.10, 2984.4*; *Code Civ. Proc. § 396a*]:

- Any case subject to the Unruh Retail Installment Sales Act (*Civ. Code § 1801 et seq.*);
- Any case subject to the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*);
- Any limited civil case subject to *Code Civ. Proc. § 395(b)*, which concerns:
  - Actions arising from an offer or provision of goods, services, loans, or extensions of credit intended primarily for personal, family, or household use; or
  - Actions arising from a transaction consummated as a proximate result of either an unsolicited telephone call made by a seller engaged in the business of consummating transactions of that kind or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller;
- Any limited civil case that is a proceeding for unlawful detainer as defined in *Code Civ. Proc. § 1161*.

[4] Designating Defendant by Fictitious Name DOE Pleading

When the plainfiff is genuinely ignorant of the name of a defendant [*see Nissan v. Barton (1970) 4 Cal. App. 3d 76, 79-81, 84 Cal. Rptr. 36]* or lacks knowledge of acts giving him or her a cause of action against that person [*Breceda v. Gamsby (1968) 267 Cal. App. 2d 167, 174, 72 Cal. Rptr. 832* ; *see Garrett v. Crown Coach Corp. (1968) 259 Cal. App. 2d 647, 650, 66 Cal. Rptr. 590]* , he or she must state that fact in the complaint [*Code Civ. Proc. § 474*]. Such defendant may be designated in any pleading by any name, and, when his or her true name is discovered, the pleading must be amended accordingly [*Code Civ. Proc. § 474*]. There is, however, no requirement under *Code Civ. Proc. § 474* that a plaintiff exercise reasonable diligence in discovering the true identity of fictitiously named defendants or the facts giving rise to a cause of action against such persons [*Joslin v. H.A.S. Ins. Brokerage (1986) 184 Cal. App. 3d 369, 376, 228 Cal. Rptr. 878]* .

Fictitiously named defendants are usually designated as DOE I, DOE II, etc., or DOES 1 through 10. An allegation of such defendants should be used whenever there is a possibility that another defendant may be liable since the allegation will toll the statute of limitations against such defendant [*see Bernson v. Browning-Ferris Indus. (1994) 7 Cal. 4th 926, 933, 30 Cal. Rptr. 2d 440, 873 P.2d 613* ; *Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 602, 15 Cal. Rptr. 817, 364 P.2d 681]* . In addition to alleging that the plaintiff does not know the name and capacity of such defendant, a charging allegation should be included. For example, an amendment of a personal injury complaint based on negligence was allowed to allege a cause of action against a different defendant based on products

liability where the original complaint alleged that each fictitious defendant was responsible in some manner for the events and happenings referred to, and caused injuries and damages proximately brought to the plaintiff as alleged further in the complaint [*Smeltzley v. Nicholson Mfg. Co. (1977) 18 Cal. 3d 932, 940, 136 Cal. Rptr. 269, 559 P.2d 624]* .

Even though the plaintiff knows of the existence of the defendant sued by a fictitious name, and even though the plaintiff knows the defendant's actual identity (that is, his/her name), the plaintiff is "ignorant " within the meaning of the statute if unaware of that person's connection with the case or with the injuries [*General Motors Corp. v. Superior Court (1996) 48 Cal. App. 4th 580, 589, 55 Cal. Rptr. 2d 871* ; *Wallis v. Southern Pac. Transp. Co. (1976) 61 Cal. App. 3d 782, 786, 132 Cal. Rptr. 631]* . Therefore, an original complaint against a Doe defendant allows a plaintiff to allege a new cause of action against a new, previously known defendant, if the plaintiff was actually ignorant of the cause of action when the original complaint was filed.

For discussion and forms of allegations relating to fictitious defendants, see Ch. 20, *Allegations Commonly Used* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 123.22 Damages and Prayer

A complaint or cross complaint must contain a demand for judgment for the relief to which the pleader claims he or she is entitled and, if the recovery of money or damages is demanded, the amount demanded must be stated with two exceptions [*Code Civ. Proc. § 425.10(a)(2)*].

The first exception is that no claim for punitive damages is to state an amount or amounts [*Civ. Code § 3295(e)*; for discussion and forms of the Code Civ. Proc. § 325.115 procedure for preserving the right to seek punitive damages pursuant on a default judgment, *see* Ch. 177, *Damages*].

The second is that an action brought to recover actual or punitive damages for personal injury or wrongful death is not to state the amount demanded. However, if the complaint involves a limited civil case, the caption must comply with *Code Civ. Proc § 422.30* (requiring statement of "limited civil case" in caption), and with *Gov. Code § 70613(b)* (requirement that first page of the first paper state whether the amount demanded exceeds or does not exceed $10,000) [*Code Civ. Proc. § 425.10(b)*; for discussion and forms regarding the *Code Civ. Proc. § 425.11* procedure for a statement of damages when the amount is not to be stated in the complaint, see Ch. 177, *Damages*].

The basic requirement of a demand for judgment for the relief claimed is the basis of the requirement that a complaint include a prayer.

It has nevertheless been said that the prayer is not essential in a contested case, that it may be corrected or supplied by amendment, and that recovery may be allowed even in the absence of a prayer [*Estate of Kalal (1981) 121 Cal. App. 3d 841, 845 fn.3, 175 Cal. Rptr. 582]* .

The better practice, however, is to include a prayer. A prayer, for example, may be necessary for determining which court has subject matter jurisdiction when jurisdiction depends on the nature of the controversy (e.g., whether the action is at law or in equity) or the amount in controversy [*see, e.g., Gardiner v. Royer (1914) 167 Cal. 238, 244, 139 P. 75]* . Moreover, if there is no answer, the relief granted to the plaintiff cannot exceed that which he or she has demanded in the complaint, the *Code Civ. Proc. § 425.11* statement of damages, or the *Code Civ. Proc. § 425.115(b)* statement preserving the right to punitive damages, although in any other case the court may grant plaintiff any relief consistent

with the case made by the complaint and embraced within the issue [*Code Civ. Proc. § 580*]. Thus, the prayer will define the scope of a default judgment [*see Code Civ. Proc. § 585(a), (b)*; for discussion of the specificity with which damages must be alleged to support a default judgment, see Ch. 205, *Defaults and Default Judgments*].

The complaint must state the specific dollar amount sought only when a default judgment is to be entered. In any other case, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue. Hence, the absence of a specific amount from the complaint is not necessarily fatal as long as the pleaded facts entitle the plaintiff to relief [*Furia v. Helm (2003) 111 Cal. App. 4th 945, 957, 4 Cal. Rptr. 3d 357]* .

The prayer usually concludes with a demand for costs of suit and for such other and further relief as the court may deem proper.

For discussion and forms relating to the allegation of damages and to prayers for relief, see Ch. 177, *Damages* , and Ch. 420, *Prayers* .

Legal Topics:

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

[1] Requirement

Beginning January 1, 1995, every pleading must be signed by at least one attorney of record in the attorney's individual name. If, however, a party is not represented by an attorney, the party must sign the papers. Each paper must state the signer's address and telephone number, if any [*Code Civ. Proc § 128.7(a)*]. An unsigned paper must be stricken unless the omission of the signature is corrected promptly after being called to the attorney's or party's attention [*Code Civ. Proc § 128.7(a)*].

Actions or proceedings filed on or after January 1, 1995 are subject to sanctions under *Code Civ. Proc. § 128.7* [*Code Civ. Proc. § 128.7(i)*].

Code Civ. Proc. § 128.7 is patterned on *Fed. R. Civ. P. 11*, and the signature links to the grounds for imposing sanctions, as *discussed under § 123.23[2][a], below*. For discussion of Rule 11, see Moore's Federal Practice, Ch. 11 (3d ed. Matthew Bender).

A corporation's failure to have an attorney sign the complaint on behalf of the corporation is a defect that may be corrected, on such terms as are just in the sound discretion of the court [*CLD Construction v. City of San Ramon (2004) 120 Cal. App. 4th 1141, 1149, 16 Cal. Rptr. 3d 555]* .

Where a complaint was signed by the party's father, instead of by the party or his or her attorney of record, the plaintiff's failure to comply with the subscription requirement did not constitute an incurable defect where the correction is promptly made and the court finds that the plaintiff actually assented to the filing of the action [*Board of Trustees v. Superior Court (2007) 149 Cal. App. 4th 1154, 1167-1170, 1173, 57 Cal. Rptr. 3d 755]* .

[2] Presentation of Complaint as Certification

[a] Four Conditions

An attorney or unrepresented party by presenting a complaint to the court certifies under *Code Civ. Proc § 128.7(b)* that

to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the complaint meets four conditions, discussed *below*.

A paper is presented to the court by any of the following actions [*Code Civ. Proc § 128.7(b)*]:

- Signing.
- Filing.
- Submitting.
- Later advocating.

For further discussion of sanctions under Section 128.7, see Ch. 510, *Sanctions* .

[b] Not Presented Primarily for Improper Purpose

The first condition is that the complaint is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in litigation cost [*Code Civ. Proc § 128.7(b)(1)*].

[c] Legal Contentions Are Not Unwarranted

The second condition is that the claims, defenses, and other legal contentions set forth in the papers are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law [*Code Civ. Proc § 128.7(b)(2)*].

[d] Evidentiary Support Exists or Likely to Exist After Reasonable Opportunity for Discovery

The third and fourth conditions deal with the evidence. The third condition is that there is evidentiary support for the allegations and other factual contentions or, if specifically so identified, the allegations and other factual contentions are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery [*Code Civ. Proc § 128.7(b)(3)*].

The fourth condition, relevant to the answer and law and motion proceedings rather than to the complaint, is that the denials of factual contentions are warranted on the evidence, or if specifically so identified, are reasonably based on a lack of information or belief [*Code Civ. Proc § 128.7(b)(4)*].

[3] Reasonable Inquiry

Code Civ. Proc. § 128.7 does not define the "inquiry reasonable under the circumstances" that must be the basis of the certification [*see* [2], *above*]. The standard under *Fed. R. Civ. P. 11*, on which *Code Civ. Proc. § 128.7* is patterned, is based on what was reasonable to believe at the time the pleading was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer, whether he or she had to rely on a client for information as to the facts underlying the pleading, motion, or other paper, whether the paper was based on a plausible view of the law, or whether he or she depended on forwarding counsel or another member of the bar [*see* Notes of Advisory Committee on Rules to 1983 Amendments to Rule 11].

This view comports with California cases which require the court to consider timing considerations, such as potential statute of limitations problems when considering imposing sanctions under *Code Civ. Proc. § 128.5* [*see Atchison, Topeka, and Santa Fe Ry. Co. v. Stockton Port Dist. (1983) 140 Cal. App. 3d 111, 115, 117, 189 Cal. Rptr. 208]* .

[4] Sanctions for Violation of Certification

If the certification of the four conditions discussed above is false, sanctions may be imposed after an opportunity to withdraw or correct the challenged complaint, claim, or allegation [*Code Civ. Proc. § 128.7(c)*]. For more detailed discussion of sanctions under Section 128.7, see Ch. 510, *Sanctions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureSanctionsBaseless FilingsCertification RequirementsCivil ProcedureSanctionsBaseless FilingsSigning Requirements

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12-123 California Forms of Pleading and Practice--Annotated § 123.24

§ 123.24 Verification

[1] Defined

A verification is an affidavit, or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*], of the truth of the matters stated in the complaint and its object is to insure good faith in the averments or statements of the plaintiff [*see Albertson v. Raboff (1960) 185 Cal. App. 2d 372, 388, 8 Cal. Rptr. 398]* .

A verification by a party consists of an affidavit, or declaration under penalty of perjury, that the pleading is true, except as to the matters stated therein on information and belief, and as to those matters, that he or she believes it to be true. A pleading is ordinarily verified by a party, but in certain instances it may be verified by the attorney or a person having knowledge of the facts, and if it is made on behalf of a corporation or public agency it may be made by any officer thereof. If it is made by the attorney, or by a corporate or public agency officer, the verification must state that such person has read the pleading and that he or she is informed and believes the matters therein to be true and on that ground alleges that they are true [*see Code Civ. Proc. § 446*]. The attorney must sign the complaint even if the plaintiff verifies it [*see Code Civ. Proc. § 128.7(a)*; for discussion, *see § 123.23, above*].

[2] When Required

Except when otherwise provided by law, a complaint need not be verified or accompanied by an affidavit [*Code Civ. Proc § 128.7(a)*; *see Code Civ. Proc § 446* (verification requirements generally); *see Quick v. Corsaro (1960) 180 Cal. App. 2d 831, 836, 4 Cal. Rptr. 674]* . Even if the complaint is not verified, the signature acts as a certification, as discussed in *§ 123.23[2][a]*. In addition, there are code provisions that require verification of complaints in specific actions [*see, e.g., Code Civ. Proc. § 1166*, operative January 1, 2005 (complaints for forcible or unlawful detainer)]. When public entities or officers are plaintiffs, verification is not required but the answers to their complaints must be verified [*see Code Civ. Proc. § 446*].

[3] Using Verification When Not Required

When verification is not required, the plaintiff, in an unlimited civil case, may nevertheless consider verifying the complaint because verification of the complaint requires the defendant to file a verified answer, thereby precluding a

general denial and requiring the defendant's denial of the allegations of the complaint to be made positively or according to the defendant's information and belief [*see Code Civ. Proc. § 431.30(d)*; *see also* Ch. 26, *Answers*]. In addition, a verified complaint alleging evidentiary facts within the verifier's personal knowledge may serve as an evidentiary statement, such as, when plaintiff seeks a temporary restraining order [*see Code Civ. Proc. § 527(a)*] or is required to submit a counter affidavit opposing a motion to change venue or to quash service of summons [*see Atkins, Kroll & Co. v. Broadway Lbr. Co. (1963) 222 Cal. App. 2d 646, 654, 35 Cal. Rptr. 385* ; *see also Civ. Code §§ 1812.10, 2984.4*; *Code Civ. Proc. § 396a discussed under § 123.21, above*].

In limited civil cases, however, the answer need not be verified even if the complaint or cross complaint is verified except in actions on claims assigned for collection [*Code Civ. Proc. §§ 91, 92(b), 431.30(d)*].

For further discussion and forms of verification, see Ch. 572, *Verification* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureSanctionsBaseless FilingsCertification Requirements

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12-123 California Forms of Pleading and Practice--Annotated § 123.25

§ 123.25 Notice of Related Case

When a party files a civil action with knowledge of a related action or proceeding pending in any state or federal court in California, he or she must file and serve a Notice of Related Case. This is a continuing duty that applies thereafter whenever the party may learn of a related action or proceeding [*Cal. Rules Ct., Rule 3.300*].

A pending civil case is related to another pending civil case, or to a civil case that was dismissed with or without prejudice, or to a civil case that was disposed of by judgment, if the cases [*Cal. Rules of Ct., Rule 3.300(a)*]:

- Involve the same parties and are based on the same or similar claims [*Cal. Rules of Ct., Rule 3.300(a)(1)*];

- Arise from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or facts [*Cal. Rules of Ct., Rule 3.300(a)(2)*];

- Involve claims against, title to, possession of, or damages to the same property [*Cal. Rules of Ct., Rule 3.300(a)(3)*]; or

- Are likely for other reasons to require substantial duplication of judicialresources if heard by different judges [*Cal. Rules of Ct., Rule 3.300(a)(4)*].

The Notice of Related Case must be served and filed as soon as possible, but no later than 15 days after the facts concerning the existence of related cases become known [*Cal. Rules of Ct., Rule 3.300(e)*]. The Notice of Related Case must be filed in all pending cases listed in the notice and must be served on all parties in those cases [*Cal. Rules of Ct., Rule 3.300(d)*].

For discussion and a form of notice, see Ch. 137, *Continuing Duties During Litigation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral Overview

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12-123 California Forms of Pleading and Practice--Annotated § 123.26

§ 123.26 Summons, Filing, and Service

[1] Preparing Summons, Filing Complaint, and Paying Filing Fee

A printed form of summons approved by the Judicial Council is usually prepared with the complaint. The complaint and summons, together with the Judicial Council Form of Case Cover Sheet [*see Cal. Rules of Ct., Rule 3.220*; for discussion, *see § 123.27*], are presented to the clerk of the court with the filing fee. As of January 1, 2006, the uniform filing fee for first papers filed in a general civil action (not including adoption, probate, or family law actions) applies to the filing of a complaint [*Gov. Code § 70611* (unlimited civil actions); *Gov. Code § 70613* (limited civil actions)]. Surcharges may be tacked onto the uniform fee for complaints in complex cases [*see Gov. Code § 70603(a)(1)*], unlawful detainer actions [*see Gov. Code § 70603(a)(2)*], and, where imposed, for court construction funds in the county or county and city of Riverside, San Bernardino, and San Francisco [*see Gov. Code §§ 70603(a)(3)-(5), 70622, 70624, 70625*].

On presentation of the complaint and the payment of the filing fee, the clerk files the complaint [*Code Civ. Proc. § 411.20*] and issues the summons [*Code Civ. Proc. § 412.10*]. The clerk must keep each original summons in the court records and provide a copy of each summons issued to the plaintiff who requested issuance of the summons [*Code Civ. Proc. § 412.10*]. Prior to the 2006 amendments to the Code, the original summons was issued to the plaintiff, served on the defendant, and then returned to the court. The clerk's issuance of summons is a routine ministerial duty on the filing of the complaint and payment of fees [*Maginn v. City of Glendale (1999) 72 Cal. App. 4th 1102, 1107, 85 Cal. Rptr. 2d 639]* . It is mandatory for court clerks to demand and receive the fee required by statute before documents or pleadings are filed [*Duran v. St. Luke's Hospital (2004) 114 Cal. App. 4th 457, 459, 8 Cal. Rptr. 3d 1]* .

For discussion of the effects of paying a complaint filing fee with a check that is returned for nonpayment, or paying less than the filing fee, see *§ 123.28*.

Cal. Rules of Ct., Rule 3.221(a) requires that each court must make available to the plaintiff, at the time of filing of the complaint, an ADR information package that includes specified information. *Cal. Rules of Ct., Rule 3.221(c)* requires that each plaintiff must serve a copy of the ADR information package on each defendant along with the complaint, and each cross-complainant must serve a copy of the ADR information package on any new parties to the action along with

the cross-complaint.

[2] ADR Information Package

When the complaint is filed in a general civil case, the court must make an ADR information package available to the plaintiff [*Cal. Rules of Ct., Rule 3.221(a)*]. The plaintiff must serve this package on each defendant along with the complaint, and each cross-complainant must serve a copy of the ADR information package on any new parties to the action along with the cross-complaint [*Cal. Rules of Ct., Rule 3.221(c)*].

ADR process and mediation as used in this context are defined in *Cal. Rules of Ct., Rule 3.800(1), (2)*].

[3] Service

A copy of the complaint, a copy of the summons, and the ADR information package are served on the defendant [*see Code Civ. Proc. §§ 413.10-416.90*] and proof of service is prepared [*see Code Civ. Proc. §§ 417.10-417.40*].

Under the Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*), local delay reduction rules may not require a shorter period for service than 60 days after the initial filing of the complaint [*Gov. Code § 68616(a)*]. For further discussion, see *§ 123.14[7], above*.

Other requirements regarding the time for service of a complaint, cross-complaint, and response are set forth in *Cal. Rules of Ct., Rule 3.110*.

Cal. Rules of Ct., Rule 3.110(c) requires that a cross complaint against a party who has appeared in the action be accompanied by proof of service of the cross complaint at the time it is filed; if the cross complaint adds new parties, the cross complaint must be served on all parties and proofs of service on the new parties must be filed within thirty days of the filing of the cross-complaint.

For discussion of service of summons, see Ch. 518, *Service of Summons and Papers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 123.27 Case Cover Sheet

The first paper filed in an action or proceeding must be accompanied by a civil case cover sheet as required in *Cal. Rules of Ct. Rule 3.220*. This cover sheet is a form prescribed by the Judicial Council, and must be filed in addition to any cover sheet required by local court rules [*Cal. Rules of Ct., Rule 3.220(a)*]. Under *Cal. Rules of Ct., Rule 3.220(b)(1)*, the Judicial Council cover sheet form CM-010 must be used in each civil action or proceeding, except those filed in small claims court or filed under the Probate Code, Family Code, or Welfare and Institutions Code [*Cal. Rules of Ct., Rule 3.220(b)(1)*; for an illustration of the form, *see § 123.60*].

Although the cover sheet must be filed, it need not be served with the complaint unless the plaintiff has indicated on the cover sheet that the case is complex under *Cal. Rules of Ct., Rule 3.400 et seq.* or a collections case under *Cal. Rules of Ct., Rule 3.740*. The cover sheet is used for statistical purposes and may affect the assignment of a complex or collections case [*Cal. Rules of Ct., Rule 3.220(a)*].

If a party that is required to provide a cover sheet under this rule or a similar local rule fails to do so or provides a defective or incomplete cover sheet at the time the party's first paper is submitted for filing, the clerk of the court must file the paper. Failure of a party or a party's counsel to file a cover sheet as required by this rule may subject that party, its counsel, or both, to sanctions under *Cal. Rules of Ct., Rule 2.30* [*Cal. Rules of Ct., Rule 3.220(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 123.28 Procedure If Filing Fee Check Returned Without Payment or In Amount Less Than Required Fee

[1] Twenty Days to Pay After Notice

If the clerk accepts for filing a complaint or other first paper, or any subsequent filing, and payment is made by check which is later returned without payment, the clerk must, by mail, notify the party who tendered the check that (1) the check has been returned without payment, (2) the administrative charge specified in *Code Civ. Proc. § 411.20(g)* has been imposed to reimburse the court for the costs of processing the returned check and providing the notice, and (3) the party has 20 days from the date of mailing of the notice within which to pay the filing fee and the administrative charge, except as provided in *Code Civ. Proc. § 411.20(e)* [*Code Civ. Proc. § 411.20(a)*]. The administrative charge must, in each instance, be either $25 or a reasonable amount that does not exceed the actual cost incurred by the court, as determined by the court [*Code Civ. Proc. § 411.20(g)*]. If any trial or other hearing is scheduled to be heard prior to the expiration of the 20-day period, the fee must be paid prior to the trial or hearing; failure of the party to pay the fee prior to the trial or hearing date requires the court to void the filing and proceed as if it had not been filed [*Code Civ. Proc. § 411.20(e)*].

If a complaint or other first paper is accompanied by payment by check in an amount less than the required fee, the clerk must accept the paper for filing, but cannot issue a summons until the court receives full payment of the required fee [*Code Civ. Proc. § 411.21(a)*]. The clerk must, by mail, notify the party tendering the check that (1) the check was made out for an amount less than the required filing fee, (2) the administrative charge specified in *Code Civ. Proc. § 411.21(g)* has been imposed to reimburse the court for the costs of processing the partial payment and providing the notice specified, and (3) the party has 20 days from the date of mailing of the notice within which to pay the remainder of the required fee and the administrative charge, except as provided in *Code Civ. Proc. § 411.21(f)*. If any trial or other hearing is scheduled to be heard prior to the expiration of the 20-day period, the fee must be paid prior to the trial or hearing; and failure of the party to pay the fee prior to the trial or hearing date requires the court to void the filing and proceed as if it had not been filed [*Code Civ. Proc. § 411.21(f)*)].

The clerk's certificate as to the mailing of the notice establishes a rebuttable presumption that the fees were not paid. This presumption is a presumption affecting the burden of producing evidence [*Code Civ. Proc. § 411.20(a)*; *see Hu v. Silgan Containers Corp. (1999) 70 Cal. App. 4th 1261, 1268, 83 Cal. Rptr. 2d 333]* .

These procedures also apply to payment of filing fees for responsive papers [*Code Civ. Proc. § 411.20(c)*].

[2] Filing Voided for Nonpayment

The clerk must void the filing if the party who tendered a returned check or on whose behalf a returned check was tendered has not paid the full amount of the fee and the administrative charge by a means specified in *Code Civ. Proc. § 411.20(a)* within 20 days of the date on which the notice was mailed; and any filing voided by this section can be disposed of immediately after the 20 days have elapsed without preserving a copy in the court records, notwithstanding *Gov. Code § 68152* [*Code Civ. Proc. § 411.20(b)*].

The clerk must void the filing if the party who tendered a check in an amount less than the required filing fee or on whose behalf a check in an amount less than the required filing fee was tendered has not paid the full amount of the fee and the administrative charge by a means specified in *Code Civ. Proc. § 411.21(a)* within 20 days of the date on which the notice was mailed; and any filing voided by this section may be disposed of immediately after the 20 days have elapsed without preserving a copy in the court records, notwithstanding *Gov. Code § 68152* [*Code Civ. Proc. § 411.21(b)*].

Payment of the filing fees within this 20-day period is both mandatory and jurisdictional. If payment is not made within this period the court loses jurisdiction over the complaint and can only void the complaint. The trial court does not possess authority thereafter to reinstate the voided complaint [*Hu v. Silgan Containers Corp. (1999) 70 Cal. App. 4th 1261, 1266, 1268-1269, 83 Cal. Rptr. 2d 333]* . Moreover, *Code Civ. Proc. § 473* cannot provide relief from the judgment of dismissal unless the fees were actually paid within the time limit or the plaintiff was prevented from paying the fees by fraud or some other conduct perpetuated by the defendant [*Hu v. Silgan Containers Corp. (1999) 70 Cal. App. 4th 1261, 1267 n.2, 1269-1270, 83 Cal. Rptr. 2d 333* (relief not available)]. For discussion of *Code Civ. Proc. § 473, see* Ch. 489, *Relief From Judgments and Orders* .

[3] Payment in Less Than Twenty Days If Trial or Hearing Scheduled Sooner

If any trial or other hearing is scheduled to be heard prior to the expiration of the 20-day period, the party must pay the fee prior to the trial or hearing. If the fee is not paid prior to the trial or hearing date, the court will void the filing and proceed as if the paper had not been filed [*Code Civ. Proc. § 411.20(e)* (returned check), *Code Civ. Proc. § 411.21(f)* (payment in amount less than required filing fee)].

[4] Opposing Party Can Claim Refund of Fee for Responsive Paper

If an adverse party files a response to a complaint, paper or filing referred to in *Code Civ. Proc. § 411.20(a)*, together with a filing fee, and the original filing is voided pursuant to *Code Civ. Proc. § 411.20(b)*, the responsive filing is not required and must be voided [*Code Civ. Proc. § 411.20(c)*]. The court must, by mail, provide notice to the parties or their attorneys that the initial paper and the response have been voided. The responding party's filing fee must be refunded upon request, provided that the request for a refund is made within 20 days from the date on which the notice was mailed. Upon receipt of the request, the court must refund the responding party's filing fee without imposing any administrative charge. A refund is available if the adverse party has filed only a responsive pleading, but not if the party has also filed a cross-complaint or other first paper seeking affirmative relief for which there is a filing fee [*Code Civ. Proc. § 411.20(c)*].

If an adverse party files a response to a complaint or other first paper referred to in *Code Civ. Proc. § 411.21(a)*, together with a filing fee, and the original filing is voided pursuant to *Code Civ. Proc. § 411.21(b)*, the responsive filing is not required and must be voided [*Code Civ. Proc. § 411.21(d)*]. The court must, by mail, provide notice to the parties that the initial paper and the response have been voided. The responding party's filing fee must be refunded upon

request, provided that the request for a refund is made in writing within 20 days from the date on which the notice was mailed. Upon receipt of the request, the court must reimburse the responding party's filing fee without imposing any administrative charge. A refund under this subdivision is available if the adverse party has filed only a responsive pleading, but not if the party has also filed a cross-complaint or other first paper seeking affirmative relief for which there is a filing fee [*Code Civ. Proc. § 411.21(d)*].

[5] Payment for Clerk's Services or Issuance of Documents

If the clerk performs a service or issues any document for which a fee is required and payment is made by check which is later returned without payment, the court may order further proceedings suspended as to the party for whom the check was tendered [*Code Civ. Proc. § 411.20(f)*]. If the court so orders, the clerk must, by mail, notify the party who tendered the check that proceedings have been suspended until the receipt of payment of the required fee and the administrative charge specified *Code Civ. Proc. § 411.20(g)* by cash, cashier's check, or other means specified by the court, but not by personal check or traveler's check. If the person who tendered the check is not a party to the action or proposed action, but only is acting on behalf of a party, the clerk must notify not only the person who tendered the check, but also the party or that party's attorney if the party is represented. The clerk's certificate as to the mailing of notice pursuant to this section establishes a rebuttable presumption that the fees were not paid; this presumption is a presumption affecting the burden of producing evidence [*Code Civ. Proc. § 411.20(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsFiling FeesCivil ProcedureRemediesCosts & Attorney FeesCostsCourt & Marshal Fees

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§ 123.29 Cross Complaints

[1] In General

Cross complaints are generally governed by the statutes and rules applicable to complaints. They are required to be separate documents [*Code Civ. Proc. § 428.40*], that is, they may not be set forth with the answer.

A cross complaint is a separate pleading that must be drafted so as to be as complete and sufficient as a complaint alleging a cause of action. The cross complainant is akin to a plaintiff and the cross defendant is akin to a defendant [*see Wilson, McCall & Daoro v. American Qualified Plans, Inc. (1999) 70 Cal. App. 4th 1030, 1036, 83 Cal. Rptr. 2d 192]* .

Issues concerning cross complaints arise depending on whether the cross complaint is permissive or compulsory. As to permissive cross complaints, questions arise as to whether the defendant is allowed to bring a particular cause of action or party into the pending action. As to compulsory cross complaints, questions arise as to whether the defendant may assert a cause of action in another action instead of in the pending action.

[2] Counterclaim Abolished

The counterclaim has been abolished. Any cause of action that formerly was asserted by counterclaim is now to be asserted by cross complaint. Where any statute refers to asserting a cause of action as a counterclaim, such cause of action is to be asserted as a cross complaint. The erroneous designation of a pleading as a counterclaim does not affect its validity, but the pleading is deemed to be a cross complaint [*Code Civ. Proc. § 428.80*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProceduresPleading & PracticePleadingsCounterclaimsGeneral Overview

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§ 123.30 Permissive Cross Complaints

[1] Causes of Action

A party against whom a cause of action has been asserted in a complaint or cross complaint may file a cross complaint setting forth either or both the following:

- Any cause of action the party has against any of the parties who filed the complaint or cross complaint against him or her. This provision, however, does not authorize the filing of a cross complaint against a plaintiff in an eminent domain action [*Code Civ. Proc. § 428.10(a)*; *see Code Civ. Proc. § 1230.010 et seq.*].

- Any cause of action the party has against a person alleged to be liable thereon, whether or not such person is already a party to the action, if the cause of action asserted in his or her cross complaint either [*Code Civ. Proc. § 428.10(b)*].

  - Arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against him or her; or

  - Asserts a claim, right, or interest in the property or controversy that is the subject to the cause brought against him or her.

Code Civ. Proc. § 428.10(a), added in 1971, adopts *Fed. R. Civ. P., Rule 13*, which states that a party against whom a complaint or cross complaint has been filed may bring any cause of action he or she has (regardless of its nature) against the party who filed the complaint or cross complaint. There need be no factual relationship between his or her cause and the cause of the other party. This subdivision is also consistent with prior law [former *Code Civ. Proc. § 438*], except that it permits unlimited scope to cross complaints which may be filed against an opposing party and does not limit the causes which a party has against an opposing party to those that satisfy the "defeat or diminish" or "several judgment" requirements [*see* Assembly Legislative Committee Comment to *Code Civ. Proc. § 428.10*; *see also* Friedenthal, *Joinder of Claims, Counterclaims, and Cross Complaints: Suggested Revision of the California Provisions, 23 Stan. L.*

Rev. 1 (1970); for discussion of the right to sever an action, *see* Ch. 125, *Consolidation, Severance, and Coordination of Actions*].

Code Civ. Proc. § 428.10(b), also added in 1971, continues the former rule [former *Code Civ. Proc. § 442*] that a cross complaint may be asserted against any person, whether or not a party to the action, if the cause of action asserted in the cross complaint arises out of the same transaction or occurrence or involves the same property or controversy [*see* Assembly Legislative Committee Comment to *Code Civ. Proc. § 428.10*].

[2] Joinder of Parties and Causes of Action

The permissive joinder rules authorized by *Code Civ. Proc. § 428.10* treat a cross complaint generally the same as a complaint in an independent action [*see* Law Review Commission Comment to *Code Civ. Proc. § 428.20*].

Thus, when a person files a cross complaint as authorized by *Code Civ. Proc. § 428.10*, he or she may

> (1) Join any person as a cross complainant or cross defendant, whether or not that person is already a party to the action, if, had the cross complaint been filed as an independent action, the joinder of that party would have been permitted by the statutes governing joinder of parties [*Code Civ. Proc. § 428.20*; *see Code Civ. Proc. §§ 378, 379* (permissive joinder of parties), 389 (compulsory joinder of parties); Ch. 395, *Parties*]; and
>
> (2) Unite with the cause of action asserted in the cross complaint any other causes of action he or she has against any of the cross defendants, other than the plaintiff in an eminent domain proceeding, whether or not this cross defendant is already a party to the action [*Code Civ. Proc. § 428.30*].

[3] When Permission to File Cross Complaint Is Required

A party must obtain leave of court to file any cross complaint not filed within the times specified in *Code Civ. Proc. § 428.50(a)* or *(b)* [*Code Civ. Proc. § 428.50(c)*]. *Code Civ. Proc. § 428.50(a)* provides that a party may file a cross complaint against any of the parties who filed the complaint or cross complaint against him or her before or at the same time as the answer to the complaint or cross complaint. *Code Civ. Proc. § 428.50(b)* provides that any other cross complaint may be filed at any time before the court has set a date for trial [*Code Civ. Proc. § 428.50(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProceduresPleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProceduresPartiesJoinderGeneral OverviewCivil ProceduresJoinder of Claims & RemediesClaims

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§ 123.31 Compulsory Cross Complaint

[1] Requirement

Except as otherwise provided by statute, if a party against whom a complaint has been filed and served fails to allege in a cross complaint any related cause of action that (at the time of serving his or her answer to the complaint) he or she has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded [*Code Civ. Proc. § 426.30(a)*; for exceptions, *see* [2], *below*].

Code Civ. Proc. § 426.30 continues the substance of the former compulsory counterclaim rule [former *Code Civ. Proc. § 439*]. However, since the scope of a cross complaint is expanded to include claims that would not have met the "defeat or diminish" or "several judgment" requirements of the former counterclaim statute, the scope of the former rule is expanded by *Code Civ. Proc. § 426.30* to include some causes of action that formerly were not compulsory. This may affect, for example, an action to quiet title in which the defendant may be required to cross complain for damages on any cause of action that arises out of the same transaction, occurrence, or series of transactions or occurrences on which the action to quiet title is based [*see Hanes v. Coffee (1931) 212 Cal. 777, 780, 300 P. 963* (noted in Senate Legislative Committee Comment to *Code Civ. Proc. § 426.30* since defendant did not have to file a cross complaint in that action)].

Code Civ. Proc. § 426.30 affects only related causes of action that exist at the time of service of the answer to the complaint on the particular plaintiff [*see* Senate Legislative Committee Comment to *Code Civ. Proc. § 426.30*], and only those related causes of action the defendant must assert against the plaintiff. A cross complaint is permissive as between coparties and between parties and nonparties [*Banerian v. O'Malley (1974) 42 Cal. App. 3d 604, 612, 116 Cal. Rptr. 919]* . If a defendant fails to file a cross-complaint against the plaintiff on a related cause of action as required by Section 426.30, the plaintiff's voluntary dismissal of the action without prejudice does not relieve the defendant from the requirement of filing a cross complaint, and Section 426.30 will bar the defendant from bringing the related action later [*see AL Holding Co. v. O'Brien & Hicks, Inc. (1999) 75 Cal. App. 4th 1310, 1313-1314, 89 Cal. Rptr. 2d 918* (later action by defendant's assignee)].

Once a compulsory cross complaint has been filed in an action, if the plaintiff voluntarily dismisses without prejudice, the plaintiff is subject to *Code Civ. Proc. § 426.30*, and cannot reflie a new separate action; rather, to refile the plaintiff

must seek leave under *Code Civ. Proc. § 426.50* to file a late cross complaint in the original action [*Carroll v. Import Motors, Inc. (1995) 33 Cal. App. 4th 1429, 1436, 39 Cal. Rptr. 2d 791* ; for discussion of Section 426.50, *see* [4] *below*].

[2] Exceptions

[a] Lack of Jurisdiction Over Party With Related Cause of Action

The provisions of *Code Civ. Proc. § 426.30(a)* [*see* [1], *above*] do not apply if the court in which the action is pending does not have jurisdiction to render a personal judgment against the person who failed to plead the related cause of action [*Code Civ. Proc. § 426.30(b)*; for similar rule in federal court practice, *see Fed. R. Civ. P., Rule 13(a)(2)*].

[b] No Response to Complaint by Party With Related Cause of Action

The provisions of *Code Civ. Proc. § 426.30(a)* [*see* [1], *above*] do not apply if the person who failed to plead the related cause of action did not file an answer to the complaint against him or her [*Code Civ. Proc. § 426.30(b)*].

[c] Lack of Jurisdiction Over Other Parties or Subject Matter or Other Action Is Pending

The provisions relating to compulsory cross complaints [*Code Civ. Proc. §§ 426.10-426.70*] do not apply if any of the following are established [*Code Civ. Proc. § 426.40*; *see also Fed. R. Civ. P., Rule 13(a)(1)* for similar provision applicable to federal district courts]:

- The cause of action not pleaded requires for its adjudication the presence of additional parties over whom the court cannot acquire jurisdiction.

- Both the court in which the action is pending and any other court to which the action is transferable pursuant to *Code Civ. Proc. § 396* (change of venue) are prohibited by the federal or state Constitution or by a statute from entertaining the cause of action not pleaded.

- At the time the action was commenced, the cause of action not pleaded was the subject of another pending action.

[d] Applicable to Civil Actions Only, Not Special Proceedings

The compulsory cross complaint rule applies only to civil actions ("actions" is defined in *Code Civ. Proc. § 22*) and does not apply to special proceedings (defined in *Code Civ. Proc. § 23*) except eminent domain proceedings discussed in [3], *below*.

[e] Not Applicable to Small Claims or Declaratory Relief

The rule does not apply to actions in the small claims court or to actions in which the only relief sought is a declaration of rights and duties of the respective parties in an action for declaratory relief under *Code Civ. Proc. § 1060 et seq.* [*Code Civ. Proc. § 426.60*; *see Anderson v. Superior Court (1990) 226 Cal. App. 3d 698, 701, 276 Cal. Rptr. 18* (small claims)].

[3] Eminent Domain Proceedings

The provisions relating to compulsory cross complaints [*Code Civ. Proc. §§ 426.10-426.70*] apply to eminent domain proceedings [*Code Civ. Proc. § 426.70(a)*]. The related cause of action may be asserted by cross complaint in an eminent domain proceeding whether or not the party asserting such cause of action has presented a claim in compliance

with *Gov. Code § 900 et seq.* (claims against public entities) to the plaintiff in the eminent domain proceeding [*Code Civ. Proc. § 426.70(b)*].

[4] Permission to Assert Unpleaded Cause

A party who fails to plead a cause of action subject to the compulsory cross complaint provisions, whether through oversight, inadvertence, mistake, neglect, or other cause, may apply to the court for leave to amend his or her pleading, or to file a cross complaint, to assert such cause at any time during the course of the action. The court, after notice to the adverse party, "shall grant," on such terms as may be just to the parties, leave to amend the pleading, or to file the cross complaint, to assert such cause if the party who failed to plead the cause acted in good faith. This provision is to be liberally construed to avoid forfeiture of causes of action [*Code Civ. Proc. § 426.50*; *see* Senate Legislative Committee Comment to *Code Civ. Proc. § 426.50*(interpreting this provision to be mandatory)]. Prior to the 1972 enactment of *Code Civ. Proc. § 426.50*, the standard for reviewing a trial court's denial of a motion to file a compulsory cross complaint was whether the court had abused its discretion. Now, under the statute, the trial court may not "exercise discretion" to deny a motion to file a compulsory cross complaint. The legislative mandate is clear. A policy of liberal construction of *Code Civ. Proc. § 426.50* to avoid forfeiture of causes of action is imposed on the trial court. A motion to file a cross complaint at any time during the course of the action must be granted if forfeiture would otherwise result unless bad faith of the moving party is demonstrated [*Silver Organizations Ltd. v. Frank (1990) 217 Cal. App. 3d 94, 98-99, 265 Cal. Rptr. 681]* .

The determination of what constitutes "good faith"--or lack of it--under *Code Civ. Proc. § 426.50* must be made in light of and in conformity with the liberality conferred on the trial courts by this section and by prior law. Generally, the principle of liberality requires that a strong showing of bad faith be made in order to support a denial of the right to amend a pleading or to file a cross complaint under *Code Civ. Proc. § 426.50* [*Foot's Transfer & Storage Co. v. Superior Court (1980) 114 Cal. App. 3d 897, 902, 171 Cal. Rptr. 1* ; *see also Silver Organizations Ltd. v. Frank (1990) 217 Cal. App. 3d 94, 99, 265 Cal. Rptr. 681* (substantial evidence of bad faith must support trial court's denial of motion)]. Mere delay in amending a pleading or filing a cross complaint is generally insufficient to constitute the requisite bad faith, absent a showing that the amendment of a pleading or filing of the cross complaint would work a substantial injustice to the opposing party and would prejudice that party's position in some way [*see Foot's Transfer & Storage Co. v. Superior Court (1980) 114 Cal. App. 3d 897, 903, 171 Cal. Rptr. 1* ; *see also Silver Organizations Ltd. v. Frank (1990) 217 Cal. App. 3d 94, 99, 265 Cal. Rptr. 681* (unless accompanied by bad faith, factors such as oversight, inadvertence, neglect, mistake, or other cause are insufficient grounds to deny the motion)].

Substantial evidence of bad faith will obviously negate good faith, the latter being the *sine qua non* to the granting of a motion under *Code Civ. Proc. § 426.50*. It is therefore necessary to examine the amorphous concept of bad faith. "Bad faith" is defined as the opposite of "good faith." It generally implies or involves actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake, but by some interested or sinister motive, not simply bad judgment or negligence, but rather the conscious doing of a wrong because of dishonest purpose or moral obliquity. That is, it contemplates a state of mind affirmatively operating with furtive design or ill will [*Silver Organizations Ltd. v. Frank (1990) 217 Cal. App. 3d 94, 100, 265 Cal. Rptr. 681]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 123.32 Filing of Cross Complaint

A cross complaint is usually filed with the answer [*see Code Civ. Proc. § 428.50*], on the payment of the filing fee for the filing of the answer or other first paper of the defendant [*see Gov. Code §§ 70611, 70612, 70613, 70614* (filing fees)]. Certain cross complaints may, however, be filed at a later time, and cross complaints not filed within the time required by *Code Civ. Proc. § 428.50(a)* or *(b)* may be filed later with court permission [*Code Civ. Proc. § 428.50(c)*; for further discussion, *see § 123.30[3], above*, and for a form of notice of motion, *see § 123.64*]. A cross complaint cannot, however, be filed after judgment has been entered on the underlying complaint, notwithstanding the fact that the case has not been finally determined on appeal [*City of Hanford v. Superior Court (1989) 208 Cal. App. 3d 580, 584, 586-589, 256 Cal. Rptr. 274* (construing "any time during the course of the action," as used in *Code Civ. Proc. § 428.50(c)*, as meaning from the time the action is commenced until judgment is entered and not from the time the action is commenced until final determination on appeal, as set forth in *Code Civ. Proc. § 1049*, specifying period "an action is deemed to be pending")].

Trial court delay reduction rules implementing the Trial Court Delay Reduction Act [*Gov. Code § 68600 et seq.*] may impose special filing and service requirements on cross complaints. For further discussion, see *§ 123.14[7], above.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 123.33 Service of Summons and Cross Complaint

If a party has not appeared in the action, a summons on the cross complaint must be issued and served on him or her in the same manner as on commencement of an original action [*Code Civ. Proc. § 428.60(1)*; *see Code Civ. Proc. § 413.10* (service of summons)]. In addition, the cross complainant must cause a copy of the most recently amended complaint and any answers to be served on cross defendants who have not previously appeared [*Cal. Rules of Ct., Rule 3.222*].

Judicial Council Form SUM-110, Summons--Cross-Complaint, is adopted for mandatory use as the summons on a cross complaint. For an illustration of this form, see *Ch. 518, Service of Summons and Papers, § 518.70A.*

In general civil cases, a copy of the ADR information package must be served on any new parties to the action along with the cross complaint [*Cal. Rules of Ct., Rule 3.221(c)*]. For further discussion, see *§ 123.26[2]*.

Other requirements regarding the time for service of a cross-complaint are set forth in *Cal. Rules of Ct., Rule 3.110*.

Cal. Rules of Ct., Rule 3.110(c) requires that a cross complaint against a party who has appeared in the action be accompanied by proof of service of the cross complaint at the time it is filed; if the cross complaint adds new parties, the cross complaint must be served on all parties and proofs of service on the new parties must be filed within thirty days of the filing of the cross-complaint.

If a party has appeared in the action, the cross complaint must be served on his or her attorney, or on the party if he or she has appeared without an attorney, in the manner provided for service of summons [*see Code Civ. Proc. §§ 413.10, 465*] or in the manner provided in *Code Civ. Proc. § 1010 et seq.* (service of papers) [*Code Civ. Proc. § 428.60(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 123.34 Third Parties

In addition to the other rights and duties a third-party defendant has under *Code Civ. Proc. §§ 428.10-428.80*, he or she may, at the times he or she files his or her answer to the cross complaint, file as a separate document a special answer alleging against the person who asserted the cause of action against the third-party plaintiff any defenses that the third-party plaintiff has to such cause of action. The special answer must be served on the third-party plaintiff and on the person who asserted the cause of action against the third-party plaintiff [*Code Civ. Proc. § 428.70(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 123.35 Pleadings in Federal District Court

In federal district court actions, complaints, third-party complaints, answers, replies to counterclaims, answers to cross claims, and third-party answers are the allowable pleadings. Cross claims and counterclaims, which are similar in some respects to cross complaints used in California state courts, are not considered separate pleadings, but are asserted in an answer [*Fed. R. Civ. P., Rule 7(a)*]. If a defendant wishes to assert a claim against a person not a party to an action who may be liable to him or her for all or part of the plaintiff's claim against him or her, he or she may file and serve a third-party complaint on such person [*Fed. R. Civ. P., Rule 14(a)*].

The form of pleadings filed in federal district courts is governed by *Fed. R. Civ. P., Rule 10*, which requires that every pleading contain a caption and that all averments of claim or defense be made in numbered paragraphs and each separate claim stated in a separate count, and provides that statements in a pleading may be adopted by reference and exhibits may be made a part of the pleading. The contents of a pleading setting forth a claim for relief (such as an original claim, a counterclaim, a cross claim, or a third-party claim) are prescribed in *Fed. R. Civ. P., Rule 8(a)*, and consist of a statement of jurisdictional grounds, a statement of the claim, and a demand for judgment. *Fed. R. Civ. P., Rule 8(e)*, states that there are no technical forms of pleading, but each averment should be simple, concise, and direct. If a party is represented by an attorney, his or her pleading is to be signed by the attorney or, otherwise, by himself or herself [*Fed. R. Civ. P., Rule 11(a)*].

For detailed discussion of federal procedure, see Moore's Federal Practice (3d ed. Matthew Bender). For a comprehensive collection of litigation forms for use in federal courts, see Bender's Federal Practice Forms.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 123.36 Judicial Council Trial Court Forms

[1] In General

Code Civ. Proc. § 425.12 requires that the Judicial Council develop and approve official forms for use in California trial courts for any complaint, cross complaint, or answer in any action based on personal injury, property damage, wrongful death, unlawful detainer, breach of contract, or fraud. Use of these forms is optional [*see Code Civ. Proc. § 425.12*].

A party or attorney may file a duplicate of a Judicial Council form produced by a computer and a printer or similar device with a resolution of at least 300 dots per inch [*Cal. Rules of Ct., Rule 1.44*]. Any form filed must be a true copy of the original form and must be as legible as a printed form [*Cal. Rules of Ct., Rule 1.43*]. A party or attorney who files a Judicial Council form certifies by filing the form that it is a true and correct copy of the form [*Cal. Rules of Ct., Rule 2.132*].

A complete set of Judicial Council trial court pleading forms is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[2] Use of Complaint Forms

In using the general complaint forms developed for tort or contract actions, one or more attachments must be used to allege specific causes of action. The Judicial Council has developed attachment forms for this purpose. The attachment forms for use in tort actions include cause of action attachments for motor vehicle accidents, general negligence, intentional tort, premises liability, products liability, and an attachment for pleading exemplary damages [*see* Judicial Council Forms, Forms PLD-PI-001(1)-PLD-PI-001(6)]. The attachment forms for use in contract actions include cause of action attachments for breach of contract, common counts, and fraud [*see* Judicial Council Forms, Forms PLD-C-001-PLD-C-001(3)]. The complaint form for unlawful detainer does not require cause of action attachments.

In cases in which specific allegations need to be alleged, the pleader must add the details, because the form complaint,

standing alone, is no more immune to demurrer than any other complaint that fails to meet essential pleading requirements to state a cause of action [*People ex rel. Dep't of Transportation v. Superior Court (1992) 5 Cal. App. 4th 1480, 1486, 7 Cal. Rptr. 2d 498* (demurrer sustained to defective complaint on Judicial Council form for dangerous condition of public property)].

[3] Use of Cross Complaint Form

For contract actions, the general complaint form may also be used as a cross complaint, and the same attachments used with the complaint may be used with the cross complaint [*see* [4], *below*]. For actions for personal injury, property damage, or wrongful death, the Judicial Council has developed a general cross complaint form separate from the general complaint form [*see* Judicial Council Forms, Form PLD-PI-002]. This cross complaint form contains allegations constituting causes of action for indemnity, apportionment of fault, declaratory relief, and others, and therefore does not require cause of action attachments. Attachment forms or attachments prepared by counsel may be used if appropriate [*see* [4], *below*].

[4] Use of Attachments

Any approved cause of action may be attached to any approved form of complaint or cross complaint [*Cal. Rules of Ct., Rule 1.45(b)*]. A cause of action for which no form has been approved may be prepared in the format prescribed by Tit. 2, Div. 2, ch. 1 of the Cal. Rules of Ct., (regulating format of papers presented for filing in superior court), and attached to any approved complaint or cross complaint. Each paragraph within a cause of action must be numbered consecutively beginning with one, and each paragraph number must be preceded with one or more identifying letters derived from the title of the cause of action [*Cal. Rules of Ct., Rule 1.45(c)*]. For specific format requirements for all attachments prepared by counsel, see *§ 123.14, above.*

In addition to cause of action attachments, it may be necessary to prepare attachments containing information for which there was insufficient space on the printed form. Occasionally the forms themselves provide for and refer to such attachments. In preparing such attachments, the format prescribed in *Cal. Rules of Ct., Rule 2.100* et seq., should be followed, and each attachment, and each paragraph within the attachment, should be sufficiently labeled as to its identity and relationship to the form. Any attachment prepared by counsel should also have the short title of the case at the top, along with a space designated for the case number, so that the attachment will be consistent in appearance with the Judicial Council form and attachments.

For illustrations of Judicial Council trial court pleading forms and attachments, and for discussion related to filling out specific forms, see Ch. 58, *Assault and Battery* , Ch. 83, *Automobiles: Bringing the Action* , § 83.120, Ch. 121, *Common Counts,* Ch. 140, *Contracts,* Ch. 177, *Damages,* Ch. 181, *Death and Survival Actions,* Ch. 269, *Fraud and Deceit,* Ch. 362, *Mental Suffering and Emotional Distress,* and Ch. 460, *Products Liability.*

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[Reserved]

§§ 123.37[Reserved]

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§ 123.50 Related Matthew Bender Publications

For memoranda of points and authorities related to forms in this chapter, see California Points and Authorities, Ch. 61, *Cross Complaints*

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For related research and practice materials, see the following legal topics:
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§ 123.51 State Statutes

[1] Complaint

Action as commenced when complaint is filed. *Code Civ. Proc. §§ 350, 411.10*

Procedure when clerk accepts check in payment of fee for filing complaint and check returned without payment. *Code Civ. Proc. § 411.20*

[2] Contents of Complaint and Cross Complaint

No claim for punitive damages to state an amount sought. Civ. Code § 70613

Caption. *Code Civ. Proc. § 422.30*; *Gov. Code § 72055*

Title of complaint. *Code Civ. Proc. § 422.40*

Factual statement of cause of action and prayer for relief. *Code Civ. Proc. § 425.10*

Amount of damages as not to be stated in action, other than limited civil case, brought in superior court to recover actual or punitive damages for personal injury or wrongful death. *Code Civ. Proc. § 425.10(b)*

Contents of complaint for infringement of rights in literary, artistic, or intellectual production. *Code Civ. Proc. § 429.30*

Signature and verification of pleadings. *Code Civ. Proc. §§ 128.7, 446*

Defective title of proceeding as not invalidating paper if action or proceeding is intelligibly referred to therein. *Code Civ. Proc. § 1046*

[3] Cross Complaint

[a] In General

Cross complaint must be separate document. *Code Civ. Proc. § 428.40*

When leave of court is or is not required for filing cross complaint. *Code Civ. Proc. § 428.50*

Service of cross complaint. *Code Civ. Proc. § 428.60*

Counterclaim abolished; cause of action as now asserted by cross complaint. *Code Civ. Proc. § 428.80*

Time to respond to cross complaint. *Code Civ. Proc. § 432.10*

[b] Compulsory Cross Complaint

When cross complaint compulsory. *Code Civ. Proc. § 426.30*

Exceptions to compulsory cross complaint rule. *Code Civ. Proc. § 426.40*

Permission to amend or file cross complaint to assert cause of action. *Code Civ. Proc. § 426.50*

When compulsory cross complaint rule is not applicable. *Code Civ. Proc. § 426.60*

[c] Interpleader

Cross complaint in interpleader. *Code Civ. Proc. § 386*

[d] Permissive

Permissive cross complaint. *Code Civ. Proc. § 428.10*

[4] Joinder of Causes

Permissive joinder of causes of action in complaint. *Code Civ. Proc. § 427.10*

Joinder of causes of action against cross defendant. *Code Civ. Proc. § 428.30*

[5] Judicial Remedies

Judicial remedies as divided into actions and special proceedings. *Code Civ. Proc. § 21*

Actions defined. *Code Civ. Proc. § 22*

Special proceedings defined. *Code Civ. Proc. § 23*

One form of civil action. *Code Civ. Proc. § 307*

[6] Parties

Complainant in civil action as designated "plaintiff"; adverse party as designated "defendant." *Code Civ. Proc. § 308*

Permissive joinder of plaintiffs. *Code Civ. Proc. § 378*

Permissive joinder of defendants. *Code Civ. Proc. § 379*

Joinder of parties by cross complaint. *Code Civ. Proc. § 428.20*

Rights of third-party defendants. *Code Civ. Proc. § 428.70*

Using fictitious name for unknown defendants. *Code Civ. Proc. § 474*

[7] Pleading

Question of fact triable, though not pleaded, on order for trial stating such question plainly and distinctly. *Code Civ. Proc. § 309*

Pleading defined. *Code Civ. Proc. § 420*

Complaint and cross complaint as permissible pleadings. *Code Civ. Proc. § 422.10*

General rules of pleading. *Code Civ. Proc. §§ 452-465*

Pleading items of account as unnecessary; right of adverse party to demand copy of account. *Code Civ. Proc. § 454*

Court as having power to authorize filing of copy where original pleading or paper lost. *Code Civ. Proc. § 1045*

[8] Prayer for Relief

Effect of prayer if answer filed. *Code Civ. Proc. § 580*

Effect of prayer if no answer filed. *Code Civ. Proc. § 580*

[9] Sanctions

Sanctions improper filings and tactics. *Code Civ. Proc. §§ 128.5, 128.7*

[10] Setoff

Defense of setoff. *Code Civ. Proc. § 431.70*

[11] Small Claims Court Actions

Action as commenced in small claims court by filing claim under oath. *Code Civ. Proc. § 116.4*

Contents of claim under oath to commence action in small claims court. *Code Civ. Proc. § 116.4*

Compulsory cross complaint rule as inapplicable to small claims court actions. *Code Civ. Proc. § 426.60*

[12] Venue Allegations

Allegations of proper venue required in actions under Unruh Retail Installment Sales Act [*Civ. Code §§ 1801-1812.10*]. *Civ. Code § 1812.10*; *Code Civ. Proc. § 396a*

Allegations of proper venue required in actions under Rees-Levering Motor Vehicle Sales and Finance Act [*Civ. Code §§ 2981-2984.4*]. *Civ. Code § 2984.4*; *Code Civ. Proc. § 396a*

Allegations of proper venue required in limited civil cases that are actions on obligations for goods, services, loans, or extensions of credit. *Code Civ. Proc. §§ 395(b), 396a*

Allegations of proper venue required in limited civil cases that are actions arising from transaction consummated as proximate result of seller's unsolicited telephone call. *Code Civ. Proc. §§ 395(b), 396a*

Allegations of proper venue required in unlawful detainer proceedings [*Code Civ. Proc. § 1161*]. *Code Civ. Proc. § 396a*

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§ 123.52 California Rules of Court

Form of papers presented for filing. *Cal. Rules of Ct., Rule 2.100 et seq.*

Time for service of a complaint, cross-complaint, and response. *Cal. Rules of Ct., Rule 3.110*

Papers required to be served on cross defendants who have not previously appeared. *Cal. Rules of Ct., Rule 3.222*

Amendment of pleadings. *Cal. Rules of Ct., Rules 3.1100, 3.1324*

Notice of change of address of party or attorney. *Cal. Rules of Ct., Rules 3.1100, 2.200*

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Forms of Pleading and Practice--Annotated

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
Chapter 123 COMPLAINTS AND CROSS COMPLAINTS
PART III. RESEARCH GUIDE

12-123 California Forms of Pleading and Practice--Annotated § 123.53

§ 123.53 Decisions

[1] Allegations

Allegation referring to "Defendants, and each of them," was sufficient to charge each defendant with liability. *Lee v. Escrow Consultants, Inc. (1989) 210 Cal. App. 3d 915, 925, 259 Cal. Rptr. 117*

[2] Appealable Orders

When defendant cross complains against third party or against codefendant, dismissal of cross complaint is final adverse adjudication of cross complainant's rights against distinct party and, order is appealable. *County of Los Angeles v. Guerrero (1989) 209 Cal. App. 3d 1149, 1152 n.2, 257 Cal. Rptr. 787*

Under single judgment rule, order striking cross complaint against plaintiff is ordinarily not considered sufficiently independent to permit entry of separate judgment on it unless judgment on cross complaint is final as to specific party. *Daon Corp. v. Place Homeowners' Assn. (1989) 207 Cal. App. 3d 1449, 1456, 255 Cal. Rptr. 448*

Purported final judgment rendered on complaint without adjudication of issues raised by cross complaint against plaintiff is nonappealable, absent some exception to general rule that there can be only one final judgment in action. *American Nat. Bank v. Stanfill (1988) 205 Cal. App. 3d 1089, 1095, 252 Cal. Rptr. 861* (also, however, amending summary judgment, holding judgment as amended was appealable, and reversing judgment with directions)

Order striking entire complaint is appealable order. *Morales v. Camello (1970) 12 Cal. App. 3d 370, 371, 90 Cal. Rptr. 718*

[3] Caption

Mislabeling cause of action is immaterial. *Gagne v. Bertran (1954) 43 Cal. 2d 481, 486-487 n.3, 275 P.2d 15*

Subject matter of action and issues involved is determinable from facts pleaded rather than from title. *Luckey v. Superior Court (1930) 209 Cal. 360, 366, 287 P. 450* ; *Lavine v. Jessup (1958) 161 Cal. App. 2d 59, 64, 326 P.2d 238* ; *Petersen v. Cloverdale Egg Farms (1958) 161 Cal. App. 2d 792, 797, 327 P.2d 127* ; *Harrold v. Harrold (1954) 127 Cal. App. 2d 582, 583, 274 P.2d 183* ; *Shimmon v. Moore (1951) 104 Cal. App. 2d 554, 556-557, 232 P.2d 22* ; *Zumwalt v. Hargrave (1945) 71 Cal. App. 2d 415, 418, 162 P.2d 957*

Misnaming court in complaint is nonfatal defect in pleading. *Ex parte Fil Ki (1889) 79 Cal. 584, 586-587, 21 P. 974*

Nature of complaint for venue purposes is determined from allegations of complaint and not from caption. *Franco Western Oil Co. v. Cameron (1962) 200 Cal. App. 2d 37, 38, 41, 19 Cal. Rptr. 304*

Incorrect description in caption of complaint of party as a corporation did not constituting fatal defect. *McDonough v. Waxman (1930) 103 Cal. App. 169, 172-173, 284 P. 482*

[4] Counts and Causes of Action Distinguished

In action by heirs of worker killed on job, "causes of action" for (1) negligence, (2) strict liability, (3) breach of implied warranty, and (4) wrongful death alleged in complaint are more properly characterized as "counts"; suit consists of only one true cause of action, namely, injury suffered as result of decedent's wrongful death, and causes of action are actually counts based on same primary right of plaintiffs and same primary duty of defendants, each of which merely alleged additional circumstances out of which primary right and duty arose; each set of circumstances, in turn, is differentiated by reference in alternative to legal theories pertaining to nature of wrongfulness of defendants' acts. *Barrett v. Superior Court (1990) 222 Cal. App. 3d 1176, 1181-1182, 272 Cal. Rptr. 304*

[5] Cross Complaint

[a] Availability and Purpose

A lawyer sued by a former client for legal malpractice is generally denied the option of filing a cross complain against plaintiff's present lawyer for indemnity or contribution. *Musser v. Provencher (2002) 28 Cal. 4th 274, 281, 121 Cal. Rptr. 2d 373* (public policy disfavors suits between past and present counsel; however, court permitted attorney to seek indemnification from co-counsel in connection with legal malpractice case, finding that public policy did not require adoption of a blanket rule barring suits against co-counsel; includes list of cases denying indemnification and one highly criticized case permitting it)

Cross complaint allowed in order to avoid circuity of litigation in which attachment defendant sued plaintiff for malicious prosecution. *White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 351 n.10, 66 Cal. Rptr. 697, 438 P.2d 345*

Use and timeliness of cross complaints in validation actions under *Code Civ. Proc. § 860 et seq.* *Moorpark Unified School Dist. v Superior Court (1990) 223 Cal. App. 3d 954, 957-960, 273 Cal. Rptr. 18*

That original complaint pleads action legal in nature does not bar cross complaint seeking equitable relief. *County of San Mateo v. Berney (1988) 199 Cal. App. 3d 1489, 1494, 245 Cal. Rptr. 738*

Code Civ. Proc. § 426.60(c) (excepting actions for declaratory relief from compulsory filing of cross complaint) does not prohibit defendant in declaratory relief action from filing cross complaint to assert related causes of action. *California State Auto. Assn. Inter-Ins. Bureau v. Superior Court (1986) 184 Cal. App. 3d 1428, 1433 n.6, 229 Cal. Rptr.*

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Issue concerning cross action was not able to be addressed when appeal was taken from main action because complaint and cross complaint are two separate actions, with issues severable from each other. *Security Pacific National Bank v. Adamo (1983) 142 Cal. App. 3d 492, 496, 191 Cal. Rptr. 134*

Provisions for compulsory cross complaints do not apply to special proceedings and permissive cross complaints are allowed only when cross complaint responds to complaint or another cross complaint, not to petition. *Airfloor Co. of California, Inc. v. Regents of University of California (1978) 84 Cal. App. 3d 1004, 1009, 149 Cal. Rptr. 130* (involving petition to confirm arbitration award)

Purpose of cross complaint is to secure complete determination of controversy among parties in order to avoid circuity of action. *Bewley v. Riggs (1968) 262 Cal. App. 2d 188, 192, 68 Cal. Rptr. 520*

[b] Compulsory

A plaintiff/cross-defendant against whom a compulsory cross-complaint has been filed is not entitled to seek a change of venue under *Code Civ. Proc. § 396b* based on a claim of improper venue as determined by reference to the cross-complaint. Rather, the cross-complaint is to be tried in the same county that has been established as the proper venue based on the original complaint. *K.R.L. Partnership v. Superior Court (2004) 120 Cal. App. 4th 490, 506, 15 Cal. Rptr. 3d 517*

Scope and effect of compulsory cross complaint rule of *Code Civ. Proc. § 426.30* is analogous to res judicata rather than to collateral estoppel, because statute bars claims party failed to assert by cross complaint in previous action arising from same occurrence and necessarily bars issues that were never litigated and never actually decided. *Hulsey v. Koehler (1990) 218 Cal. App. 3d 1150, 1156-1157, 267 Cal. Rptr. 523*

Defense based on *Code Civ. Proc. § 426.30* (mandatory cross complaint) must be specially pleaded; affirmative defense of failure to state facts sufficient to constitute cause of action is insufficient to raise it. *Hulsey v. Koehler (1990) 218 Cal. App. 3d 1150, 1158, 267 Cal. Rptr. 523*

Motion for leave to file cross complaint to cross complaint on ground that it alleged related causes of action (*see Code Civ. Proc. §§ 426.30, 426.50*) was properly denied when cross complaint to cross complaint merely set out causes of action that had been pleaded in original complaint, which was dismissed for failure to bring action to trial within five years (*see Code Civ. Proc. §§ 583.310, 583.360*). *Flynn v. Page (1990) 218 Cal. App. 3d 342, 347, 266 Cal. Rptr. 830*

Action was barred by compulsory cross complaint requirement of *Code Civ. Proc. § 426.30* when earlier federal action between parties arose out of same transaction or occurrence and involved common issues of law and fact; federal court could have heard present claims under its ancillary jurisdiction. *Currie Medical Specialties, Inc. v. Bowen (1982) 136 Cal. App. 3d 774, 776-777, 186 Cal. Rptr. 543*

[c] Declaratory Relief

Cross complaint seeking declaratory judgment that action was maliciously prosecuted was premature prior to termination of action in defendant's (cross complainant's) favor. *Babb v. Superior Court (1971) 3 Cal. 3d 841, 844-850, 92 Cal. Rptr. 179, 479 P.2d 379*

Cross complaint for declaratory relief against codefendant to determine warranty obligation to cross complainant with respect to plaintiff's claim was not premature. *Sattinger v. Newbauer (1954) 123 Cal. App. 2d 365, 367, 266 P.2d 586*

[d] Effect of Dismissal of Complaint

When plaintiff voluntarily dismissed action without prejudice after settlement conference, defendant who did not file or seek leave to file cross complaint on related cause of action prior to dismissal was barred from later asserting related cause of action by Code Civ. Code § 426.30. *AL Holding Co. v. O'Brien & Hicks, Inc. (1999) 75 Cal. App. 4th 1310, 1313-1314, 89 Cal. Rptr. 2d 918* (later action by defendant's assignee)

Cross complainant was not deprived of right of trial on issues of cross complaint by judgment dismissing complaint. *National Electric Supply Co. v. Mount Diablo Unified School Dist. (1960) 187 Cal. App. 2d 418, 422, 9 Cal. Rptr. 864*

[e] Filing

Complaint deemed filed when presented at proper office and deposited. *City of Los Angeles v. Superior Court (1968) 264 Cal. App. 2d 766, 770, 70 Cal. Rptr. 826*

[f] Filing After Answer

Court was without power to impose prohibited prejudgment attachment as condition to allowing filing of cross complaint after answer. *Medford v. Superior Court (1983) 140 Cal. App. 3d 236, 240, 189 Cal. Rptr. 227*

Filing cross complaint after answer only as permitted by court. *Dunzweiler v. Superior Court (1968) 267 Cal. App. 2d 569, 575, 73 Cal. Rptr. 331*

Ruling on application to file cross complaint after answer is reversible on appeal only on showing abuse of discretion. *Dunzweiler v. Superior Court (1968) 267 Cal. App. 2d 569, 575-576, 73 Cal. Rptr. 331* ; *Nels E. Nelson, Inc. v. Tarman (1958) 163 Cal. App. 2d 714, 730, 329 P.2d 953*

[g] Filing After Judgment

Party is not permitted to file cross complaint after judgment has been entered on underlying complaint. *City of Hanford v. Superior Court (1989) 208 Cal. App. 3d 580, 584, 586-589, 256 Cal. Rptr. 274*

[h] Judgment

Where a complaint and cross-complaint involving the same parties have been filed, there is no final, appealable judgment until both have been resolved. Thus, under the one final judgment rule, a defendant could not appeal from a judgment as to its cross-complaint while proceedings remained pending as to the complaint; defendant could appeal only from a final judgment which resolved both the complaint and the cross-complaint. *ECC Construction, Inc. v. Oak Park Calabasas Homeowners Assn. (2004) 122 Cal. App. 4th 994, 1002*

Cross complaint is not considered sufficiently independent to allow separate final judgment to be entered on it, except when cross complaint seeks separate and independent relief by or against different parties. *City of Hanford v. Superior Court (1989) 208 Cal. App. 3d 580, 584, 588, 256 Cal. Rptr. 274*

[i] Jurisdiction

Transfer of action to court having jurisdiction over subject matter of cross complaint is mandatory. *Eveleth v. American Brass & Iron Foundry (1962) 203 Cal. App. 2d 41, 44-45, 21 Cal. Rptr. 95*

[j] Parties

In declaratory judgment action against insurer by plaintiff who claims to be an additional insured on defendant insurer's policy issued to third party, defendant insurer's claim against plaintiff's primary insurer based on "other insurance" clauses of both policies did not constitute compulsory cross complaint when primary insurer not party to action. *Insurance Co. of North America v. Liberty Mutual Ins. Co. (1981) 128 Cal. App. 3d 297, 303, 180 Cal. Rptr. 244*

Defendant is not permitted to bring in possible joint tortfeasor by cross complaint absent any right of indemnification or contribution. *Balding v. D.B. Stutsman, Inc. (1966) 246 Cal. App. 2d 559, 562-563, 54 Cal. Rptr. 717*

[k] Permissive Filing

Code Civ. Proc. § 428.10(b) permits party against whom cause of action has been asserted in complaint to file cross complaint stating any cause of action he or she has against person alleged to be liable thereon; accordingly, defendant may generally file cross complaint against any person from whom he or she seeks equitable indemnity. *Platt v. Coldwell Banker Residential Real Estate Services (1990) 217 Cal. App. 3d 1439, 1444, 266 Cal. Rptr. 601*

Code Civ. Proc. § 428.10(b) permits defendant to file cross complaint against any person from whom he or she seeks total or partial indemnity on basis of comparative fault. *Daon Corp. v. Place Homeowners' Assn. (1989) 207 Cal. App. 3d 1449, 1454-1455, 255 Cal. Rptr. 448*

Motion for leave to file cross complaint to join alleged joint torfeasor was properly denied when cross complaint was devoid of any allegation of relationship or conduct by proposed cross defendant which would compel indemnification or contribution by it. *Balding v. D.B. Stutsman, Inc. (1966) 246 Cal. App. 2d 559, 563, 54 Cal. Rptr. 717*

[l] Service

Default judgment entered by court clerk on purported cross complaint is void when supposed cross complaint was not personally served on cross defendant. *Westport Oil Co. v. Garrison (1971) 19 Cal. App. 3d 974, 977-978, 97 Cal. Rptr. 287*

[m] Answer to Cross Complaint

Cross defendant must file answer to cross complaint; necessity for answer cannot be avoided on theory that cross complaint merely replicates answer and should be reclassified as counterclaim since counterclaim was abolished in 1971, pursuant to *Code Civ. Proc. § 428.80*. *Saum v. Reppert (1995) 35 Cal. App. 4th 1766, 1771-1773, 42 Cal. Rptr. 2d 454*

[6] Function of Complaint

Function of complaint is to present and define issues, form foundation of and limit proof to be submitted, and advise court and adverse party of cause of action relied on. *Roth v. Cottrell (1952) 112 Cal. App. 2d 621, 624, 246 P.2d 958*

[7] Judicial Council Forms

Demurrer to defective complaint on Judicial Council form for dangerous condition of public property improperly overruled on ground that Judicial Council form complaint is nondemurrable; form complaint is no more immune to demurrer than any other complaint that fails to state cause of action. *People ex rel. Dep't of Transportation v. Superior Court (1992) 5 Cal. App. 4th 1480, 1486, 7 Cal. Rptr. 2d 498*

[8] Pleading Facts

[a] Condition Precedent

Pleading occurrence of conditions precedent is necessary for recovery on contract. *Clack v. State of California ex rel. Dept. Pub. Wks. (1969) 275 Cal. App. 2d 743, 748, 80 Cal. Rptr. 274*

[b] Construction

Liberal construction of allegations with a view to substantial justice to the parties is required when construing pleadings to determine their effect. *Smith v. Kern County Land Co. (1958) 51 Cal. 2d 205, 206, 331 P.2d 645*

When contract is ambiguous, plaintiffs is entitled to allege their construction in complaint and on demurrer, which construction, if not clearly erroneous, must be accepted as correct. *Marina Tenants Assn. v. Deauville Marina Development Co (1986) 181 Cal. App. 3d 122, 128, 132, 226 Cal. Rptr. 321*

If complaint contains antagonistic allegations of fact, court is required to take as true allegations that bear most strongly against pleader, when they are specifically admitted in answer. *Manti v. Gunari (1970) 5 Cal. App. 3d 442, 450, 85 Cal. Rptr. 366*

Pleading to be construed liberally, but most strongly against pleader. *Lavine v. Jessup (1958) 161 Cal. App. 2d 59, 64-65, 326 P.2d 238*

Pleading to be read and construed as a whole. *Lavine v. Jessup (1958) 161 Cal. App. 2d 59, 64, 326 P.2d 238*

[c] Defects

Where original complaints are so devoid of factual allegations they fail to meet the minimal fact-pleading requirements of *Code Civ. Proc. § 425.10(a)*, the complaint is the functional equivalent of no complaint at all. *Davaloo v. State Farm Ins. Co. (2005) 135 Cal. App. 4th 409, 417, 37 Cal. Rptr. 3d 528*

Where amendment to complaint does not add a new defendant, but simply corrects a misnomer by which an old defendant was sued, case law recognizes an exception to the general rule of no relation back. *Hawkins v. Pacific Coast Building Products, Inc. (2005) 124 Cal. App. 4th 1497, 1503, 22 Cal. Rptr. 3d 453*

Pleading matters are unimportant when case is fairly tried on merits under circumstances indicating other party was not misled by pleading to his injury. *Nels E. Nelson, Inc. v. Tarman (1958) 163 Cal. App. 2d 714, 721, 329 P.2d 953*

Defect in pleading is to be disregarded unless it affects substantial rights. *Nels E. Nelson, Inc. v. Tarman (1958) 163 Cal. App. 2d 714, 721, 329 P.2d 953*

[d] Essential Facts and Specificity

Complaint is required to set forth only essential facts with reasonable precision and with sufficient particularity to acquaint the defendant with nature, source, and extent of the cause of action. *Rannard v. Lockheed Aircraft Corp. (1945) 26 Cal. 2d 149, 156-157, 157 P.2d 1*

Allegation of ultimate fact in pleading usually involves one or more conclusions of fact. *Estate of Bixler (1924) 194 Cal. 585, 589, 229 P. 704* ; *Krug v. Meeham (1952) 109 Cal. App. 2d 274, 277, 240 P.2d 732*

Where plaintiff's complaint requested, in its prayer for relief, double damages under the Uniform Trade Secrets Act, but failed to allege, or even try to allege, a prima facie case for misappropriation of a trade secret, the court refused to conclude that its lawsuit constituted a claim for misappropriation of trade secrets. *CytoDyn of New Mexico, Inc. v. Amerimmune Pharmaceuticals, Inc. (2008) 160 Cal. App. 4th 288, 297-98, 72 Cal. Rptr. 3d 600*

Plaintiff is required only to set forth essential facts of his or her case with reasonable precision and with particularity sufficient to acquaint defendant with nature, source, and extent of action; particularity required in pleading facts depends on extent to which defendant in fairness needs detailed information that can be conveniently provided by plaintiff; less particularity is required when defendant may be assumed to have knowledge of facts equal to that possessed by plaintiff; there is no need to require specificity in pleadings because modern discovery procedures necessarily affect amount of detail that should be required in a pleading. *Ludgate Ins. Co. v. Lockheed Martin Corp. (2000) 82 Cal. App. 4th 592, 608, 98 Cal. Rptr. 2d 277*

Pleading alleges facts and not mere conclusions. *Jones v. Grewe (1987) 189 Cal. App. 3d 950, 954, 234 Cal. Rptr. 717*

Specific pleading of facts showing estoppel or waiver is necessary when those elements are essential to action. *Windsor Mills v. Richard B. Smith, Inc. (1969) 272 Cal. App. 2d 336, 341-342, 77 Cal. Rptr. 300*

Cause of action to be pleaded by actionable facts, not by legal or generic terms. *Lavine v. Jessup (1958) 161 Cal. App. 2d 59, 70, 326 P.2d 238*

Complaint must state facts constituting cause of action in ordinary and concise language, but not to be tested for literary excellence. *Dillon v. Haskell (1947) 78 Cal. App. 2d 814, 816, 178 P.2d 462*

[e] Inconsistent Facts

Complaint states cause of action though containing uncertain, ambiguous, and confliting allegations. *Goes v. Perry (1941) 18 Cal. 2d 373, 378, 115 P.2d 441*

The effect of "omitted matter destructive" to a cause of action cannot be avoided by simply omitting it in a subsequent pleading. This rule is intended to prevent sham pleadings omitting an incurable defect in the case. However, rules of pleading are conveniences to promote justice and not to impede or warp it. All allegations of fact in a verified complaint, which are subsequently omitted or contradicted, are still binding on the complainant. The rule is valid and useful, but it does not exist in a vacuum and cannot be mechanically applied. It is a good rule to defeat abuses of the privilege to amend and to discourage sham and untruthful pleadings. It is not a rule, however, which is intended to prevent honest complainants from correcting erroneous allegations of generic terms which may have legal implications but which are also loosely used by laymen or to prevent the correction of ambiguous statements of fact. The rule is aimed at averments of *fact* the pleading party attempts to avoid in a later pleading. *Lim v. The.TV Corporation (2002) 99 Cal. App. 4th 684, 690-691, 121 Cal. Rptr. 2d 333* , citing *Berman v. Bromberg (1997) 56 Cal. App. 4th 936, 65 Cal. Rptr. 2d 777* and *Contreras v. Blue Cross of California (1988) 199 Cal. App. 3d 945, 245 Cal. Rptr. 258*

Verification of inconsistent facts indicates perjury, although inconsistent theories may be pleaded. *Manti v. Gunari (1970) 5 Cal. App. 3d 442, 449, 85 Cal. Rptr. 366*

[f] Information and Belief

Fact available from public records improperly alleged on information and belief. *People v. Birch Securities Co. (1948) 86 Cal. App. 2d 703, 708, 196 P.2d 143*

Facts that are peculiarly within the knowledge of the pleader improperly alleged on basis of information and belief. *Hall v. James (1926) 79 Cal. App. 433, 435-436, 249 P. 876*

[g] Language of Statute

Framing pleading in language of statute germane to action is ordinarily sufficient. *Quinn v. Mathiassen (1935) 4 Cal. 2d 329, 332, 49 P.2d 284*

[h] Separate Causes of Action

Separate causes of action to be stated separately. *Summers v. Dominguez (1938) 29 Cal. App. 2d 308, 313, 84 P.2d 237*

[i] Theory of Action

Plaintiff is permitted to plead inconsistent theories of recovery in separate counts and is entitled to recover on whichever count is supported by evidence. *Grudt v. City of Los Angeles (1970) 2 Cal. 3d 575, 586, 86 Cal. Rptr. 465, 468 P.2d 825* ; *Burks v. Poppy Construction Co. (1962) 57 Cal. 2d 463, 470, 20 Cal. Rptr. 609, 370 P.2d 313* ; *Brandolino v. Lindsay (1969) 269 Cal. App. 2d 319, 324, 75 Cal. Rptr. 56*

Cause of action is obligation to be enforced that may be stated in separate counts. *Eichler Homes of San Mateo, Inc. v. Superior Court (1961) 55 Cal. 2d 845, 847, 13 Cal. Rptr. 194, 361 P.2d 914* ; *Kaufman & Broad Bldg. Co. v. City & Suburban Mortg. Co. (1970) 10 Cal. App. 3d 206, 215, 88 Cal. Rptr. 858*

The rule of pleading related to inconsistent factual averments does not apply to alternative or even inconsistent pleading of the legal effect of the same facts. *Lim v. The.TV Corporation (2002) 99 Cal. App. 4th 684, 690, 121 Cal. Rptr. 2d 333*

California employs primary rights theory to determine scope of causes of action; under that theory, one single cause of action exists for invasion of one primary right. *Swartzendruber v. City of San Diego (1992) 3 Cal. App. 4th 896, 904, 5 Cal. Rptr. 2d 64*

When exact nature of facts is in doubt or when exact legal nature of plaintiff's right and defendant's liability depend on facts not well known to plaintiff, pleading properly sets forth alternative theories in varied and inconsistent counts. *Rader Co. v. Stone (1986) 178 Cal. App. 3d 10, 29, 223 Cal. Rptr. 806*

Doctrine limiting plaintiff to recovery on theory of his or her pleadings repudiated. *Fletcher v. Western National Life Ins. Co. (1970) 10 Cal. App. 3d 376, 399, 89 Cal. Rptr. 78*

Facts conforming to several theories of recovery are permissibly pleaded in single count in complaint. *Flournoy v. State of California (1969) 275 Cal. App. 2d 806, 811, 80 Cal. Rptr. 485*

[9] Prayer

[a] Effect and Purpose

Improper prayer for relief does not destroy otherwise sufficiently stated cause of action. *Carney v. Simmonds (1957) 49 Cal. 2d 84, 96, 315 P.2d 305*

Prayer as establishing court jurisdiction. *Gardiner v. Royer (1914) 167 Cal. 238, 244, 139 P. 75*

Where plaintiff's complaint requested, in its prayer for relief, double damages under the Uniform Trade Secrets Act, but failed to allege, or even try to allege, a prima facie case for misappropriation of a trade secret, the court refused to conclude that its lawsuit constituted a claim for misappropriation of trade secrets. *CytoDyn of New Mexico, Inc. v. Amerimmune Pharmaceuticals, Inc. (2008) 160 Cal. App. 4th 288, 297-98, 72 Cal. Rptr. 3d 600*

No legal requirement for party to affirmatively plead entitlement to costs of prejudgment interest to be able to recover them. *Pilimai v. Farmers Insurance Exchange Co. (2005) 127 Cal. App. 4th 1093, 1098, 26 Cal. Rptr. 3d 383*

Complaint must state specific dollar amount sought only when a default judgment is to be entered; in any other case, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue. *Furia v. Helm (2003) 111 Cal. App. 4th 945, 957, 4 Cal. Rptr. 3d 357* .

Absence of a specific amount from the complaint not necessarily fatal as long as the pleaded facts entitle the plaintiff to relief. *Furia v. Helm (2003) 111 Cal. App. 4th 945, 957, 4 Cal. Rptr. 3d 357* .

Failure of cross complainant to plead damages in detail and with certainty is defect deemed waived by cross defendant in absence of demurrer on that ground. *Central Surety & Ins. Corp. v. Foley (1962) 204 Cal. App. 2d 738, 743, 22 Cal. Rptr. 504*

Statement contained in prayer of complaint, although not bolstering insufficient pleading, may be considered in determining whether pleader can amend to state cause of action. *Lane v. Davis (1959) 172 Cal. App. 2d 302, 310, 342 P.2d 267*

Power of court to grant any relief consistent with issues raised by pleadings if answer has been filed. *Martin v. Pacific Southwest Royalties (1940) 41 Cal. App. 2d 161, 172, 106 P.2d 443*

[b] Default Actions

Court in default annulment of marriage case exceeded its jurisdiction by awarding plaintiff money in lieu of specific property prayed for in complaint where prayer did not request monetary award. *Wilkinson v. Wilkinson (1970) 12 Cal. App. 3d 1164, 1167, 91 Cal. Rptr. 372*

Failure to make specific request for allowable interest did not preclude award for such in contested case in which prayer did request "such other and further relief as to the court seems proper." *Shell Chemical Corp. v. Owl Transfer Co. (1959) 173 Cal. App. 2d Supp. 796, 804-805 , 344 P.2d 108*

Right to attorney's fees is in issue though not requested in prayer if lease incorporated by reference in complaint showed defendant's agreement to pay it. *Martin v. Pacific Southwest Royalties (1940) 41 Cal. App. 2d 161, 172, 106 P.2d 443*

[10] Pretrial Conference Order

Issue of defendant's negligence is triable even though not pleaded in complaint if pretrial conference order recited such negligence as issue to be tried. *Grudt v. City of Los Angeles (1970) 2 Cal. 3d 575, 585, 86 Cal. Rptr. 465, 468 P.2d 825*

Pretrial conference order, when filed, is part of record controlling subsequent course of case unless modified at or before trial to prevent injustice, even though inconsistent with pleadings. *Grudt v. City of Los Angeles (1970) 2 Cal. 3d 575, 585, 86 Cal. Rptr. 465, 468 P.2d 825*

Pretrial conference order supersedes inconsistent pleadings. *Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1011, 84 Cal. Rptr. 538*

[11] Real Party in Interest

Primary purpose underlying requirement that action be brought in name of real party in interest (*Code Civ. Proc. § 367*) is to protect defendant from multiplicity of suits and further annoyance and vexation at hands of other claimants on same demand. *Vaughn v. Dame Construction Co. (1990) 223 Cal. App. 3d 144, 149, 272 Cal. Rptr. 261*

Purpose of *Code Civ. Proc. § 367*, requiring that actions be prosecuted in name of real party in interest, is to protect defendant from multiplicity of actions predicated on same gravamen and to preserve all personal defenses and counterclaims available to that defendant. *Kaley v. Catalina Yachts (1986) 187 Cal. App. 3d 1187, 1195, 232 Cal. Rptr. 384*

[12] Sanctions

Trial court properly awarded sanctions against cross complainants and their counsel jointly under *Code Civ. Proc. § 128.5* for time spent defending against frivolous cross complaint. *580 Folsom Associates v. Prometheus Development Co. (1990) 223 Cal. App. 3d 1, 27-28, 272 Cal. Rptr. 227*

[13] Signature

Where complaint was signed by party's father, *Code Civ. Proc. § 128.7* may be interpreted to allow correction of signature defect after the defect is called to the attention of the plaintiff, where the correction is promptly made and the court finds that the plaintiff actually assented to the filing of the action. *Board of Trustees v. Superior Court (2007) 149 Cal. App. 4th 1154, 1167-1170, 1173, 57 Cal. Rptr. 3d 755*

A corporation's failure to have an attorney sign the complaint on behalf of the corporation is a defect that may be corrected, on such terms as are just in the sound discretion of the court. *CLD Construction v. City of San Ramon (2004) 120 Cal. App. 4th 1141, 1149, 16 Cal. Rptr. 3d 555*

Omission of signature to pleading is irregularity not affecting jurisdiction of court and curable by amendment. *Canadian Bank of Commerce v. Leale (1910) 14 Cal. App. 307, 309, 111 P. 759*

Unsigned complaint is sufficient to institute action within period of limitation. *Canadian Bank of Commerce v. Leale (1910) 14 Cal. App. 307, 308-309, 111 P. 759*

[14] Use of Fictitious Names

Use of fictitious names to designate defendants in personal injury action. *Smeltzley v. Nicholson Mfg. Co. (1977) 18 Cal. 3d 932, 940, 136 Cal. Rptr. 269, 559 P.2d 624*

Purpose of designating defendants by fictitious names is to toll statute of limitations. *Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 602, 15 Cal. Rptr. 817, 364 P.2d 681*

[15] Verification

Purpose of verification is to ensure good faith in plaintiff's averments or statements. *Albertson v. Raboff (1960) 185 Cal. App. 2d 372, 388, 8 Cal. Rptr. 398*

Complaint commencing civil action generally need not be verified. *Quick v. Corsaro (1960) 180 Cal. App. 2d 831, 836, 4 Cal. Rptr. 674*

Verification used as counteraffidavit in opposition to motion to quash service of summons. *Atkins, Kroll & Co. v. Broadway Lumber Co., (1963) 222 Cal. App. 2d 646, 654, 35 Cal. Rptr. 385*

[16] Filing Fee

Neither *Gov. Code § 68511.3*, which creates a special regime for prison inmates who seek permission to proceed in forma pauperis, nor any other provision of law authorizes a dismissal of a civil action filed by an inmate for failure to file a certified statement of account; instead, the sanction for a failure to file a statement of account is to require a payment of the full amount of fees under § 68511.3(e). *Sanders v. Yarborough (2006) 137 Cal. App. 4th 764, 770, 40 Cal. Rptr. 3d 565*

For discussion of waiving court fees because of a person's financial condition, see *Ch. 174, Costs and Attorney's Fees, § 174.110* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsGeneral Overview

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12-123 California Forms of Pleading and Practice--Annotated § 123.54

§ 123.54 Law Reviews

Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions, 23 Stan. L. Rev. 1 (1970)*

Comment, *Bringing in New Parties by Way of Cross-Complaint in California, 1 UCLA L. Rev. 359 (1954)*

Comment, *Cross-Demands: California Procedure and the Federal Rules, 1 UCLA L. Rev. 547 (1954)*

Comment, *The Original Defendant as Plaintiff--Counterclaims, Cross Complaints and Section 438, 40 Cal. L. Rev. 423 (1952)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProcedureJoinder of Claims & RemediesGeneral OverviewCivil ProcedureJoinder of Claims & RemediesClaims

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§ 123.55 Text References

Witkin, California Procedure, vols. 4 and 5, *Pleading*, §§ 431 et seq., 1080 et seq. (4th ed. 1997)

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[Reserved]

§§ 123.56[Reserved]

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12-123 California Forms of Pleading and Practice--Annotated § 123.60

§ 123.60 Case Cover Sheet--Judicial Council Form CM-010 [Cal. Rules of Ct., Rule 3.220]

[1] FORM Case Cover Sheet--Judicial Council Form CM-010 [Cal. Rules of Ct., Rule 3.220]

Click here to view image.

[2] Use of Form

Judicial Council Form CM-010, the Civil Case Cover Sheet illustrated in [1], *above*, must be filed with the first paper, typically the complaint, in each civil action or proceeding, except those filed in small claims court or filed under the Probate Code, Family Code, or Welfare and Institutions Code [*Cal. Rules of Ct., Rule 3.220(b)(1)*]. It must be filed in addition to any other cover sheet required by local rule (such as those required in some local trial delay reduction programs).

The cover sheet need not be served with the complaint unless the plaintiff has indicated on the sheet that the case is complex under *Cal. Rules of Ct., Rule 3.400 et seq.* or a collections case under *Cal. Rules of Ct., Rule 3.740* [*Cal. Rules of Ct., Rule 3.220(a)*].

If a party that is required to provide a cover sheet under this rule or a similar local rule fails to do so or provides a defective or incomplete cover sheet at the time the party's first paper is submitted for filing, the clerk of the court must file the paper. Failure of a party or a party's counsel to file a cover sheet as required by this rule may subject that party, its counsel, or both, to sanctions under *Cal. Rules of Ct., Rule 2.30* [*Cal. Rules of Ct., Rule 3.220(c)*].

For further discussion, see *§ 123.27*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Purpose of Cover Sheet

The sheet is to be used for statistical purposes, and may affect the assignment of a complex or collections case [*Cal. Rules of Ct., Rule 3.220(a)*]. Thus, in addition to preliminary information about the filing party or his or her attorney, and the name of the court and the case, the form consists primarily of providing basic information about the action or proceeding being initiated by the complaint or other first paper:

- In the caption, the nature of the case as limited or unlimited [for discussion, *see* Ch. 324, *Jurisdiction: Subject Matter*].

- In Paragraph 1, a very basic categorization of the case.

- In Paragraph 2, the designation of the case as complex or not complex, with additional information requested if the plaintiff is designating the case as complex [for discussion of what constitutes a complex case, *see Ch. 425, Pretrial Proceedings, § 425.52*].

- In Paragraph 3, information concerning the type of relief being sought.

- In Paragraph 4, the number of causes of action.

- In Paragraph 5, whether the case is or is not a class action suit.

The Complex Case Designation area in the caption is for use by the defendant to either contest or join in the plaintiff's categorization of the case. The plaintiff's designation of the case is addressed in Paragraph 2, rather than in the caption.

Finally, the form calls for the signature of the filing party or his or her attorney.

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12-123 California Forms of Pleading and Practice--Annotated § 123.61

§ 123.61 Format of Complaint or Cross Complaint [Code Civ. Proc. §§ 422.30, 422.40, 425.10; Cal. Rules of Ct., Rule 2.100 *et seq.*]--California State Court

[1] FORM Format of Complaint or Cross Complaint [Code Civ. Proc. §§ 422.30, 422.40, 425.10; Cal. Rules of Ct., Rule 2.100 *et seq.*]--California State Court

[Identification of Attorney. *In the space commencing one inch from the top of the page with line 1, to the left of the center of the page, set forth the name, office address or, if none, residence address, telephone number, fax number and e-mail address (if available), and State Bar membership number of the attorney for the party in whose behalf the paper is presented, or of the party if he or she is appearing in person [Cal. Rules of Ct., Rule 2.111(1)]. The inclusion of a fax number or e-mail address on any document does not constitute consent to service by fax or e-mail unless otherwise provided by law [Cal. Rules of Ct., Rule 2.111(1)].*

.....
.....
.....

_____ [*Name*]

_____ [*address*]

_____ [*telephone number*]

_____ [*State Bar membership number*]

Attorney for _____ [*specify, e.g.,* Plaintiff]

[*The first two inches of space between lines 1 and 7 to the right of the center of the page must be left blank for the use of the clerk (Cal. Rules of Ct., Rule 2.111(2)). Generally this space is used by the clerk to stamp the date the paper is filed.*]

[Title of Court. *On or below 31/3 inches from the top of the paper, at line 8, set forth the title of the court (see Cal. Rules of Ct., Rule 2.111(3)), containing the name of the court and county (Code Civ. Proc. § 422.30).*]

.....
.....
.....

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

[Title of Case. *Below the title of the court, in the space to the left of the center of the page, set forth the title of the case (Cal. Rules of Ct., Rule 2.111(4)). In the title of the case on each initial complaint or cross-complaint, the name of each party must commence on a separate line beginning at the left margin or the page (Cal. Rules of Ct., Rule 2.111(4); see Code Civ. Proc. § 308 (designation of parties as plaintiff or defendant)). On any subsequent pleading or paper, it is sufficient in the title of the case to (1) state the name of the first party on each side, with appropriate indication of other parties, and (2) state that a cross-action or cross-actions are involved, if applicable (Cal. Rules of Ct., Rule 2.111(4)). In other pleadings, except as otherwise provided by statute or rule of the Judicial Council, it is sufficient to state the name of the first party on each side with appropriate indication of other parties (see Code Civ. Proc. § 422.40). When the plaintiff is ignorant of the name of a defendant, he or she must state that fact in the complaint, and that defendant may be designated by any name, and when his or her true name is discovered, the pleading or proceeding must be amended accordingly (Code Civ. Proc. § 474). The following illustrates the title of a complaint including fictitiously named parties.*]

	)	
_____ [*name*],	)	
.....Plaintiff,	)	
	)	
.....vs.	)	NO. _____
	)	
_____ [*name*],	)	
and DOES I through XX,	)	
.....Defendants.	)	
	)	

_____

[Title of Cross Complaint. *In the title of the case on each initial cross-complaint, the name of each party must commence on a separate line beginning at the left margin or the page (Cal. Rules of Ct., Rule 2.111(4); see Code Civ. Proc. § 308 (designation of parties as plaintiff or defendant)). On any subsequent pleading or paper, it is sufficient in the title of the case to (1) state the name of the first party on each side, with appropriate indication of other parties, and (2) state that a cross-action or cross-actions are involved, if applicable (Cal. Rules of Ct., Rule 2.111(4)). The following illustrates an initial cross-complaint between two parties and includes fictitious cross defendants.*]

	)	
_____ [*name*],	)	
.....Plaintiff,	)	
	)	
.....vs.	)	
	)	
_____ [*name*],	)	
.....Defendant,	)	
_____	)	NO. _____

_____ [*name*],	)
.....Cross Complainant,	)
	)
.....vs.	)
	)
_____ [*name*],	)
and DOES I through XX,	)
.....Cross Defendants.	)
	)

[Case Number. *The number of the case is to be placed (by the clerk) to the right of and opposite the title (see Cal. Rules of Ct., Rule 2.111(5)). Sometimes a blank is typed in for the clerk's use, as illustrated above. If the document is a cross complaint, the case number will be known and inserted.*]

[Nature of Paper and Character of Action; Jurisdictional Classification. *Immediately below the number of the case, set forth the nature of the paper and the character of the action (see Cal. Rules of Ct., Rule 2.111(6)). It is customary to use all capital letters for the nature of the paper line, although the character line is sometimes in lower case letters. Attorneys vary regarding how they designate nature and character, but the following illustration is typical. If the case is a limited civil case, the caption must so state (see Code Civ. Proc. § 422.30(b); Cal. Rules of Ct., Rule 2.111(10)). The caption must also state either that the amount demanded exceeds or does not exceed $10,000 (see Gov. Code § 70613(b); Cal. Rules of Ct., Rule 2.111(9)*).]

	)	
[*title of case*]	)	NO. _____
	)	COMPLAINT FOR DAMAGES
	)	(Negligence)
	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	

[*The nature of the paper requirement is exemplified by lines such as those that follow.*]

(a) COMPLAINT

(b) CROSS COMPLAINT

(c) AMENDED _____ [COMPLAINT *or* CROSS COMPLAINT]

(d) SECOND AMENDED _____ [COMPLAINT *or* CROSS COMPLAINT]

(e) SUPPLEMENTAL _____ [COMPLAINT *or* CROSS COMPLAINT]

If a case is reclassified by an amended complaint, cross-complaint, amended cross- complaint, or other pleading under *Code Civ. Proc. §§ 403.020* or *403.030*, the caption must indicate that the action or proceeding is reclassified by this

pleading [*Cal. Rules of Ct., Rule 2.111(11)*]. The caption or title must state that the case is a limited civil case reclassified as an unlimited civil case, or an unlimited civil case reclassified as a limited civil case, or other words to that effect [*Cal. Rules of Ct., Rule 2.111(11)*]. For additional discussion of these requirements, see *Ch. 21, Amended and Supplemental Pleadings, § 21.31*.

[Assigned Judge and Department. *The name of the assigned judge and department, if any, appears below the nature of the paper or the character of the action or proceeding (Cal. Rules of Ct., Rule 2.111(7)). For an initial complaint, this information is not available as the case has not yet been assigned; however in the matter of cross-complaints or amended complaints, this information may be available and should be inserted.*]

[Introduction. *The introduction is set forth below the caption.*]

_____ [Plaintiff *or* Cross Complainant] alleges:

[Body. *The main portion of the complaint or cross complaint consists of a series of numbered paragraphs in which a statement is made of the facts constituting the cause of action, in ordinary and concise language (Code Civ. Proc. § 425.10(a)(1)). Each numbered paragraph is generally limited to allegations of a single ultimate fact or set of circumstances. A separate set of numbered paragraphs is used for each separate count or a cause of action and for each additional cause of action (Cal. Rules of Ct., Rule 2.112(1)). For the form of the body of a complaint with multiple counts and causes, see § 123.62. The paragraphs are numbered with arabic numerals preceding the paragraph on the same line as the first sentence. The following are illustrations.*]

.....
.....
.....

1. [*Allegation*]
2. [*Allegation*]

[Demand for Judgment for Relief. *Following the factual allegations set forth a demand for judgment for the relief to which plaintiff or cross complainant claims he or she is entitled. If recovery of money or damages is demanded, the amount demanded shall be stated (Code Civ. Proc. § 425.10(a)(2)). If the action is brought to recover damages for personal injury or wrongful death, the amount of money or damages demanded must not be stated (Code Civ. Proc. § 425.10(b)), and in no case may an amount of punitive damages be stated (Civ. Code § 3295(e); Code Civ. Proc. § 425.10(b)). This part is generally referred to as the prayer and often consists of an introductory line followed by a listing of items of relief.*]

[Note: *If the paper is 81/2 inches by 11 inches, line 28 would ordinarily be the last numbered line on the page and subsequent material would continue on line 1 of the succeeding page. The pages are consecutively numbered at the bottom (Cal. Rules of Ct., Rule 2.109).*]

.....
.....
.....

WHEREFORE, _____ [*identify party, e.g.,*
plaintiff] prays judgment [against defendants, and
each of them,] as follows:

1. For general damages [in the sum of $_____];

2. _____ [*Request any items of special damage, such as medical and incidental expenses*];

3. _____ [*Request any other forms of relief sought, such as injunctions or attorney's fees*];

4. For cost of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

[Subscription. *The signature of the attorney of record in his or her individual name, or if none, the party (see Code Civ. Proc. § 128.7(a)) is placed below the prayer, usually on the right side of the page, and is customarily accompanied by the typed name of the signer and a description of his or her capacity.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*party's status and name*]

[Verification: *Some complaints must be verified and others are verified as a matter of pleading strategy (see [2], below). The verification, in the form of an affidavit (see Code Civ. Proc. § 446), or a declaration under penalty of perjury (Code Civ. Proc. § 2015.5) is set out following the subscription, often under the heading "VERIFICATION," either on the same page, or on a separate page.*]

.....
.....
.....

VERIFICATION

I, _____ [*name*], am the _____ [*identify party, e.g.*, plaintiff] in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

The form in [1], *above*, illustrates the various parts of a complaint and cross complaint and sets out the required format

of such pleadings. It sets forth the illustrations of:

- The caption [*see Code Civ. Proc. §§ 422.30, 422.40*] and the required format of the first page [*see Cal. Rules of Ct., Rule 2.100 et seq.*].

- The body, which must contain a statement of the facts constituting the cause of action in ordinary and concise language [*see Code Civ. Proc. § 425.10*].

- The prayer or demand for judgment [*see Code Civ. Proc. § 425.10*].

- The signature of the attorney of record in his or her individual name, or if none, the party [*Code Civ. Proc. § 128.7(a)* (applicable to actions filed on or after January 1, 1995; pleadings filed in actions commenced before 1995 may be signed by either the attorney or the party under *Code Civ. Proc. § 446*); for discussion, *see § 123.23, above*] and the verification, if any [*see Code Civ. Proc. § 446*].

A complaint for or against a class party must include in the caption the designation "CLASS ACTION." This designation must be in capital letters on the first page of the complaint, immediately below the case number but above the description of the nature of the complaint. The complaint in a class action must also contain a separate heading entitled "CLASS ACTION ALLEGATIONS," under which the plaintiff describes how the requirements for class certification are met [*Cal. Rules of Ct., Rule 3.761*].

[3] Verification

A complaint or cross complaint generally need not be verified [*Quick v. Corsaro (1960) 180 Cal. App. 2d 831, 836, 4 Cal. Rptr. 674]* . However, in certain actions and proceedings, verification is required by statute [for a summary of those actions and proceedings, *see* [7], *below,* and Ch. 572, *Verification*].

Even if verification is not required, plaintiff or cross complainant in an unlimited civil case may wish to verify in order to compel the other party to file a verified answer [*see Code Civ. Proc. §§ 91(a), 92(b), 446*] or to require specific, rather than general, denials of the controverted allegations in the complaint or cross complaint [*see Code Civ. Proc. §§ 91(a), 431.30(d)*].

[4] Preparation of Documents Offered for Filing

[a] Paper

Documents offered for filing, other than exhibits, copies, and printed forms furnished by the court clerk must be on opaque, unglazed paper, white or unbleached, of standard quality not less than 20-pound weight, 81/2 by 11 inches in size [*Cal. Rules of Ct., Rule 2.103*]. All original papers filed in the court must be on recycled paper. All copies of papers, documents, and exhibits filed with the court or served on other parties must be on recycled paper. Filing or serving a paper after these dates will constitute a certification that the paper was purchased as recycled paper [*Cal. Rules of Ct., Rule 2.101(b). see Cal. Rules of Ct., Rule 1.6(22)* ("recycled" defined)].

Each paper presented for filing must contain two prepunched normal-sized holes, centered 21/2 inches apart and 5/8 inch from the top of the paper [*Cal. Rules of Ct., Rule 2.115*.]

[b] Type Size and Color

All documents offered for filing in court except exhibits, copies of documents, printed forms furnished by the clerks of the courts, and, in superior court, records on appeal from civil cases and briefs filed in the appellate departments are to be typewritten or printed or prepared by a photocopying or other duplication process that will produce clear and

permanent copies equally legible to printing, in type not smaller than 12 points. The type face must be essentially equivalent to Courier, Times Roman, or Helvetica. The color of print must be blue-black or black [*Cal. Rules of Ct., Rule 2.106*].

[c] Single-Sided; Spacing

Only one side of the paper is to be used, and the lines on each page must be one and one half spaced or double spaced and numbered consecutively, but descriptions of real property may be single spaced, and footnotes, quotations, and printed forms of corporate surety bonds and undertakings may be single spaced and have unnumbered lines if they comply generally with the space requirements of *Cal. Rules of Ct., Rule 2.111* [*Cal. Rules of Ct., Rule 2.108(3)*].

[d] Margins and Line Numbering

The left margin must be at least one inch from the left edge of the paper and the right margin at least one-half inch from the right edge of the paper. Line numbers must be placed at the left margin and separated from the text of the paper by a vertical column of space at least one-fifth inch wide or a single or double vertical line. The line number either must be placed on the same line as a line of type or must be evenly spaced vertically on the page. Line numbers must be consecutively numbered beginning with "1" on each page. There must be at least three line numbers for every vertical inch on the page [*Cal. Rules of Ct., Rule 2.108(4)*].

[e] Binding, Pagination, and Footers

Each page must be numbered consecutively at the bottom. All papers must consist entirely of original pages without riders and must be firmly bound together at the top. Exhibits may be fastened to pages of the specified size and, when prepared by machine copying process, must be equal to typewritten material in legibiltiy and permanency of image [*Cal. Rules of Ct., Rule 2.114*].

Except for exhibits, each paper filed with the court must have a footer in the bottom margin of each page, placed below the page number and divided from the rest of the document by a printed line. The footer must contain the title of the paper or some clear and concise abbreviation in at least 10-point type [*Cal. Rules Ct., Rule 2.110*]. One example given in the rules is simply "Complaint" [*see Cal. Rules Ct., Rule 2.110(b)*].

[5] Additions, Deletions, Interlineations, and Copies

Additions, deletions, or interlineations must be initialed by the clerk or judge at the time of filing [*Cal. Rules of Ct., Rule 2.116*]. All copies served must conform to the original filed, including the numbering of lines, pagination, additions, deletions, and interlineations [*Cal. Rules of Ct., Rule 2.117*)].

[6] Acceptance for Filing

The clerk of the court cannot accept for filing or file any papers that do not comply with Tit. 2, Div. 2, ch. 1 of the Cal. Rules of Ct. However, for good cause shown, the court may permit the filing of papers that do not comply with the Rules [*Cal. Rules of Ct., Rule 2.118(c)*]; and a clerk cannot reject a paper for filing solely on the ground that it is handwritten or handprinted or that the handwriting or handprinting is in a color other than blue-black or black [*Cal. Rules of Ct., Rule 2.118(a)*].

[7] Actions Involving Installment or Automotive Sales, Consumer Obligations, or Unlawful Detainer

In any action or proceeding subject to the provisions of the Unruh Retail Installment Sales Act (*Civ. Code § 1801 et seq.*) or the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*), in all limited civil cases subject to the provisions of *Code Civ. Proc. § 395(b)* (concerning (1) actions arising from an offer or provision of

goods, services, loans, or extensions of credit intended primarily for personal, family, or household use or (2) actions arising from a transaction consummated as a proximate result of either an unsolicited telephone call made by a seller engaged in the business of consummating transactions of that kind or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller), or in an action or proceeding for unlawful detainer as defined in *Code Civ. Proc. § 1161*, the plaintiff must file, concurrently with the complaint, an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) stating facts showing that the action has been commenced in the proper court for the trial of the action or proceeding, and that the action is subject to the provisions of *Civ. Code § 1812.10* or *2984.4* or of *Code Civ. Proc. § 395(b)* or is an action for unlawful detainer.

In lieu of an affidavit or declaration, the required facts may also be stated in a complaint verified by the oath of the plaintiff or of his or her attorney [*Civ. Code §§ 1812.10, 2984.4*; *Code Civ. Proc. § 396a*]. In cases subject to *Civ. Code § 1812.10* or *2984.4*, however, the facts may not be stated on information or belief when they are stated in a verified complaint [*Civ. Code §§ 1812.10, 2984.4*]. When an affidavit or declaration is filed with the complaint, a copy must be served with the summons [*Civ. Code §§ 1812.10, 2984.4*; *Code Civ. Proc. § 396a*].

If a plaintiff fails to file an affidavit or declaration or to state the required facts in a verified complaint, there may be no further proceedings, except to dismiss the action without prejudice [*Civ. Code §§ 1812.10, 2984.4*; *Code Civ. Proc. § 396a*]. In an action subject to *Civ. Code § 1812.10* or *2984.4*, such dismissal is obtained on the court's own motion or on motion of any party [*Civ. Code §§ 1812.10, 2984.4*]. The court may, however, on such terms as may be just, permit the affidavit or declaration to be filed after the complaint. In that case, a copy of the affidavit must be served on the defendant, and the time to answer or otherwise to plead will date from the time of service [*Civ. Code §§ 1812.10, 2984.4*; *Code Civ. Proc. § 396a*]; for venue allegation forms, *see* Ch. 20, *Allegations Commonly Used* , for further discussion and forms, *see Ch. 89, Automobiles: Sales and Financing Under the Rees-Levering Act, § 89.61[5]*; Ch. 501, *Sales: Retail Installment Sales* and Ch. 333, *Landlord and Tenant: Eviction Actions* .

[8] Cross References

For allegations commonly used in pleadings, see Ch. 20, *Allegations Commonly Used*

For forms for use in amending a complaint or cross complaint, see Ch. 21, *Amended and Supplemental Pleadings*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms of prayers, see Ch. 420, *Prayers*

For alternative forms of verification, see Ch. 572, *Verification*

Witkin, California Procedure, vol. 4, *Pleading*, §§ 11-13 (4th ed. 1997)

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12-123 California Forms of Pleading and Practice--Annotated § 123.62

§ 123.62 Body of Complaint or Cross Complaint [Code Civ. Proc. § 425.10(a)]--Skeletal Form--Multiple Causes of Action and Counts

[1] FORM Body of Complaint or Cross Complaint [Code Civ. Proc. § 425.10(a)]--Skeletal Form--Multiple Causes of Action and Counts

[*The headings, numbered paragraphs, and general allegations of a complaint or cross complaint in which more than one cause of action is pleaded and in which one of the causes of action is stated in several counts may be arranged as follows.*]

_____ [*Identify party, e.g.,* Plaintiff] alleges:

FIRST CAUSE OF ACTION
(_____ [*Specify theory, e.g.,* Negligence])

[*Identify parties in heading of cause of action if complaint names multiple parties. See § 123.63*]

[1. _____ (*Allege plaintiff's/cross complainant's status or capacity if plaintiff/cross complainant is other than a competent adult or is suing in a representative capacity.)*]

2. _____ [*Allege defendant's/cross defendant's identity, capacity, and residence, e.g.,* Defendant is, and at all times herein mentioned was, a resident of _____ County, California.]

3. _____ [*Allege unknown defendants/cross defendants by fictitious names in appropriate fictitious name allegation.*]

[4. The allegations of this complaint stated on information and belief are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.]

5. _____ [*Here and in subsequent numbered paragraphs, state facts constituting the cause of action in ordinary and concise language.*]

WHEREFORE, _____ [*identify party, e.g.,* plaintiff] prays judgment against defendant as hereinafter set forth.

SECOND CAUSE OF ACTION
FIRST COUNT
(_____ [*Specify theory, e.g.,* Breach of Contract])

[*Identify parties in heading of cause of action if complaint names multiple parties. See § 123.63*]

[*Paragraphs in succeeding causes of actions or counts should be numbered consecutively from the last paragraph of the immediately preceding cause of action or count.*]

[10. _____ (*If desired, specify any paragraphs from preceding causes of action or counts to be incorporated by reference, e.g.,* Plaintiff refers to and herein incorporates Paragraphs 1 through 5 of the First Cause of Action).]

11. _____ [*Here and in subsequent numbered paragraphs, state facts constituting the cause of action under the theory alleged, in ordinary and concise language.*]

WHEREFORE, _____ [*identify party, e.g.,* plaintiff] prays judgment against defendant as hereinafter set forth.

SECOND CAUSE OF ACTION
SECOND COUNT
(_____ [*Specify theory, e.g.,* Common Count])

[*Identify parties in heading of cause of action if complaint names multiple parties. See § 123.63*]

[*Paragraphs in succeeding causes of actions or counts should be numbered consecutively from the last paragraph of the immediately preceding cause of action or count.*]

20. _____ [*If desired, specify any paragraphs from preceding cause of action to be incorporated by reference, e.g.,* Plaintiff refers to and herein incorporates Paragraphs 1 through 5 of the First Cause of Action, and paragraphs 11 through 13 of the Second Cause of Action, First Count, as though fully set forth herein.]

21. _____ [*Here and in subsequent numbered paragraphs, state facts constituting the cause of action under the theory alleged, in ordinary and concise language.*]

WHEREFORE, _____ [*identify party, e.g.,* plaintiff] prays judgment as follows:

[*Set forth prayer for relief for each cause of action and count, for example:*]

On the FIRST CAUSE OF ACTION:

1. For general damages _____ [in the sum of $_____ *or* according to proof];

2. For _____ [*specify special damages, if any, e.g.*, damages for loss of earnings] _____ [according to proof *or* in the sum of $_____].

On the SECOND CAUSE OF ACTION, FIRST COUNT:

3. For compensatory damages in the sum of $_____;

4. For interest on the sum of $_____ from and after _____ [*date*];

[5. For reasonable attorney's fees _____ in the sum of $_____ *or* according to proof.]

On the SECOND CAUSE OF ACTION, SECOND COUNT:

6. For the sum of $_____;

7. For interest on the sum of $_____ from and after _____ [*date*].

On ALL CAUSES OF ACTION AND COUNTS:

8. For costs of suit herein incurred; and

9. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[*Verification, if desired. See § 123.61[1].*]

[2] Use of Form

The form in [1], *above,* illustrates a format that may be used in separately stating and numbering each cause of action and count, as well as the allegations therein, when multiple causes of action and counts are alleged by a single plaintiff against a single, named defendant or a single cross complainant against a single cross defendant. In the following discussion, usage of "plaintiff" also refers to "cross complainant" and usage of "defendant" also refers to "cross defendant," unless otherwise noted.

The form may be modified for use in a complaint alleging a single cause of action. When there is only one cause of action that asserts a single theory of recovery, the cause of action ordinarily will not be numbered or otherwise identified as such.

For a sample complaint involving multiple causes of action and parties, see *Ch. 83, Automobiles: Bringing the Action, § 83.66*. For a general form of complaint involving multiple parties, see *§ 123.63*.

A complaint for or against a class party must include in the caption the designation "CLASS ACTION." This designation must be in capital letters on the first page of the complaint, immediately below the case number but above the description of the nature of the complaint. The complaint in a class action must contain a separate heading entitled "CLASS ACTION ALLEGATIONS," under which the plaintiff describes how the requirements for class certification are met [*Cal. Rules of Ct., Rule 3.761*].

[3] Multiple Causes of Action

[a] General Considerations

California joinder laws permit a plaintiff who alleges a cause of action against one or more defendants to unite with that cause any other causes that he or she has against the defendant [*Code Civ. Proc. § 427.10*].

In determining whether to allege a particular cause of action, counsel should determine whether the claim would be subject to a plea of abatement because of another pending action, or to objections based on the prohibition against claim-splitting because of a prior action [*see* Ch. 3, *Abatement of Actions* and Ch. 491, *Res Judicata*]. Counsel should also consider his or her obligation to assert the cause of action in light of professional and ethical standards of conduct [*see Gambert v. Hart (1872) 44 Cal. 542, 552* (counsel bound to use ordinary skill and care in course of professional employment); *Cal. Rules Prof. Conduct, Rules 3-110* (competent performance), 3-200 (prohibiting litigation for purpose of harassment); for further discussion, *see Ch. 72, Attorney Practice and Ethics, § 72.270* et seq.].

In addition, if a party against whom a complaint has been filed and served fails to allege in a cross complaint a related cause of action that he or she has against the plaintiff at the time of serving an answer to the complaint or filing the cross complaint, the party generally may not assert, at a later time in another action, the nonpleaded related cause of action against the plaintiff [*Code Civ. Proc. § 426.30(a)*; *see Code Civ. Proc. §§ 426.30(b)* (exemptions), 426.40 (exceptions), 426.50 (application for leave to assert unpleaded cause)]. For further discussion relating to compulsory cross complaints, see *§ 123.31, above*.

[b] Cause of Action Distinguished From Count

The phrase "causes of action" is often used indiscriminately to mean what it says and also to mean "counts," which state differently the same cause of action [*see Eichler Homes of San Mateo, Inc. v. Superior Court (1961) 55 Cal. 2d 845, 847, 13 Cal. Rptr. 194, 361 P.2d 914]* . The essence of a cause of action is the existence of a primary right and one violation of that right [*Kaufman & Broad Bldg. Co. v. City & Suburban Mortg. Co. (1970) 10 Cal. App. 3d 206, 215, 88 Cal. Rptr. 858]* . An example of a primary right is the plaintiff's right to be free from injury to his or her person [*see Slater v. Blackwood (1975) 15 Cal. 3d 791, 795, 126 Cal. Rptr. 225, 543 P.2d 593]* .

A plaintiff may plead in one cause of action alternative, inconsistent theories of recovery under separate "counts" [*see Eichler Homes of San Mateo, Inc. v. Superior Court (1961) 55 Cal. 2d 845, 847, 13 Cal. Rptr. 194, 361 P.2d 914* ; *Tanforan v. Tanforan (1916) 173 Cal. 270, 273, 159 P. 709]* . For example, a plaintiff may bring an action to recover damages arising from personal injuries suffered in an automobile accident by seeking recovery under both negligence and willful misconduct theories [*see Savage v. Van Marle (1974) 39 Cal. App. 3d 241, 245, 114 Cal. Rptr. 51]* .

A count must state facts sufficient to constitute a cause of action if it is to withstand a general demurrer [*see Code Civ. Proc. § 430.10(e)*; *Warren v. Atchison, T. & S.F. Ry. Co. (1971) 19 Cal. App. 3d 24, 41, 96 Cal. Rptr. 317]* . If one well-pleaded count in a complaint is supported by the evidence, the plaintiff is entitled to recover [*Grudt v. City of*

Los Angeles (1970) 2 Cal. 3d 575, 586, 86 Cal. Rptr. 465, 468 P.2d 825] . Note, however, that the rule permitting inconsistent counts does not permit the pleader to allege inconsistently in the same complaint on the subject of facts of which the pleader purports to speak with knowledge under oath [*Faulkner v. Cal. Toll Bridge Auth. (1953) 40 Cal. 2d 317, 328, 253 P.2d 659]* .

Some examples of a single cause of action based on multiple counts are (1) an action based on personal injuries in an automobile accident alleging theories of negligence and willful misconduct [*see Savage v. Van Marle (1974) 39 Cal. App. 3d 241, 245, 114 Cal. Rptr. 51]* ; (2) an action based on removal of items from land by former tenant alleging theories of breach of contract, conversion, restoration and reinstallment, and waste [*see Peiser v. Mettler (1958) 50 Cal. 2d 594, 603-605, 328 P.2d 953]* ; (3) an action based on economic loss alleging theories of breach of contract and common counts [*see Maselli v. E. H. Appleby & Co., Inc. (1953) 117 Cal. App. 2d 634, 635-637* ; *256 P.2d 618]* .

Generally, it is a good practice to state a separate count for each separate theory of liability, rather than to combine theories in a single count or cause of action. This approach helps avoid both inconsistent pleading in the same count, as well as confusion in the framing of issues [*see Steiner v. Rowley (1950) 35 Cal. 2d 713, 715-716, 718-719, 221 P.2d 9* ; *Zumbrun v. University of Southern California (1972) 25 Cal. App. 3d 1, 9, 101 Cal. Rptr. 499]* . A separate statement of causes of action joined in the same complaint is no longer required by statute [*see* Stats. 1973, ch. 828 (repealing *Code Civ. Proc. § 425.20* and amending *Code Civ. Proc. § 430.10*)].

For further discussion of the distinction between causes of action and counts, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[c] Numbering Causes of Action, Counts, and Paragraphs

Each separately stated cause of action must be separately numbered [*Cal. Rules of Ct., Rule 2.112(1)*], and separately stated counts should also be separately numbered.

[d] Identification of Cause of Action or Count

When more than one cause of action is stated, each separate cause of action must be specifically identified with all of the following information [*Cal. Rules of Ct., Rule 2.112*]:

- Its number (*e.g.*, "First Cause of Action").
- Its nature (*e.g.*, "for Fraud").
- The party asserting it, if more than one party is represented in the pleading (*e.g.*, "by Plaintiff Jones").
- The party or parties to whom it is directed (*e.g.*, "against Defendant Smith").

Mistaken labels and confusion of legal theory, however, are not fatal to the statement of the cause of action [*see Lacy v. Laurentide Finance Corp. (1972) 28 Cal. App. 3d 251, 256, 104 Cal. Rptr. 547]* .

[4] Allegations

Paragraphs 1 and 2 of the form identify the parties. If the plaintiff is an individual, usually no identifying allegation is necessary, except if desired simply to "set the stage" of the pleading. Paragraph 3 calls for the insertion, if desired, of an allegation including fictitiously named defendants [*see Code Civ. Proc. § 474*; for further discussion, *see § 123.21[4], above*]. For further discussion and general forms of allegations relating to the identification of plaintiffs, defendants,

and fictitiously named defendants, see Ch. 20, *Allegations Commonly Used* .

Paragraphs 10 and 20 provide examples of incorporating by reference allegations from other causes of action or counts. If the complaint consists of multiple causes of action or counts, this device is a convenient means of avoiding repetition. Care must be taken, however, to avoid incorporating any facts that would render the complaint uncertain or inconsistent [*Code Civ. Proc. § 430.10(f)* (demurrer on ground that pleading is uncertain; "uncertain" as including ambiguous and unintelligible); for further discussion, *see § 123.15, above*].

[5] Allegations on Information and Belief

Optional Paragraph 4 of the form is included if the complaint includes any allegations on information and belief. In this case, the complaint should expressly state that those allegations are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. The purpose of the allegation is to ensure compliance with *Code Civ. Proc. § 128.7(b)(3)* [for discussion, *see § 123.23[2], above*].

[6] Signature

The attorney of record must sign the complaint in his or her individual name, or if the party is not represented, the party must sign [*Code Civ. Proc. § 128.7(a)* (actions filed on or after January 1, 1995, pleadings filed in actions commenced before 1995 may be signed by either the attorney or the party under *Code Civ. Proc. § 446*); for discussion, *see § 123.23, above*].

[7] Cross References

For additional commentary and cross references relating to complaints in general, see *§ 123.61*

Witkin, California Procedure, vol. 4, *Pleading*, §§ 24-56 (4th ed. 1997)

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California Forms of Pleading and Practice--Annotated

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
Chapter 123 COMPLAINTS AND CROSS COMPLAINTS
PART IV. FORMS

12-123 California Forms of Pleading and Practice--Annotated § 123.63

§ 123.63 Body of Complaint or Cross Complaint [Code Civ. Proc. § 425.10(a)]--Skeletal Form--Multiple Parties

[1] FORM Body of Complaint or Cross Complaint [Code Civ. Proc. § 425.10(a)]--Skeletal Form--Multiple Parties

[*The headings, numbered paragraphs, and general allegations of a complaint or cross complaint in which more than one cause of action is pleaded, between multiple parties, may be arranged as follows.*]

FIRST CAUSE OF ACTION
(_____ [*Specify theory, e.g.,* Negligence])

By _____ [Plaintiff *or* Cross Complainant] _____
[*name*]

Against _____ [Defendant(s) *or* Cross Defendant(s)] _____ [*name(s)*] [and DOES _____ (*specify, e.g.,* I--V, inclusive)]

_____ [Plaintiff *or* Cross Complainant] _____ [*name*] alleges:

1. _____ [Plaintiff *or* Cross Complainant] _____ [*name*] is hereinafter in this cause of action referred to as _____ [Plaintiff *or* Cross Complainant].

2. _____ [*State plaintiff's/cross complainant's status or capacity if plaintiff/cross complainant is other than a competent adult or is suing in a representative capacity.*]

3. _____ [*Allege here and in succeeding paragraphs the identity, capacity, and residence of known named defendants or cross defendants sued under this cause of action. See, e.g., § 123.62[1], Paragraph 2.*]

4. _____ [*Allege unknown defendants/cross defendants by fictitious names in appropriate fictitious name allegation, e.g.,* Plaintiff is ignorant of the true names and capacities of defendants sued hereunder as DOES _____ (*specify, e.g.,* I--V), inclusive, and therefore sues these defendants by such fictitious names. These defendants, and each of them, are, and at all times herein mentioned were, _____ (*state capacity, e.g.,* managing general partners in defendant limited partnership) and are sued herein individually and joined as parties defendant in this action (against defendant(s) _____ (*name(s)*)).]

[5. The allegations of this complaint stated on information and belief are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.]

6. _____ [*Set forth appropriate agency allegation, e.g.,* Plaintiff is informed and believes and thereon alleges that, at all times herein mentioned, _____ (*name*) was the agent of defendant _____ (*name*) and, indoing the things hereinafter alleged, was acting in the scope of such agency and with the permission and consent of defendant _____ (*name*).]

7. _____ [*Here and in subsequent numbered paragraphs, state facts constituting the cause of action in ordinary and concise language.*]

WHEREFORE, _____ [plaintiff *or* cross complainant] prays judgment as hereinafter set forth.

SECOND CAUSE OF ACTION
(_____ [*Specify theory, e.g.,* Strict Liability])

By _____ [Plaintiff *or* Cross Complainant] _____
[*name*]

Against _____ [Defendant(s) *or* Cross Defendant(s)] _____ [*name(s)*] [and DOES _____ (*specify, e.g.,* VI--X, inclusive)]

_____ [Plaintiff *or* Cross Complainant] _____ [*name*] alleges:

[*Paragraphs in succeeding causes of actions or counts should be numbered consecutively from the last paragraph of the immediately preceding cause of action or count.*]

10. _____ [Plaintiff *or* Cross Complainant] _____ [*name*] is hereinafter in this cause of action referred to as _____ [Plaintiff *or* Cross Complainant].

[11. _____ (*If desired, specify any paragraphs from preceding causes of action or counts to be incorporated by reference, e.g.,* Plaintiff refers to and herein incorporates Paragraphs 1 through 6 of the First Cause of Action).]

[12. _____ (*If not incorporated by reference from preceding cause of action, allege identity, capacity, etc., of known named defendants or cross defendants, fictitiously named defendants or cross defendants. See Paragraphs 2-6).*]

13. _____ [*Here and in subsequent numbered paragraphs, state facts constituting the cause of action*

in ordinary and concise language.]

WHEREFORE, _____ [plaintiff *or* cross complainant] prays judgment as hereinafter set forth.

THIRD CAUSE OF ACTION
(_____ [*Specify theory, e.g.,* Breach of Contract])

By _____ [Plaintiff *or* Cross Complainant] _____
[*name*]

Against _____ [Defendant(s) *or* Cross Defendant(s)] _____ [*name(s)*] [and DOES _____ (*specify, e.g.,* X--XV, inclusive)]

_____ [Plaintiff *or* Cross Complainant] _____ [*name*] alleges:

[*Paragraphs in succeeding causes of actions or counts should be numbered consecutively from the last paragraph of the immediately preceding cause of action or count.*]

20. _____ [Plaintiff *or* Cross Complainant] _____ [*name*] is hereinafter in this cause of action referred to as _____ [Plaintiff *or* Cross Complainant].

[21. _____ (*If desired, specify any paragraphs from preceding causes of action or counts to be incorporated by reference, e.g.,* Plaintiff refers to and herein incorporates Paragraphs 1 through 6 of the First Cause of Action and Paragraphs 12-13 of the Second Cause of Action).]

[22. _____ (*If not incorporated by reference from preceding cause of action, allege identity, capacity, etc., of known named defendants or cross defendants, fictitiously named defendants or cross defendants. See Paragraphs 2-6).*]

23. _____ [*Here and in subsequent numbered paragraphs, state facts constituting the cause of action in ordinary and concise language.*]

WHEREFORE, _____ [plaintiffs *or* cross complainants] pray judgment as follows:

[*Set forth prayer for relief by each plaintiff/cross complainant based on each cause of action or count, for example:*]

1. For _____ [plaintiff *or* cross complainant] _____ [*name*] and against all _____ [defendants *or* cross defendants] on the First and Second Causes of Action for:

a. General damages in the sum of $_____; and

b. _____ [*Specify special damages, if any, e.g., damages for loss of earnings*] _____ [according to proof *or* in the sum of $_____].

2. For _____ [plaintiff *or* cross defendant] _____ [*name*] and against all

_____ [defendants *or* cross defendants] on the Second Cause of Action for:

a. Compensatory damages in the sum of $_____; and

b. Interest on the sum of $_____ at the legal rate, from and after _____ [*date*].

3. For all _____ [plaintiffs *or* cross complainants] on all causes of action for:

a. Costs of suit incurred herein; and

b. Such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

VERIFICATION

The undersigned, each for himself/herself, declares:

I am one of the _____ [plaintiffs *or* cross complainants] in the above-entitled action. I have read the foregoing complaint and know the contents thereof. With respect to the causes of action alleged by me, the same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form of complaint in [1], *above*, may be used when multiple causes of action are alleged by more than one plaintiff against more than one defendant or by more than one cross complainant against more than one cross defendant. In the following discussion, usage of "plaintiff" also refers to "cross complainant" and usage of "defendant" also refers to "cross defendant," unless otherwise noted.

For a sample complaint involving multiple parties and multiple causes of action, see *Ch. 83, Automobiles: Bringing the Action, § 83.66*. For a form of complaint setting forth more than one cause of action based on alternative legal theories or counts, see *§ 123.62*.

A complaint for or against a class party must include in the caption the designation "CLASS ACTION." This designation must be in capital letters on the first page of the complaint, immediately below the case number but above the description of the nature of the complaint. The complaint in a class action must contain a separate heading entitled "CLASS ACTION ALLEGATIONS," under which the plaintiff describes how the requirements for class certification are met [*Cal. Rules of Ct., Rule 3.761*].

[3] Multiple Parties

[a] Joinder

In preparing the complaint or cross complaint, counsel should determine whether there are any persons that must be joined under compulsory joinder rules [*see Code Civ. Proc. § 389(a),(b)*]. A complaint or cross complaint must state the names, if known to the pleader, of any such persons who are not joined and the reasons why they are not joined [*see Code Civ. Proc. § 389(c)*]. Counsel should also verify whether persons contemplated as plaintiffs or defendants satisfy permissive joinder rules [*see Code Civ. Proc. §§ 378* (plaintiffs), 379 (defendants)]. For a summary of factors useful in determining who should be included as parties to an action as well as procedures relating to joinder of parties, see the Procedural Guide in Ch. 395, *Parties*.

If the pleading is a cross complaint and if a party against whom a complaint has been filed and served fails to allege in the cross complaint any related cause of action that (at the time of serving his or her answer to the complaint) he or she has against the plaintiff, with certain exceptions, the party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded [*Code Civ. Proc. § 426.30(a)*; *see Code Civ. Proc. §§ 426.30(b)* (exemptions), 426.40 (exceptions), 426.50 (application for leave to assert unpleaded cause)]. The permissive cross complaint rules under *Code Civ. Proc. §§ 428.10-428.30* should also be reviewed to determine what persons may properly be the subject of the cross complaint. For a discussion of these statutes, see *§§ 123.30* and *123.31, above* .

[b] Identification of Parties and Causes of Action

This form of complaint conforms to the requirement that each separate cause of action must be specifically identified with all of the following information [*Cal. Rules of Ct., Rule 2.112*]:

- Its number (*e.g.*, "First Cause of Action").
- Its nature (*e.g.*, "for Fraud").
- The party asserting it, if more than one party is represented in the pleading (*e.g.*, "by Plaintiff Jones").
- The party or parties to whom it is directed (*e.g.*, "against Defendant Smith").

[4] Allegations

The form provides three skeletal causes of action that set forth standard allegations that may be used in a multiple-party complaint or cross complaint.

Under the First Cause of Action, Paragraph 1 provides an initial allegationidentifying the specific person who is asserting the cause of action as "Plaintiff". The utility of this device is that it enables the pleader to set out in a definite manner who among the several plaintiffs was allegedly injured by the defendants under the cause of action. The pleader also conveniently avoids having to identify the particular party at each occurrence of the term "plaintiff" throughout the pleading. This allegation is also provided under Paragraphs 10 and 20 for the Second and Third Causes of Action.

The remaining allegations illustrate some of the basic allegations for identifying the various parties to the causes of action, including fictitiously named defendants and individuals acting as agents of a named defendant. For further discussion and general forms of allegations relating to the identification of plaintiffs, defendants, and fictitiously named defendants, see Ch. 20, *Allegations Commonly Used* .

[5] Allegations on Information and Belief

Optional Paragraph 5 of the form is included if the complaint includes any allegations on information and belief. In this case, the complaint should expressly state that those allegations are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. The purpose of the allegation is to ensure compliance with *Code Civ. Proc. § 128.7(b)(3)* [for discussion, *see § 123.23[2], above*].

[6] Prayer

A complaint or cross complaint is required to contain a demand for judgment for the relief to which the pleader claims he or she is entitled [*Code Civ. Proc. § 425.10(a)(2)*]. Hence, the foregoing form sets forth an example of a prayer under which each plaintiff separately states what relief he or she is seeking from the defendants specified in the particular cause of action. For a discussion of the use and effect of prayers in civil pleadings generally, as well as examples of prayers involving multiple plaintiffs or defendants, see Ch. 420, *Prayers* .

[7] Signature

The attorney of record must sign the complaint in his or her individual name, or if the party is not represented, the party must sign [*Code Civ. Proc. § 128.7(a)* (actions filed on or after January 1 1995; pleadings filed in actions commenced before 1995 may be signed by either the attorney or the party under *Code Civ. Proc. § 446*); for discussion, *see § 123.23, above*].

[8] Verification

This form provides an example of a verification by multiple plaintiffs. Generally, a complaint need not be verified to commence a civil action [*Quick v. Corsaro (1960) 180 Cal. App. 2d 831, 836, 4 Cal. Rptr. 674]* ; for a list of actions and proceedings in which a verification is specifically required, *see* the Research Guide in Ch. 572, *Verification*.

Verification of the complaint requires the defendant to file a verified answer in an unlimited civil case [*see Code Civ. Proc. §§ 91(a), 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[9] Cross References

For forms of captions and introductions for use in actions involving multiple parties, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to class actions, see Ch. 120, *Class Actions*

For discussion and forms relating to the severance of causes of action and issues for trial, see Ch. 125, *Consolidation, Severance, and Coordination of Actions*

For discussion of compulsory and permissive joinder of parties, see Ch. 395, *Parties*

For forms of prayers involving multiple plaintiffs or defendants, see Ch. 420, *Prayers*

For additional commentary and cross references relating to complaints in general, see *§§ 123.61, 123.62*

Witkin California Procedure, vol. 4, *Pleading*, §§ 155-192 (4th ed. 1997)

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Chapter 123 COMPLAINTS AND CROSS COMPLAINTS
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12-123 California Forms of Pleading and Practice--Annotated § 123.64

§ 123.64 Notice of Motion for Leave to File Permissive Cross Complaint After Time for Filing Without Leave of Court Has Expired [Code Civ. Proc. § 428.50(c)]

[1] FORM Notice of Motion for Leave to File Permissive Cross Complaint After Time for Filing Without Leave of Court Has Expired [Code Civ. Proc. § 428.50(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR
Plaintiff,	)	LEAVE TO FILE CROSS COMPLAINT
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*name*], _____ [*identify party or person, e.g.*, plaintiff (, and to _____ (*name*), his/her attorney)]:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in Department _____ of the above-entitled court, located at _____ [*address*], _____ [*name*] will, and hereby does, move for an order granting leave of court to file a cross complaint herein, a copy of which is attached hereto. The motion will be made on the grounds that the proposed cross complaint is permitted pursuant to Subsection _____ [(a) *or* (b)] of *Section 428.10 of the Code of Civil Procedure*, that the proposed cross complaint was not filed _____

[with _____ (*identify moving party, e.g.,* defendant's) answer to the complaint herein *or* before the court set the date for trial of this action] because of _____ [*specify reasons*], and that the interest of justice requires that leave be granted in that _____ [*specify, e.g.,* circuity of action may be avoided and a complete determination of controversies may be had in one action].

The motion will be based on this notice of motion, the memorandum of points and authorities and declaration of _____ [*name*] attached hereto, the records and file herein, and such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form in [1], *above,* is for use to apply for a court order granting leave to file an otherwise proper cross complaint not filed within the applicable time period prescribed in *Code Civ. Proc. § 428.50(a)* or *(b)* [*Code Civ. Proc. §§ 428.10, 428.50(c)*; *see Loney v. Superior Court (1984) 160 Cal. App. 3d 719, 721-724, 206 Cal. Rptr. 769* (under section 428.50(b), (c) party must obtain leave of court to file cross complaint after trial date has been set by court and vacated by stipulation of parties)]. Leave to file a cross complaint may, in the interest of justice, be granted by the court at any time during the course of the action [*Code Civ. Proc. § 428.50(c)*].

The motion in the form is for leave to file a permissive cross complaint [*see Code Civ. Proc. § 428.10*]. This motion should be distinguished from a motion for leave to file a compulsory cross complaint under *Code Civ. Proc. § 426.50* to set up a related cause of action, as defined in *Code Civ. Proc. § 426.10(c)* [*see § 123.67*]. If leave to file a permissive cross complaint is denied, the moving party can still assert the cause of action set forth in another civil action, subject to any statute of limitations defense, but if leave to file a compulsory cross complaint is denied, the cross action is forfeited and the moving party may not assert it in a subsequent civil action [*see Code Civ. Proc. §§ 426.10-426.70*; for further discussion, *see § 123.31, above*].

[3] Proposed Cross Complaint

Although there is no express statutory requirement that a copy of the proposed cross complaint be attached to the notice of motion, the better practice, which may be expressly required by local court rule, is to attach it [*cf. Code Civ. Proc. § 1010* (if any paper on which a motion is to be based has not previously been served on the party to be notified and was not filed by that party, a copy of such paper must accompany the notice of motion)].

[4] Grounds

The motion is made on the grounds that (1) the proposed cross complaint is proper under *Code Civ. Proc. § 428.10*, the permissive cross complaint statute [*see also Code Civ. Proc. § 428.30* (permissive joinder of actions in cross complaint)], and (2) granting leave to file it would be in the interest of justice [*Code Civ. Proc. § 428.50(c)*].

For a form of declaration supporting the motion, see *§ 123.65*.

[5] Court's Discretion

After the answer has been filed, filing a cross complaint is a matter for the discretion of the trial court [*see People v. City of Los Angeles (1960)179 Cal. App. 2d 558, 567, 4 Cal. Rptr. 531 , appeal dismissed, 364 U.S. 476 , reh. denied*

365 U.S. 805 ; *see also Dunzweiler v. Superior Court (1968) 267 Cal. App. 2d 569, 575-576, 73 Cal. Rptr. 331* (ruling on application to file cross complaint after answer is reversible on appeal only on showing abuse of discretion)].

[6] Form of Motion

There is no express statutory requirement that a motion for an order granting leave to file the cross complaint be noticed, but the better practice is to apply for the order by noticed motion [*cf. Code Civ. Proc. § 428.50(c)*, relating to permissive cross complaints and requiring only that the party obtain leave of court, and *Code Civ. Proc. § 426.50*, relating to compulsory cross complaints and providing that leave may be granted only after notice to the adverse party]. A noticed motion may be expressly required by local court rule. Also, the general rule is that notice of motion must be given whenever the order sought may affect the rights of an adverse party [*see McDonald v. Severy (1936) 6 Cal. 2d 629, 631, 59 P.2d 98* (motion to vacate a dismissal)].

A memorandum must be filed and a copy served with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[7] Cross References

For additional forms for use in law and motion proceedings, see Ch. 372, *Motions and Orders*

For memoranda relative to leave to file cross complaints, see California Points and Authorities, Ch. 61, *Cross Complaints* (Matthew Bender)

Witkin, California Procedure, vol. 5, *Pleading*, § 1087 (4th ed. 1997)

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12-123 California Forms of Pleading and Practice--Annotated § 123.65

§ 123.65 Declaration in Support of Motion for Leave to File Permitted Cross Complaint [Code Civ. Proc. § 428.50]

[1] FORM Declaration in Support of Motion for Leave to File Permitted Cross Complaint [Code Civ. Proc. § 428.50]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	DECLARATION OF _____ [*name*]
Plaintiff,	)	IN SUPPORT OF MOTION FOR LEAVE TO FILE
vs.	)	PERMITTED CROSS COMPLAINT
_____ [*name*],	)	[Telephone Appearance]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

On or about _____ [*date*], defendant _____ [*name*] filed an answer to the complaint

herein. Defendant has a cause of action against _____ [*name*] which is set forth in the copy of the cross complaint attached to the notice of motion as Exhibit A.

[_____ (*If the intended cross complaint is against a person who is not a party to the action, state evidentiary facts showing that the cause of action to be asserted in the cross complaint either arose out of the transaction on which plaintiff's action is brought or that it asserts an interest in the property or controversy to which such action relates*).]

The cross complaint was not filed due to _____ [*state evidentiary facts as to why the cross complaint was not filed within the time prescribed by Code Civ. Proc. § 428.50(a) or (b)*].

It is in the interest of justice that leave be granted to file the cross complaint in that _____ [*state evidentiary facts, e.g.*, if leave is not granted, defendant will file a separate action against plaintiff which will require a separate trial whereas if leave is granted, all controversies between the parties can be resolved in the within action].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
By: _____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, outlines a declaration that may be submitted in support of a notice of motion for leave to file a cross complaint [for a form of notice of motion, *see § 123.64*].

To support the request to cross complain against a new party, the declaration must show by a statement of evidentiary facts that the cause of action against the new party arises out of the transaction which cross complainant is being sued on, or asserts an interest in the property or controversy which is the subject of the action [*see Code Civ. Proc. § 428.10*].

The declaration must then state evidentiary facts showing that granting the motion would serve the interests of justice [*see Code Civ. Proc. § 428.50(c)*].

[3] Compulsory Cross Complaint

This declaration may be amended for use in seeking leave to file a compulsory cross complaint [for a form of notice of motion, *see § 123.67*]. A declaration supporting such a motion should state facts showing the cause of action in the proposed cross complaint is a related cause of action [see *Code Civ. Proc. § 426.10* (same transaction or interest in same property)], the reason it was not filed before [*Code Civ. Proc. § 426.50* (oversight, inadvertance, mistake, neglect, or other cause)], and that the party acted in good faith [*Code Civ. Proc. § 426.50*].

[4] Cross References

For alternative forms of declarations and affidavits, see Ch. 15, *Affidavits, Certificates, and Declarations*

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12-123 California Forms of Pleading and Practice--Annotated § 123.66

§ 123.66 Order on Motion for Leave to File Cross Complaint [Code Civ. Proc. §§ 426.50, 428.50]

[1] FORM Order on Motion for Leave to File Cross Complaint [Code Civ. Proc. §§ 426.50, 428.50]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

The motion of _____ [*name*] for an order by this court permitting _____ [*name*] to file a cross complaint in this action, naming therein _____ [*name*] as cross defendant, came on regularly for hearing by the court on _____ [*date*]. _____ [*Name*] appeared by attorney _____ [*name*], and _____ [*name*] appeared by attornney _____ [*name*].

On proof made to the satisfaction of the court that the motion should be _____ [granted *or* denied],

IT IS ORDERED that _____ [the motion is granted and permission is hereby granted to _____ (*name of cross complainant*) to file a cross complaint in this action, naming therein _____ (*name*) as cross defendant *or* the motion is denied].

Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is an order ruling on a motion for leave to file a cross complaint [for a form of notice of motion, *see § 123.64*].

[3] Cross References

For alternative forms of orders, see Ch. 372, *Motions and Orders*

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12-123 California Forms of Pleading and Practice--Annotated § 123.67

§ 123.67 Notice of Motion for Leave to File Compulsory Cross Complaint After Answer Is Filed [Code Civ. Proc. § 426.50]

[1] FORM Notice of Motion for Leave to File Compulsory Cross Complaint After Answer Is Filed [Code Civ. Proc. § 426.50]

[*Caption. See § 123.64[1].*]

To _____ [*name*], plaintiff, and to _____ [*name*], plaintiff's attorney:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in Department _____ of the above-entitled court, located at _____ [*address*], _____ [*name*] will move for an order granting leave to file a cross complaint herein, a copy of which is attached as Exhibit A and incorporated by reference. The motion will be made on the grounds that the cause of action asserted in the proposed cross complaint is a related cause of action as that term is defined in Subsection (c) of *Section 426.10 of the Code of Civil Procedure*, that the cross complaint was not filed before serving _____'s [*name of moving party*] answer due to _____ [oversight *or* inadvertance *or* mistake *or* neglect *or specify other cause*] in that _____ [*specify*], and that _____ [*name of moving party*] has acted in good faith in that _____ [*specify*].

The motion will be based on this notice of motion, the supporting memorandum and declaration of _____ [*name*] attached hereto, the papers and records on file herein, and such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form in [1], *above*, is for use to apply for leave of court to file a compulsory cross complaint after having served an answer [*see Code Civ. Proc. § 426.50*].

A related cause of action means a cause of action which arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his or her complaint [*Code Civ. Proc. § 426.10*].

If a party against whom a complaint has been filed and served fails to allege in a cross complaint any related cause of action which, at the time of serving his or her answer to the complaint, he or she has against the plaintiff, such party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded [*Code Civ. Proc. § 426.30(a)*]. The filing of a cross complaint asserting a related cause of action is therefore said to be compulsory as distinguished from a permitted cross complaint [*see Code Civ. Proc. §§ 428.10-428.30*; *see also § 123.64[2]* et seq.].

Leave of court to file a compulsory cross complaint may be granted after notice to the adverse party [*Code Civ. Proc. § 426.50*] and therefore a noticed motion is required [*see Code Civ. Proc. § 1010*].

Code Civ. Proc. § 426.50, by its own terms, is to be liberally construed to avoid forfeiture of causes of action. For a discussion of whether the granting of the motion is mandatory, see *§ 123.31[4], above*.

[3] Proposed Cross Complaint

This form provides for a copy of the proposed cross complaint to be attached. If a copy is not attached, the identity of the parties and the essence of the cause of action should be set forth in the declaration in support of the motion. There is no specific requirement in this regard but the court should be aware of what particular cross complaint will be filed in order to make its decision on the motion.

[4] Grounds

The grounds set forth in the form are taken from *Code Civ. Proc. § 426.50* which provides that a party who fails to plead a compulsory cross complaint whether through oversight, inadvertence mistake, or other cause may apply for leave of court if the party acted in good faith.

[5] Declaration in Support and Order

For forms of supporting declaration and order that may be modified for use with this form, see *§§ 123.65* and *123.66*.

[6] Memorandum

A Supporting memorandum must be filed and a copy served with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[7] Cross References

For additional forms for use in law and motion proceedings, see Ch. 372, *Motions and Orders*

For memoranda relating to leave for filing cross complaints, see California Points and Authorities, Ch. 61, *Cross Complaints*

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12-123 California Forms of Pleading and Practice--Annotated § 123.68

§ 123.68 Stipulation and Order to File Cross Complaint

[1] FORM Stipulation and Order to File Cross Complaint

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	STIPULATION AND ORDER
Defendant.	)	
	)	
	)	

_____

IT IS HEREBY STIPULATED by and between plaintiff and defendant in the above-entitled action, through their respective counsel, that defendant be permitted to file the attached cross complaint herein [and to bring in an additional party as cross defendant].
Date: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

ORDER

It is so ordered.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of stipulation and order in [1], *above,* is for use by the parties in lieu of a noticed motion to obtain leave of court to file a cross complaint.

[3] Cross References

For discussion of motions to leave to file permissive or mandatory cross complaint, see *§§ 123.64[2]* and *123.67[2]* et seq.

For discussion and general forms of stipulation, see Ch. 522, *Stipulations*

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1-123 California Forms of Pleading and Practice--Annotated § 123.69

§ 123.69 Confidential Reference List of Identifiers--Judicial Council Form MC-120 [Cal. Rules of Ct., Rule 1.20(b)]

[1] Form Confidential Reference List of Identifiers--Judicial Council Form MC-120 [Cal. Rules of Ct., Rule 1.20(b)]

Click here to view image.

[2] Use of Form

Judicial Council Form MC-120, Confidential Reference List of Identifiers illustrated in [1], *above*, must be filed with the complaint if the court, on a showing of good cause, orders a party filing a document containing social security numbers or financial accounts numbers to file a reference list. The party may file this reference list, along with the redacted document that will be placed in the public file. The reference list is confidential. The confidential list must identify each item of redacted information and specify an appropriate reference that uniquely corresponds to each item of redacted information listed. All references in the case to the redacted identifiers included in the confidential reference list will be understood to refer to the corresponding complete identifier. A party may amend its reference list as of right [*Cal. Rules of Ct., Rule 1.20(b)(4)*].

This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format is also available at *www.lexisone.com* at no charge.

[3] Cross References

For discussion of redacting privacy information in a complaint and filing a confidential reference list of indentifiers, see *§ 123.19[5]*

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Chapter 124 CONDOMINIUMS AND OTHER COMMON INTEREST DEVELOPMENTS

12-124 California Forms of Pleading and Practice--Annotated 124.syn

§ 124.syn Synopsis to Chapter 124: CONDOMINIUMS AND OTHER COMMON INTEREST DEVELOPMENTS

§ 124.01 Scope of Chapter

§ 124.02 Cross References

§§ 124.03-124.09 [Reserved]

§ 124.10 Governing Statutes

§ 124.11 Definitions

[1] Common Interest Development

[2] Types of Common Interest Developments

[a] Community Apartment Project

[b] Condominium Project

[c] Planned Development

[d] Stock Cooperative

[3] Other Definitions

§ 124.12 Different Types of Common Interest Developments Distinguished

§ 124.13 Creation of Common Interest Development

§ 124.14 Disclosures to Purchasers

[1] Controlling Statutes

[2] Subdivided Lands Act Requirements

[a] In General

[b] Final Report From Commissioner

[c] Additional Documents

[3] Civ. Code § 1368 Requirements

[4] Blanket Encumbrance

[5] Disclosure of Defects

§ 124.15 Extent of Interest Conveyed

§ 124.16 Declaration

[1] Contents in General

[2] Covenants and Restrictions

[3] Amendment of Declaration

[a] When Effective

[b] Construction and Marketing Provisions

[c] By Court Order

[4] Extending Term of Declaration

§ 124.17 Pre-Litigation Resolution of Disputes Related to Governing Documents, Davis-Stirling Act, and Nonprofit Mutual Benefit Corporation Law

[1] Intra-Association Dispute Resolution Procedure

[a] Rationale

[b] Disputes to Which Intra-Association Procedure Applies

[c] Requirements for Valid Intra-Association Procedure

[d] Additional Remedy for Separate Interest Owner Disputing Charge or Sum Levied by Association

[2] Formal Alternative Dispute Resolution (ADR) Procedure

[a] ADR as Prerequisite to Filing Enforcement Action

[b] Actions to Which Prerequisite Applies

[c] Initiating ADR

[d] Statute of Limitations Tolled Pending ADR

[e] ADR Process

[f] Certifying Efforts to Resolve Dispute When Enforcement Action Filed

[g] Referral to ADR If Enforcement Action Filed First

§ 124.18 Condominium Plan

§ 124.19 Compliance With Subdivision Map Act

§ 124.20 Construction of Deed, Declaration, or Plan

§ 124.21 Construction of Local Zoning Ordinances

§ 124.22 Common Areas

[1] Type of Tenancy

[2] Rights or Easements in Common Areas

[3] Restrictions on Partition Actions in Condominium Projects

§ 124.23 Management of Common Interest Development

[1] General Powers and Duties of Association

[2] Duties of Board of Directors

[3] Elections and Meetings

[a] Election Procedures

[b] Conduct of Meetings

[c] Relief for Violation of Election Procedures and Open Meeting Requirements

[4] Operating Rules

[5] Standing to Sue and Be Sued

[a] Right of Association

[b] Parties to Suits

[6] Comparative Fault

[7] Penalties

[8] Maintenance of Common Interest Development

[9] Financial Statements

[10] Availability of Books, Records, and Minutes

[11] Liability of Association

[12] Liability of Directors

[a] Fiduciary Duty

[b] Torts

[13] Liability of Volunteer Directors

[a] Immunity

[b] "Volunteer" Officer or Director

[14] Liability of Separate Interest Owners

[15] Regular and Special Assessments

[a] In General

[b] Collecting or Securing Debts for Delinquent Assessments Arising on or After January 1, 2006

[c] Assessment Liens Recorded on or After January 1, 2003

[d] Assessment Liens Recorded on or After January 1, 1986, and Before January 1, 2003

[e] Priority of Assessment Lien

[f] Enforcement of Assessment Lien

[g] Exemption from Execution by Judgment Creditors

[16] Reserve Accounts

[17] Sale or Dissolution of Common Interest Development

§ 124.24 Tort Liability of Owners of Separate Interests

§ 124.25 Tort Liability of Developer

§ 124.26 Prerequisites to Suit Based on Design or Construction Defects

[1] Notice and General Membership Meeting

[2] Mandatory Pre-Litigation Dispute Resolution Process for Developments of 20 or More Units

[a] Association's Notice of Commencement of Legal Proceedings

[b] Right of Association and Respondent to Inspect and Copy Other Party's Files

[c] Respondent's Notice to Other Potentially Responsible Parties

[d] Right of Potentially Responsible Party to Be Released from Dispute Resolution Process

[e] Statement of Insurance Provided by Subcontractor, Design Professional, or Insurer

[f] Peripheral Parties

[g] Selecting Dispute Resolution Facilitator

[h] Apportioning Costs of Dispute Resolution Facilitator

[i] Case Management Meeting

[j] Case Management Statement

[k] Respondent's Settlement Offer

[l] Meeting of Association Membership on Board's Rejection of Settlement Offer

[m] Petitioning for Court Intervention to Further Pre-Litigation Dispute Resolution Process

[n] Remedy for Failure to Complete Pre-Litigation Dispute Resolution Process

[3] Procedure Governing Litigation If Dispute Resolution Process Fails

[a] Right to Trial Priority

[b] Right to Engage in Additional Inspections or Testing

[c] Order of Discovery

[d] Seeking Relief for Failure to Complete Pre-Litigation Resolution Dispute Process

§ 124.27 Actions for Defective Construction in New Residential Condominiums Sold on or After January 1, 2003

§ 124.28 Improvements and Modifications to Separate Interest Property

§ 124.29 Liens for Labor or Material

§ 124.30 Property Taxation

[1] Bond

[2] Property Taxes

§§ 124.31-124.49 [Reserved]

§ 124.50 California Legal Forms

§ 124.51 California Real Estate Law and Practice

§ 124.52 California Environmental Law and Land Use Practice

§ 124.53 State Statutes

[1] Assessments

[2] Associations

[a] In General

[b] Business Matters

[3] Common Areas

[4] Common Interest Developments in General

[5] Community Apartment Projects

[6] Condominiums

[7] Governing Documents

[8] Homestead

[9] Lien for Labor or Materials

[10] Limited-Equity Housing Cooperatives

[11] Managing Agent

[12] Partition of Condominium

[13] Planned Developments

[14] Private Roads

[15] Removal of Vehicles From Property

[16] Securities Regulations

[17] Senior Citizen Housing Development

[18] Stock Cooperatives

[19] Subdivided Lands Act

[a] Application of Act

[b] Blanket Encumbrance

[c] Disclosures

[d] Amendment or Modification of Governing Documents

[20] Subdivision Map Act

[a] Application of Act

[b] Approval of Map

[21] Taxation

[22] Transfer of Separate Interest

[a] In General

[b] Disclosure Required Before Transfer

[23] Utility and Safety

[24] Zoning Ordinances

§ 124.54 State Regulations

[1] In General

[2] Association

[a] Powers and Duties of Governing Body

[b] Members

[c] Assessments

[3] Blanket Encumbrance

[4] Governing Instruments

[a] General Provisions

[b] Amendment of Governing Instrument

[5] Public Report

[6] Restrictions

§ 124.55 Decisions

[1] Arbitration

[2] Bylaws

[3] Conversions

[4] Covenants, Conditions, and Restrictions

[5] Disputes Involving Governing Documents

[6] Elements of Common Interest Development

[7] Liability of Association

[8] Liability of Developer

[9] Liability of Director

[10] Liability of Individual Owner

[11] Voting

§ 124.56 Attorney General Opinions

§ 124.57 Law Reviews

§ 124.58 Text References

§§ 124.59-124.69 [Reserved]

§ 124.70 Complaint for Damages for Willful Failure of Owner to Provide Documents to Purchaser of Separate Interest of Common Interest Development [Civ. Code § 1368(d)] Not Subject to Subdivided Lands Act

[1] FORM

[2] Use of Form

[3] Allegations

[4] Attorney's Fees

[5] Verification

[6] Jurisdiction and Venue

[7] Cross References

[8] State Statutes

§ 124.71 Allegation--Willful Failure of Subdivider to Notify Purchaser or Tenant of Blanket Encumbrance [Civ. Code § 1133]

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Cross References

§ 124.72 Allegation--Capacity of Plaintiff as Owner's Association of Common Interest Development [Civ. Code § 1368.3]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 124.73 Complaint for Dues and Assessments [Civ. Code § 1366(e)]--By Homeowner's Association Against Owner of Separate Interest [Civ. Code § 1368.3]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Prayer

[5] State Statutes

[6] Cross References

§ 124.74 Petition for Order Reducing Percentage of Affirmative Votes Necessary for Amending Declaration of Common Interest Development [Civ. Code § 1356]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction and Venue

[5] State Statutes

[6] Cross References

§ 124.75 Notice of Hearing on Petition for Order Reducing Percentage of Affirmative Votes Necessary for Amending Declaration of Common Interest Development [Civ. Code § 1356(b), (c)(1)]

[1] FORM

[2] Use of Form

[3] Notice Requirement

[4] Cross References

§ 124.76 Order Reducing Percentage of Affirmative Votes Necessary for Amending Declaration of Common Interest Development [Civ. Code § 1356]

[1] FORM

[2] Use of Form

[3] Cross References

§ 124.77 Objection to Petition for Order Reducing Percentage of Affirmative Votes Necessary for Amending Declaration of Common Interest Development [Civ. Code § 1356(e)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 124.78 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)] by Separate Interest Owner Against Owner's Association and Directors [Civ. Code § 1351; Code Civ. Proc. § 388]--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Specification of Damages

[5] Joining Separate Interest Owners as Defendants

[6] Cross References

[7] California Torts

[8] State Statutes

§ 124.79 Complaint for Preliminary [Code Civ. Proc. §§ 526, 527(a)] and Permanent [Civ. Code § 3422] Injunction and Temporary Restraining Order [Code Civ. Proc. § 527(c), (d)]--By Owner of Separate Interest [Civ. Code § 1351]--To Restrain Association of Common Interest Development From Selling Separate Interest to Enforce Lien for Unpaid Assessments [Civ. Code §§ 1367, 1367.1]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Certification re Notice

[5] Restrictions on Imposition of Regular and Special Assessments

[6] Cross References

[7] California Points and Authorities

[8] State Statutes

§ 124.80 Order to Show Cause and Preliminary Injunction [Code Civ. Proc. § 527(a)]--Enjoining Association of Common Interest Development From Selling Separate Interest to Enforce Lien for Unpaid Assessments [Civ. Code §§ 1367, 1367.1]

[1] FORM

[2] Use of Form

[3] Cross References

§ 124.81 Complaint for Partition and Sale of Entire Condominium Project [Civ. Code § 1359(b)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction and Venue

[5] Lis Pendens

[6] State Statutes

[7] Cross References

§ 124.82 Request for Resolution of Dispute Over Enforcement of Governing Documents, Davis-Stirling Act, or Nonprofit Mutual Benefit Corporation Law [Civ. Code § 1369.530]

[1] FORM

[2] Use of Form

[3] Contents of Request

[4] Service

[5] Response

§ 124.83 Complaint for Preliminary [Code Civ. Proc. §§ 526, 527(a)] and Permanent [Civ. Code § 3422] Injunction, Temporary Restraining Order [Code Civ. Proc. § 527], and Damages [Civ. Code § 3333]--By Owner of Separate Interest [Civ. Code § 1351]--To Compel Owner's Association to Approve or Disapprove Proposed Improvements in Conformity With Declaration of Restrictions

[1] FORM

[2] Use of Form

[3] Allegations

[4] Certificate Related to Alternative Dispute Resolution Efforts

[5] Attorney's Fees

[6] State Statutes

[7] Decisions

[8] Cross References

§ 124.84 Certificate Regarding Alternative Dispute Resolution [Civ. Code § 1369.560(a)]

[1] FORM

[2] Use of Form

[3] Failure to File

[4] Cross References

§ 124.85 General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Failure to File Certificate Regarding Alternative Dispute Resolution [Civ. Code § 1369.560(b)]

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

§ 124.86 Verified Application in Action for Damages for Design or Construction Defects by Owners' Association Against Builder of Common Interest Development--Assertion by Builder of Procedural Deficiency [Civ. Code § 1375.05(g)]

[1] FORM

[2] Use of Form

§ 124.87 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Is Volunteer Officer or Director [Civ. Code § 1365.7]

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

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PART I. SCOPE

12-124 California Forms of Pleading and Practice--Annotated § 124.01

§ 124.01 Scope of Chapter

This chapter discusses the creation, governing instruments, and liabilities of common interest developments under various statutes and regulations. The chapter includes the following forms:

- Forms for failure to provide a purchaser of a separate interest with required documents [§§ 124.70-124.72].
- A complaint for an action against a separate interest owner for dues and assessments [§ 124.73].
- Forms for obtaining or opposing an order to reduce the percentage of votes necessary to amend a development's declaration [§§ 124.74-124.77].
- A complaint for an action based on the negligence of an association [§ 124.78].
- Forms for injunctive relief to restrain a managing association from selling an interest to enforce a lien for unpaid assessments [§§ 124.79, 124.80].
- A complaint for partition and sale of a condominium project [§ 124.81].
- A complaint for injunctive relief to compel an association's good faith approval or disapproval of proposed improvements [§ 124.83].
- Forms regarding alternative dispute resolution [§§ 124.82, 124.84, 124.85].
- A form relating to an action for damages against a builder for design or construction defects [§ 124.86].
- A form of affirmative defense based on the immunity from liability accorded a volunteer officer or volunter director [§ 124.87].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsManagementReal Property LawCommon Interest CommunitiesCondominiumsPurchase & Sale

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Chapter 124 CONDOMINIUMS AND OTHER COMMON INTEREST DEVELOPMENTS
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12-124 California Forms of Pleading and Practice--Annotated § 124.02

§ 124.02 Cross References

For a discussion and forms for use in actions involving unincorporated associations, see Ch. 61, *Associations and Clubs* .

For a discussion and forms for use in making a declaration of homestead, see Ch. 294, *Homesteads* .

For a discussion and forms for use in partition actions, see Ch. 397, *Partition* .

For a discussion and forms for use in zoning issues or actions, see Ch. 579, *Zoning and Planning* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsReal Property LawEstatesConcurrent OwnershipPartition ActionsReal Property LawHomestead ExemptionsReal Property LawZoning & Land UseGeneral Overview

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PART I. SCOPE

12-124 California Forms of Pleading and Practice--Annotated §§ 124.03-124.09

[Reserved]

§§ 124.03[Reserved]

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Chapter 124 CONDOMINIUMS AND OTHER COMMON INTEREST DEVELOPMENTS
PART II. LEGAL BACKGROUND

12-124 California Forms of Pleading and Practice--Annotated § 124.10

§ 124.10 Governing Statutes

Statutes governing common interest developments are contained in *Bus. & Prof. Code § 11000 et seq.* (the Subdivided Lands Act), *Civ. Code § 1350 et seq.* (the Davis-Stirling Common Interest Development Act), and *Gov. Code § 66410 et seq.* (the Subdivision Map Act). In addition, pursuant to its authority under the Subdivided Lands Act, the California Department of Real Estate has promulgated detailed regulations [*10 Cal. Code Reg. § 2790 et seq.*] governing most aspects of the creation and control of subdivisions, including those common interest developments that are subject to the Subdivided Lands Act [*see Bus. & Prof. Code § 11004.5*]. Finally, the Condominium and Cooperative Abuse Relief Act [*15 U.S.C. § 3601 et seq.*] contains federal regulations of condominium and cooperative housing conversions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsGeneral Overview

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Chapter 124 CONDOMINIUMS AND OTHER COMMON INTEREST DEVELOPMENTS
PART II. LEGAL BACKGROUND

12-124 California Forms of Pleading and Practice--Annotated § 124.11

§ 124.11 Definitions

[1] Common Interest Development

Common interest developments are regulated by the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*].

"Common interest development" means any of the following [*Civ. Code § 1351(c)*]:

- A community apartment project [*see § 124.11[2][a]*];
- A condominium project [*see § 124.11[2][b]*];
- A planned development [*see § 124.11[2][c]*]; or
- A stock cooperative [*see § 124.11[2][d]*].

Either common ownership of the additional contiguous or noncontiguous lots, parcels, or areas, or the enjoyment of the mutual, common, or reciprocal interests in or restrictions on the separately owned lots, parcels, areas, or spaces, or both, may be through ownership of shares of stock, membership in an association, or otherwise [*Civ. Code § 1351(c)(2)*]. If through stock, each share is deemed to be an interest in a common interest development and real estate development for purposes of *Corp. Code § 25100(f)* [*Civ. Code § 1351(c)(2)*].

The estate in a separately or commonly owned lot, parcel, area, or space may be an estate of inheritance or perpetual estate, an estate for life, an estate for years, or any combination of these types of estate [*Civ. Code § 1351(c)(2)*; *see also Civ. Code §§ 783* (condominium as estate in real property), 783.1 (stock cooperative as interest in real property)].

[2] Types of Common Interest Developments

[a] Community Apartment Project

"Community apartment project" means a common interest development in which an undivided interest in land is coupled with the right of exclusive occupancy of any apartment located thereon [*Civ. Code § 1351(d)*; *see also Adler v. Elphick (1986) 184 Cal. App. 3d 642, 644, 647, 649, 229 Cal. Rptr. 254* (community apartment project cannot be created informally, but must specify right to exclusive occupancy on face of deed)].

[b] Condominium Project

"Condominium project" means a common interest development consisting of an undivided interest in common in a portion of real property coupled with a separate interest in space called a unit, the boundaries of which are described on a recorded final map, parcel map, or condominium plan in sufficient detail to locate all boundaries thereof. The area within these boundaries may be filled with air, earth, or water, or any combination thereof, and need not be physically attached to land except by easements for access and, if necessary, support. The description of the unit may refer to (1) boundaries described in the recorded final map, parcel map, or condominium plan; (2) physical boundaries, either in existence, or to be constructed, such as walls, floors, and ceilings of a structure or any portion thereof; (3) an entire structure containing one or more units; or (4) any combination thereof. The portion or portions of the real property held in undivided interest may be all of the real property, except for the separate interests, or may include a particular three-dimensional portion thereof, the boundaries of which are described on a recorded final map, parcel map, or condominium plan. The area within these boundaries may be filled with air, earth, or water, or any combination thereof [*see Bear Creek Master Assn. v. Edwards (2005) 130 Cal. App. 4th 1470, 1480, 31 Cal. Rptr. 3d 337* (presence of structure or building not required for condominium to exist)], and need not be physically attached to land except by easements for access and, if necessary, support. An individual condominium within a condominium project may include, in addition, a separate interest in other portions of the real property [*Civ. Code § 1351(f)*].

[c] Planned Development

"Planned development" means a common interest development other than a community apartment project, a condominium project, or a stock cooperative, that has either or both of the following features: (1) the owners of separately owned lots, parcels, or areas also own in common any contiguous or noncontiguous lots, parcels, or areas, and possess appurtenant rights to the beneficial use and enjoyment of the commonly owned property; and (2) the association that manages the development has the power to enforce an obligation of an owner of a separately owned lot, parcel, or area, with respect to the beneficial use and enjoyment, by means of an assessment [*see Civ. Code §§ 1367, 1367.1*], which may become a lien on the separately owned lot, parcel, or area [*Civ. Code § 1351(k)*].

[d] Stock Cooperative

"Stock cooperative" means a common interest development in which a corporation is formed or availed of primarily for the purpose of holding title to, either in fee simple or for a term of years, improved real property and in which all or substantially all of the shareholders of the corporation receive a right of exclusive occupancy in a portion of the real property, title to which is held by the corporation. The owners' interest in the corporation, whether evidenced by a share of stock, a certificate of membership, or otherwise, shall be deemed to be an interest in a common interest development and a real estate development for purposes of *Corp. Code § 25100(f)* [*Civ. Code § 1351(m)*].

A limited-equity housing cooperative that meets the criteria of *Civ. Code § 817* is a stock cooperative [*Civ. Code § 1351(m)*; *but see Bus. & Prof. Code § 11003.2* (for purposes of Subdivided Lands Act, limited equity housing cooperative is not included as stock cooperative)].

Both the separate interest [*see Civ. Code § 1351*(*l*)(4)] and the correlative interest in the stock cooperative are interests in real property [*Civ. Code § 783.1*].

[3] Other Definitions

"Association" means a nonprofit corporation or unincorporated association created for the purpose of managing a common interest development [*Civ. Code § 1351(a)*; *see Corp. Code § 25012* ("owners' association" defined for purposes of Corporations Code)].

"Declaration" means the document containing certain required information concerning the common interest development [*see Civ. Code §§ 1351(h), 1353*].

"Declarant" means the person or group of persons designated in the declaration as declarant, or if no declarant is designated, the person or group of persons who sign the original declaration or who succeed to special rights, preferences, or privileges designated in the declaration as belonging to the signator of the original declaration [*Civ. Code § 1351(g)*].

The term "governing documents" means the declaration and any other documents, such as bylaws, operating rules of the association, articles of incorporation, or articles of association that govern the operation of the common interest development or association [*Civ. Code § 1351(j)*; *see 10 Cal. Code Reg. § 2792.8* (governing instruments for ownership or management of common interest subdivisions enumerated in *Bus. & Prof. Code § 11004.5* that are subject to Subdivided Lands Act)].

"Condominium plan" means a plan of a condominium project meeting certain required informational and recordation requirements [*see Civ. Code § 1351(e)*].

"Common area" means the entire common interest development except the separate interests in the development [*Civ. Code § 1351(b)*].

"Exclusive use common area" means a portion of the common areas designated by the declaration for the exclusive use of one or more, but fewer than all, of the owners of the separate interests and which is or will be appurtenant to the separate interest or interests [*Civ. Code § 1351(i)*]. Unless the declaration otherwise provides, any shutters, awnings, window boxes, doorsteps, stoops, porches, balconies, patios, exterior doors, door frames, and hardware incident thereto, screens and windows or other fixtures designed to serve a single separate interest, but located outside the boundaries of the separate interest, are exclusive use common areas allocated exclusively to that separate interest [*Civ. Code § 1351(i)(1)*]. Notwithstanding the provisions of the declaration, internal and external telephone wiring designed to serve a single separate interest, but located outside the boundaries of the separate interest, are exclusive-use common areas allocated exclusively to that separate interest [*Civ. Code § 1351(i)(2)*; *see Civ. Code § 1364(f)* (reasonable access by owner of separate interest for purpose of maintaining wiring)].

"Separate interest" in a community apartment project means the exclusive right to occupy an apartment in the project [*Civ. Code § 1351*(*l*)(1)].

"Separate interest" in a condominium project means an individual unit in the project [*Civ. Code § 1351*(*l*)(2)].

"Separate interest" in a planned development means a separately owned lot, parcel, or area in the development [*Civ. Code § 1351*(*l*)(3)].

"Separate interest" in a stock cooperative means the exclusive right to occupy a portion of the real property of the cooperative [*Civ. Code § 1351*(*l*)(4)].

Unless otherwise provided in the declaration or condominium plan, "separate interest" in any type of common interest development includes the interior surfaces of the walls, floors, ceilings, windows, doors, and outlets designated as boundaries of a separate interest, but the other portions of the walls, floors, or ceilings are part of the common areas [*Civ. Code § 1351*(*l*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawZoning & Land UsePlanned Unit Developments

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12-124 California Forms of Pleading and Practice--Annotated § 124.12

§ 124.12 Different Types of Common Interest Developments Distinguished

Typically, a condominium consists of an apartment house in which the units consist of individual apartments and the common areas consist of the remainder of the building and the grounds. Individual owners maintain their own apartments, and an association of apartment owners maintains the common areas [*White v. Cox (1971) 17 Cal. App. 3d 824, 828, 95 Cal. Rptr. 259]* .

In its system of tenure for real property the condominium draws elements both from tenancy in common and from separate ownership. The condominium owners are tenants in common of the common areas and the personal property held by the management association, and they are owners in fee of separate units [*White v. Cox (1971) 17 Cal. App. 3d 824, 829, 95 Cal. Rptr. 259]* .

Ownership interests in a condominium should be distinguished from real property interests created in a cooperative development. In a cooperative, a corporation is formed or availed of primarily for the purpose of holding title to real property so that the shareholders of the corporation receive the right of exclusive occupancy in a portion of the real property. The title to the property, unlike a condominium, is held by the corporation, and the right of occupancy is transferable only concurrently with the transfer of the share or shares of stock in the corporation held by the person having the right of exclusive occupancy [*see Civ. Code § 1351(m)*]. Generally, by retaining ownership of the individual units of the cooperative in a corporation, each tenant has a greater dependency on the other tenant-shareholders in the cooperative than a condominium unit owner has on the other owners in a condominium project. For example, financing of a cooperative is usually by a blanket mortgage covering the whole cooperative, whereas each condominium unit is separately financed. If one tenant in a cooperative defaults in his or her share of the mortgage payment, the other tenants must pay a greater share of the payment. This greater dependency of the tenant-shareholder in a cooperative also creates tax consequences and difficulties in transferring a share of the cooperative that a condominium owner does not face [*see* California Legal Forms , Ch. 34, *Condominiums and Other Common-Interest Developments* (Matthew Bender)].

A community apartment project differs from a stock cooperative in that each owner of the community apartment project, rather than a corporation, holds an undivided interest in the land. However, the two types of common interest developments are similar in that each owner of an interest in the community apartment project holds the right of exclusive occupancy in his or her apartment located on the premises [*see Civ. Code § 1351(d), (m)*].

A planned development is a development which contains both individual building sites and common property and is managed by a homeowners' association. Except for the fact that a condominium is a separate interest in space in a building on real property [*see Civ. Code § 1351(f)*], while a planned development consists of separate ownership interests in land, planned developments and condominium projects are very similar. There are some distinctions, however, one of which is that the areas in common in a planned development, unlike those in a condominium, may be owned, and not just managed, by a homeowners' association, a distinction which may affect liability for injuries incurred in the common areas [*see* California Legal Forms , Ch. 34, *Condominiums and Other Common-Interest Developments* (Matthew Bender); *see also § 124.78*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium Associations

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12-124 California Forms of Pleading and Practice--Annotated § 124.13

§ 124.13 Creation of Common Interest Development

A common interest development is created and governed by *Civ. Code § 1350 et seq.* whenever a separate interest coupled with an interest in the common area or membership in the association is or has been conveyed, provided that a declaration, a condominium plan, if any, and a final or parcel map, if required under the Subdivision Map Act (*see Gov. Code § 66424*; *see generally Gov. Code § 66410 et seq.*) are filed [*Civ. Code § 1352*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium Associations

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12-124 California Forms of Pleading and Practice--Annotated § 124.14

§ 124.14 Disclosures to Purchasers

[1] Controlling Statutes

The prospective purchaser of an interest in a common interest development must be supplied with copies of various governing documents, financial statements, and assessment statements.

If the common interest development is not subject to the Subdivided Lands Act (*Bus. & Prof. Code § 11004.5*; *see generally Bus. & Prof. Code § 11000 et seq.*), the furnishing requirements are governed by *Civ. Code § 1368*. If the common interest development is subject to the Subdivided Lands Act, the furnishing requirements are governed by *Bus. & Prof. Code § 11018.6*. A common interest development project is subject to the Subdivided Lands Act if it has five or more condominiums, lots, or apartments, or in the case of a stock cooperative, other than a limited equity housing cooperative, if it has or is intended to have five or more shareholders [*Bus. & Prof. Code § 11004.5(a)-(d)*; *see Bus. & Prof. Code §§ 11003, 11003.2, 11004*; *Civ. Code §§ 783, 1351*].

[2] Subdivided Lands Act Requirements

[a] In General

The prospective purchaser of an interest in a common interest development subject to the Subdivided Lands Act (*Bus. & Prof. Code § 11000 et seq.*) must be supplied with specified information before the purchase of the interest [*see Bus. & Prof. Code §§ 11018, 11018.1, 11018.6*; *Civ. Code § 1133*]. For more discussion of the Subdivided Lands Act, see Ch. 579, *Zoning and Planning* .

[b] Final Report From Commissioner

A subdivider or any other person connected with a project subject to the Subdivided Lands Act may not sell, lease, or offer for sale or lease any parcel in the subdivision without first obtaining a final public report from the Commissioner of Real Estate that complies with the provisions of the Subdivided Lands Act [*see Bus. & Prof. Code §§ 11018, 11018.2*; *see also 10 Cal. Code Reg. §§ 2792-2792.2, 2792.5, 2792.6, 2794-2795.3* (public reports)]. The owner, subdivider, or agent must furnish a copy of this report to a prospective purchaser before the execution of a binding

contract or agreement for the sale or lease of any lot or parcel in a subdivision, even if offered by the subdivider after repossession. A receipt must be taken from the prospective purchaser in the form and manner set forth in regulations of the Real Estate Commissioner [*Bus. & Prof. Code § 11018.1(a)*; *see 10 Cal. Code Reg. § 2795.1* (receipt)]. A statement containing the language required in *Bus. & Prof. Code § 11018.1(c),* giving general information about a common interest development, must also be furnished to the prospective purchaser.

The owner, subdivider, or agent must also furnish a copy of the report to any member of the public who has requested a copy, and must conspicuously post a copy at any office that is selling or leasing lots within the subdivision [*Bus. & Prof. Code § 11018.1(b)*].

[c] Additional Documents

The owner of a separate interest in a common interest development subject to the Subdivided Lands Act must make a copy of numerous documents available for examination by a prospective purchaser or tenant before an offer to purchase or lease is executed. A copy of each document must be given to the purchaser or tenant as soon as practicable before the interest is actually transferred [*Bus. & Prof. Code § 11018.6*].

The documents to be furnished to the purchaser are as follows [*Bus. & Prof. Code § 11018.6*]:

- The declaration of covenants, conditions, and restrictions for the subdivision;
- The articles of incorporation or association for the subdivision owners association;
- The bylaws for the association;
- Any other instrument that establishes or defines the common, mutual, and reciprocal rights and responsibilities of the owners or tenants as shareholders or association members;
- The required current financial and related statements (*Bus. & Prof. Code § 11018.6(e)* refers to statements specified in *Civ. Code § 1365*); and
- The association's statement of assessments and charges levied by the association.

[3] Civ. Code § 1368 Requirements

The requirements of *Civ. Code § 1368*, described below, are applicable to the owner of an interest in a common interest development that is not subject to the Subdivided Lands Act [*see § 124.14[1]*] when the owner is transferring title of that interest to a purchaser [*Civ. Code § 1368(a)*].

Under *Civ. Code § 1368*, the owner of the separate interest is required to provide the prospective purchaser with the following documents, as soon as is practicable before title to the interest is transferred or the real property sales contract, as defined in *Civ. Code § 2985*, is executed [*Civ. Code § 1368(a)(1)-(5), (8)*]:

- A copy of the governing documents of the development, including any operating rules and a copy of the association's articles of incorporation, or, if not incorporated, a written statement from an authorized representative that the association is not incorporated.
- Certain statements concerning *Civ. Code § 51.3* if the governing documents limit the occupancy, residency, or use of a separate interest on the basis of age in a manner that differs from the provisions of that statute.

- A copy of the most recent financial statements, lien enforcement policies and practices, and summary of association insurance distributed pursuant to *Civ. Code § 1365*.

- A written statement from the association containing certain information concerning assessments and charges levied by the association [*see Civ. Code §§ 1367, 1367.1*].

- A copy or summary of any notice regarding the imposition of discipline previously sent to the owner that sets forth any alleged violation of the governing documents that remains unresolved at the time of the request [*see Civ. Code § 1363(h)*].

- Any change in the association's current regular and special assessments and fees that have been approved by the association's board of directors, but have not become due and payable as of the date of disclosure.

If the association is involved in a dispute with the developer that involves design or construction defects, the separate interest owner must also provide the following to the prospective purchaser [*Civ. Code § 1368(a)(6), (7)*]:

- If the dispute has not been settled or otherwise resolved, a copy of the preliminary list of defects that the association is required by statute to furnish to the developer along with a statement that a final determination has not been made as to whether the list is accurate and complete [*see Civ. Code § 1375(b)(2)*; *see also § 124.26[2][a]*];

- If the dispute has been settled or otherwise resolved, a copy of the latest information required by statute to be disclosed to association members regarding the details of the settlement or resolution [*see Civ. Code § 1375.1(a)*].

Disclosure of the preliminary list of defects or the settlement information described above, does not waive any privilege attached to the information [*Civ. Code §§ 1368(a)(6), 1375.1(c)*].

A separate interest owner may obtain copies of all documents required to be furnished to a prospective purchaser pursuant to *Civ. Code § 1368(a)(1)-(8)* by submitting a written request for the documents to the association. The association may maintain the documents in electronic form and requesting parties have the option of receiving them by electronic transmission or machine readable storage media [*see Civ. Code § 1368(b)*].

Neither an association nor a "community service organization or similar entity" may impose or collect any assessment, penalty, or fee in connection with a transfer of title or any other interest except for an amount to cover (1) the association's actual costs to change its records, and (2) the reasonable cost of furnishing documents and assessment statements required by *Civ. Code § 1368(a)* and *(b)* [*Civ. Code § 1368(c)(1)*]. For these purposes, a "community service organization or similar entity" is a nonprofit entity, other than an association, that is organized to provide services to residents of the common interest development or to the public in addition to the residents, to the extent community common areas or facilities are available to the public. The term does not include an entity that has been organized solely to raise money and contribute to other nonprofit organizations that are tax exempt under *Internal Revenue Code § 501(c)(3)* and that provide housing or housing assistance [*Civ. Code § 1368(c)(3)*].

The amount of document and transfer fees charged by a managing agent in connection with the transfer of title is not limited by *Civ. Code § 1368* [*Berryman v. Merit Property Management, Inc. (2007) 152 Cal. App. 4th 1544, 1552, 62 Cal. Rptr. 3d 177]* .

The limitation on transfer fees does not apply to a community service organization or similar entity that was established

before February 20, 2003, and that exists and operates to fund or perform environmental mitigation or to restore or maintain wetlands or native habitat, as required by the state or local government as a condition of development [*Civ. Code § 1368(c)(2)(A)*]. The limitation also does not apply to a community service organization or similar entity that satisfies all of the following requirements [*Civ. Code § 1368(c)(2)(B)*]:

- The organization or entity is not one to which *Civ. Code § 1368(2)(c)(2)(A)* applies;
- The organization or entity was established and received a transfer fee before January 1, 2004; and
- On and after January 1, 2006, the organization or entity offers a purchaser the option of paying the transfer fee or charge either at the time of transfer or on an installment basis for a period of not less than seven years.

Any person or entity who willfully fails to furnish the purchaser, or an owner who makes a written request, with these documents is liable for actual damages and, in addition, is subject to a civil penalty not to exceed $500. The prevailing party in an action to enforce the liability is entitled to attorney's fees [*Civ. Code § 1368(d)*].

Failure to comply with these requirements does not affect the validity of a title to real property that is transferred [*Civ. Code § 1368(e)*].

Civ. Code § 1368 does not impose a duty on a homeowner's association to disclose to a prospective purchaser the existence of construction defects, or the fact of any litigation over construction defects; that duty is the seller's responsibility [*Kovich v. Paseo Del Mar Homeowners' Assoc. (1996) 41 Cal. App. 4th 863, 867, 48 Cal. Rptr. 2d 758]* . For discussion of the responsibility to disclose construction defects when an existing dwelling is converted to a condominium, see *§ 124.14[5]*.

[4] Blanket Encumbrance

If a lot, parcel, or unit of a condominium or community apartment project or a stock cooperative that is divided into two or more lots, parcels, or units is subject to a blanket encumbrance, as defined in *Bus. & Prof. Code § 11013*, but is exempt from compliance with *Bus. & Prof. Code § 11013.2*, the subdivider or the subdivider's agent or representative may not sell the lot, parcel, or unit until the prospective purchaser is furnished with and has signed a notice as required by *Civ. Code § 1133(a)* [*Civ. Code § 1133(a), (b)*; *see 10 Cal. Code Reg. § 2792.14* (approval by Real Estate Commissioner of blanket encumbrance on stock cooperative)]. However, the conveyance is not invalidated if the buyer fails to sign the notice [*Civ. Code § 1133(c)*].

Any person or entity who willfully fails to furnish the purchaser with the notice is liable for actual damages, and is also guilty of a public offense punishable by a fine. The prevailing party in an action to enforce the liability or fine is entitled to attorney's fees [*Civ. Code § 1133(d)*].

[5] Disclosure of Defects

When an existing dwelling is converted into a residential condominium, community apartment project, or stock cooperative, the owner, subdivider, or agent must furnish a prospective first buyer of a unit in the development with a written statement listing all the substantial defects or malfunctions in the unit and the common areas of the development, or disclaiming knowledge of any defects or malfunctions [*Civ. Code § 1134(a)*].

The statement must be furnished as soon as practicable before title in the unit is transferred [*Civ. Code § 1134(a)*]. If the statement is delivered after the agreement to purchase is executed, the buyer may terminate the agreement within three days after delivery in person or five days after delivery by deposit in the mail [*Civ. Code § 1134(b)*].

Failure to comply with the disclosure requirement does not invalidate the transfer of title of the unit [*Civ. Code § 1134(f)*]. However, a person who willfully violates the requirements is liable for actual damages to the buyer [*Civ. Code § 1134(d)*]. The buyer may also pursue any other available remedy under any other provision of law [*Civ. Code § 1134(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsPurchase & Sale

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§ 124.15 Extent of Interest Conveyed

A conveyance of a separate interest in a community apartment project, or a judicial sale or other voluntary or involuntary transfer of the separate interest, includes a conveyance of the undivided interest in the project [*Civ. Code § 1358(a)*].

A conveyance, sale, or other transfer of a separate interest in a condominium project includes a conveyance of the undivided interest in the common areas of the project [*Civ. Code § 1358(b)*].

A conveyance, sale, or other transfer of a separate interest in a planned development includes a conveyance of the undivided interest in any existing common areas of the development [*Civ. Code § 1358(c)*].

A conveyance, sale, or other transfer of a separate interest in a stock cooperative includes the ownership interest in the corporation. A conveyance, judicial sale, or other voluntary or involuntary transfer of the owner's entire estate also includes the owner's membership interest in the association [*Civ. Code § 1358(d)*].

An interest in an exclusive use area may be transferred independent of any other interest in the common interest subdivision if authorization to separately transfer exclusive use areas is expressly stated in the declaration and if the transfer occurs in accordance with the terms of the declaration [*Civ. Code § 1358(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsPurchase & Sale

California Forms of Pleading and Practice--Annotated

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§ 124.16 Declaration

[1] Contents in General

A declaration of a common interest development, recorded on or after January 1, 1986, must include all of the following [*Civ. Code § 1353(a)(1)*]:

- A legal description of the development;
- A statement that the development is a community apartment project, condominium project, planned development, stock cooperative, or combination of these;
- The name of the association; and
- Any restrictions on use or enjoyment of any portion of the development that are intended to be enforceable equitable servitudes.

If the property is located within an airport influence area [*see Civ. Code § 1353(a)(2)* (definition)], a declaration that is recorded after January 1, 2004, must also include a statement, the wording of which is statutorily prescribed, giving notice that there is an airport in the vicinity and pointing out that there may be potential annoyances or inconveniences--such as noise, vibration, or odors--associated with proximity to airport operations [*Civ. Code § 1353(a)(1)*]. In addition, if the property is located within the San Francisco Bay Conservation and Development Commission's jurisdiction, a declaration recorded on or after January 1, 2006, must contain a statement pointing out that the property may be subject to special regulations, restrictions, and permit requirements [*Civ. Code § 1353(a)(3)*]. Neither of these statements constitutes a title defect, lien, or encumbrance [*Civ. Code § 1353(a)(4)*].

The declaration may contain any other matters considered appropriate by the original signator of the declaration or by the owners [*Civ. Code § 1353(b)*; *see 10 Cal. Code Reg. §§ 2792.8* (contents of governing instruments), 2792.26 (provisions for disciplinary action against individual owner)].

[2] Covenants and Restrictions

The covenants and restrictions in the declaration are enforceable equitable servitudes, unless unreasonable, and inure to the benefit of and bind all owners of separate interests in the project. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest, by the association, or by both [*Civ. Code § 1354(a)*]. The statute of limitations for actions to enforce covenants and restrictions is four years as specified by *Code Civ. Proc. § 337* for an action arising from a written instrument. The period commences when a demand for enforcement is made [*Cutujian v. Benedict Hills Estates Assn. (1996) 41 Cal. App. 4th 1379, 1386-1387, 49 Cal. Rptr. 2d 166]* .

A use restriction added to the declaration of a common interest development through amendment is enforceable against a homeowner who acquired his or her separate interest before the amendment was adopted and recorded [*Villa De Las Palmas Homeowners Assn. v. Terifaj (2004) 33 Cal. 4th 73, 82-83, 14 Cal. Rptr. 3d 67, 90 P.3d 1223]* . Use restrictions in amended declarations are enforceable through injunctive relief pursuant to *Civ. Code § 1354(a)*, which applies to all covenants and restrictions in the declaration, irrespective of when such covenants and restrictions were incorporated [*Villa De Las Palmas Homeowners Assn. v. Terifaj (2004) 33 Cal. 4th 73, 87, 14 Cal. Rptr. 3d 67, 90 P.3d 1223]* . Subsequently promulgated and recorded use restrictions are entitled to the same judicial deference accorded covenants and restrictions in original declarations, that is, they are presumptively valid, and the burden of proving otherwise rests on the challenging homeowner [*Villa De Las Palmas Homeowners Assn. v. Terifaj (2004) 33 Cal. 4th 73, 91-92, 14 Cal. Rptr. 3d 67, 90 P.3d 1223* ; *see Nahrstedt v. Lakeside Village Condominium Assn. (1994) 8 Cal. 4th 361, 380, 389, 33 Cal. Rptr. 2d 63, 878 P.2d 1275]* .

In determining whether a covenant or restriction is unreasonable, and thus not enforceable, the focus is on the restriction's effect on the development as a whole, not on an individual homeowner. A covenant or restriction that is part of the declaration is presumed to be reasonable and will be enforced uniformly against all owners unless it (1) is wholly arbitrary, (2) imposes a burden on the use of lands it affects that substantially outweighs any benefit to the development's residents, or (3) violates a fundamental public policy [*Nahrstedt v. Lakeside Village Condominium Assn. (1994) 8 Cal. 4th 361, 382-383, 386, 33 Cal. Rptr. 2d 63, 878 P.2d 1275* ; *see Dolan-King v. Rancho Santa Fe Assn. (2000) 81 Cal. App. 4th 965, 975, 97 Cal. Rptr. 2d 280]* .

If a declaration establishing a common plan for the ownership of property in a subdivision and containing restrictions on the use of the property as part of the common plan is recorded before the execution of a contract for the sale of any lot in the subdivision, describes the property it is to govern, and states that it is intended to bind all purchasers and their successors, then subsequent purchasers who have constructive notice of the recorded declaration are deemed to intend and agree to be bound by, and to accept the benefits of, the common plan. The restrictions need not be additionally cited in a deed or other document at the time of the sale of parcels in the subdivision [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 355, 47 Cal. Rptr. 2d 898, 906 P.2d 1314]* . *Citizens for Covenant Compliance* involved two standard subdivisions, and has had a significant impact on such subdivisions [for further discussion of this opinion, *see* Ch. 184, *Deeds*]. Although most common interest developments are considered "subdivisions" under the two most important statutes governing subdivisions [*see §§ 124.14[1], 124.19*], the case does not have a significant effect on them because the requirements of the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*] governing declarations impose similar (and, in some cases, more stringent) requirements regarding restrictions [*see Civ. Code §§ 1353, 1354*].

Any restrictions on the severability of the component interests in real property that are contained in the declaration will not be deemed conditions repugnant to the interest created within the meaning of *Civ. Code § 711*. However, these restrictions cannot extend beyond the period in which the right to partition a project is suspended under *Civ. Code § 1359* [*Civ. Code § 1358(d)*; *see 10 Cal. Code Reg. § 2792.8(a)(19)*].

Any provision purporting to restrict or abridge, directly or indirectly, the right of an owner to sell or lease his or her subdivision interest must include uniform, objective standards for invoking the restriction on sale or lease. The restriction may not be based on the race, color, national origin, religion, marital status, ancestry, or sex of the vendee or

lessee [*10 Cal. Code Reg. § 2792.25(a)*], nor may a restriction be made against selling or leasing to families with children [*see O'Connor v. Village Green Owners Ass'n (1983) 33 Cal. 3d 790, 793-797, 191 Cal. Rptr. 320, 662 P.2d 427* (restrictions against children residing in condominium as violation of Unruh Act)]. One court of appeal, however, has held that, although the outright prohibition on a sale of a unit to an owner having children may not be upheld, the prohibition against rental to a family with children may nevertheless be rationally related to the purposes of the restriction and may be upheld as reasonable [*Sunrise Country Club Assn. v. Proud (1987) 190 Cal. App. 3d 377, 382-383* , *235 Cal. Rptr. 404]* . In addition, the development may set aside some of its swimming pools or other recreational facilities for adult or for family use, so long as no group is totally excluded from the use of other such facilities [*Sunrise Country Club Assn. v. Proud (1987) 190 Cal. App. 3d 377, 382, 235 Cal. Rptr. 404]* .

In one case, the trial court did not abuse its discretion in granting a petition to reduce the number of votes required to amend the CC&Rs to prohibit short-term rentals [*Mission Shores Assn. v. Pheil (2008) 166 Cal. App. 4th 789, 797, 83 Cal. Rptr. 3d 108* ; for discussion of court orders reducing the percentage of affirmative votes necessary for amendment of declarations, see *§ 124.16[3][c]*]. The imposition of a 30-day minimum lease term was not unreasonable. The provision applied to all owners who rented their homes, the restriction did not violate public policy, and any burden to enforce the minimum lease term was outweighed by its beneficial value in preserving the residential character of the development [*Mission Shores Assn. v. Pheil (2008) 166 Cal. App. 4th 789, 796-797, 83 Cal. Rptr. 3d 108*].

A restriction that requires owner occupancy and prohibits leasing in a publicly subsidized low and moderate income project is not an unreasonable restraint on alienation and is enforceable [*City of Oceanside v. McKenna (1989) 215 Cal. App. 3d 1420, 1428-1430, 264 Cal. Rptr. 275]* . Further, a clause in the restrictions that requires approval of transfers by the association is not invalid as an unlawful restraint on alienation; however, consent to transfer may not be unreasonably withheld [*Laguna Royale Owners Asso. v. Darger (1981) 119 Cal. App. 3d 670, 680-684, 174 Cal. Rptr. 136]* . For example, refusal of consent to transfer one-quarter undivided interests to three other parties is unreasonable when each party will occupy the premises at separate times [*Laguna Royale Owners Asso. v. Darger (1981) 119 Cal. App. 3d 670, 684-688, 174 Cal. Rptr. 136]* . A condominium rule that prohibited nonresident owners from using common recreational facilities was a proper implementation of CC&R provisions that permitted owners to delegate to tenants who reside on the property the right to enjoy common facilities but prohibited the owners from severing that right from their separate interest. The clear intent of the CC&R provisions was to have one set of users per unit--either the owner or the tenant, but not both [*Liebler v. Point Loma Tennis Club (1995) 40 Cal. App. 4th 1600, 1606-1609, 47 Cal. Rptr. 2d 783]* .

If the owner gives notice to the association of the terms of a bona fide offer by a person who does not meet the prescribed standards and of his or her intention to accept the offer, the association may have a period, not to exceed 15 days after receipt of the notice, to procure or to make an offer on terms not less favorable to the owner than the terms of the offer of the person failing to meet the prescribed standards. If the association fails to take action within 15 days, the restrictions are deemed waived as to such an offer [*see 10 Cal. Code Reg. § 2792.25(b)*].

Any rule or regulation of an association that arbitrarily or unreasonably restricts an owner's ability to market his or her interest in a common interest development is void [*Civ. Code § 1368.1(a)*]. This specifically includes any rule or regulation that does either of the following [*Civ. Code § 1368.1(b)*]:

- Imposes an assessment or fee in connection with the marketing of an owner's interest in an amount that exceeds the association's actual or direct costs; or

- Establishes an exclusive relationship with a real estate broker through which the sale or marketing of interests in the development is required to occur, except with regard to common areas and/or separate interests owned by the association.

"Market" and "marketing" mean listing, advertising, or obtaining or providing access to show the owner's interest in the

development [*Civ. Code § 1368.1(c)*]. Rules or regulations regarding real estate signs are not prohibited [*Civ. Code § 1368.1(d)*; *see Civ. Code §§ 712, 713*].

The declaration (or any other governing document) may not include a provision that limits or prohibits, or that may be construed to limit or prohibit, the display of the United States flag by an owner on or in the owner's separate interest or within the owner's exclusive use common area [*Civ. Code § 1353.5*].

[3] Amendment of Declaration

[a] When Effective

The declaration may be amended in accordance with the governing documents of the project or pursuant to *Civ. Code § 1350 et seq.* [*Civ. Code § 1355(a)*; *see 10 Cal. Code Reg. § 2792.8(a)(18)* (governing documents must ordinarily provide for amendment procedures); *see also 10 Cal. Code Reg. § 2792.24* (requirements for method of amending governing instruments)]. An amendment, other than an amendment approved by the court pursuant to *Civ. Code § 1356* [*see § 124.16[3][c]*], is effective after (1) the approval of the percentage of owners required by the governing documents has been given; (2) that fact has been certified in a writing and executed and acknowledged by the officer designated in the declaration or by the association for that purpose, or if no one is designated, by the president of the association; and (3) that writing has been recorded in each county in which a portion of the common interest development is located [*Civ. Code § 1355(a)*].

However, no amendment of the declaration or other instrument affecting the rights to ownership, possession, or use of a common interest development containing five or more lots, apartments, condominiums, shareholders, or undivided interests that would materially change the rights of an owner is valid unless the real estate commissioner has given prior written consent to the amendment during the period of time in which the subdivider or the subdivider's successor in interest holds or directly controls as many as one fourth of the votes that may be cast to effect such a change [*Bus. & Prof. Code § 11018.7(a)*; *see Bus. & Prof. Code §§ 11000.1* and *11004.5* (defining subdivisions); *see also 10 Cal. Code Reg. § 2793* (applications for consent under *Bus. & Prof. Code § 11018.7*)].

Except to the extent that a declaration provides by its express terms that it is not amendable, in whole or in part, a declaration which fails to include provisions for its amendment at all times during its existence may be amended at any time. For this purpose, an amendment is effective only after (1) the proposed amendment has been distributed to all of the owners of separate interests in the common interest development by first-class mail postage prepaid or personal delivery not less than 15 days and not more than 60 days before any approval being solicited; (2) the approval of owners representing more than 50 percent, or any higher percentage required by the declaration for the approval of an amendment to the declaration, of the separate interest in the common interest development has been given, and that fact has been certified in a writing, executed and acknowledged by an officer of the association; and (3) the amendment has been recorded in each county in which a portion of the common interest development is located. A copy of any amendment must be distributed by first-class mail postage prepaid or personal delivery to all of the owners of separate interests immediately on its recordation [*Civ. Code § 1355(b)*].

[b] Construction and Marketing Provisions

After the developer of a common interest development has completed construction of the development, has terminated construction activities, and has terminated marketing activities for the sale or lease of the separate interests, the board of directors may adopt an amendment deleting from the governing documents any provision that is unequivocally, or by its nature must have been, designed and intended to facilitate the developer in completing the construction and marketing. Such an amendment may be adopted notwithstanding any provision in the governing documents to the contrary. However, provisions of the governing documents relating to a particular construction or marketing phase of the development may not be deleted until that phase has been completed [*Civ. Code § 1355.5(a)*].

The provisions that may be deleted by action of the board are limited to those providing for access by the developer over or across the common area for the purposes of completing construction of the development and erecting, constructing, or maintaining structures or other facilities designed to facilitate the completion of construction or marketing of separate interests [*Civ. Code § 1355.5(b)*].

At least 30 days before taking action, the board of directors must mail to all owners of the separate interests, by first class mail, copies of all proposed amendments to the governing documents and a notice of the time, date, and place where the board will consider the amendments. The board may consider adopting amendments only at a meeting that is open to all owners of separate interests, who must be given the opportunity to make comments. All deliberations of the board must be conducted only in such an open meeting [*Civ. Code § 1355.5(c)*].

The board of directors may not amend the governing documents without the approval of the owners by a majority of the votes cast at a meeting or election of the association at which a quorum was obtained and conducted in accordance with *Corp. Code §§ 7510-7527, 7613*. For this purpose, quorum means more than 50 percent of the owners who own no more than two separate interests apiece in the development [*Civ. Code § 1355.5(d)*].

[c] By Court Order

If an amendment to a declaration is required to be approved by the owners having more than 50 percent of the votes in the association in a single class voting structure, or by owners having more than 50 percent of the votes in more than one class in a voting structure with more than one class, the association, or any owner of a separate interest, may petition the superior court of the county in which the common interest development is located for an order reducing the percentage of the affirmative votes necessary for the amendment [*Civ. Code § 1356(a)*; *see § 124.74*]. *Civ. Code § 1356* requires an affirmative vote by more than 50 percent of all owners, whether or not they attended the meeting on the matter, rather than 50 percent of the owners who attended the meeting [*Peak Invs. v. South Peak Homeowners Assn., Inc. (2006) 140 Cal. App. 4th 1363, 1367*].

The petition may be granted, regardless of any requirement relating to quorums or the number or percentage of votes needed for approval of the amendment that would otherwise exist under the governing documents, if the petitioner has given proper notice of the hearing, balloting on the proposed amendment was properly conducted, a reasonably diligent effort was made to permit all eligible members to vote on the proposed amendment, owners having more than 50 percent of the votes in each class voted in favor of the amendment, the amendment is reasonable, and granting the petition is not improper for any reason set forth in *Civ. Code § 1356(e)* [*see Civ. Code § 1356(c), (d)*; for a sample notice and discussion of this requirement, see *§ 124.75*]. However, the court may not approve any amendment to the declaration that would (1) change a provision in the declaration that requires the approval of owners having more than 50 percent of the votes in more than one class to vote in favor of an amendment, unless owners having more than 50 percent of the votes in each affected class approved the amendment; (2) eliminate any special rights, preferences, or privileges designated in the declaration as belonging to the declarant, without the consent of the declarant; or (3) impair the security interest of a mortgagee of a mortgage or the beneficiary of a deed of trust without the approval of the percentage of the mortgagees and beneficiaries specified in the declaration, if the declaration requires the approval of a specified percentage of the mortgagees and beneficiaries [*Civ. Code § 1356(e)*].

An amendment approved by the court becomes effective, as if it had been adopted pursuant to the governing documents, when both the court order and the amendment have been recorded in every county in which a portion of the common interest development is located. Any person designated in the declaration or by the association to record an amendment, or if none, the president of the association, may record the order and amendment [*Civ. Code § 1356(f)*]. Within a reasonable time after the amendment is recorded, the association must mail a copy of the amendment to each member of the association, together with a statement that the amendment has been recorded [*Civ. Code § 1356(g)*].

[4] Extending Term of Declaration

If a declaration specifies a termination date but does not provide for an extension of that date, the owners having more than 50 percent of the votes in the association or any greater percentage specified in the declaration for an amendment thereto may approve an extension of the date. If the approval of owners having more than 50 percent of the votes in the association is required to amend the declaration, the term of the declaration may be extended by court order pursuant to *Civ. Code § 1356* [*Civ. Code § 1357(b)*; *see § 124.16[3][c]*].

No single extension of the terms of the declaration may exceed the initial term of the declaration or 20 years, whichever is less. However, more than one extension may be approved [*Civ. Code § 1357(d)*].

Any amendment to extend the termination date is effective on recordation in each county in which a portion of the common interest development is located [*see Civ. Code §§ 1355, 1357(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsPurchase & Sale

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§ 124.17 Pre-Litigation Resolution of Disputes Related to Governing Documents, Davis-Stirling Act, and Nonprofit Mutual Benefit Corporation Law

[1] Intra-Association Dispute Resolution Procedure

[a] Rationale

The formal alternative dispute resolution (ADR) process [*see § 124.17[2]*], which is a prerequisite to litigation, contemplates the use of a neutral party (such as a mediator or arbitrator) in the decision-making process [*see Civ. Code § 1369.510 et seq.*]. Although mediation or arbitration may be effective to avert litigation, they are costly remedies in the context of the nonmonetary types of disputes that frequently arise in daily interactions in a common interest development. Believing that people should be able to resolve a dispute involving ordinary living arrangements without having to engage in a formal dispute resolution process, the Law Revision Commission proposed, and the Legislature enacted, a requirement that every homeowners' association must make available a fair, reasonable, and expeditious internal dispute resolution mechanism at no cost to the membership [*see Civ. Code § 1363.820(a)*; *see also* Alternative Dispute Resolution in Common Interest Developments, 33 Cal. L. Revision Comm'n Reports 703-704 (2003)]. This supplements, and does not replace, the formal ADR process that is required as a prerequisite to an enforcement action [*Civ. Code § 1363.810(b)*]. If an association fails to provide for an internal dispute resolution procedure, a statutorily prescribed default procedure applies [*Civ. Code § 1363.820(c)*; *see Civ. Code § 1363.840*].

[b] Disputes to Which Intra-Association Procedure Applies

The intra-association dispute resolution procedure applies to any dispute between an association and a member that involves their respective rights, duties, or liabilities under any of the following [*Civ. Code § 1363.810(a)*]:

- The Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*];
- The Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*]; or
- The common interest development's or association's governing documents, which consist of the declaration and any other documents, such as bylaws, operating rules of the association, articles of

incorporation, or articles of association, that govern the operation of the common interest development or association [*see Civ. Code § 1351(j)*].

[c] Requirements for Valid Intra-Association Procedure

The intra-association dispute resolution procedure must be fair, reasonable, and expeditious. There is a presumption affecting the burden or proof in favor of any procedure adopted by an association [*Civ. Code § 1363.820(a), (b)*]. To be considered "fair, reasonable, and expeditious," a dispute procedure must satisfy specified minimum requirements [*see Civ. Code § 1363.830*]. The "fair, reasonable, and expeditious" standard is not an objective one. It will vary from association to association, depending on such factors as size and involvement of membership. The statutory presumption is intended to avoid squabbles over procedural details and instead focus on the substance of the dispute to be resolved. If an association has a procedure in place, that procedure need not be re-adopted. The existing procedure has the benefit of the presumption [*see* 33 Cal. L. Revision Comm'n Comment to 2003 enactment of *Civ. Code § 1363.820*].

[d] Additional Remedy for Separate Interest Owner Disputing Charge or Sum Levied by Association

In addition to pursuing the formal ADR process [*see* [2], *below*], the owner of a separate interest who is disputing any charge or sum levied by the association including, but not limited to, an assessment, fine, penalty, late fee, collection cost, or monetary penalty imposed as a disciplinary measure, when the disputed amount does not exceed the jurisdictional limits of small claims court, may pay under protest the disputed amount and all other amounts levied including any fees and reasonable costs of collection, reasonable attorney's fees, late charges, and interest, if any, and commence an action in small claims court [*Civ. Code § 1367.6(a)*].

[2] Formal Alternative Dispute Resolution (ADR) Procedure

[a] ADR as Prerequisite to Filing Enforcement Action

An association or an owner or a member of a common interest development may not file an enforcement action [*see § 124.17[2][b]*] in the superior court unless the parties have endeavored to submit their dispute to some form of ADR, which may consist of mediation, arbitration, conciliation, or some other nonjudicial procedure that involves a neutral party in the decision-making process. With the parties' consent, the form of ADR chosen may be binding or nonbinding [*Civ. Code §§ 1369.510(a), 1369.520(a), (d)*].

[b] Actions to Which Prerequisite Applies

In the context of the ADR requirement, an "enforcement action" is a civil action or proceeding, other than a cross-complaint, to enforce any of the following [*Civ. Code § 1369.510(b)*]:

- The Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*];
- The Nonprofit Mutual Benefit Corporation Law [*Corp. Code § 7110 et seq.*]; or
- The common interest development's governing documents, which consist of the declaration and any other documents, such as bylaws, operating rules of the association, articles of incorporation, or articles of association, that govern the operation of the common interest development or association [*see Civ. Code § 1351(j)*].

The ADR requirement applies only if the enforcement action is for declaratory, injunctive, or writ relief, or for one of those forms of relief in conjunction with a claim for monetary damages not in excess of $5,000. It does not apply to a small claims action, and, as mentioned above, except at otherwise provided by law, it also does not apply to an

assessment dispute [*Civ. Code § 1369.520(b)-(d)*]. Owners wishing to seek ADR to an assessment dispute may do so pursuant to an alternate procedure [*see Civ. Code § 1366.3*; *see also § 124.17[3]*].

[c] Initiating ADR

To initiate the ADR process, a party to the dispute must serve on all other parties (that is, all persons intended to be named in an ensuing enforcement action) a request for resolution [*Civ. Code § 1369.530(a)*]. For a form of request for resolution, see *§ 124.82*.

The request must be served by personal delivery, first-class mail, express mail, facsimile transmission, or other means reasonably calculated to provide the party on whom the request is served with actual notice of the request [*Civ. Code § 1369.530(b)*].

Once served, a party has 30 days to accept or reject the request. If that party does not accept the request within the 30-day period, that party is deemed to have rejected the request [*Civ. Code § 1369.530(c)*].

[d] Statute of Limitations Tolled Pending ADR

If the request for resolution is served before the statute of limitations for commencing an enforcement action, the statute is tolled during the 30-day period for accepting or rejecting the request [*Civ. Code § 1369.550(a)*]. If the request is accepted, the statute is tolled for 90 days from the date of acceptance, or such longer period as the parties may stipulate for completing ADR [*Civ. Code § 1369.550(b)*; *see Civ. Code § 1369.540(a)*].

[e] ADR Process

If a request for resolution is accepted, the parties must complete the ADR within 90 days unless the parties stipulate in writing to a longer period [*Civ. Code § 1369.540(a)*]. Unless the process is an arbitration, it is governed by the rules of evidence that apply to mediation, which generally relate to the confidentiality of the proceeding [*Civ. Code § 1369.540(b)*; *see Evid. Code § 1115 et seq.*].

The parties are responsible for the costs of ADR [Civ. Code §§ 1360.540(c), *1369.570(b)*].

[f] Certifying Efforts to Resolve Dispute When Enforcement Action Filed

When an enforcement action is filed, the party who commences the action must file with the initial pleading a certificate stating that one or more of the following conditions is satisfied [*Civ. Code § 1369.560(a)*]:

- ADR has been completed in compliance with *Civ. Code §§ 1369.510-1369.590*;
- One of the other parties to the dispute did not accept the terms offered for ADR; and/or
- Preliminary or temporary injunctive relief is necessary.

For a form of certificate of compliance, see *§ 124.84*.

Failure to file a certificate is grounds for demurrer or motion to strike unless the court finds that dismissal for failure to comply would substantially prejudice one of the parties [*Civ. Code § 1369.560(b)*]. The requirement to file a certificate does not apply to the filing of a cross-complaint [*see Civ. Code § 1369.510(b)* (exempting cross-complaints from "enforcement action")]. For a form of demurrer, see *§ 124.85*.

[g] Referral to ADR If Enforcement Action Filed First

If an enforcement action is commenced before ADR is initiated, the matter may be referred to ADR on written stipulation of the parties in which case the referred action is stayed. During the stay, the action is not subject to the rules adopted by the Judicial Council establishing a case differentiation classification system based on the relative complexity of cases [*Civ. Code § 1369.570(a)*; *see Gov. Code § 68603(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsPurchase & Sale

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§ 124.18 Condominium Plan

A condominium plan consists of a description or survey map of the project that shows monumentation, a three-dimensional description of the project that identifies the common areas and each separate interest, and a certificate of consent to the recordation of the plan. The plan may be amended or revoked by a subsequent instrument [*Civ. Code § 1351(e)*].

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§ 124.19 Compliance With Subdivision Map Act

Any of the following common interest developments is a "subdivision" subject to the Subdivision Map Act (*Gov. Code § 66410 et seq.*) [*Gov. Code § 66424*]:

- A condominium project, other than a conversion from a community apartment project or a stock cooperative to a condominium under certain conditions [*see Gov. Code § 66412(g), (h)*];
- A community apartment project; and
- A conversion of five or more existing dwelling units to a stock cooperative.

A tentative and final map complying with the Subdivision Map Act is required for all subdivisions creating five or more condominiums, parcels, or dwelling units [*Gov. Code § 66426*]. The map need not show the buildings or the manner in which the buildings or the airspace above the property shown on the map are to be divided, nor does the governing body have the right to refuse approval of the map because of the design or location of buildings on the property shown on the map which do not violate local ordinances, or because of the manner in which airspace is to be divided in conveying the condominium [*Gov. Code § 66427(a)*]. Local agencies may, by ordinance, waive the requirement for a tentative and final map for the construction of a condominium project on a single parcel [*Gov. Code § 66428(b)*].

The conversion of rental property to condominiums is considered to be a subdivision under the Subdivision Map Act. A local legislative body may not approve a final map for a subdivision to be created from the conversion of residential rental property into a condominium project, a community apartment project, or a stock cooperative unless that body finds that each tenant of the proposed conversion project and each person applying to rent a unit in the residential property to be converted has received or will have received all applicable notices and rights required under the Act [*Gov. Code § 66427.1(a)(1)*]. To that end, each of the tenants of the proposed condominium, community apartment project, or stock cooperative project must receive [*Gov. Code § 66427.1(a)(2)*]:

- Written notification of intention to convert [*see* Bus. & Prof. Code § 66452.18], which must be provided at least 60 days before a tentative map is filed in accordance with *Gov. Code § 66452*.

- Ten days' written notice that an application for a public report will be, or has been, submitted to DRE, that the period for each tenant's right to purchase begins with the issuance of the final public report, and that the report will be available on request.

- Written notice that the subdivider has received the public report from DRE. This notice must be provided within five days after the date that the subdivider receives the public report from DRE.

- Written notice within 10 days after approval of the final map for the proposed conversion.

- 180 days' written notice of the intention to convert, which must be must be provided before termination of the tenancy due to the conversion or proposed conversion [*see Gov. Code § 66452.19*], but not before the local authority has approved a tentative map for the conversion.

- Notice of an exclusive right to contract for the purchase of his or her respective unit on the same terms and conditions that the unit will be initially offered to the general public or terms more favorable to the tenant [*see Gov. Code § 66452.20*].

These notice requirements are deemed satisfied if service is in accordance with the legal requirements for service by mail [*Gov. Code § 66427.1(b)*; *see Code Civ. Proc. § 1013*].

In addition, the local agency is required to give notice to the tenants of any hearing to be held [*Gov. Code § 66451.3(b)*].

The subdivider or any tenant of the property may appeal the approval or disapproval of the maps [*Gov. Code § 66452.5*].

The Subdivision Map Act is discussed in more detail in Ch. 579, *Zoning and Planning* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawRestrictive CovenantsSubdivisions

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
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12-124 California Forms of Pleading and Practice--Annotated § 124.20

§ 124.20 Construction of Deed, Declaration, or Plan

Any deed, declaration, or condominium plan for a common interest development must be liberally construed to facilitate the operation of the development. In addition, its provisions are presumed to be independent and severable [*Civ. Code § 1370*].

In interpreting deeds and condominium plans, the existing physical boundaries of a unit in a condominium project, rather than the metes and bounds (if any) expressed in the deed or condominium plan, will be conclusively presumed to be its boundaries, if those boundaries are contained within a building or the unit has been reconstructed in substantial accordance with its original plans. This presumption applies regardless of (1) settling or lateral movement of the building, or (2) minor variances between the boundaries shown on the plan or in the deed and those of the building [*Civ. Code § 1371*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawDeedsConstruction & Interpretation

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12-124 California Forms of Pleading and Practice--Annotated § 124.21

§ 124.21 Construction of Local Zoning Ordinances

Unless a contrary intent is clearly expressed, local zoning ordinances will be construed to treat like structures, lots, parcels, areas, or spaces in like manner regardless of whether the common interest development is a community apartment project, condominium project, planned development, or stock cooperative [*Civ. Code § 1372*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCooperativesGeneral OverviewReal Property LawZoning & Land UseGeneral Overview

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Chapter 124 CONDOMINIUMS AND OTHER COMMON INTEREST DEVELOPMENTS
PART II. LEGAL BACKGROUND

12-124 California Forms of Pleading and Practice--Annotated § 124.22

§ 124.22 Common Areas

[1] Type of Tenancy

In a condominium project, or in a planned development in which the common areas are owned by the owners of the separate interests, the owners of the separate interests own the common area as tenants in common, in equal shares, one for each separate interest, unless otherwise provided in the declaration [*Civ. Code § 1362*].

[2] Rights or Easements in Common Areas

In a community apartment project and condominium project, and in those planned developments with common areas owned in common by the owners of the separate interests, nonexclusive rights of ingress, egress, and support, if necessary, through the common areas are appurtenant to each separate interest of an owner, unless otherwise provided in the declaration. The common areas are subject to these rights [*Civ. Code § 1361(a)*].

In a stock cooperative, and in a planned development with common areas owned by the association, an easement for ingress, egress, and support, if necessary, is appurtenant to each separate interest. The common areas are subject to these easements [*Civ. Code § 1361(b)*].

A homeowner has a cause of action against the homeowners' association for not enforcing the restrictions and allowing another homeowner to encroach in the common area [*Posey v. Leavitt (1991) 229 Cal. App. 3d 1236, 1246-1247, 280 Cal. Rptr. 568]* .

[3] Restrictions on Partition Actions in Condominium Projects

The common areas in a condominium project are undivided and may not be nonjudicially partitioned [*14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal. App. 4th 1396, 1406-1407, 74 Cal. Rptr. 2d 712]* . They may be judicially partitioned only if the owner of a separate interest maintains a partition action as to the entire project as if the owners of all the separate interests in the project were tenants in common in the entire project in the same proportion as their interests in the common areas [*Civ. Code §§ 1358(b), 1359(a), (b)*; *see 14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal. App. 4th 1396, 74 Cal. Rptr. 2d 712]* .

The court may order partition of the common areas only by sale of the entire project and if one of the following is shown: (1) more than three years before the filing of the action, the condominium project was damaged or destroyed, so that a material part was rendered unfit for its prior use, and the condominium project has not been rebuilt or repaired substantially to its state prior to the damage or destruction; (2) three-fourths or more of the project is destroyed or substantially damaged and owners of separate interests holding in the aggregate more than a 50-percent interest in the common areas oppose repair or restoration of the project; (3) the project has been in existence more than 50 years and is obsolete and uneconomical, and owners of separate interests holding in the aggregate more than a 50-percent interest in the common area oppose repair or restoration of the project; or (4) the conditions for such a sale, set forth in the declaration, have been met [*Civ. Code § 1359(b)*].

Except as provided above, the common areas may not be judicially partitioned. These areas must remain undivided, although nothing in *Civ. Code § 1359* prevents partition of a cotenancy in a condominium [*Civ. Code § 1359(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsPurchase & Sale

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12-124 California Forms of Pleading and Practice--Annotated § 124.23

§ 124.23 Management of Common Interest Development

[1] General Powers and Duties of Association

A common interest development must be managed by either an incorporated or an unincorporated association [*Civ. Code § 1363*; *see 10 Cal. Code Reg. §§ 2792.8(a)(8)-(18)* (relevant provisions in governing instrument), 2792.19-2792.21 (governing body); *see also Corp. Code § 25012* ("owners' association" defined for purposes of Corporations Code); *10 Cal. Code Reg. §§ 2792.17* (members' meetings), 2792.18 (members' voting rights)].

In general, the association may exercise the powers granted to an association by *Civ. Code §§ 1350-1374* [*Civ. Code § 1363*; *see also 10 Cal. Code Reg. § 2792.21* (powers and limitations of governing body)]. In addition, unless the governing documents provide otherwise, the association may exercise the powers granted to a nonprofit mutual benefit corporation [*see Corp. Code § 7140*]; however, an unincorporated association may not adopt or use a corporate seal or issue membership certificates [*see Corp. Code § 7313*].

[2] Duties of Board of Directors

Generally, a board of directors will act as the governing board of an association [*see, e.g., Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 503-504, 229 Cal. Rptr. 456, 723 P.2d 573* ; *see also* Code Civ. Proc. § 1365.5 (duties of board)].

If the common interest development has a "common area," the board of directors is required to review, on a quarterly basis, all of the following: (1) a current reconciliation of the association's operating accounts, (2) a current reconciliation of the association's reserve accounts, (3) the current year's actual reserve revenues and expenses compared to the current year's budget, and (4) an income and expense statement for the association's operating and reserve accounts. In addition, the board of directors is required to review the latest account statements prepared by the financial institution in which the association has its operating and reserve accounts [*Civ. Code § 1365.5(a), (h)*; *see Civ. Code § 1365.5(f)* ("reserve accounts" defined)]. These requirements are minimal, however, and the association's governing documents may impose more stringent standards [*Civ. Code § 1365.5(a)*].

[3] Elections and Meetings

[a] Election Procedures

Beginning July 1, 2006, all common interest development associations, both incorporated and unincorporated, are required to adopt rules the purpose of which is to safeguard election procedures [*Civ. Code § 1363.03(a), (j)*]. The adoption procedure must conform to that specified by *Civ. Code § 1357.100 et seq.* [*Civ. Code § 1363.03(a)*], as described in § 124.23[4]. The rules must, among other things (1) ensure that candidates for the board of directors and other association members with a point of view have equal access to association media, newsletters, or Internet web sites during a campaign; (2) ensure access to common area meeting space for all candidates; and (3) specify qualifications for the board and other elected positions, voting qualifications, and a method of selecting independent third parties to serve as voting inspectors [*see Civ. Code § 1363.03(a)*].

Association funds may not be used for campaign purposes in connection with any association board election; nor may they be used for campaign purposes in connection with any other association election except to the extent necessary to comply with the association's duties imposed by law [*Civ. Code § 1363.04(a)*; *see also Civ. Code § 1363.04(b)* ("campaign purposes" defined)].

Notwithstanding any other law or provision of an association's governing documents, an election regarding the following matters must be by secret ballot [*Civ. Code § 1363.03(b)*]:

- Assessments legally requiring a vote;
- Selection and removal of board members;
- Amendments to the governing documents; and
- Granting exclusive use of common area property.

A quorum is necessary only if required by the governing documents, or other provisions of law. If a quorum is required, each ballot received by the inspector of elections will be treated as a member present at a meeting. If the governing documents provide for cumulative voting, the association must allow for cumulative voting using secret ballot procedures [*Civ. Code § 1363.03(b)*].

Not less than 30 days before the voting deadline, the association must mail (first class) or personally deliver to every member the ballots and two pre-addressed envelopes with instructions on how to return ballots. To preserve confidentiality, a voter may not be identified by name, address, or lot, parcel, or unit number on the ballot [*Civ. Code § 1363.03(e)*]. The model for ensuring confidentiality of vote by mail ballots should be that used by California counties [*see Civ. Code § 1363.03(e)(1), (2)* (county procedures)].

All votes must be counted, tabulated, and tallied by the election inspectors in public at a properly noticed open meeting of the board or members. Any candidate or member may witness the vote counting and tabulation. No person, including an association member or management association employee, is permitted to open or otherwise review any ballot before the time and place at which the ballots are counted and tabulated [*Civ. Code § 1363.03(f)*]. The inspector may verify the member's information and signature on the outer envelope before the meeting at which the ballots are tabulated. A secret ballot is irrevocable once it is received by the inspector [*Civ. Code § 1363.03(f)*].

The election results must be promptly reported to the board and recorded in the minutes of the next board meeting. They must also be available for review by the members. Within 15 days of the election, the board must publicize the results in a communication directed to all members [*Civ. Code § 1363.03(g)*].

The sealed ballots must be in the inspector's custody, or at a location designated by the inspectors, until the vote has

been tabulated and the time allowed for challenging the election has expired, at which time custody will be transferred to the association [*Civ. Code § 1363.03(h)*; *see Corp. Code § 7527*]. If there is a recount or other challenge, the inspector must make the ballots available for inspection and review by an association member or his or her authorized representative. Any recount must be conducted in a manner that preserves the confidentiality of the vote [*Civ. Code § 1363.03(h)*]. After the ballots have been transferred to the association, they must be stored in a secure place for no less than one year after the election date [*Civ. Code § 1363.03(i)*].

[b] Conduct of Meetings

Meetings of the membership must be conducted in accordance with a recognized system of parliamentary procedure or parliamentary procedures adopted by the association [*Civ. Code § 1363(d)*]. Notwithstanding any other provision of law, notice of meetings of the members must specify the matters the board intends to present for action by the members, but, except as otherwise provided by law, any proper matter may be presented at the meeting for action [*Civ. Code § 1363(e)*]. Members of the association must have access to association records, including accounting books and records and membership lists, as provided in *Corp. Code § 8330 et seq.* [*Civ. Code § 1363(f)*].

Any congregation of a majority of the members of the board of directors at the same time and place to hear, discuss, or deliberate on any item of business scheduled to be heard by the board, except those matters that may be used in executive session, is considered to be a board meeting, and must be properly noticed [*Civ. Code § 1363.05(j)*]. Unless the bylaws provide for a longer period, members must be given at least four days' notice of the time and place of board meetings. Notice must be given by posting in a prominent place or places within the common area and by mail to any owner who has requested notification of board meetings by mail, at the address requested by the owner. Notice may also be given by mail or delivery to each unit, or by association newsletter. The notice must include the agenda for the meeting [*Civ. Code § 1363.05(f)*]. The board president or any other two board members may call an emergency meeting if there are circumstances that could not have been reasonably foreseen that require immediate attention and possible board action and that, of necessity, make it impracticable to provide notice in the normal fashion [*Civ. Code § 1363.05(g)*].

As a general rule, the board of directors may not discuss or take action on any item at a non-emergency meeting unless the item was included in the agenda that was included in the notice of the meeting. The rule applies to the board only; residents who are not on the board may nonetheless speak on issues that are not part of the agenda [Bus. & Prof. Code § 1363.05(i)(1); *but see* Bus. & Prof. Code § 1363.05(i)(2), (3)]. The board is allowed to act on a non-agenda item if it is determined to be an unanticipated emergency situation requiring immediate attention and possible action by the board. Non-agenda items also may be considered on a vote of two-thirds of the board or, if less than two-thirds are present, a unanimous vote of those board members present; or when an item was continued from a previous meeting as long as that meeting was within the last 30 days [Bus. & Prof. Code § 1363.05(i)(4)].

Any member of the association may attend meetings of the board of directors of the association, except when the board adjourns to executive session to consider litigation, matters that relate to the formation of contracts with third parties, member discipline, personnel matters, or to meet with a member, on the member's request, regarding the member's payment of assessments [*Civ. Code § 1363.05(b)*; *see Civ. Code §§ 1367, 1367.1*]. Members must also be permitted to speak at any association or board of directors meeting, except when the board meets in executive session. To this end, the board must establish a reasonable time limit for members to speak at or before meetings [*Civ. Code § 1363.05(h)*]. The board must meet in executive session if requested to do so by a member who may be subject to fine, penalty, or other form of discipline. The member is entitled to attend [*Civ. Code §§ 1363(g), 1363.05(b)*]. Any matter discussed in executive session must be generally noted in the minutes of the immediately following meeting open to the entire membership [*Civ. Code § 1363.05(c)*].

Whenever two or more associations have consolidated any of their functions under a joint neighborhood association or similar organization, members of each participating association must be entitled to attend all meetings of the joint

association other than executive sessions. Further, the members must be given reasonable opportunity for participation in the meetings, and must be entitled to the same access to the joint association's records as they are to their participating association's records [*Civ. Code § 1363(i)*].

The minutes or summary of minutes of any meeting of the board of directors, other than executive session, must be available to members within 30 days of the meeting. The minutes must be distributed to any member on request and reimbursement of cost. Members must be notified of the right to obtain copies of the minutes [*Civ. Code § 1363.05(d), (e)*].

[c] Relief for Violation of Election Procedures and Open Meeting Requirements

On or after July 1, 2006, an association member may bring a civil action against the association for declaratory or equitable relief for a violation of rules related to association election procedures and open meeting requirements [*Civ. Code § 1363.09(a)*; 2005 Stats., ch. 450, § 7 (operative date); *see Civ. Code §§ 1363.03 et seq.*]. Relief may include, but not be limited to, injunctive relief, restitution, or a combination of both. The action must be brought within one year of the date the cause of action accrues. If the court finds that the election procedures, or the procedures governing the board's power to adopt and change operating rules, have been violated, the court may void any election results [*Civ. Code § 1363.09(a)*; *see Civ. Code §§ 1363.03, 1363.04*; *see also Civ. Code § 1357.100 et seq.*]. A member who prevails is entitled to reasonable attorney's fees and court costs. The court may also impose a civil penalty of up to $500 for each violation, except each identical violation will be subject to only one penalty if the violation equally affects each member. A prevailing association is not entitled to recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation [*Civ. Code § 1363.09(b)*].

The following actions may be brought in small claims court if the amount of the demand does not exceed the court's jurisdictional limit [*Civ. Code § 1363.09(c)*]:

- Access to association resources by a candidate or member advocating a point of view [*see Civ. Code § 1363.03(a)(1), (2)*].

- The receipt of a ballot by a member, or the counting, tabulation, or reporting of, or access to, ballots for inspection and review after tabulation [*see Civ. Code § 1363.03(e)-(i)*].

[4] Operating Rules

The board of directors of a homeowners' association has the power to adopt operating rules to govern the operation of a common interest development [*see, e.g., Civ. Code §§ 1351(j), 1360.5, 1363(g)*; *10 Cal. Code Reg. § 2792.21(a)*]. However, before January 1, 2004, there was no established procedure for doing so. Thus, specified types of rule changes commenced on or after that date are now subject to a statutory procedure [*Civ. Code § 1357.120*]. However, the advent of the mandated operating rule change procedure does not affect the validity of a rule change commenced before January 1, 2004 [*Civ. Code § 1357.150(b)*].

An "operating rule" is a regulation adopted by the board of directors that generally applies to the management and operation of the common interest development or the conduct of the association's business affairs [*Civ. Code § 1357.100(a)*]. To be valid and enforceable, an operating rule must satisfy specified standards [*see Civ. Code § 1357.110*].

When a rule change relates to one or more specified subjects, such as use of common areas or separate interests [*see Civ. Code § 1357.120(a)*], the board must give notice to association members who then are afforded an opportunity to reverse the change [*see Civ. Code §§ 1357.130(c), 1357.140*]. The board is not required to follow this procedure if it determines that an immediate rule change is required to address an emergency [*see Civ. Code § 1357.130(d)*].

[5] Standing to Sue and Be Sued

[a] Right of Association

Assuming the development has a common area, as defined by *Civ. Code § 1351(b)* [*see Civ. Code § 1374*], the association has standing to institute, defend, settle, or intervene in litigation, arbitration, mediation, or administrative proceedings in its own name as the real party in interest and without joining with it the individual owners of the common interest development, in matters pertaining to (1) enforcement of its governing documents; (2) damage to the common areas; (3) damage to the separate interests that the association is obligated to maintain or repair; and (4) damage to the separate interests that arises out of, or is integrally related to, damage to the common areas or separate interests that the association is obligated to maintain or repair [*Civ. Code § 1368.3*].

The policy behind the statutory right of the homeowners' association to bring an action to enforce the covenants, conditions, and restrictions requires that declaratory judgments brought in such litigation are res judicata and binding on individual owners, including those who do not join in the litigation [*Duffey v. Superior Court (1992) 3 Cal. App. 4th 425, 433-434, 4 Cal. Rptr. 2d 334]* .

[b] Parties to Suits

When a homeowners' association brings an action for declaratory relief as to whether an improvement is barred by the covenants, conditions, and restrictions (CC&Rs), objecting neighbors are not proper defendants because the homeowners' association does not have a cause of action against them. Objecting neighbors, however, may join an enforcement lawsuit under the provisions of *Civ. Code § 1354*, which allows enforcement by owners as well as the association [*Duffey v. Superior Court (1992) 3 Cal. App. 4th 425, 428-430, 432-433, 4 Cal. Rptr. 2d 334* ; *see § 124.16[2]*].

[6] Comparative Fault

In any action maintained by an association for harm to the common areas, harm to separate interests that the association is obligated to repair, or harm to separate interests that arises out of or is integrally related to harm to the common area or separate interests that the association is obligated to repair, damages recovered by the association must be reduced by the amount of damages allocated to the association or its managing agents in direct proportion to their percentage of fault based on principles of comparative fault. In such an action, the comparative fault of the association or its managing agents may be raised by way of defense, but comparative fault may not be the basis for any cross action or separate action against the association or its managing agents for contribution or implied indemnity, when the only harm was sustained by the association or its members. It is the intent of the Legislature in enacting this provision to require that comparative fault must be pleaded as an affirmative defense rather than a separate cause of action, when the only harm was sustained by the association or its members [*Civ. Code § 1368.4(a)*].

In any such action, the defendant or cross defendant may allege and prove the comparative fault of the association or its managing agents as an offset to the defendant's liability even if the association is not a party to the action or is no longer a party, whether by reason of settlement, dismissal, or otherwise [*Civ. Code § 1368.4(b)*].

These provisions do not affect joint liability or the liability of the association or its managing agents for any act or omission that causes harm to another [*Civ. Code § 1368.4(d)*].

[7] Penalties

If an association adopts or has adopted a policy imposing any monetary penalty, including any fee, on any association member for a violation of the governing documents or rules of the association, including any monetary penalty related to the activities of a guest or invitee of a member, the board of directors must adopt and distribute to each member, by

personal delivery or first-class mail, a schedule of the monetary penalties that may be assessed for those violations. The schedule must be in accordance with the authorization for member discipline contained in the governing documents. The board of directors is not required to distribute any additional schedules of monetary penalties unless changes are made in schedules previously distributed [*Civ. Code § 1363(g)*].

When the board of directors is to meet to consider or impose discipline on a member, the board must notify the member in writing, by either personal delivery or first-class mail, at least 10 days before the meeting. The minimum requirements for the notice are (1) the date, time, and place of the meeting, (2) the nature of the alleged violation for which the member may be disciplined, and (3) a statement that the member has a right to attend and may address the board at the meeting. The board must meet in executive session if the member being disciplined so requests. If the board imposes discipline on the member, the board must notify the member in writing by either personal delivery or first-class mail within 15 days following the action. Any disciplinary action that is imposed will be ineffective unless the board has fulfilled these requirements [*Civ. Code § 1363(h)*].

A monetary penalty imposed by the association as a disciplinary measure for a member's failure to comply with the governing documents, except for late payment of regular assessments, may not be characterized or treated in the governing instruments as an assessment that may become a lien against the member's subdivision interest enforceable by foreclosure and sale of the member's interest [*Civ. Code § 1367(c)*]. However, the governing documents may authorize the creation of a lien on an owner's separate interest to secure a monetary penalty imposed as a means of reimbursing the association for its costs incurred in repairing damage to common areas and facilities for which the member or the member's guests or tenants were responsible. Such a lien may be enforced by foreclosure and sale of the owner's separate interest [*Civ. Code § 1367(b)*]. For discussion of enforcing assessment liens, see *§ 124.23[15][f]*.

[8] Maintenance of Common Interest Development

Unless otherwise provided in the declaration, the association is responsible for repairing, replacing, or maintaining the common areas, other than exclusive-use common areas [*Civ. Code § 1364(a)*; *see 10 Cal. Code Reg. § 2792.21(a)(4), (7)*]. The owner of each separate interest is responsible for maintaining that separate interest and any exclusive-use common areas appurtenant to the separate interest [*Civ. Code § 1364(a)*].

In a community apartment project, condominium project, or stock cooperative, unless otherwise provided in the declaration, the association is responsible for the repair and maintenance of the common area occasioned by the presence of wood-destroying pests or organisms. In a planned development, however, each owner of a separate interest is responsible for this type of repair and maintenance for his or her own separate interest, unless otherwise provided in the declaration or unless responsibility is delegated to the association by approval of the majority of the members of the association [*Civ. Code § 1364(b)*]. In any event, the association may cause the temporary, summary removal of any occupant of the development as is necessary for prompt, effective treatment of wood-destroying pests or organisms [*Civ. Code § 1364(d)(1)*; *see Civ. Code § 1364(d)(2), (3)* (required notice); *see also Civ. Code § 1364(e)* ("occupant" defined)]. The cost of relocation, however, is borne by the owner of the separate interest affected [*Civ. Code § 1364(c)*].

When a duly constituted association board, on reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under *Civ. Code § 1364* and the covenants and restrictions to select among means for discharging an obligation to maintain and repair the development's common areas, courts should defer to the board's authority and presumed expertise. This rule applies, regardless of the association's corporate status, when owners in common interest developments seek to litigate ordinary maintenance decisions entrusted to the board's discretion [*Lamden v. La Jolla Shores Clubdominium Homeowners Assn. (1999) 21 Cal. 4th 249, 252, 265, 87 Cal. Rptr. 2d 237, 980 P.2d 940]* .

This rule was applied in a case where the court rejected a challenge by a condominium owner to an amendment to the CC&Rs allowing ground floor condominium owners to encroach on a small strip of land outside their units in order to

protect their privacy [*Haley v. Casa Del Rey Homeowners Assn. (2007) 153 Cal. App. 4th 863, 875, 63 Cal. Rptr. 3d 514]* . *Haley* concluded that *Lamden* reasonably stands for the proposition that a homeowner's association has discretion to select among means for remedying violations of the CC&Rs without resorting to expensive and time-consuming litigation, and that courts should defer to that discretion [*Haley v. Casa Del Rey Homeowners Assn. (2007) 153 Cal. App. 4th 863, 875, 63 Cal. Rptr. 3d 514]* . However, when the CC&Rs for a residential development required all trees to be trimmed in order to preserve homeowners' views, the homeowners association's exception for palm trees was not entitled to judicial deference. The association board did not have the discretion to exclude view-blocking trees or to define what was meant by "view" in a fashion that rendered the CC&R provision meaningless [*Ekstrom v. Marquesa at Monarch Beach Homeowners Association (2008) 168 Cal. App. 4th 1111, 1124-1125, 86 Cal. Rptr. 3d 145*].

Notwithstanding the provisions of the declaration, the owner of a separate interest is entitled to reasonable access to the common areas for the purpose of maintaining the internal and external telephone wiring made part of the exclusive-use common areas of a separate interest pursuant to *Civ. Code § 1351(i)(2)* [*Civ. Code § 1364(f)*; *see § 124.11[3]*]. The access is subject to the consent of the association, whose approval must not be unreasonably withheld. This approval may include the association's approval of telephone wiring on the exterior of the common areas, and other conditions as the association determines reasonable [*Civ. Code § 1364(f)*].

[9] Financial Statements

Financial statements must be prepared by the association and distributed to all its members. Detailed financial reporting requirements are required by statute, although the governing documents may impose more stringent standards [*Civ. Code § 1365*; *see 10 Cal. Code Reg. § 2792.22* (financial and related information regularly prepared and distributed by governing body)].

A summary financial statement may be distributed to the members, but a member has a right to obtain a complete financial statement on request [*Civ. Code § 1365(d)*].

Statutes prescribe the format of required disclosures, including a disclosure document index and summary [*see Civ. Code §§ 1363.005, 1365.2.5*], and allow disclosures to be made in electronic form, including by e-mail [*Civ. Code § 1350.7*].

[10] Availability of Books, Records, and Minutes

In general, association members are entitled to the same rights to access association records as those afforded to members of other nonprofit mutual benefit corporations by *Corp. Code §§ 8330-8338* [*Civ. Code § 1363(f)*; *see 10 Cal. Code Reg. § 2792.23*]. However, beginning July 1, 2006 [*see Civ. Code § 1365.2(n)*], the association must make available "association records" [*see Civ. Code § 1365.2(a)(1)*] and "enhanced association records" [*see Civ. Code § 1365.2(a)(2)*] for inspection and copying by a member, or his or her designated representative, in accordance with statutory timeframes [*Civ. Code § 1365.2(b)(1)*; *see Civ. Code § 1365.2(i), (j)*]. As of that date, *Corp. Code §§ 8330* and *8333* do not apply to the extent that they are inconsistent with *Civ. Code § 1365.2* [*Civ. Code § 1365.2(m)*].

The right of members to inspect records applies to any community service organization or similar entity that is related to the association [*Civ. Code § 1365.2(g)*]. In general, the right does not apply to any common interest development in which the separate interests are still being marketed by the subdivider and the subdivider, and any other person who receives direct or indirect compensation from the subdivider, comprise a majority of the association's board of directors [*Civ. Code § 1365.2(m)*].

The association may withhold or redact information from association records if the information or its release could lead to identify theft or fraud, violate a privilege afforded by law, or violate an individual member's privacy [*Civ. Code § 1365.2(d)(1)(A)-(D)*].

Association records must be made available for the current fiscal year and for each of the previous two fiscal years. Minutes of member and board meetings must be permanently made available. If a committee has decision-making authority, the minutes of its meetings must be made available beginning January 1, 2007. Thereafter, they must be made permanently available [*Civ. Code § 1365.2(i)*]. The association is not liable for failing to retain records that were created before January 1, 2006 [*Civ. Code § 1365.2*(k)].

Records must be provided to a requesting member within the following timeframes [*Civ. Code § 1365.2(j)*]:

- Association records prepared during the current fiscal year, within 10 business days following receipt of the request.

- Association records prepared during the previous two fiscal years, within 30 calendar days following receipt of the request.

- Any record of statement available pursuant to *Civ. Code § 1365* or *1368*, within the timeframe specified in those statutes.

- Minutes of member and board meetings, within 30 days of the meeting [*see Civ. Code § 1363.05(d)*].

- Minutes of meetings of committees with decision-making authority for meetings commencing on or after January 1, 2007, within 15 calendar days following approval.

- Membership list, within five business days, unless the association provides a reasonable alternative [*see Corp. Code § 8330*].

The association has the right to injunctive relief and actual damages for misuse of requested information, including the right to attorney's fees if successful [*Civ. Code § 1365.2(e)* (operative July 1, 2006)].

A member may bring an action to enforce his or her right to inspect and copy association records. If the court finds that access was unreasonably withheld, the member is entitled to reasonable costs and expenses, including attorney's fees, and the court may assess a civil penalty of up to $500 for the denial of each separate written request [*Civ. Code § 1365.2(f)* (operative July 1, 2006)].

[11] Liability of Association

The association owes a fiduciary duty of good faith towards its members in its actions. In one case, a homeowner was able to state a cause of action against the association for approving the construction of a neighbor's fence in violation of the declaration of restrictions. The court also held that clauses in the declaration exculpating the association from liability for any such approvals were invalid as contrary to public policy [*Cohen v. Kite Hill Community Assn. (1983) 142 Cal. App. 3d 642, 650-655, 191 Cal. Rptr. 209]* .

However, in another case, the court of appeal upheld an exculpatory clause in the declaration of restrictions as not violative of public policy. In this case, a homeowner brought an action against the association for water damage to her condominium unit alleging that the association's failure to maintain and repair the central plumbing caused the water damage. The exculpatory clause in the declaration purported to exclude the association from liability for damage from water leaks unless caused by the gross negligence of the association. The court held that the exculpatory clause was not against public policy and that the association could contractually shift the risk of loss to the condominium owner [*Franklin v. Marie Antoinette Condominium Owners Ass'n (1993) 19 Cal. App. 4th 824, 833-834, 23 Cal. Rptr. 2d 744]* . The court noted that its enforcement of the exculpatory clause did not relieve the condominium association of its

statutory duty to maintain and repair the common area [*Franklin v. Marie Antoinette Condominium Owners Ass'n (1993) 19 Cal. App. 4th 824, 832, 23 Cal. Rptr. 2d 744* ; *see Civ. Code § 1364(a)*].

In maintaining the common areas of a common interest development, the association functions as a landlord. As such, the association has a duty to exercise due care for the residents' safety in those areas under the association's control, and is subject to liability in negligence for failure to do so. Thus, for example, when an association was aware of the need for additional lighting that could have aided in deterring criminal conduct, was notified that crimes were being committed against the development's residents, and knew that one resident's unit had in fact been recently burglarized, the association was subject to tort liability when the latter resident was subsequently attacked in her unit at night [*Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 498, 229 Cal. Rptr. 456, 723 P.2d 573]* . However, a homeowners' association and the security company it hired to enforce community rules and regulations owed no duty to either eject from the community or arrest a resident with a history of drunk driving who crashed a car while intoxicated and killed the plaintiff's father. The foreseeability of the injury and the minimal connection between the defendants and the individuals involved in the crash were outweighed by the defendants' lack of connection to the injury-producing event and the burden of complying with the proposed duties [*Titus v. Canyon Lake Property Owners Assn. (2004) 118 Cal. App. 4th 906, 916, 13 Cal. Rptr. 3d 807]* .

[12] Liability of Directors

[a] Fiduciary Duty

The directors of the management body are fiduciaries who are required to exercise their powers in accordance with the duties imposed by the Corporations Code [*Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 513, 229 Cal. Rptr. 456, 723 P.2d 573* ; *Raven's Cove Townhomes, Inc. v. Knuppe Development Co. (1981) 114 Cal. App. 3d 783, 799, 171 Cal. Rptr. 334]* . The directors are thus required to exercise due care and undivided loyalty for the interests of the association [*Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 513, 503, 229 Cal. Rptr. 456, 723 P.2d 573* ; *see Corp. Code §§ 309(a), 7231(a)*]. The fiduciary duty is to each member of the association in the capacity of shareholder, and not as a landlord to a tenant (even though the association itself functions as landlord) [*Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 513-514, 503, 229 Cal. Rptr. 456, 723 P.2d 573]* . For example, the directors may be held liable for breach of their fiduciary duties to members to maintain adequate reserves for repair and replacement. And, when the initial directors are the developers, they must avoid making decisions for the homeowners' association that benefit the developer's interests and not those of the association members [*Raven's Cove Townhomes, Inc. v. Knuppe Development Co. (1981) 114 Cal. App. 3d 783, 799-801, 171 Cal. Rptr. 334]* . On the other hand, the directors may not be held to have breached a fiduciary duty for failing to provide a member, in that member's capacity as tenant, with adequate lighting in the common grounds near the member's unit [*Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 514, 503, 229 Cal. Rptr. 456, 723 P.2d 573]* .

[b] Torts

The directors may not be held vicariously liable for any torts of the association in which they do not participate [*Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 504, 229 Cal. Rptr. 456, 723 P.2d 573]* . However, a plaintiff may maintain a tort claim against a director in the director's personal capacity if that director specifically authorized, directed, or participated in the tort, or if that director specifically knew or reasonably should have known that some hazardous condition or activity under his or her control could injure the plaintiff but the director negligently failed to take or order appropriate action to avoid the harm [*Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 508, 229 Cal. Rptr. 456, 723 P.2d 573]* . Thus, for example, a director has been held liable in tort to a resident who was attacked in her unlit unit at night, when the director specifically knew that common grounds were inadequately lit and that crimes had been committed as a result, yet failed to take action to provide adequate lighting and directed the resident to remove additional lighting that she had provided [*Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 509, 229 Cal. Rptr. 456, 723 P.2d 573]* .

When a homeowner's association sues a developer for construction defects, the developer may not bring an action for equitable indemnification against the directors of the association. Such an action would not be equitable. The acts of the directors are the acts of the association and can be raised by the developer as comparative negligence or avoidable consequences [*Jaffe v. Huxley Architecture (1988) 200 Cal. App. 3d 1188, 1190-1192, 246 Cal. Rptr. 432]* .

[13] Liability of Volunteer Directors

[a] Immunity

A volunteer officer or volunteer director of an association, as defined in *Civ. Code § 1351(a)* [*see § 124.11[3]*], that manages an exclusively residential common interest development is not personally liable, in excess of the required insurance coverage, to any person who suffers bodily injury, including, but not limited to, emotional distress or wrongful death, as a result of the tortious act or omission of the volunteer officer or volunteer director, if all of the following criteria are met [*Civ. Code § 1365.7(a)*]:

(1) The act or omission was performed within the scope of the officer's or director's association duties.

(2) The act or omission was performed in good faith.

(3) The act or omission was not willful, wanton, or grossly negligent.

(4) The association maintained and had in effect, at the time the act or omission occurred and at the time a claim is made, one or more policies of insurance that included coverage for general liability of the association and individual liability of the officers and directors of the association for negligent acts or omissions in that capacity, provided that both types of coverage are in the following minimum amounts:

(a) At least $500,000 if the common interest development consists of 100 or fewer separate interests.

(b) At least $1 million if the common interest development consists of more than 100 separate interests.

For purposes of (1), *above*, the scope of the officer's or director's association duties includes, but is not limited to, whether to conduct an investigation of the development for latent deficiencies before the applicable statute of limitations expires, and whether to commence a civil action against the builder for design or construction defects [*Civ. Code § 1365.7(f)(1)*].

Nothing in *Civ. Code § 1365.7* shall be construed to limit the liability of the association for its negligent act or omission or for any negligent act or omission of an officer or director of the association [*Civ. Code § 1365.7(d)*].

Civ. Code § 1365.7 does not provide immunity for homeowners, who as tenants in common have a nondelegable duty to control and manage their property. By its terms, § 1365.7 is applicable only to volunteer directors and officers [*Ruoff v. Harbor Creek Community Ass'n (1992) 10 Cal. App. 4th 1624, 1629, 13 Cal. Rptr. 2d 755]* .

[b] "Volunteer" Officer or Director

The payment of actual expenses incurred by a director or officer in the execution of the duties of that position does not affect the director's or officer's status as a volunteer [*Civ. Code § 1365.7(b)*]. However, an officer or director who, at the time of the act or omission, was a declarant as defined in *Civ. Code § 1351(g)* [*see § 124.11[3]*] or received either direct

or indirect compensation as an employee from the declarant or from a financial institution that purchased a separate interest, as defined in *Civ. Code § 1351*(*l*) [*see § 124.11[3]*], at a judicial or nonjudicial foreclosure of a mortgage or deed of trust on real property, is not a volunteer [*Civ. Code § 1365.7(c)*].

Civ. Code § 1365.7 only applies to a volunteer officer or volunteer director who is a tenant of a separate interest in the common interest development or who is an owner of no more than two separate interests in that development [*Civ. Code § 1365.7(e)*].

[14] Liability of Separate Interest Owners

If an association is a nonprofit mutual benefit corporation, as most are in California, the owners of separate interests, as members of the corporation, are not personally liable for the association's debts, liabilities, or obligations [*see Corp. Code § 7350(a)*]. Thus, for example, a construction contractor that contracts with the association for work to be done is barred from bring suit against individual separate interest owners because the owners are not parties to the construction contract. Rather, the contractor's cause of action is against the association itself which, in turn, will look to the separate interest owners, if necessary, to pay its debts [*ECC Construction v. Ganson (2000) 82 Cal. App. 4th 572, 575-576, 98 Cal. Rptr. 2d 292]* .

[15] Regular and Special Assessments

[a] In General

Except as provided in *Civ. Code § 1366*, the association must levy regular and special assessments sufficient to perform its obligations under its governing documents and under *Civ. Code §§ 1350-1374* [*Civ. Code § 1366(a)*; *see 10 Cal. Code Reg. §§ 2792.8(a)(5), (6)* (contents of governing instrument), 2792.16 (assessments); *see also 10 Cal. Code Reg. § 2792.9* (subdivider's payment of assessments during early stages of ownership and operation)]. However, the association must not impose or collect an assessment or a fee that exceeds the amount necessary for the purpose or purposes for which it is levied [*Civ. Code § 1366.1*; *see Foothills Townhome Assn. v. Christiansen (1998) 65 Cal. App. 4th 688, 693-694, 76 Cal. Rptr. 2d 516* (under § 1366.1, assessment may be levied to replenish association reserve funds depleted to pay for unanticipated repairs)]. Annual increases in regular assessments for any fiscal year may not be imposed unless the board has complied with the distribution of financial statements requirement [*see Civ. Code § 1365*] or has obtained consent of a majority of the owners, constituting a quorum, at a meeting or election of the association [*Civ. Code § 1366(a)*].

The declaration may provide for unequal ownership by condominium owners of common areas as tenants in common. As a result, no statute or regulation prohibits unequal assessments based on greater voting power [*see Cebular v. Cooper Arms Homeowners Assn. (2006) 142 Cal. App. 4th 106, 121, 47 Cal. Rptr. 3d 666* ; *see also Civ. Code § 1362* (ownership of common areas as tenants in common)]. Thus, provisions in a condominium association's declarations and bylaws under which some owners held more voting shares than others and the amount of assessments for common areas and other purposes was tied to the number of voting shares held did not violate California law [*Cebular v. Cooper Arms Homeowners Assn. (2006) 142 Cal. App. 4th 106, 121-122, 47 Cal. Rptr. 3d 666]* .

The power of the board of directors to make assessments may be further limited by the governing documents of the association. Notwithstanding more restrictive limitations, the board of directors may not impose a regular assessment that is more than 20 percent greater than the regular assessment for the association's preceding fiscal year or impose special assessments that in the aggregate exceed five percent of the budgeted gross expenses of the association for that fiscal year, without the approval of owners, constituting a quorum, casting a majority of the votes at a meeting or election of the association [*Civ. Code § 1366(b)*; *see Corp. Code §§ 7510-7527, 7613*]. A quorum is more than 50 percent of the owners of the association [*Civ. Code § 1366(b)*].

However, the percentage limits do not apply when an assessment is necessary for an emergency situation, defined as one of the following [*Civ. Code § 1366(b)*]:

- An extraordinary expense required by an order of a court [*see James F. O'Toole Co., Inc. v. Los Angeles Kingsbury Court Owners Assn. (2005) 126 Cal. App. 4th 549, 555, 23 Cal. Rptr. 3d 894* (trial court properly ordered homeowners' association to levy special assessment to pay civil judgment arising out of extraordinary and unforeseeable expense necessarily incurred to repair common areas following Northridge earthquake)].

- An extraordinary expense necessary to repair or maintain the development, or any part of it for which the association is responsible, when a threat to personal safety on the property is discovered.

- An extraordinary expense necessary to repair or maintain the development, or any part of it for which the association is responsible, when the expense could not have been reasonably foreseen by the board in its operating budget required by *Civ. Code § 1365*. Prior to making an assessment to cover such an unforeseen expense, the board must pass a resolution containing written findings as to the necessity of the extraordinary expense involved and why the expense was not or could not have been reasonably foreseen in the budgeting process, and the resolution must be distributed to the members with the notice of assessment.

Regular and special assessments levied pursuant to the governing documents are delinquent 15 days after they become due [*Civ. Code § 1366(d)*]. If an assessment is delinquent, the association may recover all of the following [*Civ. Code § 1366(e)(1)-(3)*]:

- Reasonable costs incurred in collecting the delinquent assessment, including reasonable attorney's fees [*see Brown v. Professional Community Management, Inc. (2005) 127 Cal. App. 4th 532, 539, 25 Cal. Rptr. 3d 617* (homeowners' association properly passed on to delinquent homeowners charges assessed by association's management company for collection services)];

- A late charge not exceeding 10 percent of the delinquent assessment or $10, whichever is greater, unless the declaration specifies a late charge in a smaller amount, in which case any late charge imposed may not exceed the amount specified in the declaration; and

- Interest on all sums imposed at an annual rate not exceeding 12 percent, commencing 30 days after the assessment becomes due, unless the declaration specifies a lesser rate, in which case the lesser rate applies.

The association must provide notice by first-class mail to the owners of the separate interests of any increase in the regular or special assessments of the association, not less than 30 nor more than 60 days prior to the increased assessment becoming due [*Civ. Code § 1366(d)*].

To ensure that it is provided with information about the subsequent purchaser of a separate interest at a foreclosure sale, the association should file with the county recorder a request that a mortgagee, trustee, or other person authorized to record a notice of default, mail to the association a copy of any trustee's deed resulting from the default sale of a separate interest. The association will then be able to begin collecting assessments from the new owner of the separate interest [*see Civ. Code § 2924b(f)*]. For a form of request, *see California Legal Forms, Ch. 34, Condominiums, § 34.248* (Matthew Bender).

An association is exempt from the interest-rate limitations imposed by Cal. Const., art. XV [*Civ. Code § 1366(f)*].

[b] Collecting or Securing Debts for Delinquent Assessments Arising on or After January 1, 2006

An association is precluded from resorting to judicial or nonjudicial foreclosure proceedings to collect on a debt arising from delinquent regular or special assessments when the debt arose on or after January 1, 2006, and the delinquent amount is less than $1,800, excluding accelerated assessments, late charges, fees and costs of collection, attorney's fees, or interest [*Civ. Code § 1367.4(a), (b)*; *but see Civ. Code § 1367.4(d)* (limitation on foreclosure does not apply to enforcement of assessments on time-share interests and interests owned by developers)]. Instead, the association has the following options [*Civ. Code § 1367.4(b)(1)-(3)*]:

- File a civil action in small claims court;

- Record a lien on the owner's separate interest and delay foreclosure until the amount of delinquent assessments, exclusive of accelerated assessments, late charges, fees and costs of collection, attorney's fees, or interest, equals or exceeds $1,800 or the assessments are more than 12 months delinquent; or

- Any other manner provided by law, except for judicial or nonjudicial foreclosure.

If an association chooses to file an action in small claims court, the amount that may be recovered may not exceed the court's jurisdictional limit and will be the sum of (1) the amount owed as of the date the complaint is filed, and (2) at the court's discretion, an additional amount equal to the amount owed for the period from the date the complaint is filed until the judgment is satisfied, including accruing unpaid assessments, reasonable late charges, fees and collection costs, attorney's fees, and interest, up to the court's jurisdictional limit [*Civ. Code § 1367.4(b)(1)(A), (B)*; *see* Code Civ. Proc. § 116.20]. The association may be represented in small claims court by an agent, a management company representative, or a bookkeeper [*Code Civ. Proc. § 116.540(i)*].

If an association chooses to record a lien and delay foreclosure, it must, before recording the lien, offer the owner and, if the offer is accepted, participate in the association's dispute resolution process [*Civ. Code § 1367.4(b)(2)*; *see* Civ. Code § 1368.810 et seq.; *see also § 124.17[1]*].

An association that seeks to collect on a debt arising from delinquent regular or special assessments when the debt arose on or after January 1, 2006, and the delinquent amount is at least $1,800, excluding accelerated assessments, late charges, fees and costs of collection, attorney's fees, or interest, may use any option provided by law, including judicial and nonjudicial foreclosure, subject to some conditions, which are described when appropriate in § 124.23[15][c] and [f] [*Civ. Code § 1367.4(c)*].

[c] Assessment Liens Recorded on or After January 1, 2003

The discussion in this subsection applies to assessment liens recorded on or after January 1, 2003 [*see Civ. Code § 1367.1(m)*].

A regular or special assessment and any late charges, reasonable fees, and costs of collection, and any reasonable attorney's fees and interest, becomes a debt of a separate interest owner at the time the assessment or other sums are levied [*Civ. Code § 1367.1(a)*]. If the governing documents so provide, a monetary charge imposed by the association as a means of reimbursing itself for costs incurred in repairing damage to common areas and facilities for which a member or the member's guests or tenants were responsible may also become a lien on the owner's unit [*Civ. Code § 1367.1(d)*; *but see Civ. Code § 1367.1(e)* (excludes monetary penalty imposed as disciplinary measure)].

At least 30 days before recording a lien on the owner's separate interest to collect a past due debt, the association must notify the owner of record in writing by certified mail. The contents of the notice are prescribed by statute [*Civ. Code § 1367.1(a)*; *see Civ. Code § 1367.1(k)* (owner's right to request mailing to secondary address)].

Before recording a lien for delinquent assessments, the association must offer the owner and, if the owner accepts, participate in dispute resolution pursuant to the association's "meet and confer" program [*Civ. Code § 1367.1(c)(1)(A)*; *see Civ. Code § 1363.810 et seq.*; *see also § 124.17[1]*]. Before initiating an action to foreclose an assessment lien, the association must once again offer the owner, and if the owner accepts, participate in dispute resolution pursuant either to the association's "meet and confer" program, or alternative dispute resolution with a neutral third party [*Civ. Code §§ 1367.1(c)(1)(B), 1367.4(c)(1)*; *see* Civ. Code § 1363.510 et seq.; *see also § 124.17[2]*]. The decision to pursue either resolution process is the owner's, except that binding arbitration is not available if the association intends to judicially foreclose the lien [*Civ. Code §§ 1367.1(c)(1)(B), 1367.4(c)(1)*]. If it is determined through dispute resolution process that the association recorded the lien in error, the association must promptly reverse all late charges, fees, interest, attorney's fees, collection costs, costs imposed for giving the owner notice of its intention to record the lien, and costs to record and release the lien, and pay all costs associated with the dispute resolution or alternative dispute resolution [*Civ. Code § 1367.5*].

For liens recorded on or after January 1, 2006, the decision to record a delinquent assessment lien can only be made by the board of directors, who may not delegate the decision to an agent of the association. Approval of the decision to record must be approved by a majority of the board members at an open meeting, and the vote must be recorded in the minutes [*Civ. Code § 1367.1(c)(2)*].

To establish the lien, the association must record a notice of delinquent assessment in the county where the owner's unit is located. The notice must state the following [*Civ. Code § 1367.1(d)*]:

- The amount of the assessment and other sums imposed;

- A legal description of the owner's separate interest in the development against which the assessment and other sums are levied;

- The name of the record owner of the separate interest in the development against which the lien is imposed; and

- If nonjudicial foreclosure is a possibility, the name and address of the trustee authorized by the association to enforce the lien by sale.

The notice of delinquent assessment must be signed by the person designated in the declaration or by the association for that purpose. If no one is designated, the president of the association must sign. A copy of the recorded notice must be mailed by certified mail to every person whose name is shown as an owner of the separate interest in the association's records. The mailing must take place no later than 10 calendar days after the notice was recorded [*Civ. Code § 1367.1(d)*].

An association may not voluntarily assign or pledge its right to collect payments or assessments, or to enforce or foreclose a lien to a third party, except when the assignment or pledge is made to a federally or state chartered or licensed financial institution as security for a loan obtained by the association. However, this does not affect the association's right or ability to assign any unpaid obligations of a former member to a third party for collection purposes [*Civ. Code § 1367.1(g)*].

[d] Assessment Liens Recorded on or After January 1, 1986, and Before January 1, 2003

The discussion in this subsection applies to assessment liens recorded on or after January 1, 1986, and before January 1, 2003 [*see Civ. Code § 1367(g)*].

A regular or special assessment and any late charges, reasonable costs of collection, and interest are a debt of the owner of the unit at the time the assessment or other sums are levied. The association may place a lien on an owner's unit to secure the amount of a regular or special assessment, plus any costs of collection, late charges, and interest assessed [*Civ. Code § 1367(a)*]. If the governing documents so provide, a monetary charge imposed by the association as a means of reimbursing itself for costs incurred in repairing damage to common areas and facilities for which a member or the member's guests or tenants were responsible may also become a lien on the owner's unit [*Civ. Code § 1367(b)*; *but see Civ. Code § 1367(c)* (excludes monetary penalty imposed as disciplinary measure)].

Before the association can place a lien on an owner's unit for a past due debt for a regular or special assessment, the owner must be notified by certified mail of the association's fee and penalty procedures, and provided with an itemized statement of the charges owed. The contents of the statement are prescribed by statute [*Civ. Code § 1367(a)*].

To establish the lien, the association must record a notice of delinquent assessment in the county where the owner's unit is located. The contents of the notice are prescribed by statute [*Civ. Code § 1367(b)*]. The notice must be signed by the person designated in the declaration or by the association for that purpose, or if no one is designated, by the president of the association. It must then be mailed to all record owners of the owner's interest. The mailing requirements are the same as those that apply when mailing a notice of default in conjunction with enforcing a trust deed power of sale [*Civ. Code § 1367(b)*; *see Civ. Code § 2924b*; *see also § 123.12[2]* (mailing requirements)].

[e] Priority of Assessment Lien

Unless the declaration provides for the subordination of a delinquent assessment lien, such a lien has priority over all liens recorded after the notice of assessment [*Civ. Code § 1367.1(f)* (liens recorded on or after January 1, 2003); *Civ. Code § 1367(d)* (liens recorded on or after January 1, 1986, and before January 1, 2003); *but see 10 Cal. Code Reg. § 2792.16(g)* (circumstances under which assessment may be subordinated)].

Although *Civ. Code § 1367.1*, which applies to liens recorded on or after January 1, 2003 [*Civ. Code § 1367.1(m)*], and *Civ. Code § 1367*, which applies to liens recorded before that date [*Civ. Code § 1367(g)*], give an assessment lien priority over subsequently recorded liens, neither statute mentions conveyances filed before an assessment lien. However, there is no reason to believe the Legislature intended to deviate from the general California rule of "first in time, first in right." It is consistent with this rule that a lien, such as that imposed by a second mortgage, recorded before an assessment lien has priority over the assessment lien as a matter of law. CC&Rs that purport to create a "separate and present lien" with power of sale to secure the payment of future assessments will not be interpreted to give priority to an assessment lien over a prior-recorded lien because, by statute, the assessment lien is not perfected until a notice of delinquent assessment has been recorded [*Thaler v. Household Finance Corp. (2000) 80 Cal. App. 4th 1093, 1100-1101, 95 Cal. Rptr. 2d 779]* .

[f] Enforcement of Assessment Lien

Thirty days after the lien is recorded, it may be enforced in any manner permitted by law, including sale by the court, sale by the trustee designated in the notice of delinquent assessment, or sale by a properly substituted trustee. Any sale by the trustee must comply with *Civ. Code §§ 2924*, *2924b*, and *2924c*, which apply to the exercise of powers of sale in mortgages and deeds of trust [*Civ. Code § 1367.1(g)* (liens recorded on or after January 1, 2003); *Civ. Code § 1367(e)* (liens recorded on or after January 1, 1986, and before January 1, 2003)]. Subject to the conditions of *Civ. Code § 1367.4* regarding liens arising from certain debts arising on or after January 1, 2006, the sale is subject to the right of redemption within 90 days after the sale [*Code Civ. Proc. § 729.035*]. The "one form of action rule" of *Code Civ. Proc. § 726* does not apply, and the association may take a deed in lieu of foreclosure [*Civ. Code § 1367.1(h)* (liens recorded on or after January 1, 2003); *Civ. Code § 1367(f)* (liens recorded on or after January 1, 1986, and before January 1, 2003)]. The inapplicability of that rule means that the association can sue on the debt without losing its right to foreclose its lien for sums uncollected by the suit on the debt.

For liens recorded on or after January 1, 2006, (1) when the debt is at least $1,800, excluding accelerated assessments, late charges, fees and collection costs, attorney's fees, or interest, or (2) when any assessments are more than 12 months delinquent, the decision to initiate foreclosure can only be made by the board and may not be delegated [*Civ. Code § 1367.4(c)(2)*]. If the lien is nonjudicially foreclosed, the owner has a right of redemption. The redemption period within which the separate interest may be redeemed ends 90 days after the sale [*Civ. Code § 1367.4(c)(4)*].

On payment of the sums specified in the notice of delinquent assessment, the association must record a notice of satisfaction and release of the lien [*Civ. Code § 1367.1(d)* (liens recorded on or after January 1, 2003); *Civ. Code § 1367(f)* (liens recorded on or after January 1, 1986, and before January 1, 2003)]. In the case of liens recorded on or after January 1, 2003, the release or notice of rescission must be recorded and a copy must be provided to the owner, within 21 days of payment of the sums owed [*Civ. Code § 1367.1(d), (m)*].

[g] Exemption from Execution by Judgment Creditors

Regular assessments that are imposed or collected to perform an association's obligations imposed by either the governing documents or the Davis-Stirling Common Interest Development Act [*Civ. Code § 1350 et seq.*] are exempt from execution by the association's judgment creditors only to the extent necessary for the association to perform essential services, such as paying for utilities and insurance. In determining the appropriateness of an exemption, a court must ensure that only essential services are protected [*Civ. Code § 1366(c)*].

The exemption does not apply to the following [*Civ. Code § 1366(c)*]:

- Consensual pledges, liens, or encumbrances that have been approved by the association owners, constituting a quorum, casting a majority of the votes at a meeting or association election;
- Any state tax lien; or
- Any lien for labor or materials supplied to the common area.

[16] Reserve Accounts

The board of directors may not expend reserve funds for any purpose other than repair, restoration, replacement, or maintenance of, or litigation involving the repair, restoration, replacement, or maintenance of, major components that the association is obligated to repair, restore, replace, or maintain and for which the reserve fund was established [*Civ. Code § 1365.5(c)(1)*].

The board may, however, authorize a temporary transfer of money from a reserve fund to the general operating fund to meet short-term cash-flow requirements or other expenses. To do so, the board must give notice of its intent to consider the transfer in a notice of meeting. The notice must include (1) the reasons the transfer is needed, (2) some of the options for repayment, and (3) whether a special assessment may be considered. If the board authorizes the transfer, it must issue a written finding, which will be recorded in its minutes, explaining the reasons for the transfer and describing when and how the money will be repaid to the reserve fund. The transferred funds must be restored to the reserve fund within one year of the initial transfer unless the board, after giving the same notice required for considering the transfer, makes a finding, supported by documentation, that a temporary delay is in the best interests of the development, in which case the restoration may be temporarily delayed [*Civ. Code § 1365.5(c)(2)*].

In making a decision to delay the restoration of temporarily transferred funds, and in restoring the funds to the reserve fund, the board must exercise prudent financial management. This includes levying a special assessment, if necessary, to fully restore the funds within the one-year period or any authorized extension of that period. Any special assessment

is subject to the five percent limitation specified in *Civ. Code § 1366(b)* [*see § 124.23[15][a]*]. The board has discretion to extend the due date for payment of any special assessment; but any extension will not prevent the board from pursuing its legal remedies to enforce and collect unpaid special assessments [*Civ. Code § 1365.5(c)(2)*].

When the board decides to use reserve funds or to temporarily transfer money from the reserve fund to pay for litigation, the association must notify its members of that decision in the next available mailing to all members [*see Corp. Code § 5016* (authorizing newsletters and other mailings to all members as means of giving required written notice to members of nonprofit corporations)]. The notice must inform the members of the availability of an accounting of the litigation expenses, which must updated on at least a quarterly basis and made available for inspection by members in the association's office [*Civ. Code § 1365.5(d)*].

At least once every three years, the board of directors must cause to be conducted a reasonably competent and diligent visual inspection of the accessible areas of the major components that the association is obligated to repair, replace, restore, or maintain as part of a study of the reserve account requirements of the development if the current replacement value of the major components is equal to or greater than one-half of the association's gross budget exclusive of the association's reserve account for that three-year period. The board must review this study annually and consider and implement necessary adjustments to the board's analysis of the reserve account requirements as a result of that review [*Civ. Code § 1365.5(e)*; *see Civ. Code § 1365.5(g)* ("reserve account requirements" defined)].

The study must, at a minimum, include all of the following [*Civ. Code § 1365.5(e)*]:

- Identification of the major components that the association is obligated to repair, replace, restore, or maintain that, as of the date of the study, have a remaining useful life of less than 30 years;

- Identification of the probable remaining useful life of the identified components as of the date of the study;

- An estimate of the cost of repair, replacement, restoration, or maintenance of each major identified component;

- An estimate of the total annual contribution necessary to defray the cost to repair, replace, restore, or maintain each major component during and at the end of its useful life, after subtracting total reserve funds as of the date of the study; and

- A reserve funding plan that indicates how the association plans to fund the estimate described, above, to meet the association's obligation for the repair and maintenance of all major components with an expected remaining life of 30 years or less, not including those components the board has determined will not be repaired or replaced [*see Civ. Code § 1365.5(e)(5)* (required contents and adoption procedure)].

The board must review a current reconciliation of the association's reserve accounts on at least a quarterly basis [*Civ. Code § 1365.5(a)(1)*; *see Civ. Code § 1365.5(f)* ("reserve accounts" defined)]. Also on at least a quarterly basis, the board must review the current year's actual reserve revenues and expenses compared to the current year's budget, as well as an income and expense statement for reserves. Further, the board must review the latest account statements prepared by the financial institutions where the association has its reserve accounts [*Civ. Code § 1365.5(a)*]. The signatures of at least two persons are required before moneys from the association's reserve accounts may be withdrawn. These two persons must either be (1) members of the board of directors, or (2) an officer who is not a member of the board of directors and a member of the board of directors [*Civ. Code § 1365.5(b)*; *see Civ. Code § 1365.5(f)* ("reserve accounts" defined)].

The requirements of *Civ. Code § 1365.5* are not applicable if the association does not have a common area [*Civ. Code § 1365.5(h)*; *see Civ. Code § 1351(b)* ("common area" defined)].

[17] Sale or Dissolution of Common Interest Development

The association managing a common interest development subject to the Subdivided Lands Act [*Bus. & Prof. Code § 11000 et seq.*; *see § 124.14[1]*] or any person acting on its behalf, shall not transfer all or substantially all of its assets, or file a certificate of dissolution without the approval of 100 percent of its members, so long as there is any lot, parcel, area, apartment, or unit for which the association is obligated to provide management, maintenance, preservation, or control [*Corp. Code § 12663(a)*].

No court may enter an order declaring the association duly wound up and dissolved [*Corp. Code § 12663(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsManagementReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawCommon Interest CommunitiesCondominiumsTermination

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12-124 California Forms of Pleading and Practice--Annotated § 124.24

§ 124.24 Tort Liability of Owners of Separate Interests

Civil liability protection is afforded by statute to owners of the separate interests in a common interest development that have common areas owned in tenancy-in-common if the association carries a specified minimum level of prescribed insurance that covers a cause of action in tort [*Civ. Code § 1365.9(a)* (legislative intent)]. When the insurance requirements are met, any tort cause of action against any separate interest owner that arises solely because the owner has an ownership interest as a tenant in common in the common area of a common interest development must be brought against the association and not against the individual separate interest owners [*Civ. Code § 1365.9(b)*]. To limit the liability of individual owners, the association must maintain and have in effect at the time of the cause of action one or more general liability policies with total policy limits of at least $2 million if the development consists of 100 or fewer separate interests, or $3 million if the development consists of more than 100 separate interests [*Civ. Code § 1365.9(b)(1), (2)*].

The association must deliver to each separate interest owner a summary of the association's general liability policy, and has an ongoing responsibility to notify owners of policy changes [*see Civ. Code § 1365(f)*].

To the extent that the specified insurance coverage requirements are not met, the clear statutory implication is that individual owners of separate interests with ownership interests in the common areas are not immune from liability to third parties for torts arising in common areas. This implication is bolstered by case law that preceded the statutory insurance requirements. Support for liability of individual owners is found in *Davert v. Larson,* a case of first impression in California on the issue of the potential tort liability of individual owners of common areas. On reversing summary judgment for the defendant who was an individual owner in a common area, the Court of Appeal noted [*Davert v. Larson (1985) 163 Cal. App. 3d 407, 412, 209 Cal. Rptr. 445]* :

> "Since California law does not require insurance to protect third parties in the case of common area torts, relieving individual owners in common of liability would eliminate any motivation on the part of *any* party to exercise due care in the management and control of commonly owned property and could leave third parties with no remedy at law.
>
> Therefore, we believe that tenants in common of real property who delegate the control and management of the property to a separate legal entity should not be immunized from liability to third

parties for tortious conduct."

The statutory tort immunity granted to volunteer association officers and directors, which is also conditioned on the association maintaining specified insurance coverage [*see Civ. Code § 1365.7*; *see also § 124.23[13][a]*], does not immunize individual owners from liability for tortious acts or omissions in managing or controlling the common areas [*Ruoff v. Harbor Creek Community Ass'n (1992) 10 Cal. App. 4th 1624, 1629-1630, 13 Cal. Rptr. 2d 755* (citing *Davert v. Larson*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceHomeowners InsuranceGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsManagementTortsPremises Liability & PropertyGeneral Overview

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12-124 California Forms of Pleading and Practice--Annotated § 124.25

§ 124.25 Tort Liability of Developer

Subject to the statutory limitations discussed in *§ 124.26*, the association of a common interest development may bring a tort action against the developer for damages to the common areas caused by negligent acts or omissions of the developer, including those acts or omissions that occurred before the association was formally organized [*see, e.g., Orange Grove Terrace Owners Assn. v. Bryant Properties, Inc. (1986) 176 Cal. App. 3d 1217, 1219, 1223 , 222 Cal. Rptr. 523* ; *see also Civ. Code §§ 1363, 1368.3(b)*].

The individual owners may also maintain a class action against the developer for fraudulently misrepresenting in the final public report the cost and extent of the maintenance of the development. In such an action, an ascertainable class exists; common questions of law and fact susceptible to common proof arise because each purchaser is required to sign the report. Justifiable reliance on the report is inferred, because the cost of the monthly maintenance fee is a material fact in development purchases, and damages may be commonly proved, because they consist of the diminution in the value of the interests resulting from the overall reduction and increased cost of maintenance services [*see, e.g., Occidental Land, Inc. v. Superior Court (1976) 18 Cal. 3d 355, 360-364, 134 Cal. Rptr. 388, 556 P.2d 750* (class action suit by condominium owners)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsManagementReal Property LawTortsConstruction Defects

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12-124 California Forms of Pleading and Practice--Annotated § 124.26

§ 124.26 Prerequisites to Suit Based on Design or Construction Defects

[1] Notice and General Membership Meeting

Before an association files suit for damages against a developer for alleged damage to the common areas, or to other areas in a development that the association has an obligation to maintain and repair, the board of directors must provide written notice to each member that a meeting will take place to discuss the problems and consider available options, including filing a civil action [*Civ. Code § 1368.5(a)*]. If the association has reason to believe that, in order to avoid expiration of the statute of limitations, a civil action must be filed before a meeting can take place, the notice of the meeting may be given within 30 days after the action has been filed [*Civ. Code § 1368.5(b)*].

[2] Mandatory Pre-Litigation Dispute Resolution Process for Developments of 20 or More Units

[a] Association's Notice of Commencement of Legal Proceedings

Beginning July 1, 2002, and continuing until July 1, 2017 [*see Civ. Code § 1375(r), (s)*], before an association representing a common interest development that includes 20 or more units can file a complaint for damages against a builder, developer, or general contractor ("respondent") based on a claim for design or construction defects in the development, the association must initiate a statutory procedure that requires the parties either to settle the matter or to submit it to alternative dispute resolution (ADR) [*Civ. Code § 1375(a)*; *see Civ. Code § 1375(p)(3)*]. The process begins with the association serving the respondent with a Notice of Commencement of Legal Proceedings that must include all of the following [*Civ. Code § 1375(b)*]:

- The name and location of the development;
- An initial list of defects that is sufficient to apprise the respondent of the general nature of the defects at issue;
- A description of the results of the defects, if known;
- A summary of the results of any survey or questionnaire distributed to homeowners to determine the

nature and extent of defects; and

- Either a summary of the results of any testing conducted to determine the nature and extent of defects, or the actual results of any test conducted.

The notice must be served by certified mail on the respondent's agent, if any. If there is no agent, it must be served on any of the respondent's officers. If there are no current officers, service must be on the person or entity otherwise authorized by law. Service on the general contractor is sufficient with regard to any building or developer [*Civ. Code § 1375(b)*].

Service of the notice will begin a period, not to exceed 180 days, during which the association, the respondent, and all other participating parties must try to resolve the dispute. The 180-day period may be extended for up to an additional 180 days on the parties' agreement [*Civ. Code § 1375(c)*]. During this period, all applicable statutes of limitation and repose, whether contractual or statutory, by and against all potentially responsible parties, regardless of whether they are named in the notice, will be tolled [*Civ. Code § 1375(b)*].

Within 25 days of service of the notice, the respondent may request in writing to meet and confer with the association's board of directors. If the request is granted, the meeting must take place within 10 days of the request. The meeting is subject to the Common Interest Development Open Meeting Act [*see Civ. Code § 1363.05*], and all discussions are privileged communications and not admissible in evidence in any civil action, unless the association and respondent waive the privilege [*Civ. Code § 1375(d)*].

[b] Right of Association and Respondent to Inspect and Copy Other Party's Files

Within 60 days of receiving the association's Notice of Commencement of Legal Proceeding, the respondent must provide the association with access, for inspection and copying purposes, to all plans and specifications, subcontracts, and other construction files that are reasonably calculated to lead to the discovery of admissible evidence regarding the defects claimed. The association must provide the respondent with similar access to all files reasonably calculated to lead to the discovery of admissible evidence regarding the defects claimed, including all reserve studies, maintenance records, and any survey questionnaires, or results of testing to determine the nature and extent of defects. All other potentially responsible parties have the same rights as the respondent regarding production of the association's documents. A privilege log must be prepared and submitted to all other parties for any documents withheld based on privilege [*Civ. Code § 1375(e)(1)*].

[c] Respondent's Notice to Other Potentially Responsible Parties

Within 60 days of receiving the association's Notice of Commencement of Legal Proceeding, the respondent must provide written notice by certified mail to all subcontractors, design professionals, their insurers, and the insurers of any additional insured whose identities are either known to the respondent or readily ascertainable by review of the project files or other similar sources and whose potential responsibility appears on the face of the notice. The notice must include a copy of the association's Notice of Commencement of Legal Proceedings. It must specify the date and manner by which the parties will meet and confer to select a dispute resolution facilitator [*see Civ. Code § 1375(f)(1)*], and advise the recipient that [*Civ. Code § 1375(e)(2)*]:

- It has an obligation to participate in the meet and confer or to serve a written acknowledgment of receipt of the notice;

- It will waive any challenge to selection of the dispute resolution facilitator if it elects not to participate in the meet and confer;

- It may be bound by any settlement reached [*see Civ. Code § 1375.05(d)*];

- It may be deemed to have waived rights to conduct inspection and testing [*see Civ. Code § 1375.05(c)*];

- It may seek the assistance of an attorney; and

- It should contact its insurer, if any.

[d] Right of Potentially Responsible Party to Be Released from Dispute Resolution Process

Any subcontractor or design professional may, at any time, petition the dispute resolution facilitator for release from the dispute resolution process on a showing that the subcontractor or design professional is not potentially responsible for the defect claims at issue. The petition must be served contemporaneously on all other parties who then will have 15 days from the date of service to object. If a petition is granted and it later appears that the released party may be a responsible party in light of the current defect list or demand, the respondent must (1) "renotice" the party [*see Civ. Code § 1375(e)(2)*], (2) provide a copy of the current defect list or demand, and (3) direct the party to attend a dispute resolution session at a stated time and location. The party who is then rejoined cannot be prejudiced by its absence from the dispute resolution process as a result of having been previously released [*Civ. Code § 1375(m)*].

[e] Statement of Insurance Provided by Subcontractor, Design Professional, or Insurer

Any subcontractor, design professional, or insurer of a subcontractor, design professional, or other insured, who receives the respondent's written notice of the meet and confer, must serve on the respondent a written acknowledgment that it received the notice. Within 10 days of service of the written acknowledgment, each subcontractor or design professional must provide the association and the respondent a Statement of Insurance that includes both of the following [*Civ. Code § 1375(e)(2)*]:

- The names, addresses, and contact persons, if known, of all insurance carriers whose policies were in effect from the commencement of construction to the present and that potentially cover the association's claims; and

- The policy number for each policy.

[f] Peripheral Parties

A peripheral party is a party having a total claimed exposure of less than $25,000. Any subcontractor or design professional, or insurer for that subcontractor, design professional, or additional insured, who so chooses may, at any time, make a written request to the dispute resolution facilitator for designation as a peripheral party. The request must be served contemporaneously on the association and the respondent. If no objection to that designation is received within 15 days, or on rejection of any objection, the dispute resolution facilitator will designate that subcontractor or design professional as a peripheral party. Participation of peripheral parties should be limited to attendance only at those dispute resolution sessions deemed peripheral party sessions or to those sessions during which the dispute resolution facilitator believes settlement as to peripheral parties may be finalized [*Civ. Code § 1375(e)(3)*].

[g] Selecting Dispute Resolution Facilitator

Within 20 days of the date the respondent sent its notice to subcontractors, design professionals, and insurers [*see Civ. Code § 1375(e)(2)*, discussed in *§ 124.26[2][c]*], the association, respondent, and those who were sent the notice must meet and confer in an effort to select a dispute resolution facilitator to preside over the mandatory dispute resolution process. Any subcontractor or design professional who received notice and chooses not to participate waives any

challenge he or she may have to the selection of the dispute resolution facilitator [*Civ. Code § 1375(f)(1)*].

The dispute resolution facilitator's role is to attempt to resolve the conflict in a fair manner. He or she must be sufficiently knowledgeable in the subject matter and be able to devote sufficient time to the case. The facilitator is not required to reside in or have an office in the county in which the project is located [*Civ. Code § 1375(f)(1)*]. He or she is empowered to enforce all provisions of *Civ. Code § 1375*, the pre-litigation dispute resolution statute [*Civ. Code § 1375(h)(8)*].

If the parties cannot agree to a facilitator, then each party will submit a list of three suggested facilitators. Each party may then strike one nominee from the other parties' lists, and petition the court for final selection. The court may then issue an order for final selection [*Civ. Code § 1375(f)(4)*; *see Civ. Code § 1375(n), (o)* (procedure for court order)].

A dispute resolution facilitator must disclose to the parties all matters that could cause a person aware of the facts to reasonably entertain a doubt that the facilitator would be able to resolve the conflict in a fair manner [*Civ. Code § 1375(f)(2)*]. On service of a notice of disqualification by any party before the case management meeting [*see § 124.26[2][i]*], the court may disqualify a facilitator based either on a disclosure made, or on information that should have been disclosed, but was not [*Civ. Code § 1375(f)(3)*].

Any subcontractor or design professional who receives notice of the association's claim without having previously received notice of the meet and confer to select the dispute resolution facilitator must be given the facilitator's name, address, and telephone number by the respondent. The subcontractor or design professional then has 15 days from the date he or she received notice of the claim to serve the parties and the facilitator with written objection to the chosen facilitator. Within seven days after the objection is served, the subcontractor or design professional may petition the court to replace the facilitator, which the court may do on a showing of good cause. Failure to satisfy these deadlines constitutes a waiver of the right to challenge the facilitator [*Civ. Code § 1375(f)(5)*].

[h] Apportioning Costs of Dispute Resolution Facilitator

The dispute resolution facilitator's costs are apportioned as follows [*Civ. Code § 1375(f)(6)*]:

- One-third to the association;
- One-third to the respondent; and
- One-third to the subcontractors and design professionals as allocated among them by the facilitator.

The facilitator's costs are recoverable by the prevailing party in any subsequent litigation pursuant to *Code Civ. Proc. § 1032*, provided that any nonsettling party may, before the complaint is filed, petition the facilitator to reallocate the facilitator's costs as they apply to the nonsettling party. In reallocating costs, the facilitator must take into account all relevant factors and equities between all parties in the dispute resolution process. The facilitator's determination with regard to cost allocation is binding in any subsequent litigation [*Civ. Code § 1375(f)(6)*].

[i] Case Management Meeting

The dispute resolution facilitator and the participating parties must agree on a date, time, and location to hold a case management meeting of all parties and the facilitator to discuss the claims being asserted and the scheduling of events under the pre-litigation dispute resolution process. The chosen date must be within 100 days of service of the association's Notice of Commencement of Legal Proceedings [*see § 124.26[2][a]*], and the location must be in the county where the project is located [*Civ. Code § 1375(f)(1)*].

No later than 10 days before the scheduled meeting, the respondent must send written notice of the meeting to the association, subcontractors, design professionals, and the insurers that, to the respondent's knowledge, are on notice of the claim. The notice must specify the meeting's date, time, and location. The facilitator, in consultation with the respondent, must maintain a contact list of the participating parties [*Civ. Code § 1375(f)(1)*].

The main purpose of the case management meeting is for the parties, with the dispute resolution facilitator's assistance, to reach agreement on a case management statement, which will govern the subsequent dispute resolution process [*see Civ. Code § 1375(h)*]. For further discussion of the case management statement, see *§ 124.26[2][j]*.

[j] Case Management Statement

Except for those elements that the parties agree are not appropriate, the case management statement must include the following elements to take place in the order listed [*Civ. Code § 1375(h)(1)-(8)*]:

(1) Establishment of a document depository, located in the county where the project is located, for deposit of all relevant documents, defect lists, demands, and other information related to the dispute.

(2) Provision for a more detailed list of defects by the association to the respondent after the association completes a visual inspection of the project.

(3) Provision for a visual inspection of the project by the respondent, subcontractors, and design professionals.

(4) Provision for invasive testing conducted by the association, as the association deems appropriate.

(5) Provision by the association of a comprehensive demand that provides sufficient detail for the parties to engage in meaningful dispute resolution.

(6) Provision for invasive testing conducted by the respondent, subcontractors, and design professionals, as they deem appropriate.

(7) Allowance for the association to modify the demand if new issues arise during the testing by the respondent, subcontractor, or design professionals.

(8) Provision for facilitated dispute resolution of the claim, with all parties, including peripheral parties, as appropriate, and insurers, if any, present and having settlement authority.

All documents exchanged by the parties and all documents created pursuant to the pre-litigation resolution dispute process must be deposited in the document depository described in (1), *above*. The documents will remain available to all parties during the dispute resolution process and in any subsequent litigation. When any party deposits a document in the depository, that party must provide written notice to all other parties [*Civ. Code § 1375(h)(1)*].

The list of defects referred to in (2), *above*, must provide sufficient detail for the respondent to ensure that all potentially responsible subcontractors and design professionals are provided with notice of the dispute resolution process. The respondent is responsible for serving a copy of the Notice of Commencement of Legal Proceedings on all subcontractors and design professionals whose potential responsibility appears on the face of the more detailed defects list. The respondent also must serve a copy of the case management statement, including the dispute resolution facilitator's name, address, and telephone number, on all potentially responsible subcontractors and design professionals at the same time [*Civ. Code § 1375(h)(2)*].

In addition to (1)-(8), *above*, on mutual agreement of the parties, the case management statement may also provide for the exchange of consultant or expert photographs, expert presentations, expert meetings, or any other mechanism the parties deem appropriate to further the resolution of the dispute [*Civ. Code § 1375(i)*].

Once the case management statement has been established, the facilitator must set deadlines for the occurrence of each event set forth in the statement, taking into account the size and complexity of the case and the requirement that the dispute resolution process may not exceed 180 days plus extensions agreed by the parties [*Civ. Code § 1375(j)*; *see Civ. Code § 1375(c)*].

[k] Respondent's Settlement Offer

At a time determined by the dispute resolution facilitator, the respondent should submit to the association all of the following [*Civ. Code § 1375(k)(1)(A)*]:

- A request to meet with the association's board to discuss a written settlement offer;
- A written settlement offer, and a concise explanation of the reasons for the offer's terms;
- A statement that the respondent has access to sufficient funds to satisfy the conditions of the settlement offer; and
- A summary of the results of any testing conducted for the purposes of determining the nature and extent of defects, unless the association provided the respondent with actual test results.

No less than 10 days after the respondent submits these items, the respondent and the association's board of directors must meet and confer about the settlement offer [*Civ. Code § 1375(k)(1)(C)*]. The respondent is permitted only one request to meet and discuss a written settlement offer [*Civ. Code § 1375(k)(1)(H)*].

[l] Meeting of Association Membership on Board's Rejection of Settlement Offer

If the association's board rejects the respondent's settlement offer, the board must hold a meeting open to each association member not less than 15 days before the association commences an action for damages against the respondent [*Civ. Code § 1375(k)(1)(D)*]. Notice of this meeting must be sent to each association member not less than 15 days before the meeting is held. The notice must specify all of the following [*Civ. Code § 1375(k)(1)(E)*]:

- That a meeting will take place to discuss problems that may lead to filing a civil action, and the time and place of the meeting;
- The options that are available to address the problems, including filing a civil action, a statement of the various foreseeable alternatives for paying for those options, and whether the payments will be made from reserve account funds, or from the proceeds of regular, special, or emergency assessments; and
- The complete text of any written settlement offer, and a concise explanation of the specific reasons for the terms of any offer submitted by the respondent to the board at any meeting requested by the respondent under *Civ. Code § 1375(d)* [*see § 124.26[2][a]*].

The respondent must pay all expenses related to sending the settlement offer to the association members. The respondent is also responsible for the expenses incurred in holding the meeting, not to exceed $3.00 per association member [*Civ. Code § 1375(k)(1)(F)*].

The discussions at the meeting, the contents of the notice, and the items required to be specified in the notice are privileged communications and are not admissible in evidence in any civil action, unless the association consents to their admission [*Civ. Code § 1375(k)(1)(G)*; *see Civ. Code § 1375*(*l*)].

[m] Petitioning for Court Intervention to Further Pre-Litigation Dispute Resolution Process

Any party may, at any time, petition the superior court in the county where the project is located, on a showing of good cause, for an order or appointment of a referee to resolve a dispute regarding the pre-litigation dispute resolution process [*Civ. Code § 1375(n)*]. Before involving the court, however, all parties must meet with the dispute resolution facilitator, if one has been appointed, and confer in person or by telephone to attempt to resolve the matter [*Civ. Code § 1375(o)(2)*]. The following matters are specified by statute as appropriate subjects for seeking court intervention in the dispute resolution process [*Civ. Code § 1375(n)*]:

- To take a deposition of any party to the process, or subpoena a third party for deposition or production of documents necessary to resolve the dispute before litigation.

- To resolve any disputes concerning inspection, testing, production of documents, or exchange of information necessary to resolve the dispute before litigation.

- To resolve any disagreements relative to the timing or contents of the case management statement.

- To authorize internal extensions of time frames set forth in the case management statement.

- To seek a determination that a settlement is a good faith settlement [*see Code Civ. Proc. § 877.6*].

- To ensure compliance, on shortened notice, with the obligation to provide a Statement of Insurance [*see Civ. Code § 1375(e)(2)*; *see also § 124.26[2][e]*].

- For any other relief appropriate to further the pre-litigation dispute resolution process, including ordering parties, and any insurers to the process with settlement authority.

The court must hear and decide the petition within 10 days after filing. The petitioning party must serve the petition on all parties, including the date, time, and location of the hearing no later than five business days before the hearing. Any responsive papers must be filed and served no later than three business days before the hearing [*Civ. Code § 1375(o)(1)*].

[n] Remedy for Failure to Complete Pre-Litigation Dispute Resolution Process

The only method for seeking judicial relief for the failure of either the association or the respondent to complete the dispute resolution process is the assertion of a procedural deficiency in an action for damages by the association against the respondent, discussed in *§ 124.26[3]*. A verified application asserting a procedural deficiency must be filed with the court no later than 90 days after service of the defendant's answer in the association's action for damages, unless the court finds that extraordinary conditions exist [*Civ. Code § 1375.05(g)(1)*]. Once the verified application has been filed, the court must schedule a hearing within 21 days to determine whether the association or respondent has substantially complied with the dispute resolution process. At the court's discretion, the issue may be determined on affidavits or oral testimony [*Civ. Code § 1375.05(g)(2)*].

If the court finds that the association or the respondent did not substantially comply with the pre-litigation dispute resolution process, the court must stay the association's action for damages for up to 90 days to allow the noncomplying party to substantially comply. The noncomplying party may apply to extend the 90-day period, which application will

be granted on a showing of good cause [*Civ. Code § 1375.05(g)(3)(A)*]. If, within the time set by the court, the association or respondent fails to establish that it has substantially complied with the dispute resolution process, the court must determine if, in the interest of justice, the association's action for damages should be dismissed without prejudice, or if another remedy should be fashioned. The action cannot, under any circumstances, be dismissed with prejudice as a result of the association's failure to substantially comply with the dispute resolution process. In determining the appropriate remedy, the court must consider the extent to which the respondent has complied with the dispute resolution process requirements [*Civ. Code § 1375.05(g)(3)(B)*].

[3] Procedure Governing Litigation If Dispute Resolution Process Fails

[a] Right to Trial Priority

Beginning July 1, 2002, and continuing until July 1, 2010 [*see Civ. Code § 1375.05(h), (i)*], if an association representing a common interest development that includes 20 or more units and the development's builder, developer, or general contractor ("respondent") completes the mandatory dispute resolution process discussed in *§ 124.26[2]*, but fails to reach a settlement of the association's claim for design or construction defects, the association or its assignee may file a complaint in superior court in the county in which the development is located. The action must be given priority on the court's trial calendar [*Civ. Code § 1375.05(a)*]. The court must assign the earliest possible trial date, considering the pretrial preparation completed pursuant to the pre-litigation dispute resolution process. The complaint is deemed to have been filed on the date the association served it's Notice of Commencement of Legal Proceeding initiating the pre-litigation dispute resolution process [*Civ. Code § 1375.05(b)*; *see Civ. Code § 1375(b)*, discussed in *§ 124.26[2][a]*].

[b] Right to Engage in Additional Inspections or Testing

Any respondent, subcontractor, or design professional who received timely prior notice of the inspections and testing conducted during the pre-litigation dispute resolution process [*see Civ. Code § 1375(h)(6)*] is prohibited from engaging in additional inspection or testing unless a motion is filed with the court and all of the following conditions are met [*Civ. Code § 1375.05(c)*]:

- There is an insurer for a subcontractor or design professional that did not have timely notice that legal proceedings were commenced under *Civ. Code § 1375* at least 30 days before inspections or testing were initiated under *Civ. Code § 1375(h)(6)*;

- The insurer's insured did not participate in any inspections or testing conducted in accordance with *Civ. Code § 1375(h)(6)*;

- After receiving notice that a complaint has been filed in superior court, the insurer retained separate counsel, who did not participate in the pre-litigation dispute resolution process, to defend its insured;

- It is reasonably likely that the insured would be prejudiced if the additional inspections or testing are not permitted; and

- The information obtainable through the proposed additional inspections or testing is not available through any reasonable alternative sources.

Any additional inspections or testing must be limited to the extent reasonably necessary to avoid the likelihood of prejudice, and must be coordinated among all similarly situated parties to ensure that they occur without unnecessary duplication [*Civ. Code § 1375.05(c)*].

If, in its complaint, the association alleges defects that were not specified in the pre-litigation dispute resolution process under *Civ. Code § 1375*, the respondent, subcontractor, and design professionals will be permitted to engage in testing or inspection necessary to respond to the additional claims. A party who seeks additional inspections or testing based on an amendment of claims must apply to the court for leave to conduct those inspections or that testing. If the court determines that it must review the defect claims alleged by the association in the pre-litigation dispute resolution process to determine whether the association alleges new or additional defects, the review must be conducted in camera. On objection of either party, the court must refer the matter to a judge other than the assigned trial judge to determine if the claim has been amended in such a way as to require additional testing or inspection [*Civ. Code § 1375.05(c)*].

[c] Order of Discovery

At the request of any defendant and except on a showing of good cause, the order of discovery must permit the association's expert witnesses to be deposed before any percipient parties are deposed. Except on a showing of good cause, the depositions must, at the association's request, be followed immediately by the defendant's experts and then by the subcontractors' and design professionals' experts. In determining whether good cause exists, the court must consider the goal of early disclosure of defects and whether the expert is prepared to render a final opinion, except that the court may modify the scope of any expert's deposition to address those concerns [*Civ. Code § 1375.05(f)*].

[d] Seeking Relief for Failure to Complete Pre-Litigation Resolution Dispute Process

The only method for seeking judicial relief for the failure of either the association or the respondent to complete the pre-litigation dispute resolution process required by *Civ. Code § 1375* is the assertion of a procedural deficiency in an action for damages by the association against the respondent. A verified application asserting a procedural deficiency must be filed with the court no later than 90 days after service of the defendant's answer in the association's action for damages [*Civ. Code § 1375.05(g)(1)*]. For further discussion, see *§ 124.26[2][n]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsManagementReal Property LawTortsConstruction Defects

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§ 124.27 Actions for Defective Construction in New Residential Condominiums Sold on or After January 1, 2003

In accordance with Division 2, Part 2, Title 7 of the Civil Code, "Requirements for Actions for Construction Defects" [*Civ. Code § 895 et seq.*], any action against a builder, general contractor, subcontractor, individual product manufacturer, or design professional, seeking recovery of damages arising out of, or related to deficiencies in, residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction when the property involved is a new residential unit (excluding a condominium conversion) when the purchase agreement with the original buyer was signed by the seller on or after January 1, 2003, is governed by detailed statutory standards related to the various functions and components of the building [*see Civ. Code §§ 896, 938*].

An action under Title 7 is preceded by a mandatory pre-litigation procedure, which provides the potential defendant with a right to attempt a repair of any alleged defect before litigation. The pre-litigation procedure also includes inspections and exchanges of documentation between the parties under certain circumstances, and mediation at various points, all pursuant to statutory timeframes [*see Civ. Code §§ 910-938*]. If the parties under a Title 7 action comply with this statutory pre-litigation process, the parties will be excused from performing the pre-litigation dispute resolution process required by *Civ. Code § 1375* to the extent that the provisions of the Title 7 procedure are substantially similar to the provisions of § 1375 [*Civ. Code § 935*]. For discussion of the *Civ. Code § 1375* procedure, see *§ 124.26[2]*. For further coverage of the Title 7 mandatory pre-litigation process, see Ch. 104, *Building Contracts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawTortsConstruction Defects

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12-124 California Forms of Pleading and Practice--Annotated § 124.28

§ 124.28 Improvements and Modifications to Separate Interest Property

Subject to the provisions of the governing documents and other applicable provisions of law, the owner of a separate interest whose boundaries are contained within a building may make any improvements or alterations within the boundaries of the interest that do not impair the structural integrity or mechanical systems or lessen the support of any portions of the common interest development [*Civ. Code § 1360(a)(1)*].

Subject to the provisions of the governing documents and other applicable provisions of law, the owner of a separate interest whose boundaries are contained within a building may modify a unit in a condominium, at the owner's expense, to facilitate access for persons who are blind, visually handicapped, deaf, or physically disabled, or to alter conditions which could be hazardous to these persons. These modifications may also include modifications of the route from the public way to the door of the unit if the unit is on the ground floor or already accessible by an existing ramp or elevator [*Civ. Code § 1360(a)(2)*].

The modifications must be consistent with applicable building code requirements and with the intent of otherwise applicable provisions of the governing documents pertaining to safety or aesthetics. Furthermore, any modifications that are external to the dwelling must not prevent reasonable passage by other residents, and must be removed by the owner when the unit is no longer occupied by blind, visually handicapped, deaf, or physically disabled persons who require those modifications [*Civ. Code § 1360(a)(2)*].

Any owner who intends to so modify a unit must submit his or her plans and specifications to the association of the condominium project for review, to determine whether the modifications will comply with the provisions of *Civ. Code § 1360(a)(2)*. The association may not deny approval of the proposed modifications without good cause [*Civ. Code § 1360(a)(2)*].

Any change in the exterior appearances of a separate interest must be in accordance with the governing documents and applicable provisions of law [*Civ. Code § 1360(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium Associations

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§ 124.29 Liens for Labor or Material

In a condominium project, a lien may not be filed against an owner of property in the project for labor performed or services or materials furnished with the consent or at the request of another owner in the condominium project, or of that other owner's agent or contractor, unless that other owner has expressly consented to or requested the performance of the labor or furnishing of the materials or services [*Civ. Code § 1369*].

Express consent is deemed to have been given by the owner of any condominium if emergency repairs are made to the property. In addition, labor performed or services or materials furnished for the common areas, if duly authorized by the association, are deemed to be performed or furnished with the express consent of each condominium owner [*Civ. Code § 1369*].

The owner of any condominium may remove his or her condominium from a lien against two or more condominiums or any part thereof by payment to the holder of the lien of the fraction of the total sum secured by the lien which is attributable to his or her condominium [*Civ. Code § 1369*].

In a related context, the law permits a blanket lien, i.e., a lien against an entire condominium complex, including the individual units, that does not allocate the amount of the lien per unit owner [*see Civ. Code § 3130*]. However, when such a lien has been filed against a condominium project, the contractor must notify each owner of the fraction of the total sum secured by the lien that is attributable to his or her condominium. The information is statutorily required so that any owner may remove his or her unit from the lien by making payment to the lienholder of the owner's fractional share [*Civ. Code § 1369*]. The lienholder's failure or refusal to notify each unit owner of his or her unit's apportioned share of the blanket lien may render the entire lien unenforceable [*see ECC Construction v. Ganson (2000) 82 Cal. App. 4th 572, 578, 98 Cal. Rptr. 2d 292* ; *but see Flintkote Co. v. Lisa Constr. Co. (1968) 268 Cal. App. 2d 606, 609, 74 Cal. Rptr. 136* (holding in non-condominium context that only penalty for failure to apportion lien is to postpone claimant's lien to other liens)].

Legal Topics:

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

Contracts LawSecured TransactionsPerfection & PriorityPriorityLiensReal Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsManagement

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12-124 California Forms of Pleading and Practice--Annotated § 124.30

§ 124.30 Property Taxation

[1] Bond

If a subdivision is subject to the Subdivision Map Act (*Gov. Code § 66410 et seq.*; *see § 124.19*) and to a lien for taxes or special assessments collected as taxes which are not yet payable, the final map or parcel map may not be recorded until the owner or subdivider executes and files a bond conditioned on the payment of the taxes with the clerk of the board of supervisors of the county in which any part of the subdivision is located, and files with that clerk a certificate statement prepared by the appropriate state or local official estimating the taxes [*Gov. Code § 66493(a)*].

[2] Property Taxes

Each separately owned lot, parcel, or area of a planned development is separately assessed and taxed for property tax purposes. The assessment includes the value of the separate interest, plus a proportionate interest in the common area reserved as an appurtenance of the separate interest [*see Rev. & Tax. Code § 2188.5*].

When individual units in a condominium project are initially sold, the initial seller or purchaser of each unit may request separate assessment of property taxes, unless a bond has been filed pursuant to *Gov. Code § 66493* [*see Rev. & Tax. Code § 2188.6*]. Thereafter, each condominium unit is separately assessed and taxed to its owner [*see Rev. & Tax. Code § 2188.3*].

The assessor must separately assess the individual interests of the owners of a community apartment project or a stock cooperative if the owners have properly given approval of a written request for the separate assessment [*see Rev. & Tax. Code § 2188.7(a)*]. The interest assessed for a community apartment project is the value of the right of exclusive occupancy in a portion of the real property, plus the value of the undivided interest in the land. The interest assessed for a stock cooperative is the value of the right of exclusive occupancy that is transferable with the transfer of the individual's shares of stock in the corporation, plus the value of the interest in appurtenant common areas [*see Rev. & Tax. Code § 2188.7(b)*].

For further discussion of property taxes, as well as forms for claiming a refund of them, see Ch. 540, *Taxes and Assessments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawRestrictive CovenantsSubdivisionsTax LawState & Local TaxesReal Property TaxCollectionGeneral OverviewTax LawState & Local TaxesReal Property TaxCollectionTax Liens

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[Reserved]

§§ 124.31[Reserved]

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12-124 California Forms of Pleading and Practice--Annotated § 124.50

§ 124.50 California Legal Forms

For legal forms relating to subdivision regulation, see California Legal Forms, Ch. 30, *Subdivision Regulation* (Matthew Bender)

For legal forms relating to common interest developments, see California Legal Forms , Ch. 34, *Condominiums and Other Common-Interest Developments* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-124 California Forms of Pleading and Practice--Annotated § 124.51

§ 124.51 California Real Estate Law and Practice

For a discussion of subdivision regulation, see California Real Estate Law And Practice, Chs. 290- 292 (Matthew Bender)

For a discussion of homeowners' associations, see California Real Estate Law And Practice, Ch. 385, *Homeowners' Associations* (Matthew Bender)

For a discussion of condominium ownership, see California Real Estate Law And Practice, Ch. 386, *Condominium Ownership* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-124 California Forms of Pleading and Practice--Annotated § 124.52

§ 124.52 California Environmental Law and Land Use Practice

For a discussion of subdivision regulation, see California Environmental Law And Land Use Practice, Ch. 61, *Subdivision Regulation* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawRestrictive CovenantsSubdivisionsReal Property LawZoning & Land UseBuilding & Housing Codes

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12-124 California Forms of Pleading and Practice--Annotated § 124.53

§ 124.53 State Statutes

[1] Assessments

Regular and special assessments by association. *Civ. Code § 1366*

Lien for assessments. *Civ. Code §§ 1367, 1367.1*

Collection of assessment debts arising on or after January 1, 2006. *Civ. Code § 1367.4*

Separate interest owner's right to pay disputed charge or sum levied by association under protest and sue in small claims court. *Civ. Code § 1367.6*

Nonliability of owner for breach of covenant running with land that occurred before estate acquired. *Civ. Code § 1466*

Sale by trustee. *Civ. Code §§ 2924-2924h, 2934a*

Jurisdiction in assessment lien action. *Code Civ. Proc. § 86(a)(6)*

[2] Associations

[a] In General

Association defined. *Civ. Code § 1351(a)*

Powers of association. *Civ. Code § 1363*

Exemption from usury provisions of Cal. Const., art. XV. *Civ. Code § 1366(f)*

Powers of nonprofit mutual benefit corporations. *Corp. Code § 7140*

"Owners' association" defined for purposes of Corporations Code. *Corp. Code § 25012*

[b] Business Matters

Adopting and changing operating rules. *Civ. Code § 1357.100 et seq.*

Financial statements. *Civ. Code § 1365*

Availability of books, records, and minutes of proceedings. *Civ. Code § 1365.2*

Duties of board of directors. *Civ. Code § 1365.5*

Standing of association to sue. *Civ. Code § 1368.3*

Membership certificates. *Corp. Code § 7313*

Meetings and voting. *Corp. Code §§ 7510-7527*

Proxies. *Corp. Code § 7613*

Sale or dissolution of association. *Corp. Code § 12663*

[3] Common Areas

Reasonable provisions regulating solar energy systems are permissible. *Civ. Code § 714.1*

Common area defined. *Civ. Code § 1351(b)*

Exclusive use common area defined. *Civ. Code § 1351(i)*

Common areas of condominium as not subject to partition except as provided in *Civ. Code § 1359*. *Civ. Code §§ 1358,*

1359(a)

Common areas as subject to easements. *Civ. Code § 1361*

Ownership of common areas. *Civ. Code § 1362*

Maintenance of common areas. *Civ. Code § 1364*

[4] Common Interest Developments in General

Davis-Sterling Common Interest Development Act. *Civ. Code § 1350 et seq.*

Common interest development defined. *Civ. Code § 1351(c)*

Separate interest defined. *Civ. Code § 1351*(*l*)

Creation of development and application of Davis-Stirling Common Interest Development Act. *Civ. Code § 1352*

Improvements or alterations of separate interest. *Civ. Code § 1360(a)(1), (b)*

Intra-Association Dispute Resolution Procedure. *Civ. Code § 1363.810 et seq.*

Immunity of volunteer officer or volunteer director of association managing exclusively residential common interest development. *Civ. Code § 1365.7*

Limitation on tort liability of individual owners through acquisition and maintenance of liability insurance by association. *Civ. Code § 1365.9*

Mandatory Pre-Litigation Alternative Dispute Resolution Procedure. *Civ. Code § 1369.510 et seq.*

Certain common interest development requirements are not applicable to commercial and industrial common interest developments. *Civ. Code § 1373*

[5] Community Apartment Projects

Community apartment project defined. *Civ. Code § 1351(d)*

[6] Condominiums

Condominium project defined. *Civ. Code §§ 783, 1351(f)*

Condominium plan defined. *Civ. Code § 1351(e)*

Modification of unit to facilitate access of handicapped persons. *Civ. Code § 1360(a)(2), (b)*

Construction and interpretation of condominium plan. *Civ. Code §§ 1370, 1371*

Acquisition of condominium interest by city or county. *Gov. Code § 25549.20*

[7] Governing Documents

Amendment of declaration. *Bus. & Prof. Code § 11018.7*; *Civ. Code §§ 1355, 1356*

Declarant defined. *Civ. Code § 1351(g)*

Declaration defined. *Civ. Code § 1351(h)*

Governing documents. *Civ. Code § 1351(j)*

Contents of declaration. *Civ. Code § 1353*

Covenants and restrictions in declaration. *Civ. Code § 1354*

Extension of term of declaration. *Civ. Code § 1357*

Construction and interpretation of deed or declaration. *Civ. Code §§ 1370, 1371*

[8] Homestead

Homestead exemption in general. *Code Civ. Proc. § 704.710 et seq.*

Applicability of exemption to common interest development as homestead. *Code Civ. Proc. § 704.710(a)(4)-(7)*

[9] Lien for Labor or Materials

Interests to which lien for labor, services, or materials attaches. *Civ. Code § 1369*

[10] Limited-Equity Housing Cooperatives

Limited-equity housing cooperative defined. *Civ. Code § 817*

[11] Managing Agent

Information required to be furnished to association board of directors by prospective managing agent prior to entering into management agreement. *Civ. Code § 1363.1*

Managing agents' management of association funds; mandatory deposit in interest-bearing account is required, commingling prohibited. *Civ. Code § 1363.2*

[12] Partition of Condominium

Partition of cotenancy in condominium. *Civ. Code § 1359(a)*

Partition of entire condominium project. *Civ. Code § 1359(b)*

[13] Planned Developments

Planned development defined. *Civ. Code § 1351(k)*

[14] Private Roads

Procedure for making Vehicle Code applicable to private roads in common interest subdivisions. *Veh. Code § 21107.7*

[15] Removal of Vehicles From Property

Removal of vehicles parked on highway within common interest development by peace officer. *Veh. Code § 22651(q)*

Removal of unauthorized vehicles from premises by association. *Veh. Code § 22658*

[16] Securities Regulations

Exemption of security of interest in subdivided lands or subdivision. *Corp. Code § 25100(f)*

[17] Senior Citizen Housing Development

Application for public report. *Bus. & Prof. Code § 11010.05*

Definition and purpose. *Civ. Code § 51.3*

Special provisions applicable to Riverside County only. *Civ. Code §§ 51.10-51.12*

[18] Stock Cooperatives

Stock cooperative defined. *Civ. Code §§ 783.1, 1351(m)*

[19] Subdivided Lands Act

[a] Application of Act

Subdivided Lands Act. *Bus. & Prof. Code § 11000 et seq.*

Subdivided lands and subdivision defined. *Bus. & Prof. Code § 11000.1*

Planned development defined. *Bus. & Prof. Code § 11003*; *Civ. Code § 1351(k)*

Stock cooperative defined. *Bus. & Prof. Code § 11003.2*; *Civ. Code § 1351(m)*

Community apartment project defined. *Bus. & Prof. Code § 11004*; *Civ. Code § 1351(d)*

Common interest development subject to Subdivided Lands Act. *Bus. & Prof. Code § 11004.5(a)-(d)*

[b] Blanket Encumbrance

Blanket encumbrance defined. *Bus. & Prof. Code § 11013*

Restraint of sale or lease when subdivision not subject to blanket encumbrance. *Bus. & Prof. Code § 11013.2*

[c] Disclosures

Final public report. *Bus. & Prof. Code §§ 11018-11018.2*

Disclosure required before transfer of title. *Bus. & Prof. Code § 11018.6*

[d] Amendment or Modification of Governing Documents

Amendment or modification of governing documents that materially changes rights of owners. *Bus. & Prof. Code § 11018.7*

[20] Subdivision Map Act

[a] Application of Act

Subdivision Map Act. *Gov. Code § 66410 et seq.*

Local agencies required to regulate initial design and improvement of common interest developments. *Gov. Code § 66411*

Act does not apply to defined conversions of community apartment projects or stock cooperatives to condominiums. *Gov. Code § 66412(g), (h)*

Types of common interest development subject to Act. *Gov. Code § 66424*

[b] Approval of Map

Requirement of tentative and final map. *Gov. Code §§ 66425, 66426*

Permissible features of map. *Gov. Code § 66427*

Conversion of residential real property to common development. *Gov. Code § 66427.1*

Map waiver by local ordinance. *Gov. Code § 66428*

Local agency must give notice to tenants of hearing to be held. *Gov. Code § 66451.3(b)*

Appeal of approval or disapproval of maps. *Gov. Code § 66452.5*

Bond conditioned on payment of taxes. *Gov. Code § 66493(a)*

[21] Taxation

Reappraisal on purchase or change of ownership of separate interest. *Rev. & Tax. Code § 65.1*

Property tax assessment of common interest developments. *Rev. & Tax. Code §§ 2188.3, 2188.5-2188.7*

Taxation of homeowner's association. *Rev. & Tax. Code § 23701t*

[22] Transfer of Separate Interest

[a] In General

Repugnant conditions restraining alienation are void. *Civ. Code § 711*

Transfer of interest. *Civ. Code § 1358*

Association rule or regulation that arbitrarily or unreasonably restricts owner's ability to market separate interest is void. *Civ. Code § 1368.1*

Real property sales contract defined. *Civ. Code § 2985*

[b] Disclosure Required Before Transfer

Disclosure requirements before transfer of interest subject to Subdivided Lands Act. *Bus. & Prof. Code § 11018.6*

Notice required before subdivider transfers interest subject to blanket encumbrance. *Civ. Code § 1133*

Disclosure requirements before first sale of converted unit. *Civ. Code § 1134*

Disclosure requirements before owner transfers separate interest not subject to Subdivided Lands Act. *Civ. Code § 1368*

[23] Utility and Safety

Electrical and gas metering. *Gov. Code § 39730*; *Pub. Util. Code § 780.5*

Smoke detectors. *Health & Safety Code § 13113.7*

Fire safety regulations of high rise structures. *Health & Safety Code § 13210 et seq.*

[24] Zoning Ordinances

Interpretation of local zoning ordinances. *Civ. Code § 1372*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawRestrictive CovenantsSubdivisionsReal Property LawZoning & Land UseGeneral OverviewTax LawState & Local TaxesReal Property TaxCollectionGeneral Overview

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§ 124.54 State Regulations

[1] In General

Regulation of common interest development subject to Subdivided Lands Act in general. *10 Cal. Code Reg. § 2790 et seq.*

[2] Association

[a] Powers and Duties of Governing Body

Provisions in governing instrument concerning governing body. *10 Cal. Code Reg. § 2792.8(a)(8)-(18)*

Selection of governing body. *10 Cal. Code Reg. § 2792.19*

Governing body in general. *10 Cal. Code Reg. §§ 2792.19-2792.22*

Powers and duties of governing body. *10 Cal. Code Reg. § 2792.21*

Maintenance of common areas. *10 Cal. Code Reg. § 2792.21(a)(4), (7)*

Financial statements. *10 Cal. Code Reg. § 2792.22*

Right of association to procure or make offer. *10 Cal. Code Reg. § 2792.25(b)*

[b] Members

Members' meetings. *10 Cal. Code Reg. § 2792.17*

Members' voting. *10 Cal. Code Reg. § 2792.18*

[c] Assessments

Contents of governing instrument regarding assessments. *10 Cal. Code Reg. § 2792.8(a)(5), (6)*

Subdivider's payment of assessments during early stages of ownership and operation. *10 Cal. Code Reg. § 2792.9*

Assessments. *10 Cal. Code Reg. § 2792.16*

[3] Blanket Encumbrance

Approval by Real Estate Commissioner of blanket encumbrance on stock cooperative. *10 Cal. Code Reg. § 2792.14*

[4] Governing Instruments

[a] General Provisions

Governing instruments for ownership or management. *10 Cal. Code Reg. § 2792.8*

Provisions for disciplinary action against individual owner. *10 Cal. Code Reg. § 2792.26*

[b] Amendment of Governing Instrument

Governing documents ordinarily provide for amendment procedures. *10 Cal. Code Reg. § 2792.8(a)(18)*

Requirements for method of amending governing instruments. *10 Cal. Code Reg. § 2792.24*

Application for consent of Real Estate Commissioner to amendment or modification of governing instrument. *10 Cal. Code Reg. § 2793*

[5] Public Report

Public reports in general. *10 Cal. Code Reg. §§ 2792-2792.2, 2792.5-2792.6, 2794-2795.3*

Receipt of public report. *10 Cal. Code Reg. § 2795.1*

[6] Restrictions

Restrictions in governing instruments on severability of separately-owned portion from common interest portion of subdivision interest. *10 Cal. Code Reg. § 2792.8(a)(19)*

Prohibition of restriction based on race, color, creed, national origin, or sex of vendee or lessee. *10 Cal. Code Reg. § 2792.25(a)*

Legal Topics:

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§ 124.55 Decisions

[1] Arbitration

Under *Code Civ. Proc. § 1281.2*, party seeking to compel arbitration must plead and prove prior demand for arbitration under agreement and refusal to arbitrate before it may be entitled to order compelling arbitration; when homeowners' association failed to make such showing its petition to compel arbitration should have been denied. *Mansouri v. Superior Court (2010) 181 Cal. App. 4th 633, 640, 104 Cal. Rptr. 3d 824*

Provision in condominium project's declaration of covenants, conditions, and restrictions requiring construction and design defect claims to be submitted to binding arbitration was contract of adhesion that was unenforceable because it was procedurally and substantively unconscionable. *Villa Milano Homeowners Ass'n v. IL Davorge (2000) 84 Cal. App. 4th 819, 835, 102 Cal. Rptr. 2d 1*

Arbitration clause in condominium purchase agreement was valid; class action for fraudulent concealment, breach of statutory and fiduciary duties, and negligence was therefore subject to arbitration. *Izzi v. Mesquite Country Club (1986) 186 Cal. App. 3d 1309, 1316, 1322, 231 Cal. Rptr. 315*

[2] Bylaws

Amendment to condominium bylaws that created two classes of members and adversely affected rights of one class was not valid because it was not approved by affected class as required by *Corp. Code § 7150*. *Lake Arrowhead Chalets Timeshare Owners Assn. v. Lake Arrowhead Chalets Owners Assn. (1996) 51 Cal. App. 4th 1403, 1408-1409, 59 Cal. Rptr. 2d 875*

[3] Conversions

Ordinance regulating condominium conversions is legitimate exercise of city's police power, is not preempted by Subdivision Map Act, and does not result in taking of property. *Griffin Development Co. v. City of Oxnard (1985) 39 Cal. 3d 256, 266-267, 217 Cal. Rptr. 1, 703 P.2d 339*

City ordinance imposing moratorium on condominium conversions was legitimate exercise of police power; ordinance was not unconstitutional as applied, because strict scrutiny test was inapplicable and rational relationship test was met because ordinance is reasonably related to city's goal of preserving rental housing; city was not required to ban all conversions but was free to restrict moratorium to those buildings whose impact on rental housing was most palpable; retroactive application of moratorium ordinance was valid. *Leavenworth Properties v. City and County of San Francisco (1987) 189 Cal. App. 3d 986, 990-994, 234 Cal. Rptr. 598*

Fifty-day period of *Gov. Code § 66452.1(b)*, requiring local advisory agency to take action on subdivision map within 50 days or be deemed to have approved it under *Gov. Code § 66452.4*, is not operative when application is not accepted by agency for filing, nor is it operative when local ordinance does not authorize agency to approve applications. *Leavenworth Properties v. City and County of San Francisco (1987) 189 Cal. App. 3d 986, 995, 234 Cal. Rptr. 598*

Subdivision Map Act prescribes exclusive means, after recordation of final map containing plan for developing condominium units, for obtaining refund of development fees imposed pursuant to Act on formal reversion to acreage. *B & P Development Corp. v. City of Saratoga (1986) 185 Cal. App. 3d 949, 961, 230 Cal. Rptr. 192*

Condominium conversion ordinance was ordinance but was not so intrusive as to have confiscatory effect. *Terminal Plaza Corp. v. City and County of San Francisco (1986) 177 Cal. App. 3d 892, 912, 223 Cal. Rptr. 379*

Local ordinance requiring condominium converter to pay relocation assistance to displaced tenants was valid. *Briarwood Properties, Ltd. v. City of Los Angeles (1985) 171 Cal. App. 3d 1020, 217 Cal. Rptr. 849* ; *Kalaydjian v. City of Los Angeles (1983) 149 Cal. App. 3d 690, 693-694, 197 Cal. Rptr. 149*

Developer engaging in condominium conversion was required to comply with local rent control ordinance that required removal permit, despite fact that developer's tentative tract map was approved before ordinance was enacted. *Blue Chip Properties v. Permanent Rent Control Bd. (1985) 170 Cal. App. 3d 648, 663, 216 Cal. Rptr. 492*

Rent control ordinance that required removal permit to convert apartments to condominiums was not preempted by Subdivision Map Act when map had been approved before enactment of ordinance. *McMullan v. Santa Monica Rent Control Bd. (1985) 168 Cal. App. 3d 960, 963-964, 214 Cal. Rptr. 617*

Consummation of tenant's right of first refusal to purchase converting unit was required to be in form of binding contract to sell and purchase real property to satisfy statute of frauds. *Greenberg v. Superior Court (1982) 131 Cal. App. 3d 441, 448, 182 Cal. Rptr. 466*

Tenant's right of first refusal to purchase converting unit arises only when project has been fully approved, final map recorded, and subdivision public report issued. *Greenberg v. Superior Court (1982) 131 Cal. App. 3d 441, 448, 182 Cal. Rptr. 466*

[4] Covenants, Conditions, and Restrictions

If declaration establishing common plan for ownership of property in subdivision and containing restrictions on use of property as part of the common plan is recorded before execution of sales agreement for any land in subdivision and satisfies other specified requirements, subsequent purchasers who have constructive notice of recorded declaration are deemed to intend and agree to be bound by common plan. *Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 355, 47 Cal. Rptr. 2d 898, 906 P.2d 1314*

Reasonableness or unreasonableness of condominium use restriction subject to *Civ. Code § 1354* is determined by reference to common interest development as whole, not to facts that are specific to objecting homeowner; use restriction subject to *Civ. Code § 1354* is enforceable unless it is wholly arbitrary, imposes burden on use of affected land that substantially outweighs any benefit to development's residents, or violates fundamental public policy. *Nahrstedt v. Lakeside Village Condominium Assn. (1994) 8 Cal. 4th 361, 382-383, 386, 33 Cal. Rptr. 2d 63, 878 P.2d 1275* ; *Dolan-King v. Rancho Santa Fe Assn. (2000) 81 Cal. App. 4th 965, 975, 97 Cal. Rptr. 2d 280*

Homeowners' association violated Fair Employment and Housing Act [*Gov. Code § 12900 et seq.*] by failing to allow married residents to keep companion dog as reasonable accommodation to their disabilities. *Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Comm'n (2004) 121 Cal. App. 4th 1578, 1591-1592, 18 Cal. Rptr. 3d 669*

When covenants, codes, and restrictions entitle members to use common areas, rule precluding use by nonresident member exceeds authority of association. *Major v. Miraverde Homeowners Assn. (1992) 7 Cal. App. 4th 618, 625-628, 9 Cal. Rptr. 2d 237*

Homeowners' association is not prohibited by *Civ. Code § 714* from imposing solar unit guidelines in covenant that are reasonable restrictions and that allow for alternative system of comparable cost and efficiency. *Palos Verdes Homes Assn. v. Rodman (1986) 182 Cal. App. 3d 324, 328, 227 Cal. Rptr. 81*

Homeowners' association that seeks to enforce covenants, codes, and restrictions to compel act by member owner is required to show that it has followed its own standards and procedures before pursuing mandatory injunctive relief, and that its substantive decision was made in good faith and is reasonable and not arbitrary or capricious. *Ironwood Owners Assn. IX v. Solomon (1986) 178 Cal. App. 3d 766, 772, 224 Cal. Rptr. 18*

[5] Disputes Involving Governing Documents

Successful invocation of homeowners' association's governing documents as defense does not entitle defendant to attorneys' fees under former *Civ. Code § 1354(f)* (*now see Civ. Code § 1369.580*) if plaintiff's claim was not brought to enforce those documents. *Salawy v. Ocean Towers Housing Corp. (2004) 121 Cal. App. 4th 664, 671, 17 Cal. Rptr. 3d 427*

Trial court has jurisdiction after voluntary dismissal to determine who was prevailing party for purposes of awarding attorney's fees under former *Civ. Code § 1354(f)* (*now see Civ. Code § 1369.580*). *Parrott v. Mooring Townhomes Assn., Inc. (2003) 112 Cal. App. 4th 873, 877, 6 Cal. Rptr. 3d 116*

Action purportedly brought under *Corp. Code § 7616* to determine validity of election of directors was in fact action to enforce members' proxy and cumulative voting rights under the bylaws; thus court properly awarded attorney's fees pursuant to former *Civ. Code § 1354(f)* (*now see Civ. Code § 1369.580*). *Kaplan v. Fairway Oaks Homeowners Assn. (2002) 98 Cal. App. 4th 715, 721, 120 Cal. Rptr. 2d 158*

[6] Elements of Common Interest Development

Declaration that restricted use of four lots did not give owners of other lots in development any interest in those four lots or right to use lots for their own enjoyment did not create any "mutual or reciprocal easement rights appurtenant to the separate interests," and development therefore was not a common interest development within meaning of Davis-Sterling Act. *Committee to Save the Beverly Highlands Homes Assn. v. Beverly Highlands Homes Assn. (2001) 92 Cal. App. 4th 1247, 1270, 112 Cal. Rptr. 2d 732*

Right to exclusive occupancy is prerequisite to creation of community apartment project, and that right must appear on face of deed for that estate to be created; community apartment project cannot be created informally. *Adler v. Elphick (1986) 184 Cal. App. 3d 642, 644, 647, 649, 229 Cal. Rptr. 254*

Condominium's system of tenure for real property draws elements from both tenancy in common and separate ownership. *White v. Cox (1971) 17 Cal. App. 3d 824, 829, 95 Cal. Rptr. 259*

Existence of condominium as defined in *Civ. Code § 783* requires that at least one unit has been conveyed by subdivider. *County of Los Angeles v. Hartford Acc. & Indem. Co. (1970) 3 Cal. App. 3d 809, 814, 83 Cal. Rptr. 740*

[7] Liability of Association

Association functions as landlord in maintaining common areas of condominium, and has duty to exercise due care for residents' safety in areas under its control. *Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 498, 503, 229 Cal. Rptr. 456, 723 P.2d 573*

Injunction properly issued requiring association to repair slab penetrations adjacent to plaintiff's unit; evidence showed that slab penetrations constituted deviation from original architectural plans for construction of building, penetrations existed in violation of current building requirements, and presence of slab penetrations constituted fire hazard. *Ritter & Ritter, Inc. Pension and Profit Plan v. Churchill Condominium Assn. (2008) 166 Cal. App. 4th 103, 124, 82 Cal. Rptr. 3d 389*

Coverage of action alleging fraud and breach of duty based on association's conduct in dispute over views blocked by new construction was not barred by exclusion in association's liability insurance policy for wrongful acts based on design or construction of any structure. *Marquez Knolls Property Owners Assn., Inc. v. Executive Risk Indemnity, Inc. (2007) 153 Cal. App. 4th 228, 234, 62 Cal. Rptr. 3d 510*

Homeowners association had no duty to inform members of filing of litigation against its insurer, when duty was not imposed in association's governing documents. *Ostayan v. Nordhoff Townhomes Homeowners Assn. (2003) 110 Cal. App. 4th 120, 129, 1 Cal. Rptr. 3d 528*

Association has no duty to disclose to prospective purchasers existence of construction defects or fact of any litigation concerning construction defects. *Kovich v. Paseo Del Mar Homeowners' Assn. (1996) 41 Cal. App. 4th 863, 867-869, 48 Cal. Rptr. 2d 758*

Clause in declaration exculpating homeowners' association from liability for damage from water leaking from pipes was enforceable as not violative of public policy and association could contractually shift the risk of loss to the condominium owner. *Franklin v. Marie Antoinette Condominium Owners Ass'n (1993) 19 Cal. App. 4th 824, 833-834, 23 Cal. Rptr. 2d 744*

Negligence action by condominium unit owner against condominium and condominium association is permitted. *White v. Cox (1971) 17 Cal. App. 3d 824, 828, 95 Cal. Rptr. 259*

[8] Liability of Developer

Right of condominium unit owners to maintain class action against developer for fraudulent misrepresentations in final public report. *Occidental Land, Inc. v. Superior Court (1976) 18 Cal. 3d 355, 360-361, 134 Cal. Rptr. 388, 556 P.2d 750*

Developer-drafted provision in CC&Rs requiring all disputes between association and developer to be decided by general judicial reference is not written contract within meaning of *Code Civ. Proc. § 638* (authorizing party to written contract to move for judicial reference if contract so provides) and therefore cannot effect waiver of right to jury trial. Treo @ *Kettner Homeowners Assn. v. Superior Court (2008) 166 Cal. App. 4th 1055, 1067, 83 Cal. Rptr. 3d 318*

Association may recover from developer for damages to common areas of condominium caused by negligent acts or omissions that occurred before association was formally organized. *Orange Grove Terrace Owners Assn. v. Bryant Properties, Inc. (1986) 176 Cal. App. 3d 1217, 1219, 1223, 222 Cal. Rptr. 523*

Developer is liable to individual homeowners and to homeowners' association for breach of fiduciary duty to act in good faith, exercise proper management, and avoid conflicts of interest. *Cohen v. S & S Construction Co. (1983) 151 Cal. App. 3d 941, 945, 201 Cal. Rptr. 173*

[9] Liability of Director

Director of association is not vicariously liable for association's tort in which he or she does not participate. *Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 504, 229 Cal. Rptr. 456, 723 P.2d 573*

Director of association is liable in his or her personal capacity for association's tort, if that director specifically authorized, directed, or participated in tort or if director specifically knew or reasonably should have known that some hazardous condition or activity under his or her control could injure plaintiff but director negligently failed to take or order appropriate action to avoid harm. *Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 508, 229 Cal. Rptr. 456, 723 P.2d 573*

Generally, board of directors of corporation is not personally liable to third parties for negligence amounting to breach of duty that officer owes to corporation alone. *Jaffe v. Huxley Architecture (1988) 200 Cal. App. 3d 1188, 1191, 246*

Cal. Rptr. 432

Condominium complex developers sued by homeowners' association for construction defects for which developers were responsible were not entitled to seek equitable indemnification from individual members of association's board of directors for acts and omissions that contributed to damages arising from original defects, because acts and omissions related to board's management of complex and were in legal sense conduct of association itself; acts and omissions could be asserted by developers against association under either doctrine of comparative negligence or doctrine of avoidable consequences. *Jaffe v. Huxley Architecture (1988) 200 Cal. App. 3d 1188, 1190-1192, 246 Cal. Rptr. 432*

[10] Liability of Individual Owner

Members of property owners' association who held access easements in private streets in subdivision had no duty to child injured on street by resident's dogs, because there was no connection between easement's scope and harm that occurred. *Cody F. v. Falletti (2001) 92 Cal. App. 4th 1232, 1243-1244, 112 Cal. Rptr. 2d 593*

Individual owner is liable for injury sustained by third person in common area. *Davert v. Larson (1985) 163 Cal. App. 3d 407, 412, 209 Cal. Rptr. 445*

[11] Voting

When not specifically prohibited by governing documents, vote on proposed amendment to declaration may be conducted by mail ballot pursuant to *Corp. Code § 7513(a)*. *Fourth La Costa Condominium Owners Assn. v. Seith (2008) 159 Cal. App. 4th 563, 569-570, 71 Cal. Rptr. 3d 299*

When vote on proposed amendment of declaration has been conducted by mail ballot, *Corp. Code § 7513(b)* ("approval by written ballot pursuant to this section shall be valid only when the number of votes cast by ballot ...equals or exceeds the quorum required to be present at a meeting authorizing the action, and the number of approvals equals or exceeds the number of votes that would be required to approve at a meeting at which the total number of votes cast was the same as the number of votes cast by ballot") does not prohibit association or member from seeking judicial intervention under *Civ. Code § 1356* (homeowners association, or any member, may petition superior court for reduction in percentage of affirmative votes required to amend CC&Rs if they require approval by "owners having more than 50 percent of the votes in the association"). *Fourth La Costa Condominium Owners Assn. v. Seith (2008) 159 Cal. App. 4th 563, 570-571, 71 Cal. Rptr. 3d 299*

When bylaws require vote by joint action of owners, votes by less than all joint owners of a unit were not valid affirmative votes. *King v. Oakmore Homes Assn. (1987) 195 Cal App. 3d 779, 782-783, 241 Cal. Rptr. 140*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsConversionsReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsManagementReal Property LawTortsConstruction Defects

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§ 124.56 Attorney General Opinions

Gov. Code § 66426 requires tentative and final maps when condominium plan effects three-dimensional division of airspace and severs it from underlying earth, or when condominium project consists of five or more divisions of airspace within previously created three-dimensional air cube, even though divisions are not coupled with any ownership interest in the underlying earth. *73 Ops. Cal. Att'y Gen. 312 (1990)*

Requirements of Subdivision Map Act (*Gov. Code § 66410 et seq.*) as applicable to proposed condominium project on previously subdivided, single parcel of property. *65 Ops. Cal. Att'y Gen. 101 (1982)*

Subdivision Map Act (*Gov. Code § 66410 et seq.*) requires tentative and final subdivision maps in order to convert existing apartment house or single-family development located on one lot to condominium even though condominium is located on single lot created by earlier approved final subdivision map. *62 Ops. Cal. Att'y Gen. 410 (1979)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 124.57 Law Reviews

Comment, *There's No Place Like Home ... Until You Discover Defects: Do Prelitigation Statutes Relating to Construction Defect Cases Really Protect the Needs of Homeowners and Developers?, 44 Santa Clara L. Rev. 1249 (2004)*

Bush, *Beware the Associations: How Homeowners' Associations Control You and Infringe Upon Your Inalienable Rights!!, 30 W. St. U. L. Rev. 1 (2003)*

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Comment, *Beyond Nahrstedt: Reviewing Restrictions Governing Life in a Property Owner Association, 42 UCLA L. Rev. 837 (1995)*

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§ 124.58 Text References

Rohan, Zoning and Land Use Controls (1977)

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Witkin, Summary of California Law, vol. 12, *Real Property*, §§ 85-126, 687-689, 790 (10th ed. 2005)

12 Cal. Jur.3d, *Condominium and Cooperative Apartments*

15 Am. Jur.2d, *Condominiums*

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[Reserved]

§§ 124.59[Reserved]

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PART IV. FORMS

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§ 124.70 Complaint for Damages for Willful Failure of Owner to Provide Documents to Purchaser of Separate Interest of Common Interest Development [Civ. Code § 1368(d)] Not Subject to Subdivided Lands Act

[1] FORM Complaint for Damages for Willful Failure of Owner to Provide Documents to Purchaser of Separate Interest of Common Interest Development [Civ. Code § 1368(d)] Not Subject to Subdivided Lands Act

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a resident of _____ County, California *or* a corporation organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), California [*if applicable*, _____ Judicial District].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as Does I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein

alleged were proximately caused by their conduct.)]

3. Defendant is, and at all times herein mentioned was, the owner of a separate interest in a common interest development commonly known as _____ [*name of development*]. Specifically, defendant is the owner of _____ [*describe defendant's separate interest*].

4. _____ [*Name of development*] is not subject to *Business and Professions Code Sections 11000-11200*, commonly known as the Subdivided Lands Act, because _____ [*specify, e.g.,* it is a community apartment project containing only three apartments].

5. On or about _____ [*date*], _____ [*describe prospective sale of defendant's separate interest to plaintiff, e.g.,* defendant and plaintiff entered into negotiations for plaintiff to purchase defendant's separate interest in the _____ (*name of development*). On _____ (*date*), defendant and plaintiff executed a real property sales contract on the separate interest].

6. Defendant failed to provide plaintiff, as soon as practicable before the _____ [transfer of title to *or* execution of the real property sales contract for] the separate interest with _____ [a copy of the operating rules *and/or* the governing documents of _____ (*name of development*) *or* a statement that the restriction in the governing documents limiting the _____ (occupancy *or* residency *or* use) of a separate interest on the basis of age is only enforceable to the extent permitted by *Civil Code Section 51.3 or* a statement specifying the applicable provisions of *Civil Code Section 51.3 or* a copy of the most recent financial statement prepared by the management association of _____ (*name of development*) and distributed to all its members pursuant to (*Civil Code Section 1367.1 or, if lien was recorded before January 1, 2003, Civil Code Section 1367*) *or* a true statement in writing obtained from an authorized representative of the management association of _____ (*name of development*) as to the amount of any assessments levied on defendant's interest in _____ (*name of development*) which are unpaid, including true information of late charges, interest, and costs of collection which are or may be made a lien on defendant's interest pursuant to *Civil Code Section 1367, or* a copy or summary of any notice issued by the board of directors to defendant pursuant to *Civil Code Section 1363(h)* that sets forth any alleged and unresolved violation of the governing documents *or any combination thereof*].

7. Defendant's failure to provide plaintiff with the above-described document(s) was willful, because _____ [*specify circumstances indicating willful failure to provide*].

8. As a proximate result of defendant's failure to provide plaintiff with the above-described document(s), plaintiff has suffered actual damages in that _____ [*describe manner in which plaintiff has been damaged*], all to his/her damage in the amount of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For actual damages in the sum of $_____;

2. For reasonable attorney's fees [in the sum of $_____];

3. For the imposition of a civil penalty in the sum of $500;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*names*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This complaint is for use by a purchaser of a separate interest in a common interest development not subject to the Subdivided Lands Act (*Bus. & Prof. Code § 11000 et seq.*), when the seller has willfully failed to provide the purchaser with the documents required under *Civ. Code § 1368(a)* [*see Civ. Code § 1368(d)*].

[3] Allegations

This complaint alleges the following:

- The residence and capacity of the defendant (Paragraph 1).
- Fictitious names (Paragraph 2).
- A description of the separate interest (Paragraph 3).
- That the development is not subject to the Subdivided Lands Act (Paragraph 4) [*see Bus. & Prof. Code § 11004.5*; *Civ. Code § 1368(a)*; *see also § 124.14[2]*].
- A description of the sale of the separate interest (Paragraph 5).
- That defendant failed to provide plaintiff with the necessary document(s) as required under *Civ. Code § 1368(a)* (Paragraph 6).
- That defendant's failure to provide plaintiff with the documents was willful (Paragraph 7).
- That, as a proximate result, plaintiff suffered actual damages (Paragraph 8) [*see Civ. Code § 1368(d)*].

[4] Attorney's Fees

If the purchaser is the prevailing party in the action, he or she is entitled to reasonable attorney's fees, in addition to actual damages [*Civ. Code § 1368(d)*].

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[6] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(6)*]. For further discussion of jurisdiction, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter* .

In limited civil cases the caption must state whether the demand exceeds or does not exceed $10,000. The caption must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

Venue is determined under the general venue statutes [*see Code Civ. Proc. §§ 392-402* (generally); *see, e.g., Code Civ. Proc. §§ 393(a)* (recovery of penalty), 395(a) (personal injury), 395.5 (corporations or associations)]. For further discussion, see Ch. 571, *Venue* .

[7] Cross References

For alternative allegations of capacity and residence of parties, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used* .

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions* .

For alternative forms of prayers and verification, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively.

[8] State Statutes

Accessible housing for senior citizens. *Civ. Code § 51.3*.

Documents to be provided to prospective purchaser of separate interest in common interest development not subject to Subdivided Lands Act. *Civ. Code § 1368(a)*.

Remedies for willful violation of requirement to provide documents to prospective purchaser of separate interest in common interest development not subject to Subdivided Lands Act. *Civ. Code § 1368(d)*.

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12-124 California Forms of Pleading and Practice--Annotated § 124.71

§ 124.71 Allegation--Willful Failure of Subdivider to Notify Purchaser or Tenant of Blanket Encumbrance [Civ. Code § 1133]

[1] FORM Allegation--Willful Failure of Subdivider to Notify Purchaser or Lessee of Blanket Encumbrance [Civ. Code § 1133]

1. Defendant is, and at all times herein mentioned was, the _____ [subdivider *or* _____ (agent *or* representative) of the subdivider, _____ (*name of subdivider*)] of a common interest development commonly known as _____ [*name of development*].

2. _____ [*Name of development*] is not subject to *Business and Professions Code Sections 11000-11200*, commonly known as the Subdivided Lands Act, and thus is exempt from compliance with *Business and Professions Code Section 11013.2* regarding conditions under which a sale or lease without a release clause is permitted, because _____ [*specify, e.g.,* it is a community apartment project containing only four apartments].

3. On or about _____ [*date*], defendant _____ [(caused to be) sold to plaintiff *or* (caused to be) leased to plaintiff for a term exceeding five years] a separate interest in _____ [*name of development*], consisting of that certain _____ [*type of interest, e.g.,* apartment] located at _____ [*street address and city*], California, and more particularly described as follows: _____ [*legal description of lot, parcel, or unit*].

4. At the time of the above _____ [sale *or* lease], the _____ [*type of interest, e.g.,* apartment] was subject to a blanket encumbrance, as defined in *Business and Professions Code Section 11013*.

5. Defendant [failed to furnish plaintiff with a true copy of the notice required by *Civil Code Section 1133*, and further] failed to obtain plaintiff's signature on the notice [required by *Civil Code Section 1133*], before making the _____ [sale *or* lease] to plaintiff.

[2] Use of Form

This allegation is for use by the purchaser of a lot, parcel, or unit of a subdivision not subject to the Subdivided Lands Act (*Bus. & Prof. Code § 11000 et seq.*) when the subdivider willfully fails to notify the buyer of a blanket encumbrance as required by *Civ. Code § 1133*. It can also be used by a tenant if the lease was for a term exceeding five years [*Civ. Code § 1133(a)*]. The allegation in this form may be inserted in lieu of Paragraphs 3-6 of § 124.70[1].

The term "subdivision" for purposes of an action under *Civ. Code § 1133* includes, but is not limited to, a condominium project as defined in *Civ. Code § 1351(f)*, a community apartment project as defined in *Civ. Code § 1351(d)*, a stock cooperative as defined in *Civ. Code § 1351(m)*, and a limited equity housing cooperative as defined in *Civ. Code § 1351(m)* [*Civ. Code § 1133(b)*].

[3] Allegations

The form alleges that:

- Defendant, or his or her agent or representative, is a subdivider (Paragraph 1) [*Civ. Code § 1133(a)*].

- The development is not subject to the Subdivided Lands Act (*Bus. & Prof. Code § 11000 et seq.*) (Paragraph 2) [*Civ. Code § 1133(a)*; *see Bus. & Prof. Code § 11004.5*; *see also § 124.14[2]*].

- Defendant sold the lot or leased it for a term exceeding five years (Paragraph 3) [*Civ. Code § 1133(a)*].

- At the time of the sale or lease, the lot, parcel, or unit was subject to a blanket encumbrance, as defined in *Bus. & Prof. Code § 11013* (Paragraph 4) [*Civ. Code § 1133(a)*].

- Defendant sold or leased the lot, parcel, or unit before plaintiff was furnished with and signed a true copy of the notice set out in *Civ. Code § 1133* (Paragraph 5) [*Civ. Code § 1133(a)*].

If the defendant's failure to provide the required notice was willful (*see § 124.70[1]*, Paragraph 7), the purchaser or tenant is entitled to actual damages. In addition, the defendant will be guilty of a public offense punishable by a fine of up to $500. The prevailing party in an action to enforce such liability or fine will be awarded reasonable attorney's fees [*Civ. Code § 1133(d)*].

[4] State Statutes

Blanket encumbrance is defined to be trust deed, mortgage, lien, or encumbrance securing payment of money, or agreement under which subdivider holds subdivision under option, contract to sell, or trust agreement. *Bus. & Prof. Code § 11013*.

Notice to purchaser or to tenant (for term exceeding five years) is required when subdivision unit is subject to blanket encumbrance; form of notice. *Civ. Code § 1133(a)*.

Failure of buyer or tenant to sign notice does not invalidate grant, conveyance, lease, or encumbrance. *Civ. Code § 1133(c)*.

Remedies for willful violation of requirement to provide notice of blanket encumbrance to prospective buyer or tenant. *Civ. Code § 1133(d)*.

[5] Cross References

See *§ 124.70*.

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12-124 California Forms of Pleading and Practice--Annotated § 124.72

§ 124.72 Allegation--Capacity of Plaintiff as Owner's Association of Common Interest Development [Civ. Code § 1368.3]

[1] FORM Allegation--Capacity of Plaintiff as Owner's Association of Common Interest Development [Civ. Code § 1368.3]

At all times herein mentioned, plaintiff was an owner's association managing _____ [*name of common interest development*] as is more particularly set out in the Declaration of Covenants, Conditions, and Restrictions executed on _____ [*date*], and recorded in the Official Records of the County of _____, Book _____, page _____.

[2] Use of Form

This form is for use in a complaint by an owner's association to allege the association's standing to sue as the real party in interest in an action for damages to the commonly owned lots, parcels, or areas occasioned by the acts or omission of others. Under the provisions of *Civ. Code § 1368.3*, an owner's association may bring such an action without the necessity of joining with the individual owners of the project.

The form may be used in combination with forms of complaints set forth in other chapters that deal with particular torts, such as Ch. 150, *Conversion*, Ch. 380, *Negligence*, Ch. 421, *Premises Liability*, and Ch. 550, *Trespass*.

[3] State Statutes

Owner's association standing to sue. *Civ. Code § 1368.3*.

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12-124 California Forms of Pleading and Practice--Annotated § 124.73

§ 124.73 Complaint for Dues and Assessments [Civ. Code § 1366(e)]--By Homeowner's Association Against Owner of Separate Interest [Civ. Code § 1368.3]

[1] FORM Complaint for Dues and Assessments [Civ. Code § 1366(e)]--By Homeowner's Association Against Owner of Separate Interest [Civ. Code § 1368.3]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DUES AND ASSESSMENTS
_____ [*name*], [and DOES I	)	[Amount demanded _____
through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. [*Capacity of plaintiff. See § 124.72[1].*]

2. Defendant(s) is/are, and at all times herein mentioned was/were, owner(s) of the individual _____ [*type of interest, e.g.,* condominium unit] located at _____ [*street address and city*], California, and commonly called _____ [*name of development*].

3. On _____ [*date*], pursuant to its authority under *Civil Code Section 1366* and in compliance with _____ [*specify portion(s) of governing documents that set(s) out procedures for levying assessment* s,

e.g., Article _____, Section _____ of the above-described Declaration], plaintiff levied a _____ [regular *or* special] assessment in the amount of $_____ on the _____ [*type of interest, e.g.,* condominium unit] of defendant(s). The assessment was levied for the purpose of _____ [*specify, e.g.,* defraying expenses and maintaining reserves necessary for the ownership, operation, and furnishing of common facilities by plaintiff for the 2004 fiscal year], and was made payable _____ [*specify, e.g.,* in equal monthly installments on or before the first day of each month].

4. On _____ [*date*], the assessment levied against the property of defendant(s) became due in the amount of $_____. [Fifteen (15) *or* _____ days, as specified in Article _____, Section _____ of the above-described Declaration] have passed since the assessment became due, and defendant(s) has/have not paid the assessment.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the amount of the delinquent assessment;

2. For a late charge in the amount of $_____;

3. For reasonable attorney's fees [in the amount of $_____ *or* according to proof];

4. For interest on all the above at the rate of _____ percent;

5. For the costs of suit incurred herein; and

6. For such other further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*names*]

[*Verification, if desired. See § 124.70.*]

[2] Use of Form

This complaint is for use by an owner's association to collect delinquent assessments from a separate interest owner in a common interest development [*see Civ. Code § 1366*].

In lieu of filing a complaint to collect a delinquent assessment, the association may record a notice of delinquent assessment, which establishes a lien on the owner's separate interest for the amount of the assessment, plus late charges, reasonable costs of collection, and interest. The lien may be enforced in any manner permitted by law, including sale by the court or by the trustee designated in the notice [*see Civ. Code § 1367(b), (e), (g)* (liens recorded on or after January 1, 1986, and before January 1, 2003); *Civ. Code § 1367.1(d), (h), (m)* (liens recorded on or after January 1, 2003); *Civ. Code § 1367.4(c)* (liens for assessment debts of $1,800 or more arising on or after January 1, 2006); *see also § 124.15[b] -[f]*]. For a form of notice of delinquent assessment for use in recording such a lien, see California Legal Forms , Ch. 34, *Condominiums and Other Common-Interest Developments* (Matthew Bender).

If the association chooses to record a notice of delinquent assessment in lieu of filing a complaint to collect the debt, the association must first offer the separate interest owner and, if the owner accepts, participate in dispute resolution

pursuant to the association's "meet and confer" program [*Civ. Code § 1367.1(c)(1)(A)*; *see Civ. Code § 1363.810 et seq.*; *see also § 124.17[1]*].

If the amount of the debt for a delinquent regular or special assessment is less than $1,800 (excluding any accelerated assessments, late charges, fees and collection costs, and attorney's fees, or interest), and the debt arose on or after January 1, 2006, the debt may be collected by filing an action in small claims court, although an action in Superior Court is not inappropriate [*see Civ. Code § 1367.4(b)(1), (3)*].

[3] Allegations

This complaint alleges the following:

- The capacity of the plaintiff (Paragraph 1).
- The residence and capacity of the defendant(s) (Paragraph 2).
- That a regular or special assessment was levied pursuant to the governing documents (Paragraph 3) [*Civ. Code § 1366(e)*].
- That at least 15 days, or a longer period specified in the Declaration, have passed since the assessment became due and it is still unpaid (Paragraph 4) [*Civ. Code § 1366(e)*].

[4] Prayer

The association may recover the following: (1) the amount of the delinquent assessment; (2) a late charge in an amount not exceeding the greater of 10 percent of the assessment or $10, unless the declaration provides for a lesser charge; and (3) reasonable fees and costs of collection, and reasonable attorney's fees, at an annual interest rate not to exceed 12 percent, commencing 30 days after the assessment becomes due, unless the declaration specifies the recovery of interest at a rate of a lesser amount, in which case the lesser interest rate will apply [*Civ. Code § 1366(e)(3)*].

[5] State Statutes

Association must levy regular and special assessments sufficient to perform its obligations under governing documents and Civ. Code *§ 1350 et seq. Civ. Code* § 1366(a).

Exemption from execution by judgment creditors of regular assessments imposed to perform essential services. *Civ. Code § 1366(c)*.

Regular and special assessments are delinquent 15 days after becoming due; association is authorized to recover collection costs, including reasonable attorney's fees, late charge, and interest; limitations on late charges and interest. *Civ. Code § 1366(e)*.

Assessment, as well as late charges, collection costs, and interest, are debt of owner of separate interest at time assessment or other sums are levied. *Civ. Code § 1367(a), (g)* (liens recorded on or after January 1, 1986, and before January 1, 2003); *Civ. Code § 1367.1(a), (m)* (liens recorded on or after January 1, 2003).

[6] Cross References

See *§ 124.70*.

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12-124 California Forms of Pleading and Practice--Annotated § 124.74

§ 124.74 Petition for Order Reducing Percentage of Affirmative Votes Necessary for Amending Declaration of Common Interest Development [Civ. Code § 1356]

[1] FORM Petition for Order Reducing Percentage of Affirmative Votes Necessary for Amending Declaration of Common Interest Development [Civ. Code § 1356]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*names(s)*],	)	
Petitioner(s),	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	PETITION FOR ORDER REDUCING PERCENT-
Respondent(s).	)	AGE OF VOTES NECESSARY TO AMEND DE-
	)	CLARATION OF COMMON INTEREST DEVEL-
	)	OPMENT

Petitioner(s) allege(s):

1. At all times mentioned herein, petitioner(s) _____ [*name(s)*] was/were, and now is/are, _____ [*specify, e.g.,* owner(s) of individual _____ (*type of interest, e.g.,* condominium units) located at _____ (*street address and city*), California, and commonly called _____ (*name of development*)].

2. At all times mentioned herein, respondent(s) _____ [*name(s)*] was/were, and now is/are, _____ [*specify, e.g.,* individual owners and the managing association, respectively, of the _____ (*type of development, e.g.,* condominium project) located at _____ (*street*

address and city), California, and commonly called _____ (*name of development*)].

3. _____ [*Name of managing association*], hereinafter referred to as the Association, was formed and now exists for the purposes set forth in the Declaration executed on _____ [*date*] and recorded in the Official Records of the County of _____, Book _____, page _____. A copy of the Declaration [and all other governing documents of _____ (*name of development*)], is/are attached to this petition as Exhibit(s) _____.

4. On or about _____ [*date*], _____ [*specify the circumstances surrounding the proposal of the amendment, e.g.,* the Association held a meeting at which petitioner proposed that the voters pass an amendment to the Declaration to _____ (*specify objective of proposed amendment*)]. A copy of the complete text of the amendment and a short explanation of the reason for the amendment are attached hereto as Exhibits _____.

5. Petitioner(s) attempted to solicit approval of the amendment by the Association members in the manner provided in the Declaration by _____ [*describe actions taken to solicit approval*]. [Copies of the _____(notices *and/or* solicitation materials) utilized in the solicitation of owner approvals are attached to this petition as Exhibit(s) _____.]

6. Balloting on the proposed amendment was conducted in accordance with all applicable provisions of the governing document(s) of _____ (*name of development*), in that _____ [*describe when and how balloting was conducted*].

7. _____ [*Name(s)*] made a reasonably diligent effort to permit all eligible members of the Association to vote on the proposed amendment, by _____ [*describe efforts made*].

[*EITHER, if single class voting structure*]

8. The votes were cast as follows: _____ [*specify number*] members of the Association, representing _____ percent of the membership, voted in favor of the amendment, and _____ [*specify number*] members of the Association, representing _____ percent of the membership, voted against the amendment.

9. Although owners having more than 50 percent of the votes voted in favor of the amendment, the balloting did not result in approval of the proposed amendment, because the Declaration requires that the Declaration may only be amended by the approval of the owners having more than _____ percent of the votes in the Association.

[*OR, if voting structure has more than one class*]

8. The votes were cast as follows: _____ [*specify numbers and corresponding percentages of affirmative and negative votes in each voting class*].

9. Although owners having more than 50 percent of the votes of each class required by the declaration to vote in favor of the amendment voted in favor of it, the balloting did not result in approval of the proposed amendment, because the Declaration requires that the Declaration may only be amended by the approval of the owners having more than _____ percent of the votes in more than one class.

[*CONTINUE*]

[10. _____ (*Specify any other matter that is relevant to court's determination, including references to other documentation that is attached as an exhibit*).]

11. Pursuant to *Civil Code Section 1356*, the court may reduce the percentage of affirmative votes necessary for approval of the proposed amendment, or dispense with the requirement altogether, and may confirm the amendment as being validly approved on the basis of the affirmative votes that were cast.

12. Granting this petition is not improper for any reason specified in *Civil Code Section 1356(e)*.

WHEREFORE, petitioner(s) pray(s) for an order as follows:

1. Dispensing with the Declaration's requirement relating to the _____ [quorum *or* number of votes *or* percentage of votes] needed for approval of the amendment, or in the alternative, confirming the amendment as being validly approved on the basis of the affirmative votes that were actually received during the balloting period; and

2. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Petitioner(s)

[2] Use of Form

This form of petition is for use by a proponent of an amendment to the declaration of a common interest development to obtain an order reducing the percentage of affirmative votes necessary for approval of the amendment. The petition is for use when the proponent has failed to obtain the approval of the owners when the declaration requires approval of amendments by more than 50 percent of the votes in an association with a single class voting structure, or by owners having more than 50 percent of the votes in more than one class if the voting structure has more than one class [*see Civ. Code § 1356*].

The court will set the matter for hearing, and issue an ex parte order setting forth the manner in which notice of the hearing is to be given [*Civ. Code § 1356(b)*]. For a form of notice of hearing, see *§ 124.75*. For a form of order reducing the required percentage of votes, see *§ 124.76*.

CAUTION:
Counsel should not use this form (1) if the proposed amendment would materially change the rights of an owner of a separate interest in a common interest development that is subject to the Subdivided Lands Act (*Bus. & Prof. Code § 11000 et seq.*), and (2) if the subdivider or his or her successor in interest holds or directly controls one-fourth of the votes that may be cast, unless the valid written consent of the Real Estate Commissioner has first been obtained [*see Bus. & Prof. Code § 11018.7*].

[3] Allegations

The petition is required to describe all of the following:

- The effort that has been made to solicit approval of the association members in the manner provided in the declaration (Paragraph 5).

- The number of affirmative and negative votes actually received (alternative Paragraphs 8).

- The number or percentage of affirmative votes required to effect the amendment in accordance with the existing declaration (alternative Paragraphs 9).

- Any other relevant matters (Paragraph 10) [*Civ. Code § 1356(a)*].

- That granting the petition is not improper for any reason stated in *Civ. Code § 1356(e)* (Paragraph 12) [*Civ. Code § 1356(c)(6)*].

The following must be attached to the petition as exhibits [*Civ. Code § 1356(a)*]:

- The governing documents (Paragraph 3).

- Complete text of the amendment and a short explanation of the reason for it (Paragraph 4).

- Copies of any notice and solicitation materials utilized in the solicitation of owner approvals (Paragraph 5).

- Any other relevant documentation (Paragraph 10).

The petition may be granted, regardless of any requirement relating to quorums or the number or percentage of votes needed for approval of the amendment that would otherwise exist under the governing documents, if [*Civ. Code § 1356(c)*]:

- The petitioner has given proper notice of the hearing (*see § 124.75*).

- Balloting on the proposed amendment was properly conducted (Paragraph 6).

- A reasonably diligent effort was made to permit all eligible members to vote on the proposed amendment (Paragraph 7).

- Owners having more than 50 percent of the votes in each class voted in favor of the amendment (alternative Paragraphs 8 and 9).

- The amendment is reasonable (Paragraph 4, referring to short explanation of reason for amendment to be attached to petition as exhibit).

- Granting the petition is not improper for any reason set forth in *Civ. Code § 1356(e)* (Paragraph 12).

It is unclear whether *Civ. Code § 1356(c)(6)* requires the petitioner to raise the latter point, or whether the issue of impropriety under *Civ. Code § 1356(e)* is instead to be raised by an opposing party as an affirmative defense. Because of the ambiguity in the statute, prudent counsel may wish to include the allegation as part of the petitioner's prima facie case.

[4] Jurisdiction and Venue

The petition may be filed in the superior court of the county in which the common interest development is located [*Civ. Code § 1356(a)*].

[5] State Statutes

Reducing percentage of affirmative votes to amend declaration. *Civ. Code § 1356*.

[6] Cross References

See *§§ 124.70, 124.77*.

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12-124 California Forms of Pleading and Practice--Annotated § 124.75

§ 124.75 Notice of Hearing on Petition for Order Reducing Percentage of Affirmative Votes Necessary for Amending Declaration of Common Interest Development [Civ. Code § 1356(b), (c)(1)]

[1] FORM Notice of Hearing on Petition for Order Reducing Percentage of Affirmative Votes Necessary for Amending Declaration of Common Interest Development [Civ. Code § 1356(b),(c)(1)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name* (*s*)],	)	
Petitioner(s),	)	NO. _____
vs.	)	NOTICE OF HEARING ON PETITION FOR OR-
_____ [*name* (*s*)],	)	DER REDUCING PERCENTAGE OF VOTES NE-
Respondent(s).	)	CESSARY TO AMEND DECLARATION OF COM-
	)	MON INTEREST DEVELOPMENT
	)	Date: _____
		Time: _____
		Location: _____

_____

To all members of _____ [*name of association of common interest development*] [and to _____ (*names of any mortgagees, beneficiaries of deeds of trust, and/or the city, county, or city and county in which the development is located that are entitled to notice under the terms of the declaration*]:

NOTICE IS HEREBY GIVEN that _____ [*name(s) of petitioner(s*)] has/have filed a petition for an order to reduce the percentage of affirmative votes necessary for approval of an amendment to the Declaration of _____ [*name of development*], and that a hearing on the petition has been set in [_____ (Department *or* Division) _____ of] the above-entitled court, located at _____ [*street address*], _____ [*city*], on _____ [*date*], at _____ _____.M.

[_____ (*Add any additional statements as may be required by the court*).]
Dated: _____.

_____ [*signature*]
Attorney for Petitioner(s)

[2] Use of Form

This form of notice of hearing is for use by the proponent of an amendment to the declaration of a common interest development who is petitioning for an order reducing the percentage of affirmative votes necessary for approval of the amendment [*see Civ. Code § 1356*]. The form should be modified as necessary to conform with requirements otherwise imposed by the court in its ex parte order setting forth the manner in which notice is to be given [*see Civ. Code § 1356(b)*].

[3] Notice Requirement

The petitioner is required to give not less than 15 days' written notice of the court hearing to (1) all members of the association; (2) any mortgagee of a mortgage or beneficiary of a deed of trust who is entitled to notice under the terms of the declaration; and (3) the city, county, or city and county in which the common interest development is located that is entitled to notice under the terms of the declaration [*Civ. Code § 1356(c)(1)*].

[4] Cross References

See *§ 124.74*.

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Chapter 124 CONDOMINIUMS AND OTHER COMMON INTEREST DEVELOPMENTS
PART IV. FORMS

12-124 California Forms of Pleading and Practice--Annotated § 124.76

§ 124.76 Order Reducing Percentage of Affirmative Votes Necessary for Amending Declaration of Common Interest Development [Civ. Code § 1356]

[1] FORM Order Reducing Percentage of Affirmative Votes Necessary for Amending Declaration of Common Interest Development [Civ. Code § 1356]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name* (*s*)],	)	
Petitioner(s),	)	NO. _____
vs.	)	ORDER _____ [DISPENSING
_____ [*name* (*s*)],	)	WITH *or* REDUCING] PERCENTAGE OF VOTES
Respondent(s).	)	NECESSARY TO AMEND DECLARATION OF
	)	COMMON INTEREST DEVELOPMENT
	)	Date: _____
		Time: _____
		Location: _____

_____

The petition of _____ [*name(s) of petitioner(s*)] for an order to reduce the percentage of affirmative votes necessary for amending the Declaration of the common interest development known as _____ [*name of common interest development*] came on regularly for hearing by the court on _____ [*date*]. Petitioner(s) appeared by counsel _____ [*name*]. [Respondent(s) _____ (*name(s*)) appeared by counsel _____ (*name*).]

The Court, having considered the petition and its exhibits, [and other documents in support of and in opposition to the petition,] having heard the arguments of counsel, and being fully advised in the matter, finds as follows:

1. The petitioner(s) gave not less than 15 days' written notice of the court hearing to all members of

_____ [*name of association*], [(and) to all _____ (mortgagees of mortgages *and/or* beneficiaries of deeds of trust) who are entitled to notice under the terms of the Declaration][, and to the City *and/or* County of _____ (*specify*) in which _____ (*name of development*) is located].

2. Balloting on the proposed amendment was conducted in accordance with all applicable provisions of the governing document(s) of _____ [*name of development*].

3. A reasonably diligent effort was made to permit all eligible members to vote on the proposed amendment.

4. Owners having more than 50 percent of the votes [of each class, as required by the Declaration to vote in favor of the amendment,] voted in favor of the amendment.

5. The amendment is reasonable.

6. Granting the petition is not improper for any reason specified in *Civil Code Section 1356(e)*.

IT IS, THEREFORE, ORDERED that the Declaration's requirement relating to the percentage of votes needed for approval of the amendment is hereby _____ [dispensed with *or* reduced], and that the amendment is confirmed as being validly approved on the basis of the affirmative votes that were actually received during the balloting period.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is for use when the court grants a petition for an order reducing the percentage of affirmative votes necessary for amending the declaration of a common interest development [*see Civ. Code § 1356*].

[3] Cross References

See *§ 124.74*.

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12-124 California Forms of Pleading and Practice--Annotated § 124.77

§ 124.77 Objection to Petition for Order Reducing Percentage of Affirmative Votes Necessary for Amending Declaration of Common Interest Development [Civ. Code § 1356(e)]

[1] FORM Objection to Petition for Order Reducing Percentage of Affirmative Votes Necessary for Amending Declaration of Common Interest Development [Civ. Code § 1356(e)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name* (*s*)],	)	
Petitioner(s),	)	
vs.	)	NO. _____
_____ [*name* (*s*)],	)	OBJECTION TO PETITION FOR ORDER REDU-
Respondent(s).	)	CING PERCENTAGE OF VOTES NECESSARY
	)	TO AMEND DECLARATION OF COMMON IN-
	)	TEREST DEVELOPMENT

_____

Respondent(s) _____ [*name(s*)] object(s) to the petition of _____ [*name(s) of petitioner(s*)] for an order reducing the percentage of votes necessary to amend the declaration of the common interest development known as _____ [*name of development*], on the following grounds:

1. Respondent(s) _____ [*name(s*)] is/are _____ [*specify status showing standing under Civ. Code § 1356(c)(1), e.g.,* a member of the association known as _____ [*name of association*].

[2. Respondent(s) deny/denies _____ (all the allegations *or* paragraphs _____ (*specify*)) of the petition.]

[*EITHER*]

3. The court is not empowered under *Civil Code Section 1356* to approve the proposed amendment to the Declaration, because the proposed amendment would change provisions in the Declaration that require the approval of owners having more than 50 percent of the votes in more than one class to vote in favor of an amendment, and owners having more than 50 percent of the votes in each affected class did not approve the amendment.

[*AND/OR*]

4. The court is not empowered under *Civil Code Section 1356* to approve the proposed amendment to the Declaration, because the proposed amendment would eliminate _____ [*specify special rights, preferences, or privileges*], which are special _____ [rights *and/or* preferences *and/or* privileges] that are designated in the Declaration as belonging to _____ [*name(s) of declarants, as defined in Civ. Code § 1351(g)*] without his/her/their consent.

[*AND/OR*]

5. The court is not empowered under *Civil Code Section 1356* to approve the proposed amendment to the Declaration, because the proposed amendment would impair the security interest of the _____ [mortgagees *and/or* beneficiaries of deeds of trust] without their approval by the percentage specified in the Declaration.

[*CONTINUE*]

WHEREFORE, respondent(s) pray(s) that the petition be denied.
Dated: _____.

_____ [*signature*]
Attorney for Respondent(s)

[2] Use of Form

This form is for use to object to a petition for an order reducing the percentage of affirmative votes necessary for amending the declaration of a common interest development [*see Civ. Code § 1356(e)*].

CAUTION:

***Civ. Code § 1356* does not specify a procedure for responding to a petition for amending a declaration. Therefore, the form in which the response should be presented is unclear. It could arguably be in the form of a response or objection, or perhaps simply by affidavit or declaration and a memorandum of points and authorities. Before drafting responding papers, counsel should consult the clerk of court to determine local practice.**

[3] Allegations

The response alleges:

- Standing to respond to the petition (Paragraph 1).
- If desired, that respondent denies all or part of the petition (optional Paragraph 2).

- That the proposed amendment to the declaration would change a provision in the declaration that requires the approval of owners having more than 50 percent of the votes in more than one class to vote in favor of an amendment, when owners having more than 50 percent of the votes in each affected class did not approve the amendment (Paragraph 3) [*see Civ. Code § 1356(e)(1)*].

- That the proposed amendment to the declaration would eliminate any special rights, preferences, or privileges designated in the declaration as belonging to the declarant, without the consent of the declarant (Paragraph 4) [*see Civ. Code § 1356(e)(2)*].

- That the proposed amendment to the declaration would impair the security interest of a mortgagee of a mortgage or the beneficiary of a deed of trust without the approval of the percentage of the mortgagees and beneficiaries specified in the declaration, if the declaration requires the approval of a specified percentage of the mortgagees and beneficiaries (Paragraph 5) [*see Civ. Code § 1356(e)(3)*].

[4] Cross References

See *§ 124.74*.

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12-124 California Forms of Pleading and Practice--Annotated § 124.78

§ 124.78 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)] by Separate Interest Owner Against Owner's Association and Directors [Civ. Code § 1351; Code Civ. Proc. § 388]--General Form

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)] by Separate Interest Owner Against Owner's Association and Directors [Civ. Code § 1351; Code Civ. Proc. § 388]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], an unincorpor-	)	(Negligence)
ated association, _____ [*names*	)	[Amount demanded _____
of directors], [and DOES I through	)	(exceeds *or* does not exceed) $10,000]
_____,]	)	[LIMITED CIVIL CASE]
Defendants.		

_____

Plaintiff alleges:

1. At all times mentioned in this complaint, defendant _____ [*name*] was, and now is, an unincorporated association, composed of approximately _____ [*number*] owners of individual _____ [*type of interest, e.g.*, condominium units] located at _____ [*street address and city*], California, and commonly called _____ [*name of development*]. Defendant association has its principal office in _____ County, California.

2. At all times mentioned in this complaint, defendants _____ [*names of directors*] were directors of

the above-described association.

[3. Plaintiff is ignorant of the true names and capacities of defendants sued in this complaint as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously-named defendants is negligently responsible in some manner for the offenses alleged in this complaint, and that plaintiff's injuries as alleged in this complaint were proximately caused by such negligence.]

[4. (Plaintiff is informed and believes and thereon alleges that) at all times mentioned in this complaint defendant(s) _____ (*name(s)*) was/were the agent(s) of defendant association and defendant directors, and each and all of the things in this complaint alleged to have been done by him/her/them were done in the capacity of and as agent for defendant association and defendant directors.]

5. Plaintiff is and at all times mentioned in this complaint was a member in good standing of defendant association.

6. Defendant association was formed and now exists for the purposes set forth in _____ [*describe the document creating the association and setting forth its purposes, e.g.,* Article VIII of the Declaration of Restrictions executed on _____ [*date*], and recorded in the Official Records of the County of _____, Book _____, page _____, which sets forth at Section 5 the maintenance, upkeep, and repair of all common areas of _____ (*name of development*) for the benefit, protection, and safety of the individual owner-members of the association].

7. On or about _____ [*date*], defendant association failed to maintain the common areas of _____ [*name of development*] and to exercise due care for the residents' safety in these areas, under the association's control, in that _____ [*describe nature of defendants' negligent conduct, e.g.,* the association failed to provide additional lighting in the common areas needed to deter criminal conduct, even though the association had been informed that crimes were being committed against the residents in darkened areas and that plaintiff's unit had been recently burglarized, and in that instead of timely responding to the need for additional lighting, the association ordered plaintiff to remove additional lights that he/she had provided for his/her unit].

8. On or about _____ [*date*], defendants _____ [*names of directors*], directors of defendant association, _____ [specifically authorized, directed, or participated in the above-described tortious conduct of the association *or* specifically knew or reasonably should have known that some hazardous condition or activity under their control could injure plaintiff but negligently failed to take or order appropriate action to avoid the harm] and thereby failed to refrain from acting in a manner that creates an unreasonable risk of personal injury to third parties, in that _____ [*describe acts or omissions of directors, e.g.,* defendant directors had received letters and other notifications of recent criminal attacks on residents, that these attacks had been linked to the lack of adequate lighting in the common areas and that defendant directors had been informed of the link, that plaintiff had informed defendant directors that his/her unit had previously been burglarized, yet defendant directors refused to provide additional lighting to the common areas, and further, that defendant directors ordered plaintiff to remove additional lighting that he/she had provided for his/her unit].

9. The above-described negligence of defendant association and defendant directors caused _____ [*describe plaintiff's accident or occurrence, e.g.,* plaintiff's unit to be in total darkness on the night of _____ [*date*], during which plaintiff was robbed and raped].

10. As a proximate result of the negligence and carelessness of defendants, and each of them, plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervous system and person, all of which injuries have caused, and continue to cause plaintiff great mental, physical, and nervous pain and suffering. Plaintiff is informed and believes, and thereon alleges, that some of the injuries will result in permanent disability to plaintiff, to

his/her general damage.

11. As a further result of the negligence of defendants, and each of them, plaintiff was required to, and did, incur bills for _____ [*specify, e.g.,* physicians, surgeons, drugs, medicines, X rays, and other medical technicians and personnel], and other related expenses, all to his/her damage.

[12. As a further result of the negligence of defendants, and each of them, _____ (*allege any additional special damages, e.g.,* plaintiff was prevented from attending to his/her usual occupation as _____ [*specify*] and thereby lost earnings. Plaintiff is informed and believes and thereon alleges that he/she will thereby be prevented from attending to his/her usual occupation for a period in the future which he/she cannot now ascertain and will thereby sustain further loss of earnings, all to his/ her damage).]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages;

2. For medical and related damages;

3. For damages for loss of income and earnings and impairment of earning ability;

4. For costs of suit incurred in this complaint; and

5. For such other and further relief as the court may deem proper.

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 124.70.*]

[2] Use of Form

This complaint is for use by the owner of a separate interest in a common interest development to bring an action for negligence against the association that manages the development and its common areas for an injury occurring on the premises. The form also joins as defendants those directors of the association whose personal act or omission created an unreasonable risk of personal injury to persons on the premises [*see Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 499, 505, 229 Cal. Rptr. 456, 723 P.2d 573* ; *White v. Cox (1971) 17 Cal. App. 3d 824, 830, 95 Cal. Rptr. 259* ; *see also Civ. Code § 1714(a)*]. The form may also be modified for use by a plaintiff who is not an owner of a separate interest, and may be combined with appropriate allegations in the forms in Ch. 421, *Premises Liability* .

[3] Allegations

The complaint alleges the following:

- The identity and capacity of the parties (Paragraphs 1 through 6).

- That defendants were negligent. An association functions as a landlord in maintaining common areas of a condominium and has the duty to exercise due care for residents' safety in areas under its control [

Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 498, 503, 229 Cal. Rptr. 456, 723 P.2d 573] (Paragraph 7) . A director of an association is liable in his or her personal capacity for the association's tort, if the director specifically authorized, directed, or participated in the tort or if the director specifically knew or reasonably should have known that some hazardous condition or activity under his or her control could injure plaintiff, but the director negligently failed to take or to order appropriate action to avoid the harm [*Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 508, 229 Cal. Rptr. 456, 723 P.2d 573] (Paragraph 8)* .

- That defendants' negligence proximately caused injury to plaintiff [*see Civ. Code § 3333*] (Paragraphs 9 and 10).

- General damages (Paragraph 10).

- Special damages (Paragraphs 11 and 12).

[4] Specification of Damages

In an unlimited civil case brought to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*]. Otherwise, the amounts claimed as damages must be alleged [*Code Civ. Proc. § 425.10(a)(2)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*see also Code Civ. Proc. §§ 425.11, 425.115*].

[5] Joining Separate Interest Owners as Defendants

This complaint may be modified to name individual owners of separate interests as defendants. However, if the association carries a specified minimum amount of general liability insurance covering tort causes of action, a cause of action against any owner of a separate interest arising solely because of the owner's interest as a tenant in common in the common area can be brought only against the association and not against the individual separate interest owners [*see Civ. Code § 1365.9(a), (b)*]. If these insurance coverage requirements are not met, individual owners of separate interests with ownership interests in the common areas are in all likelihood individually liable for the entire amount of any judgment. If a judgment exceeds the limits of the association's insurance, owners may be individually liable only for their proportional share of assessments levied to pay the amount of the judgment that exceeds those limits [*see Civ. Code § 1365.9(c)*; *Davert v. Larson (1985) 163 Cal. App. 3d 407, 412, 209 Cal. Rptr. 445]* . For a further discussion of *Civ. Code § 1365.9* and the *Davert v. Larson* case, see *§ 124.24*.

[6] Cross References

See *§ 124.70*.

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints* .

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages* .

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter* .

See generally Ch. 380, *Negligence* .

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers* .

For forms of allegations showing proper venue, see Ch. 571, *Venue* .

[7] California Torts

For general discussion of premises liability, see California Torts, Ch. 15, *General Premises Liability* (Matthew Bender).

[8] State Statutes

Common area defined. *Civ. Code § 1351(b).*

Insurance requirements applicable to maintaining tort action against owner in common interest development. *Civ. Code § 1365.9.*

Unincorporated association as party. *Code Civ. Proc. § 369.5*.

Manner of serving unincorporated association. *Corp. Code §§ 18200-18220*.

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12-124 California Forms of Pleading and Practice--Annotated § 124.79

§ 124.79 Complaint for Preliminary [Code Civ. Proc. §§ 526, 527(a)] and Permanent [Civ. Code § 3422] Injunction and Temporary Restraining Order [Code Civ. Proc. § 527(c), (d)]--By Owner of Separate Interest [Civ. Code § 1351]--To Restrain Association of Common Interest Development From Selling Separate Interest to Enforce Lien for Unpaid Assessments [Civ. Code §§ 1367, 1367.1]

[1] FORM Complaint for Preliminary [Code Civ. Proc. §§ 526, 527(a)] and Permanent [Civ. Code § 3422] Injunction and Temporary Restraining Order [Code Civ. Proc. § 527(c), (d)]--By Owner of Separate Interest [Civ. Code § 1351]--To Restrain Association of Common Interest Development From Selling Separate Interest to Enforce Lien for Unpaid Assessments [Civ. Code §§ 1367, 1367.1]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], [and DOES I	)	COMPLAINT FOR PRELIMINARY AND PER-
through _____,]	)	MANENT INJUNCTION AND TEMPORARY RE-
Defendant(s).	)	STRAINING ORDER
	)	

Plaintiff alleges:

1. Plaintiff is, and at all times mentioned in this complaint, was the owner in fee of that certain _____ [*type of interest, e.g.,* condominium unit], hereinafter referred to as "the _____ [*short reference, e.g.,* unit]," located at _____ [*street address and city*], California, commonly referred to as _____ [*name of common interest development*].

2. Defendant _____ [*name of association*] is and at all times mentioned in this complaint was the association managing _____ [*name of development*], and having its principal office in _____ County, California.

3. [*Fictitious name allegations, if appropriate. See § 124.78[1], Paragraph 2.*]

4. [*Agency allegation, if appropriate. See § 124.78[1], Paragraph 3.*]

5. Defendant, as the association managing the _____ [*name of development*], was authorized by _____ [*describe the empowering document, e.g.,* Article _____, Section _____ of the Declaration of Restrictions executed on _____ [*date*], and recorded in the Official Records of the County of _____, Book _____, page _____, a copy of which is attached to this complaint as Exhibit "A" and made a part of this complaint,] and as limited by *Section 1366 of the Civil Code*, to make reasonable assessments to meet management expenses.

6. On _____ [*date*], defendant imposed a _____ [regular *or* special] assessment on the owners of _____ [*name of common interest development*] in the aggregate amount of $_____, which included a _____ [regular *or* special] assessment on plaintiff in the amount of $_____, and which is intended to be used for _____ [*describe, e.g.,* constructing a new swimming pool in the common area].

[*EITHER, if a regular assessment*]

7. This regular assessment is more than 20 percent greater than the regular assessment for defendant's preceding fiscal year, which was in the amount of $_____.

[*OR, if a special assessment*]

7. This special assessment in the aggregate exceeds five percent of the budgeted gross expenses of defendant's preceding fiscal year, which was in the amount of $_____.

[*EITHER*]

8. This assessment is not an extraordinary expense required by an order of a court, nor is it an extraordinary expense necessary to repair or maintain _____ [*name of common interest development*] or any part of it because of a threat to personal safety on the property that has been discovered for which defendant is responsible, nor is it an extraordinary expense necessary to repair or maintain _____ [*name of common interest development*] or any part of it for which defendant is responsible that could not have been reasonably foreseen by defendant's board in preparing and distributing the proforma operating budget under *Civil Code Section 1365*.

[*OR*]

8. Defendant's governing board, before the imposition or collection of this assessment, did not _____ [pass a resolution containing written findings about the necessity of the extraordinary expense involved and why the

expense was not or could not have been reasonably foreseen in the budgeting process *and/or* distribute the resolution to defendant's members with the notice of assessment].

[*CONTINUE*]

9. This assessment was approved in the following manner: _____ [*describe, e.g.,* a meeting was held on _____ (*date*), at which only 20 percent of the owners of _____ (*name of common interest development*) were in attendance. A resolution was passed by 51 percent of those present, approving the assessment].

10. The approval of the assessment was in violation of *Civil Code Section 1366(b)*, which requires approval by a majority of the votes at a meeting or election of an association for which there is a quorum of 50 percent of its owners.

[11. Defendant was also prohibited under *Civil Code Section 1366.1* from imposing and collecting this assessment, because it exceeds the amount necessary for the purpose for which it was levied in that _____ (*state why assessment is excessive*).]

12. On _____ [*date*], defendant caused to be recorded a Notice of Assessment against plaintiff in the amount of $_____, which sum includes $_____ assessment, $_____ penalty charges, $_____ interest, and $_____ costs including attorney's fees, all of which sum is unreasonable in that it relates to the unauthorized expenditures as alleged in this complaint.

13. On _____ [*date*], plaintiff received a notice of sale which informed plaintiff that defendant intended to enforce the lien created by the _____ [*date*], recording of the Notice of Assessment by selling plaintiff's _____ [*type of unit, e.g.,* condominium unit] on _____ [*date*], at _____ _____.M. at _____ [*street address and city*], California. A copy of the notice is attached to this complaint as Exhibit "C" and made a part of this complaint.

14. Plaintiff has informed defendant of the unauthorized nature of the assessment and demanded that defendant immediately record a Satisfaction of Assessment and Release of Lien and abandon the planned sale of plaintiff's _____ [*type of interest, e.g.,* condominium unit]. Defendant refuses to do so and has repeatedly threatened plaintiff with the sale of plaintiff's _____ [*type of interest, e.g.,* condominium unit] unless plaintiff pays in full the unauthorized assessment and charges. Plaintiff is informed and believes and thereon alleges that defendant does intend to sell and will in fact sell, plaintiff's _____ [*type of interest, e.g.,* condominium unit] on _____ [*date*].

15. A subsequent action for money damages for defendant's wrongful conduct cannot adequately compensate plaintiff for the loss of plaintiff's _____ [*type of interest, e.g.,* condominium unit] and consequently plaintiff has no adequate remedy at law and will suffer irreparable injury unless defendant is enjoined and restrained by this court from selling plaintiff's _____ [*type of interest, e.g.,* condominium unit].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an order requiring defendant to show cause, if any, why it should not be enjoined as hereinafter set forth, during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant, and its agents, servants, and employees, and all persons acting under, in concert with, or for it:

a. From conducting the sale of plaintiff's _____ [*type of interest, e.g.,* condominium unit] on _____ [*date*], as presently noticed;

b. From performing any act in furtherance of conducting the sale of plaintiff's _____ [*type of interest, e.g.,* condominium unit] on _____[*date*], or on any other day to enforce the aforementioned lien against plaintiff's _____ [*type of interest, e.g.,* condominium unit] resulting from the recording of a Notice of Assessment by defendant on _____ [*date*], in the Official Records of the County of _____, Book _____, page _____, or of any other lien resulting from the past or future recording of a Notice of Assessment, the subject of which is _____ [*describe, e.g.,* an assessment resulting from the unauthorized expenditure for the capital improvement as pleaded in this complaint];

c. From making any further demands on plaintiff to pay the assessment which is the subject of this complaint;

d. To forthwith cause to be recorded in the Office of the Recorder of the County of _____, California a Satisfaction of Assessment and Release of Lien and to perform all other acts necessary to remove the lien relating to _____ [*specify, e.g.,* the assessment which is the subject of this complaint];

3. For costs of suit incurred in this complaint; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 124.70.*]

CERTIFICATION RE NOTICE

I hereby certify that _____ [*either* on _____ (*date*), I informed defendant of the time when and place where the foregoing application for a temporary restraining order would be made *or* in good faith I attempted to inform defendant of the time when and place where the foregoing application for a temporary restraining order would be made, by _____ (*specify efforts*), but I was unable to do so *or* notice to defendant of the foregoing application for a temporary restraining order should not be required for the reason that _____ (*specify*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date and place*]

_____ [*signature*]
Attorney for Plaintiff

CAUTION:

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code*

Civ. Proc. § 527(a)]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373; San Juan G. Co. v. San Juan R. etc. Assn. (1939) 34 Cal. App. 2d 159, 174*]. For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

[2] Use of Form

This form of complaint is for use by the owner of a separate interest in a common interest development to bring an action to restrain the association managing the development from enforcing a lien for unpaid assessments against the owner's individual interest. The form is used when the association is proceeding with a nonjudicial sale, which the trustee named in the notice of delinquent assessment (or a substitute trustee) may do in the same manner as a power of sale in a deed of trust is exercised under *Civ. Code §§ 2924, 2924b, 2924c* (deeds of trust) [*see Civ. Code § 1367(e), (g)* (liens recorded on or after January 1, 1986, and before January 1, 2003); *Civ. Code § 1367.1(g), (m)* (liens recorded on or after January 1, 2003)]. If the dispute between the association and the separate interest owner is to be fully resolved it may be necessary to plead additional causes of action, such as one for declaratory relief [*see Code Civ. Proc. § 1060 et seq.*; for discussion and forms, *see* Ch. 182, *Declaratory Relief*].

[3] Allegations

This complaint alleges the following:

- The identity and capacity of the parties (Paragraphs 1-4).

- That the managing association was authorized but restricted in making unauthorized assessments (Paragraph 5) [*see Civ. Code § 1366(a)*].

- That plaintiff was assessed an unauthorized amount (Paragraphs 6-11) [*see Civ. Code §§ 1366(b), 1366.1*].

- That the association recorded the unauthorized assessment (Paragraph 12).

- That plaintiff received a notice of sale as a result of the assessment (Paragraph 13) [*see Civ. Code § 1367(b), (e), (g)* (liens recorded on or after January 1, 1986, and before January 1, 2003); *Civ. Code § 1367.1(d), (h), (m)* (liens recorded on or after January 1, 2003)].

- That grounds for preliminary and permanent injunctive relief exist (Paragraphs 14 and 15) [*see Civ. Code § 3422* (permanent); *Code Civ. Proc. § 526* (preliminary)].

[4] Certification re Notice

When a temporary restraining order is sought without formal notice, the applicant or the applicant's attorney is required to certify to the court under oath that (1) within a reasonable time before the application, he or she informed the opposing party (or his or her attorney, if any) of the time when and place where the application would be made; (2) he or she in good faith attempted to inform the opposing party (or attorney) but was unable to do so, specifying the efforts made to do so; or (3) for reasons specified, he or she should not be required to inform the opposing party (or attorney) [*Code Civ. Proc. § 527(c), (e)*; *see Cal. Rules of Ct., Rule 3.1204(b)*].

[5] Restrictions on Imposition of Regular and Special Assessments

Notwithstanding more restrictive limitations placed on the board of directors by the governing documents, the board

may not impose a regular assessment that is more than 20 percent greater than the regular assessment for the association's preceding final year or impose special assessments that, in the aggregate, exceed five percent of the budgeted gross expenses of the association for that fiscal year without the approval of owners, constituting a quorum of more than 50 percent of the owners of the association, casting a majority of the votes at a meeting or election of the association [*Civ. Code § 1366(b)*; *see Corp. Code §§ 7510-7527, 7613*].

However, the board is not limited in imposing assessment increases necessary for an emergency situation. An emergency situation is any one of the following [*Civ. Code § 1366(b)*]:

- An extraordinary expense required by an order of a court;

- An extraordinary expense necessary to repair or maintain the common interest development or any part of it for which the association is responsible when a threat to personal safety on the property is discovered;

- An extraordinary expense necessary to repair or maintain the common interest development, or any part of it for which the association is responsible, that could not have been reasonably foreseen by the board in preparing and distributing the proforma operating budget under *Civ. Code § 1365*; however, before the assessment may be imposed or collected as this type of extraordinary expense, the board must pass a resolution containing written findings about the necessity of the extraordinary expense involved and why the expense was not or could not have been reasonably foreseen in the budgeting process, and the resolution must be distributed to the members with the notice of assessment; or

- An extraordinary expense in making the first payment of earthquake insurance surcharge pursuant to *Ins. Code § 5003*.

For discussion of assessments and assessment liens, see *§ 124.23[15]*.

[6] Cross References

See *§ 124.70*.

For a discussion and forms relating to injunctive relief, see Ch. 303, *Injunctions* .

For a discussion and forms relating to foreclosures, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

[7] California Points and Authorities

For memorandum relating to temporary restraining orders and preliminary injunctions, see California Points and Authorities, Ch. 116, *Injunctions* ; Ch. 230, *Trust Deeds* (Matthew Bender).

[8] State Statutes

Association is prohibited from imposing and collecting assessment that exceeds amount necessary for purpose for which it is levied. *Civ. Code § 1366.1*.

Recording notice of assessment creates lien in favor of association enforceable by sale of assessed interest. *Civ. Code §§ 1367, 1367.1*.

Grounds for injunctive relief. *Civ. Code § 3422*; *Code Civ. Proc. § 526*.

Procedure for obtaining temporary restraining order, order to show cause, and preliminary injunction. *Code Civ. Proc. § 527*.

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12-124 California Forms of Pleading and Practice--Annotated § 124.80

§ 124.80 Order to Show Cause and Preliminary Injunction [Code Civ. Proc. § 527(a)]--Enjoining Association of Common Interest Development From Selling Separate Interest to Enforce Lien for Unpaid Assessments [Civ. Code §§ 1367, 1367.1]

[1] FORM Order to Show Cause and Preliminary Injunction [Code Civ. Proc. § 527(a)]--Enjoining Association of Common Interest Development From Selling Separate Interest to Enforce Lien for Unpaid Assessments [Civ. Code §§ 1367, 1367.1]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER TO SHOW CAUSE AND PRELIMINARY
[and DOES I through _____,]	)	INJUNCTION
Defendant(s).	)	
	)	
	)	

On reading the [verified] complaint, [_____ (affidavit(s) *or* declaration(s)),] and the supporting memorandum on file in this action, and good cause appearing,

IT IS ORDERED:

1. That defendant _____ [*name of association*] appear before the court, [in Department _____], at _____ [*street address and city*], California, on _____ [

date], at _____ [*time*], and show cause, if any, why it, its agents, attorneys, and representatives, and all persons in active concert or participation with it should not be enjoined during the pendency of this action from doing any of the following acts:

a. Conducting the sale of the _____ [*type of interest, e.g.,* condominium unit] commonly known as _____ [*street address*], which has been noticed for sale on _____ [*date*], at _____ [*time*], at _____ [*street address and city*], California.

b. Giving, or causing to be given, any notice of sale of the aforementioned _____ [*type of interest, e.g.,* condominium unit] to enforce the lien resulting from that Notice of Assessment recorded _____ [*date*], in the Official Records of the County of _____, Book _____, page _____ and which is described as follows: _____ [*legal description*].

2. Pending the hearing of this order to show cause, defendant, its agents, attorneys, and representatives, and all persons in active concert or participation with it are enjoined from doing any of the following acts: _____ [*repeat subparagraphs (a) and (b), above*].

3. That a copy of the [verified] complaint [, the supporting _____ (affidavit *or* declaration) of _____ (*name*),] and the supporting memorandum, together with a copy of this order to show cause and preliminary injunction, be served on defendant not later than _____ days before the date set for the hearing on this order to show cause.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is an order to show cause and for a preliminary injunction enjoining an association of a common interest development from selling a separate interest to enforce a lien for unpaid assessments [*see Civ. Code §§ 1367, 1367.1*].

[3] Cross References

See *§ 124.79* for the complaint that is the basis of this order.

For a discussion and forms relating to injunctive relief, see Ch. 303, *Injunctions* .

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12-124 California Forms of Pleading and Practice--Annotated § 124.81

§ 124.81 Complaint for Partition and Sale of Entire Condominium Project [Civ. Code § 1359(b)]

[1] FORM Complaint for Partition and Sale of Entire Condominium Project [Civ. Code § 1359(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	COMPLAINT FOR PARTITION AND SALE OF
Defendants.	)	CONDOMINIUM PROJECT
	)	
	)	

Plaintiff alleges:

1. The subject of this action is real property situated in _____ County, California.

2. The real property is a condominium project commonly known as _____ [*name*], and more particularly described as follows: _____ [give legal description, which may be single-spaced pursuant to *Cal. Rules of Ct., Rule 2.108(2)*].

3. Plaintiff, _____ [*name*], is the owner of a separate interest in _____ [*name of condominium project*].

4. As owner of a separate interest, plaintiff may maintain a partition action as to the entire _____ [*name of condominium project*] as if the owners of all the separate interests in the project are tenants in common in the entire _____ [*name of condominium project*] in the same proportion to their interests in the common

area, pursuant to *Civil Code Section 1359(b)*.

[*EITHER*]

5. More than three years before the filing of this action, _____ [*name of condominium project*] was _____ [damaged *or* destroyed], so that a material part was rendered unfit for its prior use, as follows: _____ [*specify facts*].

6. Since the above-described _____ [damage *or* destruction], _____ [*name of condominium project*] has not been rebuilt or repaired substantially to its state prior to the _____ [damage *or* destruction].

[*AND/OR*]

5. _____ [More than *or* At least] three-fourths of _____ [*name of condominium project*] has been _____ [substantially damaged *or* destroyed], as follows: _____ [*specify facts*].

6. Owners of separate interests holding in the aggregate more than a 50 percent interest in the common areas oppose repair or restoration of the project. Specifically, _____ [*specify facts establishing opposition to repair or restoration, e.g.,* on September 29, 2004, the management association of the Project held a meeting at which voters holding a 70 percent interest in the common areas voted not to repair or restore the damage].

[*AND/OR*]

5. _____ [*name of condominium project*] has been in existence since _____ [*date*], which is more than 50 years.

6. _____ [*name of condominium project*] has become obsolete and uneconomic, because _____ [*specify*].

7. Owners of separate interests holding in the aggregate more than a 50 percent interest in the common areas oppose repair or restoration of the project. Specifically, _____ [*specify facts establishing opposition to repair or restoration, e.g.,* on September 29, 2004, the management association of the Project held a meeting at which voters holding a 70 percent interest in the common areas voted not to repair or restore the damage].

[*AND/OR*]

5. The Declaration of _____ [*name of condominium project*] provides the following conditions for a partition sale of the condominium project: _____ [*specify*].

6. The above-described conditions for a partition sale have been met, because _____ [*specify*].

[*CONTINUE*]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For partition by sale of the entire _____ [*name of condominium project*] according to the respective rights of the parties hereto; and

2. For such other and further relief as the court may deem proper.

_____ [*date*]
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*names*]

[*Verification, if desired. See § 124.70.*]

[2] Use of Form

This complaint is for use by an owner of a separate interest in a condominium project to bring an action for partition of the entire project [*Civ. Code § 1359(b)*; *see Civ. Code § 1358(b)*]. This is the only means by which partition may be sought [*see 14859 Moorpark Homeowner's Assn v. VRT Corp. (1998) 63 Cal. App. 4th 1396, 74 Cal. Rptr. 2d 712* (common areas in condominium project are undivided and may not be nonjudicially partitioned)].

An action for partition of a condominium project is specially governed by *Civ. Code § 1359(b)*, and therefore is not governed by the general provisions of *Code Civ. Proc. §§ 872.010-874.240* [*see* Legislative Committee Comment--Assembly (1976 Addition) to *Code Civ. Proc. § 872.020*]. For a discussion of the latter type of partition action, see Ch. 397, *Partition* .

[3] Allegations

This complaint alleges the following:

- The location and description of the condominium project (Paragraphs 1 and 2) [*see Code Civ. Proc. § 392(a)(1)* (venue)].

- Plaintiff's standing to bring the action (Paragraphs 3 and 4) [*see Civ. Code § 1359(b)*].

- That the project was damaged or destroyed three years previously but not yet rebuilt or repaired (first alternative Paragraphs 5 and 6) [*see Civ. Code § 1359(b)(1)*], at least three-fourths of the project is substantially damaged or destroyed and owners of an aggregate of more than a 50-percent interest in the common areas oppose repair or restoration (second alternative Paragraphs 5 and 6) [*see Civ. Code § 1359(b)(2)*], the project has been in existence for more than 50 years, has become obsolete and uneconomic, and at least three-fourths of the project is substantially damaged or destroyed and owners of an aggregate of more than a 50 percent interest in the common areas oppose repair or restoration (third alternative Paragraphs 5, 6, and 7) [*see Civ. Code § 1359(b)(3)*], or the conditions for a partition sale as set forth in the declaration have been met (fourth alternative Paragraphs 5 and 6) [*see Civ. Code § 1359(b)(4)*].

[4] Jurisdiction and Venue

Superior courts have jurisdiction to try partition cases [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. § 580(b)(3)*].

Venue is proper in the county in which the condominium project is located [*see Code Civ. Proc. § 392(a)(1)*].

[5] Lis Pendens

A party who asserts a real property claim may record a lis pendens in the county recorder's office to give constructive notice of the pendency of the action to subsequent purchasers, encumbrancers, or other transferees [*see Code Civ. Proc. §§ 405.20, 405.24*]. For a discussion and forms relating to lis pendens, see Ch. 348, *Lis Pendens* .

[6] State Statutes

Restrictions on partition of common interest developments. *Civ. Code § 1358*.

Partition of condominium projects. *Civ. Code § 1359*.

[7] Cross References

See *§ 124.70*.

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12-124 California Forms of Pleading and Practice--Annotated § 124.82

§ 124.82 Request for Resolution of Dispute Over Enforcement of Governing Documents, Davis-Stirling Act, or Nonprofit Mutual Benefit Corporation Law [Civ. Code § 1369.530]

[1] FORM Request for Resolution of Dispute Over Enforcement of Governing Documents, Davis-Stirling Act, or Nonprofit Mutual Benefit Corporation Law [Civ. Code § 1369.530]

REQUEST FOR RESOLUTION

TO: _____ [*name*]
_____ [*address*]
_____ [*city, state, zip*]

This notice relates to a dispute involving enforcement of the _____ [Davis-Stirling Common Interest Development Act *or* Nonprofit Mutual Benefit Corporation Law *or* governing documents of the _____ (*type of common interest development, e.g.,* condominium project ("Project"))] commonly referred to as _____ [*name of common interest development*] and located at _____ [*street address and city*], California. The following is a brief description of the dispute: _____ [*specify, e.g.,* You have commenced construction of an improvement to a condominium unit in the above Project. The unit is located at _____ (*street address*). The work violates the governing documents of the Project in that (1) you have not received permission from _____ (*name of homeowners' association*), the homeowners' association for the Project, to construct the improvement as required by the Declaration of Restrictions for the Project, and (2) the improvement is forbidden by the Declaration. The undersigned, who is a member of _____ (*name of homeowners' association*) and owns the condominium unit located at _____ (*street address*), has demanded in writing that the construction cease, but neither _____ (*name of homeowners' association*) nor you has responded and construction continues. This construction has and will damage the property and personal interests of the undersigned.]

As a result of the above dispute, you are hereby requested to agree to submit the dispute to a form of alternative dispute resolution (such as mediation or arbitration). You must respond to this request within 30 days of your receipt of this

request. You may respond by contacting the undersigned at _____ [*specify*]. If you do not respond within the foregoing 30-day period, you will be deemed to have rejected this request.

This notice is provided pursuant to *Civil Code Sections 1369.510 through 1359.590* [*Add if recipient is an owner of a separate interest in the common interest development:* A copy of that statute is attached to this Request.]
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of request for resolution is for use by a homeowners' association or an owner or a member of a common interest development to request that a dispute relating to the enforcement of the Davis-Stirling Common Interest Development Act, the Nonprofit Mutual Benefit Corporation Law, or the governing documents be submitted to a form of alternative dispute resolution (such as arbitration or mediation) that involves a neutral party in the decision-making process. It must be served on a party to the dispute before the filing of an enforcement action that is solely for declaratory, injunctive, or writ relief, or for that relief in conjunction with a claim for monetary damages not exceeding $5,000. It is not required before filing a small claims action [*Civ. Code §§ 1369.510, 1369.520*]. Failure to attempt to resolve the dispute by alternative means before filing an enforcement action is grounds for a demurrer or motion to strike unless the court finds that dismissal for failure to comply would substantially prejudice one of the parties [*Civ. Code § 1369.560(b)*]. For a form of demurrer, see *§ 124.85*.

The alternative dispute resolution requirements of *Civ. Code § 1369.510 et seq.* do not apply to the filing of a cross-complaint [*see Civ. Code § 1369.510(b)*].

[3] Contents of Request

The Request for Resolution must include (1) a brief description of the dispute between the parties, (2) a request for alternative dispute resolution, and (3) a notice indicating that the party receiving the request must respond to it within 30 days of receipt, and that the request will be deemed rejected if the recipient does not respond within that 30-day period. If the recipient is an owner of a separate interest in the common interest development, the request must also include a copy of *Civ. Code § 1369.510 et seq.* [*Civ. Code § 1369.530(a)*].

[4] Service

The request must be served by personal delivery, first-class mail, express mail, facsimile transmission, or other means reasonably calculated to provide the party on whom the request is served with actual notice of the request [*Civ. Code § 1369.530(b)*].

[5] Response

A party receiving a Request for Resolution has 30 days following service to accept or reject alternative dispute resolution. If the recipient does not respond within that 30-day period, the request will be deemed rejected by that party [*Civ. Code § 1369.530(c)*].

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12-124 California Forms of Pleading and Practice--Annotated § 124.83

§ 124.83 Complaint for Preliminary [Code Civ. Proc. §§ 526, 527(a)] and Permanent [Civ. Code § 3422] Injunction, Temporary Restraining Order [Code Civ. Proc. § 527], and Damages [Civ. Code § 3333]--By Owner of Separate Interest [Civ. Code § 1351]--To Compel Owner's Association to Approve or Disapprove Proposed Improvements in Conformity With Declaration of Restrictions

[1] FORM Complaint for Preliminary [Code Civ. Proc. §§ 526, 527(a)] and Permanent [Civ. Code § 3422] Injunction, Temporary Restraining Order [Code Civ. Proc. § 527], and Damages [Civ. Code § 3333]--By Owner of Separate Interest [Civ. Code § 1351]--To Compel Owner's Association to Approve or Disapprove Proposed Improvements in Conformity With Declaration of Restrictions

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*names*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*], [and DOES I	)	COMPLAINT FOR TEMPORARY RESTRAINING
through _____,]	)	ORDER, PRELIMINARY AND PERMANENT IN-
Defendant(s).	)	JUNCTIONS[, AND DAMAGES]
	)	

Plaintiff alleges:

1. [*Capacity of plaintiff. See § 124.79[1], Paragraph 1.*]

2. [*Capacity and residence of defendant association. See § 124.79[1], Paragraph 2.*]

[3. At all times mentioned in this complaint, defendants _____ (*names*) were members of the committee known as _____ (*name of committee that approved or disapproved improvements, e.g.,* the

Architectural Control Committee). They were appointed by _____ (*specify, e.g.,* the Board of Directors of defendant Association) and, at all times mentioned in this complaint, acted as the agents, officers, and employees of defendant Association.]

[4. *Fictitious name allegations, if appropriate. See § 124.78[1], Paragraph 3.*]

5. At all times mentioned in this complaint, Defendant Association [and defendants Committee Members] were obligated and empowered by _____ [*specify portion(s) of governing document requiring approval of proposed improvements, e.g.,* Article _____, Section _____] of the Declaration of Restrictions executed on _____ [*date*] and recorded in the Official Records of the County of _____, Book _____, page _____, a copy of which is attached to this complaint as Exhibit "_____" and made a part of this complaint, to _____ [*describe duties of defendant(s) as set forth in declaration, e.g.,* review all plans and specifications for proposed changes in structural and landscaping architecture and design for the development, and to approve only those plans and specifications that comply with the use restrictions set out in Article _____, Section _____ of the Declaration described above, and that are otherwise compatible with the standards of design, construction, and quality of the development as a whole].

6. On or about _____ [*date*], in compliance with the Declaration described above, _____ [plaintiff *or* _____ (*name of separate interest owner whose improvement plaintiff seeks to restrain*) submitted to defendant _____ [Association *or* Committee] plans and specifications for _____ [*describe proposed improvement, e.g.,* the construction of a two-foot fiberglass addition to the top of the existing fence on the west boundary of that unit located at _____ (*street address and city*), California, owned at all times mentioned in this complaint by _____ (*name of separate interest owner whose improvement plaintiff seeks to restrain*)]. Defendant _____ [approved *or* rejected] the plans and specifications on _____ [*date*].

7. Defendant's _____ [approval *or* disapproval] of the proposed _____ [*specify, e.g.,* fence] was unreasonable, arbitrary, and in bad faith.

[8. Furthermore, the _____ (approval *or* disapproval) of the proposed _____ (*specify, e.g.,* fence) was in violation of the restrictions contained in Article _____, Section _____ of the Declaration, which provides, inter alia, that _____ (*set out restriction alleged to be violated, e.g.,* no fence shall be constructed that materially obstructs the view of any lot).]

9. The actions described above were undertaken by defendant(s) negligently and carelessly and in breach of their fiduciary duty owed to plaintiff[, and proximately caused damage to plaintiff as hereinafter described].

[10. The actions described above were undertaken by defendant(s) with full knowledge of their breach of the Declaration and in willful, conscious, and reckless disregard for their fiduciary duty owned to plaintiff.]

11. The wrongful conduct of defendant(s), unless and until enjoined and restrained by order of this court, will cause great and irreparable injury to plaintiff in that _____ [*specify particular facts that will constitute great and irreparable injury, e.g.,* the view from plaintiff's lot will be substantially obstructed, greatly decreasing plaintiff's enjoyment of his/her property and the value thereof].

12. A subsequent action for money damages for the wrongful conduct of defendant(s) cannot adequately compensate plaintiff for the injuries _____ [currently being suffered *or* which are threatened] in that _____ [*allege facts showing that plaintiff's remedy at law is inadequate, e.g.,* it will be impossible for plaintiff to determine the precise amount of damages that he/she will suffer if defendant's arbitrary conduct is not

enjoined and restrained].

[13. _____ (*Allege facts establishing a basis for a claim for damages as additional relief, if any, e.g.,* From the commencement of the construction approved by defendant Association on the property of _____ (*name of separate interest owner whose improvement plaintiff seeks to restrain*) through the date of this complaint, plaintiff has suffered annoyance, inconvenience, discomfort, and interference with his/her rightful use and enjoyment of his/her property, constituting damages in the sum of $_____).]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an order requiring defendant(s) to show cause, if any, why they should not be compelled to _____ [approve *or* prevent] the _____ [*specify, e.g.,* continued construction of the fence described in the complaint], during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all compelling defendant(s) and his/her agents, servants, and employees, and all persons acting under, in concert with, or for them, to _____ [*specify, e.g.,* exercise its authority under the Declaration of Restrictions to halt construction of any addition to the existing fence on the west boundary of the condominium unit owned by _____ (*name of separate interest owner whose improvement plaintiff seeks to restrain*) and located at _____ [*street address and city*], California];

[3. For damages in the sum of $_____;]

[4. For reasonable attorney's fees (in the amount of $_____ *or* according to proof);]

5. For costs of suit incurred in this complaint; and

6. For such other further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*names*]

[*Verification, if desired. See § 124.70.*]

[*Certification of Notice. See § 124.79.*]

CAUTION:

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits or declarations in support of the allegations of the complaint [*see* Code Civ. Proc. § 527(a)]. For further discussion, see *§ 124.79.*

[2] Use of Form

This form of complaint is for use by a separate interest owner to restrain an owner's association, or its architectural control committee, from arbitrarily approving an improvement proposed by a neighboring owner [*see Cohen v. Kite Hill Community Assn. (1983) 142 Cal. App. 3d 642, 647, 652, 191 Cal. Rptr. 209]* . Alternatively, the form may be used to compel an association or its committee to approve an owner's plans and specifications for an improvement to the

owner's interest after an application has been arbitrarily denied.

The form may be combined with a form of complaint enjoining the individual homeowner [*see Cohen v. Kite Hill Community Assn. (1983) 142 Cal. App. 3d 642, 646, 191 Cal. Rptr. 209* ; *see also* Ch. 184, *Deeds* (discussion and forms relating to use restrictions on lots and enforcement)]. However, a separate interest owner may not directly enjoin other owners in a development from violating a construction restriction if the homeowner's association reserves the sole right to determine whether proposed construction violates the restrictions and the construction was approved [*see Trahms v. Starrett (1973) 34 Cal. App. 3d 766, 770, 110 Cal. Rptr. 239* (right reserved in subdivider)].

[3] Allegations

This complaint alleges the following:

- The identity and capacity of the parties (Paragraphs 1-2), with an Optional Paragraph 3 for use when the owner's association of a common interest development subject to the Subdivided Lands Act [*see Bus. & Prof. Code § 11004.5*] has set up an architectural control committee as mandated by *10 Cal. Code Reg. § 2792.28(a)*.

- Fictitious name allegation (Optional Paragraph 4) [*Code Civ. Proc. § 474*].

- That defendant had a duty to review and approve or disapprove proposed improvements in conformity with the Declaration of Restrictions (Paragraph 5) [*see Cohen v. Kite Hill Community Assn. (1983) 142 Cal. App. 3d 642, 650-652, 191 Cal. Rptr. 209]* .

- That plaintiff or another separate interest owner submitted plans to defendant and the defendant either approved or rejected them (Paragraph 6).

- That defendant's approval or disapproval of the proposed improvement was unreasonable, arbitrary, and in bad faith (Paragraph 7) [*see Cohen v. Kite Hill Community Assn. (1983) 142 Cal. App. 3d 642, 652, 191 Cal. Rptr. 209]* .

- That defendant's approval or disapproval of the proposed improvement also violated the restrictions set out in the declaration (Optional Paragraph 8) [*see Cohen v. Kite Hill Community Assn. (1983) 142 Cal. App. 3d 642, 652, 191 Cal. Rptr. 209]* .

- That defendants' actions were negligent (Paragraph 9) [*see Cohen v. Kite Hill Community Assn. (1983) 142 Cal. App. 3d 642, 647, 652, 191 Cal. Rptr. 209]* .

- That defendants' actions were willful and are grounds for punitive damages (Optional Paragraph 10) [*see Civ. Code § 3294(a)*; *see also Cohen v. Kite Hill Community Assn. (1983) 142 Cal. App. 3d 642, 647, 652, 191 Cal. Rptr. 209]* .

- That grounds for preliminary and injunctive relief exist (Paragraphs 11, 12) [*see Civ. Code § 3422* (permanent); *Code Civ. Proc. §§ 526* (preliminary), 527 (procedure for obtaining preliminary injunction or temporary restraining order)].

- There is also an optional allegation of damages for use when appropriate (Paragraph 13) [*see Mock v. Shulman (1964) 226 Cal. App. 2d 263, 269-270, 38 Cal. Rptr. 39]* .

[4] Certificate Related to Alternative Dispute Resolution Efforts

When the complaint is filed, it must be accompanied by a certificate stating that specified conditions related to the parties' efforts to resolve the dispute by alternative means have been satisfied [*see Civ. Code § 1369.560(a)*; *see also § 124.84*]. Such a certificate is required to be filed in conjunction with an action to enforce the Davis-Stirling Common Interest Development Act, the Nonprofit Mutual Benefit Corporation Law, or the governing documents of a common interest development, which action is solely for declaratory, injunctive, or writ relief, or for that relief in conjunction with a claim for monetary damages not in excess of $5,000 [*Civ. Code §§ 1369.510, 1369.520*].

For a form of certificate, see *§ 124.84*. With certain exceptions, the failure to file such a certificate will be grounds for a demurrer pursuant to *Code Civ. Proc. § 430.10* or a motion to strike pursuant to *Code Civ. Proc. § 435* [*Civ. Code § 1369.560(b)*]. For further discussion, see *§ 124.85* (demurrer).

[5] Attorney's Fees

The prevailing party in any action to enforce the declaration is awarded reasonable attorney's fees and costs [*Civ. Code § 1354(c)*].

[6] State Statutes

Use restrictions that are intended to be enforceable equitable servitudes are required to be set forth in declaration. *Civ. Code § 1353(a)*.

Reasonable covenants and restrictions in declaration are enforceable by separate interest owner or association as equitable servitudes. *Civ. Code § 1354(a)*.

[7] Decisions

Trial court has authority to determine identity of prevailing party in litigation under *Civ. Code § 1354* for purposes of awarding attorney's fees; defendant dismissed without prejudice in action to enforce equitable servitude under *Civ. Code § 1354* is not, ipso facto, the prevailing party. *Heather Farms Homeowners Assn., Inc. v. Robinson (1994) 21 Cal. App. 4th 1568, 1570, 26 Cal. Rptr. 2d 758* .

Covenants requiring applications for improvement to be evaluated in light of goal of "artistic result and attractiveness in exterior and physical appearance" requires Association and Art Jury to make evaluations on subjective basis; artistry and attractiveness is not objectively mesaureable or quantifiable. *Clark v. Rancho Santa Fe Assn. (1989) 216 Cal. App. 3d 606, 618-619, 265 Cal. Rptr. 41* .

Declaration of restrictions requiring individual owner to obtain approval of homeowner's association before improving or landscaping lot is enforceable if association's approval or disapproval is reasonable. *Palos Verdes Homes Assn. v. Rodman (1986) 182 Cal. App. 3d 324, 328, 227 Cal. Rptr. 81* .

Association's disapproval of landscaping change is enforceable by injunction on showing by homeowner's association that it followed its own standards and procedures, that procedures were fair, and that substantive decision was made in good faith and was reasonable. *Ironwood Owners Assn. IX v. Solomon (1986) 178 Cal. App. 3d 766, 771-773, 224 Cal. Rptr. 18* .

[8] Cross References

See *§ 124.79*.

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PART IV. FORMS

12-124 California Forms of Pleading and Practice--Annotated § 124.84

§ 124.84 Certificate Regarding Alternative Dispute Resolution
[Civ. Code § 1369.560(a)]

[1] FORM Certificate Regarding Alternative Dispute Resolution
[Civ. Code § 1369.560(a)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*names*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	CERTIFICATE REGARDING ALTERNATIVE
Defendant.	)	DISPUTE RESOLUTION
	)	
	)	

I, _____ [*names*], am the plaintiff in this action. I hereby certify that

[*EITHER*]

the alternative dispute resolution required by *Civil Code Section 1369.520* has been completed.

[*OR*]

defendant _____ [*name*] refused alternative dispute resolution prior to the filing of the complaint in this action.

[*OR*]

preliminary and temporary injunctive relief is necessary to protect my rights.
Dated: _____.

_____ [*signature*]
Plaintiff

[2] Use of Form

This form of certificate is for use by the plaintiff to be filed with the complaint in an enforcement action involving the Davis-Stirling Common Interest Development Act, the Nonprofit Mutual Benefit Corporation Law, or the governing documents of a common interest development. The enforcement action is solely for declaratory, injunctive, or writ relief, or for that relief in conjunction with a claim for monetary damages not in excess of $5,000 [*Civ. Code § 1369.560(a)*; *see Civ. Code §§ 1369.510, 1369.520*].

The certificate, which must be filed with the initial pleading, must state that one or more of the following conditions is satisfied [*Civ. Code § 1369.560(a)*]:

- Alternative dispute resolution has been completed in compliance with *Civ. Code § 1369.510 et seq.*

- One of the other parties to the dispute did not accept the terms offered for alternative dispute resolution.

- Preliminary or temporary injunctive relief is necessary.

[3] Failure to File

Failure to file the certificate is grounds for demurrer pursuant to *Code Civ. Proc. § 430.10* [*see § 124.85*] or motion to strike pursuant to *Code Civ. Proc. § 435* unless the court finds that dismissal of the action for failure to comply with the alternative dispute resolution requirements would result in substantial prejudice to one of the parties [*Civ. Code § 1369.560(b)*].

[4] Cross References

See *§§ 124.82, 124.85*.

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12-124 California Forms of Pleading and Practice--Annotated § 124.85

§ 124.85 General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Failure to File Certificate Regarding Alternative Dispute Resolution [Civ. Code § 1369.560(b)]

[1] FORM General Demurrer [Code. Civ. Proc. §§ 430.10(e), 430.30(a)]--Failure to File Certificate Regarding Alternative Dispute Resolution [Civ. Code § 1369.560(b)]

Defendant demurs to the complaint on the ground that plaintiff has not filed a certificate, as required by *Civil Code Section 1369.560(a)*, stating that (1) alternative dispute resolution has been completed in compliance with *Civil Code Sections 1369.510 through 1369.590, (2)* one of the other parties to the dispute did not accept the terms offered for alternative dispute resolution, or (3) preliminary or temporary injunctive relief is necessary.

[2] Use of Form

This form of demurrer is for use when the plaintiff has failed to file, with the initial pleading, a certificate stating that one or more of the following conditions is satisfied [*Civ. Code § 1369.560(a)*]:

- Alternative dispute resolution has been completed in compliance with *Civ. Code § 1369.510 et seq.*
- One of the other parties to the dispute did not accept the terms offered for alternative dispute resolution.
- Preliminary or temporary injunctive relief is necessary.

Failure to file the certificate is grounds for demurrer or motion to strike unless the court finds that dismissal of the action for failure to comply with the alternative dispute resolution requirements would result in substantial prejudice to one of the parties [*Civ. Code § 1369.560(b)*].

CAUTION:

A party filing a demurrer must serve and file with it a memorandum in support of each ground of demurrer [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Cal. Rules of Ct., Rules 3.1320(c), 3.1103(b)*; for

discussion and forms, see Ch. 417, *Points and Authorities*].

[3] Cross References

See *§§ 124.82, 124.84*.

For additional forms of general demurrer, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[4] State Statutes

Objection by demurrer to complaint on ground it does not state cause of actions. *Code Civ. Proc. § 430.10(e)*.

Objection to complaint is allowed to be taken by demurrer when ground for objection appears on face of complaint or from any matter of which court is required to or may take judicial notice. *Code Civ. Proc. § 430.30(a)*; *see also Code Civ. Proc. § 430.70* (specifying matter of which court may take judicial notice).

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12-124 California Forms of Pleading and Practice--Annotated § 124.86

§ 124.86 Verified Application in Action for Damages for Design or Construction Defects by Owners' Association Against Builder of Common Interest Development--Assertion by Builder of Procedural Deficiency [Civ. Code § 1375.05(g)]

[1] FORM Verified Application in Action for Damages for Design or Construction Defects by Owners' Association Against Builder of Common Interest Development--Assertion by Builder of Procedural Deficiency [Civ. Code § 1375.05(g)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*names*],	)	NO. _____
Plaintiff,	)	APPLICATION FOR DETERMINATION RE-
vs.	)	GARDING EXISTENCE OF PROCEDURAL DEFI-
_____ [*names*], [and DOES I	)	CIENCY
through _____,]	)	Date: _____
Defendant(s).	)	Time: _____
	)	Dept: _____
		Trial Date: None set

Defendant, _____ [*name*], hereby applies to this court for a determination, to be made after hearing, that a procedural deficiency exists with respect to this action. This application is made on the ground that plaintiff has failed to substantially comply with the requirements of *Civil Code Section 1375*, and is based on the following facts:

[*STATE facts evidencing defendant's efforts to comply with Civ. Code § 1375 and plaintiff's failure to do so, e.g.*]

[1. In accordance with the Case Management Statement established by the parties to this litigation pursuant to *Civil Code Section 1375(h)*, on or before _____ [*date established by dispute resolution facilitator for provision of demand*], plaintiff association was required to provide defendant with a comprehensive demand that provides in sufficient detail for the parties to engage in meaningful dispute resolution.

2. Defendant has made repeated requests of plaintiff to provide the required comprehensive demand so the parties can continue with the dispute resolution process in accordance with the requirements of *Civil Code Section 1375*, but notwithstanding defendant's efforts, plaintiff failed to provide the required demand, or to respond in any way before bringing this action.]

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant

[2] Use of Form

This form of application is for use by the building of a common interest development when (1) the development consists of 20 or more units, (2) the association has commenced an action for damages against the builder based on design or construction defects, and (3) the association has not complied with all of the requirements of *Civ. Code § 1375*, which establishes a dispute resolution process that must be followed to completion before such an action can be filed. For discussion of this process, see *§ 124.26[2]*.

The only method for seeking judicial relief for the failure of either the association or the respondent to complete the dispute resolution process required by *Civ. Code § 1375* is the assertion of a procedural deficiency in an action for damages by the association against the respondent [*see § 124.26[3]*]. A verified application asserting a procedural deficiency must be filed with the court no later than 90 days after service of the defendant's answer in the association's action for damages, unless the court finds that extraordinary conditions exist [*Civ. Code § 1375.05(g)(1)*]. Once the verified application has been filed, the court must schedule a hearing within 21 days to determine whether the association or respondent has substantially complied with the dispute resolution process. At the court's discretion, the issue may be determined on affidavits or oral testimony [*Civ. Code § 1375.05(g)(2)*]. For further discussion, see *§ 124.26[2][n], [3]*.

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12-124 California Forms of Pleading and Practice--Annotated § 124.87

§ 124.87 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Is Volunteer Officer or Director [Civ. Code § 1365.7]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Is Volunteer Officer or Director [Civ. Code § 1365.7]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. He/She is not liable to plaintiff pursuant to the provisions of *Civil Code Section 1365.7,* in that defendant is a volunteer _____ [officer *or* director] of _____ [*specify association*], an association managing a common interest development that is exclusively residential.

2. Any act or omission of defendant that may have resulted in injury to plaintiff was performed within the scope of his/her duties as a volunteer _____ [officer *or* director]. Any such act or omission was performed in good faith and was not willful, wanton, or grossly negligent.

3. _____ [*Specify association*] maintained and had in effect at the time the act or omission occurred and at the time plaintiff's claim was made policies of insurance that included coverage for general liability of the association and individual liability of the officers and directors of the association for negligent acts or omissions in that capacity, in the amount of $_____ [*if common interest development consists of 100 or fewer separate interests, specify amount of at least $500,000; if development consists of more than 100 separate interests, specify amount of at least $1 million*].

4. Defendant is _____ [a tenant of a separate interest *or* an owner of no more than _____ (one *or* two) separate interests].

[2] Use of Form

This form of affirmative defense is for insertion into an answer to a complaint based on the alleged negligence of the

defendant in his or her capacity as officer or director of an association managing a common interest residential development. The defense is based on the fact that the defendant was a volunteer officer or volunteer director, and thereby immune from liability by the provisions of *Civ. Code § 1365.7*. This immunity only applies to a volunteer officer or director who is a tenant of a separate interest in the common interest development or who is an owner of no more than two separate interests in that development. Moreover, this immunity will not be construed to limit the liability of the association for its negligent act or omission or for any negligent act or omission of an officer or director of the association [*Civ. Code § 1365.7(d), (e)*; *see § 124.23[13]*].

[3] Cross References

For general discussion and forms of answers, see Ch. 26, *Answers* .

[4] State Statutes

Immunity of volunteer officer or volunteer director of association managing exclusively residential common interest development. *Civ. Code § 1365.7*.

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12-125 California Forms of Pleading and Practice--Annotated 125.syn

§ 125.syn Synopsis to Chapter 125: CONSOLIDATION, SEVERANCE, AND COORDINATION OF ACTIONS

§ 125.01 Scope of Chapter

§ 125.02 Cross References

§§ 125.03-125.09 [Reserved]

§ 125.10 Governing Law

§ 125.11 Notice of Related Cases

§ 125.12 Consolidation

[1] Definition and Purpose

[2] Types of Consolidation

§ 125.13 Discretion to Consolidate

[1] Not a Matter of Right

[2] Factors Determining Appropriateness of Consolidation

[a] No Statutory Guideline

[b] Prejudice to Parties

[c] Confusion to Jury

[d] Evidence

[e] Identity of Parties

§ 125.14 Effect of Consolidation

[1] Filing of Papers

[2] Findings and Judgment

§§ 125.15-125.19 [Reserved]

§ 125.20 Governing Law

§ 125.21 Definition and Purpose

§ 125.22 Discretion to Sever

§ 125.23 Propriety of Severance

§ 125.24 Effect of Severance on Judgments

§ 125.25 Severance of Joined Parties and Causes of Action

§§ 125.26-125.29 [Reserved]

§ 125.30 Governing Law

§ 125.31 Definition

§ 125.32 Purpose

§ 125.33 Notice of Related Cases

§ 125.34 Different Procedures Depending on Whether Actions Are Complex or Non-Complex

§ 125.35 Determining Whether Case is Complex or Non-Complex

§ 125.36 Non-Complex Actions

[1] Grounds and Motion for Coordination

[2] Order Granting Motion

[3] Responsibilities of Moving Party When Motion Is Granted

[4] Reconciliation of Conflicting Orders; Potential Sanctions

[5] Consolidation of Actions Without Further Motion

[6] Order Directing Parties to Move for Transfer to Different Court

§ 125.37 Complex Actions

[1] Petition for Coordination

[2] Who May Petition

[a] Persons Authorized

[b] Any Party After Obtaining Presiding Judge's Permission

[c] All Parties Plaintiff or Defendant in One of Actions

[3] Action on Receipt of Petition for Coordination

[4] Standards for Determining Appropriateness of Coordination

[5] Flexibility of Coordination Procedures

[6] Disqualification of Assigned Judge

§ 125.38 Site of Coordination Proceedings

§ 125.39 Potential Add-On Case

§ 125.40 Petition for Coordination When Cases Already Ordered Coordinated

§§ 125.41-125.49 [Reserved]

§ 125.50 Related Matthew Bender Publications

§ 125.51 California Statutes

[1] Consolidation

[a] General Provisions

[b] Mandatory Consolidation in Specific Actions

[c] Permissive Consolidation in Specific Actions

§ 125.52 California Rules of Court

§ 125.53 Decisions

[1] Discretion of Trial Court

[2] Effect

[3] Particular Actions

[4] Procedure

[5] Review

§ 125.54 Attorney General Opinions

§ 125.55 Law Reviews

§ 125.56 Text References

§§ 125.57-125.59 [Reserved]

§ 125.60 Related Matthew Bender Publications

§ 125.61 California Statutes

[1] General Provisions

[2] Provisions for Severance in Specific Actions

§ 125.62 Decisions

[1] Discretion of Court

[2] Particular Actions

[3] Purpose

[4] Review

§§ 125.63-125.69 [Reserved]

§ 125.70 Related Matthew Bender Publications

§ 125.71 California Statutes

§ 125.72 California Rules of Court

§ 125.73 Decisions

[1] Grounds for Coordination

[2] Power of Coordination Judge

[3] Disqualification of Judge

[4] Review

§ 125.74 Law Reviews

§ 125.75 Text References

§§ 125.76-125.79 [Reserved]

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§ 125.81 Preliminary Determinations

§ 125.82 Stipulation

§ 125.83 Noticed Motion

§§ 125.84-125.89 [Reserved]

§ 125.90 Facts to Be Ascertained

§ 125.91 Preliminary Determinations

§ 125.92 Preparation of Papers

§ 125.93 Further Procedure

§§ 125.94-125.99 [Reserved]

§ 125.100 Non-Complex Actions: Procedure for Coordination

[1] Preliminary Determinations

[2] Prepare, File, and Serve Papers

[3] Procedure if Court Grants Motion

§ 125.101 Complex Actions: Two Procedures for Commencing Coordination

[1] By Motion

[2] By Direct Petition

§ 125.102 Filing and Service of Petition and Accompanying Papers--Complex Actions

[1] Filing of Petition and Notice of Submission

[2] Service on Parties

§ 125.103 Assignment of Coordination Motion Judge--Complex Actions

[1] Order Assigning Judge

[2] Disqualification of Assigned Motion Judge

[3] Submission of Documents to Motion Judge

[4] Liaison Counsel

§ 125.104 Determination of Appropriateness of Coordination--Complex Actions

[1] Supporting and Opposing Petitions by Other Parties

[2] Hearing on Petition for Coordination

[3] Granting or Denying Petition for Coordination

§ 125.105 Review of Coordination Orders--Complex Actions

§ 125.106 Trial of Coordinated Actions--Complex Actions

[1] Assignment of Coordination Trial Judge

[2] Disqualification of Assigned Judges

[3] Preliminary Considerations

[4] Transfer, Remand, and Termination of Actions

[5] Separate Trial of Issues

[6] Entry of Judgment or Order

§ 125.107 Stay of Action--Complex Actions

[1] Automatic Stays

[2] Discretionary Stay Orders

[3] Standards to Determine Appropriateness of Stay Order

[4] Submission of Stay Order

[5] Effect of Stay Order

[6] Termination of Stay Orders

§ 125.108 Adding on to Coordinated Action--Complex Actions

[1] Petition to Add-On Case

[2] Opposition to Petition to Add On

[3] Hearing

[4] Stay Order During Add-On Procedure

[5] Order Granting or Denying Petition

[6] Authority of Judge Over Add-On Case

§ 125.109 Requests to Extend or Shorten Time--Complex Actions

§ 125.110 Definitions--Complex Actions

§§ 125.111-125.119 [Reserved]

§ 125.120 Caption for Papers in Consolidated Action

[1] FORM

[2] Use of Form

[3] Cross References

§ 125.121 Stipulation by Counsel [Code Civ. Proc. § 283(1)] to Consolidation of Actions [Code Civ. Proc. § 1048(a)]

[1] FORM

[2] Use of Form

[3] Copies

[4] Cross References

§ 125.122 Notice of Motion for Order Consolidating Actions [Code Civ. Proc. § 1048(a)]

[1] FORM

[2] Use of Form

[3] Caption

[4] Contents of Notice

[5] Filing of Notice

[6] Service of Notice

[7] Cross References

§ 125.123 Declaration Under Penalty of Perjury in Support of Motion [Code Civ. Proc. § 2009] to Consolidate Actions [Code Civ. Proc. § 1048(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 125.124 Order Consolidating Actions [Code Civ. Proc. § 1048(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 125.125 Stipulation by Counsel [Code Civ. Proc. § 283(1)] to Consolidate Issues for Trial [Code Civ. Proc. § 1048(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 125.126 Notice of Motion for Order Consolidating Issues for Trial [Code Civ. Proc. § 1048(a)]

[1] FORM

[2] Use of Form

[3] Copies

[4] Cross References

§ 125.127 Declaration Under Penalty of Perjury in Support of Motion [Code Civ. Proc. § 2009] to Consolidate Issues for Trial [Code Civ. Proc. § 1048(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 125.128 Order Consolidating Issues for Trial [Code Civ. Proc. § 1048(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§§ 125.129-125.139 [Reserved]

§ 125.140 Notice of Motion for Order Severing Cause of Action or Issue [Code Civ. Proc. § 1048(b)]

[1] FORM

[2] Use of Form

[3] Severance

[4] Cross References

§ 125.141 Order Severing Cause of Action or Issue [Code Civ. Proc. § 1048(b)]

[1] FORM

[2] Use of Form

[3] Cross References

§§ 125.142-125.149 [Reserved]

§ 125.150 Notice of Motion to Transfer Action for Coordination--Non-Complex Action [Code Civ. Proc. § 403]

[1] FORM

[2] Use of Form

[3] Accompanying Declaration

§ 125.151 Declaration Under Penalty of Perjury in Support of Motion to Transfer Case for Coordination--Non-Complex Action [Code Civ. Proc. § 403; Cal. Rules of Ct., Rule 3.500(b)]

[1] FORM

[2] Use of Form

[3] Contents of Declaration

§ 125.152 Order Granting Motion to Transfer Case for Coordination--Non-Complex Action [Code Civ. Proc. § 403; Cal. Rules of Ct., Rule 3.500(d)]

[1] FORM

[2] Use of Form

[3] Contents of Order

[4] Additional Orders

[5] Duties of Moving Party

§§ 125.153-125.159 [Reserved]

§ 125.160 Notice of Motion for Order to Commence Coordination Proceedings--Complex Action [Code Civ. Proc. § 404]

[1] FORM

[2] Use of Form

[3] Supporting Papers

[4] Stay Order

§ 125.161 Order Granting Motion to Commence Coordination Proceedings--Complex Action [Code Civ. Proc. §

404]

[1] FORM

[2] Use of Form

[3] Signature of Presiding Judge

[4] Submission, Service, and Filing of Petition and Supporting Papers

[5] Order Granting Stay

§ 125.162 Petition for Coordination of Complex Actions [Cal. Rules of Ct., Rule 3.521(a)]

[1] FORM

[2] Use of Form

[3] Caption

[4] Contents of Petition

[5] Supporting Papers

[6] Submission of Petition

[7] Proof of Service and Filing

[8] Stay Orders

§ 125.163 Declaration Under Penalty of Perjury in Support of Petition for Coordination--Complex Action

[1] FORM

[2] Use of Form

§ 125.164 Notice of Submission of Petition for Coordination of Actions--Complex Action [Cal. Rules of Ct., Rule 3.522]

[1] FORM

[2] Use of Form

[3] Contents of Notice

[a] Caption

[b] Date of Submission

[c] Petitioner's Counsel

[d] Right to Oppose Petition

[e] Included Actions

[4] Transmission of Notice of Submission

[5] Proof of Service and Filing

§ 125.165 Caption for Papers in Coordination Proceedings--Complex Action [Cal. Rules of Ct., Rule 3.550(b)]

[1] FORM

[2] Use of Form

[3] Elements

[a] Court Title

[b] Special Title

[c] Included Actions

[d] Title of Paper

[e] Motion Papers

§ 125.166 Response in Support of Petition for Coordination--Complex Action [Cal. Rules of Ct., Rule 3.526]

[1] FORM

[2] Use of Form

[3] Transmission to Coordination Motion Judge

[4] Service

[a] Parties to Be Served

[b] Proof of Service

[c] Submission and Service of Supporting Papers

§ 125.167 Response in Opposition to Petition for Coordination--Complex Action [Cal. Rules of Ct., Rule 3.525]

[1] FORM

[2] Use of Form

[3] Transmission to Coordination Motion Judge

[4] Transmission to Chair of the Judicial Council

[5] Service

[6] Supporting Papers

§ 125.168 Notice of Motion for Order Staying Proceedings to Allow Party to Seek Coordination of Actions--Complex Action [Code Civ. Proc. § 404]

[1] FORM

[2] Use of Form

[3] Supporting Papers

[4] Notice

[5] Criteria for Stay Order

§ 125.169 Order Staying Proceedings to Allow Party to Seek Coordination of Actions--Complex Action [Code Civ. Proc. § 404]

[1] FORM

[2] Use of Form

[3] Signature of Presiding Judge

[4] Length of Stay

§ 125.170 Notice of Motion for Order Staying Proceedings in Actions to Be Coordinated [and Related Actions]--Complex Action [Code Civ. Proc. § 404.5; Cal. Rules of Ct., Rule 3.515]

[1] FORM

[2] Use of Form

[3] Contents of Notice of Motion

[4] Supporting Papers

[5] Notice

§ 125.171 Order Staying Proceedings to Allow Court to Determine Appropriateness of Actions for Coordination--Complex Action [Code Civ. Proc. § 404]

[1] FORM

[2] Use of Form

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Chapter 125 CONSOLIDATION, SEVERANCE, AND COORDINATION OF ACTIONS
PART I. SCOPE

12-125 California Forms of Pleading and Practice--Annotated § 125.01

§ 125.01 Scope of Chapter

This chapter discusses consolidation [*see § 125.10* et seq.], severance [*see § 125.20* et seq.], and coordination of actions [*see § 125.30* et seq.]. Consolidation is the power of the court to order several actions or issues with common question or law or fact, filed in the same county, to be tried together. Severance is the power of the court to order a separate trial of any cause of action or issue filed in that county. Coordination is the assignment of civil actions sharing common questions of law or fact, but filed in different counties, to a single judge for trial who coordinates pretrial procedures and may try the cases in one or more courts.

This chapter includes Procedural Checklists for consolidation [*see § 125.80* et seq.], severance [*see § 125.90* et seq.], and coordination [*see § 125.100* et seq.].

This chapter contains the following forms relating to consolidating actions or issues for trial:

- Caption for papers filed in consolidated actions [*see § 125.120*].
- Stipulations to consolidate actions [*see § 125.121*].
- Notice of motion to consolidate actions [*see § 125.122*].
- Declaration supporting motion to consolidate actions [*see § 125.123*].
- Order to consolidate actions [*see § 125.124*].
- Stipulations to consolidate issues [*see § 125.125*].
- Notice of motion to consolidate issues [*see § 125.126*].
- Declaration supporting motion to consolidate issues [*see § 125.127*].

- Order to consolidate issues for trial [*see § 125.128*].

This chapter contains the following forms relating to severance of actions or issues for trial:

- Notice of motion to sever causes of action or issues [*see § 125.140*].
- Order severing causes of action or issues [*see § 125.141*].

This chapter contains the following forms for coordination of non-complex and complex civil actions filed in different counties:

- Notice of motion to transfer non-complex actions for coordination [*see § 125.150*].
- Declaration in support motion to transfer non-complex actions [*see § 125.151*].
- Order transferring non-complex actions [*see § 125.152*].
- Notice of motion to commence coordination of complex actions [*see § 125.160*].
- Order granting motion to commence coordination of complex actions [*see § 125.161*].
- Petition for coordination of complex actions [*see § 125.162*].
- Declaration supporting coordination of complex actions [*see § 125.163*].
- Notice of submission of petition for coordination of complex actions [*see § 125.164*].
- Caption for papers in complex coordination proceedings [*see § 125.165*].
- Statement supporting petition for coordination of complex actions [*see § 125.166*].
- Statement opposing petition for coordination of complex actions [*see § 125.167*].
- Notice of motion for order staying proceedings to allow party to seek coordination of complex actions [*see § 125.168*].
- Order staying proceedings to allow party to seek coordination of complex actions [*see § 125.169*].
- Notice of motion for order staying proceedings in complex actions to be coordinated [*see § 125.170*].
- Order staying proceedings to allow court to determine appropriateness of actions for coordination [*see § 125.171*].

This chapter also includes a Research Guide for each procedure [*see § 125.50* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConsolidation of ActionsCivil ProcedurePretrial MattersSeparate Trials

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12-125 California Forms of Pleading and Practice--Annotated § 125.02

§ 125.02 Cross References

- For forms for use in raising objections and affirmative defenses, see Ch. 3, *Abatement of Actions* .
- For discussion and a form for use in consolidating appeals, see *Ch. 42, Appeal: Notice of Appeal, §§ 42.23, 42.100*.
- For a form of a statement of parties in a consolidated case, see Ch. 108, *Captions and Introductions* .
- For forms for use in joinder of parties in one action, see Ch. 395, *Parties* .
- For forms for use in actions containing multiple plaintiffs, defendants, or causes, see Ch. 420, *Prayers* .
- For forms for use in proceedings to have separate trials on issues of special defenses and liability, see Ch. 425, *Pretrial Proceedings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral Overview

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12-125 California Forms of Pleading and Practice--Annotated §§ 125.03-125.09

[Reserved]

§§ 125.03[Reserved]

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12-125 California Forms of Pleading and Practice--Annotated § 125.10

§ 125.10 Governing Law

The consolidation of actions and issues generally is governed by *Code Civ. Proc. § 1048*. Section 1048 was amended in 1971 to conform to *Rule 42 of the Federal Rules of Civil Procedure.* Decisions pertaining to Rule 42 may be referred to for possible assistance in interpreting *Code Civ. Proc. § 1048*. Other state statutes authorizing consolidation in specific situations are set forth in the Research Guide [*see § 125.51*].

Consolidation of cases is also regulated by *Cal. Rules of Ct., Rule 3.350*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConsolidation of Actions

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12-125 California Forms of Pleading and Practice--Annotated § 125.11

§ 125.11 Notice of Related Cases

A party in a civil action who knows or learns of the existence of a related action or proceeding pending in any state or federal court in California is required to file and serve a Notice of Related Case. This duty applies when a party files a case with knowledge of a related action or proceeding, and applies thereafter whenever a party learns of a related action or proceeding [*Cal. Rules Ct., Rule 3.300(b)*].

If all the related cases have been filed in one superior court, the court, on notice to all parties, may order that the cases, including probate and family law cases, be related and may assign them to a single judge or department. In a superior court where there is a master calendar, the presiding judge may order the cases related [*Cal. Rules of Ct., Rule 3.300(h)(1)*]. If the related cases are pending in more than one superior court on notice to all parties, the judge to whom the earliest filed case is assigned may confer informally with the parties and with the judges to whom each related case is assigned, to determine the feasibility and desirability of joint discovery orders and other informal or formal means of coordinating proceedings in the cases [*Cal. Rules of Ct., Rule 3.300(h)(2)*]. For coordination of actions, see *§ 125.30* et seq.

For further discussion and forms, see Ch. 137, *Continuing Duties During Litigation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase Management

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12-125 California Forms of Pleading and Practice--Annotated § 125.12

§ 125.12 Consolidation

[1] Definition and Purpose

Consolidation is the power of the court to order several actions or issues filed in the same county to be tried together. In order to promote convenience and conserve judicial resources by avoiding unnecessary costs, delays, and duplication when actions involving common questions of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions. Actions may be consolidated for all purposes with a single judgment or may be consolidated for the purpose of trial of related issues with separate judgments. The court may make any orders concerning consolidated proceedings as may tend to avoid unnecessary costs or delay [*Code Civ. Proc. § 1048(a)*].

Code Civ. Proc. § 1048(a) provides only for consolidation of actions pending before the same court in the same county. For civil causes of action that share common questions of law and fact and are filed in courts in different counties, the procedure utilized is coordination of actions, which assigns the actions to a single judge who coordinates the actions in one or more courts [*see § 125.30* et seq.]. If non-complex civil actions are transferred to another court using coordination, the court to which the case is transferred may order the cases consolidated for trial pursuant to *Code Civ. Proc. § 1048* without any further motion or hearing [*Code Civ. Proc. § 403*].

[2] Types of Consolidation

Two distinct types of consolidation are possible. The court may order complete consolidation or consolidation for all purposes, which results in a single action under one case number with one verdict or set of findings and one judgment [*Hamilton v. Asbestos Corp (2000) 22 Cal. 4th 1127, 1147, 95 Cal. Rptr. 2d 701, 998 P.2d. 403* ; *Jaffe v. Albertson Co. (1966) 243 Cal. App. 2d 592, 606-607, 53 Cal. Rptr. 25]* . Complete consolidation, with one set of findings and judgment, is correct where no doubt exists as to the applicability of the various findings to each of the consolidated cases [*Page v. Bakersfield Uniform etc. Co. (1966) 239 Cal. App. 2d 762, 772, 49 Cal. Rptr. 46]* . Complete consolidation, moreover, is proper where the plaintiffs could have joined together originally to bring the action [*Jaffe v. Albertson Co. (1966) 243 Cal. App. 2d 592, 606-607, 53 Cal. Rptr. 25]* .

Alternatively, courts may order consolidation for purposes of trial only, that is, consolidation only for the purpose of trial of related issues, with separate judgments and findings, as necessary [*Hamilton v. Asbestos Corp (2000) 22 Cal. 4th 1127, 1147, 95 Cal. Rptr. 2d 701, 998 P.2d. 403* ; *McClure v. Donovan (1949) 33 Cal. 2d 717, 722, 205 P.2d 17* ; *see Stubblefield Construction Co. v. City of San Bernardino (1995) 32 Cal. App. 4th 687, 701, 38 Cal. Rptr. 2d 413]* . With consolidation only for trial of related issues, each action maintains its separate identity and independent dispositions of the actions are necessary [*McFarland v. Booker (1967) 250 Cal. App. 2d 402, 415-417, 58 Cal. Rptr. 417* ; *see Hamilton v. Asbestos Corp (2000) 22 Cal. 4th 1127, 1147, 95 Cal. Rptr. 2d 701, 998 P.2d. 403* (actions remain otherwise separate)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPretrial MattersConsolidation of Actions

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12-125 California Forms of Pleading and Practice--Annotated § 125.13

§ 125.13 Discretion to Consolidate

[1] Not a Matter of Right

Consolidation is not a matter of right and rests solely within the sound discretion of the trial judge [*Fisher v. Nash Bldg. Co. (1952) 113 Cal. App. 2d 397, 402, 248 P.2d 466* ; *see also Hamilton v. Asbestos Corp (2000) 22 Cal. 4th 1127, 1149, 95 Cal. Rptr. 2d 701, 998 P.2d. 403* (consolidation under *Code Civ. Proc. § 1048* is permissive, and it is for trial court to determine whether consolidation is for all purposes or for trial only)]. The trial court's decision to grant consolidation will not be disturbed on appeal absent a clear showing of abuse of discretion [*Todd-Stenberg v. Dalkon Shield Claimants Trust (1996) 48 Cal. App. 4th 976, 978-979, 56 Cal. Rptr. 2d 16]* . In actual practice, it is rare that an appellate court will find a consolidation order to be an abuse of discretion.

[2] Factors Determining Appropriateness of Consolidation

[a] No Statutory Guideline

Code Civ. Proc. § 1048(a) sets forth no guidelines with respect to when consolidation is proper except general ones directed toward avoiding unnecessary costs and delays when actions contain common questions of law or fact. The factors discussed in [b]-[e], *below*, present some guidelines regarding when consolidation may be warranted.

[b] Prejudice to Parties

An order of consolidation is not proper if parties to the action are prejudiced by virtue of the consolidation [*see State Farm Etc. Ins. Co. v. Superior Court (1956) 47 Cal. 2d 428, 431-432, 304 P.2d 13]* . Such prejudice may result if the party resisting consolidation is forced to assume inconsistent and contradictory positions in the consolidated actions. For example, a declaratory judgment action in which an insurer seeks a determination that the insured was carrying riders for a charge under a liability policy which excluded coverage where passengers were carried may not be consolidated with an action brought by the riders against the insured in which the insurer is obligated to contend that the insured had been carrying guests within the meaning of a guest statute which would require the passengers to prove willful misconduct in order to recover. In such a case, obligating the insurer to argue inconsistent positions in the same

consolidated action is prejudicial and sufficient for a finding of abuse of discretion in consolidation [*see State Farm Etc. Ins. Co. v. Superior Court (1956) 47 Cal. 2d 428, 431, 304 P.2d 13]* .

[c] Confusion to Jury

Similar to the prejudice analysis, *above*, consolidation is not proper where such an order would result in confusion to the jury, such as when the same party is obligated to assume inconsistent positions and the jury must apply differing tests to particular fact situations which it may find to exist [*see State Farm Etc. Ins. Co. v. Superior Court (1956) 47 Cal. 2d 428, 431, 304 P.2d 13* ; *see also Todd-Stenberg v. Dalkon Shield Claimants Trust (1996) 48 Cal. App. 4th 976, 980, 981 n.1, 56 Cal. Rptr. 2d 16* (no confusion when jury awarded three very different awards of damages, consistent with evidence, demonstrating their ability to distinguish between plaintiffs; distinguishing situation where jury awards identical measure of damages to each plaintiff, in which case inference is overwhelming that jury did not differentiate between cases)].

[d] Evidence

Consolidation may be proper although the evidence presented in one action would not have been admissible in the other action [*Jud Whitehead Heater Co. v. Obler (1952) 111 Cal. App. 2d 861, 866-867, 245 P.2d 608]* . Where consolidation is only for the purpose of trial of related issues, the evidence presented in one case is deemed applicable in the other only to the extent that it is relevant [*McClure v. Donovan (1949) 33 Cal. 2d 717, 722, 205 P.2d 17]* .

[e] Identity of Parties

Analogous to situations in which evidence admissible in one action but not in the other, consolidation of actions may also be appropriate and not an abuse of discretion even though the parties to both actions are not identical [*Jud Whitehead Heater Co. v. Obler (1952) 111 Cal. App. 2d 861, 867, 245 P.2d 608]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersConsolidation of Actions

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12-125 California Forms of Pleading and Practice--Annotated § 125.14

§ 125.14 Effect of Consolidation

[1] Filing of Papers

The order granting or denying all or part of a motion to consolidate is filed in each case sought to be consolidated [*Cal. Rules of Ct., Rule 3.350(a)(1)(C)*].

If the motion is granted for all purposes including trial, any subsequent document is to be filed only in the lead case [*Cal. Rules of Ct., Rule 3.350(c)*]. All documents filed in the consolidated case must include the caption and case number of the lead case, followed by the case numbers of all the other consolidated cases [*Cal. Rules of Ct., Rule 3.350(d)*].

Unless otherwise ordered in granting the motion to consolidate, the lead case will be the case with the lowest file number [*Cal. Rules of Ct., Rule 3.350(b)*].

[2] Findings and Judgment

Consolidation may have the effect of joining causes of action involving the same parties to be tried as one case with one judgment and one set of findings of fact and conclusions of law [*Didier v. American Cas. Co. (1968) 261 Cal. App. 2d 742, 752, 68 Cal. Rptr. 217]* . In such situations, the cases are treated as if the actions had been united originally. A different situation exists where pending actions are consolidated only for the purpose of trial of related issues. In that case, the evidence presented in one action is deemed applicable in the other insofar as it is relevant, but separate findings, if any [*Code Civ. Proc. § 632*], and judgments must be made in each action [*McClure v. Donovan (1949) 33 Cal. 2d 717, 722, 205 P.2d 17* (decided prior to amendment of *Code Civ. Proc. § 632* in 1981, replacing findings of fact and conclusions of law with a statement of decision on the request of any party appearing at trial)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJoinder of Claims & RemediesClaimsCivil ProcedurePretrial MattersConsolidation of Actions

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12-125 California Forms of Pleading and Practice--Annotated §§ 125.15-125.19

[Reserved]

§§ 125.15[Reserved]

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12-125 California Forms of Pleading and Practice--Annotated § 125.20

§ 125.20 Governing Law

The severance of actions and issues generally is governed by *Code Civ. Proc. § 1048*. Section 1048 was amended in 1971 to conform to *Rule 42 of the Federal Rules of Civil Procedure.* Decisions pertaining to *Rule 42* may be referred to for possible assistance in interpreting *Code Civ. Proc. § 1048*. Other state statutes authorizing severance in specific situations are set forth in the Research Guide [*see § 125.61*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSeparate Trials

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12-125 California Forms of Pleading and Practice--Annotated § 125.21

§ 125.21 Definition and Purpose

Although the term severance continues to be used, *Code Civ. Proc. § 1048*, as amended in 1971, no longer authorizes severance of a civil action, but only separate trial of a cause of action or issue within a single civil action [*Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 737 n.3, 29 Cal. Rptr. 2d 804, 872 P.2d 143]* . Specifically, *Section 1048(b)* provides that the court, in furtherance of convenience or to avoid prejudice, or when separate trial will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross complaint, or of any separate issue or of any number of causes of action or issues, preserving the right of jury trial required by the constitution or a statute of California or the United States [*Code Civ. Proc. § 1048*].

Code Civ. Proc. § 1048(b) provides judicial control through severance when the liberal rules of permissive joinder might cause undue hardship to a party or create unnecessary confusion or complexity at trial [10 Cal. L. Revision Comm'n Reports 515 (1971)].

The 1971 amendment of *Section 1048(b)* was intended to conform in substance to *Fed. Rule Civ. P., Rule 42* trial [10 Cal. L. Revision Comm'n Reports 523 (1971)]. For discussion of *Rule 42*, see Moore's Federal Practice, Ch. 42 (3d ed. Matthew Bender).

Section 1048(b) does not affect other statutes that provide for separate trial of particular issues, even though *Section 1048(b)* may provide duplicative authority. Other such statutes include *Code Civ. Proc. §§ 597, 597.5, 598* [10 Cal. L. Revision Comm'n Reports 523 (1971)]. For discussion of separate trial of issues under those statutes, *see Ch. 425, Pretrial Proceedings, § 425.50* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSeparate Trials

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12-125 California Forms of Pleading and Practice--Annotated § 125.22

§ 125.22 Discretion to Sever

Severance is a matter within the discretion of the trial court and is not interfered with except where there has been a manifest abuse of discretion [*Omaha Indemnity Co. v. Superior Court (1989) 209 Cal. pp. 3d 1266, 1271, 258 Cal. Rptr. 66* ; *accord Finley v. Superior Court (2000) 80 Cal. App. 4th 1152, 1163, 96 Cal. Rptr. 2d 128]* . Severance, however, may be mandatory pursuant to particular statutes governing specific actions. For example, *Code Civ. Proc. § 597.5* requires mandatory severance of issues involving the bar of the statute of limitations in medical malpractice cases [*see § 125.61* for other similar statutes].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersSeparate Trials

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12-125 California Forms of Pleading and Practice--Annotated § 125.23

§ 125.23 Propriety of Severance

Severance is proper, for example, when an insured is sued for negligence and the insurer is sued for bad faith in the same action, because to do otherwise would violate the letter and spirit of *Evid. Code § 1155*, which precludes the use of evidence that a tortfeasor has insurance for the injury her or she allegedly caused [*Omaha Indemnity Co. v. Superior Court (1989) 209 Cal. App. 3d 1266, 1271, 258 Cal. Rptr. 66* (abuse of discretion to deny motion to sever)].

The court may sever legal and equitable claims for trial and try the equitable first, without a jury, if the claims are mutually exclusive remedies. Even if the court's determination of the equitable issue is also dispositive of the legal issues, and nothing remains to be tried to a jury, this does not deprive a party of the right to a jury trial [*Walton v. Walton (1995) 31 Cal. App. 4th 277, 293]* . Equitable claims cannot, however, be severed from legal claims where they are not mutually exclusive, such as a claim for damages for trespass and a claim for injunctive relief against future trespass [*Walton v. Walton (1995) 31 Cal. App. 4th 277, 293]* .

Severance may be appropriate when undue prejudice might arise from a $10 million punitive damage claim riding on a $200 claim for the destruction of personal property [*see Stencel Aero Engineering Corp. v. Superior Court (1976) 56 Cal. App. 3d 978, 988, 128 Cal. Rptr. 691* ; *see also Code Civ. Proc. § 1048(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsSeverance

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12-125 California Forms of Pleading and Practice--Annotated § 125.24

§ 125.24 Effect of Severance on Judgments

An appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as "separate and independent" from those remaining [*Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 743, 29 Cal. Rptr. 2d 804, 872 P.2d 143* (disapproving *Schonfeld v. City of Vallejo (1976) 50 Cal. App. 3d 401, 123 Cal. Rptr. 669* and its progeny)].

Review by writ of mandate may be available when unusual circumstances make appellate review of an interlocutory judgment appropriate. The circumstances would be so unusual that postponement of the appeal until the final judgment would cause serious hardship and inconvenience, rendering appeal from the final judgment an inadequate remedy [*Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 743, 29 Cal. Rptr. 2d 804, 872 P.2d 143]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

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12-125 California Forms of Pleading and Practice--Annotated § 125.25

§ 125.25 Severance of Joined Parties and Causes of Action

Where applicable, specific statutes on severance govern. Thus, when parties have been joined under *Code Civ. Proc. § 378* (permissive joinder of plaintiffs) or *Code Civ. Proc. § 379* (permissive joinder of defendants), the court may make such orders as may appear just to prevent any party from being embarrassed, delayed, or put to undue expense, and may order separate trials or make such other order as the interests of justice may require [*Code Civ. Proc. § 379.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderPermissive JoinderCivil ProceduresPretrial MattersSeparate Trials

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12-125 California Forms of Pleading and Practice--Annotated §§ 125.26-125.29

[Reserved]

§§ 125.26[Reserved]

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12-125 California Forms of Pleading and Practice--Annotated § 125.30

§ 125.30 Governing Law

Statutes governing coordination of civil actions are contained in *Code Civ. Proc. §§ 403* and *404-404.9*. Section 404 et seq. is patterned after *28 U.S.C. § 1407* as it pertains to complex and multi-district litigation. Although the federal statute governs pretrial procedures only, it may be referred to for possible assistance in interpreting *Code Civ. Proc. §§ 404-404.9*.

California rules of court governing coordination of civil actions are contained in *Cal. Rules of Ct., Rules 3.500 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementGovernmentsCourtsRule Application & Interpretation

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12-125 California Forms of Pleading and Practice--Annotated § 125.31

§ 125.31 Definition

Coordination is the assignment of civil actions which share common questions of law or fact and are filed in different courts--that is, courts in different counties or different levels of courts in the same county--to a single judge for trial [*see Code Civ. Proc. §§ 403, 404*]. The assigned judge may try the cases in one or more courts [*Code Civ. Proc. § 404.3*]. The assigned judge also has the flexibility to order issues or defenses tried separately, and to order the hearings conducted at various sites in the state as may be selected to provide convenience to witnesses, parties and counsel [*see Cal. Rules of Court, Rule 3.541*; *see generally McGhan MedicalCorp. v. Superior Court (1992) 11 Cal. App. 4th 804, 812-814, 14 Cal. Rptr. 2d 264* (ordering coordination of over 300 breast implant cases pending in 20 counties)]. Although coordination is a simple process, it is governed by rather complex procedural rules [*Cal. Rules of Ct., Rules 3.500 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase Management

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12-125 California Forms of Pleading and Practice--Annotated § 125.32

§ 125.32 Purpose

Coordination serves as a vehicle to eliminate unnecessary duplication of judicial resources and effort where causes of action involving common questions of law or fact are filed in different courts. Effective utilization of coordination further reduces the risk of inconsistent rulings among courts, waste of personnel and judicial facilities, and inefficient use of court calendars [*see Code Civ. Proc. § 404.1*].

Coordination is useful in a wide variety of cases including actions such as personal injury, death, property damage and commercial litigation, construction and subdivision litigation, public law litigation, fire casualty litigation, and miscellaneous tort actions [*see* Yakutis, "Multicourt Litigation Coordination: The First 100 Petitions," 10(3) Bev Hills BJ 12, 13 (1976)]. Coordination proceedings are useful in determining common issues in personal injury mass-tort claims, although each individual plaintiff is responsible for proof of the particular facts applicable to that plaintiff [*Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1125 n.19, 245 Cal. Rptr. 658, 751 P. 2d 923]* . Strict products liability actions can also benefit from coordination in the area of discovery and demurrer or summary judgment rulings [*see McGhan Medical Corp. v. Superior Court (1992) 11 Cal. App. 4th 804, 812-814, 14 Cal. Rptr. 2d 264]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPretrial MattersConferencesCase Management

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12-125 California Forms of Pleading and Practice--Annotated § 125.33

§ 125.33 Notice of Related Cases

A party in a civil action who knows or learns of the existence of a related action or proceeding pending in any state or federal court in California is required to file and serve a Notice of Related Case. This duty applies when a party files a case with knowledge of a related action or proceeding, and applies thereafter whenever a party learns of a related action or proceeding [*Cal. Rules Ct., Rule 3.300(a)*].

If all the related cases have been filed in one superior court, the court, on notice to all parties, may order that the cases, including probate and family law cases, be related and may assign them to a single judge or department. In a superior court where there is a master calendar, the presiding judge may order the cases related [*Cal. Rules of Ct., Rule 3.300(h)(1)*]. If the related cases are pending in more than one superior court on notice to all parties, the judge to whom the earliest filed case is assigned may confer informally with the parties and with the judges to whom each related case is assigned, to determine the feasibility and desirability of joint discovery orders and other informal or formal means of coordinating proceedings in the cases [*Cal. Rules of Ct., Rule 3.300(h)(2)*].

For further discussion and forms, see Ch. 137, *Continuing Duties During Litigation* .

Legal Topics:

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12-125 California Forms of Pleading and Practice--Annotated § 125.34

§ 125.34 Different Procedures Depending on Whether Actions Are Complex or Non-Complex

Code Civ. Proc. § 403 and *Cal. Rules of Ct., Rule 3.500* govern coordination of non-complex cases pending in different courts.

Code Civ. Proc. § 404 et seq. and *Cal. Rules of Ct., Rule 3.501 et seq.* govern coordination of complex cases pending in different courts.

The main distinction is that in a non-complex case, the issue of consolidation is addressed at the trial court level, while in a complex case, the issue is dealt with by a petition for consolidation directed to the Chair of the Judicial Council [*compare Code Civ. Proc. § 403 with Code Civ. Proc. § 404 et seq.*].

Legal Topics:

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12-125 California Forms of Pleading and Practice--Annotated § 125.35

§ 125.35 Determining Whether Case is Complex or Non-Complex

In determining whether a case is or is not complex within the meaning of *Code Civ. Proc. §§ 403* and *404*, the court must consider *Cal. Rules of Ct., Rule 3.400 et seq.* [*Cal. Rules of Ct., Rule 3.502*].

Rule 3.400(a) defines a complex case as an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel [*see Cal. Rules of Ct., Rule 3.400(a)*]. The factors to be considered by the court in deciding whether an action is a complex case include, among other things, whether the action is likely to involve [*Cal. Rules of Ct., Rule 3.400(b)*]:

- Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;
- Management of a large number of witnesses or a substantial amount of documentary evidence;
- Management of a large number of separately represented parties;
- Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or
- Substantial postjudgment judicial supervision.

Cal. Rules of Ct., Rule 3.400(c) provides that an action is provisionally complex if it involves one or more of the following types of claims:

- Antitrust or trade regulation claims;
- Construction defect claims involving many parties or structures;

- Securities claims or investment losses involving many parties;
- Environmental or toxic tort claims involving many parties;
- Claims involving mass torts;
- Claims involving class actions; or
- Insurance coverage claims arising out of any of the claims listed above.

Notwithstanding the above list, an action is not provisionally complex if the court has significant experience in resolving like claims involving similar facts and the management of those claims has become routine; moreover, a court may declare by local rule that certain types of cases are or are not provisionally complex [*Cal. Rules of Ct., Rule 3.400(d)*]. For additional analysis of provisionally complex actions and court case management, see *Deskbook on the Management Of Complex Civil Litigation, §§ 2.01, 3.01* et seq. (Matthew Bender).

For additional analysis of complex cases, see *Ch. 425, Pretrial Proceedings, § 425.15*, and Deskbook on the Management of Complex Civil Litigation, §§ 1.02, *2.01* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-125 California Forms of Pleading and Practice--Annotated § 125.36

§ 125.36 Non-Complex Actions

[1] Grounds and Motion for Coordination

A judge may, on motion, transfer an action or actions from another court to that judge's court for coordination with an action involving a common question of fact or law within the meaning of *Code Civ. Proc. § 404*. The motion must be supported by a declaration stating facts showing the following [*Code Civ. Proc. § 403*; *Cal. Rules of Ct., Rule 3.500(c)*]:

- The actions meet the standards specified in *Code Civ. Proc. § 404.1* [*see § 125.37[4]*].
- The actions are not complex as defined by the Judicial Council [*see § 125.35*].
- The moving party has made a good faith effort to obtain agreement to the transfer from all parties to each action.
- The moving party has notified all parties of their obligation to disclose to the court any information they may have concerning any other motions requesting transfer of any case that would be affected by the granting of the motion before the court.

For forms of notice of motion and supporting declaration for coordination of non-complex actions, see *§§ 125.150*, and *125.151*.

Notice of the motion must be served on all parties to each action and on each court in which an action is pending. Any party to that action may file papers opposing the motion within the time permitted by rule of the Judicial Council [*Code Civ. Proc. § 403*]. The motion is subject to the requirements generally applicable to motions [*Cal. Rules of Ct., Rule 3.500(c)*].

[2] Order Granting Motion

If the court orders that the case or cases be transferred from another court, the order must specify the reasons supporting

a finding that the transfer will promote the ends of justice, with reference to the following standards [*Cal. Rules of Ct., Rule 3.500(d)*; for a form of order, *see § 125.152*]:

- The actions are not complex;
- Whether the common question of fact or law is predominating and significant to the litigation;
- The convenience of the parties, witnesses, and counsel;
- The relative development of the actions and the work product of counsel;
- The efficient utilization of judicial facilities and staff resources;
- The calendar of the courts;
- The disadvantages of duplicative and inconsistent rulings, orders, or judgments; and
- The likelihood of settlement of the actions without further litigation should coordination be denied.

[3] Responsibilities of Moving Party When Motion Is Granted

If the court orders that the case or cases be transferred from another court, the moving party must promptly:

- Serve copies of the order on all parties to each case and send it to the Judicial Council and to the presiding judge of the court from which each case is to be transferred [*Cal. Rules of Ct., Rule 3.500(e)*];
- Take all appropriate action necessary to assure that the transfer takes place and that proceedings are initiated in the other court or courts to complete consolidation with the case pending in that court [*Cal. Rules of Ct., Rule 3.500(f)*].

[4] Reconciliation of Conflicting Orders; Potential Sanctions

The coordination staff in the Administrative Office of the Courts must review all transfer orders submitted under *Cal. Rules of Ct., Rule 3.500(e)* and must promptly confer with the presiding judges of any courts that have issued conflicting orders under *Code Civ. Proc. § 403*. The presiding judges of those courts must confer with each other and with the judges who have issued the orders to the extent necessary to resolve the conflict [*Cal. Rules of Ct., Rule 3.500(g)*].

If it is determined that any party to a case has failed to disclose information concerning pending motions, the court may after a duly noticed hearing find that the party's failure to disclose is an unlawful interference with the processes of the court [*Cal. Rules of Ct., Rule 3.500(g)*; *see Cal. Rules of Ct., Rule 2.30* (sanctions for unlawful interference with the processes of the court); for further discussion, *see* Ch. 510, *Sanctions*].

[5] Consolidation of Actions Without Further Motion

The court to which a case is transferred under *Code Civ. Proc. § 403* may order the cases consolidated for trial pursuant to *Code Civ. Proc. § 1048* without any further motion or hearing [*Code Civ. Proc. § 403*].

[6] Order Directing Parties to Move for Transfer to Different Court

If after considering a *Code Civ. Proc. § 403* coordination motion, the judge determines that the action or actions

pending in another court should not be transferred to the judge's court but instead all the actions that are subject to the motion to transfer should be transferred and consolidated in another court, the judge may order the parties to prepare, serve, and file a motion to have the actions transferred to the appropriate court [*Cal. Rules of Ct., Rule 3.500(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral OverviewCivil ProceduresPretrial MattersConferencesCase ManagementCivil ProceduresPretrial MattersConsolidation of Actions

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§ 125.37 Complex Actions

[1] Petition for Coordination

Any time after filing of the complaint, coordination proceedings may be commenced by a petition for coordination to the Chair of the Judicial Council [*see Code Civ. Proc. § 404*; *Cal. Rules of Ct., Rule 3.521(a)*].

The petition must be Supported by a memorandum and declarations stating facts showing that the actions are complex and meet the standards of *Code Civ. Proc. § 404.1* for coordination [*see Code Civ. Proc. § 404*; *Cal. Rules of Ct., Rule 3.521(a)*; for a form of declaration, *see § 125.163*].

In each included action, the petitioner must file a "Notice of Submission of Petition for Coordination" and the petition for coordination [*Cal. Rules of Ct., Rule 3.522(a)*].

The papers are all submitted to the Chair of the Judicial Council at the Judicial Council's San Francisco office [*Cal. Rules of Ct., Rule 3.511*, listing the papers that must be so submitted; *see also Cal. Rules of Ct., Rule 3.512*, regarding the electronic submission of documents to the Chair of the Judicial Council], with proof of prior service on all other parties to the included actions [*Cal. Rules of Ct., Rule 3.510*].

For an outline of the procedures for a petition for coordination and procedures that apply after a petition is granted, see *§ 125.100* et seq.

[2] Who May Petition

[a] Persons Authorized

A petition for coordination may be filed by any of the following [*Code Civ. Proc. § 404*]:

- All parties plaintiff or defendant to one of the actions.

- Any party to one of the actions after obtaining permission from the presiding judge.
- The presiding judge of a court in which one of the actions is pending.

[b] Any Party After Obtaining Presiding Judge's Permission

When a direct petition is not authorized by *Code Civ. Proc. § 404*, a party may request permission from the presiding judge of a court in which one of the actions is pending for permission to submit a petition for coordination to the Chair of the Judicial Council [*see Code Civ. Proc. § 404*; *Cal. Rules of Ct., Rule 3.520(b)*; for a form of notice of motion, *see § 125.160*]. The request must be made by noticed motion accompanied by a proposed order, which must state that the moving party has permission to submit a petition for coordination to the Chair of the Judicial Council under *Cal. Rules of Ct., Rules 3.521-3.523* [*Cal. Rules of Ct., Rule 3.520(b)(1)*]. The motion must be accompanied by a declaration stating facts showing that the actions are complex and meet the standards of *Code Civ. Proc. § 404.1* for coordination [*see Code Civ. Proc. § 404*; for a form of declaration, *see § 125.163*].

If permission to submit a petition is granted, the moving party must serve and file the signed order and submit it to the Chair of the Judicial Council [*Cal. Rules of Ct., Rule 3.520(b)(2)*]. To provide sufficient time for a party to submit a petition, the presiding judge may stay all related actions pending in that court for a reasonable time not to exceed 30 calendar days [*Cal. Rules of Ct., Rule 3.520(b)(3)*; for discussion of stays, *see § 125.106*; for forms of motions and orders to stay actions, *see §§ 125.168 -125.171*].

[c] All Parties Plaintiff or Defendant in One of Actions

In actual practice, the most common method of commencing a coordination proceeding is by direct petition since the requirement of concert by all parties plaintiff or defendant means only that either all plaintiffs or all defendants in any one action support the petition [*see Code Civ. Proc. § 404*]. Thus, numerous actions containing the same question of law or fact could be pending in the state, but it would be sufficient to commence a coordination proceeding if one side in any one of the actions acted in unison in supporting a direct petition.

[3] Action on Receipt of Petition for Coordination

On receiving a petition for coordination, the Chair of the Judicial Council may assign a judge to determine whether the actions are complex, and if so, whether coordination of the actions is appropriate, or may authorize the presiding judge of a court to assign the matter to judicial officers of the court to make the determination in the same manner as assignments are made in other civil cases [*see Code Civ. Proc. § 404*]. This coordination motion judge either denies or grants the coordination petition after a hearing, if requested, and transmits a copy of the order to the Chair of the Judicial Council [*see Code Civ. Proc. § 404.3*; *Cal. Rules of Ct., Rules 3.511, 3.520*]. If the order grants coordination, the Chair, on receipt of the order, either assigns a coordination trial judge to preside over the coordinated actions in the site or sites the assigned judge finds appropriate or authorizes the presiding judge of a court to assign the matter to judicial officers of the court in the same manner as assignments are made in other civilcases [*see Code Civ. Proc. § 404.3*; *see generally Keenan v. Superior Court (1980) 111 Cal. App. 3d 336, 340-341, 168 Cal. Rptr. 561]* .

For an outline of these procedures and procedures that apply after a petition is granted, see *§ 125.100* et seq.

[4] Standards for Determining Appropriateness of Coordination

The coordination motion judge, whose task it is to determine whether or not actions are appropriate for coordination, makes his or her determination based on the following statutory standards [*Code Civ. Proc. § 404.1*]:

- If one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether or not the common question of fact or law is predominating and

significant to the litigation.

- The convenience of parties, witnesses, and counsel.
- The relative development of the actions and the work product of counsel.
- The efficient utilization of judicial facilities and manpower.
- The calendar of the courts.
- The disadvantages of duplicative and inconsistent rulings, orders, or judgments.
- The likelihood of settlement of the actions without further litigation should coordination be denied.

An express limitation to these standards is that the imminence of a trial in any action otherwise appropriate for coordination may be a ground for summary denial of a petition for coordination in whole or in part [*Cal. Rules of Ct., Rule 3.521(d)*].

[5] Flexibility of Coordination Procedures

The coordination statutes refer to one judge hearing all of the actions for all purposes in a selected site or sites [*Code Civ. Proc. § 404.1*; *see also Code Civ. Proc. § 404.3* (assigning one judge to hear and determine the actions)]. *Code Civ. Proc § 404.7*, however, grants the Judicial Council the power by rule to order the practice for coordinated actions, "notwithstanding any other provision of law" [*McGhan Medical Corp. v. Superior Court (1992) 11 Cal. App. 4th 804, 812-814, 14 Cal. Rptr. 2d 264]* . Further, *Section 404.7* gives the Judicial Council broad discretion to adopt procedures which will foster the goals of coordination, and such procedures may reconcile apparent inconsistencies in the statute [*Keenan v. Superior Court (1980) 111 Cal. App. 3d 336, 341, 168 Cal. Rptr. 561]* .

Thus, even when the coordination will involve hundreds of separate complaints and as many as 20 different counties, the coordination judge would have the flexibility to (1) sever noncommon cases or issues, (2) order trial in more than one forum, (3) minimize travel by all participants by lodging discovery materials in a central location accessible by computer networking or fax and by centralizing motion practice in specific county courts [*McGhan Medical Corp. v. Superior Court (1992) 11 Cal. App. 4th 804, 812-813, 14 Cal. Rptr. 2d 264* (ordering coordination of breast implant cases)].

[6] Disqualification of Assigned Judge

Cal. Rules of Ct., Rule 3.516 contemplates and controls the exercise of any challenge to any assigned judge in a coordination proceedings including preemptory challenges under *Code Civ. Proc. § 170.6*. The procedure and practices established in *Cal. Rules of Ct., Rule 3.516* prevail over any inconsistent, additional or limiting provisions of the general disqualification statutes, *Code Civ. Proc. § 170.1 et seq.* [*Philip Morris, Inc. v. Superior Court (1999) 71 Cal. App. 4th 116, 122, 83 Cal. Rptr. 2d 671* ; *see also Farmers Ins. Exchange v. Superior Court (1992) 10 Cal. App. 4th 1509, 1511-1512, 13 Cal. Rptr. 2d 449* (challenge not rendered untimely on ground that judge had ruled on contested matters in some of the actions prior to their coordination)].

The statutory scheme for coordination and the rules of court implementing that scheme provide for two separate assignments which may be to two separate judges. To be consistent with the statutory scheme, the term "assigned judge" in Rule 3.516 must be read as the judge assigned for the particular purpose, i.e., either to determine whether coordination is appropriate or to hear and determine the coordinated actions [*Stone v. Superior Court (1994) 25 Cal. App. 4th 1144, 1147, 31 Cal. Rptr. 2d 56]* . Thus, under *Cal. Rules of Ct., Rule 3.516*, when a coordination motion judge

or coordination trial judge is assigned, the parties have 20 days after service of the assignment order to challenge the respective assigned judge whether peremptorily or otherwise [*Philip Morris, Inc. v. Superior Court (1999) 71 Cal. App. 4th 116, 123, 83 Cal. Rptr. 2d 671* ; *see* *Stone v. Superior Court (1994) 25 Cal. App. 4th 1144, 1147, 31 Cal. Rptr. 2d 56* (party challenging assignment of judge pursuant to *Code Civ. Proc. § 170.6* has 20 days after specific assignment to file affidavit of prejudice; challenge to coordinated trial judge filed on April 5 was timely when coordination motion judge was appointed February 3 and notice that same judge was appointed coordination trial judge was served on March 17)]. Once a coordinated motion judge or coordinated trial judge is assigned, the plaintiff and defense sides in any included action or coordinated action, respectively, are entitled to only one *Code Civ. Proc. § 170.6* peremptory challenge each [*Philip Morris, Inc. v. Superior Court (1999) 71 Cal. App. 4th 116, 123, 83 Cal. Rptr. 2d 671]* .

Cal. Rules of Ct., Rule 3.516 contains no provision that precludes plaintiffs in a coordination proceeding from exercising a *Code Civ. Proc. § 170.6* peremptory challenge against the coordinated trial judge when one of those plaintiff's has made a precoordination peremptory challenge to a judge in plaintiff's independent action that has later become a coordinated action. Thus, disqualification of an assigned coordination trial judge has been held proper under those circumstances [*Philip Morris, Inc. v. Superior Court (1999) 71 Cal. App. 4th 116, 125, 83 Cal. Rptr. 2d 671]* . However, *Cal Rules of Court, Rule 3.544*, dealing with the procedure to add cases to an ongoing coordination proceeding after a coordination trial judge has been assigned contains no provision for a peremptory challenge by a party to an add-on case. Accordingly, the effect of the rules governing coordination cases is to exclude add-on parties from the right to peremptorily challenge the coordination trial judge [*Industrial Indemnity Co. v. Superior Court (1989) 214 Cal. App. 3d 259, 263-264* (challenge by add-on defendants was untimely because not brought within 20 days after service of order assigning coordination trial judge); *see* *Philip Morris, Inc. v. Superior Court (1999) 71 Cal. App. 4th 116, 125, 83 Cal. Rptr. 2d 671* (*Industrial Indemnity Co.* discussed)].

The 20-day time period specified in *Cal. Rules of Ct., Rule 3.516* has been held extended under *Code Civ. Proc. § 1013* when an order of assignment of a coordination trial judge has been served by mail [*Citicorp North America, Inc. v. Superior Court (1989) 213 Cal. App. 3d 563, 565, 261 Cal. Rptr. 668]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedurePretrial MattersConferencesCase Management

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§ 125.38 Site of Coordination Proceedings

If a petition for coordination is granted, the coordination motion judge must, in the order granting coordination, recommend to the Chair of the Judicial Council a particular superior court for the site of the coordination proceedings [*Cal. Rules of Ct., Rule 3.530(a)*]. The coordination motion judge may consider any relevant factors in making a recommendation for the site of the coordination proceedings, including the following [*Cal. Rules of Ct., Rule 3.530(b)*]:

- The number of included actions in particular locations;
- Whether the litigation is at an advanced stage in a particular court;
- The efficient use of court facilities and judicial resources;
- The locations of witnesses and evidence;
- The convenience of the parties and witnesses;
- The parties' principal places of business;
- The office locations of counsel for the parties; and
- The ease of travel to and availability of accommodations in particular locations.

Legal Topics:

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§ 125.39 Potential Add-On Case

Any party to an included action in a pending petition for coordination must promptly provide notice of any potential add-on cases in which that party is also named or in which that party's attorney has appeared. The party must submit notice to the coordination motion judge and the Chair of the Judicial Council and serve it on each party appearing in the included actions in the pending petition and each party appearing in the potential add-on cases [*Cal. Rules of Ct., Rule 3.531(a)*].

By stipulation of all parties or order of the coordination motion judge, each potential add-on case will be deemed an included action for purposes of the hearing on the petition for coordination [*Cal. Rules of Ct., Rule 3.531(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-125 California Forms of Pleading and Practice--Annotated § 125.40

§ 125.40 Petition for Coordination When Cases Already Ordered Coordinated

If it appears that included actions in a petition for coordination share a common question of law or fact with cases already ordered coordinated, the Chair of the Judicial Council may assign the petition to the coordination trial judge for the existing coordinated cases to decide the petition as a request to coordinate an add-on case under *Cal. Rules of Ct., Rule 3.544* [*Cal. Rules of Ct., Rule 3.532(a)*]. The coordination trial judge's order must specify that the request to coordinate an add-on case is either granted or denied [*Cal. Rules of Ct., Rule 3.532(b)*]. The petitioner must promptly file the order in each included action, serve it on each party appearing in an included action, and submit a copy to the Chair of Judicial Council [*Cal. Rules of Ct., Rule 3.532(c)*].

If the coordination trial judge grants the petition, the included actions will be coordinated as add-on cases and the right to file a peremptory challenge under *Code of Civil Procedure section 170.6* will be limited by *Cal. Rules of Ct., Rule 3.516* [*Cal. Rules of Ct., Rule 3.532(d)*]. If the coordination trial judge denies the petition as a request to coordinate an add-on case under *Cal. Rules of Ct., Rule 3.544*, the Chair of the Judicial Council must assign a coordination motion judge to determine whether coordination is appropriate under *Cal. Rules of Ct., Rule 3.524* [*Cal. Rules of Ct., Rule 3.532(e)*].

Legal Topics:

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[Reserved]

§§ 125.41[Reserved]

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A. Consolidation

12-125 California Forms of Pleading and Practice--Annotated § 125.50

§ 125.50 Related Matthew Bender Publications

For a memoranda of points and authorities relating to forms in this chapter, see California Points and Authorities, Ch. 45, *Consolidation, Severance, and Coordination of Actions* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConsolidation of Actions

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§ 125.51 California Statutes

[1] Consolidation

[a] General Provisions

Permissive joinder of parties. *Code Civ. Proc. §§ 378, 379*

Compulsory joinder of parties. *Code Civ. Proc. § 389*

Permissive joinder of causes of action. *Code Civ. Proc. § 427.10*

Civil actions or issues pending before court which involve common questions of law or fact as permitted to be consolidated. *Code Civ. Proc. § 1048(a)*

[b] Mandatory Consolidation in Specific Actions

Actions brought by either employee or employer against a third person as required to be consolidated with any action brought independently by other. *Lab. Code § 3853*

[c] Permissive Consolidation in Specific Actions

Actions to foreclose by lienholders against processors of farm products may be consolidated by the court. *Food & Agric. Code § 55653*

Actions by plaintiffs to foreclose logger's and lumber-millman's liens may be consolidated. *Civ. Code § 3065a*

Actions to foreclose by persons claiming liens on same property may be consolidated. *Civ. Code § 3149*

Actions by lien claimants who have given stop notices may be consolidated by court first acquiring jurisdiction. *Civ. Code §§ 3175, 3214*

Wrongful death action may be consolidated with survival action arising out of same wrongful act or neglect may be consolidated for trial. *Code Civ. Proc. § 377.62(b)*

Actions by or against two or more dissenting shareholders may be consolidated. Corp. Code § 4307

Proceedings for guardianship or conservatorship of person and of estate may be consolidated. *Prob. Code § 2203(c)*

Actions to recover assessments against identical defendants may be consolidated. *Sts. & Hy. Code § 5414*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConsolidation of Actions

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12-125 California Forms of Pleading and Practice--Annotated § 125.52

§ 125.52 California Rules of Court

Motion to consolidate. *Cal. Rules of Ct., Rule 3.350(a)-(c)*

Filing documents in consolidated cases. *Cal. Rules of Ct., Rule 3.511*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConsolidation of Actions

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§ 125.53 Decisions

[1] Discretion of Trial Court

Consolidation is within discretion of trial court and as not matter of right. *Fisher v. Nash Bldg. Co. (1952) 113 Cal. App. 2d 397, 402, 248 P.2d 466*

Trial court abused discretion in ordering consolidation where prejudice resulted by requiring plaintiff to assume inconsistent positions in consolidated actions. *State Farm Mut. Auto. Ins. Co. v. Superior Court (1956) 47 Cal. 2d 428, 431-432, 304 P.2d 13*

Consolidation is permitted where defendant's substantial rights not prejudiced even though all parties not same and evidence admissible in one case is not admissible in other. *Jud Whitehead Heater Co. v. Obler (1952) 111 Cal. App. 2d 861, 866-867, 245 P.2d 608*

[2] Effect

There are two types of consolidation: consolidation for purposes of trial only where actions remain otherwise separate; and complete consolidation or consolidation for all purposes, where two actions are merged into single proceeding under one case number and result in only one verdict or set of findings and one judgment. *Hamilton v. Asbestos Corp (2000) 22 Cal. 4th 1127, 1147, 95 Cal. Rptr. 2d 701, 998 P.2d. 403*

Consolidated actions ordinarily are determined by single set of findings and single judgment. *Didier v. American Cas. Co. (1968) 261 Cal. App. 2d 742, 752, 68 Cal. Rptr. 217*

Consolidation for trial of related issues requires independent dispositions of actions with each retaining separate identity. *McFarland v. Booker (1967) 250 Cal. App. 2d 402, 415-417, 58 Cal. Rptr. 417*

One set of findings and one judgment was correct where no doubt existed as to applicability of various findings to each of consolidated cases. *Page v. Bakersfield Uniform etc. Co. (1966) 239 Cal. App. 2d 762, 772, 49 Cal. Rptr. 46*

One set of findings and one judgement was proper in consolidated case where plaintiffs originally could have joined together to bring action. *Jaffe v. Albertson Co. (1966) 243 Cal. App. 2d 592, 606-607, 53 Cal. Rptr. 25*

Consolidation for trial of related issues does not consolidate actions for all purposes. *National Elec. Supply Co. v. Mount Diablo Unified School Dist. (1960) 187 Cal. App. 2d 418, 422, 9 Cal. Rptr. 864*

Where pending actions are consolidated for purpose of trial of related issues, evidence presented in one case is deemed applicable in other so far as relevant but separate judgments and findings are required. *McClure v. Donovan (1949) 33 Cal. 2d 717, 722, 205 P.2d 17*

[3] Particular Actions

Consolidation for trial of probate matter and civil lawsuit is within trial court's discretion and is not disturbed on appeal absent clear showing of abuse of discretion. *Estate of Baker (1982) 131 Cal. App. 3d 471, 484-485, 182 Cal. Rptr. 550*

Alleged wrongdoer in tort action was not permitted to bring in other defendants where their presence would not defeat plaintiff's claim but only lessen wrongdoer's burden. *General Elec. Co. v. California ex rel. Dep't Public Works (1973) 32 Cal. App. 3d 918, 925, 108 Cal. Rptr. 543*

Consolidation of two actions to recover proceeds of separate trust accounts was within discretion of trial court. *Kropp v. Sterling Sav. & L. Ass'n (1970) 9 Cal. App. 3d 1033, 1046, 88 Cal. Rptr. 878*

Consolidation for trial of related issues was permitted with petition to determine heirship in pending proceeding and independent action to vacate prior judgment and final probate orders. *Neubrand v. Superior Court (1970) 9 Cal. App. 3d 311, 322-323, 88 Cal. Rptr. 586*

Consolidation of action seeking preliminary injunction with action for dissolution of corporation was proper. *Spector v. Superior Court (1961) 55 Cal. 2d 839, 844, 13 Cal. Rptr. 189, 361 P.2d 909*

Consolidation of actions involving condemnation proceedings as to several parcels permitted. *San Diego County v. Bank of America (1955) 135 Cal. App. 2d 143, 146-147, 286 P.2d 880*

Consolidation of causes of action for negligence for physical injuries suffered by husband and loss of consortium by wife is proper. *Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 407, 115 Cal. Rptr. 765, 525 P.2d 669*

Consolidation of condemnation actions was not abuse of discretion even though several owners of parcels were of different races and each contends he would suffer prejudice therefrom. *Los Angeles High School Dist. v. Swensen (1964) 226 Cal. App. 2d 574, 583-584, 38 Cal. Rptr. 214*

Consolidation of two unlawful detainer actions was not abuse of discretion. *Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 71, 338 P.2d 1005*

Separate actions for money had and received against same defendant were properly consolidated. *Morrell v. Clark (1951) 106 Cal. App. 2d 198, 203, 234 P.2d 774*

[4] Procedure

Where presiding judge consolidates two cases and assigns consolidated action for all further proceedings to another judge who overrules demurrer to complaints, motion to disqualify assigned judge was timely where made at least five days prior to hearing on motion to test propriety of case as class action. *Zdonek v. Superior Court (1974) 38 Cal. App. 3d 849, 852-853, 113 Cal. Rptr. 669*

Trial court may make new order of consolidation or severance after pleadings closed and parties advise court of trial plans. *Vegetable Oil Products Co. v. Superior Court (1963) 213 Cal. App. 2d 252, 259-260, 28 Cal. Rptr. 555*

Consolidation is permitted by stipulation of parties. *Phillips v. Beilsten (1958) 164 Cal. App. 2d 450, 454, 330 P.2d 912*

[5] Review

Mandate is possible remedy where trial court refuses consolidation. *Realty Mfg. Co. v. Superior Court (1913) 165 Cal. 543, 547, 132 P. 1048*

Order of consolidation is not appealable but reviewable on appeal from subsequent judgment. *State Farm Mut. Auto. Ins. Co. v. Superior Court (1956) 47 Cal. 2d 428, 432, 304 P.2d 13*

Trial court's decision to grant consolidation will not be disturbed on appeal absent clear showing of abuse of discretion. *Todd-Stenberg v. Dalkon Shield Claimants Trust (1996) 48 Cal. App. 4th 976, 978-979, 56 Cal. Rptr. 2d 16*

Judgments in actions on creditor's claims are reviewable on appeal from judgment in action for declaratory relief where actions were ordered consolidated and actually tried together. *Bank of California v. Connolly (1973) 36 Cal. App. 3d 350, 363, 111 Cal. Rptr. 468*

Exercise by court of its discretion to consolidate is not reviewable except in case of palpable abuse. *Jud Whitehead Heater Co. v. Obler (1952) 111 Cal. App. 2d 861, 867, 245 P.2d 608*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersConsolidation of ActionsCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

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12-125 California Forms of Pleading and Practice--Annotated § 125.54

§ 125.54 Attorney General Opinions

Compulsory joinder of claims in small claims court. *25 Ops. Cal. Att'y Gen. 283 (1955)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJoinder of Claims & RemediesGeneral OverviewCivil ProcedureJoinder of Claims & RemediesClaimsGovernmentsCourtsSmall Claims Courts

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§ 125.55 Law Reviews

Note, *The Consolidation of Multistate Litigation in State Courts, 96 Yale L.J. 1099 (1987)*

McCoid, *A Single Package for Multiparty Disputes, 28 Stan. L. Rev. 707 (1976)*

Marshall, *New Developments in Pleading*, 48 L.A. Bar B. 9 (1972)

Meyers, *Multiple Class Actions: A Problem Which Needs A Solution*, 47 L.A. Bar B. 436 (1972)

Conley and Sayre, *Indemnity Revisited: Insurance of the Shifting Risk, 22 Hastings L.J. 1201 (1971)*

Note, *Consolidation and Transfer in Federal Courts: 28 U.S.C. Section 1407 Viewed in Light of Rule 24(a) and 28 U.S.C. Section 1404(a) , 22 Hastings L.J. 1289 (1971)*

Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions, 23 Stan. L. Rev. 1 (1970)*

Long, *Administrative Proceedings: Their Time and Cost Can Be Cut Down, 49 ABA J. 833 (1963)*

Comment, *Joinder of Parties in California, 23 Cal. L. Rev. 320 (1935)*

Yankwich, *Joinder of Parties in Light of Recent Statutory Changes, 2 So. Cal. L. Rev. 315 (1929)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersConsolidation of ActionsCivil

ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

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§ 125.56 Text References

California Civil Procedure Before Trial, Ch. 62, *Consolidation*, Ch. 63, *Severance* (Cal. CEB 3d ed. 2000)

Witkin, California Procedure, Vol. 4, *Pleading*, §§ 305 et seq., 338 (4th ed. 1997)

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§§ 125.57[Reserved]

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12-125 California Forms of Pleading and Practice--Annotated § 125.60

§ 125.60 Related Matthew Bender Publications

For a memoranda of points and authorities relating to forms in this chapter, see California Points and Authorities, Ch. 45, *Consolidation, Severance, and Coordination of Actions* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSeparate Trials

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§ 125.61 California Statutes

[1] General Provisions

Trials and orders of permissively joined parties may be severed as appears just to prevent embarrassment, delay, or undue expense. *Code Civ. Proc. § 379.5*

Severance of civil actions or issues may be ordered by court in furtherance of convenience, economy, expedience, or to avoid prejudice. *Code Civ. Proc. § 1048(b)*

[2] Provisions for Severance in Specific Actions

Separate trial may be ordered on court's own motion or motion of either party when defendant pleads defenses not involving merits of plaintiff's cause of action. *Code Civ. Proc. § 597*

Issue of statute of limitations in medical malpractice action may be tried separately and before any other issues in case if raised on motion by either party or required on court's own motion. *Code Civ. Proc. § 597.5*

Any issue or any part of issue may be tried separately on motion of party prior to trial or on court's own motion at any time. *Code Civ. Proc. § 598*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSeparate Trials

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§ 125.62 Decisions

[1] Discretion of Court

It is within court's discretion to order severance and separate trails. *Finley v. Superior Court (2000) 80 Cal. App. 4th 1152, 1163, 96 Cal. Rptr. 2d 128*

Possibility of undue prejudice to defendant was avoidable by discretionary power of court to sever issues for trial where plaintiff's claim for $10,000 in punitive damages was associated with $200 property damages claim. *Stencel Aero Engineering Corp. v. Superior Court (1976) 56 Cal. App. 3d 978, 988, 128 Cal. Rptr. 691*

Severance and separate trials of issues in single action is within discretion of trial court. *Mellone v. Lewis (1965) 233 Cal. App. 2d 4, 7, 43 Cal. Rptr. 412*

[2] Particular Actions

Order of separate trial of several issues in class action was prejudicial to defendant prior to determination of suitability of action as class action. *Home Sav. & L. Ass'n v. Superior Court (1974) 42 Cal. App. 3d 1006, 1012, 117 Cal. Rptr. 485*

Severable nature of two causes of action, by itself, did not preclude consideration of "impracticable and futile" exception to dismissal for failure to bring an action within statutory period, where effect would be to undermine policy of consolidation statute. *Brunzell Constr. Co. v. Wagner (1970) 2 Cal. 3d 545, 551-554, 86 Cal. Rptr. 297, 468 P.2d 553*

Severance was appropriate remedy where joinder was proper under statute but inconvenient to particular defendant. *Landau v. Salam (1971) 4 Cal. 3d 901, 908, 95 Cal. Rptr. 46, 484 P.2d 1390*

Severance of actions and order of separate trials of complaint and cross complaint in divorce action are within discretion of court and not reviewable except with manifest abuse of discretion. *McLellan v. McLellan (1972) 23 Cal. App. 3d 343, 353, 100 Cal. Rptr. 258*

In tort action for deceit where defendants are jointly and severally liable and suit could have been brought originally against any or all of them, action is essentially divisible and could be severed at any time. *Ross v. George Pepperdine Foundation (1959) 174 Cal. App. 2d 135, 141-142, 344 P.2d 368*

[3] Purpose

Trial court order purporting to sever dismissed count of complaint from other count, following trial court's sustaining of demurrer to dismissed count, for purpose of permitting immediate appellate review of trial court's ruling on demurrer was improper in that court's authority under *Code Civ. Proc. § 1048(b)* to sever causes of action is limited to severance for purpose of separate trial; severance is improper where no trial of severed cause of action is contemplated. *Armstrong Petroleum Corp. v. Superior Court (1981) 114 Cal. App. 3d 732, 736, 170 Cal. Rptr. 767*

[4] Review

Exercise of court's discretion to order severance will not be interfered with on appeal except when there has been a manifest abuse of discretion. *Finley v. Superior Court (2000) 80 Cal. App. 4th 1152, 1163, 96 Cal. Rptr. 2d 128*

Although mandate in certain instances provides more effective remedy than does appeal for purpose of reviewing order denying severance, writ relief is inappropriate if trial court denies motion for severance without prejudice to making motion at later time; Supreme Court's order directing court of appeal to issue alternative writ of mandate ordering superior court to grant motion to sever constitutes determination that, in ordinary course of law, petitioner is without adequate remedy. *Omaha Indemnity Co. v. Superior Court (1989) 209 Cal. App. 3d 1266, 1274-1275, 258 Cal. Rptr. 66*

Tort settlement allocation agreement requires separate trial after judgment where remaining defendant alleges lack of good faith in allocation by settling tortfeasors. *Lareau v. Southern Pac. Transportation Co. (1975) 44 Cal. App. 3d 783, 796-798, 118 Cal. Rptr. 837*

Where plaintiff sues on separate causes of action for money due on promissory note and on account stated, entry of judgment on one cause of action was patently void and not appealable when two causes were never severed into separate lawsuits. *Trani v. R.G. Hohman Enterprises, Inc. (1975) 52 Cal. App. 3d 314, 315-316, 125 Cal. Rptr. 34*

Final judgment rule does not preclude review on appeal of properly severed action prior to determination of all actions. *Schonfeld v. City of Vallejo (1975) 50 Cal. App. 3d 401, 417-419, 123 Cal. Rptr. 669*

In proceeding in probate where court found favorably for one claimant, order was severable and appealable even though interests of other beneficiaries had not been determined. *Estate of Brissel (1963) 218 Cal. App. 2d 841, 843, 32 Cal. Rptr. 458*

Mandate is remedy to compel severance of actions for trial. *State Farm Mut. Auto. Ins. Co. v. Superior Court (1956) 47 Cal. 2d 428, 433, 304 P.2d 13*

Legal Topics:

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

Civil ProcedureClass ActionsJudicial DiscretionCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionCriminal Law & ProcedureTrialsMotions for Severance

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§§ 125.63[Reserved]

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12-125 California Forms of Pleading and Practice--Annotated § 125.70

§ 125.70 Related Matthew Bender Publications

For analysis of determining whether a case is complex or non-complex, see *Deskbook on the Management of Complex Civil Litigation, §§ 1.02, 2.01* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase Management

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§ 125.71 California Statutes

Coordination of non-complex actions sharing common question of fact or law. *Code Civ. Proc. § 403*

Coordination of complex actions sharing common question of fact or law. *Code Civ. Proc. § 404 et seq.*

Authority of presiding judge to delegate duties under *Code Civ. Proc. § 404 et seq.* to other judge of court; presiding judge defined to include sole judge of one-judge court. *Code Civ. Proc. § 404.9*

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-125 California Forms of Pleading and Practice--Annotated § 125.72

§ 125.72 California Rules of Court

Rules governing coordination of non-complex civil actions. *Cal. Rules of Ct., Rules 3.500, 3.502*

Rules governing coordination of complex civil actions. *Cal. Rules of Ct., Rule 3.501 et seq.*

Determining whether or not action is complex. *Cal. Rules of Ct., Rules 3.502*, 3.400 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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12-125 California Forms of Pleading and Practice--Annotated § 125.73

§ 125.73 Decisions

[1] Grounds for Coordination

Although coordination under *Code of Civ. Proc. § 404* is limited to "complex" cases, coordinated actions are not by definition difficult or novel. The criteria that determine whether actions are "complex" within the meaning of section 404 are set forth in former Cal. Rules of Court, Rule 1800(a) (now 3.400), which defines a "complex case" as "an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel." *Thayer v. Wells Fargo Bank (2001) 92 Cal. App. 4th 819, 835, 112 Cal. Rptr. 2d 284*

Predicted benefits of coordination of hundreds of breast implant cases in 20 counties, especially in streamlining discovery and motion practice, as outweighing some delay and inequity. *McGhan Medical Corp. v. Superior Court (1992) 11 Cal. App. 4th 804, 812-815, 14 Cal. Rptr. 2d 264* .

Although class actions are rarely appropriate for resolution of personal injury mass-tort claims because they rarely meet community-of-interest requirement in that each member's right to recover depends on facts peculiar to each particular case, some benefits of class action device as implemented by other means, such as coordination proceedings, in which common issues can be determined, but each individual plaintiff is responsible for proof of particular facts applicable to that particular plaintiff. *Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1125 n.19, 245 Cal. Rptr. 658, 751 P.2d 923*

Request for coordination as appropriate when civil actions sharing common question of fact or law are pending in different courts. *Keenan v. Superior Court (1980) 111 Cal. App. 3d 336, 340-341, 168 Cal. Rptr. 561*

Rules for coordination of civil actions, in different courts, involving common questions of fact or law contemplate that existence of pending actions will be disclosed to court by parties having knowledge of them. *Trotsky v. Los Angeles Fed. Sav. & Loan Ass'n (1975) 48 Cal. App. 3d 134, 151, 121 Cal. Rptr. 637*

[2] Power of Coordination Judge

Coordination judge as governing subsequent activities without interference by any other judge and as free to determine place of trial unfettered by narrow perspective of venue statutes. *Keenan v. Superior Court (1980) 111 Cal. App. 3d 336, 342, 168 Cal. Rptr. 561*

Presence of common questions of law, efficient utilization of judicial facilities and manpower, state of court's calendar, and problems which would be engendered by duplicative and inconsistent rulings as supporting exercise of trial court's discretion in refusing to retransfer actions which had previously been coordinated, despite fact that convenience of witnesses would favor retransferring. *Pesses v. Superior Court (1980) 107 Cal. App.3d 117, 125, 165 Cal. Rptr. 680* (wrongful death actions arising out of airplane crash)

[3] Disqualification of Judge

Former Cal. Rules of Ct., Rule 1515 (now 3.516) controls exercise of any challenge to any assigned judge in coordination proceedings, including preemptory challenges under *Code Civ. Proc. § 170.6*; under former Rule 1515, when coordination motion judge or coordination trial judge is assigned, parties have 20 days after service of assignment order to challenge judge whether peremptorily or otherwise; once coordinated motion judge or coordinated trial judge is assigned, plaintiff and defense sides in any included action or coordinated action, respectively, are entitled to only one *Code Civ. Proc. § 170.6* peremptory challenge each; procedures and practices established by former Rule 1515 prevail over any inconsistent provisions of general disqualification statutes; no provision in former Rule 1515 precludes plaintiffs from exercising *Code Civ. Proc. § 170.6* peremptory challenge against coordinated trial judge when one of those plaintiffs made precoordination peremptory challenge in plaintiff's independent action that later becomes coordinated action; thus, despite any language in Section 170.6 to contrary, former Rule 1515 made plaintiffs' peremptory challenge timely. *Philip Morris, Inc. v. Superior Court (1999) 71 Cal. App. 4th 116, 122-126, 83 Cal. Rptr. 2d 671*

In coordination proceedings under *Code Civ. Proc. § 404 et seq.*, trial court erred in striking defendants' written motion to disqualify assigned judge peremptorily under *Code Civ. Proc. § 170.6* on ground motion, submitted 22 days after order of assignment was made, was untimely under Cal. Rules of Ct., former Rule 1515 (now 3.516) (requiring submission of challenge within 20 days after order of assignment); since order was served by mail, defendants' time for moving to disqualify was extended by five days under *Code Civ. Proc. § 1013*, thus giving them 25 days from date of service of order to make motion. *Citicorp North America, Inc. v. Superior Court (1989) 213 Cal. App. 3d 563, 566-571, 261 Cal. Rptr. 668*

[4] Review

Mandate rather than appeal as method for review of orders made in connection with coordination proceedings. *Lathrup, Inc. v. Trans-West Discount Corp. (1976) 64 Cal. App. 3d 316, 317, 134 Cal. Rptr. 348*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedureRemediesWritsCommon Law WritsMandamus

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12-125 California Forms of Pleading and Practice--Annotated § 125.74

§ 125.74 Law Reviews

Yakutis, *Multicourt Litigation Coordination: The First 100 Petitions,* 10(3) Bev. Hills B.J. 12 (1976)

Note, *The Judicial Panel and the Conduct of Multidistrict Litigation, 87 Harv. L. Rev. 1001 (1974)*

Coordination: Something New in P.I. Litigation, 13 C.T.L. J. 59 (1974)

Review of Selected 1972 California Legislation, *Civil Procedure; coordination of civil actions, 4 Pac. L.J. 333 (1973)*

Rosenfield, *Class Actions: Engrafting Federal "Complex and Multi-District Litigation" Procedures in Appropriate California Cases, 47 L.A. Bar Bull. 445 (1972)*

Legal Topics:

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

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§ 125.75 Text References

California Civil Procedure Before Trial, ch. 64, *Coordination* (Cal. CEB 1990)

Witkin, California Procedure, vol. 4, *Pleading*, § 316 et seq. (4th ed. 1997)

Levit and Yakutis, Coordination of Civil Actions (Judicial Council of California)

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PART III. RESEARCH GUIDE
C. Coordination

12-125 California Forms of Pleading and Practice--Annotated §§ 125.76-125.79

[Reserved]

§§ 125.76[Reserved]

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Chapter 125 CONSOLIDATION, SEVERANCE, AND COORDINATION OF ACTIONS
PART IV. PROCEDURAL CHECKLISTS
A. Consolidation

12-125 California Forms of Pleading and Practice--Annotated

NOTE:

The following procedural checklist sets forth the procedures to be followed in consolidating an action or actions. It is designed to be illustrative only of the procedures commonly utilized by counsel in consolidation proceedings.

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12-125 California Forms of Pleading and Practice--Annotated § 125.80

§ 125.80 Facts to Be Ascertained

☐ The names of all of the parties to the actions and the names and addresses of their attorneys of record.

☐ The factual and legal issues of the actions.

☐ The witnesses who will be called to testify and the evidence which will be produced on the issues.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConsolidation of Actions

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12-125 California Forms of Pleading and Practice--Annotated § 125.81

§ 125.81 Preliminary Determinations

☐ Determine what common questions of law or fact are involved in the actions.

☐ Determine how consolidation may tend to avoid unnecessary costs or delays.

☐ Determine whether other counsel in the cases may stipulate to consolidation.

☐ Determine whether the consolidation should be of the entire actions or only of certain issues in the actions.

☐ Determine appropriate case file number for documents.

NOTE:

Unless otherwise ordered in granting the motion to consolidate, the lead case in a consolidated case is the case with the lowest file number [*Cal. Rules of Ct., Rule 3.350(b)*]. The order on the motion to consolidate is filed in each of the cases. Thereafter, if the motion is granted for all purposes including trial, any subsequent document must be filed only in the lead case [*Cal. Rules of Ct., Rule 3.350(c)*] and must include the caption and case number of the lead case, followed by the case numbers of all of the other consolidated cases [*Cal. Rules of Ct., Rule 3.350(d)*].

NOTE:

The actions may be consolidated to be tried as one case and the original actions are treated as if the causes had been united originally. Pending actions may also be consolidated for the purpose of trying only certain related issues. In that event the evidence presented in one case is deemed applicable to the other insofar as it is relevant thereto, but separate findings, when required, and judgments are made in each case [*McClure v. Donovan (1949) 33 Cal. 2d 717, 722, 205 P.2d 17]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConsolidation of Actions

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12-125 California Forms of Pleading and Practice--Annotated § 125.82

§ 125.82 Stipulation

1. If counsel for all parties to the actions agree, prepare a stipulation for consolidation of actions [for form, *see § 125.121*] or of issues for trial [for form, *see § 125.125*] in the following number of copies:

- ☐ One duplicate original for filing in each of the actions.
- ☐ One copy for each counsel signing the stipulation.
- ☐ Office copy.
- ☐ Copy for client, if desired.
- ☐ Additional copies as desired.

2. Have stipulation executed by each counsel.

3. Prepare an order for consolidation of actions [for form, *see § 125.124*] or of issues [for form, *see § 125.128*] in the same number of copies as listed in Paragraph 1, *above*.

4. Present the stipulation and order to the court clerk with the requests:

- ☐ That the stipulation be filed.
- ☐ That the filed stipulation and the order be handed to the judge.

☐ That the judge be asked to sign the order.

☐ That the signed order be filed [*see Phillips v. Beilsten (1958) 164 Cal. App. 2d 450, 454, 330 P.2d 912]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConsolidation of Actions

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12-125 California Forms of Pleading and Practice--Annotated § 125.83

§ 125.83 Noticed Motion

1. If stipulation is not possible, prepare a notice of motion for an order consolidating actions [for form, *see § 125.122*] or consolidating issues for trial [for form, *see § 125.126*] in the following number of copies [*see Cal. Rules of Ct., Rule 3.350(a)*]:

- ☐ An original for filing in the lowest numbered case.
- ☐ One copy for filing in each additional case sought to be consolidated.
- ☐ One copy for each attorney of record and unrepresented party in all of the cases.
- ☐ Office copy.
- ☐ Copy for client, if desired.
- ☐ Additional copies as desired.

2. Prepare an affidavit or a declaration under penalty of perjury [for forms, *see § 125.123*, *125.127*] and a memorandum [*Cal. Rules of Ct., Rule 3.1113(a)*] in support of the motion in the same number of copies as in Paragraph 1, *above*, omitting the copies for filing in cases other than the lowest numbered case.

NOTE:
For memoranda related to this motion, see California Points and Authorities, Ch. 45, *Consolidation, Severance, and Coordination of Actions* .

3. Insert the date and place of the hearing on the motion in the notice and request that the motion be placed on the calendar for that time.

NOTE:

If counsel is not familiar with local court practice, he or she may inquire of the clerk of the court regarding this procedure. For example, the Sacramento County Superior Court requires that motions for consolidation of actions be heard by the presiding judge on written notice to all parties which must be given, and the motion made, promptly on the necessity for the consolidation being ascertained [Sacramento Co. Super. Ct. Rules, Rule 2.02(B)].

The Contra Costa Superior Court provides that motions to consolidate cases, bifurcate issues of liability or other issues, such as statute of limitations or other special defense, or sever consolidated cases or causes of action for trial may be heard in the Law and Motion Department or may be reserved for the trial department. Motions to consolidate must be noticed for hearing in the department which is assigned to the lowest numbered case of those cases proposed for consolidation [Contra Costa Co. Super. Ct. Rules, Rule 7(i)].

4. Execute or have executed the documents in Paragraphs [1] and [2], *above*.

5. Serve copies of the notice of motion, declaration, and memorandum by mail [*Code Civ. Proc. §§ 1012, 1013*] or by delivery in person or as otherwise provided in *Code Civ. Proc. § 1011*.

6. Prepare the certificate, affidavit, or declaration of proof of service.

NOTE:

For a procedural guide for service of papers and for forms of proof of service, see Ch. 518, *Service of Summons and Papers* .

7. File the originals of all of the documents in the lowest numbered case, and file copies of the notice of motion only in each of the additional cases sought to be consolidated [*see Cal. Rules of Ct., Rule 3.350(a)*].

8. Attend the hearing on the motion and present argument in support of the motion. If the motion is granted, prepare the order [for forms, see *§§ 125.124, 125.128*] and present it to the clerk with the request that it be signed by the judge and filed.

NOTE:

Under *Code Civ. Proc. § 1019.5*, when a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order (*see* Ch. 372, ***Motions and Orders***) must be given by the prevailing party to all other parties or their attorneys, in the manner provided in *Code Civ. Proc. §§ 1010-1020* (***see*** Ch. 518, ***Service of Summons and Papers***), unless notice is waived by all parties in open court and is entered in the minutes.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPretrial MattersConsolidation of Actions

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12-125 California Forms of Pleading and Practice--Annotated §§ 125.84-125.89

[Reserved]

§§ 125.84[Reserved]

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B. Severance

12-125 California Forms of Pleading and Practice--Annotated § 125.90

§ 125.90 Facts to Be Ascertained

☐ The names of all of the parties to the causes of action and the names and addresses of their attorneys of record.

☐ The legal and factual issues of the causes of action.

☐ The witnesses who will be called to testify and the evidence which will be produced on the issues.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSeparate Trials

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B. Severance

12-125 California Forms of Pleading and Practice--Annotated § 125.91

§ 125.91 Preliminary Determinations

☐ Determine how severance of the causes of action will further convenience, avoid prejudice, or be conducive to expedition and economy.

☐ Determine whether the severance should be of the entire causes of action or only for trial of issues in the causes of action.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSeparate Trials

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B. Severance

12-125 California Forms of Pleading and Practice--Annotated § 125.92

§ 125.92 Preparation of Papers

NOTE:
A Stipulation to a severance appears to be less common than a stipulation for a consolidation; therefore, no guide is set forth here for that procedure. If each counsel is agreeable to such a stipulation, the procedural guide for consolidation (*see* *§ 125.82*) may be adapted to such procedure.

1. Prepare a notice of motion for an order severing the causes of action or issues therein [for form, *see § 125.140*] in the following number of copies:

☐ Original for filing.

☐ Copy for counsel for each other party.

☐ Office copy.

☐ Copy for client, if desired.

☐ Additional copies as desired.

2. Prepare an affidavit [*Code Civ. Proc. § 2009*] or a declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*] and a memorandum [*Cal. Rules of Ct., Rule 3.1113(a)*] in support of the motion in the same number of copies as in Paragraph 1, *above*.

NOTE:
For a form of declaration under penalty of perjury which may be adapted for use with this

motion, see *§ 125.123*. For memoranda related to this motion, see California Points and Authorities, Ch. 45, *Consolidation, Severance, and Coordination of Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSeparate Trials

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12-125 California Forms of Pleading and Practice--Annotated § 125.93

§ 125.93 Further Procedure

The procedure for calendaring the motion, serving and filing the notice, attending the hearing, and obtaining the order are the same as the procedure on a motion for consolidation [*see § 125.83*, Paragraphs 3-8].

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12-125 California Forms of Pleading and Practice--Annotated §§ 125.94-125.99

[Reserved]

§§ 125.94[Reserved]

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12-125 California Forms of Pleading and Practice--Annotated § 125.100

§ 125.100 Non-Complex Actions: Procedure for Coordination

[1] Preliminary Determinations

1. Determine that actions are not complex [*see Code Civ. Proc. § 403*]; [*Cal. Rules of Ct., Rules 3.502, 3.400 et seq.*; *see also § 125.35*].

2. Determine that actions meet standards for coordination under *Code Civ. Proc. § 404.1* [*see Code Civ. Proc. § 403*; *see also § 125.37[4]*].

3. Determine whether other parties will agree to coordination; good faith effort to obtain agreement is required [*see Code Civ. Proc. § 403*; *Cal. Rules of Ct., Rule 3.500(a)*].

4. Inform other parties of their obligation to inform the of any other motions for transfer that might affect the moving party's motion for transfer [*see Cal. Rules of Ct., Rule 3.500(a), (f)*].

[2] Prepare, File, and Serve Papers

1. Prepare:

- ☐ Notice of motion [for form, *see § 125.150*].
- ☐ Supporting declaration [for form, *see § 125.151*].
- ☐ Supporting points and authorities.
- ☐ Proposed order [for form, *see § 125.152*].

☐ Proof of service [for discussion and forms, *see* Ch. 518, *Service of Summons and Papers*].

2. Serve notice of motion and supporting papers on [*see Code Civ. Proc. § 403*]:

☐ All parties to each action.

☐ Each court in which an affected action is pending.

3. File papers.

NOTE:
Procedure on the motion is the same as for motions generally [*see* *Cal. Rules of Ct., Rule 3.500(c)*; for discussion and a procedural checklist, ***see*** Ch. 372, ***Motions and Orders***].

[3] Procedure if Court Grants Motion

1. Promptly serve copies of order granting motion to [*Cal. Rules of Ct., Rule 3.500(e)*]:

☐ All parties to each case.

☐ The Judicial Council.

NOTE:
Coordination staff in the Administrative Office of the Courts will review coordination orders and confer with presiding judges of courts which have may issued conflicting orders. Judges of those courts will then confer to resolve the conflict [*see* *Cal. Rules of Ct., Rule 3.500(g)*].

☐ The presiding judge of a court from which each case is to be transferred.

2. Take appropriate action to assure that transfer takes place to [*see Cal. Rules of Ct., Rule 3.500(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPretrial MattersConferencesCase Management

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12-125 California Forms of Pleading and Practice--Annotated § 125.101

§ 125.101 Complex Actions: Two Procedures for Commencing Coordination

NOTE:

The following checklist is designed to be illustrative only of the procedures commonly utilized by counsel in coordination proceedings. The checklist employs the definitions as set forth in *Cal. Rules of Ct., Rule 3.501,* in § 125.110. Counsel are, therefore, encouraged to refer to the definitional section in conjunction with the procedural checklist and to familiarize themselves with all rules of court pertaining to coordination of actions as set forth in *California Rules of Court, Rules 3.501-3.550*.

[1] By Motion

NOTE:

If all plaintiffs or all defendants in any of the actions are seeking coordination, they should directly petition the Chairperson of the Judicial Council under the procedures *set out in § 125.101[2]* [*see* *Code Civ. Proc. § 404*; *Cal. Rules of Ct., Rule 3.520*].

1. File motion supported by declaration in trial court, following the manner provided by law for motions in civil actions generally [*see Code Civ. Proc. §§ 1003-1030*], seeking commencement of a coordination proceeding by the presiding judge [*Code Civ. Proc. § 404*; *Cal. Rules of Ct., Rule 3.520(a)*; for forms, *see §§ 125.160*, 126.163].

2. The declaration should contain the following:

☐ The name of each petitioner and the name and address of his or her attorney of record, if any;

☐ The names of the parties to all included actions, and the name and address of each

party's attorney of record, if any;

☐ The complete title of each included action, together with the title of the court in which such action is pending and the number of such action;

☐ The complete title of any other action known to the petitioner to be pending in a California court that shares a common question of fact or law with the included actions, and a statement of the reasons for not including such other action in the petition for coordination;

☐ The status of each included action, including the status of any pretrial or discovery motions or orders in that action, if known to petitioner;

☐ The facts relied upon to show that each included action meets the coordination standards specified in *Code Civ. Proc. § 404.1*;

☐ Any facts relied on in support of a request that a particular site or sites be selected for a hearing on the petition for coordination [*Cal. Rules of Ct., Rule 3.521(a)(8)*];

☐ Facts showing that the actions are complex as defined in *Cal. Rules of Ct., Rule 3.400 et seq.* [*Code Civ. Proc. § 404*; *Cal. Rules of Ct., Rule 3.502*].

3. If permission to submit a petition for coordination is granted, the moving party must serve and file the signed order and submit it to the Chair of the Judicial Council [*Cal. Rules of Ct., Rule 3.520(b)(2)*].

[2] By Direct Petition

1. *Submit petition to Chair of Judicial Council.* When petition is made directly by all parties plaintiff or defendant, submit original petition for coordination [for form, *see § 125.162*] and a copy thereof to the Chair of the Judicial Council for assignment of a coordination motion judge to determine whether or not coordination of actions is appropriate [*Code Civ. Proc. § 404*; *Cal. Rules of Ct., Rules 3.520, 3.521(a)*].

2. *Petition for coordination.* The petition for coordination consists of the following:

☐ Contents. State whether or not a hearing is requested and include declarations and points and authorities containing those elements set forth in Paragraph [2] of § 125.102[1] [*Cal. Rules of Ct., Rules 3.520, 3.521(a)*; for form, *see § 125.162*].

NOTE:
In lieu of proof by declaration of facts [*see* Paragraph 2, (c), (f), or (g) of § 125.101[1]], a certified or endorsed copy of the respective pleadings may be attached to the petition for coordination specifying which parts of the pleadings are relied on to support a particular fact [*Cal. Rules of Ct., Rule 3.521(c)*].

☐ Proof of filing. Within five court days of submitting the petition for coordination, the petitioner must submit to the Chair of the Judicial Council proof of filing of the notice of submission of petition

required by *Cal. Rules of Ct., Rule 3.522*, and proof of service of the notice of submission of petition and of the petition required by *Cal. Rules of Ct., Rule 3.523* [*Cal. Rules of Ct., Rules 3.521(b), 3.522*; *see §§ 125.101, 125.162[7]*].

☐ Proof of service. Attach proof of service on each party or on his or her attorney of record, if he or she is represented by an attorney, of the petition for coordination and all supporting documents [*see § 125.102[2]*; *Cal. Rules of Ct., Rules 3.521(b), 3.523*].

☐ Notice of submission of petition. Attach a notice of submission of petition for coordination [*Cal. Rules of Ct., Rules 3.521(b), 3.522*; *see* Paragraph [2] of *§ 125.102[1]*; for form, *see § 125.164*].

☐ Stay order (optional). Motion for an order staying proceedings may be included with a petition for coordination or served and submitted by any party [*see § 125.107*; *Cal. Rules of Ct., Rule 3.515(a)*]. If coordination is not sought by all parties plaintiff or defendant to an action, it is recommended that an order be sought staying proceedings in that action until a coordination motion judge can be assigned by the Chair of the Judicial Council. Notice the application in the usual manner for motions for stay orders generally, according to the applicable rules of court. In a court having more than one judge, if the presiding judge does not rule on the motion, the stay order should be countersigned by the presiding judge [*see Cal. Rules of Ct., Rule 3.520*].

3. *Address of Chair of Judicial Council.* The petition and supporting papers should be submitted in duplicate to the Chair of the Judicial Council, at the following address [*Cal. Rules of Ct., Rule 3.511*]:
Chairperson of the Judicial Council
Administrative Office of the Courts
c/o Coordination Attorney
455 Golden Gate Avenue
San Francisco, California 94102-3660

4. *Documents transmitted to chair.* A copy of the following papers must be submitted to the Chair of the Judicial Council at the Judicial Council's San Francisco office [*Cal. Rules of Ct., Rule 3.511(a)*]:

(1) Petition for coordination, including a petition for coordination of add-on cases;

(2) Notice of submission of petition for coordination, along with the caption page of the original action;

(3) Order assigning coordination motion judge, if made by a presiding judge;

(4) Order assigning coordination trial judge, if made by a presiding judge;

(5) Notice of opposition;

(6) Response in opposition to or in support of a petition for coordination;

(7) Motion for a stay order;

(8) Notice of hearing on petition;

(9) Order granting or denying coordination, including coordination of add-on cases;

(10) Order of remand;

(11) Order of transfer;

(12) Order terminating a coordination proceeding in whole or in part;

(13) Order dismissing an included or coordinated action;

(14) Notice of appeal; and

(15) Notice of disposition of appeal.

The papers listed above are to be submitted by the party that filed or submitted and served the papers or that was directed to give notice of entry of the order. Notice of submission must be filed with the court as part of the proof of service [*Cal. Rules of Ct., Rule 3.511(b)*].

Any paper listed in *Cal. Rules of Ct., Rule 3.511(a)* may be submitted electronically to coordination@jud.ca.gov [*Cal. Rules of Ct., Rule 3.512(a)*]. A party submitting a document electronically must (1) take all reasonable steps to ensure that the submission does not contain computer code, including viruses, that might be harmful to the Judicial Council's electronic system and to other users of that system; and (2) furnish one or more electronic notification addresses and immediately provide any change to his or her electronic notification addresses [*Cal. Rules of Ct., Rule 3.512(b)*]. A document that is submitted electronically must meet the following requirements: (1) the software for creating and reading the document must be in the public domain or generally available at a reasonable cost; and (2) the printing of documents must not result in the loss of document text, format, or appearance [*Cal. Rules of Ct., Rule 3.512(c)*]. When a document to be submitted electronically requires a signature under penalty of perjury, the document is deemed signed by the declarant if, before submission, the declarant has signed a printed form of the document [*Cal. Rules of Ct., Rule 3.512(d)(1)*]. By electronically submitting the document, the party submitting it indicates that he or she has complied with *Cal. Rules of Ct., Rule 3.512(d)(1)* and that the original, signed document is available for review and copying at the request of the court or any party [*Cal. Rules of Ct., Rule 3.512(d)(2)*]. At any time after the document is submitted, any other party may serve a demand for production of the original signed document. The demand must be served on all other parties but need not be filed with the court [*Cal. Rules of Ct., Rule 3.512(d)(3)*]. Within five days of service of the demand, the party on whom the demand is made must make the original signed document available for review and copying by all other parties [*Cal. Rules of Ct., Rule 3.512(d)(4)*]. If a document does not require a signature under penalty of perjury, the document is deemed signed by the party if the document is submitted electronically [*Cal. Rules of Ct., Rule 3.512(e)*]. A party is not required to use a digital signature on an electronically submitted document [*Cal. Rules of Ct., Rule 3.512(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticePleadingsComplaintsRequirementsCivil ProceduresPleading & PracticeService of ProcessGeneral

OverviewCivil ProcedurePretrial MattersConferencesCase Management

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12-125 California Forms of Pleading and Practice--Annotated § 125.102

§ 125.102 Filing and Service of Petition and Accompanying Papers--Complex Actions

[1] Filing of Petition and Notice of Submission

NOTE:

Despite the different procedures for commencing the procedure for coordination of complex cases, described in §§ 125.101[1] and [2], once the petition is submitted to the chair there is no further procedural distinction made. Thus, the following procedures, as set forth below, apply equally to all coordinated actions.

1. *Filing.* File in the appropriate court for each included action one copy of the petition [*see § 125.101[2]*] along with a notice of submission of petition for coordination [*Cal. Rules of Ct., Rules 3.521(b), 3.522*; for form, *see § 125.164*].

2. *Contents.* Each notice of submission must bear the title of the court in which the notice is to be filed and the number of any included action pending in that court, together with [*Cal. Rules of Ct., Rules 3.521(b), 3.522*]:

☐ The date that the petition for coordination was submitted to the Chair of the Judicial Council;

☐ The name and address of the petitioner's attorney of record;

☐ The title and case number of each included action to which the petitioner is a party and the title of the court in which each action is pending; and

☐ The statement that any written opposition to the petition must be submitted and

served at least nine calendar days before the hearing date.

3. *Opposing petition.* Any written opposition to the petition must be submitted and served at least nine court days before the hearing date [*Cal. Rules of Ct., Rule 3.522(a)(4)*; for form, *see § 125.164*].

[2] Service on Parties

1. *Service of petition and notice.* Serve one copy of the notice of submission of petition for coordination of each included action, together with a copy of the petition for coordination and supporting documents, on each party or on his or her attorney of record if he or she is represented by an attorney and submit the notice to the Chair of the Judicial Council within five court days of submitting the petition for coordination [*Cal. Rules of Ct., Rule 3.523*].

2. *Service on liaison counsel.* Except as provided in *Cal. Rules of Ct., Rule 3.506(b)*, any party for whom liaison counsel has been designated may be served by serving the liaison counsel [*Cal. Rules of Ct., Rule 3.510(b)*; *see § 125.103[4]*.

3. *Failure to serve.* Failure to serve any defendant with a copy of the summons and of the complaint, or failure to serve any party with any other paper as required by the California Rules of Court governing coordination does not preclude the coordination of the actions, but any such defendant or party may assert such failure to serve him or her as a basis for appropriate relief [*Cal. Rules of Ct., Rule 3.510(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticePleadingsComplaintsRequirementsCivil ProceduresPleading & PracticeService of ProcessGeneral OverviewCivil ProceduresPretrial MattersConferencesCase Management

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12-125 California Forms of Pleading and Practice--Annotated § 125.103

§ 125.103 Assignment of Coordination Motion Judge--Complex Actions

[1] Order Assigning Judge

On receipt of a petition for coordination, the Chair of the Judicial Council assigns a coordination motion judge to determine whether the actions are complex, and if so, whether coordination of the actions is appropriate, or may authorize the presiding judge of a court to assign the matter to judicial officers of the court to make the determination in the same manner as assignments are made in other civil cases [*Code Civ. Proc. § 404*]. The order assigning a coordination motion judge is served on each party and bears a special number and title assigned to that particular coordination proceeding and all subsequent papers filed in such proceedings should also bear the assigned number and title [*Cal. Rules of Ct., Rule 3.524(a)(1)*; for form of caption, *see § 125.165*].

[2] Disqualification of Assigned Motion Judge

For disqualification of judge, see *§ 125.106[2]*.

[3] Submission of Documents to Motion Judge

The order assigning a coordination motion judge specifies a court address to which all subsequent documents to the coordination motion judge should be submitted [*Cal. Rules of Ct., Rule 3.524(a)(2)*]. Note that certain documents submitted to the coordination motion judge must also be transmitted to the Chair of the Judicial Council [*Cal. Rules of Ct., Rule 3.511*; *see* Paragraph 4 of *§ 125.101[2]*; *see also* Paragraph 3 of *§ 125.104[1]*, Paragraph 2 of *§ 125.104[2]*, and Paragraph 2 of *§ 125.104[3]*].

[4] Liaison Counsel

Either an assigned coordination motion judge or an assigned coordination trial judge may at any time appoint an attorney of record to an included or coordinated action to serve as representative of all parties on that side. Selection of the liaison counsel may be made by the assigned judge if the parties are unable to agree and the appointment of a liaison counsel by the coordination motion judge generally terminates with the final determination of the appropriateness of the

actions for coordination [*Cal. Rules of Ct., Rule 3.506*; for discussion of duties, *see § 125.110*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedurePretrial MattersConferencesCase Management

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
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12-125 California Forms of Pleading and Practice--Annotated § 125.104

§ 125.104 Determination of Appropriateness of Coordination--Complex Actions

OVERVIEW:

The judge assigned under *Code Civ. Proc. § 404* to hear the coordination motion determines whether the actions are complex, and if so, whether coordination of the actions is appropriate based on the standards set forth by *Code Civ. Proc. § 404.1* [*see* *§ 125.37[4]*]. Counsel will already have considered these same criteria in submission of the coordination petition and in filing of an affidavit in support of a motion to commence coordination proceedings, if the proceeding was begun by motion [***see*** *§ 125.101[1]*; for forms, ***see*** §§ 126.160, *125.162*]. These same standards [*Code Civ. Proc. § 404.1*] should be utilized by other parties wishing to submit petitions supporting or opposing coordination of actions.

[1] Supporting and Opposing Petitions by Other Parties

☐ *Statement in support of petition.* Any party to an included action that supports coordination may serve and submit a written statement in support of the petition. Any response in support must be served and filed at least nine court days before the date set for hearing. If a party that supports coordination does not support the particular site or sites requested by the petitioner for the hearing on the petition for coordination, that party may request that a different site or sites be selected and include in his or herresponse the facts relied on in support thereof [*Cal. Rules of Ct., Rule 3.526*; for form, *see § 125.166*].

☐ *Notice of opposition to petition.* Parties opposing the petition may serve, submit, and file a memorandum and declarations in opposition to the petition at least nine court days before the date set for hearing [*Cal. Rules of Ct., Rule 3.525*; for form, *see § 125.167*].

☐ *Submission of notice or statement.* After assignment of the judge under *Code Civ. Proc. § 404*, submit original of each notice of opposition or statement in support of a petition for coordination to the judge along with proof of prior service on each party to an included action [*Cal. Rules of Ct., Rule*

3.510(a)]. Additionally, transmit a copy of every notice of opposition to the Chair of the Judicial Council [*Cal. Rules of Ct., Rule 3.511*].

☐ *Address of assigned judge.* Petitions should be submitted to the assigned motion judge at the address designated in the order of assignment [*Cal. Rules of Ct., Rule 3.524(a)(2)*].

[2] Hearing on Petition for Coordination

1. *Circumstances in which hearing required*. A hearing must be held to decide a petition for coordination if a party opposes coordination. A petition for coordination may not be denied unless a hearing has been held [*Cal. Rules of Ct., Rule 3.527(b)*].

2. *Separate hearing on certain coordination issues.* When a petition for coordination may be disposed of on the determination of a specified issue or issues, without a hearing on all issues raised by the petition and any opposition, the assigned judge may order that the specified issue or issues be heard and determined before a hearing on the remaining issues [*Cal. Rules of Ct., Rule 3.528*].

3. *Notice of scheduled hearing*. If the judge sets a hearing date on a petition for coordination, the petitioner must provide notice of the hearing to each party appearing in an included action. If the coordination motion judge determines that a party that should be served with notice of the petition for coordination has not been served with notice, the coordination motion judge must order the petitioner to promptly serve that party [*Cal. Rules of Ct., Rules 3.527(a)*]. The petitioner is required to submit a copy of the notice to the Chair of the Judicial Council at the Judicial Council's San Francisco office [*Cal. Rules of Ct., Rule 3.511*].

4. *Service and submission of supporting papers*. All memorandums and declarations in support of or opposition to any petition, motion, or application must be served and submitted at least nine court days before any hearing on the matter, unless otherwise provided in the California Rules of Court or otherwise directed by the assigned judge [*Cal. Rules of Ct., Rule 3.513*].

5. *Evidence at hearing*. All factual matters to be heard on any petition for coordination, or on any other petition, motion, or application under the rules in this chapter, must be initially presented and heard on declarations, answers to interrogatories or requests for admissions, depositions, or matters judicially noticed. Oral testimony will not be permitted at a hearing except as the assigned judge may permit to resolve factual issues shown by the declarations, responses to discovery, or matters judicially noticed to be in dispute. Only parties that have submitted a petition or motion, or a written response or opposition to a petition or motion, will be permitted to appear at the hearing, except the assigned judge may permit other parties to appear, on a showing of good cause [*Cal. Rules of Ct., Rule 3.514*].

[3] Granting or Denying Petition for Coordination

1. *Severable claims or actions.* A petition for coordination may be granted or denied as to any action included in the petition for coordination or of any severable claim in any included action with the original trial court continuing to exercise jurisdiction over any severable claim that has not been ordered coordinated [*Cal. Rules of Ct., Rule 3.529(b)*].

2. *Service, filing, and submittal of order*. When a petition for coordination is granted or denied, the petitioner must promptly file the order in each included action, serve it on each party appearing in an included action, and submit it to the Chair of the Judicial Council [*Cal. Rules of Ct., Rule 3.529(a)*].

3. *Authority of coordination motion judge.* After a petition for coordination has been granted and before a coordination trial judge has been assigned, the coordination motion judge may for good cause make any appropriate order as the ends of justice may require, but is without authority to commence a trial or enter judgment in any included action. Good cause includes a showing of an urgent need for judicial action to preserve the rights of a party pending assignment of a coordination trial judge [*Cal. Rules of Ct., Rule 3.529(c)*; for general forms of notice of motion and order, *see* Ch. 372, *Motions and Orders*].

4. *Termination of authority of motion judge.* The authority of a coordination motion judge over an action terminates on the filing and service of an order denying a petition for coordination and any stay that was ordered terminates 10 days after the order denying coordination is filed [*Cal. Rules of Ct., Rule 3.529(d)*].

5. *Automatic stay of proceedings.* The filing of an order granting a petition for coordination automatically stays all further proceedings in that action, except as otherwise directed by the coordination trial judge or by the coordination motion judge pursuant to *Cal. Rules of Ct., Rule 3.529(c)* [Cal. Rules of Ct., Rule 3.592(b); *see* Paragraph [2] of *§ 125.107[1]*]. The court in which such action is pending may, however, accept and file papers with proof of submission of a copy to the coordination trial judge and may continue to exercise jurisdiction over any severable claim that has not been coordinated [*Cal. Rules of Ct., Rule 3.529(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersSeparate Trials

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12-125 California Forms of Pleading and Practice--Annotated § 125.105

§ 125.105 Review of Coordination Orders--Complex Actions

If the judge assigned under *Code Civ. Proc. § 404* determines that coordination is appropriate, he or she selects the reviewing court having appellate jurisdiction if the actions to be coordinated are within the jurisdiction of more than one reviewing court. The assigned judge is required to select the reviewing court which will promote the ends of justice as determined under the standards specified in *Code Civ. Proc. § 404.1* [*see § 125.37[4]*; *Code Civ. Proc. § 404.2*].

1. *When reviewing court must be specified.* If the actions to be coordinated are within the jurisdiction of more than one reviewing court, the coordination motion judge must select and the order granting a petition for coordination must specify, in accordance with *Code Civ. Proc. § 404.2*, the court having appellate jurisdiction of the coordinated actions [*Cal. Rules of Ct., Rule 3.505(a)*].

2. *Review by mandate.* Review of orders is by mandate and a writ of mandate to the appropriate court must be made within 10 days after service on any party of a written notice of entry of an order in a coordination proceeding [*Code Civ. Proc. § 404.6*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsReviewabilityGeneral Overview

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12-125 California Forms of Pleading and Practice--Annotated § 125.106

§ 125.106 Trial of Coordinated Actions--Complex Actions

[1] Assignment of Coordination Trial Judge

If the judge assigned under *Code Civ. Proc. § 404* determines that coordination is appropriate, he or she orders the actions coordinated, reports that fact to the Chair of the Judicial Council, and the Chair then either assigns a coordination trial judge to hear and determine the actions in the site or sites the assigned judge finds appropriate or authorizes the presiding judge of a court to assign the matter to judicial officers of the court in the same manner as assignments are made in other civil cases [*Code Civ. Proc. § 404.3*]. The order by the chair further designates the court address to which all papers submitted to the coordination trial judge shall be sent, including proof of filing of all papers filed in the coordinated action [*Cal. Rules of Ct., Rule 3.540(a)*].

The petitioner must file the assignment order in each coordinated action and serve it on each party appearing in each action. Every paper filed in a coordinated action must be accompanied by proof of submission of a copy of the paper to the coordination trial judge at the designated address. A copy of the assignment order must be included in any subsequent service of process on any defendant in the action [*Cal. Rules of Ct., Rule 3.540(c)*].

[2] Disqualification of Assigned Judges

1. *Motion or affidavit of prejudice.* Submit any motion or affidavit of prejudice regarding an assigned judge in writing to the assigned judge within 20 days after service of the order assigning that judge to the coordination proceeding [*Cal. Rules of Ct., Rule 3.516*; *see Citicorp North America, Inc. v. Superior Court (1989) 213 Cal. App. 3d 563, 565, 261 Cal. Rptr. 668* (if order of assignment was served by mail, 20-day period is extended under *Code Civ. Proc. § 1013*); *see also § 125.73[3]*].

2. *Adversary positions for disqualification.* All plaintiffs or similar parties in the included or coordinated actions constitute a side and all defendants or similar parties in the actions constitute a side for purposes of applying *Code Civ. Proc. § 170.6* (disqualification of judges) [*Cal. Rules of Ct., Rule 3.516*; *see Philip Morris, Inc. v. Superior Court (1999) 71 Cal. App. 4th 116, 124-126, 83 Cal. Rptr. 2d 671* (exercise of peremptory challenge in independent action that is later coordinated does not preclude

peremptory challenge of coordination trial judge); *Industrial Indemnity Co. v. Superior Court (1989) 214 Cal. App. 3d 259, 261, 262 Cal. Rptr. 544* (party precluded from moving to disqualify assigned judge if party's case is added to coordination proceeding beyond 20-day time period after service of order of assignment); *see also § 125.73[3]*].

[3] Preliminary Considerations

1. *Mandatory preliminary trial conference.* The pretrial conference is mandatory, preferably within 30 days of the assignment order, and counsel may at any time following the assignment of the coordination trial judge serve and submit a proposed agenda for the preliminary trial conference and a proposed form of order covering such matters of procedure and discovery as may be appropriate. Counsel should, moreover, be prepared to discuss any matters specified in the order setting the conference. A liaison counsel may be appointed at the pretrial conference [for matters considered at the conference, *see Cal. Rules of Ct., Rule 3.541(a)*; *see also § 125.103[4]*].

2. *Rules governing coordinated actions.* Except as otherwise provided by the California Rules of Court [*Cal. Rules of Ct., Rules 3.501-3.550*], all provisions of law applicable to civil actions generally apply to an actionn included in a coordination proceeding [*Cal. Rules of Ct., Rule 3.504(d)*]. The local rules of court of thedesignated court apply, except as otherwise specified by the assigned judge [*Cal. Rules of Ct., Rule 3.504(c)*].

[4] Transfer, Remand, and Termination of Actions

1. *Transfer*. The coordination trial judge may order any coordinated action or severable claim in that action transferred from the court in which it is pending to another court for a specified purpose or for all purposes. Transfer may be made by the court on its own motion or on the motion of any party to any coordinated action [*Cal. Rules of Ct., Rule 3.543(a)*]. If a party objects to the transfer, the court must hold a hearing on at least 10 days' written notice served on all parties to that action. At any hearing to determine whether an action or claim should be transferred, the court must consider the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient use of judicial facilities and resources; the calendar of the courts; and any other relevant matter [*Cal. Rules of Ct., Rule 3.543(b)*].

2. *Remand.* The coordination trial judge may at any time remand a coordinated action or any severable claim or issue in that action to the court in which the action was pending at the time the coordination of that action was ordered. Remand may be made on the stipulation of all parties or on the basis of evidence received at a hearing on the court's own motion or on the motion of any party to any coordinated action. No action or severable claim or issue in that action may be remanded over the objection of any party unless the evidence demonstrates a material change in the circumstances that are relevant to the criteria for coordination under *Code of Civil Procedure section 404.1*. If the order of remand requires that the action be transferred, the provisions of rule 3.543(b) are applicable to the transfer. A remanded action is no longer part of the coordination proceedings for purposes of *Cal. Rules of Ct., Rules 3.501-3.550*.

3. *Termination of coordinated actions.* The coordination trial judge may terminate any coordinated action by settlement or final dismissal, summary judgment, or judgment, or may transfer a coordinated action so that it may be dismissed or otherwise terminated in the court in which it was pending when coordination was ordered. The judgment entered in each coordinated action bears the title and number that would be applicable to that action without regard to the coordination proceeding. Until the judgment in a coordination becomes final (no longer subject to review), all further trial court proceedings in that action must be determined by the coordination trial judge. Subsequently, all proceedings must be

conducted in the court in which the action was pending prior to coordination [*Cal. Rules of Ct., Rule 3.545*].

4. *Copies of orders to Chair of the Judicial Council.* Counsel should note that every copy of an order remanding, transferring, or terminating a coordination proceeding in whole or in part must be transmitted to the Chair of the Judicial Council [*Cal. Rules of Ct., Rule 3.511*].

[5] Separate Trial of Issues

The coordination trial judge may order any issue or defense to be tried separately and before trial of the remaining issues when it appears that the disposition of any of the coordinated actions might thereby be expedited [*Cal. Rules of Ct., Rule 3.541(b)(3)*].

[6] Entry of Judgment or Order

A certified copy of any order dismissing or terminating the action and of any judgment must be transmitted to (1) the clerk of the court in which the action was pending when coordination was ordered, who must promptly enter any judgment and serve notice of entry of the judgment on all parties to the action, and (2) the appropriate clerks for filing in each pending coordinated action. The judgment entered in each coordinated action must bear the title and case number assigned to the action at the time it was filed [*Cal. Rules of Ct., Rule 3.545(c)*]. A copy of the order must also be transmitted to the Chair of the Judicial Council [*Cal. Rules of Ct., Rule 3.511*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersSeparate TrialsCivil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

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12-125 California Forms of Pleading and Practice--Annotated § 125.107

§ 125.107 Stay of Action--Complex Actions

NOTE:

Any action included in the petition for coordination, and any action affecting an included action, if pending in a California court is subject to being stayed by the coordination motion judge's order [*Code Civ. Proc. § 404.5*; *Cal. Rules of Ct., Rule 3.515*].

[1] Automatic Stays

a. *Automatic stay with assignment of motion judge.* A court receiving an order assigning a coordination motion judge may not commence trial of an action included in the assignment nor enter judgment in any included action except that in the absence of a stay order the court may continue to exercise jurisdiction for purposes of pretrial proceedings as well as over any trial already commenced before assignment of the coordination motion judge [*Cal. Rules of Ct., Rule 3.515(i)*].

b. *Automatic stay with order granting petition.* Filing of an order granting a petition for coordination automatically stays all further proceedings in that action unless otherwise directed by the coordination trial judge or by the coordination motion judge under *Cal. Rules of Ct., Rule 3.529(c)* [*Cal. Rules of Ct., Rule 3.529(b)*].

[2] Discretionary Stay Orders

1. *Stay orders prior to commencement of proceeding.* To provide sufficient time for a party to submit a petition for coordination, the presiding judge may stay all related actions pending in that court for a reasonable time not to exceed 30 calendar days [*Cal. Rules of Ct., Rule 3.520(b)(3)*; for forms, *see §§ 125.168, 125.169*].

2. *Stay order pending ruling on petition.* The coordination motion judge may stay any action being considered for coordination or any action affecting one being considered for coordination pending a determination of whether coordination is appropriate [*Code Civ. Proc. § 404.5*].

3. *When application for stay order made.* Motion for an order to stay proceedings in any action may be included with a petition for coordination or may be served and submitted by any party, along with all supporting documents (*see* Paragraph VII(B)(4), *below*) at any time prior to the determination of the petition [*Cal. Rules of Ct., Rule 3.515(a)*; *see § 125.107[2]*; for form, *see § 125.170*].

4. *Papers supporting stay order request.* Support any application for an order to stay proceedings with a list of all known related cases pending in any California court and whether such actions should be included in the order, a memorandum, and affidavits establishing the necessity of a stay order. If the action to be stayed is not included in the petition for coordination or any response to that petition, the motion for a stay order and all supporting documents must be served on each party to the action to be stayed [*Cal. Rules of Ct., Rule 3.515(c)*; for form, *see § 125.170*].

5. *Opposing application to stay proceedings.* Any party may serve and submit opposition to the motion for a stay order [*Cal. Rules of Ct., Rule 3.515(c)*]. Any memorandums and declarations in opposition to a motion for a stay order must be served and submitted within 10 days after service of the motion [*Cal. Rules of Ct., Rule 3.515(d)*].

NOTE:

The judge making the determination of whether a stay order shall issue may, but is not required to, schedule a hearing. If a hearing is scheduled, prepare and serve notice of the same at the direction of the judge [*Cal. Rules of Ct., Rule 3.515(a), (c)*]. All memoranda and declarations in support of or opposition to any petition, motion, or application must be served and submitted at least nine court days before any hearing on the matter at issue [*Cal. Rules of Ct., Rule 3.513*].

[3] Standards to Determine Appropriateness of Stay Order

In ruling on an application for a stay order, the assigned judge determines whether the stay will promote the ends of justice, considering the imminence of any trial or other proceeding that might materially affect the status of the action to be stayed, and whether a final judgment in that action would have a res judicata or collateral estoppel effect with regard to any common issues of the included actions [*Cal. Rules of Ct., Rule 3.515(f)*].

[4] Submission of Stay Order

Copies of application for and orders granting stays shall be submitted to the Chairperson of the Judicial Council [*Cal. Rules of Ct., Rule 3.511*].

[5] Effect of Stay Order

A stay order suspends all proceedings in the action to which it applies, unless otherwise specified in the order, and may be limited by its terms to specified proceedings, orders, motions, or other phases of the action to which the order applies. The time during which a stay order is in effect will not be included in determining whether the action should be dismissed under *Code Civ. Proc. § 583.110 et seq.*, either for delay in service when the stay affects service or for delay in bringing the action to trial [*Code Civ. Proc. §§ 583.240(b), 583.340(b), 583.420(b)*; *see also Cal. Rules of Ct., Rule 3.515(h), (j)*].

[6] Termination of Stay Orders

1. *Termination with denial of petition.* Filing and service of an order denying a petition for coordination automatically terminates any stay order that was granted 10 days after the order denying coordination is

filed. [*Cal. Rules of Ct., Rule 3.529*].

2. *Termination of ex parte orders*. If a stay order is issued, the party that requested the stay must serve and file a copy of the order in each included action that is stayed. Thirty or more days following issuance of the stay order, any party that is subject to the stay order may move to terminate the stay [*Cal. Rules of Ct., Rule 3.515(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsMultiple Claims & Parties

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12-125 California Forms of Pleading and Practice--Annotated § 125.108

§ 125.108 Adding on to Coordinated Action--Complex Actions

NOTE:

Where an action that is pending shares a common question of law or fact with actions already coordinated pursuant to *Code Civ. Proc. § 404,* the presiding judge on the court's own motion or on the motion of any party may request that the assigned trial judge add that action to the already coordinated actions. The appropriateness of the action for coordination with the others is determined by the same standards as any other coordinated action [*see* *Code Civ. Proc. § 404.1*; *see also* *§ 125.37[4]*] and the motion of any party to add on a case must be supported by an affidavit or declaration showing that the action meets the standards specified in *Code Civ. Proc. § 404.1* [*Code Civ. Proc. § 404.4*].

[1] Petition to Add-On Case

Follow the same format in a petition for coordination of an add-on case as in an ordinary petition for coordination except submit the add-on petition to the coordination trial judge following the special caption prescribed for papers filed in ongoing coordination proceedings [for forms, see *§§ 125.162, 125.165*; *see* discussion of coordination petition in *§ 125.101[2]*].

1. *Submission of request.* Submit add-on request and all supporting papers to the coordination trial judge with proof of filing in each coordinated and add-on case, proof of mailing of one copy of all required papers to the Chairperson of the Judicial Council, and proof of service on all parties in conformity with the *Cal. Rules of Ct., Rule 3.510* [*Cal. Rules of Ct., Rule 3.544(a)*; *see § 125.102*].

2. *Right to oppose petition.* Advise parties served that any party may serve and submit a notice of opposition [*Cal. Rules of Ct., Rule 3.544(b)*].

[2] Opposition to Petition to Add On

Within 10 days after the service of a request, any party may serve and submit a notice of opposition to the request.

Thereafter, within 15 days after submitting a notice of opposition, the party must serve and submit a memorandum and declarations in opposition to the request. Failure to serve and submit a memorandum and declarations in opposition may be a ground for granting the request to coordinate an add-on case [*Cal. Rules of Ct., Rule 3.544(b)*].

NOTE:

A copy of the opposition should further be transmitted to the Chairperson of the Judicial Council [*Cal. Rules of Ct., Rule 3.511*].

[3] Hearing

Follow the rules governing the hearing of a regular coordination petition if the coordination trial judge determines that a hearing on the add-on petition is appropriate [*Cal. Rules of Ct., Rule 3.544(c)*; *see § 125.104[2]*]. If a hearing is held, the judge may allow the parties to serve and submit additional written materials supporting or opposing the add-on request. At any such hearing, the court must consider the relative development of the actions and the work product of counsel, in addition to any other relevant matters [*Cal. Rules of Ct., Rule 3.544(c)*].

[4] Stay Order During Add-On Procedure

Counsel may apply to the coordination trial judge for an order staying the add-on case, otherwise following the procedure for stay orders generally [*see* Cal. *Rules of Ct., Rule 3.544(c)*; *§ 125.107*].

[5] Order Granting or Denying Petition

If no party has filed a notice of opposition within the time required under *Cal. Rules of Ct, Rule 3.544(b)*, the coordination trial judge may enter an order granting or denying the request without a hearing [*Cal. Rules of Ct., Rule 3.544(d)*].

Prepare, serve, and file in each coordinated action and the add-on case an order granting or denying a request to coordinate an add-on case. Counsel should note that the filing of any order granting an add-on case automatically stays all further proceedings in such add-on case [*Cal. Rules of Ct., Rules 3.529(b), 3.544(d)*]. A copy of any order must be transmitted to the Chair of the Judicial Council [*Cal. Rules of Ct., Rule 3.511*].

[6] Authority of Judge Over Add-On Case

The authority of the coordination motion judge over the add-on case terminates ten days after the order denying coordination is filed [*Cal. Rules of Ct., Rules 3.529(d), 3.544(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresPleading & PracticePleadingsComplaintsRequirementsCivil ProceduresPretrial MattersConferencesCase Management

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12-125 California Forms of Pleading and Practice--Annotated § 125.109

§ 125.109 Requests to Extend or Shorten Time--Complex Actions

The time within which any act is permitted or required to be done by a party may be shortened or extended by the assigned judge on such terms as may be just. Unless otherwise ordered, any motion or application for an extension of time to perform an act required by the California Rules of Court must be served and submitted in accordance with *Cal. Rules of Ct., Rule 3.501(17)*. A stipulation for the extension of time for the filing and service of documents required by *Cal. Rules of Ct., Rules 3.501-3.550* requires approval of the assigned judge [*Cal. Rules of Ct., Rule 3.503(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedurePretrial MattersConferencesCase ManagementGovernmentsCourtsRule Application & Interpretation

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12-125 California Forms of Pleading and Practice--Annotated § 125.110

§ 125.110 Definitions--Complex Actions

NOTE:

The terms defined below are used in the California Rules of Court governing coordination, unless the context or subject matter otherwise requires.

1. "Action" means any civil action or proceeding that is subject to coordination or that affects an action subject to coordination [*Cal. Rules of Ct., Rule 3.501(1)*].

2. "Assigned judge" means any judge assigned by the Chair of the Judicial Council or by a presiding judge authorized by the Chair of the Judicial Council to assign a judge under *Code Civ. Proc. § 404* or *404.3*, including a "coordination motion judge" and a "coordination trial judge" [*Cal. Rules of Ct., Rule 3.501(3)*].

3. "Included action" means any action or proceeding included in a petition for coordination [*Cal. Rules of Ct., Rule 3.501(11)*].

4. "Liaison counsel" means an attorney of record for a party to an included action or a coordinated action who has been appointedby an assigned judge to serve as representative of all parties on a side with the following powers and duties, as appropriate: (A) to receive on behalf all and promptly distribute to the parties for whom he or she acts, all notices and other documents from the court; (B) to act as spokesperson for the side that he or she represents at all proceedings set on notice before trial, subject to the right of each party to present individual or divergent positions; and (C) to call meetings of counsel for the purpose of proposing joint action [*Cal. Rules of Ct., Rule 3.501(12)*].

5. "Party" includes all parties to all included actions or coordinated actions, and the word "party," "petitioner," or any other designation of a party includes that party's attorney of record. When a notice or other paper is required to be given or served on a party, the notice or paper must be given to or served on

the party's attorney of record, if any [*Cal. Rules of Ct., Rule 3.501(13)*].

6. "Petition for coordination" means any petition, motion, application, or request for coordination of actions submitted to the Chair of the Judicial Council or to a coordination trial judge under to *Cal. Rules of Ct., Rule 3.544* [*Cal. Rules of Ct., Rule 3.501(14)*].

7. "Serve and file" means that a paper filed in a court must be accompanied by proof of prior service of a copy of the paper on each party required to be served under the Cal. Rules of Ct., Rules 1500-1550 [*Cal. Rules of Ct., Rule 3.501(16)*].

8. "Serve and submit" means that a paper to be submitted to an assigned judge under the *Cal. Rules of Ct., Rules 3.500-3.551* must be submitted to that judge at a designated court address. Every paper so submitted must be accompanied by proof of prior service on each party required to be served under the *Cal. Rules of Ct., Rules 3.500-3.550*. If there is no assigned judge, or if the paper is of a type included in *Cal. Rules of Ct., Rule 3.511(a)*, the paper must be submitted to the Chair of the Judicial Council [*Cal. Rules of Ct., Rule 3.501(17)*].

9. "Side" means all parties to an included or a coordinated action who have a common or substantially similar interest in the issues, as determined by the assigned judge for the purpose of appointing liaison counsel, or of allotting peremptory challenges in jury selection, or for any other appropriate purpose [*Cal. Rules of Ct., Rule 3.501(18)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementGovernmentsCourtsJudges

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PART IV. PROCEDURAL CHECKLISTS
C. Coordination

12-125 California Forms of Pleading and Practice--Annotated §§ 125.111-125.119

[Reserved]

§§ 125.111[Reserved]

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Chapter 125 CONSOLIDATION, SEVERANCE, AND COORDINATION OF ACTIONS
PART V. FORMS
A. Consolidation

12-125 California Forms of Pleading and Practice--Annotated § 125.120

§ 125.120 Caption for Papers in Consolidated Action

[1] FORM Caption for Papers in Consolidated Action

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	_____ [*state title of paper, e.g.,*
vs.	)	NOTICE OF MOTION AND MOTION FOR OR-
_____ [*name*],	)	DER RESETTING CASE FOR TRIAL]
_____ Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

[2] Use of Form

This form of caption in [1], *above*, is to be used on papers which are filed in consolidated actions.

Unless otherwise ordered in granting the motion to consolidate, the lowest numbered case in a consolidated case is the lead case [*Cal. Rules of Ct., Rule 3.350(b)*]. If the motion to consolidate has been granted for all purposes including

trial, any subsequent document is filed only in the lead case [*Cal. Rules of Ct., Rule 3.350(c)*] and bear the lead case caption and case number, followed by the case numbers of all the other consolidated cases [*Cal. Rules of Ct., Rule 3.350(d)*].

For format of first page of papers presented for filing, see *Cal. Rules of Ct., Rules 2.100 et seq.* , 3.1110.

[3] Cross References

For additional forms of captions, see Ch. 108, *Captions and Introductions*

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Chapter 125 CONSOLIDATION, SEVERANCE, AND COORDINATION OF ACTIONS
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12-125 California Forms of Pleading and Practice--Annotated § 125.121

§ 125.121 Stipulation by Counsel [Code Civ. Proc. § 283(1)] to Consolidation of Actions [Code Civ. Proc. § 1048(a)]

[1] FORM Stipulation by Counsel [Code Civ. Proc. § 283(1)] to Consolidation of Actions [Code Civ. Proc. § 1048(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	
_____ [*name*],	)	
_____ Defendant.	)	NO. _____
_____	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	STIPULATION TO CONSOLIDATE ACTIONS
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	
	)	

_____

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled actions, by their respective counsel, that the actions be consolidated into one action for all purposes and that _____ [*specify additional matters that will aid the consolidation, e.g.,* in lieu of _____ (*name*) filing an amended answer and cross complaint, that each and all of the allegations of the complaint in Action No. _____ be deemed denied, and that _____ (*name*) may be granted such affirmative

relief by way of accounting and otherwise as may be equitable].

The undersigned hereby jointly apply to the court for an order consolidating Action No. _____ with Action No. _____ and directing that only one set of findings of fact and conclusions of law, if any, and one judgment be made, that the original of all further papers filed in the above-entitled actions be entitled _____ vs. _____ [*state name of first party on each side with appropriate indication of other parties*] and filed in Action No. _____, and that a copy of such order be filed in Action No. _____, but that no further papers or documents or copies thereof need be filed in that action.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]
[*add signature lines for each attorney*]

[2] Use of Form

This form of stipulation in [1], *above*, is for use when counsel has stipulated that two actions be consolidated for all purposes [*see Code Civ. Proc. §§ 283, 1048(a)*]. The stipulation sets forth the agreement to consolidation and any further matters which will clarify and join the issues of the two actions. The stipulation also is a joint application for an order of consolidation and requests the court to give certain directions as to the filing of papers in only one action.

[3] Copies

Duplicate originals of this stipulation should be filed in each of the actions to be consolidated. When the order is entered duplicate originals of it will also be filed in each action. Thereafter all papers may be filed in only one action if the court so directs [*Cal. Rules of Ct., Rule 3.350*]. For further procedures to be followed in stipulating to consolidation, see *§ 125.100[1]*.

[4] Cross References

For general discussion and forms relating to stipulations, see Ch. 533, *Stipulations*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCriminal Law & ProcedureCounselRight to CounselGeneral Overview

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12-125 California Forms of Pleading and Practice--Annotated § 125.122

§ 125.122 Notice of Motion for Order Consolidating Actions [Code Civ. Proc. § 1048(a)]

[1] FORM Notice of Motion for Order Consolidating Actions [Code Civ. Proc. § 1048(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	
_____ [*name*],	)	NO. _____
_____ Defendant.	)	NOTICE OF MOTION AND MOTION TO CON-
_____	)	SOLIDATE ACTIONS
_____ [*name*],	)	Date: _____
Plaintiff,	)	Time: _____
vs.	)	Location: _____
_____ [*name*],	)	Judge: _____
Defendant.	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

To _____ [*specify party, e.g.,* defendant] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] _____ [*name*] will, and hereby does, move under *Code of Civil*

Procedure Section 1048(a) for an order consolidating Case No. _____ with Case No. _____. The motion will be made on the grounds that these actions are pending before this court, that the actions involve a common question of _____ [law *or* fact *or* law and fact], in that _____ [*specify*] and that consolidation will avoid unnecessary _____ [costs *or* delay *or* costs and delay].

The parties named in Case No. _____ are _____ [*list all named parties, indicating who has appeared and the names of their respective attorneys of record*].

The parties named in Case No. _____ are _____ [*list all named parties, indicating who has appeared and the names of their respective attorneys of record*].

[*Repeat for each case to be consolidated.*]

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s)*] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form of notice of motion and motion in [1], *above*, is for use to obtain an order to consolidate two or more actions into one action [*see Code Civ. Proc. § 1048(a)*].

A memorandum is required to be served and filed with the motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[3] Caption

The notice of motion must contain the caption of all the cases sought to be consolidated, with the lowest numbered case listed first [*Cal. Rules of Ct., Rule 3.350(a)*]. This form shows only two captions, and additional captions should be added as necessary.

[4] Contents of Notice

The notice states when the motion will be heard, the grounds on which it is based, and the papers on which it is based [*see Code Civ. Proc. § 1010*; *Cal. Rules of Ct., Rule 3.1112*]. The notice also states that the actions are pending before the court, that they involve a common question of law or fact, and that consolidation will avoid unnecessary costs or delay [*see Code Civ. Proc. § 1048(a)*].

The notice of motion must list all named parties in each case, the names of those who have appeared, and the names of their respective attorneys of record [*Cal. Rules of Ct., Rule 3.350(a)*].

[5] Filing of Notice

Although a copy of the motion must be filed in each case sought to be consolidated, the motion is deemed a single

motion for the purposes of determining the filing fee. A memorandum, declarations, and other supporting papers are to be filed only in the lowest numbered case [*Cal. Rules of Ct., Rule 3.350(a)*].

[6] Service of Notice

The motion must be served on all attorneys of record and all nonrepresented parties in all of the cases sought to be consolidated and a proof of service filed as part of the motion [*Cal. Rules of Ct., Rule 3.350(a)*].

[7] Cross References

For a related supporting declaration and an order granting the motion, see *§§ 125.123* and *125.124*

See generally, Ch. 372, *Motions and Orders*

For memoranda in support of and in opposition to this motion, see California Points and Authorities, Ch. 45, *Consolidation, Severance, and Coordination of Actions* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConsolidation of ActionsCivil ProcedureTrialsJury TrialsRight to Jury Trial

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Chapter 125 CONSOLIDATION, SEVERANCE, AND COORDINATION OF ACTIONS
PART V. FORMS
A. Consolidation

12-125 California Forms of Pleading and Practice--Annotated § 125.123

§ 125.123 Declaration Under Penalty of Perjury in Support of Motion [Code Civ. Proc. § 2009] to Consolidate Actions [Code Civ. Proc. § 1048(a)]

[1] FORM Declaration Under Penalty of Perjury in Support of Motion [Code Civ. Proc. § 2009] to Consolidate Actions [Code Civ. Proc. § 1048(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	
_____ [*name*],	)	NO. _____
_____ Defendant.	)	DECLARATION OF _____
_____	)	(*name*) IN SUPPORT OF MOTION TO CONSOLID-
_____ [*name*],	)	ATE ACTIONS]
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

I, _____ [*name*], declare:

I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of California and the attorney of record herein for _____ (*name of party or other statement as appropriate*)].

[*Here and in subsequent paragraphs set forth applicable facts in narrative form, e.g.,* Plaintiffs in both actions were riding in an automobile being driven by _____ (*name*) in _____ County, California on _____ (*date*), at which time it was involved in a collision with an automobile owned by _____ (*name*) and driven by _____ (*name*). Both actions arise out of this one automobile collision and the primary issue to be determined is the liability for the collision. The defendants in both actions are the same persons and consolidation of the actions would avoid delay since the same witnesses would be called to testify as to liability and this testimony would be repeated if the actions were tried separately.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form of declaration in [1], *above*, is for use in support of a noticed motion to consolidate actions [for the form of motion, *see § 125.122*]. The form is a declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5*] and is used in lieu of an affidavit [*see Code Civ. Proc. § 2009*].

The form identifies the declarant and sets forth facts in support of the consolidation of the actions. The conclusions to be drawn from the facts and the argument in support of the motion should be set forth in the memorandum in support of the motion.

The declaration is filed only in the lowest numbered case sought to be consolidated [*Cal. Rules of Ct., Rule 3.350(a)*].

[3] Cross References

For additional forms of affidavits and declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureTrialsExamination of WitnessesGeneral Overview

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12-125 California Forms of Pleading and Practice--Annotated § 125.124

§ 125.124 Order Consolidating Actions [Code Civ. Proc. § 1048(a)]

[1] FORM Order Consolidating Actions [Code Civ. Proc. § 1048(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	
_____ [*name*],	)	
_____ Defendant.	)	NO. _____
_____	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER CONSOLIDATING ACTIONS
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	
	)	
_____		

[*EITHER*]

On the filing of the stipulation of the parties hereto by their respective attorneys, dated _____ [*date*], for the consolidation of the above-entitled cases into one action, and good cause appearing therefor,

[*OR*]

The motion of _____ [*name of moving party*] for an order _____ [*specify, e.g.,* consolidating the above-entitled cases into one action] came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

Upon proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that Action No. _____ be, and it hereby is, consolidated with Action No. _____ for all purposes and that _____ [*specify additional orders to implement the consolidation, e.g.,* only one set of findings of fact and conclusions of law if any, and only one judgment shall be made herein. A copy of this order shall be filed in both actions but all further pleadings shall be filed only in Action No. _____ and shall be entitled _____ vs. _____ Action No. _____].

IT IS FURTHER ORDERED that _____ [*specify additional orders to implement the consolidation, e.g.,* in lieu of _____ (*name*) filing an amended answer and cross complaint, that each and all of the allegations of the complaint in Action No. _____ be deemed denied and that _____ (*name*) may be granted such affirmative relief by way of accounting and otherwise as may be equitable].
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, is for use when the court grants a motion to consolidate two or more cases into one action [*see Code Civ. Proc. §§ 1003, 1048(a)*]. The order may be made after the stipulation of the parties to the consolidation [*see § 125.121*] or after a noticed motion [*see § 125.122*]. The order must use the words of the court and should include as many directions as to further procedure as will aid the court and counsel in further handling of the case.

The order must be filed in each case sought to be consolidated [*Cal. Rules of Ct., Rule 3.350(c)*].

[3] Cross References

For additional forms of orders, see Ch. 372, *Motions and Orders*

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12-125 California Forms of Pleading and Practice--Annotated § 125.125

§ 125.125 Stipulation by Counsel [Code Civ. Proc. § 283(1)] to Consolidate Issues for Trial [Code Civ. Proc. § 1048(a)]

[1] FORM Stipulation by Counsel [Code Civ. Proc. § 283(1)] to Consolidate Issues for Trial [Code Civ. Proc. § 1048(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	
_____ [*name*],	)	
_____ Defendant.	)	NO. _____
_____	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	STIPULATION TO CONSOLIDATE ACTIONS
vs.	)	FOR TRIAL
_____ [*name*],	)	
Defendant.	)	
	)	
	)	

_____

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled actions, by their respective counsel, that the actions be consolidated for the purpose of trying the issue(s) of _____ [*specify*] only, and that _____ [*specify additional matters that will aid the consolidation*].

The undersigned hereby jointly apply to the court for an order to effectuate the above-described consolidation.

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]
[*add signature lines for each attorney*]

[2] Use of Form

The form of stipulation in [1], *above*, is for use when counsel agrees that two or more actions may be consolidated for limited purposes. A common purpose is for the trial of one or more issues which are common to each of the actions. The stipulation should clarify, insofar as possible, the exact issues that are to be consolidated and may include a request for an order as to any procedures which may be necessary to implement the consolidation.

[3] Cross References

For additional comments relating to stipulations to consolidate, see *§ 125.121[2]* et seq.

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12-125 California Forms of Pleading and Practice--Annotated § 125.126

§ 125.126 Notice of Motion for Order Consolidating Issues for Trial [Code Civ. Proc. § 1048(a)]

[1] FORM Notice of Motion for Order Consolidating Issues for Trial [Code Civ. Proc. § 1048(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	
_____ [*name*],	)	NO. _____
_____ Defendant.	)	NOTICE OF MOTION AND MOTION TO CON-
_____	)	SOLIDATE ACTIONS FOR TRIAL
_____ [*name*],	)	Date: _____
Plaintiff,	)	Time: _____
vs.	)	Location: _____
_____ [*name*],	)	Judge: _____
Defendant.	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

To _____ [*specify party, e.g.,* defendant] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] _____ [*name*] will, and hereby does, move under *Code of Civil*

Procedure Section 1048(a) for an order consolidating Action No. _____ with Action No. _____ for the purpose of trying the issue(s) of _____ [*specify*] only, and that _____ [*specify additional orders required to implement the consolidation*]. The motion will be made on the grounds that these actions are pending before this court, that the actions involve a common question of _____ [law or fact or law and fact], in that _____ [*specify*] and that consolidation will avoid unnecessary _____ [costs *or* delay *or* costs and delay].

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form of notice of motion in [1], *above*, is for use in obtaining an order to consolidate two or more actions for the purpose of trial of one or more issues. The notice states when, and the grounds on which, the motion will be made and the papers on which it is to be based [*see Code Civ. Proc. § 1010*]. The notice also states that the actions are pending before the court, that they involve a common question of law or fact, and that consolidation will avoid unnecessary costs or delay [*see Code Civ. Proc. § 1048(a)*]. The motion should also request any other orders which counsel anticipates will implement the order of consolidation.

A memorandum is required to be served and filed with the motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[3] Copies

Duplicate originals of this notice and supporting documents should be filed in each of the actions affected by the motion [*Cal. Rules of Ct., Rule 3.350(a)*]. Since the order requested is for consolidation only for trial, duplicate originals of all further papers should be filed in each of the actions.

[4] Cross References

For a related form of supporting declaration and a form of order granting the motion, see *§§ 125.127* and *125.128*

For commentary relating to motions to consolidate and to motions in general, see *§ 125.122[2]* et seq.

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12-125 California Forms of Pleading and Practice--Annotated § 125.127

§ 125.127 Declaration Under Penalty of Perjury in Support of Motion [Code Civ. Proc. § 2009] to Consolidate Issues for Trial [Code Civ. Proc. § 1048(a)]

[1] FORM Declaration Under Penalty of Perjury in Support of Motion [Code Civ. Proc. § 2009] to Consolidate Issues for Trial [Code Civ. Proc. § 1048(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	
_____ [*name*],	)	NO. _____
_____ Defendant.	)	DECLARATION OF _____
_____	)	(*name*) IN SUPPORT OF MOTION TO CONSOLID-
_____ [*name*],	)	ATE ISSUES]
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

I, _____ [*name*], declare:

I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of California and the attorney of record herein for _____ (*name of party or other statement as appropriate*)].

[*Here and in subsequent paragraphs set forth applicable facts in narrative form, e.g.,* Defendant _____ (*name*) is the alleged owner of real property that held a flea market in _____ County, California on _____ (*date*) and is the subject of a personal injury action brought by plaintiff _____ (*name*) and a separate unlawful discrimination action by plaintiff _____ (*name*). A primary issue to be determined in both actions is ownership of the property, and corporate defendant has answered that it is not the owner of the real property. The defendants in both actions are the same entity and consolidation of the actions would avoid delay since the same witnesses would be called to testify as to ownership of the real property and this testimony would be repeated if the actions were tried separately.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form of declaration in [1], *above*, is for use in support of a noticed motion to consolidate issues for trial [for the form of motion, *see § 125.126*]. The form is a declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5*] and is used in lieu of an affidavit [*see Code Civ. Proc. § 2009*].

The form identifies the declarant and sets forth facts in support of the consolidation of the issues. The conclusions to be drawn from the facts and the argument in support of the motion should be set forth in the memorandum in support of the motion.

The declaration is filed only in the lowest numbered case sought to be consolidated [*Cal. Rules of Ct., Rule 3.350(a)*].

[3] Cross References

For additional forms of affidavits and declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

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PART V. FORMS
A. Consolidation

12-125 California Forms of Pleading and Practice--Annotated § 125.128

§ 125.128 Order Consolidating Issues for Trial [Code Civ. Proc. § 1048(a)]

[1] FORM Order Consolidating Issues for Trial [Code Civ. Proc. § 1048(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	
_____ [*name*],	)	
_____ Defendant.	)	NO. _____
_____	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER CONSOLIDATING ACTIONS FOR TRI-
vs.	)	AL
_____ [*name*],	)	
Defendant.	)	
	)	
	)	
_____		

[*EITHER*]

On the filing of the stipulation of the parties hereto by their respective attorneys, dated _____ [*date*], for the consolidation of the above-entitled actions for the purpose of trying the issue(s) of _____ [*specify*], and good cause appearing therefor,

[*OR*]

The motion of _____ [*name of moving party*] for an order consolidating the above-entitled actions for the purpose of trying the issue(s) of _____ [*specify*] came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

Upon proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that Action No. _____ be, and it hereby is, consolidated with Action No. _____ for the purpose of trying the issue(s) of _____ [*specify*] and that _____ [*specify additional orders to implement the consolidation*].
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, is for use when the court grants a motion to consolidate two or more cases for the purpose of trying one or more specified issues [*see Code Civ. Proc. §§ 1003, 1048(a)*]. The order may be made after the stipulation of the parties to such consolidation [*see § 125.121*] or after noticed motion [*see § 125.122*]. The order should use the words of the court and should include as many directions as to further procedure as will aid the court and counsel in further dealing with the case. Duplicate original copies of the order should be filed in each of the cases affected.

[3] Cross References

See generally Ch. 372, *Motions and Orders*

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A. Consolidation

12-125 California Forms of Pleading and Practice--Annotated §§ 125.129-125.139

[Reserved]

§§ 125.129[Reserved]

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PART V. FORMS
B. Severance

12-125 California Forms of Pleading and Practice--Annotated § 125.140

§ 125.140 Notice of Motion for Order Severing Cause of Action or Issue [Code Civ. Proc. § 1048(b)]

[1] FORM Notice of Motion for Order Severing Cause of Action or Issue [Code Civ. Proc. § 1048(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MOTION AND NOTICE OF MOTION FOR SEV-
Plaintiff,	)	ERANCE
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*specify party, e.g.*, defendant] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.*, defendant] _____ [*name*] will, and hereby does, move under *Code of Civil Procedure Section 1048(b)* for an order severing _____ [*specify, e.g.*, plaintiff's first cause of action from plaintiff's second cause of action or the issue of the bar of the statute of limitations from the remaining issues in this case]. The motion will be made on the grounds that severance will _____ [be conducive to

expedition and economy *or* be in furtherance of convenience *or* avoid prejudice] because _____ [*state reasons*].

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form of notice of motion in [1], *above*, is for use in obtaining an order severing causes of action or issues. The notice states when, and the grounds on which, the motion will be made and the papers on which it will be based [*see Code Civ. Proc. § 1010*]. The notice also identifies the particular causes of action or issue to be severed, and states that the grounds show that the severance will be conducive to expedition and economy and is in furtherance of convenience or to avoid prejudice [*Code Civ. Proc. § 1048(b)*].

A supporting memorandum is required to be served and filed with the motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[3] Severance

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action, including a cause of action asserted in a cross complaint, or of any separate issue or of any number of causes of action or issues, preserving the right of trial by jury required by the United States Constitution or a statute of the state or of the United States [*Code Civ. Proc. § 1048*]. For a procedural checklist to be followed in moving to sever causes of action or issues, *see § 125.90* et seq.

[4] Cross References

For a form of order granting the motion, see *§ 125.141*

See generally, Ch. 372, *Motions and Orders*

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B. Severance

12-125 California Forms of Pleading and Practice--Annotated § 125.141

§ 125.141 Order Severing Cause of Action or Issue [Code Civ. Proc. § 1048(b)]

[1] FORM Order Severing Cause of Action or Issue [Code Civ. Proc. § 1048(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*name of moving party*] for an order severing _____ [*specify, e.g.,* plaintiff's first cause of action from plaintiff's second cause of action] came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

Upon proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that _____ [*specify, e.g.,* plaintiff's first cause of action be severed from plaintiff's second cause of action or the issue of the bar of the statute of limitations be severed from the remaining issues herein] and a separate trial of such _____ [causes of action *or* issues] be hereby ordered.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, is for use when the court grants a motion to sever causes of action or issues in a pending case [*see Code Civ. Proc. §§ 1003, 1048(b)*; for the related motion, *see § 125.140*]. The order should use the words of the court and should clearly identify the cause of action or issue which is severed. This form also provides for a separate trial of the causes of action or issues which are severed.

[3] Cross References

See generally Ch. 372, *Motions and Orders*

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12-125 California Forms of Pleading and Practice--Annotated §§ 125.142-125.149

[Reserved]

§§ 125.142[Reserved]

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C. Coordination

12-125 California Forms of Pleading and Practice--Annotated § 125.150

§ 125.150 Notice of Motion to Transfer Action for Coordination--Non-Complex Action [Code Civ. Proc. § 403]

[1] FORM Notice of Motion to Transfer Action for Coordination--Non-Complex Action [Code Civ. Proc. § 403]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION FOR ORDER TO TRANS-
vs.	)	FER ACTION FOR COORDINATION UNDER
_____ [*name*],	)	CODE OF CIVIL PROCEDURE SECTION 403
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

[*EITHER*]

To _____ [*identify parties in all included actions*] and to _____ [*names*] their attorneys of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____

[*identify party, e.g.,* defendant] _____ [*name*] will move for an order to transfer _____ [*identify action by court, case title, and case number*], to the above-entitled court for coordination with the above-entitled action. The motion will be made on the grounds that the actions involve a common question of _____ [fact *or* law *or* fact and law] within the meaning of *Code of Civil Procedure Section 404*, meet the standards for coordination specified in *Code of Civil Procedure Section 404.1*, are not complex actions as defined by the Judicial Council, and that the moving party has made a good faith effort to obtain agreement to the transfer from all parties to each action.

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*signature*]
Attorney for _____ [*moving party*]

[2] Use of Form

The form of notice of motion in [1], *above*, is for use in giving notice of a motion to transfer an action from another court for coordination with the action in which the motion is made [*see Code Civ. Proc. § 403*; for discussion, *see* the Introduction under Non-Complex Actions--Grounds and Motion for Coordination, *above*; for the related form of order, *see § 125.152*].

A supporting memorandum must be filed and a copy served with the motion [*Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*].

For discussion of law and motion practice in general, see Ch. 372, *Motions and Orders* .

[3] Accompanying Declaration

This notice of motion must be supported by a declaration under penalty of perjury [*Code Civ. Proc. § 403*; *see Code Civ. Proc. § 2015.5*; *Cal. Rules of Ct., Rule 3.1306(a)*; for a form of declaration and discussion of what it must contain, *see § 125.151*].

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12-125 California Forms of Pleading and Practice--Annotated § 125.151

§ 125.151 Declaration Under Penalty of Perjury in Support of Motion to Transfer Case for Coordination--Non-Complex Action [Code Civ. Proc. § 403; Cal. Rules of Ct., Rule 3.500(b)]

[1] FORM Declaration Under Penalty of Perjury in Support of Motion to Transfer Case for Coordination--Non-Complex Action [Code Civ. Proc. § 403; Cal. Rules of Ct., Rule 3.500(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF _____ [*party, e.g.,* DEFENDANT'S] MOTION TO TRANSFER ACTION FOR COORDINATION UNDER CODE OF CIVIL PROCEDURE SECTION 403
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		[Trial Date: _____]

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of California and the attorney of record herein for _____ (*identify moving party, e.g.,* defendant) *or other statement as appropriate*] and hereby make this declaration in support of _____ [*identify*

moving party, e.g., defendant's] motion for _____ [*specify*].

[*Here and in subsequent paragraphs set forth applicable facts in narrative form as set out below.*]

2. The names of each petitioner and the name and address of his or her attorney of record are as follows:

Name and Address	Parties Represented
_____ [*list each attorney of record and his/her address e.g.,* John Jay, Attorney at Law 234 First Avenue Capital City, Cal. 99999]	_____ [*list each petitioner, e.g.,* George Washington]

3. The names of the parties to all included actions, the name and address of each party's attorney of record, the complete title of each included action, the number of the action, the title of the court in which the action is pending, and the status of each included action, including the status of any pretrial or discovery motions or orders in that action which are known to petitioner are as follows:

_____ [*specify, e.g.,*

George Washington, *et al.* vs. Abraham Lincoln, *et al.*
Canyon County Superior Court No. 1234

Plaintiff(s): George Washington, John Adams, and Jefferson & Co., Inc.

Attorney(s) for Plaintiffs:
John Jay, Attorney at Law
234 First Avenue
Capital City, Cal. 99999
Representing: George Washington
John Marshall, Attorney at Law
345 Third Avenue
Capital City, Cal. 99999
Representing: John Adams and Jefferson & Co., Inc.
Defendant(s): Abraham Lincoln, Andrew Johnson, and The Union Preservation Co.

Attorney(s) for Defendants:
Madison & Monroe
Attorneys at Law
567 Fourth Avenue
Capital City, Cal. 99999
Representing: Abraham Lincoln, Andrew Johnson and the Union Preservation Co.].

4. _____ [_____ (*Specify complete title of case*) is known by petitioner to be pending in a court of this state and shares a common question of fact or law with the included actions. The above-listed action is not included in the petition for coordination because _____ (*specify reasons*) *or* No other action is

known to be pending in a court of this state that shares a common question of fact or law with the included action].

5. The actions are not complex, as defined by the Judicial Council in *California Rules of Court, Rules 3.502* and *3.400* because _____ [*state facts showing that the actions are not complex within the meaning of Cal. Rules of Ct., Rule 3.400*].

6. The actions meet the coordination standards specified in *Section 404.1 of the Code of Civil Procedure* for the following reason(s):

[*SPECIFY any or all of the following criteria*]

a. The common question

_____ [fact *or* law *or* fact and law] is predominating and significant in each included action in that

_____ [*specify*].

b. Coordination of the included actions would serve the convenience of parties, witnesses, and counsel in that

_____ [*specify*].

c. None of the included actions has reached a stage at which coordination would require any substantial revision or duplication of proceedings or of counsel's work product.

d. The assignment of a single judge to preside over disposition of the included actions would make efficient use of judicial facilities and efforts in that

_____ [*specify*].

e. The civil trial calendar of the courts in which the included actions are pending necessitate delaying the trials in the respective actions between

_____ [*shortest delay*] and

_____ [*longest delay*] and the trial in each action is anticipated to last at least

_____ [*estimated minimum trial time*].

f. Unless the included actions are coordinated, it is likely that inconsistent or needlessly duplicative rulings, orders, or judgments will be produced in that

_____ [*specify*].

g. It is unlikely that any of the included actions will be settled if coordination is denied in that

_____ [*specify*].

h. A hearing on this petition may conveniently and appropriately be held at

_____ [*specify site(s)*] because

_____ [*specify*].

[*CONTINUE*]

7. _____ [*Describe good faith effort to obtain other parties' agreement to the transfer and coordination*].

8. _____ [*Describe how moving party informed all parties of their obligation to disclose to the court any information they may have concerning any other motions requesting transfer of any case that might be affected by the motion before the court*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

The form of declaration in [1], *above*, is for use to support a motion to transfer an action or actions from another court for coordination with the action in which the motion is made [*see Code Civ. Proc. § 403*; for a form of notice of motion, *see § 125.150*].

[3] Contents of Declaration

The declaration state facts showing the following matters:

- The actions are not complex cases [*see Code Civ. Proc. § 403*; *Cal. Rules of Ct., Rules 3.500(b), 3.501, 3.400 et seq.*].

- The actions meet the standards specified in *Code Civ. Proc. § 404.1* (Paragraph 6) [*see Code Civ. Proc. § 403*; *Cal. Rules of Ct., Rule 3.500(b)*].

- The moving party made a good faith effort to obtain agreement to the transfer and coordination from all parties involved (Paragraph 7) [*see Code Civ. Proc. § 403*; *Cal. Rules of Ct., Rule 3.500(b)*].

- The moving party has informed all parties of their obligation to disclose to the court any information they may have concerning any other motions requesting transfer of any case that might be affected by the motion before the court (Paragraph 8) [*see Cal. Rules of Ct., Rule 3.500(c)(3)*; *see also Cal. Rules of Ct., Rule 3.500(g)* (failure to disclose as unlawful interference with the processes of the court)].

To grant the motion, the court will need to make findings that the transfer will promote the ends of justice, taking into consideration standards specified in *Cal. Rules of Ct., Rule 3.500(d)*. For discussion of those factors, which counsel may wish to highlight in this declaration, see the Comments to *§ 125.152[3]*.

The declaration also identifies all parties and actions involved (Paragraphs 2, 3), as well as the existence of any other related action not subject to the motion, along with the reason why it is not being included (Paragraph 4).

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12-125 California Forms of Pleading and Practice--Annotated § 125.152

§ 125.152 Order Granting Motion to Transfer Case for Coordination--Non-Complex Action [Code Civ. Proc. § 403; Cal. Rules of Ct., Rule 3.500(d)]

[1] FORM Order Granting Motion to Transfer Case for Coordination--Non-Complex Action [Code Civ. Proc. § 403; Cal. Rules of Ct., Rule 3.500(d)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER GRANTING MOTION TO TRANSFER
vs.	)	ACTION FOR COORDINATION UNDER CODE
_____ [*name*],	)	OF CIVIL PROCEDURE SECTION 403
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

The motion of _____ [*identify party, e.g.,* defendant] _____ [*name*] for an order _____ [*specify*] came on regularly for hearing by the court on _____ [*date*]. Plaintiff _____ [*name*] appeared by counsel _____ [*name*]; _____ [*list other appearing parties*].

The Court, having considered the _____ [affidavit *or* declaration] and other documents in support of and in opposition to the motion, having heard the arguments of counsel, and being fully advised in the matter, finds that

the transfer to this court of _____ [*specify action or actions to be transferred by court, title, and case number*] will promote the ends of justice as follows:

[*Specify reasons why transfer will promote ends of justice, referring to the standards set out in Cal. Rules of Ct., Rule 3.500(d), for example:*]

1. The actions included are not complex matters.

2. The common question of _____ [law *or* fact *or* law and fact] predominate and are significant to the litigation in that _____ [*specify issue and its impact on the actions*].

3. _____ [*Address convenience of parties, witnesses, and counsel*].

4. _____ [*Address relative development of the actions and counsels' work product*].

5. _____ [*Address efficient utilization of judicial facilities and staff resources*].

6. _____ [*Address the calendars of the courts involved*].

7. _____ [*Address the disadvantages of duplicative and inconsistent rulings, orders, or judgments*].

8. _____ [*Address the likelihood of settlement of the actions without further litigation should coordination be denied*].

9. _____ [*Weigh factors, if appropriate.*]

[*CONTINUE*]

IT IS, THEREFORE, ORDERED that the motion be, and hereby is, granted and that _____ [*set out particular order sought*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use when the court grants a motion to transfer a case for coordination [*see Code Civ. Proc. § 403*; for the related form of notice of motion and supporting declaration, *see §§ 125.150* and *125.151*].

For discussion of law and motion practice, including general rules regarding orders, see Ch. 372, *Motions and Orders* .

[3] Contents of Order

This order is required to include specify the reasons supporting the finding that the transfer is will promote the ends of justice, taking into consideration the following factors [*Cal. Rules Ct., Rule 3.500(d)*]:

- The actions included are not complex.

- Whether the common question of law or fact is predominating and significant to the litigation.
- The convenience of parties, witnesses, and counsel.
- The relative development of the actions and counsels' work product.
- The efficient utilization of judicial facilities and staff resources.
- The calendars of the courts.
- The disadvantages of duplicative and inconsistent rulings, orders, or judgments.
- The likelihood of settlement of the actions without further litigation should coordination be denied.

The form also includes an optional findings paragraph for weighing these factors, which may be used if some factors militate against transferring an action.

[4] Additional Orders

The court may order consolidation of actions without further motion or hearing [*see Code Civ. Proc. § 403*; for discussion, *see § 125.36[5]*].

[5] Duties of Moving Party

If the motion for transfer is granted, the moving party has the duty to provide copies to all parties and courts involved, as well as the Judicial Council, and to take any actions necessary to complete consolidation [*see Cal. Rules of Ct., Rule 3.500(e), (f)*; for discussion, *see § 125.36[3]*].

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12-125 California Forms of Pleading and Practice--Annotated §§ 125.153-125.159

[Reserved]

§§ 125.153[Reserved]

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12-125 California Forms of Pleading and Practice--Annotated § 125.160

§ 125.160 Notice of Motion for Order to Commence Coordination Proceedings--Complex Action [Code Civ. Proc. § 404]

[1] FORM Notice of Motion for Order to Commence Coordination Proceedings--Complex Action [Code Civ. Proc. § 404]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION FOR ORDER TO COMMENCE COORDINATION PROCEEDINGS [AND TO STAY PROCEEDINGS HEREIN]
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*specify party, e.g.,* defendant] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [*specify party, e.g.,* defendant] will move for an order coordinating Action No. _____ with Action

No. _____. The motion will be made on the grounds that there are pending in different courts of this state civil actions containing common questions of _____ [law *or* fact *or* law and fact] and that an order should issue transmitting a request to the Chair of the Judicial Council for an assignment of a judge to determine whether coordination of these actions is appropriate [and that a stay of proceedings in this action to permit commencement of a coordination proceeding is necessary because _____ (*party designation and name of coparty who refuses to join in submitting petition for coordination*) refuses to join in submitting a petition for coordination and further proceedings in this action will _____ (*specify e.g.,* hinder the ends of justice considering the imminence of another proceeding that will materially affect the status of the action to be stayed and have a res judicata or collateral estoppel effect)].

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the supporting memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form of notice of motion in [1], *above*, is for use by any party to obtain a court order that a petition for coordination be transmitted to the Chair of the Judicial Council for assignment of a coordination motion judge to determine the appropriateness of an action for coordination [*Code Civ. Proc. § 404*].

For discussion of law and motion practice in general, see Ch. 372, *Motions and Orders* .

[3] Supporting Papers

The notice of motion must be accompanied by a copy of the coordination petition supported by declaration or a declaration alone showing that the actions to be coordinated meet the standards for coordination [*Code Civ. Proc. § 404.1*]. For a form of declaration in support of a petition for coordination that may be adapted to support this form of notice of motion, see *§ 125.163*. The motion must further be accompanied by a supporting memorandum and declarations [*Cal. Rules of Ct., Rules 3.520, 3.521(a)*].

[4] Stay Order

A notice of motion for an order staying proceedings to allow for commencement of a coordination action may be included [*see Code Civ. Proc. § 404.5*; *Cal. Rules of Ct., Rule 3.520*].

For a form of motion for a stay order, *see § 125.170*; for discussion, see *§ 125.107*.

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12-125 California Forms of Pleading and Practice--Annotated § 125.161

§ 125.161 Order Granting Motion to Commence Coordination Proceedings--Complex Action [Code Civ. Proc. § 404]

[1] FORM Order Granting Motion to Commence Coordination Proceedings--Complex Action [Code Civ. Proc. § 404]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER GRANTING MOTION TO COMMENCE
Plaintiff,	)	COORDINATION PROCEEDINGS [AND TO
vs.	)	STAY PROCEEDINGS HEREIN]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

The motion of _____ [*name of moving party*] for an order to transmit to the Chair of the Judicial Council a request for assignment of a judge to determine whether coordination of this action with certain others is appropriate [and an order to stay proceedings to permit commencement of coordination proceedings] came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

Upon proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted, and the moving party is ordered forthwith to comply with the requirements of *Rules 3.521*, *3.522*, and *3.523 of the California Rules of Court*. On filing a copy of the petition for coordination and of the notice required by *Rule 3.522 of the California Rules of Court*, and by proof of prior service of copies of the notice and petition for coordination as required by *Rule 3.523 of the California Rules of Court*, the moving party shall transmit an original petition for coordination, along with a copy thereof, accompanied by proof of filing and service, to the Chair of the Judicial Council.

[IT IS FURTHER ORDERED that the motion be, and it hereby is, granted and that further proceedings in this action be stayed for 30 days from and after the date of entry of this order to permit the commencement of a coordination proceeding.]
Dated: _____.

_____ [*signature*]
[Presiding] Judge of the Superior Court

I concur.
_____ [*signature*]
Presiding Judge

[2] Use of Form

The form of order in [1], *above*, is for use where a motion to commence coordination proceedings is granted [*see § 125.160*]. An order to stay proceedings while coordination proceedings are commenced may also be included.

For discussion of law and motion practice, including general rules regarding orders, see Ch. 372, *Motions and Orders* .

[3] Signature of Presiding Judge

Normal motion practice according to applicable local court rules should be followed. In a court having two or more judges, if the motion is not ruled on by the presiding judge, the order should be countersigned by the presiding judge [*see Code Civ. Proc. § 404*].

[4] Submission, Service, and Filing of Petition and Supporting Papers

For discussion of submission, service, and filing of the petition for coordination and supporting papers, see *§ 125.102* and *Cal. Rules of Ct., Rules 3.522, 3.523*.

[5] Order Granting Stay

To provide sufficient time for a party to submit a petition for coordination, the presiding judge may stay all related actions pending in that court for a reasonable time not to exceed 30 calendar days [*Cal. Rules of Ct., Rule 3.520(b)(3)*].

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12-125 California Forms of Pleading and Practice--Annotated § 125.162

§ 125.162 Petition for Coordination of Complex Actions [Cal. Rules of Ct., Rule 3.521(a)]

[1] FORM Petition for Coordination of Complex Actions [Cal. Rules of Ct., Rule 3.521(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR COORDINATION
Defendant.	)	
	)	
	)	

Petitioner hereby submits a request to the Chair of the Judicial Council for assignment of a judge to determine whether the above-entitled action and the included actions referred to herein are complex actions, and if so, whether coordination of the actions is appropriate.

The request is made on the grounds set forth in *Section 404.1 of the Code of Civil Procedure*, namely, that one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and manpower; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and the likelihood of settlement of the actions without further litigation should coordination be denied.

Declarations, a memorandum, and accompanying supporting papers set forth with more particularity the

appropriateness of the actions for coordination.

Proof of filing in each included action of a notice of submission of petition for coordination and of a copy of this petition as required by *Rule 3.522 of the California Rules of Court* and proof of service on each party appearing in each included action of the notice of submission of petition for coordination and a copy of this petition as required by *Rule 3.523 California Rules of Court* is affixed to the original of this petition as Exhibit A.

WHEREFORE, petitioner prays that the actions herein referred to be coordinated pursuant to *Sections 404-404.9 of the Code of Civil Procedure* and *Rules 3.501-3.550 of the California Rules of Court*. Petitioner _____ [requests *or* does not request] that a hearing be held [at _____ (*specify site(s)*)] to determine whether coordination is appropriate.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[2] Use of Form

The form of petition in [1], *above*, is for use by a party seeking coordination of complex actions [*see Code Civ. Proc. §§ 404, 404.1*].

[3] Caption

The petition should bear a caption appropriate for the action in which the petitioner is a party. If there are several such actions, any of several appropriate captions may be used.

[4] Contents of Petition

The contents of the petition are specified in *§ 125.101[2]*.

[5] Supporting Papers

The petition must be accompanied by a supporting memorandum and declarations [*Code Civ. Proc. § 404*; *Cal. Rules of Ct., Rule 3.521(a)*; *see § 125.163*].

[6] Submission of Petition

The petition should be submitted to the Chair of the Judicial Council, Administrative Office of the Courts, c/o Coordination Attorney, 455 Golden Gate Avenue, San Francisco, California 94102-3660 [*see Cal. Rules of Ct., Rules 3.511, 3.521*].

[7] Proof of Service and Filing

For a discussion of the filing and service requirements and proof thereof which must accompany any petition, see *§ 125.102*.

[8] Stay Orders

A request for an order staying proceedings may be submitted with a petition for coordination. For discussion of stay

orders, see *§ 125.107*, and *§§ 125.161[5]* and *125.170[2]*.

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12-125 California Forms of Pleading and Practice--Annotated § 125.163

§ 125.163 Declaration Under Penalty of Perjury in Support of Petition for Coordination--Complex Action

[1] FORM Declaration Under Penalty of Perjury in Support of Petition for Coordination--Complex Action

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	DECLARATION OF _____ [*date*]
Plaintiff,	)	IN SUPPORT OF MOTION FOR COORDINA-
vs.	)	TION OF ACTIONS
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

I, _____ [*name*], declare:

I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*party*) *or other statement as appropriate*].

[*Here and in subsequent paragraphs set forth applicable facts in narrative form as set out below.*]

1. The names of each petitioner and the name and address of his or her attorney of record are as follows:

Name and Address	Parties Represented
_____ [*list each attorney of record and his/her address e.g.,* John Jay, Attorney at Law 234 First Avenue Capital City, Cal. 99999]	_____ [*list each petitioner, e.g.,* George Washington]

2. The names of the parties to all included actions, the name and address of each party's attorney of record, the complete title of each included action, the number of the action, the title of the court in which the action is pending, and the status of each included action, including the status of any pretrial or discovery motions or orders in that action which are known to petitioner are as follows:

_____ _____ [*specify, e.g.,*

George Washington, *et al.* vs. Abraham Lincoln, *et al.*
Canyon County Superior Court No. 1234
Plaintiff(s): George Washington, John Adams, and Jefferson & Co., Inc.

Attorney(s) for Plaintiffs:

John Jay, Attorney at Law
234 First Avenue
Capital City, Cal. 99999
Representing: George Washington

John Marshall, Attorney at Law
345 Third Avenue
Capital City, Cal. 99999
Representing: John Adams and Jefferson & Co., Inc.
Defendant(s): Abraham Lincoln, Andrew Johnson, and The Union Preservation Co.

Attorney(s) for Defendants:
Madison & Monroe
Attorneys at Law
567 Fourth Avenue
Capital City, Cal. 99999
Representing: Abraham Lincoln, Andrew Johnson and the Union Preservation Co.].

3. _____ [_____ (*Specify complete title of case*) is known by petitioner to be pending in a court of this state and shares a common question of fact or law with the included actions. The above-listed action is not included in the petition for coordination because _____ (*specify reasons*) *or* No other action is known to be pending in a court of this state that shares a common question of fact or law with the included action].

4. The actions are complex, as defined by the Judicial Council in *California Rules of Court, Rules 3.502* and *3.400* because _____ [*state facts showing that the actions are complex within the meaning of Cal. Rules of Ct., Rule 3.400*].

5. The actions meet the coordination standards specified in *Section 404.1 of the Code of Civil Procedure* [*specify any or*

all of the following criteria:

a. The common question is predominating and significant in each included action in that _____ (*specify*).

b. Coordination of the included actions would serve the convenience of parties, witnesses, and counsel in that _____ (*specify*).

c. None of the included actions has reached a stage at which coordination would require any substantial revision or duplication of proceedings or of counsel's work product.

d. The assignment of a single judge to preside over disposition of the included actions would make efficient use of judicial facilities and efforts in that _____ (*specify*).

e. The civil trial calendar of the courts in which the included actions are pending necessitate delaying the trials in the respective actions between _____ (*shortest delay*) and _____ (*longest delay*) and the trial in each action is anticipated to last at least (*estimated minimum trial time*).

f. Unless the included actions are coordinated, it is likely that inconsistent or needlessly duplicative rulings, orders, or judgments will be produced in that _____ (*specify*).

g. It is unlikely that any of the included actions will be settled if coordination is denied in that _____ (*specify*).

h. A hearing on this petition may conveniently and appropriately be held at _____ (*specify site(s)*) because _____ (*specify*)].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form of declaration under penalty of perjury in [1], *above*, is for use to accompany a coordination petition, in lieu of an accompanying affidavit [*Code Civ. Proc. § 2015.5*; for a form of petition, *see § 125.162*]. The declaration must set forth facts establishing that the actions are complex and the appropriateness of the action for coordination pursuant to the criteria enumerated in *Code Civ. Proc. § 404.1* and *Cal. Rules of Ct., Rule 3.521* [*see Code Civ. Proc. § 404*]. In determining whether a case is complex within the meaning of *Code Civ. Proc. § 404*, the court must consider *Cal. Rules of Ct., Rule 3.400 et seq.* [*Cal. Rules of Ct., Rule 3.502*; for discussion, *see § 125.35*].

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12-125 California Forms of Pleading and Practice--Annotated § 125.164

§ 125.164 Notice of Submission of Petition for Coordination of Actions--Complex Action [Cal. Rules of Ct., Rule 3.522]

[1] FORM Notice of Submission of Petition for Coordination of Actions--Complex Action [Cal. Rules of Ct., Rule 3.522]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF SUBMISSION OF PETITION FOR
Defendant.	)	COORDINATION
	)	
	)	

To the clerk of the above-named court, to each party appearing in the above-named action, and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], a petition for coordination of certain actions, including this action, was submitted to the Chair of the Judicial Council pursuant to *Sections 404-404.9 of the Code of Civil Procedure* and *Rules 3.501-3.550 of the California Rules of Court*.

Any party to this action who intends to oppose the petition must serve and submit written opposition thereto at least 9 calendar days before the hearing date.

The following actions are included in the petition:

_____ [*List included actions by title, case number, and title of the court in which each action is pending*].

_____ [A copy of the petition for coordination is affixed to the original of this notice to be filed herewith in the above-named court *or* Copies of the petition and supporting documents are on file in this action and will be furnished to any party who, within five days after being served with a copy of this notice, sends a written request to counsel for petitioner].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[2] Use of Form

The form of notice in [1], *above*, is for use by the party seeking coordination. It is filed with the petition [*see § 125.162*] in each included action and served on all parties.

[3] Contents of Notice

[a] Caption

A notice of the petition for coordination must be filed in each included action. Thus, counsel will prepare two or more versions of the notice, each identical in text but bearing a caption appropriate for the action in which it will be filed [*see § 125.102[1]*].

[b] Date of Submission

The notice must give the date when the petition for coordination was submitted to the Chair of the Judicial Council [*Cal. Rules of Ct., Rule 3.522*].

[c] Petitioner's Counsel

The notice must give the name and address of the petitioner's attorney of record [*Cal. Rules of Ct., Rule 3.522(a)(2)*].

[d] Right to Oppose Petition

The notice is required to contain a statement of the other parties' rights to oppose the petition by serving and filing written opposition at least nine calendar days before the date set for hearing [*Cal. Rules of Ct., Rule 3.522(a)(4)*; *see § 125.102[1]*].

[e] Included Actions

The notice must state "the title and case number of each included action to which the petitioner is a party" and the "title of the court in which each action is pending" [*Cal. Rules of Ct., Rule 3.522(a)(3)*]. Since the directive is somewhat ambiguous, the safest course is simply to list all included actions by case name, number, and court.

[4] Transmission of Notice of Submission

The notice should be submitted to the Chair of the Judicial Council, Administrative Office of the Courts, c/o

Coordination Attorney, 455 Golden Gate Avenue, San Francisco, Cal. 94102-3660, within five court days of submitting the petition for coordination.

[5] Proof of Service and Filing

For a discussion of the filing and service requirements and proof thereof which must accompany any notice of submission of petition, see *§ 125.102*.

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12-125 California Forms of Pleading and Practice--Annotated § 125.165

§ 125.165 Caption for Papers in Coordination Proceedings--Complex Action [Cal. Rules of Ct., Rule 3.550(b)]

[1] FORM Caption for Papers in Coordination Proceedings--Complex Action [Cal. Rules of Ct., Rule 3.550(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY of _____

	)	
	)	JUDICIAL COUNCIL COORDINATION PRO-
Coordination Proceeding Special Title (Rule	)	CEEDING
3.550(b)) _____ [Included *or* Co-	)	NO. _____
ordinated] Actions:	)	_____ [*court and number*]
_____	)	_____ [*court and number]*
[*case title; give abbreviated title*]	)	_____ [*etc.*]
_____ [*case title*]	)	_____ [*title of paper*]
_____ [*etc.*]		
_____		

[2] Use of Form

The form of caption in [1], *above*, should be used on papers submitted in coordination proceedings after assignment of a coordination motion judge or a coordination trial judge. A special case title and coordination proceeding number will be assigned by the Coordination Attorney in the Administrative Office of the Courts [*Cal. Rules of Ct., Rule 3.550(b)*]. This title and the file number will appear on the order of the Chair of the Judicial Council assigning a coordination motion judge, except that the court name in the foregoing form of caption is supplanted by "CHAIR, JUDICIAL COUNCIL OF CALIFORNIA, 455 Golden Gate Avenue, San Francisco, Cal. 94102" in all orders issued by the Chair of the Judicial Council.

[3] Elements

[a] Court Title

The court title is the title of the assigned judge's court, which is designated in the order of assignment [*see Cal. Rules of Ct., Rule 3.524(a)(2)*].

[b] Special Title

The phrase "Coordination Proceeding Special Title (Rule 3.550(b))" is not required by the rules but is customarily included in the special title. That title will be a descriptive phrase; for example, if automobile collision cases are the subject of the petition, the title might be "MARKET STREET COLLISION CASES."

[c] Included Actions

Until the petition is granted, the included actions are listed under the heading "Included actions." If the petition is granted, the included actions will be listed under the heading "Coordinated actions," but it would not be improper to use the heading "Included actions" on all papers.

Case titles are given on the left, court names and file numbers are given opposite the case titles, on the right. When many actions are coordinated this will mean that the first page of each paper will contain nothing but the caption, which might, indeed, continue to the second page, so that the case titles and court names and file numbers can all be listed.

Case titles listed in the caption are abbreviated to the style of running heads in the official reports (such as Washington, et al. vs. Lincoln, et al., instead of a full case title).

[d] Title of Paper

The format outlined above makes it more convenient to put the title of the paper below the caption, centered, instead of to the right of the case title as in the practice in ordinary circumstances.

[e] Motion Papers

If the paper is subject to the civil law and motion rules, which apply to most motions [*see Cal. Rules of Ct., Rules 3.110, 3.1103*], the first page of each paper must specify immediately below the case number the date, time, and location, if ascertainable, of the hearing, and the name of the hearing judge, if ascertainable, the nature or title of any attached document (other than an exhibit), the date of filing of the action, and the trial date, if set [*Cal. Rules of Ct., Rule 3.1110(b)*].

The caption of a declaration or affidavit must state the declarant's or affiant's name and specify the motion or other proceeding it supports or opposes [*Cal. Rules of Ct., Rule 3.1115*].

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12-125 California Forms of Pleading and Practice--Annotated § 125.166

§ 125.166 Response in Support of Petition for Coordination--Complex Action [Cal. Rules of Ct., Rule 3.526]

[1] FORM Statement in Support of Petition for Coordination--Complex Action [Cal. Rules of Ct., Rule 3.526]

[*Caption. See § 125.165*]

RESPONSE IN SUPPORT OF PETITION FOR COORDINATION

Support is hereby made to the petition for coordination by _____ [*name of party*], a party to the included action _____ [*name of case*] _____ [on the grounds stated in the petition for coordination *or* on the additional grounds and facts evidenced by the affidavits, declarations, and other papers affixed hereto, and as argued in the memorandum affixed hereto].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's name*]

[2] Use of Form

A memorandum and declarations in support of a petition for coordination must be served and filed at least nine court days before the date set for hearing [*Cal. Rules of Ct., Rule 3.526*; for discussion, see *§ 125.104[1]*].

[3] Transmission to Coordination Motion Judge

This statement in support of a petition for coordination must be transmitted to the coordination motion judge assigned under *Code Civ. Proc. § 404* at the court address designated in the order assigning such judge [*Cal. Rules of Ct., Rule*

3.524(a)(2)].

[4] Service

[a] Parties to Be Served

Each party to an included action must be served as provided in civil actions generally [*Code Civ. Proc. §§ 1011-1013*].

[b] Proof of Service

This statement must be transmitted to the coordination motion judge accompanied by proof of service on each party to an included action [*Cal. Rules of Ct., Rules 3.501(17), 3.510*; *Code Civ. Proc. § 1013a* (proof of service by mail)].

[c] Submission and Service of Supporting Papers

Unless otherwise provided in *Cal. Rules of Ct., Rules 3.501-3.550* or directed by the assigned judge, all memorandums and declarations in support of or opposition to any petition, motion, or application must be served and submitted at least nine court days before any hearing on the matter at issue [*Cal. Rules of Ct., Rule 3.513*; for discussion, *see § 125.104[2]*].

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12-125 California Forms of Pleading and Practice--Annotated § 125.167

§ 125.167 Response in Opposition to Petition for Coordination--Complex Action [Cal. Rules of Ct., Rule 3.525]

[1] FORM Response in Opposition to Petition for Coordination--Complex Action [Cal. Rules of Ct., Rule 3.525]

[*Caption. See § 125.165*]

RESPONSE IN OPPOSITION TO PETITION FOR COORDINATION

Opposition is hereby made to the petition for coordination by _____ [*name of party*], a party to the included action _____ [*name of case*] on the ground(s) that: _____ [*specify some or all of the standards set forth in Code Civ. Proc. § 404.1 as follows:*]

Trial in _____ (*name of case(s)*) is imminent.

The actions are not pending in different courts.

One judge hearing all of the actions for all purposes in a selected site will not promote the ends of justice because:

1. The common question of fact or law is not predominating in that _____ (*specify*);

2. The convenience of parties, witnesses, and counsel will not be served;

3. The relative development of the actions and the work product of counsel makes coordination inappropriate;

4. Efficient utilization of judicial facilities and manpower will not be realized and the calendar of the courts will not be benefitted;

5. There is no disadvantage of duplicative and inconsistent rulings;

6. Settlement of the actions without further litigation is less likely if coordination is granted].

Grounds for the opposition to petition for coordination are based on the facts as evidenced by the affidavits, declarations, and other papers attached hereto, and as argued in the memorandum affixed hereto.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for [*party's name*]

[2] Use of Form

A memorandum and declarations in opposition to a petition for coordination must be served and filed at least nine court days before the date set for hearing [*Cal. Rules of Ct., Rule 3.525*; for discussion, *see § 125.104[1]*].

[3] Transmission to Coordination Motion Judge

Transmission to the coordination motion judge is made as discussed in *§ 125.166[3]*.

[4] Transmission to Chair of the Judicial Council

A copy of every notice of opposition must be transmitted to the Chair of the Judicial Council, 455 Golden Gate Avenue, San Francisco, Cal. 94102 [*Cal. Rules of Ct., Rule 3.511(a)*; for discussion, *see § 125.104[1]*].

[5] Service

The requirements for service, proof of service, and service and submission of supporting papers are identical to those discussed in *§ 125.166[4]*.

[6] Supporting Papers

The response in opposition should be accompanied by a memorandum and declarations in opposition to the petition [*Cal. Rules of Ct., Rule 3.525*; *see* Procedural Checklist, Paragraph IV(A)(2), *above*]. Opposition should be based on the criteria set forth in *Code Civ. Proc. § 404.1* [for discussion, *see § 125.37[4]*].

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12-125 California Forms of Pleading and Practice--Annotated § 125.168

§ 125.168 Notice of Motion for Order Staying Proceedings to Allow Party to Seek Coordination of Actions--Complex Action [Code Civ. Proc. § 404]

[1] FORM Notice of Motion for Order Staying Proceedings to Allow Party to Seek Coordination of Actions--Complex Action [Code Civ. Proc. § 404]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION FOR ORDER STAYING
Plaintiff,	)	PROCEEDINGS
vs.	)	(Coordination of Actions)
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*specify party, e.g.,* defendant] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ Department *or* Division) _____ of] this court, located at _____ *address*], _____ [*city*], _____ [*specify party, e.g.,* defendant] will move the court for an order staying further proceedings in this action for 30 days to permit

commencement of a coordination proceeding. The motion will be made on the grounds that there are now pending, in different courts of this state, certain civil actions, including this action, sharing [a] common question(s), which are eligible for coordination, and that a stay of proceedings in this action to permit commencement of a coordination proceeding is necessary because _____ [*party designation and name of coparty who refuses to join in submitting petition for coordination*] refuses to join in submitting a petition for coordination and further proceedings in this action will _____ [*specify, e.g.,* hinder the ends of justice considering the imminence of another proceeding that will materially affect the status of the action to be stayed and have a res judicata or collateral estoppel effect].

The motion will be based on this notice of motion, on the declaration of _____[*name*] and the supporting memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form of notice of motion in [1], *above*, is for use by a party who will seek coordination of actions, either directly or by motion, to obtain a stay of proceedings so that a coordination proceeding can be commenced. A stay of proceedings is especially recommended if any of the moving party's coparties refuses to join in submitting a petition for coordination and the coordination proceeding is commenced by motion [*see §§ 125.101, 125.107[2]*]. For a discussion of stay orders in general, see *§ 125.107*.

For discussion of law and motion practice in general, see Ch. 372, *Motions and Orders* .

[3] Supporting Papers

The notice of motion must be accompanied by a supporting memorandum and affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) establishing that a stay order is necessary and appropriate to effectuate the purposes of coordination [*Code Civ. Proc. § 404*].

A memorandum is required to be served and filed with the motion [*see Cal. Rules of Ct., Rule 3.1113(a)*; for discussion and general forms, *see* Ch. 417, *Points and Authorities*]. A supporting affidavit (or declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) should accompany the notice of motion [*see Code Civ. Proc. § 404*].

[4] Notice

This motion should be made in the manner provided by law for civil actions in general [*Code Civ. Proc. § 1010*; *Cal. Rules of Ct., Rule 3.520*].

[5] Criteria for Stay Order

The criteria for issuance of a stay order to allow for commencement of coordination proceedings are the same as those for stay orders during other phases of coordination [*Cal. Rules of Ct., Rule 3.515(f)*].

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12-125 California Forms of Pleading and Practice--Annotated § 125.169

§ 125.169 Order Staying Proceedings to Allow Party to Seek Coordination of Actions--Complex Action [Code Civ. Proc. § 404]

[1] FORM Order Staying Proceedings to Allow Party to Seek Coordination of Actions--Complex Action [Code Civ. Proc. § 404]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	(Stay of Proceedings)
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*name of moving party*] for an order staying proceedings in this action for 30 days to permit commencement of a coordination proceeding came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

Upon proof made to the satisfaction of the court,

The court finds that there are civil actions pending in different courts of this state, of which this action is one, sharing a common question; that the standards for coordination specified in *Section 404.1 of the Code of Civil Procedure* appear to be met; that coordination of actions may be sought pursuant to *Sections 404-404.9 of the Code of Civil Procedure* and *Rules 3.501-3.550 of the California Rules of Court*; that proceedings in this action should be stayed to permit commencement of a coordination proceeding; good cause appearing and therefor,

IT IS ORDERED that the motion by, and it hereby is, granted and that further proceedings in this action be stayed for 30 days from and after the date of entry of this order to permit the commencement of a coordination proceeding.
Dated: _____.

_____ [*signature*]
[Presiding] Judge of the Superior Court

[*If not signed by presiding judge or sole judge, add:*]

I concur.
_____ [*signature*]
..... Presiding Judge

[2] Use of Form

The form of order in [1], *above*, is for use where a motion for stay of proceedings to permit commencement of a coordination proceeding [*see § 125.168*] is granted.

For discussion of law and motion practice, including general rules regarding orders, see Ch. 372, *Motions and Orders* .

[3] Signature of Presiding Judge

Normal motion practice according to applicable local court rules should be followed. In a court having two or more judges, if the motion is not ruled on by the presiding judge, the order should be countersigned by the presiding judge [*see Code Civ. Proc. § 404*].

[4] Length of Stay

To provide sufficient time for a party to submit a petition for coordination, the presiding judge may, stay all related actions pending in that court for a reasonable time not to exceed 30 calendar days [*Cal. Rules of Ct., Rule 3.520(b)(3)*].

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Volume 12: Claim and Delivery thru Consolidation, Severance, and Coordination of Actions-Chs. 119-125
Chapter 125 CONSOLIDATION, SEVERANCE, AND COORDINATION OF ACTIONS
PART V. FORMS
C. Coordination

12-125 California Forms of Pleading and Practice--Annotated § 125.170

§ 125.170 Notice of Motion for Order Staying Proceedings in Actions to Be Coordinated [and Related Actions]--Complex Action [Code Civ. Proc. § 404.5; Cal. Rules of Ct., Rule 3.515]

[1] FORM Notice of Motion for Order Staying Proceedings in Actions to Be Coordinated [and Related Actions]--Complex Action [Code Civ. Proc. § 404.5; Cal. Rules of Ct., Rule 3.515]

[*Caption. See § 125.165*]

NOTICE OF MOTION FOR ORDER STAYING PROCEEDINGS

To _____ [*specify party, e.g.,* defendant] _____ [*name*] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [*specify party, e.g.,* defendant] will move for an order staying further proceedings in the above-entitled actions [except _____ (*identify included actions as to which no stay order is sought*)] [and in the following related actions: _____ (*list by court name, file number, and case title*)]. The motion will be made on the grounds that staying further proceedings in these actions is necessary and appropriate to effectuate the purposes of coordination, in that _____ [*specify*].

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for [*party's name*]

[2] Use of Form

The form of notice of motion in [1], *above*, may be used at any time prior to the granting or denial of a petition by any party to a coordination proceeding who wishes to have proceedings in an included action, or another action which affects an included action, stayed pending determination of the petition. Any such action may be stayed by the coordination motion judge, on proper application, if a stay order is necessary and appropriate to effectuate the purposes of coordination [*Code Civ. Proc. § 404.5*; *Cal. Rules of Ct., Rule 3.515(a)*].

In ruling on the motion, the judge must determine whether a stay will promote the ends of justice, considering the imminence of any trial or other proceeding that might materially affect the status of the action to be stayed, and whether a judgment in that action would have a res judicata or collateral estoppel effect with regard to any common issue in the included actions [*Cal. Rules of Ct., Rule 3.515(f)*].

For a discussion of stay orders in general, see *§ 125.107*.

[3] Contents of Notice of Motion

A motion for a stay order must (1) list all known pending related cases; (2) state whether the stay order should extend to any such related case; and (3) be supported by a memorandum and by declarations establishing the facts relied on to show that a stay order is necessary and appropriate to effectuate the purposes of coordination [*Cal. Rules of Ct., Rule 3.515(b)*].

[4] Supporting Papers

The notice of motion must be accompanied by a supporting memorandum and affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) establishing that a stay order is necessary and appropriate to effectuate the purposes of coordination [*Code Civ. Proc. § 404*].

A memorandum is required to be served and filed with the motion [*see Cal. Rules of Ct., Rule 3.1113(a)*; for discussion and general forms, *see* Ch. 417, *Points and Authorities*]. A supporting affidavit (or declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) should accompany the notice of motion [*see Code Civ. Proc. § 404*].

[5] Notice

This motion should be made in the manner provided by law for civil actions generally [*Code Civ. Proc. § 1010*]. If the action to be stayed is not included in the petition for coordination or any response to that petition, the motion for a stay order and all supporting documents must be served on each party to the action to be stayed and any such party may serve and submit opposition to the motion for a stay order [*Cal. Rules of Ct., Rule 3.515(c)*].

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12-125 California Forms of Pleading and Practice--Annotated § 125.171

§ 125.171 Order Staying Proceedings to Allow Court to Determine Appropriateness of Actions for Coordination--Complex Action [Code Civ. Proc. § 404]

[1] FORM Order Staying Proceedings to Allow Court to Determine Appropriateness of Actions for Coordination--Complex Action [Code Civ. Proc. § 404]

[*Caption. See § 125.165*]

The motion of _____ [*name of moving party*] for an order staying proceedings in this action to allow the court to determine the appropriateness of coordination of _____ [*name of case*] and _____ [*name of case*] came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

Upon proof made to the satisfaction of the court,

The court finds that there are civil actions pending in different courts of this state, of which this action is one, sharing a common question; that the standards for coordination specified in *Section 404.1 of the Code of Civil Procedure* appear to be met; that coordination of actions pursuant to *Sections 404-404.9 of the Code of Civil Procedure* and *Rules 3.501-3.550 of the California Rules of Court* may be appropriate; and that proceedings in this action should be stayed pending a determination by the coordination motion judge of the appropriateness of the above actions for coordination.

IT IS ORDERED that the motion be, and it hereby is, granted and that further proceedings in these actions be stayed to permit a determination of the appropriateness of these actions for coordination.
Dated: _____.

_____ [*signature*]
Coordination Motion Judge

[2] Use of Form

The form of order in [1], *above*, is for use where a motion for a stay of proceedings to allow the court to determine the appropriateness of actions for coordination [*see § 125.170*] is granted.

For discussion of law and motion practice, including general rules regarding orders, see Ch. 372, *Motions and Orders* .

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Chapter 126 CONSPIRACY

13-126 California Forms of Pleading and Practice--Annotated 126.syn

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[z] Running of Statute of Limitations

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[17] Pleading Cause of Action

[18] Proof of Conspiracy

[19] Racketeer Influenced and Corrupt Organizations Act

[20] Statute of Limitations

[21] Summary Judgment

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§ 126.50 Complaint [Code Civ. Proc. § 425.10] for Compensatory [Civ. Code § 3333] and Punitive or Exemplary [Civ. Code § 3294] Damages for Injury Based on Conspiracy--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Cross References

[6] California Points and Authorities

[7] Text References

§ 126.51 Complaint [Code Civ. Proc. § 425.10] for Compensatory [Civ. Code §§ 3300, 3333] and Punitive or Exemplary [Civ. Code § 3294] Damages for Injury Based on Conspiracy--Breach of Contract

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

[5] Text References

§ 126.52 Complaint Code [Civ. Proc. § 425.10] for Compensatory [Civ. Code § 3333] and Punitive or Exemplary [Civ. Code § 3294] Damages for Injury Based on Conspiracy--Interference With Right to Practice Profession

[1] FORM

[2] Source of Form

[3] Use of Form

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[5] Cross References

§ 126.53 Complaint Code [Civ. Proc. § 425.10] for Compensatory [Civ. Code § 3336] and Punitive or Exemplary [Civ. Code § 3294] Damages for Injury Based on Conspiracy--Conversion of Plaintiff Employer's Property by Employee Salesperson and Third Party

[1] FORM

[2] Use of Form

[3] Allegations

[4] Text References

[5] Cross References

§ 126.54 Allegation of Conspiracy--To Sell Land by False Representations

[1] FORM

[2] Use of Form

[3] Cross References

[4] Text References

§ 126.55 Allegation of Conspiracy--Partner Deprived of Participation in Partnership Business and Possession of Partnership Property Through Conspiracy Between Copartner and Third Party

[1] FORM

[2] Use of Form

[3] Cross Reference

§ 126.56 Allegation of Conspiracy--To Harass Tenant

[1] FORM

[2] Use of Form

[3] Cross References

§ 126.57 Allegation of Conspiracy--Fraudulent Land Development Scheme

[1] FORM

[2] Use of Form

[3] Cross References

§ 126.58 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Actor in Alleged Conspiracy Exonerated From Liability

[1] FORM

[2] Use of Form

[3] Cross References

§ 126.59 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Legally Incapable of Committing Tort Underlying Conspiracy

[1] FORM

[2] Use of Form

[3] Cross References

§ 126.60 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant as Agent or Employee of Defendant Corporation and as Sued in That Official Capacity

[1] FORM

[2] Use of Form

[3] Cross References

§ 126.61 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant as Agent or Employee and Complaint Based on Alleged Conspiracy to Violate Duty Binding Solely on Principal

[1] FORM

[2] Use of Form

[3] Cross Reference

§ 126.62 Proceedings for Order Allowing Plaintiff to File Pleading Based on Attorney-Client Conspiracy--Petition [Civ. Code § 1714.10(a)] and Supporting Declaration [Code Civ. Proc. § 2015.5]

[1] FORM

[2] Use of Form

[3] Accompanying Documents

[4] Service of Petition and Opposition

[5] Statute of Limitations

§ 126.63 Demurrer to Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--Action Against Attorney Based on Attorney-Client Conspiracy--Failure to Obtain Order Allowing Plaintiff to File Pleading [Civ. Code § 1714.10(b)]

[1] FORM

[2] Use of Form

[3] Cross References

[4] California Points and Authorities

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Chapter 126 CONSPIRACY
PART I. SCOPE

13-126 California Forms of Pleading and Practice--Annotated § 126.01

§ 126.01 Scope of Chapter

This chapter discusses and contains forms relating to actions for damages arising from civil wrongs perpetrated or committed pursuant to civil conspiracies. It includes both forms of complaints [*see §§ 126.50 -126.53*] and allegations [*see §§ 126.54 -126.57*] for use in actions against coconspirators as well as forms of affirmative defense for use by individual coconspirators [*see §§ 126.58 -126.61*]. It also includes a form of petition and supporting declaration for an order allowing a conspiracy action to be filed against an attorney and client [*see § 126.62*], and a form of demurrer based on a plaintiff's failure to obtain that order [*see § 126.63*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral Overview

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§ 126.02 Cross References

[1] Related Actions and Chapters

For discussions and forms related to civil actions in which a conspiracy count could be alleged, see the following chapters:.

Ch. 4, *Abortion and Birth Control Methods*

Ch. 11, *Adjoining Landowners*

Ch. 14, *Advertising*

Ch. 16, *Airplanes and Airports*

Ch. 18, *Alcoholic Beverage Licenses*

Ch. 23, *Animals: Civil Liability*

Ch. 56, *Architects*

Ch. 57, *Art*

Ch. 58, *Assault and Battery*

Ch. 61, *Associations and Clubs*

Ch. 62, *Attachment*

Ch. 72, *Attorney Practice and Ethics*

Ch. 76, *Attorney Professional Liability*

Ch. 77, *Auctions and Auctioneers*

Ch. 93, *Bailments*

Ch. 103, *Brokers*

Ch. 104, *Building Contracts*

Ch. 106, *Buses and Streetcars*

Ch. 112, *Civil Rights: Post -Civil War Civil Rights Statutes*

Ch. 119, *Claim and Delivery*

Ch. 120, *Class Actions*

Ch. 122, *Community Property*

Ch. 140, *Contracts*

Ch. 150, *Conversion*

Ch. 160, *Corporations*

Ch. 181, *Death and Survival Actions*

Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*

Ch. 248, *Employer's Liability for Employee's Torts*

Ch. 257, *False Imprisonment*

Ch. 269, *Fraud and Deceit*

Ch. 270, *Fraudulent Conveyances*

Ch. 334, *Landlord and Tenant: Claims for Damages*

Ch. 340, *Libel and Slander*

Ch. 349, *Literary Property and Copyright*

Ch. 357, *Malicious Prosecution and Abuse of Process*

Ch. 362, *Mental Suffering and Emotional Distress*

Ch. 380, *Negligence*

Ch. 391, *Nuisance*

Ch. 400, *Partnerships: Governing Statutes*, through Ch. 406, *Partnerships: Dissolution*

Ch. 415, *Physicians: Medical Malpractice*

Ch. 427, *Principal and Agent*

Ch. 429, *Privacy*

Ch. 490, *Rescission and Restitution*

Ch. 515, *Securities and Franchise Regulation*

Ch. 547, *Theaters, Shows and Amusement Places*

Ch. 549, *Trademarks and Trade Names*

Ch. 550, *Trespass*

Ch. 565, *Unfair Competition*

Ch. 569, *Vendor and Purchaser*

[2] Situations Specifically Involving Conspiracy

For a form of complaint for damages for malicious prosecution of an administrative proceeding, alleging conspiracy by several defendants to charge plaintiff with immorality and unprofessional conduct during thecourse of employment, see Ch. 357, *Malicious Prosecution and Abuse of Process* .

For a form of complaint by a principal against an agent and a third party for conspiracy to breach the agent's contract with the principal and to interfere with the beneficial contractual relationship between them, see Ch. 427, *Principal and Agent* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionGeneral OverviewTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligenceGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral OverviewTortsVicarious LiabilityPartnersGeneral OverviewTortsWrongful Death & Survival ActionsSurvival Actions

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[Reserved]

§§ 126.03[Reserved]

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PART II. LEGAL BACKGROUND

13-126 California Forms of Pleading and Practice--Annotated § 126.10

§ 126.10 Definition and Nature of Civil Conspiracy

[1] In General

A civil conspiracy is a combination of two or more persons to accomplish by concerted action a criminal or unlawful purpose or a lawful purpose by criminal or unlawful means [*Parkinson Co. v. Building Trades Council (1908) 154 Cal. 581, 593, 98 P. 1027* ; *Peskin v. Squires (1957) 156 Cal. App. 2d 240, 246, 319 P.2d 405]* . Civil conspiracy in and of itself is not a tort. Thus, the labeling of an action as one for conspiracy to commit some tort is misleading since the cause of action for damages for conspiracy arises out of the commission of some wrongful act by one or more of the conspirators with damage resulting from it [*Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815, 498 P.2d 1063] , superseded by statute on other grounds as stated in Hendy v. Losse (1991) 54 Cal. 3d 723, 731-732, 1 Cal. Rptr. 2d 543* . Accordingly, in such an action, it must be determined whether the pleaded facts show that something was done that, without the conspiracy, would give rise to a right of action [*Tietz v. Los Angeles Unified Sch. Dist. (1965) 238 Cal. App. 2d 905, 913, 48 Cal. Rptr. 245* ; *see also* Harrell v. 20th *Century Ins. Co. (9th Cir. 1991) 934 F.2d 203, 208* (civil conspiracy claim fails because underlying cause of action for fraud barred by statute of limitations)].

[2] Conspirators Liable as Joint Tortfeasors

The advantage gained in alleging a conspiracy is that the act of one during the conspiracy is the act of all if done in furtherance of the conspiracy [*Mox Inc. v. Woods (1927) 202 Cal. 675, 678, 262 P. 302* ; *see* de *De Vries v. Brumback (1960) 53 Cal. 2d 643, 2 Cal. Rptr. 764, 349 P.2d 532]* . The liability of the defendants is thus joint and several [*Lomita Land & Water Co. v. Robinson (1908) 154 Cal. 36, 46, 97 P. 10* ; *Prince v. Harting (1960) 177 Cal. App. 2d 720, 728, 2 Cal. Rptr. 545* ; *see also Kesmodel v. Rand (2004) 119 Cal. App. 4th 1128, 1143, 15 Cal. Rptr. 3d 118]* . If the conspiracy is sufficiently pleaded, each participant in the conspiracy may be responsible as a joint tortfeasor for all damages ensuing from the underlying wrong, regardless of whether he or she was a direct actor or of the degree of his or her activity [*Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815, 498 P.2d 1063 , superseded by statute on other grounds as stated in Hendy v. Losse (1991) 54 Cal. 3d 723, 731-732, 1 Cal. Rptr. 2d 543* ; *Mox Inc. v. Woods (1927) 202 Cal. 675, 677-678, 262 P. 302* ; *Bank of Cal. v. Pan Am. Tire Corp. (1982) 132 Cal. App. 3d 843, 847-848, 183 Cal. Rptr. 470]* . Such liability may be imposed even if the defendant committed no overt act whatsoever and gained no benefit therefrom [*Mox Inc. v. Woods (1927) 202 Cal. 675, 678,*

262 P. 302 ; *Wetherton v. Growers Farm Labor Ass'n (1969) 275 Cal. App. 2d 168, 176, 79 Cal. Rptr. 543]* .

[3] Basis of Liability

Generally, those jointly and severally liable for tortious activity arising out of a conspiracy or concerted action include all those who in pursuance of a common plan or design to commit a tortious act, actively take part in it, further it by cooperation or request, lend aid or encouragement to the wrongdoers, or ratify and adopt his or her acts done for their benefit [*Cully v. Bianca (1986) 186 Cal. App. 3d 1172, 1176, 231 Cal. Rptr. 279* ; *Orser v. George (1967) 252 Cal. App. 2d 660, 667, 60 Cal. Rptr. 708* ; *see also Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 604, 163 Cal. Rptr. 132, 607 P.2d 924]* . It is not essential that there be an agreement, as may be implied in the word "conspiracy," but it is essential that each particular defendant charged with responsibility proceeded tortiously, that is, with intent to commit a tort, or with negligence [*Orser v. George (1967) 252 Cal. App. 2d 660, 667, 60 Cal. Rptr. 708]* . Thus, each defendant is a tortfeasor, acting or failing to act in such a way as to be a concurrent legal cause of the damage to the plaintiff [*see Summers v. Tice (1948) 33 Cal. 2d 80, 84-85, 199 P.2d 1* ; *Orser v. George (1967) 252 Cal. App. 2d 660, 666-668, 60 Cal. Rptr. 708* ; Restatement (Second) of Torts §§ 875, 876].

[4] Other Bases for Imposing Joint Liability

[a] Concurrent or Successive Tortfeasors

Joint and several liability based on the fact that several defendants are the legal cause of the damage to the plaintiff may also result from the fact that one defendant, although not acting in concert with another tortfeasor, was a concurrent or successive tortfeasor [*see* Witkin, Summary of California Law, vol. 5, *Torts,* § 49 (10th ed. 2005)]. For example, if the separate and distinct negligent acts of two persons are in substantially simultaneous operation and contribute to cause the injury, each is and both are the proximate cause, and the plaintiff may, except as noted below, recover in full from either of the parties or both [*Kramer v. Gaddis (1976) 56 Cal. App. 3d 837, 843, 128 Cal. Rptr. 860]* . Similarly, a defendant may be liable for all the plaintiff's injuries, although a third person committed a subsequent intervening negligent act that was also the proximate cause of the plaintiff's injuries, if the defendant at the time of his or her negligent conduct should have realized that the third person might so act [*see Di Muro v. Masterson Trusafe Steel Scaffold Co. (1961) 193 Cal. App. 2d 784, 792-794, 14 Cal. Rptr. 551]* .

However, in actions for personal injury, wrongful death, or property damage that are based on principles of comparative fault, cotortfeasors are liable only for their proportionate share of the injured party's noneconomic damages, such as pain and suffering [*see Civ. Code § 1431.2(a)*]. Joint liability does not apply in these situations. However, despite this limitation, joint and several liability for noneconomic damages is still the rule in a case of civil conspiracy, because liability in a case of conspiracy is not allocated based on comparative fault, but is premised on the concerted action of all tortfeasors acting as one in causing a single indivisible injury [*Kesmodel v. Rand (2004) 119 Cal. App. 4th 1128, 1143, 15 Cal. Rptr. 3d 118]* .

Concerted or conspiratorial action should also not be confused with situations in which two or more persons are participating negligently in the same conduct and the plaintiff is injured as a result of that conduct, but it is unclear which particular negligent act caused the injury. In such a case the participants are jointly and severally liable for the plaintiff's injuries. However, to speak of the action of the participants as being in concert strains that concept. The more reasonable basis for imposing such liability is that the defendants have placed the injured party in an unfair position of pointing to which defendant caused the harm. Because the defendants in such cases are ordinarily in a better position to offer evidence to determine which one caused the injury, the plaintiff satisfies his or her burden proving that one of the defendants must have caused the injury [*see Summers v. Tice (1948) 33 Cal. 2d 80, 85-86, 199 P.2d 1]* .

[b] Liability of Associations and Their Members

Liability of associations for the tortious conduct of one member normally must be based on a theory of concerted action.

Thus, although an unincorporated association is bound to use the same care as a natural person, mere membership does not make all members liable for unlawful acts of their members without their participation, knowledge, or approval [*Orser v. George (1967) 252 Cal. App. 2d 660, 670, 671, 60 Cal. Rptr. 708]* . Nevertheless, individual members of a group may be jointly and severally liable for the tortious activity of one member of the group if the particular member was entrusted with the activity even though the members neither authorized nor approved that the activity be done in a tortious manner [*see Steuer v. Phelps (1974) 41 Cal. App. 3d 468, 472, 116 Cal. Rptr. 61]* . In such a case it would seem liability is based on a joint venture theory under which the negligence of one joint venturer acting in connection with the joint venture is imputed to the other joint venturers on agency principles [*see Leming v. Oilfields Trucking Co. (1955) 44 Cal. 2d 343, 350, 282 P.2d 23* ; *Steuer v. Phelps (1974) 41 Cal. App. 3d 468, 472, 116 Cal. Rptr. 61* ; *see also Bank of Cal. v. Connolly (1973) 36 Cal. App. 3d 350, 364, 111 Cal. Rptr. 468]* .

[5] Criminal Conspiracy Distinguished

There is a clear distinction between criminal and civil conspiracy. The gist of the crime of conspiracy is the agreement to commit the unlawful act [*see People v. Corica (1942) 55 Cal. App. 2d 130, 134-135, 130 P.2d 164]* , while the gist of the tort is the damage resulting to the plaintiff froman overt act or acts done pursuant to the common design [de *Vries v. Brumback (1960) 53 Cal. 2d 643, 2 Cal. Rptr. 764, 349 P.2d 532]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsCriminal Law & ProcedureCriminal OffensesInchoate CrimesConspiracyGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyElementsTortsProcedureMultiple DefendantsJoint & Several Liability

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Chapter 126 CONSPIRACY
PART II. LEGAL BACKGROUND

13-126 California Forms of Pleading and Practice--Annotated § 126.11

§ 126.11 Elements of Cause of Action

[1] In General

The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to the plaintiff from an act or acts done in furtherance of the common design [*Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 511, 28 Cal. Rptr. 2d 475, 869 P.2d 454* ; *Saunders v. Superior Court (1994) 27 Cal. App. 4th 832, 845-846, 33 Cal. Rptr. 2d 438]* .

[2] Formation of Conspiracy

[a] Projected Joint Action Required

Generally, the formation of an alleged conspiracy depends on projected joint action [*Wetherton v. Growers Farm Labor Ass'n (1969) 275 Cal. App. 2d 168, 176, 79 Cal. Rptr. 543]* . The defendant must share a common purpose with another person, not merely suspect or have knowledge of the other person's private purpose [*Harris v. Capitol Records Distrib. Corp. (1966) 64 Cal. 2d 454, 462, 50 Cal. Rptr. 539, 413 P.2d 139]* . He or she must have united or cooperated with another in inflicting a wrong on the plaintiff [*Mox Inc. v. Woods (1927) 202 Cal. 675, 677-678, 262 P. 302* ; *Black v. Sullivan (1975) 48 Cal. App. 3d 557, 566, 122 Cal. Rptr. 119]* . It is sufficient, however, if the plaintiff can show the defendant's knowing participation in a common plan or design to commit an act or acts constituting a civil wrong [*Loeb v. Kimmerle (1932) 215 Cal. 143, 150-151, 9 P.2d 199* ; *Black v. Sullivan (1975) 48 Cal. App. 3d 557, 566-567, 122 Cal. Rptr. 119]* .

It is not necessary that a defendant join a conspiracy at the time of its inception to render him or her liable as a coconspirator. Everyone who joins and actively participates in an existing conspiracy with full knowledge of the prior acts of his or her coconspirators becomes a party to every act previously or subsequently done by any of the others in furtherance of the conspiracy [de *Vries v. Brumback (1960) 53 Cal. 2d 643, 2 Cal. Rptr. 764, 349 P.2d 532* ; *see Schick v. Lerner (1987) 193 Cal. App. 3d 1321, 1328, 238 Cal. Rptr. 902]* .

The liability of a defendant as a conspirator is limited, nevertheless, to all those who, in pursuance of a common plan or design to commit a wrong, actively take part in it, further it by cooperation or request, lend aid or encouragement to the

wrongdoer, or ratify and adopt his or her acts done for their benefit. Mere knowledge by one party of what the other is doing is not sufficient concert to make him or her liable for the acts of the other since one person ordinarily owes no duty to take affirmative steps to interfere with another's activities in the absence of some special relationship. Thus, in seeking to impose liability on coconspirators as joint tortfeasors, it is essential that each defendant charged with responsibility should have been proceeding tortiously, that is, with intent to commit a tort or with negligence, because one who innocently does an act that furthers the tortious purpose of another is not acting in concert with him or her [*see Saunders v. Superior Court (1994) 27 Cal. App. 4th 832, 846, 33 Cal. Rptr. 2d 438* ; *Orser v. George (1967) 252 Cal. App. 2d 660, 667, 60 Cal. Rptr. 708]* .

[b] Liability of Agents

A person who acts solely as an agent for a conspirator is liable for his or her participation in the conspiracy even if he or she is unacquainted with the details of the scheme [*Revert v. Hesse (1920) 184 Cal. 295, 302-303, 193 P. 943* ; *Wetherton v. Growers Farm Labor Ass'n (1969) 275 Cal. App. 2d 168, 177, 79 Cal. Rptr. 543]* .

An agent or employee is not liable for conspiracy to cause his or her principal to violate a duty that is binding only on the principal, such as an insurer's statutory duty under *Ins. Code § 790.03(h)(5)* to attempt in good faith to make a prompt, fair, and equitable settlement of a claim in which liability has become reasonably clear [*Doctors' Co. v. Superior Court (1989) 49 Cal. 3d 39, 48-49, 260 Cal. Rptr. 183, 775 P.2d 508* ; *see also Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 576, 108 Cal. Rptr. 480, 510 P.2d 1032]* .

[c] Agent's Immunity Rule

The agent's immunity rule provides that agents and employees of a corporation cannot conspire with their corporate principal or employer if they are acting in their official capacities on behalf of the corporation, and not acting either as individuals for their individual advantage or beyond the scope of their authority [*Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 512, n.4, 28 Cal. Rptr. 2d 475, 869 P.2d 454* ; *Black v. Bank of Am. (1994) 30 Cal. App. 4th 1, 4-6, 35 Cal. Rptr. 2d 725]* . A corporation is a legal fiction that cannot act at all except through its employees and agents, whose acts are the acts of the corporation. A corporation cannot conspire with itself any more than a private individual can [*Black v. Bank of Am. (1994) 30 Cal. App. 4th 1, 6, 35 Cal. Rptr. 2d 725]* .

One possible exception to the agent's immunity rule holds corporate agents or employees liable for conspiring with the corporation, despite their acting on behalf of the corporation, if they owe a duty to the plaintiff independent of the corporation's duty [*Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 511-514, 28 Cal. Rptr. 2d 475, 869 P.2d 454* ; *see also Doctors' Co. v. Superior Court (1989) 49 Cal.3d 39, 48, 260 Cal. Rptr. 183, 775 P.2d 508* ; *Younan v. Equifax Inc. (1980) 111 Cal. App. 3d 498, 516-517, 169 Cal. Rptr. 478]* . However, at least one court of appeal decision has questioned the potential breadth of this exception, and held that it did not apply in a case involving an allegation of conspiracy between a corporation and its own employees [*see Black v. Bank of Am. (1994) 30 Cal. App. 4th 1, 4-6, 35 Cal. Rptr. 2d 725* (distinguishing case from cases involving agents and employees outside corporate structure of principal)].

Another possible exception to the agent's immunity rule is that corporate officers and directors may become liable for the corporation's tortious conduct if they directly ordered, authorized, or participated in that tortious conduct, and this personal liability may rest on a conspiracy among the officers and directors to injure third parties through the corporation [*Wyatt v. Union Mortgage Co. (1979) 24 Cal. 3d 773, 785, 157 Cal. Rptr. 392, 598 P.2d 45* ; *Black v. Bank of Am. (1994) 30 Cal. App. 4th 1, 6, fn. 4, 35 Cal. Rptr. 2d 725]* .

[3] Operation of Conspiracy

[a] Overt Acts Resulting in Damage to Plaintiff

The plaintiff in a cause of action for conspiracy must show not only the formation of the conspiracy [*see § 126.11[2]*], but also its operation, that is, an overt wrongful act or acts committed by one or more of the conspirators pursuant to the common design that resulted in damage to the plaintiff [*Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815, 498 P.2d 1063 , superseded by statute on other grounds as stated in Hendy v. Losse (1991) 54 Cal. 3d 723, 731-732, 1 Cal. Rptr. 2d 543* ; *De Vries v. Brumback (1960) 53 Cal. 2d 643, 2 Cal. Rptr. 764, 349 P.2d 532* ; *Barney v. Aetna Cas. & Sur. Co. (1986) 185 Cal. App. 3d 966, 981, 230 Cal. Rptr. 215]* . The plaintiff must show that something was done that, without the conspiracy, would give rise to a right of action [*Tietz v. Los Angeles Unified Sch. Dist. (1965) 238 Cal. App. 2d 905, 913, 48 Cal. Rptr. 245]* .

The act of one of the conspirators during a conspiracy is the act of all of them if done in furtherance thereof [*Mox Inc. v. Woods (1927) 202 Cal. 675, 678, 262 P. 302* ; *Prince v. Harting (1960) 177 Cal. App. 2d 720, 728, 2 Cal. Rptr. 545* ; *see De Vries v. Brumback (1960) 53 Cal. 2d 643, 648, 2 Cal. Rptr. 764, 349 P.2d 532*]. Thus, irrespective of whether a particular conspirator was a direct actor and regardless of the degree of his or her activity, each participant is responsible for the damage resulting from the act or acts committed in furtherance of the conspiracy [*Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815, 498 P.2d 1063 , superseded by statute on other grounds as stated in Hendy v. Losse (1991) 54 Cal. 3d 723, 731-732, 1 Cal. Rptr. 2d 543* ; *Mox Inc. v. Woods (1927) 202 Cal. 675, 677-678, 262 P. 302]* even if he or she committed no overt act whatsoever and gained no benefit therefrom [*Mox Inc. v. Woods (1927) 202 Cal. 675, 678, 262 P. 302* ; *Wetherton v. Growers Farm Labor Ass'n (1969) 275 Cal. App. 2d 168, 176, 79 Cal. Rptr. 543]* .

[b] Actions Not Sufficient for Conspiracy Liability

Because the operation of a conspiracy requires a wrongful overt act that would give rise to a right of action even without the existence of the conspiracy [*see § 126.11[3][a]*], no liability for conspiracy exists if the actor had a legal right to do the act complained of [*see Agnew v. Parks (1959) 172 Cal. App. 2d 756, 762, 764, 765, 343 P.2d 118* (false testimony arising out of perjury, subornation of perjury, or concealment of evidence as not giving rise to civil action aside from defamation and malicious prosecution); *see also Thompson v. California Fair Plan Assn. (1990) 221 Cal. App. 3d 760, 767, 270 Cal. Rptr. 590* (opposition to declaratory judgment action as absolutely privileged act and cannot serve as act sufficient to revive time-barred claim on conspiracy theory)]. Thus, if the actor in a conspiracy is exonerated from liability, there is no basis for holding any coconspirators liable [*Vargas v. Giacosa (1953) 121 Cal. App. 2d 521, 525, 263 P.2d 840 , overruled on other grounds, Hardy v. Vial (1957) 48 Cal. 2d 577, 581, 311 P.2d 494* ; *see also Richard B. LeVine, Inc. v. Higashi (2005) 131 Cal. App. 4th 566, 575, 579, 32 Cal. Rptr. 3d 244* (because direct actors were absolved from liability in earlier arbitration action, res judicata doctrine precluded holding alleged conspirator liable in subsequent lawsuit)].

A similar rule applies if the actor is legally incapable of committing the tort forming the basis for the alleged conspiracy because of a statutorily created or other immunity from suit [*Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 513, 28 Cal. Rptr. 2d 475, 869 P.2d 454* ; *see also Hardy v. Vial (1957) 48 Cal. 2d 577, 582-583, 311 P.2d 494* (agents of college were immune from liability for malicious prosecution because performing investigative duties and therefore could not be liable for conspiring with defendants not similarly immune)].

Thus, a party to a contract cannot be liable for conspiracy to interfere with the performance of the contract, because only strangers to a contract can be liable in tort for intentional interference with a contract's performance [*Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 514, 28 Cal. Rptr. 2d 475, 869 P.2d 454* (*rejecting Wise v. Southern Pac. Co. (1963) 223 Cal. App. 2d 50, 71-72, 35 Cal. Rptr. 652* , which permitted imposition of liability on party to contract for conspiracy to interfere with contract)]. Similarly, a third party who is not a fiduciary of the plaintiff cannot be liable for conspiring with the fiduciary to commit a breach of fiduciary duty [1-800- *Contacts, Inc. v. Steinberg (2003) 107 Cal. App. 4th 568, 590, 132 Cal. Rptr. 2d 789* ; Everest Investors 8 v. *Whitehall Real Estate Ltd. P'ship XI (2002) 100 Cal. App. 4th 1102, 1106-1108, 123 Cal. Rptr. 2d 297]* . Finally, a person cannot be held liable for conspiracy to violate a statute when the statute does not place any duty on that person [*see, e.g., Klistoff v. Superior*

Court (2007) 157 Cal. App. 4th 469, 479-480, 68 Cal. Rptr. 3d 704 (private parties could not be liable for conspiracy to violate provisions of *Gov. Code § 1090*, which only prohibits public officials from holding financial interests in public contracts)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyElements

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§ 126.12 Pleading Cause of Action

To state a cause of action for conspiracy the complaint must allege facts showing the formation and operation of a conspiracy and, as the cause of action is for the damage suffered and not the mere conspiracy, the complaint must state facts which show that a civil wrong was done resulting in damage [*Orloff v. Metropolitan Trust Co. (1941) 17 Cal. 2d 484, 488, 110 P.2d 396* ; *see Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815, 498 P.2d 1063 , superseded by statute on other grounds asstated in Hendy v. Losse (1991) 54 Cal. 3d 723, 731-732, 1 Cal. Rptr. 2d 543* ; *Short v. Nevada Joint Union High Sch. Dist. (1985) 163 Cal. App. 3d 1087, 1101, 210 Cal. Rptr 297]* . Because a cause of action based on civil conspiracy accrues on the date of the commission of the last overt act in pursuance of the conspiracy, a plaintiff must allege when the last overt act took place [*Bedolla v. Logan & Frazer (1975) 52 Cal. App. 3d 118, 136-137, 125 Cal. Rptr. 59]* .

A complaint against the party or parties who acted pursuant to a conspiracy need not contain a conspiracy allegation where the complaint alleges the commission of the wrongful act [*see Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815, 498 P.2d 1063 , superseded by statute on other grounds as stated in Hendy v. Losse (1991) 54 Cal. 3d 723, 731-732, 1 Cal. Rptr. 243* ; *Hege v. Worthington, Park & Worthington (1962) 209 Cal. App. 2d 670, 678, 26 Cal. Rptr. 132]* . However, the advantage to the pleader in alleging a conspiracy is that such an allegation implicates all of those who participated in the common design and thus fastens liability on those who merely agreed to the plan to commit the wrong as well as on those who actually carried it out [*Wise v. Southern Pac. Co. (1963) 223 Cal. App. 2d 50, 64, 35 Cal. Rptr. 652]* .

It should be noted that although the pleaded facts must show that something was done which, without the conspiracy, would give rise to a cause of action, the information and operation of a conspiracy may be alleged in general terms. Thus, general allegations such as that the defendants "did agree together" [*Farr v. Bramblett (1955) 132 Cal. App. 2d 36, 47, 281 P.2d 372] , disapproved on other grounds, Field Research Corp. v. Superior Court of San Francisco (1969) 71 Cal. 2d 110, 114, 77 Cal. Rptr. 243, 453 P.2d 747* or the ultimate fact that the defendants "conspired together" to commit specified wrongful acts [*Greenwood v. Mooradian (1955) 137 Cal. App. 2d 532, 535-537, 290 P.2d 955]* are sufficient to allege the conspiracy. The acts constituting the conspiracy, as distinguished from the acts done pursuant to the conspiracy and inflicting the wrong, need not be alleged [*Greenwood v. Mooradian (1955) 137 Cal. App. 2d 532, 537-538, 290 P.2d 955]* .

For discussion of the allegations that are essential to plead conspiracy, see *§ 126.50[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyElements

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13-126 California Forms of Pleading and Practice--Annotated § 126.13

§ 126.13 Proof of Civil Conspiracy

[1] Inferences and Circumstantial Evidence

A plaintiff need not produce evidence showing that the defendants met and actually agreed to undertake the performance of the unlawful act [*Black v. Sullivan (1975) 48 Cal. App. 3d 557, 567, 122 Cal. Rptr. 119]* . Because of the inherent difficulty in proving a conspiracy, a conspiracy may sometimes be inferred from the nature of the acts done, the relations of the parties, the interests of the alleged conspirators, and other circumstances [*Chicago Title Ins. Co. v. Great W. Fin. Corp. (1968) 69 Cal. 2d 305, 316, 70 Cal. Rptr. 849, 444 P.2d 481* ; *Black v. Sullivan (1975) 48 Cal. App. 3d 557, 566-567, 122 Cal. Rptr. 119]* . Thus, for example, a civil conspiracy can be inferred from evidence showing a course of conduct on the part of the defendants that teems with fraudulent representations and is replete with intrigue, deception, and duplicity [*see Anderson v. Thacher (1946) 76 Cal. App. 2d 50, 73, 172 P.2d 533]* . It can also be inferred from circumstantial evidence of dealings between the defendants [*see Rogers v. Grua (1963) 215 Cal. App. 2d 1, 9, 30 Cal. Rptr. 39]* and from statements made by one who claimed merely to be an advisor rather than a conspirator from which it could be inferred that he or she had joined in the wrongful project [*see Wetherton v. Growers Farm Labor Ass'n (1969) 275 Cal. App. 2d 168, 176-177, 79 Cal. Rptr. 543]* .

In a suit based on allegations that real estate brokers, a realty board, and the seller of property had conspired to discriminate against prospective buyers on the basis of their race in violation of statute [*Civ. Code §§ 51, 52*], the conspiracy could be shown by such circumstantial evidence as the strange manner by which the plaintiffs' offer to purchase was handled by the defendants. The record as a whole supported the inference that the treatment accorded to the plaintiffs was a part of some kind of group plan or understanding, and, considering the relationship between the brokers and the realty board, it could be concluded the realty board was the instrumentality through which the discrimination was promoted [*Wagner v. O'Bannon (1969) 274 Cal. App. 2d 121, 132, 79 Cal. Rptr. 44]* .

On the other hand, when there is no evidence of any civil wrong or unlawful act committed by the defendants sufficient to sustain allegations of conspiracy against them, the court may exclude evidence that merely tends to show that the defendants were affiliated [*Peterson v. Corporation of Am. (1937) 21 Cal. App. 2d 527, 532, 69 P.2d 904]* .

[2] Hearsay Rule

Evidence of a statement offered against a party to a civil conspiracy is not inadmissible under the hearsay rule if: (1) the statement was made by the declarant while participating in the conspiracy and in furtherance thereof; (2) the statement was made prior to or during the time that the party was participating in the conspiracy; and (3) the evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in (1) or (2), or, in the court's discretion as to the order of proof, subject to the admission of such evidence [*Evid. Code § 1223*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceHearsayExemptionsStatements by CoconspiratorsGeneral OverviewEvidenceInferences & PresumptionsGeneral OverviewEvidenceRelevanceCircumstantial & Direct EvidenceTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyElements

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13-126 California Forms of Pleading and Practice--Annotated § 126.14

§ 126.14 Attorney-Client Conspiracy

[1] Tortious Acts

Under certain circumstances, attorneys may be held liable for participation in tortious acts with their clients, such as when the attorney has conspired with the principal for the attorney's independent advantage or to violate the attorney's own duty toward the plaintiff. The attorney may not be held liable, however, for conspiracy to cause a principal to violate a duty that is binding on the principal alone [*see Doctors' Co. v. Superior Court (1989) 49 Cal. 3d 39, 46-48, 260 Cal. Rptr. 183, 775 P.2d 508* ; *see also § 126.11[2][b]*].

[2] Attempt to Contest or Compromise Dispute

[a] Prefiling Order Requirement

No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which isbased on the attorney's representation of the client, may be included in a complaint or other pleading unless the court enters an order allowing the pleading to be filed [*Civ. Code § 1714.10(a)*]. The filing of the petition for the order, the proposed pleading, and the requisite supporting affidavits (or declarations under penalty of perjury under *Code Civ. Proc. § 2015.5*), tolls the running of the statute of limitations [*Civ. Code § 1714.10(a)*; *see § 126.62[5]*]. The failure to obtain the order is a defense to an action [*Civ. Code § 1714.10(b)*; *see § 126.14[2][e]*]. Any proceeding under *Civ. Code § 1714.10* is a special proceeding of a civil nature. Any order made under *Civ. Code § 1714.10* determining the rights of a petitioner or an attorney against whom a pleading has been or is proposed to be filed is appealable as a final judgment in a civil action [*Civ. Code § 1714.10(d)*; *see also Civ. Code § 1714.10(e)* (appealability provisions as declaratory of, and not constituting change in, existing law)].

The denomination of a cause of action as something other than conspiracy does not necessarily remove the case from the application of *Civ. Code § 1714.10* [*see Hung v. Wang (1992) 8 Cal. App. 4th 908, 929-930, 11 Cal. Rptr. 2d 113* ("concert of action" allegations were virtually identical to conspiracy cause of action in prior proceeding)]. Furthermore, it appears that a case may be governed by the statute even if the proposed cause of action does not include all the elements required to state a common-law conspiracy cause of action [*see Howard v. Superior Court (1992) 2 Cal. App. 4th 745, 749, 3 Cal. Rptr. 2d 575* ("aiding and abetting" cause of action is governed by § 1714.10 despite absence of

conspiracy element that defendant agree to join in wrongful conduct; decided under pre-1991 version of statute)].

[b] "Reasonable Probability" Showing

A court may allow a pleading alleging a cause of action for an attorney-client conspiracy, based on the attorney's attempt to contest or compromise a claim or dispute, only after it determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action [*Civ. Code § 1714.10(a)*]. "Reasonable probability" of prevailing, under *Civ. Code § 1714.10*, means that there is a substantial potential for success. The literal meaning of this phrase in the context of the section is that the petition must be granted if the proposed pleading is legally sufficient and the evidentiary showing to support it makes out a prima facie showing. The petitioner is not required to establish that a particular outcome is more likely than not to occur. Rather, the party must show that he or she has a case that will survive a motion for nonsuit and, if successful, will be supported by sufficient evidence to warrant affirmance on appeal [*Burtscher v. Burtscher (1994) 26 Cal. App. 4th 720, 725-726, 31 Cal. Rptr. 2d 682* ; *Hung v. Wang (1992) 8 Cal. App. 4th 908, 929-930, 11 Cal. Rptr. 2d 113* (decided under pre-1991 version of statute)].

[c] Exceptions to Requirement

[i] Independent Duty to Plaintiff

The prefiling order requirement of *Civ. Code § 1714.10* does not apply to a cause of action against an attorney for a civil conspiracy with his or her client, if the attorney has an independent legal duty to the plaintiff [*Civ. Code § 1714.10(c)*; *see, e.g.,* *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone (2003) 107 Cal. App. 4th 54, 84, 131 Cal. Rptr. 2d 777* (attorney for insurance company had independent legal duty to provide policy claimants with truthful information about policy coverage)]. In interpreting this exception, one court of appeal opinion held that the attorney for an assignee for the benefit of creditors does not owe an independent duty to the creditors or to any one of them individually [*Berg & Berg Enters. v. Sherwood Partners, Inc. (2005) 131 Cal. App. 4th 802, 828-833, 32 Cal. Rptr. 3d 325]* . Another court opinion rejected claims that attorneys representing a landowner owed any actionable independent duty to the landowner's commercial tenants when communicating with the commercial tenants about their possible lease violations in furtherance of their client's interests [*Panoutsopoulos v. Chambliss (2007) 157 Cal. App. 4th 297, 306-308, 68 Cal. Rptr. 3d 647*].

[ii] Conspiracy to Violate Legal Duty

The prefiling order requirement of *Civ. Code § 1714.10* does not apply to a cause of action against an attorney for a civil conspiracy with his or her client, if the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain [*Civ. Code § 1714.10(c)*].

For these purposes, the phrase "in furtherance of the attorney's financial gain" requires that the attorney derive economic advantage over and above the monetary compensation received in exchange for professional services actually rendered on behalf of the client, regardless of whether the attorney fees charged are alleged to have been excessive [*Panoutsopoulos v. Chambliss (2007) 157 Cal. App. 4th 297, 306, 68 Cal. Rptr. 3d 647* ; *Berg & Berg Enters. v. Sherwood Partners, Inc. (2005) 131 Cal. App. 4th 802, 835-836, 32 Cal. Rptr. 3d 325]* .

[iii] Malicious Prosecution Action

Civ. Code § 1714.10 does not apply to a malicious prosecution action against an attorney who allegedly prosecuted an action that any reasonableattorney would have recognized as untenable and allegedly did so without probable cause and adequate investigation. A wholly independent malicious prosecution action may be brought against an attorney for his or her wrongful conduct in bringing the untenable action without pleading a civil conspiracy, even if the attorney's

client is also sued for malicious prosecution [*Westamco Inv. Co. v. Lee (1999) 69 Cal. App. 4th 481, 487-488, 81 Cal. Rptr. 2d 634]* .

If the operative pleading contains a conspiracy claim in addition to a malicious prosecution claim, but the plaintiff has failed to obtain judicial authorization in compliance with *Civ. Code § 1714.10*, only the conspiracy claim is subject to dismissal under that statute, and the malicious prosecution claim may still be prosecuted [*Alden v. Hindin (2003) 110 Cal. App. 4th 1502, 1507-1508, 2 Cal. Rptr. 3d 845]* .

For discussion of the malicious prosecution cause of action generally, see Ch. 357, *Malicious Prosecution and Abuse of Process* .

[iv] Potential Effect of Exceptions on Pleading Requirement Generally

Although the discussion was arguably dicta, one court of appeal opinion has concluded that the statutory exceptions described in §§ 126.14[2][c][i] and 126.14[2][c][ii] appear to effectively exclude from the scope of the pleading requirement all viable conspiracy claims against an attorney [*Pavicich v. Santucci (2000) 85 Cal. App. 4th 382, 394-396, 102 Cal. Rptr. 2d 125]* . That court opinion noted that although the language and history of *Civ. Code § 1714.10(a)* suggest that its pleading requirement was intended to apply to conspiracy claims stemming from an attorney's representation of his or her client, under the agent's immunity rule discussed in *§ 126.11[2][c]*, an agent is not liable for conspiring with the principal if the agent is acting in an official capacity on behalf of the principal. Thus, the court of appeal concluded that an attorney could only be liable for conspiring with the client if the attorney owed an independent legal duty to the plaintiff or if the attorney's actionable conduct went beyond the scope of his or her duties to the client. Under the statutory exceptions listed above, however, these situations are precisely the situations in which the pleading requirement does not apply [*Pavicich v. Santucci (2000) 85 Cal. App. 4th 382, 394-396, 102 Cal. Rptr. 2d 125]* .

However, the court of appeal in *Pavicich* failed to recognize that the agent's immunity rule has only been applied to agents of corporations and has not generally been extended to all agents acting on behalf of a principal [*see § 126.11[2][c]*].

[d] Procedure to Obtain Order

[i] Petition and Proposed Pleadings

The court may allow the filing of a pleading that claims liability based on a civil conspiracy, but only following the filing of a verified petition therefor accompanied by the proposed pleading and supporting affidavits (or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*]) stating the facts on which the liability is based [*Civ. Code § 1714.10(a)*]. For a form of petition and supporting declaration, see *§ 126.62[1]*.

One court has held that failure to file a verified petition would not prevent a party from filing a pleading claiming liability based on an attorney's civil conspiracy. The court held that the requirement was satisfied because the party, who was moving for leave to amend a complaint to add the civil conspiracy allegations, had verified the complaint and amended complaint, and had filed declarations under penalty of perjury in support of the motion. These items were sufficient because they have the same effect as a verified petition: they tend to discourage frivolous allegations by requiring claimants to make their assertions under oath [*Burtscher v. Burtscher (1994) 26 Cal. App. 4th 720, 727, 31 Cal. Rptr. 2d 682]* .

The court is required to order service of the petition on the party against whom the action is proposed to be filed [*Civ. Code § 1714.10(a)*].

[ii] Submission of Opposing Affidavits

The court is required to permit the party against whom the action is proposed to be filed to submit opposing affidavits (or declarations under penalty of perjury under *Code Civ. Proc. § 2015.5*) before making its determination [*Civ. Code § 1714.10(a)*].

[iii] Filing of Proposed Pleading

If the final determination of the matter is favorable to the petitioning party, the court must permit the proposed pleading to be filed [*Civ. Code § 1714.10(a)*].

[e] Failure to Obtain Order Is Defense to Action

The failure to obtain an order required under *Civ. Code § 1714.10(a)* is a defense to any action for civil conspiracy filed in violation of that provision. The defense must be raised by the party charged with the civil conspiracy on that party's first appearance by demurrer, motion to strike, or other motion or application as may be appropriate. The failure to raise the defense in a timely manner constitutes a waiver of the defense [*Civ. Code § 1714.10(b)*]. For a form of demurrer to a complaint against an attorney based on an attorney-client conspiracy, see *§ 126.63[1]*.

If a single conspiracy cause of action is brought against both an attorney and the attorney's law firm, the entire cause of action is subject to the defense of failure to meet the prefiling requirements of Section 1714.10 even if one of the exceptions of *Civ. Code § 1714.10(c)* applies to the conspiracy action as brought against the individual attorney [*Evans v. Pillsbury, Madison & Sutro (1998) 65 Cal. App. 4th 599, 607, 76 Cal. Rptr. 2d 679* (entire conspiracy cause of action brought against law firm and individual attorney stricken because plaintiffs failed to comply with prefiling requirements, despite apparent application of one exception to action against attorney); *see Civ. Code § 1714.10(a)*; *see also § 126.14[2][c]*].

In appropriate circumstances, a trial court may permit amendment of the complaint after sustaining a demurrer based on failure to comply with *Civ. Code § 1714.10* [*Central Concrete Supply Co., Inc. v. Bursak (2010) 182 Cal. App. 4th 1092, 1103, 105 Cal. Rptr. 3d 909]* . For example, amendment might be allowed when the plaintiff appears able to allege that the attorney was not providing legal representation at the time of the alleged conspiratorial conduct, as well as when plaintiff appears able to allege that the attorney's acts went beyond the performance of a professional duty to serve the client and involved a conspiracy to violate a legal duty in furtherance of the attorney's financial gain [*Central Concrete Supply Co., Inc. v. Bursak (2010) 182 Cal. App. 4th 1092, 1103, 105 Cal. Rptr. 3d 909* ; *see* [a], [c][ii], *above*]. Thus, as a practical matter, a plaintiff who did not seek a pre-filing order, but who has a compelling argument that the pre-filing order requirement does not apply, should be allowed to amend his or her complaint to specifically allege the facts supporting that conclusion if he or she failed to do so in the original complaint.

If a petition to obtain an order under *Civ. Code § 1714.10* is denied on the merits, rather than on technical grounds, the denial is res judicata as to any later action [*see Castro v. Higaki (1994) 31 Cal. App. 4th 350, 358-359, 37 Cal. Rptr. 2d 84* (petition denied for failure to show any theory of liability under which petitioner could prevail)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsPrelitigation NoticesCivil ProceduresPleading & PracticePleadingsComplaintsRequirementsLegal EthicsProfessional ConductIllegal ConductTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral Overview

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§ 126.15 Statute of Limitations

[1] Determined by Nature of Underlying Wrong

There is no cause of action for conspiracy in and of itself; therefore, the applicable statute of limitations in an action against conspirators is determined by the nature of the underlying civil wrong the complaint alleges the defendants conspired to perpetrate [*McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 591, 33 Cal. Rptr. 389* ; *Agnew v. Parks (1959) 172 Cal. App. 2d 756, 765-766, 343 P.2d 118]* .

Thus, an action for damages for conspiracy to defraud is governed by a three-year statute of limitations [*Code Civ. Proc. § 338(d)*], whereas a whereas a conspiracy to commit assault or battery, or to cause injury to or death of an individual by the wrongful act or neglect of another is subject to a two-year (one-year, prior to January 1, 2003) limitations period [*Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)*; *see generally Ch. 345, Limitation of Actions, § 345.14*], and a conspiracy to violate a personal right described in *Code Civ. Proc. § 340(c)* is subject to a one-year limitation period [*see Code Civ. Proc. § 340(c)*; *Agnew v. Parks (1959) 172 Cal. App. 2d 756, 765, 343 P.2d 118* (conspiracy to obstruct prosecution of civil action); *Schessler v. Keck (1954) 125 Cal. App. 2d 827, 832, 271 P.2d 588* (defamation)].

An action for damages for conspiracy to induce a breach of contract is governed by a two-year statute of limitations, *Code Civ. Proc. § 339(1)* [*Kenworthy v. Brown (1967) 248 Cal. App. 2d 298, 301, 56 Cal. Rptr. 461]* , as is a cause of action for damages for conspiracy alleging tortious interference with the plaintiff's business [*McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 591, 33 Cal. Rptr. 389]* . A cause of action for civil conspiracy based on fraud is governed by the three-year statute of limitations set forth in *Code Civ. Proc. § 338(d)* [*Snow v. A.H. Robins Co. (1985)165 Cal. App. 3d 120, 134, 211 Cal. Rptr. 271]* . Generally, an action for damages for conspiracy based on fraudulent conveyance is subject to a four-year statute of limitations if the transfer was made or the obligation incurred on or after January 1, 1987, or subject to a three-year statute of limitations if the transfer was made or the obligation incurred prior to that date [*see Civ. Code §§ 3439.09, 3439.12* (also providing exceptions and limitations); *see also Filmservice Labs., Inc. v. Harvey Bernhard Enters., Inc. (1989) 208 Cal. App. 3d 1297, 1309, 256 Cal. Rptr. 735]* .

[2] When Statutory Period Begins and Stops Running

Generally, a cause of action based on civil conspiracy accrues on the date of the commission of the last overt act in pursuance of the conspiracy [*Wyatt v. Union Mortgage Co. (1979) 24 Cal. 3d 773, 786, 157 Cal. Rptr. 392, 598 P.2d 45* ; *Livett v. F.C. Financial Associates (1981) 124 Cal. App. 3d 413, 418, 177 Cal. Rptr. 411* ; *Kenworthy v. Brown (1967) 248 Cal. App. 2d 298, 301, 56 Cal. Rptr. 461]* . Therefore, it is imperative that the complaint in an action for damages based on conspiracy to commit an actionable wrong allege when the last overt act in the commission of that wrong actually occurred [*Maheu v. CBS, Inc. (1988) 201 Cal. App. 3d 662, 673-674, 247 Cal. Rptr. 304* ; *Bedolla v. Logan & Frazer (1975) 52 Cal. App. 3d 118, 136-137, 125 Cal. Rptr. 59]* .

An exception to this rule applies in conspiracy-to-defraud cases in which it is alleged that the fraud was not discovered until less than three years before the complaint was filed. In such cases, *Code Civ. Proc. § 338(d)* directs that the action may be timely despite the fact that the last overt act is more than three years old. If the plaintiff relies on the delayed discovery doctrine rather than on the last overt act doctrine, facts alleged in the complaint that support a tolling of the limitation period due to the plaintiff's delayed discovery, rather than allegation of the date of the last overt act, establish the timeliness of the action [*see* *Aaroe v. First Am. Title Ins. Co. (1990) 222 Cal. App. 3d 124, 128-129, 271 Cal. Rptr. 434* ; *see also* *Casualty Ins. Co. v. Rees Inv. Co. (1971) 14 Cal. App. 3d 716, 720, 92 Cal. Rptr. 857* (discussing pleading requirements for delayed discovery rule)]. For discussion of the essential facts that a plaintiff must plead and prove under the delayed discovery rule, see Ch. 269, *Fraud and Deceit* .

The filing of a petition, proposed pleading, and accompanying affidavits in pursuit of an order under *Civ. Code § 1714.10* [*see § 126.14[1]*] tolls the running of any applicable statute of limitations until the final determination of the matter [*Civ. Code § 1714.10(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLegislationStatutes of LimitationsTollingTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyElements

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§ 126.16 Racketeer Influenced and Corrupt Organizations Act

In addition to bringing a cause of action alleging conspiracy, a plaintiff's counsel may also wish to consider whether the facts of the case give rise to a civil action under the federal Racketeer Influenced and CorruptOrganizations Act (RICO) (*18 U.S.C.S. § 1961 et seq.*). RICO authorizes recovery of treble damages and costs of suit, including a reasonable attorney's fee [*18 U.S.C.S. § 1964(c)*; *see Douglas v. Superior Court (1989) 215 Cal. App. 3d 155, 159, 263 Cal. Rptr. 473* (RICO cause of action sufficiently pleaded); *see also* Ch. 565, *Unfair Competition*]. In addition to violations of RICO provisions, a conspiracy to violate RICO is itself actionable [*see 18 U.S.C.S. §§ 1962(d), 1964(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesRacketeeringRacketeer Influenced & Corrupt OrganizationsGeneral OverviewCriminal Law & ProcedureCriminal OffensesRacketeeringRacketeer Influenced & Corrupt OrganizationsElementsTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyElements

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[Reserved]

§§ 126.17[Reserved]

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§ 126.30 California Points and Authorities

For memoranda of points and authorities relating to forms in this chapter, see California Points and Authorities, Ch. 46, *Conspiracy* (Matthew Bender)

For memoranda of points and authorities relating to specific types of tort actions in which a conspiracy count might be alleged, see California Points and Authorities, *Cumulative Index* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyElements

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13-126 California Forms of Pleading and Practice--Annotated § 126.31

§ 126.31 Forms of Discovery

For forms of interrogatories for use in actions involving conspiracies, see Bender's Forms Of Discovery, *Conspiracy* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesFormTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral Overview

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§ 126.32 State Statutes

[1] Civil Conspiracy

Liability for conspiracy to fix minimum livestock sale commissions. Bus. & Prof. Code §§ 16082, 16084

California antitrust law (Cartwright Act). *Bus. & Prof. Code §§ 16720-16758*

Liability for conspiracy to discriminate. *Civ. Code §§ 51.5, 51.7, 52*

Prior judicial authorization required before plaintiff files pleading containing cause of action for civil conspiracy between attorney and client. *Civ. Code § 1714.10(a)*

Failure to prefile order in action against attorney based on attorney-client conspiracy is defense to action. *Civ. Code § 1714.10(b)*

Order made under *Civ. Code § 1714.10(a)* is appealable as final judgment in civil action. *Civ. Code § 1714.10(d)*

Form of verification. *Code Civ. Proc. § 446*

Agricultural cooperative is not conspiracy. *Food & Agric. Code § 54038*

Order permitting guardian or conservator to invest on behalf of ward or conservatee does not release guardian or

conservator from liability for conspiracy to obtain order. *Prob. Code § 2103*

[2] Criminal Conspiracy

Acts constituting conspiracy. *Penal Code §§ 182(a), 184*

Essential allegations. *Penal Code § 182(b)*

[3] Evidence

Evidence of preliminary facts. *Evid. Code § 403*

Admissibility of conspirator's statements under hearsay rule. *Evid. Code § 1223*

[4] Procedure

Permissive joinder of causes of action. *Code Civ. Proc. § 427.10*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesInchoate CrimesConspiracyGeneral OverviewEvidenceHearsayExemptionsStatements by CoconspiratorsGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyElementsTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyRemedies

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13-126 California Forms of Pleading and Practice--Annotated § 126.33

§ 126.33 Decisions

[1] Actions Required

Cause of action for damages based on conspiracy arises out of some wrongful act committed by one or more conspirators. *Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815, 498 P.2d 1063 , superseded by statute on other grounds as stated in Hendy v. Losse (1991) 54 Cal. 3d 723, 731-732, 1 Cal. Rptr. 2d 543* ; *Short v. Nevada Joint Union High Sch. Dist. (1985) 163 Cal. App. 3d 1087, 1101, 210 Cal. Rptr. 297*

Civil conspiracy does not per se give rise to cause of action unless civil wrong has been committed and that wrong results in damage. *Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815, 498 P.2d 1063 , superseded by statute on other grounds as stated in Hendy v. Losse (1991) 54 Cal. 3d 723, 731-732, 1 Cal. Rptr. 2d 543* ; *Mox Inc. v. Woods (1927) 202 Cal. 675, 677-678, 262 P. 302*

Each participant in wrongful act in pursuance of conspiracy is jointly responsible irrespective of whether participant was direct actor and regardless of degree of his or her activity. *Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815, 498 P.2d 1063 , superseded by statute on other grounds as stated in Hendy v. Losse (1991) 54 Cal. 3d 723, 731-732, 1 Cal. Rptr. 2d 543* ; *Mox Inc. v. Woods (1927) 202 Cal. 675, 677-678, 262 P. 302*

One who joins and actively participates in continuing conspiracy to convert stolen property with full knowledge of prior criminal acts of coconspirators is civilly liable as joint tortfeasor for prior acts of coconspirators. de *De Vries v. Brumback (1960) 53 Cal. 2d 643, 648-650, 2 Cal. Rptr. 764, 349 P.2d 532*

Acts alleged to have been perpetrated required to be wrongful, but not required to be criminal or in violation of statute. *Rogers v. Grua (1963) 215 Cal. App. 2d 1, 7, 30 Cal. Rptr. 39*

Civil liability for conspiracy to commit tort exists if there is conspiracy to accomplish by concerted action criminal or unlawful purpose or lawful purpose by criminal or unlawful means resulting in actual damage. *Taylor v. S & M Lamp Co. (1961) 190 Cal. App. 2d 700, 706, 12 Cal. Rptr. 323*

Act of one conspirator is act of all if done in furtherance of conspiracy. *Prince v. Harting (1960) 177 Cal. App. 2d 720, 728, 2 Cal. Rptr. 545*

Overt act not required on part of one conspirator because act of one conspirator during conspiracy is act of all if done in furtherance thereof. *Prince v. Harting (1960) 177 Cal. App. 2d 720, 728, 2 Cal. Rptr. 545*

[2] Attorney-Client Conspiracy

Denial of petition to obtain order under *Civ. Code § 1714.10* is res judicata if denial was on merits. *Castro v. Higaki (1994) 31 Cal. App. 4th 350, 358-359, 37 Cal. Rptr. 2d 84*

Requirement under *Civ. Code § 1714.10* that plaintiff alleging attorney-client conspiracy show "reasonable probability" of prevailing in action is met if plaintiff can make out prima facie showing. *Burtscher v. Burtscher (1994) 26 Cal. App. 4th 720, 725-726, 31 Cal. Rptr. 2d 682* ; *Hung v. Wang (1992)8 Cal. App. 4th 908, 929-930, 11 Cal. Rptr. 2d 113* (decided under pre-1991 version of statute)

[3] Criminal Conspiracy Distinguished

Gist of crime of conspiracy is agreement to commit unlawful act. *De Vries v. Brumback (1960) 53 Cal. 2d 643, 649, 2 Cal. Rptr. 764, 349 P.2d 532* ; *People v. Corica (1942) 55 Cal. App. 2d 130, 134-135, 130 P.2d 164*

Gist of tort action is damage resulting to plaintiff from overt act pursuant to common design while gist of crime is agreement to commit unlawful act. *De Vries v. Brumback (1960) 53 Cal. 2d 643, 649, 2 Cal. Rptr. 764, 349 P.2d 532*

[4] Defenses

Liability for conspiracy does not include one who does not share common purpose with alleged coconspirators but who merely suspected or had knowledge of their common purpose. *Harris v. Capitol Records Distrib. Corp. (1966) 64 Cal. 2d 454, 462, 50 Cal. Rptr. 539, 413 P.2d 139*

Defense that officers or agents of corporation cannot conspire with corporation when acting on its behalf and not for their individual advantage was not available because officers of corporation acted in dual capacity as corporate officers and as administrators of pension fund. *Hannon Eng'g, Inc. v. Reim (1981) 126 Cal. App. 3d 415, 428, 179 Cal. Rptr. 78*

Agents or employees of corporation sued as such along with corporation are not conspirators for acts perpetrated by them while acting in official capacities on behalf of corporation rather than as individuals acting for own individual advantage. *Black v. Bank of Am. (1994) 30 Cal. App. 4th 1, 4-6, 35 Cal. Rptr. 2d 725* ; Zumbrun v. University of So. Cal. (1972) 25 Cal. App. 3d l, 12-13, *101 Cal. Rptr. 499* ; *Wise v. Southern Pac. Co. (1963) 223 Cal. App. 2d 50,*

72-73, 35 Cal. Rptr. 652 , overruled on other grounds, Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 510, 521, 869 P.2d 454

Mere knowledge, acquiescence, or approval of action taken by one or more of conspirators, without cooperation or agreement to cooperate is insufficient to implicate one for conspiracy. *Wetherton v. Growers Farm Labor Ass'n (1969) 275 Cal. App. 2d 168, 176, 79 Cal. Rptr. 543 , overruled on other grounds, Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521, 869 P.2d 454*

Commission of crime of obstruction of justice through suborning of perjury, perjury, or concealment of documentary evidence, does not give rise to cause of action aside from defamation or malicious prosecution. *Agnew v. Parks (1959) 172 Cal. App. 2d 756, 765, 343 P.2d 118*

Action for conspiracy not maintainable if, to be established, plaintiff must rely on illegal act or transaction to which he or she is party. *Huber v. Peek-A-Boot, Inc. (1961) 189 Cal. App. 2d 512, 515, 11 Cal. Rptr. 467*

Exoneration of actor in conspiracy precludes liability of any co-conspirators. *Peterson v. Cruickshank (1956) 144 Cal. App. 2d 148, 163-164, 300 P.2d 915* ; *Vargas v. Giacosa (1953) 121 Cal. App. 2d 521, 525, 263 P.2d 840 ,overruled on other grounds, Hardy v. Vial (1957) 48 Cal. 2d 577, 581, 311 P.2d 494*

Conspiracy to induce breach of contract that is unenforceable because unlawful does not give rise to cause of action. *Mindenberg v. Carmel Film Prod. (1955) 132 Cal. App. 2d 598, 602, 282 P.2d 1024*

[5] Damage Requirement

Gist of action charging civil conspiracy is not conspiracy but damage suffered. *Orloff v. Metropolitan Trust Co. (1941) 17 Cal. 2d 484, 488, 110 P.2d 396* ; *Bank of Cal. v. Pan Am. Tire Corp. (1982) 132 Cal. App. 3d 843, 848, 183 Cal. Rptr. 470*

Allegation of casual connection between alleged delicts on part of defendants and damages claimed is required. *Zumbrun v. University of So. Cal. (1972) 25 Cal. App. 3d 1, 12, 101 Cal. Rptr. 499*

Complaint containing no allegation showing damage caused by wrongful conduct of alleged conspirators is defective. *Straughter v. Safety Sav. & Loan Ass'n (1966) 244 Cal. App. 2d 159, 163, 52 Cal. Rptr. 871*

[6] Definition and Nature

To be conspirator requires one to share common purpose with another, not merely to suspect or have knowledge of other party's private purpose. *Harris v. Capitol Records Distrib. Corp. (1966) 64 Cal. 2d 454, 462, 50 Cal. Rptr. 539, 413 P.2d 139*

Conspiracy is combination of two or more persons to accomplish by concerted action a criminal or unlawful purpose or a lawful purpose by criminal or unlawful means. *Parkinson Co. v. Building Trades Council (1908) 154 Cal. 581, 593,*

98 P. 1027 ; *Peskin v. Squires (1957) 156 Cal. App. 2d 240, 246, 319 P.2d 405*

Civil action for conspiracy is precluded if object in view of conspiracy is lawful and no unlawful means are used, even though damage results and defendants acted with malicious motives. *Keniston v. American Nat'l Ins. Co. (1973) 31 Cal. App. 3d 803, 811, 107 Cal. Rptr. 583* ; *Riner v. Paskan (1963) 213 Cal. App. 2d 499, 504, 28 Cal. Rptr. 846*

Conspiracy requires that purpose to be effected by it be unlawful in its nature or in means to be employed for its accomplishment. *Keniston v. American Nat'l Ins. Co. (1973) 31 Cal. App. 3d 803, 811, 107 Cal. Rptr. 583*

Civil conspiracy allegation does not state cause of action for independent tort. *Minniear v. Tors (1968) 266 Cal. App. 2d 495, 506, 72 Cal. Rptr. 287*

Action for damages for conspiracy requires determination whether pleaded facts show something as done that, without conspiracy, would give rise to cause of action. *Tietz v. Los Angeles Unified Sch. Dist. (1965) 238 Cal. App. 2d 905, 913, 48 Cal. Rptr. 245*

Actionability of combination requires that purpose to be effected by conspiracy be unlawful in its nature or in means to be employed for its accomplishment. *Riner v. Paskan (1963) 213 Cal. App. 2d 499, 504, 28 Cal. Rptr. 846*

Damages do not flow from conspiracy unless conspirators do some unlawful act or injure plaintiff by unlawful means; absent allegation of such unlawfulact or injury, conspiracy complaint fails to state cause of action. *Williams v. Smith (1954) 127 Cal. App. 2d 607, 613, 274 P.2d 204*

[7] Elements of Cause of Action

Elements of action for damage based on civil conspiracy are formation and operation of conspiracy and damage resulting to plaintiff from act or acts done in furtherance of common design; cause of action is for damage suffered. *Mox Inc. v. Woods (1927) 202 Cal. 675, 677, 262 P. 302* ; *Rogers v. Grua (1963) 215 Cal. App. 2d 1, 8, 30 Cal. Rptr. 39*

[8] Evidence

Evidence was insufficient to establish probability of prevailing on conspiracy claim because nothing unlawful was agreed to in memo or phone conversation and there was no proof that cross-defendant ever received, agreed with, or agreed to act on another memo that could be construed as calling for unlawful boycott. *Wilcox v. Superior Court (1994) 27 Cal. App. 4th 809, 828-829, 33 Cal. Rptr. 2d 446*

Statements of conspirators made after commission of crime that was object of conspiracy are admissible if evidence shows that conspiracy also contemplated payment of certain sum to accessory for accessory's partnership in crime. *Downey Sav. & Loan Ass'n v. Ohio Casualty Ins. Co. (1987) 189 Cal. App. 3d 1072, 1091, 234 Cal. Rptr. 835 , superseded by statute on other grounds as stated in* Yang v. Peoples Benefit Ins. Co., 2007 U.S. Dist. LEXIS 41331

[9] Formation and Operation

Conspiracy is not necessarily result of express agreement, but rests on tacit assent and acquiescence inferred from circumstances. *Chicago Title Ins. Co. v. Great W. Fin. Corp. (1968) 69 Cal. 2d 305, 316, 70 Cal. Rptr. 849, 444 P.2d 481*

Fact or scope of conspiracy is inferable from nature of acts done, relations of parties, interests of alleged conspirators, and other circumstances. *Chicago Title Ins. Co. v. Great W. Fin. Corp. (1968) 69 Cal. 2d 305, 316, 70 Cal. Rptr. 849, 444 P.2d 481* ; *Wetherton v. Growers Farm Labor Ass'n (1969) 275 Cal. App. 2d 168, 176, 79 Cal. Rptr. 543* , *overruled on other grounds, Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521, 869 P.2d 454*

Conspiracy count was properly dismissed because record did not show knowledge of intent on part of conspirators to commit wrongful acts. *Holder v. Home Sav. & Loan Ass'n (1968) 267 Cal. App. 2d 91, 108, 72 Cal. Rptr. 704*

Agreement on which charge of civil conspiracy is based is required to have been entered into by persons who knew of conspiracy and its unlawful purpose. *Beeler v. West Am. Fin. Co. (1962) 201 Cal. App. 2d 702, 707, 20 Cal. Rptr. 190*

[10] Joining Existing Conspiracy

One who joins existing conspiracy is liable for every act previously or subsequently done by any coconspirator in pursuance of conspiracy. de *De Vries v. Brumback (1960) 53 Cal. 2d 643, 648, 2 Cal. Rptr. 764, 349 P.2d 532*

To maintain cause of action on theory of vicarious liability arising out of joining already-formed conspiracy, plaintiff must allege subsequent joiner's knowledge of object and purpose of conspiracy, agreement to injure plaintiff, meeting of minds on objective and course of action, and act, committed by at least one conspirator, that resulted in injury. *Schick v. Lerner (1987) 193 Cal. App. 3d 1321, 1328, 238 Cal. Rptr. 902*

[11] Jury Instruction

Jury instruction requested by plaintiff implying that person could be held liable for "aiding and abetting" commission of tort was inadequate; instruction is required to state elements of knowledge and intent, both of which are required for liability as cotortfeasor under concerted action theory. *Gerard v. Ross (1988) 204 Cal. App. 3d 968, 983, 251 Cal. Rptr. 604*

Jury instruction given by trial court properly reflected requirement that defendant agree to commit civil wrong and that knowledge of unlawful purpose is necessary part of such agreement. *Sprague v. Equifax, Inc. (1985) 166 Cal. App. 3d 1012, 1045-1046, 213 Cal. Rptr. 69*

Erroneous jury instruction, which implied that conspiracy could be inferred from similarity of conduct, association, and discussion of common means and interests, was insufficient grounds for new trial when, in spite of potential prejudice to defendants, jury entered verdict in their favor, so instruction did not in fact mislead jury. *Bristow v. Ferguson (1981) 121 Cal. App. 3d 823, 826-827, 175 Cal. Rptr. 571*

[12] Liability as Joint Tortfeasors

If two or more persons agree to perform wrongful act, civil liability is incurred by all for resulting damages, regardless of whether they actually commit tort themselves. *Barney v. Aetna Cas. & Sur. Co. (1986) 185 Cal. App. 3d 966, 982, 230 Cal. Rptr. 215* ; *see also Saunders v. Superior Court (1994) 27 Cal. App. 4th 832, 845, 33 Cal. Rptr. 2d 438*

All who, in pursuance of common plan or design to commit wrong, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to wrongdoer, or who ratify and adopt wrongdoer's acts for their benefit are equally liable with that party as joint tortfeasors. *Orser v. George (1967) 252 Cal. App. 2d 660, 667, 60 Cal. Rptr. 708*

Mere knowledge by one party of what other party is doing is not sufficient concert to make that party liable for acts of other party because one ordinarily owes no duty to act affirmatively to interfere with another's acts in absence of special relationship. *Orser v. George (1967) 252 Cal. App. 2d 660, 667, 60 Cal. Rptr. 708*

[13] Liability of Agents

Exception to agent's immunity rule holds corporate agents or employees liable for conspiring with corporation, despite acting on behalf of corporation, if they owe duty to plaintiff independent of corporation's duty. *Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 511-514, 28 Cal. Rptr. 2d 475, 869 P.2d 454* ; *see also Doctors' Co. v. Superior Court (1989)49 Cal. 3d 39, 48, 260 Cal. Rptr. 183, 775 P.2d 508* ; *Younan v. Equifax Inc. (1980) 111 Cal. App. 3d 498, 516-517, 169 Cal. Rptr. 478* ; *but see Black v. Bank of Am. (1994) 30 Cal. App. 4th 1, 4-6, 35 Cal. Rptr. 2d 725* (questioning potential breadth of exception and holding that it did not apply to allegation of conspiracy between corporation and its own employees)

Employees or agents not liable for conspiracy to cause their principal to violate duty that is binding on principal alone. *Doctors' Co. v. Superior Court (1989) 49 Cal. 3d 39, 48, 260 Cal. Rptr. 183, 775 P.2d 508*

Agent's immunity rule provides that agents and employees of corporation cannot conspire with corporate principal or employer if they are acting in official capacities on behalf of corporation, and not acting either as individuals for individual advantage or beyond scope of their authority; corporation is legal fiction that cannot act at all except through employees and agents, whose acts are acts of corporation; corporation is not able to conspire with itself any more than private individual can. *Black v. Bank of Am. (1994) 30 Cal. App. 4th 1, 4-6, 35 Cal. Rptr. 2d 725* ; *see also Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 512 n.4, 28 Cal. Rptr. 2d 475, 869 P.2d 454*

Conduct of defendants allegedly supporting liability under civil "aiding and abetting" cause of action is within ambit of *Civ. Code § 1714.10* requirement of prefiling order in action against attorney based on conspiracy with client. *Howard v. Superior Court (1992) 2 Cal. App. 4th 745, 749, 3 Cal. Rptr. 2d 575* (interpreting statute before 1991 amendment limiting scope of requirement)

Agents and employees of insurer, although not parties to insurance contract, are liable for conspiracy if they join insurer in plan to defraud insured. *Younan v. Equifax Inc. (1980) 111 Cal. App. 3d 498, 511, 169 Cal. Rptr. 478*

Person acting solely as agent is liable for participation in conspiracy to commit civil wrong even though unacquainted with details of scheme. *Revert v. Hesse (1920) 184 Cal. 295, 302-303, 193 P. 943* ; *Wetherton v. Growers Farm*

Labor Ass'n (1969) 275 Cal. App. 2d 168, 177, 79 Cal. Rptr. 543 , overruled on other grounds, Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521, 869 P.2d 454

Estate not liable for tort committed by trustee, executor, or administrator; entry into conspiracy on part of administrator of estate is merely personal wrong on part of administrator. *Rapaport v. Forer (1937) 20 Cal. App. 2d 271, 278, 66 P.2d 1242*

[14] Liability of Conspirators

Advantage gained in alleging conspiracy is that act of one during conspiracy is act of all if done in furtherance of conspiracy. *Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815, 498 P.2d 1063 , superseded by statute on other grounds as stated in Hendy v. Losse (1991) 54 Cal. 3d 723, 731-732, 1 Cal. Rptr. 2d 543* ; *Mox Inc. v. Woods (1927) 202 Cal. 675, 677, 262 P. 302*

Effect of alleging unitary action inherent in allegations of conspiratorial conduct is implicating all participating in common design and thus fastening liability on those who agree to plan to commit wrong as well as those who actually carry it out. *Chicago Title Ins. Co. v. Great W. Fin. Corp. (1968)69 Cal. 2d 305, 316, 70 Cal. Rptr. 849, 444 P.2d 481* ; *Black v. Sullivan (1975) 48 Cal. App. 3d 557, 566, 122 Cal. Rptr. 119*

Liability of defendant as conspirator does not require that defendant join conspiracy at time of its inception. *De Vries v. Brumback (1960) 53 Cal. 2d 643, 648, 2 Cal. Rptr. 764, 349 P.2d 532*

Conspirator is jointly and severally liable with other conspirators, even if no overt act committed by him or her and no benefit received. *Lomita Land & Water Co. v. Robinson (1908) 154 Cal. 36, 46, 97 P. 10* ; *Prince v. Harting (1960) 177 Cal. App. 2d 720, 728, 2 Cal. Rptr. 545*

All parties to civil conspiracy to defraud are directly liable for all misrepresentations made pursuant thereto as are persons who knowingly aid and abet fraud or furnish means for accomplishment. *People v. Bestline Prod., Inc. (1976) 61 Cal. App. 3d 879, 918, 132 Cal. Rptr. 767*

Joint liability attaches if joint project to do wrongful act is carried out and damage results. *Wetherton v. Growers Farm Labor Ass'n (1969) 275 Cal. App. 2d 168, 175, 79 Cal. Rptr. 543 , overruled on other grounds, Applied Equip. Corp. v. Litton Saudi Arabia (1994) 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454*

Release or dismissal of action as to one conspiring joint tortfeasor does not operate to release other tortfeasors from liability. *Wetherton v. Growers Farm Labor Ass'n (1969) 275 Cal. App. 2d 168, 177, 79 Cal. Rptr. 543 , overruled on other grounds, Applied Equip. Corp. v. Litton Saudi Arabia (1994) 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454*

Release of one conspiring joint tortfeasor reduces claims against those not released to extent relief is obtained under release. *Wetherton v. Growers Farm Labor Ass'n (1969) 275 Cal. App. 2d 168, 177, 79 Cal. Rptr. 543 , overruled on other grounds, Applied Equip. Corp. v. Litton Saudi Arabia (1994) 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454*

Representations of one conspirator made in pursuance of conspiracy are binding on others. *Penziner v. West Am. Fin. Co. (1933) 133 Cal. App. 578, 586, 24 P.2d 501*

[15] Mere Conspiracy as Not Actionable

Civil conspiracy is neither separate tort nor ground for civil action unless wrongful act committed with damages flowing from it. *Archibald v. Cinerama Haw. Hotels, Inc. (1977) 73 Cal. App. 3d 152, 160, 140 Cal. Rptr. 599 , overruled on other grounds, Koire v. Metro Car Wash (1985) 40 Cal. 3d 24, 219 Cal. Rptr. 133, 707 P.2d 195*

Verdict for plaintiff on count of conspiracy to commit tort is inconsistent with verdict for defendant on count alleging tort from which liability for conspiracy is derived. *Manor Inv. Co. v. F. W. Woolworth Co. (1984) 159 Cal. App. 3d 586, 596, 206 Cal. Rptr. 37 , disapproved on other grounds, Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521, 28 Cal. Rptr. 2d 475, 869 P.2d 454*

[16] Particular Wrongs

[a] Abduction of Child

Allegation that defendant conspired with child's father to abduct child, conceal child from her mother, and deprive mother of child's society and servicesstated cause of action. *Rosefield v. Rosefield (1963) 221 Cal. App. 2d 431, 434-436, 34 Cal. Rptr. 479*

[b] Assault and Battery

Plaintiffs lacked evidence that off-duty and on-duty law enforcement officers agreed to commit battery on plaintiffs and then engage in cover-up. *Choate v. County of Orange (2000) 86 Cal. App. 4th 312, 333-334, 103 Cal. Rptr. 2d 339*

Conspiracy to commit assault and battery inferred in course of union elections. *Balistreri v. Turner (1964) 227 Cal. App. 2d 236, 242, 38 Cal. Rptr. 553*

Conspiracy to commit assault and battery by committing abortions. *Sayadoff v. Warda (1954) 125 Cal. App. 2d 626, 629, 271 P.2d 140*

[c] Breach of Contract

Cause of action for conspiracy to breach contract or to induce breach of contract does not exist against party to contract because party to contract legally incapable of committing tort of interference with contract. *Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 510, 514, 28 Cal. Rptr. 2d 475, 869 P.2d 454* (rejecting *Wise v. Southern Pac. Co. (1963) 223 Cal. App. 2d 50, 72, 35 Cal. Rptr. 652*)

[d] Civil Rights Violations

Conspiracy to discriminate on basis of race in housing purchase. *Wagner v. O'Bannon (1969) 274 Cal. App. 2d 121, 132, 79 Cal. Rptr. 44*

[e] Concealment of Cause of Action

Conspiracy to conceal and defeat plaintiff's common law action for damages. *Ramey v. General Petroleum Corp. (1959) 173 Cal. App. 2d 386, 403, 343 P.2d 787*

[f] Conversion

Conspiracy to convert property of another is continuing concert of action. de *Vries v. Brumback (1960) 53 Cal. 2d 643, 647, 2 Cal. Rptr. 764, 349 P.2d 532*

Party who joins and participates in continuing conspiracy to convert stolen property with knowledge of prior criminal acts of coconspirators is civilly liable as joint tortfeasor for prior acts of coconspirators. *De Vries v. Brumback (1960) 53 Cal. 2d 643, 648-650, 2 Cal. Rptr. 764, 349 P.2d 532*

Allegation of ouster of plaintiff by plaintiff's partner and third parties in pursuance of conspiracy and that defendants took possession of partnership party and converted it to their use, depriving plaintiff of any further use of it, was basis for cause of action. *Moropoulos v. C.H. & O.B. Fuller Co. (1921) 186 Cal. 679, 685, 200 P. 601*

Conspiracy to convert metal belonging to employer, sell it, and divide proceeds. *Arch Rib-Summerbell Steel Fabricators v. Lubliner (1960) 183 Cal. App. 2d 593, 595, 7 Cal. Rptr. 94*

Conspiracy to deprive partner of possession of partnership property. *Ellis v. Navarro (1943) 61 Cal. App. 2d 755, 759, 143 P.2d 735*

Allegation of ouster of plaintiff by plaintiff's partner and third parties in pursuance of conspiracy and that defendants took possession of partnership property and converted same to their use depriving plaintiff of any further use thereof as basis for cause of action. *Moropoulos v. C.H. & O.B. Fuller Co. (1921) 186 Cal. 679, 685, 200 P. 601*

[g] Defamation

Conspiracy to slander. *Rodriguez v. North Am. Aviation, Inc. (1967) 252 Cal. App. 2d 889, 893, 61 Cal. Rptr. 579*

Conspiracy to commit libel followed by publication of libelous matter. *Farr v. Bramblett (1955) 132 Cal. App. 2d 36, 47, 281 P.2d 372 , overruled on other grounds, Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 77 Cal. Rptr. 243, 453 P.2d 747*

Conspiracy to defame sufficiently alleged. *Schessler v. Keck (1954) 125 Cal. App. 2d 827, 833, 271 P.2d 588*

[h] False Imprisonment

Finding of conspiracy on part of defendant requires concert of action to detain unlawfully without consent, action in furtherance of common scheme or design to imprison falsely, and knowledge by defendant of conspiracy and its

unlawful purpose. *Peterson v. Cruickshank (1956) 144 Cal. App. 2d 148, 163, 300 P.2d 915*

[i] Fraud in Advertising

Civil conspiracy to defraud through false advertising. *People v. Bestline Prod., Inc. (1976) 61 Cal. App. 3d 879, 918, 132 Cal. Rptr. 767*

[j] Fraud in Real Estate

Conspiracy to defraud by land scheme. *Mox Inc. v. Woods (1927) 202 Cal. 675, 677, 262 P. 302*

Liability of person conspiring with promoters of corporation to take secret profits from sale of land to corporation. *Lomita Land & Water Co. v. Robinson (1908) 154 Cal. 36, 45, 97 P. 10*

Action against real estate broker and broker's associates for secret profits made on exercise of option to buy plaintiff's property. *Zikratch v. Stillwell (1961) 196 Cal. App. 2d 535, 541-542, 16 Cal. Rptr. 660*

In violating fiduciary obligation to principal and making secret profit in real estate transaction, broker and coconspirators assisting broker were equally liable for consequences of conspiracy, regardless of extent of participation or share of profits obtained. *Anderson v. Thacher (1946) 76 Cal. App. 2d 50, 72, 172 P.2d 533*

False statement by owner of property regarding its value. *Vah Dah Dunshee v. Boadway (1932) 119 Cal. App. 678, 684, 7 P.2d 325*

[k] Fraud in Settling Debt

Conspiracy inducing plaintiff to settle indebtedness for less than amount due and to reduce rental payments. *Campbell v. Birch (1942) 19 Cal. 2d 778, 782, 122 P.2d 902*

[l] Fraud of Fiduciary

One who knowingly aids and abets fiduciary to make secret profits is liable jointly with fiduciary. *Fink v. Weisman (1933) 129 Cal. App. 305, 317, 18 P.2d 961*

[m] Fraud on Creditors

Debtor and those who conspire with debtor to conceal assets to defraud creditors are guilty of tort and liable in damages. *Taylor v. S & M Lamp Co. (1961) 190 Cal. App. 2d 700, 706, 12 Cal. Rptr. 323*

[n] Fraud Through False Testimony

Conspiracy to defraud plaintiff by having doctor falsely represent to plaintiff and court in malpractice action that doctor was disinterested witness. *Agnew v. Parks (1959) 172 Cal. App. 2d 756, 765-769, 343 P.2d 118*

Conspiracy to have doctor falsely represent that doctor was disinterested and unprejudiced witness and would give independent testimony. *Agnew v. Parks (1959) 172 Cal. App. 2d 756, 767-775, 343 P.2d 118*

[o] Harassment

Conspiracy by landlord and others to harass tenants. *Barkett v. Brucato (1953) 122 Cal. App. 2d 264, 274, 264 P.2d 978*

[p] Inducing Breach of Lease

Inducing another to breach lease pursuant to conspiracy is tort. *McWilliams v. Holton (1967) 248 Cal. App. 2d 447, 452-453, 56 Cal. Rptr. 574*

[q] Insurance Bad Faith

Insurer's attorney was not liable for conspiracy based on conduct involving only insurer's duty to plaintiff; agent's conduct is wrongful only if independent duty to plaintiff is breached. *Doctors' Co. v. Superior Court (1989) 49 Cal. 3d 39, 45-47, 260 Cal. Rptr. 183, 775 P.2d 508* (distinguishing cases in which agent could be liable for breaching fiduciary duty owed directly to plaintiff or for acting as individual for individual advantage)

Conspiracy existed between insurer and attorney hired by insurer on behalf of insured to induce third party to file dismissal of civil action against insured with prejudice, thereby derogating insured's rights against third party. *Barney v. Aetna Cas. & Sur. Co. (1986) 185 Cal. App. 3d 966, 981-983, 230 Cal. Rptr. 215* (action for insurance bad faith and legal malpractice)

[r] Interference With Contractual Relationship

Cause of action for conspiracy to breach contract or to induce breach of contract does not exist against party to contract because party to contract legally incapable of committing tort of interference with contract. *Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 510, 514, 28 Cal. Rptr. 2d 475, 869 P.2d 454* (rejecting *Wise v. Southern Pac. Co. (1963) 223 Cal. App. 2d 50, 71-72, 35 Cal. Rptr. 652*)

Intentional interference by third person with contractual relationship, either by unlawful means or by means otherwise lawful if there is lack of sufficient justification, is actionable in tort. *Herron v. State Farm Mut. Ins. Co. (1961) 56 Cal. 2d 202, 205, 14 Cal. Rptr. 294, 363 P.2d 310* ; *Wise v. Southern Pac. Co. (1963) 223 Cal. App. 2d 50, 65, 35 Cal. Rptr. 652*

Action arising from conspiracy to interfere with real estate broker's contractual relationship was stated by general allegation of formation of conspiracy, defendant's wrongful acts, and damage to plaintiff by breach. *Allen v. Powell (1967) 248 Cal. App. 2d 502, 508-509, 56 Cal. Rptr. 715*

Depriving plaintiff of commission through acts pursuant to conspiracy is intentional interference with contractual relationship and is actionable. *Rogers v. Grua (1963) 215 Cal. App. 2d 1, 7, 8, 30 Cal. Rptr. 39*

Conspiracy to deprive broker of commission of sale. *California Auto Court Ass'n v. Cohn (1950) 98 Cal. App. 2d 145, 149, 219 P.2d 511*

[s] Interference With Joint Venture

Cause of action stated against defendants conspiring to interfere and wrongfully interfering with plaintiffs' contractual joint venture relationship. *Di Lorenzo v. Stewart Title Guar. Co. (1965) 232 Cal. App. 2d 839, 842, 43 Cal. Rptr. 261*

Conspiracy to appropriate and convert assets and profits of joint venture and interest of plaintiff therein. *Greenwood v. Mooradian (1955) 137 Cal. App. 2d 532, 540-542, 290 P.2d 955*

[t] Interference With Partnership Relationship

Allegation of ouster of plaintiff by plaintiff's partner and third parties in pursuance of conspiracy and that defendants took possession of partnership party and converted it to their use, depriving plaintiff of any further use of it, was basis for cause of action. *Moropoulos v. C.H. & O.B. Fuller Co. (1921) 186 Cal. 679, 685, 200 P. 601*

Conspiracy to deprive partner of possession of partnership property. *Ellis v. Navarro (1943) 61 Cal. App. 2d 755, 759, 143 P.2d 735*

[u] Interference With Real Property Sale

Action by vendees of real property against conspirators who induced vendor not to go forward with sale. *Duff v. Engelberg (1965) 237 Cal. App. 2d 505, 508, 47 Cal. Rptr. 114*

[v] Preventing Close of Escrow

Duty of trust deed beneficiary or assignee in conspiracy to prevent close of escrow. *Black v. Sullivan (1975) 48 Cal. App. 3d 557, 567, 122 Cal. Rptr. 119*

[w] Products Liability

Absent endorsement or sponsorship for economic gain, publisher of advertisement has no duty to investigate safety of advertised product; thus, no cause of action for conspiracy was stated against publisher based on injuries sustained from use of product. *Walters v. Seventeen Magazine (1987) 195 Cal. App. 3d 1119, 1121-1122, 241 Cal. Rptr. 101*

[x] Rendering Stock Worthless

Cause of action was stated against persons conspiring to commit tortious acts to wreck corporation and render worthless stock held by plaintiffs. *Price v. Hibbs (1964) 225 Cal. App. 2d 209, 218-221, 37 Cal. Rptr. 270*

[y] Restraining Practice of Profession

Action for damages for unfair trade practices and combinations in restraint of trade. *Chicago Title Ins. Co. v. Great W. Fin. Corp. (1968) 69 Cal. 2d 305, 312-318, 70 Cal. Rptr. 849, 444 P.2d 481*

Cause of action for interference is stated by complaint that denial of doctor's right of access to hospital resulting from conspiracy designed to restrain competition and deprive doctor of practice to benefit competing members of conspiracy. *Willis v. Santa Ana Cmty. Hosp. Ass'n (1962) 58 Cal. 2d 806, 810, 26 Cal. Rptr. 640, 376 P.2d 568 , overruled on other grounds, Cianci v. Superior Court (1985) 40 Cal. 3d 903, 221 Cal. Rptr. 575, 710 P.2d 375*

If only act in furtherance of conspiracy was association's repeated and forceful urging of member real estate firms to use contract, substantial evidence to show unlawful combination between association and firms to fix prices and restrain trade was lacking if salesperson was required by firm to sign form contract that set amount of commission earned on sales. *Bartley v. California Ass'n of Realtors (1980) 115 Cal. App. 3d 930, 935, 173 Cal. Rptr. 284*

Bus. & Prof. Code § 2392.5 requires private hospitals to be governed by same criteria as public hospitals, which may not exclude doctor except for cause and must grant hearing to determine whether doctor's qualifications meet legal requirements. *Ascherman v. San Francisco Med. Soc'y (1974) 39 Cal. App. 3d 623, 640-649, 114 Cal. Rptr. 681*

Evidence was sufficient to permit inference as to conspiracy to injure doctor in practice of profession. *Ascherman v. San Francisco Med. Soc'y (1974) 39 Cal. App. 3d 623, 655-662, 114 Cal. Rptr. 681*

[z] Running of Statute of Limitations

Conspiracy by plaintiff's attorney and indemnity company and indemnity company's attorney to allow statute of limitations to run. *Hege v. Worthington, Park & Worthington (1962) 209 Cal. App. 2d 670, 678-679, 26 Cal. Rptr. 132*

[aa] Violation of Fiduciary Duty

Fraudulent partner, as fiduciary, liable with coconspirators who owed no fiduciary duty to plaintiff partner. *Prince v. Harting (1960) 177 Cal. App. 2d 720, 731, 2 Cal. Rptr. 545*

Assisting real estate broker in violating fiduciary obligation to principal by making secret profit. *Anderson v. Thacher (1946) 76 Cal. App. 2d 50, 72, 172 P.2d 533*

[bb] Violation of Labor Code

Loss of employment pursuant to conspiracy to violate plaintiffs' rights under Labor Code is actionable. *Wetherton v. Growers Farm Labor Ass'n (1969) 275 Cal. App. 2d 168, 174-176, 79 Cal. Rptr. 543 , overruled on other grounds, Applied Equip. Corp. v. Litton Saudi Arabia (1994) 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454*

[17] Pleading Cause of Action

Statement of cause of action for conspiracy requires allegation of: (1) formation and operation of conspiracy; (2) wrongful act or acts done pursuant thereto; and (3) damage resulting from such acts. *Bartley v. California Ass'n of*

Realtors (1980) 115 Cal. App. 3d 930, 934, 173 Cal. Rptr. 284 ; *Wise v. Southern Pac. Co. (1963) 223 Cal. App. 2d 50, 64-65, 35 Cal. Rptr. 652 , overruled on other grounds, Applied Equip. Corp. v. Litton Saudi Arabia (1994) 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454*

Allegation of "conspiracy" not required if cause of action based on conspiracy arises out of some wrongful act committed by one or more conspirators and complaint alleges wrongful act. *Hege v. Worthington, Park & Worthington (1962) 209 Cal. App. 2d 670, 678, 26 Cal. Rptr. 132*

General allegation of conspiracy in restraint of trade, without statement of facts constituting conspiracy, was legal conclusion only and insufficient to constitute cause of action for damages for civil conspiracy. *Chicago Title Ins. Co. v. Great W. Fin. Corp. (1968) 69 Cal. 2d 305, 316-317, 70 Cal. Rptr. 849, 444 P.2d 481*

Pleading of civil conspiracy is merely procedural method of joining defendants and as superfluous if concurrent or successive acts are alleged, unless plaintiff cannot show or prove each defendant committed wrongful act or some part of it; consequently, dismissal of one defendant does not release others. *Barney v. Aetna Cas. & Sur. Co. (1986) 185 Cal. App. 3d 966, 983, 230 Cal. Rptr. 215*

Trial court's granting of nonsuit on cause of action based on civil conspiracy to induce breach of contract is proper if defendants could not be liable for breach of contract. *Short v. Nevada Joint Union High Sch. Dist. (1985) 163 Cal. App. 3d 1087, 1101-1102, 210 Cal. Rptr. 297*

Cause of action based on civil conspiracy accrues on date of commission of last overt act in pursuance of conspiracy and thus plaintiff must allege whenlast overt act took place. *Bedolla v. Logan & Frazer (1975) 52 Cal. App. 3d 118, 136-137, 125 Cal. Rptr. 59*

Malice, express or implied, is essential element in action for slander of title and conspiracy to slander title. *Alhambra Consol. Mines, Inc. v. Alhambra, Shumway Mines, Inc. (1966) 239 Cal. App. 2d 590, 597, 49 Cal. Rptr. 38*

Complaint alleging plaintiff was judgment creditor of third persons who were possessed of assets, but that on specified date defendant conspired with debtors in concealing such assets and thus prevented plaintiff from recovering on judgment, thereby damaging plaintiff in stated amount, is sufficient to state cause of action. *Taylor v. S & M Lamp Co. (1961) 190 Cal. App. 2d 700, 705-706, 12 Cal. Rptr. 323*

General allegation that defendants "did agree together" to commit specified wrongful acts is sufficient to allege conspiracy. *Greenwood v. Mooradian (1955) 137 Cal. App. 2d 532, 535-537, 290 P.2d 955*

Allegation of acts constituting conspiracy, as distinguished from acts done pursuant to conspiracy and inflicting wrong, are not required to be alleged. *Greenwood v. Mooradian (1955) 137 Cal. App. 2d 532, 537, 538, 290 P.2d 955*

Allegation of ultimate fact that defendants "conspired together" to commit specified wrongful acts is sufficient to allege conspiracy. *Farr v. Bramblett (1955) 132 Cal. App. 2d 36, 47, 281 P.2d 372 , overruled on other grounds, Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 77 Cal. Rptr. 243, 453 P.2d 747*

[18] Proof of Conspiracy

Conspiracy is inferrable from nature of acts done, relations of parties, interests of alleged conspirators, and other circumstances. *Chicago Title Ins. Co. v. Great W. Fin. Corp. (1968) 69 Cal. 2d 305, 316, 70 Cal. Rptr. 849, 444 P.2d 481* ; *Black v. Sullivan (1975) 48 Cal. App. 3d 557, 566-567, 122 Cal. Rptr. 119*

Plaintiff presented sufficient evidence from which jury could infer that insurance holding company conspired with insurance company, adjusters, and doctor to arrange inadequate medical examination and to produce false conclusion to deprive insured of claim benefits without adequate cause. *Sprague v. Equifax, Inc. (1985) 166 Cal. App. 3d 1012, 1027-1029, 213 Cal. Rptr. 69*

Evidence that defendants met and actually agreed to undertake performance of unlawful act is not necessary. *Black v. Sullivan (1975) 48 Cal. App. 3d 557, 567, 122 Cal. Rptr. 119*

Participation in wrongful project by one who claimed merely to be an advisor is inferrable from statements by that party. *Wetherton v. Growers Farm Labor Ass'n (1969) 275 Cal. App. 2d 168, 176-177, 79 Cal. Rptr. 543 , overruled on other grounds, Applied Equip. Corp. v. Litton Saudi Arabia (1994) 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454*

Civil conspiracy not necessarily based on expressed agreement. *Wagner v. O'Bannon (1969) 274 Cal. App. 2d 121, 132, 79 Cal. Rptr. 44*

Combination shown by circumstantial evidence such as strange manner by which plaintiffs' offer to purchase house was handled by defendants, and record as whole supported inference that there was group plan or understanding. *Wagner v. O'Bannon (1969) 274 Cal. App. 2d 121, 132, 79 Cal. Rptr. 44*

Conspiracy not necessarily result of express agreement but as resting on tacit assent and acquiescence. *Holder v. Home Sav. & Loan Ass'n (1968) 267 Cal. App. 2d 91, 108, 72 Cal. Rptr. 704*

Inclusion in conspiracy of one defendant not substantiated if that party acted in good-faith reliance on wrongful acts of actual conspirators and did not join in any wrongful acts or agreement. *General Adver. Agency, Inc. v. Komer (1967) 251 Cal. App. 2d 805, 811, 60 Cal. Rptr. 10*

Proof of conspiracy to defraud by circumstantial evidence. *Machado v. Katcher Meat Co. (1951) 108 Cal. App. 2d 1, 4-6, 237 P.2d 715*

Evidence that defendants were affiliated is excludable if there is no evidence of any civil wrong or unlawful act committed by defendants sufficient to sustain allegations of conspiracy against them. *Peterson v. Corporation of Am. (1937) 21 Cal. App. 2d 527, 532, 69 P.2d 904*

[19] Racketeer Influenced and Corrupt Organizations Act

Distribution of newspaper, even if newspaper contains injurious falsehood, is not act of "racketeering" for purposes of satisfaction of RICO requirement of illegal conduct. *Globe Int'l, Inc. v. Superior Court (1992) 9 Cal. App. 4th 393, 396, 12 Cal. Rptr. 2d 109*

"Control" requirement referred to in *18 U.S.C.S. § 1962(b)* is real, functional control, not mere business relationship. *Rosenthal v. Vogt (1991) 229 Cal. App. 3d 69, 78*

[20] Statute of Limitations

Cause of action based on civil conspiracy accrues on date of commission of last overt act in pursuance of conspiracy. *Wyatt v. Union Mortgage Co. (1979) 24 Cal. 3d 773, 786, 157 Cal. Rptr. 392, 598 P.2d 45* ; *Livett v. F.C. Fin. Assocs. (1981) 124 Cal. App. 3d 413, 418, 177 Cal. Rptr. 411* ; *Kenworthy v. Brown (1967) 248 Cal. App. 2d 298, 301, 56 Cal. Rptr. 461* ; *Schessler v. Keck (1954) 125 Cal. App. 2d 827, 832-833, 271 P.2d 588*

Action alleging conspiracy to defraud is governed by *Code Civ. Proc. § 338(d)*; delayed discovery rule of that section is applicable even if last overt act was committed more than three years before filing of action. *Aaroe v. First Am. Title Ins. Co. (1990) 222 Cal. App. 3d 124, 128-129, 271 Cal. Rptr. 434*

Action for conspiracy based on conversion is subject to three-year limitation period under *Code Civ. Proc. § 338(c). Maheu v. CBS, Inc. (1988) 201 Cal. App. 3d 662, 673, 247 Cal. Rptr. 304*

Action for damages for conspiracy to defraud is governed by three-year statute of limitations applicable to cause of action for fraud, former *Code Civ. Proc. § 338(4)* [*now see Code Civ. Proc. § 338(d)*]. *Livett v. F.C. Financial Associates (1981) 124 Cal. App. 3d 413, 418, 177 Cal. Rptr. 411* ; *Agnew v. Parks (1959) 172 Cal. App. 2d 756, 766, 343 P.2d 118*

Statute of limitations in action based on conspiracy is determined by nature of action in which conspiracy is alleged. *Bedolla v. Logan & Frazer (1975) 52 Cal. App. 3d 118, 136, 125 Cal. Rptr. 59*

Complaint alleging conspiracy to slander is subject to one-year statute of limitations, former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 340(c)*), and not barred if complaint alleges overt act causing damage within one year. *Rodriguez v. North Am. Aviation, Inc. (1967) 252 Cal. App. 2d 889, 892-894, 61 Cal. Rptr. 579*

Action for damages for conspiracy to induce breach of contract is governed by two-year statute of limitations, *Code Civ. Proc. § 339(1). Kenworthy v. Brown (1967) 248 Cal. App. 2d 298, 301, 56 Cal. Rptr. 461*

Action for damages for conspiracy tortiously to interfere with plaintiff's business as governed by two-year statute of limitations, *Code Civ. Proc. § 339(1). McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 591, 33 Cal. Rptr. 389*

Action for damages for conspiracy to violate personal rights by preventing doctor from testifying for plaintiff is

governed by one-year statute of limitations, former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 340(c)*). *Agnew v. Parks (1959) 172 Cal. App. 2d 756, 765, 343 P.2d 118*

Cause of action for conspiracy to defame is governed by one-year statute of limitations governing action for libel and slander, former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 340(c)*). *Schessler v. Keck (1954) 125 Cal. App. 2d 827, 832, 271 P.2d 588*

[21] Summary Judgment

Summary judgment in action alleging conspiracy is proper only if no triable issue of fact exists regarding formation and operation of conspiracy, wrongful act or acts done pursuant to conspiracy, and damage resulting from such acts. *Bank of Cal. v. Pan Am. Tire Corp. (1982) 132 Cal. App. 3d 843, 848, 183 Cal. Rptr. 470*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesInchoate CrimesConspiracyGeneral OverviewEvidenceHearsayExemptionsStatements by CoconspiratorsGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyElementsTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyRemedies

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13-126 California Forms of Pleading and Practice--Annotated § 126.34

§ 126.34 Law Reviews

Oakley, *From Hearsay to Eternity: Pendency and the Co-Conspirator Exception in California--Fact, Fiction, and a Novel Approach, 16 Santa Clara Law. 1 (1975)*

Note, *Civil Conspiracy and Interference With Contractual Relations, 8 Loy. L.A.L. Rev. 302 (1975)*

Dessent, *Bathtub Conspiracies: A Doctrinal Cleansing Is Needed, 9 San Diego L. Rev. 869 (1972)*

Comment, *Reason by Analogy: Agency Principles Justify Conspirators' Liability, 12 Stan. L. Rev. 476 (1960)*

Comment, *Conspiracy and Conspirators in California, 26 S. Cal. L. Rev. 64 (1952)*

Comment, *Civil Action for Interference With Federal Privilege and Immunity, 3 Stan. L. Rev. 142 (1950)*

Bonnett, *The Origin of the Labor Injunction--A Study of the Evolution of the Law of Conspiracy and Its Application to the Injunctive Process in the Light of the Conflict Between Combinations of Employers and Employees, 5 S. Cal. L. Rev. 105 (1931)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesInchoate CrimesConspiracyGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral Overview

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§ 126.35 Text References

Personal Injury: Actions, Defenses, Damages, Vol. 3, *Assault and Battery,* § 2.02 (Matthew Bender)

Personal Injury: Actions, Defenses, Damages, Vol. 8, *Conspiracies,* §§ 1-5 (Matthew Bender)

Personal Injury: Actions, Defenses, Damages, Vol. 20, *Mobs and Riots,* § 1.02[2] (Matthew Bender)

Witkin, California Procedure, vol. 5, *Pleading,* §§ 875-877 (4th ed. 1997)

Witkin, Summary of California Law, vol. 5, *Torts,* §§ 45-48 (10th ed. 2005)

12 Cal. Jur. 3d Civil Conspiracy §§ 1-6 (1974)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsAssault & BatteryDefensesTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral Overview

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[Reserved]

§§ 126.36[Reserved]

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PART IV. FORMS

13-126 California Forms of Pleading and Practice--Annotated § 126.50

§ 126.50 Complaint [Code Civ. Proc. § 425.10] for Compensatory [Civ. Code § 3333] and Punitive or Exemplary [Civ. Code § 3294] Damages for Injury Based on Conspiracy--General Form

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Compensatory [Civ. Code § 3333] and Punitive or Exemplary [Civ. Code § 3294] Damages for Injury Based on Conspiracy--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	COMPLAINT FOR DAMAGES
Defendants.	)	
	)	
	)	

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California with its principal place of business in _____ County, California [*or allege other capacity and residence*].

2. Defendant _____ [*name*] resides in _____ County, California [*or allege other capacity and residence*].

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the

fictitiously named defendants is responsible in some manner for the occurrences herein alleged and that plaintiff's injuries were proximately caused thereby.)]

[4. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of such agency.]

5. On or about _____ [*date*], defendants _____ [_____ (*names*) *or* and each of them,] [knowingly and willfully conspired and] agreed among themselves to _____ [*specify tortious or other wrongful scheme*].

6. _____ [*Here, and in subsequent paragraphs as necessary, allege facts constituting the tort or other civil wrong committed by defendants and the injury caused thereby to plaintiff*].

7. Defendants _____ [*name*] and _____ [*name*] did the acts and things herein alleged pursuant to, and furtherance of, the conspiracy and above-alleged agreement.

[8. Defendant(s) _____ (*name(s)*) _____ (furthered the conspiracy by cooperation with *or* lent aid and encouragement to *or* ratified and adopted the acts of) defendants _____ (*names of defendants set forth in Paragraph 6*) (in that _____ (*specify acts showing cooperation, aid and encouragement, or ratification and adoption*)).]

9. Plaintiff is informed and believes and thereon alleges that the last overt act in pursuance of the above-described conspiracy occurred on or about _____ [*date*], on which date defendants [_____ (*names*)] _____ [*set forth the last overt act in pursuance of the conspiracy, e.g.,* collected from plaintiff the final payment on the subject loan].

[10. _____ (*If the underlying cause of action is for fraud, and it is apparent on the face of the pleading that the statute of limitations would have run but for plaintiff's delayed discovery of the facts constituting the fraud, here and in subsequent paragraphs allege with particularity facts, rather than conclusions, showing (a) plaintiff's lack of knowledge; (b) plaintiff's lack of means of obtaining knowledge (that is, in the exercise of reasonable diligence the facts could not have been discovered at an earlier date); and (c) how and when plaintiff actually discovered the fraud*).]

11. As a proximate result of the wrongful acts herein alleged, plaintiff has been generally damaged.

12. _____ [*Here and in subsequent paragraphs specifically set forth facts on which plaintiff's claim for special damages is based*].

[13. In doing the things herein alleged, defendants acted _____ (*specify conduct constituting malice, oppression, and/or fraud as defined under Civ. Code § 3294(c), e.g.,* willfully and with the intent to cause injury to the plaintiff). Defendants were therefore guilty of _____ (malice *and/or* oppression *and/or* fraud) in conscious disregard of plaintiff's rights, thereby warranting an assessment of punitive damages in an amount appropriate to punish defendants and deter others from engaging in similar misconduct.]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages;

2. For _____ [*specify special damages, if any, e.g.,* damages for loss of earnings] _____ [according to proof];

[3. For exemplary or punitive damages;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This general form of complaint is for use in an action for damages for the violation of a civil duty owed to plaintiff by one or more defendants who acted in concert with others to violate the duty.

[3] Allegations

This complaint alleges facts showing the following:

- Formation and operation of the conspiracy with knowledge of all of the defendants (Paragraph 5) [*Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815, 498 P.2d 1063 , superseded by statute on other grounds as stated in Hendy v. Losse (1991) 54 Cal. 3d 723, 731-732, 1 Cal. Rptr. 2d 543* ; *Orloff v. Metropolitan Trust Co. (1941) 17 Cal. 2d 484, 488, 110 P.2d 396]* . Formation and operation of the conspiracy is established by specifically alleging facts showing the conspirators knowingly entered an agreement to do a wrongful act. It does not matter at what time each defendant joined the conspiracy; each is party to every act previously or subsequently done by any of the others pursuant to the conspiracy [*De Vries v. Brumback (1960) 53 Cal. 2d 643, 648, 2 Cal. Rptr. 764, 349 P.2d 532*].

- Wrongful act or acts done by one or more of the conspirators in pursuance of the conspiracy (Paragraphs 6, 7) [*Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815, 498 P.2d*

1063 , superseded by statute on other grounds as stated in Hendy v. Losse (1991) 54 Cal. 3d 723, 731-732, 1 Cal. Rptr. 2d 543 ; *Orloff v. Metropolitan Trust Co. (1941) 17 Cal. 2d 484, 488, 110 P.2d 396]* .

- Cooperation, aid and encouragement, or ratification and adoption of the acts of the defendants by other defendants who may have participated in the conspiracy subsequent to its formation and operation (Optional Paragraph 8) [*see Orser v. George (1967) 252 Cal. App. 2d 660, 667, 60 Cal. Rptr. 708]* .

- Date when the last overt act in pursuance of the conspiracy occurred (Paragraph 9) [*Wyatt v. Union Mortgage Co. (1979) 24 Cal. 3d 773, 786, 157 Cal. Rptr. 392, 598 P.2d 45* ; *Bedolla v. Logan & Frazer (1975) 52 Cal. App. 3d 118, 136, 137, 125 Cal. Rptr. 59]* . In addition, if the action is for conspiracy to defraud and the action would be barred by the statute of limitations based on the last overt act allegation, facts showing application of the delayed discovery doctrine (Optional Paragraph 10) [*Aaroe v. First Am. Title Ins. Co. (1990) 222 Cal. App. 3d 124, 128-129, 271 Cal. Rptr. 434* ; *see also Casualty Ins. Co. v. Rees Inv. Co. (1971) 14 Cal. App. 3d 716, 720, 92 Cal. Rptr. 857* (essential facts to be pleaded and proved)].

- Actual damage resulting to the plaintiff from the tortious act or acts done in pursuance of the conspiracy (Paragraphs 11, 12) [*Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 631, 102 Cal. Rptr. 815, 498 P.2d 1063 , superseded by statute on other grounds as stated in Hendy v. Losse (1991) 54 Cal. 3d 723, 731-732, 1 Cal. Rptr. 2d 543* ; *Orloff v. Metropolitan Trust Co. (1941) 17 Cal. 2d 484, 488, 110 P.2d 396]* .

- Facts supporting award of exemplary or punitive damages based on the defendants' oppression, fraud, or malice (Optional Paragraph 13) [*see Civ. Code §§ 3294, 3295(e)*; *Wyatt v. Union Mortgage Co. (1979) 24 Cal. 3d 773, 790, 157 Cal. Rptr. 392, 598 P.2d 45]* .

[4] Verification

Verification of this complaint is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. § 446(a)*] and precludes a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Cross References

For references to chapters relating to specific actionable wrongs, see the entries in the Research Guide under Cross References

For alternative allegations of capacity and residence, fictitious name, and agency allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative and additional allegations of damages, see Ch. 177, *Damages*

For allegations of mental suffering, see Ch. 362, *Mental Suffering and Emotional Distress*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 72, *Verification* , respectively

[6] California Points and Authorities

For memoranda of points and authorities relating to actions for damages based on conspiracy, see California Points and Authorities, Ch. 46, *Conspiracy* (Matthew Bender)

[7] Text References

Personal Injury: Actions, Defenses, Damages, Vol. 8, *Conspiracies* (Matthew Bender)

Witkin, California Procedure (4th ed.), vol. 5, *Pleading,* §§ 875-881

Witkin, Summary of California Law, vol 5, *Torts,* §§ 45-48 (10th ed. 2005)

12 Cal. Jur. 3d, *Civil Conspiracy,* §§ 1-6

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13-126 California Forms of Pleading and Practice--Annotated § 126.51

§ 126.51 Complaint [Code Civ. Proc. § 425.10] for Compensatory [Civ. Code §§ 3300, 3333] and Punitive or Exemplary [Civ. Code § 3294] Damages for Injury Based on Conspiracy--Breach of Contract

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Compensatory [Civ. Code §§ 3300, 3333] and Punitive or Exemplary [Civ. Code § 3294] Damages for Injury Based on Conspiracy--Breach of Contract

[*Caption. See § 126.50.*]

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 126.50, Paragraphs 1, 2.*]

2. [*Fictitious name allegation, if appropriate. See see § 126.50,* Paragraph 3.]

3. On or about _____ [*date*], at _____ [*city*], _____ County, California, plaintiff and _____ [*name of other contracting party*] entered into a written agreement, a copy of which is attached hereto as Exhibit A and made a part hereof [*or plead contract according to its legal effect or set it forth in its exact words*].

4. On or about _____ [*date*], defendants _____ [*name*] and _____ [*name*], and each of them, knowingly and willfully conspired and agreed among themselves to damage the plaintiff by depriving him/her of the benefits of this contract by inducing _____ [*name of other contracting party*] to breach said contract.

5. Pursuant to such conspiracy, and in furtherance thereof, defendants, during the _____ [*describe period, e.g.,* year _____ *or* period of _____ (*month*), _____ (

year) to _____ (*month*) _____ (*year*)] did wrongfully _____ [*describe acts perpetrated by defendants in inducing the other contracting party to breach the contract*].

6. As a proximate result of defendants' wrongful acts pursuant to the conspiracy herein alleged, _____ [*name of other contracting party*], did wrongfully breach _____ [his *or* her *or* the] contract with the plaintiff by _____ [*describe action taken to breach contract*] [and _____(*describe further action by other contracting party, e.g.,* he *or* she *or* it then entered into another contract on similar terms with defendants _____ (*name*) and _____(*name*))].

7. Plaintiff has performed all conditions, covenants, and promises under the contract on his/her part to be performed), except _____ (*conditions not performed*), the performance of which was excused on the ground that _____ (*name of other contracting party*) breached the contract as a direct and proximate result of the conspiracy herein alleged].

8. _____ [*Allege defendants' last overt act in pursuit of conspiracy, and date of that act. See § 126.50, Paragraph 12.*]

9. As a direct and proximate result of the wrongful acts pursuant to the conspiracy herein alleged, plaintiff has been generally damaged in the sum of $_____.

10. As a direct and proximate result of the defendant's wrongful acts herein alleged, plaintiff has further suffered _____ [*specify items of special damage*], to his/her damage in the sum of $_____.

[11. *Allege defendants' conduct constituting malice, oppression, and/or fraud. See § 126.50, Paragraph 13.*]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages in the sum of $_____;

2. For special damages in the sum of $_____;

3. For exemplary or punitive damages;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

[*Verification, if desired. See § 126.50.*]

[2] Use of Form

This form of complaint is for use in an action for damages for injury suffered as a result of a conspiracy to induce the breach of a contract.

[3] Allegations

This complaint alleges: (1) the formation and operation of the conspiracy (Paragraphs 4, 5); (2) the wrongful act or acts committed pursuant to the conspiracy (Paragraphs 5, 6); (3) defendants' knowledge of the conspiracy and its wrongful purpose (Paragraphs 4-6); (4) the last overt act in pursuit of the conspiracy and the date on which it occurred (Paragraph 8); and (5) the damage resulting from the wrongful act or acts (Paragraphs 9-11).

[4] Cross References

See also Comments and References to § 126.50

For breach of contract allegations, see Ch. 140, *Contracts*

For alternative and additional allegations of damages, see Ch. 177, *Damages*

For allegations of interference with contract, see *Ch. 565, Unfair Competition, § 565.130* et seq.

[5] Text References

Witkin, California Procedure (4th ed. 1996), Vol. 3, *Actions,* §§ 165-166, 148-150, 152

Witkin, Summary of California Law, vol. 5, *Torts,* § 739 (10th ed. 2005)

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13-126 California Forms of Pleading and Practice--Annotated § 126.52

§ 126.52 Complaint Code [Civ. Proc. § 425.10] for Compensatory [Civ. Code § 3333] and Punitive or Exemplary [Civ. Code § 3294] Damages for Injury Based on Conspiracy--Interference With Right to Practice Profession

[1] FORM Complaint Code [Civ. Proc. § 425.10] for Compensatory [Civ. Code § 3333] and Punitive or Exemplary [Civ. Code § 3294] Damages for Injury Based on Conspiracy--Interference With Right to Practice Profession

[*Caption. See § 126.50.*]

Plaintiff alleges:

1. Defendant _____ [*name of entity, e.g.,* hospital] is, and at all times herein mentioned was, a _____ [*specify form of organization, e.g.,* nonprofit corporation] duly organized and existing under the laws of the State of California, with its principal place of business in _____ County, California.

2. Defendant _____ [*name of professional, e.g.,* doctor] is, and at all times herein mentioned was, _____ [*specify, e.g.,* an osteopathic physician and surgeon] duly licensed to practice in the State of California, residing in _____ County, California. [*Repeat allegation for other named professional persons.*]

3. [Defendant _____ (*name*) is a director of defendant _____ (*specify capacity, e.g.,* hospital) and resides in _____ County, California.] [*Repeat allegation for other named directors.*]

4. Plaintiff is, and at all times herein mentioned was, _____ [*specify, e.g.,* an osteopathic physician and surgeon] duly licensed to practice in the State of California.

5. On or about _____, [*date*], defendants, and each of them, willfully, knowingly, oppressively, and maliciously conspired and agreed among themselves to dominate the practice of _____ [*specify, e.g.,* medicine] in _____ County, California by _____ [*specify, e.g.,* osteopathic

physicians and surgeons], to prevent some _____ [*specify, e.g.,* licensed osteopaths] from _____ [*specify, e.g.,* acquiring membership on the staffs of hospitals in _____ (*specify area*) in which membership is necessary to treat their patients, to restrain and eliminate fair competition in the _____ (*specify, e.g.,* osteopathic) field of medical practice in the county, and to enhance the practice of defendant physicians].

6. Pursuant to such conspiracy and agreement _____ [*specify, e.g.,* plaintiff's membership on the _____ (*specify, e.g.,* osteopathic) staff of defendant hospital was terminated by defendants _____ (*names of hospital and directors*)] without _____ [*specify procedure, e.g.,* any hearing or assigned reason, and without] cause.

[7. On or about _____, (*date*), defendants _____ (*names*), pursuant to the above-described conspiracy and agreement, made a public statement that plaintiff was _____ (*specify, e.g.,* expelled from such staff because of questionable competence and reputation). Such statement was false in that plaintiff is highly competent and has at all times had a good reputation in his/her field of practice.]

8. _____ [*Allege date of defendants' last overt act in pursuit of conspiracy. See § 126.50, Paragraph 9.*]

9. As a proximate result of the above-described acts by defendants, plaintiff has been prevented from _____ [*specify, e.g.,* acquiring membership on the _____ (*specify, e.g.,* osteopathic) staff of defendant _____ (*name of hospital*) and of other hospitals in _____ County, California, having adequate facilities and was unable to place his/her patients in such hospitals], and plaintiff has suffered the loss of _____ [clients *or* patients] and income to his/her damage in the sum of $_____.

10. [*Punitive or exemplary damages. See § 126.50, Paragraph 13.*]

[*Prayer. See § 126.50.*]

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for_____ [*party's status and name*]

[*Verification, if desired. See § 126.50.*]

[2] Source of Form

The suggested facts in this form of complaint are taken from *Willis v. Santa Ana Cmty. Hosp. Ass'n (1962) 58 Cal. 2d 806, 26 Cal. Rptr. 640, 376 P.2d 568 , overruled in part, Cianci v. Superior Court (1985) 40 Cal. 3d 903, 221 Cal. Rptr. 575, 710 P.2d 375 .*

[3] Use of Form

This form of complaint may be used in an action by a professional person for damages against persons and institutions

who, by conspiracy and wrongful acts, interfere with and deprive the plaintiff of the right to practice his or her profession. The examples used within the form specifically allege an action against a hospital and other parties for conspiracy based on intentional interference with a doctor's right to practice medicine in the hospital and for damage to the doctor's reputation as a result of public statements made by named defendants [*see Willis v. Santa Ana Cmty. Hosp. Ass'n (1962) 58 Cal. 2d 806, 810-811, 26 Cal. Rptr. 640, 376 P.2d 568] , overruled in part, Cianci v. Superior Court (1985) 40 Cal. 3d 903, 221 Cal. Rptr. 575, 710 P.2d 375* .

[4] Allegations

This complaint alleges: (1) the formation, operation, and knowledge of the conspiracy by defendants (Paragraph 5); (2) the wrongful acts undertaken pursuant to the conspiracy (Paragraphs 6, 7); (3) the date when the last overt act in pursuance of the conspiracy occurred (Paragraph 8);(4) the injury and damages proximately caused plaintiff by the conspiracy (Paragraph 9); and (5) malice and oppression by defendants that support an award to plaintiff of punitive and exemplary damages under *Civ. Code § 3294* (Paragraphs 5, 10) [*see Willis v. Santa Ana Cmty. Hosp. Ass'n (1962) 58 Cal. 2d 806, 808, 810, 26 Cal. Rptr. 640, 376 P.2d 568] , overruled in part, Cianci v. Superior Court (1985) 40 Cal. 3d 903, 221 Cal. Rptr. 575, 710 P.2d 375* .

[5] Cross References

See also Comments and References to § 126.50

For discussion and forms relating to physicians generally, see Ch. 414, *Physicians: Licensing and Discipline* ; Ch. 415, *Physicians: Medical Malpractice* ; and Ch. 416, *Physicians: Membership on Hospital Staffs or in Professional Organizations*

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13-126 California Forms of Pleading and Practice--Annotated § 126.53

§ 126.53 Complaint Code [Civ. Proc. § 425.10] for Compensatory [Civ. Code § 3336] and Punitive or Exemplary [Civ. Code § 3294] Damages for Injury Based on Conspiracy--Conversion of Plaintiff Employer's Property by Employee Salesperson and Third Party

[1] FORM Complaint Code [Civ. Proc. § 425.10] for Compensatory [Civ. Code § 3336] and Punitive or Exemplary [Civ. Code § 3294] Damages for Injury Based on Conspiracy--Conversion of Plaintiff Employer's Property by Employee Salesperson and Third Party

[*Caption. See § 126.50.*]

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 126.50, Paragraphs 1, 2.*]

2. [*Fictitious name allegation, if appropriate. See § 126.50, Paragraph 3.*]

3. During the period from _____ [*date*], to _____ [*date*], defendant _____ [*name of employee*] was employed by plaintiff as a _____ [*specify, e.g.,* salesperson], and plaintiff assigned to defendant in this capacity the duty and responsibility of selling plaintiff's _____ [*specify materials*] for the account of plaintiff.

4. Plaintiff is informed and believes and thereon alleges that on or about _____ [*date*], defendant _____ [*name of employee*] and defendant _____ [*name of third party*] knowingly and willfully entered into an agreement and conspiracy to convert property and inventory belonging to plaintiff, whereby defendant _____ [*name of employee*] agreed to deliver _____ [*specify materials*] to defendant _____ [*name of third party*] for defendant _____ [*name of third party*] to sell and to pay defendant _____ [*name of employee*], individually and in cash, a portion of the proceeds of sale without accounting to plaintiff for any portion of the proceeds of the sale.

5. Plaintiff is informed and believes and thereon alleges that pursuant to the agreement and conspiracy, during the period from _____ [*date*], to _____ [*date*], defendant _____ [*name of employee*] delivered to his/her codefendant certain _____ [*specify materials*] belonging to plaintiff in an amount unknown to plaintiff; defendant _____ [*name of third party*] sold the _____ [*specify materials*] and paid to defendant _____ [*name of employee*], for his/her own account, cash in the sum of $_____.

6. Defendant _____ [*name of employee*] did not pay to plaintiff any cash received from defendant _____ [*name of third party*].

7. Plaintiff is further informed and believes and thereon alleges, that during the period of approximately _____ [*date*], to _____ [*date*], defendant _____ [*name of employee*] delivered to his/her codefendant approximately _____ [*specify amount of materials*] from plaintiff'sinventory, which defendant _____ [*name of third party*] sold for the account and benefit of his/her codefendant and himself/herself.

8. [*Allege facts showing that action is not barred by applicable statute of limitations, either by alleging date of last overt act, or by alleging facts showing that delayed discovery rule applies. See § 126.50, Paragraphs 9 and 10.*]

9. The fair market value of the _____ [*specify materials*] was $_____ per _____ [*specify unit of measure*] for a total of $_____. Plaintiff has been thereby damaged in the sum of $_____.

10. [*Allege additional items of special damages such as value of time and money expended in pursuit of converted property.*]

[11. *Allege defendants' conduct constituting malice, oppression, and/or fraud. See § 126.50, Paragraph 13.*]

[*Prayer. See § 126.50.*]

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for_____ [*party's status and name*]

[*Verification, if desired. See § 126.50.*]

[2] Use of Form

This form of complaint is for use in an action against an employee and a third party for damages resulting from a conspiracy to convert and sell the plaintiff's goods.

[3] Allegations

This form of complaint alleges the formation, operation, and knowledge of the conspiracy (Paragraph 4), the wrongful acts done pursuant thereto (Paragraphs 5-7), the date of the last overt act in pursuance of the conspiracy or the

application of the delayed discovery rule (Paragraph 8), and the resulting damage to plaintiff (Paragraphs 9-11).

[4] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 1157-1196 (10th ed. 2005)

[5] Cross References

See also Comments and References to § 126.50.

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Volume 13: Conspiracy thru Conversion-Chs. 126-159
Chapter 126 CONSPIRACY
PART IV. FORMS

13-126 California Forms of Pleading and Practice--Annotated § 126.54

§ 126.54 Allegation of Conspiracy--To Sell Land by False Representations

[1] FORM Allegation of Conspiracy--To Sell Land by False Representations

The various acts and representations of defendants, and each of them, were all false and made as the result of, and in furtherance of, an agreement whereby each of the defendants knowingly conspired with the other defendants to sell plaintiff the aforementioned land at a price much greater than its value and to divide the profits derived from that sale among themselves.

[2] Use of Form

This form of allegation alleges a civil conspiracy by defendants and is for use in an action for damages for selling land by false representation.

[3] Cross References

See also Comments and References to § 126.50

For discussion and forms relating to fraud generally, see Ch. 269, *Fraud and Deceit*

For discussion and forms relating to real property transactions by purchasers against vendors, see Ch. 569, *Vendor and Purchaser*

[4] Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 898-899 (10th ed. 2005)

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13-126 California Forms of Pleading and Practice--Annotated § 126.55

§ 126.55 Allegation of Conspiracy--Partner Deprived of Participation in Partnership Business and Possession of Partnership Property Through Conspiracy Between Copartner and Third Party

[1] FORM Allegation of Conspiracy--Partner Deprived of Participation in Partnership Business and Possession of Partnership Property Through Conspiracy Between Copartner and Third Party

Commencing on or about _____ [*date*], defendants _____ [*name of third party*] and _____ [*name of copartner*] knowingly conspired together _____ [*state facts showing formation and operation of conspiracy, e.g.,* wrongfully to oust plaintiff from participation in the partnership business and possession of partnership property]. To this end defendant(s) _____ [*name(s*)]_____ [*allege wrongful act or acts perpetrated by one or both defendants in pursuance of the conspiracy, e.g.,* caused all of the assets of the partnership to be transferred fraudulently and without consideration to themselves and wrongfully induced _____ (*name of copartner*) to participate in the exclusion of plaintiff from further participation in the partnership business resulting in injury and damage to plaintiff].

[2] Use of Form

This form of allegation is for use in a complaint against a copartner and a third party for damages for depriving the plaintiff as a member of the partnership of the property of the partnership and for ousting the plaintiff from participation therein [*see Ellis v. Navarro (1943) 61 Cal. App. 2d 755, 759, 143 P.2d 735]* . With appropriate modifications, it may be incorporated into a general form of complaint based on conspiracy [see *§ 126.50*] serving as a count in a complaint alleging as against the copartner a breach of the copartner's fiduciary relationship and as against the third party a tortious interference with an advantageous business relationship [*see Ellis v. Navarro (1943) 61 Cal. App. 2d 755, 759, 143 P.2d 735]* .

[3] Cross Reference

See also Comments and References to § 126.50

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13-126 California Forms of Pleading and Practice--Annotated § 126.56

§ 126.56 Allegation of Conspiracy--To Harass Tenant

[1] FORM Allegation of Conspiracy--To Harass Tenant

From and after _____ [*date*], defendants knowingly entered into a conspiracy of annoyance and vexation designed to interfere with plaintiff's quiet and peaceable possession and enjoyment of the demised premises and to force plaintiff to abandon his/her lease and to vacate the premises. Pursuant to this conspiracy, defendants, their agents, servants, and employees, acting both jointly and severally, committed or caused to be committed against plaintiff a series of malicious and mischievous acts, namely: _____ [*specify*]. These acts were designed to annoy and harass plaintiff and to cause him/her to vacate the premises.

[2] Use of Form

This form of allegation is for use in an action for damages based on a conspiracy to harass a tenant.

[3] Cross References

See also Comments and References to § 126.50

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13-126 California Forms of Pleading and Practice--Annotated § 126.57

§ 126.57 Allegation of Conspiracy--Fraudulent Land Development Scheme

[1] FORM Allegation of Conspiracy--Fraudulent Land Development Scheme

On or about _____ [*date*], for the purpose of selling the hereinmentioned land at a profit, defendant knowingly entered into a conspiracy to defraud plaintiff by entering into an extensive campaign of _____ [*allege type of fraud, e.g.*, advertising the lands, making some improvements, and making false representations as to their intentions of developing the territory and lands, especially the town site of _____ (*name of town*), situated in _____ (*location*), so as to create a boom in the territory and a fictitious value and demand for the land and town lots and to sell the same, or any part, at greatly enhanced value and profit]. Defendants, and each of them, attempted to and intended to perfect an arrangement, combination, and collusion between themselves whereby they might carry on the venture, or might abandon the same at any time and all loss would fall on purchasers such as plaintiff, who might be induced to buy or give credit on the good faith of the enterprise.

[2] Use of Form

This form of allegation is for use in an action for damages based on a conspiracy to defraud plaintiff in a land development scheme.

[3] Cross References

See also Comments and References to §§ 126.50 and 126.54

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13-126 California Forms of Pleading and Practice--Annotated § 126.58

§ 126.58 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Actor in Alleged Conspiracy Exonerated From Liability

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Actor in Alleged Conspiracy Exonerated From Liability

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that _____ [*name of coconspirator*] was the _____ [sole acting party *or* only person who committed any act] in the furtherance of the alleged conspiracy and that he/she has been exonerated from liability in that _____ [*explain circumstances of exoneration*].

[2] Use of Form

This form of affirmative defense is for use in an answer to a complaint for damages based on conspiracy if only one of the alleged coconspirators performed any act in furtherance of the alleged conspiracy and that party has been exonerated.

[3] Cross References

See also Comments and References to § 126.50

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13-126 California Forms of Pleading and Practice--Annotated § 126.59

§ 126.59 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Legally Incapable of Committing Tort Underlying Conspiracy

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Legally Incapable of Committing Tort Underlying Conspiracy

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that he/she/it cannot be liable for civil conspiracy because he/she/it is legally incapable of committing the tort underlying the conspiracy alleged by plaintiff in that _____ [*explain circumstances making defendant legally incapable of committing underlying tort, e.g.,* plaintiff alleges that defendant, a party to the contract in question, conspired to interfere with that contract, and a party to a contract is legally incapable of interfering with his/her/its own contract.]

[2] Use of Form

This form of affirmative defense is for use in an answer to a complaint for damages based on conspiracy if the defendant was legally incapable of committing the tort underlying the alleged conspiracy

[3] Cross References

See also Comments and References to § 126.50

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13-126 California Forms of Pleading and Practice--Annotated § 126.60

§ 126.60 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant as Agent or Employee of Defendant Corporation and as Sued in That Official Capacity

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant as Agent or Employee of Defendant Corporation and as Sued in Such Official Capacity

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that he/she is the _____ [agent *or* employee] of _____ Corporation, a codefendant in this action, and that the complaint herein alleges only that he/she perpetrated acts in furtherance of the alleged conspiracy while acting in that official capacity on behalf of the above-mentioned corporation and not as an individual acting for his/her own individual advantage or beyond the scope of his/her authority.

[2] Use of Form

This form of affirmative defense is for use in an answer of an alleged individual coconspirator to a complaint for damages based on conspiracy if he or she is being sued for acts committed pursuant to an alleged conspiracy in his or her capacity as an agent or employee of the corporation and not as an individual acting for his or her own individual advantage or beyond the scope of his or her authority.

[3] Cross References

See also Comments and References to § 126.50

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13-126 California Forms of Pleading and Practice--Annotated § 126.61

§ 126.61 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant as Agent or Employee and Complaint Based on Alleged Conspiracy to Violate Duty Binding Solely on Principal

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant as Agent or Employee and Complaint Based on Alleged Conspiracy to Violate Duty Binding Solely on Principal

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that defendant is barred from liability on the ground that _____ [*name of coconspirator*] acted solely as an agent of _____ [*name of principal*] and did not personally share in the duty alleged to have been violated, in that _____ [*describe duty alleged, e.g.,* the duty to refrain from violating *Section 790.03(h)(5) of the Insurance Code* is imposed only on persons engaged in the business of insurance. _____ (*Name of coconspirator*) is not, nor has ever been, engaged in such business].

[2] Use of Form

This form of affirmative defense is for use in an answer of an alleged coconspirator to a complaint for damages based on conspiracy when he or she is being sued for conspiracy to cause the principal to violate a duty that is peculiar to the principal and not binding on the agent

[3] Cross Reference

See also Comments and References to § 126.50.

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13-126 California Forms of Pleading and Practice--Annotated § 126.62

§ 126.62 Proceedings for Order Allowing Plaintiff to File Pleading Based on Attorney-Client Conspiracy--Petition [Civ. Code § 1714.10(a)] and Supporting Declaration [Code Civ. Proc. § 2015.5]

[1] FORM Proceedings for Order Allowing Plaintiff to File Pleading Based on Attorney-Client Conspiracy--Petition [Civ. Code § 1714.10(a)] and Supporting Declaration [Code Civ. Proc. § 2015.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION FOR ORDER ALLOWING PLAINTIFF
_____ [*name*],	)	TO FILE PLEADING AGAINST ATTORNEY
Respondent.	)	BASED ON ATTORNEY-CLIENT CONSPIRACY
	)	AND SUPPORTING DECLARATION OF
	)	_____ [*name*]
		Date: _____
		Time: _____
		Location: _____

_____

Petitioner _____ [*name*] respectfully represents:

1. Petitioner _____ [*name*] seeks to file a _____ [*specify pleading, e.g.,* complaint] against _____ [*name of attorney defendant*], including a cause of action for civil conspiracy between _____ [*name of attorney defendant*] and his/her client _____ [*name of attorney's client*], arising from an attempt by _____ [*name of defendant attorney*] to _____ [contest *or* compromise] _____ [*briefly identify claim or dispute*], and that is based on the attorney's representation of _____ [*name of attorney's client*].

2. There is a reasonable probability that petitioner will prevail in the above-described action against _____ [*name of defendant attorney*] in that _____ [*set forth reasons why petitioner is likely to prevail in action against defendant for civil conspiracy*].

3. A copy of the proposed _____ [*specify pleading, e.g.,* complaint] is attached hereto as Exhibit A and made a part hereof.

WHEREFORE, petitioner prays for an order allowing petitioner to file the proposed _____ [*specify pleading, e.g.,* complaint] attached hereto.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

Petitioner

SUPPORTING DECLARATION OF _____ [name]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*petitioning party*) *or other statement as appropriate*].

2. _____ [*Set forth with specificity the facts on which the attorney's liability is based*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

CAUTION:

Civ. Code § 1714.10 requires verification of this petition. However, at least one court has held that failure to file a verified petition does not necessarily prevent a party from filing a pleading claiming liability based on an attorney's civil conspiracy. In that case, the requirement was satisfied because the party, who was moving for leave to amend a complaint to add the civil conspiracy allegations, had verified the complaint and amended complaint, and had filed declarations under penalty of perjury in support of the motion. These items were sufficient because they have the same effect as a verified petition: they tend to discourage frivolous allegations by requiring claimants to make their assertions under oath [*Burtscher v. Burtscher (1994) 26 Cal. App. 4th 720, 727, 31 Cal. Rptr. 2d 682]* .

[2] Use of Form

This form is for use by a plaintiff to obtain judicial authorization to file a complaint or other pleading if the pleading includes a cause of action based on an alleged conspiracy between an attorney and that attorney's client, arising from an attempt to contest or compromise a claim or dispute, and that is based on the attorney's representation of the client [*Civ. Code § 1714.10(a)*].

[3] Accompanying Documents

The petition must be accompanied by the proposed pleading and supporting affidavits (or declarations under *Code Civ. Proc. § 2015.5*) stating the facts on which the attorney's liability is based [*Civ. Code § 1714.10(a)*].

[4] Service of Petition and Opposition

The court must order service of the petition on the party against whom the action is proposed to be filed and permit that party to submit opposing affidavits prior to making its determination [*Civ. Code § 1714.10(a)*].

[5] Statute of Limitations

The filing of the petition, proposed pleading, and accompanying affidavits tolls the running of any applicable statute of limitations until the final determination of the matter by the court [*Civ. Code § 1714.10(a)*].

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13-126 California Forms of Pleading and Practice--Annotated § 126.63

§ 126.63 Demurrer to Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--Action Against Attorney Based on Attorney-Client Conspiracy--Failure to Obtain Order Allowing Plaintiff to File Pleading [Civ. Code § 1714.10(b)]

[1] FORM Demurrer to Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--Action Against Attorney Based on Attorney-Client Conspiracy--Failure to Obtain Order Allowing Plaintiff to File Pleading [Civ. Code § 1714.10(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DEMURRER OF DEFENDANT
vs.	)	_____ [*name of attorney*] TO COM-
_____ [*name*],	)	PLAINT OF _____ [*name*],
Defendants.	)	MEMORANDUM OF POINTS AND AUTHORIT-
	)	IES, AND NOTICE OF HEARING
	)	[*Civ. Code § 1714.10(b)*]
	)	Date: _____
		Time: _____
		Location: _____
		[Trial Date: _____]

_____

Defendant _____ [*name*] demurs to the complaint herein on the following ground:

The complaint includes a claim against an attorney for civil conspiracy with his or her client arising from an attempt to contest or compromise a claim or dispute and based on the attorney's representation of the client, and it appears from the court's records[, of which this court is requested to take judicial notice,] that plaintiff has failed to obtain an order under *Section 1714.10(a) of the Civil Code* allowing such pleading.

[WHEREFORE, defendant prays that this demurrer be sustained without leave to amend, that plaintiff take nothing by his/her complaint, that defendant have judgment for his/her costs, and for all other proper relief.]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting demurrer*]

NOTICE IS HEREBY GIVEN that this demurrer has been set for hearing on _____ [*date*], at _____ [*time*], or as soon thereafter as thematter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], California.
Dated: _____.

_____ [*signature*]

Attorney for Defendant

[2] Use of Form

This notice of motion is for use to object by demurrer to a complaint that includes a cause of action against an attorney for a civil conspiracy with his or her client arising from an attempt to contest or compromise a claim or dispute and based on the attorney's representation of the client. The ground of the objection is that the plaintiff has failed to obtain a court order allowing the pleading to be filed [*see Civ. Code § 1714.10(a), (b)*].

The failure to obtain a court order when required by *Civ. Code § 1714.10(a)* is a defense to any action for civil conspiracy filed in violation of that provision. The defense must be raised by the party charged with civil conspiracy on that party's first appearance by demurrer, motion to strike, or such other motion or application as may be appropriate [*Civ. Code § 1714.10(b)*]. This form may be modified for use in other proceedings in which the objection may be raised under *Civ. Code § 1714.10(b)*]. The failure to raise the defense constitutes a waiver of the defense [*Civ. Code § 1714.10(b)*].

The defect objected to in this form normally would not appear on the face of the complaint, but from the court's records, a matter of which the court may take judicial notice [*see Code Civ. Proc. § 430.30(a)*; *Evid. Code § 452(d)*]. This matter must be specified in the demurrer or in the supporting points and authorities for the purpose of invoking the notice, except as the court may otherwise permit [*Code Civ. Proc. § 430.70*]. Hence, this form includes an optional request that the court take judicial notice [*see Cal. Rules of Ct., Rule 3.1306(c)* (party required to make arrangements with court clerk to have court's file in court at time of hearing)].

A demurrer must be accompanied by a notice of hearing [*Cal. Rules of Ct., Rule 3.1320(c)*], and this form includes such a notice. It must also be accompanied by a memorandum of points and authorities in support of each ground for the demurrer [*Cal. Rules of Ct., Rule 3.1113*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

This form may be modified for use when the defendant is demurring to a specified cause of action, rather than to the whole complaint. In that case, the demurrer must specify the particular cause of action to which it objects [*see Cal. Rules of Ct., Rule 3.1320(a)*].

[3] Cross References

For further discussion of demurrer procedures and sample forms, including forms for use when the defendant is demurring to a specified cause of action, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

[4] California Points and Authorities

For memoranda of points and authorities supporting and opposing a demurrer to a complaint alleging attorney-client conspiracy on the ground the plaintiff failed to obtain a prefiling order, see California Points and Authorities, Ch. 46, *Conspiracy* (Matthew Bender)

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Chapter 126A CONSTITUTIONAL LAW

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§ 126A.syn Synopsis to Chapter 126A: CONSTITUTIONAL LAW

§ 126A.01 Scope of Chapter

§ 126A.02 Cross References

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§ 126A.10 Governing Law

§ 126A.11 History of the California Constitution

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[4] Effective Date of Amendments and Revisions

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[a] Presumption of Constitutionality of Statutes

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[4] Exercise of Legislative and Executive Powers by the Judiciary

[a] Legislative Power

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§ 126A.30 Governing Law

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[2] Power to Regulate

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[4] Police Power Is Inalienable

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[a] The Nature of Eminent Domain

[b] Requirement of Public Use

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[b] Elements of Cause of Action

[c] Property the Taking of Which Must Be Compensated

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[3] Sales and Use and Other Excise Taxes

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§ 126A.01 Scope of Chapter

This chapter examines civil powers and rights under the California Constitution, with relevant analysis under comparable provisions, if any, in the U.S. Constitutions included for added depth or comparison, as the case may be. Accordingly, the chapter emphasizes interpretations of the California Constitution and the powers and rights that it extends.

This chapter discusses the history, general structure, and process for amending and revising the California Constitution (*see § 126A.10* et seq.). It also touches on principles guiding analysis of conflicts between different provisions of the Constitution. For discussion of the interpretation of constitutional provisions, see Ch. 531, *Statutes and Ordinances* .

This chapter also addresses the distribution of powers among the branches of California government and between the federal and California governments, including the separation of powers, the impact of the *Commerce Clause of the U.S. Constitution* on state law, preemption of state law by federal law, and preemption of local law by state law (*see § 126A.20* et seq.).

This chapter also covers the general powers of state government, including the police power, eminent domain, the power of taxation, and the limitation on impairing the obligation of contracts (*see § 126A.30* et seq.).

This chapter also covers substantive due process and individual civil rights as limitations on government powers (*see § 126A.40* et seq.). For detailed civil rights coverage and application to specific facts, including actions for damages under *42 U.S.C.S. § 1983*, see Ch. 112, *Civil Rights: Government-Funded Programs and Activities* , see Ch. 113, *Civil Rights: Post-Civil War Statutes* , see Ch. 114, *Civil Rights: Prisoners' Rights* , see Ch. 115, *Civil Rights: Employment* , see Ch. 116, *Civil Rights: Business Establishments* , see Ch. 117, *Civil Rights: Housing* , see Ch. 117A, *Civil Rights: Interference* .

This chapter also addresses the primary elements of the broad topic of procedural due process (*see § 126A.50* et seq.). For voluminous discussion of procedural due process in administrative agency actions, see Ch. 470A, *Due Process Restrictions on Public Agencies* , et seq.

This chapter also addresses the interrelated subjects of equal protection and privileges and immunities (*see § 126A.60* et seq.).

This chapter also contains a brief discussion of procedure for challenging the constitutionality of laws and government actions, including declaratory and injunctive relief against enforcement of unconstitutional statutes or ordinances or unconstitutional applications of those laws (*see § 126A.70* et seq.). For forms andfurther discussion relating to declaratory relief to determine the validity of statutes and ordinances, see Ch.183, *Declaratory Relief* . For forms and further discussion relating to a taxpayer's suit to restrain the expenditure of public money to enforce an unconstitutional statute or ordinance, see Ch. 466, *Public Entities and Officers: Taxpayer's Actions* . For forms and further discussion relating to injunctive relief generally, see Ch. 303, *Injunctions* . For forms and discussion relating to actions for administrative mandate challenging the action of a public agency, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

This chapter also include a sample complaint alleging denial of a constitutional right under both the United States and California constitutions: specifically, a Complaint Against Public Entity and Officials for Injunctive and Declaratory Relief for Denial of Right to Freedom of Expression [*U.S. Const., amend. I, XIV*; Cal. Const., art. I, *2*]--Denial of Application for Access to Public Forum [*see § 126A.100*]. This form is illustrative of one type of constitutional challenge. Cross references throughout this chapter highlight various forms across the wide spectrum of actions that assert a constitutional right and/or infringement. Refer to the specific discussions in this chapter to locate applicable forms in other chapters.

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- For forms of complaint for declaratory and injunctive relief against enforcement of invalid statutes and ordinances, see Ch. 182, *Declaratory Relief* , and for forms relating to injunctive relief generally, see Ch. 303, *Injunctions* .

- For a discussion of and forms for use in proceedings involving the initiative or referendum process for constitutional amendments, statutes, or ordinances, see Ch. 302, *Initiative, Referendum, and Recall* .

- For a discussion of and forms in a taxpayer's suit to enjoin implementation of an unconstitutional statute or ordinance, see Ch. 466, *Public Entities and Officers: Taxpayer's Actions* , and for related discussions and forms, see Ch. 303, *Injunctions* , and Ch. 471, *Investigations by Public Agencies* .

- For a discussion of and forms for use in proceedings involving zoning ordinances generally, including a complaint for declaratory and injunctive relief challenging the constitutionality of a zoning ordinance, see Ch. 579, *Zoning and Planning* .

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[Reserved]

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§ 126A.10 Governing Law

California constitutional law is embodied in the California Constitution of 1879, as amended.

Amending and revising the California Constitution are governed by Cal. Const., art. XVIII. The legislature's power for enactments related to amending or revising the constitution is set forth in *Cal. Const., art. IV, § 1*, and the power of initiative, in *Cal. Const., art. II, §§ 8, 10, 11*.

Resolving conflicts between different provisions of the California constitution is governed by *Cal. Const., art. XVIII, § 4* [*see Crawford v. Huntington Beach Union High Sch. Dist. (2002) 98 Cal. App. 4th 1275, 1286, 121 Cal. Rptr. 2d 96]*
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§ 126A.11 History of the California Constitution

The first constitution of California, ratified on November 13, 1849, was replaced by the current California Constitution, which was ratified on May 7, 1879. This Constitution of 1879 has been amended hundreds of times [for discussion of amending, see *§ 126A.13[1]*], but has been revised only twice [for discussion of revising, see *§ 126A.13[2]*], with a third attempt at revision resulting in no changes in the 1990s. The bulk of revisory changes occurred as the result of the second revision commission in the 1960s and 1970s.

For detailed information on revision commissions, see Henke's California Law Guide, Ch. 2, California Constitution, § 2.02 [Matthew Bender]. For discussion of researching constitutional law, see Henke's California Law Guide, Ch. 2, California Constitution, § 2.03 [Matthew Bender].

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§ 126A.12 Structure of the California Constitution, and Cross References to Detailed Discussions Throughout This Publication

The California Constitution begins with the following preamble:

> "We, the People of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution."

After the preamble, the substantive articles of the Constitution address the following broad subjects presented here in the order in which they first appear:

- The inalienable rights of individual California citizens [*see* Cal. Const., art. I; for discussion, *see § 126A.40* et seq.],

- Voting, initiatives and referendums, elections, and recall [*see* Cal. Const.,art. II; for detailed discussion, *see* Chs. 242, *Election Campaigns* , 243, *Elections* , and 302, *Initiative, Referendum & Recall* ; for discussion of convicts' voting disability, *see Ch. 114, Civil Rights: Prisoners' Rights, § 114.27*],

- The basic nature of the State of California [*see* Cal. Const., art. III; for discussion of federal-law preemption of state law, *see § 126A.23*; for detailed discussion of boundaries, *see* Ch. 101, *Boundaries* ; for discussion of separation of powers, see *§ 126A.21*],

- The California Legislature [*see* Cal. Const., art. IV; for discussion of general legislative powers, *see § 126A.31* et seq.; for detailed discussion of conflicts of interest by public officials, *see Ch. 469, Public Entities and Officers: Conflicts of Interest, § 469.11* et seq.; for detailed discussion of statutes or ordinances, *see* Ch. 531, *Statutes & Ordinances*],

- The executive branch of California state government [*see* Cal. Const., art. V; for detailed discussion of powers of executive agencies, *see* Ch. 470, *Overview of Public Administrative Law* , et seq.; for

detailed discussion of conflicts of interest by public officials, *see* Ch. 469, *Public Entities and Officers: Conflicts of Interest*],

- The California court system [*see* Cal. Const., art. VI; for detailed discussion of organization and jurisdiction of California courts, *see Ch. 324, Jurisdiction: Subject Matter Jurisdiction, § 324.20* et seq.; for discussion of appellate jurisdiction, *see Ch. 40, Appeal: An Overview, §§ 40.11, 40.41* and *Ch. 54, Appeal: California Supreme Court Review, §§ 54.11, 54.21*; for detailed discussion of judges, *see* Ch. 317, *Judges*], for discussion of superior and municipal courts unification, *see Ch. 345A, Limited Civil Cases, § 345A.03*],

- Public officers and employees [*see* Cal. Const., art. VII; for detailed discussion of civil service employment of public employees, *see* Ch. 118, *Civil Service* ; for detailed discussion of public officers and employees, *see* Ch. 464, *Public Entities and Officers: California Tort Claims Act*],

- State militias [*see* Cal. Const., art. VIII],

- Education [*see* Cal. Const., art. IX; for detailed discussion of schools, *see* Ch. 512, *Schools: Certification, Dismissal, and Related Employment Issues* ; for brief discussion of state education agencies, *see Ch. 470, Overview of Public Administrative Law, § 470.12*],

- Water rights, water resources development, and marine resources protection [*see* Cal. Const., arts. X, X A, X B; for detailed discussion of water issues, *see* Ch. 575, *Waters*],

- Local government in California [*see* Cal. Const., art. XI; for detailed discussion of local governmental ordinances, *see* Ch. 531, *Statutes and Ordinances* ; for detailed discussion of zoning and planning, *see* Ch. 579, *Zoning and Planning* ; for discussion of initiatives consisting of city charter measures, *see Ch. 302, Initiative, Referendum, & Recall, § 302.25*],

- Regulation of public utilities [*see* Cal. Const., art. XII; for detailed discussion of public utilities, *see* Ch. 480, *Public Utilities*],

- Taxation [*see* Cal. Const., arts. XIII, XIII A, XIII B, XIII C, XIII D; for discussion of taxation, *see § 126A.33*],

- Labor relations [*see* Cal. Const., art. XV; for detailed discussion of employment law, *see* Ch. 249, *Employment Law: Termination and Discipline* , and *see* 250, *Employment Law: Wage and Hour Disputes*],

- Usury [*see* Cal. Const., art. XV; for detailed discussion of usury, *see* Ch. 568, *Usury*],

- Public finance [*see* Cal. Const., art. XVI; for discussion of payment of judgments by public entities, *see Ch. 467, Public Entities and Officials: Enforcement of Judgments Against Public Entities, § 467.43*; for discussion of separation of church and state, *see Ch. 110, Churches and Religious Organizations, § 110.13*],

- Amending and revising the constitution [*see* Cal. Const., art. XVIII; for discussion of amending and revising the constitution, see *§ 126A.13*],

- Motor vehicle revenues [*see* Cal. Const., arts. XIX, XIX A, XIX B],

- Miscellaneous subjects [*see* Cal. Const., art. XX; for detailed discussion of homesteads, *see* Ch. 294, *Homesteads* ; for discussion of oath of office for temporary judges, *see Ch. 317, Judges, § 317.181*; for detailed discussion of regulation of alcoholic beverages, *see* Ch. 18, *Alcoholic Beverage Licenses*],

- Reapportionment of senate, assembly, congressional, and board of equalization districts [*see* Cal. Const., art. XXI],

- Public contracts with private entities [*see* Cal. Const., art. XXII],

- Public housing project approval [*see* Cal. Const., art. XXXIV], and

- Public funding of stem cell research [*see* Cal. Const., art. XXXV].

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§ 126A.13 Amending or Revising the California Constitution

[1] Constitutional Amendments

[a] By Legislative Action

[i] Proposing, Amending, or Withdrawing Proposed Amendments

The Legislature may propose an amendment to the California Constitution, or amend or withdraw its proposed amendment. Two-thirds of the membership of each house must concur by rollcall vote entered in the journal in any proposal or amendment or withdrawal of a previously proposed amendment [*Cal. Const., art. XVIII, § 1*].

[ii] Each Proposed Amendment Submitted Separately; Separate Submission Required for Each Section Amended

Each legislatively proposed constitutional amendment must be prepared and submitted so that it can be voted on separately [*Cal. Const., art. XVIII, § 1*]. This single subject rule requires a showing that the provisions are reasonably germane to a common theme, purpose, or subject. It does not impose a stricter standard requiring a showing of close or functional relatedness. It is to be interpreted leniently [Californians for an *Open Primary v. McPherson (2006) 38 Cal. 4th 735, 777, 43 Cal. Rptr. 3d 315, 134 P. 3d 299* , (proposal concerning both primary elections and state property and bonds repayment violated the single subject rule); *see Senate of the State of Cal. v. Jones (1999) 21 Cal. 4th 1142, 1157, 90 Cal. Rptr. 2d 810, 988 P.2d 1089]* . This procedural mandate allows a proposed amendment of one section of the constitution to be submitted as a whole to the voters, even though it would affect several other sections [*Tinsley v Superior Court (1983) 150 Cal. App. 3d 90, 106-107, 197 Cal. Rptr. 643]* .

The common purpose to which the initiative's various provisions relate, however, cannot be so broad that a virtually unlimited array of provisions are joined in the proposition, essentially obliterating the constitutional requirement [*Manduley v. Superior Court (2002) 27 Cal. 4th 537, 575, 117 Cal. Rptr. 2d 168, 41 P.3d 3]* .

[iii] Relief from Proposed Amendments Not Submitted Separately

Bifurcation of proposals by subject is not a remedy for a violation of the separate-vote requirement of *Cal. Const., art. XVIII, § 1*. Rather, the measure is void, even if challenged after the election [Californians for an *Open Primary v. McPherson (2006) 38 Cal. 4th 735, 780-782, 43 Cal. Rptr. 3d 315, 134 P. 3d 299* (after election, court voided unbifurcated version adopted by legislature and bifurcated version not adopted by legislature)].

[b] By Initiative

The electors may amend the California Constitution by initiative [*Cal. Const., art. XVIII, § 3*].

For discussion of the mechanics of undertaking an initiative, see Ch. 302, *Initiative, Referendum & Recall* .

[2] Constitutional Revision

[a] Proposed by Legislature

The Legislature may propose a revision of the California Constitution, or amend or withdraw its proposed revision. Two-thirds of the membership of each house must concur by rollcall vote entered in the journal in any proposal or amendment or withdrawal of a previously proposed revision [*Cal. Const., art. XVIII, § 1*].

[b] Proposed by Constitutional Convention

The Legislature may submit at a general election the question whether to call a convention to revise the Constitution. Two-thirds of the membership of each house must concur by rollcall vote entered in the journal in submitting the question to the voters. If the majority of voters vote yes on a question whether to call a convention to revise the Constitution, then within 6 months the Legislature must provide for the convention. Delegates to a constitutional convention are to be voters elected from districts as nearly equal in population as may be practicable [*Cal. Const., art. XVIII, § 2*].

[3] Distinguishing Constitutional Amendments from Constitutional Revision

If the scope of a proposed initiative measure is so broad that if the measure became law, a substantial revision of our present state Constitution would be effected, then the measure may not properly be submitted to the electorate until and unless it is first agreed upon by a constitutional convention [*Strauss v. Horton (2009) 46 Cal. 4th 364, 424, 93 Cal. Rptr. 3d 591, 207 P.3d 48* (Proposition 8 does not constitute a constitutional revision)]. The differentiation required is not merely between two words; more accurately, it is between two procedures and between their respective fields of application [*Strauss v. Horton (2009) 46 Cal. 4th 364, 424, 93 Cal. Rptr. 3d 591, 207 P.3d 48* (quoting *McFadden v. Jordan (1948) 32 Cal. 2d 330, 347-348, 196 P.2d 787*)].

Distinguishing a revision from an amendment requires the court to examine both the quantitative and qualitative effects of the measure on the California constitutional scheme, because substantial changes in either respect can amount to a revision [*Raven v. Deukmejian (1990) 52 Cal. 3d 336, 350, 276 Cal. Rptr. 326, 801 P.2d 1077* ; *Legislature v. Eu (1991) 54 Cal. 3d 492, 506, 286 Cal. Rptr. 283, 816 P.2d 1309]* . For whether an initiative constitutes an amendment or revision to the California Constitution does not necessarily depend on the number of constitutional provisions it affects, but rather on the nature of the changes it makes [*California Assn. of Retail Tobacconists v State (2003) 109 Cal. App. 4th 792, 804, 135 Cal. Rptr. 2d 224]* . For a proposal to be a revision, the face of the proposal must necessarily or inevitably disclose that the measure would substantially alter the basic governmental framework set forth in the California Constitution [*Legislature v. Eu (1991) 54 Cal. 3d 492, 510, 286 Cal. Rptr. 283, 816 P.2d 1309* ; *California Assn. of Retail Tobacconists v State (2003) 109 Cal. App. 4th 792, 804, 135 Cal. Rptr. 2d 224]* .

One California Supreme Court decision stated that substantial changes in either quantitative or qualitative aspects of the

Constitution could amount to a revision [*Raven v. Deukmejian (1990) 52 Cal. 3d 336, 350, 276 Cal. Rptr. 326, 801 P.2d 1077*].

Under the quantitative-qualitative analysis, an enactment that is so extensive in its provisions as to change directly the "substantial entirety" of the Constitution by the deletion or alteration of numerous existing provisions may well constitute a constitutional revision. However, even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also [*Strauss v. Horton (2009) 46 Cal. 4th 364, 427, 93 Cal. Rptr. 3d 591, 207 P.3d 48* (quoting *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal. 3d 208, 223, 149 Cal. Rptr. 239, 583 P.2d 1281*)].

One instance of such an initiative "would vest all judicial interpretive power, as to fundamental criminal defense rights, in the United States Supreme Court," by virtue of its provisions limiting interpretation of rights in the California Constitution to the same standards as used by the United States Supreme Court in interpreting federal constitutional rights [*Raven v. Deukmejian (1990) 52 Cal. 3d 336, 351-352, 276 Cal. Rptr. 326, 801 P.2d 1077*].

Another standard that the California Supreme Court applied to the question of a revision looked for "such a sweeping change either in the distribution of powers made in the organic document or in the powers which it vests in [one] branch as to constitute a revision of the Constitution within the contemplation of article XVIII" [*In re Lance W. (1985) 37 Cal.3d 873, 892, 210 Cal. Rptr. 631, 694 P.2d 744*].

In contrast, even an initiative that makes very significant changes constitutes only an amendment if its changes nonetheless operate functionally within a relatively narrow range of subject matter [*Strauss v. Horton (2009) 46 Cal. 4th 364, 428, 93 Cal. Rptr. 3d 591, 207 P.3d 48* (citing *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal. 3d 208, 228, 149 Cal. Rptr. 239, 583 P.2d 1281*)].

The question of whether an initiative constitutes an amendment or a revision requires analysis of the statute on its face [*Rippon v. Bowen (2008) 160 Cal. App. 4th 1308, 1319, 73 Cal. Rptr. 3d 421*]. Each situation involving the question of amendment, as contrasted with revision, of the Constitution must be resolved upon its own facts [*Strauss v. Horton (2009) 46 Cal. 4th 364, 424, 93 Cal. Rptr. 3d 591, 207 P.3d 48* (quoting *McFadden v. Jordan (1948) 32 Cal. 2d 330, 347-348, 196 P.2d 787*)].

The distinction drawn by the California Constitution between an amendment and a revision does not turn on the relative importance of the measure, but rather upon the measure's scope [*Strauss v. Horton (2009) 46 Cal. 4th 364, 446-447, 93 Cal. Rptr. 3d 591, 207 P.3d 48*].

The Supreme Court has applied the aforementioned standards to the facts to find an initiative was an amendment as follows:

- Proposition 13's alteration of eight separate articles and 37 sections of the preexisting California Constitution did not constitute a revision in the Court's quantitative analysis, and the Court rejected arguments that Proposition 13 effected qualitative change to the framework of government through the restriction of home rule and the requirement of initiatives to approve larger tax increases [*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal. 3d 208, 221-227, 149 Cal. Rptr. 239, 583 P.2d 1281*].

- An initiative to add one section to the Constitution concerning the death penalty did not implement far reaching changes in the nature of our basic governmental plan under the qualitative analysis by a plurality of the Court [*People v. Frierson (1979) 25 Cal. 3d 142, 186-187, 158 Cal. Rptr. 281, 599 P.2d 587]* .

- 1982 Proposition 8 effected only a limited quantitative effect, in that it deleted one section and added another consisting of seven subdivisions addressing a variety of issues decided in California Supreme Court cases. The greatest impact was on the criminal justice system, but the Court found that the Proposition's qualitative effect, while substantial, fell far short of the sweeping change necessary for a determination that the initiative would constitute a revision, because it did not alter the basic framework of the Constitution [*Brosnahan v. Brown (1982) 32 Cal. 3d 236, 260-261, 186 Cal. Rptr. 30, 651 P.2d 274*].

- The provision of 1982 Proposition 8 that effectively abrogated the exclusionary rule under the state Constitution was an amendment, because it affected only one incident of the guarantee of freedom from unlawful search and seizure, which is not "such a sweeping change either in the distribution of powers made in the organic document or in the powers which it vests in the judicial branch as to constitute a revision of the Constitution" [*In re Lance W. (1985) 37 Cal. 3d 873, 895, 891-892, 210 Cal. Rptr. 631, 694 P.2d 744*].

- Proposition 140, an initiative measure that: (1) adopted legislative term limits, (2) restricted retirement benefits for legislators, and (3) limited expenditures for legislative staff and support services did not constitute a revision because the basic and fundamental structure of the Legislature as a representative branch of government was left substantially unchanged [*Legislature v. Eu (1991) 54 Cal. 3d 492, 506-510, 286 Cal. Rptr. 283, 816 P.2d 1309*].

- The Supreme Court rejected the argument that Proposition 35, relating to the contracting out of architectural and engineering services for public works, usurped the Legislature's plenary authority to regulate private contracting by public agencies in a global sense. On that basis, it ruled that the inititative did not enact sufficiently "far reaching changes [to] our basic governmental plan as to amount to a revision" [*Professional Engineers in California Government v. Kempton (2007) 40 Cal. 4th 1016, 1047, 56 Cal. Rptr. 3d 814, 155 P.3d 226*].

In contrast, Proposition 115 made a number of changes to criminal procedural rights, one of which limited the power of California courts to find constitutional rights of the accused that were more extensive than that found by the United States Supreme Court under the U.S. Constitution. The California Supreme Court determined that this provision constituted a revision, even though it added only three sections and amended a fourth, because under a qualitative analysis, the measure would, the court found, effectively vest all judicial interpretive power, as to fundamental criminal defense rights, in the United States Supreme Court [*Raven v. Deukmejian (1990) 52 Cal. 3d 336, 350-356, 276 Cal. Rptr. 326, 801 P.2d 1077*].

[4] Effective Date of Amendments and Revisions

A proposed amendment or revision submitted to the electors and approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise [*Cal. Const., art. XVIII, § 4*].

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§ 126A.14 Conflicting Provisions

It is a firmly established rule of constitutional jurisprudence that where two constitutional provisions conflict, the one that was enacted later in time controls [*Slavich v. Walsh (1947) 82 Cal. App. 2d 228, 236-237, 186 P.2d 35* ; *Crawford v. Huntington Beach Union High Sch. Dist. (2002) 98 Cal. App. 4th 1275, 1286, 121 Cal. Rptr. 2d 96]* .

If provisions of two or more constitutional amendments or revisions approved at the same election conflict, those of the measure receiving the highest affirmative vote prevail [*Cal. Const., art. XVIII, § 4*]. Under this provision, there is a distinction between the situation of two competing or alternative initiative measures, only one of which could prevail, and that of two measures presented to the voters as complementary or supplementary. In the latter situation, the two measures may be compared section by section, giving effect to both so long as there is no direct conflict [*Yoshisato v. Superior Court (1992) 2 Cal. 4th 978, 987-988, 991-992, 9 Cal. Rptr. 2d 102, 831 P.2d 327]* .

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§ 126A.15 Courts Do Not Have Authority to Invalidate

Where the language of the Constitution is express and the intent plain, there is no power in the judicial department to set it aside. For the judiciary is but the creature of the Constitution, and cannot judge its creator. It cannot rise above the source of its own existence. If it could do this, it could annul the Constitution, instead of simply declaring what it means. Therefore, California state courts do not possess the authority to invalidate an explicit constitutional amendment, adopted through a constitutionally prescribed procedure, on the ground that the amendment is inconsistent with the scope of a right previously embodied in the Constitution [*Strauss v. Horton (2009) 46 Cal. 4th 364, 468-469, 93 Cal. Rptr. 3d 591, 207 P.3d 48* (Proposition 8 cannot be invalidated on grounds that it conflicts with existing provisions of Constitution)].

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[Reserved]

§§ 126A.16[Reserved]

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§ 126A.20 Governing Law

The California constitutional provision on separate of powers of the three branches of state government is found in *Cal. Const., art. III, § 3*. The limitation on the ability of executive agencies to declare statutes invalid is contained in *Cal. Const., art. III, § 3.5*.

The *Commerce Clause of the U.S. Constitution* is set forth in U.S. *Const., art. I, § 8*, cl. 3.

The *Supremacy Clause of the U.S. Constitution* is located at U.S. Const., art. VI, *cl. 2*. The provision of the California Constitution declaring the U.S. Constitution the law of the land is *Cal. Const., art. III, § 1*.

Local law is preempted in accordance with *Cal. Const., art. XI, § 7* and *Gov. Code § 37100*. *Cal. Const., art. XI, §§ 5* and *7* set out the exceptions to this rule for certain cases involving municipal affairs of charter cities and towns.

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§ 126A.21 Separation of Powers

[1] The California Constitution on Separation of Powers

The California Constitution provides that persons charged with the exercise of legislative, executive, or judicial power of the state may not exercise another of those powers except as permitted by the Constitution [*see Cal. Const., art. III, § 3*]. However, the separation of powers doctrine does not mean quite what it seems to mean. The doctrine does not mean that legislative, executive, and judicial powers must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence in the slightest degree. The true meaning is that the whole power of one of these departments may not be exercised by the same hands that possess the whole power of either of the other departments [*People ex rel. McCauley & Tevis v. Brooks (1860) 16 Cal. 11, 40* ; *accord Manduley v. Superior Court (2002) 27 Cal. 4th 537, 557, 117 Cal. Rptr. 2d 168, 41 P.3d 3]* . The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch [*Carmel Valley Fire Protection Dist. v. State of California (2001) 25 Cal. 4th 287, 297, 105 Cal. Rptr. 2d 636, 20 P.3d 533]* .

Although enshrined in the Constitution and fundamental to the preservation of civil liberties, the separation of powers doctrine does not mean that the three departments of state government are not in many respects mutually dependent [*Younger v Superior Court of Sacramento County (1978) 21 Cal. 3d 102, 117, 145 Cal. Rptr. 674, 577 P.2d 1014* , quoting *Solberg v. Superior Court (1977) 19 Cal. 3d 182, 191, 137 Cal. Rptr. 460, 561 P.2d 1148]* . Each department of government for its own existence must in some degree exercise some of the functions of the others [*Younger v Superior Court of Sacramento County (1978) 21 Cal. 3d 102, 117, 145 Cal. Rptr. 674, 577 P.2d 1014* , quoting *Laisne v. Cal. St. Bd. of Optometry (1942) 19 Cal.2d 831, 835, 123 P.2d 457]* . The purpose of the doctrine is to prevent one branch of government from exercising the complete power constitutionally vested in another [*Younger v Superior Court of Sacramento County (1978) 21 Cal. 3d 102, 117, 145 Cal. Rptr. 674, 577 P.2d 1014* , citing *Laisne v. Cal. St. Bd. of Optometry (1942) 19 Cal. 2d 831, 835, 123 P.2d 457]* . It is not intended to prohibit one branch from taking action properly within its sphere that has the incidental effect of duplicating a function or procedure delegated to another branch [*Younger v Superior Court of Sacramento County (1978) 21 Cal. 3d 102, 117, 145 Cal. Rptr. 674, 577 P.2d 1014* , citing *Parker v. Riley (1941) 18 Cal.2d 83, 89-90, 113 P.2d 873]* .

[2] Exercise of Legislative and Judicial Powers by the Executive

[a] In General

The executive branch, via an administrative agency, may exercise judicial or legislative power without violating the separation of powers doctrine when thejudicial power is subject to judicial review and the legislative power is clearly defined by the legislature. Agency action may not violate the separation of powers doctrine even when it does not satisfy these requirements [20th *Century Ins. Co. v. Quackenbush (1998) 64 Cal. App. 4th 135, 141-142, 75 Cal. Rptr. 2d 113]* .

For discussion of the exercise by administrative agencies of legislative or judicial powers, see *Ch. 470, Overview of Public Administrative Law, § 470.12[6]*.

[b] Constitutional Limitation on Adjudicatory Powers of Administrative Agencies

Administrative agencies are constitutionally barred from declaring statutes unconstitutional or otherwise unenforceable on constitutional or federal-preemption grounds [*see Cal. Const., art. III, § 3.5*].

For discussion of *Cal. Const., art. III, § 3.5*, see *Ch. 470, Overview of Public Administrative Law, § 470.12*; *see* also *Ch. 473A, Commencing Agency Adjudication, § 473A.13*.

[3] Exercise of Executive and Judicial Powers by the Legislature

[a] Presumption of Constitutionality of Statutes

A properly enacted statute is presumed to have been enacted by the Legislature within the scope of its constitutional powers [*Hughes v. Board of Architectural Examiners (1998) 17 Cal. 4th 763, 788, 72 Cal. Rptr. 2d 624, 952 P.2d 641]* .

For detailed discussion of the presumption that statutes are constitutional, see *Ch. 531, Statutes and Ordinances, § 531.64*.

[b] Executive Power

The Legislature cannot require or authorize that powers or responsibilities that the constitution specially confers or imposes upon the governor or other executive officer are to be performed or undertaken by any other officer or authority. Likewise, the Legislature cannot directly or indirectly take matters that the constitution specifically confides to a specified body or agency from its control [*State Board of Education v. Levit (1959) 52 Cal. 2d 441, 461, 343 P.2d 8]* .

In addition, having enacted a statutory scheme, the Legislature has no power to exercise supervisory control or to retain for itself some sort of veto power over the manner of execution of the laws [*State Board of Education v. Levit (1959) 52 Cal. 2d 441, 461-462, 343 P.2d 8* ; *California Radioactive Materials Management Forum v. Department of Health Services (1993) 15 Cal. App. 4th 841, 872, 19 Cal. Rptr. 2d 357* , (Legislature cannot exercise supervisory control over executive nominee's performance of the duties of office)]. Having granted authority to an executive department to execute the provisions of a law, the Legislature "must abide by its delegation of authority until that delegation is legislatively altered or revoked" by statute in accordance with the bicameral and presentment requirements of the California Constitution [*California Radioactive Materials Management Forum v. Department of Health Services (1993) 15 Cal. App. 4th 841, 872, 19 Cal. Rptr. 2d 357* , citing and quoting *INS v. Chadha (1983) 462 U.S. 919, 954-955, 103 S.Ct. 2764, 77 L.Ed.2d 317, 347]* . The legislative branch may not control the exercise of the discretion actually vested by statute in the executive by retaining the unilateral power of removal [*Bowsher v. Synar (1986) 478 U.S. 714, 727, 106 S. Ct. 3181, 3188, 92 L. Ed. 2d 583* ; *Carmel Valley Fire Protection Dist. v. State of California (2001) 25 Cal. 4th 287, 305, 105 Cal. Rptr. 2d 636, 20 P.3d 533]* .

However, the Legislature may limit the discretion vested in the executive by enacting a statute circumscribing that discretion [*Carmel Valley Fire Protection Dist. v. State of California (2001) 25 Cal. 4th 287, 305, 105 Cal. Rptr. 2d 636, 20 P.3d 533]* . That is, control means absolute control. Incidental control within usual legislative powers is within the power of the legislative branch [*Carmel Valley Fire Protection Dist. v. State of California (2001) 25 Cal. 4th 287, 306, 105 Cal. Rptr. 2d 636, 20 P.3d 533]* . This incidental power includes the power to completely withdraw a statutory grant of authority to an executive agency or completely remove funding for a particular exercise of its power [*Consumer Energy v. F. E. R. C. (D.C. Cir. 1982) 673 F.2d 425, 474* , summarily *aff'd sub nom.*, *Process Gas Consumers Group v. Consumer Energy Council of America (1983) 463 U.S. 1216, 103 S. Ct. 3556, 77 L. Ed. 2d 1402, 1403* ; *Carmel Valley Fire Protection Dist. v. State of California, 25 Cal. 4th 287, 307, 105 Cal. Rptr. 2d 636, 20 P.3d 533]* .

Under *Cal. Const., art. IV, § 7*, the Legislature retains powers necessary to its lawmaking functions, including the power to protect the safety and security of the Legislature, its members, and any buildings and grounds used by the Legislature [*The Zumbrun Law Firm v. California Legislature (2008) 165 Cal. App. 4th 1603, 1614, 82 Cal. Rptr. 3d 525* (power to contract for construction of its facilities)].

[c] Judicial Power

The Legislature may not undertake to readjudicate controversies that have been litigated in the courts and resolved by final judicial judgment [*Superior Court v. County of Mendocino (1996) 13 Cal. 4th 45, 53, 51 Cal. Rptr. 2d 837, 913 P.2d 1046* , citing *Mandel v. Myers (1981) 29 Cal. 3d 531, 547-550, 174 Cal. Rptr. 841, 629 P.2d 935* , and *Plaut v. Spendthrift Farm, Inc. (1995) 514 U.S. 211, 115 S. Ct. 1447, 1453-1456, 131 L. Ed. 2d 328, 342-346* ; *accord Le Francois v. Goel (2005) 35 Cal. 4th 1094, 1103, 29 Cal. Rptr. 3d 249, 112 P.3d 636* (the essential judicial power to resolve specific controversies between parties is a core function that the Legislature may regulate but not usurp)].

Under *Cal. Const., art. III, § 3*, the legislature lacks the power to state that a change in the law is a declaration of existing law, as such a declaration interpreting the law is a judicial responsibility [*McClung v. Employment Development Dept. (2004) 34 Cal. 4th 467, 469-470, 20 Cal. Rptr. 3d 428, 99 P.3d 1015* (contrary to legislative declaration, statute in question changed the law)].

Nonetheless, the Legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions [*Le Francois v. Goel (2005) 35 Cal. 4th 1094, 1103, 29 Cal. Rptr. 3d 249, 112 P.3d 636* (the essential judicial power to resolve specific controversies between parties is a core function that the Legislature may regulate but not usurp); *Superior Court v. County of Mendocino (1996) 13 Cal. 4th 45, 58, 51 Cal. Rptr. 2d 837, 913 P.2d 1046* , quoting *Brydonjack v. State Bar (1929) 208 Cal. 439, 444, 281 P. 1018* (legislation authorizing counties to designate unpaid furlough days on which the courts must be closed did not violate separation of powers)].

[4] Exercise of Legislative and Executive Powers by the Judiciary

[a] Legislative Power

Where the legislature has failed to exercise its power, and that failure jeopardizes constitutional rights of the public, the judiciary may exercise that power [*see* *Wilson v. Eu (1991) 54 Cal. 3d 471, 473, 286 Cal. Rptr. 280, 816 P.2d 1306* (Legislature's failure to reapportion justifies judicial adoption of reapportionment plan)]. However, a court is without power to interfere with purely legislative action, and when the Legislature has committed to a municipal body the power to legislate on a given subject, the court has no power to command or prohibit the exercise of the legislative function [*County of Orange v. Barratt American, Inc. (2007) 150 Cal. App. 4th 420, 437, 58 Cal. Rptr. 3d 542*].

In contrast, a court may nullify a specific and valid exercise by the Legislature and the Executive of fundamental budgetary powers explicitly entrusted to those branches, simply for the purpose of satisfying a judgment or order that is unrelated to the appropriation [*Butt v. State of California (1992) 4 Cal. 4th 668, 702-703, 15 Cal. Rptr. 2d 480, 842 P.2d 1240]* .

While a court cannot compel the Legislature either to appropriate funds or to pay funds not yet appropriated, no violation of the separation of powers doctrine occurs when a court orders appropriate expenditures from already existing funds. The test is whether such funds are reasonably available for the expenditures in question. Funds are reasonably available for reimbursement when the purposes for which those funds were appropriated are generally related to the nature of costs incurred. There is no requirement that the appropriation specifically refer to the particular expenditure, nor must past administrative practice sanction coverage from a particular fund. Still, funds appropriated for one specific educational purpose may not be judicially diverted to another [*County of San Diego v. California (2008) 164 Cal. App. 4th 580, 598-599, 79 Cal. Rptr. 3d 489*].

Of course, the court may promulgate rules for its own conduct and as otherwise delegated to it by the legislative branch [*Mistretta v. United States (1989) 488 U.S. 361, 387-388, 109 S.Ct. 647, 102 L.Ed.2d 714* , citing *Sibbach v. Wilson & Co. (1941) 312 U.S. 1, 9-10, 61 S. Ct. 422, 85 L. Ed. 479]* .

The principle of constitutional separation of power underlies the mental processes principle, which precludes any judicial inquiry into the subjective motives or mental processes of legislators [*Sutter's Place v. Superior Court (2008) 161 Cal. App. 4th 1370, 1382, 75 Cal. Rptr. 3d 9*].

[b] Executive Power

Judicial exercise of power incidental to power of the executive department of state government is not a violation of separation of powers [*see Younger v Superior Court of Sacramento County (1978) 21 Cal. 3d 102, 117, 145 Cal. Rptr. 674, 577 P.2d 1014* (court order expunging criminal record after completion of sentence is not unconstitutional infringement on executive power of clemency)].

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§ 126A.22 Federal Commerce Clause as Limitation on State Powers

[1] In General

The *Commerce Clause of the U.S. Constitution* [U.S. *Const., art. I, § 8*, cl. 3] bars states from imposing a substantial burden on interstate commerce which outweighs its putative local benefits [*Edgar v. MITE Corp. (1982) 457 U.S. 624, 646, 102 S. Ct. 2629, 73 L. Ed. 2d 269* ; *Diamond Multimedia Sys. v. Superior Court (1999) 19 Cal. 4th 1036, 1073, 968 P.2d 539* ; *80 Cal. Rptr. 2d 828]* .

The Federal *Commerce Clause* precludes the application of a state statute to commerce that takes place wholly outside of the state's borders, whether or not the commerce has effects within that state [*Healy v. The Beer Institute (1989) 491 U.S. 324, 336 [109 S. Ct. 2491, 105 L. Ed. 2d 275]* .

For the effect of the Federal *Commerce Clause* on equal protection analysis, see *§ 126A.66*.

[2] Dormant Commerce Clause

[a] Nature and Applicability

The U.S. Constitution does not in terms limit the power of States to regulate commerce. Nonetheless, the *Commerce Clause* [see U.S. *Const., art. I, § 8, cl. 3*] is an implicit restraint on state authority, even in the absence of a conflicting federal statute [*United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (2007) 550 U.S. 330, 337, 127 S. Ct. 1786, 167 L. Ed. 2d 655]* . The dormant *Commerce Clause* is implicated if state laws regulate an activity that has a substantial effect on interstate commerce such that Congress could regulate the activity [*National Association of Optometrists & Opticians Lenscrafters, Inc. v. Brown (9th Cir. 2009) 567 F.3d 521, 524]* .

[b] Laws That Discriminate Against Out-of-State Persons

To determine whether a law violates the dormant *Commerce Clause*, the Court first asks whether it discriminates against interstate commerce. A statutory scheme can discriminate against out-of-state interests in three different ways [

National Association of Optometrists & Opticians Lenscrafters, Inc. v. Brown (9th Cir. 2009) 567 F.3d 521, 525] :

- Facially.
- Purposefully.
- In practical effect

In this context, "discrimination" generally means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter [*United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (2007) 550 U.S. 330, 338, 127 S. Ct. 1786, 167 L. Ed. 2d 655* , quoting *Oregon Waste Sys. v. Department of Envtl. Quality, 511 U.S. 93, 99, 114 S. Ct. 1345, 128 L. Ed. 2d 13]* . However, in the case of local laws, the discrimination may be between local persons and other persons elsewhere in the state and those outside of the state [*C & A Carbone, Inc. v. Town of Clarkstown (1994) 511 U.S. 383, 391, 114 S. Ct. 1677, 128 L. Ed. 2d 399]* .

To determine whether the laws have a purposeful discriminatory effect, it is necessary to determine whether the purpose of the law is to protect in-state entities from similar out-of-state entities [*National Association of Optometrists & Opticians Lenscrafters, Inc. v. Brown (9th Cir. 2009) 567 F.3d 521, 525]* . Discriminatory laws motivated by simple economic protectionism are subject to a virtually per se rule of invalidity [*United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (2007) 550 U.S. 330, 338, 127 S. Ct. 1786, 167 L. Ed. 2d 655 , quoting Philadelphia v. New Jersey, 437 U.S. 617, 624, 98 S. Ct. 2531, 57 L. Ed. 2d 475]* , which can only be overcome by a showing that there is no other means to advance a legitimate local purpose [*United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (2007) 550 U.S. 330, 338, 127 S. Ct. 1786, 167 L. Ed. 2d 655 , citing Maine v. Taylor, 477 U.S. 131, 138, 106 S. Ct. 2440, 91 L. Ed. 2d 110]* .

To determine whether the laws have a practical discriminatory effect, it is necessary to compare the out-of-state entity with a similarly situated in-state entity [*National Association of Optometrists & Opticians Lenscrafters, Inc. v. Brown (9th Cir. 2009) 567 F.3d 521, 525]* .

[c] Laws That Do Not Discriminate, but Burden Interstate Commerce

In contrast to laws that discriminate against out-of-state persons, non-discriminatory laws only need to satisfy a less rigorous balancing test to survive constitutional scrutiny [*C & A Carbone, Inc. v. Town of Clarkstown (1994) 511 U.S. 383, 392, 114 S. Ct. 1677, 128 L. Ed. 2d 399* ; *National Association of Optometrists & Opticians Lenscrafters, Inc. v. Brown (9th Cir. 2009) 567 F.3d 521, 524]* . If not discriminatory, the laws may still be invalidated if the burden they place on interstate commerce outweighs their benefits. Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits [*Pike v. Bruce Church, Inc. (1970) 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174* ; *National Association of Optometrists & Opticians Lenscrafters, Inc. v. Brown (9th Cir. 2009) 567 F.3d 521, 528]* .

[3] "Indian Commerce Clause"

In addition, the Indian *commerce clause* of U.S. *Const., art. I, § 8*, is a potential barrier to the exercise of state authority if the state authority interferes with "commercial activity on an Indian reservation [*Agua Caliente Band of Cahuilla Indians v. Superior Court (2006) 40 Cal. 4th 239, 249, 52 Cal. Rptr. 3d 659, 148 P.3d 1126* ; *Ramah Navajo School Bd. v. Bureau of Revenue (1982) 458 U.S. 832, 837, 102S. Ct. 3394, 73 L. Ed. 2d 1174* (federal law may preempt state authority if it interferes with tribe's ability to exercise its sovereign functions)].

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§ 126A.23 Federal Preemption of State Laws

[1] The Nature of Preemption Power

The authority of Congress to preempt state law derives from the *Supremacy Clause* in the U.S. Constitution. It provides that the federal constitution and federal statutes and treaties are the supreme law of the land and bind state judges, despite state constitutional and statutory law to the contrary [*see* U.S. Const., art. VI, *cl. 2*; *see also Cal. Const., art. III, § 1* (U.S. Constitution is supreme law of the land)]. In exercising its legislative powers, Congress may expressly preempt state law. Moreover, absent express preemption, there are three bases for finding implied preemption.

Any provision of the federal statute specifying how to determine the scope of express preemption controls [*see Silvas v. E*Trade Mortg. Corp. (9th Cir. 2008) 514 F.3d 1001, 1005* & n.1 (discussing *OTS, Final Rule, 61 Fed. Reg. 50951, 50966-67 (Sept. 30, 1996)* , concerning *12 C.F.R. § 560.2*)].

For discussion of federal-law preemption of state law in the context of federal jurisdiction and removal of cases from state to federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

[2] Express Preemption

[a] Conditions Under Which Preemption Is Express

When Congress has expressly stated in a statute the areas of state law that are preempted, a state law will fall in the following situations [*California Service Station etc. Assn. v. Union Oil Co. (1991) 232 Cal. App. 3d 44, 51, 283 Cal. Rptr. 279]* :

- A direct conflict exists between the state and federal regulations making it impossible to comply with both laws;

- The state regulation stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress; or

- Congress has taken possession of the field in a particular area so as to displace all state regulations regardless of whether they are compatible.

[b] Scope of Express Preemption

When express preemptive language establishes that Congress intended to preempt at least some state law, it is still necessary to "identify the domain" expressly preempted by the statutory language, by determining the scope of the federal statute [*Southern Cal. Gas Co. v. Occupational Safety & Health Appeals Bd. (1997) 58 Cal. App. 4th 200, 204, 67 Cal. Rptr. 2d 892* , citing *Medtronic, Inc. v. Lohr (1996) 518 U.S. 470, 485-486, 116 S. Ct. 2240, 2250, 135 L. Ed. 2d 700]* . The market participant doctrine distinguishes between a state's role as a regulator, on the one hand, and its role as a market participant, on the other. Actions taken by a state or its subdivision as a market participant are generally protected from federal preemption [*Engine Manufacturers Ass'n v. South Coast Air Quality Maintenance Dist. (9th Cir. 2007) 498 F.3d 1031, 1040*]. Given that the scope of express preemption is itself usually not stated in a federal statute, it must be inferred from the federal statute.

When interpreting a preemption clause, courts must give effect to its plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning. Interpretation does not occur in a contextual vacuum, but rather is informed by two presumptions. First, the states are independent sovereigns in the U.S. federal system, so courts have long presumed that Congress does not cavalierly preempt state law causes of action. Second, the purpose of Congress is the ultimate touchstone in every preemption case [*Sanchez v. Aerovias De Mex., S.A. de C.V. (9th Cir. 2010) 590 F.3d 1027, 1029-1030]* .

A determination of the scope of an express preemption statute begins with an analysis of its text, considered in context with the structure and purpose of the statute and its surrounding regulatory scheme. Thus, on the one hand, a statute that would preempt state health and safety regulation is narrowly construed to include within its scope only matters that are consistent with "a fair understanding of congressional purpose" [*Southern Cal. Gas Co. v. Occupational Safety & Health Appeals Bd. (1997) 58 Cal. App. 4th 200, 204, 67 Cal. Rptr. 2d 892* , citing *Medtronic, Inc. v. Lohr (1996) 518 U.S.470, 485-486, 116 S. Ct. 2240, 2250-2251, 135 L. Ed. 2d 700]* . On the other hand, when federal law so thoroughly occupies a legislative field by a pervasive and complex regulatory system, it is reasonable to infer that Congress intended to leave no room for the states to supplement it [*Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta (1982) 458 U.S. 141, 102 S. Ct. 3014, 3022, 73 L. Ed. 2d 664* ; *Southern Cal. Gas Co. v. Occupational Safety & Health Appeals Bd. (1997) 58 Cal. App. 4th 200, 205, 67 Cal. Rptr. 2d 892]* .

[c] Waivers of Express Preemption

Federal law may provide procedure and standards for administrative waiver of express preemption of state law by the federal law [*see, e.g., 42 U.S.C.S. § 6297(d)(1)(B)*; *California Energy Com. v. U.S. Dep't of Energy (9th Cir. 2009) 585 F.3d 1143, 1152]* . An appellate court will uphold an agency decision on a waiver application only on the basis of the reasoning articulated therein. It will overturn a decision as arbitrary and capricious if the agency did any of the following [*California Energy Com. v. U.S. Dep't of Energy (9th Cir. 2009) 585 F.3d 1143, 1150]* :

- Relied on a factor that Congress did not intend it to consider.

- Failed to consider an important factor or aspect of the problem.

- Failed to articulate a rational connection between the facts found and the conclusions made.

- Supported the decision with a rationale that runs counter to the evidence or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

- Made a clear error in judgment.

[3] Implied Preemption

[a] Methods of Implied Preemption

[i] Federal Statute Occupies the Field

If it is clear that Congress intended, by comprehensive legislation, to occupy an entire given field of regulation, leaving no room for the states to supplement federal law, state law in that field is preempted [*Bronco Wine Co. v. Jolly (2004) 33 Cal. 4th 943, 955-956, 17 Cal. Rptr. 3d 180, 95 P.3d 422* ; *see, e.g.,* *Beneficial Nat'l Bank v. Anderson (2003) 539 U.S. 1, 7-11, 123 S. Ct. 2058, 156 L. Ed. 2d 1* (state-law usury claims against national bank are completely preempted by National Bank Act, *12 U.S.C. § 1 et seq.*, intended to provide exclusive federal cause of action for usury against national banks)].

Unlike its traditional statutory counterpart, foreign affairs field preemption may occur even in the absence of a treaty or federal statute, because a state may violate the U.S. Constitution by establishing its own foreign policy, thus exercising a power reserved exclusively to the federal government by the Constitution [*Von Saher v. Norton Simon Museum of Art at Pasadena (9th Cir. 2010) 592 F.3d 954, 964]* .

[ii] Federal Law Conflicts With State Law

Even if Congress has not intended that federal law occupy a regulatory field, state law is nevertheless preempted to the extent it actually conflicts with federal law, that is, if compliance with both state and federal law is impossible [*Bronco Wine Co. v. Jolly (2004) 33 Cal. 4th 943, 955-956, 17 Cal. Rptr. 3d 180, 187, 95 P.3d 422* ; *California v. ARC America Corp. (1989) 490 U.S. 93, 100-101, 109 S. Ct. 1661, 104 L. Ed. 2d 86* ; *Stevenson v. San Francisco Housing Auth. (1994) 24 Cal. App. 4th 269, 280, 29 Cal. Rptr. 2d 398* ; *see* *Doyle v. Bd. of Supervisors (1988) 197 Cal. App. 3d 1358, 1363, 243 Cal. Rptr. 572* ; *see also* *Tahoe Regional Planning Agency v. King (1991) 233 Cal. App. 3d 1365, 1386-1387, 285 Cal. Rptr. 335* (court held no preemption because purpose of federal law was to induce states to comply, not require compliance)].

Where the federal law does not expressly preempt or impliedly occupy the field, states may establish their own requirements, including a state-law cause of action, pertaining to the subject of the federal statute so long as the state requirements areidentical to those contained in the federal statute [*Farm Raised Salmon Cases (2008) 42 Cal. 4th 1077, 1086, 1096, 72 Cal. Rptr. 3d 112, 175 P.3d 1170* (labeling of artificially colored food under Federal Food, Drug, and Cosmetic Act, *21 U.S.C. § 343(k)*)].

[iii] Federal Statute Obstructed by State Law

Federal law impliedly preempts any state law that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [*Bronco Wine Co. v. Jolly (2004) 33 Cal. 4th 943, 955-956, 17 Cal. Rptr. 3d 180, 95 P.3d 422* ; *Aalgaard v. Merchants Nat. Bank, Inc. (1990) 224 Cal. App. 3d 674, 686, 688, 274 Cal. Rptr. 81]* .

[b] Scope of Implied Preemption

When a state law is preempted because it conflicts with federal law, it is preempted only to that extent and no further. In such a case, the portion of the state law that does not conflict with federal law can be given effect if the invalid portion can be severed. [*Jevne v. Superior Court (2005) 35 Cal. 4th 935, 960-961, 28 Cal. Rptr. 3d 685, 111 P.3d 954]* .

In determining whether a state statute interferes with and frustrates a federal statute, a court considers whether the

existence of a conflict results from the effect and not merely the purpose of the state statute [*Bronco Wine Co. v. Jolly (2004) 33 Cal. 4th 943, 972-973, 17 Cal. Rptr. 3d 180, 95 P.3d 422* (court must consider relationship between state and federal laws as they are interpreted and applied, not merely as they are written); *California Aviation, Inc. v. Leeds (1991) 233 Cal. App. 3d 724, 732-733, 284 Cal. Rptr. 687* (effect of state limitation period on malpractice claims would be to thwart Congress's intent to extend bankruptcy limitation period to protect creditors)].

For discussion of severability of invalid portions of laws, see *§ 126A.76, below*.

[4] Federal Statutes, Regulations, Treaties, and Executive Agreements Preempt

Federal regulations have no less preemptive effect than federal statutes [*Silvas v. E*Trade Mortg. Corp. (9th Cir. 2008) 514 F.3d 1001, 1005* (applying *12 C.F.R. § 560.2*); *Olszewski v. Scripps Health (2003) 30 Cal. 4th 798, 814-827, 135 Cal. Rptr. 2d 1, 69 P.3d 927* (federal Medicaid statutes and regulations limiting provider reimbursement preempt conflicting California statutes)]. Thus, a federal agency may preempt state law through regulations that are within the scope of its statutory authority and that are not arbitrary [*People v. Edward D. Jones & Co. (2007) 154 Cal. App. 4th 627, 639, 65 Cal. Rptr. 3d 130* ; *Black v. Financial Freedom Senior Funding Corp. (2001) 92 Cal. App. 4th 917, 926, 112 Cal. Rptr. 2d 445]* . Similarly, the foreign policy of the federal government, as embodied in treaties and executive agreements made with other countries, may preempt conflicting state laws, either expressly or by necessary implication. For example, California's Holocaust Victim Insurance Relief Act of 1999 [*Ins. Code § 13800 et seq.*] is preempted because it interferes with the federal government's conduct of foreign relations, as expressed principally in executive agreements with Germany, Austria, and France [*American Ins. Ass'n v. Garamendi (2003) 539 U.S. 396, 123 S. Ct. 2374, 156 L. Ed. 2d 376, 395-402]* .

[5] Presumption Against Preemption in Areas Traditionally Regulated By States

There is a presumption against finding preemption of state law in areas traditionally regulated by the states [*State of California v. ARC America Corp. (1989) 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86, 94* (unfair business practices); *Bronco Wine Co. v. Jolly (2004) 33 Cal. 4th 943, 973-974, 17 Cal. Rptr. 3d 180, 95 P.3d 422* (presumption against preemption applies in case involving federal and state wine-labeling regulations, because protection of consumers from potentially misleading brand names and labels of food and beverages in general, and wine in particular, has traditionally been regulated by states); *McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal. 4th 412, 416-424, 106 Cal. Rptr. 2d 271, 21 P.3d 1189* (in absence of clear indication of congressional intent, Medicare Act does not preempt California tort remedies for claims that find no remedy under Medicare administrative process)], and it even applies in the determination of the scope of preemption [*see* *Washington Mutual Bank v. Superior Court (1999) 75 Cal. App. 4th 773, 782, 89 Cal. Rptr. 2d 560* , citing *Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504, 523, 112 S. Ct. 2608, 120 L. Ed. 2d 407* (in interpreting the extent of express preemption, courts must be mindful of strong presumption against preemption or displacement of state laws)]. Specifically, if a federal statute operates in an area of traditional state regulation, congressional intent to preempt must be clear and manifest [*Bronco Wine Co. v. Jolly (2004) 33 Cal. 4th 943, 973-974, 17 Cal. Rptr. 3d 180, 95 P.3d 422* (in field traditionally regulated by states, court should not find that traditional police powers of states are superseded unless it is clear and manifest that Congress intended to preempt state law)].

The presumption against preemption is applicable in implied preemption cases, including those in which the asserted basis of preemption is that state law would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [*Bronco Wine Co. v. Jolly (2004) 33 Cal. 4th 943, 958 n.12, 17 Cal. Rptr. 3d 180, 95 P.3d 422]* . In deciding whether a state law would hinder the complete accomplishment of a federal law's objective, a court must give considerable weight to the views of the federal agency charged with administering the federal law [*Jevne v. Superior Court (2005) 35 Cal. 4th 935, 958, 28 Cal. Rptr. 3d 685, 111 P.3d 954]* .

The presumption against preemption applies not only to state substantive requirements, but also to state causes of

action. The mere absence of a private right of action under the federal law does not mean that a private right of action under state law is preempted as a right inherently in conflict with the federal law. There is no federal policy against the states imposing liability in addition to that imposed by federal law. Ordinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law [*Washington Mutual Bank v. Superior Court (1999) 75 Cal. App. 4th 773, 782, 89 Cal. Rptr. 2d 560]* .

While there is a strong presumption against federal preemption of state lawgoverning historic police powers, the United States Supreme Court has held that the presumption does not apply when a state regulates in an area where there has been a history of significant federal presence [Silvas v. E* *Silvas v. E*Trade Mortg. Corp. (9th Cir. 2008) 514 F.3d 1001, 1004* (banking)].

[6] "Generic Concerns" Do Not Preempt

When both the state and federal requirements reflect "generic concerns" rather than specific regulations, they probably will not conflict, resulting in no preemption. Preemption occurs "only where a particular state requirement threatens to interfere with a specific federal interest" [*Medtronic, Inc. v. Lohr (1996) 518 U.S. 470, 485, 116 S. Ct. 2240, 2257-2258, 135 L. Ed. 2d 700* (courts should broadly interpret preemption provision of federal statutes with limited applicability and narrowly interpret statutes with general applicability); *People ex rel. Lungren v. Cotter & Co. (1997) 53 Cal. App. 4th 1373, 1384, 62 Cal. Rptr. 2d 368]* .

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-126A California Forms of Pleading and Practice--Annotated § 126A.24

§ 126A.24 State Law Preemption of Local Law

[1] General Rule

Generally, city and county ordinances must not conflict with general laws [*Cal. Const., art. XI, § 7*; *Gov. Code § 37100*; *but see discussion under § 126A.13[2]*], but they will be presumed valid until a conflict is shown [*Water Quality Assn. v. Santa Barbara County (1996) 44 Cal. App. 4th 732, 740-741, 52 Cal. Rptr. 2d 184]* . Absent a clear indication of preemptive intent from the Legislature, the court presumes that local regulation in an area over which the local government traditionally has exercised control is not preempted by state law [*Rental Housing Ass'n of N. Alameda Cty. v. City of Oakland (2009) 171 Cal. App. 4th 741, 752, 90 Cal. Rptr. 3d 181*]. However, once a conflict with state law is found to exist, the ordinance is void [*Building Industry Association of Northern California v. City of Livermore (1996) 45 Cal. App. 4th 719, 724, 52 Cal. Rptr. 2d 902]* . A conflict exists if the ordinance duplicates, contradicts, or enters into a field of regulation expressly or impliedly reserved to the state [*Lancaster v. Municipal Court (1972) 6 Cal. 3d 805, 807-808, 100 Cal. Rptr. 609, 494 P.2d 681* ; *Water Quality Assn. v. Santa Barbara County (1996) 44 Cal. App. 4th 732, 740-741, 52 Cal. Rptr. 2d 184* ; *Music Plus Four, Inc. v. Barnet (1980) 114 Cal. App. 3d 113, 121, 170 Cal. Rptr. 419* ; *Citizens for Uniform Laws v. County of Contra Costa (1991) 233 Cal. App. 3d 1468, 1473-1475, 285 Cal. Rptr. 456* (no preemption where purpose of local ordinance did not conflict with purpose of state statute)]. If the state's preemption of the field is not complete, however, local supplemental legislation is not deemed conflicting to the extent that it covers phases of the subject which have not been covered by state law [*Baron v. City of Los Angeles (1970) 2 Cal. 3d 535, 541, 86 Cal. Rptr. 673, 469 P.2d 353]* . Additionally, if the statute contains language indicating that the Legislature did not intend its regulations to be exclusive, the general rule permitting additional supplementary local regulations has been applied [*Korean American Legal Advocacy Foundation v. City of Los Angeles (1994) 23 Cal. App. 4th 376, 393, 28 Cal. Rptr. 2d 530* ; *see Lowe v. City of Commerce (1997) 59 Cal. App. 4th 1075, 1082, 69 Cal. Rptr. 2d 356* (ordinance allowed exclusion for broader range of conduct, but did not directly conflict with state statute)].

The first step in a preemption analysis is to determine whether the local regulation explicitly conflicts with or duplicates any provision of state law [*Big Creek Lumber Co. v. County of Santa Cruz (2006) 38 Cal. 4th 1139, 45 Cal. Rptr. 3d 21, 136 P.3d 821* (*Pub. Res. Code § 4516.5(d)*, which prohibits county regulation of "conduct of timber operations,"

does not expressly preempt local zoning ordinances that regulate location of timber operations but not manner in which they are carried out)]. If the local regulation does not expressly contradict or duplicate state law, its validity must then be evaluated under implied preemption principles [*see Cohen v. Board of Supervisors (1985) 40 Cal. 3d 277, 291-292, 219 Cal. Rptr. 467, 707 P.2d 840* ; *California Rifle & Pistol Assn. v. City of West Hollywood (1998) 66 Cal. App. 4th 1302, 1310, 78 Cal. Rptr. 2d 591]* . Local law contradicts state law when it is inimical to state law, and duplicates state law when it is coextensive with it [*Great W. Shows, Inc. v. County of Los Angeles (2002) 27 Cal. 4th 853, 860, 864-869, 118 Cal. Rptr. 2d 746, 44 P.3d 120* (local gun show ordinances not preempted by state gun-show laws); *Xiloj-Itzep v. City of Agoura Hills (1994) 24 Cal. App. 4th 620, 644, 29 Cal. Rptr. 2d 879]* .

Under these principles, there are three tests to determine whether the Legislature has impliedly preempted local regulation of a particular subject by manifesting an intent to fully occupy the particular area of law [*Nordyke v. King (2002) 27 Cal. 4th 875, 882, 118 Cal. Rptr. 2d 761, 44 P.3d 133* (firearms-sales ordinance not preempted by state gun-show laws); *Great W. Shows, Inc. v. County of Los Angeles (2002) 27 Cal. 4th 853, 860, 118 Cal. Rptr. 2d 746, 44 P.3d 120]* :

- Whether the subject matter has been so fully and completely covered by general law as to indicate that it has become exclusively a matter of state concern;

- Whether the subject matter has been partially covered by a general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or

- Whether the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.

Thus, preemption by implication of legislative intent exists when the scope or the goal of state legislation necessitates the abrogation of local regulation. Preemption by implication may not be found when the Legislature has expressed its intent to permit local regulation. Similarly, it should not be found when the statutory scheme recognizes local regulations [*Waste Resource Technologies v. Department of Public Health (1994) 23 Cal. App. 4th 299, 305, 28 Cal. Rptr. 2d 422]* .

Where the legislature has adopted statutes governing a particular subject matter, its intent with regard to occupying the field to the exclusion of all local regulation is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme [*Sequoia Park Associates v. Cty. of Sonoma (2009) 176 Cal. App. 4th 1270, 1278, 98 Cal. Rptr. 3d 669]* .

A party claiming preemption of local law has the burden of demonstrating state law preemption [*In re Jennifer S. (2009) 179 Cal. App. 4th 64, 69, 101 Cal. Rptr. 3d 467]* .

For a discussion and forms relating to state preemption of local licensing ordinances, see *Ch. 471B, Licensing by Public Agencies, §§ 471B.13[2]* and *471B.113* et seq.

For discussion of state law preemption of local initiatives, see *Ch. 302, Initiative, Referendum, and Recall, § 302.12[1][b]*.

[2] Charter Cities and Counties

Despite the general rule that city ordinances must not conflict with general laws [*see Cal. Const., art. XI, § 7*; *Gov. Code § 37100*], a city that adopts a charter may provide in the charter that the city may make and enforce all ordinances with respect to municipal affairs, subject only to restrictions and limitations provided in the charter. With respect to

other matters, a charter city is subject to general laws. With respect to municipal affairs, the city charter supersedes all inconsistent laws [*Cal. Const., art. XI, § 5(a)*; *Stuart v. Civil Service Com. (1985) 174 Cal. App. 3d 201, 206, 219 Cal. Rptr. 770]* . Under *Cal. Const., art. XI, §§ 5* and *7*, it is clear that ordinances enacted by a charter city are subject to and controlled by conflicting state legislative action unless the subject matter is a "municipal affair," as those words are used in *Cal. Const., art. XI, § 5* [*Whisman v. San Francisco Unified Sch. Dist. (1978) 86 Cal. App. 3d 782, 789, 150 Cal. Rptr. 548* (school system not municipal affair)]. Thus, when a charter city is involved, even if the state has preempted the field in which the city is legislating [*see* § 126A.B13[1]], the city's legislation may still be valid if it relates to a "municipal affair" [*Doe v. City and County of San Francisco (1982) 136 Cal. App. 3d 509, 512, 186 Cal. Rptr. 380]* .

The courts have not given a general definition to the term "municipal affair." The determination whether a matter is a municipal affair or one of statewide concern is an ad hoc inquiry [*California Fed. Savings & Loan Assn. v. City of Los Angeles (1991) 54 Cal. 3d 1, 15-16, 283 Cal. Rptr. 569, 812 P. 2d 916]* . The issue is not to be resolved by cordoning off an entire area of governmental activity as either a municipal affair or one of statewide concern. Invalidation of a city's measure does not necessarily mean the subject is not appropriate for municipal regulation, but that under the historical circumstances presented, the state has a more substantial interest in the subject than the charter city. Thus, invalidation of the city measure does not necessarily mean that the city could not legislate in the field if the statute were repealed. Moreover, a decision upholding a charter city measure does not preclude superseding state legislation in a later case if the factual justification of statewide dimension is subsequently demonstrated. In the case of true conflict, the decision hinges on the identification of a convincing basis for legislative action originating in extramunicipal concerns justifying legislative supersession based on sensible, pragmatic considerations [*California Fed. Savings & Loan Assn. v. City of Los Angeles (1991) 54 Cal. 3d 1, 17-18, 283 Cal. Rptr. 569, 812 P. 2d 916]* .

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[Reserved]

§§ 126A.25[Reserved]

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§ 126A.30 Governing Law

The police power arises from the legislative power granted in *Cal. Const., art. IV, § 1*, as well as from the power of initiative set forth in *Cal. Const., art. II, §§ 8, 10, 11*.

The California constitutional restrictions and procedures for exercise of eminent domain, also applicable, where relevant, to claims for inverse condemnation, are found in *Cal. Const., art. I, § 19*.

The California tax system is set forth in the California Constitution, mainly Articles XIII, XIII A, XIII B, XIII C, and XIII D. The provision barring the Legislature from delegating the power to tax to a private entity, or surrendering or suspending the taxing power by grant or contract is *Cal. Const., art. XI, § 11*.

Federal constitutional restrictions on state taxation are found in U.S. *Const., art. I, § 10*, cl. 2, art. VI, as well as the *Commerce Clause*, U.S. *Const., art. I, § 8*, cl. 3, the *Fourteenth Amendment, U.S. Const., amend. XIV*, and the foreign *commerce clause*, U.S. *Const., art. I, § 8*, cl. 3.

Constitutional restrictions on laws abridging the obligation of contracts are located in *Cal. Const., art. I, § 9* and U.S. *Const., art. I, § 10*, cl. 1.

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§ 126A.31 Police Power

[1] General Nature of Police Power

The police power is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people [*Keystone Bituminous Coal Ass'n v. DeBenedictis (1987) 480 U.S. 470, 503, 107 S. Ct. 1232, 94 L. Ed. 2d 472* ; quoting *Manigault v. Springs, 199 U.S. 473, 480, 26 S. Ct. 127, 50 L. Ed. 274]* .

The courts will not nullify laws enacted under the police power unless they are manifestly unreasonable, arbitrary or capricious, having no real or substantial relation to the public health, safety, morals or general welfare [*Ratkovich v. City of San Bruno (1966) 245 Cal.App.2d 870, 878-879, 54 Cal. Rptr. 333* , quoting *Miller v. Board of Public Works (1925) 195 Cal. 477, 490, 234 P. 381, 38 A. L. R. 1479]* .

[2] Power to Regulate

In the civil context, the police power is simply the power of sovereignty or power to govern, i.e., the inherent reserved power of the state to subject individual rights to reasonable regulation for the general welfare [*Sinclair Paint Co. v. State Bd. of Equalization (1997) 15 Cal. 4th 866, 878, 64 Cal. Rptr. 2d 447, 937 P.2d 1350* ; *Massingill v. Department of Food & Agriculture (2002) 102 Cal. App. 4th 498, 504, 125 Cal. Rptr. 2d 561]* . All contract and property rights are held subject to its fair exercise [*Atlantic Coast Line R. R. Co. v. Goldsboro (1914) 232 U.S. 548, 558, 34 S.Ct. 364, 58 L.Ed. 721* , citing *Texas &c. R.R. Co. v. Miller, 221 U.S. 408, 414, 415]* . The enforcement of uncompensated obedience to a regulation established under this power for the public health or safety is not an unconstitutional taking of property without compensation or without due process of law [*Atlantic Coast Line R. R. Co. v. Goldsboro (1914) 232 U.S. 548, 558-559, 34 S.Ct. 364, 58 L.Ed. 721 , citing Chicago, B. & Q. R. Co. v. Chicago (1896) 166 U.S. 226, 255*].

If it appears that the regulation under criticism is not in any way designed to promote the health, comfort, safety, or welfare of the community, or that the means employed have no real and substantial relation to the avowed or ostensible purpose, or that there is wanton or arbitrary interference with private rights, the question arises whether the lawmaking body has exceeded the legitimate bound of the police power [*Atlantic Coast Line R. R. Co. v. Goldsboro (1914) 232 U.S. 548, 559, 34 S.Ct. 364, 58 L.Ed. 721]* . Regulation of economic interests that goes too far may become a taking

even though the property remains in private hands [*Massingill v. Department of Food& Agriculture (2002) 102 Cal. App. 4th 498, 505-506, 125 Cal. Rptr. 2d 561* , quoting *Kavanau v. Santa Monica Rent Control Bd. (1997) 16 Cal. 4th 761, 773, 66 Cal. Rptr. 2d 672, 941 P.2d 851]* .

Among other things, the police power empowers cities to control and organize development within their boundaries as a means of serving the general welfare [*Hernandez v. City of Hanford (2007) 41 Cal. 4th 279, 296, 59 Cal. Rptr. 3d 442, 159 P.3d 33*].

For discussion of regulatory takings, see *Ch. 247, Eminent Domain and Inverse Condemnation, § 247.201*.

[3] Emergency Police Power

The police power doctrine of noncompensable loss applies in emergency situations when private property is directly taken or damaged by the government due to public necessity and to avert impending peril [*Holtz v. Superior Court (1970) 3 Cal. 3d 296, 305, 90 Cal. Rptr. 345, 475 P.2d 441]* . This doctrine extends even to incidental damage to private property by police officers in the course of efforts to enforce the law [*see* *Customer Co. v. City of Sacramento (1995) 10 Cal. 4th 368, 384-385, 41 Cal. Rptr. 2d 658, 895 P.2d 900]* .

For discussion of the noncompensable loss doctrine, see *Ch. 247, Eminent Domain and Inverse Condemnation, § 247.13[2]*.

[4] Police Power Is Inalienable

The police power can neither be abdicated nor bargained away, and is inalienable even by express grant [*Atlantic Coast Line R. R. Co. v. Goldsboro (1914) 232 U.S. 548, 558, 34 S.Ct. 364, 58 L.Ed. 721* , citing *Texas & N. O. R. Co. v. Miller (1911) 221 U.S. 408, 414, 415*]. Accordingly, a governmental entity may not contract away its right to exercise the police power in the future [*Cotta v. City and County of San Francisco (2007) 157 Cal. App. 4th 1550, 1557, 69 Cal. Rptr. 3d 612*]. A contract that purports to do so is invalid as against public policy [*Cotta v. City and County of San Francisco (2007) 157 Cal. App. 4th 1550, 1558, 69 Cal. Rptr. 3d 612*].

[5] Police Power Compared With Eminent Domain

The very essence of the police power as differentiated from the power of eminent domain is that the deprivation of individual rights and property cannot prevent its operation, once it is shown that its exercise is proper and that the method of its exercise is reasonably within the meaning of due process of law [*Consolidated Rock Products Co. v. City of Los Angeles (1962) 57 Cal. 2d 515, 530, 20 Cal. Rptr. 638, 370 P.2d 342* , quoting *Beverly Oil Co. v. City of Los Angeles (1953) 40 Cal. 2d 552, 557-558, 254 P.2d 865]* .

For discussion of eminent domain, see *§ 126A.32*.

[6] Regulatory Fees Compared With Taxation

Regulatory fees imposed under the police power are fees charged in connection with regulatory activities that do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and that are not levied for unrelated revenue purposes [*Sinclair Paint Co. v. State Bd. of Equalization (1997) 15 Cal. 4th 866, 876, 64 Cal. Rptr. 2d 447, 937 P.2d 1350]* . A "mitigating effects" measure is a police power measures imposing fees to defray the actual or anticipated adverse effects of various business operations, whether imposed at licensing or permitting or as a remedial measure [*Sinclair Paint Co. v. State Bd. of Equalization (1997) 15 Cal. 4th 866, 877, 64 Cal. Rptr. 2d 447, 937 P.2d 1350]* . The police power is broad enough to include mandatory remedial measures to mitigate the past, present, or future adverse impact of the fee payer's operations, at least where the measure requires a causal connection or nexus between the product and its adverse effects [*Sinclair Paint Co. v. State Bd. of Equalization (1997) 15 Cal.*

4th 866, 877-878, 64 Cal. Rptr. 2d 447, 937 P.2d 1350] . To show a fee is a regulatory fee and not a special tax, the government should prove (1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity [*Sinclair Paint Co. v. State Bd. of Equalization (1997) 15 Cal. 4th 866, 878, 64 Cal. Rptr. 2d 447, 937 P.2d 1350* , citing *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist. (1988) 203 Cal. App. 3d 1132, 1146, 250 Cal. Rptr. 420]* .

Regulatory fees, unlike other types of user fees, often are not easily correlated to a specific, ascertainable cost. This may be due to the complexity of the regulatory scheme and the multifaceted responsibilities of the department or agency charged with implementing or enforcing the applicable regulations; the multifaceted responsibilities of each of the employees who are charged with implementing or enforcing the regulations; the intermingled functions of various departments as well as intermingled funding sources; and expansive accounting systems that are not designed to track specific tasks [*Collier v. City and County of San Francisco (2007) 151 Cal. App. 4th 1326, 1349, 60 Cal. Rptr. 3d 698*].

A municipality may, under its police powers, spend regulatory fee revenues for the purpose of legitimate regulation so long as those revenues do not exceed the reasonably necessary expense of the regulatory effort [*Collier v. City and County of San Francisco (2007) 151 Cal. App. 4th 1326, 1339, 60 Cal. Rptr. 3d 698*].

For discussion of taxation power, see *§ 126A.33*.

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-126A California Forms of Pleading and Practice--Annotated § 126A.32

§ 126A.32 Eminent Domain and Inverse Condemnation

[1] Distinguishing Eminent Domain from Inverse Condemnation

Cal. Const., art. I, § 19 authorizes both eminent domain proceedings instituted by a public entity to acquire private property, as well as inverse condemnation proceedings initiated by a landowner to obtain compensation for a claimed taking or damaging of his or her property. Both types of actions are governed by the same principles [*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc. (1999, 4th Dist) 73 Cal App 4th 517, 529, 86 Cal Rptr 2d 473]* .

"Direct condemnation" refers to a condemnation proceeding brought by a person or public entity empowered to exercise the right to condemn property by eminent domain. "Inverse condemnation" refers to a proceeding brought by the owner of a propertyinterest taken or damaged by such a person or public entity that has failed to initiate condemnation proceedings against the owner [*see Klopping v. Whittier (1972) 8 Cal. 3d 39, 43, 104 Cal. Rptr. 1, 500 P.2d 1345]* .

For detailed discussion of and forms of complaints in eminent domain and inverse condemnation, see Ch. 247, *Eminent Domain and Inverse Condemnation* .

[2] Power of Eminent Domain

[a] The Nature of Eminent Domain

Eminent domain is the power of government to take private property for public use. The power is inherent in the sovereignty of the state [*County of San Diego v. Miller (1975) 13 Cal. 3d 684, 687, 119 Cal. Rptr. 491, 532 P.2d 139]* . However, the California Constitution sets forth the power, as well as the limitations on it [*see Cal. Const., art. I, § 19*]. Only entities authorize to use eminent domain, independently or jointly [*see Code Civ. Proc. § 1240.140(b)*], may do so, including [for discussion, see *Ch. 247, Eminent Domain and Inverse Condemnation, § 247.30*]:

- Local entities within their territorial jurisdictions [*Code Civ. Proc. § 1240.050*].

- State agencies,
- Special districts,
- Cites and counties,
- School districts,
- Private persons, and
- Quasi-public entities.

For detailed discussion of and forms of complaints in eminent domain, see Ch. 247, *Eminent Domain and Inverse Condemnation* .

[b] Requirement of Public Use

A public use is one that concerns the whole community as distinguished from a particular individual or particular number of individuals or that promotes the general interest in its relation to any legitimate object of government. A public use is not limited to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation, and enjoyment [*Housing Authority v. Dockweiler (1939) 14 Cal. 2d 437, 450, 94 P.2d 794]* . However, when the Legislature provides by statute that a use, purpose, object, or function is one for which the power of eminent domain may be exercised, this action is a legislative declaration that the use, purpose, object, or function is public [*Code Civ. Proc. § 1240.010*]. Thus, ordinarily a taking by a public entity or public utility does not present a public use issue since the property sought to be taken is usually devoted to a purpose that is declared to be a public use by statute.

[c] Statutory Scheme Governs

The legislature has enacted an elaborate statutory scheme governing the planned taking of private property for a public use [*see Code Civ. Proc. § 1230.010 et seq.*]. Except as otherwise provided by statute, the power of eminent domain may be exercised only as provided in that law [*Code Civ. Proc. § 1230.020*]. The Eminent Domain Law does not affect any other statute granting jurisdiction over any issue in eminent domain proceedings to the Public Utilities Commission [*Code Civ. Proc. § 1230.060*; for discussion of the Commission's powers on eminent domain, *see Ch. 247, Eminent Domain and Inverse Condemnation, § 247.10[3]*].

[3] Compensation for Inverse Condemnation

[a] Nature of Inverse Condemnation

Inverse condemnation is an invasion or appropriation by a public entity of some valuable property right that a landowner possesses that directly and specially affects the landowner to his or her injury [*Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 119-120, 109 Cal. Rptr. 799, 514 P.2d 111]* . Inverse condemnation actions are grounded in the constitutional proscription against taking or damaging without just compensation [*see Cal. Const., art. I, § 19*]. Such an action may be maintained even though the defendant does not have statutory authority to exercise affirmative eminent domain powers to accomplish the same result as the relief sought [*Baker v. Burbank-Glendale-Pasadena Airport Authority (1985) 39 Cal. 3d 862, 867-868, 218 Cal. Rptr. 293, 705 P.2d 866* , cert. denied, *475 U.S. 1017 (1986)]* .

For detailed discussion of and forms of complaints in actions for inverse condemnation, see *Ch. 247, Eminent Domain and Inverse Condemnation, § 247.190* et seq.

[b] Elements of Cause of Action

To establish a cause of action for inverse condemnation, a plaintiff must show:

- An injury to private property resulting from a deliberate act undertaken to fulfill the public objects of a project as a whole. Neither negligent acts committed during the routine day-to-day operation of a public improvement, nor negligence in the routine operations having no relation to the function of the project as conceived, gives rise to an inverse condemnation claim [*Bauer v. County of Ventura (1955) 45 Cal. 2d 276, 286-287, 289 P.2d 1]* .

- A substantial cause-and-effect relationship excluding the possibility that other forces alone produced the injury [*Belair v. Riverside County Flood Control Dist. (1988) 47 Cal. 3d 550, 559, 253 Cal. Rptr. 693, 764 P.2d 1070]* .

- The owner of the damaged property, if uncompensated, would contribute more than a proper share to the public undertaking. That is because the underlying purpose of the constitutional provision requiring compensation is to distribute evenly throughout the community the loss inflicted on the individual. A contrary policy consideration is that compensation too freely allowed will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost [*Varjabedian v. City of Madera (1977) 20 Cal. 3d 285, 296, 142 Cal. Rptr. 429, 572 P.2d 43]* .

For further discussion of the elements of inverse condemnation, see *Ch. 247,Eminent Domain and Inverse Condemnation, § 247.193*.

[c] Property the Taking of Which Must Be Compensated

For inverse condemnation purposes, the term "property" has a broad definition. It is not used in the nontechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. Instead, it denotes the group of rights inherent in the citizen's relation to the physical thing, such as the right to possess, use, and dispose of it [*Agins v. Tiburon (1979) 24 Cal. 3d 266, 273, 157 Cal. Rptr. 372, 598 P.2d 25* , aff'd, *447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)]* .

Exception:

Under a rule that is a vestige of former common law, if the government acts "reasonably" in the design, construction, or operation of a flood control project, or of other public improvements which increase the flow of surface water into a natural watercourse, it may be immune from liability for resulting flood damage [*Locklin v. City of Lafayette (1993) 7 Cal. 4th 327, 367, 27 Cal. Rptr. 2d 613, 867 P.2d 724* ; *Belair v. Riverside County Flood Control Dist. (1988) 47 Cal. 3d 550, 565-566, 253 Cal. Rptr. 693, 764 P.2d 1070* ; for discussion, *see Ch. 575, Waters, § 575.11[2]*].

[d] California Takings Clause Broader Than Federal

California's *Takings Clause, Cal. Const., art. I, § 19*, requires compensation for damage as well as a taking, which the Federal *Takings Clause, U.S. Const., amend. V* does not. Therefore, the California *Takings Clause* protects a somewhat broader range of property values than does the corresponding federal provision. Aside from that difference, California courts have construed the clauses congruently. Thus, courts have analyzed takings claims under decisions of both the California and United States Supreme Courts [*Monks v. City of Rancho Palos Verdes (2008) 167 Cal. App. 4th 263, 264, 84 Cal. Rptr. 3d 75*].

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§ 126A.33 Taxation

[1] Constitutional Power to Tax

[a] Under the California Constitution

The California tax system is set forth in the California Constitution, mainly Articles XIII, XIII A, XIII B, XIII C, and XIII D. The Legislature cannot delegate the power to tax to a private entity, nor may the power to tax be surrendered or suspended by grant or contract [*Cal. Const., art. XI, § 11, art. XIII, § 31*; *see Howard Jarvis Taxpayers' Assn. v. Fresno Metropolitan Projects Authority (1995) 40 Cal. App. 4th 1359, 48 Cal. Rptr. 2d 269* (construing and discussing history of *Cal. Const., art. XI, § 11*)]. The Legislature cannot impose taxes for local purposes but may authorize local governments to impose them [*Cal. Const., art. XIII, § 24*]. Local governments have no inherent taxing power; they have only such power as granted by the state Constitution or by the Legislature [*Sacramento Mun. Utility Dist. v. County of Solano (1997) 54 Cal. App. 4th 1163, 1166, 63 Cal. Rptr. 2d 286]* .

Taxation under the California Constitution must generally abide by the other provisions of the Constitution [*see, e.g., City of Alameda v. Premier Communications Network, Inc. (1984) 156 Cal. App. 3d 148, 154, 202 Cal. Rptr. 684* , cert. denied, *469 U.S. 1073* (invalidating tax that was "differentially burdensome" on instrumentalities of speech or press, such as subscription television services, as interference with *First Amendment* rights); *Ferran v. City of Palo Alto (1942) 50 Cal. App. 2d 374, 378, 122 P.2d 965* (municipal taxes must not exceed statutory grant of authority to tax)].

[b] Limits Under the Federal Constitution

Taxation under the California Constitution must generally abide by the other provisions of general or specific application in the U.S. Constitution that may bear on the power of taxation [*see, e.g., Hillsborough Township v. Cromwell (1946) 326 U.S. 620, 623, 66 S. Ct. 445, 90 L. Ed. 358* (equal protection)], as follows:

- State and local governments are prohibited from imposing any tax on exports or from taxing instrumentalities of the federal government without the consent of Congress [U.S. *Const., art. I, § 10*, cl. 2, art. VI].

- The *commerce clause* and the *Fourteenth Amendment due process clause of the Federal Constitution* limit the imposition of state and local taxes. State or local taxes may not place an undue burden on interstate commerce [U.S. *Const., art. I, § 8*, cl. 3].

- The U.S. Constitution provides limits on a state's taxation of foreign commerce that are similar to the restrictions on interstate commerce [U.S. *Const., art. I, § 8, cl. 3*].

For further discussion of limits on the power of taxation by other constitutional provisions, see *Ch. 540, Taxes and Assessments, § 540.11*.

[2] The Property Tax

Under the Constitution, property in California is generally subject to property tax in proportion to its full value [*Cal. Const., art. XIII, § 1*]. Intangible property is exempt [*Cal. Const., art. XIII, § 2*]. Real and personal property are assessed separately, but the rate for personal property cannot be higher than that for real property in the same jurisdiction [*Cal. Const., art. XIII, §§ 2, 13*]. The tax rate for the secured roll is set by the county or city every budget year. That rate is also the rate for the unsecured roll for the next year [*Cal. Const., art. XIII, § 12*].

The combined maximum of ad valorem taxes that may be levied on real property by all taxing agencies is one percent of the property's full cash value [*Cal. Const., art. XIII A, § 1(a)*]. The one-percent limitation does not apply to ad valorem property taxes or special assessments levied either to pay indebtedness that was approved by the voters prior to July 1, 1978, or to make annual payments for the principal and interest on any bonded indebtedness for acquisition or improvement of real property if that indebtedness was approved after June 4, 1986 by a two-thirds vote [*Cal. Const., art. XIII A, § 1(b)*]. From values set at the assessor's appraisal of full cash value as shown on the 1975-76 tax rolls, the assessed value of real property may only be increased by an inflation factor of not more than two percent per year. However, real property may be reassessed if the property is purchased, newly constructed, or changes ownership [*Cal. Const., art. XIII A, § 2(a), (b)*]. For these purposes, the terms "purchased," "newly constructed," and "change in ownership" have exclusions [*see, e.g., Cal. Const., art. XIII A, § 2(a), (c), (d), (g), (h)*].

To prevent the imposition of new taxes to make up for the decrease in property taxes resulting from *Cal. Const., art. XIII A, §§ 1, 2, Cal. Const., art. XIII A, §§ 3, 4* prohibit new ad valorem real property taxes and new sales or transaction taxes on real property sales and place other restrictions on state or local taxes.

Each county board of equalization meets to equalize the values of all property on the local assessment roll by adjusting individual assessments [*Cal. Const., art. XIII, § 16*]. The state's functions are limited to equalizing the assessment rolls among the counties, assessing publicly owned property subject to local taxation and property of railroad, telephone, electric generation facilities, and utility companies, providing regulatory and advisory services for counties, and performing certain appellate functions [*Cal. Const., art. XIII, §§ 11, 19*].

For detailed discussion of property taxes, see *Ch. 540, Taxes and Assessments, § 540.30* et seq.

[3] Sales and Use and Other Excise Taxes

Provisions of the California Constitution with respect to sales and use tax are limited to:

- Limitations on the extent to which the Legislature may make changes to existing statutes providing for sales and use taxation by local government [*Cal. Const., art. XIII, § 25.5*],

- Sharing of revenues of sales and use taxes among local governments [*Cal. Const., art. XIII, § 29*],

- Barring the taxation of the sale or use of food except at provided by existing statutes [*Cal. Const., art. XIII, § 34*],

- Imposition of sales and use taxes on gross receipts and certain other activities associated with selling tangible personal property at retail [*Cal. Const., art. XIII, § 29*],

The state Department of Alcoholic Beverage Control is granted exclusive power under the California Constitution to collect license fees or occupational taxes related to alcoholic beverage sales [*Cal. Const., art. XX, § 22*].

Under Cal. Const., art. XIII C, all new local general and special taxes must be approved by a vote of the local electorate [*Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 233, 45 Cal. Rptr. 2d 207, 902 P.2d 225]* . No local government or district may impose any special tax without the approval of two thirds of the voters voting in an election on the issue [*see Cal. Const., art. XIII C, § 2(d)*].

For detailed discussion of sales and use taxes, see *Ch. 540, Taxes and Assessments, § 540.110* et seq.

[4] The Income Tax

Taxes on or measured by income may be imposed on persons, corporations, or other entities as prescribed by law [*Cal. Const., art. XIII, § 26(a)*]. Interest on bonds issued by the state or a local government in the state is exempt from taxes on income [*Cal. Const., art. XIII, § 26(b)*], and the income of a nonprofit educational institution of collegiate grade within the State of California is exempt from taxes on or measured by income if two constitutional conditions are met [*Cal. Const., art. XIII, § 26(c)*]. A further provision exempts certain income of nonprofit organizations [*see Cal. Const., art. XIII, § 26(d)*].

For detailed discussion of the state income tax, see *Ch. 540, Taxes and Assessments, § 540.250* et seq.

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§ 126A.34 State Laws May Not Impair Obligation of Contracts

[1] The State and Federal Constitutional Provisions

The California contracts clause, *Cal. Const., art. I, § 9*, is similar to the contract clause of the federal constitution, U.S. *Const., art. I, § 10*, cl. 1. prohibiting the states from passing any law impairing the obligation of contracts [*White v Davis (2002) 108 Cal. App. 4th 197, 133 Cal. Rptr. 2d 691* , rev'd on other grounds, in part, remanded, ordered published *30 Cal. 4th 528, 133 Cal. Rptr. 2d 648, 68 P.3d 74]* .

For Example:

- Given that the parties, consisting of municipalities, utility companies, and cable television providers, did not contemplate that the cost of repairing inherent trenching damage would fall under the repair cost provision of the franchises, new municipal fees to cover trenching damage were simply a unilateral increase in the franchise fee. Such an increase was a substantial impairment of franchise contracts in violation of the federal and state constitutions [*PG &E Co. v City of Union City (N.D. Cal., 2002) 220 F. Supp. 2d 1070]* .

"The constitutional prohibition against contract impairment does not exact a rigidly literal fulfillment; rather, it demands that contracts be enforced according to their "just and reasonable purport;" not only is the existing law read into contracts in order to fix their obligations, but the reservation of the essential attributes of continuing governmental power is also read into contracts as a postulate of the legal order. The contract clause and the principle of continuing governmental power are construed in harmony; although not permitting a construction which permits contract repudiation or destruction, the impairment provision does not prevent laws which restrict a party to the gains "reasonably to be expected from the contract" [*People v Gipson (2004) 117 Cal. App. 4th 1065, 1069-1070, 12 Cal. Rptr. 3d 478* (citing *Board of Administration v. Wilson (1997) 52 Cal. App. 4th 1109, 1130-1131, 61 Cal. Rptr. 2d 207*)].

[2] Applicability to Vested Rights Under General Statutes

[a] Rights Against the State

For purposes of the constitutional limitation on the power of the state to modify the obligation of contracts [*see Const., art. I, § 9*], a statute [*San Bernardino Public Employees Assn. v. City of Fontana (1998, 4th Dist.) 67 Cal. App. 4th 1215, 1220, 1222, 79 Cal. Rptr. 2d 634]* or initiative [*see Hermosa Beach Stop Oil Coalition v City of Hermosa Beach (2001) 86 Cal. App. 4th 534, 549, 103 Cal. Rptr. 2d 447]* will be treated as a contract with binding obligations when the statutory language and circumstances accompanying its passage clearly evince a legislative intent to create private rights of contractual nature enforceable against the state.

However, the right against the state must have vested in order for the impairment to be invalid [*Olson v. Cory (1980) 27 Cal. 3d 532, 536-538, 178 Cal. Rptr. 568, 636 P.2d 532* ; *White v Davis (2002) 108 Cal. App. 4th 197, 228, 133 Cal. Rptr. 2d 691* , revd on other grounds, in part, remanded, ordered published *30 Cal. 4th 528, 133 Cal. Rptr. 2d 648, 68 P.3d 74* (public employee right to compensation)]. The vested rights doctrine is predicated upon estoppel of the governing body. This is a principle of equitable estoppel which may be applied against the government where justice and fairness require it. An equitable estoppel requiring the government to exempt a land use from a subsequently imposed regulation must include [*Hermosa Beach Stop Oil Coalition v City of Hermosa Beach (2001) 86 Cal. App. 4th 534, 551-552, 103 Cal. Rptr. 2d 447* (citing *Santa Monica Pines, Ltd. v. Rent Control Board (1984) 35 Cal. 3d 858, 866-867, 201 Cal. Rptr. 593, 679 P.2d 27*)]:

- A promise such as that implied by a building permit that the proposed use will not be prohibited by a class of restrictions that includes the regulation in question and

- Reasonable reliance on the promise by the promisee to the promisee's detriment.

Example:

- A ballot measure that reinstated a total ban on oil drilling within a city did not constitute an unconstitutional impairment of an oil and gas lease that the city had entered into. A developer's rights do not vest until the final building permit is received, which had not happened in this case [*Hermosa Beach Stop Oil Coalition v City of Hermosa Beach (2001) 86 Cal. App. 4th 534, 551-553, 103 Cal. Rptr. 2d 447]* .

Conversely, contracting parties whose interests under a contract have not yet vested are not entitled to relief from the impairment of contract obligations [*O'Connor v. Superior Court (1979) 90 Cal. App. 3d 107, 114-115, 153 Cal. Rptr. 306]* .

For discussion of application of contracts clause to public employees and officers, see Ch. 118, *Civil Service* , see Ch. 464, *Public Entities and Officers: California Tort Claims Act* , and see Ch. 469, *Public Entities and Officers: Conflicts of Interest* .

For discussion of application of contracts clause to retroactive statutes, see *Ch. 531, Statutes and Ordinances, § 531.71[7][a]*.

[b] Rights Against Third Parties

The provision of the California Constitution barring laws that impair the obligation of contracts [*Const., art. I, § 9*] applies to contracts between private parties [*see, e.g., Hellinger v Farmers Group, Inc. (2001) 91 Cal. App. 4th 1049, 1067, 111 Cal. Rptr. 2d 268]* .

[c] Exception for Reasonable Use of Police Power

[i] Reserve Police Power Incorporated Into All Contracts

The contract clause must be accommodated to the inherent police power of the state "to safeguard the vital interests of its people" [*People v Gipson (2004, 6th Dist) 117 Cal. App. 4th 1065, 1069, 12 Cal. Rptr. 3d 478* (citing 20th *Century Ins. Co. v. Superior Court (2001) 90 Cal. App. 4th 1247, 1268, 109 Cal. Rptr. 2d 611]* . Consequently, contracts incorporate and contemplate "the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy" [*People v Gipson (2004) 117 Cal. App. 4th 1065, 1070, 12 Cal. Rptr. 3d 478* (citing *In re Marriage of Walton (1972) 28 Cal. App. 3d 108, 112, 104 Cal. Rptr. 472*)].

PRACTICE TIP:

A contract that originally agrees to incorporate subsequent changes in the law may bar claims of impairment of the obligation of contracts by subsequent change in the law [*Torrance v Workers' Comp. Appeals Bd. (1982) 32 Cal. 3d 371, 185 Cal. Rptr. 645, 650 P.2d 1162]* . In drafting contracts, counsel may protect his or her client by including provisions that incorporate or reject incorporation of future changes in the law, as the interests of the client may require.

[ii] Establishing Valid Police Power Impairment of Obligation of Contracts

First, the court must assess the severity of the impact of the exercise of police power upon the contract rights of petitioners [*Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal. 3d 296, 308, 152 Cal. Rptr. 903, 591 P.2d 1* ; *Hellinger v Farmers Group, Inc. (2001) 91 Cal. App. 4th 1049, 1063-1064, 111 Cal. Rptr. 2d 268]* . If the statute accomplishes a severe impairment of petitioners' contractual rights, the height of the hurdle the state legislation must clear is elevated and a careful examination of the nature and purpose of the statute is required [*Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal. 3d 296, 309, 152 Cal. Rptr. 903, 591 P.2d 1* , citing *Allied Structural Steel Company v. Spannaus (1978) 438 U.S. 234, 245, 98 S.Ct. 2716, 57 L.Ed.2d 727, 737* ; *Hellinger v Farmers Group, Inc. (2001) 91 Cal. App. 4th 1049, 1064, 111 Cal. Rptr. 2d 268]* . Specifically, it must be reasonable and necessary to serve an important state interest [*United States Trust Co. v. New Jersey (1977) 431 U.S. 1, 29, 97 S.Ct. 1505, 52 L.Ed.2d 92]* . In this respect, some cases give particular weight to legislation enacted in response to a fiscal emergency [*Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal. 3d 296, 309-310, 152 Cal. Rptr. 903, 591 P.2d 1* (lack of real emergency invalidated impairment); *Hellinger v Farmers Group, Inc. (2001) 91 Cal. App. 4th 1049, 1064, 111 Cal. Rptr. 2d 268* (social or economic problem); *but see United States Trust Co. v. New Jersey (1977) 431 U.S. 1, 22-23, 97 S.Ct. 1505, 52 L.Ed.2d 92* (fiscal emergency is but one factor in determining reasonableness of exercise of police power impairing obligation of contracts)]. Finally, that the exercise of police power is temporary or limited to the exigency will help to validate an exercise of police power impairing the obligation of contracts [*see El Paso v. Simmons (1965) 379 U.S. 497, 516, 85 S. Ct. 577, 13 L. Ed. 2d 446* ; *Home Building & Loan Assn. v. Blaisdell (1934) 290 U.S. 398, 439-440, 54 S.Ct. 231, 78 L.Ed. 413, 423, 88 A.L.R. 1481]* . In the absence of an emergency, the existence at the time of the making of the contract of laws or regulations already affecting the area with which the new enactment is concerned may justify upholding the new exercise of police power [*Veix v. Sixth Ward Bldg. & Loan Ass'n (1940) 310 U.S. 32, 38, 60 S. Ct. 792, 84 L. Ed. 1061* ; *Hellinger v Farmers Group, Inc. (2001) 91 Cal. App. 4th 1049, 1064, 111 Cal. Rptr. 2d 268]* .

Example:

- *CCP § 340.9*, which extended the time for presenting insurance claims for damages from the Northridge earthquake, did not impair an insurer's contractual rights under *Cal. Const., art. I, § 9*. Although reviving contract-barred claims constituted an impairment of contract, the impairment went to the remedy for a breach of the insurance contract, rather than to its core provisions. Insurers still had

available all applicable defenses to such revived claims other than the limitations defense. In addition, § 340.9 was supported by what the Legislature could reasonably view as significant, compelling, and legitimate state interests, thus satisfying the public purpose portion of the constitutional test. As applied to the instant case, § 340.9 was also a reasonable and appropriate statute because it was limited in both time and application [*Hellinger v Farmers Group, Inc. (2001) 91 Cal. App. 4th 1049, 111 Cal. Rptr. 2d 268]* .

Where a less drastic modification of the contracting party's rights would have sufficed, alternative means of achieving the state's goals can be adopted, and changed circumstances do not justify the impairment because the public need has been known by the state, a statute modifying the state's contractual obligations unconstitutionally impairs the obligation of contract [*United States Trust Co. v. New Jersey (1977) 431 U.S. 1, 26, 29, 97 S.Ct. 1505, 52 L.Ed.2d 92]* .

[iii] Additional Consideration When Use of Police Power Affects State's Obligation

While the contract clause is not an absolute bar to subsequent modification of a state's own financial obligations, complete deference to a legislative assessment of reasonableness and necessity is not required because the government's self-interest is at stake [*United States Trust Co. v. New Jersey (1977) 431 U.S. 1, 30-31, 97 S.Ct. 1505, 52 L.Ed.2d 92* ; *Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal. 3d 296, 310, 152 Cal. Rptr. 903, 591 P.2d 1]* .

Example:

- A ballot measure that reinstated a total ban on oil drilling within a city did not constitute an unconstitutional impairment of an oil and gas lease that the city had entered into. In the face of the developer's legitimate contractually based expectation, a total prohibition of previously authorized conduct was not unconstitutional under *Cal. Const., art. I, § 9*, where the ballot measure was a legitimate exercise of the city's police power, the lease agreement at issue anticipated regulatory change impacting the project, and significant health and safety concerns supported application of the ballot measure to the project. The ballot measure was an exercise of the city's reserved powers under the lease and it used reasonable and necessary means for implementing its important public purpose [*Hermosa Beach Stop Oil Coalition v City of Hermosa Beach (2001) 86 Cal. App. 4th 534, 551-571, 103 Cal. Rptr. 2d 447]* .

[3] Applicability to Decisions by State Courts

Although the US Supreme Court has interpreted the federal contract clause to be "directed only against impairment by legislation and not by judgment of courts" [*see* *Tidal Oil Co. v. Flanagan (1924) 263 U.S. 444, 451, 44 S. Ct. 197, 68 L. Ed. 382]* , the California Supreme Court has construed the contract clause in the California constitution to also apply to judicial action [*see* *Bradley v. Superior Court (1957) 48 Cal.2d 509, 519, 310 P.2d 634* ; *see also* *Newhall v. Newhall (1964) 227 Cal. App. 2d 800, 815, 39 Cal. Rptr. 144* (court had no power to modify properly settlement agreement)].

[4] Limitation on Unilateral Modification of Contracts by Public Entities

[a] The General Rule

Cal. Const., art. I, § 9, limits the power of public entities to modify their own contracts with other parties. There can be no impairment of contract by a change in the contract effected with the consent of only one contracting party [*San Bernardino Public Employees Ass'n v. City of Fontana (1998) 67 Cal. App. 4th 1215, 1220, 1222, 79 Cal. Rptr. 2d 634]* . In balancing the sovereign power of the state against this concern, the analysis requires a two-step inquiry into: (1) the nature and extent of the contractual obligation, and (2) the scope of the Legislature's power to modify the obligation [

Teachers' Retirement Board v. Genest (2007) 154 Cal. App. 4th 1012, 1027, 65 Cal. Rptr. 3d 326]. The contract clause and the principle of continuing governmental power are construed in harmony; although not permitting a construction that permits contract repudiation or destruction, the impairment provision does not prevent laws that restrict a party to the gains "reasonably to be expected from the contract [*Teachers' Retirement Board v. Genest (2007) 154 Cal. App. 4th 1012, 1027, 65 Cal. Rptr. 3d 326*].

[b] Exception for Ultra Vires Contracts

No contractual obligation may be enforced against a public agency unless it appears the agency was authorized by the Constitution or statute to incur the obligation. A contract entered into by a governmental entity without the requisite constitutional or statutory authority is void and unenforceable [*White v Davis (2003) 30 Cal. 4th 528, 549, 133 Cal. Rptr. 2d 648, 68 P.3d 74]* .

[5] Cause of Action for Impairment of Obligation of Contracts

The constitutional issue of whether a statute impairs the obligation of contracts is not within the exclusive initial jurisdiction of the California Public Employment Relations Board; rather, it is an issue for the judiciary [*California Assn. of Professional Scientists v. Schwarzenegger (2006) 137 Cal. App. 4th 371, 380-382, 40 Cal. Rptr. 3d 354 (Board did not have the right to intervene in the lawsuit)]* .

The right of a party not to have a state or a political subdivision of a state impair its obligations of contract is protected by U.S. *Const., art. I, § 10*, cl. 1, and a deprivation of that right may give rise to a cause of action under *42 U.S.C.S. § 1983* [*So. Cal. Gas Co. v. City of Santa Ana (9th Cir. 2003) 336 F.3d 885, 887]* .

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[Reserved]

§§ 126A.35[Reserved]

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§ 126A.40 Governing Law

Substantive due process is guaranteed by *Cal. Const., art. I, § 7(a)*, and *U.S. Const., amend. XIV, § 1*, cl. 2.

The list of inalienable rights is found in *Cal. Const., art. I, § 1*.

The right to freedom of expression is set forth in *Cal. Const., art. I, § 2(a)*, and *U.S. Const., amend. 1*. the newspaperman's shield law is stated in *Cal. Const., art. I, § 2(b)*.

The rights to freedom of assembly and to petition government for redress of grievances are guaranteed by *Cal. Const., art. I, § 3(a)*, and *U.S. Const., amend. 1*.

The right to open government is provided in *Cal. Const., art. I, § 3(b)*.

Protection against government establishment of religion is set forth in *Cal. Const., art. I, § 4* and *U.S. Const., amend. I*, cl. 1, as applied to the states through *U.S. Const., amend. XIV, § 1*, cl. 2.

The right to religious freedom is contained in *Cal. Const., art. I, § 4* and *U.S. Const., amend. I*, cl. 2.

Freedom from slavery and involuntary servitude is governed by *Cal. Const., art. I, § 6* and *U.S. Const., amend. XIII*.

Freedom from discrimination in employment is guaranteed in *Cal. Const., art. I, § 8*.

Cal. Const., art. I, § 25 enunciates the constitutional right to fish on public lands.

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§ 126A.41 Substantive Due Process

[1] Distinguished from Procedural Due Process

Under the California constitution, a person may not be deprived of life, liberty, or property without due process of law [*Cal. Const., art. I, § 7(a)*]. Similarly, the federal constitution provides that "no State shall ... deprive any person of life, liberty, or property, without due process of law" [*U.S. Const., amend. XIV, § 1*]. The federal provision has been interpreted to "guarantee more than fair process" [*County of Sacramento v. Lewis (1998) 523 U.S. 833, 841, 118 S. Ct. 1708, 140 L. Ed. 2d 1043* , quoting *Washington v. Glucksberg (1997) 521 U.S. 702, 719, 117 S. Ct. 2258, 138 L. Ed. 2d 772]* , in that it covers a substantive sphere as well. Its substantive aspect bars "certain government actions regardless of the fairness of the procedures used to implement them" [*County of Sacramento v. Lewis (1998) 523 U.S. 833, 841, 118 S. Ct. 1708, 140 L. Ed. 2d 1043* , quoting *Daniels v. Williams (1986) 474 U.S. 327, 331, 106 S. Ct. 662, 88 L. Ed. 2d 662]* .

Accordingly, the touchstone of due process is protection of the individual against arbitrary action of government [*County of Sacramento v. Lewis (1998) 523 U.S. 833, 845-846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043* , quoting *Wolff v. McDonnell (1974) 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L. Ed. 2d 935]* , whether the fault lies in a denial of fundamental procedural fairness, i.e., procedural due process, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, i.e., substantive due process [*County of Sacramento v. Lewis (1998) 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043]* . The substantive due process guarantee protects against government power arbitrarily and oppressively exercised [*County of Sacramento v. Lewis (1998) 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043* ; *see, e.g., Daniels v. Williams, 474 U.S. at 331*].

For discussion of procedural due process, see *§ 126A.50* et seq.

[2] More Specific Constitutional Violation Controls

The U.S. Supreme Court has "always been reluctant to expand the concept of substantive due process" [*County of Sacramento v. Lewis (1998) 523 U.S. 833, 842, 118 S. Ct. 1708, 140 L. Ed. 2d 1043* , quoting *Collins v. Harker Heights (1992) 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261]* . Accordingly, where another constitutional

provision provides an explicit textual source of constitutional protection against a particular sort of government behavior, that provision and the standard appropriate to that specific provision--not the more generalized notion of substantive due process--must be the guide for analyzing constitutional claims concerning that behavior [*County of Sacramento v. Lewis (1998) 523 U.S. 833, 842, 843, 118 S. Ct. 1708, 140 L. Ed. 2d 1043* , quoting *Graham v. Connor (1989) 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989)* and *United States v. Lanier (1997) 520 U.S. 259, 272 n.7, 117 S. Ct. 1219, 137 L. Ed. 2d 432]* .

[3] Necessity of Deprivation of Life, Liberty, or Property Interest

[a] Initial Showing of Deprivation Required

A claim based on substantive due process must be based on the deprivation of an underlying protected life, liberty or property interest [*Stubblefield Construction Co. v. City of San Bernardino (1995) 32 Cal. App. 4th 687, 709 n.13, 38 Cal. Rptr. 2d 413]* . The Due Process Clause specially protects those fundamental rights and liberties that are, objectively, deeply rooted in this nation's history and tradition [*Washington v. Glucksberg (1997) 521 U.S. 702, 720-721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772* , quoting *Moore v. East Cleveland (1977) 431 U.S. 494, 503, 97 S. Ct. 1932, 52 L. Ed. 2d 531* (plurality opinion)] and so implicit in the concept of ordered liberty that neither liberty nor justice would exist if they were sacrificed [*Washington v. Glucksberg (1997) 521 U.S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772* , quoting *Palko v. Connecticut (1937) 302 U.S. 319, 325, 326]* . A careful description of the asserted fundamental liberty interest is required [*Washington v. Glucksberg (1997) 521 U.S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772* , quoting, inter alia, *Reno v. Flores (1993) 507 U.S. 292, 301-302, 113 S. Ct. 1439, 123 L. Ed. 2d 1]* . In making that description, the nation's history, legal traditions, and practices provide the crucial guideposts for responsible decision making [*Washington v. Glucksberg (1997) 521 U.S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772* , quoting *Collins v. Harker Heights (1992) 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261]* .

Conversely, the absence of any claim by the plaintiff that an interest in liberty or property has been impaired is a fatal defect in her substantive due process argument [*Stubblefield Construction Co. v. City of San Bernardino (1995) 32 Cal. App. 4th 687, 709 n.13, 38 Cal. Rptr. 2d 413]* .

For discussion of action for damages for deprivation of life, liberty, or property without substantive due process under *42 U.S.C.S. § 1983*, see *Ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes, § 113.14*.

[b] Interests Found to Be Protected by Substantive Due Process

In addition to the specific freedoms protected by the *Bill of Rights*, the "liberty" specially protected by the Due Process Clause includes the rights to:

- Marry [*Loving v. Virginia (1967) 388 U.S. 1* ; *Strauss v. Horton (2009) 46 Cal. 4th 364, 390, 407, 93 Cal. Rptr. 3d 591, 207 P.3d 48* (Proposition 8 does not abrogate the state constitutional due process right for same-sex couples to any other of "the core set of basic substantive legal rights and attributes traditionally associated with marriage, but instead carves out a narrow exception applicable only to access to the designation of the term "marriage"); *In re Marriage Cases (2008) 43 Cal. 4th 757, 811, 820, 76 Cal. Rptr. 3d 683, 183 P.3d 384* (same-sex couples); *see § 126A.42[3][c]*],

- Have children [*Skinner v. Oklahoma ex rel. Williamson (1942) 316 U.S. 535]* ,

- Direct the education and upbringing of one's children [*Meyer v. Nebraska (1923) 262 U.S. 390* ; *Pierce v. Society of Sisters (1925) 268 U.S. 510]* ,

- Marital privacy [*Griswold v. Connecticut (1965) 381 U.S. 479]* ,

- Use contraception [*Griswold v. Connecticut (1965) 381 U.S. 479* ; *Eisenstadt v. Baird (1972) 405 U.S. 438]* ,

- Bodily integrity [*Rochin v. California (1952) 342 U.S. 165]* ,

- Abortion [*Planned Parenthood v. Casey (1992) 505 U.S. 833, 851* ; fordiscussion of the constitutional right to abortion, *see Ch. 4, Abortion and Birth Control Methods, § 4.11*], and

- Refuse unwanted lifesaving medical treatment [*Cruzan v. Director, Mo. Dept. of Health (1990) 497 U.S. 261, 278-279]* .

- Use of land free of regulation having no substantial relation to the public health, safety, morals, or general welfare [*Lingle v. Chevron U.S.A. Inc. (2005) 544 U.S. 528, 541-542, 125 S. Ct. 2074, 161 L. Ed. 2d 876*].

[c] Effect of Involvement of Life, Liberty, or Property Interest

Substantive due process forbids the government to infringe fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest [*Washington v. Glucksberg (1997) 521 U.S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772* , quoting *Reno v. Flores (1993) 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1]* . The impairment of a lesser interest demands no more than a "reasonable fit" between governmental purpose and the means chosen to advance that purpose [*Reno v. Flores (1993) 507 U.S. 292, 305, 113 S. Ct. 1439, 123 L. Ed. 2d 1]* , that the legislation be rationally related to legitimate government interests [*Washington v. Glucksberg (1997) 521 U.S. 702, 728, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772]* , otherwise known as the rational basis test.

[4] Scope of and Elements Specific to Application

[a] Applies to Legislation and Executive Acts

While due process protection in the substantive sense limits what the government may do in both its legislative [*see, e.g.,* *Griswold v. Connecticut (1965) 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510]* and its executive capacities [*see, e.g.,* *Rochin v. California (1952) 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 183]* , criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue [*County of Sacramento v. Lewis (1998) 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043]* .

[b] Application to Legislation

Legislative acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality. The burden of proof is on the person complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way [*Stubblefield Construction Co. v. City of San Bernardino (1995) 32 Cal. App. 4th 687, 709, 38 Cal. Rptr. 2d 413* , quoting *Usery v. Turner Elkhorn Mining Co. (1976) 428 U.S. 1, 15, 96 S. Ct. 2882, 49 L. Ed. 2d 752, 766]* .

Strategic Point:

Another California court of appeal has stated the rule as providing that courts will only strike down a law on substantive due process grounds if it is manifestly unreasonable, arbitrary, or capricious, and has no real or substantial relation to public health, safety, morals or general welfare [*see* *Hess Collection Winery v. Agricultural Labor Relations Bd. (2006) 140 Cal. App. 4th 1584, 45 Cal. Rptr. 3d 609* , rev.

denied, *(2006) 2006 Cal. LEXIS 11206* , quoting *Massingill v. Department of Food & Agriculture (2002) 102 Cal. App. 4th 498, 504, 125 Cal. Rptr. 2d 561]* . By quoting *Massingill*, a case concerning proper use of the police power, the court in *Hess* implicitly points out how similar the test for substantive due process with respect to legislation is to the test for proper use of the police power. For discussion of the police power, see *§ 126A.31*.

[c] Application to Executive Acts

Only the most egregious official conduct can be said to be arbitrary in the constitutional sense [*County of Sacramento v. Lewis (1998) 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043* , quoting *Collins v. Harker Heights (1992) 503 U.S. 115, 129, 112 S. Ct. 1061, 117 L. Ed. 2d 261]* . As such, the cognizable level of executive abuse of power as that which shocks the conscience [*County of Sacramento v. Lewis (1998) 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043* , quoting *Rochin v. California (1952) 342 U.S. 165, 172-173, 72 S. Ct. 205, 96 L. Ed. 183]* . The judgment of whether conduct shocks the conscience may be informed by a history of liberty protection, but it necessarily reflects an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them [*County of Sacramento v. Lewis (1998) 523 U.S. 833, 847 n.8, 118 S. Ct. 1708, 140 L. Ed. 2d 1043]* . Conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level [*County of Sacramento v. Lewis (1998) 523 U.S. 833, 847, 118 S. Ct. 1708, 140 L. Ed. 2d 1043]* .

For detailed discussion of substantive due process respecting executive acts, see *Ch. 470A, Due Process Restrictions on Public Agencies, §§ 470A.10, 470A.31*.

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§ 126A.42 Inalienable Rights

[1] Under the Constitution

"All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy" [*Cal. Const., art. I, § 1*].

That rights listed in *Cal. Const. art. I, § 1* and in other sections of the Constitution are identified as "inalienable" does not signify that such rights are totally exempt from any limitation or restriction [*Strauss v. Horton (2009) 46 Cal. 4th 364, 466, 93 Cal. Rptr. 3d 591, 207 P.3d 48*]. The "inalienable" nature of a constitutional right never has been understood to preclude the adoption of a constitutional amendment that limits or restricts the scope or application of that right [*Strauss v. Horton (2009) 46 Cal. 4th 364, 467, 93 Cal. Rptr. 3d 591, 207 P.3d 48*]. Accordingly, there is no basis for suggesting that the inalienable rights set forth in *Cal. Const. art. I, § 1*, and the other provisions of the Declaration of Rights, are of a higher order than, and thus exempt from, the people's right to "alter or reform" the Constitution through either the legislative or the initiative constitutional amendment process [*Strauss v. Horton (2009) 46 Cal. 4th 364, 467, 93 Cal. Rptr. 3d 591, 207 P.3d 48*].

[2] The Right to Property in Particular

The right of the individual to acquire and to possess property is one of the inalienable constitutional rights granted by the California constitution [*see Cal. Const., art. I, § 1*]. It includes the right to dispose of it in whatever innocent manner as he or she may see fit [*Hart v. Beverly Hills (1938) 11 Cal. 2d 343, 345, 79 P.2d 1080]* . The right to make contracts, common to all legitimate vocations, is a property right [*Binford v Boyd (1918) 178 Cal. 458, 461, 174 P. 56]* .

The right to property is subject to land-use regulation pursuant to *Cal. Const., art. XI, § 7*.

For discussion of contracts generally, see Ch. 140, *Contracts* .

For discussion of limitations on state's power to alter obligation of contracts, see *§ 126A.34* et seq.

For discussion of land-use regulation, see Ch. 579, *Zoning and Planning* .

[3] The Right to Privacy in Particular

[a] The Right and Its Limitations

An individual's right to privacy is one of the inalienable constitutional rights granted by the California constitution [*see Cal. Const., art. I, § 1*]. A plaintiff claiming an invasion of privacy must show the following threshold elements [*International Fed. of Prof. and Tech. Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal. 4th 319, 338, 64 Cal. Rptr. 3d 693, 165 P.3d 488* ; *American Academy of Pedriatics v. Lungren (1997) 16 Cal. 4th 307, 330, 66 Cal. Rptr. 2d 210, 940 P.2d 797]* :

- A legally protected privacy interest,
- A reasonable expectation of privacy under the circumstances, and
- Conduct by the defendant that amounts to a serious invasion of that interest.

If these threshold elements are established, the diverse and somewhat amorphous character of the privacy right necessarily requires that privacy interests be specifically identified and carefully compared with competing or countervailing privacy and nonprivacy interests in a balancing test [*American Acad. of Pedriatics v. Lungren (1997) 16 Cal. 4th 307, 330 n. 15, 66 Cal. Rptr. 2d 210, 940 P.2d 797* ; *Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 37-38, 26 Cal. Rptr. 2d 834, 865 P.2d 633]* . The defendant must show that the intrusion substantively furthers one or more countervailing interests. However, the plaintiff may then rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct that have a lesser impact on the plaintiff's privacy interests [*American Academy of Pedriatics v. Lungren (1997) 16 Cal. 4th 307, 330, 66 Cal. Rptr. 2d 210, 940 P.2d 797* ; *Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 40, 26 Cal. Rptr. 2d 834, 865 P.2d 633]* .

[b] Applications of the Right to Privacy

The protection that *Cal. Const., art. 1, § 1* gives to privacy extends to, among other things:

- The right to an abortion [*Committee to Defend Reproductive Rights v. Myers (1981) 29 Cal. 3d 252, 262, 172 Cal. Rptr. 866, 625 P.2d 779* ; for discussion, *see Ch. 4, Abortion and Birth Control Methods, §§ 4.11, 4.17*].

- The right to not be sued concerning fraud in sexual relationships [*see Stephen K. v. Roni L. (1980) 105 Cal. App. 3d 640, 643, 645, 164 Cal. Rptr. 618* ; for discussion, *see Ch. 58, Assault and Battery, § 58.26*].

- The right of a prisoner not to have correspondence from a court be opened without the prisoner present [*In re Short (1976) 55 Cal. App. 3d 268, 272, 127 Cal. Rptr. 498* ; for detailed discussion of prisoners' rights generally, *see* Ch. 114, *Civil Rights: Prisoners' Rights*].

- Excessive demands of job applicants by employers [*Leonel v. American Airlines, Inc. (9th Cir. 2005) 400 F.3d 702, 712, 714* ; for discussion, *see Ch. 115, Civil Rights: Employment Discrimination, § 115.30[5]*].

- The right to choose one's living companions [*Park Redlands Covenant Control Committee v. Simon (1986) 181 Cal. App. 3d 87, 95-99, 226 Cal. Rptr. 199* ; for discussion, *see Ch. 184, Deeds, § 184.69[7][c]*].

- Freedom from overbroad discovery of private associational rights in litigation [*Britt v. Superior Court (1978) 20 Cal. 3d 844, 852-856, 143 Cal. Rptr. 695, 574 P.2d 766* ; for discussion of constitutional privilege of privacy from discovery, *see Ch. 191, Discovery and Depositions, §§ 191.12[2], 191.120*].

- Prevention of discovery of employment files in the possession of former employers [*Harding Lawson Associates v. Superior Court (1992) 10 Cal. App. 4th 7, 10, 12 Cal. Rptr. 2d 538* ; for discussion, *see Ch. 249, Employment Law: Termination and Discipline, § 249.43[5]*].

- Preclusion of sterilization of incompetent developmentally disabled persons is impermissible deprivation of privacy interests [*Conservatorship of Valerie N. (1985) 40 Cal. 3d 143, 160-161, 219 Cal. Rptr. 387, 707 P.2d 760* ; for discussion, *see Ch. 285, Guardianship and Conservatorship: Care of Ward or Conservatee, § 285.47*].

- Medical records, which doctors may protect on behalf of their patients [*see Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 680-681, 156 Cal. Rptr. 55* ; for discussion, *see Ch. 414, Physicians: Licensing and Discipline, § 414.71*].

- The right to refuse medical treatment [*Bouvia v. Superior Court (1986) 179 Cal. App. 3d 1127, 1137, 225 Cal. Rptr. 297* ; for discussion, *see Ch. 415, Physicians: Medical Malpractice, § 415.15[11]*].

- Preclusion of the discovery of a will during the testator's lifetime under most circumstances [*Estate of Gallio (1995) 33 Cal. App. 4th 592, 597, 39 Cal. Rptr. 2d 470* ; for discussion, *see Ch. 443, Probate: Compelling Production of Will, § 443.10*].

Merchant's obtaining the home address and using it for its own profit, where the plaintiff alleged no facts showing that plaintiff's home address was not otherwise publicly available or that plaintiff undertook efforts to keep it private [*Pineda v. Williams-Sonoma Stores, Inc. (2009) 178 Cal. App. 4th 714, 721, 100 Cal. Rptr. 3d 458]* .

- Restricting the power of administrative agencies to collect records [e.g., *Doyle v. State Bar (1982) 32 Cal. 3d 12, 20, 184 Cal. Rptr. 720, 648 P.2d 942* ; for discussion, *see Ch. 470, Overview of Public Administrative Law, § 470.16[2][a]*].

- The right to due process before being listed publicly as a potential child abuser [*Burt v. County of Orange (2004) 120 Cal. App. 4th 273, 284-286, 15 Cal. Rptr. 3d 373]* .

- Limitations on investigations by administrative agencies [*White v. Davis (1975) 13 Cal. 3d 757, 775, 120 Cal. Rptr. 94, 533 P.2d 222* ; for discussion, *see Ch. 471, Investigations by Public Agencies, § 471.11*].

On the other hand, the right to privacy does not extend to, among other things:

- The names and salaries of public employees earning $100,000 or more per year, including peace officers [*International Fed. of Prof. and Tech. Engineers, Local 21, AFL-CIO v. Superior Court*

(2007) 42 Cal. 4th 319, 340, 64 Cal.Rptr. 3d 693, 165 P.3d 488].

- Discovery of personal information to be used for statistical analysis for age discrimination claims in a class action [*Alch v. Superior Court (2008) 165 Cal. App. 4th 1412, 1439-1440, 82 Cal. Rptr. 3d 470* ; for discussion, *see* Ch. 191, *Discovery: Privileges and Other Discovery Limitations*, § 191.20[6][a]].

- Preventing the involuntary medication of a sexually violent predator with antipsychotic drugs in accordance with statute [*In re Calhoun (2004) 121 Cal. App. 4th 1315, 1350, 18 Cal. Rptr. 3d 315]* .

- Corporations [*Roberts v. Gulf Oil Corp. (1983) 147 Cal. App. 3d 770, 790-795, 195 Cal. Rptr. 393* ; for discussion, *see Ch. 471, Investigations by Public Agencies, § 471.20*].

For general discussion of the right to privacy and actions for invasion of privacy, see Ch. 429, *Privacy* .

[c] The Right to Marry and Proposition 8

The California state constitutional right to marry clearly falls within the reach of the constitutional protection afforded to an individual's interest in personal autonomy by California's explicit state constitutional privacy clause [*In re Marriage Cases (2008) 43 Cal. 4th 757, 810, 76 Cal. Rptr. 3d 683, 183 P.3d 384*]. The right to marry constitutes an aspect of autonomy privacy [*In re Marriage Cases (2008) 43 Cal. 4th 757, 810 n31, 76 Cal. Rptr. 3d 683, 183 P.3d 384*]The substance of the constitutional right at issue is the importance to an individual of the freedom to join in marriage with the person of one's choice [*In re Marriage Cases (2008) 43 Cal. 4th 757, 811, 76 Cal. Rptr. 3d 683, 183 P.3d 384*].

Just as the state constitutional right to marry extended to interracial couples [*Perez v. Sharp (1948) 32 Cal.2d 711, 714, 198 P.2d 17*], the right of the individual to have the freedom to join in marriage with the person of one's choice extends to same sex couples [*In re Marriage Cases (2008) 43 Cal. 4th 757, 811, 820, 76 Cal. Rptr. 3d 683, 183 P.3d 384*] The right to marry, as embodied in *Cal/ Const. art. I, §§ 1, 7,* guarantees same-sex couples the same substantive constitutional rights as opposite-sex couples to choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage [*In re Marriage Cases (2008) 43 Cal. 4th 757, 829, 76 Cal. Rptr. 3d 683, 183 P.3d 384*].

The passage of Proposition 8, providing that "[o]nly marriage between a man and a woman is valid or recognized in California" [*Cal. Const., art. I, § 7.5*] does not entirely repeal or abrogate the aspect of a same-sex couple's state constitutional right of privacy, namely, to choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage [*Strauss v. Horton (2009) 46 Cal. 4th 364, 388, 93 Cal. Rptr. 3d 591, 207 P.3d 48*]. Proposition 8 does not abrogate the state constitutional right to privacy for same-sex couples, but instead carves out a narrow exception applicable only to access to the designation of the term "marriage," but not to any other of "the core set of basic substantive legal rights and attributes traditionally associated with marriage" [*Strauss v. Horton (2009) 46 Cal. 4th 364, 390, 407, 93 Cal. Rptr. 3d 591, 207 P.3d 48*]. By its terms, the new provision refers only to "marriage" and does not address the right to establish an officially recognized family relationship, which may bear a name or designation other than "marriage." Thus, it does not affect the right of same-sex couples, as well as opposite-sex couples, to establish an officially recognized family relationship. [*Strauss v. Horton (2009) 46 Cal. 4th 364, 408, 411, 93 Cal. Rptr. 3d 591, 207 P.3d 48*].

For a full discussion of these issues, see *Ch. 387, Nonmarital Cohabitation, § 387.11[3]*.

[4] Limitations on Inalienable Rights

The inalienable rights guaranteed under *Cal. Const., art. I, § 1* are not absolute and do not operate as a curtailment on the basic power of the Legislature to enact reasonable police regulations [*Nash v City of Santa Monica (1984) 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894* . (property rights); *National Organization for Reform of Marijuana Laws v. Gain (1979) 100 Cal. App. 3d 586, 598, 161 Cal. Rptr. 181* (prohibition on private possession and use of marijuana by adults was not unconstitutional violation of rights to liberty and obtaining happiness); for discussion of police power, see *§ 126A.30* et seq.]. Similarly, the obligation to attend a legal proceeding and give testimony as a witness is a limitation on the inalilenable rights granted in *Cal. Const., art. I, § 1* [*Vannier v. Superior Court (1982) 32 Cal. 3d 163, 171, 185 Cal. Rptr. 427, 650 P.2d 302]* .

In some cases, where those rights are implicated, the Legislature's power to delegate its legislative power will be limited [*see* *Bownds v Glendale (1980) 113 Cal. App. 3d 875, 885, 170 Cal. Rptr. 342* (in areas of critical importance and sensitivity, such as impairing private property rights and mandating the expenditure of public funds, a delegation of legislative authority to an administrative agency would violate the doctrine of separation of powers); for discussion of separation of powers doctrine, *see § 126A.20* et seq.].

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§ 126A.43 Freedom of Speech and the Press

[1] Under the California Constitution

The California Constitution protects the freedom of speech and of the press [*see Cal. Const., art. I, § 2(a)*]. This provision protects most methods and modes of speech [*see, e.g., Aaron v. Municipal Court of San Jose-Milpitas Judicial Dist. (1977) 73 Cal. App. 3d 596, 602, 140 Cal. Rptr. 849]* . Commercial speech receives a lesser degree of constitutional protection than many other forms of expression, and governments may entirely prohibit commercial speech that is false or misleading [*Kasky v. Nike (2002) 27 Cal. 4th 939, 946, 119 Cal. Rptr. 2d 296, 45 P.3d 243* ; for discussion of commercial speech generally, *see* Ch. 14, *Advertising*]. Religious activity typically involves expressive speech and, although protected by the *First Amendment*, it is as a matter of law subordinate to *establishment clause* concerns [*DiLoreto v. Board of Educ. of Downey Unif. Sch. Dist. (1999) 74 Cal. App. 4th 267, 280, 87 Cal. Rptr. 2d 791* ; for discussion of the federal and state constitutional protections for religion, *see* Ch. 110, *Churches and Religious Organizations*].

For detailed discussion of the speech protected under the California Constitution, see *Ch. 59, Assemblies, Meetings and Demonstrations, §§ 59.11, 59.15*.

For detailed discussion of remedies for violation of the right to freedom of speech, see *Ch. 59, Assemblies, Meetings and Demonstrations, § 59.16*.

For discussion of public school students' right to freedom of expression, see *Ch. 513, Schools: Student Rights And Responsibilities, § 513.34*.

[2] Limitation to State Action

[a] Owners May Generally Prohibit Expression on Their Private Property

A private property owner constitutionally does not have to permit free speech activities on his or her property against his or her wishes. The owner may expel persons attempting to do so without permission as trespassers [*Trader Joe's*

Co. v. Progressive Campaigns (1999) 73 Cal. App. 4th 425, 430, 86 Cal. Rptr. 2d 442 ; *Savage v. Trammell Crow Co. (1990) 223 Cal. App. 3d 1562, 1578-1580, 273 Cal. Rptr. 302]* .

For detailed discussion of requirement of state action, see *Ch. 59, Assemblies, Meetings and Demonstrations, § 59.14[1]*.

[b] California Constitution Gives Broader Speech Protection Than Federal Constitution

The right to free speech under the California Constitution [*Cal. Const., art. I, § 2(a)*] is more "definitive and inclusive" than that afforded by the *First Amendment* [*Robins v. Pruneyard Shopping Center (1979) 23 Cal. 3d 899, 908, 153 Cal. Rptr. 854, 592 P.2d 341* , aff'd, *447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980)]* . The more expansive view includes a burden on the state to prove that the speech activity was "incompatible" with the public forum although it tolerates content-neutral speech restriction commensurate with the *First Amendment* [*Rosenbaum v. City and County of San Francisco (9th Cir. 2007) 484 F.3d 1142, 1167*]. Thus, the California provision protects the reasonable exercise of free speech rights on private property when that property is generally open to the public and functions as the equivalent of a traditional public forum [*Allred v. Harris (1993) 14 Cal. App. 4th 1386, 1390, 18 Cal. Rptr. 2d 530]* . In other situations, the court balances the competing interests of the property owner and of society with respect to the particular property or type of property at issue to determine whether there is a state constitutional right to engage in the challenged activity [*Trader Joe's Co. v. Progressive Campaigns (1999) 73 Cal. App. 4th 425, 433, 86 Cal. Rptr. 2d 442]* .

For detailed discussion of private property as a public forum, see *Ch. 59, Assemblies, Meetings and Demonstrations, § 59.14[2][a]*.

[3] Limitation by Police Power

[a] Expression in Private Forums

In determining the constitutionality of governmental limitations on free expression, the courts distinguish between and content-neutral limitations on the time, place, and manner of expression. A more stringent standard of scrutiny applies to restrictions based on the content of speech [*see, e.g.*, *Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal. 4th 352, 364-378, 93 Cal. Rptr. 2d 1, 993 P.2d 334]* . The level of scrutiny applied to content-neutral time, place, and manner regulations is anintermediate scrutiny [*Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal. 4th 352, 364, 93 Cal. Rptr. 2d 1, 993 P.2d 334]* .

Similarly, owners of private property that function as public forums may impose reasonable content-neutral limitations on the time, place, and manner of expression [*Savage v. Trammell Crow Co. (1990) 223 Cal. App. 3d 1562, 1572-1573, 273 Cal. Rptr. 302]* .

For detailed discussion of the levels of scrutiny of governmental restrictions on freedom of speech, see *Ch. 59, Assemblies, Meetings and Demonstrations, §§ 59.12, 59.14[2][b]*.

[b] Expression in Public Forums

The courts have adopted a "public forum analysis" as a means to determine when the government's interest in limiting the use of its property to its intended purpose outweighs the interests of those who wish to use the property for other purposes [*see* *Clark v. Burleigh (1992) 4 Cal. 4th 474, 482, 14 Cal. Rptr. 2d 455, 841 P.2d 975]* .

For detailed discussion of governmental restrictions on freedom of speech in public formus, see *Ch. 59, Assemblies, Meetings and Demonstrations, § 59.13*.

[c] Advertising in the Press

The state may use its police power to limit inherently misleading commercial speech [*see Bronco Wine Co. v. Jolly (2005) 129 Cal. App. 4th 988, 999, 29 Cal. Rptr. 3d 462* (state wine labeling statute did not violate winery's free speech rights)].

For detailed discussion of governmental restrictions on advertising, see *Ch. 470, Overview of Public Administrative Law, § 470.16[2][b]*.

[4] Constitutional Protection as Defense in Defamation Suit

When speech that is alleged to be defamatory in a defamation suit is constitutionally protected by the freedom of expression, the plaintiff must prove actual malice [*Antonovich v. Superior Court (1991) 234 Cal. App. 3d 1041, 1047, 285 Cal. Rptr. 863* , citing *New York Times Co. v. Sullivan (1964) 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686]* .

For detailed discussion of constitutional defenses to defamation actions, see *Ch. 340, Libel and Slander, §§ 340.18, 340.51[1]*.

[5] Newsperson's Shield Law

To protect the free flow of information, news reporters and related news media personnel have an immunity from contempt for refusing to obey an order that seeks disclosure of either the source of published information or unpublished information obtained in the course of newsgathering [*Cal. Const., art. I, § 2(b)*]. The provision is implemented by statutes [*see Evid. Code § 1070*; *Code Civ. Proc. § 1986.1*].

For detailed discussion of the newsperson's shield law, see *Ch. 191, Discovery: Privileges and Other Discovery Limitations, § 191.122* et seq.

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§ 126A.44 Assembly, Petition, and Freedom of Information

[1] Freedom of Assembly

The California constitution protects the right to freely to consult for the common good [*see Cal. Const., art. I, § 3(a)*]. Likewise, the *First Amendment* to the United State Constitutions includes the right to freedom of assembly, which applies to the states by virtue of the *Fourteenth Amendment to the U.S. Constitution* [*Danskin v. San Diego Unified School Dist. (1946) 28 Cal. 2d 536, 542, 171 P.2d 885* , citing *Thomas v. Collins, 323 U.S. 516, 530, 65 S.Ct. 315, 89 L.Ed. 430]* . Freedom of assembly is susceptible of restriction only to prevent grave and immediate danger to interests that the state may lawfully protect [*West Virginia State Bd. of Educ. v. Barnette (1943) 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, 147 A.L.R. 674]* .

[2] The Right to Petition

The California constitution sets forth the right to petition government for the redress of grievances [*see Cal. Const., art. I, § 3(a)*]. The *First Amendment* to the United State Constitutions includes the same right to petition and is applied against the states by virtue of the *Fourteenth Amendment* [*Hague v. C.I.O. (1939) 307 U.S. 496, 512-513, 59 S. Ct. 954, 963, 83 L. Ed. 1423, 1435]* . The federal and state constitutional right to petition for redress of grievances is the right of the governed to petition those exercising the powers of government [*Greene v. Hawaiian Dredging Co. (1945) 26 Cal. 2d 245, 251, 157 P.2d 367]* . It encompasses the right to lobby, file an administrative action, sue, and testify [*Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal. 4th 1106, 1115, 81 Cal. Rptr. 2d 471, 969 P.2d 564* ; *see California Transport v. Trucking Unlimited (1972) 404 U.S. 508, 510, 92 S. Ct. 609, 611-612, 30 L. Ed. 2d 642, 646* (right to sue)]. It may even extend to private property [*Robins v. Pruneyard Shopping Center (1979) 23 Cal. 3d 899, 910, 153 Cal. Rptr. 854, 592 P.2d 341* (shopping malls)]. The right to petition is subject only to reasonable restrictions [*Johnson v. Avery (1969) 393 U.S. 483, 490, 89 S. Ct. 747, 21 L. Ed. 2d 718* ; *In re Harrell (1970) 2 Cal. 3d 675, 683, 87 Cal. Rptr. 504, 470 P.2d 640]* .

For discussion of the right to petition government under the California constitution, see *Ch. 59, Assemblies, Meetings, and Demonstrations, § 59.18*.

[3] Right to Information on Government

Added to the constitution effective November 2, 2004, a California constitution provision gives the people the right of access to information concerning the conduct of the people's business [*see Cal. Const., art. I, § 3(b)(1)*]. The extent of the right to access to public information is constitutionally restricted [*see Cal. Const., art. I, § 3(b)(2)* et seq.]. Enactment of this amendment did not repeal the "mental processes principle" barring discovery of the motives or mental processes of legislators [*Sutter's Place v. Superior Court (2008) 161 Cal. App. 4th 1370, 1382, 75 Cal. Rptr. 3d 9*].

For discussion of public agency meetings, see Ch. 470B, *Public Agency Meetings* . For discussion of the Public Records Act, see Ch. 470C, *Public Records Act* .

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§ 126A.45 Religious Constitutional Rights

[1] The Separation of Church and State

[a] Federal and State Constitutions

The *Establishment Clause of the First Amendment to the U.S. Constitution* [*U.S. Const., amend. I*, cl. 1], as applied to the states through the *Fourteenth Amendment* [*U.S. Const., amend. XIV, § 1*, cl. 2], commands that a state may make no law respecting an establishment of religion or prohibiting the free exercise of religion [*Cantwell v. Connecticut (1940) 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213]* . Similarly, the California constitution bars the Legislature from making laws respecting an establishment of religion [*see Cal. Const., art. I, § 4*].

For detailed discussion of religious organizations generally, see *Ch. 110, Churches and Religious Organizations, § 110.13[1]*.

[b] Provisions Mean the Same Thing

The California concept of "a law respecting an establishment of religion" coincides with the intent and purpose of the *First Amendment's Establishment Clause* [*East Bay Asian Local Development Corp. v. State of California (2000) 24 Cal. 4th 693, 718, 102 Cal. Rptr. 2d 280, 13 P.3d 1122]* . They are not violated by a law that meets all of the following criteria [*Committee for Public Education v. Nyquist (1973) 413 U.S. 756, 772-773, 93 S. Ct. 2955, 37 L. Ed. 2d 948* ; *East Bay Asian Local Development Corp. v. State of California (2000) 24 Cal. 4th 693, 705-718, 102 Cal. Rptr. 2d 280, 13 P.3d 1122]* :

- Has a secular purpose;
- Has a primary effect that neither advances nor prohibits religion; and
- Avoids excessive government entanglement with religion.

For further discussion of federal and state constitutional separation of church and state, see *Ch. 110, Churches and Religious Organizations, § 110.13[1]*.

[2] The Right to Religious Freedom

[a] More Comprehensive Than Federal Constitution

The right of the individual to "[f]ree exercise and enjoyment of religion without discrimination or preference" is guaranteed by the California constitution [*see Cal. Const., art. I, § 4*], whereas the *Free Exercise Clause of the First Amendment to the U.S. Constitution* [*U.S. Const., amend. I*, cl. 2], as applied to the states through the *Fourteenth Amendment* [*U.S. Const., amend. XIV, § 1*, cl. 2], only bars laws "prohibiting the free exercise" of religion. In addition, the California provision contains the following sentence not yet interpreted by any California court [*see Cal. Const., art. I, § 4*]:

> This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State.

In view of the difference of language, the California constitutional provision may be more comprehensive than the federal Constitution [*see Fox v. City of Los Angeles (1978) 22 Cal. 3d 792, 796-797, 150 Cal. Rptr. 867, 587 P.2d 663* (city display of lighted cross is forbidden preference even if not discriminatory); *Smith v. Fair Employment & Housing Com. (1996) 12 Cal. 4th 1143, 1179 n.22, 51 Cal. Rptr. 2d 700, 913 P.2d 909* (specifically refers to "liberty of conscience"); *see also Lucas Valley Homeowners Assn. v. County of Marin (1991) 233 Cal. App. 3d 130, 145, 284 Cal. Rptr. 427* (under California Constitution, preference is forbidden even when there is no discrimination)]. However, there is no settled interpretation of the state *Constitution's free exercise clause* [*see Catholic Charities of Sacramento, Inc. v. Superior Court (2004) 32 Cal. 4th 527, 561, 10 Cal. Rptr. 3d 283, 85 P.3d 67]* .

Under the federal constitutional provision, religious beliefs do not excuse compliance with otherwise valid laws regulating matters the state is free to regulate [*Employment Div., Ore. Dept. of Human Res. v. Smith (1990) 494 U.S. 872, 877-882, 110 S. Ct. 1595, 108 L. Ed. 2d 876* ; *Catholic Charities of Sacramento, Inc. v. Superior Court (2004) 32 Cal. 4th 527, 547, 10 Cal. Rptr. 3d 283, 85 P.3d 67]* .

For discussion of public school students' right to freedom of religion, see *Ch. 513, Schools: Student Rights and Responsibilities, § 513.35*.

For further discussion of federal and state constitutional guarantees of the right to religious freedom, see *Ch. 110, Churches and Religious Organizations, § 110.13[2]*.

[b] Prohibits Discrimination

Even if the state provision [*see Cal. Const., art. I, § 4*] is more protective of religious exercise than that of the federal Constitution, no California court has articulated a more protective test than the compelling state interest test. Under this test if a person shows that a law substantially burdens the free exercise of religion, the government must demonstrate that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling interest [*Swaggart v. Calif. Equalization Bd. (1990) 493 U.S. 378, 384, 110 S. Ct. 688, 107 L. Ed. 2d 796, 806* ; *Smith v. Fair Employment & Housing Com. (1996) 12 Cal. 4th 1143, 1167, 51 Cal. Rptr. 2d 700, 913 P.2d 909]* . This test is strict scrutiny [*see Employment Div., Ore. Dept. of Human Res. v. Smith (1990) 494 U.S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876* ; *Catholic Charities of Sacramento, Inc. v. Superior Court (2004) 32 Cal. 4th 527, 550, 10 Cal. Rptr. 3d 283, 85 P.3d 67]* .

Under this rule, a law is a burden on free exercise of religion if:

- It is not neutral and generally applicable [*Church of Lukumi Babalu Aye, Inc. v. Hialeah (1993) 508 U.S. 520, 533-547, 113 S. Ct. 2217, 124 L. Ed. 2d 472* ; *Catholic Charities of Sacramento, Inc. v. Superior Court (2004) 32 Cal. 4th 527, 550-552, 10 Cal. Rptr. 3d 283, 85 P.3d 67]* ,

- It is a religious gerrymander [*Church of Lukumi Babalu Aye, Inc. v. Hialeah (1993) 508 U.S. 520, 534, 113 S. Ct. 2217, 124 L. Ed. 2d 472* ; *Catholic Charities of Sacramento, Inc. v. Superior Court (2004) 32 Cal. 4th 527, 552-556, 10 Cal. Rptr. 3d 283, 85 P.3d 67]* , or

- It involves so-called "hybrid rights" [*see* *Employment Div., Ore. Dept. ofHuman Res. v. Smith (1990) 494 U.S. 872, 881-882, 110 S. Ct. 1595, 108 L. Ed. 2d 876* ; *but see* *Catholic Charities of Sacramento, Inc. v. Superior Court (2004) 32 Cal. 4th 527, 556-560, 10 Cal. Rptr. 3d 283, 85 P.3d 67]* .

However, the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes) [*Employment Div., Ore. Dept. of Human Res. v. Smith (1990) 494 U.S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876* , quoting *United States v. Lee (1982) 455 U.S. 252, 263 n.3, 102 S. Ct. 1051, 71 L. Ed. 2d 127]* . Conversely, a law that is neutral and of general applicability need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice [*Church of Lukumi Babalu Aye, Inc. v. Hialeah (1993) 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472* ; *Catholic Charities of Sacramento, Inc. v. Superior Court (2004) 32 Cal. 4th 527, 549, 10 Cal. Rptr. 3d 283, 85 P.3d 67]* . It does not give an individual the right to dictate the conduct of the government's internal procedures [*Lyng v. N.W. Indian Cemetery Prot. Asso. (1988) 485 U.S. 439, 448, 108 S. Ct. 1319, 99 L. Ed. 2d 534, 546* , quoting *Bowen v. Roy (1986) 476 U.S. 693, 699-700, 106 S. Ct. 2147, 90 L. Ed. 2d 735, 744-745]* .

[c] Prohibits Preferences

The *free exercise clause* of the California Constitution, by prohibiting preferences for religion [*see Cal. Const., art. I, § 4*], also seeks to prevent government from giving any advantage to religion in California. The California Supreme Court has not interpreted this clause in light of the U.S. Supreme Court's decision in *Employment Div., Ore. Dept. of Human Res. v. Smith (1990) 494 U.S. 872, 881-882, 110 S. Ct. 1595, 108 L. Ed. 2d 876* (applied rational basis test, rejecting strict scrutiny applied in prior U.S. Supreme Court decisions) [*see* *Catholic Charities of Sacramento, Inc. v. Superior Court (2004) 32 Cal. 4th 527, 556-560, 10 Cal. Rptr. 3d 283, 85 P.3d 67* (challenged law passed even strict scrutiny, so court did not have to determine if standard was less than strict)]. California decisions prior to *Smith* applied the rule of strict scrutiny used by the U.S. Supreme Court prior to *Smith* in interpreting the California *free exercise clause* [*Catholic Charities of Sacramento, Inc. v. Superior Court (2004) 32 Cal. 4th 527, 560-562, 10 Cal. Rptr. 3d 283, 85 P.3d 67* ; *Smith v. Fair Employment & Housing Com. (1996) 12 Cal. 4th 1143, 1178-1179, 51 Cal. Rptr. 2d 700, 913 P.2d 909]* .

One court of appeals ruled subsequent to *Smith* that preferences for religion are subject to the rational basis test [*Brunson v. Department of Motor Vehicles (1999) 72 Cal. App. 4th 1251, 1255* , 85 Cal. Rtpr. 2d 710]. However, the Supreme Court found that that decision erred in concluding that *Smith v. Fair Employment & Housing Com. (1996) 12 Cal. 4th 1143, 51 Cal. Rptr. 2d 700, 913 P.2d 909* , mandated application of the rational basis test to the petitioners' claims under the state *free exercise clause*, upon which it relied in applying the rational basis test [*Catholic Charities of Sacramento, Inc. v. Superior Court (2004) 32 Cal. 4th 527, 560, 10 Cal. Rptr. 3d 283, 85 P.3d 67]* . That same Supreme Court decision disavowed the need of the lower court from which it was hearing the appeal [*see* *Catholic Charities of Sacramento, Inc. v. Superior Court (3d Dist., 2001) 90 Cal. App. 4th 425, 452-453, 109 Cal. Rptr. 2d 176* (rational basis test applies under state *free exercise clause*)] to have decided the question of whether strict scrutiny or a lower standard applies [*Catholic Charities of Sacramento, Inc. v. Superior Court (2004) 32 Cal. 4th 527, 560-562, 10 Cal. Rptr. 3d 283, 85 P.3d 67]* .

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§ 126A.46 Other Civil Constitutional Rights

[1] Freedom from Involuntary Servitude and Slavery

The California Constitution prohibits slavery and, except to punish crime, involuntary servitude [*see Cal. Const., art. I, § 6*]. When considering involuntary servitude issues, the protection extended by *Cal. Const., art. I, § 6* is coextensive with that accorded by the *Thirteenth Amendment to the U.S. Constitution* [*Moss v. Superior Court (1998) 17 Cal. 4th 396, 418-420, 71 Cal. Rptr. 2d 215, 950 P.2d 59* ; *see, e.g.,* *Johnson v. Calvert (1993) 5 Cal. 4th 84, 96 [19 Cal. Rptr. 2d 494, 851 P.2d 776]* . Accordingly, the qualifying phrase "unless for the punishment of crime" within this section's proscriptions against involuntary servitude does not vitiate or violate the provisions of the *Thirteenth Amendment to the U.S. Constitution* [*Morrison v California (S.D. Cal., 1964) 238 F. Supp. 22, 25]* .

Under the *Thirteenth Amendment*, involuntary servitude has been recognized in cases of criminal punishment for refusal to work, or where there is extrinsic evidence of coercion or duress [*Johnson v Calvert (1993) 5 Cal. 4th 84, 96, 19 Cal. Rptr. 2d 494, 851 P.2d 776]* . However, the prohibition against involuntary servitude does not prevent a court from ordering a parent to obtain paid employment in order that the parent may pay child support [*Moss v Superior Court (1998) 17 Cal. 4th 396, 418, 71 Cal. Rptr. 2d 215, 950 P.2d 59* , overruling *Ex parte Todd (1897) 119 Cal. 57, 50 P. 1071* insofar as it may apply to child support obligations)].

[2] Freedom from Discrimination in Employment or Business

Cal. Const., art. I, § 8, which provides that no person may be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin, sets forth a fundamental public policy against employment discrimination on those grounds, and may be the basis for a tort cause of action for wrongful termination in violation of public policy [*Rojo v. Kliger (1990) 52 Cal. 3d 65, 88-91, 276 Cal. Rptr. 130, 801 P.2d 373]* .

For detailed discussion of *Cal. Const., art. I, § 8*, see *Ch. 115, Civil Rights: Employment Discrimination, § 115.34*; *Ch. 249, Employment Law: Termination and Discipline, §§ 249.12, 249.21*.

[3] Fishing Rights

The California Constitution affords the people the right to fish on public lands subject to reasonable regulations [*see Cal. Const., art. I, § 25*]. The words, "public lands," mean state-owned land the use of which by the state is compatible with use by the public for purposes of fishing. Only property that is being used for a special purpose that is incompatible with its use by the public does not fall within the scope of the constitutional provision [*California v. San Luis Obispo Sportsman's Assn.(1978) 22 Cal. 3d 440, 446-447, 149 Cal. Rptr. 482, 584 P.2d 1088* (the constitutional provision applied to state-owned lands surrounding a domestic water supply reservoir where a properly implemented public recreational fishing program would not interfere with its function as a domestic water supply reservoir)].

The right to fish in the Constitution does not create an interest that is a fundamental right for purposes of equal protection analysis. The constitutional provision authorizes legislative regulation of fishing, and creates only a qualified right to fish. Further, the constitutional provision was not intended to curtail the traditional legislative prerogative to regulate fishing; the power to regulate fishing has always existed as an aspect of the inherent power of the legislature to regulate the terms under which a public resource may be taken by private citizens [*California Gillnetters Ass'n v. Dep't of Fish & Game (1995) 39 Cal. App. 4th 1145, 1153-1154, 46 Cal. Rptr. 2d 338]* .

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[Reserved]

§§ 126A.47[Reserved]

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§ 126A.50 Governing Law

Due process of law is guaranteed by *Cal. Const., art. I, § 7(a)* and *U.S. Const., amend. XIV, § 1*, cl. 2.

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§ 126A.51 Constitutional Basis for Procedural Due Process

[1] Distinguishing Procedural Due Process from Substantive Due Process, and Cross References to Detailed Discussions Throughout This Publication

Under the California constitution, a person may not be deprived of life, liberty, or property without due process of law [*Cal. Const., art. I, § 7(a)*]. Similarly, the federal constitution provides that "no State shall ... deprive any person of life, liberty, or property, without due process of law" [*U.S. Const., amend. XIV, § 1*].

Accordingly, the touchstone of due process is protection of the individual against arbitrary action of government [*County of Sacramento v. Lewis (1998) 523 U.S. 833, 845-846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043* , quoting *Wolff v. McDonnell (1974) 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L. Ed. 2d 935]* , whether the fault lies in a denial of fundamental procedural fairness, i.e., procedural due process, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, i.e., substantive due process [*County of Sacramento v. Lewis (1998) 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043]* .

For discussion of substantive due process, see *§ 126A.41*.

For discussion of action for violation of right to procedural due process under *42 U.S.C.S. § 1983*, see *Ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes, § 113.14*.

For discussion of prisoners' rights to procedural due process, see *Ch. 114, Civil Rights: Prisoners' Rights, § 114.18*.

For discussion of civil service employees' right to procedural due process, see *Ch. 118, Civil Service, § 118.13*.

For discussion of public employees' due process right to a name-clearing hearing, see *Ch. 473F, Agency Adjudication Hearings, § 473F.51[7][c]*.

For discussion of procedural due process in class actions, see *Ch. 120, Class Actions, § 120.17*.

For discussion of limitations on procedural due process rights of de facto parents in dependency proceedings, see *Ch. 328, Juvenile Courts: Dependency Proceedings, § 328.60A[3]*.

For discussion of procedural due process as applied to public entities, see Ch 470A, *Due Process Restrictions on Public Agencies* .

For discussion of procedural due process in public agency inspections, see *Ch. 471A, Public Agency Inspections, § 471A.13*.

For discussion of due process considerations in adjudication by public agencies, see *Ch 473, Public Agency Adjudication, § 473.12*.

For discussion of public agency adjudication hearings, see Ch. 473F, *Agency Adjudication Hearings* .

For discussion of service of summons and procedural due process, see *Ch. 518, Service of Summons and Papers, § 518.11*.

For discussion of social services and procedural due process, see *Ch. 527, Social Services, § 527.16*.

[2] Elements of Procedural Due Process

[a] Three Factors

The following three factors normally determine whether an individual has received the "process" that the Constitution finds "due" [*City of Los Angeles v. David (2003) 538 U.S. 715, 123 S. Ct. 1895, 155 L. Ed. 2d 946* ; *Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)]* :

- The private interest that will be affected by the official action;

- The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and

- The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

[b] Showing of Deprivation of Life, Liberty, or Property Required First

The Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must first establish that one of these interests is at stake [*Wilkinson v. Austin (2005) 545 U.S. 209, 221, 125 S. Ct. 2384, 162 L. Ed. 2d 174* ; *Mathews v. Eldridge, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)]* .

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§ 126A.52 Vagueness of Laws

A person may not be deprived of life, liberty, or property without due process of law[*U.S. Const., amend. XIV*; *Cal. Const., art. I, § 7(a)*]. Civil as well as criminal statutes must be sufficiently clear to give a fair warning of the conduct prohibited and must provide a standard or guide against which conduct can be uniformly judged by courts and administrative agencies [*Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 231, 82 Cal. Rptr. 175, 461 P.2d 375* ; *see Menefee & Son v. Department of Food & Agriculture (1988) 199 Cal. App. 3d 774, 780-783, 245 Cal. Rptr. 166]* . However, although enactments outside the criminal area have occasionally been subjected to scrutiny on grounds of vagueness, especially in cases involving the right to practice a recognized profession or the exercise of other fundamental rights, scrutiny for vagueness has normally been limited to situations in which *First Amendment* rights have been at stake [*Goldin v. Public Utilities Commission (1979) 23 Cal. 3d 638, 659, 153 Cal. Rptr. 802, 592 P.2d 289]* .

An enactment is void for vagueness if its prohibitions are not clearly defined. An enactment must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he or she may act accordingly. Also, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. When a vague statute abuts on sensitive areas of basic *First Amendment* freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries had been clearly marked [*Ketchens v. Reiner (1987) 194 Cal. App. 3d 470, 477, 239 Cal. Rptr. 549* ; *see People v. Scott (1993) 20 Cal. App. 4th Supp. 5, 26 Cal. Rptr. 2d 179]* .

Vagueness may be resolved by a more precise judicial construction and by application of the statute in conformity with the legislative objectives [*Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 232-233, 82 Cal. Rptr. 175, 461 P.2d 375* (immoral or unprofessional conduct or conduct involving moral turpitude as grounds for revocation of teacher's diplomas construed as limited to conduct showing unfitness to teach)]. For example, when the language of a statute fails to provide an objective standard by which conduct can be judged, the required specificity may nonetheless be provided by the common knowledge and understanding of members of the particular vocation or profession to which the statute applies [*Cranston v. City of Richmond (1985) 40 Cal. 3d 755, 764, 221 Cal. Rptr. 779, 710 P.2d 845]* . Additionally, a challenge on the ground of vagueness to a statute that does not involve *First Amendment* freedoms must

be examined in light of the facts of the case at hand [*Cranston v. City of Richmond (1985) 40 Cal. 3d 755, 763, 221 Cal. Rptr. 779, 710 P.2d 845]* . Many, probably most, statutes are ambiguous in some respects and instances invariably arise under which the application of statutory language may be unclear. So long as a statute does not threaten to infringe on the exercise of *First Amendment* or other constitutional rights, however, such ambiguities, even if numerous, do not justify the invalidation of a statute on its face [*City Of Santa Cruz v. Patel (2007) 155 Cal. App. 4th 234, 247, 65 Cal. Rptr. 3d 824* ; *Evangelatos v. Superior Court (1988) 44 Cal. 3d 1188, 1201, 246 Cal. Rptr. 629, 753 P.2d 585*]. In order to succeed on a facial vagueness challenge to a legislative measure that does not threaten constitutionally protected conduct, a party must do more than identify some instances in which the application of the statute may be uncertain or unambiguous; the party must demonstrate that the law is impermissibly vague in all of its applications [*People v. Scott (1993) 20 Cal. App. 4th Supp. 5, 12* , *People v. Scott (1993) 20 Cal. App. 4th Supp. 5, 26 Cal. Rptr. 2d 179]* .

Finally, in examining statutes challenged for vagueness, courts need not consider every conceivable situation that might arise under the statute's language so long as that language may be given a reasonable and practical construction which is consistent with the Legislature's probable intent and which encompasses the conduct of the complaining party [*Cranston v. City of Richmond (1985) 40 Cal. 3d 755, 764-765, 221 Cal. Rptr. 779, 710 P.2d 845* ; *People v. Scott (1993) 26 Cal. Rptr. 2d 179]* .

Economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process [*Amaral v. Cintas Corp. No. 2 (2008) 163 Cal. App. 4th 1157, 1181, 78 Cal. Rptr. 3d 572*].

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§ 126A.53 Procedural Due Process in Seizures

A person's property may not be confiscated by the state without "notice and opportunity to be heard" [*Dusenbery v. United States (2002) 534 U.S. 161, 167, 122 S. Ct. 694, 151 L. Ed. 2d 597* (civil forfeiture proceedings); *Fuentes v. Shevin (1972) 407 U.S. 67, 79-80, 92 S.Ct. 1983, 32 L.Ed.2d 556, 569-570]* . While in most cases the hearing will be required before the taking, unusual circumstances may permit the postponement of notice and hearing until after the initial taking has occurred [*Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal. 3d 294, 308, 138 Cal. Rptr. 53, 562 P.2d 1302* ; *Bryte v. City of La Mesa (1989) 207 Cal. App. 3d 687, 689, 255 Cal. Rptr. 64]* . The statute itself must provide for notice of the time and place of hearing where the parties may present in a regular and orderly manner issues of law and fact. [*Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal. 3d 294, 308, 138 Cal. Rptr. 53, 562 P.2d 1302* ; *Bryte v. City of La Mesa (1989) 207 Cal. App. 3d 687, 690, 255 Cal. Rptr. 64* ; *see City of W. Covina v. Perkins (1999) 525 U.S. 234, 119 S. Ct. 678, 681-682, 142 L. Ed. 2d 636]* .

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§ 126A.54 Procedural Due Process in Adjudicative Actions

[1] Adequate Notice and Hearing

The fundamental requisite of procedural due process of law is the opportunity to be heard. [*Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)]* . Another elementary and fundamental requirement of due process in any proceeding that is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Notice is constitutionally adequate when the practicalities and peculiarities of the case are reasonably met [*Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)* ; *Mullane v. Central Hanover Bank & Trust Co. (1950) 339 U.S. 306, 314-315, 70 S. Ct. 652, 94 L. Ed. 865]* .

The key focus is the "reasonableness" of the means chosen by the State to notify affected parties [*Mullane v. Central Hanover Bank & Trust Co. (1950) 339 U.S. 306, 315, 70 S. Ct. 652, 94 L. Ed. 865]* . Whether a particular method of notice is reasonable depends on the outcome of the balance between the "interest of the State" and "the individual interest sought to be protected by the *Fourteenth Amendment* [*Mullane v. Central Hanover Bank & Trust Co. (1950) 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865]* . Of course, it is not the courts' responsibility to prescribe the form of service that the state should adopt [*Greene v. Lindsey (1982) 456 U.S. 444, 455 n.9*]. It is the primary responsibility of the state to strike this balance, and the courts will upset this process only when the state strikes the balance in an irrational manner [*Mennonite Board of Missions v. Adams (1983) 462 U.S. 791, 801, 103 S. Ct. 2706, 77 L. Ed. 2d 180]* . Thus, the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner [*Fuentes v. Shevin, 407 U.S. 67, 80, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972)* , quoting inter alia *Baldwin v. Hale, 68 U.S. 223, 17 L. Ed. 531, 1 Wall. 223, 233 (1864)* ; *Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965)]* .

However, the rule is not that the state must provide actual notice, but rather that it must attempt to provide actual notice [*Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 796-797, 103 S. Ct. 2706, 77 L. Ed. 2d 180]* . Indeed, the government must only show the "reasonableness and hence the constitutional validity of any chosen method ... on the ground that it is in itself reasonably certain to inform those affected" [*Dusenbery v. United States (2002) 534 U.S.*

161, 170, 122 S. Ct. 694, 151 L. Ed. 2d 597 ; *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315, 70 S. Ct. 652, 94 L. Ed. 865 (1950)]* .

For discussion of complaints and cross complaints as notices of claims, see Ch. 123, *Complaints and Cross-Complaints* . For discussion of service of summons and complaint, see Ch. 518, *Service of Summons and Papers* .

[2] Neutral Decisionmaker

Due process requires a neutral and detached decisionmaker in the first instance [*Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal., 508 U.S. 602, 617, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993)* , quoting *Ward v. Monroeville, 409 U.S. 57, 61-62, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972)]* .

For discussion of appointment of neutral arbitrators for contractual arbitration, see Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* . For discussion of appointment of neutral arbitrators for judicial arbitration, see *Ch. 36, Judicial Arbitration, § 36.20 -36.22*. For discussion of disqualification of judges for cause, see Ch. 317, *Judges* .

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§ 126A.55 Facial Constitutional Conflict of Procedural Scheme

A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual. To support a determination of facial unconstitutionality, voiding the statute as a whole, a plaintiff cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute. Rather, a plaintiff must demonstrate that the provisions of an act inevitably pose a present total and fatal conflict with applicable constitutional prohibitions [*California Teachers Assn. v. State of California (1999) 20 Cal. 4th 327, 333, 337, 84 Cal. Rptr. 2d 425, 975 P.2d 622* ; *Tobe v. City of Santa Ana (1995) 9 Cal. 4th 1069, 1084, 40 Cal. Rptr. 2d 402, 892 P.2d 1145]* .

When considering a facial challenge to a procedural scheme, a court must determine whether the procedures provide sufficient protection against erroneous and unnecessary deprivations of liberty and property [*Schall v. Martin (1984) 467 U.S. 253, 274, 104 S. Ct. 2403, 2415, 81 L. Ed. 2d 207* ; *California Teachers Assn. v. State of California (1999) 20 Cal. 4th 327, 333, 347, 84 Cal. Rptr. 2d 425, 975 P.2d 622]* . The balancing analysis requires an examination of procedures to determine whether they assure a minimum overall standard of fairness in the particular context. Procedural due process rules are shaped by the risk of error inherent in the generality of cases, not the rare exceptions [*Mathews v. Eldridge (1976) 424 U.S. 319, 334-335, 96 S. Ct. 893, 902-903, 47 L. Ed. 2d 18* ; *California Teachers Assn. v. State of California (1999) 20 Cal. 4th 327, 333, 347, 84 Cal. Rptr. 2d 425, 975 P.2d 622]* .

In considering facial challenges to procedural schemes, courts are to balance the competing interests to ascertain whether the procedures meet due process requirements. It is not sufficient to ascertain simply whether there are instances falling within the scheme in which a particular result would be constitutionally permissible [*California Teachers Assn. v. State of California (1999) 20 Cal. 4th 327, 333, 347, 84 Cal. Rptr. 2d 425, 975 P.2d 622* ; *see also, e.g.,* *Cleveland Board of Education v. Loudermill (1985) 470 U.S. 532, 536-537, 542-546, 105 S. Ct. 1487, 1493, 84 L. Ed. 2d 494]* .

When the state's interest reflected in the actual language of a statute renders the statute unconstitutional, the incidental effect of conserving public resources or recouping costs cannot save the law [*California Teachers Assn. v. State of California (1999) 20 Cal. 4th 327, 346, 84 Cal. Rptr. 2d 425, 975 P.2d 622]* .

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§ 126A.56 Traditional Practice

Traditional practice provides a touchstone for constitutional analysis [*Honda Motor Co. v. Oberg (1994) 512 U.S. 415, 430, 114 S. Ct. 2331, 2339, 129 L. Ed. 2d 336* ; *California Teachers Assn. v. State of California (1999) 20 Cal. 4th 327, 333, 84 Cal. Rptr. 2d 425, 975 P.2d 622]* . Thus, the fact that a statutory provision was "unique and virtually unprecedented" was important in considering whether the statute failed to satisfy constitutional requirements [*California Teachers Assn. v. State of California (1999) 20 Cal. 4th 327, 333, 84 Cal. Rptr. 2d 425, 975 P.2d 622* (statute requiring dismissed or suspended teachers to reimburse state for half cost of administrative law judge was unique exception to statutory requirement that public agencies pay cost of such services, and radical departure from established common law tradition of public funding of adjudicators in courts and in official quasi-judicial bodies)]. Before endorsing a novel idea, particularly when the due process clause requires the state to provide a hearing, courts should proceed with great care [*California Teachers Assn. v. State of California (1999) 20 Cal. 4th 327, 333, 84 Cal. Rptr. 2d 425, 975 P.2d 622]* .

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[Reserved]

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§ 126A.60 Governing Law

Equal protection is granted by *Section 1 of the Fourteenth Amendment to the United States Constitution*, and by *Cal. Const., art. I, § 7(a)*, as limited by *Cal. Const., art. I, § 31*.

The protection of privileges and immunities in state law is governed by *Section 1 of the Fourteenth Amendment to the United States Constitution*, and by *Cal. Const., art. I, § 7(b)*.

Equal protection from special laws is provided by *Cal. Const., art. IV, § 16*, requiring uniform general laws and barring special laws when a general law applies.

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§ 126A.61 Equal Protection Under the California Constitution

The California constitutional mandate of equal protection [*see Cal. Const., art. I, § 7(a)*] was added to the California Constitution in 1974 [*see Serrano v. Priest, 18 Cal. 3d 728, 763 n.40, 135 Cal. Rptr. 345, 557 P.2d 929 (Proposition 7)]* . Prior to that time, the California courts interpreted the privileges and immunities provision of the California constitution along with the requirement of uniform general laws as being substantially equivalent to the *equal protection clause of the Fourteenth Amendment to the federal constitution* [*see § 126A.64*].

The California courts' interpretations may not restrict the guarantees accorded the national citizenry under the federal *equal protection clause* [*see U.S. Const., amend. XIV, § 1*, cl. 3]. In such constitutional adjudication, the first referent is California law and the full panoply of rights Californians have come to expect as their due. Accordingly, decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law [*People v. Longwill (1975) 14 Cal. 3d 943, 951 n. 4, 123 Cal. Rptr. 297, 538 P.2d 753]* .

For discussion of equal protection in the context of enforcing civil rights, see Ch. 112, *Civil Rights: Government-Funded Programs and Activities* , see Ch. 113, *Civil Rights: Post-Civil War Statutes* , see Ch. 114, *Civil Rights: Prisoners' Rights* , see Ch. 115, *Civil Rights: Employment* , see Ch. 116, *Civil Rights: Business Establishments* , see Ch. 117, *Civil Rights: Housing* , see Ch. 117A, *Civil Rights: Interference* .

For discussion of application of equal protection to retroactive statutes, see *Ch. 531, Statutes and Ordinances, § 531.71[8]*.

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§ 126A.62 Scrutiny of Classification in Equal Protection Analysis

[1] Rational-Basis Test Applies Generally to Statutory Classifications

In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification [*Kasler v. Lockyer, 23 Cal. 4th 472, 481-482, 97 Cal. Rptr. 2d 334, 2 P.3d 581 (2000)* (quoting *FCC v. Beach Communications, Inc. (1993) 508 U.S. 307, 313, 113 S. Ct. 2096, 2101, 124 L. Ed. 2d 211*); *Facundo-Guerrero v. Workers' Compensation Appeals Board, Nurserymen's Exchange (2008) 163 Cal. App. 4th 640, 655, 77 Cal. Rptr. 3d 731]* .

A threshold requirement of any meritorious equal protection claim is a showing that the state's classification affects two or more similarly situated groups in an unequal manner. This initial inquiry is not whether groups in question are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged [*People v. Travis (2006) 139 Cal. App. 4th 1271, 1291, 44 Cal. Rptr. 3d 177]* .

Where there are plausible reasons for a classification, the courts' inquiry is at an end [*Kasler v. Lockyer, 23 Cal. 4th 472, 481-482, 97 Cal. Rptr. 2d 334, 2 P.3d 581 (2000)* (quoting *FCC v. Beach Communications, Inc. (1993) 508 U.S. 307, 313, 113 S. Ct. 2096, 2101, 124 L. Ed. 2d 211*)]. The party challenging a classification bears the burden of demonstrating its invalidity [*City and County of San Francisco v. Flying Dutchman Park, Inc. (2004) 122 Cal. App. 4th 74, 83-84, 18 Cal. Rptr. 3d 532* (citing *Warden v. State Bar (1999) 21 Cal. 4th 628, 641, 88 Cal. Rptr. 2d 283, 982 P.2d 154*)].

Within this framework, the state may recognize that different categories or classes of persons within a larger classification may pose varying degrees of risk of harm, and properly may limit a regulation to those classes of persons as to whom the need for regulation is thought to be more crucial or imperative [*Kasler v. Lockyer, 23 Cal. 4th 472, 482, 97 Cal. Rptr. 2d 334, 2 P.3d 581 (2000)* , citing *American Bank & Trust Co. v. Community Hospital (1984) 36 Cal. 3d 359, 371, 204 Cal. Rptr. 671, 683 P.2d 670, 41 A.L.R.4th 233]* .

The courts will not overturn a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that they can only conclude that the legislature's actions were irrational [*Hernandez v. City of Hanford (2007) 41 Cal. 4th 279, 301, 59 Cal. Rptr. 3d 442, 159 P.3d 33* , *quoting Kadrmas v. Dickinson Public Schools (1988) 487 U.S. 450, 462-463, 108 S. Ct. 2481, 101 L. Ed. 2d 399*].

[2] Classifications Suspect or Touching Fundamental Interests Are Subject to Strict Scrutiny

In cases involving "suspect classifications" or touching on "fundamental interests," courts analysis the classification actively and critically, subjecting the classifications to strict scrutiny. Under this strict standard applied in those cases, the state bears the burden of establishing not only that it has a compelling interest that justifies the law, but that the distinctions drawn by the law are necessary to further its purpose [*Kasler v. Lockyer, 23 Cal. 4th 472, 480, 97 Cal. Rptr. 2d 334, 2 P.3d 581 (2000)* (quoting *Warden v. State Bar (1999) 21 Cal. 4th 628, 640-641, 88 Cal. Rptr. 2d 283, 982 P.2d 154*)]. Accordingly, the applicable test is whether the law is narrowly tailored to meet a compelling governmental interest [*Tobe v. City of Santa Ana, 9 Cal. 4th 1069, 1129, 40 Cal. Rptr. 2d 402, 892 P.2d 1145 (1995)* (Mosk, J., dissenting) (citing *Plyler v. Doe, 457 U.S. 202, 216-217, 102 S.Ct. 2382, 72 L.Ed.2d 786, 798-799 (1982))]* .

The area of fundamental interests includes "all protections of the California Declaration of Rights" [*People v. Longwill (1975) 14 Cal. 3d 943, 951 n. 4, 123 Cal. Rptr. 297, 538 P.2d 753]* .

[3] Class of One Scrutinized for Rational Basis

Equal protection claims are successfully brought by a "class of one" when the plaintiff alleges that he or she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment [*Vill. of Willowbrook v. Olech (2000) 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060* ; *Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist. (2003) 113 Cal. App. 4th 597, 605, 6 Cal. Rptr. 3d 574]* . An equal protection claim by a class of one contains the following essential elements: (1) plaintiff was treated differently from other similarly situated persons, (2) the difference in treatment was intentional, and (3) there was no rational basis for the difference in treatment [*Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist. (2003) 113 Cal. App. 4th 597, 605, 6 Cal. Rptr. 3d 574*]. A 2009 decision of the federal Ninth Circuit Court of Appeals serves as a reminder that the class-of-one treatment must concern a fundamental right [*Nurre v. Whitehead (9th Cir. 2009) 580 F.3d 1087, 1098-1099* (claim that one group of graduates was permitted to select a song for graduation while another was not involves neither a fundamental right nor a suspect class)].

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§ 126A.63 Limitation on Equal Protection by Proposition 209

[1] Proposition 209

The ratification by the voters of Proposition 209, which added Cal. Const., *art. I, § 31 to the state constitution* effective November 6, 1996, limited the scope of equal protection in respect to preferential treatments in the law based on race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting [*Crawford v. Huntington Beach Union High Sch. Dist. (2002) 98 Cal. App. 4th 1275, 1279, 121 Cal. Rptr. 2d 96]* . Proposition 209 has "undeniably changed state law," for it controls where it conflicts with the *equal protection clause* [*Crawford v. Huntington Beach Union High Sch. Dist. (2002) 98 Cal. App. 4th 1275, 1284, 121 Cal. Rptr. 2d 96]* .

[2] Limitation of Equal Protection by Proposition 209

By removing public education laws from heightened scrutiny under the California constitution, *Cal. Const., art. I, § 31* in effect put the California constitutional requirement of equal protection back to the point of federal equal protection with respect to education [*see San Antonio School Dist. v. Rodriguez (1973) 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16* (no federal equal protection on education); *compare Crawford v. Huntington Beach Union High Sch. Dist. (2002) 98 Cal. App. 4th 1275, 1284, 121 Cal. Rptr. 2d 96 with Butt v. Cal., 4 Cal. 4th 668, 683, 15 Cal. Rptr. 2d 480, 842 P.2d 1240 (1992)* (pre-Proposition 209)].

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§ 126A.63A Limitation on Equal Protection by Proposition 8

The California Supreme Court has ruled that sexual orientation is a suspect classification for purposes of the California *Constitution's Equal Protection Clause*. Therefore, statutes that treat persons differently because of their sexual orientation are subject to strict scrutiny [*see In re Marriage Cases (2008) 43 Cal. 4th 757, 840, 76 Cal. Rptr. 3d 683, 183 P.3d 384*].

The ratification by the voters of Proposition 8, which added Cal. Const., *art. I, § 7.5 to the state constitution* effective November 5, 2008, limits the scope of equal protection in respect to marriage on the basis of sexual orientation by defining a valid marriage as being between a man and a woman. Per the 2009 California Supreme Court decision upholding the constitutionality of Proposition 8 "[w]ith respect to the specific subject of the designation of the word 'marriage,' Proposition 8 does change the rule, set forth in the majority opinion in the *Marriage Cases*, that limiting access to this designation to opposite-sex couples constitutes an impermissible violation of the state *equal protection clause*. ... By incorporating into the California Constitution a specific provision that expressly restricts the designation of 'marriage' to the union of a man and a woman, Proposition 8 must be understood as creating a limited exception to the state *equal protection clause* as interpreted in the majority opinion in the Marriage Cases. ... This exception--although constituting the governing state constitutional rule with regard to the specific matter it addresses--does not alter the general equal protection principles set forth in the *Marriage Cases* and in other California decisions interpreting and applying the state constitutional *equal protection clause*. Those principles continue to apply in all other contexts" [*Strauss v. Horton (2009) 46 Cal. 4th 364, 411-412, 93 Cal. Rptr. 3d 591, 207 P.3d 48*].

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§ 126A.64 Privileges and Immunities in Relation to Equal Protection

[1] Privileges and Immunities Provision in Combination with Uniform General Laws Provision Required Equal Protection

Under the California Constitution, a citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked [*Cal. Const., art. I, § 7(b)*].

Prior to the enactment of the equal protection provision of the California Constitution [*see Cal. Const., art. I, § 7(a)*; for discussion, see *§ 126A.61* et seq.], the California Supreme Court interpreted the privileges and immunities provision of the California constitution [*see now Cal. Const., art. I, § 7(b)*] along with the requirement of uniform general laws [*see now Cal. Const., art. IV, § 16(a)*; for discussion, see *126A.65*] as being "substantially the equivalent" of the *equal protection clause of the Fourteenth Amendment to the federal constitution* [*Dep't of Mental Hygiene v. Kirchner (1965) 62 Cal.2d 586, 588, 43 Cal. Rptr. 329, 400 P.2d 321* ; *see* *Sagaser v. McCarthy (1986) 176 Cal. App. 3d 288, 305, 221 Cal. Rptr. 746* (*Cal. Const., art. IV, § 16(a)* and *Cal. Const., art. I, § 7(b)* have essentially the same meaning)].

Exception:

The privileges and immunities clause applies by its terms to "citizens." Thus, unlike due process and equal protection rights, which attach to "persons," corporations are not entitled to the protection of the privileges and immunities clause because they are not "citizens" [*City and County of San Francisco v. Flying Dutchman Park, Inc. (2004) 122 Cal. App. 4th 74, 83-84, 18 Cal. Rptr. 3d 532* (citing *Blake v. McClung (1898) 172 U.S. 239, 19 S. Ct. 165, 43 L. Ed. 432* ; *Asbury Hospital v. Cass (1945) 326 U.S. 207, 66 S. Ct. 61, 90 L. Ed. 6*)].

[2] Elements of Privileges and Immunities Analysis

To be constitutional under the privileges and immunities provision of the California constitution statutory classifications distinguishing between either individuals or businesses, and thus legally discriminate between them, whether for purposes of benefit or of restriction must [*Mansur v. Sacramento (1940) 39 Cal. App. 2d 426, 430, 103 P.2d 221]* :

- Be necessary,

- Be neither arbitrary nor capricious, and

- Rest upon some substantial, inherent, intrinsic difference or distinction in the relation of the particular class toward the lives, safety, property, health, happiness or convenience of the public, when contrasted with the relation, duties, responsibilities, position or situation of other persons or classes toward the same matters of public concern.

Under *Cal. Const., art I, § 7(b)*, like the *equal protection clause* and the prohibitions against special legislation, statutory classifications are valid unless the classification is unreasonable or arbitrary [*City and County of San Francisco v. Flying Dutchman Park, Inc. (2004) 122 Cal. App. 4th 74, 87, 18 Cal. Rptr. 3d 532* ; *People v. Housman (1984) 163 Cal. App. 3d Supp. 43, 53, 210 Cal. Rptr. 186]* .

[3] Protection of Privileges and Immunities under Fourteenth Amendment to U.S. Constitution

The *Fourteenth Amendment to the United States Constitution*, in providing that the states may not make or enforce laws that abridge the privileges or immunities of citizens of the United States [*U.S. Const., amend. XIV, § 1*], only secures those rights that owe their existence to the federal government, its national character, its constitution, or its laws [*Merrifield v. Lockyer (9th Cir. 2008) 547 F.3d 978, 983]* . It protects, among other things, a resident's right to be free of discrimination based on length of residency [*Saenz v. Roe (1999) 526 U.S. 489, 502-503, 119 S. Ct. 1518, 143 L. Ed. 2d 689* ; *People v. Parker (2006) 141 Cal. App. 4th 1297, 1305, 46 Cal. Rptr. 3d 888]* . However, other than the right to travel, the courts have not found other economic rights protected by that clause [*Merrifield v. Lockyer (9th Cir. 2008) 547 F.3d 978, 984*].

[4] Distinguish from Federal Privileges and Immunities Clause

The Privileges and Immunities Clause of the United States Constitution, in providing that the citizens of each state are entitled to the privileges and immunities of the citizens in the other states [U.S. *Const., art. IV, § 2*], applies only with respect to those privileges and immunities bearing on the vitality of the nation as a single entity [*Supreme Court of New Hampshire v. Piper (1985) 470 U.S. 274, 279, 105 S. Ct. 1272, 84 L. Ed. 2d 205]* . Accordingly, it bars states from discriminating against citizens of other states for no substantial reason beyond the fact that they are residents of other states [*Saenz v Roe (1999) 526 U.S. 489, 119 S. Ct. 1518, 143 L. Ed. 2d. 689]* .

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§ 126A.65 General Statutory Provisions in Relation to Equal Protection

[1] Operation Generally Is Substantially Equivalent to Equal Protection Analysis

Laws of a general nature are required to have uniform operation [*Cal. Const., art. IV, § 16(a)*]. Moreover, local or special statutes are invalid in any case in which a general statute can be made applicable [*Cal. Const., art. IV, § 16(b)*]. These two clauses of *Cal. Const., art. IV, § 16* have substantially the same meaning, and are substantially the equivalent of the *equal protection clause of the Fourteenth Amendment to the federal Constitution*, and the same standards apply to them as in an attack on equal protection grounds [*Sagaser v. McCarthy, 176 Cal. App. 3d 288, 305, 221 Cal. Rptr. 746* ; *Durham v. City of Los Angeles (1979) 91 Cal. App. 3d 567, 575, 154 Cal. Rptr. 243* , quoting *Russell v. Carleson, 36 Cal. App.3d 334, 342, 111 Cal. Rptr. 497* (railroads' immunity from liability to unauthorized persons on railroad cars not invalid as special law); *McGlothlen v. Department of Motor Vehicles (1977) 71 Cal. App. 3d 1005, 1025-1026, 140 Cal. Rptr. 168* (experimental program for disposition of persons convicted of driving under the influence of intoxicating liquor applicable in only four counties not invalid as special law); *see County of Sacramento v. Hickman (1967) 66 Cal. 2d 841, 844 n.1, 59 Cal. Rptr. 609, 428 P.2d 593* (statute having general application and that serves public purpose is valid under *Cal. Const., art. IV, § 16*)].

[2] Uniformity of General Laws

For a law to be general in its scope, it need not include all classes of individuals in the state. It answers the constitutional requirements of *Cal. Const., art. IV, § 16(a)* if it relates to and acts uniformly upon the whole of any single class of individuals or objects, and the classification is founded upon some natural, intrinsic or constitutional distinction. If good grounds for the classification exist, the classification is not void because it does not embrace within it every other class that could be included [*Heitz v. County of Sacramento (1978) 87 Cal. App. 3d 754, 758-759, 151 Cal. Rptr. 429* , quoting *Powers Farms v. Consolidated Irr. Dist. (1941) 19 Cal.2d 123, 131, 119 P.2d 717* (immunity from liability arising out of swine flu innoculation applicable only to participants in public innoculation programs not invalid as special law).

[3] Special Law Invalid Where General Law Applies

Under the California constitutional provision that local or special statutes are invalid in any case in which a general statute can be made applicable [*see Cal. Const., art. IV, § 16(b)*], the general law can be made to apply where [*Consolidated Printing & Publishing Co. v. Allen (1941) 18 Cal. 2d 63, 69-70, 112 P.2d 884]* :

- There is a general law in existence that on its face covers the same subject matter as the special law,

- The general law is otherwise valid, and

- The application of a special law with different requirements is not mandated on constitutional grounds or by natural and intrinsic differences of the case subject to the special law from that covered by the general law.

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§ 126A.66 Equal Protection and the Federal Commerce Clause

Discriminatory state conduct that violates the *Commerce Clause of the United States Constitution* [*see* U.S. *Const., art. I, § 8*, cl. 3] does not necessarily offend the *equal protection clause* [*Children's Hospital & Medical Center v. Bonta (2002) 97 Cal. App. 4th 740, 769, 118 Cal. Rptr. 2d 629* (citing *Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 894, 108 S. Ct. 2218, 2222, 100 L. Ed. 2d 896 (1988))]* . Essentially, an additional requirement on a class that has a rational relation to a state interest for purposes of equal protection may nonetheless constitute too great a burden on interstate commerce for purposes of the *Commerce Clause* [*compare* *G. D. Searle & Co. v. Cohn, 455 U.S. 404, 102 S. Ct. 1137, 71 L. Ed. 2d 250 (1982)* (for equal protection purposes, tolling statute rationally adjusted for difference in making service by curtailing limitations protection for absent foreign corporations) *with* *Coons v. American Honda Motor Co., 94 N.J. 307, 463 A.2d 921 (1983)* , cert. denied, *469 U.S. 1123, 105 S. Ct. 808, 83 L. Ed. 2d 800 (1985)* (same tolling statute was forced licensure provision in violation of *Commerce Clause of federal constitution*); *see* *Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 894* & n.3, *108 S. Ct. 2218, 2222, 100 L. Ed. 2d 896 (1988)]* .

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[Reserved]

§§ 126A.67[Reserved]

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§ 126A.70 Judicial Approach to Constitutional Challenges

[1] Availability of Statutory Relief

It is a well-settled rule that if statutory relief is adequate, it is unnecessary and inappropriate for a court to reach constitutional issues [*Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 230-231, 45 Cal. Rptr. 2d 207, 902 P.2d 225* ; *Americans for Safe Access v. Cty. of Alameda (2009) 174 Cal. App. 4th 1287, 1295, 95 Cal. Rptr. 3d 246* (reversing adjudication of constitutional claims)].

[2] Depends on Grounding in U.S. or California Constitution

A court's approach to analyzing a constitutional challenge to a California statute depends on whether the challenge is based on the federal or California Constitution. Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature. Two important consequences flow from this difference. First, in California, the Legislature's power is plenary. That is, the entire law-making authority of the state, other than the people's right of initiative and referendum, is vested in the Legislature, which may exercise any and all legislative powers that are not expressly or by necessary implication denied to it by the Constitution. Thus, a court will not look to the California Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited. Second, any doubt as to the Legislature's power to act in a given instance should be resolved in favor of the constitutionality of the Legislature's action. Any restrictions and limitations imposed by the California Constitution are to be construed strictly, and they are not to be extended to include matters not covered by the actual constitutional language [*State Personnel Bd. v. Department of Personnel Admin. (2005) 37 Cal. 4th 512, 36 Cal. Rptr. 3d 142, 149-150, 123 P.3d 169* ; *Methodist Hosp. v. Saylor (1971) 5 Cal. 3d 685, 691, 97 Cal. Rptr. 1, 488 P.2d 161]* . Nevertheless, the courts have a duty to enforce the provisions of the California Constitution and will not disregard a clear constitutional mandate [*State Personnel Bd. v. Department of Personnel Admin. (2005) 37 Cal. 4th 512, 523, 36 Cal. Rptr. 3d 142, 123 P.3d 169* ; *County of Riverside v. Superior Court (2003) 30 Cal. 4th 278, 284-285, 132 Cal. Rptr. 2d 713, 66 P.3d 718]* .

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§ 126A.71 Facial Unconstitutionality

In general, a complaint that seeks to "enjoin any application of the ordinance to any person in any circumstance" constitutes a facial attack on the statute. [*Tobe v. City of Santa Ana (1995) 9 Cal. 4th 1069, 1087, 40 Cal. Rptr. 2d 402, 892 P.2d 1145* ; *California Family Bioethics Council, LLC v. California Institute for Regenerative Medicine (2007) 147 Cal. App. 4th 1319, 1339, 55 Cal. Rptr. 3d 272]* . There are two ways an ordinance may be judged unconstitutional on its face [*Reed v. Town of Gilbert (9th Cir. 2009) 587 F.3d 966, 974* (citing *Members of City Council v. Taxpayers for Vincent (1984) 466 U.S. 789, 796, 104 S. Ct. 2118, 80 L. Ed. 2d 772*)]:

- It is unconstitutional in every conceivable application, or
- It seeks to prohibit such a broad range of protected conduct that it is unconstitutionally "overbroad."

A facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual [*Tobe v. City of Santa Ana (1995) 9 Cal. 4th 1069, 1084, 40 Cal. Rptr. 2d 402, 892 P.2d 1145* , citing *Dillon v. Municipal Court (1971) 4 Cal. 3d 860, 865 [94 Cal. Rptr. 777, 484 P.2d 945]* . To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute. Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions [*Tobe v. City of Santa Ana (1995) 9 Cal. 4th 1069, 1084, 40 Cal. Rptr. 2d 402, 892 P.2d 1145* , quoting *Arcadia Unified School Dist. v. State Dept. of Education (1992) 2 Cal. 4th 251, 267, 5 Cal. Rptr. 2d 545, 825 P. 2d 438]* . Thus, if a plaintiff seeks to enjoin future, allegedly impermissible, types of applications of a facially valid statute or ordinance, the plaintiff must demonstrate that such application is occurring or has occurred in the past [*Tobe v. City of Santa Ana (1995) 9 Cal. 4th 1069, 1084, 40 Cal. Rptr. 2d 402, 892 P.2d 1145]* .

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§ 126A.72 As-Applied Unconstitutionality

An as applied challenge contemplates analysis of the facts of a particular case or cases to determine the circumstances in which the statute or ordinance has been applied and to consider whether in those particular circumstances the application deprived the individual to whom it was applied of a protected right. It may seek [*Tobe v. City of Santa Ana (1995) 9 Cal. 4th 1069, 1084, 40 Cal. Rptr. 2d 402, 892 P.2d 1145* , citing inter alia *Broadrick v. Oklahoma (1973) 413 U.S. 601, 615-616, 93 S.Ct. 2908, 37 L.Ed.2d 830, 841-843* ; *County of Nevada v. MacMillen (1974) 11 Cal. 3d 662, 672, 114 Cal. Rptr. 345, 522 P.2d 1345]* :

- Relief from a specific application of a facially valid statute or ordinance to an individual or class of individuals who are under allegedly impermissible present restraint or disability as a result of the manner or circumstances in which the statute or ordinance has been applied, or

- An injunction against future application of the statute or ordinance in the allegedly impermissible manner it is shown to have been applied in the past.

The result of a successful as-applied challenge to a particular statute is not the invalidation of the statute as a whole, but rather an order enjoining specific unlawful application of the statute [*Tobe v. City of Santa Ana (1995) 9 Cal. 4th 1069, 1084-1086, 40 Cal. Rptr. 2d 402, 892 P.2d 1145* ; *California Family Bioethics Council, LLC v. California Institute for Regenerative Medicine (2007) 147 Cal. App. 4th 1319, 1339, 55 Cal. Rptr. 3d 272]* .

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§ 126A.73 Declaratory Relief

[1] Proper Action to Test Constitutionality in Most Instances

Under the declaratory relief statute [*see Code Civ. Proc. § 1060*], declaratory relief is available to adjudicate the constitutionality of statutes and ordinances on their face or as applied to a particular party or situation [*State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 251-252, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *Excelsior College v. Board of Registered Nursing (2006) 136 Cal. App. 4th 1218, 1228 n.2, 39 Cal. Rptr. 3d 618* ; *see Pennell v. City of San Jose (1986) 42 Cal. 3d 365, 367, 228 Cal. Rptr. 726, 721 P.2d 1111* (declaratory relief action to test constitutionality of rent control ordinance)].

For a form of complaint for declaratory relief under *Code Civ. Proc. § 1060* to declare state statute unconstitutional, by city and affected public officials against district attorney, see *Ch. 182, Declaratory Relief, § 182.65*.

For a form of complaint for declaratory relief and for preliminary and permanent injunctions that zoning ordinance is unconstitutional and void, see *Ch. 579, Zoning and Planning, § 579.370*.

For a further discussion and forms relating to actions for declaratory relief, including forms of complaints for declaratory relief to determine the validity of statutes, ordinances, and administrative regulations, or to interpret statutes, ordinances, and administrative regulations, see Ch. 182, *Declaratory Relief* .

[2] Taxpayer Actions

Declaratory relief is also available in a taxpayer's action [*Van Atta v. Scott (1980) 27 Cal. 3d 424, 449-450, 166 Cal. Rptr. 149, 613 P.2d 210]* .

For a form of allegation of illegal expenditure of public money under an unconstitutional statute or ordinance in an action under *Code Civ. Proc. § 526a*, see *Ch. 466, Public Entities and Officers: Taxpayer's Actions, § 466.61*.

For discussion and forms relating to taxpayer's suits, see Ch. 466, *Public Entities and Officers: Taxpayer's Actions* .

[3] Exception for Challenging Constitutionality of Application of Law by Administrative Agency

A challenge to the constitutionality of an administrative agency's application of a law are not to be resolved in an action for declaratory relief [*State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 251, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *City of Santee v. Superior Court (1991) 228 Cal. App. 3d 713, 718, 279 Cal. Rptr. 22]* .

For a further discussion and forms relating to actions for mandamus generally, see Ch. 358, *Mandate and Prohibition* .

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§ 126A.74 Injunctive Relief

[1] To Restrain Enforcement or Implementation in General

As a general rule, an injunction may not be granted to prevent the execution of a public statute by officers of the law for the public benefit [*Civ. Code § 3423(d)*; *Code Civ. Proc. § 526(b)(4)*]. For example, injunctive relief is not available to a plaintiff who makes no claim of unconstitutionality or of irreparable injury to a property right but who is merely seeking to have a penal statute construed in a manner that will allow him or her to engage in an activity undertaken merely for pleasure [*Manchel v. County of Los Angeles County (1966) 245 Cal. App. 2d 501, 506, 54 Cal. Rptr. 53]* .

Despite this statutory rule, however, injunctive relief is available in the following situations:

- When a state statute or ordinance is preempted by federal law [*Independent Living Center of Southern California, Inc. v. Shewry (9th Cir. 2008) 543 F.3d 1050, 1061-1062* (federal court)].

- When a statute or ordinance is unconstitutional on its face, or although valid on its face, is unconstitutional as applied [*Conover v. Hall (1974) 11 Cal. 3d 842, 849-850, 114 Cal. Rptr. 642, 523 P.2d 682* ; *Merandette v. City and County of San Francisco (1979) 88 Cal. App. 3d 105, 110-111, 151 Cal. Rptr. 580* ; *see Ketchens v. Reiner (1987) 194 Cal. App. 3d 470, 480, 239 Cal. Rptr. 549]* ; or

- When enforcement of the unconstitutional statute or ordinance would cause irreparable harm to property rights [*Coffee-Rich, Inc. v. Fielder (1975) 48 Cal. App. 3d 990, 999-1000, 122 Cal. Rptr. 302* , appeal dismissed, *423 U.S. 1042, 96 S. Ct. 764, 46 L. Ed. 2d 631 (1976)* ; *see Menefee & Son v. Department of Food & Agriculture (1988) 199 Cal. App. 3d 774, 783, 245 Cal. Rptr. 166]* .

For a form of complaint for declaratory relief and for preliminary and permanent injunctions that zoning ordinance is unconstitutional and void, see *Ch. 579, Zoning and Planning, § 579.370*.

For a discussion and forms relating to proceedings to obtain injunctive relief, see Ch. 303, *Injunctions* , and see Ch.

182, *Declaratory Relief* .

[2] Taxpayer's Suit

Taxpayers may bring suit to restrain the illegal expenditure of public funds, which includes the expenditure of a public official's time in performing illegal and unauthorized acts. In a taxpayer's suit, public officials may be enjoined from implementing an unconstitutional statute or ordinance [*Code Civ. Proc. § 526a*; *Blair v. Pitchess (1971) 5 Cal. 3d 258, 267-269, 96 Cal. Rptr. 42, 486 P.2d 1242* ; *see Ketchens v. Reiner (1987) 194 Cal. App. 3d 470, 474, 239 Cal. Rptr. 549]* .

Strategic Point:

While plaintiffs generally need to establish standing by showing deprivation of a life, liberty, or property interest, they need not do so if they have such a beneficial interest as taxpayers who have standing under *Code Civ. Proc. § 526a* to restrain illegal expenditure or waste of city funds on future enforcement of an unconstitutional ordinance or an impermissible means of enforcement of a facially valid ordinance [*Tobe v. City of Santa Ana (1995) 9 Cal. 4th 1069,1086, 40 Cal. Rptr. 2d 402, 892 P.2d 1145* ; *White v. Davis (1975) 13 Cal. 3d 757, 764, 120 Cal. Rptr. 94, 533 P.2d222]* .

For a form of allegation of illegal expenditure of public money under an unconstitutional statute or ordinance in an action under *Code Civ. Proc. § 526a*, see *Ch. 466, Public Entities and Officers: Taxpayer's Actions, § 466.61*.

For discussion and forms relating to taxpayer's suits, see Ch. 466, *Public Entities and Officers: Taxpayer's Actions* . Also see Ch. 303, *Injunctions* and see Ch. 471, *Investigations by Public Agencies* .

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§ 126A.75 Administrative Mandate

Actions challenging the basis of an administrative agency's decision are to be in the form of an action for writ of mandate against the agency in accordance with *CCP § 1094.5* [*State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 251, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *Excelsior College v. Board of Registered Nursing (2006) 136 Cal. App. 4th 1218, 1228 n.2, 39 Cal. Rptr. 3d 618]* .

For forms of petitions and related documents for actions challenging validity of applications of statutes, ordinances, and administrative regulations by administrative agencies, see *Ch. 474C, Procedures in Reviewing Agency Deicisions, § 474C.90* et seq.

For discussion of challenges to the validity of applications of statutes, ordinances, and administrative regulations by administrative agencies under *CCP § 1094.5*, see Ch. 474, *Availability of Judicial Review of Administrative Decisions* , et seq.

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§ 126A.76 Reformation of Laws Containing Unconstitutional or Preempted Provisions

[1] When Severance Is to Be Considered

If the Legislature's intent clearly would be furthered by application of the revised version rather than by the alternative of invalidation of the entire statute, then the court is to sever the invalid portion of the statute [*Kopp v. Fair Political Practices Comm'n (1995) 11 Cal. 4th 607, 615, 47 Cal. Rptr. 2d 108, 905 P.2d 1248* (constitutional issue)]. Judicial reformation or rewriting of a statute is appropriate when: (1) doing so closely effectuates policy judgments clearly articulated by the enacting body, and (2) the enacting body would have preferred such a reformed version of the statute over the invalid and unenforceable statute [*Kopp v. Fair Political Practices Comm'n (1995) 11 Cal. 4th 607, 625, 47 Cal. Rptr. 2d 108, 905 P.2d 1248* ; *People v. Roder (1983) 33 Cal. 3d 491, 499-502, 189 Cal. Rptr. 501, 658 P.2d 1302*].

Under California law, when faced with a question of whether to reform a state statute, the function of a federal court is to divine, to the best of its ability, how the state's highest court would resolve that state law issue [*American Bankers Ass'n v. Lockyer (2008) 541 F.3d 1214, 1217* ; *Kopp v. Fair Political Practices Comm'n (1995) 11 Cal. 4th 607, 625, 47 Cal. Rptr. 2d 108, 905 P.2d 1248*].

[2] Effect of Severance Clause

Although not conclusive, a severability clause normally calls for sustaining the valid part of the enactment, especially when the invalid part is mechanically severable. At the same time, a severability clause plus the ability to mechanically sever the invalid part while normally allowing severability, does not conclusively dictate it. The final determination depends on whether the remainder is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidity of the statute, or constitutes a completely operative expression of legislative intent and is not so connected with the rest of the statute as to be inseparable [*Gerken v. Fair Political Practices Com. (1993) 6 Cal.4th 707, 714, 25 Cal. Rptr. 2d 449, 863 P.2d 694* ; *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles (2009) 175 Cal. App. 4th 1396, 1412, 96 Cal. Rptr. 3d 875* ; *Abbott Laboratories v. Franchise Tax Board (2009) 175 Cal. App. 4th 1346, 1357, 96 Cal. Rptr. 3d 864]* .

[3] Mechanical Severability of Invalid Portion

To be severable, the invalid provision must be grammatically, functionally, and volitionally separable [*Jevne v. Superior Court (2005) 35 Cal. 4th 935, 960-961, 28 Cal. Rptr. 3d 685, 111 P.3d 954* (federal preemption of state law); *Abbott Laboratories v. Franchise Tax Board (2009) 175 Cal. App. 4th 1346, 1357, 96 Cal. Rptr. 3d 864* (state preemption of local ordinance)].

To be grammatically separable, the invalid parts of the statute have to be distinct and separable and thus be able to be removed as a whole without affecting the wording of any of the law's other provisions [*Jevne v. Superior Court (2005) 35 Cal. 4th 935, 960-961, 28 Cal. Rptr. 3d 685, 111 P.3d 954]* . The valid and invalid parts of the statute have to be able to be separated by paragraph, sentence, clause, phrase, or even single words [*Abbott Laboratories v. Franchise Tax Board (2009) 175 Cal. App. 4th 1346, 1358, 96 Cal. Rptr. 3d 864* ; *People's Advocate, Inc. v. Superior Court (1986) 181 Cal. App. 3d 316, 330, 226 Cal. Rptr. 640]* .

To be functionally separable, the invalid parts of the statute have to be not necessary to the law's operation and purpose [*Jevne v. Superior Court (2005) 35 Cal. 4th 935, 960-961, 28 Cal. Rptr. 3d 685, 111 P.3d 954]* . The remainder after separation of the invalid part must be complete in itself and capable of independent application [*Abbott Laboratories v. Franchise Tax Board (2009) 175 Cal. App. 4th 1346, 1358, 96 Cal. Rptr. 3d 864* ; *People's Advocate, Inc. v. Superior Court (1986) 181 Cal. App. 3d 316, 331-332, 226 Cal. Rptr. 640]* .

To be volitionally separable, the invalid parts of the statute must not be of critical importance to the law's enactment [*Jevne v. Superior Court (2005) 35 Cal. 4th 935, 960-961, 28 Cal. Rptr. 3d 685, 111 P.3d 954]* . The final determination depends on whether the remainder is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute or constitutes a completely operative expression of the legislative intent [*Santa Barbara Sch. Dist. v. Superior Court (1975) 13 Cal. 3d 315, 331, 118 Cal. Rptr. 637, 530 P.2d 605* ; *Abbott Laboratories v. Franchise Tax Board (2009) 175 Cal. App. 4th 1346, 1358, 96 Cal. Rptr. 3d 864]* .

[4] Applications of Severability

In the context of cases involving tax statutes that violate the *commerce clause*, the courts have consistently declined to exercise the power of judicial reformation to cure the constitutional violation [*Abbott Laboratories v. Franchise Tax Board (2009) 175 Cal. App. 4th 1346, 1361, 96 Cal. Rptr. 3d 864]* .

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[Reserved]

§§ 126A.77[Reserved]

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§ 126A.80 Federal Constitution

Interstate and foreign *Commerce Clauses*. U.S. *Const., art. I, § 8*, cl. 3

Restriction on state laws abridging the obligation of contracts. U.S. *Const., art. I, § 10*, cl. 1

Restrictions on state taxation. U.S. *Const., art. I, § 10*, cl. 2; art. VI

Right to freedom of speech. *U.S. Const., amend. 1*

Supremacy clause. U.S. Const., art. VI, *cl. 2*

Freedom of assembly and to petition government for redress of grievances. *U.S. Const., amend. 1*

Protection against government establishment of religion. *U.S. Const., amend. I*, cl. 1

Religious freedom. *U.S. Const., amend. I*, cl. 2.

Freedom from slavery and involuntary servitude. *Cal. Const., art. I, § 6* and *U.S. Const., amend. XIII*.

Due process and equal protection applied to states. *U.S. Const., amend. XIV*

Privileges and immunities in state law. *U.S. Const., amend. XIV*

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§ 126A.81 State Constitution

Inalienable rights. *Cal. Const., art. I, § 1*

Freedom of expression. *Cal. Const., art. I, § 2(a)*

Newspaperman's shield law. *Cal. Const., art. I, § 2(b)*

Freedom of assembly and to petition government for redress of grievances. *Cal. Const., art. I, § 3(a)*

The right to open government is provided in *Cal. Const., art. I, § 3(b)*

Protection against government establishment of religion. *Cal. Const., art. I, § 4*

Religious freedom. *Cal. Const., art. I, § 4*

Freedom from slavery and involuntary servitude. *Cal. Const., art. I, § 6*

Due process and equal protection. *Cal. Const., art. I, § 7(a)*

Privileges and immunities. *Cal. Const., art. I, § 7(b)*

Freedom from discrimination in employment. *Cal. Const., art. I, § 8*

Restriction on laws abridging the obligation of contracts. *Cal. Const., art. I, § 9*

Restrictions and procedures for exercise of eminent domain. *Cal. Const., art. I, § 19*

Right to fish on public lands. *Cal. Const., art. I, § 25*

Limitation on equal protection. *Cal. Const., art. I, § 31*

Initiative power. *Cal. Const., art. II, §§ 8, 10, 11*

Declaration that U.S. Constitution is the law of the land. *Cal. Const., art. III, § 1*

Separate of powers. *Cal. Const., art. III, § 3*

The limitation on the ability of executive agencies to declare statutes invalid. *Cal. Const., art. III, § 3.5*

Legislative power. *Cal. Const., art. IV, § 1*

Uniform general laws and barring special laws when a general law applies. *Cal. Const., art. IV, § 16*

Amending and revising the California Constitution. Cal. Const., art. XVIII

Exceptions to supremacy of state law over local law. *Cal. Const., art. XI, § 5*

Supremacy of state law over local law. *Cal. Const., art. XI, § 7*

Restriction barring the Legislature from delegating the power to tax. *Cal. Const., art. XI, § 11*

Power of taxation. Cal. Const., arts. XIII, XIII A, XIII B, XIII C, and XIII D

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§ 126A.82 Decisions

[1] Amending or Revising Constitution

The single subject rules pertaining to constitutional amendments have been satisfied so long as challenged provisions meet the test of being reasonably germane to a common theme, purpose, or subject. *Senate of the State of Cal. v. Jones (1999) 21 Cal. 4th 1142, 1157, 90 Cal. Rptr. 2d 810, 988 P.2d 1089*

[2] As-Applied Challenge

Plaintiffs' claim of unconstitutionality was not "a facial challenge to the ... ordinance predicated on a theory that the mere enactment of the ... ordinance worked a taking" but, rather, an as-applied claim that the County effected a taking by demanding invalid exactions as a condition of issuing them second unit permits. *Travis v. County of Santa Cruz (2004) 33 Cal. 4th 757, 767, 16 Cal. Rptr. 3d 404, 94 P.3d 538*

[3] Conflicting Provisions

Conflict in power of chartered cities under one constitutional provision resolved by looking to other constitutional provisions enacted later in time. *Slavich v. Walsh (1947) 82 Cal. App. 2d 228, 236-237, 186 P.2d 35*

[4] Declaratory Relief

Declaratory relief action to test constitutionality of rent control ordinance. *Pennell v. City of San Jose (1986) 42 Cal. 3d 365, 367, 228 Cal. Rptr. 726, 721 P.2d 1111*

[5] Due Process

[a] Substantive Due Process

A regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause. *Lingle v. Chevron U.S.A. Inc. (2005) 544 U.S. 528, 542, 125 S. Ct. 2074, 161 L. Ed. 2d 876*

City's delays in processing its application did not lack a rational relationship to a government interest, because the city explained the information needed that was related to its determination on the application. *North Pacifica LLC v. City of Pacifica (9th Cir. 2008) 526 F.3d 478, 486*

"Don't Ask, Don't Tell" policy, *10 U.S.C.S. § 654*, did not violate substantive due process rights of Air Force reservist, because under the strict scrutiny test, the government advance important governmental interests at stake, namely, the management of the military. *Witt v. Dep't of the Air Force (9th Cir. 2008) 527 F.3d 806, 821*

The irreducible minimum of a substantive due process claim challenging land use regulation is failure to advance any governmental purpose. *Crown Point Dev., Inc. v. City of Sun Valley (9th Cir. 2007) 506 F.3d 851, 856*

If a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. *Avco Community Developers, Inc. v. South Coast Regional Com. (1976) 17 Cal. 3d 785, 791, 132 Cal. Rptr. 386, 553 P.2d 546*

For additional decisions on substantive due process, see *Ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes, § 113.34*

[b] Procedural Due Process

Procedural due process concerns do not require that the Labor Code Private Attorneys General Act of 2004, *Lab. Code, § 2698 et seq.*, to be construed as requiring representative actions under the act to be brought as class actions, in order to avoid defendants in those actions from being subjected to the unfairness flowing from one-way intervention, thereby violating their constitutional right to due process of law. *Arias v. Superior Court (2009) 46 Cal. 4th 969, 985, 95 Cal. Rptr. 3d 588, 209 P.3d 923*

So long as statute does not threaten to infringe on exercise of constitutional right, ambiguities as not justifying invalidation of statute on its face; to succeed on facial vagueness challenge, party as required to do more than identify some instances in which application may be uncertain or ambiguous; party as required to demonstrate that law is impermissibly vague in all of its applications. *Evangelatos v. Superior Court (1988) 44 Cal. 3d 1188, 1201-1202, 246 Cal. Rptr. 629, 753 P.2d 585*

Even though vagueness challenges arise most often in criminal context, prohibition against vagueness as extending to administrative regulations affecting conditions of governmental employment. *Cranston v. City of Richmond (1985) 40 Cal. 3d 755, 763-764, 221 Cal. Rptr. 779, 710 P.2d 845*

Whenever property is taken, due process requires some form of notice and a hearing. The petition gave no notice to shareholder that the court might assess the corporation's voluntary dissolution litigation expenses against his shareholder interest. Nor did shareholder have prior notice the court would hold him liable for corporation's defense costs in his effectively severed, still pending civil action against it. Moreover, shareholder lacked prior notice the court would aggregate these assessments to wipe out his entire shareholder interest and enter a money judgment against him for the deficiency. *In re FairWageLaw in Voluntary Dissolution (2009) 176 Cal. App. 4th 279, 286-287, 97 Cal. Rptr. 3d 652*

Pawnbrokers have a right to procedural due process before the trial court can order that stolen property in their possession and subject to a 90-day hold under *Bus. & Prof. Code § 21647*, be returned to the purported owners of the property. *People v. Hernandez (2009) 172 Cal. App. 4th 715, 719, 91 Cal. Rptr. 3d 604*

Bonding statute, *Civ. Code, § 1695.17*, compelling persons of ordinary intelligence to necessarily guess at what the statute requires for them to comply with its obligations is void for vagueness. *Schweitzer v. Westminster Investments, Inc. (2007) 157 Cal. App. 4th 1195, 1211, 69 Cal. Rptr. 3d 472*

Finding that statute is facially unconstitutional as requiring challengers to demonstrate that statute's provisions inevitably pose present total and fatal conflict with applicable constitutional prohibitions, not merely to suggest that in some future hypothetical situation constitutional problems may possibly arise as to particular application of statute. *Lillebo v. Davis (1990) 222 Cal. App. 3d 1421, 1447, 272 Cal. Rptr. 638*

Use of nonmathematical terms such as "reasonable," "necessary and proper," "substantial," and the like, as not rendering statute or regulation invalid provided reasonable and practical construction can be given in accordance with probable intent of Legislature and in view of common experiences of mankind. *Medlock Dusters, Inc. v. Dooley (1982) 129 Cal. App. 3d 496, 501, 181 Cal. Rptr. 80*

[6] Equal Protection

[a] Exception for Exercise of Police Power

In challenge to validity of legislation enacted pursuant to police power, court as required to uphold legislation if its reasonableness is fairly debatable; court as able to nullify legislation only if it is manifestly unreasonable, arbitrary or capricious, having no real or substantial relation to public health, safety, morals, or general welfare. *Barenfeld v. City of Los Angeles (1984) 162 Cal. App. 3d 1035, 1040, 209 Cal. Rptr. 8*

Where neither suspect classifications nor fundamental interests are affected, regulation need only bear rational relationship to legitimate state purpose and does not violateequal protection simply because in practice it results in some inequality. *Pro-Family Advocates v. Gomez (1996) 46 Cal. App. 4th 1674, 1685-1686, 54 Cal. Rptr. 2d 600*

[b] Proposition 209

Statutory definition of "discrimination" exceeded Legislature's authority under *Cal Const Art XVIII, § 1*, because it conflicted with *Cal Const Art I, § 31(a)*. *C & C Construction, Inc. v Sacramento Mun. Utility Dist. (2004) 122 Cal. App. 4th 284, 301, 18 Cal. Rptr. 3d 715*

[c] Reform Measures

Legislature as free to enact reform measures one step at a time, addressing phase of problem that seems most acute to legislative mind, rather than enacting comprehensive reform scheme; presence of specific reform measures absent comprehensive reform scheme as not nullifying specific reform measure. *Brown v. Superior Court (1971) 5 Cal. 3d 509, 521, 96 Cal. Rptr. 584, 487 P. 2d 1224* ; *Myers v. Patterson (1987) 196 Cal. App. 3d 130, 139, 241 Cal. Rptr. 751*

[c1] Suspect Classes

Sexual orientation is a suspect classification for purposes of the California *Constitution's Equal Protection Clause*, and therefore statutes that treat persons differently because of their sexual orientation are subject to strict scrutiny. *In re Marriage Cases (2008) 43 Cal. 4th 757, 840, 76 Cal. Rptr. 3d 683, 840, 183 P.3d 384*

Taxpayers earning more than $1 million annually did not constitute a "suspect class" requiring a strict scrutiny constitutional analysis. *Jensen v. Franchise Tax Bd. (2009) 178 Cal. App. 4th 426, 434-435, 100 Cal. Rptr. 3d 408*

[d] Welfare Benefits

Equal protection not violated by denying welfare benefits to applicant for political asylum not yet lawfully resident under federal regulations; aliens not required to be treated alike when not similarly situated under federal immigration law. *Khasminskaya v. Lum (1996) 47 Cal. App. 4th 537, 545, 54 Cal. Rptr. 2d 915*

[e] Class of One

Village's intentional demand for a 33-foot easement as a condition of connecting plaintiff's property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners constituted a class-of-one violation of equal protection. *Vill. of Willowbrook v. Olech (2000) 528 U.S. 562, 565, 120 S. Ct. 1073, 145 L. Ed. 2d 1060*

Plaintiff failed to show a class-of-one equal protection violation given that plaintiff did not bring its objection to the city council's attention before it approved the condition on development permit, so the council did not know it was imposing a condition to which plaintiff objected and that the city had not imposed on other developers. *North Pacifica LLC v. City of Pacifica (9th Cir. 2008) 526 F.3d 478, 486*

Plaintiff presented sufficient allegations of evidence and argument of a claim for a violation of equal protection against a class of one based on air pollution control district's unequal application of testing certification requirements to defeat demurrer. *Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist. (2003) 113 Cal. App. 4th 597, 605, 6 Cal. Rptr. 3d 574*

[7] Facial Challenge

A facial challenge to a legislative act is the most difficult challenge to mount successfully, because the challenger must establish that no set of circumstances exists under which the act would be valid. *Sprint Telephony PCS, L.P., v. Cty. of San Diego (9th Cir. 2008) 543 F.3d 571, 579*

It cannot reasonably be suggested that, under any and all circumstances, a county's designation of one or more unpaid furlough days pursuant to challenged statute necessarily will "defeat" or "materially impair" a court's fulfillment of its constitutional duties. *Superior Court v. County of Mendocino, 13 Cal. 4th 45, 51 Cal. Rptr. 2d 837, 913 P.2d 1046*

[8] Federal Commerce Clause

A state may favor its own municipal bonds without violating the dormant *Commerce Clause*, U.S. *Const. art. I, § 8, cl. 3*, by including in taxable income interest from only out-of-state municipal bonds and excluding interest from in-state bonds. *Department of Rev. of Kentucky v. Davis (2008) 553 U.S. 328, 128 S. Ct. 1801, 1818-1819, 170 L. Ed. 2d 685*

After an unrelated case held that the limitation of the *Rev. & Tax Code § 24402* deduction to dividends from income on which California tax had been imposed violated the *commerce clause*, U.S. *Const., art. I, § 8, cl. 3*, the taxpayer's proposed revision of § 24402(a), did not pass the volitional separability test. *Abbott Laboratories v. Franchise Tax Board (2009) 175 Cal. App. 4th 1346, 1361, 96 Cal. Rptr. 3d 864*

Under the federal *commerce clause*, a state may not tax value earned outside its borders. *Hoechst Celanese Corp. v. Franchise Tax Bd. (2001) 25 Cal. 4th 508, 538, 22 P.3d 324* ; *106 Cal. Rptr. 2d 548*

Although an ordinance that favored a particular private business would have violated the dormant *Commerce Clause*, the Counties' ordinances did not discriminate against interstate commerce because they benefitted a clearly public facility while treating all private companies exactly the same. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth. (2007) 550 U.S. 330, 344, 127 S. Ct. 1786, 167 L. Ed. 2d 655*

Town's ordinance that required all solid waste generated in the town to pass through its new center so that the town could assess a handling fee and recoup its cost to build the center facially discriminated against out-of-town waste carriers, and did not fit into the narrow exception to invalidity of facially discriminatory laws. *C & A Carbone, Inc. v. Town of Clarkstown (1994) 511 U.S. 383, 392, 114 S. Ct. 1677, 128 L. Ed. 2d 399*

Recyclers' injury was not even marginally related to the interests the dormant *Commerce Clause* sought to safeguard. Therefore, they lacked prudential standing to bring their federal constitutional claim. *City of Los Angeles v. County of Kern (9th Cir. 2009) 581 F.3d 841, 848-849*

Statute that prevented licensed opticians from having specified business relationships with or offering services in the same locations as licensed optometrists and ophthalmologists did not discriminate against out-of-state opticians purposefully or practically, and did not burden interstate commerce. *National Association of Optometrists & Opticians Lenscrafters, Inc. v. Brown (9th Cir. 2009) 567 F.3d 521, 524-528*

State statutes imposing taxes on income earned outside the state, or imposing a tax on total income without apportionment to activities within the state, have long been held to violate the commence clause. *Ventas Finance I, LLC, v. Franchise Tax Bd. (2008) 165 Cal. App. 4th 1207, 1218, 81 Cal. Rptr. 3d 823*

[9] Federal Preemption of State Law

State requirements are preempted under the Medical Device Amendments of 1976, *21 U.S.C.S. § 360c et seq.*, only to the extent that they are "different from, or in addition to" the requirements imposed by federal law, and *21 U.S.C.S. § 360k* does not prevent a state from providing a damages remedy for claims premised on a violation of Food and Drug Administration regulations. The state duties in such a case "parallel," rather than add to, federal requirements. *Riegel v. Medtronic, Inc. (2008) 552 U.S. 312, 128 S. Ct. 999, 169 L. Ed. 2d 892, 906*

Federal Aviation Administration Authorization Act of 1994, *49 U.S.C.S. § 14501(c)(1)*, preempts state enforcement actions having a significant connection with, or reference to, carrier rates, routes, or services. *Rowe v. New Hampshire Motor Transport Association (2008) 552 U.S. 364, 128 S. Ct. 989, 169 L. Ed. 2d 933*

Federal Arbitration Act, *9 U.S.C. § 1 et seq.*, supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative, such as procedural prescriptions of the California Talent Agency Act, *Labor Code § 1700.1 et seq.*, that conflict with the FAA's dispute resolution regime in two basic respects. *Preston v. Ferrer (2008) 552 U.S. 346, 128 S. Ct.978, 169 L. Ed. 2d 917, 927*

Foreign policy of federal government, as embodied in treaties and executive agreements made with other countries,

may preempt conflicting state laws. *Am. Ins. Ass'n v. Garamendi (2003) 539 U.S. 396, 123 S. Ct. 2374, 156 L. Ed. 2d 376, 395-402*

State-law usury claims against national bank are completely preempted by National Bank Act, *12 U.S.C. § 1 et seq.*, which was intended to provide exclusive federal cause of action for usury against national banks preempted. *Beneficial Nat'l Bank v. Anderson (2003) 539 U.S. 1, 123 S. Ct. 2058, 156 L. Ed. 2d 1, 8-10*

Absent explicit indication by Congress of intent to preempt state law, state law as preempted only if compliance with both state and federal law is impossible or state law is impediment to accomplishment and execution of full purpose and objectives of *Congress. CTS Corp. v. Dynamics Corp. of America (1987) 481 U.S. 69, 78-79, 107 S. Ct. 1637, 95 L. Ed. 2d 67*

Pre-emption is not to be lightly presumed. *California Federal Sav. & L. Ass'n v. Guerra(1987) 479 U.S. 272, 281, 107 S. Ct. 683* ; *Marques v. Bank of America (1997) 59 Cal. App. 4th 356, 360, 69 Cal. Rptr. 2d 154*

Code Civ. Proc. § 354.3 was preempted by the foreign affairs doctrine because it applied to museums displaying looted art that were located outside of the state. *Von Saher v. Norton Simon Museum of Art at Pasadena (9th Cir. 2010) 592 F.3d 954, 968*

The preemption clause in the Airline Deregulation Act of 1978, *49 U.S.C.S. § 41713(b)(1)*, which prohibits states from enacting laws related to an airline's price, route, or service, does not prevent enforcement of private contracts. *Sanchez v. Aerovias De Mex., S.A. de C.V. (9th Cir. 2010) 590 F.3d 1027, 1030-1031*

Preston v. Ferrer (2008) 552 U.S. 346, 128 S. Ct. 978, 982, 169 L. Ed. 2d 917 does not change the rule that the Federal Arbitration Act, *9 U.S.C.S. § 1 et seq.*, does not impliedly preempt California unconscionability law, where the plaintiffs are challenging only the validity of the arbitration agreement. *Laster v. AT&T Mobility LLC (9th Cir. 2009) 584 F.3d 849, 857-859*

A local regulation can run afoul of *47 U.S.C.S. § 332(c)(7)(B)(i)(II)*, the Telecommunications Act of 1996's effective prohibition clause, if it prevents a wireless provider from closing a significant gap in service coverage. The effective prohibition inquiry involves a two-pronged analysis requiring: (1) the showing of a significant gap in service coverage, and (2) some inquiry into the feasibility of alternative facilities or site locations. Significant gap determinations are extremely fact-specific inquiries that defy any bright-line legal rule. The relevant service gap must be truly significant. The Act does not guarantee wireless service providers coverage free of small dead spots. *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates (9th Cir. 2009) 583 F.3d 716, 726*

Employee Retirement Income Security Act of 1974, *29 U.S.C. § 1001 et seq.*, does not preempt San Francisco Health Care Security Ordinance, S.F. Admin. Code § 14.1 et seq., which mandates that covered employers make health care expenditures to or on behalf of certain employees each quarter. *Golden Gate Restaurant Association v. City and County of San Francisco (9th Cir. 2008) 512 F.3d 1112, 1126*

Emissions standards in Clean Air Act, *42 U.S.C. §§ 7543(a), 7507*, did not preempt the "Fleet Rules" requiring operators of vehicle fleets to buy vehicles meeting state emissions or fuel standards insofar as the rules directed the procurement behavior of state and local governmental entities. *Engine Manufacturers Ass'n v. South Coast Air Quality Maintenance Dist. (9th Cir. 2007) 498 F.3d 1031, 1044*

Employee Retirement Income Security Act of 1974 (ERISA), *29 U.S.C. § 1001 et seq.*, does not preempt the claims of

parties who do not have the right to sue under ERISA because they are neither participants in nor beneficiaries of an ERISA plan. *Miller v. Rite Aid Corp. (9th Cir. 2007) 504 F.3d 1102, 1106*

Congress expressed a clear intention that federal execution law, *18 U.S.C. § 3613(a)*, was not intended to preempt state exemptions to state execution law. Thus, *18 U.S.C.S. § 3613(a)* did not override *Cal. Code Civ. Proc. § 704.130*. *Paul Revere Ins. Group v. United States (9th Cir. 2007) 500 F.3d 957, 962-963*

The federal Clean Air Act, *42 U.S.C.S. § 7401 et seq.*, did not preempt the Fleet Rules adopted under *Health & Safety Code § 40447.5*, insofar as they directed the procurement behavior of state and local governmental entities. *Engine Mfrs. Ass'n v. S. Coast Air Quality Maint. Dist. (9th Cir. 2007) 498 F.3d 1031*

The preemption provision under *5 U.S.C.S. § 8902(m)(1)* of the Federal Employee Health Benefits Act (FEHBA), *5 U.S.C.S. § 8901 et seq.*, closely resembles the express preemption provision under *29 U.S.C.S. § 1144(a)* of the Employee Retirement Income Security Act (ERISA), *29 U.S.C.S. § 1001 et seq.*, and precedent interpreting the ERISA provision thus provides authority for cases involving the FEHBA provision. *Cedars-Sinai Med. Ctr. v. Nat'l League of Postmasters (9th Cir. 2007) 497 F.3d 972, 978 n.2*

To prevent plaintiffs' evasion of the requirements of the Labor Management Relations Act, *29 U.S.C.S. § 185(a)*, by relabeling their contract claims as claims for tortious breach of contract or some other state cause of action, the *Lueck* line of preemption cases and its progeny require, first, an inquiry into whether the asserted cause of action involves a right conferred upon an employee by virtue of state law, not by a collective bargaining agreement (CBA). If the right exists solely as a result of the CBA, then the claim is preempted, and our analysis ends there. If, however, the right exists independently of the CBA, the court must still consider whether it is nevertheless substantially dependent on analysis of a CBA. If such dependence exists, then the claim is preempted by § 185(a); if not, then the claim can proceed under state law. *Burnside v. Kiewit Pac. Corp. (9th Cir. 2007) 491 F.3d 1053, 1059*

Ordinance imposing a permitting structure and design requirements presented barriers to wireless telecommunications within the county and was therefore preempted by the Telecommunications Act of 1996, *47 U.S.C.S. § 253(a)*. *Sprint Telephony PCS, L.P. v. County of San Diego (2007) 490 F.3d 700, 716*

Consumer protection laws are within the states' historic police powers and therefore are subject to the presumption against preemption. *Farm Raised Salmon Cases (2008) 42 Cal. 4th 1077, 1088, 72 Cal. Rptr. 3d 112, 175 P.3d 1170*

Federal Cigarette Labeling and Advertising Act, *15 U.S.C. § 1331 et seq.*, preempts action against defendant tobacco companies, alleging that defendants' advertising and marketing practices violate California Unfair Competition Law, *Bus. & Prof. Code, § 17200 et seq.* In *Re Tobacco Cases II (2007) 41 Cal. 4th 1257, 1276, 63 Cal. Rptr. 3d 418, 163 P.3d 106*

Party claiming preemption has burden of overcoming presumption against it. *Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 937, 216 Cal. Rptr. 345, 702 P.2d 503* ; *Marques v. Bank of America (1997) 59 Cal. App. 4th 356, 360, 69 Cal. Rptr. 2d 154*

There is a general presumption against federal preemption of a state's traditional police powers, unless the state regulates in an area where there has been a significant federal presence. The area of banking regulation has posed some issues in this regard. *Miller v. Bank of America, N.A (USA) (2008) 170 Cal. App. 4th 980, 984, 88 Cal. Rptr. 3d 723*

National Labor Relations Act, *29 U.S.C. § 151 et seq.*, does not deprive states of the power to regulate where the activity regulated is a merely peripheral concern of the Act or where the regulated conduct touches interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it cannot be inferred

that Congress deprived the states of the power to act. *Luke v. Collotype Labels USA, Inc. (2008) 159 Cal. App. 4th 1463, 1471, 72 Cal. Rptr. 3d 440*

In spite of the fact that federal law may have completely occupied the field of regulation of aircraft safety, remedies for personal injury that a party may have under state law are not necessarily preempted by the Federal Aviation Act of 1958, *49 U.S.C. § 40103 et seq.* *Booth v. Santa Barbara Biplane Tours, LLC (2008) 158 Cal. App. 4th 1173, 1181, 70 Cal. Rptr. 3d 660*

Device-specific federal approval under Medical Device Amendments, *21 U.S.C. § 360k(a)*, preempted the state-law actions for injury caused by approved device. *Jessen v. Mentor Corporation (2008) 158 Cal. App. 4th 1480, 1489-1490, 71 Cal. Rptr. 3d 714* ; *Blanco v. Baxter Healthcare Corp. (2008) 158 Cal. App. 4th 1039, 1054-1055, 1057, 70 Cal. Rptr. 3d 566*

The Locomotive Boiler Inspection Act, *49 U.S.C. § 20701 et seq.*, occupies the field of locomotive equipment, preempting all state-law claims within that field. *Frastaci v. Vapor Corp. (2007) 158 Cal. App. 4th 1389, 1396, 70 Cal. Rptr. 3d 402*

National Securities Markets Improvement Act of 1996, specifically, *15 U.S.C. § 77r*, preempts state securities registration requirements only with respect to securities that actually qualify as covered securities under federal law, so that causes of action under California Corporate Securities Law of 1968, *Corp. Code, § 25000 et seq.*, are not preempted for noncovered securities. *Apollo Capital Fund LLC v. Roth Capital Partners, LLC (2007) 158 Cal. App. 4th 226, 250-251, 70 Cal. Rptr. 3d 199*

Flight attendants' claims for state minimum wages and meal/break time damages were preempted by the Railway Labor Act (RLA), *45 U.S.C. § 151 et seq.*, which preempted state law causes of action that depended upon interpretation of a collective bargaining agreement. *Fitz-Gerald v. Skywest, Inc. (2007) 155 Cal. App. 4th 411, 419-420, 65 Cal. Rptr. 3d 913*

Savings clause in National Securities Markets Improvement Act of 1996, *15 U.S.C. § 77r(c)(1)*, allows state agencies to bring enforcement actions with respect to fraud, deceit, or unlawful conduct by a broker or dealer, and therefore does not preempt *Corp. Code §§ 25401, 25216(a)*. *People v. Edward D. Jones & Co. (2007) 154 Cal. App. 4th 627, 639, 65 Cal. Rptr. 3d 130*

Provision of Employee Retirement Income Security Act of 1974 giving trustees similar cause of action, *29 U.S.C. § 1132(a)(3)*, preempts state law breach of contract action trustees of an employee health and welfare benefit plan seeking reimbursement for medical payments made by the plan. *Totten v. Hill (2007) 154 Cal. App. 4th 40, 53, 64 Cal. Rptr. 3d 357*

Federal law as superseding state law by express preemption, by scheme of federal regulation being so comprehensive as to leave no room for supplementary state regulation, or by actual conflict between state and federal law. *Doyle v. Board of Supervisors (1988) 197 Cal. App. 3d 1358, 1363, 243 Cal. Rptr. 572*

[10] Obligation of Contracts

The insurance business is a highly regulated industry, and one in which further regulation can reasonably be anticipated, so that insurers were well aware of the possibility that initiatives or ordinary legislation might be enacted that would affect existing policies, precluding a finding that the obligation of contracts was impaired by revival of the pertinent statute of limitations. *Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal. 3d 805, 830, 258 Cal. Rptr. 161, 771 P.2d 1247*

[11] Police Power

The noncompensable loss doctrine is only applied to takings that were necessary to avoid an impending peril. *Massingill v. Department of Food & Agriculture (2002) 102 Cal. App. 4th 498, 506, 125 Cal. Rptr. 2d 561*

[12] Separation of Powers

Proposition 8, limiting a valid marriage to that between a man and a woman, does not readjudicate the equal-protection right of same-sex couples to marry under the California Constitution, so as to violate the separation of powers. *Strauss v. Horton (2009) 46 Cal. 4th 364, 463-465, 93 Cal. Rptr. 3d 591, 207 P.3d 48*

The Legislature's direction to the Commission on State Mandates to reconsider or set aside its final decisions was an unconstitutional collateral attack on those decisions. *California School Boards Assn. v. California (2009) 171 Cal. App. 4th 1183, 1200, 90 Cal. Rptr. 3d 501*

The trial court acted well within its discretion in denying counties' request for a writ of mandate compelling prompt payment of massive reimbursement claims from the state's 2005-2006 fiscal year budget. *County of San Diego v. California (2008) 164 Cal. App. 4th 580, 603, 79 Cal. Rptr. 3d 489*

California Children and Families Act of 1998, Cal. Prop. 10, which imposed taxes on cigarettes and other tobacco products and allocated the revenues for public education regarding the effects of smoking on young children and for anti-smoking programs, did not violate the separation of powers doctrine, in that the appointment mechanism for state and county commissioners did not impair the executive branch's authority over the commissions. *California Assn. of Retail Tobacconists v State (2003) 109 Cal. App. 4th 792, 135 Cal. Rptr. 2d 224*

[12A] Severance of Unconstitutional Laws

Valid portion of municipal development plan's in lieu fee provision could not be severed despite a severability clause because it was inextricably intertwined with the invalid portion of the plan's affordable housing requirements. *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles (2009) 175 Cal. App. 4th 1396, 1412, 96 Cal. Rptr. 3d 875*

After an unrelated case held that the limitation of the *Rev. & Tax Code § 24402* deduction to dividends from income on which California tax had been imposed violated the *commerce clause*, U.S. *Const., art. I, § 8, cl. 3*, the taxpayer's proposed revision of § 24402(a), did not pass the volitional separability test. *Abbott Laboratories v. Franchise Tax Board (2009) 175 Cal. App. 4th 1346, 1358-1361, 96 Cal. Rptr. 3d 864*

[13] State Preemption of Local Law

The litigation privilege, *Civ. Code § 47*, conflicts with and, thus, preempts the provision of Santa Monica Mun. Code § 4.56.020(i)(1), authorizing a suit based on a defendant landlord bringing an action to recover possession of a rental housing unit based upon facts that the landlord had no reasonable cause to believe to be true or upon a legal theory that is untenable under the facts known to the landlord. *Action Apartment Association, Inc. v. City Of Santa Monica (2007) 41 Cal. 4th 1232, 1249-1250, 63 Cal. Rptr. 3d 398, 163 P.3d 89*

Veh. Code, § 21 preempts an ordinance that seeks to regulate vehicle use in soliciting prostitution by requiring forfeiture of the vehicle. *O'Connell v. City of Stockton (2007) 41 Cal.4th 1061, 1073-1074, 63 Cal. Rptr. 3d 67, 162 P.3d 583* ; *City Of Los Angeles v. 2000 Jeep Cherokee (2008) 159 Cal. App. 4th 1272, 1278, 72 Cal. Rptr. 3d 252*

No implied preemption of local regulations by state statutory law when state legislature has expressed its intent to permit local regulation. *IT Corp. v. Solano County Bd. of Supervisors (1991) 1 Cal. 4th 81, 94, 2 Cal. Rptr. 2d 513, 820 P. 2d 1023*

Ordinances made and enforced by charter city under *Cal. Const., art. XI, § 5(a),* and relating to matters that are purely municipal affairs, as prevailing over state laws covering same subject. *Committee of Seven Thousand v. Superior Court (1988) 45 Cal. 3d 491, 505, 247 Cal. Rptr. 362, 754 P.2d 708*

Ordinance regulating escort services as preempted by state law to extent that ordinance duplicates state law prohibiting criminal conduct, but as not preempted to extent that it establishes licensing requirements. *Cohen v. Board of Supervisors (1985) 40 Cal. 3d 277, 290-304, 219 Cal. Rptr. 467, 707 P.2d 840*

Legislature's evaluation of what constitutes matter of statewide concern as accorded great weight by courts. *Baggett v. Gates (1982) 32 Cal. 3d 128, 136, 185 Cal. Rptr. 232, 649 P.2d 874*

Preemption by state of field of statewide concern for purpose of regulation as not preventing local taxation of persons or activities regulated. *The Pines v. City of Santa Monica (1981) 29 Cal. 3d 656, 659-662, 175 Cal. Rptr. 336, 630 P.2d 521*

Ordinances regulating consumption of alcohol are not preempted by state law. Localities may regulate consumption of alcohol because *Cal. Const., art. XX, § 22,* does not refer to consumption. *In re Jennifer S. (2009) 179 Cal. App. 4th 64, 69, 101 Cal. Rptr. 3d 467*

Teacher failed to demonstrate school district's action conditioning her enjoyment of earned teaching credential on her obtaining an additional certification was preempted by a conflicting state statute. *Governing Board of Ripon Unified School Dist. v. Com. on Prof. Competence (2009) 177 Cal. App. 4th 1379, 1390, 99 Cal. Rptr. 3d 903*

Gov. Code, § 66427.5, subd. (e), has the effect of an express preemption of the power of local authorities to inject other factors when considering an application to convert an existing mobilehome park from a rental to a resident-owner basis. *Sequoia Park Associates v. Cty. of Sonoma (2009) 176 Cal. App. 4th 1270, 1297, 98 Cal. Rptr. 3d 669*

The State Aeronautics Act (SAA), *Pub. Util. Code § 21001 et seq.,* does not expressly or impliedly preempt local land use regulation. To the contrary, the SAA expressly permits local regulation. *Citizens for Planning Responsibly v. County of San Luis Obispo (2009) 176 Cal. App. 4th 357, 372, 97 Cal. Rptr. 3d 636*

Ordinances that regulate in a more restrictive manner the very conduct regulated in state law impermissibly conflict with state law. *Tosi v. County of Fresno (2008) 161 Cal. App. 4th 799, 806, 74 Cal. Rptr. 3d 727*

The California Veterinary Medical Practice Act, *Bus. & Prof. Code § 4800 et seq.,* and a statute barring ordinances regulating state-regulated professions, *Bus. & Prof. Code, § 460,* did not preempt West Hollywood Mun. Code § 9.49.020, an ordinance that banned the practice of animal declawing as cruel and inhumane unless necessary for a therapeutic purpose. *California Veterinary Medical Assn. v. City of West Hollywood (2007) 152 Cal. App. 4th 536,*

557, 560, 61 Cal. Rptr. 3d 318

Gov. Code, § 38773.5(b), which required ordinances allowing attorney fees in nuisance actions to permit recovery by the prevailing party, rather than limiting recovery of fees to the city if it prevailed, preempted Monte Sereno Mun. Code § 6.17.170, which provided for recovery of attorney fees only by the city if it prevailed in a nuisance action. *City of Monte Sereno v. Padgett (2007) 149 Cal. App. 4th 1530, 1537, 58 Cal. Rptr. 3d 218*

State's limited incursion into field does not signal occupation to exclusion of all local governmental regulation affecting subject matter of ordinance. *Kucera v. Lizza (1997) 59 Cal. App. 4th 1141, 1153, 69 Cal. Rptr. 2d 582*

State statute or state constitutional provision will prevail over local ordinance if conflict occurs. *City of Oakland v. Superior Court (1996) 45 Cal. App. 4th 740, 760, 53 Cal. Rptr. 2d 120*

Even if state has preempted particular field, local governments may issue ordinances containing standards or regulations different from those at the statewide level if this action is specifically authorized by state. *Building Industry Association of Northern California v. City of Livermore (1996) 45 Cal. App. 4th 719, 726-727, 52 Cal. Rptr. 2d 902*

State legislation permitting landlords to go out of business as regulating area of statewide concern and fully occupying field and thus preempting conflicting local ordinances. *City of Santa Monica v. Yarmark (1988) 203 Cal. App. 3d 153, 163-168, 249 Cal. Rptr. 732*

As to matters of statewide concern, home rule charter cities and charter counties as subjectto and controlled by applicable general state laws regardless of provisions of their charters. *Los Angeles County Safety Police Assn. v. County of Los Angeles (1987) 192 Cal. App. 3d 1378, 1385-1386, 237 Cal. Rptr. 920*

Applicability of state statute to charter city or charter county as turning on whether statute addresses matters of statewide or strictly local concern, and courts as deciding this issue under facts of each case; doubt as required to be resolved in favor of legislative authority of state. *Los Angeles County Safety Police Assn. v. County of Los Angeles (1987) 192 Cal. App. 3d 1378, 1385-1386, 237 Cal. Rptr. 920*

Permitting local regulation as determined by balancing need of local governments to meet local needs with need for uniform state regulation; matter of health and medicine, including psychiatry, as recognized by legislature to be of statewide concern. *Northern Cal. Psychiatric Society v. City of Berkeley (1986) 178 Cal. App. 3d 90, 101, 108, 223 Cal. Rptr. 609*

Limited participation of local authority in general field as not allowing local regulation to totally control one aspect of field. *Ventura v. City of San Jose (1984) 151 Cal. App. 3d 1076, 1079, 199 Cal. Rptr. 216*

In determining issue of preemption of local regulation by state law, any doubt as to whether or not local regulation is municipal affair as required to be resolved in favor of legislative authority of state. *Aguilar v. Municipal Court (1982) 130 Cal. App. 3d 34, 37, 181 Cal. Rptr. 516*

If state's preemption of field or subject is not complete, local supplemental legislation as not deemed conflicting to extent it covers phases of subject that have not been covered by state law. *Alioto's Fish Co. v. Human Rights Com. of San Francisco (1981) 120 Cal. App. 3d 594, 604, 174 Cal. Rptr. 763*

City's transient occupancy tax was not preempted by state law. Far from manifesting an intent to fully occupy the field, the legislature instead ceded to cities and counties the ability to levy taxes on the occupancy of rooms in hotels and other lodgings unless the occupancy is for a period of more than 30 days. *Kumar v. Superior Court (2007) 149 Cal. App. 4th 543, 552* ; *57 Cal. Rptr. 3d 72*

California Forms of Pleading and Practice--Annotated

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Volume 13: Conspiracy thru Conversion-Chs. 126-159
Chapter 126A CONSTITUTIONAL LAW
PART III. RESEARCH GUIDE

-126A California Forms of Pleading and Practice--Annotated §§ 126A.83-126A.99

[Reserved]

§§ 126A.83[Reserved]

California Forms of Pleading and Practice--Annotated

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Volume 13: Conspiracy thru Conversion-Chs. 126-159
Chapter 126A CONSTITUTIONAL LAW
PART IV. FORMS

1-126A California Forms of Pleading and Practice--Annotated § 126A.100

§ 126A.100 Complaint Against Public Entity and Officials for Injunctive and Declaratory Relief for Denial of Right to Freedom of Expression [U.S. Const., amend. I, XIV; Cal. Const., art. I, 2]--Denial of Application for Access to Public Forum

[1] FORM Complaint Against Public Entity and Officials for Injunctive and Declaratory Relief for Denial of Right to Freedom of Expression [U.S. Const., amend. I, XIV; Cal. Const., art. I, 2]--Denial of Application for Access to Public Forum

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR
_____ [*name(s)*],	)	INJUNCTIVE AND
Defendant(s).	)	DECLARATORY RELIEF
	)	
	)	

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Injunctive Relief Against Violation of Constitutional Right to Free Speech and Free Assembly)

1. Plaintiff _____ [*name*] is _____ [*allege facts regarding plaintiff's capacity and standing, e.g.,* a California nonprofit corporation organized for the purpose of (*describe in detail purpose of corporation*). Plaintiff's principal place of business is located at _____ (*city*), _____ County, California].

2. Defendant _____ [*name of government entity*] is, and at all times herein mentioned was, _____ [*state capacity and type of governmental entity*], duly organized under the laws of the State of California, and was empowered and authorized to _____ [*describe duties and operations of entity, e.g.,* enforce all rules and regulations for government operations and management of the public facilities and properties under its jurisdiction]. [*Unless defendant is the county, add:* Defendant _____ (*name of governmental entity*) is located and operates within the County of _____.]

3. Defendant, _____ [*name*], is, and at all times herein mentioned was, _____ [*allege capacities and duties of anyindividual defendant(s), e.g.,* the chief administrative officer of defendant _____ (*name of governmental entity*), and is and at all times herein mentioned has been responsible for the enforcement of ordinances, rules, and regulations pertaining to facilities and property owned and/or operated by defendant _____ (*name of governmental entity*)].

4. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by the wrongful conduct of these fictitiously named defendants.]

5. [Plaintiff is informed and believes and thereon alleges that] [A]t all times herein mentioned, defendants _____ [*names*], were the agents, servants, and employees of their codefendants and in doing the things hereinafter alleged were acting within the course and scope of their authority as agents, servants, and employees with the permission and consent of their codefendants.

6. [Plaintiff is informed and believes and thereon alleges that] [A]t all times herein mentioned defendant _____ [*name*] was authorized and empowered by defendant _____ [*name of principal*] to act and did act as the agent of defendant _____ [*name of principal*], and each and all of the things herein alleged to have been done by him/her were done in the capacity of and as agent for defendant _____ [*name of principal*].

7. [Plaintiff is informed and believes and thereon alleges that] [A]t all times herein mentioned, each of the defendants sued herein as DOES I-_____, inclusive, was the agent and employee of each of the remaining defendants and was at all times acting within the course and scope of that agency and employment.

8. Defendant _____ [*name of entity*] has promulgated an ordinance that requires certain public facilities and properties under its jurisdiction to be dedicated as forums for members of the public and/or public groups to _____ [*specify nature of use, e.g.,* use to peaceably meet, assemble, and disseminate and convey messages and information to the public]. A copy of this ordinance is attached hereto as Exhibit _____ and made a part of this complaint by reference.

9. Among the facilities and properties covered by the ordinance referred to in Paragraph 8 is _____ [*identify and describe public facility that plaintiff desires to use for speech activities*].

10. On _____ [*date*], defendant _____ [*name of official*], established procedures to implement the ordinance that included specific requirements for administration of the ordinance referred to in Paragraph 9. Any members of the public and/or public groups who wished to use any facilities or properties operated by defendant _____ [*name of entity*] as a public forum for assembly, as described in Paragraph 9, were required to submit an application for a permit to defendant _____ [*name of official*] for approval as to time, place, and manner of use of the forum. A copy of these procedures is attached hereto as Exhibit _____ and

made a part of this complaint by reference.

11. On _____ [*date*], plaintiff _____ [*name(s)*] submitted an application for a permit to use the _____ [*name of public facility referred to in Paragraph 9*] as a public forum by [*specify manner of application, e.g.,* fully and properly completing the application as described in Paragraph 10 and submitting it to defendant _____ (*name of official*)'s office]. The application stated that plaintiff wished to use the _____ [*name of public facility*] to peaceably assemble for the purpose of _____ [*describe in detail the purpose and nature of plaintiff's proposed use of public facility, alleging any facts necessary to show that plaintiff's activities are constitutionally protected, e.g.,* distributing literature and displaying signs informing the public of plaintiff's position and opinions on the subject of _____ (*specify*)].

12. On _____ [*date*], defendant(s) informed plaintiff [by letter] that his/her/its application for a permit was denied on grounds that _____ [*specify reasons, e.g.,* defendant did not consider use of its facilities and properties to be suitable for the purpose of plaintiff's meeting because of its concern for maintaining public safety and it did not believe the forum to be a suitable place for conveying plaintiff's message].

13. _____ [*Allege subsequent efforts, if any, to obtain reconsideration of permit denial, e.g.,* On _____ (*date*), plaintiff contacted defendant _____ (*name of official*) and requested a meeting to discuss the denial of the application for permit and request reconsideration of the denial. Defendant _____ (*name of official*) declined to attend such a meeting and further indicated that there was no process for appealing defendants' decision].

[14. Plaintiff is informed and believe, and on that basis alleges, that the denial of his/her/its application for use of _____ (*identify public facility or property*) as a public forum was based wholly or in part on defendants' disagreement with the content of the message that plaintiff intended to convey, that is, _____ (*specify nature and content of message to be conveyed by plaintiff*).]

[*EITHER*]

15. _____ [*Identify public facility*] is a public forum that has traditionally been used by members of the public for expressive activities.

[*OR*]

15. By passing an ordinance described in Paragraph 8, defendant _____ [*name of entity*] has designated _____ [*identify publicfacility*] as a public forum for use by members of the public for expressive activities.

[*CONTINUE*]

16. No compelling state interest justifies defendants' refusal to make _____ [*identify public facility*] available for use by plaintiff to convey his/her/its constitutionally protected speech and message. In fact, defendants articulated no legitimate governmental reason whatsoever for refusing plaintiff use of _____ [*identify public facility*] to convey his/her/its message. Defendants' decision to refuse plaintiff's request for use of _____ [*identify public facility*] was wholly arbitrary.

17. As a proximate result of defendants' policies and actions, plaintiff has been deprived of the right to free speech and assembly as guaranteed by the *First* and *Fourteenth Amendments of the United States Constitution* and by *California Constitution, Article I, Sections 2* and *3*.

18. Unless defendants are restrained by injunction, plaintiff will continue to suffer severe, irreparable harm in that _____ [*describe harm, e.g.,* the message proposed by plaintiff will not be conveyed in a public forum in defendants' jurisdiction and plaintiff's constitutional rights to express its message as described in Paragraph 10 will continue to be violated]. Plaintiff is informed and believes, and on that basis alleges, that unless the court grants injunctive relief, defendants will continue to prohibit plaintiff's exercise of free speech, and plaintiff and the public will continue to suffer injury as described in Paragraph 17.

19. Plaintiff has no adequate remedy at law because monetary damages will not afford adequate relief for the suppression of plaintiff's message and the deprivation of plaintiff's constitutional rights.

SECOND CAUSE OF ACTION
(Declaratory Relief)

20. Plaintiff incorporates by reference the allegations of Paragraphs 1 through 19, inclusive, in the First Cause of Action, above, as though fully set forth here.

21. An actual controversy has arisen and now exists between plaintiff and defendants regarding their respective rights and duties in that plaintiff contends that defendants' rules, policies, and practices concerning the use of its facilities and properties for speech activities, as described in Paragraphs 8 through 14 inclusive, of the First Cause of Action set forth above, violate plaintiff's rights of freedom of speech and freedom of assembly under the *First* and *Fourteenth Amendments of United States Constitution* and under the *California Constitution, Article I, Section 2*, in the following manner: _____ [*specify manner in which policies and actions amount to constitutional violation, e.g.,* Defendants' rules vest total discretion in defendant _____ (*name of official*) to determine and allocate use of defendant _____'s (*name of entity*) property for speech activities and permits arbitrary suppression of messages with which defendant _____ (*name of official*) disagrees]. Defendants dispute these contentions and contend that the rules, policies, and practices described in this complaint are lawful and constitutional.

22. Plaintiff desires a declaration as to the validity of defendant's rules, policies, and practices, as described in this complaint, both on their face and as applied to plaintiff's permit application and proposed free speech activities. Unless the court issues an appropriate declaration of rights, the parties will not know whether defendants' policies and procedures comply with the law, and there will continue to be disputes and controversy surrounding the defendants' current policies for permitting use of and access to its facilties and properties, including _____ [*identify facility*], for public use and dissemination of information and messages.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant(s) and his/her/their/its agents, servants, and employees, and all such persons acting under, in concert with, or for him/her/them/it from denying plaintiff's constitutional right to express his/her/its views and in particular to require defendants, and each of them, to grant plaintiff's application for a permit to use _____ [*identify facility*] as a public forum for the purposes of distributing literature and other free speech activities, as described in Paragraph 11 of this complaint;

2. For a declaration by the court of the rights and duties of plaintiff herein, and specifically for a declaration that

_____ [*describe declaratory judgment sought, e.g.,* the policies and practices of defendants are unconstitutional as a violation of plaintiff's rights, as described in Paragraph 21];

3. For reasonable attorney's fees according to proof, pursuant to *Code of Civil Procedure Section 1021.5*;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I haveread this complaint and know its contents. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above,* is a complaint for use in an action arising from a governmental agency's violation of the plaintiff's constitutional rights of free speech and assembly by denying a permit to use a public forum for constitutionally protected expressive activities. The form combines a complaint for injunctive relief [*see generally Civ. Code 3420-3423*; *Code Civ. Proc. 526, 527*; Ch. 303, *Injunctions*] against the defendants' violations of plaintiff's constitutional rights (First Cause of Action), with a complaint for declaratory relief [*see generally Code Civ. Proc. 1060*; Ch. 182, *Declaratory Relief*] requesting that the court declare the defendants' rules, policies, and practices to be unconstitutional (Second Cause of Action). For discussion of free speech rights in public forums, see *Ch. 59, Assemblies, Meetings, and Demonstrations, § 59.13*.

In an appropriate case, counsel may wish to add to this complaint a cause of action under *42 U.S.C. 1983* for damages for deprivation of federal constitutional rights under color of state law. For discussion of the general requirements for establishing a cause of action under that statute and a general form of complaint that may be adapted for that purpose, see Ch. 112, *Civil Rights: Government-Funded Programs and Activities* .

Plaintiff's counsel may also wish to join a petition for writ of mandate compelling the governmental entity to immediately issue the permit to plaintiff for exercise of free speech [*see generally Code Civ. Proc. 427.10, 1084 et seq.*;

Wrather-Alvarez Broadcasting, Inc. v. Hewicker (1957) 147 Cal. App. 2d 509, 511, 305 P.2d 236] with the causes of action for declaratory and injunctive relief. For discussion of mandate proceedings, see Ch. 358, *Mandate and Prohibition* .

The prayer of the complaint includes a request for attorney fees under the statutory "private attorney general" provision [*see Code Civ. Proc. 1021.5*]. For discussion of criteria and procedures for an award of attorney's fees under that statute, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

[3] Allegations

[a] Injunctive Relief

The First Cause of Action in [1], *above,* seeks injunctive relief and alleges the following:

- Plaintiff's capacity (Paragraph 1).

- Defendants' capacities as a governmental entity and officials (Paragraphs 2, 3).

- Agency and fictitious name allegations (Paragraphs 4-7).

- Location and description of the public facility or property that plaintiff wishes to use for free speech activities (Paragraph 9) and its status as a traditional or designated public forum (Paragraph 15) [*see, e.g., Clark v. Burleigh (1992) 4 Cal. 4th 474, 482-483, 14 Cal. Rptr. 2d 455, 841 P.2d 975]* .

- Defendants' permit rules and other policies regarding the use of its facilities for such activities (Paragraphs 8, 10).

- Plaintiff's application for a permit to use the public facility for free speech activities and facts showing that the intended use was constitutionally protected under *U.S. Const., amend. I, XIV,* and Cal. Const., art. I, *2, 3* (Paragraph 11).

- Defendants' refusal to grant the permit and the reasons given for the denial, if any (Paragraph 12).

- Plaintiff's subsequent efforts to obtain reconsideration of the permit denial, if any (Paragraph 13).

- Defendants' lack of a constitutionally sufficient justification for denying plaintiff access to the public forum and the consequent violation of plaintiff's rights of free speech and assembly under *U.S. Const., amend. I, XIV,* and Cal. Const., art. I, *2, 3* (Paragraphs 16, 17).

- Facts showing how defendants' denial of permit to use the public forum constitutes great and irreparable injury to plaintiff's constitutional rights (Paragraph 18) [*see Code Civ. Proc. 526(a)(2)*; *E. H. Renzel Co. v. Warehousemen's Union I.L.A. 38-44 (1940) 16 Cal. 2d 369*].

- Facts showing plaintiff lacks an adequate remedy at law (Paragraph 19) [*see Civ. Code 3422(1)-(3)*; *Code Civ. Proc. 526(a)(4)-(6)*].

[b] Declaratory Relief

The Second Cause of Action in [1], *above,* seeks declaratory relief. Itincorporates by reference the allegations of the First Cause of Action (Paragraph 20) and alleges the following:

- Facts showing the existence of an actual controversy between the parties concerning their respective rights and duties, including the parties' conflicting contentions regarding the constitutionality of defendants' actions (Paragraph 21) [*see Code Civ. Proc. 1060*].

- Plaintiff's present need for a declaration of his, her, or its rights (Paragraph 22) [*see Code Civ. Proc. 1060, 1061*].

[4] Verification

Verification [*see Code Civ. Proc. 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavits (or declarations under *Code Civ. Proc. 2015.5*) [*see Code Civ. Proc. 527(a)*; *see generally* Ch. 303, *Injunctions*]. In addition, if a temporary restraining order is sought without notice on the other party, the certification requirements of *Code Civ. Proc. 527(c)* must be satisfied. For discussion of the procedural requirements for obtaining a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

If no preliminary injunctive relief is sought, the complaint need not be verified [*see Code Civ. Proc. 128.7(a)* (unless otherwise required by law, pleadings not required to be verified); *see also Code Civ. Proc. 128.7(j)* (*Code Civ. Proc § 128.7* applies to complaint or petition filed on or after January 1, 1995, and any other pleading, written notice of motion, or other similar paper filed in that matter)].

A public entity need not verify its answer even though the complaint is verified [*see Code Civ. Proc. 446(a)*]. However, the verification of a complaint against a public entity does preclude a general denial in superior court actions that are not limited civil cases [*see Code Civ. Proc. 431.30(d)*].

[5] Jurisdiction and Venue

The complaint should contain allegations showing that the action has been commenced in the proper county for trial. The proper place for trial of an action against a public officer for an act done by him or her "in virtue of the office" is the county in which the cause of action arose [*see Code Civ. Proc. 393(b)*]. An action against a city, county, or other local public entity may be tried in the county in which the defendant public entity is located [*see Code Civ. Proc. 394(a)*]. As a practical matter, an action against a local governmental entity and its officials arising out of challenges to restrictions on speech activities will normally be brought in the county in which the entity is located, which will also normally be the place where the cause of action arose.

For discussion of venue in actions against the State of California, see Ch. 571, *Venue* .

An action seeking permanent injunctive relief is in the jurisdiction of the superior court and is not a limited civil case [*see* Cal. Const., art. VI, *10*; *Code Civ. Proc. 85, 86(a)(8), 580(b)(2)*].

[6] Cross References

For discussion of free speech rights in public forums and similar constitutional issues, see Ch. 59, *Assemblies, Meetings, and Demonstrations* .

For alternative complaints and allegations concerning declaratory relief, see Ch. 182, *Declaratory Relief* .

For alternative complaints, allegations, orders, and defenses concerning injunctive relief, see Ch. 303, *Injunctive Relief* .

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used* .

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints* .

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter* .

For alternative forms of prayers, see Ch. 420, *Prayers* .

For discussion and forms relating to service of summons and complaint generally, see Ch. 518, *Service of Summons and Papers* .

For other forms of allegations showing proper venue, see Ch. 571, *Venue* .

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Chapter 127 CONSUMER CONTRACTS AND LOANS

13-127 California Forms of Pleading and Practice--Annotated 127.syn

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§ 127.14 Consumers Legal Remedies Act

§ 127.15 Song-Beverly Consumer Warranty Act

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§ 127.23 Consumer Credit Contracts

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[e] Billing Error

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[5] Liability for Unauthorized Use of Credit Card

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[2] Definitions

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[b] Consumer Loan

[c] Covered Loan

[d] Licensed Person

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[c] Written Agreement

[d] Fees

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[f] Prohibited Acts

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[c] Action for Treble Damages, Injunction, and Other Relief

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[1] FORM

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

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[2] Use of Form

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[1] FORM

[2] Use of Form

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§ 127.110 Complaint for Equitable Relief and Damages--Violation of Creditor Disclosure Provisions of Civ. Code § 1812.400 et seq. [Civ. Code § 1812.402(i)]

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§ 127.01 Scope of Chapter

This chapter discusses various consumer protection statutes affecting the areas of consumer credit and loans. It includes coverage of various statutory schemes and requirements [*see § 127.11*], non-statutory relief [*see § 127.27*], credit cards [*see § 127.28*], discrimination in credit transactions [*see § 127.29*], creditor remedies regarding credit disability insurance [*see § 127.30*], and consumer loans secured by real property [*see § 127.31*].

Forms in this chapter that relate to the Song-Beverly Credit Card Act of 1971 are:

- A complaint for damages by a cardholder regarding the willful failure to correct a billing error [*see § 127.80*].

- A complaint for damages by a cardholder regarding reporting untrue or unfavorable credit information [*see § 127.81*].

- An allegation regarding an improper cancellation or refusal to renew a credit card [*see § 127.82*].

- A petition for damages and to compel the issuance of a credit card due to unlawful discrimination in denying a credit card [*see § 127.83*].

- A petition to compel the issuance of a credit card bearing a maiden or married name [*see § 127.84*].

- A complaint for civil penalties regarding the wrongful recording of personal identifying information in a credit card transaction [*see § 127.85*].

Other forms for consumer protection in this chapter are:

- A complaint for civil penalties for wrongfully requiring a credit card for acceptance of a payment by check [*see § 127.90*].

- A complaint for damages for denial of offered credit on less favorable terms [*see § 127.100*].

- A complaint for damages for failure of a credit reporting agency to file spousal credit information separately [*see § 127.101*].

- A complaint for equitable relief and damages regarding a violation of the creditor disclosure provisions of *Civ. Code § 1812.400 et seq.* [*see § 127.110*].

- A complaint for damages regarding a violation of the consumer loansecured by real property provisions of *Fin. Code § 4970 et seq.* [*see § 127.120*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionCredit Card AgreementsGeneral OverviewBanking LawConsumer ProtectionCredit Card AgreementsLiabilityBanking LawConsumer ProtectionState LawGeneral OverviewReal Property LawFinancingSecondary FinancingHome Equity Credit LinesReal Property LawFinancingSecondary FinancingWraparound Mortgages

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§ 127.02 Cross References

- For discussion, procedures, and forms relating to false advertising, including failure to disclose lack of accompanying warranty on "grey market goods," see Ch. 14, *Advertising* .

- For discussion, procedures, and forms for use in action against automobile manufacturers, dealers, and repair persons, see Ch. 91, *Automobiles: Actions Involving Defects and Repairs* .

- For discussion, procedures, and forms relating to bailments and vehicle rentals, see Ch. 93, *Bailments* .

- For discussion, procedures, and forms relating to home improvement contracts, including contracts for the construction of swimming pools, see *Ch. 104, Building Contracts, § 104.100* et seq.

- For discussion, procedures, and forms relating to discrimination in business establishments and in housing, see Ch. 116, *Civil Rights: Discrimination in Business Establishments* , and Ch. 117, *Civil Rights: Housing Discrimination* .

- For discussion, procedures, and forms relating to class actions, see Ch. 120, *Class Actions* .

- For discussion, procedures, and forms relating to consumer contracts under specific regulatory statutes, see Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* .

- For discussion, procedures, and forms relating to consumer credit reporting, see Ch. 129, *Consumer Credit Reporting* .

- For discussion, procedures, and forms for use in actions for breach of contract, see Ch. 140, *Contracts* .

- For discussion, procedures, and forms relating to unconscionable contracts, see Ch. 140, *Contracts* .

- For discussion, procedures, and forms relating to liquidated damages provisions, see *Ch. 177, Damages, § 177.140* et seq.

- For discussion, procedures, and forms relating to breaches of warranties concerning food, see Ch. 268, *Food* .

- For discussion, procedures, and forms relating to actions in fraud, see Ch. 269, *Fraud and Deceit* .

- For discussion, procedures, and forms regarding Automotive Repair Act requirements for written estimates and invoices, see Ch. 274, *Garages and Gas Stations* .

- For discussion, procedures, and forms relating to garnishment, see Ch. 276, *Garnishment* .

- For discussion, procedures, and forms relating to products liability, see Ch. 460, *Products Liability* .

- For discussion, procedures, and forms relating to the regulations concerning radio and television repair, see Ch. 484, *Radio and Television* .

- For discussion, procedures, and forms relating to rescission of contracts, see Ch. 490, *Rescission and Restitution* .

- For discussion, procedures, and forms relating to sales under the California Commercial Code (UCC), see Ch. 500, *Sales: Sales Under the Commercial Code* .

- For discussion, procedures, and forms relating to retail installment sales, see Ch. 501, *Sales: Retail Installment Sales* .

- For discussion, procedures, and forms relating to consumer warranties, see Ch. 502, *Sales: Warranties* .

- For discussion, procedures, and forms relating to Commercial Code (UCC) sales involving secured transactions, see Ch. 503, *Sales: Secured Transactions* .

- For discussion, procedures, and forms relating to the Consumers Legal Remedies Act, see Ch. 504, *Sales: Consumers Legal Remedies Act* .

- For discussion, procedures, and forms relating to specific performance of contracts, see Ch. 528, *Specific Performance* .

- For discussion, procedures, and forms regarding mortgages and deeds of trusts, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

- For discussion, procedures, and forms relating to usurious loans, see Ch. 558, *Usury* .

- For discussion, procedures, and forms relating to specific performance and breach of contracts, see *Ch. 569, Vendor and Purchaser, § 569.10* et seq.

- For discussion, procedures, and forms relating to actions on installment sales contracts, see *Ch. 569, Vendor and Purchaser, § 569.10* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral OverviewCivil ProcedureClass ActionsGeneral OverviewCivil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewTortsNegligenceActionsNegligent EntrustmentTortsProducts LiabilityGeneral Overview

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[Reserved]

§§ 127.03[Reserved]

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§ 127.10 Governing Statutes

Many different statutory schemes exist to protect consumers. This chapter covers those listed below:

- The Consumer Affairs Act is contained in *Bus. & Prof. Code § 300 et seq.* [*see § 127.11*].

- The Rosenthal-Roberti Item Pricing Act is contained in *Civ. Code § 7100 et seq.* [*see § 127.18*].

- Requirements for translated versions of contracts negotiated in languages other than English are prescribed by *Civ. Code § 1632*

- The Servicemembers Civil Relief Act is contained in *50 U.S.C. App. § 501 et seq.*, and the California counterpart to the federal legislation is contained in *Mil. & Vet. Code § 400 et seq.* [*see § 127.22*].

- Credit transactions regarding women and married or single persons are regulated by *Civ. Code §§ 1812.30-1812.35* [*see § 127.29*].

- The limitations on creditors' remedies against debtors who do not meet the obligations imposed by a credit agreement because of a disability covered by credit disability insurance are governed by *Civ. Code §§ 1812.400-1812.410* [*see § 127.30*].

- Transactions respecting credit cards are governed by the California Song-Beverly Credit Card Act of 1971 (*Civ. Code § 1747 et seq.*), the federal Fair Credit Billing Act (*15 U.S.C. § 1666 et seq.*), and parts of the federal Truth in Lending Act (*15 U.S.C. § 1601 et seq.*) [*see § 127.28*]. Analogous provisions of the federal statutes are referred to in the discussion of the California provisions. The Legislature expressly stated its intent that the provisions of *Civ. Code § 1747 et seq.*, which are similar to provisions in the federal Truth in Lending Act, essentially conform and be interpreted to conform to the federal rules, regulations, or interpretations issued by an official or employee of the Federal Reserve System duly authorized to issue such an interpretation [*Civ. Code § 1747.01*].

In addition, this chapter briefly describes the following consumer protection statutes and cross refers to other chapters that have more detailed coverage of them:

- The Automotive Repair Act is contained in *Bus. & Prof. Code § 9880 et seq.* [*see § 127.12*].

- The Electronic and Appliance Repair Dealers Registration Law is contained in *Bus. & Prof. Code § 9800 et seq.* [*see § 127.13*].

- The Consumers Legal Remedies Act is contained in *Civ. Code § 1750 et seq.* [*see § 127.14*].

- The Song-Beverly Consumer Warranty Act is contained in *Civ. Code § 1790 et seq.* [*see § 127.15*].

- The Unruh Retail Installment Sales Act is contained in *Civ. Code § 1801 et seq.* [*see § 127.16*].

- The Rees-Levering Motor Vehicle Sales and Finance Act is contained in *Civ. Code § 2981 et seq.* [*see § 127.17*].

- The Magnuson-Moss Warranty-Federal Trade Commission Improvement Act is contained in *15 U.S.C. § 2301 et seq.* [*see § 127.20*].

- The Truth in Lending Act is contained in *15 U.S.C. § 1601 et seq.* [*see § 127.21*].

- Unfair competition is governed by *Bus. & Prof. Code § 17200* [*see § 127.25*].

Consumer credit issues can also be affected by the application of various laws regulating activity on the Internet. Examples are the Consumer Protection Against Computer Spyware Act [*see Bus. & Prof. Code § 22947 et seq.*] and the Anti-Phishing Act of 2005 [*see Bus. & Prof. Code § 22948 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationGeneral OverviewBanking LawConsumer ProtectionCredit Card AgreementsGeneral OverviewBanking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral OverviewMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act

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§ 127.11 Consumer Affairs Act

[1] Purpose

The Consumer Affairs Act (*Bus. & Prof. Code § 300 et seq.*) was enacted to promote and protect the interests of the people as consumers [*Bus. & Prof. Code § 301*]. A "consumer" is defined as any individual who seeks or acquires, by purchase or lease, any goods, services, money, or credit for personal, family, or household purposes [*Bus. & Prof. Code § 302(c)*].

[2] Legal Proceedings by Director of Department of Consumer Affairs

The director of the Department of Consumer Affairs administers and enforces the Consumer Affairs Act [*Bus. & Prof. Code § 305*]. Whenever it appears to the director that the interests of the consumers of California are being damaged, or may be damaged, by any person who engaged in, or intends to engage in, any acts or practices in violation of any law of this state, or any federal law, the director, or any officer or employee designated by the director, or the Attorney General, may commence legal proceedings in the appropriate forum to enjoin the acts or practices and may seek other appropriate relief on behalf of the consumers [*Bus. & Prof. Code § 321*].

[3] Receiving Complaints From Consumers

It is also the duty of the director of the Department of Consumer Affairs to receive complaints from consumers concerning [*Bus. & Prof. Code § 325*]:

- Unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in the conduct of any trade or commerce.

- The production, distribution, sale, and lease of any goods and services undertaken by any person which may endanger the public health, safety, or welfare.

- Violations of provisions of the Business and Professions Code relating to businesses and professions licensed by any agency of the department, and implementing regulations.

- Other matters consistent with the purposes of the Consumer Affairs Act [*Bus. & Prof. Code § 300 et seq.*], whenever appropriate.

Attorneys who are representing consumers should keep in mind that complaints can be made to the Department of Consumer Affairs. Since the department is quite active, as a practical matter, it would be advisable for an attorney to file a complaint under *Bus. & Prof. Code § 325*. If no relief is obtained, a civil action can then be filed.

[4] Action of Director After Receipt of Consumer Complaint

On receipt of any complaint pursuant to *Bus. & Prof. Code § 325*, the director may notify the person against whom the complaint is made of the nature of the complaint and may request appropriate relief for the consumer [*Bus. & Prof. Code § 326(a)*]. The director must also transmit any valid complaint to the local, state, or federal agency whose authority provides the most effective means to secure such relief. If appropriate, the director must advise the consumer of the action taken on the complaint and of any other means which may be available to the consumer to secure relief [*Bus. & Prof. Code § 326(b)*].

If the director receives a complaint or receives information from any source indicating a probable violation of any law or rule or order of any regulatory agency of the state, or if a pattern of complaints from consumers develops, the director must transmit any complaint he or she considers to be valid to any appropriate law enforcement or regulatory agency, along with any evidence or information he or she may have concerning such a probable violation or pattern of complaints, or he or she must request the Attorney General to undertake appropriate legal action. It is the continuing duty of the director to discern patterns of complaints and to ascertain the nature and extent of action taken with respect to probable violations or patterns of complaints [*Bus. & Prof. Code § 326(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationAntitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationGeneral Overview

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§ 127.12 Automotive Repair Act

The Automotive Repair Act [*Bus. & Prof. Code § 9880 et seq.*] governs the repair of motor vehicles by automotive repair dealers. All automotive repair dealers must register in accordance with the provisions of the act [*Bus. & Prof. Code § 9884.6*]. The act prescribes certain procedures to be followed, including the recording of all work done by an automotive repair dealer on an invoice describing all service work done and parts supplied [*Bus. & Prof. Code § 9884.8*], the giving of a written estimated price for labor and parts necessary for a specific job before work is begun [*Bus. & Prof. Code § 9884.9(a)*], and the return of replaced parts to the customer at the time of the completion of the work [*Bus. & Prof. Code § 9884.10*].

The Bureau of Automotive Repair is part of the Department of Consumer Affairs. It is under the supervision and control of a director who has the duty of enforcing and administering the Automotive Repair Act [*Bus. & Prof. Code § 9880 et seq.*]. However, nothing in the provisions of the act prohibits the bringing of a civil action against an automotive repair dealer by an individual [*Bus. & Prof. Code § 9884.18*].

Attorneys representing clients with auto repair problems should contact the Bureau of Automotive Repair before proceeding with a civil action. The bureau has a packet of material that will be mailed to any attorney who contacts them.

For a discussion and forms relating to the Automotive Repair Act [*Bus. & Prof. Code § 9880 et seq.*], see Ch. 91, *Automobiles: Actions Involving Defects and Repairs* , and Ch. 274, *Garages and Gas Stations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationAntitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationGeneral Overview

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§ 127.13 Electronic and Appliance Repair Dealer Registration Law

The Electronic and Appliance Repair Dealer Registration Law [*Bus. & Prof. Code § 9800 et seq.*] governs licensing and regulation of electronic and appliance repair dealers. Until January 1, 2013 [*Bus. & Prof. Code § 9855.9*], this law also governs service contractors [*Bus. & Prof. Code § 9855 et seq.*; *see Bus. & Prof. Code §§ 9855(a)(1), 9855.05* (what are service contracts in this context)].

The Bureau of Electronic and Appliance Repair, Home Furnishings, and Thermal Insulation, in the Department of Consumer Affairs [*Bus. & Prof. Code § 9810*], gathers evidence of violations of the act and any implementing regulations, by any service dealer, whether registered or not, and by any employee, partner, officer, or member of any service dealer. The bureau must conduct spot-check investigations of service dealers throughout California on a continuous basis [*Bus. & Prof. Code § 9812*]. Until January 1, 2013, this applies also to service contractors [*Bus. & Prof. Code § 9812.5*].

The bureau establishes procedures for accepting complaints from the public against any service dealer (and, until January 1, 2013, against any service contractor) [*Bus. & Prof. Code § 9860*].

For further discussion of the Electronic and Appliance Repair Dealer Registration Law, see *Ch. 484, Radio and Television, § 484.16*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 127.14 Consumers Legal Remedies Act

The purposes of the Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*] are to protect consumers against unfair and deceptive business practices and to provide efficient and economical procedures to secure such protection [*Civ. Code § 1760*]. The act lists unfair methods of competition and unfair or deceptive acts and practices which, when undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer, are unlawful [*Civ. Code § 1770*].

A consumer who suffers damages as a result of any person's use or employment of a method, act, or practice declared to be unlawful by *Civ. Code § 1770* may bring an individual or class action against that person [*Civ. Code §§ 1780, 1781*; *see, e.g., Consumer Advocates v. Echostar Satellite Corp. (2003) 113 Cal. App. 4th 1351, 1353-1354, 8 Cal. Rptr. 3d 22* (consumers alleged that provider of satellite TV service violated *Civ. Code § 1770(a)(5), (7), (9)*; triable issues of fact found on whether defendants violated statute with representations about number of channels and program schedule)]. The individual consumer or the class may obtain actual damages (in a class action, the total award may not be less than $1,000), punitive damages, an order enjoining the unlawful methods, acts, or practices, and any other relief which the court deems proper [*Civ. Code § 1780(a)*]. An award of up to $5,000 may be made to any senior or disabled plaintiff in an action under *Civ. Code § 1780* [*Civ. Code §§ 1780(b), 3345*].

For a detailed discussion of and forms relating to the Consumers Legal Remedies Act (*Civ. Code § 1750 et seq.*), see Ch. 504, *Sales: Consumers Legal Remedies Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationAntitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationGeneral Overview

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13-127 California Forms of Pleading and Practice--Annotated § 127.15

§ 127.15 Song-Beverly Consumer Warranty Act

The Song-Beverly Consumer Warranty Act (*Civ. Code § 1790 et seq.*) governs consumer warranties applying to consumer goods used, bought, or leased primarily for personal, family, or household purposes [*Civ. Code § 1791*]. The act defines implied and express warranties [*Civ. Code §§ 1791.1, 1791.2*] and sets forth when consumer goods are accompanied by implied warranties of merchantability and fitness [*Civ. Code §§ 1792-1792.3*]. It also prescribes the requirements for an "as is" sale [*Civ. Code §§ 1792.4, 1792.5*]. In addition, the act requires that every manufacturer of consumer goods sold in California which are accompanied by express warranties maintain sufficient service and repair facilities in California to carry out the terms of the warranties or designate and authorize as service and repair facilities independent service and repair facilities to carry out the terms of the warranties [*see Civ. Code § 1793.2*; *see also California State Electronics Assn. v. Zeos Int'l (1996) 41 Cal. App. 4th 1270, 1276-1277, 49 Cal. Rptr. 2d 127* (personal computers sold by Minnesota manufacturer by mail order to California residents were not "sold in this state" for purposes of act's local repair facilities requirement)]. The act sets forth the alternativesavailable if the manufacturer does not provide service and repair facilities in California or does maintain such facilities, but fails to supply them with adequate replacement parts and service literature [*see Civ. Code § 1793.2*].

Any buyer of consumer goods who is damaged by a failure to comply with any obligation under the Song-Beverly Warranty Act or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief [*Civ. Code § 1794(a)*; *see Mocek v. Alfa Leisure, Inc. (2003) 114 Cal. App. 4th 402, 406-408, 7 Cal. Rptr. 3d 546* (buyer is not required to give seller opportunity to repair before rescinding when implied warranty of merchantability is breached; judgment for amount of purchase price plus interest upon return of defective travel trailer affirmed); *see also Atkinson v. Elk Corporation (2003) 109 Cal. App. 4th 739, 757, 135 Cal. Rptr. 2d 433* (analyzing statutory definition of "consumer goods" and holding that roof shingles are not consumer goods under the Act)]. If the buyer establishes that the failure to comply was willful, a civil penalty not exceeding twice the amount of actual damages may be recovered [*Civ. Code § 1794(c)*]. In addition, any retailer or independent service person injured by willful or repeated violations of the act may bring an action for damages and may recover treble damages [*Civ. Code § 1794.1*].

For a discussion and forms relating to the Song-Beverly Consumer Warranty Act, see Ch. 502, *Sales: Warranties* . For transactional forms relating to the Song-Beverly Act, see California Legal Forms, Ch. 46, *Credit Cards and Other*

Open-End Credit Transactions (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationAntitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationGeneral OverviewCommercial Law (UCC)Sales (Article 2)WarrantiesGeneral Overview

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§ 127.16 Unruh Retail Installment Sales Act

The Unruh Retail Installment Sales Act (*Civ. Code § 1801 et seq.*) governs retail installment sales. The act sets forth the required provisions of retail installment contracts, including restrictions on such contracts [*see Civ. Code §§ 1803.1 et seq., 1804.1 et seq.*]. It also sets limitations on finance charges [*see Civ. Code § 1805.1*] and states to whom the buyer should make payments [*see Civ. Code § 1806.1*]. The act also contains provisions concerning refinancing and consolidation [*see Civ. Code § 1807.1 et seq.*], add-on sales [*see Civ. Code § 1808.1 et seq.*], retail installment accounts [*see Civ. Code § 1810 et seq.*], retail installment account credit card periodic rate disclosures [*see Civ. Code § 1810.21*], repossession and resale [*see Civ. Code § 1812.2 et seq.*], and penalties for noncompliance [*see Civ. Code § 1812.6 et seq.*].

The buyer may bring an action under the Unruh Act for damages against any person who violates the act and, in any case in which a person willfully violated any provision of the act in connection with the imposition, computation, or disclosures of or relating to a finance charge on a consolidated total of two or more contracts under the provisions of *Civ. Code § 1808.1 et seq.* (add-on sales), the buyer may recover three times the total of the finance charges and any delinquency, collection, extension, deferral, or refinance charges imposed, contracted for, or received on all contracts included in the consolidated total, and the seller is barred from the recovery of any such charges [*Civ. Code § 1812.9*].

For a discussion of and forms relating to the Unruh Retail Installment Sales Act (*Civ. Code § 1801 et seq.*), see Ch. 501, *Sales: Retail Installment Sales* . For transactional forms relating to the Unruh Act, see California Legal Forms, Ch. 45, *Consumer Installment Loans and Credit Sales* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationAntitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationGeneral OverviewContracts LawSecured TransactionsInstallment ContractsGeneral Overview

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13-127 California Forms of Pleading and Practice--Annotated § 127.17

§ 127.17 Rees-Levering Motor Vehicle Sales and Finance Act

The sale and financing of motor vehicles is governed by the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*). The act includes provisions concerning the formalities of conditional sales contracts [*Civ. Code § 2981.9, 2982*]; rebates, discounts, commissions, or other consideration [*Civ. Code § 2982.1*]; enforceability of contracts [*Civ. Code §§ 2983, 2983.1*]; disposing of a repossessed or surrendered motor vehicle [*Civ. Code § 2983.2*]; and correction of contracts not in compliance with the act [*Civ. Code § 2984*].

For a discussion of the Rees-Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 2981 et seq.*], see Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* . For transactional forms relating to the Rees-Levering Act, see California Legal Forms, Ch. 47, *Automotive Financing and Vehicle Leasing* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationAntitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationGeneral Overview

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§ 127.18 Rosenthal-Roberti Item Pricing Act

The Rosenthal-Roberti Item Pricing Act [*see Civ. Code § 7100 et seq.*] governs item-pricing in grocery stores and grocery departments within general retail merchandise stores using a point-of-sale system, and sets forth the exclusive remedies available to any person, state, local agency, or law enforcement official. The terms "grocery department" and "grocery store" are defined in *Civ. Code § 7100(c)(3)* and *(4)*, respectively. The term "point-of-sale system" means any computer or electronic system used by a retail establishment such as, but not limited to, universal product code (UPC) scanners, price lookup codes, or an electronic price lookup system as a means for determining the price of the item being purchased by a consumer [*Civ. Code § 7100(c)(1)*]. The act requires grocery stores and grocery departments to have a clearly readable price indicated on 85 percent of the total number of packaged consumer commodities offered for sale that are not exempt [*Civ. Code § 7100(a)*]. Exempt items are listed in *Civ. Code § 7100(b)*. "Consumer commodity" is defined in *Civ. Code § 7100(c)(2)*.

Any person, firm, corporation, or association that violates *Civ. Code §§ 7100* and *7101* is liable to any person injured by the violation for any losses and expenses thereby incurred and, in addition, to the sum of $50, but this applies only to actions brought by a single plaintiff and is not applicable in multiple-plaintiff or class actions [*Civ. Code § 7102*].

A business establishment that uses a point-of-sale system to sell goods or services to consumers must ensure that the price of each good or service to be paid by the consumer is conspicuously displayed to the consumer at the time the price is interpreted by the system. In any instance in which the business advertises a price reduction or discount regarding an item offered for sale, the checkout system customer indicator must display either (1) the discounted price for that item, or (2) the regularprice and a credit or reduction of the advertised saving. Any surcharges and the total to be charged for the overall transaction also must be displayed for the consumer at least once before the consumer is required to pay for the goods or services. The checkout system customer indicator must be positioned, and the prices and amounts displayed must be of a size and form, so as to be easily viewable from a typical and reasonable customer position at each checkout location [*Bus. & Prof. Code § 13300(a)* (applicable after 2006); *see Bus. & Prof. Code § 13300(b)* (definition of point-of-sale system); *see also Bus. & Prof. Code §§ 13301, 13302* (enforcement by public attorney or sealer)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationAntitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationGeneral Overview

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13-127 California Forms of Pleading and Practice--Annotated § 127.19

§ 127.19 Contract Negotiated in Language Other than English

[1] When Required

[a] Languages Subject to Requirement

If a language other than English is the primary language used for negotiations with a consumer, the consumer may have to be provided with a translation of the contract in that other language. For contracts entered into prior to July 1, 2004, this requirement is applicable only to contracts negotiated primarily in Spanish. On and after July 1, 2004, it is applicable to contracts negotiated primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean [*see Civ. Code § 1632*].

[b] Types of Contracts Subject to Requirement

Generally, any person engaged in a trade or business who negotiates primarily in the other language, orally or in writing, in the course of entering into any consumer contract or agreement, must deliver to the consumer, before the consumer executes the contract or agreement, a translation of the contract or agreement in the other language. This translation must include a translation of every term and condition in that contract or agreement. This requirement applies to the following kinds ofcontracts [*Civ. Code § 1632(b)*]:

- A contract or agreement that is subject to any of the following [*Civ. Code § 1632(b)(1)*]:
  - The Unruh Retail Installment Sales Act [*see Civ. Code § 1801 et seq.*].
  - The Rees-Levering Motor Vehicles Sales and Finance Act [*see Civ. Code § 2981 et seq.*; Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act*].
  - The Vehicle Leasing Act [*see Civ. Code § 2985.7 et seq.*; Ch. 90, *Automobiles: Vehicle Leasing Act*].
- Any other loan or extension of credit secured otherwise than by real property, or unsecured, for use

primarily for personal, family, or household purposes [*Civ. Code § 1632(b)(2)*].

- A lease, sublease, rental contract or agreement, or other tenancy contract or agreement, for a period longer than one month, covering a dwelling, an apartment, a mobilehome, or any other dwelling unit normally occupied as a residence [*Civ. Code § 1632(b)(3)*].

- A loan or extension of credit for use primarily for personal, family, or household purposes, when the loan or extension of credit is subject to anay of the following [*Civ. Code § 1632(b)(4)*]:

  - *Bus. & Prof. Code § 10240 et seq.*, concerning loans negotiated by real estate brokers.

  - The Industrial Loan Law [*see Fin. Code § 18000 et seq.*].

  - The California Finance Lenders Law [*see Fin. Code § 22000 et seq.*].

- A reverse mortgage [*Civ. Code § 1632(b)(5)*; *see Civ. Code § 1923 et seq.* (regulation of reverse-mortgage lenders)].

- A contract or agreement containing a statement of fees or charges, entered into for the purpose of obtaining legal services, when the person with whom the consumer negotiates the contract or agreement is a California-licensed attorney [*Civ. Code § 1632(b)(6)*].

- A foreclosure consulting contract subject to *Civ. Code § 2945 et seq.* [*Civ. Code § 1632(b)(7)*].

An alternative requirement applies in the case of negotiating in any of the specified foreign languages for a loan or other extension of credit to be secured by residential property [*see Civ. Code § 1632.5*; § 127.19[7]].

If a loan or extension of credit for use primarily for personal, family, or household purposes, is negotiated by a real estate broker and is subject to the mortgage loan disclosure statement requirements of *Bus. & Prof. Code § 10240 et seq.* [for discussion, *see* California Legal Forms, Ch. 25, *Real Estate Loans* (Matthew Bender)], the translation requirement technically applies to the resulting contract or agreement when negotiations are conducted primarily in the other language [*see Civ. Code § 1632(b)(4)*], but the broker can comply by delivering the required mortgage loan disclosure statement [*see Bus. & Prof. Code §§ 10240(a), 10241*; *see California Legal Forms, Ch. 25, Real Estate Loans, §§ 25.250, 25.251* (Matthew Bender)] in the other language [*Civ. Code § 1632(c)*].

At the time and place where a lease, sublease, or rental contract or agreement described above is executed, notice in the other language in which the contract or agreement was negotiated must be provided to the lessee or tenant [*Civ. Code § 1632(d)*].

[c] Ancillary Documents

Generally, "contract or agreement" in *Civ. Code § 1632* means the document creating the rights and obligations of the parties and includes any subsequent document making substantial changes in the rights and obligations of the parties [*Civ. Code § 1632(g)*], but periodic statements, sales slips, invoices, and other similar documents are excluded [*see* [d], *below*]. For example, a notice of repossession and deficiency of a motor vehicle under *Civ. Code § 2983.2* is a document that substantially affects the borrower's rights under the contract. Therefore, the borrower is entitled to a translation of the notice [*Reyes v. Superior Court (1981) 118 Cal. App. 3d 159, 162, 173 Cal. Rptr. 267]* .

[d] Matters Excluded From Requirement

The term "contract or agreement" does not include any of the following [*Civ. Code § 1632(g)*]:

- Matters ordinarily incorporated by reference in a residential lease, sublease, rental contract or agreement, or other tenancy contract or agreement, including but not limited to rules and regulations governing a tenancy and inventories of furnishings to be provided by the lessor or other person in the position of a lessor.

- Any subsequent documents authorized or contemplated by the original document such as periodic statements, sales slips or invoices representing purchases made pursuant to a credit card agreement, a retail installment contract or account or other revolving sales or loan account, memoranda of purchases in an add-on sale, or refinancing of a purchase as provided by, or pursuant to, the original document.

- A home improvement contract [*see Bus. & Prof. Code §§ 7151.2, 7159* (definitions)], or plans, specifications, description of work to be done and materials to be used, or collateral security taken or to be taken for the retail buyer's obligation contained in a contract for the installation of goods by a licensed contractor, if the home improvement or installation contract is otherwise a part of a contract subject to *Civ. Code § 1632*.

[e] Elements of Contract Not Required to Be Translated

The other-language version of a contract or agreement may retain the following elements of the executed English contract or agreement without translation: names and titles of individuals and other persons, addresses, brand names, trade names, trademarks, registered service marks, full or abbreviated designations of the make and model of goods or services, alphanumeric codes, numerals, dollar amounts expressed in numerals, dates, and individual words or expressions having no generally acceptable translation into English. It is permissible, but not required, that the other-language version be signed [*Civ. Code § 1632(i)*].

[2] Compliance by Supervised Financial Organization

A translation of disclosures required by federal Regulation M on consumer leasing or Regulation Z on truth in lending [*see 12 C.F.R. §§ 213.1 et seq., 226.1 et seq.*] or by the Industrial Loan Law or the California Finance Lenders Law [*see Fin. Code §§ 18000 et seq., 22000 et seq.*], can be provided to the consumer by a supervised lender, before the execution of the contract, and that will be deemed compliance with *Civ. Code § 1632*. Supervised lenders include banks, savings and loan associations, credit unions, and the holding companies, affiliates, and subsidiaries of any of them; real estate brokers when subject to *Bus. & Prof. Code § 10240 et seq.*; and lenders subject to the Industrial Loan Law or the California Finance Lenders Law [*Civ. Code § 1632(e)*].

[3] Requirements Inapplicable When Interpreter Negotiates Contract

Civ. Code § 1632 does not apply to any person engaged in a trade or business who negotiates primarily in the other language [*see* [1], *above*], if the party with whom he or she is negotiating is a buyer of goods or services, or receives a loan or extension of credit, or enters an agreement obligating himself or herself as a tenant, lessee, or sublessee, or similarly obligates himself or herself by contract or lease, and that party negotiates the terms of the contract, lease, or other obligation through his or her own interpreter who is not a minor, is able to speak fluently and read with full understanding both English and the other language, and is neither employed by nor made available through the person that negotiates with the consumer [*Civ. Code § 1632(h)*].

[4] Notice of Right to Translation

At the time and place for entering into a contract or agreement that is subject to the Unruh Retail Installment Sales Act,

the Rees-Levering Motor Vehicles Sales and Finance Act, or the Vehicle Leasing Act [*see Civ. Code §§ 1801 et seq., 2981 et seq., 2985.7 et seq.*], or that is for a loan or extension of credit secured otherwise than by real property, or unsecured, for use primarily for personal, family, or household purposes [*see* [1], *above*], a notice in the other language must be conspicuously displayed, to the effect that the person with whom the consumer is negotiating is required to provide a contract or agreement, or a translation of the disclosures required by law, in the other language in which the contract or agreement was negotiated [*Civ. Code § 1632(f)*].

It is reversible error for a court to render a deficiency judgment in favor of a finance company if the borrower is unable to understand English and there is no evidence that the finance company did or did not post a notice in the other language pursuant to *Civ. Code § 1632* at the location of the loan negotiations [*Reyes v. Superior Court (1981) 118 Cal. App. 3d 159, 162, 173 Cal. Rptr. 267]* .

[5] Evidentiary Use of Translation

The terms of the contract or agreement that is executed in English determines the rights and obligations of the parties. The other-language translation of the contract or the disclosures can be admitted into evidence only to show that no contract was entered into because of the substantial difference in the material terms and conditions of the contract and the translation [*Civ. Code § 1632(j)*].

[6] Rescission for Noncompliance

In the event of noncompliance with the requirements of *Civ. Code § 1632*, the consumer may rescind the contract or agreement. When a contract for a consumer credit sale or consumer lease that has been sold and assigned to a financial institution is rescinded, the consumer must make restitution to, and have restitution made by, the person with whom he or she made the contract, and must give notice of rescission to the assignee. Notwithstanding that the contract was assigned without recourse, the assignment must be deemed rescinded, and the assignor must promptly repurchase the contract from the assignee [*Civ. Code § 1632(k)*].

[7] Alternative Requirement for Loan or Credit Secured by Residential Property

If a state-supervised financial institution negotiates primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean, to make a loan, or otherwise to extend credit, that will be secured by residential real property, then unless the institution complies with *Civ. Code § 1632* or unless the other party negotiates the terms of the contract through his or her own interpreter, the institution must deliver to the other party a form on which the terms of the contract are summarized in the language of the negotiation [*Civ. Code § 1632.5(a), (b)(2), (c)(2), (e)(1), (j)*]. The form is prescribed by the Department of Corporations and the Department of Financial Institutions and is intended to be a foreign-language equivalent, in purpose and effect, to the good faith estimate that is prescribed by HUD for use under the Real Estate Settlement Procedures Act [*Civ. Code § 1632.5(i)*].

State-supervised financial institutions are all of the persons, except real estate brokers, that are subject to *Civ. Code § 1632* [*see § 127.19[2]*]--banks, savings associations, and credit unions; holding companies, affiliates, and subsidiaries of those institutions; industrial loan companies and finance lenders--as well as residential mortgage lenders [*Civ. Code § 1632.5(b)(2)*]. Real estate brokers are not affected by *Civ. Code § 1632.5*, although they are subject to *Civ. Code § 1632* [2009 Stats., ch. 274, § 2].

Civ. Code § 1632.5 does not create, enhance, or limit any claim, right of action, or civil liability under state law [*Civ. Code § 1632.5(k)*]. An action for violation of *Civ. Code § 1632.5* may be brought only by the institution's licensing agency or by the attorney general [*Civ. Code § 1632.5(l)*]. When an institution is subject to *Civ. Code § 1632* and complies with *Civ. Code § 1632.5*, the institution is deemed to be compliance with *Civ. Code § 1632*, and vice versa [*Civ. Code § 1632.5(c)*]; and if the institution attempts but fails to comply with *Civ. Code § 1632.5*, the institution is

subject only to remedies allowed by that section and is not subject to the remedies allowed by *Civ. Code § 1632* [2009 Stats., ch. 274, § 2].

Use of the prescribed form in compliance with *Civ. Code § 1632.5* has no legal effect on the determination of the parties' rights and obligations, which are to be determined by the terms of the contract that is executed in English. However, the translated words in the form that is provided by the institution can be admitted in evidence to show, and only to show, that no contract or agreement was entered into because of a substantial difference in the material terms and conditions of the contract or agreement as alleged and the translation in the form provided to the other party [*Civ. Code § 1632.5(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationAntitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationGeneral OverviewBanking LawConsumer ProtectionConsumer LeasingDisclosureBanking LawConsumer ProtectionTruth in LendingDisclosureContracts LawRemediesRescission & RedhibitionGeneral Overview

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§ 127.20 Magnuson-Moss Warranty--Federal Trade Commission Improvement Act

The Magnuson-Moss Warranty--Federal Trade Commission Improvement Act [*see 15 U.S.C. § 2301 et seq.*] is a federal law governing consumer product warranties. Included in the act are rules governing the contents of warranties [*15 U.S.C. § 2302*], the Federal minimum standards for written warranties [*15 U.S.C. § 2304*], and restrictions on disclaimers or modifications of implied warranties [*15 U.S.C. § 2308*]. The act sets forth procedures to be followed in informal dispute settlements [*15 U.S.C. § 2310(a)*]. In addition, the act provides for the issuance of a temporary restraining order or preliminary injunction without bond [*15 U.S.C.§ 2310(c)(1)*]. A consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation of the act, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief [*15 U.S.C. § 2310(d)(1)*].

For discussion and forms relating to the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act, see Ch. 502, *Sales: Warranties* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionMagnuson-Moss Warranty ActGeneral OverviewAntitrust & Trade LawConsumer ProtectionMagnuson-Moss Warranty ActRemediesContracts LawRemediesEquitable ReliefGeneral OverviewContracts LawSales of GoodsWarrantiesGeneral Overview

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§ 127.21 Federal Truth in Lending Act

The purposes of the federal Truth in Lending Act [*see 15 U.S.C. § 1601 et seq.*] are to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him or her and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices [*15 U.S.C. § 1601(a)*]. Its purpose is also to assure a meaningful disclosure of the terms of leases of personal property for personal, family, or household purposes so as to enable the lessee to compare more readily the various lease terms available to him or her, limit balloon payments in consumer leasing, enable comparison of lease terms with credit terms when appropriate, and to assure meaningful and accurate disclosures of lease terms in advertisements [*15 U.S.C. § 1601(b)*].

The act is divided into five parts: general provisions, credit transactions, credit advertising, credit billing, and consumer leases.

The general provisions include measures governing the determination of finance charges [*15 U.S.C. § 1605*], the determination of annual percentage rates [*15 U.S.C. § 1606*], and administrative enforcement [*15 U.S.C. § 1607*].

The credit transactions part includes provisions governing the requirement of disclosure [*15 U.S.C. § 1631*], open-end consumer credit plans [*15 U.S.C. § 1637*], consumer credit transactions other than open-end credit plans [*15 U.S.C. § 1638*], civil liability [*15 U.S.C. § 1640*], assignee liability [*15 U.S.C. § 1641*], the liability of credit cardholders [*15 U.S.C. § 1643*], the fraudulent use of credit cards [*15 U.S.C. § 1644*], business credit cards [*15 U.S.C. § 1645*], the collection, publication, and dissemination of annual percentage rates [*15 U.S.C. § 1646*], plans secured by a consumer's principal dwelling [*15 U.S.C. § 1647*], "reverse mortgages" [*15 U.S.C. § 1648*], limitations on liability for disclosure of taxes, mortgage broker fees, and other specified expenses [*15 U.S.C. § 1649*], restrictions on private educational lenders [*15 U.S.C. § 1650*], and the creation of procedures for the timely settlement of estates of deceased obligors [*15 U.S.C. § 1651*].

The credit advertising part contains provisions governing catalogs and multiple-page advertisements [*15 U.S.C. § 1661*], the advertising of downpayments and installments [*15 U.S.C. § 1662*], the advertising of open-end credit plans [*15 U.S.C. § 1663*], the advertising of credit other than open-end plans [*15 U.S.C. § 1664*], the more-than-four-installment

rule for advertisements [*15 U.S.C. § 1665a*], and the advertising of open-end consumer credit plans secured by the consumer's principal dwelling [*15 U.S.C. § 1665b*].

The part on advertising also contains provisions governing the following matters (but not in the context of advertising): interest rate reductions on open-end consumer credit plans [*15 U.S.C. § 1665c*], reasonable penalty fees on open-end consumer credit plans [*15 U.S.C. § 1665d*], and consideration of ability to repay [*15 U.S.C. § 1665e*].

The credit billing part contains provisions on the correction of billing errors [*15 U.S.C. § 1666*], the regulation of credit reports [*15 U.S.C. § 1666a*], the length of the billing period in a credit statement for imposition of a finance charge, and the effect of tardy mailing or delivery of a statement [*15 U.S.C. § 1666b*], the prompt crediting of payments and the imposition of a finance charge [*15 U.S.C. § 1666c*], the treatment of credit balances [*15 U.S.C. § 1666d*], notification to the credit card issuer, by a seller, that a return credit should be processed [*15 U.S.C. § 1666e*], inducements to cardholders by sellers of cash discounts, to encourage payments by cash, check, or similar means, and finance charges for sales transactions involving cash discounts [*15 U.S.C. § 1666f*], the prohibition of tie-in services for issuance of a credit card [*15 U.S.C. § 1666g*], offsetting a cardholder's indebtedness to the issuer of a credit card against funds deposited with the issuer by the cardholder [*15 U.S.C. § 1666h*], a cardholder's assertion, against the card issuer, of claims and defenses arising out of a credit card transaction [*15 U.S.C. § 1666i*], limits on interest rate, fee, and finance charge increases applicable to outstanding balances [*15 U.S.C. § 1666i-1*], additional limits on interest rate increases [*15 U.S.C. § 1666i-2*], and the applicability of state laws [*15 U.S.C. § 1666j*].

The consumer leasing provisions include provisions relating to consumer lease disclosures [*15 U.S.C. § 1667a*], a lessee's liability on the expiration or termination of a lease [*15 U.S.C. § 1667b*], consumer lease advertising [*15 U.S.C. § 1667c*], the civil liability of lessors [*15 U.S.C. § 1667d*], and the applicability of state laws [*15 U.S.C. § 1667e*].

For a discussion of and forms relating to these parts of the Truth in Lending Act, see Ch. 501, *Sales: Retail Installment Sales* . For additional coverage, see California Legal Forms, Ch. 45, *Consumer Installment Loans and Credit Sales*, and Ch. 46, *Credit Card and Other Open-End Credit Transactions* (Matthew Bender).

The credit billing section, also known as the Fair Credit Billing Act [*see 15 U.S.C. § 1666 et seq.*], is discussed in *§ 127.28*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionTruth in LendingGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosureBanking LawConsumer ProtectionTruth in LendingLiability

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§ 127.22 Military Service Members

[1] Debt Relief for Active Service Members

The federal Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*] provides for the temporary suspension of various legal proceedings, obligations, and liabilities for persons in military service [*see 50 U.S.C. App. § 510* (purpose of statute)]. The statute is applicable to all members of the United States Army, Navy, Marine Corps, Air Force, and Coast Guard, and to Public Health Service officers detailed for duty with the Army or Navy [*50 U.S.C. App. § 511(1) et seq.*]. The California counterpart to the federal legislation [*Mil. & Vet. Code § 400 et seq.*] is designed to fill certain gaps in the federal law in the wake of the events of September 11, 2001. The latter statute, many provisions of which are virtually identical to their federal counterparts, is designed to apply to military reservists and National Guard members who are called to active military service under specified circumstances and, in many cases, for limited periods of time [*see Mil. & Vet. Code § 400*].

The federal and California statutes provide specific relief to qualifying military personnel in a variety of areas, including the following:

- Default judgments [*50 U.S.C. App. § 520*; *Mil. & Vet. Code § 402(a)*].
- Pending judicial proceedings [*50 U.S.C. App. § 521*; *Mil. & Vet. Code § 403(a)*].
- Fines or penalties on contracts and similar obligations [*50 U.S.C. App. § 522*; *Mil. & Vet. Code § 403(b)*].
- Execution of judgments, attachments, and similar matters [*50 U.S.C. App. § 523*; *Mil. & Vet. Code § 403(c)*].
- Statutes of limitations [*50 U.S.C. App. § 525*; *Mil. & Vet. Code § 404*].
- Interest rates [*50 U.S.C. App. § 526*; *Mil. & Vet. Code § 405*].

- Rent and eviction [*50 U.S.C. App. § 530*].
- Leases [*50 U.S.C. App. § 534*; *Mil. & Vet. Code § 409*].
- Installment contracts [*50 U.S.C. App. § 531*; *Mil. & Vet. Code § 407*].
- Mortgages [*50 U.S.C. App. § 532*; *Mil. & Vet. Code § 408*].
- Insurance [*50 U.S.C. App. §§ 535, 540*-547; *Mil. & Vet. Code § 409.1*].
- Taxes [*50 U.S.C. App. §§ 560-574*; *Mil. & Vet. Code § 409.2*].

In addition to these specific types of relief, the federal and California statutes contain "catch-all" type provisions that allow qualifying service members to initiate proceedings to seek relief [*50 U.S.C. App. § 531*; *Mil. & Vet. Code § 407*].

These statutes can have important effects on consumer contracts, mortgages, and other obligations for persons in military service. If the buyer entered military service after the obligation was incurred, or is a reservist or National Guard member who was called to active duty after entering into the obligation, these statutes will limit the rate of interest that can be charged while the buyer is on active military service [*see 50 U.S.C. App. § 526*; *Mil. & Vet. Code § 405*], and significantly restrict the creditor's rights to enforce the obligation during (and in some situations immediately after) the period of military service [*see, e.g., 50 U.S.C. App. § 531*; *Mil. & Vet. Code § 407*]. In addition, statutes of limitation are tolled during the period of active military service [*50 U.S.C. App. § 525*; *Mil. & Vet. Code § 404(a)*].

For more detailed discussion of the relief available under these statutes, the manner in which such relief can be requested, and the persons who qualify for relief, see § Ch. 501, *Sales: Retail Installment Contracts*, § 501.60 et seq. Forms for requesting various forms of relief from installment and related obligations under these statutes are located in § Ch. 501, *Sales: Retail Installment Contracts*, § 501.300 et seq. For a form for a complaint for unlawful retaliation by a lender, creditor, or other person against a person who received stay or postponement because of military service, see *Ch. 129, Consumer Credit Reporting, § 129.150*.

[2] Deceptive Marketing of Financial Services and Products

No person or entity licensed under the Business and Professions Code, the Corporations Code, the Financial Code--excepting any bank or credit union [*Mil. & Vet. Code § 823.5(c)*; *see Fin. Code §§ 102, 14002* (definitions)]--or the Insurance Code may market financial services or products to a service member or former service member, or the spouse of a service member or former service member, in a misleading or deceptive manner that suggests that the person or entity marketing the financial service or product is acting on behalf of, or is an affiliate of, any branch of the U.S. military or the U.S. Department of Veterans Affairs, or the financial service or product is being offered on behalf of any branch of the U.S. military or the U.S. Department of Veterans Affairs [*Mil. & Vet. Code § 823.5(a)*].

"Service member" means an active-duty member of the U.S. armed forces, an officer or enlisted member of the national guard called or ordered into active state service by the governor [*see Mil. & Vet. Code §§ 143, 146*], or into active federal service by the President, for a period of 30 days or more, or a reservist of the U.S. military reserve who has been called to full-time active duty for a period of 30 days or more [*Mil. & Vet. Code § 823.5(d)(1)*]. "Former service member" means a veteran [*Mil. & Vet. Code § 823.5(d)(2)*; *see Mil. & Vet. Code § 980* (definition)].

If a person who violates this section is licensed under any state licensing law, a violation of *Mil. & Vet. Code § 823.5* will be deemed a violation of the laws under which that person is licensed [*Mil. & Vet. Code § 823.5(b)*].

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§ 127.23 Consumer Credit Contracts

[1] Defined

Civ. Code § 1799.90 et seq., which govern consumer credit contracts, apply to many different types of consumer transactions, including retail installment sales, automobile sales contracts, and consumer loans. (Any waiver of the provisions of *Civ. Code § 1799.90 et seq.* is contrary to public policy, and is void and unenforceable [*Civ. Code § 1799.104*].) The following transactions are considered consumer credit contracts if the consumer is obligated to pay money on a deferred payment basis and the money, property, services, or other consideration that is the subject matter of the contract is primarily for personal, family, or household purposes [*Civ. Code § 1799.90(a)*]:

- Retail installment contracts, as defined in *Civ. Code § 1802.6* of the Retail Installment Sales Act [*see* Ch. 501, *Sales: Retail Installment Sales*].

- Retail installment accounts, as defined in *Civ. Code § 1802.7* of the Retail Installment Sales Act [*see* Ch. 501, *Sales: Retail Installment Sales*].

- Conditional sales contracts, as defined in *Civ. Code § 2981(a)* of the Rees-Levering Motor Vehicles Sales and Finance Act [*see* Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act*];

- Loans or extensions of credit secured by other than real property, or unsecured, for use primarily for personal, family, or household purposes [*see* Ch. 503, *Sales: Secured Transactions*].

- Loans or extensions of credit subject to *Bus. & Prof. Code § 10240 et seq.* (real estate brokers), *Fin. Code § 18000 et seq.* (industrial loan companies), *Fin. Code § 22000 et seq.* (finance lenders) that are for use primarily for personal, family, or household purposes, whether secured by real property or otherwise [*see* Ch. 568, *Usury*].

- Lease contracts, as defined in *Civ. Code 2985.7(d)* (governing motor vehicle leases) [*see generally* Ch. 90, *Automobiles: Vehicle Leasing Act*].

[2] Permissible Collateral

[a] Household Goods

It is unlawful for any person to take a security interest in any household goods in connection with a consumer credit contract, or other credit obligation, incurred primarily for personal, family, or household purposes unless (1) the person takes possession of the household goods, or (2) the purchase price of the household goods was financed through the consumer credit contract or credit obligation [*Civ. Code § 1799.100(a)*]. A security interest taken in violation of this prohibition is void and unenforceable [*Civ. Code § 1799.100(e)*].

"Household goods" include clothing, furniture, appliances, one radio, one television, linens, china, crockery, kitchenware, personal effects, and wedding rings. They do not include other electronic entertainment equipment, other jewelry, items acquired as antiques, or works of art [*Civ. Code § 1799.100(g)(1)*].

Any person injured by a violation of *Civ. Code § 1799.100* may bring a civil action for the recovery of damages, equitable relief, and attorney's fees and costs [*Civ. Code § 1799.100(f)*].

[b] Other Personal Property

An agreement or other document creating a nonpossessory security interest in personal property in connection with a consumer credit contract, or other credit obligation, that is incurred primarily for personal, family, or household purposes, must contain a statement of description of the personal property in which the security interest is taken. The statement must indicate each specific item of the personal property, and must be reviewed and signed by the consumer [*Civ. Code § 1799.100(b)*]. "Personal property" for purposes of this requirement consists of the following:

- Any goods, as defined in *Com. Code § 9102(a)(44)* (in general, all things that are movable when a security interest attaches), except for vessels, vehicles, and aircraft, that are used or bought for use primarily for personal, family, or household purposes and that have a fair market value of less than $1,000 per individual item at the time the security interest is created [*Civ. Code § 1799.100(d)(1)*].

- The property described in *Code Civ. Proc. § 704.050* (health aids needed by debtor or debtor's spouse or dependent) and in *Code Civ. Proc. § 704.060(a)* (tools and specified personal property used in trade, business, or profession), except for vessels, vehicles, and aircraft [*Civ. Code § 1799.100(d)(2)*].

This statement-of-description requirement is automatically satisfied by any consumer credit contract, or other credit obligation, if it is subject to the Unruh Act (*Civ. Code § 1801 et seq.*) and complies with either *Civ. Code § 1803.3(a)* (required contents of retail installment contract) or § 1810.1(f) (required disclosures concerning security interests created by retail installment account). For discussion of these provisions, as well as the types of transactions subject to the Unruh Act, see Ch. 503, *Sales: Secured Transactions* .

In addition, a person who has a nonpossessory security interest in personal property taken in connection with a consumer credit contract, or other credit obligation, that is incurred primarily for personal, family, or household purposes can only enforce the security by judicial action, unless the consumer abandons or freely and voluntarily surrenders the property. Personal property for purposes of this prohibition is the same as for the statement-of-description requirement set forth in *Civ. Code § 1799.100(b)* [*Civ. Code § 1799.100(c)*].

Any person injured by a violation of *Civ. Code § 1799.100* may bring a civil action for the recovery of damages, equitable relief, and attorney's fees and costs [*Civ. Code § 1799.100(f)*].

[3] Protections for Cosignor

[a] Notice of Contract Obligations

When a creditor obtains the signature of more than one person, other than persons married to each other, on a consumer credit contract, the creditor is required to deliver a notice, in English and Spanish in at least 10-point type, to each person who does not in fact receive any of the money, property, or services that are the subject matter of the contract, prior to that cosigner becoming obligated on the contract [*Civ. Code §§ 1799.90(a), 1799.91(a)*; *see Civ. Code §§ 1799.90-1799.99*]. The exact wording of the required notice is set forth in *Civ. Code § 1799.91(a)*, and other requirements regarding the notice are set forth in *Civ. Code §§ 1799.91(b)-1799.93*. For a discussion and a form relating to the notice, see Ch. 501, *Sales: Retail Installment Sales* .

[b] Notice of Delinquency Before Credit Record Affected

In addition to the liability notice, a cosignor is entitled to notice of any delinquency before his or her credit record is affected. For the purpose of this notice requirement, a "cosigner" is a natural person, other than the primary obligor or the spouse of the primary obligor, who renders himself or herself liable for the obligation on a consumer credit contract without compensation. The term includes a person whose signature is requested by a creditor as a condition to granting credit to another person. A person who does not receive goods, services, or money in return for executing a consumer credit contract does not receive compensation within the meaning of this section. "Cosigner" does not include a joint applicant for open-ended credit pursuant to *Civ. Code § 1799.91(c)*. A person is a cosigner within the meaning of this section whether or not he or she is designated as such on a consumer credit contract or other document creating the consumer credit contract obligation for the cosigner [*Civ. Code § 1799.101(a)(3)*].

A creditor may not provide any adverse information about any cosigner to a consumer credit reporting agency, regarding a failure to make timely payment to the creditor of all or a portion of any installment under a consumer credit contract entered into on or after July 1, 1992, unless the notice requirements are satisfied. "Adverse information" includes information directly or indirectly indicating that a delinquency has occurred because a cosigner has not complied with the contractual provisions of a consumer credit contract [*Civ. Code § 1799.101(a)(1)*]. At or before the time the adverse information is provided to the consumer credit reporting agency, written notice of the delinquency must be provided to the cosignor [*Civ. Code § 1799.101(b)*; *see Civ. Code § 1799.101(a)(4)* ("delinquency" defined)]. The notice need not be given, however, if the cosigner whose address, as shown in the creditor's records respecting the consumer credit contract, is the same as the primary obligor [*Civ. Code § 1799.101(d)*].

The statutory notice is also required before a creditor may give a debt collector any information regarding the cosigner's obligation on a consumer credit contract [*Civ. Code § 1799.101(c)*].

The required cosignor notice describes, recites, or otherwise refers to the delinquency, but no particular form or language for the notice is otherwise prescribed [*see Civ. Code §§ 1799.101(a)(5), (f)*]. The notice requirements are satisfied by mailing a copy of the required notice to the cosigner at the cosigner's address, as shown in the creditor's records respecting the consumer credit contract. If more than one cosigner resides at the address shown in the creditor's records, however, a notice addressed to any cosigner at that address is deemed notice to all the cosigners residing at that address [*Civ. Code § 1799.101(e)*].

If a delinquency or delinquencies have been reported to a consumer credit reporting agency and included in a cosigner's file maintained by theagency, and the delinquency is subsequently paid, the consumer credit reporting agency, within a reasonable time after the creditor has reported to the credit reporting agency that the delinquency or delinquencies have been cured, must indicate in the file that the payment was made [*see Civ. Code § 1799.101(g)*].

For discussion of the statutes governing consumer credit reporting generally, see Ch. 129, *Consumer Credit Reporting* .

[c] Damages Action for Failure to Give Delinquency Notice

A cosigner may bring an action to recover actual damages or $250, whichever is greater, as well as reasonable attorney's fees, when he or she suffers a loss as a result of a violation of *Civ. Code § 1799.101*, which mandates cosignor notice before a creditor on a consumer credit contract reports a cosignor's delinquency or provides information to a debt collector. A consumer credit reporting agency is also required to record payment of delinquencies in a cosignor's file [*Civ. Code § 1799.102(a)*].

The cosigner, not less than 30 days before bringing an action pursuant to *Civ. Code § 1799.102(a)*, must notify the person alleged to have violated *Civ. Code § 1799.101* of the cosigner's intention to bring an action. The notice must include a statement of the specific evidence that proves the loss suffered by the cosigner. If within 25 days after the date of receiving the notice, the person alleged to have violated *Civ. Code § 1799.101* tenders to the cosigner an amount equal to the loss, or otherwise resolves the matter to the cosigner's satisfaction, the cosigner is barred from further recovery of that loss, including reasonable attorney's fees [*Civ. Code § 1799.102(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionState LawRemediesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewContracts LawTypes of ContractsGuaranty Contracts

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§ 127.24 False Advertising

It is unlawful for any person, firm, corporation, or association, or employee, with the intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation, to make or disseminate, or cause to be made or disseminated before the public in California, or to make or disseminate or cause to be made or disseminated from California before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, including over the Internet, any statement concerning the real or personal property or services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any such person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell those personal property or services, professional or otherwise, so advertised at the price stated therein, or as so advertised [*Bus. & Prof. Code § 17500*]. In addition, the Consumers Legal Remedies Act (*Civ. Code § 1750 et seq.*) makes it unlawful to advertise goods or services with the intent not to sell them as advertised, to advertise goods or services with the intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity, to advertise furniture without clearly indicating that it is unassembled if that is the case, and to advertise the price of unassembled furniture without clearly indicating the assembled price of the furniture if the furniture is available assembled from the seller [*Civ. Code § 1770(9)-(12)*].

For discussion and forms relating to false and misleading advertising, including failure to disclose lack of accompanying warranty on "grey market goods," see Ch. 14, *Advertising* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionFalse AdvertisingState Regulation

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Chapter 127 CONSUMER CONTRACTS AND LOANS
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§ 127.25 Unfair Competition

Unfair competition is and includes unlawful, unfair, or fraudulent business practices and unfair, deceptive, untrue, or misleading advertising and any act denounced by *Bus. & Prof. Code § 17500 et seq.* (false advertising) [*Bus. & Prof. Code § 17200*]. For discussion and forms relating to unfair competition, see Ch. 565, *Unfair Competition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationAntitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationGeneral OverviewAntitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationCoverage

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13-127 California Forms of Pleading and Practice--Annotated § 127.26

§ 127.26 Retailer's Duty to Deliver Merchandise Within Four-Hour Waiting Period

Whenever a contract is entered into between a consumer and a retailer with 25 or more employees relating to the sale of merchandise that is to be delivered by the retailer or the retailer's agent to the consumer at a later date, and the parties have agreed that the presence of the consumer is required at the time of delivery, the retailer and consumer must agree, either at the time of the sale or at a later date before the delivery date, on a four-hour time period within which any delivery will be made. Whenever a contract is entered into between a consumer and a retailer with 25 or more employees for service or repair of merchandise, whether or not the merchandise was sold by the retailer to the consumer, and the parties have agreed that the presence of the consumer is required at the time of service or repair, on receipt of a request for service or repair under the contract the retailer and consumer must agree, before the date of service or repair, on a four-hour period within which the service or repair will be commenced. Once a delivery, service, or repair time is established, the retailer or the retailer's agent must deliver the merchandise to the consumer, or commence service or repair of the merchandise, within that four-hour period [*Civ. Code § 1722(a)(1)*].

If the merchandise is not delivered within the specified four-hour period, except for delays caused by unforeseen or unavoidable occurrences beyond the control of the retailer, the consumer may bring an action in small claims court against the retailer for lost wages, expenses actually incurred, or other actual damages not exceeding a total of $600 [*Civ. Code § 1722(a)(2)*]. Any provision of a delivery, service, or repair contract in which the consumer or subscriber agrees to modify or waive any of the rights afforded by *Civ. Code § 1722* is void as contrary to public policy [*Civ. Code § 1722(d)*].

No action will be valid if the consumer was not present at the time, within the specified period, when the retailer or the retailer's agent attempted to make the delivery or made a diligent attempt to notify the consumer, by telephone or in person, of its inability to do so because of unforeseen or unavoidable occurrences beyond its control. If notification is by telephone, the retailer or the retailer's agent must leave a telephone number for a return telephone call by the consumer to the retailer or its agent, to enable the consumer to arrange a new two-hour period for delivery, service, or repair with the retailer or the retailer's agent [*Civ. Code § 1722(a)(3)*]. Additionally, it is a defense to the action if a diligent attempt was made to notify the consumer of the delay caused by unforeseen or unavoidable occurrences beyond the control of the retailer or its agent, or the retailer or its agent was unable to notify the consumer of the delay because of the consumer's absence or unavailability during the four-hour period, and, in either instance, the retailer or its agent

makes the delivery within two hours of a newly agreed upon time or the consumer unreasonably declines to arrange a new delivery time [*Civ. Code § 1722(a)(5)*].

Logs and other business records maintained by the retailer or its agent in the ordinary course of business are prima facie evidence of the time period specified for the delivery and of the time when the merchandise was delivered, or of a diligent attempt by the retailer or its agent to notify the consumer of a delay caused by unforeseen or unavoidable occurrences [*Civ. Code § 1722(a)(4)*].

Similar procedures and rights exist for a subscriber who calls a cable television company or a utility for a service connection or repair for which the presence of the subscriber is required. [*see Civ. Code § 1722(b)* (cable television), (c) (utilities)]. For more detailed discussion of a cable television or utility subscriber's right to have a service connection or repair for which his or her presence is required made within a previously specified four-hour time period, see Ch. 484, *Radio and Television* , and Ch. 545, *Telephone and Telegraph Communication* , respectively [*see also* Ch. 277, *Gas and Electricity* , Ch. 511, *Sanitation and Sewerage Districts* , and Ch. 575, *Waters*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationAntitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationGeneral Overview

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§ 127.27 Nonstatutory Relief

[1] In General

Counsel should be aware that in referring to the specific remedies or provisions for relief from a violation of a statute governing consumer protection, there may be other remedies not specifically provided for in the statute.

[2] Rescission

Counsel should consider whether the consumer may rescind the particular contract in question. For a discussion of and forms relating to rescission, see Ch. 490, *Rescission and Restitution* .

[3] Tort in Essence

A tort in essence is the breach of a nonconsensual duty owed another. Violation of a statutory duty to another may therefore be a tort and violation of a statute embodying a public policy is generally actionable even though no specific civil remedy is provided in the statute itself. Any injured member of the public for whose benefit the statute was enacted may bring the action [*Laczko v. Jules Meyers, Inc. (1969) 276 Cal. App. 2d 293, 295, 80 Cal. Rptr. 798]* . The tort-in-essence theory is important because many statutes enacted for the benefit of consumers do not provide for a private cause of action. Counsel should be aware of this theory when a statute declares a public policy but provides for only an administrative or a criminal remedy.

[4] Punitive Damages

In an action for the breach of an obligation not arising from contract, when the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant [*Civ. Code § 3294(a)*].

For further discussion of punitive damages, see Ch. 177, *Damages* .

[5] Attorney's Fees in Action on Contract

In any action on a contract, when the contract specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of the contract, must be awarded to one of the parties or the prevailing party, then the prevailing party on the contract, whether he or she is the party specified in the contract or not, is entitled to reasonable attorney's fees in addition to other costs [*Civ. Code § 1717(a)*].

Attorney's fees provided by *Civ. Code § 1717* are not subject to waiver by the parties to any contract. Any provision in any such contract that provides for a waiver of attorney's fees is void [*Civ. Code § 1717(a)*].

Except in the case of a voluntary dismissal or dismissal pursuant to settlement, on notice and motion of a party, the court will determine who is the party prevailing on the contract, whether or not the suit proceeds to final judgment. The party prevailing on the contract is the party who recovered a greater relief in the action on the contract. The court may also determine that for purposes of this section there is no party prevailing on the contract [*Civ. Code § 1717(b)(1)*]. When an action has been voluntarily dismissed, or dismissed pursuant to settlement, there is no prevailing party [*Civ. Code § 1717(b)(2)*; *but see Jackson v. Homeowners Association Monte Vista Estates-East (2001) 93 Cal. App. 4th 773, 779-780, 782, 113 Cal. Rptr. 2d 363* (parties who agreed on record and in written settlement agreement that trial court would determine prevailing party in action and amount of attorney fee award before dismissal of action could and did waive provisions of *Civ. Code § 1717(b)(2)*)]. Additionally, when the defendant alleges in the answer that he, she, or it has tendered to plaintiff the full amount to which plaintiff is entitled, and has deposited that amount in court, if the allegation is found to be true, defendant is deemed to be the party prevailing on the contract [*Civ. Code § 1717(b)(2)*]. When the deposit has been made pursuant to *Civ. Code § 1717*, the court, on the application of any party to the action, must order the deposit to be invested in an insured, interest-bearing account. Interest on the amount is required to be allocated to the parties in the same proportion as the original funds are allocated [*Civ. Code § 1717(b)(2)*].

Attorney's fees may be recovered by the prevailing party in certain contract actions based on a book account as defined in *Code Civ. Proc. § 337a*, entered into on or after January 1, 1987 [*see Civ. Code § 1717.5*; *see also Civ. Code § 1717*]. For further discussion, see Ch. 8, *Accounts Stated and Open Accounts* , and Ch. 174, *Costs and Attorney's Fees* , § 174.50 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewContracts LawRemediesPunitive DamagesContracts LawRemediesRescission & RedhibitionGeneral OverviewTortsBusiness TortsGeneral Overview

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§ 127.28 Credit Cards

[1] Governing Law

The issuance and use of credit cards and the rights and obligations between credit card issuers, retailers, and holders are governed by the Song-Beverly Credit Card Act of 1971 (*Civ. Code § 1747 et seq.*) [*see Powers v. Pottery Barn, Inc. (2009) 177 Cal. App. 4th 1039, 1041, 99 Cal. Rptr. 3d 693* (Act is not preempted by CAN-SPAM Act of 2003, pursuant to *15 U.S.C. § 7707(b)(2)*; *see Ch. 14, Advertising, § 14.15[3]*)]. Any waiver of the provisions of that law is contrary to public policy, and is void and unenforceable [*Civ. Code § 1747.04*].

Federal laws may also apply, such as the Truth in Lending Act [*15 U.S.C. § 1601 et seq.*; *see § 127.28[4]*] and the Fair Credit Billing Act [*15 U.S.C. § 1666 et seq.*; *see § 127.28[19]*]. (For a list of various provisions of federal law that apply to credit cards, and similar credit devices, but which are not discussed in this chapter, see *§ 127.51*.) Federal laws governing national banks may preempt state law with respect to credit cards issued by national banks [*see, e.g., Rose v. Chase Bank USA (9th Cir. 2008) 513 F.3d 1032, 1038* (National Bank Act [*12 U.S.C. § 21 et seq.*] preempts disclosure requirements of *Civ. Code 1748.9* [*see § 127.28[4][d]*], insofar as those requirements apply to national banks); *Miller v. Bank of Am. (2009) 170 Cal. App. 4th 980, 982, 88 Cal. Rptr. 3d 723* (*Civ. Code §§ 9* and *11*, stating that whenever legal or contractual act is required to be performed on holiday, it may be performed on next business day without any adverse consequence, do not apply to national bank's credit card payment due dates because those state laws are preempted by federal law stating that national bank may make non real estate loans without regard to state law limitations concerning terms of credit, including schedule for repayment of principal and interest and payments due [*12 C.F.R. § 7.4008(d)(2)(iv)*])].

[2] Definitions

[a] Credit Card

"Credit card" means any card, plate, coupon book, or other credit device existing for the purpose of being used from time to time on presentation to obtain money, property, labor, or services on credit. "Credit card" does not mean any of the following [*Civ. Code § 1747.02(a)*]:

- Any single credit device used to obtain telephone property, labor, or services in any transactions under public utility tariffs.

- Any device that may be used to obtain credit pursuant to an electronic fund transfer if such credit is obtained under an agreement between a consumer and a financial institution to extend credit when the consumer's asset account is overdrawn or to maintain a specific minimum balance in the consumer's asset account.

- Any key or card key used at an automated dispensing outlet to obtain or purchase petroleum products, as defined by *Bus. & Prof. Code § 13401(c)*, which will be used primarily for business other than personal or family purposes.

For the definition of "accepted credit card," see *Civ. Code § 1747.02(b)*.

Any rights or responsibilities created by *Civ. Code § 1747 et seq.* that are based on the use of a credit card have no effect with respect to those transactions that constitute electronic funds transfers as defined by Federal Reserve Board Regulation E (*see* 12 C.F.R. pt. 205) or to those transactions involving the use of any key or card key used at an automated dispensing outlet to obtain or purchase petroleum products, as defined by *Bus. & Prof. Code § 13401(c)*, which will be used primarily for business rather than personal or family purposes [*Civ. Code § 1747.03(a)*]. Despite *Civ. Code § 1747.03(a)*, no person, company, or corporation issued a key or card key as described in *Civ. Code § 1747.03(a)* is liable for losses incurred due to the loss or theft of the key or card key after receipt by the issuer of written or oral notification of the loss or theft [*Civ. Code § 1747.03(b)*].

[b] Card Issuer

"Card issuer" means any person, or an agent of any person, who issues a credit card [*Civ. Code § 1747.02(c)*].

[c] Cardholder

"Cardholder" means a natural person to whom a credit card is issued for consumer credit purposes, or a natural person who has agreed with the card issuer to pay consumer credit obligations arising from the issuance of a credit card to another natural person. For purposes of *Civ. Code §§ 1747.05, 1747.10*, and *1747.20*, the term includes any person to whom a credit card is issued for any purpose, including business, commercial, or agricultural use, or a person who has agreed with the card issuer to pay obligations arising from the issuance of such a credit card to another person [*Civ. Code § 1747.02(d)*].

[d] Retailer

"Retailer" means every person other than a card issuer who furnishes money, goods, services, or anything else of value on presentation of a credit card by a cardholder. Retailer does not mean the state, a county, city, city and county, or any other public agency [*Civ. Code § 1747.02(e)*].

[e] Billing Error

A "billing error" means an error by omission or commission in (1) posting any debit or credit or (2) computation or similar error of an accounting nature contained in a statement given to the cardholder by the card issuer. A "billing error" does not mean any dispute with respect to value, quality, or quantity of goods, services, or other benefit obtained through use of a credit card [*Civ. Code § 1747.02(j)*]. The Song-Beverly Credit Card Act, however, does provide for defenses by a cardholder in the case of such a dispute [*see § 127.28[11]*]. For the definitions of "unauthorized use," "response," and "adequate notice," see *Civ. Code § 1747.02(f), (h)*, and *(k)*, respectively.

[3] When Credit Card May Be Issued

No credit card may be issued except (1) in response to an oral or written request or application for the card, or (2) as a renewal of, or in substitution for, an accepted credit card, whether such card is issued by the same or a successor card issuer [*Civ. Code § 1747.05(a)*; *see 15 U.S.C. § 1642* (issuance of credit card)]. A credit card issued in substitution for an accepted credit card may be issued only if the card issuer provides an activation process whereby the cardholder is required to contact the card issuer to activate the credit card before the first use of the credit card in a credit transaction [*Civ. Code § 1747.05(b)*].

The above provisions do not prohibit the completion of an overdraft protection advance or recurring charge transaction that a cardholder has previously authorized on an accepted credit card [*Civ. Code § 1747.05(c)*].

On and after February 22, 2010 [*see* Pub. L. No. 111-24, § 3 (May 29, 2009) (effective date)]:

- No credit card may be issued to, nor may an open end consumer credit plan be established by or on behalf of, a consumer younger than 21 years old unless the consumer has submitted a written application to the card issuer that meets specified requirements [*15 U.S.C. § 1637(c)(8)*].

- No card issuer or creditor may offer to a student at an institution of higher education [*see 15 U.S.C. § 1650(a)(3)* (definition)] any tangible item to induce such student to apply for or participate in an open end consumer credit plan offered by the card issuer or creditor, if the offer is made on the campus of an institution of higher education, near the campus of an institution of higher education, as determined by regulation, or at an event sponsored by or related to an institution of higher education [*15 U.S.C. § 1650(f)(2)*].

- An institution of higher education must publicly disclose any contract or other agreement made with a card issuer or creditor for the purpose of marketing a credit card [*15 U.S.C. § 1650(f)(1)*].

It is the sense of Congress that each institution of higher education should consider adopting the following policies relating to credit cards: that any card issuer that markets a credit card on the campus of the institution must notify the institution of the location at which the marketing will take place, that the number of locations on the campus of the institution at which the marketing of credit cards takes place will be limited, and that credit card and debt education and counseling sessions will be offered as a regular part of any orientation program for new students of the institution [*15 U.S.C. § 1650(f)(3)*].

[4] Required Disclosures

[a] Credit Card Applications and Solicitations

The federal Truth in Lending Act (*15 U.S.C. § 1601 et seq.*) provisions governing open-end credit plans contain special disclosure requirements applicable to certain direct mail, telephone, and other applications and solicitations to open credit card accounts [*see 15 U.S.C. § 1637(c)*]. The federal requirements preempt any state disclosure requirements governing credit card applications and solicitations but the state may establish laws relating to enforcement of the federal requirements [*15 U.S.C. § 1610(e)*]. The federal disclosure requirements do not apply to home equity plans accessible by a credit card, overdraft lines of credit, or lines of credit accessed by check guarantee or automatic teller cards [*12 C.F.R. § 226.5a(a)(3)*]. For discussion of federal disclosure requirements related to credit card solicitations and agreements, see California Legal Forms, Ch. 46, *Credit Card and Other Open-End Credit Transactions* (Matthew Bender).

A card issuer who mails an application to open a credit card account under an open-end consumer credit plan or a

solicitation to open such an account without requiring an application must disclose the following [*see 15 U.S.C. § 1637(c)(1)*]:

- The annual percentage rate.
- Any annual fee, membership fee, or other periodic fee for the issuance or availability of the card, and any minimum finance charge.
- The extent of the grace period, if any, during which no finance charge is imposed.
- The balance calculation method.
- Any cash-advance fee, late fee, or over-the-limit fee.

The information must be provided in the form of a table in accordance with *12 C.F.R. § 226.5a*.

If the solicitation is made by telephone, the card issuer must orally disclose the same information [*15 U.S.C. § 1637(c)(2)(A)*]. However, if there is no fee to issue the card or no fee is imposed until the consumer uses the card, and the card issuer clearly informs the consumer that he or she is not obligated to accept the card, then the information may be disclosed in writing within 30 days after the consumer requests the card, but in no event later than the date of delivery of the card [*15 U.S.C. § 1637(c)(2)(B)*].

Any application or solicitation that is made available to the public or contained in catalogs, magazines, or other publications must also disclose the required information, including a conspicuous disclosure of the date the information was printed [*15 U.S.C. § 1637(c)(3)(A)*]. A general application or solicitation is sufficient if it contains no specific term and does contain a general, conspicuous statement that there are costs associated with the use of credit cards, together with a toll-free telephone number and address at which the consumer may contact the creditor to obtain the required information [*15 U.S.C. § 1637(c)(3)(C)*].

Applications and solicitations concerning charge cards, which are credit cards on accounts for which no periodic rate is used to compute a finance charge, must disclose similar information, including any transaction charge imposed for use of the card and a statement that charges are due and payable on receipt of a periodic statement [*see 15 U.S.C. § 1637(c)(4)*; *12 C.F.R. § 226.2(a)* (charge card defined)].

On and after January 29, 2010 [*see* Pub. L. No. 109-8, §§ 1303(b)(2), 1304(b)(2) (Apr. 20, 2005)]:

- Additional notice regarding "introductory rates" is required in an application or solicitation to open a credit card account, and all promotional materials accompanying such an application or solicitation for which a disclosure is required, if the application or solicitation offers a temporary annual percentage rate of interest [*15 U.S.C. § 1637(c)(6)*; *see 12 C.F.R. § 226.16(g)* (implementing regulations, published Jan. 29, 2009, effective July 1, 2010)].
- Specific disclosures are required with respect to any solicitation to open a credit card account under an open end consumer credit plan using the Internet or any other interactive computer service [*15 U.S.C. § 1637(c)(7)*; *see 12 C.F.R. § 226.5a(a)(2)(vi)(B)* (implementing regulations, published Jan. 29, 2009, effective July 1, 2010)].

A card issuer that violates the disclosure requirements in *15 U.S.C. § 1637(c)* is liable only to a cardholder who uses the card [*15 U.S.C. § 1640(a)*, 4th sentence]. For a discussion of individual actions brought under *15 U.S.C. § 1640(a)*, see Ch. 501, *Sales: Retail Installment Sales* .

[b] Renewal Disclosures

If the card issuer has changed or amended any term of the account since the last renewal, and that term has not been previously disclosed, or if the card issuer imposes any annual fee, other periodic fee, or membership fee for the issuance or availability of a credit or charge card, then the card issuer must send to the consumer, at least 30 days before the scheduled renewal date of the card, a clear and conspicuous disclosure of the following [*15 U.S.C. § 1637(d)(l)*]:

- When the account will expire if not renewed;
- The information required for direct mail applications and solicitations or for charge card applications and solicitations under *15 U.S.C. § 1637(c)(1)(A)* and *(4)(A)*; and
- The method by which the consumer may terminate the account.

A card issuer that violates this disclosure requirement in *15 U.S.C. § 1637(d)* is liable only to a cardholder who uses the card or who pays such a fee [*15 U.S.C. § 1640(a)*, 4th sentence]. For a discussion of individual actions brought under *15 U.S.C. § 1640(a)*, see Ch. 501, *Sales: Retail Installment Sales* .

[c] Change in Credit Card Account Insurance

If a credit card issuer plans to change the provider of insurance for repayment of all or part of the outstanding balance of an open-end credit card account, the issuer must send each insured consumer written notice of the proposed change not less than 30 days prior to the change, including the following items, to the extent applicable [*15 U.S.C. § 1637(g)(2), (3)*]:

- Any increase in the rate that will result from the change.
- Any substantial decrease in coverage or service which will result from the change.
- A statement that the cardholder may discontinue the insurance.

Once the change occurs, the card issuer must provide the cardholder with a written notice no later than 30 days after the change, including the following items, to the extent applicable [*15 U.S.C. § 1637(g)(2), (3)*]:

- The name and address of the new insurance provider.
- A copy of the new policy or group certificate containing the basic terms of the insurance, including the rate to be charged.
- A statement that the cardholder may discontinue the insurance.

These requirements do not supersede any provision of California law that applies to the regulation of insurance [*15 U.S.C. § 1637(g)(4)*].

[d] Extension of Credit by Preprinted Check

When credit is extended to a card holder through use of a preprinted check or draft, the credit card issuer must disclose on the front of an attachment affixed to the check or draft, in clear and conspicuous language, the following information [*Civ. Code § 1748.9* (application to transactions on and after July 1, 2000)]:

- This statement: "Use of the attached check or draft will constitute a charge against your credit account."

- The annual percentage rate and computation of finance charges, as required by *12 C.F.R. § 226.16*, associated with the use of the attached check or draft.

- Whether the finance charges are triggered immediately on the use of the check or draft.

Any waiver of the above requirements is contrary to public policy, and is void and unenforceable [*Civ. Code § 1748.14*].

The Ninth Circuit holds that the National Bank Act [*12 U.S.C. § 21 et seq.*] preempts the disclosure requirements of *Civ. Code 1748.9*, insofar as those requirements apply to national banks [*Rose v. Chase Bank USA (9th Cir. 2008) 513 F.3d 1032, 1038*].

[5] Liability for Unauthorized Use of Credit Card

A cardholder is liable for the unauthorized use of a credit card only if all of the following conditions are met [*Civ. Code § 1747.10*; *see 15 U.S.C. § 1643* (liability of credit cardholder)]:

- The card is an accepted credit card.

- The liability is not in excess of $50.

- The card issuer gives adequate notice to the cardholder of the potential liability.

- The card issuer has provided the cardholder with a description of the means by which the card issuer may be notified of loss or theft of the card.

- The unauthorized use occurs before the card issuer has been notified that an unauthorized use of the credit card has occurred or may occur as the result of loss, theft, or otherwise.

- The card issuer has provided a method whereby the user of the card can be identified as the person authorized to use it.

If 10 or more credit cards are issued by one card issuer for use by the employees of an organization, *Civ. Code § 1747.10* does not prohibit the card issuer and the organization from agreeing to liability for unauthorized use without regard to *Civ. Code § 1747.10*. However, liability for unauthorized use may be imposed on an employee of the organization, by either the card issuer or the organization, only in accordance with *Civ. Code § 1747.10* [*Civ. Code § 1747.20*].

"Unauthorized use" means the use of a credit card by a person, other than the cardholder, who does not have actual, implied, or apparent authority for such use and from which the cardholder receives no benefit. Unauthorized use does not include the use of a credit card by a person who has been given authority by the cardholder to use the credit card. Any attempted termination by the cardholder of such a person's authority is ineffective as against the card issuer until such time as the cardholder complies with any procedures that may be required by the card issuer to terminate that authority. However, following the card issuer's receipt of oral or written notice from a cardholder indicating that it wishes to terminate the authority of a previously authorized user of a credit card, the card issuer is required to follow its usual procedures for precluding any further use of a credit card by an unauthorized person [*Civ. Code § 1747.02(f)*].

When a credit card issuer mails an offer or solicitation for a credit card to a person who then submits a completed application that lists an address different from that on the mailed offer or solicitation, the applicant is not liable for an unauthorized use of the credit card issued in response if the issuer does not verify the change of address before issuing the credit card, unless the issuer proves that the person actually incurred the charge on the card issued [*Civ. Code § 1747.06(b)*].

Liability for losses due to loss or theft of a key or card key, as defined in *Civ. Code § 1747.02(a)(3)*, are similarly limited [*Civ. Code § 1747.03(b)*; *see* discussion under [2][a], *above*].

[6] Billing Errors

[a] Correction of Billing Errors by Card Issuer

Every card issuer must correct any billing error made by the issuer within two complete billing cycles, but in no event later than 90 days, after receiving an inquiry [*Civ. Code § 1747.50(a)*]. An inquiry is a writing that is posted by mail to the address of the card issuer to which payments are normally tendered, unless another address is specifically indicated on the statement for that purpose, that is received by the card issuer no later than 60 days after the card issuer transmitted the first periodic statement that reflects the alleged billing error, and that does the following [*Civ. Code § 1747.02(g)*]:

- Sets forth sufficient information to enable the card issuer to identify the cardholder and the account.
- Sufficiently identifies the billing error.
- Sets forth information providing the basis for the cardholder's belief that a billing error exists.

Although a letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail [*Evid. Code § 641*], it is nevertheless suggested that the inquiry be sent by registered mail, return receipt requested. Any issuer who fails to correct a billing error made by the issuer within the period prescribed by *Civ. Code § 1747.50(a)* is neither entitled to the amount by which the outstanding balance of the cardholder's account is greater than the correct balance, nor any interest, finance charges, service charges, or other charges on the obligation giving rise to the error [*Civ. Code § 1747.50(b)*]. Any cardholder who is injured by a willful violation of *Civ. Code § 1747.50* may bring an action for the recovery of damages. Judgment may be entered for three times the amount at which actual damages are assessed. The cardholder is entitled to recover reasonable attorney's fees and costs incurred in the action [*Civ. Code § 1747.50(c)*].

[b] Failure of Card Issuer to Give Timely Response

If a card issuer fails to give a timely response (a response mailed within two complete billing cycles, but in no event later than 90 days, after the card issuer receives an inquiry [*Civ. Code § 1747.02(i)*]) concerning any debit or credit applicable to an obligation incurred through the use of a credit card, he or she is not entitled to interest, finance charges, service charges, or any other charges thereon, from the date of mailing of the inquiry to the date of mailing of the response [*Civ. Code § 1747.40*].

[c] Correction of Billing Errors by Retailer

Every retailer must correct any billing error made by the retailer within 60 days from the date on which an inquiry (a writing posted by mail to the address of the retailer, unless another address is specifically indicated by the retailer for the purpose of mailing inquiries with respect to billing errors, then to that address [*Civ. Code § 1747.60(d)*]) concerning the error was mailed [*Civ. Code § 1747.60(a)*]. Any retailer who fails to do so is liable to the cardholder in the amount by which the outstanding balance of the cardholder's account is greater than the correct balance, and any interest,

finance charges, service charges, or other charges on the obligation giving rise to the billing error [*Civ. Code § 1747.60(b)*].

Any cardholder who is injured by a willful violation of *Civ. Code § 1747.60* may bring an action for the recovery of damages and may recover three times the amount at which actual damages are assessed in addition to reasonable attorney's fees and costs incurred in the action [*Civ. Code § 1747.60(c)*].

[d] Liability for Billing Errors

A card issuer is not liable for a billing error made by a retailer and a retailer is not liable for a billing error made by a card issuer [*Civ. Code § 1747.65*].

[7] Selling Through Another Merchant's Credit Card Account

In some cases, it is unlawful for a merchant who wishes to sell goods or services by credit card to process credit card charges through another merchant's credit cardaccount. It is a misdemeanor for any person to process a charge through a retailer's account, or for a retailer to permit charges to be processed, if that retailer did not furnish or agree to furnish the goods or services that are the subject of the charge [*see Civ. Code § 1748.7(a), (b), (e)*]. The prohibition does not apply to specified persons and institutions, including persons who process less than $500 of charges a year, persons who furnish goods or services on the business premises of a general merchandise retailer, and franchisors and franchisees [*Civ. Code § 1748.7(c)*]. Any person damaged by a violation of this prohibition may bring a civil cause of action for damages, equitable relief, and reasonable attorney's fees and costs [*Civ. Code § 1748.7(d)*].

[8] Untrue or Unfavorable Credit Information

No card issuer may knowingly give any untrue credit information to any other person concerning a cardholder [*Civ. Code § 1747.70(a)*] or after receiving an inquiry from a cardholder regarding a billing error and prior to satisfying the requirements of *Civ. Code § 1747.50* (correction of billing errors by issuer), communicate unfavorable credit information concerning the cardholder to any person solely because of the cardholder's failure to pay the amount by which the outstanding balance of the cardholder's account is greater than the correct balance [*Civ. Code § 1747.70(b)*]. Furthermore, no card issuer may cancel or refuse to renew a credit card for the reason that the cardholder has obtained relief under *Civ. Code § 1747.50* (correction of billing errors by issuer) [*Civ. Code § 1747.70(c)*].

Any cardholder who is injured by a willful violation of these provisions may bring an action for the recovery of damages and may recover three times the amount at which actual damages are assessed in addition to reasonable attorney's fees and costs incurred in the action [*Civ. Code § 1747.70(d)*].

[9] Discrimination in Issuance of Credit Card Prohibited

[a] Improper Refusal to Issue Card

No card issuer may refuse to issue a credit card to any person solely because of any characteristic listed or defined in *Civ. Code § 51(b)* or *(e)*; that is, sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation (including a perception that a person has, or is associated with, someone who has or is perceived to have any particular characteristic or characteristics within the listed categories) [*Civ. Code § 1747.80(a)*].

Any card issuer who willfully violates *Civ. Code § 1747.80* is liable for each and every such offense for the actual damages, plus an additional $250, suffered by any person denied a credit card solely for the reasons set forth in this provision, and, in addition, that person may petition the court to order the card issuer to issue him or her a credit card on the terms, conditions, and standards that the card issuer normally utilizes in granting credit to other individuals [*Civ. Code § 1747.80(b)*].

[b] Name on Card of Married Woman

If a card issuer has determined in the normal course of business that it will issue a card to a married woman, the card is to be issued bearing either the maiden name or married name of the woman, as the woman may direct. Card issuers may require that a married woman requesting a card in her maiden name open a new account in that name [*Civ. Code § 1747.81*].

[10] Notice of Cancellation of Credit Card

Unless requested by the cardholder, no card issuer may cancel a credit card without having first given the cardholder 30 days' written notice of its intention to do so, unless the cardholder is, or within the last 90 days has been, in default of payment or otherwise in violation of any provision of the agreement between the card issuer and the cardholder governing the cardholder's use of the credit card, or unless the card issuer has evidence or reasonable belief that the cardholder is unable or unwilling to repay obligations incurred under the agreement or that an unauthorized use of the card may be made [*Civ. Code § 1747.85*]. This provision does not prohibit the card issuer from placing the account of a cardholder on inactive status if the cardholder has not used the card for a period in excess of 18 months or from requiring that the cardholder, on subsequent reuse of a card, to provide to the card issuer updated information to enable the card issuer to verify the cardholder's current creditworthiness [*Civ. Code § 1747.85*].

Under the Truth in Lending Act, on and after January 29, 2009 [Pub. L. No. 109-8, § 1306(b)(2) (Apr. 20, 2005)], the creditor of any account under an open end consumer credit plan may not terminate the account before its expiration date solely because the consumer has not incurred finance charges on the account. However, the creditor may terminate the account for inactivity in three or more consecutive months [*15 U.S.C. § 1637(h)*; *see 12 C.F.R. § 226.11(b)* (implementing regulations, published Jan. 29, 2009, effective July 1, 2010)].

[11] Defenses of Cardholder Against Issuer

[a] Defenses Cardholder Has as Buyer

Subject to the limitations contained in *Civ. Code § 1747.90(b)* [discussed in [b], *below*], a card issuer who has issued a credit card to a cardholder under an open-end consumer credit plan is subject to all claims and defenses, other than tort claims, arising out of any transaction in which the credit card is used as a method of payment or extension of credit if the following conditions are met [*Civ. Code § 1747.90(a)(1)*]:

- The cardholder has made a good-faith attempt to obtain satisfactory resolution of a disagreement or problem relative to the transaction from the person honoring the credit card.

- The amount of the initial transaction exceeds $50.

- The place where the initial transaction occurred was in California, or, if not within California, then within 100 miles from the cardholder's current designated address in California.

The dollar amount and territorial limitations on a cardholder's right to assert claims and defenses against a card issuer are not applicable to any transaction in which the person honoring the credit card satisfies any of the following requirements [*Civ. Code § 1747.90(a)(2)*]:

- He or she is the same person as the card issuer.

- He or she is controlled by the card issuer.

- He or she is under direct or indirect common control with the card issuer.

- He or she is a franchised dealer in the card issuer's products or services.

- He or she has obtained the order for the transaction through a mail solicitation made by, or participated in by, the card issuer in which the cardholder is solicited to enter into the transaction by using the credit card issued by the card issuer.

[b] Limitations on Cardholder's Claims or Defenses

The amount of claims or defenses asserted by the cardholder cannot exceed the amount of credit outstanding with respect to such transaction at the time the cardholder first notifies the card issuer or the person honoring the credit card of the claim or defense. For the purpose of determining the amount of credit outstanding, payments and credits to the cardholder's account are deemed to have been applied, in the order indicated, to the payment of the following [*Civ. Code § 1747.90(b)*]:

- Late charges in the order of their entry to the account.

- Finance charges in the order of their entry to the account.

- Debits to the account other than those set forth above, in the order in which the debit entry to the account was made.

Civ. Code § 1747.90 does not apply to use of a check guarantee card or a debit card in connection with an overdraft credit plan, or to a check guarantee card used in connection with cash advance checks [*Civ. Code § 1747.90(c)*].

[12] Disclosures Required for Secured Credit Card

A secured credit card is any credit card issued under an agreement or other instrument that pledges, hypothecates, or places a lien on real property or money or other personal property to secure the cardholder's obligations to the card issuer [*Civ. Code § 1747.02(l)*]. In addition to any other disclosures required by law, a card issuer of a secured credit card, in every advertisement or solicitation to prospective cardholders, must expressly identify the credit instrument offered as a "secured credit card" and prominently disclose that credit extended under the secured credit card is secured. The card issuer must also describe the security by item or type [*Civ. Code § 1747.94(a)*].

Any deed of trust executed in connection with a secured credit card must contain a statement that it is security for a secured credit card obligation. However, the failure to include the statement will not invalidate the deed of trust [*Civ. Code § 1747.94(b)*].

The disclosure requirement for secured credit cards does not apply to (1) any credit card that is issued under an agreement or other instrument creating a purchase money security interest in property purchased with the credit card, but which does not pledge, hypothecate, or place a lien on other property of the cardholder or any co-obligor; or (2) loans or extensions of credit subject to the Federal Home Equity Loan Consumer Protection Act of 1988 (Pub. L. No. 100-709) [*Civ. Code § 1747.94(c)*].

Any violation of the disclosure provisions of *Civ. Code § 1747.94* constitutes unfair competition within the meaning of *Bus. & Prof. Code § 17200* [*Civ. Code § 1747.94(d)*; *see generally* Ch. 565, *Unfair Competition*].

[13] Invalidity of Agreements to Prohibit Discounts for Cash Payment

Any provision in a contract between a card issuer and a retailer which has the effect of prohibiting the retailer from offering price discounts or from charging a different and lower price to customers who pay for goods or services by cash instead of by credit card is contrary to public policy and void [*Civ. Code § 1748*].

[14] Statement of Interest and Finance Charges to Cardholder

A cardholder may request, not more frequently than once a year, that the card issuer inform the cardholder of the total amount of finance charges assessed on the account during the preceding calendar year. The issuer must provide that information to the cardholder within 30 days of receiving the request, without charge. The issuer must provide the information in writing if the request was made in writing. However, if the issuer is required to furnish the cardholder with a periodic billing or periodic statement of account or furnishes the billing or statement of account, the requested statement of finance charges may be furnished along with the periodic billing or periodic statement of account [*Civ. Code § 1748.5(a)*].

The above requirements do not apply to card issuers or cardholders who issue or use credit cards in connection with a retail installment account [*Civ. Code § 1748.5(b)*; *see Civ. Code § 1802.7* ("retail installment account" defined)].

[15] Notice of Cardholder's Right to Prohibit Disclosure of Marketing Information

[a] Notice and Exercise of Right

If the credit card issuer discloses marketing information concerning a cardholder to any person, the credit card issuer must provide a written notice to the cardholder that clearly and conspicuously describes the cardholder's right to prohibit the disclosure of marketing information concerning the cardholder that discloses the cardholder's identity [*Civ. Code § 1748.12(b)*; *see Civ. Code § 1748.12(a)(3)* ("marketing information" defined)]. The notice must be in 10-point type and must advise the cardholder of his or her ability to respond either by completing a pre-printed form or using a toll-free number that the cardholder may call to exercise this right [*Civ. Code § 1748.12(b)*].

The cardholder's election to prohibit disclosure of marketing information will be effective only with respect to marketing information that is disclosed to any party beginning 30 days after the credit card issuer has received, at the designated address on the form containing the new credit card or on the preprinted form, or by telephone, the cardholder's election to prohibit disclosure. This does not apply to the disclosure of marketing information prior to the cardholder's notification to the credit card issuer of the cardholder's election [*Civ. Code § 1748.12(b)*].

[b] Satisfaction of Notice Requirements

The notice requirements noted in [a], *above*, will be satisfied by furnishing the notice to the cardholder [*Civ. Code § 1748.12(c)*]:

- At least 60 days prior to the initial disclosure of marketing information concerning the cardholder by the credit card issuer.

- For all new credit cards issued on or after April 1, 2002, on the form containing the new credit card when the credit card is delivered to the cardholder.

- At least once per calendar year, to every cardholder entitled to receive an annual statement of billings rights pursuant to federal Regulation Z [*12 C.F.R. § 226.9*].

If federal law requires disclosure to cardholders regarding the use of personal information, compliance with the federal requirements will be deemed to be compliance with *Civ. Code § 1748.12* [*Civ. Code § 1748.12(f)*].

[c] Disclosures Exempt From Requirement

The disclosure requirements of *Civ. Code § 1748.12* do not apply to any of the following communications of marketing information by a credit card issuer [*Civ. Code § 1748.12(e)*]:

- Communications to any party to, or merchant specified in, the credit card agreement, or any person whose name appears on the credit card or on whose behalf the credit card is issued.

- Communications to consumer credit reporting agencies [*see Civ. Code § 1785.3(d)* (definition)].

- Communications to a corporate subsidiary or affiliate of the card issuer.

- Communications to a third person that is responsible for conveying information from the card issuer to cardholders.

[d] Termination of Election to Exercise Right

A cardholder's election to exercise this right will terminate on the credit card issuer's receipt of a notice from the cardholder indicating that the election is no longer effective [*Civ. Code § 1748.12(d)(2)*].

[16] Invalidity of Surcharge for Use of Credit Card in Lieu of Cash

A retailer (other than certain utilities; see below) may not impose a surcharge on a consumer who elects, in any sales, service, or lease transaction, to use a credit card in lieu of cash, check, or similar means of payment. A retailer, however, may offer discounts to induce payment by cash, check, or other means not involving the use of a credit card if the discount is offered to all prospective buyers [*Civ. Code § 1748.1(a)*; *see Thrifty Oil Co. v. Superior Court (2001) 91 Cal. App. 4th 1070, 1076-1079, 111 Cal. Rptr. 2d 253* (retailer's evidence of two-tier pricing based on its costs, offered to all customers, supported motion for summary adjudication; facts established permissible offer of discount under *Civ. Code § 1748.1(a)* and pricing system consistent with legislative intent to encourage discounts under *Civ. Code § 1748.1(e)*)]. A consumer is not deemed to have elected to use a credit card in lieu of another means of payment for purposes of *Civ. Code § 1748.1* when the retailer accepts only credit cards in payment for consumer orders made over the telephone, and accepts only cash at the retailer's public store or other facility [*Civ. Code § 1748.1(c)*]. Charges for third-party credit card guarantee services, when added by the retailer to the cash price, are deemed surcharges for the purposes of *Civ. Code § 1748.1* even if they are payable directly to the third party or are charged separately [*Civ. Code § 1748.1(d)*].

A retailer who willfully violates *Civ. Code § 1748.1* and who fails to pay the amount of the surcharge to the cardholder within 30 days of the cardholder's written demand by certified mail is liable to the cardholder for three times the actual damages assessed and for costs and attorney's fees incurred in the action. A cause of action under *Civ. Code § 1748.1* may be brought in small claims court or any other appropriate court [*Civ. Code § 1748.1(b)*].

Civ. Code § 1748.1(a)-(e) do not apply to charges for payment by credit card or debit card that are made by an electrical, gas, or water corporation and approved by the Public Utilities Commission [*Civ. Code § 1748.1(f)*; *see Pub. Util. Code § 755*].

[17] Credit Card Transactions

[a] Prohibition Against Recording Personal Identification Information

Except as provided in *Civ. Code § 1747.08(c)* [*see § 127.28[17][b]*], no person, firm, partnership, association, or corporation that accepts credit cards for the transaction of business may do any of the following [*Civ. Code §*

1747.08(a)]:

- Request, or require the cardholder as a condition to accepting the credit card as payment in full or in part for goods or services, to write any personal identification information on the credit card transaction form or otherwise.

- Request, or require the cardholder as a condition to accepting the credit card as payment in full or in part for goods or services, to provide personal identification information, which the person, firm, partnership, association, or corporation accepting the credit card writes, causes to be written, or otherwise records on the credit card transaction form or otherwise.

- Use, in any credit card transaction, a credit card form that contains preprinted spaces specifically designated for filling in any personal identification information of the cardholder.

"Personal identification information" means information concerning the cardholder, other than information set forth on the credit card, and including, but not limited to, the cardholder's address and telephone number [*Civ. Code § 1747.08(b)*]. A cardholder's five-digit ZIP code is not personal identification information, and the statute does not prohibit asking for it [*Party City Corp. v. Superior Court (2008) 169 Cal. App. 4th 497, 519-520, 86 Cal. Rptr. 3d 721*].

In a case interpreting *Civ. Code § 1747.08*, the court determined that the word"request" (as added to the statute in 1991) prohibits a retailer from making a request for personal identification from the consumer if it immediately precedes a credit card transaction, even if the consumer's response is voluntary and made only for marketing purposes [*Florez v. Linens'N Things, Inc. (2003) 108 Cal. App. 4th 447, 450-453, 133 Cal. Rptr. 2d 465* (allegation that store improperly requested customer's telephone number held sufficient to state cause of action for violation of *Civ. Code § 1747.08*)].

The prohibitions do not apply when a customer who bought merchandise using a credit card subsequently returns that merchandise and requests reversal of the credit card charge [*Absher v. AutoZone, Inc. (2008) 164 Cal. App. 4th 332, 346, 78 Cal. Rptr. 3d 817*].

No person, firm, partnership, association, corporation, or limited liability company that accepts credit cards in transacting business may print more than the last five digits of the credit card's account number or its expiration date on any electronically printed receipt [*Civ. Code § 1747.09(a), (b)*], whether the receipt is given to the cardholder [*Civ. Code § 1747.09(a)(1)*] or, starting January 1, 2009, the vendor retains the receipt and the cardholder either signed it or used a personal identification number to complete the transaction [*Civ. Code § 1747.09(a)(2), (3), (d)*; *see Civ. Code § 1747.09(c)* (section does not apply to other documents used for internal administrative purposes)].

[b] Inapplicability to Cash Advances and Other Transactions

Civ. Code § 1747.08(a) [*see § 127.28[17][a]*] does not apply in the following instances [*Civ. Code § 1747.08(c)*]:

- When the credit card is being used as a deposit to secure payment in the event of default, loss, damage, or similar occurrence.

- Cash advance transactions.

- When the person or entity accepting the credit card is contractually obliged to provide personal information in order to complete the credit card transaction or is obliged to collect and record the personal identification information by federal law or regulation.

- When personal identification information is required for a special purpose incidental but related to the individual credit card transaction, including, but not limited to information relating to shipping, delivery, servicing, or installation of the purchased merchandise, or for special orders [*see also Absher v. AutoZone, Inc. (2008) 164 Cal. App. 4th 332, 346, 78 Cal. Rptr. 3d 817* (prohibitions in *Civ. Code § 1747.08(a)* do not apply when customer who bought merchandise using a credit card returns that merchandise and requests reversal of the credit card charge)].

The statute also does not apply when merchandise is being returned to the merchant from whom it was bought and the merchant intends to post a credit to the buyer's credit card account. In that situation, a court of appeal has observed, there are substantial opportunities for fraud, and it behooves the merchant to identify the person who returns the merchandise, which subsequent examination may disclose to have been used, damaged, or even stolen. Therefore, and because *Civ. Code § 1747.08(a)* cannot reasonably be construed to apply to credit card transactions in the context of a person returning merchandise to the seller, a merchant may request or require personal identification information from the person returning the merchandise, and may use a preprinted form for the purpose [*TJX Cos., Inc. v. Superior Court (2008) 163 Cal. App. 4th 80, 87-89, 77 Cal. Rptr. 3d 114*].

In addition, *Civ. Code § 1747.08* does not prohibit any person, firm, partnership, association, or corporation from requiring the cardholder, as a condition to accepting the credit card as payment in full or in part for goods or services, to provide reasonable forms of positive identification, which may include a driver's license or a California state identification card or, when one of these is not available, another form of photo identification, provided that none of the information is written or recorded on the credit transaction form or otherwise [*Civ. Code § 1747.08(d)*]. If the cardholder pays for a transaction with a credit card number and does not make the credit card available on request to verify the number, the cardholder's driver's license number may be recorded on the credit card transaction form or otherwise [*Civ. Code § 1747.08(d)*].

[c] Remedies for Wrongfully Recording Personal Information

Any person who violates *Civ. Code § 1747.08* is subject to a civil penalty of up to $250 for the first violation and up to $1,000 for each subsequent violation, to be assessed and collected in a civil action brought by the person paying with a credit card, the Attorney General, or the district attorney or city attorney of the county or city in which the violation occurred. No civil penalty will be assessed for a violation of *Civ. Code § 1747.08*, however, if the defendant shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error made notwithstanding the defendant's maintenance of procedures reasonably adopted to avoid such an error. When collected, the civil penalty is payable, as appropriate, to the person paying with a credit card who brought the action, or to the general fund of whichever governmental entity brought the action to assess the civil penalty [*Civ. Code § 1747.08(e)*]. (Although *Civ. Code § 1747.08(e)* does not explicitly remove mistakes of law from the scope of the "bona fide error" defense--whereas some other statutes allowing the same defense do exclude mistakes of law--the defense probably does not cover a violation that arose from the defendant's mistaken interpretation of statutory requirements [*cf. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA (2010) -- U.S. --, 130 S. Ct. 1605, 176 L. Ed. 2d 519, 2010 U.S. LEXIS 3480, at *15-*59* (such defense allowed by Fair Debt Collection Practices Act, *15 U.S.C. § 1692k(c)*, in same language as *Civ. Code § 1747.08(e)*, did not cover debt-collecting attorney's mistake of law as to Act's requirements)].)

In addition, the Attorney General, or any district attorney or city attorney within his or her respective jurisdiction, may bring an action in the superior court in the name of the people of the State of California to enjoin a violation and, on notice to the defendant of not less than five days, to temporarily restrain and enjoin the violation. If it appears to the satisfaction of the court that the defendant has, in fact, violated *Civ. Code § 1747.08(a)*, the court may issue an injunction restraining further violations, without requiring proof that any person has been damaged by the violation. In these proceedings, if the court finds that the defendant has violated *Civ. Code § 1747.08(a)*, the court may direct the defendant to pay any or all costs incurred by the Attorney General, district attorney, or city attorney in seeking or obtaining injunctive relief pursuant to this subdivision [*Civ. Code § 1747.08(f)*; *see* Ch. 303, *Injunctions*]. Actions for

collection of civil penalties under *Civ. Code § 1747.08(e)* may be consolidated with actions for injunction relief under *Civ. Code § 1747.08(f)* [*Civ. Code § 1747.08(g)*; *see* Ch. 125, *Consolidation, Severance, and Coordination of Actions*].

For a complaint for civil penalties for wrongfully requiring personal identificationinformation in a credit card transaction, see *§ 127.85*.

[18] Payment by Negotiable Instrument

[a] Prohibition Against Requiring Credit Card

Unless permitted under *Civ. Code § 1725(c)*, no person accepting a negotiable instrument, such as a check, as payment in full or in part for goods or services sold or leased at retail, may do any of the following [*Civ. Code § 1725(a)*; *see Civ. Code § 1725(b)(4)* (defining "retail")]:

- Require the person paying with a negotiable instrument to provide a credit card as a condition of acceptance of the negotiable instrument, or record the number of the credit card.

- Require, as a condition of acceptance of the negotiable instrument, or cause the person paying with a negotiable instrument to sign a statement agreeing to allow his or her credit card to be charged to cover the negotiable instrument if returned as no good.

- Record a credit card number in connection with any part of the transaction described in *Civ. Code § 1725(a)*.

- Contact a credit card issuer to determine if the amount of any credit available to the person paying with a negotiable instrument will cover the amount of the negotiable instrument.

[b] Inapplicability to Specified Transactions

Civ. Code § 1725 does not prohibit any person from requiring the production of reasonable forms of positive identification, other than a credit card, or, when one of these is not available, another form of photo identification, which may include a driver's licence or a California state identification card, as a condition of acceptance of a negotiable instrument [*Civ. Code § 1725(c)(1)*]. In addition, *Civ. Code § 1725* does not prohibit any person from requesting but not requiring that a purchaser voluntarily display a credit card as an indicia of creditworthiness or financial responsibility, or as an additional identification, provided the only information concerning the credit card that is recorded is the type of credit card displayed, the issuer of the card, or the expiration date of the card [*Civ. Code § 1725(c)(2)*]. All retailers that request the display of a credit card pursuant to *Civ. Code § 1725(c)* must inform the customer by either of two methods (posting a notice to that effect in a conspicuous location, or training and requiring sales clerks to so inform check writing customers) that displaying the credit card is not a requirement for check writing [*Civ. Code § 1725(c)(2)(A)-(B)*].

Finally, *Civ. Code § 1725* does not prohibit any person from doing the following [*Civ. Code § 1725(c)(3)-(6)*]:

- Requesting production of, or recording, a credit card number as a condition for cashing a check that is being used solely to receive cash back from the person.

- Requesting, receiving, or recording a credit card number in lieu of requiring a deposit to secure payment in event of default, loss, damage, or other occurrence.

- Requiring, verifying, and recording the purchaser's name, address, and telephone number.

- Requesting or recording a credit card number on a check used to make a payment on that credit card account.

Civ. Code § 1725 does not require acceptance of a negotiable instrument, whether or not a credit card is presented [*Civ. Code § 1725(d)*].

For purposes of *Civ. Code § 1725*, "negotiable instrument" has the meaning specified in *Com. Code § 3104* [*Civ. Code § 1725(b)(3)*; *see also* Ch. 385, *Negotiable Instruments*]. "Credit card" has the meaning specified in *Civ. Code § 1747.02* (discussed in *§ 127.28[2][a]*), and does not include a check guarantee card, as defined in *Civ. Code § 1725(b)(1)* [*Civ. Code § 1725(b)(2)*].

[c] Remedies for Wrongfully Requiring Credit Card

Any person who violates *Civ. Code § 1725* is subject to a civil penalty of up to $250 for a first violation and up to $1,000 for a second or subsequent violation, to be assessed and collected in a civil action brought by the person paying with a negotiable instrument, the Attorney General, or the district attorney or city attorney of the county or city in which the violation occurred. No civil penalty can be assessed for a violation of *Civ. Code § 1725*, however, if the defendant shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error made notwithstanding the defendant's maintenance of procedures reasonably adopted to avoid such an error. When collected, the civil penalty is payable, as appropriate, to the person paying with a negotiable instrument or to the general fund of whatever governmental entity brought the action to assess the civil penalty [*Civ. Code § 1725(e)*]. (Although *Civ. Code § 1725(e)* does not explicitly remove mistakes of law from the scope of the "bona fide error" defense--whereas some other statutes allowing the same defense do exclude mistakes of law--the defense probably does not cover a violation that arose from the defendant's mistaken interpretation of statutory requirements [*cf. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA (2010) -- U.S. --, 130 S. Ct. 1605, 176 L. Ed. 2d 519, 2010 U.S. LEXIS 3480, at *15-*59* (such defense allowed by Fair Debt Collection Practices Act, *15 U.S.C. § 1692k(c)*, in same language as *Civ. Code § 1725(e)*, did not cover debt-collecting attorney's mistake of law as to Act's requirements)].)

In addition, the Attorney General, or any district attorney or city attorney within his or her respective jurisdiction, may bring an action in the superior court in the name of the people of the State of California to enjoin a violation and, on notice to the defendant of not less than five days, to temporarily restrain and enjoin the violation. If it appears to the satisfaction of the court that the defendant has, in fact, violated *Civ. Code § 1725(a)*, the court may issue an injunction restraining further violations, without requiring proof that any person has been damaged by the violation. In these proceedings, if the court finds that the defendant has violated *Civ. Code § 1725(a)*, the court may direct the defendant to pay any or all costs incurred by the Attorney General, district attorney, or city attorney in seeking or obtaining injunctive relief pursuant to this subdivision [*Civ. Code § 1725(f)*; *see* Ch. 303, *Injunctions*]. Actions for collection of civil penalties under *Civ. Code § 1725(e)* may be consolidated with actions for injunction relief under *Civ. Code § 1725(f)* [*Civ. Code § 1725(g)*; *see* Ch. 125, *Consolidation, Severance, and Coordination of Actions*].

For a complaint for civil penalties for wrongfully requiring personal identification information in a credit card transaction, see *§ 127.90*.

[19] Federal Fair Credit Billing Act

[a] Provisions of Act

The federal Fair Credit Billing Act [*15 U.S.C. § 1666 et seq.*] contains provisions that govern the correction of billing errors [*see 15 U.S.C. § 1666*], the information contained in credit reports about consumers who dispute bills [*see 15 U.S.C. § 1666a*], and the timely mailing of statements when a grace period is allowed [*15 U.S.C. § 1666b*]. In addition,

the act contains provisions concerning the prompt crediting of payments [*see 15 U.S.C. § 1666c*], the refunding or crediting of excess payments [*see 15 U.S.C. § 1666d*], and the notification of credit card issuers by sellers of the return of goods by obligors [*see 15 U.S.C. § 1666e*]. Provisions governing cash discounts for payments by cash, check, or similar means [*see 15 U.S.C. § 1666f*], tie-in services and the issuance of credit cards [*see 15 U.S.C. § 1666g*], and the offset of a cardholder's indebtedness by the card issuer with funds deposited with the issuer by the cardholder [*see 15 U.S.C. § 1666h*] are also contained in the act. Finally, the act delineates the claims and defenses a cardholder may assert against a card issuer [*see 15 U.S.C. § 1666i*]. For a discussion of credit cards and the federal Truth in Lending Act, see Ch. 501, *Sales: Retail Installment Sales* .

[b] Applicability of State Laws

The federal Fair Credit Billing Act does not annul, alter, affect, or exempt any person subject to the provisions of the act from complying with the laws of any state with respect to credit billing practices, except to the extent that those laws are inconsistent with any provision of the act, and then only to the extent of the inconsistency. A state law may not be determined to be inconsistent with any provisions of the act if that law gives greater protection to the consumer [*15 U.S.C. 1666j*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionCredit Card AgreementsLiabilityBanking LawConsumer ProtectionEqual Credit OpportunityDiscriminatory ActsBanking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionTruth in LendingDisclosureBanking LawConsumer ProtectionUnfair & Deceptive Credit Practices

California Forms of Pleading and Practice--Annotated

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Chapter 127 CONSUMER CONTRACTS AND LOANS
PART II. LEGAL BACKGROUND

13-127 California Forms of Pleading and Practice--Annotated § 127.29

§ 127.29 Discrimination in Credit Transactions Based on Sex and Marital Status

[1] Governing Law

Discrimination in credit transactions on the basis of sex and marital status is regulated by *Civ. Code § 1812.30 et seq.*

[2] Definitions

[a] Credit

"Credit" is the obtainment of money, property, labor, or services on a deferred-payment basis [*Civ. Code § 1812.30(g)*].

[b] Earnings

"Earnings" include, but are not limited to, spousal and child support payments, pensions, social security, and disability or survivorship benefits. Spousal and child support payments are considered in the same manner as earnings from salary, wages, or other sources where the payments are received pursuant to a written agreement or court decree to the extent that the reliability of such payments is established. The factors which a creditor may consider in evaluating the reliability of such payments are the length of time payments have been received, the regularity of receipt, and whether full or partial payments have been made [*Civ. Code § 1812.30(h)*].

[3] Circumstances Under Which Denial of Credit Prohibited

No person, regardless of marital status, may be denied credit in his or her own name if the earnings and other property over which he or she has management and control are such that a person of the opposite sex managing and controlling the same amount of earnings and other property would receive credit [*Civ. Code § 1812.30(a)*].

No unmarried person may be denied credit if his or her earnings and other property are such that a married person managing and controlling the same amount of earnings and other property would receive credit [*Civ. Code § 1812.30(c)*].

[4] Circumstances Under Which Less Favorable Credit Terms Prohibited

No person, regardless of marital status, managing and controlling earnings and other property, may be offered credit on terms less favorable than those offered to a person of the opposite sex seeking the same type of credit and managing and controlling the same amount of earnings and other property [*Civ. Code § 1812.30(b)*].

No unmarried person may be offered credit on terms less favorable than those offered to a married person managing and controlling the same amount of earnings and other property [*Civ. Code § 1812.30(d)*].

[5] Credit Information Filed Under Names of Joint Credit Account Holders

A credit reporting agency which in its normal course of business either receives information on joint credit accounts identifying the persons responsible for such accounts or receives information which reflects the participation of both spouses, must: (1) at the time the information is received, file the information separately under the names of each person or spouse, or file the information in another manner that would enable either person or spouse to gain access automatically to the credit history without having in any way to list or refer to the name of the other person, and (2) provide access to all information about the account in the name of each person or spouse [*Civ. Code § 1812.30(e)*].

For all accounts established prior to January 1, 1977, a credit reporting agency must, at any time on the written or personal request of a person who is or has been married, verify the contractual liability, the liability by operation of law, or the authorized use by that person, of joint credit accounts appearing in the file of the person's spouse or former spouse, and, if applicable, file the information separately and thereafter continue to do so under the names of each person responsible for the joint account or in another manner that would enable either person responsible for the joint account to gain access automatically to the credit history without having in any way to list or refer to the name of the other person [*Civ. Code § 1812.30(f)*].

[6] Relevant Factors in Determining Whether to Extend Credit

Nothing in *Civ. Code §§ 1812.30-1812.35* will be construed to prohibit a person from doing any of the following [*Civ. Code § 1812.30(i)*]:

- Utilizing an evaluation of the reliability of earnings provided that such an evaluation is applied to persons without regard to their sex or marital status.

- Inquiring into and utilizing an evaluation of the obligations for which community property is liable pursuant to the provisions of *Fam. Code § 700 et seq.* (obligations and property rights of husbands and wives) for the sole purpose of determining the creditor's rights and remedies with respect to the particular extension of credit, provided that it is done with respect to all applicants without regard to their sex.

- Utilizing any other relevant factors or methods in determining whether to extend credit to an applicant provided that such factors or methods are applicable to all applicants without regard to their sex or marital status. The fact that an applicant is of child-bearing age is not a relevant factor.

[7] Availability of Separate Accounts

Credit applications for obtaining money, goods, labor, or services must clearly specify that the applicant, if married, may apply for a separate account [*Civ. Code § 1812.30(j)*].

[8] Action for Damages

Any person who violates *Civ. Code § 1812.30* is liable to the aggrieved person in an amount equal to the sum of any

actual damages sustained by that person acting either in an individual capacity or as a representative of a class [*Civ. Code § 1812.31(a)*].

Any person who violates *Civ. Code § 1812.30* is liable to the aggrieved person for punitive damages in an amount not greater than $10,000 as determined by the court, in addition to any actual damages. However, in pursuing the recovery of punitive damages under *Civ. Code § 1812.31(b)*, the aggrieved person may proceed only in an individual capacity and not as a representative of a class [*Civ. Code § 1812.31(b)*].

Notwithstanding *Civ. Code § 1812.31 (b)*, any person who violates *Civ. Code § 1812.30* may be liable for punitive damages in the case of a class action in such an amount as the court may allow, except that as to each member of the class no minimum recovery is applicable, and the total recovery in such action may not exceed the lesser of $100,000 or one percent of the net worth of the creditor. In determining the amount of the award in any class action, the court must consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of violations, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's violation was intentional [*Civ. Code § 1812.31(c)*]. For a discussion and forms relating to class actions, see Ch. 120, *Class and Representative Actions* .

[9] Injunctive Relief

Any person or organization that violates or proposes to violate *Civ. Code §§ 1812.30-1812.35* may be enjoined by any court of competent jurisdiction. Actions for injunction may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in California in the name of the people of the State of California or by any person denied credit or offered credit in violation of *Civ. Code § 1812.30* [*Civ. Code § 1812.32*].

[10] Costs of Action and Attorney's Fees

Any person denied credit or offered credit in violation of *Civ. Code § 1812.31* or *1812.32* may petition the court for award of costs and reasonable attorney's fees which the court will award if the action is successful [*Civ. Code § 1812.34*].

[11] Statute of Limitations

Any action commenced pursuant to *Civ. Code § 1812.31* must be commenced within two years from the date on which the person is denied credit or is offered credit in violation of *Civ. Code § 1812.30* [*Civ. Code § 1812.35*].

[12] Federal Equal Credit Opportunity Act

The federal Equal Credit Opportunity Act [*15 U.S.C. §§ 1691-1691f*] is similar to *Civ. Code §§ 1812.30-1812.35* which regulates discrimination in credit transactions in California, but the federal act sets forth more bases on which a creditor cannot discriminate. The federal law states that it is unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction: (1) on the basis of race, color, religion, national origin, sex or marital status, or age (provided the applicant has the capacity to contract); (2) because all or part of the applicant's income derives from a public assistance program; or (3) because the applicant has in good faith exercised any right under the act [*15 U.S.C. § 1691(a)*]. The federal act requires that an applicant be notified of a creditor's action on the credit application within 30 days after receipt of the application. Applicants against whom adverse action is taken are entitled to a statement of specific reasons for such action [*15 U.S.C. § 1691(d)(1), (2), (3)*].

Any creditor who fails to comply with the federal act is liable to the aggrieved applicant for any actual damages sustained by the applicant acting in an individual capacity or as a member of a class [*15 U.S.C. § 1691(a)*]. In addition to actual damages, a noncompliant creditor is also liable for punitive damages in an amount not greater than $10,000, except that in the case of a class action the total recovery may not exceed $500,000 or one percent of the net worth of

the creditor [*15 U.S.C. § 1691(b)*]. Any action may be brought in the appropriate United States district court without regard to the amount in controversy, or in any other court or competent jurisdiction within two years from the date of the violation, but when a civil action is brought by the Attorney General orwhen an enforcement proceeding is brought by an administrative agency, the action may be brought within one year after the commencement of the proceeding or action [*15 U.S.C. § 1691(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionEqual Credit OpportunityDiscriminatory ActsBanking LawConsumer ProtectionEqual Credit OpportunityLiabilityCivil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesDamagesPunitive DamagesGovernmentsLegislationStatutes of LimitationsTime Limitations

California Forms of Pleading and Practice--Annotated

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13-127 California Forms of Pleading and Practice--Annotated § 127.30

§ 127.30 Creditor Remedies in Transactions Involving Credit Disability Insurance

[1] Governing Law

Civ. Code § 1812.400 et seq. imposes limitations on the remedies available to a creditor when the debtor in a credit transaction cannot meet his or her obligations because of a disability covered by a policy of credit disability insurance.

[2] Definitions

[a] Credit Disability Insurance

The term "credit disability insurance" means insurance of a debtor to provide indemnity for payments becoming due on a specific loan or other credit transaction while the debtor is disabled as defined in the policy [*Civ. Code § 1812.401(a)*].

[b] Creditor

The term "creditor" means the lender of money or vendor or lessor of goods, services, property, rights, or privileges, for which payment is arranged through a credit transaction, who has directly participated in, arranged, or received a commission or other compensation for the sale of credit disability insurance to the debtor, or any successor to the right, title, or interest of any such lender, vendor, or lessor, and an affiliate, associate, or subsidiary of any of them or any director, officer, or employee of any of them or any other person in any way associated with any of them [*Civ. Code § 1812.401(b)*].

[c] Creditor's Remedy

The term "creditor's remedy" means the imposition of any late charge or penalty, the acceleration of the maturity of all or any part of the indebtedness, the collection or assignment for collection of all or any part of the indebtedness, the commencement of any action or special proceeding, or the enforcement of any security interest in any manner including, but not limited to, repossession, foreclosure, or the exercise of a power of sale contained in a deed of trust or mortgage [*Civ. Code § 1812.401(d)*].

[d] Debtor

The term "debtor" means a borrower of money or a purchaser or lessee of goods, services, property, rights, or privileges for which payment is arranged through a credit transaction [*Civ. Code § 1812.401(c)*].

[e] Disability Claim Period

The term "disability claim period" or "claim period" means the period beginning on the due date of the first payment not paid by the debtor for which the debtor claims disability coverage arising from a then-current disability and continuing until three calendar months thereafter or until the insurer pays or rejects the claim, whichever occurs sooner [*Civ. Code § 1812.401(e)*].

[f] Open-End Credit Plan

The term "open-end credit plan" means credit extended by a creditor under a plan in which the creditor reasonably contemplates repeated transactions, the creditor may impose a finance charge from time to time on an outstanding unpaid balance, and the amount of credit that may be extended to the debtor during the term of the plan, up to any limit set by the creditor, is generally made available to the extent that any outstanding balance is repaid [*Civ. Code § 1812.405*].

[g] Notice

"Notice" to a creditor means written notice deposited in the United States mail postage prepaid, addressed to the creditor at the location where payments on the loan or credit transaction are normally required to be sent by the debtor. A creditor may elect to require that written notice be sent to a different location or may elect to accept telephonic notice to a telephone number specified by the creditor. In either case, in lieu of notice being sent to the location where payments are regularly required to be sent, that location or telephone number must be clearly and conspicuously disclosed as the proper place to direct any notice to the creditor relating to any claim of disability, on each monthly billing or on each payment coupon, or (if payments are automatically deducted from an account of the debtor) on the annual statement of loan activity [*Civ. Code § 1812.401(f)*].

[3] Legislative Findings

The Legislature has declared that it is unfair for a creditor who has directly participated in, arranged, or received a commission or other compensation for the sale of credit disability insurance to the debtor, or that creditor's successor in interest, to invoke a creditor's remedy because of a debtor's nonpayment of any sum that has become due during a period of disability until a reasonable time has passed for the disability insurance claim to be filed, verified, and processed [*Civ. Code § 1812.400*; *see McManis v. San Diego Postal Credit Union (1998) 61 Cal. App. 4th 547, 557-558, 71 Cal. Rptr. 2d 617]* .

[4] Applicability

[a] Transactions Covered

The provisions of *Civ. Code §§ 1812.400 et seq.* apply to the nonpayment of any sum that became due on or after April 1, 1984, and for which the debtor claims disability coverage [*Civ. Code § 1812.407*].

[b] Limitations

Civ. Code § 1812.400 et seq. apply only if the creditor, the predecessor to the right, title, or interest of the creditor, or the representative of either of them directly arranges or participates in the sale or receives a commission or other

compensation for the sale of credit disability insurance to the debtor [*Civ. Code § 1812.404*; *see* discussion under [2][b], *above*]. These provisions do not apply to credit disability insurance covering a key person, who the creditor and debtor or debtors agree must be involved in the operation of a business to assure its success, when the creditor requires the coverage as a condition of making a loan of at least $25,000 to be used in the operation of a business in which the key person is employed or has an ownership interest [*Civ. Code § 1812.406*].

Civ. Code § 1812.400 et seq. do not apply to a loan or credit transaction (including an open line of credit) of more than 10 years' duration that is secured by a mortgage or deed of trust unless (1) the principal purpose of the loan is the construction (other than initial construction), rehabilitation, or improvement of real property consisting of four or fewer residential units, and (2) a document in existence at the time the loan or extension of credit was made would indicate that purpose [*Civ. Code § 1812.406(b)*]. The exclusion provided for in *Civ. Code § 1812.406(b)* does not apply to debtors who were entitled to receive initial disclosure from the creditor pursuant to *Civ. Code § 1812.402(f)* between January 1, 1984 and September 17, 1984 (the effective date of *Civ. Code § 1812.406(b)*), unless the debtor receives notice that the remedies provided by *Civ. Code § 1812.400 et seq.* are revoked, the debtor is given the opportunity to cancel the insurance, no claim has been made, and no notice of disability has been given, as provided in *Civ. Code § 1812.401*. If such a debtor does not cancel the insurance after receipt of the notice of revocation, *Civ. Code § 1812.406(b)* will apply on payment by the debtor of the next installment of premium [*Civ. Code § 1812.406(c)*].

[5] Disclosure Requirements

[a] Creditors

At the time the insurance is sold, the creditor must disclose to the debtor the obligations of the creditor and the debtor imposed by *Civ. Code § 1812.402* in writing in at least 10-point type, in substantially the form set out in *Civ. Code § 1812.402(f)(1)*[*Civ. Code § 1812.402(f)*]. No specific consequences are prescribed for a failure to do so beyond the general provision authorizing a cause of action for a violation of *Civ. Code § 1812.400 et seq.* [*Civ. Code § 1812.402(i)*; *see* discussion under [8], *below*].

When a creditor receives notice of the debtor's claim of disability, the creditor must inform the debtor in writing of the name, address, and telephone number of the insurer or its designated representative from whom the debtor may obtain claim forms. The successor in interest of the original creditor need not do so, however, if the successor in interest (1) is not related by common ownership and control to the original creditor, and (2) has no information regarding the name, address, and telephone number of the insurer or its designated representative [*Civ. Code § 1812.402(b)*].

[b] Insurers

An insurer or its designated representative must send necessary claim forms to a debtor when the former receives notice of the debtor's disability claim [*Civ. Code § 1812.402(b)*]. When an insurer sends claim forms to the debtor, the insurer must also include a written notice disclosing the obligations of the creditor and the debtor imposed by *Civ. Code § 1812.402* in at least 10-point type, in substantially the form set out in *Civ. Code § 1812.402(f)(2)* [*Civ. Code § 1812.402(f)*]. No specific consequences are prescribed for a failure to do so beyond the general provision authorizing a cause of action for a violation of *Civ. Code § 1812.400 et seq.* [*Civ. Code § 1812.402(I)*; *see* discussion under [8], *below*].

The debtor must submit the claim to the insurer or its designated representative and must notify the creditor that a claim has been submitted [*Civ. Code § 1812.402(b)*; *see Civ. Code § 1812.401(f)* (notice requirements)].

[6] Limitations on Creditors' Remedies

[a] Generally

A creditor cannot invoke any creditor's remedy against a debtor because of the debtor's nonpayment of any sum that becomes due during any disability claim period, and for which credit disability insurance coverage is provided, subject to the provisions of *Civ. Code § 1812.400 et seq.* [*Civ. Code § 1812.402(a)*; *see* discussion under [9], *below*]. If the insurer pays the claim within the disability claim period, the creditor must treat each payment made by the insurer as though it were timely made by the debtor. If the insurer rejects the claim, or accepts the claim as a partial disability resulting in a payment of less than the full amount that would be paid for the total disability, within the disability claim period, the debtor must begiven the opportunity to pay the amount that became due during the disability claim period, minus any partial payment made by the insurer, without being subject to any creditor's remedy except the imposition of late charges, for 35 days following the date that the insurer sends notice of the rejection of the claim or acceptance of the claim as a partial disability. If the payment is not made within 35 days, the creditor may then invoke any creditor's remedy [*Civ. Code § 1812.402(e)*].

[b] Exception for Sums Due Before Disability

A creditor is not prohibited from invoking any creditor's remedy during or after the disability claim period for the debtor's nonpayment of any sum due before the claim period, whether or not the nonpayment is related to the claimed disability, or for the debtor's nonpayment of any interest, finance charge, or late charge accruing during the claim period on any sum due before the claim period [*Civ. Code § 1812.402(c)*].

[c] Exception for Foreclosure by Senior Lienholder

A creditor may also foreclose a lien on property to protect his or her security interest if a senior lienholder on that property (1) has initiated the foreclosure of its lien; (2) is not prohibited from continuing the foreclosure by any law or order of court; or (3) will not otherwise suspend or delay its foreclosure proceeding until after the disability claim period [*Civ. Code § 1812.402(d)*]. The disjunctive nature of this provision makes it appear that the existence of any of the alternatives will be sufficient to allow a creditor to foreclose a lien, although each alternative seems to assume that a proceeding to foreclose the lien has been initiated by the senior lienholder. Clarification of this apparent ambiguity awaits judicial interpretation or legislative amendment.

[d] Exception for Open-End Credit Plans

A creditor may also invoke any creditor's remedy as a result of a debtor's nonpayment when due of any amount obtained under an open-end credit plan after the debtor has given notice of a disability claim, unless the nonpayment is related to a covered disability, then affecting the debtor, that is other than the disability previously claimed. Termination of the open-end credit plan by the creditor because the debtor does not meet the creditor's customary credit standards at the time the debtor notifies the creditor of the disability claim is not a creditor's remedy for the purposes of *Civ. Code § 1812.400 et seq.* [*Civ. Code § 1812.405*; for the definition of an open-end credit plan, *see* [2][f], *above*].

[e] Exception for Debtor's Failure to Submit Forms to Insurer

A creditor may also invoke any creditor's remedy 15 days after receiving notice that the insurer has ceased making payments on a credit disability insurance claim because of the debtor's failure to submit timely any forms required by the insurer for recertification of a temporary disability [*Civ. Code § 1812.403*].

[f] Effect of Creditor's Lack of Knowledge of Disability Claim

If a creditor sends a notice of delinquency to a debtor who has not made a payment, and thereafter invokes a creditor's remedy because of the nonpayment without knowledge of the debtor's claim of disability coverage, and the provisions of *Civ. Code § 1812.400 et seq.* would otherwise apply, on receipt of notice of the debtor's claim the creditor must not invoke any further creditor's remedy during the claim period and the period provided by *Civ. Code § 1812.402(e)* [*Civ. Code § 1812.402(g)(1)*; *see* discussion under [2][e], *above*]. The creditor must also rescind every creditor's remedy that

has been invoked relating to the delinquency for which coverage is claimed, except that the creditor is not obligated to restore property that has been sold in a bona fide lawful sale to any person not related by common ownership or control to the creditor [*Civ. Code § 1812.402(g)(2)*]. The debtor is liable for costs and expenses actually incurred in connection with the invocation or rescission of any creditor's remedy [*Civ. Code § 1812.402(g)(3)*]. If the creditor complies with the requirements of *Civ. Code § 1812.402(g)(1)* and *(2)*, the creditor will not be in violation of the provisions of *Civ. Code § 1812.400 et seq.*, and no liability under *Civ. Code § 1812.402(I)* will result [*Civ. Code § 1812.402(g)(4)*; *see* discussion under [8], *below*].

[7] Bona Fide Purchasers Protected After Creditor's Violation

Civ. Code § 1812.400 et seq. will not affect or defeat an interest in the debtor's property acquired, after the creditor invokes a remedy in violation of *Civ. Code § 1812.400 et seq.*, by a bona fide purchaser or encumbrancer for value and without notice of the facts that constitute the violation [*Civ. Code § 1812.409*].

[8] Action Authorized

A debtor may bring an action for damages, equitable relief, or other relief for any violation of *Civ. Code § 1812.400 et seq.* [*Civ. Code § 1812.402(I)*; *see 127.110*].

Violations of these provisions can also affect other causes of action. For example, in a breach of contract action by a debtor against a credit union for wrongful repossession of a car while the debtor's credit disability insurance claim was pending, the debtor was allowed to assert *Civ. Code § 1812.400 et seq.* as an independent basis for reversing summary judgment in favor of the credit union, even though the debtor had never pled a separate cause of action under those sections. The court held that the act nevertheless was relevant because it showed that the credit union failedto satisfy its burden to negate the debtor's breach of contract theory. Under the express terms of the agreement between the debtor and the credit union, the credit union was entitled to repossess the vehicle if (1) the loan was in default, and (2) the repossession was "permitted by law." Under the facts, the repossession was not "permitted by law" because the credit union violated *Civ. Code § 1812.401(d)* [*see* [2][c], *above*] by moving for relief from a bankruptcy stay in a related proceeding initiated by the debtor, proffered no evidence that it made required disclosures under *Civ. Code § 1812.402(f)* [*see* [5][a], *above*], and produced no evidence showing that under Civ. Code § 1802.402(e) [*see* [6][a], *above*] it permitted the debtor 35 days to satisfy the outstanding debt once the insurer agreed to partially accept the claim [*see McManis v. San Diego Postal Credit Union (1998) 61 Cal. App. 4th 547, 557-558, 71 Cal. Rptr. 2d 617]* .

[9] Remedies Cumulative

The rights and remedies afforded debtors by *Civ. Code § 1812.400 et seq.* are cumulative to each other and to all other rights and remedies that the debtors may have under other laws [*Civ. Code § 1812.402(h)*].

[10] Provisions Not Waivable by Debtor

Any waiver by the debtor of the provisions of *Civ. Code § 1812.400 et seq.* is void and unenforceable [*Civ. Code § 1812.408*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionState LawRemediesCivil ProcedureEquityReliefInsurance LawDisability InsuranceGeneral Overview

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§ 127.31 Consumer Loans Secured by Real Property

[1] Governing Law

Consumer loans secured by real property are governed by *Fin. Code § 4970 et seq.*

[2] Definitions

[a] Annual Percentage Rate

The term "annual percentage rate" means the annual percentage rate for the loan calculated according to the provisions of the federal Truth in Lending Act [*see 15 U.S.C. § 1601 et seq.*] and the regulations adopted under that act by the Federal Reserve Board [*Fin. Code § 4970(a)*]. For discussion of the Act and Regulation Z (concerning formalities and disclosures under the Act), see Ch. 501, *Sales: Retail Installment Sales* .

[b] Consumer Loan

"Consumer loan" means a consumer credit transaction that is secured by real property located in California used, or intended to be used or occupied, as the principal dwelling of the consumer that is improved by a one-to-four residential unit. "Consumer loan" does not include a reverse mortgage, an open line of credit as defined in Regulation Z [*see 12 C.F.R. § 226.1 et seq.*], or a consumer credit transaction that is secured by rental property or second homes. "Consumer loan" does not include a bridge loan with a maturity of less than one year if the purpose of the loan is a bridge loan connected with the acquisition or construction of a dwelling intended to become the consumer's principal dwelling [*Fin. Code § 4970(d)*].

[c] Covered Loan

A "covered loan" is a consumer loan in which the original principal balance of the loan does not exceed the most current conforming loan limit for a single-family first mortgage loan established by the Federal National Mortgage Association in the case of a mortgage or deed of trust, and with respect to which one of the following conditions is met [*Fin. Code § 4970(b)*]:

- For a mortgage or deed of trust, the annual percentage rate at consummation of the transaction will exceed by more than 8 percentage points the yield on Treasury securities having comparable periods of maturity on the 15th day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor.

- The total points and fees payable by the consumer at or before closing for a mortgage or deed of trust will exceed 6 percent of the total loan amount [*see Wolski v. Fremont Inv. & Loan (2005) 127 Cal. App. 4th 347, 350, 25 Cal. Rptr. 3d 500* (transaction was not covered loan when total points and fees exceeded 6 percent only if yield-spread premium was included); *see also* [h], *below*].

[d] Licensed Person

"Licensed person" means any of the following [*Fin. Code § 4970(g)*]:

- A real estate broker licensed under the Real Estate Law [*see Bus. & Prof. Code § 10000 et seq.*].

- A commercial or industrial bank organized under the Banking Law [*see Fin. Code § 99 et seq.*].

- A savings association organized under the Savings Association Law [*see Fin. Code § 5000 et seq.*].

- A credit union organized under the California Credit Union Law [*see Fin. Code § 14000 et seq.*].

- A finance lender or broker licensed under the California Finance Lenders Law [*see Fin. Code § 22000 et seq.*].

- A residential mortgage lender licensed under the California Residential Mortgage Lending Act [*see Fin. Code § 50000 et seq.*].

A licensed person includes any person engaged in the practice of consumer lending, as defined in *Fin. Code § 4970 et seq.*, for which a licenseis required under any other provision of law, but whose license is invalid, suspended or revoked, or where no license has been obtained [*Fin. Code § 4970(g)*].

Nothing in *Fin. Code § 4970 et seq.* prevents any enforcement by a governmental entity against any person who originates a loan and who is exempt or excluded from licensure by all of the licensing agencies, based on a violation of any provision of *Fin. Code § 4970 et seq.* In addition, nothing in *Fin. Code § 4970 et seq.* prevents the Department of Real Estate from enforcing *Fin. Code § 4970 et seq.* against a licensed salesperson employed by a licensed real estate broker as if that salesperson were a licensed person under *Fin. Code § 4970 et seq.* [*Fin. Code § 4970(g)*].

[e] Licensing Agency

"Licensing agency" means the Department of Real Estate for licensed real estate brokers, the Department of Corporations for licensed residential mortgage lenders and licensed finance lenders and brokers, and the Department of Financial Institutions for commercial and industrial banks and savings associations and credit unions organized in California [*Fin. Code § 4970(f)*].

[f] Original Principal Balance

"Original principal balance" means the total initial amount the consumer is obligated to repay on the loan [*Fin. Code § 4970(e)*].

[g] Originate

"Originate" means to arrange, negotiate, or make a consumer loan [*Fin. Code § 4970(h)*].

[h] Points and Fees

"Points and fees" includes the following:

- All items required to be disclosed as finance charges under *12 C.F.R. § 226.4(a)* and *(b)*, including the Official Staff Commentary, as amended from time to time, except interest [*Fin. Code § 4970(c)(1)*].

- All compensation and fees paid to mortgage brokers in connection with the loan transaction [*Fin. Code § 4970(c)(2)*].

- All items listed in *12 C.F.R. § 226.4(c)(7)*, only if the person originating the covered loan receives direct compensation in connection with the charge [*Fin. Code § 4970(c)(3)*].

A "yield spread premium" (YSP) paid in connection with a residential mortgage loan was held *not* to be included in the definition of points and fees payable by a borrower at or before closing under *Fin. Code § 4970* [*Wolski v. Fremont Investment & Loan (2005) 127 Cal. App. 4th 347, 350, 25 Cal.Rptr. 3d 500* (transaction did not violate predatory lending law because it was not "covered loan"; total points and fees exceeded six percent only if YSP was included)].

For discussion of the referenced federal regulations (concerning components of the finance charge under the federal Truth in Lending Act), see Ch. 501, *Sales: Retail Installment Sales* .

[i] Servicer

The term "servicer" has the same meaning provided in *12 U.S.C. § 2605(I)(2)* (in the Real Estate Settlement Procedures Act of 1974) [*Fin. Code § 4970(I)*].

[3] Exemptions

Fin. Code § 4970 et seq. do not apply to persons chartered by Congress to engage in secondary mortgage market transactions [*Fin. Code § 4979.8*]. These provisions also do not impose liability on an assignee that is a holder in due course [*Fin. Code § 4979.8*].

[4] Prohibited Loan Provisions and Acts

[a] Prepayment Penalty

A covered loan may not include a prepayment fee or penalty after the first 36 months after the date of consummation of the loan [*Fin. Code § 4973(a)(1)*]. A covered loan may include a prepayment fee or penalty *up to* the first 36 months after the date of consummation of the loan if all of the following conditions are satisfied:

- The person who originates the covered loan has also offered the consumer a choice of another product without a prepayment fee or penalty [*Fin. Code § 4973(a)(2)(A)*].

- The person who originates the covered loan has disclosed in writing to the consumer at least three business days prior to loan consummation the terms of the prepayment fee or penalty to the consumer for accepting a covered loan with the prepayment penalty and the rates, points, and fees that would be available to the consumer for accepting a covered loan without a prepayment penalty [*Fin. Code §*

4973(a)(2)(B)].

- The person who originates the covered loan has limited the amount of the prepayment fee or penalty to an amount not to exceed the payment of six months advance interest, at the contract rate of interest then in effect, on the amount prepaid in any 12-month period in excess of 20 percent of the original principal amount [*Fin. Code § 4973(a)(2)(C)*].

- A covered loan will not impose the prepayment fee or penalty if the covered loan is accelerated as a result of default [*Fin. Code § 4973(a)(2)(D)*].

- The person who originates the covered loan will not finance a prepayment penalty through a new loan that is originated by the same person [*Fin. Code § 4973(a)(2)(E)*].

[b] Payment Schedule

A covered loan with a term of five years or less must not provide at origination for a payment schedule with regular periodic payments that,when aggregated, do not fully amortize the principal balance as of the maturity date of the loan [*Fin. Code § 4973(b)(1)*].

For a payment schedule that is adjusted to account for the seasonal or irregular income of the consumer, the total installments in any year must not exceed the amount of one year's worth of payments on the loan. This prohibition does not apply to a "bridge loan," which is a loan with a maturity of less than 18 months that only requires payments of interest until the time when the entire unpaid balance is due and payable [*Fin. Code § 4973(b)(2)*].

A covered loan must not contain a provision for negative amortization under which the payment schedule for regular monthly payments causes the principal balance to increase, unless the covered loan is a first mortgage and the licensed person discloses to the consumer that the loan contains a negative amortization provision that may add principal to the balance of the loan [*Fin. Code § 4973(c)*].

[c] Payments From Loan Proceeds

A covered loan must not include terms under which periodic payments required under the loan are consolidated and paid in advance from the loan proceeds [*Fin. Code § 4973(d)*].

A person who originates a covered loan must not pay a contractor under a home improvement contract from the proceeds of a covered loan other than by an instrument payable to the consumer or jointly to the consumer and the contractor or, at the election of the consumer, to a third-party escrow agent for the benefit of the contractor in accordance with terms and conditions established in a written escrow agreement signed by the consumer, the person who originates a covered loan, and the contractor prior to the disbursement of funds. No payments, other than progress payments for home improvement work that the consumer certifies is completed, may be made to an escrow account or jointly to the consumer and the contractor unless the person who originates the loan is presented with a signed and dated completion certificate by the consumer showing that the home improvement contract was completed to the satisfaction of the consumer [*Fin. Code § 4973(g)*].

[d] Interest Rate

A covered loan may not contain a provision that increases the interest rate as a result of a default. However, this does not apply to interest rate changes in a variable rate loan otherwise consistent with the provisions of the loan documents, provided the change in the interest rate is not triggered by the event of default or the acceleration for the indebtedness [*Fin. Code § 4973(e)*].

[e] Acceleration

A covered loan must not contain a call provision that permits the lender, in its sole discretion, to accelerate the indebtedness. This prohibition does not apply, however, if repayment of the loan has been accelerated in accordance with the terms of the loan documents as a result of the consumer's default, or pursuant to a due-on-sale provision, or due to fraud or material misrepresentation by a consumer in connection with the loan or the value of the security for the loan. A licensed person must not refinance or arrange for the refinancing of a consumer loan such that the new loan is a covered loan that is made for the purpose of refinancing, debt consolidation or cash out, that does not result in an identifiable benefit to the consumer, considering the consumer's stated purpose for seeking the loan, fees, interest rates, finance charges, and points [*Fin. Code § 4973(I)*].

[f] Points and Fees

A person who originates a covered loan must not make a covered loan that finances points and fees in excess of $1,000 or 6 percent of the original principal balance, exclusive of points and fees, whichever is greater [*Fin. Code § 4979.6*].

[g] Credit Insurance

After June 2002, a person who originates a consumer loan must not finance, directly or indirectly, into a consumer loan transaction or finance to the same borrower, within 30 days of a consumer loan transaction, any credit life, credit disability, credit property, or credit unemployment insurance premiums, or any debt cancellation or suspension agreement or contract fees, provided that insurance premiums, debt cancellation, or suspension fees computed and paid on a monthly basis will not be considered financed by the person originating the loan. Credit insurance does not include a contract issued by a government agency or private mortgage insurance company to insure the lender against loss caused by a mortgagor's default [*Fin. Code § 4979.7*].

[h] Default on Existing Loan

It is unlawful for a person who originates a covered loan to recommend or encourage a consumer to default on an existing consumer loan or other debt in connection with the solicitation or making of a covered loan that refinances all or any portion of the existing consumer loan or debt [*Fin. Code § 4973(h)*].

[i] Borrower's Risk Grade

A person who originates a covered loan must not steer, counsel, or direct any prospective consumer to accept a loan product with a risk grade lessfavorable than the risk grade that the consumer would qualify for based on that person's then current underwriting guidelines, prudently applied, considering the information available to that person, including the information provided by the consumer. A person will not be deemed to have violated *Fin. Code § 4973* if the risk grade determination applied to a consumer is reasonably based on the person's underwriting guidelines if it is an appropriate risk grade category for which the consumer qualifies with the person [*Fin. Code § 4973(m)(1)*].

If a broker originates a covered loan, the broker must not steer, counsel, or direct any prospective consumer to accept a loan product at a higher cost than that for which the consumer could qualify based on the loan products offered by the persons with whom the broker regularly does business [*Fin. Code § 4973(m)(2)*].

[5] Duties of Person Originating Loan

[a] Assessment of Borrower's Ability to Repay

A person who originates covered loans may not make or arrange a covered loan unless, at the time the loan is consummated, the person reasonably believes the consumer, or consumers when considered collectively in the case of

multiple consumers, will be able to make the scheduled payments to repay the obligation based upon a consideration of their current and expected income, current obligations, employment status, and other financial resources, other than the consumer's equity in the dwelling that secures repayment of the loan. In the case of a covered loan that is structured to increase to a specific designated rate, stated as a number or formula, at a specific predetermined date not exceeding 37 months from the date of application, this evaluation must be based upon the fully indexed rate of the loan calculated at the time of application. The consumer must be presumed to be able to make the scheduled payments to repay the obligation if, at the time the loan is consummated, the consumer's total monthly debts, including amounts owed under the loan, do not exceed 55 percent of the consumer's monthly gross income, as verified by the credit application, the consumer's financial statement, a credit report, financial information provided to the person originating the loan by or on behalf of the consumer, or any other reasonable means [*Fin. Code § 4973(f)(1)*].

No presumption of inability to make the scheduled payments to repay the obligation can arise solely from the fact that at the time the loan is consummated, the consumer's total monthly debts, including amounts owed under the loan, exceed 55 percent of the consumer's monthly gross income [*Fin. Code § 4973(f)(2)*].

In the case of a stated income loan, the reasonable belief requirement in *Fin. Code § 4973(f)(1)* applies. However, for stated income loans, that belief may be based on the income stated by the consumer, and other information in the possession of the person originating the loan after the solicitation of all information that the person customarily solicits in connection with loans of this type. A person must not knowingly or willfully originate a covered loan as a stated income loan with the intent, or effect, of evading the provisions of *Fin. Code § 4973(f)* [*Fin. Code § 4973(f)(3)*].

[b] Disclosure to Consumer

A covered loan may not be made unless the following disclosure, written in 12-point font or larger, has been provided to the consumer no later than three business days prior to signing of the loan documents of the transaction [*Fin. Code § 4973(j)(1)*]:

"CONSUMER CAUTION AND HOME OWNERSHIP COUNSELING NOTICE

"If you obtain this loan, the lender will have a mortgage on your home. You could lose your home, and any money you have put into it, if you do not meet your obligations under the loan.

"Mortgage loan rates and closing costs and fees vary based on many other factors, including your particular credit and financial circumstances, your earnings history, the loan-to-value requested, and the type of property that will secure your loan. Higher rates and fees may be justified depending on the individual circumstances of a particular consumer's application. You should shop around and compare loan rates and fees.

"This particular loan may have a higher rate and total points and fees than other mortgage loans and is, or may be, subject to the additional disclosure and substantive protections under Division 1.6 (commencing with *Section 4970) of the Financial Code*. You should consider consulting a qualified independent credit counselor or other experienced financial adviser regarding the rate, fees, and provisions of this mortgage loan before you proceed. For information on contacting a qualified credit counselor, ask your lender or call the United States Department of Housing and Urban Development's counseling hotline at 1-888-466-3487 or go to www.hud.gov/fha/sfh/hcc [**Publisher's Note**: Although the code section containing this disclosure language remains unchanged, the website referred to is now located at www.hud.gov/offices/hsg/sfh/hcc/hccprof14.cfm] for a list of counselors.

"You are not required to complete any loan agreement merely because you have received these disclosures or have signed a loan application.

"If you proceed with this mortgage loan, you should also remember that you may face serious financial risks if you use this loan to pay off credit card debts and other debts in connection with this transaction and then subsequently incur significant new credit card charges or other debts. If you continue to accumulate debt after this loan is closed and then experience financial difficulties, you could lose your home and any equity you have in it if you do not meet your mortgage loan obligations.

"Property taxes and homeowner's insurance are your responsibility. Not all lenders provide escrow services for these payments. You should ask your lender about these services.

"Your payments on existing debts contribute to your credit ratings. You should not accept any advice to ignore your regular payments to your existing creditors."

There is a rebuttable presumption that a licensed person has met the obligation to provide this disclosure if the consumer provides the licensed person with a signed acknowledgment of receipt of a copy of the disclosure notice [*Fin. Code § 4973(j)(2)*].

[c] Information to Employees

A person who originates covered loans must inform any employee, who originates covered loans on behalf of the person, of the administrative, civil, and criminal penalties for a violation of *Fin. Code § 4970 et seq.* [*Fin. Code § 4978.6*].

[d] Documentation to Consumer or Licensing Agency

On request, a person who originates a covered loan must provide the licensing agency or the consumer, at no cost, documentation regarding his or her loan that clearly demonstrates whether any loan is a covered loan. This documentation must include, but is not limited to, full disclosure of the original principal balance, the annual percentage rate, and the total points and fees, as defined in Fin. Code § 4971 [*Fin. Code § 4979*].

[6] Evasion or Avoidance

A person who originates a covered loan cannot avoid, and must not attempt to avoid, the application of *Fin. Code § 4970 et seq.* by doing either of the following:

- Structuring a loan transaction as an open-end credit plan for the purpose of evading the provisions of *Fin. Code § 4970 et seq.* when the loan would have been a covered loan if the loan had been structured as a closed-end loan [*Fin. Code § 4973(n)(1)*].

- Dividing any loan transaction into separate parts for the purpose of evading the provisions of *Fin. Code § 4970 et seq.* [*Fin. Code § 4973(n)(2)*].

A person who originates a covered loan must not act in any manner, whether specifically prohibited by *Fin. Code § 4973* or of a different character, that constitutes fraud [*Fin. Code § 4973(o)*].

[7] Noncompliance

[a] Unintentional Errors

Any compliance failure that was not willful or intentional and resulted from a bona fide error, that occurred notwithstanding the maintenance of procedures reasonably adopted to avoid those errors, including, but not limited to, those involving clerical errors, computation errors, computer malfunction and programming errors, and printing errors

must be corrected no later than 45 days after receipt of the complaint or discovery of the error. A person who originates a covered loan is not administratively, civilly, or criminally liable for a bona fide error that is duly corrected. An error in legal judgment is not a bona fide error [*Fin. Code § 4974(a)*].

[b] Automatic Licensing Law Violation

Any licensed person who violates any provision of *Fin. Code §§ 4973, 4979.6*, or *4979.7* is deemed to have violated that person's licensing law [*Fin. Code § 4975(a)(1)*]. After any action under Fin. Code § 4978.5 resulting in a conviction, the licensing agency may bring a proceeding to suspend the license of the licensed person for not less than six months and not more than three years [*Fin. Code § 4975(a)(2)*]. After any action under Fin. Code § 4978.5 resulting in a second or subsequent conviction, the licensing agency may bring a proceeding to permanently revoke the license of the licensed person or impose any lesser licensed sanction for at least three years [*Fin. Code § 4975(b)*].

A licensing agency may exercise any and all authority and powers available to it under any other provisions of law, to administer and enforce *Fin. Code § 4970 et seq.* A licensing agency may charge and collect reasonable costs for enforcing *Fin. Code § 4970 et seq.*; however, this does not authorize the imposition or collection of charges or fees that duplicate charges or fees authorized under any other provision of law [*Fin. Code § 4975(c)*]. Nothing in *Fin. Code § 4975* impairs or impedes a licensing agency's authority under any other provision of law [*Fin. Code § 4975(d)*].

A licensing agency may exercise any and all authority and powers available to it under any other provisions of law, to administer and enforce *Fin. Code § 4970 et seq.*, including, but not limited to, investigating and examining the licensed person's books and records, and charging and collecting the reasonable costs for these activities. The licensing agency may not charge a licensed person twice for the same service. Any civil, criminal, and administrative authority and remedies available to the licensing agency pursuant to its licensing law may be sought and employed in any combination deemed advisable by the licensing agency to enforce the provisions of *Fin. Code § 4970 et seq.* [*Fin. Code § 4977(c)*].

[c] Administrative Penalty, Forced Restitution, or Disgorgement

A licensing agency, after appropriate notice and opportunity for hearing, may levy, by order, administrative penalties against a person who violates any provision of *Fin. Code § 4970 et seq.* The administrative penalties may not be more than $2,500 for each violation. Except for licensing agencies exempt from the provisions of the Administrative Procedure Act, any hearing must be held in accordance with the Administrative Procedure Act [*see Gov. Code § 11500 et seq.*], and the licensing agency has all the powers granted under that act [*Fin. Code § 4977(a)*]. For discussion, see Ch. 473, *Public Agency Adjudication* .

If the licensing agency determines that it is in the public interest, the licensing agency may include, in any action for penalties authorized by *Fin. Code § 4977(b)*, a claim for relief in addition to the penalties, including a claim for restitution or disgorgement, and the court has jurisdiction to award the additional relief [*Fin. Code § 4977(d)*].

[d] Civil Penalty

Any person who willfully and knowingly violates any provision of *Fin. Code § 4970 et seq.* is liable for a civil penalty of not more than $25,000 for each violation. This penalty must be assessed and recovered in a civil action brought in the name of the people of the State of California by the licensing agency in any court of competent jurisdiction [*Fin. Code § 4977(b)*].

Nothing in *Fin. Code § 4977* impairs or impedes the Attorney General from representing a licensing agency in bringing an action to enforce *Fin. Code § 4970 et seq.* at the request and on behalf of the licensing agency [*Fin. Code § 4977(e)*].

In any action brought under *Fin. Code § 4970 et seq.* by the licensing agency, or the Attorney General acting at the request and at the behest of the licensing agency, in which a judgment against a person is rendered, the licensing agency or the Attorney General is entitled to recover costs which, in the discretion of the court, may include an amount representing reasonable attorney's fees and investigative expenses for services rendered for deposit in the appropriate fund of that licensing agency [*Fin. Code § 4977(f)*].

The amounts collected under *Fin. Code § 4977(a)* and *(b)* must be deposited in the appropriate fund of the licensing agency to be used by that licensing agency, subject to appropriation by the Legislature, for the purposes of education and enforcement in connection with abusive lending practices [*Fin. Code § 4977(g)*].

[e] Liability to Consumer for Damages

A person who fails to comply with *Fin. Code § 4970 et seq.* is liable to the consumer in an amount equal to any actual damages suffered by the consumer, plus attorney's fees and costs. For a willful and knowing violation of *Fin. Code § 4970 et seq.*, the person is liable to the consumer in the amount of $15,000 or the consumers actual damages, whichever is greater, plus attorney's fees and costs [*Fin. Code § 4978(a)*]. The court may also award punitive damages to the consumer on a finding that such damages are warranted pursuant to *Civ. Code § 3294* [*Fin. Code § 4978(b)*]. For discussion, see *Ch. 177, Damages, § 177.40* et seq.

Nothing in *Fin. Code § 4978* abrogates existing common law provisions prohibiting double recovery of damages [*Fin. Code § 4978(c)*].

[f] Knowledge of Broker's Violation

If a person who originates covered loans makes a loan with respect to which the person knew of and showed reckless disregard for a violation of *Fin. Code § 4970 et seq.* by a broker, the person and broker are jointly and severally liable for all damages awarded under *Fin. Code § 4970 et seq.* with respect to the broker's unlawful conduct. However, this provision does not impose or transfer liability for a breach of the broker's fiduciary duty [*Fin. Code § 4974(b)*].

[g] Voidability of Nonconforming Loan

A provision in a covered loan that violates *Fin. Code § 4970 et seq.* is unenforceable. A court in which any action is brought by, or on behalf of, an aggrieved consumer for relief may issue an order or injunction to reform the terms of the covered loan to conform to the provisions of *Fin. Code § 4970 et seq.* [*Fin. Code § 4978(b)*].

[8] Broker's Fiduciary Duty

A person who provides brokerage services to a borrower in a covered loan transaction by soliciting lenders or otherwise negotiating a consumer loan secured by real property, is the fiduciary of the consumer, and any violation of the person's fiduciary duties is a violation of *Fin. Code § 4979.5*. A broker who arranges a covered loan owes this fiduciary duty to the consumer regardless of who else the broker may be acting as an agent for in the course of the loan transaction [*Fin. Code § 4979.5(a)*].

Except for a broker or a person who provides brokerage services, no licensed person or subsequent assignee has administrative, civil, or criminal liability for a violation of *Fin. Code § 4979.5* [*Fin. Code § 4979.5(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Forms of Pleading and Practice--Annotated

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PART II. LEGAL BACKGROUND

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§ 127.32 Deferred Deposit Transactions (Payday Loans)

[1] Scope of Regulation

On and after December 31, 2004 [*see Fin. Code § 23104* (operative date)], the California Deferred Deposit Transaction Law [*Fin. Code § 23000* et seq.] governs financial service providers commonly known as payday lenders. Deferred deposit transactions (payday loans) occurring before December 31, 2004, are governed by *Civ. Code § 1789.30 et seq.* [*see generally* Stats. 2004, ch. 17; Stats. 2002, ch. 777], applicable to persons operating check-cashing businesses [for discussion of check-cashing businesses, *see* Ch. 95, *Banks, Deposits, and Checks*]. Licensed check cashers operating under the former law can obtain a license to engage in deferred deposit transactions on and after December 31, 2004 [*see Fin. Code § 23100 et seq.* (transition provisions and procedures)].

Payday lenders make small, short-term loans to individuals who receive regular paychecks. Instead of signing a promissory note, on receiving the loan amount, the borrower hands the lender a personal check covering the loan amount plus the lender's transaction fee--which together may not exceed $300, under California law--and the lender holds that check until an agreed due date, which may not be more than 31 days away, under California law [*Fin. Code § 23035(a)*]. The due date usually is the borrower's next payday, or the payday after next. On the due date, the lender may deposit the borrower's check, or present it to the borrower's bank for payment. When the lender operates a check-cashing business (which often is the case), if the borrower brings a paycheck to be cashed on the due date, the lender could retain the loan amount (plus a check-cashing fee) and hand over the remainder along with the borrower's personal check that covered the loan. (Pawnbrokers also provide a small-loan service; for discussion, see Ch. 568, *Usury* .)

A payday lender is specifically subject to the Fair Debt Collection Practices Act (*Civ. Code § 1788 et seq.*) [*Fin. Code § 23036(g)*] but is exempt under the usury law (*Cal. Const., art. XV, § 1*) [*Fin. Code § 23106*].

[2] Application of Law

The California Deferred Deposit Transaction Law applies to any person [*see Fin. Code § 23001(e)* (definition)] who offers, originates, or makes a deferred deposit transaction, who arranges a deferred deposit transaction for a deferred deposit originator, who acts as an agent for a deferred deposit originator, or who assists a deferred deposit originator in

the origination of a deferred deposit transaction [*Fin. Code § 23001(d)*].

"Deferred deposit transaction" means a transaction whereby a person defers depositing a customer's personal check until a specific date, pursuant to a written agreement, for a fee or other charge, as provided in *Fin. Code § 23035* [*Fin. Code § 23001(a)*]. "Deferred deposit originator" means a person who offers, originates, or makes a deferred deposit transaction [*Fin. Code § 23001(f)*].

The law does not apply to the following [*Fin. Code § 23001(d)*]:

- Any state or federally chartered bank, thrift, savings association, industrial loan company, or credit union.

- A retail seller engaged primarily in the business of selling consumer goods, including consumables, to retail buyers that cashes checks or issues money orders for a minimum fee not exceeding $2 as a service to its customers that is incidental to its main purpose or business.

- An employee regularly employed by a licensee at the licensee's place of business. An employee, when acting under the scope of the employee's employment, is exempt from any other law from which the employee's employer is exempt [*Fin. Code § 23001(d)*].

In any proceeding under the Deferred Deposit Transaction Law, the burden of proving an exemption or exception is on the person claiming it [*Fin. Code § 23014*].

[3] Administrative Regulation

The California Deferred Deposit Transaction Law is administered by the Department of Corporations [*see Fin. Code §§ 23001(b), (c), 23015 et seq.*]. The Department is required to maintain a toll-free telephone number for deferred deposit transaction customers to make complaints and express concerns regarding the product or a specific lender [*Fin. Code § 23025*].

Persons subject to the California Deferred Deposit Transaction Law [*see* [2], *above*] must be licensed by the Commissioner of Corporations [*Fin. Code § 23005(a)*; *see Fin. Code §§ 23005-23012* (licensing requirements)] and must maintain a $25,000 surety bond to be used for the recovery of expenses, fines, and fees, or for losses or damages incurred by consumers as the result of lender's noncompliance with the Deferred Deposit Transaction Law [*Fin. Code § 23013(a)*]. The license must be conspicuously posted in the place of business [*Fin. Code § 23018(a)*].

The lender must also post a complete, detailed, and unambiguous schedule of fees in a conspicuous location in the unobstructed view of the public within the licensed location. The information must be clear, legible, and in letters not less than one-inch in height [*Fin. Code § 23019*].

[4] Advertising Restrictions

The Deferred Deposit Transaction Law specifically prohibits payday lenders from making false, misleading, or deceptive statements, or omitting material information, in any form of advertisement with regard to business subject to the Deferred Deposit Transaction Law [*Fin. Code § 23027(a)*]. Any advertisements disseminated primarily in California for deferred deposit transactions must disclose that the lender is licensed by the Department of Corporations [*Fin. Code § 23027(b)*].

The Commissioner of Corporations may require that rates of charges or fees, if stated by the lender, be stated fully and clearly in the manner that the Commissioner deems necessary to give adequate information to, or to prevent

misunderstanding by, prospective customers [*Fin. Code § 23027(c)*].

No advertising copy may be used after its use has been disapproved by the Commissioner and the lender is notified in writing of the disapproval [*Fin. Code § 23027(d)*]. The Commissioner may require lenders to maintain a file of all advertising copy for a period of 90 days from the date of its use. The file must be available to the Commissioner on request [*Fin. Code § 23027(e)*].

[5] Transaction Requirements and Limitations

[a] In General

A payday lender may defer the deposit of a customer's personal check for up to 31 days. The face amount of the check must not exceed $300. Each deferred deposit transaction must be made pursuant to a written agreement as described in *Fin. Code § 23035(e)* that has been signed by the customer and by the lender or an authorized representative of the lender [*Fin. Code § 23035(a)*].

A payday lender must not enter into an agreement for a deferred deposit transaction with a customer during the period of time that an earlier written agreement for a deferred deposit transaction for the same customer is in effect [*Fin. Code § 23036(c)*].

A customer who enters into a deferred deposit transaction and offers a personal check to a lender pursuant to an agreement is not subject to any criminal penalty for the failure to comply with the terms of that agreement [*Fin. Code § 23035(b)*]. No customer may be required to pay treble damages if this check does not clear [*Fin. Code § 23035(c)(6)*]. A payday lender who enters into a deferred deposit transaction agreement, or any assignee of that licensee, is not entitled to recover damages for that transaction in any action brought pursuant to, or governed by, *Civ. Code § 1719* (liability, including treble damages, for passing a check on insufficient funds) [*Fin. Code § 23036(d)*].

[b] Notice to Customer

Before entering into a deferred deposit transaction, the lender must distribute to the customer a notice that must include, but need not be limited to, the following [*Fin. Code § 23035(c)*]:

- Information about charges for deferred deposit transactions;

- That if the customer's check is returned unpaid, the customer may be charged an additional fee of up to $15;

- That the customer cannot be prosecuted in a criminal action in conjunction with a deferred deposit transaction for a returned check or be threatened with prosecution;

- The toll-free telephone number of the Department of Corporations for receiving calls regarding customer complaints and concerns;

- That the lender may not accept any collateral in conjunction with a deferred deposit transaction; and

- That the check is being negotiated as part of a deferred deposit transaction made pursuant to *Fin. Code § 23035* and is not subject to the provisions of *Civ. Code § 1719* (liability for passing a check on insufficient funds).

The notice must be written and available in the same language principally used in any oral discussions or negotiations

leading to execution of the deferred deposit agreement and must be in at least 10-point type [*Fin. Code § 23035(f)*].

The following notices must be clearly and conspicuously posted in the unobstructed view of the public in each location of a business providing deferred deposit transactions, in letters not less than a half inch in height [*Fin. Code § 23035(d)*]:

- The lender cannot use the criminal process against a consumer to collect any deferred deposit transaction.

- The schedule of all charges and fees to be charged on those deferred deposit transactions with an example of all charges and fees that would be charged on at least a $100 deferred deposit transaction and a $200 deferred deposit transaction, payable in 14 days and 30 days, respectively, giving the corresponding annual percentage rate.

The schedule may be provided in a chart as specified in *Fin. Code § 23035(d)*.

[c] Written Agreement

An agreement to enter into a deferred deposit transaction must be in writing and must be provided by the lender to the customer. The written agreement must authorize the lender to defer deposit of the personal check, must be signed by the customer, and must include all of the following [*Fin. Code § 23035(e)*]:

- A full disclosure of the total amount of any fees charged for the deferred deposit transaction, expressed both in U.S. currency and as an APR as required under the federal Truth in Lending Act and its regulations.

- A clear description of the customer's payment obligations as required under the federal Truth in Lending Act and its regulations.

- The name, address, and telephone number of the lender.

- The customer's name and address.

- The date to which deposit of check has been deferred (due date).

- The payment plan, or extension, if applicable as allowed under *Fin. Code § 23036(c)*.

- An itemization of the amount financed as required under the federal Truth in Lending Act and its regulations.

- Disclosure of any returned-check charges.

- That the customer cannot be prosecuted or threatened with prosecution to collect.

- That the lender cannot accept collateral in connection with the transaction.

- That the lender cannot make a deferred deposit transaction contingent on the purchase of another product or service.

- Signature space for the customer and signature of the lender or authorized representative of the

lender and date of the transaction.

- Any other information that the Commissioner of Corporations may deem necessary by regulation.

The written agreement must be written in the same language principally used in any oral discussions or negotiations leading to execution of the deferred deposit agreement; must not be vague, unclear, or misleading and must be in at least 10-point type [*Fin. Code § 23035(g)*].

Under no circumstances may a deferred deposit transaction agreement include any of the following [*Fin. Code § 23035(h)*]:

- A hold harmless clause.
- A confession of judgment clause or power of attorney.
- Any assignment of or order for payment of wages or other compensation for services.
- Any acceleration provision.
- Any unconscionable provision.

[d] Fees

A fee for a deferred deposit transaction must not exceed 15 percent of the face amount of the check [*Fin. Code § 23036(a)*; *see Fin. Code § 23106* (exemption under usury law)]. A fee not to exceed $15 may be charged for the return of a dishonored check by a depositary institution in a deferred deposit transaction. A single returned-check fee is the exclusive charge for a dishonored check. No fee may be added for late payment [*Fin. Code § 23036(e)*]. No amount in excess of the authorized amount may be directly or indirectly charged by a payday lender pursuant to a deferred deposit transaction [*Fin. Code § 23036(f)*].

[e] Extension of Time for Repayment

A payday lender may allow an extension of time, or a payment plan, for repayment of an existing deferred deposit transaction but may not charge any additional fee or charge of any kind in conjunction with the extension or payment plan. A lender in compliance with that requirement is not in violation of *Fin. Code § 23037(g)* (which prohibits accepting more than one check for a single deferred deposit transaction; see [f], *below*) [*Fin. Code § 23036(b)*].

[f] Prohibited Acts

In no case may a payday lender do any of the following [*Fin. Code § 23037*]:

- Accept or use the same check for a subsequent transaction, or permit a customer to pay off all or a portion of one deferred deposit transaction with the proceeds of another.
- Accept any collateral for a deferred deposit transaction.
- Make any deferred deposit transaction contingent on the purchase of insurance or any other goods or services.
- Enter into a deferred deposit transaction with a person lacking the capacity to contract.

- Alter the date or any other information on a check.

- Engage in any unfair, unlawful, or deceptive conduct, or make any statement that is likely to mislead in connection with the business of deferred deposit transactions.

- Accept more than one check for a single deferred deposit transaction.

- Take any check, instrument, or form in which blanks are left to be filled in after execution.

In no case may a payday lender offer, arrange, act as an agent for, or assist a deferred deposit originator in any way in the making of a deferred deposit transaction unless the deferred deposit originator complies with all applicable federal and state laws and regulations, including the provisions of *Fin. Code § 23000 et seq.* [*Fin. Code § 23037(i)*]. However, this prohibition does not apply to the arranger, agent, or assistant to a state or federally chartered bank, thrift, savings association, or industrial loan company where the state or federally chartered bank, thrift, savings association, or industrial loan company meets all of the following requirements [*Fin. Code § 23037(i)(1)*]:

- It initially advances the loan proceeds to the customer.

- It does not sell, assign, or transfer a preponderant economic interest in the deferred deposit transaction to the arranger, agent, or assistant, or an affiliate or subsidiary of the state or federally chartered bank, thrift, savings association, or industrial loan company, unless selling, assigning, or transferring a preponderant economic interest is expressly permitted by the primary regulator of the state or federally chartered bank, thrift, savings association, or industrial loan company.

- It develops the deferred deposit transaction product or products on its own.

If a payday lender offers, arranges, acts as an agent for, or assists a state or federally chartered bank, thrift, savings association, or industrial loan company in any way in the making of a deferred deposit transaction andthe state or federally chartered bank, thrift, savings association, or industrial loan company meets the standards set forth above, the payday lender must comply with all other provisions in *Fin. Code § 23000 et seq.* to the extent they are not preempted by other state and federal laws [*Fin. Code § 23037(i)(2)*].

[6] Lender's Sale of Debt

If a payday lender sells or otherwise transfers a customer's debt, the lender must clearly disclose in a written agreement that any debt or checks held or transferred pursuant to a deferred deposit transaction made pursuant to *Fin. Code § 23035* [*see § 127.32[5][c]*] are not subject to the provisions of *Civ. Code § 1719* (liability, including treble damages, for passing a check on insufficient funds) and that no customer may be required to pay treble damages if the check or checks are dishonored [*Fin. Code § 23035(i)*].

[7] Enforcement and Remedies

[a] Administrative Remedies, Civil Penalties, and Criminal Liability

The Commissioner of Corporations has power to investigate and discipline payday lenders for violations of *Fin. Code § 23000 et seq.* [*see Fin. Code § 23045 et seq.*], and issue citations and cease and desist orders to payday lenders and unlicensed persons [*Fin. Code §§ 23050, 23058*]. The Commissioner also may bring actions for injunctive relief [*Fin. Code § 23051(a)*] and civil penalties [*Fin. Code § 23051(c)*], as well as for restitution, disgorgement, or damages on behalf of persons injured by the act or practice in question [*Fin. Code § 23051(b)*], in any combination [*Fin. Code §*

23051(d)]. Willful violation of *Fin. Code § 23000 et seq.*, or any implementing rule or order, is also a criminal offense [*see Fin. Code § 23065* (no person may be imprisoned for the violation of any rule or order unless he or she had knowledge of the rule or order)].

[b] Transaction Void If Excessive Fees Are Charged or Law Is Violated

If any amount other than, or in excess of, the charges or fees permitted by *Fin. Code § 23000 et seq.* is willfully charged, contracted for, or received, or if any provision of *Fin. Code § 23000 et seq.* is willfully violated in the making or collection of a deferred deposit transaction, the deferred deposit transaction contract is void, and no person has any right to collect or receive the principal amount provided in the deferred deposit transaction, any charges, or fees in connection with the transaction [*Fin. Code § 23060*].

If any amount other than, or in excess of, the charges permitted by *Fin. Code § 23000 et seq.* is charged, contracted for, or received in connection with a deferred deposit transaction, or if any provision of *Fin. Code § 23000 et seq.* is violated in the making or collection of a deferred deposit transaction, for any reason other than a willful act of the payday lender, the lender must forfeit all charges and fees on the deferred deposit transaction and may collect or receive only the principal amount of the transaction [*Fin. Code §§ 23061(a), 23062(a)*]. An exception is granted for errors in computation or unintentional statutory violations resulting from a bona fide error if the lender maintains procedures reasonably adapted to avoid such errors and notifies the customer of the error, within 60 days in the case of an error in computation, or 30 days in the case of any other inadvertent statutory violation, and makes whatever adjustments are necessary to correct it [*Fin. Code §§ 23061(b)*, 23062(b)]. (Although *Fin. Code §§ 23061(b)* and *23062(b)* do not explicitly remove mistakes of law from the scope of the "bona fide error" defense--whereas some other statutes allowing the same defense do exclude mistakes of law--the defense probably does not cover a violation that arose from the defendant's mistaken interpretation of statutory requirements [*cf. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA (2010) -- U.S. --, 130 S. Ct. 1605, 176 L. Ed. 2d 519, 2010 U.S. LEXIS 3480, at *15-*59* (such defense allowed by Fair Debt Collection Practices Act, *15 U.S.C. § 1692k(c)*, in same language as *Fin. Code §§ 23061(b)* and *23062(b)*, did not cover debt-collecting attorney's mistake of law as to Act's requirements)].) In addition, no provision imposing liability under *Fin. Code § 23000 et seq.* may be applied to any act done or omitted in good faith in conformity with any written general rule, regulation, or specific ruling of the Commissioner of Corporations, notwithstanding that after the act or omission has occurred, the written general rule, regulation, or specific ruling is amended, rescinded, or determined by judicial or other authority to be invalid for any reason [*Fin. Code § 23063*].

[c] Action for Treble Damages, Injunction, and Other Relief

Any person who is injured by any violation of *Fin. Code § 23000 et seq.* may bring an action for the recovery of damages, an equity proceeding to restrain and enjoin those violations, or both. The amount awarded may be up to three times the damages actually incurred, but in no event less than the amount paid by the aggrieved consumer to a person subject to *Fin. Code § 23064*. If the plaintiff prevails, the plaintiff must be awarded reasonable attorney's fees and costs. If a court determines by clear and convincing evidence that a breach or violation was willful, the court, in its discretion, may award punitive damages in addition to the amounts set forth above. On application, the court may also grant any equitable relief that it deems proper, including, but not limited to, a claim for restitution and disgorgement [*Fin. Code § 23064*].

[d] Remedies Cumulative

The rights, remedies, and penalties established by *Fin. Code § 23000 et seq.* are cumulative to the rights, remedies, or penalties established under other laws. It is not necessary to exhaust administrative remedies in order to pursue the civil remedies provided for in *Fin. Code § 23000 et seq.* [*Fin. Code § 23064.5*; *see Fin. Code § 23051(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionFalse AdvertisingState RegulationBanking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionState LawRemediesBanking LawConsumer ProtectionUnfair & Deceptive Credit PracticesCivil ProcedureRemediesDamagesCompensatory Damages

California Forms of Pleading and Practice--Annotated

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Volume 13: Conspiracy thru Conversion-Chs. 126-159
Chapter 127 CONSUMER CONTRACTS AND LOANS
PART II. LEGAL BACKGROUND

13-127 California Forms of Pleading and Practice--Annotated § 127.33

§ 127.33 Consumer Product Bought Through Website--Personal Jurisdiction of Seller

While it is possible that Internet activity alone could create the necessary minimum contacts to expose a nonresident defendant to personal jurisdiction in California courts, that issue must be determined by examining the level of interactivity and commercial nature of the exchange of information that occurs onthe defendant's website [*Pavlovich v. Superior Court (2002) 29 Cal. 4th 262, 274, 127 Cal. Rptr. 2d 329, 58 P.3d 2* ; *see Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances, § 323.14[4][b]*]. A disgruntled California consumer will not necessarily be able to sue a nonresident seller in a California court. In one case, for instance, a Florida seller's website merely advertised a consumer product (a car) for sale, which a California resident bought after initiating contact with the seller. There was no evidence that files were exchanged through the website or that any business was actually conducted through the website, nor any evidence that anything about the website specifically targeted California residents, and the seller had none of the traditionally sufficient activities with California to establish minimum contact. Therefore, the seller's maintenance of the website alone was insufficient to establish personal jurisdiction when the California consumer sued the seller in a California court for rescission or damages [*Shisler v. Sanfer Sports Cars, Inc. (2007) 146 Cal. App. 4th 1254, 1260-1262, 53 Cal. Rptr. 3d 335]* .

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§ 127.34 Private Education Loans

[1] Application of Truth in Lending Act

The Private Student Loan Transparency and Improvement Act of 2008 [Pub. L. No. 110-315, § 1001 et seq. (Aug. 14, 2008)] added several provisions to the Truth in Lending Act (TILA) for the purpose of preventing unfair and deceptive private educational lending practices and eliminating conflicts of interest with respect to such lending [*see generally 15 U.S.C. §§ 1638(e), 1650*]. Implementing regulations are at *12 C.F.R. §§ 226.46-226.48* [*see 74 Fed. Reg. 41250* et seq. (Aug. 14, 2009)].

The effective date for most of the added TILA provisions is August 14, 2009 [Pub. L. No. 110-315, §§ 1003(b), 1012(b) (Aug. 14, 2008)]; those provisions are *15 U.S.C. §§ 1638(e)(1)-(4)* and *(6)-(8), 1640(j),* and *1650(c).* Also effective August 14, 2009, are related amendments to *15 U.S.C. § 1640(a)* in the first sentence, clause (3) (concerning attorney's fees and costs), and in the fifth sentence (concerning statutory damages for violations of *15 U.S.C. § 1638*), and to *15 U.S.C. § 1640(e)* (concerning the limitation period for actions based on the added provisions).

In general, unsecured consumer loans exceeding $25,000 are exempt from TILA regulation. However, that exemption does not reach private education loans subject to *15 U.S.C. §§ 1638(e)* and *1650* [*15 U.S.C. § 1603(3)*].

The term "creditor" in TILA includes a private educational lender [*15 U.S.C. § 1602(f)*].

[2] Definitions

[a] Private Education Loan

The term "private education loan" means, in general, a loan provided by a private educational lender [*see § 127.34[2][b]*] that is not made, insured, or guaranteed under of title IV of the Higher Education Act of 1965 [*see 20 U.S.C. § 1070 et seq.*] and is issued expressly for post-secondary educational expenses to a borrower, regardless of whether the loan is provided through the educational institution that the subject student attends or directly to the borrower from the lender [*15 U.S.C. §§ 1638(e)(10), 1650(a)(7)(A)*].

The term "post-secondary educational expenses" means any of the expenses that are included as part of the cost of attendance of a student, as defined in *20 U.S.C. § 1087 ll* [*15 U.S.C. § 1650(a)(4)*].

A private education loan does not include an extension of credit under an open-end consumer credit plan, a reverse mortgage transaction, a residential mortgage transaction, or any other loan that is secured by real property or a dwelling [*15 U.S.C. §§ 1638(e)(10), 1650(a)(7)(B)*].

[b] Private Educational Lender

The term "private educational lender" means a financial institution, as defined in *12 U.S.C. § 1813*, that solicits, makes, or extends private education loans; a federal credit union, as defined in *12 U.S.C. § 1752*, that solicits, makes, or extends private education loans; or any other person engaged in the business of soliciting, making, or extending private education loans [*15 U.S.C. §§ 1638(e)(10), 1650(a)(6)*].

[c] Covered Educational Institution

The term "covered educational institution" [*see § 127.34[3], [4]*] means any educational institution that offers a post-secondary educational degree, certificate, or program of study (including any institution of higher education); and the term includes an agent, officer, or employee of the educational institution [*15 U.S.C. §§ 1638(e)(10), 1650(a)(1)*].

The term "institution of higher education" has the same meaning as in *20 U.S.C. § 1002* [*15 U.S.C. § 1650(a)(3)*].

[3] Prohibited Acts by Employees of Educational Institutions

Any person who is employed in the financial aid office of a covered educational institution [*see § 127.34[2][c]*], or who otherwise has responsibilities with respect to private education loans or other financial aid of the institution, and who serves on an advisory board, commission, or group established by a private educational lender or group of such lenders, is prohibited from receiving anything of value from that lender or group of lenders. However, nothing in this prohibition prevents the reimbursement of reasonable expenses incurred by an employee of a covered educational institution as part of the employee's service on an advisory board, commission, or group [*15 U.S.C. § 1650(d)*].

[4] Prohibited Acts by Lenders

[a] Gifts to Educational Institutions

A private educational lender may not offer or provide, directly or indirectly, any gift to a covered educational institution [*see § 127.34[2][c]*] in exchange for any advantage or consideration provided to the lender and related to its private education loan activities [*15 U.S.C. § 1650(b)(1)*].

The term "gift" means, in general, any gratuity, favor, discount, entertainment, hospitality, loan, or other item having more than a *de minimis* monetary value, including services, transportation, lodging, or meals, whether provided in kind, by purchase of a ticket, payment in advance, or reimbursement after the expense has been incurred [*15 U.S.C. § 1650(a)(2)(A)(i)*]. The term includes any such item that is provided to a family member of an officer, employee, or agent of a covered educational institution, or to any other individual based on that individual's relationship with the officer, employee, or agent, if (1) the item is provided with the knowledge and acquiescence of the officer, employee, or agent, and (2) the officer, employee, or agent has reason to believe that the item was provided because of the official position of the officer, employee, or agent [*15 U.S.C. § 1650(a)(2)(A)(ii)*].

A gift, in this context, does not include any of the following [*15 U.S.C. § 1650(a)(2)(B)(i)-(vi)*]:

- Standard informational material related to a loan, default aversion, default prevention, or financial

literacy;

- Food, refreshments, training, or informational material furnished to an officer, employee, or agent of a covered educational institution, as an integral part of a training session or through participation in an advisory council that is designed to improve the service of the private educational lender to the covered educational institution, if such training or participation contributes to the professional development of the officer, employee, or agent of the covered educational institution;

- Favorable terms, conditions, and borrower benefits on a private education loan provided to a student employed by the covered educational institution, if such terms, conditions, or benefits are not provided because of the student's employment with the covered educational institution;

- The provision of financial literacy counseling or services, including counseling or services provided in coordination with a covered educational institution, to the extent that any such counseling or service is not undertaken to secure applications for private education loans or private-education-loan volume, applications or loan volume for any loan made, insured, or guaranteed under title IV of the Higher Education Act of 1965 [*see 20 U.S.C. § 1070 et seq.*], or the purchase of a product or service of a specific private educational lender;

- Philanthropic contributions to a covered educational institution from a private educational lender that are unrelated to private education loans and are not made in exchange for any advantage related to private education loans; or

- State education grants, scholarships, or financial aid funds administered by or on behalf of a state.

[b] Revenue Sharing With Educational Institutions

A private educational lender may not engage, directly or indirectly, in revenue sharing with a covered educational institution [*15 U.S.C. § 1650(b)(2)*]. The term "revenue sharing" means an arrangement between a covered educational institution [*see* [2][c], *above*] and a private educational lender under which all of the following conditions exist [*15 U.S.C. § 1650(a)(8)*]:

- The lender provides or issues private education loans with respect to students attending the covered educational institution.

- The covered educational institution recommends, to students or others, the lender or the private education loans of the lender.

- The lender pays a fee or provides other material benefits, including profit sharing, to the covered educational institution in connection with the private education loans provided to students attending the covered educational institution or to a borrower acting on behalf of a student.

[c] Co-Branding With Educational Institutions

A private educational lender may not use the name, emblem, mascot, or logo of a covered educational institution [*see § 127.34[2][c]*], or other words, pictures, or symbols readily identified with a covered educational institution, in the marketing of private education loans, in any way that implies that the covered educational institution endorses the private education loans offered by the lender [*15 U.S.C. § 1650(c)*; *see § 127.34[1]* (effective date)].

[5] Terms and Administration of Loans

[a] 30-Day Acceptance Period

With respect to a private education loan, the borrower has the right to accept the terms of the loan and consummate the transaction at any time within 30 calendar days (or such longer period as the lender may provide) following the date the application for the loan is approved and the borrower receives the disclosure documents required under *15 U.S.C. § 1638(e)* [*see § 127.34[6]*] for the loan. The lender may not change the rates and terms of the loan during that period [*15 U.S.C. § 1638(e)(6)(A)*; *see § 127.34[1]* (effective date)].

Except for changes based on adjustments to the index used for the loan, the lender may not change the rates and terms of the loan before the date of acceptance of the terms of the loan and consummation of the transaction by the borrower or the expiration of the 30-day acceptance period, whichever occurs first [*15 U.S.C. § 1638(e)(6)(B)*; *see § 127.34[1]* (effective date)].

[b] Information Form

Before a private educational lender may consummate a private education loan with respect to a student attending an institution of higher education [*see § 127.34[2][c]*], the lender must obtain from the loan applicant a prescribed form, which the Secretary of Education is required to devise for this purpose [*20 U.S.C. § 1019d*], setting forth information about education loans. The form must be signed by the applicant. It may be in written or electronic form [*15 U.S.C. § 1638(e)(3)(A)*; *see § 127.34[1]* (effective date)].

No other provision of *15 U.S.C. § 1638(e)* may be construed to require a private educational lender to perform any additional duty under *15 U.S.C. § 1638(e)(3)*, other than collecting the specified form [*15 U.S.C. § 1638(e)(3)(B)*; *see § 127.34[1]* (effective date)].

A private educational lender has no liability under *15 U.S.C. § 1640* [*see § 127.34[7]*] for failure to comply with *15 U.S.C. § 1638(e)(3)* [*15 U.S.C. § 1640(j)*; *see § 127.34[1]* (effective date)].

[c] Borrower's Right to Cancel Within Three Days

With respect to a private education loan, the borrower may cancel the loan, without penalty to the borrower, at any time within three business days after the date the loan is consummated. The lender must disclose this right to the borrower when the loan is consummated [*15 U.S.C. § 1638(e)(7)*; *see § 127.34[6][d]*; *see also § 127.34[1]* (effective date)].

No funds may be disbursed with respect to the loan until the expiration of the three-day period allowed for the borrower to cancel the loan [*15 U.S.C. § 1638(e)(8)*; *see § 127.34[1]* (effective date)].

[d] Prepayment Fees and Penalties

It is unlawful for any private educational lender to impose a fee or penalty on a borrower for early repayment or prepayment of any private education loan [*15 U.S.C. § 1650(e)*].

[6] Disclosures by Lenders

[a] Model Form of Disclosures

Any private educational lender that elects to provide a model form of disclosures [*see 15 U.S.C. § 1638(e)(5)(A),(B)* (mandate for federal agencies to develop and issue model forms that may be used, at option of private educational lender, for providing required disclosures)], which accurately reflects the lender's practices, will be deemed to be in compliance with the disclosure requirements of *15 U.S.C. § 1638(e)* [*15 U.S.C. § 1638(e)(5)(c)*].

[b] Loan Application and Solicitation Disclosures

In any application for a private education loan, or a solicitation for a private education loan without requiring an application, the lender must disclose to the borrower, clearly and conspicuously, all of the following [*15 U.S.C. § 1638(e)(1)(A)-(Q)*; *see § 127.34[1]* (effective date)]:

- The potential range of rates of interest applicable to the loan.

- Whether the rate of interest applicable to the loan is fixed or variable.

- Limitations on interest rate adjustments, in terms of both frequency and amount, or the absence of limitations, if applicable.

- Requirements for a co-borrower, including any changes in the applicable interest rates without a co-borrower.

- Potential finance charges, late fees, penalties, and adjustments to principal, based on defaults or late payments by the borrower.

- Fees or the range of fees applicable to the loan.

- The term of the loan.

- Whether interest will accrue while the student to whom the loan relates is enrolled at a covered educational institution.

- Payment deferral options.

- General eligibility criteria for the loan.

- An example of the total cost of the loan over the life of the loan, which must be computed (1) using the principal amount and the maximum rate of interest actually offered by the lender and (2) both with and without capitalization of interest, if an option exists for postponing interest payments.

- The possibility that a covered educational institution may have school-specific education loan benefits and terms not detailed on the disclosure form.

- The possibility that the borrower may qualify for federal student financial assistance through a program under title IV of the Higher Education Act of 1965 [*see 20 U.S.C. § 1070 et seq.*], in lieu of, or in addition to, a loan from a nonfederal source.

- The interest rates available with respect to such federal student financial assistance through a program under title IV of the Higher Education Act of 1965.

- The fact that the borrower will have the right to accept the terms of the loan and consummate the transaction at any time within 30 calendar days (or such longer period as the lender may provide) following the date on which the application for the loan is approved and the borrower receives the disclosure documents required under *15 U.S.C. § 1638(e)* for the loan; and the fact that, except for changes based on adjustments to the index used for a loan, the rates and terms of the loan may not be changed by the lender during that acceptance period [*see 15 U.S.C. § 1638(e)(6)*; § 127.34[5][a]].

- The fact that, before the loan may be consummated, the borrower must obtain from the relevant institution of higher education a prescribed certification form, and complete, sign, and return the form to the lender [*see 15 U.S.C. § 1638(e)(3)*; § 127.34[5][b]].

- The fact that consumers may obtain additional information concerning federal student financial assistance from their institutions of higher education or at the web site of the Department of Education.

[c] Disclosures When Loan Application Is Approved

Contemporaneously with the approval of a private education loan application, and before the loan transaction is consummated, the lender must disclose to the borrower, clearly and conspicuously, all of the following [*15 U.S.C. § 1638(e)(2)*; *see § 127.34[1]* (effective date)]:

- The applicable rate of interest in effect on the date of approval [*15 U.S.C. § 1638(e)(2)(A)*].

- Whether the rate of interest applicable to the loan is fixed or variable [*15 U.S.C. § 1638(e)(2)(B)*].

- Limitations on interest-rate adjustments, in terms of both frequency and amount, or the absence of limitations, if applicable [*15 U.S.C. § 1638(e)(2)(C)*].

- The initial approved principal amount [*15 U.S.C. § 1638(e)(2)(D)*].

- Applicable finance charges, late fees, penalties, and adjustments to principal, based on borrower defaults or late payments, including limitations on the discharge of the loan in bankruptcy [*15 U.S.C. § 1638(e)(2)(E)*].

- Fees or the range of fees applicable to the loan [*15 U.S.C. § 1638(e)(2)(F)*].

- The maximum term under the loan program [*15 U.S.C. § 1638(e)(2)(G)*].

- An estimate of the total amount for repayment, both at the interest rate in effect on the date of approval and also at the maximum possible rate of interest offered by the lender and applicable to the borrower, or using a good faith estimate of the maximum rate if it is not determinable [*15 U.S.C. § 1638(e)(2)(H)*].

- Any principal and interest payments required while the student for whom the loan is intended is enrolled at a covered educational institution, and unpaid interest that will accrue during such enrollment [*15 U.S.C. § 1638(e)(2)(I)*].

- Payment-deferral options applicable to the borrower [*15 U.S.C. § 1638(e)(2)(J)*].

- Whether monthly payments are graduated [*15 U.S.C. § 1638(e)(2)(K)*].

- The fact that the borrower will have the right to accept the terms of the loan and consummate the transaction at any time within 30 calendar days (or such longer period as the lender may provide) following the date on which the application for the loan is approved and the borrower receives the disclosure documents required under *15 U.S.C. § 1638(e)* for the loan, and the fact that, except for changes based on adjustments to the index used for a loan, the rates and terms of the loan may not be changed by the lender during that acceptance period [*15 U.S.C. § 1638(e)(2)(L)*; *see 15 U.S.C. §*

1638(e)(6); § 127.34[5][a]].

- The possibility that the borrower may qualify for federal financial assistance through a program under title IV of the Higher Education Act of 1965 [*see 20 U.S.C. § 1070 et seq.*], in lieu of, or in addition to, a loan from a nonfederal source; and the fact that consumers may obtain additional information concerning such assistance from institutions of higher education or the web site of the Department of Education [*15 U.S.C. § 1638(e)(2)(M)*].

- The interest rates available with respect to such federal financial assistance through a program under title IV of the Higher Education Act of 1965 [*15 U.S.C. § 1638(e)(2)(N)*].

- The maximum monthly payment, computed using the maximum rate of interest actually offered by the lender and applicable to the borrower, or using a good faith estimate of the maximum rate if it is not determinable [*15 U.S.C. § 1638(e)(2)(O)*].

[d] Disclosures When Loan Is Consummated

Contemporaneously with the consummation of a private education loan, the private educational lender must disclose to the borrower [*15 U.S.C. § 1638(e)(4)(A)-(c)*; *see § 127.34[1]* (effective date)]:

- The applicable rate of interest in effect on the date of approval [*see 15 U.S.C. § 1638(e)(2)(A)*] (adjusted, as necessary, for the rate of interest in effect on the date of consummation, based on the index used for the loan).

- Each of the other disclosures described in § 127.34[6][c] [*see 15 U.S.C. § 1638(e)(2)(B)-(P)*] except the disclosure regarding the borrower's 30-day acceptance period [*see 15 U.S.C. § 1638(e)(2)(L)*].

- The borrower's right to cancel the loan [*see 15 U.S.C. § 1638(e)(4)*; *see § 127.34[5][c]*].

[7] Lender's Liability for Violation

[a] General Liability of Creditor Under TILA

Since the term "creditor" in the Truth in Lending Act (TILA) includes a private educational lender [*15 U.S.C. § 1602(f)*], a lender is generally subject to liability, under *15 U.S.C. § 1640*, for violations of *15 U.S.C. §§ 1638(e)* and *1650* [*see 15 U.S.C. § 1640(a)*]. For a discussion of individual actions brought under *15 U.S.C. § 1640*, see Ch. 501, *Sales: Retail Installment Sales* .

[b] Limitation Period

The limitation period for an action against the lender based on a violation of TILA is one year from the date on which the first regular payment of principal is due under the loan [*15 U.S.C. § 1640(e)*; *see § 127.34[1]* (effective date)].

[c] Statutory Damages

The lender cannot be liable for statutory damages [*see 15 U.S.C. § 1640(a)*, 1st sentence, cl. (2)] except in a case of violating any of the following [*15 U.S.C. § 1640(a)*, 5th sentence; *see § 127.34[1]* (effective date)]:

- Specified disclosure requirements [*see 15 U.S.C. § 1638(e)(2)(A), (B), (D), (F), (J)*; § 127.34[6][c]];

- The requirement for a 30-day acceptance period [*see 15 U.S.C. § 1638(e)(6)*; § 127.34[5][a]];

- The provision that the borrower has a right to cancel within three days [*see 15 U.S.C. § 1638(e)(4)(c), (7)*; § 127.34[5][c]]; and

- The proscription against disbursing funds until after that three-day period [*see 15 U.S.C. § 1638(e)(8)*; § 127.34[5][c]].

[d] Attorney's Fees and Costs in Case of Rescission

In any action in which a borrower is determined to have a right of rescission under *15 U.S.C. § 1638(e)(7)* [*see § 127.34[5][c]*], the plaintiff may recover (in addition to any damages) the costs of the action, together with a reasonable attorney's fee as determined by the court [*15 U.S.C. § 1640(a)*, 1st sentence, cl. (3); *see § 127.34[1]* (effective date)].

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[Reserved]

§§ 127.35[Reserved]

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§ 127.50 Related Matthew Bender Publications

California Legal Forms (Matthew Bender)

Ch. 25, *Real Estate Loans*

Ch. 25A, *Security Instruments for Real Estate Financing*

Ch. 45, *Consumer Installment Loans and Credit Sales*

Ch. 46, *Credit Card and Other Open-End Credit Transactions*

Ch. 92, *Service Contracts*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionUnfair & Deceptive Credit PracticesReal Property LawFinancingSecondary FinancingHome Equity Credit LinesReal Property LawFinancingSecondary FinancingResidential Secondary Mortgages

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§ 127.51 Federal Statutes

[1] In General

Truth in Lending Act. *15 U.S.C. § 1601 et seq.*

Fair Credit Billing Act. *15 U.S.C. § 1666 et seq.*

Consumer Leasing Act. *15 U.S.C. § 1667 et seq.*

Equal Credit Opportunity Act. *15 U.S.C. § 1691 et seq.*

Fair Debt Collection Practices Act. *15 U.S.C. § 1692 et seq.*

Electronic Fund Transfer Act. *15 U.S.C. § 1693 et seq.*

Servicemembers Civil Relief Act. *50 U.S.C. App. § 501 et seq.*

[2] Particular Provisions

Truth in Lending Act, Part BCCredit Transactions

Requirement for advance notice of rate increase or other change in credit card account. *15 U.S.C. § 1637(i)*

Prohibition on penalties for on-time payments on credit card account. *15 U.S.C. § 1637(j)*

Opt-in requirement for over-the-limit transactions on credit card account if fees are imposed. *15 U.S.C. § 1637(k)*

Limit on fees related to method of payment on credit card account. *15 U.S.C. § 1637(l)*

Use of term "fixed rate" with respect to credit card account. *15 U.S.C. § 1637(m)*

Standards applicable to initial issuance of subprime or "fee harvester" credit cards. *15 U.S.C. § 1637(n)*

Due dates for credit card accounts. *15 U.S.C. § 1637(o)*

Parental approval required to increase credit lines for accounts for which parent is jointly liable. *15 U.S.C. § 1637(p)*

Requirements respecting "college affinity" credit cards. *15 U.S.C. § 1637(r)*

Electronic Fund Transfer Act

General-use prepaid cards, gift certificates, and store gift cards. *15 U.S.C. § 1693l-1*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 127.52 California Statutes

[1] In General

Suspension of certain civil obligations and liabilities of national guard and military reserve members during qualifying periods of military service after September 11, 2001. *Mil. & Vet. Code § 400 et seq.*

[2] Alarm Companies

Alarm Company Act. *Bus. & Prof. Code § 7590 et seq.*

[3] Autographed Sports Memorabilia

Dealer requirements, including providing certificate of authenticity, when selling or offering to sell autographed sports memorabilia. *Civ. Code § 1739.7*

[4] Check Cashers

Failure of check casher (as defined in *Civ. Code § 1789.31* to exclude insured bank, savings association, credit union, industrial loan company, or retail seller) to post notice of fees and acceptable forms of identification [*see Civ. Code § 1789.30*] is unfair business practice under *Bus. & Prof. Code § 17200*. *Civ. Code § 1789.32*

[5] Collection Agencies

Rosenthal Fair Debt Collection Practices Act. *Civ. Code § 1788 et seq.*

Unlawful conduct of creditor or collection agency in collection of consumer debts. *Civ. Code § 1788.16*

Duties and rights of debt collector on receiving specified notice that alleged debtor is victim of identity theft. *Civ. Code § 1788.18*

Violation of *Civ. Code § 1812.700 et seq.* (requiring third-party debt collectors to provide specified notice to debtors) is considered to be violation of Rosenthal Fair Debt Collection Practices Act. *Civ. Code § 1812.702*

Acts of unfair competition are enjoinable. *Civ. Code § 3369*

[6] Consumer Credit

Effect of untimely response of creditor to inquiry of obligor concerning debit or credit. *Civ. Code § 1720*

Consumer credit contracts; required notices to specified co-obligors; action on contract or enforcement of security interest prohibited in specified instances if notices not given. *Civ. Code § 1799.90 et seq.*

Consumer credit contracts; limitations on use of household goods or other personal property as collateral. *Civ. Code § 1799.100*

Consumer credit contracts; required notice to cosigner before delinquency may be reported to credit agency or debt collector. *Civ. Code § 1799.101*

Damages action by cosigner for adverse credit report without prior notice. *Civ. Code § 1799.102*

Prohibition against discrimination on basis of sex or marital status in credit transactions. *Civ. Code § 1812.30 et seq.*

[7] Consumer Loans Secured by Real Property

Definitions. *Fin. Code § 4970*

Prohibited acts and limitations for covered loans. *Fin. Code § 4973*

Unintentional noncompliance; knowledge of broker's noncompliance. *Fin. Code § 4974*

Noncompliance is violation of licensing law. *Fin. Code § 4975*

Administrative and civil penalties, forced restitution, and disgorgement. *Fin. Code § 4977*

Damages to consumer; voidability of nonconforming loan. *Fin. Code § 4978*

Duty of licensed person to inform employees. *Fin. Code § 4978.6*

Documentation to consumer or licensing agency. *Fin. Code § 4979*

Broker's fiduciary duty. *Fin. Code § 4979.5*

Excessive points and fees. *Fin. Code § 4979.6*

Credit insurance. *Fin. Code § 4979.7*

Nonliability of holder in due course; nonapplication to persons chartered by Congress to engage in secondary mortgage market transactions. *Fin. Code § 4979.8*

[8] Credit Cards

Verification of address change is required when request for new credit card or increase in credit limit is received within 10 days of request for change of billing address. *Civ. Code § 1747.06(c)*

Song-Beverly Credit Card Act of 1971. *Civ. Code § 1747 et seq.*

Action against card issuer for willful failure to correct billing error. *Civ. Code § 1747.50*

Action against retailer for willful failure to correct billing error. *Civ. Code § 1747.60*

Improper cancellation or refusal to renew credit card. *Civ. Code § 1747.70(c)*

Notice to cardholders of provisions of Song-Beverly Credit Card Act. *Civ. Code § 1747.90(f)*

Areias Credit Card Full Disclosure Act of 1986. *Civ. Code § 1748.10 et seq.*

Disclosure requirements for application or solicitation to open consumer open-end credit card account. *Civ. Code §§ 1748.10, 1748.11*

Required notice to cardholder of right to prohibit disclosure of marketing information. *Civ. Code § 1748.12*

Credit card issuer must provide to cardholder, in each billing statement, various statements regarding length of time it will take, at various payment rates, to pay off balance due on open-end credit card account, as well as related information, and certain table developed by Department of Financial Institutions. *Civ. Code § 1748.13*

Areias Charge Card Full Disclosure Act of 1986. *Civ. Code § 1748.20 et seq.*

Disclosure requirements for application or solicitation to open consumer charge card account. *Civ. Code §§ 1748.20, 1748.21*

Disclosure requirements for application or solicitation to obtain credit card issued in connection with retail installment account. *Civ. Code §§ 1810.20, 1810.21*

Crimes relating to access cards. *Penal Code §§ 484d-484j*

Areias Retail Installment Account Full Disclosure Act of 1986. *Civ. Code § 1810.20 et seq.*

Deferment of payments on credit card debt, without penalties or added interest, while debtor is serving as member of U.S. military reserve or California national guard on active duty after February 9, 2005, as part of Iraq and Afghanistan conflicts. *Mil. & Vet. Code § 800 et seq.*

[9] Credit Disability Insurance

Duties of creditor when creditor participates in sale of credit disability insurance to debtor. *Civ. Code § 1812.402*

Costs and notices regarding credit life or credit disability insurance for loan made by industrial loan company. *Fin. Code §§ 18290-18293*

Requirements, costs, and notices regarding credit life or credit disability insurance for loan made by personal property broker. *Fin. Code §§ 22458-22458.8, 22473, 22505*

Requirements, costs, and notices regarding credit life or credit disability insurance for loan made by consumer finance lender. *Fin. Code §§ 24458-24458.8, 24473*

Credit disability insurance. Ins. Code § 779.01 et seq.

[10] Credit Discrimination

Circumstances under which credit denial because of applicant's sex or marital status is prohibited. *Civ. Code § 1812.30(a), (c)*

Circumstances under which less favorable credit terms because of applicant's sex or marital status are prohibited. *Civ. Code § 1812.30(b), (d)*

Action for damages for violation of provisions of *Civ. Code § 1812.30(a)-(d). Civ. Code § 1812.31*

Costs of action and attorney's fees are recoverable. *Civ. Code § 1812.34*

[11] Creditor Remedies

Legislative findings. *Civ. Code § 1812.400*

Definitions. *Civ. Code § 1812.401*

Limitation on invocation of creditor's remedies. *Civ. Code § 1812.402(a)*

Creditor's and insurer's requirements of notice on receipt of debtor's claim of disability. *Civ. Code § 1812.402(b)*

Availability of creditor's remedies for debts due prior to claim period. *Civ. Code § 1812.402(c)*

Availability of creditor's remedy of foreclosure when senior lienholder has initiated foreclosure proceeding. *Civ. Code § 1812.402(d)*

Effect of insurer's acceptance or rejection of debtor's claim. *Civ. Code § 1812.402(e)*

Requirements and forms for disclosure by creditor and insurer to debtor. *Civ. Code § 1812.402(f)*

Procedure when creditor invokes remedy without knowledge of debtor's claim. *Civ. Code § 1812.402(g)*

Cumulative nature of debtors' remedies. *Civ. Code § 1812.402(h)*

Authorization of action for equitable relief, damages, and other relief for violation of Civ. Code *§ 1812.400 et seq. Civ. Code* § 1812.402(i)

Creditor's remedies authorized when debtor does not file timely claim with insurer. *Civ. Code § 1812.403*

Applicability limited to creditor involved with sale of insurance to debtor. *Civ. Code § 1812.404*

Effect of provisions on open-end credit plan, as defined. *Civ. Code § 1812.405*

Nonapplicability to insurance covering "key person" of business. *Civ. Code § 1812.406(a)*

Nonapplicability to transactions of more than 10 years' duration secured by mortgage or deed of trust, except specified home improvement loans. *Civ. Code § 1812.406(b)*

Provisions applicable to payments due on or after April 1, 1984. *Civ. Code § 1812.407*

Waiver by debtor of provisions is unenforceable. *Civ. Code § 1812.408*

Interests of bona fide purchasers acquired without knowledge of creditor's violations as protected. *Civ. Code § 1812.409*

Severability of provisions. *Civ. Code § 1812.410*

[12] Dentists

Patient may rescind dental service contract within three business days. *Civ. Code § 1689.3*

[13] Deposits for Keeping

Storage. *Civ. Code § 1851 et seq.*

Deposits for repair, alteration, or sale. *Civ. Code § 1858 et seq.*

Inn, boarding, lodging, and apartment house keepers. *Civ. Code § 1859 et seq.*

[14] Discount Buying Services

Discount buying services. *Civ. Code § 1812.100 et seq.*

[15] Electronic Commerce

The Electronic Commerce Act of 1984. *Civ. Code § 1789 et seq.*

[16] Employment Agencies

Employment Agency, Employment Counseling, and Job Listing Services Act. *Civ. Code § 1812.500 et seq.*

[17] Financial Products and Services

Sale of financial products by lawyer to client. *Bus. & Prof. Code § 6175 et seq.*

California Deferred Deposit Transaction Law, governing payday loans. *Fin. Code § 23000 et seq.* (operative December 31, 2004)

[18] Food, Drugs, and Cosmetics

Prevention of fraud and deception in packing, labeling, and marketing. *Food & Agric. Code § 402*

Sherman Food, Drug, and Cosmetic Law. *Health & Safety Code § 109875 et seq.*

Miscellaneous provisions relating to foods, restaurants, and hazardous substances. *Health & Safety Code § 113150 et seq.*

California Retail Food Code. *Health & Safety Code § 113700 et seq.* (from July 1, 2007)

California Uniform Retail Food Facilities Law. *Health & Safety Code § 113700 et seq.* (until July 1, 2007)

[19] Fraudulent or Deceptive Practices

Marriage, family, and child counselors. *Bus. & Prof. Code § 4980 et seq.*

Deceptive practices with weights and measures. *Bus. & Prof. Code §§ 12012.1, 12019-12025.5, 12510*

Fair Packaging and Labeling Act. *Bus. & Prof. Code § 12601 et seq.*

Unfair Practices Act. *Bus. & Prof. Code § 17000 et seq.*

Charitable solicitations. *Bus. & Prof. Code § 17510 et seq.*

Labeling of products made by blind. *Bus. & Prof. Code § 17520 et seq.*

Particular unlawful representations to public. *Bus. & Prof. Code § 17530 et seq.*

False representation in sale of energy conservation products. *Bus. & Prof. Code § 17537.5*

Prohibited, misleading statements by homestead filing service. *Bus. & Prof. Code § 17537.6*

Order fulfillment requirements for sales by mail order, telephone, internet, catalog, or other electronic communication. *Bus. & Prof. Code §§ 17538, 17538.3*

Invasive advertising by sending fax or e-mail message or by sending message to cell phone or pager. *Bus. & Prof. Code §§ 17538.4-17538.45*

Travel promoters. *Bus. & Prof. Code § 17540 et seq.*

Motel and motor court rate signs. *Bus. & Prof. Code § 17560 et seq.*

American Indian-made articles. *Bus. & Prof. Code §§ 17569, 17569.9*

Vending machines. *Bus. & Prof. Code § 17570 et seq.*

Premium coupons. *Bus. & Prof. Code § 17700 et seq.*

Trading stamp companies. *Bus. & Prof. Code § 17750 et seq.*

Damages for sale of property with manufacturer's nameplate, serial number, etc., removed, defaced, covered, altered, or destroyed. *Civ. Code § 1710.1*

Intent to defraud public includes any deceived person. *Civ. Code § 1711*

Property obtained without consent or unlawfully is required to be returned; demand for return is not necessary. *Civ. Code §§ 1712, 1713*

Grey market goods sold without manufacturer's express warranty or proper disclosure. *Civ. Code §§ 1770(21), 1797.8-1797.86*

Treble penalty in action by or on behalf of senior citizen or disabled person for deceptive or unfair acts, practices, or methods of competition. *Civ. Code § 3345*

[20] Funeral Services

Specified fees and contracts for funeral services. *Bus. & Prof. Code § 7685 et seq.*

[21] Garnishment of Wages

Discharge for threat of garnishment or garnishment is prohibited. *Lab. Code § 2929*

[22] Hazardous Substances

Hazardous Substances Act. *Health & Safety Code § 108100 et seq.*

[23] Home Furnishings

Home Furnishings and Thermal Insulation Act. *Bus. & Prof. Code § 19000 et seq.*

[24] Home Improvements

Home improvement business. *Bus. & Prof. Code § 7150 et seq.*

[25] Immigration Consultants

Immigration consultants. *Bus. & Prof. Code § 22440 et seq.*

[26] Insurance

Required disclosures in sale of damage waiver by automobile rental company. *Civ. Code § 1936(g)*

Consumer protections in connection with retail sales practices, solicitations, advertising, or offers of any insurance product or annuity to consumer by depository institution or by person engaged in those activities at any office of, or on behalf of, depository institution. *Ins. Code § 759 et seq.*

Required disclosures in advertisements for term life insurance directed to individuals 55 years of age or older. *Ins. Code § 10127.8*

[27] Investment Advisors

Financial planners, investment advisors, and specified others are held to standard of expert; liability for return of compensation and damages; specified exceptions. *Civ. Code § 3372*

[28] Lay Away Practices

Regulation of lay away practices. *Civ. Code § 1749 et seq.*

[29] Money Exchange Houses

Money exchange houses. *Bus. & Prof. Code § 22515 et seq.*

[30] Money Transmitters (Foreign)

Transmission of money abroad by entity other than insured bank, savings and loan association, credit union, trust company, industrial loan company, or thrift and loan company. *Fin. Code § 1800 et seq.*

[31] Mortgages

Disclosures required by lender offering adjustable-rate residential mortgage loans; injunctive relief, damages, and attorney's fees are authorized for lender's failure to comply. *Civ. Code § 1921(b)*

Notice is required on transfer of servicing of note, bond, or other instrument secured by mortgage or deed of trust on California real property containing one to four residential units. *Civ. Code § 2937*

Borrower generally must not be required to pay interest on principal obligation under promissory note secured by mortgage or deed of trust on real property improved with one-to-four residential dwelling units for period of more than one day prior to recording mortgage or deed of trust, if loan proceeds are paid into escrow, or, if there is no escrow, date loan proceeds have been made available for withdrawal. *Civ. Code § 2948.5(a)*

Disclosure required within three days of initial application for home equity loan secured by residence. *Civ. Code §§ 2970, 2971*

[32] Motor Vehicles and Aircraft

Repairs, with certain exceptions for emergency repairs, to general aviation (not air carrier or military) aircraft. *Bus. & Prof. Code § 9790 et seq.*

Disclosures in sale of damage waivers by automobile rental company. *Civ. Code § 1936(g)*

Requirements of bailment contracts with automobile parking lots. *Civ. Code § 1630*

Liability of automobile parking lots for theft. *Civ. Code § 1630.5*

Passenger vehicle rentals for terms less than 30 days. *Civ. Code § 1936*

Motor vehicle odometer mileage reporting. *Veh. Code §§ 1819, 5900, 5901, 5906.5, 28053*

Advertising requirements of engine horsepower. *Veh. Code §§ 9950, 9952*

Correction of safety defect by manufacturer. *Veh. Code § 9975*

Disclosure requirements when manufacturer of engine differs from manufacturer of vehicle. *Veh. Code § 9980 et seq.*

Fraudulent or misleading advertising by motor vehicle lessors or retailers is unlawful. *Veh. Code §§ 11614, 11614.1*

Priority of claims if dealer fails to pay for vehicles or commits fraud or otherwise violates law. *Veh. Code § 11711*

Unlawful acts of automobile manufacturers, transporters, and dealers. *Veh. Code § 11713 et seq.*

False advertising by licensed automobile dealers is unlawful. *Veh. Code § 11713*

Requirements for advertising of vehicles. *Veh. Code § 11713.1*

Refund of excess fees by dealer to purchaser of vehicle. *Veh. Code § 11713.4*

Unlawful representation of vehicle year model. *Veh. Code § 11713.5*

Greene-Harmer Motor Vehicle Damage Control Act. *Veh. Code § 34700 et seq.* (bumper standards for passenger vehicles)

[33] Other Languages

Contracts by immigration consultants are required to contain statements in language of client. *Bus. & Prof. Code § 22442(d), (e)*

Foreign-language contracts. *Civ. Code § 1632*

[34] Postdated Checks

Unlawful for business to request postdated check and present it for payment before date of check without advising consumer that check can be cashed before date unless consumer files order with bank pursuant to *Com. Code § 4401*. *Bus. & Prof. Code § 17538.6*

[35] Tax Preparers

Regulation and licensing of tax preparers. *Bus. & Prof. Code § 9891 et seq.*

[36] Telephonic Sellers

Regulation of telephonic sellers. *Bus. & Prof. Code § 17511 et seq.*

[37] Termination of Contracts

Rescission. *Civ. Code § 1688 et seq.*

Alteration and cancellation of contracts. *Civ. Code § 1697 et seq.*

[38] Unsolicited Goods or Services

Regulation of unsolicited goods or services. *Civ. Code §§ 1584.5, 1584.6, 1616*

[39] Warranties in Sales to Consumers

Mobile home warranties. *Civ. Code § 1797 et seq.*

Warranties in retail sales. *Com. Code §§ 2800, 2801*

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationBanking LawConsumer ProtectionState LawGeneral OverviewContracts LawTypes of ContractsBailmentsReal Property LawFinancingSecondary FinancingHome Equity Credit LinesReal Property LawFinancingSecondary FinancingResidential Secondary Mortgages

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Equal credit opportunity. *12 C.F.R. § 202.1 et seq.*

Regulation Z implementing federal Truth in Lending Act. *12 C.F.R. § 226.1 et seq.*

Disclosure requirements for credit and charge card applications and solicitations. *12 C.F.R. § 226.5a*

Disclosure requirements on renewal of credit or charge card. *12 C.F.R. § 226.9(e)*

Resolution procedure for billing errors. *12 C.F.R. § 226.13*

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Registration and regulation of automotive repair dealers. *16 Cal. Code Reg § 3350 et seq.*

False or misleading advertising. *16 Cal. Code Reg § 3370 et seq.*

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§ 127.55 Decisions

[1] Consumer Loans Secured by Real Property

Yield spread premium (YSP) paid in connection with residential mortgage loan is not included in definition of points and fees payable by borrower at or before closing under *Fin. Code § 4970*. *Wolski v. Fremont Investment & Loan (2005) 127 Cal. App. 4th 347, 350, 25 Cal. Rptr. 3d 500*

[2] Credit Cards

Credit card agreement encompasses convenience "services" in addition to extension of credit, and, thus, is consumer contract for retail purchase of services and is subject to *Civ. Code § 1671(d)*, which governs validity of liquidated damages provisions. *Hitz v. First Interstate Bank (1995) 38 Cal. App. 4th 274, 287-288*

Late and over limit credit card fees charged by bank did not represent result of reasonable endeavor by parties to estimate fair average compensation for any loss that might be sustained, and thus fees constituted invalid liquidated damages under *Civ. Code § 1671(d)*, which governs validity of liquidated damages provisions. *Hitz v. First Interstate Bank (1995) 38 Cal. App. 4th 274, 289* (bank's purpose in imposing late and over limit card fees was to generate revenue rather than provide compensation for loss)

Civ. Code § 1671(d) codifies common law and entitles party who has paid sums in accordance with invalid liquidated damages provision to affirmative relief; measure of breaching party's recovery is difference between sums paid under invalid liquidated damages provision and other party's actual damages for four years (in case of written contract) prior to commencement of action. *Beasley v. Wells Fargo Bank (1991) 235 Cal. App. 3d 1383, 1398-1402, 1 Cal. Rptr. 2d 446 , disapproved on other grounds, Olson v. Automobile Club of So. Cal. (2008) 42 Cal. 4th 1142, 1153 n.6*

Despite invalid liquidated damages provision regarding late and over-limit charges, credit card issuer was entitled to recover its actual damages resulting from default; whether measure of issuer's actual damages includes its indirect costs is factual question turning on causation. *Beasley v. Wells Fargo Bank (1991) 235 Cal. App. 3d 1383, 1402,*

1404-1405, 1 Cal. Rptr. 2d 446 , disapproved on other grounds, Olson v. Automobile Club of So. Cal. (2008) 42 Cal. 4th 1142, 1153 n.6

After invalidating liquidated damages provision regarding late and over-limit charges, issuer's actual damages did not properly include fees it paid to collection agency based on percentage of collected debts, even though issuer actually paid those fees, when fees did not necessarily represent actual expense required to collect late balances. *Beasley v. Wells Fargo Bank (1991) 235 Cal. App. 3d 1383, 1405-1406, 1 Cal. Rptr. 2d 446 , disapproved on other grounds, Olson v. Automobile Club of So. Cal. (2008) 42 Cal. 4th 1142, 1153 n.6*

Although cardholder authorized friend to use credit card for one purchase, friend's use of card for other purchases in circumstances from which it could be inferred that friend never intended to return card and took it under false pretenses was unauthorized use for which cardholder was not liable. *Young v. Bank of America (1983) 141 Cal. App. 3d 108, 112-113, 190 Cal. Rptr. 122*

[3] Creditor Remedies

Credit union failed to meet its burden on summary judgment to negate consumer's breach of contract claim because it did not establish that it complied with *Civ. Code § 1812.400 et seq.* before it repossessed vehicle. *McManis v. San Diego Postal Credit Union (1998) 61 Cal. App. 4th 547, 559, 71 Cal. Rptr. 2d 617*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionState LawRemediesReal Property LawFinancingSecondary FinancingHome Equity Credit LinesReal Property LawFinancingSecondary FinancingResidential Secondary Mortgages

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§ 127.56 Attorney General Opinions

Denial of credit to women not permitted to be based on factors peculiar to women. *58 Ops. Cal. Att'y Gen. 232 (1975)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionEqual Credit OpportunityGeneral Overview

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§ 127.57 Law Reviews

Lamont, *Negative Option Offers in Consumer Service Contracts: A Principled Reconciliation of Commerce and Consumer Protection, 42 UCLA L. Rev. 1315 (1995)*

Culhane, *The Eye of the Beholder: Developments Under the Equal Credit Opportunity Act and Regulation B, 46 Bus. Law. 1069 (1991)*

Mishkin and Schieber, *New Rules for Commercial Lenders*, 36(6) Prac. Law. 73 (1990)

Note, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions, 38 Hastings L.J. 729 (1987)*

Comment, *Examining Restraints on Freedom to Contract as an Approach to Purchaser Dissatisfaction in the Computer Industry, 74 Cal. L. Rev. 2101 (1986)*

Comment, *Reviving the Law of Substantive Unconscionability: Applying the ImpliedCovenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts, 33 UCLA L. Rev. 940 (1986)*

Katz, *Restraint of Trade Activities by Real Estate Brokers*, 16 Bev. Hills B.J. 103 (1982)

Comment, *The California State Courts and Consumer Class Actions for Antitrust Violations, 33 Hastings L.J. 689 (1982)*

Dreyer and Rice, *Equal Credit Opportunity, 36 Bus. Law. 1203 (1981)*

Leonard and Tidwell, *Consumer Credit Regulation: Is Federal Preemption Necessary? 35 Bus. Law. 1291 (1980)*

Note, *Fletcher v. Security Pacific National Bank: Unfair Bank Practices and Consumer Class Actions, 68 Cal. L. Rev.*

862 (1980)

Braasch, Miller, and Rice, *Equal Credit Opportunity, 35 Bus. Law. 1237 (1980)*

Apfelberg, *Dos, Don'ts, and Maybe's Under the Equal Credit Opportunity Act*, 6 Com. Prop. J. 225 (1979)

Hsia, *Credit Scoring and the Equal Credit Opportunity Act, 30 Hastings L.J. 371 (1979)*

Schlesinger, *Jurisdictional Clauses in Consumer Transactions: A Multifaceted Problem of Jurisdiction and Full Faith and Credit, 29 Hastings L.J. 967 (1978)*

Berk, *Daar v. Yellow Cab Co.: The Advent of the Consumer Class Action in California, 10 U.S.F. L. Rev. 651 (1976)*

DuBoff, *Controlling the Artful Con: Authentication and Regulation, 27 Hastings L.J. 973 (1976)*

Comment, *Cartt v. Superior Court: Notice and Consumer Class Actions in California, 64 Cal. L. Rev. 1222 (1976)*

Comment, *Consumer Class Action in California: A Practical Approach to the Problem of Notice, 7 Pac. L.J. 811 (1976)*

Comment, *Credit Equality Comes to Women: An Analysis of the Equal Credit Opportunity Act, 13 San Diego L. Rev. 960 (1976)*

Comment, *The Federal Trade Commission Rule on the Preservation of Consumers' Claims and Defenses--What Price Protection? 16 Santa Clara L. Rev. 815 (1976)*

Symposium, *Symposium on Debtor Protection, 27 Stan. L. Rev. 1077 (1975)*

Factor, *The Credit Cardholder's Rights to Assert Claims and Preserve Defenses Under the Fair Credit Billing Act, 4 U.S.F. L. Rev. 215 (1975)*

Reppy, *Retroactivity of the 1975 California Community Property Reforms, 48 So. Cal. L. Rev. 977 (1975)*

Note, *Consumer Class Actions With a Multistate Class: A Problem of Jurisdiction, 25 Hastings L.J. 1411 (1974)*

Comment, *The Apportionment of Credit Card Fraud Loss, 4 U.C. Davis L. Rev. 377 (1971)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationBanking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionState LawRemediesReal Property LawFinancingSecondary FinancingHome Equity Credit LinesReal Property LawFinancingSecondary FinancingResidential Secondary Mortgages

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[Reserved]

§§ 127.58[Reserved]

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13-127 California Forms of Pleading and Practice--Annotated § 127.80

§ 127.80 Complaint for Damages [Civ. Code §§ 1770.50(c), 1770.60(c)] Under Song-Beverly Credit Card Act of 1971 [Civ. Code §§ 1747-1748.5]--By Cardholder Against Card Issuer [Civ. Code § 1747.50] or Retailer [Civ. Code § 1747.60]--Willful Failure to Correct Billing Error

[1] FORM Complaint for Damages [Civ. Code §§ 1770.50(c), 1770.60(c)] Under Song-Beverly Credit Card Act of 1971 [Civ. Code §§ 1747-1748.5]--By Cardholder Against Card Issuer [Civ. Code § 1747.50] or Retailer [Civ. Code § 1747.60]--Willful Failure to Correct Billing Error

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	(Violation of Song-Beverly Credit Card Act of
Defendants.	)	1971--Willful Failure to Correct Billing Error)
	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ [*city*], _____ County, California [*or allege other capacity of defendant and basis of venue as appropriate*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and

therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by their conduct).]

[*EITHER*]

3. Defendant is, and at all times herein mentioned was, _____ [regularly engaged in the practice of issuing credit cards *or* an agent of a person regularly engaged in the practice of issuing credit cards].

[*OR*]

3. Defendant is, and at all times herein mentioned was, a retailer in that he/shefurnished _____ [*specify money, goods, services, or anything else of value*] on presentation of a credit card by a cardholder.

[*CONTINUE*]

[4. *If defendant was a card issuer, allege:* On or about _____ (*date*), defendant issued on a credit card to plaintiff. Plaintiff has received a monthly statement showing his/her outstanding balance since the date of issuance of the credit card.]

5. On or about _____ [*date*], plaintiff received a statement from _____ [*if defendant was a card issuer,* defendant *or, if defendant was a retailer, specify the name of the card issuer*], a copy of which is attached as Exhibit A and incorporated by reference, demanding payment of the sum of $_____. The statement received by plaintiff included a[n] item(s) which _____ [was *or* were] incorrect in that _____ [*specify reasons item(s) was or were incorrect. If defendant was a retailer, indicate that the error was made by the retailer, and if defendant was a card issuer, indicate that the error was made by the card issuer*].

6. On or about _____ [*date*], plaintiff mailed to defendant _____ [at its address *or* at the address specifically indicated by the defendant for the purpose of mailing inquiries with respect to billing errors] an inquiry which set forth _____ [*specify information sufficient to enable defendant to identify plaintiff and his/her account*], _____ [*specify information sufficient to identify the billing error*], and _____ [*specify information sufficient to provide the basis for plaintiff's belief that there was a billing error*].

7. On or about _____ [*date*], which date was more than 60 days subsequent to the date on which the above-mentioned inquiry was mailed to defendant, defendant failed and refused to correct the above-mentioned billing error, and on or about _____ [*date*], plaintiff was billed by _____ [*name of card issuer*] for the sum of $_____, which sum included the amount traceable to the billing error and which therefore exceeded the correct balance by $_____. Defendant still fails and refuses to correct the error.

8. Plaintiff is informed and believes and thereon alleges that defendant's failure to correct the billing error was willful in that _____ [*specify reasons plaintiff believes defendant's violation was willful*].

9. As a result of defendant's failure and refusal to correct the above-mentioned billing error, plaintiff has been injured in that _____ [*describe actual injuries*], damaging plaintiff in the sum $_____.

[10. Plaintiff has incurred and will incur attorney's fees in prosecuting this action.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ which is three times the amount of actual damages;

2. For reasonable attorney's fees [in the sum of $_____];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for damages by a credit cardholder against a card issuer or a retailer based on the card issuer's or retailer's willful failure to correct a billing error under the Song-Beverly Credit Card Act of 1971 [*Civ. Code §§ 1747-1748.5*].

[3] Allegations

The complaint alleges in pertinent part that [*see Civ. Code § 1747.50*]:

- Defendant card issuer issued a credit card to plaintiff (Paragraph 4).

- Plaintiff received a statement from the card issuer containing an incorrect item (Paragraph 5).
- Plaintiff mailed an inquiry to defendant concerning the error (Paragraph 6).
- Defendant failed to correct the error within 60 days of the mailing of the inquiry (Paragraph 7).
- Defendant's failure to correct the error was willful (Paragraph 8).
- As a result of defendant's failure to correct the error, plaintiff was damaged (Paragraph 9).

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of thepaper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction, Inconvenient Forum, and Appearances*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For allegations showing proper venue, see Ch. 571, *Venue*

For alternative verification forms, see Ch. 572, *Verification*

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13-127 California Forms of Pleading and Practice--Annotated § 127.81

§ 127.81 Complaint for Damages [Civ. Code § 1747.70(d)] Under Song-Beverly Credit Card Act of 1971 [Civ. Code §§ 1747-1748.5]--By Cardholder Against Card Issuer--Reporting of Untrue Credit Information [Civ. Code § 1747.70(a)] or Communicating Unfavorable Credit Information [Civ. Code § 1747.70(b)]

[1] FORM Complaint for Damages [Civ. Code § 1747.70(d)] Under Song-Beverly Credit Card Act of 1971 [Civ. Code §§ 1747-1748.5]--By Cardholder Against Card Issuer--Reporting of Untrue Credit Information [Civ. Code § 1747.70(a)] or Communicating Unfavorable Credit Information [Civ. Code § 1747.70(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	(Violation of Song-Beverly Credit Card Act of 1971)
Defendants.	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

[1. *Capacity and residence of defendant. See Paragraph 1 in § 127.80[1].*]

[2. *Fictitious name allegation, if appropriate. See Paragraph 2 in § 127.80[1].*]

[3. *Allegation of defendant as credit card issuer or agent of issuer. See Paragraph 3 in § 127.80[1].*]

[*EITHER*]

4. On or about _____ [*date*], defendant reported to _____ [*name*] the following information: _____ [*specify untrue credit information*]. This information was and is untrue and at the time of giving it defendant knew that it was untrue in that _____ [*specify, e.g.,* on or about _____ (*date*), plaintiff had informed defendant and provided substantiation to the effect that the information was untrue].

[*OR*]

4. On or about _____ [*date*], defendant communicated to _____ [*name*] information to the effect that _____ [*describe unfavorable credit information*]. Previous to such communication and on or about _____ [*date*], plaintiff had inquired of defendant concerning a billing error, and defendant failed and refused, and continues to fail and refuse, to correct the billing error in conformity with *Section 1747.50 of the Civil Code*. Plaintiff is informed and believes and thereon alleges that defendant made the above-mentioned communication to _____ [*name*] solely because of plaintiff's failure to pay the amount by which the outstanding balance of plaintiff's account is, to defendant's knowledge, greater than the correct balance.

[*CONTINUE*]

5. As a result of defendant's reporting of the aforementioned information, plaintiff has been injured in that _____ [*specify actual injuries*], all to his/her damage in the sum of $_____.

[6. *Attorney's fees, if appropriate. See Paragraph 10 in § 127.80[1].*]

[*Prayer. See § 127.80[1].*]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 127.80[1].*]

[2] Use of Form

The complaint in [1], *above,* is for an action for damages brought by a cardholder against a card issuer who has willfully reported untrue credit information in violation of *Civ. Code § 1747.70(a)* of the Song-Beverly Credit Card Act of 1971 [*Civ. Code §§ 1747-1748.5*; *see Civ. Code § 1747.70(a)*] or who has communicated unfavorable credit information concerning plaintiff cardholder solely because of plaintiff's failure to pay the amount by which the outstanding balance of the plaintiff's account is greater than the correct balance [*see Civ. Code § 1747.70(b)*].

[3] Cross References

For discussion and cross references relevant to complaints under the Song-Beverly Credit Card Act of 1971, see *§ 127.80[2]* et seq.

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13-127 California Forms of Pleading and Practice--Annotated § 127.82

§ 127.82 Allegation of Violation of Song-Beverly Credit Card Act of 1971 [Civ. Code §§ 1747-1748.5]--Improper Cancellation or Refusal to Renew Credit Card [Civ. Code § 1747.70(c)]

[1] FORM Allegation of Violation of Song-Beverly Credit Card Act of 1971 [Civ. Code §§ 1747-1748.5]--Improper Cancellation or Refusal to Renew Credit Card [Civ. Code § 1747.70(c)]

On or about _____ [*date*], defendant _____ [canceled *or* refused to renew] plaintiff's credit card. Plaintiff is informed and believes and thereon alleges that defendant's _____ [cancellation of *or* refusal to renew] plaintiff's credit card was for the reason that plaintiff had, on or about _____ [*date*], _____ [*describe manner in which plaintiff had obtained relief under Civ. Code § 1747.50 for correction of billing error*].

[2] Use of Form

The allegation in [1], *above*, is for use in a complaint for damages under the Song-Beverly Credit Card Act of 1971 [*Civ. Code §§ 1747-1748.5*]. The form alleges that defendant card issuer either canceled or failed to renew a credit card because plaintiff cardholder had obtained relief under *Civ. Code § 1747.50* (correction of billing errors) [*see Civ. Code § 1747.70(c)*].

[3] Cross References

For discussion and cross references relevant to complaints under the Song-Beverly Credit Card Act of 1971, see *§ 127.80[2]* et seq.

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13-127 California Forms of Pleading and Practice--Annotated § 127.83

§ 127.83 Petition for Damages and to Compel Issuance of Credit Card [Civ. Code § 1747.80(b)]--Denial of Application for Credit Card Based on Unlawful Discrimination [Civ. Code § 1747.80(a)]

[1] FORM Petition for Damages and to Compel Issuance of Credit Card [Civ. Code § 1747.80(b)]--Denial of Application for Credit Card Based on Unlawful Discrimination [Civ. Code § 1747.80(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*names*],	)	PETITION TO COMPEL ISSUANCE OF CREDIT
Respondent.	)	CARD
	)	
	)	

Petitioner alleges:

1. Petitioner is, and at all times herein mentioned was, a resident of _____ County, California.

2. Respondent _____ [*name*] is, and at all times herein mentioned was, _____ [*state, e.g.,* a resident of _____ County, California *or* a corporation duly organized and existing under the laws of the state of California, and authorized and doing business as a _____ (*type of business*), with its principal place of business in _____ County, California].

3. On or about _____ [*date*], petitioner made application to respondent for issuance of a credit card and met all the expressed requirements of respondent for issuance of such a card.

4. On or about _____ [*date*], respondent notified petitioner that the above-mentioned application was denied.

5. [Petitioner is informed and believes and thereon alleges that] [R]espondent's denial of petitioner's application was based solely on the fact that petitioner is _____ [*show unlawful discrimination, e.g.,* black *or* Jewish *or* a naturalized Russian *or* of Japanese ancestry *or* a female].

[6. *Allege all actual damages, if any*.]

[7. Defendant did the things herein alleged maliciously and with the intent to injure plaintiff. Plaintiff is therefore entitled to exemplary or punitive damages.]

WHEREFORE, petitioner prays judgment against respondent as follows:

[1. For actual damages in the sum of $_____;]

2. For the sum of $250 as authorized by *Civil Code Section 1747.80(b)*;

[3. For exemplary damages;]

4. For an order compelling respondent to issue a credit card to petitioner forthwith in accordance with the terms, covenants, and conditions on which such cards are generally issued;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

[*Verification, if desired. See § 127.80[1].*]

[2] Use of Form

The form in [1], *above*, is a petition for damages and to compel the issuance of a credit card. Such an action may be brought by an applicant for a credit card against a credit card issuer following denial of the application by the issuer.

Civ. Code § 1747.80, part of California's Song-Beverly Credit Card Act of 1971 [*Civ. Code § 1747 et seq.*], prohibits credit card issuers from refusing to issue a credit card to any person solely because of any characteristic listed or defined in *Civ. Code § 51(b)* or *(e)*; that is, sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation (including a perception that a person has, or is associated with, someone who has or is perceived to have any particular characteristic or characteristics within the listed categories) [*Civ. Code § 1747.80(a)*

]. Any card issuer who willfully violates this section is liable, for each offense, for $250 plus actual damages suffered by any person who is denied a credit card solely for any of the above reasons. In addition, such a person may petition the court to order the card issuer to issue the person a credit card upon such terms, conditions, and standards as the card issuer normally utilizes in granting credit to other individuals [*Civ. Code § 1747.80(a)*].

[3] Allegations and Prayer

This petition alleges that petitioner was denied a credit card on the basis of unlawful discrimination (Paragraph 5) [*see Civ. Code § 1747.80(a)*].

The petition also prays for relief for actual damages, statutory damages, for an order compelling issuance of the credit card, for costs [*see Civ. Code § 1747.80(b)*], and for exemplary or punitive damages [*see Civ. Code § 3294*]. The amount of exemplary or punitive damages sought must not be stated in the complaint [*Civ. Code § 3295(e)*].

[4] Jurisdiction

An order to compel issuance of a credit card would appear to be in the nature of a mandatory injunction [*see* Ch. 303, *Injunctions*]. An action seeking permanent injunctive relief is in the jurisdiction of the superior court and may not be a limited civil case except as otherwise authorized by statute [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*].

[5] Exemplary and Punitive Damages

A statute providing for a penalty does not operate to exclude the recovery ofexemplary and punitive damages in a proper case [*see Greenberg v. Western Turf Asso. (1903) 140 Cal. 357, 363-364, 73 P. 1050]* . For a discussion of exemplary and punitive damages, see *§ 127.27[3]*.

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13-127 California Forms of Pleading and Practice--Annotated § 127.84

§ 127.84 Petition to Compel Issuance of Credit Card Bearing Maiden Name or Married Name of Petitioner [Civ. Code § 1747.81]

[1] FORM Petition to Compel Issuance of Credit Card Bearing Maiden Name or Married Name of Petitioner [Civ. Code § 1747.81]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION TO COMPEL ISSUANCE OF CREDIT
Respondent.	)	CARD IN MAIDEN OR MARRIED NAME
	)	
	)	

Petitioner alleges:

1. _____ [*Capacity and residence of petitioner. See Paragraph 1 in § 127.83[1]*].

2. _____ [*Capacity and residence of respondent. See Paragraph 2 in § 127.83[1]*].

3. On or about _____ [*date*], respondent _____ [*name*] issued a credit card to petitioner, a married woman. Petitioner had requested that the card be issued in her _____ [maiden *or* married] name. Contrary to petitioner's request, the credit card was issued in her _____ [maiden *or* married] name.

WHEREFORE, petitioner prays judgment against respondent as follows:

1. For an order compelling respondent to issue a credit card to petitioner in her _____ [maiden *or* married] name;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

Verification, if desired. See § 127.80[1].]

[2] Use of Form

This petition in [1], *above*, is for use in compelling issuance of a credit card to a married woman in either her maiden or married name.

Civ. Code § 1747.81, part of California's Song-Beverly Credit Card Act of 1971 [*Civ. Code § 1747 et seq.*], provides that if a credit card issuer has determined in the normal course of business that it will issue a card to a married woman, the card must be issued bearing either the maiden name or married name of the woman, as thewoman may direct [*Civ. Code § 1747.81* (note that card issuers may require that a married woman requesting a card in her maiden name open a new account in that name)].

[3] Allegations and Prayer

This petition alleges that respondent issued a credit card to petitioner bearing her maiden or married name contrary to her request, and prays for an order compelling issuance of the credit card in the name which she requested [*see Civ. Code § 1747.81*].

Civ. Code § 1747.81 does not provide any specific remedies against credit card issuers who fail to comply with its provisions. However, by analogy to *Civ. Code § 1747.80*, which specifies that a person may petition the court for issuance of a credit card refused on the basis of marital status [*see § 127.83*], it can be argued that a married woman should be able to petition under *Civ. Code § 1747.81* for issuance of a card in her married or maiden name.

[4] Jurisdiction

An order to compel issuance of a credit card would appear to be in the nature of a mandatory injunction [*see* Ch. 303, *Injunctions*]. An action seeking permanent injunctive relief is in the jurisdiction of the superior court and may not be a limited civil case except as otherwise authorized by statute [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*].

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A. Actions Under California Song-Beverly Act

13-127 California Forms of Pleading and Practice--Annotated § 127.85

§ 127.85 Complaint for Civil Penalties for Wrongfully Recording Personal Identification Information in Credit Card Transaction [Civ. Code § 1747.08]

[1] FORM Complaint for Civil Penalties for Wrongfully Recording Personal Identification Information in Credit Card Transaction [Civ. Code § 1747.08]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR CIVIL PENALTIES
_____ [*names*],	)	(Wrongfully Recording Personal Identification In-
Defendants.	)	formation in Credit Card Transaction)
	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
		(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

[1. *Capacity and residence of defendant. See Paragraph 1 in § 127.80[1].*]

[2. *Fictitious defendant allegations, if appropriate. See Paragraph 2 in § 127.80[1].*]

3. Defendant is a _____ [person *or* firm *or* partnership *or* association *or* corporation] that accepts credit cards for the transaction of business.

4. On or about _____ [*date*], plaintiff tendered his/her credit card to defendant in payment of a sales

transaction with defendant _____ [*name*].

[*EITHER*]

5. Defendant _____ [required as a condition of accepting payment by credit card *or* requested, immediately preceding acceptance of plaintiff's credit card,] that plaintiff write personal identification information, within the meaning of *Civil Code Section 1747.08*, namely, _____ [*specify, e.g.,* plaintiff's telephone number], on _____ [*specify, e.g.,* the credit card transaction form].

[*AND/OR*]

6. Defendant _____ [required as a condition of accepting payment by credit card *or* requested, immediately preceding acceptance of plaintiff's credit card,] that plaintiff provide personal identification information, within the meaning of *Civil Code Section 1747.08*, namely, _____ [*specify, e.g.,* plaintiff's telephone number], which the defendant _____ [*specify, e.g.,* caused to be written *or describe manner in which information was recorded*] on _____ [*specify, e.g.,* the credit card transaction form].

[*AND/OR*]

7. During the above-mentioned transaction, defendant used a credit card form thatcontained preprinted spaces specifically designated for filling in the credit card holder's personal identification information, within the meaning of *Civil Code Section 1747.08*.

[*CONTINUE*]

[8. Further, on or about _____ (*date*), plaintiff tendered his/her credit card to defendant in payment of a sales transaction with defendant _____ (*name*), at which time defendant _____ (*allege subsequent instances in which defendant wrongfully required personal identification information from plaintiff*).]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a civil penalty in the amount of $250 for the [first] violation of the prohibition against requiring personal identification information in a credit card transaction;

[2. For a civil penalty in the amount of $1,000 for each subsequent violation of the prohibition against requiring personal identification information in a credit card transaction;]

3. For costs of suit incurred herein; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

[*Verification, if desired. See § 127.80[1].*]

[2] Use of Form

The complaint in *§ 127.85[1]* is for use by a credit card holder against a person, firm, partnership, association, or corporation that wrongfully required or requested that the cardholder's personal identification information be recorded in a credit card transaction [*see Civ. Code § 1747.08*]. *Civ. Code § 1747.08*, part of California's Song-Beverly Credit Card Act of 1971 [*Civ. Code § 1747 et seq.*], with specified exceptions [*see Civ. Code § 1747.08(c)*], prohibits those who accept credit cards for the transaction of business from doing any of the following [*Civ. Code § 1747.08*]:

- Requesting, or requiring as a condition of accepting a credit card as payment in full or in part for goods or services, the cardholder to write any personal identification information on the credit card transaction form or otherwise.

- Requesting, or requiring as a condition of accepting the credit card as payment in full or in part for goods or services, the cardholder to provide personal identification information, which the person, firm, partnership, association, or corporation accepting the credit card writes, causes to be written, or otherwise records upon the credit card transaction form or otherwise.

- Using, in any credit card transaction, a credit card form that contains preprinted spaces specifically designated for filling in any personal identification information of the cardholder.

"Personal identification information," means information concerning the cardholder, other than information set forth on the credit card, and including, but not limited to, the cardholder's address and telephone number [*Civ. Code § 1747.08(b)*]. A cardholder's five-digit ZIP code is not personal identification information, and the statute does not prohibit asking for it [*Party City Corp. v. Superior Court (2008) 169 Cal. App. 4th 497, 519-520, 86 Cal. Rptr. 3d 721*].

In a case interpreting *Civ. Code § 1747.08*, the court determined that the word "request" (as added to the statute in 1991) prohibits a retailer from making a request for personal identification from the consumer if it immediately precedes a credit card transaction, even if the consumer's response is voluntary and made only for marketing purposes [*Florez v. Linens'N Things, Inc. (2003) 108 Cal. App. 4th 447, 450-453, 133 Cal. Rptr. 2d 465* (allegation that store improperly requested customer's telephone number held sufficient to state cause of action for violation of *Civ. Code § 1747.08*)].

For more detailed discussion of the applicable requirements and limitations, see *127.28[17][a]*.

[3] Remedies

Any person who violates *Civ. Code § 1747.08* is subject to a civil penalty not to exceed $250 for the first violation and $1,000 for each subsequent violation, to be assessed and collected in a civil action brought by the person paying with a credit card (or by certain governmental entities) [*see Civ. Code § 1747.08(e)*]. For further discussion, see *§ 127.28[17][c]*. Because the penalty is mandatory, an action to recover the penalty is subject to the one-year limitation period prescribed in *Code Civ. Proc. § 340* [*TJX Cos., Inc. v. Superior Court (2008) 163 Cal. App. 4th 80, 85-86, 77 Cal. Rptr. 3d 114*].

No civil penalty will be assessed if the defendant shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error made notwithstanding the defendant's maintenance of procedures reasonably adopted to avoid such an error [*see Civ. Code § 1747.08(e)*].

[4] Allegations

The complaint alleges:

- The basis for venue (Paragraph 1) [*see Code Civ. Proc. §§ 395* (individual), 395.2 (unincorporated association), 395.5 (corporation or association)].

- Defendant's status as an entity that accepts credit cards in the transaction of business (Paragraph 2) [*see Civ. Code § 1747.08(a)*].

- Facts regarding the wrongful requirement of or request for personal identifying information in a credit card transaction (Paragraphs 4-7) [*see Civ. Code § 1747.08(a)(1)-(3)*].

Optional Paragraph 8 may be used to allege subsequent violations of the prohibition against requiring personal identification information in credit card transactions, as abasis for additional civil penalties [*see Civ. Code § 1747.08(d)*].

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13-127 California Forms of Pleading and Practice--Annotated §§ 127.86-127.89

[Reserved]

§§ 127.86[Reserved]

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B. Use of Credit Card for Identification

13-127 California Forms of Pleading and Practice--Annotated § 127.90

§ 127.90 Complaint for Civil Penalties for Wrongfully Requiring Credit Card for Acceptance of Payment by Check [Civ. Code § 1725]

[1] FORM Complaint for Civil Penalties for Wrongfully Requiring Credit Card for Acceptance of Payment by Check [Civ. Code § 1725]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR CIVIL PENALTIES
vs.	)	(Wrongfully Requiring Credit Card for Acceptance
_____ [*names*],	)	of Payment by Check)
Defendants.	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____ (exceeds *or* does not ex-
	)	ceed) $10,000]

_____

Plaintiff alleges:

[1. *Capacity and residence of defendant. See Paragraph 1 in § 127.80[1].*]

[2. *Fictitious defendant allegations, if appropriate. See Paragraph 2 in § 127.80[1].*]

3. On or about _____ [*date*], plaintiff tendered to defendant his/her check, drawn on the _____ [*name of bank*] and directing that bank to pay to the order of defendant the sum of $_____ as [partial] payment for _____ [*specify nature of goods or services*], which

was/were offered by defendant for sale.

[*EITHER*]

4. As a condition of accepting plaintiff's check, defendant required plaintiff to provide a credit card [as a means of identification *or* (*specify other purpose, if applicable*)].

[*AND/OR*]

5. Defendant _____ [required, as a condition of accepting plaintiff's check, *or* caused] plaintiff to sign a statement agreeing to allow his/her credit card to be charged to cover the check if returned as no good.

[*AND/OR*]

6. In connection with the sales transaction, defendant recorded the number of a credit card issued to plaintiff.

[*AND/OR*]

7. Defendant contacted the issuer of a credit card issued to plaintiff to determine ifthe amount of credit available to plaintiff was sufficient to cover the amount of plaintiff's check.

[*CONTINUE*]

[8. Further, on or about _____ (*date*), plaintiff tendered to defendant his/her check, directing the _____ (*name of bank*) to pay to the order of defendant the sum of $_____ as [partial] payment for _____ (*specify nature of goods or services*), at which time defendant _____ (*allege subsequent instances in which defendant wrongfully required a credit card*).]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a civil penalty in the amount of $250 for the [first] violation of the prohibition against requiring a credit card for acceptance of payment by check;

[2. For a civil penalty in the amount of $1,000 for each subsequent violation of the prohibition against requiring a credit card for acceptance of payment by check;]

3. For costs of suit incurred herein; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 127.80[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use against a person who accepts a check as payment in full or part for goods or services but who wrongfully requires the payor to provide a credit card or sign a statement guaranteeing payment by credit card, records a credit card number, or contacts a credit card issuer to determine the amount of credit available to the payor [*see Civ. Code § 1725*].

Civ. Code § 1725(a), subject to various exceptions [*see Civ. Code § 1725(c)*; [4]-[5], *below*], prohibits any person no person accepting a negotiable instrument as payment in full or in part for goods or services sold or leased at retail from doing any of the following:

- Requiring the person paying with a negotiable instrument to provide a credit card as a condition of acceptance of the negotiable instrument, or record the number of the credit card.

- Requiring, as a condition of acceptance of the negotiable instrument, or causing the person paying with a negotiable instrument to sign, a statement agreeing to allow his or her credit card to be charged to cover the negotiable instrument if it is returned as no good.

- Recording a credit card number in connection with any part of the transaction described in this subdivision.

- Contacting a credit card issuer to determine if the amount of any credit available to the person paying with a negotiable instrument will cover the amount of the negotiable instrument.

[3] Remedies

Any person who violates *Civ. Code § 1725(e)* is subject to a civil penalty of up to $250 for a first violation, and to a civil penalty of up to $1,000 for a second or subsequent violation, to be assessed and collected in a civil action brought by the person paying with a negotiable instrument, by the Attorney General, or by the district attorney or city attorney of the county or city in which the violation occurred. The civil penalty is payable, as appropriate, to the person paying with a negotiable instrument who brought the action or to the general fund of whichever governmental entity brought the action to assess the civil penalty [*Civ. Code § 1725(e)*].

The Attorney General and local law enforcement officials are also authorized to seek and obtain injunctive relief for violation of *Civ. Code § 1725*, but this authority is not extended to private parties [*see Civ. Code § 1725(f)*].

For further discussion, see *§ 127.28[17][c]*.

[4] Unintentional Violations

The civil penalty discussed in [3], *above*, will not be assessed for a violation of *Civ. Code § 1725* if the defendant shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error made notwithstanding the defendant's maintenance of procedures reasonably adopted to avoid such an error [*see Civ. Code § 1725(e)*]. Thus, the fact that a violation was unintentional may be raised as a defense to an action under *Civ. Code §*

1725.

[5] Permissible Requests for Identification

Civ. Code § 1725 specifies numerous exceptions from its prohibitions, and activities that do not constitute a violation of the section. Specifically, the section does not prohibit any person from doing any of the following [*Civ. Code § 1725(c)*; *see § 127.28[18]*]:

- Requiring the production of reasonable forms of positive identification, *other than a credit card*, which may include a driver's license or a California state identification card or, if one of these is not available, another form of photo identification, as a condition of acceptance of a negotiable instrument.

- Requesting, but not requiring, a purchaser to voluntarily display a credit card as an indicia of creditworthiness or financial responsibility, or as an additional identification, provided the only information concerning the credit card which is recorded is the type of credit card displayed, the issuer of the card, and the expiration date of the card. Retailers that request the display of a credit card pursuant to this paragraph are required to inform the customer that displaying the credit card is not a requirement for check writing by either (1) posting a specified notice in a conspicuous location in the unobstructed view of the public within the premises where the check is being written; or (2) training andrequiring sales clerks or retail employees requesting the credit card to inform all check writing customers that they are not required to display a credit card to write a check.

- Requesting production of, or recording, a credit card number as a condition for cashing a negotiable instrument that is being used solely to receive cash back from the person.

- Requesting, receiving, or recording a credit card number in lieu of requiring a deposit to secure payment in event of default, loss, damage, or other occurrence.

- Requiring, verifying, and recording the purchaser's name, address, and telephone number.

- Requesting or recording a credit card number on a negotiable instrument used to make a payment on that credit card account.

Moreover, *Civ. Code § 1725* does not require acceptance of a negotiable instrument whether or not a credit card is presented [*Civ. Code § 1725(d)*].

[6] Allegations

The complaint in [1], *above*, alleges:

- The basis for venue (Paragraph 1) [*see Code Civ. Proc. §§ 395* (individual), 395.2 (unincorporated association), 395.5 (corporation or association)].

- Facts regarding the wrongful requirement of a credit card in accepting payment for goods or services by check (Paragraphs 3-7) [*see Civ. Code § 1725(a)(1)-(4)*].

Optional Paragraph 8 may be used to allege subsequent violations, as a basis for additional civil penalties [*see Civ. Code § 1725(b)*].

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13-127 California Forms of Pleading and Practice--Annotated §§ 127.91-127.99

[Reserved]

§§ 127.91[Reserved]

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C. Credit Issues Relating to Marital Status

13-127 California Forms of Pleading and Practice--Annotated § 127.100

§ 127.100 Compliant for Damages [Civ. Code § 1812.31]--For Denial of Credit or Offer of Credit on Less Favorable Terms in Violation of Civ. Code § 1812.30

[1] FORM Compliant for Damages [Civ. Code § 1812.31]--For Denial of Credit or Offer of Credit on Less Favorable Terms in Violation of Civ. Code § 1812.30

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	(Discrimination in Credit Transaction)
Defendants.	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

[1. *Capacity and residence of defendant. See Paragraph 1 in § 127.80[1].*]

[2. *Fictitious name allegation, if appropriate. See Paragraph 2 in § 127.80[1].*]

[*EITHER*]

3. On or about _____ [*date*], plaintiff applied to defendant for credit in his/her own name. On _____ [*date*], plaintiff received notification that credit in his/her own name was denied. Plaintiff is

informed and believes and thereon alleges that a person of the opposite sex managing and controlling the same amount of earnings and other property as plaintiff manages and controls would have received credit.

[*OR*]

3. On or about _____ [*date*], plaintiff, who manages and controls his/her earnings and other property, applied to defendant for credit. On _____ [*date*], plaintiff was offered credit. Plaintiff is informed and believes and thereon alleges that he/she was offered credit on terms less favorable than would be offered to a person of the opposite sex seeking the same type of credit and managing and controlling the same amount of earnings and other property.

[*OR*]

3. On or about _____ [*date*], plaintiff, an unmarried person, applied to defendant for credit. On _____ [*date*], plaintiff received notification that credit was denied. Plaintiff is informed and believes and thereon alleges that a married person managing and controlling the same amount of earnings and other property as plaintiff manages and controls would have received credit.

[*OR*]

3. On or about _____ [*date*], plaintiff, an unmarried person, applied to defendant for credit. On _____ [*date*], plaintiff was offered credit. Plaintiff is informed and believes and thereon alleges that he/she was offered credit on less favorable terms than would be offered a married person managing and controlling the same amount of earnings and other property.

[*OR*]

3. Plaintiff receives _____ [spousal *or* child support *or* both] payments pursuant to _____ [a written agreement *or* court decree]. The reliability of these payments has been established in that _____ [*specify the length of time payments have been received, the regularity of receipt, and whether full or partial payments have been made*]. However, when plaintiff applied for credit from defendant the _____ [spousal *or* child support *or* both] payments which he/she receives were not considered in the same manner as earnings from salary, wages, or other sources.

[*CONTINUE*]

4. As a proximate result of the actions of defendant, plaintiff has been damaged in that _____ [*describe actual damages*] in the sum of $_____.

[5. *Attorney's fees, if appropriate. See Paragraph 10 in § 127.80[1].*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For actual damages in the sum of $_____;

2. For punitive damages in an amount not greater than $10,000 as determined by the court;

3. For attorney's fees in the sum of $_____;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 127.80[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for damages brought by the plaintiff against a defendant who has denied credit or offered credit on less favorable terms than offered to other persons because of plaintiff's sex or marital status in violation of *Civ. Code § 1812.30*. For more detailed discussion of these provisions, see *§ 127.29*.

[3] Actual Damages

Violators of *Civ. Code § 1812.30* are liable to the aggrieved person in an amount equal to the sum of any actual damages sustained by the aggrieved person acting either in an individual capacity or as a representative of a class [*Civ. Code § 1812.31(a)*]. In addition, punitive damages may also be available [*see* [4], *below*].

[4] Punitive Damages

Any person who violates *Civ. Code § 1812.30* is liable to the aggrieved person for punitive damages in an amount not greater than $10,000, as determined by the court, in addition to any actual damages. However, in pursuing the recovery of punitive damages under this provision, the aggrieved person may proceed only in an individual capacity and not as a representative of a class [*Civ. Code § 1812.31(b)*].

In class actions, violators of *Civ. Code § 1812.30* are liable for punitive damages in such an amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in the action may not exceed the lesser of $100,000 or one percent of the net worth of the creditor. In determining the amount of the award in any class action, the court must consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of violations, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's violation was intentional [*Civ. Code § 1812.31(c)*].

[5] Allegations

The complaint in [1], *above*, alleges:

- The application for credit (Paragraph 3).

- The denial of credit or the offering of credit on less favorable terms than proper (Paragraph 3).
- Damages (Paragraph 4).

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13-127 California Forms of Pleading and Practice--Annotated § 127.101

§ 127.101 Complaint for Damages [Civ. Code § 1812.31]--Failure of Credit Reporting Agency to File Spousal Credit Information Separately in Violation of Civ. Code § 1812.30

[1] FORM Complaint for Damages [Civ. Code § 1812.31]--Failure of Credit Reporting Agency to File Spousal Credit Information Separately in Violation of Civ. Code § 1812.30

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	(Failure to File Credit Information Separately)
Defendants.	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

[1. *Capacity and residence of defendant. See Paragraph 1 in § 127.80[1].*]

[2. *Fictitious name allegation, if appropriate. See Paragraph 2 in § 127.80[1].*]

[*EITHER*]

3. An account was established after January 1, l977 in the name of plaintiff and _____ [*name of other person(s)*].

[*OR*]

3. Information was received after January 1, 1977 on an account that was established before January 1, l977 in the name of plaintiff and _____ [*name of other person(s)*].

[*OR*]

3. An account was established concerning plaintiff and his/her (former) spouse prior to January 1, 1977.

[*CONTINUE; EITHER*]

4. On or about _____ [*date*], defendant, a credit reporting agency which in its normal course of business receives information on joint credit accounts, [identifying the persons responsible for such accounts *or* reflecting the participation of both spouses], received information on the joint credit account of plaintiff and _____ [*name of other person*] _____ [identifying the persons responsible for the account *or* reflecting the participation of both spouses]. At the time the information was receiveddefendant did not _____ [file the information separately under the names of each _____ (person *or* spouse) *or* file such information in a manner which would enable either _____ (person *or* spouse) to gain access automatically to the credit history without having in any way to list or refer to the name of the other person]. [Defendant, in addition, did not provide access to all information about the account in the name of each _____ (person *or* spouse).]

[*OR*]

4. On _____ [*date*], plaintiff made a _____ [written *or* personal] request to defendant credit reporting agency to verify the _____ [contractual liability *or* liability by operation of law *or* authorized use by plaintiff] of the joint credit account appearing in the file of plaintiff's [former] spouse. After that request, defendant did not file the information _____ [separately and thereafter continue to do so under the names of each person responsible for the joint account *or* in a manner which would enable either person responsible for the joint account to gain access automatically to the credit history without having in any way to list or refer to the name of the other person].

[*CONTINUE*]

5. As a proximate result of the actions of defendants, plaintiff has been damaged in that _____ [*describe actual damages*] in the sum of $_____.

[6. *Attorney's fees, if appropriate. See Paragraph 10 in § 127.80[1]*.]

[*Prayer. See § 127.80[1]*.]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 127.80[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for damages against a credit reporting agency for failure to file information on joint credit accounts separately under the names of each person or spouse or in such a manner that each person or spouse could gain access to the credit history without having to list or refer to the name of the other person [*see Civ. Code § 1812.30(e), (f)*]. For additional discussion, see *§ 127.29*. For discussion of the damages available for violations of *Civ. Code § 1812.30*, see *§ 127.100[3],[4]*.

[3] Allegations

The complaint in [1], *above*, alleges the following:

- The establishment of a joint credit account (Paragraph 3).

- The failure to file information separately under the names of each person or spouse or in such a manner that each person or spouse could gain access to the credit history without having to list or refer to the name of the other person (Paragraph 4).

- Damages (Paragraph 5).

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13-127 California Forms of Pleading and Practice--Annotated §§ 127.102-127.109

[Reserved]

§§ 127.102[Reserved]

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D. Credit Disability Insurance

13-127 California Forms of Pleading and Practice--Annotated § 127.110

§ 127.110 Complaint for Equitable Relief and Damages--Violation of Creditor Disclosure Provisions of Civ. Code § 1812.400 et seq. [Civ. Code § 1812.402(i)]

[1] FORM Complaint for Equitable Relief and Damages--Violation of Creditor Disclosure Provisions of Civ. Code § 1812.400 et seq. [Civ. Code § 1812.402(i)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES[, TEMPORARY
_____ [*names*],	)	RESTRAINING ORDER, AND PRELIMINARY
Defendants.	)	AND PERMANENT INJUNCTIONS]
	)	(Violation of Civil Code Provisions Regulating Cred-
	)	it Disability Insurance)
		[LIMITED CIVIL CASE]
		[Amount demanded _____
		(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See Paragraph 1 in § 127.80[1].*]

2. [*Fictitious name allegation, if appropriate. See Paragraph 2 in § 127.80[1].*]

3. On or about _____ [*date*], plaintiff _____ [*describe credit transaction entered into, e.g.,* borrowed the sum of $5,000 from defendant _____ (*name of lender*), secured by the title to

the automobile purchased with the loan proceeds]. [A copy of the agreement is attached as Exhibit A and incorporated by reference.]

4. In connection with the above-described transaction, plaintiff entered into an agreement with [defendant] _____ [*name of insurer*], providing for credit disability insurance to provide indemnity for payments becoming due while plaintiff was disabled. [The policy is attached to this complaint as Exhibit B and incorporated by reference.]

[*EITHER*]

5. [Plaintiff is informed and believes, and thereon alleges, that] [D]efendant _____ [directly participated in *or* arranged *or* received a commission or other compensation for] the sale of credit disability insurance to plaintiff.

[*OR*]

5. [Plaintiff is informed and believes, and thereon alleges, that] [D]efendant is the successor to the right, title, or interest of _____ [*name*], and that _____ [*name*] _____ [directly participated in *or* arranged *or* received a commission or other compensation for] the sale of credit disability insurance to plaintiff.

[*CONTINUE*]

6. On or about _____ [*date*], plaintiff notified defendant that plaintiff was disabled within the meaning of the definition in the credit disability insurance policy. Notwithstanding this notice, defendant _____ [*specify creditor's remedy taken by defendant, e.g.,* repossessed the automobile that constituted the security for the loan to plaintiff] before three months had passed since the first payment was missed because of the disability and before the [defendant] insurer [paid *or* rejected] plaintiff's claim.

7. _____ [*Specify threatened action forming basis of equitable remedy sought, e.g.,* (Plaintiff is informed and believes, and thereon alleges, that) (D)efendant plans to sell plaintiff's automobile to recover his/her/its security interest in the automobile].

8. [Defendant's threatened wrongful conduct, unless and until enjoined and restrained by order of this court, will cause great and irreparable injury to plaintiff in that _____ (*specify particular facts which will constitute great and irreparable injury*).]

9. [Plaintiff has no adequate remedy at law and this action is authorized by *Civil Code Section 1812.402(i)*.]

10. _____ [*Specify damages suffered as a result of defendant's violation of Civ. Code § 1812.400 et seq., e.g.,* As a result of defendant's repossession of plaintiff's automobile, plaintiff was compelled to rent a replacement automobile, at a cost of $_____ per day from _____ [*date*], to the present].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages in the sum of $_____;

[2. For an order requiring defendants to show cause, if any they have, why they should not be enjoined as hereinafter set forth, during the pendency of this action;]

[3. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant from _____ (*specify, e.g.,* selling plaintiff's automobile);]

4. For costs of suit herein incurred; and

5. For such other further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if action seeks injunctive relief or verification is otherwise desired. See § 127.80[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for damages and/or equitable relief by a debtor against a creditor alleging that the creditor has violated the provisions of *Civ. Code § 1812.400 et seq.* [*Civ. Code § 1812.402(i)*], which imposes limitations on the remedies available to a creditor when the debtor in a credit transaction cannot meet his or her obligations because of a disability covered by a policy of credit disability insurance. The form includes optional allegations for requesting a temporary restraining order, preliminary injunction, and permanent injunction [*see Code Civ. Proc. §§ 526, 527*].

For more detailed discussion of *Civ. Code § 1812.400 et seq.*, see *§ 127.30*.

[3] Allegations

The complaint in [1], *above*, alleges the following:

- That plaintiff entered into a credit transaction, either by borrowing money or by purchasing or leasing goods, services, property, rights, or privileges (Paragraph 3) [*see Civ. Code § 1812.401(c)*].

- That plaintiff obtained credit disability insurance in connection with that transaction (Paragraph 4) [*see Civ. Code § 1812.401(a)*].

- That defendant or defendant's predecessor in interest participated in the sale of the credit disability insurance to plaintiff (Paragraph 5) [*Civ. Code §§ 1812.401(b), 1812.404*].

- That plaintiff notified defendant of plaintiff's claim of disability under the credit disability insurance policy, but that defendant nevertheless invoked a creditor's remedy during the disability claim period (Paragraph 6) [*Civ. Code § 1812.402(a)*].

- Facts showing defendant's threatened conduct (Paragraph 7), and the irreparability of defendant's actions and the inadequacy of legal remedies, when injunctive relief is sought (Paragraphs 8, 9) [*see Code Civ. Proc. §§ 526, 527*].

- Damages resulting from the alleged violation of *Civ. Code § 1812.400 et seq.* (Paragraph 10) [*Civ. Code § 1812.402(I)*].

[4] Other Causes of Action

Violations of these provisions can also affect other causes of action. For example, in a breach of contract action by a debtor against a credit union for wrongful repossession of a car while the debtor's credit disability insurance claim was pending, the debtor was allowed to assert *Civ. Code § 1812.400 et seq.* as an independent basis for reversing summary judgment in favor of the credit union, even though the debtor had never pled a separate cause of action under those sections. The court held that the act was relevant because it showed that the credit union failed to satisfy its burden to negate the debtor's breach of contract theory. Under the express terms of the agreement between the debtor and the credit union, the credit union was entitled to repossess the vehicle if (1) the loan was in default, and (2) the repossession was "permitted by law." Under the facts alleged, the repossession was not "permitted by law" because of various violations of *Civ. Code § 1812.400 et seq.* by the credit union, and therefore was in violation of the agreement. Thus, plaintiff's breach of contract complaint was sufficient to withstand defendant's motion for summary judgment [*McManis v. San Diego Postal Credit Union (1998) 61 Cal. App. 4th 547, 557-558, 71 Cal. Rptr. 2d 617]* . This decision suggests that in appropriate cases a breach of contract claim may be added to the complaint for statutory relief under *Civ. Code § 1812.400 et seq.* For a form for a general complaint for damages for breach of a written contract, see *Ch. 140, Contracts, § 140.101*.

[5] Verification

Verification [*see Code Civ. Proc. § 446*] is required if the plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint, instead of on an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527*]. Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer in an unlimited civil case [*Code Civ. Proc. § 446*]. Verification also will preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* . If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan G. Co. v. San Juan R. etc. Assn. (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* .

[6] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Code Civ. Proc. §§ 85, 86(a)(1)*]. However, an action seeking injunctive relief is in the jurisdiction of the superior court and may not be a limited civil case except as otherwise authorized by statute [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*]. Therefore, inclusion of the form language seeking injunctive relief may preclude the action from being a limited civil case.

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "immediately below the character of the action or proceeding")].

[7] Cross References

For discussion, procedures, and forms relating to obtaining temporary restraining orders, preliminary injunctions, and permanent injunctions, see Ch. 303, *Injunctions* .

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Volume 13: Conspiracy thru Conversion-Chs. 126-159
Chapter 127 CONSUMER CONTRACTS AND LOANS
PART IV. FORMS
D. Credit Disability Insurance

13-127 California Forms of Pleading and Practice--Annotated §§ 127.111-127.119

[Reserved]

§§ 127.111[Reserved]

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Volume 13: Conspiracy thru Conversion-Chs. 126-159
Chapter 127 CONSUMER CONTRACTS AND LOANS
PART IV. FORMS
E. Consumer Loans Secured by Real Property

13-127 California Forms of Pleading and Practice--Annotated § 127.120

§ 127.120 Complaint for Damages--Violation of Fin. Code § 4970 et seq. Regulating Consumer Loans Secured by Real Property [Fin. Code § 4978]

[1] FORM Complaint for Damages--Violation of Fin. Code § 4970 et seq. Regulating Consumer Loans Secured by Real Property [Fin. Code § 4978]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	(Violation of Civil Code Provisions Regulating Con-
Defendants.	)	sumer Loans Secured by Real Property)
	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
		(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. Defendant is a _____ [*specify defendant's status as lender subject to Fin. Code § 4970 et seq.:* _____ (commercial bank *or* industrial bank) organized under the Banking Law *or* savings association organized under the Savings Association Law *or* credit union organized under the California Credit Union Law *or* _____ (finance lender *or* broker) licensed under the California Finance Lenders Law *or* residential mortgage lender licensed under the California Residential Mortgage Lending Act].

2. [*Fictitious name allegation, if appropriate. See Paragraph 2 in § 127.80[1].*]

3. On _____ [*date after June, 2002*] plaintiff applied to defendant, and on _____ [*date*] plaintiff and defendant signed an agreement, for a loan (hereinafter "the loan"). The loan is secured by real property located in _____ County, California, that is _____ [used *or* intended to be used *or* occupied] as plaintiff's principal dwelling and is improved by a _____ [*describe one-to-four-unit residential dwelling, e.g.,* single-family detached house]. The original principal balance of the loan did not exceed the most current conforming loan limit for a single family first mortgage loan established by the Federal National Mortgage Association in the case of a mortgage or deed of trust. _____ [*If APR at closing was unlawfullyexcessive, allege:* The annual percentage rate at consummation of the loan transaction exceeded by more than 8 percentage points the yieldon U.S. Treasury securities having comparable periods of maturity on the 15th day of the month immediately preceding the month in which the application for the loan was received by defendant *or, if total points and fees were unlawfully excessive, allege:* The total points and fees payable by plaintiff at closing exceeded 6 percent of the total loan amount].

4. In violation of Division 1.6 (commencing with *Section 4970) of the Financial Code,* _____ [*specify how defendant violated Fin. Code § 4970 et seq., e.g.,* on and after _____ (*date within 30 days after loan transaction was consummated*) defendant solicited plaintiff, and plaintiff consequently agreed, to buy credit life insurance for a total single premium of $_____, which was added to the original principal balance and thus financed as part of the loan *or, e.g.,* defendant paid the sum of $_____ from the proceeds of the loan directly to _____ (*name*) under a home improvement contract between plaintiff and _____ (*name*), without plaintiff's permission and contrary to plaintiff's instructions, and in so doing failed to comply with *Financial Code Section 4973(g),* which requires that such payments may not be made unless the person who originates the loan is presented with a signed and dated completion certificate by the consumer showing that the home improvement contract was completed to the satisfaction of the consumer].

5. _____ [*specify how violation was "willful and knowing" if it was, e.g.,* Defendant solicited the credit life insurance purchase knowing that plaintiff had rejected the same solicitation while negotiating the loan and that plaintiff's stated reason was plaintiff's financial inability to pay the cost of the insurance in addition to the monthly loan payments. In the subsequent solicitation, defendant stressed that the cost of the insurance could be added to the loan balance and thus financed as part of the loan, and that plaintiff's monthly payments then would be increased by only a very small amount *or, e.g.,* Defendant made the payment specified in Paragraph 4 despite having received both oral and written notice from plaintiff that a dispute existed between plaintiff and _____ (*name*) regarding the nature and quality of the work performed under the home improvement contract and that no payments were to be made to _____ (*name*) until that dispute had been resolved].

6. _____ [*specify how plaintiff has been harmed, e.g.,* The aggregate amount that plaintiff paid, through _____ (*date*), for the credit life insurance is $_____, including $_____ as interest on the financed premium amount. Plaintiff has continued to make the agreed monthly loan payments, so as not become in default under the loan agreement, even though plaintiff on _____ (*date*) informed defendant that the financing of credit life insurance was illegal and that plaintiff demanded appropriate relief from it].

[7. *Attorney's fees. See Paragraph 10 in § 127.80[1].*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages in the sum of $_____ [*add, if violation was "willful and knowing" (see Fin. Code § 4978(a)):* or statutory damages in the sum of $15,000, whichever is greater];

[2. For an order declaring the unenforceability of the loan agreement insofar as it concerns _____ (*specify nonconforming provisions, e.g.,* the financing of credit life insurance) and reforming the agreement

accordingly;]

3. For reasonable attorney's fees;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 127.80[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for damages by a consumer against a commercial lender, based on violation of *Fin. Code § 4970 et seq.* in connection with the making of a consumer loan secured by residential real property, if the plaintiff applied for the loan after June, 2002 [*see* Stats. 2001, ch. 732, § 3]. This complaint can be adapted for use in an action against a real estate broker that arranged a loan subject to the governing statutes.

[3] Allegations

The complaint in [1], *above*, alleges the following:

- The defendant is a commercial lender subject to *Fin. Code § 4970 et seq.* (Paragraph 1).

- After June, 2002, the plaintiff applied for and agreed to a loan from the lender, and the loan meets the following requirements and therefore is subject to *Fin. Code § 4970 et seq.* (Paragraph 3).

- The loan is secured by real property that is located in California, which is used or intended to be used or occupied as the plaintiff's principal dwelling and is improved by a one-to-four-unit residential building [*see Fin. Code § 4970(d)* (definition of "consumer loan")] (Paragraph 3).

- One or both of the following facts is true [*see Fin. Code § 4970(b)*] (Paragraph 3):

  - The annual percentage rate at consummation of the loan transaction exceeded by more than 8 percentage points theyield on Treasury securities having comparable periods of maturity on the 15th day of the month immediately preceding the month in which the application for the loan was received by the defendant.

  - The total points and fees payable by the plaintiff at or before closing exceeded 6 percent of the total loan amount [*see Wolski v. Fremont Inv. & Loan (2005) 127 Cal. App. 4th 347, 350, 25 Cal. Rptr. 3d 500* (transaction was not covered loan when total

points and fees exceeded 6 percent only if yield-spread premium was included)].

- The lender violated *Fin. Code § 4970 et seq.* as specified (Paragraph 4). Two alternative examples are illustrated in this form. The first example alleges that the lender sold credit disability insurance in violation of the limitations imposed by *Fin. Code § 4979.7* [for discussion, *see § 127.31[4][g]*]. The second example alleges that the lender made direct payments to a contractor under a home improvement contract, in violation of *Fin. Code § 4973(g)* [for discussion, *see § 127.31[4][c]*]. Allegations of violations of the other requirements of *Fin. Code § 4970 et seq.*, as discussed in *§ 127.31*, may be substituted as appropriate.

- The violation was a willful and knowing violation as specified, if that was the case (Paragraph 5) [*see Fin. Code § 4978(a)* (in case of "willful and knowing violation," recoverable damages will be $15,000 or actual damages, whichever is greater)].

- As a proximate result of the violation, the plaintiff suffered harm as specified, if actual damages are demanded (Paragraph 6).

[4] Additional Relief

A provision in a covered loan that violates *Fin. Code § 4970 et seq.* is unenforceable. A court in which any action is brought by, or on behalf of, an aggrieved consumer for relief may issue an order or injunction to reform the terms of the covered loan to conform to the provisions of *Fin. Code § 4970 et seq.* [*Fin. Code § 4978(b)*].

In addition to any other remedy, the court may award punitive damages to the consumer on a finding that such damages are warranted pursuant to *Civ. Code § 3294* [*Fin. Code § 4978(b)*]. For discussion and forms for use in claiming punitive damages, see Ch. 177, *Damages* .

[5] Attorney's Fees

The plaintiff is entitled to recover attorney's fees and costs in an action under *Fin. Code § 4970 et seq.*, in addition to damages [*Fin. Code § 4978(b)*].

[6] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "immediately below the character of the action or proceeding")].

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Volume 13: Conspiracy thru Conversion-Chs. 126-159
Chapter 128 CONSUMER CONTRACTS: STATUTES REGULATING SPECIFIC TYPES OF CONTRACTS

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§ 128.02 Cross References

§§ 128.03-128.09 [Reserved]

§ 128.10 Dance Studio Act and Health Studio Act

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[2] Purposes

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[4] Definitions and Scope

[a] Contract for Dance Studio Lessons and Other Services

[b] Contract for Health Studio Services

[5] Written Contract Required

[6] Limitations on Length and Amount of Contract

[7] Commencement and Cancellation of Contract

[a] Dance Studio Lessons

[b] Health Studio Services

[8] Hourly Rate for Dance Studio Lessons

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[a] When Health Studio Facility Has Not Yet Opened

[b] When Health Studio Services Recipient Moves

[10] Health Studio Contracts Including Finance Charges

[11] Bonds or Cash Deposit Requirements Applicable to Dance Studios

[12] Provisions Relating to Buyer's Rights or Defenses Against Third Parties

[a] Payment by Note

[b] Assignment of Contract

[13] Relief From Payment on Death or Disability

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[16] Correction of Noncomplying Contract

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§ 128.11 Dating Service and Weight Loss Contracts

[1] Governing Law

[2] Definitions

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[b] Weight Loss Contract

[3] Contract Requirements

[4] Limitations on Payments for and Length of Contract

[5] Cancellation of Contract by Buyer

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[8] Noncompliance With Statutes; Fraudulent or Misleading Information

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§ 128.12 Home and Seminar Sales Solicitation Contracts

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[2] Definitions

[a] Home Solicitation Contract

[b] Appropriate Trade Premises

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[d] Seminar Setting

[e] Goods

[f] Services

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[3] Buyer's Right to Cancel Contract

[4] Requirements of Contract or Offer

[a] General Requirements

[b] Notice of Cancellation

[c] Copy of Contract; Oral Notice of Right to Cancel

[5] Goods Affixed to Realty in Home Solicitation Contract

[6] Refund of Payments

[7] Return of Goods to Seller

[a] Requirements for Tender

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[9] Special Rules for Home Solicitation Contracts

[a] Waiver and Confession of Judgment

[b] Emergency Services

[c] Residential Premises Damaged by Disaster

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[e] Improper Plan or Scheme

[f] Demand for Termination

[g] Return of Goods Received

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§ 128.13 Unsolicited Goods or Services

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[2] Unsolicited Goods or Services

[3] Contractual Plans Not Governed by Statute

[a] Subscriptions, Standing Orders, and Similar Arrangements

[b] Arrangements Involving Form or Announcement Card Instructing Seller Not to Ship Merchandise

[4] Termination of Membership in Organization Making Retail Sales

[5] Action to Enjoin Billing for Gifts

[6] Solicitation Disguised as Bill or Invoice

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§ 128.14 Discount Buying Services

[1] Governing Law

[2] Purpose

[3] Definitions

[a] Discount Buying Organization

[b] Contract for Discount Buying Services

[c] Discount Prices

[4] Disclosure Requirements

[a] Nature of Services

[b] Representative List of Available Items

[c] Warranties and Guarantees, Returns, Cancellation of Orders, and Refunds

[d] Incidental Charges

[e] Disclosure of Fraud by Owner or Officer

[5] Contracts for Discount Buying Services

[a] Basic Requirements

[b] Overlapping Contracts

[c] Limitation on Payment or Financing Period

[d] Requirement of Availability of Services

[e] Rights of Action and Defenses of Buyer

[f] Refund If Goods Not Delivered or Not Available

[g] Cancellation of Contract by Buyer

[6] Trust Account Requirements

[7] Buyer's Right to Rescind

[8] Rescission and Pro Rata Refund

[9] False or Misleading Representations

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[c] Correction of Contract and Limitation of Liability

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§ 128.30 State Statutes

[1] Dance Studio Act

[2] Dating Service Contracts

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[4] Health Studio Act

[5] Home Solicitation Contracts

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[7] Weight Loss Contracts

§ 128.31 Decisions

[1] Dance Studio Act

[2] Home Solicitation Contracts

§ 128.32 Law Reviews

§§ 128.33-128.39 [Reserved]

§ 128.40 Complaint for Damages [Civ. Code § 1812.94] for Violation of Health Studio Act [Civ. Code § 1812.80 et seq.]--Against Health Studio--Contract Requiring Payment in Excess of Statutory Limit [Civ. Code § 1812.86]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Actions for Recovery of Damages

[5] Verification

[6] Jurisdiction

[7] Cross References

§ 128.41 Complaint for Damages [Civ. Code §§ 1812.62, 1812.94] for Violation of Dance Studio Act [Civ. Code § 1812.50 et seq.] or Health Studio Act [Civ. Code § 1812.80 et seq.]--Excessive Term of Contract [Civ. Code §§ 1812.53(a) (Dance Studio Act), 1812.84(a) (Health Studio Act)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Alleging Other Violations of Dance Studio Act or Health Studio Act

[5] Damages

[6] Cross References

§§ 128.42-128.49 [Reserved]

§ 128.50 Complaint for Damages [Civ. Code §§ 1694.4(c), 1694.9(c)] Based on Cancellation of Dating Service [Civ. Code §§ 1694-1694.4] or Weight Loss [Civ. Code §§ 1694.5-1694.9] Contract--Failure to Refund Payments Within 10 Days of Cancellation [Civ. Code §§ 1694.1(e), 1694.6(e)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 128.51 Allegation--Contract for Dating Services [Civ. Code §§ 1694-1694.4] or Weight Loss [Civ. Code §§ 1694.5-1694.9]--Excessive Term of Contract [Civ. Code §§ 1694.2(d), 1694.7(d)]

[1] FORM

[2] Use of Form

§ 128.52 Affirmative Defense--Action on Dating Service [Civ. Code §§ 1694-1694.4] or Weight Loss [Civ. Code §§ 1694.5-1694.9] Contract--Contract Canceled [Civ. Code §§ 1694.1, 1694.6]

[1] FORM

[2] Use of Form

[3] Cross References

§§ 128.53-128.59 [Reserved]

§ 128.60 Complaint for Restitution Based on Cancellation of Home Solicitation Contract or Offer [Civ. Code §§ 1689.5-1689.14] or Seminar Sales Solicitation Contract or Offer [Civ. Code §§ 1689.20-1689.24]--Failure to Refund Payments Within 10 Days of Cancellation [Civ. Code §§ 1689.10(a), 1689.22(a)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 128.61 Affirmative Defense to Action on Home Solicitation Contract [Civ. Code § 1689.5] or Seminar Sales Solicitation Contract [Civ. Code § 1689.24]--Contract Canceled [Civ. Code §§ 1689.6, 1689.20]

[1] FORM

[2] Use of Form

[3] Cross References

§ 128.62 Complaint for Damages [Bus. & Prof. Code § 17500.3(c)] for Unlawful Home Solicitation Practices [Bus. & Prof. Code § 17500.3(a),(b)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§§ 128.63-128.69 [Reserved]

§ 128.70 Complaint for Temporary Restraining Order and Preliminary Injunction and Permanent Injunction--To Restrain Billing for Unsolicited Services or Goods [Civ. Code §§ 1584.5, 1584.6]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Certification re Notice

[6] Jurisdictional Classification

[7] Cross References

§ 128.71 Complaint for Damages--Solicitation of Order

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§§ 128.72-128.79 [Reserved]

§ 128.80 Complaint for Damages and Restitution Based on Rescission [Civ. Code § 1812.123]--By Buyer Against Discount Buying Organization and Surety--Violation of Statutory Requirements [Civ. Code §§ 1812.100-1812.128]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Liability of Surety

[5] Cross References

§ 128.81 Affirmative Defense by Discount Buying Organization to Action by Buyer for Statutory Violation [Civ. Code §§ 1812.100-1812.128]--Limitation on Recovery [Civ. Code § 1812.123(b)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 128.82 Affirmative Defense by Buyer to Action to Enforce Contract for Discount Buying Services [Civ. Code §§ 1812.100-1812.128]--Unenforceability Based on Statutory Violation

[1] FORM

[2] Use of Form

[3] Cross References

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Chapter 128 CONSUMER CONTRACTS: STATUTES REGULATING SPECIFIC TYPES OF CONTRACTS
PART I. SCOPE

13-128 California Forms of Pleading and Practice--Annotated § 128.01

§ 128.01 Scope of Chapter

This chapter discusses various types of consumer protection legislation dealing with specific categories of goods and services not covered elsewhere in this publication. The chapter covers the following topics:

- The Dance Studio Act and Health Studio Act [*see § 128.10*]. The forms include a complaint for damages based on a contract requiring payment in excess of the statutory limit [*see § 128.40*], and an allegation regarding a contract for an excessive term [*see § 128.41*].

- Dating service and weight loss contracts [*see § 128.11*]. The forms include a complaint for damages based on a failure to refund payments within 10 days of cancellation [*see § 128.50*], an allegation regarding a contract for an excessive term [*see § 128.51*], and an affirmative defense when a contract is canceled [*see § 128.52*].

- Home and seminar sales solicitation contracts [*see § 128.12*]. The forms include a complaint for restitution from the cancellation of a home or seminar solicitation contract based on the failure to refund payments within 10 days of cancellation [*see § 128.60*], an affirmative defense when the contract is canceled [*see § 128.61*], and a complaint for damages regarding unlawful home solicitation practices [*see § 128.62*].

- Unsolicited goods or services [*see § 128.13*]. The forms include a complaint for a temporary restraining order and injunction to restrain billing [*see § 128.70*] and a complaint for damages regarding the solicitation of an order [*see § 128.71*].

- Discount buying services [*see § 128.14*]. The forms include a complaint for damages and restitution [*see § 128.80*], an affirmative defense regarding limitation on recovery [*see § 128.81*], and an affirmative defense regarding unenforceability because of a statutory violation [*see § 128.82*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionGeneral OverviewAntitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationContracts LawDefensesIllegal BargainsContracts LawRemediesCompensatory DamagesGeneral Overview

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Chapter 128 CONSUMER CONTRACTS: STATUTES REGULATING SPECIFIC TYPES OF CONTRACTS
PART I. SCOPE

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§ 128.02 Cross References

- For discussion, procedures and forms relating to false advertising, see Ch. 14, *Advertising* .

- For discussion, procedures, and forms relating to answers generally, see Ch. 26, *Answers* .

- For discussion, procedures, and forms relating to assignments, see Ch. 60, *Assignments* .

- For discussion, procedures and forms relating to the kinds of home solicitation contracts classified as either "home improvement contracts" or "service and repair contracts" [*see Bus. & Prof. Code §§ 7151.2, 7159.10* (definitions)], see Ch. 104, *Building Contracts* .

- For discussion, procedures, and forms of complaint on the common count of quantum meruit to recover the reasonable value for work, labor, or services performed, see Ch. 121, *Common Counts* .

- For discussion, procedures, and forms relating to consumer contracts and loans in general, see Ch. 127, *Consumer Contracts and Loans* .

- For discussion, procedures, and forms relating to consumer credit reporting, see Ch. 129, *Consumer Credit Reporting* .

- For discussion, procedures, and forms relating to contracts generally, see Ch. 140, *Contracts* .

- For discussion, procedures, and forms relating to fraud, see Ch. 269, *Fraud and Deceit* .

- For discussion, procedures, and forms relating to rescission, see Ch. 490, *Rescission and Restitution* .

- For discussion, procedures, and forms relating to suretyship, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesGeneral OverviewAntitrust & Trade LawConsumer ProtectionFalse AdvertisingState RegulationContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & AssignorsContracts LawTypes of ContractsConstruction ContractsTortsBusiness TortsFraud & MisrepresentationGeneral Overview

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[Reserved]

§§ 128.03[Reserved]

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§ 128.10 Dance Studio Act and Health Studio Act

[1] Governing Law

Contracts for dance studio lessons and other services are governed by the Dance Studio Act [*Civ. Code § 1812.50 et seq.*]. Contracts for health studio services are governed by the Health Studio Act [*Civ. Code § 1812.80 et seq.*]. However, the provisions of the Dance Studio Act and the Health Studio Act are not exclusive and do not relieve the parties or the contracts subject to that statute from compliance with all other applicable provisions of law [*Civ. Code §§ 1812.58, 1812.90*].

Although the two acts deal with different types of contracts, their provisions are sufficiently similar to treat them together in this chapter.

[2] Purposes

The purposes of the Dance Studio Act (*Civ. Code § 1812.50 et seq.*) and the Health Studio Act (§ 1812.80 et seq.) are to safeguard the public against fraud, deceit, imposition, and financial hardship, and to foster and encourage competition, fair dealing, and prosperity in the field of dance studio lessons and other services and health studio services by prohibiting or restricting false or misleading advertising, onerous contract terms, harmful financial practices, and other unfair practices by which the public has been injured in connection with contracts for dance studio lessons and other services, and health studio services [*Civ. Code §§ 1812.50(b)* (Dance Studio Act), 1812.80(b) (Health Studio Act)].

[3] Noncomplying Contracts Void; Waivers Not Permitted

Any contracts for dance studio lessons and other services and health studio services that do not comply with the applicable provisions of the respective acts are void and unenforceable as contrary to public policy [*Civ. Code §§ 1812.59* (Dance Studio Act), 1812.91 (Health Studio Act)]. In addition, any waiver of the buyer of the provisions of the Dance Studio Act or Health Studio Act is deemed contrary to public policy and is void and unenforceable [*Civ. Code §§ 1812.61* (Dance Studio Act), 1812.93 (Health Studio Act)].

Nothing in the Health Studio Law is intended to prohibit month-to-month contracts [*Civ. Code § 1812.98* (section is

declaratory of existing law)].

[4] Definitions and Scope

[a] Contract for Dance Studio Lessons and Other Services

For purposes of the Dance Studio Act, "contract for dance studio lessons and other services" means a contract for instruction in ballroom or other types of dancing, and includes lessons and other services, whether given to students individually or in groups. It does not include contracts for professional services rendered or furnished by a person licensed in the healing arts, or contracts for instruction at schools operating pursuant to the provisions of the Education Code [*Civ. Code § 1812.51*].

The contract limitations in *Civ. Code § 1812.53* (discussed in [5], *below*), the mandatory contract provision requirements of *Civ. Code § 1812.54* (discussed in [6], *below*), *Civ. Code § 1812.64*, and the bond requirements of *Civ. Code § 1812.65* (discussed in [11], *below*) do not apply to a dance studio that only offers instruction in ballet, modern, jazz, or tap dance, to persons under 21 years of age under a contract for dance studio lessons that provides all of the following [*Civ. Code § 1812.67(b)*]:

- A total payment of less than $500.
- That all agreed-on lessons will be offered within four months from the date the contract is entered.
- That the contract may be canceled and all money paid for instruction not yet received will be refunded within 10 days of cancellation, if the dance student cancels either (1) within three days after receiving the first lesson, or (2) any time after moving his or her residence more than 15 miles from the location of the dance studio.

Other exemptions from various provisions of the Act are discussed in conjunction with those topics, *below*.

[b] Contract for Health Studio Services

For purposes of the Health Studios Act, "contract for health studio services" means a contract for instruction, training, or assistance in physical culture, body building, exercising, reducing, figure development, or any such physical skill, or for the use by an individual patron of the facilities of a health studio, gymnasium, or other facility used for any of the above purposes, or for membership in any group, club, association, or organization formed for any of the above purposes [*Civ. Code § 1812.81*]. It does not include any of the following [*Civ. Code § 1812.81*]:

- Contracts for professional services rendered or furnished by a person licensed in the healing arts.
- Contracts for instruction at schools operating pursuant to the provisions of the Education Code.
- Contracts for instruction, training, or assistance relating to diet or control of eating habits not involving physical culture, body building, exercising,figure development, or any other such physical skill.

[5] Written Contract Required

Every contract for dance studio lessons and other services, and for health studio services, must be in writing and is subject to the provisions of the Dance Studio Act and the Health Studio Act, respectively. A copy of the written contract must be given to the customer at the time he or she signs the contract [*Civ. Code §§ 1812.52* (Dance Studio Act), 1812.82 (Health Studio Act)].

[6] Limitations on Length and Amount of Contract

While lessons and other services to be rendered may extend over a period not to exceed seven years, no contract for dance studio lessons and other services may require payments or financing by the buyer over a period in excess of one year from the date the contract is entered into. The term of the contract cannot be measured by the life of the buyer [*Civ. Code § 1812.53(a)*].

A contract for health studio services may not require payment by the person receiving the services or the use of the facilities of a total amount in excess of $3,000 (rising to $4,400 on and after January 1, 2010), inclusive of initiation or initial membership fees and, exclusive of interest or finance charges [*Civ. Code § 1812.86*]. Further, the contract may not require payments or financing by the buyer over a period of more than three years, and may not have a term that exceeds three years; however, that does not apply to a member's obligation to pay a valid, outstanding debt due under the contract, including money to be paid pursuant to a termination notice period in the contract in which the termination notice period does not exceed 30 days [*Civ. Code § 1812.84(a)*]. The contract must include a statement, printed in at least 14-point type, that discloses the length of the term of the contract, and this statement must be placed above the space reserved for the buyer's signature [*Civ. Code § 1812.84(b)*].

All contracts for dance studio lessons and other services, and for health studio services, that may be in effect between the same seller and the same buyer, the terms of which overlap for any period, must be considered as one contract for the purposes of the Dance Studio Act and the Health Studio Act [*Civ. Code §§ 1812.53(b)* (Dance Studio Act), 1812.83 (Health Studio Act)].

The above provisions do not apply to dance studios that only teach ballet, modern, jazz, or tap dance, if they meet the other requirements of *Civ. Code § 1812.67(b)*, discussed in [4][a], *above*, or to nonprofit organizations that have direct grants from the California Arts Council [*Civ. Code § 1812.67(b), (c)*].

[7] Commencement and Cancellation of Contract

[a] Dance Studio Lessons

Every contract for dance studio lessons and other services must provide that performance of the agreed-upon lessons will begin within six months from the date the contract is entered into [*Civ. Code § 1812.54(a)*]. Further, every contract may be canceled by the student at any time, provided the student gives written notice to the dance studio at the address specified in the contract. When a contract is canceled, the dance studio must compute any refund on a pro rata basis. A refund must be made within 10 days of receiving the cancellation notice, unless the student owes money for studio lessons or other services received before cancellation, in which case any money owed to the dance studio may be deducted from the refund and the balance, if any, must be refunded within 10 days. A dance studio may not charge a cancellation fee, or any other fee, for cancellation of the contract by the student [*Civ. Code § 1812.54(b)*].

The above provisions do not apply to dance studios that only teach ballet, modern, jazz, or tap dance, if they meet the other requirements of *Civ. Code § 1812.67(b)*, discussed in [4][a], *above*, or to nonprofit organizations that have direct grants from the California Arts Council [*Civ. Code § 1812.67(b), (c)*].

[b] Health Studio Services

Every contract for health studio services must provide that performance of the agreed-upon services will begin within six months after the date the contract is entered into. The consumer may cancel the contract and receive a pro rata refund if the health studio fails to provide the specific facilities advertised or offered in writing by the time indicated. If no time is indicated in the contract, the consumer may cancel the contract within six months after the execution of the contract and must receive a pro rata refund. If a health studio fails to meet a timeline set forth in *Civ. Code § 1812.85*,

the consumer may cancel the contract at any time after the expiration of the timeline, provided that if, following the expiration of the timeline, the health studio does provide the advertised or agreed-on services, the consumer may cancel the contract up to 10 days after those services are provided [*Civ. Code § 1812.85(a)*].

In addition, every contract for health studio services must contain on its face, and in close proximity to the space reserved for the signature of the buyer, a conspicuous statement in a size equal to at least 10-point boldface type, as follows [*Civ. Code § 1812.85(b)(1)*]:

> You, the buyer, may cancel this agreement at any time prior to midnight of the fifth business day of the health studio after the date of this agreement, excluding Sundays and holidays. To cancel this agreement, mail or deliver a signed and dated notice, or send a telegram which states that you, the buyer,are canceling this agreement, or words of similar effect. The notice shall be sent to, _____ [*name of health studio operator*] at _____ [*address of health studio operator*].

The contract must contain on the first page, in a type size no smaller than thatgenerally used in the body of the document, the name and address of the health studio operator to which the notice of cancellation is to be mailed, and the date the buyer signed the contract [*Civ. Code § 1812.85(b)(2)*]. The contract must provide a description of the services, facilities, and hours of access to which the consumer is entitled. Any services, facilities, and hours of access that are not described in the contract must be considered optional services, and these optional services must be considered as separate contracts for the purposes of the Health Studio Law and *Civ. Code § 1812.83* [*Civ. Code § 1812.85(b)(3)*].

Until the health studio operator has complied with *Civ. Code § 1812.85*, the buyer may cancel the contract for health studio services [*Civ. Code § 1812.85(b)(4)*]. All money paid pursuant to a contract for health studio services must be refunded within 10 days after receipt of the notice of cancellation, except that payment must be made for any health studio services received prior to cancellation [*Civ. Code § 1812.85(b)(5)*].

If at any time during the term of the contract, including a transfer of the contractual obligation, the health studio eliminates or substantially reduces the scope of the facilities, such as swimming pools or tennis courts, that were described in the contract, in an advertisement relating to the specific location, or in a written offer, and available to the consumer on execution of the contract, the consumer may cancel the contract and receive a pro rata refund. The consumer may not cancel the contract for this reason if the health studio, after giving reasonable notice to its members, temporarily takes facilities out of operation for reasonable repairs, modifications, substitutions, or improvements. This cancellation privilege may not be interpreted to give the consumer the right to cancel a contract because of changes to the type or quantity of classes or equipment offered, provided the consumer is informed in the contract that the health studio reserves the right to make changes to the type or quantity of classes or equipment offered, and the changes to the type or quantity of classes or equipment offered are reasonable under the circumstances [*Civ. Code § 1812.85(c)*].

The person receiving services or the use of a facility under a contract for health studio services has the right to cancel the contract within any of the following time periods:

- Within 20 days after the contract is executed, if the contract requires payment of $1,500 to $2,000, inclusive, including initiation fees or initial membership fees [*Civ. Code § 1812.85(d)(1)*].

- Within 30 days after the contract is executed, if the contract requires payment of $2,001 to $2,500, inclusive, including initiation fees or initial membership fees [*Civ. Code § 1812.85(d)(2)*].

- Within 45 days after the contract is executed, if the contract requires payment of $2,501 or more, including initiation fees or initial membership fees [*Civ. Code § 1812.85(d)(3)*].

This right of cancellation must be set out in the membership contract [*Civ. Code § 1812.85(d)(4)*]. These rights and remedies are cumulative to any rights and remedies under other law [*Civ. Code § 1812.85(d)(5)*].

A health studio entering into a contract for health studio services that requires payment of less than $1,500, including initiation or initial membership fees and exclusive of interest or finance charges, by the person receiving the services or the use of the facilities, is not required to comply with the cancellation requirements in the preceding paragraph [*Civ. Code § 1812.85(d)(6)*].

On cancellation of a contract, the consumer is liable only for that portion of the total contract payment, including initiation fees and other charges however denominated, that has been available for use by the consumer, based on a pro rata calculation over the term of the contract. The remaining portion of the contract payment must be returned to the consumer by the health studio [*Civ. Code § 1812.85(e)*].

[8] Hourly Rate for Dance Studio Lessons

Every contract for dance studio lessons and other services must contain a written statement of the hourly rate charged for each type of lesson for which the student has contracted. If the contract includes dance studio lessons which are sold at different hourly rates, the contract must contain separate hourly rates for each different type of lesson sold. All other services for which the student has contracted which are not capable of an hourly charge must be set forth in writing in specific terms. This statement must be contained in the dance studio contract before the contract is signed by the buyer [*Civ. Code § 1812.54(c)*].

The above provisions do not apply to dance studios that only teach ballet, modern, jazz, or tap dance, if they meet the other requirements of *Civ. Code § 1812.67(b)*, discussed in *§ 128.10[4][a]*, or to nonprofit organizations that have direct grants from the California Arts Council [*Civ. Code § 1812.67(b), (c)*].

[9] Limitations on Contract Obligations

[a] When Health Studio Facility Has Not Yet Opened

Generally, all money received by the seller of health studio services from a consumer for a health studio facility that has not yet opened for business must be held in trust and be deposited in a trust account established in a state or federally chartered bank or savings association. The seller may not draw, transfer, or encumber any of the money held in trust until five business days after the health studio facility has opened and the seller hasfully paid refunds to consumers who canceled their contracts as provided in *Civ. Code § 1812.85* [*see* [7][b], *above*] or in the paragraph below [*Civ. Code § 1812.96(a)*].

In addition to any other cancellation rights, a consumer who pays any money under a contract for health studio services for a health studio facility that has not yet opened for business has the right to cancel the contract and receive a full refund at any time prior to midnight of the fifth business day after the date the health studio opens for business. This cancellation right must be set forth in the contract. The refund must be paid within 10 days of receipt of notice of cancellation [*Civ. Code § 1812.96(b)*].

A seller of health studio services may draw on money held in trust to pay refunds or may draw, transfer, or encumber funds to the extent that the amount is offset by a bond of equal or greater amount. The bond must be issued by a surety insurer admitted to do business in California and must be filed with the Secretary of State. The bond must be in favor of the State of California for the benefit of consumers harmed by a violation of the Health Studio Law [*Civ. Code § 1812.96(c)*].

The foregoing requirements do not apply to a seller of health studio services that is, at the time money is received from

the consumer, operating at least five health studio facilities in California that have been in operation for a period of at least five years, and that has an excess of current assets over current liabilities of at least $1,000,000 [*Civ. Code § 1812.96(d)*].

[b] When Health Studio Services Recipient Moves

Unless expressly provided otherwise, every contract for health studio services must contain a clause providing that if the person agreeing to receive health studio services moves further than 25 miles from the health studio and is unable to transfer the contract to a comparable facility, that person is relieved from the obligation of making payment for services other than those received prior to the move, and if that person has prepaid any sum for health studio services, the amount of that sum that is allocable to services he or she has not taken must be promptly refunded [*Civ. Code § 1812.89(b)(1)*].

Alternatively, the contract may contain a clause providing that if the person agreeing to receive health studio services moves further than 25 miles from the health studio and is unable to transfer the contract to a comparable facility, that person may be charged a predetermined fee not exceeding $100, or, if more than half the life of the contract has expired, such person may be charged a predetermined fee not exceeding $50 [*Civ. Code § 1812.89(b)(2)*].

[10] Health Studio Contracts Including Finance Charges

Health studio contracts that include finance charges must conform to the provisions of the Unruh Retail Installment Sales Act [*Civ. Code § 1801* et seq.]. *Civ. Code § 1803.3* of that Act requires retail installment sales contracts to set forth total consideration, including the cash price, down payment, amount financed, and the finance charges *[57 Ops. Cal. Att'y Gen. 394, 396 n.5 (1974)]* . The formalities required by the Unruh Retail Installment Sales Act are discussed in Ch. 501, *Sales: Retail Installment Sales* , and in California Legal Forms, Ch. 45, *Consumer Installment Loans and Credit Sales* (Matthew Bender).

[11] Bonds or Cash Deposit Requirements Applicable to Dance Studios

Every dance studio subject to the provisions of *Civ. Code §§ 1812.64* and 1864.65 (bond requirements) must include in every contract for dance studio lessons or other services a statement that the studio is bonded and that information concerning the bond may be obtained by writing to the office of the Secretary of State. If the studio has elected to make a cash deposit in lieu of procuring a bond, the contract must contain a description of the cash deposit [*Civ. Code § 1812.54(d)*]. For the bonding requirements, see *Civ. Code §§ 1812.64-1812.67*.

The above requirements do not apply to dance studios that bill or receive fees of less than $50 per month per student, or that only teach ballet, modern, jazz, or tap dance, if they meet the other requirements of *Civ. Code § 1812.67(b)*, discussed in [4][a], *above*, or to nonprofit organizations that have direct grants from the California Arts Council [*Civ. Code § 1812.67(b), (c)*].

[12] Provisions Relating to Buyer's Rights or Defenses Against Third Parties

[a] Payment by Note

No contract for dance studio lessons and other services, or for health studio services, may require or entail the execution of any note or series of notes by the buyer which, when separately negotiated, will cut off any right of action or defense as to third parties which the buyer may have against the seller [*Civ. Code §§ 1812.55* (Dance Studio Act), 1812.87 (Health Studio Act)]. This provision protects the buyer against the situation in which he or she separately negotiates a note for payment of dance studio and other services or health studio services with a third party, thereby preventing the buyer's assertion of defenses against the third party which he or she has against the seller.

[b] Assignment of Contract

No right of action or defense arising out of a contract for dance studio lessons and other services, or for health studio services, which the buyer has against the seller, and which would be cut off by assignment, may becut off by assignment of the contract to any third party whether or not he or she acquires the contract in good faith and for value, unless the assignee gives notice of the assignment to the buyer and, within 30 days of the mailing of the notice, receives no written notice of the facts giving rise to the claim or defense of the buyer. A notice of assignment must be in writing, addressed to the buyer at the address shown on the contract, and must identify the contract and inform the buyer that he or she must, within 30 days of the date of mailing of the notice, notify the assignee in writing of any facts giving rise to a claim or defense which she or he may have. The notice of assignment must state the name of the seller and buyer, a description of the lessons and other services, the contract balance, and the number and amount of the installments [*Civ. Code §§ 1812.56* (Dance Studio Act), 1812.88 (Health Studio Act)].

[13] Relief From Payment on Death or Disability

Every contract for dance studio lessons and other services, or for health studio services, must contain a clause providing that if, by reason of death or disability, the person agreeing to receive the lessons and other services is unable to receive all the lessons or services for which he or she had contracted, he or she and his or her estate will be relieved from the obligation of making payment for the lessons or services other than those received prior to death or the onset of disability, and that if he or she has prepaid any sum for the lessons or services, as much of that sum as is allocable to the lessons or services he or she has not taken will be promptly refunded to him or her or his or her representative [*Civ. Code §§ 1812.57(a)* (Dance Studio Act), 1812.89(a)(1) (Health Studio Act)]. For the purpose of *Civ. Code § 1812.89* (Health Studio Act), "disability" means a condition that precludes the buyer from physically using the facilities, and that is verified by a physician [*Civ. Code § 1812.89(a)(3)*].

In every case in which a person has prepaid a sum for services under a contract for health studio services, and, by reason of death or disability, is unable to receive all those services, the party agreeing to furnish those services, on request, must immediately refund to that person or the person's personal representative an amount of the prepaid sum proportionate to the amount of services that were not received [*Civ. Code § 1812.89(a)(2)* (Health Studio Act)]. Notwithstanding the provisions of any contract for health studio services to the contrary, whenever the contract price is payable in installments and the buyer is relieved from making further payments or to a refund, the amount of the contract price allocable to services not received must represent at least as great a proportion of the total contract price as the sum of the periodic monthly balances not yet due bears to the sum of all the periodic monthly balances under the schedule of installments in the contract [*Civ. Code § 1812.89(a)(4)* (Health Studio Act)].

Notwithstanding the provisions of any contract for dance studio lessons or other services to the contrary, whenever the contract price is payable in installments and the buyer is relieved from making further payments or entitled to a refund under *Civ. Code § 1812.57*, the buyer is entitled to receive a refund or refund credit or as much of the cash price as is allocable to the dance studio lessons or other services that the buyer did not actually receive. The refund of the finance charge must be computed according to the "sum of the balances method," also known as the "Rule of 78" [*Civ. Code § 1812.57(b)* (Dance Studio Act)]. Under this method, the sum of the digits representing the months of a year (1 to 12), which is 78, is the standard for measuring refunds. Financial publishing companies have printed tables to use in computing refunds based on the Rule of 78.

[14] Fraud Rendering Contract Void

Any contract for dance studio lessons and other services or for health studio services entered into in reliance on any willful and false, fraudulent or misleading information, representation, notice, or advertisement of the seller is void and unenforceable [*Civ. Code §§ 1812.60* (Dance Studio Act), 1812.92 (Health Studio Act)].

[15] Action for Damages

Any buyer injured by a violation of the Dance Studio Act or the Health Studio Act may bring an action for the recovery of damages. Judgment may be entered for three times the amount at which the actual damages are assessed, plus reasonable attorney's fees [*Civ. Code §§ 1812.62(a)* (Dance Studio Act), 1812.94 (Health Studio Act)].

[16] Correction of Noncomplying Contract

Notwithstanding the provisions of the Dance Studio Act or the Health Studio Act, any failure to comply with either act may be corrected within 30 days after the buyer executes the contract and, if so corrected, neither the seller nor the holder is subject to any penalty under the appropriate act, provided that any correction which increases any monthly payment, the number of payments, or the total amount due must be concurred in, in writing, by the buyer. "Holder" includes the seller who acquires the contract, or, if the contract is purchased by a financing agency or other assignee, the financing agency or other assignee [*Civ. Code §§ 1812.62(b)* (Dance Studio Act), 1812.94(b) (Health Studio Act)].

[17] Statute of Limitations

Civ. Code § 1812.62 of the Dance Studio Act, which allows the court the option of granting judgment for treble damages, does not convert the statutory right of action into one for penal damages. Thus, an action under the Dance Studio Act is an action on a liability created by statute, otherthan a penalty or forfeiture, and the applicable period of limitation is three years under *Code Civ. Proc. § 338* [*Holland v. Nelson (1970) 5 Cal. App. 3d 308, 312-313, 85 Cal. Rptr. 117* ; *but see Ashland Oil Co. of Cal. v. Union Oil Co. of Cal. (T.E.C.A., 1977) 567 F.2d 984, 991-993* ; *G.H.I.I. v. MTS, Inc. (1983) 147 Cal. App. 3d 256, 278 n. 14, 195 Cal. Rptr. 211* (questioning *Holland* and applying separate limitations to recovery of actual damages (three-year limitation of *Code Civ. Proc. § 338*) and treble damages (one-year limitation of *Code Civ. Proc. § 340(a)*))].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & AssignorsGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsBusiness TortsFraud & MisrepresentationGeneral Overview

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§ 128.11 Dating Service and Weight Loss Contracts

[1] Governing Law

Contracts for dating services are governed by *Civ. Code § 1694 et seq.* Contracts for weight loss are governed by *Civ. Code § 1694.5 et seq.* Because these statutes are substantially similar, they are discussed together in this section.

[2] Definitions

[a] Dating Service Contract

The phrase "dating service contract," as used in *Civ. Code § 1694 et seq.*, is any contract with any organization that offers dating, matrimonial, or social referral services through the exchange of names, telephone numbers, addresses, and statistics; a photograph or video selection process; personal introductions provided by the organization at its place of business; or a social environment provided by the organization intended primarily as an alternative to other singles bars or club-type environments [*Civ. Code § 1694*].

[b] Weight Loss Contract

The phrase "weight loss contract," as used in *Civ. Code § 1694.5 et seq.*, means a contract with any weight loss program or center that offers instruction, counseling, supervision, or assistance in weight reduction, body shaping, diet, and eating habits, by persons who are not licensed health care professionals; the use of facilities of a weight loss center for any such purposes; or membership in any group, club, association, or organization formed for any such purposes. "Weight loss contract" also includes a contract with any weight loss program or center that provides prepackaged or premeasured "diet foods" [*Civ. Code § 1694.5(a)*].

Contracts for health studio services, as defined in *Civ. Code § 1812.81*, are excepted from the definition of "weight loss contract" [*Civ. Code § 1694.5(b)*; *see* discussion of health studio contracts in § 128.10].

[3] Contract Requirements

Every contract for dating services or weight loss must be in writing, and a copy must be provided to the buyer at the time the buyer signs the contract [*Civ. Code §§ 1694.2(a)* (dating services), 1694.7(a) (weight loss)].

The contract must contain on its face, and in close proximity to the space reserved for the signature of the buyer, a conspicuous statement in a size equal to at least 10-point boldface type that the buyer may cancel the agreement, without any penalty or obligation, at any time prior to midnight of the original contract seller's third business day following the date of the contract, excluding Sundays and holidays, by mailing or delivering to the seller a signed and dated notice, or a telegram, stating that the buyer is canceling the agreement [*Civ. Code §§ 1694.2(b)* (dating services), 1694.7(b) (weight loss)].

The agreement must contain on the first page, in a type size no smaller than that generally used in the body of the document, (1) the name and address of the dating service or weight loss program operator to whom the notice of cancellation is to be mailed, and (2) the date the buyer signed the contract [*Civ. Code §§ 1694.2(c)* (dating services), 1694.7(c) (weight loss)].

[4] Limitations on Payments for and Length of Contract

No contract for dating services or weight loss may require payments or financing by the buyer over a period in excess of two years from the date the contract is entered into, nor may the term of any such contract be measured by the life of the buyer [*Civ. Code §§ 1694.2(d)* (dating services), 1694.7(d) (weight loss)]. Nevertheless, the services to be rendered to the buyer under a dating services contract may extend over a period beginning within six months and ending within three years of the date the contract is entered into [*Civ. Code § 1694.2(d)*]. The services to be rendered to the buyer under a weight loss contract may not extend for more than three years after the date the contract is entered [*Civ. Code § 1694.7(d)*].

[5] Cancellation of Contract by Buyer

In addition to any other right to revoke an offer, the buyer has the right to cancel a dating service or weight loss contract or offer, until midnight of the third business day after the day on which the buyer signs an agreement or offer to purchase those services [*Civ. Code §§ 1694.1(a)* (dating services), 1694.6(a) (weight loss)].

Cancellation occurs when the buyer gives written notice of cancellation by mail, telegram, or delivery to the seller at the address specified in the agreement or offer [*Civ. Code §§ 1694.1(b)* (dating services), 1694.6(b) (weight loss)]. Notice of cancellation, if given by mail, is effective when deposited in the mail, properly addressed with postage prepaid [Civ. Code§§ 1694.1(c) (dating services), 1694.6(c) (weight loss)]. Notice of cancellation given by the buyer need not take the particular form provided in the contract or offer to purchase, and however expressed, is effective if it indicates the intention of the buyer not to be bound by the contract [*Civ. Code §§ 1694.1(d)* (dating services), 1694.6(d) (weight loss)].

Although the buyer may notify the dating service or weight loss program of his or her intent to cancel the contract within the three-day period, and stop the processing of a credit card voucher or check by telephone notification to the dating service or weight loss program, this does not negate the buyer's obligation to cancel the contract by mail, telegram, or delivery as required by *Civ. Code § 1694.1* or *Civ. Code § 1694.6* [*Civ. Code §§ 1694.1(f)* (dating services), 1694.6(f) (weight loss)].

If a contract is not in compliance with *Civ. Code §§ 1694-1694.4* (dating services) or *Civ. Code §§ 1694.5-1649.9* (weight loss), the buyer may cancel the contract at any time [*Civ. Code §§ 1694.2(e)* (dating services), 1694.7(e) (weight loss); *see Civ. Code §§ 1694.4(a), 1694.9(a)* (noncomplying contracts void and unenforceable), and discussion in [8][a], *below*].

[6] Refund of Payments

Within 10 days of receipt of a notice of cancellation of a dating service or weight loss contract, all moneys paid pursuant to the contract must be refunded [*Civ. Code §§ 1694.1(e)* (dating services), 1694.6(e) (weight loss)].

Notwithstanding the provisions of any contract to the contrary, whenever the contract price is payable in installments and the buyer is relieved from making further payments or entitled to a refund pursuant to *Civ. Code § 1694 et seq.* (dating services) or 1694.5 et seq. (weight loss), the buyer is entitled to receive a refund or refund credit of that portion of the cash price as is allocable to the services not actually received by the buyer. The refund of any finance charge must be computed according to the "sum of the balance method," also known as the "Rule of 78" [*Civ. Code §§ 1694.4(d)* (dating services), 1694.9(d) (weight loss)]. Financial publishing companies have printed tables to use in computing refunds based on the Rule of 78.

[7] Relief From Payment

[a] Death or Disability of Buyer

Every dating service and weight loss contract must contain language providing that if, by reason of death or disability, the buyer is unable to receive all services for which he or she has contracted, the buyer and his or her estate may elect to be relieved of the obligation to make payments for services other than those received before death or the onset of disability. If the buyer, however, is disabled, and his or her physician determines that the duration of the disability will be less than six months, the seller may extend the term of the contract for a period of six months at no additional charge to the buyer in lieu of cancellation. If the buyer has prepaid any amount for services, so much of the amount prepaid as is allocable to services that the buyer has not received must be promptly refunded to the buyer or his or her representative [*Civ. Code §§ 1694.3(a)* (dating services), 1694.8(a) (weight loss)].

The term "disability," as used in *Civ. Code § 1694.3(a)* (dating services) or *Civ. Code § 1694.8(a)* (weight loss), means a condition that precludes the buyer from physically using the services specified in the contract during the term of disability, which is verified in writing by a physician designated and remunerated by the buyer. The physician's written verification must be presented to the seller [*Civ. Code §§ 1694.3(a)(2)* (dating services), 1694.8(a)(2) (weight loss)].

[b] Relocation of Buyer

If the buyer relocates his or her primary residence further than 50 miles from the dating service office or weight loss center and is unable to transfer the contract to a comparable facility, he or she may elect to be relieved of the obligation to make payment for services other than those received prior to the relocation. If the buyer has prepaid any amount for dating or weight loss services, so much of the amount prepaid that is allocable to services not received by the buyer must be promptly refunded to him or her. A buyer who elects to be relieved of further obligation on relocation may be charged a predetermined fee not to exceed $100 or, if more than half the life of the contract has expired, a predetermined fee not to exceed $50 [*Civ. Code §§ 1694.3(b)* (dating services), 1694.8(b) (weight loss)].

[8] Noncompliance With Statutes; Fraudulent or Misleading Information

Any contract for dating services or weight loss that does not comply with *Civ. Code § 1694 et seq.* (dating services) or *Civ. Code § 1694.5 et seq.* (weight loss), or that is entered into under willful and fraudulent or misleading information or advertisements of the seller, is void and unenforceable [*Civ. Code §§ 1694.4* (dating services), 1694.9 (weight loss)].

When language required by *Civ. Code § 1694 et seq.* is omitted from a dating services contract, and the requirement is "central to the policy of th[os]e statutes," an arbitration provision in the contract is unenforceable under California law, because the statutory scheme expressly provides that contracts omitting the required language are void and unenforceable [*Duffens v. Valenti (2008) 161 Cal. App. 4th 434, 456, 74 Cal. Rptr. 3d 311]* . (This would not be true

if the Federal Arbitration Act applied in lieu of California law [*Duffens v. Valenti (2008) 161 Cal. App. 4th 434, 451, 74 Cal. Rptr. 3d 311]*).

[9] Provisions Not Waivable

Any waiver by the buyer of the provisions of *Civ. Code § 1694 et seq.* (dating services) or 1694.5 et seq. (weight loss) is void and unenforceable [*Civ. Code §§ 1694.4(e)* (dating services), 1694.9(e) (weight loss)].

[10] Action for Damages

Any buyer injured by a violation of *Civ. Code § 1694 et seq.* (dating services) or 1694.5 et seq. (weight loss) may bring an action for the recovery of damages in a court of competent jurisdiction. Judgment may be enteredfor three times the amount at which the actual damages are assessed, and reasonable attorney's fees may be awarded to the prevailing party [*Civ. Code §§ 1694.4(c)* (dating services), 1694.9(c) (weight loss)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & AssignorsContracts LawRemediesGeneral OverviewTortsBusiness TortsFraud & MisrepresentationGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 13: Conspiracy thru Conversion-Chs. 126-159
Chapter 128 CONSUMER CONTRACTS: STATUTES REGULATING SPECIFIC TYPES OF CONTRACTS
PART II. LEGAL BACKGROUND

13-128 California Forms of Pleading and Practice--Annotated § 128.12

§ 128.12 Home and Seminar Sales Solicitation Contracts

[1] Governing Law

Home solicitation contracts or offers are governed by *Civ. Code §§ 1689.5-1689.14* and *Bus. & Prof. Code §§ 17500.3* and *17533.8*. These code sections also apply to the kinds of home solicitation contracts classified as either "home improvement contracts" or "service and repair contracts" [*see Bus. & Prof. Code §§ 7151.2, 7159.10* (definitions)]. For discussion, procedures, and forms for the latter types of contracts, see Ch. 104, *Building Contracts* .

Some provisions in *Civ. Code §§ 1689.5-1689.14* apply exclusively to what are known as "home improvement contracts" [see *Bus. & Prof. Code § 7151.2* (definition)], including the low-cost kind known as "service and repair contracts" [*see Bus. & Prof. Code § 7159.10* (definition)]. For discussion of the regulation of home improvement contracts, see *Ch. 104, Building Contracts, § 104.100* et seq.

Seminar sales solicitation contracts or offers are governed by *Civ. Code §§ 1689.20-1689.24*. The sections governing seminar sales solicitation contracts or offers are declaratory of existing law with respect to contracts made at seminars held at locations other than appropriate trade premises, as defined in *Civ. Code § 1689.5(b)* [Stats. 1989, ch. 724, § 6].

[2] Definitions

[a] Home Solicitation Contract

A "home solicitation contract or offer" as used in *Civ. Code §§ 1689.5-1689.14* (home solicitation contracts) is any contract, whether single or multiple, or any offer that is subject to approval, for the sale, lease, or rental of goods or services or both, made at other than appropriate trade premises in an amount of $25 or more, including any interest or service charges. A home solicitation contract does not include any contract under which the buyer has the right to rescind pursuant to *15 U.S.C. § 1635* (or that statute's implementing regulations), relating to credit transactions secured, or to be secured, by real property [*Civ. Code § 1689.5(a)*].

A home solicitation contract or offer also includes a contract or offer for the purchase of a "personal emergency response unit" [*see Civ. Code § 1689.6(b),(g)*; *see also* [3], *below*].

The term also encompasses a contract or offer for the sale, lease, or rental of a water treatment device, as defined in *Bus. & Prof. Code § 17577.1(b)*, if the contract or offer is subject to approval, regardless of where the contract or offer was made. Such an offer or contract is subject to the provisions of *Civ. Code §§ 1689.5-1689.14* if it arises out of a scheduled presentation to promote the sale, lease, or rental of a water treatment device to a person invited to attend the presentation at a location other than a private residence [*Bus. & Prof. Code § 17577.3(a)*]. No water treatment device or any other materials that are the subject of a contract offer described in *Bus. & Prof. Code § 17577.3(a)* may be delivered, and no installation or other service may be performed until the expiration of the rescission period provided by *Civ. Code §§ 1689.5-1689.14* [*Bus. & Prof. Code § 17577.3(b)*; for discussion of other provisions relating to water treatment devices, *see* Ch. 14, *Advertising*]. The *form in § 128.60* may be modified for use in bringing the civil action authorized by *Bus. & Prof. Code § 17577.6*

[b] Appropriate Trade Premises

The phrase "appropriate trade premises" means premises where either the owner or seller normally carries on a business, or where goods are normally offered or exposed for sale in the course of a business carried on at those premises [*Civ. Code § 1689.5(b)*].

[c] Seminar Sales Solicitation Contract

The phrase "seminar sales solicitation contract or offer" as used in *Civ. Code §§ 1689.20-1689.24* means any contract, whether single or multiple, or any offer that is subject to approval, for the sale, lease, or rental of goods or services or both, made using selling techniques in a seminar setting in an amount of $25 or more, including any interest or service charges. "Seminar sales solicitation contract" does not include any contract under which the buyer has the right to rescind pursuant to *15 U.S.C. § 1635* or its implementing regulations, relating to credit transactions secured, or to be secured, by real property; nor does it include any contract that contains a written and dated statement signed by the prospective buyer stating that the negotiation between the parties was initiated by the prospective buyer [*Civ. Code § 1689.24(a)*].

[d] Seminar Setting

"Seminar setting" means premises other than the residence of the buyer [*Civ. Code § 1689.24(b)*].

[e] Goods

"Goods" for purposes of home and seminar sales solicitation contracts means tangible chattels bought for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for these goods, and including goods which, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of the realproperty whether or not severable from the property. The term does not include any vehicle required to be registered under the Vehicle Code, nor any goods sold with a vehicle if sold under a contract governed by *Civ. Code § 2982*, relating to conditional sales contracts for motor vehicles. Also excepted from the definition of "goods" is any mobilehome, as defined in *Health & Safety Code § 18008*, and all goods sold with this mobilehome if either is sold under a contract subject to *Health & Safety Code § 18036.5* [*Civ. Code §§ 1689.5(c), 1689.24(c)*].

[f] Services

"Services" means work, labor, and services, including, but not limited to, services furnished in connection with the repair, restoration, alteration, or improvement of residential premises, or services furnished in connection with the sale or repair of goods as defined in *Civ. Code § 1802.1* (definition of goods applicable to Unruh Act), and courses of instruction, regardless of the purpose for which they are taken. The definition does not include the services of attorneys, real estate brokers and salespersons, securities dealers or investment counselors, physicians, optometrists, or dentists,

nor financial services offered by banks, savings institutions, credit unions, industrial loan companies, personal property brokers, consumer finance lenders, or commercial finance lenders, organized pursuant to state or federal law, that are not connected with the sale of goods or services, as defined in *Civ. Code §§ 1689.5(c), (d), 1689.24(c), (d)* [*Civ. Code §§ 1689.5(d), 1689.24(d)*].

Also excepted from the definition of "services" are the sale of insurance that is not connected with the sale of goods or services as defined in *Civ. Code §§ 1689.5(c), (d), 1689.24(c), (d)*, services in connection with the sale or installation of mobilehomes or of goods sold with a mobilehome if either are sold or installed under a contract subject to *Health & Safety Code § 18036.5*, and services for which the tariffs, rates, charges, costs, or expenses, including in each instance the time sale price, is required by law to be filed with and approved by the federal government or any official, department, division, commission, or agency of the United States or the State of California [*Civ. Code §§ 1689.5(d), 1689.24(d)*].

[g] Business Day

For purposes of home and seminar sales solicitation contracts, "business day" means any calendar day except Sunday, New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day [*Civ. Code §§ 1689.5(e), 1689.24(e)*].

[3] Buyer's Right to Cancel Contract

In addition to any other right to revoke an offer, the buyer has the right to cancel a home or seminar sales solicitation contract or offer until midnight of the third "business day" after the day on which the buyer signs an agreement or offer to purchase that complies with *Civ. Code § 1689.7* (requirements of home solicitation contracts) or 1689.21 (requirements of seminar sales solicitation contracts) [*Civ. Code §§ 1689.6(a)(1), 1689.20(a)*].

A consumer also has the right to cancel a home solicitation contract or offer for the purchase of a personal emergency response unit until midnight of the seventh business day after the day on which the buyer signs an agreement or offer to purchase that complies with *Civ. Code § 1689.7* [*Civ. Code § 1689.6(b),(g)*]. However, this seven day cancellation right does not apply to a personal emergency response unit installed with, and as part of, a home security alarm system subject to the Alarm Company Act (*Bus. & Prof. Code § 7590 et seq.*) that has two or more stationary protective devices used to enunciate an intrusion or fire and that is installed by an alarm company operator operating under a current license issued under the Alarm Company Act. For personal emergency response units that meet these specifications, the three day cancellation provision in *Civ. Code § 1689.6(a)* applies [*Civ. Code § 1689.6(b)*].

In addition to any other right to revoke an offer, the buyer has the right to cancel a home solicitation contract or offer for the repair or restoration of residential premises damaged by a disaster that would not be void in accordance with *Civ. Code § 1689.14* [*see* [9][c], *below*], until midnight of the seventh business day after the buyer signs and dates the contract, unless *Civ. Code § 1689.15*, which relates to contracts classified as "service and repair contracts," is applicable [*Civ. Code § 1689.6(c)*]. For discussion of the rules governing service and repair contracts [*see Bus. & Prof. Code § 7159.10* (definition)], see Ch. 104, *Building Contracts* .

Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address specified in the agreement or offer [*Civ. Code §§ 1689.6(d), 1689.20(b)*]. Notice of cancellation, if given by mail, is effective when deposited in the mail properly addressed with postage prepaid [*Civ. Code §§ 1689.6(e), 1689.20(c)*]. Notice of cancellation given by the buyer need not take the particular form as provided in the contract or offer to purchase, and however expressed, is effective if it indicates the intention of the buyer not to be bound by the home contract or offer [*Civ. Code §§ 1689.6(f), 1689.20(d)*].

Until the seller has complied with *Civ. Code § 1689.7* (home solicitation contracts) or 1689.21 (seminar sales

solicitation contracts), relating to the contents and execution of the contract [*see* [4], *below*], the buyer may cancel the contract or offer [*Civ. Code §§ 1689.7(g), 1689.21(e)*].

[4] Requirements of Contract or Offer

[a] General Requirements

In a home or seminar sales solicitation contract or offer, the buyer's agreement or offer to purchase must be written in the same language thatwas principally used in the oral sales presentation, must be dated, signed by the buyer, and must contain, in immediate proximity to the space reserved for his or her signature, a conspicuous statement in a size equal to at least 10-point boldface type that the buyer may cancel the transaction at any time prior to midnight of the third business day after the date of the transaction, with a reference to the attached notice of cancellation [*Civ. Code §§ 1689.7(a)(1), 1689.21(a)*]. The statement required pursuant to *Civ. Code § 1689.7* for a home solicitation contract or offer for purchase of a personal emergency response unit that is not subject to the Alarm Company Act [*see* discussion [3], *above*] must inform the buyer that he or she may cancel the transaction at any time before midnight of the seventh business day after the date of the transaction, with a reference to the attached notice of cancellation [*Civ. Code § 1689.7(a)(2)*]. The statement required by *Civ. Code § 1689.7* for the repair or restoration of residential premises damaged by a disaster in accordance with *Civ. Code § 1689.6(c)* [*see* [3], *above*] must inform the buyer that he or she may cancel the transaction at any time before midnight of the seventh business day after the date of the transaction, with a reference to the attached notice of cancellation [*Civ. Code § 1689.7(a)(3)*].

The agreement or offer to purchase must contain on the first page, in a type size no smaller than that generally used in the body of the document, (1) the name and address of the seller to whom the notice is to be mailed; and (2) the date the buyer signed the agreement or offer to purchase [*Civ. Code §§ 1689.7(b), 1689.21(b)*].

[b] Notice of Cancellation

The agreement or offer to purchase must be accompanied by a completed form in duplicate, captioned "Notice of Cancellation." The notice of cancellation must be attached to the agreement or offer to purchase, and be easily detachable. It must be written in the same language as used in the contract, and be printed in at least 10-point type [*Civ. Code §§ 1689.7(c), 1689.21(c)*; *see Civ. Code § 1689.7(d)* (notice of cancellation requirements applicable to agreement or offer to purchase personal emergency response unit)]. For a form for the notice of cancellation, see California Legal Forms, Ch. 77, *Discharge of Obligations* (Matthew Bender).

[c] Copy of Contract; Oral Notice of Right to Cancel

The seller must provide the buyer with a copy of the contract or offer to purchase and the attached notice of cancellation and must inform the buyer orally of his or her right to cancel at the time the home solicitation or seminar sales contract or offer is executed [*Civ. Code §§ 1689.7(f), 1689.21(d)*].

[5] Goods Affixed to Realty in Home Solicitation Contract

If the goods sold under any home solicitation contract are so affixed to real property as to become a part of the real property, whether or not severable from it, the buyer does not have the right to cancel as provided in *Civ. Code § 1689.6* or *1689.7* if, after he or she signs the contract, he or she has sold or encumbered the real property to a bona fide purchaser or encumbrancer who was not a party to the sale of goods or to any loan agreement in connection with the property [*Civ. Code § 1689.9*].

[6] Refund of Payments

Within 10 days after a home or seminar sales solicitation contract or offer has been canceled, the seller must tender to

the buyer any payments made by the buyer and any note or other evidence of indebtedness [*Civ. Code §§ 1689.10(a), 1689.22(a)*]. If the downpayment includes goods traded in, the goods must be tendered in substantially as good condition as when received [*Civ. Code §§ 1689.10(b), 1689.22(b)*]. Until the seller has complied with the obligations imposed by *Civ. Code §§ 1689.7-1689.24* (home solicitation contracts) and 1689.20-1689.24 (seminar sales solicitation contracts), the buyer may retain possession of goods that the buyer has delivered to the seller, and has a lien on the goods for any recovery to which he or she is entitled [*Civ. Code § 1689.10(c), 1689.22(c)*].

[7] Return of Goods to Seller

[a] Requirements for Tender

Except as provided in *Civ. Code §§ 1689.10(c)* and *1689.22(c)* (retention of goods by buyer), within 20 days after a home solicitation contract or offer has been canceled, the buyer, on demand, must tender to the seller any goods delivered by the seller pursuant to the sale or offer, but the buyer is not obligated to tender at any place other than his or her own address. If the seller fails to demand possession of goods within 20 days after cancellation, the goods become the property of the buyer without obligation to pay for them [*Civ. Code § 1689.11(a), 1689.23(a)*].

[b] Buyer's Duty of Care

The buyer has a duty to take reasonable care of the goods in his or her possession both prior to cancellation and during the 20-day period following cancellation. During the 20-day period after cancellation, except for the buyer's duty of care, the goods are held at the seller's risk [*Civ. Code §§ 1689.11(b), 1689.23(b)*].

[8] Services Performed by Seller Prior to Cancellation

If the seller has performed any services under a home or seminar sales solicitation contract or offer prior to cancellation, the seller is not entitledto any compensation. If the seller's services result in the alteration of property of the buyer, the seller must restore the property to substantially as good condition as it was at the time the services were rendered [*Civ. Code §§ 1689.11(c), 1689.23(c)*].

[9] Special Rules for Home Solicitation Contracts

[a] Waiver and Confession of Judgment

Any waiver or confession of judgment of the provisions of *Civ. Code §§ 1689.5-1689.14* (home solicitation contracts) is deemed contrary to public policy and is void and unenforceable [*Civ. Code § 1689.12*].

[b] Emergency Services

The provisions of *Civ. Code §§ 1689.5-1689.7* (home solicitation contracts) and 1689.10-1689.14 (cancellation of home solicitation contracts and waiver or confession of judgment) do not apply to a contract that is initiated by the buyer or his or her agent or insurance representative and that is executed in connection with the making of emergency or immediate-necessity repairs or services that are necessary for the immediate protection of persons or real or personal property, provided that the buyer furnishes the seller with a separate dated and signed personal statement describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the sale within or seven business days, whichever applies [*Civ. Code § 1689.13*].

[c] Residential Premises Damaged by Disaster

A home solicitation contract or offer for repair or restoration of residential premises signed by the buyer on or after the date a disaster [*see Civ. Code § 1689.14(b)* (disaster defined)] causes damage to residential premises, but not later than

midnight of the seventh business day after that date, is void, unless the buyer or his or her agent or insurance representative solicited the contract or offer at the appropriate trade premises of the seller. Such a contract is not void, however, if solicited by the buyer or his or her agent or insurance representative, regardless of where the contract is made. Buyer solicitation includes a telephone call from the buyer to the appropriate trade premises of the seller, whether or not the call is in response to a prior home solicitation [*Civ. Code § 1689.14(a)*].

[d] Identification of Solicitor Required

It is unlawful for any person [*see Bus. & Prof. Code § 17500.3(f)* (defining "person")] to solicit a sale or order for the sale of goods or services at the residence of a prospective buyer, in person or by means of telephone, without clearly, affirmatively, and expressly revealing at the time the person initially contacts the prospective buyer, and before making any other statement (except a greeting) or asking the prospective buyer any other questions, that the purpose of the contract is to effect a sale. To comply with this requirement, the solicitor must do all of the following [*Bus. & Prof. Code § 17500.3(a)*]:

- State the identity of the person making the solicitation.
- State the trade name of the person represented by the person making the solicitation.
- State the kind of goods or services being offered for sale.
- In the case of an "in person" contact, showing or displaying identification that states the information required by the first two listed items above, as well as the address of the place of business of one of the persons so identified.

Any rights under *Bus. & Prof. Code § 17500.3(c)*, relating to intentional violations [*see* [h], *below*], are waived if, after the signing of the contract, the party bound by the contract states that identification was given [*Bus. & Prof. Code § 17500.3(c)*].

[e] Improper Plan or Scheme

It is unlawful for any person, in soliciting a sale or order for the sale of goods or services at the residence of a prospective buyer, in person or by telephone, to use any plan, scheme, or ruse that misrepresents his or her true status or mission for the purpose of making the sale or order for the sale of goods or services [*Bus. & Prof. Code § 17500.3(b)*].

[f] Demand for Termination

In order to bring an action against the person represented by the person making the solicitation, the aggrieved party must have demanded, in writing, that the person represented by the solicitor terminate the contract and return any and all payments made thereunder. The person represented by the solicitor must have refused to terminate the contract and return the payments within a reasonable time [*Bus. & Prof. Code § 17500.3(c)*].

Persons represented by the person making the solicitation must keep and maintain copies of all demands for termination of contract for violation of *Bus. & Prof. Code § 17500.3* for a period of one year from the date of receipt. Failure to maintain the records creates a presumption affecting the burden of proof that demand for termination had been properly made [*Bus. & Prof. Code § 17500.3(d)*].

[g] Return of Goods Received

If the person represented by the person making the solicitation elects to terminate the contract, he or she must return to the aggrieved party payments received for any and all goods and for services not rendered. On return of the payments,

the aggrieved party must return any and all goods received under the contract. For these purposes, a reasonable time means 20 business days from the date of demand [*Bus. & Prof. Code § 17500.3(c)*].

[h] Damages for Intentional Violation

The intentional violation of *Bus. & Prof. Code § 17500.3* entitles persons bound to a contract, if there was a sales approach or presentation or both in which a violation of this section took place, to damages of two times the amount of the sale price or up to $250, whichever is greater. In no case may the damages be less than $50 [*Bus. & Prof. Code § 17500.3(c)*]. Any rights under *Bus. & Prof. Code § 17500.3(c)*, relating to intentional violations [*see* [h], *below*], are waived, however, if, after the signing the contract, the party bound by the contract states that identification was given [*Bus. & Prof. Code § 17500.3(c)*; *see* [d], *above*].

[i] Defense to Imposition of Penalty

A defendant may raise as a defense to the imposition of a penalty for violation of *Bus. & Prof. Code § 17500.3* that he or she did not commit the act or acts constituting the offense and that he or she did not know, and with the exercise of reasonable care could not have known, that the act constituting the violation was committed [*Bus. & Prof. Code § 17500.3(e)*].

[10] Prize or Gift Offer

It is unlawful for any person to offer, by mail, by telephone, in person, or by any other means or in any other form, including over the Internet, a prize or gift, with the intent to offer a sales presentation, without disclosing at the time of the offer of the prize or gift, in a clear and unequivocal manner, the intent to offer that sales presentation [*Bus. & Prof. Code § 17533.8(a)*]. This does not apply, however, to the publisher of any newspaper, periodical, or other publication, or any radio or television broadcaster, or the owner or operator of any cable, satellite, or other medium of communications who broadcasts or publishes, including over the Internet, an advertisement or offer in good faith, without knowledge of a violation [*Bus. & Prof. Code § 17533.8(b)*].

[11] Injunctive Relief

Any person or entity that violates or proposes to violate the statutes concerning advertising [*Bus. & Prof. Code § 17500 et seq.*] may be enjoined by any court of competent jurisdiction. The court may make whatever orders or judgments, including for the appointment of a receiver, may be necessary to prevent the use or employment by any person or entity of any practices that violate these statutes, or that may be necessary to restore to any interested person any money or property, real or personal, which may have been acquired by means of any practice declared in *Bus. & Prof. Code § 17500 et seq.* to be unlawful. Actions for injunction may be prosecuted by the Attorney General or any district attorney, county counsel, city attorney, or city prosecutor in California in the name of the people of the State of California on their own complaint or on the complaint of any board, officer, person, corporation, or association or by any person who has suffered injury in fact and has lost money or property as a result of a violation of the False Advertising Law; but a private plaintiff may pursue representative claims or relief on behalf of others only if the plaintiff meets that standing requirement and complies with *Code Civ. Proc. § 382* concerning class-action certification [*Bus. & Prof. Code § 17535*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionHome SolicitationCivil ProcedurePretrial JudgmentsJudgment by ConfessionCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewContracts LawRemediesGeneral OverviewReal Property LawPurchase & SaleGeneral Overview

California Forms of Pleading and Practice--Annotated

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§ 128.13 Unsolicited Goods or Services

[1] Governing Law

Sending voluntary and unsolicited goods or providing voluntary and unsolicited services is governed by *Civ. Code § 1584.5*. The effect of termination of membership in an organization making retail sales is governed by *Civ. Code § 1584.6*. Solicitations disguised as bills are covered by *Civ. Code § 1716*.

Mailing of unordered merchandise is also governed by federal law [*39 U.S.C. § 3009*]. For further discussion of the federal provisions, see [7], *below*.

[2] Unsolicited Goods or Services

No person, entity, agent, or employee may offer for sale goods, wares, merchandise, or services, if the offer includes the voluntary and unsolicited sending or providing of those goods, wares, merchandise, or services not actually ordered or requested by the recipient orally or in writing. The receipt of any such goods, wares, merchandise, or services will be deemed for all purposes to be an unconditional gift to the recipient, who may use or dispose of the goods, wares, merchandise, or services in any manner he or she sees fit without any obligation on his or her part to the sender [*Civ. Code § 1584.5*].

With respect to merchandise or services offered for sale through the mail, the "voluntary and unsolicited sending or providing of goods, wares, merchandise, or services not actually ordered or requested by the recipient, either orally or in writing," includes any merchandise or services selected by the company and offered to the consumer that will be mailed to him or her for sale or on approval or provided to him or her unless he or she exercises an option to reject such an offer of sale or receipt on approval. Merchandise or services selected by the seller and offered for sale on a periodic basis must be affirmatively ordered by a statement or card signed by the consumer as to each periodic offer of merchandise or services [*Civ. Code § 1584.5*].

[3] Contractual Plans Not Governed by Statute

[a] Subscriptions, Standing Orders, and Similar Arrangements

Civ. Code § 1584.5 does not apply to contractual plans or arrangements such as continuity plans, subscription arrangements, standing order arrangements, supplements, and series arrangements under which the seller periodically ships merchandise to a consumer who has consented in advance to receive that merchandise on a periodic basis [*Civ. Code § 1584.5(b)*].

[b] Arrangements Involving Form or Announcement Card Instructing Seller Not to Ship Merchandise

Civ. Code § 1584.5 also is inapplicable to contractual plans or arrangements under which the seller periodically provides the consumer with a form or announcement card which the consumer may use to instruct the seller not to ship the offered merchandise. Any instructions not to ship merchandise included on such a form or card must be printed in type as large as all other instructions and terms stated on the form or card. Theform or card must specify a date by which it must be mailed by the consumer (the "mailing date") or received by the seller (the "return date") to prevent shipment of the offered merchandise. The seller must mail the form or card either at least 25 days prior to the return date or at least 20 days prior to the mailing date, or provide a mailing date of at least 10 days after receipt by the consumer, except that whichever system the seller chooses for mailing the form or card must be calculated to afford the consumer at least 10 days in which to mail his or her form or card. The form or card must be preaddressed to the seller so that it may serve as a postal reply card or, alternatively, must be accompanied by a return envelope addressed to the seller [*Civ. Code § 1584.5(a)*].

On the membership contract or application form, or on the same page and immediately adjacent to the contract or form, in clear and conspicuous language, the seller must disclose the material terms of the plan or arrangement including all of the following [*Civ. Code § 1584.5(a)*]:

- That aspect of the plan under which the subscriber must notify the seller, in the manner provided for by the seller, if he or she does not wish to purchase or receive the selection.
- Any obligation assumed by the subscriber to purchase a minimum quantity of merchandise.
- The right of a contract-complete subscriber to cancel his or her membership at any time.
- Whether billing charges will include an amount for postage and handling.

[4] Termination of Membership in Organization Making Retail Sales

If a person is a member of an organization that makes retail sales of any goods, wares, or merchandise to its members, and the person notifies the organization of his or her termination of membership by certified mail, return receipt requested, any unordered goods, wares, or merchandise sent to the person after 30 days following execution of the return receipt for the certified letter by the organization will be deemed for all purposes unconditional gifts to the person, who may use or dispose them in any manner he or she sees fit without any obligation on his or her part to the organization [*Civ. Code § 1584.6*].

If the termination of a person's membership in such an organization breaches any agreement with the organization, nothing in *Civ. Code § 1584.6* relieves the person from liability for damages to which he or she might be otherwise subjected pursuant to law, but he or she will not be subject to any damages with respect to any goods, wares, or merchandise which are deemed unconditional gifts as described above [*Civ. Code § 1584.6*].

[5] Action to Enjoin Billing for Gifts

If, after any receipt of goods deemed to be an unconditional gift under *Civ. Code § 1584.5* or *1584.6*, the sender

continues to send bill statements or requests for payment, an action may be brought by the recipient to enjoin such conduct. In such an action, reasonable attorney's fees and costs may also be awarded to the prevailing party [*Civ. Code §§ 1584.5, 1584.6*].

[6] Solicitation Disguised as Bill or Invoice

It is unlawful for any person to solicit payment of money by another by means of a written statement or invoice, or any writing that could reasonably be considered a bill, invoice, or statement of account due, but is in fact a solicitation for an order, unless the solicitation conforms to the following requirements [*Civ. Code § 1716(a)*]. The solicitation must bear on its face the following disclaimer prescribed by *39 U.S.C. § 3001(d)(2)(A)* [*Civ. Code § 1716(b)*]:

> "This is a solicitation for the order of goods or services, or both, and not a bill, invoice, or statement of account due. You are under no obligation to make any payments on account of this offer unless you accept this offer."

Alternatively, the following notice may be used [*Civ. Code § 1716(b)* (also specifying type size and color of notice)]:

> "THIS IS NOT A BILL. THIS IS A SOLICITATION. YOU ARE UNDER NO OBLIGATION TO PAY THE AMOUNT STATED ABOVE UNLESS YOU ACCEPT THIS OFFER."

The disclaimer or notice must be displayed conspicuously apart from other print on the page, and may not be rendered unintelligible by folding or otherwise [*Civ. Code § 1716(c), (d)*]. If the solicitation is longer than one page or if any page is designed to be separated, the notice or disclaimer must be displaced in its entirety on each page or portion of a page that might be considered a bill, invoice, or statement of account [*Civ. Code § 1716(e)*].

Any person damaged by noncompliance with the above requirement is entitled to damages in any amount equal to three times the sum solicited, in addition to any other remedies [*Civ. Code § 1716*]. In addition, any person who violates *Civ. Code § 1716* is liable for a civil penalty of up to $10,000 for each violation, recoverable in a civil action brought in the name of the people of the state by the Attorney General or a district attorney, county counsel, or city attorney [*Civ. Code § 1716*]. A violation of *Civ. Code § 1716* also is a misdemeanor [*Civ. Code § 1716(g)*]. A violation of these requirements may result in a civil penalty in an action brought in the name of the people of the State of California, imprisonment in the county jail, and/or a fine [*Civ. Code § 1716(h), (i)*].

[7] Federal Prohibition Against Mailing of Unordered Merchandise

The mailing of unordered merchandise or of bills for unordered merchandise or of dunning communications, except for free samples clearly and conspicuously marked and merchandise mailed by charitable organizations soliciting contributions, is an unfair method of competition and an unfair trade practice in violation of *15 U.S.C. § 45(a)(1)* [*39 U.S.C. § 3009(a)*]. Any merchandise described above which is received by mail may be treated as a gift by the recipient who has the right to retain, use, discard, or dispose of it in any manner desired without any obligation to the sender [*39 U.S.C. § 3009(b)*].

Since the federal and California statutes are not contradictory and the federal law does not specifically preempt state authority, a plaintiff probably can choose whether to bring an action under federal law for unfair competition or an action under California law for an injunction. However, at the present time there is no case authority on this particular issue.

The sections in both federal and state statutes providing that unordered merchandise sent to a person may be regarded as a gift are almost identical, with only a few differences in wording. For example, *39 U.S.C. § 3009* refers to merchandise "mailed" and *Civ. Code § 1584.5* refers to merchandise "sent." Thus, the California section might encompass more situations, such as when merchandise is received by a means other than mail.

For a discussion and forms relating to unfair methods of competition, see Ch. 565, *Unfair Competition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionGeneral OverviewAntitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationCivil ProcedureRemediesInjunctionsGeneral Overview

California Forms of Pleading and Practice--Annotated

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13-128 California Forms of Pleading and Practice--Annotated § 128.14

§ 128.14 Discount Buying Services

[1] Governing Law

Contracts for discount buying services are governed by *Civ. Code § 1812.100 et seq.* Any waiver by the buyer of the provisions of *Civ. Code § 1812.100 et seq.* is deemed contrary to public policy and is void and unenforceable [*Civ. Code § 1812.127*].

[2] Purpose

The purpose of *Civ. Code § 1812.100 et seq.* is to safeguard the public against fraud, deceit, and financial hardship, and to foster and encourage competition, fair dealing, and prosperity in the field of discount buying services by prohibiting or restricting false or misleading advertising, unfair contract terms, harmful financial practices, and other unfair, deceptive, destructive, unscrupulous, fraudulent, and discriminatory practices by which the public has been endangered and by which the public may be harmed in the future in connection with contracts for discount buying services [*Civ. Code § 1812.100(b)*].

[3] Definitions

[a] Discount Buying Organization

A "discount buying organization" is any person or persons, corporation, unincorporated association, or other organization that, for a consideration, provides or purports to provide its clients or the clients or members of any other discount buying organization with the ability to purchase goods or services at discount prices [*Civ. Code § 1812.101(a)*]. For the bonding requirements of a discount buying organization, see *Civ. Code §§ 1812.103-1812.105*.

However, regulation under *Civ. Code § 1812.100 et seq.* does not extend to a discount buying organization in any of the following circumstances.

- Regulation does not extend to a discount buying organization in which the total consideration paid by each client or member in any manner whatsoever for the purchase of discount buying services from

the organization does not exceed a one-time fee of $50 or an annual fee of $25 to be paid on a yearly basis [*Civ. Code § 1812.101(a)(1)(A)*].

- Regulation does not extend to a discount buying organization if the total consideration paid by each client or member in any manner whatsoever for the purchase of discount buying services from the organization does not exceed a one-time or annual fee of $50, and the organization provides a majority of the goods and services throughpurchases by members who walk in to a fixed location operated by the organization [*Civ. Code § 1812.101(a)(1)(B)*].

- Regulation does not extend to a discount buying organization if persons receive discount buying services incidentally as part of a package of services provided to or available to the individual on account of his or her membership in the organization, and it is not organized for the profit of any person or organization, and it does not have the provision of discount buying services as one of its primary purposes or businesses [*Civ. Code § 1812.101(a)(3)*].

- Regulation does not extend to any person, corporation, unincorporated association, or other organization, that, for a consideration collected from another entity, provides or purports to provide the clients of the other entity with the ability to purchase goods or services at discount prices, if the clients of the other entity do not order from, or pay any money to, that person, corporation, unincorporated association, or other organization. However, the entity from which the customer purchases the right to obtain goods or services at discount prices must comply with the requirements of *Civ. Code § 1812.100 et seq.* [*Civ. Code § 1812.101(a)(4)*].

- Regulation does not extend to a discount buying organization if the total consideration paid by each client or member in any manner whatsoever for the purchase of discount buying services from theorganization does not exceed a one-time or annual fee of $100, and the organization meets all of the following requirements [*Civ. Code § 1812.101(a)(2)*]:

  - The organization must offer buying services to clients or members through toll-free telephone access, computer access, or video shopping terminals [*Civ. Code § 1812.101(a)(2)(A)*].

  - The organization must provide at least 15 toll-free service lines to California consumers devoted exclusively to customer service questions and complaints [*Civ. Code § 1812.101(a)(2)(C)*].

  - The organization must maintain a bond that meets the requirements of *Civ. Code §§ 1812.103* and *1812.104*, except that the principal sum of the bond need be only $20,000 [*Civ. Code § 1812.101(a)(2)(C)*].

- During the first year of membership of each member, on the request of the member, the organization must provide a full refund of membership fees, exclusive of any fees, however designated, not exceeding $10 in the aggregate, without conditions other than the surrender or destruction of materials that allow the member to access or use the service [*Civ. Code § 1812.101(a)(2)(B)(i)*].

- The organization must establish an escrow account of $50,000 for the purpose of providing refunds to members as stated above. If the $50,000 deposited in escrow is depleted during the first year of the existence of the escrow account, the organization, within three business days of depletion, must replenish the account in the amount of $50,000. For each calendar year thereafter, the organization must deposit in the account an amount equal to refunds made from the account in the previous calendar year, but not less

than $50,000. At any time the balance in the escrow account decreases to 50 percent of the amount funded that year, the organization, within three business days, must replenish the account back to the balance required at the beginning of that calendar year. The organization must provide proof of the establishment of the escrow account to the secretary of state and must maintain records of all member requests for refunds and refunds made pursuant to this requirement. The records must be made available for review on request by the attorney general, any district attorney, or the state department of justice [*Civ. Code § 1812.101(a)(2)(B)(ii)(I)*].

- The escrow account must be established and maintained at a federally insured bank or federally insured financial institution independent of the organization, with escrow instructions making the bank or financial institution, or an officer or employee of the bank or financial institution, the escrow trustee [*Civ. Code § 1812.101(a)(2)(B)(ii)(II)*].

- Refunds must be made from the escrow account to any member who provides proof of membership while a California resident and requests, in writing, a membership refund, and who has not previously been refunded his or her membership fee. The escrow trustee must issue the refund within 10 days of the date the written request is received by the escrow trustee. In addition, requests for refunds may be made directly to and paid directly by the organization [*Civ. Code § 1812.101(a)(2)(B)(ii)(III)*].

- Proof of creation of the escrow account, and membership refund information, must be provided to the members in the following form: "The _____ [*name of organization*] has established an escrow account for the refund of membership fees at _____ [*name of financial institution*]. Refunds from the escrow account may, in addition to other remedies and sources available to you, be obtained by mailing a written request along with proof of membership to _____ [*name of escrow trustee*]. This refund request shall not affect or limit any other remedy at law available to you" [*Civ. Code § 1812.101(a)(2)(B)(ii)(IV)*].

- The organization must possess an unrevoked acknowledgment from the attorney general that the organization has provided to the attorney general, to the attorney general's reasonable satisfaction, marketing procedures and documents that clearly explain membership fee cancellation and refund terms, including the following [*Civ. Code § 1812.101(a)(2)(E)(i)*]:

  - The amount of the initial membership fee and how and when it will be collected [*Civ. Code § 1812.101(a)(2)(E)(i)(I)*].

  - If applicable, that a member must be advised, before any charges are applied, that they need not provide billing information in order to be charged a membership fee, in circumstances in which the telemarketing firm has prior access to the member's billing information [*Civ. Code § 1812.101(a)(2)(E)(i)(II)*].

  - In the case of trial membership offers, the duration of the trial period and that if the member does not cancel within the trial period, he or she will automatically be charged the membership fee [*Civ. Code § 1812.101(a)(2)(E)(i)(III)*].

  - Specifically how the member may cancel membership [*Civ. Code § 1812.101(a)(2)(E)(i)(IV)*].

  - The written disclosure, printed in capital letters with a minimum 14-point boldface type, indicating whom to contact, both directly through the company and through the escrow account, for a refund [*Civ. Code § 1812.101(a)(2)(E)(i)(V)*].

- The written disclosure made at the time of solicitation and at the time an enrollment package is sent to consumers [*Civ. Code § 1812.101(a)(2)(E)(i)(VI)*].

- The organization must provide the disclosures listed in *Civ. Code § 1812.101(a)(2)(E)(i)(I)-(VI)* (*above*) to every prospective member [*Civ. Code § 1812.101(a)(2)(F)*].

When the organization provides documentation that includes the information listed above and that clearly explains membership fee cancellation and refund terms to the attorney general's reasonable satisfaction, the attorney general will issue a revocable acknowledgment to the organization for it to obtain this exemption. The acknowledgment issued by the attorney general is not evidence of the adequacy or accuracy of the organization's actual disclosures and representations provided to consumers. No organization in any marketing to consumers may make any reference to an acknowledgment issued by the attorney general [*Civ. Code § 1812.101(a)(2)(E)(ii)*].

The exemption is null and void if the organization fails to comply with the conditions set forth above, or if the attorney general's office revokes the exemption because of the organization's not being in full compliance with all of the provisions of this exemption [*Civ. Code § 1812.101(a)(2)(G)*].

[b] Contract for Discount Buying Services

A "contract for discount buying services" is a contract between one party (the "buyer") who is purchasing the service for personal or family use and a discount buying organization whereby, for a consideration, the buyer receives the right to obtain goods or services from the discount buying organization, or to utilize the discount buying organization's services in obtaining goods and services, at discount prices [*Civ. Code § 1812.101(b)*].

[c] Discount Prices

"Discount Prices" are prices that are represented to be lower on most or all offered goods or services than those generally charged for the items in the locality in which the representation is made. This definition is not intended to affect the degree of savings that must be offered on an item or selection of items in order to truthfully and without misleading consumers represent an item, selection of items, or entire store as being "discount" or "discounted" [*Civ. Code § 1812.101(c)*].

[4] Disclosure Requirements

[a] Nature of Services

A discount buying organization must disclose to potential customers in writing before obtaining the signature of the potential customer on any application or contract for discount buying services the exact nature of the services it provides, specifying the following [*Civ. Code § 1812.106(a)*]:

- The general categories of goods that are available at the discount buying organization's place of business or warehouse.

- Those categories of goods, if any, that must be ordered or obtained through stores to which the discount buying organization will refer the customer.

- Those categories of goods, if any, that must be ordered or obtained through the mail.

[b] Representative List of Available Items

A discount buying organization also must furnish to potential customers, in writing and before obtaining the signature of a potential customer on any application or contract for discount buying services, a list of goods reasonably representative of the type of goods available. The list may be in either of the following forms [*Civ. Code § 1812.106(b)*]:

- A list, current within the previous 60 days, of at least 100 items that are sold by or through the organization or which are available to those who contract with the organization, identified by brand name, model, and total selling price including any incidental charges at which the item can, at the time the list is furnished, be purchased by one who contracts with the organization.

- A list of at least 100 items that were purchased by its members through the discount buying organization during the preceding 60 days identifying the items by brand name, model, and total selling price including freight and other incidental charges.

The list must include the total selling price including freight charges, if any; delivery charges, if any; setup charges, if any; the discount buying organization's price markup; and any other charges imposed by the discount buying organization [*Civ. Code § 1812.106(b)*].

If the maximum number of items available through a discount buying organization is less than 100 in number, it may comply with *Civ. Code § 1812.106* by furnishing a list of the total items available [*Civ. Code § 1812.106(b)*].

[c] Warranties and Guarantees, Returns, Cancellation of Orders, and Refunds

A discount buying organization must disclose to potential customers in writing before obtaining the signature of a potential customer on any application or contract for discount buying services its policy with respect to warranties or guarantees on goods ordered, and the policy with respect to the return of ordered goods, cancellation of orders by the buyer, and refunds for canceled or returned goods [*Civ. Code § 1812.106(c)*].

[d] Incidental Charges

A discount buying organization must disclose to potential customers in writingbefore obtaining the signature of a potential customer on any application or contract for discount buying services, the kinds of charges, such as freight costs, seller's markup, and other costs which are incidental to the purchase of goods through the discount buying organization andwhich are to be paid by the buyer. These incidental charges must be disclosed and stated in specific monetary amounts for each order that is placed through the discount buying organization [*Civ. Code § 1812.106(d)*].

[e] Disclosure of Fraud by Owner or Officer

A discount buying organization must disclose whether any shareholder, director, officer, or general or limited partner has been convicted of a crime involving fraud, has been held liable in a civil action for fraud, embezzlement, or similar basis for liability, or is subject to any injunction relating to business activity [*Civ. Code § 1812.106(e)*].

[5] Contracts for Discount Buying Services

[a] Basic Requirements

Every contract for discount buying services must be in writing. The address of the seller's discount buying facility and the residence address of the buyer must be clearly indicated on the face of the contract. All blank spaces in the contract must be filled in before the contract is signed by the buyer. Provisions or terms written by hand on the buyer's copy must be legible [*Civ. Code § 1812.107*].

The contract must disclose that a bond has been obtained by the discount buying organization and that a copy of the bond is on file with the Secretary of State. In addition, the contract must be specific as to the period of time for which the discount buying services will be available to the buyer, but this time period may not be measured by the life of the buyer [*Civ. Code § 1812.107*].

A copy of the written contract must be given to the buyer at the time he or she signs the contract [*Civ. Code § 1812.107*].

[b] Overlapping Contracts

All contracts for discount buying services, which may be in effect between a seller or related sellers and a buyer, the terms of which overlap for any period of time, will be considered one contract for the purpose of determining compliance with *Civ. Code §§ 1812.100-1812.128* [*Civ. Code § 1812.108*].

[c] Limitation on Payment or Financing Period

No contract for discount buying services may require payments or financing by the buyer over a period in excess of two years from the date the contract was entered [*Civ. Code § 1812.109*].

[d] Requirement of Availability of Services

Every contract for discount buying services must provide that the buying services will become available to the buyer within seven days from the date the contract was entered into [*Civ. Code § 1812.110*].

[e] Rights of Action and Defenses of Buyer

No contract for discount buying services may require or entail the execution of any note or series of notes by the buyer which, when separately negotiated, will cut off as to any third party any right of action or defense which the buyer may have against the seller [*Civ. Code § 1812.113*]. Additionally, no right of action or defense arising out of a contract for discount buying services which the buyer has against the discount buying organization may be cut off by assignment or transfer of the contract to any third party [*Civ. Code § 1812.114*].

[f] Refund If Goods Not Delivered or Not Available

Every contract for discount buying services must provide that if any goods ordered by the buyer from the seller are not delivered to the buyer or are not available for pickup by the buyer at a location within his or her county of residence within six weeks from the date the buyer placed the order, then any money paid by the buyer for the goods in advance of delivery, on the buyer's request must be fully refunded unless a predetermined delivery date has been furnished to the buyer in writing at the time he or she ordered the goods and the goods are delivered to the buyer or are available for pickup by that date [*Civ. Code § 1812.116(a)*].

[g] Cancellation of Contract by Buyer

Every contract for discount buying services must provide that the contract may be canceled at any time within three days after the date the buyer receives a copy of the contract, by written notice to the seller at the address specified in the contract. If the buyer cancels the contract, all money paid pursuant to the contract must be refunded. Every contract for discount buying services is subject to the cancellation privilege and must comply with the requirements of *Civ. Code §§ 1689.6* and *1689.7* (cancellation of "home solicitation contracts") [*Civ. Code § 1812.118*]. For a further discussion of cancellation of home solicitation contracts, see *§ 128.12[3]*.

[6] Trust Account Requirements

Discount buying organizations are required to establish trust accounts and deposit the buyer's funds in those accounts [*Civ. Code § 1812.116(b),(c)*].

[7] Buyer's Right to Rescind

Any contract for discount buying services which does not comply with *Civ.Code §§ 1812.100-1812.128* is voidable by the buyer [*Civ. Code § 1812.119*]. For discussion and forms relating to rescinding a voidable contract, see Ch. 490, *Rescission and Restitution* .

[8] Rescission and Pro Rata Refund

If a discount buying organization either moves its place of business, or, if it conducts business at more than one location, moves that place of business which is geographically closest to the buyer's residence indicated on the face of the contract more than 20 miles farther from the buyer's residence than it was at the time the contract for discount buying services was entered into, the organization must offer rescission and a pro rata refund to each buyer affected, based on the amount of time that the buyer has been a member of the organization [*Civ. Code § 1812.121(a)*].

If a discount buying organization discontinues providing any category of goods or services either disclosed in compliance with *Civ. Code § 1812.106* or otherwise represented to the buyer to be available at or before the buyer's signing of the contract for discount buying services, the organization must offer rescission and a pro rata refund, based on the amount of time for which the buyer has been a member of the organization, to each buyer who was informed of the availability of the category of goods or services to be discontinued and who signed a contract for discount buying services within the six months immediately preceding the discontinuance of the category of goods or services [*Civ. Code § 1812.121(b)*].

[9] False or Misleading Representations

[a] In General

Any untrue or misleading information, representation, notice, or advertisement of the seller which has been received by or made to the buyer before he or she signs a contract for discount buying services renders that contract void and unenforceable by the seller. No seller may make or disseminate such information, representations, notices, or advertisements. The phrase "untrue or misleading information, representation, notice, or advertisement" includes any acts that constitute violations of *Bus. & Prof. Code § 17500 et seq.* (false advertising). Moreover, the seller remains subject to liability for civil penalties imposed by *Civ. Code § 3370.1* (unfair competition) and *Bus. & Prof. Code § 17536* advertising [*Civ. Code § 1812.120*].

[b] Treble Damages

Any buyer injured by a violation of *Civ. Code § 1812.100-1812.128* may bring an action for the recovery of damages and for return of all money paid by the buyer to the seller. Judgment will be entered for three times the amount at which the actual damages, plus restitution, are assessed, as well as reasonable attorney's fees and costs. In the event that the court finds a violation of *Civ. Code § 1812.120* relating to untrue or misleading statements, judgment will be entered for $1,000 plus reasonable attorney's fees or three times the amount of actual damages plus restitution and attorney's fees, whichever is greater [*Civ. Code § 1812.123(a)*].

[c] Correction of Contract and Limitation of Liability

Any failure to comply with any provision of *Civ. Code §§ 1812.100-1812.128* except *Civ. Code § 1812.120* may be corrected within 30 days after the execution of the contract by the buyer. If so corrected, neither the seller nor any

transferee of the seller is subject to any liability except that of a suit for actual damages plus reasonable attorney's fees and costs. However, any correction must be concurred in, in writing, by the buyer, or the contract is void and unenforceable by the seller, who must forthwith tender to the buyer a full refund. The term "transferee" includes holders and assignees [*Civ. Code § 1812.123(b)*].

[10] Remedies

[a] Overview of Available Remedies

The remedies available where there has been a violation of *Civ. Code § 1812.100 et seq.* respecting contracts for discount buying services include the following:

- Cancellation of the contract by the buyer, and recovery of any money paid pursuant to it, provided the buyer acts within three days [*see Civ. Code § 1812.118*].

- Rescission of the contract by the buyer, and recovery of any money paid pursuant to it [*see Civ. Code §§ 1812.119, 1812.121, 1812.123(b)*].

- Prosecution of a discount buying organization or an individual violator; any violation of statutory requirements is a misdemeanor [*Civ. Code § 1812.125(b)*].

- Recovery by civil authorities of a penalty for any violation of the laws prohibiting false advertising and unfair competition [*see Bus. & Prof. Code § 17536*; *Civ. Code §§ 1812.120, 3370.1*].

- The defense of unenforceability of the contract [*see Civ. Code §§ 1812.120, 1812.123(b), 1812.127*].

- Recovery by the buyer of treble damages plus restitution (for violation of *Civ. Code § 1812.120*, treble damages or $1,000, whichever is greater) plus attorney's fees and costs [*see Civ. Code § 1812.123*].

Violation of the trust fund requirements is an offense (which may be prosecuted as a felony) [*Civ. Code § 1812.125(a)*].

[b] Defense of Unenforceability of Contract

Any violation of *Civ. Code § 1812.100 et seq.* renders a contract for discount buying services void and unenforceable [*see Civ. Code §§ 1812.120, 1812.123(b)*].

Any transfer by a discount buying organization of its duty or obligation to provide services to buyers under its contracts for discount buying services to another individual, corporation, or other business entity, as a result of which a buyer will have available substantially fewer goods and services, constitutes a complete defense to an action for further enforcement of or collection on such a contract. This defense may be asserted by any buyer who did not consent in writing, after a full and fair disclosure of the categories of goods and services to be provided by the new discount buying organization, to transfer of the duty or obligation of performance, and entitles the nonconsenting individual to rescind the contract and obtain a pro rata refund from the transferor [*Civ. Code § 1812.122*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionGeneral OverviewAntitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationContracts LawRemediesGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral OverviewTortsBusiness TortsFraud & MisrepresentationGeneral Overview

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[Reserved]

§§ 128.15[Reserved]

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PART III. RESEARCH GUIDE

13-128 California Forms of Pleading and Practice--Annotated § 128.30

§ 128.30 State Statutes

[1] Dance Studio Act

The Dance Studio Act. *Civ. Code § 1812.50 et seq.*

Violation of Dance Studio Act is misdemeanor. *Civ. Code § 1812.63*

Contracts not complying with code provisions are void and unenforceable. *Civ. Code § 1812.91*

Contract not complying with provisions of Health Studio Act not subject to penalties if corrected within 30 days. *Civ. Code § 1812.94(b)*

[2] Dating Service Contracts

"Dating service contract" defined. *Civ. Code § 1694*

Buyer's right to cancel contract; manner and effect of cancellation. *Civ. Code § 1694.1*

Requirements for dating service contracts; cancellation for noncompliance. *Civ. Code § 1694.2*

Death or disability of buyer; relocation of buyer's primary residence. *Civ. Code § 1694.3*

Void and unenforceable contracts; recovery of damages; refunds. *Civ. Code § 1694.4*

[3] Discount Buying Services

Unlawful advertising. *Bus. & Prof. Code § 17500 et seq.*

Claims against deposit made in lieu of bond. *Civ. Code § 1812.105*

Action by buyer and measure of damages. *Civ. Code § 1812.123*

Limitation on recovery when violation was corrected and correction concurred in by buyer *Civ. Code § 1812.123(b)*

Violation of act governing buying services is criminal offense. *Civ. Code § 1812.125*

[4] Health Studio Act

The Health Studio Act. *Civ. Code § 1812.80 et seq.*

Contracts not complying with code provisions are void and unenforceable. *Civ. Code § 1812.91*

Contract not complying with provisions of Health Studio Act is capable of being corrected within 30 days. *Civ. Code § 1812.94(b)*

[5] Home Solicitation Contracts

Contracts for sale, lease, or rental of water treatment device or contract is subject to *Civ. Code § 1689.5 et seq.* if contract or offer arises out ofscheduled presentation at location other than private residence. *Bus. & Prof. Code § 17577.3(a)*

Action for violation of *Bus. & Prof. Code § 17577 et seq.* allows recovery of actual damages, exemplary damages, reasonable attorney's fees and costs, and appropriate equitable relief. *Bus. & Prof. Code § 17577.6(a),(b)*

Right to cancel home solicitation contract or offer. *Civ. Code § 1689.6* Refund of payments to buyer within 10 days of cancellation required. *Civ. Code §§ 1689.10(a)* (home solicitation contract), 1689.22(a) (seminar sales solicitation contract)

Right to cancel seminar sales solicitation contract or offer. *Civ. Code § 1689.20*

[6] Unsolicited Goods or Services

Voluntary and unsolicited sending of goods or providing of services is unconditional gift; injunctive relief available for repeated billing for unsolicited goods or services. *Civ. Code § 1584.5*

Unordered goods are unconditional gifts after termination of membership in organization making retail sales to members; injunctive relief available for repeated billing for unordered goods. *Civ. Code § 1584.6*

Solicitation of order in form of written statement, invoice, or writing that reasonably could be considered a bill, invoice, or statement of account due is unlawful absent warning on statement or invoice. *Civ. Code § 1716*

Requirements respecting injunction generally. *Code Civ. Proc. § 525 et seq.*

[7] Weight Loss Contracts

"Weight loss contract" defined. *Civ. Code § 1694.5*

Buyer's right to cancel; manner and effect of cancellation. *Civ. Code § 1694.6*

Requirements for weight loss contracts; cancellation for noncompliance with chapter. *Civ. Code § 1694.7*

Contract provisions; death or disability of buyer; relocation of buyer's primary residence. *Civ. Code § 1694.8*

Void and unenforceable contracts; recovery of damages; refunds. *Civ. Code § 1694.9*

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionGeneral OverviewAntitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationAntitrust & Trade LawConsumer ProtectionHome SolicitationContracts LawDefensesIllegal BargainsContracts LawRemediesGeneral Overview

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13-128 California Forms of Pleading and Practice--Annotated § 128.31

§ 128.31 Decisions

[1] Dance Studio Act

Treble damages may be imposed under *Civ. Code § 1812.62(a)* (Dance Studio Act) without finding of maliciousness. *Holland v. Nelson (1970) 5 Cal. App. 3d 308, 314, 85 Cal. Rptr. 117*

Treble damages may be imposed under *Civ. Code § 1812.62(a)* (Dance Studio Act) without finding of amount of damages that will punish defendant. *Holland v. Nelson (1970) 5 Cal. App. 3d 308, 314-315, 85 Cal. Rptr. 117*

Requirements of complaint alleging fraud in action against dance studio under Dance Studio Act [*Civ. Code § 1812.50 et seq.*]. *Staples v. Arthur Murray, Inc. (1967) 253 Cal. App. 2d 507, 512-513, 61 Cal. Rptr. 103*

Party to contracts illegal under Dance Studio Act [*Civ. Code § 1812.50 et seq.*] may recover money paid if party both was apparently not aware contracts were illegal and was member of class intended to be benefited by act. *Porter v. Arthur Murray, Inc. (1967) 249 Cal. App. 2d 410, 423-424, 57 Cal. Rptr. 554*

Unlawful under Dance Studio Act [*Civ. Code § 1812.50 et seq.*] may be enjoined; Dance Studio Act is constitutional. *People v. Arthur Murray, Inc. (1965) 238 Cal. App. 2d 333, 343-346, 348-349, 47 Cal. Rptr. 700*

Provisions regulating dance contracts is not unconstitutional as attempt to regulate matters preempted by federal regulations. *People v. Arthur Murray, Inc. (1965) 238 Cal. App. 2d 333, 334-346, 47 Cal. Rptr. 700*

[2] Home Solicitation Contracts

Trial court has power under Bus. & Prof. Code § 1735 to order restitution to customers defrauded in door-to-door solicitations; Attorney General may not seek exemplary damages on behalf of people of *California. People v. Superior Court (1973) 9 Cal. 3d 283, 286-287, 107 Cal. Rptr. 192, 507 P.2d 1400*

Contract made at unoccupied rental property is home solicitation contract; contractor is not entitled to recover in quantum meruit for value of services performed within cancellation period (distinguishing *Beley v. Municipal Court (1979) 100 Cal. App. 3d 5, 160 Cal. Rptr. 508*). *Louis Luskin & Sons, Inc. v. Samovitz (1985) 166 Cal. App. 3d 533, 536-538, 212 Cal. Rptr. 612*

Telephone solicitations initiated from business offices is within definition of "home solicitations" set forth in *Civ. Code § 1689.5(a)*. *People v. Toomey (1984) 157 Cal. App. 3d 1, 13, 203 Cal. Rptr. 642*

Homeowner was entitled to rescind contract entered into with public insurance adjuster who appeared unsolicited at plaintiff's home on ground that contract contained no notice of right to cancel as required by *Civ. Code § 1689.7*; exemptions from requirements of *Civ. Code § 1689.7*, granted to members of certain professions under Civ. Code § 1698.5(d), do not deny equal protection. *Williams v. Kapilow & Son, Inc. (1980) 105 Cal. App. 3d 156, 160, 161, 164, 164 Cal. Rptr. 176*

In action by building contractor to recover for services performed and material furnished in remodeling defendant's home, plaintiff was not entitled to recover on contract cause of action since contract was home solicitation contract but did not contain notice required by *Civ. Code § 1689.7* of defendant's right to cancel within three days; however, plaintiff was entitled to recover on cause of action in quantum meruit for reasonable value of improvements defendants received. *Beley v. Municipal Court (1979) 100 Cal. App. 3d 5, 8, 160 Cal. Rptr. 508*

Definition of "home solicitation" in *Civ. Code § 1689.5(a)* is focused on where contract was made, and not on who initiated contact. *Weatherall Aluminum Prod. Co. v. Scott (1977) 71 Cal. App. 3d 245, 248, 139 Cal. Rptr. 329* ; *but see Civ. Code § 1689.5(a)* as amended by Stats. 1988, ch. 1104 (discussed under Definitions--Home Solicitation Contract, *above*)

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionHome SolicitationCivil ProcedureRemediesDamagesPunitive DamagesContracts LawDefensesIllegal BargainsContracts LawRemediesGeneral OverviewTortsBusiness TortsFraud & MisrepresentationGeneral Overview

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13-128 California Forms of Pleading and Practice--Annotated § 128.32

§ 128.32 Law Reviews

Comment, "Consumer Protection; Mail Order Forms," *5 Pacific L.J. 307 (1974)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-128 California Forms of Pleading and Practice--Annotated §§ 128.33-128.39

[Reserved]

§§ 128.33[Reserved]

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PART IV. FORMS
A. Health Studios and Dance Studios

13-128 California Forms of Pleading and Practice--Annotated § 128.40

§ 128.40 Complaint for Damages [Civ. Code § 1812.94] for Violation of Health Studio Act [Civ. Code § 1812.80 et seq.]--Against Health Studio--Contract Requiring Payment in Excess of Statutory Limit [Civ. Code § 1812.86]

[1] FORM Complaint for Damages [Civ. Code § 1812.94] for Violation of Health Studio Act [Civ. Code § 1812.80 et seq.]--Against Health Studio--Contract Requiring Payment in Excess of Statutory Limit [Civ. Code § 1812.86]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*(*s*)], [and DOES I-	)	(Violation of Health Studio Act)
_____, inclusive,] Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. _____ [*Allege identity and capacity of defendant(s), e.g.,* Defendant _____ [*name*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California].

2. Defendant is, and at all times herein mentioned was, engaged in the business of providing _____ [*allege facts bringing defendant's operation within the definition of health studio services (see Civ. Code § 1812.81), e.g.,* instruction, training, or assistance in body building, exercising, and reducing. Defendant is a franchisee of AM Co., a Delaware corporation].

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by their conduct).]

[4. (Plaintiff is informed and believes and thereon alleges that) (A)t all times herein mentioned each of the defendants was the agent and employeeof _____ (each of the remaining *or* the other) defendant(s), and in doing the things hereinafter alleged, was acting within the scope of the agency.]

5. On or about _____ [*date*], plaintiff and defendant _____ [*name*], a health studio, entered into a contract [a copy of which is attached as Exhibit A and incorporated by reference] in _____ County, California, which provided that plaintiff would receive health studio services from defendant and would pay defendant the sum of $_____ [*specify sum in excess of $3,000 (rising to $4,400 on and after January 1, 2010)*]. On or about _____ [*date*], pursuant to the contract, plaintiff paid defendant the full sum of $_____.

6. On or about _____ [*date*], [and more than 30 days after plaintiff executed the contract,] plaintiff demanded of defendant _____ [*name*] a refund of $_____, which is the full amount of plaintiff's payments to defendant on the contract, less $_____ for _____ [*specify services received*], because _____ [*specify, e.g.,* the contract required payment in excess of the statutory limitation]. Defendant _____ [*state, e.g.,* has failed and has refused, and continues to fail and refuse, to refund that money or any part thereof, all to plaintiff's damage in the sum of $_____].

7. [*Allege additional damages, if any.*]

[8. Plaintiff has incurred and will incur attorney's fees in prosecuting this action.]

WHEREFORE, plaintiff prays judgment against defendant [s, and each of them,] as follows:

1. For three times the amount of actual damages in the sum of $_____;

2. For reasonable attorney's fees [in the sum of $_____];

3. For costs herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as those matters which are herein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for damages by a buyer against the seller of health studio services when the prepaid contract was for a sum in excess of the statutory limit of $3,000 (rising to $4,400 on and after January 1, 2010), inclusive of initiation or initial membership fees and exclusive of interest or finance charges [*see Civ. Code § 1812.86*]. (Note that the Dance Studio Act does not contain a similar limitation.)

[3] Allegations

The complaint in [1], *above*, alleges:

- The identity and capacity of defendant (Paragraphs 1) [*see Corp. Code §§ 191, 2105, 2115, 2203*; *see also* Ch. 160, *Corporations: Capacity* , regarding capacity of foreign corporations].

- Facts showing that defendant's operation is a health studio (Paragraph 2) [*see Civ. Code § 1812.81*].

- Standard fictitious defendant and agency allegations (Paragraphs 3, 4).

- The formation of the contract for a sum in excess of the allowable statutory maximum and payment of that sum by plaintiff to defendant (Paragraph 5) [*see Civ. Code § 1812.86*].

- Plaintiff's demand for a refund more than 30 days after execution of the contract (Paragraph 6) [*see Civ. Code § 1812.94(b)*].

- Defendant's failure to repay that amount (Paragraph 6).

- Attorney's fees (Paragraph 8) [*see Civ. Code § 1812.94(a)*; *Holland v. Nelson (1970) 5 Cal. App. 3d 308, 311-315, 85 Cal. Rptr. 117]* .

[4] Actions for Recovery of Damages

Any buyer injured by a violation of the Health Studio Act may bring an action for the recovery of damages. Judgment may be entered for three times the amount at which actual damages are assessed, plus reasonable attorney's fees [*Civ. Code § 1812.94* (Health Studio Act)].

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any

answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to FAX service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms for verification, see Ch. 572, *Verification*

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PART IV. FORMS
A. Health Studios and Dance Studios

13-128 California Forms of Pleading and Practice--Annotated § 128.41

§ 128.41 Complaint for Damages [Civ. Code §§ 1812.62, 1812.94] for Violation of Dance Studio Act [Civ. Code § 1812.50 et seq.] or Health Studio Act [Civ. Code § 1812.80 et seq.]--Excessive Term of Contract [Civ. Code §§ 1812.53(a) (Dance Studio Act), 1812.84(a) (Health Studio Act)]

[1] FORM Complaint for Damages

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*(*s*)],	)	(Violation of _____ [Health *or*
[and DOES I-_____, inclusive,]	)	Dance] Studio Act)
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. _____ [*Allege identity and capacity of defendant(s), e.g.,* Defendant _____ (*name*) is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California].

2. Defendant is, and at all times herein mentioned was, engaged in the business of providing _____ [*allege facts bringing defendant's operation within the definition of dance studio lessons and other services (see Civ. Code § 1812.51*), *e.g.,* instruction in ballroom (*or other types*) of dancing, including lessons and other services *or facts bringing defendant's operation within definition of health studio services* (*see Civ. Code § 1812.81*), *e.g.,* instruction,

training, or assistance in body building, exercising, and reducing]. [*Optional:* Defendant is a franchisee of _____ (*franchisor's name*), a _____ (*e.g.*, Delaware) corporation].

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by their conduct).]

[4. (Plaintiff is informed and believes and thereon alleges that) (A)t all times herein mentioned each of the defendants was the agent and employee of _____ (each of the remaining *or* the other) defendant(s), and in doing the things hereinafter alleged, was acting within the scope of the agency.]

[*EITHER, for a Dance Studio Act violation*]

5. On or about _____ [*date*], plaintiff entered into a contract with defendant for dance studio lessons and other services that _____ [required _____ (payments *or* financing) over a period of more than one year *or* specified that the term of the contract is to be measured by the life of the plaintiff]. [A copy of the contract is attached as Exhibit A and incorporated by reference.]

[*OR, for a Health Studio Act violation*]

5. On or about _____ [*date*], plaintiff entered into a contract with defendant for health studio services that _____ [required _____ (payments *or* financing) over a period of more than three years *or* had a term of more than three years]. [A copy of the contract is attached as Exhibit A and incorporated by reference.]

[*CONTINUE*]

[*EITHER, for a Dance Studio Act violation*]

6. The term of the contract between plaintiff and defendant exceeds the permissible term of contracts for dance studio lessons and other services as specified in *Civil Code Section 1812.53*, which provides in pertinent part that _____ [*specify, e.g.*, no contract for dance studio lessons and other services shall require payments or financing by the buyer over a period in excess of one year from the date the contract is entered into *or* the term of any contract may not be measured by the life of the buyer], and that contract therefore is void and unenforceable under *Civil Code Section 1812.59*.

[*OR, for a Health Studio Act violation*]

6. The term of the contract between plaintiff and defendant exceeds the permissible term of contracts for health studio services as specified in *Civil Code Section 1812.84*, which provides in pertinent part that _____ [*specify, e.g.*, a contract for health studio services may not require payments or financing by the buyer to exceed the term of the contract *or* the term of the contract may not exceed three years], and that contract therefore is void and unenforceable under *Civil Code Section 1812.91*.

[*CONTINUE*]

7. On or about _____ [*date*], [and more than 30 days after plaintiff executed the contract,] plaintiff notified the defendant that the contract between plaintiff was void and unenforceable, and demanded of defendant_____ [*name*] a refund of $_____, which is the full amount of plaintiff's payments to defendant on the contract [, less $_____ for _____ (*specify services received*)]. Defendant has failed and has refused, and continues to fail and refuse, to refund all or any part of that money, all to plaintiff's damage in the sum of $_____.

8. [*Allege additional damages, if any.*]

[9. Plaintiff has incurred and will incur attorney's fees in prosecuting this action.]

WHEREFORE, plaintiff prays judgment against defendant [s, and each of them,] as follows:

1. For three times the amount of actual damages in the sum of $_____;

2. For reasonable attorney's fees [in the sum of $_____];

3. For costs herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as those matters which are herein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for damages based on a violation of either the Dance Studio Act [*Civ. Code § 1812.50 et seq.*] or the Health Studio Act [*Civ. Code § 1812.80 et seq.*], when the basis for the complaint is that the contract in question was void because it provided for a term in excess of that permitted by statute [*see Civ. Code §§ 1812.53(a)* (Dance Studio Act), 1812.84(a) (Health Studio Act)]. The form may be modified to allege other violations of these two acts, as appropriate [*see* [4], *below*].

[3] Allegations

The complaint in [1], *above*, alleges:

- The identity and capacity of defendant (Paragraphs 1) [*see Corp. Code §§ 191, 2105, 2115, 2203*; *see also* Ch. 160, *Corporations: Capacity* , regarding capacity of foreign corporations].

- Facts showing that defendant's operation is a dance studio [*see Civ. Code § 1812.51*] or a health studio [*see Civ. Code § 1812.81*] (Paragraph 2).

- Standard fictitious defendant and agency allegations (Paragraphs 3, 4).

- The formation of the contract for a term in excess of that permitted by the applicable statute (Paragraph 5). Alternative allegations are presented. The first alleges that a contract for dance studio lessons and other services required payments or financing for a period greater than one year, or that the term of the contract was to be measured by the life of the buyer [*see Civ. Code § 1812.53(a)*]. The second alleges that a contract for health studio services required payments or financing for a period of more than three years or that the term of the contract exceeded three years [*see Civ. Code § 1812.84(a)*]. Note that if a dance or health studio brings an action against a customer, the customer can use the appropriate allegation in Paragraph 5 as an affirmative defense.Note also that the three-year limitation on required payments does not apply to a member's obligation to pay a valid, outstanding debt due under the contract, including money to be paid pursuant to a termination notice period in a contract in which the termination notice period does not exceed 30 days [*Civ. Code § 1812.84(a)*].

- That the contract is void because it violates the term limitations of the applicable statute [*see Civ. Code §§ 1812.53, 1812.59* (dance studios); *Civ. Code §§ 1812.84, 1812.91* (health studios)] (Paragraph 6).

- Plaintiff's demand for a refund more than 30 days after execution of the contract [*see Civ. Code § 1812.94(b)*], and defendant's failure to repay that amount (Paragraph 7). The 30-day time period is necessary to support the plaintiff's prayer for treble damages [*see Civ. Code §§ 1812.62* (Dance Studio Act), 1812.94 (Health Studio Act)], as discussed in [5], *below*.

- Additional damages, if any.

- Attorney's fees (Paragraph 9) [*see Civ. Code § 1812.94(a)*; *Holland v. Nelson (1970) 5 Cal. App. 3d 308, 311-315, 85 Cal. Rptr. 117]* .

[4] Alleging Other Violations of Dance Studio Act or Health Studio Act

A dance or health studio can violate the Dance Studio Act or Health Studio Act in several different ways. The allegations in this form regarding the excessive term of the contract are an example of one type of violation. Other violations include the following:

- Entering into an oral contract that was not subsequently reduced to writing within 30 days [*Civ. Code §§ 1812.62(b)* (Dance Studio Act), 1812.94(b) (Health Studio Act)].

- Refusing to refund payments after the plaintiff has died or become disabled [*Civ. Code §§ 1812.57(b)* (Dance Studio Act), 1812.89(a)(2) (Health Studio Act)].

- Failing to provide in the contract for performance to begin within the time required by statute [*Civ. Code §§ 1812.54(a)* (Dance Studio Act), 1812.85(a) (Health Studio Act)].

- Failure of the contract to contain a written statement of the hourly rate for lessons [*Civ. Code § 1812.54(c)*].

- Failure of a health studio services contract to contain a statement, printed in at least 14-point type, that discloses the length of the term of the contract, or failure to place this statement above the space reserved for the buyer's signature [*Civ. Code § 1812.84(b)*].

A health studio may also violate the Health Studio Act if the contract for health studio services does not contain either of the following provisions:

- A conspicuous written statement in a size equal to at least 10-point boldface type informing the buyer of his or her right to cancel the agreement within three business days after the date of the agreement by delivering a signed and dated notice of cancellation to the health studio operator, on which appears the name and address of the health studio operator and the date the buyer signed the contract [*Civ. Code § 1812.85(b)(1),(2)*].

- A clause providing the buyer relief from his or her obligation to pay if the buyer moves more than 25 miles from the health studio and is unable to transfer the contract to a comparable facility, and for a prompt refund of any prepayments allocable to services not yet taken, unless the contract otherwise expressly provides for a predeterminedfee within statutory limits to be charged against the buyer if he or she moves more than 25 miles from the health studio and is unable to transfer the contract to a comparable facility [*Civ. Code § 1812.89(b)*].

For more detailed information on the requirements of the Dance Studio Act and the Health Studio Act, see *§ 128.10*.

[5] Damages

Any buyer injured by a violation of the Dance Studio Act or the Health Studio Act may bring an action for the recovery of damages. Judgment may be entered for three times the amount at which actual damages are assessed, plus reasonable attorney's fees [*Civ. Code §§ 1812.62(a)* (Dance Studio Act), 1812.94(a) (Health Studio Act)]. Treble damages are unavailable, however, if the violation was corrected within 30 days after the buyer executed the contract, provided that the buyer must concur in writing with any correction that increases any monthly payment, the number of payments, or the total amount due [*Civ. Code §§ 1812.62(b)* (Dance Studio Act), 1812.94(b) (Health Studio Act)].

[6] Cross References

See the cross references in § 128.40

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13-128 California Forms of Pleading and Practice--Annotated §§ 128.42-128.49

[Reserved]

§§ 128.42[Reserved]

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B. Dating Services and Weight Loss Contracts

13-128 California Forms of Pleading and Practice--Annotated § 128.50

§ 128.50 Complaint for Damages [Civ. Code §§ 1694.4(c), 1694.9(c)] Based on Cancellation of Dating Service [Civ. Code §§ 1694-1694.4] or Weight Loss [Civ. Code §§ 1694.5-1694.9] Contract--Failure to Refund Payments Within 10 Days of Cancellation [Civ. Code §§ 1694.1(e), 1694.6(e)]

[1] FORM Complaint for Damages [Civ. Code §§ 1694.4(c), 1694.9(c)] Based on Cancellation of Dating Service [Civ. Code §§ 1694-1694.4] or Weight Loss [Civ. Code §§ 1694.5-1694.9] Contract--Failure to Refund Payments Within 10 Days of Cancellation [Civ. Code §§ 1694.1(e), 1694.6(e)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], [and DOES I through _____,] Defendant(s).	))))))	NO. _____ COMPLAINT FOR DAMAGES BASED ON CANCELLATION OF _____ [DATING SERVICE *or* WEIGHT LOSS] CONTRACT (Failure to Refund Payments) [Amount demanded _____ (exceeds *or* does not exceed) $10,000] [LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. _____ [*Allege identity, capacity, and residence of defendant(s), e.g.,* Defendant _____ (*name*) is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), California].

2. Defendant is, and at all times herein mentioned was, engaged in the business of providing _____ [*allege facts bringing defendant's operation within the definition of dating service (see Civ. Code § 1694) or weight loss program/center (see Civ. Code § 1694.5), e.g.,* dating and social referral services through a video selection process].

[3. *Fictitious name allegation, if appropriate. See Paragraph 4 in § 128.40[1].*]

[4. (Plaintiff is informed and believes and thereon alleges that) (A)t all times herein mentioned each of the defendants was the agent and employee of _____ (each of the remaining *or* the other) defendant(s), and in doing the things hereinafter alleged, was acting within the scope of the agency.]

5. On or about _____ [*date*], plaintiff and defendant _____ [*name*], a _____ [dating service *or* weight loss program/center], entered intoa contract[, a copy of which is attached as Exhibit A and incorporated by reference,] in _____ County, California, which provided that plaintiff would receive _____ [dating *or* weight loss] services from defendant and would pay defendant the sum of $_____, of which sum plaintiff paid defendant[, through its agent _____ (*name*),] the sum of $_____ [, that sum being the total contract price].

6. On or about _____ [*date*], that time being before midnight of the third business day after the day on which plaintiff signed the above-mentioned contract, plaintiff gave written notice of cancellation of the contract to defendant by _____ [*specify form of delivery, e.g.,* certified mail, return receipt requested] at the address specified in the contract.

7. Subsequent to plaintiff's cancellation of the above contract, and more than 10 days thereafter, defendant failed and refused, and continues to fail and refuse, to refund to plaintiff the payment made by plaintiff to defendant [through his/her/its agent].

8. By reason of defendant's failure to refund the payments made by plaintiff, plaintiff has been damaged in the sum of $_____ [, together with interest thereon at the rate of _____ percent per annum from _____ (*date*)].

9. [*Allege additional damages, if any.*]

[10. Plaintiff has incurred and will incur attorney's fees in prosecuting this action.]

WHEREFORE, plaintiff prays judgment against defendant[s and each of them,] as follows:

1. For three times the amount of actual damages in the sum of $_____;

[2. For reasonable attorney's fees in the sum of $_____];

3. For costs herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 128.40[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for damages by a buyer against the seller of dating or weight loss services when the seller refuses to refund money paid on cancellation of a dating service or weight loss contract [*see Civ. Code §§ 1694.1(e), 1694.4(c), 1694.6(e), 1694.9(c)*].

[3] Allegations

The complaint in [1], *above*, alleges all of the following:

- Plaintiff and defendant entered into a dating service or weight loss contract (Paragraph 5) [*see Civ. Code §§ 1694* (dating services), 1694.5 (weight loss)].

- Plaintiff paid defendant a specified sum (Paragraph 5).

- Plaintiff delivered a notice of cancellation to defendant (Paragraph 6) [*see Civ. Code §§ 1694.1* (dating services), 1694.6 (weight loss)].

- Defendant failed to refund the payment within 10 days (Paragraph 7) [*see Civ. Code §§ 1694.1(e)* (dating services), 1694.6(e) (weight loss)].

- Plaintiff's damages and attorney's fees (Paragraphs 8-10) [*see Civ. Code §§ 1694.4(c)* (dating services), 1694.9(c) (weight loss); *see also Civ. Code §§ 3287, 3289* (interest)].

[4] Cross References

For commentary and cross-references relating to complaints generally, see *§ 128.40[3]* et seq.

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13-128 California Forms of Pleading and Practice--Annotated § 128.51

§ 128.51 Allegation--Contract for Dating Services [Civ. Code §§ 1694-1694.4] or Weight Loss [Civ. Code §§ 1694.5-1694.9]--Excessive Term of Contract [Civ. Code §§ 1694.2(d), 1694.7(d)]

[1] FORM Allegation--Contract for Dating Services [Civ. Code §§ 1694-1694.4] or Weight Loss [Civ. Code §§ 1694.5-1694.9]--Excessive Term of Contract [Civ. Code §§ 1694.2(d), 1694.7(d)]

On or about _____ [*date*], plaintiff entered into a contract with defendant for _____ [dating *or* weight loss] services. The contract required _____ [payments *or* financing] by plaintiff _____ [for a period in excess of two years from the date the contract was entered into *or* for a term measured by the life of plaintiff]. [A copy of the contract is attached as Exhibit A and incorporated by reference.]

[2] Use of Form

The form in [1], *above*, is an allegation for use in a complaint for damages by a buyer against the seller of dating or weight loss services when the contract requires payments or financing for a period in excess of two years from the date the contract was entered into, or for a term measured by the life of the buyer [*see Civ. Code §§ 1694.2(d)* (dating services), 1694.7(d) (weight loss)]. For a related form of complaint, see *§ 128.50*.

If a dating service or weight loss center or program brings an action against a customer, the customer may use this allegation, with appropriate modifications, as an affirmative defense.

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13-128 California Forms of Pleading and Practice--Annotated § 128.52

§ 128.52 Affirmative Defense--Action on Dating Service [Civ. Code §§ 1694-1694.4] or Weight Loss [Civ. Code §§ 1694.5-1694.9] Contract--Contract Canceled [Civ. Code §§ 1694.1, 1694.6]

[1] FORM Affirmative Defense--Action on Dating Service [Civ. Code §§ 1694-1694.4] or Weight Loss [Civ. Code §§ 1694.5-1694.9] Contract--Contract Canceled [Civ. Code §§ 1694.1, 1694.6]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that: AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

The contract on which plaintiff's action is based is a _____ [dating service *or* weight loss] contract as that term is defined in Civil Code Section _____ [1694 *if dating service contract or* 1694.5 *for weight loss contract*], since it was a contract with _____ [*allege facts bringing contract within the definition of dating service or weight loss contract, e.g.,* an organization that offers dating and social referral services through a video selection process]. On _____ [*date*], which was within three business days of the day on which defendant signed the contract, defendant canceled the contract pursuant to Civil Code Section _____ [1694.1 *if dating service contract or* 1694.6 *for weight loss contract*] by giving written notice of cancellation to defendant by _____ [*specify form of delivery, e.g.,* certified mail, return receipt requested] at the address specified in the contract. A copy of the notice [with the postal receipt, showing delivery to plaintiff on _____ (*date*)] is attached to this complaint as Exhibit A and incorporated by reference.

[2] Use of Form

The form in [1], *above,* is an affirmative defense to an action for breach of contract brought by a dating service or weight loss program or center. It alleges that:

- The contract on which plaintiff's action is based is a dating service or weight loss contract [*see Civ. Code §§ 1694* (dating services), 1694.5 (weight loss)].

- Defendant canceled the contract within three business days of the day on which it was signed [*see Civ. Code §§ 1694.1* (dating services), 1694.6 (weight loss)].

[3] Cross References

For discussion, procedures, and forms relating to answers generally, see Ch. 26, *Answers*

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13-128 California Forms of Pleading and Practice--Annotated §§ 128.53-128.59

[Reserved]

§§ 128.53[Reserved]

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13-128 California Forms of Pleading and Practice--Annotated § 128.60

§ 128.60 Complaint for Restitution Based on Cancellation of Home Solicitation Contract or Offer [Civ. Code §§ 1689.5-1689.14] or Seminar Sales Solicitation Contract or Offer [Civ. Code §§ 1689.20-1689.24]--Failure to Refund Payments Within 10 Days of Cancellation [Civ. Code §§ 1689.10(a), 1689.22(a)]

[1] FORM Complaint for Restitution Based on Cancellation of Home Solicitation Contract or Offer [Civ. Code §§ 1689.5-1689.14] or Seminar Sales Solicitation Contract or Offer [Civ. Code §§ 1689.20-1689.24]--Failure to Refund Payments Within 10 Days of Cancellation [Civ. Code §§ 1689.10(a), 1689.22(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAIN T FOR RESTITUTION BASED ON
_____ [*name*], [and DOES I-	)	CANCELLATION OF _____
_____, inclusive,]	)	[HOME *or* SEMINAR SALES] SOLICITATION
Defendant(s).	)	_____ [CONTRACT *or* OFFER]
	)	(Failure to Refund Payments)
	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See Paragraph 1 in § 128.40[1].*]

2. [*Fictitious name allegation, if appropriate. See Paragraph 4 in § 128.40[1].*]

3. On or about _____ [*date*], plaintiff entered into a contract with defendant transacting business as a _____ [*specify, e.g.*, vacuum cleaner franchisee] [through its agent _____ (*name*)] at _____ [*specify premises other than appropriate trade premises for home solicitation contract, or premises other than buyer's residence for seminar sales solicitation contract*] for the purchase of _____ [*describe goods or services pursuant to Civ. Code § 1689.5(c),(d) for home solicitation contract, or Civ. Code § 1689.24(c),(d) for seminar sales solicitation contract*] for the sum of $_____ [*sum greater than $25 including interest or service charges*], of which sum plaintiff paid defendant [, through its agent _____ (*name*),] the sum of $_____ [, that sum being the total amount of the contract price].

4. On or about _____ [*date*], such time being before midnight of the _____ [third *or* seventh] business day after the day on which plaintiff signed the above-mentioned contract, plaintiff mailed to defendant a notice, properly addressed and with postage paid, of cancellation of the contract.

5. Subsequent to plaintiff's cancellation of the above contract, and more than 10 days thereafter, defendant failed and refused, and continues to fail and refuse, to tender to plaintiff the payment made by plaintiff to defendant [through his/her/its agent].

6. By reason of defendant's failure to restore the payments made by plaintiff, plaintiff has been damaged in the sum of $_____, together with interest on that amount at the rate of seven percent per annum from _____ [*date*].

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____ with interest thereon at the rate of seven percent per annum from _____ [*date*];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 128.40[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action to recover money paid on cancellation of a home or seminar sales solicitation contract.

[3] Allegations

The complaint in [1], *above*, alleges that:

- Plaintiff and defendant entered into a home or seminar sales solicitation contract (Paragraph 3).

- Plaintiff paid defendant a certain sum (Paragraph 3) [*see Civ. Code §§ 1689.10* (home solicitation contract), 1689.22 (seminar sales solicitation contract)].

- Plaintiff sent a notice of cancellation to defendant (Paragraph 4) [*see Civ. Code §§ 1689.6* (home solicitation contract), 1689.20 (seminar sales solicitation contract)].

- Defendant failed to refund the payment within 10 days (Paragraph 5) [*see Civ. Code §§ 1689.10(a)* (home solicitation contract), 1689.22(a) (seminar sales solicitation contract)].

[4] Cross References

For commentary and cross-references relating to complaints generally, see *§ 128.40[3]* et seq.

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13-128 California Forms of Pleading and Practice--Annotated § 128.61

§ 128.61 Affirmative Defense to Action on Home Solicitation Contract [Civ. Code § 1689.5] or Seminar Sales Solicitation Contract [Civ. Code § 1689.24]--Contract Canceled [Civ. Code §§ 1689.6, 1689.20]

[1] FORM Affirmative Defense to Action on Home Solicitation Contract [Civ. Code § 1689.5] or Seminar Sales Solicitation Contract [Civ. Code § 1689.24]--Contract Canceled [Civ. Code §§ 1689.6, 1689.20]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that: AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

[*EITHER, for a home solicitation contract*]

The contract on which plaintiff's action is based is a home solicitation contract as that term is defined in *Civil Code Section 1689.5* since it was made at _____ [*specify premises other than appropriate trade premises*].

[*OR, for a seminar sales solicitation contract*]

The contract on which plaintiff's action is based is a seminar sales solicitation contract as that term is defined in *Civil Code Section 1689.24* since it was made at _____ [*specify premises other than the residence of the buyer*].

[*CONTINUE with EITHER*]

On _____ [*date*], which was within three business days of the day on which defendant signed the contract, defendant canceled the contract pursuant to Civil Code Section _____ [1689.6(a) *if home*

solicitation contract except for repair or restoration of residential premises damaged by disaster or 1689.20 *for seminar sales solicitation contract*] of the Civil Code by giving written notice of cancellation to plaintiff at _____ [*address*], which is the address specified in the contract. A copy of the notice is attached to this complaint as Exhibit A and incorporated by reference.

[*OR, if purchase of personal emergency response unit or services for repair or restoration of residential premises damaged by disaster*]

On _____ [*date*], which was within seven business days of the day on which defendant signed the contract, defendant canceled the contract pursuant to *Civil Code Section 1689.6* by giving written notice of cancellation to plaintiff at _____ [*address*], which is the address specified in the contract. A copy of the notice is attached to this complaint as Exhibit A and incorporated by reference.

[2] Use of Form

The form in [1], *above*, is an affirmative defense to a complaint for breach of contract. It alleges that:

- The contract on which plaintiff's action is based is a home or seminar sales solicitation contract [*see Civ. Code §§ 1689.5(a)* (home solicitation contract), 1689.24(a) (seminar sales solicitation contract)].

- Defendant canceled the contract within three business days of the day on which it was signed [*see Civ. Code §§ 1689.6(a)(1)* (home solicitation contract), 1689.20(a) (seminar sales solicitation contract)], or, in the case of the purchase of a personal emergency response unit [*see Civ. Code § 1689.6(g)*] or of a home solicitation contract or offer for the repair or restoration of residential premises damaged by a disaster [*see Civ. Code § 1689.14(b)* (disaster defined)] that is not void pursuant to *Civ. Code § 1689.14*, within seven business days of the day on which it was signed [*see Civ. Code § 1689.6(b),(c)*].

[3] Cross References

For discussion, procedures, and forms relating to answers generally, see Ch. 26, *Answers*

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13-128 California Forms of Pleading and Practice--Annotated § 128.62

§ 128.62 Complaint for Damages [Bus. & Prof. Code § 17500.3(c)] for Unlawful Home Solicitation Practices [Bus. & Prof. Code § 17500.3(a),(b)]

[1] FORM Complaint for Damages [Bus. & Prof. Code § 17500.3(c)] for Unlawful Home Solicitation Practices [Bus. & Prof. Code § 17500.3(a),(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I-	)	[Amount demanded _____ (exceeds
_____, inclusive,] Defendant(s),	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See Paragraph 1 in § 128.40[1].*]

2. [*Fictitious name allegation, if appropriate. See Paragraph 4 in § 128.40[1].*]

3. On or about _____ [*date*], plaintiff was contacted [in person *or* by telephone] by defendant [through its agent _____ (*name*)] at plaintiff's residence at _____ [*street address*], _____ [*city*], California, for the purpose of soliciting the sale to plaintiff of _____ [*describe goods or services*], which plaintiff subsequently purchased for the sale price of $_____.

[*EITHER*]

4. [Prior to starting the actual sales solicitation,] [D]efendant['s agent] failed to clearly, affirmatively, and expressly state his/her identity, defendant's trade name, and the kind of _____ [goods *or* services] being offered. [*In the case of an "in person" contract, add:* Defendant('s agent) failed to _____ (show *or* display) identification which states the identity of defendant('s agent), defendant's trade name, and the address of the place of business of _____ (defendant *or* defendant's agent).] [Plaintiff is informed and believes and thereon alleges that] [T]he failure of defendant['s agent] to make the statements [and display the identification] was intentional.

[*OR*]

4. Defendant['s agent] misrepresented his/her _____ [status *or* mission] in contacting plaintiff in that _____ [*specify plan, scheme, or ruse*]. [Plaintiff is informed and believes and thereon alleges that] [T]hepurpose of such misrepresentation was to _____ [make the aforementioned sale *or* obtain an order for a sale], and the misrepresentation was intentional.

5. On _____ [*date*], plaintiff made a written demand [, a copy of which is attached to this complaint as Exhibit A and incorporated by reference,] pursuant to *Section 17500.3(c) of the Business and Professions Code* that defendant terminate the _____ [contract *or* sale] and return all payments made under the contract [in return for plaintiff returning the goods purchased], which demand for termination [and return of goods] was _____ [refused by defendant *or* not accepted by defendant] within 20 business days after written demand had been made.

6. As a proximate result of the intentional violation of *Section 17500.3 of the Business and Professions Code* by defendant ['s agent], plaintiff has been damaged in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the sum of $_____ consisting of twice the sales price (or up to $250, whichever is greater) as prescribed by *Section 17500.3(c) of the Business and Professions Code*;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 128.40[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for damages for unlawful home solicitation practices in person or by telephone as defined in *Bus. & Prof. Code § 17500.3*.

[3] Allegations

The complaint in [1], *above*, alleges the following:

- That the plaintiff entered into a binding sale of or contract for goods or services (Paragraph 3).
- The specific acts of defendant or defendant's agent which violate the statute (Paragraph 4).
- That plaintiff gave written demand to defendant for termination of the sale or contract, which termination was refused by defendant (Paragraph 5).
- The damages incurred as computed pursuant to *Bus. & Prof. Code § 17500.3(c)* (Paragraph 6).

[4] Cross References

For commentary and cross-references relating to complaints generally, see *§ 128.40[3]* et seq.

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13-128 California Forms of Pleading and Practice--Annotated §§ 128.63-128.69

[Reserved]

§§ 128.63[Reserved]

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13-128 California Forms of Pleading and Practice--Annotated § 128.70

§ 128.70 Complaint for Temporary Restraining Order and Preliminary Injunction and Permanent Injunction--To Restrain Billing for Unsolicited Services or Goods [Civ. Code §§ 1584.5, 1584.6]

[1] FORM Complaint for Temporary Restraining Order and Preliminary Injunction and Permanent Injunction--To Restrain Billing for Unsolicited Services or Goods [Civ. Code §§ 1584.5, 1584.6]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], [and DOES I-	)	COMPLAINT FOR TEMPORARY RESTRAINING
_____, inclusive,] Defendant(s).	)	ORDER AND PRELIMINARY AND PERMANENT
	)	INJUNCTIONS
		(Billing for Unordered Services or Goods)

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant, See Paragraph 1 in § 128.40[1].*]

2. [*Fictitious name allegation, if appropriate. See Paragraph 4 in § 128.40[1].*]

[*EITHER*]

3. On or about _____ [*date below*], defendant, which transacts business as _____ [*specify, e.g.,* an organization making retail sales of merchandise to its members] voluntarily, and without any solicitation by plaintiff, by _____ [*specify manner of transportation, e.g.,* United States Mail],

_____ [sent *or* provided] _____ [goods *or* services *or* wares *or* merchandise] to plaintiff that were/was not ordered or requested, either orally or in writing, by plaintiff.

[*OR*]

3. On or about _____ [*date*], plaintiff, a member of _____ [*defendant organization*], notified defendant, which transacts business as _____ [*specify, e.g.*, an organization making retail sales of merchandise to its members] by certified mail, return receipt requested, of his/her termination of membership. [A copy of this return receipt is attached as Exhibit A and incorporated by reference.] On or about _____ [*date*], more than 30 days following the execution of the return receipt, defendant sent plaintiff _____ [*specify goods, wares, or merchandise*], which were/was not ordered by plaintiff.

4. On or about _____ [*date*], and periodically thereafter, up to and including the filing of this action, defendant has sent _____ [billing statements *or* requests for payment] with respect to the above-mentioned items.

5. Plaintiff has periodically requested defendant to cease sending these _____ [billing statements *or* requests for payment], but defendant has failed and refused, and continues to fail and refuse, to do so.

6. Plaintiff has no adequate remedy at law and this action is expressly authorized by Section _____ [1584.5 *or* 1584.6] of the Civil Code.

7. [*Attorney's fees, if appropriate. See Paragraph 9 in § 128.40[1].*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an order requiring defendant to show cause, if any exists, why defendant should not be enjoined as hereinafter set forth, during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant from sending _____ [billing statements *or* requests for payment] with respect to the unsolicited goods received;

3. For reasonable attorney's fees [in the sum of $_____];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 128.40[1].*]

CERTIFICATION RE NOTICE

I hereby certify that _____ [*either* on _____ (*date*), I informed defendant of what time and where the foregoing application for a temporary restraining order would be made *or* in good faith I attempted to inform defendant of what time and where the foregoing application for a temporary restraining order would be made, by _____ (*specify efforts*), but I was unable to do so *or* notice to defendant of the foregoing application for a temporary restraining order should not be required for the reason that _____ (*specify*)].

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[2] Use of Form

The complaint in [1], *above*, is for use in an action to enjoin a party from sending statements or requests for payment for unordered goods or services that are considered unconditional gifts under either *Civ. Code § 1584.5* or *1584.6*.

[3] Allegations

The complaint in [1], *above*, alleges that:

- Defendant voluntarily and, unsolicited by plaintiff, sent goods or provided services (Paragraph 3).

- Defendant thereafter sent bills (Paragraph 4) [*see Civ. Code §§ 1584.5* (unsolicited sending of goods), 1584.6 (unordered sending of goods or provision of services after termination of membership in organization making retail sales)].

[4] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*]) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Certification re Notice

When a temporary restraining order is sought without formal notice, the applicant or the applicant's attorney is required to certify one of the following to the court under oath [*Code Civ. Proc. § 527(c)*]:

- That within a reasonable time prior to the application he or she informed the opposing party (or his or her attorney, if any) at what time and where the application would be made.

- That he or she in good faith attempted to inform the opposing party (or attorney) but was unable to do so, specifying the efforts made to do so.

- That for reasons specified he or she should not be required to inform the opposing party (or attorney).

The requirement of certification does not apply to an order issued under the Family Code [*Code Civ. Proc. § 527(g)*; *see Fam. Code § 240*].

[6] Jurisdictional Classification

An action seeking permanent injunctive relief is in the jurisdiction of the superior court and may not be a limited civil case except as otherwise authorized by statute [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*].

[7] Cross References

For commentary and cross-references relating to complaints generally, see *§ 128.40[3]* et seq.

For discussion, procedures, and forms relating to injunctive relief, see Ch. 303, *Injunctions*

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D. Unsolicited Goods or Services

13-128 California Forms of Pleading and Practice--Annotated § 128.71

§ 128.71 Complaint for Damages--Solicitation of Order

[1] FORM Complaint for Damages--Solicitation of Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Solicitation of Order)
_____ [*name*], [and DOES I-	)	[Amount demanded _____
_____, inclusive,] Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See Paragraph 1 in § 128.40[1].*]

2. [*Fictitious name allegation, if appropriate. See Paragraph 4 in § 128.40[1].*]

3. On or about _____ [*date*], defendant solicited payment of $_____ from plaintiff by means of a _____ [*specify, e.g.,* written statement *or* invoice *or writing that reasonably could be considered a bill, invoice, or statement of account due*] for _____ [*specify goods or services*]. The _____ [written statement *or* invoice *or* other writing] actually was a solicitation for an order.

[*EITHER*]

4. Nowhere on the face of the _____ [billing statement *or* invoice] did there appear the disclaimer prescribed by *39 U.S.C. § 3001(d)(2)(A)* or the warning prescribed by *Civil Code Section 1716*, to the effect that the _____ [billing statement *or* invoice] was a solicitation for the order of goods or services and that plaintiff was under no obligation to make payment unless he/she accepted the offer contained therein.

[*OR*]

4. Although a notice or disclaimer with regard to the solicitation appeared on the _____ [written statement *or* invoice *or* other writing], it did not conform to the requirements set forth in *Civil Code § 1716(b)-(f)* that the writing be conspicuous and intelligible.

[*CONTINUE*]

5. As a result of defendant's failure to include the warning on the face of the _____ [billing statement *or* invoice] as required by statute, plaintiff remitted to defendant the sum of $_____, to plaintiff's damage.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. Pursuant to *Civil Code Section 1716*, damages in the sum of $_____, which is three times the amount solicited;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 128.40[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for damages against a defendant who sent a written statement, invoice, or other writing that reasonably could be considered a bill, invoice, or statement of account due, but was actually a solicitation for an order, as a result of which the plaintiff, believing that the statement or other writing was a bill rather than a solicitation, paid the amount requested.

[3] Allegations

The complaint in [1], *above*, alleges:

- The solicitation (Paragraph 3).

- The failure to warn of the nature of the solicitation or the failure to comply with statutory requirements that the notice or disclaimer be conspicuous or intelligible (Paragraph 4).

- Damages (Paragraph 5) [*see Civ. Code § 1716*,] and, in addition, it prays for damages equal to three times the sum solicited as authorized under *Civ. Code § 1716*.

A civil action for the imposition of a monetary penalty may also be brought in the name of the people of the State of California by the Attorney General, district attorney, county counsel or city attorney [*see Civ. Code § 1716(h)*].

[4] Cross References

For commentary and cross-references relating to complaints generally, see *§ 128.40[3]* et seq.

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13-128 California Forms of Pleading and Practice--Annotated §§ 128.72-128.79

[Reserved]

§§ 128.72[Reserved]

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13-128 California Forms of Pleading and Practice--Annotated § 128.80

§ 128.80 Complaint for Damages and Restitution Based on Rescission [Civ. Code § 1812.123]--By Buyer Against Discount Buying Organization and Surety--Violation of Statutory Requirements [Civ. Code §§ 1812.100-1812.128]

[1] FORM Complaint for Damages and Restitution Based on Rescission [Civ. Code § 1812.123]--By Buyer Against Discount Buying Organization and Surety--Violation of Statutory Requirements [Civ. Code §§ 1812.100-1812.128]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AND RESTITU-
_____ [*name(s)*], Defendant(s).	)	TION (Violation of Requirements for Discount Buy-
	)	ing Services)
	)	[Amount demanded _____
		(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST COUNT
(Discount Buying Organization)

1. [*Capacity and residence of defendant. See Paragraph 1 in § 128.40[1].*]

2. Defendant _____ [*name*] is a discount buying organization in that he/she/it, for a consideration, provides or purports to provide its clients or the clients or members of other discount buying organizations with the ability to purchase goods or services at discount prices, in that one of defendant's primary purposes is to provide discount buying services, and the total consideration paid by each _____ [client *or* member] is _____ [*specify fee structure in excess of a one time fee of $50, an annual fee of $25, payable yearly, or if a majority of goods and services are provided to members who walk into the organization's fixed location, a one time or annual fee of $50, e.g.,* $35 per year, a majority of the goods being provided through mail orders].

3. On or about _____ [*date*], at _____ [*specify locality, e.g.,* Newport Beach, California,] plaintiff and defendant _____ [*name of discount buying organization*] made an agreement, the terms of which were set out in a writing then and there executed by plaintiff and defendant, a copy of which is attached hereto as Exhibit A and incorporated by reference. By the terms of the agreement, plaintiff promised to pay to defendant the sum of $_____ [per year for the term of the agreement], and defendant promised, in consideration, to provide plaintiff with the continuing opportunity, for the term of the agreement, to purchase various goods and services at prices lower than those generally charged for the same goods and services in _____ [*specify locality, e.g.,* Orange County].

4. Plaintiff made the agreement for plaintiff's personal and family use. On executing the agreement, plaintiff paid to defendant the sum of $_____ [, and since then plaintiff has paid to defendant the further sum of $_____,] as provided in the agreement.

5. _____ [*Allege defendant's acts in violation of statutory requirements set out in Civ. Code §§ 1812.106-1812.122, referring also to Bus. & Prof. Code § 17500 et seq., e.g.,* Before plaintiff executed the agreement, defendant represented to plaintiff that plaintiff could, pursuant to the agreement, purchase any quantity of any item or article offered for sale by or through defendant. Plaintiff believed this representation and made the agreement in reliance on it. In fact, this representation was false and defendant has failed and refused, and continues to fail and refuse, to sell to plaintiff, or to allow plaintiff to buy, more than one of any particular item or article in any single transaction].

6. _____ [*Allege plaintiff's damages and the measure of damages, e.g.,* On _____ [*date*], plaintiff ordered three television sets through defendant. Defendant refused to accept plaintiff's order for more than one set and so notified plaintiff on _____ [*date*]. Plaintiff was damaged in that the current retail price for the television set was $_____ and defendant's price was $_____.

[*EITHER, if complaint is to serve as notice of rescission*]

7. Plaintiff intends service of summons of this complaint to serve as notice of rescission of the contract described above, and hereby offers to restore all consideration furnished by defendant under said contract, on condition that defendant restore to him/her the consideration furnished by plaintiff in the sum of $_____ [*or describe other consideration*].

[*OR, if plaintiff has already given notice of termination*]

7. On or about _____ [*date*], plaintiff notified defendant in writing that he/she had rescinded the contract on the ground that _____ [*specify grounds*] and offered to restore to defendant all consideration given by him/her on condition that defendant restore to plaintiff the consideration advanced by him/her in the sum of $_____ [*or describe other consideration*]. Defendant has failed and refused, and continues to fail and refuse, to return that consideration [or to recognize that defendant's contract with plaintiff has been rescinded].

[*CONTINUE*]

SECOND COUNT
(Surety)

1. Plaintiff refers to and herein incorporates Paragraphs 1 and 3-7, inclusive, of the First Count.

2. [*Capacity and residence of defendant. See Paragraph 2 in § 128.40[1].*]

3. On _____ [*date*], at _____ [*city*], _____ County, California, defendant surety made, executed, and delivered to defendant _____ [*name of discount buying organization*] a bond in the sum of $_____. A copy of that bond was filed with the Secretary of State. The bond is in favor of the State of California for the benefit of any person damaged by a violation of the statutes governing discount buying organizations or by fraud or dishonesty or failure to provide the services of the discount buying organization in performance of the discount buying contract. A copy of that bond is attached as Exhibit B and incorporated by reference.

4. At all times herein mentioned, that bond was, and now is, in full force and effect.

WHEREFORE, plaintiff prays judgment against defendant [s, and each of them,] as follows:

1. For damages, against defendant _____ [*name of discount buying organization*] in the sum of $_____ which is three times the amount of actual damages plus restitution [or if the court finds a violation of *Section 1812.120 of the Civil Code* for $1,000, whichever is greater];

2. For damages, against defendant _____ [*name of surety*] in the sum of $_____ which is the actual damages plus restitution;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 128.40[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for damages and restitution where the plaintiff is the "buyer" party to

a contract for discount buying services and the contract does not comply with, or the discount buying organization has violated, *Civ. Code §§ 1812.106-1812.122*.

[3] Allegations

The complaint in [1], *above*, alleges in the First Count:

- That a contract was made (Paragraph 3).
- That the agreement was for plaintiff's personal and family use (Paragraph 4) [*Civ. Code § 1812.101(b)*].
- That plaintiff paid defendant a sum of money (Paragraph 4).
- That defendant violated the statutory requirements of *Civ. Code §§ 1812.106-1812.122* (Paragraph 5).
- That plaintiff suffered damages (Paragraph 6).
- That plaintiff has notified defendant that he or she has rescinded the contract or that the summons of the complaint is notice of rescission of the contract (Paragraph 7).

In the Second Count, the complaint alleges that defendant discount buying organization maintained a bond with a surety (Paragraph 3).

[4] Liability of Surety

The surety is liable only for actual damages plus restitution and not for treble damages [*Civ. Code § 1812.104*].

[5] Cross References

For commentary and cross-references relating to complaints generally, see *§ 128.40[3]* et seq.

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13-128 California Forms of Pleading and Practice--Annotated § 128.81

§ 128.81 Affirmative Defense by Discount Buying Organization to Action by Buyer for Statutory Violation [Civ. Code §§ 1812.100-1812.128]--Limitation on Recovery [Civ. Code § 1812.123(b)]

[1] FORM Affirmative Defense by Discount Buying Organization to Action by Buyer for Statutory Violation [Civ. Code §§ 1812.100-1812.128]--Limitation on Recovery [Civ. Code § 1812.123(b)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that on _____ [*date*], and within 30 days after the execution of the writing (Exhibit A to the complaint) evidencing the agreement referred to in the complaint, defendant corrected the alleged violation of statutory requirements by _____ [*specify corrective action*]. Plaintiff concurred in the correction, in writing, on _____ [*date*]. [A copy of that writing is attached as Exhibit B and incorporated by reference.]

[2] Use of Form

The affirmative defense in [1], *above*, may be included in the answer of a discount buying organization, sued by a buyer for alleged statutory violations [*see Civ. Code § 1812.100-1812.128*], when the defendant seeks to limit plaintiff's recovery to actual damages. Except in the case of a violation of *Civ. Code § 1812.120*, any failure to comply with *Civ. Code §§ 1812.100-1812.128* may be corrected by the seller within 30 days after the execution of the contract and, if so corrected, neither the seller nor his or her transferee is subject to any liability except that of a suit for actual damages plus reasonable attorney's fees and costs, provided that the correction was concurred in, in writing, by the buyer [*Civ. Code § 1812.123(b)*].

[3] Cross References

For discussion, procedures, and forms relating to answers generally, see Ch. 26, *Answers*

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13-128 California Forms of Pleading and Practice--Annotated § 128.82

§ 128.82 Affirmative Defense by Buyer to Action to Enforce Contract for Discount Buying Services [Civ. Code §§ 1812.100-1812.128]--Unenforceability Based on Statutory Violation

[1] FORM Affirmative Defense by Buyer to Action to Enforce Contract for Discount Buying Services [Civ. Code §§ 1812.100-1812.128]--Unenforceability Based on Statutory Violation

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the agreement referred to in the complaint is void and unenforceable, pursuant to Civil Code Section(s) _____ [*specify*], in that _____ [*specify defect, e.g.,* in violation of *Civil Code Section 1812.122*, the defendant transferred its duty to provide services to buyers under its contracts for discount buying services to another business entity as a result of which buyer had available substantially fewer goods and services. Plaintiff did not consent in writing after full and fair disclosure of the categories of goods and services to be provided by the new discount buying organization to such transfer of the duty of performance].

[2] Use of Form

The affirmative defense in [1], *above*, may be included in the answer of a buyer, sued by a discount buying organization or an assignee or a transferee, for enforcement of a contract for discount buying services, when there has been a violation of statutory requirements. Any violation of those requirements renders the contract void and unenforceable [*see Civ. Code § 1812.123(b)*; *see also Civ. Code §§ 1812.120, 1812.127*].

[3] Cross References

For discussion, procedures, and forms relating to answers generally, see Ch. 26, *Answers*

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Chapter 129 CONSUMER CREDIT REPORTING

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§ 129.syn Synopsis to Chapter 129: CONSUMER CREDIT REPORTING

§ 129.01 Scope of Chapter

§ 129.02 Cross References

§§ 129.03-129.09 [Reserved]

§ 129.10 Governing Statutes

[1] California Laws

[2] Federal Laws

§ 129.11 Commercial Credit Reports Compared

§ 129.12 Purposes of California Consumer Credit Acts

§ 129.13 Definitions

[1] Consumer

[2] Consumer Credit Report

[3] Investigative Consumer Report

[4] Consumer Credit Reporting Agency

[5] Investigative Consumer Reporting Agency

[6] Adverse Action

§ 129.14 Permissible Purposes of Consumer Credit and Investigative Consumer Reports

[1] Credit Reports

[2] Prequalifying Reports

[3] Consumer Election to Have Name Removed From List for Unsolicited Offers

§ 129.15 Unauthorized Access to or Use of Consumer Credit Data

§ 129.16 Disclosures to Government Agencies

§ 129.17 Contents of Reports

[1] Consumer Credit Reports

[a] Obsolete Information Prohibited

[b] Medical Information Prohibited

[c] Identification of Bankruptcy Chapter

[d] Closure of Open-End Credit Account

[e] Overdue Child or Spousal Support

[2] Investigative Consumer Reports

§ 129.18 Reporting Agency Procedures

[1] Verification and Certification of Users

[2] Exception for Subscriber Agreement

[3] Maintaining Accuracy of Reports

[4] Verification of Adverse Information in Subsequent Investigative Consumer Reports

[5] No Prohibition Against User's Disclosure to Consumer

[6] Notice of Obligations to Supplier of Information

[7] Permanent Block on Reporting of Information

[8] Information Traceable to Identity Theft

[9] Prohibited Sale of Consumer Debt

[10] Implementation of Security Alerts and Security Freezes

§ 129.19 Preparation or Procurement of Investigative Consumer Reports

[1] For Insurance Underwriting, Employment, or Residential Lease

[2] Persons Who May Initiate Preparation of Report

[3] Federal Requirements

§ 129.20 Disclosures to Consumers

[1] By Consumer Credit Reporting Agencies

[a] Consumer's Right to Inspect Generally

[b] Disclosure of Recipients and Inquiries

[c] Contents and Format of Disclosure

[d] Timing and Procedure for Disclosure

[e] Persons Present During Inspection

[f] Summary of Consumer's Rights and Toll-Free Number

[g] Credit Score Information

[h] Fees for Disclosure

[i] Response After Report of Identity Theft

[2] By Investigative Consumer Reporting Agencies

[a] Consumer's Right to Inspect

[b] Sources and Recipients of Information

[c] Timing and Procedures for Disclosure

[d] Persons Present During Inspection

[e] Fees for Disclosure

[3] By User of Report

[4] By Person Doing Investigation in Lieu of Hiring Investigative Agency

§ 129.21 Procedures When Consumer Disputes Report's Accuracy

[1] Reinvestigation by Consumer Credit Reporting Agency

[a] Timing and Scope

[b] Frivolous or Irrelevant Dispute

[c] Modification of File and Notice of Reinvestigation

[2] Reinvestigation by Investigative Consumer Reporting Agency

[3] Reinsertion of Information by Consumer Credit Reporting Agency

[4] Statement of Dispute by Consumer

[5] Notice of Dispute in Subsequent Reports

[6] Notice of Deletion of Disputed Information or of Dispute

[7] Summary Resolution by Consumer Credit Reporting Agency

[8] Investigation at User's Request

§ 129.22 Duties of Users of Consumer Reports

[1] Notice of Adverse Action Based on Report

[2] Disclosure of Information Not Obtained From Agencies

[3] Use of Report for Employment Purposes

[4] Use of Prequalifying Reports for Unsolicited Offers of Credit

[5] Resale of Consumer Credit Reports

[6] Implementation of Security Alerts

§ 129.23 Duties of Furnishers of Credit Information

[1] Inaccurate or Incomplete Information Prohibited

[2] Reinvestigation of Disputed Information

[3] Closure of Open-End Credit Accounts

[4] Action on Delinquent Accounts

[5] Submission of Negative Credit Information

[6] Liability for Noncompliance

§ 129.24 Remedies for Statutory Violations

[1] Consumer Credit Reporting Agencies Act

[a] Actual and Punitive Damages

[b] Injunctive Relief

[c] Punitive Damages in Class Action

[d] Costs and Attorney's Fees

[e] Civil Penalties for Wrongfully Obtaining or Using Consumer Credit Data

[f] Civil Penalty for Failure to Place Security Alert in File

[2] Investigative Consumer Reporting Agencies Act

§ 129.25 Actions for Defamation, Invasion of Privacy, and Negligence

§ 129.26 Federal Actions and Proceedings

[1] Effect of Pending Action on State Remedies

[2] Final Judgment Bars State Action

[3] Penalty for Unauthorized Disclosures by Agency's Employee

[4] Administrative Enforcement

[a] Federal Trade Commission

[b] Other Government Agencies

§§ 129.27-129.39 [Reserved]

§ 129.40 Governing Statutes

§ 129.41 Purpose

§ 129.42 Definitions

[1] Credit Denial

[2] Creditor and Applicant

§ 129.43 Notification of Action on Application

§ 129.44 Disclosure Requirements on Denial of Credit: Statement of Reasons

§ 129.45 Remedies

§ 129.46 Nonliability for Good Faith Compliance With Rules and Regulations

§§ 129.47-129.59 [Reserved]

§ 129.60 Governing Statutes

§ 129.61 Purpose

§ 129.62 Provisions Not Waivable

§ 129.63 Definitions

[1] Credit Services Organization

[2] Buyer

[3] Extension of Credit

[4] Consumer Credit Reporting Agency

[5] Person

§ 129.64 Prohibitions

[1] No Prepayment Before Performance

[2] Must Perform Agreed Services

[3] No Charges Solely for Referral

[4] Advising Buyer to Make Untrue or Misleading Statements

[5] Removal of Adverse Information From Record or Create New Credit Record

[6] No Misleading Representations

[7] Other Prohibitions

§ 129.65 Information Statement

§ 129.66 Contract Requirements and Rescission Rights

[1] Contract Requirements

[2] Rescission Rights

§ 129.67 Remedies for Breach of Contract

[1] Damages

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§ 129.68 Registration Requirements

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§ 129.90 Related Matthew Bender Publications

§ 129.91 Federal Statutes

§ 129.92 California Statutes

[1] California Consumer Credit Reporting Acts

[2] California Holden Credit Denial Disclosure Act of 1976

[3] California Credit Services Act of 1984

[4] Employment Purposes

[5] Song-Beverly Credit Card Act

[6] Other Statutes Affecting Consumer Credit Reporting

§ 129.93 Federal Regulations

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§ 129.95 Decisions

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§ 129.96 Attorney General Opinions

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§§ 129.98-129.109 [Reserved]

§ 129.110 Complaint for Damages [Civ. Code § 1785.31] for Violation of Consumer Credit Reporting Agencies Act [Civ. Code § 1785.1 et seq.]--By Consumer Against Consumer Credit Reporting Agency--Improper Furnishing of Consumer Credit Report [Civ. Code §§ 1785.11, 1785.14]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Damages

[a] Negligent Noncompliance

[b] Willful Noncompliance

[6] Injunctive Relief

[7] Jurisdiction and Limitation of Actions

[8] Attorney's Fees

[9] Cross References

§ 129.111 Allegation of Violation of Consumer Credit Reporting Agencies Act [Civ. Code § 1785.1 et seq.]--Reporting Obsolete Information [Civ. Code §§ 1785.13, 1785.14(a)] or Inaccuracies in Consumer Report [Civ. Code § 1785.14(b)]

[1] FORM

[2] Use of Form

[3] Alleging Other Violations of the Consumer Credit Reporting Agencies Act

§ 129.112 Complaint for Damages [Civ. Code § 1785.31] for Violation of Consumer Credit Reporting Agencies Act [Civ. Code § 1785.1 et seq.]--By Consumer Against User of Report--Failure to Advise Consumer Against Whom Adverse Action Taken [Civ. Code § 1785.20(a)]

[1] FORM

[2] Use of Form

[3] Allegations

§ 129.113 Complaint for Damages [Civ. Code § 1785.31] for Violation of Consumer Credit Reporting Agencies Act [Civ. Code § 1785.1 et seq.]--By Consumer Against User of Information Not Obtained From Credit Reporting Agency--Failure to Advise Consumer of Adverse Action Taken or to Disclose to Consumer Right to Make Written Request [Civ. Code § 1785.20(b)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 129.114 Affirmative Defense--Defendant User of Credit Information Obtained From Credit Reporting Agency Maintained Reasonable Procedures to Assure Compliance With Statute [Civ. Code §§ 1785.20(c), 1785.20.5(b)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 129.115 Affirmative Defense--Defendant User of Credit Information Obtained From Person Other Than Credit Reporting Agency Maintained Reasonable Procedures [Civ. Code § 1785.20(c)]

[1] FORM

[2] Use of Form

§ 129.116 Complaint for Civil Penalties for Violation of Consumer Credit Reporting Agencies Act [Civ. Code § 1785.1 et seq.]--By Consumer Against Person Who Wrongfully Obtains or Uses Consumer Credit Data [Civ. Code § 1785.19]

[1] FORM

[2] Use of Form

[3] Allegations

§ 129.117 Complaint for Damages for Violation of Consumer Credit Reporting Agencies Act [Civ. Code § 1785.1 et seq.]--By Consumer Against Person Who Obtains Credit Report Under False Pretenses or Without Permissible Purpose [Civ. Code § 1785.31(a)(3)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 129.118 Complaint for Damages for Violation of Investigative Consumer Reporting Agencies Act [Civ. Code § 1786 et seq.]--By Consumer Against Investigative Consumer Reporting Agency--Improper Furnishing of Investigative Consumer Report [Civ. Code §§ 1786.12, 1786.20, 1786.5]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Limitation of Actions

[5] Cross References

§ 129.119 Allegation of Violation of Investigative Consumer Reporting Agencies Act [Civ. Code § 1786 et seq.]--Reporting Obsolete Information [Civ. Code §§ 1786.18, 1786.20(a)] or Inaccuracies in Investigative Report [Civ. Code § 1786.20(b)]

[1] FORM

[2] Use of Form

[3] Alleging Other Violations of the Investigative Consumer Reporting Agencies Act

§ 129.120 Complaint for Damages [Civ. Code § 1786.50] for Violation of Investigative Consumer Reporting Agencies Act [Civ. Code § 1786 et seq.]--By Consumer Making Insurance or Employment Application Against Insurer or Employer--Failure to Disclose Procurement or Preparation of Investigative Consumer Report [Civ. Code § 1786.16(a)]

[1] FORM

[2] Use of Form

§§ 129.121-129.129 [Reserved]

§ 129.130 Complaint for Damages [Civ. Code § 1787.3(a),(b)] for Violation of Holden Credit Denial Disclosure Act of 1976 [Civ. Code §§ 1787.1-1787.3]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Statute of Limitations

§ 129.131 Allegation of Violation of Holden Credit Denial Disclosure Act of 1976 [Civ. Code § 1787.1 et seq.]--Failure to Notify Applicant of Action on Application [Civ. Code § 1787.2(a)]

[1] FORM

[2] Use of Form

§§ 129.132-129.139 [Reserved]

§ 129.140 Complaint for Damages [Civ. Code § 1789.21] for Violation of California Credit Services Act [Civ. Code § 1789.10 et seq.]--By Consumer Against Credit Services Organization and Surety--Misleading Representations as to Organization's Obtaining Credit Card for Consumer

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Attorney's Fees

[6] Cross Complaint by Surety

[7] Cross References

§§ 129.141-129.149 [Reserved]

§ 129.150 Complaint for Unlawful Retaliation by Lender, Creditor, or Other Person Against Person Who Received Stay or Postponement Because of Military Service [Mil. & Vet. Code § 401(a)]

[1] FORM

[2] Use of Form

[3] Governing Law

[4] Prohibition Against Taking Specified Actions Against Persons Granted Relief Under Acts

[5] Cause of Action for Violation of Prohibitions

[6] Allegations

[7] Cross References

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13-129 California Forms of Pleading and Practice--Annotated § 129.01

§ 129.01 Scope of Chapter

This chapter covers California and federal laws dealing with the collection and dissemination of information relating to consumer credit, and related areas. Specifically, it discusses the California Consumer Credit Reporting Agencies Act and the California Investigative Consumer Reporting Agencies Act [*see § 129.20* et seq.], the California Holden Credit Denial Disclosure Act of 1976 [*see* § 129.50 et seq.], and the California Credit Services Act of 1984 [*see* § 129.70 et seq.].

The following forms are included for actions under the California Consumer Credit Reporting Agencies Act and the California Investigative Consumer Reporting Agencies Act:

- A complaint for damages regarding the improper furnishing of a consumer credit report [*see § 129.110*].

- An allegation regarding reporting obsolete information or inaccuracies in a consumer report [*see § 129.111*].

- Complaints for damages regarding the failure to advise the consumer when adverse action is taken [*see §§ 129.112, 129.113*].

- Affirmative defenses based on maintaining reasonable procedures to comply with statute [*see §§ 129.114, 129.115*].

- A complaint for damages when a person has wrongfully obtained or used consumer credit data [*see § 129.116*].

- A complaint for damages when a person has obtained credit report under false pretenses or without a permissible purpose [*see § 129.117*].

- A complaint for damages when an investigative consumer report has been improperly furnished [*see*

§ 129.118].

- An allegation regarding the reporting of obsolete or inaccurate information in an investigative report [*see § 129.119*].

- A complaint for damages regarding a failure to disclose the procurement or preparation of an investigative consumer report [*see § 129.120*].

The following forms are included for actions under the California Holden Credit Denial Disclosure Act of 1976:

- A complaint for damages for violation of the statutes [*see § 129.130*].

- An allegation regarding the failure to notify the applicant of an action on the application [*see § 129.131*].

The following form is included regarding the California Credit Services Act of 1984:

- A complaint for damages regarding misleading representations on obtaining the credit card for the consumer [*see § 129.140*].

This chapter also includes the following form under the federal Servicemembers Civil Relief Act, and similar provisions of California law:

- A complaint for unlawful retaliation by a lender, creditor, or other person against a person who received a stay or postponement because of military service [*see § 129.150*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingGeneral OverviewBanking LawConsumer ProtectionFair Credit ReportingConsumer Reports

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§ 129.02 Cross References

- For discussion, procedures, and forms related to false advertising, see Ch. 14, *Advertising* .

- For discussion, procedures, and forms relating to consumer contracts and loans in general, see Ch. 127, *Consumer Contracts and Loans* .

- For discussion, procedures, and forms relating to consumer contracts under specific regulatory statutes, see Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* .

- For discussion, procedures, and forms related to actions for breach of contract, see Ch. 140, *Contracts* .

- For discussion, procedures, and forms related to damages and pleading damages, see *Ch. 177, Damages, § 177.140* et seq.

- For discussion, procedures, and forms related to actions in fraud, see Ch. 269, *Fraud and Deceit* .

- For discussion, procedures, and forms related to the federal Fair Credit Billing Act and Truth in Lending Act, see Ch. 501, *Sales: Retail Installment Sales* .

- For detailed discussion of relief from debt and obligations for persons on active military service, see *Ch. 501, Sales: Retail Installment Sales, §§ 501.60 et seq., 501.300.*

- For discussion, procedures, and forms related to consumer remedies for specified misrepresentations, see Ch. 504, *Sales: Consumers Legal Remedies Act* .

Legal Topics:

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

Antitrust & Trade LawConsumer ProtectionGeneral OverviewAntitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationAntitrust & Trade LawConsumer ProtectionFalse AdvertisingState RegulationContracts LawDefensesFraud & MisrepresentationGeneral Overview

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[Reserved]

§§ 129.03[Reserved]

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§ 129.10 Governing Statutes

[1] California Laws

Credit reporting by consumer credit reporting agencies is governed by the Consumer Credit Reporting Agencies Act [*Civ. Code § 1785.1 et seq.*]. The notices and disclosures to consumers provided for in the Act are required to be made only to those consumers who have a mailing address in California [*Civ. Code § 1785.6*]. For other limitations on the scope of the act, see *Civ. Code §§ 1785.4* and *1785.35*. Any waiver of the provisions of the act is contrary to public policy, and is void and unenforceable [*Civ. Code § 1785.36*].

Credit reporting by investigative consumer reporting agencies is governed by the Investigative Consumer Reporting Agencies Act [*Civ. Code § 1786 et seq.*]. For limitations on the scope of the act, see *Civ. Code § 1786.54*. Any waiver of the provisions of the act is contrary to public policy, and is void and unenforceable [*Civ. Code § 1786.57*].

Commercial credit reports, which differ significantly from consumer credit reports [*see Civ. Code § 1785.41*], are governed by *Civ. Code § 1785.41 et seq.* Any waiver of those provisions is contrary to public policy, and is void and unenforceable [*Civ. Code § 1785.44*].

[2] Federal Laws

Credit reporting by consumer credit reporting agencies and by investigative consumer reporting agencies also is governed by the Fair Credit Reporting Act [*15 U.S.C. § 1681 et seq.*]. Generally the federal act does not annul, alter, affect, or exempt any person subject to the provisions of the act from complying with the laws of California with respect to the collection, distribution, or use of any information on consumers or with respect to the prevention or mitigation of identity theft, except to the extent that such a California law is inconsistent with any provision of the federal act, and then only to the extent of the inconsistency [*15 U.S.C. § 1681t(a)*]. However, California law is preempted by provisions of the federal act concerning the following matters [*15 U.S.C. § 1681t(b)(1)*]:

- Prescreening of consumer reports.

- The time by which a consumer reporting agency must take any action, including the provision of notification to a consumer or other person, in any procedure related to the disputed accuracy of information in a consumer's file.

- The duties of a person who takes any adverse action with respect to a consumer.

- The duties of persons who use a consumer report in connection with any credit or insurance transaction that is not initiated by the consumer and that consists of a firm offer of credit or insurance [*see 15 U.S.C. § 1681t(c)* (definition)].

- Information contained in consumer reports, except as to any California law in effect on September 30, 1996.

- The responsibilities of persons who furnish information to consumer reporting agencies, except as to *Civ. Code § 1785.25(a)* [*see § 129.23[1]*] as in effect on September 30, 1996.

- Information available to victims.

- The exchange and use of information to make a solicitation for marketing purposes.

- The duties of users of consumer reports to provide notice with respect to terms in certain credit transactions.

California law also is preempted by provisions of the federal act concerning the following:

- Exchange of consumer report information among persons affiliated by common ownership or common corporate control [*15 U.S.C. § 1681t(b)(2)*; *see American Bankers Ass'n v. Lockyer (9th Cir. 2008) 541 F.3d 1214, 1216, 1218* (*Fin. Code § 4053(b)(1)* is preempted insofar as it applies to consumer-report information as defined in *15 U.S.C. § 1681a(d)(1)* but is not preempted insofar as it applies to nonconsumer-report information); *American Bankers Ass'n v. Gould (9th Cir. 2005) 412 F.3d 1081, 1087* (federal act preempts California Financial Information Privacy Act, *Fin. Code § 4050 et seq.*, insofar as California law attempts to regulate inter-affiliate communication of "information," as that term is defined in *15 U.S.C. § 1681a(d)(1)*)].

- Certain disclosures required to be made and the disclosure of credit scores for credit granting purposes, except as to *Civ. Code §§ 1785.10*, 1785.15-1785.15.2, 1785.16, and 1785.20.2 [*see §§ 129.20[1], 129.21*] as in effect on December 4, 2003 [*15 U.S.C. § 1681t(b)(3)*].

- The duty to provide a free annual disclosure and concerning various kinds of required conduct [*15 U.S.C. § 1681t(b)(4), (5)*].

Since the requirements placed on credit reporting agencies and investigative reporting agencies by California law and by the federal act are similar or the same in many respects, this chapter primarily discusses California law. Citations to federal provisions are included when appropriate. Any inconsistencies between California law and the federal act are noted. Several provisions of the federal act that have no counterpart in the California statutes are discussed separately [*see § 129.26*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingGeneral OverviewBanking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionState LawFederal PreemptionBanking LawConsumer ProtectionState LawRemedies

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§ 129.11 Commercial Credit Reports Compared

Commercial credit reports are not subject to the Consumer Credit Reporting Agencies Act because the circumstances, business practices, and reports themselves differ sufficiently to make it impractical to include commercial credit reports under that Act [*Civ. Code § 1785.41*]. "Commercial credit report" is defined as any reportprovided to a commercial enterprise for a legitimate business purpose, relating to the financial status or payment habits of a commercial enterprise that is the subject of the report. A commercial credit report does not include (1) a report containing information related to transactions or experiences between the subject and the person making the report; (2) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device; or (3) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to the subject conveys its decision with respect to that request [*Civ. Code § 1785.42(a)*].

Civ. Code § 1785.43 sets forth the requirements applicable to commercial credit reporting. The statute provides that commercial credit reporting agencies may protect the identity of sources of information to be used in commercial credit reports [*Civ. Code § 1785.43(a)*], requires a commercial credit reporting agency to provide, on request, a copy of a commercial credit report [*see Civ. Code § 1785.43(b)*], and establishes procedures for disputing alleged inaccuracies in the report [*see Civ. Code § 1785.43(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawGeneral OverviewBanking LawConsumer ProtectionFair Credit ReportingConsumer Reports

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§ 129.12 Purposes of California Consumer Credit Acts

The Consumer Credit Reporting Agencies Act [*Civ. Code § 1785.1 et seq.*] was enacted to require that consumer credit reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner that is fair and equitable to the consumer with regard to the confidentiality, accuracy, relevancy, and proper utilization of the information in accordance with the act's provisions [*Civ. Code § 1785.1(d)*]. The act governs "consumer credit reports" [*see § 129.13[2]*] and deals with what may be called creditworthiness information.

The purpose of the Investigative Consumer Reporting Agencies Act [*Civ. Code § 1786 et seq.*] is to require that investigative consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for employment and insurance information in a manner that is fair and equitable to the consumer with regard to the confidentiality, accuracy, relevancy, and proper utilization of the information [*Civ. Code § 1786(f)*]. This act governs "investigative consumer reports" [*see § 129.13[3]*] and deals with what may be called character information.

The Investigative Consumer Reporting Agencies Act imposes stricter duties and more severe penalties on persons compiling or requesting reports containing character information than the Consumer Credit Reporting Agencies Act does on those compiling or requesting reports containing creditworthiness information [*see, e.g., Civ. Code § 1785.31(a)(1), (2)(A), (B)* (consumer is entitled to recover actual damages for violation of credit-reporting act, plus limited punitive damages for willful violation); *Civ. Code § 1786.50(a)(1), (b)* (consumer is entitled to recover actual damages or statutory damages, whichever is greater, for violation of investigative-reporting act, plus unlimited punitive damages for willful violation); *see also § 129.24[1][a], [2]*]. Consumers have different rights depending on whether their reports contain creditworthiness information or character information [*see, e.g., Civ. Code §§ 1785.15(f), 1785.16(f)* (consumer may obtain copy of consumer credit report for limited charge and may insert 100-word statement of dispute in report); *Civ. Code §§ 1786.22(b)(1), 1786.24(i)* (consumer may obtain copy of investigative consumer report for actual cost of duplication and may insert 500-word statement of dispute in report)].

One court of appeal has concluded that the statutory scheme embodied in the two acts "presents a false dichotomy

between creditworthiness and character" [*Ortiz v. Lyon Management Group, Inc. (2007) 157 Cal. App. 4th 604, 611, 69 Cal. Rptr. 3d 66*]. The court observed that while the statutes set up a distinction between creditworthiness and character information, the line between the two is not readily apparent. On the one hand, a consumer's creditworthiness itself pertains to the consumer's character or personal characteristics. Creditworthiness is a personal attribute, the quality of being financially sound enough that a lender will extend credit in the belief that the chances of default are slight. Thus, creditworthiness information is a type of character information. On the other hand, certain types of character information may constitute creditworthiness information. Information that a consumer has the character traits or personal characteristics of (or a general reputation for) dishonesty, profligacy, carelessness, or absentmindedness would reasonably relate to the consumer's financial soundness and likelihood of default [*Ortiz v. Lyon Management Group, Inc. (2007) 157 Cal. App. 4th 604, 615, 69 Cal. Rptr. 3d 66]* . In view of these observations (and for additional other reasons), the court held that the Investigative Consumer Reporting Agencies Act is unconstitutionally vague as applied to a report containing information about whether any unlawful detainer actions had been filed against the subject of the report. "We are left with no rational basis to determine whether unlawful detainer information constitutes creditworthiness information subject to the CCRAA [Consumer Credit Reporting Agencies Act] or character information subject to the ICRAA [Investigative Consumer Reporting Agencies Act]. We doubt any 'person of ordinary intelligence' can do so either. Rather, credit reporting agencies and landlords 'must necessarily guess at [the ICRAA's] meaning and differ as to its application.' Worse, landlords must make their guesses when they request tenant screening reports, before they learn whether the report will contain any unlawful detainer information or exactly what kind of unlawful detainer information it will include... . The ICRAA thus fails to provide adequate notice to persons who compile or request tenant screening reports that may contain unlawful detainer information" [*Ortiz v. Lyon Management Group, Inc. (2007) 157 Cal. App. 4th 604, 615, 69 Cal. Rptr. 3d 66* (citations omitted)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral Overview

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§ 129.13 Definitions

[1] Consumer

The term "consumer" as used in the Consumer Credit Reporting Agencies Act means a natural individual [*Civ. Code § 1785.3(b)*; *see 15 U.S.C. § 1681a(c)*]. The term "consumer" as used in the Investigative Consumer Reporting Agencies Act means a natural individual who has made application to a person for employment purposes or insurance for personal, family, or household purposes or for the hiring of a dwelling unit, as defined in *Civ. Code § 1940(c)* [*Civ. Code § 1786.2(b)*; *see 15 U.S.C. § 1681a(c)*].

[2] Consumer Credit Report

The term "consumer credit report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's creditworthiness, credit standing, or credit capacity, that is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for any of the following [*Civ. Code § 1785.3(c)*]:

- Credit to be used primarily for personal, family, or household purposes;
- Employment purposes;
- Hiring a dwelling unit, as defined in *Civ. Code § 1940(c)*; or
- Other purposes authorized in *Civ. Code § 1785.11*, which is *set forth in § 129.14[1], below*.

The term is not as broad as the definition of "consumer reports" under the federal Fair Credit Reporting Act [*cf. 15 U.S.C. § 1681a(d)*; *see Cisneros v. U.D. Registry Inc. (1996) 39 Cal. App. 4th 548, 559, 46 Cal. Rptr. 2d 233]* .

The term does not include any of the following [*Civ. Code § 1785.3(c)*]:

- Any report containing information solely relating to transactions or experiences between the consumer and the person making the report.

- Any communication of that information or information from a credit application by a consumer that is internal within the organization making the report or that is made to an entity owned by, or affiliated by corporate control with, the organization making the report; provided that with respect to information in a credit application, it is clearly and conspicuously disclosed in writing to the consumer that the information may be provided to these persons. However, when a credit application is taken by telephone, disclosure must initially be given orally at the time the application is taken, and a clear and conspicuous written disclosure must be made to the consumer in the first written communication to that consumer after the application is taken.

- Any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device.

- Any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to that request if the third party advises the consumer of the name and address of the person to whom the request was made and that person makes the disclosures to the consumer required under *Civ. Code § 1785.20* [*see 15 U.S.C. § 1681a(d)*].

- Any report containing information based solely on a consumer's character, general reputation, personal characteristics, or mode of living that is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on, or others with whom he or she is acquainted or who may have knowledge concerning those items of information.

- Any communication about a consumer in connection with a credit transaction that is not initiated by the consumer, between persons who are affiliated within the meaning of *Corp. Code § 150* by common ownership or common corporate control [*see Corp. Code § 160*] if either of those persons has complied with the disclosure requirements with respect to a prequalifying report [*see Civ. Code § 1785.20*.1(b)(2)] from which the information communicated is taken and provided that the consumer has consented to the provision and use of the prequalifying report in writing.

- Any consumer credit report furnished for use in connection with a transaction that consists of an extension of credit to be used solely for a commercial purpose.

A "prequalifying report" means a credit report containing the limited information permitted under *Civ. Code § 1785.11(b)(2)*, which is discussed in *§ 129.14[2]* [*Civ. Code § 1785.3(k)*].

The federal act does not cover hiring a dwelling unit but includes any information that is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing a consumer's eligibility for insurance to be used primarily for personal, family, or household purposes [*15 U.S.C. § 1681a(d)*]. Under the federal act, however, a report prepared by an insurer in order to evaluate an insurance claim is not a "consumer report," even if it contains information concerning the insured's credit history [*Kemp v. County of Orange (1989) 211 Cal. App. 3d 1422, 1424, 1427, 260 Cal. Rptr. 131* ; *but see Beresh v. Retail Credit Co., Inc. (1973) 358 F. Supp. 260, 261-262]* . The federal statute governs both consumer credit and investigative consumer reporting agency procedures. As discussed in *§ 129.10*, California has two separate statutes governing the two types of agencies.

[3] Investigative Consumer Report

Except in transactions between investigative consumer reporting agencies and insurance institutions, agents, or insurance-support organizations, the term "investigative consumer report" means a consumer report in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through any means. The information does not include specific factual information relating to a consumer's credit record or manner of obtaining credit obtained directly from a creditor or from a consumer reporting agency when that information was obtained directly from a potential or existing creditor of the consumer or from the consumer [*Civ. Code § 1786.2(c)*; *see 15 U.S.C. § 1681a(e)*; *seealso Cisneros v. U.D. Registry Inc. (1996) 39 Cal. App. 4th 548, 568-569, 46 Cal. Rptr. 2d 233* (reports that company assembled and disseminated about renters were not "investigative consumer reports" under ICRA because information was not obtained through "personal interviews")].

[4] Consumer Credit Reporting Agency

The term "consumer credit reporting agency" means any person, who, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the business of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. The term does not include any governmental agency whose records are maintained primarily for traffic safety, law enforcement, or licensing purposes [*Civ. Code § 1785.3(d)*].

Although services that investigate a consumer's checking account history do not come within this definition, they are treated in the same manner as consumer credit reporting agencies for purposes of the Consumer Credit Reporting Agencies Act. Any person who, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling, evaluating, or disseminating information on the checking account experiences of consumer customers of banks or other financial institutions is subject (with some exceptions) to the laws that govern consumer credit reporting agencies [*Civ. Code § 1785.5*].

Under the federal act, a consumer reporting agency, to be considered as such, must use some means or facility of interstate commerce must be used for the purpose of preparing or furnishing consumer reports [*see 15 U.S.C. § 1681a(f)*; *Cisneros v. U.D. Registry Inc. (1996) 39 Cal. App. 4th 548, 562, 46 Cal. Rptr. 2d 233* (company in business of gathering information about renters and selling it to landlords for screening purposes was "consumer credit reporting agency" under federal act)]. In addition, the federal act does not expressly exclude from the term "consumer reporting agency" governmental agencies whose records are maintained primarily for traffic safety, law enforcement, or licensing purposes [*see 15 U.S.C. § 1681a(f)*].

[5] Investigative Consumer Reporting Agency

The term "investigative consumer reporting agency" means any person who, for monetary fees or dues, engages in whole or in part in the practice of collecting, assembling, evaluating, compiling, reporting, transmitting, transferring, or communicating information concerning consumers for the purposes of furnishing investigative consumer reports to third parties, but it does not include any governmental agency whose records are maintained primarily for traffic safety, law enforcement, or licensing purposes, or any licensed insurance agent, insurance broker, or solicitor, insurer, or life insurance agent [*Civ. Code § 1786.2(d)*].

[6] Adverse Action

For purposes of the Consumer Credit Reporting Agencies Act, "adverse action" means a denial or revocation of credit, a change in the terms of an existing credit arrangement that is adverse to the consumer's interests, or a refusal to grant credit in substantially the amount or on substantially the terms requested [*Civ. Code § 1785.3(a)*]. Adverse action includes the following [*Civ. Code § 1785.3(a)*]:

- Any denial of, increase in any charge for, or reduction in the amount of insurance for personal, family, or household purposes made in connection with the underwriting of insurance.

- Any denial of employment or any other decision made for employment purposes that adversely affects any current or prospective employee.

- Any action taken, or determination made, with respect to a consumer for an application for an extension of credit or an application for hiring a dwelling unit that is adverse to the consumer's interests.

Adverse action does not include (1) a refusal to extend additional credit to a consumer under an existing credit arrangement if the applicant is delinquent or otherwise in default under that credit arrangement or if the additional credit would exceed a credit limit previously established for the consumer, or (2) a refusal or failure to authorize an account transaction at a point of sale [*Civ. Code § 1785.3(a)*].

Other definitions include "person" [*see Civ. Code §§ 1785.3(j), 1786.2(a)*; *see also 15 U.S.C. § 1681a(b)*], "file" [*see Civ. Code §§ 1785.3(g), 1786.2(e)*; *see also 15 U.S.C. § 1681a(g)*], "employment purposes" [*see Civ. Code §§ 1785.3(f), 1786.2(f)*; *see also 15 U.S.C. § 1681a(h)*], "item of information" [*see Civ. Code § 1785.3(i)*], and "medical information" [*see Civ. Code § 1786.2(g)*; *see also 15 U.S.C. § 1681a(i)*].

For the definitions of "credit transaction that is not initiated by the consumer," "firm offer of credit," and "state or local child support enforcement agency," see *Civ. Code § 1785.3(e), (h),* and *(l)* and *15* U.S.C. § 1681a(j), respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 129.14 Permissible Purposes of Consumer Credit and Investigative Consumer Reports

[1] Credit Reports

A consumer credit reporting agency or an investigative consumer reporting agency may furnish a report under the following circumstances [*Civ. Code §§ 1785.11(a)* (consumer agencies), 1786.12 (investigative agencies); *see 15 U.S.C. § 1681b*]:

- In response to the order of a court having jurisdiction to issue such an order.
- In accordance with the written instructions of the consumer to whom it relates.

In addition, a consumer credit reporting agency may furnish a report to a person who it has reason to believe intends to do any of the following [*Civ. Code § 1785.11(a)(3)*; *see 15 U.S.C. § 1681b(a)(3)*; *see also Mone v. Dranow (9th Cir. 1991) 945 F.2d 306, 308* (determining whether individual can satisfy judgment in lawsuit intended to be filed by person obtaining report is not a permissible purpose under *15 U.S.C. § 1681b(a)(3)*; it is not in connection with either credit transaction or legitimate business purpose)]:

- Use the information in connection with a credit transaction, or entering or enforcing an order of a court of competent jurisdiction for support, involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer [*see, e.g., Olson v. Six Rivers National Bank (2003) 111 Cal. App. 4th 1, 12-13, 3 Cal. Rptr. 3d 301* (bank's request for husband's credit information in connection with wife's loan application was authorized under *Civ. Code § 1785.11(a)(3)(A)*)].
- Use the information for employment purposes.
- Use the information in connection with the underwriting of insurance involving the consumer or for

insurance claims settlements.

- Use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider the applicant's financial responsibility or status.

- Use the information in connection with the hiring of a dwelling unit as defined in *Civ. Code § 1940(c)*.

- Otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer [*see, e.g., Olson v. Six Rivers National Bank (2003) 111 Cal. App. 4th 1, 12, 3 Cal. Rptr. 3d 301* (bank's request for husband's credit information in connection with wife's loan application was authorized under *Civ. Code § 1785.11(a)(3)(F)*)].

An investigative consumer reporting agency may also furnish a report to a person who it has reason to believe intends to use the information for any of the following purposes [*Civ. Code § 1786.12(d)*; *see 15 U.S.C. § 1681b*]:

- Employment purposes.

- To serve as a factor in determining a consumer's eligibility for insurance or the rate for any insurance.

- In connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider the applicant's financial responsibility or status.

- In connection with an order of a court of competent jurisdiction to provide support and the imposition or enforcement of the order involves the consumer.

- In connection with the hiring of a dwelling unit as defined in *Civ. Code § 1940(c)*.

An investigative consumer reporting agency must not prepare or furnish an investigative consumer report to a person described in the preceding paragraph unless the agency has received the certification specified in *Civ. Code § 1786.16(a)(4)* [*see* discussion in *§ 129.19[1]*] from the person requesting the report [*Civ. Code § 1786.12(e)*]. An investigative consumer reporting agency must not furnish an investigative consumer report to a person described in the preceding paragraph if that report contains medical information about a consumer, unless the consumer consents to the furnishing of the report [*Civ. Code § 1786.12(f)*].

[2] Prequalifying Reports

A consumer credit reporting agency may furnish information to a person that it has reason to believe intends to use the information in connection with a credit transaction when that credit transaction is not initiated by the consumer (a prequalifying report) only if (1) the consumer has authorized the agency to provide the report, or (2) the proposed transaction involves a firm offer of credit [*Civ. Code § 1785.11(b)(1), (2)*].

A "firm offer of credit" means any offer of credit to a consumer that will be honored if, based on information in a credit report on the consumer and other information bearing on the consumer's creditworthiness, he or she is determined to meet the criteria used to select the consumer for the offer and the consumer is able to provide any real property collateral specified in the offer. For purposes of this subdivision, the phrase "other information bearing on the creditworthiness of the consumer" means information that the person making the offer is permitted to consider pursuant

to any rule, regulation, or formal written policy statement relating to the federal Fair Credit Reporting Act, as amended [*15 U.S.C. § 1681 et seq.*], promulgated by the Federal Trade Commission or any federal bank regulatory agency [*Civ. Code § 1785.3(h)*].

If the proposed transaction involves a firm offer of credit, the consumer credit reporting agency must have established a notification system as discussed below, and the consumer must not have elected to have his or her name excluded. If an agency satisfies these requirements, it may only provide the consumer's name and address and information pertaining to a consumer that is not identified or identifiable with a particular consumer [*Civ. Code § 1785.11(b)(2)*].

A consumer credit reporting agency must furnish to the consumer, but may not to furnish to anyone else, a record of all inquiries that resulted solely from credit transactions that were not initiated by the consumer within the previous 12-month period on his or her request [*Civ. Code §§ 1785.11(c), 1785.15(a)(3)*].

[3] Consumer Election to Have Name Removed From List for Unsolicited Offers

Every consumer credit reporting agency that furnishes prequalifying reports pursuant to *Civ. Code § 1785.11(b)* in connection with credit transactions not initiated by the consumers must establish and maintain a notification system, including a toll-free telephone number, that permits any consumer, with appropriate identification and for which the agency has a file, to notify the agency of the consumer's election to have his or her name removed from any list of names and addresses provided by the agency or by any affiliated consumer credit reporting agency in connection with any transaction that is not initiated by the consumer. Establishing such a notification system by one agency constitutes compliance by any of its affiliated agencies [*Civ. Code § 1785.11(e)*]. Each consumer credit reporting agency that compiles and maintains consumer files on a nationwide basis must establish and maintain a notification system jointly with its affiliated agencies [*Civ. Code § 1785.11(f)*].

If a consumer exercises the election to have his or her name removed from any list of names and addresses provided by the agency in connection with transactions that are not initiated by the consumer, it is effective on notifying the agency. Notification may be made in writing or by telephone. The election may be withdrawn by notifying the agency that the election is no longer effective [*Civ. Code § 1785.11(d)*].

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§ 129.15 Unauthorized Access to or Use of Consumer Credit Data

A person who knowingly and wilfully obtains access to a file, or obtains data from a file, other than as provided by *Civ. Code § 1785.11* (furnishing of consumer credit reports, discussed in *§ 129.14*), is liable for a civil penalty payable to the consumer or to the person or entity responsible for the file accessed [*Civ. Code § 1785.19(a)(1), (2)*]. A person who uses the data received from a file in a manner contrary to an agreement with the consumer credit reporting agency is also liable [*Civ. Code § 1785.19(a)(3)*]. A "file" includes all of the information on a consumer recorded and retained by a consumer credit reporting agency, regardless of how the information is stored [*Civ. Code § 1785.3(g)*].

In addition, every consumer credit reporting agency, on written request and the furnishing of sufficient identification to identify the consumer and the subject file, must create reasonable procedures to prevent a consumer credit report or information from a consumer's file from being provided to any third party for marketing purposes or for any offer of credit not requested by the consumer. This does not apply, however, to the use of information by a credit grantor for purposes related to an existing credit relationship [*Civ. Code § 1785.19*.5]. For further discussion of procedures required of consumer credit reporting agencies to prevent furnishing of consumer credit reports for impermissible purposes, see *§ 129.18*.

For discussion of a consumer or reporting agency's right to bring an action for civil penalties under *Civ. Code § 1785.19*, see *§ 129.24[1][e]*.

Legal Topics:

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13-129 California Forms of Pleading and Practice--Annotated § 129.16

§ 129.16 Disclosures to Government Agencies

A consumer credit reporting agency or an investigative consumer reporting agency may furnish to a governmental agency a consumer's name, address, former address, places of employment, or former places of employment [*Civ. Code §§ 1785.12* (consumer agencies), 1786.14 (investigative agencies); *see 15 U.S.C. § 1681f*].

Legal Topics:

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§ 129.17 Contents of Reports

[1] Consumer Credit Reports

[a] Obsolete Information Prohibited

No consumer credit reporting agency may make any consumer credit report that includes any adverse information concerning a consumer that antedates the report by more than 10 years or that otherwise is prohibited from being included in the report [*Civ. Code § 1785.13(d)*]. Prohibited items include the following [*Civ. Code § 1785.13(a)*; *see 15 U.S.C. § 1681c*]:

- Bankruptcies that, from the date of the order for relief, antedate the report by more than 10 years.

- Suits and judgments that, from the date of entry or renewal, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period.

- Unlawful detainer actions, unless the lessor was the prevailing party. The lessor is deemed the prevailing party only if either (1) a final judgment was awarded to the lessor on entry of the tenant's default, on the granting of the lessor's motion for summary judgment, or following trial; or (2) the action was resolved by a written settlement agreement between the parties that states that the unlawful detainer action may be reported. In any other instance in which the action is resolved by settlement agreement, the lessor is not deemed to be the prevailing party.

- Paid tax liens that antedate the report by more than seven years from the date of payment.

- Accounts placed for collection or charged to profit and loss that antedate the report by more than seven years.

- Records of arrest, indictment, information, misdemeanor complaint, or conviction of a crime that

antedate the report by more than seven years from the date of disposition, release, or parole, or, in the case of a conviction, for which a full pardon has been granted, or, in the case of an arrest, indictment, information, or misdemeanor complaint, for which a conviction did not result.

- Any other adverse information that antedates the report by more than seven years.

In *U.D. Registry Inc. v. State of California (1995) 34 Cal. App. 4th 107, 40 Cal. Rptr. 2d 228* , however, the court of appeal held that *Civ. Code § 1785.13(a)(3)*, prohibiting a consumer credit report from containing information about unlawful detainer actions unless the lessor was the prevailing party [*see* third item in list, *above*], violates the *First Amendment* because the state may not suppress dissemination of concededly truthful information for fear of that information's effect on its disseminators or recipients [*U.D. Registry Inc. v. State of California (1995) 34 Cal. App. 4th 107, 115-116, 40 Cal. Rptr. 2d 228]* . The court reasoned that "where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts" [*U.D. Registry Inc. v. State of California (1995) 34 Cal. App. 4th 107, 115, 40 Cal. Rptr. 2d 228* , *quoting The Florida Star v. B.J.F. (1989) 491 U.S. 524, 534, 109 S. Ct. 2603, 105 L. Ed. 2d 443]* . Since the state affords the consumer the right to dispute inaccurate information on a credit report, seek a reinvestigation of the accuracy of the information, and provide a brief statement explaining any unresolved disputed information to be included in any credit report issued about the consumer [*see Civ. Code § 1785.15(f)*], the state's concerns about the effect of the information on its recipients (that is, tenant blacklisting or imposing unfair and unnecessary hardship on tenants seeking rental housing are served without violation of the *First Amendment* [*U.D. Registry Inc. v. State of California (1995) 34 Cal. App. 4th 107, 116, 40 Cal. Rptr. 2d 228]* .

The seven-year period specified in the fifth and seventh items in the list above for accounts placed for collection (internally or by referral to a third party, whichever is earlier), charged to profit or loss, or subject to any similar action begins to run on expiration of the 180-day period beginning when the delinquency commenced that immediately preceded the collection or similar action. When more than one of these actions is taken with respect to a particular account, the seven-year period begins concurrently for all of them as of the date the first action is begun [*Civ. Code § 1785.13(b)*].

[b] Medical Information Prohibited

Consumer credit reporting agencies may not include medical information in their consumer files and may not furnish medical information for employment, insurance, or credit purposes in a credit report without the consumer's consent [*Civ. Code § 1785.13(f)*].

[c] Identification of Bankruptcy Chapter

If a consumer credit reporting agency furnishes a credit report containing information regarding any case involving a consumer arising under the bankruptcy laws, it must identify which chapter of Title 11 of the United States Code the case arose under if that information can be ascertained from the agency's source of information [*Civ. Code § 1785.13(c)*].

[d] Closure of Open-End Credit Account

If a consumer credit reporting agency is notified by a furnisher of credit information that an open-end credit account has been closed by a consumer, any credit report issued thereafter by the agency with respect to that consumer and that includes information on that account must indicate the fact that the consumer closed the account. For these purposes, an "open-end credit account" does not include any demand deposit account, such as a checking account, money market account, or share draft account [*Civ. Code § 1785.13(e)*].

[e] Overdue Child or Spousal Support

Consumer credit reports must include information, if any, on the failure of the consumer to pay overdue child or spousal support when the information was either provided to the agency by the State Department of Child Support [*Fam. Code § 4701*] or provided and verified by another federal, state, or local governmental agency [*Civ. Code § 1785.13(g)*; *see 15 U.S.C. § 1681s-1*].

[2] Investigative Consumer Reports

The prohibitions on the reporting of obsolete information contained in the Consumer Credit Reporting Agencies Act are similar to those in the Investigative Consumer Reporting Agencies Act [*compare Civ. Code § 1786.18 with Civ. Code § 1785.13*]. Under the latter act, records of arrest, indictment, information, and misdemeanor complaints may be reported pending pronouncement of judgment on the particular subject matter of those records [*Civ. Code § 1786.18(a)(7)*]. In addition, the Investigative Consumer Reporting Agencies Act prohibits the reporting of suits that antedate the report by more than seven years from the date of filing, satisfied judgments that antedate the report by more than seven years from the date of entry, and unsatisfied judgments that antedate the report by more than 10 years from the date of entry [*Civ. Code § 1786.18(a)(2), (3)*]. Bankruptcies may not be reported if they antedate the report by more than 10 years [*Civ. Code § 1786.18(a)(1)*].

The prohibitions in the Investigative Consumer Reporting Agencies Act [*see Civ. Code § 1786.18(a)*] are not applicable to any investigative consumer report to be used in either of the following circumstances [*Civ. Code § 1786.18(b)*]:

- In the underwriting of life insurance that involves, or may reasonably be expected to involve, an amount of $250,000 or more; or

- By an employer that is explicitly required by a governmental regulatory agency to check for records that are prohibited by *Civ. Code § 1786.18(a)* when the employer is reviewing a consumer's qualification for employment.

Except as otherwise provided in *Civ. Code § 1786.28* (reporting of public-record information), an investigative consumer reporting agency must not furnish an investigative consumer report that includes information that is a matter of public record and that relates to an arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment, unless the agency has verified the accuracy of the information during the 30-day period ending on the date the report is furnished [*Civ. Code § 1786.18(c)*].

An investigative consumer reporting agency must not prepare or furnish an investigative consumer report on a consumer that contains information that is adverse to the interest of the consumer and that is obtained through a personal interview with a neighbor, friend, or associate of the consumer or with another person with whom the consumer is acquainted or who has knowledge of the item of information, unless either (1) the investigative consumer reporting agency has followed reasonable procedures to obtain confirmation of the information from an additional source that has independent and direct knowledge of the information, or (2) the person interviewed is the best possible source of the information [*Civ. Code § 1786.18(d)*].

An investigative consumer reporting agency must provide, on the first page of an investigative consumer report, a notice in at least 12-point boldface type setting forth that the report does not guarantee the accuracy or truthfulness of the information as to the subject of the investigation, but only that it is accurately copied from public records, and information generated as a result of identity theft, including evidence of criminal activity, may be inaccurately associated with the consumer who is the subject of the report [*Civ. Code § 1786.29(a)*].

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§ 129.18 Reporting Agency Procedures

[1] Verification and Certification of Users

Every consumer credit reporting agency and investigative consumer reporting agency must maintain reasonable procedures designed to avoid violations of *Civ. Code §§ 1785.13* and *1786.18* (governing contents of reports) and to limit furnishing of consumer credit and investigative consumer reports to permissible purposes [*see Civ. Code §§ 1785.11* (consumer agencies), 1786.12 (investigative agencies)].

These procedures require that prospective users of the information identify themselves, certify the purposes for which the information is sought, certify that the information will be used for no other purposes, and in the case of an investigative consumer report, make the certifications described in *Civ. Code § 1786.16(a)(4)* [*see* discussion in *§ 129.19[1]*]. The consumer credit or the investigative consumer reporting agency must keep a record of the purpose for which information is sought, as stated by the user [*Civ. Code §§ 1785.14(a)* (consumer agencies), 1786.20(a) (investigative agencies)]. An investigative consumer reporting agency may assume that the purpose for which a user seeks information remains the same as that which the user has previously stated. The investigative consumer reporting agency must inform the user that the user is obligated to notify the agency of any change in the purpose for which information will be used [*Civ. Code § 1786.20(a)*]. (The federal provision does not require that a record of the purposes be kept [*see 15 U.S.C. § 1681e*].)

Every consumer credit or investigative consumer reporting agency must make a reasonable effort to verify the identity of a new prospective user and the uses certified by the prospective user prior to furnishing the user a consumer report. No consumer credit reporting agency may furnish a report to any person unless it has reasonable grounds for believing, or no investigative consumer reporting agency may furnish a report to any person unless it has a written agreement, that the consumer report will be used by the person only for the permissible purposes listed under *Civ. Code § 1785.11* or *1786.12* [*Civ. Code §§ 1785.14(a)* (consumer agencies), 1786.20(a) (investigative agencies); *see 15 U.S.C. § 1681e(a)*]. A consumer credit reporting agency does *not* have reasonable grounds for believing that a consumer credit report will be used by the person for the purposes listed in *Civ. Code § 1785.11* unless all of the following applicable requirements

are satisfied:

- If the prospective user is a retail seller [*see generally Civ. Code § 1802.3*] and intends to issue credit to a consumer who appears in person on the basis of an application for credit submitted in person, the consumer credit reporting agency must, with a reasonable degree of certainty, match at least three categories of identifying information within the file maintained by the consumer credit reporting agency on the consumer with the information provided to the consumer credit reporting agency by the retail seller. The categories of identifying information may include, but are not limited to, first and last name, month and date of birth, driver's license number, place of employment, current residence address, previous residence address, or social security number [*but see* Civ. Code § 1789.85 et seq. (restrictions on use of social security numbers)]. The categories of information must not include the mother's maiden name [*Civ. Code § 1785.14(a)(1)*].

- If the prospective user is a retail seller and intends to issue credit to a consumer who appears in person on the basis of an application for credit submitted in person, the retail seller must certify, in writing, to the consumer credit reporting agency that it instructs its employees and agents to inspect a photo identification of the consumer at the time the application was submitted in person. This paragraph does not apply to an application for credit submitted by mail [*Civ. Code § 1785.14(a)(2)*].

- If the prospective user intends to extend credit by mail pursuant to a solicitation by mail, the extension of credit must be mailed to the same address as on the solicitation unless the prospective user verifies any address changeby, among other methods, contacting the person to whom the extension of credit will be mailed [*Civ. Code § 1785.14(a)(3)*].

An investigative consumer reporting agency must not make an inquiry for the purpose of preparing an investigative consumer report on a consumer for employment purposes if the making of the inquiry by an employer or prospective employer of the consumer would violate any applicable federal or state equal employment opportunity law or regulation [*Civ. Code § 1786.20(c)*].

[2] Exception for Subscriber Agreement

A credit reporting agency does not have to inquire regarding the purpose of each report or obtain certification for each report furnished if it is operating under an agreement with a subscriber in which the subscriber has certified that reports will only be requested and used in connection with a credit transaction involving the consumer concerned in each of its requests [*Hiemstra v. TRW, Inc. (1987) 195 Cal. App. 3d 1629, 1633-1634, 241 Cal. Rptr. 564]* .

[3] Maintaining Accuracy of Reports

Whenever a consumer credit or investigative consumer reporting agency prepares a report, it must follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual to whom the report relates [*Civ. Code §§ 1785.14(b)* (consumer agencies), 1786.20(b) (investigative agencies); *see 15 U.S.C. § 1681e(b)*; *Dennis v. BEH-1, LLC (9th Cir. 2007), 485 F.3d 443, 446* (credit reporting agency that relied on secondary documents--namely trial minutes and register of actions, without obtaining copy of actual judgment--proceeded reasonably, as matter of law, to meet "maximum possible accuracy" standard); *see also Schoendorf v. U.D. Registry, Inc. (2002) 97 Cal. App. 4th 227, 238-240, 118 Cal. Rptr. 2d 313* (reversing order granting defendant's motion under anti-SLAPP statute to dismiss tenant's action against reporting agency for refusal to add clarifying information to her report in violation of both state CCRAA and federal FCRA)]. An investigative consumer reporting agency must retain the investigative consumer report for a period of two years after the report is provided [*Civ. Code § 1786.20(b)*]. For procedures when matters of public record are involved and when information is likely to havean adverse effect on a consumer's ability to obtain employment, see *Civ. Code §§ 1785.18* (consumer agencies) and 1786.28 (investigative

agencies), and *15 U.S.C. § 1681k*.

For a consumer credit reporting agency, the reasonable procedures must include, but are not limited to, permanent retention by the agency in the consumer's file, or a separately individualized file, of that portion of the data in the file that is used by the consumer credit reporting agency to identify the individual consumer pursuant to *Civ. Code § 1785.14(a)(1)* [*see* [1], *above*]. This permanently retained data must be available for use in either a reinvestigation pursuant to *Civ. Code § 1785.16(a)* [*see § 129.21[1][a]*], an investigation when the consumer has filed a police report pursuant to *Civ. Code § 1785.16(k)* [*see* [7], *below*], or a restoration of a file involving the consumer. If the permanently retained identifying information is retained in a consumer's file, it must be clearly identified in the file in order for an individual who reviews the file to easily distinguish between the permanently stored identifying information and any other identifying information that may be a part of the file. This retention requirement must not apply to data that is reported in error, obsolete, or found to be inaccurate through the results of a reinvestigation initiated by a consumer pursuant to *Civ. Code § 1785.16(a)* [*Civ. Code § 1785.14(b)*].

[4] Verification of Adverse Information in Subsequent Investigative Consumer Reports

Whenever an investigative consumer reporting agency prepares an investigative consumer report, no adverse information in the report (other than information that is a matter of public record, the status of which has been updated pursuant to *Civ. Code § 1786.28*) may be included in a subsequent investigative consumer report unless the adverse information has been verified in the process of making the subsequent consumer report, or unless the adverse information was received within the three-month period preceding the date on which the subsequent report is furnished [*Civ. Code § 1786.30*; *see 15 U.S.C. § 1681 l*].

[5] No Prohibition Against User's Disclosure to Consumer

No consumer credit reporting agency may prohibit a user from disclosing the contents of a consumer credit report to the consumer who is the subject of the report if adverse action may be taken against the consumer by the user based, in whole or in part, on the report. The act of disclosure to the consumer by the user in this situation is not a basis for liability of the consumer credit reporting agency or the user under *Civ. Code § 1785.31* (action for damages) [*Civ. Code § 1785.14(c)*]. No similar provision exists in the Investigative Consumer Reporting Agencies Act.

[6] Notice of Obligations to Supplier of Information

A consumer credit reporting agency must provide a written notice to any person who regularly and in the ordinary course of business supplies information to the agency concerning any consumer or to whom the agency provides a credit report that specifies that person's obligations under the Consumer Credit Reporting Agencies Act. The notice may consist of copies of the appropriate code sections [*Civ. Code § 1785.14(d)*]. No similar provision exists in the Investigative Consumer Reporting Agencies Act.

[7] Permanent Block on Reporting of Information

Penal Code § 530.5 provides that every person who willfully obtains personal identifying information of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense [*Penal Code § 530.5(a)*]. "Personal identifying information" means any of the following [*Penal Code § 530.55(b)*]:

- Name.
- Address.
- Telephone number.

- Health insurance number.
- Taxpayer identification number.
- School identification number.
- State or federal driver's license or identification number.
- Social security number.
- Place of employment.
- Employee identification number.
- Professional or occupational number.
- Mother's maiden name.
- Demand deposit account number.
- Savings account number.
- Checking account number.
- Personal identification number (PIN) or password.
- Alien registration number.
- Government passport number.
- Date of birth.
- Unique biometric data including fingerprint, facial scan identifiers, voiceprint, retina or iris image, or other unique physical representation.
- Unique electronic data including information identification number assigned to the person, address or routing code, telecommunication identifying information or access device.
- Information contained in a birth or death certificate.
- Credit card number of an individual person.
- Equivalent form of identification.

If a consumer submits to a credit reporting agency a copy of a valid police report (or a valid investigative report made by a Department of Motor Vehicles investigator with peace officer status) filed pursuant to *Penal Code § 530.5* [*see Penal Code § 530.6(a)* (creation of police report)], the agency must promptly and permanently block reporting of any information that the consumer alleges appears on his or her credit report as a result of a violation of *Penal Code § 530.5*, so that the information cannot be reported. The agency must promptly notify the furnisher of the information that the

information has been so blocked. The permanently blocked information may be unblocked only if, and furnishers of information and consumer credit reporting agencies must ensure that information is unblocked only if, a preponderance of the evidence establishes one of the following facts:

- The information was blocked due to a material misrepresentation of fact by the consumer or fraud.

- The consumer agrees that the blocked information was, or portions of the blocked information were, blocked in error.

- The consumer knowingly obtained possession of goods, services, or money as a result of the blocked transaction or transactions or the consumer should have known that he or she obtained possession of goods, services, or money as a result of the blocked transaction or transactions.

If blocked information is unblocked, the consumer must be promptly notified in the same manner as consumers are notified of the reinsertion of information pursuant to *Civ. Code § 1785.16(c)* [*see § 129.21[3]*]. The prior presence of the blocked information in the agency's file on the consumer is not evidence of whether the consumer knew or should have known that he or she obtained possession of any goods, services, or money. For these purposes, fraud may be demonstrated by circumstantial evidence. In unblocking information, furnishers and consumer credit reporting agencies are subject to their respective requirements pursuant to the Consumer Credit Reporting Agencies Act regarding the completeness and accuracy of information [*Civ. Code § 1785.16(k)*; *see Civ. Code § 1785.16*.3 (*Civ. Code § 1785.16(k)* does not apply to consumer reporting agency that acts only as reseller of credit information by assembling and merging information contained in database of another consumer reporting agency or agencies, and that does not maintain permanent database of credit information from which new credit reports are produced)].

In unblocking information, a consumer reporting agency must comply with all requirements of *Civ. Code § 1785.16* and *15* U.S.C. § 1681i [*see § 129.21[1]*] relating to reinvestigating disputed information. In addition, a consumer reporting agency must accept the consumer's version of the disputed information and correct or delete the disputed item when the consumer submits to the consumer reporting agency documentation obtained from the source of the item in dispute or from public records confirming that the report was inaccurate or incomplete, unless the consumer reporting agency, in the exercise of good faith and reasonable judgment, has substantial reason based on specific, verifiable facts to doubt the authenticity of the documentation submitted and notifies the consumer in writing of that decision, explaining its reasons for unblocking the information and setting forth the specific, verifiable facts on which the decision was based [*Civ. Code § 1785.16*(*l*); *see Civ. Code § 1785.16*.3 (*Civ. Code § 1785.16*(*l*) does not apply to consumer reporting agency that acts only as reseller of credit information by assembling and merging information contained in database of another consumer reporting agency or agencies, and that does not maintain permanent database of credit information from which new credit reports are produced)].

[8] Information Traceable to Identity Theft

A consumer credit reporting agency must delete from a consumer credit report inquiries for credit reports based on credit requests that theconsumer credit reporting agency verifies were initiated as the result of identity theft as defined in *Civ. Code § 1798.92* [*Civ. Code § 1785.16*.1].

A person or business that conducts business in California and owns or licensescomputerized data that includes personal information is required to disclose any breach of the security of the data to any resident of California whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person. A person or business that maintains computerized data that includes personal information owned by another also is required to notify the owner or licensee of the information of any breach of security of the data [*see Civ. Code § 1798.82(a), (b)*]. For discussion of these requirements, see Ch. 429, *Privacy* .

[9] Prohibited Sale of Consumer Debt

No creditor may sell a consumer debt to a debt collector, as defined [*see 15 U.S.C. § 1692a*; *Civ. Code § 1785.16*.2(c)], if the consumer is a victim of identity theft [*see Civ. Code § 1798.2* (definition)], and with respect to that debt, the creditor has received notice, pursuant to *Civ. Code § 1785.16(k)* [*see* [7], *above*], that the consumer's file with a consumer credit reporting agency is blocked with respect to that debt [*Civ. Code § 1785.16*.2(a)]. This does not apply to a creditor's sale of a debt to a subsidiary or affiliate of the creditor, if, with respect to that debt, the subsidiary or affiliate does not take any action to collect the debt [*Civ. Code § 1785.16*.2(b)].

[10] Implementation of Security Alerts and Security Freezes

A consumer may elect to place a security alert in his or her credit report by making a request in writing or by telephone to a consumer credit reporting agency. A security alert is a notice placed in a consumer's credit report, at the request of the consumer, that notifies a recipient of the credit report that the consumer's identity may have been used without the consumer's consent to fraudulently obtain goods or services in the consumer's name [*Civ. Code § 1785.11*.1(a)].

Every consumer credit reporting agency must do the following to implement security alerts:

- Maintain a toll-free telephone number to accept security alert requests from consumers 24 hours a day, seven days a week [*Civ. Code § 1785.11*.1(c)]. The toll-free telephone number must be included in any written disclosure by a consumer credit reporting agency to any consumer pursuant to *Civ. Code § 1785.15* [*see § 129.20[1][f]*] and must be printed in a clear and conspicuous manner [*Civ. Code § 1785.11*.1(d)].

- Place a security alert on a consumer's credit report no later than five business days after receiving a request from the consumer [*Civ. Code § 1785.11*.1(e)]. The security alert must remain in place for at least 90 days, and a consumer must have the right to request a renewal of the security alert [*Civ. Code § 1785.11*.1(f)].

- Notify each consumer who has requested that a security alert be placed on his or her consumer credit report of the expiration date of the alert [*Civ. Code § 1785.11*.1(j)].

- Notify each person requesting consumer credit information with respect to a consumer of the existence of a security alert in the credit report of that consumer, regardless of whether a full credit report, credit score, or summary report is requested [*Civ. Code § 1785.11*.1(b)].

In addition to requesting that a security alert be placed in a credit report, a consumer may elect to place a security freeze on his or her credit report by making a request in writing by mail to a consumer credit reporting agency. "Security freeze" means a notice placed in a consumer's credit report, at the request of the consumer and subject to certain exceptions, that prohibits the consumer credit reporting agency from releasing the consumer's credit report or any information from it without the express authorization of the consumer. If a security freeze is in place, information from a consumer's credit report may not be released to a third party without prior express authorization from the consumer. This does not prevent a consumer credit reporting agency from advising a third person that a security freeze is in effect with respect to the consumer's credit report [*Civ. Code § 1785.11*.2(a)]. However, it appears that the statute is not constitutionally enforceable to prevent a consumer credit reporting agency from disseminating any true information about the consumer that the agency has in its records [*U.D. Registry, Inc. v. State of California (2006) 144 Cal. App. 4th 405, 425, 50 Cal. Rptr. 3d 647]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingConsumer ReportsBanking LawConsumer ProtectionFair Credit ReportingIdentity TheftBanking LawConsumer ProtectionState LawGeneral Overview

California Forms of Pleading and Practice--Annotated

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A. California Consumer Credit Reporting Agencies Act and California Investigative Consumer Reporting Agencies Act

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§ 129.19 Preparation or Procurement of Investigative Consumer Reports

[1] For Insurance Underwriting, Employment, or Residential Lease

A person may not procure or cause to be prepared an investigative consumer report unless the following conditions are met [*Civ. Code § 1786.16(a)*; *see 15 U.S.C. § 1681d(a)*]:

- If an investigative consumer report may be sought in connection with the underwriting of insurance, it must be clearly and accurately disclosed in writing at the time the application form, medical form, binder, or similar document is signed by the consumer that an investigative consumer report regarding the consumer's character, general reputation, personal characteristics, and mode of living may be made. If no signed application form, medical form, binder, or similar document is involved in the underwriting transaction, the disclosure must be made to the consumer in a writing mailed or otherwise delivered to the consumer not later than three days after the report was first requested. The disclosure must include the name and address of any investigative consumer reporting agency conducting an investigation, plus the nature and scope of the investigation requested, and a summary of the provisions of *Civ. Code § 1786.22* [*Civ. Code § 1786.16(a)(1)*].

- If, at any time, an investigative consumer report is sought for employment purposes other than suspicion of wrongdoing or misconduct by the subject of the investigation, the person seeking the investigative consumer report may procure the report, or cause the report to be made, only if all of the following apply [*Civ. Code § 1786.16(a)(2)*]:

  - The consumer has authorized in writing the procurement of the report.

  - The person procuring or causing the report to be made has a permissible purpose [*see Civ. Code § 1786.12* (definition)].

- The person procuring or causing the report to be made provides a clear and conspicuous disclosure in writing to the consumer, at any time before the report is procured or caused to be made, in a document that consists solely of the disclosure, that aninvestigative consumer report may be obtained. The permissible purpose of the report must be identified in the disclosure, which may include information on the consumer's character, general reputation, personal characteristics, and mode of living. The disclosure must identify the name, address, and telephone number of the investigative consumer reporting agency conducting the investigation and notify the consumer of the nature and scope of the investigation requested, including a summary of the provisions of *Civ. Code § 1786.22*.

- If an investigative consumer report is sought in connection with the hiring of a dwelling unit [*see Civ. Code § 1940(c)*], the person procuring or causing the report to be made must, not later than three days after the date on which the report was first requested, notify the consumer in writing that an investigative consumer report will be made regarding the consumer's character, general reputation, personal characteristics, and mode of living. This notification must include the name and address of the consumer reporting agency that will prepare the report and a summary of the provisions of *Civ. Code § 1786.22* [*Civ. Code § 1786.16(a)(3)*].

The person procuring or causing the request to be made must certify to the investigative consumer reporting agency that the person has made the applicable disclosures to the consumer required by *Civ. Code § 1786.16(a)(1)-(3)* and that the person will comply with *Civ. Code § 1786.16(b)* [*Civ. Code § 1786.16(a)(4)*]. The person procuring the report or causing it to be prepared must agree to provide a copy of the report to the subject of the investigation [*Civ. Code § 1786.16(a)(5)*]. Any person described in *Civ. Code § 1786.12(d)* [*see* [2], *below*] who requests an investigative consumer report in accordance with *Civ. Code § 1786.16(a)* regarding that consumer must provide the consumer with a means by which the consumer may indicate on a written form, by means of a box to check, that the consumer wishes to receive a copy of any report that is prepared. If the consumer wishes to receive a copy of the report, the recipient of the report must send a copy of the report to the consumer within three business days of the date the report is provided to the recipient, who may contract with any other entity to send a copy to the consumer. The notice to request the report may be contained on either the disclosure form, as required by *Civ. Code § 1786.16(a)*, or a separate consent form. The copy of the report must contain the name, address, and telephone number of the person who issued the report and how to contact them. In addition, the person requesting the report must comply with *Civ. Code § 1786.40* [*see § 129.20[3]*] if the taking of adverse action is a consideration [*Civ. Code § 1786.16(b)*].

The foregoing provisions do not apply to an investigative consumer report procured or caused to be prepared by an employer, if the report is sought for employment purposes due to suspicion held by an employer of wrongdoing or misconduct by the subject of the investigation [*Civ. Code § 1786.16(c)*].

[2] Persons Who May Initiate Preparation of Report

The persons described in *Civ. Code § 1786.12(d)* (permissible purposes of investigative reports) constitute the sole and exclusive class of persons who may cause an investigative consumer report to be prepared [*Civ. Code § 1786.16(d)*]. These permissible persons are persons who intend to use the information for one of the following [*Civ. Code § 1786.12(d)*]:

- Employment purposes.

- As a factor in determining a consumer's eligibility for insurance or the rate for that insurance.

- In connection with a determination of the consumer's eligibility for a license or other benefit granted

by a governmental instrumentality required by law to consider the applicant's financial responsibility or status.

- In connection with an order of a court of competent jurisdiction to provide support when the imposition or enforcement of the order involves the consumer.

- In connection with the hiring of a dwelling unit [*see Civ. Code § 1940(c)* (applicable definition of "dwelling unit")].

[3] Federal Requirements

The federal act allows a person to procure or cause to be prepared an investigative consumer report under either of the following circumstances [*15 U.S.C. § 1681d(a)*]:

- If it is clearly and accurately disclosed to the consumer that an investigative consumer report, including information as to his or her character, general reputation, personal characteristics, and mode of living may be made, and the disclosure both:

  - Is made in a writing mailed or otherwise delivered to the consumer within three days after the date on which the report was first requested.

  - Includes a statement informing the consumer of his or her right to request the additional disclosures provided for under *15 U.S.C. § 1681d(b)*.

- The person certifies to the consumer reporting agency that both:

  - The person has made the disclosures to the consumer as specified above.

  - The person will comply with the statutory provisions giving the consumer the right to request additional written disclosures provided for under *15 U.S.C. § 1681d(b)*.

Any person who procures or causes to be prepared an investigative consumer report on any consumer on written request made by the consumer within a reasonable period of time after receipt of the disclosurerequired by *15 U.S.C. § 1681d(a)(1)* must make a complete and accurate disclosure of the nature and scope of the investigation requested. This disclosure must be made in a writing mailed or otherwise delivered to the consumer not later than five days after the date on which the request for the disclosure was first received from the consumer or the report was first requested, whichever is later [*15 U.S.C. § 1681d(b)*].

No person is liable for a violation of the foregoing provisions if he or she shows by a preponderance of the evidence that, at the time of the violation, he or she maintained reasonable procedures to assure compliance [*15 U.S.C. § 1681d(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 129.20 Disclosures to Consumers

[1] By Consumer Credit Reporting Agencies

[a] Consumer's Right to Inspect Generally

The following disclosures are required to be made only to those consumers who have a mailing address in California [*Civ. Code § 1785.6*]. Every consumer credit reporting agency, on request and proper identification of any consumer, must allow the consumer to visually inspect all files maintained regarding the consumer at the time of the request [*Civ. Code § 1785.10(a)*; *see 15 U.S.C. § 1681g(a)*]. On being contacted, every consumer credit reporting agency must advise the consumer of the agency's obligation to disclose the files in person, by mail, or by telephone, as well as its obligation to provide the consumer with a written version of the file on request, or with a written copy of the file with an explanation of any code, including any credit score used, and certain key factors [*Civ. Code § 1785.10(b)*], as defined in *Civ. Code § 1785.15*.1, discussed in [g], *below*. All information on a consumer in a consumer credit reporting agency's files at the time of an inspection request must be available for inspection, including the names and addresses of the sources of the information [*Civ. Code § 1785.10(c)*]. After 2002, the disclosed information must include telephone numbers identified for consumer service if provided by the sources of information [*Civ. Code § 1785.10(c)*; Stats. 2002, ch. 9, §§ 1, 2; Stats. 2001, ch. 236, §§ 2, 3; *but see* Stats. 2001, ch. 236, § 1 (requirement does not apply to person that is subject to consumer credit reporting laws merely by virtue of *Civ. Code § 1785.5*); *see also Civ. Code § 1785.10(f)* (exemption for agency that is subject to *Civ. Code § 1785.22*)].

[b] Disclosure of Recipients and Inquiries

The consumer credit reporting agency must disclose the recipients of any consumer credit report on the consumer that the agency has furnished (1) for employment purposes within the two-year period preceding the request, and (2) for any other purpose within the 12-month period preceding the request. A disclosure of credit report recipients must also include the name of the recipient or the fictitious business name under which the recipient does business and, if requested by the consumer, the address of the recipient [*Civ. Code § 1785.10(d)*; *see 15 U.S.C. § 1681g(a)*]. After 2002, the disclosed information must include the address of the recipient whether or not requested by the consumer, as well as

telephone numbers identified for consumer service if provided by the recipient [*Civ. Code § 1785.10(d)(2)*; Stats. 2002, ch. 9, §§ 1, 2; Stats. 2001, ch. 236, §§ 2, 3; *but see* Stats. 2001, ch. 236, § 1 (requirement does not apply to person that is subject to consumer credit reporting laws merely by virtue of *Civ. Code § 1785.5*); *see also Civ. Code § 1785.10(f), (g)* (exemptions for agency subject to *Civ. Code § 1785.22*)].

Every consumer credit reporting agency must also disclose a record of all inquiries received by the agency during the 12-month period prior to the request that identified the consumer in connection with a credit transaction that was not initiated by the consumer. These types of credit transactions are *discussed under § 129.14[2]*. This record of inquiries must also include the name of each recipient making an inquiry [*Civ. Code § 1785.10(e)*]. After 2002, the record of inquiries must include as well the address of each recipient making an inquiry and telephone numbers identified for consumer service if provided by the recipient [*Civ. Code § 1785.10(e)*; Stats. 2002, ch. 9, §§ 1, 2; Stats. 2001, ch. 236, §§ 2, 3; *but see* Stats. 2001, ch. 236, § 1 (requirement does not apply to person that is subject to consumer credit reporting laws merely by virtue of *Civ. Code § 1785.5*); *see also Civ. Code § 1785.10(f), (g)* (exemptions for agency subject to *Civ. Code § 1785.22*)].

[c] Contents and Format of Disclosure

A consumer has the right to request and receive all of the following information:

- Either a decoded written version of the file or a written copy of the file with an explanation of any code used containing all of the information in the file at the time of the request [*Civ. Code § 1785.15(a)(1)*] (the federal provision does not require that a decoded version or that a copy of any code used be given to the consumer [*see 15 U.S.C. § 1681h(b)*]).

- A credit score for the consumer, key factors, and related information, as defined and required in *Civ. Code § 1785.15*.1, discussed in [g], *below* [*Civ. Code § 1785.15(a)(2)*].

- A record of all inquiries, by recipient, that resulted in the provision of information concerning the consumer in connection with credit transactions that were not initiated by the consumer and that were received by the consumer credit reporting agency within the 12-month period immediately preceding the disclosure request [*Civ. Code § 1785.15(a)(3)*].

- A list of recipients, including end users specified under *Civ. Code § 1785.22* (resale of consumer credit reports), of any consumer credit report on the consumer that the consumer credit reporting agency furnished for employment purposes within the previous two years, or for any other purpose within the previous 12 months [*Civ. Code § 1785.15(a)(4)*].

Identification of the recipients of consumer credit reports by a consumer credit reporting agency must include their names or, if applicable, the fictitious business names under which the recipients do business. Identification must also include the recipients' addresses if requested by the consumer [*Civ. Code § 1785.15(a)(4)*].

[d] Timing and Procedure for Disclosure

A consumer credit reporting agency must supply files and information required under *Civ. Code § 1785.10* (disclosures to consumers) during normal business hours and on reasonable notice [*Civ. Code § 1785.15(a)*; *see 15 U.S.C. § 1681h(b)(2)*].

Files maintained on a consumer by a consumer credit reporting agency must be disclosed to the consumer as follows [*Civ. Code § 1785.15(b)(1)-(3)*]:

- In person, at the location where the agency's trained personnel are located, if he or she appears in person and furnishes proper identification.

- By mail, if the consumer makes a written request with proper identification for a copy of the file or a decoded version of the file to be sent to the consumer at a specified address. A consumer credit reporting agency must send the file by regular mail, postage prepaid, within five business days of receiving the request. Consumer credit reporting agencies complying with requests for mailings are not liable for disclosures to third parties caused by mishandling of mail after the mailings leave the agencies (there is no equivalent federal provision).

- By telephone, providing a summary of all information contained in the files on the consumer and required by *Civ. Code § 1785.10*, if the consumer has made a written request, with proper identification for telephone disclosure.

A consumer credit reporting agency may also provide the information in its files that it is required to disclose in writing in another form if it is available from the agency and authorized by the consumer. A consumer may request that such a disclosure be made in person, by telephone with proper identification, by electronic means if this is available from the agency, or by any other reasonable means that is available [*Civ. Code § 1785.15(b)(4)*].

"Proper identification" is defined as that information generally deemed sufficient to identify a person. Only if a consumer is unable to reasonably identify himself or herself may a consumer credit reporting agency require additional information concerning the consumer's employment and personal or family history in order to verify his or her identity [*Civ. Code § 1785.15(c)*].

[e] Persons Present During Inspection

A consumer credit reporting agency must provide trained personnel to explain any information furnished to the consumer under *Civ. Code § 1785.10* [*Civ. Code § 1785.15(d)*; *see 15 U.S.C. § 1681h(c)*].

The consumer may be accompanied by one other person of his or her choosing, who must furnish reasonable identification [*Civ. Code § 1785.15(e)*; *see 15 U.S.C. § 1681h(d)*; *see also Cisneros v. U.D. Registry Inc. (1996) 39 Cal. App. 4th 548, 571-572, 46 Cal. Rptr. 2d 233* (agency not required to disclose consumer files pursuant to request made directly by consumer's attorney)]. A consumer credit reporting agency may require the consumer to furnish a written statement granting permission to the agency to discuss the consumer's file in the other person's presence [*Civ. Code § 1785.15(e)*; *see 15 U.S.C. § 1681h(d)*].

[f] Summary of Consumer's Rights and Toll-Free Number

Any written disclosure by a consumer credit reporting agency to a consumer must include a written summary of all rights the consumer has under the Consumer Credit Reporting Agencies Act. In the case of a consumer credit reporting agency that compiles and maintains consumer credit reports on a nationwide basis, the disclosure must also include a toll-free telephone number that consumers can use to contact the agency [*Civ. Code § 1785.15(f)*]. For a sample of the written summary of consumer rights that must be provided, see *Civ. Code § 1785.15(f)*.

Each consumer credit reporting agency must maintain a toll-free telephone number to accept security alert requests [*see § 129.18[10]*] from consumers 24 hours a day, seven days a week [*Civ. Code § 1785.11*.1(c)]. The toll-free telephone number must be included in any written disclosure by a consumer credit reporting agency to any consumer pursuant to *Civ. Code § 1785.15* and must be printed in a clear and conspicuous manner [*Civ. Code § 1785.11*.1(d)].

[g] Credit Score Information

A "credit score" is a numerical value or a categorization derived from a statistical tool or modeling system used by a person who makes or arranges a loan, to predict the likelihood of certain credit behaviors, including default. The numerical value or the categorization derived from this analysis may also be referred to as a "risk predictor" or "risk score." The term "credit score" does not include any mortgage score or rating of an automated underwriting system that considers any factors in addition to creditinformation, including, but not limited to, the loan-to-value ratio, the amount of down payment, or a consumer's financial assets. The term also does not include other elements of the underwriting process or underwriting decision [*Civ. Code § 1785.15*.1(b)].

On receiving a consumer's request for a credit score, a consumer credit reporting agency must supply to the consumer a notice that includes the following information, along with a statement indicating that the information and credit scoring model may be different than the credit score that may be used by the lender [*Civ. Code § 1785.15*.1(a)]:

- The consumer's current credit score or the consumer's most recent credit score that was previously calculated by the credit reporting agency for a purpose related to the extension of credit.

- The range of possible credit scores under the model used.

- All of the key factors that adversely affected the consumer's credit score in the model used, the total number of which must not exceed four [*see Civ. Code § 1785.15*.1(c) ("key factors" means all relevant elements or reasons adversely affecting credit score for particular individual, listed in order of their importance based on their effect on credit score)].

- The date the credit score was created.

- The name of the person or entity that provided the credit score or credit file on which the credit score was created.

However, if the consumer requests the credit file and not the credit score, then the consumer must receive the credit file and a statement that he or she may request and obtain a credit score [*Civ. Code § 1785.15*.1(a)].

A consumer credit reporting agency must supply the consumer with a credit score that is derived from a credit scoring model that is widely distributed to users by that consumer credit reporting agency in connection with residential real property loans or with a credit score that assists the consumer in understanding the credit scoring assessment of his or her credit behavior and predictions about his or her future credit behavior, along with a statement indicating that the information and credit scoring model may be different than that used by the lender [*Civ. Code § 1785.15*.2(a)].

The required information must be provided in the same time frame and manner as the information described in *Civ. Code § 1785.15* [*Civ. Code § 1785.15*.1(d)], discussed in [d], *above*. A consumer credit reporting agency may charge a reasonable fee for providing the required information [*Civ. Code § 1785.15*.2(b)].

A consumer reporting agency cannot be compelled to develop or disclose a score if the agency does not distribute scores that are used in connectionwith residential real property loans and does not develop scores that assist credit providers in understanding a consumer's general credit behavior and predicting his or her future credit behavior [*Civ. Code § 1785.15*.1(e)].

A consumer credit reporting agency that distributes credit scores developed by another person or entity is not required to provide a further explanation of them, or to process a dispute arising pursuant to *Civ. Code § 1785.16(a)* [*see § 129.21[1][a]*], except that the consumer credit reporting agency must provide the consumer with the name and address and website for contacting the person or entity who developed the score or developed the methodology of the score.

This does not apply to a consumer credit reporting agency that develops or modifies scores that are developed by another person or entity [*Civ. Code § 1785.15*.1(f)].

A consumer reporting agency is not required to maintain credit scores in its files [*Civ. Code § 1785.15*.1(g)].

Any provision in a contract that prohibits the disclosure of a credit score by a person who makes or arranges loans or a consumer credit reporting agency is void. A lender has no liability under any contractual provision for disclosure of a credit score [*Civ. Code § 1785.16(m)*].

[h] Fees for Disclosure

Permissible charges that a consumer credit reporting agency may impose for disclosures and notifications, and impermissible charges, are governed by *Civ. Code § 1785.17* and *15* U.S.C. § 1681j.

[i] Response After Report of Identity Theft

In addition to any other rights the consumer may have under *Civ. Code § 1785.1 et seq.*, every consumer credit reporting agency, after being contacted by telephone, mail, or in person by any consumer who has reason to believe that he or she may be a victim of identity theft, must promptly provide to that consumer a statement, written in a clear and conspicuous manner, describing the statutory rights of victims of identity theft under *Civ. Code § 1785.1 et seq.* [*Civ. Code § 1785.15*.3(a), (d)]. This does not apply to a consumer reporting agency that acts only as a reseller of credit information by assembling and merging information contained in the database of another consumer reporting agency or agencies and that does not maintain a permanent database of credit information from which new credit reports are produced [*Civ. Code § 1785.15*.3(c)].

Every consumer credit reporting agency, on the receipt from a victim of identity theft of a police report prepared pursuant to *Penal Code § 530.6*, or a valid investigative report made by a Department of Motor Vehicles investigator with peace officer status regarding the public offenses described in *Penal Code § 530.5*, must provide the victim, free of charge and on request, with up to 12 copies of his or her file during a consecutive 12-month period, not to exceed one copy per month, following the date of the police report. Notwithstanding any other provision of *Civ. Code § 1785.1 et seq.*, the maximum number of free reports that a victim of identity theft is entitled to obtain under *Civ. Code § 1785.1 et seq.* is 12 per year, as provided by *Civ. Code § 1785.15*.3(b) [*Civ. Code § 1785.15*.3(b),(d)].

[2] By Investigative Consumer Reporting Agencies

[a] Consumer's Right to Inspect

Every investigative consumer reporting agency, on request and proper identification of any consumer, must allow the consumer to visually inspect all files maintained regarding that consumer at the time of the request [*Civ. Code § 1786.10(a)*; *see 15 U.S.C. § 1681g(a)*].

An investigative consumer reporting agency must provide a consumer seeking to obtain a copy of a report or making a request to review a file, a written notice in simple plain English and Spanish setting forth the terms and conditions of his or her right to receive all disclosures as provided in *Civ. Code § 1786.26* (concerning which disclosures must be provided at no charge and which may be provided for a fee) [*Civ. Code § 1786.29(b)*].

[b] Sources and Recipients of Information

All items of information must be available for inspection, except that the sources of information, other than public records and records from data bases available for sale, acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed. However, in the event an action is brought under

the Investigative Consumer Reporting Agencies Act, those sources must be available to the consumer under appropriate discovery procedures in the court in which the action brought [*Civ. Code § 1786.10(b)(1)*]. Nothing in the Act may be interpreted to mean that investigative consumer reporting agencies are required to divulge to consumers the sources of investigative consumer reports except in such appropriate discovery procedures [*Civ. Code § 1786.10(b)(2)*; *see 15 U.S.C. § 1681g(a)*].

An investigative consumer reporting agency must also identify the recipients of any investigative consumer report on the consumer that the agency has furnished either (1) for employment or insurance purposes within the three-year period preceding the request or (2) for any other purpose within the three-year period preceding the request [*Civ. Code § 1786.10(c)*; *see 15 U.S.C. § 1681g(a)*]. The identification of a recipient must include the name of the recipient or, if applicable, the trade name (written in full) under which the recipient conducts business and, on request of the consumer, the address and telephone number of the recipient [*Civ. Code § 1786.10(d)*]. The agency must also disclose the dates,original payees,and amounts of any checks or charges on which is based any adverse characterization of the consumer that is included in the file at the time of the disclosure [*Civ. Code § 1786.10(e)*].

[c] Timing and Procedures for Disclosure

An investigative consumer reporting agency must supply files and information required under *Civ. Code § 1786.10* during normal business hours and on reasonable notice [*Civ. Code § 1786.22(a)*; *see 15 U.S.C. § 1681h(b)(2)*]. The agency must supply a written explanation of any coded information in the consumer's file whenever a file is provided to a consumer [*Civ. Code § 1786.22(e)* (there is no equivalent federal provision)].

Files maintained on a consumer by an investigative consumer reporting agency must be disclosed to the consumer as follows [*Civ. Code § 1786.22(b)*]:

- In person, if he or she appears in person and furnishes proper identification. A copy of the file must be available to the consumer for a fee that may not exceed the actual cost of the duplication services provided.

- By certified mail, if the consumer makes a written request with proper identification for a copy of the file to be sent to a specified addressee. Investigative reporting agencies complying with requests for mailings are not liable for disclosures to third parties caused by mishandling of mail after the mailings leave the agencies (there is no equivalent federal provision).

- By telephone, providing a summary of all information contained in the files on the consumer and required by *Civ. Code § 1786.10*, if the consumer has made a written request, with proper identification, for telephone disclosure and the toll charge, if any, for the telephone call is prepaid by or charged directly to the consumer.

"Proper identification" is defined as that information generally deemed sufficient to identify a person, including documents such as a valid driver's license, social security account number, military identification card, and credit cards. Only if the consumer is unable to reasonably identify himself or herself with the information described above may an investigative consumer reporting agency require additional information concerning the consumer's employment and personal or family history in order to verify his or her identity [*Civ. Code § 1786.22(c)*].

[d] Persons Present During Inspection

The investigative consumer reporting agency must provide trained personnel to explain any information furnished to the consumer under *Civ. Code § 1786.10* [*Civ. Code § 1786.22(d)*; *see 15 U.S.C. § 1681h(c)*].

The consumer may be accompanied by one other person of his or her choosing, who must furnish reasonable identification. An investigative consumer reporting agency may require the consumer to furnish a written statement granting permission to the agency to discuss the consumer's file in the other person's presence [*Civ. Code § 1786.22(f)*; *see 15 U.S.C. § 1681h(d)*].

[e] Fees for Disclosure

For the charges that an investigative consumer reporting agency may make for disclosure, see *Civ. Code § 1786.26* and *15* U.S.C. § 1681j.

[3] By User of Report

Whenever insurance for personal, family, or household purposes, employment, or the hiring of a dwelling unit involving a consumer is denied, or the charge for that insurance or the hiring of a dwelling unit is increased, under circumstances in which a report regarding the consumer was obtained from an investigative consumer reporting agency, the user of the investigative consumer report must so advise the consumer against whom the adverse action has been taken and supply the name and address of the investigative consumer reporting agency making the report [*Civ. Code § 1786.40(a)*].

Whenever insurance for personal, family, or household purposes involving a consumer is denied or the charge for that insurance is increased, either wholly or in part because of information bearing upon the consumer's general reputation, personal characteristics, or mode of living, that was obtained from a person other than an investigative consumer reporting agency, the consumer, or another person related to the consumer and acting on the consumer's behalf, the user of the information, on the consumer's written request for the reasons for the adverse action received within 60 days after learning of the adverse action, must disclose, within a reasonable time, the nature and substance of the information to the consumer. The user of the information must clearly and accurately disclose to the consumer his or her right to make this written request at the time the adverse action is communicated to the consumer [*Civ. Code § 1786.40(b)*].

[4] By Person Doing Investigation in Lieu of Hiring Investigative Agency

Any person, except an agency subject to the Information Practices Act of 1977 [*see Civ. Code § 1798 et seq.*], who collects, assembles, evaluates, compiles, reports, transmits, transfers, or communicates information on a consumer's character, general reputation, personal characteristics, or mode of living, for employment purposes, which are matters of public record (meaning records documenting an arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment), and does not use the services of an investigative consumer reporting agency, must providea copy of the related public record to the consumer within seven days after receipt of the information, regardless of whether the information is received in written or oral form [*Civ. Code § 1786.53(a),(b)(1)*]. The person must provide on any job application form, or any other written form, a box that, if checked by the consumer, permits the consumer to waive his or her right to receive a copy of the public record [*Civ. Code § 1786.53(b)(2)*].

If any person obtains a public record pursuant to *Civ. Code § 1786.53* for the purpose of conducting an investigation for suspicion of wrongdoing or misconduct by the subject of the investigation, that person may withhold the information until the completion of the investigation. On completion of the investigation, that person must provide a copy of the public record, unless the consumer waived his or her rights [*Civ. Code § 1786.53(b)(3)*].

If any person takes any adverse action as a result of receiving information pursuant to *Civ. Code § 1786.53(a)*, that person must provide to the consumer a copy of the public record, regardless of whether the consumer waived his or her rights [*Civ. Code § 1786.53(b)(4)*]. "Adverse action," as relating to employment, means a denial of employment or any decision made for an employment purpose that adversely affects any current or prospective employee [*Civ. Code § 1786.53(a)(1)*].

Nothing in these requirements compels a person to provide the same information to any consumer on more than one occasion [*Civ. Code § 1786.53(c)*].

The foregoing requirements are not intended to modify *Lab. Code § 1198.5* (concerning an employee's inspection of his or her personnel record) or existing law concerning information obtained by an employer or employment agency without the use of the services of an investigative consumer reporting agency for employment reference checks, background investigations, credential verifications, or employee investigations, except as provided in *Civ. Code § 1786.53*. Nor are those requirements intended to change or supersede existing law related to privileged attorney-client communications or attorney work product, or require the production or disclosure of that information [*Civ. Code § 1786.55*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingGeneral OverviewBanking LawConsumer ProtectionFair Credit ReportingConsumer ReportsBanking LawConsumer ProtectionFair Credit ReportingIdentity TheftBanking LawConsumer ProtectionState LawGeneral Overview

California Forms of Pleading and Practice--Annotated

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Chapter 129 CONSUMER CREDIT REPORTING
PART II. LEGAL BACKGROUND
A. California Consumer Credit Reporting Agencies Act and California Investigative Consumer Reporting Agencies Act

13-129 California Forms of Pleading and Practice--Annotated § 129.21

§ 129.21 Procedures When Consumer Disputes Report's Accuracy

[1] Reinvestigation by Consumer Credit Reporting Agency

[a] Timing and Scope

If a consumer disputes the completeness or accuracy of any item of information contained in his or her file, and the consumer (or a user on behalf of the consumer) conveys the dispute directly to a consumer credit reporting agency, the agency must reinvestigate and record the current status of the disputed information within 30 business days after the agency receives notice of the dispute from the consumer or user. A consumer credit reporting agency may require that disputes by consumers be in writing. The agency must conduct the reinvestigation without charge [*Civ. Code § 1785.16(a)*].

In conducting the reinvestigation, the consumer credit reporting agency must review and consider all relevant information submitted by the consumer with respect to the disputed item of information [*Civ. Code § 1785.16(b)*]. The agency must also notify any person who provided the information in dispute within five business days after receiving notice of the dispute at the address and in the manner specified by the person [*Civ. Code § 1785.16(a)*]. For the procedure for correcting information contained in a consumer credit report by the person furnishing the information to a consumer credit reporting agency, see *Civ. Code § 1785.30*. As a matter of law, a consumer reporting agency's insistence that the consumer sign a form waiving all privacy rights to financial and medical information before reinvestigating an item in his or her file violates the California and federal Acts [*Cisneros v. U.D. Registry Inc. (1996) 39 Cal. App. 4th 548, 575, 46 Cal. Rptr. 2d 233]* .

[b] Frivolous or Irrelevant Dispute

If a consumer credit reporting agency determines that the dispute is frivolous or irrelevant, it must notify the consumer within five business days after that determination is made that it is terminating its reinvestigation of the item of information. Notification must be made by mail or, if authorized by the consumer for that purpose, by any other means available to the agency. In this notification, the agency must state the specific reasons why it has determined that the

consumer's dispute is frivolous or irrelevant, including a failure of the consumer to furnish the agency with sufficient information to investigate the dispute [*Civ. Code § 1785.16(a),(b)*]. The presence of information in the consumer's file that contradicts the contention of the consumer does not, in and of itself, constitute reasonable grounds for believing that the dispute is frivolous or irrelevant [*Civ. Code § 1785.16(e)*; *see 15 U.S.C. § 1681i(a)*]. This duty to notify is imposed solely on the agency itself, and a consumer reporting agency's officer is not liable for the failure of the agency to make a formal response to a consumer complaint [*Cisneros v. U.D. Registry Inc. (1996) 39 Cal. App. 4th 548, 582-583, 46 Cal. Rptr. 2d 233]* .

The federal Act also requires that the consumer be notified within five business days if the agency determines that the dispute is frivolous or irrelevant [*15 U.S.C. § 1681i(a)(3)(B)*].

[c] Modification of File and Notice of Reinvestigation

If the disputed item of information is found to be inaccurate or missing or can no longer be verified by the evidence submitted, the consumer credit reporting agency must promptly add, correct, or delete that informationfrom the consumer's file [*Civ. Code § 1785.16(b)*]. The agency also must maintain reasonable procedures to prevent the reappearance of information that has been deleted and not reinserted in a consumer's file and in credit reports based on the information in that consumer's file [*Civ. Code § 1785.16(i)*].

A consumer credit reporting agency must notify the consumer of the results of any reinvestigation within five days of completion. A notice of reinvestigation must include the following [*Civ. Code § 1785.16(d)*]:

- A statement that the reinvestigation is complete.

- A consumer credit report based on the consumer's file as revised following the reinvestigation.

- A description or indication of any changes made in the consumer's credit report as a result of those revisions to the consumer's file, a description of any changes made or sought by the consumer that were not made, and an explanation of why they were not made.

- A notice that the consumer may request a description of the procedures that were used by the agency to determine the accuracy and completeness of the information, including the name, business address, and telephone number of anyone who furnished information to the agency and who was contacted in connection with that information.

- A notice that the consumer has a right to add a statement to his or her file disputing the accuracy or completeness of the information.

- A notice that the consumer has a right to request that the agency provide a notice that the item of information has been deleted or that the item of information is disputed to anyone who has received a credit report concerning the consumer within the previous two years (for employment purposes) or 12 months (for any other purpose), discussed under [6], *below*.

- A notice that the dispute will remain on file with the agency as long as the credit information is used.

- A notice that a statement about the details of the dispute will be furnished to any recipient as long as the credit information is retained in the agency's database.

A consumer credit reporting agency must provide a description of the procedures it used to determine the accuracy and completeness of any information within 15 days of receiving a request [*Civ. Code § 1785.16(d)*].

The federal act does not require that the consumer be notified when inaccurate and unverifiable information has been deleted from the consumer's file [*see 15 U.S.C. § 1681i(a)*].

[2] Reinvestigation by Investigative Consumer Reporting Agency

If a consumer disputes the completeness or accuracy of any item of information contained in his or her file, and conveys the dispute directly to the investigative consumer reporting agency, the agency, without charge, must reinvestigate and record the current status of the disputed information or delete the item from the file in accordance with *Civ. Code § 1786.24(c)*, before the end of the 30-day period beginning on the date the agency receives the notice of the dispute from the consumer [*Civ. Code § 1786.24(a)*].

The agency must notify any person who provided information in dispute at the address and in the manner specified by that person. The notice must include all relevant information regarding the dispute that the agency has received from the consumer. The agency must also promptly provide to the person who provided the information in dispute all relevant information regarding the dispute that is received by the agency from the consumer during the reinvestigation [*Civ. Code § 1786.24(b)*].

In conducting a reinvestigation, the agency must review and consider all relevant information submitted by the consumer with respect to the disputed item of information [*Civ. Code § 1786.24(c)*].

The agency may terminate a reinvestigation of information disputed by a consumer if the agency reasonably determines that the dispute is frivolous or irrelevant, including by reason of a failure by a consumer to provide sufficient information to investigate the disputed information. On making a determination that a dispute is frivolous or irrelevant, the agency must notify the consumer, by mail or, if authorized by the consumer for that purpose, by any other means available to the agency. In this notification, the agency must state the specific reasons why it has determined that the consumer's dispute is frivolous or irrelevant and provide a description of any information required to investigate the disputed information, which may consist of a standardized form describing the general nature of the required information [*Civ. Code § 1786.24(d)*]. The presence of information in the consumer's file that contradicts the contention of the consumer does not, in and of itself, constitute reasonable grounds for believing the dispute is frivolous or irrelevant [*Civ. Code § 1786.24(h)*].

If a reinvestigation is made and, after reinvestigation, the disputed item of information is found to be inaccurate, incomplete, or cannot be verified by the evidence submitted, the agency must promptly delete that information from the consumer's file or modify the information, as appropriate, based on the results of the reinvestigation, and must notify the consumer that the information has been deleted or modified. The agency must also notify any and all sources from which the disputed information was obtained and inform them in writing of the reasons and results of the reinvestigation, and send a copy of this notification to the consumer. In accordance with *Civ. Code § 1786.10(b)*, the copy of the notification sent to the consumer need not reveal the identity of the source of information, unless otherwise required by law [*Civ. Code § 1786.24(e)*].

The agency must provide notice to the consumer of the results of any reinvestigation, by mail or, if authorized by the consumer for that purpose,by other means available to the agency. The notice must include all of the following [*Civ. Code § 1786.24(g)*]:

- A statement that the reinvestigation is completed.

- An investigative consumer report that is based on the consumer's file as that file is revised as a result of the reinvestigation.

- A description or indication of any changes made in the investigative consumer report as a result of those revisions to the consumer's file.

- A notice that, if requested by the consumer, a description of the procedure used to determine the accuracy and completeness of the information will be provided to the consumer by the investigative consumer reporting agency, including the name, business address, and telephone number of any furnisher of information contacted in connection with that information.

- A notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the information.

- A notice that the consumer has the right to request that the investigative consumer reporting agency furnish notifications under *Civ. Code § 1786.24(k)* [*see* discussion under [6], *below*].

Any investigative consumer reporting agency that compiles and maintains files on consumers on a nationwide basis, as defined in the federal Act, must implement an automated system through which furnishers of information to that agency may report the results of a reinvestigation that finds incomplete or inaccurate information in a consumer's file to other investigative consumer reporting agencies [*Civ. Code § 1786.24(n)*].

All actions to be taken by an investigative consumer reporting agency under *Civ. Code § 1786.24* are governed by the applicable time periods specified in *15 U.S.C. § 1681i* [*Civ. Code § 1786.24(o)*].

The federal act requires that consumer reporting agencies provide consumers with written notice of the results of a reinvestigation not later than five days after the completion of the reinvestigation. Notice must be by mail or, if the consumer authorizes it, by any other means available to the agency [*15 U.S.C. § 1681i(a)(6)(A)*].

[3] Reinsertion of Information by Consumer Credit Reporting Agency

If a consumer credit or investigative consumer reporting agency conducts a reinvestigation and deletes information from a consumer's file, that information may not be reinserted into the file unless the person who furnishes the information certifies that the information is accurate. If any previously deleted information is reinserted into a consumer's file, the agency must promptly notify the consumer of that fact in writing or, if authorized by the consumer for that purpose, by any other means available to the agency [*Civ. Code §§ 1785.16(c)* (consumer agencies), 1786.24(f) (investigative agencies)].

As part of, or in addition to this notice, a consumer credit reporting agency must provide the consumer with a written notice within five business days of reinserting the information that includes [*Civ. Code § 1785.16(c)*]:

- A statement that the disputed information has been reinserted.

- A notice that the agency will provide the consumer, within 15 days following a request, with the name, address, and telephone number of any furnisher of information contacted by or that contacted the agency in connection with the reinsertion.

- The toll-free telephone number of the consumer credit reporting agency that the consumer can use to obtain this name, address, and telephone number.

- A notice that the consumer has a right to a reinvestigation of the information reinserted by the agency and to add a statement to his or her file disputing the accuracy or completeness of the information, discussed in [d], *below*.

An investigative consumer reporting agency must provide to the consumer, in writing, all of the following [*Civ. Code § 1786.24(f)*]:

- A statement that the disputed information has been reinserted.

- The name, address, and telephone number of any furnisher of information contacted or that contacted the agency in connection with the reinsertion, and the telephone number of the furnisher, if reasonably available.

- A notice that the consumer has the right to a reinvestigation of the information reinserted by the agency and to add a statement to his or her file disputing the accuracy or completeness of the information.

A consumer credit reporting agency must maintain reasonable procedures to prevent the reappearance in a consumer's file and in consumer credit reports of information that has been deleted and not reinserted [*Civ. Code § 1785.16(i)*]. An investigative consumer reporting agency must maintain reasonable procedures designed to prevent the reappearance in a consumer's file and in investigative consumer reports of information that has been deleted pursuant to *Civ. Code § 1786.24* and not reinserted pursuant to *Civ. Code § 1786.24(f)* [*Civ. Code § 1786.24*(*l*)].

[4] Statement of Dispute by Consumer

If a consumer credit or investigative consumer reporting agency determines that a dispute is frivolous or irrelevant, or if the reinvestigation does not resolve the dispute, or if the information is reinserted into the consumer's file by an investigative consumer reporting agency pursuant to *Civ. Code § 1786.24(f)*, the consumer may file a brief statement setting forth the nature of the dispute. This procedure also applies if a consumer credit reporting agency reinserts previously deleted information. The agency may limit this statement to not more than 100 words if it provides the consumer with assistance in writing a clear summary of the dispute [*Civ. Code §§ 1785.16(f)* (consumer agencies), 1786.24(i) (investigative agencies); *see 15 U.S.C. § 1681i(b)*].

[5] Notice of Dispute in Subsequent Reports

Whenever a statement of dispute is filed, the consumer credit or investigative consumer reporting agency must, in any subsequent consumer credit or investigative consumer report containing the information in question, clearly note that the information is disputed by the consumer and must include in the report either the consumer's statement or a clear and accurate summary of the statement [*Civ. Code §§ 1785.16(g)* (consumer agencies), 1786.24(j) (investigative agencies); *see 15 U.S.C. § 1681i(c)*].

[6] Notice of Deletion of Disputed Information or of Dispute

Following the deletion of information from a consumer's file that was inaccurate or could no longer be verified, or following the filing of a dispute by a consumer, a consumer credit or investigative consumer reporting agency must, at the consumer's request, furnish a notice that an item of information has been deleted or that an item of information is in dispute. In the case of disputed information, the notice must include the statement or summary of the dispute filed pursuant to *Civ. Code § 1785.16(f)* or *1786.24(i)* [*Civ. Code §§ 1785.16(h)* (consumer agencies), 1786.24(k) (investigative agencies); *see 15 U.S.C. § 1681i(d)*].

A consumer credit reporting agency must furnish the notice to any person specifically designated by the consumer who received, within two years prior to the deletion or the filing of the dispute, a credit report concerning the consumer for employment purposes or who received, within 12 months of the deletion or the filing of the dispute, a credit report

concerning the consumer for any other purpose, if the credit report contained the deleted or disputed information. The agency must clearly and conspicuously disclose to the consumer his or her right to request that such a notice be provided. This disclosure must be made at or prior to the time the information is deleted or the consumer's statement regarding the disputed information is received [*Civ. Code § 1785.16(h)*; *see 15 U.S.C. § 1681i(d)*].

An investigative consumer reporting agency must furnish the notice to any person who has, within two years prior to the deletion or the filing of the dispute, received an investigative report concerning the consumer for employment purposes, or who has, within one year of the deletion or the filing of the dispute, received an investigative report concerning the consumer for any other purpose, if these investigative consumer reports contained the deleted or disputed information, unless the consumer specifically requests in writing that this notification not be given to all persons or to any specified persons. The agency must clearly and conspicuously disclose to the consumer his or her rights to make a request that this notification not be made [*Civ. Code § 1786.24(k)*; *see 15 U.S.C. § 1681i(d)*].

[7] Summary Resolution by Consumer Credit Reporting Agency

If a consumer's dispute with a consumer credit reporting agency is resolved by deletion of the disputed information within three business daysafter the agency is notified of the dispute and the consumer receives written verification of that fact within five business days following the deletion, the agency is excused from taking any further action that might otherwise be required for a reinvestigation [*Civ. Code § 1785.16(j)*]. However, the consumer credit reporting agency is still required to provide notice of deletion to the persons and in the manner specified in *Civ. Code § 1785.16(h)* [*Civ. Code § 1785.16(j)*; *see* discussion in [6], *above*].

If the consumer's dispute is resolved by deletion of the disputed information within three business days, beginning with the day the investigative consumer reporting agency receives notice of the dispute in accordance with *Civ. Code § 1786.24(a)* [*see* discussion in [2], *above*], the investigative consumer reporting agency will be exempt from requirements for further action under *Civ. Code § 1786.24(g)*, *(i)*, and *(j)*, if the agency does all of the following [*Civ. Code § 1786.24(m)*]:

- Provides prompt notice of the deletion to the consumer by telephone.

- Provides written confirmation of the deletion and a copy of an investigative consumer report of the consumer that is based on the consumer's file after the deletion.

- Includes, in the telephone notice or in a written notice that accompanies the confirmation and report, a statement of the consumer's right to request under *Civ. Code § 1786.24(k)* [*see* discussion in [6], *above*] that the agency furnish notifications under that subsection.

[8] Investigation at User's Request

A user, in its discretion, may notify a consumer that on the latter's request the user may contact a consumer credit reporting agency and request that the agency investigate the current status of an item or items of information contained in a consumer report if the consumer disputes the completeness or accuracy of an item or items of information as provided to the user [*Civ. Code § 1785.21(a)*]. The agency may require identification from the user to ensure the validity of the request and, in that regard, may require that the request be put in writing with proper identification [*Civ. Code § 1785.21(b)*]. In the event that the request is made and identification given in the form or manner demanded by the agency, the agency must review the consumer's file and report the current status of the disputed information to the user and to the consumer by the most expeditious means possible [*Civ. Code § 1785.21(c)*].

No user who furnishes information pursuant to *Civ. Code § 1785.21* may be liable to any person for furnishing such information [*Civ. Code § 1785.21(d)*].

There is no comparable federal provision.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingConsumer ReportsBanking LawConsumer ProtectionState LawGeneral Overview

California Forms of Pleading and Practice--Annotated

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A. California Consumer Credit Reporting Agencies Act and California Investigative Consumer Reporting Agencies Act

13-129 California Forms of Pleading and Practice--Annotated § 129.22

§ 129.22 Duties of Users of Consumer Reports

[1] Notice of Adverse Action Based on Report

Whenever any person takes any adverse action with respect to a consumer based, in whole or in part, on any information contained in a consumer credit report, that person must do all of the following [*Civ. Code § 1785.20(a)*; *see Civ. Code § 1785.16*; *see also 15 U.S.C. § 1681m(a)*]:

- Provide written notice of the adverse action to the consumer.

- Provide the consumer with the name, address, and telephone number of the consumer reporting agency that furnished the report.

- Provide a statement that the credit grantor's decision to take adverse action was based, in whole or in part, on information contained in the consumer credit report.

- Provide the consumer with a written notice informing the consumer of his or her right within 60 days to receive a free copy of his or her credit report from the agency or from any other consumer credit reporting agency that compiles and maintains files on consumers on a nationwide basis, and the consumer's right to dispute the accuracy or completeness of any information in the credit report furnished by the consumer credit reporting agency.

For the statutory definition of the term "adverse action" for purposes of the preceding requirements, see *§ 129.13[6], above* [*see also Civ. Code § 1785.3(a)*].

[2] Disclosure of Information Not Obtained From Agencies

Whenever credit or insurance for personal, family, or household purposes involving a consumer is denied, or the charge for credit or insurance is increased either wholly or in part because of information obtained from a person other than a

consumer credit reporting agency bearing on a consumer's creditworthiness or credit standing, the user of that information, within a reasonable period of time, and on the consumer's written request for the reasons for the adverse action received within 60 days after learning of the adverse action, must disclose the nature and substance of the information to the consumer. The user of the information must clearly and accurately disclose to the consumer his or her right to make a written request at the time the adverse action is communicated to the consumer [*Civ. Code § 1785.20(b)*; *see 15 U.S.C. § 1681m(b)*]. No person is liable for any violation of *Civ. Code § 1785.20* if he or she shows by a preponderance of the evidence that at the time of the alleged violation he or she maintained reasonable procedures to assure compliance with *Civ. Code § 1785.20(a)* and *(b)* [*Civ. Code § 1785.20(c)*; *see 15 U.S.C. § 1681m(c)*].

The federal provision does not require that the substance of the information be disclosed to the consumer [*see 15 U.S.C. § 1681m(b)*].

[3] Use of Report for Employment Purposes

Prior to requesting a consumer credit report for employment purposes, the user of the report must provide written notice to the person involved. The notice must inform the person that a report will be used and the source of the report, and must contain a box that the person may check off to receive a copy of the credit report. If the consumer indicates that he or she wishes to receive a copy of the report, the user must request that a copy be provided to the person when the user requests its copy from the credit reporting agency. The report to the user and to the subject person must be provided contemporaneously and at no charge to the subject person [*Civ. Code § 1785.20*.5(a)].

Whenever employment involving a consumer is denied either wholly or partly because of information contained in a consumer credit report obtained from a consumer credit reporting agency, the user of the consumer credit report must advise the consumer against whom the adverse action has been taken and supply the name and address or addresses of the agency making the report [*Civ. Code § 1785.20*.5(b)].

No person is liable for any violation of *Civ. Code § 1785.20*.5 if he or she shows by a preponderance of the evidence that, at the time of the alleged violation, he or she maintained reasonable procedures to assure compliance with that section [*Civ. Code § 1785.20*.5(b)].

The federal act does not contain a comparable provision.

[4] Use of Prequalifying Reports for Unsolicited Offers of Credit

Any person who uses a consumer credit report in connection with any credit transaction that is not initiated by the consumer and that consists of a firm offer of credit [*see Civ. Code §§ 1785.3(e), (h), 1785.11(b)*] must provide a clear and conspicuous statement to the consumer with any solicitation. This statement must contain all of the following [*Civ. Code § 1785.20*.1(a)]:

- That information contained in the consumer's prequalifying report was used in connection with the transaction.

- That the consumer received the offer of credit because he or she satisfied the criteria for creditworthiness under which the consumer was selected for the offer.

- That, when applicable, the credit may not be extended if, after the consumer responds to the offer, he or she does not meet the criteria used to select the consumer for the offer.

- That the consumer has a right to prohibit the use of information contained in his or her file with any consumer credit reporting agency in connection with any credit transaction that is not initiated by the

consumer. A consumer may exercise this right by using the notification system that consumer credit reporting agencies are required to maintain (discussed in *§ 129.14[3]*).

The requirement to provide consumers with a clear and conspicuous statement with any solicitation does not apply to any person using a prequalifying report if all of the following conditions are met [*Civ. Code § 1785.20*.1(b)]:

- The person using the prequalifying report is affiliated by common ownership or common corporate control with the person who procured the report.

- The person who procures the prequalifying report from the consumer credit reporting agency clearly and conspicuously discloses to the consumer to whom the report relates before providing the prequalifying report that the report might be provided to, and used by, an affiliate.

- The consumer consents in writing to this provision and use of the prequalifying report.

No person can be denied credit on the basis of having refused to provide his or her written consent to this provision and use of a prequalifying report unless that consent is necessary for the extension of credit related to that transaction by an affiliate [*Civ. Code § 1785.20*.1(c)].

The federal act does not contain a comparable provision.

[5] Resale of Consumer Credit Reports

A person may not procure a consumer credit report for the purpose of reselling it or any of the information it contains unless that person discloses to the consumer credit reporting agency that issues the report the identity of the ultimate user of the report and each permissible purpose for which the report is furnished to the end user [*Civ. Code § 1785.22(a)*].

A person who procures a consumer credit report for the purpose of reselling it or any of the information it contains must establish and comply with reasonable procedures designed to ensure that the consumer credit report or information is resold only for permissible purposes. These procedures must include [*Civ. Code § 1785.22(b)(1)*]:

- Identification of each prospective user of the resold consumer credit report or information.

- Certification of each purpose for which the resold consumer credit report or information will be used.

- Certification that the resold consumer credit report or information will be used for no other purpose.

The person procuring the report must make reasonable efforts to verify the identities and certifications required before reselling a consumer credit report or any of the information it contains [*Civ. Code § 1785.22(b)(2)*].

[6] Implementation of Security Alerts

On and after July 1, 2004, any person who uses a consumer credit report in connection with the approval of credit based on an application for an extension of credit, or with the purchase, lease, or rental of goods or non-credit-related services, and who receives notification of a security alert [*see § 129.18[10]*], may not lend money, extend credit, or complete the purchase, lease, or rental of goods or non-credit-related services without taking reasonable steps to verify the consumer's identity, in order to ensure that the application for an extension of credit or for the purchase, lease, or rental of goods or non-credit-related services is not the result of identity theft [*Civ. Code § 1785.11*.1(g)]. For this purpose,

"extension of credit" does not include an increase in the dollar limit of an existing open-end credit plan, as defined in Regulation Z [*see 12 C.F.R. § 226.2*], or any change to, or review of, an existing credit account [*Civ. Code § 1785.11*.1(h)].

If the consumer has placed a statement with the security alert in his or her file requesting that identity be verified by calling a specified telephone number, any person who receives that statement with the security alert in a consumer's file must take reasonable steps to verify the identity of the consumer by contacting the consumer using the specified telephone number before lending money, extending credit, or completing the purchase, lease, or rental of goods or non-credit-related services. If a person uses a consumer credit report to facilitate the extension of credit or for another permissible purpose on behalf of a subsidiary, affiliate, agent, assignee, or prospective assignee, that person may verify a consumer's identity in lieu of the subsidiary, affiliate, agent, assignee, or prospective assignee [*Civ. Code § 1785.11*.1(g)].

If a consumer has placed a statement including a telephone number with the security alert in his or her file, then his or her identity must be verified by contacting the consumer using that telephone number as specified above. Otherwise, if reasonable steps are taken to verify the identity of the consumer pursuant to *Civ. Code § 1785.20*.3(b) (requiring a creditor to verify a consumer's address when the address on a credit application varies significantly from the address in a credit report), then those steps constitute compliance with the requirements of *Civ. Code § 1785.11*.1 [*Civ. Code § 1785.11*.1(i)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingConsumer ReportsBanking LawConsumer ProtectionState LawGeneral Overview

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§ 129.23 Duties of Furnishers of Credit Information

[1] Inaccurate or Incomplete Information Prohibited

A person may not furnish information on a specific transaction or experience to any consumer credit reporting agency if that person knows or should know that the information is incomplete or inaccurate [*Civ. Code § 1785.25(a)*; *see Hussey-Head v. World Savings and Loan (2003) 111 Cal. App. 4th 773, 779-780, 4 Cal. Rptr. 3d 171* (consumer claimed lender furnished incomplete and inaccurate information to credit reporting agencies; court found triable issues of material fact concerning violation of *Civ. Code § 1785.25(a)*)].

Civ. Code § 1785.25(a) is specifically exempted from the broad preemption mandated in *15 U.S.C. § 1681t(b)(1)* for the Fair Credit Reporting Act [*15 U.S.C. § 1681t(b)(1)(F)*; *see § 129.10[2]*]. The right of action to enforce *Civ. Code § 1785.25(a)* is found in other sections of the Civil Code that are not specifically exempted from the federal preemption provision; namely, *Civ. Code § 1785.25(g)* [*see § 129.23[6]*] and *Civ. Code § 1785.31* [*see § 129.24[1][a] -[d]*]. That omission, however--the fact that those enforcement sections of the Civil Code were not specifically exempted from the federal preemption provision--does not mean that violations of *Civ. Code § 1785.25(a)* can be redressed only through actions maintained by federal or state officials, rather than by a private action as authorized in the California law. The private right of action to enforce *Civ. Code § 1785.25(a)* is not preempted [*Gorman v. Wolpoff & Abramson, LLP (9th Cir. 2009) 584 F.3d 1147, 1173-1174* ; *accord Sanai v. Saltz (2009) 170 Cal. App. 4th 746, 778, 88 Cal. Rptr. 3d 673*].

If a person who regularly and routinely furnishes information about that person's own transactions or experiences with one or more consumers to one or more consumer credit reporting agencies in the ordinary course of business determines that information on a specific reported transaction or experience is not complete or accurate, he or she must promptly notify the consumer credit reporting agency of that determination and provide the agency with any corrections or additions that are necessary to make the reported information complete and accurate [*Civ. Code § 1785.25(b)*].

[2] Reinvestigation of Disputed Information

As long as the completeness or accuracy of any information on a specific transaction or experience furnished to a consumer credit reporting agency is subject to a continuing dispute between the affected consumer and the person providing the information, that person may not report it to a consumer credit reporting agency without also including a notice that the information is disputed by the consumer [*Civ. Code § 1785.25(c)*].

If a consumer disputes the completeness or accuracy of any item of information contained in his or her file and conveys the dispute directly to a consumer credit reporting agency, the agency must reinvestigate the current status of the disputed information. Part of this reinvestigation involves verifying the information with the person who furnished it to the agency, as discussed in *§ 129.21* [*Civ. Code § 1785.16(a)*]. On receiving a notice from a consumer credit reporting agency that a consumer is disputing the completeness or accuracy of any information in his or her file, the person who provided the information to the agency must complete a reinvestigation of the disputed information and report back to the consumer credit reporting agency with the results of the reinvestigation within 30 business days following the date on which the agency received the notice of dispute from the consumer. The person who originally supplied the information must also review all relevant information submitted [*Civ. Code § 1785.25(f)*].

[3] Closure of Open-End Credit Accounts

Any person who regularly furnishes information to a consumer credit reporting agency regarding a consumer who has an open-end credit account with that person must notify the agency when the consumer closes the account. The notification must be provided in information regularly furnished for the period in which the account is closed [*Civ. Code § 1785.25(d)*].

[4] Action on Delinquent Accounts

Any person who places a delinquent account for collection (either internally or by referral to a third party), charges a delinquent account to profit or loss, or takes similar action and subsequently furnishes information to a consumer credit reporting agency regarding that action must include within the furnished information the approximate commencement date of the delinquency that gave rise to the action unless that date was previously reported to the credit agency. This provision does not require that a delinquent account be reported to any consumer credit reporting agency [*Civ. Code § 1785.25(e)*].

[5] Submission of Negative Credit Information

A creditor may submit negative credit information concerning a consumer to a consumer credit reporting agency only if the creditor notifies the consumer involved [*Civ. Code § 1785.26(b)*]. A "creditor" for these purposes includes an agent or assignee of a creditor, including an agent engaged in administering or collecting a creditor's accounts [*Civ. Code § 1785.26(a)(1)*]. "Negative credit information" is defined as information concerning a consumer's credit history that, because of the consumer's past delinquencies, late or irregular payment history, insolvency, or any form of default, would reasonably be expected to adversely affect the consumer's ability to obtain or maintain credit. The term does not include information or credit histories arising from nonconsumer transactions or any other credit transaction outside the scope of the Consumer Credit Reporting Agencies Act (*Civ. Code § 1785.1 et seq.*), nor does it include inquiries about a consumer's credit record [*Civ. Code § 1785.26(a)(2)*].

The required notice of negative credit information must be in writing and must be delivered in person or by first class mail, postage prepaid, to the consumer's last known address prior to, or within 30 days after, the negative credit information is reported to a consumer credit reporting agency [*Civ. Code § 1785.26(c)*]. After providing this notice, the creditor may submit additional information to a credit reporting agency respecting the same transaction or extension of credit that gave rise to the original negative credit information without having to provide an additional notice [*Civ. Code § 1785.26(b)*].

The required notice may be part of a notice of default, a billing statement, or other correspondence, and may be included as preprinted or standard form language in any of these communications from the creditor to the consumer [*Civ. Code § 1785.26(c)(1)*]. The notice is sufficient if it is in substantially the following form [*Civ. Code § 1785.26(c)(2)*]:

> As required by law, you are hereby notified that a negative credit report reflecting on your credit record may be submitted to a credit reporting agency if you fail to fulfill the terms of your credit obligations.

A creditor may provide a notice that is more specific than the suggested statutory language if the creditor chooses to do so. The notice may also include, but may not be limited to, particular information regarding an account or information respecting the approximate date on which the creditor submitted or intends to submit a negative credit report [*Civ. Code § 1785.26(c)(3)*].

Giving a consumer notice that negative credit information has been or will be submitted does not create any requirement that a creditor must actually submit any negative credit information to a consumer credit reporting agency. However, this required notice does not authorize the use of the notice in violation of the federal Fair Debt Collection Practices Act (*15 U.S.C. § 1692 et seq.*) [*Civ. Code § 1785.26(c)(4)*].

[6] Liability for Noncompliance

A person who furnishes information to a consumer credit reporting agency is liable for failure to comply with any of the duties imposed on that person unless that person establishes by a preponderance of the evidence that, at the time of the failure to comply, he or she maintained reasonable procedures to comply with those requirements [*Civ. Code § 1785.25(g)*]. The same standard is applicable to a creditor who fails to provide the required notice that negative credit information is being submitted to a consumer credit reporting agency [*Civ. Code § 1785.26(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionState LawRemedies

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§ 129.24 Remedies for Statutory Violations

[1] Consumer Credit Reporting Agencies Act

[a] Actual and Punitive Damages

Any consumer who suffers damage as a result of a violation of the Consumer Credit Reporting Agencies Act may bring an action against the person or persons responsible to recover the following [*Civ. Code § 1785.31(a)*; *see 15 U.S.C. §§ 1681n*, *1681o* (federal statute does not set limits for the amount of punitive damages for willful violation)]:

- For a negligent violation, actual damages, including court costs, loss of wages, attorney's fees, and, when applicable, pain and suffering.

- For a willful violation, actual damages as in the case of a negligent violation plus punitive damages of not less than $100 nor more than $5,000 for each violation, plus any other relief that the court deems proper.

In a case in which a natural person is found liable for obtaining a consumer credit report under false pretenses or for knowingly obtaining a consumer credit report without a permissible purpose, an award of actual damages may not be less than $2,500 [*Civ. Code § 1785.31(a)(3)*]. For a complaint by a consumer against a consumer credit reporting agency for improperly furnishing a consumer credit report, see *§ 129.110*.

Although *Civ. Code § 1785.31* is phrased in terms of "any person," it only creates a right of action against a credit reporting agency or a user of information for violations of the Act. It does not extend liability to one who furnishes information to a credit reporting agency. Liability in that case must be based on *Civ. Code § 1785.25* or *1785.26* (discussed in *§ 129.23[6]*). If a consumer has causes of action for intentional infliction of emotional distress and defamation against a creditor that has falsely and intentionally misreported delinquencies, the consumer is not required tohave the credit agencies investigate or correct the disputed information before proceeding against the creditor [*Pulver Avco Fin. Servs. (1986) 182 Cal. App. 3d 622, 633-634, 227 Cal. Rptr. 491* ; *see § 129.26[1]*].

For a form for drafting a complaint for damages for obtaining a consumer credit report under false pretenses or for knowingly obtaining a consumer credit report without a permissible purpose, *see § 129.117*.

[b] Injunctive Relief

Injunctive relief is available to any consumer aggrieved by a violation or a threatened violation of the act, whether or not the consumer seeks any other remedy [*Civ. Code § 1785.31(b)*; *see generally* Ch. 303, *Injunctions*]. There is no comparable federal provision.

[c] Punitive Damages in Class Action

Any person who willfully violates any requirement imposed under the Act may be held liable for punitive damages in a class action in any amount the court allows. In determining the amount of the award in a class action, the court must consider among relevant factors the amount of any actual damages awarded, the frequency of the violations, the resources of the violator, and the number of persons adversely affected [*Civ. Code § 1785.31(c)*; *see generally* Ch. 120, *Class Actions*]. There is no comparable federal provision.

[d] Costs and Attorney's Fees

Subject to an exception for actions against debt collectors, the prevailing plaintiffs in any action under *Civ. Code § 1785.31* are entitled to recover court costs and reasonable attorney's fees [*Civ. Code § 1785.31(d)*; *see 15 U.S.C. §§ 1681n, 1681o* (attorney's fees to prevailing consumer only); *see also Cisneros v. U.D. Registry Inc. (1996) 39 Cal. App. 4th 548, 577-578, 46 Cal. Rptr. 2d 233* (broader attorney fee provision of California Act not preempted by federal act); *see generally Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.]. A debt collector who is sued under *Civ. Code § 1785.31* is entitled to recover reasonable attorney's fees on a court finding that the action was not brought in good faith if the basis for the action is related to debt collection, whether or not issues relating to the debt collection are raised in the same or another proceeding [*Civ. Code § 1785.31(e)*].

Thus, if the consumer loses, he or she may have to pay the attorney's fees and court costs.

[e] Civil Penalties for Wrongfully Obtaining or Using Consumer Credit Data

The Consumer Credit Reporting Agencies Act provides that, in addition to any other remedy provided by law, a consumer may bring an action for a civil penalty, not to exceed $2,500, against any of the following persons [*Civ. Code § 1785.19(a)*]:

- A person who knowingly and willfully obtains access to a file other than as provided by *Civ. Code § 1785.11* (furnishing of consumer credit reports);

- A person who knowingly and willfully obtains data from a file other than as provided by *Civ. Code § 1785.11*; or

- A person who uses the data received from a file in a manner contrary to an agreement with the consumer credit reporting agency.

A "file" includes all of the information on a consumer recorded and retained by a consumer credit reporting agency, regardless of how the information is stored [*Civ. Code § 1785.3(g)*]. *Civ. Code § 1785.11*, which sets forth the limited circumstances in which a consumer credit reporting agency is permitted to furnish a consumer credit report, is discussed in *§ 129.14*.

The action may also be brought by the person or entity responsible for the file accessed, and is in addition to any other remedy that may exist [*Civ. Code § 1785.19(a)*]. A prevailing plaintiff must be awarded the civil penalty, costs, and reasonable attorney's fees [*Civ. Code § 1785.19(b)*].

For a complaint for civil penalties for wrongful obtaining or use of consumer credit reporting data, see § 239.116.

[f] Civil Penalty for Failure to Place Security Alert in File

A consumer may elect to place a security alert in his or her credit report by making a request in writing or by telephone to a consumer credit reporting agency [*Civ. Code § 1785.11*.1(a); *see § 129.18[10]*]. Notwithstanding *Civ. Code § 1785.19* [*see* [e], *above*], any consumer credit reporting agency that recklessly, willfully, or intentionally fails to place a security alert pursuant to *Civ. Code § 1785.11*.1 is liable for a civil penalty up to $2,500 plus reasonable attorney's fees [*Civ. Code § 1785.11*.1(k)].

The total amount recoverable would usually be within the jurisdiction of the small claims court [*see Code Civ. Proc. § 116.220(a)(1)* (jurisdictional ceiling is $5,000)]. For discussion and forms for use in suing on small claims, see Ch. 526, *Small Claims* .

[2] Investigative Consumer Reporting Agencies Act

An investigative consumer reporting agency or user of information that fails to comply with any requirement under the Investigative Consumer Reporting Agencies Act, with respect to an investigative consumer report is liable to the consumer who is the subject of the report in an amount equal to the sum of all the following [*Civ. Code § 1786.50(a)*; *see §§ 129.118, 129.119*]:

- Any actual damages sustained by the consumer as a result of the failure or, except in the case of class actions, $10,000, whichever sum is greater [*see 15 U.S.C. § 1681n* (provides for actual damages without designating minimum dollar recovery)]; and

- In the case of any successful action to enforce any liability under the act, the costs of the action together with reasonable attorney's fees as determined by the court.

If the court determines that the violation was grossly negligent or willful, the court may also assess, and the consumer may recover, punitive damages [*Civ. Code § 1786.50(b)*; *see 15 U.S.C. § 1681n(a)(2)*].

An investigative consumer reporting agency or user of information that fails tocomply with any requirement of the Act with respect to an investigative consumer report is not liable to the consumer who is the subject of the report when the failure to comply results in a more favorable investigative consumer report than if there had not been a failure to comply [*Civ. Code § 1786.50(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionLiabilityBanking LawConsumer ProtectionFair Debt CollectionUnfair PracticesBanking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionState LawRemedies

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§ 129.25 Actions for Defamation, Invasion of Privacy, and Negligence

Except for the civil remedies provided in *Civ. Code § 1785.31*, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to *Civ. Code §§ 1785.10* and *1785.15* (right to inspect agency files) and *Civ. Code § 1785.20* (duties of users of reports), except as to false information furnished with malice or willful intent to injure the consumer [*Civ. Code § 1785.32*; *see 15 U.S.C. § 1681h(e)*; *Hiemstra v. TRW, Inc. (1987) 195 Cal. App. 3d 1629, 1635, 241 Cal. Rptr. 564]* .

Civ. Code § 1785.32 and *15* U.S.C. § 1681h(e) do not create a right of action against a creditor that has falsely and intentionally misreported a debt as owing, nor do they prohibit any common law cause of action a consumer may have for conduct such as defamation or intentional infliction of emotional distress, or the bringing of such a cause of action within the provisions of either Act [*Pulver v. Avco Fin. Servs. (1986) 182 Cal. App. 3d 622, 633-634, 227 Cal. Rptr. 491*]. For a complaint for damages for intentional infliction of emotional distress for use by a consumer against a creditor who has falsely claimed a debt to be owed, see Ch. 362, *Mental Suffering and Emotional Distress* . For general discussion and forms relating to defamation and negligence actions, *see* Ch. 340, *Libel and Slander* , and Ch. 380, *Negligence* .

For the purpose of applying *15 U.S.C. § 1681h(e)*, the Ninth Circuit adopts, as the standard for the "malice" requirement, the standard enunciated in *New York Times v. Sullivan (1964) 376 U.S. 254, 279-280, 84 S. Ct. 710, 11 L. Ed. 2d 686* . Thus, to prevail on a claim for libel under the federal statute, a plaintiff alleging malice must prove that the crucial information was furnished with knowledge that it was false or with reckless disregard of whether it was false or not. To show such reckless disregard, the plaintiff must present sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the information that was furnished [*Gorman v. Wolpoff & Abramson, LLP (9th Cir. 2009) 584 F.3d 1147, 1173-1174*].

Nothing in the Investigative Consumer Reporting Agencies Act affects the right of any consumer to maintain an action

against an investigative reporting agency, a user of an investigative consumer report, or an informant for invasion of privacy or defamation [*Civ. Code § 1786.52*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingConsumer ReportsBanking LawConsumer ProtectionState LawRemediesTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsIntentional TortsInvasion of PrivacyGeneral Overview

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§ 129.26 Federal Actions and Proceedings

[1] Effect of Pending Action on State Remedies

Any consumer credit or investigative consumer reporting agency or user of information against whom an action brought pursuant to *15 U.S.C. §§ 1681n* and *1681o* (civil liabilities for willful and negligent noncompliance with federal Fair Credit Reporting Act) is pending is not subject to suit for the same act or omission under *Civ. Code § 1785.31* (consumer agencies) or 1786.50 (investigative agencies) [*Civ. Code §§ 1785.34(a)* (consumer agencies), 1786.52(a) (investigative agencies); *see Pulver v. Avco Fin. Servs. (1986) 182 Cal. App. 3d 622, 633, 227 Cal. Rptr. 491* (*15 U.S.C. §§ 1681n* and *1681o* do not create liability on part of one who furnishes false credit information to credit reporting agency)].

[2] Final Judgment Bars State Action

The entry of a final judgment against a consumer credit or investigative consumer reporting agency or user of information in an action brought pursuant to *15 U.S.C. §§ 1681n* and *1681o* is a bar to the maintenance of any action based on the same act or omission that might be brought under the Consumer Credit Reporting Agencies Act or the Investigative Consumer Reporting Agencies Act [*Civ. Code §§ 1785.34(b)* (consumer agencies), 1786.52(b) (investigative agencies)].

[3] Penalty for Unauthorized Disclosures by Agency's Employee

Any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information issubject to a fine of not more than $5,000 or imprisonment for not more than one year, or both [*15 U.S.C. § 1681r*].

[4] Administrative Enforcement

[a] Federal Trade Commission

Compliance with the requirements of the federal Fair Credit Reporting Act is enforced under the Federal Trade Commission Act (*15 U.S.C. § 41 et seq.*) by the Federal Trade Commission with respect to consumer reporting agencies and all other persons subject to that act, except to the extent that enforcement of the requirements imposed under the Fair Credit Reporting Act is specifically committed to some other government agency under *15 U.S.C. § 1681s(b)* (discussed in [b], *below*). For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement or prohibition imposed under the Fair Credit Reporting Act constitutes an unfair or deceptive act or practice in commerce in violation of *15 U.S.C. § 45(a)*, and is subject to enforcement by the Federal Trade Commission under *15 U.S.C. § 45(b)* with respect to any consumer reporting agency or person subject to enforcement by the Federal Trade Commission, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act. The Federal Trade Commission has procedural, investigative, and enforcement powers, including the power to issue procedural rules in enforcing compliance with the requirements imposed under the Fair Credit Reporting Act and to require the filing of reports, the production of documents, and the appearance of witnesses as though the applicable terms and conditions of the Federal Trade Commission Act were part of the Fair Credit Reporting Act. Any person violating any of the provisions of the Fair Credit Reporting Act is subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act as though the applicable terms and provisions were part of the Fair Credit Reporting Act [*15 U.S.C. § 1681s(a)(1)*].

[b] Other Government Agencies

Compliance with the requirements imposed under the federal Fair Credit Reporting Act with respect to consumer reporting agencies and persons who use consumer reports from those agencies is enforced under the following federal laws [*15 U.S.C. § 1681s(b)*]:

- Title *12 U.S.C. § 1818* in the case of the following:

  - National banks, and federal branches and federal agencies of foreign banks, by the Office of the Comptroller of the Currency.

  - Member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than federal branches, federal agencies, and insured state branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under *12 U.S.C. § 601 et seq.* or *611* et seq., by the Board of Governors of the Federal Reserve System.

  - Banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System) and insured state branches of foreign banks, by the Board of Directors of the Federal Deposit Insurance Corporation.

- Title *12 U.S.C. § 1818* by the Office of Thrift Supervision, in the case of savings associations whose deposits are insured by the Federal Deposit Insurance Corporation.

- The Federal Credit Union Act (*12 U.S.C. § 1751 et seq.*), by the Administrator of the National Credit Union Administration with respect to any federal credit union.

- The Interstate Commerce Act (*49 U.S.C. § 10101 et seq.*), by the Secretary of Transportation, with respect to all carriers subject to the jurisdiction of the Surface Transportation Board.

- Title *49 U.S.C. § 40101 et seq.* (concerning air commerce and safety) by the Secretary of

Transportation with respect to any air carrier or foreign air carrier.

- The Packers and Stockyards Act of 1921 (*7 U.S.C. § 181 et seq.*, except as provided in *7 U.S.C. § 226*), by the Secretary of Agriculture with respect to any activities subject to that act.

For the purpose of the exercise, by any agency referred to above, of its powers under any act referred to above, a violation of any requirement imposed under the federal Fair Credit Reporting Act is deemed to be a violation of a requirement imposed under the act referred to. In addition to its powers under any provision of law specifically referred to in the preceding paragraphs, each of the agencies referred to may exercise, for the purpose of enforcing compliance with any requirement imposed under the act, any other authority conferred on it by law [*15 U.S.C. § 1681s(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawFederal Trade Commission ActU.S. Federal Trade CommissionBanking LawConsumer ProtectionFair Credit ReportingConsumer ReportsBanking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionState LawFederal PreemptionCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

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[Reserved]

§§ 129.27[Reserved]

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§ 129.40 Governing Statutes

Denial of credit is governed by the Holden Credit Denial Disclosure Act of 1976 set forth in *Civ. Code § 1787.1 et seq.* Any waiver of the provisions of that law is contrary to public policy, and is void and unenforceable [*Civ. Code § 1787.4*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-129 California Forms of Pleading and Practice--Annotated § 129.41

§ 129.41 Purpose

The purpose of the Holden Credit Denial Disclosure Act of 1976 is to require creditors to notify credit applicants of the reasons for the denial of credit.

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-129 California Forms of Pleading and Practice--Annotated § 129.42

§ 129.42 Definitions

[1] Credit Denial

The term "credit denial" means a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested. The term does not include a refusal to extend additional credit under an existing credit arrangement when the applicant is delinquent or otherwise in default, or when the additional credit would exceed a previously established credit limit without a specific written application or request for an increase in the credit limit [*Civ. Code § 1787.2(e)(2)*].

[2] Creditor and Applicant

The term "creditor" refers only to creditors who regularly extend, or arrange for the extension of, credit whether in connection with loans, sales of property or services, or otherwise [*Civ. Code § 1787.2(e)(3)*]. The term "applicant" means a natural person who applies for credit primarily for personal, family or household purposes [*Civ. Code § 1787.2(e)(1)*].

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13-129 California Forms of Pleading and Practice--Annotated § 129.43

§ 129.43 Notification of Action on Application

Within 30 days, or at a later reasonable time as specified in federal law or regulations, after receipt of a completed written application for credit, a creditor must notify the applicant of its action on the application [*Civ. Code § 1787.2(a)*].

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§ 129.44 Disclosure Requirements on Denial of Credit: Statement of Reasons

Each applicant denied credit is entitled to a statement of reasons for that action from the creditor. A creditor satisfies this obligation by either [*Civ. Code § 1787.2(b)(2)*]:

- Providing statements of reasons in writing as a matter of course to applicants denied credit; or
- Giving written notification of credit denial that discloses both:
  - The applicant's right to a statement of reasons within 30 days after receipt by the creditor of a request made within 60 days after the notification.
  - The identity and address of the person or office from which the statement of reasons may be obtained.

The statement of reasons may be given orally if the written notification advises the applicant of the right to have the statement of reasons confirmed in writing on written request [*Civ. Code § 1787.2(b)(3)*].

A statement of reasons meets the requirements of *Civ. Code § 1787.2(b)* only if it contains the specific reasons for the credit denial [*Civ. Code § 1787.2(c)*].

If a creditor has been requested by a third party to make a specific extension of credit directly or indirectly to an applicant, the notification and statement of reasons required by *Civ. Code § 1787.2* may be made directly by the creditor, or indirectly through the third party, provided in either case that the identity of the creditor is disclosed [*Civ. Code § 1787.2(d)*].

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§ 129.45 Remedies

Any creditor who fails to comply with any requirement of *Civ. Code § 1787.2* is liable for any actual damages sustained by an applicant as a result of that failure [*Civ. Code § 1787.3(a)*]. In addition, any creditor, other than a government or governmental subdivision or agency, who fails to comply with any requirement imposed under the Holden Credit Denial Disclosure Act of 1976 [*Civ. Code § 1787.1 et seq.*] is liable to the aggrieved applicant for punitive damages in an amount not greater than $10,000, in addition to any actual damages provided for in *Civ. Code § 1787.3(a)* [*Civ. Code § 1787.3(b)*]. However, in the case of a class action, the total recovery under *Civ. Code § 1787.3(b)* may not exceed the lesser sum of $500,000 or one percent of the creditor's net worth [*Civ. Code § 1787.3(b)*].

In determining the amount of punitive damages in any action, the court must consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the numbers of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional [*Civ. Code § 1787.3(b)*].

In any action brought by an aggrieved applicant under *Civ. Code § 1787.3(a)* or *(b)*, the costs of the action, together with a reasonable attorney's fee as determined by the court, are added to any damages awarded by the court [*Civ. Code § 1787.3(c)*].

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§ 129.46 Nonliability for Good Faith Compliance With Rules and Regulations

No provision of the Holden Credit Denial Disclosure Act of 1976 [*Civ. Code § 1787.1 et seq.*] imposing liability applies to any act done or omitted in good faith in conformity with an official rule, regulation, or interpretation by the Board of Governors of the Federal Reserve System or in conformity with an interpretation or approval by an official or employee of the Federal Reserve System authorized by the board to issue such interpretations or approvals under such procedures as the board may prescribe, notwithstanding that after that act or omission has occurred, the rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason [*Civ. Code § 1787.3(d)*].

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[Reserved]

§§ 129.47[Reserved]

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§ 129.60 Governing Statutes

Advertising and business practices of credit services organizations in California are governed by the Credit Services Act of 1984 (*Civ. Code §§ 1789.10-1789.25*). The consumer remedies provided for in the Credit Services Act are in addition to any other remedies a consumer might have under any other law [*Civ. Code § 1789.22*].

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§ 129.61 Purpose

The purposes of the Credit Services Act of 1984 are to provide prospective buyers of services of credit services organizations with the information necessary to make an intelligent decision regarding the purchase of those services and to protect the public from unfair or deceptive advertising and business practices [*Civ. Code § 1789.11(b)*].

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13-129 California Forms of Pleading and Practice--Annotated § 129.62

§ 129.62 Provisions Not Waivable

A waiver by a buyer of the provisions of the Credit Services Act is deemed contrary to public policy, and is void and unenforceable. Any attempt by a credit services organization to have a buyer waive rights given by the Credit Services Act is a violation of the Act [*Civ. Code § 1789.19(a)*].

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§ 129.63 Definitions

[1] Credit Services Organization

"Credit services organization" means a person who, with respect to the extension of credit by others, sells, provides, or performs, or represents that he or she can or will sell, provide or perform, in return for the payment of money or other valuable consideration, any of the following services [*Civ. Code § 1789.12(a)*]:

- Improving a buyer's credit record, history, or rating.
- Obtaining a loan or other extension of credit for a buyer.
- Providing advice or assistance to a buyer with regard to either of the above.

"Credit services organization" does not include any of the following [*Civ. Code § 1789.12(b)*]:

- Any person holding a license to make loans or extensions of credit pursuant to the laws of California or the United States who is subject to regulation and supervision with respect to the making of those loans or extensions of credit by an official or agency of California or the United States and who is in the business of making loans or extensions of credit.
- Any bank as defined in *Fin. Code § 102* or savings institution specified in *Fin. Code § 5102(a)* or *(b)* whose deposits or accounts are eligible for insurance by the FDIC.
- Any prorater licensed by the Department of Corporations when acting within the course and scope of that license.
- Any person licensed as a real estate broker performing an act for which a real estate license is required under Part 1 of the Real Estate Law [*see Bus. & Prof. Code § 10000 et seq.*] and who is acting

within the course and scope of that license.

- Any attorney licensed to practice law in this state if the attorney renders services within the course and scope of the practice of law, unless the attorney is an employee of, or otherwise directly affiliated with, a credit services organization.

- Any broker-dealer registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission when acting within the course and scope of its regulation.

"Credit services organization" also does not include any nonprofit organization described in *I.R.C. § 501(c)(3)* that, according to a final ruling or determination by the Internal Revenue Service, is both (1) exempt from taxation under *I.R.C. § 501(a)* and *(2)* not a private foundation as defined in *I.R.C. § 509*. An advance ruling or determination of tax-exempt or foundation status does not meet these requirements [*Civ. Code § 1789.12(b)(7)*].

In any proceeding involving the Credit Services Act the burden of proving an exemption is on the person claiming it [*Civ. Code § 1789.19(b)*].

[2] Buyer

"Buyer" means any natural person who is solicited to purchase or who purchases the services of a credit services organization [*Civ. Code § 1789.12(c)*].

[3] Extension of Credit

"Extension of credit" means the right to defer payment of a debt or to incur debt and defer its payment, offered or granted primarily for personal, family, or household purposes [*Civ. Code § 1789.12(d)*].

[4] Consumer Credit Reporting Agency

"Consumer credit reporting agency" is a consumer credit reporting agency subject to the Consumer Credit Reporting Agencies Act [*Civ. Code § 1789.12(e)*; *see § 129.10* et seq.].

[5] Person

"Person" means an individual, corporation, partnership, limited liability company, joint venture, or any business entity [*Civ. Code § 1789.12(f)*].

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13-129 California Forms of Pleading and Practice--Annotated § 129.64

§ 129.64 Prohibitions

[1] No Prepayment Before Performance

A credit services organization and its salespersons, agents, representatives, and independent contractors may not charge or receive any money or other valuable consideration before full and complete performance of the services the credit services organization has agreed to perform for or on behalf of the buyer [*Civ. Code § 1789.13(a)*].

[2] Must Perform Agreed Services

A credit services organization and its salespersons, agents, representatives, and independent contractors may not fail to perform the agreed services within six months following the date the buyer signs the contract for those services [*Civ. Code § 1789.13(b)*].

[3] No Charges Solely for Referral

A credit services organization and its salespersons, agents, representatives, andindependent contractors may not charge or receive any money or other valuable consideration for referral of the buyer to a retail seller or other credit grantor in either of the following cases [*Civ. Code § 1789.13(c)*]:

- The credit that is or will be extended to the buyer is on substantially the same terms (1) as those available to the general public, or (2) that would have been extended to the buyer without the assistance of the credit services organization.

- The money or consideration is paid by the credit grantor or is derived from the buyer's payments to the credit grantor for any costs, fees, finance charges, or principal.

[4] Advising Buyer to Make Untrue or Misleading Statements

A credit services organization and its salespersons, agents, representatives, and independent contractors may not make,

or counsel or advise any buyer to make, any statement that is untrue or misleading and that is known, or that, by the exercise of reasonable care, should be known, to be untrue or misleading, to a consumer credit reporting agency, to any creditor of a buyer, or to any person to whom a buyer is applying for an extension of credit. This prohibition includes, for example, statements concerning a buyer's identification, home, address, creditworthiness, credit standing, or credit capacity [*Civ. Code § 1789.13(d)*].

[5] Removal of Adverse Information From Record or Create New Credit Record

A credit services organization and its salespersons, agents, representatives, and independent contractors may not remove, or assist or advise the buyer to remove, adverse information from the buyer's credit record that is accurate and not obsolete [*Civ. Code § 1789.13(e)*]. Creating, or assisting or advising the buyer to create, a new credit record by using a different name, address, social security number, or employee identification number is also prohibited [*Civ. Code § 1789.13(f)*].

[6] No Misleading Representations

A credit services organization and its salespersons, agents, representatives, and independent contractors may not make or use any untrue or misleading representations in the offer or sale of the services of a credit services organization, including guaranteeing or otherwise stating that the organization is able to do either of the following [*Civ. Code § 1789.13(g)*]:

- Delete an adverse credit history, unless the representation clearly discloses, in a manner equally as conspicuous as the guarantee, that this can be done only if the credit history is inaccurate or obsolete and is not claimed to be accurate by the creditor who submitted the information.

- Obtain an extension of credit, regardless of the buyers's previous credit problems or credit history, unless the representation clearly discloses, in a manner equally as conspicuous as the guarantee, the eligibility requirements for obtaining an extension of credit.

[7] Other Prohibitions

In addition to the above prohibitions, a credit services organization and its salespersons, agents, representatives, and independent contractors may not do any of the following:

- Engage, directly or indirectly, in any act, practice, or course of business that operates or would operate as a fraud or deception on any person in connection with the offer or sale of the services of a credit services organization [*Civ. Code § 1789.13(h)*].

- Advertise or cause to be advertised, in any manner, the services of the credit services organization, without being registered [*Civ. Code § 1789.13(i)*; *see § 129.68*].

- Fail to maintain an agent for service of process in California [*Civ. Code § 1789.13(j)*].

- Transfer or assign the organization's certificate of registration [*Civ. Code § 1789.13(k)*; *see § 129.68*].

- Submit a buyer's dispute to a consumer credit reporting agency without the buyer's knowledge [*Civ. Code § 1789.13(l)*].

- Use a consumer credit reporting agency's telephone system or toll-free telephone number to represent

the caller as the buyer in submitting a buyer's dispute or requesting disclosure without the buyer's prior authorization [*Civ. Code § 1789.13(m)*].

- Directly or indirectly extend credit to any buyer [*Civ. Code § 1789.13(n)*].

- Refer any buyer to a credit grantor that is related to the credit services organization by any common ownership, management, or control, including any common owner, director, or officer [*Civ. Code § 1789.13(o)*].

- Refer any buyer to a credit grantor for which the credit services organization provides, or arranges for a third party to provide, any services related to the extension of credit such as underwriting, billing, payment processing, or debt collection [*Civ. Code § 1789.13(p)*].

- Provide a credit grantor with any assurance that any portion of an extension of credit to a buyer referred by the credit services organization will be repaid, including providing a guaranty, letter of credit, or agreement to acquire any part of the credit grantor's financial interest in the extension of credit [*Civ. Code § 1789.13(q)*].

- Use any scheme, device, or contrivance to evade the prohibitions contained in *Civ. Code § 1789.13* [*Civ. Code § 1789.13(r)*].

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§ 129.65 Information Statement

Before the execution of a contract or agreement between the buyer and a credit services organization, the credit services organization must provide the buyer a statement in writing, containing all the information required by *Civ. Code § 1789.15*.The credit services organization must maintain for two years, on file or microfilm, an exact copy of the statement, personally signed by the buyer, acknowledging receipt of a copy of the statement [*Civ. Code § 1789.14*].

The information statement must be printed in at least 10-point boldface type and must include all of the following [*Civ. Code § 1789.15*]:

- A complete and detailed description of the services to be performed by the credit services organization for or on behalf of the buyer and the total amount the buyer will have to pay, or become obligated to pay, for the services.

- The buyer's right to proceed against the bond under the circumstances and in the manner set forth in *Civ. Code § 1789.18*.

- The name and address of the surety company that issued the bond.

- A complete and accurate statement of the availability of nonprofit credit counseling services.

In addition, the information statement must include either the statement set forth in *Civ. Code § 1789.15* (which sets forth consumer credit file rights) or any substantially equivalent alternative that is approved by the Department of Justice [*Civ. Code § 1789.15*]. The rights provided for in the statutory statement include the buyer's right to obtain a copy of his or her credit file, the right to dispute inaccurate information, the right to cancel the contract for any reason within five working days from signing the contract, and the right to sue a credit services organization if it misleads the buyer [*see Civ. Code § 1789.15*].

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§ 129.66 Contract Requirements and Rescission Rights

[1] Contract Requirements

A credit services organization may not provide any service to a buyer except in accordance with a written contract that complies with the statutory requirements set forth below [*Civ. Code § 1789.16(a)*].

A copy of the fully completed contract and all other documents the credit services organization requires the buyer to sign must be given to the buyer at the time they are signed [*Civ. Code § 1789.16*]. Every contract between the buyer and a credit services organization for the purchase of the services of the credit services organization must be in writing, dated, signed by the biuyer, and include all of the following [*Civ. Code § 1789.16(a)*]:

- The following statement in at least 10-point bold type, right next to the space reserved for the buyer's signature:

  "You, the buyer, may cancel this contract at any time prior to midnight of the fifth day after the date of the transaction. See the attached notice of cancellation form for an explanation of this right."

- The terms and conditions of payment, including the total of all payments to be made by the buyer, whether to the credit services organization or to some other person.

- A full and detailed description of the services to be performed by the credit services organization for the buyer, including all guarantees and all promises of full or partial refunds, and the estimated date by which the services are to be performed or the estimated length of time for performing the services, not to exceed six months or a shorter period consistent with the purposes of the Credit Services Act as may be prescribed by the Department of Justice.

- The credit services organization's principal business address and the name and address of its agent,

other than the Secretary of State, in the State of California, authorized to receive service of process.

A copy of the contract or contracts that the credit services organization intends to execute with its customers must be attached to the organization's registration statement [*Civ. Code § 1789.25(e)*; *see § 129.68, below*].

Contract modifications must be signed. A credit services organization cannot modify its membership contract to require arbitration and preclude class relief merely by notifying members by mail that continued membership constituted acceptance of the modification [*Mitchell v. American Fair Credit Association (2002) 99 Cal. App. 4th 1345, 1352-1354, 122 Cal. Rptr. 2d 193]* .

[2] Rescission Rights

Attached to the contract, and easily detachable, must be a completed form in duplicate, in at least 10-point bold type, captioned "Notice of Cancellation," containing the following statement written in the same language as used in the contract [*Civ. Code § 1789.16(b)*]:

"Notice of Cancellation"

"You may cancel this contract, without any penalty or obligation, within five days from the date the contract is signed.

"If you cancel, any payment made by you under this contract must be returned within 15 days following receipt by the seller of your cancellation notice.

"To cancel this contract, mail or deliver a signed and dated copy of this cancellation notice, or any other written notice, to

_____ (name of seller) at
_____ (address of seller)
_____ (place of business)
not later than midnight _____ (date).

"I hereby cancel this transaction."

_____ (date)..... _____ (purchaser's signature)

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§ 129.67 Remedies for Breach of Contract

[1] Damages

The seller's breach of a credit services contract is a violation of the Credit Services Act [*Civ. Code § 1789.17*]. Any buyer injured by the credit services organization's breach of contract or by any other violation of the Credit Services Act may bring an action for recovery of actual damages. Damages awarded must be at least the amountpaid by the buyer to the credit services organization, punitive damages, when proper, and reasonable attorney's fees and costs [*Civ. Code § 1789.21(a)*]. In addition, any person, including a consumer credit reporting agency [*Civ. Code § 1785.3(d)*], and any consumer of, or user of, a consumer credit reporting agency under the Consumer Credit Reporting Agencies Act [*Civ. Code § 1785.1 et seq.*], and any furnisher of credit information under that Act, may bring an action for the recovery of damages for a violation of the Credit Services Act [*Civ. Code § 1789.21(b)*]. The prevailing party in the action is entitled to reasonable attorney's fees and costs [*Civ. Code § 1789.21(b)*].

[2] Injunctions

In addition to an action for damages, any buyer, or any person, including a consumer credit reporting agency [*Civ. Code § 1785.3(d)*], and any consumer of, or user of, a consumer credit reporting agency under the Consumer Credit Reporting Agencies Act [*Civ. Code § 1785.1 et seq.*], and any furnisher of credit information under that Act, injured by the credit services organization's breach of contract or by any other violation of the Credit Services Act may bring an action for injunctive relief [*Civ. Code § 1789.21*]. Any superior court in California has jurisdiction to enjoin violation of the Credit Services Act. The duty to institute such actions is vested in the California Attorney General, district attorneys, and city attorneys [*Civ. Code § 1789.20(a)*]. If the violation of the Credit Services Act is also a practice or act declared unlawful by the Consumer Legal Remedies Act (*Civ. Code § 1750 et seq.*), the buyer will have standing under that Act to seek injunctive relief [*Civ. Code §§ 1770, 1780*]; for a detailed discussion and forms relating to the Consumer Legal Remedies Act, see Ch. 504, *Sale: Consumers Legal Remedies Act* .

[3] Bond

Before a credit services organization conducts business in California, it must obtain a $100,000 bond from an admitted

surety in favor of the State of California for the benefit of any person who is damaged by any violation of the Credit Services Act and any individual damaged by those practices [*Civ. Code § 1789.18(a)*]. A copy of the bond must be filed with the Secretary of State [*Civ. Code § 1789.18*]. The bond must be maintained for two years following the date on which the credit services organization ceases to conduct business in California [*Civ. Code § 1789.18(c)*].

Any person claiming against the bond may maintain an action against the credit services organization and the surety [*Civ. Code § 1789.18(b)*; for a discussion of such actions and forms, see *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.40* et seq.].

Former provisions of the Credit Services Act permitted the use of a trust account in lieu of a bond. However, 1992 amendments to the Credit Services Act [Stats. 1992, ch. 651] deleted the authorization of a credit services organization to use a trust account [*compare Civ. Code §§ 1789.13(a), 1789.18 with* former *Civ. Code §§ 1789.13(a), 1789.18*]. The 1992 legislation, however, did not amend *Civ. Code § 1789.24*, which provides for claims against deposits made in lieu of a bond under *Code Civ. Proc § 995.710* [*see Civ. Code § 1789.24(a)*].

If a deposit is authorized in lieu of a bond, a claimant against the deposit does not proceed under *Code Civ. Proc. § 996.430*. Instead, the claimant first obtains a judgment against the credit services organization and then establishes the claim by furnishing the Secretary of State evidence of the judgment, together with evidence that the claimant is a person with standing under former *Civ. Code § 1789.18(b)* (*now see Civ. Code § 1789.18(a)*) [*Civ. Code § 1789.24(a), (b)*]. The Secretary of State pays claims every 240 days until the account is exhausted, prorating claims whenever the account is insufficient to cover claims filed in any 240-day period [*Civ. Code § 1789.24(c)-(e)*]. Except as to amounts which would otherwise be returned to the credit services organization, the account is exempt from attachment, garnishment, or execution [*Civ. Code § 1789.24(f)*]. The Secretary of State will retain a cash deposit for two years from the date the Secretary receives written notification from the assignor of the deposit that the assignor has ceased to engage in the business of a credit services organization or has filed a bond pursuant to *Civ. Code § 1789.18*, provided that there are no outstanding claims against the deposit [Civ. Code § 1812.24(g); *see* Civ. Code § 1812.24(i) (earlier return of deposit pursuant to court order)].

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§ 129.68 Registration Requirements

Every credit services organization must file a registration application, accompanied by a specified registration fee, with the Department of Justice. The application must be filed, and a certificate of registration received, before the organization conducts business in California. A certificate of registration will not be issued until the bond required by *Civ. Code § 1789.18* has been filed and the Department establishes that the organization seeking a certificate has not engaged in, and does not propose to engage in, any activity that is in violation of *Civ. Code § 1789.13*, any law prohibiting the use of untrue or misleading statements, or any law related to the extension of credit for personal, family, or household purposes [*Civ. Code § 1789.25(a),(f)*; *see § 129.67[3]*]. The certificate expires annually on December 31 and must be renewed by filing a renewal application and accompanying fee [*Civ. Code § 1789.25(d)*].

The initial application must contain all required information, including the address of the credit services organization where business is actually conducted, the names, addresses, and driver's license numbers of all persons who own or control 10 percent or more of the organization's outstanding stock, and a statement setting forth past litigation or unresolved complaints, if any, against the organization [*see Civ. Code § 1789.25(a)*]. A copy of the bond and the contract or contracts that the credit services organization intends to execute with its customers must be attached to the registration statement [*Civ. Code § 1789.25(e)*]. The organization must allow a buyer to inspect the registration application on request [*Civ. Code § 1789.25(c)*].

An investigation may be conducted to verify the accuracy of the registration application [*Civ. Code § 1789.25(b)*]. Any change in the information required by the application must be reported to the Department of Justice in writing within 30 days of the change. However, 30 days advance notice and approval is required to change the corporate name or address, or persons owning more than 10 percent of the organization's stock [*Civ. Code § 1789.25(c)*].

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C. California Credit Services Act of 1984

13-129 California Forms of Pleading and Practice--Annotated §§ 129.69-129.79

[Reserved]

§§ 129.69[Reserved]

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Chapter 129 CONSUMER CREDIT REPORTING
PART II. LEGAL BACKGROUND
D. Other Statutes Affecting Consumer Credit Reporting

13-129 California Forms of Pleading and Practice--Annotated § 129.80

§ 129.80 Debt Relief for Qualifying Military Service Members

Federal and California law grant relief from various debts and obligations, including consumer obligations and installment sales, to qualifying military service members while they are actively engaged in military service [*see 50 U.S.C. App. § 501 et seq.* (Servicemembers Civil Relief Act); *Mil. & Vet. Code § 400 et seq.*]. Among other available relief, the governing statutes allow qualifying persons to obtain a temporary stay from payment of debts during the term of military service with respect to any obligation or liability incurred by the service member before his or her period of military service [*see 50 U.S.C. App. § 591(a), (b)*; *Mil. & Vet. Code § 409.3(a)*]. For detailed discussion of the available relief, qualifying persons, and the procedures for obtaining relief, see *Ch. 127, Consumer Contracts and Loans, § 127.22*; see also *Ch. 501, Sales: Retail Installment Sales, §§ 501.60 et seq., 501.300*.

In connection with such stays, the governing provisions of the applicable federal and California statutes provide that application by a service member for, or receipt by a service member of, a stay, postponement, or suspension in the payment of any tax, fine, penalty, insurance premium, or other civil obligation or liability of that person under the relief provisions discussed above may not of itself, without regard to other considerations, provide the basis for anyone to make an adverse report relating to the creditworthiness of the service member by or to any person or entity engaged in the practice of assembling or evaluating consumer credit information [*50 U.S.C. App. § 518(3)*; *Mil. & Vet. Code § 401(a)(3)*]. Any person violating the applicable California statute is liable for actual damages and reasonable attorney's fees incurred by the injured party [*Mil. & Vet. Code § 401(b)*]. In addition, violation of this prohibition is a misdemeanor [*Mil. & Vet. Code § 401(c)*].

The protection described above is available under federal law to members of the uniformed services [*see 10 U.S.C. § 101(a)(5)* (definition)] during periods of military service [*see 50 U.S.C. App. § 511(1)*-(3)] and, in many cases, for 90 days after termination of a member's period of military service. Protection is available under California law to officers and enlisted members of the the National Guard called or ordered into active state service by the Governor or into active federal service by the President of the United States under Title 10 or 32 of the United States Code, or reservists of the United States Military Reserve who have been called to full-time active duty [*Mil. & Vet. Code § 400(a)*]. "Military service," for purposes of the California requirements, means full-time active state service or full-time active federal service, or full-time active duty of a reservist, for a period in excess of seven days in any 14-day period [*Mil. & Vet.*

Code § 400(b) (service since September 11, 2001, to engage in homeland defense against terrorism, is credited toward seven-day period); *see also 50 U.S.C. App. § 511(3)* (meaning of "period of military service" for purposes of federal requirements)].

For a complaint for unlawful retaliation by a lender, creditor, or other person against a person who received stay or postponement because of military service, see *§ 129.150*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral OverviewMilitary & Veterans LawServicemembersU.S. National GuardMilitary & Veterans LawVeteransBenefitsLoans

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13-129 California Forms of Pleading and Practice--Annotated §§ 129.81-129.89

[Reserved]

§§ 129.81[Reserved]

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13-129 California Forms of Pleading and Practice--Annotated § 129.90

§ 129.90 Related Matthew Bender Publications

For memoranda relating to the Fair Credit Reporting Act, see California Points and Authorities, Ch. 185, *Privacy* (Matthew Bender).

For transactional forms relating to installment loans, credit cards, and the Consumer Credit Reporting Act, see California Legal Forms, Ch. 45, *Consumer Installment Loans and Credit Sales*, and Ch. 46, *Credit Card and Other Open-End Credit Transactions* (Matthew Bender).

For transactional forms relating to contracts between a credit bureau and its members, see California Legal Forms, Ch. 92, *Service Contracts* (Matthew Bender).

For discussion of consumer credit, see Lapine, Consumer Credit (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingGeneral Overview

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13-129 California Forms of Pleading and Practice--Annotated § 129.91

§ 129.91 Federal Statutes

Fair Credit Billing Act *15 U.S.C. § 1666 et seq.*

Fair Credit Reporting Act. *15 U.S.C. § 1681 et seq.*

Jurisdiction of Fair Credit Reporting Act; limitation of actions. *15 U.S.C. § 1681p*

Person knowingly and wilfully obtaining information on consumer from consumer reporting agency under false pretenses is subject to fine and imprisonment. *15 U.S.C. § 1681q*

Equal Credit Opportunity Act *15 U.S.C. § 1691 et seq.*

Prohibition against making adverse report relating to creditworthiness of military service member who has previously applied for or obtained relief from civil obligation or liability under federal Servicemembers Civil Relief Act. *50 U.S.C. App. § 518(3)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-129 California Forms of Pleading and Practice--Annotated § 129.92

§ 129.92 California Statutes

[1] California Consumer Credit Reporting Acts

California Consumer Credit Reporting Agencies Act. *Civ. Code § 1785.1 et seq.*

Consumer Credit Reporting Agencies Act inapplicable to persons licensed under *Bus. & Prof. Code § 7500 et seq.* (Collateral Recovery Act) or their employees, unless person is employed directly by agency. *Civ. Code § 1785.4*

Consumer entitled to inspect files of credit reporting agency relating to himself or herself. *Civ. Code § 1785.10*

Permissible purposes for which consumer credit reporting agency may furnish consumer credit report. *Civ. Code §§ 1785.11, 1785.12*

Consumer's election to place security alert or security freeze in consumer's credit report. *Civ. Code §§ 1785.11*.1-1785.11.8

Time and methods for credit reporting agencies to provide consumer access to files *Civ. Code § 1785.15*

Consumer entitled to dispute and require reinvestigation of material contained in credit reporting agency file. *Civ. Code § 1785.16*

Procedures for honoring consumer's request that third parties not receive data from consumer credit file for marketing purposes. *Civ. Code § 1785.19*.5

Reasonable procedures required to be maintained to limit furnishing of consumer credit reports to permissible purposes and to assure accuracy of information in reports. *Civ. Code § 1785.14*

Adverse action notice including name and address of consumer credit reporting agency supplying information is required to be given to applicant by user of credit report. *Civ. Code § 1785.20*

No liability if reasonable procedures maintained to assure compliance with *Civ. Code § 1785.20(a)* and *(b)* (adverse action by user). *Civ. Code § 1785.20(c)*

Effect of pending action or final judgment under federal Fair Credit Reporting Act for same acts or omissions under Consumer Credit Reporting Agencies Act. *Civ. Code § 1785.34*

Consumer Credit Reporting Agencies Act inapplicable to disclosures from public records regarding land and title. *Civ. Code § 1785.35*

Investigative Consumer Reporting Agencies Act. *Civ. Code § 1786 et seq.*

Reasonable procedures must be maintained to limit furnishing of investigative consumer reports to permissible purposes. *Civ. Code § 1786.20*

Investigative Consumer Reporting Agencies Act inapplicable to disclosures from public records regarding land and title. *Civ. Code § 1786.54*

Effect of invalidity of provision of Investigative Consumer Reporting Agencies Act. *Civ. Code § 1786.56*

Civil action based on conviction under *Penal Code § 502* (improper access, destruction, alteration or disruption of computer system or program). *Penal Code § 502(e)*

[2] California Holden Credit Denial Disclosure Act of 1976

Requirements of Holden Credit Denial Disclosure Act of 1976. *Civ. Code § 1787.2*

Statement of reasons for denial of consumer credit required to be given to applicant by creditor within 30 days of completion of application for credit. *Civ. Code § 1787.2*

Notification of action on application. *Civ. Code § 1787.2(a)*

Statement of reasons for denial of credit. *Civ. Code § 1787.2(b), (c), (d)*

Credit denial defined. *Civ. Code § 1787.2(e)(2)*

Creditor defined. *Civ. Code § 1787.2(e)(3)*

Recovery of actual damages for violation of act. *Civ. Code § 1787.3(a)*

Recovery of punitive damages for violation of act. *Civ. Code § 1787.3(b)*

Attorney's fees and costs of action. *Civ. Code § 1787.3(c)*

Nonliability for good-faith compliance with federal administrative rule, regulation, interpretation, or approval. *Civ. Code § 1787.3(d)*

Two-year limitation on action for violation of act. *Civ. Code § 1787.3(e)*

[3] California Credit Services Act of 1984

Purposes of act. *Civ. Code § 1789.11*

Definition of credit services organization. *Civ. Code § 1789.12(a), (b)*

Prohibitions and requirements of credit services organizations. *Civ. Code § 1789.13*

Credit services organization prohibited from making, using, or counseling buyer to make misleading statements. *Civ. Code § 1789.13*

Copy of information statement signed by buyer acknowledging receipt thereof must bekept by credit services organization for two years. *Civ. Code § 1789.14*

Content of information statement required to by given to buyer. *Civ. Code § 1789.15*

Contract requirements, including that of duplicate detachable "Notice of Cancellation" in same language as contract. *Civ. Code § 1789.16*

Seller's breach of credit services contract is violation of Credit Services Act. *Civ. Code § 1789.17*

Bond in favor of State of California and persons injured by violations of Credit Services Act is required before credit services organization may conduct business. *Civ. Code § 1789.18*

Buyer entitled to proceed directly against surety. *Civ. Code § 1789.18*; *Code Civ. Proc. § 995.850*

Waiver of provisions of Credit Services Act by buyer is void and unenforceable. *Civ. Code § 1789.19*

Violation of Credit Services Act, other than seller's breach of contract, is misdemeanor. *Civ. Code § 1789.20*

Duty of state Attorney General, district attorneys, and city attorneys to seek injunction against violation of Credit Services Act. *Civ. Code § 1789.20*

Buyer's remedies include attorney's fees and, when proper, punitive damages. *Civ. Code § 1789.21(a)*

Remedies for person other than buyer include reasonable attorney's fees and costs. *Civ. Code § 1789.21(b)*

Procedure for claim against deposit in lieu of bond. *Civ. Code § 1789.24*

Credit services organization required to register annually with Department of Justice. *Civ. Code § 1789.25*

[4] Employment Purposes

Employment purposes defined. *Civ. Code § 1786.2(f)*

[5] Song-Beverly Credit Card Act

Penalties for giving of untrue information and unlawful cancellation or refusal to renew credit card by card issuer. *Civ.*

Code § 1747.70

[6] Other Statutes Affecting Consumer Credit Reporting

Misdemeanor to make adverse report relating to creditworthiness of military service member by or to any person or entity engaged in practice of assembling or evaluating consumer credit information, after service member has applied for or received a stay, postponement, or suspension of payment of any tax, fine, penalty, insurance premium, or other civil obligation or liability. *Mil. & Vet. Code § 401(a)(3), (c)*; *see Mil. & Vet. Code § 400* (applicability)

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-129 California Forms of Pleading and Practice--Annotated § 129.93

§ 129.93 Federal Regulations

Fair Credit Reporting Act. 14 C.F.R. § 374; *16 C.F.R. §§ 1.71 et seq.*, 600 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingGeneral Overview

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[Reserved]

§ 129.94[Reserved]

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13-129 California Forms of Pleading and Practice--Annotated § 129.95

§ 129.95 Decisions

[1] California Holden Credit Denial Disclosure Act of 1976

California resident pursuing state and federal claims against issuer for improperly withholding and then willfully destroying derogatory information that formed basis for denial of Mastercard application [*see, e.g., Civ. Code § 1787.2(b)*] was first required to exhaust administrative claims against Federal Deposit Insurance Corporation as receiver [*see 12 U.S.C. § 1821(d)(3)-(13)*] appointed for bank six months before district court action was filed. *Henderson v. Bank of New England (9th Cir. 1993) 986 F.2d 319, 321* ; *see Intercontinental Travel Marketing v. FDIC (9th Cir. 1994) 45 F.3d 1278, 1282-1283* (extending *Henderson* holding to cases in which claimants filed their action before FDIC was appointed as receiver)

[2] Federal Credit Reporting

When consumer's action is based on "willful" failure to comply with Fair Credit Reporting Act [*see 15 U.S.C. § 1681n(a)*], it may encompass not only knowing violations but also defendant's reckless disregard of statutory duties. *Safeco Ins. Co. of Am. v. Burr (2007)551U.S.47, 127 S. Ct. 2201, 167 L. Ed. 2d 1045, 1058-1060*

In transaction between consumer and insurance company, Fair Credit Reporting Act [*15 U.S.C. § 1681 et seq.*] requires that company must send adverse action notice in any of these cases: (1) higher rate is charged because of credit information that company obtains, regardless of whether that rate is contained in initial policy or extension or renewal of policy and regardless of whether company has previously charged lower rate for that consumer; (2) consumer would have received lower rate for insurance had credit information been more favorable, regardless of whether consumer's credit rating is above or below average; and (3) company charges more for insurance on basis of transmission stating that no credit information or insufficient credit information is available. *Reynolds v. Hartford Fin. Servs. Group, Inc. (9th Cir. 2006) 435 F.3d 1081, 1084*

When consumer applies for insurance with family of companies and is charged higher rate for insurance because of credit report, two or more companies within that family may be jointly and severally liable. *Reynolds v. Hartford Fin.*

Servs. Group, Inc. (9th Cir. 2006) 435 F.3d 1081, 1085

Denial of credit is not prerequisite to recovery of actual damages under Fair Credit Reporting Act [*15 U.S.C. § 1681 et seq.*] for consumer reporting agency's failure to follow maximum possible accuracy in its credit reports, as required under *15 U.S.C. § 1681e(b)*. *Guimond v. Trans Union Credit Information Co. (9th Cir. 1995) 45 F.3d 1329, 1333*

Credit reporting agency cannot satisfy its obligation under Fair Credit Reporting Act [*15 U.S.C. § 1681 et seq.*] to advise consumer of sources of its information merely by claiming ignorance. *Guimond v. Trans Union Credit Information Co. (9th Cir. 1995) 45 F.3d 1329, 1334*

Credit report constitutes "consumer report" and user of report is subject to Federal Credit Reporting Act, whenever credit bureau reasonably expects user will use report for purpose permissible under Act. *Comeaux v. Brown & Williamson Tobacco Co. (9th Cir. 1990) 915 F.2d 1264, 1274* (report obtained under false pretenses in violation of *15 U.S.C. § 1681q*)

Credit reporting agency failed to meet obligation to reinvestigate inaccurate credit reports under *15 U.S.C. § 1681* when it refused to reinvestigate second inaccurate credit report based on first inaccurate report but subsequently corrected credit report. *Dynesv. TRW Credit Data (9th Cir. 1981) 652 F.2d 35, 36*

Business that provides merchants subscribing to its services with information on check-cashing histories of potential customers is within scope of Fair Credit Reporting Act (*15 U.S.C. § 1681 et seq.*). *Greenway v. Information Dynamics, Ltd. (D. Ariz. 1974) 399 F. Supp. 1092, 1095 , aff'd, 524 F.2d 1145 (1975)*

Credit report used in connection with lease application for business purposes is not "consumer report" within meaning of *Fair Credit Reporting Act. Sizemore v. Bambi Leasing Corporation (N.D. Ga. 1973) 360 F. Supp. 252, 254*

Reports prepared by consumer reporting agency for purpose of determining whether insured was totally disabled are "consumer reports" or "investigative consumer reports" within meaning of *15 U.S.C. § 1681(d)* and *(e)* of *Fair Credit Reporting Act. Beresh v. Retail Credit Co., Inc. (C.D. Cal. 1973) 358 F. Supp. 260, 261*

[3] California Credit Reporting

Bank's request for husband's credit information in connection with wife's loan application held to be authorized under *Civ. Code § 1785.11(a)(3)(A), (F)*. *Olson v. Six Rivers National Bank (2003) 111 Cal. App. 4th 1, 12-13, 3 Cal. Rptr. 3d 301*

Trial court erred in granting defendant's motion under anti-SLAPP statute to dismiss tenant's action against reporting agency for refusal to add clarifying information to her report in violation of both state CCRAA and federal FCRA; plaintiff made prima facie showing of facts that would, if established at trial, support judgment in her favor. *Schoendorf v. U.D. Registry, Inc. (2002) 97 Cal. App. 4th 227, 238-240, 118 Cal. Rptr. 2d 313*

Company in business of gathering information about renters and selling it to landlords for screening purposes was "consumer credit reporting agency" under federal act; under state act, agency not required to disclose consumer files pursuant to request made directly by consumer's attorney. *Cisneros v. U.D. Registry Inc. (1996) 39 Cal. App. 4th 548, 562, 571, 46 Cal. Rptr. 2d 233*

Credit reporting agency can prove compliance with *Civ. Code §§ 1785.11* and *1785.14* by showing it operated under

agreement with subscriber in which subscriber certified that it would only request and use reports in connection with credit transaction involving consumer named in each request; agency is not required to inquire into purpose of each report or to obtain certification for each report. *Hiemstra v. TRW, Inc. (1987) 195 Cal. App. 3d 1629, 1633-1634, 241 Cal. Rptr. 564*

In action against land developer by adjacent landowner, trial court properly granted defendant's motion for summary judgment on issue concerning recovery of punitive damages under *15 U.S.C. § 1681n*, when record did not support finding that defendant knowingly and wilfully obtained information by making any false representation to consumer reporting agency making the consumer investigation report. *Emerson v. J.F. Shea Co. (1978) 76 Cal. App. 3d 579, 600, 143 Cal. Rptr. 170*

Although federal Fair Credit Reporting Act grants concurrent jurisdiction to courts of California, trial court is not permitted to engraft provisions of *Civ. Code § 3294* (exemplary damages for oppression, fraud, or malice) onto federal law. *Emerson v. J.F. Shea Co. (1978) 76 Cal. App. 3d 579, 588-589, 143 Cal. Rptr. 170*

[4] California Credit Services Act

Credit services organization could not modify its membership contract to require arbitration and preclude class relief merely by notifying members by mail that continued membership constituted acceptance of modification; under *Civ. Code § 1789.16(a)*, contract modifications must be signed. *Mitchell v. American Fair Credit Association (2002) 99 Cal. App. 4th 1345, 1352-1354, 122 Cal. Rptr. 2d 193*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingConsumer ReportsBanking LawConsumer ProtectionFair Credit ReportingLiabilityBanking LawConsumer ProtectionState LawGeneral OverviewBanking LawConsumer ProtectionState LawRemediesCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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13-129 California Forms of Pleading and Practice--Annotated § 129.96

§ 129.96 Attorney General Opinions

Disclosure to commercial credit bureau by district attorney that absent parent is delinquent in child support payments. *65 Ops. Cal. Att'y Gen. 373, 376 (1982)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionState LawGeneral Overview

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13-129 California Forms of Pleading and Practice--Annotated § 129.97

§ 129.97 Law Reviews

Ogburn, *Helping Clients Through the Fair Credit Reporting Act, 34 Prac. Law. 13 (July 1988)*

Note, *The California Consumer Reporting Agencies Act: A Proposed Improvement on the Fair Credit Reporting Act, 26 Hastings L.J. 1219 (1975)*

Feldman, *The Fair Credit Reporting Act--From the Regulator's Vantage Point, 14 Santa Clara Law. 459 (1974)*

Note, *Panacea or Placebo? Actions for Negligent Noncompliance Under the Federal Fair Credit Reporting Act, 47 S. Cal. L. Rev. 1070 (1974)*

Oreck, *Consumer Credit Reporting: The California Experience, 4 Golden Gate U.L. Rev. 47 (1973)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingGeneral Overview

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§§ 129.98[Reserved]

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PART IV. FORMS
A. California Consumer Credit Reporting Agencies Act and California Investigative Consumer Reporting Agencies Act

13-129 California Forms of Pleading and Practice--Annotated § 129.110

§ 129.110 Complaint for Damages [Civ. Code § 1785.31] for Violation of Consumer Credit Reporting Agencies Act [Civ. Code § 1785.1 et seq.]--By Consumer Against Consumer Credit Reporting Agency--Improper Furnishing of Consumer Credit Report [Civ. Code §§ 1785.11, 1785.14]

[1] FORM Complaint for Damages [Civ. Code § 1785.31] for Violation of Consumer Credit Reporting Agencies Act [Civ. Code § 1785.1 et seq.]--By Consumer Against Consumer Credit Reporting Agency--Improper Furnishing of Consumer Credit Report [Civ. Code §§ 1785.11, 1785.14]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff, vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DAMAGES
[and DOES I through _____,]	)	(Violation of Consumer Credit Reporting Agencies
Defendant(s).	)	Act)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ [*city*], _____ County, California [*or allege other capacity of defendant and basis of venue as appropriate*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by their conduct).]

3. Defendant is, and all times herein mentioned was, regularly engaged in the practice of _____ [assembling *or* evaluating *or both*] consumer credit information on consumers for the purposes of furnishing consumer reports to third parties _____ [for monetary fees *or* for dues *or* on a cooperative nonprofit basis].

4. On or about _____ [*date*], defendant furnished a consumer credit report to _____ [*name of user*]. The subject of that report was the credit _____ [worthiness *or* standing *or* capacity] of plaintiff.

5. Plaintiff is informed and believes and based thereon alleges that in furnishing the above-mentioned consumer credit report, defendant did not have reason to believe that _____ [*name of user*] intended to use the information contained in the report in connection with _____ [*specify, e.g.*, a credit transaction].

6. In failing to comply with *Civil Code Sections 1785.11* and *1785.14(a)* in the manner described above, defendant did so _____ [negligently *or* wilfully].

7. As a proximate result of the _____ [negligent *or* wilful] conduct of defendant as mentioned above, plaintiff has been damaged in that _____ [*describe actual damages*][, in the sum of $_____].

8. Plaintiff has incurred and will incur attorney's fees in prosecuting this action.

[9. Defendant did all of the things herein alleged wilfully. Plaintiff therefore is entitled to punitive damages (in the sum of $_____).]

WHEREFORE, plaintiff prays judgment against defendant(s) as follows:

1. For actual damages in the sum of $_____;

[2. For punitive damages in the sum of $_____;]

3. For reasonable attorney's fees according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as those matters which are herein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

[2] Use of Form

The complaint in [1], *above*, is for use by a consumer against a consumer reporting agency in an action for damages pursuant to *Civ. Code § 1785.31* for the improper furnishing of a consumer credit report in violation of *Civ. Code §§ 1785.11* and *1785.14(a)*.

For a discussion of permissible purposes of consumer credit reports, see *§ 129.14[1]*. For a discussion of remedies for statutory violations, see *§ 129.24*.

[3] Allegations

This form alleges all of the following:

- That defendant is a consumer credit reporting agency (Paragraph 3) [*see Civ. Code § 1785.3(d)*].
- The date on which liability arose (Paragraph 4).
- The defendant's failure to comply with a provision of the Consumer Credit Reporting Agencies Act (Paragraph 5) [*see Civ. Code § 1785.11*].
- That liability is based on defendant's negligent or willful failure to comply (Paragraph 6) [*see Civ. Code § 1785.31*].
- Damages based on plaintiff's actual damages (Paragraph 7) [*see Civ. Code § 1785.31(a)(1)*].
- Attorney's fees (Paragraph 8) [*see Civ. Code § 1785.31(a)(1)* and discussion under [8], *below*].
- Punitive damages if the violation was willful (Paragraph 9) [*see Civ. Code § 1785.31(a)(2)*].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Damages

[a] Negligent Noncompliance

Any consumer credit reporting agency or user of information that negligently fails to comply with any requirement of the Consumer Credit Reporting Agencies Act with respect to a consumer credit report is liable to the consumer who is the subject of the report in an amount equal to actual damages, including court costs, loss of wages, attorney's fees, and (when applicable) pain and suffering [*Civ. Code §§ 1785.31(a)(1), 1785.31(d)*].

[b] Willful Noncompliance

In a case of willful violation, the agency or user is liable not only for the amounts recoverable for a negligent violation but also for punitive damages of not less than $100 nor more than $5,000 for each violation, and for any other relief that the court deems proper [*Civ. Code § 1785.31(a)(2)*].

[6] Injunctive Relief

Injunctive relief is available to any consumer aggrieved by a violation or a threatened violation of the Consumer Credit Reporting Agencies Act, whether or not the consumer seeks any other remedy [*Civ. Code § 1785.31(b)*]. See discussion and forms pertaining to injunctive relief in Ch. 303, *Injunctions*.

[7] Jurisdiction and Limitation of Actions

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

An action to enforce any liability created under *Civ. Code §§ 1785.31-1785.34* (remedies) may be brought in any appropriate court of competent jurisdiction within two years from the date the plaintiff knew or should have known of the violation of the Consumer Credit Reporting Agencies Act, but not more than seven years from the earliest date the liability could have arisen. However, when a defendant has materially and wilfully misrepresented any information required under the Consumer Credit Reporting Agencies Act to be disclosed to a consumer and the information so misrepresented is material to the establishment of the defendant's liability to the consumer, the action may be brought at any time within two years after the discovery of the misrepresentation by the consumer [*Civ. Code § 1785.33*].

[8] Attorney's Fees

Attorney's fees recovered under a contract provision or under a statute or law that authorizes their recovery are an element of costs [Civ. Code§ 1717(a); *Code Civ. Proc. § 1033.5(a)(10)*; *see Code Civ. Proc. § 1033.5(c)(5)* (methods of fixing attorney's fees that are item of costs)]. It is not necessary to plead or prove a contract provision for attorney's fees or the amount of attorney's fees incurred. It is sufficient to make the contract with the attorney's fees provision part of the complaint [*Ganey v. Doran (1987) 191 Cal. App. 3d 901, 911-912, 236 Cal. Rptr. 787]* . Nor is it necessary to plead the right to recover attorney's fees that are authorized by statute [*see Beneficial Standard Properties, Inc. v. Scharps (1977) 67 Cal. App. 3d 227, 232, 136 Cal. Rptr. 549* ; *T.E.D. Bearing Co. v. Walter E. Heller & Co. (1974) 38 Cal. App. 3d 59, 62, 112 Cal. Rptr. 910]* . However, no election or waiver results from pleading entitlement to attorney's fees [*see Lanyi v. Goldblum (1986) 177 Cal. App. 3d 181, 188, 223 Cal. Rptr. 32]* . Discussion and forms addressing the various methods for recovering attorney's fees provided by statutes are located in Ch. 174, *Costs and Attorney's Fees*, §§ 174.10 et seq., and 174.50 et seq. Recovery of attorney's fees under contract provisions is addressed in §

174.50 et seq.

[9] Cross References

For discussion, procedures, and forms for alternative allegations of agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For discussion, procedures, and forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion, procedures, and forms for the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion, procedures, and forms for damages and pleading damages, see *Ch. 177, Damages, § 177.140* et seq.

For discussion, procedures, and forms for FAX service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion, procedures, and forms related to the jurisdiction in California courts in general, see Ch. 343, *Jurisdiction, Inconvenient Forum, and Appearances*

For discussion, procedures, and forms for prayers, see Ch. 420, *Prayers*

For discussion and forms for service of summons generally, see Ch. 518, *Service of Summons and Papers*

For discussion, procedures, and forms related to proper venue, see Ch. 571, *Venue*

For discussion, procedures, and forms for verification, see Ch. 572, *Verification*

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13-129 California Forms of Pleading and Practice--Annotated § 129.111

§ 129.111 Allegation of Violation of Consumer Credit Reporting Agencies Act [Civ. Code § 1785.1 et seq.]--Reporting Obsolete Information [Civ. Code §§ 1785.13, 1785.14(a)] or Inaccuracies in Consumer Report [Civ. Code § 1785.14(b)]

[1] FORM Allegation of Violation of Consumer Credit Reporting Agencies Act [Civ. Code § 1785.1 et seq.]--Reporting Obsolete Information [Civ. Code §§ 1785.13, 1785.14(a)] or Inaccuracies in Consumer Report [Civ. Code § 1785.14(b)]

[*EITHER*]

In making the above-mentioned consumer credit report, defendant, in violation of *Civil Code Section 1785.13*, reported _____ [*specify information reported in violation of Civ. Code § 1785.13*], which information antedated the report by more than _____ [*number*] years. In so doing, defendant violated *Civil Code Section 1785.14(a)* in that defendant failed to maintain reasonable procedures to avoid including the above-mentioned information in the consumer credit report in violation of *Civil Code Section 1785.13*.

[*OR*]

In preparing the above-mentioned consumer report, defendant violated *Civil Code Section 1785.14(b)* in that defendant did not follow reasonable procedures to assure the maximum possible accuracy of the information concerning plaintiff, thereby causing the following inaccurate information to be contained in the report: _____ [*specify erroneous items*].

[2] Use of Form

The form in [1], *above*, is an allegation for use in a complaint for damages brought by a consumer against a consumer credit reporting agency when the agency has violated the Consumer Credit Reporting Agencies Act by reporting

prohibited information [*Civ. Code §§ 1785.13*, *1785.14(a)*], or when inaccurate information was contained in a consumer credit report concerning the plaintiff because of the failure of a consumer credit reporting agency in preparing the report to follow reasonable procedures to assure maximum possible accuracy of the information [*Civ. Code § 1785.14(b)*]. Either paragraph could be used in § 129.110[1] in place of Paragraph 5.

[3] Alleging Other Violations of the Consumer Credit Reporting Agencies Act

There are a number of ways in which the Consumer Credit Reporting Agencies Act may be violated. This allegation contains two examples. Other violations include:

- Failure to disclose information to the consumer [*Civ. Code § 1785.10*; *see § 129.20*].

- Failure to reinvestigate or delete inaccurate or unverifiable information [*Civ. Code § 1785.16(a)*; *see § 129.21[1]*].

- Failure to note a dispute regarding information in a file [*Civ. Code § 1785.16(g)*; *see § 129.21[4], [5]*].

- Failure to notify a designated person of the deletion or dispute of information [*Civ. Code § 1785.16(h)*; *see § 129.21[6]*].

- Improper reporting of public record information [*Civ. Code § 1785.18*].

Allegations of the above violations can be substituted in § 129.110[1] in place of either Paragraph 5 or Paragraphs 4 and 5, depending on the facts of the case.

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13-129 California Forms of Pleading and Practice--Annotated § 129.112

§ 129.112 Complaint for Damages [Civ. Code § 1785.31] for Violation of Consumer Credit Reporting Agencies Act [Civ. Code § 1785.1 et seq.]--By Consumer Against User of Report--Failure to Advise Consumer Against Whom Adverse Action Taken [Civ. Code § 1785.20(a)]

[1] FORM Complaint for Damages [Civ. Code § 1785.31] for Violation of Consumer Credit Reporting Agencies Act [Civ. Code § 1785.1 et seq.]--By Consumer Against User of Report--Failure to Advise Consumer Against Whom Adverse Action Taken [Civ. Code § 1785.20(a)]

[*Caption. See § 129.110[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See Paragraph 1 in § 129.110[1].*]

2. [*Fictitious name allegation, if appropriate. See Paragraph 2 in § 129.110[1].*]

3. On or about _____ [*date*], _____ [*name of consumer credit reporting agency*], a consumer credit reporting agency within the meaning of *Civil Code Section 1785.3(d)*, furnished defendant with a consumer credit report, the subject of which was the credit _____ [worthiness *or* standing *or* capacity] of plaintiff.

4. Defendant _____ [wholly *or* in part] relied on the report as a basis for _____ [*state adverse purpose for which report was used, e.g.*, the denial of credit for personal purposes]. In violation of *Civil Code Section 1785.20(a)*, defendant failed to advise plaintiff that the report was used for this adverse purpose and failed to supply plaintiff with the name and address or addresses of _____ [*name of consumer credit reporting agency*], the consumer credit reporting agency making the report.

5. In violating *Civil Code Section 1785.20(a),* defendant negligently did the acts alleged above.

6. [*Actual damages. See Paragraph 7 in § 129.110[1].*]

7. [*Attorney's fees. See Paragraph 8 in § 129.110[1].*]

8. [*Punitive damages, if violation was wilful. See Paragraph 9 in § 129.110[1].*]

[*Prayer. See § 129.110[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 129.110[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for damages for violation of the Consumer Credit Reporting Agencies Act brought by aconsumer against a user of information when the user failed either to advise the plaintiff that the information would be used for an adverse purpose or to supply the names and addresses of the agency supplying the information to the user [*Civ. Code § 1785.20(a)*].

[3] Allegations

This form alleges all of the following:

- Receipt of a consumer credit report (Paragraph 3).
- Adverse action by the user against plaintiff based on the report (Paragraph 4).
- The user's failure to advise plaintiff of the adverse action or the name and address or addresses of the consumer credit reporting agency that furnished the report, in violation of *Civ. Code § 1785.20(a)* (Paragraph 4).
- That defendant's violation of *Civ. Code § 1785.20(a)*] was negligent (Paragraph 5).

For a discussion of damages, see *§ 129.110[6]*.

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13-129 California Forms of Pleading and Practice--Annotated § 129.113

§ 129.113 Complaint for Damages [Civ. Code § 1785.31] for Violation of Consumer Credit Reporting Agencies Act [Civ. Code § 1785.1 et seq.]--By Consumer Against User of Information Not Obtained From Credit Reporting Agency--Failure to Advise Consumer of Adverse Action Taken or to Disclose to Consumer Right to Make Written Request [Civ. Code § 1785.20(b)]

[1] FORM Complaint for Damages [Civ. Code § 1785.31] for Violation of Consumer Credit Reporting Agencies Act [Civ. Code § 1785.1 et seq.]--By Consumer Against User of Information Not Obtained From Credit Reporting Agency--Failure to Advise Consumer of Adverse Action Taken or to Disclose to Consumer Right to Make Written Request [Civ. Code § 1785.20(b)]

[*Caption. See § 129.110[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See Paragraph 1 in § 129.110[1].*]

[2. *Fictitious name allegation, if appropriate. See Paragraph 2 in § 129.110[1].*]

3. On or about _____ [*date*], defendant _____ [wholly *or* in part] relied on plaintiff's credit _____ [worthiness *or* standing] obtained from _____ [*name of person other than consumer credit reporting agency*] as a basis for [*state adverse action taken as a result of the use of the information, e.g., the denial of credit for personal purposes*].

[*EITHER*]

4. Plaintiff learned of defendant's action on or about _____ [*date*]. On or about

_____ [*date; specify date within 60 days of learning of the action*], plaintiff made a written request of defendant for the reasons for the adverse action, and defendant, in violation of *Civil Code Section 1785.20(b)*, failed to disclose within a reasonable time the nature and substance of the information relied on by defendant. As a result, _____ [*specify result, e.g.*, plaintiff was unable to correct inaccurate information in sufficient time to receive credit to buy a house in which he/she was interested].

[*OR*]

4. On or about _____ [*date*], defendant communicated to plaintiff that the above-mentioned adverse action was taken and in so doing failed to comply with *Civil Code Section 1785.20(b)*, in that defendant did not clearly and accurately disclose to the plaintiff his/her right to make a written request for the reasons for which the adverse action was taken.

[*CONTINUE*]

5. In violating *Civil Code Section 1785.20(b)* as alleged above, defendant did so negligently.

6. [*Actual damages. See Paragraph 7 in § 129.110[1].*]

7. [*Attorney's fees. See Paragraph 8 in § 129.110[1].*]

8. [*Punitive damages, if violation was willful. See Paragraph 9 in § 129.110[1].*]

[*Prayer. See § 129.110[1]* .]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 129.110[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for damages under the Consumer Credit Reporting Agencies Act brought by a consumer against a user of information. The action concerns information about the consumer's creditworthiness or standing obtained from a person other than a consumer credit reporting agency when the user has taken adverse action against the consumer based wholly or in part on the information [*see Civ. Code § 1785.20(b)*].

[3] Allegations

The complaint alleges that:

- The information was received by the defendant, who took adverse action as a result (Paragraph 3).

- Within 60 days after learning of the adverse action, plaintiff requested in writing the reasons for the action and, in violation of *Civ. Code § 1785.20(b)*, defendant failed to disclose to the plaintiff either the

reasons for the action within a reasonable time of the receipt of the request, or his or her right to make a written request for the reasons for the adverse action at the time that the action was communicated to the consumer (Alternative Paragraphs 4).

- *Civ. Code § 1785.20(b)* was violated negligently (Paragraph 5).

[4] Cross References

For further discussion and references relating to complaints generally, see *§ 129.110[4]* et seq.

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13-129 California Forms of Pleading and Practice--Annotated § 129.114

§ 129.114 Affirmative Defense--Defendant User of Credit Information Obtained From Credit Reporting Agency Maintained Reasonable Procedures to Assure Compliance With Statute [Civ. Code §§ 1785.20(c), 1785.20.5(b)]

[1] FORM Affirmative Defense--Defendant User of Credit Information Obtained From Credit Reporting Agency Maintained Reasonable Procedures to Assure Compliance With Statute [Civ. Code §§ 1785.20(c), 1785.20.5(b)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

At the time that defendant _____ [denied plaintiff credit for _____ (personal purposes *or* family purposes *or* household purposes *or any combination of these purposes*) *or* denied plaintiff insurance for _____ (personal purposes *or* family purposes *or* household purposes *or any combination of these purposes*) *or* denied plaintiff employment *or* increased the charge for _____ (credit *or* insurance)] _____ [wholly *or* partly] because of information contained in a consumer credit report obtained from a consumer credit reporting agency, defendant maintained reasonable procedures to assure compliance with the statutory requirements of Civil Code Section _____ [1785.20(a) *or* 1785.20.5(b)], which require that the user of the consumer credit report advise the consumer against whom adverse action has been taken and supply the name and address or addresses of the consumer credit reporting agency that made the consumer credit report.

[2] Use of Form

The affirmative defense in [1], *above*, is for use in an action for damages by a consumer who is alleging that the user of a consumer credit report obtained from a consumer credit reporting agency failed to advise the consumer against whom adverse action has been taken and to supply the name and address or addresses of the consumer credit reporting agency that made the consumer credit report. The ground for this affirmative defense is that the defendant maintained reasonable procedures to assure compliance with *Civ. Code § 1785.20(a)* or *1785.20*.5(b) [*Civ. Code §§ 1785.20(c), 1785.20*.5(b)].

[3] Cross References

For discussion, procedures, and forms relating to answers generally, see Ch. 26, *Answers*

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13-129 California Forms of Pleading and Practice--Annotated § 129.115

§ 129.115 Affirmative Defense--Defendant User of Credit Information Obtained From Person Other Than Credit Reporting Agency Maintained Reasonable Procedures [Civ. Code § 1785.20(c)]

[1] FORM Affirmative Defense--Defendant User of Credit Information Obtained From Person Other Than Credit Reporting Agency Maintained Reasonable Procedures [Civ. Code § 1785.20(c)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

At the time that defendant _____ [denied plaintiff credit for _____ (personal purposes *or* family purposes *or* household purposes *or any combination thereof*) *or* denied plaintiff insurance for _____ (personal purposes *or* family purposes *or* household purposes *or any combination of these purposes*) *or* increased the charge for _____ (credit *or* insurance)] _____ [wholly *or* in part] because of information obtained from a person other than a consumer credit reporting agency, defendant maintained reasonable procedures to assure compliance with *Civil Code Section 1785.20(b)*, which requires that the user clearly and accurately disclose to the consumer his or her right to make a written request at the time the adverse action is communicated to the consumer and, on the consumer's written request for the reasons for such adverse action, disclose the nature and substance of the information to the consumer.

[2] Use of Form

The affirmative defense in [1], *above*, is for use in an action for damages by a consumer who is alleging that a user of consumer information obtained from a person other than a consumer credit reporting agency failed to disclose to the consumer his or her right to make a written request at the time the adverse action is communicated to the consumer and, on the consumer's written request for the reasons for that adverse action, disclose the nature and substance of the information to the consumer. The ground for the affirmative defense is that the defendant maintained reasonable procedures to assure compliance with *Civ. Code § 1785.20(b)* [*Civ. Code § 1785.20(c)*].

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13-129 California Forms of Pleading and Practice--Annotated § 129.116

§ 129.116 Complaint for Civil Penalties for Violation of Consumer Credit Reporting Agencies Act [Civ. Code § 1785.1 et seq.]--By Consumer Against Person Who Wrongfully Obtains or Uses Consumer Credit Data [Civ. Code § 1785.19]

[1] FORM Complaint for Civil Penalties for Violation of Consumer Credit Reporting Agencies Act [Civ. Code § 1785.1 et seq.]--By Consumer Against Person Who Wrongfully Obtains or Uses Consumer Credit Data [Civ. Code § 1785.19]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR CIVIL PENALTIES
_____ [*name*],	)	(Wrongfully Obtaining or Using Consumer Credit
[and DOES I through _____,]	)	Data)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See Paragraph 1 in § 129.110[1].*]

[2. *Fictitious defendant allegations, if appropriate. See Paragraph 2 in § 129.110[1].*]

3. _____ [*Name of consumer credit reporting agency*] at all times herein alleged was regularly

engaged in the business of _____ [assembling *and/or* evaluating] consumer credit information on consumers for the purposes of furnishing consumer credit reports to third parties _____ [for monetary fees *or* for dues *or* on a cooperative basis] and, in the course of its business, created and maintained a file containing consumer credit information relating to plaintiff.

[*EITHER*]

4. Plaintiff is informed and believes and based thereon alleges that, on or about _____ [*date*], defendant _____ [*name*] knowingly and wilfully obtained _____ [access to *and/or* data from] plaintiff's file other than as provided by *Civil Code Section 1785.11*, in that _____ [*state facts showing circumstances in which release of consumer credit report is not authorized, e.g.,* defendant represented to _____ (*name of consumer credit reporting agency*) that it intended to use(, and did thereafter so use,) information from plaintiff's file for the sole purpose of selling that information to other parties for a valuable consideration, and not for anypurpose in connection with a credit, business, or other transaction involving plaintiff].

[*AND/OR*]

5. On or about _____ [*date*], defendant and _____ [*name of consumer credit reporting agency*] entered into a written contract, a copy of which is attached as Exhibit A and incorporated by reference.

6. Plaintiff is informed and believes and based thereon alleges that, on or about _____ [*date*], defendant _____ [*name*] received data from plaintiff's file concerning plaintiff and used that data in a manner contrary to the aforesaid agreement, in that _____ [*specify act(s) violating agreement, e.g.,* defendant used information concerning plaintiff's creditworthiness and credit capacity to make an unsolicited offer of credit to plaintiff, in the form of a preapproved application for defendant's "_____" (*name*) credit card,] in violation of _____ [*specify clause, section, or paragraph*] of the aforesaid agreement.

[*CONTINUE*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a civil penalty in the amount of $2,500;

2. For costs of suit incurred herein, including reasonable attorney's fees; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification. See § 129.110[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by a consumer against a person, firm, partnership, association, or corporation that knowingly and wilfully obtains access or data from a file on the consumer maintained by a consumer credit reporting agency, other than as provided by *Civ. Code § 1785.11* (furnishing of consumer credit reports), or that uses data received from such a file in a manner contrary to an agreement with the consumer credit reporting agency [*see Civ. Code § 1785.19(a)*]. The form may also be adapted for use in an action brought by the consumer credit reporting agency, or by any other person or entity responsible for the file accessed [*see Civ. Code § 1785.19(a)*]. For further discussion, *see §§ 129.15* and *129.24[1][e]*.

[3] Allegations

This complaint alleges:

- The basis for venue (Paragraph 1) [*see Code Civ. Proc. §§ 395* (individual), 395.2 (unincorporated association), 395.5 (corporation or association)].

- Maintenance of a file on the consumer by a consumer credit reporting agency (Paragraph 3) [*see Civ. Code §§ 1785.3(d)* ("consumer credit reporting agency" defined), 1785.3(g) ("file" defined), 1785.19(a)].

- Facts regarding wrongful access to or use of data in the file (Paragraphs 4-6) [*see Civ. Code § 1785.19(a)(1)-(3)*].

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13-129 California Forms of Pleading and Practice--Annotated § 129.117

§ 129.117 Complaint for Damages for Violation of Consumer Credit Reporting Agencies Act [Civ. Code § 1785.1 et seq.]--By Consumer Against Person Who Obtains Credit Report Under False Pretenses or Without Permissible Purpose [Civ. Code § 1785.31(a)(3)]

[1] FORM Complaint for Damages for Violation of Consumer Credit Reporting Agencies Act [Civ. Code § 1785.1 et seq.]--By Consumer Against Person Who Obtains Credit Report Under False Pretenses or Without Permissible Purpose [Civ. Code § 1785.31(a)(3)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Obtaining Credit Report Under False Pretenses or
[and DOES I through _____,]	)	Without Permissible Purpose)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See Paragraph 1 in § 129.110[1].*]

[2. *Fictitious defendant allegations, if appropriate. See Paragraph 2 in § 129.110[1].*]

3. _____ [*Name of consumer credit reporting agency*] at all times herein alleged was regularly

engaged in the business of _____ [assembling *and/or* evaluating] consumer credit information on consumers for the purposes of furnishing consumer credit reports to third parties _____ [for monetary fees *or* for dues *or* on a cooperative basis] and, in the course of its business, created and maintained a file containing consumer credit information relating to plaintiff.

[*EITHER*]

4. Plaintiff is informed and believes and based thereon alleges that, on or about _____ [*date*], defendant _____ [*name*] obtained _____ [access to *and/or* a copy of] plaintiff's file under false pretenses, in that _____ [*state facts showing false pretenses under which defendant obtained plaintiff's credit report, e.g.,* defendant represented to _____ (*name of consumer credit reporting agency*) that plaintiff had applied to defendant for an extension of credit for personal, family, or household purposes when in fact plaintiff had not made any such application].

[*AND/OR*]

5. Plaintiff is informed and believes and based thereon alleges that on or about _____ [*date*], defendant _____ [*name*] knowingly and willfully obtained _____ [access to *and/or* a copy of] plaintiff's file other than for a permissible purpose as provided by *Civil Code Section 1785.11*, in that _____ [*state facts showing circumstances under which consumer credit report was knowingly obtained without a permissible purpose, e.g.,* defendant's request, as plaintiff's former employer, for a credit report to determine whether plaintiff would be able to satisfy a judgment in a planned unfair competition action is not a lawful business need in connection with a business transaction involving plaintiff under *Civil Code Section 1785.11*, and is unrelated to plaintiff's eligibility for credit, insurance, or employment].

[*CONTINUE*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For actual damages of no less than $2,500;

[2. For punitive damages in the sum of $_____;]

3. For costs of suit incurred herein, including reasonable attorney's fees; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification. See § 129.110[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by a consumer against a natural person who obtains a consumer credit report under false pretenses or knowingly obtains a consumer credit report without a permissible purpose, as provided by *Civ. Code § 1785.11* (furnishing of consumer credit reports) [*see Civ. Code § 1785.31(a)(3)*]. Actual damages for a negligent or wilful violation in such a case may not be less than $2,500. For further discussion, *see §§ 129.15* and *129.24[1][e]*.

[3] Allegations

The complaint alleges:

- The basis for venue (Paragraph 1) [*see Code Civ. Proc. § 395* (individuals)].

- Maintenance of a file on the consumer by a consumer credit reporting agency (Paragraph 3) [*see Civ. Code §§ 1785.3(d)* ("consumer credit reporting agency" defined), 1785.3(g) ("file" defined)].

- Facts regarding obtaining the file or access to the file by false pretenses or knowingly obtaining the file or access to the file without a permissible purpose (Paragraphs 4-5) [*see Civ. Code § 1785.31(a)(1)-(3)*].

[4] Cross References

For further discussion and references relating to complaints generally, see *§ 129.110[4]* et seq.

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A. California Consumer Credit Reporting Agencies Act and California Investigative Consumer Reporting Agencies Act

13-129 California Forms of Pleading and Practice--Annotated § 129.118

§ 129.118 Complaint for Damages for Violation of Investigative Consumer Reporting Agencies Act [Civ. Code § 1786 et seq.]--By Consumer Against Investigative Consumer Reporting Agency--Improper Furnishing of Investigative Consumer Report [Civ. Code §§ 1786.12, 1786.20, 1786.5]

[1] FORM Complaint for Damages [Civ. Code § 1786.50] for Violation of Investigative Consumer Reporting Agencies Act [Civ. Code § 1786 et seq.]--By Consumer Against Investigative Consumer Reporting Agency--Improper Furnishing of Investigative Consumer Report [Civ. Code §§ 1786.12, 1786.20]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Violation of Investigative Consumer Reporting
[and DOES I through _____,]	)	Agencies Act)
Defendant(s).	)	Amount demanded exceeds $10,000
	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of defendant. See Paragraph 1 in § 129.110[1].*]

[2. *Fictitious name allegation, if appropriate. See Paragraph 2 in § 129.110[1].*]

3. Defendant is, and at all times herein mentioned was, regularly engaged in the practice of _____

[assembling *or* evaluating *or both*] _____ [employment *or* insurance *or both*] information on consumers for the purpose of furnishing investigative consumer reports to third parties for _____ [monetary fees *or* dues].

4. On or about _____ [*date*], defendant furnished an investigative consumer report to _____ [*name of user*]. The subject of the report was the _____ [*specify, e.g.,* character and general reputation] of plaintiff.

5. Plaintiff is informed and believes and thereon alleges that in furnishing the above-mentioned investigative consumer report, defendant had no reason to believe that _____ [*name of user*] would use the report for a permissible purpose, in violation of *Civil Code Section 1786.20*. [*if punitive damages are being sought, add:*, and that defendant's violation of *Civil Code Section 1786.20* was grossly negligent or willful].

6. As a result of the conduct of defendant as alleged above, defendant has incurred actual damages in the amount of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For [plaintiff's actual damages or] the sum of $10,000[, whichever is greater], as provided by *Civil Code Section 1786.50(a)(1)*];

[2. For punitive damages;]

3. For costs of suit incurred herein, including reasonable attorney's fees; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 129.110[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for damages for violation of the Investigative Consumer Reporting Agencies Act brought by a consumer against an investigative consumer reporting agency when the agency has furnished an investigative consumer report for a purpose that is not permitted under *Civ. Code § 1786.12*. In such an action, the consumer may recover any actual damages sustained by the consumer as a result of the agency's action, or (except in the case of class actions) $10,000, whichever sum is greater [*Civ. Code § 1786.50(a)(1)*]. Punitive damages may be recovered for a grossly negligent or willful violation [*Civ. Code § 1786.50(b)*], and a successful plaintiff may recover reasonable attorney's fees [*Civ. Code § 1786.50(a)(2)*]. For further discussion, *see § 129.14[1]*.

[3] Allegations

This complaint alleges:

- That defendant is an investigative consumer reporting agency (Paragraph 3) [*Civ. Code § 1786.2(d)*].

- The date on which the investigative consumer report was furnished and the subject of the report (Paragraph 4).

- Defendant's failure to comply with *Civ. Code § 1786.20* (Paragraph 5) [*Civ. Code § 1786.12, 1786.20*, 1786.5].

- That defendant's compliance was willful or grossly negligent (Paragraph 5). This allegation should be included if the plaintiff will be seeking punitive damages [*see Civ. Code § 1786.50(b)*].

- Plaintiff's actual damages as a result of defendant's action [*see Civ. Code § 1786.50(a)(1)*].

[4] Limitation of Actions

An action to enforce any liability created under the Investigative Consumer Reporting Agencies Act may be brought in any appropriate court of competent jurisdiction within two years from the date of discovery [*Civ. Code § 1786.52*].

[5] Cross References

For further discussion and references relating to complaints generally, see *§ 129.110[4]* et seq.

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A. California Consumer Credit Reporting Agencies Act and California Investigative Consumer Reporting Agencies Act

13-129 California Forms of Pleading and Practice--Annotated § 129.119

§ 129.119 Allegation of Violation of Investigative Consumer Reporting Agencies Act [Civ. Code § 1786 et seq.]--Reporting Obsolete Information [Civ. Code §§ 1786.18, 1786.20(a)] or Inaccuracies in Investigative Report [Civ. Code § 1786.20(b)]

[1] FORM Allegation of Violation of Investigative Consumer Reporting Agencies Act [Civ. Code § 1786 et seq.]--Reporting Obsolete Information [Civ. Code §§ 1786.18, 1786.20(a)] or Inaccuracies in Investigative Report [Civ. Code § 1786.20(b)]

[*EITHER*]

In making the above-mentioned investigative consumer report, defendant reported _____ [*specify information reported in violation of Civ. Code § 1786.18*]; this information antedated the report by more than _____ [*number*] years. [In so doing, defendant violated *Civil Code Section 1786.20(a)* in that defendant failed to maintain reasonable procedures to prevent reporting the above-mentioned information in violation of *Civil Code Section 1786.18*.]

[*OR*]

In preparing the above-mentioned investigative consumer report, defendant violated *Civil Code Section 1786.20(b)* by failing to follow reasonable procedures to assure maximum possible accuracy of information contained in plaintiff's report, thereby causing the following inaccurate items of information to be contained in the report: _____ [*specify erroneous items*].

[*OR, if report was for employment purposes*]

In making the above-mentioned investigative consumer report for employment purposes, defendant made inquiries that, if made by an employer or prospective employer, would have violated applicable federal and state equal employment opportunity laws and regulations, in violation of *Civil Code Section 1786.20(c)*.

[2] Use of Form

The allegation in [1], *above*, is for use in a complaint for damages brought by a consumer against an investigative consumer reporting agency when the consumer claims that the agency has violated the Investigative Consumer Reporting Agencies Act by reporting obsolete information [*see Civ. Code § 1786.18*] in an investigative consumer report, or when an investigative consumer reporting agency has not followed reasonable procedures [*see Civ. Code § 1786.20(b)*] or has violated state or federal equal employment opportunity laws or regulations [*see Civ. Code § 1786.20(c)*] in preparing an investigative consumer report to assure maximum possible accuracy of the information concerning the consumer who is the subject of the report.

These allegations may be incorporated into the complaint in § 129.118.

[3] Alleging Other Violations of the Investigative Consumer Reporting Agencies Act

There are a number of ways in which the Investigative Consumer Reporting Agencies Act may be violated. This allegation illustrates two such ways. Other violations of the Act include:

- Failure to disclose information to a consumer [*Civ. Code § 1786.10*].
- Failure to reinvestigate or delete inaccurate or unverifiable information [*Civ. Code § 1786.24(a)*].
- Failure to note a dispute regarding the information contained in a file [*Civ. Code § 1786.24(j)*].
- Improper reporting of public record information [*Civ. Code § 1786.28*].
- Furnishing a subsequent report containing unverified adverse information [*Civ. Code § 1786.30*].

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13-129 California Forms of Pleading and Practice--Annotated § 129.120

§ 129.120 Complaint for Damages [Civ. Code § 1786.50] for Violation of Investigative Consumer Reporting Agencies Act [Civ. Code § 1786 et seq.]--By Consumer Making Insurance or Employment Application Against Insurer or Employer--Failure to Disclose Procurement or Preparation of Investigative Consumer Report [Civ. Code § 1786.16(a)]

[1] FORM Complaint for Damages [Civ. Code § 1786.50] for Violation of Investigative Consumer Reporting Agencies Act [Civ. Code § 1786 et seq.]--By Consumer Making Insurance or Employment Application Against Insurer or Employer--Failure to Disclose Procurement or Preparation of Investigative Consumer Report [Civ. Code § 1786.16(a)]

[*Caption. See § 129.118[1].*]

Plaintiff alleges:

[*EITHER*]

1. At all times herein mentioned, defendant _____ [*name of insurer*], an insurance company, was, and now is, a corporation duly organized and existing under the laws of the State of California, and was authorized to do business, and is doing business, as an insurer, by the Insurance Commissioner of the State of California.

[*OR*]

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ [*city*], _____ County, California [*or allege other capacity of defendant and basis of venue as*

appropriate].

[*CONTINUE*]

[2. *Fictitious name allegation, if appropriate. See Paragraph 2 § 129.110[1].*]

3. On or about _____ [*date*], plaintiff applied for _____ [an insurance policy for _____ (*state personal, family, and/or household purposes of policy*) *or* employment as _____ (*state position of employment applied for*) *or* the hiring of a dwelling unit] with defendant. In connection with the application, on or about _____ [*date*], defendant requested that an investigative consumer report be _____ [procured *or* prepared] regarding the plaintiff's character, general reputation, personal characteristics, and mode of living.

[*EITHER*]

4. Thereafter, in violation of *Civil Code Section 1786.16(a)(1)*, defendant failed to clearly and accurately disclose in writing at the time the _____ [*specify, e.g.*, insurance application form, medical form binder *or similar document*] was signed by the plaintiff that an investigative consumer report regarding the plaintiff's character, general reputation, personal characteristics, and mode of living would be made.

[*OR*]

4. Thereafter, in violation of *Civil Code Section 1786.16(a)(2)*, defendant failed to provide plaintiff with a clear and conspicuous disclosure in writing, before the report was procured, in a document consisting solely of the disclosure, stating that an investigative consumer report may be obtained, which may include information on plaintiff's character, general reputation, personal characteristics, and mode of living.

[*OR*]

4. Thereafter, in violation of *Civil Code Section 1786.16(a)(3)*, defendant failed to notify plaintiff in writing, within three days after the date the report was first requested, that an investigative consumer report would be made regarding the plaintiff's character, general reputation, personal characteristics, and mode of living, with disclosure of the name and address of the investigative consumer reporting agency that would prepare the report.

[*OR*]

4. Thereafter, in violation of *Civil Code Section 1786.16(a)(4)*, defendant failed to certify to the investigative consumer reporting agency that defendant made the applicable disclosures to the plaintiff required by *Civil Code Section 1786.16(a)* and that defendant would comply with *Civil Code Section 1786.16(b)*.

[*OR*]

4. Thereafter, in violation of *Civil Code Section 1786.16(a)(5)*, defendant failed to agree to provide a copy of the report to plaintiff.

[*CONTINUE*]

5. On _____ [*date*], defendant received the investigative consumer report from _____ [*specify, e.g.,* an investigative consumer reporting agency].

6. As a result of defendant's actions, plaintiff has been injured in that _____ [*describe actual injuries*], damaging plaintiff in the sum of $_____.

7. Plaintiff is entitled to reasonable attorney's fees pursuant to *Civil Code Section 1786.50(a)(2)*.

[8. When doing the acts alleged in this complaint, defendant acted _____ (willfully *and/or* with gross negligence). Plaintiff therefore is entitled to punitive damages in the sum of $_____.]

[*Prayer. See § 129.118[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 129.110[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for damages under the Investigative Consumer Reporting Agencies Act [*Civ. Code § 1786.50*]. It is for use by a consumer who has applied for insurance or employment or the hiring of a dwelling unit against an insurance underwriter or prospective employer or landlord who failed to disclose to the consumer that an investigative consumer report concerning the consumer's character, general reputation, personal characteristics, and mode of living might be procured or prepared when, in fact, such a report was subsequently requested [*Civ. Code § 1786.16(a)*]. For disclosure requirements, *see § 129.19[1]*.

For further discussion and references relating to complaints generally, see *§ 129.110[4]* et seq.

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[Reserved]

§§ 129.121[Reserved]

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B. California Holden Credit Denial Disclosure Act of 1976

13-129 California Forms of Pleading and Practice--Annotated § 129.130

§ 129.130 Complaint for Damages [Civ. Code § 1787.3(a),(b)] for Violation of Holden Credit Denial Disclosure Act of 1976 [Civ. Code §§ 1787.1-1787.3]

[1] FORM Complaint for Damages [Civ. Code § 1787.3(a),(b)] for Violation of Holden Credit Denial Disclosure Act of 1976 [Civ. Code §§ 1787.1-1787.3]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Violation of Holden Credit Denial Disclosure Act)
[and DOES I-_____, inclusive,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

[1. *Capacity and residence of defendant. See Paragraph 1 in § 129.110[1].*]

[2. *Fictitious name allegation, if appropriate. See Paragraph 2 in § 129.110[1].*]

3. At all times herein mentioned defendant _____ [*name of creditor*] was engaged in the business of regularly _____ [extending *or* arranging for the extension of *or both*] credit in connection with _____ [loans *or* sales of property *or* sales of service *or specify other activity*].

4. On or about _____ [*date*], plaintiff completed a written application for credit from defendant which was primarily for plaintiff's _____ [personal purposes *or* household purposes *or* family purposes *or any combination of these purposes*] in that _____ [*state purpose for credit application*]. [The application was completed as part of a request to defendant by _____ (*name of third party*) to make a specific extension of such credit to plaintiff.]

5. On or about _____ [*date*], _____ [plaintiff *or name of third party*] received _____ [an oral *or* a written] notification from defendant of a denial of credit. The credit denial consisted of a _____ [denial of plaintiff's application *or* change in the terms of an existing credit arrangement *or* refusal to grant credit _____ (in substantially the amount *or* substantially the terms) requested].

[*EITHER*]

6. In violation of *Civil Code Section 1787.2(b)*, that denial was not accompanied either by a statement in writing of the reasons for the denial or by a written disclosure of plaintiff's right to a statement of the reasons for the credit denial and the identity and address of the person from whom or office from which the statement could be obtained.

[*OR*]

6. On or about _____ [*date*], plaintiff made a [written] request for a statement of reasons for the denial of credit from the _____ [office *or* person] identified in defendant's written notification of credit denial. In violation of *Civil Code Section 1787.2(b)*, plaintiff did not receive within 60 days after that notification [, and has not yet received,] a statement of reasons for the credit denial.

[*OR*]

6. Although defendant has furnished plaintiff [on plaintiff's (written) request] a statement of reasons for the denial of credit, the statement failed to contain the specific reasons for the credit denial in violation of *Civil Code Section 1787.2(c)*. [Instead, the statement contained only vague information respecting plaintiff's creditworthiness and was to the effect that _____ (*describe reasons given in statement*).]

[*CONTINUE*]

7. Defendant's failure to comply with the statutory requirements as described above has resulted in the wrongful denial of plaintiff's credit. That wrongful denial has proximately caused plaintiff actual damages in the sum of $_____ occasioned by plaintiff _____ [obtaining substitute credit at a higher cost and at a great inconvenience *or* losing use of _____ (*describe product or service lost by denial of credit, or describe other actual damage proximately caused*)].

[8. *Attorney's fees, if appropriate. See Paragraph 8 in § 129.110[1].*]

9. Plaintiff is entitled to punitive damages in the sum of $_____ because defendant violated *Civil Code Section 1787.2* _____ [willfully *or allege other relevant factors specified in Civ. Code § 1787.3(b), e.g.,* on many other occasions involving other applications for consumer credit].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For actual damages in the sum of $_____;

2. For punitive damages in the sum of $_____;

3. For reasonable attorney's fees according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 129.110[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for damages for violation of the Holden Credit Denial Disclosure Act of 1976 [*Civ. Code §§ 1787.1-1787.3*] brought by a plaintiff who has applied for credit primarily for personal, family, or household purposes against a creditor who regularly extends or arranges for the extension of credit.

[3] Allegations

The complaint alleges:

- That defendant was engaged in the business of extending or arranging for credit (Paragraph 3).
- That plaintiff applied to creditor for credit (Paragraph 4).
- That plaintiff received notification that credit was denied (Paragraph 5).
- That the credit denial was not accompanied by the reasons for the denial or by disclosure of plaintiff's right to a statement of the reasons for the denial or that plaintiff did not receive notification of the reasons within the appropriate time or that the statement of reasons did not contain the specific reasons for the denial of credit (Paragraph 6).
- That defendant's failure to comply with the statute proximately caused plaintiff actual damages (Paragraph 7), attorney's fees (Paragraph 8) [*see § 129.110*], and punitive damages (Paragraph 9).

[4] Statute of Limitations

Actions alleging a failure to comply with any requirement of *Civ. Code § 1787.2* must be brought within two years from the date of the occurrence of the violation [*Civ. Code § 1787.3(e)*].

For further discussion and references relating to complaints generally, see *§ 129.110[4]* et seq.

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B. California Holden Credit Denial Disclosure Act of 1976

13-129 California Forms of Pleading and Practice--Annotated § 129.131

§ 129.131 Allegation of Violation of Holden Credit Denial Disclosure Act of 1976 [Civ. Code § 1787.1 et seq.]--Failure to Notify Applicant of Action on Application [Civ. Code § 1787.2(a)]

[1] FORM Allegation of Violation of Holden Credit Denial Disclosure Act of 1976 [Civ. Code § 1787.1 et seq.]--Failure to Notify Applicant of Action on Application [Civ. Code § 1787.2(a)]

In violation of *Civil Code Section 1787.2(a)*, defendant failed to notify _____ [*name of plaintiff or third party]* of its action on the application within _____ [30 days *or state other time if that time is controlled by federal law or regulation*] of the application.

[2] Use of Form

The allegation in [1], *above*, may be used in an action by a credit applicant against a creditor for violation of the Holden Credit Denial Disclosure Act of 1976 (*Civ. Code § 1787.1 et seq.*) when the creditor fails to notify the applicant of the action taken on the application within the appropriate time. The allegation may be used in the *form in § 129.130[1]*, in place of Paragraphs 5 and 6, renumbering subsequent paragraphs appropriately.

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[Reserved]

§§ 129.132[Reserved]

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C. California Credit Services Act of 1984

13-129 California Forms of Pleading and Practice--Annotated § 129.140

§ 129.140 Complaint for Damages [Civ. Code § 1789.21] for Violation of California Credit Services Act [Civ. Code § 1789.10 et seq.]--By Consumer Against Credit Services Organization and Surety--Misleading Representations as to Organization's Obtaining Credit Card for Consumer

[1] FORM Complaint for Damages [Civ. Code § 1789.21] for Violation of California Credit Services Act [Civ. Code § 1789.10 et seq.]--By Consumer Against Credit Services Organization and Surety--Misleading Representations as to Organization's Obtaining Credit Card for Consumer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Violation of Credit Services Act of 1984)
[and DOES I-_____, inclusive,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

1. [*Capacity and residence of defendants. See Paragraph 1 in § 129.110[1].*]

[2. *Fictitious name allegation, if appropriate. See Paragraph 2 in § 129.110[1].*]

[3. Defendant _____ (*name of surety*) is a surety company admitted to do business in California. At all times herein mentioned there was, and is now, in full force and effect between defendant _____ (*name of surety*) as surety and defendant _____ (*name of credit services organization*) as principal a surety bond in the penal sum of $_____ guaranteeing payment to plaintiff and others damaged by

_____'s (*name of credit services organization*) violations of *Civil Code Sections 1789.10 through 1789.25* of their actual damages.]

4. On or about _____ [*date*], defendant _____ [*name of credit services organization*], a credit services organization within the meaning of *Civil Code Section 1789.12(a)*, _____ [*allege defendant's violation of act, e.g.,* represented to the public, including plaintiff, by means of advertisements in newspapers and on television that it "guaranteed bankcard credit" and could obtain for plaintiff an extension of credit in the form of a credit card issued by a major bank].

5. The advertising representations specified in Paragraph 4, above, were false in that defendant _____ [*name of credit services organization*] could not obtain an extension of credit for plaintiff, had no authority from any bank to extend or guarantee such credit, and could only refer plaintiff to banks to be granted or denied credit on substantially the same terms and under the same conditions as available to the general public.

6. Defendant _____ [*name of credit services organization*] knew that these representations were false, did not believe them to be true, and by publishing and broadcasting the advertisements, intended to deceive and defraud the public into purchasing worthless services, all in violation of *Civil Code Section 1789.13(g), (h)*.

7. On or about _____ [*date*], plaintiff saw, heard, read, believed, and relied on defendant's advertising and, in reliance thereon, entered into a written contract with defendant _____ [*name of credit services organization*], a copy of which is attached to this complaint as Exhibit A and incorporated by reference, paid defendant _____ [*name of credit services organization*] fifty dollars, and completed various forms and questionnaires for defendant to procure a bank credit card for plaintiff. In addition, plaintiff refrained from taking any other steps or attempting to procure for himself/herself a bank credit card in reliance upon defendant's promise to procure one for him/her within 90 days.

8. Defendant _____ [*name of credit services organization*] failed to inform plaintiff, as required by *Civil Code Sections 1789.14* and *1789.15*, before execution of the contract between plaintiff and _____ [*name of credit services organization*], of his/her right to obtain a copy of his/her credit file from a consumer reporting credit agency and to dispute inaccurate information in his/her file.

9. Defendant _____ [*name of credit services organization*] promised plaintiff that it would obtain the extension of credit for him/her within 90 days of _____ [*date set out in paragraph 7*]. The 90 days have passed and defendant _____ [*name of credit services organization*] fails and refuses to obtain an extension of credit for plaintiff or to return plaintiff's money.

10. As a proximate result of the defendant _____'s [*name of credit services organization*] failure to comply with [*specify section relating to particular noncompliance, e.g., Civil Code Sections 1789.13(c), (g), (h)* and *1789.14*] in the manner described above, plaintiff has been damaged in that _____ [*describe actual damages*][, in the sum of $_____].

11. Plaintiff has incurred and will incur attorney's fees in prosecuting this action.

[12. Defendant _____ (did all of the things herein alleged willfully *or* was grossly negligent when doing all of the things herein alleged). Plaintiff is therefore entitled to punitive damages.]

[*Prayer. See § 129.110[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 129.110[1].*]

[2] Use of Form

The form in [1], *above*, is for use in an action for damages by a buyer/consumer against a credit services organization and its surety alleging that the credit services organization has violated the provisions of *Civ. Code § 1789.10 et seq.* [*see Civ. Code §§ 1789.13-1789.17, 1789.21*]. By way of example, it alleges violations of *Civ. Code § 1789.13(c),(g)* (Paragraphs 4-7), of *Civ. Code §§ 1789.14* and *1789.15* (Paragraph 8), and of *Civ. Code § 1789.17* (Paragraph 9). For forms that may be combined or used in conjunction with this form to seek relief under the Consumers Legal Remedies Act, see Ch. 504, *Sales: Consumers Legal Remedies Act* .

Judicial Council pleading forms for breach of contract actions and for fraud actions may be used in lieu of the foregoing form. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

By eliminating references to the surety, this form may be modified for use against a credit services organization that has made a deposit in lieu of bond pursuant to *Civ. Code § 1789.24.* After judgment is obtained, the claim against the account is processed by the Secretary of State [*Civ. Code § 1789.24*; *see § 129.67[3]*].

[3] Allegations

This form alleges all of the following:

- That defendants are a credit services organization and its surety (Paragraphs 1-3) [*see Civ. Code §§ 1789.12(a), (b), 1789.18*].

- That advertising misrepresentations were made and the substance of those misrepresentations (Paragraph 4) [*see Civ. Code § 1789.13(g)*].

- The falsity of the representations (Paragraph 5).

- That defendant credit services organization knew or should have known the representation was false (Paragraph 6).

- That plaintiff relied on the representations and in reliance on those representations paid defendant money and refrained from taking other steps to secure an extension of credit (Paragraph 7).

- The date and fact of the defendant credit services organization's violation of *Civ. Code § 1789.14* (Paragraph 8) [*see Civ. Code §§ 1789.14, 1789.15*].

- The failure of defendant to obtain a credit card for plaintiff and plaintiff's damages (Paragraphs 9, 10) [*see Civ. Code §§ 1789.17, 1789.21*].

- Defendant's wilfulness or gross negligence and plaintiff's entitlement to punitive damages and/or

attorney's fees (Paragraphs 11 and 12) [*see Civ. Code § 1789.21*].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Attorney's Fees

Civ. Code § 1789.21 provides for the payment of plaintiff's attorney's fees and costs [*Civ. Code § 1789.21*].

[6] Cross Complaint by Surety

A surety faced with claims in excess of the bond is likely to cross complain for declaratory relief and/or in interpleader naming plaintiff and any other known claimants under the bond as cross defendants. To avoid this complication, the plaintiff may prefer to proceed originally against the credit services organization alone, even though the plaintiff is authorized by *Civ. Code § 1789.18(b)* and *Code Civ. Proc. § 995.850* to proceed directly against the surety, and to seek recovery under the bond only if the judgment against the credit services organization proves uncollectible [*see* Ch. 538, *Suretyship, Bonds, and Undertakings* , and Ch. 314, *Interpleader*].

[7] Cross References

For discussion, procedures, and forms related to contract claims, see Ch. 140, *Contracts*

For discussion, procedures, and forms related to frauds claims, see Ch. 269, *Fraud and Deceit*

For discussion, procedures, and forms related to injunctive relief, see Ch. 303, *Injunctions* , and Ch. 504, *Sales: Consumers Legal Remedies Act*

For discussion, procedures, and forms related to interpleader, see Ch. 314, *Interpleader*

For discussion, procedures, and forms related to bonds and suretyship, see Ch. 538, *Suretyship, Bonds, and Undertakings*

For additional discussion and references relating to complaints generally, see *§ 129.110[4]* et seq.

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Volume 13: Conspiracy thru Conversion-Chs. 126-159
Chapter 129 CONSUMER CREDIT REPORTING
PART IV. FORMS
C. California Credit Services Act of 1984

13-129 California Forms of Pleading and Practice--Annotated §§ 129.141-129.149

[Reserved]

§§ 129.141[Reserved]

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Volume 13: Conspiracy thru Conversion-Chs. 126-159
Chapter 129 CONSUMER CREDIT REPORTING
PART IV. FORMS
D. Other Statutes Affecting Consumer Credit Reporting

13-129 California Forms of Pleading and Practice--Annotated § 129.150

§ 129.150 Complaint for Unlawful Retaliation by Lender, Creditor, or Other Person Against Person Who Received Stay or Postponement Because of Military Service [Mil. & Vet. Code § 401(a)]

[1] FORM Complaint for Unlawful Retaliation by Lender, Creditor, or Other Person Against Person Who Received Stay or Postponement Because of Military Service [50 U.S.C. App. § 581; Mil. & Vet. Code § 401(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	_____ (Servicemembers Civil Re-
Defendants.	)	lief Act *or* Credit Protection for Military Service
	)	Members)
	)	[LIMITED CIVIL CASE]
		[Amount demanded _____
		(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. At all times herein mentioned plaintiff was a resident of [_____ (city),] _____ County, California.

2. Defendant _____ [*name*] is, and at all times herein mentioned was, a corporation, organized and existing under the laws of California, with its principal place of business in _____ [*city*], _____ County, California.

3. Defendants DOE I through DOE _____ [*roman numeral*], inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.

4. On _____ [*date*], in _____ [*title of action, e.g.,* Doe v. Smith], Case Number _____, _____ [*court, e.g.,* Superior Court of California, County of Marin], plaintiff [*or name of military service member, if someone other than plaintiff*] applied for [and was granted] relief under _____ [*for members of regular armed forces:* the Servicemebers Civil Relief Act *Military and Veterans Code Section 400 et seq.*], with respect to_____[*describe obligation(s), liability or liabilities, or proceeding(s) with respect to which relief was applied for and/or granted*]. [*If desired, attach copies of relevant court documents, e.g.,* Copies of Plaintiff's application and the court order granting Plaintiff the requested relief are attached to this complaint as Exhibits A and B and incorporated by reference.]

5. Thereafter, Defendant _____ [*specify what defendant did, i.e.,* determined that Plaintiff was unable to pay _____ (*describe civil obligation or liability*) in accordance with its terms *or, with respect to an installment contract,* _____ (denied *or* revoked) Plaintiff's credit *or* changed the terms of Defendant's existing credit arrangement with Plaintiff by _____ (*describe changes, e.g.,* requiring immediate payment for all goods purchased by Plaintiff instead of allowing 90 days for payment as in the past) *or* refused to grant plaintiff credit on substantially the terms plaintiff requested *or* made an adverse report relating to plaintiff's creditworthiness to a person or entity engaged in the practice of assembling or evaluating consumer credit information *or* refused to insure plaintiff].

6. Defendant's actions as specified in Paragraph 5, above, were based on the fact that plaintiff had applied for [and been granted] the relief described in Paragraph 4, above, and were taken by Defendant without regard to any other considerations. Plaintiff believes, and alleges, that defendant would not have _____ [*specify, e.g.,* determined that Plaintiff was unable to pay the above-mentioned obligation *or* changed the terms of Defendant's credit arrangement with Plaintiff *or* refused to grant Plaintiff credit *or* revoked Plaintiff's credit *or* filed the adverse credit report against Plaintiff *or* refused to insure Plaintiff] if Plaintiff had not previously sought [and obtained] the relief described in Paragraph 4, above.

7. As a result of Defendant's actions as specified in Paragraphs 5 and 6, above, Plaintiff _____ [*specify plaintiff's actual damages incurred as a result of defendant's actions, e.g.,* was unable to obtain credit to purchase materials and supplies that were essential to the conduct of Plaintiff's business, and was required to expend substantial time, money, and effort in removing the adverse credit report about Plaintiff filed by Defendant], all to Plaintiff's damage in the amount of $_____.

WHEREFORE, Plaintiff prays judgment against Defendants, and each of them, as follows:

1. For plaintiff's actual damages in the sum of $_____;

2. For attorney's fees and other costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Plaintiff

[2] Use of Form

This form is a complaint by a plaintiff against a defendant who took any prohibited action against the plaintiff because the plaintiff (or some other person) previously had applied for and/or been granted relief under provisions of California law that give certain active-duty military personnel various protections against adverse consequences under civil law [*Mil. & Vet. Code § 400 et seq.*]. Those provisions apply to military reservists and National Guard members who are called to active military service under specified circumstances and, in many cases, for limited periods of time [*see Mil. & Vet. Code § 400*]. The complaint seeks recovery of actual damages incurred by the plaintiff as a result of the defendant's actions, as well as attorney's fees.

[3] Governing Law

California law provides specific relief to qualifying military personnel in a variety of areas, including default judgments [*Mil. & Vet. Code § 402(a)*], pending judicial proceedings [*50 U.S.C. App. § 521*; *Mil. & Vet. Code § 403(a)*], fines or penalties on contracts and similar obligations [*50 U.S.C. App. § 522*; *Mil. & Vet. Code § 403(b)*], execution of judgments, attachments, and similar matters [*Mil. & Vet. Code § 403(c)*], statutes of limitations [*Mil. & Vet. Code § 404*], interest rates [*50 U.S.C. App. § 526*; *Mil. & Vet. Code § 405*], leases [*Mil. & Vet. Code § 409*], installment contracts [*Mil. & Vet. Code § 407*], mortgages [*Mil. & Vet. Code § 408*], insurance [*Mil. & Vet. Code § 409.1*], and taxes [*Mil. & Vet. Code § 409.2*].

For detailed discussion of the relief available, the manner in which such relief can be requested, and the persons who qualify for this relief, see *Ch. 501, Sales: Retail Installment Sales, §§ 501.60 et seq., 501.300*.

[4] Prohibition Against Taking Specified Actions Against Persons Granted Relief Under Acts

Persons who are granted relief under the above statutes are protected against certain retaliatory acts and other negative consequences that might otherwise result from the granting of relief. Specifically, California provides that application by a service member for, or receipt by a service member of, a stay, postponement, or suspension in the payment of any tax, fine, penalty, insurance premium, or other civil obligation or liability of that person may not itself, without regard to other considerations, provide the basis for any of the following [*Mil. & Vet. Code § 401(a)*]:

- A determination by any lender or other person that the service member is unable to pay any civil obligation or liability in accordance with its terms.

- With respect to a credit transaction between a creditor and the service member, any denial or revocation of credit by the creditor, change bythe creditor in the terms of an existing credit arrangement, or refusal by the creditor to grant credit to the service member in substantially the amount or on substantially the terms requested.

- An adverse report relating to the creditworthiness of the service member by or to any person or entity engaged in the practice of assembling or evaluating consumer credit information.

- A refusal by an insurer to insure the service member.

[5] Cause of Action for Violation of Prohibitions

The California statute expressly creates a cause of action for violation of the prohibitions discussed in [4], *above*. Any person violating any of these prohibitions is liable for actual damages and reasonable attorney's fees incurred by the injured party [*Mil. & Vet. Code § 401(b)*].

Note that there is no requirement that the violator be one of the persons who were involved in the original grant of relief under the statute. Rather, a cause of action may be asserted against "any person" who does any of the prohibited acts. Thus, for example, a third party lender who denied credit to a service member after becoming aware that the service member previously had been granted relief in connection with an unrelated obligation or liability could be held liable for the actual damages resulting from the denial of credit, even though the lender had nothing to do with the original matter for which the relief was granted.

Similarly, the statutory language does not limit the term "injured party" to service members. Thus, for example, the family of an affected service member conceivably could bring an action as "injured parties" under the statute if they could show actual damages [*see also Mil. & Vet. Code § 409.5* (rights extended to dependents of service members)].

The federal Servicemembers Civil Relief Act contains prohibitions similar to those discussed in [4], above [*see 50 U.S.C. App. § 518*], but unlike its California counterpart, does not expressly provide for a private right of action for violation of those prohibitions [*compare 50 U.S.C. App. § 518 with Mil. & Vet. Code § 401(b)*]. Instead, the federal statute simply remains silent on the question of how a violation of its similar provisions is to be redressed. The general enforcement provisions of the predecessor federal statute provided that its provisions were "to be enforced through the usual forms of procedure obtaining in those courts or under such regulations as they may prescribe" [*see* former *50 U.S.C. App. § 512(2)*]. However, the 2003 revision of this statute eliminated that language [*see now 50 U.S.C. App. § 512(a),(b)*].

In addition to the civil cause of action, the California statute also provides that any person violating the above prohibitions is guilty of a misdemeanor [*Mil. & Vet. Code § 401(c)*].

[6] Allegations

The complaint in [1], *above*, alleges the following:

- Identity and residence of plaintiff and defendant [Paragraphs 1 and 2].

- Optional allegation regarding defendants sued under fictitious names [Paragraph 3].

- That plaintiff (or a military service member, if the action being brought by someone other than the military service member) previously applied for relief under *Mil. & Vet. Code § 400 et seq.* with respect to specified obligation(s), liability or liabilities, or proceeding(s) [Paragraph 4]. Note that it is not necessary that relief actually be granted, only that an application for such relief was made. However, if relief was in fact granted, this complaint includes a statement of that fact.

- That defendant thereafter took one of the prohibited actions specified in [4], *above*, against plaintiff [Paragraph 5].

- That defendant's action were taken because of the relief previously granted under the federal or California statutes, without regard to other considerations [Paragraph 6].

- That plaintiff incurred actual damages as the result of the defendant's actions [Paragraph 7]. The California statute specifically permits recovery for *actual* damages and attorney's fees [*Mil. & Vet. Code § 401(b)*]. No other kinds of damages are authorized.

[7] Cross References

- For discussion of how a party's military service may affect family law proceedings and declaration requirements, see Ch. 12A, *Adoptions: Termination of Parental Rights* ; Ch. 221, *Dissolution of Marriage: Procedure* ; and Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* .

- For an application for a stay of attachment involving a person in military service, see Ch. 62, *Attachment* .

- For an declaration for a stay of attachment involving a person in military service, see Ch. 62, *Attachment* , Form 19.

- For discussion and an application for a stay of a pending action or proceeding based on military service, see *Ch. 136, Continuances, §§ 136.20[2], 136.78A.*

- For discussion and a plaintiff's declaration under penalty of perjury setting forth facts showing that the defendant is not in the military service prior to entry of default judgment, see *Ch. 205, Defaults and Default Judgments, §§ 205.25[5], 205.92 -205.94.*

- For an application for a stay of execution of a judgment or order involving a person in military service, see Ch. 254, *Executions and Enforcement of Judgments* .

- For an application for a stay of garnishment involving a person in military service, see Ch. 276, *Garnishment* .

- For a defendant's notice of admitting service of summons and complaint, waiving further notice, and waiving rights, see *Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances, § 323.173.*

- For a lessee's notice of termination of a lease due to the lessee's military service, see *Ch. 332, Landlord and Tenant: The Tenancy, § 332.71A.*

- For a stay of eviction in an unlawful detainer proceeding during a period of military service, see *Ch. 333, Landlord and Tenant: Eviction Actions, § 333.111.*

- For an application for relief against the enforcement of a fine or penalty against a person in military service when the penalty was incurred, see Ch. 489, *Relief From Judgments and Orders* .

- For a service member's application for relief from judgment, supporting declaration and order, see *Ch. 489, Relief From Judgments and Orders, § 489.411*

- For detailed discussion of relief under the Federal Servicemembers Civil Relief Act and related California legislation, see *Ch. 501, Sales: Retail Installment Sales; §§ 501.60* et seq.

- For an application for stay of enforcement of pre-existing obligation during the period of the applicant's military service, see *Ch. 501, Sales: Retail Installment Sales, § 501.300*

- For an application (motion) for temporary relief from an obligation on the ground that the person is or was in active military service after entering into the obligation, see *Ch. 501, Sales: Retail Installment Sales, § 501.301.*

- For an affirmative defense to an action on an interest-bearing obligation on the ground that the annual rate of interest may not exceed 6 percent per year during the period of the defendant's military service, see *Ch. 501, Sales: Retail Installment Sales, § 501.302*.

- For an application (motion) in an action on a contract for the purchase of personal property for a stay of proceedings on the ground that the defendant is on active military service see *Ch. 501, Sales: Retail Installment Sales, § 501.303*.

- For an application for a stay during military service in an action to enforce a security interest in real or personal property, see *Ch. 503, Sales: Secured Transactions, § 503.113*.

- For discussion of ascertaining a defendant's military status at the time of service of summons and its benefits and effect on subsequent proceedings, see *Ch. 518, Service of Summons and Papers, § 518.19*.

- For a petition for a stay of foreclosure proceedings and relief from an installment contract, mortgage, or trust deed for the purchase of real property by an active member of the military service, see *Ch 555, Trust Deeds and Real Property Mortgages, § 555.139A*.

- For an application for a stay of proceedings to collect real property taxes or assessments by an active member of the military service, see Ch 555, *Trust Deeds and Real Property Mortgages*, § 555.139B.

- For an order staying foreclosure proceedings in relation to an obligation secured by a mortgage or trust deed on real property for an active member of the military service, see Ch 555, *Trust Deeds and Real Property Mortgages*, § 555.139C.

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Chapter 135 CONTEMPT

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[a] Initiating Affidavit or Declaration

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§ 135.33 Punishment or Coercion of Contemner

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[a] By Incarceration

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[3] Costs and Attorney's Fee Incurred by Initiating Party

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[5] Types of Contempt

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[4] Civil and Criminal Contempt Distinguished

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[a] In General

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[i] Before Court In Which Proceeding Giving Rise to Contempt Is Pending

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[9] Initiating Contempt Proceeding

[10] Nature of Contempt Power

[11] Nature of Contempt Proceeding

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[a] In General

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[i] Examples

[ii] Effect of Contemner's Apology

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[i] Examples

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[b] Construction, Amendment, and Review

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[c] When Incarceration Becomes Penal

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[4] Cross References

§§ 135.85-135.89 [Reserved]

§ 135.90 Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069] for Relief From Contempt [Code Civ. Proc. § 1222] Arising From Alleged Violation of Court Order

[1] FORM

[2] Source of Form

[3] Use of Form

[4] Allegations

[5] Verification

[6] Supporting Memorandum

[7] Additional Requirements

[8] Proof of Service

[9] Cross References

§ 135.91 Petition for Writ of Prohibition [Code Civ. Proc. § 1102] for Relief From Contempt [Code Civ. Proc. §§ 1209-1222] Arising From Alleged Violation of Court Order

[1] FORM

[2] Source of Form

[3] Use of Form

[4] Allegations

[5] Verification

[6] Supporting Memorandum

[7] Additional Requirements

[8] Proof of Service

[9] Cross References

§ 135.92 Allegation for Use in Petition Seeking Relief From Contempt Proceedings--Petitioner's Knowledge of

Order Alleged to Be Violated Not Shown

[1] FORM

[2] Use of Form

[3] Insufficient Affidavits Not Fatally Defective

[4] Cross References

§ 135.93 Allegation for Use in Petition Seeking Relief From Contempt Proceedings--Petitioner's Ability to Comply With Order Alleged to Be Violated Not Shown

[1] FORM

[2] Use of Form

[3] Cross References

§ 135.94 Allegation for Use in Petition Seeking Relief From Contempt Proceedings--Petitioner's Willful Failure to Comply With Order Alleged to Be Violated Not Shown

[1] FORM

[2] Use of Form

[3] Cross References

§ 135.95 Allegation for Use in Petition Seeking Relief From Contempt Proceedings--Finding Petitioner in Direct Contempt [Code Civ. Proc. § 1211]--Insufficient Recitals in Contempt Order

[1] FORM

[2] Use of Form

[3] Cross References

§ 135.96 Allegations for Use in Petition Seeking Reinstatement of Contempt Proceedings--Wrongful Divesting of Jurisdiction to Hear Contempt

[1] FORM

[2] Use of Form

[3] Cross References

§ 135.97 Allegation for Use in Petition Seeking Relief From Contempt Proceedings--Order Alleged to Be Violated as Void for Being Overbroad

[1] FORM

[2] Use of Form

[3] Cross References

§ 135.98 Allegations for Use in Petition Seeking Relief From Contempt Proceedings--Appearance by Accused Contemner's Attorney as Sufficient

[1] FORM

[2] Use of Form

[3] Cross References

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§ 135.01 Scope of Chapter

This chapter discusses acts constituting contempt [*§ 135.10 et seq.*], contempt proceedings under *Code Civ. Proc. § 1209 et seq.* [*§ 135.30 et seq.*], and the review of such proceedings by writ of review, writ of habeas corpus, or writ of prohibtion [*§ 135.40 et seq.*].

The following forms are included for use in contempt proceedings:

- A form of declaration to initiate indirect contempt proceedings [*see § 135.80*].
- An order to show cause re contempt [*see § 135.81*].
- An allegation providing for service on the alleged contemner's attorney [*see § 135.82*].
- An illustrative form of bench warrant, or warrant of attachment, for use when an alleged contemner fails to appear in answer to an order to show cause re contempt [*see § 135.83*].
- A form of contempt order for use in indirect contempt proceedings [*see § 135.84*].

The chapter also includes the following forms for review of contempt proceedings:

- A petition for writ of review [*see § 135.90*].
- A petition for writ of prohibition [*see § 135.91*].
- Allegations for use in petitions for writs of review and prohibition [*see §§ 135.92 -135.98*].

Legal Topics:

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

Civil ProcedureRemediesWritsCommon Law WritsProhibitionCivil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal ContemptCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCriminal Law & ProcedureHabeas CorpusGeneral Overview

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§ 135.02 Cross References

- For discussion, procedures, and forms for use in ejectment proceedings, see Ch. 241, *Ejectment* .

- For discussion, procedures, and forms for use in contempt proceedings with respect to enforcement of court orders and judgments in family law matters, see Ch. 258, *Family Law Enforcement* .

- For discussion, procedures, and forms for use in seeking writs of habeas corpus, see Ch. 292, *Habeas Corpus* .

- For discussion, procedures, and forms for use in seeking writs of prohibition, see Ch. 358, *Mandate and Prohibition* .

- For discussion, procedures, and forms for use in seeking writs of review, see Ch. 492, *Review (Certiorari), Writ of.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionCivil ProcedureU.S. Supreme Court ReviewGeneral OverviewCriminal Law & ProcedureHabeas CorpusReal Property LawTitle QualityAdverse Claim ActionsEjectment

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[Reserved]

§§ 135.03[Reserved]

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§ 135.10 Governing Statutes

The law governing civil and criminal contempt is contained in *Code Civ. Proc. §§ 1209-1222*. The law governing misdemeanor contempt is contained in *Penal Code § 166*. For a discussion of acts that constitute civil, criminal, and misdemeanor contempt, see the *discussions under §§ 135.14, 135.15*.

Other statutes relating to contempt proceedings in specific situations or proceedings include the following:

- *Bus. & Prof. Code § 6050 et seq.* (proceedings for contempt of subpoenaing body of the State Bar).
- *Bus. & Prof. Code § 6127* (unlawful detainer law).
- *Code Civ. Proc. § 1008(d)* (contempt for violation of procedures for motion to reconsider).
- *Evid. Code § 1070* (newsreporter's immunity from contempt).
- *Food & Agric. Code § 5605* (neglected or abandoned crops).
- *Food & Agric. Code § 61477* (marketing of milk and dairy products).
- *Gov. Code §§ 9405-9409* (contempt of Legislature).
- *Gov. Code §§ 11455.10, 11455.20* (contempt of administrative agency).
- *Lab. Code §§ 132, 134* (contempt power of Workers' Compensation Appeals Board).
- *Lab. Code § 3760* (employer's failure to report employee's injury as contempt).
- *Mil. & Vet. Code § 468* (contempt of military court).

- *Prob. Code § 8500* (compelling attendance of personal representative).
- *Prob. Code §§ 8870, 8873* (compelling examination of witness concerning decedent's property).
- *Pub. Util. Code §§ 728.5* (compliance with transportation rates).
- *Pub. Util. Code § 2113* (compliance with utility rates).
- *Pub. Util. Code § 21408* (violation of court prohibition to operate aircraft).
- *Rev. & Tax. Code § 16534* (compelling attendance at gift tax hearing).
- *Water Code §§ 1090, 1097* (compelling attendance of witness before State Water Resources Control Board).

Additional statutes relating to acts of contempt by witnesses are *Code Civ. Proc. §§ 1991* (disobedience of subpoena to testify), *1991.1* (disobedience of subpoena to attend deposition), and *2020(h), 2023(b)(5)* (disobedience of subpoena to be sworn or to testify). For a discussion of these statutes, see Ch. 190- 200, *Discovery* .

The law governing the review of contempt proceedings under *Code Civ. Proc. § 1209 et seq.* is governed by *Code Civ. Proc. §§ 1067-1077, 1107, 1108* (writs of review); *Penal Code §§ 1473-1508* (writs of habeas corpus); and *Code Civ. Proc. §§ 1088-1097, 1102-1105, 1107, 1108* (writs of prohibition).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsProhibitionCivil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal ContemptCriminal Law & ProcedureHabeas Corpus

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§ 135.11 Purpose of Contempt Proceedings

The purpose of a contempt proceeding is either to protect the rights of the litigants in an action or to vindicate the dignity or authority of the court [*Morelli v. Superior Court (1969) 1 Cal. 3d 328, 333, 82 Cal. Rptr. 375, 461 P.2d 655]* . This distinction in the purpose of contempt proceedings helps distinguish civil from criminal contempt [*see* discussion in *§ 135.12*]. This distinction is also relevant in distinguishing between direct and indirect contempt [*see* discussion in *§ 135.13*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal Contempt

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§ 135.12 Civil and Criminal Contempt Distinguished

Contempts arising under *Code Civ. Proc. § 1209* may be described as either civil or criminal. If the primary objective of a contempt proceeding under *Code Civ. Proc. § 1209 et seq.* is to protect the rights of the litigants, the proceeding is regarded as civil in character [*Morelli v. Superior Court (1969) 1 Cal. 3d 328, 333, 82 Cal. Rptr. 375, 461 P.2d 655* ; *see also Share v. Casiano Bel-Air Homeowners Assn. (1989) 215 Cal. App. 3d 515, 523, 263 Cal. Rptr. 753]* . On the other hand, if the objective of the contempt proceeding is to vindicate the dignity or authority of the court, the contempt is regarded as criminal in character, even though it arises in a civil action [*Morelli v. Superior Court (1969) 1 Cal. 3d 328, 333, 82 Cal. Rptr. 375, 461 P.2d 655]* .

The nature of the punishment imposed by a contempt order also determines whether it is civil or criminal. A contempt proceeding is civil when the contempt order sought is remedial and coercive in nature, and the parties chiefly interested in the conduct of a civil contempt proceeding are the individuals whose private rights and remedies the civil contempt proceeding was instituted to protect or enforce [*In re Morris (1924) 194 Cal. 63, 67, 227 P. 914]* . Conversely, a contempt proceeding is criminal when it is exclusively punitive in nature, and the government, the courts, and the people are interested in the prosecution of criminal contempt proceedings [*In re Morris (1924) 194 Cal. 63, 67, 227 P. 914]* .

Thus, whether a contempt is civil or criminal depends on whether the punishment imposed is remedial and coercive, and benefits the complainant, or whether it is solely punitive in order to vindicate the authority ofthe court [*Hicks v. Feiock (1988) 485 U.S. 624, 631, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* . If the punishment is a sentence of imprisonment, it is remedial if the contemner stands committed unless and until he or she performs the affirmative act required by the court's order, and it is punitive if the sentence is limited to imprisonment for a definite period [*Hicks v. Feiock (1988) 485 U.S. 624, 632, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* . If the punishment is a fine, it is remedial when it is paid to the complainant and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying it simply by performing the affirmative act required by the court's order [*Hicks v. Feiock (1988) 485 U.S. 624, 632, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* .

When the penalty is remedial, the conditional nature of the punishment renders the relief civil in nature because the

contemner can end the sentence or suspended sentence and discharge himself or herself at any moment by doing what he or she had previously refused to do [*Hicks v. Feiock (1988) 485 U.S. 624, 633, 637 n.8, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* . For example, when the contempt consists of an omission to perform an act that is still within the contemner's power to perform, such as the ability of a contemner to obey a duly served supbpoena in a pending action, a court may treat that contemner's disobedience as a civil contempt by imprisoning the contemner pursuant to *Code Civ. Proc. § 1219* until he or she has performed the act [*Morelli v. Superior Court (1969) 1 Cal. 3d 328, 332, 82 Cal. Rptr. 375, 461 P.2d 655* (failure of expert witness to appear for deposition); *see In re Mark A. (2007) 156 Cal. App. 4th 1124, 1143, 68 Cal. Rptr. 3d 106* (court is not authorized to punish contempt by imposing evidence sanction, such as striking testimony of other witnesses)]. Thus, punishment may not be imposed in a civil contempt proceeding if it is clearly established that the alleged contemner is unable to comply with the terms of the court's order [*Hicks v. Feiock (1988) 485 U.S. 624, 638 n.9, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* .

When the contempt consists of an omission to perform an act that is not possible for the contemner to perform, such as the inability of a contemner to obey a subpoena to testify in an action that has terminated, a court may treat the contemner's disobedience as a criminal contempt by imposing a fine not exceeding $1,000, by imprisoning the contemner for a period not to exceed five days, or both, pursuant to *Code Civ. Proc. § 1218* [*Morelli v. Superior Court (1969) 1 Cal. 3d 328, 332, 82 Cal. Rptr. 375, 461 P.2d 655* ; *see In re Mark A. (2007) 156 Cal. App. 4th 1124, 1143, 68 Cal. Rptr. 3d 106* (court is not authorized to punish contempt by imposing evidence sanction, such as striking testimony of other witnesses)]. When the penalty is punitive, the unconditional nature of the punishment renders the relief criminal in nature because the relief cannot undo or remedy what has been done or afford any compensation, and the contemnor cannot shorten the term by promising not to repeat the offense [*Hicks v. Feiock (1988) 485 U.S. 624, 633, 108 S. Ct. 1423, 99 L. Ed. 2d 721* ; *see also In re Feiock (1989) 215 Cal. App. 3d 141, 144-145, 263 Cal. Rptr. 437]* . That a determinate sentence is suspended and the contemner put on probation does not make the remedy civil in nature, for a suspended sentence with a term of probation is not equivalent to a conditional sentence that would allow the contemner to avoid or purge the sanctions;rather, it remains a determinate sentence, and a fixed term of probation is itself a punishment that is criminal in nature [*Hicks v. Feiock (1988) 485 U.S. 624, 639 n.11, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* .

Thus, an unconditional penalty is criminal in nature because it is solely and exclusively punitive in character, whereas a conditional penalty, by contrast, is civil because it is specifically designed to compel the doing of some act [*Hicks v. Feiock (1988) 485 U.S. 624, 633, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* . Any sentence must be viewed as remedial, and hence civil in nature, if the court conditions release on the contemner's willingness to comply with the order or imposes a determinate sentence that includes a purge clause [*Hicks v. Feiock (1988) 485 U.S. 624, 634, 635 n.7, 640, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* . On the contrary, a criminal contempt proceeding would be characterized by the imposition of an unconditional sentence for punishment or deterrence [*Hicks v. Feiock (1988) 485 U.S. 624, 634-635, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* . If both civil and criminal relief are imposed in the same proceeding, the criminal feature of the order is dominant and fixes its character for purposes of review by a higher court [*Hicks v. Feiock (1988) 485 U.S. 624, 638 n.10, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* .

Either form of punishment has an incidental effect. If the case is civil and punishment is purely remedial, there is also a vindication of the court's authority. If the proceeding is for criminal contempt and punishment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that the punishment tends to prevent a repetition of the disobedience. But such indirect consequences do not change punishment that is merely coercive and remedial into that which is solely punitive in character or vice versa [*Hicks v. Feiock (1988) 485 U.S. 624, 635-636, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* .

Punishment that is criminal in nature may not be imposed unless federal constitutional protections are applied in the contempt proceeding [*Hicks v. Feiock (1988) 485 U.S. 624, 637, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* . These protections include the requirement that the offense be proved beyond a reasonable doubt [*Hicks v. Feiock (1988) 485 U.S. 624, 632, 632 n.5, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* . The United States Supreme Court has recognized, however,

that certain specific constitutional protections, such as the right to trial by jury, are not applicable to those criminal contempts that can be classified as petty offenses [*Hicks v. Feiock (1988) 485 U.S. 624, 632 n.5, 108 S. Ct. 1423, 99 L. Ed. 2d 721* (citing *Bloom v. Illinois (1968) 391 U.S. 194, 208-210, 88 S. Ct. 1477, 20 L. Ed. 2d 522*)].

For further discussion of criminal contempts, see *§ 135.33*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal Contempt

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§ 135.13 Types of Contempt

[1] Classification of Contempt as Direct or Indirect

Contempts, in addition to being classified as civil or criminal in nature, are also classified as either direct or indirect.

[2] Direct Contempt

[a] Definition and Examples

A direct contempt is committed in the immediate view and presence of the court [*Arthur v. Superior Court (1965) 62 Cal. 2d 404, 407, 42 Cal. Rptr. 441, 398 P.2d 777]* or of the judge at chambers [*Code Civ. Proc. § 1211(a)*].

Examples of direct contempt include the following:

- When an attorney refuses to obey the court directing him or her to stop arguing a point on which it has ruled, or makes statements to the court the content of which are rude, hostile, and disrespectful [*see Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 223, 96 Cal. Rptr. 2d 531, 999 P.2d 748]* .

- When an attorney impugns the integrity of the court by statements made in open court, either orally or in writing [*In re Buckley (1973) 10 Cal. 3d 237, 248, 110 Cal. Rptr. 121, 514 P.2d 1201* ; *Fine v. Superior Court (2002) 97 Cal. App. 4th 651, 665-674, 119 Cal. Rptr. 2d 376* (attorney filed *Code Civ. Proc. § 170.1* disqualification affidavit containing false allegations in attempt to disqualify commissioner from acting as temporary judge)].

- When an attorney behaves insolently to a witness on cross examination [*Hawk v. Superior Court (1974) 42 Cal. App. 3d 108, 125, 116 Cal. Rptr. 713]* .

- When an attorney fails to appear before a court without excusable cause at the appointed date and hour set for the commencement or resumption of judicial proceedings in which he or she is counsel [*In*

re Baroldi (1987) 189 Cal. App. 3d 101, 106, 234 Cal. Rptr. 286 , disapproved on another ground in Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 221, 96 Cal. Rptr. 2d 531, 999 P.2d 748 ; *In re Karpf (1970) 10 Cal. App. 3d 355, 363, 88 Cal. Rptr. 895]* .

- When an attorney representing an appellant willfully fails to comply with a court order requiring the filing of the appellant's opening brief [*In re Rubin (2001) 25 Cal. 4th 1176, 1178-1179, 108 Cal. Rptr. 2d 593, 25 P.3d 1075* ; *In re Garland (2001) 25 Cal. 4th 1172, 1174-1175, 108 Cal. Rptr. 2d 591, 25 P.3d 1074]* .

- When a person carries a weapon into a courtroom with an offensive or defensive purpose [*see In re Jasper (1973) 30 Cal. App. 3d 985, 988, 106 Cal. Rptr. 754* ; *In re Carvallo (1973) 29 Cal. App. 3d 983, 987, 105 Cal. Rptr. 925]* .

As the examples illustrate, a direct contempt proceeding is essentially one undertaken to preserve the power of the court [*Reifler v. Superior Court (1974) 39 Cal. App. 3d 479, 485, 114 Cal. Rptr. 356]* . As discussed in *§ 135.12*, a contempt proceeding undertaken to preserve the authority or dignity of the court is also charaterized as a criminal contempt.

Although contemptuous conduct committed in the presence of a judge is usually treated as a direct contempt, the judge may choose to use the procedures for indirect contempt and set the matter for hearing beforeanother judge [*see, e.g., Hanson v. Superior Court (2001) 91 Cal. App. 4th 75, 82, 109 Cal. Rptr. 2d 782* (because none of contemptuous conduct occurred in presence of judge who made contempt adjudication, contempt was indirect); *see § 135.32* (indirect contempt proceedings)].

For discussion of proceedings for direct contempt, see *§ 135.31*.

[b] Effect of Contemner's Apology

In direct contempt, an apology to the court or judge is given serious consideration [*In re Buckley (1973) 10 Cal. 3d 237, 257, 110 Cal. Rptr. 121, 514 P.2d 1201]* . Generally, an apology is regarded with favor by the courts as the only remedial act left to the contemner [*see In re Carrow (1974) 40 Cal. App. 3d 924, 933, 115 Cal. Rptr. 601]* . However, the effect of the apology as a mitigating factor rests exclusively in the court's or judge's discretion unless the court or judge is personally embroiled in the contempt matter [*In re Buckley (1973) 10 Cal. 3d 237, 257, 110 Cal. Rptr. 121, 514 P.2d 1201* (judge found to have misinterpreted attorney's apology as a further affront to the court's integrity)].

[3] Indirect Contempt

[a] Definition and Examples

An indirect or constructive contempt [*see In re Roth (1934) 3 Cal. App. 2d 226, 229, 39 P.2d 490]* is not committed in the immediate view and presence of the court or of the judge at chambers [*Code Civ. Proc. § 1211(a)*; *Bridges v. Superior Court (1939) 14 Cal. 2d 464, 473, 94 P.2d 983* (*reversed on other grounds Bridges v. California (1941) 314 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192*)].

The primary example of an indirect contempt is a party's or witness' failure to comply with an order [*In re Gould (1961) 195 Cal. App. 2d 172, 175, 15 Cal. Rptr. 326]* or injunction [*Vanderstok v. Bank of America (1972) 29 Cal. App. 3d 731, 734, 105 Cal. Rptr. 699]* . Therefore, an indirect contempt proceeding is essentially one undertaken to protect the rights of the parties to litigation [*Reifler v. Superior Court (1974) 39 Cal. App. 3d 479, 485, 114 Cal. Rptr. 356]* . As discussed in *§ 135.12*, a contempt proceeding undertaken to protect the rights of parties to litigation is also characterized as a civil contempt.

If contemptuous conduct is committed in the presence of one judge, who then defers the contempt adjudication to another judge, the alleged contempt will be treated as an indirect contempt, because it was not committed in the presence of the judge who made the contempt adjudication [*see, e.g.,* *Hanson v. Superior Court (2001) 91 Cal. App. 4th 75, 82, 109 Cal. Rptr. 2d 782]* .

For discussion of proceedings for indirect contempt, see *§ 135.32*.

[b] Sufficiency of Order on Which Indirect Contempt Is Based

[i] Order Must Be Written and Clear

For an order to be enforceable in an indirect contempt proceeding, it must be in writing or entered in the court's minutes. In addition, it must be definitive and certain [*Ketscher v. Superior Court (1970) 9 Cal. App. 3d 601, 604-605, 88 Cal. Rptr. 357]* but not overbroad [*Younger v. Smith (1973) 30 Cal. App. 3d 138, 150, 106 Cal. Rptr. 225]* . Punishment for contempt can only rest on clear, intentional violation of a specific, narrowly drawn order. Whether the order is sufficiently specific is determined by the terms of the order that the trial court issued, and not by any explanation or reasons given for the order [*Board of Supervisors v. Superior Court (1995) 33 Cal. App. 4th 1724, 1737, 39 Cal. Rptr. 2d 906]* .

For example, a court lacks the power to punish a contemner under the following circumstances:

- When the order alleged to be violated is indefinite and susceptible to interpretation as a mere warning to the contemner [*see* *Ketscher v. Superior Court (1970) 9 Cal. App. 3d 601, 604-605, 88 Cal. Rptr. 357]* .

- When the order is neither in writing nor entered in the court's minutes [*see* *In re Marcus (2006) 138 Cal. App. 4th 1009, 1015-1016* (to avoid uncertainty that can arise when attempting to enforce oral ruling, order must be set forth in detail either in court's minutes or in written order signed by judge and filed with court); *Ketscher v. Superior Court (1970) 9 Cal. App. 3d 601, 604-605, 88 Cal. Rptr. 357]* .

- When the order, which intends merely to prohibit prejudicial pretrial publicity, is used to punish a technical violation that is harmless and nonprejudicial [*Younger v. Smith (1973) 30 Cal. App. 3d 138, 150, 165, 106 Cal. Rptr. 225]* .

[ii] Ability to Comply With Order Usually Must Be Shown

To punish for indirect contempt, it must be shown that the person subject to the order had the ability to comply with the order [*In re Cassil (1995) 37 Cal. App. 4th 1081, 1087, 44 Cal. Rptr. 2d 267* ; *see* *Hicks v. Feiock (1988) 485 U.S. 624, 638 n.9, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* . For example, in one case, a court of appeal overturned a judgment of contempt based on a party's failure to comply with a trial court order requiring the party to turn over certain funds to a receiver, because there was no evidence of the existence of any funds that could have been paid to the receiver and hence no evidence of ability to comply with the order [*see* *In re Cassil (1995) 37 Cal. App. 4th 1081, 1088-1089, 44 Cal. Rptr. 2d 267]* . In another case, a court of appeal held that the director of the state Department of Social Services was not in contempt for disobeying an order, in view of legislationenacted after that order which precluded the director's compliance [*Anderson v. Superior Court (1998) 68 Cal. App. 4th 1240, 1243, 1250, 80 Cal. Rptr. 2d 891* (also holding that director was not barred from asserting statute and inability to comply with order simply because she had helped draft the statute and supported its enactment)].

While ability to comply is usually an element of the charge of contempt, to be alleged and proved by the party seeking

imposition of a contempt judgment, there is an exception in the case of an order to pay child support [*see also* discussion in *§ 135.14[5][b]*]. In this case ability to pay is not an element. When a court of competent jurisdiction makes an order compelling a parent to furnish support, proof that the order was made, filed, and served on the parent, or proof that the parent was present in court at the time the order was pronounced, and proof of noncompliance with the order, together constitute prima facie evidence of a contempt of court [*Code Civ. Proc. § 1209.5*]. Proof of these basic facts proves the entire contempt. Once contempt is proved, any excuse or justification, such as inability to pay, is a matter of affirmative defense to be proved by the contemnor [*Moss v. Superior Court (1998) 17 Cal. 4th 396, 425, 71 Cal. Rptr. 2d 215, 950 P.2d 59* ; *see also § 135.14[5][b]*]. Similar principles apply to other family law orders in which the ability to pay has already been determined. Thus, for example, if an order to pay attorneys' fees in conjunction with a child-custody and support proceeding includes an implied determination of the ability to pay, the ability to pay will not be an element of the charge of contempt [*In re Ivey (2000) 85 Cal. App. 4th 793, 798-802, 102 Cal. Rptr. 2d 447* (long-standing California precedent applies principles of *Code Civ. Proc § 1209.5* to family law orders other than support orders)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal Contempt

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§ 135.14 Acts or Omissions Constituting Contempt

[1] In General

Code Civ. Proc. § 1209 describes those acts and omissions with respect to courts of justice or proceedings in courts of justice that constitute contempts of the authority of the courts. In addition, *Code Civ. Proc. §§ 1209.5* and *1210* describe acts or omissions with respect to child support and possession of real property, respectively, that constitute contempt.

[2] Interruption of Judicial Proceedings

Disorderly, contemptuous, or insolent behavior towards the judge while holding court tending to interrupt the due course of a trial or other judicial proceeding constitutes a contempt [*Code Civ. Proc. § 1209(a)(1)*]. For instance, a defense attorney's statement in open court during trial that "this court obviously doesn't want to apply the law" constitutes an act of contempt within the scope of *Code Civ. Proc. § 1209(a)(1)* [*In re Buckley (1973) 10 Cal. 3d 237, 246, 110 Cal. Rptr. 121, 514 P.2d 1201* ; *see* *Hanson v. Superior Court (2001) 91 Cal. App. 4th 75, 84-85, 109 Cal. Rptr. 2d 782* (attorney's statement in argument to jury that attorney's client "has not received a fair trial" was contemptuous on its face because it impugned court's integrity by suggesting judge had failed to carry out duty of guaranteeing fair trial)], as does an attorney's unannounced departure from the courtroom that interrupts the due course of a trial [*Thorne v. Municipal Court (1965) 237 Cal. App. 2d 249, 252, 46 Cal. Rptr. 749]* . Contemptuous conduct under *Code Civ. Proc. § 1209(a)(1)* may consist of disrespectful remarks addressed to the court or to witnesses or may consist of a disrespectful tone of voice in making otherwise noncontemptuous remarks [*see* *In re Hallinan (1969) 71 Cal. 2d 1179, 1180-1182, 81 Cal. Rptr. 1, 459 P.2d 255]* .

Likewise, a breach of the peace, boisterous conduct, or violent disturbance tending to interrupt the due course of a trial or other judicial proceeding constitutes a contempt [*Code Civ. Proc. § 1209(a)(2)*]. For instance, an attorney committed a contempt when he hawed and laughed after a trial judge sustained objections on the ground of irrelevancy to three successive questions asked by the attorney in examining a witness [*DeGeorge v. Superior Court (1974) 40 Cal. App. 3d 305, 310-311, 114 Cal. Rptr. 860]* .

[3] Misbehavior in Office

Misbehavior in office or other willful neglect or violation of duty by an attorney, counsel, clerk, sheriff, coroner, or other person appointed or elected to perform a judicial or ministerial service constitutes a contempt [*Code Civ. Proc. § 1209(a)(3)*]. For instance, a contempt may consist of counsel's infractions of a trial judge's warning to adhere to the no comment rule in a criminal trial or to refrain from commenting on a defendant's failure to testify in that trial [*see People v. Haldeen (1968) 267 Cal. App. 2d 478, 483, 73 Cal. Rptr. 102]* . Similarly, a contempt under *Code Civ. Proc. § 1209(a)(3)* may consist of unprofessional conduct by an attorney seeking to inflame a jury, such as statements by the attorney in the presence of the jury that the prosecutor of the criminal trial has reasonable doubts as to the defendant's guilt [*Hawk v. Superior Court (1974) 42 Cal. App. 3d 108, 127-128, 116 Cal. Rptr. 713]* .

An officer whose acts or omissions would ordinarily amount to contempt under *Code Civ. Proc. § 1209(a)(3)* is not guilty of contempt if those acts or omissions resulted from complying with a court order that the officer was bound to obey [*Gates v. Municipal Court (1992) 9 Cal. App. 4th 45, 53-55, 11 Cal. Rptr. 2d 439* (sheriff complying with federal court order to limit jail population had complete defense to charge of contempt based on failure to enforce conflicting state law)].

[4] Abuse of Process

Abuse of the process or proceedings of the court constitutes a contempt [*Code Civ. Proc. § 1209(a)(4)*]. An abuse of process is the use of legal process for a purpose other than that which it was designed to accomplish. The essential elements of abuse of process are an ulterior purpose and a willful act in the use of the process not proper in the regular conduct of the proceeding [*Weisenburg v. Molina (1976) 58 Cal. App. 3d 478, 489, 129 Cal. Rptr. 813]* . Similarly, falsely pretending to act under the authority or an order or process of the court constitutes a contempt [*Code Civ. Proc. § 1209(a)(4)*]. Rescuing any person or property in the custody of an officer by virtue of an order or process of the court constitutes a contempt [*Code Civ. Proc. § 1209(a)(6)*]. In addition, a contempt may consist of any other unlawful interference with the process or proceedings of a court [*Code Civ. Proc. § 1209(a)(8)*], such as the possession or display of offensive or defensive weapons by any unauthorized person in a courtroom which inevitably causes sufficient consternation to disrupt judicial proceedings [*In re Jasper (1973) 30 Cal. App. 3d 985, 988, 106 Cal. Rptr. 754]* .

[5] Disobedience of Order

[a] In General

Disobedience of any lawful judgment, order, or process of the court generally constitutes a contempt [*Code Civ. Proc. 1209(a)(5)*]. Thus, disobedience of a lawful order of a court ordinarily is a contempt [*Ketscher v. Superior Court (1970) 9 Cal. App. 3d 601, 604, 88 Cal. Rptr. 357]* , as is failure to comply with the terms of a mandatory injunction [*Vanderstok v. Bank of America (1972) 29 Cal. App. 3d 731, 734, 105 Cal. Rptr. 699]* . However, not every violation of a court order is subject to punishment as a contempt of court; a court's power to compel compliance with its orders to ensure the orderly administration of justice does not extend to punishing violations of substantive law when such violations do not impair the dignity or functioning of the court. Moreover, if the Legislature has established a specific penalty for a transgression, courts may not impose a contempt punishment that is inconsistent with the legislative scheme [*In re Nolan W. (2009) 45 Cal. 4th 1217, 1230-1231, 91 Cal. Rptr. 3d 140, 203 P.3d 454]* . For example, reunification services in juvenile dependency proceedings are voluntary and cannot be forced on an unwilling or indifferent parent; the legislative scheme contemplates that the ultimate penalty for a parent's failure to satisfy a requirement of a reunification plan is the loss of parental rights [*see, e.g., Welf. & Inst. Code §§ 361.5(a)(2), 366.21(e),(f), 366.22(a), 366.26*]. Therefore, a juvenile court may not use its contempt power to incarcerate a parent solely for the failure to comply with an order to participate in a voluntary reunification plan [*In re Nolan W. (2009) 45 Cal. 4th 1217, 1233-1238, 91 Cal. Rptr. 3d 140, 203 P.3d 454* (use of juvenile court's contempt power to incarcerate parent who fails to satisfy reunification program requirement is inconsistent with legislative scheme and therefore beyond court's power)].

An attorney may be held in contempt for a failure to appear in court if aware of an order requiring the attorney's appearance in court, and if the attorney is able to appear, but knowingly and intentionally does not appear [*In re Aguilar (2004) 34 Cal. 4th 386, 389-392, 18 Cal. Rptr. 3d 874, 97 P.3d 815* (termination of individual attorney's employment with law firm was not sufficient excuse for failure to appear at oral argument before Supreme Court or to notify Court that he would not be appearing, even though firm, not individual attorney, was client's formal attorney of record)].

However, no contempt of court is committed unless the underlying order is valid and enforceable at the time of any acts alleged to be in defiance of it [*In re Blaze (1969) 271 Cal. App. 2d 210, 212, 76 Cal. Rptr. 551]* . In one case, for example, the trial court held a party in contempt for disobediance of a judgment based on a settlement agreement. However, the purported contemnor had not personally signed the underlying settlement agreement as required by *Code Civ. Proc. § 664.6*. The court of appeal therefore held that the judgment confirming the settlement agreement was void and unforceable, and consequently annulled the contempt order [*Davidson v. Superior Court (1999) 70 Cal. App. 4th 514, 517-518, 82 Cal. Rptr. 2d 739]* .

In addition, the order must be definitive or disobedience of it cannot be punished as a contempt [*Ketscher v. Superior Court (1970) 9 Cal. App. 3d 601, 605, 88 Cal. Rptr. 357* ; *see Board of Supervisors v. Superior Court (1995) 33 Cal. App. 4th 1724, 1737, 39 Cal. Rptr. 2d 906* (order must be specific and narrowly drawn); *see also § 135.13[3][b]*].

Also, the alleged contemner's notice or knowledge of the order he or she is charged with violating is a jurisdictional prerequisite to a finding of contempt. If the contemner's counsel was present in court when the order was made and was thereafter served with the formal order, the court may infer that the contemner had notice of the order [*In re Ivey (2000) 85 Cal. App. 4th 793, 804-805, 102 Cal. Rptr. 2d 447]* .

Finally, to be held in contempt, the person subject to the order must have had the ability to comply with it [*see Hicks v. Feiock (1988) 485 U.S. 624, 638 n.9, 108 S. Ct. 1423, 99 L. Ed. 2d 721* ; *In re Cassil (1995) 37 Cal. App. 4th 1081, 1087, 44 Cal. Rptr. 2d 267* ; *see* further discussion in [b], *below*, and in *§ 135.13[3][b][ii]*].

Aside from the contempt proceedings, a judicial officer has the power to impose money sanctions, not exceeding $1,500, for a violation of a lawful court order without good cause or substantial justification [*Code Civ. Proc. § 177.5*; *see* Ch. 372, *Motions and Order*].

[b] Noncompliance With Order for Child Support

Noncompliance with an order of a court of competent jurisdiction compelling a parent to furnish support or necessary food, clothing, shelter, medical attendance, or other remedial care for his or her child may constitute contempt [*Code Civ. Proc. § 1209.5*]. Prima facie evidence of such contempt of court is shown by proof that the order was made, filed, and served on the parent or that the parent was present in court at the time the order was pronounced and by proof of noncompliance with the order [*Code Civ. Proc. § 1209.5*]. Once a contempt is proved, any excuse or justification, such as inability to pay, is a matter of defense [*Moss v. Superior Court (1998) 17 Cal. 4th 396, 425, 71 Cal. Rptr. 2d 215, 950 P.2d 59* (disapproving contrary statement in *In re Feiock (1989) 215 Cal. App. 3d 141, 147, 263 Cal. Rptr. 437*); *see also § 135.13[3][b][ii]*]. Similar principles apply to other family law orders in which the ability to pay has already been determined. Thus, for example, if an order to pay attorneys' fees in conjunction with a child-custody and support proceeding includes an implied determination of the ability to pay, the ability to pay will not be an element of the charge of contempt [*In re Ivey (2000) 85 Cal. App. 4th 793, 798-802, 102 Cal. Rptr. 2d 447* (longstanding California precedent applies principles of *Code Civ. Proc§ 1209.5* to family law orders other than support orders)].

The United States Supreme Court held that *Code Civ. Proc. § 1209.5* is consititutional only if the contempt proceeding is *civil*, rather than criminal, in nature [*Hicks v. Feiock (1988) 485 U.S. 624, 637-638, 108 S. Ct. 1423, 99 L. Ed. 2d*

721] . For purposes of federal due process, a contempt proceeding is civil in nature when the penalty provided is conditional and specifically designed to compel performance of some act; the proceeding is criminal in nature when the penalty is unconditional andexclusively punitive in character [*Hicks v. Feiock (1988) 485 U.S. 624, 631-636, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* . For discussion of how the state courts have characterized civil and criminal contempt proceedings, see *§ 135.12*.

For discussion, procedures, and forms for use in contempt proceedings with respect to enforcement of court orders and judgments in family law matters in general and with child support orders in particular, see Ch. 258, *Family Law Enforcement* .

[c] Reentry on Property After Judicial Ejectment

Every person dispossessed or ejected from real property by the judgment or process of a court of competent jurisdiction who, without having the right to do so, reenters or takes possession of the real property, or induces or procures any other person, without the right to do so, or aids and abets that person is guilty of a contempt of the court in which the judgment was rendered or from which the process issued. On conviction for contempt, the court must immediately issue an alias process directed to the proper officer requiring him or her to restore possession to the party entitled under the original judgment or process or to the party's lessee, grantee, or successor in interest [*Code Civ. Proc. § 1210*].

No appeal from the order directing the issuance of an alias writ of possession stays its execution unless a written undertaking is executed by the appellant to the effect that the appellant will not commit, or suffer to be committed, any waste on the property and, if the order is affirmed or the appeal dismissed, that the appellant will pay the value of the use and occupation of the property from the time of unlawful reentry until the delivery of possession pursuant to the judgment or order. The value of the appellant's use and occupation of the property may not exceed a sum fixed by the judge of the court in which the order for the alias writ was made and must be specified in the undertaking [*Code Civ. Proc. § 1210*]. The undertaking must be executed by two or more sufficient personal sureties, by one sufficient admitted surety insurer, or by any combination of sufficient personal sureties and admitted surety insurers [*see Code Civ. Proc. § 995.310*]. The requirement that the undertaking be in writing is now contained in *Code Civ. Proc. § 995.320(a)*.

For a discussion of bonds and undertakings and related forms, see *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.40* et seq. For discussion, procedures, and forms for use in ejectment proceedings, see Ch. 241, *Ejectment* .

[6] Conduct Involving Witnesses

Unlawfully detaining a witness or party to an action while he or she is going to, remaining at, or returning from the court where the action is on the calendar for trial constitutes a contempt [*Code Civ. Proc. § 1209(a)(7)*]. Disobedience of a subpoena duly served or refusing to be sworn or answer as a witness constitutes a contempt [*Code Civ. Proc. § 1209(a)(9)*]. For discussion, procedures, and forms for use in deposing witnesses, see Ch. 193, *Discovery: Depositions* .

[7] Conduct Involving Jurors

When summoned as a juror in a court, neglecting to attend or serve as such, improperly conversing with a party to the action to be tried in that court or with any other person in relation to the merits of the action, or receiving a communication from a party or other person in respect to an action to be tried without immediately disclosing the communication to the court constitutes a contempt [*Code Civ. Proc. § 1209(a)(10)*]. For discussion and forms relating to juror conduct, see Ch. 322, *Juries and Verdicts* .

[8] Disobedience of Superior Tribunal

Disobedience by an inferior tribunal, magistrate, or officer of the lawful judgment, order, or process of a superior court or proceeding in an action or special proceeding contrary to law after the action or special proceeding is removed from

the jurisdiction of the inferior tribunal, magistrate, or officer constitutes a contempt [*Code Civ. Proc. § 1209(a)(11)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal ContemptFamily LawChild SupportObligationsEnforcementContemptTortsIntentional TortsAbuse of ProcessGeneral Overview

California Forms of Pleading and Practice--Annotated

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§ 135.15 Conduct Constituting Misdemeanor Contempt

[1] In General

Every person guilty of any contempt of the following kinds is guilty of a misdemeanor [*Penal Code § 166(a)*]:

- Disorderly, contemptuous, or insolent behavior committed during the sitting of a court of justice in the immediate view and presence of the court and directly tending to interrupt its proceedings or to impair the respect due to its authority [*Penal Code § 166(a)(1)*].

- Disorderly, contemptuous, or insolent behavior committed in the presence of a referee while engaged in a trial or hearing pursuant to a court order, in the presence of a jury while sitting for the trial of a cause, or on an inquest or other proceeding authorized by law [*Penal Code § 166(a)(2)*].

- Any breach of the peace, noise, or other disturbance directly tending to interrupt the proceedings of a court [*Penal Code § 166(a)(3)*].

- Willful disobedience of the terms as written of any process or court order or out-of-state court order, lawfully issued by any court, including orders pending trial [*Penal Code § 166(a)(4)*; *see also* [2]-[5] *below*].

- Resistance willfully offered by any person to the lawful order or process of any court [*Penal Code § 166(a)(5)*].

- The contumacious and unlawful refusal of any person to be sworn as a witness; or, when so sworn, the like refusal to answer any material question [*Penal Code § 166(a)(6)*].

- The publication of a false or grossly inaccurate report of the proceedings of any court [*Penal Code § 166(a)(7)*].

- Presenting to any court having power to pass sentence on any prisoner under conviction, or to any member of the court, any affidavit or testimony or representation of any kind, verbal or written, in aggravation or mitigation of the punishment to be imposed on the prisoner, except as provided in the Penal Code [*Penal Code § 166(a)(8)*].

Penal Code § 166(b)-(e) and *Penal Code § 273.6* provide for specific additional punishment for disobedience of specified protective orders [*see* discussion in [2]-[5], *below*].

[2] Violation of Stay-Away Order With Previous Conviction for Stalking

Any person who is guilty of contempt of court under *Penal Code § 166(a)(4)* (willful disobedience of process or court order, *see* [1], *above*) by willfully contacting a victim either directly or by phone or mail, and who has been previously convicted of a violation of *Penal Code § 646.9* (stalking) is subject to imprisonment in a county jail for up to one year, a fine of $5,000, or both [*Penal Code § 166(b)(1)*; *see also Penal Code § 166(b)(2), (3)* (each contact a separate violation and incarceration during contact not a defense)].

[3] Violation of Protective Order in Criminal Proceeding Involving Domestic Violence

Any willful and knowing violation of certain protective orders or stay-away court orders, when the order is issued pursuant to *Penal Code § 136.2* (intimidation or dissuasion of witness) in a pending criminal proceeding involving domestic violence, or is issued as a condition of probation after a conviction in such a proceeding or in one involving elder or dependent adult abuse, constitutes contempt of court and a misdemeanor punishable by imprisonment in the county jail, fine, or both [*Penal Code § 166(c)(1)*; *see also Penal Code § 166(c)(2), (4), (e)* (additional provisions for punishment); *Penal Code § 382* (defining elder or dependent adult abuse); *Penal Code § 13700* (defining domestic violence)]. The foregoing punishments also apply to the willful and knowing violation of any of the following orders [*Penal Code § 166(c)(1), (3)*]:

- Any order issued pursuant to *Fam. Code § 6320* or *6389*.

- An order excluding one party from the family dwelling or from the dwelling of the other.

- An order enjoining a party from specified behavior that the court determined was necessary to effectuate the orders described in paragraph *Penal Code § 166(c)(1)*.

For further discussion, see Ch. 293, *Harassment and Domestic Violence* , and *California Criminal Defense Practice, § 142.11* (Matthew Bender).

[4] Violation of Order Prohibiting Possession or Ownership of Firearm

Every person who owns, possesses, purchases, or receives a firearm is subject to punishment under the provisions of *Penal Code § 12021(g)* [*Penal Code § 166(d)(1)*] if the person knows that these acts are prohibited by:

- A temporary restraining order or injunction issued pursuant to *Code Civ. Proc. § 527.6* or *527.8* (harassment and injunctive relief by employer against person who threatens or harms employee, respectively) issued against that person;

- A protective order as defined in *Fam. Code § 6218* (domestic violence and related matters), or issued pursuant to *Penal Code § 136.2* (intimidation or dissuasion of witness) or *646.91* (stalking); or

- A protective order issued pursuant to *Welf. & Inst. Code § 15657.03* (abuse of elder or dependent adult).

Every person subject to any of these protective orders may not be prosecuted under *Penal Code § 166* for owning, possessing, purchasing, or receiving a firearm to the extent that firearm is granted an exemption pursuant to *Family Code § 6389(h)* (particular firearm necessary as condition of continued employment) [*Penal Code § 166(d)(2)*].

For further discussion, see Ch. 293, *Harassment and Domestic Violence* , and *California Criminal Defense Practice, § 142.11* (Matthew Bender).

[5] Violation of Protective Order or Injunction Relating to Domestic Violence, Harassment, Threat to Employee, and Elder Abuse

Any intentional and knowing violation of any of the following orders is a misdemeanor punishable by a fine, or by imprisonment in a county jail, or both [*Penal Code § 273.6(a)*; *see Penal Code § 273.6(b)-(e)* (imprisonment for physical injury and increased penalties for subsequent convictions)]:

- A protective order, as defined in *Fam. Code § 6218* (concerning domestic violence and related matters).

- An order issued pursuant to *Code Civ. Proc. § 527.6* (concerning harassment).

- An order issued pursuant to *Code Civ. Proc. § 527.8* (concerning injunctive relief by an employer against a person who threatens or harms an employee).

- An order issued pursuant to *Code Civ. Proc. § 527.85* (concerning injunctive relief obtained by a private post secondary educational institution against a person who threatens or harms a student).

- An order issued pursuant to *Welf. & Inst. Code § 15657.03* (concerning abuse of elders and dependent adults).

For further discussion, see Ch. 293, *Harassment and Domestic Violence* , and *California Criminal Defense Practice, § 142.11* (Matthew Bender).

[6] Civil Liability as Not Precluding Criminal Liability

A criminal act of contempt [*see Penal Code § 166*] is no less punishable as a crime because it is also declared to be punishable as a contempt under *Code Civ. Proc. §§ 1218* and *1219* [*Penal Code § 657*]. However, payment of a fine or imprisonmentfor a contempt may mitigate the punishment to be imposed on a person convicted on indictment for the act adjudged to be a contempt [*Penal Code § 658*].

[7] Criminal and Misdemeanor Contempt

[a] Distinguished

Apart from the distinction between civil and criminal contempt arising under *Code Civ. Proc. § 1209*, *Penal Code § 166* describes certain contemptuous conduct as constituting a misdemeanor [*but see Penal Code § 166(c)(4), 273.6(d), (e)* (potential increased penalties for second or subsequent conviction of specified protective orders or injuctions)]. Thus, the term criminal contempt may refer either to a punitive contempt under *Code Civ. Proc. § 1209 et seq.* [*see In re Morris (1924) 194 Cal. 63, 67, 227 P. 914]* or to a contempt arising under *Penal Code § 166*. For the purpose of clarity, this chapter refers to criminal contempt as a contempt arising under *Code Civ. Proc. § 1209* and misdemeanor contempt

as a contempt arising under *Penal Code § 166*. For a discussion of conduct constituting misdemeanor contempt, see *§ 135.15*.

[b] Distinct Methods of Procedure

Civil and criminal contempts arising under *Code Civ. Proc. § 1209* and misdemeanor contempts arising under *Penal Code § 166* are the subjects of two distinct methods of procedure [*In re Application of Roth (1934) 3 Cal. App. 2d 226, 229]* . A violation under *Penal Code § 166* is a misdemeanor and, therefore, is prosecuted in the same manner as other misdemeanors [*In re McKinney (1968) 70 Cal. 2d 8, 14, 73 Cal. Rptr. 580, 447 P.2d 972* (prosecution for misdemeanor contempt improper in superior court when superior court lacks power to hear misdemeanors under Penal Code); *but see Penal Code § 166(c)(4), 273.6(d), (e)* (potential increased penalties forsecond or subsequent conviction of specified protective orders or injuctions)]. For this reason, proceedings under *Penal Code § 166* are not subject to the procedures prescribed by *Code Civ. Proc. § 1209 et seq.* For example, the affidavit requirements of *Code Civ. Proc. § 1211* are inapplicable to complaints charging misdemeanor contempt under *Penal Code § 166* [*People v. Saffel (1946) 168 P.2d 497]* . In addition, in contrast to persons prosecuted for contempt under the Code of Civil Procedure, persons prosecuted for contempt under *Penal Code § 166* have a state constitutional and statutory right to a jury trial, and this right also applies to a contempt proceeding under *Penal Code § 11229* (Red Light Abatement Law) [*Mitchell v. Superior Court (1989) 49 Cal. 3d 1230, 1240-1241, 265 Cal. Rptr. 144, 783 P.2d 731]* . Because civil and criminal proceedings have different procedural safeguards, a district attorney may not attempt to transform criminal proceedings under *Penal Code § 166* into a prosecution for contempt under *Code Civ. Proc. § 1209 et seq.* since the alleged contemners would thereby lose their right to trial by jury [*Safer v. Superior Court (1975) 15 Cal. 3d 230, 241, 124 Cal. Rptr. 174, 540 P.2d 14]* .

In the exercise of prosecutorial discretion, a prosecutor has discretion to charge a defendant with a more general lesser offense even when there is a more specific greater offense that might embrace the facts of the case. Hence, a prosecutor may charge a contempt under the Code of Civil Procedure, to which there is no right to jury trial, which could also have been prosecuted under the Penal Code, to which there is a right to trial by jury. But due process requires the prosecution to afford the defendant fair notice of the nature of the penalties and proceedings he or she faces by indicating, in the declarations filed initiating the contempt proceeding, the jurisdictional basis for the action [*Mitchell v. Superior Court (1989) 49 Cal. 3d 1230, 1251-1252, 265 Cal. Rptr. 144, 783 P.2d 731* (rejecting "suggestive dictum" to the contrary in *Safer v. Superior Court (1975) 15 Cal. 3d 230, 241, 124 Cal. Rptr. 174, 540 P.2d 14 , above*)].

[c] Challenging Validity of Basis of Misdemeanor Contempt

When prosecution of misdemeanor contempt under *Penal Code § 166* arises out of an alleged violation of an order issued by a superior court, there is no jurisdictional impediment to the misdemeanor defendant challenging the validity of the superior court's order in the misdemeanor prosecution [*People v. Gonzalez (1996) 12 Cal. 4th 804, 50 Cal. Rptr. 2d 74, 910 P.2d 1366]* . In *Gonzalez* the superior court had issued an injunction in a civil nuisance suit which purported to restrain defendant and others from engaging in specified, allegedly gang related, activities. Defendant was then charged with misdemeanor contempt for failure to comply with the injunction. The Supreme Court recognized defendant's right to collaterally attack the constitutionality of the injunction, reasoning that the only acts punishable as contempt under *Penal Code § 166* are "willful disobedience of any process or order *lawfully issued* by any court" and that a void court order cannot be the basis for a valid contempt judgment [*People v. Gonzalez (1996) 12 Cal. 4th 804, 816-817, 50 Cal. Rptr. 2d 74, 910 P.2d 1366]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal Contempt

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§ 135.16 Criminal Nature of Contempt Proceedings

[1] Proceedings Under Code Civ. Proc. §§ 1209-1222

A contempt proceeding under *Code Civ. Proc. §§ 1209-1222* is neither a civil action [*Freeman v. Superior Court (1955) 44 Cal. 2d 533, 536, 282 P.2d 857]* nor a strictly criminal action [*Bridges v. Superior Court (1939) 14 Cal. 2d 464, 477, 94 P.2d 983* (*rev'd on other grounds Bridges v. California (1941) 314 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192*)]. Rather, a contempt proceeding is a special proceeding of a criminal nature [*Pacific Tel. & Tel. Co. v. Superior Court (1968) 265 Cal. App. 2d 370, 371, 72 Cal. Rptr. 177]* and the constitutional rights of the accused must be observed [*In re Martin (1977) 71 Cal. App. 3d 472, 480, 139 Cal. Rptr. 451* (order of contempt annulled when trier of fact at contempt hearing acted as adversary to accused, thus denying accused due process of law)]. As in any criminal proceeding, no presumptions are indulged in to aid the sufficiency of the affidavit complaining of the alleged contemner [*Phillips v. Superior Court (1943) 22 Cal. 2d 256, 257, 137 P.2d 838* (affidavit in indirect contempt proceeding defective for failing to allege that accused contemner had requisite knowledge of order at time he violated it)], although a court may order or permit an insufficient or defective affidavit to be amended [*Code Civ. Proc. § 1211.5*; *Mossman v. Superior Court (1972) 22 Cal. App. 3d 706, 709-710, 99 Cal. Rptr. 638]* . Similarly, the accused contemner is entitled to a presumption of innocence and cannot be compelled to testify. Finally, a mere preponderance of evidence is insufficient; the contempt must be proved beyond a reasonable doubt [*In re Martin (1977) 71 Cal. App. 3d 472, 480, 139 Cal. Rptr. 451]* .

[2] No Right to Jury Trial

In a contempt proceeding under *Code Civ. Proc. § 1209 et seq.*, although certain constitutional rights of the accused must be observed [*see In re Martin (1977) 71 Cal. App. 3d 472, 480, 139 Cal. Rptr. 451]* , the accused contemner has no right to have the contempt matter heard before a jury [*In re Morelli (1970) 11 Cal. App. 3d 819, 850, 91 Cal. Rptr. 72* (writ of habeas corpus denied to alleged contemner asserting right to jury trial)]. Proceedings in a contempt proceeding under *Code Civ. Proc. §§ 1209-1222* are not within the constitutional requirements guaranteeing trial by jury [*Mitchell v. Superior Court (1989) 49 Cal. 3d 1230, 1240, 265 Cal. Rptr. 144, 783 P.2d 731* ; *Bridges v. Superior Court (1939) 14 Cal. 2d 464, 477, 94 P.2d 983* (*rev'd on other grounds Bridges v. California (1941) 314 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192*); *United Farm Workers, AFL-CIO v. Superior Court (1968) 265 Cal. App. 2d*

212, 214-215, 71 Cal. Rptr. 513 (denying writ of prohibition sought to prevent superior court from civil contempt matter in absence of jury)], and a trial court lacks the discretion to grant a jury trial in such a contempt proceeding [*Pacific Tel. & Tel. Co. v. Superior Court (1968) 265 Cal. App. 2d 370, 375, 72 Cal. Rptr. 177]* .

An indigent contemnor has a right to have counsel appointed as a matter of due process if the contemnor may lose his or her physical liberty as a result of the contempt proceeding [*County of Santa Clara v. Superior Court (1992) 2 Cal. App. 4th 1686, 1693-1694, 5 Cal. Rptr. 2d 7]* .

[3] No Right to Different Tribunal

[a] In General

The contempt proceeding constitutes a continuation of the action from which it emanates [*McClenny v. Superior Court (1964) 60 Cal. 2d 677, 687, 36 Cal. Rptr. 459, 388 P.2d 691]* . Therefore, unlike a proceeding for misdemeanor contempt under *Penal Code § 166* [*In re McKinney (1968) 70 Cal. 2d 8, 13-14, 73 Cal. Rptr. 580, 447 P.2d 972]* , the trial of a contempt proceeding under *Code Civ. Proc. §§ 1209-1222* is before the court in which the proceeding giving rise to the alleged contempt is pending [*Pacific Tel. & Tel. Co. v. Superior Court (1968) 265 Cal. App. 2d 370, 372, 72 Cal. Rptr. 177]* .

[b] Exception When Judge Personally Embroiled

In a direct contempt, when a judge has become so personally embroiled as to make him or her unfit to sit in judgment on the contempt charge, as a matter of due process the judge must refer the matter of adjudication of the alleged contempt to another judge [*In re Buckley (1973) 10 Cal. 3d 237, 255-257, 110 Cal. Rptr. 121, 514 P.2d 1201* , *cert. denied,* *418 U.S. 910, 94 S. Ct. 3202, 41 L. Ed. 2d 1156 (1974)* ; *see Code Civ. Proc. § 170.1(a)(6)* (disqualification of judge for bias)].

In the adjudication of a contempt proceeding justice must be fairly administered and must satisfy the appearance of justice. Therefore, whether a judge is personally embroiled may depend on both the nature of the alleged contemptuous conduct as well as the acts and statements of the judge in either responding to the conduct or in proceeding with the contempt charges [*see* *Offutt v. United States (1954) 348 U.S. 11, 14, 75 S. Ct. 11, 99 L. Ed. 11* ; *In re Buckley (1973) 10 Cal. 3d 237, 256, 257, 110 Cal. Rptr. 121, 514 P.2d 1201]* . When the conduct rises to the level of personal vilification, it may be considered as evidence of the trial court's probable personal embroilment. For example, if the attack on the integrity of the court consists of "fighting words," it carries a potential for bias which requires disqualification [*see* *In re Buckley (1973) 10 Cal. 3d 237, 256, 110 Cal. Rptr. 121, 514 P.2d 1201* (citing *Mayberry v. Pennsylvania (1971) 400 U.S. 455, 465-466, 91 S. Ct. 499, 27 L. Ed. 2d 532* , and noting *United States v. Meyer (D.C. Cir. 1972) 462 F.2d 827, 844* , in which attorney's accusation that judge had made up his mind on case before entering courtroom required disqualification)]. Similarly, statements made by the judge may indicate that he or she is unfit to sit in judgment on the alleged contemner. For example, the judge's excessive injection into counsel's examination of witnesses, and numerous comments to counsel, indicating at times hostility, even when made under provocation, may be sufficient evidence of bias and partiality to require the judge's disqualification [*see* *Offutt v. United States (1954) 348 U.S. 11, 16-17, 75 S. Ct. 11, 99 L. Ed. 11* (cited in *In re Buckley (1973) 10 Cal. 3d 237, 257, 110 Cal. Rptr. 121, 514 P.2d 1201*)].

However, even though the alleged contemner may have been disruptive, if the contemner did not attack the judge's integrity, the judge may hear the contempt charge [*In re Grossman (1972) 24 Cal. App. 3d 624, 632, 101 Cal. Rptr. 176]* . Similarly, the fact that the contemner was disrespectful does not require the judge to disqualify himself or herself [*see* *In re Buckley (1973) 10 Cal. 3d 237, 256-257, 110 Cal. Rptr. 121, 514 P.2d 1201* (finding judge's remarks, in interrupting petitioner's argument, that he did not know that petitioner went on forever demonstrated impatience but not personal embroilment, and remark attributing petitioner's delay to be result of petitioner's cunning, shrewd, and

deliberate attempt to thwart the court was accurate picture of petitioner's conduct and not example of bias)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral OverviewCivil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal ContemptCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptProceedingsCourt's Power to PunishCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptProceedingsSummary Proceedings

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§ 135.17 Newsreporters' Immunity From Contempt

To protect the free flow of information, news reporters and related news media personnel have an immunity from contempt for refusing to obey an order that seeks disclosure of either the source of published information or unpublished information obtained in the course of newsgathering. The immunity is both statutory and constitutional [*Cal. Const., art. I, § 2(b)*; *Evid. Code § 1070*], and is frequently referred to as the newspersons' "shield law."

For detailed discussion of this contempt immunity, see Ch. 191, *Discovery: Privileges and Other Discovery Limitations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal ContemptEvidencePrivilegesJournalist's PrivilegeGeneral Overview

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§ 135.18 Contempt Against County Government

Notwithstanding *Code Civ. Proc. § 1211* (summary punishment of contempt committed in court's presence) or any other law, no contempt order may be made affecting a county government or any member of its governing body acting under its constitutional or statutory authority unless the court finds either of the following [*Code Civ. Proc. § 128(f)*]:

(1) That the county has the resources necessary to comply with the court's order.

(2) That the county has the authority, without recourse to voter approval or without incurring additional indebtedness, to generate the additional resources necessary to comply with the court's order, that compliance with the court's order will not expose the county, any member of its governing body, or any other county officer to liability for failure to perform other constitutional or statutory duties, and that compliance with the court's order will not deprive the county of resources necessary for its reasonable support and maintenance.

The court's finding as to the existence of one of the above conditions must be based on a review of evidence presented at a hearing conducted for the purpose of determining contempt [*Code Civ. Proc. § 128(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal ContemptGovernmentsLocal GovernmentsClaims By & Against

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[Reserved]

§§ 135.19[Reserved]

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§ 135.30 Governing Statutes

Contempt proceedings are governed generally by *Code Civ. Proc. § 1209 et seq.*

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13-135 California Forms of Pleading and Practice--Annotated § 135.31

§ 135.31 Direct Contempt Proceedings

[1] In General

A contempt committed in the immediate view and presence of the court or the judge at chambers, known as a direct contempt, may be treated summarily [*Code Civ. Proc. § 1211(a)*; *Arthur v. Superior Court (1965) 62 Cal. 2d 404, 407, 42 Cal. Rptr. 441, 398 P.2d 777* ; *but see Hanson v. Superior Court (2001) 91 Cal. App. 4th 75, 82, 109 Cal. Rptr. 2d 782* (although contemptuous conduct committed in presence of judge is usually treated as direct contempt, judge may choose to use procedures for indirect contempt and defer contempt adjudication to another judge); *see also § 135.32* (indirect contempt proceedings)]. No hearing is required in adirect contempt proceeding [*DeGeorge v. Superior Court (1974) 40 Cal. App. 3d 305, 315, 114 Cal. Rptr. 860]* . Rather, all the requirements of due process are satisfied if the alleged contemner is confronted with the charge and given an opportunity to explain the purported contempt [*Arthur v. Superior Court (1965) 62 Cal. 2d 404, 409, 42 Cal. Rptr. 441, 398 P.2d 777]* .

A commissioner acting as a temporary judge pursuant to the parties' stipulation generally has full judicial power, including the inherent power to punish a direct contempt [*Fine v. Superior Court (2002) 97 Cal. App. 4th 651, 662-665, 119 Cal. Rptr. 2d 376]* .

[2] Timing

Direct contempt proceedings are described as "summary" [*see Code Civ. Proc. § 1211(a)*]. Thus, a judge has the authority summarily to convict and to sentence contemners for their acts of contempt as the contemptuous acts occur [*In re Siegel (1975) 45 Cal. App. 3d 843, 845, 120 Cal. Rptr. 8]* , when prompt punishment is imperative [*In re Grossman (1972) 24 Cal. App. 3d 624, 629, 101 Cal. Rptr. 176]* . In addition, a trial judge may conduct direct contempt proceedings in chambers following the allegedly contemptuous conduct, giving the accused contemner an opportunity to be heard in defense or mitigation, and suspending execution of any sentence imposed on the convicted contemner until the jury is discharged [*Hawk v. Superior Court (1974) 42 Cal. App. 3d 108, 131, 116 Cal. Rptr. 713]* . Finally, a judge may defer the adjudication of contempt and the imposition of punishment until the conclusion of a trial [*In re Grossman (1972) 24 Cal. App. 3d 624, 631, 101 Cal. Rptr. 176]* . However, where final and decisive action is deferred until a trial is concluded, an adjudication of contempt and sentencing without affording the accused contemner notice or

an opportunity to be heard may be violative of due process [*see In re Karagozian (1975) 44 Cal. App. 3d 516, 523, 118 Cal. Rptr. 793]* .

[3] Direct Contempt Order

A contempt that is committed in the immediate view and presence of either the court or the judge in chambers, known as a direct contempt, may be treated summarily. In such a case the order need only recite the facts that occurred in the court's or judge's immediate view and presence, state that the person proceeded against is thereby adjudged guilty of contempt, and prescribe the punishment [*Code Civ. Proc. § 1211(a)*; *Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 220-221, 96 Cal. Rptr. 2d 531, 999 P.2d 748]* .

The requirement that the direct contempt order recite the relevant facts is a jurisdictional requirement, and an order that lacks a sufficient factual recitation is void [*In re Ringgold (2006) 142 Cal. App. 4th 1001, 1011-1014, 48 Cal. Rptr. 3d 507]* . The facts recited must be sufficiently detailed to show, on their face, that the conduct constituted a legal contempt [*Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 221, 96 Cal. Rptr. 2d 531, 999 P.2d 748* ; *Chula v. Superior Court (1962) 57 Cal. 2d 199, 203, 18 Cal. Rptr. 507, 368 P.2d 107* ; *see Hanson v. Superior Court (2001) 91 Cal. App. 4th 75, 82, 109 Cal. Rptr. 2d 782* (if contemptuous conduct is committed in presence of one judge, who then defers contempt adjudication to another judge, contempt is indirect, and contempt order need not recite facts constituting contempt)]. When, for example, the conduct is not so outrageous as to be immediately recognized as an act of contempt, something more must be shown: the order must recite facts showing that the court or judge warned the person that further similar conduct would result in a citation for contempt, and the person nevertheless persisted in the conduct. Thus, a direct contempt order that is based on an attorney's rude, hostile, and disrespectful *manner* of speaking, as distinguished from the content of the speech, must include a recitation of the fact that the court gave such a warning and that the person directly disregarded it [*see Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 222-223, 96 Cal. Rptr. 2d 531, 999 P.2d 748* (also stating that, if an adjudication of contempt depends on the volume, accent, inflection, or tone of voice, or on manner, facial expression, or demeanor, the order of contempt must describe this conduct in detail)].

If the direct contempt is based on the violation of a prior order, the written direct contempt order must describe the prior order. As with other aspects of a written contempt order, the reference to the prior order must (1) recite the facts (what the prior order directed be done); (2) be stated with sufficient particularity that there is no need to refer to any extrinsic document in order to determine what was required by the prior order (except that a transcript may be attached to the order so as to put the contemptuous conduct in context); (3) be described with sufficient particularity to demonstrate on its face that the ensuing contemptuous conduct violated the prior order; and (4) not consist of the judge's conclusions regarding the prior order [*In re Ringgold (2006) 142 Cal. App. 4th 1001, 1014, 48 Cal. Rptr. 3d 507]* .

The order need not include the statutory formula that the conduct occurred "in the immediate view and presence" of the court or judge in chambers, so long as the facts recited in the order clearly show this to be the case [*Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 220-221, 96 Cal. Rptr. 2d 531, 999 P.2d 748* (expressly disapproving several court of appeal cases inconsistent with this holding)].

[4] Effect of Invalid Order

If an order punishing a party for direct contempt is found jurisdictionally invalid, contempt proceedings may not be reinstituted against that party [*In re Bloom (1986) 185 Cal. App. 3d 409, 412-413, 229 Cal. Rptr. 747* , *disapproved on another ground in Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 221, 96 Cal. Rptr. 2d 531, 999 P.2d 748]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal Contempt

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13-135 California Forms of Pleading and Practice--Annotated § 135.32

§ 135.32 Indirect Contempt Proceedings

[1] Definition

If a contempt did not occur in the immediate view and presence of the court or the judge at chambers, it is an indirect contempt [*Code Civ. Proc. § 1211(a)*; *see Hanson v. Superior Court (2001) 91 Cal. App. 4th 75, 82, 109 Cal. Rptr. 2d 782* (if contemptuous conduct is committed in presence of one judge but adjudicated by another judge, contempt is indirect because not committed in presence of judge who made contempt adjudication)]. For a discussion of what constitutes an indirect contempt, see the discussion in *§ 135.13[3]*.

A more elaborate procedure must be followed in an indirect contempt proceeding to notify the persons charged with contempt and to allow theman opportunity to be heard [*Arthur v. Superior Court (1965) 62 Cal. 2d 404, 407, 42 Cal. Rptr. 441, 398 P.2d 777]* .

[2] Commencing Indirect Contempt Proceeding

[a] Initiating Affidavit or Declaration

A proceeding in indirect contempt is commenced by the presentation of an affidavit or declaration under penalty of perjury under *Code Civ. Proc. § 2015.5* setting forth the alleged contemptuous acts to the court or judge [*Code Civ. Proc. § 1211(a)*; *In re Morelli (1970) 11 Cal. App. 3d 819, 830, 91 Cal. Rptr. 72]* . The affidavit or declaration is, in effect, a complaint framing the issues before the court. It is a jurisdictional prerequisite to the court's power to punish an indirect contempt [*In re Gould (1961) 195 Cal. App. 2d 172, 175, 15 Cal. Rptr. 326]* .

Code Civ. Proc. § 1211 does not require that one affidavit have all the essential facts in order to supply the facts constituting a contempt. Rather, several affidavits may be grouped, if necessary, to embrace all of the essential facts into one document or made part of a master affidavit or verified petition [*In re Roth (1934) 3 Cal. App. 2d 226, 236, 39 P.2d 490]* . The affidavit charging the contempt need be no more specific in its averments of the facts constituting the contempt than a complaint charging a crime needs to be [*In re Roth (1934) 3 Cal. App. 2d 226, 229, 39 P.2d 490]* . However, an affidavit based wholly on information and belief and without any authentic source for the information is

not an affidavit of the facts prescribed by *Code Civ. Proc. § 1211* [*In re Roth (1934) 3 Cal. App. 2d 226, 236, 39 P.2d 490]* and is insufficient to sustain a contempt conviction under the hearsay rule of evidence [*Freeman v. Superior Court (1955) 44 Cal. 2d 533, 537, 282 P.2d 857]* .

Code Civ. Proc. § 1211(b) provides that in family law matters, filing of the Judicial Council form entitled "Order to Show Cause and Affidavit for Contempt (Family Law)" [*see* Cal. Judicial Council Form FL-410] constitutes compliance with the affidavit requirement of *Code Civ. Proc. § 1211*. For a reproduction of this form, as well as a discussion of contempt in connection with family law proceedings, see Ch. 258, *Family Law Enforcement* .

For a general form of declaration initiating an indirect contempt proceeding, see *§ 135.80*.

[b] Statement of Facts by Judicial Officer

As an alternative to an affidavit or declaration under penalty of perjury, a statement of facts may be submitted by the referees, arbitrators, or other judicial officers concerning the alleged contempt [*Code Civ. Proc. § 1211(a)*]. For instance, a certificate of nonappearance of a witness prepared by a notary and shorthand reporter at a deposition meets the requirements for a statement of facts by a judicial officer under *Code Civ. Proc. § 1211(a)* [*In re Morelli (1970) 11 Cal. App. 3d 819, 829, 91 Cal. Rptr. 72]* .

[c] Affidavit Required for Issuance of Order or Warrant

Neither an order to show cause [*In re Rose (1949) 90 Cal. App. 2d 299, 304, 202 P.2d 1064]* nor a warrant of attachment [*In re Passalacqua (1954) 128 Cal. App. 2d 230, 231, 275 P.2d 160]* may be issued by a court [*see Code Civ. Proc. § 1212*] except on proper affidavits, or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*], setting forth the full facts of the alleged contempt [*Lund v. Superior Court (1964) 61 Cal. 2d 698, 713, 39 Cal. Rptr. 891, 394 P.2d 707]* . For a discussion of when orders to show cause and warrants of attachment and commitment are issued, see respectively [5] and [6], *below*.

[3] Construction, Amendment, and Review

At all stages of the contempt proceedings, the affidavit [*Code Civ. Proc. § 1211*], declaration [*Code Civ. Proc. § 2015.5*], or statement of facts [*Code Civ. Proc. § 1211*] may be construed, amended, and reviewed as follows:

- If no objection is made to the sufficiency of the affidavit, declaration, or statement during the hearing on the charges, jurisdiction of the subject matter does not depend on averments of the affidavit, declaration, or statement, but may be established by the facts found by the trial court to have been proved at the hearing. The court must cause the affidavit, declaration, or statement to be amended to conform to proof [*Code Civ. Proc. § 1211.5(a)*].

- The court may order or permit amendment of the affidavit, declaration, or statement for any defect or insufficiency at any stage of theproceedings. The trial of the person accused of contempt continues as if the affidavit, declaration, or statement had originally been filed as amended unless substantial rights of the accused would thereby be prejudiced. If such right would be prejudiced, the court may grant a reasonable postponement forno longer than the ends of justice require [*Code Civ. Proc. § 1211.5(b)*].

- No affidavit, declaration, or statement is insufficient and no trial, order, judgment, or other proceeding based thereon is affected by any defect or imperfection in matter of form which does not prejudice a substantial right of the person accused on the merits. No order or judgment of conviction for contempt will be set aside, nor will a new trial be granted, for an error in pleading in an affidavit, declaration, or statement unless, after examining the entire cause, including the evidence, the court is of

the opinion that the error complained of has resulted in a miscarriage of justice [*Code Civ. Proc. § 1211.5(c)*].

Code Civ. Proc. § 1211.5 abrogates the former rule which considered an affidavit, declaration, or statement fatally defective for failure to state one or more of the jurisdictional facts necessary to sustain a contempt order [*see Freeman v. Superior Court (1955) 44 Cal. 2d 533, 537, 282 P.2d 857]* or for other technicalities [*see Palm Springs Alpine Estates, Inc. v. Superior Court (1967) 255 Cal. App. 2d 883, 888, 63 Cal. Rptr. 618* (no verification of document purporting to be initiating affidavit)]. As a result of the enactment of § 1211.5 in 1970, affidavits, declarations, and statements are no longer considered fatally defective for these reasons. Rather, courts have greater flexibility in contempt proceedings with respect to the sufficiency of affidavits, declarations, and statements [*see Mossman v. Superior Court (1972) 22 Cal. App. 3d 706, 710, 713, 99 Cal. Rptr. 638]* . Thus, a trial court is not deprived of jurisdiction, nor are its proceedings considered void, as a result of an insufficient initiating affidavit. For instance, when contempt proceedings were initiated on the basis of an insufficient affidavit which failed to allege the contemner's notice or knowledge of the order he was charged with violating, the court of appeal issued a writ of prohibition to restrain the trial court from further proceedings against the contemner and applied *Code Civ. Proc. § 1211.5(b)* to permit amendment of the initiating affidavit [*Mossman v. Superior Court (1972) 22 Cal. App. 3d 706, 710, 713, 99 Cal. Rptr. 638]* .

[4] Opposing Affidavit

The accused contemner may submit an affidavit, or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*], in response to the affidavit initiating the contempt proceeding. The opposing affidavit, or counter affidavit [*Associated Lbr. & Box Co. v. Superior Court (1947) 79 Cal. App. 2d 577, 580, 180 P.2d 389]* , constitutes the answer or plea to the charge of contempt [*Bailey v. Superior Court (1956) 142 Cal. App. 2d 47, 53, 297 P.2d 795* (verified answer); *In re Application of Roth (1934) 3 Cal. App. 2d 226, 229*] and may raise the accused contemner's available defenses [*see Nutter v. Superior Court (1960) 183 Cal. App. 2d 72, 74, 6 Cal. Rptr. 404* (affidavit admits allegations of initiating affidavit and asserts defense that accused contemner unable to pay moneys required by court order due to accused contemner's insolvency)]. Together with the initiating affidavit, the opposing affidavit frames the issues to be tried [*Freeman v. Superior Court (1955) 44 Cal. 2d 533, 536, 282 P.2d 857]* .

Any question as to the adequacy of an order to show cause [*see Code Civ. Proc. § 1212*] and of the adequacy of the affidavit or declaration on which the order to show cause is based should be raised by an opposing affidavit or declaration [*Morelli v. Superior Court (1968) 262 Cal. App. 2d 262, 266, 68 Cal. Rptr. 572]* having the effect of a demurrer [*see Taylor v. Superior Court (1942) 20 Cal. 2d 244, 246, 125 P.2d 1]* .

[5] Order to Show Cause

An order to show cause [*Code Civ. Proc. § 1212*] is issued by the court after the initiating affidavit stating the facts constituting the contempt is presented to the court [*Arthur v. Superior Court (1965) 62 Cal. 2d 404, 408, 42 Cal. Rptr. 441, 398 P.2d 777]* . It is customary to issue the order to show cause to give the accused contemner notice of the charge of contempt and an opportunity to refute the charge before issuing a warrant for his or her arrest or commitment to custody [*see In re Rose (1949) 90 Cal. App. 2d 299, 304-305, 202 P.2d 1064]* .

The order to show cause acts as a summons to appear in court on a certain day and, as its name suggests, to show cause why the cited person should not be held in contempt. Unless the cited person has concealed himself or herself from the court, he or she must be personally served with the order to show cause and the supporting affidavit; otherwise, the court lacks jurisdiction to proceed [*Cedars-Sinai Imaging Med. Group v. Superior Court (2000) 83 Cal. App. 4th 1281, 1286-1287, 100 Cal. Rptr. 2d 320* (attorney's waiver, at hearing, of right to receive written notice of court's ruling or of further hearing date does not waive client's right to be personally served with order to show cause prior to hearing)].

For forms of order to show cause, see *§§ 135.81, 135.82*.

[6] Warrants of Attachment and Commitment

A bench warrant, or warrant of attachment, is a process issued by the court (from the "bench") for the attachment or arrest of a person in order to compel his or her attendance before the court to answer to a charge of contempt [*see Code Civ. Proc. § 1212*; *Silvagni, v. Superior Court (1958) 157 Cal. App. 2d 287, 290, 321 P.2d 15* (noting bench warrant is also used to compel attendance of witness who has failed to comply with subpoena)]. The court or judge may issue a warrant of attachment only on notice tothe accused contemner. This requirement is satisfied if the accused contemner is present in court when the order is made which he or she is accused of violating [*Ex parte Cottrell (1881) 59 Cal. 417, 418-419]* . Ordinarily, however, the trial court or judge will issue an order to show cause [*Ex parte Cottrell (1881) 59 Cal. 420, 421* ; *see Morelli v. Superior Court (1969) 1 Cal. 3d 328, 330, 82 Cal. Rptr. 375, 461 P.2d 655* (trial court issuedbench warrant following accused contemner's failure to appear at hearing on order to show cause why contemner would not be held in contempt for failure to obey subpoena duces tecum to appear for deposition)]. For an illustrative form of bench warrant, see *§ 135.83*.

As an alternative procedure, if the accused contemner has not been arrested previously by a warrant of attachment, a court or judge may grant a warrant of commitment to custody on notice or an order to show cause. However, a warrant of commitment to custody may not be issued without previous attachment to answer, notice, or an order to show cause [*Code Civ. Proc. § 1212*].

[7] Undertaking; Discharge on Undertaking

Whenever a warrant of attachment is issued pursuant to *Code Civ. Proc. § 1209 et seq.*, the court or judge must direct, by an endorsement on the warrant, that the person charged may be let to bail for his or her appearance, in an amount to be specified in the endorsement [*Code Civ. Proc. § 1213*]. Whenever a warrant of attachment is issued, the court or judge may direct, by an endorsement on the warrant, that the person charged may give an undertaking for that person's appearance. The amount of the undertaking must be specified in the endorsement [*Code Civ. Proc. § 1215*]. The undertaking must be in writing [*see Code Civ. Proc. § 995.320(a)*], and must be executed by two or more sufficient personal sureties, one sufficient admitted surety insurer, or by any combination of sufficient personal sureties and admitted surety insurers [*see Code Civ. Proc. § 995.310*]. For a discussion of bonds and undertakings and related forms, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[8] Execution of Warrant and Detention

On executing the warrant of attachment, the executing officer must keep the person in custody, bring him or her before the court or judge, and detain him or her until an order is made in the premises, unless the person arrested entitles himself or herself to be discharged pursuant to *Code Civ. Proc. § 1215* [*Code Civ. Proc. § 1214*].

[9] Return by Officer

The officer must return the warrant and undertaking, if any, received by him or her from the person arrested by the return day specified in the warrant [*Code Civ. Proc. § 1216*].

[10] Nonappearance of Accused Contemner After Arrest

When the warrant of attachment [*see Code Civ. Proc. § 1212*] has been returned by the officer [*see Code Civ. Proc. § 1216*] and the person arrested does not appear on the return day, the court or judge may order another warrant of attachment or may order the undertaking [*see Code Civ. Proc. § 1216*] to be enforced, or both. If the undertaking is enforced, the measure of damages in the action is the extent of the loss or injury sustained by the aggrieved party by

reason of the misconduct for which the warrant was issued [*Code Civ. Proc. § 1220*].

[11] Inability of Accused Contemner to Attend

Whenever an officer is required by the provisions of *Code Civ. Proc. § 1209 et seq.* to keep a person arrested on a warrrant of attachment in custody and to bring that person before a court or judge, that person's inability to attend, from illness or otherwise, is a sufficient excuse for not bringing him or her up. Furthermore, an officer may not confine a person arrested on a warrant of attachment in prison, or otherwise restrained of personal liberty, except insofar as may be necessary to secure that person's attendance [*Code Civ. Proc. § 1221*].

[12] Hearing

When the person arrested has been brought up or has appeared, the court must proceed to investigate the charge [*Code Civ. Proc. § 1217*]. The issues of fact on which the hearing must be had [*Lyon v. Superior Court (1968) 68 Cal. 2d 446, 452, 67 Cal. Rptr. 265, 439 P.2d 1]* to investigate the charge are framed by the respective affidavits [*see Code Civ. Proc. § 1211*] or declarations of the plaintiff and defendant which serve as pleadings [*Freeman v. Superior Court (1955) 44 Cal. 2d 533, 536, 282 P.2d 857]* . In addition, the court or judge must hear any answer that the accused contemner may make to the charge [*see Code Civ. Proc. § 1217*] and may take oral testimony [*Reifler v. Superior Court (1974) 39 Cal. App. 3d 479, 484, 114 Cal. Rptr. 356]* of witnesses for and against the person charged [*Code Civ. Proc. § 1217*]. For instance, the accused contemner has the opportunity to offer any legitimate excuse at the hearing [*Sorell v. Superior Court (1967) 248 Cal. App. 2d 157, 161, 56 Cal. Rptr. 222]* , such as financial inability to comply with an order of support, which constitutes a complete defense to a charge of contempt [*Nutter v. Superior Court (1960) 183 Cal. App. 2d 72, 75, 6 Cal. Rptr. 404]* .

The accused contemner is entitled to be heard by the same tribunal that is to pronounce judgment on him or her [*Marcus v. Workmen's Comp. Appeals Bd. (1973) 35 Cal. App. 3d 598, 605, 111 Cal. Rptr. 101* (order of contempt as annulled when appeals board pronounced judgment on basis of transcript of proceedings conducted by referee)]. Adjournment of the trial may be had from time to time if necessary [*Code Civ. Proc. § 1217*].

On the answer and evidence taken at the hearing [*see Code Civ. Proc. § 1217*], the court or judge must determine whether or not the person proceeded against is guilty of the contempt charged [*Code Civ. Proc. § 1218(a)*].

[13] Order Adjudging Indirect Contempt

In *Moss v. Superior Court (1998) 17 Cal. 4th 396, 71 Cal. Rptr. 2d 215, 950 P.2d59* , the Supreme Court disapproved the practice of using minute orders to set out a judgment of indirect contempt [*Moss v. Superior Court (1998) 17 Cal. 4th 396, 404 n.3, 71 Cal. Rptr. 2d 215, 950 P.2d 59* (relying, however, on *Reifler v. Superior Court (1974) 39 Cal. App. 3d 479, 114 Cal. Rptr. 356* , which, as discussed *below*, construed language that no longer appears in *Code Civ. Proc. § 1218*)]. Moreover, the Court noted that there is no jurisdictional reqirement that an indirect contempt judgment include the trial court's underlying factual findings. Nevertheless, to assist a reviewing court in determining if there is sufficient evidence to support such a judgment, a trial court should recite its factual findings either in the judgment itself or orally on the record [*Moss v. Superior Court (1998) 17 Cal. 4th 396, 404 n.3, 71 Cal. Rptr. 2d 215, 950 P.2d 59]* .

Former *Code Civ. Proc. § 1218*, first paragraph, required, in cases of indirect contempt, the entry of a "judgment" that included "the conviction, specifying particularly the offense" [*see, e.g., In re Jones (1975) 47 Cal. App. 3d 879, 881, 120 Cal. Rptr. 914* (construing former *Code Civ. Proc. § 1218*, first paragraph, and holding contempt order void for failure to specify offense particularly); *Reifler v. Superior Court (1974) 39 Cal. App. 3d 479, 484-485, 114 Cal. Rptr. 356* (construing former *Code Civ. Proc. § 1218*, first paragraph, to require that findings regarding indirect contempt be incorporated into a judgment)]. This language was removed, however, by an amendment enacted in 1977.

Currently, the relevant statutory provisions require, by implication only, that there be some order or judgment of indirect contempt that includes an adjudication that the contemnor is guilty of the contempt charged [*see Code Civ. Proc. § 1218(a)* and discussion in [12], *above*; *see also Code Civ. Proc. § 1222* (providing for the finality and conclusiveness of "[t]he judgment and orders of the court or judge, made in cases of contempt") and discussion in *§ 135.41*]. Thus, while there are express statutory requirements applicable to the making of direct contempt orders [*see Code Civ. Proc. § 1211(a)*; *see also § 135.31[3]*], there are no comparably explicit statutory requirements governing indirect contempt orders.

In light of the *Moss* opinion, although no longer explicitly required by *Code Civ. Proc. § 1218*, it is recommended that any party initiating indirect contempt proceedings seek to ensure that any subsequent judgment of contempt (1) is embodied in a formal order rather than in the trial court's minutes [*see Eldridge v. Superior Court (1989) 208 Cal. App. 3d 1350, 1354, 256 Cal. Rptr. 724* (distinguishing formal orders from minute orders)], and (2) is also supported by factual findings specifying the offense with particularity, which are either set out in the formal order itself or, alternatively, are included in the trial court's record following oral recitation.

For a form of proposed formal order adjudicating an indirect contempt, see *§ 135.84*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-135 California Forms of Pleading and Practice--Annotated § 135.33

§ 135.33 Punishment or Coercion of Contemner

[1] Punishment of Criminal Contemner

When a contemner is adjudged guilty of a criminal contempt, which consists of the omission to perform an act that is not possible for the contemner still to perform [*Morelli v. Superior Court (1969) 1 Cal. 3d 328, 332, 82 Cal. Rptr. 375, 461 P.2d 655* (inability of contemner to obey subpoena to testify in action which had terminated at time of contempt trial); *see Hicks v. Feiock (1988) 485 U.S. 624, 632-635, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* , the court or judge may impose a fine not exceeding $1,000, imprisonment not exceeding five days, or both [*Code Civ. Proc. § 1218(a)*], at its discretion [*see In re Siegel (1975) 45 Cal. App. 3d 843, 846, 120 Cal. Rptr. 8* (fine of $250 imposed on attorneys adjudged guilty of direct contempt, with execution of sentence suspended until the last day of trial, as well within discretion of court under *Code Civ. Proc. § 1218*)]. For a discussion of the distinction between criminal and civil contempt, see *§ 135.12*.

[2] Coercion of Civil Contemner

[a] By Incarceration

Except as provided in *Code Civ. Proc. § 1219(b)* (discussed under [4][b], [c], *below*), when a contemner is adjudged guilty of a civil contempt that consists of the omission to perform an act which is yet in the power of the person to perform, the court or judge may imprison that person until he or she has performed the act specified in the warrant of commitment [*Code Civ. Proc. § 1219(a)*; *see Hicks v. Feiock (1988) 485 U.S. 624, 631-632, 108 S. Ct. 1423, 99 L. Ed. 2d 721]* . For a discussion of the distinction between civil and criminal contempt, see *§ 135.12*.

Unlike a commitment under *Code Civ. Proc. § 1218(a)*, which authorizes commitment for a definite term, a commitment under *Code Civ. Proc. § 1219* is provisional; that is, a contemner may be imprisoned only until he or she performs an act that is in his or her power to perform [*County of Lake v. Superior Court (1977) 67 Cal. App. 3d 815, 817, 136 Cal. Rptr. 830]* . Therefore, an order adjudging a person guilty of contempt for failure to perform an act as directed by the court must state that it is yet withinthe power of the person sought to be imprisoned to perform the act [*Van Hoosear v. Railroad Comm'n (1922) 189 Cal. 228, 233, 207 P. 903* (mere recital that obedience to court order

willfully refused as insufficient)]. For instance, an order stating that the contemner had had the ability to comply with a restraining order and injunction is void for failing to include a finding that the act to be performed is presently within the power of the contemner to perform [*County of Lake v. Superior Court (1977) 67 Cal. App. 3d 815, 817, 136 Cal. Rptr. 830* (failure to conduct survey and conform salary schedule as required by local ordinance and to meet and confer with employees' respresentatives in good faith as ordered by court)].

[b] When Incarceration Becomes Penal

An incarceration under *Code Civ. Proc. § 1219* to compel compliance with a court order presents a special problem when disobedience of the order is based on an established moral principle, such as the contemner's promise to a news source to maintain confidentiality. When a court determines that a contemner's continued incarceration will not accomplish the purpose of the order, such as revealing the identity of the contemner's news source, the incarceration becomes penal in nature. Its duration is then limited by the five-day maximum sentence provided in *Code Civ. Proc. § 1218(a)* [*In re Farr (1974) 36 Cal. App. 3d 577, 584, 111 Cal. Rptr. 649* ; *see Evid. Code § 1070* (newsreporter's immunity from contempt)].

[3] Costs and Attorney's Fee Incurred by Initiating Party

A person who is subject to a court order as a party to the action, or any agent of that person, who is adjudged guilty of contempt for violating that court order generally may be ordered to pay to the party initiating the contempt proceeding the reasonable attorney's fees and costs incurred by that party in connection with the contempt proceeding [*Code Civ. Proc. § 1218(c)*; *see* *Goold v. Superior Court (2006) 145 Cal. App. 4th 1, 9-11, 51 Cal. Rptr. 3d 455* (second sentence of *Code Civ. Proc. § 1218(a)* authorizes court to award complainant attorney's fees and costs in all cases, including those involving violations of Family Code orders otherwise punishable under *Code Civ. Proc. § 1218(c)*)]. However, in a contempt action brought by a district attorney or city attorney against a party for failing to comply with a court order entered pursuant to the Domestic Violence Protection Act [*see Fam. Code § 6200 et seq.*], any attorney's fees and costs ordered by the court must be paid to the California Emergency Management Agency's account established for the purpose of funding domestic violence shelter service providers [*Code Civ. Proc. § 1218(d)*; *see Penal Code § 13823.15(f)* (funding for domestic violence shelter services)].

[4] Special Rules

[a] Probation Report Regarding Minor

In any case in which a contempt consists of the refusal of a minor under the age of 16 years to take the oath or to testify, before imposing any sanction for the contempt, the court must first refer the matter to theprobation officer in charge of matters coming before the juvenile court for a report and recommendation as to the appropriateness of the imposition of a sanction. The court must consider the report and recommendation in imposing a sanction in the case [*Code Civ. Proc. § 1219.5(a)*]. The court may, however, impose a sanction for contempt prior to receipt of the report and recommendation if the court enters a finding, supported by specific facts stated on the record, that the minor would be likely to flee if released before the receipt of the report and recommendation [*Code Civ. Proc. § 1219.5(c)*].

[b] Victims of Sexual Assault

Notwithstanding any other law, no court may imprison or otherwise confine or place in custody the victim of a sexual assault for contempt when the contempt consists of refusing to testify concerning that sexual assault [*Code Civ. Proc. § 1219(b)*]. Moreover, notwithstanding *Code Civ. Proc. § 1211* (summary punishment of contempt committed in court's presence) or any other law, if an order of contempt is made affecting the victim of sexual assault, when the contempt consists of refusing to testify concerning that sexual assault, the execution of any sentence is stayed pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of the court's order, violation of which is the basis for the contempt [*Code Civ. Proc. § 128(d)*].

For the purpose of these sections, "sexual assault" means any act made punishable by *Penal Code §§ 261, 262, 264.1, 285, 286, 288, 288a*, or *289* [*Code Civ. Proc. §§ 128(d), 1219(c)(1)*].

[c] Victims of Domestic Violence

Notwithstanding any other law, no court may imprison or otherwise confine or place in custody the victim of a domestic violence crime for contempt when the contempt consists of refusing to testify concerning that domestic violence crime [*Code Civ. Proc. § 1219(b)*]. Moreover, notwithstanding *Code Civ. Proc. § 1211* (summary punishment of contempt committed in court's presence) or any other law, if an order of contempt is made affecting the victim of domestic violence, if the contempt consists of refusing to testify concerning that domestic violence, the execution of any sentence is stayed pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of the court's order, a violation of which is the basis for the contempt [*Code Civ. Proc. § 128(e)*].

"Domestic violence" means abuse perpetrated against any of the following persons [*Code Civ. Proc. §§ 128(e), 1219(c)(2)*; *Fam. Code § 6211*]:

- A spouse or former spouse.
- A cohabitant or former cohabitant, as defined in *Fam. Code § 6209*.
- A person with whom the respondent is having or has had a dating or engagement relationship.
- A person with whom the respondent has had a child and the presumption applies that the male parent is the father of the child of the female parent under the Uniform Parentage Act (*Fam. Code § 7600 et seq.*).
- A child of a party or a child who is subject to an action under the Uniform Parentage Act and the presumption applies that the male parent is the father of the child to be protected.
- Any other person related by cosanguinity or affinity within the second degree.

For detailed discussion of the Domestic Violence Prevention Act (*Fam. Code § 6211 et seq.*), see Ch. 293, *Harassment and Domestic Violence* .

[d] Public Safety Employees

Notwithstanding *Code Civ. Proc. § 1211* (summary punishment of contempt committed in court's presence) or any other law, if an order of contempt is madeaffecting a public safety employee acting within the scope of employment for reason of the employee's failure to comply with a duly issued subpoena or subpoena duces tecum, the execution of any sentence must be stayed pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of the court's order on which the contempt is based [*Code Civ. Proc. §§ 128(c), 1209(d)*].

"Public safety employee" includes any peace officer, firefighter, paramedic, or any other employee of a public law enforcement agency whose duty is either to maintain official records or to analyze or present evidence for investigative or prosecutorial purposes [*Code Civ. Proc. §§ 128(c), 1209(d)*].

[e] Attorneys and Attorneys' Agents

Notwithstanding *Code Civ. Proc. § 1211* (summary punishment of contempt committed in court's presence) or any other

law, if an order of contempt is made affecting an attorney, his or her agent, investigator, or any person acting under the attorney's direction, in the preparation and conduct of any action or proceeding, the execution of any sentence must be stayed pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of the court's order, except for any conduct that is proscribed by *Bus. & Prof. Code § 6068(b)* relating to an attorney's duty to maintain respect due to courts and judicial officers [*Code Civ. Proc. §§ 128(b), 1209(c)*].

If the contemner is an attorney, and it appears that the contempt holding involves grounds warranting attorney discipline under the Business and Professions Code, the court may transmit a copy of the relevant minutes, final order, and transcript to the State Bar [*Bus. & Prof. Code § 6086.7*; *see In re Rubin (2001) 25 Cal. 4th 1176, 1179, 108 Cal. Rptr. 2d 593, 25 P.3d 1075]* .

[f] Orders Issued Under Family Code

In any court action in which a party is found in contempt of court for failure to comply with a court order pursuant to the Family Code, the court is required by statute to make an order imposing a penalty on the contemner that varies according to whether a prior finding of contempt has been made. On a first finding of contempt, the court must order the contemner to perform community service up to a specified number of hours, or be imprisoned up to that same number of hours, for each count of contempt. The penalties increase for second, third, or subsequent findings of contempt to require both imprisonment and community service up to a prescribed number of hours [*Code Civ. Proc. § 1218(c)(1)-(3)*]. The court must take parties' employment schedules into consideration when ordering community service or imprisonment, or both [*Code Civ. Proc. § 1218(c)(4)*].

In addition to mandatory community service or imprisonment, a party found in contempt for failing to comply with a court order under the Family Code may be ordered to pay to the party initiating the contempt proceeding the reasonable attorney's fees and costs incurred by that party in connection with the contempt proceeding [*Code Civ. Proc. § 1218(a)*; *Goold v. Superior Court (2006) 145 Cal. App. 4th 1, 9-11, 51 Cal. Rptr. 3d 455* (second sentence of *Code Civ. Proc. § 1218(a)* authorizes court to award complainant attorney's fees and costs in all cases, including those involving violations of Family Code orders otherwise punishable under *Code Civ. Proc. § 1218(c)*)].

A district attorney or city attorney may bring a contempt action against a party for failing to comply with a court order entered pursuant to the Domestic Violence Protection Act [*Code Civ. Proc. § 1218(d)*; *see Fam. Code § 6200 et seq.* (Domestic Violence Protection Act)].

If the contempt alleged is for failure to pay child, family, or spousal support, each month for which payment has not been made in full may be alleged as a separate count of contempt and punishment imposed for each count proven [*Code Civ. Proc. § 1218.5(a)*].

Special limitations periods apply with respect to commencing contempt actions in family law and related proceedings. If the contempt alleged is the failure to pay child, family, or spousal support, the limitations period for commencing the contempt action is three years from the date that the payment was due. If the action before the court is enforcement of another order under the Family Code, the limitations period for commencing a contempt action is two years from the time that the alleged contempt occurred [*Code Civ. Proc. § 1218.5(b)*].

No party who is in contempt of a court order or judgment in a dissolution of marriage, dissolution of domestic partnership, or legal separation action is permitted to enforce the order or judgment, by way of execution or otherwise, either in the same action or by way of a separate action, against the other party. This restriction does not affect or apply to the enforcement of spousal or child support orders [*Code Civ. Proc. § 1218(b)*].

For discussion and forms relating to the use of contempt to enforce orders and judgments under the Family Code, see Ch. 258, *Family Law Enforcement* .

Legal Topics:

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

§§ 135.34[Reserved]

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§ 135.40 Governing Statutes

The law governing the review of contempt proceedings is governed by *Code Civ. Proc. § 1222* (judgments and orders of contempt as final and conclusive) and by *Code Civ. Proc. §§ 1067-1077, 1107, 1108* (writs of review); *Penal Code § 1473 et seq.* (writs of habeas corpus); and *Code Civ. Proc. §§ 1088-1097, 1102-1105, 1107, 1108* (writs of prohibition).

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 135.41 Review of Order of Contempt

The judgment and orders of the court or judge in contempt cases are final, conclusive [*Code Civ. Proc. § 1222*], and not appealable [*Code Civ. Proc. §§ 904.1(a)(1)(B), 904.2(a)(2)* (judgment or order of contempt under *Code Civ. Proc. § 1222* not appealable); *see In re Buckley (1973) 10 Cal. 3d 237, 259, 110 Cal. Rptr. 121, 514 P.2d 1201* ; *Butler v. Butler (1967) 255 Cal. App. 2d 132, 135, 62 Cal. Rptr. 825]* .

While a contempt order is not appealable, it may be reviewed by a petition for a writof review (or writ of certiorari), habeas corpus, or prohibition [*see Mitchell v. Superior Court (1989) 49 Cal. 3d 1230, 1236, 265 Cal. Rptr. 144, 783 P.2d 731* ; *Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 764, 104 Cal. Rptr. 921* (writ of review); *In re Carvallo (1973) 29 Cal. App. 3d 983, 986, 105 Cal. Rptr. 925* (writ of habeas corpus); *Safer v. Superior Court (1975) 15 Cal. 3d 230, 235, 124 Cal. Rptr. 174, 540 P.2d 14* (writ of prohibition); *see also Code Civ. Proc. § 904.2(a)(2)* (limited civil case); *Code Civ. Proc. § 904.3* (writ review by court of appeal when appellate division of superior court has granted or denied petition for mandamus or prohibition in limited civil case)].

For a petition for writ of review, see *§ 135.90*. For a petition for writ of prohibition, see *§ 135.91*. For discussion, procedures, and forms for use in seeking writs of habeas corpus, see Ch. 292, *Habeas Corpus* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 135.42 Availability of Writs

The availability of any particular extraordinary writ to review contempt proceedings depends largely on the time when the alleged contemner seeks review. For example, a writ of review (certiorari) is granted by any court when an inferior tribunal, board, or officer exercising judicial functions exceeds the jurisdiction of that tribunal, board, or officer [*Code Civ. Proc. § 1068* (appellate division of superior court may grant writ in limited civil case)]. Thus, the writ is available to annul any *completed* contempt proceedings taken in excess of jurisdiction [*see Chula v. Superior Court (1962) 57 Cal. 2d 199, 204, 18 Cal. Rptr. 507, 368 P.2d 107* ; *Chase v. Superior Court (1962) 210 Cal. App. 2d 872, 878, 27 Cal. Rptr. 383]* .

A writ of habeas corpus is available to every person unlawfully imprisoned or restrained of liberty under any pretense whatever as a means of inquiring into the cause of the imprisonment or restraint [*Penal Code § 1473(a)*]. Thus, an alleged contemner may prosecute a writ of habeas corpus in order to seek release from custody after commitment for contempt based on, for example, either an alleged failure to comply with an order of injunction [*see In re Circosta (1963) 219 Cal. App. 2d 777, 779, 33 Cal. Rptr. 514]* or an alleged abuse of, or unlawful interference with, the proceedings of a court [*see In re Carvallo (1973) 29 Cal. App. 3d 983, 985-986, 105 Cal. Rptr. 925]* .

A writ of prohibition arrests the proceedings of any tribunal, corporation, board, or person exercising judicial injunctions when the proceedings are without, or in excess of, the jurisdiction of that tribunal, corporation, board, or person [*Code Civ. Proc. § 1102*]. Thus, the writ is available to restrain the commission of an act in a contempt proceeding which is in excess of the court's jurisdiction [*see Safer v. Superior Court (1975) 15 Cal. 3d 230, 242, 124 Cal. Rptr. 174, 540 P.2d 14* ; *State Bd. of Equalization v. Superior Court (1937) 9 Cal. 2d 252, 254, 70 P.2d 482]* . It may be sought, for example, in order to arrest a trial court's intended imposition of a contempt sentence [*Ketscher v. Superior Court (1970) 9 Cal. App. 3d 601, 604, 88 Cal. Rptr. 357* ; *see Nelson v. Superior Court (1937) 9 Cal. 2d 729, 730, 73 P.2d 232]* , or to arrest contempt proceedings prosecuted by way of a warrant of attachment against a person accused of disobeying a court order which was neither rendered nor entered in judgment [*Silvagni v. Superior Court (1958) 157 Cal. App. 2d 287, 290, 321 P.2d 15]* .

It should be noted that if a petition for a writ of prohibition is made at the appropriate time but the lower tribunal

completes the threatened judicial act before a decision is made on the petition, the reviewing court may treat the proceeding as one for a writ of review [*Chase v. Superior Court (1962) 210 Cal. App. 2d 872, 878, 27 Cal. Rptr. 383]* , provided a complete record of the lower court's proceedings, including a transcript of the evidence, is brought before the reviewing court [*Van Hoosear v. Railroad Comm'n (1922) 189 Cal. 228, 236, 207 P. 903* (annulling order of contempt by writ of review on petition for writ of prohibition when record warrants relief)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 135.43 Scope of Review

[1] Jurisdictional Basis for Issuance of Writs

Generally, writs of review, prohibition, and habeas corpus are jurisdictional writs [*see Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 762, 104 Cal. Rptr. 921* ; *In re Circosta (1963) 219 Cal. App. 2d 777, 784, 33 Cal. Rptr. 514]* . Lack of jurisdiction, in the broad sense of the word, establishes the ground for their issuance [*see Safer v. Superior Court (1975) 15 Cal. 3d 230, 242, 124 Cal. Rptr. 174, 540 P.2d 14]* . Thus, the scope of review on an application for a writ of review, prohibition, or habeas corpus by an alleged contemner is identical: (1) whether the act or omission charged against the contemner confers the court with jurisdiction to adjudicate the alleged contempt and (2) whether the jurisdictional act or omission is supported by the evidence [*In re Carvallo (1973) 29 Cal. App. 3d 983, 985, 986, 105 Cal. Rptr. 925* ; *see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 290, 109 P.2d 942* ; *In re Karpf (1970) 10 Cal. App. 3d 355, 364, 88 Cal. Rptr. 895]* .

[2] Examples of Jurisdictional Defects

Common jurisdictional defects, for which reviewing writs are available, include situations in which:

- A trial court finds a person guilty of contempt when there is a failure to show the contemner's notice or knowledge of the court order alleged to have been disobeyed (*§ 135.92*) [*see Phillips v. Superior Court (1943) 22 Cal. 2d 256, 257, 137 P.2d 838]* .

- An contempt order based on violation of a court order fails to show the contemner's ability to comply with that order (*§ 135.93*) [*see In re Liu (1969) 273 Cal. App. 2d 135, 140, 78 Cal. Rptr. 85]* , or the contemner's willful failure to comply with that order (*§ 135.94*) [*see Warner v. Superior Court (1954) 126 Cal. App. 2d 821, 824, 826, 273 P.2d 89]* .

- An order of contempt is insufficient for failure to recite the facts of a direct contempt sufficient particularity to show that the conduct constituted a legal contempt or was committed in the immediate view and presence of the court or judge in chambers (*§ 135.95*) [*Boysaw v. Superior Court (2000) 23*

Cal. 4th 215, 220-221 ;*see also* *Rosenstock v. Municipal Court (1976) 61 Cal. App. 3d 1, 7, 132 Cal. Rptr. 59]* .

- A trial court erroneously divests itself of jurisdiction to hear a contempt proceeding (*§ 135.96*) [*Taylor v. Superior Court (1942) 20 Cal. 2d 244, 246, 125 P.2d 1]* .

- No order or judgment was rendered or entered for which the contemner could be found in contempt [*Silvagni v. Superior Court (1958) 157 Cal. App. 2d 287, 290, 321 P.2d 15]* .

- The order which the contemner is alleged to have violated was void on its face [*Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 762, 104 Cal. Rptr. 921]* or is unconstitutionally overbroad (*§ 135.97*) [*Younger v. Smith (1973) 30 Cal. App. 3d 138, 150, 106 Cal. Rptr. 225]* .

- A contemner is found in contempt for nonappearance when that contemner's attorney appeared for him or her (*§ 135.98*) [*Morelli v. Superior Court (1968) 262 Cal. App. 2d 262, 270, 68 Cal. Rptr. 572]* .

[3] Examination of Entire Record

In reviewing the evidence supporting whether or not the court below had jurisdiction and whether or not such jurisdiction was exceeded, the reviewing court looks to the entire record of the contempt proceedings [*In re Circosta (1963) 219 Cal. App. 2d 777, 784, 33 Cal. Rptr. 514]* . The reviewing court indulges in no presumptions of regularity, validity, or sufficiency in support of the contempt proceedings [*In re Blaze (1969) 271 Cal. App. 2d 210, 211, 76 Cal. Rptr. 551* ; *In re Circosta (1963) 219 Cal. App. 2d 777, 785, 33 Cal. Rptr. 514]* and, because contempt proceedings are criminal in nature, strictly construes the order or judgment of contempt in favor of the accused contemner [*Andrews v. Superior Court (1960) 183 Cal. App. 2d 756, 759, 7 Cal. Rptr. 194]* .

However, with respect to the evidence supporting any particular jurisdictional act or omission in the contempt proceedings, the power to weigh the evidence rests solely with the trial court [*In re Buckley (1973) 10 Cal. 3d 237, 247, 110 Cal. Rptr. 121, 514 P.2d 1201]* . The reviewing court examines such evidence only for the purpose of ascertaining whether there was any substantial evidence before the trial court to sustain its jurisdiction [*Chula v. Superior Court (1962) 57 Cal. 2d 199, 204, 18 Cal. Rptr. 507, 368 P.2d 107]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§§ 135.44[Reserved]

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§ 135.50 State Constitution

Immunity from contempt for press and media for refusal to disclose source or unpublished information. *Cal. Const., art. I, § 2(b)*

Power of Public Utilities Commission to punish for contempt. *Cal. Const., art. XII, § 6*

Legal Topics:

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California Forms of Pleading and Practice--Annotated

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Volume 13: Conspiracy thru Conversion-Chs. 126-159
Chapter 135 CONTEMPT
PART III. RESEARCH GUIDE
A. Definitions and General Matters

13-135 California Forms of Pleading and Practice--Annotated § 135.51

§ 135.51 State Statutes

[1] Acts or Omissions Constituting Contempt

Acts or omissions constituting contempt. *Code Civ. Proc. § 1209*

Noncompliance with order for child support as contempt. *Code Civ. Proc. § 1209.5*

Reentry onto property after judicial ejectment as contempt. *Code Civ. Proc. § 1210*

[2] Conduct Constituting Misdemeanor Contempt

[a] In General

Penal Code as not affecting power conferred on any public body, tribunal, or officer to impose or inflict punishment for civil contempt. *Penal Code § 11*

Acts or omissions constituting misdemeanor contempt. *Penal Code § 166*

Officer's report to court of persons resisting process. *Penal Code § 724*

Witness granted immunity from prosecution as still able to be prosecuted or subjected to penalty for contempt. *Penal Code § 1324*

Disobedience of subpoena or refusal to be sworn or to testify as contempt. *Penal Code § 1331*

Disobedience of injunction or order expressly providing for abatement of unlawful liquor sales pursuant to *Penal Code §§ 11200-11207* as contempt. *Penal Code § 11205*

Disobedience of injunction or order expressly providing for abatement of house of prostitution pursuant to *Penal Code § 11225(a)* as contempt. *Penal Code § 11229*

Disobedience of injunction or order issued under *Penal Code § 11225(b)* and expressly providing for abatement of bathhouse that permits conduct that can transmit AIDS as contempt. *Penal Code § 11229*

Disobedience of injunction or order expressly providing for abatement of gambling ships pursuant to *Penal Code §§ 11300-11318* as contempt. *Penal Code § 11311*

[b] Civil Liability as Not Precluding Criminal Liability

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[a] Administrative Agencies

Acts constituting contempt of administrative agency in adjudicative proceeding. *Gov. Code § 11455.10*

Superior court proceedings to impose penalties for contempt of administrative agency. *Gov. Code § 11455.20*

[b] Agriculture

Noncompliance with court order made and served in proceedings to determine if neglected or abandoned crops constitute a public nuisance as contempt. *Food & Agric. Code § 5605*

Disobedience of order or subpoena of Director of Industrial Relations with respect to investigation of marketing of milk and dairy products as contempt. *Food & Agric. Code § 61477*

[c] County Government

Contempt orders affecting county government or any member of its governing body acting under constitutional or

statutory authority as allowed only on specified findings by court. *Code Civ. Proc. § 128(f)*

[d] Dissolution

Enforcement by contempt of judgment, order, or decree in dissolution of marriage. *Civ. Code § 4380* (repealed and replaced by *Fam. Code § 290* operative January 1, 1994)

[e] Law

Failure of subpoenaed person to appear, testify, or produce documents before a subpoenaing body of State Bar as contempt; proceedings in contempt. *Bus. & Prof. Code §§ 6050, 6051*

Unlawful practice of law as contempt; proceedings as governed by Code Civ. Proc. *§ 1209 et seq. Bus. & Prof. Code* § 6127

[f] Legislature

Proceedings by either house of Legislature to punish witness for contempt in neglecting or refusing to obey subpoena to appear before Senate, House, or committee thereof. *Gov. Code § 9405 et seq.*

[g] Mandate

Disobedience of peremptory writ of mandate by inferior tribunal, corporation, board, or person to which or to whom writ directed as contempt. *Code Civ. Proc. § 1097*

[h] Military Court

Confinement to jail by president of military court or summary court officer for disorderly, contemptuous, or insolent behavior in military court. *Mil. & Vet. Code § 468*

[i] Newsreporter's Immunity

Periodical and radio and television newsreporter's immunity from contempt. *Evid. Code § 1070*

[j] Probate

Court as having power to compel attendance of personal representative and to compel him or her to answer questions under oath concerning administration of estate. *Prob. Code § 8500(c)*

Court as having power to remove personal representative from office if he or she is found in contempt for disobeying order of court. *Prob. Code § 8505(a)*

Disobedience of order requiring answers to interrogatories or appearance for examination concerning property of decedent as grounds for contempt. *Prob. Code § 8870(a), (c)*

Disobedience of order requiring appearance to account for property of decedent as grounds for contempt. *Prob. Code §*

8873(c)

[k] Public Utilities Commission

Failure of railroad or transportation company to comply with tariffs or rates established by Public Utilities Commission as subject to being punished as contempt. *Pub. Util. Code § 728.5*

Failure of public utility, corporation, or person to comply with order, decision, rule, regulation, direction, demand, or requirement of Public Utilities Commission as punishable as contempt. *Pub. Util. Code § 2113*

Violation of order prohibiting operation of aircraft within state as contempt. *Pub. Util. Code § 21408*

[l] Reapplication for Contempt Order

Failure to show claimed new facts by affidavit on reapplication for order as contempt *Code Civ. Proc. § 1008*

[m] State Water Resources Control Board

Compelling attendance before State Water Resources Control Board. *Water Code § 1090*

Superior court as authorized to punish as contempt any failure of subpoenaed persons to appear, testify, or produce required evidence before State Water Resources Control Board. *Water Code § 1097*

[n] Supplemental Proceedings

Failure of person to appear for examination proceedings pursuant to *Code Civ. Proc. §§ 708.110-708.205* as contempt. *Code Civ. Proc. § 708.170*

[o] Witnesses

Disobedence by witness of subpoena or refusal by witness to be sworn or to answer as punishable as contempt by court issuing subpoena. *Code Civ. Proc. § 1991*

Disobedience by witness of subpoena requiring attendance at out-of-court deposition or refusal by witness to be sworn at deposition as contempt. *Code Civ. Proc. § 1991.1*

Disobedience of deposition subpoena either by failure to attend deposition or by refusal to be sworn as witness as subject to contempt. *Code Civ. Proc. §§ 2020(h), 2023(b)(5)* (*Code Civ. Proc. §§ 2020.240, 2023.030(e)* operative July 1, 2005)

Superior court as authorized on petition of Controller to compel compliance with subpoena issued by Controller to compel attendance at hearing to determine whether gift tax due. *Rev. & Tax. Code § 16534*

[p] Workers' Compensation Appeals Board

Superior court as authorized to enforce subpoenas of Workers' Compensation Appeals Board by contempt proceedings.

Lab. Code § 132

Workers' Compensation Appeals Board as authorized to conduct contempt proceedings. *Lab. Code § 134*

Employer failing to submit report concerning employee's injury as punishable for contempt by Workers' Compensation Appeals Board. *Lab. Code § 3760*

[5] Types of Contempt

[a] Direct

Direct contempt as committed in immediate view and presence of court or judge at chambers. *Code Civ. Proc. § 1211(a)*

[b] Indirect

Indirect contempt as not committed in immediate view or presence of court or judge at chambers. *Code Civ. Proc. § 1211(a)*

Legal Topics:

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

[1] Acts or Omissions Constituting Contempt

[a] Abuse of Process

Act of knowingly assisting another person to evade service of process as unlawful act in violation of *Penal Code § 136.1* (preventing or dissuading person from testifying as misdemeanor) and as within acts or omissions constituting contempt under *Code Civ. Proc. § 1209(a)(8)*. *In re Holmes (1983) 145 Cal. App. 3d 934, 936, 942, 193 Cal. Rptr. 790*

Elements of abuse of process. *Weisenburg v. Molina (1976) 58 Cal. App. 3d 478, 489, 129 Cal. Rptr. 813*

Contempt under former *Code Civ. Proc. § 1209(8)* (*see now Code Civ. Proc. § 1209(a)(8)*) as consisting of possession or display of offensive or defensive weapon by any unauthorized person in courtroom which inevitably causes sufficient consternation to disrupt judicial proceedings. *In re Jasper (1973) 30 Cal. App. 3d 985, 988, 106 Cal. Rptr. 754*

Abuse of process as process accomplishing some unlawful end or compelling another to do some collateral thing which he or she could not be compelled legally to do. *Pimentel v. Houk (1951) 101 Cal. App. 2d 884, 887, 226 P.2d 739*

[b] Disobedience of Order

Persons not named in permanent injunction and not parties to action in which injunction was issued as subject to being held in contempt for violating injunction only if acting in concert with or in support of enjoined party and were in fact enjoined party's aiders and abettors. *Astourian v. Superior Court (1990) 226 Cal. App. 3d 720, 725, 276 Cal. Rptr. 657*

Disobedience of any lawful judgment, order, or process of court as constituting contempt; hence, disobedience of order in wrongful termination of employment action directing plaintiff's attorney and plaintiff to surrender to defendant

documents taken from defendant by plaintiff when he left his employment with defendant as contempt of court. *Conn v. Superior Court (1987) 196 Cal. App. 3d 774, 777, 784, 242 Cal. Rptr. 148*

Punishment for contempt as required to rest on clear, intentional violation of specific, narrowly drawn order; specificity as essential prerequisite of contempt citation. *Wilson v. Superior Court (1987) 194 Cal. App. 3d 1259, 1272-1273, 240 Cal. Rptr. 131*

Custodial parent's failure to complete court-ordered visitation as not contempt when there was no evidence parent had ability to compel teenaged child to make visit and no evidence parent willfully disobeyed order. *Coursey v. Superior Court (1987) 194 Cal. App. 3d 147, 154-157, 239 Cal. Rptr. 365*

Criminal defense attorney's refusal to obey court's order to proceed with trial in one case as not constituting contempt where attorney had not prepared for trial in that case in belief that another case would be tried first. *Hughes v. Superior Court (1980) 106 Cal. App. 3d 1, 5, 164 Cal. Rptr. 721* (holding that to force an unprepared attorney to proceed with trial could result in violation of client's constitutional rights)

Failure to comply with terms of mandatory injunction as act of contempt. *Vanderstok v. Bank of America (1972) 29 Cal. App. 3d 73l, 734,*

Disobedience of any lawful order of court as contempt. *Ketscher v. Superior Court (1970) 9 Cal. App. 3d 601, 604, 88 Cal. Rptr. 357*

No contempt of court as committed in disobeying order unless order is definitive. *Ketscher v. Superior Court (1970) 9 Cal. App. 3d 601, 605, 88 Cal. Rptr. 357*

No contempt of court as committed in disobeying order unless order is valid and enforceable at time of acts alleged to be in defiance of it. *In re Blaze (1969) 271 Cal. App. 2d 210, 212, 76 Cal. Rptr. 551*

[c] Interruption of Judicial Proceedings

Defense attorney's statement in open court that "this court obviously doesn't want to apply the law" as act of contempt falling within scope of former *Code Civ. Proc. § 1209(1)* (*see now Code Civ. Proc. § 1209(a)(1)*). *In re Buckley (1973) 10 Cal. 3d 237, 246, 110 Cal. Rptr. 121, 514 P.2d 1201*

Contemptuous conduct under former *Code Civ. Proc. § 1209(1)* (*see now Code Civ. Proc. § 1209(a)(1)*) as consisting of disrespectful remarks addressed to court or witnesses or as consisting of disrespectful tone of voice in making otherwise noncontemptuous remarks. *In re Hallinan (1969) 71 Cal. 2d 1179, 1180-1182, 81 Cal. Rptr. 1, 459 P.2d 255*

Actual disruption of trial as not necessary to support adjudication of contempt; rather, under *Code Civ. Proc. § 1209(a)*, only tendency to interrupt due course of trial or other judicial proceeding as required. *McCann v. Municipal Court (1990) 221 Cal. App. 3d 527, 542, 270 Cal. Rptr. 640*

Attorney's unannounced departure from courtroom as act of contempt interrupting due course of trial within meaning of former *Code Civ. Proc. § 1209(1)* (*see now Code Civ. Proc. § 1209(a)(1)*). *Thorne v. Municipal Court (1965) 237 Cal. App. 2d 249, 252, 46 Cal. Rptr. 749*

Attorney's hawing and laughing as constituting contempt after trail judge sustained objections on ground of irrelevancy to three successive questions asked by attorney of witness. *DeGeorge v. Superior Court (1974) 40 Cal. App. 3d 305,*

310-311, 114 Cal. Rptr. 860

[d] Misbehavior in Office

Contempt under *Code Civ. Proc. § 1209(a)(3)* as consisting of unprofessional conduct by which attorney seeks to inflame jury, such as statements by attorney in presence of jury that prosecutor of criminal trial has reasonable doubts as to defendant's guilt. *Hawk v. Superior Court (1974) 42 Cal. App. 3d 108, 127-128, 116 Cal. Rptr. 713 , cert. denied, (1975) 421 U.S. 1012, 95 S. Ct. 2417, 44 L. Ed. 2d 680*

Act of contempt as consisting of counsel's infractions of trial judge's warning to adhere to no comment rule in criminal trial or to refrain from commenting on defendant's failure to testify in criminal trial. *People v. Haldeen (1968) 267 Cal. App. 2d 478, 483, 73 Cal. Rptr. 102*

[e] Noncompliance With Order for Child Support

Application of *Code Civ. Proc. § 1209.5* (prima facie showing of contempt for nonpayment of child support) to shift to alleged contemner burden of disproving element of offense as consititutional only if contempt proceeding is civil, rather than criminal, in nature. *Hicks v. Feiock (1988) 485 U.S. 624, 637-638, 108 S. Ct. 1423, 99 L. Ed. 2d 721*

State child support statute as not preempted under U.S. Constitution Supremacy Clause by federal statutes relating to Veteran's Administration disability benefits even though compliance with child support order based on statute necessitates use of disability benefits, and thus contempt finding against disabled veteran for noncompliance as proper. *Rose v. Rose (1987) 481 U.S. 619, 107 S. Ct. 2029, 95 L. Ed. 2d 599, 614*

Inability to pay child support is matter of defense. *Moss v. Superior Court (1998) 17 Cal. 4th 396, 425, 71 Cal. Rptr. 2d 215, 950 P.2d 59*

Inability to pay attorneys' fees ordered in child-custody and support proceeding is not element of charge of contempt, but rather affirmative defense. *In re Ivey (2000) 85 Cal. App. 4th 793, 798-802, 102 Cal. Rptr. 2d 447*

Code Civ. Proc. § 1209.5 (noncompliance with order for child support as contempt shown by prima facie evidence of making and service of notice or order) as not compelling person to be witness against himself or herself and, thus, as not unconstitutional. *Martin v. Superior Court (1971) 17 Cal. App. 3d 412, 418, 95 Cal. Rptr. 110*

[2] Acts Not Constituting Contempt

Attorney's letter to editor criticizing action of judge, but written after proceeding concluded and not identifying judge or author as attorney, as falling within protection of free speech and not punishable as contempt. *Lloyd v. Superior Court (1982) 133 Cal. App. 3d 896, 900-902, 184 Cal. Rptr. 467*

[3] Alternatives to Contempt Proceedings

Absent statutory safeguards, serious due process problems as resulting were trial courts to use their inherent power, in lieu of contempt power, to punish misconduct by awarding attorney's fees to opposing party or counsel. *Bauguess v. Paine (1978) 22 Cal. 3d 626, 638* (award of attorney's fees following mistrial held excess of proper limits of trial court's inherent power)

[4] Civil and Criminal Contempt Distinguished

Primary objective of civil contempt proceedings as protecting rights of litigants and primary objective of criminal contempt proceedings as vindicating dignity or authority of court. *Morelli v. Superior Court (1969) 1 Cal. 3d 328, 333, 82 Cal. Rptr. 375, 461 P.2d 655*

Court as treating contempt consisting of omission to perform act still in contemner's power to perform as civil contempt and as treating contempt consisting of omission to perform act no longer in contemner's power to perform as criminal contempt. *Morelli v. Superior Court (1969) 1 Cal. 3d 328, 332, 82 Cal. Rptr. 375, 461 P.2d 655*

Nature of civil contempt as remedial and coercive and nature of criminal contempt as punitive. *In re Application of Morris (1924) 194 Cal. 63, 67*

[5] Conduct Constituting Misdemeanor Contempt

Persons prosecuted for contempt under *Penal Code § 166* as having state constitutional and statutory right to trial by jury, and this right as applying to contempt proceeding under *Penal Code § 11229* (*Red Light Abatement Law). Mitchell v. Superior Court (1989) 49 Cal. 3d 1230, 1240-1241, 265 Cal. Rptr. 144, 783 P.2d 731*

Prosecutor as having discretion to charge defendant with more general lesser offense even when there is more specific greater offense that might embrace facts of case; hence, prosecutor as having discretion to charge contempt under *Code Civ. Proc. § 1209 et seq.*, which could also be prosecuted under Penal Code, but due process as requiring that prosecutor afford defendant fair notice of nature of penalties and proceedings by indicating, in declarations filed initiating contempt proceeding, jurisdictional basis for action. *Mitchell v. Superior Court (1989) 49 Cal. 3d 1230, 1251-1252, 265 Cal. Rptr. 144, 783 P.2d 731* (rejecting "suggestive dictum" to contrary in *Safer v. Superior Court (1975) 15 Cal. 3d 230, 241, 124 Cal. Rptr. 174, 540 P.2d 14* , cited *below*)

District attorney as not permitted to transform misdemeanor contempt proceedings into prosecution for contempt under *Code Civ. Proc. §§ 1209-1222* due to difference in procedural safeguards. *Safer v. Superior Court (1975) 15 Cal. 3d 230, 241, 124 Cal. Rptr. 174, 540 P.2d 14*

Writ of prohibition issued to prevent district attorney's prosecution for contempt under *Code Civ. Proc. §§ 1209-1222* in lieu of misdemeanor contempt under Penal Code § 166when alleged contemner thereby would lose right to trial by jury. *Safer v. Superior Court (1975) 15 Cal. 3d 230, 241, 124 Cal. Rptr. 174, 540 P.2d 14*

Violation of *Penal Code § 166* as misdemeanor prosecuted in same manner as other misdemeanors. *In re McKinney (1968) 70 Cal. 2d 8, 14, 73 Cal. Rptr. 580, 447 P.2d 972*

Provision in *Penal Code § 166(a)(2)* making certain conduct before referee subject to misdemeanor contempt as not applicable to same conduct before commissioner. *People v. Kalnoki (1992) 7 Cal. App. 4th Supp. 8, 14 , 9 Cal. Rptr. 2d 827*

Proceedings under Penal Code § 166governing misdemeanor contempt as not subject to procedures prescribed by *Code Civ. Proc. §§ 1209-1222*. *People v. Saffel (1946) 168 P.2d 497*

Affidavit requirements of *Code Civ. Proc. § 1211* as inapplicable to complaint charging misdemeanor contempt. *People v. Saffel (1946) 168 P.2d 497*

Code Civ. Proc. § 1209 (acts of civil and criminal contempt) and *Penal Code § 166* (acts of misdemeanor contempt) as showing duplication of acts and omissions defined as contempts. *In re Application of Roth (1934) 3 Cal. App. 2d 226,*

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Civil and criminal contempts under *Code Civ. Proc. §§ 1209-1222* and misdemeanor contempts under *Penal Code § 166* as subject to two distinct procedures. *In re Application of Roth (1934) 3 Cal. App. 2d 226, 229*

[6] Challenging Validity of Basis of Misdemeanor Contempt

When prosecution of misdemeanor contempt under *Penal Code § 166* arises out of alleged violation of superior court order, misdemeanor defendant is not barred from challenging the validity of the superior court's order in misdemeanor trial, because attack on superior court order is collateral and only acts punishable as contempt under *Penal Code § 166* are "willful disobedience of any process or order lawfully issued by any court" and that void court order cannot be basis for valid contempt judgment. *People v. Gonzalez (1996) 12 Cal. 4th 804, 815-817, 50 Cal. Rptr. 2d 74, 910 P.2d 1366*

[7] "Contempt" Defined

Contempt as disobedience by action in opposition to authority, justice, or dignity of court. *McCann v. Municipal Court (1990) 221 Cal. App. 3d 527, 536, 270 Cal. Rptr. 640*

[8] Criminal Nature of Contempt Proceedings Under Code Civ. Proc. §§ 1209-1222

[a] In General

When penalty imposed for contempt is punitive as opposed to remedial or coercive, unconditional nature of punishment as rendering relief criminal in nature because relief cannot undo or remedy what has been done nor afford any compensation, and contemner cannot shorten term by promising not to repeat offense. *Hicks v. Feiock (1988) 485 U.S. 624, 633, 108 S. Ct. 1423, 99 L. Ed. 2d 721* ; *see also In re Feiock (1989) 215 Cal. App. 3d 141, 144-145, 263 Cal. Rptr. 437*

Contempt proceeding under *Code Civ. Proc. §§ 1209-1222* as not civil action. *Freeman v. Superior Court (1955) 44 Cal. 2d 533, 536, 282 P.2d 857*

No presumptions as indulged in to aid sufficiency of complaining affidavit in contempt proceeding. *Phillips v. Superior Court (1943) 22 Cal. 2d 256, 257, 137 P.2d 838*

Affidavit in indirect contempt proceeding as fatally defective for failing to allege that accused contemner had requisite knowledge of order at time he or she violated it. *Phillips v. Superior Court of Kern County (1943) 22 Cal. 2d 256, 258*

Contempt proceeding under *Code Civ. Proc. §§ 1209-1222* as not strictly criminal action. *Bridges v. Superior Court of Los Angeles County (1939) 14 Cal. 2d 464, 477, 94 P.2d 983* (reversed on other grounds *Bridges v. California (1941) 314 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192*)

When object of contempt proceedings is to vindicate dignity, authority, or process of court, proceedings as quasi-criminal in character even though they arise from, or are ancillary to, civil proceeding. *Crawford v. Workers' Comp. Appeals Bd. (1989) 213 Cal. App. 3d 156, 165, 259 Cal. Rptr. 414*

Constitutional rights of accused as required to be observed in contempt proceeding. *In re Martin (1977) 71 Cal. App. 3d 472, 480, 139 Cal. Rptr. 451*

Accused contemner as entitled to presumption of innocence and as not compelled to testify; contempt as required to be proven beyond reasonable doubt. *In re Martin (1977) 71 Cal. App. 3d 472, 480, 139 Cal. Rptr. 451*

Order of contempt as annulled when trier of fact at contempt hearing acted as adversary to accused, thus denying accused due process of law. *In re Martin (1977) 71 Cal. App. 3d 472, 482-483, 139 Cal. Rptr. 451*

Court as empowered by *Code Civ. Proc. § 1211.5* to order or permit amendment of insufficient or defective affidavit. *Mossman v. Superior Court (1972) 22 Cal. App. 3d 706, 710, 99 Cal. Rptr. 638*

Contempt proceeding as special proceeding of criminal nature. *Pacific Tel. & Tel. Co. v. Superior Court (1968) 265 Cal. App. 2d 370, 371, 72 Cal. Rptr. 177*

[b] No Right to Different Tribunal

[i] Before Court In Which Proceeding Giving Rise to Contempt Is Pending

Superior Court as without jursidiction over misdemeanor contempt committed in its presence. *In re McKinney (1968) 70 Cal. 2d 8, 13-14, 73 Cal. Rptr. 580, 447 P.2d 972*

Contempt proceeding as constituting continuation of action from which it emanates. *McClenny v. Superior Court (1964) 60 Cal. 2d 677, 687, 36 Cal. Rptr. 459, 388 P.2d 691*

Trial in contempt proceeding under *Code Civ. Proc. §§ 1209-1222* as had before court in which proceeding giving rise to the alleged contempt is pending. *Pacific Tel. & Tel. Co. v. Superior Court (1968) 265 Cal. App. 2d 370, 372, 72 Cal. Rptr. 177*

[ii] Exception When Judge Personally Embroiled

Whether or not judge embroiled as dependent on both nature of alleged contemptuous conduct and judge's responding acts and statements. *Offutt v. United States (1954) 348 U.S. 11, 14, 75 S. Ct. 11, 99 L. Ed. 11* ; *In re Buckley (1973) 10 Cal. 3d 237, 256, 257, 110 Cal. Rptr. 121, 514 P.2d 1201*

Statements by judge indicating hostility to contemner as sufficient evidence of bias requiring disqualification even when judge's statements were made under provocation. *Offutt v. United States (1954) 348 U.S. 11, 16-17, 75 S. Ct. 11, 99 L. Ed. 11* ; *In re Buckley (1973) 10 Cal. 3d 237, 257, 110 Cal. Rptr. 121*

When judge in direct contempt so personally embroiled as to be unfit to sit in judgment on contempt charge, judge as required as a matter of due process to refer adjudication of contempt to another judge. *In re Buckley (1973) 10 Cal. 3d 237, 255-257, 110 Cal. Rptr. 121, 514 P.2d 1201*

Attack on integrity of court as fighting words carrying potential for bias. *In re Buckley (1973) 10 Cal. 3d 237, 256, 110 Cal. Rptr. 121*

Fact that alleged contemner disrespectful as not requiring judge to disqualify himself or herself. *In re Buckley (1973) 10 Cal. 3d 237, 256-257, 110 Cal. Rptr. 121, 514 P.2d 1201*

Referee as engaging in clear pattern of personal embroilment, rendering it error not to have sent contempt hearing to another judge, by admonishing attorney outside courtroom, telephoning partners in attorney's law firm to ask them to

alleviate problem, and sending letter about the matter both to law firm and regular client of firm. *Betsworth v. Workers' Comp. Appeals Bd. (1994) 26 Cal. App. 4th 586, 597-598, 31 Cal. Rptr. 2d 664*

Judge as permitted to hear contempt charge when alleged contemner was disruptive but did not attack integrity of court. *In re Grossman (1972) 24 Cal. App. 3d 624, 632, 101 Cal. Rptr. 176*

[c] No Right to Jury Trial

Civil contempt proceedings as expressly not within constitutional requirements guaranteeing trial by jury. *Bridges v. Superior Court (1939) 14 Cal. 2d 464, 477, 94 P.2d 983* (reversed on other grounds *Bridges v. California (1941) 314 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192*)

Accused contemner as having no right to have contempt matter heard before jury. *In re Morelli (1970) 11 Cal. App. 3d 819, 850, 91 Cal. Rptr. 72*

Trial court as lacking discretion to grant jury trial in civil contempt proceeding. *Pacific Tel. & Tel. Co. (1968) 265 Cal. App. 2d 370, 375, 72 Cal. Rptr. 177*

Denial of writ of prohibition seeking to prevent superior court from hearing contempt matter under *Code Civ. Proc. §§ 1209-1222* in absence of jury. *United Farm Workers, AFL-CIO v. Superior Court (1968) 265 Cal. App. 2d 212, 214-215, 71 Cal. Rptr. 513*

[9] Initiating Contempt Proceeding

Absent charging affidavit initiating indirect contempt proceeding (*see Code Civ. Proc. § 1211*), order finding person in contempt of court as in excess of court's jurisdiction and void; order as not saved by *Code Civ. Proc. § 1211.5*, which applies to insufficient initiating affidavits filed and not when no affidavit is filed. *In re Cowan (1991) 230 Cal. App. 3d 1281, 1282-1283, 1286-1289, 281 Cal. Rptr. 740*

[10] Nature of Contempt Power

If Legislature has established specific penalty for particular transgression, courts may not impose a contempt punishment that is inconsistent with the legislative scheme; thus, because of unique nature of reunification services in juvenile dependency proceedings juvenile court may not use its contempt power to incarcerate parent solely for failure to comply with order to participate in voluntary reunification plan. *In re Nolan W. (2009) 45 Cal. 4th 1217, 1230-1231, 1233-1238, 91 Cal. Rptr. 3d 140, 203 P.3d 454*

Contempt power as court's "ultimate weapon"; power to adjudicate direct contempt as necessarily arbitrary and to be used with great prudence, judge bearing in mind that exercise of that power is not so much to vindicate judge's character as to promote respect due administration of laws. *McCann v. Municipal Court (1990) 221 Cal. App. 3d 527, 536-537, 270 Cal. Rptr. 640*

[11] Nature of Contempt Proceeding

Contempt proceedings as separate and distinct and no part of original case from which they arise. *People v. King Bail Bond Agency (1990) 224 Cal. App. 3d 1120, 1124, 274 Cal. Rptr. 335*

[12] Newsreporter's Immunity From Contempt

[a] In General

Court must balance news reporter's immunity against possibility that defendant's constitutional right to a fair trial will be compromised if the news reporter fails to disclose his or her source, and court's balancing test should encompass two principal considerations: (1) whether there is a "substantial probability of future violations or 'leaks' " that will impair defendant's right to a fair trial and (2) whether there are reasonable alternatives to disclosure. *In re Willon (1996) 47 Cal. App. 4th 1080, 1099, 55 Cal. Rptr. 2d 245*

News reporter's immunity under *Evid. Code § 1070* as merely immunity from contempt and not privilege against disclosure. *KSDO v. Superior Court (1982) 136 Cal. App. 3d 375, 383-384, 186 Cal. Rptr. 211*

Evid. Code § 1070 as intended to protect free flow of information and to provide newsreporters with privilege against being held in contempt for refusing to answer questions concerning sources of their information. *Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 217, 124 Cal. Rptr. 427 , cert. denied, (1976) 427 U.S. 912, 96 S. Ct. 3200, 49 L. Ed. 2d 1204*

[b] Limitations on Scope of Immunity

Newsreporter's privilege as not overriding public's interest in ensuring that neither reporter nor source invades rights of other citizens through reprehensible conduct forbidden to all other persons. *Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 219, 124 Cal. Rptr. 427 , cert. denied, (1976) 427 U.S. 912, 96 S. Ct. 3200, 49 L. Ed. 2d 1204* (quoting *Branzburg v. Hayes (1972) 408 U.S. 665, 691-692, 92 S. Ct. 2646, 33 L. Ed. 2d 626*)

Newsreporter's privilege as not shielding newsreporters from testifying about criminal activity in which they have participated or which they have observed. *Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 218-219, 124 Cal. Rptr. 427 , cert. denied, (1967) 427 U.S. 912, 96 S. Ct. 3200, 49 L. Ed. 2d 1204* (quoting *Branzburg v. Hayes (1972) 408 U.S. 665, 691-692, 92 S. Ct. 2646, 33 L. Ed. 2d 626*)

Key to court's power to compel newsreporter to answer in face of *Evid. Code § 1070* as necessity for exploring violation of court's orders by those subject thereto as means of enforcing court's constitutional obligation to prevent prejudicial pretrial publicity from emanating from its officers. *Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 221, 222, 124 Cal. Rptr. 427 , cert. denied, (1976) 427 U.S. 912, 49 L. Ed. 2d 1204* ; *Farr v. Superior Court (1971) 22 Cal. App. 3d 60, 68-71, 99 Cal. Rptr. 342 , cert. denied, (1972) 409 U.S. 1011, 93 S. Ct. 430, 34 L. Ed. 2d 305*

Limitation on protection afforded by shield law as applicable only when questions asked may tend to identify who, if anyone, among those subject to court's order, may have violated it. *Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 224, 124 Cal. Rptr. 427 , cert. denied, (1976) 427 U.S. 912, 96 S. Ct. 3200, 49 L. Ed. 2d 1204*

Evid. Code § 1070 as not granting reporter immunity from contempt for refusal to name sources of information when sources were earlier identified by reporter as judicial officers subject to court's order banning publicity during notorious murder trial. *In re Farr (1974) 36 Cal. App. 3d 577, 582, 111 Cal. Rptr. 649*

[c] Scope of Immunity

Immunity from contempt under *Cal. Const., art. I, § 2(b)*, and *Evid. Code § 1070* as granting to nonparty witnesses virtually absolute protection against compelled disclosure, because generally contempt is only effective remedy against these witnesses; however, immunity as not constituting privilege against disclosure, because it does not provide protection against sanctions other than contempt which may be invoked against party to civil litigation. *Mitchell v.*

Superior Court (1984) 37 Cal. 3d 268, 274, 208 Cal. Rptr. 152, 690 P.2d 625

Privilege as extending not only to identity of source but also, in absence of constitutional or other limitation on privilege, to disclosure of information which may tend to reveal source of information. *Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 217-218, 124 Cal. Rptr. 427 , cert. denied, (1976) 427 U.S. 912, 96 S. Ct. 3200, 49 L. Ed. 2d 1204*

Burden, though not heavy, on reporter claiming privilege to show that his or her testimony may tend to lead to source. *Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 218, 124 Cal. Rptr. 427 , cert. denied, (1976) 427 U.S. 912, 96 S. Ct. 3200, 49 L. Ed. 2d 1204*

In determining applicability of newsreporter's privilege, court as considering not only offered evidence but also matters disclosed in argument, implication of the question, setting in which it is asked, and other relevant factors. *Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 218, 124 Cal. Rptr. 427 , cert. denied, (1976) 427 U.S. 912, 96 S. Ct. 3200, 49 L. Ed. 2d 1204*

[13] Order, Process, or Proceeding of Court

Unless court proceeding or process is involved, court as not authorized to invoke contempt powers; "process" as synonymous with "proceeding"; "proceeding" as referring to something done or to be done in court of justice or before judicial officer. *Raygoza v. Betteravia Farms (1987) 193 Cal. App. 3d 1592, 1596, 239 Cal. Rptr. 188*

Neither official jury questionnaire nor accompanying letter of court administrator as constituting order, process, or proceeding of court that, when disobeyed, may be punished by contempt. *Lister v. Superior Court (1979) 98 Cal. App. 3d 64, 69-71, 159 Cal. Rptr. 280*

[14] Purpose of Contempt Proceedings

Power of contempt as necessarily of arbitrary nature, and as properly used with great prudence and caution; judge as engaged not so much in vindicating judge's own character, as in promoting respect due to administration of laws. *Furey v. Commission on Judicial Performance (1987) 43 Cal. 3d 1297, 1314, 240 Cal. Rptr. 859, 743 P.2d 919* (upholding removal of judge based on multiple abuses of contempt power)

Civil contempt as means of enforcing contractual right that has been judicially determined in order or judgment, and as instituted to preserve and enforce rights of private parties to suit, and to compel obedience to orders and decrees made to enforce rights and administer remedies to which court has found them to be entitled; such proceedings as remedial and coercive in their nature, and parties chiefly in interest in their conduct and prosecution as individuals whose private rights and remedies they were instituted to protect or enforce. *Share v. Casiano Bel-Air Homeowners Assn. (1989) 215 Cal. App. 3d 515, 523, 263 Cal. Rptr. 753*

Although contempt proceedings are quasi-criminal in nature, purpose of proceedings is to protect dignity, authority, or process of court or tribunal and to provide court or tribunal with means of controlling its proceedings. *Crawford v. Workers' Comp. Appeals Bd. (1989) 213 Cal. App. 3d 156, 165, 259 Cal. Rptr. 414*

Power of judge in contempt proceedings as not designed to protect judge's own dignity or person but to protect rights of litigants and public by ensuring that administration of justice is not thwarted or obstructed; enforcement of contempt order as maintaining dignity and authority of court and preserving peace and dignity of public. *In re Holmes (1983) 145 Cal. App. 3d 934, 944, 193 Cal. Rptr. 790*

[15] Statutes of Limitation

Neither *Penal Code § 802(a)* (imposing, with specified exceptions, one-year limitation on prosecution of offense not punishable by death or imprisonment in state prison) nor *Code Civ. Proc. § 340(2)* [*now see Code Civ. Proc. § 340(b)*] (imposing one-year limitation on action on statute for forfeiture or penalty to people of California) as applying to contempt proceeding by Workers' Compensation Appeals Board against medical doctor for willful violation of *8 Cal. Code Reg. § 10606* (specifying required contents of medical reports submitted in workers' compensation cases), when alleged contemptuous acts could easily have had continuously operating effect until well into one-year period before contempt proceedings were instituted; whether appeals board loses jurisdiction of proceeding by passage of time as question of fact dependent on whether delay in prosecution was unreasonable and to contemner's prejudice, and contemner as having burden of proving by preponderance of evidence affirmative defense based on statute of limitations. *Crawford v. Workers' Comp. Appeals Bd. (1989) 213 Cal. App. 3d 156, 164-167, 259 Cal. Rptr. 414*

[16] Types of Contempt

[a] Direct

[i] Examples

Appellant's attorney commits direct contempt by willfully failing to comply with court order requiring filing of appellant's opening brief. *In re Rubin (2001) 25 Cal. 4th 1176, 1178-1179, 108 Cal. Rptr. 2d 593, 25 P.3d 1075* ; *In re Garland (2001) 25 Cal. 4th 1172, 1174-1175, 108 Cal. Rptr. 2d 591, 25 P.3d 1074]* .

Attorney commits direct contempt when he or she impugns court's integrity by statements made in open court either orally or in writing. *In re Buckley (1973) 10 Cal. 3d 237, 248, 110 Cal. Rptr. 121, 514 P.2d 1201*

Direct contempt is committed in immediate view and presence of court. *Arthur v. Superior Court (1965) 62 Cal. 2d 404, 407, 42 Cal. Rptr. 441, 398 P.2d 777*

Attorney's failure to appear at scheduled time without valid excuse is species of direct contempt that may be punished summarily; breakdown of office calendaring procedures is insufficient excuse for failure to appear in that attorney has duty to keep informed of required dates and times for court appearances. *In re Stanley (1981) 114 Cal. App. 3d 588, 591-592, 170 Cal. Rptr. 755* ; *see also People v. Tabb (1991) 228 Cal. App. 3d 1300, 1311 n.9, 279 Cal. Rptr. 480*

Attorney commits direct contempt when he or she behaves insolently to witness on cross examination. *Hawk v. Superior Court (1974) 42 Cal. App. 3d 108, 125, 116 Cal. Rptr. 713 , cert. denied, (1975) 421 U.S. 1012, 95 S. Ct. 2417, 44 L. Ed. 2d 680*

Attorney commits direct contempt when he or she engages in misconduct designed to misuse the adversary system to obtain an unfair advantage. *DeGeorge v. Superior Court (1974) 40 Cal. App. 3d 305, 312, 114 Cal. Rptr. 860*

Facts showing that an attorney refused to obey the court when it directed him or her to stop arguing a point on which it has ruled, or made statements to the court the content of which were rude, hostile, and disrespectful support a finding of direct contempt. *Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 223, 96 Cal. Rptr. 2d 531, 999 P.2d 748* (dictum)

Direct contempt proceeding undertaken to preserve the power of the court. *Reifler v. Superior Court (1974) 39 Cal. App. 3d 479, 485, 114 Cal. Rptr. 356*

Direct contempt committed by person carrying weapon into courtroom with offensive or defensive purpose. *In re*

Jasper (1973) 30 Cal. App. 3d 985, 988, 106 Cal. Rptr. 754 ; *In re Carvallo (1973) 29 Cal. App. 3d 983, 987, 105 Cal. Rptr. 925*

Attorney commits direct contempt when he or she fails to appear without excusable cause at the appointed date and hour set for the commencement or resumption of judicial proceedings in which he or she is counsel. *In re Karpf (1970) 10 Cal. App. 3d 355, 363 88 Cal. Rptr. 895*

[ii] Effect of Contemner's Apology

Apology of contemner required to be given consideration, but mitigating effect of apology as within court's discretion unless court or judge personally embroiled in contempt matter. *In re Buckley (1973) 10 Cal. 3d 237 257, 110 Cal. Rptr. 121, 514 P.2d 1201*

No evidence of judge's personal involvement in contempt matter against attorney found on review when judge found to have misinterpreted attorney's apology as further affront to court's integrity. *In re Buckley (1973) 10 Cal. 3d 237, 257, 110 Cal. Rptr. 121, 514 P.2d 1201*

Effect to be given apology by contemner as lying exclusively in sound discretion of judge. *In re Baroldi (1987) 189 Cal. App. 3d 101, 109, 234 Cal. Rptr. 286 , disapproved on another ground in Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 221, 96 Cal. Rptr. 2d 531, 999 P.2d 748*

Apology by contemner as regarded with favor by courts as only remedial act left contemner. *In re Carrow (1974) 40 Cal. App. 3d 924, 933, 115 Cal. Rptr. 601*

[iii] Sufficiency of Order Forming Basis for Direct Contempt

Order adjudging person guilty of contempt in immediate view and presence of court as required to recite facts that constitute contempt (*Code Civ. Proc. § 1211(a)*); facts as required to be stated with sufficient particularity to demonstrate on its face without aid of speculation that conduct constituted a legal contempt; evidence, findings, and judgment as all construed in favor of contemnor; however, all that is required as that order be made reciting facts, adjudging person guilty, and prescribing punishment. *McCann v. Municipal Court (1990) 221 Cal. App. 3d 527, 536, 538, 270 Cal. Rptr. 640*

[iv] Timing

Contempt committed in immediate view and presence of court, distinguished as direct contempt, as permitted to be treated summarily; but despite power to treat direct contempt summarily, common practice as being to defer adjudication of contempt for courtroom misconduct to conclusion of pending trial unless prompt punishment is imperative; in such case, due process considerations as requiring notice and hearing with opportunity to be heard, although there is no requirement that court hear contemnor as to sanctions to be imposed. *McCann v. Municipal Court (1990) 221 Cal. App. 3d 527, 538, 543, 270 Cal. Rptr. 640*

[v] Warning

Although warning is required when contempt consists of "tone of voice" or "an insolent, rude, and disrespectful manner," no warning as required when statements are contemptuous on their face. *McCann v. Municipal Court (1990) 221 Cal. App. 3d 527, 542, 270 Cal. Rptr. 640*

[b] Indirect

[i] Examples

Indirect contempt as not committed in immediate view and presence of court or judge at chambers. *Bridges v. Superior Court (1939) 14 Cal. 2d 464, 473, 94 P.2d 983* (reversed on other grounds *Bridges v. California (1941) 314 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192*)

Although contemptuous conduct committed in presence of judge is usually treated as direct contempt, judge may choose to use procedures for indirect contempt and defer contempt adjudication to another judge. *Hanson v. Superior Court (2001) 91 Cal. App. 4th 75, 82, 109 Cal. Rptr. 2d 782*

Indirect contempt as action to protect rights of parties to litigation. *Reifler v. Superior Court (1974) 39 Cal. App. 3d 479, 485, 114 Cal. Rptr. 356*

Proceeding in indirect contempt as proper process for enforcement or execution of order or judgment which is in nature of temporary restraining order or injunction. *Vanderstok v. Bank of America (1972) 29 Cal. App. 3d 731, 734, 105 Cal. Rptr. 699*

Indirect contempt found when parent, with knowledge of child support order and ability to respond to order, fails or neglects to comply with it. *In re Gould (1961) 195 Cal. App. 2d 172, 175, 15 Cal. Rptr. 326*

Indirect contempt known as constructive contempt. *In re Roth (1934) 3 Cal. App. 2d 226, 229, 39 P.2d 490*

[ii] Sufficiency of Order Forming Basis for Indirect Contempt

Order forming basis for contempt proceeding as required not to be overbroad. *Younger v. Smith (1973) 30 Cal. App. 3d 138, 150, 106 Cal. Rptr. 225*

Court as lacking jurisdiction to punish contemner when order intended to prohibit prejudicial pretrial publicity used to punish technical violation which is harmless and nonprejudicial. *Younger v. Smith (1973) 30 Cal. App. 3d 138, 150, 165, 106 Cal. Rptr. 225*

Order forming basis for contempt proceeding as required to be in writing or entered in court's minutes. *Ketscher v. Superior Court (1970) 9 Cal. App. 3d 601, 604-605, 88 Cal. Rptr. 357*

Court as lacking jurisdiction to punish contemner when order alleged to be violated indefinite and susceptable to interpretation as mere warning to contemner and when order neither in writing nor entered in court's minutes. *Ketscher v. Superior Court (1970) 9 Cal. App. 3d 601, 604-605, 88 Cal. Rptr. 357*

[17] Workers' Compensation Proceedings

In vesting WCAB with power to punish contempt, Legislature as having, in *Lab. Code § 134*, specified that WCAB or any member thereof may issue all necessary process in proceedings for contempt, in like manner and to same extent as courts of record; consequently, WCAB as required to follow applicable provisions of Code of Civil Procedure pertaining to contempt (*Code Civ. Proc. § 1209 et seq.*); when alleged contempt is not committedin WCAB's presence, contempt proceedings as in nature of indirect contempt, and WCAB as required to proceed by order to show cause supported by affidavit (*Code Civ. Proc. § 1212*), and alleged contemner as entitled to appear before and be heard by

WCAB. *Crawford v. Workers' Comp. Appeals Bd. (1989) 213 Cal. App. 3d 156, 163-164*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 135.53 Law Reviews

Kuhns, *The Summary Contempt Power: A Critique and a New Perspective, 88 Yale L.J. 39 (1978)*

Goodale, *The Press Ungagged: The Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart, 29 Stan. L. Rev. 497 (1977)*

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Warren, *The British Are Coming! The British are Coming! Is the Bicentennial Celebration to Include Imposition of the British Contempt Rule?* 51 L.A. Bar B. 543 (1976)

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Comment, *Criminal Contempt of Court--Due Process of Law and Freedom of Speech, 5 UCLA L. Rev. 90 (1958)*

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Note, *Contempt: Direct and Indirect Contempt--What Constitutes 'Immediate View and Presence,' 7 Hastings L.J. 312 (1956)*

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Note, *Contempt of Court--Perjury as Contempt--Power of the Federal Court to Punish Perjury as Contempt, 18 S. Cal. L. Rev. 284 (1945)*

Legal Topics:

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Witkin, Summary of California Law, vol. 7, *Constitutional Law*, 203, 211-213, 412; vol. 10, *Parent and Child*, § 437; vol. 11, *Husband and Wife*, §§ 108, 204-206, 246-256, 258-261, 361, 362 (10th ed. 2005)

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§ 135.60 Related Matthew Bender Publications

For memoranda of points and authorities relating to forms in this part, see California Points and Authorities, Ch. 47, *Contempt*

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§ 135.61 State Statutes

[1] Direct Contempt Proceedings

Contempt committed in immediate view and presence of court or judge at chambers, known as direct contempt, may be treated summarily. *Code Civ. Proc. § 1211(a)*

Direct contempt order as required to recite both facts showing acts which constitute contempt and that contempt committed in immediate view and presence of court. *Code Civ. Proc. § 1211(a)*

Contempt order as adjudging person proceeded against guilty of contempt and as specifying his or her punishment for the contempt. *Code Civ. Proc. § 1211(a)*

[2] Indirect Contempt Proceedings

Papers required to bring party into contempt as not subject to *Code Civ. Proc. §§ 1010-1015* governing notices, filing, and service of papers. *Code Civ. Proc. § 1016*

Indirect contempt as not occurring in immediate view and presence of court or judge at chambers. *Code Civ. Proc. § 1211(a)*

Proceeding in indirect contempt as commenced by presentation to court or judge of affidavit setting forth alleged contemptuous acts. *Code Civ. Proc. § 1211(a)*

Proceeding in indirect contempt as commenced by presentation of statement of facts concerning alleged contempt submitted by referees, arbitrators, or other judicial officers. *Code Civ. Proc. § 1211(a)*

Construction, amendement, and review of affidavits, declarations, or statements of facts. *Code Civ. Proc. § 1211.5*

Order to show cause; warrants of attachment and commitment. *Code Civ. Proc. § 1212*

Undertaking as required to be specified in warrant of attachment. *Code Civ. Proc. § 1213*

Arrest and detention of person charged with contempt. *Code Civ. Proc. § 1214*

Discharge of arrested person when undertaking executed. *Code Civ. Proc. § 1215*

Return of warrant and undertaking by officer. *Code Civ. Proc. § 1216*

Hearing on contempt charge; answer of person charged; witnesses. *Code Civ. Proc. § 1217*

Second attachment for failure to appear; damages for breach of undertaking *Code Civ. Proc. § 1220*

Illness or other inability of person charged to attend hearing is sufficient excuse; conditions of custody. *Code Civ. Proc. § 1221*

Declaration under penalty of perjury in lieu of affidavit. *Code Civ. Proc. § 2015.5*

[3] Punishment or Coercion of Contemner

Punishment imposed as fine, imprisonment, or both. *Code Civ. Proc. § 1218*

Restriction on enforcement of order by party in contempt. *Code Civ. Proc. § 1218*

Penalties for contempt of family law orders. *Code Civ. Proc. § 1218*

Authorization for treating instances of nonpayment of support as separate contempt counts; limitations periods for contempt of family law orders. *Code Civ. Proc. § 1218.5*

Compelling performance of act by imprisonment which must be specified in warrant of commitment. *Code Civ. Proc. § 1219*

Sanctions against minor for refusing to take oath or testify. *Code Civ. Proc. § 1219.5*

[4] State Bar Notification

Court holding attorney in contempt is authorized to transmit copy of relevant minutes, final order, and transcript to State Bar if it appears that contempt holding involves grounds warranting attorney discipline under Bus. & Prof. Code *§ 6000 et seq. Bus. & Prof. Code* § 6086.7

Legal Topics:

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§ 135.62 Decisions

[1] Direct Contempt Proceedings

[a] Attorney's Fees

Award of attorney's fees in contempt proceeding pursuant to contractual provision as not barred by limitations on penalty for contempt. *Share v. Casiano Bel-Air Homeowners Assn. (1989) 215 Cal. App. 3d 515, 263 Cal. Rptr. 753*

[b] Determining Whether Conduct Constitutes One or More Contempts

Contempt committed in immediate view and presence of court or judge at chambers, known as direct contempt, may be treated summarily under *Code Civ. Proc. § 1211*. *Arthur v. Superior Court (1965) 62 Cal. 2d 404, 407, 42 Cal. Rptr. 441, 398 P.2d 777*

Requirements of due process satisfied if alleged contemner confronted with charge and given opportunity to explain purported contempt. *Arthur v. Superior Court (1965) 62 Cal. 2d 404, 409, 42 Cal. Rptr. 441, 398 P.2d 777*

Crucial question in determining whether separate adjudications of contempt are proper is whether separate adjudications were based on separate insults to authority of court, not whether insults happened to occur on same or different days. *Conn v. Superior Court (1987) 196 Cal. App. 3d 774, 786, 242 Cal. Rptr. 148*

Due process requirements are not satisfied when alleged contemner, who failed to make scheduled court appearance on behalf of client, was not advised by court of specific charge or that court was contemplating contempt order. *In re Baroldi (1987) 189 Cal. App. 3d 101, 106-108, 234 Cal. Rptr. 286 , disapproved on another ground in Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 221, 96 Cal. Rptr. 2d 531, 999 P.2d 748*

No hearing required in direct contempt. *DeGeorge v. Superior Court (1974) 40 Cal. App. 3d 305, 315, 114 Cal. Rptr.*

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[c] Contempt Order

Under *Code Civ. Proc. § 1211(a)*, a direct contempt order may be summary in nature; it need only recite the facts showing that the person proceeded against engaged in conduct constituting contempt and that the conduct occurred in the court's or judge's immediate view and presence, recite further that the person is thereby adjudged guilty of contempt, and prescribe the punishment. *Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 220-221, 96 Cal. Rptr. 2d 531, 999 P.2d 748*

The facts recited in order of direct contempt must be sufficiently detailed to show, on their face, that the conduct constituted a legal contempt; if the conduct is not so outrageous as to be immediately recognized as an act of contempt, the order must recite facts showing that the court or judge warned the person that further similar conduct would result in a citation for contempt, and the person nevertheless persisted in the conduct; if an adjudication of contempt depends on the volume, accent, inflection, or tone of voice, or on manner, facial expression, or demeanor, the order of contempt must describe this conduct in detail. *Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 222-223, 96 Cal. Rptr. 2d 531, 999 P.2d 748*

Order as required to show, without aid of speculation, that contempt occurred; order as void if it falls to show on its face facts sufficient to constitute legal contempt. *Chula v. Superior Court (1962) 57 Cal. 2d 199, 203, 18 Cal. Rptr. 507, 368 P.2d 107*

Contempt order that does not identify provision alleged contemner violated does not meet standards for contempt orders. *Runnion v. Workers' Comp. Appeals Bd. (1997) 59 Cal. App. 4th 277, 287, 69 Cal. Rptr. 2d 105*

Order of contempt as void when petitioner was denied due process in that he was not confronted with charge against him and order of contempt is jurisdictionally defective. *In re Baroldi (1987) 189 Cal. App. 3d 101, 111, 234 Cal. Rptr. 286 , disapproved on another ground in Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 221, 96 Cal. Rptr. 2d 531, 999 P.2d 748*

Order as permitted but not required to recite circumstances in which contemptuous remark made. *In re Rosen (1973) 31 Cal. App. 3d 71, 73, 106 Cal. Rptr. 757 , disapproved on another ground in Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 221, 96 Cal. Rptr. 2d 531, 999 P.2d 748*

Order reciting that attorney was absent when ordered to appear, that he knew he was required to appear, that he had the ability to appear, that he willfullyneglected to appear, and that explanation offered by him to excuse his absence was wholly unsatisfactory as presenting facts sufficient to show contempt actually occurred. *In re Karpf (1970) 10 Cal. App. 3d 355, 364, 88 Cal. Rptr. 895*

[d] Timing

Judge as having authority to summarily convict and sentence contemners for their acts of contempt as the contemptuous acts occur. *In re Siegel (1975) 45 Cal. App. 3d 843, 845, 120 Cal. Rptr. 8*

When final and decisive action deferred until trial concluded, adjudication of contempt and sentencing without affording accused contemner notice oropportunity to be heard as violative of due process. *In re Karagozian (1975) 44 Cal. App. 3d 516, 523, 118 Cal. Rptr. 793*

Trial judge as permitted to conduct direct contempt proceedings in chambers following allegedly contemptuous

conduct. *Hawk v. Superior Court (1974) 42 Cal. App. 3d 108, 131, 116 Cal. Rptr. 713 , cert. denied, 421 U.S. 1012 (1975)*

Judge as empowered to punish summarily when prompt punishment is imperative. *In re Grossman (1972) 24 Cal. App. 3d 624, 629, 101 Cal. Rptr. 176*

Trial judge as permitted to defer adjudication of contempt and imposition of punishment until conclusion of trial. *In re Grossman (1972) 24 Cal. App. 3d 624, 631, 101 Cal. Rptr. 176*

[2] Indirect Contempt Proceedings

[a] In General

More elaborate procedure in indirect contempt proceedings as followed in order to notify persons charged with contempt and to allow them an opportunity to be heard. *Arthur v. Superior Court (1965) 62 Cal. 2d 404, 407, 42 Cal. Rptr. 441, 398 P.2d 777*

[b] Construction, Amendment, and Review

Trial court as not deprived of jurisdiction and contempt proceedings as not void ab initio because of insufficient initiating affidavit since *Code Civ. Proc. § 1211.5(b)* permits amendment of affidavit at any stage of proceeding. *Mossman v. Superior Court (1972) 22 Cal. App. 3d 706, 710, 99 Cal. Rptr. 638*

Court of appeal as issuing writ of prohibition to restrain trial court from further proceedings against contemner on defective initiating affidavit and as permitting amendment of initiating affidavit. *Mossman v. Superior Court (1972) 22 Cal. App. 3d 706, 713, 99 Cal. Rptr. 638*

[c] Initiating Affidavit

[i] Construction

Affidavit based wholly on information and belief as insufficient to sustain contempt conviction under hearsay rule of evidence. *Freeman v. Superior Court (1955) 44 Cal. 2d 533, 537, 282 P.2d 857*

Trial court's failure to amend affidavit pursuant to *Code Civ. Proc. § 1211.5* to include contempt charges on date not previously mentioned in affidavit when evidence of acts occurring on that date were presented as depriving defendants of clear notice that they were being charged with criminal conduct and constituting violation of their constitutional right to due process. *Reliable Enterprises, Inc. v. Superior Court (1984) 158 Cal. App. 3d 604, 619-620, 204 Cal. Rptr. 786* (disapproved on another point in *Mitchell v. Superior Court (1989) 49 Cal. 3d 1230, 1248 n.13, 265 Cal. Rptr. 144, 783 P.2d 731*)

Declaration under penalty of perjury as a satisfactory substitute for affidavit in contempt proceedings. *In re Morelli (1970) 11 Cal. App. 3d 819, 830, 91 Cal. Rptr. 72*

Acknowledgement appearing at end of document and reciting that purported affiant appeared before notary public and executed document as not written declaration under oath as required by *Code Civ. Proc. § 1211*. *Palm Springs Alpine Estates, Inc. v. Superior Court (1967) 255 Cal. App. 2d 883, 888, 63 Cal. Rptr. 618*

Affidavit as having effect of complaint framing issues before court and as jurisdictional prerequisite to court's power to punish indirect contempt. *In re Gould (1961) 195 Cal. App. 2d 172 175, 15 Cal. Rptr. 326*

Code Civ. Proc. § 1211 as not requiring one affidavit to have all essential facts in order to supply facts constituting contempt; several affidavits as capable of being grouped, if necessary, to embrace all essential facts. *In re Roth (1934) 3 Cal. App. 2d 226, 236, 39 P.2d 490*

Affidavit as required to be no more specific in its averments of facts constituting contempt than complaint charging a crime. *In re Roth (1934) 3 Cal. App. 2d 226, 229, 39 P.2d 490*

[ii] Affidavits as Required for Issuance of Order or Warrant

Order to show cause as not allowed to be isued except on proper affidavits setting forth full facts of alleged contempt. *Lund v. Superior Court (1964) 61 Cal. 2d 698, 713, 39 Cal. Rptr. 891, 394 P.2d 707*

Warrant of attachment as not allowed to be issued except on proper affidavits setting forth full facts of alleged contempt. *In re Passalacqua (1954) 128 Cal. App. 2d 230, 231, 275 P.2d 160*

Order to show cause as issued only on affidavits alleging contempt. *In re Rose (1949) 90 Cal. App. 2d 299, 304, 202 P.2d 1064*

[iii] Statement of Facts

Certificate of nonappearance of witness prepared by notary and shorthand reporter at deposition as meeting requirements for statement of facts by judicial officer under *Code Civ. Proc. § 1211*. *In re Morelli (1970) 11 Cal. App. 3d 819, 829-830, 91 Cal. Rptr. 72*

[d] Opposing Affidavit

Affidavit of accused contemner, together with initiating affidavit, as framing issues to be tried. *Freeman v. Superior Court (1955) 44 Cal. 2d 533, 536, 282 P.2d 857*

Opposing affidavit as having effect of demurrer to initiating affidavit. *Taylor v. Superior Court (1942) 20 Cal. 2d 244, 246, 125 P.2d 1*

Questions as to adequacy of order to show cause or of affidavit or declaration as required to be raised by opposing affidavit. *Morelli v. Superior Court (1968) 262 Cal. App. 2d 262, 266, 68 Cal. Rptr. 572*

Opposing affidavit as raising accused contemner's available defenses. *Nutter v. Superior Court (1960) 183 Cal. App. 2d 72, 74, 6 Cal. Rptr. 404*

Opposing affidavit in form of verified answer as constituting answer or plea to charge of contempt. *Bailey v. Superior Court (1956) 142 Cal. App. 2d 47, 53, 297 P.2d 795*

Opposing affidavit also termed a counteraffidavit. *Associated Lbr. & Box Co. v. Superior Court (1947) 79 Cal. App. 2d 577, 580, 180 P.2d 389*

Accused contemner as permitted to submit affidavit in response to initiating affidavit; affidavit submitted by accused

contemner as constituting answer or plea to charge of contempt. *In re Roth (1934) 3 Cal. App. 2d 226, 229, 39 P.2d 490*

[e] Order to Show Cause

Order to show cause as issued by court after initiating affidavit stating facts constituting contempt is presented to court. *Arthur v. Superior Court (1965) 62 Cal. 2d 404, 408, 42 Cal. Rptr. 441, 398 P.2d 777*

Order to show cause as required to be served on alleged contemner before day on which order made returnable. *Kroneberger v. Superior Court (1961) 196 Cal. App. 2d 206, 209, 16 Cal. Rptr. 339*

Issuance of order to show cause as giving accused contemner notice of charge of contempt and opportunity to refute charge before warrants for arrest or commitment to custody are issued. *In re Rose (1949) 90 Cal. App. 2d 299, 304-305, 202 P.2d 1064*

No jurisdiction to adjudicate contempt when order to show cause served after time it was made returnable. *Brophy v. Industrial Acci. Com. (1941) 46 Cal. App. 2d 278, 282-283, 115 P.2d 835*

[f] Trial

Hearing as had on issues framed by affidavits. *Lyon v. Superior Court (1968) 68 Cal. 2d 446, 452, 67 Cal. Rptr. 265, 439 P.2d 1*

Issues of fact to be tried as those framed by affidavits of plaintiff and defendant which serve as pleadings. *Freeman v. Superior Court (1955) 44 Cal. 2d 533, 536, 282 P.2d 857*

Principles of double jeopardy or *Penal Code § 1387* (preventing reprosecution of certain criminal matters) as not violated when moving party takes contempt matter off calendar, but later reschedules it, provided there were no appearances and no hearing in initially scheduled proceeding. *Mulvany v. Superior Court (1986) 184 Cal. App. 3d 906, 907-909, 229 Cal. Rptr. 334*

Contempt hearing as not able to be held in absence of contemner and his or her attorney when there is no finding that contemner was served and was willfully absent. *Farace v. Superior Court (1983) 148 Cal. App. 3d 915, 917, 196 Cal. Rptr. 297*

Contempt proceeding as one permitting oral testimony of witnesses. *Reifler v. Superior Court (1974) 39 Cal. App. 3d 479, 484, 114 Cal. Rptr. 356*

Accused contemner as entitled to be heard by same tribunal which is to pronounce judgment on him or her. *Marcus v. Workmen's Comp. Appeals Bd. (1973) 35 Cal. App. 3d 598, 605, 111 Cal. Rptr. 101*

Order of contempt as annuled when referee adjudicated contempt and board pronounced judgment on contemner on basis of transcript of proceedings before referee. *Marcus v. Workmen's Comp. Appeals Bd. (1973) 35 Cal. App. 3d 598, 605, 111 Cal. Rptr. 101*

Accused contemner as having opportunity at contempt hearing to offer any legitimate excuse for noncompliance with order, such as financial inability to comply. *Sorell v. Superior Court (1967) 248 Cal. App. 2d 157, 161, 56 Cal. Rptr. 222*

Accused contemner as offering excuse of financial inability to comply with order of support, which constitutes complete defense to charge of contempt. *Nutter v. Superior Court (1960) 183 Cal. App. 2d 72, 75, 6 Cal. Rptr. 404*

[g] Warrants of Attachment and Commitment

Warrant of attachment as ordinarily issuing only on disobedience or order to show cause. *Morelli v. Superior Court (1969) 1 Cal. 3d 328, 330, 82 Cal. Rptr. 375, 461 P.2d 655*

Code Civ. Proc. § 1212 as providing process for bringing accused person before court. *Bridges v. Superior Court (1939) 14 Cal. 2d 464, 473, 94 P.2d 983* (reversed on other grounds *Bridges v. California (1941) 314 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192*)

Warrant of attachment as properly issuing and ordering to show cause as not required when accused contemner present in court when order made which he or she was alleged to have disobeyed. *Ex parte Cottrell (1881) 59 Cal. 417, 418-419*

Warrant of attachment as properly issuing on notice to accused contemner by order to show cause. *Ex parte Cottrell (1881) 59 Cal. 420, 421*

"Bench warrant" as term applied to process issued by court for attachment of arrest of person to answer to charge of contempt. *Silvagni v. Superior Court (1958) 157 Cal. App. 2d 287, 290, 321 P.2d 15*

[3] Issues Involved in Contempt Proceeding

Substantive issues involved in contempt proceeding as being (1) rendition of valid order, (2) actual knowledge of order, (3) ability to comply, and (4) willful disobedience. *Conn v. Superior Court (1987) 196 Cal. App. 3d 774, 784, 242 Cal. Rptr. 148*

[4] Punishment or Coercion of Contemner

[a] Coercion of Civil Contemner

Whether contempt is civil or criminal as depending on whether punishment imposed is remedial and for benefit of complainant or punitive to vindicate authority of court, and this in turn as depending on nature of punishment; if punishment is a sentence of imprisonment, it is remedial if contemner stands committed unless and until he or she performs affirmative act required by court's order; when penalty imposed for contempt is remedial, conditional nature of punishment as rendering relief civil in nature because contemner can end sentence, or suspended sentence, and discharge himself or herself at any moment by doing what he or she had previously refusedto do. *Hicks v. Feiock (1988) 485 U.S. 624, 631-633, 637 n.8, 108 S. Ct. 1423, 99 L. Ed. 2d 721*

Coercion for civil contempt when act, of which omission to perform constitutes contempt, still possible for contemner to perform. *Morelli v. Superior Court (1969) 1 Cal. 3d 328, 332, 82 Cal. Rptr. 375, 461 P.2d 655*

Contempt order as required to state that it is yet within power of person sought to be imprisoned to perform the act. *Van Hoosear v. Railroad Comm'n (1922) 189 Cal. 228, 233, 207 P. 903*

Preclusion of multiple punishments embodied in *Penal Code § 654* as applicable to punishments for contempt under *Code Civ. Proc. § 1218*; fines imposed on plaintiff and his attorney for each day that order was not obeyed as exceeding

trial court's jurisdiction because plaintiff and his attorney were guilty of only one act of contempt each. *Conn v. Superior Court (1987) 196 Cal. App. 3d 774, 786-788, 242 Cal. Rptr. 148* (also noting that then operative version of *Code Civ. Proc. § 128.5* allows courts greater latitude in imposing sanctions under such circumstances)

Commitment under *Code Civ. Proc. § 1219* as provisional since contemner is imprisoned until he or she performs act which is in his or her power to perform. *Lake County v. Superior Court (1977) 67 Cal. App. 3d 815, 817, 136 Cal. Rptr. 830*

Contempt order stating that contemner had ability to comply with restraining order and injunction as void for failing to include finding that act to be performed was within power of contemner to perform. *Lake County v. Superior Court (1977) 67 Cal. App. 3d 815, 817, 136 Cal. Rptr. 830*

[b] Punishment of Criminal Contemner

Whether contempt is civil or criminal as depending on whether punishment imposed is remedial and for benefit of complainant or punitive to vindicate authority of court, and this in turn as depending on nature of punishment; if punishment is a sentence of imprisonment, it is punitive if sentence is limited to imprisonment for definite period. *Hicks v. Feiock (1988) 485 U.S. 624, 631-632, 108 S. Ct. 1423, 99 L. Ed. 2d 721*

Punishment for criminal contempt when act, of which omission to perform constitutes contempt, not possible for contemner to perform. *Morelli v. Superior Court (1969) 1 Cal. 3d 328, 332, 82 Cal. Rptr. 375, 461 P.2d 655*

Penal Code § 654, prohibiting double punishment, as applying to contempts, and as precluding successive citations arising out of same indivisible course of conduct, such as refusal to answer series of questions on same subject. *McCann v. Municipal Court (1990) 221 Cal. App. 3d 527, 545, 270 Cal. Rptr. 640*

Imposition of witness fees for petitioner's misuse of subpoena power as impermissible punishment for indirect contempt, in absence of procedural safeguards, necessary whenever contempt committed outside presence of court. *Fabricant v. Superior Court (1980) 104 Cal. App. 3d 905, 916, 163 Cal. Rptr. 894*

Imposition of punishment within scope of *Civ. Code § 1218* as discretionary. *In re Siegel (1975) 45 Cal. App. 3d 843, 846, 120 Cal. Rptr. 8*

Fine of $250 imposed on attorneys adjudged guilty of direct contempt, with execution of sentence suspended until last day of trial, as well within discretion of court under *Code Civ. Proc. § 1218*. *In re Siegel (1975) 45 Cal. App. 3d 843, 846, 120 Cal. Rptr. 8*

Support provisions in interlocutory decree as enforceable by contempt proceeding. *In re Fontana (1972) 24 Cal. App. 3d 1008, 1010, 101 Cal. Rptr. 465*

[c] When Incarceration Becomes Penal

Incarceration as becoming penal in nature when court determines that contemner's continued incarceration unlikely to accomplish purpose of order; when *Code Civ. Proc. § 1219* incarceration becomes penal, duration of incarceration as then limited to five days under *Code Civ. Proc. § 1218*. *In re Farr (1974) 36 Cal. App. 3d 577, 584, 111 Cal. Rptr. 649*

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§ 135.63 Law Reviews

Comment, *Incarceration for Civil Contempt: An Asserted Eighth Amendment Challenge Faces a Semantical Defense, In re Farr, 36 Cal. App. 3d 577, 111 Cal. Rptr. 649 (1974) , 11 San Diego L. Rev. 1026 (1974)*

Note, *Contempt--Right to Jury Trial--Jury Trial Right in Case of Multiple Indirect Contempts Should Be Determined by Seriousness of Punishment for Each Contempt Rather Than Seriousness of Aggregate Punishment--In re Puerto Rico Newspaper Guild Local 225, 476 F.2d 856 (1st Cir. 1973) , 87 Harv. L. Rev. 865 (1974)*

Note, *Contempt; Rules for Construction of Affidavit or Statement of Facts, 2 Pac. L.J. 337 (1971)*

Comment, *Violation of Invalid Court Orders in California, 3 U.S.F. L. Rev. 88 (1968)*

Comment, *Summary Punishment for Contempt: A Suggestion That Due Process Requires Notice and Hearing Before an Independent Tribunal, 39 S. Cal. L. Rev. 463 (1966)*

Note, *Contempt and the Right to a Public Trial, 34 S. Cal. L. Rev. 225 (1961)*

Note, *Contempt: Perjury: Summary Power to Hold Suspected Perjurers in Contempt for Refusing to Answer, 7 UCLA L. Rev. 515 (1960)*

Note, *Family Law: Contempt as a Means of Enforcing the Child Support Provisions of a Property Settlement Agreement, 47 Calif. L. Rev. 756 (1959)*

Comment, *Contempt Enforcement of 'Integrated' Divorce Settlements in California, 10 Stan. L. Rev. 321 (1958)*

Browning, *Enforcement of Divorce Decrees and Settlements by Contempt and Imprisonment in California*, Hastings L.J. 57 (1957)

Note, *Constitutional Law--Contempt of Congressional Committee--Sufficiency of Indictment*, *30 S. Cal. L. Rev. 223 (1957)*

Luther, *Recent Trends Curtailing the Summary Contempt Power in the Federal Courts*, *8 Hastings L.J. 56* (l956)

Note, *Procedure: Contempt Proceedings: Disqualification of Judge for Bias*, *44 Calif. L. Rev. 425 (1956)*

Note, *Contempt: Requirement of Notice for Constructive Contempt: Contempt for Violation of a Statutory Stay*, *42 Calif. L. Rev. 885 (1954)*

Note, *Equity Procedure: Civil Contempt: Use of Suspended Sentence to Enforce Prohibitory Injunction*, *1 UCLA L. Rev. 20 (1954)*

Note, *Contempt--Effect of Summary Disposition of Contempt After Trial Is Over*, *26 S. Cal. L. Rev. 90 (1952)*

Comment, *Standards of Punishment in Contempt Cases*, *39 Calif. L. Rev. 552 (1951)*

Note, *Contempt --Summary Judgment-- Immediacy of Sentence*, *24 S. Cal. L. Rev. 112 (1950)*

Summary, *Summary Contempt: A Sword or a Shield?* *2 Stan. L. Rev. 763 (1950)*

Note, *Contempt --Immunity Statutes-- Applicability to Contempt Proceedings*, *21 S. Cal. L. Rev. 195 (1948)*

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§ 135.64 Text References

Witkin, California Procedure, vol. 8, *Enforcement of Judgment*, § 332 et seq. (4th ed. 1997)

Witkin, Summary of California Law, vol. 7, *Constitutional Law*, §§ 203, 211-213, 412 (10th ed. 2005)

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§ 135.70 Related Matthew Bender Publications

For memoranda of points and authorities relating to forms in this part, see California Points and Authorities, Ch. 47, *Contempt*

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§ 135.71 State Statutes

[1] Review of Order of Contempt

[a] In General

Finality of contempt order or judgment. *Code Civ. Proc. § 1222*

[b] Writ of Habeas Corpus

Persons who may prosecute writ of habeas corpus. *Penal Code § 1473(a)*

Petition for writ of habeas corpus. *Penal Code § 1474*

[c] Writ of Prohibition

Nature and effect of writ of prohibition. *Code Civ. Proc. § 1102*

Who may issue writ of prohibition; verified petition. *Code Civ. Proc. § 1103*

Writ as alternative or peremptory. *Code Civ. Proc. § 1104*

Code Civ. Proc. §§ 1088-1097 (writs of mandate) as applicable to proceeding for writ of prohibition. *Code Civ. Proc. § 1105*

[d] Writ of Review

Writ of certiorari as denominated writ of review. *Code Civ. Proc. § 1067*

When writ of review granted. *Code Civ. Proc. § 1068*

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§ 135.72 Decisions

[1] Availability of Writs

[a] In General

Order of contempt as permitted to be reviewed by either writ of review or, when appropriate, writ of habeas corpus. *In re Buckley (1973) 10 Cal. 3d 237, 259, 110 Cal. Rptr. 121, 514 P.2d 1201* ; *In re Smith (1976) 65 Cal. App. 3d 291, 296, 135 Cal. Rptr. 5 , disapproved on another ground in Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 221, 96 Cal. Rptr. 2d 531, 999 P.2d 748*

Order of contempt as permitted to be reviewed by writ of prohibition. *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 290, 109 P.2d 942*

Review by extraordinary writ of judgment in civil contempt proceeding as proper because no appeal lies from judgment. *Conn v. Superior Court (1987) 196 Cal. App. 3d 774, 784, 242 Cal. Rptr. 148*

Habeas corpus as suitable remedy to review contempt citation; prohibition as also appropriate to prevent imposition of unauthorized discovery sanctions; but when sanction imposed for contempt for refusing to answer interrogatories is imprisonment, habeas corpus as correct vehicle to review court order. *In re De La Parra (1986) 184 Cal. App. 3d 139, 141, 228 Cal. Rptr. 864*

Writ of habeas corpus as proper procedure to challenge conviction of criminal contempt. *In re Abrams (1980) 108 Cal. App. 3d 685, 687, 166 Cal. Rptr. 749*

[b] Imprisonment as Condition for Writ of Habeas Corpus

Writ of habeas corpus as available when contemner seeks release from custody for contempt for failure to pay spousal

support and attorney's fees. *In re Jennings (1982) 133 Cal. App. 3d 373, 375, 184 Cal. Rptr. 53*

Writ of habeas corpus as available when contemner seeks release from custody for contempt for alleged abuse, or unlawful interference with, proceedings of court by carrying weapon into courtroom. *In re Carvallo (1973) 29 Cal. App. 3d 983, 985-986, 105 Cal. Rptr. 925*

Writ of habeas corpus as available when contemner seeks release from custody for contempt for failure to comply with injunction. *In re Circosta (1963) 219 Cal. App. 2d 777, 783, 33 Cal. Rptr. 514*

[c] Timeliness of Petition

Writ of prohibition as proper only when inferior tribunal is about to perform some judicial act unauthorized by law to restrain commission of thatunauthorized judicial act. *State Bd. of Equalization v. Superior Court (1937) 9 Cal. 2d 252, 254, 70 P.2d 482*

Writ of prohibition as proper to arrest contempt sentence for disobedience of court order. *Nelson v. Superior Court (1937) 9 Cal. 2d 729, 730, 73 P.2d 232*

Writ of prohibition as proper to arrest trial court's intended imposition of contempt sentence. *Ketscher v. Superior Court (1970) 9 Cal. App. 3d 601, 604, 88 Cal. Rptr. 357*

Writ of prohibition as issued to arrest lower court's proceedings in contempt by way of attachment against person accused of disobeying court order when order allegedly disobeyed neither rendered nor entered in judgment. *Silvagni v. Superior Court (1958) 157 Cal. App. 2d 287, 290, 321 P.2d 15*

[d] When Judicial Act Performed After Petition Made

Petition for writ of prohibition as permitted to be treated as petition for writ of review provided complete record of lower court's proceedings, including transcript of evidence, brought before reviewing court. *Van Hoosear v. Railroad Comm'n (1922) 189 Cal. 228, 236, 207 P. 903* (annulling order of contempt by writ of review on petition for writ of prohibition when record warranted relief)

If petition for writ of prohibition made at appropriate time but lower tribunal completes threatened judicial act before decision made on petition, reviewing court as permitted to treat proceeding as one for writ of review. *Chase v. Superior Court (1962) 210 Cal. App. 2d 872, 878, 27 Cal. Rptr. 383*

[2] Jurisdictional Defects

Direct contempt order was not defective for failing to state that conduct occurred "in immediate view and presence" of the court; statutory formula need not be recited when order otherwise recites facts showing clearly that this is what occurred. *Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 220-221, 96 Cal. Rptr. 2d 531, 999 P.2d 748*

Direct contempt order was defective when facts described conduct that was not so outrageous as to be immediately recognized as an act of contempt; in such a case the court must warn person proceeded against that further similar conduct will result in a citation for contempt, and the order must show that this warning was given but disregarded by that person; if an adjudication of contempt depends on the volume, accent, inflection, or tone of voice, or on manner, facial expression, or demeanor, the order of contempt must describe this conduct in detail. *Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 222-223, 96 Cal. Rptr. 2d 531, 999 P.2d 748*

Contempt conviction as capable of being annulled when issuance of order was beyond court's authority. *San Diego Teachers Assn. v. Superior Court of San Diego County (1979) 24 Cal. 3d 1, 5, 154 Cal. Rptr. 893, 593 P.2d 838* (writ of review)

Writ as available when trial court finds person guilty of contempt on affidavit which is fatally defective for failure to allege contemner's notice or knowledge of order alleged to have been disobeyed. *Phillips v. Superior Court (1943) 22 Cal. 2d 256, 257, 137 P.2d 838* (decided prior to enactment of *Code Civ. Proc. § 1211.5*); *In re Liu (1969) 273 Cal. App. 2d 135, 140, 78 Cal. Rptr. 85* (decided prior to enactment of *Code Civ. Proc. § 1211.5*)

Fact that alleged contemner is party to litigation as not sufficient to charge him or her with knowledge of order made in connection with litigation. *Phillips v. Superior Court of Kern County (1943) 22 Cal. 2d 256, 258, 137 P.2d 838*

To have valid contempt adjudication, trial court as required to observe procedures and requirements of *Code Civ. Proc. § 1211 et seq.*; trial court's order in civil action ordering contemner imprisoned for 15 days on his refusal to answer interrogatories as unwarranted and jurisdictionally defective when it did not comply with those procedures and requirements. *In re De La Parra (1986) 184 Cal. App. 3d 139, 144, 228 Cal. Rptr. 864*

Writ as available when trial court erroneously divests itself of jurisdiction to hear a contempt proceeding. *Taylor v. Superior Court (1942) 20 Cal. 2d 244, 246, 125 P.2d 1*

Writ as available when order of contempt insufficient for failure to recite facts of direct contempt with particularity. *Rosenstock v. Municipal Court (1976) 61 Cal. App. 3d 1, 7, 132 Cal. Rptr. 59*

Writ as available when order which contemner was alleged to have violated is unconstitutionally overbroad. *Younger v. Smith (1973) 30 Cal. App. 3d 138, 150, 106 Cal. Rptr. 225*

Writs reviewing contempt orders as jurisdictional and, as such, as available when lower tribunal acts in excesss of its jurisdiction. *Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 762, 104 Cal. Rptr. 921*

Writ as available when order which contemner was alleged to have violated is void on its face. *Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 762, 104 Cal. Rptr. 921*

Writ as available when contemner found in contempt for nonappearance when contemner's attorney appeared for him or her. *Morelli v. Superior Court (1968) 262 Cal. App. 2d 262, 270, 68 Cal. Rptr. 572*

Writ as available when no order or judgment rendered or entered for which contemner could be found in contempt. *Silvagni v. Superior Court (1958) 157 Cal. App. 2d 287, 290, 321 P.2d 15*

Writ as available when trial court finds person guilty of contempt on affidavit which is fatally defective for failure to allege contemner's willful failure to comply with order alleged to have been disobeyed. *Warner v. Superior Court (1954) 126 Cal. App. 2d 821, 824, 826, 273 P.2d 89* (decided prior to enactment of *Code Civ. Proc. § 1211.5*)

[3] Lack of Jurisdiction as Ground for Issuance of Writs

Lack of jurisdiction, in broad sense of word, as establishing ground for issuance of writ. *Safer v. Superior Court (1975) 15 Cal. 3d 230, 242, 124 Cal. Rptr. 174, 540 P.2d 14*

Writs of review and prohibition as jurisdictional writs. *Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 762,*

104 Cal. Rptr. 921

Writ of habeas corpus as jurisdictional writ. *In re Circosta (1963) 219 Cal. App. 2d 777, 784, 33 Cal. Rptr. 514*

[4] Order of Contempt Not Appealable

Contempt order as permitted to be reviewed by petition for writ of prohibition. *Safer v. Superior Court (1975) 15 Cal. 3d 230, 235, 124 Cal. Rptr. 174, 540 P.2d 14*

Contempt order or judgment as not appealable. *In re Buckley (1973) 10 Cal. 3d 237, 259, 110 Cal. Rptr. 121, 514 P.2d 1201* ; *In re Holmes (1983) 145 Cal. App. 3d 934, 941, 193 Cal. Rptr. 790* ; *Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 764, 104 Cal. Rptr. 921* ; *Butler v. Butler (1967) 255 Cal. App. 2d 132, 135, 62 Cal. Rptr. 825*

Contempt order as permitted to be reviewed by petition for writ of habeas corpus. *In re Carvallo (1973) 29 Cal. App. 3d 983, 986, 105 Cal. Rptr. 925*

Contempt order as permitted to be reviewed by petition for writ of review. *Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 764, 104 Cal. Rptr. 921*

[5] Construction of Order on Review

[a] In General

Reviewing court as not indulging in presumptions as to regularity, validity, or sufficiency of contempt proceedings. *In re Blaze (1969) 271 Cal. App. 2d 210, 211, 76 Cal. Rptr. 551* ; *In re Circosta (1963) 219 Cal. App. 2d 777, 785, 33 Cal. Rptr. 514*

Reviewing court as strictly construing contempt order or judgment in favor of accused contemner. *Andrews v. Superior Court (1960) 183 Cal. App. 2d 756, 759, 7 Cal. Rptr. 194*

[b] Writ of Habeas Corpus

Petition for writ of habeas corpus as seeking release from custody. *In re Circosta (1963) 219 Cal. App. 2d 777, 779, 33 Cal. Rptr. 514*

[c] Writ of Prohibition

Writ of prohibition as functioning to restrain acts taken in excess of court's jurisdiction. *Safer v. Superior Court (1975) 15 Cal. 3d 230, 242, 124 Cal. Rptr. 174, 540 P.2d 14*

Proceeding before court as properly arrested by writ of prohibition at any particular time in progress thereof to determine whether court has committed error either in jurisdiction or in ruling on proposition arising in course of proceeding. *Morelli v Superior Court (1968) 262 Cal. App. 2d 262, 268, 68 Cal. Rptr. 572*

[d] Writ of Review

Sole function of writ of review as to annul any proceedings taken in excess of jurisdiction. *Chula v. Superior Court of*

Orange County (1962) 57 Cal. 2d 199, 204, 18 Cal. Rptr. 507

Order of contempt annulled on review where no substantial evidence that accused contemner willfully and contemptuously refused to obey court order. *Uhler v. Superior Court of Fresno County (1953) 117 Cal. App. 2d 147, 154, 256 P.2d 90*

[6] Scope of Review

Although reviewing court looks to entire record of court below, power to weigh evidence as resting solely with trial court. *In re Buckley (1973) 10 Cal. 3d 237, 247, 110 Cal. Rptr. 121, 514 P.2d 1201*

Reviewing court as considering evidence in contempt proceeding only for purpose of ascertaining whether there was any substantial evidence before trial court to sustain its jurisdiction. *Chula v. Superior Court (1962) 57 Cal. 2d 199, 204, 18 Cal. Rptr. 507, 368 P.2d 107*

Order of contempt proper when substantial evidence supports trial court's finding that alleged contemner was ordered to appear personally, had the ability to appear at the ordered place and time, and failed to appear without sufficient reason or excuse. *Chula v. Superior Court (1962) 57 Cal. 2d 199, 206, 18 Cal. Rptr. 507, 368 P.2d 107*

Scope of review on application for writ of review or prohibition as identical. *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 290, 109 P.2d 942*

Because power to weigh evidence rests exclusively with trial court, reviewing court's responsibility on review of contempt judgment as being merely to ascertain whether there existed any substantial evidence to sustain jurisdiction of trial court. *Conn v. Superior Court (1987) 196 Cal. App. 3d 774, 784, 242 Cal. Rptr. 148*

Judicial review of evidence as limited to determination of whether there is any substantial evidence to sustain jurisdiction of trial court; power to weigh evidence as resting with trial court. *In re Holmes (1983) 145 Cal. App. 3d 934, 941, 193 Cal. Rptr. 790*

Reviewing court as looking to entire record of court below. *In re Circosta (1963) 219 Cal. App. 2d 777, 784, 33 Cal. Rptr. 514*

Scope of review as: (1) whether act or omission charged against contemner confers court with jurisdiction to adjudicate alleged contempt and (2) whether jurisdictional act or omission is supported by evidence. *In re Carvallo (1973) 29 Cal. App. 3d 983, 986, 105 Cal. Rptr. 925*

Scope of review on application for writ. *In re Carvallo (1973) 29 Cal. App. 3d 983, 986, 105 Cal. Rptr. 925*

Scope of review on application for writ of review or habeas corpus as identical. *In re Karpf (1970) 10 Cal. App. 3d 355, 364, 88 Cal. Rptr. 895* ; *In re Circosta (1963) 219 Cal. App. 2d 777, 785, 33 Cal. Rptr. 514*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsProhibitionCivil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal ContemptCriminal Law & ProcedureHabeas CorpusGeneral Overview

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§ 135.73 Law Reviews

Note, *Collateral Attack of Injunctions Restraining First Amendment Activity*, *45 So. Cal. L. Rev. 1083 (1972)*

Note, *Scope of Review of Contempt Orders in California*, *37 Cal. L. Rev. 301 (1949)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsProhibitionCivil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal ContemptCriminal Law & ProcedureHabeas CorpusGeneral Overview

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§ 135.74 Text References

Witkins, California Procedure, vol. 8, *Enforcement of Judgment*, §§ 161-164, 171, 332 et seq., *Extraordinary Writs*, §§ 31-73, 163-187 (4th ed. 1997)

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[Reserved]

§§ 135.75[Reserved]

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13-135 California Forms of Pleading and Practice--Annotated § 135.80

§ 135.80 Declaration Initiating Indirect Contempt Proceeding [Code Civ. Proc. § 1211] for Violation of Court Order

[1] FORM Declaration Initiating Indirect Contempt Proceeding [Code Civ. Proc. § 1211] for Violation of Court Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*], [Plaintiff *or* Petitioner],	)	NO. _____
vs.	)	DECLARATION RE CONTEMPT
_____ [*name*], [Defendant *or* Respondent].	)	

I, _____[*name*], declare:

1. I am the [attorney for the] _____[plaintiff *or* petitioner] herein.

2. On or about _____ [*date*], in [_____ (Department *or* Division) _____ of] this court, located at _____ [*name of building and street address*],

_____ [*city*], California, the Honorable _____ [*name*], Judge, made an order directing _____ [*name*], _____ [defendant *or* respondent] herein, to _____[*specify requirements of order*].

3. The foregoing order was _____ [in writing *or* entered in the court's minutes].

4. _____ [Defendant *or* Respondent] _____ [was served with notice of the foregoing order *or* had actual knowledge of the foregoing order *or* was present in court when the foregoing order was made].

5. At all times herein mentioned, the _____ [defendant *or* respondent] had the ability to comply with the foregoing order and _____ [still has the ability to do so *or* had the ability to do so at the time the order was violated].

6. At all times herein mentioned, the order has remained in full force and effect.

7. _____ [Defendant *or* Respondent] has disobeyed the order in that _____ [*specify*].

8. _____ [Defendant's *or* Respondent's] disobedience has been willful and with the intent to frustrate the processes of this court and to deprive _____ [*name*], _____ [plaintiff *or* petitioner] herein, of the benefits to which he/she is entitled under the order.

WHEREFORE, I, the declarant herein, pray that this court issue an order requiring _____ [*name*], _____ [defendant *or* respondent] herein, to show cause, if any he/she have, why he/she should not be judged in contempt of court by reason of his/her violation of the foregoing order, as alleged above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The declaration in [1], *above* [*see Code Civ. Proc. § 2015.5*], is for use in initiating a contempt proceeding when the contempt charged is one not committed in the immediate view and presence of the court or judge at chambers [*Code Civ. Proc. § 1211(a)*] and consists of a violation of a court order, such as an order or judgment which is in the nature of an injunction [*see Vanderstok v. Bank of America (1972) 29 Cal. App. 3d 731, 734, 105 Cal. Rptr. 699]* .

Code Civ. Proc. § 1211(b) provides that in family law matters, filing of the Judicial Council form entitled "Order to Show Cause and Affidavit for Contempt (Family Law)" [*see* Cal. Judicial Council Form FL-410] constitutes compliance with the affidavit requirement of *Code Civ. Proc. § 1211*. For a reproduction of the Judicial Council form, as well as a discussion of contempt in connection with family law proceedings, see Ch. 258, *Family Law Enforcement* .

[3] Allegations

The declaration alleges the capacity of the declarant (Paragraph 1), the making of the order alleged to be violated (Paragraph 2), [*In re Liu (1969) 273 Cal. App. 2d 135, 140, 78 Cal. Rptr. 85* (making of order as one of facts essential to establish jurisdiction for contempt proceeding)], and that the order alleged to be violated was written or entered in the

court's minutes (Paragraph 3), [*see Ketscher v. Superior Court (1970) 9 Cal. App. 3d 601, 604-605, 88 Cal. Rptr. 357]* .

Because an alleged contemner's notice or knowledge of the order he or she is charged with contempt for violating is a jurisdictional prerequisite to the validity of a contempt order [*Freeman v. Superior Court (1955) 44 Cal. 2d 533, 537, 282 P.2d 857]* , an affidavit (declaration) must also allege that the accused contemner had notice or knowledge of the existence of the order at the time he or she is alleged to have violated it. Thus, an affidavit (declaration) should allege that the accused contemner was served with notice of the order alleged to be violated, that he or she had actual knowledge of its terms, or that he or she was present in court when it was made (Paragraph 4) [*see Phillips v. Superior Court (1943) 22 Cal. 2d 256, 257-258, 137 P.2d 838]* .

An affidavit (declaration) must allege that the accused contemner had the ability to comply with the order alleged to be violated [*In re Liu (1969) 273 Cal. App. 2d 135, 140, 78 Cal. Rptr. 85* (ability to comply as one of facts essential to establish jurisdiction for contempt proceeding)] at the time he or she is alleged to have violated it (Paragraph 5) [*see Sorell v. Superior Court (1967) 248 Cal. App. 2d 157, 163, 56 Cal. Rptr. 222]* . In addition, the declaration alleges that the order alleged to be violated has remained in full force and effect (Paragraph 6).

Finally, the affidavit (declaration) must allege that the accused contemner failed to comply with the order [*In re Rose (1949) 90 Cal. App. 2d 299, 304, 202 P.2d 1064]* or injunction [*see People v. Saffel (1946) 168 P.2d 497]* or that the accused contemner voluntarily disabled himself or herself from ability to comply with the order (Paragraph 7) [*Van Hoosear v. Railroad Comm'n (1922) 189 Cal. 228, 233, 207 P. 903]* and that such disobedience was willful (Paragraph 8) [*In re Liu (1969) 273 Cal. App. 2d 135, 140, 78 Cal. Rptr. 85* (willful disobedience or order as one of facts essential to establish jurisdiction for contempt proceeding); *Warner v. Superior Court (1954) 126 Cal. App. 2d 821, 824, 826, 273 P.2d 89* (affidavit fatally defective for failure to allege willfulness)]. However, the paragraph describing the contemner's willfulness in his or her noncompliance need not also allege the contemner's specific wrongful intent unless the question of intent goes to the gravamen of the contempt alleged to be committed [*see In re Jasper (1973) 30 Cal. App. 3d 985, 988, 106 Cal. Rptr. 754* (intent a factor when contempt is act of doubtful propriety, such as carrying concealed knife into courtroom)].

[4] Jurisdiction and Venue

A civil contempt proceeding is brought before the court in which the proceeding giving rise to the alleged contempt is pending [*Pacific Tel. & Tel. Co. v. Superior Court (1968) 265 Cal. App. 2d 370, 372, 72 Cal. Rptr. 177* (quoting *Bridges v. Superior Court (1939) 14 Cal. 2d 464, 478, 94 P.2d 983 , reversed on other grounds, Bridges v. California (1941) 314 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192*)].

[5] Declaration in Lieu of Affidavit

Although *Code Civ. Proc. § 1211* authorizes an affidavit to initiate a contempt proceeding, a declaration under penalty of perjury is a satisfactorysubstitute for an affidavit [*Code Civ. Proc. § 2015.5*] in a contempt proceeding [*In re Morelli (1970) 11 Cal. App. 3d 819, 830, 91 Cal. Rptr. 72* (elements of contempt derived from declaration as meeting requirements of *Code Civ. Proc. § 1211*)]. When a contempt proceeding is initiated by referees, arbitrators, or other judicial officers, they may submit a statement of facts in lieu of an affidavit [*Code Civ. Proc. § 1211(a)*].

[6] Cross References

For discussion and forms for use in affidavits and declarations, see ch. 15, *Affidavits, Certificates, and Declarations*

For discussions and forms of captions, see Ch. 108, *Captions and Introductions*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification* ,, respectively

For memorandum of points and authorities supporting and opposing initiating affidavits for indirect contempt, see California Points and Authorities, Ch. 47, *Contempt* (Matthew Bender)

Witkins, California Procedure, vol. 8, *Enforcement of Judgment*, § 335 et seq. (4th ed. 1997)

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13-135 California Forms of Pleading and Practice--Annotated § 135.81

§ 135.81 Order to Show Cause re Indirect Contempt [Code Civ. Proc. § 1212] for Violation of Court Order

[1] FORM Order to Show Cause re Indirect Contempt [Code Civ. Proc. § 1212] for Violation of Court Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*], Plaintiff *or* Petitioner],	)	
	)	NO. _____
vs.	)	ORDER TO SHOW CAUSE RE CONTEMPT
_____ [*name*], [Defendant *or* Respondent].	)	
	)	

To _____ [*name*], _____ [defendant *or* respondent] herein:

YOU ARE HEREBY ORDERED to appear on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in the courtroom of [_____ (Department *or* Division) _____ of] the above-entitled court, located at _____ [*name of building and street address*], _____ [*city*], California, then and there to show cause, if any you have, why you should not be adjudged in contempt of court and punished accordingly for willfully disobeying the order of this court made on _____ [*date*], in the above-entitled action.

The order of _____ [*date*], and your disobedience thereto are more particularly described in the declaration of _____[*name*], which is attached hereto and made a part hereof.

This order shall be served on you by delivering a copy thereof, attached to a copy of the declaration of _____ [*name*], at least _____ [*number*] day(s) prior to the date of the hearing.
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, to show cause is for use in bringing a person charged with an indirect contempt before the court to answer to the charge [*Code Civ. Proc. § 1212*]. The order must be accompanied by an affidavit, or declaration [*see § 135.80*], stating the facts constituting the alleged contempt [*Code Civ. Proc. § 1211*].

[3] Use of Order to Show Cause

An order to show cause [*Code Civ. Proc. § 1212*] is issued by the court after the initiating affidavit (declaration) is presented to the court [*Arthur v. Superior Court (1965) 62 Cal. 2d 404, 408, 42 Cal. Rptr. 441, 398 P.2d 777]* . It is customary to issue the order to show cause in order to give the accused contemner notice of the charge of contempt and an opportunity to refute the charge before issuing a warrant for his or her arrest or commitment to custody [*see In re Rose (1949) 90 Cal. App. 2d 299, 304-305, 202 P.2d 1064]* . Unless the cited person has concealed himself or herself from the court, he or she must be personally served with the order to show cause and the supporting affidavit; otherwise, the court lacks jurisdiction to proceed [*Cedars-Sinai Imaging Med. Group v. Superior Court (2000) 83 Cal. App. 4th 1281, 1286-1287, 100 Cal. Rptr. 2d 320* (attorney's waiver, at hearing, of right to receive written notice of court's ruling or of further hearing date does not waive client's right to be personally served with order to show cause prior to hearing)].

Ordinarily, it is only on disobedience of an order to show cause that a warrant of attachment [*see Code Civ. Proc. § 1212*; *§ 135.83*] issues [*Morelli v. Superior Court (1969) 1 Cal. 3d 328, 330, 82 Cal. Rptr. 375, 461 P.2d 655]* .

[4] Cross References

For a declaration initiating an indirect contempt proceeding, see *§ 135.80*

For discussion and forms for use in preparing orders, see Ch. 372, *Motions and Orders*

For discussion, procedures, and forms for use in preparing, serving, and filing papers, see Ch. 518, *Service of Summons*

Witkins, California Procedure, vol. 8, *Enforcement of Judgment*, § 335 et seq. (4th ed. 1997)

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13-135 California Forms of Pleading and Practice--Annotated § 135.82

§ 135.82 Order to Show Cause re Indirect Contempt [Code Civ. Proc. § 1212] for Violation of Court Order--Service on Attorney of Alleged Contemner

[1] FORM Order to Show Cause re Indirect Contempt [Code Civ. Proc. § 1212] for Violation of Court Order--Service on Attorney of Alleged Contemner

[*Caption. See § 135.81[1].*]

To _____ [*name*], _____ [defendant *or* respondent] herein, and to _____ [*name*], his/her attorney of record:

IT IS HEREBY ORDERED that _____ [*name*] appear in person on _____ [*date*], at _____ [*time*], in the courtroom of [_____ (Department *or* Division) _____ of] the above-entitled court, located at _____ [*name of building and street address*], _____ [*city*], California, then and there to show cause, if any he/she have, why he/she should not be adjudged in contempt of court and punished accordingly for willfully disobeying the order of this court made on _____ [*date*], in the above-entitled action and more particularly set forth in the attached declaration of _____ [*name*].

Good cause appearing from the attached declaration of _____ [*name*],

IT IS FURTHER ORDERED that service of a copy of this order to show cause and the declaration of _____ [*name*] on _____ [*name*], attorney of record for _____ [*name*], _____ defendant *or* respondent] herein, shall constitute sufficient service without service on the alleged contemner.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form of order in [1], *above*, to show cause is for use in bringing a person charged with an indirect contempt before the court to answer to the charge [*Code Civ. Proc. § 1212*], with a provision for service on the alleged contemner's attorney [*see Kroneberger v. Superior Court (1961) 196 Cal. App. 2d 206, 210, 16 Cal. Rptr. 339* (court as permitted to direct service to alleged contemner's attorney when alleged contemner concealed himself or herself to avoid service or out of state for that purpose)]. The order to show cause must be accompanied by an affidavit, or declaration [*see § 135.80*], stating the facts constituting the alleged contempt [*Code Civ. Proc. § 1211*].

[3] Service on Attorney of Alleged Contemner

Ordinarily, when a party has an attorney of record in an action or proceeding, the service of papers, when required, must be on the attorneyrather than the party. However, this does not apply to papers which bring the party into contempt [*Code Civ. Proc. § 1015*; *Cedars-Sinai Imaging Med. Group v. Superior Court (2000) 83 Cal. App. 4th 1281, 1286-1287, 100 Cal. Rptr. 2d 320* (except when citee has concealed himself or herself from court, court lacks jurisdiction unless citee has been personally served with order to show cause and supporting affidavit)]. Similarly, the provisions of *Code Civ. Proc. §§ 1010-1015* (notices, filing, and service of papers) are made inapplicable to papers bringing a party into contempt [*Code Civ. Proc. § 1016*]. Notwithstanding these provisions, a court may direct service to be made on the attorney of record for an alleged contemner when it appears that the alleged contemner is concealing himself or herself to avoid service of the order to show cause or is remaining outside the state for that purpose [*Kroneberger v. Superior Court (1961) 196 Cal. App. 2d 206, 210, 16 Cal. Rptr. 339* (annulling, however, order of contempt where neither defendant nor defendant's attorney of record served with order to show cause with respect to an alleged failure to comply with a custody order by removing child from state)].

[4] Cross References

For a declaration initiating an indirect contempt proceeding, see *§ 135.80*

For an order to show cause without service on the attorney of the alleged contemner, see *§ 135.81*

Witkins, California Procedure, vol. 8, *Enforcement of Judgment*, § 339 (4th ed. 1997)

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§ 135.83 Bench Warrant (Civil) [Code Civ. Proc. § 1212]--Orange County Superior Court Form

[1] FORM Bench Warrant (Civil) [Code Civ. Proc. § 1212]--Orange County Superior Court Form

Click here to view image.

[2] Source of Form

This form is illustrative of civil bench warrants or warrants of attachment used by local trial courts. It is a reproduction of the form of bench warrant used by the Orange County Superior Court (Orange Co. Super. Ct., Form L525 [*see* http://www.occourts.org/forms/local/l525.pdf].

[3] Use of Form

This illustrative form of civil bench warrant is for use by a court to attach a person accused of an indirect contempt to answer the charge [*Code Civ. Proc. § 1212*], fixing bail for the person charged with the contempt [*Code Civ. Proc. § 1213*]. Ordinarily, it is only on disobedience of an order to show cause that a civil bench warrant issues [*see Morelli v. Superior Court (1969) 1 Cal. 3d 328 330, 82 Cal. Rptr. 375, 461 P.2d 655* (trial court issuing order to show cause why accused contemner should not be held in contempt for failure to obey subpoena duces tecum to appear for deposition and subsequently issuing bench warrant, with bail fixed at $500, for failure of accused contemner to appear at hearing on order to show cause)].

For a declaration initiating an indirect contempt proceeding, see *§ 135.80*. For orders to show cause for violation of court order, see *§§ 135.81, 135.82*.

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13-135 California Forms of Pleading and Practice--Annotated § 135.84

§ 135.84 Order [Code Civ. Proc. § 1003] of Contempt [Code Civ. Proc. §§ 1218(a), 1219] for Use in Indirect Contempt Proceedings

[1] FORM Order [Code Civ. Proc. § 1003] of Contempt [Code Civ. Proc. §§ 1218(a), 1219] for Use in Indirect Contempt Proceedings

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*], [Plaintiff *or* Petitioner],	)	
vs.	)	NO. _____
_____ [*name*], [Defendant *or* Respondent].	)	ORDER OF CONTEMPT
	)	

The contempt proceedings against _____ [*name*], defendant/respondent herein, came regularly for hearing by the court on this date pursuant to _____ [*specify, e.g.,* the order to show cause issued by this court on _____ (*date*)]. Plaintiff/Petitioner appeared by his/her counsel, _____ [*name*] and defendant/respondent appeared by his/her counsel, _____ [*name*]. Evidence, both oral and documentary, having been received and considered, the matter having been argued and submitted, [it appearing that defendant/respondent has the present ability to comply with the order violated as made by this court on

_____ (*date*),] and good cause appearing therefor,

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that _____ [*name*], defendant/respondent herein, is guilty of contempt of court for _____ [*specify, e.g.,* failure to obey the order of this court made on _____ (*date*), _____ (*describe acts that defendant or respondent was directed to perform or was restrained from performing*)] in that _____ [*allege facts essential to establish jurisdiction over contemner, e.g.,* he/she knew of the foregoing order, had (and still has) the ability to comply with the foregoing order, and willfully disobeyed the foregoing order].

[*EITHER*]

IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that _____ [*name*] defendant/respondent herein, is to be punished for the foregoing contempt by _____ [*specify, e.g.,* a fine of $_____ *or* confinement in the county jail for a period of _____ (*number*) days].

[*OR*]

IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that _____ [*name*], defendant/respondent herein, is to be imprisoned at _____ [*specify*] jail until he/she has performed the following act(s): _____ [*describe act(s) to be performed*].

[*CONTINUE*]

[IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that defendant/respondent _____ (*name*) shall pay the sum of $_____, as reasonable attorney's fees and costs incurred in connection with this proceeding, to plaintiff/petitioner _____ (*name*) by _____ (*date*).]
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

This form of a contempt order is for use in an indirect contempt proceeding in which the contemner is found guilty of a contempt and either punished for the contempt [*see Code Civ. Proc. § 1218(a)*] or, if the contempt consists of an omission to perform an act which is still in the contemner's power to perform, imprisoned until he or she performs the act [*see Code Civ. Proc. § 1219*]. With appropriate modifications, this form may be used as a contempt order in a direct contempt proceeding [*see Code Civ. Proc. § 1211(a)*].

The form contains an optional paragraph ordering the defendant or respondent to pay a sum for reasonable attorney's fees and costs to the party initiating the contempt proceeding [*see Code Civ. Proc. § 1218(a)*; *see also § 135.33[3]*].

[3] Requirements of Order of Contempt

An indirect contempt order must state whether or not the person proceeded against is guilty of the contempt charged [

Code Civ. Proc. § 1218(a)]. An order embodying a judgment of indirect contempt should also recite with particularity the findings respective to each charged offense [*see Moss v. Superior Court (1998) 17 Cal. 4th 396, 404 n.3, 71 Cal. Rptr. 2d 215, 950 P.2d 59* and discussion in *§ 135.32[13]*].

In addition, the order of contempt must state the fine, imprisonment, or both [*Code Civ. Proc. § 1218(a)*; *see* discussion in *§ 135.33*]. A contempt order imposing coercive punishment under *Code Civ. Proc. § 1219* must specify the act to be performed and must include a finding that that act is within the power of the contemner to perform [*County of Lake v. Superior Court (1977) 67 Cal. App. 3d 815, 817, 136 Cal. Rptr. 830* ; *see* discussion in *§ 135.33[2]*].

[4] Cross References

See also the discussion in *§§ 135.80 -135.83*

For discussion, procedures, and alternative forms of orders, see Ch. 372, *Motions and Orders*

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[Reserved]

§§ 135.85[Reserved]

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Volume 13: Conspiracy thru Conversion-Chs. 126-159
Chapter 135 CONTEMPT
PART IV. FORMS
B. Review of Contempt Proceedings

13-135 California Forms of Pleading and Practice--Annotated § 135.90

§ 135.90 Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069] for Relief From Contempt [Code Civ. Proc. § 1222] Arising From Alleged Violation of Court Order

[1] FORM Petition for Writ of Review [Code Civ. Proc. §§ 1068, 1069] For Relief From Contempt [Code Civ. Proc. § 1222] Arising From Alleged Violation of Court Order

[CIVIL NO. _____]

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

[*OR*]

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
_____ APPELLATE DISTRICT
[DIVISION _____]

[*OR*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
APPELLATE DIVISION

_____ [*name*],)
Petitioner,)

vs.	)	
THE COURT OF APPEAL OF THE STATE OF	)	
CALIFORNIA FOR THE _____	)	
APPELLATE DISTRICT,	)	[CIVIL NO. _____]
[*OR*]	)	PETITION FOR WRIT OF REVIEW
THE SUPERIOR COURT OF THE STATE OF	)	
CALIFORNIA FOR THE [CITY AND] COUNTY	)	
OF _____,	)	
[*OR*]	)	
_____ [*Name of board or of-*	)	
ficer or other person having custody of record or pro-	)	
ceedings to be satisfied]		
[*CONTINUE*]		
Respondent[,]		
[_____ [*name*], Real Party in		
Interest].		
_____		

[*EITHER*]

[TO THE HONORABLE _____ (CHIEF *or* PRESIDING) JUSTICE AND ASSOCIATE JUSTICES OF THE _____ (SUPREME COURT *or* COURT OF APPEAL OF THE _____ (*number*) APPELLATE DISTRICT, DIVISION _____ (*number*)) OF THE STATE OF CALIFORNIA:]

[*OR*]

[TO THE PRESIDING JUDGE AND JUDGES OF THE APPELLATE DIVISION OF THE SUPERIOR COURT:]

[*CONTINUE*]

Petitioner alleges:

1. Petitioner is _____ [*identify petitioner and describe capacity, if other than individual, in which the proceeding is being brought*] and is beneficially interested in this proceeding in that _____ [*specify, e.g.*, he/she has been ordered imprisoned for contempt].

2. Respondent _____ [*name*] is _____ [*describe court that issued order or conducted proceedings from which petitioner seeks relief, e.g.*, the Superior Court of California, _____ County].

[3. Real party in interest is _____ (*name*) and has an interest which is directly affected by this proceeding in that _____ (*specify reasons which make person the real party in interest, e.g.*, he/she/it is the plaintiff in the action in which these contempt proceedings arose).]

4. On _____ [*date*], Action No. _____ was filed in the _____

Court of California, _____ County, for _____ [*specify cause of action, e.g.*, money due on a promissory note] with _____ [*name*] as _____ [plaintiff *or* petitioner] and _____ [*name*] as _____ [defendant *or* respondent].

5. On or about _____ [*date*], in [_____ (Department *or* Division) _____ of] the above-entitled court, the Honorable _____ [*name*], Judge, made an order directing _____ [*name*], _____ [defendant *or* respondent] therein, to _____ [*specify requirements of order, e.g.*, deliver the partnership assets of _____ (*name*) partnership to a receiver appointed by the court].

6. On or about _____ [*date*], in [_____ (Department *or* Division) _____ of] the above-entitled court, the Honorable _____[*name*], Judge, issued an order to show cause directing petitioner to appear at a hearing to determine whether or not petitioner should be held in contempt of court for allegedly violating the order described above. At the conclusion of the hearing, the Honorable _____ [*name*], Judge, rendered his/her decision that the petitioner was in contempt of court for failure to comply with the order described above. In accordance with the foregoing decision, the Honorable _____ [*name*], Judge, ordered petitioner to _____ [*specify punishment, e.g.*, be imprisoned for five days *or* pay a fine of $500]. [Thereafter, the Honorable _____ (*name*), Judge, ordered a stay of execution until _____ [*date*], at _____ [*time*], and released petitioner (on his/her own recognizance) until that date.]

7. The respondent court exceeded its jurisdiction in adjudging petitioner in contempt of court in that _____ [*specify, e.g.*, the order petitioner is alleged to have violated is void on its face as directly contrary to statutory authority in that the order alleged to be violated is precluded by the partner's adverse claim to the assets].

8. Petitioner has no right of appeal from the order of contempt rendered by respondent court in that *Section 1222 of the Code of Civil Procedure* provides that orders or judgments of contempt are final and conclusive.

9. Petitioner has no plain, speedy, and adequate remedy, other than this proceeding for a writ of review, by reason of the foregoing lack of right to appeal from an order of contempt [and in that _____ (*state any additional facts restricting petitioner's remedy*)].

10. Enforcement of the order of contempt will require petitioner to _____ [*show effect of order of contempt on petitioner's legal rights and obligations, e.g.*, submit to imprisonment *or* pay a fine of $500] to petitioner's injury and detriment.

[11. This petition is made to this court in the first instance, rather than to the _____ (Superior Court, _____ County or Court of Appeal, _____ Appellate Division) of the State of California, for the following reason(s): _____ (*as required by Cal. Rules of Ct., Rule 8.486(a)(1) , explain why reviewing court should issue writ as original matter*).]

WHEREFORE, petitioner prays:

1. That this court issue a writ of review to respondent court [, and to the Honorable _____ (*name*), Judge,] commanding that court to certify fully to this court, at a specified time and place, a transcript of the records and proceedings in the above-entitled contempt matter adjudging petitioner guilty of contempt of court and _____ [sentencing him/her to imprisonment *or* fining him/her $500], so that the same may be inquired into and determined by this court;

2. That the foregoing cause be heard and fully considered by this court and that the order of contempt made by the Honorable _____ [*name*], Judge, for that court, on _____ [*date*], be annulled and set aside;

3. That this court issue an order requiring respondent to desist and refrain from further proceedings in the above-entitled contempt matter during the pendency of this proceeding;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name name*]

VERIFICATION

I, _____ [*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Source of Form

The fact situation suggested in the form in [1], *above*, is taken from the opinion in *Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 104 Cal. Rptr. 921* .

[3] Use of Form

The form of petition [*Code Civ. Proc. § 1069*] in [1], *above*, is for use in seeking a writ of review in the appellate division of a superior court, a court of appeal, or the Supreme Court to review the exercise of judicial functions by an inferior tribunal, board, or officer [*Code Civ. Proc. § 1068*].

More specifically, it seeks a review of a lower court's order holding the petitioner in contempt of court for violating an order of the lower court [*see Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 762, 104 Cal. Rptr. 921* (writ of review as proper when lower tribunal acts in excess of its jurisdiction)].

[4] Allegations

The petition alleges:

- The capacity of the petitioner and that the petitioner is the party beneficially interested (Paragraph 1) [*Code Civ. Proc. § 1069*].

- The identity and capacity of respondent and any real parties in interest (Paragraphs 2, 3).

- The exercise of judicial functions by a lower tribunal (Paragraphs 4, 5) [*see Code Civ. Proc. § 1068*].

- The issuance of an order to show cause re contempt [*Code Civ. Proc. § 1212*], a hearing on the alleged contempt [*Code Civ. Proc. § 1217*], a determination that the petitioner is guilty of contempt, and the imposition of punishment on the petitioner (Paragraph 6) [*Code Civ. Proc. § 1218*].

- That the inferior tribunal exceeded its jurisdiction in adjudging petitioner in contempt (Paragraph 7) [*see Code Civ. Proc. § 1068*].

- That petitioner is without the right of appeal (Paragraph 8) [*Code Civ. Proc. §§ 1068, 1222*].

- That petitioner has no plain, speedy, and adequate remedy other than by writ of review (Paragraph 9) [*Code Civ. Proc. §§ 1068, 1222*].

- That petitioner's interest will be directly affected by the proceeding (Paragraph 10).

The foregoing petition also includes an optional allegation for use when the petition might lawfully have been made to a lower court in the first instance (Paragraph 11) [*Cal. Rules of Ct., Rule 8.486(a)(1)*].

[5] Verification

A petition to a reviewing court for a writ of review must be verified [*Code Civ. Proc. § 1069*; *Cal. Rules of Ct., Rule 8.486(a)(4)*]. In addition, the petition must be accompanied by proof of service of a copy of the petition on the respondent and any real party in interest named in the petition [*Code Civ. Proc. § 1107*].

[6] Supporting Memorandum

A supporting memorandum customarily accompanies a petition filed in a superiorcourt, although it does not appear to be expressly required by statute or court rule [*see Cal. Rules of Ct., Rule 3.1103(a)* (defining law and motion proceedings), 3.1113 (generally requiring memorandum in support of noticed motion)].

[7] Additional Requirements

Any writ petition seeking review of a trial court's ruling must be accompanied by a record adequate to permit review, including (1) copies of the ruling from which the petition seeks relief, (2) copies of all documents and exhibits submitted to the trial court supporting and opposing the petitioner's position, and (3) any other documents or portions of documents submitted to the trial court that are necessary for a complete understanding of the case and the ruling under review [*Cal. Rules of Ct., Rule 8.486(b)(1)(A)-(C)*; *see Cal. Rules of Ct., Rule 8.486(c)* (format for documents and exhibits)]. In exigent circumstances, these documents may be omitted if counsel files a declaration explaining the urgency and the circumstances making the documents unavailable and fairly summarizing their substance [*Cal. Rules of Ct., Rule 8.486(b)(2)*]. The record must also include a reporter's transcript of the oral proceedings that resulted in the

ruling under review [*Cal. Rules of Ct., Rule 8.486(b)(1)(D)*]. If a reporter's transcript is unavailable, the record must include a declaration by counsel stating that a transcript has been ordered and is expected to be filed on a certain date, or if no transcript is available, explaining its unavailability and fairly summarizing the proceedings, including the parties' arguments and any statement by the court supporting its ruling [*Cal. Rules of Ct., Rule 8.486(b)(3)*]. If the petitioner does not submit the required record or explanations, or does not present facts sufficient to excuse the failure to submit them, the court may summarily deny the petition [*Cal. Rules of Ct., Rule 8.486(b)(4)*].

The petition must also be accompanied by a Certificate of Interested Entities or Persons [*Cal. Rules of Ct., Rule 8.488(b), (c)*; *see Cal. Rules of Ct., Rule 8.208*]. If the petitioner is an entity, that party's certificate must list any other entity or person the petitioner knows has an ownership interest of 10 percent or more in the petitioner. [*Cal. Rules of Ct., Rule 8.208(e)(1)*]. An "entity" for this purpose is a corporation, partnership, firm, or other association, but it does not include a governmental entity or its agencies or a natural person [*Cal. Rules of Ct., Rule 8.208(c)(2)*]. If the petitioner knows of any other person or entity that has a financial or other interest in the outcome of the proceeding that the petitioner reasonably believes the justices of the appellate court should consider in determining whether to disqualify themselves under the Code of Judicial Ethics, the petitioner's certificate must list that entity or person and identify the nature of the interest of the person or entity [*Cal. Rules of Ct., Rule 8.208(e)(2)*]. If the petitioner knows of no entity or person that must be listed, the petitioner must so state in the certificate [*Cal. Rules of Ct., Rule 8.208(e)(3)*]. A failure to file the certificate may result in the striking of the petition [*Cal. Rules of Ct., Rule 8.488(d)(2)*; *see Cal. Rules of Ct., Rule 8.488(d)(1)* (if certificate does not accompany petition, clerk will notify petitioner that certificate must be filed)].

If the petition requests a temporary stay, the cover of the document must prominently display the notice "STAY REQUESTED" and identify the nature and date of the proceeding or act sought to be stayed [*Cal. Rules of Ct., Rules 8.116(a), 8.486(a)(7)*]. The petition must also (1) identify the trial court and department involved, (2) specify the name and telephone number of the trial judge whose order the request seeks to stay, and (3) explain the urgency [*Cal. Rules of Ct., Rules 8.116(a), 8.486(a)(7)*]. If the petitioner fails to comply with these requirements, the reviewing court may decline to consider the request for a stay [*Cal. Rules of Ct., Rule 8.116(c)*].

[8] Proof of Service

When the petition is filed in an appellate court, it must be accompanied by proof of service of copies of the petition and accompanying points and authorities on the respondent and any real party in interest named in the petition, except that only the petition need be served on a respondent that is the superior court or a judge of that court [*Code Civ. Proc. § 1107*; [*Cal. Rules of Ct., Rule 8.486(e)*].

The proof of service must name each party represented by each attorney served [*Cal. Rules of Ct., Rule 8.25(a)(2)*]. A petition accompanied by a defective proof of service will be filed, but if a proper proof of service is not filed within five days, the court may strike the petition or impose a lesser sanction. However, a court may, in its discretion and for good cause, grant the petition ex parte without notice or service of the petition on the respondent and any real party in interest [*Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rules 8.486(e), 8.487(a)(4)*].

[9] Cross References

For discussion and forms for use in affidavits and declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

For discussion and forms of captions, see Ch. 108, *Captions and Introductions*

For discussion, procedures, and alternative forms for use in seeking writs of review, see Ch. 492, *Review (Certiorari), Writ of*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification*

For memoranda of points and authorities in support of petitions for review, habeas corpus, and prohibition arising from contempt proceedings, see California Points and Authorities, Ch. 47, *Contempt* (Matthew Bender)

Witkins, California Procedure, vol. 6, *Provisional Remedies*, § 406, vol. 8, *Enforcement of Judgment*, §§ 341, 354, 355, *Extraordinary Writs*, §§ 31-45, 163-184 (4th ed. 1997)

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Volume 13: Conspiracy thru Conversion-Chs. 126-159
Chapter 135 CONTEMPT
PART IV. FORMS
B. Review of Contempt Proceedings

13-135 California Forms of Pleading and Practice--Annotated § 135.91

§ 135.91 Petition for Writ of Prohibition [Code Civ. Proc. § 1102] for Relief From Contempt [Code Civ. Proc. §§ 1209-1222] Arising From Alleged Violation of Court Order

[1] FORM Petition for Writ of Prohibition [Code Civ. Proc. § 1102] for Relief From Contempt [Code Civ. Proc. §§ 1209-1222] Arising From Alleged Violation of Court Order

[CIVIL NO. _____]

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

[*OR*]

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
_____ APPELLATE DISTRICT [DIVISION _____]

[*OR*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
APPELLATE DIVISION

_____[*name*],)

Petitioner,	)	
vs.	)	
THE COURT OF APPEAL OF THE STATE OF	)	
CALIFORNIA FOR THE APPELLATE DISTRICT,	)	
[*OR*] THE SUPERIOR COURT OF THE STATE OF	)	[CIVIL NO. _____]
CALIFORNIA FOR THE [CITY AND] COUNTY	)	PETITION FOR WRIT OF PROHIBITION
OF _____,	)	[*EITHER*]
[*OR*]	)	
_____	)	
[*Name of board or officer or other person having*	)	
custody of record or proceedings to be satisfied]	)	
[*CONTINUE*]	)	
Respondent[,]	)	
[_____ [*name*],		
Real Party in Interest].		

[TO THE HONORABLE _____ (CHIEF *or* PRESIDING) JUSTICEAND ASSOCIATE JUSTICES OF THE _____ (SUPREME COURT *or* COURT OF APPEAL OF THE _____ (*number*) APPELLATE DISTRICT, DIVISION _____ (*number*)) OF THE STATE OF CALIFORNIA:]
[*OR*]

[TO THE PRESIDING JUDGE AND JUDGES OF THE APPELLATE DIVISION OF THE SUPERIOR COURT:]
[*CONTINUE*]

Petitioner alleges:

1. [*Identity of petitioner. See § 135.90[1], Paragraph 1.*]

2. [*Title, capacity, and status of respondent. See § 135.90[1], Paragraph 2.*]

3. [*Identity of real party in interest, if appropriate. See § 135.90[1], Paragraph 3.*]

4. On _____ [*date*], Action No. _____ was filed in the _____ Court of California, _____ County, for _____ [*specify cause of action, e.g.,* declaratory relief concerning a written contract of employment for legal services] with _____ [*name*] as _____ [plaintiff *or* petitioner] and _____ [*name*] as _____ [defendant *or* respondent].

5. _____ [*Allege making of order and manner in which jurisdiction arose, e.g.,* At the conclusion of the trial of the foregoing action, on _____ [*date*], in (_____ (Department *or* Division) _____ of) the above-entitled court, the Honorable _____ (*name*), Judge, orally announced his/her decision. The decision directed petitioner to _____ (*specify requirements of decision, e.g.,* make, execute, and deliver an assignment of certain shares of stock to the plaintiffs in the foregoing action and to appear on _____ (*date*), before the respondent court to show cause, if any he/she have, why the shares were not assigned at that time)].

6. _____ [*Allege proceedings taken against petitioner for alleged violation of order, e.g.,* On _____ (*date*), _____ (*name*), attorney for the petitioner, appeared before the

respondent court pursuant to the order to show cause described above and reported that petitioner had not complied with the oral decision of respondent court made on _____, (*date*). Respondent court then issued a warrant of attachment to compel petitioner's attendance before it to answer for contempt for failure to comply with its oral decision described above].

7. _____ [*Allege acts or omissions showing jurisdictional defect in contempt proceedings, e.g.,* The warrant of attachment against petitioner is void for want of jurisdiction in that _____ (*specify, e.g.,* from _____ (*date*)) to the present, no findings of fact or conclusions of law have been made, signed, or filed although petitioner requested that such findings and conclusions be made, and no judgment has been rendered or entered of which petitioner could be found in contempt].

8. Petitioner has no statutory right of appeal from the _____ [*specify, e.g.,* warrant of attachment] issued by respondent court.

9. Petitioner has no plain, speedy, and adequate remedy, other than this proceeding for a writ of prohibition, by reason of the foregoing lack of right to appeal in that, without a review of the contempt proceedings, petitioner will be held to answer for contempt [, and punished therefor for alleged disobedience of a judgment neither rendered nor entered by respondent court].

[10. Petitioner has no plain, speedy, and adequate remedy in respondent court in that _____ (*specify additional reasons, if any, e.g.,* petitioner has offered to present to respondent court the rules of law and points and authorities on which this petition is based and has requested permission to present argument in support of his/her position and such offer was refused by respondent court).]

[11. This petition is made to this court in the first instance, rather than to the _____ (Superior Court, _____ County or Court of Appeal, _____ Appellate Division) of the State of California, for the following reason(s): _____ (*as required by Cal. Rules of Ct., Rule 8.486(a)(1) , explain why reviewing court should issue writ as original matter*).]

WHEREFORE, petitioner prays:

1. That this court issue a writ of prohibition to respondent court [, and to the Honorable _____ (*name*), Judge,] commanding that court to desist and refrain from further proceedings in the above-entitled contempt matter until further order of this court and to show cause, if any it have, at a specified time and place, why it should not be absolutely restrained from further proceedings in the above-entitled contempt matter;

2. That the foregoing cause be heard and fully considered by this court and that the _____ [*specify, e.g.,* warrant of attachment] of _____ [*date*], be annulled and set aside and that all further proceedings be restrained and prohibited;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name name*]

[*Verification. See § 135.90[1].*]

[2] Source of Form

The fact situation suggested in the form in [1], *above*, is taken from the opinion in *Silvagni v. Superior Court (1958) 157 Cal. App. 2d 287, 321 P.2d 15* .

[3] Use of Form

The petition in [1], *above*, is for use in seeking a writ of prohibition in the appellate division of a superior court, court of appeal, or the Supreme Court [*Code Civ. Proc. § 1103*] to arrest contempt proceedings of a court taken in excess of its jurisdiction [*see Code Civ. Proc. § 1102*]. More specifically, it may be used to arrest a lower court's proceedings in contempt against a petitioner accused of disobeying a court order when that order was not rendered or entered in judgment [*Silvagni v. Superior Court (1958) 157 Cal. App. 2d 287, 290, 321 P.2d 15]* .

[4] Allegations

The foregoing petition alleges:

- That the petitioner is the party beneficially interested (Paragraph 1) [*Code Civ. Proc. § 1103*].
- The identity and capacity of respondent and any real parties in interest (Paragraphs 2, 3).
- The exercise of judicial functions by a lower tribunal (Paragraphs 4, 5) [*see Code Civ. Proc. § 1102*].
- The proceedings taken against petitioner for alleged disobedience of a court order (Paragraph 6) [*Code Civ. Proc. § 1212*; *see Silvagni v. Superior Court (1958) 157 Cal. App. 2d 287, 289, 321 P.2d 15]* .
- That the inferior tribunal exceeded its jurisdiction in its acts or omissions towards petitioner (Paragraph 7) [*see Code Civ. Proc. § 1102*].
- That petitioner has no statutory right of appeal (Paragraph 8).
- That petitioner has no plain, speedy, and adequate remedy other than by writ of prohibition (Paragraph 9) [*Code Civ. Proc. § 1103*].

[5] Verification

A petition to a reviewing court for a writ of prohibition must be verified [*Code Civ. Proc. § 1103*; *Cal. Rules of Ct., Rule 8.486(a)(4)*]. In addition, the petition must be accompanied by proof of service of a copy of the petition on the respondent and any real party in interest named in the petition [*Code Civ. Proc. § 1107*].

[6] Supporting Memorandum

A supporting memorandum also customarily accompanies a petition filed in superior court, although it does not appear to be expressly required by statute or court rule [*but see Code Civ. Proc. § 1090* (made applicable to writ of prohibition by *Code Civ. Proc. § 1105*, and referring to the proceeding as a "motion") and *Cal. Rules of Ct., Rule 3.1113* (requiring

memorandum in support of noticed motion)].

[7] Additional Requirements

Any writ petition seeking review of a trial court's ruling must be accompanied by a record adequate to permit review, including (1) copies of the ruling from which the petition seeks relief, (2) copies of all documents and exhibits submitted to the trial court supporting and opposing the petitioner's position, and (3) any other documents or portions of documents submitted to the trial court that are necessary for a complete understanding of the case and the ruling under review [*Cal. Rules of Ct., Rule 8.486(b)(1)(A)-(C)*; *see Cal. Rules of Ct., Rule 8.486(c)* (format for documents and exhibits)]. In exigent circumstances, these documents may be omitted if counsel files a declaration explaining the urgency and the circumstances making the documents unavailable and fairly summarizing their substance [*Cal. Rules of Ct., Rule8.486(b)(2)*]. The record must also include a reporter's transcript of the oral proceedings that resulted in the ruling under review [*Cal. Rules of Ct., Rule 8.486(b)(1)(D)*]. If a reporter's transcript is unavailable, the record must include a declaration by counsel stating that a transcript has been ordered and is expected to be filed on a certain date, or if no transcript is available, explaining its unavailability and fairly summarizing the proceedings, including the parties' arguments and any statement by the court supporting its ruling [*Cal. Rules of Ct., Rule 8.486(b)(3)*]. If the petitioner does not submit the required record or explanations, or does not present facts sufficient to excuse the failure to submit them, the court may summarily deny the petition [*Cal. Rules of Ct., Rule 8.486(b)(4)*].

The petition must also be accompanied by a Certificate of Interested Entities or Persons [*Cal. Rules of Ct., Rule 8.488(b),(c)*; *see Cal. Rules of Ct., Rule 8.208*]. If the petitioner is an entity, that party's certificate must list any other entity or person the petitioner knows has an ownership interest of 10 percent or more in the petitioner) [*Cal. Rules of Ct., Rule 8.208(e)(1)*]. An "entity" for this purpose is a corporation, partnership, firm, or other association, but it does not include a governmental entity or its agencies or a natural person [*Cal. Rules of Ct., Rule 8.208(c)(2)*]. If the petitioner knows of any other person or entity that has a financial or other interest in the outcome of the proceeding that the petitioner reasonably believes the justices of the appellate court should consider in determining whether to disqualify themselves under the Code of Judicial Ethics, the petitioner's certificate must list that entity or person and identify the nature of the interest of the person or entity [*Cal. Rules of Ct., Rule 8.208(e)(2)*]. If the petitioner knows of no entity or person that must be listed, the petitioner must so state in the certificate [*Cal. Rules of Ct., Rule 8.208(e)(3)*]. A failure to file the certificate may result in the striking of the petition [*Cal. Rules of Ct., Rule 8.488(d)(2)*; *see Cal. Rules of Ct., Rule 8.488(d)(1)* (if certificate does not accompany petition, clerk will notify petitioner that certificate must be filed)].

[8] Proof of Service

When the petition is filed in an appellate court, it must be accompanied by proof of service of copies of the petition and accompanying points and authorities on the respondent and any real party in interest named in the petition, except that only the petition need be served on a respondent that is the superior court or a judge of that court [*Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.486(e)*].

The proof of service must name each party represented by each attorney served [*Cal. Rules of Ct., Rule 8.25(a)(2)*]. A petition accompanied by a defective proof of service shall be filed, but if a proper proof of service is not filed within five days, the court may strike the petition or impose a lesser sanction. However, a court may, in its discretion and for good cause, grant the petition ex parte without notice or service of the petition on the respondent and any real party in interest [*Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rules 8.486(e), 8.487(a)(4)*].

[9] Cross References

For a general form of petition for writ of review and discussion, see *§ 135.90*

For discussion, procedures, and alternative forms for use in seeking writs of prohibition, see Ch. 358, *Mandate and Prohibition*

Witkins, California Procedure, vol. 8, *Extraordinary Writs*, §§ 46-70, 73, 187 (4th ed. 1997)

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13-135 California Forms of Pleading and Practice--Annotated § 135.92

§ 135.92 Allegation for Use in Petition Seeking Relief From Contempt Proceedings--Petitioner's Knowledge of Order Alleged to Be Violated Not Shown

[1] FORM Allegation for Use in Petition Seeking Relief From Contempt Proceedings--Petitioner's Knowledge of Order Alleged to Be Violated Not Shown

The respondent court is without power to adjudge petitioner in contempt of court in that no evidence was introduced to show that petitioner _____ [had notice or knowledge of the order he/she is accused of violating *or* had actual knowledge of the terms of the order he/she is accused of violating *or* was present in court when the order he/she is accused of violating was made].

[2] Use of Form

The allegation in [1], *above*, is for use in a petition for a writ seeking relief from contempt proceedings when the petitioner's notice or knowledge of the order he or she is accused of violating [*see* *Phillips v Superior Court (1943) 22 Cal. 2d 256, 257-258, 137 P.2d 838* (affidavit failing to allege that petitioner served with notice of order, had actual knowledge of its terms, or was present in court when it was made)] is not shown [*see* *Freeman v. Superior Court (1955) 44 Cal. 2d 533, 537, 282 P.2d 857* (sufficiency of evidence to sustain contempt order)]. In an appropriate case, the allegation may be substituted for Paragraph 7 of the petition for writ of review in § 135.90. In addition, the allegation may be used in a petition for a writ of habeas corpus [*see* Ch. 292, *Habeas Corpus*] or prohibition [*see § 135.91*].

[3] Insufficient Affidavits Not Fatally Defective

Formerly, affidavits, declarations, and statements were considered fatally defective for failure to state one or more of the jurisdictional facts necessary to sustain a contempt order [*Freeman v. Superior Court (1955) 44 Cal. 2d 533, 537, 282 P.2d 857* (affidavit as fatally defective if it fails to allege accused contemner's notice or knowledge of order allegedly disobeyed at time he or she allegedly violated it)] or for other technicalities [*Palm Springs Alpine Estates, Inc. v. Superior Court (1967) 255 Cal. App. 2d 883, 888, 63 Cal. Rptr. 618* (no verification of document purporting to be initiating affidavit)]. However, as a result of the enactment of *Code Civ. Proc. § 1211.5* in 1970, the foregoing rule is

abrogated. Thus, insufficient or defective affidavits, declarations, and statements are no longer considered fatally defective because they can be amended to conform to proof by the trial court at the hearing on the contempt charge [*Code Civ. Proc. § 1211.5(a)*] or ordered or permitted to be amended by a court at any stage of the proceedings [*Code Civ. Proc. § 1211.5(b)*; *see Mossman v. Superior Court (1972) 22 Cal. App. 3d 706, 710, 99 Cal. Rptr. 638]* . Courts now have greater flexibility in contempt proceedings with respect to the sufficiency of affidavits, declarations, and statements under *Code Civ. Proc. § 1211.5* than under the former rule [*see Mossman v. Superior Court (1972) 22 Cal. App. 3d 706, 713, 99 Cal. Rptr. 638* (court of appeal as issuing writ of prohibition to restrain trial court from further proceedings against contemner on basis of insufficient initiating affidavit and as applying *Code Civ. Proc. § 1211.5(b)* to permit amendment of such affidavit)].

[4] Cross References

See also discussion in *§§ 135.90, 135.91*.

For more allegations to use in petition for writ seeking relief from contempt proceedings, see *§§ 135.93 -135.98*

Witkins, California Procedure, vol. 8, *Enforcement of Judgment*, § 342 (4th ed. 1997)

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13-135 California Forms of Pleading and Practice--Annotated § 135.93

§ 135.93 Allegation for Use in Petition Seeking Relief From Contempt Proceedings--Petitioner's Ability to Comply With Order Alleged to Be Violated Not Shown

[1] FORM Allegation for Use in Petition Seeking Relief From Contempt Proceedings--Petitioner's Ability to Comply With Order Alleged to Be Violated Not Shown

The respondent court is without power to adjudge petitioner in contempt of court in that no evidence was introduced to show that petitioner had the present ability to perform the act he/she was ordered to perform by the respondent court in its above-described order of _____ [*date*].

[2] Use of Form

The allegation in [1], *above*, is for use in a petition for a writ seeking relief from contempt proceedings when the petitioner's ability to perform the acts required by the court order he or she is accused of violating [*see In re Liu (1969) 273 Cal. App. 2d 135, 140, 78 Cal. Rptr. 85* (ability of alleged contemner to render compliance with court order as one of facts essential to jurisdiction in contempt proceeding)] is not shown [*see Freeman v. Superior Court (1955) 44 Cal. 2d 533, 537, 282 P.2d 857* (sufficiency of evidence to sustain contempt order)]. In an appropriate case, the allegation may be substituted for Paragraph 7 of the petition for writ of review in *§ 135.90*. In addition, the allegation may be used in a petition for a writ of habeas corpus [*see* Ch. 292, *Habeas Corpus*] or prohibition [*see § 135.91*].

[3] Cross References

See also discussion in *§§ 135.90, 135.91*

For more allegations to use in petition for writ seeking relief from contempt proceedings, see *§§ 135.92, 135.94 -135.98*

Witkins, California Procedure, vol. 8, *Enforcement of Judgment*, §§ 343, 344 (4th ed. 1997)

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13-135 California Forms of Pleading and Practice--Annotated § 135.94

§ 135.94 Allegation for Use in Petition Seeking Relief From Contempt Proceedings--Petitioner's Willful Failure to Comply With Order Alleged to Be Violated Not Shown

[1] FORM Allegation for Use in Petition Seeking Relief From Contempt Proceedings--Petitioner's Willful Failure to Comply With Order Alleged to Be Violated Not Shown

The respondent court is without power to adjudge petitioner in contempt of court in that no evidence was introduced to show that petitioner willfully failed or refused to comply with the order he/she is accused of violating.

[2] Use of Form

The allegation in [1], *above*, is for use in a petition for a writ seeking relief from contempt proceedings when the petitioner's willful failure or refusal to comply with the order he or she is accused of violating [*see Warner v. Superior Court (1954) 126 Cal. App. 2d 821, 824, 826, 273 P.2d 89* (affidavit failing to allege willful failure or refusal to comply)] is not shown [*see Freeman v. Superior Court (1955) 44 Cal. 2d 533, 537, 282 P.2d 857* (sufficiency of evidence to sustain contempt order)]. In an appropriate case, the allegation may be substituted for Paragraph 7 of the petition for writ of review in *§ 135.90*. In addition, the allegation may be used in a petition for a writ of habeas corpus [*see* Ch. 292, *Habeas Corpus*] or prohibition [*see § 135.91*].

[3] Cross References

See also discussion in *§§ 135.90, 135.91*

For more allegations to use in petition for writ seeking relief from contempt proceedings, see *§§ 135.92 -135.93, 135.95 -135.98*

Witkins, California Procedure, vol. 8, *Enforcement of Judgment*, §§ 345, 347 (4th ed. 1997)

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13-135 California Forms of Pleading and Practice--Annotated § 135.95

§ 135.95 Allegation for Use in Petition Seeking Relief From Contempt Proceedings--Finding Petitioner in Direct Contempt [Code Civ. Proc. § 1211]--Insufficient Recitals in Contempt Order

[1] FORM Allegation for Use in Petition Seeking Relief From Contempt Proceedings--Finding Petitioner in Direct Contempt [Code Civ. Proc. § 1211]--Insufficient Recitals in Contempt Order

1. On or about _____ [*date*], in [_____ (Department *or* Division) _____ of] the above-entitled court, the Honorable _____[*name*], Judge, summarily made an order finding the petitioner in contempt of court for _____ [*specify*] [and sentencing him/her to _____ (*number*) days imprisonment].

2. The above-entitled court exceeded its jurisdiction in making the order of contempt against petitioner in that the order made fails to _____ [recite facts showing, with sufficient particularity, that the conduct of petitioner constitutes a legal contempt *and/or* recite that, or recite facts showing that, the conduct of petitioner occurred in the immediate view and presence of the court].

[2] Use of Form

The allegations in [1], *above*, are for use in a petition for a writ seeking relief from contempt proceedings when a lower court makes an order of direct contempt in a summary proceeding [*Code Civ. Proc. § 1211(a)*]. The ground for relief is that the order is defective in that it did not recite facts showing, with sufficient particularity, that the acts of the petitioner constituted a legal contempt, or that the order is defective because it failed either to state or recite facts showing that the acts of the petitioner occurred in the immediate view and presence of the court [*see Boysaw v. Superior Court (2000) 23 Cal. 4th 215, 220-223, 96 Cal. Rptr. 2d 531, 999 P.2d 748]* .

In an appropriate case, these allegations may be substituted for Paragraphs 4-7 in the petition for writ of review in *§ 135.90*. In addition, the allegations may be used in a petition for a writ of habeas corpus [*see* Ch. 292, *Habeas Corpus*] or prohibition [*see § 135.91*].

[3] Cross References

See also discussion in *§§ 135.31[3], 135.90, 135.91*

For more allegations to use in petition for writ seeking relief from contempt proceedings, see *§§ 135.92 -135.94, 135.96 -135.98*

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13-135 California Forms of Pleading and Practice--Annotated § 135.96

§ 135.96 Allegations for Use in Petition Seeking Reinstatement of Contempt Proceedings--Wrongful Divesting of Jurisdiction to Hear Contempt

[1] FORM Allegations for Use in Petition Seeking Reinstatement of Contempt Proceedings--Wrongful Divesting of Jurisdiction to Hear Contempt

1. On or about _____ [*date*], in [_____ (Department *or* Division) _____ of] the above-entitled court, the Honorable _____[*name*], Judge, issued an order to show cause on the basis of _____ [affidavits *or* declarations] submitted by petitioner directing _____ [*name of alleged contemner*] to appear at a hearing to determine whether or not he/she should be held in contempt of court for violating the order described above. At the hearing, the Honorable _____[*name*], Judge, declined to hear any evidence concerning the alleged contempt and rendered his/her decision that the above-entitled court had no jurisdiction to hear or determine the alleged contempt.

2. The above-entitled court exceeded its jurisdiction by refusing to hear and determine the contempt of court alleged in petitioner's _____ [affidavits *or* declarations].

3. Petitioner has no right of appeal from the order by which respondent court divested itself of jurisdiction to hear the contempt in that *Section 1222 of the Code of Civil Procedure* provides that orders or judgments of contempt are final and conclusive.

[2] Use of Form

The allegations in [1], *above*, are for use in a petition for a writ seeking reinstatement of contempt proceedings when a lower court wrongfully divests itself of jurisdiction to hear and determine an alleged contempt [*Taylor v. Superior Court (1942) 20 Cal. 2d 244, 246, 125 P.2d 1* ; *Goodall v. Superior Court (1918) 37 Cal. App. 723, 726, 174 P. 924]* . In an appropriate case, these allegations may be substituted for Paragraphs 6-8 of the petition for writ of review in *§ 135.90*. In addition, the allegations may be used in a petition for a writ of habeas corpus [*see* Ch. 292, *Habeas Corpus*] or prohibition [*see § 135.91*].

[3] Cross References

See also discussion in *§§ 135.90, 135.91*

For more allegations to use in petition for writ seeking relief from contempt proceedings, see *§§ 135.92 -135.95, 135.97, 135.98*

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13-135 California Forms of Pleading and Practice--Annotated § 135.97

§ 135.97 Allegation for Use in Petition Seeking Relief From Contempt Proceedings--Order Alleged to Be Violated as Void for Being Overbroad

[1] FORM Allegation for Use in Petition Seeking Relief From Contempt Proceedings--Order Alleged to Be Violated as Void for Being Overbroad

The respondent court exceeded its jurisdiction in adjudging petitioner in contempt of court because the order petitioner is alleged to have violated is void as constitutionally overbroad in that _____ [*specify, e.g.*, it purports to prohibit nonprejudicial statements as well as prejudicial statements].

[2] Use of Form

The allegation in [1], *above*, is for use in a petition seeking relief from contempt proceedings when the order alleged to be violated by the petitioner is unconstitutionally overbroad [*Younger v. Smith (1973) 30 Cal. App. 3d 138, 150, 165, 106 Cal. Rptr. 225]* . In an approprite case, the allegation may be substituted for Paragraph 7 of the petition for writ of review in § 135.90. In addition, the allegation may be used in a petition for a writ of habeas corpus [*see* Ch. 292, *Habeas Corpus*] or prohibition [*see § 135.91*].

[3] Cross References

See also discussion in *§§ 135.90, 135.91*

For more allegations to use in petition for writ seeking relief from contempt proceedings, see *§§ 135.92 -135.96, 135.98*

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13-135 California Forms of Pleading and Practice--Annotated § 135.98

§ 135.98 Allegations for Use in Petition Seeking Relief From Contempt Proceedings--Appearance by Accused Contemner's Attorney as Sufficient

[1] FORM Allegations for Use in Petition Seeking Relief From Contempt Proceedings--Appearance by Accused Contemner's Attorney as Sufficient

1. On or about _____ [*date*], in [_____ (Department *or* Division) _____ of] the above-entitled court, the Honorable _____[*name*], Judge, issued an order to show cause directing petitioner to appear in person at a hearing to determine whether or not petitioner should be held in contempt of court for allegedly violating the order described above.

2. On _____ [*date*], _____ [*name*], attorney for the petitioner, appeared before the respondent court pursuant to the order to show cause described above and _____ [*specify any action taken by petitioner's attorney, e.g.*, filed a declaration of petitioner in response to the order to show cause]. Respondent court then issued a warrant of attachment to compel petitioner's attendance in person before respondent court to answer the charge of contempt.

3. The warrant of attachment against petitioner for contempt is void for want of jurisdiction in that the appearance of _____ [*name*], petitioner's attorney, was sufficient to answer the order to show cause issued by respondent court.

[2] Use of Form

The allegations in [1], *above*, are for use in a petition for a writ seeking relief from contempt proceedings when a lower court proceeds in contempt against a petitioner for failure to appear in person in response to a court order [*see Morelli v. Superior Court (1968) 262 Cal. App. 2d 262, 270, 68 Cal. Rptr. 572* (appearance by petitioner's attorney on behalf of petitioner as sufficient to answer order to show cause why petitioner allegedly failed to comply with subpoena duces tecum); *Silvagni v. Superior Court (1958) 157 Cal. App. 2d 287, 291, 321 P.2d 15* (appearance in response to order to show cause as not required to be in person, but appearance by attorney as sufficient, even when order expressly directs personal appearance)]. In an appropriate case, the allegations may be substituted for Paragraphs 6 and 7 of the petition

for writ of review in *§ 135.90*. In addition, the allegations may be used in a petition for a writ of habeas corpus [*see* Ch. 292, *Habeas Corpus*] or prohibition [*see § 135.91*].

[3] Cross References

See also discussion in *§§ 135.90*, *135.91*

For more allegations to use in petition for writ seeking relief from contempt proceedings, see *§§ 135.92 -135.97*

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§ 136.40 Related Matthew Bender Publications

[1] California Points and Authorities

[2] California Trial Guide

§ 136.41 Federal Statutes

§ 136.42 State Statutes

[1] Continuances in Specific Proceedings

[2] Expenses

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§ 136.43 California Rules of Court

§ 136.44 Local Court Rules

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§ 136.60 Facts to Be Ascertained

§ 136.61 Stipulation

§ 136.62 Ex Parte Application

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§§ 136.64-136.69 [Reserved]

§ 136.70 Stipulation [Code Civ. Proc. § 283] and Order [Code Civ. Proc. § 1003] for Continuance [Code Civ. Proc. § 595.2]

[1] FORM

[2] Use of Form

[3] Effect of Stipulation

[4] Restrictions

[5] Good Cause

[6] Cross References

§ 136.71 Order on Stipulation [Code Civ. Proc. § 283] Continuing Case

[1] FORM

[2] Use of Form

[3] Cross References

§ 136.72 Ex Parte Application for Continuance [Cal. Rules of Ct., Rule 3.1332(b)]

[1] FORM

[2] Use of Form

[3] Accompanying Papers

[4] Cross References

§ 136.73 Notice of Motion and Motion for Continuance [Cal. Rules of Ct., Rule 3.1332(b)]

[1] FORM

[2] Use of Form

[3] Notice

[4] Accompanying Papers

[5] Cross References

§ 136.74 Declaration in Support of Motion [Cal. Rules of Ct., Rule 3.1332(b)] for Continuance--By Member of Legislature Who Is Attorney, Party, or Witness [Code Civ. Proc. § 595]

[1] FORM

[2] Use of Form

[3] Mandatory Continuance

[4] Cross References

§ 136.75 Declaration in Support of Motion [Cal. Rules of Ct., Rule 3.1332(b)] for Continuance--By Attorney--Necessity of Appearance in Other Trial

[1] FORM

[2] Use of Form

[3] Effect of Schedule for Trial

[4] Unavailability of Counsel for Other Reasons

[5] Cross References

§ 136.76 Declaration in Support of Motion [Cal. Rules of Ct., Rule 3.1332(b)] for Continuance--By Party Seeking to Employ Substitute Counsel

[1] FORM

[2] Use of Form

[3] Cross References

§ 136.77 Declaration in Support of Motion [Cal. Rules of Ct., Rule 3.1332(b)] for Continuance--By Defendant--Illness

[1] FORM

[2] Use of Form

[3] Cross References

§ 136.78 Declaration in Support of Motion [Cal. Rules of Ct., Rule 3.1332(b)] for Continuance--By Attorney--Unavailable Witness

[1] FORM

[2] Use of Form

[3] Cross References

§ 136.78A Declaration in Support of Motion [Cal. Rules of Ct., Rule 3.1332(b)] for Continuance--By Attorney--Party Unavailable Due to Military Service

[1] FORM

[2] Use of Form

[3] Cross References

§ 136.79 Declaration in Support of Motion [Cal. Rules of Ct., Rule 3.1332(b)] for Continuance--By Physician--Illness of Party or Witness

[1] FORM

[2] Use of Form

[3] Cross References

§ 136.80 Stipulation [Code Civ. Proc. § 283] Admitting That Absent Witness Would Testify to Certain Matters [Code Civ. Proc. § 595.4]

[1] FORM

[2] Use of Form

[3] Effect of Admission on Continuance

[4] Cross References

§ 136.81 Declaration [Code Civ. Proc. § 2015.5] in Opposition to Motion for Continuance--By Attorney--Continuance Sought for Purpose of Delay

[1] FORM

[2] Use of Form

[3] Cross References

§ 136.82 Order [Code Civ. Proc. § 1003] Granting Continuance

[1] FORM

[2] Use of Form

[3] Cross References

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13-136 California Forms of Pleading and Practice--Annotated § 136.01

§ 136.01 Scope of Chapter

This chapter discusses and contains forms related to:

- Grounds and procedures for obtaining the continuance of hearings and trials in civil cases [*see § 136.10* et seq.].

- Research guide of statutes and cases regarding obtaining the continuance of hearings and trials in civil cases [*see § 136.40* et seq.].

- Procedural checklist for obtaining the continuance of hearings and trials in civil cases [*see § 136.60* et seq.].

- Forms for pretrial stipulations for continuance or off-calendar status and orders for continuances [*see §§ 136.70* and *136.71*].

- Form for ex parte motion for continuance [*see § 136.72*].

- Forms for notice of motion for continuance [*see § 136.73*], supporting declarations [*see §§ 136.74 -136.79*], stipulation as to the testimony of an absent witness in opposition to the motion [*see § 136.80*], an opposing declaration [*see § 136.81*], and an order granting a continuance after hearing on the motion [*see § 136.82*].

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13-136 California Forms of Pleading and Practice--Annotated § 136.02

§ 136.02 Cross References

- For alternative forms of declarations, see Ch. 15, *Affidavits, Certificates, and Declarations* .

- For discussion and forms for use by a third-party claimant in obtaining a continuance of a proceeding, see Ch. 254, *Executions and Enforcement of Judgments* .

- For discussion and forms relating to motions generally, see Ch. 372, *Motions and Orders* .

- For forms for use in motions in pretrial proceedings to continue, advance, or reset, see Ch. 425, *Pretrial Proceedings* .

- For a discussion of continuances in public administrative proceedings, see Ch. 473C, *Prehearing Procedures in Agency Adjudications* .

- For forms for use in shortening and extending time, see Ch. 524, *Shortening and Extension of Time* .

- For further coverage of the Trial Court Reduction Act and the local delay reduction rules, see Ch. 552, *Trial Court Delay Reduction* .

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[Reserved]

§§ 136.03[Reserved]

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13-136 California Forms of Pleading and Practice--Annotated § 136.10

§ 136.10 Governing Law

[1] Statutory Authority

Grounds for continuances and procedures to follow in motions for continuances are contained in *Code Civ. Proc. §§ 139, 473(a)(2), 594a-596, 1024, 1054*, and *1054.1. Code Civ. Proc. § 2024(f)* [*Code Civ. Proc. § 2024.060* operative July 1, 2005] states that an extension of time for discovery is not a ground for a continuance.

Separate grounds for continuances are described in case law.

Additional procedural requirements are stated in *Cal. Rules of Ct., Rule 3.1332(b)*, and local rules of court.

Several code sections govern continuances in specific types of cases. For a listing of these sections, see *§ 136.42*.

[2] Local Rules of Court

Most trial courts have local rules governing continuances, when and before whom they may be requested, the grounds for continuance, and other requirements. Counsel should examine these rules carefully. Some rules state procedural requirements while others modify or clarify the grounds for granting continuances. Local rules of court with significant impact on continuances are discussed throughout this part.

[3] Trial Court Delay Reduction Act

Superior courts in all California counties are required to implement trial court delay reduction programs [*Gov. Code §§ 68605.5, 68620*]. In the Trial Court Delay Reduction Act, legislature has directed counties to adopt and utilize a firm, consistent policy against continuances, to the maximum extent possible and reasonable, in all stages of litigation [*see Gov. Code § 68607(g)*]. Despite this policy, the act does allow the parties to agree to a single continuance not to exceed 30 days. This agreement must be made within 30 days of the filing of the responsive pleadings, and is made by stipulation filed with the court [*Gov. Code § 68616(d)*].

Local rules may further regulate the procedure for obtaining stipulated continuances. For example, local rules may

detail the procedure for seeking a stipulated continuance and limit the number of stipulated continuances that will be granted without appearance [*see* San Francisco Co. Super. Ct. Rules, Rule 8.2(B) (continuances in law and motion matters)].

Other local rules may regulate continuances in specific situations [*see, e.g.*, Alameda Co. Super. Ct. Rules, Rule 3.170(b) (continuance of case management conference)].

For further coverage of the act and the local delay reduction rules, see Ch. 552, *Trial Court Delay Reduction* .

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13-136 California Forms of Pleading and Practice--Annotated § 136.11

§ 136.11 Nature of Continuances

A continuance is the postponement of a hearing or trial to a specified new date; some statutes use the term "postponement" instead of "continuance" [*see Code Civ. Proc. §§ 594a-596*]. The continued or postponed case should be distinguished from the case which is dropped from the civil active list since the latter must repeat all trial setting procedures and the new trial date is uncertain [*see Parker v. Dingman (1975) 48 Cal. App. 3d 1011, 1018, 122 Cal. Rptr. 309* ; *see Cal. Rules of Ct., Rule 3.1332(a)*]. In some situations, trial courts grant a stay which is like a continuance except a specific new trial date is not set [*see discussion under § 136.24*].

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13-136 California Forms of Pleading and Practice--Annotated § 136.12

§ 136.12 Source of Authority

The power to postpone for good cause the time of a hearing or trial is an integral part of a court's jurisdiction to hear and determine an action or proceeding [*Curtis v. Underwood (1894) 101 Cal. 661, 669, 36 P. 110]* . This power is independent from the rules of court which set out procedures for its exercise [*see Cal. Rules of Ct., Rule 3.1332(b)*] and statutory and case law which describe situations where exercise may be appropriate [*see Code Civ. Proc. §§ 594a-596*].

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§ 136.13 Discretionary Power

The decision of whether or not to grant a continuance is left to the trial court's discretion, even where statutory language seems to make postponement mandatory [*Thurmond v. Superior Court (1967) 66 Cal. 2d 836, 838-840, 59 Cal. Rptr. 273, 427 P.2d 985]* . This discretion has been described as a legal discretion, not capricious or arbitrary, but one controlled in its exercise by fixed legal principles [*Kalmus v. Kalmus (1951) 103 Cal. App. 2d 405, 415, 230 P.2d 57]* . In the absence of clear abuse, the trial court's determination of whether good cause for a continuance existed will not be disturbed by an appellate court [*Lewis v. Neptune Society Corp. (1987) 195 Cal. App. 3d 427, 429, 240 Cal. Rptr. 656]* . Trial courts may be reversed for refusing to grant a continuance if their actions, however laudable as an effort to control the calendar, deny the party an opportunity to present his or her case fairly and fully [*Hays v. Viscome (1953) 122 Cal. App. 2d 135, 140, 264 P.2d 173]* .

As a practical matter the action of the trial court in granting or denying a continuance is almost always upheld on appeal although denial of a continuanceis occasionally held to be reversible error [*see, e.g.,* *Oak Knoll Broadcasting Corp. v. Hudgings (1969) 275 Cal. App. 2d 563, 565-566, 80 Cal. Rptr. 175* (denial of continuance upheld where unprepared witness placed on call after service of the subpoena); *Hays v. Viscome (1953) 122 Cal. App. 2d 135, 140-141, 264 P.2d 173* (prejudicial error to deny continuance to call witness whom adverse party failed to call)].

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§ 136.14 Continuances Disfavored

Under the Trial Court Delay Reduction Act, judges are required to adopt and utilize a firm, consistent policy against continuances, to the maximum extent possible and reasonable, in all stages of litigation [*Gov. Code § 68607(g)*].

To ensure the prompt disposition of civil cases, the dates assigned for a trial are firm; and all parties and their counsel must regard the date set for trial as certain [*Cal. Rules of Ct., Rule 3.1332(a)*]. Although continuances of trials are disfavored, each request for a continuance must be considered on its own merits; and the court may grant a continuance only upon an affirmative showing of good cause requiring the continuance [*Cal. Rules of Ct., Rule 3.1332(b)*]. Failure to consider all the facts and circumstances that are relevant to the determination, and overemphasis on the Trial Court Delay Reduction Act, is reversible error [*Oliveros v. County of Los Angeles (2004) 120 Cal. App. 4th 1389, 1398, 16 Cal. Rptr. 3d 638]* . For discussion of the grounds constituting good cause, see *§ 136.17*.

The earlier doctrine of liberality in the granting of continuances has been declared by the court of appeal to be unsupported by precedent and obsolete. The court characterized unnecessary continuances as wasteful, nonproductive, time-consuming, and a fertile ground for public criticism of the courts [*County of San Bernardino v. Doria Mining & Engineering Corp. (1977) 72 Cal. App. 3d 776, 781, 140 Cal. Rptr. 383]* .

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§ 136.15 Relationship to Dismissal Status

Before seeking continuance of a trial, counsel should consider the possible effects of an order granting continuance. Should the case be exempt from the case disposition time goals of the delay reduction act [*see Cal. Rules Ct., Rule 3.714(c)*], there is the possibility that the continuance may lead to involuntary dismissal for delay in prosecution. Repeated requests for continuances may result in discretionary dismissal on the court's own motion or on the motion of the defendant if the plaintiff fails to settle or bring the case to trial within two years after filing [*see Code Civ. Proc. § 583.420(a)(2)(B)*; *Cal. Rules of Ct., Rule 3.1340*]. Alternatively, mandatory dismissal may result if the plaintiff fails to bring the case to trial within five years after filing [*Code Civ. Proc. §§ 583.310, 583.360*; *see Blank v. Kirwan (1985) 39 Cal. 3d 311, 331-332, 216 Cal. Rptr. 718, 703 P.2d 58* (prior law); *see also* Ch. 212, *Dismissal*]. If the facts of the situation or the practice of the court require counsel to put the case off calendar rather than request a continuance to a specified date, the consequences of a dismissal for delay in bringing the action to trial can be avoided if defendant waives the applicable statutory time requirement [*Code Civ. Proc. § 583.140*; *see Bank of America Nat'l Sav. & Trust Ass'n v. Superior Court (1937) 22 Cal. App. 2d 450, 452-453, 71 P.2d 296* (applying former *Code Civ. Proc. § 583(b)*].

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§ 136.16 Costs

The trial court has discretion to impose, as a condition of granting a continuance, the payment of expenses occasioned by the postponement [*Code Civ. Proc. § 1024*; *see DeCesare v. Lembert (1983) 144 Cal. App. 3d 20, 25-26, 192 Cal. Rptr. 354* (holding that "costs," under former *Code Civ. Proc. § 1024* prior to 1986 amendment substituting "expenses," did not include attorney's fees or income lost because of the continuance, and questioning the result in *McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 33 Cal. Rptr. 389* , insofar as attorney's fees were awarded)].

If the continuance was necessary because the court permitted an adverse party to amend a pleading or proceeding, the court may require, as a condition to the amendment, the payment of such costs as may be just [*Code Civ. Proc. § 473(a)(2)*]. The court need not limit its assessment of costs to those expenses ordinarily taxable after a case has been tried [*McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 594-595, 33 Cal. Rptr. 389* (amount assessed to cover costs and counsel fees); *Inman v. Fremont Medical Center (1975) 49 Cal. App. 3d 169, 172, 122 Cal. Rptr. 372* (continuance conditioned on costs of calling an entire jury panel)].

Courts have required the moving party to pay the following types of expenses: fees to jurors [*Inman v. Fremont Medical Center (1975) 49 Cal. App. 3d 169, 172, 122 Cal. Rptr. 372]* ; travel and lodging expenses [*Wilkin v. Tadlock (1952) 110 Cal. App. 2d 156, 157-158, 241 P.2d 1066]* ; and business expenses caused by postponement [*Levine v. Pollack (1995) 37 Cal. App. 4th 129, 133-139, 43 Cal. Rptr. 2d 491]* . However, courts may not require the payment of attorney's fees or lost income in exchange for a continuance or lost income [*DeCesare v. Lembert (1983) 144 Cal. App. 3d 20, 25, 192 Cal. Rptr. 354]* .

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§ 136.17 Grounds for Granting Continuances

[1] Good Cause

Continuances in civil cases, whether before or during trial, should not be granted except upon an affirmative showing of good cause requiring the continuance [*Cal. Rules of Ct., Rule 3.1332(c)*]. One element of good cause hasbeen described as necessity [*County of San Bernardino v. Doria Mining & Engineering Corp. (1977) 72 Cal. App. 3d 776, 781, 140 Cal. Rptr. 383]* . Other elements often considered in determining whether good cause exists are the party's past record of diligence in proceeding with the case and the degree of prejudice to either side [*see Carl v. Thomas (1931) 116 Cal. App. 294, 300-301, 2 P.2d 872]* .

[2] Factors Considered

A party seeking a continuance must make the motion or application as soon as reasonably practical once the necessity for continuance is discovered [*Cal. Rules of Ct., Rule 3.1332(b)*].

Circumstances that may indicate good cause include [*Cal. Rules of Ct., Rule 3.1332(c)*]:

- The unavailability of an essential lay or expert witness because of death, illness, or other excusable circumstances;
- The unavailability of a party because of death, illness, or other excusable circumstances;
- The unavailability of trial counsel because of death, illness, or other excusable circumstances;
- The substitution of trial counsel, but only where there is an affirmative showing that the substitution is required in the interests of justice;
- The addition of a new party if:
    - the new party has not had a reasonable opportunity to conduct discovery and prepare

for trial, or

- the other parties have not had a reasonable opportunity to conduct discovery and prepare for trial in regard to the new party's involvement in the case;

- A party's excused inability to obtain essential testimony, documents, or other material evidence despite diligent efforts; or

- A significant, unanticipated change in the status of the case as a result of which the case is not ready for trial.

In ruling on a motion or application for continuance, the court must consider all the facts and circumstances that are relevant to the determination, which include [*Cal. Rules of Ct., Rule 3.1332(d)*]:

- The proximity of the trial date;

- Whether there was any previous continuance, extension of time, or delay of trial due to any party;

- The length of the continuance requested;

- The availability of alternative means to address the problem that gave rise to the motion or application for a continuance;

- The prejudice that parties or witnesses will suffer as a result of the continuance;

- If the case is entitled to a preferential trial setting, the reasons for that status and whether the need for a continuance outweighs the need to avoid delay;

- The court's calendar and the impact of granting a continuance on other pending trials;

- Whether trial counsel is engaged in another trial;

- Whether all parties have stipulated to a continuance;

- Whether the interests of justice are best served by a continuance, by the trial of the matter, or by imposing conditions on the continuance; and

- Any other fact or circumstance relevant to the fair determination of the motion or application.

Although several statutes describe situations which support a finding of good cause for a continuance, case law describes other sets of facts where continuances are deemed either justifiable or necessary [*Taylor v. Bell (1971) 21 Cal. App. 3d 1002, 1008, 98 Cal. Rptr. 855 , cert. denied, 408 U.S. 923, 92 S. Ct. 2493, 33 L. Ed. 2d 334 (1972)]* . These are *discussed under §§ 136.19 -136.21* and *§ 136.24*.

[3] Grounds Enumerated

Although the trial court may consider many factors in deciding whether to grant a continuance, certain situations occur frequently and represent the principal grounds for which continuances are usually granted. These principal grounds are *discussed under §§ 136.18 -136.25*.

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§ 136.18 On Attorneys' Stipulation

The most commonly utilized ground for continuances is probably written agreement among the attorneys on a case. The Code of Civil Procedure provides that the court must postpone a trial, or the hearing of any motion or demurrer, for a period not to exceed 30 days, when all attorneys of record of parties who have appeared in the action agree in writing to such postponement [*Code Civ. Proc. § 595.2*]. This section has been construed as directory only; if it is impracticable to accommodate the parties, the court may refuse a continuance [*Lorraine v. McComb (1934) 220 Cal. 753, 757, 32 P.2d 960* ; *Pham v. Nguyen (1997) 54 Cal. App. 4th 11, 15, 62 Cal. Rptr. 2d 422]* . One court has suggested that although *Code Civ. Proc. § 595.2* does not create any entitlement to a continuance, trial courts should be cognizant of the exigencies of actual practice and recognize that continuances play a legitimate role in keeping a law practice manageable [*Pham v. Nguyen (1997) 54 Cal. App. 4th 11, 15-16, 62 Cal. Rptr. 2d 422]* . The court criticized *County of San Bernardino v. Doria Mining & Engineering Corp. (1977) 72 Cal. App. 3d 776, 140 Cal. Rptr. 383* , as going too far in suggesting that continuances be granted only grudgingly. The court recognized that balancing the competing goals of prompt disposition of civil cases and accomodating professional courtesy between opposing counsel may require some discernment by the trial court [*Pham v. Nguyen (1997) 54 Cal. App. 4th 11, 16-17, 62 Cal. Rptr. 2d 422* (holding, however, that trial court did not abuse its discretion in denying continuance)].

The Trial Court Delay Reduction Act also allows the parties to stipulate to a single continuance not to exceed 30 days [*Gov. Code § 68616(d)*; for discussion, *see § 136.10[3]*]. Local rules may further regulate the procedure for obtaining stipulated continuances. For example, local rules may detail the procedure for seeking a stipulated continuance and limit the number of stipulated continuances that will be granted without appearance [*see* San Francisco Co. Super. Ct. Rules, Rule 8.2(B) (continuances in law and motion matters)]. Even if the parties agree to a continuance by stipulation, the parties must still make a request for continuance by a noticed motion or an ex parte application under *Cal. Rules of Ct., Rule 3.1200 et seq* ., and be supported by declarations [*Cal. Rules of Ct., Rule 3.1332(b)*].

Moreover, *Cal. Rules of Ct., Rule 3.1332(a)* provides in part that a continuance before or during trial must not be granted except on an affirmative showing of good cause. Although this policy appears to contradict the express language of *Code Civ. Proc. § 595.2* (discussed *above*), *Code Civ. Proc. § 595.2* must also be interpreted consistently with the Trial Court Delay Reduction Act directive to the courts to adopt and utilize a firm, consistent policy against continuances, to the maximum extent possible and reasonable, in all stages of litigation [*see Gov. Code § 68607(g)*].

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§ 136.19 Absent Witness or Evidence

[1] General Requirements

Unavailability of a material witness, or the absence of material evidence, may be proper grounds for a continuance [*Jurado v. Toys "R" Us, Inc. (1993) 12 Cal. App. 4th 1615, 1618, 16 Cal. Rptr. 2d 158* ; *Cade v. Mid-City Hospital Corp. (1975) 45 Cal. App. 3d 589, 599-600, 119 Cal. Rptr. 571]* . The requirements of materiality of the evidence and a showing of due diligence to obtain it are interdependent. In many cases which hold the evidence to be immaterial, the party has been exceedingly lax in bringing the case to trial [*see Agnew v. Larson (1961) 197 Cal. App. 2d 444, 449-450, 17 Cal. Rptr. 538]* . Conversely, if the evidence is of critical importance to the party's cause, the court may overlook a moderate failure of diligence [*see Murr v. Murr (1948) 87 Cal. App. 2d 511, 521-522, 197 P.2d 369]* .

A motion to postpone a trial on this ground must be made on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it [*Code Civ. Proc. § 595.4*]. In the case of an absent witness, the court may require the moving party to state upon affidavit the substance of the testimony expected to be provided [*see Code Civ. Proc. § 595.4*].

A party opposing summary judgment does not have an automatic right for a second chance to prepare a responsive separate statement or present evidence; instead, the party must demonstrate a reason for the trial court to exercise its discretion, by offering a good faith showing by affidavit that a continuance is needed to obtain facts essential to justify opposition to the motion. Where no such affidavit is filed, and where defendants do not contend they needed a continuance to obtain essential facts, a trial court does not abuse its discretion by declining to grant a continuance [*Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co. (2009) 170 Cal. App. 4th 554, 577, 88 Cal. Rptr. 3d 363*].

[2] Materiality

To obtain a continuance on the ground of absent evidence, counsel must describe the desired evidence with particularity and state facts showing its materiality [*Lea v. Shank (1970) 5 Cal. App. 3d 964, 977, 85 Cal. Rptr. 709* ; *see Lewis v. Neptune Society Corp. (1987) 195 Cal. App. 3d 427, 429, 240 Cal. Rptr. 656]* .

An absent witness' testimony must be material in the sense that the evidence could not be proven in other ways [*see*

Oak Knoll Broadcasting Corp. v. Hudgings (1969) 275 Cal. App. 2d 563, 565-566, 80 Cal. Rptr. 175 (defining material witness)]. Thus, a witness whose testimony is cumulative or only collateral to the controverted issue, or who is needed only for impeachment purposes, is not a material witness for the purpose of granting a continuance [*Lewis v. Neptune Society Corp. (1987) 195 Cal. App. 3d 427, 429, 240 Cal. Rptr. 656* (cumulative testimony); *Zlotoff v. Tucker (1984) 154 Cal. App. 3d 988, 993-994, 201 Cal. Rptr. 692* (collateral issue); *In re Steiner (1955) 134 Cal. App. 2d 391, 395, 285 P.2d 972* (impeachment only)]. Similarly, an affidavit (declaration) that states evidence already testified to, or that fails to describe the evidence adequately, cannot support a continuance to produce material evidence [*Stephens v. Aviation Research & Dev. Pub. Corp. (1966) 243 Cal. App. 2d 349, 351, 52 Cal. Rptr. 322]* .

[3] Diligence

Obtaining a continuance on the basis of absence of evidence also requires a showing of diligence [*see Code Civ. Proc. § 595.4*]. Counsel must state facts which support a claim of diligence [*Lewis v. Neptune Society Corp. (1987) 195 Cal. App. 3d 427, 430, 240 Cal. Rptr. 656]* . In the case of a scheduled witness, counsel should show a substantial previous effort to procure the witness's attendance [*see Marcucci v. Vowinckel (1913) 164 Cal. 693, 694-695, 130 P. 430* ; *Jurado v. Toys "R" Us, Inc. (1993) 12 Cal. App. 4th 1615, 1619, 16 Cal. Rptr. 2d 158* (denial of continuance reversed when one subpenaed medical expert left thecountry before trial and other had moved with no forwarding address); *see also Kramer v. Kramer (1961) 197 Cal. App. 2d 727, 731, 17 Cal. Rptr. 461* (denial of continuance upheld where witness was on call, but not subpoenaed, and court refused to wait 15 minutes for witness to appear)]. If counsel cannot name the witness or state when the witness will be available, denial of a continuance is justified [*Allstate Ins. Co. v. King (1967) 252 Cal. App. 2d 698, 703, 60 Cal. Rptr. 892]* .

Diligence is also lacking when counsel requests time to obtain evidence, the need for which should have been anticipated before the trial [*Estate of Smith (1973) 9 Cal. 3d 74, 81, 106 Cal. Rptr. 774, 507 P.2d 78]* . Nevertheless, even the most diligent attorneys are not required to anticipate an unpredictable change of events at trial [*Crosby v. Martinez (1958) 159 Cal. App. 2d 534, 541-542, 324 P.2d 26* (legal surprise as basis for continuance when evidence admitted in error and rebuttal witness not otherwise needed)].

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§ 136.20 Absence of Party

[1] Good Cause Requirement

The mere absence of a party from a proceeding is not sufficient reason to compel a court to grant a continuance [*Young v. Redman (1976) 55 Cal. App. 3d 827, 832, 128 Cal. Rptr. 86]* . Thus, a party may bring an issue to trial or hearing and proceed with the case in the absence of the other party unless the court, for good cause, otherwise directs [*Code Civ. Proc. § 594(a).*] If the issue to be tried is an issue of fact, proof must first be made to the satisfaction of the court that the adverse party has had 15 days' notice for trial [*Code Civ. Proc. § 594(a)*].

Although illness of a party is considered good cause for granting a continuance, the illness should be supported, whenever possible, by an appropriate declaration of a medical doctor, and unless the illness is a result of an emergency occurring after the trial setting conference, the continuance should be requested by noticed motion with supporting documents [*In re Marriage of Teegarden (1986) 181 Cal. App. 3d 401, 405-406, 226 Cal. Rptr. 417]* .

To establish good cause, a party must prove more than serious illness or unavoidable absence [*Nahas v. Nahhas (1955) 135 Cal. App. 2d 440, 442, 287 P.2d 381]* . A party's illness does not mandate continuance if the trial court concludes that the party is able to attend trial [*Lewis v. Neptune Society Corp. (1987) 195 Cal. App. 3d 427, 430, 240 Cal. Rptr. 656]* . The party's presence must be critically necessary to assist counsel or to testify [*Sonstelie v. Bush (1929) 102 Cal. App. 396, 398-399, 283 P. 336]* . In addition, the party should have been otherwise proceeding with the case diligently [*Pacific Gas & Elec. Co. v. Taylor (1921) 52 Cal. App. 307, 310, 198 P. 651]* . If the party already has testified or could testify by deposition, continuances on the basis of absence are generally denied (except a continuance for evidence-taking) [*Young v. Redman (1976) 55 Cal. App. 3d 827, 831, 128 Cal. Rptr. 86* (voluntarily absent party had already given deposition); *Russell v. Roberts (1974) 39 Cal. App. 3d 390, 397, 114 Cal. Rptr. 305* (party hospitalized but available for evidence-taking)].

[2] Military Service

[a] Servicemembers Civil Relief Act

The Servicemembers Civil Relief Act (formerly, the Soldiers' and Sailors' Civil Relief Act) [*50 U.S.C. App., § 501 et*

seq.] provides that in any action or proceeding in which a person in the military service is involved, the court is required to grant a stay of proceedings for a minimum period of 90 days [*50 U.S.C. App. §§ 521, 522.*].

The 2003 revisions to the former Soldiers' and Sailors' Civil Relief Act were made to ease the economic and legal burdens on military personnel called to active duty. The revisions significantly changed the law to provide that the stay is no longer discretionary, but is automatic.

If the defendant is in military service, or within 90 days after release from military service, and has received notice of an action or proceeding, the court must stay the action for a minimum of 90 days upon application of the service member or upon the court's own motion [*50 U.S.C. App. § 522*].

The application from the service member must consist of a letter or other communication stating why current military duty requirements materially affect the service member's ability to appear and when the service member will be able to appear. The application must include a letter or other communication from the service member's commanding officer stating that the service member is unable to appear due to military duty and is not authorized for leave at the time of the letter [*50 U.S.C. App. § 522*]. If the application meets these requirements, the 90-day stay must be granted.

In any civil action where the defendant does not make an appearance, the plaintiff is required to file an affidavit stating whether or not the defendant is in military service or stating that the plaintiff is unable to determine if the defendant is in military service. If it appears that the defendant is in military service, an attorney is appointed for the defendant. The stay must be granted upon motion of the attorney or upon the court's own motion, if the court determines that: (1) there may be a defense to the action and a defense cannot be presented without the presence of the service member/defendant; or (2) after due diligence, counsel has been unable to contact the service member/defendant or otherwise determine if a meritorious defense exists [*50 U.S.C. App. § 521*].

While the initial 90-day stay is essentially automatic, the granting of an *additional* stay is discretionary. A request for an additional stay may be denied ifthe servicemember's ability to appear and participate in the civil action is not adversely affected by his or her military duties [*George P. v. Superior Court (2005) 127 Cal. App. 4th 216, 224-225, 24 Cal. Rptr. 3d 919]* .

Federal cases decided prior to the 2003 revisions to the Act may bear little weight because of the fundamental changes to the Act.

[b] State Protections for Reservists and Members of the National Guard

Effective June 21, 2002, California enacted a set of statutes similar to the former Soldiers' and Sailors' Civil Relief Act to offer protections for servicemembers that are officers and enlisted members of the National Guard called or ordered into active state service by the Governor or President, and Reservists of the United States Military Reserve who have been called to full-time active duty [*see Mil. & Vet. Code § 400 et seq.*]. However, California law has not yet been revised to conform to the significant revisions made by the 2003 Servicemembers Civil Relief Act, which replaced the former Soldiers' and Sailors' Civil Relief Act. Under the state statutes, at any stage in any action or proceeding in which a service member is involved, either as plaintiff or defendant, during the period of military service or within 60 days thereafter, the court may, in its discretion on its own motion, and must, on application to it by the service member or some person on his or her behalf, stay the action or proceeding unless, in the opinion of the court, the ability of the plaintiff to prosecute the action or the defendant to conduct his or her defense is not materially affected by reason of his or her military service [*see Mil. & Vet. Code § 403(a)*].

Any stay of any action may be ordered for the period of military service and three months thereafter or any part of that period, and subject to those terms as may be just; and if the service member is a codefendant with others the plaintiff may nevertheless, by leave of court, proceed against the others [*see Mil. & Vet. Code § 403(d)*].

[3] Accommodation Under the Americans With Disabilities Act (ADA)

Cal. Rules of Ct, Rule 1.100 provides a party who is a "person with disabilities" within the meaning of the Americans with Disabilities Act (ADA), the California related statutes of *Civ. Code § 51 et seq.*, or other applicable state and federal laws, may seek an "accommodation" which may include making reasonable modifications in policies, practices, and procedures of the court. One court opinion has provided the reach of this rule of court applies to a trial continuance where, in a marital dissolution proceeding, the trial court erred in denying a spouse's request for a continuance as an accommodation for disability because it was undisputed that the spouse, who had bipolar disorder, was disabled within the meaning of the Americans with Disabilities Act (ADA), had been hospitalized on the day before trial was set to resume, was under a physician's care, and was self-representing; a trial continuance was a reasonable, if not necessary, accommodation, even though it meant a delay in conducting the trial, and none of the grounds listed in *Cal. Rules of Court, Rule 1.100(f)* existed when the spouse's request was denied [*In re Marriage of James & Christine C. (2008) 158 Cal. App. 4th 1261, 1272-1277, 70 Cal. Rptr. 3d 715*].

The term "applicant" under *Cal. Rules of Ct, Rule 1.100(a)* means any lawyer, party, witness, juror, or other person with an interest in attending any proceeding before any court of this state. Whether the scope of this rule will be extended to require a continuance in appropriate circumstances for other than a party remains to be adjudicated.

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§ 136.21 Unavailability of Counsel

[1] Diligence Required

If the ground advanced for continuance is that a party's attorney is unavailable, the trial court, in exercising its discretion with due regard to all interests involved, must carefully consider the reasons for that unavailability [*Arm v. State Bar (1990) 50 Cal. 3d 763, 776, 268 Cal. Rptr. 741, 789 P.2d 922]* . Continuances may be granted to counsel to provide additional preparation time, resolve a conflict between cases, or reschedule a case when counsel is absent. In these situations, a continuance must be justified by a showing of diligence and necessity [*County of San Bernardino v. Doria Mining & Engineering Corp. (1977) 72 Cal. App. 3d 776, 783, 140 Cal. Rptr. 383]* . A request for a continuance supported by a showing of the serious physical illness or death of trial counsel will generally be granted absent a lack of diligence or other abusive circumstances [*Hernandez v. Superior Court (2004) 115 Cal. App. 4th 1242, 1247, 9 Cal. Rptr. 3d 821]* .

In situations in which the party and the attorney have been diligent, but counsel is nonetheless not ready for trial, denial of a continuance has been held to be reversible error [*Oliveros v. County of Los Angeles (2004) 120 Cal. App. 4th 1389, 1398, 16 Cal. Rptr. 3d 638* (denial of continuance reversed where attorney unavailable due to engagement in another trial; court overemphasized calendar management); *Vann v. Shilleh (1975) 54 Cal. App. 3d 192, 196-199, 126 Cal. Rptr. 401* (denial of continuance reversed where former counsel withdrew, not at party's request, one or two days before trial); *Cohen v. Herbert (1960) 186 Cal. App. 2d 488, 493-496, 8 Cal. Rptr. 922* (denial of continuance reversed where attorney was involved in military duties, opposing party was not prejudiced, and, without continuance, receivership would have been imposed)]. If the number of trial preparation days available has been adequate, an unusual problem with the case will not justify postponing the trial [*Beck v. Reinholtz (1956) 138 Cal. App. 2d 719, 722-723, 292 P.2d 906* (denial of continuance affirmed where, during pretrial period longer than that prescribed by statute, attorney discovered he did not have all necessary information)].

Similarly, in situations of schedule conflict (or absence for other reasons), a continuance may be granted if absence is unavoidable [*Palomar Mortgage Co. v. Lister (1963) 212 Cal. App. 2d 236, 238-239, 27 Cal. Rptr. 863* (denial of short continuance reversed where attorney was engaged in separate trial and opposing party was not prejudiced)]. Failure of the party or attorney, however, to attempt diligently to avoid the conflict will result in denial of the

continuance [*Bixby v. Hotchkis (1945) 72 Cal. App. 2d 368, 371-372, 164 P.2d 808* (denial of continuance affirmed where counsel failed to anticipate or take steps to resolve a schedule conflict); *Thomas v. Toppins (1928) 206 Cal. 18, 19, 272 P. 1042* (denial of continuance affirmed where, after counsel became ill, party had ample time to arrange for new counsel)].

Local court rule or practice may also restrict the availability of continuance on the ground of schedule conflict [*see, e.g.,* Placer Co. Super. Ct. Rules, Rule 20.5; San Mateo Co. Super. Ct. Rules, Rule 2.3(e)(6) (no continuance of trial date on ground counsel is engaged in trial of another case unless trial counsel and back-up trial counsel were specified at first case management conference)].

[2] Necessity Required

Even when the party and attorney act with diligence, if there is no real necessity for the continuance, it may be denied [*Fejer v. Paonessa (1951) 104 Cal. App. 2d 190, 194-195, 231 P.2d 507* (denial of continuance affirmed where two of party's attorneys unprepared but party had adequate representation from third counsel); *County of San Bernardino v. Doria Mining & Engineering Corp. (1977) 72 Cal. App. 3d 776, 783, 140 Cal. Rptr. 383* (denial of continuance affirmed where party sought to substitute counsel without showing that counsel of record was unable or unwilling to provide representation)].

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§ 136.22 Absence of Judge or Jury

When the judge is not or cannot be present, a continuance may be obtained [*Code Civ. Proc. §§ 139, 594a*].

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§ 136.23 Member of the Legislature

[1] Entitled to Continuance

A member of the California Legislature is entitled, subject to stated exceptions, to a continuance when he or she is a party, attorney of record, or principle witness to a civil action before a trial court or an administrative proceeding before a state board, commission, or officer [*Code Civ. Proc. § 595*]. In the trial court, the continuance applies to any discovery proceeding, pretrial conference, deposition, interrogatory, or any other proceeding arising out of the pending civil action as well as the trial itself [*Code Civ. Proc. § 595*].

[2] Meeting of Interim Committee

When the member of the Legislature is the duly appointed member of a legislative interim committee which is meeting or scheduled to meet within a period that the court finds does not exceed the time reasonably necessary to enable the member to reach the committee meeting by the ordinary mode of travel, the court is required, subject to stated exceptions, to postpone the trial, proceeding, or hearing to such date following adjournment or recess of the committee as the court finds is reasonably necessary to enable the member to appear using the ordinary mode of travel, unless the attorney of record consents to an earlier date [*Code Civ. Proc. § 595*].

[3] Legislature in Session or Short Recess

When the Legislature is in session or in a recess of 40 days or less and the legislator's interim committees are adjourned or recessed, the court is required, subject to stated exceptions, to postpone the trial, proceeding, or hearing to at least 30 days following final adjournment of the Legislature or until a recess of more than 40 days begins, unless the attorney of record consents to an earlier date. If a date is available during recess, continuance must be given to the earlier recess date rather than a date during adjournment [*Code Civ. Proc. § 595*].

[4] Effect on Running of Time

If the postponement is granted, it suspends for the same period of time as the postponement, the running of any period of time for any ruling or proceeding by the court, board, commission, or officer, or for the performance by any party of

any act affected by the postponement [*Code Civ. Proc. § 595*].

[5] When Continuance Not Mandatory

The granting of this continuance is mandatory unless the court determines that it would defeat or abridge a right to relief pendente lite in a paternity action or a right to invoke a provisional remedy such as pendente lite support in a domestic relations controversy, attachment and sale of perishable goods, receivership of a failing business, and temporary restraining order or preliminary injunction, and that the continuance should not be granted [*Code Civ. Proc. § 595*; *see also Thurmond v. Superior Court (1967) 66 Cal. 2d 836, 838-839, 59 Cal. Rptr. 273, 427 P.2d 985* (interpreting former *Code Civ. Proc. § 595*, which contained no provision on mandatory continuances or specified exceptions as directory, and suggesting that a court could refuse a continuance to a member of the Legislature if a substantial existing right would be defeated or abridged by extended continuances)].

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§ 136.24 Other Action Pending

Generally, when two cases which involve substantially the same issues are pending in the same jurisdiction between identical parties, the prior action may be pleaded in abatement of the second action [*Code Civ. Proc. § 430.10(c)*; *see* Ch. 3, *Abatement of Actions*]. If, because of some difference between the two cases, abatement is not applicable, but the outcome of one of the actions could substantially resolve issues in the other, a continuance (sometimes described as a stay) of the latter case is appropriate [*Anthony v. General Motors Corp. (1973) 33 Cal. App. 3d 699, 707-708, 109 Cal. Rptr. 254* (continuance proper where pending case would be collateral estoppel on a key issue); *Pesquera Del Pacifico v. Superior Court (1949) 89 Cal. App. 2d 738, 201 P.2d 553* (continuance not necessary where foreign trial raised different issues)]. Continuance may be justified whether the uncontinued case is at the pretrial, trial, or appellate stage [*Margolis v. Superior Court (1957) 151 Cal. App. 2d 333, 338-339, 311 P.2d 167]* . It is not required that the uncontinued case be filed before the continued case [*Ehrhart & Associates, Inc. v. Superior Court (1960) 185 Cal. App. 2d 1, 4, 7 Cal. Rptr. 844]* .

A result similar to a continuance is also available by statute when one case is brought in California and a related action is pending in another state. *Code Civ. Proc. § 410.30* (inconvenient forum) permits a California court to stay (or dismiss) an action when the court finds that in the interest of substantial justice, the action should be heard in a forum outside the state. When granting a continuance under case law, the main concern of the court is the effect of the other pending action on issues in the instant case; under *Code Civ. Proc. § 410.30*,however, the trial court examines such factors as convenience, residence, and availability of witnesses [*see, e.g.,* *Belnap Freight Lines, Inc. v. Petty (1975) 46 Cal. App. 3d 159, 162-164, 119 Cal. Rptr. 907]* . For additional discussion and forms, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* .

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§ 136.25 Amended Pleadings

When it appears to the satisfaction of the trial court that an amendment of pleadings renders a postponement necessary, the court may on its own motion postpone the trial [*Code Civ. Proc. § 473(a)(2)*]. The decision to allow amendment of the pleadings if requested during trial will not be disturbed absent a clear showing of abuse of discretion [*Consolidated World Investments, Inc. v. Lido Preferred Ltd. (1992) 9 Cal. App. 4th 373, 383, 11 Cal. Rptr. 2d 524]* . Continuance of trial on the ground of amendment of pleadings may be appropriate, even if the matter is on the "fast track" [*Honig v. Financial Corp. of America (1992) 6 Cal. App. 4th 960, 967, 7 Cal. Rptr. 2d 922]* .

Counsel may also request a continuance on the ground of surprise when the court permits an opposing party to amend the pleadings [*see Carl v. Thomas (1931) 116 Cal. App. 294, 298, 2 P.2d 872]* .

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§ 136.26 Procedure

[1] On Motion or Application of Parties

A party seeking a continuance of the date set for trial, whether contested or uncontested or stipulated to by the parties, must make the request for a continuance by a noticed motion or an ex parte application under *Cal. Rules of Ct., Rule 3.1200 et seq.*, with supporting declarations; and the party must make the motion or application as soon as reasonably practical once the necessity for the continuance is discovered [*Cal. Rules of Ct., Rule 3.1332(b)*].

The California Rules of Court require that (1) a motion for continuance before trial be made to the judge supervising the master calendar or, if there is no master calendar, to the judge in whose department the case is pending or, if the case has been assigned for all purposes to a specific judge or department the motion must be made before the assigned judge or in the assigned department; (2) except for good cause, the motion must be made on written notice to all other parties; and (3) notice must be given and the motion made promptly on the necessity for the continuance being ascertained [*Cal. Rules of Ct., Rules 3.1103(b), 3.1332(a)*]. Further, a continuance before or during trial must not be granted except on an affirmative showing of good cause [*see discussion under § 136.20[1]*].

[2] On Motion of Court

The court may postpone a trial on its own motion if, at the time fixed for trial the court is engaged in the trial of another action; or, if as provided in *Code Civ. Proc. § 473(a)(2)* (*see* the *discussion under § 136.25*), an amendment of the pleadings, or the allowance of time to make such amendment, or to plead, renders a postponement necessary [*Code Civ. Proc. § 594a*].

[3] Waiver of Procedural Formalities

In the exercise of their discretionary powers, trial courts may, for good cause, disregard the failure of a party requesting a continuance to satisfy such formal requirements as noticed motion, writings, or affidavits [*Taylor v. Bell (1971) 21 Cal. App. 3d 1002, 1008, 98 Cal. Rptr. 855 , cert. denied, 408 U.S. 923, (1972)* ; *see also Code Civ. Proc. § 595.4*]. If, however, a party has failed to meet these formal requirements, and the trial court denies the continuance for other reasons, the appellate court may uphold the denial without examining the merits [*see County of San Bernardino v.*

Doria Mining & Engineering Corp. (1977) 72 Cal. App. 3d 776, 783, 140 Cal. Rptr. 383] .

In any case, although the trial court may excuse failure to comply with the requirement of a declaration in support of motion for continuance, it is not required to do so [*Mahoney v. Southland Mental Health Associates Medical Group (1990) 223 Cal. App. 3d 167, 172, 272 Cal. Rptr. 602]* . Where a party fails to file an affidavit contending it needs a continuance to obtain essential facts, a trial court does not abuse its discretion by declining to grant a continuance [*Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co. (2009) 170 Cal. App. 4th 554, 577, 88 Cal. Rptr. 3d 363*].

[4] Oral Motions

While the rules of court do not expressly provide for oral motions for continuances [*see Cal. Rules of Ct., Rule 3.1332*)], a common situation creating good cause for an oral motion is the occurrence of an event at trial which surprises one of the parties; in such a case the party may immediately move for a continuance or mistrial rather than waiting to see how the case progresses [*McCown v. Spencer (1970) 8 Cal. App. 3d 216, 228, 87 Cal. Rptr. 213]* .

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§ 136.27 Deposition of Witness in Attendance

The party obtaining a postponement of a trial, if required by the adverse party, must consent that the testimony of any witness of the adverse party who is in attendance be taken by deposition before a judge, or clerk of the court in which the case is pending, or before a notary public selected by the court, which must accordingly be done; and the testimony so taken may be read on the trial, with the same effect, and subject to the same objections, as if the witnesses were produced [*Code Civ. Proc. § 596*].

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§ 136.28 Review

Appeal may not be taken from an order denying a continuance but the order isreviewable on an appeal from an appealable order [*Cohen v. Herbert (1960) 186 Cal. App. 2d 488, 490, 8 Cal. Rptr. 922* (appeal from order appointing receiver); on appealable judgments and orders, *see Code Civ. Proc. §§ 904-904.5*]. However, a writ of mandate, which is used to compel the performance of an act which the law specially enjoins, will issue to compel a continuance improperly denied [*Whalen v. Superior Court (1960) 184 Cal. App. 2d 598, 602, 7 Cal. Rptr. 610* ; *see also Code Civ. Proc. § 1085* (power to issue writ of mandate)]. In general, a trial court's determination of the existence of good cause for a continuance will not be disturbed absent a clear abuse of discretion [*Lewis v. Neptune Society Corp. (1987) 195 Cal. App. 3d 427, 429, 240 Cal. Rptr. 656]* .

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[Reserved]

§§ 136.29[Reserved]

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§ 136.40 Related Matthew Bender Publications

[1] California Points and Authorities

For memoranda supporting and opposing motions for continuances, see California Points and Authorities, Ch. 48, *Continuance of Proceedings* (Matthew Bender)

[2] California Trial Guide

For discussion and scripts for oral motions relating to continuances, see E. Johnson, *California Trial Guide, § 1.10* (Matthew Bender)

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§ 136.41 Federal Statutes

Continuance as available to party by reason of military service. *50 U.S.C. App. § 521*

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§ 136.42 State Statutes

[1] Continuances in Specific Proceedings

Continuance as available to party by reason of military service as reservist unless ability to prosecute or defend is not materially affected. *Mil. & Vet. Code § 403*

Postponement of small claims court hearing if all parties are not present. *Code Civ. Proc. § 116.370(c)(2)*

Procedure for requesting postponement of small claims court hearing date. *Code Civ. Proc. § 116.570*

Proceedings to disqualify judges. *Code Civ. Proc. § 170.6(4)*

Proceedings to obtain temporary restraining order. *Code Civ. Proc. § 527*

Proceedings to obtain temporary restraining order in labor dispute. *Code Civ. Proc. § 527.3*

Proceedings involving adjudication of mining claims. *Code Civ. Proc. § 595.3*

Proceedings to partition property. *Code Civ. Proc. § 873.850*

Mandamus proceedings. *Code Civ. Proc. § 1090*

Forcible entry and unlawful detainer proceedings. *Code Civ. Proc. § 1173*

Contempt proceedings. *Code Civ. Proc. § 1217*

Proceedings before state agency boards and administrative law judges. *Gov. Code § 11524*

Probate proceedings. *Prob. Code §§ 1045, 1205*

Motor vehicle actions against nonresidents. *Veh. Code § 17457*

[2] Expenses

Imposition of expenses occasioned by postponement as discretionary with trial court. *Code Civ. Proc. § 1024*

[3] Deposition of Witness in Attendance

Deposition of adverse witness in attendance on postponement as required on adverse party's request. *Code Civ. Proc. § 596*

[4] Grounds for Granting Continuances

Absence of judge as basis for adjournment from day to day. *Code Civ. Proc. § 139*

Stay of an action because, in interest of substantial justice, hearing in a forum outside California as required. *Code Civ. Proc. § 410.30*

Amendment of pleadings as basis for postponement and payment of costs. *Code Civ. Proc. § 473(a)(2)*

Postponement if party, attorney, or witness is member of Legislature. *Code Civ. Proc. §§ 595, 595.1*

Agreement in writing by all attorneys of record as basis for continuance. *Code Civ. Proc. § 595.2*

Postponement on ground of absence of evidence. *Code Civ. Proc. § 595.4*

Extension of time to perform certain acts. *Code Civ. Proc. § 1054*

Extension of time to perform certain acts if attorney is member of Legislature. *Code Civ. Proc. § 1054.1*

Improper discovery pursuant to subpena duces tecum. *Code Civ. Proc. § 1987.5*

Extension of discovery as not ground for continuance. *Code Civ. Proc. § 2024(f)* [*Code Civ. Proc. § 2024.060* operative July 1, 2005].

[5] Motions in General

Motions and orders generally. *Code Civ. Proc. § 1003 et seq.*

[6] Opposing Continuances

Admission that certain evidence would be given as preventing continuance. *Code Civ. Proc. § 595.4*

[7] Policy Governing Continuances

Judge as required to adopt and utilize firm policy against continuances in litigation. *Gov. Code § 68607(g)*

Single 30-day continuance possible by stipulation, not to detract from Trial Court Delay Reduction Act goals. *Gov. Code § 68616(d)*

[8] Procedure

Postponement on motion of court. *Code Civ. Proc. § 473(a)(2)*

[9] Stipulation

Stipulation by attorney. *Code Civ. Proc. § 283*

Continuance by stipulation. *Code Civ. Proc. § 595.2*

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§ 136.43 California Rules of Court

Continuance after trial begins. *Cal. Rules of Ct., Rule 10.910*

Motion for continuance before and during trial. *Cal. Rules of Ct., Rule 3.1332*

Affirmative showing of good cause required for continuance. *Cal. Rules of Ct., Rule 3.1332(c)*

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§ 136.44 Local Court Rules

[1] Alameda County

Continuance of case management conference. Alameda Co. Super. Ct. Rules, Rule 3.170(b)

[2] Los Angeles County

Litigation conduct guidelines for continuances and extensions of time. Los Angeles Co. Super. Ct. Rules, Rule 7.12(a)

[3] Orange County

No extensions or continuances without court approval. Orange Co. Super. Ct. Rules, Rule 388

[4] Sacramento County

Continuance of trial and conferences. Sacramento Co. Super. Ct. Rules, Rules 2.02(C), 2.03, 11.05, 11.18

[5] San Diego County

Continuance of case management conference. San Diego Co. Super. Ct. Rules, Rule 2.1.9

[6] San Francisco City and County

Continuance of case management conference. San Francisco Co. Super. Ct. Rules, Rule 3.4(E)

Continuances for law and motion matters. San Francisco Co. Super. Ct. Rules, Rule 8.2(B)

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§ 136.45 Decisions

[1] Absent Witness or Evidence

[a] Diligence

Court did not abuse discretion in denying party's motion for continuance to produce rebuttal witness when party knew well in advance that issue would be raised. *Estate of Smith (1973) 9 Cal. 3d 74, 81, 106 Cal. Rptr. 774, 507 P.2d 78*

Trial court did not abuse discretion in denying continuance based on unavailability of expert witness when supporting deposition simply showed that party met witness on Saturday before Monday trial date to discuss testimony and that after lengthy conversation party learned that expert was not interested in testifying on her behalf; deposition did not provide sufficient explanation of reason for unavailability, and there was no indication that witness was under subpoena. *Pham v. Nguyen (1997) 54 Cal. App. 4th 11, 16-17, 62 Cal. Rptr. 2d 422*

Code Civ. Proc. § 595.4 (motions to postpone trial on ground of absence of evidence) requires written notice and affidavit showing materiality of evidence expected to be obtained and that due diligence has been used to procure it. *Lewis v. Neptune Society Corp. (1987) 195 Cal. App. 3d 427, 430, 240 Cal. Rptr. 656*

Denial of defendant's motion for continuance was not abuse of discretion when defendant's attorney made motion only two days before trial despite awareness for previous 10 days that witness would not be available, when he made no effort to depose witness to preserve testimony, and when he made no showing that testimony of absent witness' testimony was material. *Zlotoff v. Tucker (1984) 154 Cal. App. 3d 988, 993-994, 201 Cal. Rptr. 692*

Motion for continuance on ground of absent witness is inadequate without showing that witness can be expected to appear in future. *Allstate Ins. Co. v. King (1967) 252 Cal. App. 2d 698, 703, 60 Cal. Rptr. 892*

Continuance is available to procure additional material evidence or testimony of absent, material witness if party has acted with diligence in preparing evidence for trial. *Larson v. Solbakken (1963) 221 Cal. App. 2d 410, 428-430, 34 Cal. Rptr. 450*

Discretion to deny motion for continuance to produce witnesses on ground of surprise testimony was not abused when both pleadings and pretrial order raised issue. *Specht v. Keitel (1961) 190 Cal. App. 2d 332, 340-343, 12 Cal. Rptr. 95*

Surprise is appropriate basis for continuance to obtain witness to rebut evidence admitted in error. *Crosby v. Martinez (1958) 159 Cal. App. 2d 534, 541-542, 324 P.2d 26*

Denial of continuance to call vital witness which adverse party was expected to callwas unnecessarily prejudicial to requesting party. *Hays v. Viscome (1953) 122 Cal. App. 2d 135, 140-141, 264 P.2d 173*

Denial of continuance to call material witness was error even though moving party failed to interview witness before trial. *Murr v. Murr (1948) 87 Cal. App. 2d 511, 521-522, 197 P.2d 369*

Denial of continuance justified when party cannot even name absent witness. *Dineen v. City & County of San Francisco (1940) 38 Cal. App. 2d 486, 493, 101 P.2d 736*

[b] Materiality

Denial of motion for continuance of summary judgment hearing to obtain declaration from expert witness is not error when the declaration would not create a triable issue of material fact. *Yuzon v. Collins (2004) 116 Cal. App. 4th 149, 168, 10 Cal. Rptr. 3d 18*

Denial of continuance when testimony sought from unavailable witness would be cumulative to that of other witnesses was not abuse of discretion. *Lewis v. Neptune Society Corp. (1987) 195 Cal. App. 3d 427, 429, 240 Cal. Rptr. 656*

Denial of motion for continuance to present affidavits controverting opposing party's declarations is not prejudicial to moving party if trial court did not consider declarations in reaching its decision. *Goss v. Edwards (1977) 68 Cal. App. 3d 264, 273, 137 Cal. Rptr. 252*

Discretion was not abused by denial of motion for continuance for indefinite time to obtain evidence of unknown content. *Lea v. Shank (1970) 5 Cal. App. 3d 964, 977, 85 Cal. Rptr. 709*

Denial of continuance on basis of absent witnesses is not prejudicial when requesting party does not describe what testimony witnesses would have given. *Stephens v. Aviation Research & Dev. Pub. Corp. (1966) 243 Cal. App. 2d 349, 351, 52 Cal. Rptr. 322*

Request for continuance on ground of absent material witness as supported by showing that facts cannot otherwise be proven. *Agnew v. Larson (1961) 197 Cal. App. 2d 444, 450, 17 Cal. Rptr. 538*

Affidavit that does not show what witness would state is insufficient to establish materiality. *Jennings v. American President Lines, Ltd. (1943) 61 Cal. App. 2d 417, 426, 143 P.2d 349*

[2] Costs

Conditioning grant of continuance on payment of costs of entire jury panel is permitted when party requested continuance after jury panel summoned. *Inman v. Fremont Medical Center (1975) 49 Cal. App. 3d 169, 172, 122 Cal. Rptr. 372*

[3] Granting of Continuances

[a] Good Cause

Refusal to grant continuance necessary for transcription of tape recordings, or to accept tapes themselves as administrative record, as abuse of discretion when plaintiff made good faith attempt to provide adequate record and when request for continuance was not dilatory, abusive, or prejudicial to rights of opposing party. *Darley v. Ward (1980) 28 Cal. 3d 257, 262-263, 168 Cal. Rptr. 481, 617 P.2d 1113*

Wide discretion of trial court in granting or denying continuance is not disturbed in absence of clear abuse. *Estate of Smith (1973) 9 Cal. 3d 74, 81, 106 Cal. Rptr. 774, 507 P.2d 78*

Trial court abused its discretion in entering judgment against the corporate defendant where brief trial continuance would have permitted defendant to file the required informational statement, restore the corporation's good standing with the state, and defend the litigation. *Cadle Co. v. WorldWide Hospitality Furniture (2006) 144 Cal. App. 4th 504, 512, 50 Cal. Rptr. 3d 480*

Trial court did not abuse discretion in denying motion to continue made on day of trial when, four days before trial, plaintiff was offered new job which necessitated his immediate attendance at two-week training course out of state; although plaintiff's attorney stated he was unable to go forward in the plaintiff's absence, trial court acted within its discretion when is was not convinced that plaintiff could not have arranged his work schedule to be available for trial, or that plaintiff could not have notified this attorney earlier so motion could have been brought before the trial date; plaintiff knew trial date when he accepted job, and under Cal. Rules of Ct., App. Div. I, § 9, he was to regard trial date as definite court appointment that takes precedence over all nonemergencies. *Lazarus v. Titmus (1998) 64 Cal. App. 4th 1242, 1246-1247, 1250, 75 Cal. Rptr. 2d 676*

Granting of continuances is not favored, and party seeking continuance must make proper showing of good cause. *Lewis v. Neptune Society Corp. (1987) 195 Cal. App. 3d 427, 429, 240 Cal. Rptr. 656*

Unnecessary continuances are wasteful, nonproductive, time-consuming, and fertile ground for criticism of courts. *County of San Bernardino v. Doria Mining & Engineering Corp. (1977) 72 Cal. App. 3d 776, 781, 140 Cal. Rptr. 383*

Continuance is appropriate alternative to mistrial when juror or material witness becomes ill. *Schnear v. Boldrey (1971) 22 Cal. App. 3d 478, 482, 99 Cal. Rptr. 404*

Grounds for continuance are not exclusively controlled by statutory law. *Taylor v. Bell (1971) 21 Cal. App. 3d 1002, 1008, 98 Cal Rptr 855 , cert. denied, 408 U.S. 923, 92 S. Ct. 2493, 33 L. Ed. 2d 334 (1972)*

Reversal of trial court's denial of continuance was not possible when, on appeal, moving party's failure to provide record of proceedings precludes showing of information supporting continuance. *Muller v. Tanner (1969) 2 Cal. App. 3d 445, 458, 82 Cal. Rptr. 738*

[b] Insufficient Time

Continuance was not justified by substitution of executor for party within previous 18 days without showing of prejudice to executor. *Eastwood v. Froehlich (1976) 60 Cal. App. 3d 523, 529, 131 Cal. Rptr. 577*

[c] Member of Legislature

Continuance on statutory ground that counsel is member of Legislature is directory only. *Thurmond v. Superior*

Court (1967) 66 Cal. 2d 836, 838-840, 59 Cal. Rptr. 273, 427 P.2d 985 (decided under former *Code Civ. Proc. § 595*, current statutory language modified to accommodate this case)

[d] Other Action Pending

Stay until conclusion of arbitration was appropriate, even though party requesting stay was not party to arbitration and resolution of some issues will not bind requesting party under doctrine of collateral estoppel if result of arbitration may be to simplify postponed case and prevent multiple litigation of some of issues affecting some of parties. *Marcus v. Superior Court (1977) 75 Cal. App. 3d 204, 209-212, 141 Cal. Rptr. 890*

Continuance was proper to await outcome of workers' compensation case before trying civil action for personal injuries. *Black Bros. Co. v. Superior Court (1968) 265 Cal. App. 2d 501, 509, 71 Cal. Rptr. 344 , disapproved on other grounds* in *Denham v. Superior Court (1970) 2 Cal. 3d 557, 563, 86 Cal. Rptr. 65, 468 P.2d 193*

[e] Party Absent

Continuance of civil trial until release of imprisoned defendants was appropriate when not prohibited by law or substantially prejudicing rights of plaintiffs. *Payne v. Superior Court (1976) 17 Cal. 3d 908, 923, 132 Cal. Rptr. 405, 553 P.2d 565*

Trial court erred in denying a spouse's request for a continuance as an accommodation under *Cal. Rules of Ct., Rule 1.100* for disability because it was undisputed that the spouse, who had bipolar disorder, was disabled within the meaning of the Americans with Disabilities Act (ADA), had been hospitalized on the day before trial was set to resume, was under a physician's care, and was self-representing; a trial continuance was a reasonable, if not necessary, accommodation, even though it meant a delay in conducting the trial, and none of the grounds listed in *Cal. Rules of Court, Rule 1.100(f)* existed when the spouse's request was denied. *In re Marriage of James & Christine C. (2008) 158 Cal. App. 4th 1261, 1272-1277, 70 Cal. Rptr. 3d 715*

While an initial 90-day stay under the Servicemembers Civil Relief Act is essentially automatic, the granting of an *additional* stay is discretionary. A request for an additional stay may be denied if the servicemember's ability to appear and participate in the civil action is not adversely affected by his or her military duties. A continuance was properly denied when the father's military service did not adversely affect his participation in a juvenile dependency proceeding. The record demonstrated that the father had appeared in the action and received services for reunification with his child for essentially the entire period required by law. The father had also made a personal appearance during a leave of absence from the military and had already provided necessary testimony. Furthermore, the father had been represented by counsel at all times and had been able to communicate with social services staff and counsel while he was in *Iraq. George P. v. Superior Court (2005) 127 Cal. App. 4th 216, 224-225, 24 Cal. Rptr. 3d 919*

Application for stay under the former Soldiers' and Sailors' Civil Relief Act (now, the Servicemembers Civil Relief Act) (*50 U.S.C. App. § 501 et seq.*) depends on facts and circumstances in each case; mere fact that party requesting continuance is in military service, without more, is insufficient to warrant stay; party in military service must show that he or she is actually unavailable to participate and that his or her rights would be adversely affected by virtue of absence from trial; mere contentions of unavailability, without affirmative representations that leave to attend trial was sought and refused, are insufficient to warrant such relief; record supported juvenile court's denial of father's requested stay of contested hearing under *Welf. & Inst. Code § 366.22*. This case interprets federal law prior to significant revisions made in 2003. However, it may be useful in supporting a motion for a continuance brought under the California Military and Veterans Code which requires the service member to make a prima facie showing that his or her ability to prosecute or defend is materially affected by reason of military service (*Mil. & Vet. Code § 400 et seq.*). *Christine M. v. Superior Court (1999) 69 Cal. App. 4th 1233, 1243-1245* Cal. Rptr. 2d 220

Voluntarily absent party who had given deposition was not entitled to continuance. *Young v. Redman (1976) 55 Cal. App. 3d 827, 832, 128 Cal. Rptr. 86*

Continuance was properly denied when hospitalized witness had given deposition and was available for taking of additional evidence. *Russell v. Roberts (1974) 39 Cal. App. 3d 390, 397, 114 Cal. Rptr. 305 , disapproved on other grounds* in *DeBerard v. Lim (1999) 20 Cal. 4th 659, 671, 85 Cal. Rptr. 2d 292, 976 P.2d 843*

Whether party is healthy enough to attend trial as issue for trial judge's evaluation and determination. *Agnew v. Parks (1963) 219 Cal. App. 2d 696, 702, 33 Cal. Rptr. 465*

Party's illness and inability to attend trial as insufficient to establish good cause for continuance. *Nahas v. Nahhas (1955) 135 Cal. App. 2d 440, 442, 287 P.2d 381* ; *but see Estate of Stevens (1922) 57 Cal. App. 160, 161, 206 P. 668* (illness of out-of-state parties as sufficient)

Continuance under the former Soldiers' and Sailors' Civil Relief Act (now, the Servicemembers Civil Relief Act) [*50 U.S.C. App. § 521*] until discharge of absent party is unnecessary when party is judgment proof and court already granted brief continuance for his deposition. This case interprets federal law prior to significant revisions made in 2003. However, it may be useful in supporting a motion for a continuance brought under the California Military and Veterans Code [*Mil. & Vet. Code § 400 et seq.*]. *Culver v. Superior Court (1954) 125 Cal. App. 2d 76, 78, 270 P.2d 78*

Continuance on basis of absent party is properly denied when affidavits of illness are overcome by proof to contrary. *Kalmus v. Kalmus (1951) 103 Cal. App. 2d 405, 414, 230 P.2d 57*

Military service by itself is inadequate basis for continuance under the former Soldiers' and Sailors' Civil Relief Act now the Servicemembers Civil Relief Act [*50 U.S.C. App. § 521*]. This case interprets federal law prior to significant revisions made in 2003. However, it may be useful in supporting a motion for a continuance brought under the California Military and Veterans Code which requires the servicemember to make a prima facie showing that his or her ability to prosecute or defend is materially affected by reason of military service [*Mil. & Vet. Code § 400 et seq.*]. *Ridley v. Young (1944) 64 Cal. App. 2d 503, 514-515, 149 P.2d 76*

[f] Plaintiff's Bankruptcy

Plaintiff's pending bankruptcy did not require that trial be continued on defendant's motion; although bankrupt's cause of action becomes part of bankruptcy estate on filing of petition in bankruptcy (*11 U.S.C. § 541(a)(1)*), such transfer by operation of law did not divest plaintiff of right to continue to prosecute case pendingassertive action by trustee in bankruptcy (*11 U.S.C. § 323(a)*; *Bankr. Rules, Rule 6009*); former *Code Civ. Proc. § 385* (*now see Code Civ. Proc. § 368.5*) expressly authorized plaintiff to remain real party in interest even after cause of action had been transferred to bankruptcy estate by operation of law until such time as court allowed trustee to substitute for plaintiff. *National Secretarial Service, Inc. v. Froehlich (1989) 210 Cal. App. 3d 510, 520, 258 Cal. Rptr. 506*

[g] Stipulation

Code Civ. Proc. § 595.2, providing that court shall postpone trial or hearing on consent of parties, as directory. *Lorraine v. McComb (1934) 220 Cal. 753, 755, 32 P.2d 960*

[h] Unavailability of Counsel

Denial of request for trial continuance constitutes reversible error when trial counsel for the County was engaged in another trial resulting in a lack of representation in court. *Oliveros v. County of Los Angeles (2004) 120 Cal. App. 4th 1389, 1398, 16 Cal. Rptr. 3d 638*

A request for a continuance supported by a showing of the serious physical illness or death of trial counsel will generally be granted absent a lack of diligence or other abusive circumstances. Trial counsel sought a continuance due to battle with pancreatic cancer and later died. Trial counsel's serious physical illness culminating in death clearly constituted good cause for a continuance. *Hernandez v. Superior Court (2004) 115 Cal. App. 4th 1242, 1247, 9 Cal. Rptr. 3d 821*

Continuance required if counsel withdraws, not at party's request, one or two days before trial. *Vann v. Shilleh (1975) 54 Cal. App. 3d 192, 196-199, 126 Cal. Rptr. 401*

Discretion to deny trial continuance is not abused when party insists on particular counsel who refuses to try case or changes counsel just prior to trial. *Agnew v. Parks (1963) 219 Cal. App. 2d 696, 700-702, 33 Cal. Rptr. 465* ; *Flynn v. Fink (1923) 60 Cal. App. 670, 674-675, 213 P. 716*

Denial of short continuance when attorney is engaged in separate trial and opposing party is not prejudiced as unjustified. *Palomar Mortgage Co. v. Lister (1963) 212 Cal. App. 2d 236, 238-239, 27 Cal. Rptr. 863*

Attorney unavoidably unprepared was sufficient ground for continuance when remedy sought was receivership. *Cohen v. Herbert (1960) 186 Cal. App. 2d 488, 493-496, 8 Cal. Rptr. 922*

Denial of continuance was justified when, although two of party's attorneys were unprepared, party had adequate representation from third attorney. *Fejer v. Paonessa (1951) 104 Cal. App. 2d 190, 194-195, 231 P.2d 507*

Continuance because of attorney absence was properly denied when counsel showed only conflicting professional engagement. *Mann v. Pacific Greyhound Lines (1949) 92 Cal. App. 2d 439, 446, 207 P.2d 105*

Denial of continuance was justified when counsel failed to anticipate or take steps to resolve schedule conflict. *Bixby v. Hotchkis (1945) 72 Cal. App. 2d 368, 371-372, 164 P.2d 808*

[4] Procedure

[a] On Motion of Parties

Motions for continuance is required to be made on written notice. *Lewis v. Neptune Society Corp. (1987) 195 Cal. App. 3d 427, 430, 240 Cal. Rptr. 656* (citing former Cal. Rules of Ct., Rule 375, now *3.1332*)

[b] Waiver of Procedural Formalities

Where a party fails to file an affidavit contending it needs a continuance to obtain essential facts, a trial court does not abuse its discretion by declining to grant a continuance. *Oldcastle Precast, Inc. v. Lumbermens Mutual Casualty Co. (2009) 170 Cal. App. 4th 554, 577, 88 Cal. Rptr. 3d 363*

Oral stipulation by attorney not of record is insufficient under *Code Civ. Proc. § 595.2* (postponement when attorneys of record agree in writing). *County of San Bernardino v. Doria Mining & Engineering Corp. (1977) 72 Cal. App. 3d 776, 784, 140 Cal. Rptr. 383*

[5] Review

When arbitrator exercises discretion in denying a continuance request, trial court must determine whether the arbitrator abused his or her discretion by refusing to postpone the hearing upon sufficient cause being shown. Second, if there was an abuse of discretion, the trial court must determine whether the moving party suffered substantial prejudice as a result. Moreover, on appeal from the trial court's order granting or denying a request to vacate the arbitration award, the review is de novo. SWAB Financial, LLC v. E* *Trade Securities, LLC (2007) 150 Cal. App. 4th 1181, 1198, 58 Cal. Rptr. 3d 904*

Absent clear abuse, trial court's determination of whether good cause for continuance existed will not be disturbed by appellate court [*Eastwood v. Froehlich (1976) 60 Cal. App. 3d 523, 529, 131 Cal. Rptr. 577]* .

Order denying continuance is nonappealable but reviewable on appeal of another appealable order. *Cohen v. Herbert (1960) 186 Cal. App. 2d 488, 490, 8 Cal. Rptr. 922*

Writ of mandate is available to compel continuance improperly denied. *Whalen v. Superior Court (1960) 184 Cal. App. 2d 598, 602, 7 Cal. Rptr. 610*

[6] Right of Party Opposing Continuance

Plaintiff who diligently prosecutes suit is entitled to have trial within reasonable time; policy that causes shall be disposed of on their merits is not served when party without fault is denied determination of cause through repeated continuances granted to opposing party; requirement is that at some point case shall without fail be tried on day certain. *Redevelopment Agency v. Tobriner (1989) 215 Cal. App. 3d 1087, 1096, 264 Cal. Rptr. 481*

[7] Third-Party Claims

In hearing on third-party claim under former *Code Civ. Proc. § 689* (*now see Code Civ. Proc. §§ 720.110, 720.210*), denial of 60-day continuance for out-of-state witnesses requested by third-party claimant which erroneously expected trial by affidavit was proper considering burden on adverse party which had alreadybrought witnesses from abroad. *Joint Holdings & Trading Co. v. First Union Nat'l Bank of N.C. (1975) 50 Cal. App. 3d 159, 167, 123 Cal. Rptr. 519*

When one party obtains continuance of hearing for third-party claim under former *Code Civ. Proc. § 689* (*now see Code Civ. Proc. §§ 720.110, 720.210*) by telephone call to court, notice of new date is inadequate unless reasonably certain to inform adverse counsel who did not participate in telephone call. *Parker v. Dingman (1975) 48 Cal. App. 3d 1011, 1018, 122 Cal. Rptr. 309*

Party to summary proceeding on third-party claim under former *Code Civ. Proc. § 689* (*now see Code Civ. Proc. §§ 720.110, 720.210*) (claim that levied-on personal property belongs to third party) was not entitled to continuance though out of state at time of hearing. *Dingwall v. Anderson (1969) 271 Cal. App. 2d 658, 663-664, 76 Cal. Rptr. 827*

Continuance was denied in proceeding on third-party claim under former *Code Civ. Proc. § 689* (*now see Code Civ. Proc. §§ 720.110, 720.210*) when subpoenaed witness placed on call not available for hearing. *Oak Knoll Broadcasting Corp. v. Hudgings (1969) 275 Cal. App. 2d 563, 565-566, 80 Cal. Rptr. 175*

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§ 136.46 Text References

Witkin, California Procedure, vol. 7, *Trial*, §§ 7 et seq., 13-14, 16-17, 19-20, 26-29, 32, 36 (4th ed. 1997)

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[Reserved]

§§ 136.47[Reserved]

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§ 136.60 Facts to Be Ascertained

1. Determine whether facts support a continuance. Examples of facts supporting common grounds for continuances include the following:

a. Absent witness.

Determine:

☐ What would witness' testimony be [*see, e.g., Lea v. Shank (1970) 5 Cal. App. 3d 964, 977, 85 Cal. Rptr. 709]* .

☐ That the evidence is new and material [*see, e.g., Gibson v. Cobb (1965) 236 Cal. App. 2d 226, 235-237, 46 Cal. Rptr. 57]* .

☐ That the evidence could not be otherwise proven [*see, e.g., Agnew v. Larson (1961) 197 Cal. App. 2d 444, 450, 17 Cal. Rptr. 538]* .

☐ That the witness is unavailable despite the party's diligent efforts [*see, e.g., Kramer v. Kramer (1961) 197 Cal. App. 2d 727, 731, 17 Cal. Rptr. 461]* .

☐ Nature of illness, if any; use a physician's declaration [*see* Form 10].

☐ When the witness can be present [*see, e.g., Allstate Ins. Co. v. King (1967) 252 Cal. App. 2d 698, 703, 60 Cal. Rptr. 892]* .

b. Absent party.

Determine:

☐ That the party's presence is vitally needed because party is the sole or major witness and a deposition is inadequate or party's assistance to counsel is indispensable since party is the only person who knows all of the facts and the whereabouts of witnesses [*see, e.g., Sonstelie v. Bush (1929) 102 Cal. App. 396, 398-399, 283 P. 336]* .

☐ That absence is unavoidable [*see, e.g., Nahas v. Nahhas (1955) 135 Cal. App. 2d 440, 442, 287 P.2d 381]* .

☐ Nature of illness, if any; use a physician's declaration [*see forms in §§ 136.78* and *136.80*].

☐ If the party is absent due to military service [*see* (f), *below*].

c. Unavailability of counsel because of schedule conflict.

Determine:

☐ That the conflict arose after the date for trial was set and could not be avoided [*see, e.g., Bixby v. Hotchkis (1945) 72 Cal. App. 2d 368, 371-372, 164 P.2d 808]* .

☐ That substituting attorneys is not possible [*see, e.g., Fejer v. Paonessa (1951) 104 Cal. App. 2d 190, 194-195, 231 P.2d 507]* .

d. Substitution of counsel.

Determine:

☐ That substantial reasons existed for changing counsel [*see, e.g., County of San Bernardino v. Doria Mining & Engineering Corp. (1977) 72 Cal. App. 3d 776, 783, 140 Cal. Rptr. 383]* .

☐ That party acted diligently as soon as it became apparent that new counsel was needed [*see, e.g., Thomas v. Toppins (1928) 206 Cal. 18, 19, 272 P. 1042]* .

☐ That party found it difficult to find counsel who would accept the case unless a continuance were granted [*see, e.g., Vann v. Shilleh (1975) 54 Cal. App. 3d 192, 196-199, 126 Cal. Rptr. 401]* .

e. Other action pending.

Determine whether or not the other case, once decided, could resolve significant issues in the instant case [*see, e.g., Anthony v. General Motors Corp. (1973) 33 Cal. App. 3d 699, 707-708, 109 Cal. Rptr. 254]* .

f. Military service.

To support a motion for continuance on the ground of military service of party Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*], determine:

☐ The manner in which current military duty requirements materially affect the servicemember's ability to appear.

☐ When the servicemember is able to appear.

☐ Ability to take leave.

State protections for reservists and members of the National Guard [*Mil. & Vet. Code § 400 et seq.*]), determine:

☐ Present military service and duration.

☐ Place of service and availability of leave.

☐ How counsel's ability to prosecute or defend is materially affected by the party's absence [*see, e.g., Whealton v. Whealton (1967) 67 Cal. 2d 656, 665-666, 63 Cal. Rptr. 291, 432 P.2d 979]* .

2. Determine the earliest date to which the matter could be continued.

3. Determine the effect, if any, on the possibility for dismissal for failure to bring the case to trial [*Code Civ. Proc. § 583.310 et seq.*] if the party seeking a continuance is a plaintiff, petitioner, or cross complainant.

NOTE:
If granting the continuance may make the party vulnerable to a motion to dismiss by defendant [*Code Civ. Proc. § 583.310 et seq.*], counsel should consider the possibility of obtaining a waiver [for appropriate language, *see* *form in § 136.70*].

4. Any prejudice that may result to other parties to the case if a continuance is granted.

NOTE:
**When an attack is made on a discretionary procedural order, including continuance orders, the order is not considered made in the exercise of sound discretion if it resulted in possible or probable prejudice to a party [*see* *Cohen v. Herbert (1960) 186 Cal. App. 2d 488, 493-496, 8 Cal. Rptr. 922* (order denying continuance reversed); *Larson v. Solbakken (1963) 221 Cal. App. 2d 410, 428-430, 34 Cal. Rptr. 450* (order granting continuance upheld on finding that no prejudice to adverse

party was shown)] although its application may be limited to situations of emergency at least where the trial court has granted continuance [***see*** discussion in *§ 136.14*].

5. Whether counsel for the other parties will stipulate to the continuance. For procedure, see *§ 136.61*.

NOTE:

Subject to its own discretion, the court will postpone a trial, or the hearing of any motion or demurrer, for a period not to exceed 30 days, when all attorneys of record who have appeared in the action agree in writing to such postponement [*Code Civ. Proc. § 595.2*; *see also forms in §§ 136.70 -136.71*].

6. If not all parties will stipulate, move for a continuance.

a. Determine whether good cause exists to dispense with written notice to the other parties. If so, proceed by ex parte motion. For procedure, see *§ 136.62*.

b. Otherwise, proceed by noticed motion. For procedure, see *§ 136.63*.

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§ 136.61 Stipulation

1. Ascertain new trial or hearing date.

Ascertain the earliest date on which all counsel and the court can proceed. This may require substantial discussion among counsel and the court clerk to fix a date that all can agree to.

2. Prepare papers.

a. Stipulation for continuance to a certain day or, if required, to drop the case from the trial calendar [*see § 136.70*].

b. Order [*see § 136.71*].

NOTE:
The order may be added at the end of the stipulation [*see* *§ 136.70*] or may be a separate document [***see*** *§ 136.71*].

3. Sign the original of the stipulation and have counsel for each party or party appearing in pro per sign it.

4. Obtain signature of judge.

Present the original stipulation and the order to the clerk with the request that it be presented to the judge for signature. If the judge signs the order, present the stipulation and order to the clerk with the request that it be filed.

5. Distribute conformed, file-stamped copies of the stipulation and order to each of the other counsel or parties appearing in pro per.

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§ 136.62 Ex Parte Application

NOTE:
If counsel for the other parties will not stipulate to a continuance, an ex parte application or noticed motion is used. The ex parte application is made on written notice [*Cal. Rules of Ct., Rule 3.1332(b)*]. If good cause is shown for making the motion without notice to the adverse party, an ex parte motion may be used. Otherwise, counsel should proceed by way of a noticed motion [for procedure, *see* *§ 136.63*].

1. Consult local court rules relating to continuances, such as rules stating the court and time for making such motions [*see, e.g.,* San Francisco Co. Super. Ct. Rules, Rule 8.2(B)].

2. Prepare papers.

a. Ex parte application for continuance [*see § 136.72*].

NOTE:
The application must set forth both the reason justifying the continuance and facts establishing good cause for not giving notice [*see* *Cal. Rules of Ct., Rule 3.1332(a)*].

b. Declarations supporting both requirements for good cause [*see §§ 136.75 -136.80*].

c. Memorandum in support of the motion.

d. Order granting the continuance [*see § 136.82*].

NOTE:
The order usually follows at the end of the motion on the same paper.

2. Sign papers.

Counsel for the moving party signs the application and memorandum, if any, and has the person making the declaration, if any, sign it, or, in the case of an affidavit, has the affiant subscribe and swear to its contents before an officer authorized to administer oaths [*see Code Civ. Proc. §§ 2012, 2093*].

3. Present papers.

a. Present the application and supporting papers to the court clerk with the request that the motion and supporting documents be presented to the judge for signature.

b. If the judge signs the order, the originals of the application, supporting documents, and order are filed. Obtain conformed copies of the order from the court clerk for service on the other parties.

NOTE:

Under *Code Civ. Proc. § 1019.5(a)*, when a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order [*see* Ch. 372, ***Motions and Orders***] must be given by the prevailing party to all other parties or their attorneys, in the manner provided in *Code Civ. Proc. § 1010 et seq.* [***see*** Ch. 518, ***Service of Summons and Papers***], unless notice is waived by all parties in open court and is entered in the minutes.

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§ 136.63 Noticed Motion

1. Ascertain new date.

Ascertain from the court clerk or local court rule the date on which the motion for a continuance can be heard and the department of the court that will hear it.

NOTE:
The minimum notice period is 16 court days, plus increased periods when service is by mail, facsimile transmission, overnight delivery, or electronic service unless time is shortened [*Code Civ. Proc. §§ 1005(b), 1010.6*; *see* Ch. 524, ***Shortening and Extension of Time***]. If In addition, counsel will need time to prepare the written documents and to have the supporting declarations executed by the persons making them.

2. Prepare papers.

a. Notice of motion [§ 136.73].

b. Affidavit or declaration under penalty of perjury in support of themotion [*see §§ 136.74 -136.79*].

c. Supporting memorandum.

d. Proof of service [for forms, *see* Ch. 518, *Service of Summons and Papers*].

e. Proposed order, if desired [*see § 136.82*].

3. Sign papers.

Counsel for the moving party signs the notice of motion and memorandum and has the person making

the declaration sign it, or, in the case of an affidavit, subscribe and swear to its contents before an officer authorized to administer oaths [*see Code Civ. Proc. §§ 2012, 2093*].

4. Serve papers.

Counsel for the moving party should serve the papers on other counsel or parties appearing in pro per by mail [*see Code Civ. Proc. §§ 1012, 1013*] or by delivery in person or as otherwise provided in *Code Civ. Proc. § 1011*.

NOTE:

When a written notice of motion is necessary, it must be given at least 16 court days before the hearing, provided that if service is by mail the 16-day period is increased by five calendar days if the place of mailing and address are within California, 10 calendar days if either the place of mailing or address is outside California but within the United States, and 20 calendar days if either the place of mailing or address is outside the United States [*Code Civ. Proc. § 1005(b)*]. If the notice is served by facsimile transmission or overnight delivery, the 16-day period is increased by two calendar days [*Code Civ. Proc. § 1005(b)*]. An extension period of two court days may apply in the case of electronic service [*see* *Code Civ. Proc. 1010.6(a)(6)*; for discussion, ***see*** *Ch. 518,* ***Service of Summons and Papers,*** *§ 518.41[8]*].

Papers served by mail should either bear a notation of date and place of mailing or be accompanied by an unsigned copy of the affidavit, declaration, or certificate of mailing [*Code Civ. Proc. § 1013(b)*]. If service is by facsimile transmission, Express Mail, or another method of overnight delivery, the papers should bear a notation of their date and place of deposit or transmission, or be accompanied by an unsigned copy of the proof of service [*Code Civ. Proc. § 1013(d), (f), (g)*].

5. Present the papers to the court.

Present the original notice of motion, affidavit (declaration), and memorandum with proof of service attached to the court clerk for filing and request that the motion be placed on calendar.

NOTE:

With respect to attachment of proof of service, see NOTE under Paragraph D(4), ***above***].

6. Argue the motion.

a. If motion is opposed, examine any opposing papers, and, if time permits, prepare, serve, and file a supplemental affidavit (declaration), and memorandum in the same manner as the original documents [*see* (2), *above*].

NOTE:

Counsel for a party opposing the motion may prepare an affidavit or declaration [*see* *§ 136.81*] in opposition to the motion or may admit that certain evidence would be given at the trial and oppose a continuance on that ground [***see*** *Code Civ. Proc. § 595.4*; *§ 136.80*]. Counsel for a party opposing the motion may also prepare, serve, and file a memorandum in opposition to the motion. For memoranda opposing a motion for a continuance, see California Points and Authorities, Ch. 48, ***Continuance of Proceedings*** (Matthew Bender).

b. Attend the hearing on the motion and present argument, if any, in support of the motion. If the motion is granted, ascertain the exact wording of the court's order.

7. Obtain order.

a. Prepare the order, if not already done [*see § 136.82*].

b. Present the original and copies of the order to the clerk with the request that he or she obtain the judge's signature to, and file, the original and that he or she conform and return the copies. If the order is presented by mail, a self-addressed, stamped envelope should be enclosed for return of the conformed copies.

c. Give notice of the court's decision or order granting or denying the motion to all other parties or their attorneys, in the manner provided in *Code Civ. Proc. § 1010 et seq.* (*see* Ch. 518, *Service of Summons and Papers*) unless notice was waived by all parties in open court and was entered in the minutes [*Code Civ. Proc. § 1019.5*; for a form of notice, *see* Ch. 372, *Motions and Orders*].

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[Reserved]

§§ 136.64[Reserved]

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§ 136.70 Stipulation [Code Civ. Proc. § 283] and Order [Code Civ. Proc. § 1003] for Continuance [Code Civ. Proc. § 595.2]

[1] FORM Stipulation [Code Civ. Proc. § 283] and Order [Code Civ. Proc. § 1003] for Continuance [Code Civ. Proc. § 595.2]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	STIPULATION FOR CONTINUANCE AND OR-
Defendant.	)	DER
	)	
	)	

_____

IT IS HEREBY STIPULATED AND AGREED by and between all of the attorneys of record of the parties who have appeared in this _____ [action *or* proceeding] that the _____ [trial *or* hearing] set for _____ [*date*], be postponed and continued to _____ [*date*], [or such subsequent date as the court may set].

This stipulation is made on the ground that good cause for the continuance exists, as shown by the declaration(s) of _____ [*name(s)*] filed herewith.

Dated: _____.

_____ [*signature*]
Attorney for Plaintiff
_____ [*signature*]

Attorney for Defendant

ORDER

IT IS SO ORDERED.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is a form of stipulation for use when all the parties agree to the continuance of a trial or hearing date.

If counsel and the court clerk have established a new hearing or trial date, it may be used in the form. Otherwise, counsel should state the earliest acceptable date and use the optional language on subsequent dates.

For the steps to be taken in preparing a stipulation, see *§ 136.61*.

[3] Effect of Stipulation

Code Civ. Proc. § 595.2 provides that in all cases the court shall postpone a trial for a period not to exceed 30 days when all attorneys of record of parties who have appeared in the action agree in writing to the postponement. Although *Code Civ. Proc. § 595.2* refers only to actions, its provisions may be applicable to special proceedings under statutes relating to such proceedings and incorporating the provisions of Part II of the Code of Civil Procedure, including *Code Civ. Proc. § 595.2* [*see, e.g., Code Civ. Proc. § 1230.040* (eminent domain proceedings)].

[4] Restrictions

Counsel may be restricted by the policies and provisions of the Trial Court Delay Reduction Act [*see Gov. Code §§ 68607(g)* (policy against continuances), 68616(d) (limited allowance for 30 day stipulated continuance). For discussion, *see § 136.10[3]*].

[5] Good Cause

Code Civ. Proc. § 595.2 does not expressly require a showing of good cause for the continuance, but this statute has been held to be directory only and not mandatory [*see Lorraine v. McComb (1934) 220 Cal. 753, 755, 32 P.2d 960]* . Therefore, since *Cal. Rules of Ct., Rule 3.1332* states that a continuance will not be granted except on a showing of good cause supported by declaration, have the stipulation state that good cause for the continuance exists and that an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) establishing the facts showing good cause be attached to the stipulation. This is expressly required by some local court rules [*see, e.g.,* San Francisco Uniform Local Ct. Rules, Rule 8.2(B)].

For discussion of what may constitute good cause, see §§ 136.136.17[1] and 136.20[1].

[6] Cross References

For an order on stipulation continuing a case, see *§ 136.71*.

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13-136 California Forms of Pleading and Practice--Annotated § 136.71

§ 136.71 Order on Stipulation [Code Civ. Proc. § 283] Continuing Case

[1] FORM Order on Stipulation [Code Civ. Proc. § 283] Continuing Case

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	ORDER
Defendant.	)	
	)	
	)	

_____

On the stipulation and agreement of the parties and of all of the attorneys of record of the parties who have appeared in this cause, and good cause appearing therefor,

IT IS ORDERED that the _____ [trial *or* hearing] of this cause heretofore set for _____ [*date*], be continued to _____ [*date*] [at _____ (*time*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is an order granting a continuance based on the stipulation of the parties, and is for use only if the court requires a separate formal order as opposed to an abbreviated form of order like the one that appears at the end of the *form in § 136.70*. The form recites the stipulation by all of the attorneys of record of the parties who have

appeared in the action [*see Code Civ. Proc. § 595.2*.].

[3] Cross References

For a stipulation for continuance of a case, see *§ 136.70*.

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13-136 California Forms of Pleading and Practice--Annotated § 136.72

§ 136.72 Ex Parte Application for Continuance [Cal. Rules of Ct., Rule 3.1332(b)]

[1] FORM Ex Parte Application for Continuance [Cal. Rules of Ct., Rule 3.1332(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	EX PARTE APPLICATION FOR CONTINUANCE
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name(s)*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	
_____		

_____ [*Specify party, e.g.,* plaintiff] hereby applies for a court order continuing the _____ [trial *or* hearing] in this cause set for _____ [*date*], _____ [until _____ (*date*), *or* for _____ days]. The application is made on the ground(s) that _____ [*specify*]. _____ [*Specify party, e.g.,* Plaintiff] did not request a continuance by noticed motion because _____ [*specify grounds establishing good cause for failure to apply by noticed motion*].

This application is based on the declaration of _____ [*name*] and supporting memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing, if any, on the application.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

[2] Use of Form

The form in [1], *above*, is an ex parte application for continuance to be used when, for good cause, a motion for continuance cannot be made on written notice to all other parties [*see Cal. Rules of Ct., Rule 3.1332(b)*]. The form provides for both a showing of good cause for not giving written notice and a showing of the grounds for the continuance.

If good cause does not exist for avoiding the notice requirement, counsel must use the noticed motion procedure [*see § 136.73*].

For a description of steps to be taken in preparing an ex parte application, see *§ 136.62*.

For discussion as to what constitutes good cause, see *§§ 136.17[1]* and *136.20[1]*.

[3] Accompanying Papers

Counsel should prepare affidavits or declarations under penalty of perjury supporting both good cause requirements [*Code Civ. Proc. §§ 2003, 2009, 2015.5*; *see §§ 136.74 -136.79* for declarations supporting good cause for granting a continuance].

For discussion of the *Cal. Rules of Ct., Rule 3.1204(b)* requirement that an ex parte order be supported by affidavit or declaration relating to the giving of or the attempt to give notice or that for specified reasons notice should not be required, and a form of declaration, see Ch. 372, *Motions and Orders* .

[4] Cross References

For declarations in support of a motion for continuance of a case, see *§§ 136.74 -136.79*. For a notice of motion for a continuance, see *§ 136.73*. For an order granting a continuance, see *§ 136.82*.

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13-136 California Forms of Pleading and Practice--Annotated § 136.73

§ 136.73 Notice of Motion and Motion for Continuance [Cal. Rules of Ct., Rule 3.1332(b)]

[1] FORM Notice of Motion and Motion for Continuance [Cal. Rules of Ct., Rule 3.1332(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR CON-
Plaintiff,	)	TINUANCE
vs.	)	Date: _____
_____ [*name(s)*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
_____		

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant] will, and hereby does, move for an order continuing the _____ [*specify proceedings, e.g.,* trial *or* hearing on plaintiff's motion for summary judgment], heretofore set for _____ [*date*], to _____ [*date*]. The motion will be made on the grounds that _____ [*specify*].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

[2] Use of Form

The form in [1], *above*, is a notice of a motion for a continuance.

For a description of steps to be taken in preparing a noticed motion, see *§ 136.63*.

[3] Notice

A party seeking a continuance of the date set for trial, whether contested or uncontested or stipulated to by the parties, must make the request for a continuance by a noticed motion or an ex parte application under *Cal. Rules of Ct., 3.1200 et seq.*, with supporting declarations; and the party must make the motion or application as soon as reasonably practical once the necessity for the continuance is discovered [*Cal. Rules of Ct., Rule 3.1332(b)*].

The notice is required to state when and the grounds on which the motion will be made, and the papers on which it will be based [*see Code Civ. Proc. § 1010*].

[4] Accompanying Papers

Facts supporting the grounds for this type of motion are to be stated in an affidavit or declaration under penalty of perjury [*Code Civ. Proc. §§ 2003, 2009, 2015.5*; *see §§ 136.74 -136.79*].

A supporting memorandum must be served and filed with the notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*; for discussion and forms, see Ch. 417, *Points and Authorities*].

[5] Cross References

For declarations in support of a motion for continuance of a case, see *§§ 136.74 -136.79*. For an order granting a continuance, see *§ 136.82*.

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13-136 California Forms of Pleading and Practice--Annotated § 136.74

§ 136.74 Declaration in Support of Motion [Cal. Rules of Ct., Rule 3.1332(b)] for Continuance--By Member of Legislature Who Is Attorney, Party, or Witness [Code Civ. Proc. § 595]

[1] FORM Declaration in Support of Motion [Cal. Rules of Ct., Rule 3.1332(b)] for Continuance--By Member of Legislature Who Is Attorney, Party, or Witness [Code Civ. Proc. § 595]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	DECLARATION OF _____ [*name*]
Plaintiff,	)	IN SUPPORT OF MOTION FOR CONTINUANCE
vs.	)	Date: _____
_____ [*name(s)*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

I, _____ [*name*], declare:

[*EITHER*]

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record for _____ (*moving party*) *or other statement as appropriate*] in this _____ [action *or* proceeding], now set for _____ [trial *or* hearing] on _____ [*date*], at _____ [*time*], [in _____ (Department

or Division) _____ of this court *or* before this _____ (board *or* commission *or* officer)].

[*OR*]

1. I am a principal witness in this _____ [action *or* proceeding], now set for _____ [trial *or* hearing] on _____ [*date*], at _____ [*time*], _____ [in _____ (Department *or* Division) _____ of this court *or* before this _____ (board *or* commission *or* officer)]. My testimony is important to this _____ [action *or* proceeding] for the following reason(s): _____ [*outline testimony and explain relevance*].

[*OR*]

1. I am the _____ [*specify party, e.g.,* plaintiff] in this [action *or* proceeding], now set for _____ (trial *or* hearing) on _____ [*date*], at _____ [*time*], _____ [in _____ (Department *or* Division) _____ of this court *or* before this _____ (board *or* commission *or* officer)].

[*CONTINUE*]

2. I am a duly elected member of the Legislature of California, namely, _____ [*specify, e.g.,* a member of the Assembly from the _____ District]. _____ [*Specify legislative business warranting continuance, e.g.,* The Legislature will be in regular session beginning _____ (*date*)]. _____ [*Specify date on which declarant will be available, e.g.,* I expect the Legislature to _____ (adjourn *or* recess) on _____ (*date*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a declaration that may be used in lieu of an affidavit [*see Code Civ. Proc. § 2015.5*] in support of a motion for a continuance on the ground that the declarant is a member of the Legislature and is either a party, a principal witness, or an attorney for a party.

[3] Mandatory Continuance

Granting this type of a continuance is mandatory, unless the court determines that it would defeat or abridge certain specified rights [*Code Civ. Proc. § 595*; *see Thurmond v. Superior Court (1967) 66 Cal. 2d 836, 838-840, 59 Cal. Rptr. 273, 427 P.2d 985]* .

For further discussion of continuance on this ground, see § 136.136.23[1].

[4] Cross References

For a notice of motion for a continuance, see *§ 136.73*. For an ex parte motion for a continuance, see *§ 136.72*. For an order granting a continuance, see *§ 136.82*.

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13-136 California Forms of Pleading and Practice--Annotated § 136.75

§ 136.75 Declaration in Support of Motion [Cal. Rules of Ct., Rule 3.1332(b)] for Continuance--By Attorney--Necessity of Appearance in Other Trial

[1] FORM Declaration in Support of Motion [Cal. Rules of Ct., Rule 3.1332(b)] for Continuance--By Attorney--Necessity of Appearance in Other Trial

[*Caption. See § 136.74.*]

I, _____ [*name*], declare:

1. I am an attorney at law duly admitted to practice before all the courts of California and the attorney of record for _____ [*name of party*] in this _____ [action *or* proceeding] which has been set for _____ [trial *or* hearing] on _____ [*date*], [in _____ (Department *or* Division) _____ of] this court.

2. I am also attorney for _____ [*specify party*] in the case of _____ [*title, court, and number*], set for trial [in _____ (Department *or* Division) _____ thereof], on _____ [*date*], at _____ [*city*], California.

3. It will be necessary for me to be present in that court for trial of that cause which is expected to last approximately _____ days, and I therefore request a continuance of the _____ [trial *or* hearing] herein until _____ [*date*], or as soon thereafter as is convenient to the court.

4. _____ [*State reason why conflict occurred, e.g.,* The conflict in trial dates would not have been reasonably anticipated at the time of the trial setting conference and occurs because of requests by an opposing party in the other case.]

5. _____ [*State reason why adequate representation is not otherwise available, e.g.,* Within my law firm, both of these cases were assigned to me for trial and the time is insufficient for another attorney to prepare either

case.]

6. _____ [*State reasons for necessity of proceeding with other case, e.g.,* The cause to be tried in _____ (*city*), _____, California cannot be continued and numerous witnesses are under subpoena for appearance therein who could not appear at a later date.]

7. _____ [*Name of adverse party*] will not be prejudiced by a continuance of the subject cause until a later date.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a declaration for use in support of a motion for acontinuance on the ground that the attorney has a schedule conflict.

The form states the conflict, the next available trial date, the reasons the conflict occurred despite counsel's diligence, and the unavailability of adequate legal representation from other sources.

For further discussion of this ground for continuance, see § 136.136.21[1].

For a related form of declaration by a party for use in supporting a continuance based on substitution of counsel, see *§ 136.76*.

[3] Effect of Schedule for Trial

Once a case has been scheduled for trial, a court may be reluctant to grant a continuance on this ground. Unless there are clear facts to support the conclusion that the conflict could not be avoided or alternative representation procured, counsel should consider requesting a stipulation for continuance from opposing counsel [*see § 136.70*].

[4] Unavailability of Counsel for Other Reasons

This form may be modified and used to support continuances made on the ground that the attorney is unavoidably absent due to illness or unavoidably unprepared because of newness, surprise, or some other cause. The declaration must show that the absence or lack of preparation is unavoidable (*e.g.*, the party's previous attorney withdrew just prior to trial [*see Vann v. Shilleh (1975) 54 Cal. App. 3d 192, 196-199, 126 Cal. Rptr. 401]* ; counsel diligently attempted to prepare [*see Cohen v. Herbert (1960) 186 Cal. App. 2d 488, 493-496, 8 Cal. Rptr. 922]* ; counsel could not have anticipated the event causing surprise at trial [*see Crosby v. Martinez (1958) 159 Cal. App. 2d 534, 541-542, 324 P.2d 26]*). The declaration must also establish the unavailability of adequate alternative legal representation. Illness should be supported by a physician's declaration [*see § 136.79*].

[5] Cross References

For a notice of motion for a continuance, see *§ 136.73*. For an ex parte motion for a continuance, see *§ 136.72*. For an order granting a continuance, see *§ 136.82*.

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13-136 California Forms of Pleading and Practice--Annotated § 136.76

§ 136.76 Declaration in Support of Motion [Cal. Rules of Ct., Rule 3.1332(b)] for Continuance--By Party Seeking to Employ Substitute Counsel

[1] FORM Declaration in Support of Motion [Cal. Rules of Ct., Rule 3.1332(b)] for Continuance--By Party Seeking to Employ Substitute Counsel

[*Caption. See § 136.74.*]

I, _____ [*name*], declare:

1. I am the _____ [*specify party, e.g.,* defendant] in this _____ [action *or* proceeding] and make this declaration in support of the motion for continuance.

2. On _____ [*date*], I employed _____ [*name*], an attorney at law of _____ [*city*], California to represent me. At that time the attorney accepted the employment and undertook the representation.

3. On _____ [*date*], the _____ [action *or* proceeding] was set for _____ [trial *or* hearing] on _____ [*date*], but on or about _____ [*date*], _____ [*name*] stated that he/she could not and would not represent me further, that he/she was not prepared to go forward with the trial, and that I should get another lawyer.

4. I am not an attorney at law. I am not familiar with legal procedure and do not begin to know how to go about representing myself.

5. As soon as _____ [*name*] advised me that he/she would not go forward with the _____ [trial *or* hearing], I made every effort to secure another lawyer to represent me and went to several lawyers but none would undertake to represent me on such short notice unless I were able to secure a continuance in order to enable them to prepare.

6. I require a continuance to have an opportunity to secure the services of an attorney so that such attorney would have ample time to prepare for the forthcoming _____ [trial *or* hearing]. [The earliest date on which another attorney is prepared to proceed is _____ (*date*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a declaration for use by a party whose attorney has refused to proceed with a hearing or trial in the case.

The declaration should show the short time which the party had to obtainanother attorney, and may also include the earliest date on which another attorney would be prepared to proceed.

The motion should be made as soon as the attorney is found.

[3] Cross References

For a notice of motion for a continuance, see *§ 136.73*. For an ex parte motion for a continuance, see *§ 136.72*. For an order granting a continuance, see *§ 136.82*.

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13-136 California Forms of Pleading and Practice--Annotated § 136.77

§ 136.77 Declaration in Support of Motion [Cal. Rules of Ct., Rule 3.1332(b)] for Continuance--By Defendant--Illness

[1] FORM Declaration in Support of Motion [Cal. Rules of Ct., Rule 3.1332(b)] for Continuance--By Defendant--Illness

[*Caption. See § 136.74.*]

I, _____ [*name*], declare:

1. I am the defendant in this action; I have fully and fairly stated all of the facts to my attorney, _____ [*name*], and I have been advised by him/her that I have a good and meritorious defense to the action on each and every _____ [count *or* cause of action] set out in plaintiff's complaint.

2. _____ [*If party needed as witness, state facts supporting the need, e.g.,* I am my own principal witness in this action, and I know all of the circumstances of the transactions with plaintiff and all of the acts, statements, conduct, and representations of plaintiff and I am the only person who knows all of the facts].

3. _____ [*If assistance to counsel is the sole or supplemental basis for showing necessity of party's presence, state appropriate facts, e.g.,* I have been advised by my attorney that in order to fully present my defense it will be necessary for me to be present at the trial to consult, confer with, and make suggestions and to give advice to my attorney.]

4. On _____ [*date*], the _____ [action *or* proceeding] was set for trial on _____ [*date*], but on or about _____ [*date*], I _____ [began to suffer from *or* had a recurrent attack of] _____ [*state nature of illness*] and have been advised by my physician and know from my own experience, that my condition is made more severe by physical exertion and excitement.

5. I have been fully advised by my physician and believe that my physical condition by reason of such illness is such that I will be unable to undergo the strain and excitement of attending a trial which my attorney informs me will be of _____ days duration and that the strain and excitement of a trial of that length at this time would be injurious to my health and to give testimony would be dangerous to my physical well-being but that with rest and freedom from excitement for a period of _____ days it is probable that I will be able to attend and testify on my own behalf in the action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a declaration for use in support of a motion forcontinuance on the ground that the party is absent because of illness.

To establish the necessity of the party's presence, the form describes the party as a witness for important evidence which cannot be proven otherwise or an individual whose factual knowledge is indispensable for assisting counsel.

For further discussion of continuance on this ground, see *§ 136.20[1]*.

For a declaration by physician in support of a motion for continuance on this ground, see *§ 136.79*.

[3] Cross References

For a notice of motion for a continuance, see *§ 136.73*. For an ex parte motion for a continuance, see *§ 136.72*. For an order granting a continuance, see *§ 136.82*.

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13-136 California Forms of Pleading and Practice--Annotated § 136.78

§ 136.78 Declaration in Support of Motion [Cal. Rules of Ct., Rule 3.1332(b)] for Continuance--By Attorney--Unavailable Witness

[1] FORM Declaration in Support of Motion [Cal. Rules of Ct., Rule 3.1332(b)] for Continuance--By Attorney--Unavailable Witness

[*Caption. See § 136.74.*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record for _____ (*moving party*) *or other statement as appropriate*] in this _____ [action *or* proceeding] which has been set for _____ [trial *or* hearing] on _____ [*date*], in [_____ (Department *or* Division) _____ of] this court.

2. On that date, a witness _____ [*name*] who resides at _____ [*city*], State of _____ will be unavailable to testify and I therefore request a continuance of the _____ [trial *or* hearing] herein until _____ [*date*], or as soon thereafter as is convenient to the court.

3. The witness will be unavailable because _____ [*describe reason*] even though _____ [*describe efforts showing diligence, e.g.,* I subpoenaed the witness and then held a personal interview wherein I stressed the importance of appearing to testify]. I first learned about the unavailability of the witness on _____ [*date*].

4. The attendance of this witness is required for trial. Witness would testify to _____ [*describe expected testimony*] and this evidence is material because _____ [*show that the evidence is new and relevant*]. This evidence cannot be proven with the testimony of any other available witness.

5. The witness informed me that he/she can be available to testify on _____ [*date*].

6. _____ [*Specify adverse party*] will not be prejudiced by a continuance to a later date.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a declaration for use in support of a motion for continuance based on the unavailability of a material witness of one of the parties [*Code Civ. Proc. § 595.4*].

Counsel should give particular attention to describing a diligent effort to procure attendance of the witness and the nature and materiality of the expected testimony.

For a declaration by a physician in support of a motion for continuance on the ground that the unavailable witness is ill, *see § 136.80*.

[3] Cross References

For a notice of motion for a continuance, see *§ 136.73*. For an ex parte motion for a continuance, see *§ 136.72*. For an order granting a continuance, see *§ 136.82*.

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13-136 California Forms of Pleading and Practice--Annotated § 136.78A

§ 136.78A Declaration in Support of Motion [Cal. Rules of Ct., Rule 3.1332(b)] for Continuance--By Attorney--Party Unavailable Due to Military Service

[1] FORM Declaration in Support of Motion [Cal. Rules of Ct., Rule 3.1332(b)] for Continuance--By Attorney--Party Unavailable Due to Military Service

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____ DECLARATION OF
vs.	)	_____ [*name*] REGARDING
_____ [*name*],	)	_____ [PLAINTIFF'S *or* DEFEND-
Defendant.	)	ANT'S] MILITARY STATUS
	)	

_____

I, _____ [*name*], declare:

I am the _____ [plaintiff *or* attorney for plaintiff *or* defendant *or* attorney for defendant] in the above-entitled action.

This declaration is in support of _____ [plaintiff's *or* defendant's] motion for a _____ [continuance *and/or* stay] of the above entitled _____ [action *or* proceeding]. The declaration is made to comply with the provisions of the _____ [Act of Congress cited as the Servicemembers Civil Relief Act (*50 U.S.C. App. § 501 et seq.*) *and/or* state statutes for reservists (*Mil. & Vet. Code § 400 et seq.*)].

_____ [*Name*], the/a _____[defendant *or* plaintiff] in the above-entitled action, is, at the date hereof, a person in the military service of the United States, within the meaning of the _____

[Servicemembers Civil Relief Act *and/or* state statutes for reservists] in that he/she is _____ [a member of the Army of the United States *or* a member of the United States Marine Corps *or* a member of the United States Coast Guard *or* a member of the United States Air Force *or* an officer of the Public Health Service detailed by proper authority for duty with the _____ (Army or Navy) *or* a person being trained or educated under the supervision of the United States preliminary to induction into military service *or* an officer or enlisted member of the National Guard called or ordered into active state service by the Governor or President *or* a reservists of the United States Military Reserve who has been called to full-time active duty].

_____ [Set forth other facts tending to show that defendant is in the military service, such as location where defendant is stationed, date of induction, rank, etc. If motion is made under the Servicemembers Civil Relief Act, attach asan exhibit a letter or other communication from the defendant that states the manner in which current military duty requirements materially affect the defendant's ability to appear, and give a date when the defendant will be available to appear. Also attach a letter or other communication from the defendant's commanding officer stating that the service member is unable to appear due to military duty and is not authorized for leave at the time of the letter.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [date]
_____ [signature]
[*typed name*]

[2] Use of Form

The form of declaration in [1], *above*, may be used by a plaintiff seeking to continue and/or stay an action or proceeding due to the plaintiff's or defendant's unavailability due to military status. For the definition of "persons in military service" under the Servicemembers Civil Relief Act, see *50 U.S.C. App. § 511(1)*. For the applicability of the Servicemembers Civil Relief Act [*50 U.S.C. App. §§ 501-591*] to state courts, see *50 U.S.C. App. § 512*. For the definition of members of the National Guard or reservists called to active duty, see *Mil. & Vet. Code § 401(a)*.

[3] Cross References

For discussion of the grounds for continuance and the length of stay that may be ordered by the court, see *§ 136.20[2], [3]*.

For discussion of how a party's military service may affect family law proceedings and declaration requirements, see Ch. 12A, *Adoptions: Termination of Parent* ; Ch. 221, *Dissolution of Marriage: Procedure* ; and Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* .

For an declaration for a stay of attachment involving a person in military service, see Ch. 62, *Attachment* , Form 19.

For discussion and a plaintiff's declaration under penalty of perjury setting forth facts showing that the defendant is not in the military service prior to entry of default judgment, see *Ch. 205, Defaults and Default Judgments, §§ 205.25[5], 205.92 -205.94*.

For a defendant's notice of admitting service of summons and complaint, waiving further notice, and waiving rights under the Servicemembers Civil Relief Act and similar state statutes, see *Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances, § 323.173*.

For an application for relief against the enforcement of a fine or penalty against a person in military service when the penalty was incurred, see Ch. 489, *Relief From Judgment or Order* .

For detailed discussion of relief under the Servicemembers Civil Relief Act and related California legislation, see *Ch. 501, Sales: Retail Installment Contracts; §§ 501.60* et seq.

For an application for a stay during military service in an action to enforce a security interest in real or personal property, see *Ch. 503, Sales: Secured Transactions, § 503.113*.

For discussion of ascertaining a defendant's military status at the time of service of summons and its benefits and effect on subsequent proceedings, see *Ch. 518, Service of Summons and Papers, § 518.19*.

For an order staying foreclosure proceedings in relation to an obligation secured by a mortgage or trust deed on real property for an active member of the military service, see Ch. 555, *Trust Deeds and Real Property Mortgages*, § 555.139C.

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13-136 California Forms of Pleading and Practice--Annotated § 136.79

§ 136.79 Declaration in Support of Motion [Cal. Rules of Ct., Rule 3.1332(b)] for Continuance--By Physician--Illness of Party or Witness

[1] FORM Declaration in Support of Motion [Cal. Rules of Ct., Rule 3.1332(b)] for Continuance--By Physician--Illness of Party or Witness

[*Caption. See § 136.74.*]

I, _____ [*name*], declare:

1. At all times herein mentioned I have been a physician and surgeon duly licensed as such and engaged in the practice of my profession in _____ [*specify state, e.g.*, California]. _____ [*Name of party*] has been a patient of mine since _____ [*date*].

2. At the time of my first examination I found _____ [*name of party*] to be suffering from _____ [*nature of illness*]; I treated him/her for this condition and he/she is still under treatment.

3. This condition is serious and greatly aggravated by excitement of the slightest degree. Because of the condition, _____ [*name of party*] is in no condition to undergo the strain of attending a trial of several days duration and of testifying in any way in an action in which his/her interests are involved.

4. To attend trial would be extremely injurious to his/her health and to testify would be dangerous to his/her physical well-being.

5. The prognosis is good and, in the absence of any complications, _____ [*name*] should be able to attend trial on or after _____ [*date*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a declaration for use in support of a motion for continuance on the ground that the party or material witness is absent because of illness.

[3] Cross References

For a notice of motion for a continuance, see *§ 136.73*. For an ex parte motion for a continuance, see *§ 136.72*. For an order granting a continuance, see *§ 136.82*.

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13-136 California Forms of Pleading and Practice--Annotated § 136.80

§ 136.80 Stipulation [Code Civ. Proc. § 283] Admitting That Absent Witness Would Testify to Certain Matters [Code Civ. Proc. § 595.4]

[1] FORM Stipulation [Code Civ. Proc. § 283] Admitting That Absent Witness Would Testify to Certain Matters [Code Civ. Proc. § 595.4]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	STIPULATION AS TO TESTIMONY BY ABSENT
Defendant.	)	WITNESS
	)	
	)	

_____

_____ [*Specify party, e.g.*, Plaintiff] admits that the evidence contained in the _____ [affidavit *or* declaration] of _____ [*name of witness*], filed herein on _____ [*date*] would be given by _____ [*name of witness*] and _____ [*specify party, e.g.*, plaintiff] consents that such evidence be considered as either actually given on the trial or offered and overruled as improper.

This stipulation is made for the sole purpose of opposing _____'s [*specify party, e.g.*, defendant] motion for a continuance and in the event that such continuance is granted, this stipulation shall be of no further force or effect.

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for _____ [*moving party*]

[2] Use of Form

The form in [1], *above*, is a stipulation for use when a party has made a motion for a continuance on account of the absence of a material witness and, on order of the court, has filed an affidavit (declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]), stating the evidence which he or she expects to obtain.

Although *Code Civ. Proc. § 595.4* does not so provide, a cautionary paragraph has been added to this form stating that the stipulation is only for the purpose of opposing the motion for continuance.

[3] Effect of Admission on Continuance

If the adverse party admits that such evidence would be given and that it be considered as actually given on the trial or offered and overruled as improper, the trial must not be postponed [*Code Civ. Proc. § 595.4*].

Because time is a factor in motions for continuances, this admission may be required to be made orally in court and the written form filed later.

[4] Cross References

For a stipulation and order for a continuance, see *§ 136.70*.

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13-136 California Forms of Pleading and Practice--Annotated § 136.81

§ 136.81 Declaration [Code Civ. Proc. § 2015.5] in Opposition to Motion for Continuance--By Attorney--Continuance Sought for Purpose of Delay

[1] FORM Declaration [Code Civ. Proc. § 2015.5] in Opposition to Motion for Continuance--By Attorney--Continuance Sought for Purpose of Delay

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	DECLARATION OF
Plaintiff,	)	_____ [*name*]
vs.	)	IN OPPOSITION TO
_____ [*name(s)*],	)	MOTION FOR CONTINUANCE
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Trial Date: _____
	)	

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*Set out facts constituting claim of delay, e.g.,* Approximately _____ weeks prior to the date set for the trial of this action, _____ (*specify party requesting continuance, e.g.,*

plaintiff's) attorney, _____ (*name*), asked for a continuance of the trial on the ground that he/she expected to be in trial on _____ [*date*] the date on which this action was set for trial; I consented to the case trailing until _____ (*name of attorney*) had finished the trial of the other action but specified that the matter should be disposed of as soon as _____ (*name of attorney*) was available to try it and that I would oppose any continuance other than to trail the case until _____ (*name of attorney*) was available for trial].

3. _____ [*Set out facts why claim of delay is without good cause, e.g.,* On _____ (*date*), attorney for _____ (*specify party requesting continuance, e.g.,* plaintiff) completed the trial of the cause referred to above and was at that time prepared to go to trial. On _____ (*date*), _____ (*name of attorney*) was discharged by _____ (*specify party, e.g.,* plaintiff) for the sole purpose of obtaining a continuance].

4. Therefore, the motion for continuance by _____ [*specify party, e.g.,* plaintiff] is without good cause and for the sole purpose of delay.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a declaration for use in opposing, on the ground of delay, a motion for continuance.

[3] Cross References

For declarations in support of a continuance, see *§§ 136.74 -136.79*.

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13-136 California Forms of Pleading and Practice--Annotated § 136.82

§ 136.82 Order [Code Civ. Proc. § 1003] Granting Continuance

[1] FORM Order [Code Civ. Proc. § 1003] Granting Continuance

[*Caption. See § 136.71.*]

The motion of _____ [*specify moving party, e.g.,* plaintiff] for a continuance came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*]. Good cause for [the failure of the moving party to give written notice thereof having been shown, and good cause for] such continuance having been shown,

IT IS ORDERED that the _____ [hearing *or* trial] heretofore set for _____ [*date*], be continued to _____ [*date*], at _____ [*time*], in [_____ (Department *or* Division) _____ [of] this court.]
Dated: _____.

_____ [*signature*]
Judge of the_____ Court

[2] Use of Form

The form in [1], *above*, is an order granting a continuance.

If the motion was made ex parte, the order should show that good cause was shown for not giving written notice [*see § 136.72*].

If the court imposed any conditions on the granting of the order, such conditions should be stated in the order.

For a discussion of the specific finding recommended by the Standards of Judicial Administration when the ground for continuance is unavailability of counsel due to a conflicting trial, see *§ 136.75*.

[3] Cross References

For an ex parte motion for a continuance, see *§ 136.72*. For a notice of motion for a continuance, see *§ 136.73*.

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13-137 California Forms of Pleading and Practice--Annotated 137.syn

§ 137.syn Synopsis to Chapter 137: CONTINUING DUTIES DURING LITIGATION

§ 137.01 Scope of Chapter

§ 137.02 Cross References

§§ 137.03-137.09 [Reserved]

§ 137.10 Duty to Notify Court and Parties of Change of Address

§ 137.11 Maintenance of List of Addresses by First-Named Plaintiff

§ 137.12 Duty to Inform Court of Related Cases

[1] Continuing Duty to Give Notice

[2] Persons to Be Served

[2] Contents of Notice and Time for Service

[4] What Constitutes a "Related" Case

[5] Response Supporting or Opposing Notice of Related Case

[6] Action by the Court

[a] Related Cases Pending in One Superior Court

[b] Related Cases Pending in Different Superior Courts

[7] Ruling on Related Cases

[8] Cases Not Ordered Related

§ 137.13 Duty to Inform Court of Stay of Proceedings

[1] Duty to Give Notice of Stay

[2] Duty to Give Notice of Termination or Modification of Stay

§§ 137.14-137.49 [Reserved]

§ 137.50 California Rules of Court

§§ 137.51-137.59 [Reserved]

§ 137.60 Notice of Change of Address of Party or Attorney [Cal. Rules of Ct., Rules 2.200, 3.254]--Judicial Council Form MC-040

[1] FORM

[2] Use of Form

§ 137.61 Notice of Related Case [Cal. Rules of Ct., Rule 3.300]--Judicial Council Form CM-015

[1] FORM

[2] Use of Form

[3] Contents of Notice

[4] Service and Filing of Notice

§ 137.62 Response to Notice of Related Case [Cal. Rules of Ct., Rule 3.300]

[1] FORM

[2] Use of Form

[3] Contents of Response

§ 137.63 Notice of Stay of Proceedings [Cal. Rules of Ct., Rule 3.650]--Judicial Council Form CM-180

[1] FORM

[2] Use of Form

§ 137.64 Notice of Termination or Modification of Stay [Cal. Rules of Ct., Rule 3.650]--Judicial Council Form CM-181

[1] FORM

[2] Use of Form

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§ 137.01 Scope of Chapter

This chapter discusses general duties of parties and their attorneys that continue while an action or proceeding is pending. The duties addressed in this chapter are:

- The duty to notify the court of a change of address [*see §§ 137.10, 137.11*]. A form of notice of change of address of party or attorney is included [*see § 137.60*].

- The duty to inform the court of related cases [*see § 137.12*]. A form of notice of related case and response to notice of related case are included [*see §§ 137.61, 137.62*].

- The duty to inform the court of the notice of stay of the proceedings and the duty to inform the court of the termination or modification of the stay [*see § 137.13*]. A form of notice of stay and notice of termination or modification of stay are included [*see §§ 137.63, 137.64*].

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§ 137.02 Cross References

Continuing duties that arise in connection with specific procedures that may or may not be present in any given action or proceeding are discussed together with those procedures. For example, a plaintiff's continuing duty under *Gov. Code § 985(c)* to inform the defendant in an action under the California Tort Claims Act of the existence of collateral sources is discussed in Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

The presentation of a pleading or other paper to the court by an attorney or unrepresented party may result in the impostition of sanctions under *Code Civ. Proc. § 128.7*. Presentation includes later advocating the paper, which may be thought of as a continuing duty. Section 128.7 applies to actions commenced on or after January 1, 1995 [*see* Ch. 510, *Sanctions*].

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[Reserved]

§§ 137.03[Reserved]

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13-137 California Forms of Pleading and Practice--Annotated § 137.10

§ 137.10 Duty to Notify Court and Parties of Change of Address

A party or attorney whose address changes while an action is pending must serve on all parties and file a written notice of the change of address [*Cal. Rules of Ct., Rule 2.200*; *see also Cal. Rules Ct., Rule 3.254, discussed under § 137.11*].

For a form of notice, see *§ 137.60*.

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13-137 California Forms of Pleading and Practice--Annotated § 137.11

§ 137.11 Maintenance of List of Addresses by First-Named Plaintiff

If more than two parties appear in a case and are represented by different counsel, the plaintiff or petitioner named first in the complaint or petition must maintain a current list of the parties and addresses for service on each party. The plaintiff or petitioner must, on request, furnish a copy of this list to any party or the court [*Cal. Rules of Ct., Rule 3.254*].

Each party is required to provide the first-named plaintiff or petitioner with its current address for service of notice when it first appears in the action, and to notify that plaintiff or petitioner of any change in address [*Cal. Rules of Ct., Rule 3.254*; *see also Cal. Rules of Ct., Rule 2.200* (duty to notify court and all parties of change of address), discussed in *§ 137.10*].

Any party serving an order, notice, or pleading on a party who has not yet appeared in the action must serve a copy of the list at the same time as the order, notice, or pleading is served [*Cal. Rules of Ct., Rule 3.254*].

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13-137 California Forms of Pleading and Practice--Annotated § 137.12

§ 137.12 Duty to Inform Court of Related Cases

[1] Continuing Duty to Give Notice

Whenever a party in a civil action knows or learns that the action or proceeding is related to another action or proceeding pending, dismissed, or disposed of by judgment in any state or federal court in California, the party must serve and file a Notice of Related Case [*Cal. Rules of Ct., Rule 3.300(b)*]. This duty applies when a party files a case with knowledge of a related action or proceeding or thereafter learns of a related action or proceeding [*Cal. Rules of Ct., Rule 3.300(f)*].

For a form of notice, Judicial Council Form CM-015, Notice of Related Case, see *§ 137.61*.

[2] Persons to Be Served

The Notice of Related Case must be filed in all pending cases listed in the notice and must be served on all parties in those cases [*Cal. Rules of Ct., Rule 3.300(d)*].

[2] Contents of Notice and Time for Service

The Notice of Related Case must [*Cal. Rules of Ct., Rule 3.300(c)*]:

- List all civil cases that are related by court, case name, case number, and filing date;
- Identify the case that has the earliest filing date and the court and department in which that case is pending; and
- Describe the manner in which the cases are related.

The Notice of Related Case must be served and filed as soon as possible, but no later than 15 days after the facts concerning the existence of related cases become known [*Cal. Rules of Ct., Rule 3.300(e)*].

A party is not required to serve and file a Notice of Related Case if another party has already filed a notice and served all parties on the same case [*Cal. Rules of Ct., Rule 3.300(k)*].

[4] What Constitutes a "Related" Case

A pending civil case is related to another pending civil case, or to a civil case that was dismissed with or without prejudice, or to a civil case that was disposed of by judgment, if the cases [*Cal. Rules of Ct., Rule 3.300(a)*]:

- Involve the same parties and are based on the same or similar claims;

- Arise from the same or substantially identical transactions, incidents, or events requiring the determination of the same or substantially identical questions of law or fact;

- Involve claims against, title to, possession of, or damages to the same property; or

- Are likely for other reasons to require substantial duplication of judicial resources if heard by different judges.

[5] Response Supporting or Opposing Notice of Related Case

Within five days after service on a party of a Notice of Related Case, the party may serve and file a response supporting or opposing the notice. The response must state why one or more of the cases listed in the notice are not related or why other good cause exists for the court not to transfer the cases to or from a particular court or department. The response must be filed in all pending cases listed in the notice and must be served on all parties in those cases [*Cal. Rules of Ct., Rule 3.300(g)*].

[6] Action by the Court

[a] Related Cases Pending in One Superior Court

If all the related cases have been filed in one superior court, the court, on notice to all parties, may order that the cases, including probate and family law cases, be related and may assign them to a single judge or department. In a superior court where there is a master calendar, the presiding judge may order the cases related [*Cal. Rules of Ct., Rule 3.300(h)(1)*].

In a court in which cases are assigned to a single judge or department, cases may be ordered related as follows [*Cal. Rules of Ct., Rule 3.300(h)(1)*]:

- Where all the cases listed in the notice are unlimited civil cases, or where all the cases listed in the notice are limited civil cases, the judge who has the earliest filed case must determine whether the cases must be ordered related and assigned to his or her department;

- Where the cases listed in the notice include both unlimited and limited civil cases, the judge who has the earliest filed unlimited civil case must determine whether the cases should be ordered related and assigned to his or her department;

- Where the cases listed in the notice contain a probate or family law case, the presiding judge or a judge designated by the presiding judge must determine whether the cases should be ordered related and, if so, to which judge or department they should be assigned;

- In the event that any of the cases listed in the notice are not ordered related under one of the above

scenarios, any party in any of the cases listed in the notice may file a motion to have the cases related. The motion must be filed with the presiding judge or the judge designated by the presiding judge; and

- If the procedures for relating pending cases under this rule do not apply, the procedures under *Code Civ. Proc. § 1048* and Rule 3.350 must be followed to consolidate cases pending in the same superior court.

The above provisions do not apply to cases that have been designated as complex by the parties or determined to be complex by the court [*Cal. Rules of Ct., Rule 3.300(h)(3)*].

[b] Related Cases Pending in Different Superior Courts

If the related cases are pending in more than one superior court on notice to all parties, the judge to whom the earliest filed case is assigned may confer informally with the parties and with the judges to whom each related case is assigned, to determine the feasibility and desirability of joint discovery orders and other informal or formal means of coordinating proceedings in the cases [*Cal. Rules of Ct., Rule 3.300(h)(2)(A)*]. If it is determined that related cases pending in different superior courts should be formally coordinated, the procedures in *Code of Civil Procedure section 403* and rule 3.500 must be followed for noncomplex cases, and the procedures in *Code of Civil Procedure section 404 et seq.* and rules 3.501 et seq. must be followed for complex cases [*Cal. Rules of Ct., Rule 3.300(h)(2)(B)*].

[7] Ruling on Related Cases

The court, department, or judge issuing an order relating cases must either [*Cal. Rules of Ct., Rule 3.300(i)*]:

- File a notice of the order in all pending cases and serve a copy of the notice on all parties listed in the Notice of Related Case; or

- Direct counsel for a party to file the notice in all pending cases and serve a copy on all parties.

[8] Cases Not Ordered Related

If for any reason a case is not ordered related, that case will remain assigned to the court, judge, or department where it was pending at the time of the filing and service of the Notice of Related Case [*Cal. Rules of Ct., Rule 3.300(j)*].

For discussion of formal consolidation and coordination of actions, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

For discussion of the effect on a later action of a prior action pending in California on the same cause of action, see Ch. 3, *Abatement of Actions* .

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§ 137.13 Duty to Inform Court of Stay of Proceedings

[1] Duty to Give Notice of Stay

The party who requested or caused a stay of a proceeding must immediately serve and file a notice of the stay and attach a copy of the order or other document showing that the proceeding is stayed. If the person who requested or caused the stay has not appeared, or is not subject to the jurisdiction of the court, the plaintiff must immediately file a notice of the stay and attach a copy of the order or other document showing that the proceeding is stayed. The notice of stay must be served on all parties who have appeared in the case [*Cal. Rules of Ct., Rule 3.650(a)*].

The party responsible for giving notice under (a) must provide notice if the case is stayed for any of the following reasons [*Cal. Rules of Ct., Rule 3.650(a)*]:

- An order of a federal court or a higher state court;
- Contractual arbitration under *Code Civ. Proc. § 1281.4*;
- Arbitration of attorney fees and costs under *Bus. & Prof. Code § 6201*;
- Automatic stay caused by a filing in another court, including a federal bankruptcy court.

The notice must state whether the case is stayed with regard to all parties or only certain parties. If it is stayed with regard to only certain parties, the notice must specifically identify those parties. The notice must also state the reason that the case is stayed [*Cal. Rules of Ct., Rule 3.650(c)*].

For the mandatory form of notice, Judicial Council Form CM-180, Notice of Stay of Proceedings, see *§ 137.63*.

[2] Duty to Give Notice of Termination or Modification of Stay

When a stay is vacated, is no longer in effect, or is modified, the party who filed the notice of the stay must immediately serve and file a notice of termination or modification of stay. If that party fails to do so, any other party in the action

who has knowledge of the termination or modification of the stay must serve and file a notice of termination or modification of stay. Once one party in the action has served and filed a notice of termination or modification of stay, other parties in the action are not required to do so [*Cal. Rules of Ct., Rule 3.650(d)*].

For the mandatory form of notice, Judicial Council Form CM-181, Notice of Termination or Modification of Stay, see *§ 137.64*.

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[Reserved]

§§ 137.14[Reserved]

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§ 137.50 California Rules of Court

Continuing duty of party and attorney to inform court and other parties of change of address. *Cal. Rules of Ct., Rules 2.200, 3.254*

Duty of first-named plaintiff to maintain list of parties and addresses. *Cal. Rules of Ct., Rule 3.254*

Continuing duty of attorney to inform court and other parties of related litigation. *Cal. Rules of Ct., Rule 3.300*

Continuing duty of party who requested or caused a stay of a proceeding to inform court and other parties of stay, and continuing duty of party to inform court of termination or modification of stay. *Cal. Rules of Ct., Rule 3.650*

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[Reserved]

§§ 137.51[Reserved]

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13-137 California Forms of Pleading and Practice--Annotated § 137.60

§ 137.60 Notice of Change of Address of Party or Attorney [Cal. Rules of Ct., Rules 2.200, 3.254]--Judicial Council Form MC-040

[1] FORM Notice of Change of Address of Party or Attorney [Cal. Rules of Ct., Rules 2.200, 3.254]--Judicial Council Form MC-040

Click here to view image.

[2] Use of Form

The form of notice illustrated in [1], *above*, is for use by any party to notify the other parties and the court of a change of address that occurs while an action is pending [*see Cal. Rules of Ct., Rule 2.200*, Judicial Council Form MC-040]. California Judicial Council Form MC-040 has been adopted by the California Judicial Council for optional use [*Cal Rules Ct, Rule 1.35*].

For discussion, see *§ 137.10*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format is also available at *www.lexisone.com* at no charge.

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13-137 California Forms of Pleading and Practice--Annotated § 137.61

§ 137.61 Notice of Related Case [Cal. Rules of Ct., Rule 3.300]--Judicial Council Form CM-015

[1] FORM Notice of Related Case [Cal. Rules of Ct., Rule 3.300]--Judicial Council Form CM-015

Click here to view image.

[2] Use of Form

The form of notice in [1], *above*, is for use by counsel in a civil action who is or becomes aware of a related case or cases to give notice of the existence of the related cases [*see Cal. Rules of Ct., Rule 3.300*]. The notice is sent to all the parties in the related cases and the court or courts in which they are pending [*Cal. Rules of Ct., Rule 3.300(d)*].

The obligation to give notice applies to cases pending, dismissed, or disposed of by judgment in any state or federal court in California [*Cal. Rules of Ct., Rule 3.300(b)*]. For further discussion of the obligation to give this notice, see *§ 137.12*.

For discussion, see *§ 137.12*.

California Judicial Council Form CM-015 has been adopted by the California Judicial Council for optional use [*Cal Rules Ct, Rule 1.35*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Contents of Notice

The form is required to include the following information [*Cal. Rules of Ct., Rule 3.300(c)*]:

- List all civil cases that are related by court, case name, case number, and filing date;

- Identify the case that has the earliest filing date and the court and department in which that case is pending; and

- Describe the manner in which the cases are related.

[4] Service and Filing of Notice

The Notice of Related Case must be filed in all pending cases listed in the notice and must be served on all parties in those cases [*Cal. Rules of Ct., Rule 3.300(d)*]. The Notice of Related Case must be served and filed as soon as possible, but no later than 15 days after the facts concerning the existence of related cases become known [*Cal. Rules of Ct., Rule 3.300(e)*].

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13-137 California Forms of Pleading and Practice--Annotated § 137.62

§ 137.62 Response to Notice of Related Case [Cal. Rules of Ct., Rule 3.300]

[1] FORM Response to Notice of Related Case [Cal. Rules of Ct., Rule 3.300]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	RESPONSE _____
Defendant.	)	[SUPPORTING *or* OPPOSING] NOTICE OF RE-
	)	LATED CASE
	)	

_____

To all parties and their attorneys of record in the cases listed below:

_____ [*Specify responding party, e.g.*, Tom Smith, defendant in Jones v. Smith, pending in Paradise County Superior Court, Case No. 96-34567, filed on March 20, 1996, was served with a Notice of Related Case on _____ [*date*], and makes this response _____ [supporting *or* opposing] that Notice of Related Case.

_____ [*State reasons supporting or opposing the Notice of Related Case*].
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Use of Form

The form in [1], above, is for use to respond to a Notice of Related Case [*see § 137.61*]. Any party may serve and file a response supporting or opposing the notice within five days of being served [*Cal. Rules of Ct., Rule 3.300(g)*].

[3] Contents of Response

The response must state why one or more of the cases listed in the notice are not related or why other good cause exists for the court not to transfer the cases to or from a particular court or department. The response must be filed in all pending cases listed in the notice and must be served on all parties in those cases [*Cal. Rules of Ct., Rule 3.300(g)*].

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13-137 California Forms of Pleading and Practice--Annotated § 137.63

§ 137.63 Notice of Stay of Proceedings [Cal. Rules of Ct., Rule 3.650]--Judicial Council Form CM-180

[1] FORM Notice of Stay of Proceedings [Cal. Rules of Ct., Rule 3.650]--Judicial Council Form CM-180

Click here to view image.

[2] Use of Form

The form of notice in [1], *above*, is for use by a party who requested or caused a stay of a proceeding and the notice must be immediately filed with the court and served on all parties who have appeared in the cases [*Cal. Rules of Ct., Rule 3.650(a)*]. A copy of the order or other document showing that the proceeding is stayed must be attached to the notice. If the person who requested or caused the stay has not appeared, or is not subject to the jurisdiction of the court, the plaintiff must immediately file a notice of the stay and attach a copy of the order or other document showing that the proceeding is stayed [*Cal. Rules of Ct., Rule 3.650(a)*]. For discussion of this notice requirement, see *§ 137.13[1]*.

The notice must state whether the case is stayed with regard to all parties or only certain parties. If it is stayed with regard to only certain parties, the notice must specifically identify those parties. The notice must also state the reason that the case is stayed [*Cal. Rules of Ct., Rule 3.650(c)*].

California Judicial Council Form CM-180 has been adopted by the California Judicial Council as a mandatory form [*Cal Rules Ct, Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format is also available at *www.lexisone.com* at no charge.

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13-137 California Forms of Pleading and Practice--Annotated § 137.64

§ 137.64 Notice of Termination or Modification of Stay [Cal. Rules of Ct., Rule 3.650]--Judicial Council Form CM-181

[1] FORM Notice of Termination or Modification of Stay [Cal. Rules of Ct., Rule 3.650]--Judicial Council Form CM-181

Click here to view image.

[2] Use of Form

When a stay is vacated, is no longer in effect, or is modified, the party who filed the notice of the stay must immediately serve and file a notice of termination or modification of stay. If that party fails to do so, any other party in the action who has knowledge of the termination or modification of the stay must serve and file a notice of termination or modification of stay. Once one party in the action has served and filed a notice of termination or modification of stay, other parties in the action are not required to do so [*Cal. Rules of Ct., Rule 3.650(d)*].

For discussion of this notice requirement, see *§ 137.13[2]*.

California Judicial Council Form CM-181 has been adopted by the California Judicial Council as a mandatory form [*Cal Rules Ct, Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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[c] Revocation Before Acceptance

[d] Option Supported by Consideration

[4] Acceptance

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[b] Qualified Acceptance Is Rejection

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[2] Obtain Relevant Documents

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§ 140.100 Judicial Council Trial Court Pleading Form--Complaint for Damages [Civ. Code § 3300] for Breach of Contract [Cal. Rules of Ct., Rule 1.45(a), (b); Judicial Council Forms PLD-C-001, PLD-C-001(1)]

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[c] Defendant's Acts in Breach of Contract (Paragraph BC-2)

[d] Performance of Conditions Precedent (Paragraph BC-3)

[e] Plaintiff's Damages (Paragraph BC-4)

[f] Attorney's Fees (Paragraph BC-5)

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[5] Limitation of Action

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[c] Concurrent Conditions

[d] Ability to Perform

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[3] Allegations

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[1] FORM

[2] Use of Form

[3] Allegations

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[5] Action Filed in Improper Court

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[2] Use of Form

[3] Offer of Performance

§ 140.110 Allegation--Contract Implied in Fact [Civ. Code § 1621]

[1] FORM

[2] Use of Form

[3] Pleading and Proof of Implied Contract

[4] Proof of Damages for Breach of Implied Contract

[5] Cross References

§ 140.111 Allegation--Custom and Usage Applicable to Construction of Contract [Civ. Code § 1656]

[1] FORM

[2] Use of Form

[3] Custom and Usage

§ 140.112 Allegation--Modification of Original Written Contract by Subsequent Written Agreement or Executed Oral Agreement or Oral Agreement Supported by New Consideration [Civ. Code § 1698]

[1] FORM

[2] Use of Form

[3] Modification of Written Contract

[a] Parties' Power to Modify Contract

[b] Provision Against Orally Modifying Contract

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[2] Use of Form

[3] Waiver of Conditions

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Accompanying Papers

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[1] FORM

[2] Use of Form

[3] Accompanying Papers

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[1] FORM

[2] Use of Form

[3] Making General Denial

[4] Filling Out Form

[a] Heading

[b] Number of Pages (Paragraph 1)

[c] Name of Defendant (Paragraph 2)

[d] General Denial (Paragraph 3a)

[e] Specific Denials (Paragraph 3b)

[f] Affirmative Defenses (Paragraph 4)

[g] Other Allegations (Paragraph 5)

[h] Prayer (Paragraph 6)

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Allegation of Lack of Capacity

[4] Basic Prerequisites to Rescission

[5] Cross References

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[1] FORM

[2] Use of Form

§ 140.136 Affirmative Defense--Waiver of Breach

[1] FORM

[2] Use of Form

[3] Waiver of Breach as Defense

§ 140.137 Affirmative Defense--Impossibility [Civ. Code §§ 1441, 1511(2), 1596]

[1] FORM

[2] Use of Form

[3] Impossibility as Defense

[4] Act of God and Force Majeure

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[1] FORM

[2] Use of Form

§ 140.139 Affirmative Defense--Tender of Payment by Deposit and Notice [Civ. Code § 1500]

[1] FORM

[2] Use of Form

§ 140.140 Affirmative Defense--Prevention of Performance [Civ. Code § 1511(1)]

[1] FORM

[2] Use of Form

§ 140.141 Affirmative Defense--Novation [Civ. Code § 1530]

[1] FORM

[2] Use of Form

[3] Methods of Making Novation

[4] Pleading and Evidence of Novation

§ 140.142 Affirmative Defense--Lack of Consideration [Civ. Code § 1550]--Written Contract

[1] FORM

[2] Use of Form

§ 140.143 Affirmative Defense--Statute of Frauds [Civ. Code § 1624]

[1] FORM

[2] Use of Form

[3] Pleading Statute of Frauds

[4] Defendant's Waiver of Statute

§ 140.144 Affirmative Defense--Contract Contrary to Express Provision of Law [Civ. Code § 1667(1)]

[1] FORM

[2] Use of Form

[3] Necessity of Pleading Illegality

[4] Illegality Is Unavoidable Issue

[5] Contracts Held to Be Illegal

[6] Cross References

§ 140.145 Affirmative Defense--Contract Contrary to Public Policy or Good Morals [Civ. Code § 1667(2), (3)]

[1] FORM

[2] Use of Form

[3] Contravention of Public Policy or Good Morals

[4] Exculpatory Clause as Against Public Policy

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[1] FORM

[2] Use of Form

[3] Pleading and Proving Unconscionability

[4] Determination of Unconscionability

[a] Procedural and Substantive Aspects

[b] Standardized Form of Contract

[c] Parties' Relative Positions

[d] Liquidated Damages Provision

[e] Conscionability of Price

[5] Provisions Held Unconscionable

[a] Arbitration Clauses

[b] Other Contract Provisions

[6] Provisions Held Not Unconscionable

§ 140.147 Affirmative Defense--Rescission by Mutual Consent [Civ. Code § 1689(a)]

[1] FORM

[2] Use of Form

§ 140.148 Affirmative Defense--Failure of Consideration [Civ. Code § 1689(b)(2)]

[1] FORM

[2] Use of Form

[3] Failure of Consideration

[a] Lack of Consideration Distinguished

[b] Worthlessness of Consideration Distinguished

[4] Defense in Action by Assignee

§ 140.149 Affirmative Defense--Modification of Oral Contract by Writing [Civ. Code § 1697]

[1] FORM

[2] Use of Form

§ 140.150 Affirmative Defense--Modification of Written Contract by Written Agreement or by Oral Agreement [Civ. Code § 1698(a), (c)]

[1] FORM

[2] Use of Form

[3] Modification by Oral Agreement

§ 140.151 Affirmative Defense--Modification of Written Contract by Executed Oral Agreement [Civ. Code § 1698(b)]

[1] FORM

[2] Use of Form

§ 140.152 Affirmative Defense--Alteration of Written Contract Without Consent [Civ. Code § 1700]

[1] FORM

[2] Use of Form

[3] Material Alteration

[a] Alteration Extinguishing Defendant's Obligation

[b] Evidence of Alteration

[c] Test of Materiality

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§ 140.01 Scope of Chapter

This chapter discusses the basic elements of a cause of action for damages based on breach of contract, along with various defenses to such an action, and contains the following forms:

- The Judicial Council form for a complaint for damages based on contract with a breach of contract cause of action attached [§ 140.100].
- Complaints for damages for breach of contract [§§ 140.101-140.106].
- An allegation to establish venue otherwise than on the basis of the defendant's residence [§ 140.107], and a declaration of proper venue for use in an action involving consumer obligations [§ 140.108].
- Alternative allegations that may be inserted into a complaint, depending on the facts of the case [§§ 140.109 140.116].
- Demurrers for use against a defective complaint for damages based on breach of contract [§§ 140.130, 140.131].
- The Judicial Council form for an answer to a complaint based on breach of contract [§ 140.132].
- Affirmative defenses that may be inserted into an answer, depending on the facts of the case [§§ 140.133-140.152].

This chapter does not cover seeking and resisting enforcement of an arbitration provision in lieu of a legal action. If the contract contains an arbitration provision, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueIndividual DefendantsContracts LawBreachGeneral Overview

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§ 140.02 Cross References

[1] Actions, Complaints, and Allegations

- For a comprehensive procedural guide that chronologically outlines the procedures in a typical civil action in a California court, see Ch. 2, *Procedural Guide for Civil Actions* .

- For discussion and forms relating to accounts stated, see Ch. 8, *Accounts Stated and Open Accounts* .

- For a complaint for use in an action for restitution of the amount paid on the purchase price of a liquor business and license, see *Ch. 18, Alcoholic Beverage Licences, § 18.86*.

- For common allegations relating to contract actions, see Ch. 20, *Allegations Commonly Used* .

- For discussion and forms relating to the sale of artwork, see Ch. 57, *Art* .

- For discussion and forms relating to the assignment of contracts, see Ch. 60, *Assignments* .

- For a complaint to be used in an action for relief based on rescission of a contract for the conditional sale of an automobile, see Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* .

- For discussion and forms relating to building and construction contracts, see Ch. 104, *Building Contracts* .

- For discussion and forms relating to cancellation of contracts, see Ch. 107, *Cancellation of Instruments* .

- For discussion and forms relating to common counts, see Ch. 121, *Common Counts* .

- For a complaint for use in an action for relief based on rescission of a property settlement agreement,

see Ch. 122, *Community Property* .

- For discussion and forms relating to contracts entered into by consumers, see Ch. 127, *Consumer Contracts and Loans* , and Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* .

- For forms for use in actions for specific performance of contracts for the sale of corporate securities, see Ch. 162, *Corporations: Issuance of Shares* , and Ch. 163, *Corporations: Transfers of Shares* .

- For discussion and forms relating to the award of costs and attorneys fees to the prevailing party pursuant to a contract provision, see Ch. 174, *Costs and Attorney's Fees* .

- For discussion and forms relating to damages in contract actions, see *Ch. 177, Damages, § 177.40* et seq.

- For discussion and forms relating to a declaration of rights and duties under a contract, see Ch. 182, *Declaratory Relief* .

- For discussion and forms relating to contracts entered into by minors and court approval of artistic or athletic service contracts of minors, see Ch. 365, *Minors: Contract Actions* .

- For discussion and forms relating to reformation of contracts, see Ch. 488, *Reformation of Instruments* .

- For discussion and forms relating to the rescission of contracts and actions for restitution, see Ch. 490, *Rescission and Restitution* .

- For discussion and forms relating to the specific performance of contracts, see Ch. 528, *Specific Performance* .

- For discussion and forms relating to the statute of frauds, see Ch. 530, *Statute of Frauds* .

- For discussion and forms relating to contracts for the conveyance of real property, see Ch. 569, *Vendor and Purchaser* .

- For discussion and forms relating to venue, see Ch. 571, *Venue* .

[2] Answers and Defenses

- For a comprehensive procedural guide that chronologically outlines the procedures in a typical civil action in a California court, see Ch. 2, *Procedural Guide for Civil Actions* .

- For discussion and forms relating to accord and satisfaction, see Ch. 6, *Accord and Satisfaction* .

- For discussion and affirmative defenses based on an act of God or an irresistible, superhuman cause, see Ch. 10, *Act of God* .

- For an affirmative defense alleging incapacity to contract due to intoxication, see *Ch. 19, Alcoholic Beverages: Civil Liability, § 19.90.*

- For a general discussion and forms for answers, see Ch. 26, *Answers* .

- For an affirmative defense alleging the plaintiff's lack of a certificate to practice as an architect, see Ch. 56, *Architects* .

- For affirmative defenses relating to contracts of sale by auction, see Ch. 77, *Auctions and Auctioneers* .

- For affirmative defenses relating to bailment contracts, see Ch. 93, *Bailments* , and Ch. 413, *Personal Property Leases* , § 413.30 et seq.

- For affirmative defenses relating to brokerage contracts, see Ch. 103, *Brokers* .

- For affirmative defenses relating to breach of building and construction contracts, see Ch. 104, *Building Contracts* .

- For discussion and affirmative defense based on incapacity of a corporate plaintiff at the time the contract was formed or the action was commenced, see Ch. 160, *Corporations: Capacity* .

- For discussion and forms relating to contracts entered into as a result of duress, menace, fraud, undue influence, and mistake, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

- For an affirmative defense based on the statute of limitations, see Ch. 345, *Limitation of Actions* .

- For affirmative defenses relating to the breach of employment contracts, see Ch. 249, *Employment Law: Termination and Discipline* .

- For discussion and forms for affirmative defenses relating to contracts entered into by a minor, see Ch. 365, *Minors: Contract Actions* .

- For an affirmative defense relating to equitable estoppel, see Ch. 385, *Negotiable Instruments* .

- For an affirmative defense to an action for damages for breach of a patent license agreement, see Ch. 411, *Patents and Inventions* .

- For affirmative defenses for use in actions for breach of contract by principals and agents, see Ch. 427, *Principal and Agent* .

- For an affirmative defense to an action on a contract brought by an unlicensed plaintiff engaged in a profession or business in which a license is required, see Ch. 471B, *Licensing by Public Agencies* .

- For a discussion and forms for defenses to actions for rescission, see Ch. 490, *Rescission and Restitution* .

- For a defense for use in an action for the breach of a contract for a reward, see Ch. 493, *Rewards* .

- For discussion and forms for defenses for use in actions for specific performance, see Ch. 528, *Specific Performance* .

- For discussion of the constitutional prohibition against the statutory impairment of the obligations of

contracts, see Ch. 531, *Statutes and Ordinances* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesPunitive DamagesContracts LawRemediesRescission & RedhibitionGeneral Overview

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§ 140.03 Governing Statutes

[1] In General

Contracts are governed generally by Part 2 of Division 3 the Civil Code [*see generally Civ. Code § 1549 et seq.*]. Obligations in general are governed by Part 1 of Division 3 of the Civil Code [*see generally Civ. Code § 1549 et seq.*]. *Civ. Code § 38 et seq.* and *Fam. Code § 6700 et seq.* govern the capacity of incompetent persons and minors to make contracts. Statutes relating to obligations arising from particular transactions are in Part 4 of Division 3 of the Civil Code [*see generally Civ. Code § 1738 et seq.*].

Gov. Code § 810 et seq., commonly known as the Government Claims Act (or Tort Claims Act) [*see City of Stockton v. Superior Court (2007) 42 Cal. 4th 730, 734, 737-740, 68 Cal. Rptr. 3d 295, 171 P.3d 20*], applies to a claim for damages based on breach of a contract by the state or a local government. For discussion, see *§ 140.55[5]*.

[2] Commercial Code

Contracts concerning sales of goods are governed Division 2 of the Commercial Code [*see generally Com. Code § 2101 et seq.*] and are discussed in Ch. 500, *Sales: Sales Under the Commercial Code* , although this chapter refers to the Commercial Code provisions when pertinent.

Contracts for sales of securities are governed in large part by Division 8 of the Commercial Code [*see generally Com. Code § 8101 et seq.*] and are discussed in Ch. 163, *Corporations: Transfers of Shares* .

[3] Consumer Contract Awareness Act

Consumer contracts and consumer contract guaranties are governed by the Consumer Contract Awareness Act of 1990 [*see generally Civ. Code § 1799.200 et seq.*] and by *Fin. Code § 757*. For discussion of the Consumer Contract Awareness Act as applied to depository and banking services, including safe deposit rentals and personal property safekeeping or storage agreements, see Ch. 95, *Banks, Deposits, and Checks* . For discussion of the Act as applied to consumer contract guaranties, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationCommercial Law (UCC)Sales (Article 2)Subject MatterGeneral OverviewContracts LawFormationCapacity of PartiesGeneral OverviewContracts LawTypes of ContractsGuaranty ContractsGovernmentsState & Territorial GovernmentsClaims By & Against

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[Reserved]

§§ 140.04[Reserved]

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§ 140.10 Definitions

[1] Contract and Agreement

The Civil Code defines a contract as an agreement to do or not to do a particular thing [*Civ. Code § 1549*; *Breckinridge v. Crocker (1889) 78 Cal. 529, 536, 21 P. 179]* . Generally, however, "agreement" has a wider meaning than "contract":

- An *agreement* is a manifestation of mutual assent by two or more persons to one another, which may be made by words or by any other conduct, including silence [*see Stevens v. Dillon (1946) 74 Cal. App. 2d 178, 182, 168 P.2d 492]* .

- A *contract* is an enforceable agreement that satisfies the requirements for a contract [*see Civ. Code § 1550*; § 140.20] and creates an obligation or duty, for the breach of which the law supplies a remedy to the party to whom the obligation or duty is owed [*see Scott v. Security Title Ins. & Guar. Co. (1937) 9 Cal. 2d 606, 614, 72 P.2d 143* ; *Ulwelling v. Crown Coach Corp. (1962) 206 Cal. App. 2d 96, 137 138, 23 Cal. Rptr. 631]* .

[2] Oral or Written Contract

All contracts may be oral, except those that are specifically required by statute to be in writing [*Civ. Code § 1622*; *see, e.g., Fam. Code § 1611* (premarital agreements); former *Civ. Code § 5134* (marriage settlement agreements executed before 1986, *see Fam. Code § 1503*)]. A contract may be partly oral and partly written [*Griffith v. Bucknam (1947) 81 Cal. App. 2d 454, 458 184 P.2d 179]* .

In an action based on a contract, the court may apply various rules distinguishing oral contracts and written contracts, for example:

- The limitation period generally is two years for an action based on an oral contract [*Code Civ. Proc. § 339(1)*] or four years for an action based on a written contract [*Code Civ. Proc. § 337(1)*], but there are

exceptions [*see, e.g., Com. Code § 2725* (period may be from one year to four years for action on contract for sale of goods, whether oral or written)]. For further discussion, see Ch. 345, *Limitation of Actions* .

- The statute of frauds may be pleaded in defense against enforcement of a contract listed in the statute, if the contract is oral and no note or memorandum of the contract is in writing and subscribed by the defendant or his or her agent [*see, e.g., Civ. Code § 1624*; *Prob. Code § 21700* (contract to make will or not to revoke will)]. For a form for an affirmative defense based on the statute of frauds, *see § 140.143*; for further discussion and forms, see Ch. 530, *Statute of Frauds* .

- The parol evidence rule generally may be raised to preclude evidence of the terms of a written contract, other than the writing [*see Code Civ. Proc. § 1856*; for discussion of the parol evidence rule, see *§ 140.31, below*].

For forms for complaints for breach of a written contract, *see §§ 140.101 -140.103, 140.105*; for a form for a complaint for breach of an oral contract, *see § 140.104*.

[3] Executory or Executed Contract

An executory contract is one that, to some extent, remains to be performed, whereas an executed contract is one that has been fully performed [*Civ. Code § 1661*; *Mather v. Mather (1944) 25 Cal. 2d 582, 586 587, 154 P.2d 684]* . There must be complete performance by both parties for the contract to be executed; performance on only one side is not sufficient [*Smith v. Parlier Winery, Inc. (1935) 7 Cal. App. 2d 357, 360, 46 P.2d 170]* .

[4] Unilateral or Bilateral Contract

A bilateral contract comprises an exchange of promises made by both parties, while a unilateral contract is a promise made by one party in exchange for an expected act or forbearance, which the other party subsequently does or forbears to do, with knowledge of the promise [*see Davis v. Jacoby (1934) 1 Cal. 2d 370, 378, 34 P.2d 1026]* . A unilateral contract sometimes is described in terms of offer and acceptance; the promise is an offer, which the other party may accept by doing, or forbearing to do, a specified act [*Asmus v. Pacific Bell (2000) 23 Cal. 4th 1, 14-15, 96 Cal. Rptr. 2d 179, 999 P.2d 71* (after employer modified its unilaterally adopted policy, employees' continued employment constituted acceptance of offer of modified unilateral contract); *Newberger v. Rifkind (1972) 104 Cal. Rptr. 663* (continuing in employment was acceptance of employer's implied offer of unilateral contract consisting of right to exercise stock option); *Tetrick v. Sloan (1959) 170 Cal. App. 2d 540, 546 547, 339 P.2d 613* (offer to pay broker's commission for selling particular real estate generally required acceptance by act of selling real estate)]. For discussion of offer and acceptance generally, *see § 140.22[3], [4]*.

[5] Express or Implied Contract

[a] In General

A contract is either express or implied [*Civ. Code § 1619*]. The terms of an express contract are stated in words [*Civ. Code § 1620*], whereas the existence and terms of an implied contract are manifested by conduct [*Civ. Code § 1621*; *Bell v. Superior Court (1989) 215 Cal. App. 3d 1103, 1108,263 Cal. Rptr. 787* ; *McGough v. University of San Francisco (1989) 214 Cal. App. 3d 1577, 1584, 263 Cal. Rptr. 404* ; *see Mitsui O.S.K. Lines v. Dynasea Corp. (1999) 72 Cal. App. 4th 208, 212-213, 85 Cal. Rptr. 2d 1* (no implied contract that defendant agreed to pay freight charges for shipment)]. For example, if one party does not rely on the explicit words by which the parties agreed, but instead considers that a course of conduct, which may include various oral representations, has created a reasonable expectation of a certain performance, then failure to receive that performance gives rise to a cause of action for breach of an implied-in-fact contract [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 675, 254 Cal. Rptr. 211, 765 P.2d*

373 ; *McGough v. University of San Francisco (1989) 214 Cal. App. 3d 1577, 1584 1585, 263 Cal. Rptr. 404* ; *Wilkerson v. Wells Fargo Bank (1989) 212 Cal. App. 3d 1217, 1225 n.2, 261 Cal. Rptr. 185* ; *see Scott v. Pacific Gas & Electric Co. (1995) 11 Cal. 4th 454, 463-464, 46 Cal. Rptr. 2d 427, 904 P.2d 834* ; *Kawasho Internat. (U.S.A.), Inc. v. Lakewood Pipe Service, Inc. (1983) 152 Cal. App. 3d 785, 789 791, 201 Cal. Rptr. 640]* . For an allegation of a contract implied in fact to be used in a complaint for breach of contract, *see § 140.110*.

The essential elements of an implied-in-fact contract and an express contract are the same, namely, mutual assent and consideration [*McGough v. University of San Francisco (1989) 214 Cal. App. 3d 1577, 1584, 263 Cal. Rptr. 404* ; *Chandler v. Roach (1957) 156 Cal. App. 2d 435, 440, 319 P.2d 776]* . Similarly, once the implied-in-fact contract is established, its terms stand on an equal footing with express terms [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 677, 254 Cal. Rptr. 211, 765 P.2d 373]* .

An essential difference between an implied contract and an express contract is the mode of proof [*Bell v. Superior Court (1989) 215 Cal. App. 3d 1103, 1108, 263 Cal. Rptr. 787]* . When the contract is implied, the party asserting the contract must prove conduct from which the court can infer the promise [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 677, 254 Cal. Rptr. 211, 765 P.2d 373* ; *Youngman v. Nevada Irrigation Dist. (1969) 70 Cal. 2d 240, 246, 74 Cal. Rptr. 398, 449 P.2d 462]* . The court must determine, as a matter of fact, whether the parties acted in a manner that provides the necessary foundation for the implied contract. The plaintiff may introduce evidence of the parties' conduct, and the defendant may introduce evidence rebutting the inferences arising from that conduct or showing another explanation for it [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 677, 254 Cal. Rptr. 211, 765 P.2d 373]* .

[b] Implied-in-Fact or Implied-by-Law Contract

Implied contracts under *Civ. Code §§ 1619* and *1621* refer to implied-in-fact contracts that arise from the mutual agreement of the parties [*Iusi v. Chase (1959) 169 Cal. App. 2d 83, 87, 337 P.2d 79* ; *see § 140.10[5][a]*]. Courts recognize contracts called "implied-by-law contracts" or "quasi-contracts" to prevent the unjust enrichment of one party, who has no intent, either express or implied, to pay or to make reimbursement for something of value received by that party. The law imposes an obligation to pay or reimburse because good conscience dictates that the party benefited should make the payment reimbursement [*Santa Clara County v. Robbiano (1960) 180 Cal. App. 2d 845, 848, 5 Cal. Rptr. 19* ; *see Halperin v. Raville (1986) 176 Cal. App. 3d 765, 774, 222 Cal. Rptr. 350* (imposing liability to repay loan to family business on equitable ground when no express promise was made)].

The equitable doctrine of unjust enrichment applies where the plaintiff, while having no enforceable contract, nonetheless has conferred a benefit on the defendant, which the defendant has knowingly accepted in circumstances in which it would be inequitable for the defendant to retain the benefit without paying for its value. The phrase "unjust enrichment" does not describe a theory of recovery but describes the effect that would result from a failure to make restitution in circumstances where it is equitable to do so. Therefore, no particular form of pleading is necessary to invoke the doctrine of restitution, and a well-pleaded claim for breach of contract can be sufficient. While the measure of damages for unjust enrichment is essentially restitution, that concept that has been expanded in modern jurisprudence to include, not only the restoration of something, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury caused to, another [*Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 195, 198, 98 Cal. Rptr. 2d 44* ; *accord, Hernandez v. Lopez (2009) 180 Cal. App. 4th 932, 939, 103 Cal. Rptr. 3d 376* (*Dunkin* was dispositive in case that was "textbook example for application of the equitable doctrine of unjust enrichment"; plaintiff pleaded cause of action for breach of contract that fully raised all facts and circumstances in which equity could contemplate quasi-contractual remedy to prevent defendant from being unjustly enriched)].

As a general rule, a public entity cannot be sued on an implied-by-law contract or quasi-contract. The theory of recovery is based on quantum meruit and equitable theories of restitution, which are outweighed by the need to protect and limit a public entity's contractual obligations [*see Miller v. McKinnon (1942) 20 Cal. 2d 83, 88, 124 P.2d 34* ; *Lundeen*

Coatings Corp. v. Department of Water & Power (1991) 232 Cal. App. 3d 816, 832 n.9, 283 Cal. Rptr. 551] .

[6] Void or Voidable Contract

A *voidable* contract is one that is void as to one party, who has acted wrongly, but not void as to the other party, who has not acted wrongly, unless the innocent party elects to treat it as void. Thus, a voidable contract may be rendered a nullity at the option of an innocent party [*BGJ Associates, LLC v. Wilson (2003) 113 Cal. App. 4th 1217, 1226-1230, 7 Cal. Rptr. 3d 140* (oral joint venture agreement between attorney and client which was result of undue influence and violation of attorney's fiduciary duties was voidable; client did not ratify it by his conduct); *White Dragon Prods. v. Performance Guarantees, Inc. (1987) 196 Cal. App. 3d 163, 172, 241 Cal. Rptr. 745* ; *Depner v. Joseph Zukin Blouses (1936) 13 Cal. App. 2d 124, 127, 56 P.2d 574]* .

A *void* contract is a nullity by operation of law. It cannot be given any effect, and it cannot be ratified by a party [*Durbin v. Hillman (1920) 50 Cal. App. 377, 379, 195 P. 274]* . A contract void because of illegality has no legal existence for any purpose, and it may not serve as the foundation of any action, either at law or in equity [*R.M. Sherman Co. v. W.R. Thomason, Inc. (1987) 191 Cal. App. 3d 559, 563, 236 Cal. Rptr. 577]* . However, one who is not a party to a contract does not have standing to seek to void it on public policy grounds [*Killian v. Millard (1991) 228 Cal. App. 3d 1601, 1605, 1607, 279 Cal. Rptr. 877* (plaintiffs sold interests in litigation to finance it; defendant had no standing to void those contracts)].

Determining whether a particular contract is void or merely voidable is not always easy [*see, e.g.,* *Asdourian v. Araj (1985) 38 Cal. 3d 276, 291-294, 211 Cal. Rptr. 703, 696 P.2d 95* ; *White Dragon Prods. v. Performance Guarantees, Inc. (1987) 196 Cal. App. 3d 163, 172-173, 241 Cal. Rptr. 745]* . For forms for raising an affirmative defense of illegality, see *§§ 140.144, 140.145*; for coverage of this issue in various contexts see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* , which discusses and includes forms for allegations related to the defenses to formation of a contract discussed in this chapter, and Ch. 490, *Rescission and Restitution*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsExecutory ContractsContracts LawTypes of ContractsExpress ContractsContracts LawTypes of ContractsImplied-in-Fact ContractsContracts LawTypes of ContractsOral AgreementsContracts LawTypes of ContractsUnilateral ContractsGeneral Overview

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Chapter 140 CONTRACTS
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A. Definitions and Specific Provisions

13-140 California Forms of Pleading and Practice--Annotated § 140.11

§ 140.11 Forum Selection Clause

[1] Effect

The parties to a contract may agree contractually in advance on the forum for resolving disputes between them. A forum selection clause in a contract will be given effect unless it is unfair or unreasonable [*M/S Bremen v. Zapata Off-Shore Co. (1972) 407 U.S. 1, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513* (enforcing reasonable clause in international commercial transaction stipulating forum in England unless invalid for fraud or overreaching); *Richards v. Lloyd's of London (9th Cir. 1997) 135 F.3d 1289, 1294-1296* (applying *Bremen* and holding that antiwaiver provisions of Securities Act of 1933 and Securities Exchange Act of 1934 did not void contract's forum selection and choice of law provisions in international transaction); *Smith, Valentino & Smith, Inc. v. Superior Court (1976) 17 Cal. 3d 491, 495-496, 131 Cal. Rptr. 374, 551 P.2d 1206* (enforcement does not contravene policy favoring access to courts by resident plaintiffs if plaintiff has freely and voluntarily negotiated away that right); *Cal-State Business Products & Services, Inc. v. Ricoh (1993) 12 Cal. App. 4th 1666, 1678, 16 Cal. Rptr. 2d 417]* .

"Unreasonable" in this context means that the party challenging the forum-selection clause must establish one of the following facts [*Smith, Valentino & Smith, Inc. v. Superior Court (1976) 17 Cal. 3d 491, 494-496, 131 Cal. Rptr. 374, 551 P.2d 1206* ; *Cal-State Business Products & Services, Inc. v. Ricoh (1993) 12 Cal. App. 4th 1666, 1679, 16 Cal. Rptr. 2d 417]* :

- The forum selected would be unavailable or unable to accomplish substantial justice;

- The forum selection clause is the result of overreaching or the unfair use of unequal bargaining power; or

- The forum chosen by the parties would be seriously inconvenient for the trial of the particular action.

Neither inconvenience nor additional expense in litigating in the selected forum is part of the test of unreasonableness [*Smith, Valentino & Smith, Inc. v. Superior Court (1976) 17 Cal. 3d 491, 496, 131 Cal. Rptr. 374, 551 P.2d 1206* ;

America Online, Inc. v. Superior Court (2001) 90 Cal. App. 4th 1, 15, 108 Cal. Rptr. 2d 699 (expense of litigating in Virginia rather than California should not be considered); *Furda v. Superior Court (1984) 161 Cal. App. 3d 418, 426-427, 207 Cal. Rptr. 646]* . However, the choice of forum must have some rational basis, and enforcement of the forum selection clause must not bring about a result contrary to the public policy of the forum [*Furda v. Superior Court (1984) 161 Cal. App. 3d 418, 426, 427, 207 Cal. Rptr. 646* ; *see Cal-State Business Products & Services, Inc. v. Ricoh (1993) 12 Cal. App. 4th 1666, 1681-1682, 16 Cal. Rptr. 2d 417* (New York was major commercial center close enough to one party's domicile to have sufficient nexus for parties domiciled in New Jersey and California)]. For example, in a case in which a forum selection clause designated Virginia as the jurisdiction in which all disputes arising out of the relationship would be litigated, the court held that because one of the causes of action sought class action relief under the Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*], which voids any waiver of rights under the Act as contrary to public policy, enforcement of the clause would be the functional equivalent of a contractual waiver and thus was prohibited under California law [*America Online, Inc. v. Superior Court (2001) 90 Cal. App. 4th 1, 15, 108 Cal. Rptr. 2d 699* (also concluding that because Virginia law does not allow consumer lawsuits to be brought as class actions, rights of California class members would be diminished if they were required to litigate in Virginia)].

A contractual *venue* selection clause differs from a forum selection clause in that it is purely an intrastate issue involving the selection of a county in which to hold the trial, rather than the selection of a court from among different states or nations. Such a clause has been held invalid to the extent that it is inconsistent with the statutory venue scheme [*Alexander v. Superior Court (2003) 114 Cal. App. 4th 723, 725-727, 8 Cal. Rptr. 3d 111* (finding that agreements fixing venue in location other than that allowed by statute violate public policy)].

[2] Enforcement

[a] Fairness Test

Courts will enforce a forum selection clause in a contract entered into freely and voluntarily by parties who have negotiated at arms' length [*Smith, Valentino & Smith, Inc. v. Superior Court (1976) 17 Cal. 3d 491, 495-496, 131 Cal. Rptr. 374, 551 P.2d 1206* ; *Cal-State Business Products & Services, Inc. v. Ricoh (1993) 12 Cal. App. 4th 1666, 1679, 16 Cal. Rptr. 2d 417]* . The parties entered into a forum selection clause freely and voluntarily if the party who is displeased with it had the power to walk away from the contract negotiations [*Cal-State Business Products & Services, Inc. v. Ricoh (1993) 12 Cal. App. 4th 1666, 1681, 16 Cal. Rptr. 2d 417]* .

Even if the forum selection clause is in a contract of adhesion and was not the subject of bargaining, the courts will enforce it if [*Carnival Cruise Lines, Inc. v. Shute (1991) 499 U.S. 585, 591-594, 111 S. Ct. 1522, 113 L. Ed. 2d 622, 633* ; *Cal State Business Products & Services, Inc. v. Ricoh (1993) 12 Cal. App. 4th 1666, 1679, 16 Cal. Rptr. 2d 417* ; *Furda v. Superior Court (1984) 161 Cal. App. 3d 418, 426, 207 Cal. Rptr. 646* ; *Bos Material Handling, Inc. v. Crown Controls Corp. (1982) 137 Cal. App. 3d 99, 108,186 Cal. Rptr. 740* ; *see Hunt v. Superior Court (2000) 81 Cal. App. 4th 901, 908-909, 97 Cal. Rptr. 2d 215* (in dispute involving lease and guaranty, forum selection clause held not valid when it did not give notice that party was consenting to have California exercise personal jurisdiction)]:

- There is no evidence of unfair use of superior power to impose the contract on the other party; and
- The clause is within the reasonable expectations of the party against whom it is being enforced.

[b] Clause in Contract for Ocean Passage

Forum selection clauses on cruise tickets are governed by federal admiralty law. They are not invalid simply because they are not negotiated and are found in form ticket contracts, at least when the passenger does not claim lack of notice of the clause and evidence does not support a finding that the chosen forum is inconvenient [*Carnival Cruise Lines, Inc. v. Shute (1991) 499 U.S. 585, 590, 595, 111 S. Ct. 1522, 113 L. Ed. 2d 622, 629, 632-633, 634* (clause does not

violate *46 U.S.C. App. § 183c*)].

However, when the ticket is purchased in California and there is an issue regarding the consumer's notice of a forum selection clause, the courts will determine the issue in accordance with *Civ. Code §§ 1550, 1565*, and *1580*, which would make such a clause unenforceable as to any plaintiff who did not have sufficient notice of the clause before entering into the contract. Absent notice, mutual consent would be lacking [*see Carnival Cruise Lines, Inc. v. Superior Court (1991) 234 Cal. App. 3d 1019, 1026-1027, 286 Cal. Rptr. 323* (on remand from United States Supreme Court, state court of appeal again remanded for factual determinations regarding notice)].

[3] Challenge to Enforcement of Clause

A defendant seeking to challenge the plaintiff's choice of forum on the basis of a forum selection clause may move to dismiss or stay the action because of inconvenient forum [*see Code Civ. Proc. §§ 410.30, 418.10*]. In an ordinary (*i.e.*, noncontractually based) challenge to the forum in which the plaintiff initiated the action, the defendant's burden of proof is set forth by the statutory criteria of forum non conveniens and substantial justice [*Code Civ. Proc. §§ 410.30(a), 418.10(a)(2)*; *Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 751, 1 Cal. Rptr. 2d 556, 819 P.2d 14* ; *Cal-State Business Products & Services, Inc. v. Ricoh (1993) 12 Cal. App. 4th 1666, 1675-1678, 16 Cal. Rptr. 2d 417]* .

When a party moves under *Code Civ. Proc. §§ 410.30* and *418.10* for enforcement of a forum selection clause, the party opposing enforcement of the clause (generally the plaintiff) bears the burden of proving that there are grounds for invalidating the contract provision [*Smith, Valentino & Smith, Inc. v. Superior Court (1976) 17 Cal. 3d 491, 496, 131 Cal. Rptr. 374, 551 P.2d 1206* ; *Cal-State Business Products & Services, Inc. v. Ricoh(1993) 12 Cal. App. 4th 1666, 1680-1681, 16 Cal. Rptr. 2d 417]* . Because the plaintiff, by entering into a contract with a forum selection provision, has contracted away the right to the forum of preference, and the defendant is seeking to enforce the contract right to the preferred forum, the issues are whether the provision is reasonable and whether it was the result of overreaching or the use of unfair bargaining power [*Cal-State Business Products & Services, Inc. v. Ricoh (1993) 12 Cal. App. 4th 1666, 1678-1683, 16 Cal. Rptr. 2d 417* ; *but see Lifeco Services Corp. v. Superior Court (1990) 222 Cal. App. 3d 331, 335, 271 Cal. Rptr. 385* (forum selection clause enforced on basis of reasonableness, but court also engaged in analysis of traditional forum non conveniens factors)]. If, however, recovery in an action is based on legislation that contains a statutory anti-waiver provision, the burden of proof may be shifted to the party seeking enforcement of the forum selection clause [*America Online, Inc. v. Superior Court (2001) 90 Cal. App. 4th 1, 10-11, 108 Cal. Rptr. 2d 699* (fact that claims were pleaded under Consumers Legal Remedies Act containing statutory anti-waiver provision mandated departure from general rule that places burden of proving unfairness or unreasonableness of forum selection clause on party opposed to its enforcement); *accord, Doe 1 v. AOL LLC (9th Cir. 2009) 552 F.3d 1077, 2009 U.S. App. LEXIS 875, at *15-*19]* .

A plaintiff who is not a party to a contract will be bound by the contract's forum selection clause if (1) the third party is closely related to the contractual relationship, and (2) the contractual forum state provides a suitable alternative forum for the lawsuit [*Net2phone, Inc. v. Superior Court (2003) 109 Cal. App. 4th 583, 587* (private plaintiff which itself had suffered no injury but filed representative action under California's unfair competition law alleging that defendant's contractual provisions subjected its customers to unfair business practices was bound by contract providing that disputes would be subject to exclusive jurisdiction in New Jersey)]. However, a nonparty to the contract may not be entitled to enforce a contractual forum selection clause on the basis of being "closely related to the contractual relationship" between the parties [*see, e.g., Bancomer, S.A. v. Superior Court (1996) 44 Cal. App. 4th 1450, 1458-1461, 52 Cal. Rptr. 2d 435* (bank, designated in purchase agreement to establish trust through which interests in Mexico resort would be purchased, not entitled to enforce forum selection clause because it lacked standing as third-party beneficiary and was not "closely related to contractual relationship" between vendor and purchaser); *see also Berclain America Latina v. Baan Company N.V. (1999) 74 Cal. App. 4th 401, 407-409, 87 Cal. Rptr. 2d 745* (reversing order dismissing action based on forum selection clause when corporation was neither signatory nor third party beneficiary of agreement, and was not so closely related to signatory as to be entitled to assert forum selection clause)]. The key to the "closely

related" test is whether the nonsignatories were close to the contractual relationship. Giving standing to all closely related entities honors general principles of judicial economy by making all parties closely allied to the contractual relationship accountable in the same forum, thereby abating a proliferation of actions and inconsistent rulings [*Bugna v. Fike (2000) 80 Cal. App. 4th 229, 233-236, 95 Cal. Rptr. 2d 161* (defendants, who were not signatories to contract, but who were closely related to contractual relationship by virtue of negotiating, evaluating, and putting together transactions under attack, held entitled to enforce forum selection clause)].

For discussion and forms related to the enforceability and enforcement of forum selection clauses and motions to dismiss or stay for inconvenient forum, see Ch. 323, *Jurisdiction: Personal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPractice & ProcedureForumContracts LawContract Conditions & ProvisionsForum Selection Clauses

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13-140 California Forms of Pleading and Practice--Annotated § 140.12

§ 140.12 Implied Covenant of Good Faith and Fair Dealing

[1] In Every Contract

California law recognizes an implied covenant of good faith and fair dealing in every contract. However, breach of the covenant does not necessarily give rise to a cause of action [*Quigley v. Pet, Inc. (1984) 162 Cal. App. 3d 877, 889-890, 208 Cal. Rptr. 394]* . The covenant is to the effect that neither party to the contract will do anything deliberately to deprive the other of the benefits of the agreement [*Pasadena Live, LLC v. City of Pasadena (2004) 114 Cal. App. 4th 1089, 1092-1094, 8 Cal. Rptr. 3d 233* (allegation that defendant city breached implied covenant of good faith and fair dealing by preventing plaintiff entertainment production company from even submitting entertainment proposals for consideration adequately alleged breach of contract for amphitheater productions); *see Oracle Corp. v. Falotti (9th Cir. 2003) 319 F.3d 1106, 1111-1112* (compensation committee did not breach covenant of good faith and fair dealing under stock option agreement); *Quigley v. Pet, Inc. (1984) 162 Cal. App. 3d 877, 887-888, 887 n.2, 893-894, 893 n.5, 894 n.6, 208 Cal. Rptr. 394* (difference between contract standard and tort standard)].

A breach of the implied covenant of good faith and fair dealing involves something more than a breach of a contractual duty itself. It involves unfair dealing (which may or may not also constitute a breach of an express contract term) in the form of a conscious and deliberate act that unfairly frustrates the agreed common purpose of the contract and disappoints the reasonable expectations of the other party to the contract [*Celador Int'l Ltd. v. Walt Disney Co. (C.D. Cal. 2004) 347 F. Supp. 2d 846, 852* , citing *Careau & Co. v. Security Pac. Bus. Credit, Inc. (1990) 222 Cal. App. 3d 1371, 1394, 272 Cal. Rptr. 387]* . If a claim for breach of the implied covenant of good faith and fair dealing does not go beyond the statement of a breach of the express contractual terms and seeks the same relief sought in a breach of contract claim, it is simply superfluous to the contract claim. However, a claim for breach of the implied covenant is separate and distinct from a contract claim in three situations: (1) if no contract claim is alleged; (2) if the plaintiff is seeking recovery in tort; and (3) if the plaintiff alleges that the defendant acted in bad faith to frustrate the benefits plaintiff was to receive under the contract [*Celador Int'l Ltd. v. Walt Disney Co. (C.D. Cal.2004) 347 F. Supp. 2d 846, 852* , citing *Careau & Co. v. Security Pac. Bus. Credit, Inc. (1990) 222 Cal. App. 3d 1371, 1395, 272 Cal. Rptr. 387* , *Guz v. Bechtel Nat'l, Inc. (2000) 24 Cal. 4th 317, 353 n. 18, 100 Cal. Rptr. 2d 352, 8 P.3d 1089]* .

The implied covenant does not create a fiduciary relationship; it merely affords a basis for redress for breach of contract [*see* *Wolf v. Superior Court (2003) 107 Cal. App. 4th 25, 30-31, 130 Cal. Rptr. 2d 860* (contingent entitlement to future compensation within control of one party did not, alone, give rise to fiduciary relationship)]. Without an express contractual relationship, a party cannot assert a cause of action for breach of the implied covenant [*Smith v. City and County of San Francisco (1990) 225 Cal. App. 3d 38, 49, 275 Cal. Rptr. 17* (statutory relationship between developer and city would not support cause of action for breach of implied covenant; promissory estoppel argument also failed); *Kim v. Regents of the University of California (2000) 80 Cal. App. 4th 160, 164-165, 95 Cal. Rptr. 2d 10* (civil service employee could not state cause of action for breach of contractual covenant of good faith and fair dealing, since public employment is held by statute rather than by contract)].

[2] Nature of Duty Imposed

The precise nature and extent of the duty imposed by this covenant depends on the contractual purposes [*Sheppard v. Morgan Keegan & Co. (1990) 218 Cal. App. 3d 61, 66-67, 266 Cal. Rptr. 784* ; *Ellis v. Chevron, U.S.A., Inc. (1988) 201 Cal. App. 3d 132, 139, 246 Cal. Rptr. 863* ; *Mobil Oil Corp. v. Exxon Corp. (1986) 177 Cal. App. 3d 942, 949, 223 Cal. Rptr. 392* (judgment on pleadings usually improper when precise extent of duty imposed by covenant at issue)]. However, courts will not use the implied covenant of good faith and fair dealing to vary the terms on an unambiguous agreement or to override an express provision in a contract [*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc. (1992) 2 Cal. 4th 342, 374-376, 6 Cal. Rptr. 2d 467, 826 P.2d 710* (termination of lease); *April Enterprises, Inc. v. KTTV (1983) 147 Cal. App. 3d 805, 816, 195 Cal. Rptr. 421]* . Further, courts will not apply the implied covenant when the contract is unambiguous and implication of the covenant is not needed to effectuate the parties' expressed desire for a binding agreement [*Storek & Storek, Inc. v. Citicorp Real Estate, Inc. (2002) 100 Cal. App. 4th 44, 55-58, 64, 122 Cal. Rptr. 2d 267* (covenant of good faith and fair dealing not implied so as to prohibit defendant lender from doing what it was expressly permitted to do under loan agreement--withhold loan funds when conditions precedent to its performance were not fulfilled to its satisfaction); *Third Story Music, Inc. v. Waits (1995) 41 Cal. App. 4th 798, 808-809, 48 Cal. Rptr. 2d 747* (corporation's promise to market music or refrain from doing so, at its election, was not subject to implied covenant of good faith and fair dealing)].

If a contract gives one party discretion to affect rights of the other party, this covenant imposes a duty to exercise that discretion in good faith and in accordance with fair dealing [*Cal. Lettuce Growers v. Union Sugar Co. (1955) 45 Cal. 2d 474, 484, 289 P.2d 785* ; *Locke v. Warner Bros., Inc. (1997) 57 Cal. App. 4th 354, 363-364, 66 Cal. Rptr. 2d 921* ; *Sheppard v. Morgan Keegan & Co. (1990) 218 Cal. App. 3d 61, 67, 266 Cal. Rptr. 784* ; *Walter E. Heller Western, Inc. v. Tecrim Corp. (1987) 196 Cal. App. 3d 149, 161, 241 Cal. Rptr. 677]* . For example, in a case in which a class of automobile purchasers sued the corporation that financed the purchases for breach of contract, the court of appeal held that the corporation breached the implied covenant by using a method of computing mandatory insurance premium and refunds--the accelerated method--that was not objectively reasonable [*Acree v. General Motors Acceptance Corp. (2001) 92 Cal. App. 4th 385, 393-396, 112 Cal. Rptr. 2d 99* (given sales agreement's silence on issue of premium refund method, borrower legitimately could expect that a different refund method--pro-rata by time method--would be used)]. In another example, when a legal publisher's author agreement obligated the publisher to make a judgment as to the quality or literary merit of the author's work, the court held that the contract was not illusory because the publisher's duty to exercise its discretion was limited by its duty of good faith and fair dealing [*Chodos v. West Publishing Co., Inc. (9th Cir. 2002) 292 F.3d 992, 997* (publisher was required to make judgment in good faith and could not reject manuscript for other unrelated reasons)].

[3] Breach of Implied Covenant in Insurance Contract

In the context of insurance policies, a breach of the implied covenant of good faith and fair dealing may be the basis for a tort action [*see* *Comunale v. Traders & General Ins. Co. (1958) 50 Cal. 2d 654, 658, 328 P.2d 198* ; for tort and contract actions, *see § 140.56[2], see generally Ch. 308, Insurance, § 308.10* et seq.]. Courts that allow the cause of action in the context of insurance contracts emphasize the special relationship between the contracting parties,

characterized by elements of public interest, adhesion, and fiduciary responsibility [*see, e.g., Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 820, 157 Cal. Rptr. 482, 598 P.2d 452 , cert. denied, 445 U.S. 912 (1980)]* .

The special relationship test involves the following characteristics [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 690-691, 254 Cal. Rptr. 211, 765 P.2d 373* ; *see Wallis v. Superior Court (1984) 160 Cal. App. 3d 1109, 1119, 207 Cal. Rptr. 123* (using five criteria instead of four)]:

- One of the parties to the contract enjoys a superior bargaining position to the extent of being able to dictate the terms of the contract;

- The purpose of the weaker party in entering into the contract is not primarily to profit but rather to secure an essential service or product, financial security, or peace of mind;

- The relationship of the parties is such that the weaker party places trust and confidence in the stronger party; and

- There is conduct on the part of the stronger party indicating an intention to frustrate the weaker party's enjoyment of the contract rights.

[4] Bad-Faith Denial of Existence of Contract

In 1995, the California Supreme Court ruled in *Freeman & Mills, Inc. v. Belcher Oil Co.* that tort recovery is precluded for breach of the implied covenant of good faith and fair dealing outside the insurance context, at least in the absence of an independent duty arising from principles of tort law *other than* the bad faith denial of the existence of, or liability under, the breached contract [*Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal. 4th 85, 102, 44 Cal. Rptr. 2d 420, 900 P.2d 669]* . The Court expressly overruled a 1984 case holding that a party to a contract may be subject to tort remedies when, in addition to breaching the contract, the party seeks to avoid liability by denying, in bad faith and without probable cause, that the contract exists [*Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal. 4th 85, 92, 44 Cal. Rptr. 2d 420, 900 P.2d 669* ; *Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 769-770, 206 Cal. Rptr. 354, 686 P.2d 1158]* . That cause of action was known as the tort of bad faith denial of the existence of a contract. The Court concluded that the former rule was no longer viable [*see Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal. 4th 85, 102-103, 44 Cal. Rptr. 2d 420, 900 P.2d 669]* . However, the Court emphasized that nothing in the *Freeman* opinion should be read as affecting existing precedent governing enforcement of implied contracts in insurance cases [*Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal. 4th 85, 103, 44 Cal. Rptr. 2d 420, 900 P.2d 669]* .

The Court's opinion in *Freeman* contained no statement regarding the effect of its decision on pending actions. It appears that the decision was fully retroactive and barred any pending claims based on the abrogated cause of action [*see Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal. 3d 287, 305, 250 Cal. Rptr 116, 758 P.2d 58* ; *Peterson v. Superior Court (1982) 31 Cal. 3d 147, 151-152, 181 Cal. Rptr. 784, 642 P.2d 1305]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract InterpretationGood Faith & Fair DealingInsurance LawBad Faith & Extracontractual LiabilityGeneral Overview

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§ 140.13 Arbitration Clause and Service-of-Suit Clause

In a service-of-suit clause, a party agrees to submit to the personal jurisdiction of designated courts for specified purposes related to the contract. The purpose of such a clause is to ease the burdens that the beneficiary of the clause might otherwise encounter in trying to obtain service of process sufficient to establish personal jurisdiction over the other party (for instance, when the other party is not a citizen of the United States and has no presence in the United States). Generally, because of the publicpolicy favoring arbitration in lieu of litigation, courts have tended to hold that a service-of-suit clause can co-exist in a contract along with an arbitration clause--that is, the two clauses will not be in conflict--as long as the service-of-suit clause can be interpreted as having been intended to facilitate enforcement of the arbitration clause. This is easily possible if the arbitration clause is qualified by an introductory phrase such as "Notwithstanding every other provision of this contract... " [*Boghos v. Certain Underwriters at Lloyd's of London (2005) 36 Cal. 4th 495, 502-503, 30 Cal. Rptr. 3d 787, 115 P.3d 68* (both clauses could operate in insurance contract when it was construed so that service-of-suit clause would allow insured to sue in court if insurer refused to arbitrate or refused to pay award)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesContracts LawContract Conditions & ProvisionsArbitration Clauses

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[Reserved]

§§ 140.14[Reserved]

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§ 140.20 Essential Elements

The following elements are essential to the existence of a contract [*Civ. Code § 1550*; *Schaefer v. Williams (1993) 15 Cal. App. 4th 1243, 1246, 19 Cal. Rptr. 2d 212* (promise by one party is not contract); *Marshall & Co. v. Weisel (1966) 242 Cal. App. 2d 191, 196, 51 Cal. Rptr. 183]* :

- Parties that are capable of contracting. Generally all persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights [*Civ. Code § 1556*]. For discussion of a party incapable of contracting generally, *see § 140.21*; for discussion of void and voidable contracts made by persons of unsound mind, *see § 140.10[6]*; for discussion and forms relating to a minor's incapacity to contract, see Ch. 365, *Minors: Contract Actions* .

- The parties' consent [*see § 140.22*].

- A sufficient consideration [*see § 140.23*].

- A lawful object, which may be assumed as long as the contract is not specifically prohibited [*see generally, e.g., Civ. Code § 1667 et seq.* (unlawful contracts)] and unless the defendant asserts illegality of the contract [*see § 140.24*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawConsiderationGeneral OverviewContracts LawFormationCapacity of PartiesMental CapacityContracts LawFormationMeeting of Minds

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§ 140.21 Person Incapable of Contracting

[1] Unsound Mind

[a] Contract Void

A person entirely without understanding or whose incapacity has been judicially determined and who has not been restored to reason has no power to make a contract of any kind. Any contract entered into by such a person is void, except that a person entirely without understanding is liable for the reasonable value of things furnished that are necessary for his or her support or the support of his or her family [*Civ. Code §§ 38, 40*]. A person whose incapacity has been judicially determined is liable on a contract implied by law for the payment of necessaries. Whether an incompetent person can be liable on an express contract for necessaries appears unlikely [*Estate of Doyle (1932) 126 Cal. App. 646, 647, 14 P.2d 920]* .

The term "understanding" denotes not the act of understanding but the capacity or faculty of doing so. The expression "without understanding" denotes persons without that capacity. However, the expression should not be understood in its literal and extreme sense because even the most disabled person may have some degree of understanding. Instead, the expression as it applies to both executed and executory contracts, refers to a person entirely without the capacity to understand or comprehend such transactions [*Jacks v. Estee (1903) 139 Cal. 507, 511, 73 P. 247]* .

The statutory exception cannot be invoked by a person of sound mind who wants to avoid a contract with a person subsequently ascertained to be of unsound mind. *Civ. Code §§ 38, 40* are intended to protect only persons without the capacity to comprehend the nature and subject of a contract [*San Francisco Credit Clearing-House v. MacDonald (1912) 18 Cal. App. 212, 215, 122 P. 964]* .

[b] Contract Voidable

A contract made by a person of unsound mind but not totally without understanding, before the person has been judicially determined to be without capacity, may be rescinded [*Civ. Code §§ 39(a), 1689(b)(7)*; *but see* *Saret-Cook v. Gilbert, Kelly, Crowley & Jennett (1999) 74 Cal. App. 4th 1211, 1225-1227, 88 Cal. Rptr. 2d 732* (even if plaintiff

lacked contractual capacity because she was under influence of Demerol at time of executing agreement, she both ratified contract and accepted benefits under agreement)]. A person need not be incompetent to enter into every kind of contract to obtain rescission. The test is whether the person could deal with the subject matter of the contract sought to be rescinded, with a full understanding of his or her rights and the nature, purpose, and effect of what he or she did with respect to the particular transaction [*Walton v. Bank of California (1963) 218 Cal. App. 2d 527, 541, 32 Cal. Rptr. 856]* .

The test of understanding varies from one contract to the next [*Smalley v. Baker (1968) 262 Cal. App. 2d 824, 832, 69 Cal. Rptr. 521]* . However, a rebuttable presumption affecting the burden of proof that a person is of unsound mind exists for purposes of rescission if the person is substantially unable to manage his or her own financial resources or resist fraud or undue influence [*Civ. Code § 39(b)*]. Substantial inability may not be proved solely by isolated incidents of negligence or imprudence [*Civ. Code § 39(b)*].

Incompetence is determined as of the time the contract was made. In addition, the right to rescind does not depend on knowledge of the disabled party's incompetence or fraud on the part of the other party [*Weseman v. Latham (1957) 153 Cal. App. 2d 841, 846, 315 P.2d 364]* .

For a complaint for relief based on rescission of a contract as a result of incompetence before adjudication, see Ch. 490, *Rescission and Restitution* . For affirmative defenses based on various degrees of incapacity to contract, see *§§ 140.133 -140.135*.

[c] Evidentiary Requirements

The Probate Code establishes evidentiary requirements relating to judicial determinations of capacity, including the capacity to contract [*see Prob. Code § 812* (application of rules)]. A determination that a person is of unsound mind or lacks the capacity to contract must be supported by evidence of a deficit in at least one of four specified mental functions, and evidence of a correlation between the deficit or deficits and the decision or acts in question [*Prob. Code § 811(a)*]:

- Alertness and attention;
- Information processing;
- Thought processes; and
- Ability to modulate mood and effect.

There are specific statutory examples of what is sufficient to demonstrate impairment in each of these categories.

The court may consider such a deficit only if the deficit, by itself or in combination with other mental-function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question [*Prob. Code § 811(b)*]. The court may take into consideration the frequency, severity, and duration of periods of impairment [*Prob. Code § 811(c)*].

Diagnosis of a mental or physical disorder is insufficient by itself to support a determination that a person is of unsound mind or lacks the capacity to contract [*Prob. Code § 811(d)*; *see Prob. Code § 810(b)* (legislative findings and declarations in support of requirements specified in *Prob. Code § 811*)].

[2] Defendant Deprived of Civil Rights

Persons deprived of their civil rights are not capable of contracting [*Civ. Code § 1556*; *see Penal Code § 2600* (deprivation of state prisoners' civil rights)]. Any person deprived of civil rights may assert the defense of incapacity to contract, especially if the evidence shows that the party asserted the incapacity but the other party proceeded with the contract [*Rosman v. Cuevas (1959) 176 Cal. App. 2d Supp. 867, 869, 1 Cal. Rptr. 485* ; *but cf. Jones v. Allen (1960) 185 Cal. App. 2d 278, 282-283, 8 Cal. Rptr. 316* (seller who sold automobile to convict whose civil rights had been suspended did not remain owner for purpose of imposing liability for personal injuries sustained by person hit by automobile driven by convict)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingProperty Rights (sec. 1982)General OverviewContracts LawFormationCapacity of PartiesMental Capacity

California Forms of Pleading and Practice--Annotated

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Volume 13: Conspiracy thru Conversion-Chs. 126-159
Chapter 140 CONTRACTS
PART II. LEGAL BACKGROUND
B. Formation of Enforceable Contract

13-140 California Forms of Pleading and Practice--Annotated § 140.22

§ 140.22 Parties' Consent

[1] Consent Must Be Free

The consent of the parties must be freely given [*Civ. Code § 1565*]. A consent that is not free is nevertheless not ineffectual. The contract may be rescinded, in the manner prescribed by the rules for rescission contained in *Civ. Code § 1688 et seq.* [*Civ. Code § 1566*; *see Thompson Crane & Trucking Co. v. Eyman (1954) 123 Cal. App. 2d 904, 908, 267 P.2d 1043]* . For discussion and forms relating to rescission, see Ch. 490, *Rescission and Restitution* .

An apparent consent is not real or free when obtained through duress, menace, fraud, undue influence, or mistake [*Civ. Code § 1567*; *see Jones v. Adams Financial Services (1999) 71 Cal. App. 4th 831, 840, 84 Cal. Rptr. 2d 151* (loan documents signed by elderly woman who was blind and suffered from dementia were obtained through fraud in the execution without negligence on plaintiff's part and contract therefore was void)]. Consent is deemed to have been obtained through one of these causes only when it would not have been given had the cause not existed [*Civ. Code § 1568*]. For discussion and forms relating to contracts tainted by such defects, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

When a party to a contract containing an arbitration clause elects to resist arbitration and asserts fraud in the inducement or fraud in the execution, special procedural rules apply because an arbitration clause is considered to be separable from the contract. If the party asserts fraud in the *inducement* of the *contract generally,* the assertion is no bar to the arbitration of the contract. The separable arbitration clause is considered valid, and the parties must arbitrate whether the contract was induced by fraud (even though a finding of fraud in the inducement may result in rescission of the contract as a whole). If, however, the party is asserting fraud in the inducement of the *arbitration clause specifically,* the assertion is to be resolved by the trial court, as it goes to the validity of the arbitration clause itself. An assertion of fraud in the *execution* of the entire agreement is not arbitrable under either state or federal law. If the entire contract is void ab initio because of fraud, the parties have not agreed to arbitrate any controversy; therefore, an issue of fraud in the execution is to be resolved by the trial court, not by an arbitrator [*Brown v. Wells Fargo Bank, N.A. (2008) 168 Cal. App. 4th 938, 958, 85 Cal. Rptr. 3d 817* ; *see generally Rosenthal v. Great Western Fin. Securities Corp. (1996) 14 Cal. 4th 394, 415-419, 58 Cal. Rptr. 2d 875, 926 P.2d 1061* (prescribing court's duty, in proceedings to compel

arbitration, to determine existence and validity of arbitration agreement, as well as parties' respective burdens of proof); *Toal v. Tardif (2009) 178 Cal. App. 4th 1208, 1220-1222, 101 Cal. Rptr. 3d 97* (prescription, in *Rosenthal* opinion, of court's duty and parties' burdens of proof respecting existence of valid arbitration agreement, applies also to proceedings for confirmation of arbitration award; party's consent to arbitration agreement cannot be proved solely by evidence that party's attorney signed agreement on party's behalf)]. For discussion, see *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21[4]*.

[2] Mutuality

[a] Requirement

The consent of the parties must be mutual [*Civ. Code § 1565*]. Consent is not mutual unless the parties agree on the same thing in the same sense [*Civ. Code § 1580*; *see The Money Store v. Southern California Bank (2002) 98 Cal. App. 4th 722, 728, 120 Cal. Rptr. 2d 58* (lender's closing instructions to bank exhibited mutual consent); *Weddington Productions, Inc. v. Flick (1998) 60 Cal. App. 4th 793, 811* ; *McClintock v. Robinson (1937) 18 Cal. App. 2d 577, 582, 64 P.2d 749]* .

[b] Objective Test

The mutuality of the parties' consent must be gathered from their words and acts, judged by a reasonable standard, which must manifest an intention to agree in regard to the matter in question. The real but unexpressed state of a party's mind on the subject is immaterial [*Brant v. California Dairies, Inc. (1935) 4 Cal. 2d 128, 133, 48 P.2d 13* ; *Hilleary v. Garvin (1987) 193 Cal. App. 3d 322, 327, 238 Cal. Rptr. 247]* . Under this objective test, a "meeting of the minds" is unnecessary. A party may be bound even though that party misunderstood the terms of a proposed contract and actually had a different undisclosed intention [*Myers v. Carter (1963) 215 Cal. App. 2d 238, 241, 30 Cal. Rptr. 91]* .

On the other hand, a failure to reach a meeting of the minds on all material points prevents the formation of a contract even though the parties have orally agreed on some of the terms or have taken some action related to the alleged contract [*Banner Entertainment, Inc. v. Superior Court (1998) 62 Cal. App. 4th 348, 359, 72 Cal. Rptr. 2d 598]* . Thus, when undisputed facts showed that there was no meeting of the minds as to the essential structure and operation of an alleged joint venture, as a matter of law there was no contract, even if there was agreement on some of the terms [*Bustamante v. Intuit, Inc. (2006) 141 Cal. App. 4th 199, 215, 45 Cal. Rptr. 3d 692]* .

[c] Unenforceable Promise Does Not Preclude Mutuality

A contract does not lack mutuality of consent if the promise of one of the parties is unenforceable or voidable because of a special privilege not expressly reserved in the promise but given by the law. Examples are the voidable contracts of minors and persons lacking mental capacity to contract [*Metropolitan Water Dist. v. Marquardt (1963) 59 Cal. 2d 159, 179, 28 Cal. Rptr. 724, 379 P.2d 28* ; *see § 140.21*].

[3] Offer

[a] Definition

A contract is created by a proposal or offer by one party and an acceptance by the other [*Tuso v. Green (1924) 194 Cal. 574, 580-581, 229 P. 327]* . An offer is a promise that is in its terms conditional on an act, forbearance, or return promise to be given in exchange for the promise or its performance [Restatement of Contracts, § 24].

[b] Requirements

The offer must reach the offeree. The burden of ascertaining whether it did reach the offeree is on the offeror.

Consequently, the offeror, merely by sending an offer, is not entitled to take for granted that the offeree received and accepted it [*American Bldg. Maintenance Co. v. Indemnity Ins. Co. (1932) 214 Cal. 608, 616, 7 P.2d 305]* .

An offer must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain. A contract is void if it is so uncertain and indefinite that the intention of the parties in material respects cannot be determined [*Weddington Productions, Inc. v. Flick (1998) 60 Cal. App. 4th 793, 811-812* ; *Ladas v. California State Auto. Ass'n (1993) 19 Cal. App. 4th 761, 770, 23 Cal. Rptr. 2d 810* ; for the effect of a contract being void, *see § 140.10[6]*].

The California Supreme Court has held that a licensed auto dealer's newspaper advertisement for the sale of a particular vehicle at a specified price constituted an offer that was accepted by a customer's tender of the advertised price [*Donovan v. RRL Corp. (2001) 26 Cal. 4th 261, 271, 276, 109 Cal. Rptr. 2d 807, 27 P.3d 702* (construing offer in light of *Veh. Code § 11713.1(e)*, which states it is a violation of Vehicle Code for dealer to fail to sell vehicle at advertised price)].

[c] Revocation Before Acceptance

The offeror may revoke an offer at any time before the offeree has communicated acceptance to the offeror, but not afterwards [*Civ. Code § 1586*; *Grieve v. Mullaly (1930) 211 Cal. 77, 79, 293 P. 619* ; *see Ersa Grae Corp. v. Fluor Corp. (1991) 1 Cal. App. 4th 613, 622, 2 Cal. Rptr. 2d 288* (communication of revocation to offeror's agent did not revoke offer when agent did not notify offeree of revocation before offeree accepted); *see also CPI Builders, Inc. v. Impco Technologies, Inc. (2001) 94 Cal. App. 4th 1167, 1174, 114 Cal. Rptr. 2d 851* (offeror's communication of revocation to offeror's attorney did not revoke offer when offeror's attorney did not notify offeree's attorney of revocation before offeree accepted)]. The offeror may withdraw an offer that states that it will remain open for a given length of time at any time prior to acceptance unless based on a valuable consideration [*Davies v. Langin (1962) 203 Cal. App. 2d 579, 584, 21 Cal. Rptr. 682* ; for discussion of options supported by consideration, *see* [d], *below*].

An offer is revoked on the occurrence of any of the following events:

- The communication of a notice of revocation by the offeror to the other party in the manner prescribed by *Civ. Code §§ 1581* and *1583* (methods by which consent can be communicated and the time consent is deemed communicated) before the other party's acceptance has been communicated to the offeror [*Civ. Code § 1587(1)*; *Wilson v. White (1911) 161 Cal. 453, 462, 119 P. 895]* . A personal messenger is not a "normal means of communication" or a "mode" of communication within the meaning of *Civ. Code §§ 1582* and *1587*. "Mode" refers to the medium, not to the messenger [*Ersa Grae Corp. v. Fluor Corp. (1991) 1 Cal. App. 4th 613,622-623, 2 Cal. Rptr. 2d 288]* .

- The lapse of the time prescribed in the offer for its acceptance or, if no time is prescribed, the lapse of a reasonable time without communication of the acceptance [*Civ. Code § 1587(2)*; *Davies v. Langin (1962) 203 Cal. App. 2d 579, 584-585, 21 Cal. Rptr. 682]* .

- The failure of the offeree to fulfill a condition precedent to acceptance [*Civ. Code § 1587(3)*].

- The death or insanity of the offeror before acceptance [*Civ. Code § 1587(4)*; *Bard v. Kent (1942) 19 Cal. 2d 449, 451-452, 122 P.2d 8]* .

[d] Option Supported by Consideration

An option agreement is a unilateral contract that results when one party (the optionor) offers to do something when and if some condition is satisfied by the other party (the optionee), and consideration passes from the optionee to the

optionor. Usually, the optionor's offer is to sell property to the optionee on specified terms within a specified period, and the condition is that the optionee must accept the offer--that is, exercise the option--within that period, and the consideration is the payment of money by the optionee [*Steiner v. Thexton (2010) 48 Cal. 4th 411, 106 Cal. Rptr. 3d 252, 226 P.3d 359, 2010 Cal. LEXIS 1913, at *10-*11* ; *County of San Diego v. Miller (1975) 13 Cal. 3d 684, 688, 119 Cal. Rptr. 491, 532 P.2d 139]* . In some cases, the equitable doctrine of promissory estoppel can be applied to overcome the absence of normal consideration [*e.g., A-C Co. v. Security Pac. Nat'l Bank (1985) 173 Cal. App. 3d 462, 472, 219 Cal. Rptr. 62* ; *see § 140.23[8]*].

This kind of unilateral contract may be called an irrevocable option, or irrevocable offer, because the effect of the consideration is to transform what would otherwise be a mere offer, which could be revoked at any time prior to acceptance, into an offer that cannot be revoked as long as satisfaction of the specified condition remains in the optionee's power [*Steiner v. Thexton (2010) 48 Cal. 4th 411, 106 Cal. Rptr. 3d 252, 226 P.3d 359, 2010 Cal. LEXIS 1913, at *15-*25]* .

In the case of an irrevocable option to purchase real property, the effect of the optionee's satisfying the specified condition is to supplant the unilateral contract (the option agreement) with a bilateral contract for sale of the property by the optionor and purchase by the optionee [*Palo Alto Town & Country Village, Inc. v. BBTC Co. (1974) 11 Cal. 3d 494, 503-504, 113 Cal. Rptr. 705, 521 P.2d 1097]* .

An irrevocable option may be exercised against the optionor's successors following the optionor's death. Unless the option agreement provides to the contrary, an irrevocable option generally is assignable [*County of San Diego v. Miller (1975) 13 Cal. 3d 684, 688, 119 Cal. Rptr. 491, 532 P.2d 139]* .

[4] Acceptance

[a] Definition and Requirements

An acceptance of an offer is an expression of assent to the offered terms, made by the offeree in a manner requested or authorized by the offeror. Unless otherwise required by statute or by the terms of the offer [*see Schreiber v. Hooker (1952) 114 Cal. App. 2d 634, 639, 251 P.2d 55]* , an acceptance may be written or oral [*Riverside Fence Co. v. Novak (1969) 273 Cal. App. 2d 656, 661, 78 Cal. Rptr. 536]* . An acceptance, to be effective, must comply with the terms of the offer in every respect, but it is not essential that the acceptance repeat the identical language [*Schreiber v. Hooker (1952) 114 Cal. App. 2d 634, 639, 251 P.2d 55]* .

With respect to the procedure established by *Code Civ. Proc. § 998*, governing written offers to compromise a pending action, it has been held that both the policy of encouraging settlement and the desirability of maintaining certainty compel the conclusion that general contract principles should not apply to the determination of whether an offer has been rejected. Thus, in the absence of an unequivocal rejection of a *Code Civ. Proc. § 998* offer, the offer may be accepted by the offeree during the statutory period unless the offer has been revoked by the offeror [*Guzman v. Visalia Community Bank (1999) 71 Cal. App. 4th 1370, 1376-1377, 84 Cal. Rptr. 2d 581* (trial court erred in denying plaintiff's request to enforce defendant's *Code Civ. Proc. § 998* offer to compromise, since disparaging comment of plaintiff's counsel regarding that offer did not constitute a rejection)].

[b] Qualified Acceptance Is Rejection

The acceptance must be absolute and unqualified [*Civ. Code § 1585*; *King v. Stanley (1948) 32 Cal. 2d 584, 588, 197 P.2d 321 , disapproved on other grounds, Patel v. Liebermensch (2008) 45 Cal. 4th 344, 351 n.4, 86 Cal. Rptr. 3d 366, 197 P.3d 177]* . A qualified acceptance is a new proposal [*Civ. Code § 1585*; *Ten Winkel v. Anglo Cal. Sec. Co. (1938) 11 Cal. 2d 707, 717, 81 P.2d 958* ; *but see Com. Code § 2207* (expression of acceptance operates as acceptance even though additional or different terms are included)], and constitutes a rejection terminating the offer [*see Roth v.*

Malson (1998) 67 Cal. App. 4th 552, 557-559, 79 Cal. Rptr. 2d 226 (prospective buyer's response to seller's counteroffer was a counter-counteroffer rather than an acceptance, and no contract was formed)]. The new proposal (or counteroffer) must be accepted by the original offeror, now turned offeree, before a contract results [*Landberg v. Landberg (1972) 24 Cal. App. 3d 742, 750, 101 Cal. Rptr. 335]* .

[c] Sealed Bid as Acceptance

Generally, a seller who solicits sealed bids is not bound to accept the highest bid submitted. However, if the seller manifests an intent to be bound by the highest bid submitted, the request or bid is an offer [*Carver v. Teitsworth (1991) 1 Cal. App. 4th 845, 851-852, 2 Cal. Rptr. 2d 446* (acceptance with following change manifested intent to be bound by highest bid: "Sale price to be determined by sealed bid(s) at price not less than $795,000, 2 PM. 9/12/88. Terms will not be renegotiated.")].

A sealed bid that states the price in terms of a formula, such as "$1,000 higher [or lower] than any other sealed bid received at the bid opening," is defective for uncertainty even if the price can be objectively determined [*Carver v. Teitsworth (1991) 1 Cal. App. 4th 845, 853, 2 Cal. Rptr. 2d 446]* . The problem with formula bids is not that they are uncertain, but that they are considered unfair, and thus void, because they defraud both the soliciting party and the sum-certain bidders. The fraud on the sum-certain bidders occurs because it renders their bids ineffective and guarantees the formula bidder's supremacy. The prospect of a formula bidder frightens away potential sum-certain bidders, which chills competition. Fraud on the soliciting party occurs if the formula bidder prevails at a price lower (for a purchase) or higher (for a sale) than actual competition would have produced. However, formula bidding is fully valid if the soliciting party expressly solicits relative bids or if relative bidding is objectively reasonable as being customary in the particular trade or industry [*Carver v. Teitsworth (1991) 1 Cal. App. 4th 845, 854-855, 2 Cal. Rptr. 2d 446* (reversing summary judgment for insufficiency of factual record, which contained no expert opinions regarding industry practice, although clearly sum-certain bidders were not aware that relative bid would be submitted)].

[d] When Acceptance Is Effective

Consent is deemed to be fully communicated between the parties as soon as the offeree puts an acceptance in the course of transmission to the offeror [*Civ. Code § 1583*; *see Civ. Code § 1582* (requiring conformity to conditions of proposal)].

[5] Communication of Consent or Acceptance

[a] Requirement

Generally, in order to constitute a contract, the acceptance of an offer must be communicated to the offeror [*Commercial Casualty Ins. Co. v. Industrial Acci. Com. (1953) 116 Cal. App. 2d 901, 907, 254 P.2d 954* ; *see Civ. Code § 1565(3)*]. For discussion of acceptance of unilateral contracts as an exception to this rule, *see* [b], *below*.

If an offer prescribes any conditions concerning communication of its acceptance, the offeror is not bound unless the acceptance satisfies those conditions. However, when the offer prescribes no conditions, the offeree may use any reasonable and usual mode of accepting [*Civ. Code § 1582*]. That is, if the offer does not make a positive requirement or impose an absolute condition of a specified manner of acceptance but merely suggests a permitted manner, another method of acceptance is not precluded [*Estate of Crossman (1964) 231 Cal. App. 2d 370, 372, 41 Cal. Rptr. 800* ; *see Palo Alto Town & Country Village, Inc. v. BBTC Co. (1974) 11 Cal. 3d 494, 498-500, 113 Cal. Rptr. 705, 521 P.2d 1097* (applying same principles to option)].

[b] Unilateral Contracts

In the case of a unilateral contract, no notice of acceptance by performance is normally required [*Davis v. Jacoby*

(1934) 1 Cal. 2d 370, 378, 34 P.2d 1026 ; for definition of unilateral contract, *see § 140.10[4]*]. An offer for a unilateral contract is accepted and the contract is formed when the offeree performs. However, the offeree is required to give notice of the performance to the offeror within a reasonable time. Without notice, the offeror may treat the offer as lapsed [*Harris v. Time, Inc. (1987) 191 Cal. App. 3d 465, 476, 236 Cal. Rptr. 471* ; *see Skaggs-Stone, Inc. v. La Batt (1960) 182 Cal. App. 2d 142, 143-144, 5 Cal. Rptr. 882* (guaranty of obligation owed to creditor was enforceable only when creditor had notice of undertaking)].

[c] Modes of Communicating Consent or Acceptance

For the acceptance or consent to be effectively communicated, the offeree must perform some act or omission by which the offeree intends to communicate (or that necessarily tends to communicate) consent [*Civ. Code § 1581*]. Consent may be manifested by acts or conduct and need not necessarily be shown by a writing or express words [*Kritzer v. Citron (1950) 101 Cal. App. 2d 33, 39, 224 P.2d 808]* .

When acceptance is by mail, formation of the contract is complete when the letter of acceptance is posted. Delivery to the post office of an acceptance properly addressed and with correct postage operates as delivery to the person addressed at the place and time it is delivered to the post office [*Palo Alto Town & Country Village, Inc. v. BBTC Co. (1974) 11 Cal. 3d 494, 500-501, 113 Cal. Rptr. 705, 521 P.2d 1097* ; *Gibbs v. American Savings & Loan Assn. (1990) 217 Cal. App. 3d 1372, 1376, 266 Cal. Rptr. 517]* . Delivery to a third person who is to deposit the acceptance in the mail is not effective for this purpose [*Gibbs v. American Savings & Loan Assn. (1990) 217 Cal. App. 3d 1372, 1376, 266 Cal. Rptr. 517]* . Even in the face of testimony that an acceptance was deposited in the mail on a certain date, another date on the postmark is sufficient evidence to support a judgment that the acceptance did not occur until the date of the postmark [*Gibbs v. American Savings & Loan Assn. (1990) 217 Cal. App. 3d 1372, 1375-1376, 266 Cal. Rptr. 517]* .

If an offer is accepted by telegram, it takes effect on its deposit for transmission [*Sam Finman, Inc. v. Rokuz Holding Corp. (1955) 130 Cal. App. 2d 758, 761, 279 P.2d 982]* .

Civ. Code §§ 1582 and *1583* apply to irrevocable options as well as to revocable offers. Absent any provisions in the option contract to the contrary, the exercise of an option becomes effective at the time written notice of acceptance is deposited in the mail [*Palo Alto Town & Country Village, Inc. v. BBTC Co. (1974) 11 Cal. 3d 494, 501, 113 Cal. Rptr. 705, 521 P.2d 1097* ; for discussion of revocation before acceptance, *see* [3][c], *above*; for discussion of irrevocable options, *see* [3][d], *above*)].

[d] Silence as Acceptance

Silence generally may not constitute an acceptance unless there is a relationship between the parties, a previous course of dealing pursuant to which silence would be understood as acceptance [*Southern Cal. Acoustics Co. v. C.V. Holder, Inc. (1969) 71 Cal. 2d 719, 722, 79 Cal. Rptr. 319, 456 P.2d 975* ; *accord Adams v. Johns-Manville Corp. (9th Cir. 1989) 876 F.2d 702, 704* (applying California law; settlement procedures in class action provided course of conduct between parties requiring objection by party who intended not to accept settlement offer)], or unless the circumstances impose on the offeree a duty to speak [*Wold v. League of the Cross (1931) 114 Cal. App. 474, 479, 300 P. 57]* . Acceptance may be inferred from inaction in the face of a duty to act to reject a benefit, the retention of a benefit conferred, the past relations of the parties, or the offeror having given the offeree reason to believe that acceptance would be manifested by silence [*Golden Eagle Ins. Co. v. Foremost Ins. Co. (1993) 20 Cal. App. 4th 1372, 1385-1387, 25 Cal. Rptr. 2d 242* ; *see Durgin v. Kaplan (1968) 68 Cal. 2d 81, 91, 65 Cal. Rptr. 158, 436 P.2d 70]* .

Acceptance through silence can be said to be an application of the doctrine of equitable estoppel. A party invoking this doctrine must prove all of the following [*Adams v. Johns-Manville Corp. (9th Cir. 1989) 876 F.2d 702, 706-707* (applying California law)]:

- The party to be estopped was apprised of the facts;

- The party to be estopped intended his, her or its conduct to be acted on, or that party acted in such a way that the party asserting estoppel could reasonably believe that silence would constitute acceptance;

- The party asserting estoppel was ignorant of the actual facts; and

- The party asserting estoppel relied on the other's conduct to his, her, or its injury.

[e] Performance of Conditions or Acceptance of Consideration as Consent

Performance of the conditions of a proposal, or the acceptance of the consideration offered with a proposal, is an acceptance of the proposal [*Civ. Code § 1584*; *see Estate of Klauenberg (1973) 32 Cal. App. 3d 1067, 1070, 108 Cal. Rptr. 669]* . Additionally, in option contracts (*see* [3][d], *above*), although the usual contemplated method of accepting an option is by notice, a valid acceptance may be made by a tender of actual performance [*Riverside Fence Co. v. Novak (1969) 273 Cal. App. 2d 656, 661, 78 Cal. Rptr. 536]* . However, *Civ. Code § 1584*, stating that the acceptance of the consideration offered with a proposal is an acceptance of the proposal, can have no application unless the offeree has an opportunity to reject the consideration before it is conveyed. If the offeree has not had such an opportunity, he or she cannot be said to have accepted [*Desny v. Wilder (1956) 46 Cal. 2d 715, 739, 299 P.2d 257]* .

[f] New Contract Terms Posted on Web Site

In some situations the terms of a consumer service contract are posted on the service provider's web site, and that posting is the only source to which a customer can refer for those terms. If the service provider posts revised terms on the web site, an issue exists as to whether the modified contract is enforceable against an existing customer.

In this situation, the Ninth Circuit has concluded that such a party has no obligation to check the terms of the contract on a periodic basis in order to learn whether they have been changed by the service provider. The customer would not know when to check the web site for possible changes to the contract terms without being notified regarding how the contract had been changed. Even if the customer checked the contract every day for possible changes, an examination still would be cumbersome in the absence of such notice, because the customer would have to compare every word of the posted contract with the existing contract in order to detect whether it had changed. It is elementary that a party cannot unilaterally change the terms of a contract, but must obtain the other party's consent to do so. Presenting a revised contract amounts to nothing more than making an offer and does not bind the other party until it is accepted. Generally an offeree cannot actually assent to an offer unless the offeree knows of its existence. Even if the customer's continued use of the provided service could be considered assent, such assent can be inferred only after the customer has received proper notice of the proposed changes [*Douglas v. United States Dist. Court (9th Cir. 2007) 495 F.3d 1062, 1066-1067]* .

[6] Promise to Agree in Future

[a] In General

The general rule is that if an "essential element" of a promise is reserved for the future agreement of the parties, the promise gives rise to no legal obligation until the future agreement is made. The enforceability of a contract containing a promise to agree depends on the relative importance and the severability of the matter left to the future. It is a question of degree that may be settled by determining whether the indefinite promise is so essential to the bargain that inability to enforce that promise strictly according to its terms would make the enforcement of the remainder of the agreement unfair [*Coleman Engineering Co. v. North American Aviation, Inc. (1966) 65 Cal. 2d 396, 405, 55 Cal. Rptr. 1, 420 P.2d 713* ; *see Com. Code § 2204(3)* (contract for sale of goods does not fail for indefiniteness when terms are left open,

if parties intended to make contract and there is reasonably certain basis for giving appropriate remedy); *Kruse v. Bank of America (1988) 202 Cal. App. 3d 38, 59, 248 Cal. Rptr. 217* (when evidence clearly shows that only subject matter under consideration is left for further negotiation and agreement, no contract is formed; reason is not vagueness and indefiniteness but is simply absence of any terms)].

It is not unlawful or even unusual, however, for contracting parties to agree to cross certain bridges when they are reached [*see, e.g.,* *Herman v. County of Los Angeles (2002) 98 Cal. App. 4th 484, 487-488, 119 Cal. Rptr. 2d 691* (agencies' promise to reach mutual agreement on new placement of former police officers who did not pass review process did not void contract for failure to reach agreement on essential term)].

A minor possible ground of disagreement in an otherwise complete agreement will not render the agreement uncertain. If the matters left for future agreement are unessential, each party will be forced to accept a reasonable determination of the unsettled point, or, if possible, the unsettled point may be left unperformed and the remainder of the contract enforced. The law does not favor the destruction of contracts because of uncertainty. Courts will construe agreements to carry into effect the reasonable intentions of the parties if they can be ascertained and are feasible [*Wong v. Di Grazia (1963) 60 Cal. 2d 525, 539, 35 Cal. Rptr. 241, 386 P.2d 817]* . A promise to agree in the future is unenforceable only when the uncertainty or incompleteness prevents the court from knowing, with the aid of extrinsic evidence if necessary, what to enforce [*Okun v. Morton (1988) 203 Cal. App. 3d 805, 817, 819, 250 Cal. Rptr. 220]* .

One rule of interpretation is that a contract is to be given effect if possible. One court, in considering the term "based on" in an agreement that called for horse-race purses to be based on the previous year's pari-mutuel pools, noted that if "based on" meant "estimated," there would be something left for the parties to agree on, and the contract might be illusory; but if "based on" meant "equal to," there was sufficient certainty [*Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn. (1992) 4 Cal. App. 4th 1538, 1558-1559, 6 Cal. Rptr. 2d 698* (trial court properly submitted matter to jury after admitting extrinsic evidence)].

[b] Intention to Execute Written Agreement

When the parties definitely agree on all of the essential terms of an agreement in a writing, there is a contract even though the parties intendthat a formal writing will be executed later [*see* *Harris v. Rudin, Richman & Appel (1999) 74 Cal. App. 4th 299, 306-309, 87 Cal. Rptr. 2d 822* (distinguishing *Beck v. American Health Group Internat., Inc. (1989) 260 Cal. Rptr. 237* , discussed *below*, when signed letter purported to embody "essential terms" of agreement)]. On the other hand, when there is a manifest intention that the agreement is not to be complete until reduced to a formal writing to be executed, there is no contract until this is done [*Rennick v. O.P.T.I.O.N. Care, Inc. (9th Cir. 1996) 77 F.3d 309, 315-316* ; *Banner Entertainment v. Superior Court (1998) 62 Cal. App. 4th 348, 357-358, 72 Cal. Rptr. 2d 598* ; *Beck v. American Health Group Internat., Inc. (1989) 211 Cal. App. 3d 1555, 1562, 260 Cal. Rptr. 237* ; *Duran v. Duran (1983) 150 Cal. App. 3d 176, 180, 197 Cal. Rptr. 497* ; *Smissaert v. Chiodo (1958) 163 Cal. App. 2d 827, 830-831, 330 P.2d 98]* .

An agreement to agree that shows a manifest intention that the parties not be bound until they have finally agreed or until a final, formal agreement is executed will not support a cause of action for breach of contract or for specific performance [*Autry v. Republic Productions, Inc. (1947) 30 Cal. 2d 144, 151, 180 P.2d 888* ; *Beck v. American Health Group Internat., Inc. (1989) 211 Cal. App. 3d 1555, 1563, 260 Cal. Rptr. 237]* . If an ambiguous written agreement to agree is incorporated into a complaint, or set forth *in haec verba*, and a party does not allege the meaning that party ascribes to it, the court will construe the language of the agreement on its face and as a whole to determine whether there is a manifest intention that the parties are already bound or that they will not be bound until a final, formal document is executed [*Beck v. American Health Group Internat., Inc. (1989) 211 Cal. App. 3d 1555, 1562, 260 Cal. Rptr. 237* ; *Hillsman v. Sutter Community Hospitals (1984) 153 Cal. App. 3d 743, 749-750, 200 Cal. Rptr. 605]* .

[c] Contract to Negotiate an Agreement

One court has held that a contract to negotiate an agreement is distinguishable from a so-called "agreement to agree," and can be formed and breached just like any other contract [*see Copeland v. Baskin Robbins U.S.A. (2002) 96 Cal. App. 4th 1251, 1253, 117 Cal. Rptr. 2d 875* (parties agreed to purchase and sell ice cream manufacturing plant, and agreed to negotiate terms of second agreement for purchase and sale of ice cream manufactured at that plant)]. The court first stated that the contract to negotiate the terms of a second agreement, in this case for the purchase and sale of ice cream, was neither illegal or immoral pursuant to *Civ. Code § 1667*. The court further found that a contract to negotiate the terms of an agreement differs from a mere agreement to agree because failure to agree is not itself a breach of a contract to negotiate. A party will be liable only if a failure to reach ultimate agreement resulted from a breach of that party's obligation to negotiate or to negotiate in good faith [*Copeland v. Baskin Robbins U.S.A. (2002) 96 Cal. App. 4th 1251, 1257*].

The appropriate remedy for breach of a contract to negotiate is not damages for the injured party's lost profits under the prospective contact, but rather damages caused by the injured party's reliance on the agreement to negotiate. Reliance damages include plaintiff's out-of-pocket costs in conducting the negotiations, and any lost opportunity costs [*Copeland v. Baskin Robbins U.S.A. (2002) 96 Cal. App. 4th 1251, 1260-1264, 117 Cal. Rptr. 2d 875* (holding that defendant was entitled to summary judgment because it showed that plaintiff could not establish reliance damages); *see Ch. 177, Damages, § 177.140* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationMeeting of MindsContracts LawFormationOffersGeneral OverviewContracts LawFormationOffersRejectionsContracts LawTypes of ContractsOption ContractsContracts LawTypes of ContractsUnilateral ContractsGeneral Overview

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Volume 13: Conspiracy thru Conversion-Chs. 126-159
Chapter 140 CONTRACTS
PART II. LEGAL BACKGROUND
B. Formation of Enforceable Contract

13-140 California Forms of Pleading and Practice--Annotated § 140.23

§ 140.23 Consideration

[1] In General

Consideration is an act or return promise, bargained for and given in exchange for a promise, which either gives a benefit to the promisor or imposes a burden on the promisee [*Civ. Code § 1605*; *Flojo Internat., Inc. v. Lassleben (1992) 4 Cal. App. 4th 713, 719, 6 Cal. Rptr. 2d 99* ; *Peterson Tractor Co. v. State Board of Equalization (1962) 199 Cal. App. 2d 662, 670, 18 Cal. Rptr. 800]* . A promise alone, unsupported by consideration, is not enforceable and has no binding force [*Western Lith. Co. v. Vanomar Producers (1921) 185 Cal. 366, 369, 197 P. 103* ; *see, e.g., O'Byrne v. Santa Monica-UCLA Medical Center (2002) 94 Cal. App. 4th 797, 808-810* (no consideration was given for medical staff bylaws adopted pursuant to *22 Cal. Code Reg. § 70703*; thus bylaws did not in and of themselves constitute contract between hospital and physician on its medical staff); *see also Kremen v. Cohen (9th Cir. 2003) 337 F.3d 1024, 1028-1029* (registrar of Internet domain name did not breach implied contract with registrant by assigning name to another party; no consideration was given for registration)].

Consideration is a necessary element of both express contracts and implied contracts [*Civ. Code § 1605*; *Grant v. Long (1939) 33 Cal. App. 2d 725, 737, 92 P.2d 940]* . However, the requirement of consideration applies only to executory contracts. After the contract is fully executed on both sides, the question of consideration becomes immaterial [*Schiffman v. Atlas Mill Supply, Inc. (1961) 193 Cal. App. 2d 847, 853, 14 Cal. Rptr. 708]* .

The existence of consideration does not depend on a benefit being conferred on the promisor. It is sufficient if the promisee must take on some burden of suffer some detriment, or gives a return promise to do so [*Brody v. Gabriel (1961) 193 Cal. App. 2d 644, 645, 14 Cal. Rptr. 539]* .

Generally it does not matter from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for a promise, the promise is not gratuitous. In one case, for example, the owner of a closely held corporation had relinquished ownership and control to the corporation's major supplier in return for forgiveness of a debt owed to thecorporation and the right to royalties and commissions based on sales generated by the former owner as sales representative for the reorganized corporation. The corporation refused to pay commissions, claiming that it had not

received any consideration. The court of appeal rejected the argument, characterizing the corporation as the promisor of the promise to pay royalties. The consideration received was the transfer of the corporate stock to the supplier, which was a detriment to the promisee, the former owner, and apparently of vital interest to the corporation [*Flojo Internat., Inc. v. Lassleben (1992) 4 Cal. App. 4th 713, 719, 6 Cal. Rptr. 2d 99]* .

[2] Element of Bargain or Agreed Exchange

The consideration for a promise must actually be bargained for and given in exchange for the promise [*Simmons v. California Institute of Technology (1949) 34 Cal. 2d 264, 272, 209 P.2d 581* ; *Jara v. Suprema Meats, Inc. (2004) 121 Cal. App. 4th 1238, 1251, 18 Cal. Rptr. 3d 187* (promise by one shareholder to another not to vote for increased officer compensation without other's agreement was unenforceable gratuitous promise because it was not induced by, or given, to induce return promise or performance); *Passante v. McWilliam (1997) 53 Cal. App. 4th 1240, 1247-1249, 62 Cal. Rptr. 2d 298* (attorney who arranged loan could not enforce subsequent promise by grateful borrower to transfer stock to attorney)]. No act of an offeree can constitute consideration binding on the offeror unless the latter agrees to be bound in return [*Bard v. Kent (1942) 19 Cal. 2d 449, 452, 122 P.2d 8]* . The fact that the promisee relies on the promise to the promisee's injury, or the promisor gains some advantage, does not establish consideration without the element of bargain or agreed exchange [*Meyer v. Glenmoor Homes, Inc. (1966) 246 Cal. App. 2d 242, 259, 55 Cal. Rptr. 502*].

[3] When Consideration Presumed

A written instrument is presumptive evidence of consideration [*Civ. Code § 1614*]. Thus, the plaintiff does not need to plead the existence and character of the consideration in a complaint for breach of contract if the pleading states that the contract was in writing [*Henke v. Eureka Endowment Asso. (1893) 100 Cal. 429, 433, 34 P. 1089]* , or if a written contract is set forth in full in the pleading [*Williams v. Hall (1889) 79 Cal. 606, 607, 21 P. 965]* .

The presumption of consideration under *Civ. Code § 1614* affects the burden of producing evidence, not the burden of proof [*Rancho Santa Fe Pharmacy, Inc. v. Seyfert (1990) 219 Cal. App. 3d 875, 884, 268 Cal. Rptr. 505]* . Once the court admits sufficient evidence to call into question the validity of the presumed fact, *i.e.*, consideration, the proponent of the written instrument has the burden of proving the presumed fact [*Rancho Santa Fe Pharmacy, Inc. v. Seyfert (1990) 219 Cal. App. 3d 875, 883*]. On the other hand, the burden of pleading and proving the lack of consideration is on the party seeking to avoid the contract on that ground [*Civ. Code § 1615*; *Blonder v. Gentile (1957) 149 Cal. App. 2d 869, 874, 309 P.2d 147]* . However, the presumption does not apply to a contract in which a different rule is expressly prescribed [*Toomy v. Dunphy (1890) 86 Cal. 639, 642, 25 P. 130]* , nor does it apply to ordinary letters [*Michaelian v. State Fund (1996) 50 Cal. App. 4th 1093, 1112, 58 Cal. Rptr. 2d 133* ; *Foltz v. First Trust & Sav. Bank (1948) 86 Cal. App. 2d 59, 61, 194 P.2d 135]* .

The recital of a certain specific consideration in an agreement subscribed by both parties is a statement or admission of the parties that the consideration was received and is prima facie evidence to that effect [*Podesta v. Mehrten (1943) 57 Cal. App. 2d 66, 71, 134 P.2d 38]* . Nevertheless, the parties are not estopped by recitals in an agreement with respect to its consideration. A party may always show the true consideration or want of it by extrinsic evidence for the purpose of avoiding a contract, even though the contract states facts that show a valuable consideration [*Royer v. Kelly (1916) 174 Cal. 70, 72, 161 P. 1148]* .

[4] Mutuality of Obligation Required

When the parties exchange promises as consideration in their attempt to contract, the promises must be mutual in obligation. Without mutuality of obligation, there is no consideration for the agreement, and no enforceable contract results.

The mutuality of obligation principle, however, applies only to bilateral contracts. In the unilateral contract context,

there is no mutuality of obligation [*see Asmus v. Pacific Bell (2000) 23 Cal. 4th 1, 14-15, 96 Cal. Rptr. 2d 179, 999 P.2d 71* (rule governing termination of unilateral contracts is that once employer promisor determines it will terminate or modify contract, and provides its employees with reasonable notice of change, additional consideration is not required)].

For discussion of lack of mutuality of obligation as a defense to an action for breach of contract, see *§ 140.62[1]*.

[5] Ability of One Party to Terminate Contract

Courts generally hold that contracts permitting one party to withdraw at will, or permitting performance by one party as he or she pleases, lack consideration. However, a contract is not necessarily unenforceable if one party has the power to terminate the contract under certain conditions. For instance, the defense of lack of mutuality of obligation (*see § 140.62[1]*) generally does not apply if a party has the right to terminate the contract on the happening of certain contingencies beyond the party's control [*Vitagraph, Inc. v. Liberty Theatres Co. (1925) 197 Cal. 694, 701, 242 P. 709]* . The defense also does not apply when a party has a power ofrevocation, if the power is exercisable only on notice to the other party. In such a case the requirement of notice is a sufficient legal detriment to constitute consideration [*Mutz v. Wallace (1963) 214 Cal. App. 2d 100, 111, 29 Cal. Rptr. 170]* . For discussion of termination of contracts generally, see *§ 140.47*.

[6] Requirements Contracts

[a] Validity in General

A contract that reserves in either party an option to deliver or to accept personal property, or to contract for a future delivery, and under which the quantity is dependent on the will, wish, want, or desire of the other party, is void for lack of consideration and mutuality. For discussion of defense of lack mutuality generally, see *§ 140.62[1]*. However, when a buyer agrees to buy what he or she needs or requires of a certain product, and the seller absolutely promises to sell, a contract is made. Such a contract imposes on the buyer the duty of buying what the buyer requires from the seller and on the seller the obligation to sell to the buyer at the contract price [*Ross v. Frank W. Dunne Co. (1953) 119 Cal. App. 2d 690, 698, 260 P.2d 104]* .

[b] Performance Conditional on Party's Satisfaction

Contracts making the duty of performance of one of the parties conditional on that party's satisfaction are enforceable. They are of two kinds [*see Mattei v. Hopper (1958) 51 Cal. 2d 119, 122-123, 126, 330 P.2d 625]* :

- Contracts in which the condition calls for satisfaction as to commercial value or quality, operative fitness, or mechanical utility are enforceable, since dissatisfaction cannot be claimed arbitrarily, unreasonably, or capriciously. Courts use the standard of the reasonable person in determining whether satisfaction has been received.

- Contracts containing satisfaction clauses involving fancy, taste, or judgment are nevertheless enforceable, even though the satisfaction of one party is dependent on a subjective standard, since the party's determination of dissatisfaction must be made in good faith [*see, e.g., Locke v. Warner Bros., Inc. (1997) 57 Cal. App. 4th 354, 364-365, 66 Cal. Rptr. 2d 921* (evidence raised triable issue of material fact as to whether movie studio had honest or good faith dissatisfaction with director's proposals under film development deal)].

One party's approval of the documents, or of preliminary title reports and inspections in real estate transactions, may be a condition precedent to that party's performance. If the party whose approval is required expressly and unequivocally disapproves, the contract is terminated and cannot be revived by later waiver of the condition [*Beverly Way Associates*

v. Barham (1990) 226 Cal. App. 3d 49, 51, 56, 276 Cal. Rptr. 240] .

[7] Sufficiency of Consideration

[a] Intrinsic Value Not Counted

The sufficiency of the consideration supporting a promise does not depend on its intrinsic value. Generally, courts do not inquire into the real value of consideration as long as it is something of legally cognizable value. The determination as to the adequacy of the consideration in this regard is left to the parties at the time of contracting and should not be made by the court when one party attempts to enforce the contract [*see Schumm v. Berg (1951) 37 Cal. 2d 174, 185, 231 P.2d 39* ; *Rice v. Brown (1953) 120 Cal. App. 2d 578, 582, 261 P.2d 565]* . However, this rule does not preclude a party from showing that the consideration had some value at least. Something that is completely worthless by any standard cannot constitute a valid consideration [*Louisville Title Ins. Co. v. Surety Title & Guar. Co. (1976) 60 Cal. App. 3d 781, 791, 132 Cal. Rptr. 63]* .

[b] Court's Power to Weigh Consideration

Whether sufficient consideration was received by a promisor is a question of fact [*Estate of Thomson (1913) 165 Cal. 290, 296, 131 P. 1045]* . In certain cases, courts have been given the power by statute to consider relative values in weighing the sufficiency of consideration. These cases include agreements involving the rights of heirs, devisees, and legatees [Prob. Code § 1020.1; *Estate of Freeman (1965) 238 Cal. App. 2d 486, 489, 48 Cal. Rptr. 1]* .

Further, the courts may not enforce specific performance against a party to a contract unless that party has received adequate consideration [*Civ. Code § 3391*; *Morrill v. Everson (1888) 77 Cal. 114, 115-116, 19 P. 190* ; for discussion of specific performance generally, see Ch. 528, *Specific Performance*]. In this context, "adequate" means a consideration that is fair and reasonable in the circumstances [*Chalmers v. Raras (1962) 200 Cal. App. 2d 682, 689, 19 Cal. Rptr. 531]* . In considering the circumstances, the court should determine the object to be obtained by the contract and the relationship of the parties [*Berkeley Lawn Bowling Club v. City of Berkeley (1974) 42 Cal. App. 3d 280, 290, 116 Cal. Rptr. 762]* .

[c] Sufficiency at Time of Making Contract

The courts determine the sufficiency of the consideration as of the time the parties entered into the contract, not in relation to a subsequent time [*Crail v. Blakely (1973) 8 Cal. 3d 744, 753, 106 Cal. Rptr. 187, 505 P.2d 1027]* . If there was sufficient consideration at the time the parties made the agreement, the fact that it subsequently diminished in value or became of no value does not relieve the promisor from liability on the promise [*Riverside Water Co. v. Jurupa Ditch Co. (1960) 187 Cal. App. 2d 538, 542, 9 Cal. Rptr. 742]* .

[d] Moral Obligation as Consideration

In general, a moral obligation is not consideration for a contract. However, a moral obligation originating in some benefit conferred on the promisor or prejudice suffered by the promisee is consideration for a promise [*see Civ. Code § 1606*] if good and valuable consideration once existed [*Wilson v. Wilson (1960) 54 Cal. 2d 264, 271-272, 5 Cal. Rptr. 317, 352 P.2d 725* (father's moral obligation of continued support of children after failure to perform property agreement made at time of divorce rested on legal duty to support children)].

For example, if a party once had a past legal obligation, but the remedy is now barred, *e.g.*, when a debt is barred by the statute of limitations or a discharge in bankruptcy or an original obligation is barred by the statute of frauds, a subsequent promise to pay is enforceable [*cf. Dow v. River Farms Co. (1952) 110 Cal. App. 2d 403, 410, 243 P.2d 95* (company's promise to pay plaintiff's husband for past services rendered was only promise to make gift and unenforceable because no past legal obligation existed)]. The subsequent promise is enforceable because, although the

remedy to enforce the payment of the debt is gone or never existed, the moral obligation to pay remains [*Lambert v. Schmalz (1897) 118 Cal. 33, 35, 50 P. 13]* .

If there was no expectation of payment by either party when past services were rendered, a promise by the party receiving the services to pay the performing party is a mere promise to make a gift and not enforceable [*Passante v. McWilliam (1997) 53 Cal. App. 4th 1240, 1248-1249, 62 Cal. Rptr. 2d 298* (no consideration for directors' oral promise to provide corporation's attorney with stock interest in return for arranging financing when loan was arranged before stock was promised)].

[e] Promise to Perform Existing Duty

Consideration for an agreement is not adequate when it is a mere promise to perform what the promisor is already legally bound to do [*Grant v. Aerodraulics Co. (1949) 91 Cal. App. 2d 68, 75, 204 P.2d 683]* . For example, a promise of extra compensation for completion of a contract, made to a party who has the existing legal duty to perform the contract, is without consideration [*Bailey v. Breetwor (1962) 206 Cal. App. 2d 287, 291-292, 23 Cal. Rptr. 740]* .

However, the agreed consideration may consist almost wholly of a performance that is already required if some small additional performance is bargained for and given. Thus, if the bargained-for performance that is rendered includes something not within the requirements of an existing duty, the requirement of consideration is met [*House v. Lala (1963) 214 Cal. App. 2d 238, 243, 29 Cal. Rptr. 450]* .

[f] Relinquishment of Claimed Right

Relinquishment or forbearance of a claimed right is consideration for the creation of a new right, regardless of whether the claimed right actually was effective [*Walters v. Calderon (1972) 25 Cal. App. 3d 863, 873-874, 102 Cal. Rptr. 89]* . Examples include [*Booth v. Bond (1942) 56 Cal. App. 2d 153, 157, 132 P.2d 520]* :

- Cancellation of an existing debt.
- Release of security.
- Forbearance to sue (even though it subsequently appears that the forbearer might not have been successful in the suit).

Similarly, a promise given in consideration of the settlement or compromise of a dispute or controversy, the outcome of which is uncertain or doubtful, is supported by consideration [*see* *Baker v. Philbin (1950) 97 Cal. App. 2d 393, 397, 218 P.2d 119]* .

The determinative question is whether the purported right waived or relinquished was one the promisee could have urged in good faith and which presented some bona fide question of validity, however slight, rather than whether the right was legally valid and effective. If the right waived and relinquished was obviously worthless and ineffective, a promise to relinquish it would not constitute valid consideration [*Walters v. Calderon (1972) 25 Cal. App. 3d 863, 873-874, 102 Cal. Rptr. 89]* .

[8] Promissory Estoppel as Substitute for Consideration

[a] In General

Consideration is something bargained for and given in exchange for a promise. The promisee's performance is requested at the time the promisor makes the promise and the performance is bargained for. The absence of this bargained-for exchange would normally render a promise unenforceable. Nevertheless, a promisor may be bound under the doctrine

of promissory estoppel when the following conditions exist [*Drennan v. Star Paving Co. (1958) 51 Cal. 2d 409, 413, 333 P.2d 757* ; *US Ecology, Inc. v. State (2005) 129 Cal. App. 4th 887, 891, 908, 28 Cal. Rptr. 3d 894* ; *Smith v. City and County of San Francisco (1990) 225 Cal. App. 3d 38, 48, 275 Cal. Rptr. 17* ; *Sheppard v. Morgan Keegan & Co. (1990) 218 Cal. App. 3d 61, 67, 266 Cal. Rptr. 784* ; *A-C Co. v. Security Pacific Nat. Bank (1985) 173 Cal. App. 3d 462, 474, 219 Cal. Rptr. 62]* :

- The promisor makes a promise that the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee;

- The promise does induce such action or forbearance;

- The promisor's breach of the promise was a substantial factor in causing injury to the promisee; and

- Injustice can be avoided only by enforcement of the promise.

The doctrine of promissory estoppel employs equitable principles to satisfy the requirement that consideration be given in exchange for the promise sought to be enforced [*Raedeke v. Gibraltar Sav. & Loan Asso. (1974) 10 Cal. 3d 665, 672, 111 Cal. Rptr. 693, 517 P.2d 1157]* .

[b] Elements

For the doctrine of promissory estoppel to apply, the plaintiff must establish that:

- Defendant made a promise [*see* *Southern Cal. Acoustics Co. v. C.V. Holder, Inc. (1969) 71 Cal. 2d 719, 723, 79 Cal. Rptr. 319, 456 P.2d 975* ; *see also* *Glen Holly Entm't Inc. v. Tektronix Inc. (9th Cir. 2003) 352 F.3d 367, 381* (affirming dismissal of promissory estoppel claim; alleged representations did not constitute actionable promises because they were too vague and indefinite to be enforceable); *Lange v. TIG Ins. Co. (1998) 68 Cal. App. 4th 1179, 1186-1187, 81 Cal. Rptr. 2d 39* (doctrine of promissory estoppel did not apply when no promise of sufficient definitiveness and clarity was found)];

- The plaintiff's reliance on defendant's promise was reasonable [*see* *MacIsaac & Menke Co. v. Freeman (1961) 194 Cal. App. 2d 327, 335, 15 Cal. Rptr. 48]* ;

- The plaintiff suffered substantial detriment as a result of the reliance on defendant's promise or representation [*see* *Henry v. Weinman (1958) 157 Cal. App. 2d 360, 366-367, 321 P.2d 117]* ; and

- Defendant's breach of the promise was a substantial factor in causing injury to the plaintiff [*US Ecology, Inc. v. State (2005) 129 Cal. App. 4th 887, 891, 908, 28 Cal. Rptr. 3d 894]* .

The existence of these elements is a question of fact [*Division of Labor Law Enforcement v. Transpacific Transportation Co. (1977) 69 Cal. App. 3d 268, 275-276, 137 Cal. Rptr. 855]* .

As an illustration of the application of promissory estoppel, in the case of an employment contract, the court may estop an employer from terminating an employee before the start date, and without an opportunity to demonstrate the employee's ability to meet the job requirements, after the employee severs his or her former employment and moves across the country [*Sheppard v. Morgan Keegan & Co. (1990) 218 Cal. App. 3d 61, 67, 266 Cal. Rptr. 784]* .

The California Supreme Court has applied the doctrine of promissory estoppel in the public contract context, holding that the lowest responsible bidder that was wrongfully denied a public contract has a cause of action for monetary damages against the public entity. Those damages, however, included bid preparation costs but not lost profits [

Kajima/Ray Wilson v. Los Angeles MTA (2000) 23 Cal. 4th 305, 315-317, 96 Cal. Rptr. 2d 747] .

[c] Equitable Estoppel

Evid. Code § 623 creates a related doctrine called "equitable estoppel." It provides that a party who has, by the party's own statement or conduct, intentionally and deliberately led another to believe a particular thing to be true and to act on that belief, may not, in litigation arising out of that statement or conduct, contradict it. The doctrine of equitable estoppel requires proof of four elements [*Hair v. State of California (1991) 2 Cal. App. 4th 321, 328-329, 2 Cal. Rptr. 2d 871]* :

- The party to be estopped must be apprised of the true facts;
- The party to be estopped must intend that his, her or its conduct be acted on, or must act so that the party asserting the estoppel had a right to believe that was the intent;
- The party asserting the estoppel must be ignorant of the true facts; and
- The party asserting the estoppel must rely on the conduct or statement to that party's injury.

An oral promise to make a will or not to revoke a will [*see generally Prob. Code § 21700* (statute of frauds); *see also* former *Civ. Code § 1624(6)* (statute of frauds applicable to such contracts made before 1985); former *Prob. Code § 150* (statute of frauds applicable to such contracts made in 1985-2000)] can be enforced by application of the equitable estoppel doctrine, whether the promisor is living [*Juran v. Epstein (1994) 23 Cal. App. 4th 882, 897, 28 Cal. Rptr. 2d 588]* or dead [*Estate of Housley v. Haywood (1997) 56 Cal. App. 4th 342, 349-351, 357-358, 65 Cal. Rptr. 2d 628]* . Furthermore, a party may be estopped from asserting the statute of limitations as a defense to an untimely action to enforce an oral promise to make a will [*Battuello v. Battuello (1998) 64 Cal. App. 4th 842, 847-848, 75 Cal. Rptr. 2d 548* (appellant alleged sufficient facts to come within doctrine of equitable estoppel to assertion of one-year statute of limitations set forth in *Code Civ. Proc. § 366.2*, which applied because promisor made inter vivos transfer of property covered by contract)].

The complaint in § 140.106[1] may be modified to allege breach of a contract arising from, and the terms of which are governed by, the defendant's conduct or statement. For an affirmative defense asserting equitable estoppel to establish discharge of an obligation, see Ch. 385, *Negotiable Instruments* .

[9] Failure of Consideration Based on Failure to Perform

[a] In General

Failure of consideration is the failure to perform a promise, the performance of which has been exchanged for performance by the other party. In all executory contracts the several promises of the parties constitute toeach, reciprocally, the consideration of the contract. A failure to perform constitutes a failure of consideration, either partial or total, within the meaning of *Civ. Code § 1689* (grounds for rescission of contract) [*Bliss v. California Coop. Producers (1947) 30 Cal. 2d 240, 248-249, 181 P.2d 369* ; for discussion of partial failure, *see* [b], *below*].

The other party may invoke the failure as a basis for rescinding or terminating the contract, provided the failure or refusal to perform constitutes a breach in such an essential particular as to justify rescission or termination. The right of the aggrieved party to claim release from obligations and thus to elect to terminate the contract depends on the gravity of the breach [*Taliaferro v. Davis (1963) 216 Cal. App. 2d 398, 411-412, 31 Cal. Rptr. 164]* .

Failure of consideration, however, does not vitiate the contract from the beginning. Until rescinded or terminated, a

contract once in effect remains in effect. This principle rests on the distinction that failure of consideration is based not on facts existing at the time the mutual promises in a bilateral contract are made, but on some fact or contingency that occurs between the time of the making of the contract and the action that results in the material failure of performance by one party [*Taliaferro v. Davis (1963) 216 Cal. App. 2d 398, 411, 31 Cal. Rptr. 164]* .

For an affirmative defense based on failure of consideration, see *§ 140.148[1]*.

[b] Partial Failure of Consideration

A failure of a part of a lawful consideration nullifies that part. However, because the amount of consideration is irrelevant, the court may nevertheless enforce the promise if there remains a substantial consideration [*Del Riccio v. Photochart (1954) 124 Cal. App. 2d 301, 312, 268 P.2d 814*]. Although an insubstantial failure of consideration does not give the other party the right to rescind the contract, it can be a basis for damages [*Hofland v. Gustafson (1955) 132 Cal. App. 2d Supp. 907, 909*]. A partial failure of consideration resulting from the willful failure of a party to perform a material part of the contract is sufficient, however, to justify the other party's rescission [*Bonadelle Construction Co. v. Hernandez (1959) 169 Cal. App. 2d 396, 399, 337 P.2d 85]* .

[c] Substantial Performance

Substantial performance means that [*Bonadelle Construction Co. v. Hernandez (1959) 169 Cal. App. 2d 396, 399, 337 P.2d 85]* :

- There has been no willful departure from the terms of the contract;
- There has been no omission of any of its essential parts; and
- The performing party has in good faith performed all of the substantive terms of the contract.

The doctrine of substantial performance assumes the existence of a binding contract [*Rosenaur v. Pacelli (1959) 174 Cal. App. 2d 673, 677, 345 P.2d 102]* . The rule as to what constitutes substantial performance is indefinite, and the question must be determined in each case with reference to the existing facts and circumstances [*Bonadelle Construction Co. v. Hernandez (1959) 169 Cal. App. 2d 396, 399, 337 P.2d 85]* . The defects in performance must be easily remedied or compensated, so that the other party may get almost what the contract called for [*Posner v. Grunwald-Marx, Inc. (1961) 56 Cal. 2d 169, 187, 14 Cal. Rptr. 297, 363 P.2d 313]* . For further discussion, see Ch. 104, *Building Contracts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawConsiderationEnforcement of PromisesForbearanceContracts LawConsiderationMutual ObligationContracts LawConsiderationPromissory EstoppelContracts LawConsiderationSufficient ConsiderationContracts LawDefensesEquitable EstoppelGeneral Overview

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B. Formation of Enforceable Contract

13-140 California Forms of Pleading and Practice--Annotated § 140.24

§ 140.24 Illegal Contracts

[1] What Makes Contract Illegal

The consideration and the object of a contract--that is, the thing the party receiving the consideration agrees to do or not to do [*Civ. Code § 1595*]--must be lawful. If either the consideration or the object of the contract is unlawful, the contract is illegal and may be unenforceable [*McIntosh v. Mills (2004) 121 Cal. App. 4th 333, 344, 346, 17 Cal. Rptr. 3d 66]* . A contract is illegal if the object or consideration is any of the following [*Civ. Code §§ 1596, 1607, 1109* & *1667*; *Diosdado v. Diosdado (2002) 97 Cal. App. 4th 470, 474, 118 Cal. Rptr. 2d 494* (contract between husband and wife providing for liquidated damages for infidelity held contrary to public policy); *Homami v. Iranzadi (1989) 211 Cal. App. 3d 1104, 1109-1111, 260 Cal. Rptr. 6* ; *Green v. Mt. Diablo Hospital Dist. (1989) 207 Cal. App. 3d 63, 71, 254 Cal. Rptr. 689* ; *Bovard v. American Horse Enterprises, Inc. (1988) 201 Cal. App. 3d 832, 838, 247 Cal. Rptr. 340* ; *see Vick v. Patterson (1958) 158 Cal. App. 2d 414, 417, 322 P.2d 548]* :

- Contrary to an express provision of law;
- Contrary to the policy of express law, even though not expressly prohibited; or
- Otherwise contrary to good morals.

Whether a contract is illegal or contrary to public policy is a question of law to be determined from the circumstances of each particular case [*Jackson v. Rogers & Wells (1989) 210 Cal. App. 3d 336, 349-350, 258 Cal. Rptr. 454* ; *Kallen v. Delug (1984) 157 Cal. App. 3d 940, 951, 203 Cal. Rptr. 879]* .

For affirmative defenses asserting illegality, see *§ 140.143* (contract contrary to an express provision of law) and § 140.145 (contract contrary to public policy or good morals).

[2] Contrary to Law or Public Policy

Generally, a contract that is against public policy or against the mandate of a statute is void and may not be made the

foundation of any action,either in law or in equity [*McIntosh v. Mills (2004) 121 Cal. App. 4th 333, 344, 17 Cal. Rptr. 3d 66* ; *Homami v. Iranzadi (1989) 211 Cal. App. 3d 1104, 1109-1111, 260 Cal. Rptr. 6* ; *South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 Cal. App. 3d 750, 756, 102 Cal. Rptr. 286*]. In determining whether the subject of a given contract violates public policy, courts must rely on the state of law as it existed at the time the contract was made [*Bovard v. American Horse Enterprises, Inc. (1988) 201 Cal. App. 3d 832, 840 n.3, 247 Cal. Rptr. 340* ; *Moran v. Harris (1982) 131 Cal. App. 3d 913, 918, 182 Cal. Rptr. 519*].

Such illegal contracts include the following agreements for the sharing of attorney's fees:

- A contract for fee sharing between an attorney and a nonlawyer [*McIntosh v. Mills (2004) 121 Cal. App. 4th 333, 344, 17 Cal. Rptr. 3d 66* (unenforceable as contrary to rule of professional conduct)].

- A contract for fee-sharing between attorneys not in compliance with *Cal. Rules Prof. Conduct, Rule 2-200*, which prohibits fee-sharing between attorneys who are not partners, except by written client consent [*see* *Chambers v. Kay (2002) 29 Cal. 4th 142, 162-163, 126 Cal. Rptr. 2d 536, 56 P.3d 645* (Rule 2-200 was approved to protect public and promote respect and confidence in legal profession, and fee-sharing agreements not in compliance with that rule therefore are unenforceable); *Margolin v. Shemaria (2000) 85 Cal. App. 4th 891, 903, 102 Cal. Rptr. 2d 502* (attorney who made case referral to another attorney had no viable contract for sharing of fees that complied with Rule 2-200); *but see Huskinson & Brown, LLP v. Wolf (2004) 32 Cal. 4th 453, 464, 9 Cal. Rptr. 3d 693, 84 P.3d 379* (law firm was barred from recovering under fee-sharing agreement with another firm, in absence of written client consent to agreement required by Rule 2-200, but was entitled to recover from other firm in quantum meruit for reasonable value of services rendered on client's behalf)].

Other kinds of contracts that are illegal as violating a statute or public policy include the following:

- An agreement by which an heir hunter obtains an assignment authorizing the heir hunter to select and pay for an attorney, if there is any element of legal representation included in the contract or assignment, such as the heir hunter's being empowered to control litigation involving the inheritance in question [*Estate of Molino (2008) 165 Cal. App. 4th 913, 923, 81 Cal. Rptr. 3d 512* (void as against public policy)].

- An agreement for an agent to be compensated for procuring performance engagements for a singer, if the agent does not meet licensing requirements in the Talent Agencies Act, *Lab. Code § 1700 et seq.* [*Yoo v. Robi (2005) 126 Cal. App. 4th 1089, 1103, 24 Cal. Rptr. 3d 740* (agent's contract was void; defense of illegality based on public policy was not waived by failure to include it as affirmative defense, since legality was challenged in petition to Labor Commissioner, who found contract illegal and void)].

- An agreement for the establishment of a plant in Iran to manufacture computer products to be sold in Iran [*Kashani v. Tsann Kuen China Enterprise, Ltd. (2004) 118 Cal. App. 4th 531, 537, 13 Cal. Rptr. 3d 174* (unenforceable as illegal and against public policy because it violated U.S. presidential executive orders and implementing regulations excluding U.S. persons from transactions relating to supply of technology to Iran)].

- A contract between spouses providing for liquidated damages for infidelity [*Diosdado v. Diosdado (2002) 97 Cal. App. 4th 470, 474, 118 Cal. Rptr. 2d 494* (contrary to public policy underlying no-fault provisions for dissolution of marriage)].

- A sperm bank's agreement with potential parents precluding disclosure of a donor's identity and other information under all circumstances [*Johnson v. Superior Court (2000) 80 Cal. App. 4th 1050,*

1065-1067, 95 Cal. Rptr. 2d 864 (contrary to public policy and unenforceable, as *Fam. Code § 7613* permits disclosure of insemination records under certain circumstances); *but see Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 189-190, 98 Cal. Rptr. 2d 44* (agreement by unmarried couple to grant male partner paternity rights to child conceived by artificial insemination was not against public policy, and served rather than contravened family law policies to legitimate children and provide for their support)].

- A confidentiality clause in a settlement agreement that prohibits a securities dealer's customer from discussing the dealer's misconduct with regulatory authorities [*Cariveau v. Halferty (2000) 83 Cal. App. 4th 126, 138, 99 Cal. Rptr. 2d 417* (void and unenforceable as violation of public policy set forth in securities laws and regulations)].

[3] Taint of Partial Illegality

If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void [*Civ. Code § 1608*]. Similarly, if a contract has a single object and that object is unlawful, either in whole or in part, the entire contract is void [*Civ. Code § 1598*; *see Yoo v. Jho (2007) 147 Cal. App. 4th 1249, 1251, 1256, 55 Cal. Rptr. 3d 243* (in view of illegal object of contract for sale of business dealing in counterfeit goods, trial court erred in entertaining action and in awarding any relief, including attorney's fees; also holding that if parties fail to raise issue of contract's illegality, trial court should raise it *sua sponte* when evidence reveals probable illegality); *Bovard v. American Horse Enterprises, Inc. (1988) 201 Cal. App. 3d 832, 838, 247 Cal. Rptr. 340* (refusing to enforce notes given to purchase company that manufactured jewelry and drug paraphernalia)]. For the legal effect of a void contract, see *§ 140.10[6]*.

However, if the contract is only partially illegal, these rules apply only when the court otherwise determines that the contract is not severable [*see Keene v. Harling (1964) 61 Cal. 2d 318, 320, 324, 38 Cal. Rptr. 513, 392 P.2d 273]* . Thus, if the transaction is of a nature that the good part of the consideration can be separated from what is bad, courts make void only what is against the law and let the rest stand[*Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 Cal. 4th 119, 137-138, 140, 70 Cal. Rptr. 2d 304, 949 P.2d 1* ; *Keene v. Harling (1964) 61 Cal. 2d 318, 320, 324, 38 Cal. Rptr. 513, 392 P.2d 273]* .

If the contract has several distinct objects, at least one of which is lawful, the contract is valid and enforceable as to the lawful object, provided the lawful object is clearly severable from the rest [*Civ. Code § 1599*; *Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 Cal. 4th 119, 137-138, 140, 70 Cal. Rptr. 2d 304, 949 P.2d 1* ; *Symcox v. Zuk (1963) 221 Cal. App. 2d 383, 389, 34 Cal. Rptr. 462]* . *Civ. Code § 1599* authorizes, but does not require, a court to sever the illegal object of a contract from the legal object. The decision whether to sever the illegal object of a contract is informed by equitable considerations [*Yoo v. Robi (2005) 126 Cal. App. 4th 1089, 1105, 24 Cal. Rptr. 3d 740* ; e.g., *Chiba v. Greenwald (2007) 156 Cal. App. 4th 71, 81-82, 67 Cal. Rptr. 3d 86* (trial court, in refusing to order severance, correctly found that agreement's lawful and unlawful objects were inextricably intertwined and correctly disregarded plaintiff's attempt, in second amended complaint, to allege separate consideration for each object, which allegation was inconsistent with two previous iterations of complaint)].

[4] Exculpatory Contract

Any contract that has for its object, directly or indirectly, to exempt anyone from responsibility for any of the following is against the policy of the law [*Civ. Code § 1668*; *see Neubauer v. Goldfarb (2003) 108 Cal. App. 4th 47, 54-57, 133 Cal. Rptr. 2d 218* ; *Farnham v. Superior Court (1997) 60 Cal. App. 4th 69, 73, 70 Cal. Rptr. 2d 85* ; *Blankenheim v. E.F. Hutton & Co. (1990) 217 Cal. App. 3d 1463, 1472-1473, 266 Cal. Rptr. 593* (negligent misrepresentation as species of fraud within meaning of *Civ. Code § 1668*)]:

- The person's own fraud;

- The person's own willful injury to the person or property of another; or
- The person's own violation of law, whether willful or negligent.

The plain language of *Civ. Code § 1668* shows that its provisions apply to "[a]ll contracts" the object of which is, directly or indirectly, to exempt "anyone" from responsibility for his or her "own fraud, or willful injury to the person or property of another, or violation of law"; therefore, no exculpatory provision in any contract can be invoked by anyone who claims to have the benefit of the provision (whether or not the person is a party to the contract), in order to avoid the legal consequences of the person's own fraud, willful injury of another, or violation of law [*Manderville v. PCG&S Group, Inc. (2007) 146 Cal. App. 4th 1486, 1501-1502, 55 Cal. Rptr. 3d 59* (defendant real estate broker could not invoke any exculpatory provisions of standard-form CAR contract of sale between plaintiff and broker's client, to avoid liability for broker's intentional misrepresentation to plaintiff)].

For example, an agreement exculpating a child care provider from its own negligence is void as against public policy [*Gavin W. v. YMCA of Metropolitan Los Angeles (2003) 106 Cal. App. 4th 662, 671-674, 131 Cal. Rptr. 2d 168* (finding that contract involved public interest under criteria enumerated in *Tunkl v. Regents of University of California (1963) 60 Cal. 2d 92, 32 Cal. Rptr. 33, 383 P.2d 441*); *see § 140.145, below*]. A contractual clause prohibiting any recovery of damages (but not equitable relief) for any violation of statutory or regulatory law not made part of the parties' contractual obligations was held invalid under *Civ. Code § 1668* [*Health Net of Cal., Inc. v. Dept. of Health Servs. (2003) 113 Cal. App. 4th 224, 226-227, 234-236, 6 Cal. Rptr. 3d 235* (extending settled interpretation of § 1668 with respect to violations of statutory law, to cover regulatory violations; contract involved public interest under *Tunkl*)]. A waiver of corporate directors' and majority shareholders' fiduciary duties to a minority shareholder in a private close corporation has been held to be against public policy and a clause purporting to effect such a waiver in a buy-sell agreement was held void [*Neubauer v. Goldfarb (2003) 108 Cal. App. 4th 47, 54-57, 133 Cal. Rptr. 2d 218]* .

However, *Civ. Code § 1668* is not strictly applied. It does not per se prohibit a contractual release of future liability for ordinary negligence unless the "public interest" is involved or unless a statute expressly forbids it, and does not bar either contractual indemnity or insurance [*see* *Benedek v. PLC Santa Monica, LLC (2002) 104 Cal. App. 4th 1351, 1358-1359, 129 Cal. Rptr. 2d 197* (express language of unambiguous release of health club from all premises liability applied to personal injuries unrelated to exercise suffered by member; release of premises liability in consideration of permission to enter recreational facilities does not violate public policy); *Farnham v. Superior Court (1997) 60 Cal. App. 4th 69, 74-75, 70 Cal. Rptr. 2d 85* (contractual limitation on liability of corporate directors for defamation was not incompatible with public policy so as to violate *Civ. Code § 1668*)].

An agreement made in the context of sports or recreational programs or services, purporting to release anyone from liability for future gross negligence, generally is unenforceable as a matter of public policy [*City of Santa Barbara v. Superior Court (Janeway) (2007) 41 Cal. 4th 747, 776-777, 62 Cal. Rptr. 3d 527, 161 P.3d 1095]* .

For further discussion of the validity or invalidity of exculpatory agreements, see *§ 140.145[4]* and Ch. 380, *Negligence* .

In the case of a contract between two businesses having equal bargaining power, when the only question is which of them should bear the risk of economic loss in the event of a particular mishap that both parties recognize could ensue, there is no reason for the courts to intervene and remake the parties' agreement in the light of *Civ. Code § 1668* [*CAZA Drilling (California), Inc. v. TEG Oil & Gas U.S.A., Inc. (2006) 142 Cal. App. 4th 453, 475, 48 Cal. Rptr. 3d 271]* . However, a contract provision limiting consequential damages in commercial transactions may be tested for legality under *Com. Code § 2719(3)* [*see generally* Ch. 500, *Sales: Sales Under the Commercial Code*] rather than under *Civ. Code § 1668* [*Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co. (1988) 200 Cal. App. 3d 1518, 1538-1539, 246 Cal. Rptr. 823]* .

[5] Superficial Legality

Even though a contract is legal on its face, a party may introduce evidence to establish its illegal character. If the substance of the transaction is illegal, it does notmatter when or how the illegality is raised. Whether the evidence comes from one side or the other, it is fatal to the case [*Homami v. Iranzadi (1989) 211 Cal. App. 3d 1104, 1112, 260 Cal. Rptr. 6* (plaintiff not entitled to recover after testifying he had oral agreement with defendant to collect interest secretly to evade tax law)].

When the parties are *in pari delicto,* this rule may leave the defendant with an unexpected benefit for the transaction. Nevertheless, the courts do not apply the rule to correct injustice between the parties, but out of regard for a higher interest, *i.e.,* that of the public, whose welfare demands that the courts discourage these transactions. Knowing they will receive no help from the courts may be a deterrent making parties less likely to enter into illegal agreements [*Homami v. Iranzadi (1989) 211 Cal. App. 3d 1104, 1112-1113, 260 Cal. Rptr. 6]* .

[6] When Illegal Contract Is Enforceable

[a] In General

A contract that is illegal because its object is contrary to common standards of morality ("malum in se") will not be enforced, but a contract that is illegal merely because its object is in violation of a statute ("malum prohibitum") may be enforceable, in spite of its illegality, by a party who is not in pari delicto [*McIntosh v. Mills (2004) 121 Cal. App. 4th 333, 344 n.10, 17 Cal. Rptr. 3d 66* (refusing enforcement); *see Wong v. Tenneco, Inc. (1985) 39 Cal. 3d 126, 136-138, 216 Cal. Rptr. 412, 702 P.2d 570* (refusing enforcement); *Shenson v. Fresno Meat Packing Co. (1950) 96 Cal. App. 2d 725, 731, 216 P.2d 156* (refusing enforcement); *see also California Physicians' Serv. v. Aoki Diabetes Research Inst. (2008) 163 Cal. App. 4th 1506, 1516-1517, 78 Cal. Rptr. 3d 646* (while health care provider's contract with service plan was illegal because it violated statutory prohibition on corporate practice of medicine, that prohibition is meant to protect patients, not service plans, and contract for provision of medical services by licensed professionals plainly is not malum in se; service plan would have been unjustly enriched if it had been allowed to retain benefit of services that provider bestowed on its subscribers without compensating provider, and contract therefore was enforceable to extent of compensating provider for services rendered; court did not discuss parties' relative culpability)].

Whether an illegal contract should be enforced, the extent of enforceability, and the kind of remedy the court should allow depend on a variety of factors, including the policy of the transgressed law, the kind of illegality, and the particular facts. For example, the court should not refuse to enforce the contract if the following conditions are met: [*Johnson v. Johnson (1987) 192 Cal. App. 3d 551, 557-558, 237 Cal. Rptr. 644* (resulting trust awarded); *Emmons, Williams, Mires & Leech v. State Bar (1970) 6 Cal. App. 3d 565, 569, 86 Cal. Rptr. 367* (attorney fee-sharing agreement enforced in favor of bar association's attorney referral service); *Cain v. Burns (1955) 131 Cal. App. 2d 439, 442, 280 P.2d 888* (attorney fee-sharing agreement enforced in favor of relatively innocent private investigator who had performed work)]:

- The public policy underlying the statute, regulation, or rule will not be affected in view of the circumstances of the particular transaction;
- The public cannot be protected because the transaction has been completed;
- No serious moral turpitude is involved;
- The defendant is the one guilty of the greater moral fault; and
- The defendant would otherwise be unjustly enriched at the expense of the plaintiff.

Similarly, if the illegality of a bargain is due to facts of which one party is justifiably ignorant and the other party is not, the court may grant the ignorant party relief [*Tiedje v. Aluminum Taper Milling Co. (1956) 46 Cal. 2d 450, 454, 296 P.2d 554]* .

[b] Plaintiff in Class Protected by Law

If the policy of the law violated by the contract was designed for the plaintiff's protection, the court may enforce the contract. When the Legislature enacts a statute forbidding conduct to protect one class of persons from the activities of another, a member of the protected class may maintain an action for breach of contract, notwithstanding the fact that that party shared in the illegal transaction. The protective purpose of the legislation is realized by allowing the plaintiff who is not *in pari delicto* to maintain the action against the defendant who is within the class primarily to be deterred [*Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 153, 308 P.2d 713]* .

[c] Unfairly Harsh Result

In some cases a statute making conduct illegal may provide for a fine or administrative discipline and exclude by implication the additional penalty involved in holding the illegal contract unenforceable. In others, the forfeiture resulting from unenforceability is disproportionately harsh considering the nature of the illegality [*M. Arthur Gensler, Jr., & Associates, Inc. v. Larry Barrett, Inc. (1972) 7 Cal. 3d 695, 702-703, 103 Cal. Rptr. 247, 499 P.2d 503]* .

Courts may provide a remedy despite a contract's illegality if the wrong involved is *malum prohibitum* (wrong because prohibited by law) and not *malum in se* (wrong in itself). In the former case, courts will take notice of the circumstances and give relief if justice and equity require a restoration of money received by either party [*Smith v. Bach (1920) 183 Cal. 259, 263, 191 P. 14]* . The principle is usually applied to aid one not *in pari delicto* but to some extent involved in the illegality, who is comparatively less culpable [*South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 Cal. App. 3d 750, 758, 102 Cal. Rptr. 286]* .

[7] Secret Intent to Violate Law

A secret intent to violate the law, concealed in the mind of one party to an otherwise legal contract, does not enable that party to avoid the contract and escape liability under its terms [*Griffin v. Payne (1933) 133 Cal. App. 363, 373, 24 P.2d 370* (appellant unable to avoid margin contract despite intent to gamble on stock market when intent was not disclosed to brokers during time appellant was trading through them)]. In addition, a contract legal in itself is not rendered unenforceable by the fact that one of the parties knew that the other party intended, by means of the contract or the subject matter, to violate a law or public policy [*People v. Brophy (1942) 49 Cal. App. 2d 15, 30, 120 P.2d 946* (contract between appellant and telephone company was enforceable despite company's knowledge of appellant's use of telephones for illegal purposes)].

An agreement that is legal when standing by itself, but is merely a step intended for the accomplishment of an illegal object, is illegal. Thus, if the effect of the contract is to accomplish an unlawful purpose, the court will declare the agreement illegal regardless of the intention of the parties [*Stockton Morris Plan Co. v. California Tractor & Equip. Corp. (1952) 112 Cal. App. 2d 684, 689-690, 247 P.2d 90]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsExculpatory ClausesContracts LawDefensesIllegal Bargains

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§ 140.25 Unconscionable Contract

[1] Nature of Unconscionability

[a] Procedural and Substantive Unconscionability

Unconscionability generally includes the absence of meaningful choice on the part of one of the parties together with contract terms that unreasonably favor the other party [*Allan v. Snow Summit, Inc. (1996) 51 Cal. App. 4th 1358,1376-1377, 59 Cal. Rptr. 2d 813* ; *Carboni v. Arrospide (1991) 2 Cal. App. 4th 76, 82-83, 2 Cal. Rptr. 2d 845* ; *West v. Henderson (1991) 227 Cal. App. 3d 1578, 1586, 278 Cal. Rptr. 570]* .

An unconscionable contract ordinarily involves both a procedural and a substantive element: (1) oppression or surprise due to unequal bargaining power, and (2) overly harsh or one-sided results [*Donovan v. RRL Corp. (2001) 26 Cal. 4th 261, 291-292, 109 Cal. Rptr. 2d 807, 27 P.3d 702* (citing *Armendariz*); *Armendariz v. Foundation Health Psychcare Servs. (2000) 24 Cal. 4th 83, 113-114, 99 Cal. Rptr. 745, 6 P.3d 669* (reversing order compelling arbitration in wrongful termination action brought under FEHA); *Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159, 1164* ; *Villa Milano Homeowners Association v. Il Davorge (2000) 84 Cal. App 4th 819, 828-829, 102 Cal. Rptr. 2d 1* (arbitration clause contained in CC&Rs was unconscionable adhesion contract and unenforceable to the extent it applied to construction and design defect claims against developer who drafted, signed, and recorded CC&Rs)]. Both elements must appear to invalidate a contract or one of its individual terms. These elements, however, need not be present in the same degree. The more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa [*Armendariz v. Foundation Health Psychcare Servs. (2000) 24 Cal. 4th 83, 114, 6 P.3d 669* ; *Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159, 1164-1165, 22 Cal. Rptr. 3d 189* ; *Freeman v. Wal-Mart Stores, Inc. (2003) 111 Cal. App. 4th 660, 669, 3 Cal. Rptr. 3d 860* (service fee on shopping card held not unconscionable); *Woodside Homes v. Superior Court (2003) 107 Cal. App. 4th 723, 730, 736, 132 Cal. Rptr. 2d 35* (low level of procedural unconscionability required high level of substantive unconscionability; agreements for judicial reference held enforceable)].

The party asserting unconscionability has the burden of proving both procedural and substantive unconscionability [

Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159, 1165, 22 Cal. Rptr. 3d 189] .

"The procedural element focuses on two factors: oppression and surprise. Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice... . Surprise involves the extent to which the terms of the bargain are hidden in a 'prolix printed form' drafted by a party in a superior bargaining position" [*Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159, 1165, 22 Cal. Rptr. 3d 189* , quoting *Olsen v. Breeze, Inc. (1996) 48 Cal. App. 4th 608, 621, 55 Cal. Rptr. 2d 818]* . There is no general rule that a form contract is procedurally unconscionable. Rather, procedural unconscionability arises from the manner in which the contract is presented to the party in the weaker position [*Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159, 1165, 22 Cal. Rptr. 3d 189* ; *accord, Lhotka v. Geographic Expeditions, Inc. (2010) 181 Cal. App. 4th 816, 824, 104 Cal. Rptr. 3d 844* (by showing that defendant presented its contract as both nonnegotiable and not different from contract that would be presented by any other provider of guided hiking expeditions, plaintiff established minimal level of oppression to justify finding of procedural unconscionability)].

No extrinsic evidence of procedural unconscionability is required if a great disparity of power can be inferred from the parties' relationship or from the contract itself [*Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159, 1165, 22 Cal. Rptr. 3d 189* (unconscionability could not be inferred from the relationship between a consumer and a motor home dealer)]. For example, oppression may be inferred in the employment context because generally only the most sought-after employees are in a position to refuse a job if the employer requires an arbitration agreement [*Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159, 1165, 22 Cal. Rptr. 3d 189* ; *see Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83, 115, 99 Cal. Rptr. 2d 745* ; *O'Hare v. Municipal Res. Consultants (2003) 107 Cal. App. 4th 267, 283, 132 Cal. Rptr. 2d 116]* .

Surprise may be found if a contract merely refers to rules set forth in another source that the customer would have to see prior to signing in order to learn the full import of the contract [*Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159, 1165, 22 Cal. Rptr. 3d 189* ; *see Harper v. Ultimo (2003) 113 Cal. App. 4th 1402, 1406, 7 Cal. Rptr. 3d 418* (contract unconscionable because it incorporated terms not attached and those terms both required arbitration and severely limited damages)].

A provision is substantively unconscionable if it is so one-sided as to "shock the conscience" or it imposes harsh or oppressive terms [*24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal. App. 4th 1199, 1213, 78 Cal. Rptr. 2d 533]* . Those concepts--harshness, oppression, and "shocking to the conscience"--are not synonymous with "unreasonable." Basing an unconscionability determination on the unreasonableness of a contract provision would inject an inappropriate level of judicial subjectivity into the analysis [*Morris v. Redwood Empire Bancorp (2005) 128 Cal. App. 4th 1305, 1322, 27 Cal. Rptr. 3d 797]* . With a concept as nebulous as "unconscionability" it is important that a court not intervene to change contract terms that the parties have agreed to, merely because the court believes the terms are unreasonable; rather, the terms must "shock the conscience" [*American Software, Inc. v. Ali (1996) 46 Cal. App. 4th 1386, 1391, 54 Cal. Rptr. 2d 477]* .

In the context of an arbitration agreement, the agreement is unconscionable unless there is a "modicum of bilaterality" in the arbitration remedy [*O'Hare v. Municipal Resource Consultants (2003) 107 Cal. App. 4th 267, 273-274, 132 Cal. Rptr. 2d 116* (citing *Armendariz*; finding mandatory arbitration provision procedurally and substantively unconscionable); *Flores v. Transamerica Homefirst, Inc. (2001) 93 Cal. App. 4th 846, 853-855, 113 Cal. Rptr. 2d 376* (citing *Armendariz*; finding arbitration provisions procedurally and substantive unconscionable); *Armendariz v. Foundation Health Psychcare Servs. (2000) 24 Cal. 4th 83, 117, 6 P.3d 669]* . The kind of arbitration provision that is so one-sided as to be substantively unconscionable is one that, rather than providing a neutral forum for dispute resolution, actually provides a strong disincentive for the weaker party to pursue any claim in any forum [*Lhotka v. Geographic Expeditions, Inc. (2010) 181 Cal. App. 4th 816, 825, 104 Cal. Rptr. 3d 844* (arbitration provision "guaranteed that plaintiffs could not possibly obtain anything approaching full recompense for their harm" because maximum recovery was limited to price plaintiffs paid for hiking expedition, remedy was restricted to mediation and

arbitration in city far from plaintiffs' home, plaintiffs were required to share cost of mediation and to indemnify defendant for defense costs if plaintiffs sued instead of pursuing arbitration, and defendant was not subject to reciprocal limitation on recovery or reciprocal indemnification obligation)].

Another kind of substantively unconscionable provision in the context of an arbitration agreement occurs when the party imposing arbitration mandates a post-arbitration proceeding, either judicial or arbitral, wholly or largely to its benefit at the expense of the party on which the arbitration is imposed [*Little v. Auto Stiegler (2003) 29 Cal. 4th 1064, 1072-1074, 1076, 130 Cal. Rptr. 2d 892, 63 P.3d 979* (finding provision in mandatory employment arbitration agreement that permitted either party to appeal arbitration award of more than $50,000 to second arbitrator to be unconscionable, but concluding that provision could be severed and rest of agreement enforced)].

The courts have recognized that there is a sliding scale or a balancing relationship between the two elements of unconscionability. The greater the degree of unfair surprise or unequal bargaining power, the less the degree of substantive unconscionability required to annul the contract, and vice versa [*Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 160-161, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* (finding class-wide arbitration waiver provision in consumer credit card agreement to be both procedurally and substantively unconscionable); *Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159, 1165, 22 Cal. Rptr. 3d 189* ; *Harper v. Ultimo (2003) 113 Cal. App. 4th 1402, 1406, 7 Cal. Rptr. 3d 418* (finding arbitration provision in construction contract to be both procedurally and substantively unconscionable); *Marin Storage & Trucking, Inc. v. Benco Contracting and Engineering, Inc. (2001) 89 Cal. App. 4th 1042, 1056, 107 Cal. Rptr. 2d 645* (in light of low level of procedural unfairness in adhesion contract containing indemnity clause, greater degree of substantive unfairness than that shown was required before contract could be found substantively unconscionable)]. Because procedural unconscionability must be measured on a sliding scale with substantive unconscionability, it is necessary not only to determine whether procedural unconscionability exists but also, and more important, to ascertain in what degree it may exist [*Morris v. Redwood Empire Bancorp (2005) 128 Cal. App. 4th 1305, 1319, 27 Cal. Rptr. 3d 797]* .

These rules are intended to make it possible for the courts to police explicitly against the contracts or clauses they find to be unconscionable. In the past, such policing has been accomplished largely by adverse construction of language, manipulation of the rules of offer and acceptance, or determinations that the clause is contrary to public policy or to the dominant purpose of the contract. Now, under these rules, a court may pass directly on the unconscionability of the contract or a particular clause and make a conclusion of law as to its unconscionability. The basic test is whether, in light of the general background and the needs of the particular case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. The principle is one of prevention of oppression and unfair surprise, without disturbance of the allocation of risks because of superior bargaining power [Legislative Committee Comment to *Civ. Code § 1670.5*].

For discussion of unconscionability as a defense to an action for breach of contract, see *§ 140.64*.

[b] Unenforceable Contract of Adhesion

A contract of adhesion is a standardized contract imposed and drafted by the party of superior bargaining strength. It relegates to the subscribing party only the opportunity to adhere to the contract or reject it [*Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1533-1534, 60 Cal. Rptr. 2d 138]* . A court will not enforce a contract of adhesion if it is unduly oppressive or unconscionable or if its terms are not within the reasonable expectation of the weaker or adhering party [*Pardee Construction Company v. Superior Court (2002) 100 Cal. App. 4th 1081, 1086-1087, 123 Cal. Rptr. 2d 288* (real estate purchase agreements requiring all disputes to be submitted to judicial reference were adhesive contracts fatally infected with procedural and substantive unconscionability); *Allan v. Snow Summit, Inc. (1996) 51 Cal. App. 4th 1358, 1375-1376, 59 Cal. Rptr. 2d 813* ; *Graham v. Scissor-Tail, Inc. (1981) 28 Cal. 3d 807, 820, 171 Cal. Rptr. 604, 623 P.2d 165* ; *Izzi v. Mesquite Country Club (1986) 186 Cal. App. 3d 1309, 1317-1318, 231 Cal. Rptr. 315* ; *see Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 113-114, 99 Cal. Rptr. 2d 745, 6 P.3d*

669 (reversing order compelling arbitration in wrongful termination action brought under FEHA); *Villa Milano Homeowners Assn. v. IL Davorge (2000) 84 Cal. App. 4th 819, 835-836, 102 Cal. Rptr. 2d 1* (arbitration clause contained in CC&Rs was unconscionable adhesion contract and unenforceable to extent it applied to construction and design defect claims against developer who drafted, signed, and recorded CC&Rs)].

Use of a standardized form does not of itself make a contract an unconscionable adhesion contract. Even if a contract is adhesive, the court applies a sliding scale. There must be some showing of substantive unconscionability [*Soltani v. Western & Southern Life Insurance Co. (9th Cir. 2001) 258 F.3d 1038, 1042-1045* (holding that employment contract provision shortening limitations period for wrongful termination action to six months was not unconscionable)]. The test for unconscionability is whether the stronger party has disappointed the reasonable expectations of the other party [*Coon v. Nicola (1993) 17 Cal. App. 4th 1225, 1234, 1235, 21 Cal. Rptr. 2d 846]* . Adhesion, however, is not a prerequisite for unconscionability [*Harper v. Ultimo (2003) 113 Cal. App. 4th 1402, 1406, 7 Cal. Rptr. 3d 418* (finding arbitration provision in construction contract to be both procedurally and substantively unconscionable)]. For discussion of interpretation of contracts of adhesion, see *§ 140.32[12][c]*.

[2] Facts Indicating Unconscionability

[a] Arbitration Clause in Contract

An arbitration clause in an employment contract may be unconscionable according to the mores and business practices of the time and place of execution, if the contract provides the employer more rights and greater remedies than would otherwise be available and concomitantly deprives employees of significant rights and remedies they would normally enjoy, when the contract is considered in light of the commercial context in which it operates and the legitimate needs of the parties at the time the parties entered into it [*Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1542, 60 Cal. Rptr. 2d 138* ; *see Bolter v. Superior Court (2001) 87 Cal. App. 4th 900, 910-911* ("place and manner" arbitration clauses in franchise agreement found unconscionable and clearly severable from remainder of agreement)]. Further, the Federal Arbitration Act [*9 U.S.C. § 1 et seq.*] would not preclude a court from finding that the arbitration clause was unconscionable and unenforceable [*Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1552, 60 Cal. Rptr. 2d 138]* .

However, an arbitration clause is not necessarily unconscionable simply because it is in an employment agreement, even though an employee seldom has as much bargaining power as the employer. An arbitration clause can be enforceable by the employer if it is written so that an employee would understand it, and the employee in fact read it before signing the agreement, and if the clause neither gives greater power to the employer nor deprives the employee alone of important rights [*see Roman v. Superior Court (Flo-Kem, Inc.) (2009) 172 Cal. App. 4th 1462, 1470-1476, 92 Cal. Rptr. 3d 153* (arbitration clause, which employee initialed, was in short agreement and applied to "all disputes" relating to employee's employment; clause did not reserve any rights solely to employer, did not impose undue limitation on discovery by employee, and did not limit administrative remedies available to employee under state law); *but cf., e.g., Olvera v. El Pollo Loco, Inc. (2009) 173 Cal. App. 4th 447, 455-457, 93 Cal. Rptr. 3d 65* (employer's attempt to force arbitration of employees' claims failed because purported agreement to arbitrate was based on procedurally and substantively unconscionable contents of employee manual)].

In *Armendariz v. Foundation Health Psychcare Services, Inc.*, a pre-employment arbitration "agreement" was found to be one-sided and thus unconscionable and unenforceable when it (1) contained limitations on remedies that the employee could obtain, (2) contained oppressive cost provisions requiring the employee to bear expenses that he or she would not be required to bear if the action could be brought in court, and (3) inherently favored the employer without some reasonable justification for that lack of mutuality. The California Supreme Court stated that such multiple defects indicated a systematic effort to impose arbitration on an employee not simply as an alternative to litigation, but as an inferior forum that works to the employer's advantage. Because courts are unable to cure this unconscionability through severance or restriction and are not permitted to cure it through reformation and augmentation, they must void the entire

agreement [*Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 124-125, 99 Cal. Rptr. 2d 745, 6 P.3d 669* (reversing order compelling arbitration in wrongful termination action brought under FEHA); *Pinedo v. Premium Tobacco Stores, Inc. (2000) 85 Cal. App. 4th 774, 780-781* (affirming order denying arbitration in action brought under FEHA); *see Blake v. Ecker (2001) 93 Cal. App. 4th 728, 740-743, 113 Cal. Rptr. 2d 422* (citing principles set forth in *Armendariz* and remanding case to trial court to determine whether *Armendariz* applied to make parties' arbitration agreement unenforceable)]. This same reasoning was used by a federal court in determining that an employment contract provision requiring 10 days written notice to the employer as a prerequisite to filing suit was unenforceable. The court found that, as in *Armendariz*, the effect of the provision was to maximize employer advantage without reasonable justification for that arrangement. The failure to comply with the provision deprived an employee of a judicial forum and its concomitant rights [*Soltani v. Western & Southern Life Insurance Co. (9th Cir. 2001) 258 F.3d 1038, 1045-1047]* .

In another case, in which arbitration provisions in a reverse mortgage agreement were found to be both procedurally and substantively unconscionable, the court followed *Armendariz* in refusing to sever the invalid arbitration provisions. Because it was faced with an arbitration agreement in which no single provision could be stricken to remove the unconscionable taint, the court affirmed the trial court's order denying the lender's motion to compel arbitration [*Flores v. Transamerica Homefirst, Inc. (2001) 93 Cal. App. 4th 846, 857-858, 113 Cal. Rptr. 2d 376]* . Similarly, in a case in which the court found the provisions of an arbitration agreement between a securities corporation and its sales personnel to be both substantively and procedurally unconscionable, the cited *Armendariz* in holding that the arbitration agreement was unenforceable. Because the contract was permeated with unconscionability and illegality, the court could not cure it by removing the offending provisions [*Mercuro v. Superior Court (2002) 96 Cal. App. 4th 167, 184-186, 116 Cal. Rptr. 2d 671]* .

An investment company's standard-form customer account agreement requiring customers to arbitrate disputes before a panel of three arbitrators from the Judicial Arbitration and Mediation Service and prohibiting consolidation or joinder of claims was so prohibitively expensive as to be unconscionable. The investment company's failure in court to offer a justification or explanation for requiring three arbitrators instead of one demonstrated that these provisions were included deliberately for the improper purpose of discouraging or preventing customers from vindicating their rights. Because these provisions could not be severed, the arbitration provisions in their entirety were unenforceable [*Parada v. Superior Court (Monex Deposit Co.) (2009) 176 Cal. App. 4th 1554, 1586-1587, 98 Cal. Rptr. 3d 743*].

In a case involving a mandatory preemployment arbitration agreement in which a provision permitting either party to appeal an arbitration award of more than $50,000 to a second arbitrator was found unconscionable under *Armendariz,* the court concluded that the offending provision could be severed. Unlike the agreement in *Armendariz,* this contract involved only a single provision that was unconscionable, and no contract reformation was required [*Little v. Auto Stiegler (2003) 29 Cal. 4th 1064, 1072-1074, 1076, 130 Cal. Rptr. 2d 892, 63 P.3d 979]* .

A one-sided arbitration clause may have attributes of a contract of adhesion and yet not be unconscionable on its face. In that case, the court may uphold the clause against a claim of unconscionability. However, application of the clause could raise issues of fraud and waiver [*Engalla v. Permanente Medical Group, Inc. (1997) 15 Cal. 4th 951, 984-986, 64 Cal. Rptr. 2d 843, 938 P.2d 903* (arbitration requirement in group medical plan)].

An arbitration provision in an attorney's retainer agreement was held to be enforceable when the initial retainer agreement and amendment did not constitute an adhesion contract. The clients did not enter into a standardized contract with the attorney on a take it or leave it basis, the retainer agreement and amendment were negotiated and individualized agreements, and the clients possessed the freedom to employ the attorney of their choice and bargain for the terms of their choice [*Powers v. Dickson, Carlson & Campillo (1997) 54 Cal. App. 4th 1102, 1110, 63 Cal. Rptr. 2d 261]* .

An arbitration provision in a comprehensive contracting service agreement between an insurer and a hospital was held

to be enforceable when evidence of unconscionability presented by the hospital included only a declaration from its attorney who had no personal involvement with negotiation of the service agreement, and two newspaper articles containing quotes from an officer of the hospital on the reasons for filing the lawsuit. None of this material was competent evidence sufficient to establish unconscionability as a defense to mandatory arbitration [*Coast Plaza Doctors Hospital v. Blue Cross of California (2000) 83 Cal. App. 4th 677, 687-689, 99 Cal. Rptr. 2d 809* (neither procedural nor substantive unconscionability found)].

[b] Prices of Consumer Goods and Services

Facts to be considered in determining whether a price is unconscionable are [*Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 926-927, 216 Cal. Rptr. 345, 702 P.2d 503* ; *Carboni v. Arrospide (1991) 2 Cal. App. 4th 76, 82-83, 2 Cal. Rptr. 2d 845* (interest rate of 200 percent per year unenforceable on loan exempt from usury law); *see Civ. Code § 1670.5*]:

- The basis and justification for the price charged.
- The price paid by other similarly situated consumers in similar transactions.
- The inconvenience imposed on the party charging the price.
- The true value of the goods or services.
- The absence of meaningful choice on the part of the party being charged the price.
- Whether deceptive practices are involved.

Although it is unlikely a court would find a price set by a freely competitive market unconscionable, the market price set by an oligopoly is not immune from scrutiny [*Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 927, 216 Cal. Rptr. 345, 702 P.2d 503]* .

The "oppression" element of procedural unconscionability requires lack of meaningful alternative sources of the goods or services in question [*Shadoan v. World Savings & Loan Assn. (1990) 219 Cal. App. 3d 97, 102-103, 268 Cal. Rptr. 207* ; *Dean Witter Reynolds, Inc. v. Superior Court (1989) 211 Cal. App. 3d 758, 768, 259 Cal. Rptr. 789]* . On the other hand, the existence of consumer choice only decreases the extent of procedural unconscionability. It does not negate the oppression or obligate courts to enforce the challenged provision regardless of the extent of substantive unfairness. The existence of consumer choice is relevant, but it is not determinative of the entire issue of procedural unconscionability. Except in unusual circumstances--such as when the consumer is highly sophisticated and the challenged provision does not undermine important public policies--the use of a contract of adhesion establishes a minimal degree of procedural unconscionability notwithstanding the availability of market alternatives [*Gatton v. T-Mobile USA, Inc. (2007) 152 Cal. App. 4th 571, 583-585, 61 Cal. Rptr. 3d 344* ("In sum, there are provisions so unfair or contrary to public policy that the law will not allow them to be imposed in a contract of adhesion, even if theoretically the consumer had an opportunity to discover and use an alternate provider for the goods or services involved")].

[c] Class Action Waiver in Consumer Contract

In some cases in California, class action waivers in consumer contracts of adhesion [*see § 140.32[12][c]* (definition)] are unenforceable, whether the consumer is being asked to waive the right to class action litigation or the right to class-wide arbitration. When the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with

the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent that the obligation at issue is governed by California law, the waiver becomes in practice what is prohibited by statute: the exemption of the stronger party from responsibility for its own fraud, or willful injury to the person or property of another [*see Civ. Code § 1668*]. Under these circumstances, such waivers are unconscionable under California law and should not be enforced [*Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 162-163, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* ; *see Gatton v. T-Mobile USA, Inc. (2007) 152 Cal. App. 4th 571, 588, 61 Cal. Rptr. 3d 344* (class-action/class-arbitration waiver in arbitration provision in cell phone service contract was directly within the scope of the holding in *Discover Bank*, and "even though the evidence of procedural unconscionability is limited, the evidence of substantive unconscionability is strong enough to tip the scale and render the arbitration provision unconscionable"); *Cohen v. DIRECTV, Inc. (2006) 142 Cal. App. 4th 1442, 1451-1453, 48 Cal. Rptr. 3d 813* (application of *Discover Bank* principles to class-action waiver in satellite TV customer agreement, which was held unenforceable; summaries of other cases); *Szetela v. Discover Bank (2002) 97 Cal. App. 4th 1094, 1099-1102, 118 Cal. Rptr. 2d 862]* .

The Federal Arbitration Act [*9 U.S.C. § 1 et seq.*; *see* Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*] does not preempt California law in this respect [*Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 153, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* ; *accord, Shroyer v. New Cingular Wireless Servs. (9th Cir. 2007) 498 F.3d 976, 987-988]* . Furthermore, there is no conflict between the *Discover Bank* holding and the Federal Arbitration Act sufficient to support a conclusion of implicit preemption [*Shroyer v. New Cingular Wireless Servs. (9th Cir. 2007) 498 F.3d 976, 988-993]* .

Prior to the *Discover Bank* decision cited above, the Ninth Circuit had held that a telecommunications carrier's new consumer services agreement was both procedurally and substantively unconscionable under California law. The imposition of the contract on customers without the opportunity for negotiation, modification, or waiver rendered it procedurally unconscionable. The one-sided contract terms, which barred class actions, imposed an arbitration fee scheme, and required any arbitration to remain confidential, rendered the contract substantively unconscionable [*Ting v. AT&T (9th Cir. 2003) 319 F.3d 1126, 1148-1152]* . Following the *Discover Bank* decision, the Ninth Circuit has added some refinements to the holding:

- If a service provider has overwhelming bargaining power and presents a take-it-or-leave-it contract to a customer, the contract can be held procedurally unconscionable, whether or not the customer has a meaningful choice as to service providers [*Nagrampa v. MailCoups, Inc. (9th Cir. 2006) 469 F.3d 1257, 1283-1284* ; *see Douglas v. United States Dist. Court (9th Cir. 2007) 495 F.3d 1062, 1067-1068]* .

- A waiver that fails under the *Discover Bank* analysis is not saved by a contractual provision relieving the consumer of all expenses, including attorney's fees, that the consumer would incur pursuing an individual case [*Shroyer v. New Cingular Wireless Servs. (9th Cir. 2007) 498 F.3d 976, 986* ("when the potential for individual *gain* is small, very few plaintiffs, if any, will pursue individual arbitration or litigation, which greatly reduces the aggregate liability a company faces when it has exacted small sums from millions of consumers"; original emphasis); *see* Laster v. AT&T Mobility LLC (9th Cir. 2009) 584 F.3d 849, 854-856] .

[3] No Ground for Affirmative Relief

Regardless of the status or identity of the plaintiff making the claim of unconscionability, *Civ. Code § 1670.5* does not support an affirmative cause of action. However, a cause of action may exist under some other statute; for example:

- An affirmative cause of action may exist under the Consumers Legal Remedies Act [*see, e.g., Civ. Code §§ 1770(a)(19), 1780*; *see generally* Ch. 504, *Sales: Consumers Legal Remedies Act*], based on the use of unconscionable provisions in consumer contracts [*Dean Witter Reynolds, Inc. v. Superior Court*

(1989) 211 Cal. App. 3d 758, 766, 259 Cal. Rptr. 789] .

- Use of unconscionable contract provisions might support affirmative relief or injunctive relief under *Bus. & Prof. Code § 17200 et seq.* [*seegenerally Ch. 565, Unfair Competition, § 565.10* et seq.], on the theory that use of such provisions constituted a deceptive or unfair business practice [*Dean Witter Reynolds, Inc. v. Superior Court (1989) 211 Cal. App. 3d 758, 772-775, 259 Cal. Rptr. 789]* .

- If the contested term is a liquidated damages provision in a consumer contract, *Civ. Code § 1671(d)* provides affirmative relief to a party who has paid sums in accordance with an invalid provision to the extent the sums paid exceed the other party's actual damages [*Beasley v. Wells Fargo Bank (1991) 235 Cal. App. 3d 1383, 1398-1401, 1 Cal. Rptr. 2d 446 , disapproved on other grounds, Olson v. Automobile Club of So. Cal. (2008) 42 Cal. 4th 1142, 1153 n.6*]. Liquidated damages provisions are discussed in Ch. 177, *Damages* .

[4] Court Will Hear Evidence

It is proper for the court to hear evidence on these questions. This evidence is for the court's consideration, not the jury's. The court must decide whether a particular contract or clause is unconscionable [*see* Legislative Committee Comment to *Civ. Code § 1670.5*]. The critical juncture for determining whether a contract is unconscionable is the moment it was entered into by the parties. The issue is not whether it is unconscionable in light of subsequent events [*Civ. Code § 1670.5*; *see American Software, Inc. v. Ali (1996) 46 Cal. App. 4th 1386, 1391, 54 Cal. Rptr. 2d 477]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationContracts LawDefensesUnconscionabilityGeneral OverviewContracts LawDefensesUnconscionabilityAdhesion ContractsContracts LawDefensesUnconscionabilityArbitration Agreements

California Forms of Pleading and Practice--Annotated

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PART II. LEGAL BACKGROUND
B. Formation of Enforceable Contract

13-140 California Forms of Pleading and Practice--Annotated § 140.26

§ 140.26 Electronic Contracts and Signatures

[1] In General

With the advent of the Internet and other advances in technology, agreements are frequently negotiated and finalized by electronic communication methods such as fax, e-mail, or Internet websites. Agreements formed in this matter are not "written" or "signed" within the traditional meanings of those terms. In recognition of the changes in the way agreements are formed and preserved, both California and the federal government have enacted legislation validating electronic documents and electronic signatures. In California, the governing statute is the Uniform Electronic Transactions Act (UETA) [*Civ. Code § 1633.1 et seq.*]. Nearly all other states also have enacted UETA. The federal counterpart is the Electronic Signatures in Global and National Commerce Act (E-SIGN) [Pub. L. No. 106-229, tit. 1, 2 (June 30, 2000); *15 U.S.C. § 7001 et seq.*]. For a discussion of the relationship between the state and federal statutes, see *§ 140.26[3][b]*.

[2] California Transactions

[a] Application of Uniform Act

In California, UETA applies (with some specified exceptions) to electronic records and electronic signatures relating to a "transaction"; that is, an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs [*Civ. Code § 1633.3(a)*; *see Civ. Code § 1633.2(o)* (definition of "transaction"); *see also Civ. Code §§ 1633.2(a)-(n), 1633.3(b)-(d), (f)* (other definitions; exceptions)]. UETA is to be construed and applied so as to facilitate electronic transactions consistent with other applicable law; to be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices; and to effectuate the general purpose to make uniform the law with respect to the subject of UETA among states enacting it [*Civ. Code § 1633.6*].

Numerous specific statutory exclusions from UETA exist [*see Civ. Code § 1633.3(b), (c)*]. The broadest exclusions include the following:

- Transactions subject to a law governing the creation and execution of wills, codicils, or testamentary trusts [*Civ. Code § 1633.3(b)(1)*].

- Transactions subject to Division 1 of the Commercial Code, except *Com. Code §§ 1107* and *1206* [*Civ. Code § 1633.3(b)(2)*].

- Transactions subject to Divisions 3 (negotiable instruments), 4 (bank deposits and collections), 5 (letters of credit), 8 (investment securities), 9 (secured transactions), or 11 (funds transfers) of the Commercial Code [*Civ. Code § 1633.3(b)(3)*].

- Transactions subject to any law requiring that specifically identifiable text or disclosures in a record or portion of a record be separately signed or initialed [*Civ. Code § 1633.3(b)(4)*]. This would include various consumer protection laws, although some of these laws, such as the federal Truth In Lending Act, contain their own provision governing electronic disclosures [*see 12 C.F.R. § 226.36* (electronic communication of Regulation Z disclosures); *see also California Legal Forms, Ch. 45, Consumer Installment Loans and Credit Sales, § 45.220[1][c]* (Matthew Bender)]. However, this exclusion does not apply to transactions subject to *Civ. Code §§ 1677* or *1678*, relating to liquidated damages in real property sales contracts, or *Code Civ. Proc. § 1278*, relating to arbitration provisions in real property sales contracts.

Although transactions excluded from UETA are not subject to its provisions, they still may be conducted by electronic means if that can be done under any other applicable law [*Civ. Code § 1633.3(f)*].

[b] Effect of Electronic Contract or Signature

Under UETA, a record or signature may not be denied legal effect or enforceability solely because it is in electronic form. A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation. If a law requires a record to be in writing, an electronic record satisfies the law. If a law requires a signature, an electronic signature satisfies the law [*Civ. Code § 1633.7*; *see Civ. Code § 1633.2(a), (d), (e), (g), (h), (m)* (definitions of "contract," "electronic," and "record")]. In a case evaluating, under common law, the validity of an e mail sent prior to enactment of the UETA, a federal court held that the e mail, signed with a party's name, satisfied the statute of frauds, assuming that a binding oral agreement existed and that the e mail included all of the material terms of that agreement [*Lamle v. Mattel, Inc. (Fed. Cir. 2005) 394 F.3d 1355, 1362-1363]* .

Evidence of a record or signature may not be excluded in a proceeding solely because it is in electronic form [*Civ. Code § 1633.13*].

[c] Effect of Uniform Act on Parties

UETA does not *require* that a record or signature be created, generated, sent, communicated, received, stored, or otherwise processed or used, by electronic means or in electronic form [*Civ. Code § 1633.5(a)*].

Moreover, UETA applies only to a transaction between parties each of whom has agreed to conduct the transaction by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct. Except for a separate and optional agreement the primary purpose of which is to authorize a transaction to be conducted by electronic means, an agreement to conduct a transaction by electronic means may not be contained in a standard form contract that is not an electronic record. An agreement in such a standard form contract may not be conditioned on an agreement to conduct transactions by electronic means. An agreement to conduct a transaction by electronic means may not be inferred solely from the fact that a party has used electronic means to pay an account or register a purchase or warranty. These statutory rules may

not be varied by agreement [*Civ. Code § 1633.5(b)*].

A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. If a seller sells goods or services by both electronic and nonelectronic means and a buyer purchases the goods or services by conducting the transaction by electronic means, the buyer may refuse to conduct further transactions regarding the goods or services by electronic means. These statutory rules may not be varied by agreement [*Civ. Code § 1633.5(c)*].

Except as otherwise provided in UETA, the effect of any of its provisions may be varied by agreement. The presence in certain provisions of UETA of the words "unless otherwise agreed," or words of similar import, does not imply that the effect of other provisions may not be varied by agreement [*Civ. Code § 1633.5(d)*].

[d] Attribution of Electronic Contract or Signature to Party

An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to whom the electronic record or electronic signature was attributable [*Civ. Code § 1633.9(a)*]. The effect of an electronic record or electronic signature attributed to a person under the foregoing rules is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law [*Civ. Code § 1633.9(b)*].

[e] Other Effects of Uniform Act

UETA also provides rules affecting the following aspects of transactions subject to it:

- Providing, sending, or delivering information "in writing" to another person, and the posting, displaying, or formatting of such information [*see Civ. Code § 1633.8*].
- Making changes, and dealing with errors, in electronic records [*see Civ. Code § 1633.10*].
- Notarizing an electronic signature, and signing under penalty of perjury [*see Civ. Code § 1633.11*].
- Complying with legal requirements to retain specified types of records [*see Civ. Code § 1633.12*].
- Conducting wholly automated transactions [*see Civ. Code § 1633.14*].
- Sending and receiving electronic records related to a transaction [*see Civ. Code § 1633.15*].
- Using electronic means to send a notice of a right to cancel [*see Civ. Code § 1633.16*].
- Prohibiting state agents from interfering with the use of electronic signatures [*see Civ. Code § 1633.17*].

[3] Interstate and International Transactions

[a] Effect of Electronic Contract or Signature

The federal E-SIGN Act applies to any transaction in or affecting interstate or foreign commerce [*see 15 U.S.C. § 7001(a)*]. Under E-SIGN, notwithstanding any statute, regulation, or other rule of law, a signature, contract, or other record relating to a transaction affecting interstate or foreign commerce may not bedenied legal effect, validity, or enforceability solely because it is in electronic form, and a contract relating to such a transaction may not be denied

legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation [*15 U.S.C. § 7001(a)*; *see 15 U.S.C. § 7006* (definitions)]. The term "transaction" means an action, or a set of actions, relating to the conduct of business, consumer, or commercial affairs between two or more persons, including any of the following types of conduct [*15 U.S.C. § 7006(13)*]:

- The sale, lease, exchange, licensing, or other disposition of personal property (including goods and intangibles) or services (or any combination of these actions).

- The sale, lease, exchange, or other disposition (or any combination of these actions) of any interest in real property.

The E-SIGN requirements do not limit, alter, or otherwise affect any requirement imposed by a statute, regulation, or rule of law, other than a requirement that contracts or other records be written, signed, or in nonelectronic form [*15 U.S.C. § 7001(b)(1)*].

However, E-SIGN does not require any to agree to use or accept electronic records or electronic signatures (except a governmental agency, with respect to a record other than a contract to which it is a party) [*15 U.S.C. § 7001(b)(2)*].

[b] Effect of State Laws

State law, regulation, or other rule of law may modify, limit, or supersede the provisions of *15 U.S.C. § 7001* [discussed in [a], *above*] with respect to state law in the following cases [*15 U.S.C. § 7002(a)*]:

- The law or regulation in question constitutes an enactment of UETA *as approved and recommended for enactment in all the states by the National Conference of Commissioners on Uniform State Laws in 1999*, except that any exception to the scope of UETA enacted by a state [*see, e.g., Civ. Code § 1633.3(b)(4), (c)* (California exceptions)] is preempted to the extent that the exception is inconsistent with the regulatory provisions of E-SIGN. In other words, UETA controls in states that have enacted it, but individual state modifications of UETA that are inconsistent with E-SIGN are preempted.

- The law or regulation is question specifies alternative procedures or requirements for the use and/or acceptance of electronic records or signatures to establish the legal effect, validity, or enforceability of contracts, if these procedures or requirements are consistent with E-SIGN.

As of mid-2007, UETA has been enacted in all but four states, and those four have equivalent laws [*see 15 U.S.C. § 7002(a)(2)*]. UETA has also been enacted in the District of Columbia and the U.S. Virgin Islands.

In addition, state law may not require or accord greater legal status or effect to the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures [*15 U.S.C. § 7002(a)(2)(A)(ii)*; *see 15 U.S.C. § 7002(a)(1)*]. States also are not permitted to circumvent the regulatory provisions of E-SIGN through the imposition of nonelectronic delivery methods under section 8(b)(2) of UETA [*15 U.S.C. § 7002(c)*; *see Civ. Code § 1633.8(b)(2)*].

In a few other specified circumstances, state law will supersede E-SIGN requirements [*see 15 U.S.C. § 7003*]. Specifically, the requirement to give effect to an electronic contract or signature does not apply to a contract or other record to the extent it is governed by any of the following state laws [*15 U.S.C. § 7003(a)*]:

- A statute, regulation, or other rule of law governing the creation and execution of wills, codicils, or testamentary trusts.

- A statute, regulation, or other rule of law governing adoption, divorce, or other matters of family law.

- The Uniform Commercial Code, other than section 1 206 (presumptions), Article 2 (sales of goods), and Article 2A (personal property leases) [*see Com. Code §§ 1206, 2101 et seq., 10101 et seq.*].

The requirement to give effect to an electronic signature or record also does not apply to court documents (such as orders, notices, briefs and pleadings); notices of cancellation or termination of utility services; specified notices in connection with default, acceleration, repossession, foreclosure, eviction, or right to cure under a credit agreement secured by, or a rental agreement for, an individual's primary residence; cancellation of health or life insurance benefits; product recall notices [*15 U.S.C. § 7003(b)(2)*]; and any document required to accompany any transportation or handling of toxic or dangerous materials [*15 U.S.C. § 7003(b)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Computer & Internet LawInternet BusinessContractsDigital Signatures

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[Reserved]

§§ 140.27[Reserved]

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§ 140.30 Governing Law

[1] General Rule Absent Choice of Law Provision

Generally, a contract is interpreted in accordance with the law and usage of the place at which it is to be performed, or, if it does not indicate a place ofperformance, according to the law and usage of the place at which it was made [*Civ. Code § 1646*; *see, e.g., Shannon-Vail Five Inc. v. Bunch (9th Cir. 2001) 270 F.3d 1207, 1210* (finding that since Nevada was place of performance of loan contract, Nevada law should be applied; analyzing Restatement (Second) of Conflicts to reach same result)]. The parties may provide in the contract for their choice of a different law, however [*see* [3], *below*].

[2] Contract Involving $250,000 or More Specifying California Law

The parties to any contract, agreement, or undertaking, contingent or otherwise, relating to a transaction involving in the aggregate not less than $250,000, may agree that California law will govern their rights and duties in whole or in part, whether the contract, agreement, or undertaking, or the transaction, bears a reasonable relation to California, and even if the transaction would otherwise be covered by *Com. Code § 1301(a)* (requiring reasonable connection to California and another state or country, to uphold choice of law provision) [*Civ. Code § 1646.5*; *see Code Civ. Proc. § 410.40* (jurisdiction and venue over foreign corporation or resident pursuant to choice of law provision in contract involving not less than $1,000,000)].

However, this rule does not apply to any of the following contracts, agreements, or undertakings [*Civ. Code § 1646.5*]:

- A contract for labor or personal services.

- A contract relating to any transaction primarily for personal, family, or household purposes.

- Any other contract to the extent provided in *Com. Code § 1301(b)*. The latter section lists Commercial Code sections that override a choice of law provision in situations involving creditors' rights against goods sold, leases, bank deposits and collections, letters of credit, bulk sales, investment

securities, and perfection of security interests.

[3] Enforceability of Choice of Law Provision

[a] Adoption of Restatement Approach

In determining the enforceability of arm's length contractual choice of law provisions, California courts must apply the principles set forth in Restatement 2d of Conflict of Laws section 187, which reflects a strong policy favoring enforcement of such provisions [*Nedlloyd Lines B.V. v. Superior Court (1992) 3 Cal. 4th 459, 464-465, 11 Cal. Rptr. 2d 330, 834 P.2d 1148* ; *see* *Washington Mutual Bank v. Superior Court (2001) 24 Cal. 4th 906, 927-928, 103 Cal. Rptr. 2d 320, 15 P.3d 1071* (trial court erred in certifying class in multi-state class action without first determining effect of choice of law agreements at issue: choice of law issues must be resolved as part of certification process)].

[b] Determining Reasonable Basis for Parties' Choice

To apply the principles of Restatement 2d of Conflict of Laws section 187 [*see* [a], *above*], the court first must determine that either (1) the chosen state has a substantial relationship to the parties or their transaction or (2) there is some other reasonable basis for the parties' choice of law. However, in making this inquiry, the court should be aware of the following possible exceptions [*Nedlloyd Lines B.V. v. Superior Court (1992) 3 Cal. 4th 459, 465, 11 Cal. Rptr. 2d 330, 834 P.2d 1148]* .

- There may be an exception when a choice of law issue arises from a contract subject to the Uniform Commercial Code, which provides that, with specified exceptions, when a transaction bears a reasonable relation to California and also to another state or nation, the parties may agree that the law either of California or of the other state or nation will govern their rights and duties. Failing such an agreement, the Commercial Code applies to transactions bearing an appropriate relation to California [*Com. Code § 1301*].

- A different result might obtain under subdivision (1) of Restatement 2d of Conflict of Laws section 187, which appears to allow the parties in some circumstances to specify the law of a state that has no relation to the parties or their transaction [*Nedlloyd Lines B.V. v. Superior Court (1992) 3 Cal. 4th 459, 465 n.4, 11 Cal. Rptr. 2d 330, 834 P.2d 1148]* .

The fact that one of the parties resides in another state gives the parties a reasonable ground for choosing that state's law [*Nedlloyd Lines B.V. v. Superior Court (1992) 3 Cal. 4th 459, 467, 11 Cal. Rptr. 2d 330, 834 P.2d 1148* ; *Hughes Electronics Corp. v. Citibank Delaware (2004) 120 Cal. App. 4th 251, 258, 15 Cal. Rptr. 3d 244]* . The same should be true when there is an intended third-party beneficiary of the contract, and that person resides in the chosen state [*ABF Capital Corp. v. Berglass (2005) 130 Cal. App. 4th 825, 835, 30 Cal. Rptr. 3d 588]* .

If the court cannot determine that there is a reasonable basis for the parties' choice, that is the end of the inquiry, and the court need not enforce the parties' choice of law [*Nedlloyd Lines B.V. v. Superior Court (1992) 3 Cal. 4th 459, 465, 11 Cal. Rptr. 2d 330, 834 P.2d 1148]* .

[c] Testing for Conflict With Fundamental Policy

If the court determines that the parties' choice of law was reasonable [*see* [b], *above*], the court must next determine whether the chosen state's law is contrary to a fundamental policy of California. If there is no such conflict, the court must enforce the parties' choice of law [*Nedlloyd Lines B.V. v. Superior Court (1992) 3 Cal. 4th 459, 465, 11 Cal. Rptr. 2d 330, 834 P.2d 1148* ; *e.g.,* *IBM v. Bajorek (9thCir. 1999) 191 F.3d 1033, 1041-1042* (New York law, chosen in stock-option agreement); *Guardian Savings & Loan Ass'n v. MD Assocs. (1998) 64 Cal. App. 4th 309, 323, 75 Cal. Rptr. 2d 151* (Texas law)].

There are no bright-line rules for determining what is or is not contrary to a fundamental policy of California [*Discover Bank v. Superior Court (2006) 134 Cal. App. 4th 886, 893, 36 Cal. Rptr. 3d 456]* . The absence of a fundamental conflict of laws could be due simply to the absence of any conflict [*see, e.g., Gerdlund v. Electronic Dispensers International (1987) 190 Cal. App. 3d 263, 269-270, 235 Cal. Rptr. 279* (Nevada law was reasonable choice; there was no conflict with California policy since California's parol evidence rule was same as Nevada rule)]. Or it could be due to the absence of a fundamental policy that would be affected. For instance, California law allows contracting parties to shorten or extend limitation periods; thus, California has no discernible fundamental policy that would be thwarted by enforcing a choice of law provision for the application of another state's limitation period [*ABF Capital Corp. v. Berglass (2005) 130 Cal. App. 4th 825, 836, 30 Cal. Rptr. 3d 588]* .

In determining whether another state's law conflicts with the fundamental policy of California, it would be error for the court to isolate the differences between an applicable California law and the other state's comparable law and then determine whether the isolated differences in the two states' laws reflect a fundamental policy. This approach would lead the court to consider each portion of the compared laws separately, which would minimize the impact of any deviation from the requirements of the California law. It is erroneous because it fails to consider the California law as an integrated whole, the particular parts of which reinforce each other [*Brack v. Omni Loan Co., Ltd. (2008) 164 Cal. App. 4th 1312, 1325, 80 Cal. Rptr. 3d 275* (choice of Nevada law, in consumer loan contract of adhesion, conflicted with fundamental policy expressed in Finance Lenders Law, *Fin. Code § 22000 et seq.*)].

There may be an occasional case in which California is the forum, and the parties have chosen the law of another state, but the law of yet a third state, rather than California's law, would apply but for the parties' choice. In that situation, the California court will look to the fundamental policy of the third state in determining whether to enforce the parties' choice of law [*Nedlloyd Lines B.V. v. Superior Court (1992) 3 Cal. 4th 459, 465 n.5, 11 Cal. Rptr. 2d 330, 834 P.2d 1148]* .

[d] Resolving Fundamental Conflict of Laws

When there is a fundamental conflict with California law, the court then must determine whether California has a materially greater interest than the chosen state in the determination of the particular issue. If California has a materially greater interest than the chosen state, the choice of law will not be enforced, for the obvious reason that in such a case the California court should decline to enforce a law contrary to California's fundamental policy [*Nedlloyd Lines B.V. v. Superior Court (1992) 3 Cal. 4th 459, 465, 11 Cal. Rptr. 2d 330, 834 P.2d 1148]* . For example:

- California's strong policy expressed in *Bus. & Prof. Code § 16600*, prohibiting covenants not to compete, determined the enforceability of a noncompetition agreement in an employment contract, which provided that Maryland law would govern contract disputes [*Application Group Inc. v. Hunter Group, Inc. (1998) 61 Cal. App. 4th 881, 900-902, 72 Cal. Rptr. 2d 73* ; *see Scott v. Snelling & Snelling, Inc. (N.D. Cal. 1990) 732 F. Supp. 1034, 1039-1041* (*Bus. & Prof. Code § 16600* would control as to validity of noncompetition clause in franchise agreement that was to be governed by Pennsylvania law)].

- The parties' choice of Colorado law allowing an interest rate that would be usurious under California law could not be enforced [*Mencor Enterprises, Inc. v. Hets Equities Corp. (1987) 190 Cal. App. 3d 432, 441, 235 Cal. Rptr. 464]* .

Otherwise, the parties' choice of law should be enforced. For example, California's interest in enforcing the policy underlying *Code Civ. Proc. § 580b*, which prohibits a deficiency judgment in certain cases of foreclosing a lien, was not materially greater than a Texas policy of ensuring that the justified expectations of the parties would be met [*Guardian Savings & Loan Ass'n v. MD Assocs. (1998) 64 Cal. App. 4th 309, 323, 75 Cal. Rptr. 2d 151]* .

There may be cases in which the chosen state has a materially greater interest in the matter than does California, but enforcement of the law of the chosen state would lead to a result contrary to a fundamental policy of California. In some cases, enforcement of the law of the chosen state may be appropriate in spite of California's policy to the contrary. For example, enforcement of a class-action waiver in a particular consumer contract of adhesion could be contrary to a fundamental policy of California [*see Discover Bank v. Superior Court (2005) 36 Cal. 4th 148* ; *§ 140.25[2][c]*], but if enforcement of such a waiver would be consistent with the law of the other state that the contract specifies will govern the parties' rights and obligations, and if the party opposing enforcement of the waiver is asserting claims in a California court against a resident of that other state solely under the law of that state, the California court may conclude that the other state has a materially greater interest in seeing its law enforced than California has in enforcing its contrary fundamental policy [*Discover Bank v. Superior Court (2006) 134 Cal. App. 4th 886, 895, 36 Cal. Rptr. 3d 456* (trial court correctly ruled that plaintiff, attempting to pursue class action, must abide by class-action waiver in consumer contract of adhesion governed by Delaware law and must submit to arbitration on his claim alone)]. On the other hand, if the party opposing enforcement is asserting claims under California law, then the court may conclude that California's interest in enforcing its fundamental policy is greater than the other state's interest in enforcing its contrary law [*Klussman v. Cross Country Bank (2005) 134 Cal. App. 4th 1283, 1298-1300, 36 Cal. Rptr. 3d 728* (trial court correctly ruled that class action waiver in consumer contract of adhesion governed by Delaware law could not be enforced in action under Consumers Legal Remedies Act and California's unfair competition law); *accord, Omstead v. Dell, Inc. (9th Cir. 2010) 594 F.3d 1081, 1086* (under California law, choice-of-law provision electing Texas law, in computer manufacturer's consumer contract, was unenforceable; class-action waiver was unconscionable under *Discover Bank* test and could not be severed, rendering entire arbitration provision unenforceable)]. In these kinds of cases, careful consideration of both California's policy and the other state's interest would be required [*Nedlloyd Lines B.V. v. Superior Court (1992) 3 Cal. 4th 459, 465 n.6, 11 Cal. Rptr. 2d 330, 834 P.2d 1148]* .

[4] Application of Choice of Law Provision in Tort Action

Generally, a clause referring to all disputes "arising under or growing out of thisagreement" is considered broader than one stating only that "this agreement shall be governed by and construed in accordance with the law of" a specified jurisdiction. The California Supreme Court narrowly held that a provision of the first kind required a cause of action for breach of fiduciary duty to be determined in accordance with the foreign law specified in the choice of law provision. Whatever fiduciary duties the parties had toward each other arose out of their contractual obligations to each other [*Nedlloyd Lines B.V. v. Superior Court (1992) 3 Cal. 4th 459, 469-472, 11 Cal. Rptr. 2d 330, 834 P.2d 1148* (majority shareholder's duty to corporation)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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13-140 California Forms of Pleading and Practice--Annotated § 140.31

§ 140.31 Parol Evidence Rule

[1] Elements

[a] Writing Intended as Final Expression of Agreement

The parol evidence rule generally prohibits the introduction of any extrinsic evidence, whether oral or written, to vary, alter, or augment the terms of an integrated written contract. The rule is codified in *Civ. Code § 1625* and *Code Civ. Proc. § 1856* [*Casa Herrera, Inc. v. Beydoun (2004) 32 Cal. 4th 336, 343, 9 Cal. Rptr. 3d 97, 83 P.3d 497]* .

The execution of a contract in writing, whether the law requires it to be written or not, supersedes all of the negotiations or stipulations concerning its subject matter that preceded or accompanied the execution of the contract [*Civ. Code § 1625*].

Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to the terms included in the writing may not be contradicted by evidence of any previous agreement or of a contemporaneous oral agreement [*Code Civ. Proc. § 1856(a)*; *see Com. Code § 2202* (virtually identical rule applicable to contracts for sales of goods)]. The parties may explain or supplement the terms in such an agreement by evidence of consistent additional terms, unless the writing is intended as a complete and exclusive statement of the terms of the agreement [*Code Civ. Proc. § 1856(b)*; *see* [b], *below*].

The parol evidence rule does not, however, prohibit the introduction of extrinsic evidence to explain the meaning of a written contract if the meaning urged is one to which the written contract terms are reasonably susceptible [*Casa Herrera, Inc. v. Beydoun (2004) 32 Cal. 4th 336, 343, 9 Cal. Rptr. 3d 97, 83 P.3d 497]* . Extrinsic evidence is admissible to explain ambiguities or to give meaning and content to words used in the agreement, as long as that evidence does not vary or contradict the written terms of the agreement [*Blackburn v. Charnley (2004) 117 Cal. App. 4th 758, 766, 11 Cal. Rptr. 3d 885* ; *see Code Civ. Proc. 1856(e)*]. Evidence admitted to explain an agreement may include evidence of a course of dealing, usage of trade, or course of performance [*Code Civ. Proc. 1856(c)*; *Employers Reins. Co. v. Superior Court (2008) 161 Cal. App. 4th 906, 911, 923-924, 74 Cal. Rptr. 3d 733* (course-of-performance evidence is admissible only to interpret contract under which parties were performing; it is not relevant to interpret any

other contract between same parties, even if both contracts involved same subject); *see United States Cellular Inv. Co. v. GTE Mobilnet, Inc. (9th Cir. 2002) 281 F.3d 929, 937-938* (course of performance of partnership agreement demonstrated that partners did not intend that corporate partner's transfers of stock would trigger anti-transfer provisions); *see also Com. Code § 2202* (virtually identical rule applicable to contracts for sales of goods)].

[b] Writing Intended as Final and Complete Agreement

As codified in *Code Civ. Proc. 1856(a)*, the parol evidence rule precludes only evidence to contradict the terms of a written agreement that the parties intended to be their final agreement on those terms. It does not preclude evidence of consistent additional terms relating to the same subject matter unless the parties intended the agreement to be not only the final expression of their agreement but also their complete and exclusive statement of the terms of their agreement on the subject matter [*Code Civ. Proc. 1856(b)*; *see Com. Code § 2202* (virtually identical rule applicable to contracts for sales of goods)].

[c] Determination of Parties' Intention

The trial court determines whether the parties intended the writing to be a final expression of their agreement with respect to the terms included in it and whether the writing is intended also as a complete and exclusive statement of the terms of the agreement [*Code Civ. Proc. § 1856(d)*; *see Banco Do Brasil, S.A. v. Latian, Inc. (1991) 234 Cal. App. 3d 973, 1001, 285 Cal. Rptr. 870* (whether rule applies to exclude evidence of any collateral oral agreements is question of law to be determined by court); *see also Wang v. Massey Chevrolet (2002) 97 Cal. App. 4th 856, 872-873, 876, 118 Cal. Rptr. 2d 770* (citing *Banco Do Brasil* in determining that parol evidence rule barred evidence of oral misrepresentations when lease was not reasonably susceptible to interpretation consistent with those representations)].

[d] Integrity of Writing or Validity of Agreement

When a party puts a mistake or imperfection of the writing in issue by the pleadings, the parol evidence rule does not preclude taking evidence relevant to that issue [*Code Civ. Proc. § 1856(e)*; *see Pacific State Bank v. Greene (2003) 110 Cal. App. 4th 375, 388-389, 1 Cal. Rptr. 3d 739* (loan guarantor's declaration regarding which loan she intended to guarantee raised triable issue of fact concerning mutual mistake defense in bank's action to recover on several loans)].

When the validity of the agreement is in dispute, the parol evidence rule does not preclude taking evidence relevant to that issue [*Code Civ. Proc. § 1856(f)*; *Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 148, 308 P.2d 713* (rule does not preclude evidence that contract lawful on its face is in fact part of illegal transaction); *Homami v. Iranzadi (1989) 211 Cal. App. 3d 1104, 1112, 260 Cal. Rptr. 6]* .

[e] Circumstances of Making Agreement

For the proper construction of an instrument, the parties may show the circumstances in which it was made, including the situation of the subject of the instrument and of the parties to it, so that the judge may be placed in the position of those whose language he or she is to interpret [*Code Civ. Proc. § 1860*]. The parol evidence rule does not preclude taking evidence of the circumstances in which the agreement was made or to which it relates, or to explain an extrinsic ambiguity, or otherwise to interpret the terms of the agreement, or to establish illegality or fraud [*Code Civ. Proc.§ 1856(g)* (so-called fraud exception to parol evidence rule); *see, e.g., Kavruck v. Blue Cross of California (2003) 108 Cal. App. 4th 773, 782-784, 134 Cal. Rptr. 2d 152* (insured entitled to submit parol evidence to support interpretation of ambiguous health insurance policy term); *Darling v. Controlled Environments Construction, Inc. (2001) 89 Cal. App. 4th 1221, 1234-1235, 108 Cal. Rptr. 2d 213* (parol evidence rule did not bar extrinsic evidence introduced to assist court in ascertaining parties' intent regarding ambiguity of floor flatness standard in structural concrete subcontract); *Neverkovec v. Fredericks (1999) 74 Cal. App. 4th 337, 350-353, 87 Cal. Rptr. 2d 856* (parol evidence rule did not bar extrinsic evidence introduced by third party regarding intent of parties to release); *see generally* Ch. 269, *Fraud and Deceit*]. For example, in a case in which a guarantor claimed that she agreed to guarantee a single loan but that a bank

employee's misrepresentations led her to sign guaranty agreements covering four loans, the court of appeal held that evidence of factual misstatements was admissible to show mistake or fraud pursuant to the statutory exceptions to the parol evidence rule. The court concluded that the judicial limitation on the scope of the statutory fraud exception should not be further extended to preclude parol evidence of a misrepresentation of fact over the content of the physical document at time of signing [*Pacific State Bank v. Greene (2003) 110 Cal. App. 4th 375, 378-379, 396, 1 Cal. Rptr. 3d 739]* .

[2] Rule of Substantive Law

The parol evidence rule is a rule of substantive law, not a rule of evidence [*Casa Herrera, Inc. v. Beydoun (2004) 32 Cal. 4th 336, 343, 9 Cal. Rptr. 3d 97, 83 P.3d 497* ; *Estate of Gaines (1940) 15 Cal. 2d 255, 264, 100 P.2d 1055* ; *Alling v. Universal Manufacturing Corp. (1992) 5 Cal. App. 4th 1412, 1433, 7 Cal. Rptr. 2d 718* ; *Banco Do Brasil, S.A. v. Latian, Inc. (1991) 234 Cal. App. 3d 973, 1000, 285 Cal. Rptr. 870]* . It does not preclude evidence for reasons ordinarily requiring exclusion, such as the low probative value of the evidence or a policy against admitting it. Instead, the rule states simply that, as a matter of substantive law, the act of embodying the complete terms of an agreement in a writing, called integration, becomes the contract of the parties. Extrinsic evidence of their agreement, no matter how persuasive, is precluded because it cannot serve to prove what the agreement was; that is determined as a matter of law to be the writing itself [*Riley v. Bear Creek Planning Committee (1976) 17 Cal. 3d 500, 508-509, 131 Cal. Rptr. 381, 551 P.2d 1213* ; *Alling v. Universal Manufacturing Corp. (1992) 5 Cal. App. 4th 1412, 1434, 7 Cal. Rptr. 2d 718* ; *Banco Do Brasil, S.A. v. Latian, Inc. (1991) 234 Cal. App. 3d 973, 1000, 285 Cal. Rptr. 870 , cert. denied, 504 U.S. 986 (1992)* ; *Marani v. Jackson (1986) 183 Cal. App. 3d 695, 701, 228 Cal. Rptr. 518]* .

In a case in which a court resolved an action for breach of contract and fraud in favor of a defendant by applying the parol evidence rule, and the defendant thereafter filed a malicious prosecution action against the plaintiffs in the underlying action, the California Supreme Court held that the termination of the underlying action based on the parol evidence rule satisfied the favorable termination element of a malicious prosecution claim [*Casa Herrera, Inc. v. Beydoun (2004) 32 Cal. 4th 336, 339, 349, 9 Cal. Rptr. 3d 97, 83 P.3d 497]* .

PRACTICE TIP:

Possibility of Action for Fraud in Lieu of Action for Breach of Contract. A party may not be able to prove a cause of action for breach of contract based on an oral misrepresentation that contradicts a written integrated agreement. However, the party may be able to prove a tort cause of action for fraud based on fraudulent concealment if the party was induced to enter into the written, integrated agreement by the other party's intentional failure to disclose material facts that party had a duty to disclose [*see Marketing West, Inc. v. Sanyo Fisher (USA) Corp. (1992) 6 Cal. App. 4th 603, 612-614, 7 Cal. Rptr. 2d 859]* . This strategy is discussed in Ch. 269, *Fraud and Deceit* .

[3] Integration and Susceptibility

[a] Determination That Agreement Is Integrated

The parties may not use parol evidence to add to or vary the terms of a written contract if they have agreed that it is an "integrated agreement," that is, a complete and final embodiment of the terms of their agreement [*Masterson v. Sine (1968) 68 Cal. 2d 222, 225, 65 Cal. Rptr. 545, 436 P.2d 561* ; *Bionghi v. Metropolitan Water District of Southern California (1999) 70 Cal. App. 4th 1358, 1364, 83 Cal. Rptr. 2d 388* (extrinsic evidence offered by plaintiff to show that contract required good cause for termination was inadmissible when agreement included integration clause); *SDC/Pullman Partners v. Tolo Inc. (1997) 60 Cal. App. 4th 37, 53-54, 70 Cal. Rptr. 2d 62* ; *Alling v. Universal Manufacturing Corp. (1992) 5 Cal. App. 4th 1412, 1434, 7 Cal. Rptr. 2d 718* ; *Wagner v. Glendale Adventist Medical Center (1989) 216 Cal. App. 3d 1379, 1385, 265 Cal. Rptr. 412]* . Whether a written agreement is integrated depends on the parties' intent, which the court must determine by considering relevant extrinsic evidence that explains but does not flatly contradict the writing [*Stevenson v. Oceanic Bank (1990) 223 Cal. App. 3d 306, 316, 272 Cal. Rptr. 757]* . The

crucial issue in determining whether the agreement is integrated is whether the parties intended their writing to serve as the exclusive embodiment of their agreement. The resolution of this question involves examining the instrument itself as well as collateral agreements and circumstances at the time of the writing, and the subject matter, nature, and object of the contract [*Masterson v. Sine (1968) 68 Cal. 2d 222, 225-226, 65 Cal. Rptr. 545, 436 P.2d 561* ; *Wedeck v. Unocal Corp. (1997) 59 Cal. App. 4th 848, 862-863, 69 Cal. Rptr. 2d 501* ; *Wagner v. Glendale Adventist Medical Center (1989) 216 Cal. App. 3d 1379, 1385-1386, 265 Cal. Rptr. 412* ; *McLain v. Great American Ins. Companies (1989) 208 Cal. App. 3d 1476, 1484, 256 Cal. Rptr. 863* ; *Marani v. Jackson (1986) 183 Cal. App. 3d 695, 702, 228 Cal. Rptr. 518]* .

An appellate court is not bound by the trial court's determination of whether a written agreement is integrated. The appellate court may review the evidence de novo [*Banco Do Brasil, S.A. v. Latian, Inc. (1991) 234 Cal. App. 3d 973, 1001, 285 Cal. Rptr. 870* , *cert. denied, 504 U.S. 986 (1992)]* , unless the decision rests on evidence that is contradictory or from which conflicting inferences may be drawn, in which case the sufficiency-of-the-evidence standard applies [*see* *Sunniland Fruit, Inc. v. Verni (1991) 233 Cal. App. 3d 892, 897, 284 Cal. Rptr. 824]* .

[b] Factors to Be Considered

In determining integration, factors the court should consider include [*Stevenson v. Oceanic Bank (1990) 223 Cal. App. 3d 306, 316, 272 Cal. Rptr. 757* ; *McLain v. Great American Ins. Companies (1989) 208 Cal. App. 3d 1476, 1484, 256 Cal. Rptr. 863* ; *Marani v. Jackson (1986) 183 Cal. App. 3d 695, 702, 228 Cal. Rptr. 518* ; *Mobil Oil Corp. v. Rossi (1982) 138 Cal. App. 3d 256, 266, 187 Cal. Rptr. 845]* :

- The language and completeness of the written agreement;
- Whether it contains an integration clause;
- The terms of the alleged oral agreement and whether it might contradict those in the writing;
- Whether the oral agreement might naturally be made as a separate agreement or, conversely, involves terms that would more naturally have been included in the writing; and
- Whether the jury might be misled by the introduction of parol evidence.

[c] Previous Agreements

If the contract provides that there are no previous understandings or agreements not contained in the writing, it may express the parties' intention to nullify antecedent understandings or agreements. However, the court must examine such collateral agreements themselves to determine whether the parties intended that the subjects of negotiation withwhich the contract deals were to be included in, excluded from, or otherwise affected by, the writing [*Masterson v. Sine (1968) 68 Cal. 2d 222, 225-226, 65 Cal. Rptr. 545, 436 P.2d 561* (repudiating face-of-document rule requiring court to determine from face of instrument whether contract appeared to be complete agreement)].

[d] Partial Integration

Integration may be partial. The parties may intend a writing as a final expression of their agreement with respect to a particular subject matter or term, but not as a final expression of their entire agreement [*Founding Members of Newport Beach Country Club v. Newport Beach Country Club, Inc. (2003) 109 Cal. App. 4th 944, 953-954, 135 Cal Rptr. 2d 505* (concluding that part of contract regarding right of first offer of sale was integrated); *Wallis v. Farmers Group, Inc. (1990) 220 Cal. App. 3d 718, 730, 269 Cal. Rptr. 299* , *disapproved on other grounds, Dore v. Arnold Worldwide, Inc. (2006) 39 Cal. 4th 384, 394 n.2* ; *Wagner v. Glendale Adventist Medical Center (1989) 216 Cal. App.*

3d 1379, 1385, 265 Cal. Rptr. 412] . If only part of the agreement is integrated, the parol evidence rule applies to that part of the agreement; the parties may use extrinsic evidence to prove nonintegrated elements [*Wallis v. Farmers Group, Inc. (1990) 220 Cal. App. 3d 718, 730, 269 Cal. Rptr. 299* , *disapproved on other grounds, Dore v. Arnold Worldwide, Inc. (2006) 39 Cal. 4th 384, 394 n.2* ; *but see Harden v. Maybelline Sales Corp. (1991) 230 Cal. App. 3d 1550, 1555-1556, 282 Cal. Rptr. 96* (disagreeing with *Wallis* regarding application of parol evidence rule to employment applications)].

[e] Provisional Receipt of Evidence

To determine whether parol evidence is admissible, the court must provisionally receive all evidence offered relating to the intention of parties, the circumstances surrounding the making of the agreement, and the proffered collateral agreement [*Gerdlund v. Electronic Dispensers International (1987) 190 Cal. App. 3d 263, 270, 235 Cal. Rptr. 279]* . The following guidelines may apply:

- A contract provision that states that the contract supersedes all previous agreements between parties is not conclusive of integration. The court must examine the collateral agreement itself to determine whether the agreement was integrated [*Gerdlund v. Electronic Dispensers International (1987) 190 Cal. App. 3d 263, 270-271, 235 Cal. Rptr. 279]* .

- A standardized form drafted by one party is less likely to reflect an integrated agreement than a document drafted specifically to memorialize the parties' transaction [*see McLain v. Great American Ins. Companies (1989) 208 Cal. App. 3d 1476, 1485, 256 Cal. Rptr. 863]* .

- A document that fails to address significant aspects of the agreement is not likely to be integrated [*see McLain v. Great American Ins. Companies (1989) 208 Cal. App. 3d 1476, 1485, 256 Cal. Rptr. 863* (employment application that made no mention of salary or position not integrated agreement)].

[f] Admission of Evidence

The court should exclude parol evidence of oral collateral agreements only if the collateral agreements directly contradict the writing and the jury is likely to be misled [*Masterson v. Sine (1968) 68 Cal. 2d 222, 227, 65 Cal. Rptr. 545, 436 P.2d 561]* . Phrased another way, parol evidence is admissible if the agreement is susceptible of the meaning urged by the party offering the evidence [*SDC/Pullman Partners v. Tolo Inc. (1997) 60 Cal. App. 4th 37, 53-54, 70 Cal. Rptr. 2d 62* ; *McLain v. Great American Ins. Companies (1989) 208 Cal. App. 3d 1476, 1483, 1485-1486, 256 Cal. Rptr. 863* ; *see Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co. (1968) 69 Cal. 2d 33, 37, 69 Cal. Rptr. 561, 442 P.2d 641* ; *Bionghi v. Metropolitan Water District of Southern California (1999) 70 Cal. App. 4th 1358, 1364-1366, 83 Cal. Rptr. 2d 388* (extrinsic evidence offered by plaintiff did not show that contract language was reasonably susceptible to interpretation that added requirement of good cause for termination and thus was inadmissible); *United States Cellular v. GTE Mobilnet, Inc. (9th Cir. 2002) 281 F.3d 929, 938-939* (district court did not abuse discretion in excluding extrinsic evidence supporting plaintiff's construction of agreement's anti-transfer provisions because provisions were not fairly susceptible to that construction)].

Whether the court admits the evidence involves a determination of the credibility of the evidence and whether, considering the circumstances of the parties, the agreement is one that might naturally be made as a separate agreement [*see Riley v. Bear Creek Planning Committee (1976) 17 Cal. 3d 500, 509, 131 Cal. Rptr. 381, 551 P.2d 1213* ; *Masterson v. Sine (1968) 68 Cal. 2d 222, 227-228, 65 Cal. Rptr. 545, 436 P.2d 561* ; *FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 388, 282 Cal. Rptr. 508* ; *cf. Com. Code § 2202*, Comment 3 (court should exclude evidence of additional terms only if they certainly would be included in document)]. If the court concludes that it would not have been natural for the parties to make an alleged collateral oral agreement, the court should nevertheless permit parol evidence of such an agreement if the court is convinced that the unnatural negotiation actually happened in

the case [*see* *Masterson v. Sine (1968) 68 Cal. 2d 222, 228 n.1, 65 Cal. Rptr. 545, 436 P.2d 561]* .

[g] Issue of Law or Fact

California courts disagree on whether the issue of integration, *i.e.*, whether the parties intended a writing as a final, complete, and exclusive statement of their agreement, is a question of law or of fact. The primary significance of whether integration is a question of law or fact is the standard applicable on review. If it is a question of law, the trial court's decision is subject to plenary review as long as the foundational extrinsic evidence is not in conflict. In some cases, the result will be the same whether theappellate court applies a substantial evidence test or makes its own determination [*see, e.g.,* *Esbensen v. Userware Internat., Inc. (1992) 11 Cal. App. 4th 631, 638 n.4, 14 Cal. Rptr. 2d 93]* .

The First District and Fourth District Courts of Appeal have held that integration is a question of law [*see* *Esbensen v. Userware Internat., Inc. (1992) 11 Cal. App. 4th 631, 638 n.4, 14 Cal. Rptr. 2d 93* ; *Alling v. Universal Manufacturing Corp. (1992) 5 Cal. App. 4th 1412, 1434, 7 Cal. Rptr. 2d 718* ; *Malmstrom v. Kaiser Aluminum & Chemical Corp. (1986) 187 Cal. App. 3d 299, 314, 231 Cal. Rptr. 820* ; *Brawthen v. H & R Block, Inc. (1972) 28 Cal. App. 3d 131, 137, 104 Cal. Rptr. 486]* . The Second District has held that it is a question of fact [*Mobil Oil Corp. v. Handley (1978) 76 Cal. App. 3d 956, 961, 143 Cal. Rptr. 321]* .

The Third District Court of Appeal treats integration as a mixed question of law and fact. The Third District permits a limited weighing of the evidence by the trial court for the purpose of keeping "incredible" evidence of an oral understanding from the jury. Analysis of integration involves three steps [*FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 391, 392, 282 Cal. Rptr. 508]* :

- Determining what happened.
- Selecting the applicable rules of law.
- Applying the rules to the facts.

Only if the evidence bearing on the first step (what happened) presents a conflict will the trial court weigh evidence. Necessarily, the court should not weigh evidence on a motion for summary judgment.

[4] Invocation of Rule by Stranger to Contract

Before 1978, *Code Civ. Proc. § 1856* limited application of the parol evidence rule to the parties to the contract and their representatives and successors in interest. Case law interpreted this limitation to make the rule inapplicable to actions involving a stranger to the contract. In 1978, *Code Civ. Proc. § 1856* was amended to remove the limiting language. The California Supreme Court has not yet addressed the issue. However, one court of appeal concluded that the amendment was a deliberate substantive change, and the parol evidence rule applies in actions involving a stranger to a contract [*Kern County Water Agency v. Belridge Water Storage Dist. (1993) 18 Cal. App. 4th 77, 86, 22 Cal. Rptr. 2d 354* ; *see also* *Neverkovec v. Fredericks (1999) 74 Cal. App. 4th 337, 350, n.8, 87 Cal. Rptr. 2d 856* (citing *Kern*)]. The effect is to preclude the introduction of evidence of terms contradicting a writing even though the action is between a party to the contract and a stranger.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsIntegration ClausesContracts LawContract InterpretationParol EvidenceGeneral OverviewEvidenceDocumentary EvidenceParol Evidence

California Forms of Pleading and Practice--Annotated

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Volume 13: Conspiracy thru Conversion-Chs. 126-159
Chapter 140 CONTRACTS
PART II. LEGAL BACKGROUND
C. Interpretation of Contract

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140.32 Rules of Interpretation

[1] Uniformity of Rules

Courts must interpret all contracts, public or private, by the same rules, except as otherwise provided by the Civil Code [*Civ. Code § 1635*; *see National Marble Co. v. Bricklayers & Allied Craftsmen (1986) 184 Cal. App. 3d 1057, 1067, 229 Cal. Rptr. 653* (language of contract, if clear and explicit, governs its interpretation)].

[2] Purpose to Give Effect to Parties' Intention

A court must interpret a contract to give effect to the mutual intention of the parties as the intention existed at the time of contracting, as far as that is ascertainable and lawful [*Civ. Code § 1636*; *Roden v. Bergen Brunswig Corporation (2003) 107 Cal. App. 4th 620, 625, 633, 132 Cal. Rptr. 2d 549* (trial court did not err in interpreting judgment encapsulating section 998 settlement agreement concerning retirement benefits); *People v. R.J. Reynolds Tobacco Co. (2003) 107 Cal. App. 4th 516, 525, 132 Cal. Rptr. 2d 151* (trial court did not err in interpreting terms of master settlement limiting outdoor tobacco advertising); *De Anza Enterprises v. Johnson (2002) 104 Cal. App. 4th 1307, 1314-1315, 1318, 128 Cal. Rptr. 2d 749* (examination of joint venturers' contract terms, in context of document as a whole and surrounding circumstances, led to conclusion that parties intended to fix purchase price by mutual agreement or appraisal, leaving date to follow as matter of course); *Stevenson v. Oceanic Bank (1990) 223 Cal. App. 3d 306, 316, 272 Cal. Rptr. 757* ; *United States Cellular v. GTE Mobilnet, Inc. (9th Cir. 2002) 281 F.3d 929, 934-936* (finding no genuine issue of material fact as to proper construction of anti-transfer provisions in partnership agreement, because intent of parties as expressed in plain language of partnership agreement was not to restrict legitimate sale of stock of corporate partner)]. To ascertain the intention of the parties, if it is doubtful, the court must apply statutory rules [*Civ. Code § 1637*; *see § 140.32[3] -[19]*].

[3] Contract Language Governs

[a] Rule and Exception

The language of a contract governs its interpretation, if the language is clear and unambiguous and does not involve

absurdity [*Civ. Code § 1638*; *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 11, 262 Cal. Rptr. 716* ; *National Marble Co. v. Bricklayers & Allied Craftsmen (1986) 184 Cal. App. 3d 1057, 1067, 229 Cal. Rptr. 653]* . This interpretation, even though it involves what might properly be called questions of fact, is essentially a judicial function to be exercised according to the generally accepted canons of interpretation unless the interpretationturns on the credibility of extrinsic evidence [*Parsons v. Bristol Development Co. (1965) 62 Cal. 2d 861, 865, 44 Cal. Rptr. 767, 402 P.2d 839* ; *Oceanside 84, Ltd. v. Fidelity Federal Bank (1997) 56 Cal. App. 4th 1441* ; *Canadian Ins. Co. v. Ehrlich (1991) 229 Cal. App. 3d 383, 391-392, 280 Cal. Rptr. 141* ; *Greater Middleton Assn. v. Holmes Lumber Co. (1990) 222 Cal. App. 3d 980, 989, 271 Cal. Rptr. 917* ; *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 11, 262 Cal. Rptr. 716* ; *Moss Dev. Co. v. Geary (1974) 41 Cal. App. 3d 1, 9, 115 Cal. Rptr. 736* ; *see Sanchez v. Bally's Total Fitness Corporation (1998) 68 Cal. App. 4th 62, 69, 79 Cal. Rptr. 2d 902* (health club release and assumption of risk provision was clear, explicit, and comprehensible in itself and when considered with entire agreement and thus plaintiff's cause of action for negligence was barred by terms of agreement)].

[b] Judicial Function

When there is no extrinsic evidence or when the extrinsic evidence is uncontradicted, the interpretation of a written instrument is solely a judicial function [*Greater Middleton Assn. v. Holmes Lumber Co. (1990) 222 Cal. App. 3d 980, 989-990, 271 Cal. Rptr. 917* ; *Northridge Hospital Foundation v. Pic 'N' Save No. 9, Inc. (1986) 187 Cal. App. 3d 1088, 1095* ; *see In re Crow Winthrop Operating Partnership (9th Cir. 2001) 241 F.3d 1121, 1124* (court may interpret contract without recourse to extrinsic evidence if contract terms are unambiguous)]. When conflicting inferences may be drawn from extrinsic evidence that is not in conflict, the court must interpret the contract [*Medical Operations Management, Inc. v. National Health Laboratories, Inc. (1986) 176 Cal. App. 3d 886, 891-892, 895, 222 Cal. Rptr. 455]* .

In general, when a dispute arises over the meaning of contract language, the first question the court must decide is whether the language is "reasonably susceptible" to the interpretation urged by a party. If not, the issue is concluded [*Foster-Gardner, Inc. v. National Union Fire Insurance Company (1998) 18 Cal. 4th 857, 879-880, 77 Cal. Rptr. 2d 107, 959 P.2d 265* (use of word "suit" in insurance policies was not ambiguous; reasonable interpretation of that term is "lawsuit," that is, court proceeding initiated by filing of complaint, and construction which included pre-complaint notices was not reasonable); *Oceanside 84, Ltd. v. Fidelity Federal Bank (1997) 56 Cal. App. 4th 1441, 1448* ; *So. Cal. Edison Co. v. Superior Court (1995) 37 Cal. App. 4th 839, 847-848, 44 Cal. Rptr. 2d 227* ; *see Consolidated World Investments, Inc. v. Lido Preferred, Ltd. (1992) 9 Cal. App. 4th 373, 379, 11 Cal. Rptr. 2d 524]* . The court can determine whether the contract is reasonably susceptible to the party's interpretation from the language of the contract [*So. Cal. Edison Co. v. Superior Court (1995) 37 Cal. App. 4th 839, 848, 44 Cal. Rptr. 2d 227* ; *see United Teachers of Oakland v. Oakland Unified Sch. Dist. (1977) 75 Cal. App. 3d 322, 330, 142 Cal. Rptr. 105* ; *see also* [6], *below*], or from extrinsic evidence of the parties' intent [*Oceanside 84, Ltd. v. Fidelity Federal Bank (1997) 56 Cal. App. 4th 1441, 1448* ; *So. Cal. Edison Co. v. Superior Court (1995) 37 Cal. App. 4th 839, 848, 44 Cal. Rptr. 2d 227* ; *see Winet v. Price (1992) 4 Cal. App. 4th 1159, 1165, 6 Cal. Rptr. 2d 554]* .

If the court decides the language is reasonably susceptible to the interpretation urged, the court moves to the second question; that is, what the parties intended the language to mean [*So. Cal. Edison Co. v. Superior Court (1995) 37 Cal. App. 4th 839, 847-848, 44 Cal. Rptr. 2d 227* ; *see Winet v. Price (1992) 4 Cal. App. 4th 1159, 1165, 6 Cal. Rptr. 2d 554]* .

[c] Admissibility of Extrinsic Evidence

The paramount consideration in the interpretation of contracts is the mutual intention of the parties at the time of the contracting, as far as it is ascertainable and lawful [*Western Camps, Inc. v. Riverway Ranch Enterprises (1977) 70 Cal. App. 3d 714, 723, 138 Cal. Rptr. 918* ; *see Civ. Code § 1636*]. The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether the instrument appears to the court to be plain and

unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language is reasonably susceptible [*Founding Members of Newport Beach Country Club v. Newport Beach Country Club, Inc. (2003) 109 Cal. App. 4th 944, 955-956, 961, 135 Cal Rptr. 2d 505* (country club's governing regulation was not reasonably susceptible to interpretation urged by club's members); *General Motors Corp. v. Superior Court (1993) 12 Cal. App. 4th 435, 441, 15 Cal. Rptr. 2d 622* (release); *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn. (1992) 4 Cal. App. 4th 1538, 1559, 6 Cal. Rptr. 2d 698* ; *Murphy Slough Assn. v. Avila (1972) 27 Cal. App. 3d 649, 653, 104 Cal. Rptr. 136]* .

The court must ascertain and give effect to this intention by determining what the parties meant by the words they used. The meaning of particular words or groups of words varies with the verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of the users and hearers or readers. A word has no meaning apart from these factors [*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co. (1968) 69 Cal. 2d 33, 38, 69 Cal. Rptr. 561, 442 P.2d 641]* . Even if one assumes that words standing alone mean one thing, when the parties have demonstrated by their actions that to them those words mean something different, the court must enforce the meaning and intention of the parties [*Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1978) 22 Cal. 3d 302, 314, 148 Cal. Rptr. 918, 583 P.2d 777]* .

[d] Use of Extrinsic Evidence

Extrinsic evidence is admissible to explain the meaning of a written instrument when the offered evidence is relevant to prove a meaning towhich the language of the instrument is reasonably susceptible in the light of all of the circumstances that reveal the sense in which the writer used the words [*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co. (1968) 69 Cal. 2d 33, 40, 69 Cal. Rptr. 561, 442 P.2d 641* ; *Southern Pacific Transportation Company v. Santa Fe Pacific Pipelines Inc. (1999) 74 Cal. App. 4th 1232, 1241-1242, 88 Cal. Rptr. 2d 777* ; *Oakland-Alameda County Coliseum, Inc. v. Oakland Raiders, Ltd. (1988) 197 Cal. App. 3d 1049, 1057, 243 Cal. Rptr. 300]* . Extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written contract [*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co. (1968) 69 Cal. 2d 33, 39, 69 Cal. Rptr. 561, 442 P.2d 641* ; *Oakland-Alameda County Coliseum, Inc. v. Oakland Raiders, Ltd. (1988) 197 Cal. App. 3d 1049, 1058, 243 Cal. Rptr. 300* ; *Gerdlund v. Electronic Dispensers International (1987) 190 Cal. App. 3d 263, 272, 235 Cal. Rptr. 279* ; *see In re Crow Winthrop Operating Partnership (9th Cir. 2001) 241 F.3d 1121, 1124* (court may interpret contract without recourse to extrinsic evidence if contract terms are unambiguous)]. For example, in a case in which independent contractor insurance agents sought to use parol evidence to interpret a contract's termination provision to show that it required good cause, the court of appeals held that *Pacific Gas,* cited *above,* clearly prohibited such an attempt to graft a good cause requirement onto the termination provision's plain language allowing termination at will [*Appling v. State Farm Mut. Auto. Ins. Co. (9th Cir. 2003) 340 F.3d 769, 777-779* (affirming district court's holding that there was no genuine issue of material fact as to meaning of termination provision)]. Nevertheless, the court must first determine these terms before it can decide whether a party is offering extrinsic evidence for a prohibited purpose [*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co. (1968) 69 Cal. 2d 33, 39, 69 Cal. Rptr. 561, 442 P.2d 641* ; *Oakland-Alameda County Coliseum, Inc. v. Oakland Raiders, Ltd. (1988) 197 Cal. App. 3d 1049, 1058, 243 Cal. Rptr. 300]* .

Rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties [*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co. (1968) 69 Cal. 2d 33, 39-40, 69 Cal. Rptr. 561, 442 P.2d 641*]. Therefore, the trial court must provisionally receive any proffered extrinsic evidence that is relevant to show whether the contract is reasonably susceptible of a particular meaning. It is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face [*Morey v. Vannucci (1998) 64 Cal. App. 4th 904, 912, 75 Cal. Rptr. 2d 573* ; *e.g., Halicki Films v. Sanderson Sales & Mktg. (9th Cir. 2008) 547 F.3d 1213, 1223* (in absence of indication in record that trial court considered certain proffered documents, although court was specifically asked to do so and court mentioned other proffered documents, appellate court had to assume that trial court did not consider documents not mentioned; failure to consider that evidence was reversible error: "The court was required to use the

extrinsic evidence to aid in its interpretation of the contract.")].

If the court decides, after considering this evidence, that the language of a contract, in the light of all of the circumstances, is fairly susceptible of either one of the two proposed interpretations, extrinsic evidence relevant to prove either of those meanings is admissible [*Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co. (1968) 69 Cal. 2d 33, 37, 39-40, 69 Cal. Rptr. 561, 442 P.2d 641* (overruling "plain meaning" rule that no parol evidence admissible to interpret writing clear on its face if no ambiguity or uncertainty asserted); *Wolf v. Superior Court (2004) 114 Cal. App. 4th 1343, 1346, 1350-1351, 8 Cal. Rptr. 3d 649* (trial court erred in finding that term "gross receipts" in author's royalty contract meant only cash and in rejecting expert extrinsic evidence that, in entertainment context, term meant both money and value of other consideration received); *Southern Pacific Transportation Company v. Santa Fe Pacific Pipelines Inc. (1999) 74 Cal. App.4th 1232, 1245-1246, 88 Cal. Rptr. 2d 777* (trial court committed reversible error in rejecting almost all exhibits and refusing to interpret agreements to determine formula for establishing rent or to consider extrinsic evidence pertinent to issue)]. This rule allows extrinsic evidence of the parties' understanding and intended meaning of the words used in their written agreement and is unconcerned with extrinsic collateral agreements [*Brawthen v. H & R Block, Inc. (1972) 28 Cal. App. 3d 131, 136, 104 Cal. Rptr. 486]* .

[e] Procedure for Admitting Extrinsic Evidence

When the proponent of extrinsic evidence urges a particular interpretation of a contract, the court, outside the presence of the jury, must permit the parties to introduce, conditionally or subject to a motion to strike, all available evidence on the issue of the meaning to be given to the written instrument. If the evidence has the effect of imparting to the written instrument a meaning to which the instrument is not readily susceptible, the court will strike the extrinsic evidence. The jury is involved only if the court makes three determinations [*Equitable Life Assurance Society v. Berry (1989) 212 Cal. App. 3d 832, 838, 260 Cal. Rptr. 819]* :

- The wording of the instrument is reasonably susceptible of the interpretation urged by the proponent of the extrinsic evidence;
- The extrinsic evidence is relevant to prove the proposed meaning; and
- The credibility of the proponent's parol evidence is disputed.

[4] Objective Manifestation Governs

The law imputes to a person the intention corresponding to the reasonable meaning of his or her language, acts, and conduct [*H.S. Crocker Co., Inc. v. McFaddin (1957) 148 Cal. App. 2d 639, 643, 307 P.2d 429]* . In construing the mutual intention of the parties, the objective, outward manifestation of mutual consent generally governs [*Winet v. Price (1992) 4 Cal. App. 4th 1159, 1166, 6 Cal. Rptr. 2d 554]* . If the objective manifestations are sufficient to establish a contract, the parties' subjective intentions or beliefs are wholly immaterial. In other words, when a person who can read and understand an instrument signs it, in the absence of fraud or imposition, that person is bound by its contents and is estopped from saying that its provisions are contrary to his or her intentions or understandings [*Estate of Wilson (1976) 64 Cal. App. 3d 786, 802, 134 Cal. Rptr. 749]* .

[5] Contract Fails to Express Parties' Intentions

When, through fraud, mistake, or accident, a written contract fails to express the realintention of the parties, the court must regard their intention and disregard the erroneous parts of the writing [*Civ. Code § 1640*]. Extrinsic evidence is admissible to show that the writing does not containthe real contract between the parties [*Pasqualetti v. Galbraith (1962) 200 Cal. App. 2d 378, 381, 19 Cal. Rptr. 323* ; *see Trident Center v. Connecticut General Life Ins. (9th Cir. 1988) 847 F.2d 564, 568-570]* .

The parties may show by extrinsic evidence that a writing was not intended as a final act because it was not to become effective until a condition occurred; that is, the existence or efficacy of the instrument as a contract depends on a condition precedent, not inconsistent with its terms [*Louis Lesser Enterprises, Ltd. v. Roeder (1962) 209 Cal. App. 2d 401, 410, 25 Cal. Rptr. 917]* . In addition, the parties may introduce extrinsic evidence to show that they never intended a writing to constitute a contract [*Martindell v. Bodrero (1967) 256 Cal. App. 2d 56, 62, 63 Cal. Rptr. 774]* , or that they never, in fact, reached an agreement [*Earp v. Nobmann (1981) 122 Cal. App. 3d 270, 288, 175 Cal. Rptr. 767* (disapproved on other grounds in *Silberg v. Anderson (1990) 50 Cal. 3d 205, 212, 266 Cal. Rptr. 638, 786 P.2d 365*)]. The burden of overcoming the presumption that a correctly executed contract correctly expresses the intention of the parties rests on the party seeking to avoid its plain terms [*Taff v. Atlas Assur. Co. (1943) 58 Cal. App. 2d 696, 702, 137 P.2d 483]* .

[6] Construction by the Parties

When the contract is ambiguous or uncertain, the practical construction placed on the contract by the parties, before any controversy arose as to its meaning, affords one of the most reliable means of determining the intent of the parties [*Bohman v. Berg (1960) 54 Cal. 2d 787, 795, 8 Cal. Rptr. 441, 356 P.2d 185* ; *Oceanside 84, Ltd. v. Fidelity Federal Bank (1997) 56 Cal. App. 4th 1441, 1449* ; *Kennecott Corp. v. Union Oil Co. (1987) 196 Cal. App. 3d 1179, 1189-1190, 242 Cal. Rptr. 403]* . If the parties perform without objection under a contract the terms of which appear to be indefinite, they have indicated that its terms were sufficiently certain so they, at least, could perform it [*Bohman v. Berg (1960) 54 Cal. 2d 787, 795-796, 8 Cal. Rptr. 441, 356 P.2d 185* ; *Okun v. Morton (1988) 203 Cal. App. 3d 805, 819, 250 Cal. Rptr. 220]* . The principle of practical construction applies only to acts performed under the contract before any dispute arose [*Warner Constr. Corp. v. City of Los Angeles (1970) 2 Cal. 3d 285, 296-297, 85 Cal. Rptr. 444, 466 P.2d 996* ; *Okun v. Morton (1988) 203 Cal. App. 3d 805, 819, 250 Cal. Rptr. 220]* .

[7] Words Interpreted in Ordinary Sense

[a] General Rule

The words of a contract are to be understood in their ordinary and popular sense, rather than according to any strict legal meaning [*Beck v. American Health Group Internat., Inc. (1989) 211 Cal. App. 3d 1555, 1562, 260 Cal. Rptr. 237* ; *Salton Bay Marina, Inc. v. Imperial Irrigation Dist. (1985) 172 Cal. App. 3d 914, 931, 218 Cal. Rptr. 839]* , unless the parties used the words in a technical sense or gave them a special meaning by usage, in which case the latter must be followed [*Civ. Code § 1644*; *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 11, 262 Cal. Rptr. 716* ; *Achen v. Pepsi-Cola Bottling Co. (1951) 105 Cal. App. 2d 113, 120, 233 P.2d 74* ; *see* Northridge Hospital Foundation v. Pic 'N' Save No. 9, Inc. (1986) 187 Cal. App. 3d 1088, 1095 n.4, 232 Cal. Rptr. 329]. For example, courts will not give the disjunctive "or" will its ordinary meaning but may read it as "and" when that construction is necessary to carry out the obvious intent of the parties as gleaned from the context in which they used the word [*Kelly v. William Morrow & Co. (1986) 186 Cal. App. 3d 1625, 1630-1632, 231 Cal. Rptr. 497]* .

Courts interpret technical words as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense [*Civ. Code § 1645*].

[b] Custom and Trade Usage

Although courts ordinarily construe words in a contract according to their plain, ordinary, popular, or legal meaning, if, in reference to the subject matter of the contract, particular expressions have acquired a different meaning by trade usage, and both parties are engaged in that trade, courts will deem the parties to the contract to have used them according to their different and peculiar sense as shown by the trade usage [*see, e.g.*, *Texas Instruments, Inc. v. Tessera, Inc. (Fed. Cir. 2000) 231 F.3d 1325, 1331* (in patent case, term "litigation" in governing law clause of license agreement was found to include International Trade Commission proceedings); *Wolf v. Superior Court (2004) 114*

Cal. App. 4th 1343, 1346, 1354-1355, 8 Cal. Rptr. 3d 649 (trial court erred in finding that term "gross receipts" in author's royalty contract meant only cash and in rejecting expert extrinsic evidence that, in context of entertainment industry, term meant both money and value of other consideration received when not otherwise limited or defined by contract)]. Parol evidence is admissible to establish the trade usage even though the words in their ordinary or legal meaning are entirely unambiguous [*Beneficial Fire & Cas. Ins. Co. v. Kurt Hitke & Co. (1956) 46 Cal. 2d 517, 525-526, 297 P.2d 428]* .

Generally, if there is a custom in an industry, courts deem those engaged in that industry to have contracted in reference to that practice unless the contrary appears from the other terms of the contract. The prevailing industry custom binds those engaged in the business even if there is no specific proof that the particular party to the litigation knew of the custom. The industry practice becomes a part of the contract, and the evidence of the custom is admissible to supply a missing term or to aid in interpretation if it does not alter or vary the terms of the contract [*Midwest Television, Inc. v. Scott, Lancaster, Mills & Atha, Inc. (1988) 205 Cal. App. 3d 442, 451, 252 Cal. Rptr. 573]* .

[c] Party Not Engaged in Industry

A party to a contract not engaged in the industry is not bound by a custom or usage unless that party had actual knowledge of it, or it is so general or well-known in the community as to give rise to the presumption of that knowledge. For example, courts do not presume that customs of special trades and local usages limited to certain communities are known to all persons. In such a case, one who is not engaged in the trade or occupation that employs the usage relied on may be bound, but proof of actual knowledge of the usage is necessary unless it is so commonly accepted that the public is presumed to recognize its existence [*see* *Peiser v. Mettler (1958) 50 Cal. 2d 594, 608, 328 P.2d 953]* . In addition, custom and usage cannot change a rule of law and thus cannot override positive statutory law [*Hayward Tamkin & Co. v. Carpenteria Inv. Co. (1968) 265 Cal. App. 2d 617, 623-624, 71 Cal. Rptr. 462* (custom and usage did not create duty on part of limited partners when governing statute, *Corp. Code § 15501* [Uniform Limited Partnership Act, repealed Jan. 1, 2010], stated that limited partners would not be bound by obligations of partnership; *now see Corp. Code § 15632* [California Revised Limited Partnership Act, operative July 1, 1984, and repealed Jan. 1, 2010]; *Corp. Code § 15903.03* [Uniform Limited Partnership Act of 2008, applicable to all limited partnerships effective Jan. 1, 2010])].

[8] Implied Terms

[a] Test of Necessity

Stipulations necessary to make a contract reasonable or conformable to usage are deemed implied in respect to matters concerning which the contract manifests no contrary intention [*Civ. Code § 1655*]. All things in law or usage considered as incidental to a contract or necessary to carry it into effect are implied by the contract, unless some of them are expressly mentioned in the contract, in which case all other things of the same class are deemed excluded [*Civ. Code § 1656*; *Addiego v. Hill (1965) 238 Cal. App. 2d 842, 846, 48 Cal. Rptr. 240]* .

In an effort to remedy a deficiency, if it does not alter or vary the terms of the agreement, the court may [*Frankel v. Board of Dental Examiners (1996) 46 Cal. App. 4th 534, 545, 54 Cal. Rptr. 2d 128* ; *Addiego v. Hill (1965) 238 Cal. App. 2d 842, 846, 48 Cal. Rptr. 240]* :

- Consider the usual and reasonable terms found in similar contracts;
- Infer unexpressed provisions of the contract from the writing;
- Rely on external facts; and

- Resort to custom and usage.

[b] Limitation on Finding Implied Terms

The law generally does not favor implied terms in contracts because they interfere with the right of the parties to freely set the contractual terms. A court's authority to infer a term in a contract is subject to the following limitations [*Lippman v. Sears, Roebuck & Co. (1955) 44 Cal. 2d 136, 142,145, 280 P.2d 775* ; *Frankel v. Board of Dental Examiners (1996) 46 Cal. App. 4th 534, 545-546, 54 Cal. Rptr. 2d 128* ; *City of Glendale v. Superior Court (1993) 18 Cal. App. 4th 1768, 1778, 23 Cal. Rptr. 2d 305]* :

- The implied term must arise from the language used or it must be indispensable to effectuate the intention of the parties;

- It must appear from the language used that the implied term was so clearly within the contemplation of the parties that they deemed it unnecessary to express;

- Implied terms can be justified only on the ground of legal necessity;

- A promise can be deemed to be implied only when it can be rationally assumed that it would have been expressly made if attention had been called to it; and

- There can be no implied term when the subject is completely covered by the contract.

[c] Covenant of Good Faith and Fair Dealing

Every contract contains an implied covenant of good faith and fair dealing that neither party will do anything to deprive the other of the benefits of the contract [*Merritt v. J.A. Stafford Co. (1968) 68 Cal. 2d 619, 626, 68 Cal. Rptr. 447, 440 P.2d 927* ; *Sheppard v. Morgan Keegan & Co. (1990) 218 Cal. App. 3d 61, 66, 266 Cal. Rptr. 784* ; *Ellis v. Chevron, U.S.A., Inc. (1988) 201 Cal. App. 3d 132, 139, 246 Cal. Rptr. 863]* . For purposes of traditional contract remedies, this covenant imposes on each party not only the duty to refrain from doing anything to render performance of the contract impossible, but also the duty to do everything the contract presupposes that party will do to accomplish the purpose of the contract [*Pasadena Live, LLC v. City of Pasadena (2004) 114 Cal. App. 4th 1089, 1092-1094, 8 Cal. Rptr. 3d 233* (allegation that defendant city breached implied covenant of good faith and fair dealing by preventing plaintiff entertainment production company from even submitting entertainment proposals for consideration adequately alleged breach of contract for amphitheater productions); *Floystrup v. City of Berkeley Rent Stabilization Bd. (1990) 219 Cal. App. 3d 1309, 1318, 268 Cal. Rptr. 898* ; *Corson v. Brown Motel Investments, Inc. (1978) 87 Cal. App. 3d 422, 427, 151 Cal. Rptr. 385* ; *Harm v. Frasher (1960) 181 Cal. App. 2d 405, 417, 5 Cal. Rptr. 367]* . For discussion of the covenant, see *§ 140.12*.

[9] Entire Contract to Be Given Effect

The whole of a contract is to be taken together, so as to avoid internal conflict in its provisions and to give effect to every part, if reasonably practicable, each clause helping to interpret the other [*Civ. Code § 1641*; *Trident Center v. Connecticut General Life Ins. (9th Cir. 1988) 847 F.2d 564, 566-567* (applying California law); *Moore v. Wood (1945) 26 Cal. 2d 621, 630, 160 P.2d 772* ; *Zubia v. Farmers Ins. Exchange (1993) 14 Cal. App. 4th 790, 797, 18 Cal. Rptr. 2d 65* ; *Gutzi Associates v. Switzer (1989) 215 Cal. App. 3d 1636, 1642, 264 Cal. Rptr. 538* ; *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 12, 262 Cal. Rptr. 716* ; *see Code Civ. Proc. § 1858*]. Thus, the meaning of the contract is not determined by isolating one term used by the parties and defining it without reference to other language of the contract [*Moore v. Wood (1945) 26 Cal. 2d 621, 630, 160 P.2d 772]* .The meaning of the words used must be determined from a reading of the entire contract [*Rodriguez v. Barnett (1959) 52 Cal. 2d 154, 160, 338*

P.2d 907] . Even if one provision of the contract is clear and explicit, that portion alone does not govern its interpretation [*Alperson v. Mirisch Co. (1967) 250 Cal. App. 2d 84, 90, 58 Cal. Rptr. 178]* .

However, if construing every provision of the contract would be obviously repugnant to the intention of the parties or would lead to some other inconvenience or absurdity, the court will not construe the contract that way [*Transamerica Ins. Co. v. Sayble (1987) 193 Cal. App. 3d 1562, 1566, 239 Cal. Rptr. 201]* . The court will interpret the contract to give effect to the contract's main apparent purpose [*Harris v. Klure (1962) 205 Cal. App. 2d 574, 578, 23 Cal. Rptr. 313]* .

[10] Resolving Ambiguities

[a] Trial Court's Procedure

When the meaning of words used in a contract is disputed, the trial court engages in a three-step process. First, the court provisionally receives any proffered extrinsic evidence that is relevant to prove a meaning to which the language of the contract is reasonably susceptible. If, in light of the extrinsic evidence, the language is reasonably susceptible to the interpretation urged, the extrinsic evidence is then admitted to aid the court in its role in interpreting the contract. When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law. This is true even when conflicting inferences may be drawn from the undisputed extrinsic evidence or when the extrinsic evidence renders the contract terms susceptible to more than one reasonable interpretation. If, however, there is a conflict in the extrinsic evidence, the factual conflict is to be resolved by the jury [*Wolf v. Walt Disney Pictures & Television (2008) 162 Cal. App. 4th 1107, 1126-1127, 76 Cal. Rptr. 3d 585*].

[b] General Words Following Specific Words

When general words follow the enumeration of particular classes of persons or things, the court will construe the general words as applicable only to persons or things of the same general nature or class as those enumerated. This rule is based on the belief that if the writer had intended the general words to be used in their unrestricted sense, he or she would not have mentioned the particular things or class of things that would in that event be mere surplusage. The words "other" or "any other" following an enumeration of particular classes should be read as "other such like" or to include others "of like kind or character" [*Fiske v. Niagra Fire Ins. Co. (1929) 207 Cal. 355, 357, 278 P. 861* ; *Lawrence v. Walzer & Gabrielson (1989) 207 Cal. App. 3d 1501, 1506, 256 Cal. Rptr. 6* ; *Scally v. Pacific Gas & Electric Co. (1972) 23 Cal. App. 3d 806, 819, 100 Cal. Rptr. 501]* . For example, an agreement to arbitrate disputes regarding "fees, costs, or any other aspect of" the parties' relationship only required arbitration of financial matters similar to disputes regarding fees and costs, but did not require arbitration of other breaches of their contract [*Lawrence v. Walzer & Gabrielson (1989) 207 Cal. App. 3d 1501, 1506, 256 Cal. Rptr. 6]* .

[c] Interpretation of Ambiguities With Reference to Entire Contract

The court must interpret an ambiguous clause with reference to the entire contract [*Medical Operations Management, Inc. v. National Health Laboratories, Inc. (1986) 176 Cal. App. 3d 886, 893, 222 Cal. Rptr. 455* (also considering evidence as to negotiations, letter of intent, and drafting history)]. If two clauses of an agreement appear to be in direct conflict, the court must reconcile those clauses so as to give effect to the whole instrument. In construing an agreement in this manner, the court will consider no term uncertain or ambiguous if its meaning can be ascertained by fair inference from the terms of the agreement [*Ellis v. McKinnon Broadcasting Co. (1993) 18 Cal. App. 4th 1796, 1802, 23 Cal. Rptr. 2d 80* ; *see* [11], *below,* for further discussion of reconciling inconsistent provisions].

[d] Ambiguity Must Relate to Particular Case

The court must construe language in a contract in the context of the instrument as a whole (*see* [9], *above*), and in the circumstances of the particular case. The court cannot find language ambiguous in the abstract. There can be no ambiguity unrelated to application of the instrument to the particular facts of a case [*Bay Cities Paving & Grading,*

Inc. v. Lawyers' Mutual Ins. Co. (1993) 5 Cal. 4th 854, 867, 21 Cal. Rptr. 2d 691, 855 P.2d 1263] .

[e] On Demurrer

At the demurrer stage, as long as the complaint does not place a clearly erroneous construction on the provisions of the contract, the court must accept the plaintiff's construction of an ambiguous contract as correct [*Aragon-Haas v. Family Security Ins. Services, Inc. (1991) 231 Cal. App. 3d 232, 239, 282 Cal. Rptr. 233* ; *Marina Tenants Assn. v. Deauville Marina Development Co. (1986) 181 Cal. App. 3d 122, 128, 132, 226 Cal. Rptr. 321]* .

[11] Reconciling Inconsistent Provisions

[a] General and Specific Provisions

When general and specific provisions of a contract deal with the same subject matter, the specific provision, if inconsistent with the general provision, controls [*Continental Cas. Co. v. Zurich Ins. Co. (1961) 57 Cal. 2d 27, 35, 17 Cal. Rptr. 12, 366 P.2d 455]* . When the two provisions do not conflict, the court will give both effect [*Powers v. Superior Court (1987) 196 Cal. App. 3d 318, 321-322, 242 Cal. Rptr. 55* (specific language in waiver and release did not conflict with general exculpatory language used in related rental agreement, and both provisions were effective)].

On the other hand, the court will reject specific words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties [*Civ. Code § 1653*; *see, e.g.,* *Safeco Ins. Co. v. Robert S. (2001) 26 Cal. 4th 758, 766, 110 Cal. Rptr. 2d 844* (insurance policy's illegal act exclusion could not reasonably be given meaning under established rules of construction of contracts and was thus rejected as invalid)].

[b] Written and Printed Provisions

If a contract is partly written and partly printed, or if part of it is written or printed under the special directions of the parties, and with a special view to their intention, and the remainder is copied from a form originally prepared without special reference to the particular parties and the particular contract in question, the written parts control the printed parts, and the purely original parts control those copied from a form. If the two are absolutely repugnant, the court must disregard the latter to that extent [*Civ. Code § 1651*; *Gutzi Associates v. Switzer (1989) 215 Cal. App. 3d 1636, 1642, 264 Cal. Rptr. 538* ; *American City Bank v. Zetlen (1967) 253 Cal. App. 2d 548, 553, 61 Cal. Rptr. 311]* .

The word "written" in *Civ. Code § 1651* includes "typewritten" [*Continental Cas. Co. v. Phoenix Constr. Co. (1956) 46 Cal. 2d 423, 431, 296 P.2d 801]* . Thus, the court must give a typewritten provision effect even when it is totally contrary to printed text [*Gutzi Associates v. Switzer (1989) 215 Cal. App. 3d 1636, 1642-1643, 264 Cal. Rptr. 538]* .

[12] Interpretation Against Party Causing Uncertainty

[a] General Rule

In cases of uncertainty not removed by the statutory rules of construction [*see generally Civ. Code § 1635 et seq.*], the court should interpret the language of a contract most strongly against the party who caused the uncertainty [*Civ. Code § 1654*; *see* *Taylor v. J.B. Hill Co. (1948) 31 Cal. 2d 373, 374, 189 P.2d 258* ; *Badie v. Bank of America (1999) 67 Cal. App. 4th 779, 801, 79 Cal. Rptr. 2d 273* (interpreting provision in original credit account agreements that bank could change any "term, condition, service or feature" of account, which was ambiguous as to whether bank could impose alternative dispute resolution clause); *Powers v. Dickson, Carlson & Campillo (1997) 54 Cal. App. 4th 1102, 1112, 63 Cal. Rptr. 2d 261* ; *Gutzi Associates v. Switzer (1989) 215 Cal. App. 3d 1636, 1641-1643, 264 Cal. Rptr. 538* ; *Lawrence v. Walzer & Gabrielson (1989) 207 Cal. App. 3d 1501, 1507, 256 Cal. Rptr. 6* ; *Ellis v. Chevron, U.S.A., Inc. (1988) 201 Cal. App. 3d 132, 138, 246 Cal. Rptr. 863]* . For example, in a case involving a Chapter 11 debtor's bankruptcy plan, the Ninth Circuit held that the lower courts correctly concluded that ambiguous language in the plan

regarding discharge of "gap period" interest on taxes owed to the IRS should be construed against the debtor/drafter [*Miller v. United States (9th Cir. 2004) 363 F.3d 999, 1006]* . For purposes of this principle, uncertainty or ambiguity means doubtfulness, doubtfulness of meaning, duplicity, indistinctness, or uncertainty of meaning of an expression used in a written instrument, want of clearness or definiteness. It denotes language difficult to comprehend or distinguish, and of doubtful import [*Royal Neckwear Co. v. Century City, Inc. (1988) 205 Cal. App. 3d 1146, 1153, 252 Cal. Rptr. 810* ; *Estate of Black (1962) 211 Cal. App. 2d 75, 85, 27 Cal. Rptr. 418]* .

For example, a lease that obligates the lessor to repair a roof is not ambiguous even though it also provides that the lessor is not liable for any consequential damages suffered by the tenant as a result of the lessor's failure to make the repairs. Nor is there ambiguity in a lease that obligates the tenants to pay for common area costs, including security, but allows the landlord to determine what level of security is appropriate [*Royal Neckwear Co. v. Century City, Inc. (1988) 205 Cal. App. 3d 1146, 1153, 252 Cal. Rptr. 810]* . However, a guaranty agreement including a waiver of the limitation period to the extent permitted by law is not ambiguous so as to require construction against the drafter when the only ambiguity was in the statute describing the permissible extent of waiver [*California First Bank v. Braden (1989) 216 Cal. App. 3d 672, 675-676, 264 Cal. Rptr. 820]* .

[b] When Rule Applies

This rule is to be applied only when an uncertainty has not been removed by other rules of construction [*Oceanside 84, Ltd. v. Fidelity Federal Bank (1997) 56 Cal. App. 4th 1441, 1448-1449* ; *Jacobson v. Simmons Real Estate (1994) 23 Cal. App. 4th 1285, 1293, 28 Cal. Rptr. 2d 699* , *disapproved on other grounds* in *Trope v. Katz (1995) 11 Cal. 4th 274, 292, 45 Cal. Rptr. 2d 241, 902 P.2d 259*]. This principle of interpretation is sometimes referred to as *contra proferentem*, and is not applicable to ambiguous language that was the product of joint drafting efforts [*Mitchell v. Exhibition Foods, Inc. (1986) 184 Cal. App. 3d 1033, 1042, 229 Cal. Rptr. 535]* . In dealing with ambiguous form contracts, courts apply this principle by interpreting the contract to have the meaning that a reasonable person in the position of the party with less bargaining power would expect [*Hurd v. Republic Ins. Co. (1980) 113 Cal. App. 3d 250, 253, 169 Cal. Rptr. 675]* .

[c] Contract of Adhesion

"Contract of adhesion" refers to a standardized contract prepared entirely by one party for acceptance by the other. Because of a great disparity in bargaining power between the parties, a contract of adhesion embodies an offer the second party must accept or reject on a "take it or leave it" basis, without an opportunity to bargain and under such conditions that the party accepting (or adhering to) the offer cannot obtain the desired product or service except by acquiescing to the form agreement [*Steven v. Fidelity & Casualty Co. (1962) 58 Cal. 2d 862, 882, 27 Cal. Rptr. 172, 377 P.2d 284* ; *see Flores v. Transamerica Homefirst, Inc. (2001) 93 Cal. App. 4th 846, 853-854, 113 Cal. Rptr. 2d 376* (finding arbitration agreement to be procedurally unconscionable contract of adhesion when undisputed facts showed it was imposed on plaintiffs on "take it or leave it" basis); *Powers v. Dickson, Carlson & Campillo (1997) 54 Cal. App. 4th 1102, 1110, 63 Cal. Rptr. 2d 261* (attorney's retainer agreement was not contract of adhesion when clients did not enter into standardized contract on take it or leave it basis, retainer agreement and amendment were negotiated and individualized agreements, and clients had freedom to employ attorney of choice and bargain for terms of choice)]. The fact that a form contract is standardized does not itself establish the adhesive character of the contract. The determinative criteria are [*Powers v. Dickson, Carlson & Campillo (1997) 54 Cal. App. 4th 1102, 1110, 63 Cal. Rptr. 2d 261* (attorney retainer agreement not contract of adhesion); *Izzi v. Mesquite Country Club (1986) 186 Cal. App. 3d 1309, 1317-1318, 231 Cal. Rptr. 315* ; *Parr v. Superior Court (1983) 139 Cal. App. 3d 440, 444, 188 Cal. Rptr. 801]* :

- The relative bargaining powers of the parties;

- Whether the adhering party was free to negotiate for alteration of the printed terms of the proffered agreement; and

- The availability of the product or service from other sources.

The court will not enforce a contract of adhesion or an adhesive provision against the weaker or "adhering" party if the contract or provision does not fall within the reasonable expectations of the weaker party or an ordinary person in that party's position. Among the factors that strongly affect the court's assessment of whether the contract was within the reasonable expectation of the adhering party are notice and the extent to which the contract affects the public interest [*Allan v. Snow Summit, Inc. (1996) 51 Cal. App. 4th 1358, 1375-1376, 59 Cal. Rptr. 2d 813]* . The court also will not enforce an adhesive contract or provision if, considered in its context, the contract is unduly oppressive or unconscionable [*Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 925, 216 Cal. Rptr. 345, 702 P.2d 503* ; *Marin Storage & Trucking, Inc. v. Benco Contracting and Engineering, Inc. (2001) 89 Cal. App. 4th 1042, 1052, 107 Cal. Rptr. 2d 645* (although standardized contract could be considered contract of adhesion, that finding merely begins inquiry of whether particular provision within contract should be denied enforcement because it defeats expectations of weaker party or is unduly oppressive or unconscionable); *Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1530, 60 Cal. Rptr. 2d 138* ; *Parr v. Superior Court (1983) 139 Cal. App. 3d 440, 445, 188 Cal. Rptr. 801* ; *Holmes v. City of Los Angeles (1981) 117 Cal. App. 3d 212, 217, 172 Cal. Rptr. 589]* . For discussion of unconscionable contracts, see *§ 140.25*.

An exculpatory adhesion contract will be unenforceable if it violates public policy [*see* *Tunkl v. Regents of University of California (1963) 60 Cal. 2d 92, 98-101, 32 Cal. Rptr. 33, 383 P. 2d 441* (enumerating factors indicating public policy violation); *see also* *YMCA of Metropolitan Los Angeles v. Superior Court (1997) 55 Cal. App. 4th 22, 27-28, 63 Cal. Rptr. 2d 612* (provision by which participants in Senior Program released YMCA for personal injury arising from YMCA's negligence exhibited none of coercive aspects typically found in adhesion contract)].

Certain rules of interpretation apply with particular force to contracts of adhesion, such as the rule that an ambiguity caused by the drafter or promisor must be resolved against that party. The party of superior bargaining power prescribes the words of the instrument. The party who subscribes to it lacks the economic strength to change that language. Hence, any ambiguity in the contract should be resolved against the drafter, and questions of doubtful interpretation should be construed in favor of the subscribing party [*Neal v. State Farm Ins. Cos. (1961) 188 Cal. App. 2d 690, 695, 10 Cal. Rptr. 781* ; *Badie v. Bank of America (1999) 67 Cal. App. 4th 779, 803-804, 79 Cal. Rptr. 2d 273* (interpreting provision in original credit account agreements that bank could change any "term, condition, service or feature" of account, which was ambiguous as to whether bank could impose alternative dispute resolution clause)].

An arbitration clause in an employment contract may be part of a contract of adhesion, even if the employee is a successful and sophisticated corporate executive, if the employee had no realistic ability to modify the terms of the employment contract. Experienced but legally unsophisticated business people may be unfairly surprised by unconscionable contract terms [*Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1533-1534, 60 Cal. Rptr. 2d 138]* .

[d] Insurance Policy

It does not matter whether or not insurance policies are labeled adhesive, because the canons of construction governing insurance contracts are well established and have independent vitality even though the applicable principles undoubtedly grew out of contracts of adhesion [*Equitable Life Assurance Society v. Berry (1989) 212 Cal. App. 3d 832, 837, 260 Cal. Rptr. 819]* . For discussion of principles of interpretation of insurance contracts, see Ch. 308, *Insurance* .

[13] Several Instruments Taken Together

Several contracts relating to the same matters, between the same parties, and made as parts of substantially one

transaction, are to be taken together [*Civ. Code § 1642*; *Boyd v. Oscar Fisher Co. (1989) 210 Cal. App. 3d 368, 378, 258 Cal. Rptr. 473* ; *Housing Authority v. Monterey Senior Citizen Park (1985) 164 Cal. App. 3d 348, 353-354, 210 Cal. Rptr. 497* ; *Nevin v. Salk (1975) 45 Cal. App. 3d 331, 338, 119 Cal. Rptr. 370* ; *but see Stevenson v. Oceanic Bank (1990) 223 Cal. App. 3d 306, 317-318, 272 Cal. Rptr. 757* (loan agreement and guaranty separate; term from loan agreement not to be incorporated into guaranty agreement if it would be inconsistent with specific term of guaranty agreement)]. The term "contract" as used in *Civ. Code § 1642* is descriptive only of a writing and actually refers to an "instrument" [*Harm v. Frasher (1960) 181 Cal. App. 2d 405, 413, 5 Cal. Rptr. 367]* . Whether the parties intended several writings to cover one transaction is generally a question of fact [*Boyd v. Oscar Fisher Co. (1989) 210 Cal. App. 3d 368, 378, 258 Cal. Rptr. 473* ; *BMP Property Development v. Melvin (1988) 198 Cal. App. 3d 526, 531, 243 Cal. Rptr. 715* ; *Nevin v. Salk (1975) 45 Cal. App. 3d 331, 338, 119 Cal. Rptr. 370]* .

The general principle of joint construction of several instruments as one agreement is applicable regardless of whether they expressly refer to each other or it appears from extrinsic evidence that they were executed as a part of one transaction [*Harm v. Frasher (1960) 181 Cal. App. 2d 405, 413, 5 Cal. Rptr. 367]* . This principle also applies regardless of whether each of the several instruments was signed by all or only by some of the parties to the transaction [*Harm v. Frasher (1960) 181 Cal. App. 2d 405, 414, 5 Cal. Rptr. 367]* , or whether the written instruments were executed contemporaneously [*Mayers v. Loew's, Inc. (1950) 35 Cal. 2d 822, 827, 221 P.2d 26]* or at different times [*Boyd v. Oscar Fisher Co. (1989) 210 Cal. App. 3d 368, 378, 258 Cal. Rptr. 473* ; *BMP Property Development v. Melvin (1988) 198 Cal. App. 3d 526, 531-532, 243 Cal. Rptr. 715* (loan agreement and exchange agreement single transaction even though closed through separate escrows); *Nevin v. Salk (1975) 45 Cal. App. 3d 331, 338, 119 Cal. Rptr. 370]* .

[14] Incorporation by Reference

A written agreement may incorporate other written agreements by expressly referring to them. In the event of incorporation of other agreements by reference, the court must consider and construe as one the original agreement and those referred to [*Holbrook v. Fazio (1948) 84 Cal. App. 2d 700, 701, 191 P.2d 123]* . For the terms ofanother document to be incorporated into the document executed by the parties, the following conditions must be satisfied [*Kleveland v. Chicago Title Ins. Co. (2006) 141 Cal. App. 4th 761, 765* (arbitration clause in title insurance policy was not incorporated by reference into preliminary title report and so was not binding on insured because arbitration was not mentioned in that report and report referred to policy that was different from what was actually issued by insurer); *Baker v. Aubry (1989) 216 Cal. App. 3d 1259, 1264* ; *Richards v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1976) 64 Cal. App. 3d 899, 904 n.3, 135 Cal. Rptr. 26* ; *cf. Chan v. Drexel Burnham Lambert, Inc. (1986) 178 Cal. App. 3d 632, 636-641, 223 Cal. Rptr. 838* (reference and availability were insufficient)]:

- The reference must be clear and unequivocal;
- The reference must be called to the attention of the other party;
- The other party must consent to it; and
- The terms of the incorporated document must be known or easily available to the contracting parties.

The contract need not recite that it "incorporates" another document, so long as it "guides" the reader to the incorporated document [*Shaw v. Regents (1997) 58 Cal. App. 4th 44, 53-54, 67 Cal. Rptr. 2d 850* (patent agreement signed by university professor incorporated patent policy in effect at time agreement was executed)]. Documents that are not contracts may be incorporated into a contract [*Shaw v. Regents (1997) 58 Cal. App. 4th 44, 55, 67 Cal. Rptr. 2d 850* (holding that university's patent policy was incorporated into employment agreement)].

[15] Supportive Interpretation

The court must give a contract susceptible to different interpretations an interpretation that will make the contract lawful, operative, definite, reasonable, and capable of being carried into effect, if the court can give it that construction without violating the intention of the parties [*Civ. Code § 1643*; *see Apra v. Aureguy (1961) 55 Cal. 2d 827, 831, 13 Cal. Rptr. 177, 361 P.2d 897* ; *City of Los Angeles v. Superior Court (1959) 51 Cal. 2d 423, 437, 333 P.2d 745* ; *Strong v. Theis (1986) 187 Cal. App. 3d 913, 919-921, 232 Cal. Rptr. 272* (construction to avoid violating rule against perpetuities)]. The court must avoid an interpretation that will make a contract extraordinary, harsh, unjust, or inequitable, or that would result in an absurdity [*Citizens for Goleta Valley v. HT Santa Barbara (2004) 117 Cal. App. 4th 1073, 1076-1077, 12 Cal. Rptr. 3d 249* (developer's interpretation of settlement agreement rejected by court when it defeated reasonable expectations of parties and would lead to absurd results); *Ticor Title Ins. Co. v. Rancho Santa Fe Assn. (1986) 177 Cal. App. 3d 726, 730, 223 Cal. Rptr. 175* ; *Howe v. American Baptist Homes of the West, Inc. (1980) 112 Cal. App. 3d 622, 627, 169 Cal. Rptr. 418* ; *see Northridge Hospital Foundation v. Pic 'N' Save No. 9, Inc. (1986) 187 Cal. App. 3d 1088, 1095*]. For example, because every contract in California has an implied covenant of good faith and fair dealing, the court properly interpreted a noncompetition clause in a lease to include additions to the shopping center to which it related; to do otherwise would violate the implied covenant [*Edmond's of Fresno v. MacDonald Group, Ltd. (1985) 171 Cal. App. 3d 598, 605-608, 217 Cal. Rptr. 375]* . For discussion of the implied covenant of good faith and fair dealing, see *§ 140.12*.

This rule of construction is based on a policy that favors carrying out the parties' intentions by enforcing their contract and disfavors holding contracts unenforceable for uncertainty [*Hennefer v. Butcher (1986) 182 Cal. App. 3d 492, 500-501, 227 Cal. Rptr. 318]* .

[16] Incorporation of Existing Law

As a general rule, all applicable laws in existence when the parties enter into a contract are presumed to be known to the parties and form a part of the contract as if the contract expressly referred to them and incorporated them in its terms [*California First Bank v. Braden (1989) 216 Cal. App. 3d 672, 675-676, 264 Cal. Rptr. 820* (distinction between ambiguity in contract, which would require interpretation against drafter, and ambiguity in statute, which does not); *Century 21 Region V., Inc. v. Pondoff Realty, Inc. (1988) 203 Cal. App. 3d Supp. 11, 15* ; *Grubb v. Ranger Ins. Co. (1978) 77 Cal. App. 3d 526, 529, 143 Cal. Rptr. 558* ; *People v. Wilshire Ins. Co. (1976) 61 Cal. App. 3d 51, 58, 132 Cal. Rptr. 19]* . Existing law includes court decisions interpreting statutes [*California Ass'n of Highway Patrolmen v. Department of Personnel Admin. (1986) 185 Cal. App. 3d 352, 364, 229 Cal. Rptr. 729]* . The parties can agree originally to incorporate subsequent changes in the law or can reexecute their agreement to accomplish that purpose [*Swenson v. File (1970) 3 Cal. 3d 389, 394-395, 90 Cal. Rptr. 580, 475 P.2d 852]* .

Applying this principle, the court can interpret an agreement that might otherwise be unclear or ambiguous without resort to other rules of interpretation. For example, a franchise agreement that was the subject of a dispute with respect to escrow income and required the franchisee to pay the franchisor a percentage of its gross income derived from "all transactions requiring a real estate license" was not ambiguous when construed with regard to the relevant licensing law, which allowed the franchisee to operate its escrow services without an escrow license if it had a real estate license. In light of the applicable law, the income from escrow services clearly had to be included in gross income for purposes of computing the amount due to the franchisor [*Century 21 Region V., Inc. v. Pondoff Realty, Inc. (1988) 203 Cal. App. 3d Supp. 11, 14-15*].

[17] Question of Law

Issues of contract interpretation are questions of law for the trial court, not for a referee under *Code Civ. Proc. § 639(a)* [*De Guere v. Universal City Studios, Inc. (1997) 56 Cal. App. 4th 482, 501, 65 Cal. Rptr. 2d 438* ; *Parsons v. Bristol Development Co. (1965) 62 Cal. 2d 861, 865, 44 Cal. Rptr. 767, 402 P.2d 839]* . Similarly, issues of contract enforceability, such as whether an agreement is a contract of adhesion and if so, whether it is enforceable, are equitable

issues to be resolved by the trial court rather than a referee [*De Guere v. Universal City Studios, Inc. (1997) 56 Cal. App. 4th 482, 501, 65 Cal. Rptr. 2d 438* ; *see Westlye v. Look Sports (1993) 17 Cal. App. 4th 1715, 1735-1737, 22 Cal. Rptr. 2d 781]* .

[18] Appellate Court's Role in Interpreting Contract

Interpretation of a written instrument generally presents a question of law for the appellate court to determine anew [*Parsons v. Bristol Development Co. (1965) 62 Cal. 2d 861, 865, 44 Cal. Rptr. 767, 402 P.2d 839* ; *Curry v. Moody (1995) 40 Cal. App. 4th 1547, 1552-1553, 48 Cal. Rptr. 2d 627* ; *Equitable Life Assurance Society v. Berry (1989) 212 Cal. App. 3d 832, 840, 260 Cal. Rptr. 819* ; *Boyd v. Oscar Fisher Co. (1989) 210 Cal. App. 3d 368, 378, 258 Cal. Rptr. 473* (dealership agreement and invoices taken as one contract); *Northridge Hospital Foundation v. Pic 'N' Save No. 9, Inc. (1986) 187 Cal. App. 3d 1088, 1099*], when it does not depend on conflicting evidence. When extrinsic evidence was offered in the trial court, the reviewing court is not bound by the trial court's interpretation if the extrinsic evidence is incompetent, uncontradicted, not in conflict, not substantial, or inconsistent with the only interpretation to which the agreement is reasonably susceptible [*Stevenson v. Oceanic Bank (1990) 223 Cal. App. 3d 306, 315, 272 Cal. Rptr. 757* ; *Greater Middleton Assn. v. Holmes Lumber Co. (1990) 222 Cal. App. 3d 980, 989-990, 271 Cal. Rptr. 917* ; *Broffman v. Newman (1989) 213 Cal. App. 3d 252, 257, 261 Cal. Rptr. 532]* . When the extrinsic evidence itself is not in conflict, but the inferences that may be drawn from it are, the appellate court is required to make its own de novo interpretation of the meaning of the agreement [*Okun v. Morton (1988) 203 Cal. App. 3d 805, 816, 250 Cal. Rptr. 220* ; *Malmstrom v. Kaiser Aluminum & Chemical Corp. (1986) 187 Cal. App. 3d 299, 315, 231 Cal. Rptr. 820* ; *Medical Operations Management, Inc. v. National Health Laboratories, Inc. (1986) 176 Cal. App. 3d 886, 893, 222 Cal. Rptr. 455]* .

In the absence of extrinsic evidence, the appellate court must accept the trial court's interpretation of a written instrument if that interpretation is reasonable, if it is one of two or more reasonable constructions of the instrument, or if it is equally tenable with the appellate court's interpretation. The appellate court still has a duty to interpret the instrument, but it must determine that the trial court's interpretation is erroneous before it may properly reverse the judgment [*Parsons v. Bristol Development Co. (1965) 62 Cal. 2d 861, 866, 44 Cal. Rptr. 767, 402 P.2d 839]* . Similarly, when the trial court properly admits evidence to interpret an ambiguous contract, the appellate court must uphold any reasonable interpretation by the trial court, although the appellate court is not bound by the trial court's finding of ambiguity if it is based on incompetent evidence [*Aviointeriors SpA v. World Airways, Inc. (1986) 181 Cal. App. 3d 908, 915, 226 Cal. Rptr. 527* ; *Heston v. Farmers Ins. Group (1984) 160 Cal. App. 3d 402, 410, 206 Cal. Rptr. 585* ; *Robinson v. Nevada Irrigation Dist. (1980) 101 Cal. App. 3d 760, 769-770, 161 Cal. Rptr. 863]* .

[19] Effect of Factual Statements in Written Contract

Written contracts often contain material factual statements that are attributable to one party and are accepted as true by the other party when the contract was made. If the reliant party eventually discovers that such a factual statement was significantly untrue, that party may be able to assert, on a theory of fraud, a claim for damages or a right to rescind the contract [*see* Ch. 269, *Fraud and Deceit* ; Ch. 490, *Rescission and Restitution*], or a defense to an action for breach of the contract [*see* Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*], assuming that both actionable misrepresentation and justifiable reliance can be proven [*see, e.g., McClain v. Octagon Plaza, LLC (2008) 159 Cal. App. 4th 784, 792-794, 71 Cal. Rptr. 3d 885* (shopping mall lease exaggerated square footage of lessee's commercial space and total square footage of mall on which rent and lessee's share of common-area expenses were to be computed under lease)].

When fraud can be shown, the culpable party is precluded from invoking any provision in the contract by way of exculpation, such as a stipulation or waiver by the reliant party, since any such provision is void by statute [*see Civ. Code § 1668* (any contract having as its object, directly or indirectly, to exempt any person from responsibility for that person's own fraud, whether willful or negligent, is "against the policy of the law"); § 140.24[4]]. Therefore, a provision

stating that one party "acknowledges" or otherwise stipulates that some material factual statement by the other party is true, or that one party "agrees to" or otherwise purportedly accepts a fact-based situation of the other party's making, which does not comport with reality, is unenforceable when fraud exists [*see, e.g., McClain v. Octagon Plaza, LLC (2008) 159 Cal. App. 4th 784, 794-796, 71 Cal. Rptr. 3d 885* (commercial lease stated that lessee "acknowledged" having investigated suitability of mall space for lessee's business use, when in fact lessor obstructed all investigative efforts while giving assurance that lessee could rely on lessor's exaggerated statement as to square footage)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract InterpretationGeneral OverviewContracts LawContract InterpretationAmbiguities & Contra ProferentemGeneral OverviewContracts LawContract InterpretationAmbiguities & Contra ProferentemLatent AmbiguitiesContracts LawContract InterpretationAmbiguities & Contra ProferentemPatent AmbiguitiesContracts LawContract InterpretationGood Faith & Fair Dealing

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[Reserved]

§§ 140.33[Reserved]

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13-140 California Forms of Pleading and Practice--Annotated § 140.40

§ 140.40 Obligation Extinguished by Performance

[1] Acceptance of Performance

Generally, full performance of an obligation, either by the party whose duty it is to perform or by anyone else on that party's behalf and with that party's assent, if accepted by the party entitled to performance, extinguishes the obligation [*Civ. Code § 1473*].

If there is joint liability for an obligation, performance by one of the several parties jointly liable extinguishes the liability of all [*Civ. Code § 1474*; *Wax v. Infante (1983) 145 Cal. App. 3d 1029, 1030 n.2, 194 Cal. Rptr. 14* (obligation for penalty assessed against defendants and their attorney satisfied when attorney paid penalty)].

Performance of an obligation for the delivery of money only is called "payment" [*Civ. Code § 1478*]. For discussion of extinguishment of an obligation to pay money, see [2], *below*; for an affirmative defense alleging payment, see *§ 140.138*.

[2] Obligation to Pay Money

[a] Tender of Check or Note

Unless the parties agree otherwise, if the obligee takes a certified check, cashier's check, or teller's check in payment of an obligation, the obligation is discharged to the extent of the amount of the check [*Com. Code § 3310(a)*]. Unless the parties agree otherwise, and except as provided in *Com. Code § 3310(a)*, if the obligee takes a noteor an uncertified check in payment of an obligation, the obligation is suspended to the extent of the amount of the check or note [*Com. Code § 3310(b)*].

In the case of an uncertified check, suspension continues until dishonor of the check or until it is paid or certified. Payment or certification of the check results in discharge of the obligation to the extent of the amount of the check [*Com. Code § 3310(b)(1)*; *Navrides v. Zurich Ins. Co. (1971) 5 Cal. 3d 698, 706, 97 Cal. Rptr. 309, 488 P.2d 637* ; *Hale v. Bohannon (1952) 38 Cal. 2d 458, 467, 241 P.2d 4* ; *Cornwell v. Bank of America (1990) 224 Cal. App. 3d 995,*

1000-1001, 274 Cal. Rptr. 322] .

In the case of a note, suspension continues until dishonor of the note or until it is paid. Payment of the note results in discharge of the obligation to the extent of the payment [*Com. Code § 3310(b)(2)*]. If the check or note is dishonored and the obligee of the obligation for which the instrument was taken is the person entitled to enforce the instrument, the obligee may enforce either the instrument or the obligation [*Com. Code § 3310(b)(3)*; *see Com. Code § 3310(b)(4), (c)*].

[b] Lost Instrument

Unless the parties agree otherwise, and except as provided in *Com. Code § 3310(a)*, if the obligee is the person entitled to enforce the instrument but no longer has possession of it because it was lost, stolen, or destroyed, the obligation may not be enforced to the extent of the amount payable on the instrument. To that extent the obligee's rights against the obligor are limited to enforcement of the instrument [*Com. Code § 3310(b)(4)*].

[c] Creditor's Direction

If a creditor or any one of two or more joint creditors at any time directs the debtor to perform the obligation in a particular manner, the obligation is extinguished by performance in that manner, even though the creditor does not receive the benefit of that performance [*Civ. Code § 1476*]. This rule applies only to a creditor's direction regarding the manner of transmission, not to a direction to pay something other than what was originally bargained for [*Cober v. Connolly (1942) 20 Cal. 2d 741, 744, 128 P.2d 519]* . If the creditor directs payment by mail, and the debtor mails the money but it is lost in transit, the obligation is satisfied even though the creditor does not receive the benefit. However, the creditor's provision to the debtor of self-addressed envelopes and payment coupons that state, "Detach and mail with payment" and "Mail this coupon with check payable to (the creditor)," does not amount to a direction to make payments by mail when the creditor also accepts payments by other methods, such as in its offices and by wire transfers or automated teller networks [*Cornwell v. Bank of America (1990) 224 Cal. App. 3d 995, 999, 274 Cal. Rptr. 322]* .

"Direct" as used in *Civ. Code § 1476* refers to a single method of payment and is inapplicable without a specific direction to pay only in that manner. A creditor will not be held to have "directed" all methods of payment that it makes available [*Cornwell v. Bank of America (1990) 224 Cal. App. 3d 995, 1000, 274 Cal. Rptr. 322]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsDishonor & PresentmentGeneral OverviewContracts LawPerformanceDischarges & TerminationsContracts LawPerformanceTender & Delivery

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13-140 California Forms of Pleading and Practice--Annotated § 140.41

§ 140.41 Obligation Extinguished by Offer or Tender of Performance

[1] Offer or Tender Generally

An obligation is extinguished by an offer or tender of performance by the debtor, or by someone on the debtor's behalf and with the debtor's assent, with the intent to extinguish the obligation [*Civ. Code §§ 1485, 1487*]. The offer or tender must be made to the party entitled to performance or to someone authorized by that party to receive performance [*see Civ. Code § 1488*; *Hoover v. Wolfe (1914) 167 Cal. 337, 342, 139 P. 794* ; *Barnes v. Osgood (1930) 103 Cal. App. 730, 734, 284 P. 975]* . When properly made, the offer or tender has the effect of putting the other party in default if the party refuses to accept it [*Still v. Plaza Marina Commercial Corp. (1971) 21 Cal. App. 3d 378, 385, 98 Cal. Rptr. 414]* .

[2] Conditions for Valid Offer or Tender

[a] Full Performance

To be effective, an offer or tender of performance must be for full performance. An offer or tender of partial performance has no effect [*Civ. Code § 1486*; *Still v. Plaza Marina Commercial Corp. (1971) 21 Cal. App. 3d 378, 385, 98 Cal. Rptr. 414]* . Moreover, the offer or tender must be made in good faith, and in the manner most likely to benefit the creditor in the circumstances [*Civ. Code § 1493*; *K & M, Inc. v. Le Cuyer (1951) 107 Cal. App. 2d 710, 717, 238 P.2d 28]* .

[b] Unconditional

An offer of performance must be free from any conditions the creditor is not already bound to perform [*Civ. Code § 1494*; *Gaffney v. Downey Savings & Loan Assn. (1988) 200 Cal. App. 3d 1154, 1165, 1168, 246 Cal. Rptr. 421* ; *Still v. Plaza Marina Commercial Corp. (1971) 21 Cal. App. 3d 378, 385, 98 Cal. Rptr. 414* ; *see Klinger v. Realty World Corp. (1987) 196 Cal. App. 3d 1549, 1553-1554, 242 Cal. Rptr. 592* (*Civ. Code § 1494* applied to continue accrual of prejudgment interest)]. An unwarranted condition annexed to an offer is, in effect, a refusal to perform [*Steelduct Co. v. Henger-Seltzer Co. (1945) 26 Cal. 2d 634, 646, 160 P.2d 804]* .

[c] Present Ability to Perform

An offer or tender of performance has no effect if the person making it is not able and willing to perform according to the offer [*Civ. Code § 1495*; *Allen v. Chatfield (1916) 172 Cal. 60, 68, 156 P. 47]* . Even if the necessity of an offer or tender of performance is eliminated, such as by repudiation of the contract, ability to perform must be proved at trial to enforce the other party's obligation when that is an issue [*see McDorman v. Moody (1942) 50 Cal. App. 2d 136, 141, 122 P.2d 639]* .

A thing to be delivered need not be actually produced on an offer or tender of performance, unless the other party accepts the offer or tender [*Civ. Code § 1496*]. An offer in writing to pay a particular sum of money or to deliver a written instrument or specific personal property is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property [*Code Civ. Proc. § 2074*; *State of California v. Agostini (1956) 139 Cal. App. 2d 909, 913, 294 P.2d 769* ; for discussionof offer or tender of payment of money generally, see [5], *below*].

[3] Time for Offer or Tender

[a] No Time Fixed--Implication of Reasonable Time

When the contract is silent as to the time for delivery or performance, the court will imply a reasonable time for performance [*Civ. Code § 1657*; *Walnut Creek Pipe Distributors, Inc. v. Gates Rubber Co. (1964) 228 Cal. App. 2d 810, 816, 39 Cal. Rptr. 767* ; *compare Resolution Trust Corporation v. First American Bank (9th Cir. 1998) 155 F.3d 1126, 1128* (California law implying "reasonable time" term was inapplicable when agreement was not silent as to time but rather gave careful consideration to time requirements)]. What is "reasonable" is a question of fact [*Palmquist v. Palmquist (1963) 212 Cal. App. 2d 322, 331, 27 Cal. Rptr. 744]* . The offer or tender may be made at any time after it is due and before the debtor, on a reasonable demand, has refused to perform [*Civ. Code § 1491*]. However, if the performance is in its nature capable of being done instantaneously, *e.g.,* the payment of money only (*see* [5], *below*), it must be performed immediately once the thing to be done has been exactly ascertained [*Civ. Code § 1657*; *Shipley Co. v. Rosemead Co. (1929) 100 Cal. App. 706, 711, 280 P. 1017]* .

When delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer or tender of performance, accompanied by an offer of compensation, may be made at any time after it is due, but without prejudice to any rights acquired by the creditor or by any other person in the meantime [*Civ. Code § 1492*; *Benedict v. Calkins (1937) 19 Cal. App. 2d 416, 419, 65 P.2d 831]* . The general rule of equity is that time is not of the essence of a contract unless it clearly appears from the terms of the contract, in the light of all the circumstances, that it was the intention of the parties [*Henck v. Lake Hemet Water Co. (1937) 9 Cal. 2d 136, 143, 69 P.2d 849]* .

[b] Time Fixed by Contract

If a contract fixes a time for performance, the offer or tender must be made [*Civ. Code § 1490*]:

- At that time;
- Within reasonable hours; and
- Not before or after.

[c] Premature Offer or Tender

A premature offer or tender of performance is not valid [*Waller v. Brooks (1968) 267 Cal. App. 2d 389, 394, 72 Cal. Rptr. 228]* .

[4] Place for Offer or Tender

If the contract does not expressly stipulate a place of performance, the court will find the contract performable in the place at which the circumstances viewed in the light of pertinent code provisions indicate the parties expected or intended it to be performed [*Hale v. Bohannon (1952) 38 Cal. 2d 458, 466-467, 241 P.2d 4* (issue of fact)]. The place of performance for the payment of a debt, in the absence of an agreement or stipulation to the contrary, is either the place of the creditor's residence or business, if the creditor has one, or wherever else the creditor may be found. Under ordinary circumstances, it is the duty of the debtor to seek the creditor for the purpose of making payment [*Civ. Code §§ 1488, 1489*; *Hale v. Bohannon (1952) 38 Cal. 2d 458, 466-467, 241 P.2d 4]* .

In the absence of an express provision to the contrary, an offer or tender of performance may be made, at the option of the debtor, at any of the following locations [*Civ. Code § 1489*]:

- At any place appointed by the creditor;
- Wherever the creditor can be found;
- At the creditor's residence or place of business, when it can, with reasonable diligence, be found within California, if the creditor cannot, with reasonable diligence, be found within California, and within a reasonable distance from the residence or place of business, or if the creditor evades the debtor; or
- If that cannot be done, at any place within California.

[5] Offer of Payment of Money

An obligation for the payment of money is extinguished by an offer or tender of payment, if the debtor [*Civ. Code § 1500*; *Taliaferro v. Taliaferro (1956) 144 Cal. App. 2d 109, 113, 300 P.2d 726 , cert. denied, 352 U.S. 971 (1957)]* :

- Immediately deposits the amount in the name of the creditor;
- At a bank of deposit or savings and loan association within California of good repute; and
- Gives notice to the creditor.

Civ. Code § 1500 does not prescribe the mode of tender, but, rather, delineates a method of extinguishing an obligation [*Sayward v. Houghton (1898) 119 Cal. 545, 550, 51 P. 853, 52 P. 44]* .

For a deposit under *Civ. Code § 1500* to constitute valid tender, the money deposited must be unconditionally available to the creditor. An account set up so that the creditor cannot withdraw from it without the debtor's signature does not amount to tender [*Gaffney v. Downey Savings & Loan Assn. (1988) 200 Cal. App. 3d 1154, 1167, 246 Cal. Rptr. 421]* . For an affirmative defense based on tender and deposit pursuant to *Civ. Code § 1500*, see *§ 140.139*.

[6] Objections

[a] Required on Tender

To allow the obligor to remedy defects in the tender, the obligee must, at that time, specify any objection. Otherwise, the objection is deemed waived [*Civ. Code § 1501*; *Code Civ. Proc. § 2076*; *see Riverside Fence Co. v. Novak (1969) 273 Cal. App. 2d 656, 661-662, 78 Cal. Rptr. 536]* .

[b] Permissible Subjects of Objection

Objections to the mode of an offer or tender may cover not only what is offered, but also the conditions of the offer [*Kofoed v. Gordon (1898) 122 Cal. 314, 321-323, 54 P. 1115]* . If the objection is to an amount of money, the terms of an instrument, or an amount or kind of property, the obligee must specify the amount, terms, or kind required; otherwise the obligee is precluded from objecting afterward [*Noyes v. Habitation Resources, Inc. (1975) 49 Cal. App. 3d 910, 913-914, 123 Cal. Rptr. 261]* .

[c] Effect of Generally Recognized Business Usage or Course of Dealings Between Parties

Because of generally recognized business usage or the course of dealing between the parties, the obligor may have reason to believe that tender in a medium other than that prescribed by law will be acceptable. If the obligee refuses it, insisting on legal tender, the obligee must give the obligor a reasonable time to make a valid tender. The more technical the objection to the tender, the more reasonable the inference from slight evidence that the obligee waived the objection [*Hunt v. Mahoney (1947) 82 Cal. App. 2d 540, 547, 187 P.2d 43]* .

[d] Failure to Object

Failure to object to a tender does not waive a defect that, if specified, could not have been cured by the obligor [*Klein v. Markarian (1917) 175 Cal. 37, 41, 165 P. 3* ; *Roven v. Miller (1959) 168 Cal. App. 2d 391, 399, 335 P.2d 1035]* . In addition, failure to object to a premature offer does not render the performance immediately due or waive the right to object to a subsequent offer made at maturity [*Allen v. Chatfield (1916) 172 Cal. 60, 68, 156 P. 47]* .

[7] Offer or Tender Not Required When Futile

An offer or tender of performance is not necessary when the conduct and declarations of the other party show that the offer or tender would be unavailing or when the person who should have made the offer or tender is induced not to by an act of the other party naturally tending to have that effect, at or before the time the performance or offer or tender may be made [*Civ. Code § 1511(3)*; *Hoppin v. Munsey (1921) 185 Cal. 678, 685, 198 P. 398* ; *United California Bank v. Maltzman (1974) 44 Cal. App. 3d 41, 52, 118 Cal. Rptr. 299]* .

Legal Topics:

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§ 140.42 Demand for Performance

[1] When Required

When one party has an unconditional duty to perform an act, the other party is not required to demand performance before commencing an action for breach of contract. The action itself is the only demand necessary [*Danielson v. Neal (1913) 164 Cal. 748, 750, 130 P. 716* ; *McDonald v. Filice (1967) 252 Cal. App. 2d 613, 623, 60 Cal. Rptr. 832]* .

If the promisor does not have an unconditional duty to perform and the contract does not specify a time for performance, the promisee must make a demand for performance within a reasonable time after it can lawfully be made [*Woollomes v. Gomes (1938) 26 Cal. App. 2d 461, 465, 79 P.2d 728]* , to put the promisor in default. For discussion of conditional performance generally, *see § 140.44*. The primary object of the demand is to enable the promisor to perform the obligation or otherwise discharge the liability without being subject to the inconvenience and expense of litigation [*Tisdale v. Bryant (1918) 38 Cal. App. 750, 757, 177 P. 510]* . However, if a demand for performance would be futile, the demand need not be made, since the law does not require idle acts [*Cook v. Snyder (1936) 16 Cal. App. 2d 587, 591, 61 P.2d 53]* . For example, if the delay has operated to the detriment of the promisee to so as to render the delayed performance valueless, and the promisor was charged with knowledge of the special circumstances, the promisee need not demand performance [*Leonard v. Rose (1967) 65 Cal. 2d 589, 592-593, 55 Cal. Rptr. 916, 422 P.2d 604]* .

[2] Effect on Running of Statute of Limitations

A demand for performance may be considered a preliminary requirement to the beginning of an action or a condition precedent to a right. If it is a preliminary requirement to an action, the statute of limitations begins to run when a right has fully accrued. However, if the demand is an integral part of a cause of action, the statute does not run until the demand is made [*Woollomes v. Gomes (1938) 26 Cal. App. 2d 461, 465, 79 P.2d 728]* .

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§ 140.43 Performance of Alternative Obligations

A party whose obligation requires the performance of alternative acts has the right to select which act to perform unless the terms of the obligation provide otherwise [*Civ. Code § 1448*; *San Bernardino Valley Water Dev.Co. v. San Bernardino Valley Mun. Water Dist. (1965) 236 Cal. App. 2d 238, 247, 45 Cal. Rptr. 793]* . The party must select an alternative in its entirety, unless the other party otherwise consents [*see Civ. Code § 1450*].

The selecting party must give notice of the selection within the time fixed by the terms of the obligation. If the terms of the obligation do not fix a time, the selecting party must give notice before the time the obligation ought to be performed; otherwise the right of selection passes to the other party [*Civ. Code § 1449*; *Norris v. Harris (1860) 15 Cal. 226, 258]* . The obligation becomes absolute only on the making of a selection by either party [*see Norris v. Harris (1860) 15 Cal. 226, 258]* .

If one of the alternative acts is unlawful or becomes unlawful or impossible to perform, the court will interpret the obligation as though the other stood alone [*Civ. Code § 1451*; *Rosenthal v. Perkins (1898) 123 Cal. 240, 243, 55 P. 804]* .

Legal Topics:

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§ 140.44 Performance of Conditional Obligation

[1] In General

The performance of a contractual obligation is conditional when the rights or duties of a party depend on the occurrence of an uncertain event [*Civ. Code § 1434*; *Riess v. Murchison (9th Cir. 1964) 329 F.2d 635, 643 , after remand, 503 F.2d 999 (1974)]* . Parties may insert in their contracts whatever legal conditions they desire [*Cavanaugh v. Casselman (1891) 88 Cal. 543, 549, 26 P. 515]* . These conditions may be precedent[*see* [4], *below*], subsequent [*see* [5], *below*], or concurrent [*Civ. Code § 1435*; *see* [6], *below*].

The breach of an important condition may excuse the other party from performance [*Civ. Code § 1439*; *see, e.g., Wiz Technology, Inc. v. Coopers & Lybrand LLP (2003) 106 Cal. App. 4th 1, 11-14, 130 Cal. Rptr. 2d 263* (auditor's resignation was justified by client's breach of material condition which required hiring different securities counsel)].

[2] Condition and Covenant Distinguished

A condition is a fact or event that creates no right or duty, but merely limits or modifies a contractual duty or right. The nonoccurrence of a condition can prevent the existence of a duty in the other party, but it cannot create any remedial rights and duties unless one party has promised that it will occur [*see Civ. Code § 1582*].

On the other hand, a promise or covenant is an expression of intention that the promisor will render some future performance and an assurance of its rendition to the promisee. The nonfulfillment of a promise, unlike a condition, is a breach of contract and creates in the other party a right to damages.

Whether a provision constitutes a condition or a covenant is determined from the whole document, its purpose, and the intention of the parties [*Pacific Allied v. Century Steel Products (1958) 162 Cal. App. 2d 70, 80,327 P.2d 547]* . When it is doubtful whether words create a promise or an express condition, the court interprets the words as creating a promise. Such an interpretation protects both parties and avoids having a slight failure to perform wholly destroy all rights under the contract [*Div. Labor L. Enf. v. Ryan Aero. Co. (1951) 106 Cal. App. 2d Supp. 833, 836*].

[3] Express and Implied Conditions

An express condition is a condition by agreement of the parties, expressed in definite language when the parties make the contract. A condition is implied when the parties make promises by expressing an intention that a fact or event should be a condition of their legal duty without putting it into words [*see Sosin v. Richardson (1962) 210 Cal. App. 2d 258, 264, 26 Cal. Rptr. 610]* .

[4] Condition Precedent

[a] Definition

A condition precedent is a condition to be performed before a right dependent on it accrues or an act dependent on it is to be performed [*Civ. Code § 1436*]. For example, the parties create a condition precedent by agreeing that a third person is to determine performance of the contract [*see Lucas v. Quigley Motor Co. (1961) 191 Cal. App. 2d 152, 155, 12 Cal. Rptr. 442]* , or that one party must perform to the satisfaction of the other party before the approving party has a duty to perform [*see Mattei v. Hopper (1958) 51 Cal. 2d 119, 122-123, 330 P.2d 625* ; *see also Locke v. Warner Bros., Inc. (1997) 57 Cal. App. 4th 354, 363-364, 66 Cal. Rptr. 2d 921]* .

[b] Not Favored by Law

The law does not favor conditions precedent. Courts are disinclined to construe the stipulations of a contract as conditions precedent unless compelled by the language of the contract, because such a construction prevents the court from doing justice for the parties according to the equities of the case [*Front St., Mission & Ocean R.R. Co. v. Butler (1875) 50 Cal. 574, 577* ; *Frankel v. Board of Dental Examiners (1996) 46 Cal. App. 4th 534, 550, 54 Cal. Rptr. 2d 128]* . However, parties to a contract may agree that any matter is a condition precedent. If the words used in the contract are so precise, express, and strong that such an interpretation of the contract finding such an intention is the only one compatible with the terms employed, the court must give effect to the declared intention of the parties [*Schwab v. Bridge (1915) 27 Cal. App. 204, 207, 149 P. 603]* .

[c] Approval of Agreement by Others

Generally, an agreement subject to the approval of the board of directors of one of the contracting parties or of some third person is not unenforceable as illusory. Unless a reasonable person would have understood that the agreement was not effective when signed, approval is a condition precedent to the party's duty to perform, not a condition precedent to the formation of the contract [*Jacobs v. Freeman (1980) 104 Cal. App. 3d 177, 187, 189-190, 163 Cal. Rptr. 680* ; for discussion of formation of enforceable contracts generally, *see § 140.20* et seq.].

The condition of approval and the implied covenant of good faith and fair dealing (*see § 140.12*) give rise to a duty on the part of the party whose performance is conditioned on approval to submit the contract to the board or other person for approval, as well as a duty on the part of the board or other person to decide whether to approve the contract [*Moreland Development Co. v. Gladstone Holmes, Inc. (1982) 135 Cal. App. 3d 973, 977-978, 186 Cal. Rptr. 6* ; *Jacobs v. Freeman (1980) 104 Cal. App. 3d 177, 190, 163 Cal. Rptr. 680]* .

Failure to submit the contract for approval is a breach of contract. For discussion of breach of contract generally, *see § 140.50* et seq. If approval would have been given if sought, failure to seek approval excuses the condition of approval and the party whose performance was conditioned on approval must perform [*Jacobs v. Tenneco West, Inc. (1986) 186 Cal. App. 3d 1413, 1417-1418, 231 Cal. Rptr. 351* (decree of specific performance proper on trial court's finding that approval would have been given if sought)]. If approval would not have been given if sought, failure to seek approval is excused, and the party whose performance was conditioned on approval need not perform. This excuse for nonperformance is a kind of affirmative defense. The party who did not submit the contract for approval has the burden of proving that the board of directors or other person, acting in good faith, would not have approved the contract if the

party had submitted it for approval in a timely manner [*Jacobs v. Tenneco West, Inc. (1986) 186 Cal. App. 3d 1413, 1418-1419, 231 Cal. Rptr. 351]* .

[d] Payment From Particular Fund

A contract may limit an obligation to pay sums by prescribing payment out of a specified fund or from a specified source. The existence of the fund is a condition precedent to the obligation of payment. If, through no fault of the promisor, the fund does not exist, the promisor will not be obligated to pay [*Sunniland Fruit, Inc. v. Verni(1991) 233 Cal. App. 3d 892, 899, 284 Cal. Rptr. 824* ; *Jeschke v. Lamarr (1965) 234 Cal. App. 2d 506, 511, 44 Cal. Rptr. 416* ; *but see Wm. R. Clarke Corp. v. Safeco Ins. Co. (1997) 15 Cal. 4th 882, 888-896, 64 Cal. Rptr. 2d 578, 938 P.2d 372* (in subcontractor's action against surety on general contractor's payment bond, "pay if paid" provision in subcontract did not create condition precedent to subcontractor's contractual right to receive payment from general contractor; provision was not valid as waiver of subcontractor's mechanic's lien rights); *see also Capital Steel Fabrications v. Mega Construction Co. (1997) 58 Cal. App. 4th 1049, 1062, 58 Cal. App. 4th 1049, 68 Cal. Rptr. 2d 672* (holding that *Clarke* applies to a public works project when there is no pending action against the governmental entity)].

Simple identification of a particular pool of money as a source of payment does not limit or preclude recovery from other sources when the pool fails to materialize, unless the agreement expressly so states [*Sunniland Fruit, Inc. v. Verni (1991) 233 Cal. App. 3d 892, 900, 284 Cal. Rptr. 824* (fact that advance would be "deducted" from grower's profits did not condition duty to repay advance on existence of profits)].

When the duty to pay is conditioned on the existence of a specific fund, the promisee must allege and prove that the condition has been satisfied [*Draper v. Patterson (1958) 156 Cal. App. 2d 606, 608-609, 319 P.2d 694* (complaint insufficient for failing to allege that defendant made profit from crops off land in question)].

[5] Condition Subsequent

A condition subsequent is a future event, on the happening of which the obligation will become no longer binding on the other party if the other party chooses to avail himself, herself or itself of the condition [*Civ. Code § 1438*; *Frankel v. Board of Dental Examiners (1996) 46 Cal. App. 4th 534, 550, 54 Cal. Rptr. 2d 128]* . An example of a condition precedent is an agreement that the transfer of patent rights to a company is subject to the condition that the company must thereafter manufacture and sell at least 5,000 patented devices each year, otherwise, on demand, the patent rights must be reassigned [*Lowe v. Copeland (1932) 125 Cal. App. 315, 318, 321, 13 P.2d 522]* .

The intent to create a condition subsequent must appear expressly or by clear implication. However, no precise words are necessary [*Lowe v. Copeland (1932) 125 Cal. App. 315, 321, 13 P.2d 522]* .

[6] Concurrent Conditions

Concurrent conditions are conditions that are mutually dependent and are to be performed at the same time [*Civ. Code § 1437*; *Groobman v. Kirk (1958) 159 Cal. App. 2d 117, 123, 323 P.2d 867]* . In a bilateral contract (*see § 140.10[4]*), although performances are not necessarily to be rendered at the same time, the performance of one promise is the agreed exchange for the other promise [*see McDorman v. Moody (1942) 50 Cal. App. 2d 136, 142, 122 P.2d 639]* . As a result, and since the law does not favor conditions precedent, whenever possible the courts construe promises in a bilateral contract as mutually dependent and concurrent conditions [*Rubin v. Fuchs (1969) 1 Cal. 3d 50, 53-54, 81 Cal. Rptr. 373, 459 P.2d 925* ; for discussion of conditions precedent, *see* [4], *above*].

The only important difference between a concurrent condition and a condition precedent is that the condition precedent must be performed before another duty arises, while a tender of performance is sufficient to cause another duty to arise in the case of concurrent conditions. The failure of both parties to perform concurrent conditions during the time for

performance does not leave the contract open for an indefinite period so that either party may tender performance at that party's leisure [*Pittman v. Canham (1992) 2 Cal. App. 4th 556, 559, 3 Cal. Rptr. 2d 340]* . The failure of both parties to perform concurrent conditions results in a discharge of both parties' duty to perform. Thus, when a contract makes time of the essence, if the time expires without tender by either party, both parties are discharged from their obligations under the contract [*Pittman v. Canham (1992) 2 Cal. App. 4th 556, 559-560, 3 Cal. Rptr. 2d 340]* .

[7] Excuse of Condition

Courts will sometimes excuse conditions, allowing one party to enforce the contract even though the condition has not been satisfied. For example, if the obligee gives notice to the obligor before the obligor is in default, that the obligee will not perform the obligation, and does not retract that notice before the time performance is due, the obligor is entitled to enforce the obligation without previously performing or offering to perform any obligation in favor of the defaulting obligee [*Civ. Code § 1440*; *see* *Tatum v. Ackerman (1905) 148 Cal. 357, 360, 83 P. 151]* .

If a condition is solely for the benefit of one party, the condition and the implied covenant of good faith and fair dealing give rise to the duty on the part of that party to do everything the contract presupposes that party will do to accomplish its purpose [*Jacobs v. Freeman (1980) 104 Cal. App. 3d 177, 188-189, 163 Cal. Rptr. 680]* . When the party to be benefitted by performance of the condition tries in good faith to satisfy the condition but is unable to do so, that party has an option not to consummate the transaction. Thus, a party may waive a condition precedent solely for that party's benefit [*Crescenta Valley Moose Lodge v. Bunt (1970) 8 Cal. App. 3d 682, 687, 87 Cal. Rptr. 428* ; *see* *Wyler Summit Partnership v. Turner Broadcasting (9th Cir. 1998) 135 F.3d 658, 662-664* (holding that plaintiff stated claim for breach of contract based on its alleged waiver of installment payment provision for "percentage compensation" for profits from film "Ben Hur"); *Wyler Summit Partnership v. Turner Broadcasting (9th Cir. 2000) 235 F.3d 1184, 1191-1192* (trial court erred in granting summary judgment to studio on issue of waiver when genuine issue of material fact existed regarding whether installment provision originally was included in contract for sole benefit of director)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsConditions PrecedentContracts LawContract Conditions & ProvisionsConditions Subsequent

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§ 140.45 Impossibility of Performance

[1] In General

[a] Impossible or Impracticable

At common law, the determination that a contract was impossible to perform was limited to literal or physical impossibility of performance [*Kennedy v. Reece (1964) 225 Cal. App. 2d 717, 724, 37 Cal. Rptr. 708]* . The common law rule still applies to the extent that a party may not escape a voluntarily assumed contractual obligationmerely because performance would be more expensive or more difficult than contemplated when the agreement was executed [*Butler v. Nepple (1960) 54 Cal. 2d 589, 599, 6 Cal. Rptr. 767, 354 P.2d 239]* .

However, modern cases recognize something as legally impossible when it is impracticable, that is, when it can be done only at an excessive and unreasonable cost [*Mineral Park Land Co. v. Howard (1916) 172 Cal. 289, 293, 156 P. 458]* . The defense of impossibility may be based on impracticability when it is due to excessive and unreasonable difficulty or expense [*Christin v. Superior Court (1937) 9 Cal. 2d 526, 533, 71 P.2d 205* ; *see In re Marriage of Benjamins (1994) 26 Cal. App. 4th 423, 432 n.3, 31 Cal. Rptr. 2d 313* (general contract principles applied to dissolution settlement agreement)]. Nevertheless, facts that make performance more difficult or expensive than the parties anticipated do not constitute a ground for the defense of impracticability unless they are of the gravest importance [*Kennedy v. Reece (1964) 225 Cal. App. 2d 717, 725, 37 Cal. Rptr. 708]* .

A party invoking the impossibility defense must show that reasonable efforts were used to surmount the obstacles that prevented performance [*McCalden v. California Library Ass'n (9th Cir. 1990) 955 F.2d 1214, 1219 , cert. denied, 504 U.S. 957 (1992)]* .

For an affirmative defense based on impossibility, see *§ 140.137*.

[b] Objective Test

If performance of a contract is possible, failure to perform is not an excuse for nonperformance, but is instead a breach

even if the obligor may have become wholly unable to perform. If what is agreed to be done is possible and lawful, it must be done. If a party expressly undertakes to do a thing lawful in itself, and not necessarily impossible in all circumstances, but does not do it, that party must pay damages, even if the performance was rendered impracticable or even impossible by an unforeseen cause for which no provision was made and over which the party had no control but against which the party might have provided in the contract [*Kennedy v. Reece (1964) 225 Cal. App. 2d 717, 725, 37 Cal. Rptr. 708]* .

The impossibility must attach to the nature of the thing to be done and not to the inability of the promisor to do it. For example, failure of the defendant to obtain permission to divert traffic from an old bypass road in time for the plaintiff to proceed with the contract to construct new roads did not excuse performance on the grounds of impossibility, when the defendant was able to get consent later and might have arranged for the diversion at the date required by using greater diligence or better planning [*Hensler v. City of Los Angeles (1954) 124 Cal. App. 2d 71, 83, 268 P.2d 12]* . A party cannot assert the defense of impossibility if that party has placed performance of the contract beyond that party's control by a voluntary act [*Pacific Venture Corporation v. Huey (1940) 15 Cal. 2d 711, 717, 104 P.2d 641* ; *Lortz v. Connell (1969) 273 Cal. App. 2d 286, 290-291, 78 Cal. Rptr. 6]* .

[2] Extreme Hardship

A party cannot assert a defense of impossibility based on extreme hardship if the party has received the full consideration or if circumstances have not entirely destroyed the purpose that both parties had in mind. There is no impossibility of performance when one party rendered services as agreed and nothing remains for the other party to do but pay the agreed compensation [*Browne v. Fletcher Aviation Corp. (1945) 67 Cal. App. 2d 855, 862, 155 P.2d 896* (no impossibility of performance and plaintiff test pilot permitted to recover full contract price under contract to test gliders manufactured by defendant for Air Force, when gliders were delivered, accepted, and paid for in amount satisfactory to defendant even though tests by plaintiff lasted only three hours instead of projected 10 hours)].

[3] Destruction of Thing or Death of Party

If performance depends on the existence of a given thing, and existence was assumed as the basis of the agreement, performance is excused to the extent the thing ceases to exist or is nonexistent [*Mineral Park Land Co. v. Howard (1916) 172 Cal. 289, 292, 156 P. 458]* . Similarly, when one party engages another to render personal services for a specified period, the obligor's death or incapacity before the end of the agreed time terminates the contract if the terms of the contract and the surrounding circumstances indicate that each party relied on personal skills, talents, or characteristics that no one other than the other contracting party could provide [*Farnon v. Cole (1968) 259 Cal. App. 2d 855, 858, 66 Cal. Rptr. 673* ; *Cazares v. Saenz (1989) 208 Cal. App. 3d 279, 284-286, 256 Cal. Rptr. 209* (when partner in two-person law firm was appointed to bench, association agreement was discharged, and attorney associated with firm did not have to work with other partner)].

If the existence of a particular person is necessary for performance, incapacity making performance impracticable is sufficient to discharge the contract [*Restatement (Second) of Contracts § 262* (1979)]. This rule does not apply if the services may be as well performed by others or if the contract by its terms shows that performance by others was contemplated [*Howard v. Adams (1940) 16 Cal. 2d 253, 258, 105 P.2d 971]* .

[4] Interference by Operation of Law

Performance may be excused by operation of law if the passage of a statute or ordinance makes the contemplated performance illegal or a condemnation proceeding brought by the state or a public agency prevents performance. Prevention by court order or process obtained by a private litigant, as in the case of an injunction or attachment obtained against the promisor by a third person, is not an excuse for nonperformance, however [*see Civ. Code § 1511(1)*; *Webster v. Southern Cal. First National Bank (1977) 68 Cal. App. 3d 407, 415-416, 137 Cal. Rptr. 293]* . Laws or other

governmental acts that only make performance unprofitable or more difficult or expensive also do not excuse the duty to perform a contractual obligation [*Lloyd v. Murphy (1944) 25 Cal. 2d 48, 55, 153 P.2d 47]* .

A court holding may also have the effect of making performance impossible and therefore excused. For example, the lessee under an equipment lease, *i.e.*, a financing agreement in lease form, may be excused from making payments when, in a turn of events not reasonably foreseeable by either party when the agreement was made, the equipment became unusable because of a federal court order requiring that it berendered inoperable, operation of the equipment having been found to unlawfully interfere with operation of other similar equipment by the federal government [*see Federal Leasing Consultants, Inc. v. Mitchell Lipsett Co. (1978) 85 Cal. App. 3d Supp. 44, 47-49*]. The court applied the commercial frustration doctrine [*see § 140.46*].

[5] Act of God or Public Enemy

Performance may be excused by an irresistible, superhuman cause or by an act of God [*Civ. Code § 1511(1)*; *Sun Oil Co. v. Union Drilling etc. Co. (1929) 208 Cal. 114, 120, 280 P. 535]* . For a discussion and forms relating to an act of God, see Ch. 10, *Act of God* .

Performance is also excused when prevented or delayed by the act of public enemies of California or of the United States, unless the parties have expressly agreed to the contrary [*Civ. Code § 1511(2)*; *but see U.S. Trading Corp. v. Newmark G. Co. (1922) 56 Cal. App. 176, 186-187, 205 P. 29* (railroad embargo to continue for indefinite time suspended but did not discharge performance of contract for shipment of goods)].

[6] Temporary Impossibility

Temporary impossibility of a character that, if it should become permanent, would discharge a promisor's entire contractual duty, operates as a permanent discharge if performance after the impossibility ceases would impose a substantially greater burden on the promisor. Otherwise, the duty is suspended while the impossibility exists [*Autry v. Republic Productions, Inc. (1947) 30 Cal. 2d 144, 149, 180 P.2d 888* ; *see G.W. Andersen Construction Co. v. Mars Sales (1985) 164 Cal. App. 3d 326, 336-337, 210 Cal. Rptr. 409* (building moratorium temporary impossibility suspending contractor's performance duty but not defendant's duty to make down payment required by contract)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceImpossibility of PerformanceGeneral OverviewContracts LawPerformanceImpossibility of PerformanceImpracticability

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§ 140.46 Frustration of Purpose

The doctrine of frustration applies when performance remains possible but the fundamental reason of both parties for entering into the contract has been frustrated by an unanticipated supervening circumstance, destroying substantially the value of performance by the party standing on the contract [*Cutter Laboratories, Inc. v. Twining (1963) 221 Cal. App. 2d 302, 314-315, 34 Cal. Rptr. 317]* . A promisor without fault in causing the frustration, who is harmed by it, is discharged from performance unless a contrary intention appears [*Dorn v. Goetz (1948) 85 Cal. App. 2d 407, 411, 193 P.2d 121]* .

The defense of frustration is available only when the frustration is substantial. It is not enough that the transaction will be less profitable than originally anticipated or even that one party will sustain a loss. The frustration must be so severe that it is not fairly regarded as within the risks assumed by that party under the contract [*FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 399, 282 Cal. Rptr. 508* ; *Nieman v. Peterson (1978) 86 Cal. App. 3d Supp. 14, 19*].

The doctrine of frustration is akin to the doctrine of impossibility of performance, since both developed from the commercial necessity of excusing performance in cases of extreme hardship. However, frustration is not a form of impossibility [*Lloyd v. Murphy (1944) 25 Cal. 2d 48, 53-54, 153 P.2d 47]* . Frustration more properly relates to the consideration for performance [*Autry v. Republic Productions, Inc. (1947) 30 Cal. 2d 144, 148, 180 P.2d 888]* .

The question is whether the equities of the case, considered in the light of sound public policy, require placing the risk of disruption or complete destruction of the contract equilibrium on the defendant or the plaintiff in the circumstances of the case. The answer depends on whether an unanticipated circumstance, the risk of which should not be fairly thrown on the promisor, has made performance vitally different from what was reasonably to be expected. The court must examine the circumstances surrounding the formation of the contract to determine whether it can fairly infer that the risk of the event causing the alleged frustration was not reasonably foreseeable. If it was foreseeable, the contract should have provided for it. The absence of a provision gives rise to an inference that the parties assumed the risk [*Lloyd v. Murphy (1944) 25 Cal. 2d 48, 53-54, 153 P.2d 47]* . Of course, if the parties have contracted with reference to the frustrating event or have contemplated the risks arising from it, they may not invoke the doctrine of frustration to escape

their obligations [*Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 676, 75 Cal. Rptr. 889, 451 P.2d 721* ; *U.S. Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal. App. 3d 1431, 1448 n.10, 279 Cal. Rptr. 533* (doctrine inapplicable because crane defect foreseeable as demonstrated by lease disclaimer provision)].

Legal Topics:

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§ 140.47 Termination of Contract

[1] In General

The parties may terminate an executory contract, wholly or in part, by mutual consent at any stage of performance. Termination means doing away with the existing agreement and leaving the parties in their respective positions at the time of termination. It differs from rescission, one result of which is to restore the parties to their former positions [*Sanborn v. Ballanfonte (1929) 98 Cal. App. 482, 487-488, 277 P. 152]* . The parties may terminate a written contract by an oral agreement, whether executed or not [*Grant v. Aerodraulics Co. (1949) 91 Cal. App. 2d 68, 75, 204 P.2d 683]* .

[2] Contractual Provision for Termination

[a] Enforceability and Effect

If a contract provides that a party may terminate it at that party's option, the party is not liable after termination for further transactions under the contract. However, obligations that accrued before termination are not affected [*Merrill v. Continental Assurance Co. (1962) 200 Cal. App. 2d 663, 670, 19 Cal. Rptr. 432]* .

A provision giving one party an option to terminate on substantial notice need not be supported by consideration different from consideration supporting the entire agreement [*Millgee Investment Co. v. Friedrich (1967) 254 Cal. App. 2d 802, 805, 62 Cal. Rptr. 730]* . The express term of the contract is not shortened or affected by the termination clause unless a party exercises the option to terminate under the clause inthe manner prescribed by the contract [*Kuffel v. Seaside Oil Co. (1970) 11 Cal. App. 3d 354, 368, 90 Cal. Rptr. 209]* .

Once a party exercises an option to terminate a contract, the contract is extinguished and discharged. The other party cannot thereafter revive it through an offer to perform an act, the nonperformance of which gave rise to the option to terminate [*Siegel v. Lewis (1946) 74 Cal. App. 2d 86, 91, 168 P.2d 50]* .

When a contract provides that either party may terminate it without cause by giving notice a specified number of days before termination, a party who terminates the contract without notice or on shorter notice than required breaches the

contract. Damages for breach are limited to those that could have accrued during the period of the required notice [*see Civ. Code § 3358*; *Martin v. U-Haul Co. of Fresno (1988) 204 Cal. App. 3d 396, 410-411, 251 Cal. Rptr. 17]* .

[b] Necessity for Cause or Good Faith

The implied covenant of good faith and fair dealing [*see § 140.12*] may supply a requirement of good cause for termination if the contract is silent or ambiguous on that subject. However, courts will not interpret the implied covenant to add a requirement of good cause when the written contract expressly provides that it may be terminated at will or for any reason on notice [*Gerdlund v. Electronic Dispensers International (1987) 190 Cal. App. 3d 263, 277-278, 235 Cal. Rptr. 279* (contract with nonemployee sales representative)].

Similarly, no tort cause of action arises for termination of a contract pursuant to a notice provision unless a special relationship exists between the parties to the contract [*Martin v. U-Haul Co. of Fresno (1988) 204 Cal. App. 3d 396, 412-415, 251 Cal. Rptr. 17* (no special relationship: equipment rental dealership); *Premier Wine & Spirits v. E. & J. Gallo Winery (9th Cir. 1988) 846 F.2d 537, 540* (applying California law in diversity action; no special relationship: wine distributorship); *see Abrahamson v. NME Hospitals, Inc. (1987) 195 Cal. App. 3d 1325, 1329-1330, 241 Cal. Rptr. 396* (no tort even if termination pursuant to notice provision was motivated by refusal of independent contractor physician to condone poor practices in healing arts)].

The court may receive parol evidence of industry custom and the circumstances surrounding formation of the contract on the issue of whether a provision for termination by either party after notice includes the requirement that termination must be for poor performance that remains uncorrected after notice [*Jack Rowe Assoc., Inc. v. Fisher Corp. (9th Cir. 1987) 833 F.2d 177, 181-183 , after remand, 936 F.2d 578 (1991)* (applying California law to require retrial: distributorship agreement); *see Esbensen v. Userware Internat., Inc. (1992) 11 Cal. App. 4th 631, 636-640, 14 Cal. Rptr. 2d 93* (parol evidence admissible regarding oral understanding of grounds for termination of employment contract that was only partially integrated)].

Even when termination amounts to a breach of the contract because done on less notice than required by the contract, it does not constitute tortious denial of the existence of the contract [*Martin v. U-Haul Co. of Fresno (1988) 204 Cal. App. 3d 396, 412, 251 Cal. Rptr. 17]* . For discussion of tortious denial of the existence of a contract, see *§ 140.12[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract InterpretationParol EvidenceGeneral OverviewContracts LawPerformanceDischarges & Terminations

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[Reserved]

§§ 140.48[Reserved]

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13-140 California Forms of Pleading and Practice--Annotated § 140.50

§ 140.50 In General

[1] Definition

A breach of contract is a party's unjustified or unexcused nonperformance of a contractual duty the party is required to immediately perform. A breach may be total or partial [*see § 140.51*]. It may consist of [*see Sackett v. Spindler (1967) 248 Cal. App. 2d 220, 227, 56 Cal. Rptr. 435]* :

- Failure to perform acts promised;
- Prevention or hindrance of performance; or
- Repudiation of the promise.

A party cannot actually breach a contract until the time specified for performance has arrived [*Taylor v. Johnston (1975) 15 Cal. 3d 130, 137, 123 Cal. Rptr. 641, 539 P.2d 425]* . However, the court may treat repudiation of a promise as anticipatory breach [*see § 140.54*].

When a contract is expressly renewable for a fixed term at a party's option, but subject to the condition that renewal will depend on the parties reaching agreement about something essential to the contract (such as the nature and amount of security that one party will provide for that party's performance) in the renewal term, there is no breach of contract in the event that, after the option to renew is exercised, the parties fail to reach agreement on that essential something. After the original term ends, even if the parties continue to do business with each other as before, their conduct does not imply that the contract continues in existence. Therefore, if their negotiations regarding that essential something eventually come to naught, neither party can be liable for breach of contract [*Warner Bros. Int'l TV Distrib. v. Golden Channels Co. (9th Cir. 2008) 522 F.3d 1060, 1070*].

[2] Accrual of Cause of Action

A cause of action based on breach of contract accrues at the time of the breach. In the case of a personal performance

contract, breach of the obligation to pay occurs at the time the other party completes the required performance [*E.O.C. Ord, Inc. v. Kovakovich (1988) 200 Cal. App. 3d 1194, 1203, 246 Cal. Rptr. 456]* .

[3] Effect

Any breach, total or partial, that causes a measurable injury gives the aggrieved party a right to damages as compensation for the breach [*Borgonovo v. Henderson (1960) 182 Cal. App. 2d 220, 231, 6 Cal. Rptr. 236]* . The breach may consist of a defective performance as well as an absence of performance [*Linden Partners v. Wilshire Linden (1998) 62 Cal. App. 4th 508, 531-532, 73 Cal. Rptr. 2d 708]* . If there is a total breach of the contract, the plaintiff may sue for all consequential damages, general and special. Any subsequent action for additional damages could be successfully opposed by a plea of res judicata; thus, the plaintiff's injury is necessarily permanent.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachGeneral OverviewContracts LawBreachNonperformance

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13-140 California Forms of Pleading and Practice--Annotated § 140.51

§ 140.51 Partial Breach

[1] Effect

If the breach is partial only, the aggrieved party may recover damages for nonperformance only to the time of trial and may not recover damages for anticipated future nonperformance. Even if a breach is total, the aggrieved party may treat it as partial, unless the wrongdoer repudiated the contract [*Coughlin v. Blair (1953) 41 Cal. 2d 587, 598-599, 262 P.2d 305]* .

[2] Determination of Partial Breach

Whether a breach of contract is total or partial depends on its materiality and ordinarily is a question of fact [*Whitney Inv. Co. v. Westview Dev. Co. (1969) 273 Cal. App. 2d 594, 601, 78 Cal. Rptr. 302* ; for discussion of materiality of breach, *see § 140.52*]. The circumstances of each case determine whether the aggrieved party may treat a breach of contract as total. If the aggrieved party has fully performed his, her or its obligations under a bilateral contract, courts usually treat a breach as partial unless it appears that performance of the agreement is unlikely and the aggrieved party may be protected only by the recovery of damages for the value of the promise [*Coughlin v. Blair (1953) 41 Cal. 2d 587, 599, 262 P.2d 305]* .

Legal Topics:

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

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§ 140.52 Materiality

The materiality of a breach does not depend necessarily on the amount of money involved [*Associated Lathing & Plastering Co. v. Louis C. Dunn, Inc. (1955) 135 Cal. App. 2d 40, 51, 286 P.2d 825* (subcontractor's failure to install hangers was material breach even though cost of installing hangers was only $3,500 and total contract was for $140,000)]. In determining the materiality of a failure to fully perform a promise, the court should consider the following factors [*Whitney Inv. Co. v. Westview Dev. Co. (1969) 273 Cal. App. 2d 594, 602, 78 Cal. Rptr. 302* ; *Sackett v. Spindler (1967) 248 Cal. App. 2d 220, 229, 56 Cal. Rptr. 435]* :

- The extent to which the aggrieved party will obtain the substantial benefit that party could have reasonably anticipated;

- The extent to which the aggrieved party may be adequately compensated in damages for lack of complete performance;

- The extent to which the party failing to perform has partly performed or made preparations for performance;

- The extent of the hardship on the party failing to perform, if the court terminates the contract;

- The willful, negligent, or innocent behavior of the party failing to perform;

- The extent of uncertainty that the party failing to perform will perform the remainder of the contract; and

- The timing of the breach (a slight breach at the outset may justify termination whereas a like breach later in performance may be insubstantial).

Whether a particular breach is material is usually a question of fact. The timing of a breach is a relevant consideration in

determining its materiality. A slight breach at the outset may justify rescission, while a similar breach later in performance may be insubstantial [*Whitney Inv. Co. v. Westview Dev. Co. (1969) 273 Cal. App. 2d 594, 601-602, 78 Cal. Rptr. 302]* .

Legal Topics:

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

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§ 140.53 Entire Contract or Severable Provisions

A factor for consideration in the breach of an executory contract is whether the terms of the contract are entire or severable [*Big Boy Drilling Corp., Ltd. v. Etheridge (1941) 44 Cal. App. 2d 114, 119, 111 P.2d 953]* . If a contract is divisible and severable so that both parties may fully perform without affecting subsequent performance or right of performance as to the remainder, and a breach occurs as to the severable part, the aggrieved party may treat that part as abandoned and recover the money paid on the severable part [*San Diego Constr. Co. v. Mannix (1917) 175 Cal. 548, 554, 166 P. 325]* .

However, if a contract is entire, a repudiation of a part is a repudiation of it all. The aggrieved party has the right to consider the breach of a part as a breach of the entire contract and discontinue performance on the entire contract. The aggrieved party is discharged from the satisfaction of any conditions on his, her or its part [*De Prosse v. Royal Eagle Distilleries Co. (1902) 135 Cal. 408, 411, 67 P. 502]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsSeverability ClausesContracts LawTypes of ContractsDivisible Contracts

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§ 140.54 Anticipatory Breach

[1] Treatment as Actual Breach

California recognizes the rule of anticipatory breach. The promisee may treat the promisor's definite and unconditional repudiation of the contract, communicated to the promisee, as a breach of the contract creating an immediate right of action, even though the repudiation takes place long before the time prescribed for the promised performance and before conditions specified in the contract have been satisfied [*Daum Development Corp. v. Yuba Plaza, Inc. (1970) 11 Cal. App. 3d 65, 73-74, 89 Cal. Rptr. 458 , disapproved on other grounds* in *Ninety Five Ten v. Crain (1991) 231 Cal. App. 3d 36, 40-41, 282 Cal. Rptr. 141* ; *see Civ. Code § 1440*; *see also* *Mobil Oil Exploration & Producing Southeast, Inc. v. United States (2000) 530 U.S. 604, 120 S. Ct. 2423, 147 L.Ed. 2d 528, 534* (obligor's statement to obligee indicating that obligor will breach an important contractual promise, thereby substantially impairing the value of the contract, constituted repudiation of contract and plaintiffs were entitled to restitution whether or not repudiated contracts ultimately would have produced financial gain)].

[2] Requirements

[a] Repudiation Before Performance Due

An essential element of anticipatory breach is that the promisor expressly or implicitly repudiate the promise before the promisor's performance is due [*Taylor v. Johnston (1975) 15 Cal. 3d 130, 137, 123 Cal. Rptr. 641, 539 P.2d 425]* . The promisee may then treat the repudiation as a breach. However, the promisor may retract the repudiation up to the time performance is due, as long as the promisee has not madea detrimental change in position in reliance on the repudiation [*Guerrieri v. Severini (1958) 51 Cal. 2d 12, 19, 330 P.2d 635]* .

[b] Bilateral Contract

The contract must be bilateral [*Taylor v. Johnston (1975) 15 Cal. 3d 130, 137, 123 Cal. Rptr. 641, 539 P.2d 425* ; *see § 140.10[4]*]. The doctrine of anticipatory breach by repudiation does not apply to contracts that are unilateral in their inception or that have become so by complete performance by one party. The theory underlying this rule is that a

plaintiff who has no future obligations to perform is not prejudiced by having to wait for the arrival of the defendant's time for performance to sue for breach [*Harris v. Time, Inc. (1987) 191 Cal. App. 3d 449, 457, 237 Cal. Rptr. 584* ; *Diamond v. University of So. California (1970) 11 Cal. App. 3d 49, 53-54, 89 Cal. Rptr. 302]* .

[3] Remedies

When the promisor repudiates the contract, the aggrieved promisee may elect a remedy [*Taylor v. Johnston (1975) 15 Cal. 3d 130, 137, 123 Cal. Rptr. 641, 539 P.2d 425* ; *see Mobil Oil Exploration & Producing Southeast, Inc. v. United States (2000) 530 U.S. 604, 120 S. Ct. 2423, 147 L.Ed. 2d 528, 534* (oil companies sought restitution--rather than damages for breach of contract--of initial payments made to federal government after government repudiated lease contracts)]:

- Treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract, terminating the contractual relation between the parties; or

- Treat the repudiation as an empty threat, wait until the time for performance arrives, and exercise remedies for actual breach if a breach does in fact occur at that time.

Treating repudiation as an anticipatory breach may enable the aggrieved party to pursue remedies apart from a suit for damages. For instance, if the aggrieved party normally would be entitled to mechanic's lien rights, a lien would have to be recorded within 90 days "after [the aggrieved party] completes his contract" [*Civ. Code § 3115*]. A contract is complete for purposes of commencing the recordation period when all work under the contract has been performed or excused, or has been otherwise discharged, as when the aggrieved party elects to treat repudiation of the contract as an anticipatory breach [*Howard S. Wright Constr. Co. v. BBIC Investors, LLC (2006) 136 Cal. App. 4th 228, 241-243, 38 Cal. Rptr. 3d 769]* .

If the aggrieved party disregards the repudiation and treats the contract as still in force, and the repudiating party retracts the repudiation before performance, the repudiation is nullified, and the aggrieved party is left with the remedies, if any, invocable at the time of performance [*Taylor v. Johnston (1975) 15 Cal. 3d 130, 137-138, 123 Cal. Rptr. 641, 539 P.2d 425]* . However, the aggrieved party's manifest purpose to allow or require performance by the promisor in spite of the repudiation does not nullify its effect as a breach, or prevent the repudiation from excusing satisfaction of conditions and from discharging the duty to render a return performance. Although the effect of repudiation may be nullified, it operates until nullified, not only as a breach but also as a continuing excuse of conditions and as a continuing justification of the promisee's failure to perform a return promise, even though the promisee indicated a willingness to forgive the repudiation [*Guerrieri v. Severini (1958) 51 Cal. 2d 12, 19-20, 330 P.2d 635* ; *see Civ. Code § 1440*; *but see Ersa Grae Corp. v. Fluor Corp. (1991) 1 Cal. App. 4th 613, 625, 2 Cal. Rptr. 2d 288* (promisor who sues for damages must still prove ability to perform)]. Therefore, the promisee's option to treat the repudiation as an anticipatory breach, and seek damages for breach of contract [*Taylor v. Johnston (1975) 15 Cal. 3d 130, 137, 123 Cal. Rptr. 641, 539 P.2d 425*], remains viable unless and until the repudiation is nullified [*Central Valley Gen. Hosp. v. Smith (2008) 162 Cal. App. 4th 501, 519, 75 Cal. Rptr. 3d 771* (promisee is entitled to sue immediately for damages but is not required to make that election immediately after promisor's anticipatory breach)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 140.55 Action for Damages After Breach

[1] Elements

The essential elements of a cause of action for damages for breach of contract are [*Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377* ; *Acoustics, Inc. v. Trepte Constr. Co. (1971) 14 Cal. App. 3d 887, 916, 92 Cal. Rptr. 723]* :

- The contract [*see § 140.20* et seq.], which the court will need to construe [*see § 140.30* et seq.] to assess the other elements of the cause of action;
- Plaintiff's performance or excuse for nonperformance [*see* [2], *below*];
- Defendant's breach; and
- The resulting damages to the plaintiff [*see* [3], *below*].

[2] Plaintiff's Ability to Perform

To be entitled to a judgment for damages for breach of contract, the plaintiff must prove that but for the defendant's breach, the plaintiff would have had the ability to perform [for performance of contract generally, *see § 140.40* et seq.]. This requirement usually arises after the defendant has repudiated or anticipatorily breached a contract [*see § 140.54*]. The plaintiff does not have to allege readiness or willingness to perform, but must prove ability to perform [*Ersa Grae Corp. v. Fluor Corp. (1991) 1 Cal. App. 4th 613, 625, 2 Cal. Rptr. 2d 288* (in action based on real estate sale, plaintiff did not have to actually form consortium or obtain financing to prove ability to perform); *McDorman v. Moody (1942) 50 Cal. App. 2d 136, 140-141, 122 P.2d 639]* .

[3] Causal Connection Between Breach and Damages

Damages are not presumed to flow from the fact that a party breached a contract. The plaintiff must establish the causal

connection between the breach and the damages sought [*see Civ. Code § 3300*; for damages in breach of contract actions generally, *see § 140.56[3]*].

The fact that the defendant breached a contract by repudiating it or obtaining performance elsewhere is not sufficient to infer the plaintiff's damages. The plaintiffis relieved of the duty to perform, but must still prove damages. For example, if the plaintiff's performance is impossible, the plaintiff cannot prove that damages flowed from the breach, and the defendant is entitled to judgment [*Metzenbaum v. R.O.S. Associates (1986) 188 Cal. App. 3d 202, 211-214, 232 Cal. Rptr. 741]* . In the context of a franchise relationship, a franchisee's failure to make past royalty payments is not a proximate or "natural and direct" cause of the franchisor's failure to receive future royalty payments [*see Postal Instant Press, Inc. v. Sealy (1996) 43 Cal. App. 4th 1704, 1713, 51 Cal. Rptr. 2d 365]* .

On the other hand, the defendant's breach need not be the sole cause of the plaintiff's damages. Under the substantial-factor test, the defendant may be liable for all the plaintiff's damages even though other factors contributed. The plaintiff need not show the proportional contribution of the defendant's breach among the several factors causing injury. For example, a seller sued an escrow company for negligence and breach of contract based on the escrow company's failure to forward preliminary title reports or any demand, and the court found the escrow company liable to the seller for attorney's fees and litigation expenses incurred in the buyer's specific-performance suit against the seller. The court reasoned that the escrow company's failure to perform its duties with reasonable care and dispatch was a substantial factor in the collapse of the escrow, which resulted in the seller's damages [*Bruckman v. Parliament Escrow Corp. (1987) 190 Cal. App. 3d 1051, 1060-1061, 1063-1064, 235 Cal. Rptr. 813]* . For discussion and forms applying theories of implied contractual indemnity to this type of situation, see *Ch. 300, Indemnity and Contribution, § 300.30* et seq.

[4] Demand for Damages

A demand for damages is unnecessary when the defendant has an unconditional duty to perform an act or pay a sum of money [*Bryson v. McCone (1898) 121 Cal. 153, 158, 53 P. 637* ; *McDonald v. Filice (1967) 252 Cal. App. 2d 613, 623, 60 Cal. Rptr. 832]* . When the contract calls for the payment of money at a certain time and the breach consists of the debtor's refusal to pay, the creditor's failure to make a demand at the place named does not discharge the debt. However, the debtor may plead it as a defense to the recovery of costs or interest if the defendant establishes the ability and willingness to pay the debt when due [*Rottman v. Hevener (1921) 54 Cal. App. 474, 483-484, 202 P. 329]* .

The court will award interest as damages only from the date of a demand or from the date of filing suit if there has been no previous demand [*see Civ. Code § 3287*; *KGM Harvesting Co. v. Fresh Network (1995) 36 Cal. App. 4th 376, 391, 42 Cal. Rptr. 2d 286* (test for recovery of prejudgment interest under *Civ. Code § 3287(a)* is whether defendant either actually knows amount of damages owed plaintiff or could have computed that amount from reasonably available information)]. An award of prejudgment interest is not automatic; a request for interest must be made in the trial court. Furthermore, requests for prejudgment interest under *Civ. Code § 3287* by a successful plaintiff must be made by way of motion prior to entry of judgment, or the request must be made in the form of a motion for new trial no later than the time allowed for filing such a motion [*North Oakland Medical Clinic v. Rogers (1998) 65 Cal. App. 4th 824, 829-831, 76 Cal. Rptr. 2d 743* (when damages were awarded but no interest was included in verdict, and neither court nor jury had determined whether damages were liquidated or unliquidated, rule was applied retroactively to plaintiffs who never sought prejudgment interest as part of damages and sought interest at last minute as part of order awarding costs)].

For discussion of interest on damages generally, see *§ 140.56[3][e]*.

[5] Application of Government Claims Act (Tort Claims Act)

Gov. Code § 810 et seq., commonly known as the Government Claims Act (or Tort Claims Act), applies to a claim for damages based on breach of a contract by the state or a local public entity [*City of Stockton v. Superior Court (2007)*

42 Cal. 4th 730, 734, 737-740, 68 Cal. Rptr. 3d 295, 171 P.3d 20]. Therefore, "all claims for money or damages against the state ... on express contract" and all such claims against a local public entity are required to be presented in accordance with a prescribed procedure, not later than one year after the accrual of the cause of action [*Gov. Code §§ 905, 905.2(b)(3), 911.2(a)*]. No suit for money or damages may be brought against the state or local public entity "on a cause of action for which a claim is required to be presented in accordance with ... [the prescribed procedure] until a written claim therefor has been presented to the public entity and has been acted upon ... or has been deemed to have been rejected" [*Gov. Code § 945.4*]. For discussion of the claim procedure [*see generally Gov. Code § 900 et seq.*] and related forms, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 140.56 Remedies for Breach

[1] Choice of Remedies

[a] Action for Damages, Specific Performance, or Rescission

If a breach of contract is sufficiently material, the aggrieved party has the option to withhold future performance and rescind the contract. An aggrieved party who has the option of rescission has the choice of the following three remedies [*see Michaelian v. Elba Land Co. (1926) 76 Cal. App. 541, 557, 245 P. 476]* :

- An action for damages [*see* [3], *below*];
- A suit in equity for specific performance [*e.g., Michaelian v. Elba Land Co. (1926) 76 Cal. App. 541, 557, 245 P. 476* ; *see generally* Ch. 528, *Specific Performance*]; or
- An action for rescission and restitution [*see generally* Ch. 490, *Rescission and Restitution*].

For discussion of the factors for determining whether a breach is material, see *§ 140.52*.

With rescission, the aggrieved party may seek return of any consideration furnished before the rescission, less offsets for any benefits retained, or, if what was furnished cannot be returned, *e.g.*, labor, the aggrieved party may recover in quantum meruit for the value of the performance before rescission [*Civ. Code §§ 1691, 1692*; *C. Norman Peterson Co. v. Container Corp. of America (1985) 172 Cal. App. 3d 628, 642-644, 218 Cal. Rptr. 592* (quantum meruit recovery after mutual abandonment followingbreach); *B.C. Richter Contracting Co. v. Continental Cas. Co. (1964) 230 Cal. App. 2d 491, 499-500, 41 Cal. Rptr. 98]* .

[b] Action for Declaratory Relief or Injunction

If a dispute arises about the parties' respective rights and duties under the contract, but there has been no breach, the appropriate action may be for declaratory relief [*Code Civ. Proc. § 1060*; *Supervalu, Inc. v. Wexford Underwriting*

Managers, Inc. (2009) 175 Cal. App. 4th 64, 96 Cal. Rptr. 3d 316 (there is no requirement that declaratory judgment must resolve particular claim; only requirement for declaratory relief action is existence of actual controversy relating to legal rights and duties of parties to contract); *Bertero v. National General Corp. (1967) 254 Cal. App. 2d 126, 135, 62 Cal. Rptr. 714* ; *see generally* Ch. 182, *Declaratory Relief*]. In addition, if the contract would be specifically enforceable, the aggrieved party may bring suit for an injunction [*Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(a)(1)*; *see generally* Ch. 303, *Injunctions*]. An action for injunction does not waive the plaintiff's right to assert a claim for damages in a subsequent action [*Ahlers v. Smiley (1912) 163 Cal. 200, 206, 124 P. 827]* .

[c] Effect of Contractual Stipulation for Equitable Relief

As a general matter, if the parties have stipulated in the contract as to the nature or amount of a remedy, it is proper for the trial court to honor the parties' agreement unless the court finds that to do so would be contrary to a rule of law or public policy. In determining the lawfulness of a stipulation that contemplates an equitable remedy, the court should take into account the special nature of equitable remedies. Given their extraordinary nature, equitable remedies usually are unavailable when the remedy at law is adequate, as when damages are quantifiable. A court must reject a stipulation contemplating an equitable remedy that is contrary to law or public policy, as in a case in which the evidence shows that an aggrieved party actually has an adequate remedy at law; otherwise, the court should honor the parties' agreement and enforce the stipulation [*DVD Copy Control Assn. v. Kaleidescape, Inc. (2009) 176 Cal. App. 4th 697, 725726, 97 Cal. Rptr. 3d 856*].

[2] Tort Remedies

[a] No Tort Recovery for Breach in Violation of Public Policy

Outside the employment context [*see* *Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330* (employee fired for refusing to engage in illegal pricing practices)], no tort cause of action arises for breach of contract in violation of public policy [*Harris v. Atlantic Richfield Co. (1993) 14 Cal. App. 4th 70, 82, 17 Cal. Rptr. 2d 649* (franchisee's claim that franchisor's refusal to make repairs as promised was in retaliation for franchisee's reporting underground gasoline leaks to authorities and failing to comply with defendant's pricing policies); *Abrahamson v. NME Hospitals, Inc. (1987) 195 Cal. App. 3d 1325, 1329-1330, 241 Cal. Rptr. 396* (termination of physician's independent-contractor agreement, according to its terms, because of refusal to condone allegedly improper healing practices); *see Premier Wine & Spirits v. E. & J. Gallo Winery (9th Cir. 1988) 846 F.2d 537, 540]* . For discussion of this cause of action in the employment context, see Ch. 249, *Employment Law: Termination and Discipline* .

[b] Cause of Action for Negligence

The plaintiff may combine a contract cause of action with one for negligence in an appropriate case [for combining contract and tort causes of action in a single action generally, *see § 140.56[2][e]*]. A cause of action for negligence may be based on the negligent performance of an implied obligation arising from the contract [*see, e.g.,* *North American Chemical Co. v. Superior Court (1997) 59 Cal. App. 4th 764, 775-776, 69 Cal. Rptr. 2d 466* (packaging and shipping contract imposed duty to reasonably and carefully perform contractual obligations; negligent performance of contractual obligation give rise to action in tort)]. The four-year limitation of *Code Civ. Proc. § 337(1)* governs an action based on negligent performance and breach of contract [*Bruckman v. Parliament Escrow Corp. (1987) 190 Cal. App. 3d 1051, 1057-1058, 235 Cal. Rptr. 813* ; *cf.* *Hensley v. Caietti (1993) 13 Cal. App. 4th 1165, 1169, 16 Cal. Rptr. 2d 837* (complaint alleged only cause of action for attorney malpractice, with no mention of contract between attorney and client, so court applied one-year limitation of *Code Civ. Proc. § 340.6* to bar action)]. For further discussion, see Ch. 380, *Negligence* .

[c] Claim for Emotional Distress

A plaintiff may recover damages for emotional distress when it is foreseeable from the nature of the contract that emotional distress will result from a breach of the contract [*see, e.g., Wynn v. Monterey Club (1980) 111 Cal. App. 3d 789, 799-801, 168 Cal. Rptr. 878* ; *Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 851-852, 88 Cal. Rptr. 39]* . However, in a case to determine whether emotional distress damages were recoverable for the negligent breach of a contract to construct a house, the California Supreme Court held that when the contractor's negligence directly caused only economic injury and property damage, and breached no duty independent of the contract, the homeowners could not recover damages for emotional distress based upon breach of the contract [*Erlich v. Menezes (1999) 21 Cal. 4th 543, 548, 558-560, 87 Cal. Rptr. 2d 886, 981 P.2d 978* ; *see generally Ch. 177, Damages, § 177.140* et seq.].

The plaintiff also may allege intentional infliction of emotional distress [*see, e.g., Rulon-Miller v. International Business Machines Corp. (1984) 162 Cal. App. 3d 241, 254-255, 208 Cal. Rptr. 524* ; *Wallis v. Superior Court (1984) 160 Cal. App. 3d 1109, 1119-1120, 207 Cal. Rptr. 123]* . For a general discussion of the tort of infliction of emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress* .

[d] Other Torts Involving Contracts

- For discussion of torts arising out of the specific contractual relationship of employer and employee, see Ch. 349, *Employment Law: Termination and Discipline* .

- For discussion of the torts of misrepresentation and deceit, which may be applicable in contractual relationships, see Ch. 269, *Fraud and Deceit* .

- For discussion of torts based on business contracts, see Ch. 565, *Unfair Competition* .

[e] Combining Tort and Contract Causes of Action

[i] In General

A plaintiff may want to allege a tort cause of action in a complaint alleging a breach of contract to increase the number of possible counts on which to base remedies and to increase the total amount of damages by recovering punitive damages. Contract damages are limited to the amount that will compensate the plaintiff for all of the detriment proximately caused by the breach [*Civ. Code § 3300*]. Punitive damages are not available for breach of contract, no matter how willful or malicious the defendant's conduct, except when the wrongful act is also a tort [*see Civ. Code § 3294(a)*; *Quigley v. Pet, Inc. (1984) 162 Cal. App. 3d 877, 887, 208 Cal. Rptr. 394* ; for discussion of the preclusion of punitive damages in contract actions generally, *see § 140.56[3][c]*].

Tort damages may include compensation for all detriment caused by the tort [*see Civ. Code § 3333*], plus punitive damages if the plaintiff pleads and proves statutoryprerequisites [*see Civ. Code § 3294(a)*]. However, the plaintiff must exercise care in alleging a tort cause of action in a complaint alleging breach of a contract other than an insurance contract, as a result of the Supreme Court's 1995 holding discussed in *§ 140.12[3]* [*see Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal. 4th 85, 44 Cal. Rptr. 2d 420, 900 P.2d 669]* . For general discussion of the issues involved in awarding damages in tort and contract actions, see Ch. 177, *Damages* .

[ii] Contract Statute of Limitations

An action for breach of the covenant of good faith and fair dealing [*see § 140.12[1]*] sounds both in tort and in contract. The plaintiff is allowed to make an election. Unless and until the plaintiff makes an irrevocable election, the plaintiff is not estopped to rely on the contract theory and is entitled to the benefit of the four-year statute of limitations [*see Code Civ. Proc. § 337(1)*] governing actions on written contracts [*Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 220-221, 285 Cal. Rptr. 717* ; *Frazier v. Metropolitan Life Ins. Co. (1985) 169 Cal. App. 3d 90, 102-103, 214 Cal. Rptr. 883]* .

The statute of limitations begins to run on the occurrence of the last element necessary to the cause of action, which in contract actions is generally the breach. The discovery rule may extend accrual of the cause of action until the plaintiff discovers or reasonably should discover the existence of the cause of action [*see El Pollo Loco, Inc. v. Hashim (9th Cir. 2003) 316 F.3d 1032, 1038-1040* (discovery rule applied to toll statute of limitations in contract claim when fraudulent misrepresentations were asserted in conjunction with contract claim)]. However, the discovery rule applies only when a statutory scheme or a fiduciary relationship between the parties imposes a duty to disclose [*Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 221-222, 285 Cal. Rptr. 717* (evidence did not establish special relationship, so discovery rule was inapplicable and even contract action was barred)].

[iii] Attorney's Fees

A broad enough attorney's fee provision in a contract will support an award of attorney's fees to a prevailing party under *Civ. Code § 1717* (discussed in Ch. 174, *Costs and Attorney's Fees*), even if only tort causes of action go to the jury. However, the tort causes of action must arise from the contract [*Xuereb v. Marcus & Millichap, Inc. (1992) 3 Cal. App. 4th 1338, 1342-1345, 5 Cal. Rptr. 2d 154* (causes of action for negligence, breach of fiduciary duty, concealment, and misrepresentation arising from real estate purchase agreement)]. When a plaintiff before trial has voluntarily dismissed an action asserting both tort and contract claims arising from a contract containing a broadly worded attorney fee provision, *Civ. Code § 1717* bars recovery of attorney fees incurred in defending contract claims. That section, however, does not bar recovery of attorney fees incurred in defending tort or other *noncontract* claims. Whether attorney fees incurred in the noncontract claims are recoverable after a pretrial dismissal depends upon the terms of the contractual attorney fee provision [*Santisas v. Goodin (1998) 17 Cal. 4th 599, 602, 608, 71 Cal. Rptr. 2d 830, 951 P.2d 399]* . In one case, it was held that defendant was not the prevailing party for purposes of recovery of attorney fees incurred in defending noncontract causes of action when the plaintiffs obtained their litigation objective through settlement with other defendants [*Silver v. Boatwright Home Inspection, Inc. (2002) 97 Cal. App. 4th 443, 446, 118 Cal. Rptr. 2d 475]* . In a case in which a defendant who was not a party to a contract was sued for breach of that contract and various related tort and statutory causes of action, the court held that defendant could not recover attorney's fees incurred in defending the noncontract causes of action when the plaintiff had filed a voluntary dismissal with prejudice [*Topanga and Victory Partners, LLP v. Toghia (2002) 103 Cal. App. 4th 775, 778, 127 Cal. Rptr. 2d 104]* . For further discussion of attorney's fees, see Ch. 174, *Costs and Attorney's Fees* .

[3] Contract Damages

[a] Measure of Damages

Unless a statute otherwise specifically provides, the proper measure of damages for the breach of a contract is the amount that will compensate the plaintiff for all the detriment proximately caused by the breach or that, in the ordinary course of things, would be likely to result from the breach [*Civ. Code § 3300*; *see Robinson Helicopter Company, Inc. v. Dana Corporation (2004) 34 Cal. 4th 979, 992-993, 22 Cal. Rptr. 3d 352, 102 P. 3d 268* (scope of contract remedy assumes that the parties can negotiate the risk of loss occasioned by a breach; accordingly courts enforce those obligations each party voluntarily assumes and award only those benefits they expected to receive)]. The plaintiff may not recover damages unless they are clearly ascertainable in both their nature and origin [*Civ. Code § 3301*; *see, e.g., Vestar Development v. General Dynamics Corporation (9th Cir. 2001) 249 F.3d 958, 961-962* (action for breach of agreement to negotiate was properly dismissed when only damages sought were lost profits, which could not be proved with reasonable certainty as required by *Civ. Code § 3301*)].

Damages must be reasonable. If an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages may be recovered [*Civ. Code § 3359*; *Coughlin v. Blair (1953) 41 Cal. 2d 587, 600, 262 P.2d 305]* .

Generally, the measure of damages for breach of contract includes only lost profits and prejudgment interest [*Burnett & Doty Development Co. v. Phillips (1978) 84 Cal. App. 3d 384, 389-392, 148 Cal. Rptr. 569]* . Nevertheless, courts have construed *Civ. Code §§ 3300* and *3301* to allow recovery of damages for emotional distress and mental suffering in a breach of contract action if, from the particular subject matter of the contract and in the contemplation of the parties, mental suffering or emotional distress was a foreseeable and contemplated result of its breach [*Rogoff v. Grabowski (1988) 200 Cal. App. 3d 624, 633, 246 Cal. Rptr. 185* ; *Wynn v. Monterey Club (1980) 111 Cal. App. 3d 789, 799-801, 168 Cal. Rptr. 878]* .

For further discussion of damages in contract actions, see *Ch. 177, Damages, § 177.140* et seq.

[b] Limitation on Damages

Except as expressly provided by statute, a plaintiff may not recover a greater amount in damages for the breach of an obligation than that plaintiff could have gained by full performance on both sides [*Civ. Code § 3358*; *see* *Martin v. U-Haul Co. of Fresno (1988) 204 Cal. App. 3d 396, 409-411, 251 Cal. Rptr. 17* (damages for breach of contract with termination option limited to damages that could potentially accrue during period of notice required to terminate)]. However, the court cannot apply this rule if the parties cannot show what the performance would have been. In that case, the court must make an estimate of damages rather than an actual computation. The party whose wrongful conduct rendered ascertainment of damages difficult cannot complain because the court estimated damages [*Benard v. Walkup (1969) 272 Cal. App. 2d 595, 605-606* , 77 Cal. Rpt 544].

[c] Punitive Damages

A plaintiff may not recover punitive or exemplary damages in an action for breach of contract [*Civ. Code § 3294*]. For discussion of combining tort causes of action with contract causes of action, see [2], *above*.

[d] Minimizing Damages

Although aggrieved by a breach of contract, the plaintiff is required to do everything reasonably possible to minimize the loss and reduce the damages for which the defendant is liable. The plaintiff may not recover damages for detriment that could have been avoided by reasonable effort and without undue expense. The question of whether the plaintiff acted reasonably in mitigating damages is one of fact [*Sackett v. Spindler (1967) 248 Cal. App. 2d 220, 238-239, 56 Cal. Rptr. 435]* .

[e] Interest on Damages

[i] When Allowed

Every person who is entitled to recover damages certain, or capable of being made certain by calculation, whose right to recover is vested on a particular day, is entitled also to recover interest from that day, except for a period during which the debtor is prevented by law, or by the act of the creditor, from paying the debt [*Civ. Code § 3287(a)*]. Every person who is entitled under any judgment to receive damages based on a cause of action in contract when the claim was unliquidated may also recover interest from a date before the entry of judgment, which the court, in its discretion, may fix, but in no event earlier that the date the action was filed [*Civ. Code § 3287(b)*].

Requests for prejudgment interest under *Civ. Code § 3287* by a successful plaintiff must be made by way of motion prior to entry of judgment, or the request must be made in the form of a motion for new trial no later than the time allowed for filing such a motion [*North Oakland Medical Clinic v. Rogers (1998) 65 Cal. App. 4th 824, 829-831, 76 Cal. Rptr. 2d 743* (when damages were awarded but no interest was included in verdict, and neither court nor jury had determined whether damages were liquidated or unliquidated, rule was applied retroactively to plaintiffs who never sought prejudgment interest as part of damages and sought interest at last minute as part of order awarding costs)].

A legal rate of interest to which the parties agreed in the contract remains chargeable after a breach, as before, until the contract is superseded by a verdict or another new obligation [*Civ. Code § 3289(a)*; *see Civ. Code § 3289.5* (retail installment contracts governed by *Civ. Code § 1801 et seq.*)]. If a contract does not stipulate a legal rate of interest, the obligation bears interest at the rate of 10 percent per year after breach [*Civ. Code § 3289(b)*; *see Mark McDowell Corp. v. LSM 128 (1989) 214 Cal. App. 3d 1427, 1431-1433* (if rate of interest specified in contract is usurious, *Civ. Code § 3289(b)* allows recovery of interest at 10 percent per year from date of breach)]. "Contract," as used in *Civ. Code § 3289(b)*, does not include a note secured by a deed of trust on real property [*Civ. Code § 3289(b)*].

[ii] When Precluded

Accepting payment of the whole principal waives all claim to interest [*Civ. Code § 3290*; *see San Francisco Unified School Dist. v. San Francisco Classroom Teachers Assn. (1990) 222 Cal. App. 3d 146, 150, 272 Cal. Rptr. 38* (*Civ. Code § 3290* applies only to interest as damages, not to postjudgment interest; thus, cashing check in satisfaction of judgment does not waive claim to postjudgment interest)].

An offer of payment stops the running of interest on an obligation. However, an offer to pay part of an amount owed does not stop the running of prejudgment interest if conditioned on the creditor's dropping a demand for other sums claimed [*see Civ. Code §§ 1494, 1504*; *Klinger v. Realty World Corp. (1987) 196 Cal. App. 3d 1549, 1553-1554, 242 Cal. Rptr. 592]* . Tender and deposit of the amount owing pursuant to *Civ. Code § 1500* also stops the running of interest [*Klinger v. Realty World Corp. (1987) 196 Cal. App. 3d 1549, 1554 n.2, 242 Cal. Rptr. 592]* . For an affirmative defense alleging tender and deposit, see *§ 140.139*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJoinder of Claims & RemediesClaimsContracts LawBreachMaterial BreachContracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral OverviewTortsNegligenceActionsGeneral Overview

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§ 140.57 Waiver of Breach

The aggrieved party may waive a breach of contract. For example, an aggrieved party waives a breach by continued performance without a claim of breach [*A.B.C. Distrib. Co. v. Distillers Distrib. Corp. (1957) 154 Cal. App. 2d 175, 187, 316 P.2d 71]* . Waiver does not require actual subjective intent to waive a given right, but may result from conduct that, accordingto its natural import, is so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that the aggrieved party has relinquished the right [*see Rubin v. Los Angeles Fed. Sav. & Loan Ass'n. (1984) 159 Cal. App. 3d 292, 298, 205 Cal. Rptr. 455* (detrimental reliance not necessarily element of waiver but only of estoppel)]. Thus, whether specific conduct constitutes a waiver is a question of fact.

In continuing obligation contracts, a waiver of a breach up to a certain time does not necessarily preclude the promisee from asserting a subsequent breach [*Bowman v. Santa Clara County (1957) 153 Cal. App. 2d 707, 713, 315 P.2d 67]* . The court will determine whether the waiver occurred late enough to preclude a breach.

For an affirmative defense based on waiver of the breach, see *§ 140.136*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachGeneral OverviewContracts LawContract Conditions & ProvisionsWaiversGeneral Overview

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[Reserved]

§§ 140.58[Reserved]

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13-140 California Forms of Pleading and Practice--Annotated § 140.60

§ 140.60 Party's Lack of Ability to Contract

The following defenses may be asserted to an action for breach of contract based on a party's lack of ability to contract, making the contract void or voidable:

- The party is a minor [*see* Ch. 365, *Minors: Contract Actions*].
- The party is of unsound mind [*see § 140.21[1]*].
- The party has been deprived of civil rights [*see § 140.21[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil Rights LawContractual Relations & HousingProperty Rights (sec. 1982)General OverviewContracts LawFormationCapacity of PartiesMental Capacity

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13-140 California Forms of Pleading and Practice--Annotated § 140.61

§ 140.61 Lack of Parties' Consent

[1] Revocation of Offer

The offeror may revoke an offer at any time before the offeree communicates acceptance to the offeror, but not afterward [*Civ. Code § 1586*; *Grieve v. Mullaly (1930) 211 Cal. 77, 79, 293 P. 619* ; *see Ersa Grae Corp. v. Fluor Corp. (1991) 1 Cal. App. 4th 613, 622, 2 Cal. Rptr. 2d 288* (communication of revocation to offeror's agent did not revoke offer when agent did not notify offeree of revocation before offeree accepted); *see also CPI Builders, Inc. v. Impco Technologies, Inc. (2001) 94 Cal. App. 4th 1167, 1174, 114 Cal. Rptr. 2d 851* (offeror's communication of revocation to offeror's attorney did not revoke offer when offeror's attorney did not notify offeree's attorney of revocation before offeree accepted)]. The result of the offeror's revocation before acceptance is that no contract results. For discussion of revocation of an offer before acceptance, see *§ 140.22[3][c]*; for discussion of options supported by consideration constituting irrevocable offers, see *§ 140.22[3][d]*.

[2] Other Defenses Based on Lack of Consent

The following defenses may also be raised in an action for breach of contract, based on lack of consent:

- Consent was not freely given [*see § 140.22[1]*].
- Consent was not mutual [*see § 140.22[2]*].
- No contract was formed because the agreement was a promise or promises to agree in the future [*see § 140.22[6]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawConsiderationMutual ObligationContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawFormationAcceptanceGeneral OverviewContracts LawFormationOffersRevocable Offers

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13-140 California Forms of Pleading and Practice--Annotated § 140.62

§ 140.62 Lack of Consideration

[1] No Mutuality of Obligation

In the case of a bilateral contract [*see § 140.10[4]*], in which promises are exchanged as consideration, the promises must be mutual in obligation, that is, both parties must have assumed some legal obligation. Without this mutuality of obligation, the agreement lacks consideration, and the parties have not created an enforceable contract. If one of the promises leaves the promisor free to perform or to withdraw from the agreement at will, the promise is illusory and provides no consideration [*Mattei v. Hopper (1958) 51 Cal. 2d 119, 122, 330 P.2d 625]* .

The defense of lack of mutuality of obligation [*see § 140.23[4]*] does not apply if either party has performed. The defense applies only to executory contracts and not to executed contracts or to unilateral contracts in general [*see Asmus v. Pacific Bell (2000) 23 Cal. 4th 1, 14-15, 96 Cal. Rptr. 2d 179, 999 P.2d 71* (mutuality of obligation principle requiring new consideration for contract termination applies to bilateral contracts only); *Mutz v. Wallace (1963) 214 Cal. App. 2d 100, 109, 29 Cal. Rptr. 170* ; *Anchor Cas. Co. v. Surety Bond Sav. & L. Ass'n (1962) 204 Cal. App. 2d 175, 182-183, 22 Cal. Rptr. 278]* . For an affirmative defense asserting the lack of consideration, see *§ 140.142[1]*.

[2] Other Defenses Based on Lack of Consideration

Other defenses based on lack of consideration include:

- One party's ability to terminate the contract [*see § 140.23[5]*].
- One party's obligation to perform conditional on party's approval [requirements contract; *see § 140.23[6]*].
- Insufficient consideration [*see § 140.23[7]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawConsiderationMutual ObligationContracts LawConsiderationSufficient ConsiderationContracts LawPerformanceIllusory Promises

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§ 140.63 Illegal Contract

The consideration and the object of a contract, that is, the thing that the party receiving the consideration agrees to do or not to do [*Civ. Code § 1595*], must be lawful. That a contract is illegal is a defense to an action for its breach [*see, e.g., Civ. Code §§ 1596, 1607, 1677*; *Homami v. Iranzadi(1989) 211 Cal. App. 3d 1104, 1109-1111, 260 Cal. Rptr. 6* ; *Green v. Mt. Diablo Hospital Dist. (1989) 207 Cal. App. 3d 63, 71, 254 Cal. Rptr. 689* ; *Bovard v. American Horse Enterprises, Inc. (1988) 201 Cal. App. 3d 832, 838, 247 Cal. Rptr. 340* ; *see Vick v. Patterson (1958) 158 Cal. App. 2d 414, 417, 322 P.2d 548]* . For discussion of illegal contracts generally, see *§ 140.24*.

Legal Topics:

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

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§ 140.64 Unconscionable Contract

If a court, as a matter of law, finds a contract or any clause of a contract to have been unconscionable at the time it was made, the court may do any of the following [*Civ. Code § 1670.5(a)*; *see, e.g., Blake v. Ecker (2001) 93 Cal. App. 4th 728, 743-745, 113 Cal. Rptr. 2d 422* (remanding case to trial court to determine whether parties' arbitration agreement was unenforceable; agreement itself expressly provided for severance of provisions that resulted in plaintiff's claim of unconscionability)]:

- Refuse to enforce the contract [*see, e.g., Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159, 1164, 22 Cal. Rptr. 3d 189* ; *Abramson v. Juniper Networks, Inc. (2004) 115 Cal. App. 4th 638, 668, 9 Cal. Rptr. 3d 422* (finding entire arbitration agreement in employment contract to be void and unenforceable; because illegality and unconscionability permeated agreement, objectionable terms could not be severed); *O'Hare v. Municipal Resource Consultants (2003) 107 Cal. App. 4th 267, 279, 132 Cal. Rptr. 2d 116* (because unconscionability permeated entire agreement, severance was not appropriate); *Pardee Construction Company v. Superior Court (2002) 100 Cal. App. 4th 1081, 1086-1087, 123 Cal. Rptr. 2d 288* (trial court properly denied home builder's motion for appointment of judicial referee when real estate purchase agreements requiring all disputes to be submitted to judicial reference were adhesive contracts fatally infected with procedural and substantive unconscionability); *Flores v. Transamerica Homefirst, Inc. (2001) 93 Cal. App. 4th 846, 857-858, 113 Cal. Rptr. 2d 376* (arbitration provisions in reverse mortgage agreement found to be both procedurally and substantively unconscionable; court refused to sever invalid provisions because no single provision could be stricken to remove the unconscionable taint, and lender therefore could not compel arbitration)];

- Enforce the remainder of the contract without the unconscionable clause [*see Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159, 1164, 22 Cal. Rptr. 3d 189* ; *Little v. Auto Stiegler (2003) 29 Cal. 4th 1064, 1072-1074, 1076, 130 Cal. Rptr. 2d 892, 63 P.3d 979* (finding provision in mandatory employment arbitration agreement that permitted either party to appeal arbitration award of more than $50,000 to second arbitrator to be unconscionable, but concluding that provision could be severed and rest of agreement enforced); *McManus v. CIBC World Markets Corp.*

(2003) 109 Cal.App. 4th 76, 101-102, 134 Cal. Rptr. 2d 446 (unconscionable provisions requiring employee's payment of fees could be severed from arbitration agreements); *Bolter v. Superior Court (2001) 87 Cal. App. 4th 900, 910-911, 104 Cal. Rptr. 2d 888* (unconscionable place and manner clauses in arbitration agreement regarding forum selection, consolidation restrictions, and damages limitations found clearly severable from remainder of agreement)]; or

- Limit the application of any unconscionable clause so as to avoid an unconscionable result.

When a party claims or it appears to the court that all or any part of a contract may be unconscionable, the court must give the parties a reasonable opportunity to present evidence regarding the contract's commercial setting, purpose, and effect, to aid the court in making its determination [*Civ. Code § 1670.5(b)*]. For discussion of unconscionable contracts, see *§ 140.25*; for an affirmative defense based on unconscionability, see *§ 140.146*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesUnconscionabilityGeneral OverviewContracts LawDefensesUnconscionabilityArbitration Agreements

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§ 140.65 Defenses Related to Performance

The following defenses are related to legally cognizable excuses for nonperformance:

- Failure of consideration based on failure to perform [for discussion, *see § 140.23[9]*; for an affirmative defense, *see § 140.148*].

- Impossibility or impracticability of performance [for discussion of the defense, *see § 140.45*; for an affirmative defense based on impossibility, *see § 140.137[1]*].

- Frustration of purpose [*see § 140.46*].

- Termination of contract [*see § 140.47*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceImpossibility of PerformanceGeneral OverviewContracts LawPerformanceImpossibility of PerformanceFrustration of PurposeContracts LawPerformanceImpossibility of PerformanceImpracticability

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§ 140.66 Defenses Related to Breach

The defendant may raise as an affirmative defense to an action for damages based on breach of contract, the plaintiff's waiver of the breach. For discussion, see *§ 140.57*; for an affirmative defense, see *§ 140.136*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsWaiversGeneral Overview

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13-140 California Forms of Pleading and Practice--Annotated §§ 140.67-140.79

[Reserved]

§§ 140.67[Reserved]

California Forms of Pleading and Practice--Annotated

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Volume 13: Conspiracy thru Conversion-Chs. 126-159
Chapter 140 CONTRACTS
PART III. RESEARCH GUIDE

13-140 California Forms of Pleading and Practice--Annotated § 140.80

§ 140.80 Related Matthew Bender Publications

For discussion and memoranda of points and authorities relating to actions for breach of contract, see California Points and Authorities, Ch. 50, *Contracts* (Matthew Bender)

For discussion and interrogatories for use in actions involving the creation, existence, and termination of contracts, see Bender's Forms of Discovery Interrogatories, Ch. 51, *Contracts* (Matthew Bender)

For discussion and transactional forms relating generally to contracts and standard contractual provisions, assignment of rights and obligations, discharge of obligations, and contracts of minors, see California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, Ch. 76, *Assignments of Rights and Obligations*, Ch. 77, *Discharge of Obligations*, and Ch. 100B, *Contracts and Employment of Minors* (Matthew Bender)

For discussion and transactional forms relating to specific kinds of contracts, see chapters covering the relevant topics in California Legal Forms (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewContracts LawTypes of ContractsGeneral Overview

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13-140 California Forms of Pleading and Practice--Annotated § 140.81

§ 140.81 Federal Constitution

Prohibition against state action that impairs contract. U.S. Const. art. I, § 10

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawCongressional Duties & PowersContracts ClauseGeneral Overview

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13-140 California Forms of Pleading and Practice--Annotated § 140.81A

§ 140.81A Federal Statutes

Electronic Signatures in Global and National Commerce (E-SIGN) Act. Pub. L. No. 106-229 (June 30, 2000); *15 U.S.C. §§ 7001 et seq., 7021, 7031*

Legal Topics:

For related research and practice materials, see the following legal topics:
Computer & Internet LawInternet BusinessContractsDigital Signatures

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13-140 California Forms of Pleading and Practice--Annotated § 140.82

§ 140.82 State Statutes

[1] Contracts Generally

Acts required by contract to be performed on particular day when day falls on holiday. *Civ. Code § 11*; *Code Civ. Proc. §§ 13, 13a*

Transfer of obligations. *Civ. Code § 1457 et seq.*

Damages. *Civ. Code §§ 1671, 3300 et seq.*

Attorney's fees. *Civ. Code § 1717*

Interest on awarded damages. *Civ. Code § 3287*

Specific performance. *Civ. Code § 3384 et seq.*

Revision or reformation. *Civ. Code § 3399 et seq.*

Statutes of limitations. *Code Civ. Proc. §§ 337, 339*

Venue. *Code Civ. Proc. §§ 395, 395.2, 395.5, 396a*

Objection to complaint by demurrer or answer for failure to state whether contract is written or oral or implied by conduct. *Code Civ. Proc. § 430.10(g)*

Performance of conditions precedent in contract permitted to be stated generally in complaint. *Code Civ. Proc. § 457*

Issues of fact tried by jury in actions for money claimed to be due on contract, for damages for breach of contract, or for recovery of specific, real, or personal property. *Code Civ. Proc. § 592*

Successive actions permitted to be maintained on same contract whenever new cause of action arises after former action. *Code Civ. Proc. § 1047*

Declaratory relief. *Code Civ. Proc. § 1060 et seq.*

Recitals in written instruments conclusively presumed to be true except for recital of consideration. *Evid. Code § 622*

[2] Definitions

Obligation. *Civ. Code § 1427*

Contract. *Civ. Code § 1549*

Express contract. *Civ. Code § 1620*

Implied contract. *Civ. Code § 1621*

Execution of written instrument. *Code Civ. Proc. § 1933*

[3] Elements of Contract

Capacity. *Civ. Code § 38 et seq.*; *Fam. Code § 6700 et seq.*

Essential elements to existence of contract. *Civ. Code § 1550*

Parties to contract. *Civ. Code § 1556 et seq.*

Consent. *Civ. Code § 1565 et seq.*

Objects of contracts. *Civ. Code § 1595 et seq.*

Consideration for contracts. *Civ. Code § 1605 et seq.*

[4] Extinction of Contract Obligation

Performance. *Civ. Code § 1473 et seq.*

Offer of performance. *Civ. Code § 1485 et seq.*

Prevention of performance or offer. *Civ. Code § 1511 et seq.*

Accord and satisfaction. *Civ. Code § 1521 et seq.*

Novation. *Civ. Code § 1530 et seq.*

Release. *Civ. Code § 1541 et seq.*

Manner in which contracts may be extinguished. *Civ. Code § 1682*

Rescission. *Civ. Code § 1688 et seq.*

Modification and cancellation. *Civ. Code § 1697 et seq.*

Effect of release of coobligor on rights of other coobligors. *Code Civ. Proc. § 877*

Party who has, by statement or conduct, intentionally and deliberately led another to believe particular thing to be true and to act on that belief not allowed in any litigation arising out of that statement or conduct to contradict it. *Evid. Code § 623*

[5] Foreign Money Claims

Uniform Foreign Money Claims Act. *Code Civ. Proc. § 676 et seq.*

[6] Illegal Contract

Objects of contracts. *Civ. Code §§ 1596, 1598, 1599*

Unlawful contracts. *Civ. Code § 1667 et seq.*

Contract in restraint of marriage is void. *Civ. Code § 1676*

[7] Interpretation of Contract

Construction of contracts dealing with weights and measures. *Bus. & Prof. Code §§ 12300, 12301*

Interpretation of obligations. *Civ. Code § 1429 et seq.*

Interpretation of contracts. *Civ. Code § 1635 et seq.*

Interpretation that gives effect preferred to interpretation that makes void. *Civ. Code § 3541*

Parol evidence rule. *Code Civ. Proc. § 1856*

Construction or interpretation of writing or instrument. *Code Civ. Proc. §§ 1857-1866*

[8] Manner of Creating Contract

Express or implied contracts. *Civ. Code § 1619*

Oral contracts. *Civ. Code § 1622*

Contract prevented from being put into writing by fraud. *Civ. Code § 1623*

Statute of frauds. *Civ. Code § 1624*; *Code Civ. Proc. § 1974*

Writing supersedes prior negotiations. *Civ. Code § 1625*

Delivery. *Civ. Code §§ 1626, 1627*

Seals. *Civ. Code §§ 1628, 1629*; *Code Civ. Proc. § 1932*

Electronic creation of agreement with broker-dealer. *Civ. Code § 1633*

Uniform Electronic Transactions Act. *Civ. Code § 1633.1 et seq.*

[9] Specific Contracts

[a] Commercial Contracts

Landscape architects required to provide customer with detailed written contract. *Bus. & Prof. Code § 5616*

Franchises between petroleum refiner and distributor or retailer, or distributor and another distributor or retailer. *Bus. & Prof. Code §§ 20999, 20999.1-20999.4, 21140, 21140.1, 21150*; *Corp. Code §§ 31005, 31005.5, 31104*

Franchise agreements between retail gasoline dealer and franchiser. *Bus. & Prof. Code § 21150.1*

Invention development service contracts. *Bus. & Prof. Code § 22370 et seq.*

Bailment contracts with automobile parking lots. *Civ. Code §§ 1630, 1630.5*

Sale of mining machinery. *Civ. Code § 1631*

Adjustable-rate residential mortgage loans. *Civ. Code § 1921(b)*

Indemnity clauses in construction contracts. *Civ. Code §§ 2782-2784*

Indemnity clauses in hauling contracts. *Civ. Code § 2784.5*

Suretyship contracts. *Civ. Code § 2792 et seq.*

Borrower generally must not be required to pay interest on principal obligation under promissory note secured by mortgage or deed of trust on real property improved with one to four residential dwelling units for period of more than one day prior to recording mortgage or deed of trust, if loan proceeds are paid into escrow, or, if there is no escrow, date loan proceeds have been made available for withdrawal. *Civ. Code § 2948.5(a)*

Real property sales contracts. *Civ. Code § 2985 et seq.*

Arbitration provision in medical service contract. *Code Civ. Proc. § 1295*

Sale of goods. *Com. Code § 2101 et seq.*

Contracts for purchase or sale of capital stock of corporation or association without intention to receive or deliver are void. *Corp. Code § 29104*

California State University Contract Law. Educ. Code § 25200 et seq.

Contracts for public purchases. *Gov. Code § 4475 et seq.*

Contracts for rapid transit equipment or structures. *Gov. Code § 4500*

Continuing care (life care) contracts. *Health & Safety Code § 1770 et seq.*

Motor club service contracts. *Ins. Code §§ 12158, 12250 et seq.*

Contracts for sale of farm or home to veteran. *Mil. & Vet. Code §§ 270.19, 986.9, 987.1, 987.2, 987.69*

Contracts for prison supplies. *Penal Code § 2051*

State Contract Act. *Pub. Contract Code § 10100 et seq.*

Arbitration of public works contracts claims. *Pub. Contract Code §§ 22200, 22201*

Consignment agreements between dealer and vehicle owner. *Veh. Code §§ 266, 11729, 11730*

Life care contracts. *Welf. & Inst. Code § 16300 et seq.*

[b] Consumer Contracts

Home improvement contracts, including contracts for swimming pool construction. *Bus. & Prof. Code § 7150 et seq.*

Funeral service contracts. *Bus. & Prof. Code § 7685 et seq.*

Required contents of sales contract relating to purchase of real property in subdivision. *Bus. & Prof. Code § 11200*

Financial institution prohibited from entering into contract that provides for reassignment. *Bus. & Prof. Code §§ 17350, 17351*

Foreign-language translation of contract, or related disclosure required by law, required to be given to consumer before execution of contract, lease, loan, or agreements. *Civ. Code §§ 1632, 1632.5*

Home solicitation contracts. *Civ. Code §§ 1689.5-1689.14*

Dating service contracts. *Civ. Code § 1694 et seq.*

Contracts with weight loss program or center. *Civ. Code § 1694.5 et seq.*

Consumer's or subscriber's presence required for delivery, service, connection or repair, for retail merchandise, cable television or utility. *Civ. Code § 1722*

Credit cards. *Civ. Code § 1747 et seq.*

Consumer credit contracts. *Civ. Code § 1799.90 et seq.*

Retail installment sales contracts. *Civ. Code § 1801 et seq.*

Dance studio contracts. *Civ. Code § 1812.50 et seq.*

Health studio contracts. *Civ. Code § 1812.80 et seq.*

Discount buying service contracts. *Civ. Code § 1812.100 et seq.*

Employment agencies, employment counseling services, job listing services, and nurses' registries. *Civ. Code § 1812.500 et seq.*

Automobile sales finance contracts. *Civ. Code § 2981 et seq.*

[10] Unconscionable Contracts

Extent of enforceability of unconscionable contract or clause. *Civ. Code § 1670.5*

Loan contract subject to Finance Lenders Law [*Fin. Code § 22000 et seq.*] that is found to be unconscionable under *Civ. Code § 1670.5* is violation of, and subject to remedies of, Finance Lenders Law. *Fin. Code § 22302*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesGeneral OverviewContracts LawFormationMeeting of MindsContracts LawRemediesSpecific PerformanceContracts LawTypes of ContractsExpress ContractsContracts LawTypes of ContractsImplied-in-Fact Contracts

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13-140 California Forms of Pleading and Practice--Annotated § 140.83

§ 140.83 Decisions

[1] Acceptance

Oral contract consummated over telephone made when offeree utters words of acceptance. *Travelers Insurance Co. v. Workmen's Comp. App. Bd. (1967) 68 Cal. 2d 7, 14-15, 64 Cal. Rptr. 440, 434 P.2d 992* ; *Ledbetter Erection Corp. v. Workers' Comp. App. Bd. (1984) 156 Cal. App. 3d 1097, 1105-1106, 203 Cal. Rptr. 396*

With respect to *Code Civ. Proc. § 998* written offer to compromise, policy of encouraging settlement and desirability of maintaining certainty compel conclusion that general contract principles should not apply to determining whether offer has been rejected; thus, in absence of unequivocal rejection of *Code Civ. Proc. § 998* offer, offer may be accepted by offeree during statutory period unless revoked by offeror. *Guzman v. Visalia Community Bank (1999) 71 Cal. App. 4th 1370, 1376-1377, 84 Cal. Rptr. 2d 581* (trial court erred in denying plaintiff's request to enforce defendant's *Code Civ. Proc. § 998* offer to compromise, since disparaging comment of plaintiff's counsel regarding offer did not constitute rejection)

When prospective buyer purported to accept seller's counteroffer by signing preprinted real estate form in space labeled "counter to counteroffer" and added terms in space labeled "changes/amendments," prospective buyer's response was counter-counteroffer rather than acceptance, and no contract was formed. *Roth v. Malson (1998) 67 Cal. App. 4th 552, 557-559, 79 Cal. Rptr. 2d 226*

[2] Attorney's Fees

Plaintiff, who was actual prevailing party, did not obtain "net monetary recovery" (which is required in order for plaintiff to be prevailing party for purposes of *Code Civ. Proc. § 1032*) because plaintiff settled with several defendants and then obtained nonjury damages award, against nonsettling defendant, in amount less than settlement proceeds; therefore, by statute, damages award against nonsettling defendant was offset by amount plaintiff received from settling defendants, resulting in take-nothing (zero damages) judgment against nonsettling defendant, to whom trial court properly awarded discretionary attorney's fees pursuant to *Code Civ. Proc. § 1032(a)(4)*. *Goodman v. Lozano (2010)*

47 Cal. 4th 1327, 1337-1338, Cal. Rptr. 3d , 223 P.3d 77

Plaintiff who rejects *Code Civ. Proc. § 998* settlement offer that is greater than ultimate recovery may nonetheless recover preoffer costs to which it otherwise would be entitled, including preoffer attorney's fees when those fees are authorized category of recoverable costs under *Code Civ. Proc. §§ 1032, 1033.5*. *Scott Co. of California v. Blount, Inc. (1999) 20 Cal. 4th 1103, 1111-1112, 86 Cal. Rptr. 2d 614, 979 P.2d 974*

In case in which defendant was not prevailing party but whose *Code Civ. Proc. § 998* settlement offer was greater than plaintiff's, defendant was entitled under *Code Civ. Proc. § 998* to those costs incurred after settlement offer to which prevailing party would be entitled under *Code Civ. Proc. § 1032*; by operation of *Code Civ. Proc. § 1033.5*, attorney's fees are category of cost allowable under *Code Civ. Proc. § 1032* to which defendant was entitled. *Scott Co. of California v. Blount, Inc. (1999) 20 Cal. 4th 1103, 1112-1114, 86 Cal. Rptr. 2d 614, 979 P.2d 974*

Judgment on property owner's claim against construction contractor for breach of warranty, based on defects in building, could not include attorney's fees for successful plaintiff because warranty, which was separate from construction contract and which property owner had acquired by assignment on purchasing property from previous owner that had erected building, did not contain attorney's fees provision, and construction contract, which did contain such provision, had not been assigned by seller. *Vons Cos. v. Lyle Parks Jr., Inc. (2009) 177 Cal. App. 4th 823, 825-826, 835, 99 Cal. Rptr. 3d 562*

Action for declaratory and injunctive relief to avoid enforcement of contract's arbitration provision absent order compelling arbitration was "action on a contract" for purposes of awarding attorney fees pursuant to *Civ. Code § 1717*; defendant was entitled to attorney's fees for successful defense in this action, notwithstanding possibility that defendant might not prevail in ensuing arbitration. *Turner v. Schultz (2009) 175 Cal. App. 4th 974, 980-984, 96 Cal. Rptr. 3d 659*

In action for declaratory relief, which ended with mixed results, trial court abused its discretion in denying seller's request for attorney's fees after finding that neither party achieved greater relief on contract; record indisputably showed that seller of real estate obtained greater relief on contract when trial court declared that seller had properly terminated parties' agreements based on buyer's inability to perform. *Silver Creek, LLC v. BlackRock Realty Advisors, Inc. (2009) 173 Cal. App. 4th 1533, 1537, 1541, 93 Cal. Rptr. 3d 864*

In bank's action to recover on promissory note providing for attorney's fees, after defendant's motion for summary judgment was granted based on application of one-action rule in *Code Civ. Proc. § 726*, defendant was entitled to attorney's fees with respect to that successful defense against bank's breach of contract claim, even though bank succeeded on its common count for money lent and on its claim for unjust enrichment and thus was prevailing party overall. *Federal Deposit Ins. Corp. v. Dintino (2008) 167 Cal. App. 4th 333, 355-358, 84 Cal. Rptr. 3d 38*

Party to mediation agreement is not entitled to attorney's fees under *Code Civ. Proc. § 1717* when agreement is inadmissible under *Evid. Code § 1115 et seq.* [*see Ch. 31, Mediation, § 31.13*]. *Rael v. Davis (2008) 166 Cal. App. 4th 1608, 1622-1623, 83 Cal. Rptr. 3d 745*

Defendant is not entitled to claim attorney's fees under *Code Civ. Proc. § 998* after plaintiff has dismissed action on contract, because even though plaintiff has failed to obtain more-favorable judgment than defendant's earlier settlement offer, *Code Civ. Proc. § 998* does not create independent right to attorney's fees; rather, defendant's only avenue for recovering attorney's fees is *Civ. Code § 1717(a)*, but this path to fees is blocked by *Civ. Code § 1717(b)(2)*, which bars any award of contractual attorney's fees when action has been voluntarily dismissed. *Ford Motor Credit Co. v. Hunsberger (2008) 163 Cal. App. 4th 1526, 1529, 78 Cal. Rptr. 3d 661*

In action for breach of contract, if contract provides that in any litigation involving contract, prevailing party will be

entitled to recover attorney's fees and costs, and if trial court grants defendant's motion to quash service of summons for lack of personal jurisdiction, then defendant is party prevailing on contract under *Civ. Code § 1717* and is entitled to recover reasonable attorney's fees as costs, because complaint is necessarily dismissed in its entirety and thus plaintiff obtains nothing. *Profit Concepts Management, Inc. v. Griffith (2008) 162 Cal. App. 4th 950, 952, 76 Cal. Rptr. 3d 396*

If action is brought solely to compel arbitration of contractual dispute between parties, party who succeeds in obtaining order denying petition to compel arbitration is prevailing party in action on contract even though merits of parties' underlying contractual dispute have not yet been resolved; order denying request for costs and attorney's fees under such circumstances is appealable as special order after final judgment under *Code Civ. Proc. § 1294(e)*. *Otay River Constructors v. San Diego Expressway (2008) 158 Cal. App. 4th 796, 799, 70 Cal. Rptr. 3d 434*

Unlawful detainer action can be either contract action or tort action, depending on facts constituting plaintiff's cause of action; if it is tort action, and tenancy was based on lease that provides for attorney's fees in sufficiently broad terms, then right to attorney's fees is governed by *Code Civ. Proc. § 1032*, not by *Civ. Code § 1717*. *Drybread v. Chipain Chiropractic Corp. (2007) 151 Cal. App. 4th 1063, 1076-1077, 60 Cal. Rptr. 3d 580*

When contract provides that in any action between parties, prevailing party is entitled to recover attorney's fees unless that party brought action without first attempting to mediate dispute, then seeking mediation is condition precedent to recovery of attorney's fees by party who initiates action; but if other party prevails, that party may recover attorney's fees pursuant to *Civ. Code § 1717*, whether or not mediation was sought by either party. *Van Slyke v. Gibson (2007) 146 Cal. App. 4th 1296, 1299-1300, 53 Cal. Rptr. 3d 491*

Guarantors under agreement that contained attorney's fee provision were entitled to recover attorney's fees incurred to vacate domesticated out-of-state judgment; guarantors were prevailing parties, and basis of recovery was underlying contract, not judgment. *Rainier National Bank v. Bodily (1991) 232 Cal. App. 3d 83, 86, 282 Cal. Rptr. 926*

When alleged breach consisted of bank's three-year delay in turning over to borrower's trustee in bankruptcy assets of borrower that constituted bank's collateral, and delay resulted in attorney's fees in bankruptcy proceeding, fees were recoverable only in bankruptcy proceeding. *Kruse v. Bank of America (1988) 202 Cal. App. 3d 38, 61, 248 Cal. Rptr. 217*

[3] Breach of Contract

Contract action for damages was proper remedy after administrative agency unreasonably exercised its power to withhold specified contractual benefit from private entity with which agency had made contract; although agency's decision to withhold contractual benefit was discretionary decision, administrative mandamus (which agency argued was sole remedy) was not proper because agency did not make that decision after evidentiary hearing, nor was any hearing required by law; ordinary writ of mandate was not available because agency in fact made contract and acted pursuant to it; and cause of action for declaratory judgment could also be alleged in complaint for contract damages. *300 DeHaro St. Investors v. Department of Hous. & Community Dev. (2008) 161 Cal. App. 4th 1240, 1243, 75 Cal. Rptr. 3d 98*

Pleading cause of action for specific performance and obtaining preliminary injunction restraining defendant from renting auditorium to any other entity on date reserved by plaintiff was not election of remedy barring recovery for breach of contract, when parties had stipulated to dismissal of specific performance cause of action and dissolution of preliminary injunction. *Southern Christian Leadership Conference v. Al Malaikah Auditorium Co. (1991) 230 Cal. App. 3d 207, 222-225, 281 Cal. Rptr. 216*

Mil. & Vet. Code § 987.77, governing cancellation of contract under Veterans' Farm and Home Purchase Act of 1974 [

Mil. & Vet. Code § 987.50 et seq.] in event of breach, prevails over general scheme of Civil Code in expressly authorizing Department of Veterans Affairs to force forfeiture when veteran breaches Cal-Vet contract. *Department of Veterans Affairs v. Duerksen (1982) 138 Cal. App. 3d 149, 157, 187 Cal. Rptr. 832*

[4] Choice of Forum

Forum selection clause is not "defect" within meaning of *28 U.S.C. § 1447(c)* governing removal from state court to federal court and providing, "a motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a)"; therefore, motion to remand based on forum selection clause is not subject to 30-day limitation period (although district court may deny motion that is not made within reasonable time),and district court's order remanding case on basis of forum selection clause will be appealable notwithstanding *28 U.S.C. § 1447(d)* providing, "an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." *Kamm v. ITEX Corp. (9th Cir. 2009) 568 F.3d 752, 756-757*

Forum selection clause giving exclusive jurisdiction to "the courts of Virginia" was construed to mean state courts only, not state and federal courts in Virginia, because it specified courts "of" Virginia (and because same clause mandated choice of law as "laws of the Commonwealth of Virginia"). *Doe 1 v. AOL LLC (9th Cir. 2009) 552 F.3d 1077*

Federal law governs validity of forum selection clause in diversity action; enforcement of forum selection clause is mandatory absent fraud, overreaching, or serious inconvenience. *Spradlin v. Lear Siegler Management Services (9th Cir. 1991) 926 F.2d 865, 867-869*

Parties contracted for sale of olive oil, to be delivered by Italian seller to California buyer, for $406,000; seller received buyer-initiated purchase order and was presented with option of completing substantial transaction with California entity in California, which required delivery of goods to California; seller opted to accept this order; on jurisdictional issue of whether seller could be sued in California, totality of facts supported finding that seller purposefully availed itself of benefits of forum; also, court concluded that it is not unreasonable to expect seller to make selection of appropriate forum in written contract before shipping $406,000 worth of goods into foreign jurisdiction, and seller's failure to make appropriate forum selection vitiated any concern that might have arisen over fairness of causing seller to face suit in *California. Luberski, Inc. v. Oleificio F.LLI Amato S.R.L. (2009) 171 Cal. App. 4th 409, 419, 89 Cal. Rptr. 3d 774*

Plaintiff who is not party to contract will be bound by contract's forum selection clause if (1) third party is closely related to contractual relationship, and (2) contractual forum state provides suitable alternative forum for lawsuit; private plaintiff which itself suffered no injury but filed representative action under California's unfair competition law alleging that contractual provisions constituted unfair business practices was bound by contract providing that disputes would be subject to exclusive jurisdiction in New Jersey. *Net2phone, Inc. v. Superior Court (2003) 109 Cal. App. 4th 583, 587*

Contractual venue selection clause is purely intrastate issue involving selection of county in which to hold trial; clause held invalid to extent it was inconsistent with statutory venue scheme. *Alexander v. Superior Court (2003) 114 Cal. App. 4th 723, 725-727, 8 Cal. Rptr. 3d 111*

Provision in franchise agreement negotiated in California between California corporations, requiring any litigation under agreement to be in Florida, was enforceable when franchisor's parent, which owned all trademarks and names licensed under agreement, had its principal place of business in Florida. *Lu v. Dryclean-U.S.A. of California, Inc. (1992) 11 Cal. App. 4th 1490, 1493-1494*

[5] Conditions

Whether condition precedent existed as pleaded and whether provision in ancillary agreement negated its existence were questions of fact to be resolved by trial court. *MacManus v. A.E. Realty Partners (1987) 195 Cal. App. 3d 1106, 1115, 241 Cal. Rptr. 315*

When contract language is ambiguous and susceptible to two different meanings, one understood by each party, court will properly uphold contract and give it meaning attached by party who manifested meaning it attached, if that party had no reason to know of different meaning attached by other party and other party had reason to know of meaning attached by first party. *Merced County Sheriff's Employees' Assn. v. County of Merced (1987) 188 Cal. App. 3d 662, 672-674, 233 Cal. Rptr. 519*

Mutual assent is lacking if parties attach materially different meanings to their manifestations of assent and either (a) neither party knows or has reason to know meaning attached by other party or (b) each party knows or has reason to know of meaning attached by other; thus, no contract is formed if neither party is at fault or if both parties are equally at fault. *Merced County Sheriff's Employees' Assn. v. County of Merced (1987) 188 Cal. App. 3d 662, 670, 675-676, 233 Cal. Rptr. 519*

Mutual agreement to definite specifications of written building contract, including measurements of site and building and cost of construction, supported finding of valid contract. *Sanders Construction Co. v. San Joaquin First Fed. Sav. & Loan Assn. (1982) 136 Cal. App. 3d 387, 394-395, 186 Cal. Rptr. 218*

[6] Consideration

When defendants agreed to execute promissory note at time plaintiff made contribution to corporation, consideration existed for note although it was executed after plaintiff's contribution. *Swanson v. Skiff (1979) 92 Cal. App. 3d 805, 809, 155 Cal. Rptr. 280*

[7] Creation of Contract

[a] In General

Party contending that contract was conditioned on execution by all parties (and therefore was not binding on any signing party until signed by all) has burden of proving that signatures of all parties were contemplated as condition precedent to validity of contract, and failure to make that proof can leave that party bound by contract in question. *Fagelbaum & Heller LLP v. Smylie (2009) 174 Cal. App. 4th 1351, 1365, 95 Cal. Rptr. 3d 252*

When party resisting petition to compel arbitration contends, and submits evidence supporting contention, that there was no meeting of minds as to arbitration provision in franchise agreement, court has authority to determine whether parties in fact made agreement to arbitrate. *Winter v. Window Fashions Professionals, Inc. (2008) 166 Cal. App. 4th 943, 948-949, 83 Cal. Rptr. 3d 89*

Acceptance of deposit to reserve auditorium on specific date created contract in nature of option; although formal contract was not executed and cost figures had not been worked up, defendant was bound not to book other entity for auditorium on that date. *Southern Christian Leadership Conference v. Al Malaikah Auditorium Co. (1991) 230 Cal. App. 3d 207, 220-222, 281 Cal. Rptr. 216*

Contract is "invalid" if not signed by all parties purportedly bound only when it is shown, either by parol evidence or

express condition, that contract was not intended to be complete until all parties had signed; conversely, in absence of showing that contract was not intended to be complete until signed by all parties, parties who did sign it are bound. *Angell v. Rowlands (1978) 85 Cal. App. 3d 536, 542, 149 Cal. Rptr. 574*

[b] Objective Manifestations of Parties

In borrowers' action against lender alleging TILA violations and seeking rescission of loan, trial court erred in granting summary judgment to lender; essential element of loan contract, rate of interest, was not determined when terms of loan application differed from those in loan documents and agent represented that terms would be corrected; material issues as to existence and terms of contract remained. *Grimes v. New Century Mortgage Corporation (9th Cir. 2003) 340 F.3d 1007, 1010-1011*

In case involving sale of goods, trial court correctly instructed jury that in determining terms of parties' contract, jurors may consider all circumstances surrounding contract, including negotiations and statements of parties prior to contract; object, nature, and subject matter of contract; and subsequent acts and conduct of parties. *Brittalia Ventures v. Stuke Nursery Co. (2007) 153 Cal. App. 4th 17, 23, 62 Cal. Rptr. 3d 467*

In dispute over whether or not employer was contractually obligated to provide employee with vested stock options, trial court erred in granting summary judgment for employer on grounds that as matter of law vesting schedule was material term in contract and parties did not reach agreement on question of vesting; existence of agreement with respect to conditions for vesting of options involved factual questions that could not be determined as matter of law due to conflicting inferences that could be drawn from words and acts of parties. *Alexander v. Codemasters Group Limited (2002) 104 Cal. App. 4th 129, 147, 127 Cal. Rptr. 2d 145*

Trial court erred in finding that signed "Work Authorization and Contract" containing indemnity clause on reverse was not binding contract due to absence of mutual assent; parties' course of dealings over years of using same document, despite no actual negotiation of every term, established that oral agreement to do work included terms contained in that document, which was signed at end of each work day. *Marin Storage & Trucking, Inc. v. Benco Contracting and Engineering, Inc. (2001) 89 Cal. App. 4th 1042, 1049-1051, 107 Cal. Rptr. 2d 645*

Manifestation of willingness to enter into bargain is not offer if person to whom it is addressed knows, or has reason to know, that person making it does not intend to conclude bargain until he or she has made further manifestation of assent. *Kruse v. Bank of America (1988) 202 Cal. App. 3d 38, 59, 248 Cal. Rptr. 217*

Offeree is not bound by inconspicuous contractual provisions of which offeree was unaware and were contained in document whose contractual nature was not obvious, regardless of apparent manifestation of offeree to proposal. *Windsor Mills, Inc. v. Collins & Aikman Corp. (1972) 25 Cal. App. 3d 987, 992-993, 101 Cal. Rptr. 347*

Contract does not result when both parties understand no promise is intended. *Findleton v. Taylor (1962) 208 Cal. App. 2d 651, 652, 25 Cal. Rptr. 439*

Whether interchange of words constitutes binding contract depends on circumstances under which words were uttered, tone of voice used, and to whom they were addressed. *Fowler v. Security-First Nat'l Bank (1956) 146 Cal. App. 2d 37, 47, 303 P.2d 565*

[8] Defenses

Fact that party was compelled to enter into contract because of third person's refusal to deal with party is no defense to breach of contract. *Pacific Tel. & Tel. Co. v. MCI Telecommunications Corp. (9th Cir. 1981) 649 F.2d 1315,*

1321-1322

Excuses for nonperformance not apparent on face of contract nor embraced within facts alleged in complaint are affirmative defenses. *Eucalyptus Growers Ass'n v. Orange County Nursery & Land Co. (1917) 174 Cal. 330, 335, 163 P. 45*

Recission of contract is affirmative defense to be pleaded by defendant. *Garratt v. Baker (1936) 5 Cal. 2d 745, 748, 56 P.2d 225* ; *Stanton v. Santa Ana Sugar Co. (1927) 84 Cal. App. 206, 208-209, 257 P. 907*

Defendant landowner, on being sued by real estate developer for breach of contract, could file anti-SLAPP motion because action was based on statements made and plans submitted to planning commission and city council (that is, protected activity) by defendant; however, developer made prima facie showing that land owner in fact breached contract, thus establishing probability that developer would prevail on complaint, and anti-SLAPP motion therefore was properly denied. *Midland Pac. Bldg. Corp. v. King (2007) 157 Cal. App. 4th 264, 274-275, 68 Cal. Rptr. 3d 499*

With respect to *Code Civ. Proc. § 337* statute of limitations defense, plaintiff's out-of-state travel unrelated to interstate commerce may toll the statute pursuant to *Code Civ. Proc. § 351*; although *Code Civ. Proc. § 351* impermissibly burdens interstate commerce with respect to residents who travel in the course of interstate commerce, tolling statutory periods for duration of out-of-state travel unrelated to interstate commerce does not violate commerce clause. *Filet Menu, Inc. v. Cheng (1999) 71 Cal. App. 4th 1276, 1282-1284, 84 Cal. Rptr. 2d 384*

Dismissal of defendant's cross-complaint with prejudice did not preclude defendant from defending against complaint by introducing evidence tending to refute elements of breach of contract claim that had been generally denied by defendant. *Walsh v. West County Mission Community College District (1998) 66 Cal. App. 4th 1532, 1545-1547, 78 Cal. Rptr. 2d 725*

Denial of "execution" puts in issue whether defendant's signature was obtained by fraud and whether instrument was delivered, but not defense of fraud in inducement or "sham transaction." *FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 401-403, 282 Cal. Rptr. 508*

Defense of prematurity of action must be timely raised by defendant and is waived if not raised. *State Medical Education Bd. v. Roberson (1970) 6 Cal. App. 3d 493, 501, 86 Cal. Rptr. 258*

When plaintiff pleaded and defendant denied oral offer to do certain work, issue of whether offer had been made was raised, and whether offer was in fact made was not an affirmative defense. *Leo F. Piazza Paving Co. v. Bebek & Brkich (1956) 141 Cal. App. 2d 226, 232, 296 P.2d 368*

Defendant cannot rely on defense of estoppel unless it has been pleaded. *Swanson v. Thurber (1955) 132 Cal. App. 2d 171, 181, 281 P.2d 642*

[9] Demurrers

In action for breach of fiduciary duty, court of appeal denied plaintiff's petition for writ of mandate to compel trial court to vacate order sustaining demurrer; one contracting party's right to contingent compensation in form of percentage of future revenues in exclusive control of other contracting party does not create fiduciary relationship in otherwise arm's length business transaction. *Wolf v. Superior Court (2003) 107 Cal. App. 4th 25, 30-31, 130 Cal. Rptr. 2d 860*

Trial court improperly sustained defendant's demurrer in action alleging that defendant offered the domain name "golf.tv" in Internet auction, that plaintiff accepted offer by e-mail which entered highest bid, and that defendant

memorialized contract by congratulatory e-mail to plaintiff entitled "E-mail invoice for domain registration"; plaintiff adequately pleaded cause of action for breach of contract. *Lim v. The.TV Corp. Internat. (2002) 99 Cal. App. 4th 684, 690-693, 121 Cal. Rptr. 2d 333*

When express promise on which cause of action depended was alleged for first time in fourth amended complaint with no explanation for change, and record from previous demurrers made clear that plaintiff considered related duty to arise from implied covenant of good faith and fair dealing, cause of action was sham, and demurrer was properly sustained without leave to amend. *Amid v. Hawthorne Community Med. Group, Inc. (1989) 212 Cal. App. 3d 1383, 1387-1391, 261 Cal. Rptr. 240*

In contract action, granting demurrer without leave to amend is improper if plaintiff might be able to show extrinsic circumstances indicating parties' intent, thus curing contract's uncertainty. *Larwin-Southern Cal., Inc. v. JGB Inv. Co. (1979) 101 Cal. App. 3d 626, 635, 162 Cal. Rptr. 52*

Demurrer is properly sustained against party attempting to circumvent doctrine barring tort action by pleading action for breach of contract. *Austin v. Regents of Univ. of Cal. (1979) 89 Cal. App. 3d 354, 358, 152 Cal. Rptr. 420*

[10] Execution of Contracts

Addition of "Pres." after defendant's signature did not change legal effect of document as defendant's personal guaranty; to interpret document as guaranty by corporate general partner was objectively unreasonable because corporation was already liable without guaranty, and that interpretation would nullify guaranty. *Home Federal Savings & L. Assn. v. Ramos (1991) 229 Cal. App. 3d 1609, 1613-1614, 284 Cal. Rptr. 1*

Director, officer, or other agent signing corporation's contract containing promise in proper form for an individual is not relieved from personal liability by addition to name of term such as "director" or "president"; these terms are merely descriptive of person rather than relationship in which person signs agreement; mere fact that person sustains agency relation to another does not prevent him or her from becoming personally liable on contract with third persons. *Sebastian Int'l, Inc. v. Peck (1987) 195 Cal. App. 3d 803, 808, 240 Cal. Rptr. 911*

[11] Failure of Consideration

Important consideration in determining if party has substantially performed is whether or not deviations are so slight that they might have been made by one who was honestly endeavoring to comply with contract. *Perry v. Quackenbush (1894) 105 Cal. 299, 309, 38 P. 740*

[12] Illegal Contracts

Civ. Code § 1511 is not declaration that public policy of California is not to enforce contract that would be unenforceable under laws of another jurisdiction, but is codification of private law embodying common law defense and thus does not prohibit payment of commissions illegal under law of Saudi Arabia. *Northrop Corp. v. Triad Intern. Marketing S.A. (9th Cir. 1987) 811 F.2d 1265, 1270-1271*

Law firm that was barred from recovering under fee-sharing agreement with another firm, due to the absence of written client consent to the agreement required by *Cal. Rules Prof. Conduct, Rule 2-200,* held entitled to recover from other firm in quantum meruit for reasonable value of services it rendered on client's behalf. *Huskinson & Brown, LLP v. Wolf (2004) 32 Cal. 4th 453, 464, 9 Cal. Rptr. 3d 693, 84 P.3d 379*

Cal. Rules Prof. Conduct, Rule 2-200(A)(1) precluded plaintiff attorney from sharing in fees due to noncompliance with rule's written client consent requirement; attorneys who agreed to work as co-counsel on sexual harassment case were not "partners or associates" for purposes of exemption from rule; fee that parties negotiated without client's consent was not proper basis for quantum meruit award. *Chambers v. Kay (2002) 29 Cal. 4th 142, 162-163, 126 Cal. Rptr. 2d 536, 56 P.3d 645*

California courts will refuse to aid enforcement of contract illegal under Mexican law; comity is applicable when no California public policy is offended. *Wong v. Tenneco, Inc. (1985) 39 Cal. 3d 126, 137-138, 216 Cal. Rptr. 412, 702 P.2d 570*

Noncompetition and nonsolicitation clauses in employment agreements were void and unenforceable under *Bus. & Prof. Code § 16600*, and their use violated *Bus. & Prof. Code § 17200*. *Dowell v. Biosense Webster, Inc. (2009) 179 Cal. App. 4th 564, 574, 102 Cal. Rptr. 3d 1* (concluding also that so-called common law trade secret exception to stringent rule on covenants not to compete was probably no longer viable, but declining to decide that issue)

When contract called for plaintiff to provide range of services, some apparently requiring broker's license, which plaintiff did not have, and others seemingly not requiring license, plaintiff was entitled to go to trial on claim for compensation respecting services that did not require license. *Venturi & Co. LLC v. Pacific Malibu Development Corp. (2009) 172 Cal. App. 4th 1417, 1421-1422, 92 Cal. Rptr. 3d 123*

Contract allowing purchaser to complete purchase of four acres of unsubdivided land if, at purchaser's election, final map was recorded or purchaser "waived" recording of final map, thus allowed for sale of parcel of real property before final map had been filed, without being expressly conditioned on approval and filing of subdivision or parcel map, and that would have violated Subdivision Map Act; contract was therefore void as matter of law at time it was executed. *Sixells, LLC v. Cannery Bus. Park (2008) 170 Cal. App. 4th 648, 653-654, 88 Cal. Rptr. 3d 235*

With respect to illegal insurance contracts, *Ins. Code § 700* (insurance company licensing statute) and policy behind that statute require that consumer who innocently purchases policy from company unlicensed in California may still enforce that insurance contract, even though it is illegal. *Medina v. Safe-Guard Products, Internat., Inc. (2008) 164 Cal. App. 4th 105, 108109, 78 Cal. Rptr. 3d 672*

No-hire provision in company's standard contract for buying various consultants' services, which bound consultant to pay damages if consultant hired any of company's employees within one year, was not enforceable because it was very broad provision covering not only solicitation by consultant but also all hiring, it applied to all of company's employees regardless of whether they worked with consultant or were even employed at time consultant rendered services, it was not necessary to protect company's legitimate interests, and it was outweighed by public policy favoring freedom of mobility for employees. *VL Systems, Inc. v. Unisen, Inc. (2007) 152 Cal. App. 4th 708, 718, 61 Cal. Rptr. 3d 818*

Although action for breach of contract was unavailing because it was based on contract that was partly illegal and consequently wholly unenforceable (in violation of *Bus. & Prof. Code § 6155*, plaintiff was operating as unregistered attorney referral service), plaintiff could recover quantum meruit for lawful services (that is, services other than attorney referrals) performed pursuant to that contract; but recovery could not exceed amount that plaintiff would have recovered under that contract if it had been enforceable, and since that contract entitled plaintiff to fee only if referred lawyer won other party's case, plaintiff's quantum meruit recovery could be paid only from whatever judgment or settlement proceeds that lawyer obtained for other party. *Selten v. Hyon (2007) 152 Cal. App. 4th 463, 471-472, 60 Cal. Rptr. 3d 896*

Because illegal contract is void, it cannot be ratified by any subsequent act. *Black Hills Invs., Inc. v. Albertson's, Inc. (2007) 146 Cal. App. 4th 883, 896, 53 Cal. Rptr. 3d 263*

Substantial evidence supported trial court's finding that singer's personal manager violated Talent Agencies Act by procuring performance engagements without license, rendering contracts void and barring recovery of commission; defense of illegality based on public policy not waived by failure to include it as affirmative defense. *Yoo v. Robi (2005) 126 Cal. App. 4th 1089, 1103, 24 Cal. Rptr. 3d 740*

Agreement for establishment of plant in Iran to manufacture computer products to be sold in Iran held unenforceable as illegal and against public policy; agreement violated U.S. presidential executive orders and implementing regulations prohibiting U.S. persons from transactions relating to the supply of technology to Iran. *Kashani v. Tsann Kuen China Enterprise, Ltd. (2004) 118 Cal. App. 4th 531, 537*

Contract between husband and wife providing for liquidated damages for infidelity held unenforceable because it was contrary to public policy underlying no-fault provisions for dissolution of marriage. *Diosdado v. Diosdado (2002) 97 Cal. App. 4th 470, 474, 118 Cal. Rptr. 2d 494*

Attorney who made case referral to another attorney had no viable contract for sharing of fees when contract did not comply with *Cal. Rules Prof. Conduct, Rule 2-200*, which prohibits fee-sharing unless specified conditions such as written client consent are met; policy considerations that caused enactment of Rule 2-200 for benefit of public also require that fee sharing agreement not be enforced by court of law. *Margolin v. Shemaria (2000) 85 Cal. App. 4th 891, 903, 102 Cal. Rptr. 2d 502*

Confidentiality clause in settlement agreement that prohibited securities customer from discussing dealer's misconduct with regulatory authorities was void and unenforceable as violation of public policy set forth in securities laws and regulations. *Cariveau v. Halferty (2000) 83 Cal. App. 4th 126, 138, 99 Cal. Rptr. 2d 417*

Agreement by unmarried couple to grant male partner paternity rights to child conceived by artificial insemination was not against public policy, and served rather than contravened family law policies to legitimate children and provide for their support. *Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 189-190, 98 Cal. Rptr. 2d 44*

Sperm bank's agreement with potential parents precluding disclosure of donor's identity and other information under all circumstances was contrary to public policy and unenforceable, because *Fam. Code § 7613* permits disclosure of insemination records under certain circumstances. *Johnson v. Superior Court (2000) 80 Cal. App. 4th 1050, 1065-1067, 95 Cal. Rptr. 2d 864*

Promise of married person to support his or her lover is unenforceable when they never lived together and sexual services were inseparable part of consideration. *Taylor v. Fields (1986) 178 Cal. App. 3d 653, 663-665, 224 Cal. Rptr. 186*

[13] Implied Contracts

No implied agreement to modify a written contract can arise from the conduct of the parties when the contract expressly requires any modification to be in writing. *Warner Bros. Int'l TV Distrib. v. Golden Channels & Co. (9th Cir. 2008) 522 F.3d 1060, 1069*

Implied-in-fact contract consists of obligations arising from mutual agreement and intent to promise, when agreement and promise have not been expressed in words. *Silva v. Providence Hosp. of Oakland (1939) 14 Cal. 2d 762, 773, 97 P.2d 798*

No contract was implied by city's adoption of resolution that created modified regulatory framework in form of subsidy for certain taxicab operators, when there was no intent to grant private rights of contract, nor any promise by city to pay

for services rendered, nor any vested right of taxicab operators to receive compensation on performance. *Cotta v. City and County of San Francisco (2007) 157 Cal. App. 4th 1550, 1563, 69 Cal. Rptr. 3d 612*

Implied contract of state is of equal dignity to express contract for purposes of prohibitions against impairment of contractual obligations. *California Teachers Assn. v. Cory (1984) 155 Cal. App. 3d 494, 505, 202 Cal. Rptr. 611*

Legislative intent to grant contractual right is implied from statute if it contains unambiguous element of exchange of consideration by private party for consideration offered by State. *California Teachers Assn. v. Cory (1984) 155 Cal. App. 3d 494, 505*

[14] Incapacity of Parties

Imposition of conservatorship without finding of incompetence does not deprive conservatee of capacity to contract. *Board of Regents v. Davis (1975) 14 Cal. 3d 33, 36, 120 Cal. Rptr. 407, 533 P.2d 1047*

[15] Interpretation of Contracts

[a] Contract of Adhesion

Contract of adhesion defined; because Legislature has determined that parties to real estate transaction should not rely on real estate brokers for tax advice, term in listing agreement so stating was not within reasonable expectation of seller or oppressive, and thus not adhesive. *Carleton v. Tortosa (1993) 14 Cal. App. 4th 745, 759, 17 Cal. Rptr. 2d 734*

[b] Duration of Contract

Unambiguous language that contract would continue until grounds arose for termination was a valid, express contractual term of duration; termination was only for cause, and not at will. *Zee Medical Distributor Association, Inc. v. Zee Medical, Inc. (2000) 80 Cal. App. 4th 1, 13-14, 94 Cal. Rptr. 2d 829*

Under contracts that provide no fixed date for termination of promisor's obligation but condition obligation on event that necessarily implies termination, obligation is continuing until that event occurs; hence, agreement to pay percentage of billings on sales to specific accounts is construed to continue for as long as sales to those accountsare made. *Lura v. Multaplex, Inc. (1982) 129 Cal. App. 3d 410, 414-415, 179 Cal. Rptr. 847*

[c] Extrinsic Evidence to Explain Meaning of Contract

Court may interpret contract without recourse to extrinsic evidence if contract terms are unambiguous. *In re Crow Winthrop Operating Partnership (9th Cir. 2001) 241 F.3d 1121, 1124* (bankruptcy court properly determined validity of change in ownership provision)

Civ. Code § 1647 requires court to consider extrinsic evidence regarding circumstances surrounding agreement's formation, and when inferences reasonably support party's interpretation, jury must test credibility of that interpretation and extrinsic evidence. *Miller v. Fairchild Industries, Inc. (9th Cir. 1989) 885 F.2d 498, 507-508*

Summary judgment is not proper when agreement is ambiguous on its face; court must consider extrinsic evidence regarding circumstances of formation of contract and subsequent conduct of parties that supports reasonable interpretation of contract. *IBEW, Local 47 v. Southern California Edison Co. (9th Cir. 1989) 880 F.2d 104, 107-108* (third-party beneficiary issue)

Trial court is required to consider proffered extrinsic evidence even if contract is not ambiguous, but evidence is admissible only if written agreement is reasonably susceptible to interpretation consistent with proffered extrinsic evidence. *Barris Industries, Inc. v. Worldvision Enterprises, Inc. (9th Cir. 1989) 875 F.2d 1446, 1450*

When party contends that language of contract is ambiguous, test for admissibility of extrinsic evidence to explain meaning of contract is not whether contract appears to court to need interpreting but whether offered evidence is relevant to prove meaning to which language of instrument is reasonably susceptible; therefore, court must provisionally receive all credible evidence concerning parties' intentions, to determine whether contract language is reasonably susceptible to interpretation urged by party; and if, in light of extrinsic evidence, language is reasonably susceptible to interpretation urged, then extrinsic evidence is admitted to aid in interpreting contract. *Wagner v. Columbia Pictures Indus. (2007) 146 Cal. App. 4th 586, 589-590, 52 Cal. Rptr. 3d 898*

Trial court erred in finding that term "gross receipts" in author's royalty contract meant only cash, and in rejecting expert extrinsic evidence that in context of entertainment industry term meant both money and value of other consideration received when not otherwise limited or defined by contract. *Wolf v. Superior Court (2004) 114 Cal. App. 4th 1343, 1346, 1354-1355, 8 Cal. Rptr. 3d 649*

Substantial evidence supported trial court's ruling that phrase "forgiveness or discharge of debt" in contingency fee clause in attorney fee agreement was not ambiguous, and that undetermined and unrecovered claims did not constitute forgiveness or discharge of debt. *Beard v. Goodrich (2003) 110 Cal. App. 4th 1031, 1039, 2 Cal. Rptr. 3d 160*

Parol evidence rule did not bar extrinsic evidence introduced to assist court in ascertaining intent of parties regarding ambiguity of floor flatness standard in structural concrete subcontract. *Darling v. Controlled Environments Construction, Inc. (2001) 89 Cal. App. 4th 1221, 1234-1235, 108 Cal. Rptr. 2d 213*

Trial court committed reversible error in rejecting almost all exhibits and refusing to interpret agreements to determine formula for establishing rent or to consider extrinsic evidence pertinent to issue. *Southern Pacific Transportation Company v. Santa Fe Pacific Pipelines Inc. (1999) 74 Cal. App. 4th 1232, 1245-1246, 88 Cal. Rptr. 2d 777*

Parol evidence rule did not bar extrinsic evidence introduced by third party regarding intent of parties to release. *Neverkovec v. Fredericks (1999) 74 Cal. App. 4th 337, 350-353, 87 Cal. Rptr. 2d 856*

When defendant made no showing that contract was ambiguous or uncertain but claimed that parties had implied agreement to delete covenants implied by statute, grant of summary judgment for defendant was error. *Fidelity National Title Ins. Co. v. Miller (1989) 215 Cal. App. 3d 1163, 1172-1173, 264 Cal. Rptr. 17*

Sustaining demurrer was improper when extrinsic evidence should have been admitted to interpret contract provision. *Southern Pacific Land Co. v. Westlake Farms, Inc. (1987) 188 Cal. App. 3d 807, 815-817*

Latent ambiguity exists when language that appears to be perfectly clear is in fact susceptible to more than one reasonable interpretation; extrinsic evidence is admissible to determine existence of, and to resolve, latent ambiguity. *Los Angeles City Employees Union v. City of El Monte (1985) 177 Cal. App. 3d 615, 622-623, 220 Cal. Rptr. 411*

When guaranty instrument had blanks as to amount guaranteed, extrinsic evidence of intent that amount be unlimited was admissible to interpret instrument. *RCA Corp. v. Hunt (1982) 133 Cal. App. 3d 903, 905-906, 184 Cal. Rptr. 633*

[d] Implied Covenants

Same conduct that constitutes price-fixing conspiracy by consortium of purchasers under contract constitutes breach of duty of good faith imposed by *State of California v. Chevron Corp. (9th Cir. 1989) 872 F.2d 1410, 1413-1414* , (considering federal and California antitrust claims and California bad faith claim)

Allegation that defendant city breached implied covenant of good faith and fair dealing by preventing plaintiff entertainment production company from even submitting entertainment proposals for consideration adequately alleged breach of contract for amphitheater productions. *Pasadena Live, LLC v. City of Pasadena (2004) 114 Cal. App. 4th 1089, 1092-1094, 8 Cal. Rptr. 3d 233*

Covenant of good faith and fair dealing not implied so as to prohibit defendant lender from doing what it was expressly permitted to do under loan agreement-withhold loan funds when conditions precedent to its performance were not fulfilled to its satisfaction; defendant had no duty to act in good faith when making determination of satisfaction; it was required only to make objectively reasonable decision. *Storek & Storek, Inc. v. Citicorp Real Estate, Inc. (2002) 100 Cal. App. 4th 44, 55-58, 64, 122 Cal. Rptr. 2d 267*

Implied covenant of good faith and fair dealing in commercial lease and development agreement required land owner to do everything possible to accomplish purpose of lease; failure to do so was breach of implied covenant. *Ocean Services Corp. v. Ventura Port Dist. (1993) 15 Cal. App. 4th 1762, 1780-1782, 19 Cal. Rptr. 2d 750*

Implied covenant of good faith and fair dealing is not broad enough to require party, absent special circumstances such as letter of intent or acts constituting estoppel, to negotiate in good faith for modification or extension, or, once negotiations have commenced, to impose duty not to be unreasonable or not to break off negotiations for any reason or for no reason. *Racine & Laramie, Ltd. v. Department of Parks & Recreation (1992) 11 Cal. App. 4th 1026, 1034-1035, 14 Cal. Rptr. 2d 335*

Bank signature cards executed by customer do not contain implied promise of customer to refrain from writing checks on checking accounts without sufficient funds (NSF checks). *Shapiro v. United California Bank (1982) 133 Cal. App. 3d 256, 263, 184 Cal. Rptr. 34*

[e] Implied Terms

When parties failed to agree on termination provision for oral contract under which X was to receive commission based on percentage of orders booked for procuring customer (with continuing relationship) for Y, and Y unilaterally discharged X, X was entitled to post-termination commissions for reasonable period based on quantum meruit. *Watson v. Wood Dimension, Inc. (1989) 209 Cal. App. 3d 1359, 1363-1364, 257 Cal. Rptr. 816*

[f] Interpretation Against Party Causing Uncertainty

Contract, even adhesion contract, is not to be construed against party causing uncertainty unless and until established rules of interpretation are unsuccessful in removing uncertainty. *Mogil v. California Physicians Corp. (1990) 218 Cal. App. 3d 1030, 1040, 267 Cal. Rptr. 487*

Prepayment clause was ambiguous and was construed against drafter of contract; plaintiff, who borrowed from defendant drafter, was entitled to offset prepaid interest when payment of specified sum was made in accordance with clause. *Sands v. E.I.C., Inc. (1981) 118 Cal. App. 3d 231, 234-236, 173 Cal. Rptr. 342*

[g] Reasonable Interpretation

EPA order requiring business to remediate pollution did not initiate "suit" within meaning of insurance policies and thus did not give rise to insurers' duty to defend; use of word "suit" in policies was not ambiguous, as reasonable interpretation of that term is "lawsuit" (that is, court proceeding initiated by filing of complaint), and construction that included pre-complaint notices was not reasonable. *Foster-Gardner, Inc. v. National Union Fire Insurance Company (1998) 18 Cal. 4th 857, 879-880, 77 Cal. Rptr. 2d 107, 959 P.2d 265*

[h] Several Instruments Taken Together

Partnership agreement executed before construction agreement, which authorized general partners to bind limited partnership to construction agreement, was not one with construction agreement so as to give general partners benefit of attorney's fee provision in suit by limited partners for breach of partnership agreement. *Pilcher v. Wheeler (1992) 2 Cal. App. 4th 352, 355-357, 3 Cal. Rptr. 2d 533*

Letter of commitment to extend permanent financing and construction loan agreement were taken together. *Peterson Development Co. v. Torrey Pines Bank (1991) 233 Cal. App. 3d 103, 114, 284 Cal. Rptr. 367*

Rule under *Civ. Code § 1642* that several contracts relating to same matter are to be taken together was applicable to interpretation of transaction in which auto insurer issued separate liability policies on two of insured's three vehicles. *Colonial Insurance Co. v. Montoya (1986) 184 Cal. App. 3d 74, 83, 228 Cal. Rptr. 833*

Whether several writings compose one transaction is question of fact. *Nevin v. Salk (1975) 45 Cal. App. 3d 331, 338, 119 Cal. Rptr. 370*

[16] Mutuality of Obligation

Satisfaction clause in real estate contract did not render contract unenforceable for lack of mutuality, since promisor's duty to act in good faith was adequate consideration to support contract. *Larwin-Southern Cal., Inc. v. JGB Inv. Co. (1979) 101 Cal. App. 3d 626, 640, 162 Cal. Rptr. 52*

[17] Offer

[a] Generally

Licensed auto dealer's newspaper advertisement for sale of particular vehicle at specified price constituted offer that was accepted by customer's tender of the advertised price. *Donovan v. RRL Corp. (2001) 26 Cal. 4th 261, 271, 276, 109 Cal. Rptr. 2d 807, 27 P.3d 702* (construing offer in light of *Veh. Code § 11713.1(e)*, which states it is a violation of Vehicle Code for dealer to fail to sell vehicle at advertised price)

Common-law contract principles applied to contracts for sale of surplus school property under Naylor Act (former *Educ. Code § 39390 et seq.*); district's notice of "offer to sell" was actually only invitation to accept offers on specified terms; thus, city's responses were not acceptances and did not result in contract. *City of Moorpark v. Moorpark Unified School Dist. (1991) 54 Cal. 3d 921, 930-931, 1 Cal. Rptr. 2d 896, 819 P.2d 854*

Lottery advertisements are not offers to potential purchasers to enter into unilateral contracts by buying lottery tickets; thus, potential purchaser who could not purchase ticket with chosen numbers because ticket machine malfunctioned had no cause of action against state or retailer for breach of contract. *Brown v. California State Lottery Com. (1991) 232 Cal. App. 3d 1335, 1339-1340, 284 Cal. Rptr. 108*

[b] Option Supported by Consideration

Letter of commitment for which fee was paid was option to addressee to obtain loan at specific term. *Peterson Development Co. v. Torrey Pines Bank (1991) 233 Cal. App. 3d 103, 115, 284 Cal. Rptr. 367*

Dual nature of option; after exercise of option, optionee is entitled to specific performance of transfer relating back to time option was given. *In re Marriage of Joaquin (1987) 193 Cal. App. 3d 1529, 1532-1533, 239 Cal. Rptr. 175*

Option supported by consideration is irrevocable offer, open for prescribed period; unlike conditional or qualified acceptance in formation stage of contract, purported exercise of option that is qualified or conditional does not itself terminate option if time remains during term of option in which unauthorized qualification or condition may be removed and option may be exercised absolutely. *C. Robert Nattress & Associates v. CIDCO (1986) 184 Cal. App. 3d 55, 66-67, 229 Cal. Rptr. 33*

Although numerous decisions refer to exercise of option as acceptance of irrevocable offer, more accurate definition is that option is contract by which owner of property vests another with exclusive right to purchase property at stipulated sum within limited or reasonable period in future. *C. Robert Nattress & Associates v. CIDCO (1986) 184 Cal. App. 3d 55, 66, 229 Cal. Rptr. 33*

Right of first refusal, that is, preemptive right to purchase property on terms and conditions of offer to purchase by third person, becomes option of sorts after bona fide offer to purchase has been made to owner by third person. *C. Robert Nattress & Associates v. CIDCO (1986) 184 Cal. App. 3d 55, 66, 229 Cal. Rptr. 33*

Doctrine of substantial performance was not applicable to extend term of option to allow exercise after expiration of stated term; doctrine of relief from forfeiture under *Civ. Code § 3275* was similarly unavailable to allow optionee to recover price increment under new and more costly contract that optionee was forced to negotiate because of failure to exercise option within prescribed period. *Bekins Moving & Storage Co. v. Prudential Ins. Co. (1985) 176 Cal. App. 3d 245, 251-254, 221 Cal. Rptr. 738*

Option given for consideration is not permitted to be terminated without consent of optionee during period specified. *Prather v. Vasquez (1958) 162 Cal. App. 2d 198, 204, 327 P.2d 963*

[18] Oral and Written Contracts

In action for breach of real estate contract, plaintiff's successor in interest should not have been permitted to amend pleadings to conform to proof and assert claim for breach of written contract, in addition to original claim for breach of oral contract; defendants were unfairly prejudiced because plaintiff had testified at his deposition that only loan agreement between parties concerning property was oral agreement and that he had no knowledge of any agreement in nature of written lease-option; this testimony had reasonably limited focus of defendants' discovery efforts and manner in which they had prepared for trial; and at time of trial, plaintiff was deceased and so could not have been questioned on any issues relevant to alleged written lease-option agreement. *Garcia v. Roberts (2009) 173 Cal. App. 4th 900, 913, 93 Cal. Rptr. 3d 286*

Oral modification of written contract is valid executed oral agreement when promisee performs according to oral terms and gives valid consideration for new agreement by relinquishing right to certain benefits under original written agreement. *Sanders Construction Co. v. San Joaquin First Fed. Sav. & Loan Assn. (1982) 136 Cal. App. 3d 387, 396-397, 186 Cal. Rptr. 218*

Letter from one party reminding other party of terms of orally made agreement is not sufficient to bring contract within statute of limitations for written contracts. *Citizens Cas. Co. v. Otis Clark & Co. (1971) 19 Cal. App. 3d 294, 299-300, 96 Cal. Rptr. 838*

[19] Parol Evidence Rule

Bankruptcy court did not err in precluding introduction of parol evidence to interpret settlement agreement; provision was not reasonable susceptible to meaning offered. *In re Bennett (9th Cir. 2002) 298 F.3d 1059, 1064-1065*

Termination of underlying breach of contract and fraud action in favor of defendant based on parol evidence rule satisfied favorable termination element of that party's subsequent malicious prosecution claim. *Casa Herrera, Inc. v. Beydoun (2004) 32 Cal. 4th 336, 339, 349, 9 Cal. Rptr. 3d 97, 83 P.3d 497*

Parol evidence was not available to explain meaning of written agreement that did not, on its face, clearly provide for compounding of interest by securities broker on customer debit-balance accounts. *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1983) 33 Cal. 3d 816, 191 Cal. Rptr. 458, 662 P.2d 916*

Insured was entitled to submit parol evidence to support her interpretation of ambiguous health insurance policy term governing age rating. *Kavruck v. Blue Cross of California (2003) 108 Cal. App. 4th 773, 782-784, 134 Cal. Rptr. 2d 152*

Parol evidence rule did not constitute defense or bar to claim based on *Civ. Code § 1770(14)* (Consumer Legal Remedies Act); however, rule barred evidence of oral misrepresentations in fraud cause of action when auto lease was not reasonably susceptible to interpretation consistent with those representations. *Wang v. Massey Chevrolet (2002) 97 Cal. App. 4th 856, 870, 877, 118 Cal. Rptr. 2d 770*)

Contract that was integrated and in unambiguous terms required only notice for termination was not on its face reasonably susceptible of good cause requirement; because plaintiff offered no extrinsic evidence indicating contract was susceptible of such a meaning, parol evidence was not admissible to prove terms of contract. *Bionghi v. Metropolitan Water District of Southern California (1999) 70 Cal. App. 4th 1358, 1369, 83 Cal. Rptr. 2d 388*

Parol evidence was admissible to show creation of new agreement at termination of written agreement rather than to alter written agreement; admission of evidence was necessary to resolve ambiguity of written agreement. *Girard v. Ball (1981) 125 Cal. App. 3d 772, 785-786, 178 Cal. Rptr. 406*

[20] Performance

[a] Equitable Estoppel

Equitable estoppel was not available to bar collection of prepayment penalty when collection agent mistakenly accepted payoff from note maker's agent without penalty and maker's agent knew of clear penalty language in note. *Sanguansak v. Myers (1986) 178 Cal. App. 3d 110, 117-118, 223 Cal. Rptr. 490*

Equitable estoppel was applicable to estop payee from asserting maker's liability on note after maker did what payee instructed maker to do in response to maker's request that payee accept third person's payoff andrelinquish its security interest. *San Diego Credit Union v. Smith (1986) 176 Cal. App. 3d 919, 922-923, 222 Cal. Rptr. 467*

Civ. Code § 1606, which provides that moral obligation may be sufficient consideration, was not applicable to revive obligation that payee was equitably estopped from asserting, thus extension agreement was not binding on maker. *San*

Diego Credit Union v. Smith (1986) 176 Cal. App. 3d 919, 923-924, 222 Cal. Rptr. 467

[b] Joint Obligors

Performance by one of several joint obligors extinguishes liability of all. *Los Angeles National Bank v. Vance (1908) 9 Cal. App. 57, 59, 98 P. 58*

[c] Offer of Performance

Neither *Civ. Code § 1501* (waiver of inadequacies of tendered performance if no objection made at time of tender) nor *Code Civ. Proc. § 2076* (same) prohibited collection of prepayment penalty after collection agent mistakenly accepted payoff from note maker's agent without penalty; *Civ. Code § 1501* and *Code Civ. Proc. § 2076* apply to intentional failures to demand proper tender. *Sanguansak v. Myers (1986) 178 Cal. App. 3d 110, 115-117, 223 Cal. Rptr. 490*

[d] Time of Performance

Civ. Code §§ 9 and *11*, stating that whenever legal or contractual act is required to be performed on holiday, it may be performed on next business day without any adverse consequence, do not apply to national bank's credit card payment due dates because those state laws are preempted by federal law stating that national bank may make non-real-estate loans without regard to state law limitations concerning terms of credit, including schedule for repayment of principal and interest and payments due [*12 C.F.R. § 7.4008(d)(2)(iv)*]. *Miller v. Bank of Am. (2009) 170 Cal. App. 4th 980, 982, 88 Cal. Rptr. 3d 723*

Code Civ. Proc. § 12a, which extends time to perform act to next non-holiday if performance falls due on Saturday or other holiday, does not apply to acts governed solely by contractual provisions; that section, therefore, did not extend time in which tenants could exercise option to extend lease when act fell due on Saturday but was performed on Monday. *Gans v. Smull (2003) 111 Cal. App. 4th 985, 990*

Time is not of essence of contract unless it is so declared. *Baypoint Mortgage Corp. v. Crest Premium Real Estate etc. Trust (1985) 168 Cal. App. 3d 818, 825-826, 214 Cal. Rptr. 531*

When only reasonable inference was that parties intended covenant to be effective immediately, time for performance of covenant not to compete contained in option contract commenced on execution and delivery of option contract, not on exercise of option. *Hoover Community Hotel Development Corp. v. Thomson (1985) 167 Cal. App. 3d 1130, 1139, 213 Cal. Rptr. 750*

[21] Personal Service Contracts

That hospital had contract with law enforcement agencies to provide care to crime victims was not sufficient to give rise to personal service contract between rape victim and hospital. *Brownfield v. Daniel Freeman Marina Hospital (1989) 208 Cal. App. 3d 405, 411-412, 256 Cal. Rptr. 240*

[22] Promissory Estoppel as Substitute for Consideration

Dismissal of promissory estoppel claim affirmed; alleged representations did not constitute actionable promises because they were too vague and indefinite to be enforceable. *Glen Holly Entm't Inc. v. Tektronix Inc. (9th Cir. 2003) 352 F.3d 367, 381*

Doctrine of promissory estoppel applied (although fitting circumstances imperfectly) to public contract context; lowest responsible bidder wrongfully denied public contract had cause of action for monetary damages against public entity; damages included bid preparation costs but not lost profits. *Kajima/Ray Wilson v. Los Angeles MTA (2000) 23 Cal. 4th 305, 315-317, 96 Cal. Rptr. 2d 747*

Doctrine of promissory estoppel is essentially equitable in nature, developed to provide remedy not generally available in courts of law before 1850; consequently neither party is entitled to jury trial as matter of right. *C & K Engineering Contractors v. Amber Steel Co. (1978) 23 Cal. 3d 1, 8, 11, 151 Cal. Rptr. 323, 587 P.2d 1136*

Doctrine of promissory estoppel will not apply when promise of sufficient definitiveness and clarity is not found. *Lange v. TIG Ins. Co. (1998) 68 Cal. App. 4th 1179, 1186-1187, 81 Cal. Rptr. 2d 39*

Party asserting promissory estoppel is required to establish that injury resulted from reliance on promise. *Thomson v. International Alliance of Stage Employees (1965) 232 Cal. App. 2d 446, 454, 42 Cal. Rptr. 785*

[23] Termination

[a] Generally

When parties failed to agree on termination provision for oral contract under which X was to receive commission based on percentage of orders booked for procuring customer (with continuing relationship) for Y, and Y unilaterally discharged X, X was entitled to post-termination commissions for reasonable period based on quantum meruit. *Watson v. Wood Dimension, Inc. (1989) 209 Cal. App. 3d 1359, 1363-1364, 257 Cal. Rptr. 816*

[b] Breach of Implied Covenant of Good Faith and Fair Dealing

Author-publisher relationship did not warrant tort damages for bad faith breach of implied covenant of good faith and fair dealing when author had published many works, bargaining positions were equal, and motive for entering contract was profit. *Denholm v. Houghton Mifflin Co. (9th Cir. 1990) 912 F.2d 357, 361-362* (diversity case applying California law)

Cause of action for breach of implied covenant was duplicative of cause of action for breach of contract when it relied on same acts and sought same damages, and thus could be disregarded. *Bionghi v. Metropolitan Water District of Southern California (1999) 70 Cal. App. 4th 1358, 1370, 83 Cal. Rptr. 2d 388 , citing Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal. App. 3d 1371, 1395, 272 Cal. Rptr. 387 , below*

Cause of action for breach of implied covenant of good faith and fair dealing is not stated in absence of valid contract to which covenant applies. *Pacific States Enterprises, Inc. v. City of Coachella (1993) 13 Cal. App. 4th 1414, 1425, 17 Cal. Rptr. 2d 68*

When plaintiff has not pleaded any basis for recovery of anything other than ordinary contract damages, claim of tortious breach of covenant of good faith and fair dealing is simply duplicative of contract cause of action and may be disregarded. *Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal. App. 3d 1371, 1392, 1395, 272 Cal. Rptr. 387*

Allegation that parties had special relationship is sufficient to allow amendment to add cause of action for tortious breach of implied covenant of good faith and fair dealing. *Kittredge Sports Co. v. Superior Court (1989) 213 Cal. App. 3d 1045, 1048, 261 Cal. Rptr. 857*

On rescission of contract, all rights under contract are extinguished, including right to bring action for tortious breach of contract. *Imperial Cas. and Indem. Co. v. Sogomonian (1988) 198 Cal. App. 3d 169, 184-185, 243 Cal. Rptr. 639*

Implied covenant of good faith and fair dealing arises on formation of contract; thus, precontract conduct does not support tort action for breach of covenant. *Hess v. Transamerica Occidental Life Ins. Co. (1987) 190 Cal. App. 3d 941, 945, 235 Cal. Rptr. 715*

[c] Negligence

Although contract may create duty whose breach is negligence, contract between physician and hospital did not impose duty on hospital to keep report of peer review committee confidential; thus, no cause of action for negligence arose from disclosure to affiliated health insurer. *Amid v. Hawthorne Community Medical Group, Inc. (1989) 212 Cal. App. 3d 1383, 1392, 261 Cal. Rptr. 240*

[24] Third-Party Beneficiary

[a] In General

Understanding by promisor that promisee had intent to benefit third person is sufficient to bring third-party action under contract. *Lucas v. Hamm (1961) 56 Cal. 2d 583, 590-591, 15 Cal. Rptr. 821, 364 P.2d 685*

Record on appeal, after trial court granted defense motion for summary judgment, disclosed existence of triable issue of fact on question of whether plaintiff was intended third-party beneficiary of short-term residential lease between defendant landlord and plaintiff's employer. *Spinks v. Equity Residential Briarwood Apartments (2009) 171 Cal. App. 4th 1004, 1025-1030, 90 Cal. Rptr. 3d 453*

Third-party beneficiary has no standing to rescind contract. *Schauer v. Mandarin Gems of California, Inc. (2005) 125 Cal. App. 4th 949, 957-958, 23 Cal. Rptr. 3d 233*

Third party may qualify as beneficiary under contract when contracting parties must have intended to benefit third party and intent appears from the terms of the contract, as determined by reading the contract as a whole in light of the circumstances under which it was made. *Burnett v. Chimney Sweep (2004) 123 Cal. App. 4th 1057, 1070, 20 Cal. Rptr. 3d 562* ; *Johnson v. Superior Court (2000) 80 Cal. App. 4th 1050, 1064, 95 Cal. Rptr. 2d 864*

Test for determining whether contract was made for benefit of third person is whether that intent appears from terms of contract; if those terms necessarily require promisor to confer benefit on third person, contract contemplates that benefit and parties are presumed to have intended it. *Prouty v. Gores Tech. Group (2004) 121 Cal. App. 4th 1225, 1232, 18 Cal. Rptr. 3d 178*

Statutory requirement in *Civ. Code § 1559* that contract be made expressly for benefit of third-party beneficiary by judicial interpretation means only that benefit must not be incidental. *Prouty v. Gores Tech. Group (2004) 121 Cal. App. 4th 1225, 1232-1233, 18 Cal. Rptr. 3d 178*

When lease was extinguished by foreclosure and thus rescission did not occur according to statutory procedures, third-party beneficiary could still enforce agreement. *Principal Mutual Life Insurance Company v. Vars, Pave, McCord & Freedman (1998) 65 Cal. App. 4th 1469, 1485-1488, 77 Cal. Rptr. 2d 479* (mortgagee could enforce attornment provision in lease as third-party beneficiary of that provision)

Third person may not recover on contract that incidentally benefits third person but was not expressly made for his or her benefit. *Shurpin v. Elmhirst (1983) 148 Cal. App. 3d 94, 103, 195 Cal. Rptr. 737* ; *City & County of San Francisco v. Western Air Lines, Inc. (1962) 204 Cal. App. 2d 105, 121, 22 Cal. Rptr. 216*

Third-party beneficiary's rights are subject to conditions of contract. *Mercury Casualty Company v. Maloney (2003) 113 Cal. App. 4th 799, 802-803, 6 Cal. Rptr. 3d 647* ; *Votaw Precision Tool Co. v. Air Canada (1976) 60 Cal. App. 3d 52, 56, 131 Cal. Rptr. 335*

Test for determining whether contract was made for benefit of third person is whether intent to benefit third person appears from terms of contract; plaintiff is required to plead that contract was made expressly for his or her benefit or that it appears from contract that he or she was intended beneficiary. *Luis v. Orcutt Town Water Co. (1962) 204 Cal. App. 2d 433, 441-442, 22 Cal. Rptr. 389*

[b] Criteria

When government is party to contract, intent of parties to benefit third person is to be determined from terms of contract and circumstances surrounding formation of agreement. *Martinez v. Socoma Companies, Inc. (1974) 11 Cal. 3d 394, 401-402, 113 Cal. Rptr. 585, 521 P.2d 841*

Whether defendant attorney who was sued for malpractice in handling personal injury case against country club was intended third party beneficiary of release agreement between plaintiffs and country club was triable issue of fact; trial court erred in granting summary judgment to attorney on basis that language in release agreement was unambiguous and benefitted attorney. *Vahle v. Barwick (2001) 93 Cal. App. 4th 1323, 1332, 113 Cal. Rptr. 2d 793*

Developer whose proposed project was denied after consultant hired by county prepared EIR could not sue county for damages caused by county's alleged failure to prepare proper EIR, as developer was not third-party creditor beneficiary of county's contract with consultant; written terms of contract showed intent that developer was not intended beneficiary. *Mission Oaks Ranch, Ltd. v. County of Santa Barbara (1998) 65 Cal. App. 4th 713, 724, 77 Cal. Rptr. 2d 1 , disapproved on other grounds, Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1123, 81 Cal. Rptr. 2d 471, 969 P.2d 564*

Showing that claimant is of class of persons for whose benefit third-party contract was made is sufficient to fulfill requirement that contract be expressly for third party's benefit. *Rader Co. v. Stone (1986) 178 Cal. App. 3d 10, 30, 223 Cal. Rptr. 806*

[c] Third-Party Beneficiary Found

Under federal common law of contracts, federally funded medical clinics, which were able to purchase prescription drugs at discount from drug manufacturers under standardized agreement between federal government and those manufacturers, were intended direct beneficiaries of pharmaceutical pricing agreements between Secretary of Health and Human Services and those manufacturers, and clinics thus had right to enforce those agreements' discount provisions against manufacturers and sue them for reimbursement of excess payments. County of Santa Clara v. Astra USA, Inc. (9th Cir. 2008) 540 F.3d 1094, 1101-1102

Tort recovery for breach of duty arising out of third-party beneficiary contract permitted despite lack of privity, when transaction intended to benefit third party and harm to third party foreseeable. *Christensen v. Superior Court (1991) 54 Cal. 3d 868, 891, 2 Cal. Rptr. 2d 79, 820 P.2d 181* (close family members, funeral service contracts)

Subcontractor's liability insurer was third-party beneficiary of settlement agreement between contractor and

subcontractor for release of "subcontractor and its insurers" from claims by contractor; therefore, insurer had standing to sue contractor for breach of that agreement. *Performance Plastering v. Richmond Am. Homes of Cal., Inc. (2007) 153 Cal. App. 4th 659, 667, 63 Cal. Rptr. 3d 537*

Former employees of corporation were third-party beneficiaries of amendment to stock purchase agreement between former parent company and new parent company that expressly provided for specific severance benefits in event of their termination, notwithstanding general clause in original agreement stating that no third-party beneficiaries existed. *Prouty v. Gores Tech. Group (2004) 121 Cal. App. 4th 1225, 1232-1237, 18 Cal. Rptr. 3d 178*

Son attending college was donee beneficiary of parents' marital separation agreement thatprovided that father would pay for son's college expenses if father was financially able. *In re Marriage of Smith & Maescher (1993) 21 Cal. App. 4th 100, 108, 26 Cal. Rptr. 2d 133*

Company engaged in business of purchasing advertising space for clients was third-party beneficiary of contract between manufacturer and manufacturer's advertising agent that specifically provided for agent to contract with third persons for media time and space. *Outdoor Services, Inc. v. Pabagold, Inc. (1986) 185 Cal. App. 3d 676, 681-684, 230 Cal. Rptr. 73*

Prospective low-income tenants were third-party beneficiaries of regulatory contract between owner-developer and city required by *Health & Safety Code § 52080(b)*. *Zakaria v. Lincoln Property Co. (1986) 185 Cal. App. 3d 500, 509-510, 229 Cal. Rptr. 669*

Tenants had standing to sue as third-party beneficiaries for breach of contract between landlord and Department of Housing and Urban Development in which landlord agreed not to charge more rent than permitted by department-approved schedule of rents. *Zigas v. Superior Court (1981) 120 Cal. App. 3d 827, 834-840, 174 Cal. Rptr. 806*

[d] Third-Party Beneficiary Not Found

Real estate developer was not third-party beneficiary of contract between county and independent consultant for preparation of environmental impact report (EIR) because county's duty to prepare EIR was obligation owed to general public, not to developer. *Lake Almanor Assocs. L.P. v. Huffman Broadway Group, Inc. (2009) 178 Cal. App. 4th 1194, 1199-1202, 101 Cal. Rptr. 3d 71*

Property manager was not third-party beneficiary so as to benefit from exculpatory clause in commercial lease when exculpatory clause expressly applied only to "lessor" and did not mention property manager, whereas a separate indemnification clause expressly applied to "lessor and its agents." *Burnett v. Chimney Sweep (2004) 123 Cal. App. 4th 1057, 1070, 20 Cal. Rptr. 3d 562*

References to applicants for longshore-workers foreperson position in collective bargaining agreement and fact that they could use grievance process were insufficient to give them standing as third-party beneficiaries to sue for breach; local law, to extent compatible with federal law, determined whether plaintiffs were third-party beneficiaries of labor agreement. *Sepulveda v. Pacific Maritime Asso. (9th Cir. 1989) 878 F.2d 1137, 1139-1141*

Plaintiff, an officer of one corporation, who signed licensing agreements (providing for arbitration) with a second corporation in representative capacity rather than in individual capacity, was not third party beneficiary of contract and thus could not be compelled to arbitrate libel action he had brought against second corporation and its president. *Benasra v. Marciano (2001) 92 Cal. App. 4th 987, 991-993, 112 Cal. Rptr. 2d 358*

When plaintiff did not sign contract that contained attorney fee provision, defendant that was prevailing party could recover contractual attorney fees only if nonsignatory plaintiff would have been entitled to those fees had it prevailed; because contracting parties did not intend to benefit third party by including it within contractual attorney fee clause, it could not have recovered attorney fees had it prevailed on third-party breach of contract cause of action and thus it should not have attorney fees imposed against it. *Sessions Payroll Management, Inc. v. Noble Construction Co. (2000) 84 Cal. App. 4th 671, 680-681, 101 Cal. Rptr. 2d 127*

Person who was not party to release agreement could not enforce it as third-party beneficiary due to failure to meet burden of showing that parties intended their agreement to benefit him. *Neverkovec v. Fredericks (1999) 74 Cal. App. 4th 337, 349-350, 87 Cal. Rptr. 2d 856*

Excess insurer was incidental beneficiary, not express third-party beneficiary, in insurance agreement. *Fireman's Fund Ins. Co. v. Maryland Casualty Co. (1994) 21 Cal. App. 4th 1586, 1600, 26 Cal. Rptr. 2d 762*

Investor with profit participation was only incidental beneficiary, not third-party beneficiary, of sales contract between company in which investor owned stock and its customer, even though payments under contract were to be made to jointly designated account; purchaser's obligation was discharged by payment to seller. *Eastern Aviation Group, Inc. v. Airborne Express, Inc. (1992) 6 Cal. App. 4th 1448, 1452-1453, 8 Cal. Rptr. 2d 355*

Potential purchaser of lottery tickets was not third-party beneficiary of contract between state and retailer; retailer's contract with state to sell lottery tickets was intended to benefit schools, not "those who wish to engage in a capricious fling with fortune." *Brown v. California State Lottery Com. (1991) 232 Cal. App. 3d 1335, 1340-1341, 284 Cal. Rptr. 108*

Subcontractor was not third-party beneficiary of contract between city department and primary contractor, and thus could not state cause of action based on department's termination of primary contract after one unit of multiple-unit contract. *Lundeen Coatings Corp. v. Department of Water & Power (1991) 232 Cal. App. 3d 816, 834, 283 Cal. Rptr. 551*

Insured was not third-party beneficiary of contract between insurer and independent adjuster hired by insurer to investigate cause and validity of insured's claim. *Thompson v. Cannon (1990) 224 Cal. App. 3d 1413, 1416-1417, 274 Cal. Rptr. 608*

Civ. Code § 1559 precludes enforcement of contract by persons only incidentally or remotely benefited by it. *Clemens v. American Warranty Corp. (1987) 193 Cal. App. 3d 444, 455, 238 Cal. Rptr. 339* (vehicle service contract)

Plaintiff had no standing to sue as third-party beneficiary for breach of lease between landlord and tenant (to which plaintiff was not party) when lease contained no expression of intent to do anything but fix respective rights and duties of landlord and tenant. *Staples v. Hoefke (1987) 189 Cal. App. 3d 1397, 1414, 235 Cal. Rptr. 165*

Fact that contract between supplier and seller was executed after seller's agreement to assign franchise to plaintiff merely fortuitous and insufficient to establish plaintiff as third-party beneficiary entitled to enforce agreement with supplier when supplier had no knowledge of assignment and no intention to benefit third party. *Don Rose Oil Co., Inc. v. Lindsley (1984) 160 Cal. App. 3d 752, 756-758, 206 Cal. Rptr. 670*

Plaintiff who was only incidental beneficiary of title insurance policy issued to buyers was not intended third-party beneficiary and had no ground for recovery on contract against title insurer when title abstracter had no knowledge of plaintiff's interest in property at time contract was performed. *Stagen v. Stewart-West Coast Title Co. (1983) 149 Cal. App. 3d 114, 119, 196 Cal. Rptr. 732*

Former owner of basketball team was not third-party beneficiary of contract to combine assets and liabilities of two basketball teams entered into by former owner's assignee and general partner of another club, and thus was not permitted to enforce general partner's alleged obligation to pay remainder of deferred compensation to former player. *Kirst v. Silna (1980) 103 Cal. App. 3d 759, 763, 163 Cal. Rptr. 230*

[25] Unilateral and Bilateral Contracts

Once employer's unilaterally adopted policy--which required employees to be retained as long as specified condition did not occur--had become part of employment contract, employer thereafter could unilaterally terminate policy, even though specifiedcondition had not occurred. *Asmus v. Pacific Bell (2000) 23 Cal. 4th 1, 5, 96 Cal. Rptr. 2d 179, 999 P.2d 71*

Offer is generally interpreted by courts as contemplating bilateral rather than unilateral contract. *Bandoni v. Walston (1947) 79 Cal. App. 2d 178, 183, 179 P.2d 365*

[26] Void Provisions

Private parties cannot agree to alter statutory duties; federal law governs pension credit accrued while worker is in military. *Imel v. Laborers Pension Trust Fund for N. Cal. (9th Cir. 1990) 904 F.2d 1327, 1330*

Provision in commercial lease waiving right to jury trial in action on lease neither illegal nor contrary to public policy and therefore enforceable. *Trizec Properties, Inc. v. Superior Court (1991) 229 Cal. App. 3d 1616, 1619, 280 Cal. Rptr. 885*

Provision in contract purporting to relieve court of jurisdiction is void. *Estate of Parrette (1985) 165 Cal. App. 3d 157, 162, 211 Cal. Rptr. 313*

[27] Voidable Contracts

Federal statute requiring approval by Secretary of Interior if contract implicates lands held in trust by United States for Indian tribe [*see 25 U.S.C. § 81(b)*] does not require approval if contract implicates only lands that are merely anticipated to become, at some future date, lands held in trust for Indian tribe. *Guidiville Band of Pomo Indians v. NGV Gaming, Ltd. (9th Cir. 2008) 531F.3d 767, 2008 U.S. App. LEXIS 13474, at *43*

Oral joint venture agreement between attorney and client which was result of undue influence and violation of attorney's fiduciary duties was voidable; client did not ratify it by conduct; once client acted to void it, trial court properly refused to enforce it. *BGJ Associates, LLC v. Wilson (2003) 113 Cal. App. 4th 1217, 1226-1230, 7 Cal. Rptr. 3d 140*

Contract entered into by corporation while its powers, rights, and privileges are suspended [*see Rev. & Tax. Code §§ 23301, 23301.5*] is voidable at option of other party even after corporation has been revived. *Damato v. Slevin (1989) 214 Cal. App. 3d 668, 673-675, 262 Cal. Rptr. 879*

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Narasimhan, *Relationship or Boundary? Handling Successive Contracts, 77 Cal. L. Rev. 1077 (1989)*

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Legal Topics:

For related research and practice materials, see the following legal topics:
Computer & Internet LawInternet BusinessContractsDigital SignaturesContracts LawContract InterpretationParol EvidenceGeneral OverviewContracts LawDefensesUnconscionabilityGeneral OverviewContracts LawFormationGeneral OverviewContracts LawRemediesRestitution

California Forms of Pleading and Practice--Annotated

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Volume 13: Conspiracy thru Conversion-Chs. 126-159
Chapter 140 CONTRACTS
PART III. RESEARCH GUIDE

13-140 California Forms of Pleading and Practice--Annotated § 140.85

§ 140.85 Text References

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Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 1-1042 (10th ed. 2005)

Restatement (Second) of Contracts §§ 1-385 (1981)

Legal Topics:

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

California Forms of Pleading and Practice--Annotated

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Volume 13: Conspiracy thru Conversion-Chs. 126-159
Chapter 140 CONTRACTS
PART III. RESEARCH GUIDE

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[Reserved]

§§ 140.86[Reserved]

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Volume 13: Conspiracy thru Conversion-Chs. 126-159
Chapter 140 CONTRACTS
PART IV. PROCEDURAL CHECKLISTS

13-140 California Forms of Pleading and Practice--Annotated § 140.90

§ 140.90 Plaintiff's Checklist for Action for Damages

NOTE:

Illustrative Procedures. This checklist is for use by the plaintiff in an action for damages for breach of contract. It is illustrative of procedures commonly used. A given case may require procedures not set forth here.

[1] Ascertain Relevant Facts

☐ Facts relating to the plaintiff:

☐ Name, address, and telephone number of the plaintiff.

☐ Capacity of the plaintiff (*e.g.*, minor, adult, trustee, conservator, guardian, executor, partnership, domestic corporation, foreign corporation).

☐ Additional facts as desired, relating to the plaintiff's stability and financial solvency (*e.g.*, employment status, prior residences, credit, bank, and personal references).

☐ Facts relating to the defendants:

☐ Name and address of each potential defendant, including all parties to the contract and, depending on the case, their:

☐ Assignees.

☐ Successors in interest.

☐ Personal representatives.

☐ Heirs.

☐ Capacity of each potential defendant (*e.g.*, minor, adult, trustee, conservator, guardian, executor, partnership, domestic corporation, foreign corporation).

PRACTICE TIP:

When the defendant is the state or a local public entity, the plaintiff must follow the claim procedure prescribed in *Gov. Code § 810 et seq.*, the Government Claims Act (Tort Claims Act) [*City of Stockton v. Superior Court (2007) 42 Cal. 4th 730, 734, 737-740, 68 Cal. Rptr. 3d 295, 171 P.3d 20* ; *see § 140.55[5]*].

☐ Facts relating to the cause of action:

☐ Objective of the contract.

☐ Names, capacities, and addresses of all parties to the contract.

☐ Plaintiff's relationship to the contract or parties (*e.g.*, third-party beneficiary, assignee).

☐ Whether the contract was oral, written, or implied by conduct.

☐ Where the parties entered into the contract.

☐ When the breach occurred.

☐ Description of the defendant's obligations under the contract.

☐ Description of the plaintiff's obligations under the contract, or, if the plaintiff is a third-party beneficiary, assignee, etc., the obligations of the other party to the contract.

☐ Whether these were the original obligations of the parties; if the original obligations have been altered or modified, when, where, and in what respect.

☐ What precisely the defendant failed or refused to do.

☐ What reasons, if any, the defendant give for the failure or refusal to perform.

PRACTICE TIP:

Strategic Use of Defendant's Statements. Reasons, if any, the defendant gave for failing or refusing to perform may suggest possible defenses the defendant could raise in the breach of contract action and the kind of action the plaintiff should bring. For example, the defendant's statements may indicate that the plaintiff should sue for reformation of the contract, if the contract does not clearly reflect the intention of the parties, and for breach of the contract as reformed, or for declaratory relief if the parties dispute the meaning of an ambiguous provision in the contract.

☐ What the plaintiff said or did in response to the defendant's failure or refusal to perform, possibly indicating grounds for the defendant to raise affirmative defenses of waiver, estoppel, rescission of the contract, or others.

☐ How the defendant's failure or refusal injured the plaintiff.

☐ Whether there have there been any other disputes between the parties arising out of the contract, what they were, and whether they led to litigation.

☐ What obligations on the plaintiff's part remain to be performed under the contract.

[2] Obtain Relevant Documents

☐ The contract, if it is in writing, including all documents that collectively make up the contract.

NOTE:

A written contract can be wholly or partially in electronic form, or one or more of the parties can execute the contract by some type of electronic signature [*see Civ. Code § 1633.1 et seq.*]. For discussion of electronic contracts and signatures, see *§ 140.22[7]*. When this is the case, printouts of the relevant electronic documents should be made, and the originals should be preserved.

☐ Actual or purported written modifications or alterations of the contract.

☐ Memoranda or written communication between the parties relating to performance or nonperformance of the contract.

☐ Written notice of rescission.

☐ Any document tending to show items or amounts of damages.

☐ Documents filed in any prior action between the parties or others arising out of the contract.

[3] Make Preliminary Determinations

☐ Capacity of the plaintiff to sue, which may be governed by specific statutes for certain plaintiffs:

☐ Executor, administrator, or trustee, who may sue without joining persons for whose benefit they are prosecuting the action [*see Code Civ. Proc. § 369*].

☐ Married person [*see Code Civ. Proc. § 370*].

☐ Minor, incompetent person, or person for whom a conservator has been appointed, who, in each instance, lacks capacity to sue and must appear by a guardian, conservator of the estate, or guardian ad litem [*Code Civ. Proc. § 372(a)*].

☐ Causes of action and counts, which may be or include:

☐ Reformation [*see Civ. Code §§ 3399, 3402*; *Landis v. Superior Court (1965) 232 Cal. App. 2d 548, 555, 42 Cal. Rptr. 893* ; *see also* *Lemoge Electric v. County of San Mateo (1956) 46 Cal. 2d 659, 663, 297 P.2d 638* (reformation only available to effectuate common, single intention of both parties incorrectly reduced to writing); *Bailard v. Marden (1951) 36 Cal. 2d 703, 708, 227 P.2d 10* ; for further discussion, procedures, and forms for use in actions for reformation of contracts, *see* Ch. 488, *Reformation of Instruments*].

☐ Cancellation [*see Civ. Code § 3412*] and any monetary relief necessary to do complete equity between the parties [*Matlin v. Crescent Commercial Corp. (1949) 93 Cal. App. 2d 8, 11, 207 P.2d 873* ; for discussion and forms for use in actions for cancellation, *see* Ch. 107, *Cancellation of Instruments*].

☐ Unilateral rescission and restitution [*see Civ. Code §§ 1689(a), 1691*] if any of the following is satisfied [*Civ. Code § 1689(b)*; for discussion, procedures, and forms for use in an action for restitution based on rescission, *see* Ch. 490, *Rescission and Restitution*]:

☐ The consent of the party rescinding, or of any party jointly contracting with the rescinding party, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom the party rescinds, or of any other party to the contract jointly interested with such party; or

☐ The consideration for the obligation fails, in whole or in part, through the fault of the party as to whom the party rescinds; or

☐ The consideration for the obligation of the rescinding party becomes entirely void from any cause; or

☐ The consideration for the obligation of the rescinding party, before rendered to that party, fails in a material respect from anycause; or

☐ The contract is unlawful for causes that do not appear in its terms or conditions,

and the parties are not equally at fault; or

☐ The public interest will be prejudiced by permitting the contract to stand.

☐ Unilateral rescission pursuant to any statute authorizing rescission [*see Civ. Code § 1689(b)(7)*], including:

☐ *Civ. Code § 39* (contracts by incompetent persons before incompetence judicially determined).

☐ *Civ. Code § 1533* (grounds for rescission by creditor).

☐ *Civ. Code § 1566* (rescission on ground that consent was not free).

☐ *Civ. Code § 1930* (rescission by letter when hirer uses thing let for purpose other than purpose for which it was hired).

☐ *Civ. Code § 2314* (rescission of ratification of agency).

☐ *Ins. Code § 331* (rescission of insurance policy by insured for concealment).

☐ *Ins. Code § 338* (rescission by insurer for intentional and fraudulent omission by insured to communicate information about falsity of warranty).

☐ *Ins. Code § 359* (rescission by aggrieved party for representation that was false in material point).

☐ *Ins. Code § 447* (rescission for violation of material warranty or other material provision of insurance policy).

☐ *Ins. Code § 1904* (rescission for intentional misrepresentations involving marine insurance).

☐ *Ins. Code § 2030* (rescission of fire insurance contract for alteration in use or condition of insured property).

☐ Declaratory relief [*see Code Civ. Proc. § 1060*; *Fagerstedt v. Continental Ins. Co. (1968) 266 Cal. App. 2d 370, 372, 72 Cal.Rptr. 126* ; for discussion, procedures, and forms for use in actions for declaratory relief, *see* Ch. 182, *Declaratory Relief*].

☐ Specific performance [*see Civ. Code § 3384 et seq.*], provided all the following conditions are

satisfied, unless a statute makes specific performance unavailable [*see Civ. Code §§ 3390, 3391*; for discussion, procedures, and forms for use in actions for specific performance, *see* Ch. 528, *Specific Performance*].

☐ The terms of the contract are complete and certain in all particulars essential to its enforcement, and the agreement contains all the material terms expressed in a reasonably definite manner [*Lawrence v. Shutt (1969) 269 Cal. App. 2d 749, 761, 75 Cal. Rptr. 533* ; *White Point Co. v. Herrington (1968) 268 Cal. App. 2d 458, 465, 73 Cal. Rptr. 885]* ; and

☐ The plaintiff has fully and fairly performed all conditions precedent on plaintiff's part to the obligation of the other party, or the plaintiff has partially failed to perform, but the failure was either entirely immaterial or capable of being fully compensated [*Civ. Code § 3392*]; and

☐ The contract is fair and reasonable as to the defendant [*Civ. Code § 3391(2)*]; and

☐ The defendant received adequate consideration [*Civ. Code § 3391(1)*]; and

☐ The defendant's assent was not obtained by misrepresentation [*Civ. Code § 3391(3)*] or under the influence of mistake [*Civ. Code § 3391(4)*]; and

☐ The remedy at law (damages) would be inadequate [*Morrison v. Land (1915) 169 Cal. 580, 586, 147 P. 259* ; *see also Wilkison v. Wiederkehr (2002) 101 Cal. App. 4th 822, 832-833, 124 Cal. Rptr. 2d 631* (plaintiff could not maintain action for quasi-specific performance when he had adequate legal remedy in form of claim for damages)].

PRACTICE TIP:

Injunction as Alternative or Additional Relief. An injunction may be sought as an alternative or additional remedy to an action for breach of contract if the contract would be specifically enforceable. Suing for an injunction does not waive the plaintiff's right to assert a claim for damages in a subsequent action [*Ahlers v. Smiley (1912) 163 Cal. 200, 206, 124 P. 827]* . For discussion, procedures, and forms for use in obtaining injunctive relief, see Ch. 303, *Injunctions* .

☐ Unlawful interference with contractual relationship.

PRACTICE TIP:

Tort Action Against Interfering Third Person in Lieu of Contract Action. If one purposely and wrongfully induces another not to perform a contract by an act either unlawful in itself, such as libel, slander, fraud, physical violence, or threats of such an action [*Elsbach v. Mulligan (1943) 58 Cal. App. 2d 354, 366, 136 P.2d 651]* , or lawful in itself but not justified, in that the breach was not induced to protect an interest that has greater social value than insuring the stability of the contract [*Imperial Ice Co. v. Rossier (1941) 18 Cal. 2d 33, 35, 112 P.2d 631]* , a party to the contract who is aggrieved may bring an action against the party that induced the breach. For

discussion and forms for use in an action for unlawful interference with a contractual relationship, see Ch. 565, *Unlawful Competition* .

☐ Determine whether another state's law might govern interpretation of the contract, based on:

☐ The contract's choice of law provision [*see* *Gamer v. DuPont GloreForgan, Inc. (1976) 65 Cal. App. 3d 280, 286-287, 135 Cal. Rptr. 230* ; *see also* *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1971) 20 Cal. App. 3d 668, 673, 97 Cal. Rptr. 811* (contracting parties may specify what law is to control contract if enforcement of contract in accordance with specified foreign law does not result in evasion of settled public policy or statute of California protecting its citizens); *but see* *Hall v. Superior Court (1983) 150 Cal. App. 3d 411, 416-417, 197 Cal. Rptr. 757* (agreement designating foreign law will not be given effect if it would violate strong California public policy or result in evasion of statute protecting California citizens)]; or

☐ The respective interests of the states or other jurisdictions involved (governmental interest approach) [*Hurtado v. Superior Court (1974) 11 Cal. 3d 574, 579-580, 114 Cal. Rptr. 106, 522 P.2d 666]* , considering the following factors:

☐ Character of the contract and purposes of the contract law under consideration [*Dixon Mobile Homes, Inc. v. Walters (1975) 48 Cal. App. 3d 964, 972-973, 122 Cal. Rptr. 202] , disapproved on other grounds in* *Bullis v. Security Pac. Nat'l Bank (1978) 21 Cal. 3d 801, 815 n.18, 148 Cal. Rptr. 22, 582 P.2d 109* ;

☐ Where the parties entered into the contract [*see* *Henderson v. Superior Court (1978) 77 Cal. App. 3d 583, 592-593, 142 Cal. Rptr. 478]* ;

☐ Where the negotiations for the contract took place;

☐ Where the contract was performed or was to be performed [*see* *Henderson v. Superior Court (1978) 77 Cal. App. 3d 583, 592-593, 142 Cal. Rptr. 478]* ;

☐ Where the subject matter of the contract was located;

☐ Domiciles, residences, places of business, and places of incorporation of the parties;

☐ Nationality of the parties;

☐ If any payments were made, where they were initiated;

☐ If a loan was involved, where the security for the loan was located;

☐ Where any acts relating to the breach occurred.

☐ Determine the appropriate venue (county) for filing the complaint [*see § 140.100[3][d]*].

☐ Determine if case is a limited civil case [*see Code Civ. Proc. §§ 85, 86(a)(1)* (amount in controversy, exclusive of interest, is $25,000 or less)].

☐ If the action is a limited civil case, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*].

[4] Prepare the Complaint

☐ Draft essential allegations:

☐ Capacity or residence of the plaintiff (generally optional, unless plaintiff is suing in a representative capacity or it is necessary to establish the plaintiff's right to maintain the action).

☐ Name, capacity, and residence of the defendant or each defendant. See the *form in § 140.101[1]* (Paragraph 1).

☐ Fictitious name allegations, if appropriate. See the *form in § 140.101[1]* (Paragraph 2). For other forms of fictitious name allegations, see Ch. 20, *Allegations Commonly Used* .

☐ The date and place of making the contract. See the *form in § 140.101[1]* (Paragraph 4).

☐ Whether the contract was written or oral. See the *form in § 140.101[1]* (Paragraph 4).

☐ If the defendant's performance is conditioned on an event, the happening of the event on which the obligation depends.

☐ Plaintiff's performance of all conditions, covenants, and promises under the contract on plaintiff's part to be performed (or the excuse for nonperformance). See the *form in § 140.101[1]* (Paragraph 5).

☐ Defendant's breach of the contract. See the *form in § 140.101[1]* (Paragraph 7).

☐ Plaintiff's damages as a result of the defendant's breach. See the *form in § 140.101[1]* (Paragraph 8).

☐ If the meaning of the contract is at issue, the meaning the plaintiff ascribed to the contract and the particular customs and usages relating to the contract.

☐ Produce an original complaint and copies as needed and as prescribed by rules of court.

☐ Format, typing, paper, and style requirements are prescribed in the California Rules of Court. For discussion, see Ch. 123, *Complaints and Cross Complaints* .

☐ Copies to be prepared include:

☐ Original for filing.

☐ Copies for service on each defendant.

☐ Copy for office file.

☐ Copy for client, if desired.

☐ Sign the complaint, or have the plaintiff sign it [*Code Civ. Proc.§ 446*].

☐ Add a verification if appropriate [*see Code Civ. Proc. §§ 446, 2009, 2015.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAgeContracts LawFormationCapacity of PartiesMental CapacityContracts LawRemediesRescission & RedhibitionContracts LawRemediesSpecific PerformanceLabor & Employment LawWrongful TerminationBreach of ContractEmployer HandbooksTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview

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Chapter 140 CONTRACTS
PART IV. PROCEDURAL CHECKLISTS

13-140 California Forms of Pleading and Practice--Annotated § 140.91

§ 140.91 Defendant's Checklist of Affirmative Defenses

NOTE:
For a table of affirmative defenses referring to forms of affirmative defenses provided throughout this publication, see Ch. 26, *Answers* .

☐ Disaffirmation of minor's contract [*see Fam. Code § 6710*]. For discussion and forms of affirmative defenses relating to contracts entered into by a minor, see Ch. 365, *Minors : contract Actions*.

☐ Defendant's entire lack of understanding [*see Civ. Code § 38*; § 140.133].

☐ Defendant's incompetence before adjudication [*see Civ. Code §§ 39, 1691*; § 140.134].

☐ Defendant's incompetence after adjudication [*see Civ. Code § 40*; *Hellman Commercial T. & S. Bk. v. Alden (1929) 206 Cal. 592, 604-605, 275 P. 794* ; § 140.135].

☐ Waiver of breach [*see § 140.136*].

☐ Impossibility of performance [*see Civ. Code §§ 1441, 1511(2), 1596*; § 140.137].

☐ Payment of the amount claimed [*see Civ. Code §§ 1473-1475, 1478*; § 140.138].

☐ Tender of payment [*see Civ. Code § 1485 et seq.*; § 140.139].

☐ Prevention of performance [*see Civ. Code § 1511(1)* (requirement for notice); § 140.140].

☐ Novation [*see Civ. Code § 1530*; § 140.141].

☐ Lack of consideration [*see Civ. Code § 1550*; § 140.142].

☐ Statute of frauds [*see Civ. Code § 1624*; § 140.143].

☐ Contract contrary to an express provision of law [*see Civ. Code § 1667(1)*; § 140.144].

☐ Contract contrary to public policy [*see Civ. Code § 1667(2), (3)*; § 140.145].

☐ Contract or clause is unconscionable [*see Civ. Code § 1670.5*; § 140.146].

☐ Rescission by mutual consent [*see Civ. Code § 1689(a)*; § 140.147].

☐ Failure of consideration [*see Civ. Code § 1689(b)(2)*; § 140.148].

☐ Modification of oral contract by writing [*see Civ. Code § 1697*; § 140.149].

☐ Modification of written contract by written agreement or by oral agreement supported by new consideration [*see Civ. Code § 1698(a), (c)*; § 140.150].

☐ Modification of written contract by executed oral agreement [*see Civ. Code § 1698(b)*; § 140.151].

☐ Alteration of written contract without consent [*see Civ. Code § 1700*; § 140.152].

☐ Execution of contract under menace by threat of confinement of or injury to person or property of defendant, defendant's spouse, or defendant's or defendant's spouse's ancestor, descendant, or adopted child [*see Civ. Code §§ 1569, 1570*].

☐ Fraud in the inducement to execute the contract by [*see Civ. Code § 1572*]:

☐ Suggestion as a fact of that which was not true by the plaintiff, who did not believe it to be true; or

☐ Positive assertion of that which was not true, in a manner not warranted by information, by the plaintiff although the plaintiff believed it to be true; or

☐ Suppression of that which was true by the plaintiff, who had knowledge or belief of

the fact; or

☐ A promise made without any intention of performing it; or

☐ Any other act intended to deceive.

☐ Execution of contract under undue influence.

☐ Mistake of fact [*see Civ. Code § 1577*] that was material to the contract and not the result of neglect of legal duty, if enforcement of the contract would be unconscionable and if the other party can be placed in "status quo ante" [*see Donovan v. RRL Corp. (2001) 26 Cal. 4th 261, 271, 294, 109 Cal. Rptr. 2d 807, 27 P.3d 702* (construing *Civ. Code § 1577* and determining that defendant satisfied requirements for rescission of contract on ground of unilateral mistake of fact); *M.F. Kemper Constr. Co. v. Los Angeles (1951) 37 Cal. 2d 696, 701, 235 P.2d 7* (rescission is available remedy); *California Packing Corp. v. Larsen (1921) 187 Cal. 610, 612, 203 P. 102* (reformation is available remedy); *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga (2009) 175 Cal. App. 4th 1306, 1343, 96 Cal. Rptr. 3d 813* (rescission was justified because of both parties' mistake of fact regarding one party's ability to qualify for status that was essential to achieving contract's purpose); *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 18 n.8, 262 Cal. Rptr. 716* ; *see generally Civ. Code § 1688 et seq.* (rescission); *Civ. Code § 3399 et seq.* (reformation)].

☐ Mistake of law [*see Civ. Code § 1578*] that affected execution and material elements of the contract, if enforcement would be materially harmful or more onerous to the defendant than it would have been had the law been as believed [*Guthrie v. Times-Mirror Co. (1975) 51 Cal. App. 3d 879, 886, 124 Cal. Rptr. 577* ; *see Civ. Code § 1688 et seq.* (rescission)].

☐ Prevention by superhuman cause [*see generally Ryan v. Rogers (1892) 96 Cal. 349, 353, 31 P. 244* (natural cause whose effect could not have been prevented by exercise of prudence, diligence, and care)] or enemy act.

☐ Accord and satisfaction. For discussion, see Ch. 6, *Accord and Satisfaction* .

☐ Failure to follow the claim procedure prescribed in *Gov. Code § 810 et seq.*, the Government Claims Act (Tort Claims Act), when the defendant is the state or a local public entity [*see City of Stockton v. Superior Court (2007)42 Cal. 4th 730, 734, 737-740, 68 Cal. Rptr. 3d 295, 171 P.3d 20* ; *see also § 140.55[5*]].

☐ Defenses or claims that can be asserted by the defendant against an assignee-plaintiff [*see Civ. Code § 1457*; *Royal Bank Export Finance Co. v. Bestways Distributing Co. (1991) 229 Cal. App. 3d 764, 767-768, 280 Cal. Rptr. 355]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesUnconscionabilityGeneral

OverviewContracts LawPerformanceDischarges & TerminationsContracts LawPerformanceNovationContracts LawRemediesRescission & RedhibitionGeneral Overview

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§§ 140.92[Reserved]

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PART V. FORMS
A. Complaints and Allegations

13-140 California Forms of Pleading and Practice--Annotated § 140.100

§ 140.100 Judicial Council Trial Court Pleading Form--Complaint for Damages [Civ. Code § 3300] for Breach of Contract [Cal. Rules of Ct., Rule 1.45(a), (b); Judicial Council Forms PLD-C-001, PLD-C-001(1)]

[1] FORM Judicial Council Trial Court Pleading Form--Complaint for Damages [Civ. Code § 3300] for Breach of Contract [Cal. Rules of Ct., Rule 1.45(a), (b); Judicial Council Forms PLD-C-001, PLD-C-001(1)]

Click here to view image.

[2] Use of Form

This form is a complaint that may be used in any action for breach of contract. It consists of the Judicial Council contract complaint with an attached Judicial Council breach of contract cause of action [*see Code Civ. Proc. § 425.12*; *Cal. Rules of Ct., 1.45*; Judicial Council Forms PLD-C-001, PLD-C-001(1)].

Use of these forms is optional [*see Code Civ. Proc. § 425.12*; *Cal. Rules of Ct., Rule 1.45*]. For discussion and forms for complaints that can be used in lieu of the Judicial Council forms, see *§§ 140.101 -140.106*.

For reproduction and discussion of the Judicial Council form for a cause of action for common counts [Judicial Council Form PLD-C-001(2)], see *Ch. 121, Common Counts, § 121.50*. If a fraud cause of action is being asserted in conjunction with the breach of contract claim, Judicial Council Form PLD-C-001(3) may be attached. For an illustration of the latter form, see *Ch. 269, Fraud and Deceit, § 269.90*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Filling Out Contract Complaint Form

[a] Heading

Counsel should fill in the name, address, and telephone number of the attorney for the plaintiff, the name, post office and street address of the court, and the names of the plaintiff and the defendant. The appropriate box should be checked and the number completed if the complaint is filed against defendants unknown at the time of filing. In addition, counsel should check the appropriate box to designate the pleading as a complaint or a cross complaint.

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*]. The statement regarding the demand must use the following language: "Amount demanded _____ [exceeds *or* does not exceed] $10,000" [*see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")]. The caption of the Judicial Council form contains space for the preceding information, as well as a box that may be checked if the action is being reclassified as a limited or unlimited civil case as the result of filing of the form as an amended complaint or cross-complaint.

[b] Number of Pages (Paragraph 2)

The blank with the number of pages contained in the pleading, including attachments and exhibits, must be filled in.

[c] Action Involving Installment or Automotive Sales or Consumer Obligations (Paragraph 6)

The appropriate boxes in Paragraph 6 must be checked when the action is subject to the provisions of the Unruh Retail Installment Act [*see Civ. Code § 1801 et seq.*] or the Rees-Levering Motor Vehicle Sales and Finance Act [*see Civ. Code § 2981 et seq.*]. If the action arises from an offer or provision of goods, services, loans or extensions of credit intended primarily for personal, family or household use, other than an obligation described in *Civ. Code §§ 1812.10* or *2984.4*, or arises from a transaction consummated as a proximate result of either an unsolicited telephone call made by a seller engaged in the business of consummating transactions of that kind or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller, then *Code Civ. Proc. § 395(b)* applies [*see Fontaine v. Superior Court (CashCall, Inc.) (2009) 175 Cal. App. 4th 830, 838-840, 96 Cal. Rptr. 3d 607* (statute applies to action by or against consumer, and if any defendant in consumer's action is individual, that is irrelevant to application of statute)], and the plaintiff should check the first box and insert "*Code of Civil Procedure Section 395(b)*" in lieu of the printed alternatives [*see Code Civ. Proc. § 396a(a)*].

In any action under these provisions, the plaintiff must file an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) concurrently with the complaint, stating facts showing that the action has been commenced in the proper court for the trial of the action, and that the action is subject to the provisions of *Civ. Code § 1812.10* or *Civ. Code § 2984.4* or *Code Civ. Proc. § 395(b)*. When the plaintiff files an affidavit or declaration with the complaint, plaintiff must serve a copy with the summons [*Civ. Code §§ 1812.10(c), 2984.4(c)*; *Code Civ. Proc. § 396a(a)*]. In lieu of an affidavit or declaration, the plaintiff may state the required facts in a complaint verified by the oath of the plaintiff or plaintiff's attorney [*Civ. Code §§ 1812.10(c), 2984.4(c)*; *Code Civ. Proc. § 396a(a)*]. In cases subject to *Civ. Code § 1812.10* or *Civ. Code § 2984.4*, however, the plaintiff may not state facts on information or belief when they are stated in a verified complaint [*Civ. Code §§ 1812.10(c), 2984.4(c)*].

If the plaintiff fails to file an affidavit or declaration or state the required facts in a verified complaint, there may be no further proceedings. The court must, on its own motion or the motion of a party, dismiss the action without prejudice. The court, however, on such terms as may be just, may permit the plaintiff to file an affidavit or declaration after the complaint. In that case, the plaintiff must serve a copy of the affidavit on the defendant. The defendant's time to answer

orotherwise plead dates from the service [*Civ. Code §§ 1812.10(c), 2984.4(c)*; *see Code Civ. Proc. § 396a(a)*].

For further discussion, see Ch. 20, *Allegations Commonly Used* , Ch. 89 *Automobiles: Sales and Financing Under the Rees-Levering Act* , and Ch. 501, *Sales: Retail Installment Sales* .

[d] Venue (Paragraph 7)

Paragraph 7 provides allegations relating to venue of the action, which may be determined by the following rules:

- Subject to *Code Civ. Proc. § 395(b)* (see the next rule), if a defendant has contracted to perform an obligation in a particular county, the superior court in the county where the obligation is to be performed, or where the contract in fact was entered into, or where the defendant or any defendant resides at the commencement of the action, is a proper court for the trial of an action founded on that obligation, and the county where the obligation is incurred is the county where it is to be performed, unless there is a special contract in writing to the contrary [*Code Civ. Proc. § 395(a)*].

- In an action arising from an offer or provision of goods, services, loans, or extensions of credit intended primarily for personal, family, or household use, other than an obligation described in *Civ. Code §§ 1812.10* or *2984.4* (see the next rule), or in an action arising from a transaction consummated as a proximate result of either an unsolicited telephone call made by a seller engaged in the business of consummating transactions of that kind or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller, the superior court in the county where the buyer or lessee in fact signed the contract, or where the buyer or lessee resided at the time the contract was entered into, or where the buyer or lessee resides at the commencement of the action, is the proper court for the trial of the action [*Code Civ. Proc. § 395(b)*; *see Fontaine v. Superior Court (CashCall, Inc.) (2009) 175 Cal. App. 4th 830, 838-840, 96 Cal. Rptr. 3d 607* (statute applies to action by or against consumer, and if any defendant in consumer's action is individual, that is irrelevant to application of statute)].

- Venue provisions relating to an action under the Unruh Retail Installment Sales Act [*Civ. Code § 1801 et seq.*; *see* Ch. 501, *Sales: Retail Installment Sales*] or the Rees-Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 2981 et seq.*; *see* Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act*] are set out in *Civ. Code §§ 1812.10(a)* and *2984.4(a)*.

- A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or where the breach occurs, or where the principal place of business of the corporation or association is situated [*Code Civ. Proc. § 395.5*].

[e] Causes of Action Attached (Paragraph 8)

Counsel should check the appropriate box in Paragraph 8 for each cause of action attached. The form contains specific boxes for breach of contract and common counts, and a general category labeled "Other." "Other" may include a Judicial Council approved cause of action form or a form prepared by counsel for a cause of action for which the Judicial Council has not yet approved a form [*Cal. Rules of Ct., Rule 1.45(b), (c)*]. Counsel should specify the title of the cause of action when checking "Other."

[f] Other Allegations (Paragraph 9)

Paragraph 9 provides space for other allegations. This space may be used for stating facts that do not fit within one of the specified paragraphs.

[g] Prayer (Paragraph 10)

In Paragraph 10, counsel should check the appropriate boxes for requesting damages, interest on damages, and attorney's fees. When plaintiff requests damages, counsel should fill in the amount. When attorney's fees are requested, counsel should check the "attorney fees" box and fill in a specific amount, or check the box asking for fees according to proof. Counsel should check "Other" and state the relief requested when seeking relief not specified on the form.

When seeking prejudgment interest from the date of breach at a rate stipulated by the contract [*see Civ. Code § 3289(a)*], counsel should insert the stipulated rate, state the date of breach, and check all three boxes. If the contract does not stipulate a legal rate of interest, the obligation bears interest at 10 percent per year after the breach [*Civ. Code § 3289(b)*] (except note secured by deed of trust on real property). Counsel should specify 10 percent per year, state the date of breach, and check all three boxes. When seeking prejudgment interest on damages not certain at the time of filing the complaint, and if the parties entered into the contract before 1986 and the contract contains no provision for interest on damages following a breach, counsel should check the first two boxes on the line referring to interest.

When seeking prejudgment interest at the legal rate from the date damages were certain or capable of being made certain [*see Civ. Code § 3287(a)*], counsel should insert the date damages became certain, substitute "legal rate" for "rate of _____ percent per year," and check all three boxes [*see Civ. Code § 3302* (detriment caused by breach of obligation to pay money only is amount due with interest)].

[h] Pleading on Information and Belief (Paragraph 11)

If plaintiff alleges any matters on information and belief, counsel should check the box for Paragraph 11 and specify the appropriate paragraph numbers. Allegations as to matters peculiarly within the defendant's knowledge, which the plaintiff can learn only from statements made by the defendant to others, may properly be based on information and belief. The plaintiff may not allege on information and belief facts presumptively within plaintiff's knowledge [*Hall v. James (1926) 79 Cal. App. 433, 435-436, 249 P. 876* ; *Seamen's Bank v. Superior Court (1987) 190 Cal. App. 3d 1485, 1495, 236 Cal. Rptr. 31]* , such as facts that are public record [*People v. Birch Securities Co. (1948) 86 Cal. App. 2d 703, 708, 196 P.2d 143*].

[4] Filling Out Breach of Contract Attachment

[a] Heading

Counsel should fill in the breach of contract cause of action heading with the short title of the case and the number of the cause of action. In addition, counsel should fill in the page number of the cause of action and check the appropriate box stating whether the cause of action is attached to a complaint or cross complaint.

[b] Nature of Contract (Paragraph BC-1)

Counsel should specify the plaintiff's name, the date the parties made the contract, the parties to the agreement, and the nature of the contract. The form contains boxes to indicate whether the contract was written, oral, or other. If counsel selects the "other" box, counsel should specify the type of agreement involved, such as an implied contract. The defendant may object by demurrer or answer to a complaint founded on a contract when defendant cannot ascertain from the complaint whether the contract iswritten, oral, or implied by conduct [*Code Civ. Proc. § 430.10(g)*].

Counsel should also check a box indicating that a copy of the agreement is attached as Exhibit A, or that the essential terms are stated in an attachment (Attachment BC-1) or specified in the space following Paragraph BC-1. Apparently, an attachment should be used when the essential terms cannot be alleged within the space provided on the form. All attachments to the cause of action must have numbers that correspond to the form's appropriate paragraph number.

[c] Defendant's Acts in Breach of Contract (Paragraph BC-2)

Counsel should specify the dates of breach and the defendant's acts in breach of the contract [*see Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377]* in the space provided in Paragraph BC-2 or in an attachment labeled Attachment BC-2. Counsel should set out the facts showing the defendant's breach in an attachment to Paragraph BC-2 when the complaint form does not contain sufficient space.

A complaint based on breach of a contract to pay a sum of money must allege nonpayment of the money to state a cause of action [*Davanay v. Eggenhoff (1872) 43 Cal. 395, 397* ; *Marshall v. Von Zumwalt (1953) 120 Cal. App. 2d 807, 810, 262 P.2d 363] , superseded by statute as stated in 178 Cal. App. 4th 506 (2009)* .

[d] Performance of Conditions Precedent (Paragraph BC-3)

Counsel need not state facts showing performance of conditions precedent in a contract. The form may state generally, as in Paragraph BC-3, that the plaintiff duly performed all conditions on plaintiff's part. If defendant controverts the allegation, however, the plaintiff must establish at the trial the facts showing performance [*Code Civ. Proc. § 457*]. To recover actual damages, the plaintiff must prove that but for the defendant's breach, the plaintiff would have had the ability to perform [*Ersa Grae Corp. v. Fluor Corp. (1991) 1 Cal. App. 4th 613, 625, 2 Cal. Rptr. 2d 288* ; *see McDorman v. Moody (1942) 50 Cal. App. 2d 136, 140-141, 122 P.2d 639* ; *Dickey v. Kuhn (1930) 106 Cal. App. 300, 303-304, 289 P. 242]* .

[e] Plaintiff's Damages (Paragraph BC-4)

The complaint must specify the damages proximately caused by the defendant's breach [*see Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377]* . The plaintiff's damages may be stated in the space on the cause of action form for Paragraph BC-4 or in an attachment labeled Attachment BC-4.

An essential element of a cause of action for breach of contract is the sustaining of damages. The plaintiff is entitled to recover nominal damages for breach of contract, since the defendant's failure to perform a contractual duty is by itself a legal wrong that is fully distinct from the actual damages [*Sweet v. Johnson (1959) 169 Cal. App. 2d 630, 632, 337 P.2d 499]* .

Unless a statute specifically provides otherwise, the proper measure of damages for breach of contract is the amount that will compensate the plaintiff for all the detriment proximately caused by the breach or that, in the ordinary course of things, would be likely to result from the breach [*Civ. Code § 3300*; *see generally Civ. Code § 3300 et seq.* (damages in action based on breach of contract); *Civ. Code § 3287 et seq.* (interest as damages)].

[f] Attorney's Fees (Paragraph BC-5)

Counsel may check the box in Paragraph BC-5 stating that the plaintiff is entitled to attorney's fees by agreement or by statute. Except as provided by statute, the measure and mode of compensation of attorneys is left to the express or implied agreement of the parties [*Code Civ. Proc. § 1021*].

When the contract specifically provides that attorney's fees and costs incurred to enforce the provisions of the contract will be awarded to one of the parties or to the prevailing party, in an action for breach of the contract, the party determined to be the prevailing party, whether that party is the party specified in the contract or not, is entitled to reasonable attorney's fees in addition to other costs [*Civ. Code § 1717(a)*; *see Scott Co. of California v. Blount, Inc. (1999) 20 Cal. 4th 1103, 1108-1109, 86 Cal. Rptr. 2d 614, 979 P.2d 974]* (although contract's attorney fees provision was unilateral, giving only defendant and not plaintiff right to attorney fees, *Civ. Code § 1717* rendered provision mutual, giving prevailing party right to attorney fees on any claims based on contract); *International Billing Services,*

Inc. v. Emigh (2000) 84 Cal. App. 4th 1175, 1182-1183, 101 Cal. Rptr. 2d 532 (employees were entitled to attorney fees under reciprocity statute, *Civ. Code § 1717*, notwithstanding fact that employment agreement fee provision contained following atypical language: "You promise to reimburse Company for any legal fees, liability, or loss which Company incurs as a result of any unauthorized disclosure or use of Confidential Information by You"); *Sears v. Baccaglio (1998) 60 Cal. App. 4th 1136, 1154-1155* (reviewing legislative history of *Civ. Code § 1717* and finding that party can fail to recover net monetary judgment and still prevail for purposes of collecting fees in action founded on contract); *see also Gilbert v. Master Washer & Stamping Co., Inc. (2001) 87 Cal. App. 4th 212, 214, 104 Cal. Rptr. 2d 461* (attorney represented by other members of his or her law firm is entitled to recover reasonable attorney fees under *Civ. Code § 1717* when representation involves attorney's personal interests and not those of the firm)].

A court may deny a contractual claim for attorneys' fees by a defendant who has been voluntarily dismissed from a suit prior to trial [*see Santisas v. Goodin (1998) 17 Cal. 4th 599, 602, 608, 71 Cal. Rptr. 2d 830* ; *Silver v. Boatwright Home Inspection, Inc. (2002) 97 Cal. App. 4th 443, 446, 118 Cal. Rptr. 2d 475* (holding that defendant was not prevailing party when plaintiffs obtained their litigation objective through settlement with other defendants); *see also Jackson v. Homeowners Association Monte Vista Estates-East (2001) 93 Cal. App. 4th 773, 779-780, 782, 113 Cal. Rptr. 2d 363* (parties who agreed on record and in written settlement agreement that trial court would determine prevailing party in action and amount of attorney fee award before dismissal of action could and did waive provisions of *Civ. Code § 1717(b)(2)*, which provides there will be no prevailing party when an action is dismissed pursuant to settlement)].

One appellate decision holds that when the plaintiff sues for breach of contract and wins, and the plaintiff's claim is based on proof of a written contract not containing aprovision for attorney's fees, the plaintiff cannot be entitled, under *Civ. Code § 1717*, to an award of attorney's fees based on a provision for attorney's fees found in a document that the defendant contended, unsuccessfully, was part of the parties' contract. In other words, a successful plaintiff's claim for attorney's fees under that statute must rest on the contract on which the plaintiff obtained judgment; the plaintiff's claim cannot rest on the discredited contract for which the defendant contended, even though (1) the plaintiff prevailed against the defendant's contention based on that contract and (2) the defendant could have claimed attorney's fees if the defendant had prevailed [*Brittalia Ventures v. Stuke Nursery Co. (2007) 153 Cal. App. 4th 17, 31, 62 Cal. Rptr. 3d 467]* .

The court will construe the provision for attorney's fees as applying to the entire contract unless each party was represented by counsel in the negotiation and execution of the contract and the fact of that representation was specified in the contract [*Civ. Code § 1717(a)*]. For further discussion of attorney's fees, see *Ch. 174, Costs and Attorney's Fees, 174.50* et seq.

Attorney's fees may be recovered by the prevailing party in certain contract actions based on a book account as defined in *Code Civ. Proc. § 337a*, entered into after 1986 [*see Civ. Code § 1717.5*; *see also Civ. Code § 1717*]. For further discussion, see Ch. 8, *Accounts Stated and Open Accounts* .

Counsel has the option of checking a box and filling in a specific amount requested or checking a box asking for attorney's fees according to proof. Note that under *Civ. Code § 1717*, reasonable attorney's fees are fixed by the court, on notice and motion of a party, and the fees are an element of the costs of suit. Thus, a request for attorney's fees in the prayer would appear to be sufficient. To avoid ambiguity, however, counsel should state the appropriate information in Paragraph BC-5.

[g] Other Allegations (Paragraph BC-6)

Counsel may use the space marked "Other" in Paragraph BC-6 to allege facts for which no space has been provided in the form, such as an allegation on information and belief that the fictitiously named defendants are liable for the occurrences alleged in the complaint.

[5] Limitation of Action

The limitation period for an action on a contract in writing, except as provided in *Code Civ. Proc. § 336a* (corporation bonds, notes, or debentures), is four years [*Code Civ. Proc. § 337(1)*; *see Code Civ. Proc. § 337(2)* (actions on book accounts); *see also Filet Menu, Inc. v. Cheng (1999) 71 Cal. App. 4th 1276, 1282-1284, 84 Cal. Rptr. 2d 384* (statute may be tolled by plaintiff's out-of-state travel unrelated to interstate commerce pursuant to *Code Civ. Proc. § 351*)]. Actions on oral contracts are barred after two years [*Code Civ. Proc. § 339(1)*]. For a more detailed discussion, see Ch. 345, *Limitation of Actions* .

An action on a contract for the sale of goods, whether oral or written, is subject to the limitation period set forth in *Com. Code § 2725* [*see Code Civ. Proc. § 339(1)*].

[6] Verification

Counsel may attach a verification to the complaint, if desired. For discussion and a form for verification of the complaint, see *§ 140.101[1], [5]*.

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Volume 13: Conspiracy thru Conversion-Chs. 126-159
Chapter 140 CONTRACTS
PART V. FORMS
A. Complaints and Allegations

13-140 California Forms of Pleading and Practice--Annotated § 140.101

§ 140.101 Complaint for Damages [Civ. Code § 3300] for Breach of Written Contract--General Form

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Written Contract--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	(Breach of Contract)
Defendants.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times mentioned was, a resident of _____ County, California[, in the _____ (*name*) Judicial District].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

[3. This action is subject to the provisions of _____ (*Section 1812.10 of the Civil Code or Section 2984.4 of the Civil Code or Section 395(b) of the Code of Civil Procedure*).]

4. On or about _____ [*date*], at _____ [*city*], _____ County,

California, plaintiff and defendant entered into a written agreement, _____ [a copy of which is attached as Exhibit _____ and made a part of this pleading *or plead contract according to its legal effect or set it forth in its exact words*].

5. Plaintiff has performed all conditions, covenants, and promises required on his/her/its part to be performed in accordance with the terms and conditions of the contract [except _____ (*specify conditions not performed*). Plaintiff did not perform _____ (this *or* these) condition(s) because _____ (*specify facts showing excuse for nonperformance*)].

[6. On or about _____ (*date*), plaintiff requested that defendant perform his/her/its obligations under the contract.]

7. On or about _____ [*date*], defendant breached the contract by _____ [*specify acts or omissions constituting breach*].

8. As a result of defendant's breach of the contract, plaintiff has _____ [*specify items of damage*], to his/her/its damage in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For compensatory damages in the sum of $_____;

2. For interest on the sum of $_____ from and after _____ [*date*];

[3. For reasonable attorney's fees _____ (of $_____ *or* according to proof).]

4. For costs of suit and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for damages for breach of a written contract.

[3] Allegations

[a] In General

This complaint alleges the following elements of a cause of action for breach of contract [*see Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377* ; *FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 383, 282 Cal. Rptr. 508* ; *Acoustics, Inc. v. Trepte Constr. Co. (1971) 14 Cal. App. 3d 887, 916, 92 Cal. Rptr. 723* ; *Lortz v. Connell (1969) 273 Cal. App. 2d 286, 290, 78 Cal. Rptr. 6]* :

- The existence of the contract (Paragraph 4). Attaching a copy of a written contract and incorporating it by reference are not essential for pleading the contract, which may be properly pleaded by alleging the making of the contract and the substance of the relevant terms [*Perry v. Robertson (1988) 201 Cal. App. 3d 333, 341, 247 Cal. Rptr. 74]* .

PRACTICE TIP:
Tactical Advantage in Setting Out Contract. When a complaint sets out a written contract in full, a general demurrer is deemed to admit the contents of the contract and any pleaded meaning to which the contract is reasonably susceptible [*Martinez v. Socoma Companies, Inc. (1974) 11 Cal. 3d 394, 400, 113 Cal. Rptr. 585, 521 P.2d 841* ; *Aragon-Haas v. Family Security Ins. Services, Inc. (1991) 231 Cal. App. 3d 232, 239, 282 Cal. Rptr. 233* (although plaintiff's interpretation of contract may prove invalid, resolution of issue on demurrer improper if plaintiff pleaded meaning to which contract is reasonably susceptible)].

- The performance of all conditions on the plaintiff's part or the plaintiff's excuse for nonperformance (Paragraph 5) [*cf. Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal. App. 3d 1371, 1390-1391, 272 Cal. Rptr. 387* (statements of defendant's representatives, who said conditions precedent were satisfied, were evidence but not sufficient as allegations in pleading)].

- The breach by the defendant (Paragraph 7).

- The resulting damage to the plaintiff (Paragraph 8).

The complaint alleges that the agreement was written (Paragraph 4). In an action founded on a contract, the defendant may object by demurrer [*see § 140.130*] or answer, on the ground that defendant cannot ascertain from the pleading whether the contract is written or oral or implied by conduct [*Code Civ. Proc. § 430.10(g)*].

When the contract is ambiguous, the complaint may allege the plaintiff's construction. On demurrer, the court must accept the plaintiff's construction as correct, as long as it is not clearly erroneous [*Aragon-Haas v. Family Security Ins. Services, Inc. (1991) 231 Cal. App. 3d 232, 239, 282 Cal. Rptr. 233* ; *Marina Tenants Assn. v. Deauville Marina Development Co. (1986) 181 Cal. App. 3d 122, 128, 132, 226 Cal. Rptr. 321]* .

[b] Conditions Precedent

In pleading the performance of conditions precedent in the contract [*see generally Civ. Code § 1436* (condition precedent defined)] (Paragraph 6), it is not necessary to state the facts showing performance. The complaint may state generally that the plaintiff duly performed all the conditions on plaintiff's part. If the defendant controverts the allegation, the plaintiff must establish at trial the facts showing performance [*Code Civ. Proc. § 457*].However, an

allegation that the defendant breached the contract does not indicate that the plaintiff performed all that the plaintiff was obligated to perform or that the defendant prevented the plaintiff from rendering performance [*Lortz v. Connell (1969) 273 Cal. App. 2d 286, 291, 78 Cal. Rptr. 6]* .

If a condition precedent imposed by the contract must happen before the defendant's duty of performance arises, a specific allegation of the happening of the event is a necessary part of pleading the defendant's breach [*Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal. App. 3d 1371, 1389-1390, 272 Cal. Rptr. 387* (agreement for loan in which six of eight conditions were events and not acts to be performed by plaintiff)]. For example, if the defendant's promise to pay money is conditioned on defendant's ability to pay or on the existence of a fund from which payment is to be made, the plaintiff must allege that the condition has been satisfied [*Byrne v. Harvey (1962) 211 Cal. App. 2d 92, 112-113, 27 Cal. Rptr. 110* ; *see Clack v. State of California ex rel. Dept. Pub. Wks. (1969) 275 Cal. App. 2d 743, 748, 80 Cal. Rptr. 274]* . Similarly, whenever it is essential to the cause of action that the plaintiff request that the defendant perform, the plaintiff must allege the request in the complaint and prove it at trial [*California Canneries Co. v. Great Western Lumber Co. (1919) 44 Cal. App. 69, 71, 185 P. 1008]* .

A general allegation of due performance will not suffice if the plaintiff also sets forth what actually occurred and the specific facts do not constitute due performance. If the plaintiff alleges due performance as a permissible conclusion of law, but also avers specific additional facts that do not support the conclusion or are inconsistent with it, the specific allegations control. A complaint that might have been sufficient with general allegations alone becomes defective [*Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal. App. 3d 1371, 1389-1390, 272 Cal. Rptr. 387]* .

[c] Concurrent Conditions

Concurrent conditions are like conditions precedent, but are mutually dependent. The only important difference between a concurrent condition and a condition precedent is that the condition precedent must be performed before another duty arises, while a tender of performance is sufficient in the case of a concurrent condition. Failure of both parties to perform concurrent conditions does not leave the contract open for an indefinite period so that either party can tender performance at that party's leisure. Failure of both parties to perform concurrent conditions during the time for performance results in discharge of each party's duty to perform. Thus, when a contract makes time of the essence, if the time expires without tender by either party, both parties are discharged [*Pittman v. Canham (1992) 2 Cal. App. 4th 556, 559-560, 3 Cal. Rptr. 2d 340]* .

[d] Ability to Perform

To establish damages, the plaintiff must prove that but for the defendant's breach, the plaintiff would have had the ability to perform. Plaintiff must make this proof in any action for breach of contract, even one based on repudiation or anticipatory breach in which the plaintiff need not allege tender of performance [*Ersa Grae Corp. v. Fluor Corp. (1991) 1 Cal. App. 4th 613, 625, 2 Cal. Rptr. 2d 288* ; *McDorman v. Moody (1942) 50 Cal. App. 2d 136, 140-141, 122 P.2d 639]* .

[e] Consideration

A written instrument is presumptive evidence of consideration [*Civ. Code § 1614*]. The plaintiff need not plead the existence and character of the consideration if the complaint states that the contract was in writing or sets forth the written contract in full [*Henke v. Eureka Endowment Asso. (1893) 100 Cal. 429, 433, 34 P. 1089]* .

The presumption shifts the burden of producing evidence, not the burden of proof [*Rancho Santa Fe Pharmacy, Inc. v. Seyfert (1990) 219 Cal. App. 3d 875, 884, 268 Cal. Rptr. 505]* . Once the court has admitted evidence sufficient to call into question the presumed fact (consideration), the plaintiff has the burden of proving consideration [*Rancho Santa Fe Pharmacy, Inc. v. Seyfert (1990) 219 Cal. App. 3d 875, 883, 268 Cal. Rptr. 505]* .

[f] Damages

General damages (those that directly and inevitably flow from breach of any similar agreement) do not need to be itemized in a complaint, but special damages (secondary or derivative losses arising from circumstances that are particular to the contract or to the parties) must be pled with particularity [*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 969, 975, 22 Cal. Rptr. 3d 340, 102 P. 3d 257* (defining general and special damages and requiring specific pleading of special damages); *Colvig v. RKO Gen., Inc. (1965) 232 Cal. App. 2d 56, 69, 42 Cal. Rptr. 473* (no specificity required for pleading of general damages)].

[4] Actions Involving Installment or Automotive Sales or Consumer Obligations

Counsel should cite the appropriate statute, *Civ. Code § 1812.10* or *Civ. Code § 2984.4*, in Paragraph 3 when the action is subject to the provisions of the Unruh Retail Installment Act [*Civ. Code § 1801 et seq.*] or the Rees-Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 2981 et seq.*]. If the action arises from an offer or provision of goods, services, loans, or extensions of credit intended primarily for personal, family, or household use, other than an obligation described in *Civ. Code §§ 1812.10* or *2984.4*, or arises from a transaction consummated as a proximate result of either an unsolicited telephone call made by a seller engaged in the business of consummating transactions of that kind or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller, then *Code Civ. Proc. § 395(b)* applies [*see Fontaine v. Superior Court (CashCall, Inc.) (2009) 175 Cal. App. 4th 830, 838-840, 96 Cal. Rptr. 3d 607* (statute applies to action by or against consumer, and if any defendant in consumer's action is individual, that is irrelevant to application of statute)], and the complaint should cite that statute [*see Code Civ. Proc. § 396a(a)*].

Concurrently with the complaint, the plaintiff must file an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) stating facts showing that the action has been commenced in the proper court for the trial of the action, and that the action is subject to the provisions of *Civ. Code § 1812.10* or *Civ. Code § 2984.4* or *Code Civ. Proc. § 395(b)*. In lieu of an affidavit or declaration, the complaint may state the required facts if the complaint is verified by the oath of the plaintiff or of plaintiff's attorney [*Civ. Code §§ 1812.10(c), 2984.4(c)*; *Code Civ. Proc. § 396a(a)*]. In cases subject to *Civ. Code § 1812.10* or *Civ. Code § 2984.4*, the plaintiff may not state facts on information or belief in a verified complaint [*Civ. Code §§ 1812.10(c), 2984.4(c)*].

When an affidavit or declaration is filed with the complaint, a copy must be served with the summons [*Civ. Code §§ 1812.10(c), 2984.4(c)*; *Code Civ. Proc. § 396a(a)*].

[5] Verification

Verification of a complaint for damages for breach of contract generally is not required. However, verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov.*

Code § 70613(b)]. The statement regarding the demand must use the following language: "Amount demanded _____ [exceeds *or* does not exceed] $10,000" [*see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[7] Attorney's Fees

In an action based on a contract that provides for an award of attorney's fees, the plaintiff need not plead or prove the contract provision for attorney's fees or the amount of attorney's fees incurred [*see Civ. Code § 1717*]. It is sufficient to make the contract part of the complaint [*Ganey v. Doran (1987) 191 Cal. App. 3d 901, 911-912, 236 Cal. Rptr. 787]* (Paragraph 4). However, no election or waiver results from pleading a contractual right to attorney's fees [*Lanyi v. Goldblum (1986) 177 Cal. App. 3d 181, 188, 223 Cal. Rptr. 32]* . The prayer in the form in [1], *above,* contains a specific request for attorney's fees.

For further discussion of attorney's fees, see Ch. 174, *Costs and Attorney's Fees* . For discussion of attorney's fees under *Civ. Code § 1717.5* in contract actions based on a book account as defined in *Code Civ. Proc. § 337a*, see Ch. 8, *Accounts Stated and Open Accounts* .

[8] Cross References

For alternative allegations for agency, capacity, and residence of parties, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* , and Ch. 324, *Jurisdiction: Subject Matter Jurisdiction*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For alternative allegations of venue, see Ch. 571, *Venue*

For alternative forms for verification, see Ch. 572, *Verification*

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A. Complaints and Allegations

13-140 California Forms of Pleading and Practice--Annotated § 140.102

§ 140.102 Complaint for Damages [Civ. Code § 3300] for Breach of Written Contract--Based on Correspondence Between Parties

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Written Contract--Based on Correspondence Between Parties

[*Caption and introduction. See § 140.101[1].*]

1. [*Capacity and residence of defendant. See § 140.101[1], Paragraph 1.*]

2. [*Fictitious name allegation. See § 140.101[1], Paragraph 2.*]

3. On or about _____ [*date*], plaintiff and defendant entered preliminary negotiations regarding _____ [*specify, e.g.,* the sale of plastic tubing, manufactured by plaintiff, to defendant and the quantities and prices for the sale].

4. By exchange of letters from _____ [*date*], to _____ [*date*], plaintiff and defendant agreed in writing that _____ [*allege legal effect of contract*]. The written contract of the parties is contained in their letters, copies of which are attached as Exhibits; _____-_____ and incorporated by reference.

5. The letters from defendant to plaintiff were received by plaintiff in the ordinary course of the mail and the letters from plaintiff to defendant were sent in the ordinary course of mail, postage prepaid, addressed to defendant at _____ [*mailing address*].

6. [*Performance of conditions, covenants, and promises. See § 140.101[1], Paragraph 5.*]

7. [*Defendant's breach. See § 140.101[1], Paragraph 7.*]

8. [*Damages. See § 140.101[1], Paragraph 8.*]

[*Prayer. See § 140.101[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 140.101[1].*]

[2] Use of Form

The complaint in [1], *above,* is for use in an action for damages for breach of a contract entered into by correspondence between the parties.

[3] Allegations

The complaint alleges the following elements of the cause of action:

- Negotiations by the parties (Paragraph 3).
- A resulting agreement (Paragraphs 4 and 5).
- The plaintiff's performance of all conditions or the excuses for nonperformance (Paragraph 6).
- The breach by the defendant (Paragraph 7).
- The damages suffered by the plaintiff (Paragraph 8).

[4] Contract by Correspondence

Correspondence between the parties does not necessarily constitute a contract [*Tibbs v. Smart & Final Iris Co. (1957) 152 Cal. App. 2d 618, 624, 313 P.2d 636* (no binding and enforceable agreement of sale existed between parties when numerous letters exchanged but last letter constituted new and conditional offer abrogating previous offers and was rejected); *Azevedo v. Davidson (1920) 49 Cal. App. 443, 446, 193 P. 594* (letter did not constitute contract because correspondence indicated negotiations not to be considered closed until certain investigations made)]. However, when correspondence contains an offer and an absolute, unqualified acceptance, a contract may result. Some applicable statutory rules include the following:

- Consent is communicated when the party accepting a proposal has put the acceptance in the course of transmission to the proposer [*Civ. Code § 1583*].
- Acceptance must be absolute and unqualified [*Civ. Code § 1585*].
- A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of the mail [*Evid. Code § 641*].

Parol evidence is admissible to explain an incomplete contract entered into through correspondence [*Amco Plastic*

Pipe Co. v. Jet Specialties Co. (1961) 194 Cal. App. 2d 32, 37, 14 Cal. Rptr. 712] .

A signed letter expressly referring to and adopting a contract is sufficient to bind the signing party to a written contract executed only by the plaintiff [*Bartlett v. Rogers (1951) 103 Cal. App. 2d 250, 254, 229 P.2d 434]* .

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13-140 California Forms of Pleading and Practice--Annotated § 140.103

§ 140.103 Complaint for Damages [Civ. Code § 3300] for Breach of Written Contract--By Third-Party Beneficiary [Civ. Code § 1559]

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Written Contract--By Third-Party Beneficiary [Civ. Code § 1559]

[*Caption and introduction. See § 140.101[1].*]

1. [*Capacity and residence of defendant. See § 140.101[1], Paragraph 1.*]

2. [*Fictitious name allegation. See § 140.101[1], Paragraph 2.*]

3. On or about _____ [*date*], _____ [*name*] and defendant entered into a written contract, a copy of which is attached as Exhibit _____ and made a part of this pleading.

4. By the terms of the contract, _____ [*name*] agreed to _____ [*specify performance*], and defendant agreed to _____ [*specify performance*]. The contract was made for the plaintiff's benefit in that _____ [*specify facts showing intent to benefit plaintiff*].

5. [*Defendant's breach. See § 140.101[1], Paragraph 7.*]

6. [*Damages. See § 140.101[1], Paragraph 8.*]

[*Prayer. See § 140.101[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 140.101[1].*]

[2] Use of Form

The complaint in [1], *above,* is for use in an action for damages for breach of contract by a third-party beneficiary to the contract.

[3] Allegations

The complaint alleges the following elements of the cause of action:

- The existence of the contract (Paragraph 3).
- The parties' intent that the contract be for the plaintiff's benefit (Paragraph 4).
- The defendant's breach of the contract (Paragraph 5).
- The plaintiff's damages caused by the breach (Paragraph 6).

[4] Third-party Beneficiary's Right

[a] Requirements to Enforce Contract

A third party may enforce a contract expressly for the benefit of that party at any time before the parties to the contract rescind it [*Civ. Code § 1559*]. *Civ. Code § 1559* excludes enforcement of a contract by third parties who are only incidentally or remotely benefited by it. However, the contract need not be exclusively for the benefit of the third party, and the third party need not be named and identified in the contract [*COAC, Inc. v. Kennedy Engineers (1977) 67 Cal. App. 3d 916, 919-920, 136 Cal. Rptr. 890]* . California law generally classifies parties having enforceable rights under contracts to which they are not parties as creditor beneficiaries [*see* [b], *below*] or donee beneficiaries [*see* [c], *below*].

Intent to benefit the third party is important in determining the third party's right to bring an action under a contract. It is sufficient that the promisor understood that the promisee had that intent [*Lucas v. Hamm (1961) 56 Cal. 2d 583, 591, 15 Cal. Rptr. 821, 364 P.2d 685 , cert. denied, 368 U.S. 987 (1962)* ; *Schauer v. Mandarin Gems of California, Inc. (2005) 125 Cal. App. 4th 949, 958, 23 Cal. Rptr. 3d 233* (jeweler must have understood that husband intended to give ring he was buying to wife because they shopped together, wife chose the ring, and husband bought it for the purpose of giving it to wife); *see Mission Oaks Ranch, Ltd. v. County of Santa Barbara (1998) 65 Cal. App. 4th 713, 724, 77 Cal. Rptr. 2d 1* (developer whose proposed project was denied after consultant hired by county prepared EIR could not sue county for damages caused by county's alleged failure to prepare proper EIR, as developer was not third-party creditor beneficiary of county's contract with consultant; written terms of contract showed intent that developer was not intended beneficiary), *disapproved on another point in Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1123, 81 Cal. Rptr. 2d 471, 969 P.2d 564* ; *Dateline Builders, Inc. v. City of Santa Rosa (1983) 146 Cal. App. 3d 520, 526, 194 Cal. Rptr. 258* (developer holding option on real property beyond city limits and wanting to connect proposed project with city sewer lines not third-party beneficiary under contract between city and county to coordinate property development standards and avoid proliferation of fragmented sewer districts and systems)].

The third party need not be named or identified individually if the third party can show that he, she, or it is a member of a class for whose express benefit the parties made the contract [*General Motors Corp. v. Superior Court (1993) 12 Cal. App. 4th 435, 444, 15 Cal. Rptr. 2d 622* (release); *Macaulay v. Norlander (1992) 12 Cal. App. 4th 1, 7-8, 15 Cal.*

Rptr. 2d 204 (agreement between investor and clearing broker); *Kaiser Engineers, Inc. v. Grinnell Fire Protection Systems Co. (1985) 173 Cal. App. 3d 1050, 1054-1055, 219 Cal. Rptr. 626* ; *but see Vahle v. Barwick (2001) 93 Cal. App. 4th 1323, 1332, 113 Cal. Rptr. 2d 793* (trial court erred in granting summary judgment to attorney who was sued for malpractice in handling plaintiffs' personal injury case against country club on basis that language in release agreement between plaintiffs and country club was unambiguous and benefitted attorney; whether defendant attorney was intended third party beneficiary of release agreement was triable issue of fact)].

The party claiming to be a third-party beneficiary bears the burden of proving that the contracting parties actually promised the performance that the third-party beneficiary seeks. In a case in which the plaintiff did not sign a contract that contained an attorney fee provision, the court found that a defendant that was the prevailing party could recover contractual attorney's fees only if the nonsignatory plaintiff would have been entitled to those fees had it prevailed [*see Sessions Payroll Management, Inc. v. Noble Construction Co. (2001) 84 Cal. App. 4th 671, 680-681, 101 Cal. Rptr. 2d 127* (because contracting parties did not intend to benefit third party by including it within contractual attorney's fee clause, it could not have recovered attorney's fees had it prevailed on third-party breach of contract cause of action; it thus should not have attorney's fees imposed against it); *but see Loduca v. Polyzos (2007) 153 Cal. App. 4th 334, 337, 62 Cal. Rptr. 3d 780* (property owner was third-party beneficiary of contract between general contractor and subcontractor for installation of cabinetry in owner's house under construction; property owner successfully sued subcontractor for breach of that contract and was entitled to attorney's fees under provision in that contract)].

A third party beneficiary's rights are subject to the conditions of the contract [*see, e.g., Mercury Casualty Company v. Maloney (2003) 113 Cal. App. 4th 799, 802-803, 6 Cal. Rptr. 3d 647* (injured passenger who received medical payments from driver's excess insurer was obligated to reimburse insurer pursuant to insurance policy provision requiring reimbursement upon settlement with responsible party)].

[b] Creditor Beneficiary

A party cannot be a creditor beneficiary unless the contract will discharge some form of legal duty owed to the beneficiary by the promisee [*COAC, Inc. v. Kennedy Engineers (1977) 67 Cal. App. 3d 916, 919-920, 136 Cal. Rptr. 890]* .

A creditor beneficiary may bring an action against either the promisee or the promisor or against both of them [*Anderson v. Calaveras Cent. Mining Corp. (1936) 13 Cal. App. 2d 338, 344, 57 P.2d 560]* .

The third-party contract is not an offer to the creditor-beneficiary that the creditor-beneficiary must accept before a cause of action accrues. The cause of action accrues at the time the parties to the contract execute it, even if the creditor-beneficiary does not know of its existence. The cause of action is subject to the four-year statute of limitations [*Skylawn & Skyview Memorial Lawn v. Superior Court (1979) 88 Cal. App. 3d 316, 318-320, 151 Cal. Rptr. 793* ; *see Code Civ. Proc. § 337(1)*].

[c] Donee Beneficiary

A party is a donee beneficiary if the promisee's contractual intent is to make a gift or confer a right against the promisor. If the promisee intends to make a gift, the donee beneficiary may recover if the promisor must have understood the donative intent from the nature of the contract and the circumstances accompanying its execution [*Schauer v. Mandarin Gems of California, Inc. (2005) 125 Cal. App. 4th 949, 958, 23 Cal. Rptr. 3d 233* (jeweler must have understood that husband intended to give ring he was buying to wife because they shopped together, wife chose the ring, and husband bought it for the purpose of giving it to wife)]. Even though a third party is not the intended recipient of a gift, the third party may nevertheless be a donee beneficiary if it appears from the terms of the promise, in view of the accompanying circumstances, that the promisee's purpose in obtaining the promise was to confer on the third party a right against the promisor to performance that was not due, supposed or asserted to be due from the promisee to the

beneficiary [*Martinez v. Socoma Companies, Inc. (1974) 11 Cal. 3d 394, 400-401, 113 Cal. Rptr. 585, 521 P.2d 841* ; *Dateline Builders, Inc. v. City of Santa Rosa (1983) 146 Cal. App. 3d 520, 526, 194 Cal. Rptr. 258]* .

[d] Exception for Express Trust Beneficiary

Express trusts are not governed by the rules that apply to contracts generally. *Civ. Code § 1559* has no application to a trust beneficiary. A trust beneficiary may not sue the trustee, an agent of the trustee or one with whom the trustee contracted for the benefit of the trust. The express trust beneficiary's rights are governed by the Probate Code provisions applicable to trusts [*National Bank v. Exchange Nat. Bank (1921) 186 Cal. 172, 180, 199 P. 1* ; *Saks v. Damon Raike & Co. (1992) 7 Cal. App. 4th 419, 430-431, 8 Cal. Rptr. 2d 869* ; *see, e.g., Prob. Code §§ 16401, 16420, 16421, 17000, 17200*].

[5] Promisee's Right to Enforce Contract

The promisee has the right to enforce a third-party contract for the benefit of the third party. The type of enforcement action depends on whether the third-party beneficiary is a creditor beneficiary or a donee beneficiary [*see* [4][b], [c], *above*]. For a creditor beneficiary, the promisee may bring an action for damages or specific performance, because the promisor has a legal obligation to pay the debt. For a donee beneficiary, the promisee may enforce the contract only through an action for specific performance. Although the promisee is entitled to the promised performance by the promisor, the performance is a gift to the beneficiary, and the promisee has no economic interest in the performance. Therefore, damages would be an inadequate remedy, and only specific performance is appropriate [*In re Marriage of Smith & Maescher (1993) 21 Cal. App. 4th 100, 106-108, 26 Cal. Rptr. 2d 133]* .

[6] Waiver of Rights

The rights of a third-party beneficiary may be voluntarily waived or disclaimed. However, the burden is on the party claiming waiver to prove it by clear and convincing evidence. The courts will decide doubtful cases against a waiver [*Bass v. John Hancock Mut. Life Ins. Co. (1974) 10 Cal. 3d 792, 796, 112 Cal. Rptr. 195, 518 P.2d 1147]* .

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13-140 California Forms of Pleading and Practice--Annotated § 140.104

§ 140.104 Complaint for Damages [Civ. Code § 3300] for Breach of Oral Contract [Civ. Code § 1622]--General Form

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Oral Contract [Civ. Code § 1622]--General Form

[*Caption and introduction. See § 140.101[1].*]

1. [*Capacity and residence of defendant. See § 140.101[1], Paragraph 1.*]

2. [*Fictitious name allegation. See § 140.101[1], Paragraph 2.*]

3. On or about _____ [*date*], plaintiff and defendant entered into an oral agreement whereby plaintiff agreed to _____ [*specify*] and defendant agreed to _____ [*specify*].

4. Plaintiff has performed all conditions, covenants, and promises required on his/her/its part to be performed in accordance with the terms and conditions of the contract [except _____ (*specify conditions not performed*), the performance of which was excused on the ground that _____ (*specify*)].

5. On or about _____ [*date*], defendant breached the oral agreement by _____ [*specify acts or omissions constituting breach*].

6. [*Damages. See § 140.101[1], Paragraph 8.*]

[*Prayer. See § 140.101[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 140.101[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for damages for breach of an oral agreement not subject to the statute of frauds [*see, e.g., Marketing West, Inc. v. Sanyo Fisher (USA) Corp. (1992) 6 Cal. App. 4th 603, 614, 7 Cal. Rptr. 2d 859* (oral employment contract allowing termination only for cause breached when employer threatened to terminate representatives who did not sign new written contract that allowed termination without cause)]. All contracts may be oral, except those that are specially required by statute to be in writing [*Civ. Code § 1622*; *see generally Civ. Code § 1624* (contracts that must be in writing)].

For discussion and forms relating to contracts within the statute of frauds, see Ch. 530, *Statute of Frauds* . For an affirmative defense based on the statute of frauds, see *§ 140.143*.

[3] Allegations

The complaint alleges the following elements of the cause of action:

- The parties entered into an oral agreement (Paragraph 3). The complaint should state that the agreement was oral; otherwise, the defendant may demur on the ground that defendnat cannot ascertain from the pleading whether the contract is written or oral or implied by conduct [*Code Civ. Proc. § 430.10(g)*; *see generally § 140.130*].

- The parties made mutual promises constituting consideration (Paragraph 3). Since there is no presumption of consideration for an oral agreement, the complaint must allege the consideration [*Acheson v. Western Union Tel. Co. (1892) 96 Cal. 641, 644, 31 P. 583]* .

- The plaintiff performed all conditions required of plaintiff or was excused from performance (Paragraph 4).

- The defendant breached the contract (Paragraph 5).

- The plaintiff sustained damages (Paragraph 6).

The complaint need not allege a specific duration for an oral agreement. The law infers a reasonable term. Even if an oral agreement is terminable at will, *Com. Code § 2309* requires that reasonable notice be given before termination [*Khoury v. Maly's of California, Inc. (1993) 14 Cal. App. 4th 612, 616, 17 Cal. Rptr. 2d 708* (sustaining demurrer improper although no duration of contract alleged, in part because what constitutes commercially reasonable time is presumptively within defendant's knowledge as much as plaintiff's)].

If the complaint does not allege explicit words by which the parties agreed but instead alleges a course of conduct, including oral representations that created a reasonable expectation, the cause of action is one for breach of an implied contract rather than breach of an oral contract [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 675, 254 Cal. Rptr. 211, 765 P.2d 373* ; *Wilkerson v. Wells Fargo Bank (1989) 212 Cal. App. 3d 1217, 1225 n.2, 261 Cal. Rptr. 185* (implied contracts for employment terminable only for cause)]. For a form of allegation of an implied contract, see *§ 140.110[1]*.

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§ 140.105 Complaint for Damages [Civ. Code § 3300] for Breach of Written Contract--Anticipatory Breach [Civ. Code § 1440]

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Written Contract--Anticipatory Breach [Civ. Code § 1440]

[*Caption and introduction. See § 140.101[1].*]

1. [*Capacity and residence of defendant. See § 140.101[1], Paragraph 1.*]

2. [*Fictitious name allegation. See § 140.101[1], Paragraph 2.*]

3. On or about _____ [*date*], plaintiff and defendant entered into a written contract, _____ [a copy of which is attached as Exhibit _____ and made a part of this pleading *or plead contract according to its legal effect or set it forth in its exact words*].

[*EITHER*]

4. On or about _____ [*date*], defendant, by _____ [*specify, e.g.,* a letter to plaintiff] gave notice that defendant would not perform the contract, and defendant totally repudiated it. [A copy of defendant's _____ (*specify, e.g.,* letter) is attached as Exhibit _____ and made a part of this pleading.] Defendant's repudiation has not been retracted.

[*OR*]

4. _____ [*If repudiation was implied instead of express, allege facts showing that defendant put it out*

of defendant's power to perform, e.g., Defendant dissolved the partnership, liquidated its assets, and voluntarily went out of business despite defendant's promise to pay plaintiff's note from the profits of the partnership].

[*CONTINUE*]

[5. At the time plaintiff received defendant's repudiation, plaintiff (had performed all of the conditions and things on his/her/its part to be done and performed, and) was ready, able, and willing to _____ (perform those terms and conditions on his/her/its part to be performed *or* complete performance on his/her/its part).]

6. [*Damages. See § 140.101[1], Paragraph 8.*]

[*Prayer. See § 140.101[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 140.101[1].*]

[2] Use of Form

The complaint in [1], *above,* is for use in an action for damages resulting from anticipatory breach of contract, when the breach occurs before the time for performance by the defendant [*see, e.g., Zogarts v. Smith (1948) 86 Cal. App. 2d 165, 170-171, 194 P.2d 143* (anticipatory breach by implied repudiation occurred when defendants who covenanted to pay plaintiff's note out of partnership profits dissolved partnership, liquidated its assets, and voluntarily went out of business)]. If a promisor gives notice to the promisee before the promisee is in default, that the promisor will not perform the obligation on the promisor's part, and the promisor does not retract the notice before performance on is due, the promisee is entitled to enforce the obligation without previously performing or offering to perform any conditions on the promisee's part in favor of the promisor [*Civ. Code § 1440*].

The doctrine of anticipatory breach does not apply to contracts unilateral in their inception, or contracts that have become unilateral because of complete performance by one party [*Diamond v. University of So. California (1970) 11 Cal. App. 3d 49, 53, 89 Cal. Rptr. 302]* .

For further discussion of anticipatory breach, see *§ 140.54*.

[3] Allegations

The essential element of anticipatory breach is that repudiation by the promisor occurred before the promisor's performance was due under the contract [*Taylor v. Johnston (1975) 15 Cal. 3d 130, 137, 123 Cal. Rptr. 641, 539 P.2d 425* (aggrieved party faced with election of remedies when promisor repudiates contract: immediately seek damages for breach of contract or treat repudiation as empty threat and wait until time for performance arrives, then exercise remedies for actual breach)]. The complaint alleges the following elements of the cause of action:

- The contract (Paragraph 3).
- The repudiation by the defendant, which defendnat has not retracted (Paragraph 4) [*see, e.g., Daum*

Development Corp. v. Yuba Plaza, Inc. (1970) 11 Cal. App. 3d 65, 73-74, 89 Cal. Rptr. 458 (definite and unconditional repudiation of contract by promisor communicated to promisee is breach of contract that creates immediate right of action even though it occurs long before time for performance); *Mobil Oil Exploration & Producing Southeast, Inc. v. United States (2000) 530 U.S. 604, 120 S. Ct. 2423, 147 L.Ed. 2d 528, 534* (obligor's statement to obligee indicating that obligor will breach an important contractual promise, thereby substantially impairing the value of the contract, constituted repudiation of contract and plaintiffs were entitled to restitution whether or not repudiated contracts ultimately would have produced financial gain)].

- The plaintiff's performance of the contract or the plaintiff's willingness to perform, which need not be alleged (Paragraph 5). Since *Civ. Code § 1440* states that anticipatory breach waives conditions, the plaintiff need not allege performance of all conditions on plaintiff's part. However, plaintiffs customarily include these allegations in a complaint for damages for anticipatory breach.

- The damages suffered by the plaintiff (Paragraph 6).

To establish a claim for damages, the plaintiff must prove that but for the defendant's breach, plaintiff would have had the ability to perform. Plaintiff must make this proof in any action for breach of contract, even one based on repudiation or anticipatory breach in which the plaintiff need not allege tender of performance [*Ersa Grae Corp. v. Fluor Corp. (1991) 1 Cal. App. 4th 613, 625, 2 Cal. Rptr. 2d 288* ; *McDorman v. Moody (1942) 50 Cal. App. 2d 136, 140-141, 122 P.2d 639]* .

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13-140 California Forms of Pleading and Practice--Annotated § 140.106

§ 140.106 Complaint for Damages [Civ. Code § 3300] for Breach of Contract--Promissory Estoppel as Substitute for Consideration

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Contract--Promissory Estoppel as Substitute for Consideration

[*Caption and introduction. See § 140.101[1]*.]

1. [*Capacity and residence of defendant. See § 140.101[1], Paragraph 1*.]

2. [*Fictitious name allegation. See § 140.101[1], Paragraph 2*.]

3. On or about _____ [*date*], in _____ [*city*], _____ County, California, defendant _____ [promised *or* assured *or* represented to] plaintiff that _____ [*describe defendant's promise to plaintiff*].

4. In so doing, defendant _____ [knew *or* should have known] that plaintiff would be reasonably induced to rely on defendant's _____ [promise *or* assurance *or* representation] by _____ [*describe act or forbearance of plaintiff that defendant knew or should have known would be induced*].

5. Plaintiff reasonably relied on defendant's _____ [promise *or* assurance *or* representation] and was induced to _____ [*describe specifically action or forbearance taken by plaintiff*].

6. Defendant has not performed any part of his/her/its _____ [promise *or* assurance *or* representation].

7. As a proximate result of defendant's failure to perform according to the _____ [promise *or* assurance *or* representation] that he/she/it made to plaintiff, plaintiff has _____ [*specify items of*

damage], to his/her/its damage in the sum of $_____.

8. Injustice can be avoided only by enforcing defendant's _____ [promise *or* assurance *or* representation] completely.

[*Prayer. See § 140.101[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 140.101[1].*]

[2] Use of Form

The complaint in [1], *above,* is for use in an action for damages for breach of contract when the consideration is supplied by the doctrine of promissory estoppel [*see § 140.23[8]*]. The complaint may be used for a written or an oral contract in which the customary type of bargained-for consideration is missing.

Generally, a public entity is not estopped by the conduct of officers or employees unless a grave injustice would otherwise result [*Lundeen Coatings Corp. v. Department of Water & Power (1991) 232 Cal. App. 3d 816, 830, 283 Cal. Rptr. 551]* .

[3] Pleading and Proof

[a] Burden

The party claiming estoppel must specifically plead all facts to establish it. Conclusionary pleading of reliance is insufficient. The complaint must allege facts showing reliance and a change of position [*Smith v. City and County of San Francisco (1990) 225 Cal. App. 3d 38, 48, 275 Cal. Rptr. 17]* .

The burden of proof is on the party asserting estoppel to prove its essential elements, leaving nothing to surmise or questionable inference [*Bank of California v. Connolly (1973) 36 Cal. App. 3d 350, 366, 111 Cal. Rptr. 468]* .

[b] Allegations

The purpose of promissory estoppel is to make a promise binding without the customary bargained-for consideration [*Youngman v. Nevada Irrigation Dist. (1969) 70 Cal. 2d 240, 249, 74 Cal. Rptr. 398, 449 P.2d 462]* . The complaint alleges the following elements of the cause of action [*see US Ecology, Inc. v. State (2005) 129 Cal. App. 4th 887, 891, 908, 28 Cal. Rptr. 3d 894* (plaintiff must prove that defendant's breach was substantial factor in causing injury to plaintiff); *Lundeen Coatings Corp. v. Department of Water & Power (1991) 232 Cal. App. 3d 816, 829, 283 Cal. Rptr. 551* ; *Thomson v. International Alliance of Stage Employees (1965) 232 Cal. App. 2d 446, 454, 42 Cal. Rptr. 785]* :

- A promise clear and unambiguous in its terms (Paragraph 3).
- Reasonable and foreseeable reliance (Paragraph 4).
- Reliance by the plaintiff (Paragraph 5).

- Failure of the defendant to perform (Paragraph 6).
- Injury to the plaintiff as a proximate result of the defendant's breach of the promise (Paragraph 7).
- The necessity of enforcing the defendant's promise completely to avoid injustice (Paragraph 8).

[4] Remedy for Breach of Promise

The appropriate remedy in an action based on promissory estoppel lies in enforcement of the defendant's promise [*Tomerlin v. Canadian Indemnity Co. (1964) 61 Cal. 2d 638, 639, 39 Cal. Rptr. 731, 394 P.2d 571]* . Generally, the court enforces the promise *in toto*. The trial court does nothave discretion to apportion or limit damages according to the equities of the case [*see Saliba-Kringlen Corp. v. Allen Engineering Co. (1971) 92 Cal. Rptr. 799]* . However, there is some authority for limiting the amount of recovery to a sum the judge considers equitable in a particular case [*Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center Authority (1974) 40 Cal. App. 3d 98, 104-105, 114 Cal. Rptr. 834* (trial judge could decide proper measure of damages, and plaintiff entitled to at least partial enforcement of defendant's promise)].

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13-140 California Forms of Pleading and Practice--Annotated § 140.107

§ 140.107 Allegation--Venue Based on Allegation Other Than Defendant's Residence at Time Action Is Commenced

[1] FORM Allegation--Venue Based on Allegation Other Than Defendant's Residence at Time Action Is Commenced

[*EITHER*]

The contract creating the obligation on which plaintiff brings this action, was entered into in _____ County, California.

[*OR*]

The place of performance for the contract is _____County, California.

[*OR*]

This action arises from_____ [*either* an offer or provision of goods, services, loans or extensions of credit intended primarily for personal, family or household use, other than an obligation described in *Civil Code Section 1812.10* or *Civil Code Section 2984.4 or* a transaction consummated as a proximate result of either an unsolicited telephone call made by a seller engaged in the business of consummating transactions of that kind or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller]. _____[Plaintiff *or* Defendant] _____ *[specify ground for venue, e.g.,* in fact signed the contract or resided, at the time the contract was signed, or now resides] in

[2] Use of Form

One of the allegations in § 140.107[1] may be used when the basis of venue is other than the defendant's residence at the time the action for breach of contract is commenced. Counsel can use the allegation in place of Paragraph 1 in the *form in § 140.101[1]*.

If the defendant is a corporation or an association, venue is also proper in the county in which the obligation or liability arose, or in which the breach occurred, or in which the principal place of business of the corporation or association is situated [*Code Civ. Proc. § 395.5*].

For allegations and declarations of venue based on *Civ. Code § 2984.4* (motor vehicle sales) or *Civ. Code § 1812.10* (retail installment sales), respectively, see Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* , and Ch. 501, *Sales: Retail Installment Sales* .

[3] Accompanying Papers

In a case subject to *Code Civ. Proc. § 395(b)*, concerning consumer obligations, the plaintiff must use the third alternative allegation [*see § 140.107[1]*; *see also Fontaine v. Superior Court (CashCall, Inc.) (2009) 175 Cal. App. 4th 830, 838-840, 96 Cal. Rptr. 3d 607* (statute applies to action by or against consumer, and if any defendant in consumer's action is individual, that is irrelevant to application of statute)] and verify the complaint, or state the facts in an affidavit (ordeclaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) filed with the complaint, to show that the action has been commenced in the proper court for the trial of that action [*Code Civ. Proc. § 396a(a)*]. For a form for a declaration of proper venue for use in an action subject to *Code Civ. Proc. § 395(b)*, see *§ 140.108[1]*.

[4] Cross References

For memoranda relating to forms supporting and opposing motions for change of venue, see California Points and Authorities, Ch. 238, *Venue* (Matthew Bender).

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13-140 California Forms of Pleading and Practice--Annotated § 140.108

§ 140.108 Declaration of Proper Venue to Be Filed With Complaint in Action Involving Consumer Obligations [Code Civ. Proc. §§ 395(b), 396a]

[1] FORM Declaration of Proper Venue to Be Filed With Complaint in Action Involving Consumer Obligations [Code Civ. Proc. §§ 395(b), 396a]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	DECLARATION
Defendants.	)	
	)	
	)	

_____

I _____ [*name*], declare:

I am the [attorney for the] plaintiff in the above-entitled action, which arises from _____ [*either* an offer or provision of goods, services, loans or extensions of credit intended primarily for personal, family or household use, other than an obligation described in *Civil Code Section 1812.10* or *Civil Code Section 2984.4 or* a transaction consummated as a proximate result of either an unsolicited telephone call made by a seller engaged in the business of consummating transactions of that kind or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller]. This action is therefore subject to *Code of Civil Procedure Section 395(b)*].

_____ [*State facts showing that action is being commenced in county where buyer or lessee in fact signed contract, or where buyer or lessee resided at time contract was entered into, or where buyer or lessee resides at*

commencement of action].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This declaration is to be filed by the plaintiff at the time the complaint is filed if the action is subject to the venue provisions of *Code Civ. Proc. § 395(b)* [*see § 140.108[3]*] and the complaint is not verified and does not allege compliance with the venue provisions of *Code Civ. Proc. § 395(b)* [*Code Civ. Proc. § 396a(a)*].

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive ofinterest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

[3] Venue

In an action arising from an offer or provision of goods, services, loans, or extensions of credit intended primarily for personal, family, or household use, other than an obligation described in *Civ. Code § 1812.10* (Unruh Retail Installment Sales Act [*Civ. Code § 1801 et seq.*; *see* Ch. 501, *Sales: Retail Installment Sales*]) or *Civ. Code § 2984.4* (Rees-Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 2981 et seq.*; *see* Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act*]), or in an action arising from a transaction consummated as a proximate result of either an unsolicited telephone call made by a seller engaged in the business of consummating transactions of that kind or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller, the superior court in the county where the buyer or lessee in fact signed the contract, or where the buyer or lessee resided at the time the contract was entered into, or where the buyer or lessee resides at the commencement of the action, is the proper court for the trial of the action [*Code Civ. Proc. § 395(b)*; *see Fontaine v. Superior Court (CashCall, Inc.) (2009) 175 Cal. App. 4th 830, 838-840, 96 Cal. Rptr. 3d 607* (statute applies to action by or against consumer, and if any defendant in consumer's action is individual, that is irrelevant to application of statute)].

[4] Requirement That Affidavit or Declaration Be Filed and Served

Concurrently with filing the complaint, in a case subject to *Code Civ. Proc. § 395(b)*, the plaintiff must file an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) in which the plaintiff or the plaintiff's attorney states facts showing that the action was commenced in the proper court for the trial of the action and that the action is subject to the provisions of *Code Civ. Proc. § 395(b)*. In addition, the plaintiff must serve a copy of the affidavit or declaration on the defendant at the time the summons is served. The facts may be stated in a verified complaint instead of an affidavit or declaration. If the plaintiff fails to file the affidavit or declaration or state facts in a verified complaint as required, there can be no further proceedings except to dismiss the action without prejudice. However, the court has discretion to permit late filing of the affidavit or declaration on terms as may be just [*Code Civ. Proc. § 396a(a)*].

For a form for an affidavit, see Ch. 15, *Affidavits, Certificates, and Declarations* .

[5] Action Filed in Improper Court

In a case subject to *Code Civ. Proc. § 395(b)*, if it appears from the complaint or affidavit or declaration, or otherwise that the court is not the proper court for trial, the court, whenever the fact appears, must transfer the action to the proper court, on its own motion or on motion of the defendant, unless the defendant consents in writing or in open court to keeping the action in the court in which plaintiff commenced it. Consent in open court must be entered in the minutes or docket of the court. If the defendant gives consent, the action may continue in the court in which plaintiff commenced it. However, the defendant may not give consent unless represented by counsel at the time the consent is given. In any case, when the court orders the action transferred, if summons is served before the action is filed in the court to which it is transferred, the time to answer or otherwise plead dates from the time of service on the defendant of written notice of filing as to any defendant so served who has not appeared in the action [*Code Civ. Proc. § 396a(b), (c)*].

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13-140 California Forms of Pleading and Practice--Annotated § 140.109

§ 140.109 Allegation--Offer of Performance [Civ. Code § 1485]

[1] FORM Allegation--Offer of Performance [Civ. Code § 1485]

On or about _____ [*date*], plaintiff offered to perform his/her/its obligations under the agreement in good faith and unconditionally by _____ [*specify tender of performance*] and demanded that defendant perform the obligations on his/her/its part to be performed by _____ [*specify defendant's performance*], but defendant failed and refused, and continues to fail and refuse, to so perform.

[2] Use of Form

The allegation in [1], *above*, is for use in a complaint for damages for breach of contract when the plaintiff extinguished plaintiff's contractual duty by making an offer of performance.

[3] Offer of Performance

An offer of performance extinguishes the offering party's obligation [*Civ. Code § 1485*] when it is an offer of full performance [*Civ. Code § 1486*] by the debtor or someone on the debtor's behalf [*Civ. Code § 1487*] to the creditor [*Civ. Code § 1488*]. The offer must be in good faith [*Civ. Code § 1493*] and unconditional [*Civ. Code § 1494*]. An offer of performance puts the other party in default if that party refuses to accept it [*Still v. Plaza Marina Commercial Corp. (1971) 21 Cal. App. 3d 378, 385, 98 Cal. Rptr. 414]* .

The party making an offer of performance must be able and willing to perform according to the offer [*Civ. Code § 1495*]. The party will have to prove the ability to perform at trial when it is an issue [*Ersa Grae Corp. v. Fluor Corp. (1991) 1 Cal. App. 4th 613, 625, 2 Cal. Rptr. 2d 288* ; *McDorman v. Moody (1942) 50 Cal. App. 2d 136, 141, 122 P.2d 639* ; *Dickey v. Kuhn (1930) 106 Cal. App. 300, 304, 289 P. 242]* .

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13-140 California Forms of Pleading and Practice--Annotated § 140.110

§ 140.110 Allegation--Contract Implied in Fact [Civ. Code § 1621]

[1] FORM Allegation--Contract Implied in Fact [Civ. Code § 1621]

_____ [*Allege that plaintiff performed act as part of course of conduct, or as result of usage of trade or personal understanding between plaintiff and defendant, so that defendant voluntarily accepted consideration with expectation on both plaintiff's and defendant's parts that plaintiff would receive benefit for his/her/its actions, e.g.,* At the instance and request of defendant, plaintiff submitted to defendants, orally and in writing, a novel idea for a marketing campaign, with the expectation, which was fully and clearly understood by defendants, that plaintiff would be compensated for its use by defendants when and if defendants used it].

[2] Use of Form

The allegation in [1], *above,* is for use in a complaint for damages for breach of contract when the contract is implied in fact, that is, when the existence and terms of the contract are manifested by conduct and not by express words [*see generally Civ. Code § 1621* (implied contract defined)]. It can be inserted in the *form in § 140.101[1]* in place of Paragraph 4.

[3] Pleading and Proof of Implied Contract

The essential elements of an implied-in-fact contract and an express contract are the same, *i.e.*, mutual assent and consideration [*Chandler v. Roach (1957) 156 Cal. App. 2d 435, 440, 319 P.2d 776]* . The essential difference between an implied contract and an express contract is the mode of proof. When a contract is implied, the party asserting it must prove conduct from which a promise may be inferred [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 675, 677, 254 Cal. Rptr. 211, 765 P.2d 373* ; *Youngman v. Nevada Irrigation Dist. (1969) 70 Cal. 2d 240, 246, 74 Cal. Rptr. 398, 449 P.2d 462* ; *Chandler v. Roach (1957) 156 Cal. App. 2d 435, 440, 319 P.2d 776* ; *Thompson v. California Brewing Co. (1957) 150 Cal. App. 2d 469, 473, 310 P.2d 436]* . The party seeking to prove the contract may introduce evidence of the parties' conduct to establish an implied-in-fact contract. The other party may introduce evidence rebutting inferences arising from the conduct or showing another explanation for it [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 677, 254 Cal. Rptr. 211, 765 P.2d 373]* .

In pleading a cause of action on an agreement implied from conduct, the plaintiff need only allege the facts from which the promise is implied [*Youngman v. Nevada Irrigation Dist. (1969) 70 Cal. 2d 240, 246-247, 74 Cal. Rptr. 398, 449 P.2d 462]* . For example, the plaintiff established an implied-in-fact contract that interest was owed on past-due accounts bya course of conduct between the parties, including the seller's acceptance of special interest invoices, partial payment of interest, the continued business relationship between the parties, and an indication by the seller that interest would be paid [*Kawasho Internat. (U.S.A.), Inc. v. Lakewood Pipe Service, Inc. (1983) 152 Cal. App. 3d 785, 789-791, 201 Cal. Rptr. 640]* .

If the complaint does not allege explicit words by which the parties agreed, but instead alleges a course of conduct including oral representations that created a reasonable expectation, the cause of action is for breach of an implied contract rather than for breach of oral contract [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 675, 254 Cal. Rptr. 211, 765 P.2d 373* ; *Wilkerson v. Wells Fargo Bank (1989) 212 Cal. App. 3d 1217, 1225 n.2, 261 Cal. Rptr. 185* (implied contract for employment terminable only for cause)].

[4] Proof of Damages for Breach of Implied Contract

The value of the benefit conferred is evidence of the reasonable value of services rendered under an implied contract [*LuMetta v. U.S. Robotics, Inc. (9th Cir. 1987) 824 F.2d 768, 770* (diversity case applying California law); *Ferrier v. Commercial Steel Corp. (1956) 142 Cal. App. 2d 424, 426-427, 298 P.2d 555]* .

The terms of an unenforceable express contract may be evidence of the reasonable value of services rendered under an implied contract, provided the agreed price assigns a dollar value to the promised performance or provides a formula by which the ultimate sum is readily ascertainable [*LuMetta v. U.S. Robotics, Inc. (9th Cir. 1987) 824 F.2d 768, 770* ; *George v. Double-D Foods, Inc. (1984) 155 Cal. App. 3d 36, 42, 201 Cal. Rptr. 870]* .

[5] Cross References

For discussion and forms relating to common counts, see Ch. 121, *Common Counts* .

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13-140 California Forms of Pleading and Practice--Annotated § 140.111

§ 140.111 Allegation--Custom and Usage Applicable to Construction of Contract [Civ. Code § 1656]

[1] FORM Allegation--Custom and Usage Applicable to Construction of Contract [Civ. Code § 1656]

At all times mentioned there has existed a trade custom and usage _____ [*set out custom and usage, e.g.,* that in all contracts in which a manufacturer's representative is granted an exclusive agency by the manufacturer to perform services as a sales agent, the agent or manufacturer's representative correspondingly receives a commission on all sales made in the specified territory, notwithstanding the fact that the request for quotation of prices or the actual purchase order may be sent directly to the manufacturer for approval and shipment, and notwithstanding the fact that the principal may actually close the sale specifically originated by the agent]. This custom and usage is, and at all times mentioned has been, certain and uniform, of general continuity and notoriety, and acquiesced-in by the whole of this industry. This custom and usage was well known to plaintiff and to defendant and was in fact deemed by each of the parties to be an integral part of the contract.]

[2] Use of Form

The allegation in [1], *above,* is for use in a complaint for damages for breach of contract when there is a trade custom or usage the court should use in interpreting the contract.

[3] Custom and Usage

A party is not bound by a custom or usage unless the party had actual knowledge of it, or it is so general or well known in the community as to create a presumption of knowledge [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 608, 328 P.2d 953* ; *Wise v. Reeve Electronics, Inc. (1960) 183 Cal. App. 2d 4, 9, 6 Cal. Rptr. 587]* . The complaint must plead a custom for the court to accept evidence of that custom [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 608, 328 P.2d 953* ; *Hanley v. Marsh & McLennan-J.B.F. Davis & Son, Ltd. (1941) 46 Cal. App. 2d 787, 797, 117 P.2d 69]* .

The parties are deemed to have used words according to their different and peculiar sense as shown by trade usage [*Beneficial Fire & Cas. Ins. Co. v. Kurt Hitke & Co. (1956) 46 Cal. 2d 517, 525-526, 297 P.2d 428]* . The test for admissibility of extrinsic evidence is not whether a written agreement appears to the court to be plain and unambiguous

on its face, but whether the evidence offered is relevant to prove a meaning to which the language of the agreement is reasonably susceptible. Thus, the court could have properly admitted parol evidence of industry custom along with evidence of the circumstances surrounding formation of the contract todetermine whether a provision that either party could terminate a distributorship agreement on 30 days' notice meant that termination could be based only on poor performance that went uncorrected after notice [*Jack Rowe Assoc., Inc. v. Fisher Corp. (9th Cir. 1987) 833 F.2d 177, 180-183* ; *see* *Wolf v. Superior Court (2004) 114 Cal. App. 4th 1343, 1346, 1354-1355, 8 Cal. Rptr. 3d 649* (trial court erred in finding that term "gross receipts" in author's royalty contract meant only cash and in rejecting expert extrinsic evidence that, in context of entertainment industry, term meant both money and value of other consideration received when not otherwise limited or defined by contract)].

A trade usage that existed at the contract's inception no longer governs when, at the time of termination, that trade usage no longer exists [*Varni Bros. Corp. v. Wine World, Inc. (1995) 35 Cal. App. 4th 880, 892-893, 41 Cal. Rptr. 2d 740]* .

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§ 140.112 Allegation--Modification of Original Written Contract by Subsequent Written Agreement or Executed Oral Agreement or Oral Agreement Supported by New Consideration [Civ. Code § 1698]

[1] FORM Allegation--Modification of Original Written Contract by Subsequent Written Agreement or Executed Oral Agreement or Oral Agreement Supported by New Consideration [Civ. Code § 1698]

[*EITHER*]

On or about _____ [*date*], plaintiff and defendant entered into a written contract, a copy of which is attached as Exhibit _____ and made a part of this pleading. After entering into that contract, on or about _____ [*date*], plaintiff and defendant entered into another written contract, a copy of which is attached as Exhibit _____ and made a part of this pleading. The purpose of the second contract was to modify the terms of the first contract.

[*OR*]

On or about _____ [*date*], plaintiff and defendant entered into a written contract, a copy of which is attached as Exhibit _____ and made a part of this pleading. After the parties entered into that contract, on or about _____ [*date*], plaintiff and defendant made an oral agreement to _____ [*specify terms of oral agreement*]. The purpose of the oral agreement was to modify the written contract. The object of the oral agreement has been fully performed in that _____ [*specify performance of oral agreement by plaintiff and defendant*].

[*OR*]

On or about _____ [*date*], plaintiff and defendant entered into a written contract, a copy of which is

attached as Exhibit _____ and made a part of this pleading. The contract did not contain a provision stating that the parties could not modify the contract by an oral agreement supported by new consideration. After the parties entered into the contract, on or about _____ [*date*], plaintiff and defendant made an oral agreement to _____ [*specify terms of oral agreement*]. The purpose of the oral agreement was to modify the written contract. The oral agreement was supported by valuable and new consideration in that _____ [*specify new consideration*].

[2] Use of Form

The allegation in [1], *above,* is for use in a complaint for damages for breach of contract when the parties modified the original written contract. This allegation may be used in the *form in § 140.101[1]* in place of Paragraph 4.

[3] Modification of Written Contract

[a] Parties' Power to Modify Contract

A modification of a contract is a change in one or more respects that introduces new elements into the details of the contract, or cancels some of them, but leaves the general purpose and effect undisturbed [*Grant v. Aerodraulics Co. (1949) 91 Cal. App. 2d 68, 74, 204 P.2d 683]* .

A contract in writing may be modified by a contract in writing [*Civ. Code § 1698(a)*], or by an oral agreement to the extent that the oral agreement is executed by the parties [*Civ. Code § 1698(b)*; *Estate of Wilson (1976) 64 Cal. App. 3d 786, 799, 134 Cal. Rptr. 749* (decided before 1976 amendment of *Civ. Code § 1698*); *see Pearsall v. Henry (1908) 153 Cal. 314, 325, 95 P. 159* (*Civ. Code § 1698* has no application to new agreements substituted for existing written agreements)]. Whether the parties modified a written contract by an executed oral agreement is a question of fact [*Daugherty Co. v. Kimberly-Clark Corp. (1971) 14 Cal. App. 3d 151, 158, 92 Cal. Rptr. 120]* .

Unless the contract expressly provides otherwise [*see* [b], *below*], a written contract may be modified by an oral agreement supported by new consideration [*Civ. Code § 1698(c)*; see *Raedeke v. Gibraltar Sav. & Loan Asso. (1974) 10 Cal. 3d 665, 673, 111 Cal. Rptr. 693, 517 P.2d 1157* (decided before 1976 amendment of *Civ. Code § 1698*; *but see Com. Code § 2209(1)* (allowing modification of contract without consideration)]. When applicable, the statute of frauds [*Civ. Code § 1624*] must be satisfied if a contract is modified by an oral agreement supported by new consideration [*Civ. Code § 1698(c)*].

[b] Provision Against Orally Modifying Contract

Parties may prevent enforcement of executory oral modifications pursuant to *Civ. Code § 1698(c)* by providing in the written contract that it may only be modified in writing [*see Com. Code § 2209(2)* (signed agreement can exclude modification except by signed writing)]. However, this contractual provision would not apply to a modification by an executed oral agreement as provided for in *Civ. Code § 1698(b)* [*MacIsaac & Menke Co. v. Cardox Corp. (1961) 193 Cal. App. 2d 661, 670, 14 Cal. Rptr. 523* (in action by subcontractor to recover costs for work performed under written subcontract modified by executed oral agreement, defendant estopped from relying on subcontract provision requiring prior written approval before proceeding with work involving extra compensation by its acts and conduct in orally promising to pay for extra work performed)].

Courts may apply various rules of law to permit oral modification even though the written contract expressly provides that modifications must be in writing. Those rules include:

- Estoppel [*MacIsaac & Menke Co. v. Cardox Corp. (1961) 193 Cal. App. 2d 661, 670, 14 Cal. Rptr. 523]* ;

- Oral novation and substitution of a new agreement [*Pearsall v. Henry (1908) 153 Cal. 314, 325, 95 P. 159]* ;

- Rescission of a written contract by an oral agreement [*see generally* Ch. 490, *Rescission and Restitution*];

- Waiver of a provision of a written contract [*1st. Olympic Corp. v. Hawryluk (1960) 185 Cal. App. 2d 832, 841* (provision in building contract that owner could be charged only for extras ordered in writing permitted to be waived)]; and

- Oral independent collateral contracts [*Lacy Mfg. Co. v. Gold Crown Mining Co. (1942) 52 Cal. App. 2d 568, 577, 126 P.2d 644* (subsequent oral agreement to pay additional sum for excess weight was independent, collateral contract that did not alter or vary written contract to transport and reconstruct factory)].

[4] Equitable or Implicit Modification

When one party has, through oral representations and conduct or custom, behaved in a manner antithetical to one or more of the terms of a contract after execution and has induced the other party to rely on those representations and conduct or custom, equity will uphold the apparent modification [*cf.* *Wagner v. Glendale Adventist Medical Center (1989) 216 Cal. App. 3d 1379, 1388, 265 Cal. Rptr. 412* (dicta, conduct not sufficient)].

The court may imply an agreement to modify a written contract by conduct of the parties that is inconsistent with the written contract so as to warrant a conclusion that the parties intended to modify it [*Garrison v. Edward Brown & Sons (1944) 25 Cal. 2d 473, 479, 154 P.2d 377* ; *Daugherty Co. v. Kimberly-Clark Corp. (1971) 14 Cal. App. 3d 151, 158, 92 Cal. Rptr. 120]* .

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13-140 California Forms of Pleading and Practice--Annotated § 140.113

§ 140.113 Allegation--Waiver of Condition by Defendant

[1] FORM Allegation--Waiver of Condition by Defendant

On or about _____ [*date*], defendant waived performance of the condition that plaintiff _____ [*set forth condition*] by _____ [*specify how defendant waived condition*]. Plaintiff has performed all other conditions of the contract on his/her/its part to be performed.

[2] Use of Form

The allegation in [1], *above*, is for use in a complaint for damages for breach of contract when the defendant has waived performance of a condition and the plaintiff has performed all other conditions.

[3] Waiver of Conditions

Waiver is the intentional relinquishment of a known right. Waiver may result from an express agreement or be inferred from circumstances indicating an intent to waive. It is essential that the promisee could and would have performed the condition had it not been for the promisor's waiver [*Panno v. Russo (1947) 82 Cal. App. 2d 408, 412, 186 P.2d 452]* .

A creditor waives all objections to the mode of an offer of performance that the creditor had an opportunity to state but did not state at the time to the party making the offer [*Civ. Code § 1501*].

The rule concerning modification of a written contract [*see Civ. Code § 1698*; § 140.112[3]] is subject to the exception that a party to a contract may by conduct or representations waive the performance of a condition or be estopped because of conduct or representations, to deny that the party has waived the performance [*Panno v. Russo (1947) 82 Cal. App. 2d 408, 412, 186 P.2d 452* (decided before 1976 amendment of *Civ. Code § 1698*)].

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13-140 California Forms of Pleading and Practice--Annotated § 140.114

§ 140.114 Allegation--Charitable Pledge

[1] FORM Allegation--Charitable Pledge

1. On or about _____ [*date*], defendant executed a written subscription in favor of plaintiff by the terms of which defendant promised to pay to plaintiff the sum of $_____. A copy of the subscription is attached as Exhibit _____ and made a part of this pleading.

[*EITHER*]

2. At or about the same time other persons executed similar subscriptions by the terms of which all those persons concurred in a mutual promise to contribute to the payment of an aggregate sum of $_____ for the benefit of plaintiff.

[*OR*]

2. On the faith of and relying on defendant's subscription, plaintiff _____ [*specify, e.g.,* erected a building, purchased equipment, employed teachers, and equipped a department to further the work of _____ (*specify*)].

[2] Use of Form

The allegations in [1], *above*, are for use in a complaint for damages for breach of a contract to pay a promised amount to a charitable institution. This allegation may be inserted in the *form in § 140.101[1]* in place of Paragraph 4.

[3] Enforceability of Pledge or Subscription

The general rule is that the promise to pay a subscription is ordinarily a mere offer that, in the absence of consideration,

the promisor may withdraw at any time before acceptance. The subscription is an offer until the beneficiary accepts it or acts on it. However, when several parties may similar promises to contribute to the payment of an aggregate sum for the benefit of a charitable, religious, or educational institution in which they are all interested, the so-called mutuality of the promises is generally adequate consideration for enforcement by the promisee [*Board of Home Missions v. Manley (1933) 129 Cal. App. 541, 543-544, 19 P.2d 21* ; see *Grand Lodge v. Farnham (1886) 70 Cal. 158, 159-160, 11 P. 592]* .

A subscription promise to a charitable institution is enforceable if the promisee uses the subscription to induce other contributions, even though the subscription was not conditioned on securing any particular sum in the aggregate [*First Trust & Sav. Bank of Pasadena v. Coe College (1935) 8 Cal. App. 2d 195, 199, 47 P.2d 481]* . Acts performed and obligations incurred by a promisee in reliance on the payment of a subscription noterender the agreement enforceable and estop the promisor from denying its validity [*University of So. Cal. v. Bryson (1929) 103 Cal. App. 39, 51, 283 P. 949]* .

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13-140 California Forms of Pleading and Practice--Annotated § 140.115

§ 140.115 Allegation--Exclusive Vending Machine Concession

[1] FORM Allegation--Exclusive Vending Machine Concession

On or about _____ [*date*], plaintiff and defendant entered into a written contract by the terms of which defendant _____ [*specify, e.g.,* granted to plaintiff an exclusive concession for the sale of _____ (*specify product*) by means of automatic vending machines in and about defendant's place of business located at _____ (*city*), _____ County, California]. A copy of the contract is attached as Exhibit _____ and made a part of this pleading. Plaintiff agreed _____ [*specify, e.g.,* to pay defendant commissions based on the sales through the vending machines, and plaintiff paid defendant the sum of $_____ as advance commissions on sales as provided in the contract].

[2] Use of Form

The allegation in [1], *above,* is for use in an action for damages for breach of a contract to allow the sale of the plaintiff's products through vending machines located on the defendant's premises. This allegation may be inserted in the *form in § 140.101[1]* in place of Paragraph 4.

The fact that a contract gives a vending machine company discretion to change commission rates on written notice to the defendant does not render the contract illusory, lacking in mutuality, or void [*Automatic Vending Co. v. Wisdom (1960) 182 Cal. App. 2d 354, 357, 6 Cal. Rptr. 31]* .

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13-140 California Forms of Pleading and Practice--Annotated § 140.116

§ 140.116 Allegation--Agreement to Manufacture and Promote Invention

[1] FORM Allegation--Agreement to Manufacture and Promote Invention

1. On or about _____ [*date*], at _____ [*city*], _____ County, California, plaintiff and defendant entered into a written contract for the manufacture and sale by defendant of a device invented by plaintiff, in which plaintiff owns the patent rights. A copy of the agreement is attached as Exhibit _____ and made a part of this pleading. The device that is the subject of the contract is _____ [*describe*].

2. Under the terms of the contract, defendant agreed to _____ [*specify terms, e.g.,* advance sufficient funds to manufacture and make up certain designs and models, to manufacture large numbers of the devices, to prepare the necessary sales brochures, and to make a concentrated direct effort for sales of the device]. Defendant further agreed to manufacture and sell sufficiently large numbers of the device within a reasonable time and to pay to plaintiff the sum of $_____.

[2] Use of Form

The allegations in [1], *above,* are for use in a complaint for damages for breach of a contract to manufacture, sell, and promote a patented invention. These allegations may be inserted in the *form in § 140.101[1]* in place of Paragraph 4.

[3] Cross References

For forms of complaint for use in an action for breach of a patent licensing agreement, see Ch. 411, *Patents and Inventions* .

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[Reserved]

§§ 140.117[Reserved]

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13-140 California Forms of Pleading and Practice--Annotated § 140.130

§ 140.130 Demurrer--Complaint Fails to Specify Whether Contract Was Oral or Written or Implied by Conduct [Code Civ. Proc. § 430.10(g)]

[1] FORM Demurrer--Complaint Fails to Specify Whether Contract Was Oral or Written or Implied by Conduct [Code Civ. Proc. § 430.10(g)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	DEMURRER TO COMPLAINT[, NOTICE OF
_____ [*name*],	)	HEARING AND SUPPORTING MEMORANDUM]
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____[*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Defendant demurs to the complaint on the following ground:

The cause of action is founded on a contract, and defendant cannot ascertain from the complaint whether the contract is written or oral or implied by conduct.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

NOTICE IS HEREBY GIVEN that this demurrer has been set for hearing on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], _____ County, California.

The demurrer will be based on this notice of hearing and the supporting memorandum served and filed with this demurrer and notice of hearing, on the records and files herein, and on such evidence as may be presented at the hearing of the demurrer.

[2] Use of Form

The demurrer in [1], *above,* is for use by the defendant to object to a complaint for breach of contract in superior court on the ground that the complaint fails to specify whether the contract is written or oral or implied by conduct [*Code Civ. Proc. § 430.10(g)*]. Special demurrers are not allowed in limited civil cases (amount in controversy is $25,000 or less) [*see Code Civ. Proc. §§ 91(a), (d), 92(c)*; *Buss v. J.O. Martin Co. (1966) 241 Cal. App. 2d 123, 133, 50 Cal. Rptr. 206* (demurrer under *Code Civ. Proc. § 430.10(g)* as special demurrer)]. For further discussion and forms of demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Accompanying Papers

The defendant is required to serve and file with the demurrer a notice of hearing [*Cal. Rules of Ct., Rule 3.1320(c),(d)*], which may instead be included in the demurrer as shown in the form in [1], *above.* A memorandum in support of the demurrer is not required; however, the court may construe the absence of a supporting memorandum as an admission that the demurrer is not meritorious and cause for overruling it, and as a waiver of all grounds not supported [*see Cal. Rules of Ct., Rules 3.1113(a), 3.1320*].

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13-140 California Forms of Pleading and Practice--Annotated § 140.131

§ 140.131 Demurrer--Promisee for Benefit of Donee Third Party May Not Recover Damages

[1] FORM Demurrer--Promisee for Benefit of Donee Third Party May Not Recover Damages

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	DEMURRER TO COMPLAINT [NOTICE OF
Plaintiff,	)	HEARING AND SUPPORTING MEMORANDUM]
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

Defendant demurs to the complaint on the following ground:

Plaintiff's complaint fails to state a cause of action in that, the contract having been made for the benefit of a third party, and the plaintiff having failed to allege that the plaintiff was bound to provide the promised benefit to the third party, the plaintiff may not recover damages for breach of the contract because the third-party beneficiary is a donee beneficiary.

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Defendant _____ [*name*]

NOTICE IS HEREBY GIVEN that this demurrer has been set for hearing on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] the above-entitled court, located at _____ [*name of building or street address or both*], in _____ [*city*], _____ County, California.

The demurrer will be based on this notice of hearing and the supporting memorandum served and filed with this demurrer and notice of hearing, on the records and files herein, and on such evidence as may be presented at the hearing of the demurrer.

[2] Use of Form

The demurrer in [1], *above*, is for use when the defendant demurs on the ground that the complaint fails to state a cause of action in that the plaintiff, as promisee of a contract for the benefit of a donee third party, may not recover damages for breach of the contract.

[3] Accompanying Papers

The defendant is required to serve and file a notice of hearing with the demurrer [*Cal. Rules of Ct., Rule 3.1320(c), (d)*]. The notice may be included in the demurrer as shown in the form in [1], *above.* A memorandum in support of the demurrer is not required; however, the court may construe the absence of a supporting memorandum as an admission that the demurrer is not meritorious and cause for overruling it, and as a waiver of all grounds not supported [*see Cal. Rules of Ct., Rules 3.1113(a), 3.1320*].

[4] Promisee for Donee Third-Party Beneficiary Not Damaged

When a contract is for the benefit of a third party, and the promisee is not bound to provide the promised benefit to the third party, *i.e.*, the promised performance is a gift, not a legal obligation, the promisee may not recover damages if the promisor breaches the contract, because the third-party beneficiary is a donee beneficiary, not a creditor beneficiary [*see § 140.103[4][b], [c]*]. However, the promisee may seek specific performance [*In re Marriage of Smith & Maescher (1993) 21 Cal. App. 4th 100, 106-108, 26 Cal. Rptr. 2d 133]* .

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13-140 California Forms of Pleading and Practice--Annotated § 140.132

§ 140.132 Judicial Council Trial Court Pleading Form--Answer in Action Based on Contract [Cal. Rules of Ct., Rule 1.45(a), (b); Judicial Council Form PLD-C-010]

[1] FORM Judicial Council Trial Court Pleading Form--Answer in Action Based on Contract [Cal. Rules of Ct., Rule 1.45(a), (b); Judicial Council Form PLD-C-010]

Click here to view image.

[2] Use of Form

The Judicial Council has approved the answer in [1], *above*, for use in answering any action based on contract [*see Code Civ. Proc. § 425.12*; *Cal. Rules of Ct., Rule 1.45(a), (b)*; Judicial Council Form PLD-C-010; *see generally* Ch. 26, *Answers*]. Use of the form is optional [*see Code Civ. Proc. § 425.12*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format is also available at www.lexisone.com at no charge.

[3] Making General Denial

If the complaint is not verified or the demand or the value of the property in controversy does not exceed $1,000, the defendant may make a general denial [*Code Civ. Proc. §§ 431.30(d), 431.40(a)*]. The Judicial Council has adopted a form for a general denial for this purpose [*see Code Civ. Proc. § 431.40(c)*; *Cal. Rules of Ct., Rule 1.45(a)*; Judicial Council Form PLD-050]. Use of the general denial form is mandatory [*Cal. Rules of Ct., Rule 1.31(c)*]. However, in an action based on contract brought on a Judicial Council complaint form [*see § 140.100*] that is unverified, the defendant may use either the mandatory general denial form or the form in [1], *above*, which more specifically applies to a contract complaint and has been approved by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.35*; Judicial Council Form PLD-C-010]. Counsel should review local court practice to determine whether the court will require the mandatory general denial form.

[4] Filling Out Form

[a] Heading

Counsel should fill in the heading with the name, address, and telephone number of and party represented by the attorney filing the answer. Counsel should also fill in the name and post office and street address of the court, the names of the plaintiff and the defendant, and the case number. The appropriate box should be checked indicating whether counsel is answering a complaint or cross complaint, and fill in the name of the party who filed the complaint or cross complaint.

[b] Number of Pages (Paragraph 1)

Counsel should fill in the blank with the number of pages contained in the pleading, including attachments and exhibits.

[c] Name of Defendant (Paragraph 2)

The name of the defendant answering the complaint or cross complaint should be inserted in Paragraph 2.

[d] General Denial (Paragraph 3a)

Counsel should check the box for Paragraph 3a if the defendant generally denies each statement of the complaint or cross complaint.

The filing of a general denial denies in one sentence all the allegations of the complaint. In the case of a complaint for breach of contract, a general denial denies that there is a contract, that the plaintiff performed or had an excuse for nonperformance, that the defendant did not perform, or that the plaintiff was damaged. A general denial allows the denying party the opportunity to present evidence to refute the allegations in the complaint [*Walsh v. West County Mission Community College District (1998) 66 Cal. App. 4th 1532, 1545-1547, 78 Cal. Rptr. 2d 725* (dismissal of defendant's cross-complaint with prejudice did not preclude defendant from defending against complaint by introducing evidence tending to refute elements of breach of contract claim that had been generally denied by defendant)].

[e] Specific Denials (Paragraph 3b)

Counsel should check the box for Paragraph 3b when denying only part of the allegations of the complaint or cross complaint. Counsel should state the paragraph numbers of the allegations denied or an explanation of the denials in Paragraph 3b(1). The denials of the allegations controverted may be stated by reference to specific paragraphs or parts of the complaint. Denials may be stated also by express admission of certain allegations of the complaint with a general denial of all of the allegations not admitted [*Code Civ. Proc. § 431.30(f)*].

Denials based on lack of information or belief as to the truth of allegations should be stated in Paragraph 3b(2). Denials may be stated by denying certain allegations on information and belief or for lack of sufficient information or belief, with a general denial of all allegations not so denied or expressly admitted [*Code Civ. Proc. § 431.30(f)*].

If the space allowed for specific denials in Paragraphs 3b(1) and 3b(2) is not sufficient, counsel may continue the denials on Attachment 3b(1) and Attachment 3b(2). For additional discussion of denials, see Ch. 26, *Answers* .

[f] Affirmative Defenses (Paragraph 4)

Defendant's affirmative defenses must be alleged in Paragraph 4. The answer to a complaint must contain a statement of any new matter constituting a defense [*Code Civ. Proc. § 431.30(b)(2)*]. The example stated in Paragraph 4 may be used in an answer to an action for damages for breach of contract when the action was not commenced before expiration of

the applicable statute of limitations [*see Code Civ. Proc. §§ 337, 339*; *see also Filet Menu, Inc. v. Cheng (1999) 71 Cal. App. 4th 1276, 1282-1284, 84 Cal. Rptr. 2d 384* (statute may be tolled by plaintiff's out-of-state travel unrelated to interstate commerce pursuant to *Code Civ. Proc. § 351*)]. The defenses must be separately stated, and the several defenses must refer to the causes of action they are intended to answer, in a manner by which they may be intelligibly distinguished [*Code Civ. Proc. § 431.30(g)*]. Each separately stated defense must be separately numbered [*Cal. Rules of Ct., Rule 2.112*]. Counsel should continue the list of affirmative defenses on a separate sheet of paper labeled Attachment 4.

For possible affirmative defenses, see *§§ 140.133 -140.152*. For further discussion of affirmative defenses, see Ch. 26, *Answers* .

[g] Other Allegations (Paragraph 5)

Counsel should state any additional allegations in Paragraph 5 of the answer.

[h] Prayer (Paragraph 6)

Counsel should check the box for Paragraph 6b if requesting costs of suit. Counsel may request additional relief by checking the box marked "other" and specifying the relief sought.

Except as otherwise provided specifically by statute, the measure and mode of compensation of attorneys is left to the express or implied agreement of the parties [*Code Civ. Proc. § 1021*]. In any action on a contract, when the contract specifically provides that attorney's fees and costs incurred to enforce the contract will be awarded to one of the parties or to the prevailing party, the party determined to be the prevailing party, whether or not the party specified in the contract, is entitled to reasonable attorney's fees in addition to costs and necessary disbursements [*Civ. Code § 1717*; *see Scott Co. of California v. Blount, Inc. (1999) 20 Cal. 4th 1103, 1108-1109, 86 Cal. Rptr. 2d 614, 979 P.2d 974* (although attorney fees provision in contract was unilateral, giving only defendant and not plaintiff right to attorney fees, *Civ. Code § 1717* rendered provision mutual, giving prevailing party right to attorney fees on any claims based on contract); *Sears v. Baccaglio (1998) 60 Cal. App. 4th 1136, 1154-1155, 70 Cal. Rptr. 2d 769]* (reviewing legislative history of *Civ. Code § 1717* and finding that party can fail to recover net monetary judgment and still prevail for purposes of collecting fees in action founded on contract). A court may deny a contractual claim for attorneys' fees by a defendant who has been voluntarily dismissed from a suit prior to trial [*see Santisas v. Goodin (1998) 17 Cal. 4th 599, 602, 608, 71 Cal. Rptr. 2d 830* (examining recovery of attorney fees incurreddefending action when plaintiff has voluntarily dismissed action before trial); *see also Silver v. Boatwright Home Inspection, Inc. (2002) 97 Cal. App. 4th 443, 446, 118 Cal. Rptr. 2d 475* (holding that defendant was not prevailing party when plaintiffs obtained their litigation objective through settlement with other defendants)]. For further discussion of attorney's fees, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

There appear to be two options for requesting attorney's fees. According to *Civ. Code § 1717*, reasonable attorney's fees are fixed by the court, on notice and motion by a party, and the fees are an element of the costs of suit. Thus, although a request for costs of suit might also serve as a request for attorney's fees, counsel should check the box marked "other" and specifically request attorney's fees.

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13-140 California Forms of Pleading and Practice--Annotated § 140.133

§ 140.133 Affirmative Defense--Party Entirely Without Understanding [Civ. Code § 38]

[1] FORM Affirmative Defense--Party Entirely Without Understanding [Civ. Code § 38]

AS A [_____ (*specify number, if more than one, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*add, if more than one cause of action was alleged,* TO THE _____ (*specify number, e.g., SECOND*) CAUSE OF ACTION], defendant alleges:

1. On or about _____ [*date*], when plaintiff and defendant entered into the contract, a copy of which is attached to the complaint as Exhibit _____, defendant was a person entirely without understanding and was not competent to make a contract of any kind.

2. The contract was not for things furnished to the defendant necessary for his/her support or the support of his/her family.

[2] Use of Form

The affirmative defense in [1], *above,* is for use in an answer to a complaint for damages for breach of contract, by a defendant who was entirely without understanding at the time the contract was made [*see Civ. Code § 38* (persons entirely without understanding have no power to make contracts); *Evid. Code § 522* (party claiming any person is insane, including himself or herself, has burden of proof on that issue)]. For further discussion, see *§ 140.21[1]*.

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13-140 California Forms of Pleading and Practice--Annotated § 140.134

§ 140.134 Affirmative Defense--Defendant Lacked Capacity to Contract [Civ. Code § 39; Prob. Code § 812]--Contract Entered Into Before Adjudication of Incompetence

[1] FORM Affirmative Defense--Defendant Lacked Capacity to Contract [Civ. Code § 39; Prob. Code § 812]--Contract Entered Into Before Adjudication of Incompetence

AS A [_____ (*specify number, if more than one, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*add, if more than one cause of action was alleged,* TO THE _____ (*specify number, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. On or about _____ [*date*], when plaintiff and defendant entered into the contract attached to the complaint as Exhibit _____, defendant was a person of unsound mind, but not entirely without understanding. Defendant lacked the capacity to contract, by virtue of the fact that defendant lacked the ability to understand and appreciate the rights, duties, and responsibilities created or affected by the contract, the probable consequences for defendant and other persons affected by the contract, or the significant risks and benefits of, and alternatives to, the contract.

[2. On or about _____ (*date*), when plaintiff and defendant entered into the written contract attached to the complaint as Exhibit _____, defendant was substantially unable to manage his/her own financial resources and/or to resist fraud or undue influence.]

3. At the time plaintiff and defendant entered into the contract, defendant's incapacity to contract had not been judicially determined.

4. On or about _____ [*date*], defendant rescinded the contract by _____ [*specify means of giving notice to plaintiff, e.g.,* a letter from defendant to plaintiff].

5. On or about _____ [*date*], defendant _____ [restored to plaintiff everything of value that he/she received from plaintiff under the contract *or* offered to restore everything of value that he/she received

from plaintiff, on the condition that plaintiff restore to defendant everything plaintiff received under the contract].

[2] Use of Form

The affirmative defense in [1], *above*, is for use in an answer to a complaint seeking damages for breach of contract, when the defendant allegedly lacked the capacity to contract at the time the parties entered into the contract. This form admits that the defendant was not entirely without understanding, but alleges that the defendant was of unsound mind at the time the contract was entered into. A contract entered into by a person of unsound mind before that person's incapacity has been judicially determined is not automatically void, but is subject to rescission [*Civ. Code § 39*]. In contrast, a contract made by a person entirely without understanding is void [*Civ. Code § 38*]. To allege that the contract is void because the defendant was entirely without understanding, use the *form in § 140.133* instead of this form. For further discussion, see *§ 140.21*.

[3] Allegation of Lack of Capacity

Paragraph 1 alleges that the defendant was of unsound mind, but not entirely without understanding. This basic allegation is derived from the language of *Civ. Code § 39(a)*. The additional language in support of that basic allegation is derived from *Prob. Code § 812*, which specifies the general criteria to determine whether a person lacks capacity to make any decision. A person lacks that capacity unless he or she has the ability to communicate the decision verbally or by other means and to understand and appreciate, to the extent relevant, all of the following [*Prob. Code § 812*]:

- The rights, duties, and responsibilities created by or affected by the decision;
- The probable consequences for the decision-maker and, when appropriate, the persons affected by the decision; and
- The significant risks, benefits, and reasonable alternatives involved in the decision.

These criteria apply to any determination of a person's capacity to make a decision, except as otherwise provided by law [*Prob. Code § 812*; *see Smalley v. Baker (1968) 262 Cal. App. 2d 824, 832, 69 Cal. Rptr. 521* (test of mental competency is whether person understood nature, purpose, and effect of what he or she did); *Walton v. Bank of California (1963) 218 Cal. App. 2d 527, 541, 32 Cal. Rptr. 856* (test of mental capacity is whether person could deal with subject matter of contract sought to be rescinded with full understanding of his or her rights)].

The optional language in Paragraph 2 may be included to invoke the rebuttable presumption established by *Civ. Code § 39(b)*. Under that section, there is a rebuttable presumption, affecting the burden of proof, that a person is of unsound mind for purposes of rescission if the person is substantially unable to manage his or her own financial resources or resist fraud or undue influence [*Civ. Code § 39(b)*]. Substantial inability may not be proved solely by isolated incidents of negligence or imprudence [*Civ. Code § 39(b)*].

[4] Basic Prerequisites to Rescission

To qualify for rescission under *Civ. Code § 39*, the contract must have been entered into before defendant's incapacity was determined. Accordingly, Paragraph 3 of this form alleges that no such determination had been made at the time the plaintiff and the defendant entered into the contract.

To effect a rescission, the defendant must do both of the following promptly on discovering the facts that entitle him or her to rescind, if he or she is free from duress, menace, undue influence, or disability, and is aware of his or her right to rescind [*Civ. Code § 1691*]:

- Give notice of rescission to the plaintiff; and

- Restore to the plaintiff everything of value the defendant received from the plaintiff under the contract, or offer to restore it on condition that the plaintiff do likewise, unless the plaintiff is unable or positively refuses to do so.

Paragraphs 4 and 5 allege that these conditions have been satisfied.

[5] Cross References

For memoranda of points and authorities supporting and opposing a general demurrer to a complaint and to an answer for cancellation of a void contract or conveyance and for partial summary judgment in actions in which one party may be mentally incompetent, see California Points and Authorities, Ch. 117, *Insane and Incompetent Persons* , pt. II (Matthew Bender).

For discussion and forms relating to rescission, see Ch. 490, *Rescission and Restitution* .

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13-140 California Forms of Pleading and Practice--Annotated § 140.135

§ 140.135 Affirmative Defense--Incompetence--After Adjudication [Civ. Code § 40]

[1] FORM Affirmative Defense--Incompetence--After Adjudication [Civ. Code § 40]

AS A [_____ (*specify number, if more than one, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*add, if more than one cause of action was alleged,* TO THE _____ (*specify number, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. On or about _____ [*date*], defendant was adjudicated incompetent by order of the Superior Court of _____ County, California, Case No. _____.

2. Defendant has not been restored to capacity since the time of that order, and, at the time of making the contract, defendant was wholly and absolutely incompetent and unable to comprehend and understand the nature of the transaction.

[2] Use of Form

The form of affirmative defense in [1], *above,* is for use in an answer to a complaint for damages for breach of contract by a person adjudged incompetent before the parties entered into the contract into [*see Civ. Code § 40* (person judicially determined to be of unsound mind not competent to make contract); *Hellman Commercial T. & S. Bk. v. Alden (1929) 206 Cal. 592, 604-605, 275 P. 794* (contract void if defendant judicially determined to be incompetent before contract entered into and defendant not restored to capacity before time of contracting); *see also Civ. Code § 38* (person entirely without understanding without power to contract); *Civ. Code §§ 1556, 1557*(persons of unsound mind not capable of contracting)]. For further discussion, see *§ 140.21*.

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13-140 California Forms of Pleading and Practice--Annotated § 140.136

§ 140.136 Affirmative Defense--Waiver of Breach

[1] FORM Affirmative Defense--Waiver of Breach

AS A [_____ (*specify number, if more than one, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*add, if more than one cause of action was alleged,* TO THE _____ (*specify number, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

On _____ [*date*], plaintiff had full knowledge that defendant had not _____ [*specify performance or lack of performance constituting breach*], and plaintiff waived his/her/its right to performance on that date, in that plaintiff elected to treat the contract as still alive, viable, and binding, and plaintiff accepted further performance of the contract from defendant in that _____ [*specify*].

[2] Use of Form

The form of affirmative defense in [1], *above,* is for use in an answer to a complaint for damages for breach of contract when the defendant breached the contract, but the plaintiff waived the breach.

[3] Waiver of Breach as Defense

A breach of contract is waived by continued performance on the part of the aggrieved party without a claim of breach [*A.B.C. Distrib. Co. v. Distillers Distrib. Corp. (1957) 154 Cal. App. 2d 175, 187, 316 P.2d 71* ; *see Bowman v. Santa Clara County (1957) 153 Cal. App. 2d 707, 713, 315 P.2d 67* (in case of continuing-obligation contract, waiver of breach up to certain time does not necessarily preclude promisee from asserting subsequent breach); *see also § 140.57*]. Waiver may be shown by conduct. What conduct constitutes waiver is a question of fact [*Bowman v. Santa Clara County (1957) 153 Cal. App. 2d 707, 713, 315 P.2d 67]* .

The plaintiff may waive the right to hold the defendant liable for breach if the plaintiff failed to give timely notice of cancellation of the contract and subsequently accepted a late tender of performance, treating the contract as binding after acquiring full knowledge of the breach [*Leiter v. Eltinge (1966) 246 Cal. App. 2d 306, 317, 54 Cal. Rptr. 703]* .

For example, acceptance of rent by a landlord after the tenant's breach of a condition of the lease, with full knowledge of all of the facts, was a waiver of the breach and precluded the landlord from declaring forfeiture of the lease by reason of the breach [*Kern Sunset Oil Co. v. Good Roads Oil Co. (1931) 214 Cal. 435, 440, 6 P.2d 71]* .

The burden of proving waiver of the right to rescind is on the party asserting and relying on the waiver [*Mayer v. Northwood Textile Mills (1951) 105 Cal. App. 2d 406, 409, 233 P.2d 657]* .

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13-140 California Forms of Pleading and Practice--Annotated § 140.137

§ 140.137 Affirmative Defense--Impossibility [Civ. Code §§ 1441, 1511(2), 1596]

[1] FORM Affirmative Defense--Impossibility [Civ. Code §§ 1441, 1511(2), 1596]

AS A [_____ (*specify number, if more than one, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*add, if more than one cause of action was alleged,* TO THE _____ (*specify number, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

[*EITHER*]

The _____ [condition *or* object] of the contract alleged in the complaint was impossible to _____ [fulfill *or* perform] at the time defendant was to have _____ [fulfilled *or* performed] it in that _____ [*specify*].

[*OR*]

Defendant's performance of the obligation to _____ [*specify*] was prevented by _____ [an irresistible, superhuman cause *or* the act of public enemies of California *or* the act of public enemies of the United States] in that _____ [*specify*].

[2] Use of Form

The form of affirmative defense in [1], *above,* is for use in an answer to a complaint for damages for breach of contract when the defendant's fulfillment of a condition or performance of the object of the contract was impossible or prevented by a superhuman cause or an act of the public enemy.

[3] Impossibility as Defense

Impossibility of performance is an affirmative defense. The burden of proving it rests on the defendant [*Oosten v. Hay Haulers Dairy Employees & Helpers Union (1955) 45 Cal. 2d 784, 788, 291 P.2d 17 , cert. denied, 351 U.S. 937 (1956)* ; *see § 140.45*]. Whether impossibility exists is a question of law [*Autry v. Republic Productions, Inc. (1947) 30 Cal. 2d 144, 157, 180 P.2d 888]* .

An impossible condition in a contract is void [*Civ. Code § 1441*]. Performance is excused by the intervention of an irresistible superhuman cause or an act of public enemies [*Civ. Code § 1511(2)*; *but see, e.g., Civ. Code §§ 2194, 2195* (liability of inland common carrier of property for loss or injury caused by act of public enemy or superhuman cause); *Com. Code § 2613* (rights of buyer when goods suffer casualty without fault of buyer or seller before risk of loss passes to buyer or under "no arrival, no sale" contract)]. The object of a contract must be possible by the time the contract is to be performed [*Civ. Code § 1596*]. Everything is deemed possible except that which is impossible in the nature of things [*Civ. Code § 1597*]. A contract with a single object that is wholly impossible of performance is void [*Civ. Code § 1598*].

Impracticability because of excessive and unreasonable difficulty or expense may be a defense [*Christin v. Superior Court (1937) 9 Cal. 2d 526, 533, 71 P.2d 205* ; *see § 140.45*].

[4] Act of God and Force Majeure

No party is responsible for that which no party can control [*Civ. Code § 3526*]. Acts of God are within this rule of law, as acts of God are events that occur independently of human agency [*Conlin v. Coyne (1937) 19 Cal. App. 2d 78, 87, 64 P.2d 1123]* . Damage by the elements is equivalent to an act of God [*Pope v. Farmers' Union etc. Co. (1900) 130 Cal. 139, 141, 62 P. 384]* . The words "irresistible, superhuman cause" are equivalent in meaning to the phrase "act of God," and refer to natural causes the effects of which cannot be prevented by the exercise of prudence, diligence, and care [*Ryan v. Rogers (1892) 96 Cal. 349, 353, 31 P. 244]* . The jury is required to determine as a fact whether the injury was caused by an act of God [*Conlin v. Coyne (1937) 19 Cal. App. 2d 78, 87, 64 P.2d 1123* (jury's conclusion, if reasonably supported by evidence, conclusive on appeal)].

"Force majeure" is not limited to the meaning of "act of God." The test of force majeure is whether in the particular circumstances there was such an insuperable interference, occurring without the bound party's intervention, as could not have been prevented by the exercise of prudence, diligence, and care [*Pacific Vegetable Oil Corp. v. C.S.T., Ltd. (1946) 29 Cal. 2d 228, 238, 174 P.2d 441]* .

The rule that no one is responsible for damage caused by an act of God does not inure to the benefit of one who could have avoided the damage by complying with the contract [*Holt Manufacturing Co. v. Thornton (1902) 136 Cal. 232, 235, 68 P. 708]* .

[5] Cross References

For alternative forms of affirmative defenses based on superhuman causes, see Ch. 10, *Act of God* .

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13-140 California Forms of Pleading and Practice--Annotated § 140.138

§ 140.138 Affirmative Defense--Payment of Obligation [Civ. Code § 1478]

[1] FORM Affirmative Defense--Payment of Obligation [Civ. Code § 1478]

AS A [_____ (*specify number, if more than one, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*add, if more than one cause of action was alleged,* TO THE _____ (*specify number, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

On or about _____ [*date*], the obligation set forth in the complaint was fully discharged by defendant's payment to plaintiff of the sum of $_____, which was the full amount due and was accepted by plaintiff in full payment of the obligation.

[2] Use of Form

The form of affirmative defense in [1], *above,* is for use in an answer to a complaint for damages for breach of contract when the defendant discharged the obligation sued on by payment [*see Civ. Code §§ 1473, 1478* (full performance of obligation, if accepted by creditor, extinguishes it, and payment is performance of obligation for delivery of money only); *Sousa v. First California Co. (1950) 101 Cal. App. 2d 533, 540, 225 P.2d 955* (performance consists of delivery and acceptance of money of other thing)].

A denial in the answer should be sufficient to put the fact of payment in issue, since the plaintiff must allege nonpayment to state a cause of action [*Hawley Bros. etc. Co. v. Brownstone (1899) 123 Cal. 643, 646, 56 P. 468* ; *Davanay v. Eggenhoff (1872) 43 Cal. 395, 397]* . However, since the California Supreme Court holds payment to be an affirmative defense that must be pleaded, the safer practice is to plead payment as an affirmative defense [*Pastene v. Pardini (1902) 135 Cal. 431, 434, 67 P. 681]* .

If payment is by uncertified check, the underlying obligation is not discharged until the check is paid [*Com. Code § 3310(b)(1)*; *Cornwell v. Bank of America (1990) 224 Cal. App. 3d 995, 1000-1001, 274 Cal. Rptr. 322* ; *but see Civ. Code § 1476* (if creditor directs particular manner of performance, risk of loss from performance as directed is on creditor)].

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13-140 California Forms of Pleading and Practice--Annotated § 140.139

§ 140.139 Affirmative Defense--Tender of Payment by Deposit and Notice [Civ. Code § 1500]

[1] FORM Affirmative Defense--Tender of Payment by Deposit and Notice [Civ. Code § 1500]

AS A [_____ (*specify number, if more than one, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*add, if more than one cause of action was alleged,* TO THE _____ (*specify number, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. On or about _____ [*date*], defendant tendered to plaintiff at _____, California, $_____ in full payment of the alleged claim set forth in the complaint.

2. Plaintiff refused, and continues to refuse, to accept the sum tendered.

3. On that date, defendant deposited to the credit of plaintiff in _____ [*name of bank or savings and loan association*], a _____ [*specify type of entity, e.g.,* federal savings and loan association] located at _____, California, the sum of $_____ in accordance with *Section 1500 of the Civil Code*.

4. On _____ [*date*], defendant notified plaintiff of the deposit, in writing by _____ [*specify method of delivery of notice, e.g.,* certified mail, return receipt requested] addressed to _____ [*give address to which notice was mailed or at which it was served*]. A copy of the notice is attached as Exhibit _____ and made a part of this pleading.

[2] Use of Form

The form of affirmative defense in [1], *above,* is for use in an answer to a complaint for damages for breach of a contract to pay money, when the defendant tendered payment to the plaintiff, and, immediately after the plaintiff's refusal to accept the tender, the defendant deposited the money, in the plaintiff's name, in a bank or savings and loan association in California, of good repute, and notified the plaintiff of the deposit. The obligation is extinguished by the tender, deposit, and notice [*Civ. Code § 1500*; *e.g., Taliaferro v. Taliaferro (1956) 144 Cal. App. 2d 109, 113, 300*

P.2d 726 , cert. denied, 352 U.S. 971 (1957) (deposit of money in bank in accordance with *Civ. Code § 1500* is necessary to extinguish obligation)].

Tender without deposit accomplishes the discharge of incidents under *Civ. Code § 1504, i.e.,* stops the running of interest, but does not discharge the obligation under *Civ. Code § 1500* [*Walker v. Houston (1932) 215 Cal. 742, 745-746, 12 P.2d 952]* .

The money deposited must be unconditionally available to the creditor. An account from which the creditor could not withdraw without thedebtor's signature was not a tender, especially in view of the debtor's testimony that she intended her attorney to hold the funds and not make them available to the creditor [*Gaffney v. Downey Savings & Loan Assn. (1988) 200 Cal. App. 3d 1154, 1167, 246 Cal. Rptr. 421]* .

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13-140 California Forms of Pleading and Practice--Annotated § 140.140

§ 140.140 Affirmative Defense--Prevention of Performance [Civ. Code § 1511(1)]

[1] FORM Affirmative Defense--Prevention of Performance [Civ. Code § 1511(1)]

AS A [_____ (*specify number, if more than one, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*add, if more than one cause of action was alleged,* TO THE _____ (*specify number, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. Defendant has performed all of the conditions of the contract on his/her/its part to be performed except _____ [*specify condition not performed*].

2. Defendant failed to perform the condition of _____ [*specify condition*] because plaintiff prevented defendant's performance by _____ [*specify plaintiff's acts preventing defendant's performance, e.g.,* barring him/her/it from the premises where defendant was to do the work required by the terms of the contract].

3. At all times mentioned defendant was and is ready, willing, and able to perform the condition, but plaintiff has prevented and continues to prevent defendant's performance.

[4. On _____ [*date*], defendant gave notice to plaintiff that _____ (*specify contents of notice, e.g.,* defendant intended to claim an extension of time to complete performance of the contract).]

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer to a complaint for damages for breach of contract when the plaintiff prevented the defendant's performance. The want of performance of an obligation, or an offer of performance in whole or in part, or any delay in performance, is excused when the performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though the parties stipulated that this would not be an excuse [*see Taylor v. Sapritch (1940) 38 Cal. App. 2d 478, 481, 101 P.2d 539]* . However, the parties may expressly require in the contract that the party relying on prevention to excuse the party's performance must give written notice to the other party of an intention to claim an extension of time or of an intention to bring suit or of any other similar or

related intent, within a reasonable time after the occurrence of the event excusing performance, provided the notice requirement is reasonable and just [*Civ. Code § 1511(1)*] (Paragraph 4).

If the creditor prevents performance of an obligation, the debtor is entitled to all the benefits the debtor would have received if both parties had performed the contract [*Civ. Code § 1512*]. For example, when theowner's breach delayed the contractor in the construction of a building, the contractor was excused from performance within the time specified and was entitled to damages [*Kenworthy v. State of California (1965) 236 Cal. App. 2d 378, 382, 46 Cal. Rptr. 396]* .

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13-140 California Forms of Pleading and Practice--Annotated § 140.141

§ 140.141 Affirmative Defense--Novation [Civ. Code § 1530]

[1] FORM Affirmative Defense--Novation [Civ. Code § 1530]

AS A [_____ (*specify number, if more than one, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*add, if more than one cause of action was alleged,* TO THE _____ (*specify number, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. On or about _____ [*date*], plaintiff and defendant made a new contract in writing, a copy of which is attached as Exhibit _____ and made a part of this pleading.

2. The new contract _____ [substituted a new obligation, namely, _____ (*describe new obligation*) between the parties with the intent to extinguish the obligation created by the original contract sued on *or* substituted a new debtor, _____(*name of new debtor*), in place of defendant, with the intent to release defendant *or* substituted a new creditor, _____ (*name of new creditor*), in place of plaintiff, with the intent to transfer the rights of plaintiff to the new creditor].

[2] Use of Form

The form of affirmative defense in [1], *above,* is for use in an answer to a complaint for damages for breach of contract when the parties to the contract made a novation.

[3] Methods of Making Novation

A novation is the substitution of a new obligation for an existing one [*Civ. Code § 1530*; *Alexander v. Angel (1951) 37 Cal. 2d 856, 860, 236 P.2d 561]* . It requires an intent to discharge the old contract, mutual assent, and consideration [*Howard v. County of Amador (1990) 220 Cal. App. 3d 962, 977-978, 269 Cal. Rptr. 807]* . Whether these elements are present is a question of fact [*Klepper v. Hoover (1971) 21 Cal. App. 3d 460, 463, 98 Cal. Rptr. 482]* . A novation is subject to the general rules governing contracts [*Civ. Code § 1532*].

A novation is made by one of the following methods [*Civ. Code § 1531*]:

- The substitution of a new obligation between the parties, with intent to extinguish the old obligation [*Howard v. County of Amador (1990) 220 Cal. App. 3d 962, 977-978, 269 Cal. Rptr. 807* ; *Hunt v. Smyth (1972) 25 Cal. App. 3d 807, 818*].

- The substitution of a new debtor in place of the old one, with the intent to release the latter [*Alexander v. Angel (1951) 37 Cal. 2d 856, 860, 236 P.2d 561]* . Acceptance of payments from a new debtor does not amount to a contract to release the original debtor, however[*University of Redlands v. Ford (1942) 56 Cal. App. 2d 151, 152, 132 P.2d 238]* .

- The substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former.

[4] Pleading and Evidence of Novation

The defendant must plead novation expressly or by unequivocal implication [*Alexander v. Angel (1951) 37 Cal. 2d 856, 860, 236 P.2d 561]* . Although a novation may be established by implication, the implication cannot arise until there is evidence showing facts and circumstances from which the court may reasonably infer that the parties intended a novation [*Paykar Construction, Inc. v. Spilat Construction Corp. (2001) 92 Cal. App. 4th 488, 494, 111 Cal. Rptr. 2d 863* (no evidence that subcontractor who settled with property owners and accepted promissory note in lieu of original debt also intended to substitute note for general contractor's obligation to subcontractor, particularly in light of subcontractor's dismissal of first action against defendants without prejudice); *Ayoob v. Ayoob (1946) 74 Cal. App. 2d 236, 254, 168 P.2d 462]* . The burden of proving a novation is on the party asserting it [*Alexander v. Angel (1951) 37 Cal. 2d 856, 860, 236 P.2d 561* ; *Davies Mach. Co. v. Pine Mountain Club, Inc. (1974) 39 Cal. App. 3d 18, 24-25, 113 Cal. Rptr. 784* ; *see Howard v. County of Amador (1990) 220 Cal. App. 3d 962, 977-978, 269 Cal. Rptr. 807* (when novation asserted by third party rather than party to original contract, third party has heavy burden of proof, and, absent fraud or collusion, court is warranted in finding in favor of original parties to contract simply because they are original parties)].

If an oral agreement is substituted for an existing written agreement, the extinguishment of the written contract may be shown by parol evidence. *Civ. Code § 1698*, requiring that a contract in writing be altered only by a contract in writing or by an executed oral agreement, does not apply in this case [*Producers Fruit Co. v. Goddard (1925) 75 Cal. App. 737, 756-757, 243 P. 686* (decided before 1976 amendment of *Civ. Code § 1698*)].

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§ 140.142 Affirmative Defense--Lack of Consideration [Civ. Code § 1550]--Written Contract

[1] FORM Affirmative Defense--Lack of Consideration [Civ. Code § 1550]--Written Contract

AS A [_____ (*specify number, if more than one, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*add, if more than one cause of action was alleged,* TO THE _____ (*specify number, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

The contract was executed without any consideration whatsoever [in that _____ (*state facts showing lack of consideration*)].

[2] Use of Form

The affirmative defense in [1], *above,* is for use in an answer to a complaint for damages for breach of contract when there was no consideration for the contract [*see Civ. Code § 1550* (consideration as essential element of contract); *see, e.g., O'Byrne v. Santa Monica-UCLA Medical Center (2001) 94 Cal. App. 4th 797, 808-810* (no consideration was given for medical staff bylaws adopted pursuant to *22 Cal. Code Reg. § 70703*; thus bylaws did not in and of themselves constitute contract between hospital and physician on its medical staff)]. Lack of consideration is an affirmative defense and must be pleaded [*Williams v. Kinsey (1946) 74 Cal. App. 2d 583, 603, 169 P.2d 487* ; *see Civ. Code § 1615*]. The burden of pleading and proving lack of consideration is on the party seeking to avoid the contract or invalidate it on that ground [*Civ. Code § 1615*; *Blonder v. Gentile (1957) 149 Cal. App. 2d 869, 874, 309 P.2d 147]* .

In addition to alleging that the contract was executed without consideration, it is better practice to plead facts showing that no consideration existed. Some courts have held that pleading in so many words that a contract was executed without any consideration whatever states a good defense [*Bank of Italy v. Wetzel (1927) 82 Cal. App. 240, 244, 255 P. 254* ; *see First-Trust Joint Stock Land Bank of Chicago v. Meredith (1936) 5 Cal. 2d 214, 221, 53 P.2d 958]* . However, other courts have held that pleading execution of the contract without consideration is a conclusion of law and the defendant should state facts to show that no consideration existed [*Gushee v. Leavitt (1855) 5 Cal. 160, 161* ; *Drovers Nat'l Bank v. Browne (1928) 88 Cal. App. 716, 723, 264 P. 265]* .

For further discussion, see *§ 140.23*.

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13-140 California Forms of Pleading and Practice--Annotated § 140.143

§ 140.143 Affirmative Defense--Statute of Frauds [Civ. Code § 1624]

[1] FORM Affirmative Defense--Statute of Frauds [Civ. Code § 1624]

AS A [_____ (*specify number, if more than one, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*add, if more than one cause of action was alleged,* TO THE _____ (*specify number, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

Plaintiff's alleged cause of action is barred by the provisions of subdivision _____ [*number*] of *Civil Code Section 1624* in that the contract _____ [*specify how the contract violates the statute of frauds, e.g.,* is an agreement that by its terms is not to be performed within a year], and no note or memorandum of it is in writing and subscribed by defendant or defendant's agent.

[2] Use of Form

The affirmative defense in [1], *above,* is for use in an answer to a complaint for damages for breach of contract when the contract comes within the statute of frauds [*see Civ. Code § 1624* (contracts that must be written); *Com. Code § 2201* (contract for sale of goods for $500 or more); *Fam. Code § 1611* (contracts for marriage settlements); *Prob. Code § 21700* (contract to make will or not to revoke will or other instrument); *see also Civ. Code § 1698(c)* (statute of frauds must be satisfied if written contract modified by oral agreement is within its provisions); *Civ. Code § 2794* (when promise to answer for obligation of another need not be in writing)] and is not evidenced by an appropriate writing.

[3] Pleading Statute of Frauds

If the face of the complaint shows that the contract was oral and within the statute of frauds, the defendant may raise the defense by a general demurrer [*see Code Civ. Proc. § 430.10(e)*]. Defendant may use a special demurrer in a superior court action to force the plaintiff to state whether the contract is written or oral or implied by conduct [*Code Civ. Proc. § 430.10(g)*; *see § 140.130*]. However, a general denial is sufficient to raise the defense of the statute of frauds [*Howard v. Adams (1940) 16 Cal. 2d 253, 257, 105 P.2d 971]* . The defendant may also make a specific denial of the contract [*Walsh v. Standart (1917) 174 Cal. 807, 810, 164 P. 795]* . Although a general or specific denial is sufficient

to raise the defense, the more informative and better practice is to specifically plead the statute. For a more detailed discussion and forms relating to the statute of frauds, see Ch. 530, *Statute of Frauds* .

[4] Defendant's Waiver of Statute

The promisor may waive the protection of the statute of frauds [*Romano v. Wilbur Ellis & Co. (1947) 82 Cal. App. 2d 670, 674, 186 P.2d 1012]* . When the complaint alleges an oral agreement within the statute of frauds, and the defendant does not demur, plead the statute in the answer, or assert it during the trial, the defendant waives the defense [*Baggesi v. Baggesi (1950) 100 Cal. App. 2d 828, 835, 224 P.2d 894]* . Admitting the contract in the answer does not waive the protection of the statute of frauds, however, if the defendant specifically pleads the statute [*Jamison v. Hyde (1903) 141 Cal. 109, 112, 74 P. 695]* .

The defense of the statute of frauds may not be raised for the first time on appeal [*Rutland, Edwards & Co. v. Cooke (1941) 44 Cal. App. 2d 258, 262, 112 P.2d 287]* .

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13-140 California Forms of Pleading and Practice--Annotated § 140.144

§ 140.144 Affirmative Defense--Contract Contrary to Express Provision of Law [Civ. Code § 1667(1)]

[1] FORM Affirmative Defense--Contract Contrary to Express Provision of Law [Civ. Code § 1667(1)]

AS A [_____ (*specify number, if more than one, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*add, if more than one cause of action was alleged,* TO THE _____ (*specify number, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

The contract alleged in the complaint is unenforceable because it is contrary to an express provision of law, namely _____ [*specify illegality*].

[2] Use of Form

The affirmative defense in [1], *above,* is for use in an answer to a complaint for damages for breach of contract when the contract is contrary to a particular law [*see § 140.24*].

[3] Necessity of Pleading Illegality

Generally, illegality of a contract is an affirmative defense and should be specially pleaded if the illegality does not appear from the face of the complaint [*see Eaton v. Brock (1954) 124 Cal. App. 2d 10, 13, 268 P.2d 58* ; *see Yoo v. Robi (2005) 126 Cal. App. 4th 1089, 1103, 24 Cal. Rptr. 3d 740* (defense of illegality based on public policy [violation of Talent Agencies Act] not raised as affirmative defense was not waived when issue was raised in petition to Labor Commissioner, whose decision was appealed in contract action)]. Nevertheless, illegality is a defense if the illegality appears on the face of the contract or the evidence proving the contract discloses the illegality [*Cain v. Burns (1955) 131 Cal. App. 2d 439, 442, 280 P.2d 888* ; *see Fomco, Inc. v. Joe Maggio, Inc. (1961) 55 Cal. 2d 162, 166, 10 Cal. Rptr. 462, 358 P.2d 918* (finding no cases permitting trial court to grant motion for new trial on ground of newly discovered evidence of illegality when no evidence introduced at trial establishing illegality and moving party made no showing of exercise of diligence required by *Code Civ. Proc. § 657(4)*)].

The defense of illegality may be raised for the first time on appeal when the evidence at trial discloses the illegality [*see*

Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 147-148, 308 P.2d 713 ; *La Fortune v. Ebie (1972) 26 Cal. App. 3d 72, 75, 102 Cal. Rptr. 588* ; *contra Prudential Ins. Co. v. Fromberg (1966) 240 Cal. App. 2d 185, 190, 49 Cal. Rptr. 475]* .

[4] Illegality Is Unavoidable Issue

A party to an illegal contract cannot ratify it, be estopped from relying on the illegality, or waive the right to assert the defense [*City Lincoln--Mercury Co. v. Lindsey (1959) 52 Cal. 2d 267, 274*]. The court may raise the issue of illegality on its own motion when the evidence shows illegality, even if the parties did not raise issue at trial [*Bovard v. American Horse Enterprises, Inc. (1988) 201 Cal. App. 3d 832, 838, 247 Cal. Rptr. 340]* .

[5] Contracts Held to Be Illegal

A lawful object is an essential element of a contract [*Civ. Code § 1550*]. A contract is unlawful if it is contrary to an express provision of law [*Civ. Code § 1667(1)*; *see Civ. Code § 1689(b)(5)* (rescission of unlawful contract)]. The law may be a federal law or a state law [*Hainey v. Narigon (1966) 247 Cal. App. 2d 528, 531, 55 Cal. Rptr. 638]* . Examples of contracts held to be illegal include:

- An agreement for the establishment of a plant in Iran to manufacture computer products to be sold in Iran was held unenforceable as illegal and against public policy in that it violated U.S. presidential executive orders and implementing regulations prohibiting U.S. persons from engaging in transactions relating to the supply of technology to Iran [*Kashani v. Tsann Kuen China Enterprise, Ltd. (2004) 118 Cal. App. 4th 531, 537, 13 Cal. Rptr. 3d 174]* .

- A contract by a hospital to compensate the director of mental health services based on a percentage of gross revenues for room and board charges of all psychiatric patients in violation of *Bus. & Prof. Code § 650* was void [*Beck v. American Health Group Internat., Inc. (1989) 211 Cal. App. 3d 1555, 1564-1565, 260 Cal. Rptr. 237* (sustaining demurrer without leave to amend)].

- An agreement employing a person to act as a real estate broker who was not licensed was void [*Fellom v. Adams (1969) 274 Cal. App. 2d 855, 862, 79 Cal. Rptr. 633]* .

[6] Cross References

For discussion and forms relating to the unenforceability of wagers and contracts based on illegal gambling activities, see Ch. 272, *Gambling* .

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13-140 California Forms of Pleading and Practice--Annotated § 140.145

§ 140.145 Affirmative Defense--Contract Contrary to Public Policy or Good Morals [Civ. Code § 1667(2), (3)]

[1] FORM Affirmative Defense--Contract Contrary to Public Policy or Good Morals [Civ. Code § 1667(2), (3)]

AS A [_____ (*specify number, if more than one, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*add, if more than one cause of action was alleged,* TO THE _____ (*specify number, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

The contract alleged in the complaint is unenforceable. It is contrary to _____ [the policy of express law *or* good morals] in that _____ [*specify facts*].

[2] Use of Form

The affirmative defense in [1], *above,* is for use in an answer to a complaint for damages for breach of contract when the contract is contrary to public policy or good morals [*see § 140.24*].

[3] Contravention of Public Policy or Good Morals

A lawful object is an essential element of a contract [*Civ. Code § 1550*]. A contract is unlawful if it is contrary to the policy of express law, even though not expressly prohibited, or otherwise contrary to good morals [*Civ. Code § 1667(2), (3)*; *see Civ. Code § 1669* (contract in restraint of marriage); *see also Civ. Code § 1689(b)(5)* (rescission of unlawful contract); *Diosdado v. Diosdado (2002) 97 Cal. App. 4th 470, 474, 118 Cal. Rptr. 2d 494* (contract between husband and wife providing for liquidated damages for infidelity held contrary to public policy underlying no-fault provisions for dissolution of marriage)]. For example, *Cal. Rules Prof. Conduct, Rule 2-200,* which prohibits fee sharing between attorneys who are not partners without written client consent, was approved to protect the public and promote respect and confidence in the legal profession, and fee-splitting agreements made in the absence of compliance with that rule therefore are unenforceable [*see Chambers v. Kay (2002) 29 Cal. 4th 142, 162-163, 126 Cal. Rptr. 2d 536, 56 P. 3d 645* ; *Margolin v. Shemaria (2000) 85 Cal. App. 4th 891, 903, 102 Cal. Rptr. 2d 502* (attorney who made case referral to another attorney had no viable contract for sharing of fees; policy considerations that caused enactment of *Cal. Rules Prof. Conduct, Rule 2-200,* which prohibits attorney fee-sharing unless specified conditions are met, also require that

non-complying fee sharing agreement not be enforced by court of law); *but see Huskinson & Brown, LLP v. Wolf (2004) 32 Cal. 4th 453, 464, 9 Cal. Rptr. 3d 693, 84 P.3d 379* (law firm that was barred from recovering under fee-sharing agreement with another firm, due to the absence of written client consent to the agreement required by *Cal. Rules Prof. Conduct, Rule 2-200*, held entitled to recover from other firm in quantum meruit for reasonable value of services it rendered on client's behalf)]. The law may be a federal law or a state law [*Hainey v. Narigon (1966) 247 Cal. App. 2d 528, 531, 55 Cal. Rptr. 638]* .

The court determines whether a contract violates public policy on the basis of the law as it existed at the time the parties made the contract [*Bovard v. American Horse Enterprises, Inc. (1988) 201 Cal. App. 3d 832, 840 n.3, 247 Cal. Rptr. 340* ; *Moran v. Harris (1982) 131 Cal. App. 3d 913, 918, 182 Cal. Rptr. 519]* .

[4] Exculpatory Clause as Against Public Policy

All contracts that have for their object, directly or indirectly, to exempt anyone from responsibility for his or her own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law [*Civ. Code § 1668*; *see, e.g., Neubauer v. Goldfarb (2003) 108 Cal. App. 4th 47, 54-57, 133 Cal. Rptr. 2d 218* (waiver of corporate directors' and majority shareholders' fiduciary duties to minority shareholder in private close corporation is against public policy and contract provision in buy-sell agreement purporting to effect such a waiver is void)]. The California Supreme Court in *Tunkl v. Regents of University of California* interpreted *Civ. Code § 1668* to invalidate exculpatory clauses in certain types of agreements as contrary to public policy [*Tunkl v. Regents of University of California (1963) 60 Cal. 2d 92, 98-101, 32 Cal. Rptr. 33, 383 P.2d 441* (exculpatory clause in hospital admission form); *see, e.g., Henrioulle v. Marin Ventures, Inc. (1978) 20 Cal. 3d 512, 518-519, 143 Cal. Rptr. 247, 573 P.2d 465* (exculpatory clause in residential lease)]. The Court in *Tunkl* delineated six criteria for identifying the type of agreement in which an exculpatory clause is invalid as contrary to public policy [*see generally Ch. 380, Negligence, § 380.170* et seq.; *see also Burnett v. Chimney Sweep (2004) 123 Cal. App. 4th 1057, 1065-1066, 20 Cal. Rptr. 3d 562* (commercial lease involved none of the six characteristics present in *Tunkl*); *Health Net of Cal., Inc. v. Dep't of Health Servs. (2003) 113 Cal. App. 4th 224, 226-227, 234-236* (contractual clause prohibiting any recovery of damages--but not equitable relief--for any violation of statutory or regulatory law not made part of the parties' contractual obligations held invalid under *Civ. Code 1668*; contract involved public interest under *Tunkl*); *Gavin W. v. YMCA of Metropolitan Los Angeles (2003) 106 Cal. App. 4th 662, 671-674* (agreement exculpating child care provider from its own negligence is void as against public policy; contract involved public interest under six factors enumerated in *Tunkl*)].

The plain language of *Civ. Code § 1668* shows that its provisions apply to "[a]ll contracts" the object of which is, directly or indirectly, to exempt "anyone" from responsibility for his or her "own fraud, or willful injury to the person or property of another, or violation of law"; therefore, no exculpatory provision in any contract can be invoked by anyone who claims to have the benefit of the provision (whether or not the person is a party to the contract), in order to avoid the legal consequences of the person's own fraud, willful injury of another, or violation oflaw [*Manderville v. PCG&S Group, Inc. (2007) 146 Cal. App. 4th 1486, 1501-1502, 55 Cal. Rptr. 3d 59* (defendant real estate broker could not invoke any exculpatory provisions of standard-form CAR contract of sale between plaintiff and broker's client, to avoid liability for broker's intentional misrepresentation to plaintiff)].

The criteria established for determining whether an exculpatory clause is unenforceable on the ground of contravening public policy are not applicable to a commercial transaction between large, sophisticated companies [*Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 27-32, 262 Cal. Rptr. 716* ; *see CAZA Drilling (California), Inc. v. TEG Oil & Gas U.S.A., Inc. (2006) 142 Cal. App. 4th 453, 475, 48 Cal. Rptr. 3d 271* (if only question is which of two equal bargainers should bear risk of economic loss in event of particular mishap, there is no reason for courts to intervene and remake parties' agreement in light of *Civ. Code § 1668*); *Burnett v. Chimney Sweep (2004) 123 Cal. App. 4th 1057, 1065-1066, 20 Cal. Rptr. 3d 562* (commercial lease is matter of private contract with which general public is not concerned)]. Nevertheless, exculpatory clauses in commercial contracts may be void under

Civ. Code § 1668 [*see, e.g.,* *Blankenheim v. E.F. Hutton & Co. (1990) 217 Cal. App. 3d 1463, 1472-1473, 266 Cal. Rptr. 593* (hold harmless agreement signed by investors void in action by investors against stockbroker for negligent misrepresentation)].

Exculpatory clauses have withstood challenges in various cases; for example:

- A hybrid contractual waiver in an employment agreement that preserved an employee's claims against his corporate employer but waived his right to sue the corporation's officers, directors, and shareholders for damages arising out of the employment agreement was not unenforceable for illegality under *Civ. Code § 1668*, primarily because the contractual provision was the result of a private, voluntary transaction in which the employee retained the right to seek redress from the corporation [*Farnham v. Superior Court (1997) 60 Cal. App. 4th 69, 77-78, 70 Cal. Rptr. 2d 85]* .

- A conspicuous and reasonable exculpatory clause in a ski equipment rental agreement was not unenforceable for illegality under *Civ. Code § 1668* merely because of the recreational-sports context, since recreational sports do not constitute a public interest [*Westlye v. Look Sports (1993) 17 Cal. App. 4th 1715, 1731-1733, 22 Cal. Rptr. 2d 781* ; *accord* *YMCA of Metropolitan Los Angeles v. Superior Court (1997) 55 Cal. App. 4th 22, 26-29, 63 Cal. Rptr. 2d 612* (release in agreement for participation in YMCA-sponsored programs for senior citizens); *see also* *Benedek v. PLC Santa Monica, LLC (2002) 104 Cal. App. 4th 1351, 1358-1359, 129 Cal. Rptr. 2d 197* (express language of unambiguous release of health club from all premises liability applied to personal injuries unrelated to exercise suffered by member; release of premises liability in consideration of permission to enter recreational facilities does not violate public policy)]. However, an agreement made in the context of sports or recreational programs or services, purporting to release anyone from liability for future gross negligence, generally is unenforceable as a matter of public policy [*City of Santa Barbara v. Superior Court (Janeway) (2007) 41 Cal. 4th 747, 776-777, 62 Cal. Rptr. 3d 527, 161 P.3d 1095]* .

- An indemnity and hold harmless agreement was not unenforceable when only one of the criteria set forth in *Tunkl v. Regents of University of California (1963) 60 Cal. 2d 92, 98-101, 32 Cal. Rptr. 33, 383 P. 2d 441* , for determining whether exculpatory clause is unenforceable on grounds of public interest applied [*Rooz v. Kimmel (1997) 55 Cal. App. 4th 573, 588-590, 64 Cal. Rptr. 2d 177* ; *see Queen Villas Homeowners Ass'n v. TCB Property Mgmt. (2007) 149 Cal. App. 4th 1, 6, 56 Cal. Rptr. 3d 528* (" *Rooz,* however, merely illustrates an extreme end of the rule of strict construction: If parties go out of their way and say 'we really, really mean it,' language clearly contemplating exculpation may be enforced.")].

- An exculpatory clause limiting a telephone directory company's liability for negligent failure to publish an advertisement was not unenforceable for illegality under *Civ. Code § 1668*, primarily because the standard form contract contained an offer to negotiate a different limitation and the plaintiff did not seek to do that [*McCarn v. Pacific Bell Directory (1992) 3 Cal. App. 4th 173, 178-183, 4 Cal. Rptr. 2d 109]* .

- A release regarding injuries sustained while participating in a hypnotism show sponsored by a student-parent-teacher association was not invalid on public policy grounds because the activity did not constitute providing essential goods or services but was only recreational [*Hohe v. San Diego Unified Sch. Dist. (1990) 224 Cal. App. 3d 1559, 1563-1564, 274 Cal. Rptr. 647]* .

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13-140 California Forms of Pleading and Practice--Annotated § 140.146

§ 140.146 Affirmative Defense--Unconscionability [Civ. Code § 1670.5]

[1] FORM Affirmative Defense--Unconscionability [Civ. Code § 1670.5]

AS A [_____ (*specify number, if more than one, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*add, if more than one cause of action was alleged,* TO THE _____ (*specify number, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

[Paragraph _____ of] [T]he contract alleged in the complaint is unenforceable [or construction and application of (that provision of) the contract should be limited to avoid an unconscionable result] because it was unconscionable at the time the contract was made, in that _____ [*specify facts*].

[2] Use of Form

The affirmative defense in [1], *above,* is for use in an answer to a complaint for damages for breach of contract when the contract or a clause of the contract was unconscionable at the time it was made [*see § 140.25*].

[3] Pleading and Proving Unconscionability

The statutory basis for the defense of unconscionability is *Civ. Code § 1670.5,* which does not define unconscionability but authorizes a court to refuse to enforce an unconscionable contract or clause [*Civ. Code § 1670.5(a)*; *see, e.g., Flores v. Transamerica Homefirst, Inc. (2001) 93 Cal. App. 4th 846, 857-858, 113 Cal. Rptr. 2d 376* (court refused to sever unconscionable arbitration provisions in reverse mortgage agreement); *Bolter v. Superior Court (2001) 87 Cal. App. 4th 900, 910-911, 104 Cal. Rptr. 2d 888* (unconscionable place and manner clauses in arbitration agreement regarding forum selection, consolidation restrictions, and damages limitations found clearly severable from remainder of agreement)]. The defendant may present evidence regarding the commercial setting, purpose, and effect of the contract to aid the court in determining whether the contract or a clause is unconscionable [*Civ. Code § 1670.5(b)*].

The party relying on unconscionability has the burden of proof [*e.g., Trend Homes, Inc. v. Superior Court (2005) 131 Cal. App. 4th 950, 957-964, 32 Cal. Rptr. 3d 411* (purchasers of home failed to present evidence sufficient to support

their assertion that provision for judicial reference as exclusive remedy under purchase contract was unconscionable)].

A party cannot state a claim for damages or injunctive relief under *Civ. Code § 1670.5* based on the unconscionability of contract terms. However, if a contract is unconscionable, the court may award damages or injunctive relief under *Bus. & Prof. Code § 17203* on the ground that imposing the offending terms constituted an unfair business practice [*Shadoan v. World Savings & Loan Assn. (1990) 219 Cal. App. 3d 97, 101, 268 Cal. Rptr. 207]* .

When a complaint challenged a prepayment penalty as unconscionable and an unfair business practice, pleading lack of alternative financing without the offending term and the plaintiff's relative lack of bargaining power was a conclusion and without facts, and the trial court properly sustained a demurrer. Further, the prepayment penalty was not oppressive or unreasonably favorable to the defendant [*Shadoan v. World Savings & Loan Assn. (1990) 219 Cal. App. 3d 97, 103-106, 268 Cal. Rptr. 207]* .

[4] Determination of Unconscionability

[a] Procedural and Substantive Aspects

Determining unconscionability encompasses procedural and substantive aspects. "The procedural element focuses on two factors: oppression and surprise. Oppression arises from an inequality of bargaining power which results in no real negotiation and an absence of meaningful choice. ... Surprise involves the extent to which the terms of the bargain are hidden in a 'prolix printed form' drafted by a party in a superior bargaining position" [*Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159, 1165, 22 Cal. Rptr. 3d 189* , quoting *Olsen v. Breeze, Inc. (1996) 48 Cal. App. 4th 608, 621, 55 Cal. Rptr. 2d 818]* . There is no general rule that a form contract is procedurally unconscionable [*see* [b], *below*]. Rather, procedural unconscionability arises from the manner in which the contract is presented to the party in the weaker position [*Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159, 1165, 22 Cal. Rptr. 3d 189]* . No extrinsic evidence of procedural unconscionability is required when a great disparity of power can be inferred from the parties' relationship or from the contract itself [*Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159, 1165, 22 Cal. Rptr. 3d 189* (unconscionability could not be inferred from the relationship between a consumer and a motor home dealer)].

Substantive unconscionability is evaluated as of the time the contract was made and consists of an allocation of risks in an objectively unreasonable manner [*Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 113-114, 99 Cal. Rptr. 2d 745, 6 P.3d 669* (reversing order compelling arbitration in wrongful termination action brought under FEHA); *Szetela v. Discover Bank (2002) 97 Cal. App. 4th 1094, 1099-1100* (citing *Armendariz* and finding class arbitration waiver provision in consumer credit card agreement to be both procedurally and substantively unconscionable); *Villa Milano Homeowners Association v. IL Davorge (2000) 84 Cal. App. 4th 819, 835-836, 102 Cal. Rptr. 2d 1* (arbitration clause contained in CC&Rs was unconscionable adhesion contract and unenforceable to extent it applied to construction and design defect claims against developer who drafted, signed, and recorded CC&Rs); *Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co. (1988) 200 Cal. App. 3d 1518, 1535* ; *Kurashige v. Indian Dunes, Inc. (1988) 200 Cal. App. 3d 606, 613-614, 246 Cal.Rptr. 310* ; *see § 140.25[2]*]. A compelling showing of substantive unconscionability supersedes a weaker showing of procedural unconscionability [*Carboni v. Arrospide (1991) 2 Cal. App. 4th 76, 86, 2 Cal. Rptr. 2d 845* ; *West v. Henderson (1991) 227 Cal. App. 3d 1578, 1588, 278 Cal. Rptr. 570]* .

The courts have recognized that there is a sliding scale or a balancing relationship between the two elements of unconscionability. The greater the degree of unfair surprise or unequal bargaining power, the less the degree of substantive unconscionability required to annul the contract, and vice versa [*Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 160-161, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* (finding class arbitration waiver provision in consumer credit card agreement to be both procedurally and substantively unconscionable); *Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159, 1165, 22 Cal. Rptr. 3d 189* ; *Harper v. Ultimo (2003) 113 Cal. App. 4th 1402, 1406, 7 Cal. Rptr. 3d 418* (finding arbitration provision in construction contract to be both procedurally and

substantively unconscionable); *Woodside Homes v. Superior Court (2003) 107 Cal. App. 4th 723, 730, 736, 132 Cal. Rptr. 2d 35* (low level of procedural unconscionability required high level of substantive unconscionability; agreements for judicial reference held enforceable); *Mercuro v. Superior Court (2002) 96 Cal. App. 4th 167, 174-175* (given employer's highly oppressive conduct in securing employee's consent to arbitration agreement, employee needed to make only minimal showing of substantive unconscionability); *Marin Storage & Trucking, Inc. v. Benco Contracting and Engineering, Inc. (2001) 89 Cal. App. 4th 1042, 1056, 107 Cal. Rptr. 2d 645* (in light of low level of procedural unfairness in adhesion contract containing indemnity clause, greater degree of substantive unfairness than that shown was required before contract could be found substantively unconscionable)].

[b] Standardized Form of Contract

A standardized form does not automatically render a contract unconscionable [*Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159, 1165, 22 Cal. Rptr. 3d 189* (no general rule of unconscionability exists regarding form contracts); *Marin Storage & Trucking, Inc. v. Benco Contracting and Engineering, Inc. (2001) 89 Cal. App. 4th 1042, 1052, 107 Cal. Rptr. 2d 645* (although standardized contract could be considered contract of adhesion, that finding merely begins inquiry of whether particular provision within contract should be denied enforcement because it defeats expectations of weaker party or is unduly oppressive or unconscionable); *Coon v. Nicola (1993) 17 Cal. App. 4th 1225, 1235, 21 Cal. Rptr. 2d 846]* . A standardized form does not establish the adhesive character of the contract. The court must consider the relative bargaining powers of the parties and the availability of contract benefits from other sources [*see § 140.25[2][c]*]. Conversely, the fact that certain terms of a standardized contract vary among inferior parties does not itself demonstrate that an objectionable provision was actively negotiated or eliminate the possibility that the provision is unconscionable [*Ellis v. McKinnon Broadcasting Co. (1993) 18 Cal. App. 4th 1796, 1805, 23 Cal. Rptr. 2d 80]* .

Even if the contract is adhesive, an arbitration clause is enforceable if it is not in conflict with the reasonable expectations of the weaker party or unduly oppressive or unconscionable [*Izzi v. Mesquite Country Club (1986) 186 Cal. App. 3d 1309, 1317-1318, 231 Cal. Rptr. 315]* . If a contract is adhesive, the court applies a sliding scale. There must be some showing of substantive unconscionability [*Soltani v. Western & Southern Life Insurance Co. (9th Cir. 2001) 258 F.3d 1038, 1042-1045* (holding that employment contract provision shortening limitations period for wrongful termination action to six months was not unconscionable)].

A finding that a contract is one of adhesion is essentially a finding of procedural unconscionability. Substantive unconscionability focuses on the one-sidedness of the contract terms. In the context of an arbitration agreement, the agreement is unconscionable unless there is a "modicum of bilaterality" in the arbitration remedy [*Flores v. Transamerica Homefirst, Inc. (2001) 93 Cal. App. 4th 846, 853-855, 113 Cal. Rptr. 2d 376* (citing *Armendariz*; finding arbitration provisions procedurally and substantive unconscionable); *Armendariz v. Foundation Health Psychcare Servs. (2000) 24 Cal. 4th 83, 117, 6 P.3d 669]* .

Another kind of substantively unconscionable provision in the context of an arbitration agreement occurs when the party imposing arbitration mandates a post-arbitration proceeding, either judicial or arbitral, wholly or largely to its benefit at the expense of the party on which the arbitration is imposed [*Little v. Auto Stiegler (2003) 29 Cal. 4th 1064, 1072-1074, 1076, 130 Cal. Rptr. 2d 892, 63 P.3d 979* (finding provision in mandatory employment arbitration agreement that permitted either party to appeal arbitration award of more than $50,000 to second arbitrator to be unconscionable, but concluding that provision could be severed and rest of agreement enforced)].

[c] Parties' Relative Positions

The fact that a manufacturer is better able than a buyer to detect defects in a product was not relevant in evaluating a claim of unconscionability of warranty disclaimer and hold harmless clauses, when the manufactured item was not mass-produced but was the product of specialized high technology, it was a high risk product, and the contract was not

preprinted but was negotiated by the parties [*Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 25-26, 262 Cal. Rptr. 716]* .

A buyer that drafted one of two exculpatory clauses in a contract and dealt with similar provisions in previous contracts between the parties could not claim surprise at the scope of provisions claimed to be unconscionable [*AppalachianIns. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 24-25, 262 Cal. Rptr. 716]* .

Between large, sophisticated companies, no procedural element of unconscionability was established by an allegation of total monopoly in the manufacture of upper-stage rockets used to launch communications satellites, when a third company, with which the buyer originally contracted, provided an alternative launch capability [*Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 23, 262 Cal. Rptr. 716]* . Similarly, there is nothing inherent in the relationship between a motor home buyer and motor home dealership from which to infer a great disparity of bargaining power [*Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159, 1166, 22 Cal. Rptr. 3d 189* (noting buyer's freedom not to make elective purchase)].

With regard to employment agreements, arbitration provisions that limited employee remedies, contained oppressive cost provisions, and inherently favored the employer without reasonable justification, were found in *Armendariz v. Foundation Health Psychcare Services, Inc.* to be so one-sided as to be unconscionable and unenforceable [*Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 124-125, 99 Cal. Rptr. 2d 745, 6 P.3d 669* (reversing order compelling arbitration in wrongful termination action brought under FEHA); *Pinedo v. Premium Tobacco Stores, Inc. (2000) 85 Cal. App. 4th 774, 780-781* (affirming order denying arbitration in action brought under FEHA); *see Blake v. Ecker (2001) 93 Cal. App. 4th 728, 740-743, 113 Cal. Rptr. 2d 422* (citing principles set forth in *Armendariz* and remanding case to trial court to determine whether *Armendariz* applied to make parties' arbitration agreement unenforceable); *see also § 140.25[2][b]*]. This same reasoning was used by a federal court in determining that an employment contract provision requiring 10 days written notice to the employer as a prerequisite to filing suit was unenforceable. The court found that, as in *Armendariz*, the effect of the provision was to maximize employer advantage without reasonable justification for that arrangement. The failure to comply with the provision deprived an employee of a judicial forum and its concomitant rights [*Soltani v. Western & Southern Life Insurance Co. (9th Cir. 2001) 258 F.3d 1038, 1045-1047]* . In a case involving a mandatory preemployment arbitration agreement in which a provision permitting either party to appeal an arbitration award of more than $50,000 to a second arbitrator was found unconscionable under *Armendariz*, the court concluded that the offending provision could be severed. Unlike the agreement in *Armendariz*, this contract involved only a single provision that was unconscionable, and no contract reformation was required [*Little v. Auto Stiegler (2003) 29 Cal. 4th 1064, 1072-1074, 1076, 130 Cal. Rptr. 2d 892, 63 P.3d 979]* .

In the context of real property developments, an arbitration clause contained in covenants, conditions, and restrictions (CC&Rs) was held to be an unconscionable adhesion contract that was unenforceable to the extent it applied to construction and design defect claims against the developer who drafted, signed, and recorded the CC&Rs [*Villa Milano Homeowners Association v. Il Davorge (2000) 84 Cal. App. 4th 819, 835-836, 102 Cal. Rptr. 2d 1]* . Similarly, real estate purchase agreements containing a provision requiring all disputes to be submitted to judicial reference were held to be adhesive contracts fatally infected with procedural and substantive unconscionability [*Pardee Construction Company v. Superior Court (2002) 100 Cal. App. 4th 1081, 1086-1087, 123 Cal. Rptr. 2d 288* (trial court properly denied home builder's motion for appointment of judicial referee; contract provision presented each entry-level home buyer with "take it or leave it" proposition)].

In the context of consumer credit card agreements, an arbitration clause that prohibited class treatment of small individual claims was held to be unconscionable and unenforceable [*Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 162-163, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* ; *Szetela v. Discover Bank (2002) 97 Cal. App. 4th 1094, 1099-1102, 118 Cal. Rptr. 2d 862]* .

In the case of a satellite TV customer agreement, a provision in an arbitration clause prohibiting class or representative claims in arbitration was unconscionable and unenforceable, based on application of the *Discover Bank* principles. Because the customer agreement expressly prohibited the severance of that provision from the remainder of the arbitration clause, the entire arbitration clause was unenforceable [*Cohen v. DIRECTV, Inc. (2006) 142 Cal. App. 4th 1442, 1447, 1451-1453, 48 Cal. Rptr. 3d 813* (summaries of other cases)].

[d] Liquidated Damages Provision

The reasonableness standard set forth in *Civ. Code § 1671(b)*, concerning liquidated damages, provides for more judicial scrutiny than is allowed under unconscionability standards [*see, e.g.,* *Ridgley v. Topa Thrift and Loan Assn. (1998) 17 Cal. 4th 970, 979-981, 73 Cal. Rptr. 2d 378, 953 P.2d 484* (Cal. Supreme Court evaluated clause in promissory note which was both prepayment charge and late payment penalty); *see also* Ch. 177, *Damages*]. An unreasonable risk allocation could invalidate a liquidated damages clause without the clause's being unconscionable, but a liquidated damages clause that is reasonable under *Civ. Code § 1671(b)* cannot be unconscionable [*H.S. Perlin Co. v. Morse Signal Devices (1989) 209 Cal. App. 3d 1289, 1301-1302, 258 Cal. Rptr. 1]* .

[e] Conscionability of Price

Factors relevant to determining whether a price is unconscionable include all of the following [*Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 926-929, 216 Cal. Rptr. 345, 702 P.2d 503 , appeal dismissed, 475 U.S. 1001 (1986)* ; *see Civ. Code § 1670.5*]:

- The basis and justification for the charged amount.
- The price paid by other similarly situated consumers in similar transactions.
- The inconvenience imposed on the seller.
- The true value of the goods or services.
- The absence of a meaningful choice for the buyer.
- Whether deceptive practices are involved.

A price set by a freely competitive market is unlikely to be unconscionable, but a market price set by oligopoly is subject to scrutiny [*Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 927, 216 Cal. Rptr. 345, 702 P.2d 503* .

[5] Provisions Held Unconscionable

[a] Arbitration Clauses

The following are examples of arbitration clauses that have been held to be unconscionable [*see generally* Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*]:

- An arbitration clause in a contract for a television show was procedurally and substantively unconscionable. The weaker parties were five siblings who were young and unsophisticated and had recently lost both parents. The arbitration provision appeared in one paragraph near the end of a lengthy, single-spaced document. No words were printed in bold letters or larger font, nor were they capitalized. Although the siblings were required to place their initials in boxes adjacent to six other paragraphs, no box appeared next to the arbitration provision. The arbitration provision was substantively unconscionable because it required only the siblings to submit their claims to arbitration; only the

television show producers, not the siblings, could compel arbitration; and the provision barred only the siblings from seeking appellate review of the arbitrator's decision [*Higgins v. Superior Court (2006) 140 Cal. App. 4th 1238, 1252-1254, 45 Cal. Rptr. 3d 293]* .

- An arbitration clause in an employment contract was unconscionable because it provided the employer more rights and greater remedies than would otherwise be available, and deprived employees of significant rights and remedies they would normally enjoy [*Stiren v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1542, 60 Cal. Rptr. 2d 138* , 60 Cal. Rptr. 32d 138; *see Armendariz v. Foundation Health Psychcare Services, Inc. (2000) 24 Cal. 4th 83, 124-125, 99 Cal. Rptr. 2d 745, 6 P.3d 669* (reversing order compelling arbitration in wrongful termination action brought under FEHA); *accord, Davis v. O'Melveny & Myers (9th Cir. 2007) 485 F.3d 1066, 1084]* .

- Provisions in real estate purchase agreements requiring all disputes to be submitted to judicial reference were procedurally and substantively unconscionable [*Pardee Construction Company v. Superior Court (2002) 100 Cal. App. 4th 1081, 1090-1092, 123 Cal. Rptr. 2d 288]* .

- An arbitration provision in a construction contract that required all controversies under the contract to be settled in accordance with the Uniform Rules for Better Business Bureau Arbitration--which were not attached--was held to be unconscionable [*Harper v. Ultimo (2003) 113 Cal. App. 4th 1402, 1406, 7 Cal. Rptr. 3d 418]* .

- An arbitration clause in a consumer credit card agreement that prohibited class treatment of small individual claims was held to be procedurally and substantively unconscionable [*Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 162-163, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* ; *Szetela v. Discover Bank (2002) 97 Cal. App. 4th 1094, 1099-1102, 118 Cal. Rptr. 2d 862]* .

- An arbitration provision in a set of covenants, conditions, and restrictions (CC&Rs), to the extent that the provision applied to construction and design defect claims against the developer who had drafted, signed, and recorded the CC&Rs [*Villa Milano Homeowners Association v. Il Davorge (2000) 84 Cal. App. 4th 819, 835-836, 102 Cal. Rptr. 2d 1* (arbitration clause in CC&Rs was unconscionable adhesion contract and unenforceable to extent it applied to construction and design defect claims against developer who drafted, signed, and recorded CC&Rs)].

- An arbitration provision in a residential lease, which provided for binding arbitration of personal injury disputes arising from the condition of lease premises (that is, exclusively tenant claims) and which provided no opportunity for tenants to decline the provision, was held unconscionable due to lack of sufficient bilaterality [*Jaramillo v. JH Real Estate Partners, Inc. (2003) 111 Cal. App. 4th 394, 405-406, 3 Cal. Rptr. 3d 525]* .

[b] Other Contract Provisions

The following are examples of contract provisions other than arbitration clauses that have been held to be unconscionable:

- A telecommunications carrier's new consumer services agreement that barred class actions, imposed an arbitration fee scheme, and required any arbitration to remain confidential, and which imposed the contract on customers without the opportunity for negotiation, modification, or waiver, was held substantively and procedurally unconscionable [*Ting v.AT&T (9th Cir. 2003) 319 F.3d 1126, 1148-1152* .

- A provision in an employment contract requiring 10 days written notice to the employer as a prerequisite to filing suit [*Soltani v. Western & Southern Life Insurance Co. (9th Cir. 2001) 258 F.3d 1038, 1045-1047* (finding that effect of provision was to maximize employer advantage without reasonable justification for that arrangement)].

- An advertising salesman's standardized form employment agreement that provided for forfeiture of commissions on previously sold advertising if the employer had not yet received payment on the salesman's termination was both procedurally and substantively unconscionable [*Ellis v. McKinnon Broadcasting Co. (1993) 18 Cal. App. 4th 1796, 1803-1805, 23 Cal. Rptr. 2d 80]* .

- An interest rate of 200 percent per year on a loan exempt from the usury law was unconscionable and thus unenforceable, considering that similar loans by exempt lenders would have cost one tenth as much and the borrower was subject to emotional duress when the loan was negotiated, needed the loan to pay pressing obligations, and could not obtain funds any other way [*Carboni v. Arrospide (1991) 2 Cal. App. 4th 76, 82-87, 2 Cal. Rptr. 2d 845]* .

- Allegations that the price charged in standardized, nonnegotiable adhesion contracts by car rental companies for a collision damage waiver was far in excess of a price that would be determined in a competitive business environment, and that on an annualized basis the rate charged was twice the amount of insurance provided, while no competition existed between the defendants for such insurance, were sufficient to support a claim of unconscionability to survive a demurrer [*Truta v. Avis Rent A Car System, Inc. (1987) 193 Cal. App. 3d 802, 820-821, 238 Cal. Rptr. 806]* .

[6] Provisions Held Not Unconscionable

The following are examples of contract provisions held *not* to be unconscionable:

- A charge imposed for excess value insurance on packages to be shipped via the carrier from convenience outlets at supply stores, even though it was double the charge that the carrier would have imposed for the same insurance on directly shipped packages [*Wayne v. Staples, Inc. (2006) 135 Cal. App. 4th 466, 482-483, 37 Cal. Rptr. 3d 544* (amount that office supply store's outlets would charge was clearly disclosed to customers, office supply store's outlets gave customers the option to ship packages without purchasing the excess value coverage as well as option to obtain excess value coverage from other providers, and potential customers had a wide range of choices for shipping their packages at places other than office supply store's outlets)].

- An arbitration provision in a form purchase contract for a used motor home [*Crippen v. Central Valley RV Outlet, Inc. (2004) 124 Cal. App. 4th 1159, 1165-1166, 22 Cal. Rptr. 3d 189* (fact that dealer used a form contract for its transactions did not mean contract was unconscionable, and buyer was under no economic compulsion to buy)].

- A clearly marked provision imposing a service fee on a shopping card after 24 months of nonuse [*Freeman v. Wal-Mart Stores, Inc. (2003) 111 Cal. App. 4th 660, 667-670, 3 Cal. Rptr. 3d 860* (no take-it-or-leave-it situation existed, as purchaser could use card before imposition of fee or simply decline to purchase shopping card and make purchases by other means)].

- An employment contract provision shortening the limitations period for a wrongful termination action to six months [*Soltani v. Western & Southern Life Insurance Co. (9th Cir. 2001) 258 F.3d 1038, 1042-1045* (no showing of substantive unconscionability)].

- A clause in a real estate sales contract requiring home buyers who sue the builder to submit the dispute to binding judicial reference [*Woodside Homes v. Superior Court (2003) 107 Cal. App. 4th 723, 730, 736, 132 Cal. Rptr. 2d 35* ; *see also Greenbriar Homes Communities, Inc. v. Superior Court (2004) 117 Cal. App. 4th 337, 344-346, 11 Cal. Rptr. 3d 371* (provision for judicial reference in real estate purchase and sale agreements found to be neither procedurally nor substantively unconscionable)].

- An indemnity clause in a "Work Authorization and Contract," which had been used between the parties for many years, noted above the signature line that it was a contract that included all terms and conditions on the reverse side, and contained the indemnification clause among other provisions on the reverse side [*Marin Storage & Trucking, Inc. v. Benco Contracting and Engineering, Inc. (2001) 89 Cal. App. 4th 1042, 1052, 107 Cal. Rptr. 2d 645* (in light of low level of procedural unfairness, greater degree of substantive unfairness than that shown was required before contract could be found substantively unconscionable)].

- A provision in a substance abuse recovery agreement waiving the right to appeal any discipline, including separation from service, to the defendant's personnel board [*Robison v. City of Manteca (2000) 78 Cal. App. 4th 452, 458-459, 92 Cal. Rptr. 2d 748* (provision found not even remotely material to dismissal for refusal to participate in a substanceabuse program)].

- A provision in a health care service plan giving the insurer the right to modify benefits [*Williams v. California Physicians' Service (1999) 72 Cal. App. 4th 722, 741-744, 85 Cal. Rptr. 2d 497* (amendments were subject to review by Department of Corporations and plan clearly allowed for type of reduction that took place)].

- A release signed by a skier as a condition of enrolling in a ski school, by which he agreed to hold the resort and its employees harmless for any injuries [*Allan v. Snow Summit, Inc. (1996) 51 Cal. App. 4th 1358, 1377, 59 Cal. Rptr. 2d 813* ; *but see City of Santa Barbara v. Superior Court (Janeway) (2007) 41 Cal. 4th 747, 776-777, 62 Cal. Rptr. 3d 527, 161 P.3d 1095* (agreement made in context of sports or recreational programs or services, purporting to release anyone from liability for future gross negligence, generally is unenforceable as matter of public policy)].

- An employment contract that terminated a salesperson's right to receive commissions on payments received on her accounts 30 days after severance of her employment [*American Software Inc. v. Ali (1996) 46 Cal. App. 4th 1386, 1395, 54 Cal. Rptr. 2d 477]* .

- A provision in a bank depositor's signature-card contract imposing a deposit-item-returned fee, based on an industry-wide comparison of fees [*California Grocers Ass'n v. Bank of America (1994) 22 Cal. App. 4th 205, 215-216, 27 Cal. Rptr. 2d 396]* .

- A provision in a television game show participant's contract disqualifying individuals who had been on three game shows and requiring contestants who misrepresented past appearances to forfeit winnings was neither a contract of adhesion nor unconscionable [*Winston v. National Broadcasting Co. (1991) 231 Cal. App. 3d 540, 550, 282 Cal. Rptr. 498]* .

- A six-month limitation on a tenant's right of action was not unconscionable when the tenant had time and was advised to consult an attorney before signing the lease. The one-sided application of the limitation was justified by the fact that any litigation by the tenant could inhibit the lessor's ability to deal with the property [*West v. Henderson (1991) 227 Cal. App. 3d 1578, 1586-1588, 278 Cal. Rptr. 570]* .

- A provision in a contract between a developer and an engineer limiting the engineer's liability for

economic losses caused by its own negligence was enforceable because it was the result of arm's-length negotiation [*Markborough California, Inc. v. Superior Court (1991) 227 Cal. App. 3d 705, 714-717, 277 Cal. Rptr. 919]* .

- A termination fee of $50 for a self-directed IRA account was not unconscionable when other institutions offered IRAs with lower fees. Unconscionability requires a lack of meaningful alternative sources of the goods or services in question [*Dean Witter Reynolds, Inc. v. Superior Court (1989) 211 Cal. App. 3d 758, 768-772, 259 Cal. Rptr. 789]* .

- When the parties had a 20-year commercial relationship, the conscionability of a seller's limitation of consequential damages was tested under *Com. Code § 2719(3)* and the limitation was a material part of the bargain [*Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co. (1988) 200 Cal. App. 3d 1518, 1538-1539, 246 Cal. Rptr. 823]* .

- A contract between a drawee bank and an agent that issued money orders was not unconscionable in placing the risk of loss on the agent, considering the purpose, effect, business setting, and reasonableness of the contract [*Central Bank v. Kaiperm Santa Clara Fed. Credit Union (1987) 191 Cal. App. 3d 186, 205, 236 Cal. Rptr. 262]* .

- A preprinted, standardized contract requiring the party with less bargaining power to provide and maintain insurance and indemnify the other party for all damages except those caused by the sole and exclusive negligence of the stronger party was not one of adhesion since it did not defeat the expectations of weaker party. The contract was not unconscionable, since the costs of indemnification were passed on to the stronger party [*Chevron, U.S.A., Inc. v. Bragg Crane & Rigging Co. (1986) 180 Cal. App. 3d 639, 647-648, 225 Cal. Rptr. 742]* .

- A dealership contract was one of adhesion and thus not enforceable. A nonassignment clause was not unconscionable, however, since the agreement was clear, unambiguous, and not susceptible to a reasonable expectation of assignability or survival [*San Francisco Newspaper Printing Co. v. Superior Court (1985) 170 Cal. App. 3d 438, 442-444, 216 Cal. Rptr. 462]* .

- A contract providing for a commission of 0.65 percent of the sale price if a real estate broker obtained a fully executed purchase and sale agreement that closed escrow, and a second commission of 0.35 percent of the sale price if the broker served through the successful close of escrow, with forfeiture of the latter commission if escrow was not closed on the termination of employment [*Chretian v. Donald L. Bren Co. (1984) 151 Cal. App. 3d 385, 389, 198 Cal. Rptr. 523]* .

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13-140 California Forms of Pleading and Practice--Annotated § 140.147

§ 140.147 Affirmative Defense--Rescission by Mutual Consent [Civ. Code § 1689(a)]

[1] FORM Affirmative Defense--Rescission by Mutual Consent [Civ. Code § 1689(a)]

AS A [_____ (*specify number, if more than one, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*add, if more than one cause of action was alleged,* TO THE _____ (*specify number, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

On or about _____ [*date*], plaintiff and defendant consented and agreed that the contract be, and it was, rescinded. [A copy of the memorandum of the rescission is attached as Exhibit _____ and made a part of this pleading.]

[2] Use of Form

The affirmative defense in [1], *above,* is for use in an answer to a complaint for damages for breach of contract when the contract was rescinded by mutual consent of the parties before any breach occurred. A contract may be rescinded if all of the parties consent [*Civ. Code § 1689(a)*; *Kane v. Sklar (1954) 122 Cal. App. 2d 480, 482, 265 P.2d 29]* . Rescission may be asserted as a defense [*Civ. Code § 1692*]. For further discussion, see Ch. 490, *Rescission and Restitution* .

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13-140 California Forms of Pleading and Practice--Annotated § 140.148

§ 140.148 Affirmative Defense--Failure of Consideration [Civ. Code § 1689(b)(2)]

[1] FORM Affirmative Defense--Failure of Consideration [Civ. Code § 1689(b)(2)]

AS A [_____ (*specify number, if more than one, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*add, if more than one cause of action was alleged,* TO THE _____ (*specify number, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

[1.] Defendant admits that he/she/it failed to perform the obligation described in the complaint but alleges that the failure resulted from plaintiff's failure to _____ [*specify*], as required by the terms of the contract, and that performance on plaintiff's part was a _____ [condition precedent to *or* concurrent condition with] the performance of defendant's obligation.

[2. Because of plaintiff's failure and refusal to perform the obligation on his/her/its part to be performed, defendant, on or about _____ (*date*), rescinded the contract by _____ (*specify manner of rescission*) and _____ (restored *or* offered to restore) to plaintiff everything of value that defendant had received under the contract.]

[2] Use of Form

The affirmative defense in [1], *above*, is for use in an answer to a complaint for damages for breach of contract when there has been a failure of consideration [*see § 140.23[9]*]. Failure of consideration through the fault of the other party is a ground for rescission [*Civ. Code § 1689(b)(2)*]. For a discussion of rescission, see Ch. 490, *Rescission and Restitution* .

[3] Failure of Consideration

[a] Lack of Consideration Distinguished

In a bilateral contract, failure of consideration is a defense to an action for a breach of the contract, since it is

contemplated that the performance of the promises will be in exchange for each other, the promises being considered as equal in value [*Bliss v. California Coop. Producers (1947) 30 Cal. 2d 240, 248, 181 P.2d 369]* . Although the terms are sometimes interchanged, "lack of consideration" involves a promise given by one party to another without anything being bargained for or given in exchange for it, while "failure of consideration" means that a performance for which the promisor bargained has not been rendered [*Nault v. Smith (1961) 194 Cal. App. 2d 257, 265-266, 14 Cal. Rptr. 889* ; *but see The Money Store v. Southern California Bank (2002) 98 Cal. App. 4th 722, 728-729, 120 Cal. Rptr. 2d 58* (although contract stated that lender "was to be at no expense in this transaction," deposit of loan funds in exchange for other party's promises was adequate consideration)]. For example, when the promise of a sellerto deliver corporate stock failed without fault on the buyer's part, consideration for the buyer's promise to pay failed in a material respect [*McDorman v. Moody (1942) 50 Cal. App. 2d 136, 141, 122 P.2d 639]* .

[b] Worthlessness of Consideration Distinguished

The defense of failure of consideration is not available when the defendant received what the defendant bargained for, but it has become worthless. However, the defense of frustration of purpose may be available [*FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 397-401, 282 Cal. Rptr. 508* ; *see § 140.46*].

Failure of consideration is not established if the contract became unprofitable and the defendant knew that its value could be affected by a particular future event but made no provision in the contract with respect to that risk, only the defendant's error in judgment. Defendant bears the risk, and is not entitled to avoid, rescind, or reform the contract [*Mosher v. Mayacamas Corp. (1989) 215 Cal. App. 3d 1, 5-6, 263 Cal. Rptr. 373]* .

[4] Defense in Action by Assignee

Failure of consideration under a bilateral contract, consisting of breach by the plaintiff's assignor, is a defense to an action by an assignee, whether it occurred before or after notice of the assignment [*Dreyfuss v. Burton (1966) 246 Cal. App. 2d 629, 638, 54 Cal. Rptr. 843]* .

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13-140 California Forms of Pleading and Practice--Annotated § 140.149

§ 140.149 Affirmative Defense--Modification of Oral Contract by Writing [Civ. Code § 1697]

[1] FORM Affirmative Defense--Modification of Oral Contract by Writing [Civ. Code § 1697]

AS A [_____ (*specify number, if more than one, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*add, if more than one cause of action was alleged,* TO THE _____ (*specify number, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. On or about _____ [*date*], the parties consented to a modification of the oral agreement alleged in the complaint in a writing providing that _____ [*specify*]. A copy of the writing is attached as Exhibit _____ and made a part of this pleading.

2. Defendant has performed all of the conditions of the contract, as modified, on his/her/its part to be performed in accordance with the terms of the contract _____ [except _____ (*specify conditions not performed*), which defendant did not perform because _____ (*specify facts showing excuse for nonperformance*)].

[2] Use of Form

The affirmative defense in [1], *above,* is for use in an answer to a complaint for damages for breach of contract when an oral contract was subsequently modified by the parties' consent. A contract not in writing may be modified in any respect by consent of the parties in writing without a new consideration, and is extinguished to the extent of the modification [*Civ. Code § 1697*; *see Roehm Distrib. Co. v. Burgermeister Brewing Corp. (1961) 196 Cal. App. 2d 678, 681, 16 Cal. Rptr. 881]* .

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13-140 California Forms of Pleading and Practice--Annotated § 140.150

§ 140.150 Affirmative Defense--Modification of Written Contract by Written Agreement or by Oral Agreement [Civ. Code § 1698(a), (c)]

[1] FORM Affirmative Defense--Modification of Written Contract by Written Agreement or by Oral Agreement [Civ. Code § 1698(a), (c)]

AS A [_____ (*specify number, if more than one, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*add, if more than one cause of action was alleged,* TO THE _____ (*specify number, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

[*EITHER*]

1. On or about _____ [*date*], the contract was modified by another contract in writing between plaintiff and defendant, providing that _____ [*specify*]. A copy of the second contract is attached as Exhibit _____ and made a part of this pleading.

[*OR*]

1. The contract alleged in the complaint did not contain any provision stating that it could not be modified by an oral agreement supported by new consideration. On or about _____ [*date*], plaintiff and defendant made an oral agreement to _____ [*specify terms of oral agreement*]. The purpose of the oral agreement was to modify the written contract alleged in the complaint. The oral agreement was supported by valuable and new consideration in that _____ [*specify new consideration*].

[*OR*]

1. The contract alleged in the complaint provided that it could be modified only in writing. On or about _____ [*date*], plaintiff and defendant made an oral agreement to _____ [*specify terms of oral agreement*]. Plaintiff is estopped to deny that the contract was modified by that oral agreement because _____ [*specify facts showing estoppel, e.g.,* defendant was misled into believing, at a time when he/she/it was ready to redeem the fur coat, that he/she/it was being given an extra week in which to repay the loan, but during that time the coat was sold by plaintiff for less than the amount of the loan.]

[*CONTINUE*]

2. Defendant has performed all of the conditions of the contract, as modified, on his/her/its part to be performed in accordance with the terms of the contract [except _____ (*specify conditions not performed*), which defendant did not perform because _____ (*specify facts showing excuse for nonperformance*)].

[2] Use of Form

The affirmative defense in [1], *above,* is for use in an answer to a complaint for damages for breach of contract when the parties modified a written contract by another written agreement or by an oral agreement supported by new consideration [*see Civ. Code § 1698*]. For further discussion of modification, see *§ 140.112[3]*.

The court will treat defendant's failure to plead modification of the written contract as an affirmative defense and failure to object to the introduction of evidence pertaining to the oral agreement as a waiver of the defense [*James G. Freeman & Associates, Inc. v. Tanner (1976) 56 Cal. App. 3d 1, 9, 128 Cal. Rptr. 109]* .

[3] Modification by Oral Agreement

A written contract may be modified by an oral agreement supported by new consideration [*Civ. Code § 1698(c)*; *D.L. Godbey & Sons Constr. Co. v. Deane (1952) 39 Cal. 2d 429, 432-433, 246 P.2d 946* ; *Malmstrom v. Kaiser Aluminum & Chemical Corp. (1986) 187 Cal. App. 3d 299, 314, 231 Cal. Rptr. 820* (employee's move after elimination of position to another facility of employer did not amount to consideration because detriment was incidental to preparation to accept out-of-state offer of employment); *Raedeke v. Gibraltar Sav. & Loan Asso. (1974) 10 Cal. 3d 665, 673, 111 Cal. Rptr. 693, 517 P.2d 1157* ; *see Com. Code § 2209* (modification of contract for sale of goods)]. This rule does not preclude the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts [*Civ. Code § 1698(d)*].

An obligation a party was required to perform under the written contract is not consideration that will support an oral modification [*Marani v. Jackson (1986) 183 Cal. App. 3d 695, 704-706, 228 Cal. Rptr. 518]* .

Reliance on oral statements that allegedly modified or superseded a written agreement is not justifiable. The doctrine of estoppel is unavailable to provide a basis for an oral modification unless an unconscionable injury or unjust enrichment would result from failure to enforce the oral modification [*Malmstrom v. Kaiser Aluminum & Chemical Corp. (1986) 187 Cal. App. 3d 299, 319-320, 231 Cal. Rptr. 820]* .

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Chapter 140 CONTRACTS
PART V. FORMS
B. Demurrers and Defenses

13-140 California Forms of Pleading and Practice--Annotated § 140.151

§ 140.151 Affirmative Defense--Modification of Written Contract by Executed Oral Agreement [Civ. Code § 1698(b)]

[1] FORM Affirmative Defense--Modification of Written Contract by Executed Oral Agreement [Civ. Code § 1698(b)]

AS A [_____ (*specify number, if more than one, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*add, if more than one cause of action was alleged,* TO THE _____ (*specify number, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

On or about _____ [*date*], plaintiff and defendant made an oral agreement to _____ [*specify terms of oral agreement*]. The purpose of the oral agreement was to modify the written contract alleged in the complaint. The oral agreement has been executed in that _____ [*specify performance of oral agreement by plaintiff and defendant*].

[2] Use of Form

The affirmative defense in [1], *above,* is for use in an answer to a complaint for damages for breach of contract when the parties have modified a written contract by an executed oral agreement. A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties [*Civ. Code § 1698(b)*; *D.L. Godbey & Sons Constr. Co. v. Deane (1952) 39 Cal. 2d 429, 432, 246 P.2d 946]* .

Whether a written contract was modified by an executed oral agreement is a question of fact [*Daugherty Co. v. Kimberly-Clark Corp. (1971) 14 Cal. App. 3d 151, 158, 92 Cal. Rptr. 120]* . An agreement to modify a written contract may be implied by conduct of the parties that is inconsistent with the written contract and warrants the conclusion that the parties intended to modify it [*Garrison v. Edward Brown & Sons (1944) 25 Cal. 2d 473, 479, 154 P.2d 377* ; *Daugherty Co. v. Kimberly-Clark Corp. (1971) 14 Cal. App. 3d 151, 158, 92 Cal. Rptr. 120]* . The party asserting the oral modification must prove the elements of an oral modification of a written contract by a preponderance of the evidence [*Barrett v. Bank of America (1986) 183 Cal. App. 3d 1362, 1369, 229 Cal. Rptr. 16]* .

A provision in a written contract prohibiting modification except in a writing before completion of the transaction precludes modification by an executed oral agreement [*Marani v. Jackson (1986) 183 Cal. App. 3d 695, 704-705, 228 Cal. Rptr. 518]* .

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13-140 California Forms of Pleading and Practice--Annotated § 140.152

§ 140.152 Affirmative Defense--Alteration of Written Contract Without Consent [Civ. Code § 1700]

[1] FORM Affirmative Defense--Alteration of Written Contract Without Consent [Civ. Code § 1700]

AS A [_____ (*specify number, if more than one, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*add, if more than one cause of action was alleged,* TO THE _____ (*specify number, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. On or about _____ [*date*], plaintiff materially modified, altered, and changed the terms of the contract alleged in the complaint, in that _____ [*specify*].

2. Plaintiff's modification, alteration, and change of the original contract was intentional and without the consent or knowledge of defendant. By reason of such modification, alteration, and change, all of defendant's obligations under the original contract have been extinguished.

[2] Use of Form

The affirmative defense in [1], *above,* is for use in an answer to a complaint for damages for breach of contract when the plaintiff materially altered the written contract without the defendant's consent.

[3] Material Alteration

[a] Alteration Extinguishing Defendant's Obligation

The intentional destruction, cancellation, or material alteration of a written contract by a party entitled to any benefit under it, or with that party's consent, extinguishes all the executory obligations of the contract in that party's favor against parties who do not consent to the act [*Civ. Code § 1700*]. The answer is demurrable if it fails to aver that the alteration was made with the plaintiff's knowledge or consent [*Humphreys v. Crane & Yale (1855) 5 Cal. 173, 175]* .

[b] Evidence of Alteration

The rule precluding parol evidence to vary or contradict a written contract does not exclude evidence to show that an alteration of the writing has been made [*Akopoff v. Mesropian (1929) 96 Cal. App. 128, 129, 273 P. 604]* . Evidence of alteration in a written contract after it was signed is admissible as relevant to the denial of the execution of the contract [*Dennie v. Clark (1906) 3 Cal. App. 760, 763, 87 P. 59]* .

[c] Test of Materiality

The test of materiality of an alteration is whether it changes the rights or duties of the parties, *i.e.*, whether it works an alteration in the meaning or legal effect ofthe contract [*Consolidated Loan Co. v. Harman (1957) 150 Cal. App. 2d 488, 491, 310 P.2d 450]* . Lack of a fraudulent purpose does not cure a material alteration [*California Savings & Commercial Bank v. Wheeler (1932) 216 Cal. 742, 746, 16 P.2d 737]* .

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Chapter 150 CONVERSION

13-150 California Forms of Pleading and Practice--Annotated 150.syn

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§ 150.10 Conversion Defined

[1] General Definition

[2] Reluctance to Extend Conversion to New Contexts

§ 150.11 Property Subject to Conversion

[1] Tangibles Versus Intangibles

[2] Money

[3] Checks

[4] Real Property

§ 150.12 Plaintiff's Interest in Property

[1] Actual Possession or Right to Immediate Possession

[2] One Who Has Right to Immediate Possession

[3] Ownership Without Right to Possession Is Not Adequate

[4] Ownership Not Required

[5] Assignee of Cause of Action Needs No Other Interest

[6] Defendant's Superior Right of Possession Defeats Action

§ 150.13 Defendant's Conversion

[1] Requirement of Substantial Interference

[2] Interference Must Be Actual to Be Substantial

[3] Methods of Actual Interference

[4] Substantialness of Interference

[5] Intentional Conduct Required

[6] Strict Liability

[7] Demand for Return of Property

§ 150.14 Duty to Avoid Further Harm

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[1] In General

[2] Measure of Damages

[a] Value of Property Plus Interest or Proximate and Foreseeable Loss

[b] In Action by Merchant or Library

[3] Damages Suffered in Recovering Property

[4] Proof of Value

[5] Exemplary Damages

[6] Recovery by Owner of Limited Interest

[7] Mitigation of Damages

§ 150.17 Defenses

[1] Statute of Limitations

[a] Three-Year Statute Generally Applies

[b] Special Rules Provide Shorter Period for Particular Situations

[c] Period Begins to Run at Time of Conversion

[d] Delayed Accrual

[i] Concealment of Facts

[ii] Fiduciary Relationship

[iii] Subsequent Purchaser

[iv] Theft of Article of Historical, Interpretive, Scientific, or Artistic Significance

[2] Consent

[3] Defense of Own Interests

[4] Equitable Defenses

§ 150.18 Alternative Forms of Action

[1] Waiving Tort

[2] Claim and Delivery

[3] Trespass

§ 150.19 Immunity for Delivery of Decedent's Tangible Personal Property

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[1] Acts Constituting Conversion

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[4] Defenses

[5] Demand

[6] Duty to Return Property

[7] Effect of Conversion on Lien

[8] Liability for Conversion Other Than Damages

[9] Statute of Limitations

§ 150.32 Decisions

[1] Alternative Forms of Action

[a] Trespass

[b] Waiving Tort

[2] Conversion Defined

[3] Damages

[a] Element of Cause of Action for Conversion

[b] Exemplary Damages

[c] Measure of Damages

[d] Mitigation of Damages

[e] Proof of Value

[f] Recovery by Owner of Limited Interest

[4] Defendant's Conversion

[a] Acts Constituting Conversion

[b] Acts Not Constituting Conversion

[c] Actual Interference

[d] Demand for Return of Property

[e] Good Faith No Defense

[f] Intentional Conduct Requirement

[g] Possession

[h] Ownership Interest

[i] Substantialness of Interference

[5] Defenses

[a] Assumption of Risk

[b] Consent

[c] Defendant's Superior Right of Possession

[d] Equitable Defenses

[e] Statute of Limitations

[6] Elements of Conversion

[7] Plaintiff's Interest in Property

[a] Assignee

[b] Ownership Interest

[c] Owner of Limited Interest

[d] Right to Possession

[8] Property Subject to Conversion

[a] Checks

[b] Community Property

[c] Money

[d] Property Held in Bailment

[e] Real Property

[f] Tangibles and Intangibles

§ 150.33 Attorney General Opinions

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§ 150.40 Plaintiff's Guide

[1] Facts to Be Ascertained

[a] Facts Relating to Plaintiff

[b] Facts Relating to Defendants

[c] Facts Relating to Potential Cause of Action for Conversion

[2] Documents to Be Obtained

[3] Alternative Causes of Action

[4] Venue

[5] Drafting the Complaint

§ 150.41 Defendant's Guide

[1] Facts to Be Ascertained

[a] Facts Relating to Defendant

[b] Facts Required for Answer

[2] Documents to Be Obtained

[3] Affirmative Defenses

[4] Absence of Elements of Cause of Action

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§ 150.50 Complaint for Damages for Conversion--General Form

[1] FORM

[2] Use of Form

[3] Allegations

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§ 150.51 Allegation--Facts Justifying Punitive Damages

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[2] Use of Form

§ 150.52 Allegation--Conversion by Unauthorized Sale of Property--General Form

[1] FORM

[2] Use of Form

§ 150.53 Complaint for Damages for Conversion--By Unauthorized Sale of Stock--Against Stockbroker--For Selling Stock He/She Agreed to Carry

[1] FORM

[2] Use of Form

§ 150.54 Allegation--Conversion by Unauthorized Sale of Property--By Owner Against Voluntary Bailee

[1] FORM

[2] Use of Form

[3] Cross References

§ 150.55 Allegation--Conversion by Purchase of Converted Property

[1] FORM

[2] Use of Form

§ 150.56 Complaint for Damages for Conversion--By Misdelivery of Goods--Against Common Carrier

[1] FORM

[2] Use of Form

[3] Cross References

§ 150.57 Allegation--Conversion by Refusal to Redeliver Property--Against Agent to Sell Automobile

[1] FORM

[2] Use of Form

§ 150.58 Allegation--Conversion by Refusal to Redeliver Property--By Lessor Against Lessee

[1] FORM

[2] Use of Form

[3] Cross References

§ 150.59 Allegation--Conversion by Refusal to Redeliver Property--Action by Bailor Against Bailee's Landlord

[1] FORM

[2] Use of Form

[3] Cross References

§ 150.60 Complaint for Damages for Conversion--By Refusal to Redeliver Property--By Letter (Lessor) Against Hirer (Lessee)--Breaking Condition of Hiring of Personal Property

[1] FORM

[2] Use of Form

[3] Cross References

§ 150.61 Allegation--Conversion by Manual Taking--Against Tenant--Removal of Fixtures

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§ 150.62 Complaint for Damages for Conversion--By Manual Taking--By Employer Against Bookkeeper--Embezzlement

[1] FORM

[2] Use of Form

§ 150.63 Allegation--Conversion by Obtaining Property Through False Representation

[1] FORM

[2] Use of Form

[3] Cross References

§ 150.64 Complaint for Damages for Conversion--By Wrongful Claim of Title Causing Forfeit of Judgment Lien

[1] FORM

[2] Use of Form

[3] Cross References

§ 150.65 Complaint for Damages for Conversion--By Acquisition of Possession by Unlawful Means--Illegal Entry Into Garage to Repossess Automobile

[1] FORM

[2] Use of Form

§ 150.66 Complaint for Damages for Conversion--Against Sheriff or Marshal--Failure to Follow Attachment Procedures

[1] FORM

[2] Use of Form

[3] Verification

[4] Cross References

§ 150.67 Complaint for Damages for Conversion--Against Agent--Failure to Pay Over Collected Funds

[1] FORM

[2] Use of Form

§ 150.68 Complaint for Damages for Conversion--Against Agent--Failure to Deposit Funds

[1] FORM

[2] Use of Form

§ 150.69 Complaint for Damages for Conversion--Against Purchasing Agent--Appropriation of Funds

[1] FORM

[2] Use of Form

§ 150.70 Complaint for Damages for Conversion--Against Attorney--Misappropriation of Client's Funds

[1] FORM

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[3] Cross References

§ 150.71 Complaint for Damages for Conversion--Against Factor--Conversion of Proceeds of Sale

[1] FORM

[2] Use of Form

§ 150.72 Complaint for Damages for Conversion--Against Agent Wrongfully Appropriating Property and His/Her Principal

[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Cross References

§ 150.74 Complaint for Damages for Conversion--Action by Possessory Lienholder Against Owner of Personal Property

[1] FORM

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[1] FORM

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§ 150.77 Allegation--Excuse for Failure to Make Demand for Return of Property

[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Cross References

§§ 150.79-150.89 [Reserved]

§ 150.90 Affirmative Defense--Defendant Took Possession as Personal Representative and in Good Faith Belief That Property Was Part of Decedent's Estate [Prob. Code § 9651]

[1] FORM

[2] Use of Form

[3] Cross References

§ 150.91 Affirmative Defense--Defendant Took Possession of Property in Defense of Own Interests

[1] FORM

[2] Use of Form

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Chapter 150 CONVERSION
PART I. SCOPE

13-150 California Forms of Pleading and Practice--Annotated § 150.01

§ 150.01 Scope of Chapter

This chapter discusses actions at law for the conversion of personal property. It includes:

- A general form of complaint for conversion [*see § 150.50*].
- An allegation seeking punitive damages [*see § 150.51*].
- Complaints and allegations based on various methods of converting property [*see §§ 150.52 -150.65*].
- Complaints against particular defendants [*see §§ 150.66 -150.72*].
- Complaints and allegations for use by particular plaintiffs [*see §§ 150.73 -150.76*].
- An allegation for relief from the requirement of making a demand for the return of property [*see § 150.77*].
- An allegation to request injunctive relief [*see § 150.78*].
- An affirmative defense for use by a personal representative of a decedent's estate [*see § 150.90*].
- An affirmative defense for use by a defendant to assert that he or she took possession of the property for the purpose of defending his or her own interests [*see § 150.91*].

This chapter also includes procedural checklists for use by a plaintiff [*see § 150.40*] and by a defendant [*see § 150.41*].

Legal Topics:

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

TortsIntentional TortsConversionRemedies

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13-150 California Forms of Pleading and Practice--Annotated § 150.02

§ 150.02 Cross References

For general related topics, see generally, Ch. 93, *Bailments* , Ch. 119, *Claim and Delivery* , and Ch. 121, *Common Counts* .

For forms relating to conversion in specific situations, see the following chapters:

- For a form of complaint for conversion by a bailor of an airplane against a bailee, see Ch. 16, *Airplanes and Airports*

- For forms of complaints for conversion of animals by a bailee or an animal shelter, see Ch. 23, *Animals: Civil Liability*

- For a form of complaint by an owner against an auctioneer for wrongful auction sale, see Ch. 77, *Auctions and Auctioneers*

- For discussion of the measure of damages for unlawful motor vehicle subleasing, see Ch. 90, *Automobiles: Vehicle Leasing Act*

- For a form of complaint by an employer for conspiracy to convert against an employee and a third party, see Ch. 126, *Conspiracy*

- For a form of complaint for failure to return or damage to stored or shipped goods, see Ch. 213, *Documents of Title*

- For a form of complaint by a buyer against an escrow holder for misappropriation of escrow funds or for a form of allegation that an escrow holder converted property held in escrow, see Ch. 253, *Escrows*

- For a discussion of statutory liens giving the possessor the right to retain certain property without incurring liability for conversion, see Ch. 342, *Liens and Wage Preferences*

- For a form of complaint for conversion against the finder of lost property for failure to return it to the owner on demand, see Ch. 355, *Lost and Unclaimed Property*

- For a form of complaint for conversion against a partnership and partner by a third party, see *Ch. 402, Partnerships: Actions Between General Partners or Partnership and Third Parties, § 402.42*

- For a form of complaint for conversion by a principal against an agent, see Ch. 427, *Principal and Agent*

- For a form of complaint by a secured party against a debtor to obtain possession of collateral after default, see Ch. 500, *Sales and Secured Transactions*

- For a form of complaint for trespass to real property and conversion of machinery thereon, see Ch. 550, *Trespass*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionAssumpsitContracts LawTypes of ContractsBailmentsTortsNegligenceActionsNegligent Entrustment

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[Reserved]

§§ 150.03[Reserved]

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Chapter 150 CONVERSION
PART II. LEGAL BACKGROUND

13-150 California Forms of Pleading and Practice--Annotated § 150.10

§ 150.10 Conversion Defined

[1] General Definition

Numerous definitions of conversion are found in the case law. Conversion is defined to be an act of willful interference with personal property, done without lawful justification, by which any person entitled thereto is deprived of the use and possession of the personal property [*de Vries v. Brumback (1960) 53 Cal. 2d 643, 647, 2 Cal. Rptr. 764, 349 P.2d 532]* . Alternatively, conversion is said to result from any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his or her rights therein [*Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 549, 176 P.2d 1* ; *Weiss v. Marcus (1975) 51 Cal. App. 3d 590, 599, 124 Cal. Rptr. 297]* .

These definitions are helpful only insofar as they provide the broad framework of the tort. The actual requirements for stating a cause of action for conversion show the tort to be narrower in scope than what these definitions suggest. Thus, for example, conversion does not result from any act of wrongful dominion but only from intentional acts involving substantial interference with the plaintiff's right of possession [*see* *Jordan v. Talbot (1961) 55 Cal. 2d 597, 610, 12 Cal. Rptr. 488, 361 P.2d 20]* .

[2] Reluctance to Extend Conversion to New Contexts

The California Supreme Court, in an action for conversion brought by a medical patient against medical personnel and genetic researchers who used his excised body cells for potentially lucrative research without his permission, expressed a cautious attitude in determining whether to apply the general law of conversion to a new context of social importance. The Court ultimately declined to extend conversion, a tort theory originally used to determine whether the finder or loser of a horse had the better title, to decide issues of ownership of the results of socially important medical research [*Moore v. Regents of Univ. of Cal. (1990) 51 Cal. 3d 120, 135, 147, 271 Cal. Rptr. 146, 793 P. 2d 479]* . The Court held that the plaintiff was unable to show that he retained either an expectation to retain possession of his cells or an ownership interest in the cells following their removal from his body, and, consequently, that he was unable to sue for their conversion [*Moore v. Regents of Univ. of Cal. (1990) 51 Cal. 3d 120, 136-137, 142-147, 271 Cal. Rptr. 146, 793 P. 2d 479]* . The Court also stated that the "patented cell line," and the products derived from it, obtained through research, were factually and legally distinct from the cells taken from plaintiff's body. Therefore, plaintiff could not claimownership of them inconsistent with the federal patent obtained by the researchers, because federal law permits the

patenting of organisms that represent the product of "human ingenuity" (although it does not allow the patenting of naturally occurring organisms) [*Moore v. Regents of Univ. of Cal. (1990) 51 Cal. 3d 120, 141-142, 143-145, 271 Cal. Rptr. 146, 793 P. 2d 479]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionElements

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13-150 California Forms of Pleading and Practice--Annotated § 150.11

§ 150.11 Property Subject to Conversion

[1] Tangibles Versus Intangibles

Conversion, at common law, lay only for damage to tangible property capable of being identified and taken into actual possession [*Payne v. Elliot (1880) 54 Cal. 339, 340]* . Incorporeal, intangible things, which existed in idea and were incapable of being subjected to actual possession, were not subject to conversion at common law [*Payne v. Elliot (1880) 54 Cal. 339, 340]* .

The common law has been changed so that intangibles, if represented by a document, are also subject to conversion [*see Payne v. Elliot (1880) 54 Cal. 339, 341-342* (stock)]. Thus, although the names of a laundry's customers are too intangible, uncertain, and indefinite a property interest to be subject to conversion [*Olschewski v. Hudson (1927) 87 Cal. App. 282, 286, 262 P. 43]* , when the names are placed in an index card file, the names become subject to conversion [*Palm Springs etc. Co. v. Kieberk Corp. (1941) 46 Cal. App. 2d 234, 240, 115 P.2d 548]* .

[2] Money

Money may be the subject of a conversion action only when the money can be described or identified as specific property since conversion deals with interference with property [*Shahood v. Cavin (1957) 154 Cal. App. 2d 745, 748, 316 P.2d 700]* . Thus, a generalized claim for money lost while playing card games at card club was insufficient to support conversion action. Plaintiffs failed to identify any specific identifiable sums the club took from them [*Vu v. California Commerce Club, Inc. (1997) 58 Cal. App. 4th 229, 235, 68 Cal. Rptr. 2d 31* ; *see also PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP (2007) 150 Cal. App. 4th 384, 397* (conversion action rejected when plaintiffs could only estimate amount of cash taken and could not identify specific sum)].

Money is not considered to be specific property when only the relationship of creditor and debtor exists between the parties and the subject matter of the action is the alleged conversion of the funds representing the indebtedness [*see Watson v. Stockton Morris Plan Co. (1939) 34 Cal. App. 2d 393, 403, 93 P.2d 855]* . Where the money involved cannot be specifically identified, the proper action is in contract or for debt [*Baxter v. King (1927) 81 Cal. App. 192, 194, 253 P. 172]* .

While the money must be a specific sum capable of identification, it is not necessary that each coin or bill be earmarked. It is sufficient if a definite sum is involved [*Haigler v. Donnelly (1941) 18 Cal. 2d 674, 681, 117 P.2d 331* ; *Weiss v. Marcus (1975) 51 Cal. App. 3d 590, 599, 124 Cal. Rptr. 297]* .

[3] Checks

A check, being capable of identification, is capable of being converted [*McCafferty v. Gilbank (1967) 249 Cal. App. 2d 569, 576, 57 Cal. Rptr. 695* ; *Acme Paper Co. v. Goffstein (1954) 125 Cal. App. 2d 175, 180, 181, 270 P.2d 505* , *criticized on other grounds, Roam v. Koop (1974) 41 Cal. App. 3d 1035, 1042, 116 Cal. Rptr. 539* ; *see Cooper v. Union Bank (1973) 9 Cal. 3d 371, 374-386, 107 Cal. Rptr. 1, 507 P.2d 609* (liability of bank for payment on forged check)].

[4] Real Property

It is generally acknowledged that conversion is a tort which may be committed only in respect to personal property and not to real property [*Munger v. Moore (1970) 11 Cal. App. 3d 1, 7, 89 Cal. Rptr. 323* ; *but see Murphy v. Wilson (1957) 153 Cal. App. 2d 132, 135-136, 314 P.2d 507* ; *Katz v. Enos (1945) 68 Cal. App. 2d 266, 269, 156 P.2d 461* (where damages were awarded for conversion of real property without discussing the issue)]. Thus, leaseholds, as interests in real property, are not subject to conversion [*Vuich v. Smith (1934) 140 Cal. App. 453, 455, 35 P.2d 365]* .

Goods which are attached to real property but are severable, or become severed, are subject to conversion [*Eistrat v. Western Hardwood Lumber Co. (1958) 164 Cal. App. 2d 374, 379, 330 P.2d 629* (lumber cut from timberlands); *Kirkman Corp. v. Owens (1944) 62 Cal. App. 2d 193, 198, 144 P.2d 405* (crops)]. Additionally, an agreement between the parties as to the nature of fixtures is binding on the issue of whether they constitute real or personal property [*Bedell v. Mashburn (1948) 87 Cal. App. 2d 417, 423, 197 P.2d 98* (agreement between parties that water heater affixed to land would remain personal property, *disapproved on other grounds, Reynolds v. Bank of Am. (1959) 53 Cal. 2d 49, 51, 345 P.2d 926*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesConversionContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesConversion of InstrumentsTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionElements

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Chapter 150 CONVERSION
PART II. LEGAL BACKGROUND

13-150 California Forms of Pleading and Practice--Annotated § 150.12

§ 150.12 Plaintiff's Interest in Property

[1] Actual Possession or Right to Immediate Possession

The interest which the tort of conversion seeks to protect is freedom from interference with the right of possession [*Chatterton v. Boone (1947) 81 Cal. App. 2d 943, 946, 185 P.2d 610]* . The plaintiff must be able to establish either actual possession of the property [*Igauye v. Howard (1952) 114 Cal. App. 2d 122, 127, 249 P.2d 558]* or the right to immediate possession at the time of the conversion in order to bring an action [*General Motors A. Corp. v. Dallas (1926) 198 Cal. 365, 370, 245 P. 184* ; *Messerall v. Fulwider (1988) 199 Cal. App. 3d 1324, 1329, 245 Cal. Rptr. 548* ; *Aero Properties, Inc. v. Gottlieb (1962) 206 Cal. App. 2d 711, 716, 24 Cal. Rptr. 277]* .

To prevail, the plaintiff will have to prove interference with his or her ownership or right of possession [Moore v. Regents of University ofCalifornia *(1990) 51 Cal. 3d 120, 136, 271 Cal. Rptr. 146, 793 P. 2d 479]* .

[2] One Who Has Right to Immediate Possession

As between one who is in actual possession of personal property and one who has a right to immediate possession of the property, the latter is liable for conversion of the property if he or she obtained the property by force or threats of force or other breaches of the peace [*see Henderson v. Security Nat. Bank (1977) 72 Cal. App. 3d 764, 770, 140 Cal. Rptr. 388* (upholding award of damages for bank's conversion of automobile obtained by breaking lock although bank had right to possession); *see also § 150.65*].

[3] Ownership Without Right to Possession Is Not Adequate

It is not sufficient that plaintiff is the owner of the converted property. Ownership must be coupled with actual possession or a right to possession of the property. For example, where the converted property was subject to a pledge at the time of the conversion, the owner has no right to possession of the property and, thus, has an insufficient interest to bring an action [*Aero Properties, Inc. v. Gottlieb (1962) 206 Cal. App. 2d 711, 716, 24 Cal. Rptr. 277* ; *but see Reynolds v. Lerman (1956) 138 Cal. App. 2d 586, 596, 292 P.2d 559* (rejecting requirement of right to immediate possession where property was in custody of sheriff under writ of attachment at time of conversion)].

[4] Ownership Not Required

The interest in the property need not be that of an owner, so long as the limited interest carries with it the right to immediate possession of the property [*Camp v. Ortega (1962) 209 Cal. App. 2d 275, 286, 25 Cal. Rptr. 873* (chattel mortgagor); *Arques v. National Superior Co. (1945) 67 Cal. App. 2d 763, 767-768, 155 P.2d 643* (worker's lien in chattel giving statutory right of possession); *Perlick v. Pacific Discount Corp. (1942) 53 Cal. App. 2d 136, 141, 127 P.2d 647* (trustee)].

Although neither legal title nor absolute ownership of the property is necessary, a mere contractual right of payment, without more will not suffice [*Farmers Ins. Exchange v. Zerin (1997) 53 Cal. App. 4th 445, 452, 61 Cal. Rptr. 2d 707]* . A person entitled to immediate possession of property under a security interest in the property, may however, have a claim for conversion of the property [*Farmers Ins. Exchange v. Zerin (1997) 53 Cal. App. 4th 445, 452, 61 Cal. Rptr. 2d 707* (holding that plaintiff failed to establish equitable lien on property); *Messerall v. Fulwider (1988) 199 Cal. App. 3d 1324, 1329, 245 Cal. Rptr. 548* (bailee, who was storing boat for person who was buying it, liable for conversion when he failed to turn boat over to seller who had security interest in it and demanded delivery of boat after buyer defaulted in payments)]. A promise to pay a debt out of aparticular fund, without more, will not create an equitable lien on the fund. Similarly, a promise to hold property in trust for another, standing alone, will not create an equitable interest in the property. An equitable lien may arise from such promises if detrimental reliance or unjust enrichment are present [*Farmers Ins. Exchange v. Zerin (1997) 53 Cal. App. 4th 445, 454-455, 61 Cal. Rptr. 2d 707* (no lien established; no liability for conversion)].

[5] Assignee of Cause of Action Needs No Other Interest

The one situation where plaintiff need not prove any interest in the converted property is where plaintiff is the assignee of the chose in action for conversion. Plaintiff must show only that the assignor of the chose in action had sufficient interest in the property to bring an action [*Lehmann v. Schmidt (1890) 87 Cal. 15, 22, 25 P. 161* ; *Staley v. McClurken (1939) 35 Cal. App. 2d 622, 625, 96 P.2d 805]* .

[6] Defendant's Superior Right of Possession Defeats Action

If the defendant has a right of possession which is superior to that of the plaintiff, conversion will not lie [*Silverstin v. Kohler & Chase (1919) 181 Cal. 51, 54, 183 P. 451* (seller under installment sale contract as having superior right of possession after buyer default)].

In one case, for example, the court held that a judgment imposing a constructive trust in favor of plaintiff on funds in a brokerage account did not retroactively create an interest that was superior to a third-party creditor's claim on the same property that had previously been reduced to judgment and levied upon. Therefore, the plaintiff could not bring an action against the levying creditor for conversion of the funds [*see CHoPP Computer Corp. v. U.S. (9th Cir. 1993) 5 F.3d 1344, 1348-1349* (applying California law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & AssignorsContracts LawPerformanceAssignmentGeneral OverviewTortsIntentional TortsConversionDefensesTortsIntentional TortsConversionElements

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§ 150.13 Defendant's Conversion

[1] Requirement of Substantial Interference

The gist of an action for conversion is the wrongful interference with the right of possession [*Chatterton v. Boone (1947) 81 Cal. App. 2d 943, 946, 185 P.2d 610]* . However, not all interferences with property constitute conversion. An action for conversion will lie only if defendant's conduct amounts to a substantial interference with plaintiff's possession or his or her rights thereto [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 610, 12 Cal. Rptr. 488, 361 P.2d 20]* .

[2] Interference Must Be Actual to Be Substantial

The first requisite of "substantial interference" is that there must be actual interference [*Home v. Kramer (1936) 7 Cal. 2d 361, 363-364*]. Thus, the mere assertion of an intent to wrongfully claim title falls short of the required interference [*Aronson v. Bank of America etc. Assn. (1937) 9 Cal. 2d 640, 643, 72 P.2d 548]* .

For example, where one purchases property at a marshal's sale but makes no attempt to assert ownership in or take possession of the property, no actual interference has occurred [*Kee v. Becker (1942) 54 Cal. App. 2d 466, 473-475, 129 P.2d 159]* . Similarly, the mere execution of a quitclaim deed does not constitute actual interference with the true owner's interest since the deed purports to transfer only such title as the seller owned [*Home v. Kramer (1936) 7 Cal. 2d 361, 363, 364, 60 P.2d 854]* .

[3] Methods of Actual Interference

In attempting to establish actual interference with plaintiff's property, there are numerous actions which may constitute interference. While an unjustified manual taking of the property is the clearest case of interference, it is well established that such manual taking is not required [*see* *Gruber v. Pacific States Sav. & Loan Co. (1939) 13 Cal. 2d 144, 148-149, 88 P.2d 137* ; *Beverly Finance Co. v. American Casualty Co. (1969) 273 Cal. App. 2d 259, 264, 78 Cal. Rptr. 334]* .

Conversion may result when possession of the property was obtained by fraud [*Freedman v. Queen Ins. Co. (1961) 56 Cal. 2d 454, 457, 15 Cal. Rptr. 69, 364 P.2d 245* (obtaining property by false personation)]. Conversion actions may also be based on:

- Unauthorized sales of property [*Reynolds v. Lerman (1956) 138 Cal. App. 2d 586, 592, 292 P.2d 559* (sale by warehouseman of attached property for storage fees)];

- Purchase of converted goods [*Swim v. Wilson (1891) 90 Cal. 126, 129-131, 27 P. 33* ; *Culp v. Signal Van & Storage Co. (1956) 142 Cal. App. 2d Supp. 859, 861* , *298 P.2d 162]* ;

- Misdelivery [*Byer v. Canadian Bank of Commerce (1937) 8 Cal. 2d 297, 299, 65 P.2d 67* (delivery of bonds to impostor by bank)];

- Refusal to return possession [*Igauye v. Howard (1952) 114 Cal. App. 2d 122, 126, 249 P.2d 558* (landlord's refusal to return evicted tenant's property)]; and

- Denial of access to property [*Carey v. Glenco Citrus Products (1965) 235 Cal. App. 2d 572, 580, 45 Cal. Rptr. 365* (refusal to permit buyer of crop to enter onto land to harvest it)].

Conversion may also result from:

- Unauthorized use of the property [*Igauye v. Howard (1952) 114 Cal. App. 2d 122, 126, 249 P.2d 558* (use of evicted tenant's property in operation of hotel)];

- Alteration of the property [*Asato v. Emirzian (1918) 177 Cal. 493, 496, 171 P. 90* (planting of nursery stock trees as altering their nature to realty)];

- Destruction of the property [*Bedell v. Mashburn (1948) 87 Cal. App. 2d 417, 423, 197 P.2d 98* , *disapproved on other grounds*, *Reynolds v. Bank of Am. (1959) 53 Cal. 2d 49, 51, 345 P.2d 926* ; *Staley v. McClurken (1939) 35 Cal. App. 2d 622, 628-629, 96 P.2d 805]* ; and

- Willful appropriation of property [*Fischer v. Machado (1996) 50 Cal. App. 4th 1069, 58 Cal. Rptr. 2d 213* (commission merchant's own use of commingled proceeds of sale of consigned farm products); *see also* *Mendoza v. Continental Sales Co. (2006) 140 Cal. App. 4th 1395, 1405, 45 Cal. Rptr. 3d 525* (*Fischer* rationale applied to subagents of grower who dealt only with intermediary commission merchant)].

Interference also occurs where defendant's wrongful claim of title to property results in the defeat of plaintiff's writ of attachment [*Service v. Trombetta (1963) 212 Cal. App. 2d 313, 316, 28 Cal. Rptr. 68* ; *but see* *Glasband v. Sun State Music Distributors, Inc. (1968) 265 Cal. App. 2d 413, 417, 71 Cal. Rptr. 482* (questioning existence of cause of action for conversion where writ of attachment was based on judgment lien subsequently invalidated by debtor's bankruptcy)].

Interference with an intangible may be the basis for a conversion action even though there is no interference with the document itself. For example, where a corporation wrongfully refuses to make a requested change in the registration of shares on its books, its actions towards those shares may be treated as a conversion despite the fact that there was no interference with the stock certificates themselves [*Mears v. Crocker First Nat. Bank (1948) 84 Cal. App. 2d 637, 644, 645, 191 P.2d 501]* .

If the defendant is lawfully entitled to possession but acquires possession by illegal means, acquisition by those means constitutes interference with the plaintiff's possessory rights [*see* *Henderson v. Security Nat. Bank (1977) 72 Cal. App. 3d 764, 770, 771, 140 Cal. Rptr. 388* (defendant liable for conversion where its agent effected legal repossession of automobile by means of an illegal entry into plaintiff's garage)].

[4] Substantialness of Interference

Once it is shown that actual interference with plaintiff's property has occurred, it must be shown that the interference was substantial [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 610, 12 Cal. Rptr. 488, 361 P.2d 20]* . This element requires the plaintiff to prove the defendant's intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his or her property [*Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 549, 550, 176 P.2d 1]* .

Conduct that falls short of an exercise of ownership over the goods cannot be the basis of a conversion action. For example, although a landlord who denies the tenant access to the building to recover his or her property has substantially interfered with that property [*Gruber v. Pacific States Sav. & Loan Co. (1939) 13 Cal. 2d 144, 147-148, 88 P.2d 137* ; *Kessinger v. Organic Fertilizers, Inc. (1957) 151 Cal. App. 2d 741, 754, 312 P.2d 345]* , if the landlord removes the tenant's property from the premises and places it into storage in the tenant's name, no substantial interferencehas occurred and conversion will not lie [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 610, 12 Cal. Rptr. 488, 361 P.2d 20]* .

Similarly, a bailee does not become a converter by making a qualified refusal to turn over property where his or her purpose, expressed and real, is to secure a reasonable opportunity to inquire into the claimant's rights [*Giacomelos v. Bank of America (1965) 237 Cal. App. 2d 99, 100-101, 46 Cal. Rptr. 612]* .

[5] Intentional Conduct Required

Assuming that some actual, substantial interference has occurred, liability for conversion results only if the conduct was intended to affect the property [*Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 918, 114 Cal. Rptr. 622, 523 P.2d 662]* . Interference that was the result of negligence on the part of a defendant will not provide a basis for a conversion action [*George v. Bekins Van & Storage Co. (1949) 33 Cal. 2d 834, 837, 838, 205 P.2d 1037]* .

Although the conduct must be intentional, it need not be affirmative. If defendant's conduct is undertaken with an intent to affect the property, liability may be based on a willful omission to act that deprives plaintiff of his or her property [*Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 918, 114 Cal. Rptr. 622, 523 P.2d 662* (common carrier's refusal to protect, return, or account for plaintiff's goods damaged in transit)].

[6] Strict Liability

Conversion is a strict liability tort that imposes liability on all those into whose hands the property comes [*see* *Moore v. Regents of University of California (1990) 51 Cal. 3d 120, 144, 271 Cal. Rptr. 146, 793 P. 2d 479* (dicta)]. The gist of an action for conversion is the wrongful interference with the right of possession. The motive for the interference is immaterial [*Chatterton v. Boone (1947) 81 Cal. App. 2d 943, 946, 185 P.2d 610]* . Thus, the fact that a defendant was acting in good faith, without notice, and without negligence as to his or her right to exercise such control over the property, is no defense [*Byer v. Canadian Bank of Commerce (1937) 8 Cal. 2d 297, 299, 65 P.2d 67* ; *Poggi v. Scott (1914) 167 Cal. 372, 376, 139 P. 815* ; *Beverly Finance Co. v. American Casualty Co. (1969) 273 Cal. App. 2d 259, 264-265, 78 Cal. Rptr. 334]* .

For example, the purchaser of converted goods is liable for conversion even though there was nothing to indicate that the seller was not authorized to sell the goods [*Swim v. Wilson (1891) 90 Cal. 126, 129-131, 27 P. 33* ; *Culp v. Signal Van& Storage Co. (1956) 142 Cal. App. 2d Supp. 859, 861* , *298 P.2d 162]* . Similarly, when an automobile is lawfully repossessed the repossessor may be liable for conversion of property contained in the car, even if the repossessor did not know that the property was there [*Varela v. Wells Fargo Bank (1971) 15 Cal. App. 3d 741, 749, 750, 93 Cal.Rptr. 428* (bank liable for conversion of diamond rings in glove compartment of repossessed car)].

[7] Demand for Return of Property

If the property was originally obtained by tort, a demand for its return is not required [*Igauye v. Howard (1952) 114 Cal. App. 2d 122, 127, 249 P.2d 558]* . If, however, a defendant comes into possession of the property lawfully, the plaintiff usually will have to demand return of the property and be refused before the cause of action arises [*Flennaugh v. Heinrich (1948) 89 Cal. App. 2d 214, 222, 200 P.2d 580]* . However, demand is not required when it can be shown that the demand would be futile [*Scott's V. F. Exch. v. Growers Refrigeration Co., Inc. (1947) 81 Cal. App. 2d 437, 450, 184 P.2d 183* , *disapproved on other grounds,* *Hischemoeller v. Nat. Ice etc. Storage Co. (1956) 46 Cal. 2d 318, 328, 294 P.2d 433]* . A demand is also not required when defendant's conduct in relation to the property clearly evidences a conversion [*Metzler v. Foster Holding Co. (1936) 5 Cal. 2d 278, 282, 54 P.2d 447* (property either sold or consumed); *Coy v. E.F. Hutton & Co. (1941) 44 Cal. App. 2d 386, 390, 391, 112 P.2d 639* (securities in question sold by defendant)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsConversionElementsTortsStrict LiabilityGeneral Overview

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§ 150.14 Duty to Avoid Further Harm

The general tort principle that a tortfeasor has a duty to come to the aid of his or her victim has been held to apply to the tort of conversion. Thus, a person who has converted the property of another has the duty to avoid further harm resulting from this wrongful act [*Gladstone v. Hillel (1988) 203 Cal. App. 3d 977, 989, 250 Cal. Rptr. 372* (injunction against use of plaintiff's jewelry molds and designs held proper because of separate duty not to further convert property); *but see Bonito Boats v. Thunder Craft Boats (1989) 489 U.S. 141, 167-168, 109 S. Ct. 971, 103 L. Ed. 2d 118* (apparently abrogating *Gladstone* to extent that it upheld injunction for violation of anti-direct molding statute set forth in former *Bus. & Prof. Code § 17300*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionElements

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§ 150.15 Acts Not Constituting Conversion

The California Supreme Court has held that a medical patient who brought an action against medical personnel and genetic researchers, who used his excised body cells for potentially lucrative research without his permission, failed to state a cause of action in conversion because he failed to show an ownership interest in the cells or the patented products resulting from the research [*Moore v. Regents of University of California (1990) 51 Cal. 3d 120, 136-142, 271 Cal. Rptr. 146, 793 P. 2d 479]* . The Court also refused to extend the scope of the tort of conversion to include recovery on those facts, on the grounds that [*Moore v. Regents of Universityof California (1990) 51 Cal. 3d 120, 142-143, 271 Cal. Rptr. 146, 793 P. 2d 479]* :

- The relevant policy considerations (for example, protection of a competent patient's right to make autonomous medical decisions, and protection of socially beneficial researchers who are unaware of the scope of the donor's consent) counsels against extending the tort;
- Those issues are better suited to legislative resolution; and
- The tort of conversion is not necessary to protect a patient's rights.

A bank is not subject to liability in conversion for converting deposited funds to its own use, because the bank's relationship to its depositor is that of debtor to creditor, and the title to deposited funds passes immediately to the bank, which may use the funds for its own business purposes. In an action based on a bank's honoring of an unauthorized check, and the bank's subsequent reinstatement of the amount of the check to the customer on request, a demurrer to the cause of action in conversion was held to be properly sustained [*Lee v. Bank of Am. (1990) 218 Cal. App. 3d 914, 919-920, 267 Cal. Rptr. 387]* . Similarly, because a bank has no duty to monitor trust accounts for breaches of fiduciary duty a bank cannot be held liable for a mortgage loan broker's conversion of note payments which are deposited in bank trust accounts [*Chazen v. Centennial Bank (1998) 61 Cal. App. 4th 532, 541, 71 Cal. Rptr. 2d 462* (complaint alleging that bank charged trust accounts for obligations that loan broker personally owed to bank stated conversion cause of action)].

A person such as an attorney who, acting as a mere custodian, intermediary, or conduit, files a complaint in interpleader

when faced with conflicting claims against litigation proceeds, does not exercise dominion over those funds sufficient to support an action for conversion [*Shopoff & Cavallo LLP v. Hyon (2008) 167 Cal. App. 4th 1489, 1508, 85 Cal. Rptr. 3d 268*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsGeneral OverviewTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionElements

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§ 150.16 Damages

[1] In General

Damages are an element of the plaintiff's cause of action. If the property converted is shown to be without value, no action for conversion will lie [*Bentley v. Mountain (1942) 51 Cal. App. 2d 95, 100, 124 P.2d 91* (valueless union shop cards); *see Oakes v. Suelynn Corp. (1972) 24 Cal. App. 3d 271, 279, 100 Cal. Rptr. 838]* . A plaintiff may recover emotional distress damages growing out of a defendant's conversion of personal property [*Gonzales v. Personal Storage, Inc. (1997) 56 Cal. App. 4th 464, 477, 65 Cal. Rptr. 2d 473]* .

[2] Measure of Damages

[a] Value of Property Plus Interest or Proximate and Foreseeable Loss

The detriment caused by the wrongful conversion of personal property ispresumed to be the value of the property at the time of the conversion, plus interest from the time of conversion or an amount sufficient to indemnify the party for the proximate and foreseeable loss suffered [*Civ.Code § 3336*; *Hamer v. Hathaway (1867) 33 Cal. 117, 120* (value of the property is to be determined at the place of conversion)]. The interest allowable under the statute is the legal rate of interest of 7 percent [*see Cal. Const. art. XV, § 1*; *Beverly Fin. Co. v. Am. Cas. Co. (1969) 273 Cal. App. 2d 259, 265, 78 Cal. Rptr. 334]* .

Although *Civ. Code § 3336* appears to provide alternative damages formulae, the first, the value of the property at the time of the conversion, is considered to be the proper one. The alternative provision, an amount sufficient to indemnify the party for the loss suffered, is resorted to only when the determination on the basis of value at the time of the conversion would be manifestly unjust [*Myers v. Stephens (1965) 233 Cal. App. 2d 104, 116, 43 Cal. Rptr. 420]* .

For example, when a plaintiff purchases a building with the disclosed intent of moving the building, renovating it, and then reselling it, and the defendant converts the building by reselling it to a third party, it would be unjust to limit the plaintiff's recovery to the $250 purchase price of the building if there was an expected profit of $3,040. In such a case, recovery of the expected profit is allowed [*Myers v. Stephens (1965) 233 Cal. App. 2d 104, 116, 43 Cal. Rptr. 420]* .

However, if a plaintiff does not prove with reasonable certainty the fact of proximately caused injury, the plaintiff cannot recover regardless of how much evidence is introduced as to the appropriate measure of damages [*Lueter v. State of California (2002) 94 Cal. App. 4th 1285, 1303, 115 Cal. Rptr. 2d 68* (value of destroyed evidence to lawsuit was wholly speculative and conjectural and could not be used as measure of damages for conversion)].

Although *Civ. Code § 3336* does not specifically indicate that prejudgment interest is available if the measure of damages is an amount sufficient to indemnify the party for the loss suffered, prejudgment interest may still be awarded if this measure of damages is used, pursuant to the general prejudgment interest authority of *Civ. Code § 3287(a)* [*Moreno v. Greenwood Auto Ctr. (2001) 91 Cal. App. 4th 201, 210-211, 110 Cal. Rptr. 2d 177* ; *see Civ. Code § 3287(a)*].

If a plaintiff regains possession of converted goods prior to adjudication of the right to possession of those goods, either through a writ of possession under *Code Civ. Proc. § 512.010 et seq.* or otherwise, the plaintiff's right to prejudgment interest continues beyond the point at which the plaintiff regained possession and extends to the entry of judgment. Prior to adjudication, the plaintiff faces the prospect of losing possession of the goods after trial, effectively depriving the plaintiff of the liberty of dealing with the goods as the plaintiff sees fit until that adjudication is made [*Irving Nelkin & Co. v. South Beverly Hills Wilshire Jewelry & Loan (2005) 129 Cal. App. 4th 692, 702-703, 28 Cal. Rptr. 3d 815]* . If the right to possession is determined through summary adjudication and all that remains to bedetermined is the amount of damages, the right to interest extends only to the date of the order granting summary adjudication in the plaintiff's favor [*Irving Nelkin & Co. v. South Beverly Hills Wilshire Jewelry & Loan (2005) 129 Cal. App. 4th 692, 704-705, 28 Cal. Rptr. 3d 815]* .

[b] In Action by Merchant or Library

In an action under *Penal Code § 490.5(c)* against an adult or emancipated minor by a merchant or library facility for the unlawful taking of merchandise or books or other library material, statutory damages are recoverable in an amount of not less than $50 or more than $500. These damages are in addition to the retail value of the merchandise if not recovered in merchantable condition, or the fair market value of the book or other library materials if not recovered in undamaged condition. Costs are also recoverable [*Penal Code § 490.5(c)*]. The cause of action authorized under *Penal Code § 490.5(c)* is in addition to any other civil remedies available to merchants or other persons [*see Penal Code § 490.5(c)*].

[3] Damages Suffered in Recovering Property

Plaintiff is additionally entitled to collect fair compensation for time and money properly expended in pursuit of the property [*Civ. Code § 3336*]. Definite and certain evidence tending to show that money was properly paid out and time properly lost in pursuit of the property, and the amount thereof, must be shown before a party will be permitted recovery [*see Sherman v. Finch (1886) 71 Cal. 68, 71-72, 11 P. 847* ; *Haines v. Parra (1987) 193 Cal. App. 3d 1553, 1559, 239 Cal. Rptr. 178]* . In addition, any such compensation must be fair and reasonable [*Haines v. Parra (1987) 193 Cal. App. 3d 1553, 1559, 239 Cal. Rptr. 178* (noting that $10,000 in time and money to recover property worth $4,000 was not reasonable)].

Attorney's fees are not recoverable as damages under *Civ. Code § 3336* [*Viner v. Untrecht (1945) 26 Cal. 2d 261, 272, 158 P.2d 3* ; *Haines v. Parra (1987) 193 Cal. App. 3d 1553, 1558-1559, 239 Cal. Rptr. 178]* . However, not all items having some connection with the litigation are excluded from the calculation under *Civ. Code § 3336*. The statute should at least extend to efforts that had a purpose independent of the litigation, such as preparation of lists of missing property, inspection of inventories, meetings with the other party, contacts with law enforcement authorities, and inquiries regarding appropriate courses of action [*Gladstone v. Hillel (1988) 203 Cal. App. 3d 977, 992, 250 Cal. Rptr. 372* (apparently abrogated by *Bonito Boats v. Thunder Craft Boats (1989) 489 U.S. 141, 167-168, 109 S. Ct. 971, 103 L. Ed. 2d 118* , to extent that *Gladstone* upheld injunction for violation of anti-direct molding statute set forth

in former *Bus. & Prof. Code § 17300*)].

[4] Proof of Value

The cost of the property, the extent of use, its condition, and depreciation are all admissible on the issue of value [*Wade v. Markwell & Co. (1953)118 Cal. App. 2d 410, 431, 258 P.2d 497* ; *see Lonergan v. Monroe (1946) 77 Cal. App. 2d 223, 225, 175 P.2d 42* (contract price of property admissible but not determinative of value)]. In addition, the opinion of the owner as to value of property is admissible and often sufficient to support a judgment based on that value [*see Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 921, 114 Cal. Rptr. 622, 523 P.2d 662]* .

With respect to the value of a security, the face value of the security is prima facie evidence of its value [*Jeanese, Inc. v. Security Title & Guar. Co. (1959) 176 Cal. App. 2d 449, 454, 1 Cal. Rptr. 752]* . Similarly, the face value of a bill or note is prima facie evidence of its value. If a note is secured by property and there is no personal liability of the maker, the value of the note equals the value of the property up to the face value of the note [*Knudsen v. Hill (1964) 227 Cal. App. 2d 639, 642, 643, 38 Cal. Rptr. 859]* .

[5] Exemplary Damages

An action for conversion will support a claim for punitive damages, given the required showing of oppression, fraud, or malice [*see Civ. Code § 3294*; *Haigler v. Donnelly (1941) 18 Cal. 2d 674, 681, 117 P.2d 331* ; *Cyrus v. Haveson (1976) 65 Cal. App. 3d 306, 316, 135 Cal. Rptr. 246]* .

[6] Recovery by Owner of Limited Interest

When a plaintiff owns a limited interest in the property, but sues one who has no interest in it for conversion, the plaintiff may recover the full value of the property. Plaintiff is then liable to the true owner for the excess in value recovered [*Goldberg v. List (1938) 11 Cal. 2d 389, 393, 79 P.2d 1087* ; *Camp v. Ortega (1962) 209 Cal. App. 2d 275, 286, 25 Cal. Rptr. 873]* . However, when the owner of a limited interest sues the owner of one having a superior right in the property for conversion, recovery is limited to the extent of plaintiff's interest [*Watson v. Stockton Morris Plan Co. (1939) 34 Cal. App. 2d 393, 400, 401, 93 P.2d 855* ; *see Civ. Code § 3338*].

[7] Mitigation of Damages

When a plaintiff recovers the property, it is received in mitigation of the damages, and the measure of damages becomes the expense of procuring the property's return, with interest, plus any special damages proved [*Blewett v. Miller (1900) 131 Cal. 149, 151, 63 P. 157* ; *Beetson v. Hollywood Athletic Club (1930) 109 Cal. App. 715, 722, 293 P. 821]* .

However, the subsequent application of the converted property to the benefit of the owner will not mitigate damages when the defendant's possession of the property was wrongful from the beginning and when the owner does not consent to the application of the property to his or her benefit [*see Civ. Code § 3337*; *Goldberg v. List (1938) 11 Cal. 2d 389, 393, 79 P.2d 1087]* . For example, when a landlord locks a tenant out of the building, thereby converting the tenant's property contained inside, the fact that the landlord later offers to permit the tenant to recover the property does not mitigate the damages if the tenant refuses the offer [*Price v. Hovsepian (1952) 114 Cal. App. 2d 385, 388, 250 P.2d 252]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesProperty DamageGeneral OverviewTortsDamagesPunitive DamagesConduct Supporting AwardsTortsIntentional TortsConversionGeneral OverviewTortsIntentional

TortsConversionElementsTortsIntentional TortsConversionRemedies

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13-150 California Forms of Pleading and Practice--Annotated § 150.17

§ 150.17 Defenses

[1] Statute of Limitations

[a] Three-Year Statute Generally Applies

Actions for conversion are, in general, subject to a three-year statute of limitations [*Fabricon Prod. v. United Cal. Bank (1968) 264 Cal. App. 2d 113, 118, 70 Cal. Rptr. 50* ; *see Code Civ. Proc. § 338(c)*].

[b] Special Rules Provide Shorter Period for Particular Situations

Certain actions are subject to different limitation periods. For example, actions to recover the value of goods seized by a tax collector or stock improperly sold for delinquent assessment must be brought within six months of the seizure or sale [*Code Civ. Proc. § 341(1),(2)*; Corp. Code § 2713]. As another example, actions for recovery of personal property from a hotel must be brought within 90 days of the date of departure of the owner from the hotel [*Code Civ. Proc. 341a*; *cf. Taylor v. Forte Hotels International (1991) 235 Cal. App. 3d 1119, 1122, 1 Cal. Rptr. 2d 189* (limitation does not apply to actions against hotel based on negligence or breach of contract)].

When a public entity is the defendant, the plaintiff must first file a claim with the Victim Compensation and Government Claims Board within six months after the accrual of the cause of action [*Gov. Code §§ 905.2, 911.2*]. If the claim is denied, the action must be commenced within six months after denial of the claim [*Gov. Code § 945.6*]. For further discussion, procedures, and forms for use in filing a claim against a public entity, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[c] Period Begins to Run at Time of Conversion

The statute begins to run at the time of the conversion, regardless of whether or not plaintiff is aware that the cause of action exists [*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 561, 305 P.2d 20* ; *Barnes v. Witt (1962) 207 Cal. App. 2d 441, 445, 24 Cal. Rptr. 545]* . There are, however, situations in which the cause of action does not accrue until a later time, as discussed in [d], *below*.

[d] Delayed Accrual

[i] Concealment of Facts

If the defendant conceals facts which constitute the cause of action, the statute does not begin to run until the plaintiff discovered, or should havediscovered, those facts [*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 561, 305 P.2d 20* ; *Strasberg v. Odyssey Group, Inc. (1996) 51 Cal. App. 4th 906, 916, 59 Cal. Rptr. 2d 474]* .

[ii] Fiduciary Relationship

A different rule controls the running of the statute where there is a fiduciary relationship between the parties. In that situation, the statute does not begin to run until the conversion is clearly and unequivocally brought to the attention of the owner [*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 561, 562, 305 P.2d 20* (statute as not running against shareholder in favor of corporation until conversion brought to attention of shareholder); *Bufano v. City & County of San Francisco (1965) 233 Cal. App. 2d 61, 70, 43 Cal. Rptr. 223* (statute as not running against bailor in favor of bailee until conversion brought to attention of bailor)].

[iii] Subsequent Purchaser

The three year period of *Code Civ. Proc. § 338* begins to run anew when a subsequent purchaser acquires the stolen property [*Harpending v. Meyer (1850) 55 Cal. 555, 561* ; *Society of Cal. Pioneers v. Baker (1996) 43 Cal. App. 4th 774, 50 Cal. Rptr. 2d 865]* .

[iv] Theft of Article of Historical, Interpretive, Scientific, or Artistic Significance

If the conversion of an article of historical, interpretive, scientific, or artistic significance constitutes theft under *Penal Code § 484*, the cause of action for conversion is not deemed to have accrued until the aggrieved party, that party's agent, or the law enforcement agency that originally investigated the theft discovers the whereabouts of the article [*Code Civ. Proc. § 338(c)*; *see* *Society of Cal. Pioneers v. Baker (1996) 43 Cal. App. 4th 774, 50 Cal. Rptr. 2d 865* (delayed accrual language applies to cases in which the three-year limitation period had not expired at the time of the 1983 amendment of Section 338(c) adding that language)].

[2] Consent

Plaintiff's consent to the interference complained of is a defense to a conversion action [*Klett v. Security Acceptance Co. (1952) 38 Cal. 2d 770, 789, 790, 242 P.2d 873* ; *Wade v. Southwest Bank (1962) 211 Cal. App. 2d 392, 406, 27 Cal. Rptr. 337]* . However, if the consent was obtained by fraud, the fraud vitiates the consent, and conversion will lie [*Freedman v. Queen Ins. Co. (1961) 56 Cal. 2d 454, 457, 15 Cal. Rptr. 6, 364 P.2d 245]* .

For example, if a plaintiff advises a defendant who purchased converted goods that plaintiff would pursue its rights against the seller, and for some two and one-half years makes no demand for return of the property on defendant, the plaintiff may be considered to have waived its rights against the defendant [*Eistrat v. Western Hardwood Lumber Co. (1958) 164 Cal. App. 2d 374, 381, 382, 330 P.2d 629]* .

Similarly, a plaintiff is estopped from asserting its claim against a defendant auctioneer if the defendant innocently sold converted goods belonging to plaintiff and plaintiff was in a position to learn of the sale before it took place and stop it [*Jessup v. Cattle Center, Inc. (1968) 259 Cal. App. 2d 434, 437-439, 66 Cal. Rptr. 361]* .

[3] Defense of Own Interests

One is privileged to commit an act, which would otherwise be a trespass or a conversion of property in the possession of

another, for the purpose of defending himself or herself againstthe other, when the actor reasonably believes that the other person intends to cause harm to the actor, or that the invasion of his or her interests is reasonably probable, and the actor reasonably believes that the apprehended harm can be safely prevented only by taking of the property of the other person [*Church of Scientology v. Armstrong (1991) 232 Cal. App. 3d 1060, 1072-1073, 283 Cal. Rptr. 917* (regarding church archive material taken by former church member in order to prevent church representatives from causing physical and emotional harm to himself and his wife based on statements he made about material)]. In so holding, an appellate court adopted the position of Restatement (Second) of Torts, § 261 [*Church of Scientology v. Armstrong (1991) 232 Cal. App. 3d 1060, 1072-1073, 283 Cal. Rptr. 917]* . For a form of affirmative defense that defendant took possession of the property in defense of his or her own interests, see *§ 150.91*.

[4] Equitable Defenses

The equitable defenses of waiver and estoppel are available in conversion actions [*Eistrart v. Western Hardwood Lbr. Co. (1958) 164 Cal. App. 2d 374, 381, 382, 330 P.2d 629* (waiver); *Jessup v. Cattle Center, Inc. (1968) 259 Cal. App. 2d 434, 437-439, 66 Cal. Rptr. 361* (estoppel)]. The equitable defense of unclean hands is available in a conversion action, as it is in any legal action, if it satisfies the three prongs of the test first enunciated in a legal malpractice action [*see Blain v. Doctor's Co. (1990) 222 Cal. App. 3d 1048, 1060, 272 Cal. Rptr. 250]* and applied to an action for conversion in *Unilogic, Inc. v. Burroughs Corp. (1992) 10 Cal. App. 4th 612, 12 Cal. Rptr. 2d 741* [*Unilogic, Inc. v. Burroughs Corp. (1992) 10 Cal. App. 4th 612, 619, 621, 12 Cal. Rptr. 2d 741]* . Under the test, the defense is available if:

- Analogous case law supports application of the defense [*Unilogic, Inc. v. Burroughs Corp. (1992) 10 Cal. App. 4th 612, 619-620, 12 Cal. Rptr. 2d 741]* ;

- The nature of the misconduct alleged by the defendant is sufficient to support the defense; and

- The misconduct relates sufficiently closely to the plaintiff's claimed injuries to pertain to the subject matter involved in the case and affect the equitable relations between the parties [*Unilogic, Inc. v. Burroughs Corp. (1992) 10 Cal. App. 4th 612, 620-621, 12 Cal. Rptr. 2d 741]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewTortsIntentional TortsConversionRemediesTortsProcedureStatutes of LimitationsAccrual of ActionsGeneral OverviewTortsProcedureStatutes of LimitationsTollingEquitable Estoppel

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§ 150.18 Alternative Forms of Action

[1] Waiving Tort

When personal property has been converted, the plaintiff may elect to waive the tort and sue on an implied contract [*Hill v. Superior Court (1940) 16 Cal. 2d 527, 530, 106 P.2d 876]* . Plaintiff, in effect, consents to the conversion and affirms the act of the wrongdoer. Plaintiff then treats it as a sale and sues to recover under an implied contract of sale or for money had and received [*Bank of America etc. Ass'n. v. Hill (1937) 9 Cal. 2d 495, 499, 500, 71 P.2d 258]* .

For discussion, procedures, and forms for use in an action on implied contracts, see Ch. 140, *Contracts* . For discussion, procedures, and forms for use in an action for money had and received, see Ch. 121, *Common Counts* .

There are certain advantages and disadvantages to waiving the tort. Suing in contract makes available the provisional remedy of attachment, which is not available in actions in tort [*Los Angeles Drug Co. v. Superior Court (1936) 8 Cal. 2d 71, 75, 63 P.2d 1124* ; *see Code Civ. Proc. § 483.010*]. However, the use of the provisional remedy of attachment amounts to a binding election of the quasi-contract theory [*Acme Paper Co. v. Goffstein (1954) 125 Cal. App. 2d 175, 178, 270 P.2d 505 , disapproved regarding allowing election issue to be raised for first time on appeal, Roam v. Koop (1974) 41 Cal. App. 3d 1035, 1042, 116 Cal. Rptr. 539]* . Furthermore, although punitive damages are available if the action is in tort, they are not available if the suit sounds in contract [*Haigler v. Donnelly (1941) 18 Cal. 2d 674, 680, 117 P.2d 331* ; *see Civ. Code § 3294*].

For discussion, procedures, and forms for use in an action seeking a writ of attachment, see Ch. 62, *Attachment* .

[2] Claim and Delivery

A person entitled to immediate possession of specific personal property may bring an action to recover the property [*see Civ. Code § 3379*; *Commercial & Sav. Bk. v. Foster (1930) 210 Cal. 76, 79, 290 P. 583]* . The action is commonly referred to as "claim and delivery," although that term properly applies to the provisional remedy employed in those actions [*see Code Civ. Proc. §§ 511.010-516.050*]. In such an action, plaintiff is entitled to recover possession of the property, or the value of the property if redelivery is not possible, plus damages for its detention [*see Code Civ. Proc. § 667*].

For discussion, procedures, and forms for use in an action to recover possession of personal property, see Ch. 119, *Claim and Delivery* .

[3] Trespass

If the defendant has interfered with plaintiff's personal property, but the interference was not substantial enough to amount to a conversion, plaintiff's cause of action is for trespass [*see Jordan v. Talbot (1961) 55 Cal. 2d 597, 610, 12 Cal. Rptr. 488]* . Recovery in those cases is limited to actual damages suffered by reason of the impairment of the property or loss of its use [*Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 551, 176 P.2d 1]* . Thus, if the defendant has taken possession of the plaintiff's property, but placed the property in storage under the plaintiff's name, no conversion has occurred and plaintiff may only recover the actual damages suffered [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 610, 12 Cal. Rptr. 488* ; *Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 551, 176 P.2d 1]* .

Although a lesser interference may be actionable as a trespass to personal property, or trespass to chattels, than would be actionable as a conversion, some actual injury must have occurred to state an action for trespass. There must be some interference with the possessor's use or possession of the personal property or interference with some other legally protected interest in that property [*Intel Corp. v. Hamidi (2003) 30 Cal. 4th 1342, 1351, 1 Cal. Rptr. 3d 32, 71 P.3d 296]* . For example, the California Supreme Court held that the tort did not encompass the mass sending of e-mails to the employees of a large corporation because the e-mails neither damaged nor impaired the functioning of the corporation's computer system [*Intel Corp. v. Hamidi (2003) 30 Cal. 4th 1342, 1347, 1 Cal. Rptr. 3d 32, 71 P.3d 296* (loss of employee time spent reading and responding to messages was insufficient to support recovery)]. The Court distinguished cases in which mass e-mails actually adversely affected the performance of a computer system, or threatened to do so, which might support a cause of action for trespass to chattels [*see Intel Corp. v. Hamidi (2003) 30 Cal. 4th 1342, 1353-1356, 1 Cal. Rptr. 3d 32, 71 P.3d 296]* .

In another case, the court of appeal held that a triable issue of fact existed as to whether conduct by a steward of the California Horse Racing Board to prevent the owner of a horse from removing the horse from the race grounds before a race constituted intentional interference with the owner's possession of the horse sufficient to support a cause of action for trespass to chattels. In that case, the steward indicated he would not allow the owner to pull the horse from a scheduled race nor remove the horse from the grounds, and in fact went so far as to post security officers at the horse's stable, although the owner did not confront the officers and try to force removal from the grounds [*Jamgotchian v. Slender (2009) 170 Cal. App. 4th 1384, 1401-1402, 89 Cal. Rptr. 3d 122*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsContracts LawTypes of ContractsImplied-in-Fact ContractsTortsPremises Liability & PropertyTrespassElements

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§ 150.19 Immunity for Delivery of Decedent's Tangible Personal Property

A public administrator, government official, law enforcement agency, hospital or institution where a decedent died, or the decedent's employer may, without the need to wait 40 days after death, deliver the tangible personal property of the decedent in its possession, including keys to the decedent's residence, to the decedent's surviving spouse, relative, or conservator or guardian of the estate acting in that capacity at the time of death [*Prob. Code § 330(a)*]. However, a person must not deliver the property if the person knows or has reason to believe that there is a dispute over the right to possession of the property [*Prob. Code § 330(b)*]. A person delivering such property must require reasonable proof of the status and identity of the person to whom the property is delivered, and he or she may rely on any document described in *Prob. Code § 13104(d)* as proof of identity [*Prob. Code § 330(c)*]. The person delivering such property must keep a record of the property delivered and the status and identity of the person to whom the property is delivered for a period of three years after the date of delivery of the property [*Prob. Code § 330(d)*]. Such delivery of property does not determine ownership of the property nor preclude later proceedings for administration of the decedent's estate [*Prob. Code § 330(e)*]. A person that delivers such property is not liable for loss or damage to the property caused by the person to whom the property is delivered [*Prob. Code § 330(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsConversionDefensesTortsPublic Entity LiabilityImmunityGeneral Overview

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§ 150.20 Immunity of Decedent's Personal Representative

A personal representative who in good faith takes into possession real or personal property, and reasonably believes that the property is part of the estate of a decedent, is neither criminally liable, nor civilly liable to any person, for so doing [*Prob. Code § 9651(a)*; *see § 150.90*]. However, the personal representative must make reasonable efforts to determine the true nature of, and title to, the property so taken into possession [*Prob. Code § 9651(b)*].

During his or her possession, the personal representative is entitled to receive all rents, issues, and profits of the property. If the property is later determined not to be part of the decedent's estate, the personal representative shall deliver the property, or cause it to be delivered, to the person legally entitled to it, together with all rents, issues, and profits of the property received by the personal representative, less any expenses incurred in protecting and maintaining the property and in collecting rents, issues, and profits [*Prob. Code § 9651(c)*].

The personal representative may request court approval before delivering the property pursuant to Prob. Code. § 9651(c) [*Prob. Code § 9651(c)*]. The court may allow the personal representative reasonable compensation for services rendered in connection with the duties specified in this section as to property later determined not to be part of the estate of the decedent, if the court makes one of the following findings [*Prob. Code § 9651(d)*]:

- The services were of benefit to the estate. If the court makes this finding, the compensation and the expenses and costs of litigation, including attorney's fees of the attorney hired by the personal representative to handle the matter, are a proper expense of administration.

- The services were essential to preserve, protect, and maintain the property. If the court makes this finding, the court shall award compensation and the expenses and costs of litigation, including attorney's fees of the attorney hired by the personal representative to handle the matter, as an expense deductible from the rents, issues, and profits received by the personal representative, or,if these are insufficient, as a lien against the property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesClaims By & AgainstTortsIntentional TortsConversionDefenses

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[Reserved]

§§ 150.21[Reserved]

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§ 150.30 Related Matthew Bender Publications

California Points and Authorities , Ch. 51, *Conversion* Bender's Forms Of Discovery, *Conversion*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionElements

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§ 150.31 State Statutes

[1] Acts Constituting Conversion

Liability of one who wrongfully uses materials of another. *Civ. Code § 1033*

Disposition by merchant-buyer of rightfully rejected goods is not conversion. *Com. Code §§ 2603, 2604*

Conversion of negotiable instrument (commercial paper). *Com. Code § 3419*

Liability of collecting bank for conversion. *Com. Code § 4203*

Willful violation of requirements for enforcement of warehouseworker's lien is conversion. *Com. Code § 7210(i)*

Bad-faith delivery of goods by bailee to person claiming under a missing negotiable warehouse receipt or bill of lading is conversion. *Com. Code § 7601(b)*

Cause of action and damages for taking merchandise from merchant or books or library material from library facility. *Penal Code § 490.5(c)*

Conversion of mineral deposits on public lands. *Pub. Res. Code § 6224.2*

[2] Claims Against Estate

Procedure for filing of claims against estate of decedent who, in his or her lifetime, converted the property of another. *Prob. Code §§ 550-555, 9000-9205, 9390*

[3] Damages

Presumption of detriment caused by wrongful conversion of personal property. *Civ. Code § 3336*

Presumption of detriment caused by wrongful conversion of personal property is not overcome by subsequent application of property to benefit of owner. *Civ. Code § 3337*

Limitation on lienor's recovery for conversion of property secured by lien. *Civ. Code § 3338*

[4] Defenses

Rights acquired by good faith purchaser for value of warehouse receipts and bills of lading are not defeated by fact of prior or contemporaneous conversion. *Com. Code § 7502*

Agent or bailee is not liable for conversion for good faith sale, pledge, or delivery of certificated securities or good faith transfer or pledge of uncertificated securities. *Com. Code § 8318*

Immunity and compensation to personal representative of decedent's estate taking possession of property based on good faith belief that it is property of estate. *Prob. Code § 9651*

[5] Demand

Demand for return of property wrongfully acquired is unnecessary except where obtained by mutual mistake. *Civ. Code § 1713*

[6] Duty to Return Property

Duty to return property wrongfully acquired. *Civ. Code § 1712*

[7] Effect of Conversion on Lien

Lien is extinguished by lienholder's conversion of encumbered property. *Civ. Code § 2910*

[8] Liability for Conversion Other Than Damages

Conversion (theft) is ground for censure, or denial, suspension, or revocation of license of broker-dealer. *Corp. Code § 25212*

Conversion is ground for censure, suspension, or bar from position of employment, management, or control of broker-dealer or investment advisor. *Corp. Code § 25213*

Conversion (theft) is ground for censure or denial, suspension, or revocation of license of investment advisor. *Corp. Code § 25232*

Criminal liability for conversion of military or naval property of the state or of the United States. *Mil. & Vet. Code § 421*

Conversion constitutes theft. *Penal Code §§ 484-502.7*

Conversion constitutes embezzlement. *Penal Code §§ 503-514*

Criminal provision against obtaining money or property by means of false personation. *Penal Code § 530*

[9] Statute of Limitations

Three-year statute of limitations in action for taking, detaining, or injuring goods or chattels. *Code Civ. Proc. § 338(c)*

Ninety-day statute of limitations in action for conversion of property left at hotel, rest home, sanitarium, boarding or lodging house, or furnished apartment or bungalow. *Code Civ. Proc. § 341a*

One-hundred-eighty-day statute of limitations in action for conversion of well-drilled oil, gas, or other liquid or fluids. *Code Civ. Proc. § 3493*/4

Commencement of period of limitation in action by person claiming under decedent against personal representative to recover property sold. *Prob. Code § 10382*

Commencement of period of limitation in action by ward or conservatee or person claiming under him or her against guardian or conservator to recover property sold. *Prob. Code § 2548*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsTortsIntentional TortsConversionDefensesTortsIntentional TortsConversionElementsTortsIntentional TortsConversionRemediesTortsProcedureStatutes of LimitationsGeneral Overview

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13-150 California Forms of Pleading and Practice--Annotated § 150.32

§ 150.32 Decisions

[1] Alternative Forms of Action

[a] Trespass

Action for trespass as proper remedy where interference with property not substantial enough to constitute conversion. *Jordan v. Talbot (1961) 55 Cal. 2d 597, 610, 12 Cal. Rptr. 488* ; *Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 551, 176 P.2d 1*

Recovery in action for trespass as limited to actual damages suffered or loss of use. *Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 551, 176 P.2d 1*

[b] Waiving Tort

Suit on implied contract as alternative to conversion action. *Hill v. Superior Court (1940) 16 Cal. 2d 527, 530, 106 P.2d 876*

Waiving the tort as affirming acts of wrongdoer and treating it as a sale. *Bank of America etc. Ass'n. v. Hill (1937) 9 Cal. 2d 495, 499, 500, 71 P.2d 258*

Punitive damages as available in suits sounding in tort but not in contract. *Haigler v. Donnelly (1941) 18 Cal. 2d 674, 680, 117 P.2d 331*

Attachment as available in suits sounding in contract but not in tort. *Los Angeles Drug Co. v. Superior Court (1936) 8 Cal. 2d 71, 75, 63 P.2d 1124*

Use of provisional remedy of attachment as constituting a binding election to waive the tort and sue in contract. *Acme Paper Co. v. Goffstein (1954) 125 Cal. App. 2d 175, 178, 270 P.2d 505 , disapproved regarding allowing election issue*

to be raised for first time on appeal, Roam v. Koop (1974) 41 Cal. App. 3d 1035, 1042, 116 Cal. Rptr. 539

[2] Conversion Defined

Conversion as an act of willful interference with a chattel, done without lawful justification, depriving a person entitled thereto of use and possession. de *Vries v. Brumback (1960) 53 Cal. 2d 643, 647, 2 Cal. Rptr. 764, 349 P.2d 532*

Conversion as any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his or her rights therein. *Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 549, 176 P.2d 1* ; *Weiss v. Marcus (1975) 51 Cal. App. 3d 590, 599, 124 Cal. Rptr. 297*

Freedom from interference with rights of possession as basis of tort of conversion. *Shahood v. Cavin (1952) 154 Cal. App. 2d 745, 748, 316 P.2d 700* ; *Chatterton v. Boone (1947) 81 Cal. App. 2d 943, 946, 185 P.2d. 610*

[3] Damages

[a] Element of Cause of Action for Conversion

Damages as element of plaintiff's cause of action. *Oakes v. Suelynn Corp. (1972) 24 Cal. App. 3d 271, 279, 100 Cal. Rptr. 838*

Conversion as requiring converted property to have some value. *United States Rubber Co. v. Union Bank & Trust Co. (1961) 194 Cal. App. 2d 703, 709, 15 Cal. Rptr. 385* ; *Metropolitan Life Ins. Co. v. San Francisco Bank (1943) 58 Cal. App. 2d 528, 534, 136 P.2d 853*

Union shop cards as without value and not subject to action for conversion. *Bentley v. Mountain (1942) 51 Cal. App. 2d 95, 100, 124 P.2d 91*

[b] Exemplary Damages

Exemplary damages as available in conversion action given showing of malice, fraud, or oppression. *Haigler v. Donnelly (1941) 18 Cal. 2d 674, 681, 117 P.2d 331* ; *Cyrus v. Haveson (1976) 65 Cal. App. 3d 306, 316, 135 Cal. Rptr. 246*

[c] Measure of Damages

Attorney's fees as not within scope of allowable damages. *Viner v. Untrecht (1945) 26 Cal. 2d 261, 272, 158 P.2d 3 Haines v. Parra (1987) 193 Cal. App. 3d 1553, 1558-1559, 239 Cal. Rptr. 178*

Measure of damages for conversion as value of property at time of conversion with interest unless special circumstances require resort to other alternatives enumerated in *Civ. Code § 3336*. *Krueger v. Bank of America (1983) 145 Cal. App. 3d 204, 215, 193 Cal. Rptr. 322*

Expense of procuring property's return with interest, plus special damages proved, as measure of damages where plaintiff recovers property. *Blewett v. Miller (1900) 131 Cal. 149, 151, 63 P. 157* ; *Beetson v. Hollywood Athletic Club (1930) 109 Cal. App. 715, 722, 293 P. 821*

Government as not immune from liability for interest from date of conversion. *Kane v. County of San Diego (1969) 2*

Cal. App. 3d 550, 553, 83 Cal. Rptr. 19

Seven percent as interest allowable on value of property. *Beverly Fin. Co. v. American Casualty Co. (1969) 273 Cal. App. 2d 259, 265, 78 Cal. Rptr. 334*

Goodwill as element of recoverable damages. *Carrey v. Boyes Hot Springs Resort, Inc. (1966) 245 Cal. App. 2d 618, 623, 54 Cal. Rptr. 199*

Alternative damage provision [*Civ. Code § 3336*] as applicable where awarding damages based on value would be manifestly unjust. *Myers v. Stephens (1965) 233 Cal. App. 2d 104, 116, 43 Cal. Rptr. 420*

Alternative damage remedy as allowing recovery of expected profit. *Myers v. Stephens (1965) 233 Cal. App. 2d 104, 116, 43 Cal. Rptr. 420*

In award of damages, defendant as entitled to distinct findings of fact as to value of each article allegedly converted. *Flennaugh v. Heinrich (1948) 89 Cal. App. 2d 214, 222, 200 P.2d 580*

Conversion of a portion of property as conversion of the whole. *Horn v. Klatt (1944) 65 Cal. App. 2d 510, 517, 518, 151 P.2d 149*

Alternative damage remedy as allowing award of value of property on date conversion discovered rather than date of actual conversion. *Betzer v. Olney (1937) 14 Cal. App. 2d 53, 61, 57 P.2d 1376*

[d] Mitigation of Damages

Recovery of property by plaintiff as mitigation of damages. *Blewett v. Miller (1900) 131 Cal. 149, 151, 63 P. 157* ; *Beetson v. Hollywood Athletic Club (1930) 109 Cal. App. 715, 722, 293 P. 821*

Statutory presumption of damages [*Civ. Code § 3337*] as not overcome by subsequent, unconsented to application of property to plaintiff's benefit by defendant whose possession was wrongful from beginning. *Goldberg v. List (1938) 11 Cal. 2d 389, 393, 79 P.2d 1087*

Offer to return converted goods as not mitigating damages. *Price v. Hovsepian (1952) 114 Cal. App. 2d 385, 388, 250 P.2d 252*

[e] Proof of Value

Face value of bill or note as prima facie evidence of true value, except in cases where instrument imposes no personal liability. *Knudsen v. Hill (1964) 227 Cal. App. 2d 639, 642, 38 Cal. Rptr. 859*

Face value of security as prima facie evidence of value. *Jeanese, Inc. v. Security Title & Guar. Co. (1959) 176 Cal. App. 2d 449, 454, 1 Cal. Rptr. 752*

Face value of check as prima facie evidence of value. *Acme Paper Co. v. Goffstein (1954) 125 Cal. App. 2d 175, 181, 270 P.2d 505*

Cost, extent of use, condition, and depreciation of property as admissible on issue of value. *Wade v. Markwell & Co. (1953) 118 Cal. App. 2d 410, 431, 258 P.2d 497*

Cost of property as admissible on issue of value. *Stroman v. Lynch (1949) 91 Cal. App. 2d 406, 408, 205 P.2d 409*

Contract price of converted goods admissible as evidence of value. *Lonergan v. Monroe (1946) 77 Cal. App. 2d 223, 225, 175 P.2d 42*

[f] Recovery by Owner of Limited Interest

Owner of limited interest as entitled to recover full value of property in suit against stranger. *Goldberg v. List (1938) 11 Cal. 2d 389, 393, 79 P.2d 1087* ; *Camp v. Ortega (1962) 209 Cal. App. 2d 275, 286, 25 Cal. Rptr. 873* (owner of property subject to mortgage)

Recovery by owner of limited interest in property as limited to extent of interest in suit against owner or one claiming under owner. *Watson v. Stockton Morris Plan Co. (1939) 34 Cal. App. 2d 393, 400, 401, 93 P.2d 855*

[4] Defendant's Conversion

[a] Acts Constituting Conversion

Evidence showing that defendant vehicle dealership failed to forward proceeds of sold vehicles to manufacturer as required by security agreements, and spent money elsewhere, as supporting finding of conversion. *Champion Home Builders Co. v. Sipes (1990) 219 Cal. App. 3d 1415, 1425-1426, 269 Cal. Rptr. 75*

Civ. Code § 2983.3, depriving motor vehicle seller of deficiency judgment for failure to allow buyer to reinstate contract of sale of vehicle, as not precluding seller's liability to buyer for conversion of repossessed and resold vehicle when seller fails to properly notify buyer, under *Civ. Code § 2983.2*, of seller's intent to repossess and sell vehicle, and when buyer has right to reinstate contract of sale under *Civ. Code § 2983.3*. *Cerra v. Blackstone (1985) 172 Cal. App. 3d 604, 609, 218 Cal. Rptr. 15*

Manual taking as not required for conversion. *Gruber v. Pacific States Sav. & L. Co. (1939) 13 Cal. 2d 144, 148, 149, 88 P.2d 137* ; *Beverly Fin. Co. v. American Casualty Co. (1969) 273 Cal. App. 2d 259, 264, 78 Cal. Rptr. 334*

Obtaining of property by fraud as conversion. *Freedman v. Queen Ins. Co. (1961) 56 Cal. 2d 454, 457, 15 Cal. Rptr. 69, 364 P.2d 245* ; *Acme Paper Co. v. Goffstein (1954) 125 Cal. App. 2d 175, 178, 270 P.2d 505*

Larceny as conversion. de *Vries v. Brumback (1960) 53 Cal. 2d 643, 645-647, 2 Cal. Rptr. 764, 349 P.2d 532*

Misdelivery of goods as conversion. *Byer v. Canadian Bank of Commerce (1937) 8 Cal. 2d 297, 299, 65 P.2d 67*

Auctioneer as liable for conversion when selling goods its principal had no authority to sell. *Development Co. v. Seaboard D. C. Corp. (1934) 1 Cal. 2d 121, 129, 34 P.2d 139*

Planting of nursery stock trees as altering their nature from personal property to real property and as constituting conversion. *Asato v. Emirzian (1918) 177 Cal. 493, 496, 171 P. 90*

Agent as liable for conversion if principal is also liable. *Swim v. Wilson (1891) 90 Cal. 126, 129-131, 27 P. 33* ; *Wells Fargo Bank v. Dowd (1956) 139 Cal. App. 2d 561, 575, 294 P.2d 159*

Purchase of previously converted goods as conversion. *Swim v. Wilson (1891) 90 Cal. 126, 129-131, 27 P. 33* ; *Culp v. Signal Van & Storage Co. (1956) 142 Cal. App. 2d Supp. 859, 861* , *298 P.2d 162*

Acquisition of possession by illegal entry as constituting conversion despite fact that defendant has right to possession. *Henderson v. Security Nat. Bank (1977) 72 Cal. App. 3d 764, 770, 771, 140 Cal. Rptr. 388*

Unauthorized sale by Department of Mental Hygiene of patient's personal property compromise of disputed claim as constituting conversion. *Strutt v. Ontario Sav. & Loan Assn. (1972) 28 Cal. App. 3d 866, 874, 105 Cal. Rptr. 395*

Repossession of automobile by dealer who failed to reserve security interest properly as conversion. *English v. Ford (1971) 17 Cal. App. 3d 1038, 1047, 95 Cal. Rptr. 501*

Failure to return item in glove compartment of repossessed car as constituting conversion. *Varela v. Wells Fargo Bank (1971) 15 Cal. App. 3d 741, 749, 750, 93 Cal. Rptr. 428*

Wrongful claim of title which defeats writ of attachment as not act constituting conversion where underlying judgment lien subsequently invalidated. *Glasband v. Sun State Music Distributors, Inc. (1968) 265 Cal. App. 2d 413, 417, 71 Cal. Rptr. 482*

Refusal of landlord to permit purchaser of tenant's crop access on the land in order to harvest as constituting conversion. *Carey v. Glenco Citrus Products (1965) 235 Cal. App. 2d 572, 581, 45 Cal. Rptr. 365*

Sale of building by principal after sale of same building by agent as constituting conversion. *Myers v. Stephens (1965) 233 Cal. App. 2d 104, 108, 109, 43 Cal. Rptr. 420*

Suit for purchase price by seller under chattel mortgage as waiving seller's right to retake property and subjecting seller to conversion action for retention of the property. *Smith v. Greenfield Bank (1963) 222 Cal. App. 2d 869, 873, 35 Cal. Rptr. 579*

Appropriation and use of joint venture's assets to exclusion of a joint venturer as giving rise to conversion. *Miller v. Rau (1963) 216 Cal. App. 2d 68, 76, 30 Cal. Rptr. 612*

Wrongful claim of title which defeats writ of attachment as constituting conversion. *Service v. Trombetta (1963) 212 Cal. App. 2d 313, 316, 28 Cal. Rptr. 68*

Unauthorized sale of property as conversion. *Reynolds v. Lerman (1956) 138 Cal. App. 2d 586, 592, 292 P.2d 559*

Refusal to return possession of property on demand as conversion. *Igauye v. Howard (1952) 114 Cal. App. 2d 122, 126, 249 P.2d 558*

Unauthorized use of property as constituting conversion. *Igauye v. Howard (1952) 114 Cal. App. 2d 122, 126, 249 P.2d 558*

City's placing of money supposed to be held in trust pending outcome of dispute into "general fund" as conversion. *Bertone v. City & County of San Francisco (1952) 111 Cal. App. 2d 579, 586-588, 245 P.2d 29*

Destruction of property as constituting conversion. *Bedell v. Mashburn (1948) 87 Cal. App. 2d 417, 423, 197 P.2d 98 , disapproved on other grounds, Reynolds v. Bank of Am. (1959) 53 Cal. 2d 49, 51, 345 P.2d 926*

Conversion of stock as based on interference with rights of ownership of stock and not requiring physical interference with stock certificates. *Mears v. Crocker First Nat'l Bank (1948) 84 Cal. App. 2d 637, 644, 645, 191 P.2d 501*

Co-owner taking complete possession of property as not constituting conversion since each coowner is entitled to possession. *Estergren v. Sager (1940) 39 Cal. App. 2d 401, 403, 103 P.2d 177*

Subbailment as not amounting to a wrongful assumption of control by bailee. *Travelers Fire Ins. Co. v. Brock & Co. (1938) 30 Cal. App. 2d 112, 114, 85 P.2d 905*

Proof of bailment and subsequent refusal to redeliver as prima facie evidence of conversion. U Drive, etc. v. *System A. Parks, Ltd. (1937) 28 Cal. App. 2d Supp. 782, 784 , 71 P.2d 354*

Failure to comply with statutory requirements in sale of goods stored for nonpayment of storage charges as conversion. *Fitch v. Bekins Van & Storage Co. (1937) 22 Cal. App. 2d 101, 104, 70 P.2d 670*

Seizure of property by constable under writ of attachment improperly issued as subjecting constable to liability for conversion. *Culley v. Cochran (1936) 17 Cal. App. 2d 498, 503, 504, 62 P.2d 168*

Delivery of goods to owner as conversion where another has superior right to possession. *Smith v. Miller (1935) 5 Cal. App. 2d 564, 572, 43 P.2d 347*

Conversion by bailee who, having power to do so and without reasonable excuse, fails to redeliver goods in accordance with terms of contract. *Steele v. Marsicano (1894) 102 Cal. 666, 669, 670, 36 P. 920*

[b] Acts Not Constituting Conversion

Photograph-processing company franchisee as failing to state claim in conversion against franchisor based on overcharges for film and processing when franchisor had credited franchisee's accountfor those amounts. *Eichman v. Fotomat Corp. (9th Cir. 1989) 880 F.2d 149, 167*

[c] Actual Interference

Actual interference is necessary element of action for conversion. *Aronson v. Bank of America etc. Ass'n (1937) 9 Cal. 2d 640, 643, 72 P.2d 548* ; *Kee v. Becker (1942) 54 Cal. App. 2d 466, 473-475, 129 P.2d 159*

Mere assertion of intent wrongfully to claim title to chattel is not actual interference. *Aronson v. Bank of America Nat'l Trust & Sav. Ass'n (1937) 9 Cal. 2d 640, 643, 72 P.2d 548*

Mere execution of quitclaim deed is not actual interference. *Home v. Kramer (1936) 7 Cal. 2d 361, 363, 364, 60 P.2d 854*

Purchase of property at marshal's sale is not to actual interference if no attempt to assert ownership or take possession was made. *Kee v. Becker (1942) 54 Cal. App. 2d 466, 473-475, 129 P.2d 159*

Execution of quitclaim deed is not actual interference with personal property on realty. *Phillips v. Bank of America Nat'l Trust & Sav. Ass'n (1935) 3 Cal. App. 2d 557, 558, 40 P.2d 316*

[d] Demand for Return of Property

Defendant's sale and consumption of goods excuses requirement of making demand for return of goods before bringing suit. *Metzler v. Foster Holding Co. (1936) 5 Cal. 2d 278, 282, 54 P.2d 447*

Demand for return of property not required if original possession obtained unlawfully. *Igauye v. Howard (1952) 114 Cal. App. 2d 122, 127, 249 P.2d 558*

Demand for return of property required if defendant first comes into possession lawfully. *Flennaugh v. Heinrich (1948) 89 Cal. App. 2d 214, 222, 200 P.2d 580*

Demand for return of property not required if it is shown that demand would be futile. *Flennaugh v. Heinrich (1948) 89 Cal. App. 2d 214, 222, 200 P.2d 580*

Demand for return of property not required if return is beyond the power of defendant. *Scott's V. F. Exch. v. Growers Refrigeration Co. Inc. (1947) 81 Cal. App. 2d 437, 450, 184 P.2d 183 , disapproved on other grounds, Hischemoeller v. Nat. Ice etc. Storage Co. (1956) 46 Cal. 2d 318, 328, 294 P.2d 433*

Demand for return of property not required if defendant makes actual conversion of property. *Coy v. E.F. Hutton & Co. (1941) 44 Cal. App. 2d 386, 390, 112 P.2d 639*

[e] Good Faith No Defense

Acting in good faith, without notice and without negligence, is no defense to conversion action. *Poggi v. Scott (1914) 167 Cal. 372, 376, 139 P. 815* ; *Beverly Fin. Co. v. American Casualty Co. (1969) 273 Cal. App. 2d 259, 264, 78 Cal. Rptr. 334*

Good-faith purchaser of converted goods liable for conversion. *Swim v. Wilson (1891) 90 Cal. 126, 129-131, 27 P. 33* ; *Culp v. Signal Van & Storage Co. (1956) 142 Cal. App. 2d Supp. 859, 861 , 298 P.2d 162*

Absent enforceable security agreement, creditor's good-faith belief in right to maintain possession of plaintiff's collateral is irrelevant to claim of conversion. *Burlesci v. Petersen (1998) 68 Cal. App. 4th 1062, 1066-1067, 80 Cal. Rptr. 2d 704*

Repossessor of car is liable for conversion of car's contents despite lack of knowledge of their existence. *Varela v. Wells Fargo Bank (1971) 15 Cal. App. 3d 741, 749, 750, 93 Cal. Rptr. 428*

Motive for interference with property immaterial in conversion action. *Chatterton v. Boone (1947) 81 Cal. App. 2d 943, 946, 185 P.2d 610*

[f] Intentional Conduct Requirement

Conversion resulted from willful omission to act and did not require affirmative conduct intended to affect the chattel. *Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 918, 114 Cal. Rptr. 622, 523 P.2d 662*

Proof that defendant's conduct was intended to affect the chattel is element of conversion. *Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 918, 114 Cal. Rptr. 622, 523 P.2d 662*

Negligence did not provide basis for conversion action. *George v. Bekins Van & Storage Co. (1949) 33 Cal. 2d 834, 838, 205 P.2d 1037*

[g] Possession

Nonsuit on cause of action for conversion, on ground of lack of possession, improperly granted based on plaintiff's repossession of property; plaintiff need only show entitlement to possession at time of conversion. *Enterprise Leasing Corp. v. Shugart Corp. (1991) 231 Cal. App. 3d 737, 748, 282 Cal. Rptr. 620* (motion would have been proper on ground that use was not wrongful, which ground was not raised)

[h] Ownership Interest

In action by checking account customer against bank, cause of action for conversion not stated based on bank's charging her account with amount that it had previously credited to it, conditioned on the settlement of dishonored deposited check; any money allegedly debited from account was in fact only revocation of provisional settlement, and not deprivation of plaintiff's personal property. *Symonds v. Mercury Savings & Loan Assn. (1990) 225 Cal. App. 3d 1458, 1468, 275 Cal. Rptr. 871*

[i] Substantialness of Interference

Substantial interference with possession or right to possession is element of conversion. *Jordan v. Talbot (1961) 55 Cal. 2d 597, 610, 12 Cal. Rptr. 488, 361 P.2d 20*

Liability for conversion is based on whether or not defendant's conduct indicates an assumption of control or ownership over the goods. *Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 549, 550, 176 P.2d 1*

Denial of access to property is substantial interference. *Gruber v. Pacific States Sav. & L. Co. (1939) 13 Cal. 2d 144, 147, 148, 88 P.2d 137* ; *Kessinger v. Organic Fertilizers, Inc. (1957) 151 Cal. App. 2d 741, 754, 312 P.2d 345*

Storing of removed items in warehouse in plaintiff's name was insufficient interference to constitute conversion. *Jordan v. Talbot (1961) 55 Cal. 2d 597, 610, 12 Cal. Rptr. 488, 361 P.2d 20* ; *Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 551, 176 P.2d 1*

Requirement that plaintiff establish defendant's intent or purpose to convert the goods. *Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 550, 176 P.2d 1*

Refusal of bailee to deliver property on demand as not amounting to conversion where bailee was seeking reasonable opportunity to inquire into claimant's rights. *Giacomelos v. Bank of America (1965) 237 Cal. App. 2d 99, 100, 101, 46 Cal. Rptr. 612*

Appointment of receiver to protect beneficiaries' interest in trust res as insufficient interference to constitute conversion. *McAllister v. Metzger (1963) 220 Cal. App. 2d 692, 707, 708, 33 Cal. Rptr. 879*

Actions taken to preserve value of property subject to lien as not constituting conversion. *Kertz v. Paris (1959) 168 Cal. App. 2d 67, 70, 335 P.2d 154*

[5] Defenses

[a] Assumption of Risk

Assumption of risk as no defense to conversion. *Fresno Air Service v. Wood (1965) 232 Cal. App. 2d 801, 806, 807, 43 Cal. Rptr. 276*

[b] Consent

Consent to taking as defense to conversion action. *Klett v. Security Acceptance Co. (1952) 38 Cal. 2d 770, 789, 790, 242 P.2d 873* ; *Wade v. Southwest Bank (1962) 211 Cal. App. 2d 392, 406, 27 Cal. Rptr. 337*

Authorization from owner to take possession as defense to conversion. *Newhart v. Pierce (1967) 254 Cal. App. 2d 783, 793, 62 Cal. Rptr. 553*

Fraud as vitiating consent. *Freedman v. Queen Ins. Co. (1961) 56 Cal. 2d 454, 457, 15 Cal. Rptr. 69, 364 P.2d 245*

[c] Defendant's Superior Right of Possession

Defendant's superior right of possession as defense to conversion. *Silverstin v. Kohler & Chase (1919) 181 Cal. 51, 54, 183 P. 451*

[d] Equitable Defenses

Unclean hands as defense applicable to conversion action. *Unilogic, Inc. v. Burroughs Corp. (1992) 10 Cal. App. 4th 612, 619-621, 12 Cal. Rptr. 2d 741*

Waiver as defense in conversion action. *Eistrat v. Western Hardwood Lumber Co. (1958) 164 Cal. App. 2d 374, 381, 382, 330 P.2d 629*

Waiver by plaintiff of interest in the property as defense to conversion. Imperial NH3 v. *Central Valley Feed Yards, Inc. (1977) 70 Cal. App. 3d 513, 518, 519, 139 Cal. Rptr. 8*

Estoppel as defense in conversion action. *Jessup v. Cattle Center, Inc. (1968) 259 Cal. App. 2d 434, 437-439, 66 Cal. Rptr. 361*

[e] Statute of Limitations

In action based on bank's honoring of unauthorized check, and subsequent reinstatement of check amount to customer on request, cause of action for conversion as governed by three-year limitations period under former *Code Civ. Proc. § 338(3)* (now *Code Civ. Proc. § 338(c)*). *Lee v. Bank of America (1990) 218 Cal. App. 3d 914, 918, 267 Cal. Rptr. 387*

Three-year statute of limitations for action based on conversion as normally beginning to run from date of conversion, even though injured person is ignorant of his or her rights, except when fraudulent concealment is alleged. *Maheu v. CBS, Inc. (1988) 201 Cal. App. 3d 662, 673, 247 Cal. Rptr. 304*

Statutory extension of time provided by *Code Civ. Proc. § 340.3* for bringing civil action for damages against defendant based on defendant's commission of felony as applicable to conversion cause of action when limitation period for conversion cause of action had not expired prior to enactment of *Code Civ. Proc. § 340.3*. *Gallo v. Superior Court (1988) 200 Cal. App. 3d 1375, 1383, 246 Cal. Rptr. 587*

Three-year statute of limitations [*Code Civ. Proc. § 338(c)*] as applicable to conversion. *Fabricon Prod. v. United Cal. Bank (1968) 264 Cal. App. 2d 113, 118, 70 Cal. Rptr. 50*

Three-year statute of limitations [*Code Civ. Proc. § 338(c)*] as controlling conversion action under *Com. Code § 3419*. *Bank of America v. Security Pacific Nat. Bank (1972) 23 Cal. App. 3d 638, 642, 100 Cal. Rptr. 438*

Statute of limitations as commencing at time of conversion and not at time plaintiff learns of the conversion. *Barnes v. Witt (1962) 207 Cal. App. 2d 441, 445, 24 Cal. Rptr. 545* ; *Coy v. E.F. Hutton & Co. (1941) 44 Cal. App. 2d 386, 390, 112 P.2d 639*

Statute of limitations as commencing when conversion clearly and unequivocally brought to owner's attention. *Bufano v. City & County of San Francisco (1965) 233 Cal. App. 2d 61, 70, 43 Cal. Rptr. 223*

Fraudulent concealment of the facts of conversion as tolling statute of limitations until cause of action is discovered or should have been discovered. *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 561, 305 P.2d 20* ; *Barnes v. Witt (1962) 207 Cal. App. 2d 441, 445, 24 Cal. Rptr. 545*

Statute of limitations as tolled in certain circumstances by filing of petition in bankruptcy by defendant. *Eistrat v. Cekada (1958) 50 Cal. 2d 289, 292, 293, 324 P.2d 881*

[6] Elements of Conversion

Plaintiff's right to possession of chattel, defendant's conversion of chattel, and damages as the elements of conversion. *Franklin v. Municipal Court (1972) 26 Cal. App. 3d 884, 901, 103 Cal. Rptr. 354*

[7] Plaintiff's Interest in Property

[a] Assignee

Assignee of cause of action for conversion as not required to become owner of chattel before bringing action. *Lehmann v. Schmidt (1890) 87 Cal. 15, 22, 25 P. 161* ; *Staley v. McClurken (1939) 35 Cal. App. 2d 622, 625, 96 P.2d 805*

Assignment of chattel mortgage as not resulting in assignment of cause of action for previous conversion. *Millner v. Lankershim Packing Co. (1936) 13 Cal. App. 2d 315, 318, 319, 56 P.2d 1295*

[b] Ownership Interest

Ownership without possession or right to possession as insufficient interest to bring action. *Aero Properties, Inc. v. Gottlieb (1962) 206 Cal. App. 2d 711, 716, 24 Cal. Rptr. 277*

Owner as not required to show right to immediate possession to bring action where property in custody of sheriff under writ of attachment. *Reynolds v. Lerman (1956) 138 Cal. App. 2d 586, 596, 292 P.2d 559*

Existence of lien on property as not affecting owner's right to bring action for conversion. *Everfresh, Inc. v. Goodman (1955) 131 Cal. App. 2d 818, 820, 281 P.2d 560*

Owner of pledged stock as having no right to immediate possession and thus unable to bring conversion action. *McCoy v. Northwestern Cas. & Sur. Co. (1935) 3 Cal. App. 2d 534, 537, 538, 39 P.2d 864*

[c] Owner of Limited Interest

Defaulting chattel mortgagor as having no right of possession and thus as unable to bring suit for conversion. *Gardena Valley Airport, Inc. v. All American Sports Enterprises, Inc. (1964) 230 Cal. App. 2d 478, 481, 482, 41 Cal. Rptr. 93*

Limited interest in chattel as sufficient to permit owner of such interest to bring action for conversion. *Camp v. Ortega (1962) 209 Cal. App. 2d 275, 286, 25 Cal. Rptr. 873*

Chattel mortgagor as owning sufficient interest in chattel to bring action for conversion. *Camp v. Ortega (1962) 209 Cal. App. 2d 275, 286, 25 Cal. Rptr. 873*

Holder of worker's lien on boat as having sufficient interest to bring action for conversion. *Arques v. National Superior Co. (1945) 67 Cal. App. 2d 763, 767, 155 P.2d 643*

Interest of trustee in personal property as sufficient interest to permit trustee to bring conversion action. *Perlick v. Pacific Discount Corp. (1942) 53 Cal. App. 2d 136, 141, 127 P.2d 647*

Lienholder's possession or right to immediate possession as required for bringing action. *Thomsen v. Culver City Motor Co. (1935) 4 Cal. App. 2d 639, 646, 41 P.2d 597*

[d] Right to Possession

Plaintiff's right to immediate possession as sufficient interest to bring action. *General Motors Acceptance Corp. v. Dallas (1926) 198 Cal. 365, 370* , P. 184; *Aero Properties, Inc. v. Gottlieb (1962) 206 Cal. App. 2d 711, 716, 24 Cal. Rptr. 277*

Actual possession as sufficient interest to bring action. *Igauye v. Howard (1952) 114 Cal. App. 2d 122, 127, 249 P.2d 558*

Third party's right of possession as not defeating right of actual possessor to bring action against wrongdoer. *Fletcher Aviation Corp. v. Landis Mfg. Co. (1950) 95 Cal. App. 2d 905, 908, 214 P.2d 400*

Failure to demand delivery of, or offer to pay for partial delivery of, contracted for goods as negating purchaser's right to immediate possession. *Scutt v. Bassett (1948) 86 Cal. App. 2d 373, 375, 194 P.2d 781*

[8] Property Subject to Conversion

[a] Checks

Liability of banks for payment on forged checks. *Cooper v. Union Bank (1973) 9 Cal. 3d 371, 374-386, 107 Cal. Rptr. 1*

Checks as subject to conversion. *McCafferty v. Gilbank (1967) 249 Cal. App. 2d 569, 576, 57 Cal. Rptr. 695* ; *Acme Paper Co. v. Goffstein (1954) 125 Cal. App. 2d 175, 180, 181, 270 P.2d 505*

[b] Community Property

Community property as subject to conversion by spouse. *Chuba v. Fishbein (1970) 13 Cal. App. 3d 382, 391, 91 Cal.*

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[c] Money

Money, specifically identified, as subject to conversion. *Haigler v. Donnelly (1941) 18 Cal. 2d 674, 681, 117 P.2d 331*

Money as not required to be specifically earmarked to be subject to conversion. *Haigler v. Donnelly (1941) 18 Cal. 2d 674, 681, 117 P.2d 331* ; *Weiss v. Marcus (1975) 51 Cal. App. 3d 590, 599, 124 Cal. Rptr. 297*

Money as not property subject to conversion if relationship of mere debtor and creditor exists. *Watson v. Stockton Morris Plan Co. (1939) 34 Cal. App. 2d 393, 403, 93 P.2d 855*

[d] Property Held in Bailment

Attorney acting as escrow holder in corporate stock transaction could be liable for conversion of stock shares because he transferred shares to agent for closing with knowledge that prerequisites for closing had not been met and that seller had rescinded offer of sale and demanded return of stock certificates. *Virtanen v. O'Connell (2006) 140 Cal. App. 4th 688, 706-710, 44 Cal. Rptr. 3d 702*

Professional bailee as liable in conversion when presented with reasonably compelling evidence demonstrating third party is entitled to possession, and refuses to investigate claim or file interpleader action to adjudicate third party's claim of possession. *Messerall v. Fulwider (1988) 199 Cal. App. 3d 1324, 1329-1333, 245 Cal. Rptr. 548*

[e] Real Property

Real property as not subject to conversion. *Munger v. Moore (1970) 11 Cal. App. 3d 1, 7, 89 Cal. Rptr. 323*

Leaseholds as not subject to conversion. *Vuich v. Smith (1934) 140 Cal. App. 453, 455, 35 P.2d 365*

Agreement of the parties as determining real or personal property nature of property allegedly affixed to land. *Bedell v. Mashburn (1948) 87 Cal. App. 2d 417, 423, 197 P.2d 98 , disapproved on other grounds, Reynolds v. Bank of Am. (1959) 53 Cal. 2d 49, 51, 345 P.2d 926*

Fixtures as subject to conversion by lessee's removal. *Sill Properties, Inc. v. CMAG, Inc. (1963) 219 Cal. App. 2d 42, 48-50, 33 Cal. Rptr. 155*

Timber as becoming subject to conversion once severed from the land. *Eistrat v. W. Hardwood Lumber Co. (1958) 164 Cal. App. 2d 374, 379, 330 P.2d 629*

Crops as subject to conversion. *Kirkman Corp. v. Owens (1944) 62 Cal. App. 2d 193, 198, 144 P.2d 405*

Nursery trees as personal property. *Story v. Christin (1939) 14 Cal. 2d 592, 596, 95 P.2d 925*

[f] Tangibles and Intangibles

Modern rule as permitting tangible and intangible personal property to be subject to conversion. *Payne v. Elliot (1880)*

54 Cal. 339, 340-342

Although some intangibles may be subject to conversion, to extent conversion claim sought recovery for taking of plaintiff's ownership rights of material adapted for motion picture, action was preempted by Copyright Act. *Melchior v. New Line Productions, Inc. (2003) 106 Cal. App. 4th 779, 792-793, 131 Cal. Rptr. 2d 347*

Shares of stock as property subject to conversion. *Payne v. Elliot (1880) 54 Cal. 339, 342* ; *Schneider v. Union Oil Co. (1970) 6 Cal. App. 3d 987, 992, 86 Cal. Rptr. 315*

Conversion as remedy for interference only with property which is specific enough to be identified and not for interference with indefinite, intangible, or uncertain property rights. *Olschewski v. Hudson (1927) 87 Cal. App. 282, 288, 262 P. 43*

Index card file of customers as subject to conversion. Palm Springs- *La Quinta Dev. Co. v. Kieberk Co. (1941) 46 Cal. App. 2d 234, 240, 115 P.2d 548*

Bonds as subject to conversion. *Nichols v. Leach (1931) 114 Cal. App. 545, 550, 300 P. 103*

Goodwill of business and customer list as not subject to conversion. *Adkins v. Model Laundry Co. (1928) 92 Cal. App. 575, 582, 583, 268 P. 939*

Laundry's customer list as too intangible, uncertain, and indefinite a property right to be subject to conversion. *Olschewski v. Hudson (1927) 87 Cal. App. 282, 286, 262 P. 43*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsImplied-in-Fact ContractsTortsDamagesCompensatory DamagesGeneral OverviewTortsDamagesPunitive DamagesGeneral OverviewTortsIntentional TortsConversionElementsTortsIntentional TortsConversionRemedies

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§ 150.33 Attorney General Opinions

Merchandise as not needing to be damaged regarding merchant's recovery in civil action under *Penal Code § 490.5*; disposition of criminal action as not prerequisite for recovery of damages, and payment of demand for damages as not in itself resulting in compromise under *Penal Code § 1378*. *69 Ops. Cal. Att'y Gen. 271 (1986)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesProperty CrimesGeneral OverviewTortsIntentional TortsConversionGeneral Overview

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§ 150.34 Law Reviews

Note, *The Commercialization of Human Tissue--The Source of Legal, Ethical and Social Problems: An Area Better Suited to Legislative Resolution, 24 Loy. L.A. L. Rev. 115 (1990)*

Recent Case, *Secured Transactions--Secured Party Who Accepts Collateral is Liable in Conversion for the Wrongful Taking of Property by an Independent Licensed Repossessor--Henderson v. Security National Bank, 18 Santa Clara L. Rev. 1091 (1978)*

Note, *Suing a Slant Driller for Subsurface Trespass or Drainage, 15 Stan. L. Rev. 665 (1963)*

Comment, *Theft of Labor and Services, 12 Stan. L. Rev. 663 (1960)*

Comment, *Interest as Damages in California, 5 UCLA L. Rev. 262 (1958)*

Note, *Liability of Innocent Bailee, Agent, or Servant for Conversion,* 45 Cal. L. Rev. (1957)

Note, *Conversion: Waiver of Tort; Effect of Statute of Limitations, 31 Cal. L. Rev. 584 (1943)*

Note, *Right of the State to Change Existing Rules as to Damages for Conversion of Oil, 12 S. Cal. L. Rev. 471 (1939)*

Comment, *Damages Against Improver of Converted Chattel, 6 S. Cal. L. Rev. 42 (1932)*

Comment, *Measure of Damages in Conversion of Mining Stock, 4 Cal. L. Rev. 246 (1916)*

Comment, *Fixtures: Constructive Severance, 4 Cal. L. Rev. 153 (1915)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesElection of RemediesTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionElementsTortsPremises Liability & PropertyTrespassGeneral Overview

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§ 150.35 Text References

Witkin, California Procedure, Vol.3, *Actions* §§ 153-160, 567-573, 740; Vols. 4 and 5, *Pleading,* §§ 660-663; Vol. 8, *Enforcement of Judgment,* §§ 156, 356-357, 491 (4th ed. 1996 & 1997)

Witkin, Summary of California Law, Vol. 1, *Contracts,* § 1040, Vol. 3, *Agency and Employment,* § 202; Vol. 3, *Negotiable Instruments,* § 58; Vol. 5, *Torts,* § 699-720; Vol. 6, *Torts,* § 1589, 1630, 1722, 1723; Vol. 13, *Personal Property,* §§ 164-166 (10th ed 2005)

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[Reserved]

§§ 150.36[Reserved]

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13-150 California Forms of Pleading and Practice--Annotated § 150.40

§ 150.40 Plaintiff's Guide

NOTE:

Illustrative Checklist. The following checklist is illustrative only of the basic points which counsel for a plaintiff in a conversion action should cover.

[1] Facts to Be Ascertained

NOTE:

Not all of the following facts will be ascertainable from the client in the initial interview. Subsequent interviews may be required, or it may be necessary to ascertain the facts from other persons, including the potential defendant, by use of discovery proceedings.

[a] Facts Relating to Plaintiff

☐ Name, address, and telephone number of plaintiff.

☐ Capacity of plaintiff such as minor, adult, corporation, unincorporated association, or partner in partnership.

☐ Additional facts, as desired, relating to plaintiff's stability and financial solvency such as:

- ☐ Employment status.
- ☐ Prior residences.
- ☐ Credit, bank, and personal references.

[b] Facts Relating to Defendants

☐ Name and address of each potential defendant, including:

☐ The person who converted the client's property.

☐ The converter's principal if the conversion was performed by an agent in the course of his or her agency [*see Jessup v. Cattle Ctr., Inc. (1968) 259 Cal. App. 2d 434, 437, 66 Cal. Rptr. 361]* .

☐ Any person who retains or disposes of the converted property received from the converter [*see § 150.13[3], [6]*].

☐ An agent of the converter who disposes of the converted property [*see § 150.13[3], [6]*].

☐ A coconspirator of the converter [*see de Vries v. Brumback (1960)53 Cal. 2d 643, 647, 2 Cal. Rptr.764, 349 P.2d 532* ; for discussion and forms of complaint for civil conspiracy, *see* Ch. 126, *Conspiracy*].

☐ The owner of property vis-a-vis a holder of a possessory lien [*see § 150.12[3]*].

☐ Capacity of each potential defendant such as minor, adult, corporation, unincorporated association, or partner in partnership.

[c] Facts Relating to Potential Cause of Action for Conversion

☐ Any act constituting dominion wrongfully exerted over property in denial of or inconsistent with the rights of another therein constitutes conversion [*see § 150.13[1] -[4]*]. Such an act may involve:

☐ The taking of property without consent [*see § 150.13[3]*].

☐ Intentional destruction of property [*see § 150.13[3]*].

☐ Unauthorized sale or transfer of property [*see § 150.13[3]*].

☐ Purchase of converted property [*see § 150.13[3],[6]*].

☐ Misdelivery of property [*see § 150.13[3]*].

☐ Wrongful withholding of property [*see § 150.13[3]*].

☐ Unauthorized use of property [*see § 150.13[3]*].

☐ Wrongful claim of title resulting in defeat of writ of attachment [*see § 150.13[3]*].

☐ Aquisition of possession by unlawful means [*see §§ 150.12, 150.13[3]*].

☐ Wrongful levy on property [*see Missouri State Life Ins. Co. v. Gillette (1932) 215 Cal. 709, 711, 712, 12 P.2d 955]* .

☐ Ascertain the facts establishing whether defendant's acquisition of the property was lawful or unlawful.

NOTE:
Demand for Return. If property was lawfully acquired, plaintiff must demand its return before an action may be brought [*see § 150.13[7]*].

☐ Ascertain the facts establishing plaintiff's interest in the property giving plaintiff a right to possession [*see § 150.12*]].

☐ Obtain description of property in as specific detail as possible.

☐ Determine the date of defendant's conversion.

NOTE:
The date of conversion is important for the determination of the running of the statute of limitations [*see § 150.17[1]*]. The date of conversion is also important in determining damages since the converted property must be valued as of the date of conversion [*Civ. Code § 3336*; [*see § 150.16[2]*]].

☐ Determine the place of defendant's conversion.

NOTE:
Value of the property is to be determined at the place of conversion [*see § 150.16[2]*].

☐ Determine plaintiff's opinion as to the value of the converted property [*see § 150.16[4]*].

☐ Determine if demand for return of the property has been made [*see § 150.13[7]*].

NOTE:
Even if demand for return of the property is not actually required under the facts of the specific case, it is advantageous to make such demand before the action is brought to remove demand as a possible issue.

☐ If demand was made, what was defendant's response?

☐ Was defendant acting alone, or was he or she acting in concert with others [*see* discussion of potential defendants

in [1][b], *above*].

☐ Loss of profits, if any, caused by the conversion [*see § 150.16[2]*].

☐ Any other damages suffered as a result of the conversion which would cause it to be unjust to base plaintiff's recovery on the value of the converted property [*see Civ. Code § 3336*; § 150.16[2]].

☐ Whether time and money were expended in the pursuit of the property and, if so, how much [*see Civ. Code § 3336*; § 150.16[3]]?

☐ Whether client consented to subsequent application of the converted property to his or her own benefit [*see Civ. Code § 3337*; § 150.16[7]].

[2] Documents to Be Obtained

NOTE:
Not all of the following documents will be obtained from the client in the first interview. Subsequent interviews may be required or, where circumstances permit, the documents might be mailed to the attorney. Also, it might be necessary to obtain these documents from persons other than the client.

☐ Copies of any correspondence relating to the property between the parties.

☐ If the property was legally obtained by the defendant, a copy of any written agreement between the parties.

☐ Instruments which may place a value on the property.

☐ Instruments which may evidence the client's ownership or other interest in the converted property [*see § 150.12*].

☐ Any other contracts, agreements, memoranda, or other documents concerning the converted property with relation to either the client's or the defendant's interest therein.

[3] Alternative Causes of Action

☐ Consider whether the facts that give rise to the cause of action for conversion may also give rise to remedies under alternative theories, such as:

☐ Action for quasi-contractual relief; consider that:

☐ Suing on an implied contract theory allows the provisional remedy of attachment [*see § 150.18[1]*].

☐ The statute of limitations for quasi-contractual actions is two years [*see Code Civ.*

Proc. § 339(1); § 150.17[1]].

☐ If theories of conversion and quasi contract are pleaded alternatively, plaintiff will have to elect between them at the trial level [*see § 150.18[1]*].

☐ Claim and delivery; consider:

☐ Action seeks recovery of the property rather than its value [*see § 150.18[2]*; for discussion, procedures, and forms for use in an action to recover possession of personal property, *see* Ch. 119, *Claim and Delivery*].

☐ Trespass to personal property; consider:

☐ Trespass occurs when defendant's interference with the property was not substantial enough to constitute conversion [*see § 150.18[3]*].

☐ Recovery for trespass is allowed when the complaint alleges conversion but the evidence shows insubstantial interference with the property [*see §§ 150.13[4], 150.18[3]*].

☐ Fraud; consider:

☐ If defendant fraudulently obtained possession of property, a suit seeking damages for fraud is available [*see Wendling etc. Co. v. Glenwood etc. Co. (1908) 153 Cal. 411, 413]* . For discussion, procedures, and forms for use in an action for fraud, see Ch. 269, *Fraud and Deceit* .

☐ Breach of contract, consider:

☐ If the acts constituting conversion also amount to a breach of contract between the parties, such as a bailment contract, a cause of action for breach of contract may be pleaded. For discussion, procedures, and forms for use in an action for breach of contract, see Ch. 140, *Contracts* .

☐ The statute of limitations is either four years if the contract was written [*Code Civ. Proc. § 337*] or two years if the contract was oral [*Code Civ. Proc. § 339*].

[4] Venue

☐ Determine venue:

☐ Conversion being a transitory action, the county in which the defendants, or some of them, reside at the commencement of the action is the proper county for the trial of the

action [*Code Civ. Proc. § 395*; *Haurat v. Superior Court (1966) 241 Cal. App. 2d 330, 333, 50 Cal. Rptr. 520]* .

☐ The enlarged venue available in actions for injuries to personal property is not available in a conversion action [*see Code Civ. Proc. § 395*; *Mason v. Buck (1929) 99 Cal. App. 219, 220, 221, 278 P. 461]* .

[5] Drafting the Complaint

☐ Draft complaint [for forms, *see §§ 150.50 -150.78*].

☐ Sign complaint.

NOTE:
At least one attorney of record, or the party, if unrepresented, must sign the complaint in the attorney's individual name. The complaint must state the signer's address and telephone number [*Code Civ. Proc. § 128.7(a)*].

☐ If complaint is to be verified, which is not required [*Code Civ. Proc. §§ 446, 2009, 2015.5*; *see § 150.50[4]*], have the verification executed by:

☐ Plaintiff, if an individual.

☐ Counsel, if plaintiff is out of the country in which counsel has his or her office, or for some cause is unable to verify it, or if facts are within attorney's knowledge.

☐ If plaintiff is a corporation, by an officer thereof.

☐ Prepare summons [for discussion of the procedures and forms for use in the preparation and service of the summons, *see* Ch. 518, *Service of Summons and Papers*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueIndividual DefendantsContracts LawTypes of ContractsImplied-in-Fact ContractsTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionElementsTortsPremises Liability & PropertyTrespassGeneral Overview

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§ 150.41 Defendant's Guide

NOTE:
Illustrative Checklist: The following checklist is illustrative only of the basic points which counsel for a defendant in a conversion action should cover.

[1] Facts to Be Ascertained

NOTE:
Not all of the following facts will be ascertainable from the client in the initial interview. Subsequent interviews may be required, or it may be necessary to ascertain the facts from other persons, including the plaintiff, by use of discovery proceedings.

[a] Facts Relating to Defendant

☐ Name, address, and telephone number of defendant.

☐ Capacity of defendant such as minor, adult, corporation, unincorporated association, or partner in partnership.

☐ Additional facts, as desired, relating to defendant's stability and financial solvency such as:

- ☐ Employment status.
- ☐ Prior residences.
- ☐ Credit, bank, and personal references.

[b] Facts Required for Answer

☐ Date, manner, and place of service of the complaint and summons.

☐ Allegations of the complaint.

☐ Ascertain which of the facts alleged in the compliant are true, which are false, and of which ones defendant does not know the truth or falsity.

[2] Documents to Be Obtained

☐ For a checklist of documents that may be relevant, see *§ 150.40[2]*.

[3] Affirmative Defenses

☐ Consider the following defenses:

☐ Statute of limitations [*see § 150.17[1]*].

☐ Equitable defenses of waiver and estoppel [*see § 150.17[4]*].

☐ Consent [*see § 150.17[2]*].

☐ Immunity of personal representative of decedent's estate who takes possession of property in good faith belief that it is property of estate [*see § 150.20*].

☐ Determine how to raise defense [*see Code Civ. Proc. §§ 430.10, 430.30*]:

☐ If the defense appears on the face of the complaint or from matters of which the court must or may take judicial notice, it may be raised by demurrer as well as by answer.

☐ Otherwise, the defense must be raised by answer.

[4] Absence of Elements of Cause of Action

☐ Consider potential defects in plaintiff's cause of action:

☐ Does the plaintiff have adequate interest in the property to maintain the action [*see § 150.12*].

☐ Was the interference with plaintiff's property insubstantial, so that conversion cannot be established, limiting plaintiff's recovery to actual damages under a trespass theory [*see §§ 150.13[4], 150.18[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionDefensesTortsProcedureStatutes of LimitationsGeneral OverviewTortsProcedureStatutes of LimitationsTollingEquitable Estoppel

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[Reserved]

§§ 150.42[Reserved]

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PART V. FORMS

13-150 California Forms of Pleading and Practice--Annotated § 150.50

§ 150.50 Complaint for Damages for Conversion--General Form

[1] FORM Complaint for Damages for Conversion--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*], [and DOES 1	)	(Conversion)
through_____],	)	[Amount demanded _____ (exceeds
Defendant(s).	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. _____ [*Allege defendant's capacity and residence, e.g.,* Defendant _____ (*name*) is, and at all times herein mentioned was, a resident of _____ County, California].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by their conduct.)]

3. At all times herein mentioned, and in particular on or about _____ [*date*], plaintiff was, and still is, the _____ [*describe plaintiff's interest in the property, e.g.,* owner] and was, and still is, entitled to the possession of the following personal property, namely: _____ [*describe property*].

4. On or about _____ [*date*], and at _____ [*city*], _____ County, California, the property described above had a value of $_____.

5. On or about _____ [*date*], defendant _____ [*describe defendant's conversion of the property, e.g.,* took the property described above from plaintiff's possession and] converted the same to his/her own use.

[6. *If the property was initially acquired lawfully from plaintiff, include the following allegation* : On or about _____ (*date*), plaintiff (orally) demanded the immediate return of the above-mentioned property but defendant failed and refused, and continues to fail and refuse, to return the property to plaintiff. (A copy of plaintiff's written demand for return of the property is attached hereto as Exhibit A and made a part hereof.) (A copy of defendant's written refusal to return the property is attached hereto as Exhibit B and made a part hereof.)]

[7. *If seeking damages under the alternative damage provision of Civ. Code § 3336, include the following allegation* : As a proximate result of defendant's conversion, plaintiff _____ (*allege injuries suffered which are the natural, reasonable, and proximate results of the conversion*), all to plaintiff's damage in the sum of $_____.]

[8. Between the time of defendant's conversion of the above-mentioned property to his/her own use and the filing of this action, plaintiff _____ (*describe time and money properly expended in pursuit of the converted property*), all to plaintiff's further damage in the sum of $_____.]

9. The defendant's acts alleged above were willful, wanton, malicious, and oppressive, [were undertaken with the intent to defraud,] and justify the awarding of exemplary and punitive damages.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For the value of the property converted;

2. For interest at the legal rate on the foregoing sum pursuant to *Section 3336 of the Civil Code,* from and after _____ [*date*];

[3. For damages for the proximate and foreseeable loss resulting from defendant's conversion in the sum of $_____;]

[4. For interest at the legal rate on the foregoing sum pursuant to *Section 3287(a) of the Civil Code,* from and after _____(*date*);]

[5. For damages for time and money properly expended in pursuit of the converted property in the sum of _____;]

[6. For punitive and exemplary damages;]

7. For costs of suit herein incurred; and

8. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same istrue of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form of complaint is a general form for use in an action for damages for conversion. Subsequent forms provide an allegation seeking punitive damages [§ 150.51], complaints and allegations based on various methods of converting property [§§ 150.52-150.65], complaints and allegations for use by particular plaintiffs [§§ 150.73-150.76], and an allegation alleging excuse from the requirement of making a demand for the return of property [§ 150.77].

[3] Allegations

This complaint alleges [*see Franklin v. Municipal Court (1972) 26 Cal. App. 3d 884, 901, 103 Cal. Rptr. 354* (necessity of pleading plaintiff's interest, defendant's conversion, and damages in action for conversion)]:

- Plaintiff's interest in, and right to possession of, certain identified personal property (Paragraph 3) [*Igauye v. Howard (1952) 114 Cal. App. 2d 122, 127, 249 P.2d 558* ; *Hall v. Susskind (1898) 120 Cal. 559, 565, 53 P. 46* (necessity of alleging description of property); *see §§ 150.11, 150.12*];

- The value of the property (Paragraph 4) [*Oakes v. Suelynn Corp. (1972) 24 Cal. App. 3d 271, 279, 100 Cal. Rptr. 838* ; *see § 150.16*]; and

- Defendant's conversion (Paragraph 5) [*Jordan (1961) 55 Cal. 2d 597, 610, 12 Cal. Rptr. 488, 361 P.2d 20* ; *see § 150.13*].

If defendant's original possession was lawfully acquired, a demand for return of the property must be made on defendant before action is brought [*Flennaugh v. Heinrich (1948) 89 Cal. App. 2d 214, 222, 200 P.2d 580* ; *see § 150.13[7]*]. Optional Paragraph 6 may be used to allege the demand and defendant's refusal to comply. For a form of allegation that may be used in lieu of this paragraph when no demand is required, for example, when demand would be futile [*see Scott's V. F. Exch. v. Growers Refrigeration Co., Inc. (1947) 81 Cal. App. 2d 437, 450, 184 P.2d 183 , disapproved on other grounds, Hischemoeller v. Nat. Ice etc. Storage Co. (1956) 46 Cal. 2d 318, 328, 294 P.2d 433]* ,

see *§ 150.77*.

Civ. Code § 3336, which provides for an alternative measure of damages, is employed when damages based on the value of the property would yield an unjust result [*Myers v. Stephens (1965) 233 Cal. App. 2d 104, 116, 43 Cal. Rptr. 420* ; *see § 150.16[2]*]. To seek damages under this alternative damage provision, include Optional Paragraph 7 in addition to the allegation of damages based on the value of the property (Paragraph 4).

Optional Paragraph 8 may be used to seek damages for expenditures properly made in the pursuit of the property [*see Civ. Code § 3336*; *see also § 150.16[3]*].

Exemplary damages [*Civ. Code § 3294*] may be recovered in a conversion action, given the requisite showing of malice, fraud, or oppression [*Haigler v. Donnelly (1941) 18 Cal. 2d 674, 681, 117 P.2d 331* ; *see § 150.16[5]*]. Optional Paragraph 9 may be used to seek exemplary damages. No claim for exemplary damages may state an amount claimed [*Civ. Code § 3295(e)*]. For punitive damages allegations that may be used as an alternative to Paragraph 9, see *§ 150.51*.

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Venue

For purposes of venue, conversion is not considered an injury to person or personal property as provided in *Code Civ. Proc. § 395(a)* which would permit trial in the county where the conversion took place since such an injury is limited to physical or corporeal injury [*Spangenberg v. Spangenberg (1932) 123 Cal. App. 387, 391, 11 P.2d 408]* . Therefore, the residence of the defendant is the proper county for the trial of an action for conversion [*see Code Civ. Proc. § 395(a)*; *Haurat v. Superior Court (1966) 241 Cal. App. 2d 330, 333, 50 Cal. Rptr. 520]* .

[6] Copies

The following copies of this complaint should be prepared:

- Original to be filed with the court;
- One copy, together with a copy of the summons, to be served on each defendant [different forms of service require different numbers of copies; for discussion *see* Ch. 518, *Service of Summons and Papers*];
- One copy for the office file;
- Copy for client, if desired; and
- Other copies as desired.

[7] Cross References

For alternative allegations of capacity and residence, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification*

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 660-663 (4th ed. 1997)

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13-150 California Forms of Pleading and Practice--Annotated § 150.51

§ 150.51 Allegation--Facts Justifying Punitive Damages

[1] FORM Allegation--Facts Justifying Punitive Damages

1. At the time defendant converted the property, defendant was guilty of malice, oppression, and a willful and conscious disregard for the rights of plaintiff in that defendant, without making any investigation and with reckless indifference and willful and conscious disregard for the rights of any person whomay have had an interest in the converted property, and particularly for the rights of plaintiff, did convert the property.

2. Further, after knowledge and notice of plaintiff's interest in the converted property was given to defendant, defendant failed and refused, and continues to fail and refuse, to return the property. By reason of these acts plaintiff has been oppressed and seeks punitive and exemplary damages.

[2] Use of Form

The allegation in [1], *above*, states circumstances upon which an award of punitive and exemplary damages is sought. Upon proper showing, punitive damages are available in a conversion action [*see Ferraro v. Pacific Fin. Corp. (1970) 8 Cal. App. 3d 339, 351, 87 Cal. Rptr. 226* ; *Civ. Code § 3294*]. No claim for exemplary damages may state an amount claimed [*Civ. Code § 3295(e)*].

When appropriate, these allegations may be substituted for Paragraph 9 of § 150.50[1], thereby becoming Paragraphs 9 and 10.

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13-150 California Forms of Pleading and Practice--Annotated § 150.52

§ 150.52 Allegation--Conversion by Unauthorized Sale of Property--General Form

[1] FORM Allegation--Conversion by Unauthorized Sale of Property--General Form

1. At all times herein mentioned, the personal property described above was in the lawful possession of defendant. Defendant's possession resulted from _____ [*describe circumstances that brought defendant into lawful possession of the property*].

2. On or about _____ [*date*], defendant, without plaintiff's consent, sold the above-described property and thereby converted it and its proceeds to his/her own use.

[2] Use of Form

The form of allegation in [1], *above*, may be used in a complaint for conversion by the unauthorized sale of property [*see Reynolds v. Lerman (1956) 138 Cal. App. 2d 586, 592, 292 P.2d 559]* . It alleges the circumstances of defendant's possession (Paragraph 1) and defendant's unauthorized sale of the property (Paragraph 2). When appropriate, it may be substituted for Paragraph 5 of § 150.50[1] (general complaint for conversion), with subsequent paragraphs renumbered accordingly.

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13-150 California Forms of Pleading and Practice--Annotated § 150.53

§ 150.53 Complaint for Damages for Conversion--By Unauthorized Sale of Stock--Against Stockbroker--For Selling Stock He/She Agreed to Carry

[1] FORM Complaint for Damages for Conversion--By Unauthorized Sale of Stock--Against Stockbroker--For Selling Stock He/She Agreed to Carry

[*Caption, introduction. See § 150.50[1].*]

1. [*Capacity and residence of defendant. See § 150.50[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 150.50[1], Paragraph 2.*]

3. On or about _____ [*date*], plaintiff employed defendant as his/her broker and agent, to purchase _____ [*name of corporation*] stock for plaintiff's account, and in consideration thereof and of the payments hereinafter set out, defendant agreed with plaintiff that he/she would hold and carry such stock for plaintiff until plaintiff had given him/her directions to sell, and that he/she would not sell or dispose of such stock unless plaintiff's margin should be insufficient or exhausted, and then only in the event that plaintiff failed to comply with defendant's demand for further margin. In the event of plaintiff's failure to do so, defendant agreed to give him/her _____ [*number*] days' notice of the time and place of sale of such stock. On the date specified above plaintiff paid defendant the sum of $_____ as payment on the price of such securities as defendant should thereafter buy for plaintiff under the above-described agreement.

4. Thereafter, on or about _____ [*date*], defendant purchased for the account of plaintiff _____ [*number*] shares of _____ [*name of corporation*] stock for $_____, which sum, less the $_____ paid thereon by plaintiff, he/she charged to plaintiff, and for the purchase of which he/she charged plaintiff a commission of $_____; defendant retained the stock so purchased as collateral security for the sum advanced by him/her on the purchase of the stock.

5. On or about _____ [*date*], without any notice to plaintiff of the amount due from him/her, or any

demand on him/her for payment thereof, and without any authorization from plaintiff to do so, defendant, without notice to defendant of the time and place of sale and without plaintiff's consent, sold and disposed of the securities and converted the same to his/her own use.

6. The reasonable market value of the securities as of _____ [*date*], was _____ [*state value of securities*].

7. [*Allegation of demand for return of property, if appropriate. See § 150.50[1], Paragraph 6.*]

8-10. [*Allegation of damages. See § 150.50[1], Paragraphs 7-9.*]

[*Prayer. See § 150.50[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 150.50[1]; for discussion, see § 150.50[4].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action for damages for the unauthorized sale and conversion of securities by a stockbroker. It alleges:

- The manner in which defendant came into possession of the stock (Paragraphs 3, 4);
- That the stock was purchased for plaintiff's account (Paragraph 4); and
- Their unauthorized sale (Paragraph 5).

For discussion of the other allegations essential to this complaint, see *§ 150.50[3]*.

Demand for return of the stock is not required in this type of case since, the stock having already been sold, demand for its return would be futile [*see Coy v. E.F. Hutton & Co. (1941) 44 Cal. App. 2d 386, 390, 391, 112 P.2d 639* ; for discussion, *see § 150.13[7]*]. However, it is advisable that a demand be made to remove this issue (Optional Paragraph 7).

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13-150 California Forms of Pleading and Practice--Annotated § 150.54

§ 150.54 Allegation--Conversion by Unauthorized Sale of Property--By Owner Against Voluntary Bailee

[1] FORM Allegation--Conversion by Unauthorized Sale of Property--By Owner Against Voluntary Bailee

1. At all times herein mentioned, the personal property described above has been in the possession of defendant with whom plaintiff had left the same for safekeeping.

2. On or about _____ [*date*], defendant, without plaintiff's consent, sold the property described above and thereby converted it and its proceeds to his/her own use.

[2] Use of Form

The form of allegation in [1], *above*, is for use to allege the conversion of goods by their unauthorized sale by a voluntary bailee. It alleges defendant's possession of plaintiff's property (Paragraph 1) and defendant's unauthorized sale of the property (Paragraph 2) [*see Poggi v. Scott (1914) 167 Cal. 372, 373-376, 139 P. 815]* . When appropriate, these paragraphs may be substituted for Paragraph 5 of § 150.50[1], with subsequent paragraphs renumbered accordingly.

[3] Cross References

For forms of complaints concerning deposits with bailees generally, see Ch. 93, *Bailments*

Witkin, Summary of California Law, vol. 13, *Personal Property*, §§ 164-166 (10th ed. 2005)

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13-150 California Forms of Pleading and Practice--Annotated § 150.55

§ 150.55 Allegation--Conversion by Purchase of Converted Property

[1] FORM Allegation--Conversion by Purchase of Converted Property

1. On or about _____ [*date*], at _____ [*location*], _____ [*name*] wrongfully converted the property described above in that he/she _____ [*describe method of conversion*].

2. Thereafter, on or about _____ [*date*], the property described above came into possession of defendant, and plaintiff is informed and believes and thereon alleges that defendant purchased it from _____ [*name of original converter*].

[2] Use of Form

The form of allegation in [1], *above*, is for use to allege conversion by the purchase of previously converted property. It alleges the conversion by a third party (Paragraph 1) and defendant's purchase of the previously converted goods (Paragraph 2) [*see Swim v. Wilson (1891) 90 Cal. 126, 128-131, 27 P. 33]* . When appropriate, these allegations may be substituted for Paragraph 5 of § 150.50[1], with subsequent paragraphs renumbered accordingly.

Although the initial converter is a possible defendant, there is nothing to indicate that plaintiff cannot select which of many possible converters against whom to pursue the case [*see Culp v. Signal Van & Storage Co. (1956) 142 Cal. App. 2d Supp. 859, 861 , 298 P.2d 162]* .

Because in the typical situation a defendant purchaser will have purchased the property in ignorance of plaintiff's interest in the property, a demand for the property's return will be necessary before an action may be brought [*see Flennaugh v. Heinrich (1948) 89 Cal. App. 2d 214, 222, 200 P.2d 580]* .

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13-150 California Forms of Pleading and Practice--Annotated § 150.56

§ 150.56 Complaint for Damages for Conversion--By Misdelivery of Goods--Against Common Carrier

[1] FORM Complaint for Damages for Conversion--By Misdelivery of Goods--Against Common Carrier

[*Caption, introduction. See § 150.50[1].*]

1. _____ [*Allege capacity and residence of defendant, e.g.,* At all times herein mentioned, defendant _____ (*name*) was and is a corporation duly organized and existing under the laws of the State of California and doing business as a common carrier of freight for reward, with its principal office for the transaction of business in _____ County, California].

2. [*Fictitious name allegation, if appropriate. See § 150.50[1], Paragraph 2.*]

3. [*Allegation describing converted property and plaintiff's interest therein. See § 150.50[1], Paragraph 3.*]

4. [*Allegation of value of converted property. See § 150.50[1], Paragraph 4.*]

5. On or about _____ [*date*], plaintiff delivered the above-mentioned goods to defendant for transportation by it for compensation paid by plaintiff from _____ [*give address or other location*], _____ County, California to _____ [*give address or other location*], _____ County, California, there to be delivered to _____ [*name of consignee*].

6. Defendant failed to deliver the goods, wares, and merchandise to the consignee, and in so failing did not observe reasonable commercial standards in that _____ [*describe how reasonable commercial standards were not observed*], with the result that the goods, wares, and merchandise were delivered to some other person unknown to plaintiff.

7. [*Allegation of demand for return of property. See § 150.50[1], Paragraph 4.*]

8-10. [*Allegation of damages. See § 150.50[1], Paragraphs 7-9.*]

[*Prayer. See § 150.50[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 150.50[1]; for discussion, see § 150.50[4].*]

[2] Use of Form

This form of complaint is for use in an action for damages for conversionbrought against a common carrier for the misdelivery of goods.

The form alleges the delivery of the goods to defendant (Paragraph 5) and misdelivery of those goods by defendant (Paragraph 6) [*see Com. Code § 7404*]. For a discussion of the other allegations essential to this complaint for conversion, *see § 150.50[3]*.

Under statute, a common carrier is relieved of liability for conversion if the misdelivery was made in good faith [*see Com. Code § 7404*; *but see McCaslin v. Southern Pac. Co. (1922) 187 Cal. 716, 723, 724, 203 P. 742* (liability of initial carrier for conversion by connecting carrier in selling shipment for transportation charges on refusal of consignee to accept shipment)].

[3] Cross References

For discussion and forms of complaint in actions against common carriers based on nondelivery of freight, see Ch. 109, *Carriers*

Witkin, Summary of California Law, vol. 13, *Personal Property*, §§ 177-184 (10th ed. 2005)

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13-150 California Forms of Pleading and Practice--Annotated § 150.57

§ 150.57 Allegation--Conversion by Refusal to Redeliver Property--Against Agent to Sell Automobile

[1] FORM Allegation--Conversion by Refusal to Redeliver Property--Against Agent to Sell Automobile

1. On or about _____ [*date*], plaintiff delivered the automobile described above to defendant and it was received by defendant under an [oral] agreement [, attached hereto as Exhibit A and made a part hereof,] by which defendant was to use his/her best efforts to sell the automobile for a price not to be less than $_____ and to pay the proceeds of the sale to plaintiff [less a discount of _____ percent which defendant was entitled to retain as his/her commission on the sale]. Defendant furtheragreed, in the event that the automobile was not sold, to return it to plaintiff on _____ [*date*].

2. Although _____ [*date*], the date for return of the automobile, has passed, and defendant has failed to sell the automobile, defendant still retains possession of the automobile.

[2] Use of Form

The form of allegation in [1], *above*, is for use in a complaint for conversion brought against an agent authorized to sell an automobile. It alleges delivery of the property to defendant (Paragraph 1) and defendant's continued retention of the property (Paragraph 2). When appropriate, these allegations may be substituted for Paragraph 5 of § 150.50[1], with subsequent paragraphs renumbered accordingly.

Because defendant's original acquisition of possession was lawful, demand for return of the property is required [*see § 150.50[1]*, Paragraph 6; *Flennaugh v. Heinrich (1948) 89 Cal. App. 2d 214, 222, 200 P.2d 580]* .

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13-150 California Forms of Pleading and Practice--Annotated § 150.58

§ 150.58 Allegation--Conversion by Refusal to Redeliver Property--By Lessor Against Lessee

[1] FORM Allegation--Conversion by Refusal to Redeliver Property--By Lessor Against Lessee

1. On or about _____ [*date*], plaintiff delivered the personal property described above to defendant [for his/her use in work then being done by him/her] and defendant then and there agreed to pay plaintiff the sum of $_____ per _____ [*specify period of time, e.g.,* day] for the use of the property and to return the property to plaintiff _____ [on demand *or* on _____ (*date*)].

2. On or about _____ [*date*], [and after the date for return of the property had passed,] plaintiff duly demanded of defendant that he/she return the above-mentioned property, but defendant failed and refused, and continues to fail and refuse, to return the property and has thereby converted it to his/her own use. [A copy of plaintiff's demand (and defendant's refusal) is attached hereto as Exhibit(s) A (and B, respectively,) and made a part hereof.]

[2] Use of Form

The form of allegation in [1], *above,* is for use in a complaint for conversion brought against a lessee who has refused to return property to the plaintiff lessor at the end of the lease period.

The form alleges that defendant leased an item of personal property from plaintiff (Paragraph 1) and that defendant failed and refused to return the property after the lease period had terminated (Paragraph 2). When appropriate, these allegations may be substituted for Paragraph 5 of § 150.50[1], with subsequent paragraphs renumbered accordingly.

The need to demand return of the property before bringing the action depends on the circumstances of the case [*see Greiner v. Greiner (1881) 58 Cal. 115, 120, 121* (conversion by depositary as relieving depositor of obligation to demand return of property)]. When property is lent for a specified time or specified purpose, it must be returned when the time has expired or the purpose has been accomplished [*see Civ. Code §§ 1895, 1958*]. In other cases, demand for the return must be made [*see Flennaugh v. Heinrich (1948) 89 Cal. App. 2d 214, 222, 200 P.2d 580]* , in which case Optional Paragraph 6 of the form of complaint in § 150.50[1] should be included in the form.

[3] Cross References

For a complaint by a depositor against a depositary and third party for failure to return property left to be repaired, see Ch. 93, *Bailments*

For discussion and forms relating to bailments for hire under *Civ. Code § 1925 et seq.* and *1955 et seq.*, and to personal property leases under Division 10 of the Commercial Code, *Com. Code § 10101 et seq.*, see Ch. 413, *Personal Property Leases*

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13-150 California Forms of Pleading and Practice--Annotated § 150.59

§ 150.59 Allegation--Conversion by Refusal to Redeliver Property--Action by Bailor Against Bailee's Landlord

[1] FORM Allegation--Conversion by Refusal to Redeliver Property--Action by Bailor Against Bailee's Landlord

1. On or about _____ [*date*], plaintiff left the property described above and created a bailment by _____ [oral *or* written] contract with _____ [*name*], the lessee of the premises known as _____ [*describe premises*] and located at _____ [*address*], which premises were owned by defendant and leased by him/her to _____ [*name of lessee*]. _____ [*Describe terms of bailment, e.g.,* By the terms of this contract, the personal property was left under bailment by contract with the lessee for the mutual benefit of the parties and on the agreement of the lessee that the personal property would be returned to plaintiff on demand]. [A copy of this contract is attached hereto as Exhibit A and made a part hereof.]

2. On or about _____ [*date*], defendant regained possession of the premises, and on or about _____ [*date*], plaintiff duly demanded of defendant that he/she return the personal property described above to plaintiff, but defendant failed and refused, and continues to fail and refuse, to return possession of the property to plaintiff, and has converted the same to his/her own use and benefit. [A copy of plaintiff's demand (and defendant's refusal) is attached hereto as Exhibit(s) B (and C, respectively,) and made a part hereof.]

[2] Use of Form

The form of allegation in [1], *above*, is for use in a complaint for conversion against a bailee's landlord who has refused to redeliver possession to plaintiff bailor. It alleges the existence of a bailment (Paragraph 1) and defendant's power over the property and refusal to return it on demand (Paragraph 2) [*see Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 549, 550, 176 P.2d 1* (conversion where possessor of realty refuses to allow owner of personal property to remove it)]. When appropriate, these allegations may be substituted for Paragraphs 5 and 6 of § 150.50[1].

[3] Cross References

For cross references relating to leases of personal property, see *§ 150.58[3]*

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13-150 California Forms of Pleading and Practice--Annotated § 150.60

§ 150.60 Complaint for Damages for Conversion--By Refusal to Redeliver Property--By Letter (Lessor) Against Hirer (Lessee)--Breaking Condition of Hiring of Personal Property

[1] FORM Complaint for Damages for Conversion--By Refusal to Redeliver Property--By Letter (Lessor) Against Hirer (Lessee)--Breaking Condition of Hiring of Personal Property

[*Caption, introduction. See § 150.50[1].*]

1. [*Capacity and residence of defendant. See § 150.50[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 150.50[1]. Paragraph 2.*]

3. [*Allegation describing converted property and plaintiff's interest therein. See § 150.50[1], Paragraph 3.*]

4. [*Allegation of value of converted property. See § 150.50[1], Paragraph 4.*]

5. On or about _____ [*date*], plaintiff let the property described above to defendant for a period of _____ [*specify*].

6. In consideration of this hiring, defendant promised and agreed to pay plaintiff the sum of $_____ per _____ [*specify period of time, e.g.,* month] for the use of the property and it was further agreed by defendant that in the event of his/her failure to make payment to plaintiff of the above sum of $_____, which under the terms of the agreement became due and payable on the _____ [*specify, e.g.,* first] day of each and every month during the period of the leasing, that plaintiff could, at his/her option, declare the entire agreement null and void and that all of defendant's rights thereunder would immediately cease and plaintiff would immediately be entitled to the return of the property.

7. Pursuant to the agreement, the sum of $_____ for the monthly rent for the month of _____ [*specify*] became due and payable by defendant to plaintiff on _____ [*date*].

Defendant did not pay the sum due on _____ [*same date*], and the plaintiff thereon elected to declare the agreement null and void and so notified defendant [in writing]; all of the defendant's rights under the agreement thereon ceased, and plaintiff immediately became entitled to possession of the property. [A copy of this notice is attached hereto as Exhibit A and made a part hereof.]

8. Thereafter, on or about _____ [*date*], plaintiff demanded of defendant the return of the above-mentioned property but defendant failed and refused, and continues to fail and refuse to return the same. [A copy of this demand (and defendant's refusal) is attached hereto as Exhibit(s) B (and C, respectively,) and made a part hereof.]

9-11. [*Allegation of damages. See § 150.50[1], Paragraphs 7-9.*]

[*Prayer. See § 150.50[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 150.50[1]; for discussion, see § 150.50[4].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action for damages for conversion brought by a letter (lessor) against a hirer (lessee) for breaking the conditions of a lease for personal property. It alleges:

- The existence of the bailment (Paragraph 5);
- The terms of the bailment (Paragraphs 6, 7); and
- Defendant's refusal to redeliver possession at a time when the bailor was entitled to possession (Paragraph 8) [*see Civ. Code § 1958*; *Wolfe v. Willard H. George, Inc. (1930) 110 Cal. App. 532, 535, 536, 294 P. 436]* .

For a discussion of the other allegations essential to this complaint, see *§ 150.50[3]*.

[3] Cross References

For cross references relating to leases of personal property, see *§ 150.58[3]*

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13-150 California Forms of Pleading and Practice--Annotated § 150.61

§ 150.61 Allegation--Conversion by Manual Taking--Against Tenant--Removal of Fixtures

[1] FORM Allegation--Conversion by Manual Taking--Against Tenant--Removal of Fixtures

1. On or about _____ [*date*], [*specify period of time, e.g.,* six months] prior thereto, defendant was in possession of [a portion of] the premises [, namely: the _____ (*describe premises e.g.,* bookstore)] as a tenant of plaintiff.

2. On or about _____ [*date*], defendant vacated the above-described premises and surrendered possession thereof to plaintiff.

3. When defendant vacated the premises, he/she removed and carried away certain parts thereof consisting of _____ [*describe, e.g.,* counters, showcases, electric fixtures, and signs], and in so doing defendant damaged the premises by _____ [*describe damage, e.g.,* ripping up a portion of the floor and by cracking and otherwise damaging the ceiling and walls of the store] in order to effect removal of such fixtures.

[2] Use of Form

The form of allegation in [1], *above,* is for use in a complaint by a landlord against a tenant to allege conversion consisting of the tenant's manual taking of fixtures.

The form alleges the tenancy (Paragraph 1), its termination (Paragraph 2), and the severance and removal of the fixtures by the tenant (Paragraph 3) [*see McNally v. Connolly (1886) 70 Cal. 3, 6, 11 P. 320]* . It also alleges that the removal of the fixtures caused injury to the property (Paragraph 3) [*see Civ. Code § 1019* (removal of fixtures)]. When appropriate, these allegations may be substituted for Paragraph 5 of § 150.50[1], with subsequent paragraphs renumbered accordingly.

[3] Cross References

For a discussion of what constitute fixtures and when they may be removed, as well as a form of complaint for a

declaration of rights as to the removability of fixtures, see *Ch. 334, Landlord and Tenant: Claims for Damages, § 334.94*

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13-150 California Forms of Pleading and Practice--Annotated § 150.62

§ 150.62 Complaint for Damages for Conversion--By Manual Taking--By Employer Against Bookkeeper--Embezzlement

[1] FORM Complaint for Damages for Conversion--By Manual Taking--By Employer Against Bookkeeper--Embezzlement

[*Caption, introduction. See § 150.50[1].*]

1. [*Capacity and residence of defendant. See § 150.50[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 150.50[1], Paragraph 2.*]

3. On or about _____ [*date*], plaintiff employed defendant as a bookkeeper for plaintiff's _____ [*specify type of business*] business, which is owned and operated by plaintiff at _____ [*address*], _____ [*city*], California, and defendant continued in such employment until on or about _____, [*date*]. During the course of his/her employment, defendant, as bookkeeper, was solely and completely in charge of keeping the books and business records of plaintiff's business, and plaintiff employed no other person for that purpose.

4. During the period of his/her employment, defendant, by means of false and fraudulent alteration and writing of checks drawn on plaintiff's business account, and by means of false, fraudulent, and deceptive entries in the check register, the journal, and other business records, misappropriated and converted to his/her personal use and possession, without plaintiff's knowledge or consent, the sum of $_____, all of which sum belonged to plaintiff.

5-7. [*Allegation of damages. See § 150.50[1], Paragraphs 7-9.*]

[*Prayer. See § 150.50[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 150.50[1]; for discussion, see § 150.50[4].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action for damages for conversion brought by an employer against a bookkeeper for the embezzlement of money. A relationship of more than mere creditor to debtor is required for conversion of money [*Watson v. Stockton Morris Plan Co. (1939) 34 Cal. App. 2d 393, 402, 403, 93 P.2d 855]* . For a discussion of the allegations essential to this complaint, see *§ 150.50[3]*.

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13-150 California Forms of Pleading and Practice--Annotated § 150.63

§ 150.63 Allegation--Conversion by Obtaining Property Through False Representation

[1] FORM Allegation--Conversion by Obtaining Property Through False Representation

1. On or about _____ [*date*], defendant, _____ [*describe action sought to be induced by defendant's representation, e.g.,* for the purpose of inducing plaintiff to sell to him/her on credit], falsely and fraudulently represented to plaintiff that _____ [*specify false representation, e.g.,* he/she was the agent for _____ (*name*) and was acting on his/her behalf in purchasing the above-described goods].

2. This representation was in fact false, and defendant knew of its falsity. The true facts were _____ [*specify*].

3. Plaintiff justifiably relied on defendant's representations and was thereby induced to part with and deliver to defendant the goods described above.

[2] Use of Form

The form of allegation in [1], *above,* is for use in a complaint for conversion when the acts constituting the conversion consisted of the defendant's false representations used in obtaining plaintiff's property. It alleges [*see Freedman v. Queen Ins. Co. (1961) 56 Cal. 2d 454, 457, 15 Cal. Rptr. 69, 364 P.2d 245]* :

- The false representations made and the action sought to be induced (Paragraph 1);
- That the representations were false (Paragraph 2); and
- That plaintiff detrimentally relied on the representations (Paragraph 3).

When appropriate these allegations may be substituted for Paragraph 5 of § 150.50[1], with subsequent paragraphs renumbered accordingly.

When the defendant has obtained possession of the property by fraud, plaintiff may pursue the claim in either a

conversion action or a fraud action [*see Amer v. Hightower (1886) 70 Cal. 440, 443* ; *see also Wendling etc. Co. v. Glenwood etc. Co. (1908) 153 Cal. 411, 417, 95 P. 1029* (burden of proof where property sold and plaintiff claims sale void for fraud)].

[3] Cross References

For a discussion and form of complaint for an action for fraud, see Ch. 269, *Fraud and Deceit*

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13-150 California Forms of Pleading and Practice--Annotated § 150.64

§ 150.64 Complaint for Damages for Conversion--By Wrongful Claim of Title Causing Forfeit of Judgment Lien

[1] FORM Complaint for Damages for Conversion--By Wrongful Claim of Title Causing Forfeit of Judgment Lien

[*Caption, introduction. See § 150.50[1].*]

1. [*Capacity and residence of defendant. See § 150.50[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 150.50[1], Paragraph 2.*]

3. On _____ [*date*] an action was brought by plaintiff against _____ [*name of defendant judgment debtor in underlying action*] entitled _____ [*name of underlying action*] in _____ [*name of court*], No. _____ in the files and records of the court. On _____ [*date*], judgment was entered for plaintiff in _____ [*specify where judgment was entered in court records, e.g.,* Vol. _____ of the Judgment Book, page _____] for the sum of $_____ as principal, $_____ as interest, and $_____ as costs. That judgment is still in full force and effect and remains _____ [wholly unsatisfied *or* unsatisfied in part, only $_____, having been paid on it].

4. On _____ [*date*], plaintiff secured a writ of execution in _____ [*name of court*]. The writ of execution was directed to the _____ [sheriff *or* marshal] of _____ County, California.

5. Pursuant to the writ of execution, the levying officer took into his/her possession _____ [*describe property levied upon*] belonging to _____ [*name of judgment debtor*].

6. On or about _____ [*date*], defendant served a third-party claim upon said levying officer pursuant to *Code of Civil Procedure Section 720.120*. Plaintiff did not post a bond and the above-described property was released

on or about _____ [*date*]. Plaintiff did petition the court under *Code of Civil Procedure Section 720.310* for a determination of the validity of the third party claim.

7. Defendant's third-party claim of title was in fact false. _____ [*Name of judgment debtor*] was, and still is, the owner of the property levied on.

8. Before the validity of defendant's third-party claim was determined, the property levied on became unavailable to satisfy plaintiff's judgment because _____ [*describe how property levied on became unavailable to plaintiff, e.g.,* _____ (*name of judgment debtor*) declared bankruptcy and the trustee in bankruptcy took possession of the property, sold it and applied the proceeds to the partial satisfaction of _____ (*name of judgment debtor*)'s debts].

8. [*Allegation of value of property levied on. See § 150.50[1], Paragraph 4.*]

9. [*Allegation of damages. See § 150.50[1], Paragraphs 7-9.*]

[*Prayer. See § 150.50[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 150.50[1]; for discussion, see § 150.50[4].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action for damages for conversion of goods caused by defendant's false claim of title over the goods which interfered with plaintiff's execution lien on the goods [*see Code Civ. Proc. § 720.110 et seq.*]. It alleges [*see Service v. Trombetta (1963) 212 Cal. App. 2d 313, 316, 28 Cal. Rptr. 68* ; *but see Glasband v. Sun State Music Distributors, Inc. (1968) 265 Cal. App. 2d 413, 417, 71 Cal. Rptr. 482* (wrongful claim of title which defeats writ of attachment as not actionable where underlying judgment lien subsequently invalidated)]:

- That plaintiff was a judgment creditor (Paragraphs 3, 5);
- That plaintiff secured an execution of property belonging to the judgment debtor (Paragraphs 4, 5); and
- That defendant made a false claim of title to the attached goods which resulted in the release of the attachment (Paragraphs 6, 7).

For a discussion of the other allegations essential for a complaint for conversion, see *§ 150.50[3]*.

[3] Cross References

For discussion and forms relating to attachment of property, see Ch. 62, *Attachment*

For discussion and forms of writs of execution and to third-party claims, see Ch. 254, *Executions and Enforcement of Judgments*

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13-150 California Forms of Pleading and Practice--Annotated § 150.65

§ 150.65 Complaint for Damages for Conversion--By Acquisition of Possession by Unlawful Means--Illegal Entry Into Garage to Repossess Automobile

[1] FORM Complaint for Damages for Conversion--By Acquisition of Possession by Unlawful Means--Illegal Entry Into Garage to Repossess Automobile

[*Caption, introduction. See § 150.50[1].*]

1. [*Capacity and residence of defendant. See § 150.50[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 150.50[1], Paragraph 2.*]

3. On or about _____ [*date*], plaintiff purchased a 19 _____ _____ [*describe*] automobile, California registration No. _____.

4. Plaintiff and defendant _____ [*name of finance company*] entered into a written agreement, attached hereto as Exhibit A and made a part hereof, for the purpose of financing the purchase of the above-described automobile.

5. Under the terms of the finance agreement, defendant _____ [*name of finance company*] had the power to retake possession of the automobile upon plaintiff's failure to make timely repayments on the loan as set forth in the finance agreement.

6. On or about _____ [*date*], defendant _____ [*name of finance company*] retook possession of the above-described automobile. At that time, plaintiff was in default on his/her repayments and defendant _____ [*name of finance company*] was entitled to possession of the automobile under the terms of the finance agreement.

7. At the time defendant _____ [*name of finance company*] retook possession of the automobile, the

automobile was _____ [*describe circumstances surrounding the illegal taking, e.g.,* locked in the garage attached to plaintiff's home]. In acquiring possession, defendant _____ [*describe illegal meansused to acquire possession, e.g.,* gained access to the garage by means of forcibly breaking the lock on the garage door].

8. [*Allegation of value of converted property. See § 150.50[1], Paragraph 4.*]

9-11. [*Allegation of damages. See § 150.50[1], Paragraphs 7-9.*]

[*Prayer. See § 150.50[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 150.50[1]; for discussion, see § 150.50[4].*]

[2] Use of Form

The form of complaint in [1], *above,* is for use in an action for damages for conversion of property by means of the use of an illegal entry to gain possession of the property. The form is based on the facts in *Henderson v. Security Nat. Bank (1977) 72 Cal. App. 3d 764, 768-770, 140 Cal. Rptr. 388* .

The form alleges that defendant had a right to the property (Paragraphs 5, 6) but that the defendant acquired possession by unlawful means (Paragraph 7) [*see Henderson v. Security Nat. Bank (1977) 72 Cal. App. 3d 764, 770, 771, 140 Cal. Rptr. 388]* .

For a discussion of the other allegations essential to a complaint for conversion, see *§ 150.50[3]*.

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13-150 California Forms of Pleading and Practice--Annotated § 150.66

§ 150.66 Complaint for Damages for Conversion--Against Sheriff or Marshal--Failure to Follow Attachment Procedures

[1] FORM Complaint for Damages for Conversion--Against Sheriff or Marshal--Failure to Follow Attachment Procedures

[*Caption, introduction. See § 150.50[1].*]

1. [*Capacity and residence of defendant. See § 150.50[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 150.50[1], Paragraph 2.*]

3. At all times herein mentioned, defendant was [and still is] the _____ [Sheriff of _____ County *or* Marshal of _____ District] and acted in this matter, as will be more particularly described herein, by and through his/her duly constituted and regularly acting deputies.

4. _____ [*Describe converted property and plaintiff's interest therein, e.g.,* On or about _____ (*date*), plaintiff occupied the premises at _____ (*address*), _____(*city*), California, and at that address maintained _____ (*describe, e.g.,* office furniture, office supplies, merchandise, and equipment)].

5. At the above time and place, _____ [*name of attaching creditor*], pursuant to a writ of attachment which was obtained by him/her in Action No. _____ in the files and records of _____'s [*specify court*], ordered the _____ [sheriff's *or* marshal's] office of that _____ [county *or* district] to attach the property of plaintiff as and for security of a claim in the sum of $_____.

6. Pursuant to the writ of attachment, on or about _____ [*date*], defendant attached the above-described property located at the above address and removed the property therefrom, to _____ [

describe warehouse] in _____ [*city*], California.

7. An inventory of the property belonging to plaintiff and taken under the attachment as hereinabove described appears in Exhibit A which is attached hereto and made a part hereof.

8. _____ [*Describe manner in which sheriff, marshal, or constable failed to conform to statutory requirements for attachment, e.g.,* Defendant agreed to pay the bills incurred for the storage of the property. Plaintiff is informed and believes and thereon alleges that defendant incurred a storage bill of $_____, which he/she refused to pay. As a result of his/her refusal to pay the storage bill, the property belonging to plaintiff and which was taken under the writ of attachment was sold to satisfy the storage charges. Defendant failed to protect plaintiff against the loss that he/she has sustained and failed to obtain a court order for the sale of the property belonging to the plaintiff. Plaintiff was never notified that the property was being sold to satisfy the storage charges incurred by defendant].

9. [*Allegation of value of converted property. See § 150.50[1], Paragraph 4.*]

10. [*Allegation of demand for return of property, if appropriate. See § 150.50[1], Paragraph 6.*]

11-13. [*Allegation of damages. See § 150.50[1] Paragraphs 7-9.*]

[*Prayer. See § 150.50[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The form of complaint in [1], *above,* is for use in an action for damages for conversion brought against a sheriff or marshal for failure to follow the statutory requirements in dealing with attached property, such as allowing attached property to be sold by a warehouse worker for storage charges (Paragraph 8) [*see Code Civ. Proc. §§ 17(b)(10), 262.7, 542(4*); *Reynolds v. Lerman (1956) 138 Cal. App. 2d 586, 592-594, 292 P.2d 559]* . For a discussion of the allegations essential to this complaint, see *§ 150.50[3]*.

A demand for return of the property would not be required if the goods had been disposed of by the defendant prior to the time plaintiff sought their return [*see Coy v. E.F. Hutton & Co. (1941) 44 Cal. App. 2d 386, 390, 391, 112 P.2d 639]* . In other situations, where defendant still has possession of the property, a demand for its return and a refusal to return is required before the action may be brought [*see Flennaugh v. Heinrich (1948) 89 Cal. App. 2d 214, 222, 200 P.2d 580]* .

[3] Verification

Although normally when a complaint is verified, the answer must also be verified, verification of the complaint in [1], *above,* will not compel a county official who is a defendant in his or her official capacity to verify the answer [*see Code Civ. Proc. § 446*; for further discussion of verification, *see § 150.50[4]*].

[4] Cross References

For a discussion of the requirements and procedures of attachment, see Ch. 62, *Attachment*

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13-150 California Forms of Pleading and Practice--Annotated § 150.67

§ 150.67 Complaint for Damages for Conversion--Against Agent--Failure to Pay Over Collected Funds

[1] FORM Complaint for Damages for Conversion--Against Agent--Failure to Pay Over Collected Funds

[*Caption, introduction. See § 150.50[1].*]

1. [*Capacity and residence of defendant. See § 150.50[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 150.50[1], Paragraph 2.*]

3. On or about _____ [*date*], plaintiff employed defendant as his/her agent to collect and receive from _____ [*names of debtors*] money due plaintiff for _____ [*specify nature of obligation*] for the purpose of remitting and paying the same to plaintiff as collected [and plaintiff agreed to allow defendant a commission of _____ percent on the amount so collected for his/her collection services].

4. Defendant, as plaintiff's agent, collected various sums of money set out in Exhibit A which is attached hereto and made a part hereof, amounting in all to the sum of $_____, which sum [less the amount of $_____, which defendant was entitled to retain as his/her commission in making such collections] was to be, and should have been, remitted and paid over to plaintiff as it was collected.

5. Plaintiff has duly demanded payment of the above sum of $_____ from defendant but defendant has failed and refused, and continues to fail and refuse, to make such payment.

6-8. [*Allegation of damages. See § 150.50[1], Paragraphs 7-9.*]

[*Prayer. See § 150.50[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 150.50[1]; for discussion, see § 150.50[4].*]

[2] Use of Form

The form of complaint in [1], *above,* is for use in an action for damages for conversion against an agent for collection who retains collected funds. It alleges that defendant was required to turn over collected funds to plaintiff (Paragraphs 3, 4) and that defendant, after demand, has failed and refused to do so (Paragraph 5) [*see Haigler v. Donnelly (1941) 18 Cal. 2d 674, 681, 117 P.2d 331* ; *see also Shahood v. Cavin (1957) 154 Cal. App. 2d 745, 748, 316 P.2d 700]* .

The existence of a fiduciary relationship (such as that of agent and principal) is necessary in an action for conversion of money received onbehalf of someone else [*see Watson v. Stockton Morris Plan Co. (1939) 34 Cal. App. 2d 393, 402, 93 P.2d 855]* .

For a discussion of other allegations essential to a complaint for conversion, see *§ 150.50[3]*.

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13-150 California Forms of Pleading and Practice--Annotated § 150.68

§ 150.68 Complaint for Damages for Conversion--Against Agent--Failure to Deposit Funds

[1] FORM Complaint for Damages for Conversion--Against Agent--Failure to Deposit Funds

[*Caption, introduction. See § 150.50[1].*]

1. [*Capacity and residence of defendant. See § 150.50[1]. Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 150.50[1], Paragraph 2.*]

3. On or about _____ [*date*], at _____ [*location*], plaintiff delivered to defendant the sum of $_____ on the express understanding and agreement that defendant should pay the same to _____ [*describe, e.g.,* _____ (*name of bank*), in payment of a note of which that _____ (*specify, e.g.,* bank) was then the holder and owner, made by plaintiff to _____ (*name*), on _____ (*date*)].

4. Defendant received such sum of $_____ and agreed to pay the same to the _____ [*specify, e.g.,* bank] as alleged above.

5. Disregarding his/her duty defendant wholly failed and neglected to pay the sum of $_____ to [*specify, e.g.,* the bank] or to plaintiff or to anyone for plaintiff or to expend that sum on behalf of plaintiff, but instead detained and converted the same to his/her own use.

6-8. [*Allegation of damages. See § 150.50[1], Paragraphs 7-9.*]

[*Prayer. See § 150.50[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 150.50[1]; for discussion, see § 150.50[4].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action for damages for conversion against an agent for the failure to deposit funds. For a discussion of the allegations essential to this complaint, see *§§ 150.50[3]* and *150.67[2]*.

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13-150 California Forms of Pleading and Practice--Annotated § 150.69

§ 150.69 Complaint for Damages for Conversion--Against Purchasing Agent--Appropriation of Funds

[1] FORM Complaint for Damages for Conversion--Against Purchasing Agent--Appropriation of Funds

[*Caption, introduction. See § 150.50[1].*]

1. [*Capacity and residence of defendant'. See § 150.50[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 150.50[1], Paragraph 2.*]

3. At all times herein mentioned, defendant was engaged in business as a purchasing agent in _____ [*city*], California, and agreed for consideration to be paid him/her to purchase goods, wares, and merchandise of various kinds from wholesalers and manufacturers in _____ [*city*] and from other business firms and corporations for retail dealers in other communities.

4. At all times herein mentioned, plaintiff was, and still is, engaged in business in the sale of _____ [*specify*] at _____ [*address*], _____ [*city*], California.

5. On or about _____ [*date*], plaintiff entered into a[n] _____ [oral *or* written] agreement with defendant whereby defendant was to purchase for plaintiff certain goods, wares, and merchandise consisting of _____ [*specify*] and plaintiff delivered to defendant the sum of $_____ which under their agreement was to be in payment of the goods to be purchased by defendant and the commissions to which defendant would be entitled on making such purchase.

6. Defendant has wholly failed and neglected to purchase the above-mentioned goods for plaintiff and has converted to his/her own use the money so received by him/her from plaintiff.

7-9. [*Allegation of damages. See § 150.50[1], Paragraphs 7-9.*]

[*Prayer. See § 150.50[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 150.50[1]; for discussion, see § 150.50[4].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action for damages for conversion brought against a purchasing agent forappropriating funds entrusted to him/her. For a discussion of the allegations essential to this complaint, see *§§ 150.50[3]* and *150.67[2]*.

For a form of allegation that may be used with this form if the agent obtained the property through false representation, see *§ 150.63*.

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13-150 California Forms of Pleading and Practice--Annotated § 150.70

§ 150.70 Complaint for Damages for Conversion--Against Attorney--Misappropriation of Client's Funds

[1] FORM Complaint for Damages for Conversion--Against Attorney--Misappropriation of Client's Funds

[*Caption, introduction. See § 150.50[1].*]

1. [*Capacity and residence of defendant. See § 150.50[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 150.50[1], Paragraph 2.*]

3. On or about _____ [*date*], defendant was an attorney at law licensed to practice in the State of California, and engaged in the practice of law in _____ [*city*], California.

4. On or about _____ [*date*], plaintiff employed defendant _____ [*describe nature of employment e.g.*, to collect from _____ (*name of debtor*), residing at _____ (*address*), the sum of $_____, which was then due and owing from _____ (*name of debtor*) to plaintiff for _____ (*describe nature of debt*), and for such services plaintiff agreed to pay defendant _____ (*specify, e.g.*, _____ percent of the amount which defendant should so collect)].

5. Defendant collected the sum of $_____ [in full settlement of the claim] and plaintiff then became the owner, entitled to the immediate possession of such sum [less the amount of _____ percent thereof which defendant was entitled to retain as a fee for his/her services].

6. [*Allegation of demand for return. See § 150.50[1], Paragraph 6.*]

7-9. [*Allegation of damages. See § 150.50[1], Paragraphs 7-9.*]

[*Prayer. See § 150.50[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 150.50[1]; for discussion, see § 150.50[4].*]

[2] Use of Form

The form of complaint in [1], *above,* is for use in an action for damages for conversion brought against an attorney for converting money collected for a client. It alleges [*see McRaven v. Dameron (1889) 82 Cal. 57, 62, 63, 23 P. 33* ; *see also In re Treadwell (1885) 67 Cal. 353, 357, 358, 7 P. 724]* :

- Defendant's employment (Paragraph 4);
- That defendant collected money on behalf of his/her client (Paragraph 5); and
- That defendant failed to deliver or account for the money to plaintiff (Paragraph 6).

For a discussion of other allegations essential to this complaint, see *§ 150.50[3]*.

[3] Cross References

For discussion and forms relating to disciplinary actions against attorney, see Ch. 71, *Attorney Discipline*

For discussion of client trust account management, see Ch. 72, *Attorney Practice and Ethics*

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13-150 California Forms of Pleading and Practice--Annotated § 150.71

§ 150.71 Complaint for Damages for Conversion--Against Factor--Conversion of Proceeds of Sale

[1] FORM Complaint for Damages for Conversion--Against Factor--Conversion of Proceeds of Sale

[*Caption, introduction. See § 150.50[1].*]

1. At all times herein mentioned, defendant was engaged in business as a _____[factor *or* commission merchant] in the sale of _____ [*specify type of goods*] with his/her place of business located at _____ [*address*], _____ [*city*], _____ County, California.

2. [*Fictitious name allegation, if appropriate. See § 150.50[1], Paragraph 2.*]

3. On or about _____ [*date*], plaintiff employed defendant to sell certain goods, wares, and merchandise for him/her consisting of _____ [*describe*] on commission and on such date delivered the goods, which were then and there the property of plaintiff, to defendant at his/her place of business for such purpose. At this time defendant agreed to use his/her best efforts to sell the above-described goods, wares, and merchandise forthe account of plaintiff and to transmit forthwith to plaintiff all sums received therefor, less the commissions to which defendant was entitled for selling the same.

4. Thereafter and prior to _____ [*date*], defendant sold the goods and received the sum of $_____ therefor on behalf of plaintiff and in a fiduciary capacity [as _____ (*if not clear from facts already alleged about the parties' relationship, state facts showing fiduciary relationship*)].

5. The just and proper charges of defendant for his/her commission on the sale of such goods, wares, and merchandise is the sum of $_____.

6. Despite plaintiff's demand, defendant failed and refused, and continues to fail and refuse, to pay over to plaintiff the balance of the proceeds of the sale of such goods, wares, and merchandise remaining after the deduction of the just charges of defendant for his/her commission, namely: $_____, and has converted such balance due to

his/her own use.

7-9. [*Allegation of damages. See § 150.50[1], Paragraphs 7-9.*]

[*Prayer. See § 150.50[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired See § 150.50[1]; for discussion, see § 150.50[4].*]

[2] Use of Form

The form of complaint in [1], *above,* is for use in an action for damages for conversion brought against a factor by his or her principal for converting the proceeds of a sale. It alleges [*see Lehmann v. Schmidt (1890) 87 Cal. 15, 20, 21, 25 P. 161]* :

- That defendant was employed as a factor to sell plaintiff's goods (Paragraph 3);
- That defendant sold the factored goods (Paragraph 4);
- That defendant's charges and commission are a sum certain (Paragraph 5); and
- That defendant, on demand, refused to remit to plaintiff the excess (Paragraph 6).

The existence of a fiduciary relationship (Paragraph 4) is necessary in an action for conversion of money received on behalf of someone [*see* Watson v. Stockton Morris Plan Co. (1939) 34Cal. App. 2d 393, 402, *93 P.2d 855]* . If not otherwise clear from the complaint, the optional phrase at the end of Paragraph 4 should be included to support the allegation of a fiduciary relationship.

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13-150 California Forms of Pleading and Practice--Annotated § 150.72

§ 150.72 Complaint for Damages for Conversion--Against Agent Wrongfully Appropriating Property and His/Her Principal

[1] FORM Complaint for Damages for Conversion--Against Agent Wrongfully Appropriating Property and His/Her Principal

[*Caption, introduction. See § 150.50[1].*]

1. [*Capacity and residence of defendant. See § 150.50[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 150.50[1], Paragraph 2.*]

3. At all times herein mentioned, defendant _____ [*name of agent*] was in the employ of defendant _____ [*name of principal*] as _____ [*describe type of relationship*] in _____ [*city*], California, receiving compensation for his/her services and subject to the authority and orders of defendant _____ [*name of principal*].

4. [*Allegation describing converted property and plaintiff's rights therein. See § 150.50[1], Paragraph 3.*]

5. On or about _____ [*date*], at _____ [*location*] defendant _____ [*name of agent*] acting as the agent of defendant _____ [*name of principal*], for and in his/her behalf, and acting within the course and scope of his/her authority and under instructions from defendant _____ [*name of principal*] _____ [*describe conversion, e.g.,* took and carried away the property described above from plaintiff, and defendants thereon converted the property to their own use].

6. [*Allegation of value of converted property. See § 150.50[1], Paragraph 4.*]

7-9. [*Allegation of damages. See § 150.50[1], Paragraphs 7-9.*]

[*Prayer. See § 150.50[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 150.50[1]; for discussion, see § 150.50[4].*]

[2] Use of Form

The form of complaint in [1], *above,* is for use in an action for damages for conversion of personal property brought against a principal and his or her agent who wrongfully appropriated the property. It alleges agency (Paragraphs 3, 5) [*see Civ. Code §§ 2295, 2299*] and defendant's conversion (Paragraph 4). Both the agent and the principal are potentially liable for conversion [*see Civ. Code §§ 2338, 2343*; *English v. Ralph Williams Ford (1971) 17 Cal. App. 3d 1038, 1049, 95 Cal. Rptr. 501]* . For a discussion of other allegations essential to this complaint, see *§ 150.50[3]*.

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13-150 California Forms of Pleading and Practice--Annotated § 150.73

§ 150.73 Allegation--Plaintiff as Assignee of Claim for Conversion

[1] FORM Allegation--Plaintiff as Assignee of Claim for Conversion

Prior to the commencement of this action and for a valuable consideration, _____ [*name of plaintiff's assignor*] transferred and assigned the claim sued on herein, and the demand represented thereby, and plaintiff ever since has been, and now is, the owner and holder thereof. [The assignment was made in writing, a copy of which is attached hereto as Exhibit A and made a part hereof.]

[2] Use of Form

The form of allegation in [1], *above*, is for use to allege the assignment of a claim for conversion to plaintiff. An assignee of a claim for conversion may bring an action despite the fact that he or she has no other interest in the property converted [*see Staley v. McClurken (1939) 35 Cal. App. 2d 622, 625, 96 P.2d 805]* .

When appropriate, this allegation may be added to the form of complaint in § 150.50, with the rest of the complaint alleging facts constituting the assignor's cause of action.

[3] Cross References

For discussion and forms of allegations and a complaint in an action based on assignment of claim, see Ch. 60, *Assignments*

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13-150 California Forms of Pleading and Practice--Annotated § 150.74

§ 150.74 Complaint for Damages for Conversion--Action by Possessory Lienholder Against Owner of Personal Property

[1] FORM Complaint for Damages for Conversion--Action by Possessory Lienholder Against Owner of Personal Property

[*Caption, introduction. See § 150.50[1].*]

1. [*Capacity and residence of defendant. See § 150.50[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 150.50[1], Paragraph 2.*]

3. At all times herein mentioned, plaintiff was, and still is, the owner of a _____ [*describe type of service business, e.g.,* garage engaging in automotive repairs] at _____ [*address*], _____ [*city*], California.

4. Plaintiff is informed and believes and thereon alleges that at all times hereinafter referred to defendant was, and still is, the owner of a certain _____ [*describe personal property, e.g.,* _____ (*specify brand name manufacturer*) watch].

5. On or about _____ [*date*], defendant delivered the above-mentioned property to plaintiff for the purpose of _____ [*describe, e.g.,* having it repaired] and agreed to pay plaintiff _____ [$_____ *or* the reasonable value] therefor.

6. Thereafter and prior to _____ [*date*], plaintiff _____ [*describe services rendered, e.g.,* repaired the watch] and thereon became entitled to the sum of $_____, his/her proper and reasonable charge [as agreed upon by defendant], and thereby acquired a lien on the property pursuant to the provisions of Section _____ [3051 *or* 3052a] of the Civil Code for the amount of his/her charge, and was entitled to retain possession of the property until the charge had been paid.

7. Thereafter, on or about _____ [*date*], defendant, without the permission of plaintiff and without paying plaintiff the amount of the charge for the services of plaintiff, took the property from plaintiff's possession and converted the same to his/her own use, to plaintiff's damage in the sum of $_____, the amount of plaintiff's lien.

8-10. [*Allegation of damages. See § 150.50[1], Paragraphs 7-9.*]

[*Prayer. See § 150.50[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 150.50[1]; for discussion, see § 150.50[4].*]

[2] Use of Form

The form of complaint in [1], *above,* is for use in an action for damages for conversion of personal property brought by a lienholder against the owner of the property who had wrongfully taken the property before the extinguishment of the lien. It alleges the existence of the possessory lien on the property (Paragraphs 4, 6) [*see Civ. Code §§ 3051, 3052a*] and that defendant owner converted the subject property (Paragraph 7) [*see Arques v. National Superior Co. (1945) 67 Cal. App. 2d 763, 767, 768, 155 P.2d 643* (permitting possessory lienholder supplying labor and materials to vessel to bring action for conversion against owner)]. However, *Civ. Code § 3051* is not applicable to a vessel as defined in *Harb. & Nav. Code § 21* or to a vehicle as defined in *Veh. Code § 670* which is subject to registration pursuant to that code.

For a discussion of the other allegations essential to this complaint, see *§ 150.50[3]*.

Recovery by a lienholder is limited to the lesser of (1) the amount secured plus compensation for expenditures in pursuit of the property or (2) the value of the property converted [*see Watson v. Stockton Morris Plan Co. (1939) 34 Cal. App. 2d 393, 400, 401, 93 P.2d 855* ; *Civ. Code § 3338*; *see also Irwin v. McDowell (1891) 91 Cal. 119, 122, 27 P. 601* (applicability of *Civ. Code § 3338* (lienor's rights in conversion) to chattel mortgage)].

[3] Cross References

For forms of notice and complaints to be used in perfecting and enforcing liens, see Ch. 342, *Liens and Wage Preferences*

Witkin, Summary of California Law, vol. 13, *Personal Property*, §§ 216-244 (10th ed. 2005)

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13-150 California Forms of Pleading and Practice--Annotated § 150.75

§ 150.75 Complaint for Damages [Prob. Code § 9869] for Conversion--Action by Personal Representative--Conversion of Estate Property

[1] FORM Complaint for Damages [Prob. Code § 9869] for Conversion--Action by Personal Representative--Conversion of Estate Property

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*name*], _____ [Executor of the Will *or* Administrator with Will Annexed *or* Administrator of the Estate of _____ (*name*)], Deceased,	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES (Conversion)
vs.	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
[*name*], Defendant.	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 150.50[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 150.50[1], Paragraph 2.*]

3. On _____ [*date*], plaintiff was _____ [*describe plaintiff's representative capacity, e.g.*, duly appointed as Executor of the Last Will and Testament of _____ (*name*), deceased; thereafter, on _____ [*date*], plaintiff was duly qualified as such Executor, at which time Letters Testamentary were duly issued, which Letters are still in full force and effect].

4. At the time of his/her death on _____ [*date*], the decedent was the owner and in possession of certain improved property located at _____ [*address*], _____ [*city*], _____ County, California, and he/she was likewise the owner and in possession of various items of personal property as referred to below.

5. Prior to _____ [*date*], defendant was residing in the premises described above pursuant to an agreement with plaintiff whereby defendant was to be permitted to occupy the property and to use the household furnishings therein located on payment of a reasonable rental therefor.

6. On or about _____ [*date*], defendant, wrongfully, in bad faith, and without plaintiff's knowledge or consent, removed numerous articles of personal property from the premises, converted them to his/her own use, and concealed the same from plaintiff; a list and description of those articles [insofar as they are known to plaintiff at this time] is attached hereto as Exhibit A and made a part hereof. [This complaint will be amended to include other such articles which defendant has converted to his/her own use and which are unknown to plaintiff at the time of the filing of this complaint.]

7. Each and all of the above-mentioned articles were the property of the above decedent at the time of his/her death; [under and by virtue of the terms and conditions of the Last Will and Testament of deceased,] all of the personal property of decedent is required to be [converted into cash and] distributed to persons other than defendant.

8. Plaintiff, as the _____ [*describe plaintiff's representative capacity, e.g.,* Executor of the Last Will and Testament of deceased] was and is entitled to the possession of each and all of the above-mentioned articles at all times subsequent to the death of deceased, and defendant, in removing, converting, and concealing the same, acted without right or justification.

9. Immediately on discovery of the foregoing facts, on or about _____ [*date*], plaintiff demanded the immediate return of the above-mentioned property by defendant, but although such demand has often been repeated, defendant failed and refused, and continues to fail and refuse, to return the same to plaintiff.

10. Plaintiff is informed and believes and thereon alleges that the value of the personal property is and was $_____.

11-13. [*Allegation of damages. See § 150.50[1], Paragraphs 7-9.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For double the amount of damages in the sum of $_____, as provided for in *Section 612 of the Probate Code*;

2. For interest at the legal rate on the foregoing sum pursuant to *Section 3336 of the Civil Code* from and after _____ [*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 150.50[1]; for discussion, see § 150.50[4].*]

[2] Use of Form

The form of complaint in [1], *above,* is for use in an action for damages for conversion of property of an estate after a testator's death. It alleges [*see Prob. Code § 9869* (liability for twice the value of the property for wrongfully taking, concealing, or disposing of estate property)]:

- Plaintiff's representative capacity (Paragraph 3) [*see Ham v. Henderson (1875) 50 Cal. 367, 369]* ;

- That decedent owned and was entitled to possession of such property at the time of his or her death (Paragraph 4) [*see Crill v. Doyle (1879) 53 Cal. 713, 715]* ; and

- That plaintiff is entitled to possession of the converted goods (Paragraph 8).

The form further alleges that defendant, in bad faith, concealed and refused to disclose the whereabouts of the converted goods (Paragraphs 6, 9).

Pleading requirements for alleging the plaintiff's interest are lenient. It is sufficient to plead that the property was owned by the estate [*see Ham v. Henderson (1875) 50 Cal. 367, 369]* or that plaintiff was in possession at the time of the conversion without alleging the representative capacity [*see Munch v. Williamson (1864) 24 Cal. 167, 171]* . However, plaintiff must prove decedent's right to possession at the time of death [*see Crill v. Doyle (1879) 53 Cal. 713, 715]* .

[3] Cross References

For an alternative allegation that an action was instituted by the personal representative for the benefit of the estate and orders approving a compromise of a claim by an estate against a third party, see Ch. 454, *Probate: Claims Against the Estate* .

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13-150 California Forms of Pleading and Practice--Annotated § 150.76

§ 150.76 Complaint for Damages for Conversion--By Refusal to Redeliver--By Assignee of Property

[1] FORM Complaint for Damages for Conversion--By Refusal to Redeliver--By Assignee of Property

[*Caption, introduction. See § 150.50[1].*]

1. [*Capacity and residence of defendant. See § 150.50[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 150.50[1], Paragraph 2.*]

3. On or about _____ [*date*], _____ [*name of assignor*] was the owner and in possession of _____ [*describe property, e.g.,* Certificate No. _____ for _____ (*number*) shares of the _____ (*type of stock*) of the _____ (*name*) Corporation].

4. On that date, _____ [*name of assignor*] delivered the _____ [*describe property, e.g.,* certificate and shares of stock] to defendant under an agreement under the terms of which defendant was to redeliver the same to _____ [*name of assignor*] or to his/her assigns on demand.

5. Thereafter, on or about _____ [*date*], _____ [*name of assignor*] duly assigned to plaintiff all his/her right, title, and interest in the _____ [*describe property, e.g.,* certificate and shares of stock].

6. Thereafter, on or about _____ [*date*], at _____ [*give address or other location*] plaintiff duly demanded from defendant delivery of _____ [*describe property, e.g.,* the certificate and shares of stock], but defendant failed and refused, and continues to fail and refuse, to deliver same to plaintiff and has converted the stock to his/her own use. [A copy of plaintiff's demand (and defendant's refusal) is attached hereto as Exhibit(s) A (and B, respectively,) and made a part hereof.]

7. [*Allegation of value of property. See § 150.50[1], Paragraph 4.*]

8-10. [*Allegation of damages. See § 150.50[1], Paragraphs 7-9.*]

[*Prayer. See § 150.50[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 150.50[1]; for discussion, see § 150.50[4].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action for damages for conversion brought by an assignee of property against one in possession for refusal to deliver possession of the property. It alleges:

- That defendant obtained the property from the assignor (Paragraph 4);
- That the rights to the property were assigned to plaintiff by the assignor (Paragraph 5); and
- That plaintiff demanded possession of the property and was refused (Paragraph 6).

For a discussion of the other allegations necessary to this complaint, see *§ 150.50[3]*.

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13-150 California Forms of Pleading and Practice--Annotated § 150.77

§ 150.77 Allegation--Excuse for Failure to Make Demand for Return of Property

[1] FORM Allegation--Excuse for Failure to Make Demand for Return of Property

Plaintiff did not make a demand on defendant for the return of the above-mentioned goods because, prior to the date plaintiff sought the return of the property, defendant _____ [*describe circumstances excusing the making of a demand for return, e.g.,* sold all of the property].

[2] Use of Form

The form of allegation in [1], *above,* is for use to allege facts that relieve plaintiff of the requirement of making a demand for the return of the property. Demand for the return of goods is not required where the demand would be futile [*see Scott's V. F. Exch. v. Growers Refrigeration Co., Inc. (1947) 81 Cal. App. 2d 437, 450, 184 P.2d 183 , disapproved on other grounds, Hischemoeller v. Nat. Ice etc. Storage Co. (1956) 46 Cal. 2d 318, 328, 294 P.2d 433]* or where defendant has sold or consumed the property [*see Metzler v. Foster Holding Co. (1936) 5 Cal. 2d 278, 282, 54 P.2d 447* ; for discussion of the demand requirement, *see § 150.13[7]*]. Although no case requires this allegation, if the complaint does not otherwise allege the facts excusing demand, this allegation should be substituted for Paragraph 6 of § 150.50[1].

Counsel should also note that it is advisable to make a demand for return of the property before bringing the action even if suchdemand is not required so as to remove this as a possible issue of contention.

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13-150 California Forms of Pleading and Practice--Annotated § 150.78

§ 150.78 Allegation--Request for Injunctive Relief

[1] FORM Allegation--Request for Injunctive Relief

No adequate remedy exists at law for the injuries suffered by plaintiff herein, insofar as further harm will result to plaintiff from defendant's wrongful act of conversion absent injunctive relief. If this court does not grant injunctive relief of the type and for the purpose specified herein, plaintiff will suffer irreparable injury. Therefore, plaintiff requests the following injunctive relief: _____ [*specify nature and extent of injunctive relief sought, e.g.*, an order enjoining defendant from using plaintiff's molds in making and selling jewelry and requiring defendant to destroy all molds, designs, sketches, and representations of plaintiff's work in defendant's possession].

[2] Use of Form

The form of allegation in [1], *above*, is for use to seek injunctive relief on the ground that the damages requested provide an inadequate remedy at law and irreparable injury will otherwise occur to the plaintiff. A defendant owes a duty to the plaintiff to avoid further harm [*see § 150.14*], and it may be necessary for the plaintiff to obtain an injunction to prevent further damage to the plaintiff [*see Gladstone v. Hillel (1988) 203 Cal. App. 3d 977, 988-990, 250 Cal. Rptr. 372* ; *but see Bonito Boats v. Thunder Craft Boats (1989) 489 U.S. 141, 167-168, 109 S. Ct. 971, 103 L. Ed. 2d 118* (apparently abrogating *Gladstone* to the extent that it upheld injunction for violation of anti-molding statute set forth in *Bus. & Prof. Code § 17300*)].

When appropriate, this allegation may be used in any of the complaints in this chapter. When it is used in a complaint, counsel must also insert a request for injunctive relief in the prayer.

[3] Cross References

For discussion, a procedural checklist, and forms regarding injunctions generally, see Ch. 303, *Injunctions*

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[Reserved]

§§ 150.79[Reserved]

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13-150 California Forms of Pleading and Practice--Annotated § 150.90

§ 150.90 Affirmative Defense--Defendant Took Possession as Personal Representative and in Good Faith Belief That Property Was Part of Decedent's Estate [Prob. Code § 9651]

[1] FORM Affirmative Defense--Defendant Took Possession as Personal Representative and in Good Faith Belief That Property Was Part of Decedent's Estate [Prob. Code § 9651]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. From and after _____ [*date*], and at the time of the acts complained of, this defendant was[, and is,] the duly appointed, qualified, and acting _____ [administrator of the estate (with will annexed) *or* executor of the will] of _____ [*name*], deceased. [A copy of the letters _____ (testamentary *or* of administration) is attached hereto marked Exhibit _____ and made a part hereof].

2. When this defendant took possession of the _____ [*specify, e.g.,* stock certificates], he/she/it did so as the acting and qualified personal representative of the estate of _____ [*name of decedent*] and in the good faith belief that the property was part of that estate[, after having made reasonable efforts to determine the true nature of, and title to, those _____ (*specify, e.g.,* certificates)].

[2] Use of Form

The form of affirmative defense in [1], *above,* is for use by the personal representative of a decedent's estate in an answer to an action for damages for conversion of property which the personal representative took in the good faith belief that it was part of the decedent's estate [*see Prob. Code § 9651*]. Because *Prob. Code § 9651(a)* provides immunity for both civil and criminal liability for taking possession of either real or personal property, this form may also be used in an action for damages for trespass to real property.

Prob. Code § 9651(b) requires that the personal representative make reasonable efforts to determine the true nature of, and title to, the property taken. The section has not yet been judicially interpreted, and it is not clear whether reasonable efforts are a necessary basis of the good faith belief in the estate's superior claim to the property.

For discussion of the representative's entitlement to issues, rents, and profits from the property, as well as expenses and compensation for preservation of the property, see *§ 150.20*.

[3] Cross References

For more detailed discussion and an alternative form, see *California Probate Practice, § 10.03* (Matthew Bender)

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13-150 California Forms of Pleading and Practice--Annotated § 150.91

§ 150.91 Affirmative Defense--Defendant Took Possession of Property in Defense of Own Interests

[1] FORM Affirmative Defense--Defendant Took Possession of Property in Defense of Own Interests

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that defendant took possession of the property that is the subject of this cause of action for the purpose of defending himself/herself from _____ [*specify, e.g.,* physical harm *or other interests*], in the reasonable belief that plaintiff intended to harm him/her in that manner, and that the harm could safely be prevented only by taking the property.

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use by a defendant in an answer to a cause of action for conversion when the defendant wishes to allege that he or she took the property that is the subject of the action for the purpose of defending himself or herself from being harmed by the plaintiff, when defendant reasonably believed that plaintiff intended harm, and that he or she could safely prevent the harm only by taking the property [*see Church of Scientology v. Armstrong (1991) 232 Cal. App. 3d 1060, 1072-1073, 283 Cal. Rptr. 917]* . For further discussion, see *§ 150.17[3]*.

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§ 160.syn Synopsis to Chapter 160: CORPORATIONS: CAPACITY

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§ 160.03 California Points and Authorities

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§ 160.12 Foreign Corporations

[1] Transacting Intrastate Business

[a] Test

[b] Failure to Qualify

[c] Forfeiture of Qualification

[2] Subject to California Law

[a] Determining Factors

[b] Choice of California Law in Specified Agreements

[c] Business and Shareholder Characteristics

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§ 160.13 Suspension or Forfeiture of Corporate Powers

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[1] Capacity

[2] Foreign Corporations

[a] Subject to California Law

[b] Transacting Intrastate Business

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[1] Capacity

[a] Failure to Assert

[b] Federal Case

[c] Nonqualified Foreign Corporation

[d] Suspension or Forfeiture of Powers for Nonpayment of Taxes

[2] Choice of Law; Foreign Corporation Not Subject to California Registration

[3] Fictitious Business Name

[4] Legal Representation

[5] Standing

[6] Suspension of Powers for Failure to File Biennial Information Statement

§ 160.33 Law Reviews

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§§ 160.35-160.49 [Reserved]

§ 160.50 Allegation of Capacity and Principal Place of Business [Code Civ. Proc. § 395.5]--Domestic Corporation

[1] FORM

[2] Use of Form

[3] Legal Capacity of Corporations

[4] Venue

[5] Cross References

[6] State Statutes

[7] Decisions

§ 160.51 Allegation of Capacity and Principal Place of Business [Code Civ. Proc. § 395.5]--Foreign Corporation Transacting Intrastate Business in California [Corp. Code §§ 170, 191]

[1] FORM

[2] Use of Form

[3] Failure of Foreign Corporation to Qualify

[4] Cross References

[5] California Points and Authorities

[6] California Legal Forms

[7] State Statutes

[8] Decisions

[9] Text References

§ 160.52 Allegation of Capacity [Code Civ. Proc. § 395]--Foreign Corporation Not Authorized to Transact Intrastate Business in California

[1] FORM

[2] Use of Form

[3] Venue

[4] State Statutes

[5] Decisions

[6] Cross References

§ 160.53 Allegation of Applicability of General Corporation Law to Foreign Corporation [Corp. Code § 2115]

[1] FORM

[2] Use of Form

[3] Nominally Foreign Corporations

[a] How Status Acquired

[b] Parent Corporations

[c] When Status Commences and Ceases

[d] Applicability of General Corporation Law

[e] Exemption From Status

[4] State Statutes

[5] Text References

§ 160.54 Affirmative Defense--Plaintiff Foreign Corporation Is Not Qualified to Transact Intrastate Business in California [Corp. Code §§ 191, 2105, 2203(c)]

[1] FORM

[2] Use of Form

[3] Foreign Corporations

[a] Transacting Intrastate Business

[b] Qualification Requirement

[e] Failure to Qualify

[4] Cross References

[5] California Points and Authorities

[6] State Statutes

[7] Decisions

[8] Text References

§ 160.55 Summary Adjudication of Cause of Action or Affirmative Defense [Code Civ. Proc. § 437c(f)]--Notice of Motion--By Plaintiff or Defendant--Based on Whether Defendant Foreign Corporation Is Subject to Corp. Code § 2115

[1] FORM

[2] Use of Form

[3] Possibility of Declaratory Relief

[4] California Points and Authorities

[5] State Statutes

[6] Text References

[7] Cross References

§ 160.56 Summary Adjudication of Cause of Action or Affirmative Defense [Code Civ. Proc. § 437c(f)]--Order Declaring That Corporation Is or Is Not Subject to Corp. Code § 2115

[1] FORM

[2] Cross References

§ 160.57 Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--To Declare Defendant Is Foreign Corporation Subject to Corp. Code § 2115

[1] FORM

[2] Use of Form

[3] Cross References

[4] California Points and Authorities

[5] State Statutes

§ 160.58 Proceedings to Declare Corporation Not Subject to Corp. Code § 2115 [Corp. Code § 2115(e)]--Petition

[1] FORM

[2] Use of Form

[3] How Nominally Foreign Status Terminated

[4] Propriety of Proceeding by Petition

[5] State Statutes

[6] Cross References

§ 160.59 Proceedings to Declare Corporation Not Subject to Corp. Code § 2115 [Corp. Code § 2115(e)]--Order

[1] FORM

[2] Cross References

§ 160.60 Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Corporate Plaintiff's Powers Suspended or Forfeited for Failure to Comply With Tax Statutes [Rev. & Tax. Code §§ 23301, 23301.5]

[1] FORM

[2] Use of Form

[3] Failure to Pay Tax

[4] Failure to File Tax Return

[5] Relief From Suspension or Forfeiture

[6] Effect

[7] Exceptions From Rule of Incapacity

[8] Cross References

[9] California Points and Authorities

[10] State Statutes

[11] Decisions

[a] Effect of Revivor

[b] Suspension or Forfeiture

[12] Text References

§ 160.61 Summary Adjudication of Cause of Action or Affirmative Defense [Code Civ. Proc. § 437c(f)]--Notice of Motion--By Plaintiff or Defendant--Lack of Capacity to Prosecute or Defend Action Because of Suspension or Forfeiture of Corporate Powers for Noncompliance With Tax Statutes [Rev. & Tax. Code §§ 23301, 23301.5]

[1] FORM

[2] Use of Form

[3] Cross References

[4] California Points and Authorities

[5] Decisions

§ 160.62 Summary Adjudication of Cause of Action or Affirmative Defense [Code Civ. Proc. § 437c(f)]--Order--Powers of Corporation Suspended or Forfeited--Corporation Lacks Power to Prosecute or Defend

[1] FORM

[2] Cross References

§ 160.63 Summary Adjudication of Cause of Action or Affirmative Defense [Code Civ. Proc. § 437c(f)]--Notice of Motion--By Plaintiff or Defendant--Lack of Capacity to Participate in Any Litigation Activities Because of Suspension of Corporate Powers for Failure to File Required Information Statement [Corp. Code §§ 1502, 2205]

[1] FORM

[2] Use of Form

[3] Contents of Information Statement; Notice of Deliquency

[4] Suspension of Corporate Powers, Rights, and Privileges

[5] California Points and Authorities

[6] Decisions

[7] Cross References

§ 160.64 Summary Adjudication of Cause of Action or Affirmative Defense [Code Civ. Proc. § 437c(f)]--Order--Powers of Corporation Suspended for Failure to File Information Statement--Corporation Lacks Capacity to Participate in Any Litigation Activities [Corp. Code §§ 1502, 2205]

[1] FORM

[2] Cross References

§ 160.65 Continuance [Cal. Rules of Ct., Rule 3.1332(a)] to Obtain Reinstatement of Corporation Whose Powers Are Suspended or Forfeited Under Tax Statutes [Rev. & Tax. Code § 23305 et seq.]--Notice of Motion

[1] FORM

[2] Use of Form

[3] Application for Relief From Voidability

[4] California Points and Authorities

[5] State Statutes

[6] Decisions

[7] Cross References

§ 160.66 Continuance [Cal. Rules of Ct., Rule 3.1332(a)] to Obtain Reinstatement of Corporation Whose Powers Are Suspended or Forfeited Under Tax Statutes [Rev. & Tax. Code § 23305 et seq.]--Declaration in Support of Motion [Code Civ. Proc. § 2009]

[1] FORM

[2] Use of Form

[3] Cross References

§ 160.67 Continuance [Cal. Rules of Ct., Rule 3.1332(a)]--Order Granting Continuance to Obtain Reinstatement of

Corporation Whose Powers Are Suspended or Forfeited Under Tax Statutes

[1] FORM

[2] Cross References

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Chapter 160 CORPORATIONS: CAPACITY
PART I. SCOPE

14-160 California Forms of Pleading and Practice--Annotated § 160.01

§ 160.01 Scope of Chapter

This chapter contains discussion and forms that deal with the capacity in which a corporation may sue or be sued. In addition to coverage of the disabilities that may be imposed on a corporation for failure to comply with various statutory requirements, the capacity or status of certain foreign corporations that are subject to California law is treated in this chapter. Jurisdiction over foreign corporations pursuant to California's "long-arm" statute [*Code Civ. Proc. § 410*], the related doctrine of forum non conveniens, and motions to quash service for lack of personal jurisdiction are discussed in Ch. 323, *Jurisdiction: Personal* . For forms and discussion relating to the requirements for actually serving summons on foreign corporations, see Ch. 518, *Service of Summons and Papers* . The subject of venue in actions involving both domestic and foreign corporations is covered in Ch. 571, *Venue* .

This chapter also includes allegations of corporate capacity and principal place of business [*see §§ 160.50 -160.52*], and an allegation that the defendant is a foreign corporation governed by *Corp. Code § 2115* (a "nominally foreign corporation" for the purposes of this chapter) [*see § 160.53*]. Also included is an affirmative defense to a foreign corporation's right to maintain an action in California based on its nonqualification to transact intrastate business [*see § 160.54*].

Several forms for motions, actions, and proceedings relating to a foreign corporation's commencement and cessation of nominally foreign status are also included [*see §§ 160.55 -160.59*].

Pleas and motions concerning the capacity of corporations that have suffered suspension or forfeiture of corporate powers under the tax statutes comprise the final group of forms in this part [*see §§ 160.60 -160.67*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGeneral OverviewCivil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedurePartiesCapacity of PartiesAgents

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14-160 California Forms of Pleading and Practice--Annotated § 160.02

§ 160.02 Cross References

For a form for specific denial of plaintiff's corporate status, see Ch. 26, *Answers* .

For an allegation of capacity and principal office of a church incorporated in California, see *Ch. 110, Churches and Religious Organizations, § 110.50*.

For an allegation of capacity and principal office of an unincorporated nonprofit association, see *Ch. 110, Churches and Religious Organizations, § 110.51*.

For a form alleging diversity of citizenship in an action involving a corporation, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

For a notice of motion to quash service of summons for lack of personal jurisdiction or inconvenient forum, see Ch. 323, *Jurisdiction: Personal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipBusiness EntitiesCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePartiesCapacity of PartiesGeneral Overview

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14-160 California Forms of Pleading and Practice--Annotated § 160.03

§ 160.03 California Points and Authorities

For memoranda of points and authorities supporting and opposing motions to abate an action, see California Points and Authorities, Ch. 10, *Abatement* (Matthew Bender)

For memoranda of points and authorities supporting and opposing motions relating to a foreign corporation transacting business in California, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeSupporting Memoranda

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14-160 California Forms of Pleading and Practice--Annotated §§ 160.04-160.09

[Reserved]

§§ 160.04[Reserved]

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§ 160.10 Governing Statutes

The transaction of intrastate business by a foreign corporation, the requirement that foreign corporations be qualified in California, and the further requirement relating to the submission of biennial reports, are governed by *Corp. Code §§ 191, 2105-2107, 2203-2206*. The status of foreign corporations having such significant involvement with California that they may be deemed subject to certain provisions of the General Corporation Law is governed by *Corp. Code §§ 171*, and *2115*. Suspension and/or forfeiture of a foreign or domestic corporation's right to maintain or defend against a lawsuit by reason of its failure to pay taxes is governed by *Rev. & Tax. Code §§ 23301-23305e*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawForeign BusinessesQualificationsTax LawState & Local TaxesFranchise TaxGeneral Overview

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14-160 California Forms of Pleading and Practice--Annotated § 160.11

§ 160.11 Capacity to Sue and Be Sued

Because a corporation has all the powers of a natural person in carrying out its business activities [*Corp. Code § 207*], it follows that it has the capacity to sue and be sued in any court [*see also Code Civ. Proc. § 17*(defining person as including a corporation)]. Generally, in court matters, a corporation can act only through licensed attorneys and can appear neither in propria persona nor by an officer who is not an attorney [*Himmel v. City Council (1959) 169 Cal. App. 2d 97, 100, 336 P.2d 996* ; *Paradise v. Nowlin (1948) 86 Cal. App. 2d 897, 898, 195 P.2d 867]* .

In small claims court, a corporation may appear only through a regular employee or a duly appointed or elected officer or director who is employed, appointed, or elected for purposes other than solely representing the corporation in small claims court [*Code Civ. Proc. § 116.540(b)*; *see Code Civ. Proc. § 116.540(i)* (special rules for association managing common interest development)]. Except as otherwise provided, no attorney may take part in the conduct or defense of a small claims action [*Code Civ. Proc. § 116.530(a)*]. Two of the exceptions to this prohibition include if the attorney is a party or if the attorney is appearing to maintain or defend an action by or against a professional corporation of which he or she is an officer or director and of which all other officers and directors are attorneys [*Code Civ. Proc. § 116.530(b)*]. For further discussion of small claims procedures, see Ch. 526, *Small Claims* .

A dissolved corporation has a capacity to sue and defend, and otherwise continues to exist, but only for the limited purpose of winding up its affairs [*Corp. Code § 2010(a)*]. An action or proceeding to which a corporation is a party does not abate by the dissolution of the corporation or the proceedings for winding up and dissolution [*Corp. Code § 2010(b)*]. For a detailed discussion of the capacity of a dissolved corporation, and forms related to such corporations, see Ch. 170, *Corporations: Dissolution and Winding Up.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedurePartiesCapacity of PartiesAgentsGovernmentsCourtsSmall Claims Courts

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14-160 California Forms of Pleading and Practice--Annotated § 160.12

§ 160.12 Foreign Corporations

[1] Transacting Intrastate Business

[a] Test

A foreign corporation, including a business association organized as a trust under the laws of a foreign jurisdiction [*Corp. Code §§ 170, 171*] transacts intrastate business in California when it enters into repeated and successive transactions of its business in California, other than interstate or foreign commerce [*Corp. Code § 191(a)*]. Although the question of whether a corporation is transacting intrastate business will require a factual analysis of its activities in California, *Corp. Code § 191(b)-(d)* furnishes examples of a corporation's status and activities, one or more of which will *not* constitute the transaction of intrastate business by corporations generally and by lending institutions in particular. The activities listed in *Corp. Code § 191(b)-(d)* are not intended to exclude other activities that may not constitute the transaction of intrastate business [*Corp. Code § 191(c), (d)*; *see, e.g., United Systems of Arkansas, Inc. v. Stamison (1998) 63 Cal. App. 4th 1001, 1007, 74 Cal. Rptr. 2d 407* (submitting bid in response to request for quotation by DMV was not "transacting intrastate business" and out-of-state bidder could maintain suit challenging award of contract to another bidder without obtaining certificate of qualification)].

[b] Failure to Qualify

The failure of a foreign corporation to qualify to transact intrastate business by first obtaining a certificate of qualification from the Secretary of State pursuant to *Corp. Code § 2105* will bar that corporation from maintaining any action or proceeding in any court of California on any of the intrastate business so transacted if the action or proceeding is commenced prior to compliance with the certification requirements. The corporation remains under this disability until it has complied with the provisions of *Corp. Code § 2105*, has paid to the Secretary of State a penalty in addition to the fees due for filing the statement and designation required by *Corp. Code § 2105*, and has filed with the clerk of the court in which the action is pending receipts showing the payment of these fees and penalty and all franchise taxes and other taxes on business or property in California that should have been paid for the period during which it transacted intrastate business [*Corp. Code § 2203(c)*; *see also Corp. Code § 13404.5* (qualification requirements for foreign professional corporations)].

Corp. Code § 2203(c), however, does not prevent a corporation that has failed to comply with *Corp. Code § 2105* from defending an action brought against it [*see Mediterranean Exports, Inc. v. Superior Court (1981) 119 Cal. App. 3d 605, 614, 174 Cal. Rptr. 169]* . Furthermore, a foreign corporation transacting intrastate business that has failed to qualify may *commence* an action in state court [*United Medical Management Ltd. v. Gatto (1996) 49 Cal. App. 4th 1732, 1739, 57 Cal. Rptr. 2d 600* ; *Ward Land etc. Co. v. Mapes (1905) 147 Cal. 747, 753, 82 P. 426]* . The act of *maintaining* an action commenced prior to qualification requires compliance with *Corp. Code § 2203(c)*. However, a foreign corporation that qualifies to transact intrastate business after transacting, but before commencing an action on, intrastate business, may maintain the action without complying with *Corp. Code § 2203(c)* as long as the Franchise Tax Board has not suspended the corporation for failure to pay taxes before it commences the action [*United Medical Management Ltd. v. Gatto (1996) 49 Cal. App. 4th 1732, 1742, 57 Cal. Rptr. 2d 600]* .

Any foreign corporation that transacts intrastate business and does not hold a valid certificate from the Secretary of State is deemed to consent to the jurisdiction of California courts in any civil action arising in California in which it is named a defendant [*Corp. Code § 2203(a)*].

[c] Forfeiture of Qualification

A foreign corporation, other than an association, qualified to transact intrastate business in California that does not file the annual statement required by *Corp. Code § 2117* is subject to a monetary penalty and, after continuous failure, to suspension of its California privileges pursuant to *Corp. Code §§ 2204, 2205* [*Corp. Code § 2206(a)*].

A foreign corporation that is qualified for the transaction of intrastate business but that is merged into another corporation is referred to as a "foreign disappearing corporation," which surrenders its right to transact intrastate business automatically by the filings required by *Corp. Code § 1108(c)* if the surviving corporation is a domestic corporation, or by *Corp. Code § 1108(d)* if the surviving corporation is a foreign corporation [*Corp. Code § 1108(c), (e)*].

A qualified foreign corporation that converts into another foreign corporation (for instance, a Nevada corporation that becomes a Delaware corporation) cannot lose its capacity to do business, or to appear in legal proceedings, in California either (1) because of noncompliance with *Corp. Code § 1157*, governing conversion of certain entities to or from status as a corporation, since that code section does not apply to a foreign corporation's conversion into another foreign corporation, or (2) because of a failure to follow the notification procedure in *Corp. Code § 2107* for a change in name or address of a qualified foreign corporation, since that code section does not require (nor does any other statute require) notification of a mere change in the state of incorporation [*Capital Gold Group, Inc. v. Nortier (2009) 176 Cal. App. 4th 1119, 1130-1133, 98 Cal. Rptr. 3d 439*].

[2] Subject to California Law

[a] Determining Factors

Although states traditionally have been reluctant to attempt to regulate the "internal affairs" of foreign corporations, it is clear that in some cases the incorporation under the enabling statute of a foreign jurisdiction only creates a nominally foreign corporation if that corporation's activities are largely conducted in a sister state. Thus, the General Corporation Law provides that a foreign corporation (other than a foreign association or a foreign nonprofit corporation, but including a foreign parent corporation even though it does not itself transact intrastate business) transacting intrastate business [*see Corp. Code § 191* (definition of transacting intrastate business)] is a foreign corporation subject to *Corp. Code § 2115* if the average of its California property factor, payroll factor, and sales factor is more than 50 percent during its latest full income year and if more than one half of its outstanding voting securities are held of record by persons having addresses in California appearing on the books of the corporation on the record date for the latest meeting of shareholders held during its latest full income year (or if no meeting was held during that year, on the last

day of the latest full income year) [*Corp. Code § 2115(a)*]. In making the calculation regarding outstanding shares, any securities held to the knowledge of the issuer in the names of broker-dealers; nominees for broker-dealers (including clearing corporations); or banks, associations, or other entities holding securities in a nominee name or otherwise on behalf of a beneficial owner (collectively "Nominee Holders") are not considered outstanding unless the Nominee Holder has made the appropriate certification [*Corp. Code § 2115(a)*; *see § 160.53* (discussing acquisition of nominally foreign status)].

Note that a foreign parent corporation need not itself be qualified to transact intrastate business in California to be a corporation subject to *Corp. Code § 2115* because the characteristics of its share ownership are determined on the same basis as a qualified foreign corporation and the factors relating to property, payroll, and sales are determined on a consolidated basis according to a formula that includes the property, payroll, and sales of all 50 percent or more owned subsidiaries (less any percentage attributable to minority ownership) [*Corp. Code § 2115(a)*].

For the purposes of this discussion a foreign corporation that is subject to *Corp. Code § 2115*, and that therefore is treated as a domestic corporation with respect to certain important areas of substantive law concerned with shareholder and creditor rights, will be termed a "nominally foreign" corporation.

[b] Choice of California Law in Specified Agreements

Notwithstanding *Civ. Code § 1646*, which provides that a contract is to be interpreted in accordance with the law of the place of performance or, if no place of performance is indicated, the law of the place where it was made, the parties to a contract, agreement, or undertaking, contingent or otherwise, relating to a transaction involving in the aggregate not less than $250,000 may agree that California law will govern their rights and duties, in whole or in part, whether or not the contract, agreement, undertaking, or transaction bears a reasonable relation to California. This provision applies even if the transaction would otherwise be covered by *Com. Code § 1301(a)* (requiring reasonable connection to California and another state or country to uphold choice of law provision), but does not apply to any contract, agreement, or undertaking (1) for labor or personal services, (2) relating to any transaction primarily for personal, family, or household purposes, or (3) to the extent *Com. Code § 1301(c)* provides for a different result [*Civ. Code § 1646.5*]. *Civ. Code § 1646.5* applies to contracts, agreements, and undertakings entered into before, on, or after its effective date; it is fully retroactive [*Civ. Code § 1646.5*]. Contracts, agreements, and undertakings selecting California law entered into before the effective date of Civ. Code § 1646.5 (September 20, 1986 for original version) are valid, enforceable, and effective as if *Civ. Code § 1646.5* had been in effect on the date they were entered into; and actions and proceedings commencing in a California court before the effective date of *Civ. Code § 1646.5* may be maintained as if *Civ. Code § 1646.5* were in effect on the date they were commenced [*Civ. Code § 1646.5*].

Any person may maintain an action or proceeding in a California court against a foreign corporation or nonresident person if the action arises out of or relates to any contract, agreement, or undertaking for which a choice of California law has been made, in whole or in part, by the parties thereto if the contract, agreement, or undertaking, contingent or otherwise, (1) relates to a transaction involving in the aggregate not less than $1 million, and (2) contains a provision or provisions under which the foreign corporation or nonresident agrees to submit to the jurisdiction of the California courts. [*Code Civ. Proc. § 410.40*]. *Code Civ. Proc. § 410.40* also applies to contracts, agreements, and undertakings entered into before, on, or after its effective date (September 20, 1986 for original version), and is fully retroactive. Contracts, agreements, and undertakings selecting California law entered into before the effective date of *Code Civ. Proc. § 410.40* are valid, enforceable, and effective as if *Code Civ. Proc. § 410.40* had been in effect on the date they were entered into; and actions and proceedings commencing in a California court before the effective date of *Code Civ. Proc. § 410.40* may be maintained as if *Code Civ. Proc. § 410.40* were in effect on the date they were commenced [*Code Civ. Proc. § 410.40*].

[c] Business and Shareholder Characteristics

The property, payroll, and sales factors that are employed in the determination of a foreign corporation's nominally foreign status are derived from the Bank and Corporation Tax Law [*Corp. Code § 2115(a)*; *see Rev. & Tax. Code §§ 25129, 25132, 25134*]. The three-factor formula is used in computing the portion of a corporation's income which is attributable to California. The operation of that formula is not discussed here [*see* Ballantine & Sterling, California Corporation Laws, Ch. 22, *Corporate Franchise and Income Taxes in California* (Matthew Bender)] since in the great majority of cases the determination as to a corporation's nominally foreign status may be made on the basis of public records as described below.

[d] Commencement and Cessation of Nominally Foreign Status

Nominally foreign status commences on the first day of the first income year of the corporation beginning on or after the 135th day of the income year immediately following the latest income year with respect to which the shareholder and business tests [*see Corp. Code § 2115(a)* (setting forth tests)] have been met, or beginning on or after the entry of a final order by a court of competent jurisdiction declaring that those tests have been met [*Corp. Code § 2115(d)*].

Nominally foreign status ceases at the end of the first income year of the corporation immediately following the latest income year with respect to which at least one of the tests is not met, or at the end of the income year of the corporation during which a final order has been entered by a court of competent jurisdiction declaring that one of those tests is not met. However, the filing of the court order will be ineffective if a contrary report or order is entered before the end of the income year [*Corp. Code § 2115(e)*].

[e] Exemption From Nominally Foreign Status

Nominally foreign status does not apply to a corporation with either of the following characteristics [*Corp. Code § 2115(c)*]:

- The corporation has outstanding securities listed on the New York Stock Exchange , the NYSE Amex, the NASDAQ Global Market, or the NASDAQ Capital Market;

- All of the corporation's voting shares (other than director's qualifying shares) are owned directly or indirectly by a corporation or corporations not subject to *Corp. Code § 2115*.

[f] Applicability of General Corporation Law

Foreign corporations that are nominally foreign because they satisfy the criteria set forth in *Corp. Code § 2115(a)* [*see § 160.12[2][a]*] are subject to specific provisions of the General Corporation Law otherwise only applicable to domestic corporations. The General Corporation Law will apply to such corporations to the exclusion of the law of the jurisdiction in which such corporations are incorporated [*Corp. Code § 2115(b)*]. The following are those provisions of the General Corporation Law that apply to nominally foreign corporations [*Corp. Code § 2115(b)*]:

- Chapter 1 [*Corp. Code § 100 et seq.* (general provisions and definitions)], to the extent applicable to the following provisions.

- *Corp. Code § 301*, relating to the annual election of directors.

- *Corp. Code § 303*, relating to the removal of directors without cause.

- *Corp. Code § 304*, relating to removal of directors by court proceeding.

- *Corp. Code § 305(c)*, pertaining to the filling of director vacancies if less than a majority in office

have been elected by shareholders.

- *Corp. Code § 309*, setting forth the directors' standard of care.

- *Corp. Code § 316* (except for subdivisions (a)(3) and (f)(3)), imposing liability on directors for unlawful distributions.

- *Corp. Code § 317*, imposing limitations and setting procedures for the indemnification of directors, officers, and others.

- *Corp. Code §§ 500-505*, limiting distributions of corporate cash or property.

- *Corp. Code § 506*, imposing liability on shareholders receiving unlawful distributions.

- *Corp. Code § 600(b), (c)*, requiring an annual shareholders' meeting.

- *Corp. Code § 708(a)-(c)*, providing for the shareholders' right to cumulate votes at any election of directors.

- *Corp. Code § 710*, relating to supermajority vote requirements.

- *Corp. Code § 1001(d)*, limiting the corporation's power to dispose of its assets.

- *Corp. Code § 1101(e)*, second paragraph, respecting equal treatment of all shareholders of a given class or series, and the treatment of nonredeemable shares, in the case of mergers.

- *Corp. Code § 1151* (first sentence only), regarding limitations on conversions.

- *Corp. Code § 1152*, regarding requirements of conversions.

- Chapter 12 [*Corp. Code § 1200 et seq.*], defining and setting forth required approvals for corporate "reorganizations."

- Chapter 13 [*Corp. Code § 1300 et seq.*], providing for dissenters' rights.

- *Corp. Code §§ 1500, 1501*, setting forth recordkeeping and reporting requirements.

- *Corp. Code § 1508*, authorizing action by the Attorney General to seek plenary relief against a corporation that is not complying with the General Corporation Law's requirements regarding shareholders' meetings [*Corp. Code § 600 et seq.*], voting [*Corp. Code § 700 et seq.*], and rights of inspection [*Corp. Code § 1600 et seq.*].

- Chapter 16 [*Corp. Code §§ 1600-1605*], providing for the rights of inspection of corporate records and property.

Any foreign corporation that is subject to the requirements of *Corp. Code § 2115(b)*, discussed above, must advise any shareholder of record, any officer, director, employee, or other agent [*see Corp. Code § 317* (definition)] and any creditor of the corporation in writing, within 30 days of receipt of written request for that information, whether or not it is subject to *Corp. Code § 2115(b)* at the time the request is received. If any party obtains a final determination by a court of competent jurisdiction that the corporation failed to provide the required information to the party, or provided

the party incorrect information, the court in its discretion has the power to include in its judgment recovery by the party from the corporation of all court costs and reasonable attorneys' fees incurred in that legal proceeding, to the extent they relate to obtaining that final determination [*Corp. Code § 2115(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGoverning Documents & ProceduresGeneral OverviewBusiness & Corporate LawCorporationsShareholdersGeneral OverviewBusiness & Corporate LawForeign BusinessesNoncomplianceBusiness & Corporate LawForeign BusinessesQualificationsContracts LawContract Conditions & ProvisionsForum Selection Clauses

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14-160 California Forms of Pleading and Practice--Annotated § 160.13

§ 160.13 Suspension or Forfeiture of Corporate Powers

[1] Nonpayment of Taxes

Distinct from provisions of the General Corporation Law imposing disabilities on foreign corporations failing to qualify in California or forfeiting that qualification are those provisions of the Revenue and Taxation Code relating to the suspension (in the case of a domestic corporation) or forfeiture (in the case of a foreign corporation qualified to do business in California) of corporate powers resulting from failure to pay taxes or file returns. These forfeiture provisions and some other provisions [*see Rev. & Tax. Code §§ 23301, 23301.5, 23775*], apply to a foreign corporation only if the corporation is qualified to do business in California. A corporation that is required under *Corp. Code § 2105* to qualify to do business is not deemed to have qualified to do business for purposes of the provisions on suspension and revivor unless it has in fact qualified with the Secretary of State [*Rev. & Tax. Code § 23301.6*].

Except for the purposes of filing an application for exempt status or amending the articles of incorporation as necessary either to perfect that application or to set forth a new name, the corporate powers, rights, and privileges of a domestic taxpayer may be suspended, and the exercise of the corporate powers, rights, and privileges of a foreign taxpayer in California may be forfeited, if any of the following conditions occur [*Rev. & Tax. Code § 23301*]:

- If any tax, penalty, or interest, or any portion thereof, that is due and payable under the Corporation Tax Law (*Rev. & Tax. Code § 23001 et seq.*) or the administrative provisions (*Rev. & Tax. Code § 19001 et seq.*) either at the time the return is required to be filed, or on or before the 15th day of the ninth month following the close of the taxable year, is not paid on or before 6 p.m. on the last day of the 12th month after the close of the taxable year; or

- If any tax, penalty, or interest, or any portion thereof, due and payable on notice and demand from the Franchise Tax Board or due and payable under the Corporation Tax Law (*Rev. & Tax Code § 23001 et seq.*) or the administration provisions (*Rev. & Tax Code § 18401 et seq.*) is not paid on or before 6 p.m. on the last day of the 11th month following the due date of the tax; or

- If any liability, or any portion of liability, that is due and payable under Article 7 of Part 10.2 (*Rev.*

& Tax Code § 19131 et seq., Penalties and Additions to Tax) is not paid on or before 6 p.m. on the last day of the 11th month following the date on which tax liability is due and payable.

[2] Nonfiling of Return

Except for the purposes of filing an application for exempt status or amending the articles of incorporation as necessary either to perfect that application or to set forth a new name, the corporate powers, rights, and privileges of a domestic taxpayer may be suspended, and the exercise of the corporate powers, rights, and privileges of a foreign taxpayer in California may be forfeited for failure to file a tax return [Rev. & Tax. Code § 22301.5 (franchise tax)]. Again, this is only applicable to a foreign corporation required to qualify to do business in California if it has in fact qualified with the Secretary of State [*Rev. & Tax. Code § 23301.6*].

[3] When Suspension Effective; Notice; Evidence

Forfeiture or suspension of a corporation's rights, powers, and privileges pursuant to *Rev. & Tax. Code § 23301, 23301.5*, or *23775* occurs and becomes effective only as expressly provided in *Rev. & Tax. Code § 23302* [*Rev. & Tax. Code § 23302(a)*]. For a corporation's powers, rights, and privileges to be suspended or forfeited pursuant to *Rev. & Tax. Code § 23301, 23301.5*, or *23775*, the Franchise Tax Board must have mailed the corporation a notice of preliminary suspension that indicates that the corporation will be suspended by a date certain. The preliminary notice must be mailed to the corporation at least 60 days before the date certain [*Rev. & Tax. Code §§ 21020, 23302(b)*; *see Ogden Martin Systems v. San Bernardino County (9th Cir. 1991) 932 F.2d 1284, 1291* (contractor that had not paid taxes as entitled to sue for rescission and restitution because its powers were never suspended by Franchise Tax Board)]. The Franchise Tax Board must transmit the name of a delinquent corporate taxpayer to the Secretary of State, and on doing so the suspension or forfeiture will become effective. The certificate of the Secretary of State is prima facie evidence of suspension or forfeiture [*Rev. & Tax. Code § 23302(c)*]. The Secretary of State is not required to issue the certificate in order for suspension to be effective [*Damato v. Slevin (1989) 214 Cal. App. 3d 668, 671, 262 Cal. Rptr. 879]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFinanceFranchise TaxPenalties for NoncomplianceBusiness & Corporate LawForeign BusinessesNoncomplianceBusiness & Corporate LawForeign BusinessesQualifications

California Forms of Pleading and Practice--Annotated

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Volume 14: Corporations: Capacity thru Corporations: Dissolution and Winding Up-Chs. 160-173
Chapter 160 CORPORATIONS: CAPACITY
PART II. LEGAL BACKGROUND

14-160 California Forms of Pleading and Practice--Annotated § 160.14

§ 160.14 Relief From Suspension or Forfeiture

[1] Application

Any taxpayer that has suffered the suspension or forfeiture provided for in *Rev. & Tax. Code §§ 23301* and *23301.5* may be relieved from the suspension or forfeiture on making application for relief in writing to the Franchise Tax Board, filing all required tax returns, and on payment of the tax, additions to tax, penalties, interest, and any other amounts for nonpayment of which the suspension or forfeiture occurred, together with all other taxes, additions to tax, penalties, interest, and any other amounts due under the Corporation Tax Law [*Rev. & Tax. Code § 23001 et seq.*], and on the issuance by the Franchise Tax Board of a certificate of revivor. Application for the certificate on behalf of any corporation that has suffered suspension may be made by any stockholder or creditor, by a majority of the surviving trustees or directors, by an officer, or by any other person who has interest in the relief from suspension [*Rev. & Tax. Code § 23305*. However, the name of suspended corporation may be reserved and adopted by another corporation during period of suspension, resulting in denial of an application for revivor [*see Boyer v. Jones (2001) 88 Cal. App. 4th 220, 221-222, 105 Cal. Rptr. 2d 824* (under *Corp. Code § 201(b)* and *Rev. & Tax. Code § 23305a*, trial court properly denied suspended corporation's petition for writ of mandate seeking restoration of its name)].

The Franchise Tax Board may revive a corporation without full payment of taxes, penalties, and interest due if it determines that the revivor will improve the prospects for collection of the full amount due. This revivor may be limited as to time and/or functions that the revived corporation may perform, and the corporate powers, rights, and privileges may again be suspended or forfeited if the Franchise Tax Board determines that the prospects for collection have not been improved by the revivor [*Rev. & Tax. Code § 23305b*].

[2] Satisfaction of Liability With Bond or Deposit

Notwithstanding *Rev. & Tax. Code §§ 23305* and *23305.1*, which require a taxpayer to pay any liability to the Franchise Tax Board as a condition to revivor or relief from voidability, the Franchise Tax Board must issue a certificate of revivor under *Rev. & Tax. Code § 23305* or of relief from voidability under *Rev. & Tax. Code § 23305.1* if the taxpayer provides the Franchise Tax Board with an assumption of liability, or a bond, deposit, or other security for taxpayer's liability, that is acceptable to the Franchise Tax Board. The Franchise Tax Board must notify the person filing the application for revivor or relief from voidability of the amount of the bond, deposit, or other security or of the terms of

an assumption of liability, which amount must be furnished as a condition of revivor or relief from voidability [*Rev. & Tax. Code § 23305.2*]. Obtaining revivor or voidability relief by securing the debt pursuant to *Rev. & Tax. Code § 23305.2* does not constitute an admission of liability by the taxpayer or relieve the taxpayer or any individual or corporation from liability for any taxes, additions to tax, penalties, or interest imposed by *Rev. & Tax. Code § 23001 et seq.* A taxpayer that provides an assumption of liability or a bond, deposit, or other security to obtain revivor or relief from voidability, notwithstanding *Rev. & Tax. Code § 23305* or *23305.1*, may file any returns required under those sections within a reasonable time after relief is granted by the Franchise Tax Board [*Rev. & Tax. Code § 23305.2*].

[3] Revivor by Substantial Compliance

One court of appeal has held that the doctrine of substantial compliance allows a suspended corporation to prosecute or defend its action even though the certificate of revivor has not been issued [*Sade Shoe Co. v. Oschin & Snyder (1990) 217 Cal. App. 3d 1509, 1514-1515, 266 Cal. Rptr. 619]* . To establish substantial compliance, the suspended corporation's action must satisfy the policy of the statute, which, in this case, is to pressure corporations into paying delinquent taxes. Thus, the suspended corporation must have paid the tax and any interest and penalties for nonpayment for which the suspension or forfeiture occurred, together with all other taxes, deficiencies, interest, and penalties due [*Rev. & Tax. Code § 23305*; *Sade Shoe Co. v. Oschin & Snyder (1990) 217 Cal. App. 3d 1509, 1515-1516, 266 Cal. Rptr. 619* ; *see also Damato v. Slevin (1989) 214 Cal. App. 3d 668, 672-673, 262 Cal. Rptr. 879* (purpose of suspension is to put pressure on corporations to pay their taxes; once that is done, there is no need to impose additional penalties)]. In *Sade Shoe Co.*, susbstantial compliance was not established because the suspended corporation still owed $90.85 in penalties and interest [*Sade Shoe Co. v. Oschin & Snyder (1990) 217 Cal. App. 3d 1509, 1516, 266 Cal. Rptr. 619]* .

[4] Certificate of Revivor

On issuance of the certificate of revivor, the Franchise Tax Board must transmit to the Secretary of State the revived taxpayer's name and its corporate number or account number as issued by the Franchise Tax Board. The taxpayer's name and number, the fact that the taxpayer's corporate powers, rights, and privileges have been revived, and the effective date of the revivor are a matter of public record [*Rev. & Tax. Code § 23305c*]. In addition, if the Franchise Tax Board determines that a suspension or forfeiture was in error by the Franchise Tax Board, the Franchise Tax Board, in connection with the revivor, must indicate that the corporation is "restored." The status of the restored corporation will be retroactive to the date of suspension or forfeiture as if there had been no suspension or forfeiture [*Rev. & Tax. Code § 23305c(c)*]. Further, if the Franchise Tax Board determines that the mailing of the 60-day demand notice referred to in *Rev. & Tax. Code § 23304.1(d)* was in error or that the Franchise Tax Board's original determination as to compliance with the 60-day demand notice was in error, the Franchise Tax Board's revised conclusions also will be part of the public record [*Rev. & Tax. Code § 23305c(d)*].

Legal Topics:

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Chapter 160 CORPORATIONS: CAPACITY
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14-160 California Forms of Pleading and Practice--Annotated § 160.15

§ 160.15 Effect of Suspension or Forfeiture and Revivor

[1] In General

During the period of the suspension or forfeiture of its corporate powers, a corporation may neither prosecute [*Ransome-Crummey Co. v. Superior Court (1922) 188 Cal. 393, 394-397]* nor defend [*Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp. (1957) 155 Cal. App. 2d 46, 49, 317 P.2d 649 , appeal dismissed, 356 U.S. 583, 78 S. Ct. 993, 2 L. Ed. 2d 1063* ; *see Mediterranean Exports, Inc. v. Superior Court (1981) 119 Cal. App. 3d 605, 614-615, 617-618, 174 Cal. Rptr. 169* (suspension or forfeiture under *Rev. & Tax. Code § 23302* only takes effect when F.T.B. transmits name of tax-delinquent foreign corporation to Secretary of State)] an action, nor may the corporation's liability insurer defend a lawsuit in the corporation's name [*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc. (2006) 136 Cal. App. 4th 212, 216-222, 39 Cal. Rptr. 3d 33* (insurance company may, however, intervene in lawsuit to protect rights of insured suspended corporation, and intervention is insurance company's only procedural option)], nor may the corporation appeal from an adverse judgment [*Boyle v. Lakeview Creamery Co. (1937) 9 Cal. 2d 16, 20, 68 P.2d 968]* . During the period of suspension, a suspended corporation that failed to revive its powers by paying delinquent taxes cannot renew a judgment obtained while it was in good standing [*see Timberline, Inc. v. Jaisinghani (1997) 54 Cal. App. 4th 1361, 1368-1369, 64 Cal. Rptr. 2d 4* (corporation's action in requesting court to renew judgment was unauthorized attempt to exercise rights, powers, and privileges of a going concern)]. The assignee of a suspended corporation is also subject to the corporation's disability to prosecute an action [*Cleveland v. Gore Bros., Inc. (1936) 14 Cal. App. 2d 681, 682, 58 P.2d 931]* .

Because the objection to a corporation's disability to sue, defend, or engage in other proceedings is a matter of abatement, not favored in law [*Peacock Hill Asso. v. Peacock Lagoon Constr. Co. (1972) 8 Cal. 3d 369, 372, 105 Cal. Rptr. 29, 503 P.2d 285* ; *Maryland C. Co. v. Superior Court (1928) 91 Cal. App. 356, 363, 267 P. 169]* , the revivor of a corporation's powers during an action or proceeding will generally have the effect of validating all prior actions of the corporation [*Maryland Casualty Co. v. Superior Court of San Francisco (1928) 91 Cal. App. 356, 363, 267 P. 169* (act of filing complaint during suspension validated by revivor before motion to abate was made); *Hall v. Citizens Nat. Tr. & Sav. Bank of Los Angeles (1942) 53 Cal. App. 2d 625, 630-632, 128 P.2d 545* (suspended corporation can validate commencement of action by securing reinstatement before trial on motion to abate); *see also Traub Co. v. Coffee Break Service, Inc. (1967) 66 Cal. 2d 368, 371, 57 Cal. Rptr. 846, 425 P.2d 790* (fact of

corporation's suspension does not subject judgment in its favor to collateral attack); *Rochin v. Pat Johnson Manufacturing Company (1998) 67 Cal. App. 4th 1228, 1236-1237, 79 Cal. Rptr. 2d 719* (although manufacturer's corporate powers were suspended before personal injury action was brought against it and before subsequent action to vacate amended judgment, corporation was entitled to defend appeal from order sustaining its demurrer in second action because corporation's certificate of revivor became effective during pendency of appeal)]. For instance, the extension of an expired use permit to construct a winery at a time when the corporate applicant's powers were suspended was procedural, not substantive. The purpose of the suspension statute had been satisfied, in that the applicant paid its taxes. Thus, the corporation's revivor served to validate the extended permit [*Benton v. County of Napa (1991) 226 Cal. App. 3d 1485, 1491-1492, 277 Cal. Rptr. 541]* . Furthermore, an objection to a corporation's incapacity, unlike an objection to its standing to sue, is a technical objection and must be raised at the earliest opportunity or it is waived [*Color-Vue, Inc. v. Abrams (1996) 44 Cal. App. 4th 1599, 1606, 52 Cal. Rptr. 2d 443]* . Thus, it has been held that a trial court abused its discretion by denying a corporation's motion for a continuance to pay taxes and revive corporate powers, granting the opposing party's motion to dismiss the corporation's complaint, and permitting the opposing party to proceed with default prove-up, when the opposing party was aware of the corporation's failure to pay taxes but did not raise that issue until trial [*Color-Vue, Inc. v. Abrams (1996) 44 Cal. App. 4th 1599, 1606, 52 Cal. Rptr. 2d 443]* .

When a defendant corporation's suspended status comes to light during litigation, the normal practice is for the trial court to permit a short continuance in order to enable the suspended corporation to effect reinstatement so as to defend itself in court [*Timberline, Inc. v. Jaisinghani (1997) 54 Cal. App. 4th 1361, 1366, 64 Cal. Rptr. 2d 4]* . If a suspended corporation delays--even as late as the time its appellate brief is filed--revealing that its corporate status was revived during or soon after trial and before entry of a judgment against it, the corporation still should be granted a reversal of that judgment for the purpose of presenting a defense at trial. All acts of a suspended corporation, taken before or after judgment, are validated by revival [*Peacock Hill Asso. v. Peacock Lagoon Constr. Co. (1972) 8 Cal. 3d 369, 373-374, 105 Cal. Rptr. 29, 503 P.2d 285]* . Any prejudice to the plaintiff, because of having to try its case, is outweighed by the strong public policy disfavoring pleas in abatement. Suspension of a corporation is intended to encourage it to pay taxes and file required documents, not to provide a boon or windfall to an adverse party [*Cadle Co. v. World Wide Hospitality Furniture, Inc. (2006) 144 Cal. App. 4th 504, 512-514, 50 Cal. Rptr. 3d 480]* .

Prior actions will not be validated, however, when to do so would prejudice any action, defense, or right that has accrued by reason of the suspension [*Rev. & Tax. Code § 23305a*; *see ABA Recovery Services, Inc. v. Konold (1988) 198 Cal. App. 3d 720, 724-725, 244 Cal. Rptr. 27* ; *Welco Construction, Inc. v. Modulux, Inc. (1975) 47 Cal. App. 3d 69, 73-74, 120 Cal. Rptr. 572* (running of limitation period as substantive defense or right that cannot be prejudiced by revivor); *see also Community Elec. Service v. National Elec. Contr. (9th Cir. 1989) 869 F.2d 1235, 1240-1241* (relying on *Welco* and *ABA Recovery Services*)]. *Rev. & Tax. Code § 23305a* protects independent and superseding rights of parties other than the corporation and the taxing authorities, namely the rights of those who deal with revived corporations [*Damato v. Slevin (1989) 214 Cal. App. 3d 668, 673-674, 262 Cal. Rptr. 879]* .

In addition, contracts that were voidable pursuant to *Rev. & Tax. Code § 23304.1* but have not been rescinded pursuant to *Rev. & Tax. Code § 23304.5* may be affirmed in accordance with *Rev. & Tax. Code § 23305.1* [*Rev. & Tax. Code § 23305a*; *see § 160.15[2]*].

[2] Contracts Formed During Suspension

[a] Voidable

A contract entered into by a corporation while its powers, rights, and privileges are suspended pursuant to *Rev. & Tax. Code § 23301*, *23301.5*, or *23775* is, subject to *Rev. & Tax. Code § 23304.5*, voidable at the instance of any party to the contract other than the taxpayer [*Rev. & Tax. Code § 23304.1(a)*].

A party that has a right to declare a contract to be voidable pursuant to *Rev. & Tax. Code § 23304.1* may exercise that

right only in a lawsuit brought by either party to the contract in a court of competent jurisdiction. The rights of parties to the contract are not affected by *Rev. & Tax. Code § 23304.1* except to the extent expressly provided by a final judgment of the court, which judgment cannot be issued unless the suspended corporation is allowed a reasonable opportunity to cure the voidability under *Rev. & Tax. Code § 23305.1* [*Rev. & Tax. Code § 23304.5*]. If the court finds the contract to be voidable under *Rev. & Tax. Code § 23304.1*, the court must order the contract to be rescinded. In no event, however, may the court order rescission of the suspended corporation's contract unless that corporation receives full restitution of the benefits provided by it under the contract [*Rev. & Tax. Code § 23304.5*].

The other party's right to avoid a contract entered into with a corporation while that corporation was suspended is not barred by equitable estoppel unless the other party knew of the corporation's disability at the time the contract was formed [*Damato v. Slevin (1989) 214 Cal. App. 3d 668, 675, 262 Cal. Rptr. 879* (decided under former *Rev. & Tax. Code § 23304*)].

[b] Unqualified Foreign Corporation Without Franchise Tax Account

If a foreign corporation that neither is qualified to do business nor has a corporate account number from the Franchise Tax Board fails to file a return required by *Rev. & Tax. Code § 23101 et seq.* or § 23501 et seq., any contract made in California by that corporation during the applicable period is voidable, subject to *Rev. & Tax. Code § 23304.5* (discussed in *§ 160.15[2][a]*), at the instance of any party to the contract other than that corporation [*Rev. & Tax. Code § 23304.1(b)*]. For purposes of *Rev. & Tax. Code § 23304.1(b)*, the applicable period begins on January 1, 1991, or on the first day of the taxable year for which the corporation has failed to file a return or pay taxes, whichever is later, and ends on the earlier of the date the corporation qualified to do business in California or the date the corporation obtained a corporate account number from the Franchise Tax Board [*Rev. & Tax. Code § 23304.1(c)*]. In a case predating the applicability of the 1990 amendments, the court allowed a foreign corporation that had not qualified to do business in California or registered with the Franchise Tax Board until after the suit was commenced to recover based on equitable principles [*Gardiner Solder Co. v. SupAlloy Corp., Inc. (1991) 232 Cal. App. 3d 1537, 1542-1545, 284 Cal. Rptr. 206]* .

[c] Unqualified Foreign Corporation That Has Franchise Tax Account

If a foreign corporation that has a corporate account number from the Franchise Tax Board but has not qualified to do business under *Corp. Code § 2105* fails to file a return required by *Rev. & Tax. Code § 23101 et seq.* or § 23501 et seq., to pay any tax or other amount owing to the Franchise Tax Board under *Rev. & Tax. Code §§ 23101 et seq., 23501 et seq., 23707*, or *23772*, or to file any statement or return required under *Rev. & Tax. Code §§ 23772* or *23774*, within 60 days of receiving written demand from the Franchise Tax Board, any contract made in California by that corporation during the period beginning at the end of the 60-day demand period and ending on the date relief is granted under *Rev. & Tax. Code § 23305.1*, or the date the taxpayer qualifies to do business in California, whichever is earlier, is voidable at the instance of any party to the contract other than that corporation [*Rev. & Tax. Code § 23304.1(d)*].

[d] Application for Relief From Voidability

A suspended corporation may apply to the Franchise Tax Board for relief from the voidability provisions of *Rev. & Tax. Code § 23304.1*. To be relieved from voidability, the suspended corporation must do all of the following [*Rev. & Tax. Code § 23305.1(a)*]:

- Provide the Franchise Tax Board with an application for relief from contract voidability in a form and manner prescribed by the Franchise Tax Board;

- Include on the application the period for which relief is requested, which period, in the case of an application made simultaneously with an application for revivor, must begin on the date one of the

taxpayer's taxable years begins and ends on the date relief is granted [*see Rev. & Tax. Code § 23305.1(b)(1)(A)*]. If the application for relief from voidability is filed for a period in which an application for revivor has been made and the certificate of revivor has been issued, the period for which relief from voidability is requested (and thus the period for which the penalty is imposed by *Rev. & Tax. Code § 23305.1(b)*) begins on the date the corporation's powers, rights, and privileges were suspended or forfeited and ends on the date relief is granted [*see Rev. & Tax. Code § 23305.1(b)(2)(A)*];

- File any tax returns required to be filed with the Franchise Tax Board, including returns for the period for which relief is requested;

- Pay any tax, additions to tax, penalties, interest, and any other amounts owing to the Franchise Tax Board, including any liability attributable to the period for which relief is requested; and

- Pay any penalty imposed under *Rev. & Tax. Code § 23305.1(b)* for the period for which relief is requested.

In the case of a corporation that enters into an approved voluntary disclosure agreement [*see Rev. & Tax. Code § 19191*], the corporation will be considered to have met the last three of the five requirements listed above, if the corporation fulfills to the satisfaction of the Franchise Tax Board all of the specifications of the voluntary disclosure agreement [*see Rev. & Tax. Code § 19191(d)(2)*] and if the Franchise Tax Board has not found that any of the circumstances described in *Rev. & Tax. Code § 19194* rendered the agreement null and void.

The Franchise Tax Board must assess a penalty equal to $100 for each day of the period for which relief from voidability is granted, but in the case of an application made simultaneously with an application for revivor, the penalty cannot exceed the amount of tax for the period for which relief is granted [*Rev. & Tax. Code § 23305.1(b)(1)(B)*; *see Rev. & Tax. Code § 23305.1(b)(1)(A)* (relief as granted for period beginning at beginning of taxpayer's taxable year)].

In the case of an application for relief from voidability filed, for a period for which a certificate of revivor has already been issued, the penalty is $100 per day for each day of the period for which relief is requested, not to exceed the amount of tax that would be imposed under *Rev. & Tax. Code § 23151*, but except in the case of exempt organizations or trusts, no less than the amount of the minimum tax provided under *Rev. & Tax. Code § 23153* for the period for which relief is granted [*Rev. & Tax. Code § 23305.1(b)(2)(B)*; *see Rev. & Tax. Code § 23305.1(b)(2)(A)* (penalty period begins on date of suspension or forfeiture and ends on date relief is granted)]. In the case of an exempt organization or trust that is required by *Rev. & Tax. Code § 23731 et seq.* to pay tax on unrelated business taxable income, the penalty cannot exceed the amount of tax imposed on its unrelated business income for the period for which relief is requested [*Rev. & Tax. Code § 23305.1(b)(2)(C)*].

Any penalty imposed under *Rev. & Tax. Code § 23305.1(b)* is, subject to *Rev. & Tax. Code § 23305.2*, due and payable on demand by the Franchise Tax Board [*Rev. & Tax. Code § 23305.1(b)(3)*].

On satisfaction of the conditions specified in *Rev. & Tax. Code § 23305.1(a)*, including through application of *Rev. & Tax. Code § 23305.2* (discussed in *§ 160.14[2]*), all contracts entered into during the period for which relief is granted that have not been rescinded by a final court order pursuant to *Rev. & Tax. Code § 23304.5* (discussed in *§ 160.15[2][a]*) may be enforced in the same manner and to the same extent, with regard to both parties to the contract and any third parties, as if the contract had never been voidable. On granting relief from voidability, the Franchise Tax Board must certify that relief to the applicant. The certificate must be issued or mailed to the applicant, or as directed by the applicant, and must indicate the period for which relief is granted [*Rev. & Tax. Code § 23305.1(c)*; *see also Rev. & Tax. Code § 23305.1(c)(1)(B)* (when sale, transfer, or exchange of real property is validated; discussed under *§ 160.15[3]*)].

The fact that a certificate of relief from voidability was issued pursuant to *Rev. & Tax. Code § 23305.1* and the information contained on the certificate are subject to public disclosure. The certificate is prima facie evidence of the relief from voidability for contracts entered into during the period of relief stated on the certificate, and the certificate may be recorded in the office of the county recorder of any county in California [*Rev. & Tax. Code § 23305.1(d)*].

[e] Transition Provisions Regarding Voidability

[i] 1993 Legislation

The version of *Rev. & Tax. Code § 23305.1* allowing separate applications for revivor and relief from voidability and discussed in *§ 160.65[3]* governs applications for relief filed on or after January 1, 1994, without regard to income years [Stats. 1993, ch. 680, § 2(a)]. It applies if the taxpayer both (1) received a certificate of revivor between January 1, 1991, and January 1, 1994, and (2) has contracts for which voidability relief could have been granted had the application for relief been filed simultaneously with the application for revivor [Stats. 1993, ch. 680, § 2(b)]. In addition, the 1993 legislation specified, as did the 1990 legislation, notwithstanding Stats. 1993, ch. 680, § 2(a), that the Legislature intends that Stats. 1993, ch. 680, not be construed in any manner that would affect the rights of any party to any action that has been commenced in a court of competent jurisdiction before January 1, 1994, or the rights of that party in a subsequent action based on the same claims as those asserted in the pre-1994 action, and that all those rights be determined without the application of Stats. 1993, ch. 680, but instead be determined by the law in effect before January 1, 1994 [Stats. 1993, ch. 680, § 2(a)].

[ii] 1990 Legislation

No contract entered into by a suspended corporation before January 1, 1991, is voidable under *Rev. & Tax. Code § 23301 et seq.* unless the contract was entered into while the taxpayer's powers, rights, and privileges in California were forfeited or suspended by the Franchise Tax Board through notice to the Secretary of State as provided in *Rev. & Tax. Code § 23302* (discussed in *§ 160.13[3]*) [Stats. 1990, ch. 926, § 17(a)]. Subject to the limitations set forth in Stats. 1990, ch. 926, § 17, a taxpayer that received a certificate of revivor between January 1, 1990, and January 1, 1991, may apply for relief from voidability under *Rev. & Tax. Code § 23305.1* [*Rev. & Tax. Code § 23305.1*]. A corporation that entered into a contract while its powers, rights, and privileges were forfeited or suspended by the Franchise Tax Board in accordance with the procedures set forth in *Rev. & Tax. Code § 23302*, even if the contract was entered into before January 1, 1991, is entitled to relief from voidability pursuant to *Rev. & Tax. Code § 23305.1* (discussed in *§ 160.15[2][d]*) in connection with an application for revivor [Stats. 1990, ch. 926, § 17(b)].

A contract entered into after January 1, 1991, by a corporation whose powers, rights, and privileges have not been forfeited or suspended by the Franchise Tax Board through notice to the Secretary of State is voidable only to the extent expressly provided in *Rev. & Tax. Code § 23304.1(b)* or *(d)* (*Rev. & Tax. Code § 23304.1(b)* or *(d)*) [Stats. 1990, ch. 926, § 17(a) (amended Stats. 1991, ch. 1082, § 11)].

A corporation that received a certificate of revivor after January 1, 1990, and before January 1, 1991, may apply for relief from voidability with respect to any contract that was voidable because the contract was entered into by that corporation while its powers, rights, and privileges in California were forfeited or suspended [Stats. 1990, ch. 926, § 17(b); *see Damato v. Slevin (1989) 214 Cal. App. 3d 668, 673-675, 262 Cal. Rptr. 879* (decided under prior law; contract entered into by corporation while its powers, rights, and privileges are suspended is voidable at option of other party to contract even after corporation had been revived)].

Notwithstanding Stats. 1990, ch. 926, § 17(a) or (b), the Legislature intends that Stats. 1990, ch. 926 not be construed in any manner that would affect the rights of any party to any action that has been commenced in a court of competent jurisdiction before January 1, 1991, or the rights of that party in a subsequent action based on the same claims as those asserted in the pre-1994 action, and that all such rights be determined without application of any provisions of Stats.

1990, ch. 926, and by the law in effect before January 1, 1991 [Stats. 1990, ch. 926, § 17(c)].

[3] Real Property Transactions

If a corporation's powers, rights, and privileges are forfeited or suspended pursuant to *Rev. & Tax. Code §§ 23301, 23301.5*, or *23775*, without limiting other consequences of the forfeiture or suspension, the corporation is not entitled to sell, transfer, or exchange real property in California during the period of suspension [*Rev. & Tax. Code § 23302(d)*; *see Rev. & Tax. Code § 23301.6* (discussed in *§ 160.32[1][d]*)]. However, on satisfaction of the conditions specified in *Rev. & Tax. Code § 23305.1(a)*, any sale, transfer, or exchange of real property in California during the period for which relief is granted and which the corporation at that time was not entitled to sell, transfer, or exchange by reason of *Rev. & Tax. Code § 23302(d)*, and which has not been rescinded by a final court order pursuant to *Rev. & Tax. Code § 23304.5*, will be as valid as if the taxpayer had not been subject to *Rev. & Tax. Code § 23302(d)* at the time of the sale, transfer, or exchange [*Rev. & Tax. Code § 23305.1(c)(1)(B)*].

Nevertheless, in a case predating the applicability of the 1990 amendments in which plaintiff, a foreign corporation, had not qualified to do business in California or registered with the Franchise Tax Board until after the suit was commenced, the court allowed plaintiff to recover based on equitable principles. The court reasoned (1) that the purpose of the suspension statute had been achieved in that the plaintiff did register and pay appropriate taxes and penalties and (2) that it would be inequitable to grant the defendant a windfall [*Gardiner Solder Co. v. SupAlloy Corp., Inc. (1991) 232 Cal. App. 3d 1537, 1542-1545, 284 Cal. Rptr. 206]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 160.16 Suspension of Corporate Powers for Failure to File Annual Information Statement

Corp. Code § 1502 provides that every corporation must file a statement every year containing information that includes the following:

- The corporation's current directors;
- The number of board vacancies, if any;
- The current officers;
- The street address of its principal executive office (and its mailing address, if different);
- If the principal office is in another state, the street address of its principal office in California;
- A statement of the corporation's general type of business; and
- The name and address of a person in California designated to receive service of legal process on the corporation.

For detailed discussion regarding the filing requirements, and illustrations of the official forms used for filing annual statements, see California Legal Forms (Matthew Bender), Ch. 7, *Corporate Records and Reports*.

In addition to the information required by *Corp. Code § 1502*, every publicly traded company [*see Corp. Code § 1502.1(b)(1)* (definition)] must file annually, within 150 days after the end of its fiscal year, a statement on a form prescribed by the Secretary of State that includes information such as [*Corp. Code § 1502.1(a)*]:

- The name of the independent auditor that prepared the most recent auditor's report on the corporation's annual financial statements;

- A description of annual compensation and loans made to any member of the board;

- Whether an order for relief has been entered in a bankruptcy case with respect to the corporation or its officers or board members within the previous 10 years; and

- Whether any officer or board member was convicted of fraud within the previous 10 years.

For discussion and an illustration of that form, see *California Legal Forms (Matthew Bender), Ch. 7, Corporate Records and Reports, § 7.207B.*

Corp. Code § 2204 provides that if a corporation fails to file its required information statement under *Corp. Code § 1502*, the Secretary of State will give the corporation notice of the delinquency. Sixty days after notice of the delinquency, if the corporation has not filed the required statement, the Secretary of State must certify the name of the corporation to the Franchise Tax Board, and the Franchise Tax Board imposes a penalty on the corporation [*see Rev. & Tax. Code § 19141*].

If a corporation fails to file a statement under *Corp. Code § 1502*, fails to file a statement for 24 months, and has been assessed a penalty under *Corp. Code § 2204* during that 24-month period, then the corporation is subject to suspension under *Corp. Code § 2205*. The Secretary of State must notify the corporation that its corporate powers, rights, and privileges will be suspended after an additional 60 days, if it fails to file the required statement. If the corporation fails to comply within 60 days, the Secretary of State certifies to the Franchise Tax Board that the corporation is suspended, and mails a notice to the suspended corporation. Except for the purpose of amending the articles of incorporation to set forth a new name, the powers, rights, and privileges of the corporation are suspended [*Corp. Code § 2205(c)*; *see* Ballantine & Sterling, California Corporation Laws, Ch. 13, *Records, Reports, and Inspection Rights* (Matthew Bender)].

A corporation suspended for failure to file a required statement under *Corp. Code § 1502* is disabled from participating in any litigation activities to the same extent as a corporation suspended for failure to pay taxes under *Rev. & Tax. Code § 23301* [*Palm Valley Homeowners Association, Inc. v. Design MTC (2000) 85 Cal. App. 4th 553, 559-562, 102 Cal. Rptr. 2d 350* (holding that trial court did not abuse its discretion in finding that law firm acted in bad faith by pursuing litigation activities on behalf of its client, even after the firm knew that the client was a suspended corporation, and in imposing sanctions accordingly); *see also § 160.32[1][d]*]. In a case of first impression, the court of appeal in *Palm Valley* addressed whether these two types of corporate suspensions--for nonpayment of taxes and for failure to file required information statement--both result in a disqualification from litigation. It concluded that although the statutory provisions suspending a corporation for failure to file a required statement had not yet been so construed in any published California case, those provisions would make clear to any reasonable attorney that a corporation suspended under the Corporations Code, like a corporation suspended under the Revenue and Tax Code, is also disabled from participating in litigation activities [*Palm Valley Homeowners Association, Inc. v. Design MTC (2000) 85 Cal. App. 4th 553, 556, 102 Cal. Rptr. 2d 350* (finding that law firm did not rely on any purported distinction between a Corporations Code suspension and a Revenue and Taxation Code suspension in deciding to conceal its knowledge of the client's suspended status from court and opposing counsel and thus affirming trial court's imposition of sanctions); *see* Forms 15.1, 15.2].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFormationCorporate Existence, Powers & PurposeGeneral OverviewCivil ProcedurePartiesCapacity of PartiesGeneral Overview

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[Reserved]

§§ 160.17[Reserved]

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Chapter 160 CORPORATIONS: CAPACITY
PART III. RESEARCH GUIDE

14-160 California Forms of Pleading and Practice--Annotated § 160.30

§ 160.30 California Legal Forms

For transactional forms and further discussion relating to the forms in this chapter, see the following chapters in California Legal Forms (Matthew Bender):
Ch. 2, *Special Procedures in Corporate Formation*
Ch. 3, *Articles of Incorporation*
Ch. 7, *Corporate Records and Reports*
Ch. 12B, *Foreign Corporations and Associations*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFormationCorporate Existence, Powers & PurposeGeneral OverviewBusiness & Corporate LawCorporationsGoverning Documents & ProceduresGeneral Overview

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PART III. RESEARCH GUIDE

14-160 California Forms of Pleading and Practice--Annotated § 160.31

§ 160.31 State Statutes

[1] Capacity

Corporation defined as person. *Code Civ. Proc. § 17*

Corporation has all powers of natural person. *Corp. Code § 207*

Proceedings for winding up and dissolution of corporation as not abating any action to which corporation is party. *Corp. Code § 2010(b)*

[2] Foreign Corporations

[a] Subject to California Law

Required reporting of business and shareholder activity in *California. Corp. Code § 2117*

Additional annual statement required for publicly traded companies. *Corp. Code § 1502.1*

Corporation is subject to California law when property, payroll, and sales factors average more than 50 percent and more than one-half outstanding securities held by California residents. *Corp. Code § 2115(a)*

Sections of General Corporation Law applicable to corporations subject to California law. *Corp. Code § 2115(b)*

Commencement and cessation of status. *Corp. Code § 2115(d), (e)*

Corporations exempt from imposition of California law. *Corp. Code §§ 2115(c), 25100(o)*

[b] Transacting Intrastate Business

Foreign corporation defined to include business association organized as trust under laws of foreign jurisdiction. *Corp. Code § 170*

Transaction of intrastate business defined. *Corp. Code § 191(a)*

Activities not constituting transaction of intrastate business. *Corp. Code § 191(b)-(d)*

Foreign disappearing corporation that is merged into another corporation surrenders its right to transact intrastate business. *Corp. Code § 1108(c)-(e)*

Requirement that foreign corporation transacting intrastate business obtain certificate from Secretary of State. *Corp. Code § 2105*

Forfeiture of qualification to transact intrastate business. *Corp. Code §§ 2204-2206*

Nonqualified foreign corporation has consented to the jurisdiction of California courts. *Corp. Code § 2203(a)*

Failure of foreign corporation transacting intrastate business to obtain certificate of qualification prevents such corporation from maintaining any action or proceeding in California courts. *Corp. Code § 2203(c)*

[3] Suspension or Forfeiture of Powers

Suspension or forfeiture of powers for failure to file franchise tax return or to notify Franchise Tax Board of accounting period. *Rev. & Tax. Code § 23301.5*

Forfeiture provisions of *Rev. & Tax. Code §§ 23301, 23301.5, 23775* are only applicable to foreign corporation required to qualify to do business [*see Corp. Code § 2105*] if it has in fact qualified with the Secretary of State. *Rev. & Tax. Code § 23301.6*

When suspension effective. *Rev. & Tax. Code § 23302*

Contracts made with corporation during period of its suspension or forfeiture voidable at instance of any party other than taxpayer. *Rev. & Tax. Code §§ 23304.1, 23304.5*; *see also Rev. & Tax. Code § 23305.1* (relief from voidability)

Relief from suspension or forfeiture. *Rev. & Tax. Code §§ 23305, 23305a-23305d*

Assumption of liability, a bond, deposit, or other security for taxpayer's liability that is acceptable to Franchise Tax Board as alternative to payment required for revivor or relief from voidability. *Rev. & Tax. Code § 23305.2*

Person attempting to exercise powers of corporation during its suspension or forfeiture are subject to fine and imprisonment. *Rev. & Tax. Code § 19719*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFinanceFranchise TaxPenalties for NoncomplianceBusiness & Corporate LawCorporationsFinanceFranchise TaxReinstatementBusiness & Corporate LawForeign BusinessesQualificationsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil

ProcedurePartiesCapacity of PartiesAgents

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14-160 California Forms of Pleading and Practice--Annotated § 160.32

§ 160.32 Decisions

[1] Capacity

[a] Failure to Assert

Failure of corporate plaintiff to plead facts of organization and existence to assert capacity to sue does not render complaint subject to general demurrer. *Los Angeles Railway Co. v. Davis (1905) 146 Cal. 179, 180-181, 79 P. 865*

[b] Federal Case

Under *Fed. R. Civ. P., Rule 17(b)*, corporation's capacity is determined under state law; antitrust law does not evidence any overriding federal interest to prevent application of that rule. *Community Elec. Service v. National Elec. Contr. (9th Cir. 1989) 869 F.2d 1235, 1239*

[c] Nonqualified Foreign Corporation

Corporation not precluded from asserting statute of limitations as defense because it is amenable to substituted service on Secretary of State if it is engaged in unauthorized transaction of intrastate business. *Steiner v. 20th Century-Fox Film Corp. (9th Cir. 1956) 232 F.2d 190, 196*

Bar to maintaining action or proceeding in California courts is inapplicable to federal cause of action heard in federal district court in nondiversity case. *Harms, Inc. v. Tops Music Enterprises, Inc., (S.D. Cal. 1958) 160 F. Supp. 77, 78*

Burden of proving that foreign corporation is transacting intrastate business and is therefore subject to qualification requirement is on party pleading nonqualification as bar to action. *Automotriz etc. De Cal. v. Resnick (1957) 47 Cal. 2d 792, 794, 306 P.2d 1*

Dismissal of lawsuit under *Corp. Code § 2203(c)* against plaintiff corporation that transacted intrastate business

without first having obtained certificate of qualification as required by *Corp. Code § 2105* does not violate commerce clause of United States Constitution. *Neogard Corp. v. Malott & Peterson-Grundy (1980) 106 Cal. App. 3d 213, 226-227, 164 Cal. Rptr. 813*

Failure of foreign corporation to qualify bars assignee of that corporation. *Thorner v. Selective Cam Transmission Co. (1960) 180 Cal. App. 2d 89, 93, 4 Cal. Rptr. 409*

[d] Suspension or Forfeiture of Powers for Nonpayment of Taxes

Reinstatement of corporate powers occurring after time for notice of appeal expired validates giving of notice during period of suspension. *Peacock Hill Asso. v. Peacock Lagoon Constr. Co. (1972) 8 Cal. 3d 369, 371, 105 Cal. Rptr. 29, 503 P.2d 285*

Judgment in favor of suspended corporation is not subject to collateral attack. *Traub Co. v. Coffee Break Service, Inc. (1967) 66 Cal. 2d 368, 371, 57 Cal. Rptr. 846, 425 P.2d 790*

Rule that corporation may neither prosecute nor defend action, nor appeal from adverse judgment, while its corporate powers are suspended, is inapplicable to shareholder's derivative suit alleging wrong to corporation by corporate officials. *Reed v. Norman (1957) 48 Cal. 2d 338, 343, 309 P.2d 809*

Corporation, having filed complaint after duly complying with statutory pre-suit notice requirement during period of suspension, and having subsequently obtained revival certificate before trial court granted defense motion for judgment on the pleadings, was entitled to reversal of judgment against it; trial court erroneously treated notice requirement as jurisdictional, whereas it was merely procedural. *Center for Self Improvement & Community Dev. v. Lennar Corp. (2009) 173 Cal. App. 4th 1543, 1549, 1557, 94 Cal. Rptr. 3d 74*

Name of suspended corporation may be reserved and adopted by another corporation during period of suspension, resulting in denial of application for revivor; under *Corp. Code § 201(b)* and *Rev. & Tax. Code § 23305a*, trial court properly denied suspended corporation's petition for writ of mandate seeking restoration of its name. *Boyer v. Jones (2001) 88 Cal. App. 4th 220, 221-222, 105 Cal. Rptr. 2d 824*

Suspended corporation was entitled to defend appeal after having obtained certificate of revivor; revival of corporate powers validated procedural steps taken on behalf of corporation while it was under suspension and allowed it to proceed with the appeal. *Rochin v. Pat Johnson Manufacturing Company (1998) 67 Cal. App. 4th 1228, 1236-1237, 79 Cal. Rptr. 2d 719*

Although statute of limitations defense that accrues during corporate suspension is not prejudiced on revival, that defense is capable of being waived. *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co. (1981) 122 Cal. App. 3d 834, 845, 176 Cal. Rptr. 239*

Revivor of corporate powers does not validate suspended corporation's acts in commencing action if statute of limitations expired during period of suspension. *Welco Construction, Inc. v. Modulux, Inc. (1975) 47 Cal. App. 3d 69, 73, 120 Cal. Rptr. 572* ; *Cleveland v. Gore Bros., Inc. (1936) 14 Cal. App. 2d 681, 682, 58 P.2d 931*

Appeal from adverse judgment denied to domestic corporation suspended for failure to pay tax if corporation has not offered to pay tax after issue raised. *Gar-Lo, Inc. v. Prudential Sav. & L. Assn. (1974) 41 Cal. App. 3d 242, 244-245, 116 Cal. Rptr. 389*

Joint venturer of corporation suspended for nonpayment of franchise taxes is not necessarily prevented from bringing

action on behalf of itself and joint venture. *Laurel Crest, Inc. v. Vaughn (1969) 272 Cal. App. 2d 363, 364, 77 Cal. Rptr. 538*

Fact of corporation's suspension for nonpayment of franchise taxes does not preclude trial court from recognizing existence of corporation for purpose of granting continuance to enable corporation to obtain reinstatement. *Schwartz v. Magyar House, Inc. (1959) 168 Cal. App. 2d 182, 189, 335 P.2d 487*

Taking of default judgment against suspended corporate is not a "right" accruing by reason of suspension that would be prejudiced by corporation's reinstatement. *Schwartz v. Magyar House, Inc. (1959) 168 Cal. App. 2d 182, 190, 335 P.2d 487*

Revivor of corporate powers validates acts done during corporation's period of suspension for nonpayment of franchise taxes. *Hall v. Citizens Nat. Tr. & Sav. Bank of Los Angeles (1942) 53 Cal. App. 2d 625, 630-632, 128 P.2d 545*

Lease executed by suspended corporation is voidable rather than void and valid if affirmed by other party. *Depner v. Joseph Zukin Blouses (1936) 13 Cal. App. 2d 124, 127-128, 56 P.2d 574*

Objection to suspended corporation's capacity to sue or defend constitutes merely plea in abatement. *Maryland C. Co. v. Superior Court (1928) 91 Cal. App. 356, 361, 267 P. 169*

[2] Choice of Law; Foreign Corporation Not Subject to California Registration

Even if valid choice of law clause applies California law, issues of continuing corporate legal existence are determined by law of state of incorporation; under Mo. Rev. Stat. §§ 351.535, 351.540(2), Missouri corporation was unable to maintain suit on contract entered into during forfeiture period even though forfeiture was rescinded during pendency of action. *CM Record Corp. v. MCA Records, Inc. (1985) 168 Cal. App. 3d 965, 967-969, 214 Cal. Rptr. 409*

[3] Fictitious Business Name

Plaintiffs who sued corporation by fictitious business name could not obtain default judgement against fictitious business name as legally distinct entity after corporation responded to complaint in corporate name and obtained a dismissal. *Pinkerton's Inc. v. Superior Court (1996) 49 Cal. App. 4th 1342, 1347-1348, 57 Cal. Rptr. 2d 356* .

[4] Legal Representation

Answer to complaint on behalf of corporation may not be filed by corporate officer who is not attorney. *Merco Constr. Engineers, Inc. v. Municipal Court (1978) 21 Cal. 3d 724, 729-730, 147 Cal. Rptr. 631, 581 P.2d 636*

General common law rule requiring corporations to be represented by counsel in proceedings before courts of record other than small claims courts does not extend to proceedings before administrative agencies and tribunals; decision of Department of Alcoholic Beverage Control, upheld by Alcoholic Beverage Control Appeals Board, to revoke corporation's liquor license was not void for lack of jurisdiction when corporation was represented by nonattorney president at evidentiary administrative hearing before ALJ. *Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd. (2002) 99 Cal. App. 4th 1094, 1103*

Written waiver of statute of limitations signed by corporation's attorney-agent is valid under *Code Civ. Proc. § 360.5* even though attorney had no written authority from corporation to sign waiver; waiver of statute of limitations is not contract, so equal dignities rule (*Civ. Code § 2309*) did not require specific authorization from principal. *Carlton*

Browne & Co. v. Superior Court (1989) 210 Cal. App. 3d 35, 37, 46, 258 Cal. Rptr. 118

Corporate president who is not attorney is able to file notice of appeal on behalf of corporation from labor commissioner's decision on wage claim; notice of appeal under *Lab. Code § 98(a)* is different from notice of appeal of court judgment and requires no legal training or acumen. *Rogers v. Municipal Court (1988) 197 Cal. App. 3d 1314, 1318-1319, 243 Cal. Rptr. 530*

Representation of corporate party in court (other than small claims court) is permitted only by licensed attorney. *Himmel v. City Council (1959) 169 Cal. App. 2d 97, 100, 336 P.2d 996* ; *Paradise v. Nowlin (1948) 86 Cal. App. 2d 897, 898, 195 P.2d 867* ; *Van Gundy v. Camelot Resorts, Inc. (1983) 152 Cal. App. 3d Supp. 29, 31-32*

Notice of appeal by corporation from superior court judgment is required to be filed by attorney. *Paradise v. Nowlin (1948) 86 Cal. App. 2d 897, 898, 195 P.2d 867*

Former *Code Civ. Proc. § 117(g)* (*now Code Civ. Proc. § 117.4*) barring attorneys from representing small claims litigants permits representation of corporation by nonlawyer. *Prudential Ins. Co. v. Small Claims Court (1946) 76 Cal. App. 2d 379, 386, 173 P.2d 38*

[5] Standing

Civ. Code § 49(c) does not give corporation either standing or cause of action against third party who injured employee. *I. J. Weinrot & Son, Inc. v. Jackson (1985) 40 Cal. 3d 327, 332-341, 220 Cal. Rptr. 103, 708 P.2d 682*

Bankruptcy trustee had standing to bring legal malpractice action against law firm on behalf of "sham" corporation, which could sustain injury even if its sole purpose was to serve as engine of fraud for its shareholders; injury was evidenced by fact that corporation remained legally distinct entity that was responsible for liability it incurred as result of allegedly fraudulent actions of its insiders. *Loyd v. Paine Webber, Inc. (9th Cir. 2000) 208 F.3d 755, 758* (holding, however, that complaint failed to state claim for legal malpractice under California law)

[6] Suspension of Powers for Failure to File Biennial Information Statement

Corporation suspended for failure to file required statement under *Corp. Code § 1502*, like corporation suspended for failure to pay taxes under *Rev. & Tax. Code § 23301*, is disabled from participating in any litigation activities. *Palm Valley Homeowners Association, Inc. v. Design MTC (2000) 85 Cal. App. 4th 553, 559-562, 102 Cal. Rptr. 2d 350*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFinanceFranchise TaxPenalties for NoncomplianceBusiness & Corporate LawCorporationsFinanceFranchise TaxReinstatementBusiness & Corporate LawForeign BusinessesQualificationsCivil ProcedureParticiesCapacity of PartiesAgentsContracts LawContract Conditions & ProvisionsForum Selection Clauses

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14-160 California Forms of Pleading and Practice--Annotated § 160.33

§ 160.33 Law Reviews

Comment, *Criminal Sentences for Corporations: Alternative Fining Mechanisms, 73 Calif. L. Rev. 443 (1985)*

Bauer and Baran, *Counseling the Politically Active Corporation: Legal Uncertainties and Political Pressures, 39 Bus. Law. 919 (1984)*

Ginger, *Regulation of Quasi-Foreign Corporations in California: Reflections on Section 2115 after Wilson v. Louisiana-Pacific Resources, Inc.*, 14 Sw. U. (L.A.) L. Rev. 665 (1984)

Comment, *The Scope of Federal Venue Over Corporations in Multidistrict States, 71 Calif. L. Rev. 193 (1983)*

Klein, *The Modern Business Organization: Bargaining Under Constraints, 91 Yale L.J. 1521 (1982)*

Note, *Constitutional Rights of the Corporate Person, 91 Yale L.J. 1641 (1982)*

Gergacz, *Attorney-Corporate Client Privilege, 37 Bus. Law. 461 (1981)*

Oldham, *California Regulates Pseudo-Foreign Corporations--Trampling Upon the Tramp? 17 Santa Clara L. Rev. 85 (1977)*

Halloran and Hammer, *Section 2115 of the New California General Corporation Law--The Application of California Corporation Law to Foreign Corporations, 23 UCLA L. Rev. 1282 (1976)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawForeign BusinessesGeneral OverviewCivil ProcedureVenueCorporationsCriminal Law & ProcedureSentencingFinesEvidencePrivilegesAttorney-Client PrivilegeGeneral Overview

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14-160 California Forms of Pleading and Practice--Annotated § 160.34

§ 160.34 Text References

Ballantine & Sterling, California Corporation Laws, Ch. 14, *Litigation Involving Corporations and Shareholders* ; Ch. 18, *Foreign Corporations* (Matthew Bender)

Witkin, California Procedure, vols. 4-5, *Pleading*, §§ 75-80, 854, 1055-1061 (4th ed. 1997)

Witkin, Summary of California Law, vol. 9, *Corporations*, §§ 222-239 (10th ed. 2005)

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[Reserved]

§§ 160.35[Reserved]

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14-160 California Forms of Pleading and Practice--Annotated § 160.50

§ 160.50 Allegation of Capacity and Principal Place of Business [Code Civ. Proc. § 395.5]--Domestic Corporation

[1] FORM Allegation of Capacity and Principal Place of Business [Code Civ. Proc. § 395.5]--Domestic Corporation

_____ [*Name of corporation*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California, with its principal place of business at _____ [*street address and city*], _____ County, California.

[2] Use of Form

This allegation of capacity and principal place of business of a domestic corporation is for insertion in a pleading. The allegation of principal place of business may be included if it is necessary to establish venue [*see Code Civ. Proc. § 395.5*]. If, however, venue is to be established on a different basis, such as the county where the liability arises [*see Code Civ. Proc. § 395.5*], the allegation of principal place of business should be omitted. See generally Ch. 571, *Venue* .

[3] Legal Capacity of Corporations

Although it is customary to plead corporate organization and existence to assert a corporation's capacity to be sued, it has been held that failure to affirmatively allege capacity of a corporation to sue is not a proper ground for general demurrer [*Los Angeles Railway Co. v. Davis (1905) 146 Cal. 179, 180-181, 79 P. 865]* , and it has been suggested that the capacity of the plaintiff to sue or of the defendant to be sued need not be affirmatively alleged in the complaint [Witkin, California Procedure, vol. 5, *Pleading*, § 853 (4th ed. 1997)].

[4] Venue

A corporation may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises or the breach occurs, or in the county where the principal place of business of the corporation is situated, subject to the power of the court to change the place of trial as in other cases [*Code Civ. Proc. § 395.5*].

For purposes of venue under *Code Civ. Proc. § 395.5*, a domestic corporation's designation of the location of its

principal place of business in its annual domestic stock certificate filed with the Secretary of State exclusively fixes the corporation's principal place of business [*Rosas v. Superior Court (1994) 25 Cal. App. 4th 671, 672, 30 Cal. Rptr. 2d 609]* .

[5] Cross References

For alternative allegations of venue, *see* Ch. 571, *Venue*

[6] State Statutes

Venue of actions against corporations. *Code Civ. Proc. § 395.5*

Franchise Tax Board letters of good standing verifying corporation's status for doing business in California. *Rev. & Tax. Code § 23305e*

[7] Decisions

Absence of allegation of capacity of corporate plaintiff to sue is not ground for general demurrer. *Los Angeles Ry. Co. v. Davis (1905) 146 Cal. 179, 180-181, 79 P. 865*

Domestic corporation's designation of location of its principal place of business in its annual domestic stock certificate filed with Secretary of State exclusively fixes corporation's principal place of business for purposes of venue under *Code Civ. Proc. § 395.5*. *Rosas v. Superior Court (1994) 25 Cal. App. 4th 671, 672, 30 Cal. Rptr. 2d 609*

Venue in class action is not based on service to particular defendant unless plaintiff, as representative of class, has personal cause of action against that defendant. *General Motors Corp. v. Superior Court (1983) 141 Cal. App. 3d 966, 969, 970, 190 Cal. Rptr. 742*

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14-160 California Forms of Pleading and Practice--Annotated § 160.51

§ 160.51 Allegation of Capacity and Principal Place of Business [Code Civ. Proc. § 395.5]--Foreign Corporation Transacting Intrastate Business in California [Corp. Code §§ 170, 191]

[1] FORM Allegation of Capacity and Principal Place of Business [Code Civ. Proc. § 395.5]--Foreign Corporation Transacting Intrastate Business in California [Corp. Code §§ 170, 191]

_____ [*Name of corporation*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of _____, and authorized to transact, and transacting, intrastate business in California, with its principal place of business in this state in [_____ (*name*) _____ (Municipal Court *or* Judicial) District,] _____ County, California.

[2] Use of Form

This allegation of capacity and principal place of business of a foreign corporation authorized to transact and transacting intrastate business [*see Corp. Code § 191* (definition and exceptions)] in California is for insertion in a pleading. For a discussion of allegations of capacity and principal place of business, see the Comments to § 160.50.

[3] Failure of Foreign Corporation to Qualify

A foreign corporation that transacts intrastate business in California [*see Corp. Code § 191*] but fails to obtain a certificate from the Secretary of State qualifying it to transact such business [*see Corp. Code § 2105*] may not maintain any action or proceeding upon any such business so transacted in any California court until it has qualified and paid all penalties assessed for its failure to qualify [*Corp. Code § 2203(c)*].

For an affirmative defense alleging a plaintiff foreign corporation's incapacity to maintain an action, see *§ 160.54*.

[4] Cross References

For procedure and forms concerning service of process on foreign corporations doing business in California, *see* Ch. 518, *Service of Summons and Papers*

[5] California Points and Authorities

For memoranda of points and authorities related to a foreign corporation's failure to qualify to transact business in California, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

[6] California Legal Forms

For the forms necessary to a foreign corporation to transact business in California, see California Legal Forms, Ch. 12B, *Foreign Corporations* (Matthew Bender)

[7] State Statutes

Qualification requirements for foreign professional corporations transacting intrastate business in California. *Corp. Code § 13404.5*

Foreign corporation transacting business in California without certificate of qualification is unable to maintain action or proceeding based on such intrastate business. *Corp. Code § 2203(c)*

[8] Decisions

Absence of allegation of compliance by foreign corporate plaintiff with statutory requirements for maintaining suit is not ground for general demurrer. *H. D. Haley & Co. v. McVay (1924) 70 Cal. App. 438, 440, 233 P. 409* ; *Bernheim Distilling Co. v. Elmore (1909) 12 Cal. App. 85, 86, 106 P. 720*

[9] Text References

Ballantine and Sterling, California Corporation Laws, Ch. 18, *Foreign Corporations* , § 391 (Matthew Bender)

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14-160 California Forms of Pleading and Practice--Annotated § 160.52

§ 160.52 Allegation of Capacity [Code Civ. Proc. § 395]--Foreign Corporation Not Authorized to Transact Intrastate Business in California

[1] FORM Allegation of Capacity [Code Civ. Proc. § 395]--Foreign Corporation Not Authorized to Transact Intrastate Business in California

_____ [*Name of corporation*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of _____, and is not authorized to transact intrastate business in California.

[2] Use of Form

This form is an allegation of capacity of a foreign corporation which is not authorized to transact intrastate business in California [*see Corp. Code § 191* (defining what constitutes transaction of intrastate business and the exceptions thereto)].

[3] Venue

Since a foreign corporation which does not transact intrastate business in California has no principal place of business in this state, the venue provisions of *Code Civ. Proc. § 395* will apply and the corporation may be sued in any county in the state which the plaintiff may designate [*Code Civ. Proc. § 395*; *Easton v. Superior Court (1970) 12 Cal. App. 3d 243, 246-247, 90 Cal. Rptr. 642]* .

[4] State Statutes

Venue of actions against persons not residing in California. *Code Civ. Proc. § 395*

[5] Decisions

Foreign corporation not qualified to transact intrastate business has no residence in California and therefore no basis on

which to seek residence venue. *Easton v. Superior Court (1970) 12 Cal. App. 3d 243, 246-247, 90 Cal. Rptr. 642* ; *Hobson v. Metropolitan Cas. Ins. Co. (1931) 114 Cal. App. 349, 355, 300 P. 87*

[6] Cross References

For alternative allegations of venue, *see* Ch. 571, *Venue*

For a related form, *see § 160.51*.

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14-160 California Forms of Pleading and Practice--Annotated § 160.53

§ 160.53 Allegation of Applicability of General Corporation Law to Foreign Corporation [Corp. Code § 2115]

[1] FORM Allegation of Applicability of General Corporation Law to Foreign Corporation [Corp. Code § 2115]

_____ [*Name of corporation*] is, and at all times herein mentioned was, a foreign _____ [corporation transacting intrastate business in California *or* parent corporation] which is subject to *Section 2115 of the California Corporations Code* and to which Section _____ [*specify provisions or sections set forth in Corp. Code § 2115(b) which are relevant to action*] of the Corporations Code is applicable to the exclusion of the law of the jurisdiction of its incorporation.

[2] Use of Form

This allegation is for use in a pleading in which the plaintiff asserts rights against a foreign corporation based on substantive provisions of the General Corporation Law applicable to such a corporation by virtue of *Corp. Code § 2115* [*see § 160.53[3]*]. This allegation should be used when the status of a foreign corporation under *Corp. Code § 2115* is a matter of record and the cause of action arose during the time that the corporation was subject to the provisions of *Corp. Code § 2115*. Since nominally foreign status can be acquired by either a foreign corporation transacting intrastate business or a foreign parent corporation upon the first day of the first income year of the corporation beginning on or after the 135th day of the income year immediately following the latest income year with respect to which the shareholder and business tests [*see Corp. Code § 2115(a)* (setting forth tests)] have been met, or beginning on or after the entry of a final order by a court of competent jurisdiction declaring that those tests have been met [*Corp. Code § 2115(d)*], this allegation would not be appropriate where that status had not been established by one of these two methods. For a complaint to have a foreign corporation declared subject to the provisions of *Corp. Code § 2115*, see *§ 160.57*. For a motion for partial summary judgment on the issue of the foreign corporation's nominally foreign status, see *§ 160.55*.

[3] Nominally Foreign Corporations

[a] How Status Acquired

A foreign corporation becomes nominally foreign, and therefore subject to the provisions of the California General

Corporation Law set forth in *Corp. Code § 2115(b)*, when the tests of *Corp. Code § 2115(a)* are satisfied. Briefly, these tests relate to business factors (payroll, property, and sales) on the one hand, and share ownership on the other. The business factors are derived from the Bank and Corporation Tax Law's provisions concerning the allocation of income to the various states in which a corporation does business [*see Rev. & Tax. Code §§ 25129, 25132, 25134*]. Use of the three-factor formula is required in the computation of taxes of most corporations conducting business in several states, and, for the purpose of determining nominally foreign status, must also be used by corporations the allocation of whose income is governed by special formulas or which are not required to file separate tax returns [*Corp. Code § 2115(a)*]. If the average of the property, payroll, and sales factors is more than 50 percent during its latest full income year and if more than one-half of its outstanding voting securities are held of record by persons having California addresses appearing on the books of the corporation on the record date for the latest meeting of shareholders held during its latest full income year (or if no meeting was held during that year, on the last day of the latest full income year), the corporation will be nominally foreign [*Corp. Code § 2115(a)*].

It is important to remember when determining whether the shareholder test is satisfied that any securities held to the knowledge of the issuer in the names of broker-dealers, nominees for broker-dealers (including clearing corporations) or banks, associations, or other entities holding securities in a nominee name of otherwise on behalf of a beneficial owner (collectively "nominee holders"), are not considered outstanding [*Corp. Code § 2115(a)*]. However, if the foreign corporation requests all nominee holders to certify, with respect to all beneficial owners for whom securities are held, the number of shares held for those beneficial owners having addresses (as shown on the records of the nominee holder) in California and outside of California, then all shares so certified must be considered "outstanding" and held of record by persons having addresses either in California or outside California as so certified, provided that the certification so provided must be retained with the record of shareholders and made available for inspection and copying in the same manner as is provided in *Corp. Code § 1600* with respect to that record. A current list of beneficial owners of a foreign corporation's securities provided to the corporation by one or more nominee holders or their agent pursuant to the requirements of Rules 14b-1(b)(3) or 14b-2(b)(3) as adopted on January 6, 1992, promulgated under the Securities Exchange Act of 1934, will constitute an acceptable certification with respect to beneficial owners [*Corp. Code § 2115(a)*].

[b] Parent Corporations

A foreign parent may be a nominally foreign corporation even though it does not itself transact intrastate business in California [*Corp. Code § 2115(a)*]. The test for outstanding shares held by California residents is the same as for corporations transacting intrastate business, but the determination of the property, payroll, and sales factors is made on a consolidated basis, including in a unitary computation (after elimination of intercompany transactions) the property, payroll, and sales of the parent and all of its subsidiaries in which it owns directly or indirectly more than 50 percent of the outstanding shares entitled to vote for the election of directors, but deducting a percentage of the property, payroll, and sales of any subsidiary equal to the percentage of minority ownership, if any, in the subsidiary [*Corp. Code § 2115(a)*]. Note that although the definition of parent [*Corp. Code § 175*] does not specify a particular percentage of ownership in a subsidiary [*see Corp. Code § 189* (definition)], for the purposes of the foregoing computation, only majority-owned subsidiaries are included.

[c] When Status Commences and Ceases

Nominally foreign status begins on the first day of the first income year of the corporation commencing on or after the 135th day of the income year immediately following the latest income year with respect to which the shareholder and business tests [*see Corp. Code § 2115(a)* (setting forth tests)] have been met, or beginning on or after the entry of a final order by a court of competent jurisdiction declaring that those tests have been met [*Corp. Code § 2115(d)*]. That status ceases to be applicable to a foreign corporation at the end of the first income year of the corporation immediately following the latest income year with respect to which at least one of the tests is not met, or at the end of the income year of the corporation during which a final order has been entered by a court of competent jurisdiction declaring that

one of those tests is not met, provided that a contrary order has not been entered before the end of the income year [*Corp. Code § 2115(e)*].

[d] Applicability of General Corporation Law

Once a foreign corporation acquires nominally foreign status, it will be subject to specific provisions of the General Corporation Law, which are listed in *Corp. Code § 2115(b)*, to the exclusion of the law of the jurisdiction in which the corporation is incorporated [*Corp. Code § 2115(b)*]. These provisions are set forth in *§ 160.12[2][f]*.

[e] Exemption From Status

For discussion of exemptions from nominally foreign status, see *§ 160.12[2][e]*.

[4] State Statutes

Foreign professional corporations transacting intrastate business in California subject to General Corporation Law applicable to foreign corporations, except when those provisions are in conflict with provisions governing California professional corporations (*Corp. Code § 13400 et seq.*). *Corp. Code § 13404.5*

Transaction of intrastate business defined. *Corp. Code § 191(a)*

Activities not constituting transaction of intrastate business. *Corp. Code § 191(b)-(d)*

Foreign corporations subject to General Corporation Law. *Corp. Code § 2115*

Foreign corporations exempt from *Corp. Code § 2115*. *Corp. Code § 2115(c)*

[5] Text References

Ballantine and Sterling, California Corporation Laws, Ch. 18, *Foreign Corporations* ; Ch. 22, *Corporate Franchise and Income Taxes in California* (Matthew Bender)

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14-160 California Forms of Pleading and Practice--Annotated § 160.54

§ 160.54 Affirmative Defense--Plaintiff Foreign Corporation Is Not Qualified to Transact Intrastate Business in California [Corp. Code §§ 191, 2105, 2203(c)]

[1] FORM Affirmative Defense--Plaintiff Foreign Corporation Is Not Qualified to Transact Intrastate Business in California [Corp. Code §§ 191, 2105, 2203(c)]

AS A [_____ (*if more than one, specify number, e.g.*, FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.*, SECOND) CAUSE OF ACTION], defendant alleges that plaintiff is a foreign corporation that has entered into repeated and successive transactions of its business in this state, other than in interstate or foreign commerce, but does not hold a valid certificate of qualification from the California Secretary of State to transact intrastate business. Plaintiff is therefore barred from maintaining this _____ [action *or* proceeding], which is based upon the transaction of such intrastate business.

[2] Use of Form

This affirmative defense is for use in the answer of a defendant in an action or proceeding brought by a foreign corporation which is transacting intrastate business but which has not qualified to do so. Although the failure of a foreign corporation to qualify to transact business has been raised in other ways [*see Thorner v. Selective Cam Transmission Co. (1960) 180 Cal. App. 2d 89, 90, 4 Cal. Rptr. 409* (motion to dismiss)], it is normally set up as a defense in the answer [*W. W. Kimball Co. v. Read (1919) 43 Cal. App. 342, 344, 185 P. 192* ; *McMillan Process Co. v. Brown (1939) 33 Cal. App. 2d 279, 282, 91 P.2d 613]* .

Failure of a foreign corporation to qualify to transact business prior to commencing an action is a matter of abatement of the action. The defendant may raise the issue of lack of capacity to maintain the action by demurrer or as an affirmative defense in the answer. If the bar of *Corp. Code 2203(c)* is established, the plaintiff must comply with the statute by qualifying and paying fees, penalties, and taxes. Ordinarily, the matter should be stayed to permit the corporation to comply. If it does not comply, the matter should be dismissed without prejudice [*United Medical Management Ltd. v. Gatto (1996) 49 Ca. App. 4th 1732, 1740, 57 Cal. Rptr. 2d 600* ; *see also Hall v. Citizens Nat. Tr. & Sav. Bank of Los Angeles (1942) 53 Cal. App. 2d 625, 630, 128 P.2d 545* (revival of corporate powers prior to hearing on plea in abatement validated all prior acts of corporation)].

[3] Foreign Corporations

[a] Transacting Intrastate Business

A foreign corporation, including a business association organized as a trust under the laws of a foreign jurisdiction [*Corp. Code §§ 170, 171*] transacts intrastate business in California when it enters into repeated and successive transactions of its business in California, other than interstate or foreign commerce [*Corp. Code § 191(a)*]. Whether a foreign corporation is transacting intrastate business may present close factual questions [*see Lilly & Co. v. Sav-On-Drugs (1961) 366 U.S. 276, 81 S. Ct. 1316, 6 L. Ed. 2d 288, 291-294* (holding that maintaining 18 employees in state to promote products purchased from local wholesalers constituted transaction of intrastate business)]. A corporation's status as a shareholder of a domestic corporation, a limited partner of a limited partnership, or a member or manager of a LLC; or that of a foreign corporation, limited partnership, or LLC transacting intrastate business, is excluded from the definition of transacting intrastate business [*Corp. Code § 191(b)*. Further, certain activities are excluded by statute from the definition of transacting intrastate business, thereby providing a kind of "safe harbor" with respect to such activities. The excluded activities are listed in *Corp. Code § 191(b)-(d)* and refer to activities carried on by foreign corporations generally and foreign lending institutions in particular. The activities listed are not intended to exclude other activities which also may not constitute the transaction of intrastate business [*Corp. Code § 191(c), (d)*; *see, e.g., United Systems of Arkansas, Inc. v. Stamison (1998) 63 Cal. App. 4th 1001, 1007, 74 Cal. Rptr. 2d 407* (submitting bid in response to request for quotation by DMV was not "transacting intrastate business" and out-of-state bidder could maintain suit challenging award of contract to another bidder without obtaining certificate of qualification)].

[b] Qualification Requirement

A foreign corporation must not transact intrastate business without having first obtained from the California Secretary of State a certificate of qualification [*Corp. Code § 2105(a)*]. The certificate is obtained by the filing of a statement and designation of agent for service of process on a form, the contents of which are prescribed by *Corp. Code § 2105*.

[e] Failure to Qualify

In addition to a penalty or fine levied for each day a foreign corporation transacts intrastate business without holding a valid certificate of qualification [*Corp. Code § 2203(a), (b)*], such a corporation is barred from maintaining any action or proceeding on any intrastate business so transacted, which action or proceeding is commenced prior to compliance with *Corp. Code § 2105* (qualification requirement), until the corporation has complied with the provisions thereof and has paid to the Secretary of State a penalty of $250 in addition to the fees due for filing the statement and designation required by *Corp. Code § 2105*, and has filed with the clerk of the court in which the action is pending receipts showing the payment of said fees and penalty and all franchise taxes and any other taxes on business or property in California that should have been paid for the period during which it transacted intrastate business [*Corp. Code § 2203(c)*].

[4] Cross References

For forms of answers, see Ch. 26, *Answers*

For forms and discussion of pleas in abatement, see Ch. 3, *Abatement of Actions*

[5] California Points and Authorities

For points and authorities supporting a motion to strike the complaint of a nonqualified foreign corporation, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

[6] State Statutes

Foreign association defined. *Corp. Code § 170*

Foreign corporation defined. *Corp. Code § 171*

Transact intrastate business defined. *Corp. Code § 191(a)*

Exclusions from definition of transact intrastate business. *Corp. Code § 191(b)-(d)*

Foreign disappearing corporation that is merged into another corporation surrenders its right to transact intrastate business. *Corp. Code § 1108(c)-(e)*

Requirement that foreign corporation qualify to transact intrastate business. *Corp. Code § 2105*

Penalty imposed and bar to maintaining action by foreign corporation transacting intrastate business without valid certificate of qualification. *Corp. Code § 2203*

[7] Decisions

Corporation not precluded from asserting statute of limitations as defense because it is amenable to substituted service on Secretary of State if it is engaged in unauthorized transaction of intrastate business. *Steiner v. 20th Century-Fox Film Corp. (9th Cir. 1956) 232 F.2d 190, 196*

Bar to maintaining an action or proceeding in California courts is inapplicable to federal cause of action heard in federal district court in nondiversity case. *Harms, Inc. v. Tops Music Enterprises, Inc., (S.D. Cal. 1958) 160 F. Supp. 77, 78*

Burden of proving that foreign corporation is transacting intrastate business is on party pleading bar to maintenance of action. *Automotriz etc. De Cal. v. Resnick (1957) 47 Cal. 2d 792, 794, 306 P.2d 1*

Telephonic negotiations between Mexico and United States regarding sale of automobiles subsequently shipped from Mexico to United States do not constitute transaction of intrastate business. *Automotriz Del Golfo De Cal. v. Resnick (1957) 47 Cal. 2d 792, 794, 306 P.2d 1*

Foreign corporation that qualifies to transact intrastate business after transacting, but before commencing an action on, intrastate business may maintain action without complying with *Corp. Code § 2203(c)* so long as Franchise Tax Board has not suspended the corporation for failure to pay taxes before it commences the action. *United Medical Management Ltd. v. Gatto, 49 Cal. App. 4th 1732, 1742, 57 Cal. Rptr. 2d 600 (1996)*

Motion to strike answer and cross complaint on ground that it was sham because corporation had failed to comply with *Corp. Code § 2105* prior to transacting intrastate business as improperly granted when affidavits supporting and opposing motion created triable issue of fact as to whether corporation's activities within California amounted to transaction of intrastate business that required it to obtain certificate of qualification. *Mediterranean Exports, Inc. v. Superior Court (1981) 119 Cal. App. 3d 605, 616-617, 174 Cal. Rptr. 169*

Failure of foreign corporation to qualify to transact intrastate business bars assignee of that corporation from maintaining action. *Thorner v. Selective Cam Transmission Co. (1960) 180 Cal. App. 2d 89, 93, 4 Cal. Rptr. 409*

[8] Text References

Ballantine & Sterling, California Corporation Laws, Ch. 18, *Foreign Corporations* , § 391 (Matthew Bender)

Witkin, Summary of California Law, vol. 9, *Corporations*, §§ 226-233 (10th ed. 2005)

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14-160 California Forms of Pleading and Practice--Annotated § 160.55

§ 160.55 Summary Adjudication of Cause of Action or Affirmative Defense [Code Civ. Proc. § 437c(f)]--Notice of Motion--By Plaintiff or Defendant--Based on Whether Defendant Foreign Corporation Is Subject to Corp. Code § 2115

[1] FORM Summary Adjudication of Cause of Action or Affirmative Defense [Code Civ. Proc. § 437c(f)]--Notice of Motion--By Plaintiff or Defendant--Based on Whether Defendant Foreign Corporation Is Subject to Corp. Code § 2115

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR SUM-
Plaintiff,	)	MARY ADJUDICATION
vs.	)	Date: _____
_____ [*name*], a Corporation,	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*name*], _____ [plaintiff *or* defendant], and to _____ [*name*], its attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter can be heard, in the courtroom [of _____ (*specify court designation*)] of this court at _____ [*address*], _____ [plaintiff *or* defendant] will, and hereby does, move for an order entering summary judgment in favor of _____ [plaintiff *or* defendant] on the

_____ [*number*] cause of action, [or as to any other element of the _____ (*number*) cause of action,] on the ground that there is no triable issue of fact regarding defendant's status as a foreign [parent] corporation subject to *California Corporations Code Section 2115*, and that _____ [plaintiff *or* defendant] is entitled to judgment [on that cause of action] as a matter of law.

The motion will be based on this notice of motion, _____ [*add, if appropriate* : on the attached _____ (affidavit *or* declaration) of _____ (*name*),] the attached memorandum, the papers and records on file herein, and such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

CAUTION:
A memorandum must accompany this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This motion for summary adjudication is for use in disposing of a cause of action or affirmative defense that turns on the single issue of whether or not a foreign corporation meets the tests of *Corp. Code § 2115(a)* [*see Code Civ. Proc. § 437c(f)(1), (n)-(o)*; *see also § 160.53* (allegation that corporation is "nominally foreign")]. If the foreign corporation meets those tests, it will be subject to provisions of the California General Corporation Law enumerated in *Corp. Code § 2115(b)*. For the purposes of this chapter, corporations meeting these tests are referred to as nominally foreign corporations. Nominally foreign status does not commence until the first day of the first income year of the corporation commencing on or after the 135th day of the income year immediately following the latest income year with respect to which the shareholder and business tests [*see Corp. Code § 2115(a)* (setting forth tests)] have been met, or beginning on or after the entry of a final order by a court of competent jurisdiction declaring that those tests have been met [*Corp. Code § 2115(d)*]. That status ceases to be applicable to a foreign corporation at the end of the first income year of the corporation immediately following the latest income year with respect to which at least one of the tests is not met, or at the end of the income year of the corporation during which a final order has been entered by a court of competent jurisdiction declaring that one of those tests is not met, provided that a contrary order has not been entered before the end of the income year [*Corp. Code § 2115(e)*].

A motion for summary adjudication of a cause of action or affirmative defense is appropriate when one or more causes of action within an action has no merit or there is no defense thereto [*Code Civ. Proc. § 437c(f)(1)*]. A cause of action has no merit if either (1) one or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded, or (2) a defendant establishes an affirmative defense to that cause of action [*Code Civ. Proc. § 437c(o)*; *see Code Civ. Proc. § 437c(p)* (burdens and means of proof)]. A motion for summary adjudication can be granted only if it completely disposes of a cause of action, affirmative defense, claim for damages, or an issue of duty [*Code Civ. Proc. § 437c(f)(1)*]. Thus, use of this form, without more, is only appropriate when the only contested element of the cause of action or defense is the corporation's status as a "nominally foreign" corporation.

[3] Possibility of Declaratory Relief

Corp. Code § 2115(d) provides that nominally foreign status will commence on or after the entry of a final order by a court of competent jurisdiction declaring that the tests of *Corp. Code § 2115(a)* have been met. Thus, one could seek declaratory relief to establish the corporation's nominally foreign status. The wording of *Corp. Code § 2115(d)* strongly suggests that nominally foreign status would not commence until the court has declared the tests met, and that therefore a nunc pro tunc order is not authorized by that section. That being the case, one seeking declaratory relief could not assert in the same action a claim based on the applicability of a provision of the General Corporation Law unless the relief sought were prospective, for example, to obtain inspection rights [*see Corp. Code § 2115(b)* (applying *Corp. Code § 1600* to nominally foreign corporations)]. For a complaint for declaratory relief to have a foreign corporation declared nominally foreign, see *§ 160.57*.

[4] California Points and Authorities

For memoranda of points and authorities supporting and opposing a motion for partial summary judgment based on a foreign corporation's status under *Corp. Code § 2115*, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

[5] State Statutes

Summary judgment. *Code Civ. Proc. § 437c*

Foreign corporations subject to California law. *Corp. Code § 2115(b)*

Secretary of State's duty to furnish certified copy of any instrument filed in Secretary's office. *Gov. Code § 12168*

Fee for preparing copies of instrument and certifying same by Secretary of State. *Gov. Code §§ 12182, 12183, 12185*

[6] Text References

Ballantine & Sterling, California Corporation Laws, Ch. 18, *Foreign Corporations* , §§ 392, 393 (Matthew Bender)

[7] Cross References

For forms and discussion of summary judgment and adjudication, *see* Ch. 537, *Summary Judgment*

For related forms, *see §§ 160.53* and *160.54*.

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14-160 California Forms of Pleading and Practice--Annotated § 160.56

§ 160.56 Summary Adjudication of Cause of Action or Affirmative Defense [Code Civ. Proc. § 437c(f)]--Order Declaring That Corporation Is or Is Not Subject to Corp. Code § 2115

[1] FORM Summary Adjudication of Cause of Action or Affirmative Defense [Code Civ. Proc. § 437c(f)]--Order Declaring That Corporation Is or Is Not Subject to Corp. Code § 2115

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER GRANTING SUMMARY ADJUDICA-
Plaintiff,	)	TION
vs.	)	Date: _____
_____ [*name*], a Corporation,	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

_____ [Plaintiff's *or* Defendant's] motion for summary adjudication of a _____ [cause of action *or* affirmative defense] came on regularly for hearing on _____ [*date*]. _____ [*Name*] appeared as counsel for plaintiff and _____ [*name*] appeared as counsel for defendant. The court examined the declarations submitted in support of and in opposition to the motion, and the matter was argued and submitted.

On consideration of all the evidence set forth in the papers submitted, and the inferences reasonably deducible therefrom, except that to which objection was sustained, the Court makes the following determinations for the following reasons:

There is no triable issue as to any material fact regarding whether defendant is [not] a nominally foreign corporation, as appears from the _____ [*specify evidence*], and thus _____ [plaintiff *or* defendant] is entitled as a matter of law to summary adjudication in his/her/its favor and against _____ [defendant *or* plaintiff] on the [_____ (*number*)] _____ [cause of action (of plaintiff's _____ (*number*) Amended Complaint) *or* affirmative defense].

[2] Cross References

For a related form, *see § 160.55*.

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14-160 California Forms of Pleading and Practice--Annotated § 160.57

§ 160.57 Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--To Declare Defendant Is Foreign Corporation Subject to Corp. Code § 2115

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--To Declare Defendant Is Foreign Corporation Subject to Corp. Code § 2115

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], a Corporation,	)	COMPLAINT FOR DECLARATORY RELIEF
Defendant.	)	
	)	
	)	

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, a foreign _____ [corporation transacting intrastate business in California *or* parent corporation] duly organized and existing under the laws of the State of _____ [, with its principal place of business in this state in _____ County, California].

2. _____ [*Set out essential facts of transaction to which plaintiff desires to have California's General Corporation Law apply to the exclusion of the law of the state of incorporation of defendant, e.g.*, Defendant has announced its intention to sell substantially all of its assets for cash to a corporation more than 50 percent of whose voting power is owned _____ (directly *or* indirectly) by the defendant. Plaintiff, a shareholder of record of defendant, received notice of the proposed sale of assets in the notice of a shareholders' meeting to be held on

_____ [*date*], for the purpose of approving the sale of assets. Copies of the notice, management's proxy, and accompanying proxy statement are attached as Exhibits A, B, and C, respectively, and incorporated by reference].

3. An actual controversy has arisen and now exists between plaintiff and defendant concerning their respective rights and duties in that plaintiff contends that defendant is a foreign corporation which meets the tests set forth in *California Corporations Code Section 2115(a)* and to which that Section is therefore applicable. [Plaintiff further contends that the proposed sale of assets for cash by defendant is a transaction which must be approved by at least 90 percent of the voting power of defendant as required by *California Corporations Code Section 1001(d)*, made applicable to defendant to the exclusion of the law of _____ (*defendant's state of incorporation*) by *California Corporations Code Section 2115(b)*.] Defendant disputes this contention and contends that it is not a foreign corporation meeting the tests set forth in *California Corporations Code Section 2115(a)*[, and that its proposed sale of assets for cash is a transaction governed exclusively by the law of _____ (*defendant's state of incorporation*), which law requires only the approval of a majority of defendant's shareholders to authorize the proposed sale of assets].

4. Plaintiff desires a judicial determination of his/her rights and duties, and a declaration as to the applicability of *California Corporations Code Section 2115(a)* to defendant.

5. Such a declaration is necessary and appropriate at this time in order that plaintiff may ascertain his/her rights and duties as a shareholder of record of defendant generally[, and, in particular, to avoid the loss of his/her investment in a prosperous business which will result if plaintiff is forced to take cash for his/her shares in a transaction receiving the approval of a simple majority of defendant's shareholders contrary to the requirements of applicable law governing such transactions].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a declaration that defendant is a foreign corporation meeting the tests set forth in *California Corporations Code Section 2115(a)* as of the date upon which an order of the court so declaring is entered;

[2. For a declaration that defendant's proposed sale of assets for cash is a transaction governed by *California Corporations Code Section 1001(d)* to the exclusion of the law of _____ (*defendant's state of incorporation*);]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This complaint is for use by a shareholder of a foreign corporation to obtain a declaratory judgment that the defendant is a foreign corporation subject to *Corp. Code § 2115(a)* because it meets the business and shareholder tests set forth in that section. Normally, the request for declaratory relief will be in the context of a dispute as to the applicability of California law, as the form illustrates.

For discussion of the event which will determine the applicability of *Corp. Code § 2115(a)*, *see § 160.53*, Comments.

[3] Cross References

For discussion, procedures, and forms relating to declaratory relief, *see* Ch. 182, *Declaratory Relief*

For related forms, *see §§ 160.52, 160.53,* and *§ 160.55*.

[4] California Points and Authorities

For points and authorities supporting a defendant foreign corporation's opposition to a motion for summary judgment in an action to enforce a provision of the General Corporation Law, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

[5] State Statutes

Declaratory relief. *Code Civ. Proc. § 1060*

Events determining applicability of *Corp. Code § 2115(a). Corp. Code § 2115(d), (e)*

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Volume 14: Corporations: Capacity thru Corporations: Dissolution and Winding Up-Chs. 160-173
Chapter 160 CORPORATIONS: CAPACITY
PART IV. FORMS

14-160 California Forms of Pleading and Practice--Annotated § 160.58

§ 160.58 Proceedings to Declare Corporation Not Subject to Corp. Code § 2115 [Corp. Code § 2115(e)]--Petition

[1] FORM Proceedings to Declare Corporation Not Subject to Corp. Code § 2115 [Corp. Code § 2115(e)]--Petition

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In re _____ [*name*], a Foreign Corporation.	))))	NO. _____ PETITION FOR ORDER DECLARING THAT FOREIGN CORPORATION IS NOT SUBJECT TO SECTION 2115(a) OF THE CALIFORNIA CORPORATIONS CODE

_____

Petitioner alleges:

1. _____ [*Name*], petitioner herein, is a foreign corporation duly organized and existing under the laws of the State of _____.

2. On _____ [*date*], _____ [*specify manner in which corporation ceased to meet the tests of Corp. Code § 2115(a), e.g.,* the corporation acquired, pursuant to an agreement, a copy of which is attached as Exhibit A and incorporated by reference, all of the outstanding shares of _____ (*name*), a corporation, in exchange for common shares of the petitioner. As a result of this acquisition, shares of the petitioner which are outstanding voting securities held of record by persons having addresses in California are less than one-half of the total of those securities].

WHEREFORE, petitioner prays as follows:

That the court give and make its order that _____ [*specify at least one test set forth under Corp. Code § 2115(a) which corporation no longer satisfies, e.g.*, as of _____ [*date*], less than one-half of the petitioner's outstanding voting securities were held of record by persons having addresses in California appearing on the books of the corporation _____ (on the record date for the latest meeting of shareholders held during its latest full income year *or, if no meeting was held during that year:* on the last day of the latest full income year)], and that therefore the petitioner no longer satisfies one of the tests specified in *Section 2115(a) of the California Corporations Code*.

_____ [*signature*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], declare that I am the _____ [*title*] of _____[*name of petitioner*], petitioner herein and I have been authorized to make this verification on its behalf. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This petition is for use by a foreign corporation which seeks to terminate its nominally foreign status under *Corp. Code § 2115(a)* by obtaining a court order that it is no longer subject to that section of the law because it no longer meets one of the tests for nominally foreign status [*see Corp. Code § 2115(a)* (setting forth tests)].

[3] How Nominally Foreign Status Terminated

A foreign corporation which is, or will be, subject to the provisions of *Corp. Code § 2115(a)*, and therefore a nominally foreign corporation subject to a number of substantive provisions of California's General Corporation Law [*see Corp. Code § 2115(b)*; *see also* Comments to § 160.53], may have that status terminated in one of two ways:

- *Corp. Code § 2115(a)* will no longer be applicable to a foreign corporation at the end of any income year at least one of the tests of *Corp. Code § 2115(a)* is not met; or

- *Corp. Code § 2115(a)* will cease to be applicable at the end of any income year during which a final order shall have been entered by a court of competent jurisdiction declaring that one of the tests is not met [*Corp. Code § 2115(d)*].

However, the order will not be effective if a contrary report or order is made or entered before the end of that income year [*Corp. Code § 2115(e)*].

[4] Propriety of Proceeding by Petition

The General Corporation Law makes clear neither the purpose nor the procedure for terminating nominally foreign status by means of obtaining a final order of a court of competent jurisdiction. It may be assumed, however, that since an adversary setting in which such an order might issue is inconceivable (since the order actually only takes effect at the end of the income year in which it is issued), the logical method for obtaining such an order is by way of petition to the superior court.

By using the petition illustrated by this form, the corporation can be relieved of its nominally foreign status at the end of the income year during which it obtains the court's final order [*Corp. Code § 2115(d)*].

[5] State Statutes

When *Corp. Code § 2115(a)* no longer applicable to foreign corporation. *Corp. Code § 2115(e)*

[6] Cross References

For related forms, *see §§ 160.53* and *160.55*.

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14-160 California Forms of Pleading and Practice--Annotated § 160.59

§ 160.59 Proceedings to Declare Corporation Not Subject to Corp. Code § 2115 [Corp. Code § 2115(e)]--Order

[1] FORM Proceedings to Declare Corporation Not Subject to Corp. Code § 2115 [Corp. Code § 2115(e)]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In re _____ [*name*],	)	NO. _____
a Foreign Corporation.	)	ORDER DECLARING THAT FOREIGN CORPOR-
	)	ATION IS NOT SUBJECT TO SECTION 2115(a)
		OF THE CALIFORNIA CORPORATIONS CODE

_____

This matter came on regularly for hearing by the court on _____ [*date*], at _____ [*time*], on the petition of _____ [*name*], a foreign corporation, made and filed in its name by its attorney and verified by its _____ [*specify, e.g.,* chief financial officer], for an order declaring that the petitioner _____ [*specify test under Corp. Code § 2115(a) which corporation no longer satisfies, e.g.,* as of _____ (*date*), has less than one half of its outstanding voting securities held of record by persons having addresses in California appearing on the books of the corporation _____ (on the record date for the latest meeting of shareholders held during its latest full income year *or, if no meeting was held during that year:* on the last day of the latest full income year)], and that therefore the petitioner no longer satisfies one of the tests specified in *Section 2115(a) of the California Corporations Code*.

On proof to the satisfaction of the court that the petition should be granted,

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED:

1. That _____ [*name*], a foreign corporation and the petitioner herein, _____ [*specify test under Corp. Code § 2115(a) that corporation no longer satisfies*].

2. That the petitioner is not a corporation meeting all of the tests specified in *California Corporations Code Section 2115(a)*.

3. That this order shall be effective on _____ [its entry *or specify date*].
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Cross References

For a related form, see *§ 160.58*.

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14-160 California Forms of Pleading and Practice--Annotated § 160.60

§ 160.60 Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Corporate Plaintiff's Powers Suspended or Forfeited for Failure to Comply With Tax Statutes [Rev. & Tax. Code §§ 23301, 23301.5]

[1] FORM Affirmative Defense of Lack of Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]--Corporate Plaintiff's Powers Suspended or Forfeited for Failure to Comply With Tax Statutes [Rev. & Tax. Code §§ 23301, 23301.5]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that on _____ [*date that Franchise Tax Board transmitted plaintiff's name to Secretary of State*], the corporate powers of plaintiff were _____ [suspended *or* forfeited] for _____ [*specify, e.g.,* nonpayment of taxes pursuant to *Revenue and Taxation Code Section 23301*]. A copy of the certificate of the Secretary of State evidencing such _____ [suspension *or* forfeiture] is attached as Exhibit A and incorporated by reference. Plaintiff's corporate powers have not been reinstated in the manner provided by law and plaintiff is without capacity to maintain this action.

[2] Use of Form

This affirmative defense is for use when the lack of capacity to sue results from a corporate plaintiff's failure to comply with *Rev. & Tax. Code § 23301* or *23301.5*. Although it has been raised by motion [*see Graceland v. Peebler (1942) 50 Cal. App. 2d 545, 546, 123 P.2d 527* (motion for judgment on the pleadings)], if a plaintiff corporation's lack of capacity to sue is treated as a plea in abatement [*Maryland C. Co. v. Superior Court (1928) 91 Cal. App. 356, 361, 267 P. 169]* and as a defect not appearing on the face of the complaint, it is usually raised by answer [*see* Ch. 26, *Answers* (discussion of new matter in answer)].

The forfeiture provisions of *Rev. & Tax. Code §§ 23301*, *23301.5*, and *23775* only apply to a foreign corporation that is required under *Corp. Code § 2105* to qualify to do business is in California if it has in fact qualified with the Secretary of State [*Rev. & Tax. Code § 23301.6*].

For a motion for summary adjudication based on a corporate defendant's lack of capacity to defend, see *§ 160.61*. That

form, with appropriate modification, could also be used in the situation contemplated by this form if it appears that the corporate plaintiff will be unable to secure reinstatement of its corporate powers or has failed to move for a continuance to accomplish that purpose.

[3] Failure to Pay Tax

Failure of a domestic corporation to pay its franchise or income taxes and assessments when due will result in suspension of its corporate powers, rights, and privileges [*Rev. & Tax. Code § 23301* (franchise taxes)]. Failure of a foreign corporation that has qualified with the Secretary of State to do business in California to pay its franchise taxes and assessments when due will result in forfeiture of its corporate powers, rights, and privileges [*Rev. & Tax. Code § 23301*; *see Rev. & Tax. Code § 23301.6* (*Rev. & Tax. Code § 23301* is only applicable to foreign corporation that has qualified with Secretary of State)]. Such a suspension or forfeiture becomes effective on receipt by the Secretary of State of the name of the delinquent corporation from the Franchise Tax Board [*Rev. & Tax. Code § 23302* (franchise tax)].

The forfeiture prescribed by *Rev. & Tax Code § 23301* is not automatic; it takes effect only when the Franchise Tax Board transmits the name of the tax-delinquent foreign corporation to the Secretary of State. If this has not been done, the corporation will continue to have the capacity to sue and defend, even though the corporation may, in fact, have failed to pay its taxes [*Rev. & Tax. Code § 23302*; *see Mediterranean Exports, Inc. v. Superior Court (1981) 119 Cal. App. 3d 605, 615, 617-618, 174 Cal. Rptr. 169]* .

The certificate of the Secretary of State is prima facie evidence of the fact of the suspension or forfeiture for failure to pay franchise taxes [*Rev. & Tax. Code § 23302*]; the certificate of the Franchise Tax Board is prima facie evidence of the fact of suspension for failure to pay corporate income taxes [*Rev. & Tax. Code § 23302*].

[4] Failure to File Tax Return

Except for the purposes of filing an application for exempt status or amending the articles of incoproration as necessary either to perfect that application or to set forth a new name, under regulations prescribed by the Franchise Tax Board, the corporate powers, rights, and privileges of a domestic corporation may be suspended and the exercise of the corporate powers, rights, and privileges of a foreign taxpayer in this state may be forfeited if a taxpayer fails to file a tax return [*Rev. & Tax. Code § 23301.5*; *see Rev. & Tax. Code § 23301.6* (*Rev. & Tax. Code § 23301.5* is only applicable to foreign corporation that has qualified with Secretary of State)]. The suspension or forfeiture applies whether the corporation is paying franchise or income taxes. The procedure for establishing the delinquency of a corporation that has not filed a return is the same as that followed when nonpayment of taxes is the ground for suspension or forfeiture [*Rev. & Tax. Code §§ 23302, 23305d*; *see § 160.60[3]*].

[5] Relief From Suspension or Forfeiture

A corporation that has suffered a suspension or forfeiture of its corporate powers may be reinstated by applying to the Franchise Tax Board for a certificate of revivor, filing all required tax returns, and paying the taxes, interest, and penalties due. Application for revivor may be made by any shareholder or creditor, by a majority of the surviving trustees or directors, by an officer, or by any other person who has interest in the relief [*Rev. & Tax. Code § 23305*]. Reinstatement without full payment of taxes, penalties, and interest due may be allowed by the Franchise Tax Board if it determines that the revivor will improve the prospects for collection of the full amount due. The revivor may be limited as to time and/or functions that the revived corporation can perform, and the corporate powers, rights, and privileges may be again suspended or forfeited if the Franchise Tax Board determines that the prospects for full collection have not been improved by the revivor [*Rev. & Tax. Code § 23305b*]. In addition, a suspended corporation or one whose powers have been forfeited may obtain relief by providing the Franchise Tax Board with an assumption of liability, or a bond, deposit, or other security for its liability, that is acceptable to the Franchise Tax Board [*Rev. & Tax.*

Code § 23305.2; *see § 160.14[2]*].

On issuance of the certificate of revivor, the taxpayer is reinstated, but the reinstatement is without prejudice to any action, defense, or right that has accrued by reason of the original suspension or forfeiture, except that contracts that were voidable under *Rev. & Tax. Code § 23304.1* (discussed in *§ 160.15[2]*) but that have not been rescinded pursuant to *Rev. & Tax. Code § 23304.5* may have that voidablity cured in accordance with *Rev. & Tax. Code § 23305.1* [*Rev. & Tax. Code § 23305a*]. Case law indicates that perhaps the only "action, defense, or right" that might be preserved in spite of reinstatement of the corporation is the running of the statute of limitations, a true defense rather than merely a plea in abatement [*Cleveland v. Gore Bros., Inc. (1936) 14 Cal. App. 2d 681, 683, 58 P.2d 931* ; *Welco Construction, Inc. v. Modulux, Inc. (1975) 47 Cal. App. 3d 69, 73, 120 Cal. Rptr. 572]* .

For a motion for continuance to secure reinstatement of a corporation, see *§ 160.65*.

[6] Effect

The California Supreme Court has held that since objection to a suspended corporation's capacity is merely a matter of abatement, the suspended status of the corporation at the time of filing of its action does not affect the jurisdiction of the court to proceed. It follows that such a suspension after the filing of the action does not deprive the court of jurisdiction or render the judgment void and subject to collateral attack [*Traub Co. v. Coffee Break Service, Inc. (1967) 66 Cal. 2d 368, 371, 57 Cal. Rptr. 846, 425 P.2d 790]* . Furthermore, a plea in abatement such as lack capacity to sue, unlike an objection to standing to sue, must be raised at the earliest opportunity or it is waived. Therefore, a corporation that was suspended after filing an action against a third party should have been granted a continuance in that action to allow time for it to pay its taxes and revive its powers, when the issue of incapacity was raised for the first time at trial [*Color-Vue, Inc. v. Abrams (1996) 44 Cal. App. 4th 1599, 1606, 52 Cal. Rptr. 2d 443]* .

Based on another Supreme Court decision involving a motion to dismiss an appeal on grounds of the corporation's suspension [*see* *Peacock Hill Asso. v. Peacock Lagoon Constr. Co. (1972) 8 Cal. 3d 369, 105 Cal. Rptr. 29, 503 P.2d 285]* and on cases approved in that decision, revival of corporate powers will validate corporate acts that occurred during the period of suspension, and, unless the matter of suspension is asserted during such incapacity and decided at that time [*see* *Hall v. Citizens Nat. Tr. & Sav. Bank of Los Angeles (1942) 53 Cal. App. 2d 625, 630-632, 128 P.2d 545* (revivor prior to hearing of plea in abatement validates acts prior to revivor)], the corporation's acts in commencing litigation will not be a nullity.

[7] Exceptions From Rule of Incapacity

Suspension or forfeiture of corporate powers resulting from failure to comply with the applicable tax statutes does not affect a shareholder's right to maintain a derivative suit [*Reed v. Norman (1957) 48 Cal. 2d 338, 343, 309 P.2d 809]* . In the case of a joint venture between a suspended corporation and another party, the suspension will not necessarily prevent the other party from bringing an action on behalf of itself and the joint venture [*Laurel Crest, Inc. v. Vaughn (1969) 272 Cal. App. 2d 363, 365, 77 Cal. Rptr. 538]* . If it appears that the suspended corporation would benefit from a judgment in an action brought by its joint venturer, the remedy could usually be limited in some manner to the joint venturer, and, even if not so limited, the action might be allowed on the ground that the suspension should not result in strict forfeiture [*Duncan v. Sunset Agricultural Minerals (1969) 273 Cal. App. 2d 489, 492-493, 78 Cal. Rptr. 339]* .

One court of appeal has held that the doctrine of substantial compliance allows a suspended corporation to prosecute or defend its action even though the certificate of revivor has not been issued [*Sade Shoe Co. v. Oschin & Snyder (1990) 217 Cal. App. 3d 1509, 1514-1515, 266 Cal. Rptr. 619]* . In that case, however, susbstantial compliance was not established because the suspended corporation still owed $90.85 in penalties and interest [*Sade Shoe Co. v. Oschin & Snyder (1990) 217 Cal. App. 3d 1509, 1515-1516, 266 Cal. Rptr. 619]* .

[8] Cross References

For forms and discussion of pleas in abatement, see Ch. 3, *Abatement of Actions*

[9] California Points and Authorities

For memoranda supporting and opposing motions based on a corporation's suspension or forfeiture for failure to comply with tax statutes, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

[10] State Statutes

Suspension or forfeiture of corporate powers for failure to pay franchise taxes. *Rev. & Tax. Code § 23301*

Suspension or forfeiture of corporate powers for failure to file return. *Rev. & Tax. Code § 23301.5* (franchise taxes)

Suspension or forfeiture of corporate powers is effective on transmission of name of delinquent taxpayer by Franchise Tax Board to Secretary of State. *Rev. & Tax. Code § 23302* (franchise tax)

Revival of suspended or forfeited powers. *Rev. & Tax. Code § 23305 et seq.* (franchise tax).

Certificate of Franchise Tax Board is prima facie evidence of fact of suspension for failure to pay corporate income taxes. *Rev. & Tax. Code § 23305d*

Franchise Tax Board letters of good standing verifying corporation's status for doing business in California. *Rev. & Tax. Code § 23305e*

Penalty for exercising corporate power after suspension or forfeiture. *Rev. & Tax. Code § 19719*

[11] Decisions

[a] Effect of Revivor

Suspension of corporate powers is defense that may be asserted so long as party-corporation is under disability; on revival of its corporate powers, party is entitled to proceed with prosecution or defense of action. *Diverco Constructors, Inc. v. Wilstein (1970) 4 Cal. App. 3d 6, 12, 85 Cal. Rptr. 851*

On revivor of corporate powers, corporation is able to continue action commenced during period of suspension and not previously dismissed, even though other party pleaded suspension prior to revivor. *A.E. Cook Co. v. KS Racing Enterprises, Inc. (1969) 274 Cal. App. 2d 499, 500, 79 Cal. Rptr. 123*

[b] Suspension or Forfeiture

Rev. & Tax. Code § 23301 (suspension provisions) does not necessarily preclude trial court from recognizing existence of suspended corporation for limited purpose of granting a continuance to enable corporation to secure reinstatement. *Schwartz v. Magyar House, Inc. (1959) 168 Cal. App. 2d 182, 189, 335 P.2d 487*

[12] Text References

Ballantine & Sterling, California Corporation Laws, Ch. 14, *Litigation Involving Corporations and Shareholders* , §§ 301-304 (Matthew Bender)

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14-160 California Forms of Pleading and Practice--Annotated § 160.61

§ 160.61 Summary Adjudication of Cause of Action or Affirmative Defense [Code Civ. Proc. § 437c(f)]--Notice of Motion--By Plaintiff or Defendant--Lack of Capacity to Prosecute or Defend Action Because of Suspension or Forfeiture of Corporate Powers for Noncompliance With Tax Statutes [Rev. & Tax. Code §§ 23301, 23301.5]

[1] FORM Summary Adjudication of Cause of Action or Affirmative Defense [Code Civ. Proc. § 437c(f)]--Notice of Motion--By Plaintiff or Defendant--Lack of Capacity to Prosecute or Defend Action Because of Suspension or Forfeiture of Corporate Powers for Noncompliance With Tax Statutes [Rev. & Tax. Code §§ 23301, 23301.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR SUM-
Plaintiff,	)	MARY ADJUDICATION
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*name*], _____ [plaintiff *or* defendant], and to _____ [*name*], its attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter can be heard, in the courtroom of _____ [department *or* judge *or specify other court designation*] at _____ [*address*], plaintiff will, and hereby does, move for an order entering summary judgment for _____ [plaintiff *or* defendant] on the _____ [*number*] cause

of action. The motion will be made on the ground that _____ [plaintiff *or* defendant] is without the capacity to _____ [prosecute *or* defend] this [cause of] action, its corporate powers, rights, and privileges having been _____ [suspended *or* forfeited] on _____ [*date that Franchise Tax Board transmitted defendant's name to Secretary of State*], and that _____ [plaintiff *or* defendant] is entitled to judgment as a matter of law.

This motion will be made and based on this notice, the pleadings, records, and files herein, on the certificate of the Secretary of State evidencing the _____ [suspension *or* forfeiture] of _____ [plaintiff's *or* defendant's] corporate powers, a copy of which is attached hereto as Exhibit A and made a part hereof, and on the memorandum served and filed herewith.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

CAUTION:
A memorandum must accompany this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This motion is for use by a plaintiff in an action by or against a corporation whose corporate powers, rights, and privileges have been suspended or forfeited for failure to pay its franchise or income taxes, or its failure to file a tax return [*see Rev. & Tax. Code §§ 23301, 23301.5*]. The forfeiture provisions of *Rev. & Tax. Code §§ 23301, 23301.5*, and *23775* only apply to a foreign corporation that is required under *Corp. Code § 2105* to qualify to do business in California if it has in fact qualified with the Secretary of State [*Rev. & Tax. Code § 23301.6*]. A corporation whose corporate powers have been suspended or forfeited is without capacity to prosecute or defend against a suit until revivor of its powers by the appropriate statutory procedure [*see Rev. & Tax. Code §§ 23305-23305d*]. For a motion for a continuance to secure reinstatement of corporate powers, see *§ 160.65*.

A motion for summary adjudication of a cause of action or affirmative defense is appropriate when one or more causes of action within an action has no merit or there is no defense thereto [*Code Civ. Proc. § 437c(f)(1)*].

A cause of action has no merit if either (1) one or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded, or (2) a defendant establishes an affirmative defense to that cause of action [*Code Civ. Proc. § 437c(o)*; *see also Code Civ. Proc. § 437c(p)* (burdens and means of proof)]. A motion for summary adjudication can be granted only if it completely disposes of a cause of action, affirmative defense, claim for damages, or an issue of duty [*Code Civ. Proc. § 437c(f)(1)*].

A motion for summary adjudication may also be used to dispose of a cause of action on a contract that is voidable because it was formed during the period of suspension or forfeiture [*see Damato v. Slevin (1989) 214 Cal. App. 3d 668, 675, 262 Cal. Rptr. 879* (decided under prior law); *see also § 160.15[2]*]. This notice of motion form may be modified for use in connection with a cause of action on a voidable contract or an affirmative defense of voidability.

[3] Cross References

For forms and discussion relating to motions for summary judgment and adjudication, see Ch. 537, *Summary Judgment*

For related forms, *see §§ 160.58* and *160.60*

[4] California Points and Authorities

For memoranda of points and authorities supporting and opposing motions for summary judgment based on suspension or forfeiture of a corporation's powers, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

[5] Decisions

Suspended corporation loses right to defend and therefore right to appeal from adverse decision. *Boyle v. Lakeview Creamery Co. (1937) 9 Cal. 2d 16, 20, 68 P.2d 968*

Motion to strike pleadings of defendant corporation whose corporate powers forfeited for nonpayment of taxes is proper after commencement of trial. *Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp. (1957) 155 Cal. App. 2d 46, 50, 317 P.2d 649*

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14-160 California Forms of Pleading and Practice--Annotated § 160.62

§ 160.62 Summary Adjudication of Cause of Action or Affirmative Defense [Code Civ. Proc. § 437c(f)]--Order--Powers of Corporation Suspended or Forfeited--Corporation Lacks Power to Prosecute or Defend

[1] FORM Summary Adjudication of Cause of Action or Affirmative Defense [Code Civ. Proc. § 437c(f)]--Order--Powers of Corporation Suspended or Forfeited--Corporation Lacks Power to Prosecute or Defend

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER GRANTING SUMMARY ADJUDICA-
Plaintiff,	)	TION
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

_____ [Plaintiff's *or* Defendant's] motion for summary adjudication of a _____ [cause of action *or* affirmative defense] came on regularly for hearing before me on _____ [*date*]. _____ [*Name*] appeared as counsel for plaintiff and _____ [*name*] appeared as counsel for defendant.

On consideration of all the evidence set forth in the papers submitted, and the inferences reasonably deducible therefrom, except that to which objection was sustained, the Court makes the following determinations for the following reasons:

There is no triable issue as to any material fact regarding the _____ [suspension *or* forfeiture] of _____ [defendant's *or* plaintiff's] powers, rights, and privileges for failure to _____ [*describe failure, e.g.,* pay taxes], as appears from the _____ [*specify evidence, e.g.,* certificate of suspension from the Secretary of State], and thus _____ [plaintiff *or* defendant] is entitled as a matter of law to summary adjudication in his/her/its favor and against _____ [defendant *or* plaintiff] on the [_____ (*number*)] _____ [cause of action (of plaintiff's _____ (*number*) Amended Complaint) *or* affirmative defense].

Accordingly,

IT IS ORDERED that the motion for an order granting summary adjudication be, and hereby is, granted in favor of _____ [plaintiff *or* defendant] and against _____ [defendant *or* plaintiff] _____ [*name*] with respect to the [_____ (*number*)] _____ [cause of action (of plaintiff's _____ (*number*) Amended Complaint) *or* affirmative defense][, and that this adjudication shall be carried into any final judgment subsequently entered in this action].

IT IS FURTHER ORDERED that [the answer herein be, and hereby is, stricken and that] summary judgment in favor of _____ [plaintiff *or* defendant] be granted [as to the _____ (*number*) cause of action] [*if judgment is in favor of plaintiff, continue:* and that plaintiff recover from defendant as follows:

1. The sum of $_____;

(2. Interest on said sum at the rate of _____percent per annum from and after _____ (*date*), to and including the date hereof, said interest amounting to the sum of $ _____;) and

3. Costs herein incurred.]
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Cross References

For related forms, *see §§ 160.60* and *160.61*.

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Volume 14: Corporations: Capacity thru Corporations: Dissolution and Winding Up-Chs. 160-173
Chapter 160 CORPORATIONS: CAPACITY
PART IV. FORMS

14-160 California Forms of Pleading and Practice--Annotated § 160.63

§ 160.63 Summary Adjudication of Cause of Action or Affirmative Defense [Code Civ. Proc. § 437c(f)]--Notice of Motion--By Plaintiff or Defendant--Lack of Capacity to Participate in Any Litigation Activities Because of Suspension of Corporate Powers for Failure to File Required Information Statement [Corp. Code §§ 1502, 2205]

[1] FORM Summary Adjudication of Cause of Action or Affirmative Defense [Code Civ. Proc. § 437c(f)]--Notice of Motion--By Plaintiff or Defendant--Lack of Capacity to Participate in Any Litigation Activities Because of Suspension of Corporate Powers for Failure to File Required Information Statement [Corp. Code §§ 1502, 2205]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR SUM-
Plaintiff,	)	MARY ADJUDICATION
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*name*], _____ [plaintiff *or* defendant], and to _____ [*name*], its attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter can be heard, in the courtroom of _____ [department *or* judge *or specify other court designation*] at _____ [*address*], _____ [plaintiff *or* defendant] will, and hereby does, move for an order entering summary judgment for _____ [plaintiff *or* defendant] on the

_____ [number] cause of action. The motion will be made on the ground that _____ [plaintiff *or* defendant] is without the capacity to _____ [prosecute *or* defend] this [cause of] action, its corporate powers, rights, and privileges having been suspended on _____ [*date that Secretary of State certified to Franchise Tax Board that corporation was suspended*], and that _____ [plaintiff *or* defendant] is entitled to judgment as a matter of law.

This motion will be made and based on this notice, the pleadings, records, and files herein, on the certificate of the Secretary of State evidencing the suspension of _____ [plaintiff's *or* defendant's] corporate powers, a copy of which is attached as Exhibit A and incorporated by reference, and on the memorandum served and filed herewith.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

CAUTION:
A memorandum must accompany this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This motion is for use by a party in an action by or against a corporation whose corporate powers, rights, and privileges have been suspended for failure to file a required information statement under *Corp. Code §§ 1502, 2205*.

A motion for summary adjudication of a cause of action or affirmative defense is appropriate when one or more causes of action within an action has no merit or there is no defense to the action [*Code Civ. Proc. § 437c(f)(1)*].

[3] Contents of Information Statement; Notice of Deliquency

Every corporation must file an annual statement containing information including the following [*Corp. Code § 1502*]:

- The corporation's current directors;
- The number of board vacancies, if any;
- The current officers;
- The street address of its principal executive office (and its mailing address, if different);
- If the principal office is in another state, the street address of its principal office in California;
- A statement of the corporation's general type of business; and
- The name and address of a person in California who is designated to receive service of legal process

on the corporation.

For detailed discussion regarding the filing requirements, and illustrations of the official forms used for filing annual statements, see California Legal Forms (Matthew Bender), Ch. 7, *Corporate Records and Reports*.

In addition, *Corp. Code § 1502.1* requires every publicly traded company [*see Corp. Code § 1502.1(b)(1)* (definition)] to file annually, within 150 days after the end of its fiscal year, a statement on a form prescribed by the Secretary of State that includes information such as [*Corp. Code § 1502.1(a)*]:

- The name of the independent auditor that prepared the most recent auditor's report on the corporation's annual financial statements;

- A description of annual compensation and loans made to any member of the board;

- Whether an order for relief has been entered in a bankruptcy case with respect to the corporation or its officers or board members within the previous 10 years; and

- Whether any officer or board member was convicted of fraud within the previous 10 years.

For discussion and an illustration of that form, see *California Legal Forms (Matthew Bender), Ch. 7, Corporate Records and Reports, § 7.207B.*

Corp. Code § 2204 provides that if a corporation fails to file its required information statement under *Corp. Code § 1502*, the Secretary of State will give the corporation notice of the delinquency. Sixty days after notice of the delinquency, if the corporation has not filed the required statement, the Secretary of State must certify the name of the corporation to the Franchise Tax Board, and the Franchise Tax Board imposes a penalty on the corporation [*see Rev. & Tax. Code § 19141*].

[4] Suspension of Corporate Powers, Rights, and Privileges

If a corporation fails to file a statement under *Corp. Code § 1502*, fails to file a statement for 24 months, and has been assessed a penalty under *Corp. Code § 2204* during that 24-month period [*see § 160.63[3]*], then the corporation is subject to suspension under *Corp. Code § 2205*. The Secretary of State must notify the corporation that its corporate powers, rights, and privileges will be suspended after an additional 60 days, if it fails to file the required statement. If the corporation fails to comply within 60 days, the Secretary of State certifies to the Franchise Tax Board that the corporation is suspended, and mails a notice to the suspended corporation. Except for the purpose of amending the articles of incorporation to set forth a new name, the corporate powers, rights, and privileges are suspended [*Corp. Code § 2205(c)*; *see* Ballantine & Sterling, California Corporation Laws, Ch. 13, *Records, Reports, and Inspection Rights* (Matthew Bender)].

A corporation suspended for failure to file a required statement under *Corp. Code § 1502* is disabled from participating in any litigation activities to the same extent as a corporation suspended for failure to pay taxes under *Rev. & Tax. Code § 23301* [*Palm Valley Homeowners Association, Inc. v. Design MTC (2000) 85 Cal. App. 4th 553, 559-562, 102 Cal. Rptr. 2d 350* (holding that trial court did not abuse its discretion in finding that law firm acted in bad faith by pursuing litigation activities on behalf of its client, even after the firm knew that the client was a suspended corporation, and in imposing sanctions accordingly)]. *In Palm Valley Homeowners Association, Inc. v. Design MTC*, the court addressed whether these two types of corporate suspensions--for nonpayment of taxes and for failure to file the required information statement--both result in a disqualification from litigation. It concluded that although the statutory provisions suspending a corporation for failure to file a required statement had not yet been so construed in any published California case, those provisions would make clear to any reasonable attorney that a corporation suspended

under the Corporations Code, like a corporation suspended under the Revenue and Tax Code, is also disabled from participating in litigation activities [*Palm Valley Homeowners Association, Inc. v. Design MTC (2000) 85 Cal. App. 4th 553, 556, 102 Cal. Rptr. 2d 350* (finding that law firm did not rely on any purported distinction between a Corporations Code suspension and a Revenue and Taxation Code suspension in deciding to conceal its knowledge of the client's suspended status from court and opposing counsel and thus affirming trial court's imposition of sanctions)].

[5] California Points and Authorities

For memoranda supporting and opposing motions for summary judgment based on suspension or forfeiture of a corporation's powers, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

[6] Decisions

Corporation suspended for failure to file required statement under *Corp. Code § 1502*, like corporation suspended for failure to pay taxes under *Rev. & Tax. Code § 23301*, is disabled from participating in any litigation activities. *Palm Valley Homeowners Association, Inc. v. Design MTC (2000) 85 Cal. App. 4th 553, 559-562, 102 Cal. Rptr. 2d 350*

[7] Cross References

For forms and discussion relating to motions for summary judgment and adjudication, see Ch. 537, *Summary Judgment*

For related forms, *see §§ 160.61* and *160.62*

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Chapter 160 CORPORATIONS: CAPACITY
PART IV. FORMS

14-160 California Forms of Pleading and Practice--Annotated § 160.64

§ 160.64 Summary Adjudication of Cause of Action or Affirmative Defense [Code Civ. Proc. § 437c(f)]--Order--Powers of Corporation Suspended for Failure to File Information Statement--Corporation Lacks Capacity to Participate in Any Litigation Activities [Corp. Code §§ 1502, 2205]

[1] FORM Summary Adjudication of Cause of Action or Affirmative Defense [Code Civ. Proc. § 437c(f)]--Order--Powers of Corporation Suspended for Failure to File Information Statement--Corporation Lacks Capacity to Participate in Any Litigation Activities [Corp. Code §§ 1502, 2205]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER GRANTING SUMMARY ADJUDICA-
Plaintiff,	)	TION
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

_____ [Plaintiff's *or* Defendant's] motion for summary adjudication of a _____ [cause of action *or* affirmative defense] came on regularly for hearing before me on _____ [*date*]. _____ [*Name*] appeared as counsel for plaintiff and _____ [*name*] appeared as counsel for defendant.

On consideration of all the evidence set forth in the papers submitted, and the inferences reasonably deducible therefrom, except that to which objection was sustained, the Court makes the following determinations for the following

reasons:

There is no triable issue as to any material fact regarding the suspension of _____ [defendant's *or* plaintiff's] powers, rights, and privileges for failure to _____ [*describe failure, e.g.*, file the required biennial information statement], as appears from the _____ [*specify evidence, e.g.*, certificate of suspension from the Secretary of State], and thus _____ [plaintiff *or* defendant] is entitled as a matter of law to summary adjudication in his/her/its favor and against _____ [defendant *or* plaintiff] on the [_____ (number)] _____ [cause of action (of plaintiff's _____ (number) Amended Complaint) *or* affirmative defense].

Accordingly,

IT IS ORDERED that the motion for an order granting summary adjudication be, and hereby is, granted in favor of _____ [plaintiff *or* defendant] and against _____ [defendant *or* plaintiff] _____ [*name*] with regard to the [_____ (number)] _____ [cause of action (of plaintiff's _____ (number) Amended Complaint) *or* affirmative defense], [and that this adjudication shall be carried into any final judgment subsequently entered in this action].

IT IS FURTHER ORDERED that [the answer herein be, and hereby is, stricken and that] summary judgment in favor of _____ [plaintiff *or* defendant] be granted [as to the _____ (number) cause of action] [if judgment is in favor of plaintiff, continue: and that plaintiff recover from defendant as follows:

1. The sum of $_____;

(2. Interest on that sum at the rate of _____ percent per annum from and after _____ (*date*), to and including the date hereof, that interest amounting to the sum of $_____;) and

3. Costs herein incurred.]
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Cross References

For related forms, *see §§ 160.62* and *160.63*.

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14-160 California Forms of Pleading and Practice--Annotated § 160.65

§ 160.65 Continuance [Cal. Rules of Ct., Rule 3.1332(a)] to Obtain Reinstatement of Corporation Whose Powers Are Suspended or Forfeited Under Tax Statutes [Rev. & Tax. Code § 23305 et seq.]--Notice of Motion

[1] FORM Continuance [Cal. Rules of Ct., Rule 3.1332(a)] to Obtain Reinstatement of Corporation Whose Powers Are Suspended or Forfeited Under Tax Statutes [Rev. & Tax. Code § 23305 et seq.]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR CON-
Plaintiff,	)	TINUANCE
vs.	)	Date: _____
_____ [*name*]	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To each party and to the attorney of record for each party herein:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter can be heard, in the courtroom [of _____ (*specify court designation*)] of this court at _____ [*address*], _____ [plaintiff *or* defendant] _____ [*name*] will, and hereby does, move for an order continuing the _____ [*specify, e.g.,* hearing on plaintiff's motion for summary judgment *or* trial of this action], heretofore set for _____ [*date*], to _____ [*date by which it is expected that corporate powers may be revived*]. The motion will be made on the ground that _____ [plaintiff *or* defendant] is entitled to a continuance for the purpose of

_____ [reinstating its corporate powers, rights, and privileges pursuant to Revenue and Taxation Code Sections _____ (23305 and 23305a *or* 23305b) *and/or* obtaining relief from voidability of contracts entered into during the period of _____ (suspension *or* forfeiture) pursuant to *Revenue and Taxation Code Sections 23301, 23304.5, 23305.1*] and that this _____ [reinstatement *and/or* relief from voidability] will not prejudice any _____ [action *or* defense *or* right] that has accrued by reason of the original _____ [suspension *or* forfeiture] of _____ [plaintiff's *or* defendant's] corporate powers.

The motion will be based on this notice of motion, on the declaration of _____[*name*] and the memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

CAUTION:
A memorandum must accompany this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form is a notice of motion for a continuance is for use in opposing a plaintiff's or defendant's motion or pleading to obtain judgment based on the incapacity of a suspended corporation to sue or defend and/or the voidability of a contract entered into by the corporation while its powers were suspended or forfeited. The procedures set forth in the Revenue and Taxation Code for revivor of corporations whose powers have been suspended or forfeited for noncompliance with the tax statutes [*see Rev. & Tax. Code § 23305 et seq.*] do not provide that a continuance may be granted to obtain reinstatement. However, the decisions, although not directly holding that a motion for continuance must be granted to a party seeking reinstatement of its corporate powers, do indicate that the court may recognize the party for the limited purpose of entertaining the motion [*Schwartz v. Magyar House, Inc. (1959) 168 Cal. App. 2d 182, 187-188, 335 P.2d 487]* , and that it is error for a trial court to render a judgment based on the suspension or forfeiture once it is apprised of the defendant's effort to obtain reinstatement, and the fact of reinstatement, prior to entry of the judgment [*Duncan v. Sunset Agricultural Minerals (1969) 273 Cal. App. 2d 489, 493, 78 Cal. Rptr. 339]* .

[3] Application for Relief From Voidability

In addition, a contract entered into by a corporation during the period of its suspension or forfeiture cannot be declared void pursuant to *Rev. & Tax. Code § 23304.1* unless the suspended corporation is allowed a reasonable opportunity to cure the voidability under *Rev. & Tax. Code § 23305.1* [*Rev. & Tax. Code § 23304.5*].

Until January 1, 1994, applications for revivor and applications for relief from voidability had to be filed together [*see* former *Rev. & Tax. Code § 23305.1(e)*]. On and after January 1, 1994, relief from voidability may be sought separately. However, to avoid a second penalty [*see Rev. & Tax. Code § 23305.1(b)(2)* (discussed in *§ 160.15[2][d]*)], a corporation that is aware of contracts formed during the period of suspension or forfeiture that are likely to be

challenged by the other party to the contract would probably prefer to make simultaneous applications.

If the corporation obtained its certificate of revivor between January 1, 1990, and January 1, 1991, this form may be used to apply only for relief from voidability [Stats. 1993, ch. 689, § 2(b); *see also § 160.66*].

[4] California Points and Authorities

For memoranda of points and authorities supporting and opposing a motion for continuance, see California Points and Authorities, Ch. 48, *Continuance of Proceedings* (Matthew Bender)

[5] State Statutes

Requisites of motion. *Code Civ. Proc. § 1010*

Application for relief from suspension or forfeiture. *Rev. & Tax. Code §§ 23305 et seq.*

[6] Decisions

Payment of delinquent franchise taxes during pendency of action revives corporation and allows it to defend and present evidence. *United States v. 2.61 Acres of Land, More or Less (9th Cir. 1985) 791 F.2d 666, 668-670*

Denial of continuance to allow suspended corporation to pay delinquent franchise taxes is within discretion of trial court and not to be reversed, absent showing of prejudice to corporation or unless denial was arbitrary or capricious. *United States v. 2.61 Acres of Land, More or Less (9th Cir. 1985) 791 F.2d 666, 670-671*

Denial of continuance to allow suspended corporation to pay delinquent franchise taxes in condemnation action is reversible for prejudice when value found was 30 percent less than original government appraisal and corporation could present evidence without revival. *United States v. 2.61 Acres of Land, More or Less (9th Cir. 1985) 791 F.2d 666, 671-672*

[7] Cross References

For discussion and forms related to motions for continuance, see Ch. 136, *Continuances*

For a related form, *see § 160.60*.

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14-160 California Forms of Pleading and Practice--Annotated § 160.66

§ 160.66 Continuance [Cal. Rules of Ct., Rule 3.1332(a)] to Obtain Reinstatement of Corporation Whose Powers Are Suspended or Forfeited Under Tax Statutes [Rev. & Tax. Code § 23305 et seq.]--Declaration in Support of Motion [Code Civ. Proc. § 2009]

[1] FORM Continuance [Cal. Rules of Ct., Rule 3.1332(a)] to Obtain Reinstatement of Corporation Whose Powers Are Suspended or Forfeited Under Tax Statutes [Rev. & Tax. Code § 23305 et seq.]--Declaration in Support of Motion [Code Civ. Proc. § 2009]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	DECLARATION OF _____
Plaintiff,	)	[*name*] IN SUPPORT OF _____
vs.	)	[PLAINTIFF'S *or* DEFENDANT'S] MOTION FOR
_____ [*name*],	)	CONTINUANCE
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am the _____ [*specify, e.g.,* chief financial officer of the defendant] in the above-entitled _____ [action *or* proceeding].

2. On _____ [*date*], on behalf of _____ [plaintiff *or* defendant], I submitted a written application to the Franchise Tax Board of California for a certificate of revivor, along with a check in [partial] payment of the amounts calculated to be due for taxes, deficiencies, interest, and penalties under the Bank and Corporation Tax Law, Part 11 of Division 2 of the Revenue and Taxation Code.

[*EITHER*]

Simulatenously, I submitted a written application for relief from voidability of contract puruant to *Revenue and Taxation Code Section 23305.1*.

[*OR*]

That application was resolved by issuance of a certificate of revivor on _____ [*date*]. During the period of _____ [suspension *or* forfeiture], _____ [*name of corporation*] entered into contacts _____ [*describe, e.g.,* including the one which is the subject of the above-entitled action]. On _____ [*date*], I submitted written application to the Franchise Tax Board of California for relief from voidability. I submitted a [certified] check with that application in the amount of $_____, which is equivalent to [*whichever is less:* $100 per day for the _____ (*number of days*)-day period *or* the minimum penalty that could be imposed pursuant to *Revenue and Taxation Code Section 23151* for the period] of _____ [suspension *or* forfeiture].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This declaration is for use in lieu of an affidavit [*see Code Civ. Proc. § 2015.5*] in support of a motion [*see Code Civ. Proc. § 2009*] for a continuance on the ground that plaintiff's or defendant's corporate powers are about to be reinstated, thus removing the objection as to the capacity of the corporation to sue or defend [*see Rev. & Tax. Code § 23305 et seq.*] and giving the corporation the opportunity to which it is entitled under *Rev. & Tax. Code § 23304.5* to apply for relief from voidability of a contract entered into during the period of suspension or forfeiture [*Rev. & Tax. Code § 23305.1*].

If the contract for which relief from voidability is sought was entered into before January 1, 1991, and the certificate of revivor was issued between January 1, 1990, and January 1, 1991, the application for relief from voidability will be subject to the transition provisions of the 1991 amendments, discussed in *§ 160.15[2][e][ii]*.

[3] Cross References

For alternative forms for declarations, *see* Ch. 15, *Affidavits, Certificates, and Declarations*

For related forms, *see §§ 160.60*, *160.61*, and *160.65*.

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14-160 California Forms of Pleading and Practice--Annotated § 160.67

§ 160.67 Continuance [Cal. Rules of Ct., Rule 3.1332(a)]--Order Granting Continuance to Obtain Reinstatement of Corporation Whose Powers Are Suspended or Forfeited Under Tax Statutes

[1] FORM Continuance [Cal. Rules of Ct., Rule 3.1332(a)]--Order Granting Continuance to Obtain Reinstatement of Corporation Whose Powers Are Suspended or Forfeited Under Tax Statutes

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER GRANTING CONTINUANCE
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*specify, e.g.*, plaintiff] for a continuance having been heard by this court on _____ [*date*], and good cause for such continuance having been shown,

IT IS ORDERED that the _____ [hearing *or* trial] heretofore set for _____ [*date*], be continued to _____ [*date*], at _____ [*time*] [in Department _____].
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Cross References

For a related form, *see § 160.65*.

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Volume 14: Corporations: Capacity thru Corporations: Dissolution and Winding Up-Chs. 160-173
Chapter 161 CORPORATIONS: ALTER EGO LIABILITY

14-161 California Forms of Pleading and Practice--Annotated 161.syn

§ 161.syn Synopsis to Chapter 161: CORPORATIONS: ALTER EGO LIABILITY

§ 161.01 Scope of Chapter

§ 161.02 Cross References

§§ 161.03-161.09 [Reserved]

§ 161.10 Alter Ego Doctrine

§ 161.11 Extent of Liability Under Doctrine

[1] Persons Liable for Corporation's Debt

[2] Corporation Not Liable for Shareholder's Unrelated Debt

§ 161.12 Alter Ego Liability Is Joint and Several

§ 161.13 Conditions Precedent for Application of Doctrine

[1] In General

[2] Specific Factors Considered by Courts

[a] Generally

[b] Inadequate Capitalization

[c] Commingling or Manipulation of Assets and Liabilities

[d] Disregard of Corporate Formalities

[e] Representations to Creditors

[3] Knowledge by Plaintiff Creating Estoppel

[4] When Corporation Itself Seeks Benefit of Doctrine

[5] When Shareholders Seek Benefit of Doctrine

§ 161.14 Procedure

[1] Alter Ego Liability Alleged in Complaint

[a] Essential Allegations

[b] Plaintiff's Risk in Action on Contract

[2] Service of Process on Alter Ego Defendant Added by Amended Complaint

[3] Binding Nonparties or Fictitious Defendants After Judgment

[4] Statute of Limitations

[5] Enforcing Corporation's Arbitration Agreement

§§ 161.15-161.29 [Reserved]

§ 161.30 California Points and Authorities

§ 161.31 Forms of Discovery

§ 161.32 State Statutes

§ 161.33 Decisions

[1] Alter Ego Doctrine Inapplicable When Plaintiff Not Misled

[2] Appeal

[3] Attorney's Fees

[4] Bankruptcy

[5] Crimes

[6] Effect of Settlement With Original Defendant

[7] Elements of Alter Ego Doctrine

[8] Factors Considered

[a] Absence of One or Both Elements of Test

[b] Commingling or Manipulation of Assets and Liabilities

[c] Equitable Considerations

[d] Failure to Observe Corporate Formalities

[e] Inadequate Capitalization

[f] Representations to Creditors

[9] Federal Standard

[10] Jurisdiction

[11] Liability Not Imposed

[12] Parent-Subsidiary Relationship

[13] Persons Liable

[14] Pleading

[15] Postjudgment Application

[16] Statute of Limitations

§ 161.34 Law Reviews

§ 161.35 Text References

§§ 161.36-161.49 [Reserved]

§ 161.50 Complaint Against Corporation and Its Controlling Shareholder(s) on Corporate Obligation--Corporation as Alter Ego of Controlling Shareholder(s)

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction

[6] Cross References

[7] California Points and Authorities

[8] Forms of Discovery

[9] Decisions

[10] Text References

§ 161.51 Allegation(s)--Failure to Issue Stock and/or Inadequate Capitalization

[1] FORM

[2] Use of Form

[3] Nonissuance of Stock

[4] Inadequate Capitalization

[5] Law Reviews

§ 161.52 Allegation--Commingling or Manipulation of Assets

[1] FORM

[2] Use of Form

[3] Commingling of Assets

[4] Manipulation of Assets

[5] Decisions

§ 161.53 Allegation--Corporation Is Mere Conduit for Business of Shareholder

[1] FORM

[2] Use of Form

[3] Decisions

§ 161.54 Allegation--Failure to Observe Corporate Formalities

[1] FORM

[2] Use of Form

[3] Disregard of Corporate Formalities by Close Corporations

[4] State Statutes

[5] Decisions

§ 161.55 Allegation--Shareholder Fraud in Diverting or Concealing Corporation's Assets

[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

§ 161.56 Allegation--Controlling Shareholder's Representations That Shareholder Will Be Responsible for Corporate Obligations

[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

§ 161.57 Allegation--Shareholder's Acts Led Public to Deal With Inadequately Financed Corporation

[1] FORM

[2] Use of Form

[3] Holding Out to Creditors

[4] Cross References

§ 161.58 Demurrer to Complaint Against Individual on Corporate Obligation--Failure to Allege Facts Showing That Individual and Corporation Are Same Entity and That Recognition of Separate Entity Would Consummate Wrong

[1] FORM

[2] Use of Form

[3] Pleading Elements of Alter Ego

[4] Mere Ownership and Control

[5] Cross References

[6] California Points and Authorities

[7] State Statutes

[8] Decisions

[a] Elements of Alter Ego Doctrine

[b] Factors Considered

§ 161.59 Demurrer to Complaint Against Individual on Corporate Obligation--Failure to Allege That Individual Defendant Had Beneficial Ownership in Corporation

[1] FORM

[2] Use of Form

[3] Requirement of Beneficial Ownership

[4] California Points and Authorities

[5] Decisions

[6] Cross References

§ 161.60 Affirmative Defense to Shareholder's Liability Under Alter Ego Doctrine--Plaintiff's Knowledge of Facts Regarding Relationship Between Shareholder and Corporation

[1] FORM

[2] Use of Form

[3] Plaintiff's Knowledge of Facts as Defense

[4] Decisions

§ 161.61 Amending Judgment to Include Shareholder as Judgment Debtor--Notice of Motion

[1] FORM

[2] Use of Form

[3] Amending Judgment to Add Alter Ego

[4] Control of Litigation

[5] Cross References

[6] California Points and Authorities

[7] Decisions

§ 161.62 Amending Judgment to Include Shareholder as Judgment Debtor--Declaration in Support of Motion Based on Creditor's Examination [Code Civ. Proc. § 708.110(a)]

[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

§ 161.63 Amending Judgment to Include Shareholder as Judgment Debtor--Order

[1] FORM

[2] Use of Form

[3] Decisions

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Chapter 161 CORPORATIONS: ALTER EGO LIABILITY
PART I. SCOPE

14-161 California Forms of Pleading and Practice--Annotated § 161.01

§ 161.01 Scope of Chapter

This chapter discusses the essential elements and various applications of the alter ego doctrine. Included in this chapter are the following forms: a complaint [*see § 161.50*] and allegations [*see* §§ 161.51-161.57] alleging that a corporation is the alter ego of its shareholders; demurrers to complaints alleging alter ego liability [*§§ 161.58, 161.59*]; an affirmative defense to alter ego liability based on the plaintiff's knowledge [*see § 161.60*]; and forms to amend a judgment to include a shareholder or promoter as a judgment debtor along with the corporation which is his or her alter ego [*see* §§ 161.61-161.63].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoGeneral Overview

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§ 161.02 Cross References

For declarations supporting and opposing a defendant's motion for summary judgment on the ground that he or she is not an alter ego of a defendant corporation, see Ch. 537, *Summary Judgment* .

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[Reserved]

§§ 161.03[Reserved]

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§ 161.10 Alter Ego Doctrine

Although the general rule is that a corporation is an entity separate and distinct from its stockholders, it is also equally well settled that both law and equity, when necessary to circumvent fraud, protect the rights of third persons, and accomplish justice, will disregard the distinct existence of a corporation and its stockholders and treat them as identical [*Erkenbrecher v. Grant (1921) 187 Cal. 7, 10-11, 200 P. 641]* . The term "alter ego" describes a doctrine, the application of which results in either the obligations of a corporation being treated as those of its equitable owners [*Minton v. Cavaney (1961) 56 Cal. 2d 576, 579, 15 Cal. Rptr. 641, 364 P.2d 473* ; *Riddle v. Leuschner (1959) 51 Cal. 2d 574, 580, 335 P.2d 107]* or the obligations of the equitable owners being treated as those of the corporation [*Wenban Estate, Inc. v. Hewlett (1924) 193 Cal. 675, 696-697, 227 P. 723]* . In order to avoid an abuse of the corporate privilege the courts will look through the forms and behind the corporate entity involved to deal with the situation as justice may require [*People v. Clauson (1964) 231 Cal. App. 2d 374, 379, 41 Cal. Rptr. 691* ; *see Civ. Code § 3528* (law respects form less than substance)].

The alter ego doctrine is essentially an equitable one, and for that reason is particularly within the province of the trial court. Thus, the constitutional guaranty of the right to a jury trial does not apply and relief is obtainable only in courts of equity [*Dow Jones Co. v. Avenel (1984) 151 Cal. App. 3d 144, 147-148, 198 Cal. Rptr. 457]* .

A similar doctrine, the "integrated enterprise" test, has been applied to determine whether two entities constitute a "single employer" for federal Title VII [*42 U.S.C. § 2000e et seq.*] purposes. California courts, however, apparently have not adopted that test for California FEHA [*Gov. Code § 12900 et seq.*] or other purposes, although that test is functionally similar to but less exacting than California's alter ego rules [*see Laird v. Capital Cities/ABC Inc. (1998) 68 Cal. App. 4th 727, 737-738, 80 Cal. Rptr. 2d 454* ; *see also* Ballantine & Sterling, California Corporation Laws, Ch. 14, *Litigation Involving Corporations and Shareholders* (Matthew Bender) for further discussion].

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-161 California Forms of Pleading and Practice--Annotated § 161.11

§ 161.11 Extent of Liability Under Doctrine

[1] Persons Liable for Corporation's Debt

In most situations, the alter ego doctrine is applied to hold shareholders liable for the obligations of the corporations which they control [*see, e.g., Minifie v. Rowley (1921) 187 Cal. 481, 487, 202 P. 673]* , or to hold a parent corporation liable for the obligations of its subsidiary [*see, e.g., Marr v. Postal Union Life Ins. Co. (1940) 40 Cal. App. 2d 673, 681-682, 105 P.2d 649]* . However, in some instances the corporation has never issued shares, and thus liability will fasten on the promoters, the failure to issue shares being one factor indicating that the individual defendants are doing business as such [*Automotriz etc. De Cal. v. Resnick (1957) 47 Cal. 2d 792, 796, 306 P.2d 1* ; *Claremont Press Pub. Co. v. Barksdale (1960) 187 Cal. App. 2d 813, 816, 10 Cal. Rptr. 214]* . Similarly, an attorney who organizes a corporation and consents to act as a director may be held liable where he or she functions as one of the corporation's promoters [*Minton v. Cavaney (1961) 56 Cal. 2d 576, 580, 15 Cal. Rptr. 641, 364 P.2d 473* (holding trial court entitled to disregard defendant's contention that he was only acting as an "accommodation" director)].

Whether an individual who merely controls a corporation but owns no stock in it may be liable under the alter ego doctrine is not clear. One case has held the donor of shares held by members of the donor's family liable where he in fact controlled the corporation [*Goldsmith v. Tub-O-Wash (1962) 199 Cal. App. 2d 132, 139-140, 18 Cal. Rptr. 446]* . On the other hand, in an earlier case the California Supreme Court reversed a judgment against the president and general manager of two corporations, both of which were family corporations, holding the president's control to be only that of a salaried employee while his wife (who held one share in one of the corporations) and son were liable under the alter ego doctrine because the element of unity of ownership and interest was present in their case [*Riddle v. Leuschner (1959) 51 Cal. 2d 574, 580, 335 P.2d 107]* .

The *Riddle* case cited above suggests that if an individual does own shares in the corporation that is alleged to be his or her alter ego, the fact that he or she fails to take cognizance of the financial condition of the business or otherwise exercise control over its destiny will not excuse him or her from liability [*see McKee v. Peterson (1963) 214 Cal. App. 2d 515, 531, 29 Cal. Rptr. 742* (bad faith must be imputed to defendant at least by virtue of defendant's negligence in permitting a situation to exist in which the dealings were in form with a corporation but in reality were with the individual incorporators)]. On the other hand, if the owner of a minority interest enjoys no control other than the power

to vote his or her minority stock, the corporation may not be regarded as his or her alter ego [*see Pearl v. Shore (1971) 17 Cal. App. 3d 608, 616-618, 95 Cal. Rptr. 157* (minority shareholder of corporate general partner of limited partnership not liable for loss of one limited partner's investment when shareholder exercised no control over limited partnership's investments)].

[2] Corporation Not Liable for Shareholder's Unrelated Debt

In California, a third-party judgment creditor of a shareholder--that is, a plaintiff having a judgment against a shareholder on a claim unrelated to the corporation--may not pierce the corporate veil to reach corporate assets in order to satisfy the shareholder's liability [*Postal Instant Press, Inc. v. Kaswa Corp. (2008) 162 Cal. App. 4th 1510, 1513, 77 Cal. Rptr. 3d 96*].

Some courts in other states have recognized a variant of the alter ego doctrine, called outside reverse piercing (or third-party piercing) of the corporate veil, by which the corporate veil is pierced to permit a third-party judgment creditor to reach corporate assets to satisfy claims against a shareholder. However, according to a California court of appeal that declined to accept that view, the reasoning of the cases adopting outside reverse piercing of the corporate veil is flawed. It is not a logical extension of the standard alter ego doctrine but instead addresses significantly different concerns. Outside reverse piercing can harm innocent shareholders and corporate creditors and can allow judgment creditors to bypass normal judgment-collection procedures. Other legal theories (such as agency or *respondeat superior*) and legal remedies (such as claims for conversion or fraudulent conveyance) adequately protect judgment creditors without the need to distort theories of corporate liability [*Postal Instant Press, Inc. v. Kaswa Corp. (2008) 162 Cal. App. 4th 1510, 1513, 77 Cal. Rptr. 3d 96*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoGeneral OverviewBusiness & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoCorporate FormalitiesBusiness & Corporate LawCorporationsShareholdersShareholder Duties & LiabilitiesControlling ShareholdersGeneral OverviewBusiness & Corporate LawCorporationsShareholdersShareholder Duties & LiabilitiesPersonal Liability

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§ 161.12 Alter Ego Liability Is Joint and Several

If the corporate veil is pierced, each defendant as to whom it is pierced is jointly and severally liable for the full amount of the corporation's obligation. Alter ego liability is not apportioned according to the ownership interests of each defendant. A person who is not made a defendant or against whom alter ego liability is not established does not have to contribute to payment of the corporate obligation [*Minnesota Mining & Manufacturing Co. v. Superior Court (1988) 206 Cal. App. 3d 1025, 1028-1029, 253 Cal. Rptr. 908]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoGeneral OverviewBusiness & Corporate LawCorporationsShareholdersShareholder Duties & LiabilitiesControlling ShareholdersGeneral OverviewBusiness & Corporate LawCorporationsShareholdersShareholder Duties & LiabilitiesPersonal LiabilityTortsProcedureMultiple DefendantsJoint & Several Liability

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14-161 California Forms of Pleading and Practice--Annotated § 161.13

§ 161.13 Conditions Precedent for Application of Doctrine

[1] In General

Before a corporation's acts and obligations can be legally recognized as those of a particular person, and vice versa, the following conditions must exist [*Minifie v. Rowley (1921) 187 Cal. 481, 487, 202 P. 673* ; *Robbins v. Blecher (1997) 52 Cal. App. 4th 886, 892, 60 Cal. Rptr. 2d 815* ; *Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal. App. 2d 825, 837, 26 Cal. Rptr. 806* ; *Talbot v. Fresno-Pac. Corp. (1960) 181 Cal. App. 2d 425, 431, 5 Cal. Rptr. 361* ; *see Stark v. Coker (1942) 20 Cal. 2d 839, 846, 129 P.2d 390* ; *Watson v. Commonwealth Ins. Co. (1936) 8 Cal. 2d 61, 68, 63 P.2d 295]* :

- It must appear that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of such person and the corporation has ceased; and

- The facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice.

Both of these requirements must be found to exist before the corporate existence will be disregarded. Such a determination is primarily one for the trial court and is not a question of law. The conclusion of the trier of fact will not be disturbed if it is supported by substantial evidence [*Arnold v. Browne (1972) 27 Cal. App. 3d 386, 394, 103 Cal. Rptr. 775 , disapproved on other grounds, Reynolds Metals Co. v. Alperson (1979) 25 Cal. 3d 124* ; *Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal. App. 2d 825, 837, 26 Cal. Rptr. 806* ; *see Playboy Enterprises, Inc. v. Welles (9th Cir. 2002) 279 F.3d 796, 806-807* (although unity of interest was established, no showing was made that fiction of separate existence of corporation would sanction fraud or promote injustice)].

While the alter ego doctrine does not depend on the presence of actual fraud, it is designed to prevent what would be fraud or injustice, if accomplished. Accordingly, bad faith in one form or another is an underlying consideration and will be found in some form or another in those cases wherein the trial court was justified in disregarding the corporate entity [*Clejan v. Reisman (1970) 5 Cal. App. 3d 224, 239, 84 Cal. Rptr. 897* ; *Associated Vendors, Inc. v. Oakland*

Meat Co. (1962) 210 Cal. App. 2d 825, 838, 26 Cal. Rptr. 806 ; *see Pearl v. Shore (1971) 17 Cal. App. 3d 608, 618, 95 Cal. Rptr. 157* ; *Rosen v. E.C. Losch Co., Inc. (1965) 234 Cal. App. 2d 324, 335, 44 Cal. Rptr. 377* ; *see also Laird v. Capital Cities/ABC Inc. (1998) 68 Cal. App. 4th 727, 742, 80 Cal. Rptr. 2d 454* (plaintiff failed to show specific manipulative conduct by parent toward subsidiary which relegated subsidiary to status of mere instrumentality, agency, conduit, or adjunct of parent); *Am. Home Ins. Co. v. Travelers Indem. Co. (1981) 122 Cal. App. 3d 951, 966, 175 Cal. Rptr. 826* (alter ego doctrine unavailable to extend responsibility for indemnification by insurer of subsidiary to sister subsidiary, despite numerous factors indicating ownership and control of one over other); *Doney v. TRW, Inc. (1995) 33 Cal. App. 4th 245, 251-252, 39 Cal. Rptr. 2d 292* (alter ego doctrine unavailable to hold employer's parent corporation liable for damages suffered by employees in course of employment when employer had satisfied its obligations to employees by securing payments of workers' compensation benefits)].

The fraud or inequity, the elimination of which legitimately invokes the doctrine, must be that of the party against whom the doctrine is invoked, and that party must have been an actor in the course of conduct constituting the abuse of corporate privilege or must be seeking some inequitable advantage based on the fiction of separate existence. That is, the alter ego doctrine may not be applied so as to prejudice the rights of an innocent third party who has dealt with the corporation as such [*United States Fire Ins. Co. v. National Union Fire Ins. Co. (1980) 107 Cal. App. 3d 456, 469-474, 165 Cal. Rptr. 726]* . Further, the alter ego doctrine is not designed to unite two separate entities with opposing interests for the benefit of one claiming to control the other. Rather, the doctrine is used to prevent two parties with the same interest from inequitably using the corporate form to thwart a third party's rights [*Communist Party v. 522 Valencia, Inc. (1995) 35 Cal. App. 4th 980, 995, 41 Cal. Rptr. 2d 618* (party alleged it was beneficial owner of two public benefit corporations and that alter ego doctrine established relationship between party and defendant corporations, thereby allowing party to obtain defendant corporations' assets)]. However, corporations may be allowed to disavow the corporate form when doing so prevents injustice. For example, in the context of an attorney disqualification motion, one court has determined that a corporation should be entitled to assert its status as the alter ego of a lawyer's existing client. If one entity is an attorney's client, its alter ego shares the client's expectation of loyalty from the attorney [*Brooklyn Navy Yard Cogeneration Partners v. Superior Court (1997) 60 Cal. App. 4th 248, 258-259, 70 Cal. Rptr. 2d 419* (estopping corporation from asserting its alter ego status and thereby allowing attorney's breach of duty of loyalty would be inequitable result); *but see Seretti v. Superior Nat. Ins. Co. (1999) 71 Cal. App. 4th 920, 931* , discussed in *§ 161.13[5*] (shareholders not allowed to disregard corporate form for their own benefit)].

In seeking to apply the alter ego doctrine, it is not sufficient merely to show that a creditor will remain unsatisfied if the corporate veil is not pierced, and thus set up such a circumstance as proof of an "inequitable result." The purpose of the alter ego doctrine is not to protect every unsatisfied creditor but rather to afford him or her protection where some conduct amounting to bad faith makes it inequitable for the equitable owner of a corporation to hide behind its corporate veil [*Roman Catholic Archbishop v. Superior Court (1971) 15 Cal. App. 3d 405, 412, 93 Cal. Rptr. 338* ; *Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal. App. 2d 825, 842, 26 Cal. Rptr. 806* (leading case)]. The requirement that there be some form of inequity present is clear from those cases emphasizing that mere ownership and control of a corporation, standing alone, is an insufficient ground for holding the corporation to be the instrumentality, conduit, or adjunct of its shareholders. It must further appear that to recognize the separateness of the corporation would aid in the consummation of a wrong [*Erkenbrecher v. Grant (1921) 187 Cal. 7, 11, 200 P. 641* ; *Shafford v. Otto Sales Co., Inc. (1953) 119 Cal. App. 2d 849, 862, 260 P.2d 269]* .

[2] Specific Factors Considered by Courts

[a] Generally

The variety of factors that courts have considered in reaching their determination as to whether the alter ego doctrine should be applied were summarized, with citations to authority, in *Associated Vendors Inc. v. Oakland Meat Co. (1962) 210 Cal. App. 2d 825, 838-840, 26 Cal. Rptr. 806* :

- Commingling of funds and other assets, failure to segregate funds of the separate entities, and the unauthorized diversion of corporate funds or assets to other than corporate uses.

- The treatment by an individual of the assets of the corporation as his or her own.

- The failure to obtain authority to issue stock or to subscribe to or issue the same.

- The holding out by an individual that he or she is personally liable for the debts of the corporation.

- The failure to maintain minutes or adequate corporate records and the confusion of the records of the separate entities.

- The identical equitable ownership in the two entities; the identification of the equitable owners with the domination and control of the two entities; identification of the directors and officers of the two entities as the responsible supervision and management; sole ownership of all of the stock in a corporation by one individual or the members of a family.

- The use of the same office or business location and the employment of the same employees or attorneys or both.

- The failure to adequately capitalize a corporation or the total absence of corporate assets and under-capitalization.

- The use of a corporation as a mere shell, instrumentality, or conduit for a single venture or the business of an individual or another corporation.

- The concealment and misrepresentation of the identity of the responsible ownership, management, and financial interest, or concealment of personal business activities.

- The disregard of legal formalities and the failure to maintain arm's-length relationships among related entities.

- The use of the corporate entity to procure labor, services, or merchandise for another person or entity.

- The diversion of assets from a corporation by or to a stockholder or other person or entity, to the detriment of the creditors, or the manipulation of assets and liabilities between entities so as to concentrate the assets in one and the liabilities in the other.

- The contracting with another with intent to avoid performance by use of a corporate entity as a shield against personal liability, or the use of a corporation as a subterfuge of illegal transactions.

- The formation and use of a corporation to transfer to it the existing liability of another person or entity.

In most cases involving an alter ego, several of the foregoing factors were present and considered by the court but none of the factors has been deemed conclusive on the trier of fact [*Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal. App. 2d 825, 840, 26 Cal. Rptr. 806]* .

[b] Inadequate Capitalization

Inadequate capitalization and failure to issue stock are factors that have been held supportive of trial court findings that the individuals were doing business through their corporate alter ego [*Automotriz etc. De Cal. v. Resnick (1957) 47 Cal. 2d 792, 798, 306 P.2d 1* ; *see Claremont Press Pub. Co. v. Barksdale (1960) 187 Cal. App. 2d 813, 816-817, 10 Cal. Rptr. 214* ; *CFTC v. Topworth Int'l, Ltd. (9th Cir. 2000) 205 F.3d 1107, 1112-1113* (district court did not clearly err in finding that alter ego doctrine applied in light of corporation's extreme under-capitalization)]. If a corporation is organized and carries on business without substantial capital in such a way that the corporation is likely to have no sufficient assets available to meet its debts, it is inequitable for shareholders to escape personal liability. If the capital is illusory or trifling compared with the business to be done and the risks of loss, this is a ground for denying the separate entity privilege [*Automotriz Del Golfo De Cal. v. Resnick (1957) 47 Cal. 2d 792, 797, 306 P.2d 1]* . Under-capitalization by itself, however, does not necessitate disregarding the corporate entity, but is merely a factor to be considered along with all other factors [*Harris v. Curtis (1970) 8 Cal. App. 3d 837, 841-843, 87 Cal. Rptr. 614* ; *see Arnold v. Browne (1972) 27 Cal. App. 3d 386, 396, 103 Cal. Rptr. 775* , *disapproved on other grounds, Reynolds Metals Co. v. Alperson (1979) 25 Cal. 3d 124, 129, 158 Cal. Rptr. 1, 599 P.2d 83* ; *cf. Minton v. Cavaney (1961) 56 Cal. 2d 576, 580, 15 Cal. Rptr. 641, 364 P.2d 473* (dictum that inadequate capitalization was sufficient to affirm judgment disregarding corporate entity; judgment reversed on other grounds)].

It is not always clear whether the capitalization referred to is the initial capital furnished the corporation or the equity base which exists at the time of the transactions which are the subject of a creditor's action [*see Pearl v. Shore (1971) 17 Cal. App. 3d 608, 95 Cal. Rptr. 157* (holding that financial troubles stemmed from poor management rather than initial under-capitalization)]. In any event, attempts to create solvency through loans or advances from shareholders whether initially or during a period of financial embarrassment, have been regarded as tending to show either the lack of distinction between the entity and its shareholders [*see Riddle v. Leuschner (1959) 51 Cal. 2d 574, 581, 335 P.2d 107* (loans by shareholder made to keep once-prospering corporation afloat)] or the presence of an "inequitable result" if the corporate entity is not ignored [*Linco Servs. Inc. v. DuPont (1966) 239 Cal. App. 2d 841, 844, 49 Cal. Rptr. 196* (although defendant did not make initial loan to corporation, he did guarantee its debt and made related financial commitments enabling the corporation to return to active business, thereby inviting the public to deal with what was an essentially under-financed company); *see Claremont Press Pub. Co. v. Barksdale (1960) 187 Cal. App. 2d 813, 818, 10 Cal. Rptr. 214]* . On the other hand, personally guaranteed loans may be viewed as an additional contribution of capital from each of the guarantors where there are no other factors indicative of unity of ownership and interest and bad faith [*Arnold v. Browne (1972) 27 Cal. App. 3d 386, 396-397, 103 Cal. Rptr. 775* , *disapproved on other grounds, Reynolds Metals Co. v. Alperson (1979) 25 Cal. 3d 124*].

[c] Commingling or Manipulation of Assets and Liabilities

One of the most significant factors leading courts to hold that the privilege of conducting business as a corporation has been abused and that the owners of the corporation should be liable for its obligations is the commingling or rerouting of assets between entities and/or their shareholders [*Flying Tiger Line, Inc. v. U.S. Aircoach (1958) 51 Cal. 2d 199, 201-203, 331 P2d 37]* . Such commingling may take the form of shifting assets between two or more corporations owned by the same persons [*Riddle v. Leuschner (1959) 51 Cal. 2d 574, 579, 335 P.2d 107]* , or transferring assets to avoid liabilities between a parent and subsidiary, leading to the parent being held the alter ego of the subsidiary [*Thomson v. L. C. Roney & Co., (1952) 112 Cal. App. 2d 420, 428-430, 246 P.2d 1017]* . Such manipulation of assets may involve the conduct of a single business enterprise by two or more separate corporations, with the assets concentrated in one and the liabilities, including lease obligations to the first corporation, in the other. In such instances both the solvent corporation and its controlling shareholders have been held liable under the alter ego theory [*Talbot v. Fresno-Pac. Corp. (1960) 181 Cal. App. 2d 425, 429, 5 Cal. Rptr. 361* ; *Temple v. Bodega Bay Fisheries, Inc. (1960) 180 Cal. App. 2d 279, 283, 4 Cal. Rptr. 300]* . However, the intermingling of the business operations of two corporations, when clearly contemplated by all parties including creditors, may have no relevance to the liability of the individual shareholders of both corporations if there is no commingling or confusion between the assets of those individuals and either corporation [*Arnold v. Browne (1972) 27 Cal. App. 3d 386, 396, 103 Cal. Rptr. 775* ,

disapproved on other grounds, Reynolds Metals Co. v. Alperson (1979) 25 Cal. 3d 124, 129, 158 Cal. Rptr. 1, 599 P.2d 83] ..

[d] Disregard of Corporate Formalities

Although often mentioned by the courts in their findings of alter ego liability [*Riddle v. Leuschner (1959) 51 Cal. 2d 574, 581, 335 P.2d 107* ; *Rosen v. E. C. Losch Co. (1965) 234 Cal. App. 2d 324, 334, 44 Cal. Rptr. 377]* , a corporation's failure to observe corporate formalities, such as the holding of directors' meetings or maintaining accurate records and minutes of meetings, is not as essential to a holding of alter ego liability as the presence of other factors. Nevertheless, recognition that courts may cite failure to observe corporate formalities as an additional ground for imposing alter ego liability led the drafters of the General Corporation Law to specifically exclude this consideration in the case of close corporations [*see Corp. Code § 158*]. Thus, the close corporation operating under a shareholders' agreement [*see Corp. Code § 300(b)* (stating what agreement may cover)] may ignore traditional formalities relating to directors' and shareholders' meetings in connection with the management of its affairs and such informality will not be considered a factor tending to establish that the shareholders have personal liability for corporate obligations [*Corp. Code § 300(e)*].

[e] Representations to Creditors

In contract actions, another important factor considered by the courts in imposing alter ego liability is whether the creditor has been led to believe that the shareholders of the corporation will be responsible for its obligations. This holding out to creditors may take the form of assurances that a recently incorporated business is under the same ownership and management as its predecessor [*Talbot v. Fresno-Pac. Corp. (1960) 181 Cal. App. 2d 425, 429, 5 Cal. Rptr. 361* ; *see Stark v. Coker (1942) 20 Cal. 2d 839, 847, 129 P.2d 390]* . Another kind of misrepresentation involves creating the impression that the corporation is financially stable, thus luring creditors into the belief that it will be able to meet its obligations [*Linco Servs. Inc. v. DuPont (1966) 239 Cal. App. 2d 841, 843-844, 49 Cal. Rptr. 196]* . However, when no representations are made that any person other than the corporation will be responsible for the corporation's debts and the evidence indicates that the plaintiff has looked solely to the corporation in extending credit, the courts may rely on these facts to refuse to impose alter ego liability [*TWM Homes, Inc. v. Atherwood Realty & Inv. Co. (1963) 214 Cal. App. 2d 826, 853, 29 Cal. Rptr. 887]* . This does not necessarily mean that express contract provisions relieving an individual of liability will immunize that person from alter ego liability [*e.g., Flying Tiger Line, Inc. v. United States Aircoach (1958) 51 Cal. 2d 199, 201-204, 331 P.2d 37* (agreement absolving defendant of personal liability other than that created by pledge of shares in defendant's corporation did not prevent trial court from finding that defendant was alter ego of corporation when its funds were misappropriated by defendant without plaintiff's knowledge); *but see Arnold v. Browne (1972) 27 Cal. App. 3d 386, 395, 103 Cal. Rptr. 775* (plaintiffs agreed that individual promoter had right to assign contract to corporation pursuant to provision absolving promoter of individual liability), *disapproved on other grounds, Reynolds Metals Co. v. Alperson (1979) 25 Cal. 3d 124, 129, 158 Cal. Rptr. 1, 599 P.2d 83*].

[3] Knowledge by Plaintiff Creating Estoppel

The court may properly refuse to disregard the corporate entity at the behest of one who was thoroughly familiar with all the facts concerning the alleged alter ego's relationship with the corporation [*Lynch v. McDonald (1909) 155 Cal. 704, 706, 102 P. 918]* . This matter has been said to be essentially one of estoppel [*Engineering Serv. Corp. v. Longridge Inv. Co. (1957) 153 Cal. App. 2d 404, 417, 314 P.2d 563]* .

[4] When Corporation Itself Seeks Benefit of Doctrine

The alter ego doctrine should not be applied when the corporation itself raises the issue for its own benefit. For example, the Ninth Circuit, apparently applying federal common law, has held that a corporation is not entitled to establish and use its affiliates' separate legal existence for some purposes but have its own separate corporate existence

disregarded for its own benefit against third parties. The corporate veil generally can be pierced only by an adversary of the corporation, not by the corporation itself for its own benefit [*Disenos Artisticos E Indus. v. Costco Wholesale (9th Cir. 1996) 97 F.3d 377, 380* ; *see United Continental Tuna Corp. v. United States (9th Cir. 1977) 550 F.2d 569, 573]* .

[5] When Shareholders Seek Benefit of Doctrine

Just as the corporation itself cannot raise the alter ego doctrine for its own benefit [*see § 161.13[4]*], the alter ego doctrine should not be applied when the corporate shareholders raise the issue for their own benefit. In a case in which the shareholders of a small, closely held corporation sought to pierce the veil of their own corporation and substitute themselves in the place of the corporation as the named insured under a workers compensation policy, the court found that the shareholders' inability to maintain individual actions against their corporation's workers' compensation carrier did not constitute the type of "grave injustice" that justified ignoring a corporation's separate existence. The fact that individual shareholders would not be able to pursue bad faith insurance claims against the corporation's insurer did not allow the insurer to escape liability for improper conduct. The corporation itself, as named insured, could pursue its own rights, and the shareholders would profit indirectly [*Seretti v. Superior Nat. Ins. Co. (1999) 71 Cal. App. 4th 920, 931* (shareholders who elect to avail themselves of benefits of corporate structure cannot complaint about their inability to take personal advantage of a right belonging to corporation alone)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoGeneral OverviewBusiness & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoFraudBusiness & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoInadequate CapitalizationBusiness & Corporate LawCorporationsShareholdersShareholder Duties & LiabilitiesPersonal Liability

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Volume 14: Corporations: Capacity thru Corporations: Dissolution and Winding Up-Chs. 160-173
Chapter 161 CORPORATIONS: ALTER EGO LIABILITY
PART II. LEGAL BACKGROUND

14-161 California Forms of Pleading and Practice--Annotated § 161.14

§ 161.14 Procedure

[1] Alter Ego Liability Alleged in Complaint

[a] Essential Allegations

If a creditor or tort victim seeks to impute liability to either individual or corporate shareholders of a corporation that is alleged to be their alter ego, the following allegations of fact should appear in the complaint:

- The existence of the obligation owed to plaintiff by the corporation [*see Design Associates, Inc. v. Welch (1964) 224 Cal. App. 2d 165, 171, 36 Cal. Rptr. 341]* ;

- Unity and identity of interest between the individual and the corporation [*Shea v. Leonis (1939) 14 Cal. 2d 666, 670, 96 P.2d 332* (demurrer to complaint sustained as to one individual defendant for failure to allege in complaint that defendant had any beneficial interest in the stock of the corporation); *Rosen v. E.C. Losch Co., Inc. (1965) 234 Cal. App. 2d 324, 333, 44 Cal. Rptr. 377]* ; and

- That adherence to the fiction of the separate existence of the corporation would, under particular circumstances alleged, sanction fraud or promote injustice [*Minifie v. Rowley (1921) 187 Cal. 481, 487, 202 P. 673* ; *Pearl v. Shore (1971) 17 Cal. App. 3d 608, 618, 95 Cal. Rptr. 157* ; *Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal. App. 2d 825, 837, 26 Cal. Rptr. 806]* .

Although the foregoing elements are essential to a finding of alter ego liability, the issue of liability may be raised in other ways, depending on the liberality with which the court treats the pleading requirements. Thus, although not placed in issue by the pleadings, if alter ego as a basis for liability is the subject of pretrial statements and orders and thereafter tried by the parties without objection, pleading deficiencies will not be the subject of appellate concern [*Carey v. Glenco Citrus Products (1965) 235 Cal. App. 2d 572, 576, 45 Cal. Rptr. 365]* . There is also authority for the proposition that if a defendant is charged with liability, his or her denial is sufficient to authorize the reception of evidence to establish liability under the alter ego doctrine, even though the complaint is devoid of such an allegation, provided the defendant has not been misled by the variance between the pleadings and proof [*Auer v. Frank (1964) 227 Cal. App. 2d 396, 403, 38 Cal. Rptr. 684* ; *see Pan Pac. Sash & Door Co. v. Greendale Park, Inc. (1958) 166 Cal.*

App. 2d 652, 655, 333 P.2d 802 (failure to plead alter ego ruled nonprejudicial); *First W. Bank & Trust Co. v. Bookasta (1968) 267 Cal. App. 2d 910, 915-916, 73 Cal. Rptr. 657* (allegation of facts essential to finding of alter ego liability on note not signed by defendant sufficient to raise issue although that theory of liability not specifically alleged)].

[b] Plaintiff's Risk in Action on Contract

When a corporation is sued on a contract containing a provision for attorney's fees, and the complaint names an additional defendant on the alter ego theory, the alter ego defendant may move for a separate preliminary determination of the alter ego issue. If the alter ego issue is disposed of preliminarily, the party prevailing on that issue is entitled to obtain an award of attorney's fees at that point. When the moving defendant is the prevailing party, the action is at an end as far as that defendant is concerned, and it is irrelevant, for the purpose of awarding fees, how the underlying contract claim might eventually be determined [*Pueblo Radiology Med. Group, Inc. v. Gerlach (2008) 163 Cal. App. 4th 826, 828-830, 77 Cal. Rptr. 3d 880*]. Thus the plaintiff risks being bound to pay attorney's fees to a defendant even after winning on the contract claim. Unless the plaintiff is reasonably convinced that the alter ego issue will be determined in the plaintiff's favor, the plaintiff should consider omitting allegations on the alter ego theory in the complaint, and waiting to pursue an alter ego defendant until after a judgment has been obtained [*see* [3], *below*].

[2] Service of Process on Alter Ego Defendant Added by Amended Complaint

A defendant may be first named in an amended complaint and alleged to be the alter ego of a defendant named in the original complaint. For purposes of the three-year limitation on service of process [*see Code Civ. Proc. § 583.210(a)*], the action is commenced as to that defendant at the time when the amended complaint naming him or her is filed. The new defendant must be served with summons issued on the amended complaint for the court to acquire personal jurisdiction over him or her. This is true even though the alter ego defendant is considered to be identical with the defendant named in the original complaint. It is also true as to all causes of action alleged in the amended complaint, regardless of whether or not the cause of action would relate back to the original complaint for purposes of determining a bar by a statute of limitations [*Hennessey's Tavern, Inc. v. American Air Filter Co. (1988) 204 Cal. App. 3d 1351, 1359-1360, 251 Cal. Rptr. 859]* .

Apparently, the result is different if, instead of adding the alter ego as a new defendant, the alter ego is brought into the action by an amendment substituting a true name for a fictitiously named defendant [*Barrington v. A. H. Robins Co. (1985) 39 Cal. 3d 146, 150, 216 Cal. Rptr. 405, 702 P.2d 563* (noting general rule that action is commenced as to fictitiously named defendant for purposes of running of three-year period for service at time of filing of original complaint); *see Nelson v. A.H. Robins Co. (1983) 149 Cal. App. 3d 862, 866-868, 197 Cal. Rptr. 179* (noting that amended complaint that rests on same general set of facts as original complaint and thus relates back for purposes of avoiding statute of limitations as to fictitiously named defendants also relates back for purposes of triggering three-year period)]. Because an action may be brought against an alter ego defendant after the statute of limitations applicable to the cause of action alleged in the original complaint has expired, an alter ego defendant should always be added as a new defendant by an amended complaint, rather than as the true name of a Doe defendant [*Hennessey's Tavern, Inc. v. American Air Filter Co. (1988) 204 Cal. App. 3d 1351, 1359, 251 Cal. Rptr. 859* ; *§ 161.33[16]*]. For general discussion of these principles, see Ch. 21, *Amended and Supplemental Pleadings* , and Ch. 212, *Dismissal* .

[3] Binding Nonparties or Fictitious Defendants After Judgment

The following procedures may be used to obtain a judgment imposing alter ego liability on a person or other entity that was not a party to the initial action against the corporation, though not all of the procedures will be appropriate in every situation:

- Motion after trial to amend the judgment to add the controlling person as judgment debtor [

Alexander v. Abbey of the Chimes (1980) 104 Cal. App. 3d 39, 44-46, 163 Cal. Rptr. 377 ; *Mirabito v. San Francisco Dairy Co. (1935) 8 Cal. App. 2d 54, 57-60, 47 P.2d 530* ; *see McClellan v. Northridge Park Townhome Owners Association, Inc. (2001) 89 Cal. App. 4th 746, 753-756, 107 Cal. Rptr. 2d 702* (trial court properly granted motion to amend judgment adding successor corporation as judgment debtor in addition to bankrupt predecessor, when substantial evidence supported conclusion that successor was mere continuation of predecessor); *Hall, Goodhue, Haisley & Barker, Inc. v. Marconi Conf. Center Bd. (1996) 41 Cal. App. 4th 1551, 1555, 49 Cal. Rptr. 2d 286* (judgment confirming arbitration award may be amended to add alter ego as additional judgment debtor)].

- Petition for an order to show cause why the judgment should not be amended to add the controlling person as judgment debtor [*Motores De Mexicali v. Superior Court (1958) 51 Cal. 2d 172, 174-176, 331 P.2d 1* ; *Schoenberg v. Romike Properties (1967) 251 Cal. App. 2d 154, 168, 59 Cal. Rptr. 359]* .

- Separate action against the controlling person or entity to establish its liability for the original judgment [*Silverman v. Superior Court (1988) 203 Cal. App. 3d 145, 151-152, 249 Cal. Rptr. 724* ; *Taylor v. Newton (1953) 117 Cal. App. 2d 752, 753-757, 257 P.2d 68]* .

- Joint debtor proceedings under *Code Civ. Proc. §§ 989-994* [*see Silverman v. Superior Court (1988) 203 Cal. App. 3d 145, 147-148, 152, 249 Cal. Rptr. 724* ; *Marcus v. Superior Court (1977) 75 Cal. App. 3d 204, 211 n.3, 141 Cal. Rptr. 890* (dicta in both cases)]. Joint debtor proceedings are limited to establishing liability for contract obligations and are only available against a person who was named as a defendant, albeit a fictitious one, in the original complaint [*Code Civ. Proc. § 989*; *Vincent v. Grayson (1973) 30 Cal. App. 3d 899, 905-906, 106 Cal. Rptr. 733* ; *McRae v. Bates (1961) 196 Cal. App. 2d 510, 512, 16 Cal. Rptr. 565]* . Joint debtor proceedings are discussed in Ch. 254, *Executions and Enforcement of Judgments* .

Although the change in the judgment to add an additional judgment debtor is referred to as an amendment, it is not technically an amendment. What the court is actually doing is exercising its authority under *Code Civ. Proc. § 187* to correct the judgment to set forth the name of the true defendant [*McClellan v. Northridge Park Townhome Owners Association, Inc. (2001) 89 Cal. App. 4th 746, 752, 107 Cal. Rptr. 2d 702* (trial court properly granted motion to amend judgment adding successor corporation as judgment debtor in addition to bankrupt predecessor, when substantial evidence supported conclusion that successor was mere continuation of predecessor); *Alexander v. Abbey of the Chimes (1980) 104 Cal. App. 3d 39, 44-45, 163 Cal. Rptr. 377* ; *Mirabito v. San Francisco Dairy Co. (1935) 8 Cal. App. 2d 54, 57, 47 P.2d 530]* . The evidence establishing alter ego liability may be presented in the original proceeding or on the hearing of the motion [*Jack Farenbaugh & Son v. Belmont Construction, Inc. (1987) 194 Cal. App. 3d 1023, 1029, 240 Cal. Rptr. 78* ; *Thomson v. L.C. Roney & Co. (1952) 112 Cal. App. 2d 420, 428-429, 246 P.2d 1017* (hearing of motion); *Mirabito v. San Francisco Dairy Co. (1935) 8 Cal. App. 2d 54, 57, 47 P.2d 530* (original trial)]. Correcting the judgment to bind the alter ego is only appropriate if the person or entity sought to be added as a judgment debtor actually controlled the initial litigation, personally or through a representative, and had occasion to conduct it with a diligence corresponding to the risk of personal liability involved [*NEC Electronics Inc. v. Hurt (1989) 208 Cal. App. 3d 772, 778-779, 256 Cal. Rptr. 441* ; *Silverman v. Superior Court (1988) 203 Cal. App. 3d 145, 151-152, 249 Cal. Rptr. 724* ; *Alexander v. Abbey of the Chimes (1980) 104 Cal. App. 3d 39, 45, 163 Cal. Rptr. 377]* .

Actual control is necessary because without it, an individual sought to be added as a judgment debtor would never have an opportunity to litigate any question beyond his or her relationship to the corporation, and that would infringe his or her right to due process [*Katzir's Floor & Home Design, Inc. v. M-MLS.COM (9th Cir. 2004) 394 F.3d 1143, 1149-1150* (reversing amended judgment adding individual as additional judgment debtor on alter ego grounds) *Motores De Mexicali v. Superior Court (1958) 51 Cal. 2d 172, 176, 331 P.2d 1* ; *NEC Electronics Inc. v. Hurt (1989) 208 Cal. App. 3d 772, 779, 256 Cal. Rptr. 441]* . Actual control contemplates some active defense [*NEC Electronics Inc. v. Hurt (1989) 208 Cal. App. 3d 772, 781, 256 Cal. Rptr. 441]* , but does not require the matter to have been fully

litigated. The persons sought to be added as judgment debtors need not have actually participated in the trial, but they must have had the opportunity to do so. For example, a person who controlled the initial litigation may be added as a judgment debtor to a judgment based on plaintiff's successful motion for summary judgment [*Dow Jones Co. v. Avenel (1984) 151 Cal. App. 3d 144, 150-151, 198 Cal. Rptr. 457]* . Sufficient control to overcome the due process objection may consist of a combination of factors, usually including financing the litigation, hiring the attorneys, and controlling the course of the litigation [*NEC Electronics Inc. v. Hurt (1989) 208 Cal. App. 3d 772, 781, 256 Cal. Rptr. 441]* . Another criteria of sufficient control examines whether the corporate defendant's interests and those of the alter ego were so similar that the trial strategy of the corporate defendant effectively represented the interests of the alter ego [*NEC Electronics Inc. v. Hurt (1989) 208 Cal. App. 3d 772, 780-781, 256 Cal. Rptr. 441]* . For example, the interests of the individual and the corporation are not sufficiently similar if the corporate defendant was on the verge of bankruptcy and negotiated with the plaintiff, as well as with other creditors, to compromise the claim in order to avoid bankruptcy or to agree on a plan for a Chapter 11 reorganization, but did not appear at the trial or present any defense. In that situation, there is no defense for the individual to control, and correction of the judgment to include the individual as judgment debtor is not proper [*NEC Electronics Inc. v. Hurt (1989) 208 Cal. App. 3d 772, 780-781, 256 Cal. Rptr. 441]* .

In deciding whether or not to correct the judgment, the court must also address equitable considerations, and can refuse to correct the judgment if the plaintiff did not act with due diligence after learning of the alter ego relationship [*Alexander v. Abbey of the Chimes (1980) 104 Cal. App. 3d 39, 47-49, 163 Cal. Rptr. 377]* . Whether one proceeds by motion or by a second action to establish the controlling person's liability on the original judgment, it may also be necessary for plaintiff to establish his or her attempts to satisfy the original judgment and that all or part of the original judgment against the corporation has not been satisfied [*see* *Alexander v. Abbey of the Chimes (1980) 104 Cal. App. 3d 39, 48, 163 Cal. Rptr. 377* (failure to show attempts to satisfy judgment as equitable consideration in determining whether to grant motion); *Taylor v. Newton (1953) 117 Cal. App. 2d 752, 756, 257 P.2d 68* (findings in separate action)].

[4] Statute of Limitations

An action may be brought against an alter ego defendant after the statute of limitations applicable to the cause of action alleged in the original complaint has expired [*Hennessey's Tavern, Inc. v. American Air Filter Co. (1988) 204 Cal. App. 3d 1351, 1359, 251 Cal. Rptr. 859]* . The allegation that one is the alter ego of a corporation asks merely to have the fictitious identity of the corporation disregarded. In effect, the alter ego is substituted for the originally named defendant, and, if the action was filed in a timely manner with regard to that defendant, it is also timely as to the alter ego [*Most Worshipful Sons v. Sons etc. Lodge (1958) 160 Cal App. 2d 560, 565-567, 569, 325 P.2d 606* ; *Taylor v. Newton (1953) 117 Cal. App. 2d 752, 757, 257 P.2d 68* ; *see* *People v. Clauson (1964) 231 Cal. App. 2d 374, 376-380, 41 Cal. Rptr. 691* (three-year statute of limitations of *Code Civ. Proc. § 359* for actions against shareholders to enforce liability created by law is inapplicable to equitable liability imposed under alter ego doctrine)].

[5] Enforcing Corporation's Arbitration Agreement

When a person is sued on the theory that a corporation is the person's alter ego, that person has standing to enforce the corporation's agreement to arbitrate the underlying dispute, even though that person was not a party to the agreement [*Rowe v. Exline (2007) 153 Cal. App. 4th 1276, 1285, 63 Cal. Rptr. 3d 787*]. For discussion of enforcement of an arbitration agreement, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporate NamesFictitious NamesGeneral OverviewBusiness & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoGeneral OverviewCivil ProcedurePleading &

PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsService Upon AgentsGovernmentsLegislationStatutes of LimitationsTime Limitations

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[Reserved]

§§ 161.15[Reserved]

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14-161 California Forms of Pleading and Practice--Annotated § 161.30

§ 161.30 California Points and Authorities

For memoranda of points and authorities related to forms in this part, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoGeneral Overview

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14-161 California Forms of Pleading and Practice--Annotated § 161.31

§ 161.31 Forms of Discovery

For interrogatories for use in actions involving disregard of the corporate entity, see Bender's Forms of Discovery, *Corporations* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesForm

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§ 161.32 State Statutes

Failure of close corporation [*see Corp. Code § 158* (definition)] to observe corporate formalities relating to meetings of directors or shareholders in connection with management of its affairs pursuant to a shareholders' agreement [*see Corp. Code § 300(b)*] not considered a factor tending to establish that shareholders have personal liability for corporate obligations. *Corp. Code § 300(e)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoGeneral OverviewBusiness & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoCorporate Formalities

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§ 161.33 Decisions

[1] Alter Ego Doctrine Inapplicable When Plaintiff Not Misled

Alter ego theory inapplicable when plaintiff was thoroughly familiar with all facts concerning defendant's relationship to corporation. *Lynch v. McDonald (1909) 155 Cal. 704, 706, 102 P. 918*

Absence of representations that any person other than corporation was responsible for its debts and evidence that plaintiff looked solely to corporation in extending credit was basis for refusal to impose alter ego liability. *TWM Homes, Inc. v. Atherwood Realty & Inv. Co. (1963) 214 Cal. App. 2d 826, 853, 29 Cal. Rptr. 887*

Plaintiff's agreement to provision in contract permitting promoter to assign contract to corporation and absolving defendant of individual liability was evidence supporting finding of no alter ego liability. *Arnold v. Browne (1972) 27 Cal. App. 3d 386, 395, 103 Cal. Rptr. 775*

Alter ego doctrine was inapplicable in attempt by bank to offset amount owed on shareholders' notes against bank account of corporation when bank loaned money to shareholders with full knowledge of their intent to lend such money to corporation and refused to make loan directly to corporation. *Potts v. First City Bank (1970) 7 Cal. App. 3d 341, 344-346, 86 Cal. Rptr. 552*

Plaintiff was estopped from asserting doctrine of disregarding corporate entity when throughout most of his relationship with corporation he acted as officer and dealt with business as that of corporation. *Granoff v. Yackle (1961) 196 Cal. App. 2d 253, 256, 16 Cal. Rptr. 394* ; *see also Petersen v. Cloverdale Egg Farms (1958) 161 Cal. App. 2d 792, 797-799, 327 P.2d 127* ; *Engineering Serv. Corp. v. Longridge Inv. Co. (1957) 153 Cal. App. 2d 404, 417, 314 P.2d 563*

[2] Appeal

When alter ego liability is imposed by default judgment, sufficiency of evidence is not reviewable on appeal unless

relief from default was sought. *Bein v. Brechtel-Jochim Group, Inc. (1992) 6 Cal. App. 4th 1387, 1394, 8 Cal. Rptr. 2d 351*

[3] Attorney's Fees

Entity determined not to be alter ego of party to collective bargaining agreement is not entitled to attorney's fees under *Civ. Code § 1717* because California law is preempted by federal law [*see 29 U.S.C. § 185(a)*], which does not allow attorney's fees. *Carpenters Health & Welfare Trust Fund v. Acme Industries, Inc. (1990) 224 Cal. App. 3d 187, 190-191, 273 Cal. Rptr. 519*

[4] Bankruptcy

Trial court properly granted motion to amend judgment adding successor corporation as judgment debtor in addition to bankrupt predecessor, when substantial evidence supported conclusion that successor was mere continuation of predecessor. *McClellan v. Northridge Park Townhome Owners Association, Inc. (2001) 89 Cal. App. 4th 746, 752, 107 Cal. Rptr. 2d 702*

Former Cal. Rules of Ct., Rule 209, requiring that case be at issue as to all essential parties before placement on civil active list, was no bar to plaintiff's proceeding to trial on alter ego theory against officer and principal shareholder of corporation when litigation against corporation has been stayed due to bankruptcy. *Maximum Technology v. Superior Court (1987) 188 Cal. App. 3d 935, 938, 233 Cal. Rptr. 733*

[5] Crimes

Corporation may not be used by individuals who control it to circumvent statute. *People v. Anderson (1991) 1 Cal. App. 4th 1084, 1092, 3 Cal. Rptr. 2d 247* (sale of liquor license for amount exceeding statutory maximum)

[6] Effect of Settlement With Original Defendant

When plaintiff sues one party as alter ego of another, plaintiff is not barred from proceeding against former (here parent corporation) after settling with its alter ego. *Mesler v. Bragg Management Co. (1985) 39 Cal. 3d 290, 306, 216 Cal. Rptr. 443, 702 P. 2d 601*

[7] Elements of Alter Ego Doctrine

Amount of respect given to separate identity of corporation by its shareholders, fraudulent intent of incorporators, and degree of injustice visited on litigants by recognition of corporate entity are factors relied on by court in deciding whether shareholders are personally liable for debts of corporation. *Laborers Clean-Up Contract v. Uriarte Clean-Up Ser. (9th Cir. 1984) 736 F.2d 516, 524-525*

Two requirements for application of alter ego doctrine: (1) unity of interest so that separate personalities of corporation and individual no longer exist; and (2) inequitable result will follow if acts are treated as of corporation alone. *Minifie v. Rowley (1921) 187 Cal. 481, 487, 202 P. 673* ; *Arnold v. Browne (1972) 27 Cal. App. 3d 386, 394, 103 Cal. Rptr. 775* ; *Pearl v. Shore (1971) 17 Cal. App. 3d 608, 618, 95 Cal. Rptr. 157* ; *Playboy Enterprises, Inc. v. Welles (9th Cir. 2002) 279 F.3d 796, 806-807*

Determination of whether requirements exist for disregarding corporate entity are primarily for trial court, and not

question of law, and not to be disturbed on appeal if supported by substantial evidence. *Arnold v. Browne (1972) 27 Cal. App. 3d 386, 394, 103 Cal. Rptr. 775* ; *Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal. App. 2d 825, 837, 26 Cal. Rptr. 806*

Bad faith is underlying consideration in disregarding corporate entity. *Pearl v. Shore (1971) 17 Cal. App. 3d 608, 616, 95 Cal. Rptr. 157* ; *Clejan v. Reisman (1970) 5 Cal. App. 3d 224, 239, 84 Cal. Rptr. 897* ; *Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal. App. 2d 825, 838, 26 Cal. Rptr. 806*

Action against alter ego of corporation was not necessarily based on fraud; complaint merely set forth additional facts of improper domination of corporation as basis for judgment against individuals dominating it. *First W. Bank & Trust Co. v. Bookasta (1968) 267 Cal. App. 2d 910, 914, 73 Cal. Rptr. 657*

Alter ego doctrine does not require that individual own every share of corporation, but that corporation is controlled by individual sought to be held and that recognition of separate existence of controlled corporation would work fraud or injustice. *O'Donnell v. Weintraub (1968) 260 Cal. App. 2d 352, 358, 67 Cal. Rptr. 274*

[8] Factors Considered

[a] Absence of One or Both Elements of Test

To impose alter ego liability on corporate president in federal securities case by piercing corporate veil, president is still required to have requisite mental state. *Orloff v. Allman (9th Cir. 1987) 819 F.2d 904, 908*

Alter ego liability may not be imposed on corporate president under California law in securities case by piercing corporate veil merely because president wished to limit liability when there is no abuse of corporate form, such as under-capitalization. *Orloff v. Allman (9th Cir. 1987) 819 F.2d 904, 908-909*

Under-capitalization alone is not sufficient to invoke alter ego doctrine. *Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal. App. 2d 825, 842, 26 Cal. Rptr. 806* ; *Harris v. Curtis (1970) 8 Cal. App. 3d 837, 841, 87 Cal. Rptr. 614*

Failure of plaintiff to offer evidence showing that capital was inadequate or what would constitute reasonable capital is reason for not imposing alter ego liability. *Carlesimo v. Schwebel (1948) 87 Cal. App. 2d 482, 490, 197 P.2d 167*

Sole ownership and control of corporation not enough to warrant piercing corporate veil absent some showing of confusion of personal and corporate affairs, failure to disclose to creditors, or some form of bad faith. *Shafford v. Otto Sales Co., Inc. (1953) 119 Cal. App. 2d 849, 862, 260 P.2d 269*

Purpose of alter ego doctrine is not to protect every unsatisfied creditor, but rather to afford protection when some conduct amounting to bad faith makes it inequitable for equitable owner of corporation to hide behind its corporate veil. *Roman Catholic Archbishop v. Superior Court (1971) 15 Cal. App. 3d 405, 412, 93 Cal. Rptr. 338*

[b] Commingling or Manipulation of Assets and Liabilities

Intermingling of funds of two corporations by owners to assist them in evading obligations merited treatment of corporations as single entity which was alter ego of controlling shareholders. *Riddle v. Leuschner (1959) 51 Cal. 2d 574, 579, 335 P.2d 107*

Misappropriation and diversion of corporate assets by defendant occurring after pledge of shares to plaintiff as security

warrant imposition of alter ego liability and nullify provision in pledge agreement absolving defendant of personal liability. *Flying Tiger Line, Inc. v. U.S. Aircoach (1958) 51 Cal. 2d 199, 201-203, 331 P.2d 37*

Manipulation of assets between identically owned corporations to concentrate assets in one and liabilities in the other justify imposition of personal liability on shareholders. *Rosen v. E. C. Losch Co. (1965) 234 Cal. App. 2d 324, 334, 44 Cal. Rptr. 377* ; *Thomson v. L.C. Roney & Co., Inc. (1952) 112 Cal. App. 2d 420, 428-430, 246 P.2d 1017* ; *Temple v. Bodega Bay Fisheries, Inc. (1960) 180 Cal. App. 2d 279, 283, 4 Cal. Rptr. 300*

Failure to keep internal controls and to prevent improper disbursements along with use of corporate funds to discharge personal liabilities were factors warranting charging shareholders with debts of corporation. *McKee v. Peterson (1963) 214 Cal. App. 2d 515, 530-531, 29 Cal. Rptr. 742*

[c] Equitable Considerations

Fact that subsidiary's worth exceeded judgment does not vitiate need to pierce veil to do justice when parent was actively involved in transaction from beginning, subsidiary's staff and operations had been substantially curtailed since beginning of transaction, and possibility existed that subsidiary would totally deplete its assets before plaintiff could realize on judgment. *Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal. App. 3d 1220, 1251, 1 Cal. Rptr. 2d 301*

Court's discretion to amend judgment to add judgment debtor is equitable; granting of motion made seven years after entry of original judgment without any showing that facts were newly discovered or that attempts had been made to satisfy original judgment was abuse of discretion. *Alexander v. Abbey of the Chimes (1980) 104 Cal. App. 3d 39, 48-49, 163 Cal. Rptr. 377*

[d] Failure to Observe Corporate Formalities

Failure to follow normal corporate procedures with respect to holding meetings and keeping records was evidence supporting trial court's finding of alter ego liability. *Riddle v. Leuschner (1959) 51 Cal. 2d 574, 581, 335 P.2d 107*

Failure of corporation to maintain accurate minutes of meetings is another factor which may be relied upon to disregard corporate entity. *McKee v. Peterson (1963) 214 Cal. App. 2d 515, 531, 29 Cal. Rptr. 742* ; *Rosen v. E.C. Losch Co., Inc. (1965) 234 Cal. App. 2d 324, 334, 44 Cal. Rptr. 377*

[e] Inadequate Capitalization

Fact that parent corporation (of general partner of development limited partnership) guaranteed $42 million of subsidiary's loans strongly suggested that subsidiary was undercapitalized for company in business of developing shopping centers. *Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal. App. 3d 1220, 1250, 1 Cal. Rptr. 2d 301*

Loans or advances by shareholders of under-capitalized corporation tended to show that corporation was not regarded as separate entity by shareholders. *Riddle v. Leuschner (1959) 51 Cal. 2d 574, 581, 335 P.2d 107*

Alter ego liability imposed when capital is illusory or trifling compared with business to be done and risks of loss. *Automotriz etc. De Cal. v. Resnick (1957) 47 Cal. 2d 792, 797, 306 P.2d 1* ; *Minton v. Cavaney (1961) 56 Cal. 2d 576, 580, 15 Cal. Rptr. 641, 364 P.2d 473* ; *CFTC v. Topworth Int'l, Ltd. (9th Cir. 2000) 205 F.3d 1107, 1112-1113* (extreme under-capitalization found)

Failure to issue stock or apply for permit and under-capitalization were factors to be considered in determining whether individuals dealing through corporation should be held personally responsible for corporate obligations. *Automotriz Del Golfo De Cal. v. Resnick (1957) 47 Cal. 2d 792, 796-797, 306 P.2d 1* ; *Claremont Press Pub. Co. v. Barksdale (1960) 187 Cal. App. 2d 813, 816-817, 10 Cal. Rptr. 214*

Under-capitalization was factor to be considered along with all other factors in determining whether alter ego doctrine should be applied, but did necessitate, by itself, application of doctrine. *Harris v. Curtis (1970) 8 Cal. App. 3d 837, 841-843, 87 Cal. Rptr. 614* ; *see also Arnold v. Browne (1972) 27 Cal. App. 3d 386, 396, 103 Cal. Rptr. 775*

Guaranty of under-financed corporation's debt was indicative of promoter's intent to invite public to deal with corporation, thus supplying element of bad faith necessary to ignore corporate entity. *Linco Servs., Inc. v. DuPont (1966) 239 Cal. App. 2d 841, 844, 49 Cal. Rptr. 196*

Excessive salaries contributed to under-capitalization of corporation. *McKee v. Peterson (1963) 214 Cal. App. 2d 515, 531, 29 Cal. Rptr. 742*

Burden of showing inadequate capitalization of corporation is on plaintiff. *Carlesimo v. Schwebel (1948) 87 Cal. App. 2d 482, 490, 197 P.2d 167*

[f] Representations to Creditors

Agreement absolving defendant of personal liability for corporate obligations was ineffective in light of court's finding that corporation was his alter ego. *Flying Tiger Line, Inc. v. United States Aircoach (1958) 51 Cal. 2d 199, 201-204, 331 P.2d 37*

Statements by shareholder that he and wife were in effect the corporation obligated on note created inference that note accepted under belief that shareholder and wife were true parties obligated. *Stark v. Coker (1942) 20 Cal. 2d 839, 848, 129 P.2d 390*

Guaranty of corporate obligations and loans by promoter created impression that corporation was financially stable. *Linco Servs. Inc. v. DuPont (1966) 239 Cal. App. 2d 841, 843-844, 49 Cal. Rptr. 196*

Assurances that recently incorporated business is under same ownership as predecessor and that individual shareholder will meet obligations supported finding of inequitable result if corporate entity not disregarded. *Talbot v. Fresno-Pac. Corp. (1960) 181 Cal. App. 2d 425, 429, 5 Cal. Rptr. 361*

[9] Federal Standard

In determining whether to disregard corporate form, federal court applies federal substantive law, but may look to state law for guidance; federal standard considers three factors: amount of respect given to separate identity of corporation by shareholders; degree of injustice that would result from recognition of corporate entity; and any fraudulent intent of incorporators. *International Brotherhood of Electrical Workers, Local Union No. 332 v. Hyland Wilson Electrical Contractors, Inc., (9th Cir. 1989) 881 F.2d 820, 821* ; *Bd. of Trustees v. Valley Cabinet & Mfg. Co. (9th Cir. 1989) 877 F.2d 769, 772*

[10] Jurisdiction

When foreign corporation is alter ego of its stockholders so as to justify disregard of corporate entity, jurisdiction over corporation supports jurisdiction over stockholders. *Sheard v. Superior Court (1974) 40 Cal. App. 3d 207, 210, 114 Cal. Rptr. 743* (holding, however, that there was insufficient proof of alter ego doctrine to justify jurisdiction of stockholders)

[11] Liability Not Imposed

In case applying Delaware law, in which surviving corporation claimed shareholders of acquired corporation benefitted from pre-merger fraud by acquired entity and sought recovery for unjust enrichment, court held that longstanding principles of corporate law and policies favoring maintenance of corporate form were so compelling that it could not permit corporation to pierce corporate veil and obtain remedy against its own shareholders. *McKesson HBOC, Inc. v. New York State Common Retirement Fund, Inc. (9th Cir. 2003) 339 F.3d 1087, 1089, 1094-1096*

Although spouse's community property interest [*Civ. Code § 5105* (repealed and replaced by *Fam. Code § 751*, operative January 1, 1994)] in shares held in name of officer/director spouse satisfies ownership requirement for imposition of alter ego liability, mere passive acceptance of benefits of disregarding corporate entity is insufficient basis for imposition of alter ego liability; alter ego liability can only be imposed on one who has actively influenced or governed corporation in course of conduct that constitutes abuse of corporate privilege. *Firstmark Capital Corp. v. Hempel Financial Corp. (9th Cir. 1988) 859 F.2d 92, 94-95*

Former employee of subsidiary failed to show that subsidiary was parent corporation's alter ego for purposes of holding parent liable for employment discrimination against employee; there was no evidence that parent exercised day-to-day control over subsidiary's employment decisions or that parent exercised greater control over subsidiary's operations than that which parent corporation would normally exercise over its subsidiary, and there was no showing of common management. *Laird v. Capital Cities/ABC Inc. (1998) 68 Cal. App. 4th 727, 738-739, 741-742, 80 Cal. Rptr. 2d 454*

Alter ego doctrine is not applicable to require county to pay obligations of county regional justice financing agency, because both acted in good faith in accordance with Legislative mandate and justice did not require county to be derivatively liable. *Rider v. County of San Diego (1992) 11 Cal. App. 4th 1410, 1425, 14 Cal. Rptr. 2d 885*

[12] Parent-Subsidiary Relationship

Parent corporation can be held liable as owner under CERCLA for its subsidiary's actions in operating polluting facility if there are factors that would allow piercing corporate veil under general corporate law principles. *United States v. Bestfoods (1998) 524 U.S. 51, 118 S. Ct. 1876, 1885-1886, 141 L.Ed. 2d 43*

[13] Persons Liable

Difference in wording may be used, but elements are same, when entity sought to be held liable under alter ego doctrine is another corporation rather than individual. *Mesler v. Bragg Management Co. (1985) 39 Cal. 3d 290, 300, 216 Cal. Rptr. 443, 702 P. 2d 601*

Organizing attorney serving as director was liable under alter ego doctrine when he functioned as promoter of corporation. *Minton v. Cavaney (1961) 56 Cal. 2d 576, 580, 15 Cal. Rptr. 641, 364 P.2d 473*

President and managing employee of family corporation was not liable when he owned no stock in corporation. *Riddle v. Leuschner (1959) 51 Cal. 2d 574, 580, 335 P.2d 107*

Disregard of corporate entity for purpose of calculating assets from which husband could pay support was proper when corporations were formed for purpose of tax avoidance and to created shelter from creditors. *In re Marriage of Dick (1993) 15 Cal. App. 4th 144, 161, 18 Cal. Rptr. 2d 743*

Promoters of corporation liable when corporation has never issued shares. *Automotriz Del Golfo De Cal. v. Resnick (1957) 47 Cal. 2d 792, 796, 306 P.2d 1* ; *Claremont Press Pub. Co. v. Barksdale (1960) 187 Cal. App. 2d 813, 816, 10 Cal. Rptr. 214*

Shareholder exercising no control over corporate activities was liable under alter ego theory when his failure to exercise responsibilities as director warranted imputation of bad faith. *McKee v. Peterson (1963) 214 Cal. App. 2d 515, 531, 29 Cal. Rptr. 742*

Donor of shares to members of family corporation which he controlled, although not as shareholder, was liable under alter ego theory. *Goldsmith v. Tub-O-Wash (1962) 199 Cal. App. 2d 132, 139-140, 18 Cal. Rptr. 446*

Parent corporation liable for obligations of subsidiary under alter ego doctrine. *Marr v. Postal Union Life Ins. Co. (1940) 40 Cal. App. 2d 673, 681, 105 P.2d 649*

[14] Pleading

When defendant is charged with liability, his denial thereof was sufficient to authorize reception of evidence to establish alter ego theory even though complaint did not allege that theory, provided defendant was not misled by variance between pleadings and proof. *Auer v. Frank (1964) 227 Cal. App. 2d 396, 403, 38 Cal. Rptr. 684* (action on common counts); *Pan Pac. Sash & Door Co. v. Greendale Park, Inc. (1958) 166 Cal. App. 2d 652, 655, 333 P.2d 802* (failure to plead alter ego theory nonprejudicial); *see also Los Angeles Cemetery Ass'n v. Superior Court (1968) 268 Cal. App. 2d 492, 494, 74 Cal. Rptr. 97* (dictum)

Necessity of pleading existence of corporate obligation owed to plaintiff in complaint seeking to charge dominant shareholders on alter ego theory. *Design Associates, Inc. v. Welch (1964) 224 Cal. App. 2d 165, 171, 36 Cal. Rptr. 341*

Pleading that subsidiary is owned, managed, and operated by parent corporation and is therefore the alter ego of parent corporation was ineffective. *Luis v. Orcutt Town Water Co. (1962) 204 Cal. App. 2d 433, 443-444, 22 Cal. Rptr. 389*

[15] Postjudgment Application

Amended judgment adding individual as additional judgment debtor on alter ego grounds reversed to avoid violation of due process rights. *Katzir's Floor & Home Design, Inc. v. M-MLS.COM (9th Cir. 2004) 394 F.3d 1143, 1149-1150*

Necessity that alter ego of defendant exercise control of litigation before it may be bound by judgment and subsequently named as judgment debtor. *Minton v. Cavaney (1961) 56 Cal. 2d 576, 581, 15 Cal. Rptr. 641, 364 P.2d 473* ; *Motores De Mexicali v. Superior Court (1958) 51 Cal. 2d 172, 175-176, 331 P.2d 1*

Court has authority under *Code Civ. Proc. § 187* (implied powers) to impose liability after judgment on alter ego who has had control of litigation. *Schoenberg v. Romike Properties (1967) 251 Cal. App. 2d 154, 168, 59 Cal. Rptr. 359* ; *Thomson v. L.C. Roney & Co., Inc. (1952) 112 Cal. App. 2d 420, 426-427, 246 P.2d 1017* ; *Mirabito v. San Francisco Dairy Co. (1935) 8 Cal. App. 2d 54, 57-61, 47 P.2d 530*

[16] Statute of Limitations

Statute of limitations applicable to corporation also applicable to alter ego when corporate entity disregarded. *People v. Clauson (1964) 231 Cal. App. 2d 374, 380, 41 Cal. Rptr. 691*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoGeneral OverviewBusiness & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoCorporate FormalitiesBusiness & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoFraudBusiness & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoInadequate CapitalizationCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral Overview

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§ 161.34 Law Reviews

Comment, The Alter Ego Doctrine: Alternative Challenges to the Corporate Form, *30 UCLA L. Rev. 129 (1982)*

Barber, Incorporation Risks: Defective Incorporation and Piercing the Corporate Veil in California, *12 Pac. L.J. 839 (1981)*

Olson, Personal Service Corporations: Who Is the Income Earner? *13 Pac. L.J. 333 (1981)*

Wang, The California Statutory Close Corporation: Gateway to Flexibility or Trap for the Unwary? *15 San Diego L. Rev. 687 (1978)*

Comment, Res Judicata and Collateral Estoppel Beneath the Corporate Veil, *66 Cal. L. Rev. 1093 (1978)*

Grossman, "Alter Ego: A Perplexing Problem," *51 LA Bar J 233 (1975)*

Note, "Inadequate Capitalization as a Basis for Shareholder Liability: The California Approach and a Recommendation," *45 So Cal. L Rev 823 (1972)*

Kaufer, "Pleading Facts Sufficient to Disregard the Corporate Entity," *40 LA Bar B 131 (1965)*

Samuels, "Disregard of the Corporate Entity for the Taxpayer's Benefit: A Case Study," *5 Santa Clara Lawyer 145 (1964)*

Oppenheim, "The Close Corporation in California--Necessity of Separate Treatment: The Close Corporation as a Separate Entity--The Alter Ego Doctrine," *12 Hastings LJ 227 (1961)*

Note, "Disregarding the Corporate Entity--Evidence--Inadequate Capitalization," *30 So Cal. L Rev 538 (1957)*

Comment, "Corporations: 'Disregarding the Corporate Entity' as a Regulatory Process," *31 Calif L Rev 426 (1943)*

Ballantine, "Separate Entity of Parent and Subsidiary Corporations," *14 Calif L Rev 12 (1925)*

Note, "Corporations: Disregarding Corporate Entity: One Man Company," *13 Calif L Rev 235 (1925)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoGeneral OverviewBusiness & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoCorporate FormalitiesBusiness & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoFraudBusiness & Corporate LawCorporationsShareholdersDisregard of Corporate EntityAlter EgoInadequate Capitalization

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§ 161.35 Text References

Ballantine & Sterling, California Corporation Laws, Ch. 14, *Litigation Involving Corporations and Shareholders* , §§ 295-300 (Matthew Bender)

Witkin, California Procedure, Vol. 5, *Pleading*, § 881 (4th ed. 1997)

Witkin, Summary of California Law, vol. 9, *Corporations, §§ 9-18* (10th ed 2005)

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[Reserved]

§§ 161.36[Reserved]

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14-161 California Forms of Pleading and Practice--Annotated § 161.50

§ 161.50 Complaint Against Corporation and Its Controlling Shareholder(s) on Corporate Obligation--Corporation as Alter Ego of Controlling Shareholder(s)

[1] FORM Complaint Against Corporation and Its Controlling Shareholder(s) on Corporate Obligation--Corporation as Alter Ego of Controlling Shareholder(s)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR _____ [*specify, e.g.*, DAMAGES]
_____ [*name*],	)	
a Corporation, and _____	)	[Amount demanded _____
[*name*(*s*) *of shareholder*(*s*)],	)	(exceeds *or* does not exceed) $10,000]
Defendants.	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence of plaintiff*].

2. Defendant _____ [*name of corporation*] is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of _____, with its principal place of business at _____ [*address*], _____ [*city*], California.

3. Defendant _____ [*name of shareholder*] is, and at all times herein mentioned was, _____ [*specify interest in corporation, e.g.*, the owner of _____ (*number*) of shares

of stock of defendant corporation *or* a promoter of defendant corporation and subscriber to _____ (*number*) of shares of its stock]. The shares so _____ [owned *or* subscribed to] constitute _____ percent of the total number of shares _____ [issued and outstanding *or* which have been subscribed to].

[*In separately numbered paragraphs, state capacity and interest in corporation of any other individual defendants, as illustrated in Paragraph 3, above.*]

4. There exists, and at all times herein mentioned there existed, a unity of interest and ownership between defendant(s) _____ [*name(s) of shareholder*(*s*)] and defendant corporation, such that any individuality and separateness between defendant(s) _____ [*name(s) of shareholder*(*s*)] and defendant corporation have ceased, and defendant corporation is the alter ego of defendant(s) _____ [*name(s) of shareholder*(*s*)] in that _____ [*set forth facts showing control and domination of corporate business by shareholder*(*s*); *see §§ 161.51-161.64 for illustrative allegations*].

5. Adherence to the fiction of the separate existence of the defendant corporation as an entity distinct from defendant(s) _____ [*name(s) of shareholder*(*s*)] would permit an abuse of the corporate privilege and would _____ [sanction fraud *or* promote injustice] in that _____ [*set forth facts showing fraud, injustice, or bad faith on the part of individual defendants; see* §§ 161.55-161.57 for illustrative allegations].

6. _____ [*Continue with complaint by alleging cause of action against corporation in separately numbered paragraphs.*]

WHEREFORE, plaintiff prays judgment against defendants and each of them as follows:

1. For _____ [*specify, e.g.*, damages in the sum of $_____];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This skeletal form for a complaint is for use when the plaintiff seeks to impose liability for a corporate obligation on the dominant shareholders or the promoter(s) on the alter ego theory.

[3] Allegations

The complaint alleges:

- The capacity of the parties (Paragraphs 1-3);

- That there is a unity of ownership and interest between the corporation and the individual defendants (Paragraph 4) [*see Minifie v. Rowley (1921) 187 Cal. 481, 487, 202 P. 673]* ; and

- That adherence to the fiction of separate existence of the corporation would sanction fraud or promote injustice (Paragraph 5) [*see Minifie v. Rowley (1921) 187 Cal. 481, 487, 202 P. 673* ; *see also People v. Clauson (1964) 231 Cal. App. 2d 374, 379, 41 Cal. Rptr. 691]* .

To these allegations must be added those alleging the underlying cause of action against the corporation (Paragraph 6) [*see Design Associates, Inc. v. Welch (1964) 224 Cal. App. 2d 165, 171, 36 Cal. Rptr. 341]* . For the essential allegations to be pleaded in a particular cause of action, see the applicable chapter in this publication.

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification also will preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*]. In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the first paper must state whether the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[6] Cross References

For alternative forms for captions and introductions, *see* Ch. 108, *Captions and Introductions*

For alternative forms for prayers and verifications, *see* Ch. 473, *Prayers* , and Ch. 572, *Verification* , respectively

[7] California Points and Authorities

For memoranda of points and authorities related to this form, see California Points and Authorities, Ch. 52, *Corporations*

[8] Forms of Discovery

For form interrogatories for use in actions involving disregard of the corporate entity, see Bender's Forms of Discovery, Ch. 54, *Corporations* (Matthew Bender)

[9] Decisions

Allegation that defendant owns more than majority of capital stock of corporation and controls, dominates, and manages corporation and all of its shares was insufficient to raise issue of alter ego theory. *Dos Pueblos Ranch & Improvement Co. v. Ellis (1937) 8 Cal. 2d 617, 621, 67 P.2d 340*

Requirements for application of alter ego doctrine. *Minifie v. Rowley (1921) 187 Cal. 481, 487, 202 P. 673* ; *Arnold v. Browne (1972) 27 Cal. App. 3d 386, 394, 103 Cal. Rptr. 775* ; *Pearl v. Shore (1971) 17 Cal. App. 3d 608, 618, 95 Cal. Rptr. 157* ; *Rosen v. E.C. Losch Co., Inc. (1965) 234 Cal. App. 2d 324, 333, 44 Cal. Rptr. 377*

Necessity of pleading cause of action against corporation in action to hold shareholder liable. *Design Associates, Inc. v. Welch (1964) 224 Cal. App. 2d 165, 171, 36 Cal. Rptr. 341*

Denial by defendant charged with liability is sufficient to put alter ego doctrine in issue even though complaint is devoid of that allegation. *Auer v. Frank (1964) 227 Cal. App. 2d 396, 403, 38 Cal. Rptr. 684* (action on common counts); *Pan Pac. Sash & Door Co. v. Greendale Park, Inc. (1958) 166 Cal. App. 2d 652, 655, 333 P.2d 802* (failure to plead alter ego theory also held to be nonprejudicial); see also *Los Angeles Cemetery Ass'n v. Superior Court (1968) 268 Cal. App. 2d 492, 494, 74 Cal. Rptr. 97* (dictum)

[10] Text References

Ballantine & Sterling, California Corporation Laws, Ch. 14, *Litigation Involving Corporations and Shareholders, § 299* (Matthew Bender)

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14-161 California Forms of Pleading and Practice--Annotated § 161.51

§ 161.51 Allegation(s)--Failure to Issue Stock and/or Inadequate Capitalization

[1] FORM Allegation(s)--Failure to Issue Stock and/or Inadequate Capitalization

Defendant _____ [*name of corporation*] is, and at all times herein mentioned was, a mere shell and sham without capital, assets, stock, or stockholders. Defendant _____ [*name of corporation*] was conceived, intended, and used by defendant _____ [*name of shareholder*] as a device to avoid individual liability and for the purpose of substituting a financially insolvent corporation in the place of defendant _____ [*name of shareholder*]. At no time after defendant _____ [*name of corporation*] became incorporated was any stock authorized to be issued or issued, nor has any permit for issuance of stock been applied for with the Commissioner of Corporations.

[*AND/OR*]

Defendant _____ [*name of corporation*] is, and at all times herein mentioned was, so inadequately capitalized that, compared with the business to be done by the defendant and the risks of loss, its capitalization was _____ [illusory *or* trifling].

[2] Use of Form

This allegation is for use in a pleading seeking to disregard the corporate entity on the grounds of lack of capitalization and failure to issue stock. These factors would be considered as bearing on the element of unity of interest. The allegation must be combined with allegations showing that there will be an inequitable result if the corporate entity is not disregarded [*see Minifie v. Rowley (1921) 187 Cal. 481, 487, 202 P. 673]* .

[3] Nonissuance of Stock

The failure to issue stock or to apply at any time for a permit, although not conclusive evidence, is an indication that persons controlling the corporation were doing business as individuals. While the fact standing alone that a corporation remains inchoate without stockholders or stock is not of itself determinative of an alter ego relationship on its part,

nevertheless it does indicate that the corporation may exist merely to serve the interests of another--a corporation or an individual [*Automotriz etc. De California v. Resnick (1957) 47 Cal. 2d 792, 796, 306 P.2d 1]* .

[4] Inadequate Capitalization

A factor to be considered in determining whether individuals dealing through a corporation should be held personally responsible for the corporate obligations is whether there was an attempt to provide adequate capitalization for the corporation [*Automotriz etc. De California v. Resnick (1957) 47 Cal. 2d 792, 796-797, 306 P.2d 1* ; *see CFTC v. Topworth Int'l, Ltd. (9th Cir. 2000) 205 F.3d 1107, 1112-1113* (extreme under-capitalization found)]. Inadequate capitalization, per se, does not necessarily render the shareholders, officers, and directors liable for the obligations of the corporation. Rather, the rule is that under-capitalization is a factor to be considered along with all other factors present in the case in determining whether those individuals should be declared the alter ego of the corporation [*Harris v. Curtis (1970) 8 Cal. App. 3d 837, 841-843, 87 Cal. Rptr. 614* ; *see also Arnold v. Browne (1972) 27 Cal. App. 3d 386, 396, 103 Cal. Rptr. 775* ; *cf. Minton v. Cavaney (1961) 56 Cal. 2d 576, 580, 15 Cal. Rptr. 641, 364 P.2d 473* (court indicated by dicta that undisputed evidence that there was no attempt to provide adequate capitalization could be a proper ground to affirm judgment disregarding entity but reversed judgment on other grounds)].

[5] Law Reviews

Note, "Inadequate Capitalization as a Basis for Shareholder Liability: The California Approach and a Recommendation," *45 So Cal. L Rev 823 (1972)*

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14-161 California Forms of Pleading and Practice--Annotated § 161.52

§ 161.52 Allegation--Commingling or Manipulation of Assets

[1] FORM Allegation--Commingling or Manipulation of Assets

[*EITHER*]

Defendant _____ [*name of corporation*] is, and at all times herein mentioned was, the alter ego of defendant _____ [*name of shareholder*] and there exists, and at all times herein mentioned has existed, a unity of interest and ownership between the defendants such that any separateness has ceased to exist, in that defendant _____ [*name of shareholder*] used assets of the corporation for his/her personal uses, caused assets of the corporation to be transferred to him/her without adequate consideration, and withdrew funds from the corporation's bank accounts for his/her personal use.

[*OR*]

Defendant _____ [*name of parent corporation*] and defendant _____ [*name of subsidiary corporation*] are, and at all times herein mentioned were, the alter egos of defendant _____ [*name of shareholder*], and there exists, and at all times herein mentioned has existed, a unity of interest and ownership between defendants such that any separateness between them has ceased to exist, in that defendant _____ [*name of shareholder*] completely controlled, dominated, managed, and operated both corporate defendants and intermingled the assets of each to suit the convenience of defendant _____ [*name of shareholder*] by placing the fixed assets of defendant _____ [*name of plaintiff's debtor*] in the name of defendant _____ [*name of transferee corporation*] in order to evade payment of the obligations owed to creditors of defendant _____ [*name of plaintiff's debtor*].

[2] Use of Form

This form sets forth alternative allegations relating to the misappropriation or manipulation of corporate assets, either between the shareholder and the corporation, or between two corporations controlled by the shareholders.

[3] Commingling of Assets

The failure to keep internal controls and prevent improper disbursements of corporate funds to discharge personal liabilities of shareholders have been considered significant factors by the courts when reviewing the trial court's imposition of alter ego liability [*McKee v. Peterson (1963) 214 Cal. App. 2d 515, 530-531, 29 Cal. Rptr. 742* ; *Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal. App. 2d 825, 838, 26 Cal. Rptr. 806]* .

[4] Manipulation of Assets

Another factor supporting a finding of alter ego liability is the manipulation of assets between identically owned corporation in order to concentrate the assets in one corporation and the liabilities in another to the detriment of creditors of the latter [*Riddle v. Leuschner (1959) 51 Cal. 2d 574, 579, 335 P.2d 107* ; *Rosen v. E.C. Losch Co., Inc. (1965) 234 Cal. App. 2d 324, 334, 44 Cal. Rptr. 377]* .

[5] Decisions

Commingling of funds and other assets, failure to segregate funds of the separate entities, and unauthorized diversion of corporate funds or assets to other than corporate uses as factors pertinent to trial court's determination of whether corporate entity should be disregarded. *Riddle v. Leuschner (1959) 51 Cal. 2d 574, 581-582, 335 P.2d 107* ; *Rosen v. E.C. Losch Co., Inc. (1965) 234 Cal. App. 2d 324, 334, 44 Cal. Rptr. 377* ; *Goldberg v. Engelberg (1939) 34 Cal. App. 2d 10, 13-14, 92 P.2d 935* ; see also *Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal. App. 2d 825, 838, 26 Cal. Rptr. 806*

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14-161 California Forms of Pleading and Practice--Annotated § 161.53

§ 161.53 Allegation--Corporation Is Mere Conduit for Business of Shareholder

[1] FORM Allegation--Corporation Is Mere Conduit for Business of Shareholder

Defendant _____ [*name of corporation*] is, and at all times herein mentioned was, a mere shell, instrumentality, and conduit through which defendant _____ [*name of shareholder*] carried on his/her _____ [*type of business*] business in the corporate name exactly as he/she had conducted it previous to incorporation, exercising complete control and dominance of such business to such an extent that any individuality or separateness of defendant _____ [*name of corporation*] and defendant _____ [*name of shareholder*] does not, and at all times herein mentioned did not, exist.

[2] Use of Form

Allegations that the defendant corporation is the mere shell, instrumentality, and business conduit of its dominant shareholder have been held proper to raise the alter ego issue [*First W. Bank & Trust Co. v. Bookasta (1968) 267 Cal. App. 2d 910, 915, 73 Cal. Rptr. 657]* .

To apply the alter ego doctrine, it must appear that the dominant shareholder and the corporation are the business conduits and alter ego of one another, and that to recognize their separate entities would aid the consummation of a wrong. The mere circumstance that all the capital stock of a corporation is owned or controlled by one or more persons does not destroy its separate existence [*Erkenbrecher v. Grant (1921) 187 Cal. 7, 11, 200 P. 641]* .

[3] Decisions

Mere ownership or control of corporation is insufficient to warrant application of business conduit rule. *Erkenbrecher v. Grant (1921) 187 Cal. 7, 11, 200 P. 641*

Corporation as business conduit for controlling shareholder is ground for disregarding corporate entity. *Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal. App. 2d 825, 839, 26 Cal. Rptr. 806* (recognizing rule); *McCombs v. Rudman (1961) 197 Cal. App. 2d 46, 49-51, 17 Cal. Rptr. 351* ; *Pan Pac. Sash & Door Co. v. Greendale Park, Inc.*

(1958) 166 Cal. App. 2d 652, 657-659, 333 P.2d 802

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14-161 California Forms of Pleading and Practice--Annotated § 161.54

§ 161.54 Allegation--Failure to Observe Corporate Formalities

[1] FORM Allegation--Failure to Observe Corporate Formalities

Defendant _____ [*name of corporation*] is, and at all times herein mentioned was, controlled, dominated, and operated by defendant _____ [*name of shareholder*] as his/her individual business and alter ego, in that the activities and business of defendant corporation were carried out without the holding of directors' or shareholders' meetings, no records or minutes of any corporate proceedings were maintained, and defendant _____ [*name of shareholder*] entered into personal transactions with defendant corporation without the approval of other directors or shareholders.

[2] Use of Form

Although not the most persuasive of reasons for disregarding the corporate entity, the failure to maintain records, hold meetings, and otherwise follow established corporate formalities have been considered as factors tending to support imposition of alter ego liability [*Riddle v. Leuschner (1959) 51 Cal. 2d 574, 581, 335 P.2d 107* ; *Rosen v. E. C. Losch Co. (1965) 234 Cal. App. 2d 324, 334, 44 Cal. Rptr. 377]* . When it appears that the defendant corporation was operated in this manner, this allegation should be used.

[3] Disregard of Corporate Formalities by Close Corporations

Factors other than the nonobservance of corporate formalities tend to play a greater role in the court's determination of alter ego liability. Furthermore, "close corporations" [see *Corp. Code § 158*] operating under a shareholders' agreement may dispense with the formalities relating to the holding of meetings of shareholders or directors [*Corp. Code § 300(b)*], and the failure of a close corporation to observe such formalities must not be considered a factor tending to establish that the shareholders have personal liability for corporate obligations [*Corp. Code § 300(e)*]. Note, however, that a close corporation is nevertheless required to maintain adequate records of its financial transactions and other matters [*Corp. Code § 300(c)*; see *Corp. Code §§ 1500-1605* and C. 165, *Corporations: Corporate Records and Reports*].

[4] State Statutes

Definition of close corporation. *Corp. Code § 158*

Definition of shareholders' agreement. *Corp. Code § 186*

Contents of shareholders' agreement. *Corp. Code § 300(b)-(e)*

[5] Decisions

Failure to follow normal corporate procedures with respect to holding meetings, keeping records, and obtaining shareholder and director approval of transactions with interested director is evidence supporting finding of alter ego liability. *Riddle v. Leuschner (1959) 51 Cal. 2d 574, 581, 335 P.2d 107*

Failure of corporation to maintain accurate minutes of meetings is another factor which may be relied upon to disregard corporate entity. *McKee v. Peterson (1963) 214 Cal. App. 2d 515, 531, 29 Cal. Rptr. 742*

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14-161 California Forms of Pleading and Practice--Annotated § 161.55

§ 161.55 Allegation--Shareholder Fraud in Diverting or Concealing Corporation's Assets

[1] FORM Allegation--Shareholder Fraud in Diverting or Concealing Corporation's Assets

Adherence to the fiction of the separate existence of defendant _____ [*name of corporation*] as an entity distinct from defendant _____ [*name of shareholder*] would permit abuse of the corporate privilege and would sanction a fraud in that defendant _____ [*name of shareholder*] caused the sum of $ _____ to be withdrawn from the funds of defendant _____ [*name of corporation*] and _____ [*specify, e.g.*, distributed to himself/herself without any consideration to defendant _____ (*name of corporation*) *or* deposited in safety deposit boxes], all for the purpose of avoiding and preventing attachment and execution by creditors, including plaintiff, thereby rendering defendant _____ [*name of corporation*] insolvent and unable to meet its obligations.

[2] Use of Form

This allegation alleges facts which may be pleaded to show that to recognize the corporate defendant as an entity distinct from its shareholder(s) would tend to sanction a fraud [see *Flying Tiger Line, Inc. v. U.S. Aircoach (1958) 51 Cal. 2d 199, 201, 202, 331 P.2d 37]* .

[3] Decisions

Mere ownership and control of corporation, standing alone, is insufficient ground for holding corporation to be alter ego of shareholders. *Erkenbrecher v. Grant (1921) 187 Cal. 7, 11, 200 P. 641* ; *Shafford v. Otto Sales Co., Inc. (1953) 119 Cal. App. 2d 849, 862, 260 P.2d 269*

Showing that creditor will remain unsatisfied if corporate veil not pierced is insufficient proof of "inequitable result." *Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal. App. 2d 825, 842, 26 Cal. Rptr. 806*

Alter ego doctrine does not depend on presence of actual fraud but rather on showing that doctrine must be applied to prevent what would be fraud or injustice if accomplished. *Clejan v. Reisman (1970) 5 Cal. App. 3d 224, 239, 84 Cal.*

Rptr. 897 ; *Rosen v. E.C. Losch Co., Inc. (1965) 234 Cal. App. 2d 324, 335, 44 Cal. Rptr. 377*

[4] Cross References

For complaints and allegations relating to fraud and fraudulent conveyances, *see* Ch. 269, *Fraud and Deceit* , and Ch. 270, *Fraudulent Conveyances* , respectively

For a related form, *see § 161.50*.

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14-161 California Forms of Pleading and Practice--Annotated § 161.56

§ 161.56 Allegation--Controlling Shareholder's Representations That Shareholder Will Be Responsible for Corporate Obligations

[1] FORM Allegation--Controlling Shareholder's Representations That Shareholder Will Be Responsible for Corporate Obligations

Adherence to the fiction of the separate existence of defendant _____ [*name of corporation*] as an entity distinct from defendant _____ [*name of shareholder*] would permit abuse of the corporate privilege and produce an inequitable result in that defendant _____ [*name of shareholder*] represented to the plaintiff that _____ [*specify, e.g.,* the note signed on behalf of the corporation was in fact the obligation of defendant _____ (*name of shareholder*) and such note was accepted under the belief that defendant _____ (*name of shareholder*) was in reality the true party obligated].

[2] Use of Form

This allegation illustrates the type of fact situation which would establish that the shareholder held himself or herself out to the plaintiff as liable for the obligations of the corporation which the shareholder controls. Such a holding out has been held a sufficient showing that the creditor was misled and an inequitable result would follow if the corporate entity were not disregarded [*Stark v. Coker (1942) 20 Cal. 2d 839, 848, 129 P.2d 390* ; see also *Talbot v. Fresno-Pac. Corp. (1960) 181 Cal. App. 2d 425, 429, 5 Cal. Rptr. 361]* .

[3] Decisions

Assurances that recently incorporated business is under same ownership as predecessor and that individual shareholder will meet obligations of corporation supports finding of inequitable result if corporate entity not disregarded. *Talbot v. Fresno-Pac. Corp. (1960) 181 Cal. App. 2d 425, 429, 5 Cal. Rptr. 361*

Statements by shareholder that he and wife were in effect the corporation obligated on note creates inference that note was accepted under belief that shareholder and wife were true parties obligated. *Stark v. Coker (1942) 20 Cal. 2d 839, 848, 129 P.2d 390*

[4] Cross References

For a related form, *see § 161.50*.

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14-161 California Forms of Pleading and Practice--Annotated § 161.57

§ 161.57 Allegation--Shareholder's Acts Led Public to Deal With Inadequately Financed Corporation

[1] FORM Allegation--Shareholder's Acts Led Public to Deal With Inadequately Financed Corporation

Adherence to the fiction of the separate existence of defendant _____ [*name of corporation*] as an entity distinct from defendant _____ [*name of shareholder*] would permit abuse of the corporate privilege and would produce an inequitable result in that defendant _____ [*name of shareholder*] made loans to defendant corporation and guaranteed certain of its obligations thereby enabling defendant _____ [*name of corporation*] to return to active business, without adequate financing and without capital stock, which return to business invited the public generally, and plaintiff in particular, to deal with defendant _____ [*name of corporation*] to plaintiff's loss.

[2] Use of Form

This allegation is for use when the "inequitable result" element of the alter ego doctrine is to be supplied by evidence that defendant shareholder, by financing the corporation's return to business, misled creditors.

[3] Holding Out to Creditors

These allegations are based on the holding in *Linco Servs., Inc. v. DuPont (1966) 239 Cal. App. 2d 841, 843-844, 49 Cal. Rptr. 196* , in which the court stated that the absence of direct misrepresentation to the plaintiff, and plaintiff's lack of knowledge of the defendant's participation in the corporation, were not decisive. It was a sufficient showing of inequitable result that the defendant enabled the corporation to return to business, thereby inviting the general public to deal with the corporation as a going concern [*Linco Servs., Inc. v. DuPont (1966) 239 Cal. App. 2d 841, 844, 49 Cal. Rptr. 196]* .

[4] Cross References

For a related form, *see § 161.53*.

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14-161 California Forms of Pleading and Practice--Annotated § 161.58

§ 161.58 Demurrer to Complaint Against Individual on Corporate Obligation--Failure to Allege Facts Showing That Individual and Corporation Are Same Entity and That Recognition of Separate Entity Would Consummate Wrong

[1] FORM Demurrer to Complaint Against Individual on Corporate Obligation--Failure to Allege Facts Showing That Individual and Corporation Are Same Entity and That Recognition of Separate Entity Would Consummate Wrong

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DEMURRER OF _____ [*name*]
vs.	)	TO COMPLAINT OF _____
_____ [*name*],	)	[*name*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	[Amount demanded _____
		(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Defendant _____ [*name of shareholder*] demurs to the complaint herein on the ground that the complaint does not state facts sufficient to constitute a cause of action against defendant _____ [*name of shareholder*] in that it fails to allege facts showing that _____ [this defendant and defendant _____ (*name of corporation*) were the same entity at the times mentioned in the complaint *or*

recognition of the corporation as a separate entity would tend to sanction fraud or injustice or otherwise aid in the consummation of a wrong *or both*].

[*A prayer to a demurrer is unnecessary, but may be added as follows:*]

WHEREFORE, defendant prays that this demurrer be sustained [without leave to amend], that defendant be dismissed from this action, that defendant have judgment for his/her costs, and for all other proper relief.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

CAUTION:

A party filing a demurrer must serve and file a notice of hearing with the demurrer [*Cal. Rules of Ct., Rule 3.1320(c)*], as well as a supporting memorandum [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Cal. Rules of Ct., Rule 3.1103(c)* (law and motion rules apply to demurrers); *see also* Ch. 417, *Points and Authorities*].

[2] Use of Form

This demurrer is for use when the complaint against the corporation and the shareholder who is allegedly liable for its obligations under the alter ego theory is deficient on its face because it fails to allege facts establishing the unity of interest requirement and/or the inequitable result requirement.

[3] Pleading Elements of Alter Ego

To state a cause of action against an individual based on his or her liability for the acts and obligations of a corporation, the complaint must show that there is such a unity of interest and ownership between the individual and the corporation that their individuality or separateness has ceased; and that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice [*Minifie v. Rowley (1921) 187 Cal. 481, 487, 202 P. 673]* .

[4] Mere Ownership and Control

An allegation that an individual owns a majority of the capital stock of a corporation and that he or she controls and dominates its affairs does not allege facts sufficient to satisfy the requirement of the alter ego doctrine, which requires that there be a unity of interest and ownership such that the separate identities of the shareholder and the corporation have disappeared [*Dos Pueblos Ranch & Improvement Co. v. Ellis (1937) 8 Cal. 2d 617, 621, 67 P.2d 340]* . Assuming that the defendant does operate the corporation as a business conduit, the separate identity of the corporation will not be disregarded unless there are facts showing that failure to ignore the corporate entity would produce an inequitable result [*Erkenbrecher v. Grant (1921) 187 Cal. 7, 11, 200 P. 641* ; *Shafford v. Otto Sales Co., Inc. (1953) 119 Cal. App. 2d 849, 862, 260 P.2d 269* ; *Norins Realty Co., Inc. v. Consolidated Abstract Title Co. (1947) 80 Cal. App. 2d 879, 883, 182 P.2d 593]* .

[5] Cross References

See generally Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

For a related form, *see § 161.50*.

[6] California Points and Authorities

For a memorandum of points and authorities supporting a demurrer to a complaint alleging alter ego liability on the ground that the complaint fails to allege facts showing that the individual and the corporation are the same entity and/or that recognition of the corporation as a separate entity would aid in the consummation of a wrong, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

[7] State Statutes

Demurrer for failure to state a cause of action. *Code Civ. Proc. §§ 430.10(e), 430.30(a)*

[8] Decisions

[a] Elements of Alter Ego Doctrine

Requirements for application of alter ego doctrine are (1) that there be such unity of interest that separate personalities of corporation and individual no longer exist and (2) that inequitable result will follow if acts are treated as of corporation alone. *Minifie v. Rowley (1921) 187 Cal. 481, 487, 202 P. 673* ; *Arnold v. Browne (1972) 27 Cal. App. 3d 386, 394, 103 Cal. Rptr. 775* ; *Pearl v. Shore (1971) 17 Cal. App. 3d 608, 618, 95 Cal. Rptr. 157* ; *Playboy Enterprises, Inc. v. Welles (9th Cir. 2002) 279 F.3d 796, 806-807*

Bad faith as underlying consideration in disregarding corporate entity. *Pearl v. Shore (1971) 17 Cal. App. 3d 608, 616, 95 Cal. Rptr. 157* ; *Clejan v. Reisman (1970) 5 Cal. App. 3d 224, 239, 84 Cal. Rptr. 897* ; *Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal. App. 2d 825, 838, 26 Cal. Rptr. 806*

Action against alter ego of corporation are not necessarily based on fraud; complaint merely sets forth additional facts of improper domination of corporation as basis for judgment against individuals dominating it. *First W. Bank & Trust Co. v. Bookasta (1968) 267 Cal. App. 2d 910, 914, 73 Cal. Rptr. 657*

[b] Factors Considered

Failure to issue stock or apply for permit and under-capitalization are factors to be considered in determining whether individuals dealing through corporation should be held personally responsible for corporate obligations. *Automotriz Del Golfo De Cal. v. Resnick (1957) 47 Cal. 2d 792, 796-797, 306 P.2d 1* ; *Claremont Press Pub. Co. v. Barksdale (1960) 187 Cal. App. 2d 813, 816-817, 10 Cal. Rptr. 214*

Factors generally considered in determining whether to disregard corporate entity. *Arnold v. Browne (1972) 27 Cal. App. 3d 386, 394-395, 103 Cal. Rptr. 775* ; *Associated Vendors, Inc. v. Oakland Meat Co. (1962) 210 Cal. App. 2d 825, 838-840, 26 Cal. Rptr. 806*

Under-capitalization is factor to be considered along with all other factors in determining whether alter ego doctrine should be applied, but by itself does not necessitate application of doctrine. *Harris v. Curtis (1970) 8 Cal. App. 3d 837*

, 841-843, *87 Cal. Rptr. 614* ; *see also* *Arnold v. Browne (1972) 27 Cal. App. 3d 386, 396, 103 Cal. Rptr. 775*

Excessive salaries by controlling parties are factor in determining whether to disregard corporate entity. *McKee v. Peterson (1963) 214 Cal. App. 2d 515, 531, 29 Cal. Rptr. 742*

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14-161 California Forms of Pleading and Practice--Annotated § 161.59

§ 161.59 Demurrer to Complaint Against Individual on Corporate Obligation--Failure to Allege That Individual Defendant Had Beneficial Ownership in Corporation

[1] FORM Demurrer to Complaint Against Individual on Corporate Obligation--Failure to Allege That Individual Defendant Had Beneficial Ownership in Corporation

[*Caption. See § 161.58.*]

The complaint does not state facts sufficient to constitute a cause of action against defendant _____ [*name of individual*] in that the complaint does not allege that defendant _____ [*name of individual*] holds, or held at any time mentioned in the complaint, any beneficial interest in defendant _____ [*name of corporation*].

[*Prayer, if desired. See § 161.58.*]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

CAUTION:

A party filing a demurrer must serve and file a notice of hearing with the demurrer [*Cal. Rules of Ct., Rule 3.1320(c)*], as well as a supporting memorandum [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Cal. Rules of Ct., Rule 3.1103(c)* (law and motion rules apply to demurrers); *see also* Ch. 417, *Points and*

Authorities].

[2] Use of Form

This ground for demurrer should be urged when the defendant does not own any shares, directly or beneficially, in the corporation which is alleged to be the defendant's alter ego.

[3] Requirement of Beneficial Ownership

Unity of interest and ownership between an individual sought to be charged with liability for a corporation's debts and the corporation does not exist when the individual held none of the corporation's stock and had no other interest or right to share in the profits of the enterprise [*Riddle v. Leuschner (1959) 51 Cal. 2d 574, 580, 335 P.2d 107* ; *Shea v. Leonis (1939) 14 Cal. 2d 666, 670, 96 P.2d 332]* . However, one case has held the donor of shares in a family corporation liable under the alter ego doctrine, even though he held no shares himself, when he completely dominated the affairs of the corporation [*Goldsmith v. Tub-O-Wash (1962) 199 Cal. App. 2d 132, 139, 18 Cal. Rptr. 446]* . The case could be distinguished on its facts from those stating the requirement that there be some ownership interest, since there were only two shares issued to the defendant's daughter and son-in-law and they could properly be viewed as merely the nominees of the defendant.

[4] California Points and Authorities

For a memorandum supporting a demurrer to a complaint alleging alter ego liability on the ground that there is no allegation that the individual defendant owns a beneficial interest in the corporation, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

[5] Decisions

President and managing employee of family corporation was not liable under alter ego theory when he owned no shares nor had any interest other than as salaried employee in corporation. *Riddle v. Leuschner (1959) 51 Cal. 2d 574, 580, 335 P.2d 107*

Failure to aver individual defendant had any beneficial interest in shares of corporation stated no cause of action against that individual. *Shea v. Leonis (1939) 14 Cal. 2d 666, 670, 96 P.2d 332*

Ownership in corporation is necessary element for application of alter ego doctrine under California law; asset freeze against brokerage, however, did not require alter ego relationship. *SEC v. Hickey (9th Cir. 2003) 322 F.3d 1123, 1128, 1131*

[6] Cross References

For a related form, *see § 161.58*.

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14-161 California Forms of Pleading and Practice--Annotated § 161.60

§ 161.60 Affirmative Defense to Shareholder's Liability Under Alter Ego Doctrine--Plaintiff's Knowledge of Facts Regarding Relationship Between Shareholder and Corporation

[1] FORM Affirmative Defense to Shareholder's Liability Under Alter Ego Doctrine--Plaintiff's Knowledge of Facts Regarding Relationship Between Shareholder and Corporation

AS A [_____ (*if more than one, specify number, e.g.*, FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.*, SECOND) CAUSE OF ACTION], defendant alleges:

1. Plaintiff at all times mentioned in the complaint dealt with _____ [*name of corporation*] as a corporation separate and distinct from this defendant.

2. Plaintiff at all times mentioned in the complaint was fully aware of defendant's relationship with the corporation and of _____ [*specify facts relied on by plaintiff in complaint to disregard corporate entity, e.g.*, the fact that the corporation was thinly capitalized] as alleged in plaintiff's complaint.

3. This defendant relied on the fact that plaintiff at all times dealt with the corporation as a separate entity.

4. Equity does not require application of the "alter ego" doctrine in favor of plaintiff to disregard the corporate entity, and such an application would be inequitable as to this defendant.

[2] Use of Form

This form is an affirmative defense to a complaint asserting liability on the alter ego theory. The form alleges that [*see Lynch v. McDonald (1909) 155 Cal. 704, 706, 102 P. 918* ; *Hiehle v. Torrance Millworks, Inc. (1954) 126 Cal. App. 2d 624, 629-630, 272 P.2d 780]* :

- Plaintiff dealt with the corporation at all times as a separate entity (Paragraph 1) with full knowledge of the facts (Paragraph 2).

- Defendant relied on the fact that plaintiff dealt with the corporation as a separate entity (Paragraph 3).

- Equity does not require disregarding the corporate entity on plaintiff's behalf and that doing so would be inequitable to defendant (Paragraph 4).

[3] Plaintiff's Knowledge of Facts as Defense

The court may properly refuse to disregard the corporate entity at the behest of one who was thoroughly familiar with all the facts concerning the alleged alter ego's relationship with the corporation [*Lynch v. McDonald (1909) 155 Cal. 704, 706, 102 P. 918* ; *see also Hiehle v. Torrance Millworks, Inc. (1954) 126 Cal. App. 2d 624, 629-630, 272 P.2d 780]* . This defense has been said to be essentially one of estoppel [*see Engineering Serv. Corp. v. Longridge Inv. Co. (1957) 153 Cal. App. 2d 404, 417, 314 P.2d 563]* .

[4] Decisions

Alter ego theory was inapplicable when plaintiff was thoroughly familiar with all facts concerning defendant's relationship to corporation. *Lynch v. McDonald (1909) 155 Cal. 704, 706, 102 P. 918* ; *see also Granoff v. Yackle (1961) 196 Cal. App. 2d 253, 256, 16 Cal. Rptr. 394* (plaintiff officer of corporation held estopped from asserting doctrine); *Engineering Serv. Corp. v. Longridge Inv. Co. (1957) 153 Cal. App. 2d 404, 417, 314 P.2d 563* ; *Hiehle v. Torrance Millworks, Inc. (1954) 126 Cal. App. 2d 624, 629-630, 272 P.2d 780*

Absence of representations that any other than corporation responsible for its debts and evidence that plaintiff looked solely to corporation in extending credit was basis for refusal to impose alter ego liability. *TWM Homes, Inc. v. Atherwood Realty & Inv. Co. (1963) 214 Cal. App. 2d 826, 853, 29 Cal. Rptr. 887*

Plaintiff's agreement to provision in contract permitting promoter to assign contract to corporation and absolving defendant of individual liability was evidence supporting finding of no alter ego liability. *Arnold v. Browne (1972) 27 Cal. App. 3d 386, 395, 103 Cal. Rptr. 775*

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14-161 California Forms of Pleading and Practice--Annotated § 161.61

§ 161.61 Amending Judgment to Include Shareholder as Judgment Debtor--Notice of Motion

[1] FORM Amending Judgment to Include Shareholder as Judgment Debtor--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION TO AMEND JUDGMENT
Plaintiff,	)	TO INCLUDE SHAREHOLDER AS JUDGMENT
vs.	)	DEBTOR
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To the above-named defendant and to its attorney of record, and to _____ [*name of shareholder*]:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in the courtroom of [_____ (Department *or* Division) _____ (*number*) of] the above-entitled court, located at _____ [*name of building and street address*], in _____ [*city*], California, plaintiff will, and hereby does, move for an order amending the judgment rendered in this case as follows:

That portion of the judgment which begins with the words "_____" on page _____, line _____ and continues with the words "_____" on page _____,

line _____, and that now reads as follows: _____ [*set out portion of judgment naming corporation as judgment debtor*] be amended to read as follows: _____ [*restate above portion adding name of alter ego as judgment debtor*].

The motion will be made on the ground that _____ [*name of alter ego*] is, and at all times material to plaintiff's case was, the alter ego of defendant, and that the judgment as rendered contains a misnomer in failing to include the name of _____ [*name of alter ego*] as judgment debtor.

The motion will be based on this notice of motion, on the declaration of _____[*name*] and the memorandum of points and authorities served and filed herewith, on all the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of this motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

CAUTION:

This notice of motion must be accompanied by a supporting memorandum [*Cal. Rules of Ct., Rule 3.1113(a)*; for discussion and forms, *see* Ch. 417, *Points and Authorities*]. A copy of any paper on which the motion is to be based must also accompany the notice if that paper has not previously been served on the party to be notified and was not filed by him or her [*Code Civ. Proc. § 1010*]. The notice of motion may also be, and most often is, accompanied by a declaration establishing the facts on which the motion is based [*see Code Civ. Proc. §§ 2003, 2009, 2015.5*].

[2] Use of Form

This notice of motion is for use to obtain an order to add the name of a corporate defendant's alter ego to a judgment rendered against the corporation. The notice states when, and the grounds on which, the motion will be made, and the papers on which it will be based [*see Code Civ. Proc. § 1010*].

[3] Amending Judgment to Add Alter Ego

The trial court may amend its judgment at any time so that the judgment properly designates the real defendants [*Mirabito v. San Francisco Dairy Co. (1935) 8 Cal. App. 2d 54, 57, 60, 47 P.2d 530* ; *Jack Farenbaugh & Son v. Belmont Construction, Inc. (1987) 194 Cal. App. 3d 1023, 1028-1029, 240 Cal. Rptr. 78]* . In *Mirabito v. San Francisco Dairy Co.*, the court, after stating the foregoing rule, held that "where ... , as here, ... the evidence is sufficient to warrant the conclusion that in effect the two corporations are identical; where, as here, the action was fully and fairly tried with at least the direct financial assistance of [the alter ego]; and where, as here, nothing appears in the record to show that [the alter ego] could have produced a scintilla of evidence that would have in any way affected the results of the trial, there is no basis for a different rule" [*Mirabito v. San Francisco Dairy Co. (1935) 47 P.2d 530]* .

The alter ego relationship may be established either during the initial trial [*Jack Farenbaugh & Son v. Belmont Construction, Inc. (1987) 194 Cal. App. 3d 1023, 1028-1029, 240 Cal. Rptr. 78* ; *Mirabito v. San Francisco Dairy Co. (1935) 8 Cal. App. 2d 54, 58, 47 P.2d 530]* or during the hearing on the motion [*Thomson v. L.C. Roney & Co. (1952)*

112 Cal. App. 2d 420, 427, 246 P.2d 1017 (applying *Code Civ. Proc. § 187,* giving court power to adopt suitable procedure to effectuate jurisdiction)].

A judgment confirming an arbitration award may be amended to add an alter ego as an additional judgment debtor [*Hall, Goodhue, Haisley & Barker, Inc. v. Marconi Conf. Center Bd. (1996) 41 Cal. App. 4th 1551, 1555, 49 Cal. Rptr. 2d 286]* .

[4] Control of Litigation

In order that a person in control of the litigation is bound by the judgment, it is necessary that the one in whose favor or against whom the rules of res judicata operate participate in the control of the action and, if judgment is adverse, be able to determine whether or not an appeal should be taken. It is not sufficient that he or she appear as a witness or cooperate without having control [*Minton v. Cavaney (1961) 56 Cal. 2d 576, 581, 15 Cal. Rptr. 641, 364 P.2d 473* ; *see also Motores De Mexicali v. Superior Court (1958) 51 Cal. 2d 172, 175-176, 331 P.2d 1* ; *Schoenberg v. Romike Properties (1967) 251 Cal. App. 2d 154, 168, 59 Cal. Rptr. 359]* .

[5] Cross References

See generally Ch. 372, *Motions and Orders*

[6] California Points and Authorities

For a memorandum in support of the foregoing motion, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

[7] Decisions

Alter ego of defendant must have exercised control of litigation before it may be bound by judgment. *Minton v. Cavaney (1961) 56 Cal. 2d 576, 581, 15 Cal. Rptr. 641, 364 P.2d 473* ; *Motores De Mexicali v. Superior Court (1958) 51 Cal. 2d 172, 175-176, 331 P.2d 1*

Trial court properly granted motion to amend judgment adding successor corporation as judgment debtor in addition to bankrupt predecessor, when substantial evidence supported conclusion that successor was mere continuation of predecessor. *McClellan v. Northridge Park Townhome Owners Association, Inc. (2001) 89 Cal. App. 4th 746, 752, 107 Cal. Rptr. 2d 702*

Power of trial court to amend judgment confirming arbitration award to add alter ego as additional judgment debtor. *Hall, Goodhue, Haisley & Barker, Inc. v. Marconi Conf. Center Bd. (1996) 41 Cal. App. 4th 1551, 1555, 49 Cal. Rptr. 2d 286* .

Trial judge not disqualified to hear motion to amend judgment to include controlling officer as judgment debtor. *Jack Farenbaugh & Son v. Belmont Construction, Inc. (1987) 194 Cal. App. 3d 1023, 1031-1032, 240 Cal. Rptr. 78*

When trial judge hears motion to include alter ego as judgment debtor, judge's own recollections and personal observations of trial may be properly considered along with other evidence. *Jack Farenbaugh & Son v. Belmont Construction, Inc. (1987) 194 Cal. App. 3d 1023, 1031-1032, 240 Cal. Rptr. 78*

Trial court permitted to amend judgment to add alter egos as post-judgement debtors pursuant to *Code Civ. Proc. § 187*

(implied powers of court), subject only to due process considerations. *Dow Jones Co. v. Avenel (1984) 151 Cal. App. 3d 144, 148-149, 198 Cal. Rptr. 457*

Power of court to include defendant's alter ego as judgment debtor when that alter ego exercised control of litigation. *Schoenberg v. Romike Properties (1967) 251 Cal. App. 2d 154, 168, 59 Cal. Rptr. 359* ; *Thomson v. L.C. Roney & Co. (1952) 112 Cal. App. 2d 420, 426-427, 246 P.2d 1017* ; *Mirabito v. San Francisco Dairy Co. (1935) 8 Cal. App. 2d 54, 57-61, 47 P.2d 530*

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Chapter 161 CORPORATIONS: ALTER EGO LIABILITY
PART IV. FORMS

14-161 California Forms of Pleading and Practice--Annotated § 161.62

§ 161.62 Amending Judgment to Include Shareholder as Judgment Debtor--Declaration in Support of Motion Based on Creditor's Examination [Code Civ. Proc. § 708.110(a)]

[1] FORM Amending Judgment to Include Shareholder as Judgment Debtor--Declaration in Support of Motion Based on Creditor's Examination [Code Civ. Proc. § 708.110(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	DECLARATION OF _____
Plaintiff,	)	[*name*] IN SUPPORT OF MOTION TO AMEND
vs.	)	JUDGMENT TO INCLUDE SHAREHOLDER AS
_____ [*name*],	)	JUDGMENT DEBTOR
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

I am the plaintiff in this _____ [action *or* proceeding].

On _____ [*date*] judgment was entered in my favor against _____ [*name of defendant*], a corporation, in the amount of $ _____.

On _____ [*date*], I conducted a creditor's examination of _____ [*name of defendant*] pursuant to an order by this court under *Code Civ. Proc. § 708.110(a)*, whereat _____ [*name*] as _____ [*position, e.g.*, president] of defendant appeared and was examined on behalf of defendant. [A copy of the transcript of the examination is attached to this declaration as Exhibit A and incorporated by reference.]

The examination disclosed that _____ [*set forth facts establishing alter ego relationship on the basis of unity of interest and ownership and inequity resulting from recognition of separate corporate entity*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This declaration is for use to factually establish the relationship between defendant and its alter ego, in support of a motion to include the name of the alter ego in the judgment as judgment debtor. The declaration is based on facts discovered during plaintiff's examination of an officer of the defendant corporation pursuant to *Code Civ. Proc. § 708.110(a)* (examination of debtor supplemental to execution) [*see Thomson v. L.C. Roney & Co. (1952) 112 Cal. App. 2d 420, 422, 246 P.2d 1017]* . To establish the alter ego relationship the declaration and exhibits must show that there exists a unity and identity of interest between defendant and its alter ego [*see Arnold v. Browne (1972) 27 Cal. App. 3d 386, 394, 103 Cal. Rptr. 775 , disapproved on other grounds, Reynolds Metals Co. V. Alperson (1979) 25 Cal. 3d 124* ; *Rosen v. E.C. Losch Co., Inc. (1965) 234 Cal. App. 2d 324, 333, 44 Cal. Rptr. 377]* and that if the acts are treated as those of the corporation alone, an inequitable result will follow [*see Arnold v. Browne (1972) 27 Cal. App. 3d 386, 394, 103 Cal. Rptr. 775 , disapproved on other grounds, Reynolds Metals Co. V. Alperson (1979) 25 Cal. 3d 124* ; *Schoenberg v. Romike Properties (1967) 251 Cal. App. 2d 154, 167, 59 Cal. Rptr. 359* ; *Thomson v. L.C. Roney & Co., Inc. (1952) 112 Cal. App. 2d 420, 427-429, 246 P.2d 1017]* .

Counsel may wish to modify this form to include references to trial or deposition testimony of the corporate officer or shareholder sought to be added as a judgment debtor. If the declarant was also plaintiff's trial counsel, his or her personal observations as to the alter ego's actual participation in and control of the trial may also be used as evidence to support alter ego liability [*Jack Farenbaugh & Son v. Belmont Construction, Inc. (1987) 194 Cal. App. 3d 1023, 1032-1034, 240 Cal. Rptr. 78]* .

Counsel may also wish to modify the statements regarding discovery of the facts to describe circumstances of the particular situation. Because of the equitable nature of the motion to amend, the declaration should describe plaintiff's due diligence to discover the true facts and to act on them after discovery, as well as any attempts made to satisfy the original judgment against the corporation and the extent to which it remains unsatisfied [*Alexander v. Abbey of the Chimes (1980) 104 Cal. App. 3d 39, 47-49, 163 Cal. Rptr. 377]* .

[3] Decisions

Declaration and deposition testimony of alter ego and declaration of attorney who tried case for plaintiff held sufficient to establish alter ego liability. *Jack Farenbaugh & Son v. Belmont Construction, Inc. (1987) 194 Cal. App. 3d 1023, 1033-1034, 240 Cal. Rptr. 78*

[4] Cross References

For a related form, *see § 161.61*

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PART IV. FORMS

14-161 California Forms of Pleading and Practice--Annotated § 161.63

§ 161.63 Amending Judgment to Include Shareholder as Judgment Debtor--Order

[1] FORM Amending Judgment to Include Shareholder as Judgment Debtor--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER AMENDING JUDGMENT TO INCLUDE
Plaintiff,	)	SHAREHOLDER AS JUDGMENT DEBTOR
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

The motion of plaintiff _____ [*name*] for an order amending the judgment rendered in this case on _____ [*date*], to include the name of _____ [*name of shareholder or promoter*] therein as judgment debtor came on regularly for hearing by the court on this date. Plaintiff appeared by counsel _____ [*name*]; _____ [*specify other appearances*].

On proof made to the satisfaction of the court that defendant _____ [*name of corporation*] is the alter ego of _____ [*name of shareholder or promoter*] and that the judgment rendered in this case should be amended to bind defendant under the name of _____ [*name of shareholder or promoter*].

IT IS ORDERED that the judgment heretofore rendered in this action be amended as follows:

That portion of the judgment which begins with the words "_____" on page _____, line _____ and continues with the words "_____" on page _____, line _____, and that now reads _____ [*set out portion of judgment naming corporation as judgment debtor*] be amended to read as follows: _____ [*restate above portion adding name of shareholder or promoter as judgment debtor*].
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

This order is for use in granting plaintiff's motion to add the name of defendant's alter ego to a judgment. This order does not include findings in accordance with the general rule that none is required in an order granting a motion [*see Waller v. Weston (1899) 125 Cal. 201, 204, 57 P. 892* ; *see also Perez v. Perez (1952) 111 Cal. App. 2d 827, 829-830, 245 P.2d 344]* .

[3] Decisions

Findings of fact and conclusions of law are unnecessary in written order on motion. *Waller v. Weston (1899) 125 Cal. 201, 204, 57 P. 892* ; *Perez v. Perez (1952) 111 Cal. App. 2d 827, 829-830, 245 P.2d 344*

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Chapter 162 CORPORATIONS: ISSUANCE OF SHARES

14-162 California Forms of Pleading and Practice--Annotated 162.syn

§ 162.syn Synopsis to Chapter 162: CORPORATIONS: ISSUANCE OF SHARES

§ 162.01 Scope of Chapter

§ 162.02 Cross References

§ 162.03 Governing Statutes

[1] Corporations Code

[2] Commercial Code

[a] In General

[b] Validity of Shares

§§ 162.04-162.09 [Reserved]

§ 162.10 Definitions

[1] Articles

[2] Shares and Related Terms

[a] Shares and Securities

[b] Common and Preferred Shares

[c] Certificated and Uncertificated Shares

[d] Registered or Bearer Form

[e] Initial Transaction Statement and Written Statements

[f] Classes and Series of Shares

[g] Overissue

[3] Shareholder and Shareholders' Agreement

§ 162.11 Issuance of Shares

[1] Authorization

[2] Uncertificated Shares

[3] Unauthorized Issuance and Overissue

[4] Implied Terms

[a] Certificated Shares

[b] Uncertificated Shares

[5] Preincorporation Subscriptions

[a] In General

[b] Enforceability

[c] Noncompliance With Securities Law as Defense

[6] Preemptive Right

§ 162.12 Consideration for Shares

[1] Permissible Consideration

[2] Fixing Consideration

[a] Duties of Directors

[b] Liability of Directors

[3] Liability of Shareholders for Overvalued Consideration

[4] Partly Paid Shares

[a] How Created

[b] Liability of Original Purchaser to Corporation

[c] Liability of Transferee Without Knowledge

[d] Liability of Transferee With Knowledge

[e] Liability of Representatives and Fiduciaries

[f] Actions by Corporation's Creditors

§ 162.13 Share Certificates and Initial Transaction Statements

[1] Contents of Certificate or Statement

[a] Classified and Serial Shares

[b] Additional Statements When Applicable

[c] Effect of Failure to Include Statements

[d] Close Corporation Share Certificates

[e] Corporation's Lien on Certificated Shares

[2] Shareholder's Entitlement to Certificate

[3] Lost, Destroyed, or Stolen Certificate

[a] When Owner Entitled to New Certificate

[b] When Owner Precluded From Asserting Claim

[c] Action to Obtain Replacement Certificate

§ 162.14 Corporation's Right to Cancel and Reissue Shares

[1] Certificated Shares

[2] Uncertificated Shares

§ 162.15 Corporation's Denial of Validity of Issued Shares

[1] Validity of Certificated Shares

[a] Validity of Signatures on Certificate

[b] Defect in Shares

[c] Lack of Genuineness

[d] Other Defenses

[e] Incomplete Certificate

[f] Altered Certificate

[g] Warranties by Signers

[2] Guarantor as Issuer

§§ 162.16-162.29 [Reserved]

§ 162.30 Related Matthew Bender Publications

§ 162.31 State Statutes

[1] Certificates

[2] Consideration for Shares

[3] Definitions

[4] Issuance of Shares

[5] Preemptive Right

[6] Qualification of Shares

§ 162.32 Law Reviews

§ 162.33 Text References

§§ 162.34-162.39 [Reserved]

§ 162.40 Complaint for Reformation of Agreement [Civ. Code § 3399] and for Surrender and Cancellation of Share Certificates [Civ. Code § 3412; Corp. Code § 422] and Reissuance to Reflect Actual Contributions to Corporation--By Corporation Against Shareholder

[1] FORM

[2] Use of Form

[3] Causes of Action

[4] Jurisdiction and Venue

[5] Verification

[6] Cross References

§ 162.41 Complaint to Collect Unpaid Subscription Price--By Corporation Against Subscriber [Corp. Code § 410(a)]--Preincorporation Subscription

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction and Venue

[5] Verification

§ 162.42 Affirmative Defense to Action on Preincorporation Subscription Agreement--Illegal Contract [Civ. Code § 1667(1)]--Noncompliance With Corporate Securities Law [Corp. Code §§ 25102(a), 25110]

[1] FORM

[2] Use of Form

§ 162.43 Complaint to Impress Constructive Trust [Civ. Code § 2224] on Shares Acquired in Violation of Quasi-Preemptive Right--By Shareholder Against Majority Directors and Corporation

[1] FORM

[2] Use of Form

[3] Jurisdiction and Venue

[4] Verification

[5] Corporation as Defendant

[6] Constructive Trust as Remedy

§ 162.44 Complaint for Damages--Breach of Fiduciary Duty [Corp. Code § 309] and Fraud in Fixing Consideration for Shares [Corp. Code § 409(b)]--Shareholder's Derivative Suit [Corp. Code § 800] Against Directors

[1] FORM

[2] Use of Form

[3] Allegations

[4] Directors' Duty

[5] Form of Action and Relief

[6] Jurisdiction

§ 162.45 Complaint to Compel Corporation to Replace Lost, Stolen, or Destroyed Certificate [Corp. Code § 419(b), (c); Com. Code § 8405]

[1] FORM

[2] Use of Form

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Volume 14: Corporations: Capacity thru Corporations: Dissolution and Winding Up-Chs. 160-173
Chapter 162 CORPORATIONS: ISSUANCE OF SHARES
PART I. SCOPE

14-162 California Forms of Pleading and Practice--Annotated § 162.01

§ 162.01 Scope of Chapter

This chapter discusses the issuance of shares by a corporation and some of the liabilities that may exist under California law in that context. The forms comprise complaints for use by the corporation against a shareholder [*see §§ 162.40, 162.41*], an affirmative defense for use by a shareholder [*see § 162.42*], and complaints for use by a shareholder against the corporation [*see* §§ 162.43-162.45].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFinanceInitial Capitalization & Stock SubscriptionsGeneral OverviewCommercial Law (UCC)Investment Securities (Article 8)Issuer Duties

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14-162 California Forms of Pleading and Practice--Annotated § 162.02

§ 162.02 Cross References

- For discussion and forms relating to actions arising from transfers of issued shares, see Ch. 163, *Corporations: Transfers of Shares* .

- For a discussion and forms relating to the qualification requirements under the Corporate Securities Law [*see generally Corp. Code § 25000 et seq.*], see Ch. 515, *Securities and Franchise Regulation* .

- For additional discussion and transactional forms related to the issuance of shares, see California Legal Forms, Ch. 2, *Formation of Corporations*, Ch. 3, *Articles of Incorporation*, Ch. 4, *Bylaws*, and Ch. 6, *Corporate Securities* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersTransfers of SharesCommercial Law (UCC)Investment Securities (Article 8)Issuer DutiesCommercial Law (UCC)Investment Securities (Article 8)Transfers

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Chapter 162 CORPORATIONS: ISSUANCE OF SHARES
PART I. SCOPE

14-162 California Forms of Pleading and Practice--Annotated § 162.03

§ 162.03 Governing Statutes

[1] Corporations Code

Provisions concerning the share structure of a California corporation that are required or permitted to appear in the articles of incorporation are governed by *Corp. Code §§ 202(d),(e), 203,* and *203.5*.

Issuance of shares is the subject of Chapter 4 of the General Corporation Law [*see generally Corp. Code § 400 et seq.*]. Specifically, Chapter 4 addresses the following matters:

- Legal consideration for shares [*Corp. Code § 409*].
- Issuance of partly paid shares, and civil liabilities of holders and transferees of those shares [*Corp. Code §§ 410-415*].
- Shareholders' entitlement to certificates [*Corp. Code § 416*].
- Contents of share certificates [*Corp. Code §§ 417, 418*].
- Issuance of assessable shares and collection of assessments [*Corp. Code § 423*].

The Corporate Securities Law [*see generally Corp. Code § 25000 et seq.*] generally governs subscriptions for shares [*see generally Corp. Code §§ 25019, 25102(a), 25110*].

[2] Commercial Code

[a] In General

Division 8 of the Commercial Code, concerning investment securities [*see generally Com. Code § 8101 et seq.*], governs transactions in corporate shares (as well as other types of securities). Although most of the provisions of Division 8 concern transfers of issued shares [*see Ch. 163, Corporations: Transfers of Shares, § 163.11*], some rules

apply to the issuance of shares and to the corporation in its role as an issuer of securities, and those rules are discussed in this chapter. *Com. Code § 8210*, for instance, governs the effect of an overissue of shares and the remedies for a holder of overissued shares.

A writing that is a share certificate is governed by Division 8 and not by Division 3, which governs negotiable instruments [*see generally Com. Code § 3101 et seq.*], even if the certificate also meets the requirements of that division [*Com. Code § 8103(d)*].

[b] Validity of Shares

In the case of a California corporation, Division 8 of the Commercial Code (along with other California law generally) will govern the validity of the corporation's shares and other equity securities [*Com. Code § 8110(a)(1)*], unless the corporation has made an election to have the law of another jurisdiction govern that matter. A California corporation is empowered to make such an election [*Com. Code § 8110(a), (d)*].

When the validity of a foreign corporation's shares is in issue in a California action, the matter generally will be governed by the law of the jurisdiction in which the corporation is organized. If the foreign corporation has elected, under the law of the jurisdiction in which the corporation is organized, to have the matter governed by the law of a different jurisdiction, the validity of the corporation's shares will be governed by the law of that jurisdiction [*Com. Code § 8110(a)(1), (d)*].

When a corporation has made the foreign law election described above, any subsequent agreement to the contrary is effective only to the extent permitted by the foreign law so specified [*Com. Code § 1301(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGoverning Documents & ProceduresArticles of Incorporation & BylawsGeneral OverviewCommercial Law (UCC)Investment Securities (Article 8)Issuer DutiesCommercial Law (UCC)Investment Securities (Article 8)Security Certificates

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[Reserved]

§§ 162.04[Reserved]

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Chapter 162 CORPORATIONS: ISSUANCE OF SHARES
PART II. LEGAL BACKGROUND

14-162 California Forms of Pleading and Practice--Annotated § 162.10

§ 162.10 Definitions

[1] Articles

In the Corporations Code, references to the "articles," respecting provisions affecting the issuance of shares (or any other provisions), include the articles of incorporation, amendments, amended articles, restated articles, the certificate of incorporation, and certificates of determination [*Corp. Code § 154*].

[2] Shares and Related Terms

[a] Shares and Securities

"Shares" are the units into which the proprietary interest in a corporation is divided in the articles of incorporation [*Corp. Code § 184*].

Shares (and similar equity interests, such as warrants, for example) issued by a corporation are "securities" [*see generally Com. Code § 8102(a)(15)*], the issuance and transfer of which are subject to Division 8 of the Commercial Code [*Com. Code § 8103(a)*]. A federally registered investment company's shares and similar equity interests also are securities under Division 8 [*Com. Code § 8103(b)*]. (A mutual fund is the most common example of a registered investment company.)

Shares also are "securities" under the Corporate Securities Law of 1968 [*Corp. Code § 25019*], which regulates the issuance and transfer of securities.

[b] Common and Preferred Shares

Common shares are shares that have no preference over any other shares with respect to the distribution of assets on liquidation or with respect to the payment of dividends [*Corp. Code § 159*]. Preferred shares are shares other than common shares [*Corp. Code § 176*].

[c] Certificated and Uncertificated Shares

Shares represented by a certificate are "certificated securities" under Division 8 of the Commercial Code, and shares not represented by a certificate are "uncertificated securities" [*Com. Code § 8102(a)(4),(18)*]. The Commercial Code definitions are also applied in the Corporations Code [*see Corp. Code §§ 156.1, 191.1*]. Rules governing transfers of shares may differ, depending on whether shares are certificated or uncertificated [*see generally* Ch. 163, *Corporations: Transfers of Shares*]. The application of some rules affecting the corporation's rights and duties as an issuer will also depend on whether shares are certificated or uncertificated.

[d] Registered or Bearer Form

Certificated shares usually are issued to specifically named holders. Thus, certificated shares in most cases are issued in "registered form" [*see Com. Code § 8102(a)(13)*].

It is possible, but would be very unusual, for a share certificate to be issued in "bearer form"; that status, meaning "payable to the bearer of the ... certificate according to its terms and not by reason of an endorsement" [*Com. Code § 8102(a)(2)*], usually is reserved for bonds and other debt securities.

All uncertificated shares are necessarily in registered form because, in the absence of a certificate, there is no evidence of the holder's ownership other than an entry in the corporation's shareholder records and a corresponding statement sent to the holder [*see* [e], *below*].

[e] Initial Transaction Statement and Written Statements

"Initial transaction statement" means a statement referring to uncertificated shares, signed by or on behalf of the corporation and sent to the new registered owner, describing the issue of which the uncertificated shares are part. "Written statements," when used in connection with uncertificated shares, means the written statements that are periodically, or at the request of the registered owner, sent by the corporation to the registered owner, describing the issue of which the uncertificated shares are part [*Corp. Code § 171.1*].

[f] Classes and Series of Shares

Shares, whether common or preferred, may be issued in classes, and classified shares may be issued in series [*Corp. Code § 400*]. A "series" of shares means those shares within a class that have the same rights, preferences, privileges, and restrictions, but differ from other shares within the same class in one or more of the rights, preferences, privileges, or restrictions. Certificated and uncertificated shares do not constitute different series if the only difference is certificated and uncertificated status [*Corp. Code § 183*].

[g] Overissue

"Overissue" means an issue of shares in excess of the number that the corporation is authorized to issue. An overissue does not occur if appropriate action has cured the overissue [*Com. Code § 8210(a)*].

[3] Shareholder and Shareholders' Agreement

"Shareholder" means a holder of record of shares [*Corp. Code § 185*]. "Shareholders' agreement" means a written agreement among all of the shareholders of a close corporation, or, if a close corporation has only one shareholder, between the shareholder and the corporation, as authorized by *Corp. Code § 300(b)* [*Corp. Code § 186*].

Legal Topics:

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

Business & Corporate LawClosely Held CorporationsGeneral OverviewCommercial Law (UCC)Investment Securities (Article 8)Indorsement, Instructions & Entitlement OrdersCommercial Law (UCC)Investment Securities (Article 8)Issuer DutiesCommercial Law (UCC)Investment Securities (Article 8)RegistrationCommercial Law (UCC)Investment Securities (Article 8)Security Certificates

California Forms of Pleading and Practice--Annotated

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Volume 14: Corporations: Capacity thru Corporations: Dissolution and Winding Up-Chs. 160-173
Chapter 162 CORPORATIONS: ISSUANCE OF SHARES
PART II. LEGAL BACKGROUND

14-162 California Forms of Pleading and Practice--Annotated § 162.11

§ 162.11 Issuance of Shares

[1] Authorization

A corporation has broad powers to issue and otherwise deal with its shares [*see Corp. Code § 207(d)* (enumerating powers)]. These powers, however, may be limited by provisions of the General Corporation Law [*see, e.g., Corp. Code § 500 et seq.* (provisions governing distributions, which apply to redemptions of shares)] or by provisions in the articles. Subject to those limitations, a corporation may issue one or more classes or series of shares, or both, with full, limited, or no voting rights, and with any other rights, preferences, privileges, and restrictions that are stated or authorized in the articles [*Corp. Code § 400(a)*]. However, no denial or limitation of voting rights will be effective unless at the time one or more classes of outstanding shares or debt securities, singly or in the aggregate, are entitled to full voting rights. No denial or limitation of dividend or liquidation rights will be effective unless at the time one or more classes of outstanding shares, singly or in the aggregate, are entitled to unlimited dividends and liquidation rights [*Corp. Code § 400(a)*].

If the articles authorize more than one class of shares, or if any class is to have two or more series, the articles may also give the board of directors the power to establish the number of shares in any series, to designate any series, and to determine or alter the rights, preferences, privileges, and restrictions granted to or imposed on any wholly unissued class of shares or any wholly unissued series of any class [*Corp. Code § 202(e)(3)*]. The procedure that the board of directors must follow to make the determinations is spelled out in *Corp. Code § 401*.

[2] Uncertificated Shares

Because the effective use of certificates is severely limited when trading in the shares of a corporation produces a high volume of transactions, the Corporations Code authorizes corporations to adopt a system of electronic or other means of issuance, recordation, and transfer of shares. When a book entry system is either approved by the Securities and Exchange Commission, authorized by a federal statute, or in accordance with applicable provisions of Division 8 of the Commercial Code [*see generally Com. Code § 8101 et seq.*], the corporation may forgo the use of certificates [*Corp. Code § 416(b)*].

If a book entry system is used, it must include a method for transmitting notice to purchasers as a substitute for the

notices that would be required to appear on share certificates [*see generally Corp. Code §§ 417, 418, 1302*]. This requirement is met by the use of an initial transaction statement and subsequent written statements [*see § 162.10[2][e]*]. The system must not become effective as to issued and outstanding certificated shares until the certificates have been surrendered to the corporation [*Corp. Code § 416(b)*].

[3] Unauthorized Issuance and Overissue

Since the power of a corporation to issue shares is governed by the articles [*Corp. Code § 207(d)*], it may not issue more than the number of shares authorized in the articles for each class [*see Corp. Code § 202(d),(e)*] or more than the total number of shares authorized in the articles or fixed by the board of directors for each series [*Corp. Code § 202(e)(1)*]. To the extent that directors approving an overissue of shares performed their duties in accordance with the prescribed standard of care [*see Corp. Code § 309*], those directors would not be personally liable for an overissue.

None of the provisions of Division 8 of the Commercial Code that validate shares or compel the issue or reissue of shares apply to the extent that the validation, issue, or reissue would result in an overissue [*Com. Code § 8210(b)*]. However, if identical shares that do not also constitute an overissue are reasonably available for purchase, the person entitled to issue or validation may compel the corporation to purchase and deliver those shares, if the shares are certificated, or register the transfer, if the shares are uncertificated, against surrender of any share certificate that the person holds [*Com. Code § 8210(c)*]. In the alternative, if shares are not available for purchase, the person entitled to issue or validation may recover from the corporation the price that he or she or the last purchaser for value paid, with interest from the date of demand [*Com. Code § 8210(d)*].

[4] Implied Terms

[a] Certificated Shares

Even against a purchaser for value [*Com. Code §§ 1201(b)(29), (30), 1204 8102(c)*] and without notice, the terms of certificated shares include terms stated on the certificate and terms made part of the certificate by reference on the certificate to another instrument, indenture, or document or to a constitution, statute, ordinance, rule, regulation, order, or the like, to the extent the terms referred to do not conflict with terms stated on the certificate [*Com. Code § 8202(a)*].

A reference to *Com. Code § 8202(a)* does not of itself charge a purchaser for value with notice of a defect going to the validity of the shares, even if the certificate expressly states that a person accepting it admits notice [*Com. Code § 8202(a)*].

[b] Uncertificated Shares

The terms of uncertificated shares include those stated in any instrument, indenture, or document pursuant to which the shares are issued [*Com. Code § 8202(a)*].

[5] Preincorporation Subscriptions

[a] In General

Every subscriber to shares and every person to whom shares are originally issued is liable to the corporation for the full consideration agreed to be paid for the shares [*Corp. Code § 410(a)*]. This liability is distinct from the liability of a shareholder of partly paid shares [*see Corp. Code §§ 409(d), 410(b)*; *see also § 162.12[4]*] because, although both the subscriber and the holder of partly paid shares are liable for the full price, the latter's liability also runs in favor of creditors [*Corp. Code § 414*] and is based on an agreement with a corporation already in existence, the articles of which authorize the issuance of partly paid shares [*Corp. Code § 409(d)*]. Subscriptions for shares executed between the organizers and the prospective shareholders before the formation of a corporation, known as preincorporation

subscription agreements, do not involve the issuance of shares (except insofar as they may create enforceable contract rights leading to the issuance of shares). The subscriber's contractual obligation is to purchase shares "when, as, and if issued" or "when distributed" or the like.

A subscription agreement may empower the subscriber to cancel the contract in the event of a material change in the character of the shares contemplated by the contract or in the plan or arrangement pursuant to which the shares are to be issued or distributed [*see Com. Code § 8202(e)*].

[b] Enforceability

A preincorporation subscription is a contract with reference to a corporation to be formed. When formed, the corporation must be the one contemplated by the preincorporation subscription agreement [*Marysville Elec. Light & Power Co. v. Johnson (1895) 109 Cal. 192, 194-196, 41 P. 1016* ; *Harlie R. Norris Co., Ltd. v. Lovett (1932) 123 Cal. App. 640, 645, 12 P.2d 141]* .

In an early case holding the subscriber bound to take and pay for the shares subscribed to, the California Supreme Court stated that the subscriber became irrevocably obligated "[u]pon the formation of the plaintiff corporation ... and plaintiff's acceptance of the agreement" [*Marysville Elec. Light & Power Co. v. Johnson (1892) 93 Cal. 538, 546-547, 29 P. 126]* . In a later case in which the revocability of a preincorporation subscription agreement was raised in connection with the alleged negligence of an attorney in representing his corporate client, the court stated that "in California, the subscription becomes binding upon the subscriber and the corporation when the corporation is formed, in the absence of special circumstances or an agreement to the contrary" [*Moser v. Western Harness Racing Assn. (1948) 89 Cal. App. 2d 1, 9, 200 P.2d 7]* . However, a board of directors' resolution to apply to the Corporations Commissioner for a permit to issue shares pursuant to the subscription agreement was also viewed as an acceptance of the offer of the subscriber [*Moser v. Western Harness Racing Assn. (1948) 89 Cal. App. 2d 1, 10, 200 P.2d 7]* .

For a form of complaint to recover the unpaid portion of a share subscription amount, see *§ 162.41*.

[c] Noncompliance With Securities Law as Defense

In connection with any litigation involving preincorporation subscription agreements, the fact that those agreements are "securities" as that term is defined in the Corporate Securities Law [*Corp. Code § 25019*] should be kept in mind. Since there is no exemption from qualification for subscription agreements as securities, they can only be offered and accepted pursuant to the transactional exemption permitting nonpublic offerings of agreements for the sale of securities. The Corporate Securities Law exempts from qualification a nonpublic offer [*see Corp. Code § 25017(b)*] (but not a sale [*see Corp. Code § 25017(a)*]) and the execution and delivery of any agreement for the sale of securities pursuant to the offer, if both of the following conditions are satisfied [*Corp. Code § 25102(a)*]:

- The agreement contains substantially the following provision: "The sale of the securities which are the subject of this agreement has not been qualified with the Commissioner of Corporations of the State of California and the issuance of such securities or the payment or receipt of any part of the consideration therefor prior to such qualification is unlawful. The rights of all parties to this agreement are expressly conditioned upon such qualification being obtained."

- No part of the purchase price is paid or received and no shares are issued until their sale is qualified under the Corporate Securities Law.

If the conditions of this exemption were not satisfied, the offer of shares through the preincorporation subscription would be unlawful unless the underlying shares were qualified for sale or not subject to qualification under the Corporate Securities Laws [*Corp. Code § 25110*; *see Corp. Code §§ 25100, 25100.1, 25101, 25101.1, 25102.1, 25104*

(exempt securities and securities not subject to qualification); *10 Cal. Code Reg § 260.105* et seq.]. Further, an offer or sale of shares is an unqualified offer or sale if it varies or differs from, exceeds the scope of, or fails to conform with, a material term or material condition of qualification of the offering as set forth in the permit or qualification order or a material representation as to the manner of offering that is set forth in the application for qualification [*Corp. Code § 25110*].

Thus, in addition to whatever defenses generally might exist in favor of a subscriber as a matter of contract law [*see* Ch. 140, *Contracts*], failure of the persons offering the preincorporation subscription to either qualify the offer (which would amount to qualifying the underlying shares) or satisfy the conditions of *Corp. Code § 25102(a)* for exemption from qualification would make the subscription agreement contrary to law [*see Corp. Code § 25110*] and unenforceable [*Civ. Code § 1667*].

For a form for an affirmative defense based on noncompliance with the Corporate Securities Law, see *§ 162.42*. For further discussion and additional forms relating to liabilities of issuers and others under the Corporate Securities Law, see Ch. 515, *Securities and Franchise Regulation* . For discussion and forms concerning preincorporation contracts with promoters, see Ch. 160, *Corporations: Capacity* .

[6] Preemptive Right

The common-law preemptive right accorded to shareholders, to purchase shares of the corporation before they are offered to the public, has been abolished by statute in California. Unless the articles of incorporation provide otherwise, the board of directors may issue shares, options, or securities having conversion or option rights without first offering them to shareholders of any class [*Corp. Code § 406*].

Shareholders have the right, sometimes called a quasi-preemptive right, to demand that directors and officers not use their positions for their own personal advantage, or to discriminate between shareholders, or to cause shares to be issued in order to make a profit for themselves or to obtain or retain control of the corporation [*Schwab v. Schwab-Wilson Mach. Corp. (1936) 13 Cal. App. 2d 1, 3, 55 P.2d 1268* ; *see* *Sheppard v. Wilcox (1962) 210 Cal. App. 2d 53, 60, 26 Cal. Rptr. 412* (issuance of majority of common shares to preferred shareholders during their exercise of corporate control pursuant to voting switch constituted violation of fiduciary duty of board)]. For a form for a complaint based on a shareholder's quasi-preemptive right, see *§ 162.43*.

The statutory abolition of the preemptive right does not relieve directors of the obligation of good faith, nor does it permit them to issue shares to favored individuals at a low price [*Shaw v. Empire Sav. & Loan Asso., (1960) 186 Cal. App. 2d 401, 404-406, 9 Cal. Rptr. 204]* . However, that obligation runs in favor of the corporation rather than the individual shareholders, and unless the action of the directors was intended to oust a shareholder from control, an allegation that shares had been issued for insufficient consideration would be proper only in a derivative action on behalf of the corporation [*Shaw v. Empire Sav. & Loan Asso., (1960) 186 Cal. App. 2d 401, 409, 9 Cal. Rptr. 204]* . For a form for a complaint asserting a derivative action in this context, see *§ 162.44*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesFiduciary ResponsibilitiesDuty of Good FaithBusiness & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesCancellation & RedemptionBusiness & Corporate LawCorporationsFinanceInitial Capitalization & Stock SubscriptionsSubscription AgreementsBusiness & Corporate LawCorporationsGoverning Documents & ProceduresArticles of Incorporation & BylawsGeneral OverviewCommercial Law (UCC)Investment Securities (Article 8)Issuer Duties

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Chapter 162 CORPORATIONS: ISSUANCE OF SHARES
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14-162 California Forms of Pleading and Practice--Annotated § 162.12

§ 162.12 Consideration for Shares

[1] Permissible Consideration

Shares may be issued for such consideration as is determined from time to time by the board, or by the shareholders if the articles so provide, consisting of any or all of the following [*Corp. Code § 409(a)(1)*]:

- Money paid.
- Labor done.
- Services actually rendered to the corporation or for its benefit or in its formation or reorganization.
- Debts or securities canceled.
- Tangible or intangible property actually received either by the corporation or by a wholly owned subsidiary.

Neither promissory notes of the purchaser, unless adequately secured by collateral other than the shares acquired or unless permitted by *Corp. Code § 408* (stock purchase plan), nor future services may constitute payment or part payment for shares [*Corp. Code § 409(a)*].

Alternatively, shares may be issued as a share dividend or on a stock split, reverse stock split, reclassification of outstanding shares into shares of another class, conversion of outstanding shares into shares of another class, exchange of outstanding shares for shares of another class, or other change affecting outstanding shares [*Corp. Code § 409(a)(2)*].

[2] Fixing Consideration

[a] Duties of Directors

In the absence of fraud in the transaction, the judgment of the directors as to the value of the consideration for shares is

conclusive [*Corp. Code § 409(b)*]. If the consideration for shares is not money, then the board of directors must state by resolution its determination of the fair value to the corporation of the consideration, but this requirement does not affect the accounting treatment of any transaction, which must be in conformity with generally accepted accounting principles [*Corp. Code § 409(e)*]. For discussion of how a court may be expected to deal with the reference to generally accepted accounting principles, see *Ch. 165, Corporations: Corporate Records and Reports, § 165.25[2]*. If the articles of incorporation reserve to the shareholders the right to determine the consideration for any shares, the determination must be made by approval of the outstanding shares [*Corp. Code § 409(c)*; *see Corp. Code § 152* (approval of outstanding shares)].

[b] Liability of Directors

Since the directors have a fiduciary obligation to the corporation and the shareholders in connection with the issuance of shares [*see Shaw v. Empire Sav. & Loan Asso., (1960) 186 Cal. App. 2d 401, 406, 9 Cal. Rptr. 204* ; *see also § 162.12[2][b]*] and since, in the presence of fraud, their determination as to the value of consideration for shares will not be conclusive [*see Corp. Code § 409(b)*], the directors may incur liability to the corporation for the fraudulent overvaluation of consideration [*James v. Steifer Mining Co. (1918) 35 Cal. App. 778, 783-786, 171 P. 117* (complaint alleging that shares were issued for no consideration or for overvalued property was good against general demurrer)]. The directors' violation of their fiduciary duty to the corporation may also take the form of an undervaluation of shares sold to a principal shareholder [*Shaw v. Empire Sav. & Loan Asso., (1960) 186 Cal. App. 2d 401, 405-406, 9 Cal. Rptr. 204]* . In either case, the cause of action is derivative in nature and must be prosecuted on behalf of the corporation [*Shaw v. Empire Sav. & Loan Asso., (1960) 186 Cal. App. 2d 401, 406-409, 9 Cal. Rptr. 204* ; *James v. Steifer Mining Co. (1918) 35 Cal. App. 778, 783, 171 P. 117]* , unless the injury is personal to an individual shareholder and he or she seeks to prevent the issuance of shares from being used to obtain or retain control at the expense of the other shareholders [*Shaw v. Empire Sav. & Loan Asso., (1960) 186 Cal. App. 2d 401, 409, 9 Cal. Rptr. 204]* . For a form of complaint in a derivative action against directors in this context, see *§ 162.44*.

[3] Liability of Shareholders for Overvalued Consideration

Except in the case of the issuance of shares that are expressly issued as partly paid shares [*see Corp. Code § 409(d)*; *see generally* [4], *below*], shares issued for any legal consideration [*see Corp. Code § 409(a)*; *see also* [1], *above*] in a transaction not tainted by fraud must be declared and taken to be fully paid shares and not liable to any further call. The holder will not be liable for any further payments under the provisions of the General Corporation Law [*Corp. Code § 409(b)*].

The judgment of the board of directors is conclusive as to the value of consideration for shares, unless there is fraud in the making of that judgment [*Corp. Code § 409(b)*]. A shareholder who, as a promoter of the corporation, misleads other promoters as to the value of his or her contribution to the corporation, will be liable to the corporation and to the other promoters [*Topanga Corp. v. Gentile (1967) 249 Cal. App. 2d 681, 688-689,58 Cal. Rptr. 713]* . The corporation may either recover damages [*Victor Oil Co. v. Drum (1920) 184 Cal. 226, 238, 193 P. 243]* , or set aside the transaction and reclaim the shares issued to the misrepresenting shareholder [*Topanga Corp. v. Gentile (1967) 249 Cal. App. 2d 681, 688, 58 Cal. Rptr. 713]* . In addition, because the shareholder's liability is based on fraud, the corporation may recover punitive damages [*Civ. Code § 3294*] even when seeking cancellation of the shares instead of damages [*Topanga Corp. v. Gentile (1967) 249 Cal. App. 2d 681, 691, 58 Cal. Rptr. 713]* .

For a form of complaint by the corporation against a shareholder based on the shareholder's fraud leading to overvaluation of the consideration for shares, see *§ 162.40*.

[4] Partly Paid Shares

[a] How Created

A corporation may issue shares as partly paid and subject to call for the remainder of the consideration to be paid for the shares. The total amount of the consideration to be paid and the amount already paid must be conspicuously stated on the certificate issued to represent partly paid shares or on the initial transaction statement for uncertificated shares. When any dividend is declared on fully paid shares, the corporation must also declare a proportional dividend on partly paid shares of the same class, on the basis of the percentage of the consideration actually paid [*Corp. Code § 409(d)*].

[b] Liability of Original Purchaser to Corporation

Every subscriber to shares, and every person to whom shares are originally issued, is liable to the corporation for the full consideration agreed to be paid for the shares [*Corp. Code § 410(a)*]. The full agreed consideration for shares must be paid before or concurrently with the issuance of the shares, unless the shares are issued as partly paid, in which case the consideration must be paid in accordance with the agreement of subscription or purchase [*Corp. Code § 410(b)*]. The corporation may recover unpaid balances on partly paid shares only by an action against the shareholder [*see Corp. Code § 423(a),(n)*].

[c] Liability of Transferee Without Knowledge

A transferee of shares for which the full agreed consideration has not been paid to the corporation, who acquired them in good faith, without knowledge that the consideration was not paid in full or to the extent stated on the certificate representing the shares or on the initial transaction statement, is liable only for the amount shown by the certificate or statement to be unpaid on the shares, until the transferee transfers the shares to one who becomes liable for payment of the amount owed. However, the transferor will remain personally liable if the certificate or statement so provides, or the personal liability is agreed on in writing. The liability of any holder of the shares who derives title through such a transferee and who is not a party to any fraud affecting the issuance of the shares is the same as that of the transferee through whom title is derived [*Corp. Code § 411*].

[d] Liability of Transferee With Knowledge

Every transferee of partly paid shares who acquired them under a certificate showing the fact of part payment, and every transferee of such shares who acquired them with actual knowledge that the full agreed consideration had not been paid to the extent stated on the certificate, other than a transferee who derives title through a holder in good faith without knowledge and who is not a party to any fraud affecting the issuance of the shares, is personally liable to the corporation for installments of the amount unpaid becoming due, until the shares are transferred to one who becomes liable for the unpaid amount. The transferor remains personally liable if the certificate so provides or personal liability is agreed on in writing [*Corp. Code § 412*].

[e] Liability of Representatives and Fiduciaries

A person holding shares as pledgee, executor, administrator, guardian, conservator, trustee, or receiver, or in any other representative or fiduciary capacity, is not personally liable for any unpaid balance of the subscription price of the shares because the shares are so held, but the estate and funds in the hands of the fiduciary or representative are liable, and the shares are subject to sale for recovery of the unpaid balance [*Corp. Code § 413*].

[f] Actions by Corporation's Creditors

No action may be brought by or on behalf of any creditor of the corporation, to reach and apply the liability of a shareholder to pay the amount due on shares, unless final judgment has been rendered in favor of the creditor against the corporation and execution has been returned unsatisfied in whole or in part, or unless proceeding against the corporation would be useless [*Corp. Code § 414(a)*]. All creditors of the corporation, with or without reducing their claims to judgment, may intervene in any such creditor's action to reach and apply unpaid subscription money, and any or all shareholders who hold partly paid shares may be joined in the action. Several judgments may be rendered for and

against the parties to the action or in favor of a receiver for the benefit of the respective parties [*Corp. Code § 414(b)*]. All amounts paid by any shareholder in any action brought by creditors must be credited on the unpaid balance due to the corporation on the shareholder's shares [*Corp. Code § 414(c)*].

The creditor's action is like an equitable garnishment to enforce the corporation's debt to the creditor, and the creditor would stand in the shoes of the corporation [*see Spencer v. Anderson (1924) 193 Cal. 1, 5, 222 P. 355]* . Since the shareholder's obligation is based on a contract with the corporation, the shareholder may assert any contract defenses against the corporation in the suit brought by the creditor [*Spencer v. Anderson (1924) 193 Cal. 1, 8-9, 222 P. 355]* . The three-year limitation period [*Code Civ. Proc. § 338*] begins to run at the time the individual installments become due under the contract with the corporation [*Spencer v. Anderson (1924) 193 Cal. 1, 9-10, 222 P. 355]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesFiduciary ResponsibilitiesDuty of Good FaithBusiness & Corporate LawCorporationsFinanceInitial Capitalization & Stock SubscriptionsConsideration for SharesBusiness & Corporate LawCorporationsFinanceInitial Capitalization & Stock SubscriptionsUnpaid SubscriptionsBusiness & Corporate LawCorporationsShareholdersShareholder Duties & LiabilitiesPersonal LiabilityCommercial Law (UCC)Investment Securities (Article 8)Purchasers

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14-162 California Forms of Pleading and Practice--Annotated § 162.13

§ 162.13 Share Certificates and Initial Transaction Statements

[1] Contents of Certificate or Statement

[a] Classified and Serial Shares

If the shares of the corporation are classified or any class of shares has two or more series, the certificate or on the initial transaction statement and written statements must bear one of the following [*Corp. Code § 417*]:

- A statement of the rights, preferences, privileges, and restrictions granted to or imposed on each class or series of shares authorized to be issued, and on the holders.

- A statement setting forth the office or agency of the corporation from which shareholders may obtain, on request and without charge, a copy of the statement referred to in the above.

- A summary of the rights, preferences, privileges, and restrictions with reference to the provisions of the articles and any certificate of determination establishing them.

"On the certificate" means that a statement appears on the face of a share certificate or on the reverse of the certificate with a reference to it on the face or, in the case of uncertificated shares, that the applicable provisions of *Com. Code §§ 8202(a)* and *8204* have been complied with [*Corp. Code § 174*]. For discussion of those code sections, see *§ 162.11[4]* and *[c], below*.

[b] Additional Statements When Applicable

Unless the rights, preferences, privileges, and restrictions of the shares are stated or summarized on certificates or statements [*see generally Corp. Code § 417(a), (b)*; *see also* [a], *above*], a certificate or an initial transaction statement and other written statements must bear the following, when applicable [*Corp. Code § 418(a)*]:

- A conspicuous statement, if it is the case, that the shares are subject to restrictions on transfer [*see Ch. 163, Corporations: Transfers of Shares, § 163.12[2][c]*].

- A statement, if it is the case, that the shares are subject to a voting agreement [*see Corp. Code § 706(a)*] or an irrevocable proxy [*see Corp. Code § 705(e)*] or restrictions on voting rights contractually imposed by the corporation.

- A statement, if it is the case, that the shares are redeemable or that the shares are convertible, specifying the period for conversion.

- If the shares are assessable, a conspicuous statement that they are assessable; and if the shares are not fully paid, the statements required by *Corp. Code § 409(d)* [*see § 162.12[4][a]*].

[c] Effect of Failure to Include Statements

A restriction on transfer imposed by the corporation, even if otherwise lawful, is ineffective against a person without knowledge of the restriction unless the restriction is noted conspicuously on the share certificate or, if the shares are uncertificated, the registered owner has been notified of the restriction [*Com. Code § 8204*; *Corp. Code § 418(b)*; *see Corp. Code § 174* ("on the certificate" defined); *see also § 162.13[1][a]*]. For further discussion of restrictions on transfer, see Ch. 163, *Corporations: Transfers of Shares* .

Unless the prescribed statements appear on the certificate or the initial transaction statement and other written statements [*see Corp. Code § 418(a)*; *see also § 162.13[1][b]*], no right of redemption, voting agreement, irrevocable proxy, or voting restriction imposed by the corporation will be enforceable against a transferee of the shares without actual knowledge of the right, agreement, proxy, or restriction, and no liability for assessment or for the unpaid portion of the subscription price will be enforceable against a transferee. In this context, "transferee" includes a purchaser from the corporation [*Corp. Code § 418(b)*].

[d] Close Corporation Share Certificates

All certificates representing shares of a close corporation [*see Corp. Code § 158*] must contain, in addition to any other required statements, the following conspicuous legend on the face of the certificate [*Corp. Code § 418(c)*]:

> "This corporation is a close corporation. The number of holders of record of its shares of all classes cannot exceed _____ [*number not more than 35*]. Any attempted voluntary inter vivos transfer which would violate this requirement is void. Refer to the articles, bylaws, and any agreements on file with the secretary of the corporation for further restrictions."

Any attempted voluntary inter vivos transfer of the shares of a close corporation that would result in the number of holders of record exceeding the maximum number specified in the articles is void if the certificate contains the legend [*Corp. Code § 418(d)*]. By accepting legended shares of a close corporation, each shareholder agrees and consents that he or she will not make any transfer of the shares that would result in an excessive number of shareholders. Each shareholder also waives any right that he or she might have under any other law to sell the shares to a greater number of purchasers or to demand any registration of the shares under the Securities Act of 1933 [*see generally 15 U.S.C. § 77a et seq.*], for as long as the corporation is a close corporation [*Corp. Code § 421*].

No operating agreement by the shareholders of a close corporation [*see generally Corp. Code § 300(b)*] may alter or waive the provisions of *Corp. Code § 417* [*see § 162.13[a]*] and *Corp. Code § 418* [*see § 162.13[b], [c]*] regarding the contents of share certificates [*Corp. Code § 300(c)*].

[e] Corporation's Lien on Certificated Shares

A lien on certificated shares in favor of the corporation is valid against a purchaser [*see generally Com. Code §§*

1201(b)(29), (30), 8102(c)] only if the right of the corporation to the lien is noted conspicuously [*see generally Com. Code §§ 1201(b)(10), 8102(c)*] on the share certificate [*Com. Code § 8209*].

[2] Shareholder's Entitlement to Certificate

Except when the corporation issues uncertificated shares, a holder of shares is entitled to have a duly signed certificate stating the number of shares and the class or series of shares that the holder owns [*Corp. Code § 416(a)*]. An action for specific performance is appropriate to enforce this right [*Wait v. Kern River Mining, Etc., Co. (1909) 157 Cal. 16, 24, 106 P. 98]* , provided the shareholder first demanded the certificate [*Lowe v. Copeland (1932) 125 Cal. App. 315, 325, 13 P.2d 522]* .

[3] Lost, Destroyed, or Stolen Certificate

[a] When Owner Entitled to New Certificate

If an owner of certificated shares, whether in registered form [*Com. Code § 8102(a)(13)*] or bearer form [*Com. Code § 8102(a)(2)*], claims that the certificate has been lost, destroyed, or wrongfully taken, the corporation must issue a new certificate if the owner does all of the following [*Com. Code § 8405(a)*]:

- Requests a new certificate before the corporation has notice that the missing certificate has been acquired by a protected purchaser [*Com. Code § 8303*].

- Files with the corporation a bond or other adequate security sufficient to indemnify the corporation against any claim that may be made against it (including any expense or liability) on account of the alleged loss, theft, or destruction of the certificate or the issuance of a new certificate [*Corp. Code § 419(a)*].

- Satisfies other reasonable requirements imposed by the corporation.

If, after the issue of a replacement certificate, a protected purchaser [*Com. Code § 8303*] of the original certificate presents it for registration of transfer, the corporation must register the transfer unless an overissue [*Com. Code § 8210(a)*] would result. In that case, the corporation's liability is governed by *Com. Code § 8210*. In addition to any rights on the indemnity bond, an corporation may recover the replacement certificate from a person to whom it was issued or any person taking under that person, except a protected purchaser [*Com. Code § 8405(b)*].

[b] When Owner Precluded From Asserting Claim

If a share certificate has been lost, apparently destroyed, or wrongfully taken, and (1) the owner fails to notify the corporation of that fact within a reasonable time after the owner has notice of it, and (2) the corporation registers a transfer of the shares before receiving notification, the owner may not assert against the corporation a claim for replacement of the certificate [*Com. Code § 8406*].

Both of the above conditions must be satisfied. Thus, the owner is not precluded even if he or she fails to notify the corporation of the loss, destruction, or theft of the certificate within a reasonable time, provided that when the corporation does receive notice, it has not registered a transfer of the shares [*Ibanez v. Farmers Underwriters Asso. (1975) 14 Cal. 3d 390, 398, 121 Cal. Rptr. 256, 534 P.2d 1336]* . If the corporation has registered the transfer prior to receiving the notice that the certificate is lost, destroyed, or stolen, then the issue becomes whether the delay between the owner's acquiring actual or constructive notice of the loss and notifying the corporation of that fact is reasonable, which is a question for the trier of fact [*Ibanez v. Farmers Underwriters Asso. (1975) 14 Cal. 3d 390, 397-398, 121 Cal. Rptr. 256, 534 P.2d 1336]* .

[c] Action to Obtain Replacement Certificate

If the corporation refuses to issue a new certificate, the owner may bring an action in the superior court of the proper county [*see Corp. Code § 177* (definition of proper county)] for an order requiring the corporation to issue a new certificate [*Corp. Code § 419(b)*]. For a form for a complaint that may be used in an action seeking such an order, see *§ 162.45*.

If the court is satisfied that the plaintiff is the lawful owner of the shares described in the complaint and that the certificate has been lost, destroyed,or stolen, and no sufficient cause has been shown why a new certificate should not be issued, it must issue an order requiring the corporation to issue and deliver a new certificate to the plaintiff [*Corp. Code § 419(c)*]. In its order the court must direct that prior to the issuance and delivery to the plaintiff of the new certificate, the plaintiff give the corporation a bond or other adequate security sufficient to indemnify the corporation against any claim that may be made against it (including any expense or liability) on account of the alleged loss, theft, or destruction of the certificate or the issuance of a new certificate [*Corp. Code § 419(c)*].

A person acting as authenticating trustee, transfer agent, registrar, or other agent for the corporation in the issuance of new certificates has the same obligation to the holder or owner of the shares with regard to the particular functions performed as the corporation has in regard to those functions [*Com. Code § 8407*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawClosely Held CorporationsGeneral OverviewBusiness & Corporate LawCorporationsFinanceInitial Capitalization & Stock SubscriptionsStock CertificatesCommercial Law (UCC)Investment Securities (Article 8)Security Certificates

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Chapter 162 CORPORATIONS: ISSUANCE OF SHARES
PART II. LEGAL BACKGROUND

14-162 California Forms of Pleading and Practice--Annotated § 162.14

§ 162.14 Corporation's Right to Cancel and Reissue Shares

[1] Certificated Shares

When the articles are amended in any way affecting statements contained in share certificates, or it becomes desirable for any reason, in the discretion of the board, to cancel any share certificate and issue a new certificate conforming to the rights of the holder, the board may order any holders to surrender and exchange their certificates for new certificates within a reasonable time to be fixed by the board [*Corp. Code § 422(a)*].

The surrender order may provide that a holder is not entitled to vote or to receive dividends or exercise any of the other rights of shareholders until the holder has complied with the order; but the order operates to suspend the shareholder's rights only after notice and until compliance. The shareholder's duty of surrender may be enforced by civil action [*Corp. Code § 422(b)*].

[2] Uncertificated Shares

When the articles are amended in any way affecting the initial transaction statement or other written statements for uncertificated shares, or it becomes desirable for any reason, in the discretion of the board, to amend, revise, or supersede outstanding initial transaction statements or other written statements, the board may order the issuance and delivery to holders of record of amended, revised, or superseding initial transaction statements or other written statements [*Corp. Code § 422(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesCancellation & Redemption

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14-162 California Forms of Pleading and Practice--Annotated § 162.15

§ 162.15 Corporation's Denial of Validity of Issued Shares

[1] Validity of Certificated Shares

[a] Validity of Signatures on Certificate

Any share certificate, or any assignment or endorsement of a certificate executed or entered into by the corporation and any other person, is not invalidated as to the corporation by any lack of authority of the signing officers if the other party to the instrument has no actual knowledge of the lack of authority [*Corp. Code § 313*; *see Snukal v. Flightways Manufacturing, Inc. (2000) 23 Cal. 4th 754, 786-787, 98 Cal. Rptr. 2d 1, 3 P.3d 286* (interpreting *Corp. Code § 313* in context of lease agreement to hold that signature of one person alone is sufficient to bind corporation, as long as individual holds corporate offices in both "operational group" and "financial group" described in that statute)].

In an action on certificated shares, against the corporation, each signature on a share certificate or in a necessary endorsement [*see Com. Code § 8102(a)(11)*] is admitted unless specifically denied in the pleadings [*Com. Code § 8114(a)*]. If the effectiveness of a signature is put in issue, the burden of establishing effectiveness is on the party claiming under the signature, but the signature is presumed to be genuine or authorized [*Com. Code § 8114(b)*].

If signatures on a share certificate are admitted or established, production of the certificate entitles a holder to recover on it unless the defendant establishes a defense or a defect going to the validity of the shares [*Com. Code § 8114(c)*]. If it is shown that a defense or defect exists, the plaintiff has the burden of establishing that the plaintiff or some person under whom the plaintiff claims is a person against whom the defense or defect cannot be asserted [*Com. Code § 8114(d)*].

[b] Defect in Shares

Shares that are issued with a defect going to validity are valid in the hands of a purchaser for value [*see Com. Code §§ 1201(b)(29), (30), 1204, 8102(c)*] and without notice of the particular defect unless the defect involves a violation of a constitutional provision. In that case, the shares are valid in the hands of a purchaser for value and without notice of the defect, other than one who takes by original issue [*Com. Code § 8202(b)(1)*].

After an act or event, other than a call that has been revoked, setting a date on or after which shares are to be presented or surrendered for redemption or exchange, a purchaser is charged with notice of any defect in the issue or any defense of the corporation, if the act or event either [*Com. Code § 8203*]:

- Requires the payment of money, delivery [*see generally Com. Code § 8301(a)*] of certificated securities, or registration of transfer ofuncertificated securities, on presentation or surrender of any share certificate, and the money is available or securities are available on the date set for payment or exchange, and the purchaser takes the shares more than one year after that date; or

- Is not covered by the preceding item, and the purchaser takes the shares more than two years after the date set for surrender or presentation.

[c] Lack of Genuineness

Generally, lack of genuineness of certificated shares is a complete defense, even against a purchaser for value [*see generally Com. Code §§ 1201(b)(29), (30), 1204, 8102(c)*] and without notice [*Com. Code § 8202(c)*].

An unauthorized signature placed on a share certificate before or in the course of issuance is ineffective, but (and notwithstanding the first paragraph, *above*) the signature is effective in favor of a purchaser for value if the purchaser is without notice of the lack of authority and the signing has been done by one of the following [*Com. Code § 8205*]:

- An authenticating trustee, registrar, transfer agent, or other person entrusted by the corporation with the signing of the certificate or of similar certificates, or the immediate preparation of any of them for signing; or

- An employee of the corporation, or of any of the persons listed above, entrusted with responsible handling of the certificate.

[d] Other Defenses

All other defenses of the corporation as issuer, including nondelivery and conditional delivery [*see generally Com. Code § 8301*] of certificated shares, are ineffective against a purchaser for value [*see generally Com. Code §§ 1201(b)(29), (30), 1204, 8102(c)*] who has taken the certificated shares without notice of the particular defense [*Com. Code § 8202(d)*].

[e] Incomplete Certificate

If a share certificate contains the signatures necessary to its issuance or transfer, but is incomplete in any other respect, any person may complete it by filling in the blanks as authorized. Even if the blanks are incorrectly filled in, the certificate as completed is enforceable by a purchaser who took it for value [*see generally Com. Code §§ 1201(b)(29), (30), 1204, 8102(c)*] and without notice of the incorrectness [*Com. Code § 8206(a)*].

[f] Altered Certificate

A complete share certificate that has been improperly altered, even if fraudulently, remains enforceable, but only according to its original terms [*Com. Code § 8206(b)*].

[g] Warranties by Signers

A person signing a share certificate as authenticating trustee, registrar, transfer agent, or the like, warrants all of the following to a purchaser for value [*see generally Com. Code §§ 1201(b)(29), (30), 1204, 8102(c)*] of the certificated

shares, if the purchaser is without notice of a particular defect [*Com. Code § 8208(a)*]:

- The certificate is genuine.

- The signer's own participation in the issuance of the shares is within the signer's capacity and within the scope of the authority received by the signer from the corporation.

- The signer has reasonable grounds to believe that the certificate is in the form, and the number of shares is within the limit, that the corporation is authorized to issue.

Unless otherwise agreed, the person signing the certificate does not assume responsibility for the validity of the shares in other respects [*Com. Code § 8208(b)*].

[2] Guarantor as Issuer

With respect to an obligation on or defense to shares, a guarantor is an issuer to the extent of the guaranty, whether or not the guarantor's obligation is noted on a share certificate [*Com. Code § 8201(b)*]. The guarantor is in the same position as the corporation, which is the actual issuer [*see generally Com. Code § 8201(a)* (issuer defined)], regarding the validity of shares [*see § 162.15[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFinanceInitial Capitalization & Stock SubscriptionsStock CertificatesCommercial Law (UCC)Investment Securities (Article 8)Issuer DutiesCommercial Law (UCC)Investment Securities (Article 8)Security CertificatesCommercial Law (UCC)Investment Securities (Article 8)Warranties

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14-162 California Forms of Pleading and Practice--Annotated §§ 162.16-162.29

[Reserved]

§§ 162.16[Reserved]

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PART III. RESEARCH GUIDE

14-162 California Forms of Pleading and Practice--Annotated § 162.30

§ 162.30 Related Matthew Bender Publications

Ballantine & Sterling, California Corporation Laws, Ch. 3, *Formation of Corporations* , Ch. 4, *Close Corporations* , Ch. 7, *Issuance of Shares and Indebtedness* , Ch. 21, *Corporate Securities Law* (Matthew Bender)

Marsh & Volk, Practice Under The California Securities Laws, Ch. 3, *Offers and Negotiations* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawClosely Held CorporationsGeneral OverviewCommercial Law (UCC)Investment Securities (Article 8)Issuer Duties

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PART III. RESEARCH GUIDE

14-162 California Forms of Pleading and Practice--Annotated § 162.31

§ 162.31 State Statutes

[1] Certificates

Shareholder's entitlement to certificate. *Corp. Code § 416(a)*

Authorization of book entry system of transfer. *Corp. Code § 416(b)*

Contents of certificate. *Corp. Code §§ 409, 417, 418*

Execution and authentication of certificates. *Corp. Code § 416(a)*

Cancellation of security and issuance of new security by corporation. *Corp. Code § 422*

[2] Consideration for Shares

Consideration for shares. *Corp. Code § 409(a)*

Valuation of consideration other than money. *Corp. Code § 409(e)*

Liability of subscriber or purchaser to pay for shares. *Corp. Code § 410*

Liability of transferee of partly paid shares. *Corp. Code § 411*

Liability of representatives and fiduciaries. *Corp. Code § 413*

Creditor's action to collect unpaid balance of share price. *Corp. Code § 414*

Other fraud remedies unaffected. *Corp. Code § 415*

[3] Definitions

Articles. *Corp. Code § 154*

Common shares. *Corp. Code § 159*

On the certificate. *Corp. Code § 174*

Overissue. *Com. Code § 8210(a)*

Preferred shares. *Corp. Code § 176*

Series. *Corp. Code § 183*

Shares. *Corp. Code § 184*

Shareholder. *Corp. Code § 185*

Shareholders' agreement. *Corp. Code § 186*

[4] Issuance of Shares

Issuer defined. *Com. Code § 8201*

Implied terms of certificated shares. *Com. Code § 8202(a)*

Validity of shares; rules when validity is in issue. *Com. Code § 8202(b)-(f)*

Purchaser's constructive notice of defective shares or issuer's defense. *Com. Code § 8203*

Unauthorized signature on share certificate. *Com. Code § 8205*

Incomplete share certificate. *Com. Code § 8206*

Who is shareholder, from issuer's point of view. *Com. Code § 8207*

Warranties of person signing share certificate. *Com. Code § 8208*

Issuer's lien on certificated shares. *Com. Code § 8209*

Effect of overissue. *Com. Code § 8210(b)-(d)*

Criminal liabilities. *Corp. Code §§ 2251, 2252*

Fraud remedies unaffected by provisions of General Corporation Law. *Corp. Code §§ 203.5, 415*

Statements in articles regarding classes and series of shares. *Corp. Code §§ 202(e), 203, 400*

Conversion and option rights. *Corp. Code §§ 404-406*

Power to issue fractional shares or scrip. *Corp. Code § 407*

Stock purchase plan. *Corp. Code § 408(a), (b)*

Lab. Code § 406 (property put up by employee as part of employment contract is treated as bond) and *Lab. Code § 407* (advertising investment and sale of stock in connection with securing position is illegal) are not applicable to shares issued to corporate employee pursuant to stock purchase plan or to person becoming corporate officer. *Corp. Code § 408(c)*

[5] Preemptive Right

Preemptive right abrogated. *Corp. Code § 406*

[6] Qualification of Shares

Subscription for shares is "security" under Corporate Securities Law of 1968. *Corp. Code § 25019*

Exemption of securities or transactions from qualification requirements. *Corp. Code § 25100 et seq.*

Qualification or exemption required for issuer transactions. *Corp. Code § 25110*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFinanceInitial Capitalization & Stock SubscriptionsConsideration for SharesBusiness & Corporate LawCorporationsFinanceInitial Capitalization & Stock SubscriptionsStock CertificatesBusiness & Corporate LawCorporationsFinanceInitial Capitalization & Stock SubscriptionsUndercapitalizationCommercial Law (UCC)Investment Securities (Article 8)Issuer DutiesCommercial Law (UCC)Investment Securities (Article 8)Security Certificates

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14-162 California Forms of Pleading and Practice--Annotated § 162.32

§ 162.32 Law Reviews

Berger, *Protection of Shareholder Interests in California Closely Held and Statutory Close Corporations: A Practitioner's Guide, 20 Pac. L.J. 1127 (1989)*

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14-162 California Forms of Pleading and Practice--Annotated § 162.33

§ 162.33 Text References

Witkin, Summary of California Law, vol. 9, *Corporations*, §§ 123-128 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawClosely Held CorporationsGeneral Overview

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Chapter 162 CORPORATIONS: ISSUANCE OF SHARES
PART III. RESEARCH GUIDE

14-162 California Forms of Pleading and Practice--Annotated §§ 162.34-162.39

[Reserved]

§§ 162.34[Reserved]

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Chapter 162 CORPORATIONS: ISSUANCE OF SHARES
PART IV. FORMS

14-162 California Forms of Pleading and Practice--Annotated § 162.40

§ 162.40 Complaint for Reformation of Agreement [Civ. Code § 3399] and for Surrender and Cancellation of Share Certificates [Civ. Code § 3412; Corp. Code § 422] and Reissuance to Reflect Actual Contributions to Corporation--By Corporation Against Shareholder

[1] FORM Complaint for Reformation of Agreement [Civ. Code § 3399] and for Surrender and Cancellation of Share Certificates [Civ. Code § 3412; Corp. Code § 422] and Reissuance to Reflect Actual Contributions to Corporation--By Corporation Against Shareholder

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], a Corporation,	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	COMPLAINT FOR REFORMATION OF AGREE-
Defendants.	)	MENT AND CANCELLATION OF SHARE CERTI-
	)	FICATES
	)	

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Reformation of Agreement)

1. Plaintiff is, and at all times mentioned in this pleading was, a corporation duly organized and existing under the laws of the State of California.

2. _____ [*Allege capacity and residence, e.g.,* Defendant is a resident of _____

County, California].

3. On or about _____ [*date*], defendant commenced discussion with _____ [*names of copromoters*] ("the promoters") concerning the advisability of forming a corporation to purchase certain real property known as _____ [*name of property*]. During the discussions, defendant represented that the property could be acquired for a purchase price of $_____ with a down payment of $_____ in cash and another parcel of real property, title to which defendant represented that he/she held. Defendant represented that the parcel would be accepted by the owners of _____ [*name of property*] at an agreed value of $_____.

4. Defendant further represented to the promoters that after defendant had acquired _____ [*name of property*], defendant would assist in forming a corporation to which the property would in turn be conveyed, in return for which, defendant and the promoters would be issued shares of the corporation's common stock in proportion the amounts agreed to be contributed by each of the promoters and defendant toward the total purchase price of _____ [*name of property*].

5. On _____ [*date*], defendant entered into an escrow agreement with the owners of _____ [*name of property*] to purchase the property for a total price of $_____ [*actual price paid*], payable as follows: $_____ [*actual value allowed for defendant's property*] in an exchange for the parcel, title to which defendant represented that he/she held; $_____ [*cash contribution of copromoters*]; and a promissory note secured by a deed of trust for $_____. A copy of the escrow agreement is attached as Exhibit A and made part of this pleading.

6. On _____ [*date*], the promoters, believing and relying on defendant's representation as alleged in Paragraphs 3 and 4, entered a written agreement with defendant embodying defendant's representations. A copy of the agreement is attached as Exhibit B and made part of this pleading.

7. On _____ [*date*], plaintiff was incorporated pursuant to the agreement alleged in Paragraph 6 and adopted that agreement. Pursuant to the agreement, the promoters paid to defendant $_____ as the cash down payment on _____ [*name of property*].

8. On _____ [*date*], the terms of the escrow agreement between defendant and the owners of _____ [*name of property*] were satisfied, escrow was closed, and title to the property was conveyed by deed to defendant. On _____ [*date*], defendant conveyed the property to plaintiff, and plaintiff in turn issued defendant certificate number _____ representing _____ [*number*] shares of plaintiff's common stock.

9. On or about _____ [*date*], plaintiff discovered the false and fraudulent representations made by defendant as to the actual purchase price of _____ [*name of property*] and as to the actual value of the property representing defendant's contribution to the purchase price of _____ [*name of property*], and plaintiff discovered that at the time of entering the agreement with the promoters alleged in Paragraph 6, defendant had no right or interest in the property.

10. Because of the fraud and deceit practiced by defendant on the promoters, and because defendant's acts and conduct are a breach of his/her fiduciary duty to the plaintiff, the agreement between defendant and the promoters, which was adopted by plaintiff, does not truly express the intention of the parties.

11. The acts of defendant were oppressive, fraudulent, and malicious in that defendant intentionally inflated the price of the property that he/she intended for the plaintiff to acquire from him/her and intentionally deceived the promoters and plaintiff as to the actual value of his/her contribution toward the purchase of _____ [*name of property*

], thereby receiving shares of plaintiff's stock to which defendant is not entitled. Plaintiff therefore seeks punitive and exemplary damages.

SECOND CAUSE OF ACTION
(Surrender and Cancellation of Shares)

1. Plaintiff alleges and incorporates by reference each and every allegation in Paragraphs 1-9 of the First Cause of Action.

2. On _____ [*date*], after learning of defendant's fraud and deceit, plaintiff ordered all outstanding share certificates to be surrendered at its principal office. Notice of the order was received by defendant on _____ [*date*].

3. Defendant has not surrendered his/her share certificate in compliance with the order. Defendant's share certificate represents _____ [*number*] more shares than he/she is entitled to own, and defendant should now be required to surrender the certificate in order that the certificates representing all shares outstanding may be canceled and certificates may be reissued to reflect the agreement alleged in Paragraph 6 of the First Cause of Action, as reformed to state defendant's actual contribution of $_____ toward the purchase of _____ [*name of property*].

WHEREFORE, plaintiff prays judgment as follows:

1. That the agreement dated _____ [*date*] and attached as Exhibit B be reformed to show that the purchase price of _____ [*name of property*] is $_____ and that defendant's contribution to that price is $_____;

2. That defendant be ordered to surrender certificate number _____ to plaintiff for cancellation in exchange for the issuance of a new certificate for _____ [*number*] shares;

3. For exemplary and punitive damages;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the _____ [*specify title, e.g.,* President] of _____ [*name*], the plaintiff in this action, and I have been authorized to make this verification on its

behalf. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This complaint is for use in enforcing a shareholder's liability to the corporation for his or her misrepresentation of the value of the consideration that he or she paid for the shares [*see § 162.12[3]*]. The facts recited in the complaint are based on the classic promoter's secret-profit situation [*see, e.g., Topanga Corp. v. Gentile (1967) 249 Cal. App. 2d 681, 58 Cal. Rptr. 713]* , although a secret profit is usually in the form of cash instead of shares [*see, e.g., Lomita Land & Water Co. v. Robinson (1908) 154 Cal. 36, 50-51, 97 P. 10]* .

[3] Causes of Action

The first cause of action is for reformation of a preincorporation agreement to reflect the actual facts of the property transactions out of which liability is alleged to have arisen [*see Civ. Code § 3399* (contract revised for fraud)].

The second cause of action is to force surrender of the defendant's share certificate for the purpose of canceling it and issuing another certificate for the number of shares that the defendant is entitled to receive pursuant to the reformed agreement [*see Corp. Code § 422* (board of directors' discretion to order cancellation of certificates if desirable for any reason); *see also Civ. Code § 3412* (written instrument may be ordered to be delivered up or canceled on application of person against whom it is void or voidable); for discussion, *see § 162.14*].

[4] Jurisdiction and Venue

An action seeking reformation of an agreement and cancellation of instruments is in the jurisdiction of the superior court and is not a limited civil case [*see Code Civ. Proc. §§ 85, 86(b)*].

Ordinarily, the action may be commenced in any of the following counties [*Code Civ. Proc. § 395(a)*]:

- The county where any defendant resides at the commencement of the action; or
- If a defendant contracted to perform the obligation, on which the action is founded, in a particular county, then either:
  - The county where the obligation is to be performed, or
  - The county where the contract in fact was entered into.

In special cases, other counties also may be proper [*see, e.g., Code Civ. Proc. §§ 395(b)* (action arising from consumer transaction), 395.1 (action against executor, administrator, guardian, or trustee), 395.2 (action against unincorporated association), 395.5 (action against corporation or association)].

[5] Verification

Verification of this complaint is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. § 446*] and precludes a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[6] Cross References

For alternative allegations as to agency, capacity, and residence of parties, as well as fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For forms and discussion relating to cancellation of instruments, see Ch. 107, *Cancellation of Instruments*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For forms and discussion regarding actions to reform contracts, see Ch. 488, *Reformation of Instruments*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For allegations showing proper venue, see Ch. 571, *Venue* , Pt. I

For alternative verification forms, see Ch. 572, *Verification*

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14-162 California Forms of Pleading and Practice--Annotated § 162.41

§ 162.41 Complaint to Collect Unpaid Subscription Price--By Corporation Against Subscriber [Corp. Code § 410(a)]--Preincorporation Subscription

[1] FORM Complaint to Collect Unpaid Subscription Price--By Corporation Against Subscriber [Corp. Code § 410(a)]--Preincorporation Subscription

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR BREACH OF CONTRACT
_____ [*names*],	)	[Amount demanded _____
Defendants.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Capacity of plaintiff. See § 162.40[1], Paragraph 1.*]

2. [*Capacity of defendant. See § 162.40[1], Paragraph 2.*]

3. On _____ [*date*], in _____ County, California, defendant entered into a written agreement in contemplation of the organization and incorporation of plaintiff (the "subscription agreement"). Defendant agreed to purchase shares of stock of plaintiff. The subscription agreement provides _____ [*set out terms regarding number of shares to be purchased, price, and time and manner of payment*]. A copy of the agreement is attached as Exhibit A and made part of this pleading.

4. Plaintiff commenced its corporate existence on _____ [*date*]. As incorporated, plaintiff exists for the specific purpose set forth in the subscription agreement.

5. Plaintiff's articles of incorporation provide that plaintiff is authorized to issue _____ [*number*] shares of stock. On _____ [*date*], plaintiff's board of directors approved and accepted the subscription agreement and directed the issuance of _____ [*number within authorization*] shares to defendant pursuant to the agreement.

6. Payment for the shares became due from defendant on _____ [*date*]. On that date plaintiff was, and still is, ready, willing, and able to issue to defendant _____ [*number*] shares. Plaintiff has duly demanded that defendant pay the sum of $_____ pursuant to the subscription agreement.

7. Plaintiff has duly performed all conditions of the subscription agreement to be performed by plaintiff. Defendant has not paid the subscription price [or any part of it] and has refused and continues to refuse to perform his/her obligations under the agreement.

[8. The agreement provides for attorney's fees as follows: _____ (*set out provision regarding payment of attorney's fees in event of litigation*). Plaintiff has incurred reasonable attorney's fees in connection with this matter in the sum of $_____.]

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____;

2. For interest on $_____ from and after _____ [*date*];

[3. For attorney's fees in the sum of $_____;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 162.40[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action to recover the subscription price of shares that the defendant agreed to purchase in a preincorporation subscription agreement [*see Corp. Code § 410* (subscriber is liable to corporation for full subscription price); *see also Civ. Code § 1717* (attorney's fees); *Civ. Code § 3287* (interest); *Code Civ. Proc. § 1021* (attorney's fees)]. For discussion, see *§ 162.11[5]*.

[3] Allegations

The complaint in [1], *above*, alleges the following facts constituting the cause of action:

- The parties made a subscription agreement for the consideration agreed to be paid (Paragraph 3).

- The plaintiff was incorporated as contemplated by the agreement, by the filing of the articles with the Secretary of State [*Corp. Code § 200(c)*] (Paragraph 4). When formed, the corporation must be the one contemplated in the subscription agreement [*Marysville Elec. Light & Power Co. v. Johnson (1895) 109 Cal. 192, 194-195, 41 P. 1016]* , and this fact must be alleged in the complaint to recover the subscription price [*Harlie R. Norris Co., Ltd. v. Lovett (1932) 123 Cal. App. 640, 645, 12 P.2d 141]* .

- The plaintiff's articles authorized the issuance of shares to the defendant, and the agreement was accepted by the board of directors [*see Corp. Code § 202(d), (e)* (shares authorized by articles); *Marysville Elec. Light & Power Co. v. Johnson (1892) 93 Cal. 538, 546-547, 29 P. 126* (subscriber is obligated under agreement on corporation's organization and acceptance of agreement)] (Paragraph 5).

- On the date payment for the shares was due from the defendant, the plaintiff was ready and willing to deliver the shares to the defendant [*see Coast Amusements, Inc. v. Stineman (1931) 115 Cal. App. 746, 752, 2 P.2d 447* (tender of certificate is unnecessary if plaintiff is ready and willing to deliver)] (Paragraph 6).

- The defendant refused to pay the price due for the shares (Paragraph 7).

[4] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*]. In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the first paper must state whether the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

For discussion of venue, see *§ 162.40[4]*.

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

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Volume 14: Corporations: Capacity thru Corporations: Dissolution and Winding Up-Chs. 160-173
Chapter 162 CORPORATIONS: ISSUANCE OF SHARES
PART IV. FORMS

14-162 California Forms of Pleading and Practice--Annotated § 162.42

§ 162.42 Affirmative Defense to Action on Preincorporation Subscription Agreement--Illegal Contract [Civ. Code § 1667(1)]--Noncompliance With Corporate Securities Law [Corp. Code §§ 25102(a), 25110]

[1] FORM Affirmative Defense to Action on Preincorporation Subscription Agreement--Illegal Contract [Civ. Code § 1667(1)]--Noncompliance With Corporate Securities Law [Corp. Code §§ 25102(a), 25110]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the preincorporation subscription agreement alleged in the complaint is unenforceable. The shares offered for sale pursuant to the agreement have not been qualified pursuant to the Corporate Securities Law. The offer and sale are subject to qualification, and no exemption from qualification is provided, under the Corporate Securities law. Therefore, the agreement violates *Corp. Code § 25110*, which declares unlawful the offer or sale in California of any shares in an issuer transaction unless the sale has been qualified, is not subject to qualification, or is exempt from qualification.

[2] Use of Form

The form in [1], *above*, is an affirmative defense to an action on a preincorporation subscription contract. It is based on the contract's illegality [*Civ. Code § 1667(1)*] resulting from failure to meet the requirements of the Corporate Securities Law [*see generally Corp. Code § 25102(a)*; for discussion, *see § 162.11[5][c]*]. The form may be used if the preincorporation subscription is an unlawful contract in either of these cases:

- The agreement would have been exempt from qualification but one or more of the conditions for the exemption have not been satisfied.

- The offer and sale were subject to qualification, no exemption from qualification was available, and the shares to which the agreement refers were not qualified.

On the other hand, if the *offer* through the subscription agreement was exempt from qualification, but the *sale* of the shares was not qualified at the time of the action on the subscription, the defendant's response could be either a simple denial that the plaintiff was ready, willing, and able to perform its obligation to deliver shares or an affirmative defense

alleging noncompliance with the Corporate Securities Law, depending on the allegations of the complaint.

For discussion and forms of answers generally, see Ch. 26, *Answers* .

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14-162 California Forms of Pleading and Practice--Annotated § 162.43

§ 162.43 Complaint to Impress Constructive Trust [Civ. Code § 2224] on Shares Acquired in Violation of Quasi-Preemptive Right--By Shareholder Against Majority Directors and Corporation

[1] FORM Complaint to Impress Constructive Trust [Civ. Code § 2224] on Shares Acquired in Violation of Quasi-Preemptive Right--By Shareholder Against Majority Directors and Corporation

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	COMPLAINT FOR IMPOSITION OF CON-
Defendants.	)	STRUCTIVE TRUST
	)	
	)	

Plaintiff alleges:

1. Defendant _____ [*name of corporation*] is, and at all times mentioned in this pleading was, a corporation duly organized and existing under the laws of the State of California ("the corporation") and having its principal place of business in _____ County, California.

2. Plaintiff is, and at all times mentioned in this pleading was, a shareholder of the corporation.

3. Defendants _____ [*names of majority directors*] are duly _____ [elected *or* appointed] directors of the corporation ("the director defendants"), and in that capacity they owe, and at all times mentioned in this pleading did owe, a fiduciary duty to plaintiff.

4. On _____ [*date*], the director defendants, without plaintiff's knowledge, caused the articles of incorporation of the corporation to be amended to increase the authorized number of its common shares to _____ [*number*] shares.

5. On _____ [*date*] the director defendants obtained a permit from the California Commissioner of Corporations for the corporation to issue _____ [*number*] shares of common stock ("the additional shares"), and on that date the director defendants caused the corporation to issue the additional shares to themselves for the sole purpose of converting their status from minority shareholders to majority shareholders and obtaining control of the corporation.

6. As a result of the acts of the director defendants and the corporation, plaintiff has been _____ [*specify, e.g.,* deprived of the power to elect a majority of the board of directors *or* ousted from equal control of corporate affairs in contravention of the understanding between plaintiff and the director defendants that none of them would own shares of stock sufficient to exercise voting control of the corporation].

7. Plaintiff is, and at all times mentioned in this pleading was, ready, willing, and able to purchase and pay for _____ [*number*] of the additional shares, in proportion to plaintiff's shares in the corporation before the issuance of the additional shares to the director defendants.

WHEREFORE, plaintiff prays judgment against defendants as follows:

1. Declaring that the director defendants hold _____ [*number*] of the additional shares in trust for plaintiff;

2. Compelling _____ [the director defendants to endorse and deliver certificates for *or* the corporation to register a transfer, from the director defendants, of] that number of the additional shares to plaintiff, so as to restore plaintiff to his/her proportional voting interest that existed before the additional shares were issued to the director defendants;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This complaint is for use by a shareholder seeking to enforce a quasi-preemptive right to purchase shares after the board of directors caused the corporation to issue shares to certain shareholders (in this case the directors themselves) for the sole purpose of converting their interests into majority interests, against the plaintiff's interest. For discussion, see *§ 162.11[6]*. This form of complaint normally will be used when the corporation is closely held.

[3] Jurisdiction and Venue

An action seeking imposition of a constructive trust and an order to effect equitable relief is in the jurisdiction of the superior court and is not a limited civil case [*see Code Civ. Proc. §§ 85, 86(b)*; *see Cal. Const. art. VI, § 10* (original jurisdiction of superior court)].

In addition to the venue alternatives for actions against individual defendants [*see § 162.40[4]*], when a corporation is a defendant, the action may be filed in the county where the obligation or liability arose or the county in which the corporation's principal place of business is situated [*Code Civ. Proc. § 395.5*].

[4] Verification

Verification of this complaint is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. § 446*] and precludes a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Corporation as Defendant

When one group of shareholders causes shares to be issued to themselves in order to change their status from minority to majority shareholders, the essence of the case is not fraud against the corporation, but fraud against the other group of shareholders [*Sheppard v. Wilcox (1962) 210 Cal. App. 2d 53, 64, 26 Cal. Rptr. 412]* . In the cases upholding the shareholder's claim of a quasi-preemptive right, the corporation has been joined as a defendant [*Sheppard v. Wilcox (1962) 210 Cal. App. 2d 53, 59-60, 26 Cal. Rptr. 412* ; *Schwab v. Schwab-Wilson Mach. Corp. (1936) 13 Cal. App. 2d 1, 3-4, 55 P.2d 1268]* . The corporation's agents will have to carry out any transfers of shares on the books of the corporation, and if the corporation is a party, no claim could be made that the judgment is not binding on it.

[6] Constructive Trust as Remedy

Imposition of a constructive trust on shares issued to directors, without the plaintiff's knowledge, is a proper remedy because the corporation then could retain the proceeds of the issue while the former alignment of voting interests would be restored [*Sheppard v. Wilcox (1962) 210 Cal. App. 2d 53, 60, 26 Cal. Rptr. 412* ; *see Civ. Code § 2224* (person gaining property through wrongful act is involuntary trustee for benefit of person who would otherwise have benefitted)]. For discussion and forms related to constructive trusts, see Ch. 560, *Trusts* .

The allegation in the complaint that the plaintiff is ready, willing, and able to purchase a proportional number of shares of the additional issue (Paragraph 7) may or may not be an essential allegation [*see Schwab v. Schwab-Wilson Mach. Corp. (1936) 13 Cal. App. 2d 1, 2, 55 P.2d 1268]* . It appears that the plaintiff's ability to purchase shares would not be a condition precedent to asserting a quasi-preemptive right, but would be merely evidence favorable to the plaintiff's

demand for equitable cognizance of his or her claim [*see Schwab v. Schwab-Wilson Mach. Corp. (1936) 13 Cal. App. 2d 1, 4, 55 P.2d 1268]* . On the other hand, if the plaintiff seeks an order to have a number of shares transferred to the plaintiff, it may be assumed that equity will require that he or she pay for the shares, since the purpose of impressing property with a constructive trust is to prevent unjust enrichment [*Day v. Greene (1963) 59 Cal. 2d 404, 410-411, 29 Cal. Rptr. 785, 380 P.2d 385]* .

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14-162 California Forms of Pleading and Practice--Annotated § 162.44

§ 162.44 Complaint for Damages--Breach of Fiduciary Duty [Corp. Code § 309] and Fraud in Fixing Consideration for Shares [Corp. Code § 409(b)]--Shareholder's Derivative Suit [Corp. Code § 800] Against Directors

[1] FORM Complaint for Damages--Breach of Fiduciary Duty [Corp. Code § 309] and Fraud in Fixing Consideration for Shares [Corp. Code § 409(b)]--Shareholder's Derivative Suit [Corp. Code § 800] Against Directors

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR FRAUD AND BREACH OF FI-
_____ [*names*],	)	DUCIARY DUTY
Defendants.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name of corporation*] is, and at all times mentioned in this pleading was, a corporation duly organized and existing under the laws of the State of _____ ("the corporation") and having its principal place of business in [the _____ (*name*) Judicial District in] _____ County, California.

2. Defendants _____ [*names of directors who approved consideration received for shares*] are, and at all times mentioned in this pleading were, duly elected directors of the corporation ("the defendant directors") and owe, and did at all times mentioned in this pleading owe, a fiduciary duty to the corporation.

3. Defendants _____ [*names of recipients of shares*] are [the majority] shareholders [and directors] of the corporation ("the defendant shareholders").

4. Plaintiff is, and at all times mentioned in this pleading was, a _____ [shareholder of record *or* beneficial owner of shares *or* holder of voting trust certificates representing shares] of the corporation.

5. On _____ [*date*] the defendant directors conspired among themselves and with the defendant shareholders to defraud, and they did defraud, the corporation of its assets in that, contrary to the best interests of the corporation, and in violation of their duty to obtain the largest possible return from the sale of the corporation's stock, the defendant directors authorized the issuance of _____ [*number*] shares of the common stock of the corporation to the defendant shareholders at a price of $_____ per share.

6. All defendants knew that the price was substantially lower than the _____ [book value *or* market price] per share of outstanding shares of the same class. The issuance of the shares was unjust and unreasonable to the corporation. The shares issued to the defendant shareholders were not offered to plaintiff or other shareholders, nor was any attempt made to obtain a higher price for the shares.

[*EITHER*]

7. On or about _____ [*date*] plaintiff made the following efforts to cause the corporation to pursue its claim against the defendants. On _____ [*date*] plaintiff _____ [informed the board of directors in writing of the ultimate facts of each cause of action *or* delivered to the board of directors a true copy of the complaint that plaintiff proposed to file], and plaintiff demanded that the board of directors take action as necessary for the corporation to prosecute its claim against the defendants. The board of directors and the corporation refused, and they continue to refuse, to prosecute this action. In refusing to prosecute this action, the board of directors did not act in good faith or in any reasonable belief that its refusal to commence this action was a good business judgment or in the best interest of the corporation. Rather, this refusal by the board of directors was in the exercise of bad faith and breach of the directors' fiduciary duty to maintain and defend the interests of the corporation.

[*OR*]

7. Plaintiff did not make any effort to cause the board of directors to prosecute this action because _____ [*set forth facts demonstrating futility of demand*].

8. As a result of the breach of fiduciary duty owed by defendants to the corporation, the corporation has been damaged in the sum of $_____.

[9. The acts and conduct of defendants were oppressive, fraudulent, and malicious, in that defendants knew that the consideration received for shares issued to the defendant shareholders was unjust and unreasonable to the corporation and substantially below the price at which the shares could have been sold to others. Plaintiff therefore seeks punitive and exemplary damages.]

10. If plaintiff is successful in this action, a substantial benefit and common fund will accrue to the corporation, and plaintiff will be entitled to reasonable attorney's fees in the sum of $_____ against the corporation.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages in the sum of $_____;

2. For interest on $_____ from and after _____ [*date*];

3. For exemplary and punitive damages;

4. For reasonable attorney's fees in the sum of $_____;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 162.43[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in attacking the directors' actions in connection with the valuation of consideration for shares, or, as is alleged in this form, the undervaluation of, the shares themselves. For discussion of the consideration for shares, see *§ 162.12*.

[3] Allegations

In addition to the allegations that are required in a derivative suit [*see Corp. Code § 800*; *see also* Ch. 168, *Corporations: Derivative Actions*], regarding the plaintiff's status (Paragraph 4) and efforts to produce board action (Paragraph 7), the complaint alleges the following facts constituting the cause of action:

- The directors' breach of their fiduciary duty to the corporation to obtain the largest possible return from the sale of shares [*see Shaw v. Empire Sav. & Loan Asso., (1960) 186 Cal. App. 2d 401, 409, 9 Cal. Rptr. 204* (distinguishing duty to obtain highest return from duty not to issue shares for sole purpose of retaining or obtaining control)] (Paragraphs 5 and 6).

- The corporation's resulting damages (Paragraph 8).

- Optionally, depending on the facts, the directors' liability for punitive damages [*see Civ. Code § 3294*] (Paragraph 9).

- The corporation's liability for attorney's fees [*see Winslow v. Harold G. Ferguson Corp. (1944) 25 Cal. 2d 274, 277, 153 P.2d 714* (allowance of attorney's fees in derivative suit when common fund is created for benefit of corporation)] (Paragraph 10).

[4] Directors' Duty

The duty of directors is, generally, to act in the best interest of the corporation and the shareholders [*Corp. Code § 309(a)*]. It is possible that a director may negligently breach the duty of care in connection with the valuation of property transferred to the corporation or the value assigned to shares [*see Corp. Code § 309(a), (b)* (what information director may lawfully rely on); *see also § 162.12[2]*]. This complaint alleges a knowing and fraudulent breach of a director's duty to act in the best interest of the corporation. It is assumed that if share transactions take place between the corporation and directors, the interested directors will not participate in either shareholder approval or board approval of the transactions [*see Corp. Code § 310(a)* (what kinds of approval or ratification of transaction with interested director will render transaction immune from attack); *see also Corp. Code § 153* (approval by shareholders)]. For further discussion of transactions between the corporation and interested directors, see Ch. 167, *Corporations: Directors and Management* .

[5] Form of Action and Relief

When directors have accepted less money for shares than could be received in an arm's-length sale, or overvalued property to be received by the corporation, the injury is to the corporation. Any action based on those wrongs is derivative, not personal to any shareholder [*Shaw v. Empire Sav. & Loan Asso., (1960) 186 Cal. App. 2d 401, 409, 9 Cal. Rptr. 204* ; *James v. Steifer Mining Co. (1918) 35 Cal. App. 778, 784, 171 P. 117* (allegation that defendant directors issued shares in exchange for worthless land stated cause of action for breach of duty to corporation)]; *but see Jones v. H.F Ahmanson & Co. (1969) 1 Cal. 3d 93, 107, 81 Cal. Rptr. 592, 460 P.2d 464* (holding that shareholder could maintain cause of action based on diminished value of stock if the injury in question was not incidental to an injury to the corporation; minority shareholder need not not show that injury was unique to that shareholder)].

The plaintiff may elect either of two remedies: let the transaction stand and seek damages, or set it aside and reclaim the shares [*see Victor Oil Co. v. Drum (1920) 184 Cal. 226, 238, 193 P. 243* (inadequacy of consideration received for shares); *Topanga Corp. v. Gentile (1967) 249 Cal. App. 2d 681, 688, 58 Cal. Rptr. 713]* . For example, if property conveyed to the corporation is worthless, then voiding the transaction might be advisable [*cf. James v. Steifer Mining Co. (1918) 35 Cal. App. 778, 782, 171 P. 117* (plaintiff prayed that issuance of shares for worthless property be declared void, but court did not review that remedy)]. On the other hand, damages might be appropriate if a majority shareholder connived to have shares issued to him or her at a discount [*cf. Shaw v. Empire Sav. & Loan Asso. (1960) 186 Cal. App. 2d 401, 409, 9 Cal. Rptr. 204* (unless plaintiff could show that issuance of shares at discount to majority shareholder was intended to allow him to gain or retain control, plaintiff's action was derivative, and constructive trust on defendant's shares was inappropriate)].

[6] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*]. In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the first paper must state whether the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

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14-162 California Forms of Pleading and Practice--Annotated § 162.45

§ 162.45 Complaint to Compel Corporation to Replace Lost, Stolen, or Destroyed Certificate [Corp. Code § 419(b), (c); Com. Code § 8405]

[1] FORM Complaint to Compel Corporation to Replace Lost, Stolen, or Destroyed Certificate [Corp. Code § 419(b), (c); Com. Code § 8405]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR REPLACEMENT OF MISSING
_____ [*name*],	)	SHARE CERTIFICATE
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is a corporation duly organized and existing under the laws of the State of California and having its principal executive office in _____ County, California.

2. Plaintiff is the lawful owner of _____ [*number*] shares of the _____ [*specify, e.g.,* common] stock of defendant, represented by a certificate numbered _____ and dated _____ [*date*], which is registered in the plaintiff's name.

3. Plaintiff has not assigned, endorsed, or otherwise transferred, hypothecated, or disposed of the certificate.

4. On _____ [*date*], plaintiff discovered that the certificate had been _____ [lost *or*

stolen *or* destroyed] in that _____ [*summarize facts surrounding loss, theft, or destruction*].

5. On _____ [*date*], plaintiff duly notified defendant's transfer agent of the _____ [loss *or* theft *or* destruction] of the certificate and requested that no transfer of the shares be recorded in defendant's shareholder records.

6. On _____ [*date*], plaintiff appropriately requested defendant to issue plaintiff a new certificate to replace the _____ [lost *or* stolen *or* destroyed] certificate. This request included plaintiff's offer to pay the premium due on any necessary indemnity bond and sign any necessary documents in connection with placing it in effect.

7. Defendant has refused and continues to refuse to issue to plaintiff a new certificate to replace plaintiff's _____ [lost *or* stolen *or* destroyed] certificate.

WHEREFORE, plaintiff prays judgment as follows:

1. That defendant forthwith issue and deliver a new certificate to plaintiff on the condition that plaintiff deposit adequate security, or deliver to this court a bond sufficient to indemnify defendant against loss, expense, or liability arising from any claim that may be made against defendant on account of the _____ [loss *or* theft *or* destruction] of the certificate numbered _____ or the issuance of the new certificate;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 162.43[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in obtaining an order compelling a corporation to issue a new share certificate to replace one that has been lost, stolen, or destroyed [*see Corp. Code § 419(b), (c)*]. For discussion, see *§ 162.13[3]*.

The complaint in [1], *above*, alleges the following facts:

- The location of the corporation's principal executive office, for the purpose of establishing venue in the proper county [*see Corp. Code §§ 177, 419(b)* (defining proper county)] (Paragraph 1).

- The plaintiff's lawful ownership of the shares represented by the missing certificate [*Corp. Code § 419(c)*] (Paragraph 2).

- The facts surrounding the loss, theft, or destruction of the certificate [*Corp. Code § 419(c)*]

(Paragraph 4).

- Notification to defendant of the loss, destruction, or theft [*Com. Code § 8405(a)(1)*] (Paragraph 5).

- The plaintiff's request for a new certificate and the offer to furnish security [*see Corp. Code § 419(a), (c)*; *see also Com. Code § 8405(a)(2)*] (Paragraph 6).

- The defendant's refusal to issue a new certificate [*Corp. Code § 419(b)*] (Paragraph 7).

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14-163 California Forms of Pleading and Practice--Annotated 163.syn

§ 163.syn Synopsis to Chapter 163: CORPORATIONS: TRANSFERS OF SHARES

§ 163.01 Scope of Chapter

§ 163.02 Cross References

§ 163.03 Governing Statutes

[1] Commercial Code

[a] In General

[b] Corporation as Issuer of Transferred Shares

[c] Adverse Claims to Certificated Shares

[2] Other Statutes

§§ 163.04-163.09 [Reserved]

§ 163.10 Definitions

[1] Shares and Securities

[2] Certificated and Uncertificated Shares

[3] Registered or Bearer Form

[4] Initial Transaction Statement and Written Statements

[5] Purchaser and Purchaser for Value

§ 163.11 Transfers of Shares

[1] Delivery

[a] Definition of Delivery

[b] Purchaser's Acquired Rights

[c] Protected Purchaser's Acquired Rights

[2] Endorsement for Transfer of Certificated Shares

[a] Definition and Effect of Endorsement

[b] Blank or Special Endorsement

[c] Partial Endorsement

[d] Missing Endorsement

[3] Instruction for Transfer of Uncertificated Shares

[a] Definition and Effect of Instruction

[b] Incomplete Instruction

[4] Effective Endorsement or Instruction

[a] Appropriate Person to Endorse or Instruct

[b] Conditions for Effectiveness

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PART I. SCOPE

14-163 California Forms of Pleading and Practice--Annotated § 163.01

§ 163.01 Scope of Chapter

This chapter covers the principal rules and concepts governing transfers of a corporation's issued shares, and restrictions on transfer. The complaints and affirmative defenses in this chapter are for use in the following kinds of actions:

- Against a buyer, for recovery of the purchase price [*see §§ 163.40* (complaint), *163.41*, *163.42* (affirmative defenses)].

- Against a seller, for specific performance of the contract [*see §§ 163.33* (sale of shares), *163.44* (option to repurchase shares sold)].

- Against the corporation, to compel registration of a transfer [*see § 163.45*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersTransfers of SharesCommercial Law (UCC)Investment Securities (Article 8)Transfers

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PART I. SCOPE

14-163 California Forms of Pleading and Practice--Annotated § 163.02

§ 163.02 Cross References

- For discussion and forms relating to actions against stockbrokers, see Ch. 103, *Brokers* .

- For discussion and forms relating to contract remedies generally, see Ch. 140, *Contracts* .

- For discussion and forms relating to actions arising from the issuance of shares, see Ch. 162, *Corporations: Issuance of Shares* .

- For a discussion and forms relating to the qualification requirements under the Corporate Securities Law [*see generally Corp. Code § 25000 et seq.*], see Ch. 515, *Securities and Franchise Regulation* .

- For a complaint for specific performance of an agreement to transfer shares of a close corporation, see Ch. 528, *Specific Performance* .

- For additional discussion and forms of contractual transfer restrictions and shareholders' buy-sell agreements, see California Legal Forms, ch. 8B, *Voting Agreements and Voting Trusts*, and Ch. 8C, *Close Corporation Shareholder Agreements* (Matthew Bender).

- For additional discussion and forms for shareholders' buy-sell agreements, see California Legal Forms, ch. 8D, *Buy-Sell Agreements* (Matthew Bender).

- For discussion of the mechanics of transfer through brokers and stock exchanges, the book-entry method of issuance and transfer of shares, and specific forms of endorsement and documentation that must accompany particular transfers, see Ballantine & Sterling, California Corporation Laws, ch. 10, *Transfer and Registration of Securities* (Matthew Bender).

Legal Topics:

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

Business & Corporate LawCorporationsFinanceInitial Capitalization & Stock SubscriptionsGeneral OverviewBusiness & Corporate LawCorporationsShareholdersMeetings & VotingVoting SharesVoting TrustsBusiness & Corporate LawCorporationsShareholdersTransfers of SharesContracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesSpecific Performance

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PART I. SCOPE

14-163 California Forms of Pleading and Practice--Annotated § 163.03

§ 163.03 Governing Statutes

[1] Commercial Code

[a] In General

Division 8 of the Commercial Code, entitled "Investment Securities," generally governs rights, duties, and liabilities of sellers, buyers, and issuing corporations arising from transactions in corporations' issued shares [*see generally Com. Code § 8101 et seq.*]. A writing that is a share certificate is governed by Division 8 and not by Division 3, which governs negotiable instruments [*see generally Com. Code § 3101 et seq.*], even if the certificate also meets the requirements of that division [*Com. Code § 8103(d)*].

Actions commenced before 1997 are governed by the former Division 8, which was superseded January 1, 1997, by the current Division 8 [*Com. Code §§ 8601, 8603(a)*].

[b] Corporation as Issuer of Transferred Shares

In the case of a California corporation, Division 8 of the Commercial Code (along with other California law generally) will govern each of the following matters in particular, unless the corporation has made an election to have the law of another jurisdiction govern the matter [*Com. Code § 8110(a), (d)*]:

- The rights and duties of the corporation as an issuer [*see Com. Code § 8201* (issuer defined)], with respect to the registration of a transfer of shares.

- The effectiveness of a registration of transfer by the corporation.

- Whether the corporation owes any duties to an adverse claimant [*see Com. Code § 8102(a)(1)* (adverse claim defined)] respecting issued shares.

- Whether an adverse claim can be asserted against a person to whom a transfer of shares is registered or a person who has obtained control of uncertificated shares [see *Com. Code § 8106(c)* (control

defined)].

When any such matter respecting shares of a foreign corporation is in issue in a California action, the matter generally will be governed by the law of the jurisdiction in which the corporation is organized. If the foreign corporation has elected, under the law of the jurisdiction in which the corporation is organized, to have the matter governed by the law of a different jurisdiction, the matter will be governed by the law of that jurisdiction [*Com. Code § 8110(a)(1), (d)*].

When a corporation has made the foreign-law election described above, any subsequent agreement to the contrary is effective only to the extent permitted by the foreign law so specified [*Com. Code § 1301(c)*].

[c] Adverse Claims to Certificated Shares

The local law of the jurisdiction in which a share certificate is located at the time of delivery [*see generally Com. Code § 8301* (delivery)] governs whether an adverse claim [*see generally Com. Code § 8102(a)(1)*; *§ 163.11[6][a]*] can be asserted against a person to whom the certificate is delivered [*Com. Code § 8110(c)*].

[2] Other Statutes

Transfers of shares in California also are governed by the following statutes:

- *Corp. Code §§ 416-422*, which govern the contents, execution, and exchange of share certificates and the extent of a corporation's liability for registering certain transfers.

- *Corp. Code § 25100 et seq.* (especially *Corp. Code § 25130 et seq.* concerning nonissuer transactions), which govern the qualification of shares under the Corporate Securities Law [*see generally Corp. Code § 25000 et seq.*], exemptions from qualification, and conditions on qualification.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersTransfers of SharesCommercial Law (UCC)Investment Securities (Article 8)PurchasersCommercial Law (UCC)Investment Securities (Article 8)Transfers

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14-163 California Forms of Pleading and Practice--Annotated §§ 163.04-163.09

[Reserved]

§§ 163.04[Reserved]

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14-163 California Forms of Pleading and Practice--Annotated § 163.10

§ 163.10 Definitions

[1] Shares and Securities

"Shares" are the units into which the proprietary interest in a corporation is divided in the articles of incorporation [*Corp. Code § 184*].

Shares (and similar equity interests, such as warrants, for example) issued by a corporation (or business trust, joint stock company, or similar entity) are "securities" [*see Com. Code § 8102(a)(15)*] the issuance and transfer of which are subject to Division 8 of the Commercial Code [*Com. Code § 8103(a)*]. A federally registered investment company's shares and similar equity interests also are securities under Division 8 [*Com. Code § 8103(b)*]. A mutual fund is the most common example of a registered investment company.

Shares also are "securities" under the Corporate Securities Law [*Corp. Code § 25019*], which generally regulates the issuance and transfer of securities.

[2] Certificated and Uncertificated Shares

Shares represented by a certificate are "certificated securities" under Division 8 of the Commercial Code, and shares not represented by a certificate are "uncertificated securities" under Division 8 [*Com. Code § 8102(a)(4), (18)*]. The Commercial Code definitions are also applied in the Corporations Code [*see Corp. Code §§ 156.1, 191.1*]. Rules governing transfers of shares may differ depending on whether shares are certificated or uncertificated. The application of some rules affecting the corporation's rights and duties as an issuer will also depend on whether shares are certificated or uncertificated.

[3] Registered or Bearer Form

Certificated shares usually are issued to specifically named holders. Thus, certificated shares in most cases are issued in "registered form" [*see Com. Code § 8102(a)(13)*].

It is possible for a share certificate to be issued in "bearer form," but it would be very unusual; that status, meaning

"payable to the bearer of the ... certificate according to its terms and not by reason of an endorsement" [*Com. Code § 8102(a)(2)*], usually is reserved for bonds and other debt securities.

All uncertificated shares are necessarily in registered form because, in the absence of a certificate, there is no evidence of the holder's ownership other than an entry in the corporation's shareholder records and a corresponding statement sent to the holder [*see* [4], *below*].

[4] Initial Transaction Statement and Written Statements

"Initial transaction statement" means a statement referring to uncertificated shares, signed by or on behalf of the corporation and sent to the new registered owner, describing the issue of which the uncertificated shares are part. "Written statements," when used in connection with uncertificated shares, means the written statements that are periodically, or at the request of the registered owner, sent by the corporation to the registered owner, describing the issue of which the uncertificated shares are part [*Corp. Code § 171.1*].

[5] Purchaser and Purchaser for Value

"Purchaser" means a person who takes shares by purchase. "Purchase" includes taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in the shares [*Com. Code §§ 1201(b)(29), (30), 8102(c)*]. A purchaser gives "value" for shares if he or she acquires them in any of the following ways [*Com. Code §§ 1204, 8102(c)*]:

- Generally, in return for any consideration sufficient to support a simple contract.
- By accepting delivery pursuant to a preexisting contract for purchase.
- As security for, or in total or partial satisfaction of, a preexisting claim.
- In return for a binding commitment to extend credit or for the extension of immediately available credit, whether or not drawn on and whether or not a chargeback is provided for in the event of difficulties in collection.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersTransfers of SharesCommercial Law (UCC)Investment Securities (Article 8)General OverviewCommercial Law (UCC)Investment Securities (Article 8)PurchasersCommercial Law (UCC)Investment Securities (Article 8)Security CertificatesCommercial Law (UCC)Investment Securities (Article 8)Transfers

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14-163 California Forms of Pleading and Practice--Annotated § 163.11

§ 163.11 Transfers of Shares

[1] Delivery

[a] Definition of Delivery

"Delivery" with respect to an instrument or document of title means voluntary transfer of possession [*Com. Code §§ 1201(b)(15), 8102(c)*]. Delivery of certificated shares to a purchaser occurs when any of the following occurs [*Com. Code § 8301(a)*]:

- The purchaser acquires possession of the certificate.

- A securities intermediary [*see Com. Code § 8102(a)(14)*] (normally, a broker) acting on behalf of the purchaser acquires possession of the certificate, provided the certificate is in registered form, has not been endorsed to the securities intermediary or in blank, and is either (1) registered in the name of the purchaser, (2) payable to the order of the purchaser, or (3) specially endorsed to the purchaser by an effective endorsement [*Com. Code § 8102(a)(11)*].

- Another person, other than a securities intermediary, either acquires possession of the certificate on behalf of the purchaser or, having previously acquired possession of the certificate, acknowledges holding it for the purchaser.

Delivery of uncertificated shares to a purchaser occurs when either of the following happens [*Com. Code § 8301(b)*]:

- The corporation registers the purchaser as the registered owner, on original issue or registration of transfer.

- Another person, other than a securities intermediary, either becomes the registered owner of the shares on behalf of the purchaser or, having previously become the registered owner, acknowledges holding them for the purchaser.

[b] Purchaser's Acquired Rights

A shareholder's legal or contractual duty to put a purchaser in possession of shares is discharged by delivery of the shares [*see generally Com. Code § 8301*] to the purchaser [*see Com. Code § 8104(a)(1), (d)*].

In general, on delivery of shares to a purchaser, the purchaser acquires all rights in the shares that the transferor had or had power to transfer [*Com. Code § 8302(a)*]. A purchaser of a limited interest acquires rights only to the extent of the interest purchased [*Com. Code § 8302(b)*].

However, a purchaser of certificated shares who takes from a protected purchaser [*see Com. Code § 8303*; for discussion, *see § 163.11[1][c]*] and who as a previous holder had notice of an adverse claim [*see Com. Code § 8105*; for discussion, *see § 163.11[6][a]*] does not improve his or her position by taking from the protected purchaser [*Com. Code § 8302(c)*].

[c] Protected Purchaser's Acquired Rights

"Protected purchaser" means a purchaser who does all of the following [*Com. Code § 8303(a)*]:

- Gives value.
- Does not have notice of any adverse claim [*see Com. Code § 8105*; for discussion, *see § 163.11[6][a]*] to the shares.
- Obtains control of the shares [*see Com. Code § 8106*].

In addition to acquiring the rights of a purchaser, a protected purchaser also acquires his or her interest in the shares free of any adverse claim [*Com. Code § 8303(b)*].

[2] Endorsement for Transfer of Certificated Shares

[a] Definition and Effect of Endorsement

"Endorsement" means a signature that, alone or accompanied by other words, is made on a share certificate in registered form or on a separate document, for the purpose of transferring (or assigning or redeeming) certificated shares or granting a power to transfer (or assign or redeem) them [*Com. Code § 8102(a)(11)*]. An endorsement, whether special or in blank [*see § 163.11[2][b]*], does not constitute a transfer until delivery [*see generally Com. Code § 8301*] of the certificate on which it appears or, if the endorsement is on a separate document, until delivery of both the document and the certificate [*Com. Code § 8304(c)*].

Endorsement of a share certificate in bearer form is not necessary for a transfer. An endorsement of a certificate in bearer form may give notice of an adverse claim [*see generally Com. Code § 8105*; for discussion, *see § 163.11[6][a]*] to the certificate, but it does not otherwise affect a right to registration that the holder possesses [*Com. Code § 8304(e)*].

Unless otherwise agreed, a person making an endorsement assumes only the obligations of the statutory warranties [*see § 163.13*] and not an obligation that the shares will be honored by the corporation [*Com. Code § 8304(f)*].

[b] Blank or Special Endorsement

An endorsement on a share certificate may be in blank or special. An endorsement in blank includes an endorsement to bearer. A special endorsement specifies to whom the shares are to be transferred or who has power to transfer them. A holder may convert a blank endorsement to a special endorsement [*Com. Code § 8304(a)*].

[c] Partial Endorsement

An endorsement purporting to be only of part of a certificate representing numerous shares is effective to the extent of the endorsement [*see Com. Code § 8304(b)*]. For example, a certificate representing 100 shares could be delivered with an endorsement for the transfer of only 25 shares.

[d] Missing Endorsement

If a share certificate in registered form has been delivered [*see generally Com. Code § 8301*] to a purchaser without a necessary endorsement, the purchaser may become a protected purchaser [*see generally Com. Code § 8303*; for discussion, *see § 163.11[1][c]*] only when the endorsement is supplied. However, against the transferor, the transfer is complete on delivery, and the purchaser has a specifically enforceable right to have any necessary endorsement supplied [*Com. Code § 8304(d)*].

[3] Instruction for Transfer of Uncertificated Shares

[a] Definition and Effect of Instruction

"Instruction" means a notification communicated [*see generally Com. Code § 8102(a)(6)*] to the corporation and directing that a transfer of uncertificated shares be registered [*Com. Code § 8102(a)(12)*]. Unless otherwise agreed, a person initiating an instruction assumes only the obligations of the statutory warranties [*see § 163.13*] and not an obligation that the shares will be honored by the corporation [*Com. Code § 8305(b)*].

[b] Incomplete Instruction

If an instruction has been originated by an appropriate person [*see Com. Code § 8107(a)*; for discussion, *see § 163.11[4][a]*] but is incomplete in any other respect, any person may complete it as authorized, and the corporation may rely on it as completed, even if it has been completed incorrectly [*Com. Code § 8305(a)*].

[4] Effective Endorsement or Instruction

[a] Appropriate Person to Endorse or Instruct

Endorsements and instructions are effective if made by appropriate persons (or an agent on behalf of an appropriate person) [*see § 163.11[4][b]*]. Generally "appropriate person" means either [*Com. Code § 8107(a)(1), (2)*]:

- With respect to an endorsement, the person specified by the share certificate, or by an effective special endorsement, to be entitled to the shares.

- With respect to an instruction, the registered owner of the uncertificated shares.

If the appropriate person is deceased, then a successor taking under other law, or the personal representative acting for the estate, or the beneficiary of a security [*see Prob. Code § 5501(d)*] registered in beneficiary form [*see Prob. Code § 5501(a)*] who has survived the death of all registered owners, is an appropriate person. If the appropriate person lacks capacity, then a guardian, conservator, or other similar representative, who has power under other law to transfer the shares, is an appropriate person [*Com. Code § 8107(a)(4), (5)*].

[b] Conditions for Effectiveness

An endorsement or instruction is effective if one of the following conditions has been satisfied [*Com. Code § 8107(b)*]:

- It was made by the appropriate person.

- It was made by a person who has power under the law of agency to transfer the shares on behalf of the appropriate person, including, in the case of an instruction, a purchaser who has control of the shares because the corporation has agreed that it will comply with instructions originated by the purchaser without further consent by the registered owner [*see Com. Code § 8106(c)(2)*].

- The appropriate person has ratified it or is otherwise precluded from asserting its ineffectiveness.

Effectiveness of an endorsement or instruction is determined as of the date the endorsement or instruction is made, and an endorsement or instruction does not become ineffective by reason of any later change of circumstances [*Com. Code § 8107(e)*]. An effective endorsement or instruction is not rendered ineffective by any of the following circumstances:

- It was made by a representative who failed to comply with a controlling instrument or with the law of the state having jurisdiction of the representative relationship, including any law requiring the representative to obtain court approval of the transaction [*Com. Code § 8107(c)(1)*].

- It was made by a representative whose action in making it or using the proceeds of the transaction was otherwise a breach of duty [*Com. Code § 8107(c)(2)*].

- The shares are registered in the name of, or are specially endorsed to, or are held in a securities account [*see Com. Code § 8501(a)*] maintained in the name of, a person described as a representative, and the endorsement or instruction was made by that person even though the person was no longer serving in the described capacity [*Com. Code § 8107(d)*].

[5] Proof of Transfer Authority

Unless otherwise agreed, the transferor on due demand must supply the purchaser with proof of authority to transfer or with any other required assistance necessary to obtain registration of the transfer of the shares, but if the transfer is not for value, the transferor need not comply unless the purchaser pays the necessary expenses. If the transferor fails within a reasonable time to comply with the demand, the purchaser may reject or rescind the transfer [*Com. Code § 8307*].

[6] Notice of Adverse Claims

[a] In General

"Adverse claim" means a claim that the claimant has a property interest in the shares and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the shares [*Com. Code § 8102(a)(1)*]. A person has notice of an adverse claim if any of the following conditions is satisfied [*Com. Code § 8105(a)*; *see Com. Code §§ 1202, 8102(c)* (person having knowledge or actual notification of fact or reason to know it has notice of that fact)]:

- The person knows of the adverse claim.

- The person is aware of facts sufficient to indicate that there is a significant probability that the adverse claim exists, and he or she deliberately avoids information that would establish the existence of the adverse claim [*see Decker v. Yorkton Securities, Inc. (2003) 106 Cal. App. 4th 1315, 1322-1324, 1327, 131 Cal. Rptr. 2d 645* (in case involving stolen certificate, court held that *Com. Code § 8105(a)(2)* sets forth subjective standard; introducing broker does not have actual notice of adverse claim unless it believes there is significant probability of adverse claim and nevertheless deliberately avoids further information that would confirm its suspicion)].

- The person has a duty, imposed by statute or regulation, to investigate whether an adverse claim exists, and the required investigation would establish the existence of the adverse claim.

Filing of a financing statement under Division 9 [*Com. Code § 9101 et seq.*], governing secured transactions in certain personal property, is not notice of an adverse claim to shares [*Com. Code § 8105(e)*].

[b] Purchaser of Certificated Shares

A purchaser of certificated shares has notice of an adverse claim if either of the following conditions is satisfied [*Com. Code § 8105(d)*]:

- Whether in bearer form or registered form, the certificate has been endorsed "for collection" or "for surrender" or for some other purpose not involving transfer.

- The certificate is in bearer form and has on it an unambiguous statement that it is the property of a person other than the transferor. However, the mere writing of a name on the certificate is not such a statement.

[c] Transfer by Representative

A person having knowledge that a representative has transferred or will transfer shares or an interest in shares has no consequent duty of inquiry into the rightfulness of the transaction, and that knowledge is not notice of an adverse claim. However, a person who knows that a representative has transferred shares or an interest in shares in a transaction that is, or whose proceeds are being used, for the individual benefit of the representative or otherwise in breach of duty has notice of an adverse claim [*Com. Code § 8105(b)*].

[7] Illegality as Defense to Action for Price

An action to recover the purchase price of shares tendered to the purchaser may be defended on the basis of the contract's illegality becauseof the seller's failure to comply with the Corporate Securities Law [*Corp. Code § 25000 et seq.*]. It is unlawful for any person to offer or sell securities in California in any nonissuer transaction [*see Corp. Code § 25011*] unless the securities are qualified for sale, exempt from qualification, or not subject to qualification, under the Corporate Securities Law [*Corp. Code § 25130*; *see Corp. Code §§ 25100, 25100.1, 25101, 25101.1, 25102.1, 25104* (exempt securities and securities not subject to qualification); *10 Cal. Code Reg § 260.105 et seq.*]. Although by far the largest number of nonissuer transactions involve offers and sales of publicly held shares and are therefore exempt from qualification [*see Corp. Code § 25101*] or not subject to qualification [*see Corp. Code § 25101.1*] (or are conducted through brokers, and the purchaser's liability is on his or her account with the broker), transactions involving shares that are not publicly held may require qualification. For example, a shareholder may sell his or her shares in a closely held corporation for his or her own account, but the sale will be exempt only if it is not accompanied by the publication of any advertisement and is not effected by or through a broker-dealer in a public offering [Corp. Code § 24104(a)]. Moreover, even if the sale is exempt as a private sale, the shares may be subject to a currently effective legend condition requiring that the Commissioner of Corporations consent to a transfer. It is unlawful to consummate the sale or transfer of such shares without first obtaining the Commissioner's consent [*Corp. Code § 25133*].

For forms for affirmative defenses based on illegality under the Corporate Securities Law, see §§ 161.41, 161.42. For additional discussion and forms related to the purchaser's actions against the seller for violations of the Corporate Securities Law, see Ch. 515, *Securities and Franchise Regulation* .

[8] Purchaser's Right to Specific Performance

If the shares that are the subject of a purchase contract represent control of the corporation or otherwise have a peculiar value for the purchaser and are not readily available on the open market, the contract may be specifically enforceable [*Kaneko v. Okuda (1961) 195 Cal. App. 2d 217, 235, 15 Cal. Rptr. 792* ; *Glascock v. Sukumlyn (1955) 131 Cal. App. 2d 587, 592-593, 281 P.2d 90]* . Generally the purchaser must prove tender of performance conforming to the terms of the contract [*Glascock v. Sukumlyn (1955) 131 Cal. App. 2d 587, 594, 281 P.2d 90]* . Specific performance will not be withheld in a case of a nonconforming tender of performance, however, if the variance from the terms of the contract is unavoidable [*see Addiego v. Hill (1965) 238 Cal. App. 2d 842, 847, 48 Cal. Rptr. 240]* or the tendered performance constituted substantial performance based on a mistaken interpretation of the terms [*see Piedmont Publishing Co. v. Rogers (1961) 193 Cal. App. 2d 171, 192, 14 Cal. Rptr. 133* (mistake in computation under buy-out formula made by independent accountant was not fatal to action for specific performance)]. On the other hand, an option providing that "all" of the optionor's shares would be purchased did not entitle the optionee to elect to purchase only some of the optionor's shares [*Stewart Title Co. v. Herbert (1970) 6 Cal. App. 3d 957, 962-963, 96 Cal. Rptr. 631]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersTransfers of SharesCommercial Law (UCC)Investment Securities (Article 8)Indorsement, Instructions & Entitlement OrdersCommercial Law (UCC)Investment Securities (Article 8)PurchasersCommercial Law (UCC)Investment Securities (Article 8)Security CertificatesCommercial Law (UCC)Investment Securities (Article 8)Transfers

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California Forms of Pleading and Practice--Annotated

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Volume 14: Corporations: Capacity thru Corporations: Dissolution and Winding Up-Chs. 160-173
Chapter 163 CORPORATIONS: TRANSFERS OF SHARES
PART II. LEGAL BACKGROUND

14-163 California Forms of Pleading and Practice--Annotated § 163.12

§ 163.12 Restrictions on Transfer

[1] How Imposed

[a] By Corporation

Reasonable restrictions on the right to transfer or hypothecate shares of any class or classes or series may be imposed by the articles of incorporation, but no restriction will be binding with respect to shares issued before the adoption of the restriction unless the holders of those shares voted in favor of the restriction [*Corp. Code § 204(b)*]. Restrictions also may be imposed by a bylaw provision [*Corp. Code § 212(b)(1)*].

The share certificates of a close corporation [*see generally Corp. Code § 158*] must contain, in addition to other statements allowed or required, a statement that a transfer is void if it would increase the number of shareholders above the number authorized by the articles [*Corp. Code § 418(c)*; *see Corp. Code § 418(d)* (attempted voluntary inter vivos transfer of legended shares that would result in number of shareholders exceeding maximum number specified in articles is void); *see also Corp. Code § 158(a)* (requirement that articles must specify number of shareholders)].

Closely held corporations taking advantage of the exemption from qualification under the Corporate Securities Law [*see generally Corp. Code § 25102(h)*] must require each purchaser to represent that the purchaser is purchasing for the purchaser's own account, or for a trust account if the purchaser is a trustee, and not with a view to, or for sale in connection with, any distribution of the shares [*Corp. Code § 25102(h)(5)*].

[b] By Shareholders

Restrictions on transfer, including the terms for purchasing a deceased or withdrawing shareholder's shares, may be the subject of an agreement between the shareholders [*see, e.g., Addiego v. Hill (1968) 268 Cal. App. 2d 280, 288-289, 73 Cal. Rptr. 901* (upholding restriction giving remaining shareholders right of first refusal to purchase shares)] or between the corporation and the shareholders [*see, e.g., Yeng Sue Chow v. Levi Strauss & Co. (1975) 49 Cal. App. 3d 315, 322, 122 Cal. Rptr. 816* (upholding repurchase option given to corporation pursuant to employee stock purchase plan)]. Restrictions on transfer are also may appear in statutory shareholders' agreements [*see Corp. Code § 186*], which are written agreements by and between all shareholders of a close corporation [*see Corp. Code § 158*]. Under a buy-sell

agreement (which is merely an executory contract to buy and sell shares), a shareholder is entitled to the benefits of ownership until delivery is made or tendered to the buyer, unless the contract specifies or implies a different intention [*see Stephensen v. Drever (1997) 16 Cal. 4th 1167, 1173-1174, 69 Cal. Rptr. 2d 764, 947 P.2d 1301* (holding that agreement at issue did not imply any intention by parties to deny shareholder his rights during the post-employment period used to determine share value)].

[2] Enforcement

[a] Validity

Reasonable restrictions on transfer may appear in the articles and in the bylaws of the corporation [*Corp. Code §§ 204(b), 212(b)(1)*]. The test of reasonableness has been held to involve two requirements: (1) the restriction must not constitute an unreasonably restrictive curtailment of the right of alienation, and (2) the restriction must not otherwise unreasonably deprive the shareholder of substantial rights [*Tu-Vu Drive-In Corp. v. Ashkins (1964) 61 Cal. 2d 283, 286, 38 Cal. Rptr. 348, 391 P.2d 828]* .

Courts have shown less inclination to inquire into the reasonableness of the price terms of a buy-sell agreement between shareholders, and such agreements have been upheld even when the price at which the selling shareholder was required to sell was alleged to be unfairly low [*Vannucci v. Pedrini (1932) 217 Cal. 138, 144, 17 P.2d 706* ; *Yeng Sue Chow v. Levi Strauss & Co. (1975) 49 Cal. App. 3d 315, 324, 122 Cal. Rptr. 816* ; *Cutter Laboratories, Inc. v. Twining (1963) 221 Cal. App. 2d 302, 316, 34 Cal. Rptr. 317]* . In any event, a bylaw granting a right of first refusal to other shareholders or the corporation does not unreasonably restrict the right of alienation or deprive the owner of substantial rights [*Tu-Vu Drive-In Corp. v. Ashkins (1964) 61 Cal. 2d 283, 286, 38 Cal. Rptr. 348, 391 P.2d 828]* .

However, any restriction on the transfer of shares must be noted conspicuously on the share certificate, or the initial transaction statement and other written statements concerning uncertificated shares, in order to be enforceable against a transferee, including a purchaser from the corporation, unless the transferee or purchaser has actual knowledge of the restriction [*Corp. Code § 418(a), (b)*; *see Com. Code § 8204*; *see also § 163.12[2][d]*].

[b] Specific Performance

A restriction imposed by an agreement between shareholders requiring each shareholder to first offer his or her shares to the corporation or other shareholders may be enforced by an action for specific performance [*Addiego v. Hill (1968) 268 Cal. App. 2d 280, 288, 73 Cal. Rptr. 901* ; *Polinsky v. Vaughan (1968) 268 Cal. App. 2d 183, 187, 73 Cal. Rptr. 764]* . The right to specific performance will not be denied on the ground of inadequate consideration if the purchase money tendered is the wrong amount but the error is based solely on an inadvertent misinterpretation or misapplication of a buy-out formula [*Polinsky v. Vaughan (1968) 268 Cal. App. 2d 183, 195, 73 Cal. Rptr. 764* ; *Piedmont Publishing Co. v. Rogers (1961) 193 Cal. App. 2d 171, 192, 14 Cal. Rptr. 133]* .

If the agreement is between the shareholders and does not involve a right of first refusal on behalf of the corporation, the corporation need not be joined in the action for specific performance [*Piedmont Publishing Co. v. Rogers (1961) 193 Cal. App. 2d 171, 182, 14 Cal. Rptr. 133]* .

The same remedy may be available if the transfer restriction and buy-sell provisions are contained in the bylaws or articles. It has long been held that the bylaws are in the nature of a contract between shareholders and the corporation [*Vannucci v. Pedrini (1932) 217 Cal. 138, 144, 17 P.2d 706* ; *Casady v. Modern Metal Spinning & Mfg. Co. (1961) 188 Cal. App. 2d 728, 733, 10 Cal. Rptr. 790]* , and articles of incorporation have been referred to as part of the contract between the shareholders and the corporation [*Silva v. Coastal Plywood & Timber Co. (1954) 124 Cal. App. 2d 276, 278, 268 P.2d 510]* .

[c] Enforcement Against Transferees

A restriction on transfer imposed by the corporation, even if otherwise lawful, is ineffective against a person without knowledge of the restriction unless the restriction is noted conspicuously on the share certificate or, if the shares are uncertificated, the registered owner has been notified of the restriction [*Com. Code § 8204*; *Corp. Code § 418(b)*; *see Corp. Code § 174* ("on the certificate" defined); *Mancini v. Patrizi (1930) 110 Cal. App. 42, 44-45, 293 P. 828* (transferee of shares subject to transfer restriction of which he had no knowledge and that was not noted on certificate takes shares free of restriction)]. The restriction is conspicuously noted if it is so written, displayed, or presented that a reasonable person against whom it is to operate out to have noticed it. A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size is conspicuous. Language in the body of a record or display in larger type than the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language is conspicuous [*Com. Code §§ 1201(b)(10), 8102(c)*].

In the case of statutory close corporations [*see generally Corp. Code § 158*], restrictions on transfer contained in a shareholders' agreement [*see Corp. Code § 186*] that is filed with the secretary of the corporation are binding on transferees who were not parties to the agreement, provided the existence of the agreement is noted on the share certificate or the purchaser has actual knowledge of the agreement [*Corp. Code § 300(b)*].

[d] Reacquisition by Corporation

If a buy-out agreement is an entity purchase plan, and the corporation is either given first refusal rights or under an obligation to purchase theshares of a terminating or deceased shareholder, the corporation's ability to specifically enforce the agreement could be subject to the defense of illegality [*see Civ. Code § 1667(1)*]. The corporation, in order to purchase the shares, must meet the balance-sheet test or the liquidity test for a distribution [*see generally Corp. Code § 500*] because the reacquisition of a shareholder's shares is a distribution [*see Corp. Code § 166* (definition of distribution to shareholders)] and cannot be legally made unless the applicable test is met [*Corp. Code § 500*].

A shareholder who receives an unlawful distribution with knowledge of the facts of its impropriety is liable to the corporation for the benefit of creditors and other shareholders [*Corp. Code § 506(a)*]. If the shareholder accepted the buy-out payment and later discovered its illegality as a prohibited distribution, the shareholder could rescind the transaction and recover the shares [*Tiedje v. Aluminum Taper Milling Co. (1956) 46 Cal. 2d 450, 454-455, 296 P.2d 554]* .

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For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesCancellation & RedemptionBusiness & Corporate LawCorporationsShareholdersTransfers of SharesCommercial Law (UCC)Investment Securities (Article 8)TransfersContracts LawRemediesSpecific Performance

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Chapter 163 CORPORATIONS: TRANSFERS OF SHARES
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14-163 California Forms of Pleading and Practice--Annotated § 163.13

§ 163.13 Statutory Warranties in Transfers of Shares

[1] Warranties to Purchaser

[a] Transfer of Certificated Shares

A person who transfers certificated shares to a purchaser for value warrants to the purchaser, and an endorser, if the transfer is by endorsement, warrants to any subsequent purchaser, all of the following [*Com. Code § 8108(a)*]:

- The certificate is genuine and has not been materially altered.
- The transferor or endorser does not know of any fact that might impair the validity of the shares.
- There is no adverse claim [*see Com. Code § 8102(a)(1)*; for discussion, *see § 163.11[6][a]*] to the shares.
- The transfer does not violate any restriction on transfer.
- If the transfer is by endorsement, the endorsement is made by an appropriate person [*see Com. Code § 8107(a)*; for discussion, *see § 163.11[4][a]*], or if the endorsement is by an agent, the agent has actual authority to act on behalf of the appropriate person.
- The transfer is otherwise effective and rightful.

[b] Agent's Delivery of Certificate

If a person acts as agent of another in delivering [*see Com. Code § 8301*; for discussion, *see § 163.11[1]*] a share certificate to a purchaser, the agent warrants only that the agent has authority to act for the principal and does not know of any adverse claim [*see Com. Code § 8102(a)(1)*; for discussion, *see § 163.11[6][a]*] to the shares, provided the identity of the principal is known to the person to whom the certificate is delivered, and the certificate delivered by the agent was received by the agent from the principal or received by the agent from another person at the direction of the

principal [*Com. Code § 8108(g)*].

[c] Transfer of Uncertificated Shares

A person who originates an instruction for registration of transfer of uncertificated shares to a purchaser for value warrants to the purchaser all of the following [*Com. Code § 8108(b)*]:

- The instruction is made by an appropriate person [*see generally Com. Code § 8107(a)*; for discussion, *see § 163.11[4][a]*] or, if the instruction is by an agent, the agent has actual authority to act on behalf of the appropriate person.

- The shares are valid.

- There is no adverse claim [*see Com. Code § 8102(a)(1)*; for discussion, *see § 163.11[6][a]*] to the shares.

- At the time the instruction is presented to the corporation, all of the following will be applicable [*Com. Code § 8108(b)(4)*]:

  - The purchaser will be entitled to the registration of transfer.

  - The transfer will be registered by the corporation free from all liens, security interests, restrictions, and claims other than those specified in the instruction.

  - The transfer will not violate any restriction on transfer.

  - The requested transfer will otherwise be effective and rightful.

A person who transfers uncertificated shares to a purchaser for value and does not originate an instruction in connection with the transfer warrants all of the following [*Com. Code § 8108(c)*]:

- The shares are valid.

- There is no adverse claim to the shares.

- The transfer does not violate any restriction on transfer.

- The transfer is otherwise effective and rightful.

[2] Warranties to Issuer

[a] Corporation as Issuer

A person who endorses a share certificate warrants to the issuer, that is, the corporation [*see Com. Code § 8201(a)*], that there is no adverse claim [*see Com. Code § 8102(a)(1)*; for discussion, *see § 163.11[6][a]*] to the shares and that the endorsement is effective [*Com. Code § 8108(d)*].

A person who originates an instruction for registration of transfer of uncertificated shares warrants to the corporation that the instruction is effective and that at the time the instruction is presented to the corporation the purchaser will be entitled to the registration of transfer [*Com. Code § 8108(e)*].

A person who presents a share certificate for registration of transfer warrants to the corporation that the person is entitled to the registration, but a purchaser for value and without notice of adverse claims [*see Com. Code § 8105*; for discussion, *see § 163.11[6][a]*] to whom a transfer is registered warrants only that he or she has no knowledge of any unauthorized signature in a necessary endorsement [*Com. Code § 8108(f)*].

[b] Guarantor as Issuer

With respect to an obligation on or defense to shares, a guarantor is an issuer to the extent of the guaranty, whether or not the guarantor's obligation is noted on a share certificate [*Com. Code § 8201(b)*].

[3] Guarantor's Warranties

[a] Guarantor of Endorser's Signature

A person who guarantees a signature of an endorser of a share certificate warrants that, at the time of signing, all of the following were true [*Com. Code § 8306(a)*]:

- The signature was genuine.

- The signer was an appropriate person [*see Com. Code § 8107(a)*; for discussion, *see § 163.11[4][a]*] to endorse, or if the signature is by an agent, the agent had actual authority to act on behalf of the appropriate person.

- The signer had legal capacity to sign.

The guarantor does not otherwise warrant the rightfulness of the transfer [*Com. Code § 8306(d)*].

[b] Guarantor of Signature of Originator of Instruction

A person who guarantees a signature of the originator of an instruction warrants that at the time of signing all of the following were true [*Com. Code § 8306(b)*]:

- The signature was genuine.

- The signer was an appropriate person [*see Com. Code § 8107(a)*; for discussion, *see § 163.11[4][a]*] to originate the instruction, or if the signature is by an agent, the agent had actual authority to act on behalf of the appropriate person, if the person specified in the instruction as the registered owner was, in fact, the registered owner, as to which fact the signature guarantor does not make a warranty.

- The signer had legal capacity to sign.

A person who specially guarantees the signature of an originator of an instruction makes the foregoing warranties and also warrants that at the time the instruction is presented to the corporation all of the following are true [*Com. Code § 8306(c)*]:

- The person specified in the instruction as the registered owner of the shares will be the registered owner.

- The transfer of the shares requested in the instruction will be registered by the corporation free from all liens, security interests, restrictions, and claims other than those specified in the instruction.

The corporation may not require a special guaranty of signature as a condition to the registration of a transfer [*Com. Code § 8306(g)*].

The guarantor or special guarantor does not otherwise warrant the rightfulness of the transfer [*Com. Code § 8306(d)*].

[c] Guarantor of Endorsement or Instruction

A person who guarantees an endorsement of a share certificate makes the warranties of a signature guarantor [*see Com. Code § 8306(a)*; for discussion, *see* [a], *above*] and also warrants the rightfulness of the transfer in all respects [*Com. Code § 8306(e)*].

A person who guarantees an instruction requesting the transfer of uncertificated shares makes the warranties of a special signature guarantor [*see Com. Code § 8306(c)*; for discussion, *see* [b], *above*] and also warrants the rightfulness of the transfer in all respects [*Com. Code § 8306(f)*].

The corporation may not require a guaranty of endorsement or a guaranty of instruction as a condition to the registration of a transfer [*Com. Code § 8306(g)*].

[d] Liability on Guarantor's Warranty

The warranties of a guarantor are made to a person taking or dealing with the shares in reliance on the guaranty, and the guarantor is liable to the person for loss resulting from their breach. An endorser or originator of an instruction whose signature, endorsement, or instruction has been guaranteed is liable to a guarantor for any loss suffered by the guarantor as a result of breach of the warranties of the guarantor [*Com. Code § 8306(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Investment Securities (Article 8)Indorsement, Instructions & Entitlement OrdersCommercial Law (UCC)Investment Securities (Article 8)Security CertificatesCommercial Law (UCC)Investment Securities (Article 8)Signature GuaranteesCommercial Law (UCC)Investment Securities (Article 8)TransfersCommercial Law (UCC)Investment Securities (Article 8)Warranties

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14-163 California Forms of Pleading and Practice--Annotated § 163.14

§ 163.14 Registration of Transfers

[1] Corporation's Right and Duty

[a] Recognition of Registered Owner

Before due presentment for the registration of a transfer of a share certificate in registered form, or of an instruction requesting the registration of a transfer of uncertificated shares, the corporation may treat the registered owner as the person exclusively entitled to vote, receive notifications, and otherwise exercise all of the rights and powers of an owner [*Com. Code § 8207(a)*].

[b] Duty to Register Transfer

If a share certificate in registered form is presented to the corporation with a request to register a transfer, or an instruction is presented to the corporation with a request to register a transfer of uncertificated shares, the corporation must register the transfer as requested, if the following conditions are satisfied [*Com. Code § 8401(a)*]:

- Under the terms of the shares, the person seeking registration of the transfer is eligible to have the shares registered in that person's name.

- The endorsement or instruction is made by an appropriate person [*Com. Code § 8107(a)*] or by an agent who has actual authority to act on behalf of an appropriate person.

- Reasonable assurance is given, if the corporation requires reasonable assurance [*see generally Com. Code § 8402*; for discussion, *see* [2], *below*], that the endorsement or instruction is genuine and authorized.

- Any applicable law relating to the collection of taxes has been complied with.

- The transfer does not violate any restriction on transfer imposed by the corporation in accordance with statutory provisions [*see Com. Code § 8204*; for discussion, *see § 163.12*].

- A demand that the corporation not register the transfer has not become effective [*see Com. Code § 8403*; for discussion, *see* [3], *below*]; or the corporation has complied with a statutory requirement to give notice of such a demand [*see Com. Code § 8403(b)*; for discussion, *see* [3][b], *below*], but no legal process or indemnity bond has been obtained as a result [*see Com. Code § 8403(d)*; for discussion, *see* [3][c], *below*].

- The transfer is in fact rightful or is to a protected purchaser [*see generally Com. Code § 8303*; for discussion, *see § 163.11[1][c]*].

For a form of complaint to compel a corporation to register a transfer of shares, see *§ 163.45*.

[2] Corporation's Requirement of Assurance

The corporation may require any reasonable assurance [*see Com. Code § 8402(b)*], and specifically the following assurances, that each necessary endorsement or each instruction is genuine and authorized [*Com. Code § 8402(a)*]:

- In all cases, a guaranty of the signature of the person making an endorsement or originating the instruction [*see generally § 163.13[3][a], [b]* (guarantor's warranties)], including, in the case of an instruction, reasonable assurance of identity. "Guaranty of the signature" means a guaranty signed by or on behalf of a person reasonably believed by the corporation to be responsible. The corporation may adopt standards with respect to responsibility if they are not manifestly unreasonable [*Com. Code § 8402(c)(1)*].

- If the endorsement is made or the instruction is originated by an agent, appropriate assurance of actual authority to sign.

- If the endorsement is made or the instruction is originated by a fiduciary for a decedent's estate or an incapacitated person [*see generally Com. Code § 8107(a)(4), (5)*], appropriate evidence of appointment or incumbency. "Appropriate evidence of appointment or incumbency" means [*Com. Code § 8402(c)(2)*]:

  - In the case of a fiduciary appointed or qualified by a court, a certificate issued by or under the direction or supervision of the court or an officer of the court and dated within 60 days before the date of presentation for transfer.

  - In any other case, a copy of a document showing the appointment or a certificate issued by or on behalf of a person reasonably believed by the corporation to be responsible or, in the absence of that document or certificate, other evidence that the corporation reasonably considers appropriate.

- If there is more than one fiduciary, reasonable assurance that all who are required to sign have signed.

- If the endorsement is made or the instruction is originated by a person not covered by one of the foregoing alternatives, assurance appropriate to the case corresponding as nearly as may be to the foregoing alternatives.

[3] Demand to Withhold Registration

[a] Making of Demand

A person who is an appropriate person [*see Com. Code § 8107(a)*; for discussion, *see § 163.12[4][a]*] to make an endorsement or originate an instruction may demand that the corporation not register a transfer of shares. The demand is to be made by communicating [*see Com. Code § 8102(a)(6)* ("communicate" means to send signed writing unless parties have agreed otherwise)] to the corporation a notification that identifies the registered owner and the issue of which the shares are part, and provides an address for communications directed to the person making the demand. The demand is effective only if it is received by the corporation at a time and in a manner affording the corporation a reasonable opportunity to act on it [*Com. Code § 8403(a)*].

The demand is commonly referred to as a stop-transfer notice. Under prior and similar provisions of law, it was held that a stop-transfer notice was adequate if it informed the corporation of all facts known to the owner at the time the notice was sent [*Ibanez v. Farmers Underwriters Asso. (1975) 14 Cal. 3d 390, 397, 121 Cal. Rptr. 256, 534 P.2d 1336]* .

[b] Notification That Demand Was Made

If, after a stop-transfer notice has become effective, a share certificate in registered form is presented to the corporation with a request to register a transfer, or an instruction is presented to the corporation with a request to register a transfer of uncertificated shares, the corporation must promptly communicate [*see Com. Code § 8102(a)(6)* ("communicate" means to send signed writing unless parties have agreed otherwise)] to both the person who initiated the demand, at the address provided in the demand, and the person who presented the share certificate for registration of transfer or initiated the instruction requesting registration of transfer, a notification stating all of the following [*Com. Code § 8403(b)*]:

- The fact that the share certificate has been presented for registration of a transfer, or the instruction for registration of a transfer of the uncertificated shares has been received.

- The fact that a demand that the corporation not register the transfer was previously received.

- A statement that the corporation will withhold registration of the transfer for a period of time stated in the notification, in order to provide the person who initiated the demand an opportunity to obtain legal process or an indemnity bond [*see* [c], *below*]. The stated period may not exceed 30 days after the date of communication of the notification, but the corporation may specify a shorter period if that period is not manifestly unreasonable [*Com. Code § 8403(c)*].

[c] Corporation's Relief From Liability

The corporation is not liable to a person who initiated a stop-transfer notice [*see* [b], *above*] for any loss the person suffers as a result of registration of a transfer pursuant to an effective endorsement or instruction, if the person who initiated the notice fails, within the time stated in the corporation's communication, to take one of the following steps [*Com. Code § 8403(d)*]:

- Obtain an appropriate restraining order, injunction, or other process from a court of competent jurisdiction enjoining the corporation from registering the transfer.

- File with the corporation an indemnity bond that is sufficient, in the corporation's judgment, to protect the corporation and any transfer agent, registrar, or other involved agent of the corporation from any loss that may be suffered by refusing to register the transfer.

The corporation is not relieved from liability for registering a transfer pursuant to an endorsement or instruction that was not effective [*Com. Code § 8403(e)*].

[4] Wrongful Refusal or Failure to Register

[a] Corporation's Liability

If the corporation is under a duty to register a transfer of shares [*see* [1][b], *above*], the corporation is liable to a person presenting a share certificate or an instruction for registration, or to the person's principal, for loss resulting from an unreasonable delay in registration or a failure or refusal to register the transfer [*Com. Code § 8401(b)*].

[b] Corporation Officer's Penalty

If a corporate officer is charged with the duty of entering a transfer of shares on the books of the corporation and issuing a share certificate, and the officer unreasonably neglects, fails, or refuses to perform that duty after written request by any person entitled to the entry, the officer will be subject to a penalty of $100 plus $10 for each day the default continues, beginning five days after receipt of the request, up to a maximum of $500 [*Corp. Code § 2201*]. Every director or other officer unreasonably causing the neglect, failure, or refusal is subject to a like penalty [*Corp. Code § 2201*]. The penalty must be paid to each person aggrieved, is enforceable by action, and is in addition to all other remedies by way of injunction, mandate, or action for damages [*Corp. Code §§ 2201, 2202*]. For a form of complaint stating a cause of action for a penalty, see *§ 163.45*.

The court in which the action for a penalty is brought may reduce, remit, or suspend the penalty on such terms and conditions as the court may deem reasonable, when the neglect, failure, or refusal was inadvertent or excusable [*Corp. Code § 2202*].

Officers are not liable for a refusal to register a transfer of shares that the transferee acquired with knowledge that they had been transferred in violation of a bylaw restricting their transfer [*Vannucci v. Pedrini (1932) 217 Cal. 138, 143, 17 P.2d 706]* .

[5] Wrongful Registration of Transfer

[a] Corporation's Liability

Except in certain cases [*see* [b], [c], *below*], the corporation is liable for wrongful registration of a transfer if the corporation registered a transfer of shares to a person not entitled to them, in any of the following circumstances [*Com. Code § 8404(a)*]:

- Pursuant to an ineffective endorsement or instruction [*see generally Com. Code § 8107* (effectiveness of endorsement or instruction); for discussion, *see § 163.11[4]*].

- If the corporation received a demand not to register the transfer, that demand became effective [*see generally Com. Code § 8403(a)*; for discussion, *see* [3][a], *above*], and the corporation did not duly communicate a notification that the demand was made [*see generally Com. Code § 8403(b)*; for discussion, *see* [3][b], *above*]

- After the corporation was served with an injunction, restraining order, or other legal process enjoining it from registering the transfer, issued by a court of competent jurisdiction, if the corporation had a reasonable opportunity to act on the injunction, restraining order, or other legal process.

- By the corporation acting in collusion with the wrongdoer.

Except as otherwise stated above or provided in the law relating to the collection of taxes, the corporation is not liable to an owner or other person suffering loss as a result of the registration of a transfer of shares if registration was made pursuant to an effective endorsement or instruction [*Com. Code § 8404(c)*].

If the corporation is liable, then on demand the corporation must provide the person entitled to the shares with like shares and any payments or distributions that the person did not receive as a result of the wrongful registration [*Com. Code § 8404(b)*]. However, if an overissue would result, the corporation's liability to provide the person with like shares is governed by the rules on overissue [*see Com. Code § 8210*]. For discussion of the problem of overissue, see *Ch. 162, Corporations: Issuance of Shares, § 162.11*.

[b] Exception for Missing Certificate

If a share certificate has been lost, apparently destroyed, or wrongfully taken, but the owner fails to notify the corporation of that fact within a reasonable time after the owner has notice of it, and the corporation registers a transfer of the shares before receiving notification, then the owner may not assert a claim against the corporation for registering a transfer of the shares [*Com. Code § 8406*]. For discussion of the owner's right to obtain a replacement certificate, see *Ch. 162, Corporations: Issuance of Shares, § 162.13*.

[c] Exceptions Under General Corporation Law

Neither a domestic corporation or foreign corporation, nor its transfer agent or registrar, is liable in any of the following situations:

- For transferring or causing to be transferred on the books of the corporation to the surviving joint tenant or tenants any shares issued to two or more persons in joint tenancy, whether or not the transfer is made with actual or constructive knowledge of the existence of any understanding, agreement, condition, or evidence that the shares were held otherwise than in joint tenancy or evidence of a breach of trust by any joint tenant [*Corp. Code § 420(a)*].

- To a minor or incompetent person in whose name shares are of record on its books, or to any transferee from or transferor to the minor or incompetent person, for transferring the shares on its books at the request of the minor or incompetent person or to the minor or incompetent person or for recognizing or dealing with the minor or incompetent person as a shareholder, whether or not the corporation, transfer agent, or registrar had actual or constructive notice of the minority or incompetency, unless a guardian or conservator of the property of the minor or incompetent person has been appointed and the corporation, transfer agent, or registrar has received written notice of the appointment [*Corp. Code § 420(b)*].

- To any married person or to any transferee from a married person, for transferring shares on its books at the request of the person in whose name they are registered, in the same manner as if the person were unmarried, without the signature of the person's spouse, regardless of whether the registration indicates that the shares are community property [*Corp. Code § 420(c)*].

- For transferring shares or causing shares to be transferred on the books of the corporation pursuant to a judgment or order of a court that has been set aside, modified, or reversed, unless, before the registration of the transfer on the books of the corporation, written notice is served on the corporation or its transfer agent, in the mannerprovided by law for the service of a summons in a civil action, stating that an appeal or other further court proceeding has been or is to be taken from or with regard to the judgment or order [*Corp. Code § 420(d)*].

After the service of the notice referred to above, neither the corporation nor its transfer agent has any duty to register the requested transfer until the corporation or its transfer agent has received a certificate of the county clerk of the county in which the judgment or order was made, showing that the judgment or order has become final [*Corp. Code § 420(d)*].

The provisions of the Commercial Code do not affect the foregoing limitations and liability. Provisions of the Family Code governing management of community property [*see Fam. Code § 1100*] are subject to the foregoing limitations and liability, and may not be construed to prevent transfers, or result in liability to the corporation, transfer agent, or registrar permitting or effecting transfers, in compliance with *Corp. Code § 420* [*Corp. Code § 420(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesGeneral OverviewCommercial Law (UCC)Investment Securities (Article 8)Indorsement, Instructions & Entitlement OrdersCommercial Law (UCC)Investment Securities (Article 8)Issuer DutiesCommercial Law (UCC)Investment Securities (Article 8)RegistrationCommercial Law (UCC)Investment Securities (Article 8)Transfers

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14-163 California Forms of Pleading and Practice--Annotated § 163.15

§ 163.15 Actions Based on Transfers of Shares

[1] Statute of Frauds

A contract or modification of a contract for the sale or purchase of shares is enforceable whether or not there is a writing signed or record authenticated by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one year of its making [*Com. Code § 8113*].

For a form for a complaint to recover the purchase price of shares sold, see *§ 163.40*. For forms for affirmative defenses based on illegality of the sale contract under the Corporate Securities Law, see *§§ 163.41*, *163.42*. For a form for a complaint for specific performance of a contract to sell shares, see *§ 163.43*. For a form for a complaint for specific performance of an option to repurchase sold shares, see *§ 163.44*.

[2] Liability of Transfer Agent

A person acting as authenticating trustee, transfer agent, registrar, or other agent for the corporation in the registration of a transfer of shares or in the cancellation of surrendered share certificates has the same obligation to the holder or owner of the shares, with regard to the particular functions performed, as the corporation has in regard to those functions [*Com. Code § 8407*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersTransfers of SharesCommercial Law (UCC)Investment Securities (Article 8)Securities IntermediariesCommercial Law (UCC)Investment Securities (Article 8)TransfersContracts LawStatutes of FraudsGeneral Overview

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[Reserved]

§§ 163.16[Reserved]

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14-163 California Forms of Pleading and Practice--Annotated § 163.30

§ 163.30 Related Matthew Bender Publications

Ballantine & Sterling, California Corporation Laws (Matthew Bender) Ch. 10, *Transfer and Registration of Securities*

Ch. 21, *Corporate Securities Law*

Marsh & Volk, Practice Under The California Securities Laws (Matthew Bender)

Ch. 10, *Nonissuer Transactions*

Ch. 11, *Transfer of Securities Subject to Legend or Escrow Condition*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersTransfers of SharesCommercial Law (UCC)Investment Securities (Article 8)Transfers

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14-163 California Forms of Pleading and Practice--Annotated § 163.31

§ 163.31 State Statutes

[1] Definitions

Adverse claim. *Com. Code § 8102(a)(1)*

Appropriate person. *Com. Code § 8107(a)*

Bearer form. *Com. Code § 8102(a)(2)*

Certificated security. *Com. Code § 8102(a)(4)*

Close corporation. *Corp. Code § 158*

Conspicuous. *Com. Code § 1201(b)(10)*

Delivery. *Com. Code § 1201(b)(15)*

Distribution to shareholders. *Corp. Code § 166*

Good faith. *Com. Code § 1201(b)(20)*

Notice. *Com. Code § 1202*

On the certificate. *Corp. Code § 174*

Registered form. *Com. Code § 8102(a)(13)*

Security. *Com. Code § 8102(a)(15)*

Shareholders' agreement. *Corp. Code § 186*

Unauthorized signature. *Com. Code § 1201*)(b)(41)

Uncertificated security. *Com. Code § 8102(a)(18)*

Value. *Com. Code § 1204*

[2] Levy of Attachment on Shares

Validity of levy of attachment on certificated and uncertificated shares. *Code Civ. Proc. § 488.450*; *Com. Code § 8112*

[3] Lost, Destroyed, or Stolen Share Certificate

When issuer must issue a replacement security. *Com. Code § 8405*

Action to compel issuance of replacement security. *Corp. Code § 419*

[4] Qualification of Shares and Transactions

Nonissuer transaction defined. *Corp. Code § 25011*

Exemption of securities or transactions from qualification requirements. *Corp. Code § 25100 et seq.*

Qualification or exemption is required for nonissuer transactions that are subject to qualification. *Corp. Code § 25130*

Requirement to obtain consent of Commissioner of Corporations before transfer of legended securities. *Corp. Code § 25133*

[5] Registration of Transfers

Corporation's duty to register transfer. *Com. Code § 8401(a)*

Liability for wrongful refusal or failure to register. *Com. Code § 8401(b)*

Right to require assurances. *Com. Code § 8402*

Demand to withhold registration of transfer. *Com. Code § 8403*

Liability for wrongful registration of transfer. *Com. Code § 8404*

Penalty of officers and directors for failure or refusal to register transfer. *Corp. Code §§ 2201, 2202*

[6] Transfer of Shares

Delivery. *Com. Code § 8301*

Rights of purchaser on delivery. *Com. Code § 8302*

Rights of protected purchaser. *Com. Code § 8303*

Endorsement of share certificate. *Com. Code § 8304*

Instruction for transfer of uncertificated shares. *Com. Code § 8305*

Guaranty of endorser's signature. *Com. Code § 8306(a)*

Guaranty and special guaranty of signature of originator of instruction. *Com. Code § 8306(b), (c)*

Guaranty of endorsement. *Com. Code § 8306(e)*

Guaranty of instruction. *Com. Code § 8306(f)*

Limitation on requiring guaranties. *Com. Code § 8306(g)*

Proof of transferor's authority to transfer shares. *Com. Code § 8307*

[7] Transfer Restrictions

Transfer restrictions imposed by articles or bylaws. *Corp. Code §§ 204, 212*

Transferee of close corporation shares is bound by contents of shareholders' agreement. *Corp. Code § 300(b)*

When restrictions on transfer bind transferees. *Corp. Code § 418(b)*; *Com. Code § 8204*

Legend condition restricting transfer of close corporation shares. *Corp. Code § 418(d)*

Legend condition restricting transfer of shares issued pursuant to small offering exemption. *Corp. Code § 25102(h)(1)*

[8] Administrative Regulations

Contents of legend condition restricting transfer. *10 Cal. Code Reg § 260.141.11*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersTransfers of SharesCommercial Law (UCC)Investment Securities (Article 8)DeliveryCommercial Law (UCC)Investment Securities (Article 8)PurchasersCommercial Law (UCC)Investment Securities (Article 8)RegistrationCommercial Law (UCC)Investment Securities (Article 8)Transfers

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14-163 California Forms of Pleading and Practice--Annotated § 163.32

§ 163.32 Decisions

[1] Contracts to Purchase Shares

In action by terminated executive for breach of contract and fraud after former employer refused to allow exercise of stock options a year after termination, stock option agreements provided that options would not vest after termination and had to be exercised within 30 days of termination or ceased to be exercisable, and agreements were not altered by severance agreement. *Barton v. Elexsys International Inc. (1998) 62 Cal. App. 4th 1182, 1188, 1189, 73 Cal. Rptr. 2d 212*

Option granted to corporation to repurchase shares issued to employee pursuant to stock option plan was not void for want of mutuality and was contract of adhesion. *Yeng Sue Chow v. Levi Strauss & Co. (1975) 49 Cal. App. 3d 315, 324-325, 122 Cal. Rptr. 816*

Enforceability of stock options granted to employees if employee continues employment knowing of options. *Newberger v. Rifkind (1972) 28 Cal. App. 3d 1070, 1073, 104 Cal. Rptr. 663*

When offer under option contract is rejected, party rejecting is not allowed subsequently to accept offer and thereby convert it to agreement by acceptance; well settled rule is that attempt to exercise option on terms varying from those offered is tantamount to rejection of original offer and is the making of counteroffer, but rule is not applied when optionor in original offer, or optionee in counteroffer, states that in spite of counteroffer, original offer will not be terminated. *Landberg v. Landberg (1972) 24 Cal. App. 3d 742, 757, 101 Cal. Rptr. 335*

Interest on purchase price but not exceeding increase in proportional net worth of corporation attributable to shares of sellers was awardable incident to decree for specific performance of agreement to sell shares of close corporation. *Addiego v. Hill (1971) 17 Cal. App. 3d 453, 461-462, 95 Cal. Rptr. 151*

Order enjoining defendants from all activities in connection with corporation was proper pending appeal of decree of specific performance of agreement to sell control shares, defendants having threatened to drain all cash from corporation during pendency of appeal. *Addiego v. Hill (1968) 268 Cal. App. 2d 280, 289, 73 Cal. Rptr. 901*

Improper determination by independent accountants of value of shares to be sold under option did not preclude specific performance of option agreement to sell shares. *Polinsky v. Vaughan (1968) 268 Cal. App. 2d 183, 193, 73 Cal. Rptr. 764* ; *Piedmont Publishing Co. v. Rogers (1961) 193 Cal. App. 2d 171, 191-192, 14 Cal. Rptr. 133*

[2] Financing Share Transfers

Code Civ. Proc. § 580b (barring deficiency judgments after foreclosure of real property purchase-money mortgage) is not applicable to deed of trust given by acquired entity pledging its real property to secure note taken by seller of all of acquired entity's shares; transaction having been structured as purchase of shares by individuals, those individuals' liability is not affected by fact that acquired corporation later pledged its assets. *Union Bank v. Anderson (1991) 232 Cal. App. 3d 941, 949-950, 283 Cal. Rptr. 823*

[3] Notice of Adverse Claims

If circumstances justify conclusion that failure to make inquiry arose from suspicion that inquiry would disclose vice or defect in instrument or transaction, purchaser is charged with knowledge. *Christian v. California Bank (1947) 30 Cal. 2d 421, 425, 182 P.2d 554*

Com. Code § 8105(a)(2) sets forth subjective standard; in case involving stolen certificate, introducing broker held not to have had actual notice of adverse claim unless it believed there was significant probability of adverse claim and nevertheless deliberately avoided further information that would confirm its suspicion; no reasonable jury could find that brokers believed there was significant probability of adverse claim. *Decker v. Yorkton Securities, Inc. (2003) 106 Cal. App. 4th 1315, 1322-1324, 1327, 131 Cal. Rptr. 2d 645*

Generally, whether person has notice of adverse claim is question of mere knowledge of facts sufficient to put prudent person on inquiry, without actual knowledge; mere suspicion of infirmity or defect of title does not preclude purchaser from being bona fide purchaser unless circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith. *Popp v. Exchange Bank (1922) 189 Cal. 296, 303, 208 P. 113*

Lender that accepted stolen share certificates as collateral had reason to know they were stolen, and lender's claim to bona fide purchaser status was rejected. *Hollywood Nat. Bank v. International Business Machines Corp. (1974) 38 Cal. App. 3d 607, 613-615, 113 Cal. Rptr. 494*

[4] Transfer Restrictions

Provision for division of shares in marital property settlement agreement could not be specifically enforced although shares were subject to transfer restriction, since neither corporation nor other shareholders were parties to settlement agreement. *Casady v. Modern Metal Spinning & Mfg. Co. (1961) 188 Cal. App. 2d 728, 732-733, 10 Cal. Rptr. 790*

[5] Violation of Bylaws

Owner of half of pharmacy corporation's shares, who intended to sell all of those shares, had fiduciary duty to owner of other half not to violate bylaw giving right of first refusal to buy those shares or bylaw forbidding transfer of shares to anyone else for price lower, or on terms more favorable, than price and terms stated in notice of intent to sell. *Le v. Pham (2010) 180 Cal. App. 4th 1201, 1207-1212, 103 Cal. Rptr. 3d 606*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersTransfers of SharesCommercial Law (UCC)Investment Securities (Article 8)PurchasersCommercial Law (UCC)Investment Securities (Article 8)Transfers

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14-163 California Forms of Pleading and Practice--Annotated § 163.33

§ 163.33 Law Reviews

Berger, *Protection of Shareholder Interests in California Closely Held and Statutory Close Corporations: A Practitioner's Guide*, *20 Pac. L.J. 1127 (1989)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGeneral Overview

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§ 163.34 Text References

Witkin, Summary of California Law, vol. 9, *Corporations*, §§ 129-146 (10th ed. 2005)

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[Reserved]

§§ 163.35[Reserved]

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PART IV. FORMS

14-163 California Forms of Pleading and Practice--Annotated § 163.40

§ 163.40 Complaint to Recover Purchase Price of Shares--By Seller Against Purchaser

[1] FORM Complaint to Recover Purchase Price of Shares--By Seller Against Purchaser

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT
_____ [*name*],	)	(Breach of Contract)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. _____ [*Allege capacity and residence of defendant, e.g.,* Defendant is a resident of (the _____ [*name of district*] Judicial District in) _____ County, California].

2. On _____ [*date*], plaintiff agreed to sell to defendant and defendant agreed to purchase from plaintiff _____ [*number*] shares of the capital stock of _____ [*name of corporation*], a _____ [*e.g.,* California] corporation, at a purchase price of $_____, payable as follows: _____ [*set forth payment terms*]. Under that agreement, _____ [*set forth terms regarding possession, control, and delivery of shares pending full payment, e.g.,* plaintiff is entitled to retain possession of all of the shares, and has the right to exercise all voting rights on the shares, until the entire purchase price is paid. If defendant defaults in any of the payments when due, or otherwise breaches any of the provisions of the agreement, plaintiff has the option of declaring the entire unpaid balance due and payable after giving defendant 10 days written notice and demand to cure the default]. A copy of the agreement is attached as Exhibit A and

made part of this pleading.

3. On _____ [*date*], an installment of the purchase price in the amount of $_____ became due and payable under the agreement. Defendant failed to pay any part of it and defaulted on the agreement.

4. _____ [*Set forth conditions under agreement rendering full amount of price due and payable, e.g.,* On _____ (*date*), plaintiff gave written notice to defendant that defendant was in default under the agreement andthat plaintiff the entire unpaid balance of the purchase price was immediately due and payable if the default was not cured by payment of the delinquent installment within 10 days after the notice. Defendant failed to pay the installment within the 10-day period].

5. The unpaid amount of the purchase price is $_____ and is now due from defendant.

6. Plaintiff tendered all of the shares to defendant on _____ [*date*] and demanded that defendant pay to plaintiff the sum of $_____. Defendant failed and refused, and continues to fail and refuse, to pay that sum.

[7. Plaintiff has incurred reasonable attorney's fees in the sum of $_____ in connection with prosecuting this action.]

WHEREFORE, plaintiff prays judgment as follows:

1. For payment of the sum of $_____;

[2. For attorney's fees in the sum of $_____;]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The complaint in [1], *above*, is for use by a seller of shares to recover the purchase price from the buyer. This form illustrates the language appropriate to a complaint based on an installment contract.

[3] Allegations

The complaint alleges the following facts constituting the cause of action:

- The making of the purchase agreement and its material terms (Paragraph 2).
- The defendant's failure to pay the price according to the agreement (Paragraphs 3-5).
- The plaintiff's tender of the shares to the defendant and the defendant's refusal to pay (Paragraph 6).

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*]. In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the first paper must state whether the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[5] Venue

Ordinarily, the action may be commenced in any of the following counties [*Code Civ. Proc. § 395(a)*]:

- The county where any defendant resides at the commencement of the action; or
- If a defendant contracted to perform the obligation, on which the action is founded, in a particular county, then either:
    - The county where the obligation is to be performed, or
    - The county where the contract in fact was entered into.

In special cases, other counties also may be proper [*see, e.g., Code Civ. Proc. § 395(b)* (action arising from consumer transaction); *Code Civ. Proc. § 395.1* (action against executor, administrator, guardian, or trustee); *Code Civ. Proc. § 395.2* (action against unincorporated association)]. When a corporation is the defendant, the action may be filed in the county where the obligation or liability arose or the county in which the corporation's principal place of business is situated [*Code Civ. Proc. § 395.5*].

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the

defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, as well as fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For forms and discussion regarding actions to reform contracts, see Ch. 488, *Reformation of Instruments*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For allegations showing proper venue, see Ch. 571, *Venue* , Pt. I

For alternative forms for verification, see Ch. 572, *Verification*

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14-163 California Forms of Pleading and Practice--Annotated § 163.41

§ 163.41 Affirmative Defense to Action to Recover Purchase Price of Shares--Illegal Contract [Civ. Code § 1667(1)]--Noncompliance With Qualification Requirement Under Corporate Securities Law [Corp. Code § 25130]

[1] FORM Affirmative Defense to Action to Recover Purchase Price of Shares--Illegal Contract [Civ. Code § 1667(1)]--Noncompliance With Qualification Requirement Under Corporate Securities Law [Corp. Code § 25130]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the contract alleged in the complaint is unenforceable. The offer and sale of the shares that are the subject of the contract were not qualified by the Commissioner of Corporations as required by *Corporations Code Section 25130*. The offer and sale are subject to qualification, and no exemption from qualification is provided, under the Corporate Securities Law.

[2] Use of Form

The affirmative defense in [1], *above*, may be asserted in an action to recover the purchase price of shares. The defense is based on illegality of the contract [*Civ. Code § 1667*] for failure of the seller (the plaintiff) to comply with the qualification requirements of the Corporate Securities Law [*see generally Corp. Code § 25000 et seq.*], assuming that the offer and sale of the shares would be subject to qualification and that no exemption from qualification exists. For discussion of the qualification requirements, see *§ 163.11[7]* and Ch. 515, *Securities and Franchise Regulation* .

This defense would be appropriate only if the contract was wholly executory; that is, if the defendant has not yet paid any consideration for the shares. If the defendant has made partial payment, he or she is left to the remedy under the Corporate Securities Law and could seek rescission and restitution [*see Corp. Code § 25503*]. For a discussion and forms related to actions for rescission of transactions that violate of the Corporate Securities Law, see Ch. 515, *Securities and Franchise Regulation* .

For discussion and forms of answers generally, see Ch. 26, *Answers* .

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14-163 California Forms of Pleading and Practice--Annotated § 163.42

§ 163.42 Affirmative Defense to Action to Recover Purchase Price of Shares--Illegal Contract [Civ. Code § 1667(1)]--Noncompliance With Legend Requirement [Corp. Code § 25133]

[1] FORM Affirmative Defense to Action to Recover Purchase Price of Shares--Illegal Contract [Civ. Code § 1667(1)]--Noncompliance With Legend Requirement [Corp. Code § 25133]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the contract alleged in the complaint is unenforceable. The shares that are the subject of the contract are required to bear, but they do not bear, a legend to the effect that the written consent of the Commissioner of Corporations must be obtained before any sale or transfer of the shares. No written consent to sale or transfer or these shares was obtained from the Commissioner. The attempted sale or transfer of the shares pursuant to the contract therefore violates *Corp. Code § 25133*.

[2] Use of Form

The affirmative defense in [1], *above*, may be asserted in an action to recover the purchase price of shares based on illegality of the contract [*Civ. Code § 1667*]. If the purchaser has partially or fully paid for the shares, however, his or her remedy is rescission and restitution under the Corporate Securities Law [*see Corp. Code § 25503*]. For a discussion and forms related to actions for rescission of transactions that violate of the Corporate Securities Law, see *§ 163.11[7]* and Ch. 515, *Securities and Franchise Regulation* .

For discussion and forms of answers generally, see Ch. 26, *Answers* .

[3] Required Consent to Transfer

It is unlawful for any person, without the written consent of the Commissioner of Corporations, to consummate the sale or transfer of any shares that are subject to a currently effective legend condition requiring the Commissioner's consent or concerning which the Commissioner has issued a written notice to the holders pursuant to *Corp. Code § 25534* ordering the share certificates to be stamped or printed with a legend as provided in that section [*Corp. Code § 25133*].

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14-163 California Forms of Pleading and Practice--Annotated § 163.43

§ 163.43 Complaint for Specific Performance of Contract [Civ. Code § 3384]--Sale of Shares Without Discernible Market Value and Representing Control of Corporation

[1] FORM Complaint for Specific Performance of Contract [Civ. Code § 3384]--Sale of Shares Without Discernible Market Value and Representing Control of Corporation

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR SPECIFIC PERFORMANCE
_____ [*names*],	)	(Breach of Contract)
Defendant.	)	
	)	
	)	

Plaintiff alleges:

1. _____ [*Allege capacity and residence of defendant, e.g.,* Defendant is a resident of _____ County, California].

2. _____ [*Name of corporation*] is, and at all times mentioned in this pleading was, a corporation duly organized and existing under the laws of the State of California ("the corporation").

3. Defendant is, and at all times mentioned in this pleading was, the owner of _____ [*number*] shares of the issued and outstanding capital stock of the corporation ("the shares").

4. On _____ [*date*], plaintiff and defendant entered into an agreement [in writing] that defendant

would sell and plaintiff would purchase all of the shares at $_____ a share for a total purchase price of $_____, payable as follows: _____ [*specify payment terms*]. [A copy of the agreement is attached as Exhibit A and made part of this pleading.]

5. Pursuant to the agreement plaintiff tendered $_____ to defendant and demanded that defendant deliver the shares to plaintiff.

6. Defendant rejected plaintiff's tender and refused, and still refuses, to deliver the shares pursuant to the agreement.

7. Plaintiff has performed all terms, covenants, and conditions on his/her part to be performed under the agreement. Plaintiff has always been, and now is, ready, willing, and able to pay in cash the amount of the purchase price agreed, and plaintiff hereby offers to comply with and perform each and every requirement imposed on him/her by the agreement in order to enable him/her to acquire the shares.

8. The consideration set forth in the agreement is the fair and reasonable value of the shares, and the contract is, as to defendant, just and reasonable.

9. The total number of shares of the capital stock of the corporation issued and outstanding is _____ [*number*] shares, all of which are owned in the aggregate by _____ [*number*] persons including defendant. The shares that defendant agreed to sell to plaintiff would permit plaintiff to obtain control of the corporation. Plaintiff has no plain, speedy, or adequate remedy in the ordinary course of law in that the shares that defendant has agreed to sell to plaintiff have a peculiar value to plaintiff as control shares and are not traded on any open market. Damages cannot be properly ascertained and will be inadequate to compensate plaintiff for the detriment suffered by him/her.

WHEREFORE, plaintiff prays judgment as follows:

1. That defendant sell _____ [*number*] shares of the stock of _____ [*name of corporation*] to plaintiff for the total purchase price of $_____, pursuant to the agreement between plaintiff and defendant;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 163.40[1].*]

[2] Use of Form

The complaint in [1], *above*, is for specific performance of an agreement [*see Civ. Code § 3384 et seq.*] to sell shares representing control of a corporation and not obtainable on any open market [*see, e.g., Glascock v. Sukumlyn (1955)*

131 Cal. App. 2d 587, 593, 281 P.2d 90 (specific performance was proper to enforce contract to sell shares having peculiar value to plaintiff because they could not have been purchased readily on open market, could be acquired from only one person, and were acquired by plaintiff as part of his business plan)]. For discussion, see *§ 163.11[8]*, and, for additional discussion and forms relating to specific performance of contracts, see Ch. 528, *Specific Performance* .

[3] Allegations

The complaint alleges the following facts constituting the cause of action:

- The agreement between the plaintiff and the defendant (Paragraph 4).

- The plaintiff's performance of all terms on his or her part pursuant to the agreement to the extent permitted by the defendant [*see* *Reyburn v. Young (1936) 11 Cal. App. 2d 478, 479, 54 P.2d 86* (failure to plead performance, tender, or excuse in specific performance action)] (Paragraphs 5-7).

- Failure by the defendant to perform under the agreement (Paragraph 6).

- That the consideration is adequate and the contract is just and reasonable as to the defendant [*see Rose v. Lawton (1963) 215 Cal. App. 2d 18, 19, 29 Cal. Rptr. 844* (complaint for specific performance must allege that defendant received adequate consideration or that contract was, as to defendant, just and reasonable)] (Paragraph 8).

- That the plaintiff has no adequate remedy at law because the shares have a peculiar value as control shares and are not obtainable on an open market [*see Civ. Code § 3384*; *Kaneko v. Okuda (1961) 195 Cal. App. 2d 217, 233-234, 15 Cal. Rptr. 792* ; *Sherwood v. Wallin (1905) 1 Cal. App. 532, 536-537, 82 P. 566]* (Paragraph 9).

The corporation is not a proper party in the action if the corporation is not a party to the agreement and has no first-refusal rights [*Piedmont Publishing Co. v. Rogers (1961) 193 Cal. App. 2d 171, 182, 14 Cal. Rptr. 133]* .

[4] Jurisdiction

An action for specific performance of a contract is in the jurisdiction of the superior court and is not a limited civil case [*see Code Civ. Proc. §§ 85, 86(b)*].

[5] Cross References

For cross-references relating to complaints generally, see *§ 163.40[7]*

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14-163 California Forms of Pleading and Practice--Annotated § 163.44

§ 163.44 Complaint for Specific Performance of Contract [Civ. Code § 3384] and for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Option to Repurchase Employee's Shares on Termination of Employment With Close Corporation--By Optionee Against Optionor

[1] FORM Complaint for Specific Performance of Contract [Civ. Code § 3384] and for Temporary Restraining Order and Preliminary Injunction [Code Civ. Proc. § 527]--Option to Repurchase Employee's Shares on Termination of Employment With Close Corporation--By Optionee Against Optionor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR SPECIFIC PERFORMANCE[,
_____ [*names*],	)	TEMPORARY RESTRAINING ORDER, AND
Defendant.	)	PRELIMINARY INJUNCTION]
	)	(Breach of Contract)
	)	

_____

Plaintiff alleges:

1. _____ [*Allege capacity and residence of defendant, e.g.,* Defendant is a resident of _____ County, California].

2. _____ [*Name of corporation*] is, and at all times mentioned in this pleading was, a California corporation ("the corporation"). The corporation is authorized by the articles of incorporation to issue _____ [*number*] shares of stock.

3. Plaintiff is, and at all times mentioned in this pleading was, _____ [*specify relationship with*

corporation, e.g., the duly elected, qualified, and acting president] of the corporation, and until _____ [*date*], plaintiff owned _____ [*number*] shares of the stock of the corporation. Plaintiff's share holding composed _____ percent of the total authorized issue of the stock.

4. On or about _____ [*date*], defendant was employed by the corporation as _____ [*specify position*].

5. On or about _____ [*date*], in order to provide incentive to key employees and to induce them to foster and promote the business of the corporation, plaintiff inaugurated a program by which certain key employees could acquire some of plaintiff's shares.

6. In accordance with the program, on _____ [*date*], plaintiff and defendant entered into a written agreement with respect to defendant's acquiring _____ [*number*] of plaintiff's shares ("the incentive shares"). A copy of the agreement is attached as Exhibit A and made part of this pleading.

7. Pursuant to the agreement, defendant purchased the incentive shares for the total price of $_____.

8. By the terms of the agreement, the parties agreed that if for any reason defendant should leave employment with the corporation, plaintiff would have the right and exclusive option to repurchase the inventive shares at fair market value as determined by _____ [*specify manner of determining value, e.g.,* the firm of _____ (*name*)], provided, however, that plaintiff would pay no less than $_____ a share for the shares. The option exists for _____ [*specify term*] after defendant's termination of employment. During that term defendant could not to sell or transfer the incentive shares to any other person.

9. On _____ [*date*], defendant voluntarily left employment with the corporation.

10. On _____ [*date*], plaintiff notified defendant in writing that plaintiff exercised the option to repurchase all of the incentive shares and tendered the full amount of the fair market value, $_____, as determined in accordance with the method provided in the agreement.

11. Defendant repudiated his/her obligation under the agreement, refused to accept the price tendered by plaintiff, and refused to sell, transfer, or deliver the incentive shares to plaintiff.

12. The consideration set forth in the agreement is adequate and the contract is, as to defendant, just and reasonable.

13. Plaintiff has performed all of the covenants and conditions contained in the agreement on his/her part to be performed. Defendant has refused, and continues to refuse, to sell and transfer the incentive shares pursuant to the agreement.

14. Plaintiff has no adequate remedy at law in that the incentive shares have a unique and peculiar value to plaintiff in the pursuit of his/her business, and shares of the corporation are not available on the open market. Damages would be extremely difficult to ascertain and would not afford adequate relief.

[15. Plaintiff is informed and believes, and thereon alleges, that defendant, unless restrained by the court, will sell the incentive shares to other persons. That act would render a judgment for plaintiff ineffectual.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

[1. For a temporary restraining order and preliminary injunction restraining defendant from transferring, selling, assigning, or otherwise disposing of the incentive shares pending a hearing and trial of this action;]

2. That the court order defendant to sell, transfer, and convey _____ [*number*] shares of the stock of _____ [*name of corporation*] to plaintiff for the total price of $_____;

3. For costs of suit incurred; and

4. For other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 163.40[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for specific performance of an option agreement to resell shares held by a key employee whose employment is terminated, and to obtain a preliminary injunction pending trial to restrain the defendant from disposing of the shares in violation of the agreement. For discussion of the enforcement of restrictions on the transfer of shares, see *§ 163.12[2]*.

[3] Allegations

The complaint alleges the following facts constituting the cause of action:

- The plaintiff's incentive program for transferring shares to key employees (Paragraphs 5-7).

- The agreement with the defendant pursuant to that program, by which the defendant purchased incentive shares and agreed that the plaintiff would have an option to repurchase the shares on termination of the defendant's employment (Paragraphs 7 and 8).

- The termination of the defendant's employment (Paragraph 9).

- The plaintiff's exercise of the option [*see Glascock v. Sukumlyn (1955) 131 Cal. App. 2d 587, 594, 281 P.2d 90* (right to specific performance of option to purchase shares is conditioned on proof that plaintiff's tender of performance conformed with terms of offer)] (Paragraph 10).

- The defendant's repudiation of the agreement and refusal to sell the incentive shares to the plaintiff (Paragraph 11).

- That the contract is supported by adequate consideration [*see Glascock v. Sukumlyn (1955) 131 Cal. App. 2d 587, 592, 281 P.2d 90* (adequacy of consideration for option to purchase shares is determined at date option was granted, not date option was exercised)] and is just and reasonable as to the defendant (Paragraph 12).

- That the plaintiff has performed all conditions required of him or her under the agreement [*see Reyburn v. Young (1936) 11 Cal. App. 2d 478, 479, 54 P.2d 86* (failure to plead performance, tender, or excuse in specific performance actions)] (Paragraph 13).

- That the plaintiff has no adequate remedy at law [*see Civ. Code § 3384*; *Polinsky v. Vaughan (1968) 268 Cal. App. 2d 183, 187, 73 Cal. Rptr.764* (option agreement to sell shares is subject to specific performance)] (Paragraph 14).

- Facts to support an application for pendente lite injunctive relief [*see Code Civ. Proc. §§ 526, 527* (grounds for injunction; temporary restraining order and preliminary injunction)] (Paragraph 15).

[4] Additional Papers

A temporary restraining order may not be granted unless it appears from facts shown by affidavit or declaration executed under penalty of perjury [*Code Civ. Proc. § 2015.5*], or by a verified complaint, that great or irreparable injury would result to the applicant before the matter can be heard on notice [*Code Civ. Proc. § 527(d)*]. For further discussion and forms relating to temporary restraining orders and injunction, see Ch. 303, *Injunctions* .

[5] Jurisdiction

An action for specific performance of a contract and injunctive relief is in the jurisdiction of the superior court and is not a limited civil case [*see Code Civ. Proc. §§ 85, 86(b)*].

[6] Cross References

For cross-references relating to complaints generally, see *§ 163.40[7]*

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14-163 California Forms of Pleading and Practice--Annotated § 163.45

§ 163.45 Complaint to Compel Registration of Transfer [Com. Code § 8401] and for Declaration of Rights [Code Civ. Proc. § 1060] as Shareholder and for Damages and Penalty Against Officers of Corporation [Corp. Code § 2201]--By Transferee Against Corporation, Transferor, Officers, Transfer Agent, and Registrar

[1] FORM Complaint to Compel Registration of Transfer [Com. Code § 8401] and for Declaration of Rights [Code Civ. Proc. § 1060] as Shareholder and for Damages and Penalty Against Officers of Corporation [Corp. Code § 2201]--By Transferee Against Corporation, Transferor, Officers, Transfer Agent, and Registrar

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	COMPLAINT FOR MANDATORY INJUNCTION,
Defendant.	)	DECLARATORY JUDGMENT, DAMAGES, AND
	)	PENALTY
	)	

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Refusal to Register Transfer)

1. Defendant _____ [*name of corporation*] is, and at all times mentioned in this pleading was, a corporation duly organized and existing under the laws of the State of California, with its principal place of business in _____ County, California ("the corporation").

2. Defendant _____ [*name of transfer agent*] is, and at all times mentioned in this pleading was, a corporation duly organized and existing under the laws of the State of California, with its principal place of business in _____ County, California ("the transfer agent").

3. Defendant _____ [*name of registrar*] is, and at all times mentioned in this pleading was, a corporation duly organized and existing under the laws of the State of California, and is authorized to do business and is doing business in _____ County, California ("the registrar").

4. Defendant _____ [*name*] is, and at all times mentioned in this pleading was, the duly elected, qualified, and acting president of the corporation ("the president"). Defendant _____ [*name*] is, and at all times mentioned in this pleading was, the duly elected, qualified, and acting secretary of the corporation ("the secretary").

5. Defendant _____ [*name*] is a resident of _____ County, California.

6. On _____ [*date*], defendant _____ [*name*] was the holder and owner of _____ [*number*] shares of the capital stock of the corporation ("the transferor"). The shares are [represented by certificate number _____ and] registered in the name of the transferor on the books of the corporation.

7. On _____ [*date*], the transferor [duly endorsed and delivered the certificate to plaintiff and] transferred all of his/her right, title, and interest in all of the shares to plaintiff. Plaintiff is informed and believes and thereon alleges that the transfer was not in violation of any transfer restrictions or of the rights of any person, and that the transfer to plaintiff was in fact rightful.

8. On or about _____ [*date*], plaintiff presented _____ [the certificate or an instruction] to the corporation, together with [a guaranty of the signature of the transferor and] a request to register the transfer. All applicable laws relating to the collection of taxes have been complied with.

9. Plaintiff is informed and believes and thereon alleges that no notice of adverse claim or stop-transfer notice has been received by the corporation or any defendant.

10. The transfer agent is, and at all times mentioned in this pleading was, the duly appointed, qualified, and acting stock transfer agent for the corporation with full power and authority to make and execute transfers of shares of the corporation [and to issue new certificates in connection with transfers].

11. The registrar is, and at all times mentioned in this pleading was, the duly appointed, qualified, and acting registrar of transfers of the shares of the corporation, with full power and authority to register transfers of shares of the corporation.

12. Defendants have refused, and continue to refuse, to register or cause to be registered the transfer of shares to plaintiff. They [have refused, and continue to refuse, to issue or to have issued to plaintiff a new certificate for the shares and] have refused, and continue to refuse, to recognize plaintiff as a shareholder of the corporation and to permit plaintiff to enjoy any of the rights, privileges, and benefits to which he/she is entitled as a shareholder.

13. As a proximate result of the failure by the corporation, transfer agent, and registrar to register the transfer of the shares to plaintiff, plaintiff has been damaged _____ [*describe injury*], in the sum of $_____.

SECOND CAUSE OF ACTION
(Recovery of Penalty)

1. Paragraphs 1-11 of the First Cause of Action are incorporated in this Second Cause of Action.

2. The president and the secretary, as officers of the corporation, have caused, and continue to cause, without reason, the corporation, transfer agent, and registrar to neglect, fail, and refuse to register the transfer of the shares to plaintiff.

3. Plaintiff is entitled to recover a penalty against each officer under Corporations Code Section 3016, in the sum of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For a declaration that plaintiff is the lawful owner of the shares that were transferred to plaintiff as described in this pleading;

2. For a declaration that the transferor has no right, title, or interest in the shares;

3. For an order compelling the corporation, transfer agent, registrar, president, and secretary, and each of them, to register or cause to be registered the transfer of the shares to plaintiff on the books of the corporation [and to issue or cause to be issued within a reasonable time to plaintiff a new certificate representing the shares and showing plaintiff to be the owner];

4. For damages on the first cause of action in the sum of $_____ against all defendants, and each of them;

5. For a penalty on the second cause of action in the sum of $_____ against the president and the secretary;

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 163.40[1].*]

[2] Use of Form

The complaint in [1], *above*, may be used to compel a corporation and its responsible officers and agents to register a transfer of shares [*see Com. Code § 8401*; for discussion, *see § 163.14[1][a]*] and to recover statutory penalties against the officers of the corporation causing the neglect, failure, or refusal to register the shares (and issue the plaintiff a new certificate) [*see Corp. Code § 2201*; for discussion, *see § 163.14[4][b]*; *see also Spangenberg v. Western Heavy Hardware & Iron Co. (1913) 166 Cal. 284, 285, 135 P. 1127* (suit in equity rather than mandate proceeding is

appropriate remedy to compel corporation to register transfer of shares); *Hagan v. Fairfield (1961) 194 Cal. App. 2d 240, 248, 16 Cal. Rptr.14]* .

[3] Allegations

On the first cause of action the complaint alleges the following facts:

- The shares in question were rightfully transferred to the plaintiff (Paragraph 7).
- The plaintiff presented a certificate in registered form (along with a guaranty of the endorser's signature) or an instruction, with a request for registration of the transfer, and all applicable tax laws have been complied with (Paragraph 8).
- There was no notice of an adverse claims, nor any stop-transfer notice (Paragraph 9).
- The defendants refused to register the transfer (Paragraph 12).
- The plaintiff has suffered damages (Paragraph 13).

On the second cause of action the complaint additionally alleges that the president and secretary, as officers of the corporation, unreasonably caused the neglect, failure, or refusal by the corporation, its transfer agent, and registrar to register the transfer (and to issue a new certificate to the plaintiff), entitling the plaintiff to recover a statutory penalty against them [*see Corp. Code § 2201*; for discussion, *see § 163.14[4][b]*].

[4] Cross References

For cross-references relating to complaints generally, see *§ 163.40[7]*

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14-164 California Forms of Pleading and Practice--Annotated 164.syn

§ 164.syn Synopsis to Chapter 164: CORPORATIONS: DIVIDENDS AND REACQUISITIONS OF SHARES

§ 164.01 Scope of Chapter

§§ 164.02-164.09 [Reserved]

§ 164.10 Governing Statutes

§ 164.11 Distribution to Its Shareholders

[1] Defined

[2] By Subsidiary

[3] Time of Distribution

[a] Dividends

[b] Repurchase or Redemption

[c] Sinking Fund Payment

[4] Exclusions

§ 164.12 When Distributions Are Permissible

[1] Use of Generally Accepted Accounting Principles

[2] Use of Consolidated Statements

[3] Two Basic Tests

[a] Generally

[b] Retained Earnings Test

[c] Remaining Assets Test

[4] Distribution of Property

[5] Overriding Solvency Test

[6] Tests Protecting Liquidation and Dividend Preferences

[7] Other Tests or Restrictions Affecting Distributions

[8] Applicability of Tests to Foreign Corporations

[9] Applicability of Tests to Dissenting Shareholders

[10] Inapplicability of Tests

[a] Investment Companies and Real Estate Investment Trusts

[b] Corporations in Dissolution

[c] Insurance--Funded Share Retirements

[d] Disability

§ 164.13 Liability for Improper Distributions

[1] Shareholders' Liability

[a] Generally

[b] Action to Enforce Liability of Shareholders

[c] Right to Implead Other Shareholders Liable

[3] Liability of Directors

[a] Generally

[b] Damages

[c] Action to Enforce Liability of Directors

[d] Director's Right to Contribution or Action Against Shareholders

§ 164.14 Dividends

[1] Determination of Shareholders of Record

[2] Identification of Source

[3] Dividends on Partly Paid Shares

[4] Shareholders' Right to Dividends

[a] No Right Until Declared

[b] Preferred Shares

[c] Right to Declared Dividend

§ 164.15 Repurchase of Shares

[1] Corporation's Authority to Repurchase; Restrictions

[2] Other Limitations on Repurchase

[3] Executory Contracts

[a] Enforceability

[b] Persons Who May Attack Validity

[4] Issuance of Negotiable Instrument--Rights of Holder Test

§ 164.16 Redemption of Shares

[1] Authority to Issue Redeemable Shares

[2] Creation of Sinking Fund

[3] Procedure for Redeeming Shares

[a] Generally

[b] Notice

[c] Mailing of Notice

[d] Payment or Deposit of Redemption Price

[4] Issuance of Negotiable Instrument

[a] Rights of Holder

§§ 164.17-164.29 [Reserved]

§ 164.30 California Legal Forms

§ 164.31 State Statutes

[1] Definitions

[2] Distributions

[3] Dividends

[4] Liability for Improper Distributions

[5] Repurchase or Redemption of Shares

§ 164.32 Decisions

[1] Dividends

[a] Defined

[b] Power to Declare; Discretion of Board

[c] Right to Dividend

[i] Between Transferor and Transferee of Shares

[ii] Preferred Shares

[iii] Prior to Declaration

[iv] Upon Declaration

[2] Unlawful Distributions

§ 164.33 Law Reviews

§ 164.34 Text References

§§ 164.35-164.49 [Reserved]

§ 164.50 Complaint for Damages Against Directors for Approving Improper Distribution to Shareholders [Corp. Code § 316(a)-(d)]--By Creditors or Preferred Shareholders [Corp. Code § 506(b)]

[1] FORM

[2] Use of Form

[3] Distribution to Its Shareholders

[4] Prohibited Distributions

[a] Two Basic Tests

[b] Applicability of Tests to Foreign Corporations

[c] Applicability of Tests to Dissenting Shareholders

[d] Inapplicability of Tests

[5] Director's Liability for Improper Distributions

[a] Scope

[b] Persons Who May Enforce Liability

[6] Jurisdiction

[7] State Statutes

[8] Decisions

[i] In General

[ii] Disguised Distributions

[9] Text References

§ 164.51 Complaint for Damages Against Shareholders for Receiving Improper Distribution [Corp. Code § 506(a)]--By Creditors or Preferred Shareholders [Corp. Code § 506(b)]

[1] FORM

[2] Use of Form

[3] Shareholder's Liability for Improper Distributions

[a] Scope

[b] Shareholder's Knowledge of Impropriety

[c] Several Liability

[d] Persons Who May Enforce Liability

[4] State Statutes

[5] Decisions

[6] Cross References

§ 164.52 Cross Complaint to Implead Other Parties Liable With Defendant in Main Action to Recover Illegal Corporate Distribution [Corp. Code §§ 316(e), 506(c)]

[1] FORM

[2] Use of Form

[3] Director's Right to Contribution or Action Against Shareholders

[4] Shareholder's Right to Contribution

[5] State Statutes

[6] Cross References

§ 164.53 Cross Complaint by Director Defendant in Action to Recover Illegal Corporate Distribution [Corp. Code § 316(a)-(d)]--For Subrogation to Rights of Corporation Against Shareholders Receiving Distribution [Corp. Code § 316(f)(1)]

[1] FORM

[2] Use of Form

[3] Director's Right to Subrogation Against Shareholders

[4] Cross References

[5] State Statutes

§ 164.54 Complaint for Damages for Refusal to Make Distribution to Plaintiff Shareholder

[1] FORM

[2] Use of Form

[3] Dividends

[4] Repurchase of Shares

[5] State Statutes

[6] Decisions

[a] Discretion of Board to Declare--Dividends

[b] Shareholder's Right To Dividend

[i] Prior to Declaration

[ii] Right to Declared Dividend

[7] Text References

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PART I. SCOPE

14-164 California Forms of Pleading and Practice--Annotated § 164.01

§ 164.01 Scope of Chapter

This chapter discusses corporate dividends and a corporation's reacquisition of its shares whether by redemption or by repurchase. Since these transactions will in most instances involve a "distribution to shareholders" [*Corp. Code § 166*], and therefore be subject to legal tests based on the corporation's financial condition, this part first discusses the nature of these transactions as distributions, the applicable tests, and the liabilities that may be incurred in connection with unlawful distributions. This part next covers matters particularly related to the declaration and payment of dividends, the repurchase of shares, and the procedures related to the issuance of redeemable shares and their ultimate redemption.

Although this chapter also covers the statutory tests governing the legality of a distribution to shareholders, the accounting concepts which form an integral part of these tests are beyond its scope. For a discussion of these concepts and other matters related to distributions generally, see Ballantine and Sterling, California Corporation Laws, Ch. 8, *Dividends and Reacquisition of Shares* (Matthew Bender).

The forms in this chapter include complaints against directors [*see § 164.50*] and shareholders [*see § 164.51*] based on their participation in an improper distribution, cross complaints by directors and shareholders to implead others liable for such distributions [*§§ 164.52, 164.53*], and a complaint for damages for wrongful refusal to make a distribution [*see § 164.54*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesGeneral OverviewBusiness & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesCancellation & Redemption

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14-164 California Forms of Pleading and Practice--Annotated §§ 164.02-164.09

[Reserved]

§§ 164.02[Reserved]

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PART II. LEGAL BACKGROUND

14-164 California Forms of Pleading and Practice--Annotated § 164.10

§ 164.10 Governing Statutes

The provisions of the General Corporation Law governing the payment of dividends and the reacquisition of shares, including the propriety of such transactions and the liability of shareholder recipients of unlawful distributions, are found in *Corp. Code §§ 500-508*. *Corp. Code §§ 309* and *316* govern the liability of directors who authorize unlawful distributions. General provisions and definitions applicable to this chapter may be found in Chapter 1 [*Corp. Code §§ 100-195*] of the General Corporation Law. Various provisions of Chapter 4 [*Corp. Code §§ 400-423*] govern the issuance of redeemable shares and the dividend rights of certain types of shares. *Corp. Code § 701* prescribes the method for determining the record date of shareholders entitled to receive dividends.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesCancellation & RedemptionBusiness & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesDeclaration & Distribution

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PART II. LEGAL BACKGROUND

14-164 California Forms of Pleading and Practice--Annotated § 164.11

§ 164.11 Distribution to Its Shareholders

[1] Defined

"Distribution to its shareholders" means the transfer of cash or property by a corporation to its shareholders without consideration, whether by way of dividend or otherwise, except a dividend in shares of the corporation. The term also means the purchase or redemption by a corporation of its shares for cash or property [*Corp. Code § 166*].

[2] By Subsidiary

A distribution to its shareholders by a corporation includes the foregoing transfers, purchases, or redemptions by a subsidiary of the corporation [*Corp. Code § 166*; *see Corp. Code § 189* (defining "subsidiary")].

[3] Time of Distribution

[a] Dividends

The time of any distribution by way of dividend is deemed to be the date of its declaration [*Corp. Code § 166*].

[b] Repurchase or Redemption

The time of any distribution by purchase or redemption of shares is deemed to be the date cash or property is transferred by the corporation, whether or not pursuant to a contract of an earlier date. However, when a debt obligation that is a security [*see Com. Code § 8102*] is issued in exchange for shares, the time of the distribution is the date when the corporation acquires the shares in such an exchange [*Corp. Code § 166*].

[c] Sinking Fund Payment

In the case of a sinking fund payment, cash or property is transferred as a distribution at the time that it is delivered to a trustee for the holders of preferred shares [*see Corp. Code § 176* (defining "preferred shares")] to be used for the redemption of those shares, or the time that it is physically segregated by the corporation in trust for that purpose [*Corp.*

Code § 166].

[4] Exclusions

"Distribution to its shareholders" does not include [*Corp. Code § 166*]:

- Satisfaction of a final judgment of a court or tribunal of appropriate jurisdiction ordering the rescission of the issuance of shares;

- The rescission by a corporation of the issuance of the shares, if the board determines (with any director who is, or would be, a party to the transaction not being entitled to vote) that it is reasonably likely that the holder or holders of the shares in question could legally enforce a claim for the rescission, that the rescission is in the best interests of the corporation, and that the corporation is likely to be able to meet its liabilities (except those for which payment is otherwise adequately provided) as they mature; or

- The repurchase by a corporation of the shares issued by it pursuant to *Corp. Code § 408* (employee stock purchase or stock option plans), if the board determines (with any director who is, or would be, a party to the transaction not being entitled to vote) that the repurchase is in the best interests of the corporation and that the corporation is likely to be able to meet its liabilities (except those for which payment is otherwise adequately provided) as they mature.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesGeneral OverviewBusiness & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesCancellation & Redemption

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Volume 14: Corporations: Capacity thru Corporations: Dissolution and Winding Up-Chs. 160-173
Chapter 164 CORPORATIONS: DIVIDENDS AND REACQUISITIONS OF SHARES
PART II. LEGAL BACKGROUND

14-164 California Forms of Pleading and Practice--Annotated § 164.12

§ 164.12 When Distributions Are Permissible

[1] Use of Generally Accepted Accounting Principles

Whether or not the tests for determining the propriety of a distribution to shareholders are satisfied will depend almost exclusively on the use of generally accepted accounting principles. Generally speaking, all references in the General Corporation Law to financial statements, balance sheets, income statements, and statements of cashflows, and all references to assets, liabilities, earnings, retained earnings, and similar accounting items of a corporation mean those financial statements or comparable statements or items prepared or determined in conformity with generally accepted accounting principles then applicable, and fairly presenting, in conformity with generally accepted accounting principles, the matters that they purport to present, subject to any specific accounting treatment required by a particular provision of the General Corporation Law [*Corp. Code § 114*]. For discussion of how a court may be expected to deal with the reference to generally accepted accounting principles, see *Ch. 165, Corporations: Corporate Records and Reports, § 165.25[2]*.

[2] Use of Consolidated Statements

Unless otherwise provided in the General Corporation Law, all references to financial statements mean, in the case of a corporation which has subsidiaries, consolidated statements of the corporation and such of its subsidiaries as are required or permitted to be included in such consolidated statements under generally accepted accounting principles then applicable [*Corp. Code § 114*].

[3] Two Basic Tests

[a] Generally

The corporation's ability to legally make a distribution to its shareholders will depend initially on whether or not the corporation meets either of the two prescribed tests of its financial position at the time of the distribution [*see Corp. Code § 166* (stating when a distribution is made); *see also* discussion in *§ 164.50[3]*]. Neither of these two tests, however, applies to a corporation licensed as a broker-dealer under *Corp. Code § 25210 et seq.*, if immediately after giving effect to any distribution, the corporation is in compliance with the net capital rules of the Commissioner of

Corporations and the Securities and Exchange Commission [*Corp. Code § 500(e)*].

[b] Retained Earnings Test

The first test prohibits a corporation from making a distribution unless the amount of the retained earnings of the corporation immediately prior thereto equals or exceeds the amount of the proposed distribution [*Corp. Code § 500(a)*; *but see Corp. Code § 500(e)* and discussion in *§ 164.50[4][a]*].

[c] Remaining Assets Test

If the retained earnings test is not met, the second basic test prohibits a distribution unless, immediately after giving effect to the distribution:

- The sum of the assets of the corporation, exclusive of goodwill, capitalized research and development expenses, and deferred charges, would be at least equal to one and one-fourth times its liabilities, not including deferred taxes, deferred income, and other deferred credits [*Corp. Code § 500(b)(1)*]; and

- The current assets of the corporation would be at least equal to its current liabilities or, if the average of the earnings of the corporation before taxes on income and before interest expense for those two preceding fiscal years was less than the average of the interest expense of the corporation forthose fiscal years, at least equal to one and one-fourth times its currentliabilities. However, in determining the amount of the assets of the corporation, profits derived from an exchange of assets shall not be included unless the assets received are currently realizable in cash. Furthermore, for the purposes of this section, "current assets" may include net amounts which the board has determined in good faith may reasonably be expected to be received from customers during the 12-month period used in calculating current liabilities pursuant to existing contractual relationships obligating those customers to make fixed or periodic payments during the term of the contract or, in the case of public utilities, pursuant to service connection with customers, after in each case giving effect to future costs not included in current liabilities but reasonably expected to be incurred by the corporation in performing those contracts or providing service to utility customers [*Corp. Code § 500(b)(2)*].

The second part of this test [*Corp. Code § 500(b)(2)*] does not apply to a corporation that does not classify its assets into current and fixed under generally accepted accounting principles [*Corp. Code § 500(b)(2)*; *but see Corp. Code § 500(e)*; *see also* discussion in *§ 164.50[4][a]*].

For the purpose of applying *Corp. Code § 500* to a distribution by a corporation of cash or property in payment by the corporation in connection with the purchase of its shares, there must be added to retained earnings all amounts that had been previously deducted with respect to obligations incurred in connection with the corporation's repurchase of its shares and reflected on the corporation's balance sheet, but not in excess of the principal of the obligations that remain unpaid immediately before the distribution. In addition, there must be deducted from liabilities all amounts that had been previously added with respect to the obligations incurred in connection with the corporation's repurchase of its shares and reflected on the corporation's balance sheet, but not in excess of the principal of the obligations that will remain unpaid after the distribution, provided that no addition to retained earnings or deduction from liabilities under *Corp. Code § 500(b)(2)* may occur on account of any obligation that is a distribution to the shareholders [*see Corp. Code § 166* (when distribution is made)] at the time the obligation is incurred [*Corp. Code § 500(d)*].

[4] Distribution of Property

For the purpose of both the retained earnings and remaining assets tests, and for the purposes of other tests set forth in

Corp. Code § 500 et seq., the amount of any distribution payable in property must be determined on the basis of the value at which the corporation carries the property on its financial statements in accordance with generally accepted accounting principles [*Corp. Code § 500(c)*].

[5] Overriding Solvency Test

In addition to the two basic tests, *Corp. Code § 501* provides that neither a corporation nor any of its subsidiaries may make any distribution to the corporation's shareholders if the corporation or the subsidiary making the distribution is, or as a result of the distribution would be, likely to be unable to meet its liabilities, except for those whose payment is otherwise adequately provided for, as they mature.

[6] Tests Protecting Liquidation and Dividend Preferences

Neither a corporation nor any of its subsidiaries is permitted to make any distribution to the corporation's shareholders on any shares of its stock of any class or series that are junior to outstanding shares of any other class or series with respect to distribution of assets on liquidation if, after giving effect to the distribution, the excess of its assets (exclusive of goodwill, capitalized research and development expenses, and deferred charges) over its liabilities (not including deferred taxes, deferred income, and other deferred credits) would be less than the liquidation preference of all shares having a preference on liquidation over the class or series to which the distribution is made [*Corp. Code § 502*]. Nevertheless, for the purpose of applying *Corp. Code § 502* to a distribution by a corporation of cash or property in payment by the corporation in connection with the purchase of its shares, there must be deducted from liabilities all amounts that had been previously added with respect to obligations incurred in connection with the corporation's repurchase of its shares and reflected on the corporation's balance sheet, but not in excess of the principal of the obligations that will remain unpaid after the distribution [*Corp. Code § 502*]. Furthermore, no deduction from liabilities may occur on account of any obligation that is a distribution to the shareholders [*see Corp. Code § 166* (when distribution is made)] at the time the obligation is incurred [*Corp. Code § 502*].

Neither a corporation nor any of its subsidiaries is permitted to make any distribution to the corporation's shareholders on any shares of its stock of any class or series that are junior to outstanding shares of any other class or series with respect to payment of dividends, and as to which senior class or series the corporation has cumulative dividends in arrears, unless the amount of the retained earnings of the corporation immediately prior thereto equals or exceeds the amount of proposed distribution plus the aggregate amount of the cumulative dividend in arrears on all shares having a preference with respect to payment of dividends over the class or series to which the distribution is made [*Corp. Code § 503*]. "Cumulative dividends in arrears" means only cumulative dividends that have not been paid as required on a scheduled payment date set forth in, or determined pursuant to, the articles of incorporation, regardless of whether those dividends had been declared prior to that scheduled payment date [*Corp. Code § 163.1*]. Nevertheless, for the purpose of applying *Corp. Code § 503* to a distribution by a corporation of cash or property in payment by the corporation in connection with the purchase of its shares, there must be added to retainedearnings all amounts that had been previously deducted therefrom with respect to obligations incurred in connection with the corporation's repurchase of its shares and reflected on the corporation's balance sheet, but not in excess of the principal of the obligations that remain unpaid immediately before the distribution. Furthermore, no addition to retained earnings may occur on account of any obligation that is a distribution to the shareholders [*see Corp. Code § 166* (when distribution is made)] at the time the obligation is incurred [*Corp. Code § 503*].

[7] Other Tests or Restrictions Affecting Distributions

Nothing in *Corp. Code §§ 500-510* prohibits additional restrictions on the declaration of dividends or the purchase or redemption of a corporation's own shares by provisions in the articles or bylaws or in any indenture or other agreement entered into by the corporation [*Corp. Code § 505*]. For example, in the case of a statutory close corporation [*see Corp. Code § 158* (defining "close corporation")], the shareholders could enter a shareholders' agreement pursuant to *Corp.*

Code § 300(b) which agreement would impose restrictions on distributions. However, the statutory tests described above could not be waived or altered by such an agreement [*Corp. Code § 300(c)*].

[8] Applicability of Tests to Foreign Corporations

While the directors of a foreign corporation that transacts intrastate business in California [*see Corp. Code § 191* (defining "transact intrastate business")] are liable for, among other transgressions, the making of unauthorized dividends, the purchase of shares or the distribution of assets in accordance with any applicable law of the state of incorporation [*Corp. Code § 2116*], the directors (and shareholders) of a nominally foreign corporation [*see Corp. Code § 2115*; *see also* Ch. 160, *Corporations: Capacity* , discussing nominally foreign corporations] will be liable under California law when distributions are made which do not meet the tests of *Corp. Code §§ 500-505* [*Corp. Code § 2115(b)*].

[9] Applicability of Tests to Dissenting Shareholders

To the extent that any of the tests described above prevent payment to any holders of dissenting shares [*see Corp. Code § 1300(b)*(defining "dissenting shares"); *see also* Ch. 169, *Corporations: Reorganizations*], for example, shareholders who have elected to require that the corporation purchase their shares upon its reorganization or merger, then those shareholders will become subordinated creditors of the corporation until the debt to them can be legally paid under the tests discussed above [*Corp. Code § 1306*].

[10] Inapplicability of Tests

[a] Investment Companies and Real Estate Investment Trusts

The retained earnings and remaining assets tests [*see Corp. Code § 500*] do not apply to any dividend declared by a regulated investment company, as defined in *I.R.C. § 851*, to the extent that the dividend is necessary to maintain the status of the corporation as a regulated investment company under the provisions of the Internal Revenue Code [*Corp. Code § 504(a)(1)*; *see I.R.C. §§ 851-855* (governing regulated investment companies)].

Those tests also do not apply to a real estate investment trust, as defined in the Internal Code, to the extent that the dividend is necessary to maintain the status of the corporation as a real estate investment trust under that code [*Corp. Code § 504(a)(2)*].

None of the restrictions on distributions described above [*see Corp. Code §§ 500-503*] apply to any purchase or redemption of shares redeemable at the option of the holder by a registered open-end investment company under the Investment Company Act of 1940 [*15 U.S.C. § 80a-1 et seq.*], so long as the right of redemption remains unsuspended under the provisions of that act and under the articles of incorporation and bylaws of the corporation [*Corp. Code § 504(b)*].

[b] Corporations in Dissolution

None of the provisions relating to distributions contained in *Corp. Code § 500 et seq.* apply in connection with any proceeding for winding up and dissolution of a corporation pursuant to *Corp. Code §§ 1800-1907* [*Corp. Code § 508*; *see* Ch. 170, *Corporations: Dissolution* , regarding distributions on dissolution].

[c] Insurance--Funded Share Retirements

None of the restrictions on distributions in *Corp. Code §§ 500-503* will apply to a purchase or redemption of shares of a deceased shareholder from the proceeds of insurance on the shareholder's life in excess of the total of all premium payments by the corporation, provided that the redemption or repurchase is pursuant to an agreement between the

shareholder and the corporation [*Corp. Code § 503.1*].

[d] Disability

Corp. Code §§ 500-503 do not apply to the purchase or redemption of the shares of a disabled shareholder from the proceeds of disability insurance applicable to the disabled shareholder in excess of the total amount of all premiums paid by the corporation for the insurance, in order to carry out the provisions of an agreement between the corporation and the shareholder to purchase or redeem shares on the disability of the shareholder as defined in that policy. "Disability insurance" means an agreement of indemnification against the insured's loss of the ability to work because of accident or illness [*Corp. Code § 503.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesGeneral OverviewBusiness & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesCancellation & RedemptionReal Property LawTrustsReal Estate Investment Trusts (REITs)Securities LawInvestment CompaniesDistribution, Redemption & Repurchase of Shares

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PART II. LEGAL BACKGROUND

14-164 California Forms of Pleading and Practice--Annotated § 164.13

§ 164.13 Liability for Improper Distributions

[1] Shareholders' Liability

[a] Generally

Any shareholder who receives any distribution prohibited by *Corp. Code § 500 et seq.* with knowledge of facts indicating the impropriety of the distribution is liable to the corporation for the benefit of all of the creditors or shareholders entitled to institute an action for the amount so received by the shareholder, with interest on that amount at the legal rate on judgments until paid, but not exceeding the liabilities of the corporation owed to nonconsenting creditors at the time of the violation and the injury suffered by nonconsenting shareholders, as the case may be [*Corp. Code § 506(a)*]. Further, in the event that any shareholder receives any distribution of the corporation's property prohibited by *Corp. Code § 500 et seq.*, the shareholder receiving that illegal distribution is liable to the corporation for an amount equal to the fair market value of the property at the time of the illegal distribution, plus any interest on that amount from the date of distribution at the legal rate on judgments until paid, together with all reasonably incurred costs of appraisal or other valuation, if any, of that property, but not exceeding the liabilities of the corporation owed to nonconsenting creditors at the time of the violation "and" [*sic:* or] the injury suffered by nonconsenting shareholders, as the case may be [*Corp. Code § 506(a)*].

[b] Action to Enforce Liability of Shareholders

Suit may be brought in the name of the corporation to enforce the liability of shareholders:

- To creditors for a distribution which violates *Corp. Code § 500* or *501* (retained earnings or remaining assets test or insolvency test), against any or all shareholders liable, by any one or more creditors of the corporation whose debts or claims arose prior to the time of the distribution and who have not consented to the distribution, whether or not they have reduced their claims to judgment; or

- To preferred shareholders for distributions in derogation of their liquidation or dividend preferences [*see Corp. Code §§ 502, 503*], against any or all shareholders liable, by any one or more holders of preferred shares whose shares were outstanding at the time of the distribution and who have not

consented to the distribution. The preferred shareholders may bring such an action in the name of the corporation without complying with the requirements for derivative suits set forth in *Corp. Code § 800* [*Corp. Code § 506(b)*].

[c] Right to Implead Other Shareholders Liable

Any shareholder sued under *Corp. Code § 506* may implead all other shareholders liable and may compel contribution, either in that action or in an independent action, against shareholders not joined in that action [*Corp. Code § 506(c)*]. Nothing contained in *Corp. Code § 500* affects any liability which any shareholder may have under *Civ. Code § 3439 et seq.* (fraudulent conveyances) [*Corp. Code § 506(d)*].

[3] Liability of Directors

[a] Generally

Directors of a corporation who approve the making of any distribution to its shareholders are, to the extent the distribution is contrary to the provisions of *Corp. Code §§ 500-503*, jointly and severally liable to the corporation for the benefit of all the creditors or shareholders entitled to institute an action to enforce the liability. The directors' liability, however, is subject to *Corp. Code § 309* which sets forth the standard of care that a director must observe [*Corp. Code § 316(a)*]. Under *Corp. Code § 309(c)*, a person who performs the duties of a director in accordance with the prescribed standard of care will have no liability based on any alleged failure to discharge the person's obligations as a director [*Corp. Code § 309(c)*]. In addition, the liability of a director for monetary damages may be eliminated or limited in the articles of incorporation to the extent provided in *Corp. Code § 204(a)(10)* [*Corp. Code § 309(c)*; *see Fin. Code § 8501* (governing directors of federal savings associations)]. For a complete discussion of the standard of care and the right of a director to rely on the opinions, reports, and data supplied by others, see Ch. 167, *Corporations: Directors and Management* .

[b] Damages

The damages recoverable from a director are computed as the amount of the illegal distribution (or if the distribution consists of property, the fair market value of the property at the time of the distribution), plus interest on that amount from the date of the distribution at the legal rate on judgments until paid, together with all reasonable incurred costs of appraisal and other valuation, if any, of the property distributed, or the loss suffered by the corporation as a result of the illegal loan or guaranty, as the case may be, but not exceeding the liabilities of the corporation owed to nonconsenting creditors at the time of the violation "and" [*sic:* or] the injury suffered by nonconsenting shareholders, as the case may be [*Corp. Code § 316(d)*].

[c] Action to Enforce Liability of Directors

Suit in the name of the corporation to enforce the liability of directors whoapproved of an improper distribution to its shareholders may be brought against any or all directors liable by the same creditors and shareholders, and under the same conditions, as are prescribed in *Corp. Code § 506(b)* relating to the persons entitled to sue shareholders receiving improper distributions [*Corp. Code § 316(c)*; *see § 164.13[2]*].

[d] Director's Right to Contribution or Action Against Shareholders

Any director sued because of an improper distribution may implead in the suit all other directors liable and may compel contribution from the other directors liable for the improper distribution either in that action or in an independent action against directors not joined as parties in that action [*Corp. Code § 316(e)*]. A director held liable for an improper distribution by the corporation is also entitled to be subrogated to the rights of the corporation against shareholders who received the distribution [*Corp. Code § 316(f)*]. The director may proceed against these shareholders either by filing a

cross complaint against them in the action in which the director is sued, or by bringing an independent action against them [*Corp. Code § 316(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesGeneral OverviewBusiness & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesCancellation & RedemptionBusiness & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesDeclaration & DistributionBusiness & Corporate LawCorporationsShareholdersActions Against CorporationsDerivative ActionsGeneral OverviewBusiness & Corporate LawCorporationsShareholdersShareholder Duties & LiabilitiesPersonal Liability

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14-164 California Forms of Pleading and Practice--Annotated § 164.14

§ 164.14 Dividends

[1] Determination of Shareholders of Record

The time of any "distribution" by way of dividend is the date of declaration of the dividend [*Corp. Code § 166*]. In order that the corporation may determine that the shareholders are entitled to receive payment of any dividend or other distribution or allotment of any rights, the board may fix, in advance, a record date, which must not be more than 60 days prior to the date set for payment in the declaration [*Corp. Code § 701(a)*]. If no record date is fixed, the record date for determining shareholders will be at the close of business on the day on which the board adopts the resolution relating thereto, or the 60th day prior to the date of the action, whichever is later [*Corp. Code § 701(b)(3)*]. The shareholders at the close of business on the record date are entitled to receive the dividend, distribution, or allotment of rights, notwithstanding any transfer of any shares on the books of the corporation after the record date, except as otherwise provided in the articles or by agreement or in the General Corporation Law [*Corp. Code § 701(d)*].

[2] Identification of Source

Each dividend other than one chargeable to retained earnings must be identified in a notice to shareholders as being made from a source other than retained earnings, stating its accounting treatment. The notice must accompany the dividend or must be given within three months after the end of the fiscal year in which the dividend is paid [*Corp. Code § 507*].

[3] Dividends on Partly Paid Shares

On the declaration of any dividend on fully paid shares, the corporation must declare a dividend on partly paid shares of the same class, but only on the basis of the percentage of the consideration actually paid thereon [*Corp. Code § 409(d)*].

[4] Shareholders' Right to Dividends

[a] No Right Until Declared

A shareholder has no vested right to a dividend until it has been declared by the corporation's board of directors [

Miller v. McColgan (1941) 17 Cal. 2d 432, 436, 110 P.2d 419] . However, while the board of directors may exercise its judgment as to the best use of funds available for distribution as dividends, the discretion of the board must be exercised fairly and honestly, and not arbitrarily. Thus, a court may interfere with the board's financial judgment if it appears that dividends are being paid in the form of wages to shareholder-employees but not to other shareholders [*De Martini v. Scavenger's Protective Asso. (1935) 3 Cal. App. 2d 691, 698, 40 P.2d 317* ; *O'Hare v. Marine Elec. Co. (1964) 229 Cal. App. 2d 33, 37, 39 Cal. Rptr. 799]* . Nevertheless, as a general rule the courts are reluctant to interfere with the board's discretion in the matter of dividends [*Richards v. Pacific S.W. Discount Corp. (1941) 44 Cal. App. 2d 551, 558, 112 P.2d 698]* .

[b] Preferred Shares

The preferred shareholders usually hold shares which have a preference, either cumulative or noncumulative, as to dividends. This means that those shareholders are entitled to receive a regular periodic dividend payable before dividends may be declared on common shares. When those dividends are "cumulative," all accumulated and unpaid dividends must be paid before common shareholders may receive dividends or payments upon liquidation. The general rule is that an action to compel payment of a dividend is equitable in nature, for example, for specific performance, and thus it would seem that the action is not derivative but rather is a direct claim upon the corporation [*see* Ballantine and Sterling, California Corporation Laws, Ch. 8, *Dividends and Reacquisition of Shares, § 142.05[3]* , (Matthew Bender)]. However, as in the case of dividends on common shares, the board of directors has considerable discretion with respect to declaring dividends on preferred shares absent some language in the preferred share provisions which require payment of dividends "if earned" or "if legally permissible" [*see* Cavitch, *Business Organizations, Ch. 141, Rights and Duties of Directors and Shareholders with Respect to Dividends, § 141.02[2]* (Matthew Bender) (contractual dividend provisions)].

[c] Right to Declared Dividend

When a dividend has lawfully been declared by the board of directors, theportion of the dividend to which each shareholder is entitled vests in the shareholder as an individual [*Meyers v. El Tejon Oil & Refining Co. (1946) 29 Cal. 2d 184, 188, 174 P.2d 1]* . That declaration creates a debtor-creditor relationship between the corporation and the shareholder which cannot be altered without the consent of each shareholder [*Meyers v. El Tejon Oil & Refining Co. (1946) 29 Cal. 2d 184, 188, 174 P.2d 1]* . When the funds for payment of the dividend have been set aside, either in the corporation's own treasury or in a depository, the insolvency of either the corporation or the depository will not affect the shareholders' paramount right to the declared dividend [*In re Associated Gas & Elec. Co. (2nd Cir. [NY] 1943) 137 F.2d 607, 610]* . However, the declaration of a dividend must be complete in order for the right thereto to vest in the shareholders [United States v. Southwest Portland Cement Co. (9th Cir. [Cal] 1938) *97 F.2d 413, 415]* . For examples of dividend declarations held to be incomplete, see Ballantine and Sterling, California Corporation Laws, Ch. 8, *Dividends and Reacquisition of Shares § 142.05[4][a][v]* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesDeclaration & DistributionBusiness & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesRight to DividendsBusiness & Corporate LawCorporationsShareholdersGeneral Overview

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14-164 California Forms of Pleading and Practice--Annotated § 164.15

§ 164.15 Repurchase of Shares

[1] Corporation's Authority to Repurchase; Restrictions

In the absence of some specific restriction on a corporation's purchase of its own shares, such as the restrictions on distributions to shareholders [*see Corp. Code §§ 166, 500-505*] or those which may be imposed by the articles or by contract, a corporation may purchase, redeem, receive, take or otherwise acquire its own shares [*Corp. Code § 207(d)*; *see also Corp. Code § 402(d)* (providing that nothing in *Corp. Code § 402* regarding issuance of redeemable shares shall prevent a corporation from entering into an agreement for the redemption or purchase of its shares to the extent permitted by *Corp. Code §§ 500-510*, the restrictions on distributions)].

[2] Other Limitations on Repurchase

Apart from statutory restrictions on distributions which would impair the corporation's financial position, or contractual or charter limitations, the power to repurchase shares is subject to restrictions based on the duty of the directors to act in the best interests of the corporation [*see* Cavitch, *Business Organizations, Ch. 147, Acquisition by a Corporation of Its Own Shares, § 147.04* (Matthew Bender)]. For example, if shares are repurchased to quell a takeover attempt by the owners of those shares and the directors' motivation for the repurchase was the desire to retain their positions of power and control, not only will the directors be liable for breach of fiduciary duty, but the selling shareholders may be jointly liable as aiders and abettors [*Heckmann v. Ahmanson (1985) 168 Cal. App. 3d 119, 127, 214 Cal. Rptr. 177]* . Similarly, the corporation must fully and fairly disclose the factual circumstances surrounding its purchase of its own shares [see *Corp. Code § 25401*(misrepresentation or omission of material facts in connection with purchase or offer to purchase a security as unlawful)].

[3] Executory Contracts

[a] Enforceability

Prior to January 1, 1977, the effective date of the present General Corporation Law, there was some uncertainty as to the enforceability of executory contracts for the repurchase of shares. The decisions under prior law indicated that in order for such a contract to be enforceable, the corporation must be able to purchase the shares both at the time the contract is

made and at the time it is to be performed [*Cutter Laboratories, Inc. v. Twining (1963) 221 Cal. App. 2d 302, 313-314, 34 Cal. Rptr. 317* ; *Goodman v. Global Indus. (1947) 80 Cal. App. 2d 583, 589, 182 P.2d 300]* . Thus, under prior law, mutuality of obligation was apparently a requirement from the time the contract was entered, although the contract could later become unenforceable if a repurchase would violate the statutory provisions analogous to those [*see Corp. Code §§ 500, 501*] which now prohibit distributions inimical to the interests of creditors [*Cutter Laboratories, Inc. v. Twining (1963) 221 Cal. App. 2d 302, 313-314, 34 Cal. Rptr. 317]* . Since present law requires that a corporation be able to make a distribution in the form of a repurchase only as of the date of the performance (*i.e.*, the transfer of cash or property), whether or not pursuant to a contract of an earlier date [*Corp. Code § 166, see also Corp. Code §§ 500, 501* (relating tests as to legality of distributions to the time either immediately prior to or after the distribution)], it appears that the cases requiring that the corporation have the capability to perform at the time the contract is entered have been overruled.

[b] Persons Who May Attack Validity

The statutory restrictions on distributions in the form of repurchases of a corporation's own shares are enacted for the benefit of the corporation, creditors, and innocent shareholders [*Tiedje v. Aluminum Taper Milling Co. (1956) 46 Cal. 2d 450, 455, 296 P.2d 554]* . However, a shareholder who is a party to a repurchase agreement which is performed at a time when the corporation cannot legally make a distribution is entitled to rescission and restitution of his or her shares if he or she can prove that he or she did not know that the conditions allowing the corporation to repurchase did not in fact exist [*Tiedje v. Aluminum Taper Milling Co. (1956) 46 Cal. 2d 450, 454-455, 296 P.2d 554]* . On the other hand, if the contract to repurchase can be construed as obligating individuals rather than the corporation to purchase the shares, the contract's validity will not be subject to attack on the ground of the corporation's inability to perform [*Fenolio v. McDonald (1959) 171 Cal. App. 2d 508, 509-510, 340 P.2d 657* (transfer of all assets of corporation to individuals pursuant to agreement providing that shares would be transferred to them if corporation defaulted on agreement to pay forthem as not preventing selling shareholders from recovering on promissory notes)].

[4] Issuance of Negotiable Instrument--Rights of Holder Test

Notwithstanding the provisions of *Corp. Code §§ 500-510*, a negotiable instrument issued by a corporation for the purchase of shares is enforceable by a holder in due course [*see Com. Code § 3302*] without notice that it was issued for that purpose or by a person who acquired the instrument through such a holder [*Corp. Code § 511*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesCancellation & RedemptionBusiness & Corporate LawCorporationsShareholdersGeneral OverviewContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesHolders in Due CourseGeneral Overview

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§ 164.16 Redemption of Shares

[1] Authority to Issue Redeemable Shares

A corporation may provide in its articles for one or more classes or series of shares which are redeemable, in whole or in part, at the option of the corporation only (with one exception discussed below), at such price or prices, within such time or upon the happening of one or more specified events, and upon such terms and conditions as are stated in the articles [*Corp. Code § 402(a)*]. A corporation may not issue shares which purport by their terms to grant the shareholder the right to compel the corporation to redeem them. An exception to this rule is made for open-end investment companies registered under the United States Investment Company Act of 1940 [*15 U.S.C. §§ 80a-1-80a-52*], which may provide in their articles for redemptions at the option of the shareholder at net-asset value [*Corp. Code § 402(b)*]. A corporation is also prohibited from issuing redeemable common shares unless it has another outstanding class of common shares not subject to redemption. The exceptions to this rule are for:

- Shares of registered open-end investment companies;

- Shares of a corporation holding a license or franchise from a governmental agency to conduct business or which are member corporations of a national securities exchange when the license, franchise, or membership is conditioned upon some or all of the holders of its stock possessing prescribed qualifications, but the shares are only redeemable to the extent necessary to prevent the loss of the license, franchise, or membership, or to reinstate it; and

- Shares of a professional corporation as defined in *Corp. Code § 13401(b)* [*Corp. Code § 402(c)*].

[2] Creation of Sinking Fund

Corp. Code § 402(d) provides that nothing in *Corp. Code § 402* (authorizing the issuance of redeemable shares) will prevent a corporation from creating a sinking fund or similar provision for the redemption or purchase of its shares to the extent permitted by the financial restrictions on distributions contained in *Corp. Code §§ 500-503* [*Corp. Code § 402(d)*; *see § 164.12*]. A corporation can either transfer cash or property to a trustee for the holders of preferred shares to be used for the redemption of those shares, or it may physically segregate cash or property in trust for that purpose. In

either case, a "distribution to its shareholders" takes place at the time of the transfer or physical segregation [*Corp. Code § 166*].

[3] Procedure for Redeeming Shares

[a] Generally

With the exception of registered open-end investment companies under the United States Investment Company Act of 1940 [*15 U.S.C. §§ 80a-1 et seq.*], real estate investment companies, and corporations in the process of winding up and dissolution, *Corp. Code § 509* provides for the method by which shares are redeemed [*Corp. Code §§ 504, 508*]. A corporation may redeem any or all redeemable shares by: (1) giving notice of redemption, and (2) paying or depositing the redemption price of the shares as provided in its articles or depositing the redemption price pursuant to the provisions of *Corp. Code § 509(d)* [*Corp. Code § 509(a)*].

[b] Notice

Subject to any provisions in the articles with respect to the notice required for redemption, the corporation may give notice of the redemption of any or all shares subject to redemption by causing a notice of redemption to be published in a newspaper of general circulation in the county in which the principal executive office of the corporation is located at least once a week for two successive weeks, in each instance on any day of the week, commencing not earlier than 60 nor later than 20 days before the date fixed for redemption. The notice of redemption must set forth all of the following:

- The class or series of shares or part of any class or series to be redeemed;
- The date fixed for redemption;
- The redemption price; and
- If the shares are certificated securities, the place at which the shareholders may obtain payment of the redemption price upon surrender of their share certificates [*Corp. Code § 509(b)*].

[c] Mailing of Notice

If the corporation gives notice by publication as provided above, it must also mail a copy of the notice to each holder of record of shares to be redeemed as of the date of mailing or the record date fixed in accordance with *Corp. Code § 701* [*Corp. Code § 509(c)*]. The record date may be fixed by the corporation's boardof directors as any date not more than 60 days prior to the date fixed for redemption of the shares [*Corp. Code § 701(a)*]. When not fixed by the board, the record date is the date on which the board adopted the redemption resolution or the sixtieth day prior to the date set for redemption, whichever is later [*Corp. Code § 701(b)(3)*].

The notice must be addressed to the holder at the address of the holder appearing on the books of the corporation or given by the holder to the corporation for the purpose of notice. If no address appears on the books or none has been given by a holder, notice must be mailed to the holder at the place where the principal executive office of the corporation is located. The notice must be mailed not earlier than 60 nor later than 20 days before the date fixed for redemption. However, failure to comply with the notice provisions of *Corp. Code § 509(c)* will not invalidate the redemption of shares [*Corp. Code § 509(c)*].

[d] Payment or Deposit of Redemption Price

Payment or deposit of the redemption price may be made as provided in the articles of incorporation or may be made as provided in *Corp. Code § 509(d)* [*Corp. Code § 509(a)*]. Under the procedure set forth in *Corp. Code § 509(d)*, if, on or

before the date fixed for redemption of any of its redeemable shares, a corporation deposits with any bank or trust company in California, as a trust fund, a sum sufficient to redeem, on the date fixed for their redemption, the shares called for redemption, the shares must be redeemed as of the date of the deposit. The funds must be accompanied by irrevocable instructions and authority to the depositary to publish the notice of redemption (or to complete publication if it has already been commenced), and to pay, on and after the date fixed for redemption or prior thereto, the redemption price of the shares to their respective holders upon the surrender of their share certificates [*Corp. Code § 509(d)*].

Although the date of deposit may, and normally will be, prior to the date fixed for redemption, the deposit will constitute full payment of the shares to their holders. From and after the date fixed for redemption, holders of redeemed shares have no right to dividends on the shares. From and after the date of the deposit, the shares are no longer outstanding, and the holders cease to be shareholders with respect to the shares and have no rights except the right to receive payment of the redemption price or any right to convert these shares which may exist for a period fixed by their terms, which period will continue [*Corp. Code § 509(d)*].

In the case of the redemption of uncertificated securities, the corporation must deposit with the bank or trust company an officer's certificate setting forth the holders of the uncertificated securities registered on its books and the number of shares held by each. In those cases, payment to the holder is not conditioned on surrender of the share certificate, but on delivery of the officer's certificate. In determining the holders of uncertificated securities, the bank or trust company is entitled to rely on any officer's certificate deposited with it in accordance with *Corp. Code § 509(d)* [*Corp. Code § 509(d)*].

[4] Issuance of Negotiable Instrument

[a] Rights of Holder

Notwithstanding the provisions of *Corp. Code §§ 500-510*, a negotiable instrument issued by a corporation for the redemption of shares is enforceable by a holder in due course [*see Com. Code § 3302*] without notice that it was issued for that purpose or by a person who acquired the instrument through such a holder [*Corp. Code § 511*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesCancellation & RedemptionBusiness & Corporate LawCorporationsShareholdersGeneral OverviewReal Property LawTrustsReal Estate Investment Trusts (REITs)Securities LawInvestment CompaniesDistribution, Redemption & Repurchase of Shares

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[Reserved]

§§ 164.17[Reserved]

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14-164 California Forms of Pleading and Practice--Annotated § 164.30

§ 164.30 California Legal Forms

For transactional forms relating to this chapter, see California Legal Forms, Ch. 9, *Dividends, Reacquisitions of Shares, and Assessments* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesCancellation & Redemption

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14-164 California Forms of Pleading and Practice--Annotated § 164.31

§ 164.31 State Statutes

[1] Definitions

Independent accountant. *Corp. Code § 115*

Distribution to its shareholders. *Corp. Code § 166*

Redemption price. *Corp. Code § 180*

Reverse stock split. *Corp. Code § 182*

Stock split. *Corp. Code § 188*

Subsidiary. *Corp. Code § 189*

Transact intrastate business. *Corp. Code § 191*

Dissenting shares. *Corp. Code § 1300(b)*

[2] Distributions

Applicability of generally accepted accounting principles. *Corp. Code § 114*

Defined. *Corp. Code § 166*

Time of distribution. *Corp. Code § 166*

Prohibitions on distributions based on retained earnings and remaining assets tests. *Corp. Code § 500*

Prohibition against distributions in derogation of rights of preferred shareholders. *Corp. Code §§ 502, 503*

Restrictions on distributions as inapplicable to certain investment companies and real estate investment companies. *Corp. Code § 504*

Restrictions on distributions appearing in articles or bylaws. *Corp. Code § 505*

Inapplicability of restrictions on distributions to winding up and dissolution proceedings. *Corp. Code § 508*

Applicability of restrictions on distributions to payments to dissenting shareholders. *Corp. Code § 1306*

Applicability of restrictions on distributions to nominally foreign corporations. *Corp. Code § 2115(b)*

Directors of foreign corporation transacting intrastate business liable for improper distributions under law of state of incorporation. *Corp. Code § 2116*

[3] Dividends

Cumulative dividends in arrears defined. *Corp. Code § 163.1*

Dividend, except share dividend, is distribution. *Corp. Code § 166*

Record date is determined by bylaws. *Corp. Code § 212(b)(7)*

Dividend rights respecting fractional shares, scrip, and warrants. *Corp. Code § 407*

Authority to issue share dividend. *Corp. Code § 409(a)*

Partly paid shares' entitlement to proportional dividend. *Corp. Code § 409(d)*

Identification of source of dividends not paid from retained earnings. *Corp. Code § 507*

Determination of record date of shareholders entitled to receive dividends. *Corp. Code § 701*

[4] Liability for Improper Distributions

Directors' standard of care. *Corp. Code § 309*

Determination of dividend not within power of executive committee. *Corp. Code § 311(f)*

Directors' liability for approving improper distribution. *Corp. Code § 316*

Shareholders' liability for receipt of improper distribution. *Corp. Code § 506*

Directors' criminal liability for improper distribution. *Corp. Code § 2253*

[5] Repurchase or Redemption of Shares

Repurchase or redemption as distribution. *Corp. Code § 166*

Time of repurchase or redemption. *Corp. Code § 166*

Authority of corporation to contract to reacquire shares. *Corp. Code §§ 207(d), 402(d)*

Provision in articles for issuance of redeemable shares. *Corp. Code § 402*

Authority to create sinking fund to redeem shares. *Corp. Code § 402(d)*

Procedure for redeeming shares. *Corp. Code § 509*

Status of reacquired shares. *Corp. Code § 510*

Misrepresentation or omission of material fact prohibited in connection with purchase or offer to purchase shares. *Corp. Code § 25401*

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-164 California Forms of Pleading and Practice--Annotated § 164.32

§ 164.32 Decisions

[1] Dividends

[a] Defined

"Dividend," under common use of word among shareholders of private corporations organized for profit, more often designates share of profits to be apportioned among shareholders as return on their investment. *Estate of Talbot (1969) 269 Cal. App. 2d 526, 535, 74 Cal. Rptr. 920*

Distribution of earnings to corporate shareholders were dividends when shareholder-employee received wages of almost one-half corporate earnings for year in return for nominal services. *Kohn v. Kohn (1950) 95 Cal. App. 2d 708, 715-716, 214 P.2d 71*

Share dividend is not true distribution in sense of adding anything to shareholder's holdings or taking anything away from corporation's property. *Eisner v. Macomber (1920) 252 U.S. 189, 202-203, 40 S. Ct. 189, 64 L. Ed. 521*

Dividend declared by one corporation of shares in another corporation is cash distribution in terms of actual value of shares on declaration date. *Commissioner v. Scatena (9th Cir. [Cal] 1936) 85 F.2d 729, 731*

[b] Power to Declare; Discretion of Board

Allocation of earnings to payment of cash dividends is largely one of policy, entrusted to discretion of directors acting honestly and intelligently in management of corporate affairs, and not misappropriating money. *Zellerbach v. Allenberg (1893) 99 Cal. 57, 70-71, 33 P. 786*

Whether dividend declared and for how much rests totally within the directors' fair and honestly exercised discretion. *Mulcahy v. Hibernia Sav. & L. Soc'y (1904) 144 Cal. 219, 223-225, 77 P. 910*

Issuance of preferred share dividend is managerial decision belonging to board of directors, for which, if made in good faith, court will not substitute its own judgment. *Marble v. Latchford Glass Co. (1962) 205 Cal. App. 2d 171, 178-179, 22 Cal. Rptr. 789*

In absence of showing of fraud or bad faith, directors have absolute discretion to dispose of funds available for dividends; burden of proof of bad faith is on complainant. *Richards v. Pacific S.W. Discount Corp. (1941) 44 Cal. App. 2d 551, 558, 112 P.2d 698*

Merely describing distribution to shareholder-employees as "wages" does not allow corporation to distribute its profits so as to deprive any shareholder otherwise of rights, although valid contract of employment otherwise may be made providing for distribution of profits to shareholding employees. *De Martini v. Scavenger's Protective Asso. (1935) 3 Cal. App. 2d 691, 698, 40 P.2d 317*

[c] Right to Dividend

[i] Between Transferor and Transferee of Shares

Buyer under executory contract for sale of shares not entitled to dividends until passage of legal title in absence of agreement to contrary. *Richards v. Pacific S.W. Discount Corp. (1941) 44 Cal. App. 2d 551, 555, 112 P.2d 698*

[ii] Preferred Shares

Preferred noncumulative shares are only entitled to fixed return on earnings if declared in particular year of returns, but without cumulative entitlement to dividends passed in any particular year. *Wabash Ry. Co. v. Barclay (1930) 280 U.S. 197, 202-203, 50 S. Ct. 106, 74 L. Ed. 368*

[iii] Prior to Declaration

Action to compel payment of dividend do not require joinder of board of directors as defendants; judgment against corporation alone is effective. *Muggill v. Reuben H. Donnelley Corp. (1965) 62 Cal. 2d 239, 241, 42 Cal. Rptr. 107, 398 P.2d 147* (dictum)

Directors have exclusive authority to declare dividends; in absence of which act shareholders have no direct proprietary interest in corporate earnings, there being no dividend in earnings until one is declared. *Gibbons v. Mahon (1890) 136 U.S. 549, 558, 568, 10 S. Ct. 1057, 34 L. Ed. 525*

Scheme or device for distribution of profits to shareholders generally but excluding minority from payments gives rise to individual cause of action against corporation for profits withheld. *O'Hare v. Marine Elec. Co. (1964) 229 Cal. App. 2d 33, 37, 39 Cal. Rptr. 799* ; *De Martini v. Scavenger's Protective Asso. (1935) 3 Cal. App. 2d 691, 698, 40 P.2d 317*

Shareholder-employee is able to quit job with corporation but, in absence of agreement, articles, or bylaws to contrary, is still entitled to dividend portion of payments; and when no breakdown has been previously decided on, court is able to determine dividend portion by contrasting wages given to nonshareholding employees doing same work, or otherwise using observations based on common knowledge, and subtracting such portion as wages. *Perata v. Oakland Scavenger Co. (1952) 111 Cal. App. 2d 378, 384-389, 393, 244 P.2d 940*

Corporation is owner of its property and earnings, rather than shareholder, who has expectancy of sharing in earnings

but right to share in earnings only as they may be declared in dividends arising from use of property. *Miller v. McColgan (1941) 17 Cal. 2d 432, 436-437, 110 P.2d 419*

[iv] Upon Declaration

Declaration of dividend creates nonrescindable debt in favor of shareholders unless qualified otherwise within the declaration; key characteristics of fully declared dividend are definite, final, irrevocable, and enforceable in nature. *United States v. Southwest Portland Cement Co. (9th Cir. [Cal] 1938) 97 F.2d 413, 415*

Plaintiff demanding payment of dividend already declared does not need to allegecorporation had available proper source of funds from which to pay dividend--that issue being one which defendant corporation must assert. *Meyers v. El Tejon Oil & Refining Co. (1946) 29 Cal. 2d 184, 188, 174 P.2d 1*

Phrase "otherwise acquires its own shares" in *Corp. Code § 510(a)* (when corporation purchases, redeems, acquires by way of conversion to another class or series, or otherwise acquires its own shares, shares are restored to status of authorized by unissued shares, unless articles prohibit reissuance) recognizes reacquisition through surrender by stockholder. *Simon v. Steelman (1990) 224 Cal. App. 3d 1002, 1006-1007, 274 Cal. Rptr. 218* (note that although this case was decided before *Corp. Code § 510(a)* was amended in 1995 [*see* 1995 Stats., ch. 154 § 5 (when a corporation reacquires its own shares)], it appears that the holding would remain unchanged).

[2] Unlawful Distributions

Trustee in bankruptcy of debtor, which was surviving corporation after leveraged buyout ("LBO"), does not have standing to attack distributions made to selling shareholders at time of sale when no creditors existed then; later payments, if they were distributions to which *Corp. Code § 500* or *501* was applicable, are to be scrutinized at time they were made, not at time parties executed LBO agreement that provided that they would be made; later payments were not distributions to which *Corp. Code §§ 500* and *501* apply. *Kupetz v. Wolf (9th Cir. 1988) 845 F.2d 842, 846-850*

For the limited purpose of determining creditor plaintiff's standing to sue directors approving distribution in the form of purchase by corporation of its shares, the term "debt" includes preexisting contractual obligation to pay future rent. *UMF Sys., Inc. v. Eltra Corp. (1976) 17 Cal. 3d 753, 757, 132 Cal. Rptr. 129, 553 P.2d 225*

Requirement that, in order to be liable for receiving improper distribution, shareholder have knowledge of facts indicating impropriety thereof does not require that shareholder reach subjective conclusion or belief that the distribution is illegal. *England v. Christensen (1966) 243 Cal. App. 2d 413, 429-432, 52 Cal. Rptr. 402*

Question of corporation's ability to meet liabilities on maturity is one of fact; while evidence that corporation is overdue in payment of some accounts and may not be operating at profit is some evidence tending to show inability to satisfy debts when due, other evidence may be overcome by showing ability to pay debts when due. *Flynn v. California Casket Co. (1951) 105 Cal. App. 2d 196, 204-205, 233 P.2d 131*

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-164 California Forms of Pleading and Practice--Annotated § 164.33

§ 164.33 Law Reviews

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Brudney, *Equal Treatment of Shareholders in Corporate Distributions and Reorganizations, 71 Cal. L. Rev. 1072 (1983)*

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Ackerman and Sterrett, *California's New Approach to Dividends and Reacquisitions of Shares, 23 UCLA L. Rev. 1052 (1976)*

Dreyfuss, *Distributions to Shareholders Under the New California General Corporation Law, 9 Loyola L. Rev. 839 (1976)*

Buxbaum, *Preferred Stock--Law and Draftsmanship, 42 Calif. L. Rev. 243 (1954)*

Jones, *Redeemable Corporate Securities, 5 So. Cal. L. Rev. 83 (1931)*

Legal Topics:

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

Business & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesCancellation & RedemptionBusiness & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesDeclaration & DistributionBusiness & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesRight to DividendsBusiness & Corporate LawCorporationsFinanceInitial Capitalization & Stock SubscriptionsClasses of Stock

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§ 164.34 Text References

Ballantine and Sterling, California Corporation Laws, Ch. 8, *Dividends and Reacquisition of Shares* (Matthew Bender)

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 113, 119, 120, 122, 123, 125, 219, 233-235, 237-240, 321, 322, 324, 328 (10th ed. 2005)

Marsh, California Corporation Law and Practice, Ch. III, *Corporate Distributions*

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14-164 California Forms of Pleading and Practice--Annotated §§ 164.35-164.49

[Reserved]

§§ 164.35[Reserved]

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PART IV. FORMS

14-164 California Forms of Pleading and Practice--Annotated § 164.50

§ 164.50 Complaint for Damages Against Directors for Approving Improper Distribution to Shareholders [Corp. Code § 316(a)-(d)]--By Creditors or Preferred Shareholders [Corp. Code § 506(b)]

[1] FORM Complaint for Damages Against Directors for Approving Improper Distribution to Shareholders [Corp. Code § 316(a)-(d)]--By Creditors or Preferred Shareholders [Corp. Code § 506(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
a Corporation, and	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	[Amount demanded _____
_____ [*name*(*s*)],	)	(exceeds *or* does not exceed) $10,000]
[and Does I through_____,]	)	[LIMITED CIVIL CASE]
Defendant(s).	)	
	)	
	)	

_____

Plaintiff alleges:

1. Plaintiff _____ [*name of corporation*] ("the corporation") is, and at all times mentioned in this complaint was, a corporation organized and existing under the laws of the State of _____ and has its principal place of business in _____ County, California.

2. [*If corporation is nominally foreign corporation subject to provisions of Corp. Code § 2115(b)*, continue with allegation as to applicability of California law. *See § 160.53*]

[*ADD, if plaintiff is a creditor of the corporation*]

3. Plaintiff _____ [*name of creditor*] is a creditor of the corporation with a _____ [debt *or* claim] for _____ [*describe nature of debt or claim*] in the currently outstanding amount of $ _____. Plaintiff's _____ [debt *or* claim] arose on _____ [*date*], prior to the time of the distribution alleged in Paragraph 5, and plaintiff did not consent to that distribution. Plaintiff brings this action on its own behalf and on behalf of and in the name of the corporation.

[*OR*]

[*ADD, if plaintiff is a preferred shareholder of the corporation*]

3. Plaintiff _____ [*name of shareholder*] is a holder of _____ preferred shares of the corporation with a preference _____ [on liquidation *or* with respect to payment of dividends] over the _____ [class *or* series] of shares to which the distribution alleged in Paragraph 5 was made. Plaintiff's shares were outstanding at the time that distribution was made, and plaintiff did not consent to the distribution. Plaintiff brings this action on its own behalf and on behalf of and in the name of the corporation.

[*CONTINUE*]

4. Defendant _____ [*name of director*] is a resident of _____ County, California. [*Continue to name all defendant directors and their residences*]. Each of the defendants named in this paragraph was at the time of the act herein complained of, a director of such corporation _____ [and still so remains *or* although defendants _____ (*names*) no longer serve in such capacity].

5. Plaintiff is informed and believes, and on that basis alleges, that on or about _____ [*date*], defendants _____ [*names of directors*] approved a distribution of the corporation's _____ [cash *or* property] to its shareholders by _____ [*specify, e.g.*, declaring a dividend in an amount of $_____ per share on _____ (*number*) outstanding _____ (*describe class or series*) shares *or* voting to _____ (purchase *or* redeem) _____ (*number*) shares of the corporation's outstanding _____ (*describe class or series*) shares for an amount of $ _____ per share, which amount in the aggregate of $ _____ was actually _____ (transferred to *or* irrevocably delivered to a trustee for the benefit of) holders of those shares on _____ (date)].

[*ADD, if creditor is plaintiff*]

[*EITHER*]

6. Plaintiff is informed and believes, and on that basis alleges, that the distribution alleged in Paragraph 5 of this complaint was contrary to law in that neither immediately prior to the distribution did the retained earnings of the corporation equal or exceed the amount of the distribution, nor immediately after giving effect to the distribution did the sum of the corporation's assets, exclusive of goodwill, capitalized research and development expenses and deferred charges, equal at least 125 percent of its liabilities, not including deferred taxes, income and other deferred credits, and

the corporation's current assets did not equal _____ [its current liabilities *or* 125 percent of its current liabilities, the average of the earnings of the corporation before income taxes and interest expense for the two fiscal years preceding the distribution having been less than the average of the interest expense for such fiscal years].

[*OR*]

6. Plaintiff is informed and believes, and on that basis alleges, that the distribution alleged in Paragraph 5 of this complaint was contrary to law in that the corporation _____ [is *or* as a result of making the distribution, will be] likely to be unable to meet its liabilities as they mature.

[*ADD, if preferred shareholder is plaintiff*]

[*EITHER*]

6. Plaintiff is informed and believes, and on that basis alleges, that the distribution alleged in Paragraph 5 of this complaint was contrary to law in that it was made to shareholders holding shares of a _____ [class *or* series] that are junior to outstanding shares of the _____ [class *or* series] held by plaintiff with respect to the distribution of the corporation's assets on liquidation, and after giving effect to the distribution the excess of the assets of the corporation (exclusive of goodwill, capitalized research and development expenses and deferred charges) over its liabilities (not including deferred taxes, income and other deferred credits) were less than the liquidation preference of all outstanding shares of the _____ [class *or* series] held by plaintiff over the _____ [class *or* series] to which the distribution was made.

[*OR*]

6. Plaintiff is informed and believes, and on that basis alleges, that the distribution alleged in Paragraph 5 of this complaint was contrary to law in that it was made to shareholders holding shares of a _____ [class *or* series] that are junior to outstanding shares of the _____ [class *or* series] held by plaintiff with respect to payment of dividends, and the amount of the retained earnings of the corporation immediately prior to the distribution did not equal or exceed the amount of the distribution plus the aggregate amount of the cumulative dividends in arrears on all outstanding shares of the _____ [class *or* series] held by plaintiff.

[*ADD, if creditor is plaintiff*]

7. No creditor of the corporation whose debt or claim arose prior to the time of the unlawful distribution alleged in Paragraph 5 of this complaint consented to the distribution [except for creditors to whom the corporation was then obligated in the amount of $_____]. The liabilities of the corporation to the nonconsenting creditors at the time of the distribution was $_____.

[*ADD, if preferred shareholder is plaintiff*]

7. No holder of shares of the corporation having a _____ [liquidation *or* dividend] preference whose shares were outstanding at the time of the unlawful distribution alleged in Paragraph 5 of this complaint consented to the distribution [except holders of _____ (*number*) of shares having a _____ (

describe) preference]. The injury suffered by the nonconsenting preferred shareholders was $_____ [*insert either liquidation price times number of nonconsenting preferred shares or cumulative dividends in arrears on shares held by nonconsenting preferred shareholders*].

[*CONTINUE*]

8. As a result of the unlawful distribution alleged in this complaint, defendants _____ [*names of directors*] are jointly and severally liable to the corporation for the benefit of all _____ [creditors *or* shareholders] not consenting to the distribution in the amount of $ _____ [*sum not exceeding either liabilities of corporation to nonconsenting creditors or injury suffered by preferred shareholders as alleged in Paragraph 7 and not exceeding amount of distribution or fair market value of property distributed*] plus any interest on that amount from the date of distribution at the legal rate on judgments until paid _____ [*add, if property was distributed:* together with all reasonably incurred costs of appraisal and valuation of the property distributed].

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____, to be awarded the corporation for the benefit of all nonconsenting _____ [creditors *or* shareholders];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This complaint may be used either by creditors or by preferred shareholders ofa corporation to recover damages from

directors who approved an unlawful distribution. The complaint alleges:

- The capacity of the corporate plaintiff as a corporation (Paragraphs 1 and 2) [*Corp. Code § 316(c)(1)*].

- The capacity of the plaintiff bringing the action in the name of the corporation as either a creditor or a preferred shareholder who did not consent to the alleged distribution (Paragraph 3) [*Corp. Code §§ 316(c)(1), 506(b)*].

- The capacity of the defendants (Paragraph 4).

- The approval by the defendants of an unlawful distribution (Paragraph 5) [*Corp. Code § 316(a)(1)*].

- The allegations appropriate to either a creditor's or a shareholder's suit based on the impropriety of the distribution (Paragraph 6) [*Corp. Code §§ 316(a)(1), 500-503*].

- The amount owed to nonconsenting creditors at the time of the violation or the injury suffered by nonconsenting preferred shareholders (Paragraph 7) [*see Corp. Code § 316(d)*].

- That the directors who approved the distribution are jointly and severally liable to the corporation to the corporation for the benefit of all nonconsenting creditors or preferred shareholders (Paragraph 8) [*Corp. Code § 316(a)(1)*].

[3] Distribution to Its Shareholders

For a definition of a "distribution to its shareholders" by a corporation or a subsidiary of the corporation and a discussion of the time of any distributions by dividend, by repurchase or redemption, or by sinking fund payment, see *§ 164.11*.

[4] Prohibited Distributions

[a] Two Basic Tests

For discussions of the tests and requirements that a corporation must meet in order to make a distribution to its shareholders [*Corp. Code §§ 500-505*], see *§ 164.12*.

[b] Applicability of Tests to Foreign Corporations

For a discussion of the liability of foreign and nominally foreign corporations for making distributions that do not meet the tests of *Corp. Code §§ 500-505*, see *§ 164.12[8]*.

[c] Applicability of Tests to Dissenting Shareholders

For a discussion of how the tests of *Corp. Code §§ 500-505* apply to dissenting shareholders, see *§ 164.12[9]*.

[d] Inapplicability of Tests

For a discussion of situations in which the distribution restrictions of *Corp. Code §§ 500-505* do not apply, see *§ 164.12[10]*.

[5] Director's Liability for Improper Distributions

[a] Scope

For discussions of the liability of directors of a corporation who approve the making of any improper distributions to the shareholders, see *§ 164.13[3][a]* and *[b]*.

[b] Persons Who May Enforce Liability

Suit may be brought in the name of the corporation to enforce the liability of any or all directors approving an unlawful distribution [*Corp. Code §§ 316(c), 506(b)*]:

- By any one or more creditors whose debts or claims arose prior to the time of a distribution that violates *Corp. Code § 500* or *501* (retained earnings or remaining assets test or insolvency test), and who have not consented thereto, whether or not they have reduced their claims to judgment; or

- By any one or more holders of preferred shares whose shares were outstanding at the time of a distribution that violates their liquidation [*Corp. Code § 502*] or dividend [*Corp. Code § 503*] preferences, and who have not consented thereto, without having to comply with the requirements for derivative suits.

[6] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*]. In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the first paper must state whether the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[7] State Statutes

Distribution to shareholders. *Corp. Code § 166*

Subsidiary. *Corp. Code § 189*

Transact intrastate business. *Corp. Code § 191*

For a listing of some of the statutory provisions that regulate corporate distributions to shareholders, see *§ 164.31[2]*.

For a listing of some of the statutory provisions that determine liability for improper distributions, see *§ 164.31[4]*.

[8] Decisions

[i] In General

FSLIC, in its corporate capacity and as assignee of FSLIC acting as receiver of insolvent state-chartered association, is entitled to collect dividends paid to sole shareholder, who was also director, out of paid-in surplus in violation of *Fin. Code § 6522* [*see Corp. Code § 316(a)(1)* (liability of director for illegal dividends)]. *Federal Sav. and Loan Ins. Corp. v. Molinaro (9th Cir. 1990) 901 F.2d 1490, 1492-1493*

For the limited purpose of determining creditor plaintiff's standing to sue directors approving distribution in the form of purchase by corporation of its shares, the term "debt" includes preexisting contractual obligation to pay future rent. *UMF Sys., Inc. v. Eltra Corp. (1976) 17 Cal. 3d 753, 757, 132 Cal. Rptr. 129, 553 P.2d 225*

Cause of action for breach of debtor corporation's fiduciary duty to refrain from intentionally acting to prejudice unsecured creditors requires allegation that corporation has been or will be unable to pay; diminution of market value of debentures as insufficient allegation of damage. *Fox v. MGM Grand Hotels, Inc. (1982) 137 Cal. App. 3d 524, 527-528, 187 Cal. Rptr. 141*

Question of corporation's ability to meet liabilities on maturity is one of fact; and while evidence that corporation is overdue in payment of some accounts and may not be operating at profit is some evidence tending to show inability to satisfy debts when due, other evidence is able to overcome such facts by showing ability to pay debts when due. *Flynn v. California Casket Co. (1951) 105 Cal. App. 2d 196, 204-205, 233 P.2d 131*

[ii] Disguised Distributions

Scheme or device for distribution of profits to shareholders generally but excluding minority from such payments gives rise to individual cause of action against corporation for profits withheld. *O'Hare v. Marine Elec. Co. (1964) 229 Cal. App. 2d 33, 37, 39 Cal. Rptr. 799* ; *De Martini v. Scavenger's Protective Asso. (1935) 3 Cal. App. 2d 691, 698, 40 P.2d 317*

Distribution of earnings to corporate shareholders are dividends when shareholder-employee received wages of almost one-half corporate earnings for year in return for nominal services. *Kohn v. Kohn (1950) 95 Cal. App. 2d 708, 715-716, 214 P.2d 71*

[9] Text References

Ballantine & Sterling, California Corporation Laws, Ch. 8, *Dividends and Reacquisition of Shares, §§ 140* , 141, 146 (Matthew Bender)

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14-164 California Forms of Pleading and Practice--Annotated § 164.51

§ 164.51 Complaint for Damages Against Shareholders for Receiving Improper Distribution [Corp. Code § 506(a)]--By Creditors or Preferred Shareholders [Corp. Code § 506(b)]

[1] FORM Complaint for Damages Against Shareholders for Receiving Improper Distribution [Corp. Code § 506(a)]--By Creditors or Preferred Shareholders [Corp. Code § 506(b)]

[*Caption. See § 164.50.*]

Plaintiff alleges:

1. [*Allege capacity of corporation. See § 164.50, Paragraph 1.*]

2. [*Allege applicability of California law if corporation is nominally foreign subject to Corp. Code § 2115* (*b*). *See § 160.53.*]

3. [*Allege capacity of plaintiff. See § 164.50, Paragraph 3.*]

4. Defendant _____ [*name of shareholder*] is a resident of _____ County, California. [*Continue to name all defendant shareholders and their residences.*] Each of the defendants named in this paragraph was, at the time of the distribution alleged in Paragraph 5, a holder of _____ [*describe, e.g.,* common *or specify other class or series*] of shares of the corporation.

5. On or about _____ [*date*], the corporation made a distribution of its _____ [cash *or* property consisting of _____ (*describe*)] to its shareholders by _____ [*specify, e.g.,* declaring a dividend in an amount of $_____ per share on _____ (*number*) outstanding _____ (*describe class or series*) shares, of which dividend defendants received a total of $_____ *or* _____ (redeeming *or* purchasing) _____ (*number*) shares of the corporation's outstanding _____ (*describe class or series*) for an amount of $_____ per share, of which amount defendants received a total of $_____ upon its

_____ (transfer to them *or* irrevocable delivery to a trustee for their benefit) on _____ (*date*)].

6. [*Allege impropriety of distribution. See § 164.50, Paragraph 6.*]

7. Defendants received the distribution alleged in paragraph with knowledge of the facts indicating its impropriety. [*Continue allegation with any facts supporting allegation.*]

8. [*Allege liabilities to nonconsenting creditors or injury to nonconsenting preferred shareholders. See § 164.50, Paragraph 7.*]

9. As a result of the improper distribution alleged in this complaint, each defendant is liable to the corporation for the benefit of all _____ [creditors *or* shareholders] not consenting to that distribution up to the amount received by that defendant plus interest thereon at the legal rate on judgments, but not exceeding $ _____ [*sum equal to either liabilities of corporation to nonconsenting creditors or injury suffered by preferred shareholders as alleged in Paragraph 8*].

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____, to be apportioned among the defendants according to the improper distribution received by each defendant, and to be awarded to the corporation for the benefit of all nonconsenting _____ [creditors *or* shareholders];

2. For interest at the legal rate on the amount of the distribution received by each defendant from and after _____ [*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 164.50.*]

[2] Use of Form

This form is a complaint that may be used by either creditors or preferred shareholders of a corporation to recover damages from shareholders who have received an improper distribution with knowledge of the facts indicating its impropriety. The allegations closely parallel those in a complaint against directors for approving the improper distribution [*see* Comments to § 164.50]. Unique to this complaint are the allegations:

- That the defendants are shareholders of the corporation (Paragraph 4).

- That the defendants received the distribution with knowledge of facts indicating its impropriety (Paragraph 7) [*Corp. Code § 506(a)*].

- That the defendants are severally liable up to the amount of the distribution received plus interest (Paragraph 9) [*Corp. Code § 506(a)*].

[3] Shareholder's Liability for Improper Distributions

[a] Scope

Any shareholder who receives any distribution prohibited by *Corp. Code §§ 500-510* with knowledge of facts indicating its impropriety is liable to thecorporation for the benefit of all of the creditors or shareholders entitled to institute an action for the amount received by that shareholder with interest at the legal rate on judgments until paid, but not exceeding the liabilities of the corporation owed to nonconsenting creditors at the time of the violation and the injury suffered by nonconsenting shareholders, as the case may be [*Corp. Code § 506(a)*]. Further, in the event that any shareholder receives any distribution of the corporation's property prohibited by *Corp. Code § 500 et seq.*, the shareholder receiving that illegal distribution is liable to the corporation for an amount equal to the fair market value of the property at the time of the illegal distribution, plus any interest on that amount from the date of distribution at the legal rate on judgments until paid, together with all reasonably incurred costs of appraisal or other valuation, if any, of that property, but not exceeding the liabilities of the corporation owed to nonconsenting creditors at the time of the violation "and" [*sic:* or] the injury suffered by nonconsenting shareholders, as the case may be [*Corp. Code § 506(a)*].

[b] Shareholder's Knowledge of Impropriety

The shareholder's liability for receiving an improper distribution is conditioned on his or her having knowledge of the facts indicating the impropriety [*Corp. Code § 506(a)*]. "Impropriety" means unlawfulness or illegality [*England v. Christensen (1966) 243 Cal. App. 2d 413, 430, 52 Cal. Rptr. 402]* . Knowledge of facts indicating that a distribution is unlawful is to be distinguished from knowledge of the unlawfulness itself. The shareholder need only know the facts on the basis of which the law declares the distribution unlawful, but he or she need not know that it was in fact illegal [*England v. Christensen (1966) 243 Cal. App. 2d 413, 429-432, 52 Cal. Rptr. 402]* . Proof of the shareholder's knowledge of such facts may be difficult, particularly in the case of publicly held corporations. However, in the case of closely held corporations the shareholder is likely to be more intimately acquainted with the corporation's financial condition, or have reason to be.

[c] Several Liability

Since each shareholder receiving an improper distribution is liable only for the amount he or she received, plus interest at the legal rate on judgments until it is repaid (or, in the case of an improper distribution of the corporation's property, for an amount equal to the fair market value of the property at the time of the illegal distribution, plus any interest on that amount from the date of distribution at the legal rate on judgments until paid, together with all reasonably incurred costs of appraisal or other valuation, if any, of that property) [*Corp. Code § 506(a)*], it may be necessary to join the largest number of shareholders possible to recover an amount adequate to cover the liabilities of the corporation to nonconsenting creditors or the injury to nonconsenting preferred shareholders. If the plaintiff creditor or shareholder is claiming an amount less than the total distribution, although equal to or in excess of the distribution to a particular shareholder, and only that shareholder is sued, the defendant may bring in all other shareholders who are similarly liable and compel contribution, or the defendant may initiate a separate action to compel contribution against those shareholders [*Corp. Code § 506(c)*].

[d] Persons Who May Enforce Liability

Suit in the name of the corporation to enforce the liability of shareholders who received an improper distribution may be

brought by the same creditors and shareholders, and under the same conditions, as are entitled, under *Corp. Code § 506(b)*, to maintain an action against directors for approving an improper distribution [*see § 164.50[5][b]*].

[4] State Statutes

Shareholder's liability for receipt of improper distribution. *Corp. Code § 506*

[5] Decisions

Requirement that, in order to be liable for the receiving improper distribution, shareholder have knowledge of facts indicating impropriety does not require that shareholder reach subjective conclusion or belief that the distribution is illegal. *England v. Christensen (1966) 243 Cal. App. 2d 413, 429-432, 52 Cal. Rptr. 402*

[6] Cross References

For a related form, see *§ 164.50*.

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14-164 California Forms of Pleading and Practice--Annotated § 164.52

§ 164.52 Cross Complaint to Implead Other Parties Liable With Defendant in Main Action to Recover Illegal Corporate Distribution [Corp. Code §§ 316(e), 506(c)]

[1] FORM Cross Complaint to Implead Other Parties Liable With Defendant in Main Action to Recover Illegal Corporate Distribution [Corp. Code §§ 316(e), 506(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
a Corporation, and	)	
_____ [*name*],	)	
Plaintiff,	)	
vs.	)	
_____ [*name*(*s*)],	)	NO. _____
[and Does I through _____]	)	CROSS COMPLAINT TO IMPLEAD PARTIES
Defendants.	)	[Amount demanded _____
_____	)	(exceeds *or* does not exceed) $10,000]
_____ [*name*],	)	[LIMITED CIVIL CASE]
Cross Complainant,	)	
vs.	)	
_____ [*names*],	)	
Cross Defendants.	)	
	)	
	)	

_____

Cross complainant alleges:

1. Cross complainant is a defendant in the above-entitled action, which plaintiff commenced by filing his/her complaint

on _____[*date*], and in which plaintiff seeks to recover damages from cross complainant, alleging that cross complainant was a _____ [director *or* shareholder] of _____ [*name of corporation*], hereafter called "corporation," and is liable to the corporation for the benefit of its _____ [creditors *or* shareholders] for _____ [approving *or* receiving] an improper distribution of the corporation's _____ [cash *or* property] on _____ [*date*], to which distribution plaintiff did not consent.

2. At all times, in this complaint mentioned, cross defendants were _____ [directors *or* shareholders] of the corporation and each of them did _____ [approve *or* receive with knowledge of the impropriety thereof] the distribution alleged to be improper in plaintiff's complaint.

3. In plaintiff's complaint it is alleged that the alleged distribution was improper in that _____ [*specify ground of impropriety. See § 164.50, Paragraph 6*].

4. If all allegations of plaintiff's complaint are true, then it is also true that cross defendants are _____ [*if directors* : jointly and severally liable with cross complainant for approving the alleged distribution *or, if shareholders* : severally liable with cross complainant to the extent of the distribution received by each with knowledge of the impropriety thereof, plus interest thereon until repaid].

5. Cross complainant hereby impleads cross defendants to compel contribution toward any judgment of this court rendered in favor of the plaintiff against cross complainant.

WHEREFORE, cross complainant prays judgment as follows:

1. That cross defendants must contribute _____ [equally with cross complainant *or* in proportion as the distribution received by each bears to the total judgment, plus interest,] to the payment of any judgment that might be rendered against cross complainant in the above-entitled action against him/her by plaintiff;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 164.50.*]

[2] Use of Form

This form is a cross complaint for use by either a director or shareholder who is a defendant in an action brought to enforce their liability for, respectively, approving or receiving an improper distribution [*see Corp. Code §§ 316(a)* (directors' liability), *506(a)* (shareholder's liability); *see also §§ 164.50, 164.51*]. The cross complaint may be used to implead nonparty directors or shareholders who may be liable on the same grounds as the plaintiff in the main action. Although an independent action to compel contribution is authorized [*see Corp. Code §§ 316(e), 506(c)*], and may be

necessary when nonparties cannot be served in the main action, the procedure authorized for impleading the main action is probably most satisfactory from the defendant's point of view.

[3] Director's Right to Contribution or Action Against Shareholders

For a discussion of the rights of a director sued in an action arising from an improper distribution, see *§ 164.13[3][d]*. For a form of cross complaint to obtain subrogation against shareholders who have received the distribution, see *§ 164.53*.

[4] Shareholder's Right to Contribution

Any shareholder sued under *Corp. Code § 506* for receiving an improperdistribution may implead all other shareholders not joined who received the distribution with knowledge of the facts indicating its impropriety and may compel contribution against them either in the same action in which the defendant is sued or in an independent action [*Corp. Code § 506(c)*].

[5] State Statutes

Ability of defendant director to implead other directors in action to recover illegal distribution. *Corp. Code § 316(e)*

Ability of defendant shareholder to implead other shareholders in action to recover illegal distribution. *Corp. Code § 506(c)*

[6] Cross References

For related forms, see *§§ 164.50* and *164.51*.

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14-164 California Forms of Pleading and Practice--Annotated § 164.53

§ 164.53 Cross Complaint by Director Defendant in Action to Recover Illegal Corporate Distribution [Corp. Code § 316(a)-(d)]--For Subrogation to Rights of Corporation Against Shareholders Receiving Distribution [Corp. Code § 316(f)(1)]

[1] FORM Cross Complaint by Director Defendant in Action to Recover Illegal Corporate Distribution [Corp. Code § 316(a)-(d)]--For Subrogation to Rights of Corporation Against Shareholders Receiving Distribution [Corp. Code § 316(f)(1)]

[*Caption. See § 164.52.*]

Cross complainant alleges:

1. Cross complainant is a defendant in the above-entitled action, which plaintiff commenced by filing his/her complaint on _____ [*date*], and in which plaintiff seeks to recover damages from cross complainant, alleging that cross complainant was a director of _____ [*name of corporation*], hereafter called "corporation," and is liable to the corporation for the benefit of its _____ [creditors *or* shareholders] for approving an improper distribution of the corporation's _____ [cash *or* property] on _____ [*date*], to which distribution plaintiff did not consent.

2. At all times herein mentioned, cross defendants were shareholders holding _____ [*specify class or series receiving distribution*] shares of the corporation in the amounts set forth opposite their names in Exhibit A, which is attached hereto and made a part hereof. On or about _____ [*date*], cross defendants and each of them received the distribution alleged to be improper in plaintiff's complaint, with knowledge of facts indicating such impropriety, in the amounts indicated opposite their names and shareholdings in Exhibit A.

3. In plaintiff's complaint it is alleged that the alleged distribution was improper in that _____ [*specify ground of impropriety. See § 164.50, Paragraph 6*].

4. If all allegations of plaintiff's complaint are true, then it is also true that cross defendants are severally liable to the

corporation for the benefit of its _____ [creditors *or* shareholders] up to the amount of the distribution received by each, plus interest thereon until repaid.

5. Cross complainant hereby impleads cross defendants in order to enforce his/her right to be subrogated to the rights of the corporation against cross defendants.

WHEREFORE, cross complainant prays for judgment as follows:

1. That cross complainant be subrogated to the rights of _____ [*name of corporation*] against cross defendants to the extent of any judgment that might be rendered against cross complainant in the above-entitled action against him/her by plaintiff;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Cross Complainant

[*Verification, if desired. See § 164.50.*]

[2] Use of Form

This form is a cross complaint that permits a director, sued for recovery of an illegal distribution approved by that director, to cross complain against shareholders receiving that distribution for subrogation to the rights of the corporation against them for any recovery that the director may end up paying in the main action.

[3] Director's Right to Subrogation Against Shareholders

Directors liable to the corporation for having approved an illegal distribution [*see Corp. Code § 316(a)*]--whether sued by its creditors or preferred shareholders [*see Corp. Code §§ 316(c), 506(b)*]--are entitled to be subrogated to the rights of the corporation against shareholders who received the distribution [*Corp. Code § 316(f)(1)*]. The director's recovery may be obtained either through an independent action or through cross complaint in the main action in which the director has been made a defendant [*Corp. Code § 316(f)*].

[4] Cross References

For forms of complaint based on subrogation, see Ch. 536, *Subrogation*

For related forms, see *§§ 164.50* and *164.51*.

[5] State Statutes

Directors' entitlement to be subrogated to rights of corporation against shareholders receiving illegal distribution. *Corp. Code § 316(f)(1)*

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14-164 California Forms of Pleading and Practice--Annotated § 164.54

§ 164.54 Complaint for Damages for Refusal to Make Distribution to Plaintiff Shareholder

[1] FORM Complaint for Damages for Refusal to Make Distribution to Plaintiff Shareholder

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], a Corporation,	)	[Amount demanded _____
Defendant.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ County, California.

2. On _____ [*date*], plaintiff was the owner and holder of _____ [*number*] of the defendant's _____ [*describe class or series*] shares and was on that day a shareholder of record of the defendant. Plaintiff has at all times since been the shareholder of record of those shares.

[*EITHER*]

3. On _____ [*date*], the defendant's board of directors declared a dividend in the sum of

$_____ per share to be paid to shareholders of record on _____ [*date*], the record date fixed by the board of directors.

[*OR*]

3. On _____ [*date*], plaintiff and defendent entered an agreement, a copy of which is attached hereto as Exhibit A and made a part hereof, providing that plaintiff's shares would be purchased by the defendant _____ [*specify contingency, e.g.*, upon plaintiff's resignation as an employee of defendant] at a price of $_____ per share.

[*EITHER*]

4. On _____ [*date*], at _____ [*street address and city*], California, defendant's principal place of business, plaintiff delivered a written demand, a copy of which is attached hereto as Exhibit B and made a part hereof, that defendant pay all dividends then due and owing on all shares held by theplaintiff. Defendant has failed and refused, and continues to fail and refuse, to pay plaintiff such dividends.

[*OR*]

4. On _____ [*date*], _____ [*specify happening of condition precedent to defendant's obligation to purchase plaintiff's shares, e.g.*, plaintiff tendered his/her resignation to defendant, which was accepted, and thereafter plaintiff has not been employed by defendant]. On _____ [*date*], plaintiff tendered all his/her shares to the defendant at _____ [*street address and city*], California, defen dant's principal place of business, and demanded payment for those shares in accordance with the agreement. Defendant failed and refused, and continues to fail and refuse, to pay plaintiff for those shares in accordance with the terms of the agreement.

5. By reason of defendant's refusal to pay the _____ [dividends on *or* purchase price of] plaintiff's shares, plaintiff has been damaged in the sum of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____, with interest thereon from and after _____ [*date*];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 164.50.*]

[2] Use of Form

This complaint is for use by a shareholder of record to recover damages plus interest from the corporation for its wrongful refusal to make a distribution to the plaintiff in the form of either a dividend or payment for purchase of plaintiff's shares pursuant to agreement.

[3] Dividends

For discussions of the proper procedure for a corporation to use in determining shareholders of record, the fact that a shareholder has no vested right to a dividend until one has been declared by the corporation's board of directors, and the rights that a shareholder does have to a declared dividend, see *§ 164.14[1]*, and *§ 164.14[4][a]* and *[c]* respectively.

[4] Repurchase of Shares

For discussions of a corporation's authority to repurchase its own shares and the restrictions thereon and of the enforceability of executory contracts for the repurchase of shares, see *§ 164.15[1]* and *[2]*, and *§ 164.14[3][a]*.

[5] State Statutes

Distribution includes either dividend or share purchase by corporation. *Corp. Code § 166*

Power of corporation to purchase own shares. *Corp. Code §§ 207(d), 402(d)*

Restrictions on distributions. *Corp. Code §§ 500-505*

Fixing record date for dividends. *Corp. Code § 701*

Interest on recovery of fixed obligation. *Civ. Code § 3287*

[6] Decisions

[a] Discretion of Board to Declare--Dividends

Directors have exclusive authority to declare dividends; in absence of which act shareholders have no direct proprietary interest in corporate earnings, there being no dividend in earnings until one is declared. *Gibbons v. Mahon (1890) 136 U.S. 549, 558, 568, 10 S. Ct. 1057, 34 L. Ed. 525*

Whether dividend declared and for how much rests totally within the directors' fair and honestly exercised discretion. *Mulcahy v. Hibernia Sav. & L. Soc'y (1904) 144 Cal. 219, 223-225, 77 P. 910*

Issuance of preferred share dividend is managerial decision belonging to board of directors, for which, if made in good faith, court will not substitute its own judgment. *Marble v. Latchford Glass Co. (1962) 205 Cal. App. 2d 171, 178-179, 22 Cal. Rptr. 789*

[b] Shareholder's Right To Dividend

[i] Prior to Declaration

Corporation is owner of its property and earnings, rather than shareholder, who has expectancy in sharing in earnings but right to share in such earnings only as they may be declared in dividends arising from use of such property. *Miller*

v. McColgan (1941) 17 Cal. 2d 432, 436-437, 110 P.2d 419

Discretion of board is not absolute where dividends paid in form of wages to shareholder-employees but not to other shareholders. *De Martini v. Scavenger's Protective Asso. (1935) 3 Cal. App. 2d 691, 698, 40 P.2d 317* ; *O'Hare v. Marine Elec. Co. (1964) 229 Cal. App. 2d 33, 37, 39 Cal. Rptr. 799*

[ii] Right to Declared Dividend

Declaration of dividend creates nonrescindable debt in favor of the shareholders, unless qualified otherwise within the declaration; key characteristics of fully declared dividend are definite, final, irrevocable, and enforceable in nature. *United States v. Southwest Portland Cement Co. (9th Cir. [Cal] 1938) 97 F.2d 413, 415*

Incomplete or contingent declaration of dividend does not vest right to payment thereof in shareholders. *United States v. Southwest Portland Cement Co. (9th Cir. [Cal] 1938) 97 F.2d 413, 415*

Action to compel payment of dividend do not require joinder of board of directors as defendants; judgment against corporation alone as effective. *Muggill v. Reuben H. Donnelley Corp. (1965) 62 Cal. 2d 239, 241, 42 Cal. Rptr. 107, 398 P.2d 147* (dictum)

Plaintiff demanding payment of dividend already declared not required to allege corporation had available proper source of funds from which to pay dividend--that issue being one which defendant corporation must assert. *Meyers v. El Tejon Oil & Refining Co. (1946) 29 Cal. 2d 184, 188, 174 P.2d 1*

[7] Text References

Ballantine & Sterling, California Corporation Laws, Ch. 8, *Dividends and Reacquisition of Shares, §§ 142* , 143 (Matthew Bender)

Marsh, California Corporation Law and Practice, Ch. XIII, *Corporate Distributions*, §§ 13.16, 13.24-13.30 (Matthew Bender)

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14-165 California Forms of Pleading and Practice--Annotated 165.syn

§ 165.syn Synopsis to Chapter 165: CORPORATIONS: CORPORATE RECORDS AND REPORTS

§ 165.01 Scope of Chapter

§ 165.02 Cross References

§§ 165.03-165.09 [Reserved]

§ 165.10 Governing Statutes

§ 165.11 Applicability to Nominally Foreign Corporations

§ 165.12 Obligation to Keep Certain Records

[1] Bylaws

[2] Books and Minutes

[3] Record of Shareholders

[4] Sales and Proceeds of Securities

§ 165.13 Shareholder's Right to Inspect Books and Minutes

[1] In General

[2] Applicable to Domestic and Certain Foreign Corporations

[3] Right to Inspect Not Absolute

§ 165.14 Shareholder's Right to Inspect Property of Corporation

§ 165.15 Shareholder's Right to Inspect Record of Shareholders

[1] In General

[2] Applicable to Domestic and Certain Foreign Corporations

[3] Rights of Five-Percent Shareholder

[4] Right to Inspect Not Absolute

[5] Applicable to Domestic and Certain Foreign Corporations

§ 165.16 No Corporate Limitation of Shareholder's Right

§ 165.17 Shareholder's Right to Inspect Bylaws

§ 165.18 Shareholder's Right to Inspect Documents

§ 165.19 Director's Right to Inspect Records

[1] In General

[2] Applicable to Directors of Certain Foreign Corporations

[3] Right to Inspect Absolute

§ 165.20 Records Available in Written Form

§ 165.21 Right to Make Copies

§ 165.22 Records Available to Agent or Attorney

§ 165.23 Tax Assessor's Right to Inspect Records

§ 165.24 Judicial Enforcement of Right to Inspect Records

[1] In General

[2] Mandate an Appropriate Remedy

[3] Inspection or Audit Permitted

[4] Expenses

[5] Penalty Against Corporation

[6] Postponement of Shareholders' Meeting

[7] Appeal as Not Staying Judgment

§ 165.25 Obligation to Make Annual Reports and Financial Statements

[1] Applicable to Domestic and Certain Foreign Corporations

[2] Annual Report to Shareholders

[a] Requirement

[b] Generally Accepted Accounting Principles

[3] Annual Report When 100 or More Shareholders

[4] Obligation to Report Results of Voting at Shareholder Meetings

[5] Financial Statement at Shareholder's Request

[6] Special Financial Statement at Request of Five-Percent Shareholder

§ 165.26 Electronic Transmission

[1] By the Corporation

[2] To the Corporation

§ 165.27 Judicial Enforcement of Right to Annual Report or Financial Statement

[1] In General

[2] Expenses

[3] Penalty Against Corporation

§ 165.28 Civil Penalties and Liabilities

[1] Failure to Keep Records, Prepare Financial Statements, or Advise Shareholder Regarding Application of California Law

[2] Liability for Failure to Report Misleading Statements

[3] False Statements or Reports

§ 165.29 Criminal Penalties and Liabilities

[1] False Reports

[2] Fraudulent Nondisclosure

[3] Fraudulent Alteration

[4] Fraudulent Exhibition to Public Officer

[5] Fraudulent Advertising

§§ 165.30-165.49 [Reserved]

§ 165.50 California Points and Authorities

§ 165.51 California Legal Forms

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[1] Civil Penalties and Liabilities

[2] Criminal Penalties and Liabilities

[3] Definitions

[4] Governing Statutes

[5] Judicial Enforcement of Right to Annual Report or Financial Statement

[6] Judicial Enforcement of Right to Inspect Records

[7] Obligation to Keep Certain Records

[8] Obligation to Make Annual Reports and Financial Statements

[9] Obligation to Report Results of Voting at Shareholder Meetings

[10] Right to Inspect Corporate Records

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§ 165.53 Decisions

[1] Director's Right to Inspect Records

[2] Discovery of Records by Third Party

[3] Judicial Enforcement of Right to Inspect Records

[4] Records Available to Agent or Attorney

[5] Savings and Loan Associations

[6] Shareholder's Right to Inspect Books and Minutes

[7] Shareholder's Right to Inspect Property of Corporation

[8] Shareholder's Right to Inspect Record of Shareholders

§ 165.54 Law Reviews

§ 165.55 Text References

§§ 165.56-165.69 [Reserved]

§ 165.70 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--By Shareholder [Corp. Code §§ 1600(c), 1601(a)] Against Corporation--To Compel Inspection of Corporate Records [Corp. Code § 1603]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction

[5] Venue

[6] Penalty Against Corporation

[7] Costs and Attorney's Fees

[8] California Points and Authorities

[9] California Legal Forms

[10] State Statutes

[a] Mandate

[b] Rights of Inspection

[c] Penalties

[11] Decisions

[12] Law Reviews

[13] Text References

[14] Cross References

§ 165.71 Allegation--To Compel Inspection of Corporate Property

[1] FORM

[2] Source of Form

[3] Use of Form

[4] California Points and Authorities

[5] State Statutes

[6] Decisions

[7] Cross References

§ 165.72 Allegation--By Five-Percent Shareholder [Corp. Code § 1600(a)]--To Compel Inspection of Record of Shareholders

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] Cross References

§ 165.73 Petition for Writ of Mandate--By Shareholder [Corp. Code § 1501(a)] Against Corporation--To Compel Making and Mailing of Annual Report [Corp. Code § 1501(e)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] California Legal Forms

[5] State Statutes

[6] Text References

[7] Cross References

§ 165.74 Allegation--To Compel Mailing of Financial Statements [Corp. Code § 1501(c)]

[1] FORM

[2] Use of Form

[3] California Legal Forms

[4] State Statutes

[5] Text References

[6] Cross References

§ 165.75 Allegation--By Five-Percent Shareholder--To Compel Mailing of Special Income Statement [Corp. Code § 1501(c)]

[1] FORM

[2] Use of Form

[3] California Legal Forms

[4] State Statutes

[5] Cross References

§ 165.76 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--By Director [Corp. Code § 1602] Against Corporation--To Compel Inspection of Corporate Records and Property [Corp. Code § 1603]

[1] FORM

[2] Use of Form

[3] Allegations

[4] California Points and Authorities

[5] State Statutes

[6] Decisions

[7] Law Reviews

[8] Cross References

§ 165.77 Alternative Writ of Mandate and Order That Writ Issue [Code Civ. Proc. § 1087]--To Enforce Shareholder's Right to Inspect Corporate Records [Corp. Code §§ 1600, 1601, 1603]

[1] FORM

[2] Use of Form

[3] Issuance of ex Parte Alternative Writs

[4] Service of Alternative Writ of Mandate

[5] State Statutes

[6] Text References

[7] Cross References

§ 165.78 Order That Alternative Writ of Mandate Issue [Code Civ. Proc. § 1087]--To Enforce Shareholder's Right to Inspect Corporate Records [Corp. Code §§ 1600, 1601, 1603]

[1] FORM

[2] Use of Form

[3] Cross References

§ 165.79 Return to Alternative Writ of Mandate [Code Civ. Proc. § 1087] Enforcing Shareholder's Right to Inspect Corporate Records [Corp. Code §§ 1600, 1601, 1603]--By Demurrer [Code Civ. Proc. §§ 430.10, 1089]

[1] FORM

[2] Use of Form

[3] Grounds for Demurrer

[4] Time for Return

[5] California Points and Authorities

[6] State Statutes

[7] Decisions

[8] Text References

[9] Cross References

§ 165.80 Return to Alternative Writ of Mandate Enforcing Shareholder's Right to Inspect Corporate Records [Corp. Code §§ 1600, 1601, 1603]--By Answer [Code Civ. Proc. §§ 431.30, 1089]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Text References

[6] Cross References

§ 165.81 Proceedings to Postpone Shareholders' Meeting Where Failure to Comply With Shareholder's Demand for Corporate Records [Corp. Code § 1600(b)]--Notice of Motion

[1] FORM

[2] Use of Form

[3] Jurisdiction

[4] Papers Accompanying Notice of Motion

[5] State Statutes

[6] Text References

[7] Cross References

§ 165.82 Proceedings to Postpone Shareholders' Meeting Where Failure to Comply With Shareholder's Demand for Corporate Records [Corp. Code § 1600(b)]--Declaration by Five-Percent Shareholder

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Text References

[5] Cross References

§ 165.83 Proceedings to Postpone Shareholders' Meeting Where Failure to Comply With Shareholder's Demand for Corporate Records [Corp. Code § 1600(b)]--Order Granting Postponement

[1] FORM

[2] Use of Form

[3] Cross References

§ 165.84 Complaint for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction--To Postpone Shareholders' Meeting on Basis of Delay in Complying With Shareholder's Demand for Corporation's Records [Corp. Code § 1600(b)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction

[5] State Statutes

[6] Text References

[7] Cross References

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14-165 California Forms of Pleading and Practice--Annotated § 165.01

§ 165.01 Scope of Chapter

This chapter discusses a corporation's obligation to keep records and make reports and the right of shareholders and directors to inspect corporate records and to receive corporate reports. This chapter includes petitions for writ of mandate to enforce inspection rights of shareholders [*see* §§ 165.70-165.72] and of directors [*see § 165.76*] and to enforce shareholders' rights to certain financial reports [*see* §§ 165.73-165.75], forms for alternative writ of mandate [*see § 165.77*], and order [*see § 165.78*], and forms for return to an alternative writ by demurrer [*see § 165.79*] and by answer [*see § 165.80*]. In addition, this chapter includes a form to notice a motion [*see § 165.81*], together with accompanying papers [*§§ 165.82, 165.83*], to postpone a shareholders' meeting. This chapter also includes a form of complaint for an injunction to postpone a shareholders' meeting [*see § 165.84*].

For additional discussion of the requirements imposed on corporations to keep, file, and maintain records and reports, and of the differing rights of directors and shareholders to have access to corporate records and reports, see Ballantine and Sterling, California Corporation Laws (4th ed.), Ch. 13, *Records, Reports, and Inspection Rights* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsRecordkeepingCivil ProcedureRemediesWritsCommon Law WritsMandamus

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14-165 California Forms of Pleading and Practice--Annotated § 165.02

§ 165.02 Cross References

For complaints for use against corporations fraudulently advertising their products, see Ch. 14, *Advertising* .

For discussion of when judgments are not stayed on appeal, see Ch. 43, *Appeal: Stay of Proceedings* .

For discussion and forms for use in a petition for a writ of mandate to enforce the right of a member of an unincorporated association to inspect financial records, see Ch. 61, *Associations and Clubs* .

For discussion and forms for use when a church or religious organization is a corporation, see Ch. 110, *Churches and Religious Organizations* .

For discussion and forms for use where there is diversity of citizenship involving a corporation, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

For a complaint for use against a hospital failing to maintain medical records and charts, see Ch. 295, *Hospitals* .

For discussion and forms for use to establish title to property after loss or destruction of land records, see Ch. 348, *Lis Pendens* .

For discussion and forms for use to restore lost, destroyed, or stolen records, documents, or papers, see Ch. 356, *Lost Papers* .

For discussion and forms for use in bringing a quo warranto action against a corporation, see Ch. 483, *Quo Warranto* .

For discussion and forms for use by a shareholder to compel a closely held corporation to transfer shares, see Ch. 528, *Specific Performance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionFalse AdvertisingGeneral OverviewBusiness & Corporate LawUnincorporated AssociationsCivil ProcedureRemovalGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsQuo Warranto

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14-165 California Forms of Pleading and Practice--Annotated §§ 165.03-165.09

[Reserved]

§§ 165.03[Reserved]

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14-165 California Forms of Pleading and Practice--Annotated § 165.10

§ 165.10 Governing Statutes

The obligation of corporations to keep records and reports is governed by *Corp. Code §§ 1500-1512*; the rights of inspection with respect to corporate records and property are governed by *Corp. Code §§ 1600-1605*. The applicability of corporate record-keeping and inspection rights to nominally foreign corporations is governed by *Corp. Code § 2115*. The liabilities and penalties imposed on a corporation for failure to keep required records are governed by *Corp. Code §§ 2200-2201, 2253-2257*, and *2260*.

Records required to be maintained by persons possessing the power to vote shares of stock on behalf of another are governed by *Corp. Code § 711* and discussed in Ch. 166, *Corporations: Shareholders' Meetings and Voting* .

Inspection rights of shareholders of state savings and loan associations and their holding companies are governed by *Fin. Code § 6050* rather than by *Corp. Code § 1600 et seq.* [*Feldman v. San Mateo Financial Corp. (1990) 226 Cal. App. 3d 543, 547, 276 Cal. Rptr. 285]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsInspection RightsDirectorsBusiness & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsInspection RightsShareholdersBusiness & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsRecordkeeping

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14-165 California Forms of Pleading and Practice--Annotated § 165.11

§ 165.11 Applicability to Nominally Foreign Corporations

The requirement that corporations maintain certain records and make certain reports under *Corp. Code §§ 1500* and *1501*, respectively, is applicable to nominally foreign corporations. Likewise, the rights of inspection of corporate records granted by *Corp. Code §§ 1600-1605* are applicable to nominally foreign corporations [*Corp. Code § 2115(b)*]. A corporation, other than an association or a nonprofit corporation, incorporated in a state other than California, but not a corporation or association chartered under the laws of the United States [*see Corp. Code § 171*], is considered nominally foreign if the average of the property factor [*Rev. & Tax. Code § 25129*], the payroll factor [*Rev. & Tax. Code § 25132*], and the sales factor [*Rev. & Tax. Code § 25134*] equals more than 50 percent during the corporation's latest full income year and more than one-half of the corporation's outstanding voting shares are held of record by persons having addresses in California appearing on the books of the corporation on the record date for the latest meeting of shareholders held during its latest full income year (or, if no meeting was held during that year, on the last day of the latest full income year) [*Corp. Code § 2115(a)*]. For discussion of the three-factor test for nominally foreign corporations, see *§ 160.12[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsInspection RightsGeneral OverviewBusiness & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsRecordkeepingBusiness & Corporate LawForeign BusinessesGeneral Overview

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14-165 California Forms of Pleading and Practice--Annotated § 165.12

§ 165.12 Obligation to Keep Certain Records

[1] Bylaws

Each domestic corporation must keep at its principal executive office in California the original or a copy of its bylaws as amended to date. If a corporation's principal executive office is not in this state, the original or copy of the bylaws as amended to date must be kept at its principal business office in California [*Corp. Code § 213*].

[2] Books and Minutes

Each domestic corporation, and each nominally foreign corporation [*Corp. Code § 2115(b)*], must keep adequate and correct books and records of account and must keep minutes of the proceedings of its shareholders, board, and committees of the board. These minutes must be kept in written form. Other books and records must be kept either in written form or in any other form capable of being converted into written form [*Corp. Code § 1500*].

[3] Record of Shareholders

Each domestic corporation, and each nominally foreign corporation [*Corp. Code § 2115(b)*], must keep at its principal executive office, or at the office of its transfer agent or registrar, a record of its shareholders, giving the names and addresses of all shareholders and the number and class of shares held by each. These records must be kept either in written form or in another form capable of being converted into clearly legible tangible form, or in any combination of the foregoing. When minutes and other books and records are kept in a form capable of being converted into clearly legible paper form, the clearly legible paper form into which those minutes and other books and records are converted will be admissible in evidence, and accepted for all other purposes, to the same extent as an original paper record of the same information would have been, provided that the paper form accurately portrays the record [*Corp. Code § 1500*].

[4] Sales and Proceeds of Securities

Every corporate issuer qualifying securities for sale in California must keep and maintain a complete set of books, records, and accounts of the sales and the disposition of proceeds from the sale of the securities. Every issuer must thereafter, as required by the Commissioner of Corporations, make and file with the Commissioner a report setting forth

the securities sold by it under the qualification, the proceeds derived from the sale, and the disposition of those proceeds [*Corp. Code § 25145*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGoverning Documents & ProceduresArticles of Incorporation & BylawsGeneral OverviewBusiness & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsRecordkeeping

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14-165 California Forms of Pleading and Practice--Annotated § 165.13

§ 165.13 Shareholder's Right to Inspect Books and Minutes

[1] In General

The accounting books and records and the minutes of proceedings of the shareholders, the board, and the committees of the board of a corporation must be open to inspection on written demand on the corporation by any shareholder or holder of a voting trust certificate [*see § 165.70*] at any reasonable time during usual business hours [*Corp. Code § 1601(a)*]. The corporation may not thwart the exercise of these rights by failing to respond to proper requests, by sending communications that make further requests futile, or by actions impeding the inspection process. However, the corporation is required only to allow inspection at corporate offices, not to mail or otherwise provide copies, and the corporation is not required to respond to demands for disclosure falling outside scope of what the statute requires [*Jara v. Suprema Meats, Inc. (2004) 121 Cal. App. 4th 1238, 1263-1265, 18 Cal. Rptr. 3d 187]* .

[2] Applicable to Domestic and Certain Foreign Corporations

The rights of inspection granted under *Corp. Code § 1601* apply to any domestic corporation and to any foreign corporation keeping records in California or having its principal executive office in California [*Corp. Code § 1601(a)*], as well as to any nominally foreign corporation [*Corp. Code § 2115(b)*; *see Corp. Code § 2115(a)* (nominally foreign corporation defined)]. In addition, the rights of inspection under *Corp. Code § 1601* apply to each subsidiary of any of the foregoing corporations [*Corp. Code § 1601(a)*].

[3] Right to Inspect Not Absolute

Shareholders do not have an absolute right to inspect and copy a corporation's books and minutes. Rather, their right to inspect exists only for a purpose reasonably related to their interests as shareholders or holders of voting trust certificates [*Corp. Code § 1601(a)*]. Ordinarily, the purpose referred to is that purpose existing in the mind of a shareholder at the time of inspection of the corporate records, whether or not the shareholder is likely to succeed in accomplishing that purpose [*Capron v. Pacific Southwest D. Corp. (1935) 6 Cal. App. 2d 436, 441, 44 P.2d 629]* .

For instance, in demanding the right to inspect corporate records, a shareholder expressed a purpose reasonably related to his interest as a shareholder when he stated his belief that the president of the corporation lent corporate funds for the

purchase of outstanding shares of stock with the ultimate objective of vesting all shares of stock in one individual and thus depreciating the value of shares of stock held by other shareholders [*Capron v. Pacific Southwest D. Corp. (1935) 6 Cal. App. 2d 436, 437-438, 439, 44 P.2d 629]* . Likewise, a purpose reasonably related to a shareholder's interest in a corporation was found when a shareholder desired to inspect a corporation's books due to the disparity in value between the published annual report of the corporation and the market value of its outstanding stock and thereby to determine whether the outstanding stock was held by a few shareholders who dictated the corporation's accounting policies, to determine whether the relation of the directors was against the interests of the minority shareholders, and to ascertain the present value of stock owned by the shareholder [*Private Investors v. Homestake Min. Co. (1936) 11 Cal. App. 2d 488, 496, 54 P.2d 535]* .

On the other hand, a corporation put at issue a purpose not reasonably related to a shareholder's interest in denying a shareholder the right of inspection when it alleged that the shareholder's purpose was to secure the names of other shareholders in order to secure options to purchase shares of those individuals and then to offer the shares to the corporation at a higher price to the detriment of the corporation [*Capron v. Pacific Southwest D. Corp. (1935) 6 Cal. App. 2d 436, 440, 44 P.2d 629* (corporation's answer to shareholder's petition for writ of mandate to inspect corporate records as raising issues which, if proved, would warrant denial of writ)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsInspection RightsShareholdersBusiness & Corporate LawForeign BusinessesGeneral Overview

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14-165 California Forms of Pleading and Practice--Annotated § 165.14

§ 165.14 Shareholder's Right to Inspect Property of Corporation

If the books of a corporation do not afford a shareholder information as to the condition of a corporation and the value of his or her interest in the corporation, or if the condition and value of corporate property are susceptible to concealment and misrepresentation, a shareholder may have the right to inspect corporate property [*see § 165.71*]. For example, a shareholder may inspect mining property held by a corporation in order to determine the nature of the ore bodies or the manner in which the work is being carried on [*Hobbs v. Tom Reed Gold Min. Co. (1913) 164 Cal. 497, 501, 129 P. 781* (reversal of judgment denying writ of mandate to shareholder to inspect mine where new body of ore may have been discovered)]. Since the few cases discussing a shareholder's right to inspect corporate property concern corporate mining property [*Hobbs v. Tom Reed Gold Min. Co. (1913) 164 Cal. 497, 129 P. 781]* and since the right of a shareholder to inspect mining property is guaranteed by statute [*Pub. Res. Code § 3984* (shareholder's absolute right to inspect corporate mining property)], the right to inspect other kinds of corporate property is questionable. However, commentators have suggested that the right to inspect corporate property follows logically from the right to inspect corporate books [*see* Ballantine and Sterling, California Corporation Laws (4th ed.), Ch. 13, *Records, Reports, and Inspection Rights*, § 272.01 (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsInspection RightsGeneral OverviewBusiness & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsInspection RightsShareholders

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14-165 California Forms of Pleading and Practice--Annotated § 165.15

§ 165.15 Shareholder's Right to Inspect Record of Shareholders

[1] In General

The record of shareholders must be open to inspection and copying by any shareholder or holder of a voting trust certificate [*see § 165.70*] at any time during usual business hours on written demand on the corporation [*Corp. Code § 1600(c)*].

[2] Applicable to Domestic and Certain Foreign Corporations

These rights of inspection apply to any domestic corporation and to any foreign corporation having its principal executive office in California or customarily holding meetings of its board in California [*Corp. Code § 1600(d)*], as well as to any nominally foreign corporation [*Corp. Code § 2115(b)*; *see Corp. Code § 2115(a)* (nominally foreign corporation defined)].

[3] Rights of Five-Percent Shareholder

A shareholder, or shareholders, holding at least five percent in the aggregate of the outstanding voting shares of a corporation or holding at least one percent of those voting shares and filing a Schedule 14A with the United States Securities and Exchange Commission relating to the election of directors of the corporation have an absolute right to do either or both of the following [*see § 165.72*]:

- Inspect and copy the record of shareholders' names, addresses, and shareholdings during usual business hours on five business days' prior written demand on the corporation; or

- Obtain from the transfer agent for the corporation on five business days' prior demand and on tender of the corporation's usual charges for such a list (the amount of those charges are required to be stated to the shareholder by the transfer agent on request) a list of the names, addresses, and shareholdings of the shareholders entitled to vote for the election of directors as of the most recent record date for which such a list has been compiled or as of a date specified by the shareholder subsequent to the date of demand.

The list must be made available on or before the later of five business days after the demand is received or the date specified in the demand as the date as of which the list is to be compiled. A corporation has the responsibility for causing its transfer agent to comply with these rules [*Corp. Code § 1600(a)*].

[4] Right to Inspect Not Absolute

Except as noted in *§ 165.15[3]*, shareholders do not have an absolute right to inspect and copy the record of shareholders. Rather, their right to inspect exists only for a purpose reasonably related to their interests as shareholders or holders of voting trust certificates [*Corp. Code § 1600(c)*]. However, a shareholder must be accorded the right to inspect a record of shareholders and to make extracts therefrom unless it is clearly shown that the shareholder's demand is not for any purpose reasonably related to his or her interest as a shareholder [*Gilmore v. Emsco Derrick & Equip. Co. (1937) 22 Cal. App. 2d 64, 67, 70 P.2d 251]* . For instance, a shareholder was entitled to inspect the record of shareholders of a corporation even though she was the attorney for a detective agency and acted to some extent in an executive capacity for the detective agency. Her right of inspection was upheld because the corporation failed to establish that she desired the information for use in the course of the detective agency's business [*Gilmore v. Emsco Derrick & Equip. Co. (1937) 22 Cal. App. 2d 64, 67, 70 P.2d 251]* . For additional discussion of when a purpose is reasonably related to a shareholder's interest, see *§ 165.13[3]*.

[5] Applicable to Domestic and Certain Foreign Corporations

These rights of inspection apply to any domestic corporation and to any foreign corporation having its principal executive office in California or customarily holding meetings of its board in California [*Corp. Code § 1600(d)*], as well as to any nominally foreign corporation [*Corp. Code § 2115(b)*; *see Corp. Code § 2115(a)* (nominally foreign corporation defined)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-165 California Forms of Pleading and Practice--Annotated § 165.16

§ 165.16 No Corporate Limitation of Shareholder's Right

A shareholder's right to inspect books and minutes [*Corp. Code § 1601(a)*] and the record of shareholders [*Corp. Code § 1600(a), (c)*] may not be limited by the articles or bylaws of a corporation [*Corp. Code §§ 1600(d), 1601(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGoverning Documents & ProceduresArticles of Incorporation & BylawsGeneral OverviewBusiness & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsInspection RightsShareholders

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§ 165.17 Shareholder's Right to Inspect Bylaws

The original or copy of a corporation's bylaws as amended to date must be open to inspection by shareholders at all reasonable times during office hours at the corporation's principal executive office in California or, if the corporation does not have its principal executive office in California, at its principal business office in California. If a corporation has neither a principal executive nor a principal business office in California, it must furnish any shareholder with a copy of its bylaws as amended to date at the written request of the shareholder [*Corp. Code § 213*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 165.18 Shareholder's Right to Inspect Documents

When any provisions or terms of articles of incorporation or an agreement of merger are made dependent upon facts ascertainable outside the filed instrument through a reference to an agreement or similar document, the corporation filing that instrument must [*Corp. Code § 109.5(b)*]:

- Maintain at its principal executive office a copy of any such agreement or document and all amendments; and

- Provide to its shareholders, in the case of articles, or to shareholders of any constituent corporation, in the case of an agreement of merger, a copy of them upon written request and without charge.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFormationPlace of IncorporationPrincipal OfficeBusiness & Corporate LawCorporationsGoverning Documents & ProceduresArticles of Incorporation & BylawsGeneral OverviewBusiness & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsInspection RightsShareholders

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14-165 California Forms of Pleading and Practice--Annotated § 165.19

§ 165.19 Director's Right to Inspect Records

[1] In General

Every director may inspect and copy all books, records, and documents of every kind and may inspect the physical properties of a corporation [*see § 165.76*] of which he or she is a director [*Corp. Code § 1602*]. This right of inspection extends to the records of each subsidiary corporation, domestic or foreign, of the corporation of which he or she is a director [*Corp. Code § 1602*].

[2] Applicable to Directors of Certain Foreign Corporations

The rights of inspection under *Corp. Code § 1602* apply to the directors of any domestic corporation and to the directors of any foreign corporation having its principal executive office in California or customarily holding meetings of its board in California [*Corp. Code § 1602*], as well as to directors of any nominally foreign corporation [*Corp. Code § 2115(b)*; *see Corp. Code § 2115(a)* (nominally foreign corporation defined); *see also Havlicek v. Coast-To-Coast Analytical Services, Inc. (1995) 39 Cal. App. 4th 1844, 1854-1856, 46 Cal. Rptr. 2d 696* (holding that *Corp. Code § 1602* does not violate commerce clause or full faith and credit clause, and that court may impose just and proper conditions on "absolute right" of inspection)].

[3] Right to Inspect Absolute

The right of a director to inspect records under *Corp. Code § 1602* is absolute. A director may exercise his or her right at any reasonable time [*Corp. Code § 1602*; *but see NFL Properties Inc. v. Superior Court (1998) 65 Cal. App. 4th 100, 109-110, 75 Cal. Rptr. 2d 893* (if director sues in capacity as shareholder rather than director, attorney-client and work product privileges are properly asserted by corporation)]. Thus, by statute, a director has a greater right to acquire corporate information than does a shareholder [*see Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 621, 120 Cal. Rptr. 253]* . It has been suggested that directors are accorded the unqualified right of inspection because they occupy a fiduciary relationship to the corporation and its shareholders [*see Hartman v. Hollingsworth (1967) 255 Cal. App. 2d 579, 581-582, 63 Cal. Rptr. 563* (reversing judgment granting writ of mandate to director of corporation at time of dissolution to inspect corporate books and records because corporation ceased to exist after filing certificate of dissolution except for purpose of winding up)].

Although a court may impose just and proper conditions on this "absolute right" of inspection in an egregious case [*see Havlicek v. Coast-To-Coast Analytical Services Inc. (1995) 39 Cal. App. 4th 1844, 1854-1856, 46 Cal. Rptr. 2d 696]* , this principle should only be applied in extreme circumstances in which a preponderance of the evidence establishes a director's clear intent to use documents to commit a tort against the corporation [*Saline v. Superior Court (2002) 100 Cal. App. 4th 909, 915-916, 122 Cal. Rptr. 2d 813* (holding that trial court failed to make findings necessary to justify limitation on director's right to corporate documents, and that there was no legal basis for prior restraint on his right to discuss corporate documents with persons other than board members)].

A corporate director does not have the right to access documents that are covered by the attorney-client privilege and were generated in defense of a suit for damages that the director filed against the corporation [*Tritek Telecom, Inc. v. Superior Court (2009) 169 Cal. App. 4th 1385, 1391-1392, 87 Cal. Rptr. 3d 455*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsInspection RightsDirectorsBusiness & Corporate LawForeign BusinessesGeneral Overview

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§ 165.20 Records Available in Written Form

If any record subject to inspection pursuant to *Corp. Code §§ 1600-1605* (rights of inspection) is not maintained in written form, a request for inspection is not complied with unless and until the corporation at its expense makes the records available in written form [*Corp. Code § 1605*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-165 California Forms of Pleading and Practice--Annotated § 165.21

§ 165.21 Right to Make Copies

A shareholder or director having the right to inspect corporate records also has the right to make copies or extracts of the records examined [*Corp. Code §§ 1600(d), 1601(b), 1602*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 165.22 Records Available to Agent or Attorney

Inspection of corporate records may be made in person or by an agent or attorney [*Corp. Code §§ 1600(d), 1601(b), 1602*]. Thus, a party may summon whatever assistance is reasonably necessary to make the right of inspection effective [*see Dandini v. Superior Court (1940) 38 Cal. App. 2d 32, 35, 100 P.2d 535* (annulling order of contempt against corporation which refused, under former statute, to allow attorney and accountant brought by corporate director to inspect corporate ledger and supporting documents)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-165 California Forms of Pleading and Practice--Annotated § 165.23

§ 165.23 Tax Assessor's Right to Inspect Records

On request of an assessor, a domestic corporation owning, claiming, possessing, or controlling property subject to local assessment must make available at the corporation's principal office in California or at a place mutually acceptable to the assessor and the corporation a true copy of business records relevant to the amount, cost, and value of all property that it owns, claims, possesses, or controls within the county [*Corp. Code § 1506*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-165 California Forms of Pleading and Practice--Annotated § 165.24

§ 165.24 Judicial Enforcement of Right to Inspect Records

[1] In General

On a corporation's refusal of a lawful demand for inspection, the superior court of the proper county may enforce the right of inspection with just and proper conditions [*see* §§ 165.70-165.72, *165.76*, *165.78*]. The proper county in which to bring an action involving a corporation is the county where the principal execut ive office of the corporation is located. However, if the principal executive office of a corporation is not in California or if the corporation has no such office, the proper county is Sacramento County [*Corp. Code § 177*]. The judicial enforcement of rights of inspection applies to any domestic corporation or any foreign corporation keeping records in California [*Corp. Code § 1603(a)*] as well as to any nominally foreign corporation [*Corp. Code § 2115(b)*]. In addition, judicial enforcement of inspection rights applies to any subsidiary corporation of the foregoing corporations which keeps records in California [*Corp. Code § 1603(a)*].

[2] Mandate an Appropriate Remedy

A proceeding in mandate [*see* §§ 165.70-165.72, *165.76*] is an appropriate remedy by which a shareholder or director may seek to enforce his or her right to inspect corporate records [*see Most v. First Nat. Bank of San Diego (1966) 246 Cal. App. 2d 425, 54 Cal. Rptr. 669* (affirming judgment granting writ of mandate to shareholder permitting shareholder to inspect and make copies of list of shareholders of bank); *see Hagan v. Fairfield (1960) 183 Cal. App. 2d 703, 7 Cal. Rptr. 248* (affirming judgment denying writ of mandate when petitioner was an assignee of shares and thus not a shareholder of record for the purpose of inspection of corporate records)]. The purpose of a writ of mandate is to enforce a clear legal right of a particular petitioner, such as a shareholder, against one who has a legal duty to perform an act necessary to the enjoyment of that right, such as a corporation with its duty to allow shareholder inspection of its corporate records [*see Farrington v. Fairfield (1961) 194 Cal. App. 2d 237, 239, 16 Cal. Rptr. 119* (denying motion for substitution of one party for another in mandate proceeding to allow inspection of corporate records)].

[3] Inspection or Audit Permitted

If good cause is shown, the court may appoint one or more competent inspectors or accountants to audit the books and records kept in California, to investigate the property, funds, and affairs of the corporation, and to report thereon in any

manner that the court may direct [*Corp. Code § 1603(a)*]. All officers and agents of the corporation are required to produce for the appointed inspectors or accountants all books and documents in their custody or power. Failure to comply with this requirement subjects those officers and agents to punishment for contempt of court [*Corp. Code § 1603(b)*].

[4] Expenses

All expenses of an investigation or audit are defrayed by the applicant unless the court orders them to be paid or shared by the corporation [*Corp. Code § 1603(c)*]. In ordering the expenses of an investigation to be paid or shared by a corporation, the court may exercise expeditious and timesaving methods [*see Koshaba v. Koshaba (1942) 56 Cal. App. 2d 302, 312, 132 P.2d 854]* . For instance, a court acted properly in fixing the amount of an audit, making it a preferred charge against the corporation, and issuing a writ of execution without requiring a cost bill to be filed by the shareholder where the accountant performing the audit was appointed by the court with the consent of all parties [*Koshaba v. Koshaba (1942) 56 Cal. App. 2d 302, 311-312, 132 P.2d 854]* . Furthermore, if the court finds in any action or proceeding under *Corp. Code §§ 1600* or *1601* that the failure of the corporation to comply with a proper demand thereunder was without justification, the court may award an amount sufficient to reimburse the shareholder or holder of a voting trust certificate for the reasonable expenses incurred by the holder, including attorney's fees, in connection with the action or proceeding [*Corp. Code § 1604*].

[5] Penalty Against Corporation

In addition to any remedy by writ of mandate [*Corp. Code § 2202*], a shareholder may seek to collect a penalty from a corporation neglecting, failing, or refusing to comply with a request for inspection of the record of shareholders or books of account, or, if the corporation is a foreign corporation, to comply with a shareholder request regarding the application of California law [*Corp. Code § 2200*; *see Corp. Code § 2115(b), (f)*; *see also § 160.12[2][f]*]. For discussion of civil penalties against corporations, see *§ 165.28[1]*.

[6] Postponement of Shareholders' Meeting

Any delay by a corporation or its transfer agent in complying with a demand under *Corp. Code § 1600(a)* (inspection rights of five-percent shareholders) beyond the time limits specified therein gives the shareholder or shareholders properly making the demand the right to obtain from the superior court, on the filing of a verified complaint [*see § 165.84*] in the proper county [*see Corp. Code § 177* (proper county defined)] and after a hearing, notice [§§ 165.81, 165.82] of which must be given to the persons and in the manner that the court directs, an order [*see § 165.83*] postponing any shareholders' meeting previously noticed for a period equal to the period of delay. This right exists in addition to any other legal or equitable remedies to which the shareholder may be entitled [*Corp. Code § 1600(b)*]. For discussion of the special inspection rights of five-percent shareholders, see *§ 165.53[8]*.

[7] Appeal as Not Staying Judgment

In the absence of an order of the trial court providing otherwise or of a writ of supersedeas, the perfecting of an appeal does not stay proceedings if the judgment or order directs a corporation, or any of its officers or its agents to give a person adjudged to be a director, stockholder, or member of the corporation a reasonable opportunity to inspect or make copies of the corporation's books, papers, or documents which the court finds the director, stockholder, or member of the corporation entitled by law to inspect or copy [*Code Civ. Proc. § 917.8(b)*]. Thus, mandate proceedings to inspect corporate records are summary in character and the right of inspection is not suspended during the long process of appeal except for some special reason [*Private Investors, Inc. v. Homestake Min. Co. (1936) 11 Cal. App. 2d 488, 491, 54 P.2d 535* (writ of supersedeas restraining enforcement or writ of mandate permitting inspection of corporate records is matter of discretion with appellate court)]. For discussion of when judgments are not stayed on appeal, see Ch. 43, *Appeal: Stay of Proceedings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-165 California Forms of Pleading and Practice--Annotated § 165.25

§ 165.25 Obligation to Make Annual Reports and Financial Statements

[1] Applicable to Domestic and Certain Foreign Corporations

The rights to annual reports and financial statements granted by *Corp. Code § 1501* apply to any domestic corporation and also to any foreign corporation having its principal executive office in California or customarily holding meetings of its board in California [*Corp. Code § 1501(g)*] as well as to nominally foreign corporations [*Corp. Code § 2115(b)*].

[2] Annual Report to Shareholders

[a] Requirement

The board must send an annual report to the shareholders not later than 120 days after the close of the fiscal year, unless in the case of a corporation with less than 100 holders of record of its shares as determined by *Corp. Code § 605*, this requirement is expressly waived in the bylaws [*Corp. Code § 1501(a)(1)*; *see § 165.73*]. Unless so waived, the report must be sent to the shareholders at least 15 days (or 35 days, if sent by third-class mail) prior to the annual meeting of the shareholders to be held during the next fiscal year. (However, this requirement does not limit the requirement for holding an annual meeting as required by *Corp. Code § 600*.) [*Corp. Code § 1501(a)(2)*] Unless otherwise provided by the articles or bylaws, and if approved by the board of directors, the report and any accompanying material may be sent by electronic transmission by the corporation [*Corp. Code § 1501(a)(1)*; *see Corp. Code § 20* (definition); *see also § 165.26*].

The report must contain a balance sheet as of the end of that fiscal year and an income statement and a statement of cashflows for that fiscal year, accompanied by any report of independent accountants or, if there is no report, the certificate of an authorized officer of the corporation that the statements were prepared without audit from the books and records of the corporation [*Corp. Code § 1501(a)(1)*; *see § 165.25[2]*].

These reporting requirements [*see Corp. Code § 1501(a)(1), (2)*] will be considered satisfied if a corporation with an outstanding class of securities registered under Section 12 of the Securities Exchange Act of 1934 [*15 U.S.C. § 78a*] complies with *17 C.F.R. § 240.14a-16* (relating to Internet availability of annual report) with respect to the obligation of a corporation to furnish an annual report to shareholders pursuant to *17 C.F.R. § 240.14a-3(b)* [*Corp. Code § 1501(a)(4)*

].

Notwithstanding *Corp. Code § 114* [*see § 165.25[2]*], the financial statements of any corporation with fewer than 100 shareholders of record (as determined by *Corp. Code § 605*) required to be furnished by *Corp. Code § 1501(a)* and *(c)* are not required to be prepared in conformity with generally accepted accounting principles if they reasonably set forth the assets and liabilities and the income and expense of the corporation and disclose the accounting basis used in their preparation [*Corp. Code § 1501(a)(3)*].

[b] Generally Accepted Accounting Principles

Generally speaking, all references in the General Corporation Law to financial statements, balance sheets, income statements, and statements of cashflows, and all references to assets, liabilities, earnings, retained earnings, and similar accounting items of a corporation mean those financial statements or comparable statements or items prepared or determined in conformity with generally accepted accounting principles then applicable, and fairly presenting, in conformity with generally accepted accounting principles, the matters that they purport to present, subject to any specific accounting treatment required by a particular provision of the General Corporation Law [*Corp. Code § 114*].

Accountants long have recognized that "generally accepted accounting principles" (GAAP) are far from being a canonical set of rules that will ensure identical accounting treatment of identical transactions. Instead, GAAP will tolerate a range of reasonable treatments, leaving the choice among alternatives to management [*Thor Power Tool Co. v. Commissioner (1979) 439 U.S. 522, 544, 99 S. Ct. 773, 58 L. Ed. 2d 785]* . In the United States, GAAP are an amalgam of statements issued by the American Institute of Certified Public Accountants through the successive groups that it has established to promulgate accounting principles: the Committee on Accounting Procedure, the Accounting Principles Board, and the Financial Accounting Standards Board. GAAP include broad statements of accounting principles amounting to aspirational norms as well as more specific guidelines and illustrations. The lack of an official compilation allows for some debate over whether particular announcements are encompassed within GAAP [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 382, 11 Cal. Rptr. 2d 51, 834 P.2d 745* (observing that one standard text purporting to comprehensively restate GAAP includes 90 major sections and more than 500 pages)]. GAAP are found in "a hodgepodge of accounting sources, which [in the United States] find their respective places in the hierarchical structure established by the American Institute of Certified Public Accountants" [*Bolt v. Merrimack Pharm., Inc. (9th Cir. 2007) 503 F.3d 913, 918 n.6* (describing that hierarchy)].

When a court must determine whether a particular financial accounting result is in accordance with generally accepted accounting principles, the court should not try to apply those principles but should defer to the professional judgment of the accountant who audited or prepared the financial statements, "unless a GAAP authority *demands* a contrary accounting treatment" [*Bolt v. Merrimack Pharm., Inc. (9th Cir. 2007) 503 F.3d 913, 918* (original emphasis; corporation's net worth, as disclosed on audited balance sheet, was determined in accordance with GAAP)].

[3] Annual Report When 100 or More Shareholders

In addition to the financial statements required by *Corp. Code § 1501(a)*, the annual report of any corporation having 100 or more holders of record of its shares as determined by *Corp. Code § 605*, either not subject to the reporting requirements of Section 13 of the Securities Exchange Act of 1934 (*15 U.S.C. § 78m*) or exempted from those reporting requirements by Section 12(g)(2) of the Securities Exchange Act of 1934 (*15 U.S.C. § 78l(g)(2)*), must also briefly describe any transaction, excluding compensation of officers and directors, during the previous fiscal year involving an amount in excess of $40,000, other than contracts let at competitive bid or services rendered at prices regulated by law, to which the corporation or its parent or subsidiary was a party and in which any director or officer of the corporation or of a subsidiary or any holder of more than 10 percent of the outstanding voting shares of the corporation had a direct or indirect material interest. The report must name the director, officer, subsidiary, or 10-percent shareholder and must state that party's relationship to the corporation, the nature of that party's interest in the transaction, and, when

practicable, the amount of that party's interest in the transaction. It is further provided that in the case of a transaction with a partnership of which that person is a partner, only the interest of the partnership need be stated and that no such report need be made in the case of transactions approved by the shareholders [*Corp. Code § 1501(b)(1)*].

The annual report must also describe briefly the amount and circumstances of any indemnification or advances aggregating more than $10,000 paid during the fiscal year to any officer or director of the corporation pursuant to *Corp. Code § 317* (corporate power to indemnify); provided that no such report need be made in the case of indemnification approved by the shareholders under *Corp. Code § 317(e)(3)* (entitlement to vote) [*Corp. Code § 1501(b)(2)*].

[4] Obligation to Report Results of Voting at Shareholder Meetings

For a period of 60 days following the conclusion of an annual, regular, or special meeting of shareholders, a corporation, on written request from a shareholder, must forthwith inform the shareholder of the result of any particular vote of shareholders taken at the meeting, including the number of shares voting for, the number of shares voting against, and the number of shares abstaining or withheld from voting. If the matter voted on was the election of directors, the corporation must report the number of shares (or votes if voted cumulatively) cast for each nominee for director. If more than one class or series of shares voted, the report must state the appropriate numbers by class and series of shares [*Corp. Code § 1509*]. A foreign corporation qualified to transact intrastate business in California must provide this information to a shareholder resident in California [*Corp. Code § 1510(a)*; *see Corp. Code § 1510(b)* (defining shareholder resident)]. A foreign corporation that is not qualified to transact intrastate business in California but has one or more subsidiaries that are domestic corporations or foreign corporations qualified to transact intrastate business in California must provide the information specified in *Corp. Code § 1509*, at the request of a shareholder resident in California, as defined in *Corp. Code § 1510(b)* [*Corp. Code § 1511*].

For the purposes of *Corp. Code §§ 1509-1511*, a shareholder includes (1) any person named in a share certificate as a shareholder, or (2) any person named as a shareholder on the records of a central depository, bank, or broker-dealer with respect to shares that are subject to the control of the central depository, bank, or broker-dealer [*Corp. Code § 1512(a)*]. A beneficiary of a trust, a beneficiary of the estate of a decedent, or an employee with respect to a pension, retirement, or health care trust or fund is not a shareholder of any shares standing in the name of the trust, the fund, the decedent, or the decedent's estate [*Corp. Code § 1512(b)*; *but see Corp. Code § 711* (beneficial owners may have right to obtain this information through other channels, discussed in Ch. 166, *Shareholders' Meetings and Voting*)]. A person who is a shareholder by reason of being named as such on the records of a bank or broker [*see Corp. Code § 1512(a)*, discussed *above*] must provide the corporation with a photocopy of a receipt of a statement from the central depository, bank, or broker-dealer showing the person to be a shareholder [*Corp. Code § 1512(c)*]. The corporation must accept the photocopy as sufficient evidence [*Corp. Code § 1512(c)*].

[5] Financial Statement at Shareholder's Request

If no annual report for the last fiscal year has been sent to shareholders, the corporation, on written request of any shareholder made more than 120 days after the close of that fiscal year, must deliver or mail to the person making the request, within 30 days thereafter, the financial statements [*see § 165.74*] required by *Corp. Code § 1501(a)* for that year [*Corp. Code § 1501(c)*].

Since *Corp. Code § 1501(c)* appears to distinguish between the annual report and "the financial statements required by [*Corp. Code § 1501(a)*]," the fact that a corporation with fewer than 100 shareholders has waived the annual report requirement [*see § 165.25[2]*] would not seem to deprive a shareholder of such a corporation of the right to receive the "financials" which are required to appear in an annual report. Note, however, that such a corporation's financials are not held to the generally accepted accounting principles standard [*see Corp. Code § 1501(a)*].

[6] Special Financial Statement at Request of Five-Percent Shareholder

A shareholder, or shareholders, holding at least five percent of the outstanding shares of any class of a corporation may make a written request to the corporation for an income statement of the corporation for the three-month, six-month, or nine-month period of the current fiscal year ended more than 30 days prior to the date of the request and a balance sheet of the corporation as of the end of that period [*see § 165.75*] and, in addition, if no annual report for the fiscal year has been sent to shareholders, the statements required by *Corp. Code § 1501(a)*, for the last fiscal year. The statements must be delivered or mailed to the person making the request within 30 days thereafter. A copy of the statements must be kept on file in the principal office of the corporation for 12 months and they must be exhibited at all reasonable times to any shareholder demanding an examination of them or a copy must be mailed to the shareholder [*Corp. Code § 1501(c)*].

The quarterly income statement and balance sheets referred to in *Corp. Code § 1501* must be accompanied by the report thereon, if any, of any independent accountants engaged by the corporation or the certificate of an authorized officer of the corporation that the financial statements were prepared without audit from the books and records of the corporation [*Corp. Code § 1501(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFinanceFranchise TaxAnnual Report FilingsBusiness & Corporate LawCorporationsGoverning Documents & ProceduresArticles of Incorporation & BylawsMinimum Requirements for Articles of IncorporationBusiness & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsInspection RightsGeneral OverviewBusiness & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsRecordkeepingBusiness & Corporate LawCorporationsShareholdersMeetings & VotingGeneral Overview

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§ 165.26 Electronic Transmission

[1] By the Corporation

For the purpose of giving notice by electronic transmission, when permitted [*see, e.g., § 165.25*], the following definitions apply. "Electronic transmission by the corporation" means a communication that is delivered to a recipient that has provided an unrevoked consent to the use of one of the following means of transmission for communications under or pursuant to the Corporations Code [*Corp. Code § 20*]:

- Facsimile telecommunication or electronic mail when directed to the facsimile number or electronic mail address, respectively, for that recipient on record with the corporation;

- Posting on an electronic message board or network which the corporation has designated for those communications, together with a separate notice to the recipient of the posting, which transmission will be validly delivered upon the later of the posting or delivery of the separate notice thereof; or

- Other means of electronic communication.

The communication must create a record that is capable of retention, retrieval, and review, and that may thereafter be rendered into clearly legible tangible form [*Corp. Code § 20*]. However, an electronic transmission under the Corporations Code by a corporation to an individual shareholder or member of the corporation who is a natural person (and if an officer or director of the corporation, only if communicated to the recipient in that person's capacity as a shareholder or member), is not authorized unless in addition to satisfying the requirements of *Corp. Code § 20*, the consent to the transmission has been preceded by or includes a clear written statement to the recipient as to the following [*Corp. Code § 20(c)*]:

- Any right of the recipient to have the record provided or made available on paper or in nonelectronic form;

- Whether the consent applies only to that transmission, to specified categories of communications, or

to all communications from the corporation; and

- The procedures the recipient must use to withdraw consent.

[2] To the Corporation

"Electronic transmission to the corporation" means a communication delivered by one of the following means, as to which the corporation has placed in effect reasonable measures to verify that the sender is the shareholder (in person or by proxy) or director purporting to send the transmission, and that creates a record that is capable of retention, retrieval, and review, and that may thereafter be rendered into clearly legible tangible form [*Corp. Code § 21*]:

- Facsimile telecommunication or electronic mail when directed to the facsimile number or electronic mail address, respectively, which the corporation has provided from time to time to shareholders or members and directors for sending communications to the corporation;

- Posting on an electronic message board or network which the corporation has designated for those communications, and which transmission will be validly delivered upon the posting; or

- Other means of electronic communication.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsRecordkeepingComputer & Internet LawGeneral Overview

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14-165 California Forms of Pleading and Practice--Annotated § 165.27

§ 165.27 Judicial Enforcement of Right to Annual Report or Financial Statement

[1] In General

The superior court of the proper county may enforce a corporation's duty of making, mailing, or delivering the information and financial statements required by *Corp. Code § 1501* [*see* §§ 165.73-165.75], and, if good cause is shown, may extend the time therefor [*Corp. Code § 1501(e)*]. The proper county in which to bring an action involving a corporate defendant is the county where the principal executive office of the corporation is located. However, if the principal executive office of a corporation is not in California or if the corporation has no such office, the proper county is Sacramento County [*Corp. Code § 177*]. The judicial enforcement of rights to annual reports and financial statements is applicable to any domestic corporation and to any foreign corporation having its principal executive office in California or customarily holding meetings of its board in California [*Corp. Code § 1501(g)*], as well as to any nominally foreign corporation [*Corp. Code § 2115(b)*].

[2] Expenses

If the court in any action or proceeding under *Corp. Code § 1501* finds that the failure of a corporation to comply with the requirements of *Corp. Code § 1501* has been without justification, the court may award an amount sufficient to reimburse the shareholder for the reasonable expenses incurred by the shareholder, including attorney's fees, in connection with the action or proceeding [*Corp. Code § 1501(f)*].

[3] Penalty Against Corporation

In addition to any remedy by writ of mandate [*Corp. Code §§ 1501(e), 2202*], a shareholder may seek to collect a penalty from a corporation neglecting, failing, or refusing to prepare or submit financial statements [*Corp. Code § 2200*]. For discussion of civil penalties against corporations, see *§ 165.28[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsInspection

RightsRemediesBusiness & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsRecordkeepingCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamus

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14-165 California Forms of Pleading and Practice--Annotated § 165.28

§ 165.28 Civil Penalties and Liabilities

[1] Failure to Keep Records, Prepare Financial Statements, or Advise Shareholder Regarding Application of California Law

In addition to any remedies by injunction, by action for damages, or by writ of mandate [*Corp. Code § 1501(e), (f)*], a corporation is subject to a penalty if it neglects, fails, or refuses to do any of the following [*Corp. Code § 2200*]:

- Keep or maintain a record of shareholders or books of account.
- Prepare or submit financial statements as required.
- If the corporation is a foreign corporation, give any shareholder of record advice regarding the application of California law [*see Corp. Code § 2115(b), (f); see also § 160.12[2][f]*].

The penalty imposed is $25 per day, beginning 30 days after a corporation's receipt of a written request that it perform the above duties, up to a maximum of $1,500. In the case of a foreign corporation's failure to give a shareholder of record advice regarding the application of California law, the 30-day period runs from the date of receipt of the request made pursuant to *Corp. Code § 2115(f)* [*see § 160.12[2][f]*] and no additional request is required [*Corp. Code § 2200*]. The penalty is payable to a shareholder who institutes suit within 90 days after making a written request to the corporation, including any request made pursuant to *Corp. Code § 2115(f)*. The maximum daily penalty for failure to comply with any number of separate requests made on any one day or for the same act is $250.

The court in which an action for a penalty is brought may reduce, remit, or suspend the penalty when it appears that the corporation's neglect, failure, or refusal to comply with its duties was inadvertent or excusable [*Corp. Code § 2202*].

[2] Liability for Failure to Report Misleading Statements

A publicly traded corporation [*see Corp. Code § 2207(f)*] is subject to a civil penalty up to $1 million if the corporation acquires actual knowledge that its officer, director, manager, or agent makes a materially false or misleading statement that affects the public's perception of its financial condition, and if it knowingly fails to notify appropriate government

authorities and its shareholders [*Corp. Code § 2207(a)*; *see* Stats 2003, ch. 477, § 1 (statement of legislative intent that publicly traded corporations act in responsible manner with respect to statements about financial condition)]. For further discussion, see Ballantine & Sterling, California Corporation Laws, Ch. 13, *Records, Reports, and Inspection Rights § 277* , (Matthew Bender).

[3] False Statements or Reports

Any officers, directors, employees, or agents of a corporation who do any of the following are liable jointly and severally for all the resulting damage to the corporation or any person injured thereby who relied thereon, or to both [*Corp. Code § 1507*]:

- Make, issue, deliver, or publish any prospectus, report, circular, certificate, financial statement, balance sheet, public notice, or document respecting the corporation or its shares, assets, liabilities, capital, dividends, business, earnings, or accounts which is false in any material respect, knowing it to be false, or who knowingly participate therein.

- Make or cause to be made in the books, minutes, records, or accounts of the corporation any entry which is false in any material particular, knowing that entry is false.

- Remove, erase, alter, or cancel any entry therein with intent to deceive.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsInspection RightsRemediesBusiness & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsRecordkeepingCivil ProcedureRemediesWritsCommon Law WritsMandamus

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§ 165.29 Criminal Penalties and Liabilities

[1] False Reports

Every director, officer, or agent of any corporation, domestic or foreign, is guilty of a felony if he or she knowingly concurs in making, publishing, or posting, either generally or privately, to the stockholders or other persons, any of the following [*Corp. Code § 2254*]:

- Any written report, exhibit, or statement of the corporation's affairs or pecuniary condition, or book or notice containing any material statement which is false.

- Any untrue or willfully or fraudulently exaggerated report, prospectus, account, statement of operations, values, business, profits, expenditures, or prospects.

- Any paper or document intended to produce or give, or having a tendency to produce or give, the shares of stock in the corporation a greater value or a less apparent or market value than they really possess.

A director, officer, or agent of a corporation, domestic or foreign, who refuses to make any books or post any notice required by law in the manner required by law, is also guilty of a felony [*Corp. Code § 2254*].

[2] Fraudulent Nondisclosure

Every director, officer, or agent of any corporation, domestic or foreign, who knowingly receives or possesses himself or herself of any property of the corporation, other than in payment of a just demand, and, with intent to defraud, omits to make, or to cause or direct to be made, a full and true entry of that fact in the books or accounts of the corporation, is guilty of a public offense punishable by imprisonment in a state prison, or by imprisonment in a county jail, not exceeding one year, and a fine not exceeding $500, or by both fine and imprisonment [*Corp. Code § 2255(a), (c)*].

[3] Fraudulent Alteration

Every director, officer, agent, or shareholder of any corporation, domestic or foreign, who, with intent to defraud, destroys, alters, mutilates, or falsifies any of the books, papers, writings, or securities belonging to the corporation, makes or concurs in making any false entries, or omits or concurs in omitting to make any material entry in any book of accounts or other record or document kept by the corporation, is guilty of a public offense punishable by imprisonment in a state prison, or by imprisonment in a county jail, not exceeding one year, and a fine not exceeding $500, or by both fine and imprisonment [*Corp. Code § 2255(b), (c)*].

[4] Fraudulent Exhibition to Public Officer

Every officer, agent, or clerk of any corporation, domestic or foreign, or any persons proposing to organize a corporation or to increase the capital stock of any corporation, who knowingly exhibits any false, forged, or altered book, paper, voucher, security, or other instrument of evidence to any public officer or board authorized by law to examine the organization of the corporation, to investigate its affairs, or to allow an increase of its capital, with intent to deceive that officer or board, is punishable by imprisonment in a state prison, or by imprisonment in a county jail for a period not exceeding one year [*Corp. Code § 2256*].

[5] Fraudulent Advertising

Every person who, without being authorized to do so, subscribes the name of another to or inserts the name of another in any prospectus, circular, or other advertisement, or announcement of any corporation, domestic or foreign, whether existing or intended to be formed, with intent to permit the document to be published, and thereby to lead persons to believe that the person whose name is so subscribed is an officer, agent, shareholder, or promoter of that corporation, is guilty of a misdemeanor [*Corp. Code § 2257*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsRecordkeepingCriminal Law & ProcedureCriminal OffensesFraudSecurities FraudGeneral OverviewCriminal Law & ProcedureCriminal OffensesFraudSecurities FraudPenalties

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[Reserved]

§§ 165.30[Reserved]

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14-165 California Forms of Pleading and Practice--Annotated § 165.50

§ 165.50 California Points and Authorities

For memoranda of points and authorities related to this chapter, see California Points and Authorities, Ch. 52, *Corporations*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsRecordkeeping

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§ 165.51 California Legal Forms

For forms related to shareholders' requests for inspection or reports, see California Legal Forms, Ch. 7, *Corporate Records and Reports*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsInspection RightsGeneral OverviewBusiness & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsInspection RightsDirectorsBusiness & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsInspection RightsShareholders

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14-165 California Forms of Pleading and Practice--Annotated § 165.52

§ 165.52 State Statutes

[1] Civil Penalties and Liabilities

Civil liability for making false report, statement, or entry. *Corp. Code § 1507*

Penalty for corporation's failure to keep record, to issue financial statements, or for foreign corporation to comply with shareholder request regarding application of California law. *Corp. Code § 2200*

Penalty is in addition to judicial remedies. *Corp. Code § 2202*

[2] Criminal Penalties and Liabilities

Making false report, statement, or entry. *Corp. Code § 2254*

Fraudulent transfer of corporate property. *Corp. Code § 2255(a), (c)*

Fraudulent alteration of corporate records. *Corp. Code § 2255(b), (c)*

Exhibiting false corporate records. *Corp. Code § 2256*

Unauthorized use of name in corporate advertisement. *Corp. Code § 2257*

[3] Definitions

Corporation. *Corp. Code § 162*

Domestic corporation. *Corp. Code § 167*

Foreign corporation. *Corp. Code § 171*

Shareholder. *Corp. Code § 185*

Nominally foreign corporation. *Corp. Code § 2115(a)*

[4] Governing Statutes

Obligation of corporation to keep records and reports. *Corp. Code §§ 1500-1508*

Obligation to report results of voting at shareholder meetings. *Corp. Code §§ 1509-1512*

Rights to inspect corporate records and property. *Corp. Code §§ 1600-1605*

Applicability of corporate record-keeping and inspection rights to nominally foreign corporations. *Corp. Code § 2115(b)*

Crimes and penalties imposed for failure by corporation to keep required records. *Corp. Code §§ 2200, 2201, 2253-2257, 2260*

[5] Judicial Enforcement of Right to Annual Report or Financial Statement

Action in superior court to enforce shareholder's right to annual report or financial statement. *Corp. Code § 1501(e)*

Judicial remedy in addition to civil penalty. *Corp. Code § 1501(e)*

Reimbursement for expenses when corporation's failure to make annual reports or financial statements is unjustified. *Corp. Code § 1501(f)*

Rights to annual reports and financial statements under *Corp. Code § 1501* applicable to domestic corporations and to foreign corporations having principal executive office or customarily holding meeting of board in *California. Corp. Code § 1501(g)*

Rights to annual reports and financial statements under *Corp. Code § 1501* applicable to nominally foreign corporations. *Corp. Code § 2115(b)*

[6] Judicial Enforcement of Right to Inspect Records

Appeal does not stay judgment when court orders corporation to allow inspection of corporate records by shareholder, director, or officer. *Code Civ. Proc. § 917.8(b)*

Right to postpone shareholders' meeting when delay in compliance with demand to inspect corporate records. *Corp. Code § 1600(b)*

Judicial enforcement of shareholder's right to inspect corporate records. *Corp. Code § 1603(a), (b)*

Expenses of investigation or audit when judicial enforcement of right to inspect corporate records. *Corp. Code §*

1603(c)

Reimbursement for expenses when corporation's failure to allow inspection unjustified. *Corp. Code § 1604*

Judicial enforcement of right to inspect records under *Corp. Code §§ 1600-1605* applicable to nominally foreign corporations. *Corp. Code § 2115(b)*

[7] Obligation to Keep Certain Records

Corporate duty to keep bylaws amended to date. *Corp. Code § 213*

Corporate duty to keep books, records, and minutes; duty to keep record of shareholders. *Corp. Code § 1500*

Corporate duty to keep books, records, minutes, and record of shareholders under *Corp. Code § 1500* applicable to nominally foreign corporation. *Corp. Code § 2115(b)*

Corporate duty to keep records of sales and proceeds of securities. *Corp. Code § 25145*

[8] Obligation to Make Annual Reports and Financial Statements

Corporate duty to send annual report to shareholders; contents of annual report. *Corp. Code § 1501(a)(1)*

Time requirements for mailing annual report to shareholders. *Corp. Code § 1501(a)(2)*

When financial statements not required to be in conformity with generally accepted accounting principles. *Corp. Code § 1501(a)(3)*

Reporting requirements satisfied if corporation with registered securities complies with federal regulation regarding Internet availability of annual report. *Corp. Code § 1501(a)(4)*

Additional requirements for annual report when corporation has 100 or more shareholders and either is not subject to the reporting requirements of Section 13 of the Securities Exchange Act of 1934 or is exempted from those reporting requirements by Section 12(g)(2) of the Securities Exchange Act of 1934. *Corp. Code § 1501(b)*

Right of shareholders to request financial statement of last fiscal year. *Corp. Code § 1501(c)*

Right of shareholder holding five percent of outstanding shares of corporation to obtain special financial statement. *Corp. Code § 1501(c)*

Financial statement of corporation accompanied by independent report. *Corp. Code § 1501(d)*

Shareholder's rights to obtain annual reports and financial statements applicable to domestic and certain foreign corporations. *Corp. Code § 1501(g)*

Shareholder's rights under *Corp. Code § 1501* applicable to nominally foreign corporation. *Corp. Code § 2115(b)*

[9] Obligation to Report Results of Voting at Shareholder Meetings

Shareholder entitled to request result of any particular vote of shareholders taken at meeting; information required to be furnished. *Corp. Code § 1509*

Foreign corporation qualified to transact intrastate business in California and foreign corporation which is not so qualified but has subsidiary which is so qualified or is domestic corporation as required to furnish voting results. *Corp. Code §§ 1510, 1511*

Definition of shareholder for purposes of *Corp. Code §§ 1509-1511*. *Corp. Code § 1512*

[10] Right to Inspect Corporate Records

Shareholder's right to inspect bylaws of corporation. *Corp. Code § 213*

Tax assessor's right to inspect records of corporation controlling property subject to local assessment. *Corp. Code § 1506*

Right of shareholder holding five percent of outstanding voting shares of corporation or holding one percent of voting shares and filing Schedule 14A with United States Securities and Exchange Commission to inspect record of shareholders. *Corp. Code § 1600(a)*

Shareholder's right to inspect record of shareholders. *Corp. Code § 1600(c)*

Shareholder's right to inspect record of shareholders applicable to domestic and certain foreign corporations. *Corp. Code § 1600(d)*

Shareholder's right to inspect books and minutes or record of shareholders not limited by corporation's articles or bylaws. *Corp. Code §§ 1600(d), 1601(b)*

Inspection of records by agent or attorney; right to inspection includes right to make copies. *Corp. Code §§ 1600(d), 1601(b), 1602*

Shareholder's right to inspect corporate books and minutes. *Corp. Code § 1601(a)*

Director's right to inspect corporate documents and property. *Corp. Code § 1602*

Records required to be made available in written form. *Corp. Code § 1605*

Rights of inspection under *Corp. Code §§ 1600-1605* applicable to nominally foreign corporations. *Corp. Code § 2115(b)*

Shareholder's right to inspect mining property of corporation. *Pub. Res. Code § 3984*

[11] Statutes Applicable to Nominally Foreign Corporations

Nominally foreign corporation defined. *Corp. Code § 2115(a)*

Corp. Code §§ 1500, 1501, and *1600-1605* applicable to nominally foreign corporations. *Corp. Code § 2115(b)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-165 California Forms of Pleading and Practice--Annotated § 165.53

§ 165.53 Decisions

[1] Director's Right to Inspect Records

Raiders football club, as plaintiff in shareholder's suit against NFL, did not have right to inspect NFL merchandising corporation's documents protected by attorney-client privilege; when director sues in capacity as shareholder rather than director under *Corp. Code § 1602*, attorney-client and work product privileges are properly asserted by corporation. *NFL Properties Inc. v. Superior Court (1998) 65 Cal. App. 4th 100, 107-108, 75 Cal. Rptr. 2d 893*

Director has greater right by statute to acquire corporate information than shareholder. *Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 621, 120 Cal. Rptr. 253*

Directors accorded unqualified right of inspection because of their fiduciary relationship to corporation and its shareholders. *Hartman v. Hollingsworth (1967) 255 Cal. App. 2d 579, 581-582, 63 Cal. Rptr. 563*

[2] Discovery of Records by Third Party

Spouse of 30 percent shareholder/employee of closely held corporation entitled, in dissolution proceeding, to compel corporation to produce business records and corporate tax returns and quarterly payroll tax information regarding spouse, but not payroll tax information identifying other persons. *Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 723, 21 Cal. Rptr. 2d 200, 854 P.2d 1117*

When shares are community property, non-shareholder spouse has same right to inspect corporate records as shareholder spouse, either indirectly, through shareholder spouse, or directly by means of third party discovery; non-shareholder spouse's purpose in seeking corporate records--to ascertain value of stock and community's and husband's financial status--held proper under *Corp. Code § 1601(a)*. *Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 715, 21 Cal. Rptr. 2d 200, 854 P.2d 1117*

[3] Judicial Enforcement of Right to Inspect Records

Proceeding in mandate is appropriate remedy by which shareholder may seek to enforce right to inspect corporate records. *Most v. First Nat. Bank of San Diego (1966) 246 Cal. App. 2d 425, 54 Cal. Rptr. 669* ; *Hagan v. Fairfield (1960) 183 Cal. App. 2d 703, 7 Cal. Rptr. 248*

Purpose of writ of mandate in shareholder proceeding against corporation was to enforce clear legal duty of corporation to allow inspection. *Farrington v. Fairfield (1961) 194 Cal. App. 2d 237, 239, 16 Cal. Rptr. 119*

Court properly exercised expeditious and timesaving methods in ordering expenses of investigation of corporation to be paid or shared by corporation. *Koshaba v. Koshaba (1942) 56 Cal. App. 2d 302, 312, 132 P.2d 854*

Court properly fixed amount of audit, making it a preferred charge against corporation, and issued writ of execution without requiring cost bill to be filed by shareholder when accountant performing audit appointed by court with consent of all parties. *Koshaba v. Koshaba (1942) 56 Cal. App. 2d 302, 311-312, 132 P.2d 854*

Mandate proceeding to inspect corporate records is summary in character; inspection not suspended during process of appeal except for some special reason. *Private Investors, Inc. v. Homestake Min. Co. (1936) 11 Cal. App. 2d 488, 491, 54 P.2d 535*

[4] Records Available to Agent or Attorney

Records are available to agent or attorney so that party may summon whatever assistance reasonably necessary to make right of inspection effective. *Dandini v. Superior Court (1940) 38 Cal. App. 2d 32, 35, 100 P.2d 535*

[5] Savings and Loan Associations

Inspection rights of shareholders of state savings and loan associations and their holding companies are governed by *Fin. Code § 6050* rather than by *Corp. Code § 1600 et seq.* *Feldman v. San Mateo Financial Corp. (1990) 226 Cal. App. 3d 543, 547, 276 Cal. Rptr. 285*

[6] Shareholder's Right to Inspect Books and Minutes

Purpose reasonably related to shareholder's interest was found when shareholder desired to inspect corporation's books due to disparity in value between published annual report of corporation and market value of corporation's outstanding stock. *Private Investors, Inc. v. Homestake Min. Co. (1936) 11 Cal. App. 2d 488, 496, 54 P.2d 535*

Shareholder's expressed purpose for inspection of corporate records was reasonably related to interest as shareholder when belief that president of corporation lent funds for purchase of outstanding shares with objective of vesting all shares in one person and depreciating value of shares held by other shareholders. *Capron v. Pacific Southwest D. Corp. (1935) 6 Cal. App. 2d 436, 437-438, 439, 44 P.2d 629*

Purpose is that purpose existing in mind of shareholder at time of inspection of corporate records, whether or not shareholder likely to succeed in accomplishing purpose. *Capron v. Pacific Southwest D. Corp. (1935) 6 Cal. App. 2d 436, 441, 44 P.2d 629*

Purpose not reasonably related to shareholder's interest found when shareholder's purpose alleged to be securing of names of other shareholders in order to secure options to purchase shares of shareholders to sell to corporation at inflated price. *Capron v. Pacific Southwest D. Corp. (1935) 6 Cal. App. 2d 436, 440, 44 P.2d 629*

[7] Shareholder's Right to Inspect Property of Corporation

Right of shareholder to inspect mine and, as part of inspection, to take ore samples, since purpose of inspection to arrive at value of property in which shareholder interested. *Symmes v. Sierra Nev. Mining Co. (1915) 171 Cal. 427, 429, 153 P. 710*

Right of shareholder to inspect mining property of corporation to determine nature of ore bodies or manner in which work carried on. *Hobbs v. Tom Reed Gold Min. Co. (1913) 164 Cal. 497, 501, 129 P. 781*

Shareholder has right to inspect corporate property when books of corporation unable to disclose information as to condition of corporation and value of shareholder's interest in corporation or when condition and value of shareholder's interest susceptible to concealment and misrepresentation. *Hobbs v. Tom Reed Gold Min. Co. (1913) 164 Cal. 497, 501, 129 P. 781*

[8] Shareholder's Right to Inspect Record of Shareholders

Application of *Corp. Code § 1600* to foreign corporation with principal executive office in California does not violate full faith and credit, due process, commerce, or *equal protection clauses of federal Constitution*. *Valtz v. Penta Investment Corp. (1983) 139 Cal. App. 3d 803, 807-810, 188 Cal. Rptr. 922*

Shareholder accorded right of inspection unless corporation clearly shows that demand for inspection not for any purpose reasonably related to interest as shareholder. *Gilmore v. Emsco Derrick & Equip. Co. (1937) 22 Cal. App. 2d 64, 67, 70 P.2d 251*

Shareholder entitled to inspect record of shareholders even though attorney for detective agency when corporation fails to establish shareholder's desire to use information for use in detective agency business. *Gilmore v. Emsco Derrick & Equip. Co. (1937) 22 Cal. App. 2d 64, 67, 70 P.2d 251*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsInspection RightsDirectorsBusiness & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsInspection RightsShareholdersBusiness & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsRecordkeepingCivil ProcedureRemediesWritsCommon Law WritsMandamusLegal EthicsClient RelationsGeneral Overview

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PART III. RESEARCH GUIDE

14-165 California Forms of Pleading and Practice--Annotated § 165.54

§ 165.54 Law Reviews

Miller and Levine, *Recent Developments in Corporate Criminal Liability, 24 Santa Clara L. Rev. 41 (1984)*

Carter, *Corporate Minutes: Their Form, Contents, Inspection, and Evidentiary Value, 29 Prac. Law. 45 (1983)*

Note, *California's New General Corporation Law: Prospects for Minority Shareholders, 7 Pacific L.J. 706 (1976)*

Kirshman, *The Strategy of Corporate Proxy Contests-- An Overview, 48 L.A. Bar B. 249 (1973)*

Ludlum, *Corporate Directors: Their Right to Inspect, 5 Texas Tech. L. Rev. 35 (1973)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGeneral OverviewBusiness & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsInspection RightsDirectorsBusiness & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsRecordkeepingCriminal Law & ProcedureCriminal OffensesFraudSecurities FraudGeneral Overview

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PART III. RESEARCH GUIDE

14-165 California Forms of Pleading and Practice--Annotated § 165.55

§ 165.55 Text References

Ballantine and Sterling, California Corporation Laws (4th ed.), Ch. 13, *Records, Reports, and Inspection Rights* (Matthew Bender)

Witkin, California Procedure, Vol. 8, *Extraordinary Writs*, § 88 (4th ed.)

Witkin, Summary of California Law, Vol. 9, *Corporations*, §§ 85, 136-138 (10th ed. 2005)

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14-165 California Forms of Pleading and Practice--Annotated §§ 165.56-165.69

[Reserved]

§§ 165.56[Reserved]

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Chapter 165 CORPORATIONS: CORPORATE RECORDS AND REPORTS
PART IV. FORMS

14-165 California Forms of Pleading and Practice--Annotated § 165.70

§ 165.70 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--By Shareholder [Corp. Code §§ 1600(c), 1601(a)] Against Corporation--To Compel Inspection of Corporate Records [Corp. Code § 1603]

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--By Shareholder [Corp. Code §§ 1600(c), 1601(a)] Against Corporation--To Compel Inspection of Corporate Records [Corp. Code § 1603]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name of*	)	PETITION FOR WRIT OF MANDATE
corporation and names of individual respondents, if	)	
any],	)	
Respondent(s)	)	
	)	

Petitioner alleges:

1. Respondent _____ [*name*], hereinafter referred to as "respondent corporation," is a corporation duly organized and existing under the laws of the State of _____ [*state of incorporation*] [_____ *if state of incorporation is other than California, add*: and _____ (keeps its corporate records *or* has its principal executive office *or* customarily holds meetings of its board) in _____ County, California].

[2. Respondent _____ (*name*) is, and at all times herein mentioned was, _____ (*state corporate title held by individual respondent, e.g.*, secretary of respondent corporation).]

[3. Petitioner is ignorant of the true names and capacities of respondents sued herein as DOES I-_____, inclusive, and therefore sues these respondents by these fictitious names. Petitioner will amend this petition to allege their true names and capacities when ascertained. (Petitioner is informed and believes and thereon alleges that each of the fictitiously named respondents is responsible in some manner for each act or omission herein alleged.)]

[4. At all times herein mentioned, each of the respondents was the agent and employee of each of the remaining respondents, and, in doing the things hereinafter alleged, was acting within the course and scope of that agency.]

5. Petitioner is the owner of record of _____ [*number*] shares of _____ [*describe, e.g.*, Class A common] stock of respondent corporation. On or about _____ [*date*], petitioner made written demand on respondent(s) to make available to petitioner for inspection and the making of extracts therefrom the _____ [*specify, e.g.*, record of shareholders' names, addresses, and shareholdings *or* respondent corporation's accounting books and records and minutes of proceedings of the shareholders, the board, and the committees of the board]. A copy of petitioner's demand is attached as Exhibit A and incorporated by reference. Petitioner's demand was refused and is still refused by respondent(s)[, and each of them].

6. Petitioner's purpose in demanding inspection is reasonably related to his/her interest as a shareholder in respondent corporation in that _____ [*specify relevant facts, such as circumstances placing petitioner's interest in respondent corporation in jeopardy and what petitioner's inspection of respondent corporation's records is anticipated to reveal, e.g.*, petitioner is informed and believes that the president of respondent corporation has lent corporate funds for the purchase of outstanding shares of stock in respondent corporation with the objective of vesting all such shares in one individual and thus depreciating the value of shares held by other shareholders]. Therefore, respondent corporation's failure to allow petitioner to inspect its records is without justification.

[7. An audit of the books and records and an investigation of the property, funds, and affairs of respondent corporation are necessary because _____ (*specify why review of books and records by shareholder would not reveal true status of respondent corporation, e.g.*, petitioner is informed and believes that the president of respondent corporation has misappropriated corporate funds for various purposes and that such misappropriations would not be disclosed by a simple review of respondent corporation's books and records). _____ (*Name*) is a _____ (*describe qualifications, e.g.*, certified public accountant), is competent to conduct the audit and inspection requested, and has consented to do so.]

8. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition, in that _____ [*state facts showing absence of an adequate legal remedy, e.g.*, petitioner has no means by which to otherwise discover the condition of respondent corporation and the value of his/her shares in respondent corporation *or* the penalties imposed by *Corporations Code Section 2200* will not provide petitioner with information regarding the condition of respondent corporation and the value of petitioner's shares therein].

WHEREFORE, petitioner prays:

1. That the court issue an alternative writ of mandate commanding respondent(s) [, and each of them,] to make available to petitioner [and to _____(*name*), petitioner's _____ (agent *or* attorney),] at _____ [*street address*], _____ [*city*], California, on _____ [*date*], for inspection and the making of extracts therefrom, the following records of respondent corporation: _____ [*specify, e.g.*, the record of shareholders' names, addresses, and shareholdings *or* respondent corporation's accounting books and records and minutes of proceedings of the shareholders, the board, and the committees of the board], or to show cause before this court at a time specified by court order why _____ [it has *or* they have] not done so and why a peremptory writ should not issue;

2. That on the return of the alternative writ and the hearing of this petition, this court issue its peremptory writ of mandate commanding respondent(s) [, and each of them,] to _____ [*describe duty to be performed by respondent corporation, e.g.*, make available to petitioner (and to _____ (*name*), petitioner's _____ (agent *or* attorney),) at _____ (*street address*), _____ (*city*), California, for inspection and the making of extracts therefrom, the following records of respondent corporation: _____ (*specify, e.g.*, the record of shareholders' names, addresses, and shareholdings *or* respondent corporation's accounting books and records and minutes of proceedings of the shareholders, the board, and the committees of the board)];

[3. That this court appoint _____ (*name*) to _____ (*describe duties to be performed by auditor or investigator, e.g.*, audit the books and records of respondent corporation and to investigate the property, funds, and affairs of respondent corporation) and to report thereon as the court may direct;]

[4. That this court direct the expenses of the audit and investigation to be paid by respondent corporation;]

[5. For the penalty prescribed by *Corporations Code Section 2200*, commencing on _____ (*date*);]

6. For attorney's fees in the sum of $_____;

7. For costs of suit herein incurred; and

8. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*signature*]

Attorney for Petitioner

VERIFICATION [*Code Civ. Proc. §§ 446, 1086, 1109, 2015.5*]

I, _____ [*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

CAUTION:

A petition for writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Proof of service of a copy of a petition that seeks an alternative writ on each respondent and real party in interest must accompany the petition when it is offered for filing (except when, in its discretion and for good cause, the court has granted the application for the writ ex parte) [*Code Civ. Proc. § 1107*; for discussion of method of serving petition, *see* Ch. 358, *Mandate and Prohibition*]. A supporting memorandum also customarily accompanies a petition filed in a superior court, although it does not appear to be expressly required by

statute [*but see Code Civ. Proc. § 1090*, referring to the proceeding as a "motion" and *Cal. Rules of Ct., Rule 3.1113(a)*, requiring a memorandum in support of a motion other than a motion listed in *Cal. Rules of Ct., Rule 3.1114*; for discussion and forms, see Ch. 417, *Points and Authorities*].

[2] Use of Form

This petition is to obtain a writ of mandate to enforce the right of a shareholder to inspect corporate records. The accounting books and records and minutes of proceedings of the shareholders, board of directors, and board committees of a corporation are subject to inspection by any shareholder, on written demand, if the inspection is reasonably related to the holder's interest as a shareholder [*Corp. Code § 1601(a)*]. Further, the record of shareholders must be open to inspection and copying by any shareholder if inspection is for a purpose reasonably related to the holder's interest as a shareholder [*Corp. Code § 1600(c)*].

[3] Allegations

The petition alleges the following:

- Corporate status of respondent (Paragraph 1).
- Capacity of individual respondents (Paragraph 2).
- Fictitious name and agency allegations, if applicable (Paragraphs 3, 4).
- That petitioner is a shareholder of record in the respondent corporation (Paragraph 5) [*Hagan v. Fairfield (1960) 183 Cal. App. 2d 703, 706, 7 Cal. Rptr. 248* (no proper basis for issuing writ of mandate when petitioner fails to allege that he or she is a shareholder of record)].
- That petitioner demanded in writing to inspect respondent corporation's records (Paragraph 5) [*Corp. Code §§ 1600(c), 1601(a)*].
- That respondent corporation refused petitioner's demand (Paragraph 5) [*see Corp. Code § 1603(a)*].
- That petitioner's demand was reasonably related to his or her interest as a shareholder (Paragraph 6) [*Corp. Code §§ 1600(c), 1601(a)*; *Capron v. Pacific Southwest D. Corp. (1935) 6 Cal. App. 2d 436, 439, 44 P.2d 629* (allegation that purpose is reasonably related to interest as shareholder as necessary element of cause of action)].
- That respondent corporation's refusal to allow inspection by petitioner is without justification (Paragraph 6) [*Corp. Code § 1604*].
- Petitioner's demand for an audit or investigation, if desired (Paragraph 7) [*Corp. Code § 1603(a)*].
- Petitioner's lack of any other plain, speedy, or adequate remedy in the ordinary course of law (Paragraph 8) [*Code Civ. Proc. § 1086*].

[4] Jurisdiction

Although mandate proceedings may generally be brought in the Supreme Court, courts of appeal, and superior courts [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 1085, 1108*], mandate proceedings to enforce the right of a shareholder to inspect corporate records or to enforce the right of a shareholder to receive an annual report from a corporation are

brought in the superior court [*Corp. Code §§ 1501(e), 1603(a)*].

[5] Venue

The proper county in which to bring an action involving a corporate defendant is the county where the principal executive office of the corporation is located. However, if the principal executive office of a corporation is not in California, or if the corporation has no such office, the proper county is Sacramento County [*Corp. Code § 177*].

[6] Penalty Against Corporation

A corporation failing to keep records of shareholders or books of account, failing to prepare financial statements as required, or a foreign corporation failing to comply with a shareholder request regarding the application of California law [*see Corp. Code § 2115(b), (f)*; *see also § 160.12[2][f]*], is subject to a penalty of $25 for each day that its failure or refusal continues, beginning 30 days after receipt of a written request that the duty be performed from one entitled to make the request. In the case of a foreign corporation's failure to give a shareholder of record advice regarding the application of California law, the 30-day period runs from the date of receipt of the request made pursuant to *Corp. Code § 2115(f)* [*see § 160.12[2][f]*] and no additional request is required [*Corp. Code § 2200*]. The penalty may accrue to a maximum of $1,500. The penalty is paid to a shareholder, or jointly to shareholders, making the request that the duty be performed and damaged by the corporation's failure or refusal to comply if suit is commenced against the corporation within 90 days after the written request is made, including any request made pursuant to *Corp. Code § 2115(f)* [*Corp. Code § 2200*]. This penalty is in addition to an action brought in the superior court of the proper county to enforce a shareholder's right to annual reports or financial statements [*Corp. Code §§ 1501(e), 2202*].

[7] Costs and Attorney's Fees

A court may award an amount sufficient to reimburse a shareholder for expenses, including attorney's fees, if it appears that a corporation's refusal to allow inspection of corporate records or failure to send an annual report was without justification [*Corp. Code §§ 1501(f), 1604*].

[8] California Points and Authorities

For memoranda of points and authorities supporting a petition for writ of mandate enforcing a shareholder's rights of inspection, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

[9] California Legal Forms

For transactional forms related to a shareholder's demand to inspect corporate records or records of shareholders, see California Legal Forms, Ch. 7, *Corporate Records and Reports* (Matthew Bender)

[10] State Statutes

[a] Mandate

Courts having jurisdiction to issue writ of mandate generally. *Code Civ. Proc. §§ 1085, 1108*

Purpose of writ of mandate. *Code Civ. Proc. § 1085*

Writ of mandate issued when plain, speedy, and adequate remedy not available in ordinary course of law. *Code Civ. Proc. § 1086*

Writ of mandate issued to party beneficially interested. *Code Civ. Proc. § 1086*

Alternative writ of mandate requires party to do act or show why act was not done; peremptory writ of mandate requires party to do act. *Code Civ. Proc. § 1087*

Notice requirements for issuance of writ of mandate. *Code Civ. Proc. § 1088*

[b] Rights of Inspection

Shareholder's right to inspect and copy record of shareholders on written demand of corporation for a purpose reasonably related to interest as shareholder. *Corp. Code § 1600(c)*

Shareholder's right to inspect and copy books and minutes of corporation on written demand of corporation for a purpose reasonably related to interest as shareholder. *Corp. Code § 1601(a)*

Superior court enforces shareholder's right of inspection on refusal of shareholder's demand for inspection by corporation. *Corp. Code § 1603(a)*

Court appoints inspectors or accountants to audit and investigate corporation when good cause shown. *Corp. Code § 1603(a)*

Expenses of investigation or audit paid by applicant unless court orders corporation to pay or share expenses. *Corp. Code § 1603(c)*

Reimbursement of expenses, including attorney's fees, to shareholder when corporation's refusal to allow inspection by shareholder was without justification. *Corp. Code § 1604*

Rights of inspection under *Corp. Code §§ 1600-1605* applicable to nominally foreign corporations. *Corp. Code § 2115(b)*

[c] Penalties

Civil penalties for corporation's failure to keep record of shareholders or books of account, to prepare or submit financial statements, or failure of foreign corporation to comply with shareholder request regarding application of California law [*Corp. Code § 2115(b), (f)*]; penalty payable to shareholder. *Corp. Code § 2200*

Penalty under *Corp. Code § 2200* additional to any remedy by writ of mandate; court permitted to reduce, remit, or suspend penalty when corporation's failure inadvertent or excusable. *Corp. Code § 2202*

[11] Decisions

Corp. Code § 1600, granting shareholder absolute right to inspect shareholder list, is constitutionally applicable to foreign corporation with principal office in *California. Valtz v. Penta Investment Corp. (1983) 139 Cal. App. 3d 803, 807-810, 188 Cal. Rptr. 922*

Corporation's refusal to allow inspection of shareholder records based on asserted unconstitutionality of *Corp. Code § 1600* unsupported by authority justifies award of attorney's fees to shareholder. *Valtz v. Penta Investment Corp.*

(1983) 139 Cal. App. 3d 803, 810-811, 188 Cal. Rptr. 922

Shareholder's right to inspect all formal records of corporation described by *Corp. Code §§ 1600* and *1601*. *Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 621, 120 Cal. Rptr. 253*

Purpose of writ of mandate; assignee of shares unable to enforce writ issued in favor of former owner of shares to inspect corporate records. *Farrington v. Fairfield (1961) 194 Cal. App. 2d 237, 239, 16 Cal. Rptr. 119*

Petition for writ of mandate by shareholder insufficient when petitioner fails to allege that he or she is a shareholder of record in corporation. *Hagan v. Fairfield (1960) 183 Cal. App. 2d 703, 706, 7 Cal. Rptr. 248*

Conditions in which court will defray expenses of audit or investigation; court acted properly in adopting expeditious and timesaving methods in ordering corporation to pay charge. *Koshaba v. Koshaba (1942) 56 Cal. App. 2d 302, 311-312, 132 P.2d 854*

Reasonable motive for demanding inspection shown by shareholder expressing concern over federal indictments against directors of corporation and dividend checks believed to be paid to persons listed as shareholders of record but not bona fide shareholders. *Gilmore v. Emsco Derrick & Equip. Co. (1937) 22 Cal. App. 2d 64, 66, 70 P.2d 251*

Shareholder given right of inspection unless corporation shows demand for inspection not for any purpose reasonably related to interest as shareholder. *Gilmore v. Emsco Derrick & Equip. Co. (1937) 22 Cal. App. 2d 64, 67, 70 P.2d 251*

Purpose reasonably related to shareholder's interest in corporation found when shareholder desires to inspect corporate books due to disparity in value between published annual report of corporation and market value of outstanding stock. *Private Investors, Inc. v. Homestake Min. Co. (1936) 11 Cal. App. 2d 488, 496, 54 P.2d 535*

Allegation that purpose was reasonably related to interest as shareholder was necessary element of cause of action. *Capron v. Pacific Southwest D. Corp. (1935) 6 Cal. App. 2d 436, 439, 44 P.2d 629*

Purpose reasonably related to shareholder's interest found when shareholder believes president of corporation to have lent corporate funds for purchase of outstanding shares with objective of vesting all shares in one individual and thus depreciating value of shares held by other shareholders. *Capron v. Pacific Southwest D. Corp. (1935) 6 Cal. App. 2d 436, 437-438, 439, 44 P.2d 629*

Corporation showed shareholder's motive in demanding inspection not reasonably related to interest as shareholder when shareholder alleged to desire names of other shareholders in order to secure options to purchase shares of those shareholders and then to offer shares to corporation at higher price. *Capron v. Pacific Southwest D. Corp. (1935) 6 Cal. App. 2d 436, 440, 44 P.2d 629*

[12] Law Reviews

Note, *Corporations: Shareholders' Right to Inspect Books of Foreign Corporations, 39 Calif. L. Rev. 133 (1951)*

Note, *Corporations: Inspection of Corporate Records in California: Cal. Civ. Code § 355 , 20 Calif. L. Rev. 449 (1932)*

[13] Text References

Ballantine and Sterling, California Corporation Laws (4th ed.), Ch. 13, *Records, Reports, and Inspection Rights, §§*

272.01-272.04 (Matthew Bender)

Witkin, California Procedure, Vol. 8, *Extraordinary Writs*, §§ 67-78, 88, 146-149, 151-153, 156-162 (4th ed.)

Witkin, Summary of California Law, Vol. 9, *Corporations*, §§ 68, 136, 137 (10th ed. 2005)

[14] Cross References

For alternative forms for capacity, fictitious name, and agency allegations, see Ch. 20, *Allegations Commonly Used*

For discussion and forms related to mandate proceedings generally, see Ch. 358, *Mandate and Prohibition*

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14-165 California Forms of Pleading and Practice--Annotated § 165.71

§ 165.71 Allegation--To Compel Inspection of Corporate Property

[1] FORM Allegation--To Compel Inspection of Corporate Property

5. Petitioner is the owner of record of _____ [*number*] shares of _____ [*describe, e.g.*, Class A common] stock of respondent corporation. On _____ [*date*], petitioner made written demand on respondent(s) to allow petitioner to inspect the property held by respondent corporation. A copy of petitioner's demand is attached as Exhibit A and incorporated by reference. Petitioner's demand was refused and is still refused by respondent(s)[, and each of them].

6. Petitioner's purpose in demanding inspection is reasonably related to his/her interest as a shareholder in respondent corporation in that _____ [*specify relevant facts, such as circumstances placing petitioner's interest in respondent corporation in jeopardy and what petitioner's inspection of respondent corporation's property is anticipated to reveal, e.g.*, petitioner is informed and believes that the mining property held by respondent corporation may have increased in value due to the discovery of new ore bodies and thus increased the value of shares held by all shareholders] and in that _____ [*specify why inspection of corporate records would be insufficient for this purpose, e.g.*, petitioner is informed and believes that the condition and value of respondent corporation's mining property is susceptible to concealment or misrepresentation and thus an inspection of such books and records would not adequately inform him/her as to the condition of respondent corporation and the value of his/her shares].

[2] Source of Form

These allegations are based on *Hobbs v. Tom Reed Gold Min. Co. (1913) 164 Cal. 497, 129 P. 781* . That case suggested that a shareholder may have the right to inspect corporate property when the books of a corporation do not afford him or her information as to the condition of the corporation or the value of his or her interest therein or when the condition and value of corporate property are susceptible to concealment and misrepresentation. Therefore, the shareholder was allowed to inspect the mining property held by the corporation in order to determine the nature of the ore bodies or the manner in which the work was being carried on [*Hobbs v. Tom Reed Gold Min. Co. (1913) 164 Cal. 497, 501, 129 P. 781]* .

[3] Use of Form

These allegations are for use in a petition to obtain a writ of mandate to enforce the right of a shareholder to inspect corporate property in lieu of an inspection of corporate records [*see Hobbs v. Tom Reed Gold Min. Co. (1913) 164 Cal. 497, 501, 129 P. 781* (reversing judgment denying writ of mandate to shareholder to compel corporation to allow shareholder to inspect mine where new body of ore may have been discovered)] and may be substituted for Paragraphs 5 and 6 of *§ 165.70*.

A shareholder's right to inspect corporate property is questionable because the few cases that discuss the right of inspection concern mining property only and because the right to inspect mining property is guaranteed by Pub. Res. Code § 2605 (shareholder's absolute right to inspect corporate mining property). However, commentators have suggested that the right to inspect corporate property follows logically from the right to inspect corporate books [*see* Ballantine and Sterling, California Corporation Laws, Ch. 13, *Records, Reports, and Inspection Rights, § 272.01* (Matthew Bender)].

[4] California Points and Authorities

For memoranda of points and authorities supporting a petition for writ of mandate enforcing a shareholder's right to inspect corporate property, see California Points and Authorities, Ch. 52, *Corporations* , (Matthew Bender)

[5] State Statutes

Shareholder's absolute right to inspect corporate mining property; penalties to corporation for noncompliance. *Pub. Res. Code § 3984*

[6] Decisions

Right of shareholder to inspect corporate mining property and, as part of inspection, to take ore samples since purpose of inspection is to arrive at value of property in which shareholder is interested. *Symmes v. Sierra Nev. Mining Co. (1915) 171 Cal. 427, 429, 153 P. 710*

Right of shareholder to inspect corporate mining property when new body of ore may have been discovered in order to determine nature of ore bodies or manner in which work is being carried out. *Hobbs v. Tom Reed Gold Min. Co. (1913) 164 Cal. 497, 501, 129 P. 781*

Right of shareholder to inspect corporate property when books of corporation do not afford shareholder information as to condition of corporation and value of shareholder's interest or when condition and value of corporate property susceptible to concealment and misrepresentation. *Hobbs v. Tom Reed Gold Min. Co. (1913) 164 Cal. 497, 501, 129 P. 781*

[7] Cross References

For a related form, see *§ 165.70*.

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14-165 California Forms of Pleading and Practice--Annotated § 165.72

§ 165.72 Allegation--By Five-Percent Shareholder [Corp. Code § 1600(a)]--To Compel Inspection of Record of Shareholders

[1] FORM Allegation--By Five-Percent Shareholder [Corp. Code § 1600(a)]--To Compel Inspection of Record of Shareholders

5-6. Petitioner is the owner of record of _____ [*number*] shares of _____ [*describe e.g.*, Class A common stock of respondent corporation, which constitutes at least _____ [five percent of the outstanding voting shares of the corporation *or* one percent of the outstanding voting shares of the corporation and has filed Schedule 14A with the United States Securities and Exchange Commission]. On _____ [*date*], petitioner made written demand on respondent(s) to make available to petitioner for inspection the _____ [*specify, e.g.*, record of shareholders' names, addresses, and shareholdings *or* list of names, addresses, and shareholdings of shareholders entitled to vote for directors as of the most recent record date for which the list was compiled]. A copy of petitioner's demand is attached as Exhibit A and incorporated by reference. Petitioner's demand was refused and is still refused by respondent(s)[, and each of them].

[2] Use of Form

This allegation is for use in a petition to obtain a writ of mandate to enforce the right of a shareholder to inspect corporate records. A shareholder, or shareholders, holding at least five percent of the outstanding voting shares of a corporation, or holding at least one percent of those voting shares and who has filed with the United States Securities and Exchange Commission a Schedule 14A relating to solicitation of proxies for the election of directors, has an absolute right to do either or both of the following [*Corp. Code § 1600(a)*]:

- On five business days prior written demand, to inspect and copy, in person or by agent or attorney, during usual business hours, the record of shareholders' names, addresses, and shareholdings

- On written demand and tender of the usual charges, to obtain from the corporation's transfer agent a list of the names, addresses, and shareholdings of shareholders entitled to vote for directors as of the most recent record date for which the list was compiled or as of a date specified by the shareholders subsequent to the date of the demand

This allegation may be substituted for Paragraphs 5 and 6 of *§ 165.70*.

[3] California Points and Authorities

For memoranda of points and authorities supporting a petition for writ of mandate enforcing a five-percent shareholder's right of inspection, see California Points and Authorities, Ch. 52, *Corporations* , (Matthew Bender)

[4] Cross References

For a related form, see *§ 165.70*.

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14-165 California Forms of Pleading and Practice--Annotated § 165.73

§ 165.73 Petition for Writ of Mandate--By Shareholder [Corp. Code § 1501(a)] Against Corporation--To Compel Making and Mailing of Annual Report [Corp. Code § 1501(e)]

[1] FORM Petition for Writ of Mandate--By Shareholder [Corp. Code § 1501(a)] Against Corporation--To Compel Making and Mailing of Annual Report [Corp. Code § 1501(e)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____	)	PETITION FOR WRIT OF MANDATE
[*name of corporation and names of individual respondents, if any*],	)	
Respondent(s).	)	
	)	

Petitioner alleges:

1. Respondent _____ [*name*], hereinafter referred to as "respondent corporation," is a corporation duly organized and existing under the laws of the State of _____ [*state of incorporation*] [_____ *if state of incorporation is other than California, add:* and _____ (has its principal executive office *or* customarily holds meetings of its board) in _____ County, California].

[*2. Capacity or residence of individual respondents, if appropriate. See § 165.70, Paragraph 2.*]

[*3. Fictitious name allegation, if appropriate. See § 165.70, Paragraph 3.*]

[*4. Agency allegation, if appropriate. See § 165.70, Paragraph 4.*]

5. Petitioner is the owner of record of _____ [*number*] shares of _____ [*describe, e.g.*, Class A common] stock of respondent corporation.

6. On _____ [*date*], the fiscal year of respondent corporation ended. More than 120 days have passed since that date. Respondent corporation's board has failed to cause an annual report to be made and has further failed to send an annual report to petitioner [*add, if applicable:* or comply with federal regulation regarding notice of Internet availability of the annual report]. The bylaws of respondent corporation do not expressly waive the requirement for an annual report to be sent to shareholders.

7. Respondent corporation's failure to make and mail [*add, if applicable:* or provide a notice of Internet availability of] an annual report to petitioner is without justification in that _____ [*state facts showing respondent's neglect, e.g.*, the board of respondent corporation has met several times during the 120 days since the expiration of respondent corporation's fiscal year, has had the opportunity to prepare, or order to be prepared, an annual report of respondent corporation, and has failed both to make such report and to mail it to shareholders of respondent corporation].

8. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law other than the relief sought in this petition in that _____ [*state facts showing absence of an adequate legal remedy, e.g.*, the penalties imposed by *Corporations Code Section 2200* will not provide petitioner with information regarding the condition of respondent corporation and the value of petitioner's shares therein].

WHEREFORE, petitioner prays:

1. That the court issue an alternative writ of mandate commanding respondent(s) [, and each of them,] to make and mail to petitioner [and to _____ (*name*), petitioner's _____ (agent *or* attorney),] at _____ [*street address*], _____ [*city*], California, _____ [*specify, e.g.*, an annual report of respondent corporation for the fiscal year ending _____ [*date*], or to show cause before this court at a time specified by court order why _____ [it has *or* they have] not done so and why a peremptory writ should not issue;

2. That on return of the alternative writ and the hearing of this petition, this court issue its peremptory writ of mandate commanding respondent(s) [, and each of them,] to _____ [*describe duty to be performed by respondent corporation, e.g.*, make and mail to petitioner (and to _____ (*name*), petitioner's _____ (agent *or* attorney),) at _____ (*street address*), _____ (*city*), California, an annual report of respondent corporation for the fiscal year ending _____ (*date*)];

[3. For the penalty prescribed by *Corporations Code Section 2200* commencing on _____ (*date*);]

4. For attorney's fees in the sum of $_____;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 165.70.*]

CAUTION:

A petition for writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Proof of service of a copy of a petition that seeks an alternative writ on each respondent and real party in interest must accompany the petition when it is offered for filing (except when, in its discretion and for good cause, the court has granted the application for the writ ex parte) [*Code Civ. Proc. § 1107*; for discussion of method of serving petition, *see* Ch. 358, *Mandate and Prohibition*]. A supporting memorandum also customarily accompanies a petition filed in a superior court, although it does not appear to be expressly required by statute [*but see Code Civ. Proc. § 1090*, referring to the proceeding as a "motion" and *Cal. Rules of Ct., Rule 3.1113(a)*, requiring a memorandum in support of a motion other than a motion listed in *Cal. Rules of Ct., Rule 3.1114*].

[2] Use of Form

This petition is for use in obtaining a writ of mandate to enforce the right of a shareholder to be mailed an annual report. The board of a domestic corporation or foreign corporation having its principal executive office in California or customarily holding its board meetings in California [*see Corp. Code § 1501(g)*] is required to send its shareholders an annual report no later than 120 days after the close of the corporation's fiscal year, unless such reports are expressly waived by a corporation having fewer than 100 shareholders of record [*Corp. Code § 1501(a)(1)*].

The reporting requirements [*see Corp. Code § 1501(a)(1),(2)*] will be considered satisfied if a corporation with an outstanding class of securities registered under Section 12 of the Securities Exchange Act of 1934 [*15 U.S.C. § 78a*] complies with *17 C.F.R. § 240.14a-16* (relating to notice of Internet availability of annual report) with respect to the obligation of a corporation to furnish an annual report to shareholders pursuant to *17 C.F.R. § 240.14a-3(b)* [*Corp. Code § 1501(a)(4)*].

[3] Allegations

This petition alleges the following:

- Corporate status of respondent (Paragraph 1).

- Capacity of individual respondents and fictitious name and agency allegations, if applicable (Paragraphs 2-4).

- That petitioner is a shareholder of record in the respondent corporation (Paragraph 5) [*Hagan v. Fairfield (1960) 183 Cal. App. 2d 703, 706, 7 Cal. Rptr. 248* (no proper basis for issuing writ of mandate when petitioner fails to allege that he or she is a shareholder of record)].

- That the board of respondent corporation has failed to send the shareholders an annual report within 120 days after the close of respondent corporation's fiscal year or, in a corporation with registered securities [*see* [2], *above*], provide a notice of Internet availability of the annual report (Paragraph 6) [*Corp. Code § 1501(a)(1), (4)*].

- That respondent corporation's refusal to make and send petitioner an annual report is without justification (Paragraph 7) [*Corp. Code § 1501(f)*].

- Petitioner's lack of any other plain, speedy, or adequate remedy in the ordinary course of law (Paragraph 8) [*Code Civ. Proc. § 1086*].

[4] California Legal Forms

For discussion related to shareholders' rights to an annual report, see California Legal Forms, Ch. 7, *Corporate Records and Reports*

[5] State Statutes

Duty of board of corporation to send annual report to shareholders not later than 120 days after close of corporation's fiscal year; contents of annual report; when annual report waivable in corporate bylaws. *Corp. Code § 1501(a)(1)*

Time requirements for mailing annual report to shareholders. *Corp. Code § 1501(a)(2)*

When financial statements not required to be in conformity with generally accepted accounting principles. *Corp. Code § 1501(a)(3)*

Reporting requirements satisfied if corporation with registered securities complies with federal regulation regarding Internet availability of annual report. *Corp. Code § 1501(a)(4)*

Additional requirements of annual report when corporation has 100 or more shareholders of record. *Corp. Code § 1501(b)*

Superior court as enforcing shareholder's right to an annual report from corporation. *Corp. Code § 1501(e)*

Reimbursement of expenses, including attorney's fees, to shareholder when corporation's failure to send an annual report to shareholders is without justification. *Corp. Code § 1501(f)*

Corp. Code § 1501 is applicable to any domestic corporation and to any foreign corporation having its principal executive office or customarily holding its board meetings in *California. Corp. Code § 1501(g)*

Right to annual report and other financial documents under *Corp. Code § 1501* is applicable to nominally foreign corporations. *Corp. Code § 2115(b)*

Penalty against corporation. *Corp. Code § 2200*

Penalty in addition to remedy by writ of mandate. *Corp. Code § 2202*

[6] Text References

Ballantine and Sterling, California Corporation Laws, Ch. 13, Records, Reports, and Inspection Rights, §§ 273.01-273.03, 273.05 (Matthew Bender)

Witkin, Summary of California Law, Vol. 9, *Corporations, § 153* (10th ed. 2005)

[7] Cross References

For a petition for a writ of mandate to enforce the right of a member of an unincorporated association to inspect financial records, see Ch. 61, *Associations and Clubs*

For a related form, see *§ 165.70*.

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14-165 California Forms of Pleading and Practice--Annotated § 165.74

§ 165.74 Allegation--To Compel Mailing of Financial Statements [Corp. Code § 1501(c)]

[1] FORM Allegation--To Compel Mailing of Financial Statements [Corp. Code § 1501(c)]

6. On _____ [*date*], petitioner made written demand on respondent(s) to mail to petitioner a copy of the financial statements prepared for respondent corporation as of the end of the last fiscal year. A copy of petitioner's demand is attached as Exhibit A and incorporated by reference. Petitioner's demand was refused and is still refused by respondent(s) [, and each of them].

[2] Use of Form

This allegation is for use in a petition to obtain a writ of mandate to enforce the right of a shareholder to be mailed financial statements for the last fiscal year. If no annual report for the last fiscal year has been sent to shareholders, the corporation must, on written request of any shareholder made more than 120 days after the close of that fiscal year, deliver or mail to the person making the request, within 30 days, the financial statements required by *Corp. Code § 1501(a)* for that year [*Corp. Code § 1501(c)*]. This allegation may be substituted for Paragraph 6 of *§ 165.73*.

[3] California Legal Forms

For forms related to a shareholder's demand for a corporation's last income statement and balance sheet, see California Legal Forms, Ch. 7, *Corporate Records and Reports*

[4] State Statutes

Shareholder's right to financial statements for last fiscal year. *Corp. Code § 1501(c)*

Quarterly income statements and balance sheets accompanied by report of independent accountants or certificate of corporate officer. *Corp. Code § 1501(d)*

[5] Text References

Ballantine and Sterling, California Corporation Laws (4th ed.), Ch. 13, Records, Reports, and Inspection Rights, § 273.04 (Matthew Bender)

[6] Cross References

For related forms, see *§§ 165.70* and *165.73*.

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14-165 California Forms of Pleading and Practice--Annotated § 165.75

§ 165.75 Allegation--By Five-Percent Shareholder--To Compel Mailing of Special Income Statement [Corp. Code § 1501(c)]

[1] FORM Allegation--By Five-Percent Shareholder--To Compel Mailing of Special Income Statement [Corp. Code § 1501(c)]

[5. or 6.] Petitioner is the owner of record of _____ [*number*] shares of _____ [*describe, e.g.,* common *or* Class A common] stock of respondent corporation, which is at least five percent of _____ [its outstanding shares *or* that class of outstanding shares]. On _____ [*date*], petitioner made written demand on respondent(s) for an income statement of respondent corporation for the _____ [three *or* six *or* nine]-month period of the current fiscal year of respondent corporation ending more than 30 days prior to the demand and for a balance sheet of the respondent corporation as of the end of the same _____ [three *or* six *or* nine] -month period. [In addition, petitioner demanded an annual report for the last fiscal year of respondent corporation.] A copy of petitioner's demand is attached as Exhibit A and incorporated by reference. More than 30 days have passed since the date of petitioner's demand. Petitioner's demand was refused and neglected and is still refused and neglected by respondent(s) [, and each of them].

[2] Use of Form

This allegation is for use in a petition to obtain a writ of mandate to enforce the right of a shareholder to be provided with a periodic income statement and a balance sheet. A shareholder or shareholders holding at least five percent of the outstanding shares of any class of a corporation may make a written request to the corporation for an income statement of the corporation for the three-month, six-month, or nine-month period of the current fiscal year ended more than 30 days prior to the date of the request and a balance sheet of the corporation as of the end of that period and, in addition, if no annual report for the last fiscal year has been sent to shareholders, may request the statements required by *Corp. Code § 1501(a)*. The statements must be delivered or mailed to the person making the request within 30 days thereafter [*Corp. Code § 1501(c)*]. This allegation may be substituted for Paragraphs 5 and 6 of Form 83.

[3] California Legal Forms

For forms related to a shareholder's right to a special financial statement, see California Legal Forms, Ch. 7, *Corporate Records and Reports*

[4] State Statutes

Right of five-percent shareholder to special income statement and balance sheet within 30 days of written request. *Corp. Code § 1501(c)*

Right of five-percent shareholder to statements supporting annual report of corporation for last fiscal year if no annual report made. *Corp. Code § 1501(c)*

[5] Cross References

For related forms, see *§§ 165.70* and *165.73*.

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14-165 California Forms of Pleading and Practice--Annotated § 165.76

§ 165.76 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--By Director [Corp. Code § 1602] Against Corporation--To Compel Inspection of Corporate Records and Property [Corp. Code § 1603]

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--By Director [Corp. Code § 1602] Against Corporation--To Compel Inspection of Corporate Records and Property [Corp. Code § 1603]

[*Caption. See § 165.70.*]

Petitioner alleges:

1. Respondent _____ [*name*], hereinafter referred to as "respondent corporation," is a corporation duly organized and existing under the laws of the State of _____ [*state of incorporation*] [_____ *if state of incorporation is other than California, add* : and _____ (has its principal executive office *or* customarily holds meetings of its board) in _____ County, California].

[*2. Capacity or residence of individual respondents, if appropriate. See § 165.70, Paragraph 2.*]

[*3. Fictitious name allegation, if appropriate. See § 165.70, Paragraph 3.*]

[*4. Agency allegation, if appropriate. See § 165.70, Paragraph 4.*]

5. Petitioner is now a director of respondent corporation. Petitioner was elected to the office of director on _____ [*date*], at a properly called and lawfully held meeting of the shareholders of respondent corporation. Petitioner has neither resigned from the office of director nor been lawfully removed from this office as of the date of this petition.

6. On _____ [*date*], _____ [*allege facts showing attempted exercise of right to inspect at reasonable time, e.g.*, during respondent corporation's regular business hours], petitioner was prevented from inspecting _____ [*specify, e.g.*, respondent corporation's accounting books and the records and minutes

of proceedings of the board *or* the property of respondent corporation located at _____ (*street address*), _____ County, California].

[7. An audit of the books and records and an investigation of the property, funds, and affairs of respondent corporation are necessary because _____ (*specify why review of books and records or property by director would not reveal true status of respondent corporation, e.g.*, petitioner is informed and believes that the president of respondent corporation has misappropriated corporate funds for various purposes and that the misappropriation would not be disclosed by a simple review of respondent's books and records). _____ (*Name*), a _____ (*describe qualifications, e.g.*, certified public accountant), is competent to conduct the audit and inspection requested, and has consented to do so.]

8. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition, in that _____ [*state facts showing absence of an adequate legal remedy, e.g.*, petitioner has no means by which to otherwise discover the condition of respondent corporation in order to make informed decisions as a director of respondent corporation].

WHEREFORE, petitioner prays:

1. That the court issue an alternative writ of mandate commanding respondent(s) [, and each of them,] to make available to petitioner [and to _____ (*name*), petitioner's _____ (agent *or* attorney),] at _____ [*street address*], _____ [*city*], California, for inspection and the making of extracts therefrom, the following _____ [records *or* property] of respondent corporation: _____ [*specify, e.g.*, respondent corporation's accounting books and the records and minutes of proceedings of the board *or* the property of respondent corporation located at _____ (*street address*), _____ County, California], or to show cause before this court at a time specified by court order why _____ [it has *or* they have] not done so and why a peremptory writ should not issue;

2. That on the return of the alternative writ and the hearing of this petition, this court issue its peremptory writ of mandate commanding respondent(s) [, and each of them,] to _____ [*describe duty to be performed by respondent corporation, e.g.*, make available to petitioner (and to _____ (*name*), petitioner's _____ (agent *or* attorney),) at _____ (*street address*), _____ (*city*), California, for inspection and the making of extracts therefrom, the following _____ (records *or* property) of respondent corporation: _____ (*specify, e.g.*, respondent corporation's accounting books and the records and minutes of proceedings of the board *or* the property of respondent corporation located at _____ (*street address*), _____ County, California]; [and]

[3. That this court appoint _____ (*name*) to _____ (*describe duties to be performed by auditor or investigator, e.g.*, audit the books and records of respondent corporation and to investigate the property, funds, and affairs of respondent corporation) and to report thereon as the court may direct; and]

[4. That this court direct the expenses of the audit and investigation to be paid by respondent corporation; and]

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 165.70.*]

CAUTION:

A petition for writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Proof of service of a copy of a petition that seeks an alternative writ on each respondent and real party in interest must accompany the petition when it is offered for filing (except when, in its discretion and for good cause, the court has granted the application for the writ ex parte) [*Code Civ. Proc. § 1107*; for discussion of method of serving petition, see Ch. 358, *Mandate and Prohibition*]. A supporting memorandum also customarily accompanies a petition filed in a superior court, although it does not appear to be expressly required by statute [*but see Code Civ. Proc. § 1090*, referring to the proceeding as a "motion" and *Cal. Rules of Ct., Rule 3.1113(a)*, requiring a memorandum in support of a motion other than a motion listed in *Cal. Rules of Ct., Rule 3.1114*; for discussion and forms, *see* Ch. 417, *Points and Authorities*].

[2] Use of Form

This petition is for use in obtaining a writ of mandate to enforce the right of a director to inspect corporate records or property. All books, records, and documents of every kind and the physical properties of a corporation are subject to inspection by any director at any reasonable time [*Corp. Code § 1602*].

[3] Allegations

This petition alleges the following:

- Corporate status of respondent (Paragraph 1);
- Capacity of individual respondents and fictitious name and agency allegations, if applicable (Paragraphs 2-4);
- That petitioner is a director of the respondent corporation (Paragraph 5) [*Corp. Code § 1602*];
- That respondent corporation refused to allow petitioner to inspect its corporate records or properties (Paragraph 6) [*Corp. Code §§ 1602, 1603(a)*];
- Petitioner's demand for an audit or investigation, if desired (Paragraph 7) [*Corp. Code § 1603(a)*]; and
- Petitioner's lack of any other plain, speedy, or adequate remedy in the ordinary course of law (Paragraph 8) [*Code Civ. Proc. § 1086*].

[4] California Points and Authorities

For memoranda supporting a petition for writ of mandate enforcing a director's right of inspection, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

[5] State Statutes

Director's absolute right to inspect and copy all corporate records and to inspect physical properties of corporation. *Corp. Code § 1602*

Superior court enforcement of director's right of inspection on corporation's refusal to allow inspection by director. *Corp. Code § 1603(a)*

Court to appoint inspectors or accountants to audit and investigate corporation when good cause is shown. *Corp. Code § 1603(a)*

Expenses of investigation or audit to be defrayed by applicant unless court orders corporation to pay or share expenses. *Corp. Code § 1603(c)*

Rights of inspection under *Corp. Code §§ 1600-1605* is applicable to nominally foreign corporations. *Corp. Code § 2115(b)*

[6] Decisions

Corporate director does not have right to access documents that are covered by attorney-client privilege and were generated in defense of suit for damages that director filed against corporation. *Tritek Telecom, Inc. v. Superior Court (2009) 169 Cal. App. 4th 1385, 1391-1392, 87 Cal. Rptr. 3d 455*

Although court may impose just and proper conditions on "absolute right" of inspection in egregious case, this principle should only be applied in extreme circumstances in which preponderance of evidence establishes director's clear intent to use documents to commit tort against corporation; here, trial court failed to make findings necessary to justify limitation on director's right to corporate documents. *Saline v. Superior Court (2002) 100 Cal. App. 4th 909, 915-916, 122 Cal. Rptr. 2d 813*

Corp. Code § 1602 does not violate commerce clause or full faith and credit clause, and court may impose just and proper conditions on "absolute right" of inspection. *Havlicek v. Coast-To-Coast Analytical Services, Inc., 39 Cal. App. 4th 1844, 1854-1856, 46 Cal. Rptr. 2d 696 (1995)*

Directors have greater right to acquire corporate information than corporate shareholders. *Goldstein v. Lees (1975) 46 Cal. App. 3d 614, 621, 120 Cal. Rptr. 253*

Directors are accorded unqualified right of inspection in aid of fiduciary relationship they occupy to corporation and its shareholders. *Hartman v. Hollingsworth (1967) 255 Cal. App. 2d 579, 581-582, 63 Cal. Rptr. 563*

[7] Law Reviews

Note, "Corporations: Director's Right of Inspection of Books and Records," *44 Cal. L. Rev. 417 (1956)*

Note, "Corporations: Right of a Director to Assistance in Making Inspection of Corporate Books and Records," *28 Cal. L. Rev. 636 (1940)*

[8] Cross References

For a related form, see *§ 165.70*.

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14-165 California Forms of Pleading and Practice--Annotated § 165.77

§ 165.77 Alternative Writ of Mandate and Order That Writ Issue [Code Civ. Proc. § 1087]--To Enforce Shareholder's Right to Inspect Corporate Records [Corp. Code §§ 1600, 1601, 1603]

[1] FORM Alternative Writ of Mandate and Order That Writ Issue [Code Civ. Proc. § 1087]--To Enforce Shareholder's Right to Inspect Corporate Records [Corp. Code §§ 1600, 1601, 1603]

[*Caption. As on papers previously filed.*]

The People of the State of California to the respondent(s), _____ [*name*(*s*)]:

It appears from the verified petition that petitioner is a shareholder of record of respondent _____ [*name of corporation*], that petitioner made lawful demand for inspection of respondent corporation's record, which was denied, and that the purpose of the inspection sought by petitioner is reasonably related to petitioner's interest in respondent corporation as a shareholder;

It further appears from the verified petition that petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, and that an alternative writ of mandate should issue;

NOW, THEREFORE, you are commanded _____ [immediately on the receipt of this writ *or* on or before _____ (*date*),] to _____ [*describe duty to be performed by respondent corporation, e.g.*, make available to petitioner (and to _____ (*name*), petitioner's _____ (agent *or* attorney),) on _____ (*date*), at _____ (*time*), at _____ (*street address*), _____ (*city*), California, for inspection and the making of extracts therefrom, the following records of respondent corporation: _____ (*specify, e.g.*, record of shareholders' names, addresses, and shareholdings *or* respondent corporation's accounting books and records and minutes of proceedings of the shareholders, the board, and the committees of the board)]; or

IN THE ALTERNATIVE, to show cause before this court at _____ [*address*], on _____ [*date*], at _____ [*time*], why you have not done so.

[The writ shall be served on respondent on or before _____ (*date*).]

[The written return, if any, to this writ shall be filed and served by respondent on or before _____, (*date*).]

Witness the Honorable _____ [*name and title of judge*].

Attest my hand and the seal of this court this _____ day of _____, _____.

_____
Clerk

By _____ [*signature*]
Deputy Clerk

ORDER

Let the foregoing writ issue.

[IT IS FURTHER ORDERED that a copy of this alternative writ (and a copy of the petition) be served at least _____ (*number*) days before the hearing on the above order to show cause.]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This alternative writ is for use by a shareholder to enforce his or her rights of inspection of corporate records. The alternative writ requires the corporation to produce the records for inspection by the shareholder and the shareholder's agent or attorney at a specified time and place or to show cause before the court why the records were not produced for inspection [*see Code Civ. Proc. § 1087*]. This alternative writ incorporates an order issuing the writ, which may be permitted under local court rules. When an order may not be incorporated in the same form, use the order shown in *§ 165.78*. When a director seeks to enforce his or her rights of inspection, this form of alternative writ may be adapted for use by the director.

[3] Issuance of ex Parte Alternative Writs

Code Civ. Proc. § 1107 provides that a petition for a writ of mandate that seeks an alternative writ must be accompanied by proof of service of a copy of it on the respondent. The section also provides an exception that the court may, in its discretion and for good cause, grant the petition ex parte without notice or service of the petition. The practice with regard to how narrowly or broadly this exception is interpreted varies throughout the state. Thus, local court rules and local practice should be consulted before a petition is served.

[4] Service of Alternative Writ of Mandate

The alternative writ must be served in the same manner as a summons in a civil action unless the court expressly directs otherwise. Service of the alternative writ of mandate on a majority of the members of any board or body is service on the board or body whether or not, at the time of the service, the board or body was in session [*Code Civ. Proc. § 1096*]. See generally Ch. 518, *Service of Summons and Papers* .

[5] State Statutes

Contents and issuance of alternative writ of mandate. *Code Civ. Proc. § 1087*

Service of writ, including service on board. *Code Civ. Proc. § 1096*

Service of application for writ of mandate. *Code Civ. Proc. § 1107*

[6] Text References

Witkin, California Procedure, Vol. 8, *Extraordinary Writs*, §§ 166, 167, 169, 184-188 (4th ed.)

[7] Cross References

For additional forms for alternative writs of mandate, see Ch. 358, *Mandate and Prohibition*

For discussion and forms related to service of papers on parties to an action, see Ch. 518, *Service of Summons and Papers*

For a related form, see *§ 165.70*.

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14-165 California Forms of Pleading and Practice--Annotated § 165.78

§ 165.78 Order That Alternative Writ of Mandate Issue [Code Civ. Proc. § 1087]--To Enforce Shareholder's Right to Inspect Corporate Records [Corp. Code §§ 1600, 1601, 1603]

[1] FORM Order That Alternative Writ of Mandate Issue [Code Civ. Proc. § 1087]--To Enforce Shareholder's Right to Inspect Corporate Records [Corp. Code §§ 1600, 1601, 1603]

[*Caption. As on papers previously filed.*]

GOOD CAUSE APPEARING from the verified petition on file in this action:

IT IS HEREBY ORDERED that an alternative writ of mandate issue under the seal of this court directed to respondent in this action commanding it _____ [immediately on the receipt of this writ *or* on or before _____ (*date*),] to _____ [*describe duty to be performed by respondent corporation, e.g.*, make available to petitioner (and to _____ (*name*), petitioner's _____ (agent *or* attorney),) on _____ (*date*), at _____ _____.M., at _____ (*street address*), _____ (*city*), California, for inspection and the making of extracts therefrom, the following records of respondent corporation: _____ (*specify, e.g.*, the record of shareholders' names, addresses, and shareholdings *or* respondent corporation's accounting books and records and minutes of proceedings of the shareholders, the board, and the committees of the board)]; or in the alternative, to show cause before this court at the courtroom thereof at _____ [*address*], on _____ [*date*], at _____ _____.M., why it has not done so. [IT IS FURTHER ORDERED that a copy of this alternative writ (and a copy of the petition) be served at least _____ (*number*) days before the hearing on the above order to show cause.]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is an order for use when local practice requires the alternative writ and the order that an alternative writ issue to be prepared separately.

[3] Cross References

For related forms, see *§§ 165.70* and *165.77*.

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14-165 California Forms of Pleading and Practice--Annotated § 165.79

§ 165.79 Return to Alternative Writ of Mandate [Code Civ. Proc. § 1087] Enforcing Shareholder's Right to Inspect Corporate Records [Corp. Code §§ 1600, 1601, 1603]--By Demurrer [Code Civ. Proc. §§ 430.10, 1089]

[1] FORM Return to Alternative Writ of Mandate [Code Civ. Proc. § 1087] Enforcing Shareholder's Right to Inspect Corporate Records [Corp. Code §§ 1600, 1601, 1603]--By Demurrer [Code Civ. Proc. §§ 430.10, 1089]

[*Caption. As on papers previously filed.*]

Respondent _____ [*name*], as a return to the alternative writ of mandate issued by this court, demurs to the petition for writ of mandate herein on [each of] the following ground(s):

1. This court has no jurisdiction to issue a writ of mandate in this proceeding in that _____ [*specify why court has no jurisdiction, e.g.*, the petitioner fails to allege that respondent corporation is a _____ (domestic corporation *or* foreign corporation _____ (having its principal executive office *or* customarily holding meetings of its board *or* keeping its records) in California *or* nominally foreign corporation within the meaning of *Corporations Code Section 2115(a)*)].

2. The petition fails on its face to state facts sufficient to constitute a cause of action for issuance of a writ of mandate in that _____ [*specify insufficiency in petition, e.g.*, the petition fails to allege that petitioner is a shareholder of record holding at least _____ (five percent of the outstanding voting shares of stock *or* one percent of the outstanding voting shares of stock and having filed Schedule 14B with the United States Securities and Exchange Commission) in respondent corporation at the present time].

3. The petition is uncertain [, ambiguous, and unintelligible] in that _____ [*specify basis of uncertainty, e.g.*, the petition fails to state clearly how petitioner's purpose for inspection of respondent corporation's records is reasonably related to petitioner's interest as a shareholder in respondent corporation].

[*Continue to state additional grounds for demurrer.*]

WHEREFORE, respondent prays that this demurrer be sustained [without leave to amend]; that the alternative writ of mandate be discharged; that the petition be dismissed; that respondent recover costs in this proceeding; and that the court grant all other relief it considers proper.
Dated: _____.

_____ [*signature*]

Attorney for Respondent

CAUTION:

A demurrer must state on the first page immediately below the case number the name of the party filing the demurrer and the name of the party whose pleading is the subject of the demurrer [*Cal. Rules of Ct., Rule 3.1320(e)*]. In addition, the first page of each paper must specify immediately below the case number [*Cal. Rules of Ct., Rule 3.1110(b)*]:

- The date, time, and location, if ascertainable, of any scheduled hearing, and the name of the hearing judge, if ascertainable;
- The nature or title of any attached document other than an exhibit;
- The date of filing of the action; and
- The trial date, if set.

A party filing a demurrer must serve and file a notice of hearing with the demurrer [*Cal. Rules of Ct., Rule 3.1320(c)*], as well as a supporting memorandum [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Cal. Rules of Ct., Rule 3.1103(c)* (law and motion rules apply to demurrers); *see also* Ch. 417, *Points and Authorities*].

[2] Use of Form

This demurrer is for use by a respondent corporation as a return to an alternative writ of mandate secured by one of its shareholders. A respondent may make its return to an alternative writ of mandate by demurrer, verified answer, or both. In a superior court, if the return is by demurrer alone, the court may allow an answer to be filed within such time as it may designate [*Code Civ. Proc. § 1089*]. This form may be adapted for use by an individual respondent. In addition, this form may be adapted for use where the petitioner is a director seeking inspection of corporate records.

[3] Grounds for Demurrer

This demurrer alleges the following grounds for relief:

- Lack of jurisdiction [*Code Civ. Proc. § 430.10(a)*] over the respondent corporation (Paragraph 1) [*see Corp. Code §§ 1600(d), 1601(a), 2115(b)*].
- Insufficient facts to state a cause of action (Paragraph 2) [*Code Civ. Proc. § 430.10(e)*; *Hagan v. Fairfield (1960) 183 Cal. App. 2d 703, 706, 7 Cal. Rptr. 248* (no proper basis for issuing writ of mandate when petitioner fails to allege that he or she is a shareholder of record)].

- Uncertainty (Paragraph 3) [*Code Civ. Proc. § 430.10(f)*; *see Corp. Code §§ 1600(c), 1601(a)*].

These grounds are illustrative only, and a respondent may also demur on any of the other grounds specified in *Code Civ. Proc. § 430.10*.

[4] Time for Return

A demurrer or answer must be filed on the date of the return of the alternative writ [*Code Civ. Proc. § 1089*]. However, if the petitioner follows the noticed motion procedure [Cal. Rules of Ct., Rule 3.113(a)] in setting a date for a hearing on the application, the demurrer or answer must be filed on the date noticed [*Code Civ. Proc. § 1089*; Cal. Rules of Ct., Rule 3.113(a)].

[5] California Points and Authorities

For memoranda of points and authorities opposing a petition for writ of mandate enforcing a shareholder's rights of inspection against a corporation, see California Points and Authorities, Ch. 52, *Corporations* , (Matthew Bender)

[6] State Statutes

Part Two of Code of Civil Procedure is applicable to mandate proceedings. *Code Civ. Proc. § 1109*

[7] Decisions

Demurrer was interposed solely to delay proceedings when none of four grounds alleged in demurrer were sufficient to discharge writ and last of four grounds called for conclusion of law by petitioner. *Private Investors, Inc. v. Homestake Min. Co. (1936) 11 Cal. App. 2d 488, 497, 54 P.2d 535*

[8] Text References

Witkin, *California Procedure*, vol. 5, Pleading, § 899 et seq.; vol. 8, Extraordinary Writs, § 231 et seq. (4th ed.)

[9] Cross References

See generally Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

For alternative forms for returns to writs of mandate, see Ch. 358, *Mandate and Prohibition*

For related forms, see *§§ 165.70* and *165.77*.

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14-165 California Forms of Pleading and Practice--Annotated § 165.80

§ 165.80 Return to Alternative Writ of Mandate Enforcing Shareholder's Right to Inspect Corporate Records [Corp. Code §§ 1600, 1601, 1603]--By Answer [Code Civ. Proc. §§ 431.30, 1089]

[1] FORM Return to Alternative Writ of Mandate Enforcing Shareholder's Right to Inspect Corporate Records [Corp. Code §§ 1600, 1601, 1603]--By Answer [Code Civ. Proc. §§ 431.30, 1089]

[*Caption. As on papers previously filed.*]

Respondent _____ [*name*], as a return to the alternative writ of mandate issued by this court, answers the petition for writ of mandate herein as follows:

1. Admits that _____ [*set forth admissions*].

2. Denies that _____ [*set forth specific denial, e.g.*, petitioner is, and at all times mentioned in his/her petition was, a shareholder of record holding at least _____ (five percent of the outstanding voting shares of stock *or* one percent of the outstanding voting shares of stock and having filed Schedule 14A with the United States Securities and Exchange Commission) in respondent corporation].

3. Denies each and every allegation in the petition not heretofore expressly admitted.

FIRST AFFIRMATIVE DEFENSE

_____ [Petitioner's petition is legally defective in that _____ (*describe defect, e.g.*, it fails to allege that petitioner's demand for inspection of corporate records was in writing)].

SECOND AFFIRMATIVE DEFENSE

_____ [Petitioner's petition is legally defective in that _____ (*describe defect, e.g.*, it fails to set forth facts establishing petitioner's purpose for inspection as being reasonably related to petitioner's interest as a shareholder in respondent corporation)].

[*Continue to state additional affirmative defenses.*]

WHEREFORE, respondent prays that the petition for writ of mandate herein be denied; that the alternative writ of mandate be discharged; that this proceeding be dismissed; that respondent recover costs in this proceeding; and that the court grant all other relief it considers proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent

VERIFICATION

I, _____ [*name*], am _____ [the respondent *or* an officer of the respondent corporation] in this proceeding. I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

CAUTION:
An answer to a petition for a writ of mandate must be verified [*Code Civ. Proc. § 1089*].

[2] Use of Form

This answer is for use by a respondent corporation as a return to an alternative writ of mandate secured by one of its shareholders. A respondent may make its return to an alternative writ of mandate by demurrer, verified answer, or both. In a superior court, if the return is by demurrer alone, the court may allow an answer to be filed within such time as it may designate [*Code Civ. Proc. § 1089*]. The grounds for denial and for affirmative defenses set forth in the answer are illustrative only. This form may be adapted for use by an individual respondent. In addition, this form may be adapted for use where the petitioner is a director seeking inspection of corporate records.

[3] State Statutes

Form and contents of answer. *Code Civ. Proc. § 431.30*

[4] Decisions

Reply or answer by petitioner to respondent's return is proper. *Scott v. Superior Court (1928) 205 Cal. 525, 526-527, 271 P. 906*

Answer alleging that petitioner's sole purpose for inspection was to procure names of shareholders and other information concerning corporation in order to carry out plan to serious detriment and harassment of corporation was insufficient to warrant denial of writ of mandate when answer was not supported by substantial evidence. *Gilmore v. Emsco Derrick & Equip. Co. (1937) 22 Cal. App. 2d 64, 65-66, 70 P.2d 251*

Denial of allegation that inspection was for purpose reasonably related to petitioner's interest as shareholder held sufficient to put petitioner's purpose in seeking inspection in issue. *Capron v. Pacific Southwest D. Corp. (1935) 6 Cal. App. 2d 436, 439-440, 44 P.2d 629*

Answer sufficient, and not merely conclusory, when it alleges that petitioner's purpose in demanding inspection was to secure names of shareholders in order to secure options to purchase stock from those shareholders and then to offer to resell stock to corporation at higher price to corporation's detriment. *Capron v. Pacific Southwest D. Corp. (1935) 6 Cal. App. 2d 436, 440, 44 P.2d 629*

Allegations in answer that petitioner's purpose was to use corporate records to injury of corporation and that petitioner's demand was influenced by and made with bad motives as failing to state facts showing petitioner was not acting in good faith; petitioner's demurrer to respondent's answer as sustained. *Gertridge v. State Capital Co. (1933) 129 Cal. App. 86, 86-87, 88, 18 P.2d 375*

[5] Text References

Witkin, *California Procedure*, vol. 5, Pleading, § 899 et seq.; vol. 8, Extraordinary Writs, § 231 et seq. (4th ed.)

[6] Cross References

See generally Ch. 26, *Answers*

For related forms, see *§§ 165.70* and *165.79*.

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14-165 California Forms of Pleading and Practice--Annotated § 165.81

§ 165.81 Proceedings to Postpone Shareholders' Meeting Where Failure to Comply With Shareholder's Demand for Corporate Records [Corp. Code § 1600(b)]--Notice of Motion

[1] FORM Proceedings to Postpone Shareholders' Meeting Where Failure to Comply With Shareholder's Demand for Corporate Records [Corp. Code § 1600(b)]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Petitioner,	)	NOTICE OF MOTION FOR ORDER TO POST-
vs.	)	PONE SHAREHOLDERS' MEETING
_____ [*name of*	)	[, SUPPORTING DECLARATION OF
corporation and names of individual respondents, if	)	_____ (*name*), AND SUPPORTING
any],	)	MEMORANDUM]
Respondent(s)	)	Date: _____
	)	Time: _____
		Dept: _____
		Trial Date: _____

_____

To _____ [*name of corporation*], and to _____ [*name*], its attorney of record:

[*EITHER*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [

specify party, e.g., petitioner] will move for an order postponing the shareholders' meeting previously noticed for _____ [*date*], for a period of time equal to the period of delay by respondent corporation in complying with petitioner's demand to _____ [inspect and copy the record of shareholders' names, addresses, and shareholdings of *or* obtain a list of the names, addresses, and shareholdings of shareholders entitled to vote for the election of directors in respondent corporation. The motion will be made on the ground that petitioner is a shareholder holding at least _____ [five percent of the outstanding voting shares *or* one percent of the outstanding voting shares and having filed a Schedule 14A with the United States Securities and Exchange Commission relating to the election of directors] of _____ [*name of respondent corporation*]. As such a shareholder, petitioner is entitled to inspect and copy the record of shareholders' names, addresses, and shareholdings on written demand of respondent corporation. On _____ [*date*], petitioner made written demand on respondent corporation. A copy of petitioner's demand is attached as Exhibit A and incorporated by reference. A period of _____ [*number*] business days have passed since petitioner's demand and the requested records have not been made available to petitioner for inspection. Petitioner is now entitled to a postponement of the duly noticed shareholders' meeting set for _____ [*date*] for a period of time equal to the delay of respondent corporation in complying with petitioner's demand.

[*OR*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.*, petitioner] will move for an order postponing the shareholders' meeting previously noticed for _____ [*date*], for a period of time equal to the period of delay by respondent corporation in complying with petitioner's demand to _____[inspect and copy the record of shareholders' names, addresses, and shareholdings of *or* obtain a list of the names, addresses, and shareholdings of shareholders entitled to vote for the election of directors in respondent corporation. The motion will be made on the motion will be made on the ground that petitioner is a shareholder holding at least _____ [five percent of the outstanding voting shares *or* one percent of the outstanding voting shares and having filed a Schedule 14A with the United States Securities and Exchange Commission relating to the election of directors] of _____ [*name of respondent corporation*]. As such a shareholder, petitioner is entitled to obtain, for the usual charge, the record of the names, addresses, and shareholdings of shareholders entitled to vote for the election of directors on written demand of _____ [*name*], respondent corporation's transfer agent. On _____ [*date*], petitioner made written demand on and tendered payment in the sum of $_____ to _____ [*name*], respondent corporation's transfer agent. A copy of petitioner's demand is attached as Exhibit A and incorporated by reference. A period of _____ [*number*] business days have passed since _____ [petitioner's demand *or* the date specified in petitioner's demand as the date of compilation] and the requested records have not been delivered to petitioner. Petitioner is now entitled to a postponment of the duly noticed shareholders' meeting set for _____ [*date*], for a period of time equal to the delay of _____ [*name*] and respondent corporation in complying with petitioner's demand.

[*CONTINUE*]

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, on the records and file herein, and on any evidence that may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

CAUTION:

A supporting memorandum must accompany this notice of motion [*Cal. Rules of Ct., 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*; for discussion and forms, *see* Ch. 417, *Points and Authorities*].

[2] Use of Form

This notice of motion is for use by a shareholder to postpone a noticed shareholders' meeting when a corporation, or its transfer agent, fails to comply with the shareholder's demand for inspection or delivery of certain records of shareholders. This motion seeks to postpone a shareholders' meeting for a period of time equal to the period of delay by the corporation or its transfer agent in complying with a shareholder's request and may be brought in addition to any other legal or equitable remedies to which the shareholder is entitled [*Corp. Code § 1600(b)*], such as a petition for writ of mandate [*see §§ 165.70, 165.72*] to compel a corporation's compliance with the request for corporate records. Thus, this notice, together with the declaration in support of the motion [*see § 165.82*] and order [*see § 165.83*], are for use in conjunction with a pending action in mandate. For a form seeking a temporary restraining order, a preliminary and a permanent injunction against a corporation complying with a shareholder's demand in an untimely fashion, see *§ 165.84*.

Shareholders who may bring this motion are shareholders holding at least five percent of the outstanding shares of a corporation or shareholders holding at least one percent of the outstanding shares of a corporation and having filed a Schedule 14A with the United States Securities and Exchange Commission relating to the election of directors [*see Corp. Code § 1600(a)*]. This motion may be brought against a corporation that fails to permit a shareholder to inspect the record of shareholders' names, addresses, and shareholdings on five days written demand by the shareholder. In addition, this motion may be brought against a corporation and its transfer agent that fails to provide a list of names, addresses, and shareholdings of shareholders entitled to vote for the election of directors on five days written demand by the shareholder or on a later date specified in such a demand [*Corp. Code § 1600(a), (b)*].

[3] Jurisdiction

A motion to delay a shareholders' meeting for a period of time equal to the period of delay in complying with a shareholder's demand for records of shareholders must be brought in a superior court [*Corp. Code § 1600(b)*].

[4] Papers Accompanying Notice of Motion

A memorandum must accompany the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*; for discussion and forms, *see* Ch. 417, *Points and Authorities*]. The notice of motion is accompanied by a declaration [*Code Civ. Proc. § 2015.5*] by the shareholder making the motion [*Corp. Code § 1600(b)*]. Proof of service is usually filed with the notice of motion and accompanying papers and is frequently required by local court rule.

[5] State Statutes

Notice of motion to be given by moving party at least 16 court days, plus additional time when service is by mail, fax,

express mail, or overnight delivery, before hearing of motion. *Code Civ. Proc. § 1005(b)*

Motion is deemed made on serving and filing of notice of motion. *Code Civ. Proc. § 1005.5*

Requirements for written notice; accompanying papers must be filed and served. *Code Civ. Proc. § 1010*

Absolute right of five-percent shareholder or one-percent shareholder having filed Schedule 14A with United States Securities and Exchange Commission to inspect record of shareholders and to obtain list of shareholders entitled to vote for election of directors from corporate transfer agent; five days written notice required. *Corp. Code § 1600(a)*

Shareholder's motion for postponement of shareholders' meeting when corporation or transfer agent fails to comply with *Corp. Code § 1600(a)*; motion to be brought in superior court; motion in addition to other remedies of shareholder. *Corp. Code § 1600(b)*

Rights of inspection under *Corp. Code §§ 1600-1605* is applicable to nominally foreign corporations. *Corp. Code § 2115(b)*

[6] Text References

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, § 1 et seq. (4th ed. 1997)

[7] Cross References

For discussion and alternative forms for use in noticing a motion, *see* Ch. 372, *Motions and Orders*

For related forms, *see §§ 165.70* and *165.72*.

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14-165 California Forms of Pleading and Practice--Annotated § 165.82

§ 165.82 Proceedings to Postpone Shareholders' Meeting Where Failure to Comply With Shareholder's Demand for Corporate Records [Corp. Code § 1600(b)]--Declaration by Five-Percent Shareholder

[1] FORM Proceedings to Postpone Shareholders' Meeting Where Failure to Comply With Shareholder's Demand for Corporate Records [Corp. Code § 1600(b)]--Declaration by Five-Percent Shareholder

[*Caption. See § 165.81.*]

_____ [I *or* We], _____ [*name*(*s*)], declare that _____ [I am *or* we are] shareholder(s) holding at least _____ [five percent of the aggregate voting shares in *or* one percent of the outstanding voting shares and having filed a Schedule 14A with the United States Securities and Exchange Commission relating to the election of directors of] _____ [*name of corporation*]. On _____ [*date*], _____[I *or* we] made written demand that _____ [_____ (*name of corporation*) permit inspection and copying of the record of shareholders' names, addresses, and shareholdings during usual business hours *or* _____ (*name*), transfer agent for _____ (*name of corporation*), provide, at its usual charge, a list of the names, addresses, and shareholdings of shareholders entitled to vote for the election of directors as of _____ (the most recent record date on which such a list has been compiled *or* _____ [*date*])]. A copy of the written demand is attached hereto as Exhibit A and made a part hereof.

_____ [More than five business days *or* The date specified for compilation of the list of shareholders entitled to vote for the election of directors] passed and _____ [*name of corporation or transfer agent*] failed to make a timely response to _____ [my *or* our] written demand. _____ [My *or* Our] demand has not yet been met though _____ [*number*] business days have passed after the date appointed therefor.

_____ [I *or* we] declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature(s)*]

[2] Use of Form

This declaration is for use by a shareholder in support of a motion to postpone a noticed shareholders' meeting when a corporation fails to comply with the shareholder's demand for inspection or possession of certain records of shareholders. An affidavit [*Code Civ. Proc. § 2009*] or declaration [*Code Civ. Proc. § 2015.5*] is required to verify the motion [*Code Civ. Proc. § 2009*; *Corp. Code § 1600(b)*]. This form of declaration is for use in conjunction with *see § 165.81*.

[3] State Statutes

Affidavit in support of motion. *Code Civ. Proc. § 2009*

Declaration under penalty of perjury in lieu of affidavit. *Code Civ. Proc. § 2015.5*

[4] Text References

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, § 1 et seq. (4th ed. 1997)

[5] Cross References

For skeletal forms of affidavits and declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

For related forms, *§§ 165.70*, *165.72*, and *165.82*.

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14-165 California Forms of Pleading and Practice--Annotated § 165.83

§ 165.83 Proceedings to Postpone Shareholders' Meeting Where Failure to Comply With Shareholder's Demand for Corporate Records [Corp. Code § 1600(b)]--Order Granting Postponement

[1] FORM Proceedings to Postpone Shareholders' Meeting Where Failure to Comply With Shareholder's Demand for Corporate Records [Corp. Code § 1600(b)]--Order Granting Postponement

[*Caption. See § 165.81.*]

The motion of petitioner for an order postponing the shareholders' meeting previously noticed for _____ [*date*] for a period of time equal to the period of delay by respondent in complying with petitioner's demand to _____ [inspect the record of shareholders *or* obtain the list of shareholders entitled to vote for the election of directors] came on regularly for hearing by the court this date. Petitioner appeared by counsel _____ [*name*]; respondent appeared by counsel _____ [*name*].

Upon proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that the shareholders' meeting previously noticed for _____ [*date*] is postponed for a period of time equal to the delay by _____ [respondent corporation *or* transfer agent for respondent corporation] in complying with petitioner's written demand, a total of _____ [*number*] business days.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This order granting a motion is prepared by a shareholder for use at the conclusion of the hearing on the noticed motion

to postpone a shareholders' meeting [*see § 165.81*]. The order contemplates that the motion by the shareholder will be granted. The direction of a court or judge in writing constitutes an order [*Code Civ. Proc. § 1003*], and an order is required to postpone a previously noticed shareholders' meeting when a corporation or its transfer agent fails to comply in a timely fashion with a shareholder's demand under *Corp. Code § 1600(a)* [*Corp. Code § 1600(b)*].

[3] Cross References

For alternative forms of orders, *see* Ch. 372, *Motions and Orders* .

For related forms, see *§§ 165.70, 165.72, 165.81*, and *165.82*.

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14-165 California Forms of Pleading and Practice--Annotated § 165.84

§ 165.84 Complaint for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction--To Postpone Shareholders' Meeting on Basis of Delay in Complying With Shareholder's Demand for Corporation's Records [Corp. Code § 1600(b)]

[1] FORM Complaint for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction--To Postpone Shareholders' Meeting on Basis of Delay in Complying With Shareholder's Demand for Corporation's Records [Corp. Code § 1600(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____	)	
[*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name of corporation and names of individual defendants, if any*],	)	COMPLAINT FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY AND PERMANENT INJUNCTIONS
Defendant(s).	)	
	)	

Plaintiff alleges:

1. Defendant _____ [*name*], hereinafter referred to as "defendant corporation," is a corporation duly organized and existing under the laws of the State of _____ [*state of incorporation*] [*if state of incorporation is other than California, add* : and _____ (has its principal executive office *or* customarily holds meetings of its board) in _____ County, California].

[2. Defendant _____ (*name*) is, and at all times herein mentioned was, _____ (*state corporate title held by individual defendant, e.g.*, transfer agent for defendant corporation).]

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by those fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for each act or omission herein alleged.)]

[4. At all times herein mentioned, each of the defendants was the agent and employee of each of the remaining defendants, and, in doing the things alleged in this complaint, was acting within the course and scope of that agency.]

5. Plaintiff is the owner of record of _____ [*number*] shares of _____ [*describe, e.g.*, Class A common] stock of defendant corporation, which constitutes at least _____ [five percent of the outstanding voting shares of the corporation *or* one percent of the outstanding voting shares of the corporation and has filed Schedule 14A with the United States Securities and Exchange Commission]. As such a shareholder, plaintiff is entitled to _____ [inspect and copy the record of shareholders' names, addresses, and shareholdings on written demand of defendant corporation *or* obtain a record of the names, addresses, and shareholdings of shareholders entitled to vote for the election of directors on written demand of _____ (*name*), transfer agent for defendant corporation, and tender of the usual charge therefor]. Furthermore, as such a shareholder, plaintiff is entitled to move for the postponement of a duly noticed shareholders' meeting when a corporation delays _____ [more than five business days after plaintiff's demand *or* after the date specified in plaintiff's demand as the date for compilation of this list].

[*EITHER*]

6. On _____, [*date*], plaintiff made written demand on defendant corporation to inspect and copy the record of shareholders' names, addresses, and shareholdings. A copy of plaintiff's demand is attached hereto as Exhibit A and made a part hereof. A period of _____ [*number*] business days passed from the date of plaintiff's demand to the time the records were made available to plaintiff on _____ [*date*]. This represents a delay of _____ [*number*] business days over and above the five days prescribed by *Section 1600(a) of the Corporations Code*.

[*OR*]

6. On _____ [*date*], plaintiff made written demand on the _____ [defendant corporation *or* transfer agent for defendant corporation] to obtain for $_____ the record of the names, addresses, and shareholdings of shareholders entitled to vote for the election of directors. A copy of plaintiff's demand is attached hereto as Exhibit A and made a part hereof. Plaintiff tendered $_____ in full payment for that list. A period of _____ [*number*] business days passed from the date _____ [of plaintiff's demand and tender *or* specified in plaintiff's demand as the date for compilation of that list] to the time the list was delivered to plaintiff on _____ [*date*]. This represents a delay of _____ [*number*] business days over and above the five days prescribed by *Section 1600(a) of the Corporations Code*.

7. A duly noticed shareholders' meeting of defendant corporation is set for _____ [*date*].

8. Unless and until defendant corporation is enjoined to postpone its duly noticed shareholders' meeting set for _____ [*date*] to a date _____ [*number*] business days following that date, plaintiff will suffer great and irreparable injury in that _____ [*specify facts constituting injury to plaintiff, e.g.*, plaintiff will have an insufficient time to assemble, organize, interpret, and act on the information which the _____ (defendant corporation *or* transfer agent for defendant corporation) delayed in

_____ (making available *or* delivering) to plaintiff].

9. Plaintiff has no plain, speedy, and adequate remedy at law for the injury threatened by defendant corporation in that _____ [*specify facts tending to show the unavailability or inadequacy of legal remedies, e.g.*, plaintiff has no other action or proceeding pending against defendant corporation in which plaintiff could move to compel defendant corporation to postpone its scheduled shareholders' meeting *or* it would be impossible to determine the amount of damage sustained by plaintiff as a result of defendant corporation holding its scheduled shareholders' meeting after its delay in compliance with plaintiff's demand in an action at law].

WHEREFORE, plaintiff prays:

1. For an order requiring defendant(s) to show cause, if it/they have any, why it/they should not be enjoined as hereinafter set forth, during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant(s), [and each of them,] and its/their agents, servants, and employees, and all persons acting under, in concert with, or for it/them:

a. From holding the shareholders' meeting duly noticed and set for _____ [*date*]; and

b. To postpone that shareholders' meeting from _____ [*date*] to a date at least _____ [*number*] business days after the set and noticed date therefor;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

CAUTION:
A complaint to postpone a shareholders' meeting must be verified [*Corp. Code § 1600(b)*].

[2] Use of Form

This complaint is for use by a shareholder to postpone a noticed shareholders' meeting when a corporation, or its transfer agent, delays in complying with the shareholder's demand for inspection or delivery of certain records of shareholders. This complaint seeks a temporary restraining order, a preliminary injunction, and a permanent injunction [*Civ. Code § 3422*; *Code Civ. Proc. §§ 526, 527*] postponing a shareholders' meeting for a period of time equal to the period of delay by the corporation, or its transfer agent, in complying with a shareholder's request [*Corp. Code § 1600(b)*]. This complaint is for use when no other action or proceeding is pending against a corporation. When an action or proceeding is pending against a corporation, a motion may be noticed for the purpose of postponing a shareholders' meeting [*see* §§ 165.81-165.83]. When an affidavit or a declaration [*Code Civ. Proc. § 2015.5*] is needed to support an application for a temporary restraining order and/or preliminary injunction [*Code Civ. Proc. § 527*], the declaration supporting a motion to postpone a shareholders' meeting [*see § 165.82*] may be adapted for use in conjunction with this form of complaint.

[3] Allegations

The complaint alleges the following:

- Capacity of defendant (Paragraphs 1, 2).
- Fictitious name and agency relationships (Paragraphs 3, 4).
- Plaintiff's capacity, based on the fact that plaintiff is a shareholder who is entitled to inspect and copy the corporation's record of its shareholders and, as such, is entitled to move for postponement of a shareholder's meeting when the corporation delays in complying with a request for that record (Paragraph 5) [*Corp. Code § 1600(a)*].
- Plaintiff's assertion of the right to inspect or obtain record of shareholders (Paragraph 6).
- Defendant's delay in complying with plaintiff's demand (Paragraph 6).
- Date appointed for a noticed shareholder's meeting (Paragraph 7).
- Facts showing why defendant's conduct will constitute great and irreparable injury (Paragraph 8) [*Code Civ. Proc. §§ 526(a)(2), 527*].
- Facts showing why plaintiff lacks an adequate remedy at law (Paragraph 9) [*Civ. Code § 3422(1)-(3)*; *Code Civ. Proc. § 526(a)(4)-(6)*].

[4] Jurisdiction

Actions for injunctive relief to postpone a shareholders' meeting are brought in the superior court [*Corp. Code § 1600(b)*].

[5] State Statutes

Grounds for issuance of injunction. *Civ. Code § 3422*; *Code Civ. Proc. § 526*

Definition of injunction. *Code Civ. Proc. § 525*

Procedure to obtain temporary restraining order and preliminary injunction; verified complaint or affidavits required. *Code Civ. Proc. § 527*

Shareholder's verified complaint for postponement of shareholders' meeting when corporation delays in complying with *Corp. Code § 1600(a)* (inspection or delivery of shareholder records); verified complaint brought in superior court. *Corp. Code § 1600(b)*

[6] Text References

Witkin, California Procedure, vol. 6, *Provisional Remedies*, § 46 et seq. (4th ed. 1997)

[7] Cross References

For discussion and forms related to injunctive relief generally, *see* Ch. 303, *Injunctions*

For related forms, see *§§ 165.70* and 165.81-165.83.

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Chapter 166 CORPORATIONS: SHAREHOLDERS' MEETINGS AND VOTING

14-166 California Forms of Pleading and Practice--Annotated 166.syn

§ 166.syn Synopsis to Chapter 166: CORPORATIONS: SHAREHOLDERS' MEETINGS AND VOTING

§ 166.01 Scope of Chapter

§ 166.02 Cross References

§§ 166.03-166.09 [Reserved]

§ 166.10 Governing Statutes

§ 166.11 Annual Meeting Required

[1] In General

[2] Shareholder's Remedy for Failure to Hold Annual Meeting

[3] Applicability to Nominally Foreign Corporations

§ 166.12 Special Meetings

[1] In General

[2] Written Request for Notice of Special Meeting

[3] Remedy for Failure to Give Notice of Special Meeting

[4] Remedy if Majority of Directors Are Not Elected by Shareholders

[5] Hearing on Applications

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§ 166.14 Electronic Meetings

§ 166.15 Notice Requirements for Shareholders' Meetings

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[2] Contents of Notice

[3] Notice of Adjourned Meeting

§ 166.16 Manner in Which Notice Given

§ 166.17 Waiver of Notice

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[2] When Shareholder Is Present

§ 166.18 Quorum

[1] In General

[2] Effect of Withdrawal on Quorum

[3] If Quorum Is Absent

§ 166.19 Minutes of Meeting

§ 166.20 Action Taken Without Meeting

[1] Shareholder Consent

[2] Prompt Notice of Shareholder Approval

[3] Ten-Day Notice of Shareholder Approval for Certain Acts

[4] Revocation of Consent

§ 166.21 Form of Consent When There Are 100 or More Shareholders

[1] In General

[2] Determination of Number of Shareholders

[a] In General

[b] Shares Held by Entity, Fiduciary, or Trustee

[c] Shares Held by Two or More Persons

[d] Shares Held in Similar Names

[3] Shares Subject to Voting Agreement or Trust

[4] Shareholder's Remedy for Noncompliance

§ 166.22 Amendment or Revision of "Referenced Agreements"

§ 166.23 Voting Rights of Shares

[1] In General

[2] Manner of Voting Shares

§ 166.24 Record Owner Entitled to Vote

[1] In General

[2] Transfer of Shares After Record Date

§ 166.25 Voting by One Other Than Shareholder

[1] Shares Held by Administrator or Guardian

[2] Shares Held by Trustee

[3] Shares in Minor's Name

[4] Vote Authorized by Power of Attorney

[5] Shares in Receiver's Name

[6] Pledged Shares

[7] Shares Held in Name of Other Corporation

[a] By Subsidiary Corporation

[b] In Fiduciary Capacity

[8] Shares Held by Two or More Persons

§ 166.26 Proxy

[1] Defined

[2] Right to Authorize Proxy

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[5] Revocable Proxies

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[7] Form of Proxy

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[c] If Directors Are to Be Elected

[d] Shareholder's Remedy for Noncompliance

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[1] In General

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[1] Defined

[2] When Permitted

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§ 166.32 Supermajority Vote

[1] Defined

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§ 166.33 Action to Challenge Validity of Election or Appointment

[1] Availability in General

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[2] Action to Challenge Validity of Election or Appointment

[3] Annual Meeting Required

[4] Cumulative Voting

[5] Election of Directors

[6] Inspectors of Election

[7] Manner in Which Notice Given

[8] Minutes of Meeting

[9] Notice Required

[10] Proxy

[11] Quorum

[12] Reliance on Record Date in Giving Notice or to Vote

[13] Reliance on Record Holder of Shares

[14] Special Meetings

[15] Supermajority Vote

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[18] Voting Rights of Shareholders

[19] Voting Rights of Shares

[20] Voting Trust Agreement

[21] Waiver of Notice

[22] Where Meetings Held

[23] Written Request for Notice of Special Meeting

§ 166.52 Decisions

[1] Action Taken Without Meeting

[2] Action to Challenge Validity of Election or Appointment

[3] Annual Meeting Required

[4] Cumulative Voting

[5] Election of Directors

[6] Inspectors of Election

[7] Manner in Which Notice Given

[8] Minutes of Meeting

[9] Notice Required

[a] Generally

[b] Special Meetings

[10] Proxy

[11] Proxy Solicitations

[12] Quorum

[13] Reliance on Record Date in Giving Notice or to Vote

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§§ 166.55-166.69 [Reserved]

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[1] FORM

[2] Use of Form

[3] Procedure in Obtaining Summary Order

[4] Verification

[5] Jurisdiction

[6] Venue

[7] California Legal Forms

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[9] Text References

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§ 166.71 Notice of Hearing on Application for Order Directing Corporation to Hold Annual Shareholders' Meeting [Corp. Code § 600(c)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 166.72 Order Directing Corporation to Hold Annual Shareholders' Meeting [Corp. Code § 600(c)]

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[2] Use of Form

[3] State Statutes

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[5] Text References

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§ 166.73 Application for Order Directing Corporation to Give Notice of Special Shareholders' Meeting [Corp. Code § 601(c)]

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[3] Who May Make Application

[4] Supporting Affidavits or Declarations

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[10] Cross References

§ 166.74 Application by Five-Percent Shareholder for Order Directing Corporation to Hold Special Shareholders' Meeting to Elect New Board [Corp. Code § 305(c)]

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[2] Use of Form

[3] Alternative Procedure

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[5] Cross References

§ 166.75 Notice of Hearing on Application for Order Directing Corporation to Hold [Corp. Code § 305(c)(2)] or Give Notice of [Corp. Code § 601(c)] Special Shareholders' Meeting

[1] FORM

[2] Use of Form

[3] Form and Service of Notice

[4] Notice Period

[5] Hearing Takes Precedence on Calendar

[6] California Legal Forms

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[8] Text References

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§ 166.76 Notice of Opposition [Corp. Code § 305(c)(2)] to Application for Order Directing Corporation to Hold [Corp. Code § 305(c)(2)] or Give Notice of [Corp. Code § 601(c)] Special Shareholders' Meeting

[1] FORM

[2] Use of Form

[3] Cross References

§ 166.77 Order Directing Corporation to Give Notice of Special Shareholders' Meeting [Corp. Code § 601(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 166.78 Order Directing Corporation to Hold Special Shareholders' Meeting to Elect New Board [Corp. Code § 305(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 166.79 Complaint for Declaratory and Injunctive [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527] Relief--By Shareholder Against Corporation--To Declare Shareholders' Meeting Invalid for Want of Proper Notice [Corp. Code § 601(e)] and Enjoin Any Action Taken as Result of Meeting

[1] FORM

[2] Use of Form

[3] Allegations

[4] Limitations on Shareholder's Remedy

[5] Jurisdiction

[6] California Legal Forms

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[8] Decisions

[9] Text References

[10] Cross References

§ 166.80 Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527], and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526]--By Shareholder Against Corporation With 100 or More Shareholders [Corp. Code § 604(a), (b)]--To Compel Resolicitation of Improper Consents or Proxies [Corp. Code § 604(d)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction

[5] California Legal Forms

[6] State Statutes

[7] Text References

[8] Cross References

§ 166.81 Allegation--Corporation to Vote Contrary to Shareholder's Choice as Expressed on Consent or Proxy [Corp. Code § 604(a), (b)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 166.82 Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527], and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526]--By Shareholder Against Corporation Holding Election of Directors [Corp. Code § 604(c)]--To Compel Resolicitation of Proxies [Corp. Code § 604(d)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 166.83 Complaint for Specific Performance [Civ. Code § 3384] of Voting Agreement--By Shareholder of Close Corporation Against Another Shareholder [Corp. Code § 706(a)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] California Legal Forms

[6] State Statutes

[7] Decisions

[8] Text References

[9] Cross References

§ 166.84 Complaint by Shareholder or Other Person Entitled to Vote--Against Directors and Corporation--To Determine Validity of Election of Directors [Corp. Code § 709]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction

[5] Venue

[6] Parties

[7] State Statutes

[8] Decisions

[9] Text References

§ 166.85 Allegations--To Determine Validity of Appointment of Directors [Corp. Code § 709(a)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 166.86 Order to Show Cause--In Action Contesting Corporate Election or Appointment [Corp. Code § 709(b)]

[1] FORM

[2] Use of Form

[3] Caption

[4] Service

[5] State Statutes

[6] Decisions

[7] Cross References

§ 166.87 Judgment Determining Validity of Corporate Election or Appointment [Corp. Code § 709(a), (c)]

[1] FORM

[2] Use of Form

[3] Stay of Enforcement Pending Appeal

[4] State Statutes

[5] Decisions

[6] Cross References

§ 166.88 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--By Legal or Beneficial Owner of Shares Against Person Empowered to Vote Those Shares--To Compel Disclosure of Voting Record [Corp. Code § 711(j)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction

[5] Venue

[6] Costs and Attorney's Fees

[7] Subsequent Papers

[8] State Statutes

[9] Cross References

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Chapter 166 CORPORATIONS: SHAREHOLDERS' MEETINGS AND VOTING
PART I. SCOPE

14-166 California Forms of Pleading and Practice--Annotated § 166.01

§ 166.01 Scope of Chapter

This chapter discusses shareholders' meetings and the manner in which shareholders vote at meetings, as well as the duties of persons possessing the power to vote shares of stock on behalf of another.

This chapter includes forms for use in proceedings to compel a corporation to hold an annual [*see* §§ 166.70-166.72], or special [*see* §§ 166.73-166.78], shareholders' meeting. It also includes forms for use in seeking a declaration of the invalidity of a shareholders' meeting for want of proper notice [*see § 166.79*], injunctive relief when a corporation has improperly solicited or voted consents or proxies [*see* §§ 166.80-166.82], for seeking and specific performance of a voting agreement among shareholders [*see § 166.83*]. In addition, it includes forms for use in actions attacking the validity of an election or appointment of directors [*see* §§ 166.84-166.87] and a form to compel disclosure of the voting record of a third person who held and exercised the power to vote shares of stock on behalf of another.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersMeetings & VotingGeneral OverviewBusiness & Corporate LawCorporationsShareholdersMeetings & VotingVoting SharesGeneral Overview

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14-166 California Forms of Pleading and Practice--Annotated § 166.02

§ 166.02 Cross References

For discussion and forms for use with respect to meetings of directors, see Ch. 167, *Corporations: Directors and Management* . For additional discussion of shareholders' meetings and voting, see Ballantine and Sterling, California Corporation Laws, Ch. 9, *Shareholders' Meetings and Voting* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersMeetings & VotingGeneral Overview

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14-166 California Forms of Pleading and Practice--Annotated §§ 166.03-166.09

[Reserved]

§§ 166.03[Reserved]

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PART II. LEGAL BACKGROUND

14-166 California Forms of Pleading and Practice--Annotated § 166.10

§ 166.10 Governing Statutes

Shareholders' meetings and consents are governed by *Corp. Code §§ 600-605*, and the voting of shares is governed by *Corp. Code §§ 700-711*. Shareholders' rights to results of voting taken at shareholder meetings are governed by *Corp. Code §§ 1509-1512* and are discussed in Ch. 165, *Corporations: Corporate Records and Reports* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersMeetings & VotingGeneral OverviewBusiness & Corporate LawCorporationsShareholdersMeetings & VotingVoting SharesGeneral Overview

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PART II. LEGAL BACKGROUND

14-166 California Forms of Pleading and Practice--Annotated § 166.11

§ 166.11 Annual Meeting Required

[1] In General

Unless, to effectuate a voting shift, the articles provide that directors hold office for a shorter term, directors must be elected at each annual meeting of the shareholders to hold office until the next annual meeting [*Corp. Code § 301(a)*; *see Corp Code § 194.7* (defining voting shift); *see also Corp. Code § 301.5(b)* (elections when directors are divided into classes, discussed in Ch. 167, *Corporations: Directors and Management*)]. Therefore, subject to the provision of *Corp. Code § 603* (permitting the election of directors without a prior meeting if the requisite consent of the shareholders has been obtained), an annual meeting of shareholders must be held for the election of directors [*Corp. Code § 600(b)*].

The meeting must be held on a date and at a time stated in or fixed in accordance with a corporation's bylaws. Any other proper business may be transacted at the annual meeting [*Corp. Code § 600(b)*].

[2] Shareholder's Remedy for Failure to Hold Annual Meeting

If there is a failure to hold the annual meeting of shareholders for a period of 60 days after the date designated therefor or, if no date has been designated, for a period of 15 months after the organization of the corporation or after its last annual meeting, the superior court of the proper county [*see Corp. Code § 177* (proper county defined)] may summarily order a meeting to be held on the application of any shareholder after notice to the corporation giving it an opportunity to be heard [*Corp. Code § 600(c)*; *see* §§ 166.70-166.72]. The court may issue, in addition, such orders as may be appropriate, including, without limitation, orders designating the time and place of the meeting, the record date for determination of shareholders entitled to vote, and the form of notice of the meeting [*Corp. Code § 600(c)*].

The shares represented at the meeting, either in person or by proxy, constitute a quorum [*see Corp. Code § 602(a)* (quorum defined)] for the purpose of that meeting, notwithstanding any provisions of the articles, bylaws, or General Corporation Law to the contrary [*Corp. Code § 600(c)*]. This provision prevents directors and shareholders from obstructing a court ordered election of which due notice is given by staying away from the election [*see Burnett v. Banks (1955) 130 Cal. App. 2d 631, 637, 279 P.2d 579]* .

[3] Applicability to Nominally Foreign Corporations

The requirement that a corporation hold an annual meeting [*Corp. Code § 600(b)*] and the remedy provided for its failure to do so [*Corp. Code § 600(c)*] extend to nominally foreign corporations [*Corp. Code § 2115(b)*]. For a discussion of nominally foreign corporations, see Ch. 160, *Corporations: Capacity* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersMeetings & VotingAnnual MeetingsBusiness & Corporate LawForeign BusinessesGeneral Overview

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14-166 California Forms of Pleading and Practice--Annotated § 166.12

§ 166.12 Special Meetings

[1] In General

Special meetings of shareholders may be called by the board, the chairperson of the board, the president, or the holders of shares entitled to cast not less than 10 percent of the votes at a shareholders' meeting or by any additional persons as may be provided in the corporation's articles or bylaws [*Corp. Code § 600(d)*].

Special meetings may also be called by any holder or holders of an aggregate of five percent or more of the total number of shares outstanding to elect a new board of directors. This right matures only when, as a result of vacancies on the board being filled by the directors [*Corp. Code § 305(a)*], the number of directors who are elected by shareholders constitutes less than a majority of the directors in office [*Corp. Code § 305(c)*].

[2] Written Request for Notice of Special Meeting

On the request in writing to the corporation, addressed to the attention of the chairperson of the board, president, vice-president, or secretary of the corporation by any person, other than the board, entitled to call a special meeting, notice of a special meeting must be given forthwith to the shareholders entitled to vote at that meeting [*Corp. Code § 601(c)*]. The written request may be either mailed or personally delivered. However, the corporate officer to whom the request is addressed need not be formally named on the face of the request itself [*Humboldt Oil Co. v. Hoagland (1924) 70 Cal. App. 454, 457-458, 233 P. 404]* . The notice, as given by the corporate officer, must state that the meeting will be held at a time requested by the person or persons calling the meeting not less than 35 nor more than 60 days after receipt of the written request for the special meeting [*Corp. Code § 601(c)*].

[3] Remedy for Failure to Give Notice of Special Meeting

If the notice requested by a person entitled to call a special meeting is not given by a corporation within 20 days after receipt of the request, that person may either give notice instead [*Corp. Code § 601(c)*; *Dedrick v. California Whaling Co. (1936) 16 Cal. App. 2d 284, 287-288, 60 P.2d 551* (notice as given by any director or shareholder when proper officer refuses or neglects to give notice)] or apply to the superior court for the proper county for an order compelling the corporation to give notice of the special meeting [*see* §§ 166.74-166.76]. The corporation is given an opportunity to

be heard with respect to the application [*Corp. Code § 601(c)*; *see Corp. Code § 177* (proper county defined)]. At the conclusion of the hearing, the court may issue such orders as may be appropriate, including, without limitation, orders designating the time and place of a meeting, the record date for determination of shareholders entitled to vote, and the form of notice for the meeting [*Corp. Code § 601(c)*].

[4] Remedy if Majority of Directors Are Not Elected by Shareholders

If the reason for a special meeting is to elect a new board when less than a majority of directors on the board are elected by the shareholders as a result of vacancies being filled by the remaining directors, a holder of five percent of the outstanding shares may give notice [*Corp. Code § 305(c)(1)*] or that person may apply [*Corp. Code § 305(c)(2)*] to the superior court for the proper county for an order compelling the corporation to hold a special shareholders' meeting [*Corp. Code § 305(c)(2)*; *see Corp. Code § 177* (proper county defined); *see also §§ 166.74*, *166.77*, and *166.78*].

[5] Hearing on Applications

The hearing on an application is held on not less than 10 business days notice [*see § 166.75*] to the corporation. If the corporation intends to oppose the application, it must file with the court a notice of opposition not later than five business days prior to the date set for the hearing. The application and any notice of opposition [*see § 166.76*] must be supported by appropriate affidavits (or declarations [*Code Civ. Proc. § 2015.5*]). The court's determination is based on the papers in the record. However, if good cause is shown, the court may receive and consider at the hearing additional evidence, oral or documentary, and additional points and authorities. The hearing on this application takes precedence over all other matters not of a similar nature pending on the date set for the hearing [*Corp. Code §§ 305(c), 601(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 166.13 Where Meetings Held

Meetings of shareholders may be held at any place stated in or fixed in accordance with the bylaws, whether or not that place is in California. If no place is stated in or fixed by the bylaws, shareholders' meetings must be held at the principal executive office of the corporation [*Corp. Code § 600(a)*].

Shareholders not physically present in person or by proxy at a meeting of shareholders may do the following, pursuant to electronic transmission by and to the corporation [*see Corp. Code §§ 20, 21* (defined); *see also* Electronic Transmission in Ch. 165, *Corporations: Corporate Records and Reports*] or electronic video screen communication [*Corp. Code § 600(a)*]:

- Participate in a meeting of shareholders;
- Be deemed present in person or by proxy; and
- Vote at a meeting of shareholders, whether that meeting is to be held at a designated place or in whole or in part by means of electronic transmission by and to the corporation or by electronic video screen communication [*see § 166.14*].

This procedure is applicable unless prohibited by the bylaws of the corporation. It must be authorized by the board of directors in its sole discretion, and is subject to the requirement of consent [*see Corp. Code § 20(b)*] and to those guidelines and procedures that the board of directors may adopt [*Corp. Code § 600(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 166.14 Electronic Meetings

A meeting of the shareholders may be conducted, in whole or in part, by electronic transmission by and to the corporation or by electronic video screen communication, if [*Corp. Code § 600(e)*]:

- The corporation implements reasonable measures to provide shareholders (in person or by proxy) a reasonable opportunity to participate in the meeting and to vote on matters submitted to the shareholders, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with those proceedings; and

- Any shareholder votes or takes other action at the meeting by means of electronic transmission to the corporation or electronic video screen communication, a record of that vote or action is maintained by the corporation.

Any request by a corporation to a shareholder pursuant to *Corp. Code § 20(b)* ("electronic transmission by the corporation" defined) for consent to conduct a meeting of shareholders by electronic transmission by and to the corporation must include a notice that, absent consent of the shareholder pursuant to *Corp. Code § 20(b)*, the meeting will be held at a physical location in accordance with *Corp. Code § 600(a)* [*Corp. Code § 600(a)*; *see § 166.13*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 166.15 Notice Requirements for Shareholders' Meetings

[1] In General

Whenever shareholders are required or permitted to take any action at a meeting, written notice of the meeting must be given to each shareholder entitled to vote at the meeting no less than 10 (or if sent by third-class mail, 30) nor more than 60 days prior to the meeting [*Corp. Code § 601(a)*]. For a discussion related to the determination of shareholders entitled to receive notice, see *§ 166.24*.

[2] Contents of Notice

In every case, the notice must state the place, date, and hour of the meeting and the means of electronic transmission by and to the corporation [*see Corp. Code §§ 20, 21* (definitions); *see also Ch. 165, Corporations Corporate Records and Reports, § 165.26*] or electronic video screen communication, if any, by which shareholders may participate in that meeting [*Corp. Code § 601(a)*; *San Buenaventura Mfg. Co. v. Vassault (1875) 50 Cal. 534, 537* (annual meeting not sufficiently noticed when time of meeting not specified); *Grant v Hartman Ranch Co. (1961) 193 Cal App 2d 497, 501, 14 Cal Rptr. 531* (meeting invalid when notice failed to specify hour of meeting)].

Notice of an annual meeting of shareholders must state those matters which the board, at the time notice is mailed, intends to present for action by the shareholders. However, any proper matter may be presented at the meeting for shareholder action [*Corp. Code § 601(a)*]. If directors are to be elected at the meeting, the notice must also include the names of nominees intended to be presented by management for election as of the date of notice [*Corp. Code § 601(a)*].

Notice of a special meeting of shareholders must state the general nature of the business to be transacted [*Corp. Code § 601(a)*]. No business other than that stated in the notice of the meeting may be transacted at a special meeting [*Corp. Code § 601(a)*]. Hence, a special meeting is not authorized to elect directors when the notice of the meeting fails to specify that the election of directors is one of the purposes of the meeting [*Dolbear v. Wilkinson (1916) 172 Cal 366, 370, 156 P. 488* (notice stating that purpose of meeting to transact any business that comes before the meeting insufficient)]. However, shareholders were held to have had ample notice that a special meeting may involve a change in officers and directors responsible for corporate management when the notice stated that the purpose of the meeting was to consider and determine all questions related to the property, management, and business policy of the corporation

and to take action expedient or necessary in connection with these matters [*Lawrence v. I.N. Parlier Estate Co. (1940) 15 Cal 2d 220, 233-234, 100 P2d 765* (decided under former Civ. Code § 314, which similarly required notice of special meeting to state general nature of business to be transacted)].

Corp. Code § 601(f) provides that any shareholder approval at an annual or special meeting, other than unanimous approval by those entitled to vote, is valid only if the general nature of the proposal so approved was stated in the notice of the meeting and involved any of the following matters:

- Contracts in which a director is financially interested [*Corp. Code § 310*].
- Amendment of the articles [*Corp. Code § 902*].
- Conversion of the corporation [*Corp. Code § 1152*].
- Reorganization of the corporation [*Corp. Code § 1201*].
- Voluntary dissolution of the corporation by the shareholders [*Corp. Code § 1900*].
- The plan of distribution at dissolution of the corporation [*Corp. Code § 2007*].

[3] Notice of Adjourned Meeting

Unless the bylaws of a corporation require otherwise, notice need not be given when a shareholders' meeting is adjourned to another time or place if the time and place (or the means of electronic transmission by and to the corporation or electronic video screen communication, if any, by which the shareholders may participate) are announced at the meeting at which the adjournment is taken. However, notice must be given to each shareholder of record entitled to vote at the meeting if the adjournment is for more than 45 days or if a new record date is fixed for the adjourned meeting after the adjournment. At the adjourned meeting, the corporation may transact any business it might have transacted at the original meeting [*Corp. Code § 601(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 166.16 Manner in Which Notice Given

Notice of a shareholders' meeting or any report must be given personally, by electronic transmission by the corporation [*see Corp. Code § 20* (definition); *see also Ch. 165, Corporations: Corporate Records and Reports, § 165.26*], by first-class mail, or, in the case of a corporation with outstanding shares held of record by 500 or more persons (as determined under *Corp. Code § 605* [*see § 166.21*]), on the record date for the shareholders' meeting, notice may be sent third-class mail, or by other means of written communication to each shareholder. Notice is addressed to a shareholder at the address for that shareholder appearing on the books of the corporation or at the address given to the corporation by a shareholder for the purpose of notice. If no address appears or is given, notice is either addressed to the place where the principal executive office of the corporation is located or published at least once in a newspaper of general circulation in the county in which the corporation's principal executive office is located. The notice is deemed to have been given at the time when it is delivered personally, sent by electronic transmission by the corporation [*see Corp. Code § 20* (definition); *see also* Electronic Transmission in Ch. 165, *Corporations: Corporate Records and Reports*], deposited in the mail, or sent by other means of written communication. An affidavit of mailing or electronic transmission by the corporation [*see Corp. Code § 20* (definition); *see also* Electronic Transmission in Ch. 165, *Corporations: Corporate Records and Reports*] executed by the secretary, assistant secretary, or any transfer agent is prima facie evidence of the giving of notice [*Corp. Code § 601(b)*].

If any notice addressed to a shareholder at the address of the shareholder appearing on the books of the corporation is returned to the corporation by the United States Postal Service marked to indicate that the postal service was unable to deliver the notice to the shareholder at that address, all future notices to the shareholder are deemed to be duly given without further mailing, provided the notices are available on written demand of the shareholder at the principal executive office of the corporation for one year from the date of the notice to all other shareholders [*Corp. Code § 601(b)*].

Notice given by electronic transmission by the corporation is valid only if it complies with *Corp. Code § 20* [*see* Electronic Transmission in Ch. 165, *Corporations: Corporate Records and Reports*, for discussion]. However, notice may not be given by electronic transmission by the corporation after the corporation is unable to deliver two consecutive notices to the shareholder by that means, or the inability to so deliver the notices to the shareholder becomes known to the secretary, any assistant secretary, the transfer agent, or other person responsible for the giving of

the notice [*Corp. Code § 601(b)*].

Legal Topics:

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§ 166.17 Waiver of Notice

[1] When Shareholder Is Not Present

Either before or after a shareholders' meeting, a person entitled to vote, who is not present at the meeting in person or by proxy, may sign a written waiver of notice, a consent to the holding of the meeting, or an approval of the minutes of the meeting. The waiver, consent, or approval must be filed with the corporate records or made a part of the minutes of the meeting. Unless the articles, bylaws, or *Corp. Code § 601(f)* (specific notice required for certain matters) require otherwise, the written waiver of notice need not specify the business to be transacted or the purpose of any regular or special meeting of shareholders [*Corp. Code § 601(e)*].

[2] When Shareholder Is Present

A person entitled to vote at a shareholders' meeting may waive notice of the meeting by his or her attendance at the meeting [*Corp. Code § 601(e)*]. The notice requirement is only for the benefit of a shareholder and the necessity of protecting a shareholder does not arise when the shareholder is present and acting at a meeting [*Guaranty Loan Co. v. Treadwell (1921) 53 Cal. App. 538, 542, 200 P. 653]* . The shareholder's attendance and participation is a waiver of any objection to the regularity of the call or to the place of the meeting [*Guaranty Loan Co. v. Fontanel (1920) 183 Cal. 1, 9, 190 P. 177]* .

However, attendance does not constitute a waiver of notice when the person objects at the beginning of the meeting to the transaction of any business because the meeting is not lawfully called or convened [*Corp. Code § 601(e)*]. In addition, attendance at a shareholders' meeting is not a waiver of the right to object to the consideration of matters required to be included in the notice [*see Corp. Code § 601(a), (f)*] and not so included, provided an objection is expressly made at the meeting [*Corp. Code § 601(e)*].

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§ 166.18 Quorum

[1] In General

Except as provided in *Corp. Code § 602(b)* (effect on quorum by withdrawal), the affirmative vote of a majority of the shares represented and voting at a duly held meeting at which a quorum is present is the act of the shareholders, provided (1) that the shares voting affirmatively also constitute at least a majority of the required quorum and (2) that the vote of a greater number or voting by classes is not required by the General Corporation Law or the articles [*Corp. Code § 602(a)*].

[2] Effect of Withdrawal on Quorum

The shareholders present at a duly called or held meeting at which a quorum is present may continue to transact business until adjournment even though enough shareholders withdraw from the meeting to leave less than a quorum. Any action taken, other than adjournment, must be approved by at least a majority of the shares required to constitute a quorum, or if required by law or by the articles, the vote of a greater number or voting by classes [*Corp. Code § 602(b)*].

[3] If Quorum Is Absent

In the absence of a quorum, any meeting of shareholders may be adjourned from time to time by the vote of a majority of the shares represented either in person or by proxy, but no other business may be transacted, except as provided in *Corp. Code § 602(c)* (effect of withdrawal on quorum) [*Corp. Code § 602(c)*].

Legal Topics:

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§ 166.19 Minutes of Meeting

The original or a copy, in writing or in any other form capable of being converted into clearly legible tangible form, of the minutes of any shareholders' meeting or of any resolution adopted by the shareholders, when certified to be a true copy by a person purporting to be the secretary or assistant secretary of a corporation, is prima facie evidence of the due holding of the meeting and of the matters stated therein [*Corp. Code § 314*; *Shamel v. Lite Prod. Sales, Inc. (1955) 131 Cal. App. 2d 33, 36, 279 P.2d 1020* , questioned on other grounds in *Columbia Eng'r Co. v. Joiner (1965) 231 Cal. App. 2d 837, 848-849, 42 Cal. Rptr. 241* (obligation of shareholder attacking regularity of election of directors to rebut presumption of regularity and correctness created by minutes of the meeting)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 166.20 Action Taken Without Meeting

[1] Shareholder Consent

Unless the articles provide otherwise, any action which may be taken at an annual or special meeting of shareholders may be taken without a meeting and without prior notice if a consent in writing (as specified in *Corp. Code § 195*), setting forth the action to be taken, is provided by the holders of outstanding shares having no less than the minimum number of votes necessary to authorize that action at a meeting at which all shares entitled to vote were present and voting [*Corp. Code § 603(a)*]. For instance, two of the directors and shareholders of a corporation, who between themselves control a majority of shares, may consent to sell certain corporate property without conducting a formal meeting or keeping minutes. The consent of the third director and minority shareholder is unnecessary to authorize the action [*Mannon v. Pesula (1943) 59 Cal. App. 2d 597, 604-605, 139 P.2d 336]* . Likewise, written consent to voluntary dissolution of a corporation by the holder of 50 percent of the voting shares [*see Corp. Code § 1900(a)*] is effective to authorize the voluntary dissolution even if there is no special notice of a meeting of shareholders and no approval of the action by all shareholders [*In re Security Fin. Co. (1957) 49 Cal. 2d 370, 381, 317 P.2d 1]* . For a discussion of voluntary dissolution of a corporation by a majority shareholder, see Ch. 170, *Corporations: Dissolution* .

However, directors may not be elected by written consent except by unanimous written consent of all shares entitled to vote for the election of directors. The shareholders may elect a director to fill a vacancy, other than a vacancy created by removal, by the written consent of a majority of the outstanding shares entitled to vote [*Corp. Code § 603(d)*].

[2] Prompt Notice of Shareholder Approval

Unless the consents of all shareholders are solicited in writing, notice of shareholder approval without a meeting by less than unanimous written consent must be promptly given to those shareholders entitled to vote who have not consented in writing. *Corp. Code § 601(b)* governs the giving of that notice [*Corp. Code § 603(b)(2)*].

[3] Ten-Day Notice of Shareholder Approval for Certain Acts

Corp. Code § 603(b)(1) provides that unless the consents of all shareholders are solicited in writing, notice of shareholder approval without a meeting by less than unanimous written consent must be given at least 10 days prior to

the consummation of the action authorized by that approval when the action approved involves any of the following matters:

- Contracts in which a director is interested [*Corp. Code § 310*].
- Indemnification of a corporate agent [*Corp. Code § 317*].
- Conversion of the corporation [*Corp. Code § 1152*].
- Reorganization of the corporation [*Corp. Code § 1201*].
- The plan of distribution at dissolution of the corporation [*Corp. Code § 2007*].

Notice must be given as provided in *Corp. Code § 601(b)* [*Corp. Code § 603(b)(1)*].

[4] Revocation of Consent

Any shareholder giving a written consent may revoke the consent personally or by proxy by a writing received by the corporation prior to the time that written consents of the number of shares required to authorize the proposed action are filed with the secretary of the corporation. However, a shareholder may not revoke his or her written consent after that time. The revocation is effective on its receipt by the secretary of the corporation. This applies to a shareholder's proxyholders, a transferee of the shares, a personal representative of the shareholder, or their respective proxyholders, as well as to the shareholder [*Corp. Code § 603(c)*].

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§ 166.21 Form of Consent When There Are 100 or More Shareholders

[1] In General

A written consent distributed to 10 or more shareholders of a corporation with outstanding shares held of record [*see Corp. Code § 605(a)* (shares deemed held of record)] by 100 or more persons must offer an opportunity on the form of written consent to specify a choice between approval and disapproval of each matter or group of related matters intended to be acted on by the written consent, other than elections to office. In addition, a written consent must provide, subject to reasonable specified conditions, that, where a person solicited specifies a choice with respect to any matter, the shares are voted in accordance with that choice. The above rules do not apply to any corporation with an outstanding class of securities registered under Section 12 of the Securities and Exchange Act [*15 U.S.C. § 781*] or whose securities are exempted from such registration by Section 12(g)(2) [*15 U.S.C. § 781(g)(2)*] of that act [*Corp. Code § 604(a)*].

Every form of written consent which provides an opportunity for the shareholder to approve or disapprove any proposal must also contain an appropriate space marked "abstain," by which a shareholder may indicate his or her desire to abstain from voting on that proposal. When a written consent is marked "abstain" by a shareholder with respect to a particular proposal, that written consent is not voted either for or against that proposal [*Corp. Code § 604(b)*].

[2] Determination of Number of Shareholders

[a] In General

For the purpose of determining whether or not a corporation has outstanding shares held of record by 100 or more persons, shares are deemed held of record by each person identified as the owner of the shares on the record of shareholders maintained by or on behalf of the corporation [*Corp. Code § 605(a)*]. However, when the record of shareholders is not maintained in accordance with accepted practice, any additional person is included as a shareholder of record if he or she would be identified as an owner of shares in the record of shareholders if the records were maintained in accordance with accepted practice [*Corp. Code § 605(a)(1)*].

[b] Shares Held by Entity, Fiduciary, or Trustee

When shares are identified as held of record by a corporation, a partnership, a limited liability company, a trust, whether or not trustees are named, or other organization, the shares are included as so held by one person [*Corp. Code § 605(a)(2)*]. Similarly, when shares are identified as held of record by one or more persons as trustees, executors, guardians, custodians, or in any other fiduciary capacity with respect to a single trust, estate, or account, the shares are included as held of record by one person [*Corp. Code § 605(a)(3)*].

[c] Shares Held by Two or More Persons

When shares are held by two or more persons as coowners, the shares are included as held of record by one person [*Corp. Code § 605(a)(4)*].

[d] Shares Held in Similar Names

When a corporation, or other person soliciting proxies, has reason to believe that shares registered in substantially similar names are owned by the same person because of the address or other indications, the shares held in the substantially similar names may be included as held of record by one person [*Corp. Code § 605(a)(5)*].

[3] Shares Subject to Voting Agreement or Trust

Notwithstanding the provisions of *Corp. Code § 605(a)* [*see § 166.21[1]*], shares held, to the knowledge of a corporation, or other person soliciting proxies, which are subject to a voting trust, deposit agreement, or similar arrangement are included as shares held of record by the recordholders of the voting trust certificates, certificates of deposit, receipts, or similar evidences of interest in the securities. The corporation, or other person soliciting proxies, may rely in good faith on information received in response to its request from a nonaffiliated issuer of the certificates or evidences of interest [*Corp. Code § 605(b)(1)*]. Furthermore, if the corporation, or other person soliciting proxies, knows or has reason to know that the form of holding shares of records is used primarily to circumvent the provisions of *Corp. Code § 605* (shares deemed held of record), the beneficial owners of the shares are deemed owners of record [*Corp. Code § 605(b)(2)*].

[4] Shareholder's Remedy for Noncompliance

Although corporate actions are not invalidated by failure to comply with the provisions of *Corp. Code § 604(a), (b)* (form for written consent), a corporation's failure to comply may be the basis for a shareholder's suit [*§§ 166.79, 166.80*] in the superior court to compel compliance [*Corp. Code § 604(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 166.22 Amendment or Revision of "Referenced Agreements"

If a reference in the corporation's articles is to an agreement or contract to which the corporation is a party (a "referenced agreement"), any amendment or revision of the referenced agreement requires shareholder approval, in addition to approvals otherwise required, in the following instances and no other [*Corp. Code § 109.5(c)*]:

- If the amendment or revision of the referenced agreement would result in a material change in the rights, preferences, privileges, or restrictions of a class or series of shares, the amendment or revision of the referenced agreement is required to be approved by the outstanding shares [*see Corp. Code § 152*] of that class or series.

- If the amendment or revision of the referenced agreement would result in a material change in the rights or liabilities of any class or series of shares with respect to the subject matter of *Corp. Code § 204(a)(1), (2), (3), (5),* or *(9),* the amendment or revision of the referenced agreement is required to be approved by the outstanding shares [*see Corp. Code § 152*] of that class or series.

- If the amendment or revision of the referenced agreement would result in a material change in the restrictions on transfer or hypothecation of any class or series of shares, the amendment or revision of the referenced agreement is required to be approved by the outstanding shares [*see Corp. Code § 152*] of that class or series.

- If the amendment or revision of the referenced agreement would result in a change of any of the principal terms of an agreement of merger, the amendment or revision of the referenced agreement is required to be approved in the same manner as required by *Corp. Code § 1104* for a change in the principal terms of an agreement of merger.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 166 CORPORATIONS: SHAREHOLDERS' MEETINGS AND VOTING
PART II. LEGAL BACKGROUND

14-166 California Forms of Pleading and Practice--Annotated § 166.23

§ 166.23 Voting Rights of Shares

[1] In General

Unless the articles or any shareholders' agreement specify otherwise, no distinction exists between classes or series of shares or the holders thereof [*Corp. Code § 203*; *see Corp. Code § 203.5* (series within class)]. Thus, each outstanding share, regardless of class, is entitled to one vote on each matter submitted to a vote of shareholders [*Corp. Code § 700(a)*], except as otherwise provided in the articles.

However, pursuant to its articles a corporation may issue one or more classes or series of shares with full, limited, or no voting rights. In such a case, it is required that one or more classes or series of outstanding shares have full voting rights [*Corp. Code § 400(a)*], that all shares of any one class have the same voting rights unless the class is divided into series, and that all shares of any one series have the same voting rights [*Corp. Code § 400(b)*].

A corporation's unlawful interference with a shareholder's right to vote may be restrained. For instance, an order enjoining any interference with a shareholder's right to vote certain shares of stock is a proper exercise of a court's power to protect the property rights incidental to the ownership of shares and is not an unwarranted interference with a corporation's internal affairs [*Meyberg v. Superior Court (1942) 19 Cal. 2d 336, 341-342, 121 P.2d 685* (order holding corporate officers in contempt of court for refusing to allow shareholder to vote all shares owned by him in the election of directors after court's temporary restraining order permitting all such shares to be voted)].

[2] Manner of Voting Shares

A shareholder entitled to vote on any matter may vote part of the shares in favor of the proposal and refrain from voting the remaining shares or vote them against the proposal, in matters other than elections to office. The shareholder may not, in the absence of a contrary provision in the articles or bylaws or good reason shown by the shareholder, split whole shares into multiple fractional votes [*Garnier v. Garnier (1967) 248 Cal. App. 2d 255, 259, 56 Cal. Rptr. 247* (only those directors elected by whole shares validly elected)]. If the shareholder fails to specify the number of shares he or she is voting affirmatively, it is conclusively presumed that the shareholder's approving vote is with respect to all the shares he or she is entitled to vote [*Corp. Code § 700(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFinanceInitial Capitalization & Stock SubscriptionsClasses of StockBusiness & Corporate LawCorporationsShareholdersMeetings & VotingVoting SharesGeneral Overview

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14-166 California Forms of Pleading and Practice--Annotated § 166.24

§ 166.24 Record Owner Entitled to Vote

[1] In General

A shareholder has the right to vote at a shareholders' meeting only those shares of stock standing of record in his or her name in the corporation's books [*Los Angeles v. Owens River Canal Co. (1932) 120 Cal. App. 380, 386, 7 P.2d 1064]* . For a corporation to determine which shareholders are entitled to notice of a meeting or to vote, the board may fix, in advance, a record date no more than 60 nor less than 10 days prior to the date of the meeting [*Corp. Code § 701(a)*]. If no record date is fixed, the record date for determining shareholders entitled to notice of or to vote at a meeting of shareholders is the close of business on the business day next preceding the day on which notice is given or, if notice is waived, at the close of business on the business day next preceding the day on which the meeting is held [*Corp. Code § 701(b)(1)*]. A determination of shareholders of record entitled to notice of or to vote at a shareholders' meeting applies also to any adjournment of a meeting unless the board fixes a new record date for the adjourned meeting. When the meeting is adjourned for more than 45 days from the date set for the original meeting, the board is required to fix a new record date for the adjourned meeting [*Corp. Code § 701(c)*].

[2] Transfer of Shares After Record Date

Unless the articles, an agreement, or the General Corporation Law provide otherwise, shareholders on the record date are entitled to notice and to vote even though they may have transferred any of their shares on the books of the corporation after the record date [*Corp. Code § 701(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersMeetings & VotingVoting SharesGeneral OverviewBusiness & Corporate LawCorporationsShareholdersTransfers of Shares

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14-166 California Forms of Pleading and Practice--Annotated § 166.25

§ 166.25 Voting by One Other Than Shareholder

[1] Shares Held by Administrator or Guardian

Shares held by an administrator, executor, guardian, conservator, or custodian may be voted by the holder of those shares either in person or by proxy without a transfer of the shares to the holder's name [*Corp. Code § 702(a)*]. Thus, the legal representative of a shareholder's estate obtains the authority and power of a shareholder during the period of administration [*Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 17, 108 P.2d 906* (shareholder's executor entitled to bring derivative action prior to distribution of shares to legatees)].

[2] Shares Held by Trustee

Shares standing in the name of a trustee may be voted by the trustee either in person or by proxy. However, a trustee is not entitled to vote shares held by him or her without a transfer of shares to his or her name [*Corp. Code § 702(a)*].

[3] Shares in Minor's Name

Shares standing in the name of a minor may be voted and the corporation may treat all rights incident to those shares as exercisable by the minor, in person or by proxy, whether or not the corporation has notice, actual or constructive, of the nonage, unless a guardian of the minor's property has been appointed and written notice of that appointment has been given to the corporation [*Corp. Code § 702(d)*].

[4] Vote Authorized by Power of Attorney

Shares held by or under the control of an attorney in fact may be voted if the power of attorney by which the attorney in fact was appointed authorizes the attorney in fact to vote the shares. In such a case, the corporation may treat all rights incident to the shares as exercisable by the attorney in fact, in person or by proxy, without the transfer of the shares into the name of the attorney in fact [*Corp. Code § 702(e)*]. When a durable power of attorney gives an attorney in fact the power to exercise voting rights, a proxy given by the attorney in fact to another to exercise the voting rights is not subject to the Power of Attorney Law [*Prob. Code § 4050(b)(3)*]; *see Prob. Code § 4000 et seq.* (Power of Attorney Law)].

[5] Shares in Receiver's Name

Shares standing in the name of a receiver may be voted by the receiver. In addition, shares held by or under the control of a receiver may be voted by the receiver without a transfer of the shares to his or her name if the authority to do so is contained in the court order by which the receiver was appointed [*Corp. Code § 702(b)*].

[6] Pledged Shares

Except when the parties agree otherwise in writing, a shareholder whose shares are pledged is entitled to vote his or her shares until the shares have been transferred to the name of the pledgee [*Corp. Code § 702(c)*]. After the shares are transferred to the name of the pledgee, the pledgee is entitled to vote the shares [*Corp. Code § 702(c)*], unless the pledgor and pledgee agree to the retention of the right to vote in the pledgor after the transfer of shares [*Lawrence v. I.N. Parlier Estate Co. (1940) 15 Cal. 2d 220, 229, 100 P.2d 765* (implied agreement that pledgors retain right to vote their shares)].

[7] Shares Held in Name of Other Corporation

Shares standing in the name of another corporation, domestic or foreign, may be voted by an officer, agent, or proxyholder as the bylaws of the other corporation prescribe. In the absence of a bylaw provision, the shares may be voted as the board of the other corporation may determine, or in the absence of such a determination, by the chairperson of the board, president, or any vice-president of the other corporation or by any person authorized to do so by the chairperson of the board, president, or vice-president of the other corporation. Unless the contrary is shown, shares purported to be voted or any proxy purported to be executed in the name of a corporation, whether or not the title of the person signing it is indicated, are presumed to be voted or executed in accordance with the foregoing rules [*Corp. Code § 703(a)*].

[a] By Subsidiary Corporation

Shares of a corporation owned by its subsidiary corporation are not entitled to vote on any matter [*Corp. Code § 703(b)*].

[b] In Fiduciary Capacity

Shares held by an issuing corporation in a fiduciary capacity and shares of an issuing corporation held in a fiduciary capacity by that corporation's subsidiary are not entitled to vote on any matter. However, they may vote to the extent that the settlor or beneficial owner possesses and exercises a right to vote or to give the corporation binding instructions as to how to vote its shares, or, when there are one or more cotrustees who are not affected by the prohibition of *Corp. Code § 703(c)*, the shares may be voted by the cotrustees as if they are the sole trustee [*Corp. Code § 703(c)*].

[8] Shares Held by Two or More Persons

Shares may stand of record in the names of two or more persons, such as fiduciaries, members of a partnership, joint tenants, tenants in common, husband and wife holding community property, tenants by the entirety, voting trustees, persons entitled to vote under a shareholder voting agreement, and others. And, two or more persons, including proxyholders, may have the same fiduciary relationship with respect to the same shares [*Corp. Code § 704*].

Unless the secretary of a corporation is given written notice to the contrary and is furnished with a copy of the instrument or order appointing one of them or creating the relationship whereby one of them is entitled to vote, the votes of persons with shares in their names have the following effect [*Corp. Code § 704*]:

- If only one of them votes, that vote binds all of them.

- If more than one of them votes, the vote of the majority binds all of them.

- If more than one of them votes and the vote is evenly split on a particular matter, each faction may vote the securities proportionately.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityGeneral OverviewBusiness & Corporate LawCorporationsShareholdersMeetings & VotingVoting SharesGeneral OverviewEstate, Gift & Trust LawIntestacyAdministratorsEstate, Gift & Trust LawPowers of AttorneyGeneral OverviewFamily LawGuardiansDuties & Rights

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14-166 California Forms of Pleading and Practice--Annotated § 166.26

§ 166.26 Proxy

[1] Defined

A proxy is a written authorization signed, or an electronic transmission authorized, by a shareholder or a shareholder's attorney giving another person or persons power to vote with respect to the shares of that shareholder. A proxy is signed when the shareholder's name or other authorization is placed on the proxy by manual signature, typewriting, telegraphic or electronic transmission, or otherwise, by either the shareholder or the shareholder's attorney [*Corp. Code § 178*].

[2] Right to Authorize Proxy

Every person entitled to vote shares may authorize another person or persons to act by proxy with respect to his or her shares [*Corp. Code § 705(a)*]. The corporation may not restrict a shareholder's right to choose whomever he or she considers advisable for the object of voting his or her shares [*People's Bank v. Superior Court (1894) 104 Cal. 649, 652-653, 38 P. 452* (corporate bylaw requiring all proxyholders to be shareholders invalid as restriction on shareholder's selection of proxy)].

Any proxy executed in accordance with the provisions of the General Corporation Law [*Corp. Code §§ 100-2319*] is presumed valid [*Corp. Code § 705(a)*].

[3] Right of Pledgor or Owner to Compel Issuance of Proxy

Except when the parties agree otherwise in writing, the recordholder of shares which such person holds as a pledgee or otherwise as security or which belong to another must issue to the pledgor or to the owner of the shares a proxy to vote or take other action thereon on the demand therefor and payment of necessary expenses thereof [*Corp. Code § 705(d)*].

[4] Expiration

Unless otherwise provided in the proxy, a proxy is not valid after the expiration of 11 months from the date of the proxy [*Corp. Code § 705(b)*].

[5] Revocable Proxies

Subject to its 11-month expiration period, a proxy continues in full force and effect until it is revoked by the person executing it prior to a vote [*Corp. Code § 705(b)*], unless the proxy is made irrevocable [*see § 166.26[6]*]. Thus, a proxy for any term is revocable at the pleasure of a shareholder [*Simpson v. Nielson (1926) 77 Cal. App. 297, 300, 246 P. 342]* . A proxy may be revoked by a writing delivered to the corporation stating that the proxy is revoked [*Corp. Code § 705(b)*]. In addition, a proxy may be revoked by a subsequent proxy executed by the person executing the proxy. The dates contained on the forms of proxy presumptively determine the order of execution of the proxies regardless of the postmark dates on the envelopes in which they are mailed. A proxy is also revoked by attendance at the shareholders' meeting and voting in person by the person executing the proxy [*Corp. Code § 705(b)*].

In addition, a proxy is not revoked by the death or incapacity of the maker of the proxy unless written notice of the death or incapacity is received by the corporation before the vote is counted [*Corp. Code § 705(c)*].

[6] Irrevocable Proxies

A proxy stating that it is irrevocable is irrevocable for the period specified therein, notwithstanding *Corp. Code § 705(i)* (death or incapacity of maker), when the proxy is held by any of the following or a nominee of any of the following [*Corp. Code § 705(e)*]:

- A pledgee.
- A person who has purchased, agreed to purchase, or holds an option to purchase the shares or a person who has sold a portion of such person's shares in the corporation to the maker of the proxy.
- A creditor or creditors of the corporation, a shareholder who extended or continued credit to the corporation, or a shareholder in consideration of the proxy if the proxy states that it was given in consideration of the extension or continuation of credit and states the name of the person extending or continuing credit.
- A person who has contracted to perform services as an employee of the corporation, if a proxy is required by the contract of employment and if the proxy states that it was given in consideration of the contract of employment, the name of the employee, and the period of employment contracted for.
- A person designated by or under an agreement under *Corp. Code § 706* (shareholder and voting trust agreements).
- A beneficiary of a trust with respect to shares held by the trust.

In addition, a proxy may be made irrevocable if it is given to secure the performance of a duty or to protect a title, either legal or equitable, until the happening of events which, by its terms, discharge the obligations secured by it [*Corp. Code § 705(e)*].

Notwithstanding the period of specified irrevocability, an irrevocable proxy is revoked when one of the following occurs [*Corp. Code § 705(e)*]:

- The pledge is redeemed,
- The option or agreement to purchase is terminated or the seller no longer owns any shares of the corporation or dies,

- The debt of the corporation or the shareholder is paid,
- The period of employment provided for in the contract of employment has terminated,
- The agreement under *Corp. Code § 706* has terminated, or
- The person ceases to be a beneficiary of the trust.

In addition, an irrevocable proxy is revoked by the happening of events which, by the terms of the proxy, discharge the obligations secured by it [*Corp. Code § 705(e)*].

A proxy may be revoked, notwithstanding a provision making it irrevocable, by a transferee of shares without knowledge of the existence of the provision, unless the existence of the proxy and its irrevocability appears, in the case of certificated securities, on the certificate representing the shares, or in the case of uncertificated securities, on the initial transaction statement and written statements [*Corp. Code § 705(f)*].

[7] Form of Proxy

[a] In General

Generally, no particular words are required to create a proxy. In fact, the instrument creating the proxy may be informal in nature [*Smith v. San Francisco & N. P. R. Co. (1897) 115 Cal. 584, 598, 47 P. 582]* , such as a letter acknowledging the right of one who is not a shareholder to vote 51 percent of the shares [*Shamel v. Lite Prod. Sales, Inc. (1955) 131 Cal. App. 2d 33, 36-37, 279 P.2d 1020* , questioned on other grounds in *Columbia Eng'r Co. v. Joiner (1965) 231 Cal. App. 2d 837, 848-849, 42 Cal. Rptr. 241]* .

[b] If There Are 100 or More Shareholders

A proxy distributed to 10 or more shareholders of a corporation with outstanding shares held of record [see *Corp. Code § 605(a)* (shares deemed held of record)] by 100 or more persons must offer an opportunity on the proxy to specify a choice between approval and disapproval of each matter or group of related matters intended to be acted on at the meeting for which the proxy is solicited, other than elections to office. In addition, a proxy must provide, subject to reasonable specified conditions, that, when a person solicited specifies a choice with respect to any matter, the shares are voted in accordance with that choice. These rules do not apply to any corporation with an outstanding class of securities registered under Section 12 of the Securities and Exchange Act of 1934 [*15 U.S.C. § 781*] or whose securities are exempted from registration by Section 12(g)(2) [*15 U.S.C. § 781(g)(2)*] of that act [*Corp. Code § 604(a)*].

Every form of proxy which provides an opportunity for the shareholder to approve or disapprove any proposal must also contain an appropriate space marked "abstain," by which a shareholder may indicate his or her desire to abstain from voting on that proposal. When a proxy is marked "abstain" by a shareholder with respect to a particular proposal, that proxy is not voted either for or against that proposal [*Corp. Code § 604(b)*].

[c] If Directors Are to Be Elected

If directors are to be elected, a shareholder may mark his or her proxy "withhold" or mark it in some manner indicating that the authority to vote for the election of directors is withheld. When any form of proxy in any election of directors is so marked, it is not voted either for or against the election of a director. However, with respect to election of directors this rule is not applicable to any corporation with an outstanding class of securities registered under Section 12 of the Securities and Exchange Act of 1934 [*15 U.S.C. § 781*] or whose securities are exempted from registration by Section 12(g)(2) [*15 U.S.C. § 781(g)(2)*] of that act [*Corp. Code § 604(c)*].

[d] Shareholder's Remedy for Noncompliance

Although corporate actions are not invalidated by failure to comply with the provisions of *Corp. Code § 604(a)-(d)* (form of proxy), a corporation's failure to comply may be the basis for challenging any proxy at a meeting or for a shareholder's suit in the superior court to compel compliance [*Corp. Code § 604(d)*; *see* §§ 166.80-166.82].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersMeetings & VotingVoting SharesDirector Elections & RemovalsBusiness & Corporate LawCorporationsShareholdersMeetings & VotingVoting SharesProxy Agreements

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§ 166.27 Voting Agreements

[1] In General

Under the General Corporation Law, voting agreements generally are permitted between two or more shareholders of a corporation [*see Corp. Code § 706(a)*]. Voting trust agreements as provided in *Corp. Code § 706(b)* are also permitted. In addition, *Corp. Code § 706(a)* or *(b)* does not invalidate any voting or other agreement among shareholders or any irrevocable proxy which states that it is irrevocable and which is held by a person designated by or under the voting agreement, if the agreement or proxy is not otherwise illegal [*Corp. Code § 706(d)*; *see also Corp. Code § 300* (permitting shareholders' agreements relating to any phase of the affairs of a close corporation)].

The agreement between two or more shareholders may provide that in exercising any voting rights, the shares held by them are to be voted as provided in the agreement, as the parties may thereafter agree, or as determined in accordance with a procedure agreed on by them [*Corp. Code § 706(a)*]. In addition, the parties to the agreement may (but need not) transfer the shares covered by the agreement to a third party, or parties, with authority to vote the shares in accordance with the agreement. The voting agreement must be in writing and signed by the parties [*Corp. Code § 706(a)*]. The fact that shares are subject to a voting agreement under *Corp. Code § 706(a)* must appear on the certificate [*Corp. Code § 418(a)(3)*].

[2] Specific Performance Not Denied

A voting agreement may not be denied specific performance [*see Civ. Code §§ 3384-3395* (when specific performance of obligation compelled)] by a court on the ground that the remedy at law is adequate or other grounds relating to the jurisdiction of a court of equity [*Corp. Code § 706(a)*; *see § 166.83*].

[3] Not Invalid as Failed Voting Trust

Even though the parties to a voting agreement may transfer the shares covered by the agreement to a third party [*Corp. Code § 706(a)*], a voting agreement is not invalid or unenforceable on the ground it does not comply with provisions governing voting trusts or that it is a proxy that does not comply with *Corp. Code § 705* [*Corp. Code § 706(c)*; *see Corp. Code § 706(b)* (form of voting trust)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-166 California Forms of Pleading and Practice--Annotated § 166.28

§ 166.28 Voting Trust Agreement

[1] In General

Shareholders in any corporation may transfer their shares to a trustee or trustees in order to confer on the trustee or trustees the right to vote and otherwise represent their shares for a given period [*Corp. Code § 706(b)*]. The validity of a voting trust agreement is not dependent on the delivery of stock certificates to a trustee or trustees; rather, a voting trust agreement is in the nature of a contract which becomes binding at the time it is executed [*Boericke v. Weise (1945) 68 Cal. App. 2d 407, 420, 156 P.2d 781]* . The transfer of shares to a trustee or trustees must be by written agreement [*Corp. Code § 706(b)*].

The voting trust agreement may contain restrictions on the power of the trustee, and a trustee is bound to comply with restrictions in casting ballots at a shareholders' meeting [*see Bryson v. Bryson (1923) 62 Cal. App. 170, 175-176, 216 P. 391* (trustee voting outside the authority given in trust instrument to elect director)]. Moreover, the trustee acts in a fiduciary capacity and is subject to removal whenever his or her private interests conflict with the trust duties in order to preserve the trust property [*Moore v. Bowes (1937) 8 Cal. 2d 162, 165, 64 P.2d 423* (misappropriation of money by trustee as basis for action by shareholders who are beneficiaries of voting trust agreement)].

[2] Period of Validity

A voting trust agreement is valid for a period of time, not exceeding 10 years, as may be specified in the agreement. However, the validity of the agreement, otherwise lawful, is not affected during a period of 10 years from the date when it was created (or last extended, as is discussed below) by the fact that under its terms it will or may last beyond the 10-year period [*Corp. Code § 706(b)*].

At any time during the two years prior to expiration of a voting trust agreement as originally fixed or last extended, one or more beneficiaries under the agreement may extend the duration of the agreement for an additional period of time not exceeding 10 years from the expiration date of the trust as originally fixed or last extended. The beneficiaries extending an agreement do so with respect to their own shares only. A beneficiary's extension must be by written agreement and with the written consent of the trustee or trustees [*Corp. Code § 706(b)*].

Except for the provisions governing the maximum period of time that a voting trust agreement is valid, the General Corporation Law does not set out the conditions for the termination of a voting trust.

Presumably, provisions governing trusts generally apply, in which case a trust that is revocable by the settlor may be revoked in whole or in part by (1) compliance with any method of revocation provided in the trust instrument or (2) a writing (other than a will) signed by the settlor and delivered to the trustee during the lifetime of the settlor (unless the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation) [*Prob. Code § 15401(a)*]. Unless otherwise provided in the instrument, if a trust is created by more than one settlor, each settlor may revoke the trust as to the portion of the trust contributed by that settlor, except as provided in *Fam. Code § 761* (community property in certain revocable trusts) [*Prob. Code § 15401(b)*]. A trust may not be modified or revoked by an attorney in fact under a power of attorney unless modification or revocation by the attorney in fact is expressly permitted by the trust instrument [*Prob. Code § 15401(c)*]. However, this rule does not limit the authority to modify or terminate a trust according to *Prob. Code §§ 15403* (modification or termination of irrevocable trust by all beneficiaries), 15404 (modification or termination by settlor and all beneficiaries) [*Prob. Code § 15401(d)*]. Moreover, the manner of revocation of a trust revocable by the settlor that was created by an instrument executed before July 1986 is governed by prior law and not by *Prob. Code § 15401* [*Prob. Code § 15401(e)*]. Under prior law, every voluntary trust (unless expressly made irrevocable by the instrument creating the trust) was revocable by the trustor by a writing filed with the trustee [*see* former *Civ. Code § 2280*].

If the trust agreement so provides, the transfer of shares during the period of the voting trust agreement does not free the transferred shares from the operation of the restrictive clauses of the agreement [*Bodkin v. Silveira (1942) 49 Cal. App. 2d 1, 10, 120 P.2d 910* (notice of intention to sell stock by shareholder owning shares covered by voting trust agreement does not free stock from terms of agreement)].

[3] Filing and Dispersement of Agreement

A duplicate of the voting trust agreement and any extension of it must be filed with the secretary of the corporation [*Corp. Code § 706(b)*]. Furthermore, a copy of the voting trust agreement and any extension of it must be open to inspection on the same terms as the record of shareholders of the corporation is open to inspection [*see Corp. Code § 1600* (right to inspect record of shareholders)] by a shareholder, a holder of a voting trust certificate, or the agent of either [*Corp. Code § 706(b)*].

[4] Cause of Action for Breach or Enforcement

Because a valid voting trust agreement is a contract binding at execution, a cause of action for breach of contract by a trustee against a shareholder may lie if the shareholder fails to deliver the shares to the trust after a demand by the trustee to do so [*Boericke v. Weise (1945) 68 Cal. App. 2d 407, 420, 156 P.2d 781*]. Shareholders owning stock covered by a voting trust agreement also may enforce their rights under the agreement by a suit in equity as well as by an action for damages against another shareholder violating the agreement [*Bodkin v. Silveira (1942) 49 Cal. App. 2d 1, 13, 120 P.2d 910* (shareholder violates voting trust agreement granting option to purchase shares to other shareholders in trust by offering those shares to outsiders)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersMeetings & VotingVoting SharesVoting Trusts

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§ 166.29 Inspectors of Election

[1] In General

In advance of any shareholders' meeting, the board may appoint inspectors of election to act at the meeting and at any adjournment of the meeting. Either one or three inspectors may be appointed. If the board does not appoint inspectors of election or if the persons appointed fail to appear or refuse to act, the chairperson of the meeting may appoint inspectors of election or inspectors to replace those who fail to appear or refuse to act. On the request of a shareholder or shareholder's proxy, the chairperson is required to appoint inspectors of election. If inspectors are appointed at a meeting at the request of one or more shareholders or proxies, a majority of shares represented in person or by proxy determines whether one or three inspectors are appointed [*Corp. Code § 707(a)*].

[2] Duties

Inspectors of election determine the number of shares outstanding and the voting power of each, the shares represented at the meeting, the existence of a quorum, and the authenticity, validity, and effect of proxies [*Corp. Code § 707(b)*]. In addition, inspectors of election are empowered to [*Corp. Code § 707(b)*]:

- Receive votes, ballots, or consents [*see Clopton v. Chandler (1915) 27 Cal. App. 595, 600, 150 P. 1012* (inspectors of election as empowered to decide all questions as to acceptance or rejection of votes in their exercise of reasonable discretion)].

- Hear and determine all challenges and questions in any way arising in connection with the right to vote.

- Count and tabulate all votes or consents.

- Determine when the polls shall close [*see Clopton v. Chandler (1915) 27 Cal. App. 595, 600, 150 P. 1012* (inspectors empowered to keep polls open for any reasonable period of time that they deem necessary to enable shareholders to vote their shares)].

- Determine the result.
- Do those acts that are proper to conduct the election or vote with fairness to all shareholders.

The inspectors of election are required to perform their duties impartially, in good faith, to the best of their ability, and as expeditiously as is practical [*Corp. Code § 707(c)*]. For instance, an inspector of election fails to act impartially or fairly when he or she challenges the validity of a shareholder's vote in secret and weighs and determines the challenge in secret [*Kauffman v. Meyberg (1943) 59 Cal. App. 2d 730, 739-740, 140 P.2d 210]* .

[3] Effect of Actions

If there are three inspectors of election, the decision, act, or certificate of a majority is effective in all respects as the decision, act, or certificate of all. Furthermore, any report or certificate made by the inspectors of election is prima facie evidence of the facts stated therein [*Corp. Code § 707(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-166 California Forms of Pleading and Practice--Annotated § 166.30

§ 166.30 Election of Directors

[1] Candidates Winning Election

The power of electing directors of a corporation is lodged by statute in the hands of the shareholders [*Corp. Code §§ 301(a), 600(b)* (annual meeting at which shareholders elect directors); *Brewster v. Hartley (1869) 37 Cal. 15, 24* (corporation unable to give or take away right to elect directors)]. In any election of directors, those candidates are elected who receive the highest number of votes of the shares entitled to be voted for them up to the number of directors to be elected by the shares [*Corp. Code § 708(c)*]. However, a listed corporation that has eliminated cumulative voting may amend its articles or bylaws to require approval of the shareholders [*see Corp. Code § 153*] to elect a director in an uncontested election [*Corp. Code §§ 708(c), 708.5(b)*].

[2] Ballots

Unless the bylaws require election by ballot, the election of directors need not be by ballot. However, a shareholder may demand election by ballot at the shareholders' meeting before the voting begins [*Corp. Code § 708(e)*]. Additionally, ballots may be returned to shareholders to be corrected so that they may express the shareholders' true intentions, at least if the ballots are returned before the final votes are cast and before the votes are counted or the results announced [*Zierath Combination Drill Co. v. Croake (1913) 21 Cal. App. 222, 223-224, 131 P. 335]* .

Legal Topics:

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14-166 California Forms of Pleading and Practice--Annotated § 166.31

§ 166.31 Cumulative Voting

[1] Defined

Cumulative voting, in effect, permits a shareholder to cast for any candidate a number of votes greater than the number of votes that the shareholder normally is entitled to cast by giving the shareholder a number of votes equal to the number of directors to be elected multiplied by the number of votes to which his or her shares are normally entitled. The total number of votes the shareholder is entitled to cast under cumulative voting may be cast for one candidate or may be distributed among as many candidates as the shareholder thinks fit [*see Corp. Code § 708(a), (b)*]. For a discussion of the calculation of shares that are necessary to elect a specific number of directors, see Ballantine and Sterling, California Corporation Laws, Ch. 9, *Shareholders' Meetings and Voting,* § 176.03[3] (Matthew Bender).

Note, however, that listed corporations may eliminate cumulative voting in accordance with *Corp. Code § 301.5*. *Corp. Code § 301.5* is discussed in Ch. 167, *Corporations: Directors and Management* .

[2] When Permitted

A shareholder is entitled to cumulate votes only if (1) the candidate's name has or the candidates' names have been placed in nomination prior to the voting and (2) the shareholder gave notice of his or her intention to cumulate votes at the meeting prior to the vote. If any one shareholder gives notice of his or her intention to cumulate votes, all other shareholders may cumulate their votes for candidates in nomination [*Corp. Code § 708(b)*; *see also Corp. Code § 708(b)* (when cumulative voting permitted among shareholders of mutual water companies)].

[3] Applicability to Nominally Foreign Corporations

The right of a shareholder to cumulate his or her votes under *Corp. Code § 708(a), (b),* and *(c)* extends to nominally foreign corporations [*Corp. Code § 2115(b)*]. There are no constitutional obstacles to the application of the cumulative voting requirements of *Corp. Code § 708(a), (b),* and *(c)* when extended to nominally foreign corporations under *Corp. Code § 2115(b)*. Cumulative voting may be included in the qualifying company's articles of incorporation by judicial addendum, entitling all of the company's shareholders to cumulative voting, whether or not they are California residents [*Wilson v. Louisiana-Pacific Resources, Inc. (1982) 138 Cal. App. 3d 216, 222-231, 187 Cal. Rptr. 852]* . For a more

detailed discussion of nominally foreign corporations, see Ch. 160, *Corporations: Capacity* .

Legal Topics:

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14-166 California Forms of Pleading and Practice--Annotated § 166.32

§ 166.32 Supermajority Vote

[1] Defined

A "supermajority vote" is a requirement set forth in the articles or in a certificate of determination [*see Corp. Code § 401*] that specifies corporate action or actions be approved by a larger proportion of the outstanding shares than a majority, or by a larger proportion of the outstanding shares of a class or series than a majority [*Corp. Code § 710(b)*]. No supermajority vote that is subject to *Corp. Code § 710* may require a vote in excess of 662/3 percent of the outstanding shares or 662/3 percent of the outstanding shares of any class or series of those shares [*Corp. Code § 710(b)*].

[2] Applies to Nominally Foreign Corporations

The provisions of *Corp. Code 710* regarding supermajority votes apply to nominally foreign corporations [*Corp. Code § 2115(b)*]. *Corp. Code 2115* is discussed in Ch. 160, *Corporations: Capacity* .

[3] Adoption of Supermajority Requirement

An amendment of the articles or a certificate of determination that includes a supermajority vote requirement must be approved by at least as large a proportion of the outstanding shares, as defined in *Corp. Code § 152*, as is required pursuant to that amendment or certificate of determination for the approval of the specified corporation action or actions [*Corp. Code § 710(c)*]. *Corp. Code § 710* applies to a corporation with outstanding shares held of record by 100 or more persons (determined as provided in *Corp. Code § 605*) that files an amendment of articles or certificate of determination containing a supermajority vote provision on or after January 1, 1989 [*Corp. Code § 710(a)*].

However, *Corp. Code § 710* does not apply to a corporation that files an amendment of articles or certificate of determination on or after January 1, 1994, if, at the time of filing, the corporation has all of the following [*Corp. Code § 710(a)*]:

- Outstanding shares of more than one class or series of stock;

- No class of equity securities registered under Section 12(b) or 12(g) of the Securities Exchange Act of 1934; and

- Outstanding shares held of record by fewer than 300 persons determined as provided by *Corp. Code § 605*.

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§ 166.33 Action to Challenge Validity of Election or Appointment

[1] Availability in General

Any shareholder or any person claiming to have been denied the right to vote [*e.g.,* *Haah v. Kim (2009) 175 Cal. App. 4th 45, 55, 95 Cal. Rptr. 3d 515* (persons with standing include those who have entered into agreements to take shares in corporation but whose shares have not yet been issued)] may file an action in the superior court of the proper county [*see Corp. Code § 177* (proper county defined)] to determine the validity of the election or appointment of any director [*Corp. Code § 709(a)*; *see* §§ 166.84-166.87].

The action is equitable in nature [*see* *Braude v. Havenner (1974) 38 Cal. App. 3d 526, 113 Cal. Rptr. 386]* , and constitutes a special and summary proceeding [*see* *Elberta Oil Co. v. Superior Court (1925) 74 Cal. App. 114, 118-119, 239 P. 415]* . In the case of a shareholder, it is not necessary that he or she be entitled to vote at the election to be entitled to bring the action [*Fritz v. Superior Court (1936) 18 Cal. App. 2d 232, 234-235, 63 P.2d 872]* .

In addition, the action may be brought to uphold a corporate election or appointment as well as to challenge the validity of such an election or appointment [*Boericke v. Weise (1945) 68 Cal. App. 2d 407, 411, 156 P.2d 781]* .

However, it may not be brought or heard to challenge the election of a director after the director sued has been supplanted by others at a subsequent election [*see* *Fritz v. Superior Court (1936) 18 Cal. App. 2d 232, 236, 63 P.2d 872* ; *see* *Braude v. Havenner (1974) 38 Cal. App. 3d 526, 530, 113 Cal. Rptr. 386* (case not dismissed as moot when general public interest and future rights of parties involved and when issues likely to be litigated again)].

Because a proceeding under *Corp. Code § 709* is equitable in nature, equitable defenses, such as unclean hands, may be asserted [*DeGarmo v. Goldman (1942) 19 Cal. 2d 755, 765, 123 P.2d 1* (clean hands doctrine applicable in shareholder's action to remove directors); *Boericke v. Weise (1945) 68 Cal. App. 2d 407, 419, 156 P.2d 781* (denial of relief not proper when moving party comes to court with unclean hands with respect to transaction not before the court)].

[2] Application to Foreign Corporations

An action under *Corp. Code § 709(a)* may also be brought to try and determine the validity of any election or appointment of any director of a foreign corporation if the election was held or the appointment was made in California. In such a case, the plaintiff has the option to bring the action in the county in which the corporation has its principal office in California or in the county in which the election was held or the appointment was made [*Corp. Code § 709(a)*].

[3] Notice of Hearing; Service of Notice

On the filing of the complaint and before any other proceedings, the court must enter an order fixing a date for a hearing. The date must be within five days unless a later date is fixed on a showing of good cause. The court's order requires notice of the date set for a hearing and copy of the complaint to be served on the corporation, on the person whose purported election or appointment is questioned, and on any other person (other than the plaintiff) whom the plaintiff alleges to have been elected or appointed [*Corp. Code § 709(b)*].

Service of the notice and complaint may be made in the manner in which a summons is required to be served [*see Code Civ. Proc. §§ 413.10-417.40* (service of summons)] or, if the court directs, by registered mail. The court may make additional requirements as to notice as appear proper under the circumstances [*Corp. Code § 709(b)*].

Ordinarily, a corporation makes only a pro forma appearance at the hearing since the issue at the hearing is who controls the corporation and the corporation is not in a position to speak for itself [*American Center for Educ., Inc. v. Cavnar (1972) 26 Cal. App. 3d 26, 36-37, 102 Cal. Rptr. 575* (corporation not a necessary party on appeal from summary judgment finding election valid)].

[4] Relief Available

The court may determine at the hearing of the complaint the person entitled to the office of director or may order a new election to be held or appointment to be made. It may also determine the validity, effectiveness, and construction of voting agreements and voting trusts, the validity of the issuance of shares, and the right of persons to vote. Finally, it may direct such other relief as may be just and proper [*Corp. Code § 709(c)*]. This power includes the power to grant injunctive relief and damages [*Corp. Code § 709(c)*; *see Edward Sidebotham & Son v. Chandler (1960) 183 Cal. App. 2d 823, 831, 7 Cal. Rptr. 216* (holding that trial court acted properly in issuing injunction restraining director from seeking election for period of three years, rendering personal money judgment against removed director, and canceling corporation's uncashed salary checks to removed director); *Simpson v. Nielson (1926) 77 Cal. App. 297, 299, 246 P. 342* (permitting injunctive relief even when complaint failed to plead all elements essential to granting of injunctive relief)].

In determining a challenge to a corporate election, the court should consider all factors bearing on the validity of the election, including such things as the manner in which proxies were solicited and the sufficiency of the notice of the meeting, and give effective direction to the relief required. Thus, the scope of inquiry is not limited to technical and procedural questions involved in the corporate election [*Braude v. Havenner (1974) 38 Cal. App. 3d 526, 530, 533, 113 Cal. Rptr. 386]* .

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§ 166.34 Shares Voted on Behalf of Another

[1] Duty to Disclose Voting Record

Beginning January 1, 1990, every person possessing the power to vote shares of stock on behalf of another must maintain a record of the manner in which the shares were voted. The record must be maintained for a period of 12 consecutive months from the effective date of the vote [*Corp. Code § 711(d), (k)*]. On reasonable written request, the person possessing the power to vote shares of stock on behalf or another, or a designated agent, must disclose the voting record with respect to any matter involving a specific security or securities in accordance with the procedures discussed in *§ 166.34[7]* [*Corp. Code § 711(e)*].

[2] Alternative Compliance by Retirement Plan Investment Manager

In the event that a statute or regulation pursuant to the federal Employee Retirement Income Security Act of 1974 (*29 U.S.C. §§ 1001-1461*, hereinafter "ERISA"), imposes on investment managers (as defined in *Section 2(38) of ERISA* (*29 U.S.C. § 1002(38)*)) duties substantially the same as those set forth in *Corp. Code § 711*, compliance with those statutory and regulatory requirements by persons subject to *Corp. Code § 711* will be deemed to fulfill the obligations contained in *Corp. Code § 711* [*Corp. Code § 711(a)*].

[3] Purpose and Construction of Statute

Corp. Code § 711 was enacted pursuant to a legislative finding and declaration that many California residents are the legal and beneficial owners or otherwise the ultimate beneficiaries of shares of stock of domestic and foreign corporations, title to which may be held by a variety of intermediate owners, as defined in *Corp. Code § 711(b)*. The informed and active involvement of those beneficial owners and beneficiaries in holding legal owners and, through them, management accountable in their exercise of corporate power is essential to the interest of those beneficial owners and beneficiaries and to the economy and well-being of California [*Corp. Code § 711(a)*]. The purpose of *Corp. Code § 711* is to serve the public interest by ensuring that voting records are maintained and disclosed as provided in *Corp. Code § 711*. *Corp. Code § 711* must be liberally construed to achieve that purpose [*Corp. Code § 711(a)*].

[4] Who Is Entitled to Disclosure

The legislative declaration describes the protected class as California residents who are the legal and beneficial owners, and those who are otherwise the ultimate beneficiaries of, shares of stock that are voted by another, whether that stock is issued by a California corporation or a foreign corporation [*Corp. Code § 711(a)*]. For purposes of *Corp. Code § 711*, a person on whose behalf shares are voted includes, but is not limited to the following [*Corp. Code § 711(b)*]:

- A participant or beneficiary of an employee benefit plan with regard to shares held for the benefit of the participant or beneficiary [*but see § 166.34[2]*]; and

- A shareholder, beneficiary, or contract owner of any entity (or of any portfolio of an entity) as defined in Section 3(a) of the federal Investment Company Act of 1940 (*15 U.S.C. § 80a-3(a)*), as amended, to the extent the entity (or portfolio) holds the shares for which the record is requested.

[5] Persons Not Entitled to Disclosure

[a] Those Who Can Withdraw Without Penalty

For purposes of *Corp. Code § 711*, the phrase "a person on whose behalf shares are voted" does not include a person who possesses the right to terminate or withdraw from the shareholder, contract owner, participant, or beneficiary relationship with an entity (or of any portfolio of an entity) as defined in Section 3(a) of the federal Investment Company Act of 1940 (*15 U.S.C. § 80a-3(a)*), as amended. This exclusion does not apply in the event the right of termination or withdrawal cannot be exercised without automatic imposition of a tax penalty. The right to substitute a relationship with an entity or portfolio, the shares of which are voted by or subject to the direction of the investment advisor as defined in Section 2 of the federal Investment Company Act of 1940 (*15 U.S.C. § 80a-2(a)(20)*), as amended, or of the prior entity or portfolio, or an affiliate of the investment advisor, will not be deemed to be a right of termination or withdrawal within the meaning of *Corp. Code § 711(c)(1)* [*Corp. Code § 711(c)(1)*].

[b] Beneficiaries of Trusts Governed by Probate Code

Also excluded from the phrase "a person on whose behalf shares are voted" is a person entitled to receive information about a trust pursuant to *Prob. Code § 16061* [*Corp. Code § 711(c)(2)*]. *Prob. Code § 16061*, which requires a trustee to report regarding his or her actions at the request of a trust beneficiary, is discussed in Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* [*Prob. Code § 16061*]. For discussion of whether or not a particular trust is governed by *Prob. Code § 16061*, see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

[c] Beneficiaries of Certain Insurance Contracts

The phrase "a person on whose behalf shares are voted" does not include a beneficiary, participant, contract owner, or shareholder whose interest is funded through the general assets of a life insurance company authorized to conduct business in California [*Corp. Code § 711(c)(3)*].

[6] Proxies

Signing a proxy on another's behalf and forwarding it for disposition or receiving voting instructions does not constitute power to vote [*Corp. Code § 711(g)*]. However, a person forwarding proxies or receiving voting instructions must disclose the identity of the person having the power to vote the shares on reasonable written request by a person entitled to request a voting record under *Corp. Code § 711(c)* (*sic*) [*Corp. Code § 711(g)*].

[7] Procedures for Disclosure

[a] Verification of Requester's Identity

Except as set forth in *Corp. Code § 711(e)(2)* (discussed in *§ 166.34[7][b]*), disclosure must be made to the person making the request [*Corp. Code § 711(e)(1)*]. The person making the disclosure may require identification sufficient to identify the person making the request as a person on whose behalf the shares were voted. A request for identification, if made, must be reasonable, must be made promptly, and may include a request for the person's social security number [*Corp. Code § 711(e)(1)*].

[b] Voting Authority Derives From Third Person

If the person possessing the power to vote shares of stock on behalf of another holds that power pursuant to an agreement entered into with a party other than the person making the request for disclosure, the person maintaining and disclosing the record, may, instead, make the disclosure to that party. Disclosure to that party will be deemed compliance with the disclosure requirement of *Corp. Code § 711* [*Corp. Code § 711(e)(2)*]. If disclosure is made to that party instead of the person making the request, *Corp. Code § 711(i)* (discussed in *§ 166.34[7][e]*) does not apply. However, nothing in *Corp. Code § 711* prohibits that party and the person possessing the power to vote shares from entering into an agreement between themselves for the payment or assessment of a reasonable charge to defray the expenses of disclosing the record [*Corp. Code § 711(e)(2)*].

[c] Voting Power Held by Unit Investment Trust

If an entity subject to these disclosure requirements is organized as a unit investment trust as defined in Section 4(2) of the federal Investment Company Act of 1940 (*15 U.S.C. § 80a-4(2)*), the open-ended investment companies underlying the unit investment trust must, on evidence of a bona fide request for voting record information pursuant to *Corp. Code § 711(e)*, promptly make their proxy voting records available to the unit investment trust [*Corp. Code § 711(f)*].

[d] Voting Power Held by Two or More Persons

For purposes of *Corp. Code § 711*, if one or more persons has the power to vote shares on behalf of another, unless a governing instrument provides otherwise, the person or persons may designate an agent who must maintain and disclose the record in accordance with *Corp. Code § 711(b)* and *(c)* (*sic*) [*Corp. Code § 711(h)*].

[e] Charge for Disclosure

Except as provided in *Corp. Code § 711(e)(2)* (discussed in *§ 166.34[7][b]*), or as otherwise provided by law or a governing instrument, a person maintaining and disclosing a record pursuant to *Corp. Code § 711* may assess a reasonable charge to the requesting person in order to defray the expenses of disclosing the record in accordance with *Corp. Code § 711(e)* [*Corp. Code § 711(i)*]. Disclosure must be made within a reasonable time after payment is received [*Corp. Code § 711(i)*].

[8] Action for Enforcement; Attorney's Fees

On the petition of any person who successfully brings an action pursuant to or to enforce *Corp. Code § 711*, the court awards costs and reasonable attorney's fees if the court finds that the defendant willfully violated *Corp. Code § 711* [*Corp. Code § 711(j)*; *see § 166.88*].

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[Reserved]

§§ 166.35[Reserved]

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§ 166.50 California Legal Forms

For corporate forms relating to the subject matter of this chapter, see California Legal Forms, Ch. 8A, *Shareholders' Meetings, Voting, and Agreements* (Matthew Bender)

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§ 166.51 State Statutes

[1] Action Taken Without Meeting

When written consent of majority of shareholders needed for election of directors. *Corp. Code § 305(b)*

Written consents of shareholders. *Corp. Code § 603(a)*

When notice of shareholder approval by consent must be given 10 days prior to action authorized. *Corp. Code § 603(b)(1)*

When prompt notice of shareholder approval by consent required. *Corp. Code § 603(b)(2)*

When consent revocable; when revocation effective. *Corp. Code § 603(c)*

Directors elected by unanimous written consents. *Corp. Code § 603(d)*

Form of consent distributed to 10 or more shareholders of corporation with outstanding shares held of records by 100 or more shareholders. *Corp. Code § 604(a)*

Requirement that consent form providing opportunity to approve or disapprove each proposal presented also provide for abstention. *Corp. Code § 604(b)*

Shareholder's remedy for noncompliance with consent form provisions. *Corp. Code § 604(d)*

Shares deemed held of record. *Corp. Code § 605(a)*

[2] Action to Challenge Validity of Election or Appointment

Proper county defined. *Corp. Code § 177*

Who may bring action. *Corp. Code § 709(a)*

Notice of hearing; service of notice; hearing. *Corp. Code § 709(b)*

Available judicial relief in action. *Corp. Code § 709(c)*

[3] Annual Meeting Required

Proper county in which to bring application. *Corp. Code § 177*

Directors elected by shareholders at annual meeting. *Corp. Code § 301(a)*

Annual meeting of shareholders to elect directors as required. *Corp. Code § 600(b)*

Application by shareholder to superior court when corporation fails to hold annual meeting within specified period. *Corp. Code § 600(c)*

Shares at court-ordered annual shareholders' meeting constitute quorum. *Corp. Code § 600(c)*

Written notice to shareholders of meetings. *Corp. Code § 601*

Quorum defined. *Corp. Code § 602(a)*

Nominally foreign corporation defined. *Corp. Code § 2115(a)*

Corp. Code § 600(b) and *(c)* applicable to nominally foreign corporations. *Corp. Code § 2115(b)*

[4] Cumulative Voting

How shareholder votes cumulatively. *Corp. Code § 708(a)*

When cumulative voting permitted. *Corp. Code § 708(a), (b)*

Cumulative voting defined. *Corp. Code § 708(b)*

When shareholders in mutual water companies permitted to vote cumulatively. *Corp. Code § 708(d)*

Nominally foreign corporation defined. *Corp. Code § 2115(a)*

Corp. Code § 708(a), (b), and *(c)* are applicable to nominally foreign corporations. *Corp. Code § 2115(b)*

[5] Election of Directors

Power of electing directors in hands of shareholders. *Corp. Code §§ 301(a), 600(b)*

Candidates winning election. *Corp. Code § 708(c)*

Ballots not required; shareholder's demand for ballot. *Corp. Code § 708(e)*

[6] Inspectors of Election

Appointment of inspectors of election. *Corp. Code § 707(a)*

Duties of inspectors of election. *Corp. Code § 707(b), (c)*

Effect of actions by inspectors of election. *Corp. Code § 707(c)*

[7] Manner in Which Notice Given

Delivery of notice to shareholders; affidavits of mailing. *Corp. Code § 601(b)*

[8] Minutes of Meeting

Minutes of shareholders' meeting are prima facie evidence of due holding of meeting and matters stated in minutes. *Corp. Code § 314*

[9] Notice Required

Notice required of meeting requiring or permitting shareholder action; contents of notice. *Corp. Code § 601(a)*

Notice of adjourned meeting. *Corp. Code § 601(d)*

Proposals required to be stated in notice. *Corp. Code § 601(f)*

[10] Proxy

Proxy defined. *Corp. Code § 178*

Fact that proxy irrevocable is required to appear on certificate. *Corp. Code § 418(a)(3)*

Form of proxy distributed to 10 or more shareholders of corporation with outstanding shares held of record by 100 or more shareholders. *Corp. Code § 604(a)*

Requirement that proxy form providing opportunity to approve or disapprove each proposal presented also provide for abstention. *Corp. Code § 604(b)*

Form of proxy when directors to be elected. *Corp. Code § 604(c)*

Shareholder's remedy for noncompliance with proxy form provisions. *Corp. Code § 604(d)*

Right of every person entitled to vote shares to authorize another to act by proxy with respect to those shares. *Corp. Code § 705(a)*

Proxy executed in conformity with provisions of General Corporation Law presumed valid. *Corp. Code § 705(a)*

Proxy expires 11 months after date of proxy unless proxy provides otherwise. *Corp. Code § 705(b)*

Before expiration, proxy is revocable by person executing it prior to vote. *Corp. Code § 705(b)*

Manner in which proxy revoked. *Corp. Code § 705(b)*

Proxy is not revoked by death or incapacity of maker unless written notice of death or incapacity received by corporation before vote of proxy. *Corp. Code § 705(c)*

When proxy irrevocable. *Corp. Code § 705(e)*

Events revoking irrevocable proxy. *Corp. Code § 705(e)*

Revocation of irrevocable proxy by purchaser of shares without knowledge of irrevocability. *Corp. Code § 705(f)*

[11] Quorum

What constitutes a quorum; affirmative vote of majority of quorum constitutes act of shareholders. *Corp. Code § 602(a)*

Permitted action when quorum present and withdraws. *Corp. Code § 602(b)*

Permitted action when no quorum present. *Corp. Code § 602(c)*

[12] Reliance on Record Date in Giving Notice or to Vote

When record date may be fixed by board. *Corp. Code § 701(a)*

How record date determined when not set by board. *Corp. Code § 701(b)(1)*

Record date is applicable to any adjournment of meeting unless new date fixed or adjournment more than 45 days from original meeting. *Corp. Code § 701(c)*

Shareholders of record entitled to notice and to vote even though they transfer shares after record date. *Corp. Code § 701(d)*

[13] Reliance on Record Holder of Shares

Shares deemed held of record by each person identified as owner of shares on record of shareholders maintained by corporation. *Corp. Code § 605(a)*

Determination of shareholders of record when corporation's records not maintained in accordance with accepted practice. *Corp. Code § 605(a)(1)*

Shares held of record by corporations, partnerships, limited liability companies, trusts, or fiduciaries. *Corp. Code § 605(a)(2), (3)*

Shares held of record by two or more persons. *Corp. Code § 605(a)(4)*

Shares held of record in similar names. *Corp. Code § 605(a)(5)*

Shareholder of record of shares held subject to voting agreement or trust. *Corp. Code § 605(b)(1)*

Beneficial owners of record when form of holding shares on record is means of circumventing *Corp. Code § 605*. *Corp. Code § 605(b)(2)*

[14] Special Meetings

When special meeting may be called by five-percent shareholder. *Corp. Code § 305(c)*

Who may call special meetings. *Corp. Code § 600(d)*

[15] Supermajority Vote

Supermajority vote defined. *Corp. Code § 710(b)*

Requirements for imposing supermajority vote. *Corp. Code § 710(c)*

Corp. Code § 710 applicable to nominally foreign corporation. *Corp. Code § 2115(b)*

[16] Voting Agreement

When specific performance of obligation compelled. *Civ. Code §§ 3384-3395*

Close corporation defined. *Corp. Code § 158*

Fact that share subject to voting agreement is required to appear on certificate. *Corp. Code § 418(a)(3)*

Voting agreement between two or more shareholders of corporation. *Corp. Code § 706(a)*

Voting agreement valid as irrevocable proxy. *Corp. Code § 705(e)* subd (5)

Voting agreement between two or more shareholders of corporation. *Corp. Code § 706(a)*

Transfer of shares subject to voting agreement to third party with authority to vote shares. *Corp. Code § 706(a)*

Specific performance of voting agreement not denied. *Corp. Code § 706(a)*

Voting agreement not held invalid as failed voting trust. *Corp. Code § 706(c)*

[17] Voting by One Other Than Shareholder

Voting of shares held by fiduciary or trustee. *Corp. Code § 702(a)*

Voting of shares held in receiver's name. *Corp. Code § 702(b)*

Voting of pledged shares. *Corp. Code § 702(c)*

Voting of shares held in minor's name. *Corp. Code § 702(d)*

Voting of shares by attorney in fact authorized by power of attorney. *Corp. Code § 702(e)*

Voting of shares held by another corporation. *Corp. Code § 703(a)*

Shares owned by subsidiary corporation not entitled to vote. *Corp. Code § 703(b)*

Shares held by issuing corporation in fiduciary capacity and shares of issuing corporation held in fiduciary capacity are not usually entitled to vote; when those shares may vote. *Corp. Code § 703(c)*

Voting of shares held by two or more persons. *Corp. Code § 704*

Pledgor entitled to vote shares on demand and payment to pledgee. *Corp. Code § 705(d)*

[18] Voting Rights of Shareholders

Shareholder entitled to one vote for each share. *Corp. Code § 700(a)*

Manner of voting shares. *Corp. Code § 700(b)*

[19] Voting Rights of Shares

No distinction between classes or series of shares or holders thereof. *Corp. Code § 203*; *see Corp. Code § 203.5* (series within class)

One or more classes or series of outstanding shares are required to have full voting rights. *Corp. Code § 400(a)*

All shares of one class or series are required to have same voting rights as all other shares in class or series. *Corp. Code § 400(b)*

Each share entitled to one vote on each matter submitted for shareholder vote. *Corp. Code § 700(a)*

[20] Voting Trust Agreement

Shareholders permitted to transfer shares to trustee with authority to vote shares for given period. *Corp. Code § 706(b)*

Voting trust agreement valid for 10 years. *Corp. Code § 706(b)*

Extension of term of voting trust agreement. *Corp. Code § 706(b)*

Copies of voting trust agreement. *Corp. Code § 706(b)*

[21] Waiver of Notice

Written waiver of notice; waiver by attendance at meeting. *Corp. Code § 601(e)*

[22] Where Meetings Held

Shareholders' meetings held at place specified in bylaws or, if no place specified, at principal executive office of corporation. *Corp. Code § 600(a)*

[23] Written Request for Notice of Special Meeting

Proper county in which to bring application. *Corp. Code § 177*

If less than majority of directors are elected by shareholders as result of vacancies being filled by remaining directors, right of five-percent shareholder to give notice or apply for order compelling corporation to give notice of special shareholders' meeting to elect entire board. *Corp. Code § 305(a)*

Hearing on application. *Corp. Code §§ 305(c), 601(c)*

Persons entitled to call special shareholders' meetings. *Corp. Code § 600(d)*

Notice of special meeting at written request of person, other than board, entitled to call special meeting. *Corp. Code § 601(c)*

If corporation fails to give notice after written request, right of party requesting notice to give notice or apply for order compelling corporation to give notice. *Corp. Code § 601(c)*

Procedure for application under *Corp. Code § 601(c)* given by *Corp. Code § 305(c)*. *Corp. Code § 601(c)*

Record date of ownership of shares. *Corp. Code § 701*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsRecordkeepingBusiness & Corporate LawCorporationsShareholdersMeetings & VotingAnnual MeetingsBusiness & Corporate LawCorporationsShareholdersMeetings & VotingVoting SharesGeneral OverviewBusiness & Corporate LawCorporationsShareholdersMeetings & VotingVoting SharesDirector Elections & RemovalsBusiness & Corporate LawCorporationsShareholdersMeetings & VotingVoting SharesProxy Agreements

California Forms of Pleading and Practice--Annotated

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Volume 14: Corporations: Capacity thru Corporations: Dissolution and Winding Up-Chs. 160-173
Chapter 166 CORPORATIONS: SHAREHOLDERS' MEETINGS AND VOTING
PART III. RESEARCH GUIDE

14-166 California Forms of Pleading and Practice--Annotated § 166.52

§ 166.52 Decisions

[1] Action Taken Without Meeting

Written consent of shareholder controlling 50 percent of voting shares authorizes voluntary dissolution even though no notice of meeting to shareholders and no approval of action by all shareholders. *In re Security Fin. Co. (1957) 49 Cal. 2d 370, 381, 317 P.2d 1*

Corporation's failure to notice shareholders' meeting to authorize transfer of corporate assets does not invalidate transfer if requisite number of shareholders consent. *McDermott v. Bear Film Co. (1963) 219 Cal. App. 2d 607, 611, 33 Cal. Rptr. 486*

Consent of shareholders controlling majority of shares authorizes sale of certain corporate property without formal meeting. *Mannon v. Pesula (1943) 59 Cal. App. 2d 597, 604-605, 139 P.2d 336*

[2] Action to Challenge Validity of Election or Appointment

Action to uphold election was properly brought under *Corp. Code § 709*. *Shahin v. Wawro (1982) 136 Cal. App. 3d 749, 753, 186 Cal. Rptr. 446*

Case not dismissed as moot when general public interest and future rights of parties involved and when issues likely to be litigated again. *Braude v. Havenner (1974) 38 Cal. App. 3d 526, 530, 113 Cal. Rptr. 386*

Corporation generally makes only pro forma appearance at hearing. *American Center for Educ., Inc. v. Cavnar (1972) 26 Cal. App. 3d 26, 36-37, 102 Cal. Rptr. 575*

Corporation not a necessary party on appeal from summary judgment finding election valid. *American Center for Educ., Inc. v. Cavnar (1972) 26 Cal. App. 3d 26, 36-37, 102 Cal. Rptr. 575*

Because *Corp. Code § 709* is equitable in nature, equitable defenses applicable. *DeGarmo v. Goldman (1942) 19 Cal. 2d 755, 765, 123 P.2d 1* ; *Boericke v. Weise (1945) 68 Cal. App. 2d 407, 418, 156 P.2d 781*

Court does not abuse discretion in failing to order new election. *Garnier v. Garnier (1967) 248 Cal. App. 2d 255, 259, 56 Cal. Rptr. 247*

Expiration of voting trust agreement after entry of judgment does not render issue of its validity moot. *Olincy v. Merle Norman Cosmetics, Inc. (1962) 200 Cal. App. 2d 260, 276-277, 19 Cal. Rptr. 387*

Order removing director and barring removed director from reelection for specified period. *Olincy v. Merle Norman Cosmetics, Inc. (1962) 200 Cal. App. 2d 260, 275, 19 Cal. Rptr. 387*

Order removing director, restraining removed director from seeking reelection for three years, rendering personal money judgment against removed director, and canceling corporation's uncashed salary checks to removed director was proper. *Edward Sidebotham & Son v. Chandler (1960) 183 Cal. App. 2d 823, 831, 7 Cal. Rptr. 216*

Judgment rendered under *Corp. Code § 709* has effect of order on all persons to whom directed. *Boswell v. Mt. Jupiter Mut. Water Co. (1950) 97 Cal. App. 2d 437, 442, 217 P.2d 980*

Proceeding under *Corp. Code § 709* brought to uphold corporate election as well as to challenge election. *Boericke v. Weise (1945) 68 Cal. App. 2d 407, 411, 156 P.2d 781*

Corp. Code § 709 is remedial statute conferring on superior court power to determine in summary proceeding whether particular director or entire board properly elected or appointed. *Boericke v. Weise (1945) 68 Cal. App. 2d 407, 411, 156 P.2d 781*

Because *Corp. Code § 709* is an exclusive remedy, judgment in quo warranto is inappropriate. *Boericke v. Weise (1945) 68 Cal. App. 2d 407, 410, 156 P.2d 781*

Court considers validity of voting trust agreement as it affects question of validity of election. *Boericke v. Weise (1945) 68 Cal. App. 2d 407, 419, 156 P.2d 781*

Corp. Code § 709 proper when shareholder's right to vote obstructed. Kauffman v. *Meyberg (1943) 59 Cal. App. 2d 730, 742, 140 P.2d 210*

Test for determining whether election invalid. *Vanderlip v. Los Molinos Land Co. (1943) 56 Cal. App. 2d 747, 755, 133 P.2d 467*

No controversy for adjudication when challenged board supplanted by different board at subsequent annual election. *Fritz v. Superior Court (1936) 18 Cal. App. 2d 232, 236, 63 P.2d 872*

Because *Corp. Code § 709* is an exclusive remedy, declaratory relief action is improper. *Fritz v. Superior Court (1936) 18 Cal. App. 2d 232, 236, 63 P.2d 872*

Relief denied when no substantial compliance with procedures specified in statute. *Fritz v. Superior Court (1936) 18 Cal. App. 2d 232, 235, 63 P.2d 872*

Court determines right of persons to vote shares. *Smith v. California Thorn Cordage, Inc. (1933) 129 Cal. App. 93, 95, 18 P.2d 393*

Corp. Code § 709 is proper remedy when shareholder's right to vote is denied. *Los Angeles v. Owens River Canal Co. (1932) 120 Cal. App. 380, 386, 7 P.2d 1064*

Order that shareholders' meeting be held within 30 days, providing necessary procedure for meeting, and enjoining unelected de facto directors from acting as directors unless elected or appointed to office. *Los Angeles v. Owens River Canal Co. (1932) 120 Cal. App. 380, 384, 7 P.2d 1064*

Injunctive relief proper is auxiliary relief to proceeding under *Corp. Code § 709*, even though elements not pleaded. *Simpson v. Nielson (1926) 77 Cal. App. 297, 299, 246 P. 342*

Proceeding is special and summary in nature; legislative directions required to be followed in all essentials to secure right. *Elberta Oil Co. v. Superior Court (1925) 74 Cal. App. 114, 118-119, 239 P. 415*

Because *Corp. Code § 709* is an exclusive remedy, writ of prohibition is improper remedy. *Elberta Oil Co. v. Superior Court (1925) 74 Cal. App. 114, 118-119, 239 P. 415*

Proceeding required to be brought in county where corporation maintained principal California office and held challenged election. *Elberta Oil Co. v. Superior Court (1925) 74 Cal. App. 114, 121, 239 P. 415*

Superior court inquires into validity of election of directors. *Elberta Oil Co. v. Superior Court (1925) 74 Cal. App. 114, 118, 239 P. 415*

Mere irregularities do not render election invalid so long as substantial rights of shareholders not affected. *Clopton v. Chandler (1915) 27 Cal. App. 595, 600, 150 P. 1012*

Superior court hears allegations and proofs of parties with respect to validity of election of directors. *Clopton v. Chandler (1915) 27 Cal. App. 595, 602, 150 P. 1012*

[3] Annual Meeting Required

Court issues appropriate orders, such as order directing annual meeting to be held for purpose of adjournment only. *Colburn Biological Inst. v. DeBolt (1936) 6 Cal. 2d 631, 639, 59 P.2d 108*

Annual meeting necessary to prevent directors from perpetuating themselves in office. *Burnett v. Banks (1955) 130 Cal. App. 2d 631, 634, 279 P.2d 579*

Court properly directs election of directors under court auspices when it appears that an election will not be called because directors will fail to call it or because directors will not conduct full and fair election. *Burnett v. Banks (1955) 130 Cal. App. 2d 631, 635, 279 P.2d 579*

Withdrawal of opponents of court-ordered election to constitute less than quorum fails to invalidate election. *Burnett v. Banks (1955) 130 Cal. App. 2d 631, 637, 279 P.2d 579*

Right of record shareholders to compel holding of annual meeting and election of directors. *Los Angeles v. Owens River Canal Co. (1932) 120 Cal. App. 380, 385, 7 P.2d 1064*

[4] Cumulative Voting

Cumulative voting is means of protecting minority shareholders by assuring their representation on board to extent

roughly proportionate to minority's size. *CTS Corp. v. Dynamics Corp. of Am. (1987) 481 U.S. 69, 86 n.11, 107 S. Ct. 1637, 95 L. Ed. 2d 67* (upholding Indiana protective statute relating to acquisition of "control shares")

Shareholder entitled to cumulate votes even when his or her decision to do so results from influence exerted by corporate officers and managers wishing to retain positions within corporation. *Clopton v. Chandler (1915) 27 Cal. App. 595, 601, 150 P. 1012*

[5] Election of Directors

Corporation unable to give or take away right to elect directors. *Brewster v. Hartley (1869) 37 Cal. 15, 24*

Correction of ballots allowed for purpose of affording all shareholders greatest liberty to express their wishes. *Zierath Combination Drill Co. v. Croake (1913) 21 Cal. App. 222, 223-224, 131 P. 335*

[6] Inspectors of Election

Self-constituted inspector of election acts illegally in making secret challenges and in conducting shareholders' meetings without quorum. *Kauffman v. Meyberg (1943) 59 Cal. App. 2d 730, 739-740, 140 P.2d 210*

Inspectors of election ascertain victors in election of directors. *Kauffman v. Meyberg (1943) 59 Cal. App. 2d 730, 740, 140 P.2d 210*

When ballot is questioned, shareholder is entitled to be heard and inspector of election prohibited from making challenge and determination as to ballot in secret. *Kauffman v. Meyberg (1943) 59 Cal. App. 2d 730, 740, 140 P.2d 210*

When shareholder's ballot not challenged, inspector's only remaining duty is counting ballots and returning number of votes received by nominees. *Kauffman v. Meyberg (1943) 59 Cal. App. 2d 730, 740, 140 P.2d 210*

Inspectors of election empowered to decide all questions as to acceptance or rejection of votes in their exercise of reasonable discretion. *Clopton v. Chandler (1915) 27 Cal. App. 595, 600, 150 P. 1012*

Inspectors empowered to keep polls open for reasonable time as they deem necessary to enable shareholders to vote their shares. *Clopton v. Chandler (1915) 27 Cal. App. 595, 600, 150 P. 1012*

[7] Manner in Which Notice Given

Secretary's affidavit of mailing of notice sufficient to establish mailing when supported by secretary's direct testimony that affidavit correctly states facts. *Dolbear v. Wilkinson (1916) 172 Cal. 366, 370, 156 P. 488*

[8] Minutes of Meeting

Obligation of shareholder attacking regularity of election of directors to rebut presumption of regularity and correctness created by minutes of meeting. *Shamel v. Lite Prod. Sales, Inc. (1955) 131 Cal. App. 2d 33, 36, 279 P.2d 1020* , questioned on other grounds in *Columbia Eng'r Co. v. Joiner (1965) 231 Cal. App. 2d 837, 848-849, 42 Cal. Rptr. 241*

[9] Notice Required

[a] Generally

Notice of meeting includes notice of any unusual business to be transacted. *Dolbear v. Wilkinson (1916) 172 Cal. 366, 369, 156 P. 488*

Annual meeting not sufficiently noticed when time of meeting not specified. *San Buenaventura Mfg. Co. v. Vassault (1875) 50 Cal. 534, 537*

Action of corporation not invalidated even though corporation failed to notify shareholders if requisite number of shareholders consent. *McDermott v. Bear Film Co. (1963) 219 Cal. App. 2d 607, 611, 33 Cal. Rptr. 486*

Meeting invalid when notice failed to specify hour of meeting. *Grant v. Hartman Ranch Co. (1961) 193 Cal. App. 2d 497, 501, 14 Cal. Rptr. 531*

Invalidity of special meeting of shareholders when not all shareholders in good standing notified. *Boswell v. Mt. Jupiter Mut. Water Co. (1950) 97 Cal. App. 2d 437, 441, 217 P.2d 980*

Substantial compliance with notice requirement met only when notice specific as to time, place, and purpose of meeting and when all shareholders receive seasonable and actual notice. *Boericke v. Weise (1945) 68 Cal. App. 2d 407, 414-415, 156 P.2d 781*

[b] Special Meetings

Notice stating that purpose of special meeting to consider and determine questions relating to property, management, and policy of corporation is sufficient to inform shareholders of possible change in officers and directors. *Lawrence v. I.N. Parlier Estate Co. (1940) 15 Cal. 2d 220, 233-234, 100 P.2d 765*

Notice stating that purpose of special meeting to transact any business as comes before meeting is insufficient. *Dolbear v. Wilkinson (1916) 172 Cal. 366, 369, 156 P. 488*

Notice of special meeting insufficient because it did not state object of meeting, which was to elect directors. *Dolbear v. Wilkinson (1916) 172 Cal. 366, 369, 156 P. 488*

Special meetings of such importance that they are subject to express statutory regulation. *Beatty v. Rianda (1917) 34 Cal. App. 180, 182, 167 P. 185*

Notice of adjourned shareholders' meeting is required when adjournment resolution not sufficiently specific as to time and place of next meeting. *Spencer v. Older (1982) 133 Cal. App. 3d 95, 101-102, 183 Cal. Rptr. 722*

[10] Proxy

Power of proxyholder to vote shares not suspended when shareholder appears at meeting but does not elect to vote shares held by proxy or does not object to proxy's voting on previous matters at meeting. *Meyberg v. Superior Court (1942) 19 Cal. 2d 336, 344, 121 P.2d 685*

No particular words are required to create proxy. *Smith v. San Francisco & N. P. R. Co., (1897) 115 Cal. 584, 598, 47 P. 582*

Corporation not permitted to restrict right of shareholder to choose proxy to vote his or her shares. *People's Bank v. Superior Court (1894) 104 Cal. 649, 652-653, 38 P. 452*

Proxy expenses are payable by corporation if authorized by board of directors or shareholders and if related to policy issue, not personnel issue; judicial review of payment authorization is limited to whether expenses were reasonable and not ultra vires. *Johnson v. Tago, Inc. (1986) 188 Cal. App. 3d 507, 514, 233 Cal. Rptr. 503*

Court's authority under *Corp. Code § 600(c)* extends only to mechanical aspects of annual shareholders meeting and as not broad enough to support order that proxy expenses be paid from corporate treasury. *Johnson v. Tago, Inc. (1986) 188 Cal. App. 3d 507, 515-517, 233 Cal. Rptr. 503*

Corp. Code § 600(c) does not authorize order that shareholder/officers' attorney's fees in connection with proxy fight be paid from corporate treasury. *Johnson v. Tago, Inc. (1986) 188 Cal. App. 3d 507, 517, 233 Cal. Rptr. 503*

Even if award of attorney's fees in connection with proxy fight and election or ouster of officers and directors could be sustained under substantial benefit theory, award in connection with preliminary injunction was premature. *Johnson v. Tago, Inc. (1986) 188 Cal. App. 3d 507, 518, 233 Cal. Rptr. 503*

Automobile club not permitted to request applicants for membership to execute both application form and attached proxy in favor of corporate management due to inference that applicant must sign both as condition of membership. *Braude v. Havenner (1974) 38 Cal. App. 3d 526, 531, 113 Cal. Rptr. 386*

Proxies valid when proxy states it creates voting agency and when corporation's representatives disclose that proxy not necessary as condition of membership in automobile club. *Braude v. Havenner (1974) 38 Cal. App. 3d 526, 532, 113 Cal. Rptr. 386*

Proxy recognized when letter acknowledges right of person not a shareholder to vote shares. *Shamel v. Lite Prod. Sales, Inc. (1955) 131 Cal. App. 2d 33, 36-37, 279 P.2d 1020 , overruled on other grounds in Columbia Eng'r Co. v. Joiner (1965) 231 Cal. App. 2d 837, 848-849, 42 Cal. Rptr. 241*

Powers of proxyholder suspended when shareholder appears in person to vote shares. *Thomsen v. Yankee Mariner Corp. (1951) 106 Cal. App. 2d 454, 456-457, 235 P.2d 234*

When voting agreement with respect to promotional stock held in escrow specifies no period of duration after release of shares to several owners, voting agreement creates proxy expiring after 11 months. *Dougherty v. Cross (1944) 65 Cal. App. 2d 687, 703, 151 P.2d 654* (voting agreement rendered inoperative when shares released from escrow and no understanding that voting agreement to remain in force after release)

Written notice of revocation of proxy by shareholder. *Simpson v. Nielson (1926) 77 Cal. App. 297, 300, 246 P. 342*

[11] Proxy Solicitations

Shareholders' proxy solicitation and fact that it failed to comply with federal registration requirements [*see 15 U.S.C. §§ 78m(d), 78n(a)*] does not constitute predicate act of either securities fraud or mail fraud sufficient to state civil cause of action under Racketeer Influenced and Corrupt Organizations Act ("RICO," *18 U.S.C. § 1961 et seq.*) when solicitation caused no pecuniary loss. *First Pacific Bancorp, Inc. v. BRO (9th Cir. 1988) 847 F.2d 542, 546-547*

[12] Quorum

Appointment of inspectors of election by less than quorum of shareholders invalid since only permitted action to adjourn. *Kauffman v. Meyberg (1943) 59 Cal. App. 2d 730, 740, 140 P.2d 210*

[13] Reliance on Record Date in Giving Notice or to Vote

Shareholder not appearing on books entitled to seek aid of court to secure statutory review of election or retransfer of shares to shareholder. *Caminetti v. Pacific Mut. Life Ins. Co. (1943) 22 Cal. 2d 344, 385, 139 P.2d 908*

Corporation's record of shares not conclusive as to shareholder's right to vote irrespective of method by which ownership of shares kept in corporation's books. *Lawrence v. I.N. Parlier Estate Co. (1940) 15 Cal. 2d 220, 227-228, 100 P.2d 765*

[14] Special Meetings

Special meeting called by individual who is both president and substantial shareholder in corporation. *Boericke v. Weise (1945) 68 Cal. App. 2d 407, 413, 156 P.2d 781*

Right to demand special shareholders' meeting is dependent on right to vote at meeting. *Dedrick v. California Whaling Co. (1936) 16 Cal. App. 2d 284, 286, 60 P.2d 551*

[15] Voting Agreement

Voting agreement found when parties to determine by majority vote how shares held by them to be voted as block. *Smith v. San Francisco & N. P. R. Co. (1897) 115 Cal. 584, 598, 47 P. 582*

Agreement that voting arrangement to continue while shares in escrow terminates when shares come out of escrow and stand in name of each of shareholders. *Dougherty v. Cross (1944) 65 Cal. App. 2d 687, 701-703, 151 P.2d 654*

[16] Voting by One Other Than Shareholder

Legal representative of shareholder's estate has authority and power of shareholder during period of administration. *Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 17, 108 P.2d 906*

Pledgor and pledgee permitted to agree to retention of right to vote in pledgor after transfer of shares. *Lawrence v. I.N. Parlier Estate Co. (1940) 15 Cal. 2d 220, 229, 100 P.2d 765*

Power of cotrustees of inter vivos trust to vote shares of stock held in trust is governed by *Corp. Code § 704*, providing that act of majority of cotrustees is binding, rather than *Prob. Code § 15620*, providing that cotrustees may exercise their powers by unanimous action only. *Edwards v. Edwards (1998) 61 Cal. App. 4th 599, 602-603, 71 Cal. Rptr. 2d 653*

Executor or administrator votes shares standing in name of decedent shareholder at death of shareholder. *Beraksa v. Stardust Records, Inc. (1963) 215 Cal. App. 2d 708, 714, 30 Cal. Rptr. 504*

Pledgor votes record owner of shares if shares not registered to pledgee. *Beraksa v. Stardust Records, Inc. (1963) 215 Cal. App. 2d 708, 714, 30 Cal. Rptr. 504*

Trustee's authority to vote shares based on trustee's legal ownership of shares on corporation's books. *Dougherty v. Cross (1944) 65 Cal. App. 2d 687, 701, 151 P.2d 654*

Shares distributed at termination of testamentary trust not required to be distributed jointly to beneficiaries or to be voted jointly after distribution. *Estate of Rey (1939) 31 Cal. App. 2d 648, 652, 88 P.2d 718*

No formal transfer of shares required for executor or administrator to vote decedent shareholder's shares. *Estate of Barreiro (1932) 125 Cal. App. 752, 758, 14 P.2d 786*

Pledgee authorized to vote shares when pledgor fails to appear in person or by proxy at shareholders' meeting. *Michaels v. Pacific Soft Water Laundry (1930) 104 Cal. App. 366, 367-368, 286 P. 172*

[17] Voting Rights of Shareholders

Unlawful interference with shareholder's right to vote his or her shares enjoined by court. *Meyberg v. Superior Court (1942) 19 Cal. 2d 336, 341-342, 121 P.2d 685*

Shareholder not precluded from voting at shareholders' meeting because of individual interest adverse to another shareholder. *Middleton v. Arastraville Mining Co. (1905) 146 Cal. 219, 224, 79 P. 889*

Transferor of shares eligible to vote in corporate election when transfer not entered in corporation's books. *People v. Robinson (1883) 64 Cal. 373, 375, 1 P. 156*

Shareholder not prevented from voting in election of directors by corporate bylaws, resolutions, or contracts abridging that right. *Brewster v. Hartley (1869) 37 Cal. 15, 24*

In absence of article or bylaw providing for fractional voting, shareholder not permitted to split whole shares into multiple fractional votes. *Garnier v. Garnier (1967) 248 Cal. App. 2d 255, 259, 56 Cal. Rptr. 247*

Transferor eligible to vote shares when certificate endorsed to transferee to take effect at transferor's death. *Wisler v. Wisler (1961) 198 Cal. App. 2d 511, 514, 17 Cal. Rptr. 813*

Shareholder agreeing to sell shares as shareholder of record entitled to vote those shares when sale not consummated. *Edward Sidebotham & Son v. Chandler (1960) 183 Cal. App. 2d 823, 828, 7 Cal. Rptr. 216* ; *Thomsen v. Yankee Mariner Corp. (1951) 106 Cal. App. 2d 454, 456, 235 P.2d 234*

Each owner of stock entitled to one vote for each share of stock held. *Pritchard v. Crestline Village Mut. Serv. Co. (1949) 95 Cal. App. 2d 151, 158, 212 P.2d 526*

Shareholder entitled to vote even though he or she not yet issued certificates evidencing his or her interest. *Kauffman v. Meyberg (1943) 59 Cal. App. 2d 730, 739, 140 P.2d 210*

Right of shareholder to vote shares is dependent on ownership of shares as disclosed by corporation's books; each shareholder votes shares standing of record in his or her name. *Los Angeles v. Owens River Canal Co. (1932) 120 Cal. App. 380, 386, 7 P.2d 1064*

[18] Voting Trust Agreement

Trustees subject to removal whenever private interests in conflict with trust duties. *Moore v. Bowes (1937) 8 Cal. 2d*

162, 165, 64 P.2d 423

Voting trust agreement in nature of contract binding at time of execution. *Boericke v. Weise (1945) 68 Cal. App. 2d 407, 420, 156 P.2d 781*

Cause of action for breach of contract arises when shareholder fails to deliver shares to trust after demand by trustee. *Boericke v. Weise (1945) 68 Cal. App. 2d 407, 420, 156 P.2d 781*

Trustee bound to comply with restrictions contained in voting trust agreement in casting ballots at shareholders' meeting. *Bryson v. Bryson (1923) 62 Cal. App. 170, 175-176, 216 P. 391*

Transfer of shares during period of voting trust agreement does not free shares from terms of agreement. *Bodkin v. Silveira (1942) 49 Cal. App. 2d 1, 10, 120 P.2d 910*

Shareholders permitted to enforce rights under voting trust agreement by suit in equity as well as by action for damages. *Bodkin v. Silveira (1942) 49 Cal. App. 2d 1, 13, 120 P.2d 910*

[19] Waiver of Notice

Shareholders' attendance is waiver of objections to regularity of call or place of meeting. *Guaranty Loan Co. v. Fontanel (1920) 183 Cal. 1, 9, 190 P. 177*

Attendance does not waive right to object to matter taken up at meeting and not mentioned in notice of meeting. *Dolbear v. Wilkinson (1916) 172 Cal. 366, 370, 156 P. 488*

Attendance and participation of shareholder at meeting does not constitute waiver of notice when shareholder objects at beginning of meeting to lack of notice pursuant to *Corp. Code § 601(e)*. *Spencer v. Older (1982) 133 Cal. App. 3d 95, 102-103, 183 Cal. Rptr. 722*

Waiver of notice of irregularly called meeting when shareholder attends and nominates and votes for directors. *Shamel v. Lite Prod. Sales, Inc. (1955) 131 Cal. App. 2d 33, 36, 279 P.2d 1020 , overruled on other grounds in Columbia Eng'r Co. v. Joiner (1965) 231 Cal. App. 2d 837, 848-849, 42 Cal. Rptr. 241*

Notice requirement for benefit of shareholder; necessity of protecting shareholder does not arise when shareholder present and acting at meeting. *Guaranty Loan Co. v. Treadwell (1921) 53 Cal. App. 538, 542, 200 P. 653*

[20] Written Request for Notice of Special Meeting

Written request may be either mailed or personally delivered; corporate officer to whom request addressed is not required to be named. *Humboldt Oil Co. v. Hoagland (1924) 70 Cal. App. 454, 457-458, 233 P. 404*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGoverning Documents & ProceduresRecords & Inspection RightsRecordkeepingBusiness & Corporate LawCorporationsShareholdersMeetings & VotingAnnual MeetingsBusiness & Corporate LawCorporationsShareholdersMeetings & VotingVoting SharesGeneral OverviewBusiness & Corporate LawCorporationsShareholdersMeetings & VotingVoting SharesDirector Elections & RemovalsCivil ProcedureEquityRelief

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PART III. RESEARCH GUIDE

14-166 California Forms of Pleading and Practice--Annotated § 166.53

§ 166.53 Law Reviews

Note, *The Case for Heightened Scrutiny in Defense of the Shareholders' Franchise Right, 44 Stan. L. Rev. 129 (1991)*

Bebchuk, *A Framework for Analyzing Legal Policy Towards Proxy Contests, 78 Cal. L. Rev. 1073 (1990)*

Berger, *Protection of Shareholder Interests in California Closely Held and Statutory Close Corporations: A Practitioner's Guide, 20 Pac. L.J. 1127 (1989)*

Note, *The Standstill Agreement: A Case of Illegal Vote Selling and a Breach of Fiduciary Duty, 93 Yale L.J. 1093 (1984)*

Schenk and Schulman, *Shareholders' Voting and Appraisal Rights in Corporate Acquisition Transactions, 38 Bus. Law. 1529 (1983)*

Kruger, *Corporate Pooling Agreements and Restriction-of-Directors Agreements, 10 Anglo-Am. L. Rev. 73 (1981)*

Wang, *Pooling Agreements Under the New California General Corporation Law, 23 UCLA L Rev 1171 (1976)*

Kirshman, *The Strategy of Corporate Proxy Contests--An Overview, 48 LA Bar B 249* (1973)

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawClosely Held CorporationsGeneral OverviewBusiness & Corporate LawCorporationsShareholdersMeetings & VotingVoting SharesProxy AgreementsContracts LawTypes of ContractsPooling Agreements

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14-166 California Forms of Pleading and Practice--Annotated § 166.54

§ 166.54 Text References

Ballantine and Sterling, California Corporation Laws, Ch. 9, *Shareholders' Meetings and Voting* (Matthew Bender).

Witkin, Summary of California Law, Vol. 9, *Corporations, §§ 150, 151, 155-165* (10th ed, 2005)

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14-166 California Forms of Pleading and Practice--Annotated §§ 166.55-166.69

[Reserved]

§§ 166.55[Reserved]

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PART IV. FORMS

14-166 California Forms of Pleading and Practice--Annotated § 166.70

§ 166.70 Shareholder's Application for Summary Order Directing Corporation to Hold Annual Shareholders' Meeting [Corp. Code § 600(c)]

[1] FORM Shareholder's Application for Summary Order Directing Corporation to Hold Annual Shareholders' Meeting [Corp. Code § 600(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Applicant,	)	
vs.	)	NO. _____
_____ [*name of corporation*],	)	APPLICATION FOR ORDER DIRECTING A
Respondent.	)	CORPORATION TO HOLD ANNUAL SHARE-
	)	HOLDERS' MEETING
	)	

Applicant alleges:

1. Applicant, _____ [*name*], is the owner of record of _____ [*number*] shares of _____ [*describe, e.g.*, Class A common] stock of respondent corporation.

2. Respondent is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of _____ [*state of incorporation*] _____ [with its principal place of business in _____ (*city*), _____County, California *or*, doing business in the State of California *or allege other capacity and residence, as appropriate; see §§ 160.50-160.53*].

3. Respondent has failed to hold, and continues to fail to hold, an annual shareholders' meeting even though _____ [60 days have passed since the date designated for that meeting *or* no date has been designated

in respondent's bylaws for the holding of an annual shareholders' meeting and _____ (15 months have passed since respondent was organized *or* 15 months have passed since respondent's last annual meeting)].

WHEREFORE, applicant prays:

1. That this court issue an order after notice to respondent is given directing respondent to hold an annual shareholders' meeting.

2. That this court direct the time and place of such meeting in the order;

[3. That this court direct the record date for determining shareholders entitled to vote at such meeting in the order;]

[4. That this court direct the form of notice of such meeting in the order;]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Applicant

VERIFICATION

I, _____ [*name*], am the applicant in the above-entitled action. I have read the foregoing application and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
[_____ (*date*)]

_____ [*signature*]

CAUTION:

A supporting memorandum must accompany a motion, other than a motion listed in *Cal. Rules of Ct., Rule 3.1114*, in law and motion proceedings as defined in *Cal. Rules of Ct., Rule 3.1103(a)* [*Cal. Rules of Ct., Rule 3.1113(a)*; for discussion, *see* Ch. 417, *Points and Authorities*]. Although it is not clear that the definition in Rule 3.1103(a) extends to this form of application, it is better practice to support the application with a memorandum. If this is considered a law and motion proceeding within the meaning of Rule 3.1103(a), the format requirements of *Cal. Rules of Ct., Rule 3.1110* will apply to the notice of motion. For discussion and forms, see Ch. 372, *Motions and Orders* .

[2] Use of Form

This application is for use by a shareholder seeking an order to compel a corporation to hold an annual shareholders' meeting. A shareholder may bring this action when a corporation fails to hold an annual meeting for a period of 60 days

after the date designated for the meeting or, if no date has been designated, 15 months after the organization of the corporation or 15 months after the corporation's last annual meeting [*Corp. Code § 600(c)*]. The shareholder must give notice of the hearing on the application to the respondent corporation [*see §§ 166.70[3], 166.71*].

[3] Procedure in Obtaining Summary Order

Other than authorizing the superior court to order summarily a meeting to be held on the application of any shareholder after notice to the corporation giving it an opportunity to be heard [*see Corp. Code § 600(c)*], the Corporations Code does not specify the precise procedures the shareholder should follow in obtaining the order.

To give the corporation an opportunity to be heard, it would appear that the safest procedure to follow is to file the application and serve on the corporation an endorsed copy of the application and a notice of motion specifying the time for the hearing on the application [*see Code Civ. Proc. §§ 1010-1013* (requisites of written notice and service of notice)]. The noticed motion procedure may, in fact, be required regardless of whether the procedure in *Corp. Code § 600(c)* is considered a proceeding or an action, since the definitions of motions and orders provided in civil actions apply to special proceedings [*see Code Civ. Proc. § 1064*], and an application for an order is a motion in a civil action [*see Code Civ. Proc. § 1003*].

The time requirements for the notice of the hearing on the application may be the minimum of 15 days, plus additional time when service is by mail, fax, or overnight delivery as provided in Civ. Code § 1005, or may be greater as required by local rules of court.

The application should be accompanied by a supporting memorandum [*see Cal. Rules of Ct., Rules 3.1103(a), 3.1113(a)*].

[4] Verification

Verification of this application is not required [*see Corp. Code § 600(c)*]. However, a verified application could be substituted for an affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) if the noticed motion procedure is followed as suggested in *§ 166.70[3]*. If local practice permits an ex parte proceeding in which a hearing is not required unless the corporation requests one (*Corp. Code § 600(c)* only requires that the corporation be given an opportunity to be heard), the application should be verified or be accompanied by an affidavit (or declaration).

[5] Jurisdiction

A shareholder's application for an order compelling a corporation to hold an annual shareholders' meeting must be brought in a superior court and is not a limited civil case [*Code Civ. Proc. § 85*; *Corp. Code § 600(c)*].

[6] Venue

A shareholder's application for an order compelling a corporation to hold an annual shareholders' meeting must be brought in a proper county [*Corp. Code § 600(c)*]. A proper county is that county where the corporation's principal executive office is located or, if the corporation's principal executive office is not located in California or if the corporation has no principal executive office, Sacramento County [*Corp. Code § 177*].

[7] California Legal Forms

For corporate forms relating to annual meetings of shareholders, see California Legal Forms, Ch. 8A, *Shareholders' Meetings, Voting, and Agreements* (Matthew Bender)

[8] State Statutes

Application for order as motion. *Code Civ. Proc. § 1003*

Time requirements for notice of motion. *Code Civ. Proc. § 1005*

Motion as deemed made on serving and filing of notice. *Code Civ. Proc. § 1005.5*

Requirements of written notice; papers to accompany written notice. *Code Civ. Proc. § 1010*

Notice to corporation of hearing on shareholder's application for order compelling corporation to hold annual shareholders' meeting. *Corp. Code § 600(c)*

[9] Text References

Ballantine and Sterling, California Corporations Laws, Ch. 9, *Shareholders' Meetings and Voting*, § 163.02 (Matthew Bender)

Witkin, California Procedure, Vol. 6, *Proceedings Without Trial*, §§ 6-33 (4th ed. 1997)

Witkin, Summary of California Law, Vol. 9, *Corporations, §§ 150, 151, 155, 156* (10th ed. 2005)

Marsh, California Corporation Law and Practice, Vol. 17, Ch. XI, *Shareholders' Meetings and Consents*, § 11.6

[10] Cross References

For discussion, procedural checklists, and forms for use in preparing motions and orders, see Ch. 372, *Motions and Orders*

For discussion, procedural checklists, and forms relating to the service of summons and papers, see Ch. 518, *Service of Summons and Papers*

For discussion and forms relating to the subject of venue, see Ch. 571, *Venue*

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PART IV. FORMS

14-166 California Forms of Pleading and Practice--Annotated § 166.71

§ 166.71 Notice of Hearing on Application for Order Directing Corporation to Hold Annual Shareholders' Meeting [Corp. Code § 600(c)]

[1] FORM Notice of Hearing on Application for Order Directing Corporation to Hold Annual Shareholders' Meeting [Corp. Code § 600(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF HEARING ON APPLICATION FOR
Applicant,	)	ORDER COMPELLING SHAREHOLDERS' MEET-
vs.	)	ING
_____ [*name of corporation*],	)	Date: _____
Respondent.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*name of corporation*] and its attorney:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, [located at _____ (*address*),] applicant will apply for an order directing respondent to hold an annual meeting of shareholders, as well as any other orders as may be appropriate, including, without limitation, designating the time and place of such meeting, the record date for determination of shareholders entitled to vote at such meeting, and the form of notice of such meeting. The application will be made on

the ground that respondent failed to hold an annual shareholders' meeting for a period of at least _____ [60 days after the date designated for such meeting *or* 15 months after the organization of the respondent *or* 15 months after the respondent's last annual meeting].

The application will be based on this notice of hearing, on the application [, on the affidavit (or declaration) of _____ (*name*)], and the memorandum of points and authorities served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing on the application.
Dated:_____.

_____ [*signature*]

Attorney for Applicant

[2] Use of Form

This form is a notice of motion for use by a shareholder to notify a corporation of a hearing on that shareholder's application for an order compelling the corporation to hold an annual shareholder's meeting. Such an order may be granted on a shareholder's application after notice to the corporation giving it an opportunity to be heard [*Corp. Code § 600(c)*].

The notice should be served on the corporation along with the application and then filed with the clerk of the superior court, accompanied by a proof of service [*see Code Civ. Proc. §§ 1010, 1013*]. If the application has been verified, it would not appear that a separate affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) need be filed. Sixteen court days' notice, plus additional time if service is by mail, fax, express mail, or overnight delivery, must be given to the corporation [*see Code Civ. Proc. § 1005(b)*], but it may be a longer period if required by local court rule.

[3] Cross References

For a related form, *see § 166.70*.

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14-166 California Forms of Pleading and Practice--Annotated § 166.72

§ 166.72 Order Directing Corporation to Hold Annual Shareholders' Meeting [Corp. Code § 600(c)]

[1] FORM Order Directing Corporation to Hold Annual Shareholders' Meeting [Corp. Code § 600(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER (To Hold Annual Shareholders' Meeting)
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	
_____		

The application of _____ [*name*] for an order directing respondent to hold an annual shareholders' meeting came on regularly for hearing on _____ [*date*], before the above-entitled court, the Honorable _____ [*name*], Judge, presiding. The applicant appeared [personally and] by _____ [*name*], his/her attorney [, and respondent appeared by _____ (*name*), its attorney]. Evidence, both oral and documentary, having been presented, the court being fully advised in the matter, the matter having been submitted to the court, and it appearing to the court from the evidence presented that no annual shareholders' meeting has been held even though _____ [60 days have passed since the date designated for such a meeting *or* no date has been designated in respondent's bylaws for the holding of an annual shareholders' meeting and _____ (15 months have passed since the respondent was organized *or* 15 months have passed since respondent's last annual meeting)]; now, therefore,

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that respondent corporation hold an annual shareholders' meeting.

[IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that respondent _____ (*describe any further orders made by court specifying the time and place of the shareholders' meeting, the record date for determination of shareholders entitled to vote at the meeting, and the form of notice for the meeting, e.g.*, hold that meeting within 30 days from the date of this order at respondent's principal executive office in _____ County, California; that the record date for determination of shareholders entitled to vote at that meeting is _____ [*date*]; and that notice be mailed to those shareholders by first-class mail stating the place, date, and hour of the meeting and _____ (*specify any other matters which may be heard at the annual meeting as permitted by Corp. Code § 601(a)(2), (f)*).]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order is for use in a proceeding on a shareholders' application to compel a corporation to hold an annual shareholders' meeting as provided in *Corp. Code § 600(c)*.

[3] State Statutes

Hearing on motion. *Code Civ. Proc. § 1006*

Refusal of application for order. *Code Civ. Proc. § 1008*

Court may summarily order annual meeting; court may issue such orders as may be appropriate to holding of annual meeting. *Corp. Code § 600(c)*

[4] Decisions

Court may properly order annual meetings for purpose of adjournment only, pending determination of rights of certain parties to membership on board of trustees. *Colburn Biological Institute v. De Bolt (1936) 6 Cal. 2d 631, 639, 59 P.2d 108*

Court's right to order election under court's auspices when it appears that directors will fail to call election or will not conduct a free, fair, and full election. *Burnett v. Banks (1955) 130 Cal. App. 2d 631, 635, 279 P.2d 579*

Shareholders not permitted to obstruct state's policy requiring corporation's affairs to be managed by fairly elected directors by staying away from court-ordered election of which due notice was given. *Burnett v. Banks (1955) 130 Cal. App. 2d 631, 637, 279 P.2d 579*

[5] Text References

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, § 42 (4th ed. 1997)

[6] Cross References

For related forms, *see §§ 166.70* and *166.71*.

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14-166 California Forms of Pleading and Practice--Annotated § 166.73

§ 166.73 Application for Order Directing Corporation to Give Notice of Special Shareholders' Meeting [Corp. Code § 601(c)]

[1] FORM Application for Order Directing Corporation to Give Notice of Special Shareholders' Meeting [Corp. Code § 601(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	APPLICATION FOR ORDER DIRECTING COR-
Applicant,	)	PORATION TO GIVE NOTICE OF SPECIAL
vs.	)	SHAREHOLDERS' MEETING
_____ [*name of corporation*]	)	Date: _____
Respondent.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

Applicant alleges:

1. Applicant, _____ [*name*], is the _____ [chairperson of the board *or* president *or* owner of record of _____ (*number*) shares of _____ (*describe, e.g.*, Class A common) stock, which is at least ten percent of the shares entitled to cast votes at a shareholders' meeting,] of respondent.

2. _____ [*Capacity and residence of respondent. See § 166.70, Paragraph 2.*]

3. _____ [*Name*] is the _____ [chairperson of the board *or* president *or* vice-president *or* secretary] of respondent and, at all times herein mentioned, was the agent and employee of respondent and, in doing the things hereinafter alleged, was acting within the course and scope of that agency.

4. On or about _____ [*date*], applicant made written request to the corporation, addressed to the attention of the _____ [chairperson of the board *or* president *or* vice-president *or* secretary] of respondent to give notice to all shareholders entitled to vote of a special shareholders' meeting at a time specified by applicant. A copy of applicant's request is attached hereto as Exhibit A and made a part hereof.

5. More than 20 days have passed since applicant's request, and notice of a special shareholders' meeting has not been given by the _____ [chairperson of the board *or* president *or* vice-president *or* secretary] of respondent as is required by *Section 601(c) of the Corporations Code*.

WHEREFORE, applicant prays:

1. That this court issue an order directing respondent and its _____ [chairperson of the board *or* president *or* vice-president *or* secretary] to give notice of a special shareholders' meeting;

[2. That this court direct the time and place of such meeting in the order;]

[3. That this court direct the record date for determining shareholders entitled to vote at such meeting in the order;]

[4. That this court direct the form of notice of such meeting in the order;]

5. For costs of suit incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Applicant

[*Verification, if desired. See § 166.70* .]

[2] Use of Form

This application is for use by any person entitled to call a special shareholders' meeting under *Corp. Code § 600(d)* who seeks an order to compel the corporation and its officers to give notice of a special shareholders' meeting. This application is an alternative remedy that permits the shareholder to call his or her own meeting as provided in *Corp. Code § 601(c)* when the shareholder's written request to a corporate officer is not complied with in 20 days. The shareholder may also give notice of a special shareholders' meeting [*Corp. Code § 601(c)*].

Notice of the application must be given to the corporation [*see § 166.75[4]*].

[3] Who May Make Application

Any person, other than the board, who is entitled to call a special shareholders' meeting may make an application if his or her written request for notice of a meeting is not complied with within 20 days [*Corp. Code § 601(c)*]. Those persons

include the chairperson of the board, the president, the holders of shares entitled to cast not less than 10 percent of the votes at the meeting, or any persons provided for in a corporation's articles or bylaws [*see Corp. Code § 600(d)*].

[4] Supporting Affidavits or Declarations

The application must be supported by appropriate affidavits (or declarations [*Code Civ. Proc. § 2015.5*]). Likewise, any notice of opposition must be supported by appropriate affidavits or declarations [*Corp. Code § 305(c)*].

[5] Verification

Verification of this application is not required under *Corp. Code § 305(c)*, but a verified application may eliminate the need for an accompanying affidavit or declaration.

[6] Jurisdiction

An application for an order compelling a corporation to hold or give notice of a special shareholders' meeting must be brought in a superior court and is not a limited civil case [*Code Civ. Proc. § 85*; *Corp. Code §§ 305(c)(2), 601(c)*].

[7] Venue

An application for an order compelling a corporation to hold or give notice of a special shareholders' meeting must be brought in a proper county [*Corp. Code §§ 305(c)(2), 601(c)*]. A proper county is that county where the corporation's principal executive office is located in California or if the corporation has no principal executive office, Sacramento County [*Corp. Code § 177*].

[8] State Statutes

Procedure for making application under *Corp. Code § 601(c). Corp. Code § 305(c)*

Application for order compelling corporation to give notice of special shareholders' meeting after request to do so by person entitled to call special meeting [*Corp. Code § 601(c)*].

[9] Decisions

Special meeting of shareholders is not authorized to elect directors unless notice specifies that election of directors one of purposes of meeting. *Dolbear v. Wilkinson (1916) 172 Cal. 366, 369, 156 P. 488*

Special meeting called by individual who was both president and substantial shareholder. *Boericke v. Weise (1945) 68 Cal. App. 2d 407, 413, 156 P.2d 781*

Corporate officer to whom request addressed is not required to be formally named. *Humboldt Oil Co. v. Hoagland (1924) 70 Cal. App. 454, 457-458, 233 P. 404*

Notice is given by any director or shareholder when proper officer refuses or neglects to give notice. *Dedrick v. California Whaling Co. (1936) 16 Cal. App. 2d 284, 287-288, 60 P.2d 551*

Right to demand special shareholders' meeting is dependent on right to vote at that meeting. *Dedrick v. California Whaling Co. (1936) 16 Cal. App. 2d 284, 286, 60 P.2d 551*

[10] Cross References

For related forms, *see §§ 166.70* and *166.71*.

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14-166 California Forms of Pleading and Practice--Annotated § 166.74

§ 166.74 Application by Five-Percent Shareholder for Order Directing Corporation to Hold Special Shareholders' Meeting to Elect New Board [Corp. Code § 305(c)]

[1] FORM Application by Five-Percent Shareholder for Order Directing Corporation to Hold Special Shareholders' Meeting to Elect New Board [Corp. Code § 305(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name(s)*]	)	APPLICATION FOR ORDER DIRECTING COR-
Applicant(s),	)	PORATION TO HOLD SPECIAL SHAREHOLD-
vs.	)	ERS' MEETING
_____ [*name of corporation*],	)	Date: _____
Respondent.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

Applicant(s) allege(s):

1. Applicant(s) _____ [*name(s)*] _____ [is *or* are] the owner(s) of record of _____ [*number*] shares of _____ [*describe, e.g.,* Class A common] stock of respondent, which is at least five percent of respondent's outstanding shares.

2. _____ [*Capacity and residence of respondent. See § 166.70, Paragraph 2.*]

3. On or about _____ [*date*], the board of directors of respondent corporation filled _____ [*number*] _____ [vacancy *or* vacancies] on the board. As a result of the board's action in filling _____ [this *or* these] _____ [vacancy *or* vacancies], there now exists on the board less than a majority of directors elected by the shareholders of respondent.

WHEREFORE, applicant(s) pray(s):

1. That this court issue an order directing respondent to hold a special shareholders' meeting for the purpose of electing a new board;

2. For costs of suit herein incurred; and

3. For such and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Applicant(s)

[*Verification, if desired. See § 166.70* .]

CAUTION:

A supporting memorandum must accompany a motion, other than a motion listed in *Cal. Rules of Ct., Rule 3.1114*, in law and motion proceedings as defined in *Cal. Rules of Ct., Rule 3.1103(a)* [*Cal. Rules of Ct., Rule 3.1113(a)*; for discussion and forms, *see* Ch. 417, *Points and Authorities*]. Although it is not clear whether the definition in Rule 3.1103(a) extends to this form, it is better practice to support the application with a memorandum.

[2] Use of Form

The application is for use by a shareholder, or shareholders, holding an aggregate of at least five percent of the outstanding shares of a corporation [*Corp. Code § 305(c)*] seeking an order to compel a corporation to hold a special shareholders' meeting for the purpose of electing a new board of directors [*Corp. Code § 305(c)(2)*]. Notice of this application must be given to the corporation [*see Corp. Code § 305(c)(2)*; *see § 166.75*]. In addition, the requirements set out in *§ 166.73* concerning affidavits, verification, jurisdiction, and venue apply in a proceeding to compel a special meeting of shareholders to elect a new board of directors.

[3] Alternative Procedure

The application authorized in *Corp. Code § 305(c)(2)* is for use when, as a result of vacancies on the board of directors being filled by the remaining directors [*Corp. Code § 305(a)*], the directors elected by the shareholders constitute less than a majority of the directors on the board. As an alternative to the application procedure, the shareholder or shareholders holding an aggregate of five percent of the outstanding shares at the time outstanding may call the special meeting of the shareholders [*see Corp. Code § 305(c)(1)*].

[4] State Statutes

Five-percent shareholder's application for order compelling corporation to call special shareholders' meeting for purpose of electing new board. *Corp. Code § 305(c)(2)*

[5] Cross References

For related forms, *see §§ 166.73* and *166.75*.

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Volume 14: Corporations: Capacity thru Corporations: Dissolution and Winding Up-Chs. 160-173
Chapter 166 CORPORATIONS: SHAREHOLDERS' MEETINGS AND VOTING
PART IV. FORMS

14-166 California Forms of Pleading and Practice--Annotated § 166.75

§ 166.75 Notice of Hearing on Application for Order Directing Corporation to Hold [Corp. Code § 305(c)(2)] or Give Notice of [Corp. Code § 601(c)] Special Shareholders' Meeting

[1] FORM Notice of Hearing on Application for Order Directing Corporation to Hold [Corp. Code § 305(c)(2)] or Give Notice of [Corp. Code § 601(c)] Special Shareholders' Meeting

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name(s)*],	)	NOTICE OF HEARING ON APPLICATION
Applicant(s),	)	Date: _____
vs.	)	Time: _____
_____ [*name of corporation*],	)	Location: _____
Respondent.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

To _____ [*name of corporation*] and its attorney:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], [*specify date not less than 10 business days from date corporation receives notice*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, [located at _____ (*address*),] applicant will apply for an order directing respondent to _____ [hold a special shareholders' meeting (and designating the time and place of that meeting, the record date for determination of shareholders entitled to vote at that meeting, and the form of notice of that meeting) *or* give notice of a special shareholders' meeting to elect a new board of directors].

The application will be made on the ground that respondent _____ [failed to give notice of a special shareholders' meeting within 20 days after receiving a written request by applicant to do so *or* now has a board of directors of which less than a majority has been elected by the shareholders].

The application will be based on this notice of hearing, on the application [, on the _____ (affidavit *or* declaration) of _____ (*name*)], and the memorandum of points and authorities served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing on the application.
Dated: _____.

_____ [*signature*]

Attorney for Applicant

CAUTION:
A supporting memorandum must accompany a motion, other than a motion listed in *Cal. Rules of Ct., Rule 3.1114*, in law and motion proceedings as defined in *Cal. Rules of Ct., Rule 3.1103(a)* [*Cal. Rules of Ct., Rule 3.1113(a)*; for discussion and forms, *see* Ch. 417, *Points and Authorities*]. Although it is not clear whether the definition in Rule 3.1103(a) extends to this form, it is better practice to support the application with a memorandum.

[2] Use of Form

This notice is for use in notifying a corporation of a hearing on an application for an order compelling the corporation to hold [*Corp. Code § 305(c)(2)*; *see § 166.74*] or to give notice of [*Corp. Code § 601(c)*; *see § 166.73*] a special shareholders' meeting. Such an order may be granted on an application after notice to the corporation giving it an opportunity to be heard.

[3] Form and Service of Notice

No particular form of notice is prescribed in *Corp. Code § 305(c)* in giving notice to a corporation of an application under Corp. Code § 350(c)(2) or *601(c)*. However, it is recommended that the notice comply with the requirements for notice of motion. Following such a procedure would remove the problem of whether or not a memorandum of points and authorities and/or affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) should be filed with the application. Under provisions of *Code Civ. Proc. §§ 1003* and *1064*, an application is a motion, whether it is an application in a special proceeding or a civil action, and, therefore, may be subject to the provisions of *Code Civ. Proc. §§ 1010-1013* (contents of notices of motion and service of notice), as well as *Cal. Rules of Ct., Rule 3.1600* (failure to accompany notice of motion with a memorandum within prescribed time as cause for its denial).

[4] Notice Period

The corporation must receive no less than 10 business days notice of the impending hearing on the application. If the corporation intends to oppose the application, it must file with the court a notice of opposition no less than five business days prior to the date set for the hearing [*Corp. Code § 305(c)*; *see § 166.76*].

[5] Hearing Takes Precedence on Calendar

A hearing on an application brought under *Corp. Code §§ 601(c)* and *305(c)* takes precedence over all other matters not

of a similar nature pending on the date set for the hearing [*Corp. Code § 305(c)*].

[6] California Legal Forms

For forms relating to special meetings of shareholders, see *California Legal Forms, Ch. 8A, Shareholders' Meetings, Voting, and Agreements, §§ 8A.201*, 8A.203-8A.205 (Matthew Bender)

[7] State Statutes

Notice to corporation on five-percent shareholder's application for order compelling corporation to hold special shareholders' meeting. *Corp. Code § 305(c)(2)*

Persons entitled to call special shareholders' meetings, generally. *Corp. Code § 600(d)*

Notice to corporation on application of person entitled to call special shareholders' meeting for order compelling corporation to give notice of special meeting. *Corp. Code § 601(c)*

[8] Text References

Ballantine and Sterling, California Corporation Laws, Ch. 9, *Shareholders' Meetings and Voting, § 164.02* (Matthew Bender)

[9] Cross References

For related forms, *see §§ 166.70*, *166.73*, and *166.74*.

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14-166 California Forms of Pleading and Practice--Annotated § 166.76

§ 166.76 Notice of Opposition [Corp. Code § 305(c)(2)] to Application for Order Directing Corporation to Hold [Corp. Code § 305(c)(2)] or Give Notice of [Corp. Code § 601(c)] Special Shareholders' Meeting

[1] FORM Notice of Opposition [Corp. Code § 305(c)(2)] to Application for Order Directing Corporation to Hold [Corp. Code § 305(c)(2)] or Give Notice of [Corp. Code § 601(c)] Special Shareholders' Meeting

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name(s)*],	)	NOTICE OF OPPOSITION TO APPLICATION
Applicant(s),	)	Date: _____
vs.	)	Time: _____
_____ [*name of corporation*],	)	Location: _____
Respondent.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

To _____ [*name(s) of applicant(s)*] and _____ his/her/their attorney:

NOTICE IS HEREBY GIVEN that _____ [*name of corporation*], respondent herein, will oppose the application filed in the above-entitled proceeding at the hearing on the application at the time and place noted above. Opposition to the application will be made on the ground(s) that _____ [*specify grounds, e.g.,* _____ (*name(s) of applicant(s)*) are not entitled to apply for an order compelling respondent to hold a special shareholders' meeting in that he/she/they _____ (do *or* does) not own an aggregate of five percent of the outstanding shares which have the right to vote for directors at a shareholders' meeting].

This notice of opposition will be based on this notice, [on the affidavit (or declaration) of _____ (*name*) and the memorandum of points and authorities served and filed herewith,] on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing on the application.
Dated: _____.

_____ [*signature*]

Attorney for Respondent

[2] Use of Form

This notice of opposition to an application for an order compelling the respondent corporation to hold [*Corp. Code § 305(c)(2)*; *see § 166.74*] or to give notice of [*Corp.Code § 601(c)*; see Form 103] a special shareholders' meeting must be filed not later than five business days prior to the date set for the hearing on the application if the corporation intends to oppose the application. It should also be supported by appropriate affidavits (or declarations [*Code Civ. Proc. § 2015.5*]), although for good cause, the court may receive and consider at the hearing additional evidence, oral or documentary, and additional points and authorities [*see Code Civ. Proc. § 305(c)(2)*].

[3] Cross References

For a related form, *see § 166.75*.

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14-166 California Forms of Pleading and Practice--Annotated § 166.77

§ 166.77 Order Directing Corporation to Give Notice of Special Shareholders' Meeting [Corp. Code § 601(c)]

[1] FORM Order Directing Corporation to Give Notice of Special Shareholders' Meeting [Corp. Code § 601(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Applicant,	)	(To Give Notice of Special Shareholders' Meeting)
vs.	)	Date: _____
_____ [*name of corporation*],	)	Time: _____
Respondent.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The application of _____ [*name*] for an order directing respondent and its _____ [chairperson of the board *or* president *or* vice-president *or* secretary] to give notice of a special shareholders' meeting came on regularly for hearing on _____ [*date*], before the above-entitled court, the Honorable _____ [*name*], Judge, presiding. The applicant appeared [personally and] by _____ [*name*], his/her attorney, and respondent appeared by _____ [*name*], its attorney. [Both oral and] [D]ocumentary evidence, having been presented, the court being fully advised in the matter, the matter having been submitted to the court, and it appearing to the court from the evidence presented that applicant requested in writing that respondent and its officers give notice of a special shareholders' meeting, that applicant was entitled to make such request of respondent, and that respondent and its officers have _____ [failed *or* refused] to give notice of such meeting even though 20 days have passed from the date such request was received by respondent and its

officers; now, therefore,

IT IS HEREBY ADJUDGED, ORDERED AND DECREED that respondent and its _____ [chairperson of the board *or* president *or* vice-president *or* secretary] give notice of a special shareholders' meeting [at the time specified in applicant's request].

[IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that respondent and its _____ (chairperson of the board *or* president *or* vice-president *or* secretary) _____ (*describe any further orders made by court specifying the time and place of the shareholders' meeting, the record date for determination of shareholders entitled to vote at the meeting, and the form of notice of the meeting, e.g.,* hold that meeting within 60 days from the date of this order at respondent's principal executive office in _____ County, California; that the record date for determination of shareholders entitled to vote at that meeting is _____ [*date*]; and that notice be mailed to shareholders by first-class mail stating the place, date, and hour of the meeting and _____ (*specify any other matters which may be heard at the annual meeting as permitted by Corp. Code § 601(a)(2), (f)*).]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order is for use in a proceeding on an application [*see § 166.73*] by one entitled to call a special shareholders' meeting under *Corp. Code § 600(d)* to compel a corporation and its officers to give notice of a special shareholders' meeting when the corporation and its officers have either failed or refused to give notice of the meeting within 20 days after receiving a request in writing to do so [*Corp. Code § 601(c)*].

[3] State Statutes

Court may summarily order notice of special meeting; court may issue such orders as may be appropriate to holding of special meeting. *Corp. Code § 601(c)*

[4] Cross References

For related forms, *see §§ 166.73* and *166.75*.

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14-166 California Forms of Pleading and Practice--Annotated § 166.78

§ 166.78 Order Directing Corporation to Hold Special Shareholders' Meeting to Elect New Board [Corp. Code § 305(c)]

[1] FORM Order Directing Corporation to Hold Special Shareholders' Meeting to Elect New Board [Corp. Code § 305(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Applicant,	)	(To Hold Special Shareholders' Meeting)
vs.	)	Date: _____
_____ [*name of corporation*],	)	Time: _____
Respondent.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The application of _____ [*name*] for an order directing respondent to hold a special shareholders' meeting for the purpose of electing a new board came on regularly for hearing on _____ [*date*], before the above-entitled court, the Honorable _____ [*name*], Judge, presiding. The applicant appeared [personally and] by _____ [*name*], his/her attorney, and respondent appeared by _____ [*name*], its attorney. [Both oral and] [D]ocumentary evidence having been presented, the court being fully advised in the matter, the matter having been submitted to the court, and it appearing to the court from the evidence presented that less than a majority of the directors now in office in respondent have been elected by the shareholders therof, and that applicant(s) _____ [is a *or* are] holder(s) of [an aggregate of] at least five

percent of the outstanding shares of respondent and, thus, entitled to bring this action; now therefore,

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that respondent corporation hold a special shareholders' meeting for the purpose of electing an entire new board.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This order is for use by a shareholder or shareholders holding at least an aggregate of five percent of the outstanding shares in a corporation in a proceeding on an application [*see § 166.74*] to compel the corporation to hold a special shareholders' meeting when, as a result of vacancies on the board being filled by a majority of the remaining directors, less than a majority of the directors in office are elected by the shareholders. At the election of successor directors pursuant to the order, the term of office of any director on the former board terminates [*Corp. Code § 305(c)*].

[3] State Statutes

Court may summarily order special shareholders' meeting to elect new board of directors. *Corp. Code § 305(c)*

[4] Cross References

For related forms, *see §§ 166.71*, *166.74*, *166.75*, and *166.77*.

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14-166 California Forms of Pleading and Practice--Annotated § 166.79

§ 166.79 Complaint for Declaratory and Injunctive [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527] Relief--By Shareholder Against Corporation--To Declare Shareholders' Meeting Invalid for Want of Proper Notice [Corp. Code § 601(e)] and Enjoin Any Action Taken as Result of Meeting

[1] FORM Complaint for Declaratory [Code Civ. Proc. § 1060] and Injunctive [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527] Relief--By Shareholder Against Corporation--To Declare Shareholders' Meeting Invalid for Want of Proper Notice [Corp. Code § 601(e)] and Enjoin Any Action Taken as Result of Meeting

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name of corporation*],	)	COMPLAINT FOR DECLARATORY RELIEF TO
Defendant.	)	DETERMINE VALIDITY OF SHAREHOLDERS'
	)	MEETING [AND FOR TEMPORARY RESTRAIN-
	)	ING ORDER AND PRELIMINARY AND PER-
		MANENT INJUNCTIONS]

_____

Plaintiff alleges:

[1. *Ownership interest of plaintiff. See § 166.70, Paragraph 1.*]

[2. *Capacity and residence of defendant. See § 166.70, Paragraph 2.*]

3. On or about _____ [*date*], defendant gave notice of _____ [an annual *or* a special] shareholders' meeting to be held on _____ [*date*]. The notice given by defendant was defective and improper in that it _____ [*specify manner in which notice was improper, e.g.,* failed to

specify the time of the shareholders' meeting *or* was not sent to all shareholders entitled to vote at the meeting].

4. On _____ [*date*], the _____ [annual *or* special] shareholders' meeting convened at _____ [*address*], _____ [*city*], _____ County, California. [*If any actions were approved or authorized at the meeting, specify, e.g.,* The shareholders present at the meeting voted to approve and authorize the transfer of corporate assets.]

5. An actual controversy has arisen and now exists between plaintiff and defendant concerning their respective rights and duties in that plaintiff contends that the meeting of shareholders held on _____ [*date*], was invalid for want of proper notice to shareholders and that any actions approved or authorized at the meeting are invalid, whereas defendant disputes these contentions and contends that the meeting of shareholders on _____ [*date*], was properly noticed to shareholders and that all actions approved or authorized at that meeting are valid.

6. Plaintiff desires a judicial determination of his/her rights and duties, and declaration as to the validity of the meeting of shareholders held on _____ [*date*], and as to the validity of acts approved or authorized at that meeting.

7. Such a declaration is necessary and appropriate at this time in order that plaintiff may ascertain his/her right and duties. [*Also allege any financial or other burden being caused to plaintiff by the unsettled state of affairs and the fact that administrative remedies have been exhausted or are unavailable, e.g.,* The value of the plaintiff's shares of stock in defendant corporation may be adversely affected by the purported shareholders' meeting on _____ [*date*], and the actions purportedly approved or authorized at that meeting. Plaintiff has no available administrative remedy by which to contest the holding of that meeting or the actions taken at that meeting.]

[8. Unless and until defendant's (threatened) wrongful conduct in acting with the approval and authorization of the purported shareholders' meeting held on _____ (*date*), is enjoined and restrained by order of this court, defendant's actions will cause great and irreparable injury to plaintiff in that _____ (*specify injury to plaintiff, e.g.,* the value of plaintiff's shares of stock in defendant may be adversely affected).]

[9. Plaintiff has no adequate remedy at law for the injuries _____ (currently being suffered *or* which are threatened) in that _____ (*specify facts in addition to those previously alleged which tend to show the inadequacy of any legal remedy, especially monetary damages, which plaintiff might pursue, e.g.,* it will be impossible for plaintiff to determine the precise amount of damage which he/she will suffer if defendant's conduct is not restrained).]

WHEREFORE, plaintiff prays for judgment as follows:

1. That the court declare the respective rights, duties, and responsibilities of plaintiff and defendant with respect to any meeting of shareholders held on _____ [*date*]; and that by such declaration and judgment it be declared that any actions approved or authorized at the meeting of shareholders on _____ [*date*], are invalid and have no effect;

[2. That the court issue a temporary restraining order, a preliminary injunction, and a permanent injunction enjoining defendant from exercising its power to _____ (*specify act, e.g.,* transfer corporate assets) as purportedly approved or authorized at the shareholders' meeting on _____ (*date*);]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. [_____ (*date*)]

_____ [*signature*]

CAUTION:

If a temporary restraining order or preliminary injunction is sought in addition to a declaratory judgment on the basis of facts alleged in the complaint, the complaint must be verified. However, the facts to be verified may be set forth in an affidavit [*Code Civ. Proc. § 527*] (or declaration [*Code Civ. Proc. § 2015.5*]).

[2] Use of Form

This form is a complaint for use by a shareholder seeking a declaratory judgment [*Code Civ. Proc. § 1060*] stating that a shareholders' meeting and any transactions at the shareholders' meeting are invalid [*Corp. Code § 601(e)*] for want of proper notice [*Corp. Code § 601(a)*]. When appropriate, it may also be used to enjoin any actions decided on at the shareholders' meeting.

[3] Allegations

This complaint alleges:

- That plaintiff is a shareholder (Paragraph 1).
- That defendant is a corporation (Paragraph 2).
- The giving of notice of an annual or special shareholders' meeting by defendant (Paragraph 3) [*Corp. Code § 601(a)*].
- That the notice given was defective or improper (Paragraph 3) [*San Buenaventura Mfg. Co. v. Vassault (1875) 50 Cal. 534, 537* (notice insufficient in failing to state time of meeting); *Boericke v. Weise (1945) 68 Cal. App. 2d 407, 414-415, 156 P.2d 781* (substantial compliance with notice requirement is met only if notice specific as to time, place, and purpose of meeting and all shareholders receive seasonable and actual notice)].
- The holding of the shareholders' meeting on the defective notice (Paragraph 4).

- An actual controversy between plaintiff and defendant concerning whether or not the notice was insufficient and the subsequent meeting therefore invalid (Paragraph 5) [*Code Civ. Proc. § 1060*].

- That plaintiff desires a declaration of his or her rights and duties with respect to the meeting and the actions taken at the meeting (Paragraph 6) [*Code Civ. Proc. § 1060*].

- That declaratory relief is necessary (Paragraph 7).

- That plaintiff will suffer great and irreparable harm (Paragraph 8) for which plaintiff has no adequate remedy at law (Paragraph 9), entitling plaintiff to temporary and permanent injunctive relief.

[4] Limitations on Shareholder's Remedy

A shareholder's remedy for the failure of the corporation to notice properly a shareholders' meeting is not clear in the Corporations Code. The Code merely provides that defective or improper notice does not invalidate transactions at a shareholders' meeting if (1) a quorum is present, either in person or by proxy, and (2) either before or after the meeting, each person entitled to vote not present in person or by proxy provides a waiver of notice, a consent to the holding of the meeting, or an approval of the minutes of the meeting in writing, or attends the meeting and does not offer any objection to its holding [*Corp. Code § 601(e)*]. Whether or not defective or improper notice does invalidate the shareholders' meeting if these two conditions are not met is unclear.

Generally, however, an improper or defective notice entitles a shareholder to bring a declaratory relief action to declare invalid both the meeting and any action taken as a consequence of the meeting [*see Grant v. Hartman Ranch Co. (1961) 193 Cal. App. 2d 497, 499-501, 14 Cal. Rptr. 531]* . The basis of the action does not appear to be only in *Corp. Code § 601(e)*, but, more fundamentally, in the breach of the contract relationship between the shareholders and the corporation, since the provisions of the Corporation Code are considered to form a part of the contract between the shareholders and the corporation [*see In re Mayellen Apts. Inc. (1955) 134 Cal. App. 2d 298, 304, 285 P.2d 943]* . For this reason, the corporation itself does not have a cause of action, even though a shareholders' meeting was improperly noticed, if the requisite number of shareholders approved the action which is sought to be held invalid [*McDermott v. Bear Film Co. (1963) 219 Cal. App. 2d 607, 611, 33 Cal. Rptr. 486]* .

Moreover, regardless of the form of the action, a stranger dealing with the corporation in good faith cannot be put to the necessity of confirming the directors' compliance with internal notification procedures. Thus, the failure to follow statutory formalities for obtaining shareholders' approval will not vitiate a corporate transaction if, in fact, the requisite number of shareholders have consented. The statutes governing shareholders' meetings in this respect are mandatory in requiring shareholders' consent, but only directory in specifying the procedure of obtaining consent [*McDermott v. Bear Film Co. (1963) 219 Cal. App. 2d 607, 612, 33 Cal. Rptr. 486]* .

[5] Jurisdiction

An original action for declaratory relief must be brought in a superior court and is not a limited civil case [*Code Civ. Proc. §§ 85, 86*, 580(b)(4), *1060*].

[6] California Legal Forms

For notices of shareholders' meetings, see California Legal Forms, Ch. 8A, *Shareholders' Meetings, Voting, and Agreements*, §§ 8A.200-8A.208 (Matthew Bender)

[7] State Statutes

Grounds for issuance of injunction. *Civ. Code § 3422*; *Code Civ. Proc. § 526*

Injunction defined. *Code Civ. Proc. § 525*

Procedures for obtaining temporary restraining order or preliminary injunction. *Code Civ. Proc. § 527*

When declaratory relief is proper. *Code Civ. Proc. § 1060*

Cumulative nature of remedy in declaratory relief. *Code Civ. Proc. § 1062*

When notice of shareholders' meeting must be given; contents of notice. *Corp. Code § 601(a)*

Validity of meeting when notice is defective or improper. *Corp. Code § 601(e)*

[8] Decisions

Shareholders' meeting neither regular nor legal when only portion of required shareholders were in attendance and when notice was insufficient as to time of meeting. *San Buenaventura Mfg. Co. v. Vassault (1875) 50 Cal. 534, 537, 538*

Transfer of corporate assets not invalidated by failure to give notice to shareholders if requisite number of shareholders approve action. *McDermott v. Bear Film Co. (1963) 219 Cal. App. 2d 607, 611, 33 Cal. Rptr. 486*

Shareholders gave adequate notice when, on refusal of officers to call meeting of shareholders, shareholders published notice without order from corporation's acting president. *Humboldt Oil Co. v. Hoagland (1924) 70 Cal. App. 454, 456-458, 233 P. 404*

Statutes requiring notice are for benefit of real shareholders; giving of notice necessary except when all shares present and represented at meeting or persons ceased to be stockholders and are no longer entitled to notice as shareholders. *Guaranty Loan Co. v. Treadwell (1921) 53 Cal. App. 538, 542, 200 P. 653*

Shareholders' meeting invalid when held without notice to shareholders; validity depends on showing that meeting was held with written consent of all shareholders or that all shareholders were present. *Lowe v. Los Angeles Suburban Gas Co. (1914) 24 Cal. App. 367, 373, 141 P. 399*

[9] Text References

Ballantine & Sterling, California Corporation Laws, Ch. 9, *Shareholders' Meetings and Voting, §§ 164.01-164.02*

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 805-833 (4th ed. 1997)

Marsh, California Corporation Law and Practice, Vol. 17, Ch. XI, *Shareholders' Meeting and Consents*, §§ 11.09-11.11

[10] Cross References

For discussion, procedural checklists, and forms for use in seeking declaratory relief generally, see Ch. 182, *Declaratory Relief*

For discussion, procedural checklists, and forms for use in obtaining an injunction, see Ch. 303, *Injunctions*

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14-166 California Forms of Pleading and Practice--Annotated § 166.80

§ 166.80 Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527], and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526]--By Shareholder Against Corporation With 100 or More Shareholders [Corp. Code § 604(a), (b)]--To Compel Resolicitation of Improper Consents or Proxies [Corp. Code § 604(d)]

[1] FORM Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527], and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526]--By Shareholder Against Corporation With 100 or More Shareholders [Corp. Code § 604(a), (b)]--To Compel Resolicitation of Improper Consents or Proxies [Corp. Code § 604(d)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name of corporation*],	)	COMPLAINT FOR TEMPORARY, RESTRAIN-
Defendant.	)	ING ORDER AND PRELIMINARY AND PER-
	)	MANENT INJUNCTIONS
	)	

Plaintiff alleges:

[1. *Ownership interest of plaintiff. See § 166.70, Paragraph 1.*]

[2. *Capacity and residence of defendant. See § 166.70, Paragraph 2.*]

3. Defendant has outstanding shares of stock held of record by 100 or more persons.

[*EITHER*]

4. On or about _____ [*date*], defendant distributed forms of written consents to 10 or more of its shareholders. These forms of consent were improper and defective in that _____ [*specify imperfection or defect in form, e.g.,* they did not specify a choice between approval and disapproval of the proposals for which they were sought *or* they did not provide an opportunity for a shareholder to abstain with respect to the proposals presented].

[*OR*]

4. On or about _____ [*date*], defendant distributed forms of proxies to 10 or more of its shareholders. These forms of proxy were improper and defective in that _____ [*specify imperfection or defect in form, e.g.,* they did not specify a choice between approval and disapproval of the proposals to be voted on at the shareholders' meeting for which they were sought *or* they did not provide an opportunity for a shareholder to abstain with respect to voting on the proposals to be presented at the shareholders' meeting for which they were sought].

5. Defendant _____ [subsequently has acted *or* threatened to act] on the improper and defective _____ [consents *or* proxies] as if they were correct in form by _____ [*specify action taken or threatened to be taken for which consents or proxies were obtained*].

6. Unless and until enjoined and restrained by this court, defendant's [threatened] wrongful conduct will cause great and irreparable injury to plaintiff in that _____ [*specify particular facts which will constitute great and irreparable injury, e.g.,* plaintiff will be deprived of his/her effective vote in determining proposals before a corporation of which he/she is a shareholder].

7. Plaintiff has no adequate remedy at law for the injuries which are threatened in that _____ [*specify facts in addition to those previously alleged which tend to show the inadequacy of any legal remedy, especially monetary damages, which plaintiff might pursue e.g.,* it will be impossible for plaintiff to determine the precise amount of damage which he/she will suffer if defendant's conduct is not restrained].

WHEREFORE, plaintiff prays:

1. For an order requiring defendant to show cause, if it has any, why it should not be enjoined as hereinafter set forth during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant, its agents, servants, and employees, and all persons acting under, in concert with, or for it:

a. From _____ [*specify acts defendant is to be prohibited from doing, e.g.,* acting on the _____ (consents *or* proxies) of shareholders obtained as a result of defendant's distribution of _____ (consents *or* proxies) on or about _____ (*date*)];

b. To _____ [*specify acts defendant is commanded to do, e.g.,* distribute forms of _____ (consents *or* proxies) to shareholders, which conform to the requirement that a shareholder should be afforded an opportunity to _____ (specify between approval and disapproval of *or* abstain from choosing to approve or disapprove) all matters presented for which the _____ (consent *or* proxy) is sought];

3. For costs of suit herein incurred; and

4. For such other further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 166.79.*]

CAUTION:
If a temporary restraining order or preliminary injunction is sought, the complaint must be supported by an affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) or by verification of the complaint [*Code Civ. Proc. § 527*].

[2] Use of Form

This form is a complaint for use by a shareholder seeking injunctive relief against a corporation with outstanding shares held of record by 100 or more persons to compel compliance with statutory rules for consent and proxy forms [*Corp. Code § 604(e)*]. These rules require that in distributing written consent forms and proxy forms, the corporation afford its shareholders an opportunity on the form to specify a choice between approval and disapproval of each matter or group of matters, other than election of officers, for which the consent is sought or the proxy solicited [*Corp. Code § 604(a)*]. The corporation must also provide a space marked "abstain," whereby its shareholders may indicate a desire to abstain from voting on a proposal [*Corp. Code § 604(b)*]. *Corp. Code § 604(d)* provides that failure to comply with these requirements does not invalidate any corporate action, but it may be the basis for challenging any proxy at a meeting and the superior court may compel compliance therewith at the suit of any shareholder. The code does not provide a similar remedy for the shareholder seeking to compel compliance with the statutory requisites for forms of consents, but it would appear that a shareholder's suit would also be a proper remedy [*see* Ballantine and Sterling, California Corporation Laws, Ch. 9, *Shareholders' Meetings and Voting, § 169.01[1]*] .

[3] Allegations

This complaint for injunctive relief alleges:

- That plaintiff is a shareholder (Paragraph 1).
- That defendant is a corporation (Paragraph 2).
- That defendant has outstanding shares held of record by 100 or more persons (Paragraph 3) [*Corp. Code § 604(a)*].
- That defendant distributed improper forms of proxy or consent (Paragraph 4) [*Corp. Code § 604(a)* (form as required to give shareholder opportunity to approve or disapprove each proposal or group of proposals presented), *604(b)* (form as required to give shareholder opportunity to abstain with respect to any proposal presented)].
- That defendant has acted or threatened to act on the improper proxies or consents (Paragraph 5).
- That defendant's conduct will cause great and irreparable harm to plaintiff (Paragraph 6) [*Code Civ. Proc. § 526(a)(2)*].

- That plaintiff has no adequate remedy at law (Paragraph 7) [*see Civ. Code § 3422(1)-(3)*; *Code Civ. Proc. § 526(a)(4)-(6)*].

[4] Jurisdiction

An action to compel compliance with *Corp. Code § 604* must be brought in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 85, 580(b)(2)*; *Corp. Code § 604(d)*].

[5] California Legal Forms

For consents and proxies by shareholders, see California Legal Forms, Ch. 8A, *Shareholder's Meetings, Voting, and Agreements* (Matthew Bender)

[6] State Statutes

Grounds for issuance of injunction. *Civ. Code § 3422*; *Code Civ. Proc. § 526*

Injunction defined. *Code Civ. Proc. § 525*

Procedures for obtaining temporary restraining order, or preliminary injunction. *Code Civ. Proc. § 527*

In corporation having outstanding shares held of record by 100 or more persons, written consent or proxy form is improper if not offering opportunity to specify choice between approval or disapproval of each proposal presented. *Corp. Code § 604(a)*

When opportunity to specify between approval and disapproval of each proposal presented, written consent or proxy form is improper if it does not offer space to indicate abstention with respect to each proposal presented. *Corp. Code § 604(b)*

Shareholder's suit to compel compliance with provisions of *Corp. Code § 604(a), (b). Corp. Code § 604(d)*

[7] Text References

Ballantine & Sterling, California Corporation Laws, Ch. 9, *Shareholders' Meetings and Voting, §§ 169.01* , 172.01, 172.02, 172.04 (Matthew Bender)

Witkin, California Procedure, Vol. 6, *Provisional Remedies*, §§ 276-387; Vol. 5, *Pleading*, §§ 778-783; Vol. 7, *Judgment*, § 34 (4th ed. 1997)

Witkin, Summary of California Law, Vol. 9, *Corporations, §§ 163, 164* (10th ed. 2005)

Marsh, California Corporation Law and Practice, Vol. 17, Ch. XI, *Shareholders' Meetings and Consents*, §§ 11.13, 11.25-11.32

[8] Cross References

For discussion, procedural checklists, and forms for use in seeking injunctive relief generally, see Ch. 303, *Injunctions*

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14-166 California Forms of Pleading and Practice--Annotated § 166.81

§ 166.81 Allegation--Corporation to Vote Contrary to Shareholder's Choice as Expressed on Consent or Proxy [Corp. Code § 604(a), (b)]

[1] FORM Allegation--Corporation to Vote Contrary to Shareholder's Choice as Expressed on Consent or Proxy [Corp. Code § 604(a), (b)]

Thereafter, defendant _____ [acted *or* voted *or* threatened to _____ (act *or* vote)] [on] the _____ [consents *or* proxies] on each matter or group of matters proposed in the forms distributed by it in a manner inconsistent with the choice of its shareholders, including plaintiff, to _____ [approve *or* disapprove *or* abstain].

[2] Use of Form

This form is an allegation for use by a shareholder in a complaint for injunctive relief against a corporation with outstanding shares held of record by 100 or more persons to compel compliance [*Corp. Code § 604(d)*] with the corporation's obligation to vote shares in accordance with the written consents or proxies of its shareholders. This allegation is for use when the consent or proxy forms are proper and not defective but where the corporation has failed to vote them as the person specified. With appropriate modifications made in *§ 166.80*, this allegation may be substituted for Paragraph 5 of that form.

[3] State Statutes

When voter specifies choice between approval and disapproval on consent or proxy, corporation must act on or vote shares represented by consent or proxy in accordance with expressed choice. *Corp. Code § 604(a)*

When voter specifies abstention on consent or proxy, corporation must not act or vote shares represented by consent or proxy. *Corp. Code § 604(b)*

[4] Cross References

For a related form, *see § 166.80*.

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14-166 California Forms of Pleading and Practice--Annotated § 166.82

§ 166.82 Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527], and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526]--By Shareholder Against Corporation Holding Election of Directors [Corp. Code § 604(c)]--To Compel Resolicitation of Proxies [Corp. Code § 604(d)]

[1] FORM Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527], and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526]--By Shareholder Against Corporation Holding Election of Directors [Corp. Code § 604(c)]--To Compel Resolicitation of Proxies [Corp. Code § 604(d)]

[*Caption, introduction. See § 166.80.*]

[1. *Ownership interest of plaintiff. See § 166.70, Paragraph 1.*]

[2. *Capacity and residence of defendant. See § 166.70, Paragraph 2.*]

3. On or about _____ [*date*], defendant distributed forms of proxies to its shareholders for the election of directors at a shareholders' meeting to be held on or about _____ [*date*], in _____ [*city*], _____County, California. The names of the directors to be voted on were named on such proxies as candidates.

4. Plaintiff marked his/her proxy from _____ ["withhold *or specify other indication that authority to vote was withheld*] with respect to the candidates for director named therein.

5. Thereafter, defendant _____ [voted *or* threatened to vote] the proxies marked "withhold" by its shareholders, including plaintiff, in the election of the directors.

[6. *Allegation of great and irreparable injury. See § 166.80, Paragraph 6.*]

[7. *Allegation of inadequacy of plaintiff's legal remedy. See § 166.80, Paragraph 7.*]

WHEREFORE, plaintiff prays:

1. For an order requiring defendant to show cause, if it has any, why it should not be enjoined as hereinafter set forth during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant, its agents, servants, and employees, and all persons acting under, in concert with, or for it:

a. From _____ [*specify acts defendant is to be prohibited from doing, e.g.,* voting the shares marked "withhold" in the election of directors];

b. To _____ [*specify acts defendant is commanded to do, e.g.,* distribute new proxies to shareholders; to provide in the election of directors following such resolicitation for the shares marked "withhold" not to be voted for or against any candidate for director];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 166.79.*]

CAUTION:
When a temporary restraining order or preliminary injunction is sought, the complaint must be supported by an affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) or by verification of the complaint [*Code Civ. Proc. § 527*].

[2] Use of Form

This form is a complaint for use by a shareholder in an action to enjoin a corporation from voting proxies for or against the election of any director which have been marked with "withhold" or marked in some manner indicating that the shareholder withholds his or her authority to vote on that named candidate [*see Corp. Code § 604(c)*].

[3] State Statutes

Proxies naming candidates in election of directors may not be voted when marked "withhold" or marked to indicate that authority to vote for or against candidate withheld. *Corp. Code § 604(c)*

Shareholder's suit to compel compliance with provisions of *Corp. Code § 604(c). Corp. Code § 604(d)*

[4] Cross References

For a related form, *see § 166.80*.

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14-166 California Forms of Pleading and Practice--Annotated § 166.83

§ 166.83 Complaint for Specific Performance [Civ. Code § 3384] of Voting Agreement--By Shareholder of Close Corporation Against Another Shareholder [Corp. Code § 706(a)]

[1] FORM Complaint for Specific Performance [Civ. Code § 3384] of Voting Agreement--By Shareholder of Close Corporation Against Another Shareholder [Corp. Code § 706(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	COMPLAINT FOR SPECIFIC PERFORMANCE
Defendant(s).	)	
	)	
	)	

Plaintiff alleges:

1. Plaintiff, _____ [*name*], is the owner of record of _____ [*number*] shares of _____ [*describe, e.g.,* Class A common] stock of _____ [*name*] corporation.

2. Defendant(s), _____ [*name(s)*], _____ [is *or* are] the owner(s) of record of _____ [*number*] shares of _____ [*describe, e.g.,* Class A common] stock of _____ [*name*] corporation.

3. _____ [*Name*] corporation, hereinafter referred to as "corporation," is, and at all times herein mentioned was, a close corporation organized and existing under the laws of the State of California with its principal place of business in _____ [*city*], _____ County, California [*or allege other capacity*

and residence of close corporation].

4. On or about _____ [*date*], plaintiff and defendant(s) entered into a written agreement, signed by each of them, with respect to the shares of stock held by them in the corporation. The agreement provided that the shares owned by plaintiff and defendant(s) were to be voted as _____ [*state manner in which shares were agreed to be voted, e.g.,* provided in the agreement *or* the parties to the agreement thereafter agree *or* determined in accordance with procedures agreed on by the parties]. [A copy of the agreement is attached as Exhibit A and incorporated by reference.]

[5. The agreement further provided that plaintiff and defendant(s) would transfer the shares covered by the agreement to _____ (*name*(*s*)) with authority to vote the shares in accordance with the terms of the agreement.]

[6. The agreement further provided that, during the period of time covered by the agreement, neither plaintiff nor defendant(s) could sell the shares covered by the agreement to persons not a party to the agreement unless first offering the parties to the agreement an opportunity to purchase the shares within a reasonable time.]

7. Plaintiff has performed all terms, covenants, and conditions on his/her part to be performed under the voting agreement.

8. On or about _____ [*date*], defendant[(s), and each of them,] violated the terms of the voting agreement by _____ [*specify acts of defendant*(*s*) *in violation of agreement, e.g.,* executing a proxy to vote the shares covered under the agreement to a party not specified in the agreement *or* failing to transfer the shares covered by the agreement to the person specified in the agreement as having the authority to vote the shares *or* agreeing to sell the shares covered by the voting agreement to persons not a party to the voting agreement without first offering the parties to the voting agreement an opportunity to purchase the shares].

[9. Plaintiff has no plain, speedy, or adequate remedy in the ordinary course of the law. Damages, if awarded, could not properly be ascertained and would be inadequate to compensate plaintiff for the detriment suffered by him/her as a result of _____ (defendant's *or* defendants') violation of the terms of the voting agreement in that _____ (*specify why damages inadequate, e.g.,* plaintiff and defendant(s) bargained for the strength of shares voted as a block and the pecuniary damage caused by the absence of shares from the voting block cannot easily be ascertained).]

WHEREFORE, plaintiff prays:

1. That this court direct defendant[(s), and each of them,] to specifically perform the acts required under the terms of the voting agreement between plaintiff and defendant(s); that this court direct the defendant(s) to _____ [*specify acts required of defendant(s) under terms of agreement, e.g.,* revoke any proxy executed to vote the shares covered by the agreement given to a party not specified in the agreement *or* transfer the shares covered by the agreement to the person specified in the agreement as having the authority to vote the shares *or* offer the parties to the agreement an opportunity to purchase the shares covered by the agreement prior to offering these shares for sale to persons not a party to the agreement];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 166.79.*]

[2] Use of Form

This form is a complaint for specific performance [*Civ. Code § 3384*] for use by one shareholder against other shareholders violating the terms of a voting agreement [*Corp. Code § 706(a)*]. A voting agreement between shareholders of a corporation may not be denied specific performance on the ground that the remedy at law is adequate or on other grounds relating to the jurisdiction of a court of equity [*Corp. Code § 706(a)*].

[3] Allegations

This complaint for specific performance alleges the following:

- That plaintoff and defendant are shareholders of a corporation (Paragraphs 1-3) [*Corp. Code § 706(a)* (voting agreements between shareholders in close corporation)].

- That plaintiff and defendant entered into a written, signed voting agreement with respect to their shares (Paragraph 4) [*Corp. Code § 706(a)* (formation of voting agreements between shareholders)].

- Any additional terms, such as the transfer of shares to a third party (Paragraph 5) [*Corp. Code § 706(a)*] or an option to purchased shares governed by the agreement (Paragraph 6) [*Bodkin v. Silveira (1942) 49 Cal. App. 2d 1, 10, 120 P.2d 910* (each party to voting agreement has option to purchase his or her proportion of stock from any party intending to sell)].

- That plaintiff performed his or her obligation under the agreement (Paragraph 7) [*Civ. Code § 3386(b)*].

- That defendant violated the terms of the agreement (Paragraph 8).

- That plaintiff is without an adequate remedy at law (Paragraph 9) [*see Corp. Code § 706(a)* (specific performance may not denied on ground that remedy at law is adequate)].

[4] Verification

Verification of this complaint is not required, but verification of the complaint requires that defendant file a verified answer [*Code Civ. Proc. § 446*]. It also precludes a general denial [*Code Civ. Proc. § 431.30(d)*].

[5] California Legal Forms

For voting agreements and voting trust agreements, see California Legal Forms, Ch. 8B, *Voting Agreements and Voting Trusts* (Matthew Bender)

[6] State Statutes

Specific performance may be compelled. *Civ. Code § 3384*

Security of counter performance for want of equity, fraud, or undue influence. *Civ. Code § 3391*

Contracts not subject to specific performance. *Civ. Code §§ 3392, 3394*

Voting agreements between two or more shareholders of close corporation; specific performance of voting agreements may not be denied on ground remedy at law adequate or on grounds relating to jurisdiction of court of equity. *Corp. Code § 706(a)*

[7] Decisions

Valid voting agreement by which shares are to be voted as a block based on determination of majority of shareholders. *Smith v. San Francisco & N. P. R. Co. (1897) 115 Cal. 584, 598, 47 P. 582*

When shares are sold to parties outside voting agreement in violation of option provision of agreement, court may enforce voting agreement by imposing constructive trust on shares sold, thus recovering shares for purchase by parties to agreement. *Bodkin v. Silveira (1942) 49 Cal. App. 2d 1, 3-4, 120 P.2d 910*

[8] Text References

Ballantine and Sterling, California Corporation Laws, Ch. 9, *Shareholders' Meetings and Voting, §§ 174.01* , 174.02 (Matthew Bender)

Witkin, California Procedure, vol. 5, *Pleading*, §§ 740-761; vol. 7, *Judgment*, § 16 (4th ed. 1997)

Witkin, Summary of California Law, vol. 9, *Corporations, § 165* (10th ed. 2005)

[9] Cross References

For discussion, procedural checklists, and forms for use in seeking specific performance generally, see Ch. 528, *Specific Performance*

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14-166 California Forms of Pleading and Practice--Annotated § 166.84

§ 166.84 Complaint by Shareholder or Other Person Entitled to Vote--Against Directors and Corporation--To Determine Validity of Election of Directors [Corp. Code § 709]

[1] FORM Complaint by Shareholder or Other Person Entitled to Vote--Against Directors and Corporation--To Determine Validity of Election of Directors [Corp. Code § 709]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO DETERMINE VALIDITY OF
_____ [*name of corporation and in-*	)	ELECTION OF DIRECTORS
dividual defendants],	)	(Corporate Election Contest)
Defendants.	)	
	)	

_____

Plaintiff alleges:

[*EITHER*]

1. Plaintiff is the owner of record of _____[*number*] shares of the _____[*describe, e.g.*, Class A common] stock of defendant corporation.

[*OR*]

_____ [*State facts showing that plaintiff has standing as person (other than shareholder) who claims to*

have been denied right to vote, e.g., Plaintiff and defendant corporation are parties to an executory contract under which plaintiff has agreed to make a significant investment in the corporation in exchange for shares of stock, to be issued by the corporation, aggregating to a significant percentage of the outstanding shares of the corporation. Plaintiff has tendered the promised investment and offered to perform plaintiff's other obligations, but the corporation has not yet accepted that tender and has not issued any shares to plaintiff. In light of that agreement, plaintiff has an equitable interest in the corporation as a beneficial shareholder, who has been denied the right to vote as a shareholder because of the corporation's failure to perform its obligations].

[*CONTINUE*]

2. [*Capacity and residence of defendant. See § 166.70, Paragraph 2.*]

3. On or about _____ [*date*], [*if foreign corporation is involved and venue is based on county in which election held,* in _____ County, California,] an election was held for the purpose of electing _____ [*number*] director(s) of defendant corporation.

4. As a _____ [shareholder *or person entitled to vote shares, e.g.,* proxyholder], plaintiff was entitled to vote _____ [*number*] shares in the election of directors held on or about _____ [*date*].

[5. At the election on or about _____ (*date*), plaintiff was denied the right to vote for the election of directors.]

6. _____ [*Allege reasons why the election was invalid, such as the invalidity, ineffectiveness, or improper performance of a voting trust or agreement, voting of shares not validly issued, voting by persons not entitled to vote, or unlawful interference with the right to vote.*]

7. _____ [*Allege facts showing need, if any, for provisional or permanent injunctive relief; see § 166.79* and Ch. 303, Injunctions].

WHEREFORE, plaintiff prays:

1. That this court determine that the election on or about _____ [*date*], of defendant(s) _____ [*name(s)*] as director(s) of defendant corporation is, and was, invalid and that _____ [this *or* these] defendant(s) _____ [is *or* are] not lawfully elected to the office of director;

[2. That this court determine that _____ (*name(s)*) _____ (is *or* are) entitled to the office of director;]

[3. That this court order a new election to be held forthwith for the election of _____ (all *or specify number*) director(s);]

[4. That this court determine the right of _____ (*name of shareholder or other person entitled to vote shares*] to vote _____ (*number*) shares, before cumulation, in the election of directors;]

[5. *If provisional injunctive relief is sought in addition to the foregoing determination(s):* For a temporary restraining order and a preliminary injunction enjoining defendant(s), its/their agents, servants, and employees, and all persons acting under, in concert with, or for it/them from _____ (*specify acts enjoined, e.g.,* interfering with

plaintiff's right to vote shares in any other action by shareholders) pending judgment in this action;]

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 166.79.*]

CAUTION:
Whenever a temporary restraining order or preliminary injunction is sought, the complaint must be supported by an affidavit (or delaration [*Code Civ. Proc. § 2015.5*]) or by verification of the complaint [*Code Civ. Proc. § 527*].

[2] Use of Form

This form is a complaint for use in an action contesting the validity of any election of directors of a corporation. The complaint may be brought by any shareholder or by any person who claims to have been denied the right to vote [*e.g., Haah v. Kim (2009) 175 Cal. App. 4th 45, 55, 95 Cal. Rptr. 3d 515* (persons with standing include those who have entered into agreements to take shares in corporation but whose shares have not yet been issued)]. The complaint also may be brought with respect to the election of directors by any domestic corporation or by a foreign corporation holding its election in California [*Corp. Code § 709(a)*].

An action to contest the validity of an election of a director is a summary proceeding. On the filing of the complaint, the court must enter an order fixing a date for the hearing [*see § 166.86*].

[3] Allegations

This complaint alleges:

- Plaintiff's capacity as shareholder or other person claiming to have been denied right to vote (Paragraphs 1, 4, 5) [*Corp. Code § 709(a)*].
- The capacity and residence of corporate defendant (Paragraph 2).
- That an election was held to elect directors (Paragraph 3).
- That the election was invalid (Paragraph 6) [*see Corp. Code § 709(a), (c)*].
- Facts entitling plaintiff to injunctive relief (Paragraph 7).

[4] Jurisdiction

A proceeding to contest the election or appointment of directors must be brought in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 85, 85.1*; *Corp. Code § 709(a)*].

[5] Venue

A proceeding to determine the validity of the election or appointment of directors must be brought in a proper county [*Corp. Code § 709(a)*]. A proper county is that county where the corporation's principal executive office is located or, if the corporation's principal executive office is not located in California or if the corporation has no principal executive office, Sacramento County [*Corp. Code § 177*]. If a foreign corporation [*see Corp. Code § 171* (foreign corporation defined)] is involved, the proceeding may be brought, at the plaintiff's option, in the county where the corporation has its principal office in California or in the county in which the election was held or the appointment made [*Corp. Code § 709(a)*; *see Elberta Oil Co. v. Superior Court (1925) 74 Cal. App. 114, 121, 239 P. 415* (action required to be brought in Fresno County where corporation maintained principal California office and held challenged election)].

[6] Parties

A proceeding under *Corp. Code § 709* may be brought by any shareholder [*see Corp. Code §§ 185, 701* (who are shareholders entitled to vote)] or by any person who claims to have denied the right to vote [*Corp. Code § 709(a)*]. Hence, persons who may bring suit include the following:

- Proxyholders [*Corp. Code § 178* (proxy as giving authority to vote shares)],
- Administrators, executors, guardians, conservators, or custodians [*Corp. Code § 702(a)*],
- Receivers [*Corp. Code § 702(b)*],
- Pledgees holding shares in their own names [*Corp. Code § 702(c)*,
- Officers, agents, or proxyholders of another corporation holding shares [*Corp. Code § 703(a)*],
- Trustees of voting agreements [*Corp. Code § 706(a)*] and voting trust agreements [*Corp. Code § 706(b)*], and
- Persons who have entered into agreements to take shares in the corporation but whose shares have not yet been issued [*Haah v. Kim (2009) 175 Cal. App. 4th 45, 55, 95 Cal. Rptr. 3d 515*].Persons who have entered into agreements to take shares in the corporation but whose shares have not yet been issued [*Haah v. Kim (2009) 175 Cal. App. 4th 45, 55, 95 Cal. Rptr. 3d 515*].

A proceeding under *Corp. Code § 709* should be brought against the corporation and against the person whose purported election or appointment is questioned. In addition, the plaintiff may want to join as a party the person (other than the plaintiff) whom the plaintiff alleges to have been elected [*see Corp. Code § 709(b)*].

[7] State Statutes

Record date for shareholders entitled to vote. *Corp. Code § 701*

Voting of shares by fiduciaries of shareholder. *Corp. Code § 702*

Voting of shares held by another corporation. *Corp. Code § 703*

Voting of shares by proxy. *Corp. Code § 705*

Voting of shares by trustee. *Corp. Code § 706*

Action to determine validity of corporate election of directors brought by shareholder or person who claims to have been denied right to vote; jurisdiction over certain foreign corporations; venue when foreign corporation a party. *Corp. Code § 709(a)*

[8] Decisions

Proceeding to contest corporate election is equitable in nature. *DeGarmo v. Goldman (1942) 19 Cal. 2d 755, 760, 123 P.2d 1* ; *Boericke v. Weise (1945) 68 Cal. App. 2d 407, 411, 156 P.2d 781* (implication that equitable defenses, such as laches, apply)

Court is entitled to consider all matters necessary to proper determination of validity of contested election and all matters necessary to just direction of relief required. *Lawrence v. I.N. Parlier Estate Co. (1940) 15 Cal. 2d 220, 227, 100 P.2d 765*

Corporation is proper but not necessary party. *Colburn Biological Inst. v. DeBolt (1936) 6 Cal. 2d 631, 642, 59 P.2d 108* ; *American Center for Educ. v. Cavnar (1972) 26 Cal. App. 3d 26, 36-37, 102 Cal. Rptr. 575*

Injunctive relief is proper in appropriate case. *Colburn Biological Inst. v. DeBolt (1936) 6 Cal. 2d 631, 644, 59 P.2d 108*

Plaintiff's involuntary loss of standing by illegal means after proceeding is begun (such as by sale of shares for nonpayment of illegal assessments or by directors not legally in office) is not cause for dismissal. *Whitehead v. Sweet (1899) 126 Cal. 67, 74, 58 P. 376*

Use of unfair and illegal election procedure as ground for invalidating election. *Braude v. Havenner (1974) 38 Cal. App. 3d 526, 534, 113 Cal. Rptr. 386*

Election contest is not made moot by expiration of challenged director's term of office if case involves general public interest and future rights of parties, and there is reasonable probability same questions will be litigated again if case dismissed for mootness. *Braude v. Havenner (1974) 38 Cal. App. 3d 526, 530, 113 Cal. Rptr. 386* (refusal to dismiss appeal for mootness)

Casting fractional votes in the absence of authorization in articles or bylaws is ground for invalidating election. *Garnier v. Garnier (1967) 248 Cal. App. 2d 255, 259, 56 Cal. Rptr. 247*

Issues are limited to those bearing on question of validity of election. *Columbia Eng'r Co. v. Joiner (1965) 231 Cal. App. 2d 837, 849, 42 Cal. Rptr. 241*

Proceeding to contest corporate election is appropriate to determine validity of voting trust. *Simpson v. Salsbury (1960) 184 Cal. App. 2d 795, 797, 7 Cal. Rptr. 784* ; *Boericke v. Weise (1945) 68 Cal. App. 2d 407, 419, 156 P.2d 781*

Conspiracy by some shareholders in close corporation to deny right of another shareholder to vote shares actually owned, on technical ground (e.g., ownership not of record) made irrelevant by conspiring shareholders' knowledge of actual ownership of shares. *Kauffman v. Meyberg (1943) 59 Cal. App. 2d 730, 739, 140 P.2d 210*

Necessity of showing that result of election could have been different if illegal acts complained of had not occurred. *Vanderlip v. Los Molinos Land Co. (1943) 56 Cal. App. 2d 747, 755, 133 P.2d 467*

Provisional injuctive relief is available under court's power pursuant to predecessor to *Corp. Code § 709*; *Code Civ. Proc. § 526* prohibiting such relief when given to prevent exercise of private office in lawful manner by person in possession is not applicable. *Fritz v. Superior Court (1936) 18 Cal. App. 2d 232, 235, 63 P.2d 872* ; *Simpson v. Nielson (1926) 77 Cal. App. 297, 299, 246 P. 342*

Venue requirements [*see Corp. Code §§ 177, 709(a)*] are jurisdictional. *Elberta Oil Co. v. Superior Court of Kings County (1925) 74 Cal. App. 114, 118-121, 239 P. 415*

Corporate election not invalidated when there is campaigning for certain candidates by corporate election committee or inspectors, or advising shareholders to cumulate and cast votes in favor of particular candidate, when that activity is not prohibited by articles, bylaws, or statute. *Clopton v. Chandler (1915) 27 Cal. App. 595, 602, 150 P. 1012*

[9] Text References

Ballantine and Sterling, California Corporation Laws, Ch. 9, *Shareholders' Meetings and Voting, §§ 177.01-177.06* (Matthew Bender)

Witkin, Summary of California Law, vol. 9, *Corporations, §§ 159, 160* (10th ed. 2005)

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PART IV. FORMS

14-166 California Forms of Pleading and Practice--Annotated § 166.85

§ 166.85 Allegations--To Determine Validity of Appointment of Directors [Corp. Code § 709(a)]

[1] FORM Allegations--To Determine Validity of Appointment of Directors [Corp. Code § 709(a)]

1. On or about _____ [*date*], [*if foreign corporation is involved and venue is based on county in which appointment made*, in _____ County, California,] the directors of defendant corporation appointed _____ [*number*] vacancies on defendant corporation's board.

2. As a _____ [shareholder *or person entitled to vote shares, e.g.,* proxyholder], plaintiff would have been entitled to vote _____ [*number*] shares, before cumulation, in any election of directors to fill the vacancies on defendant corporation's board to which defendant(s) _____ [*name(s)*] _____ [was *or* were] appointed.

3. _____ [*Allege reasons why the appointment was invalid, e.g.,* The directors of defendant corporation failed to call a special meeting of shareholders as required by Article _____ (*number*), Section _____ (*number*) of its _____ (articles *or* bylaws) providing for such a meeting to be called in the event of a vacancy on the board]. By reason of the failure and refusal of the directors of defendant corporation to hold an election, as required by its _____ [articles *or* bylaws], plaintiff was denied the right to vote for the election of directors.

[2] Use of Form

These allegations are for use in a complaint contesting the validity of any appointment of directors of a corporation. A complaint may be brought by any shareholder or by any person who claims to have been denied the right to vote [*e.g., Haah v. Kim (2009) 175 Cal. App. 4th 45, 55, 95 Cal. Rptr. 3d 515* (persons with standing include those who have entered into agreements to take shares in corporation but whose shares have not yet been issued)]. A complaint also may be brought with respect to the appointment of directors by any domestic corporation or by a foreign corporation making its appointments in California [*Corp. Code § 709(a)*]. With appropriate modifications, these allegations may be substituted for Paragraphs 3-6 in *see § 166.84*.

[3] State Statutes

Action to determine validity of corporate appointment of directors by shareholder or person who claims to have been denied right to vote. *Corp. Code § 709(a)*

[4] Cross References

For a related form, *see § 166.84*.

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14-166 California Forms of Pleading and Practice--Annotated § 166.86

§ 166.86 Order to Show Cause--In Action Contesting Corporate Election or Appointment [Corp. Code § 709(b)]

[1] FORM Order to Show Cause--In Action Contesting Corporate Election or Appointment [Corp. Code § 709(b)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER TO SHOW CAUSE
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name(s)*],	)	Location: _____
Defendant(s).	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

To _____ [*name(s) of person(s), including corporation, to be served*]:

Plaintiff, having filed a complaint praying for a judicial determination of the validity of an _____ [election *or* appointment] on or about _____ [*date*], of certain directors of _____ [*name of corporation*], a corporation, and for other appropriate relief, to which complaint reference may be had for further particulars,

YOU ARE HEREBY ORDERED to appear at _____ [*time*], on _____ [*date within five days after filing of complaint unless later date fixed for good cause*], in the courtroom of [_____ (Department *or* Division) _____ of] the above-entitled court at _____ [*address*] in _____ [*city*], _____ County, California, then

and there to show cause, if you have any, why the _____ [election *or* appointment] should not be adjudged invalid and other relief prayed for in the complaint should not be given.

A copy of this order and a copy of the complaint will be served on [each of] you _____ [in the manner in which a summons is required to be served *or* by registered mail] _____ [*further requirements as to notice, if appearing to the court proper in the circumstances, e.g.,* and such service will be made, and proof of service will be filed, within two days hereafter].
Dated: _____.

_____ [*signature*],

Judge of the Superior Court

[2] Use of Form

This form is for use in conjuction with a complaint contesting the validity of a corporate election [*see § 166.84*] or the appointment of directors [*see § 166.85*] brought by a shareholder or person claiming to have been denied the right to vote [*Corp. Code § 709(a)*]. On the filing of the complaint, the court enters an order fixing a date for a hearing. Unless good cause for a later date is shown, the hearing is held within five days. In ordering the hearing, the court requires notice of the hearing and a copy of the complaint to be served on the corporation, on the person whose purported election or appointment is questioned, and on any person (other than the plaintiff) whom the plaintiff alleges to have been elected or appointed [*Corp. Code § 709(b)*].

[3] Caption

It is good practice to include in the caption of the order to show cause the names of all of the parties. The abbreviation "et al." should not be used.

[4] Service

The notice of hearing and copy of the complaint are required to be served in the manner in which a summons and complaint are served [*Corp. Code § 709(b)*; *see Code Civ. Proc. §§ 413.10-417.40* (service of summons)]. However, the court may direct service by registered mail and may make additional requirements as to notice as appear proper under the circumstances [*Corp. Code § 709(b)*].

[5] State Statutes

Manner of service of summons in civil actions. *Code Civ. Proc. §§ 413.10-417.40*

Service by registered mail as including by certified mail. *Corp. Code § 113*

Procedure for notice and hearing in corporate election contests. *Corp. Code § 709(b)*

[6] Decisions

Relief properly denied when no substantial compliance with procedures for bringing corporate election contest. *Fritz v. Superior Court (1936) 18 Cal. App. 2d 232, 235, 63 P.2d 872* (no order setting date of hearing issued by court and no service of order on defendant)

[7] Cross References

For discussion of the manner in which summons is required to be served and for forms of proof of service that can be adapted for use in a corporate election contest, see Ch. 518, *Service of Summons and Papers*

For related forms, *see §§ 166.84* and *166.85*.

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14-166 California Forms of Pleading and Practice--Annotated § 166.87

§ 166.87 Judgment Determining Validity of Corporate Election or Appointment [Corp. Code § 709(a), (c)]

[1] FORM Judgment Determining Validity of Corporate Election or Appointment [Corp. Code § 709(a), (c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*(*s*)],	)	
Defendant(s).	)	
	)	
	)	

_____

This cause came on regularly for hearing on _____ [*date*], in [_____ (Department *or* Division)_____of] the above-entitled court, the Honorable _____ [*name*], Judge, presiding. Plaintiff appeared [personally and] by _____ [*name*], his/her attorney, and defendant(s)_____ [*name*(*s*)], appeared by _____ [*name*], his/her/their attorney. [*Specify additional appearances or defaults, e.g.,* Defendant corporation was duly served with the order to show cause in this matter but made no appearance]. Evidence, both oral and documentary, having been presented, the court being fully advised in the matter, the matter having been submitted to the court, and it appearing to the court that plaintiff has shown good cause therefor,

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that the _____ [election *or* appointment] of _____ [*name*(*s*)] as director(s) of _____ [*name*] defendant corporation on or about _____, [*date*] _____ was invalid.[

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that _____ (*describe any further orders*

made by court specifying the persons entitled to office, ordering a new election to be held or appointment made, determining the validity, effectiveness, and construction of voting agreements and voting trust agreements, or determining the validity of the issuance of shares and the right of persons to vote, e.g., defendant corporation hold a special shareholders' meeting for the purpose of an election of directors within 30 days from the date of this order at defendant corporation's principal office in _____ County, California; that the directors elected at this meeting immediately take office for a term ending on the election and qualification of successor directors at the annual meeting of shareholders in _____ [*date*]; and that in the election, the right of _____ (*name*) to vote _____ (*number*) shares, before cumulation, is to be recognized and given effect.]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is a judgment for use by a successful plaintiff in an action seeking to hold a corporate election or appointment of a director invalid under *Corp. Code § 709*. In giving its judgment in an election of appointment contest, a court may do all of the following [*Corp. Code § 709(c)*]:

- Determine the person entitled to the office of director.
- Order a new election to be held or appointment made.
- Determine the validity, effectiveness, and construction of voting agreements and voting trusts.
- Determine the validity of the issuance of shares and the right of persons to vote.
- Direct such other relief as may be just and proper.

[3] Stay of Enforcement Pending Appeal

The perfecting of an appeal stays proceedings in the trial court on the judgment appealed from, or on the matters embraced therein or affected thereby, including enforcement of the judgment [*Code Civ. Proc. § 916(a)*]. However, the perfecting of an appeal does not prevent duly elected directors from acting as such, nor does it authorize an appellate court to restrain the directors from acting as such pending determination of the appeal [*Dulin v. Pacific Wood & Coal Co. (1893) 98 Cal. 304, 307-309, 33 P. 123]* .

On the other hand, if the judgment invalidates the election and determines that a particular person is entitled to a contested directorship, an appeal prevents the superior court from giving effect to the judgment by, for example, enforcing an award of mandatory injunctive relief included in the judgment [*Foster v. Superior Court (1896) 115 Cal. 279, 284-285, 47 P. 58* (judgment that plaintiff entitled to contested directorship and that defendant directors were to be enjoined from interfering with plaintiff's exercise of that office; after appeal perfected, order finding one defendant director in contempt for violating injunction requiring director not to interfere with plaintiff's directorship held erroneous and vacated because of statutory foreclosure of further trial court proceedings on the judgment)].

[4] State Statutes

Appeal. *Code Civ. Proc. §§ 901-923*

Judgment is final determination of rights of parties in special proceeding. *Code Civ. Proc. § 1064*

Contents of judgment in corporate election contest. *Corp. Code § 709(c)*

[5] Decisions

Appeal from judgment invalidating election prevents trial court from enforcing judgment pending determination of appeal. *Foster v. Superior Court (1896) 115 Cal. 279, 284-285, 47 P. 58*

Appeal from judgment upholding election does not prevent elected directors from functioning and does not authorize appellate court to restrain elected directors from acting pending determination of appeal. *Dulin v. Pacific Wood & Coal Co. (1893) 98 Cal. 304, 307-309, 33 P. 123*

Court did not abuse discretion in failing to order new election. *Garnier v. Garnier (1967) 248 Cal. App. 2d 255, 259, 56 Cal. Rptr. 247*

Order removing director and barring removed director from reelection for specified period. *Olincy v. Merle Norman Cosmetics, Inc. (1962) 200 Cal. App. 2d 260, 275, 19 Cal. Rptr. 387*

In order to prevent multiplicity of actions, court properly removed director, restrained removed director from seeking reelection, rendered personal money judgment against removed director, and canceled corporation's uncashed salary checks to removed director. *Edward Sidebotham & Son v. Chandler (1960) 183 Cal. App. 2d 823, 831, 7 Cal. Rptr. 216*

Judgment rendered under election contest statute has effect of order on persons to whom directed. *Boswell v. Mt. Jupiter Mut. Water Co. (1950) 97 Cal. App. 2d 437, 442, 217 P.2d 980*

Court properly considered validity of voting trust agreement as that issue affects question of validity of election. *Boericke v. Weise (1945) 68 Cal. App. 2d 407, 419, 156 P.2d 781*

Court passed on right of party to vote certain shares if illegal transfer of those shares alleged. *Smith v. California Thorn Cordage, Inc. (1933) 129 Cal. App. 93, 95 18 P.2d 393*

Order that shareholders' meeting be held within 30 days, providing necessary procedures for such meeting, and enjoining unelected de facto directors from acting as directors unless elected or appointed to office. *Los Angeles v. Owens River Canal Co. (1932) 120 Cal. App. 380, 384, 7 P.2d 1064*

Temporary restraining order is proper auxiliary relief, even if not all circumstances for issuance of injuctive relief pleaded. *Simpson v. Nielson (1926) 77 Cal. App. 297, 299, 246 P. 342*

[6] Cross References

For related forms, *see* §§ 166.84-166.86.

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14-166 California Forms of Pleading and Practice--Annotated § 166.88

§ 166.88 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--By Legal or Beneficial Owner of Shares Against Person Empowered to Vote Those Shares--To Compel Disclosure of Voting Record [Corp. Code § 711(j)]

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--By Legal or Beneficial Owner of Shares Against Person Empowered to Vote Those Shares--To Compel Disclosure of Voting Record [Corp. Code § 711(j)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner, vs.	)	
_____ [*name(s)*],	)	NO. _____
[and DOES I through _____,]	)	PETITION FOR WRIT OF MANDATE
Respondent(s).	)	
	)	
	)	
_____		

Petitioner alleges:

1. Respondent _____ [*name*], hereinafter referred to as "respondent corporation," is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the state of _____ [*state of incorporation; add if appropriate:* authorized to transact, and transacting, intrastate business in California], and [is registered as and] doing business as _____ [*allege respondent's type of business, e.g.,* an investment company within the meaning of the federal Investment Company Act of 1940]. Respondent corporation _____ [has its principal place of business (in California) *or* keeps its corporate records *or* keeps the records whose disclosure is sought by this proceeding] in _____County, California [*or allege other capacity and residence of defendant as appropriate*].

[2. Respondent _____ (*name*) is, and at all times herein mentioned was, _____ (*corporate title, e.g.,* Vice-President and Portfolio Manager of respondent corporation) and the officer in possession of the records whose disclosure is sought by this proceeding.]

[3. *Fictitious respondents. See § 165.70, Paragraph 3.*]

[4. *Agency of fictitious respondents. See § 165.70, Paragraph 4.*]

5. Petitioner is the _____ [*describe petitioner's interest, e.g.,* owner of record] of _____ [*allege quantity or share and type of interest held by petitioner, e.g.,* 25 units of the _____ (*name*) Fund, hereinafter referred to as "the Fund," issued by respondent corporation. The Fund is a closed-end fund, advertised and represented by respondent corporation as having no investments in companies that operate in South Africa or South America. The common stocks comprising the portfolio of the Fund include _____ (*name(s) of issuer(s)*)].

6. On or about _____ [*date*], petitioner made written demand on respondent(s) to make available to petitioner its record of the manner in which the Fund's shares of _____ [*name(s) of issuer(s)*] were voted _____ [*specify meeting or subject matter and date(s) of vote(s), e.g.,* in March, 1990, on the question of whether _____ (*name of issuer*) should acquire a cattle raising operation in Brazil]. A copy of petitioner's written request is attached hereto marked Exhibit "A" and made a part hereof.

[*EITHER*]

7. Respondent has not asked petitioner to supply any identification or verification of his/her interest in the _____ [*entity in which petitioner holds interest, e.g.,* Fund].

[*OR*]

7. On or about _____ [*date*], respondent informed petitioner by letter, that in order to comply with petitioner's written request, respondent required _____ [*specify identification demanded, e.g.,* the number of the certificate confirming petitioner's original purchase of his or her units and petitioner's social security number]. Petitioner supplied that information to respondent by letter dated _____ [*date*], a copy of which is attached hereto marked Exhibit "B" and made a part hereof.

[*CONTINUE*]

[*EITHER*]

8. Respondent has not asked petitioner to pay any fee for the processing of his/her interest request.

[*OR*]

8. On or about _____ [*date*], respondent informed petitioner by letter, that in order to comply with petitioner's written request, respondent required petitioner to pay a fee of $_____. On or about _____ [*date*], petitioner tendered his/her check #_____in payment of that fee.

_____ [Petitioner is informed and believes and on such information and belief alleges that respondent has not cashed the check *or* A copy of that cancelled check is attached hereto marked Exhibit "C" and made a part hereof].

[*CONTINUE*]

9. Respondent(s) [and each of them] failed and refused, and continue(s) to fail and refuse to furnish the voting record(s) requested by petitioner.

10. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition, in that petitioner has no means by which to otherwise compel the disclosure of the voting record to which petitioner is entitled pursuant to *Section 711 of the Corporations Code*.

WHEREFORE, petitioner prays:

1. That the court issue an alternative writ of mandate commanding respondent(s) [and each of them] to disclose to petitioner [and to _____ (*name*), petitioner's _____ (agent *or* attorney),] in writing delivered to _____ [*street address*], _____ [*city*], California, the manner in which it voted the shares of _____ [*name(s) of issuer(s)*] [held by _____ (*name of entity that owns the shares, e.g.,* its _____ (*name*) Fund]_____ [*specify meeting or subject matter and date(s) of vote(s), e.g.,* in March, 2006, on the question of whether _____ (*name of issuer*) should acquire a cattle raising operation in Brazil], or to show cause before this court at a time specified by court order why a peremptory writ should not issue;

2. That on return of the alternative writ and the hearing of this petition, this court issue its peremptory writ of mandate commanding respondent(s) [and each of them] to disclose to petitioner [and to _____ (*name*), petitioner's _____ (agent *or* attorney),] in writing delivered to _____ [*street address*], _____ [*city*], California, the manner in which it voted the shares of _____ [*name(s) of issuer(s)*] [held by _____ (*name of entity that owns the shares, e.g.,* its _____ (*name*) Fund]_____ [*specify meeting or subject matter and date(s) of vote(s), e.g.,* in March, 1990, on the question of whether _____ (*name of issuer*) should acquire a cattle raising operation in Brazil];

3. For reasonable attorney's fees;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*date*]

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 165.70.*]

CAUTION:

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Proof of service on each

respondent and real party in interest of a copy of a petition that seeks an alternative writ must accompany the petition when it is offered for filing except when, in its discretion and for good cause, the court has granted the application for the writ ex parte [*Code Civ. Proc. § 1107*; for a discussion of serving the petition, see Ch. 358, *Mandate and Prohibition*]. Points and authorities also customarily accompany a petition filed in a superior court, although they do not appear to be expressly required by statute. When no alternative writ is sought, proof of service of a copy of the petition need not accompany the application, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

[2] Use of Form

This form is a petition for a writ of mandate for use to obtain a writ to compel disclosure of a voting record from a respondent who voted shares of stock on behalf of petitioner. The voting record need only be maintained for a period of 12 consecutive months from the effective date of the vote; and the requirement of maintaining such a record only became operative January 1, 1990 [*see Corp. Code § 711(d), (e), (k)* (*see § 166.34*)].

Corp. Code § 711does not specify the type of action or proceeding to be used to compel disclosure, but only refers to "an action pursuant to or to enforce this section' [*see Corp. Code § 711(j)*]. An action for declaratory relief [*see Code Civ. Proc. § 1060* (relief in addition to declaration as may be granted)], or a mandatory injunction [*Code Civ. Proc. § 526*] would probably also be available, but the proceeding for writ of mandate seems likely to provide relief sooner. Mandate is appropriate to compel a corporation or person to perform a duty resulting from an office, trust, or station [*Code Civ. Proc. § 1085*; *see also* Ch. 358, *Mandate and Prohibition*].

[3] Allegations

This petition for a writ of mandate alleges:

- Respondent's corporate capacity and principal office (Paragraph 1).

- Respondent's type of business and any registrations, licenses, or authorizations held by it (Paragraph 1).

- The capacity of individual respondents (Paragraph 2).

- Fictitious name and agency allegations, if applicable (Paragraphs 3, 4) [*see Code Civ. Proc. § 1109* (regular rules of pleading set forth in *Code Civ. Proc. §§ 307-1062.10* as applicable to petition for writ of mandate unless otherwise provided in *Code Civ. Proc. §§ 1084-1097*)].

- The relationship between petitioner and respondent (Paragraph 5).

- Petitioner's status as a person entitled to disclosure of the record of the manner in which respondent voted shares on petitioner's behalf (Paragraph 5) [*Corp. Code § 711(a)-(c), (g)*].

- Petitioner's written request for disclosure of the record of a specific vote or votes by respondent after January 1, 1990, and effective within the previous 12 months (Paragraph 6) [*Corp. Code § 711(d), (e), (k)*].

- Petitioner's compliance with any request made by respondent for information to verify petitioner's identity, or the fact that respondent did not ask for any such information (alternative Paragraphs 7) [*Corp. Code § 711(e)(1)*].

- Petitioner's payment or tender of any reasonable fee requested by respondent, or the fact that respondent did not request any fee (alternative Paragraphs 8) [*Corp. Code § 711(i)*].

- Respondent's continued failure to disclose the voting record to respondent (Paragraph 9).

- Petitioner's lack of any other plain, speedy, or adequate remedy in the ordinary course of law (Paragraph 10) [*Code Civ. Proc. § 1086*].

[4] Jurisdiction

Mandate proceedings may be brought in the Supreme Court, courts of appeal, and superior courts [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 1085, 1108*]. When the writ sought is not directed to a court, however, the petition is usually filed in superior court [*see* Ch. 358, *Mandate and Prohibition*].

[5] Venue

A corporation may be sued in the county where the obligation sued on arises or in the county where it has its principal place of business [*Code Civ. Proc. § 395.5*]. With regard to individual respondents, the county in which the respondent, or any of them, resides at the commencement of the proceedings is the proper venue [*Code Civ. Proc. § 395(a)*]. If there is a contract between the parties designating a particular place for disclosures pursuant to *Corp. Code § 711*, that county or the county in which the contract was made are also proper venues [*Code Civ. Proc. §§ 395(a), 395.5*].

The proper county in which to bring an action involving a corporate defendant is the county where the principal executive office of the corporation is located. However, if the principal executive office is not located in California, or if the corporation has no principal executive office, the proper county is Sacramento County [*Corp. Code § 177*; *see also*Los Angeles Co. Super. Ct. Rules, Rule 2.0(b), (c) (districts for filing petitions for writ of mandate in Los Angeles County)].

[6] Costs and Attorney's Fees

One who successfully brings an action pursuant to or to enforce *Corp. Code § 711* may recover costs and reasonable attorney's fees if the court finds that the defendant willfully violated *Corp. Code § 711* [*Corp. Code § 711(j)*]. For forms for use to recover costs and attorney's fees authorized by statute, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

[7] Subsequent Papers

For alternative writs and orders directing issuance of an alternative writ, modify §§ 165.77 and 165.78, respectively, by deleting text referring to inspection or audit of records and substituting text similar to that found in the prayer of the above form referring to disclosure of the record of a particular vote, or see more general forms in Ch. 358, *Mandate and Prohibition* . Similarly, forms for a return to an alternative writ, by demurrer and answer, respectively, may be composed by modifying the forms in *§§ 166.79* and *166.80* to set forth grounds, allegation, or defenses applicable under *Corp. Code § 711* or by using the more general forms in Ch. 358, *Mandate and Prohibition* .

[8] State Statutes

Purpose and construction of statute. *Corp. Code § 711(a)*

Alternative compliance by retirement plan investment manager. *Corp. Code § 711(a)*

Who is entitled to disclosure. *Corp. Code § 711(b)*

Persons not entitled to disclosure. *Corp. Code § 711(c)*

Duty to maintain and disclose record of shares voted on behalf of another. *Corp. Code § 711(d), (e), (k)*

Procedures for disclosure. *Corp. Code § 711(e)*

Disclosure when voting power is held by unit investment trust. *Corp. Code § 711(f)*

Proxies do not constitute vote, but disclosure of person who has power to vote is required. *Corp. Code § 711(g)*

Disclosure when voting power is held by two or more persons. *Corp. Code § 711(h)*

Imposition of reasonable fee to defray costs of disclosure is permitted, except when voting power is derived from third person. *Corp. Code § 711(i)*

Action for enforcement; attorney's fees. *Corp. Code § 711(i)*

[9] Cross References

See also Comments and References to *§ 165.70*.

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Chapter 167 CORPORATIONS: DIRECTORS AND MANAGEMENT

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§ 167.syn Synopsis to Chapter 167: CORPORATIONS: DIRECTORS AND MANAGEMENT

§ 167.01 Scope of Chapter

§§ 167.02-167.09 [Reserved]

§ 167.10 Governing Statutes

§ 167.11 Direction and Management of Corporate Affairs

§ 167.12 Selection of Directors

[1] Designation in Articles or Bylaws

[2] Election by Shareholders

[a] Elected at Large

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[3] Corporation's Status as Listed Corporation

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[3] Attorney's Fees and Costs

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[5] Jurisdiction

[6] State Statutes

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Chapter 167 CORPORATIONS: DIRECTORS AND MANAGEMENT
PART I. SCOPE

14-167 California Forms of Pleading and Practice--Annotated § 167.01

§ 167.01 Scope of Chapter

This part covers actions and proceedings involving corporate directors and management personnel (officers and controlling shareholders), with emphasis on three principal areas:

- Court appointment of provisional directors and removal of directors.

- Fiduciary duties of directors, officers, and controlling shareholders.

- Indemnification of a corporate agent by the corporation for defense expenses incurred in a civil, criminal, administrative, or investigative proceeding.

-

The chapter contains the following forms:

- Forms relating to the appointment and removal of directors:

  - Petitions [*see §§ 167.160, 167.161*], an order to show cause [*see § 167.162*], and a judgment [*see § 167.163*] for appointment of a provisional director.

  - A petition [*see § 167.164*] and a judgment [*see § 167.165*] for appointment of a board of directors if all directors have died, resigned, or become incompetent, and the corporation has not issued shares.

  - A complaint [*see § 167.166*] and a judgment [*see § 167.167*] for removal of a director.

  - A petition for writ of mandate [*see § 167.168*] to restore a wrongfully removed director to office.

- Forms relating to the exercise of the fiduciary duties of corporate directors, officers, and controlling shareholders:

  - A complaint for damages for breach of a director's fiduciary duties [*see § 167.180*] and an affirmative defense to such an action [*see § 167.184*].

  - A complaint against a director for approving an illegal loan of corporate funds or property, or an illegal guaranty on the corporation's credit [*see § 167.183*].

  - A complaint for use when a former officer has wrongfully appropriated an invention belonging to the corporation [*see § 167.181*].

  - A complaint for use when a contract or transaction is voidable because of a director's interest [*see § 167.182*].

- Forms relating to the indemnification of corporate agents by the corporation:

  - A notice of motion for an order directing the corporation to provide indemnity [*see § 167.200*].

  - An order to show cause, for use when the corporation is not already a party to the action or proceeding in which the motion is made [*see § 167.201*].

  - An order directing the corporation to provide indemnity [*see § 167.202*].

  - A complaint for indemnification for use when a motion cannot be made [*see § 167.203*].

Some aspects of directors' duties and disclosure obligations in regard to mergers and securities are discussed in Ch. 169, *Corporations: Reorganizations* , and in Ch. 515, *Securities and Franchise Regulation*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesFiduciary ResponsibilitiesDuty of Good FaithBusiness & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesIndemnificationBusiness & Corporate LawCorporationsDirectors & OfficersTerms in OfficeRemoval & Resignation

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14-167 California Forms of Pleading and Practice--Annotated §§ 167.02-167.09

[Reserved]

§§ 167.02[Reserved]

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14-167 California Forms of Pleading and Practice--Annotated § 167.10

§ 167.10 Governing Statutes

Designation of initial directors is governed by *Corp. Code §§ 204, 210*, and *212(b)(1)*; election of directors by the shareholders is governed by *Corp. Code §§ 301(a), 301.5*, and *305(b)*; appointment of directors by the board is governed by *Corp. Code § 305(a)*; and appointment of directors by the superior court is governed by *Corp. Code §§ 306, 308*, and *1806(f), (g)*.

Contests of corporate elections and appointments of directors other than by a court are governed by *Corp. Code § 709*.

Removal of directors by the shareholders is governed by *Corp. Code § 303*; removal by the board is governed by *Corp. Code § 302*; and removal by the superior court is governed by *Corp. Code §§ 304* and *1806(g)*.

A director's standard of care is set out in *Corp. Code § 309*. The voidability of contracts and transactions because of a director's interest is governed by *Corp. Code § 310*. The liability of directors for approving an illegal loan of corporate funds or property or an illegal guaranty on the corporation's credit is governed by *Corp. Code §§ 315* and *316*.

Indemnification of corporate agents for defense expenses is governed by *Corp. Code § 317*, subject to the limitations of *Corp. Code § 204(a)(11)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesFiduciary ResponsibilitiesDuty of Good FaithBusiness & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesIndemnificationBusiness & Corporate LawCorporationsDirectors & OfficersScope of AuthorityDiscretionBusiness & Corporate LawCorporationsDirectors & OfficersTerms in OfficeElectionsBusiness & Corporate LawCorporationsDirectors & OfficersTerms in OfficeRemoval & Resignation

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14-167 California Forms of Pleading and Practice--Annotated § 167.11

§ 167.11 Direction and Management of Corporate Affairs

Subject to the provisions of the General Corporation Law [*Corp. Code §§ 100-2319*] and any limitations in the articles relating to action required to be approved by the shareholders [*see Corp. Code § 153*] or by the outstanding shares [*see Corp. Code § 152*], "the business and affairs of the corporation shall be managed and all corporate powers shall be exercised by or under the direction of the board [of directors]. The board may delegate the management of the day-to-day operation of the business of the corporation to a management company or [an]other person provided that the business and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board" [*Corp. Code § 300(a)*]. The shareholders of a close corporation, by agreement, may allocate management duties among themselves [*see Corp. Code § 300(b)-(e)*].

The board, by resolution adopted by a majority of the authorized number of directors, may designate committees, each consisting of two or more directors, to serve at the pleasure of the board. Any such committee, to the extent provided in the resolution or in the bylaws, will have all the authority of the board except with respect to the matters specified in *Corp. Code § 311*.

As a matter of general corporate law, a board of directors has no power to delegate the performance of its basic powers and functions unless there is specific statutory authority for them to do so. *Corp. Code §§ 300, 309,* and *311* are examples of this type of specific statutory authority [*Wells Fargo Bank v. Superior Court (1991) 53 Cal. 3d 1082, 1095-1096, 282 Cal. Rptr. 841, 811 P.2d 1025]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawClosely Held CorporationsGeneral OverviewBusiness & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesGeneral OverviewBusiness & Corporate LawCorporationsDirectors & OfficersScope of AuthorityGeneral Overview

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14-167 California Forms of Pleading and Practice--Annotated § 167.12

§ 167.12 Selection of Directors

[1] Designation in Articles or Bylaws

The articles of incorporation of a corporation organized under the General Corporation Law [*Corp. Code §§ 100-2319*] may set forth the names of the persons designated by the incorporators to act as initial directors [*Corp. Code § 204*]. If the initial directors are not designated in the articles, they may be designated in the bylaws [*Corp. Code § 212(b)(1)*].

If no initial directors are named in the articles, the incorporators may perform corporate acts until the election of directors [*Corp. Code § 210*]. If the incorporators adopt bylaws designating initial directors, which they have the power to do when no initial directors are designated in the articles [*see Corp. Code § 210*], then presumably the incorporators lose power to perform corporate acts when the designated directors assume office.

[2] Election by Shareholders

[a] Elected at Large

Except as provided in *Corp. Code § 301.5* (discussed in *§ 167.12[2][b]*), at each annual meeting of shareholders, directors must be elected to hold office until the next annual meeting [*Corp. Code § 301(a)*]. Nevertheless, to effectuate a voting shift, the articles may provide that directors hold office for a shorter term [*Corp. Code § 301(a)*; *see Corp. Code § 194.7* (voting shift as change, pursuant to articles, in relative rights of one or more classes or series of shares to elect one or more directors)].

The shareholders may elect a director at any time to fill a vacancy on the board which the directors have not filled [*Corp. Code § 305(b)*; *§ 167.12[4]*].

The election of a director or directors may be contested in a judicial proceeding [*see § 167.30 et seq*.].

[b] Election by Classes; Elimination of Cumulative Voting

A listed corporation, as defined in *Corp. Code § 301.5(d)* (discussed in *§ 167.12[3]*), by amendment of its articles or bylaws, may adopt provisions to divide the board of directors into two or three classes to serve for terms of two or three years respectively, or to eliminate cumulative voting, or both [*Corp. Code § 301.5(a)*; *see also Corp. Code § 301.7* (applicable to listed corporations engaged in operation of recreation venture)]. After the issuance of shares, a corporation that is not a listed corporation, by amendment of its articles or bylaws, may adopt provisions to be effective when the corporation becomes a listed corporation to divide the board of directors into two or three classes to serve for terms of two or three years respectively, or to eliminate cumulative voting, or both [*Corp. Code § 301.5(a)*; *see also Corp. Code § 301.5(j)* (legend required on amendment to become effective when corporation becomes listed)].

An article or bylaw amendment providing for division of the board of directors into classes, or any change in the number of classes, or the elimination of cumulative voting may only be adopted by the approval of the board and the outstanding shares (*Corp. Code § 152*) voting as a single class, notwithstanding *Corp. Code § 903*, relating to shareholder approval of amendments [*Corp. Code § 301.5(a)*; *see also Corp. Code § 301.5(e)* (additional formalities of certificate of amendment)].

If the board of directors is divided into two classes, the authorized number of directors must be no less than six; and one half of the directors, or as close an approximation as possible, must be elected at each annual meeting of the shareholders [*Corp. Code § 301.5(b)*]. If the board of directors is divided into three classes, the authorized number of directors must be no less than nine; and one third of the directors, or as close an approximation as possible, must be elected at each annual meeting of the shareholders [*Corp. Code § 301.5(b)*]. Directors of a listed corporation may be elected by classes at a meeting of shareholders at which an amendment to the articles or bylaws described in *Corp. Code § 301.5(a)* is approved, but the extended terms for directors are contingent on that approval, and in the case of an amendment to the articles, the filing of any necessary amendment pursuant to *Corp. Code § 905* or *910* [*Corp. Code § 301.5(b)*]. If directors of more than one class are to be elected by the shareholders at any one meeting and the election is by cumulative voting pursuant to *Corp. Code § 708*, votes may be cumulated only for directors to be elected within each class [*Corp. Code § 301.5(c)*].

A listed corporation that has eliminated cumulative voting may amend its articles or bylaws to require that in an uncontested election, approval of the shareholders [*see Corp. Code § 153*] will be required to elect a director [*Corp. Code §§ 708(c), 708.5(b)*; *see § 166.30[1]*].

[3] Corporation's Status as Listed Corporation

For purposes of *Corp. Code § 301.5*, a "listed corporation" means a corporation with outstanding shares listed on the New York Stock Exchange, the NYSE Amex, the NASDAQ Global Market, or the NASDAQ Capital Market [Corp. Code § 310.5(d)].

Subject to *Corp. Code § 301.5(h)* (discussed *below*), if a listed corporation having a board of directors divided into classes pursuant to *Corp. Code § 301.5(a)* ceases to be a listed corporation for any reason, unless the articles of incorporation or bylaws of the corporation provide for the elimination of classes of directors at an earlier date or dates, the board of directors of the corporation will cease to be divided into classes as to each class of directors on the date of the expiration of the term of the directors in that class and the term of each director serving at the time the corporation ceases to be a listed corporation (and the term of each director elected to fill a vacancy resulting from the death, resignation, or removal of any of those directors) will continue until its expiration as if the corporation had not ceased to be a listed corporation [*Corp. Code § 301.5(e)*]. If a listed corporation having a provision in its articles or bylaws eliminating cumulative voting pursuant to *Corp. Code § 301.5(a)*, or permitting noncumulative voting in the election of directors pursuant to that subdivision, or both, ceases to be a listed corporation for any reason, the shareholders will be entitled to cumulate their votes pursuant to *Corp. Code § 708* at any election of directors occurring while the corporation is not a listed corporation notwithstanding that provision in its articles of incorporation or bylaws [*Corp. Code § 301.5(f)*; *see Corp. Code § 301.5(h)*].

Subject to *Corp. Code § 301.5(i)* (discussed *below*), if a corporation that is not a listed corporation adopts amendments to its articles of incorporation or bylaws to divide its board of directors into classes or to eliminate cumulative voting, or both, pursuant to *Corp. Code § 301.5(a)* and then becomes a listed corporation, unless the articles of incorporation or bylaws provide for those provisions to become effective at some other time and, in cases in which classes of directors are provided for, identify the directors who, or the directorships that, are to be in each class or the method by which those directors or directorships are to be identified, the provisions will become effective for the next election of directors after the corporation becomes a listed corporation at which all directors are to be elected [*Corp. Code § 301.5(g)*].

If a corporation ceases to be a listed corporation on or after the record date for a meeting of shareholders and prior to the conclusion of the meeting, including the conclusion of the meeting after an adjournment or postponement that does not require or result in the setting of a new record date, then, solely for purposes of *Corp. Code § 301.5(e), (f)*, the corporation will not be deemed to have ceased to be a listed corporation until the conclusion of the meeting of shareholders [*Corp. Code § 301.5(h)*]. If a corporation becomes a listed corporation on or after the record date for a meeting of shareholders and prior to the conclusion of the meeting, including the conclusion of the meeting after an adjournment or postponement that does not require or result in the setting of a new record date, then, solely for purposes of *Corp. Code § 301.5(g)* (discussed *above*), the corporation will not be deemed to have become a listed corporation until the conclusion of the meeting of shareholders [*Corp. Code § 301.5(i)*].

[4] Appointment by Other Directors

Unless otherwise provided in the articles or bylaws, and (in some cases) except for a vacancy created by removal of a director [*see* Removal of Directors, *below*], a vacancy on the board may be filled by approval of the board as defined in *Corp. Code § 151* or, if the number of directors then in office is less than a quorum, by (1) the unanimous written consent of the directors then in office; (2) the affirmative vote of a majority of the directors then in office at a meeting held pursuant to notice or waivers of notice complying with *Corp. Code § 307*; or *(3)* a sole remaining director. When a vacancy is created by removal of a director, the remaining directors may fill it only if the articles or a bylaw adopted by the shareholders give the remaining directors, or a sole remaining director, that power [*Corp. Code § 305(a)*].

If, after the directors have filled a vacancy on the board, the directors then in office who have been elected by the shareholders comprise less than a majority of the directors then in office, shareholders may compel the calling of a special meeting for the election of directors [*Corp. Code § 305(c)*].

Appointment of a director by other directors may be contested in a judicial proceeding [*see* Corp. Code § 2236].

[5] Appointment by Superior Court

If a corporation has not issued shares, and all directors have resigned, died, or become incompetent, or if initial directors were not named in the articles and all the incorporators have resigned, died, or become incompetent prior to election of the initial directors, any party in interest may apply to the superior court for appointment of directors [*Corp. Code § 306*; *see § 167.164* and Comments].

In certain circumstances, the superior court may appoint a provisional director or provisional directors [*see § 167.31*].

If the superior court has removed a director in an involuntary proceeding for winding up [§ 167.13[3]], the court may order an election to fill the vacancy so caused, and may enjoin, for such time as it considers proper, the reelection of the director so removed; or the court, in lieu of ordering an election, may appoint a director to fill the vacancy [*Corp. Code § 1806(g)*].

In an involuntary winding up proceeding, the court's jurisdiction includes the filling of any vacancies on the board which the directors or shareholders are unable to fill [*Corp. Code § 1806(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersTerms in OfficeElectionsBusiness & Corporate LawCorporationsDirectors & OfficersTerms in OfficeRemoval & ResignationBusiness & Corporate LawCorporationsDirectors & OfficersTerms in OfficeVacanciesBusiness & Corporate LawCorporationsFinanceGeneral OverviewBusiness & Corporate LawCorporationsShareholdersMeetings & VotingVoting SharesGeneral OverviewBusiness & Corporate LawCorporationsShareholdersMeetings & VotingVoting SharesDirector Elections & Removals

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14-167 California Forms of Pleading and Practice--Annotated § 167.13

§ 167.13 Removal of Directors

[1] By Shareholders

Any director or directors, or the entire board, may be removed by the vote of the shareholders, subject to two limitations for the protection of cumulative voting rights and, if they exist, of rights to elect directors according to classes or series of shares [*Corp. Code § 303*].

Removal by the shareholders may be without cause [*Corp. Code § 303(a)*]. However, if a director is removed in violation of either of the two limitations for the protection of voting rights, the election of a successor may be contested on that ground and the wrongfully removed director may sue for a writ of mandate to get his or her position restored [*see § 167.168* and Comments].

[2] By Other Directors

The board (i.e., a majority of the directors, unless the articles or bylaws provide otherwise [*Corp. Code § 307(a)(7)*]) may declare vacant the office of a director who has been declared of unsound mind by a court or convicted of a felony [*Corp. Code § 302*].

[3] By Superior Court

Any director who has committed fraudulent or dishonest acts or a gross abuse of authority or discretion with reference to the corporation may be removed by the superior court on the complaint of a shareholder or shareholders holding at least 10 percent of the shares in the corporation or, if the shares are divided into classes, at least 10 percent of any class [*Corp. Code § 304*; *see § 167.32*].

When an involuntary proceeding for winding up the corporation has begun, the jurisdiction of the court includes the removal of any director if it appears that the director has been guilty of dishonesty, misconduct, neglect, or abuse of trust in conducting the winding up or if the director is unable to act [*Corp. Code § 1806(g)*; *see* Part X, "Dissolution and Winding Up"]. The court may fill any vacancy created by the court's removal of a director in those circumstances [§

167.12[5]].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersTerms in OfficeElectionsBusiness & Corporate LawCorporationsDirectors & OfficersTerms in OfficeRemoval & ResignationBusiness & Corporate LawCorporationsDirectors & OfficersTerms in OfficeVacanciesBusiness & Corporate LawCorporationsShareholdersMeetings & VotingVoting SharesGeneral OverviewBusiness & Corporate LawCorporationsShareholdersMeetings & VotingVoting SharesDirector Elections & Removals

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14-167 California Forms of Pleading and Practice--Annotated § 167.14

§ 167.14 Officers

A corporation is required to have a chief executive officer, a secretary, and a chief financial officer. A corporation may have other officers. The chief executive officer, who is the chairman of the board unless there is a president and that office is occupied by someone else, is the "general manager" of the corporation except as otherwise provided in the articles or bylaws [*Corp. Code § 312(a)*].

Except as otherwise provided by the articles or bylaws, officers are chosen by the board and serve at the pleasure of the board, subject to the rights, if any, of an officer under a contract of employment. Any officer may resign at any time on written notice to the corporation without prejudice to the rights, if any, of the corporation under any contract to which the officer is a party [*Corp. Code § 312(b)*]. The presumption of at-will employment created by *Corp. Code § 312(b)* is no greater than that created by *Lab. Code § 2922*. Thus, a corporate officer may have a cause of action for wrongful termination by breach of an implied contract of employment created by conduct of the parties or personnel policies and practices [*Bell v. Superior Court (1989) 215 Cal. App. 3d 1103, 1108-1111, 263 Cal. Rptr. 787]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesGeneral OverviewBusiness & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesFiduciary ResponsibilitiesGeneral Overview

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14-167 California Forms of Pleading and Practice--Annotated § 167.15

§ 167.15 Tort Liability of Officers and Directors

Other than by application of the alter ego doctrine (discussed in Part II, "Alter Ego Liability"), corporate directors and officers cannot be held *vicariously* liable for the corporation's torts in which they do not participate. Their liability, if any, stems from their own tortious conduct, not from their status as officers or directors of the enterprise. For example, in a case arising under the Fair Housing Act [*42 U.S.C. § 3601 et seq.*], the U.S. Supreme Court held that the right of a real estate corporation's president to control the conduct of a corporate employee did not create a principal/agent or employer/employee relationship that would give rise to vicarious liability of that officer for the employee's alleged violation of the Act [*Meyer v. Holley (2003) 537 U.S. 280* , (Act imposes liability without fault on employer in accordance with traditional agency principles, *i.e.*, it imposes vicarious liability on corporation but not on its officers or owners)]. An officer or director will not be liable for torts in which he or she does not personally participate, of which he or she has no knowledge, or to which he or she did not consent. Although the corporation itself may be liable for the tortious acts, the individual officer or director will be immune unless he or she authorized, directed, or in some meaningful sense actively participated in the wrongful conduct [*Michaelis v. Benavides (1998) 61 Cal. App. 4th 681, 685-687, 71 Cal. Rptr. 2d 776* (involving corporate officer's personal tortious conduct and breach of duty to a third party who suffered physical damage to property); *Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 503-505, 229 Cal. Rptr. 456, 723 P.2d 573* (directors liable for failure to correct dangerous condition in common area of condominium project); *PMC, Inc. v. Kadisha (2000) 78 Cal. App. 4th 1368, 1372, 1379, 93 Cal. Rptr. 2d 663* (directors and officers alleged to be liable for co-defendants' misappropriation of plaintiffs' trade secrets); *Seagate Technology v. A.J. Kogyo Co. (1990) 219 Cal. App. 3d 696, 701, 268 Cal. Rptr. 586* (officer/director alleged to have fraudulently induced plaintiff to extend credit to corporation); *Taylor-Rush v. Multitech Corp. (1990) 217 Cal. App. 3d 103, 113, 265 Cal. Rptr. 672* (officers alleged to have fraudulently induced plaintiff to enter into contracts with corporation); *see also Armato v. Baden (1999) 71 Cal. App. 4th 885, 894-895, 84 Cal. Rptr.2d 294* (independent contractor doctors for professional medical corporation not liable for allegedly negligent treatment plaintiff received from physician assistant because they did not personally direct or participate in tortious conduct, and there was no special relationship between doctors and plaintiff to support liability for failing to supervise assistant)]. Owners and officers of corporations, however, have been held vicariously liable for compensatory damages for an employee's violations of the Fair Housing Act (FHA) [*42 U.S.C. § 3601 et seq.*]. Although under general principles of tort law corporate shareholders and officers usually are not held vicariously liable for an employee's action, the criteria for the

FHA is different as liability is specified for those who direct or control (or have the right to direct or control) the conduct of another with respect to the sale of or provision of brokerage services to the sale of a dwelling [*see Holley v. Crank (9th Cir. 2001) 258 F.3d 1127, 1130-1132* (citing HUD regulations allowing complaint to be filed against any person who directs or controls conduct of another, and finding individual liable in capacity as sole owner of company and as president of corporation)].

Officers or directors are jointly liable with the corporation and may be joined as defendants if they personally directed or participated in the tortious conduct. Directors are liable to third persons injured by their tortious conduct regardless of whether they acted on behalf of the corporation and regardless of whether the corporation is also liable. This liability does not depend on the same grounds as "piercing the corporate veil" on account of inadequate capitalization, for example, but rather on the officer's or director's personal participation or specific authorization of the tortious act. This rule has its roots in the law of agency. Directors are said to be agents of their corporate principal. The rule is that the agent is liable for his or her own acts regardless of whether the principal is liable or amenable to judicial action. Moreover, directors are not subordinate agents of the corporation. Rather, their role is as their title suggests: they are the policymakers who direct and ultimately control corporate conduct. Unlike ordinary employees or other subordinate agents under their control, a corporate officer is under no compulsion to take action unreasonably injurious to third parties. Like any other employee, however, directors individually owe a duty of care, independent of the corporate entity's own duty, to refrain from acting in a manner that creates unreasonable risk of personal injury to third parties. The reason for this rule is that otherwise a director could inflict injuries on others and then escape liability behind the shield of his or her representative character, even though the corporation might be insolvent or irresponsible. Director status neither immunizes a person from individual liability nor subjects an individual to vicarious liability [*Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 503-505, 229 Cal. Rptr. 456, 723 P.2d 573* ; *PMC, Inc. v. Kadisha (2000) 78 Cal. App. 4th 1368, 1372, 1379, 93 Cal. Rptr. 2d 663* ; *Seagate Technology v. A.J. Kogyo Co. (1990) 219 Cal. App. 3d 696, 701-702, 268 Cal. Rptr. 586]* .

A director's duty to a third person is not governed by the business judgment rule [*Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 507 n.15, 229 Cal. Rptr. 456, 723 P.2d 573]* . Nor does the business judgment standard abrogate the common law duty that every person owes to others; that is, a duty to refrain from conduct that imposes an unreasoanble risk of injury to third persons [*Kurtz, Richards, Wilson & Co. v. Insurance Communicators Marketing Corp. (1993) 12 Cal. App. 4th 1249, 1259, 16 Cal. Rptr. 2d 259* ; *Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 507, 229 Cal. Rptr. 456, 723 P.2d 573]* . To impose tort liability on a director or officer, one must show that the director or officer specifically authorized, directed, or otherwise participated in the tortious conduct, or that, although the director or officer knew or reasonably should have known that some hazardous condition or activity under their control could injure plaintiff, he or she negligently failed to take or order appropriate action to avoid the harm [*Michaelis v. Benavides (1998) 61 Cal. App. 4th 681, 685-687, 71 Cal. Rptr. 2d 776* (involving corporate officer's personal tortious conduct and breach of duty to a third party who suffered physical damage to property); *Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 508, 229 Cal. Rptr. 456, 723 P.2d 573* ; *but see Grosvenor Properties, Ltd. v. Southmark Corp. (9th Cir. 1990) 896 F.2d 1149, 1153-1154* (under California law, officer or employee of corporation has no independent duty to parties with whom corporation contracts and thus cannot be liable for inducing breach of the corporation's contract or conspiring to breach it)].

In one action for misappropriation of trade secrets, unfair competition, and interference with prospective economic action, the court of appeal held that a corporate director or officer may be liable for an intentional tort if (1) the officer or director purchased or invested in the corporation, the principal assets of which were the result of unlawful conduct; (2) the officer or director took control of the corporation and appointed personnel to run the corporation which was engaging in unlawful conduct; and (3) the officer or director did so with knowledge or, with regard to trade secret misappropriation, when he or she had reason to know, of the unlawful conduct [*PMC, Inc. v. Kadisha (2000) 78 Cal. App. 4th 1368, 1372, 93 Cal. Rptr. 2d 663* (reversing summary judgment, finding that plaintiffs raised triable issue of material fact as to individual defendants' active meaningful participation in, consent to, or approval of, tortious conduct)].

California boards, commissions, and agencies that regulate a particular profession may require that the shareholders of a professional corporation bear some degree of personal liability for the acts of the corporation. Shareholders of a foreign professional corporation that has been qualified to do business in California in any profession on which such a condition is imposed by a California agency are subject to the same degree of personal liability, if any, as is prescribed by the governing agency for shareholders of a California professional corporation rendering services in the same profession [*Corp. Code § 13404.5(c)*].

Indemnification of corporate officers and directors is discussed in Subpart C. For further discussion of tort liability of corporate officers and directors, see the particular chapter regarding that tort, for example, Ch. 269, *Fraud and Deceit,* Ch. 380, *Negligence,* Ch. 460, *Products Liability,* and Ch. 565, *Unfair Competition*. Liability of corporate officers and directors for violations of securities and franchise laws is discussed in Ch. 515, *Securities and Franchise Regulation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-167 California Forms of Pleading and Practice--Annotated §§ 167.16-167.29

[Reserved]

§§ 167.16[Reserved]

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14-167 California Forms of Pleading and Practice--Annotated § 167.30

§ 167.30 Governing Statutes

Appointment of provisional directors by the superior court is governed by *Corp. Code §§ 306, 308, 1806(f), (g).* Removal of directors by the superior court is governed by *Corp. Code §§ 304, 1806(g).*

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-167 California Forms of Pleading and Practice--Annotated § 167.31

§ 167.31 Appointment of Provisional Director

If a corporation has an even number of directors, one half representing one of two opposing factions among the shareholders and the other half representing the other faction, the directors may become deadlocked, that is, unable to get a majority vote on corporate matters. This can occur even when the opposing shareholder blocs do not hold equal numbers of shares. For example, in a corporation having four directors, a majority (three) of the board cannot be elected, with cumulative voting, by fewer than 60 percent of the shares plus one share. (If there are 400 shares, 241 are needed to elect three of four directors.) If opposing blocs hold any combination between 50-50 percent and 60-40 percent, inclusive, neither bloc can elect a majority on a four-director board. Consequently, a divided board will be perpetuated in office unless something is done to break the deadlock.

Similarly, in a corporation having an uneven number of directors, if opposing shareholder blocs each hold 50 percent of the shares, neither bloc will be able to elect a majority of the board. (Regardless of the number of directors, a majority of an uneven number cannot be elected, with cumulative voting, by fewer than 50 percent of the shares plus one share.) Each bloc can elect two out of five, or three out of seven, and so on, necessarily leaving the odd director to hold over from year to year because of an inability to elect a successor. The situation effectively gives control of the corporation to the hold-over director, who can manipulate the corporation by siding with one bloc's director(s) against the other bloc's director(s). Thus, a deadlock among equally divided shareholders in a corporation having an uneven number of directors can be as deleterious to the corporation as a deadlock among an even number of directors who are equally divided.

In either case, one available remedy, although a drastic one, is dissolution of the corporation [*see Corp. Code § 1800(b)(2)*; *see* Ch. 170, *Corporations: Dissolution*]. As an alternative, the General Corporation Law authorizes appointment of a provisional director or provisional directors for the purpose of breaking a deadlock among directors or shareholders. The remedy is not available, however, in the case of a corporation governed by the Public Utilities Act, *Pub. Util. Code § 201 et seq.* [*Corp. Code § 308(d)*].

[1] Deadlock on Even-Numbered Board

If a corporation has an even number of directors who are equally divided and cannot agree as to the management of the corporation's affairs, so that the corporation's business can no longer be conducted to advantage or there is danger that the corporation's property and business will be impaired or lost, any director or the holder(s) of not less than 331/3 percent of the voting power of the corporation may petition the superior court for appointment of a provisional director to break the deadlock. A provisional director may be appointed in such a case notwithstanding any contrary or conflicting provision in the articles or bylaws (such as a provision limiting the number of directors) and whether or not a proceeding is pending for an involuntary winding up or dissolution of the corporation [*Corp. Code § 308(a)*; *see § 167.160*; *see also In re Jamison Steel Corp. (1958) 158 Cal. App. 2d 27, 36, 322 P.2d 246* (discussing facts which will justify appointment)].

[2] Deadlocked Shareholders Unable to Elect New Board

If the shareholders of a corporation are deadlocked so that they cannot elect the directors to be elected at an annual meeting of shareholders, any shareholder(s) holding 50 percent of the voting power of the corporation may petition the superior court for appointment of a provisional director or provisional directors, notwithstanding any contrary or conflicting provision in the articles or bylaws, or for any other appropriate relief [*Corp. Code § 308(b)*; *see § 167.161*].

[3] Equitable Remedy

The wording of *Corp. Code § 308(b)* suggests that the proceeding is equitable in nature ("order such other equitable relief as the court deems appropriate"). However, it is an unusual kind of equitable remedy in that the good or bad faith of interested parties, the question of estoppel, and similar equitable issues are of no concern to the court. If there is a deadlock on the board and the business of the corporation can no longer be conducted to advantage or the business or property of the corporation will be impaired or lost unless a provisional director is appointed, the court should not inquire into why the deadlock exists [*In re Jamison Steel Corp. (1958) 158 Cal. App. 2d 27, 39, 322 P.2d 246]* . In such a case, a provisional director should be appointed whether or not the regular directors are justified in causing a deadlock. Similarly, if shareholders are deadlocked, provisional directors should be appointed, or other appropriate relief should be given, whether or not the deadlock is justifiable.

[4] Procedure

Corp. Code § 308 does not specify the procedure to be followed in appointment of a provisional director. Since the proceeding under that section is a special proceeding, the provisions of Part 2 of the Code of Civil Procedure [*Code Civ. Proc. §§ 307-1062.10*], governing civil actions, are generally not applicable. However, the court is empowered to adopt "any suitable process or mode of proceeding ... which may appear most conformable to the spirit of" the Code of Civil Procedure [*Code Civ. Proc. § 187*].

Since the need for speedy relief is apparent from the nature of the proceeding, the court may decide to order issuance and service of an order to show cause [*see § 167.162*], followed by a prompt hearing and rendition of judgment. It has been held, however, that such a case may not be decided on affidavits alone [*Desert Club v. Superior Court (1950) 99 Cal. App. 2d 346, 347, 221 P.2d 766]* .

The court may appoint a receiver pending determination of the proceeding [*Boyle v. Superior Court (1917) 176 Cal. 671, 673-675, 170 P. 1140]* . For discussion and forms relating to appointment of a receiver, see Ch. 486, *Receivers* .

[5] Powers of Provisional Directors

A provisional director has all of the rights and powers of a regular director until the deadlock on the board or among the shareholders is broken or until he or she is removed by order of the court or by approval of the outstanding shares [*Corp. Code § 308(c)*]. "Approval of the outstanding shares" generally means approval by the affirmative vote of a majority of the outstanding shares entitled to vote [*Corp. Code § 152*].

[6] Compensation of Provisional Directors

A provisional director is entitled to any compensation that he or she and the corporation may agree on or, in the absence of such an agreement, any compensation that the court may fix [*Corp. Code § 308(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersCompensationGeneral OverviewBusiness & Corporate LawCorporationsDirectors & OfficersTerms in OfficeVacanciesCivil ProcedureEquityRelief

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§ 167.32 Action for Removal of Director

If a director of a corporation governed by the General Corporation Law [*Corp. Code §§ 100-2319*] has committed fraudulent or dishonest acts or a gross abuse of authority or discretion with reference to the corporation, a shareholder or shareholders holding at least 10 percent of the shares in the corporation or, if the shares are divided into classes, 10 percent of any class, may sue in the superior court for a judgment removing the director from office [*Corp. Code § 304*; *see § 167.166*].

A lawsuit seeking removal of a corporate director is an equitable remedy. Therefore, among other consequences, the equitable defenses (such as unclean hands) may be raised to defeat the claim for relief [*DeGarmo v. Goldman (1942) 19 Cal. 2d 755, 759-761, 123 P.2d 1]* .

[1] Grounds for Relief

Corp. Code § 304 specifies four grounds for removal of directors:

- Fraudulent acts with reference to the corporation.
- Dishonest acts with reference to the corporation.
- Gross abuse of authority with reference to the corporation.
- Gross abuse of discretion with reference to the corporation.

When a director acts within his or her authority and without committing fraud or lapsing into dishonesty, he or she may not be removed for a "gross abuse of discretion" if he or she acts in the good faith belief that what he or she does is in the best interest of the corporation; and in the absence of evidence of fraud, dishonesty, or acts outside the director's authority, it will be presumed that in the management of corporate affairs, a director acts in good faith [*see Starbird v. Lane (1962) 203 Cal. App. 2d 247, 255, 21 Cal. Rptr. 280* ; *Fornaseri v. Cosmosart Realty & Bldg. Corp. (1929) 96*

Cal. App. 549, 557, 274 P. 597] .

If a director becomes subject to removal under *Corp. Code § 304* and is thereafter reelected to office, he or she may not be removed on account of grounds arising in the previous term of office [*Remillard Brick Co. v. Remillard-Dandini (1952) 109 Cal. App. 2d 405, 424, 241 P.2d 66]* .

Legal Topics:

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

§§ 167.33[Reserved]

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14-167 California Forms of Pleading and Practice--Annotated § 167.50

§ 167.50 Governing Statutes

A director's standard of care is set out in *Corp. Code § 309*, subject to the limitations in *Corp. Code § 204(a)(10)*. The voidability of contracts and transactions because of a director's interest is governed by *Corp. Code § 310*. The liability of directors for approving an illegal loan of corporate funds or property or an illegal guaranty on the corporation's credit is governed by *Corp. Code §§ 315* and *316*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-167 California Forms of Pleading and Practice--Annotated § 167.51

§ 167.51 Director's Standard of Care

A director must perform the duties of a director [*see § 167.11*], including duties as a member of any committee of the board on which the director may serve, in good faith, in a manner the director believes to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances [*Corp. Code § 309(a)*; *see Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1263, 256 Cal. Rptr. 702* (discussed *below*, adding requirement that director be without conflict of interest), *disapproved on other grounds in Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184]* . A person who performs the duties of a director in accordance with this standard must have no liability based on any alleged failure to discharge the person's obligations as a director [*Corp. Code § 309(c)*]. In addition, the liability of a director for monetary damages may be eliminated or limited in a corporation's articles to the extent provided in *Corp. Code § 204(a)(10)*, discussed in *§ 167.58* [*Corp. Code § 309(c)*; *see also Fin. Code § 8501* (governing directors of federal savings associations)].

Corp. Code § 309 is a codification of the "business judgment rule" [*Will v. Engebretson & Co. (1989) 213 Cal. App. 3d 1033, 1040, 261 Cal. Rptr. 868* ; *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1264, 256 Cal. Rptr. 702 , disapproved on other grounds in Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184]* . The common law business judgment rule refers to a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions. The business judgment rule is premised on the notion that the directors are better able than the courts to judge whether or not a particular act or transaction is in the best interests of the corporation [*Desaigoudar v. Meyercord (2003) 108 Cal. App. 4th 173, 179, 133 Cal. Rptr. 2d 408* (holding that judicial review of decision of special litigation committee is governed by business judgment rule); *Will v. Engebretson & Co. (1989) 213 Cal. App. 3d 1033, 1040, 261 Cal. Rptr. 868* ; *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1263, 256 Cal. Rptr. 702 , disapproved on other grounds in Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184]* . Under the business judgment rule, a director is not liable for a mistake in business judgment that is made in good faith and in what the director believes is in the best interests of the corporation, if no conflict of interest exists [*Biren v. Equality Emergency Medical Group, Inc. (2002) 102 Cal. App. 4th 125, 136-138, 125 Cal. Rptr. 2d 325* (director/officer's dismissal of billing contractor without obtaining required board approval was protected by business judgment rule); *Gaillard v. Natomas Co. (1989) 208 Cal.*

App. 3d 1250, 1265-1266, 256 Cal. Rptr. 702 , disapproved on other grounds in Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184 ; *but see* Everest Investors 8 v. *McNeil Partners (2003) 114 Cal. App. 4th 411, 429-430, 8 Cal. Rptr. 3d 31* (in limited partners' action for breach of fiduciary duty, triable issues of fact existed regarding general partner's defense that actions were protected by business judgment rule; summary judgment could not be upheld based on theory that general partner conducted good faith and reasonable investigation into whether merger transaction was in best interests of limited partners)]. For example, this rule has been held to immunize the directors of a federally insured national bank from liability for purely negligent acts [*see FDIC v. Castetter (9th Cir. 1999) 184 F.3d 1040, 1044-1046* (non-officer directors entitled to rely on company employees and advisors without duty of further inquiry, absent special circumstances)].

Corp. Code § 309 is not applicable to determine the liability of a director who is also an officer of the corporation ("inside director") for acts that were not "perform[ing] the duties of a director" as specified in *Corp. Code § 309*, but were undertaken in his or her capacity as an officer or employee. For instance, in recommending and seeking the approval of a "golden parachute" for his or her own benefit, a director is not performing the duties of a director, but is acting as an officer or employee [*Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1265-1266, 1268, 256 Cal. Rptr. 702 , disapproved on other grounds in Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184]* .

In applying *Corp. Code § 309*, a distinction also must be made between disinterested directors who were members of a committee of the board that made recommendations to the other disinterested directors on a particular action and those who were not [*see Corp. Code § 309(b), (c)*; *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1269-1272, 256 Cal. Rptr. 702]* . Greater scope of inquiry is required by committee members; the extent to which they may rely on an expert retained by the corporation who also advises the other parties to the transaction is a question of fact [*Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1269-1271, 256 Cal. Rptr. 702 , disapproved on other grounds in Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184]* .

Legal Topics:

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§ 167.52 Officer's Standard of Care

The standard of care owed by an officer is not specified by statute. Although the standard of care to which an officer is held is similar to thestandard applicable to directors, it may be somewhat higher, in that, under the circumstances of a particular case, an officer may be required to be more familiar with corporate affairs and less able to rely on the reports or statements of others [*see* Ballantine & Sterling, California Corporation Laws, Ch. 6, *Management; Duties and Liabilities of Directors and Controlling Shareholders, § 6.102* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 14: Corporations: Capacity thru Corporations: Dissolution and Winding Up-Chs. 160-173
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14-167 California Forms of Pleading and Practice--Annotated § 167.53

§ 167.53 Director's and Officer's Duties Are Fiduciary

"Corporate officers and directors are not permitted to use their position[s] of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. A public policy ... demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers" [*Bancroft-Whitney Co. v. Glen (1966) 64 Cal. 2d 327, 345, 49 Cal. Rptr. 825, 411 P.2d 921* ; *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc. (2000) 83 Cal. App. 4th 409, 420-424, 99 Cal. Rptr. 2d 665* (concluding that officer who participates in management of corporation, exercising some discretionary authority, is fiduciary of corporation as a matter of law; trial court erred in failing to instruct jury accordingly)].

Civ. Code § 1668 provides that all contracts that have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law. This provision has been successfully used to invalidate a contractual provision that waived the fiduciary duties of the corporation's officers, directors, and majority shareholders to the minority shareholder [*see Neubauer v. Goldfarb (2003) 108 Cal. App. 4th 47, 54-57, 133 Cal. Rptr. 2d 218]* . In *Neubauer v. Goldfarb*, the minority shareholder brought an action for fraud in connection with his agreement to sell his shares to majority shareholders. The court held that waiver of corporate directors' and majority shareholders' fiduciary duties to the minority shareholder in a private close corporation is against public policy and a contract purporting to effect such a waiver is void so that, among other things, *Civ. Code § 1668* applied [*Neubauer v. Goldfarb (2003) 108 Cal. App. 4th 47, 57, 133 Cal. Rptr. 2d 218]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesFiduciary ResponsibilitiesDuty of CareBusiness & Corporate LawCorporationsDirectors & OfficersManagement Duties &

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§ 167.54 Right to Rely on Others

In performing the duties of a director, a director is entitled to rely on information, opinions, reports, or statements, including financial statements [*see Corp. Code § 114*] and other financial data, in each case prepared or presented by (1) one or more of the officers or employees of thecorporation whom the director believes to be reliable and competent in the matters presented, or (2) counsel, independent accountants [*see Corp. Code § 115*], or other persons, as to matters which the director believes to be within the person or persons' professional or expert competence, or (3) a committee of the board on which the director does not serve, as to matters within its designated authority, which committee the director believes to merit confidence. In any such case of reliance, the director must act in good faith, after reasonable inquiry when the need therefor is indicated by the circumstances, and without knowledge that would cause the reliance to be unwarranted [*Corp. Code § 309(b)*; *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1264, 256 Cal. Rptr. 702* (extent of other board members' right to rely on board committee's recommendation regarding "golden parachutes," which were generally known to be of questionable nature, as question of fact), *disapproved on other grounds in Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184]* .

A person who performs the duties of a director in accordance with this standard will have no liability based on any alleged failure to discharge the person's obligations as a director [*Corp. Code § 309(c)*]. In addition, the liability of a director for monetary damages may be eliminated or limited in a corporation's articles to the extent provided in *Corp. Code § 204(a)(10)*, discussed in *§ 167.58* [*Corp. Code § 309(c)*; *see also Fin. Code § 8501* (governing directors of federal savings associations)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 167.55 Common Directorships

No contract or other transaction between a corporation and another corporation or an association having any director in common is either void or voidable because the common director was present at the meeting of the board or a committee of the board in which the transaction was authorized, approved, or ratified, if either of two conditions is met.

One of those conditions is that the material facts as to the transaction and the common directorship were fully disclosed or known to the board or committee, and the board or committee authorized, approved, or ratified the transaction in good faith by a vote sufficient without counting the vote of any common director, or the transaction was approved by the shareholders [*see Corp. Code § 153*] in good faith [*Corp. Code § 310(b)(1)*].

The other condition is that, as to transactions not authorized, approved, or ratified in that way, the transaction was just and reasonable as to the corporation when it was authorized, approved, or ratified [*Corp. Code § 310(b)(2)*].

Common directors may be counted in determining the presence of a quorum at a meeting of the board or committee of the board in which the transaction is authorized, approved, or ratified [*Corp. Code § 310(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-167 California Forms of Pleading and Practice--Annotated § 167.56

§ 167.56 Serving "Best Interests" of Corporation

[1] Director Interested in Corporate Contract or Transaction

No contract or other transaction between a corporation and any of its directors, or between a corporation and any corporation, firm, or association in which any of its directors has or have a material financial interest, is either void or voidable because a director or the other corporation, firm, or association, is a party, or because any such interested director was present at the meeting of the board or a committee of the board in which the contract or transaction was authorized, approved, or ratified, if any of the following conditions are met [*Corp. Code § 310(a)*]:

- The material facts as to the transaction and as to any director's interest were fully disclosed or known to the shareholders, and the transaction was approved by the shareholders [*see Corp. Code § 153*] in good faith, with the shares owned by any interested director not being entitled to vote on the question.

- The material facts as to the transaction and as to any director's interest were fully disclosed or known to the board or committee, and the board or committee authorized, approved, or ratified the transaction in good faith by a vote sufficient without counting the vote of any interested director, provided the transaction was just and reasonable as to the corporation when it was authorized, approved, or ratified.

- As to transactions not authorized, approved, or ratified in one of the ways mentioned above, the person asserting the validity of the transaction sustains the burden of proving that the transaction was just and reasonable as to the corporation when it was authorized, approved, or ratified.

A mere common directorship does not constitute a "material financial interest." A director is not "interested" in a resolution fixing the compensation of another director as director, or as an officer or employee of the corporation, whether or not he or she (the first director) also receives compensation from the corporation [*Corp. Code § 310(a)*].

An interested director may be counted in determining the presence of a quorum at a meeting of the board or a committee of the board in which the transaction is authorized, approved, or ratified [*Corp. Code § 310(c)*].

The bargain to be enforced by a director cannot be harsh or unfair. The burden is on the director to prove not only the good faith of the transaction but also its inherent fairness from the point of view of the corporation. The test is whether the transaction carries the earmarks of an arm's length bargain. A transaction unfair to the corporation may be avoided by it, and a director is charged with the knowledge that an unfair agreement may be avoided. Factors to be considered in determining whether a transaction is fair and reasonable include: whether the director was dependent on the transaction for his livelihood; if so, whether the other directors know that; whether the director is foregoing other opportunities by performing the sevice or making the sale to the corporation and if so, whether the other directors are aware of that; how the director became involved in the transaction in question; how the price or fee compares with prevailing fees in the market; whether the bylaws specifically allow or prohibit compensation of directors for professional services [*Tenzer v. Superscope, Inc. (l985) 39 Cal. 3d 18, 31-34, 216 Cal. Rptr. 130, 702 P.2d 212]* .

Corp. Code § 310 only addresses the voidness or voidability of the contract or transaction. The fact that the requirements of Section 310 were met does not render a contract or transaction immune from attack on other grounds, and does not render directors immune from liability for breach of fiduciary duty as a result of their approval of the contract or transaction [*Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1273, 256 Cal. Rptr. 702* , *disapproved on other grounds in Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184* ; *see Walczak v. EPL Prolong, Inc. (9th Cir. 2000) 198 F.3d 725, 732-733* (district court did not abuse discretion in issuing preliminary injunction prohibiting completion of company's agreement to license patent and liquidate, because factual findings that agreement was unfair and appellants engaged in pattern of improper transfer of corporate assets were not clearly erroneous)].

[2] Dealing With Corporate Property

If a director acquires property of the corporation in good faith, taking title in his or her own name, he or she becomes a resulting trustee with the duty (his or her only duty) to convey the property to the corporation. If he or she acquires property of the corporation for himself or herself, he or she becomes a constructive trustee, with the same duty [*Bainbridge v. Stoner (1940) 16 Cal. 2d 423, 428-429, 106 P.2d 423]* .

[3] Competition With Corporation

The mere fact that a corporate officer makes preparations to compete before he or she resigns his or her office is not sufficient to constitute a breach of duty.

There is no requirement that an officer disclose his or her preparations to compete with the corporation in every case, and failure to disclose such acts will render the officer liable for a breach of his or her fiduciary duties only if particular circumstances render nondisclosure harmful to the corporation. Conversely, the mere act of disclosing his or her activities cannot immunize the officer from liability when his or her conduct in other respects amounts to a breach of duty. The significant inquiry in each situation is whether the officer's acts or omissions constitute a breach under the general principles applicable to the performance of his or her trust [*Bancroft-Whitney Co. v. Glen (1966) 64 Cal. 2d 327, 346-347, 49 Cal. Rptr. 825, 411 P.2d 921]* . A former director may provide services to clients of the corporation that the corporation cannot provide. For instance, an injunction against a former attorney-employee of a labor relations consulting firm was was overbroad in prohibiting the attorney from providing legal services to clients of the firm because the firm was not licensed to provide those services [*John F. Matull & Associates, Inc. v. Cloutier, (1987) 194 Cal. App. 3d 1049, 1056, 240 Cal. Rptr. 211]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 167.57 Action on Behalf of Corporation Against Wrongdoing Director

A director or group of directors has no authority to bring an action on behalf of the corporation against another director or group of directors to redress an injury to the corporation. When the gravamen of the complaint is injury to the corporation, the appropriate form of action is a shareholder's derivative action [*Anmaco, Inc. v. Bohlken (1993) 13 Cal. App. 4th 891, 898-900, 16 Cal. Rptr. 2d 675* ; *Sealand Inv. Corp. v. Emprise, Inc. (1961) 190 Cal. App. 2d 305, 313, 12 Cal. Rptr. 153]* . The issue in *Anmaco* required analysis of a president's power in the event of a deadlock or division of directors, to initiate litigation in the corporation's name. The California Supreme Court has not addressed this issue [*see* *Holt v. College of Osteopathic Physicians & Surgeons (1964) 61 Cal. 2d 750, 755-756, n.4, 40 Cal. Rptr. 244, 394 P.2d 932]* , but on the *Anmaco* facts, that court found there is no presumption of implied authority in the president to institute litigation in the name of the corporation against a codirector and equal shareholder. Pressing the corporation into litigation as a plaintiff is inappropriate when the other shareholder-director can claim equal authority to bring suit in the corporate name [*Anmaco, Inc. v. Bohlken (1993) 13 Cal. App. 4th 891, 899-900, 16 Cal. Rptr. 2d 675]* .

Anmaco, Inc. had only two directors, each of whom was a 50-percent shareholder. One was president and the other was the chief executive officer. The president sued the other director, naming the corporation as plaintiff, on 14 causes of action including breach of fiduciary duty by appropriating corporate assets, conversion of corporate property, fraud on the corporation, interference with contractual and business relations, and constructive trust on corporate benefits. The corporation's bylaws authorized the president to institute legal actions on behalf of the corporation when the other 50 percent owner did not consent, but also provided that the president's exercise of office was subject to the control of the board of directors. The court concluded those bylaws did not confer authority to institute litigation in the corporate name against the other 50 percent shareholder [*Anmaco, Inc. v. Bohlken (1993) 13 Cal. App. 4th 891, 898, 16 Cal. Rptr. 2d 675]* .

Sealand Inv. Corp. v. Emprise [*Sealand Inv. Corp. v. Emprise, Inc. (1961) 190 Cal. App. 2d 305, 12 Cal. Rptr. 153]* was a suit by two directors, who owned 50 percent of the stock, against the two other directors, who also owned 50 percent of the stock, for diversion of corporate assets, breach of fiduciary duty, misappropriation of corporate opportunities, and to impose a constructive trust. Plaintiffs in *Sealand* included the secretary-treasurer, and the president

was one of the defendant directors.

Derivative actions are discussed in Ch. 168, *Corporations: Derivative Actions* . In some cases, a deadlock may be resolved by appointment of a provisional director [*see Corp. Code § 308*; *see* §§ 167.160-167.163], removal of a dishonest director [*see Corp. Code § 304*; *see* §§ 167.166-167.167], appointment of a receiver [*see Code Civ. Proc. § 564(b)(6)*], or involuntary dissolution [*see Corp. Code § 1800*, discussed in Ch. 170, *Corporations: Dissolution*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 167.58 Limitations on Director's Liability

The articles of incorporation may contain provisions eliminating or limiting the personal liability of a director for monetary damages in an action brought by or in the right of the corporation for breach of a director's duties to the corporation and its shareholders, as set forth in *Corp. Code § 309* [*Corp. Code §§ 204(a)(10), 309(c)*; *see also Fin. Code § 8501* (governing directors of federal savings associations)]. However, liability may not be eliminated or limited in the following instances [*Corp. Code § 204(a)(10)*; *see also Fin. Code § 8501* (governing directors of federal savings associations)]:

- For acts or omissions that involve intentional misconduct or a knowing and culpable violation of law;

- For acts or omissions that a director believes to be contrary to the best interests of the corporation or its shareholders or that involve the absence of good faith on the part of the director;

- For any transaction from which a director derived an improper personal benefit;

- For acts or omissions that show a reckless disregard for the director's duty to the corporation or its shareholders in circumstances in which the director was aware, or should have been aware, in the ordinary course of performing a director's duties, of a risk of serious injury to the corporation or its shareholders;

- For acts or omissions that constitute an unexcused pattern of inattention that amounts to an abdication of the director's duty to the corporation or its shareholders;

- Under *Corp. Code § 310* (pertaining to actions in which a director has a conflict of interest);

- Under *Corp. Code § 316* (pertaining to prohibited actions that subject a director to joint and several liability);

- For acts or omissions occurring prior to the effective date of the provision limiting or eliminating liability; and

- For acts or omissions of an officer, acting in his or her capacity as an officer, even if the officer is also a director or the actions, if negligent or improper, have been ratified by the directors.

Although other methods of adopting a provision under *Corp. Code § 204(a)(10)* are permitted, a provision in the articles in substantially the following form is sufficient to limit or eliminate liability of a director: "The liability of the directors of the corporation for monetary damages shall be eliminated to the fullest extent permissible under California law" [*Corp. Code § 204.5(a), (b)*].

For an affirmative defense to assert immunity under *Corp. Code § 204(a)(10), see § 167.184*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 167.59 Controlling Shareholder's Duties

[1] Fiduciary

The rule in California is that "majority shareholders, either singly or acting in concert to accomplish a joint purpose, have a fiduciary responsibility to the minority [shareholders] and to the corporation to use their ability to control the corporation in a fair, just, and equitable manner" [*Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 108, 81 Cal. Rptr. 592, 460 P.2d 464* ; *but see Skarbrevik v. Cohen, England & Whitfield (1991) 231 Cal. App. 3d 692, 707, 712, 282 Cal. Rptr. 627* (attorney for majority as not owing any duty to minority and thus is not liable to minority for professional negligence or conspiracy to defraud)]. This rule may be described as a "comprehensive rule of inherent fairness from the viewpoint of the corporation and those interested therein" [*Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 110, 81 Cal. Rptr. 592, 460 P.2d 464]* .

[2] Sale or Transfer of Control

[a] Duty to Avert Looting

A majority shareholder has a duty to investigate a potential buyer of the controlling shares so as not to pass control to a person who intends, or can reasonably be expected, to loot the corporation. The majority shareholder who knows facts which would lead a prudent person to suspect that the potential buyer will loot the corporation, has a duty to investigate [*DeBaun v. First W. Bank & Trust Co. (1975) 46 Cal. App. 3d 686, 696-697, 120 Cal. Rptr. 354* (reporting rule)]. This duty is owed both to the corporation and to minority shareholders [*DeBaun v. First W. Bank & Trust Co. (1975) 46 Cal. App. 3d 686, 698, 120 Cal. Rptr. 354]* .

If a majority shareholder transfers control to a looter in violation of the duty to investigate the circumstances and avert the consequences when looting will probably occur, damages may be the aggregate of (1) the sum necessary to wipe out a negative net worth, if the looting buyer has rendered the corporation insolvent, and (2) the value of the corporation's tangible assets when control was transferred to the looter, and (3) the corporation's "going business value" at that time, determined with reference to future profits reasonably estimated (if there is a record of earnings on which to base the estimate) [*DeBaun v. First W. Bank & Trust Co. (1975) 46 Cal. App. 3d 686, 699-700, 120 Cal. Rptr. 354]* .

[3] Marketability of Shares

If no market exists for a corporation's shares, the controlling shareholders may not use their power to control the corporation for the purpose of promoting a marketing scheme that benefits themselves alone to the detriment of the minority shareholders [*Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 115, 81 Cal. Rptr. 592, 460 P.2d 464]* .

This rule does not require controlling shareholders to make a market for (i.e., to facilitate public trading of) the shares. Neither does it prevent controlling shareholders from selling their shares or transferring them to a holding company. The rule is only that controlling shareholders may not make a market for their own shares, to the exclusion of minority shares, by using their power to control the corporation [*Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 115, 81 Cal. Rptr. 592, 460 P.2d 464]* .

[4] Dissolution of Corporation

Majority shareholders have the power to cause a voluntary dissolution of a corporation [*see Corp. Code § 1900(a)*], but they do not have an absolute right to exercise this power. For instance, they have no right to dissolve a corporation for the purpose of defrauding minority shareholders or squeezing them out [*In re Security Finance Co. (1957) 49 Cal. 2d 370, 376-377, 317 P.2d 1]* . Majority shareholders are required to use their power to dissolve the corporation in good faith. Thus, majority shareholders may dissolve a corporation for the purpose of protecting their investments where alternative methods are foreclosed, no advantage is secured over other shareholders, and no rights of third parties will be adversely affected [*In re Security Fin. Co. (1957) 49 Cal. 2d 370, 378, 317 P.2d 1]* .

Legal Topics:

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§ 167.60 Liability of Director of Foreign Corporation

The directors of a foreign corporation [*see Corp. Code § 171*] transacting intrastate business [*see Corp. Code § 191*] are liable to the corporation, its shareholders, creditors, receiver, liquidator, or trustee in bankruptcy for violations of official duty according to any applicable laws of the state or place of incorporation or organization, whether committed in California or elsewhere; and that liability may be enforced in California courts [*Corp. Code § 2116*].

Further, the provisions of *Corp. Code § 309* (director's standard of care) apply to directors of foreign corporations which are subject to *Corp. Code § 2115* [*Corp. Code § 2115(b)*]. These corporations are called "nominally foreign corporations" in this chapter. For discussion, see Ch. 160, *Corporations: Capacity* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 167.61 Directors' Duty to Creditors When Corporation Is Insolvent

Some California cases are in accord with a so-called "trust fund doctrine," to the effect that all of the assets of a corporation, immediately on its becoming insolvent, become a trust fund for the benefit of all of its creditors, in order to satisfy their claims [*Berg & Berg Enters. v. Boyle (2009) 178 Cal. App. 4th 1020, 1040, 100 Cal. Rptr. 3d 875]* . However, this does not mean that the directors of an insolvent corporation are in the position of a trustee with respect to the corporation's creditors. In California, the directors of an insolvent corporation owe no fiduciary duty of due care or loyalty the corporation's creditors solely because the corporation is insolvent. The scope of any noncontractual duty owed by corporate directors to the insolvent corporation's creditors is limited, in California, to the avoidance of acts that divert, dissipate, or unduly risk corporate assets that might otherwise be used to pay creditors' claims [*cf. Civ. Code § 1708* (every person is bound, without contract, to abstain from "injuring the person or property of another, or infringing upon any of his or her rights")]. This includes acts that involve self dealing or the preferential treatment of creditors. Furthermore, there is no fiduciary duty prescribed under California law that is owed to creditors by directors of a corporation solely by virtue of its operating in any so-called zone of insolvency (or in the "vicinity of insolvency," as some courts have described it) without being actually insolvent [*Berg & Berg Enters. v. Boyle (2009) 178 Cal. App. 4th 1020, 1041, 100 Cal. Rptr. 3d 875* (disgruntled creditor failed to allege facts stating cause of action when gist of complaint was that directors effected assignment for benefit of creditors rather than investigating, exploring, or pursuing bankruptcy reorganization through which, plaintiff theorized, value of corporation's accumulated net operating losses could have been maximized for benefit of plaintiff and other creditors; moreover, common law business judgment rule [*see § 167.51*] would have shielded directors even if cause of action had been stated)].

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[Reserved]

§§ 167.62[Reserved]

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§ 167.80 Governing Law

[1] Statutes

Indemnification of corporate agents is governed by *Corp. Code § 317*. The indemnification authorized by *Corp. Code § 317* will not be deemed exclusive of any additional rights to indemnification for breach of duty to the corporation and its shareholders while acting in the capacity of a director or officer of the corporation to the extent the additional rights of indemnification are authorized in an article adopted pursuant to *Corp. Code § 204(a)(11)* (discussed in *§ 167.58*) [*Corp. Code § 317(g)*].

The indemnification provided by *Corp. Code § 317* for acts, omissions, or transactions while acting in the capacity of, or serving as, a director or officer of the corporation, but *not* involving breach of duty to the corporation and its shareholders, will not be deemed exclusive of any other rights to which those seeking indemnification may be entitled under any bylaw, agreement, vote of shareholders or disinterested directors, or otherwise, to the extent that the additional rights to indemnification are authorized in the articles of the corporation [*Corp. Code § 317(g)*].

An article provision authorizing indemnificaiton "in excess of that otherwise permitted by *Corp. Code § 317*," or "to the fullest extent permitted by California law," or any substantial equivalent will be construed to be both (1) a provision for additional indemnification for breach of duty to the corporation and its shareholders as referred to in, and subject to the limitations of, *Corp. Code § 204(a)(11)*, and *(2)* a provision for additional indemnification for acts, omissions, or transactions while acting in the capacity of, or serving as, a director or officer of the corporation but not involving breach of duty to the corporation and its shareholders [*Corp. Code § 317(g)*].

The rights to indemnity of *Corp. Code § 317* continue as to a person who has ceased to be a director, officer, employee, or agent and inures to the benefit of the heirs, executors, and administrators of the person. Nothing in *Corp. Code § 317* affects any right to indemnification to which persons other than the directors and officers may be entitled by contract or otherwise [*Corp. Code § 317(g)*].

[2] Articles, Bylaws, Shareholder Resolutions, and Agreements

The articles of incorporation may authorize, whether by bylaw, agreement, or otherwise, the indemnification of agents in excess of that expressly permitted by *Corp. Code § 317* for breach of duty to the corporation and its stockholders, except to the same extent that directors may not be relieved of liability under *Corp. Code § 204(a)(10)*, discussed in *§ 167.58* [*Corp. Code § 204(a)(11)*; *see Corp. Code § 317(a)* (agents defined to include, among others, directors, officers, and employees), *Corp. Code § 317(g)*; *see also Fin. Code § 8501* (governing directors of federal savings associations)]. In the case of close corporations, any of the provisions authorized by *Corp. Code § 204(a)(11)* may be validly included in a shareholder's agreement. Despite *Corp. Code § 204(a)(11)*, bylaws may require for all or any actions by the board, the affirmative vote of a majority of the authorized number of directors. Nothing in *Corp. Code § 204(a)(11)* affects the enforceability, as between the parties thereto, of any lawful agreement not otherwise contrary to public policy [*Corp. Code § 204(a)(11)*].

If the articles or bylaws, as of January 1, 1977, contain any statement relating to indemnification of corporate agents, that statement will not be construed as a limitation on the corporation's power to indemnify as given in *Corp. Code § 317* unless it is expressly stated to be such a limitation [*Corp. Code § 2306*].

Subject to the two exceptions noted below, no indemnification or advance may be made under *Corp. Code § 317* if it would be inconsistent with a provision in the articles or bylaws, a resolution of the shareholders, or an agreement that prohibits or otherwise limits indemnification, if the article, bylaw, resolution, or agreement was in effect at the time of the accrual of the alleged cause of action asserted in the proceeding in which the expenses were incurred or other amount was paid [*Corp. Code § 317(h)(1)*]. However, that does not prevent indemnification to the extent that the agent of the corporation has been successsful on the merits in the defense of any proceeding under *Corp. Code § 317(b)* or *(c)* [*see Corp. Code § 317(d)* (discussed *§§ 167.81[2], 167.82[1]*)], or when indemnification is authorized by a court under *Corp. Code § 317(e)(4)* [*Corp. Code § 317(h)(1)*].

[3] Court Order Approving Settlement

When the proceeding in question (for the defense of which the corporation wishes to indemnify its agent) is or was an action or a judicial proceeding settled with the court's approval, the corporation may not elect to provide indemnity if that would be inconsistent with any condition expressly imposed by the court in approving the settlement [*Corp. Code § 317(h)(2)*].

[4] Corporate Agents Connected With Employee Benefit Plans

Indemnification of fiduciaries of employee benefit plans is governed by *Corp. Code § 207(f)* [*Corp. Code § 317(j)*]. That provision gives a corporation power, subject to limitations in the articles and requirements of other provisions of the General Corporation Law (*Corp. Code §§ 100-2319*) and any other applicable laws, to indemnify, purchase, and maintain insurance on behalf of any fiduciary of any pension, profit-sharing, share bonus, share purchase, share option, savings, thrift, or other retirement, incentive, or benefit plan, trust, or provision for any or all of the directors, officers, and employees of the corporation or any of its subsidiary or affiliated corporations [*Corp. Code § 207(f)*].

[5] Foreign Corporations

Corp. Code § 317 applies to foreign corporations that are subject to *Corp. Code § 2115(a)* [*Corp. Code § 2115(b)*]. Those corporations are called "nominally foreign corporations" in this chapter. For discussion, see Ch. 160, *Corporations: Capacity* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesIndemnificationBusiness & Corporate LawCorporationsGoverning Documents & ProceduresArticles of Incorporation & BylawsGeneral

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14-167 California Forms of Pleading and Practice--Annotated § 167.81

§ 167.81 Eligibility for Indemnification

[1] Status of Claimant

To be eligible for indemnification, a claimant must have been a party (in the position of a defendant) in some civil, criminal, administrative, or investigative proceeding, by reason of the fact that he or she is or was an agent of the corporation in one of the following categories [*Corp. Code § 317(a)*]:

- Director, officer, employee, or other agent of the corporation.

- Serving at the request of the corporation as director, officer, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, or other enterprise.

- Director, officer, employee, or agent of a foreign or domestic corporation that was a predecessor corporation of the present corporation.

- Director, officer, employee, or agent of another enterprise at the request of the predecessor corporation.

When outside counsel (as opposed to in-house counsel) is retained by a corporation to represent it at trial, and then is sued by the corporation for legal malpractice while representing the corporation, the outside counsel is a party to the malpractice suit by reason of the outside counsel's actions in the capacity of an independent contractor, not "by reason of the fact that he or she is or was an agent of the corporation" within the meaning of *Corp. Code § 317* [*Channel Lumber Company, Inc. v. Porter Simon (2000) 78 Cal. App. 4th 1222, 1225, 93 Cal. Rptr. 2d 482* (reversing order awarding attorney fees and expenses to counsel under *Corp. Code § 317(d)*)].

[2] Success in Defense or Good Faith

[a] As Prerequisite

A claimant whose status makes him or her eligible for indemnification is entitled to be indemnified for expenses actually and reasonably incurred in connection with a successful defense on the merits as to any claim, issue, or matter in the proceeding in question [*Corp. Code § 317(d)*].

A claimant who was not successful in defense on the merits, even if successful in a technical or procedural defense, is not entitled to be indemnified but remains, nevertheless, eligible for indemnification if he or she performed his or her duties as a corporate agent in compliance with whichever of three standards of conduct applies, depending on the nature of the proceeding in which defense expenses were incurred [*see Corp. Code § 317(e)*].

[b] Action by Corporation; Derivative Action

To be eligible for indemnification for defense expenses incurred in an action by the corporation or a derivative action on behalf of the corporation, a claimant who was not successful in defense on the merits must have performed his or her duties as a corporate "agent" in good faith, in a manner he or she believed to be in the best interests of the corporation and its shareholders [*see Corp. Code § 317(c)*].

[c] Other Civil Action or Proceeding

To be eligible for indemnification for defense expenses incurred in a civil action or proceeding other than an action by the corporation or a derivative action on behalf of the corporation, or in an administrative proceeding or a noncriminal investigative proceeding, a claimant who was not successful in defense on the merits must have performed his or her duties as a corporate agent in good faith, in a manner he or she reasonably believed to be in the best interests of the corporation. The termination of the action or proceeding by judgment, order, settlement, or the like, or the equivalent of a plea of nolo contendere, does not, of itself, create a presumption that the claimant failed to adhere to this standard of conduct [*Corp. Code § 317(b)*].

Actions taken by a corporate agent for his or her own benefit, unrelated to his or her corporate duties, will not establish entitlement to indemnification under *Corp. Code § 317(b)*. For instance, corporate marketing officers who resigned and formed their company, which became the corporation's exclusive Northern California sales agent, and which resulted in termination of the corporation's contract with its existing sales agent, were not entitled to be indemnified against a judgment against them in the terminated agent's action for interference with economic advantage [*Plate v. Sun-Diamond Growers (1990) 225 Cal. App. 3d 1115, 1126, 275 Cal. Rptr. 667]* ; *see Wilshire-Doheny Associastes, Ltd. v. Shaprio (2000) 83 Cal. App. 4th 1380, 1390, 100 Cal. Rptr. 2d 478* (trial court erred in determining as matter of law that *Corp. Code § 317* did not apply, because question of its application is factual one; trial on allegations of complaint was necessary to determine whether appellants' alleged acts were taken on behalf of corporation, or whether they were acting to further their own personal interests). Similarly, a finding that the agent's conduct consisted of intentional wrongdoing against a third party precludes a finding of good faith as required for indemnification under *Corp. Code § 317(b)*. The fact that the wrongdoing did not harm the corporation or was not against the best interests of the corporation does not establish that the agents acted in good faith in participating in the wrongful conduct [*Plate v. Sun-Diamond Growers (1990) 225 Cal. App. 3d 1115, 1126, 275 Cal. Rptr. 667]* .

[d] Criminal Proceeding or Investigation

To be eligible for indemnification for defense expenses incurred in a criminal proceeding or investigation, a claimant who was not successful in defense on the merits must have performed his or her duties as a corporate "agent" in good faith, in a manner he or she reasonably believed to be in the best interests of the corporation, with no reasonable cause to believe that his or her conduct was unlawful. The termination of the proceeding by judgment, order, settlement, conviction, or a plea of nolo contendere or its equivalent, does not, of itself, create a presumption that the claimant failed to adhere to this standard of conduct or had reasonable cause to believe that his or her conduct was unlawful [*Corp. Code § 317(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesFiduciary ResponsibilitiesDuty of Good FaithBusiness & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesIndemnification

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14-167 California Forms of Pleading and Practice--Annotated § 167.82

§ 167.82 Corporation's Duty to Provide Indemnity

[1] Under Statute

Where a claimant eligible for indemnification is entitled to be indemnified (because of a successful defense on the merits), the corporation is required to provide indemnity [*see Corp. Code § 317(d)*] and can be compelled to do so by a court.

[2] Pursuant to Court Order

[a] Defense of Action Brought by Corporation or Derivative Action

Where a claimant eligible for indemnification is not entitled to be indemnified, because of a defense successful otherwise than on the merits, if the proceeding in which defense expenses were incurred was an action by the corporation or a derivative action on behalf of the corporation, the court in which the action is or was pending may, on the application of the corporation, or the claimant, or the attorney or any other person who rendered services in connection with the defense, and whether or not the corporation opposes the application, authorize or direct the corporation to provide indemnity, on determining that the claimant has conformed to the applicable standard of conduct in performing his or her duties as a corporate agent [*see Corp. Code § 317(e)(4)*]. Regarding the applicable standard of conduct, see § p167.81[2].

When a claimant eligible for indemnification is not entitled to be indemnified, because of an unsuccessful defense, if the proceeding in which defense expenses were incurred was an action by the corporation or a derivative action on behalf of the corporation, the court in which the action is or was pending may, on application, direct the corporation to provide indemnity for such expenses as the court determines should be subject to indemnity, if the court determines that indemnification is fair and reasonable in view of all the circumstances, and notwithstanding that the claimant has been adjudged liable to the corporation [*see Corp. Code § 317(c)(1)*].

[b] Defense of Other Action or Proceeding

When a claimant eligible for indemnification is not entitled to be indemnified, because of an unsuccessful defense or a defense successful otherwise than on the merits, if the proceeding in which defense expenses were incurred was a civil action or proceeding other than an action by the corporation or a derivative action on behalf of the corporation, or was a criminal proceeding, the court in which that proceeding is or was pending, on the application of the corporation, or the claimant, or the attorney or any other person who rendered services in connection with the defense, and whether or not the corporation opposes the application, may authorize or direct the corporation to provide indemnity, on determining that the claimant has conformed to the applicable standard of conduct in performing his or her duties as a corporate "agent" [*see Corp. Code § 317(e)(4)*]. Regarding the applicable standard of conduct, see *§ 167.81[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesIndemnification

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14-167 California Forms of Pleading and Practice--Annotated § 167.83

§ 167.83 Corporation's Election to Provide Indemnity

When a claimant eligible for indemnification is not entitled to be indemnified, because of an unsuccessful defense or a defense successful otherwise than on the merits, the corporation may elect to provide indemnity, by any of the three following methods:

- If there are enough disinterested directors to form a quorum of the board, they may meet and, on determining that the claimant has conformed to the applicable standard of conduct in performing his or her duties as a corporate agent [*see § 167.81[2]*], by the votes of a majority of them may authorize indemnification [*see Corp. Code § 317(e)(1)*].

- If a quorum of directors is not obtainable, indemnification may be authorized by written opinion of independent legal counsel [*see Corp. Code § 317(e)(2)*].

- Alternatively, indemnification may be authorized by the approval of the shareholders [*see Corp. Code § 153*], with the shares owned by the claimant not being entitled to vote, on the shareholders' determining that the claimant has conformed to the applicable standard of conduct in performing his or her duties as a corporate "agent" [*see Corp. Code § 317(e)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-167 California Forms of Pleading and Practice--Annotated § 167.84

§ 167.84 Expenses Subject to Indemnity

[1] In General

Except as to certain expenses incurred in an action by the corporation or a derivative action on behalf of the corporation, a corporation may elect to provide, or may be authorized or directed by court order to provide, indemnity for all "expenses" actually and reasonably incurred by the claimant in connection with the defense in question, including attorney's fees, judgments, fines, and settlements [*Corp. Code § 317(a), (b), (d)*].

[2] Exception in Case of Action by Corporation or Derivative Action

The corporation may not indemnify an agent in connection with an action by or in the right of the corporation for amounts paid in settling or otherwise disposing of a pending action with out court approval or for expenses incurred in defending a pending action that is settled or otherwise disposed of without court approval [*Corp. Code § 317(c)(2), (3)*].

[3] Costs of Court Order Directing Corporation to Provide Indemnity

If a claimant is obliged to seek a court order or a judgment directing the corporation to provide indemnity, and such an order or judgment is obtained, the claimant's expenses incurred in that proceeding are also subject to indemnity [*see Corp. Code § 317(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesIndemnification

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14-167 California Forms of Pleading and Practice--Annotated § 167.85

§ 167.85 Advancement of Expenses

If a claimant will be eligible for indemnification on the conclusion of some pending civil, criminal, administrative, or investigative proceeding or civil action, the corporation may elect to advance the claimant's defense expenses already incurred, on receiving an undertaking by or on behalf of the claimant to repay the amounts advanced unless it be ultimately determined that the corporation has a duty (under the statute or pursuant to court order) to provide indemnity [*see Corp. Code § 317(f)*]. *Corp. Code § 315(a)*, which requires shareholder approval for any loan by the corporation to any officer or director, or any guarantee by the corporation of any obligation of an officer or director, does not apply to any such advances [*Corp. Code § 317(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesIndemnification

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14-167 California Forms of Pleading and Practice--Annotated § 167.86

§ 167.86 Liability Insurance

A corporation may purchase and maintain insurance on behalf of any "agent" of the corporation [*see Corp. Code § 317(a)*] against any liability asserted against or incurred by the agent in that capacity or arising out of the agent's status as such, whether or not the corporation would have the power to indemnify the agent against the liability under *Corp. Code § 317* [*Corp. Code § 317(i)*]. The fact that a corporation owns all or a portion of the shares of the insurance company does not render the authorization to purchase insurance inapplicable if either of the following conditions met [*see Corp. Code § 317(i)*]:

- The articles authorize indemnification in excess of that authorized in *Corp. Code § 317* and the insurance provided by this provision is limited as indemnification is required to be limited by *Corp. Code § 204(a)(11)*; or

- All of the following conditions are satisfied:

  - The insurer is organized, licensed, and operated in compliance with the insurance laws and regulations applicable to its jurisdiction of organization;

  - The insurer processes claims in a manner that prohibits the corporation that purchased the policy from directly controlling the insurer; and

  - The policy provides for a manner of risk sharing between the insurer and purchaser on one hand, and an unaffiliated person or persons on the other.

Legal Topics:

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

§§ 167.87[Reserved]

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14-167 California Forms of Pleading and Practice--Annotated § 167.100

§ 167.100 California Points and Authorities

For points and authorities for use in actions and proceedings involving corporate directors, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersTerms in OfficeElectionsBusiness & Corporate LawCorporationsDirectors & OfficersTerms in OfficeRemoval & ResignationBusiness & Corporate LawCorporationsShareholdersMeetings & VotingVoting SharesDirector Elections & Removals

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§ 167.101 State Statutes

Appointment of provisional directors. *Corp. Code § 308*

Removal of directors for fraud, dishonesty, or gross abuse of authority or discretion. *Corp. Code § 304*

"Domestic corporation" defined. *Corp. Code § 167*

"Foreign corporation" defined. *Corp. Code § 171*

"Approval of the outstanding shares" defined. *Corp. Code § 152*

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-167 California Forms of Pleading and Practice--Annotated § 167.102

§ 167.102 Decisions

[1] Appointment of Provisional Director

Appointment of provisional director to break deadlock on even-numbered board of close corporation. *In re ANNRHON, Inc. (1993) 17 Cal. App. 4th 742, 751-754, 21 Cal. Rptr. 2d 599*

Person appointed provisional director of professional medical corporation is required to be physician or other licensed person as defined in *Corp. Code § 13401.5*. *Marik v. Superior Court (1987) 191 Cal. App. 3d 1136, 1141, 236 Cal. Rptr. 751*

Appointment of provisional director to break deadlock on even-numbered board. *In re Jamison Steel Corp. (1958) 158 Cal. App. 2d 27, 35-36, 322 P.2d 246*

Proceeding under *Corp. Code § 308* is special proceeding of civil nature. *In re Jamison Steel Corp. (1958) 158 Cal. App. 2d 27, 30, 322 P.2d 246* ; *Desert Club v. Superior Court (1950) 99 Cal. App. 2d 346, 347, 221 P.2d 766*

Proceeding under *Corp. Code § 308* is equitable remedy, but equitable defenses are not applicable. *In re Jamison Steel Corp. (1958) 158 Cal. App. 2d 27, 39, 322 P.2d 246*

Proceeding under *Corp. Code § 308* is appropriate case for appointment of receiver pendente lite when facts so require. *Boyle v. Superior Court of San Francisco (1917) 176 Cal. 671, 673-675, 170 P. 1140*

[2] Removal of Director

Action for removal of director under *Corp. Code § 304* is equitable remedy. *De Garmo v. Goldman, (1942) 19 Cal. 2d 755, 759-761, 123 P.2d 1*

Action for removal of director is analogous to lawsuit for removal of trustee. *DeGarmo v. Goldman (1942) 19 Cal. 2d 755, 760-761, 123 P.2d 1*

Acts of director, in absence of fraud, dishonesty, or abuse of authority, are presumptively in good faith. *Starbird v. Lane (1962) 203 Cal. App. 2d 247, 255, 21 Cal. Rptr. 280* ; *Fornaseri v. Cosmosart Realty & Bldg. Corp. (1929) 96 Cal. App. 549, 557, 274 P. 597*

Director subject to removal under *Corp. Code § 304* is not removable if reelected to another term. *Remillard Brick Co. v. Remillard-Dandini (1952) 109 Cal. App. 2d 405, 424, 241 P.2d 66*

Court is empowered to give other relief, such as damages, in addition to removing director, when facts properly pleaded and proved. *Edward Sidebotham & Son v. Chandler (1960) 183 Cal. App. 2d 823, 827, 829-830, 832, 7 Cal. Rptr. 216*

Court is empowered to give conditional relief when case warrants it. *Remillard Brick Co. v. Remillard-Dandini (1952) 109 Cal. App. 2d 405, 423-424, 241 P.2d 66*

[3] Removal of Officers

Corp. Code § 600(c) does not authorize order that shareholder/officers' attorney's fees or expenses in connection with proxy fight be paid from corporate treasury. *Johnson v. Tago, Inc. (1986) 188 Cal. App. 3d 507, 515-517, 233 Cal. Rptr. 503*

Even if award of attorney's fees in connection with proxy fight and election or ouster of officers could be sustained under substantial benefit theory, award in connection with preliminary injunction as premature. *Johnson v. Tago, Inc. (1986) 188 Cal. App. 3d 507, 518, 233 Cal. Rptr. 503*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 167.103 Text References

Ballantine and Sterling, California Corporation Laws, Ch. 5, *Management: Functions of Directors, Officers, and Committees*, §§ 82.01-82.04, 83.02; Ch. 9, *Shareholders' Meetings and Voting*, § 176.04 (Matthew Bender)

Witkin, Summary of California Law, vol. 9, *Corporations*, §§ 78, 79, 89 (10th ed. 2005)

Marsh, California Corporation Law and Practice, Ch. VIII, *Corporate Management*, §§ 8.6, 8.10

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-167 California Forms of Pleading and Practice--Annotated §§ 167.104-167.119

[Reserved]

§§ 167.104[Reserved]

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B. Fiduciary Duties Of Directors, Officers, And Controlling Shareholders

14-167 California Forms of Pleading and Practice--Annotated § 167.120

§ 167.120 California Points and Authorities

For memoranda of points and authorities for use in actions and proceedings involving corporate directors, officers, and agents, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersShareholder Duties & LiabilitiesControlling ShareholdersFiduciary Responsibilities

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14-167 California Forms of Pleading and Practice--Annotated § 167.121

§ 167.121 State Statutes

Limitations on director's liability. *Corp. Code §§ 204(a)(10), 204.5, 309(c)*

Director's standard of care. *Corp. Code § 309*

Voidability of contracts and transactions because of director's interest. *Corp. Code § 310*

Liability of directors for approving illegal loan or guaranty. *Corp. Code §§ 315, 316*

Application of director's standard of care to directors of "nominally foreign corporations." *Corp. Code § 2115(b)*

Liability of directors of foreign corporations transacting intrastate business. *Corp. Code § 2116*

Legal Topics:

For related research and practice materials, see the following legal topics:
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PART III. RESEARCH GUIDE
B. Fiduciary Duties Of Directors, Officers, And Controlling Shareholders

14-167 California Forms of Pleading and Practice--Annotated § 167.122

§ 167.122 Decisions

[1] Business Judgment Rule; Corp. Code § 309

Business judgment rule held to immunize directors of federally-insured national bank from liability for purely negligent acts; nonofficer directors entitled to rely on company employees and advisors without duty of further inquiry, absent special circumstances. *FDIC v. Castetter (9th Cir. 1999) 184 F.3d 1040, 1044-1046*

Business judgment rule applied as matter of law, because decision-making process was not tainted by fraud, oppression, or illegality, when (1) board of directors could and did properly rely on information from company's management and financial analysis department in its deliberative process; (2) board was sufficiently informed, through written financial materials, oral presentations from company officers, and discussions during board meetings, to make independent decisions about dividends; (3) board did not engage in fraud by failing to disclose information of type it had no duty to disclose; and (4) there was nothing fraudulent about annual financial reports that were based on audits prepared by independent accountants in compliance with applicable principles of accounting. *Hill v. State Farm Mut. Auto. Ins. Co. (2008) 166 Cal. App. 4th 1438, 1449, 83 Cal. Rptr. 3d 651* (applying principles of corporation law of Illinois, where company was incorporated, and other states, in nationwide class action)

Triable issues of fact existed regarding general partner's business judgment rule defense in limited partners' action for breach of fiduciary duty; summary judgment could not be upheld based on theory that general partner conducted good faith and reasonable investigation into whether merger transaction was in best interests of limited partners. Everest Investors 8 v. *McNeil Partners (2003) 114 Cal. App. 4th 411, 429-430, 8 Cal. Rptr. 3d 31*

Emergency room physician serving as officer/director of ER physicians' corporation who dismissed billing contractor and hired another without obtaining required board approval was protected by business judgment rule. *Biren v. Equality Emergency Medical Group, Inc. (2002) 102 Cal. App. 4th 125, 136-138, 125 Cal. Rptr. 2d 325*

Various defensive measures taken by board of directors of oil company to combat perceived hostile action by competing oil company were a reasonable good faith exercise of power in best interest of corporation. *Katz v.*

Chevron Corp. (1994) 22 Cal. App. 4th 1352, 1367-1370, 27 Cal. Rptr. 2d 681

Policyholder of mutual insurance company enjoys same rights as shareholder in company; however, such a policyholder is without standing to challenge insurer's use of profits/premium revenues to influence political activity; use of revenues is within sound discretion of insurer's directors and officers. *Barnes v. State Farm Mut. Auto. Ins. Co. (1993) 16 Cal. App. 4th 365, 375-380, 20 Cal. Rptr. 2d 87*

Shareholder ratification [*Corp. Code § 310(a)(1)*] is no defense to allegation that directors breached their fiduciary duty in approving agreements; *Corp. Code § 310* only goes to contract's voidness or voidability and does not prevent attack on other grounds. *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1273, 256 Cal. Rptr. 702 , disapproved on other grounds in Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*

"Under similar circumstances" in *Corp. Code § 309(a)* requires (1) consideration of director's alleged mistake in judgment in context of size, complexity, and location of activities involved; and (2) limiting assessment to time of action or nonaction, thus avoiding harsher judgments that may be made with benefit of hindsight. *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1265, 256 Cal. Rptr. 702 , disapproved on other ground in Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*

Because form and amount of executive compensation are fundamentally business decisions, *Corp. Code § 309* is applicable to determine whether disinterested directors ("outside directors") breached their fiduciary duty in approving golden parachutes for "inside directors." *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1265, 256 Cal. Rptr. 702 , disapproved on other ground in Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*

Members of board's compensation committee did not breach their fiduciary duty in recommending $1 million, four-year consulting agreement with president and chief operating officer who would be going with spun-off corporation after merger because their inquiry and evaluation of corporation's interest in retaining particular expertise was sufficient; fact that consultant devoted less than one day to performance of agreement is not relevant because that was not known when agreement was recommended and approved. *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1260-1261, 1263, 1271, 256 Cal. Rptr. 702 , disapproved on other ground in Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*

Presumption established by business judgment rule that directors' decisions are based on sound business judgment is rebuttable only by factual showing of fraud, bad faith, or gross overreaching; usual rule that fraud must be pleaded with particularity is not applicable when specific facts are within knowledge and control of defendant, as when defendant is fiduciary. *Eldridge v. Tymshare, Inc. (1986) 186 Cal. App. 3d 767, 776, 230 Cal. Rptr. 815*

[2] Golden Parachutes

Golden parachutes are special termination agreements that shelter executives from effects of corporate takeover. *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1256, 256 Cal. Rptr. 702 , disapproved on other ground in Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*

Recognized functions of golden parachutes are (1) to foster executive objectivity toward merger and tender offers, and (2) to allow corporations that are likely takeover targets to attract top executives; those functions are best accomplished if golden parachute is negotiated before corporation becomes takeover target. *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1266, 1266-1267, 256 Cal. Rptr. 702 , disapproved on other ground in Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*

For purposes of evaluating golden parachutes alleged to have been made in breach of fiduciary duty, *Corp. Code § 309* is standard applicable only to "outside directors," not to "inside directors" who were officers of corporation and beneficiaries of parachutes and abstained from voting on their approval by other directors. *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1265-1266, 1268, 256 Cal. Rptr. 702 , disapproved on other ground in Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*

[3] Mergers

Directors of corporation targeted for takeover have no duty to disclose merger negotiations to shareholders until agreement in principle has been reached even though withdrawal from prior agreement in principle and termination of earlier merger negotiations had been publicly announced. *Eldridge v. Tymshare, Inc. (1986) 186 Cal. App. 3d 767, 772-776, 230 Cal. Rptr. 815*

Shareholder challenging directors' decision to resist or accept takeover bid is required to make specific allegations of malfeasance or bad faith; only improper motive which was sole or primary reason for directors' action constitutes malfeasance or bad faith. *Eldridge v. Tymshare, Inc. (1986) 186 Cal. App. 3d 767, 776, 230 Cal. Rptr. 815*

Shareholder's complaint for damages for directors' wrongful rejection of tender offers at price higher than that for which plaintiff sold his shares is demurrable for failure to allege that wrongful rejection occurred while plaintiff owned shares. *Eldridge v. Tymshare, Inc. (1986) 186 Cal. App. 3d 767, 777-778, 230 Cal. Rptr. 815*

Directors do not owe fiduciary duty to preferred shareholders to structure reorganization in manner which will give preferred shareholders continued market for their shares, profitable return on their shares, or anything above rights enumerated in certificate of determination. *Kirschner Brothers Oil, Inc. v. Natomas Co. (1986) 185 Cal. App. 3d 784, 792-800, 229 Cal. Rptr. 899*

Directors authorizing repurchase of shares to quell takeover attempt breach fiduciary duty if their motivation was desire to retain their positions of power and control. *Heckmann v. Ahmanson (1985) 168 Cal. App. 3d 119, 127, 214 Cal. Rptr. 177*

[4] Officers and Directors

Bank's expectancy interest in certain ventures had not matured into type of vested, direct property interest for which Victim and Witness Protection Act (VWPA) [*18 U.S.C. §§ 3663, 3664*] allows restitution under usurption of corporate opportunities doctrine; however, to extent that chairman usurped association's vested contractual interests, restitution would be proper. *United States v. Rodrigues (9th Cir. 2000) 229 F.3d 842, 846-847*

Under *Corp. Code § 313* regarding lack of authority by officer to sign instrument, signature of one person is sufficient to bind corporation if he or she holds corporate offices in both "operational group" and "financial group" described in that statute, even when instrument lists only one of his or her offices. *Snukal v. Flightways Manufacturing, Inc. (2000) 23 Cal. 4th 754, 786-787, 98 Cal. Rptr. 2d 1, 3 P.3d 286* (interpreting section in context of real property lease agreement)

Director not prohibited as matter of law from asserting corporation's estoppel to raise statute of frauds in action on transaction with corporation. *Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 31-34, 216 Cal. Rptr. 130, 702 P.2d 212* (discussing factors for determining if contract may be enforced by director against corporation)

Corporate officers and directors occupy fiduciary positions similar to trustee's position. *Bancroft-Whitney Co. v. Glen (1966) 64 Cal. 2d 327, 345, 49 Cal. Rptr. 825*

Officer who assists rival corporation in recruiting personnel is guilty of breach of fiduciary duty. *Bancroft-Whitney Co. v. Glen (1966) 64 Cal. 2d 327, 346-356, 49 Cal. Rptr. 825, 411 P.2d 921*

Director for "accommodation" only is nevertheless subject to rules and statutes respecting director's fiduciary duties. *Minton v. Cavaney (1961) 56 Cal. 2d 576, 580, 15 Cal. Rptr. 641, 364 P.2d 473*

Director acquiring property of corporation is thereby becoming resulting or constructive trustee with duty to convey or deliver to corporation. *Bainbridge v. Stoner (1940) 16 Cal. 2d 423, 428-429, 106 P.2d 423*

Waiver of corporate directors' and majority shareholders' fiduciary duties to minority shareholder in private close corporation is against public policy and contract provision in buy-sell agreement purporting to effect such a waiver is void. *Neubauer v. Goldfarb (2003) 108 Cal. App. 4th 47, 54-57, 133 Cal. Rptr. 2d 218*

Plaintiff corporate officer who signed licensing agreements (providing for arbitration) with defendant corporation in representative capacity rather than in individual capacity was not third party beneficiary of contract; officer thus could not be compelled to arbitrate libel action he had brought against other corporation and its president. *Benasra v. Marciano (2001) 92 Cal. App. 4th 987, 991-993, 112 Cal. Rptr. 2d 358*

If third party knowingly participates in perpetration of fraud upon corporation, that participation is defense or ground of invalidity as to that party for purposes of *Corp. Code § 208*. *Saks v. Charity Mission Baptist Church (2001) 90 Cal. App. 4th 1116, 1140-1142, 110 Cal. Rptr. 2d 45* (investor who knowingly participated in scheme with church pastor to obtain money from public agency and real property for himself and partners through use of church's name was not permitted to claim lack of actual knowledge of contents of church's bylaws regarding pastor's lack of authority to enter into real estate transactions)

Trial court erred in failing to instruct jury that officer who participates in management of corporation, exercising some discretionary authority, is fiduciary of corporation as a matter of law. *GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc. (2000) 83 Cal. App. 4th 409, 420-424, 99 Cal. Rptr. 2d 665*

Debenture holders, even of debentures convertible into stock, are unsecured creditors and thus corporation and directors do not owe any fiduciary duty to debenture holders to manage corporation in manner that will cause bonds to maintain their value or rating. *Pittelman v. Pearce (1992) 6 Cal. App. 4th 1436, 1441-1447, 8 Cal. Rptr. 2d 359* (decided under Delaware law, after determining there was no conflict between California and Delaware law; *see Fox v. MGM Grand Hotels, Inc. (1982) 137 Cal. App. 3d 524, 527, 187 Cal. Rptr. 141* , *Kessler v. General Cable Corp. (1979) 92 Cal. App. 3d 531, 538-540, 155 Cal. Rptr. 94*)

If nonresident president and major shareholder fraudulently induced plaintiff to extend credit to corporation, minimum contacts jurisdiction would be established for California jurisdiction over officer/shareholder. *Seagate Technology v. A. J. Kogyo Co. (1990) 219 Cal. App. 3d 696, 704-707, 268 Cal. Rptr. 586*

Minimum contacts jurisdiction found over nonresident officers alleged to have fraudulently induced plaintiff to enter into contract for sale of California corporation. *Taylor-Rush v. Multitech Corp. (1990) 217 Cal. App. 3d 103, 117-118, 265 Cal. Rptr. 672* (officers alleged to have fraudulently induced plaintiff to enter into contracts with corporation)

As general rule, board of directors of corporation are not personally liable to third parties for negligence amounting to breach of duty that officer owes to corporation alone. *Jaffe v. Huxley Architecture (1988) 200 Cal. App. 3d 1188, 1191, 246 Cal. Rptr. 432*

Minimum contacts found for personal jurisdiction in California over both president and corporate counsel of foreign

corporation; foreign corporate counsel, whether in-house or independent, are not entitled to same "official capacity" shield from personal jurisdiction in California as corporate officers and directors. *Mihlon v. Superior Court (1985) 169 Cal. App. 3d 703, 715-716, 215 Cal. Rptr. 442*

[5] Shareholders

Majority shareholders have fiduciary duty to corporation and minority shareholders to use controlpower in fair, just, and equitable manner. *Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 108, 110, 81 Cal. Rptr. 592, 460 P.2d 464*

Minority shareholder as an individual had no standing to bring action for breach of fiduciary duty against majority shareholder, but should have brought derivative action on behalf of corporation of which the two were sole shareholders; because all acts alleged to have caused individual's injury amounted to alleged misfeasance or negligence in managing corporation's business, causing business to be total failure, any obligations violated were duties owed directly and immediately to corporation. *Nelson v. Anderson (1999) 72 Cal. App. 4th 111, 124-126, 84 Cal. Rptr. 2d 753*

Shareholders owning 12 percent of shares are jointly liable as aiders and abettors of directors who breached their fiduciary duty by authorizing repurchase of those shares to quell takeover attempt; imposition of constructive trust on shareholders' profits on sale of shares to corporation is proper remedy, therefore, preliminary injunction restraining disposal of profits during pendency of suit is also proper. *Heckmann v. Ahmanson (1985) 168 Cal. App. 3d 119, 127, 135-136, 214 Cal. Rptr. 177*

Allegation by minority shareholder that allocation of tax savings to parent corporation accrued by parent and subsidiary corporation filing consolidated tax return under provisions of Internal Revenue Code properly raised question as to whether or not allocation was inherently fair and equitable to plaintiff and was entered in good faith under California rule that majority shareholders have fiduciary duties toward minority shareholders as well as to corporation. *Smith v. Tele-Communication, Inc. (1982) 134 Cal. App. 3d 338, 343-346, 184 Cal. Rptr. 571*

Majority shareholder has duty to investigate buyer's intentions before selling control, so as to avert looting. *DeBaun v. First W. Bank & Trust Co. (1975) 46 Cal. App. 3d 686, 696-700, 120 Cal. Rptr. 354*

Majority shareholders have fiduciary duty to minority shareholders, when no public market for the shares exists, not to use controlpower to make market for their own shares only. *Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 115, 81 Cal. Rptr. 592, 460 P.2d 464*

Majority shareholder has fiduciary duty to minority shareholders not to use controlpower to dissolve corporation for purpose of defrauding or squeezing out minority. *In re Security Fin. Co. (1957) 49 Cal. 2d 370, 378, 317 P.2d 1*

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Veasey, *Duty of Loyalty: The Criticality of the Counselor's Role, 45 Bus. Law. 2065 (1990)*

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Veasey, *New Insights Into Judicial Deference to Directors' Business Decisions: Should We Trust the Courts?, 39 Bus. Law. 1461 (1984)*

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Frahm, *The Corporate "Termination Bonus" for Executives Entering Public Service: Proper Government Recruiting Aid or Conflict of Interest?, 49 S. Cal. L. Rev. 827 (1976)*

Stern, *Symposium: The New California General Corporation Law--The General Standard of Care Imposed on Directors Under the New California General Corporation Law, 23 UCLA L. Rev. 1269 (1976)*

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§ 167.124 Text References

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Witkin, Summary of California Law, vol. 9, *Corporations*, §§ 90-106 (10th ed. 2005)

Marsh and Finkle, Marsh's California Corporation Law, Ch. XI, *Fiduciary Duties of Promoters, Directors, Officers and Controlling Shareholders* (Prentice-Hall 3d ed. 1990)

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§§ 167.125[Reserved]

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§ 167.140 State Statutes

Indemnification of directors, officers, employees, and agents. *Corp. Code § 317*

Application of *Corp. Code § 317*. *Corp. Code § 2306*

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§ 167.141 Decisions

Insurer of corporation under comprehensive general liability (CGL) policy had no duty to defend plaintiff (a minority shareholder who remained a director after leaving corporation's business to work elsewhere) in federal counterclaim action for defamation, when plaintiff was sued as an individual and offered no evidence to support his claim that he was acting in his capacity as a director when he allegedly defamed the corporation. *Lomes v. Hartford Financial Services Group, Inc. (2001) 88 Cal. App. 4th 127, 132-135, 105 Cal. Rptr. 2d 471*

Trial court erred in determining as matter of law that *Corp. Code § 317* did not apply, because question of its application is factual one; trial on allegations of complaint was necessary to determine whether appellants' alleged acts were taken on behalf of corporation, or whether they were acting to further their own personal interests. *Wilshire-Doheny Associastes, Ltd. v. Shaprio (2000) 83 Cal. App. 4th 1380, 1390, 100 Cal. Rptr. 2d 478*

Outside counsel retained by corporation to represent it at trial, and then sued by corporation for legal malpractice while representing corporation, is not party to malpractice suit "by reason of the fact that he or she is or was an agent of the corporation" within meaning of *Corp. Code § 317*. *Channel Lumber Company, Inc. v. Porter Simon (2000) 78 Cal. App. 4th 1222, 1225, 93 Cal. Rptr. 2d 482* (reversing order awarding attorney fees and expenses to counsel under *Corp. Code§ 317(d)*)

Primary right to seek authorization for indemnity under *Corp. Code § 317(b)* is not same cause of action as one for breach of contract for indemnity or one asserted under doctrine of equitable estoppel. *Branson v. Sun-Diamond Growers (1994) 24 Cal. App. 4th 327, 343, 29 Cal. Rptr. 2d 314*

Findings of fact regarding whether agent is sued by reason of his or her official corporate position and whether agent acted in good faith and for best interests of corporation must be upheld if supported by substantial evidence, reviewed in light most favorable to trial court's findings. *APSB Bancorp v. Thorton Grant (1994) 26 Cal. App. 4th 926, 932, 31 Cal. Rptr. 2d 736* ; *Plate v. Sun-Diamond Growers (1990) 225 Cal. App. 3d 1115, 1125, 275 Cal. Rptr. 667*

Corp. Code § 317(b), requiring corporation to indemnify its agent who has acted in good faith and in manner reasonably believed to be in best interests of corporation, requires judicial determination of actual merits of agent's defense. *American Nat'l Bank & Trust Co. v. Schigur (1978) 83 Cal. App. 3d 790, 793, 148 Cal. Rptr. 116*

Former Corp. Code § 830 does not permit motion for order compelling indemnification to be made in court after conclusion of criminal proceeding in which defense expenses were incurred. *P.S. & S., Inc. v. Superior Court (1971) 17 Cal. App. 3d 354, 359-360, 94 Cal. Rptr. 738*

Former Corp. Code § 830 is legislative application, in favor of corporate personnel, of theory that principal is obligated to indemnify agent for expenses arising from performance of agency. *Fletcher v. A.J. Indus., Inc. (1968) 266 Cal. App. 2d 313, 327, 72 Cal. Rptr. 146*

Former Corp. Code § 830(f) empowered corporation to indemnify agent whose defense was not successful on the merits. *Brokate v. Hehr Mfg. Co. (1966) 243 Cal. App. 2d 133, 140-141, 52 Cal. Rptr. 672*

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§ 167.142 Law Reviews

Comment, *Void ab Initio: Application Fraud as Grounds for Avoiding Directors' and Officers' Liability Insurance Coverage, 74 Cal. L. Rev. 929 (1986)*

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Ballantine & Sterling, California Corporation Laws, Ch. 6, *Management: Duties and Liabilities of Directors and Controlling Shareholders, §§ 109.01* , 109.02 (Matthew Bender)

Witkin, Summary of California Law, vol. 9, *Corporations §§ 109-112* (9th ed. 1987)

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[Reserved]

§§ 167.144[Reserved]

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§ 167.160 Provisional Director [Corp. Code § 308]--Petition for Appointment--Deadlock on Even-Numbered Board of Directors

[1] FORM Provisional Director [Corp. Code § 308]--Petition for Appointment--Deadlock on Even-Numbered Board of Directors
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In re	)	NO. _____
_____ [*name of corporation*].	)	PETITION FOR APPOINTMENT OF PROVISION-
	)	AL DIRECTOR

_____

Petitioner(s) respectfully represent(s):

1. _____ [*Name of corporation*] is a corporation organized and existing under the _____ [*governing law, e.g.,* General Corporation Law] of California.

2. The _____ [principal executive office of the corporation is located in _____ County *or* principal executive office of the corporation is not located in California *or* corporation has no principal executive office].

[*EITHER*]

3. Petitioner(s) is/are the holder(s) of _____ [*number not less than 331/3*] percent of the voting power of the corporation.

[*OR*]

3. Petitioner(s) is/are _____ [a director *or* the directors] of the corporation.

4. The corporation is authorized by its articles to have, and does have, a board of _____ [*even number*] directors. The [other] present director(s) is/are _____ [*name(s)*].

5. The directors are equally divided and cannot agree as to the management of the corporation's affairs. The circumstances creating the division are as follows: _____ [*specify; use lettered subparagraphs if necessary to avoid unduly long paragraph*].

6. Unless a provisional director is appointed, the _____ [business of the corporation can no longer be conducted to advantage *or* property and business of the corporation will be impaired or lost] because of the deadlock on the board.

7. _____ [*Name*] is an impartial person who is neither a shareholder nor a creditor of the corporation and who is not related by consanguinity or affinity within the third degree according to the common law to any of the present directors of the corporation or to any present judge of the above-entitled court. _____ [*Name*] is willing to serve as a provisional director.

WHEREFORE, petitioner(s) pray(s) that a provisional director be appointed pursuant to *Corporations Code Section 308* to break the deadlock on the board of directors of the corporation.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am [one of] the petitioner(s) in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to matters therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

CONSENT TO APPOINTMENT

I, _____ [*name*], being nominated in the foregoing petition for appointment to serve as a director of _____ [*name of corporation*], hereby consent to be so appointed pursuant to such judgment and orders as the court shall make in the above-entitled proceeding.

_____ [*signature*]

_____ [*address*]

[2] Use of Form

This petition is for use by a director or shareholder or shareholders wishing to obtain appointment of a provisional director for the purpose of breaking a deadlock on a board of an even number of directors.

[3] Jurisdiction and Venue

The petition must be filed in the superior court in the county where the principal executive office of the corporation is located or, if the principal executive office of the corporation is not located in California or the corporation has no such office, in Sacramento County [*Corp. Code §§ 177, 308(a)*].

[4] Standing

The holder or holders of "not less than 331/3 percent of the voting power" of a domestic corporation, or any director or directors of the corporation, may petition for appointment of a provisional director in order to break a deadlock on a board of an even number of directors [*Corp. Code § 308(a)*; *see Corp. Code §§ 162* ("corporation" defined), 194.5 ("voting power" defined)]. However, *Corp. Code § 308(a)* does not apply in the case of a corporation subject to the Public Utilities Act, *Pub. Util. Code § 201 et seq.*[*Corp. Code § 308(d)*].

[5] Grounds for Appointment

A provisional director may be appointed if a corporation has an even number of directors who are equally divided and cannot agree as to the management of the corporation's affairs so that the corporation's business can no longer be conducted to advantage or there is danger that the corporation's property and business will be impaired or lost. When these grounds for appointment exist, a provisional director may be appointed notwithstanding any contrary provisions in the articles or bylaws and whether or not an action is pending for an involuntary winding up or dissolution of the corporation [*Corp. Code § 308(a)*].

[6] Qualifications for Appointment

A provisional director must be an impartial person who is neither a shareholder nor a creditor of the corporation and who is not related by consanguinity or affinity within the third degree according to the common law to any of the other directors of the corporation or to any judge of the court by which the provisional director is appointed [*Corp. Code § 308(c)*]. Relatives within the third degree according to the common law are the (1) children, grandchildren, and great-grandchildren, and (2) parents, grandparents, and great-grandparents, and (3) brothers and sisters, uncles and aunts, and nephews and nieces of the subject.

[7] Nomination of Appointee; Consent

Although the statute does not so require, the petitioner should nominate a person for appointment in the petition. This is customary in other similar proceedings, and the court will expect the petitioner to say whom the petitioner wishes to be appointed.

Again, although not required, it is good practice to append the nominee's consent so that the court knows the nominee will accept appointment.

[8] Verification

The petition is not required to be verified, but verification will enable counsel to use the petition as an affidavit if the occasion should arise.

[9] State Statutes

Venue of proceeding. *Corp. Code §§ 177, 308(a)*

"Corporation" as used in *Corp. Code § 308(a)* as meaning domestic corporation. *Corp. Code § 162*

"Voting power" of corporation defined. *Corp. Code § 194.5*

[10] Text References

Ballantine and Sterling, California Corporation Laws, Ch. 5, *Management: Functions of Directors, Officers, and Committees, §§ 82.01-82.04* Ch. 9, "Shareholders' Meetings and Voting," § 176.04 (Matthew Bender)

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14-167 California Forms of Pleading and Practice--Annotated § 167.161

§ 167.161 Provisional Director [Corp. Code § 308]--Petition for Appointment--Deadlock Among Shareholders of Corporation Unable to Elect Directors at Annual Meeting

[1] FORM Provisional Director [Corp. Code § 308]--Petition for Appointment--Deadlock Among Shareholders of Corporation Unable to Elect Directors at Annual Meeting

[*Caption. See § 167.160.*]

Petitioner(s) respectfully represent(s):

1. _____ [*Identity of corporation. See § 167.160, Paragraph 1.*]

2. _____ [*Venue facts. See § 167.160, Paragraph 2.*]

3. Petitioner(s) is/are [a] shareholder(s) holding 50 percent of the voting power of the corporation.

4. The corporation is authorized by its articles to have, and does have, a board of _____ [*number*] directors. The present directors are _____ [*names*].

5. The shareholders of the corporation are divided into two blocs, each holding 50 percent of the voting power of the corporation. At the last previous annual meeting on _____ [*date*], [and at the annual meeting(s) in _____ (*prior year or years*),] the shareholders were unable because of that division to elect a successor board not reflecting the division between them; and they remain so divided that the election of a successor board not reflecting the division is impossible.

6. Unless provisional directors are appointed, or other appropriate relief is obtained, the deadlock between the shareholders will continue to perpetuate the present board in office or will prevent the election of a successor board not reflecting the division between the shareholders.

7. _____ [*Name*] and _____ [*name*] are impartial persons who are neither shareholders nor creditors of the corporation and who are not related by consanguinity or affinity within the third degree according to the common law to any of the present directors of the corporation, or to any present judge of the above-entitled court, or to each other. They are, and each is, willing to serve as provisional directors.

WHEREFORE, petitioner(s) pray(s) that two provisional directors be appointed, or that other appropriate relief be given, pursuant to *Corporations Code Section 308* to break the deadlock between the shareholders of the corporation.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

[*Verification, if desired. See § 167.160.*]

CONSENT TO APPOINTMENT

We, the undersigned, being nominated in the foregoing petition for appointment to serve as directors of _____ [*name of corporation*], hereby consent to be so appointed pursuant to such judgment and orders as the court shall make in the above-entitled proceeding.

_____ [*signature*]

_____ [*address*]

_____ [*signature*]

_____ [*address*]

[2] Use of Form

This petition is for use by a shareholder or shareholders who wish to obtain appointment of a provisional director or directors for the purpose of breaking a deadlock among the shareholders that prevents the shareholders from electing a new board of directors.

[3] Standing

The holder or holders of 50 percent of the voting power of a domestic corporation may petition for appointment of a provisional director or provisional directors in order to break a deadlock among the shareholders that prevents them from electing a new board [*Corp. Code § 308(b)*; *see Corp. Code §§ 162* ("corporation" defined), *194.5* ("voting power" defined)]. However, *Corp. Code § 308(b)* does not apply in the case of a corporation subject to the Public Utilities Act, *Pub. Util. Code §§ 201-2115* [*Corp. Code § 308(d)*].

[4] Grounds for Appointment

A provisional director or provisional directors may be appointed if the shareholders are deadlocked so that they cannot elect a successor board at an annual meeting of shareholders [*Corp. Code § 308(b)*].

[5] Two Appointees

Two provisional directors should be appointed when the board has an uneven number of directors and the appointment of only one provisional director might lead to a deadlock on an even-numbered board.

[6] Text References

For additional discussion, see Ballantine and Sterling, California Corporation Laws, Ch. 9, *Shareholders' Meetings and Voting, § 176.04* (Matthew Bender)

[7] Cross References

For a related form, *see § 167.160*.

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14-167 California Forms of Pleading and Practice--Annotated § 167.162

§ 167.162 Provisional Director [Corp. Code § 308]--Order to Show Cause

[1] FORM Provisional Director [Corp. Code § 308]--Order to Show Cause

[*Caption. See § 167.160.*]

To _____ [*name(s) of present director*(*s*)]:

_____ [*Name(s) of petitioner*(*s*)] having filed a petition seeking appointment of [a] provisional director(s) of the above-named corporation, alleging a deadlock between the _____ [directors *or* shareholders], to which petition reference may be had for further particulars,

YOU ARE ORDERED to appear at _____ [*time*], on _____ [*date*], in the courtroom of [_____ (Department *or* Division) _____ of] the above-entitled court at _____ [*name, if any, and street address of building*] in _____ [*city*], California, then and there to show cause, if any you have, why the relief sought in the petition should not be given.

A copy of this order and a copy of the petition shall be served on [each of] you _____ [*specify manner of service directed by court, e.g.*, in the manner in which a summons is required to be served] _____ [*give further notice requirements according to court's direction, e.g.*, and that service shall be made, and proof of service shall be filed, within _____ (*number*) days hereafter].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form of order to show cause is for use in connection with a petition for appointment of a provisional director [*see §§ 167.160, 167.161* and comments]. The statute [*Corp. Code § 308*] does not prescribe procedure, but it appears that use of an order to show cause would be appropriate.

[3] Cross References

For related forms, *see §§ 167.160* and *167.161*.

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14-167 California Forms of Pleading and Practice--Annotated § 167.163

§ 167.163 Provisional Director [Corp. Code § 308]--Judgment

[1] FORM Provisional Director [Corp. Code § 308]--Judgment

[*Caption. See § 167.160.*]

This cause came on regularly for hearing on _____ [*date*], in [_____ (Department *or* Division) _____ of] the above-entitled court, the Honorable _____, Judge, presiding, sitting without a jury. Petitioner(s) _____ [*name*(*s*)] appeared by _____ [*name*], counsel; _____ [*specify other appearances*]; _____ [*specify defaults, e.g.*, _____ (*name*) was duly served with the order to show cause heretofore issued in this cause but made no appearance]. Evidence, both oral and documentary, having been presented by _____ [all appearing parties *or* petitioner(s) only *or otherwise as was the case*], the cause having been argued and submitted for decision,

IT IS ADJUDGED, ORDERED, AND DECREED that

1. _____ [*Name*(*s*)] is/are appointed to serve as [a] provisional director(s) of _____ [*name of corporation*], with all of the rights and powers of a director, from and after the date of entry of this judgment until removal by further order of this court or by the vote of the shareholders as provided in the General Corporation Law of California.

[2. *If suit was brought to break deadlock between or among shareholders, add other appropriate relief, if any*.]

3. The court will retain jurisdiction of this cause for the purpose of entertaining a motion for removal of _____ [*name*(*s*)] [, or either of them,] and appointment of a successor, if necessary, or a motion for appointment of an additional provisional director. Leave is hereby granted to any person, if that person has standing to sue for the relief herein given at the time the motion is made, to make such a motion, on _____ [*number*] days' written notice filed and served on the provisional director(s) then in office.

4. The court will also retain jurisdiction of this cause for the purpose of fixing the compensation which the provisional director(s) shall receive. In the event that this compensation is not fixed by agreement between the provisional director(s) and the corporation, leave is hereby given to [either or both of] the provisional director(s), to move for an order fixing the compensation which the provisional director(s) shall receive, on _____ [*number*] days' written notice filed and served on the corporation. Such a motion may be made whether or not the provisional director(s) so moving be then in office, provided that the motion shall not be made later than _____ [*number*] days after removal or resignation of the provisional director(s) on whose behalf it is made.

5. Except as to the matters of which the court expressly retains jurisdiction as stated in the two preceding paragraphs, this judgment is the court's final determination of the rights of the parties in this cause.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This judgment is for use in the event a petition for appointment of a provisional director or provisional directors is granted. A provisional director serves until removed by the court or the vote of the shareholders, and is entitled to compensation [*Corp. Code § 308(c)*]. It is appropriate, therefore, for the court to retain jurisdiction for the purposes of deciding a motion for removal of a provisional director and of deciding a motion to fix compensation [*cf. Braude v. Havenner (1974) 38 Cal. App. 3d 526, 534, 113 Cal. Rptr. 386* (corporate election contest; retention of jurisdiction to compel use of fair election procedure)].

[3] Cross References

For related forms, *see* §§ 167.160-167.162.

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14-167 California Forms of Pleading and Practice--Annotated § 167.164

§ 167.164 Appointment of Entire Board [Corp. Code § 306]--Petition

[1] FORM Appointment of Entire Board [Corp. Code § 306]--Petition

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In re _____ [*name of corporation*].	)))))	NO. _____ PETITION FOR APPOINTMENT OF BOARD OF DIRECTORS

Petitioner respectfully represents:

1. _____ [*Name of corporation*] is a corporation organized and existing under the _____ [*governing law, e.g.,* General Corporation Law] of California.

2. The corporation has not issued any shares.

[*EITHER*]

3. The corporation is authorized to have _____ [*number*] directors; but the corporation does not now have, and since _____ (*date*), has not had, any directors, inasmuch as _____ [*state circumstances of death, resignation, and/or incompetency of all directors, e.g.,* on _____ (*date*), _____ (*name*), who was then a director, resigned, and no director has been elected or appointed to succeed him/her; on _____ [*date*], _____ (*name*), who was then a director, was

declared incompetent by the _____ (*court*, *e.g.*, Superior Court of Sacramento County), and thereafter the remaining directors declared his/her office on the board vacant, and no director has been elected or appointed to succeed him/her; and on _____ (*date*), _____ (*name*) and _____ (*name*), who were then the remaining directors, died].

[*OR, if initial directors were not named in articles*]

3. The corporation's initial directors were not named in the articles, and all of the incorporators have _____ [*specify*, *e.g.*, resigned *and/or* died *and/or* become incompetent)] prior to the election of the initial directors.

[*CONTINUE*]

4. Petitioner is a resident of _____ [*city or county*], California, and is a party in interest in this matter by virtue of _____ [*describe*].

5. _____ [*Names*] are suitable persons to be appointed as directors of the corporation in that _____ [*specify*].

WHEREFORE, petitioner prays that _____ [*number*] suitable persons be appointed to constitute the board of directors of the corporation pursuant to *Section 306 of the Corporations Code*.

_____ [*signature*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge except as to matters therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

CONSENT TO APPOINTMENT

I, the undersigned, being nominated in the foregoing petition for appointment to serve as a director of _____ [*name of corporation*], hereby consent to be so appointed pursuant to such judgment and orders as the court shall make in the above-entitled proceeding.

_____ [*signature*]

_____ [*address*]

_____ [*signature*]

_____ [*address*]

[2] Use of Form

This petition is for use by any "party in interest" to obtain appointment of a board of directors for a corporation that has not issued any shares, if all the directors resign, die, or become incompetent, or if initial directors were not named in the articles and all the incorporators resign, die, or become incompetent prior to election of initial directors [*Corp. Code § 306*]. The governing statutes specify that the superior court of any county may appoint directors on "application" by any party in interest. The statutes do not provide any additional guidance as to the form of the pleading by which this "application" is to be made [*Corp. Code § 306*], and local practice in this regard should be ascertained if possible. This form is drafted in the form of a petition. For a similar form for use in connection with nonprofit corporations, drafted as an "application" but in substantially the form of a petition, see *Ch. 388, Nonprofit Corporations, § 388.168*.

The petition may be filed in the superior court in any county [*Corp. Code § 306*]. Verification is not required.

[3] Notice

The statute [*Corp. Code § 306*] contains no procedural provisions. Since the judgment will not bind any person who did not have actual or constructive notice of the pendency of the proceeding [*see Code Civ. Proc. § 1908*], it would be advisable to publish a citation, directed to all interested persons. An order for publication may be obtained ex parte. For discussion of the analogous subject of publication of summons, and related forms, see Ch. 518, *Service of Summons and Papers* .

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14-167 California Forms of Pleading and Practice--Annotated § 167.165

§ 167.165 Appointment of Entire Board [Corp. Code § 306]--Judgment

[1] FORM Appointment of Entire Board [Corp. Code § 306]--Judgment

[*Caption. See § 167.164.*]

This cause came on regularly for hearing on _____ [*date*], in [_____ (Department *or* Division) _____ of] the above-entitled court, the Honorable _____, Judge, presiding, sitting without a jury. Petitioner _____ [*name*] appeared by _____ [*name*], counsel; _____ [*specify other appearances or, if none, state facts as to notice, e.g.*, notice was duly given by _____ (*e.g.*, publication) pursuant to the order of the court heretofore entered, but no other person appeared]. Evidence, both oral and documentary, having been presented by _____ [all appearing parties *or* petitioner *or other*], the cause having been argued and submitted for decision,

IT IS ADJUDGED, ORDERED, AND DECREED that

1. _____ [*Names*] are appointed to serve as directors of _____ [*name of corporation*], with all of the rights and powers of directors [except as hereinafter provided], from and after the date of entry of this judgment until removal by further order of this court or, in the event the corporation issues shares, by the vote of the shareholders as provided in the General Corporation Law of California.

2. _____ [*Other appropriate terms of the judgment, such as that the appointed directors must make periodic reports and accountings to the court, that they will have compensation from the corporation in a stated amount, that they will not do certain acts as directors without the court's approval, and so forth*].

3. The court will retain jurisdiction of this cause for any further proceedings that may be necessary. Leave is hereby granted to any person, if that person has standing to sue for the relief herein given at the time the motion is made, to move for any appropriate order or modification of this judgment, on _____ [*number*] days written

notice filed and served on the corporation and, if the motion concerns removal of any appointed director, on the director or directors affected.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form of judgment is for use in the event a petition for appointment of the entire board of directors [*see § 167.164*] is granted. Since the relief is apparently equitable, the court may include any provisions which seem proper; and the court may appropriately retain jurisdiction for further proceedings, since the corporation is being placed in the hands of the court's appointees.

[3] Cross References

For a related form, *see § 167.164*.

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14-167 California Forms of Pleading and Practice--Annotated § 167.166

§ 167.166 Removal of Director [Corp. Code § 304]--Complaint--Skeletal Form

[1] FORM Removal of Director [Corp. Code § 304]--Complaint--Skeletal Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name*(*s*) *of director*(*s*)]	)	COMPLAINT FOR REMOVAL OF DIRECTOR
and _____ [*name of*	)	
corporation],	)	
Defendants.	)	
	)	

Plaintiff(s) allege(s):

[1. *Identity of corporation. See § 167.160, Paragraph 1.*]

[2. *Venue facts. See § 167.160, Paragraph 2.*]

3. Plaintiff(s) is/are the holder(s) of record of _____ [*number, at least 10*] percent of the outstanding [Class _____ (*designation*)] shares in the corporation.

4. Defendant(s) _____ [*name*(*s*)] is/are, and at all times herein mentioned was/were, [a] director(s) of the corporation.

5. _____ [*Allege commission of fraudulent or dishonest acts or gross abuse of authority or discretion by defendant director*(*s*); *see Comments to this form*].

WHEREFORE, plaintiff(s) pray(s) judgment as follows:

1. For removal of defendant(s) _____ [*name*(*s*)] from the office of director of the corporation;

[2. That defendant(s) _____ (*name*(*s*)) be barred from reelection to the office of director for a period of _____ (*number*) years or such other period as the court prescribes;]

3. _____ [*Other relief, as appropriate; see Comments to this form*];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff(s)

VERIFICATION

I, _____ [*name*], am [one of] the plaintiff(s) in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to matters therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form is a complaint for use by a shareholder or shareholders holding 10 percent or more of the outstanding shares of any class, to remove a director or directors from office under *Corp. Code § 304*. Whether that section authorizes a civil action or a special proceeding is unclear. Early cases considered that a lawsuit for removal of a corporate director was a special proceeding [*see, e.g., Chollar M. Co. v. Wilson (1885) 66 Cal. 374, 376, 5 P. 670]* , but the majority of cases, including all recent cases, seem to treat such a lawsuit as a civil action. The language of *Corp. Code § 304* is compatible with the modern view; and since that view permits joining a cause of action for damages, which will often be desirable, it is the view taken in this chapter.

[3] Parties

[a] Plaintiff

The statute gives standing to "shareholders holding at least 10 percent of the number of outstanding shares of any class" [*Corp. Code § 304*]. It is necessary to include in the complaint an appropriate allegation showing the plaintiff(s) to have

standing under the statute [*see Mason v. San-Val Oil & Water Co., Ltd. (1934) 1 Cal. 2d 670, 673, 36 P.2d 616]* .

[b] Defendant

Since the action authorized by *Corp. Code § 304* is for the removal of a director, it is necessary to allege that the defendant is now, and at all times mentioned in the complaint was, a director of the corporation. A person who is not now a director cannot be removed [*Starbird v. Lane (1962) 203 Cal. App. 2d 247, 258-259, 21 Cal. Rptr. 280]* ; and a director who was not in office when the acts complained of were committed is not subject to removal [*see § 167.166[5]*].

The statute requires that the corporation be made a party [*Corp. Code § 304*], but it is not specified that the corporation must be made a defendant. The corporation can be only a defendant [*see, e.g., DeGarmo v. Goldman (1942) 19 Cal. 2d 755, 758, 123 P.2d 1]* since shareholders have no control of the corporation and cannot make it a plaintiff. In any event, only "shareholders" have standing to sue, and a corporation cannot be its own shareholder.

[4] Nominally Foreign Corporation

Corp. Code § 304 applies in the case of a "foreign corporation" [*see Corp. Code § 171*] (to the exclusion of the law of the jurisdiction in which it is incorporated) if it is subject to *Corp. Code § 2115(a)* [*Corp. Code § 2115(b)*]. Such corporations are called "nominally foreign corporations" in this chapter [*see* Ch. 160, *Corporations: Capacity*]. If a nominally foreign corporation is involved, the allegation of the corporation's identity in Paragraph 1 will have to be in the style illustrated in Ch. 160, *Corporations: Capacity*, §§ 161.51-161.53.

[5] Allegations

A director may be removed from office by the court "in case of fraudulent or dishonest acts or gross abuse of authority or discretion with reference to the corporation" [*Corp. Code § 304*]. General allegations of fraud or dishonesty or abuses of discretion or abuses of authority are not sufficient. Facts showing a ground for removal must be specifically alleged [*Starbird v. Lane (1962) 203 Cal. App. 2d 247, 255, 21 Cal. Rptr. 280]* .

The basis for the action is a director's commission of fraudulent or dishonest acts or gross abuse of authority or discretion "with reference to the corporation" [*Corp. Code § 304*]. Therefore, it is necessary to allege facts connecting the defendant director's acts with the corporation [*Starbird v. Lane (1962) 203 Cal. App. 2d 247, 257, 21 Cal. Rptr. 280]* .

[6] Jurisdiction and Venue

The complaint must be filed in the superior court in the county where the principal executive office of the corporation is located or, if the principal executive office of the corporation is not located in California or the corporation has no such office, in Sacramento County [*Corp. Code §§ 177, 304*]. The venue requirement is probably "jurisdictional."

[7] Verification

Verification is not required, but verification of the complaint requires that the defendant file a verified answer [*Code Civ. Proc. § 446*] and precludes a general denial [*Code Civ. Proc. § 431.30(d)*].

[8] State Statutes

Removal of director for fraudulent or dishonest acts or gross abuse of authority or discretion with reference to corporation. *Corp. Code § 304*

[9] Decisions

Necessity to allege facts showing plaintiff's standing to sue. *Mason v. San-Val Oil & Water Co., Ltd. (1934) 1 Cal. 2d 670, 673, 36 P.2d 616*

Necessity to allege that defendant is now, and at time of acts complained of was, a director. *Starbird v. Lane (1962) 203 Cal. App. 2d 247, 258-259, 21 Cal. Rptr. 280*

Necessity to allege specific facts showing ground for removal. *Starbird v. Lane (1962) 203 Cal. App. 2d 247, 255, 21 Cal. Rptr. 280*

Necessity to allege facts connecting defendant's alleged wrongdoing with corporation. *Starbird v. Lane (1962) 203 Cal. App. 2d 247, 257, 21 Cal. Rptr. 280*

Action for director's removal as properly combined with claim for damages resulting from director's wrongdoing. *Edward Sidebotham & Son v. Chandler (1960) 183 Cal. App. 2d 823, 827-832, 7 Cal. Rptr. 216*

[10] Text References

Ballantine and Sterling, California Corporation Laws, Ch. 5, *Management: Functions of Directors, Officers, and Committees, § 83.02*

Witkin, Summary of California Law, vol. 9, *Corporations*, § 79 (10th ed 2005)

Marsh, California Corporation Law and Practice, Ch. XIV, *Shareholders' Rights*, § 14.8

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Chapter 167 CORPORATIONS: DIRECTORS AND MANAGEMENT
PART IV. FORMS
A. Appointment And Removal Of Directors

14-167 California Forms of Pleading and Practice--Annotated § 167.167

§ 167.167 Removal of Director [Corp. Code § 304]--Judgment [Code Civ. Proc. § 577]

[1] FORM Removal of Director [Corp. Code § 304]--Judgment [Code Civ. Proc. § 577]

[*Caption. See § 167.166.*]

This cause came on regularly for trial on _____ [*date*], in [_____ (Department *or* Division) _____ of] the above-entitled court, the Honorable _____, Judge, presiding, sitting without a jury. Plaintiff(s) _____ [*name*(*s*)] appeared by _____ [*name*], counsel; _____ [*specify other appearances*]; _____ [*specify defaults, e.g.*, _____ (*name*) was duly served with copies of the summons and complaint but made no appearance]. Evidence, both oral and documentary, having been presented by _____ [all appearing parties *or* plaintiff(s) only *or other*], the cause having been argued and submitted for decision, and findings of fact and conclusions of law _____ [having been filed *or* not being required],

IT IS ADJUDGED, ORDERED, AND DECREED that

1. _____ [*Name*(*s*)] shall be, and hereby is/are, removed from the office of director of _____ [*name of corporation*], effective on _____ [*specific date or, e.g.*, service on _____ (him *or* her *or* each of them) of a copy of this judgment, after the date of entry of this judgment, together with a notice of the entry of this judgment].

[2. _____ (*Name*) shall be, and hereby is, barred from election to the office of director of the corporation for a period of _____ (*specify*) from and after _____ (*specify, e.g.*, the 1977 annual meeting of shareholders of the corporation).]

[3. _____ (*Other relief, as appropriate*).]

4. Plaintiff(s) have and recover costs from defendant(s) _____ [*name*(*s*)].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is a judgment for use in the event the court decides in favor of the plaintiff seeking removal of a director under *Corp. Code § 304*[*see § 167.166* and Comments thereto].

[3] Relief

The court may not only remove a director from office, but may also bar him or her from being elected to the board for a prescribed period [*Corp. Code § 304*]. The court may give relief conditionally if that is appropriate [*Remillard Brick Co. v. Remillard-Dandini (1952) 109 Cal. App. 2d 405, 423-424, 241 P.2d 66]* ; and if other relief, such as damages, is properly sought and supported by the evidence, that other relief may also be given [*see Edward Sidebotham & Son v. Chandler (1960) 183 Cal. App. 2d 823, 827, 829-830, 832, 7 Cal. Rptr. 216]* .

[4] Appeal

[a] Stay of Enforcement of Judgment

The perfecting of an appeal stays proceedings in the trial court on the judgment appealed from, or on the matters embraced therein or affected thereby, including enforcement of the judgment, but the trial court may proceed on any other matter embraced in the lawsuit and not affected by the judgment appealed from [*Code Civ. Proc. § 916(a)*].

[5] State Statutes

Court in action under *Corp. Code § 304* as empowered to remove director from office and bar him or her from reelection for prescribed period. *Corp. Code § 304*

[6] Cross References

For a related form, *see § 167.166*.

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Chapter 167 CORPORATIONS: DIRECTORS AND MANAGEMENT
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A. Appointment And Removal Of Directors

14-167 California Forms of Pleading and Practice--Annotated § 167.168

§ 167.168 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Restore Wrongfully Removed Director to Office [and to Oust Usurper]

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Restore Wrongfully Removed Director to Office [and to Oust Usurper]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name of corporation*], [and	)	PETITION FOR WRIT OF MANDATE
_____ (*name of usurper*),]	)	
Respondent(s).	)	
	)	

Petitioner respectfully represents:

1. Respondent _____ [*name of corporation*] is a corporation organized and existing under the laws of California.

2. _____ [*Facts about corporate structure, as necessary, e.g.*, The corporation is authorized by its articles of incorporation to have, and it does have, a board of five directors. Shares in the corporation are of one class. There are 1,000 shares outstanding].

3. On, and for some time continuously before, _____ [*date*], petitioner was a duly _____ [elected *or* appointed] director of the corporation.

4. _____ [*Circumstances of petitioner's removal, e.g.*, At a special meeting of shareholders on that date, held for the purposes of voting on the question whether petitioner should be removed and of electing a successor in the event of such removal, a total of 750 votes were cast, 624 votes in favor of removal and 126 votes against removal. The chairman of the board, presiding at the meeting, tallied the votes and announced the result, declaring that petitioner was thereupon duly removed from the office of director].

[5. _____ (*Circumstances of election of successor, if any, e.g.*, Immediately thereafter, the chairman of the board announced that nominations would be received of candidates for election to fill the vacancy on the board purportedly existing because of petitioner's purported removal. Petitioner and respondent _____ (*name of usurper*) were duly nominated; nominations were closed; and a total of 750 votes were cast, 624 votes for respondent _____ (*name of usurper*) and 126 votes for petitioner. The chairman of the board tallied the votes and announced the result, declaring that respondent _____ (*name of usurper*) was thereupon duly elected to the office of director).]

6. Petitioner's purported removal from the office of director was invalid in that _____ [*specify, e.g.*, pursuant to *Section 303 of the Corporations Code*, where a corporation has five directors and a total of 750 votes are cast at a meeting of shareholders voting on the question of removing one of the directors, the director in question may not be removed if 126 of the votes cast are against removal].

7. Since _____ [*date*], petitioner has attempted without success to exercise his/her rights and powers as a director of the corporation. Petitioner is not, and since that date has not been, recognized by the corporation or any of its officers and agents as a director. Petitioner is unlawfully precluded by respondent(s) from the use and enjoyment of the office of director to which petitioner is entitled. Thus, petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition.

8. As director, petitioner was and is entitled to a compensation of $_____ per _____ [*period; add other particulars, if any, as to compensation*]. Since _____ [*date*], petitioner has not received $_____ of compensation to which petitioner was and is entitled.

WHEREFORE, petitioner prays:

[1. _____ (*If using an alternative writ instead of notice* : That an alternative writ of mandate be issued commanding the corporation to restore petitioner to the office of director effective as of _____ (*date of removal*), (*add, if appropriate* : to set aside the election of respondent _____(*name of usurper*) as a director and remove him/her from office,) and to pay petitioner all compensation which petitioner would have received as director if petitioner had not been removed, or to show cause why it has not done so and why a peremptory writ of mandate should not issue;)]

2. For judgment that petitioner was unlawfully removed from the office of director on _____ [*date*] [that respondent _____ (*name of usurper*) was unlawfully elected to succeed petitioner,] and that petitioner is entitled to be restored to the office of director effective as of _____ [*date of removal*]; and that petitioner have and recover from the corporation damages in the sum of $_____;

3. That a peremptory writ of mandate be issued commanding the corporation to _____ [*as in Paragraph 1, above, omitting command to show cause*];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Petitioner

[*Verification. See Ch. 165, Corporations: Corporate Records and Reports, § 165.70.*]

CAUTION:
A petition for writ of mandate must be verified [*Code Civ. Proc. § 1086*].

[2] Use of Form

This form of petition is for use by a wrongfully ousted director seeking a writ of mandate commanding the corporation to restore him or her to office and pay such compensation as he or she would have received if in office during the period of ouster.

For discussion of mandate proceedings generally and other related forms (such as an alternative writ of mandate), see Ch. 358, *Mandate and Prohibition* .

[3] Wrongful Removal of Director

No director may be removed from office by the shareholders (unless the entire board is removed) when the votes cast against removal, or not consenting in writing to the removal, would be sufficient to elect the director if voted cumulatively at an election at which the same total number of votes were cast (or, if the action is taken by written consent, all shares entitled to vote were voted) and the entire number of directors authorized at the time of the director's most recent election were then being elected [*Corp. Code § 303(a)(1)*].

When, by the provisions of the articles, the holders of the shares of any class or series, voting as a class or series, are entitled to elect one or more of the directors, any director so elected may be removed only by the applicable vote of the holders of the shares of that class or series [*Corp. Code § 303(a)(2)*].

A director of a corporation whose board of directors is divided into classes pursuant to *Corp. Code § 301.5* may not be removed if the votes cast against removal of the director, or not consenting in writing to the removal, would be sufficient to elect the director if voted cumulatively (without regard to whether the shares may otherwise be voted cumulatively) at an election at which the same total number of votes were cast (or, if the action was taken by written consent, all shares entitled to vote were voted) and either the number of directors elected at the most recent annual meeting of the shareholders, or if greater, the number of directors for whom removal is being sought, were being elected [*Corp. Code § 303(a)(3)*].

If a director is removed in contravention of any of the foregoing provisions, the removal is wrongful as contrary to a statutory protection of voting rights.

[4] Availability of Remedy

A writ of mandate may be issued "to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded" [*Code Civ. Proc. § 1085*], if that person has no "plain, speedy, and adequate remedy, in the ordinary course of law" [*Code Civ. Proc. § 1086*].

There is no statutory proceeding available to a wrongfully removed director seeking restoration to the office. Therefore, it appears that the proper remedy is a suit for a writ of mandate, and there is some authority in the California cases for this conclusion [*see Potomac Oil Co. v. Dye (1909) 10 Cal. App. 534, 539, 102 P. 677]* . By analogy to cases in which

a writ of mandate has been issued to restore a person to union membership after wrongful expulsion [*see, e.g., Cason v. Glass Bottle Blowers Asso. (1951) 37 Cal. 2d 134, 140, 147, 231 P.2d 6]* , the remedy is appropriate.

Although the aggrieved director might be a shareholder and entitled to contest the election of a successor, an election contest would only oust the successor; it would not restore the office to the wrongfully removed director. Therefore, an election contest is not an equivalent "plain, speedy, and adequate remedy, in the ordinary course of law."

[5] Cross References

For discussion and forms relating generally to mandate proceedings, see Ch. 358, *Mandate and Prohibition*

[6] State Statutes

Mandate generally. *Code Civ. Proc. §§ 1084-1097, 1107-1109*

Limitations on shareholder power to remove directors without cause. *Corp. Code § 303*

[7] Decisions

Mandate proceeding held appropriate to determine title to office of corporate secretary, incidentally to determination of right to books and seal. *Potomac Oil Co. v. Dye (1909) 10 Cal. App. 534, 539, 102 P. 677*

Mandate proceeding to restore ousted worker to membership in labor union. *Cason v. Glass Bottle Blowers Asso. (1951) 37 Cal. 2d 134, 140, 147, 231 P.2d 6*

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[Reserved]

§§ 167.169[Reserved]

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B. Fiduciary Duties Of Directors, Officers, And Controlling Shareholders

14-167 California Forms of Pleading and Practice--Annotated § 167.180

§ 167.180 Complaint for Damages--Breach of Director's Fiduciary Duty [Corp. Code § 309]--Skeletal Form

[1] FORM Complaint for Damages--Breach of Director's Fiduciary Duty [Corp. Code § 309]--Skeletal Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Breach of Fiduciary Duty)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. _____ [*Name of corporation*] is, and at all times herein mentioned was, a corporation organized and existing under the _____ [*governing law, e.g.,* General Corporation Law of California] _____ [*if foreign corporation, add:* and subject to *Corporations Code Section 2115*].

2. At all times herein mentioned, _____ [*name(s)*] _____ [was a director *or* were directors] of the corporation.

3. _____ [*Facts as to what director(s) did giving rise to liability*].

4. In acting as described above, defendant(s) did not exercise the care required of directors in that _____ [*specify; if some defendants had a duty of care different from the duty shared by other*

defendants, specify in separate sentences].

5. As a proximate result of the act(s) of defendant(s) herein-above described, plaintiff corporation has been damaged in the sum of $ _____.

6. [*Add claim for exemplary damages, if fraud, oppression, or malice is shown.*]

WHEREFORE, plaintiff prays for judgment [against defendants, and each of them,] as follows:

1. For damages in the sum of $_____;

[2. For interest on the sum of $_____ from and after _____ (*date*);]

[3. For exemplary damages;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court deems proper.

_____ [*signature*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am _____ [*title of office, e.g.,* president] of _____ [*name of corporation*], the plaintiff in the above-entitled action, and am authorized to make this verification on the corporation's behalf. I have read the foregoing complaint and know the contents thereof. I am informed and believe that the matters stated therein are true and on that ground I allege that the matters stated therein are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date: _____.

_____ [*signature*]

[2] Use of Form

This skeletal complaint form is for use by a corporation to obtain damages for a director's breach of fiduciary duty. For a complaint for use by a shareholder in a derivative action, see Ch. 168, *Corporations: Derivative Actions* . For a complaint illustrating a specific case (wrongful appropriation of corporate property), see *§ 167.181*.

[3] Limitation of Action

An action to enforce a director's liability arising from a statute or the Constitution (as distinguished from a liability existing at common law) must be begun within three years "after ... the liability was created" [*Code Civ. Proc. § 359*], that is, after the last act was done on which the liability depends [*see Coombes v. Getz (1933) 217 Cal. 320, 333-335, 18 P.2d 939* ; *see also Hoover v. Galbraith (1972) 7 Cal. 3d 519, 524-525, 102 Cal. Rptr. 733, 498 P.2d 981* (when a

liability is created, for purpose of applying *Code Civ. Proc. § 359*)].

A split of authority exists with respect to the applicability of the three-year period specified in *Code Civ. Proc. § 359* to actions against directors under *Corp. Code § 309*. In *Smith v. Superior Court (1990) 217 Cal. App. 3d 950, 266 Cal. Rptr. 253* , the court held that actions against directors for negligence or breach of their fiduciary duty to the corporation involve liability created by law, specifically *Corp. Code § 309*, and are subject to the three-year limitation of *Code Civ. Proc. § 359* [*Smith v. Superior Court (1990) 217 Cal. App. 3d 950, 953-954, 266 Cal. Rptr. 253]* . The court in *Smith* concluded that when the Legislature enacted *Corp. Code § 309* in 1975, it codified the standard of care for directors. *Corp. Code § 309(c)* precludes liability if the standard is met. By codifying the standard of care and precluding further liability, *Corp. Code § 309* conveys the Legislature's intent that any action by a beneficiary of the fiduciary relationship must necessarily flow from the statute [*Smith v. Superior Court (1990) 217 Cal. App. 3d 950, 953, 266 Cal. Rptr. 253]* .

However, another court subsequently reached the opposite conclusion. The court in *Briano v. Rubio (1996) 46 Cal. App. 4th 1167, 1179-1180, 54 Cal. Rptr. 2d 408]* found that *Corp. Code § 309* did not create a new form of liability against directors of corporations, but merely codified and refined existing common law. The court in *Briano* concluded that therefore, under *Coombes v. Getz (1933) 217 Cal. 320, 333-335, 18 P.2d 939* (cited *above*), *Corp. Code § 309* does not constitute a "liability created by law." Since *Corp. Code § 309* is not such a liability, the limitations period set forth in *Code Civ. Proc. § 359* is inapplicable [*Briano v. Rubio (1996) 46 Cal. App. 4th 1167, 1179-1180, 54 Cal. Rptr. 2d 408]* . The *Briano* court found that the court in *Smith v. Superior Court (1990) 217 Cal. App. 3d 950, 266 Cal. Rptr. 253* , discussed above misapplied the phrase "liability created by law" by concluding that if there was a statutory basis for an action, it automatically constituted a "liability created by law," regardless of whether the statute merely codified existing common law [*Briano v. Rubio (1996) 46 Cal. App. 4th 1167, 1175, 54 Cal. Rptr. 2d 408* ; *accord, Lehman v. Superior Court (2006) 145 Cal. App. 4th 109, 116-122, 51 Cal. Rptr. 3d 411]* .

Directors' liability for failure to cause the corporation to commence litigation against a third party in a timely manner is created when the statute of limitations on the corporation's cause of action against the third party expires [*see* *Smith v. Superior Court (1990) 217 Cal. App. 3d 950, 953-954, 266 Cal. Rptr. 253]* .

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*]. In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the first paper must state whether the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[5] State Statutes

Interest on damages. *Civ. Code § 3287*

Exemplary damages. *Civ. Code § 3294*

[6] Decisions

Waiver of corporate directors' and majority shareholders' fiduciary duties to minority shareholder in private close corporation is against public policy and contract provision in buy-sell agreement purporting to effect such a waiver is void. *Neubauer v. Goldfarb (2003) 108 Cal. App. 4th 47, 54-57, 133 Cal. Rptr. 2d 218*

Director and sole shareholder who arranged for loan to third party, proceeds of which were used to purchase director's interest in association, breached fiduciary duty to association; director not liable for amount of entire loan proceeds received for stock, but only for amount of profit realized on transaction. *Federal Sav. and Loan Ins. Corp. v. Molinaro (9th Cir. 1990) 889 F.2d 899, 904-905* (applying California law; relying on *F. & M. Bank v. Downey (1879) 53 Cal. 466, 468* ; *Bank of America v. Ryan (1962) 207 Cal. App. 2d 698, 706, 24 Cal. Rptr. 739* ; *Broadway Fed. etc. Loan Assoc. v. Howard (1955) 133 Cal. App. 2d 382, 393, 285 P.2d 61*)

Limitation of actions against directors. *Hoover v. Galbraith (1972) 7 Cal. 3d 519, 524-525, 102 Cal. Rptr. 733, 498 P.2d 981* (when a liability is created, for purpose of applying *Code Civ. Proc. § 359*); *Coombes v. Getz (1933) 217 Cal. 320, 333-335, 18 P.2d 939* (three-year period of limitation under *Code Civ. Proc. § 359* applicable to case of liability created by statute or Constitution, not common law); *Southern Counties Thrift Co. v. Rairdon (1941) 47 Cal. App. 2d 770, 771-772, 118 P.2d 828* (prohibitory statute does not impose liability merely by stating prohibition; liability for violation arises under common law rules, if at all; action not governed by *Code Civ. Proc. § 359*)

Director's fiduciary duties to corporation. *Pigeon Point Ranch, Inc. v. Perot (1963) 59 Cal. 2d 227, 233, 28 Cal. Rptr. 865, 379 P.2d 321* overruled on other grounds by *Kowis v. Howard (1992) 3 Cal. 4th 888, 901, 12 Cal. Rptr. 2d 728, 838 P.2d 250* ; *Remillard Brick Co. v. Remillard-Dandini (1952) 109 Cal. App. 2d 405, 418, 241 P.2d 66*

Corporation entitled to recover interest on damages in action against director. *Tevis v. Beigel (1959) 174 Cal. App. 2d 90, 101, 344 P.2d 360*

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14-167 California Forms of Pleading and Practice--Annotated § 167.181

§ 167.181 Complaint for Declaratory Relief [Code Civ. Proc. § 1060], Accounting [Code Civ. Proc. § 639], and Permanent Injunction [Civ. Code § 3422]--By Corporation Against Former Officer--Wrongful Appropriation of Invention Belonging to Corporation [Corp. Code § 309(a)]

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. § 1060], Accounting [Code Civ. Proc. § 639], and Permanent Injunction [Civ. Code § 3422]--By Corporation Against Former Officer--Wrongful Appropriation of Invention Belonging to Corporation [Corp. Code § 309(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name of corporation*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DECLARATORY RELIEF,
Defendant.	)	ACCOUNTING, AND INJUNCTION
	)	
	)	

Plaintiff alleges:

1. On _____ [*date*], defendant and _____ [*name of defendant's joint venturer*] entered into an oral agreement whereby the parties thereto agreed to work together, pool their inventive ideas and funds in a joint venture to perfect and market _____ [*specify nature of invention*].

2. Pursuant to the joint venture agreement defendant developed and produced the aforementioned invention.

3. On _____ [*date*], defendant and _____ [*name of defendant's joint venturer*]

incorporated the joint venture under the laws of California for the purpose of perfecting, manufacturing, and marketing the invention. The corporation so formed is the plaintiff in this action.

4. On _____ [*date*], defendant and _____ [*name of defendant's joint venturer*] transferred to plaintiff corporation all the rights and assets of the joint venture.

5. At all times following the organization of plaintiff corporation and until _____ [*date*], defendant was _____ [*specify office held by defendant, e.g.*, president and general manager] of plaintiff.

6. Defendant in his/her capacity as _____ [*specify*] caused plaintiff corporation to engage in developing, manufacturing, selling, and marketing the aforementioned invention and made and developed improvements, alterations, and modifications of the invention; all of the work done in developing, producing, and experimenting to improve the invention was performed at the expense of plaintiff corporation and by defendant in the course of his/her employment. In contravention of the agreements hereinbefore described and in violation of the fiduciary relationship of defendant to plaintiff corporation, defendant has asserted that all rights to the invention are his/her personal property and has asserted that the corporation has no right thereto or interest therein.

7. On _____ [*date*], defendant resigned as _____ [*specify*] of plaintiff corporation.

8. On _____ [*date*], defendant established a business _____ [*state location, e.g.*, next door to the principal office and place of business of plaintiff corporation]; the business so established by defendant consists of the manufacture, sale, and repair of _____ [*specify*] identical with the invention being manufactured, repaired, and sold by plaintiff corporation and which was so manufactured, repaired, and sold during the time defendant was employed by plaintiff corporation.

9. Immediately prior to the resignation of defendant as _____ [*specify office*] of plaintiff and immediately thereafter, defendant contacted plaintiff's customers and notified them that he/she was now producing and selling the invention for his/her own account; defendant utilized the personal contacts he/she had made while he/she was employed by plaintiff to take the customers of plaintiff corporation away from plaintiff corporation and to make them customers of his/her own business; as a result of the actions of defendant, plaintiff's business has deteriorated so badly that plaintiff will soon be forced to discontinue operations and thereby suffer irreparable injury unless the situation is remedied and defendant's actions are restrained and enjoined by this court.

10. An actual controversy exists between plaintiff and defendant relating to the legal rights and duties of the respective parties arising out of the fiduciary relationship between defendant and plaintiff corporation and the agreements relative to the rights to the production and sale of the invention.

11. Plaintiff contends that:

a. Defendant does not have any right to produce or sell the invention or any modifications, alterations, or improvements thereof.

b. The aforementioned acts of defendant were performed in direct contravention of and with an utter disregard for his/her prior agreements, promises, declarations, and the fiduciary duty of defendant to plaintiff.

c. _____ [*Continue enumerating in separately numbered paragraphs each of plaintiff's contentions*].

12. Defendant contends that:

a. He/She has every right to produce and sell the invention and any modifications, alterations, or improvements thereof.

b. He/She is not acting in contravention of or disregard for his/her agreements, promises, declarations, and fiduciary duty to plaintiff.

c. _____[*Continue enumerating in separately numbered paragraphs each of plaintiff's contentions*].

WHEREFORE, plaintiff prays judgment as follows:

1. That it be adjudged and determined that defendant, his/her agents, servants, employees, and attorneys have no right to manufacture or sell _____ [*specify invention*] of the types produced and sold by plaintiff during the course of defendant's employment by plaintiff, or alterations, improvements, and modifications thereof, and that the rights to produce and sell such invention, as between plaintiff and defendant, are the sole and exclusive property of plaintiff;

2. That the defendant be permanently enjoined and restrained from manufacturing or selling _____ [*specify invention*] of the types produced and sold by plaintiff during the course of defendant's employment by plaintiff, or alterations, improvements, or modifications thereof;

3. That defendant be required to account for and pay to plaintiff all the proceeds received by him/her from the production and sale of the aforesaid _____ [*specify invention*] since _____ [*date*];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 167.180.*]

[2] Use of Form

This form is a complaint for declaratory relief, an injunction, and an accounting for use when a former officer enters into competition with the corporation by making, selling, altering, or repairing an invention which was developed by the corporation while the officer was employed therein [*see Sequoia Vacuum Systems v. Stransky (1964) 229 Cal. App. 2d 281, 286, 40 Cal. Rptr. 203]* .

It alleges;

- Preincorporation planning and corporate development of an invention pursuant to agreements which resulted in a corporation and employment by the corporation of the defendant in developing the invention (Paragraphs 1-6) [*see Sequoia Vacuum Systems v. Stransky (1964) 229 Cal. App. 2d 281, 287-288, 40 Cal. Rptr. 203]* ;

- Resignation and competition in breach of fiduciary duty by the officer (Paragraphs 7, 8) [*see Xum Speegle, Inc. v. Fields (1963) 216 Cal. App. 2d 546, 554, 31 Cal. Rptr. 104]* ;

- That defendant's improper sales, modifications, alterations, or improvements to the invention have so

damaged plaintiff's business that injunctive relief is required (Paragraph 9) [*see Civ. Code § 3422*; *Code Civ. Proc. § 526*];

- That an actual controversy exists between the parties with contentions with respect to rights on each side (Paragraph 10) [*see Code Civ. Proc. § 1060*]; and

- The parties' contentions (Paragraphs 11, 12).

[3] Cross References

See generally the chapters Ch. 7, *Accounting, Action For*, Ch. 182, *Declaratory Relief*, and Ch. 303, *Injunctions*

[4] State Statutes

Grounds for injunctive relief. *Civ. Code § 3422*; *Code Civ. Proc. § 526*

Declaratory relief. *Code Civ. Proc. §§ 1060-1062a*

References for accounting. *Code Civ. Proc. § 639*

[5] Decisions

Liability for diversion of business by corporate director. *Xum Speegle, Inc. v. Fields (1963) 216 Cal. App. 2d 546, 554, 31 Cal. Rptr. 104* ; *Daniel Orifice Fitting Co. v. Whalen (1962) 198 Cal. App. 2d 791, 800, 18 Cal. Rptr. 659* ; *Hall v. Dekker (1941) 45 Cal. App. 2d 783, 786-787, 115 P.2d 15*

Production technique as trade secret. *Components for Research, Inc. v. Isolation Prod., Inc. (1966) 241 Cal. App. 2d 726, 729, 50 Cal. Rptr. 829*

Officer or director is not able to seize for himself, to detriment of company, business opportunities in company's line of activities. *Sequoia Vacuum Systems v. Stransky (1964) 229 Cal. App. 2d 281, 286, 40 Cal. Rptr. 203*

Third party who is aware of or ratifies breach of fiduciary duty, cooperates in breach, and receives benefit of breach is liable for part in breach of fiduciary duties. *Bancroft-Whitney Co. v. Glen (1966) 64 Cal. 2d 327, 353, 49 Cal. Rptr. 825, 411 P.2d 921*

[6] Cross References

For a related form, *see § 167.180*.

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Volume 14: Corporations: Capacity thru Corporations: Dissolution and Winding Up-Chs. 160-173
Chapter 167 CORPORATIONS: DIRECTORS AND MANAGEMENT
PART IV. FORMS
B. Fiduciary Duties Of Directors, Officers, And Controlling Shareholders

14-167 California Forms of Pleading and Practice--Annotated § 167.182

§ 167.182 Complaint for Declaratory Relief [Code Civ. Proc. § 1060], Restitution Based on Rescission [Civ. Code §§ 1689, 1692], and Cancellation of Written Instrument [Civ. Code § 3412]--Voidable Contract or Transaction Because of Director's Interest [Corp. Code § 310]

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. § 1060], Restitution Based on Rescission [Civ. Code §§ 1689, 1692], and Cancellation of Written Instrument [Civ. Code § 3412]--Voidable Contract or Transaction Because of Director's Interest [Corp. Code § 310]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name of corporation*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*(*s*)],	)	COMPLAINT FOR DECLARATORY RELIEF,
Defendant(s).	)	RESTITUTION BASED ON RESCISSION, AND
	)	CANCELLATION OF INSTRUMENT
	)	

Plaintiff alleges:

[1. *Identity of corporation. See § 167.180, Paragraph 1.*]

2.At all times herein mentioned, defendant(s) _____ [*name*(*s*)] _____ [was a director *or* were directors] of plaintiff corporation (hereinafter called the corporation or plaintiff).

[3. *Identify other defendants, if any, e.g.*, Defendant _____ (*name*) is, and at all times herein mentioned was, a corporation organized and existing under the General Corporation Law of California *or*, Plaintiff is ignorant of the names of defendants sued as DOES I-_____, inclusive, who are so designated for that reason.]

4. _____ [*Facts as to contract or transaction between corporation and defendant director(s), or between corporation and another corporation, firm, or association in which defendant director has material financial interest, or between corporation and another corporation or association of which defendant director is also a director. Include necessary allegation of defendant director's interest or common directorship, as appropriate, e.g.*, At all times herein mentioned, defendant _____ (*name*) had a financial interest in _____ (*name of other corporation, firm, or association*), to wit: _____ (*specify, showing materiality of interest or, e.g.*, At all times herein mentioned, defendant _____ (*name*) was a director of _____ (*name of other corporation or association*))].

[*Allegation(s) as to voidability of contract or transaction; select one or more of the following, as appropriate:*]

5. The _____ [contract *or* transaction] has not been approved by the shareholders of the corporation as provided in subdivision _____ [(a) *or* (b)] of *Section 310 of the Corporations Code*.

[*AND/OR*]

5. The material facts as to the _____[contract *or* transaction] and as to defendant _____'s [*name*] _____ [interest *or* common directorship] were not fully disclosed or known to the _____ [board *or* committee] when that body _____ [authorized *or* approved *or* ratified] it.

[*AND/OR*]

5. The _____ [contract *or* transaction] was _____ [authorized *or* approved *or* ratified] by a vote of _____ [*specify, e.g.*, 3 to 2 with 1 abstention], including defendant _____'s [*name*] vote in favor thereof. _____ [*Article, bylaw, or statute specifying vote required*] requires that such a _____ [contract *or* transaction] be _____ [authorized *or* approved *or* ratified] by the votes of not fewer than _____ [*e.g.*, 4] directors.

[*AND/OR*]

5. At the time it was _____ [authorized *or* approved *or* ratified], the _____ [contract *or* transaction] was not, and it is not, just and reasonable as to the corporation in that _____ [*specify*].

6. Plaintiff had no knowledge of the foregoing facts until, on [or about] _____ [*date*], plaintiff discovered _____ [*specify circumstances of plaintiff's discovering that contract or transaction was voidable*].

[*EITHER*]

7. Plaintiff intends service of copies of the summons and this complaint as notice of rescission of the _____ [contract *or* transaction] and hereby offers to restore to defendant(s) _____ [*name*(*s*)] all consideration received by plaintiff, on condition that said defendant(s) restore to plaintiff all consideration furnished by plaintiff, namely _____ [*specify*].

[*OR*]

7. On [or about] _____ [*date*], plaintiff notified defendant(s) _____ [*name*(*s*)] in writing that plaintiff rescinded the _____ [contract *or* transaction] on the ground that it was voidable because of a conflict of interest and a failure to validate it under *Section 310 of the Corporations Code*, and plaintiff offered to restore to said defendant(s) all consideration received by plaintiff, on condition that said defendant(s) restore to plaintiff all consideration furnished by plaintiff, namely _____ [*specify*]. Said defendant(s) refused, and continue(s) to refuse, to restore said consideration to plaintiff [or to recognize that the _____ (contract *or* transaction) has been rescinded].

8. As a result of the _____ [contract *or* transaction], there is in existence a certain written instrument which purports to be _____ [*describe generally*, *e.g.*, a promissory note]. The form and contents of the _____ [*e.g.*, purported note] are _____ [as set out in the copy which is attached hereto as Exhibit A and made a part hereof *or* as follows: _____ (*set out instrument verbatim, following its form as closely as possible*)]. The _____ [*e.g.*, purported note] is _____ [in the possession *or* under the control] of defendant(s) _____ [*name*(*s*)].

9. The _____ [*instrument*, *e.g.*, purported note] was executed by plaintiff and delivered to _____ [*specify*] in connection with the _____ [contract *or* transaction] hereinabove described and is not valid except to the extent that said _____ [contract *or* transaction] is valid.

10. _____ [*Allege facts showing reasonable apprehension that, if left outstanding, the instrument may cause serious injury to plaintiff, e.g.*, If the purported note is left outstanding after the underlying contract has been adjudged invalid in this action, plaintiff may be required to pay it or to defend a lawsuit based on it, although it would not be a lawful obligation of plaintiff, and by refusing to pay it, plaintiff may suffer damage to plaintiff's credit. Defendant(s) _____ (*name*(*s*)) _____ (has *or* have) refused to surrender the purported note to plaintiff and _____ (has *or* have) communicated to plaintiff an intention to hold the purported note for collection according to its terms].

11. _____ [*Allege facts establishing a basis for a claim for exemplary damages, if any, e.g.*, Defendant(s) _____ (*name*(*s*)) transferred the purported note on (or about) _____ [*date*], for value, and knew at the time of making the transfer that the purported note would not be honored by plain tiff because of plaintiff's prior rescission of the underlying contract, but did not disclose this fact to the transferee. Said defendant(s) transferred the purported note with intent to injure and defraud plaintiff].

WHEREFORE, plaintiff prays for judgment [against defendants, and each of them,] as follows:

1. For a declaration that the _____ [contract *or* transaction] hereinabove referred to is, and from the time of inception was, void;

2. That plaintiff have and recover from defendant(s) _____ [*name*(*s*)] all consideration given by plaintiff in connection with the _____ [contract *or* transaction], namely _____ [*specify*], or, in lieu of restitution, damages in the sum of $_____;

3. For a declaration that the _____ [*instrument*, *e.g.*, purported note] hereinabove referred to and _____ [described *or* illustrated by the copy attached hereto as Exhibit A] is, and from the time of execution was, void;

4. That defendant(s) _____ [*name*(*s*)] deliver the _____ [*e.g.*, purported note]

forthwith to the clerk for cancellation;

5. For damages in the sum of $_____ in the event that the _____ [*e.g.*, purported note] is not delivered for cancellation pursuant to the judgment, plus interest thereon from and after _____ [*date of execution of instrument*], at the rate of _____ [*e.g.*, seven percent per annum], as compensation in lieu of cancellation;

[6. For exemplary damages in the sum of $_____;]

7. For costs of suit herein incurred; and

8. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 167.180.*]

[2] Use of Form

This form is a complaint for use in an action by a corporation against directors (or former directors) and other appropriate defendants for (1) a judicial declaration that a certain contract or transaction to which the corporation is a party is void because of a conflict of interest on the part of a defendant director and a failure to obtain validation as prescribed in *Corp. Code § 310*, and *(2)* restitution of consideration given by the corporation in connection with that contract or transaction, and (3) cancellation of an instrument, such as a promissory note, executed by the corporation in connection with that contract or transaction, which instrument is outstanding and might injure the corporation if it is not canceled when the underlying contract or transaction is adjudged void. See *§ 167.56* for discussion of the circumstances under which contracts and other transactions are void because of a director's interest.

[3] Cross References

See generally the chapters Ch. 107, *Cancellation of Instruments*, Ch. 182, *Declaratory Relief*, and Ch. 490, *Rescission and Restitution*

[4] State Statutes

Voidability of contracts and transactions because of director's interest. *Corp. Code § 310*

[5] Text References

Ballantine and Sterling, California Corporation Laws, Ch. 6, *Management: Duties and Liabilities of Directors and Controlling Shareholders, §§ 103.01-103.03*

Marsh, California Corporation Law and Practice, Ch. X, *Fiduciary Duties of Promoters, Directors, Officers and Controlling Shareholders*, §§ 10.7-10.14

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B. Fiduciary Duties Of Directors, Officers, And Controlling Shareholders

14-167 California Forms of Pleading and Practice--Annotated § 167.183

§ 167.183 Complaint for Damages--Shareholder's Derivative Action [Corp. Code § 316]--Illegal Corporate Loan or Guaranty [Corp. Code § 315]

[1] FORM Complaint for Damages--Shareholder's Derivative Action [Corp. Code § 316]--Illegal Corporate Loan or Guaranty [Corp. Code § 315]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name of corporation*]	)	COMPLAINT FOR DAMAGES
and _____ [*names*],	)	(Illegal Corporate Loan *or* Guaranty)
Defendants.	)	
	)	
	)	

Plaintiff alleges:

[1. *Identity of corporation. See § 167.180, Paragraph 1.*]

[2. *Allege plaintiff's status if other than individual, e.g.*, Plaintiff _____ (*name*) is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of Delaware.]

3. At all times herein mentioned, and particularly on _____ [*date of making illegal loan or guaranty*], plaintiff was the holder of shares of the corporation.

4. At all times herein mentioned, defendants _____ [*names*] were directors of the corporation.

[5. Plaintiff is ignorant of the names of defendants sued herein as DOES I-_____, inclusive, who are so designated for that reason.]

6. On [or about] _____ [*date*], at a meeting of the [_____ (*specify particular committee, e.g.*, executive) committee of the] board of directors of the corporation, defendants _____ [*names*] voted in favor of, and there was adopted, a resolution authorizing _____ [*specify transaction authorized, showing approval of loan or guaranty prohibited by Corp. Code § 315* (*a*) *or* (*c*) *unless approved by prescribed shareholder vote*]. [Defendant _____ (*name*) was present at the meeting when the votes on the resolution were taken, but he/she abstained from voting.]

7. In voting to adopt that resolution, defendant(s) _____ [*name*(*s*)] did not exercise the care required of directors in that _____ [*specify; if some defendants had a duty of care different from the duty shared by other defendants, specify in separate sentences*]. [In abstaining from voting on the resolution, defendant _____ (*name*) did not exercise the care required of directors in that _____ (*specify*).]

8. _____ [*Allege facts showing that corporation has suffered loss as a result of making the illegal loan or guaranty*].

9. _____ [*Allege facts showing that making of the loan or guaranty has not been approved by the prescribed shareholder vote*].

10. Plaintiff did not consent and does not consent to the making of the _____ [loan *or* guaranty] hereinabove referred to.

WHEREFORE, plaintiff prays judgment against defendants _____ [*names*], and each of them, as follows:

1. On behalf of _____ [*name of corporation*], for damages in the sum of $_____ together with interest thereon at the legal rate of interest from and after _____ [*date*];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

VERIFICATION [*Code Civ. Proc. §§ 446, 2015.5*]

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge except as to matters therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form is a complaint for use by a shareholder or shareholders to enforce the liability of directors of their corporation for making an illegal loan or guaranty as a result of which the corporation suffered a loss [*see Corp. Code §§ 315, 316*]. The action is derivative, but it is not governed by the general derivative-action statute, *Corp. Code § 800*. For discussion of other derivative actions, and appropriate forms, see Ch. 168, *Corporations: Derivative Actions* .

By changing the allegation in Paragraph 3, a creditor may also use this form. Regarding a creditor's right to sue, see *§ 167.183[5]*.

[3] Loan of Money or Property or Guaranty of Obligation

The General Corporation Law [*Corp. Code §§ 100-2319*] prohibits most corporations subject to it (banks, industrial loan companies, and credit unions excepted) from making any loan of money or property to or guarantying the obligations of certain persons (with some exceptions; *see § 167.183[3][b]*), or from loaning to or guarantying the obligations of anyone on the security of shares of the corporation or its parent, without shareholder approval [*see Corp. Code § 315(a), (c), (f)*; regarding similar prohibitions applicable to financial corporations, see *Fin. Code §§ 780-787* (banks), *7177-7181* (savings and loan associations), *15050* (credit unions), *18436, 18442* (industrial loan companies)]. In the event that a corporation makes an illegal loan or guaranty (*§ 167.183[3][a]*) and suffers a loss as a result, the directors who approved making the loan are liable to the corporation for the amount of the loss [*see Corp. Code § 316(a), (d)*].

[a] Illegal Loans or Guaranties

Any loan by a corporation of money or property to, or a guaranty of an obligation of, any director or officer of the corporation or its parent or subsidiary is illegal, unless the transaction or an employee benefit plan authorizing such loans or guaranties, after disclosure of the right under such a plan to include officers or directors, is (1) approved by the shareholders, with shares owned by the director or officer, or by the directors or officers then eligible to participate in the plan not being entitled to vote thereon, or (2) approved by the unanimous vote of the shareholders [*Corp. Code § 315(a)*; see *Corp. Code §§ 175* ("parent" defined), *189* ("subsidiary" defined)].

Additionally, any loan by a corporation of money or property to, or a guaranty of an obligation of, any person on the security of shares of the corporation or of its parent is illegal, unless the loan or guaranty is (1) otherwise adequately secured, (2) made pursuant to an employee benefit plan permitted by *Corp. Code § 408, (3)* approved by the shareholders with the shares owned by the borrower not entitled to vote, or (4) approved by unanimous vote of the shareholders [*Corp. Code § 315(c)*].

[b] Permissible Loans or Guaranties

Notwithstanding *Corp. Code § 315(a)* [*§ 167.183[3][a]*], if the corporation has outstanding shares held of record by 100 or more persons [*see Corp. Code § 605*] on the date of approval by the board, and has a bylaw approved by the outstanding shares [*see Corp. Code § 152*] authorizing the board alone to approve such a loan or guaranty to an officer, whether or not a director, or an employee benefit plan authorizing such a loan or guaranty to an officer, such a loan or guaranty or employee benefit plan may be approved by the board alone by a vote sufficient without counting the vote of any interested director or directors if the board determines that the loan or guaranty or plan may reasonably be expected to benefit the corporation [*Corp. Code § 315(b)*].

Also notwithstanding *Corp. Code § 315(a)*, a corporation may advance money to a director or officer of the corporation or of its parent or any subsidiary for any expenses reasonably anticipated to be incurred in the performance of the duties of the director or officer, provided that in the absence of such advance the director or officer would be entitled to be reimbursed for such expenses by the corporation, its parent, or any subsidiary [*Corp. Code § 315(d)*].

[4] Premium on Life Insurance

The provisions of *Corp. Code § 315(a)* [*§ 167.183[3][a]*] do not apply to the payment of premiums in whole or in part by a corporation on a life insurance policy on the life of a director or officer so long as repayment to the corporation of the amount paid by it is secured by the proceeds of the policy and its cash surrender value [*Corp. Code § 315(e)*].

[5] Directors' Liability for Illegal Loan or Guaranty

Directors who approved the making of an illegal loan or guaranty without adhering to the standard of care mandated by *Corp. Code § 309* are jointly and severally liable to the corporation for the amount of any loss suffered by the corporation as a result of the illegal loan or guaranty, but not exceeding the liabilities of the corporation owed to the nonconsenting creditors at the time of the distribution "and [sic: or]" the injury suffered by the nonconsenting shareholders, as the case may be [*Corp. Code § 316(a), (d)*]. A director who was present at the meeting but abstained when the vote was taken to approve the loan or guaranty is deemed to have approved making it [*Corp. Code § 316(b)*].

A director's liability is established only when all of the following facts are proved:

- The board, or a committee duly empowered to act on those matters, approved the making of a loan or guaranty which is prohibited by *Corp. Code § 315(a)* unless approved by the prescribed shareholder vote.

- The director in question voted to approve the loan or guaranty or was present at the meeting but abstained when the vote was taken to approve it.

- In so voting or abstaining, the director did not adhere to the standard of care mandated by *Corp. Code § 309*.

- The corporation suffered a loss as a result of making the loan or guaranty.

- The making of the loan or guaranty was not approved by the prescribed shareholder vote.

[6] Parties

Any shareholder at the time of the making of an illegal loan or guaranty, who has not consented to it, may sue the culpable directors in the name of the corporation to enforce their liability, without regard to the provisions of *Corp. Code § 800* governing shareholders' derivative actions generally [*Corp. Code § 316(c)*].

Any creditor having a debt or claim that arose before the making of the illegal loan or guaranty, who has not consented to it, may also sue the culpable directors in the name of the corporation to enforce their liability, whether or not the creditor's claim has been reduced to judgment [*Corp. Code § 316(c)*]. A debt or claim may be deemed to have arisen before the making of the illegal loan or guaranty not only if it was due and payable at that time but also when it is based on a contractual obligation of the corporation existing at that time [*cf. UMF Sys., Inc. v. Eltra Corp. (1976) 17 Cal. 3d 753, 757-758, 132 Cal. Rptr. 129, 553 P.2d 225* (interpreting language of former Corp. Code § 826)]. In a creditor's action the directors' liability is limited to the liabilities of the corporation owed to nonconsenting creditors at the time of

the violation "and [*sic* or]" the injury suffered by the nonconsenting shareholders, as the case may be [*Corp. Code § 316(d)*].

The action may be brought by any one or more of the holders of shares outstanding at the time of the making of the illegal loan or guaranty who have not consented to the corporate action [*Corp. Code § 316(c)*].

The corporation must be a party [*see, e.g., Beyerbach v. Juno Oil Co. (1954) 42 Cal. 2d 11, 27-28, 265 P.2d 1]* , necessarily a defendant. When the culpable directors are no longer in control, shareholders may nevertheless sue on behalf of the corporation without appealing to the present board to sue (a necessary condition to ordinary shareholder derivative actions [*see Corp. Code § 800*]) because, in this case, they are specifically relieved of that burden [*see Corp. Code § 316(c)*].

[a] Contribution and Subrogation

Any director sued under *Corp. Code § 316* may implead all other directors liable and may compel contribution, either in that action or in an independent action against directors not joined in that action [*Corp. Code § 316(e)*].

Directors liable under *Corp. Code § 316* are entitled to be subrogated to the rights of the corporation against the person who received, that is, benefited from, the illegal loan or guaranty. Any such director may file a cross complaint against the person liable to him or her as a result of this subrogation or may proceed against that person in an independent action [*Corp. Code § 316(f)*].

For discussion and forms relating to these subjects, see Ch. 395, *Parties* , and Ch. 536, *Subrogation* , respectively; see also Ch. 123, *Complaints and Cross Complaints* .

[7] Limitation of Action

The action is limited by the three-year period of *Code Civ. Proc. § 359* [*Hoover v. Galbraith (1972) 7 Cal. 3d 519, 521-522, 102 Cal. Rptr. 733, 498 P.2d 981]* .

[8] Attorney's Fees

If judgment is given for the plaintiff in a derivative action, the court may award the plaintiff a reasonable attorney's fee, payable (along with the plaintiff's costs) out of the fund recovered for the corporation or from other corporate funds, the award being a charge against the corporation rather than the individual defendants [*see, e.g., Beyerbach v. Juno Oil Co. (1954) 42 Cal. 2d 11, 19-20, 265 P.2d 1]* . Since the action under *Corp. Code § 316(c)* is a derivative action, there appears to be no reason why the plaintiff may not apply for and receive an award of attorney's fees.

[9] Verification

Verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. § 446*] and precludes a general denial [*Code Civ. Proc. § 413.30*].

[10] Undertaking for Costs

In an ordinary shareholder's derivative action, the plaintiff can be compelled to furnish an undertaking for costs [*see Corp. Code § 800(c)-(e)*]. In an action governed by *Corp. Code § 316*, however, the cost-bond provisions of *Corp. Code § 800* do not apply [*Corp. Code § 316(c)*].

[11] Cross References

For discussion and forms relating to suretyship in general, see Ch. 538, *Suretyship, Bonds, and Undertakings*

For discussion and forms relating to joinder of parties, see Ch. 395, *Parties*

[12] State Statutes

Prohibition against making loans to or guarantying obligations of directors, officers, and other persons. *Corp. Code § 315*

Liability of directors for approving illegal loan or guaranty. *Corp. Code § 316*

Prohibitions against, or special requirements on, loans by financial institutions to directors and officers:

Banks. *Fin. Code §§ 780-787*

Credit unions. *Fin. Code § 15050*

Industrial loan companies. *Fin. Code §§ 18436, 18442*

Prohibition against guaranties of directors' and officers' obligations by industrial loan companies. *Fin. Code § 18436*

Director's standard of care. *Corp. Code § 309*

Shareholders' derivative actions. *Corp. Code § 800*

Limitation of action against corporate directors to enforce liability created by law. *Code Civ. Proc. § 359* (three years)

[13] Decisions

Purpose of law making directors liable for making illegal loans and guaranties is protection of creditors and shareholders. *UMF Sys., Inc. v. Eltra Corp. (1976) 17 Cal. 3d 753, 757, 132 Cal. Rptr. 129, 553 P.2d 225* (re: former Corp. Code § 826 on which present *Corp. Code § 316* is based in part)

Statute authorizes action by creditor (on behalf of corporation) whose debt or claim is based on contractual obligation of corporation existing at time of making illegal loan or guaranty. *UMF Sys., Inc. v. Eltra Corp. (1976) 17 Cal. 3d 753, 757-758, 132 Cal. Rptr. 129, 553 P.2d 225* (applying former Corp. Code § 826)

Action under *Corp. Code § 316* is limited by *Code Civ. Proc. § 359*: three years after director's liability was created. *Hoover v. Galbraith (1972) 7 Cal. 3d 519, 521-522, 102 Cal. Rptr. 733, 498 P.2d 981* (action under former Corp. Code § 826)

Derivative actions is equitable. *Rankin v. Frebank Co. (1975) 47 Cal. App. 3d 75, 90-92, 121 Cal. Rptr. 348* (no right to jury trial); *Rosenfeld v. Zimmer (1953) 116 Cal. App. 2d 719, 722, 254 P.2d 137* (reporting rule)

Derivative actions either equitable or legal depending on nature of claim. *Ross v. Bernhard (1970) 396 U.S. 531, 538-542, 90 S. Ct. 733, 24 L. Ed. 2d 729* (re: right to jury trial under *Seventh Amendment*)

Corporation required to be made party to action. *Beyerbach v. Juno Oil Co. (1954) 42 Cal. 2d 11, 27-28, 265 P.2d 1*

(derivative action)

Attorney's fees recoverable by successful plaintiff in derivative action. *Beyerbach v. Juno Oil Co. (1954) 42 Cal. 2d 11, 19-20, 265 P.2d 1*

[14] Text References

Ballantine and Sterling, California Corporation Laws, Ch. 6, *Management: Duties and Liabilities of Directors and Controlling Shareholders, §§ 106.01* , 106.02 (Matthew Bender)

Marsh, California Corporation Law and Practice, Ch. X, *Fiduciary Duties of Promoters, Directors, Officers and Controlling Shareholders*, §§ 10.15-10.19

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14-167 California Forms of Pleading and Practice--Annotated § 167.184

§ 167.184 Affirmative Defense Allegation--Director's Liability for Breach of Duty Under Corp. Code § 309 Eliminated or Limited by Articles of Incorporation [Corp. Code §§ 204(a)(10)]

[1] FORM Affirmative Defense Allegation--Director's Liability for Breach of Duty Under Corp. Code § 309 Eliminated or Limited by Articles of Incorporation [Corp. Code §§ 204(a)(10)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT _____ [*name*] ALLEGES that he/she is not personally liable to plaintiff for any monetary damages incurred as a result of the actions alleged in the complaint because Article _____ [*specify number and section, if applicable*] of the Articles of Incorporation of _____ [*name of corporation*], adopted _____ [*date*], specifically _____ [eliminates *or* limits] the personal liability of a director for monetary damages for breach of duty to the corporation and its shareholders as set forth in *Corp. Code § 309*. A copy of the above-mentioned article is attached hereto as Exhibit "_____."

[2] Use of Form

This affirmative defense is for use in an answer to a complaint based on negligence for breach of a director's duty to the corporation or its shareholders, as set forth in *Corp. Code § 309*, when the corporation has eliminated or limited the personal liability of a director for monetary damages for breach of such a duty. The extent to which the articles of corporation may shield a director is limited by *Corp. Code § 204(a)(10)*, and among other things, the defense does not apply when the action is based on *Corp. Code § 310* or *316* [*see Corp. Code § 204(a)(10)*; for further discussion, *see § 167.58*].

[3] Cross References

For discussion and forms relating to answers, see Ch. 26, *Answers* .

[4] State Statutes

Limitations on directors' liability. *Corp. Code §§ 204(a)(10), 309(c)*

Fiduciary duties of directors. *Corp. Code § 309(a), (b)*

Duties of directors' of federal savings associations. *Fin. Code § 8501*

[5] Cross References

For a related form, *see § 167.180*.

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[Reserved]

§§ 167.185[Reserved]

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C. Indemnification For Defense Expenses

14-167 California Forms of Pleading and Practice--Annotated § 167.200

§ 167.200 Notice of Motion for Order Compelling Indemnification for Defense Expenses [Corp. Code § 317]

[1] FORM Notice of Motion for Order Compelling Indemnification for Defense Expenses [Corp. Code § 317]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION FOR ORDER COMPEL-
Plaintiff,	)	LING CORPORATION TO INDEMNIFY AGENT
vs.	)	FOR DEFENSE EXPENSES
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*name of corporation*]:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in the courtroom of [_____ (Department *or* Division) _____ of] the above-entitled court, located at _____ [*name, if any, and street address of building*] in _____ [*city*], California, defendant [_____ (*name*)] will, and hereby does, move for an order _____ [compelling *or* authorizing] you to indemnify him/her for defense expenses incurred in the above-entitled _____ [action *or* proceeding]. The motion will be based on the ground that the moving party is an agent as defined in *Section 317 of the Corporations Code*, was made a defendant in

the above-entitled _____ [action *or* proceeding] because of such status, and is eligible for indemnification for his/her defense expenses under that section.

The motion will be based on this notice of motion, the attached declaration of _____ [*name*], the attached memorandum of points and authorities, the records and file herein, and such evidence as may be presented at the hearing.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant

CAUTION:
A memorandum must accompany the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This notice of motion is for use by a corporate agent [*see Corp. Code § 317(a)*] claiming that he or she is entitled to indemnity from the corporation for defense expenses incurred in an action or proceeding in which he or she was sued because of being an agent of the corporation and in which the corporation is a party as of the time of entry of the judgment.

With appropriate modification, this form may be used by the attorney or any other person rendering services in connection with the defense to seek an order compelling or authorizing the corporation to provide indemnity, or by the corporation to seek an order authorizing it to provide indemnity [*see Corp. Code § 317(e)(4)*].

[3] Criminal Proceedings

It is not clear whether a motion for an order compelling or authorizing a corporation to indemnify an agent for defense expenses [*see Corp. Code § 317*] may be made in a criminal proceeding. There are no cases deciding the point under the 1975 revision of the General Corporation Law. It was decided under the former law [former Corp. Code § 830] that such a motion was improper in a criminal proceeding [*P.S. & S., Inc. v. Superior Court (1971) 17 Cal. App. 3d 354, 359-360, 94 Cal. Rptr. 738]* .

[4] Timing of Motion

The statute provides that an order directing the corporation to provide indemnity for expenses incurred in a judicial (as distinguished from an administrative or investigative) proceeding may be issued by the court "in which such proceeding is or was pending" [*Corp. Code § 317(e)(4)*]. This language ("or was pending") suggests that the court's power to issue the order continues indefinitely. However, when a judgment becomes final, the court which rendered it loses jurisdiction of the cause except to the extent that a statute continues the court's jurisdiction for a specific purpose. Thus, the probable meaning of the quoted language, as respects timing of the motion, is that the motion may be made after, as

well as before, the judgment is entered, as long as the court retains jurisdiction of the cause--that is, ordinarily, until the judgment becomes final. Thereafter, a claimant for indemnification would be obliged to begin a new action [*see § 167.203*].

[5] Attorney's Fees and Costs

Attorney's fees and costs incurred by the moving party in obtaining an order compelling or authorizing the corporation to provide indemnity are also subject to indemnity [*see Corp. Code § 317(a)*].

[6] Cross References

For discussion and forms relating to noticed motions in general, see Ch. 372, *Motions and Orders*

[7] California Points and Authorities

For a memorandum supporting a motion for indemnification for expenses incurred in defending a proceeding without success on the merits, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

[8] State Statutes

Indemnification of corporate agents for defense expenses. *Corp. Code § 317*

[9] Decisions

Notice to adverse party is required when party moves for order affecting adverse party's rights. *Bohn v. Bohn (1913) 164 Cal. 532, 536, 129 P. 981*

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Volume 14: Corporations: Capacity thru Corporations: Dissolution and Winding Up-Chs. 160-173
Chapter 167 CORPORATIONS: DIRECTORS AND MANAGEMENT
PART IV. FORMS
C. Indemnification For Defense Expenses

14-167 California Forms of Pleading and Practice--Annotated § 167.201

§ 167.201 Order to Show Cause re Indemnification for Defense Expenses [Corp. Code § 317]

[1] FORM Order to Show Cause re Indemnification for Defense Expenses [Corp. Code § 317]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], [et al.,]	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name*], [et al.,]	)	ORDER TO SHOW CAUSE RE INDEMNIFICA-
Defendant(s).	)	TION FOR DEFENSE EXPENSES
_____	)	Date: _____
_____ [*name*],	)	Time: _____
Applicant,	)	Location: _____
vs.	)	Judge: _____
_____ [*name of corporation*],	)	Date Action Filed: _____
Respondent.	)	Trial Date: _____
	)	
	)	

_____

To _____ [*name of corporation*]:

YOU ARE ORDERED to appear on _____ [*date*], at _____ [*time*], in the courtroom of [_____ (Department *or* Division) _____ of] the above-entitled court, located at _____ [*name, if any, and street address of building*] in _____ [*city*], California, then and there to show cause, if any you have, why you should not be ordered to indemnify _____ [*name*], defendant and applicant herein, for his/her defense expenses incurred in the

above-entitled _____ [action *or* proceeding], as requested in the declaration of _____ [*name*] heretofore filed.

This order and a copy of the declaration shall be served on you by delivery of copies to an appropriate agent for service of process at least _____ [*number*] days before the date of the hearing.
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

The order to show cause is for use by a corporate "agent" [*see Corp. Code § 317(a)*] claiming that he or she is entitled to have, or should have, indemnity from the corporation for defense expenses incurred in a civil action or proceeding in which he or she was sued because of being an agent of the corporation but in which the corporation is not a party at the time of entry of the judgment. The form may also be used by the attorney or any other person rendering services in connection with the defense, if the motion is made by the attorney or such other person [*see Corp. Code § 317(e)(3)*].

[3] Necessity for Personal Jurisdiction of Corporation

An order directing the corporation to provide indemnity will not be effective unless the court has obtained personal jurisdiction of the corporation. Where the corporation is not already a party to the action or proceeding, it will be necessary to obtain jurisdiction by appropriate service of process [*see Code Civ. Proc. § 1917* ("The jurisdiction sufficient to sustain a record is jurisdiction over the cause, [and] over the parties ... ."); *cf. Tiffany Records, Inc. v. M.B. Krupp Distributors, Inc. (1969) 276 Cal. App. 2d 610, 615, 81 Cal. Rptr. 320* ("Jurisdiction over the parties is necessary to the validity of the judgments in personam ... sought here by appellants"; action for money due on account and damages)].

One method of obtaining the necessary jurisdiction is to begin a new action and serve a summons on the corporation. But the statute [*Corp. Code § 317*] contemplates that the added expense and delay involved in a new action will be avoided by moving for an order in the action or proceeding in which the expenses subject to indemnification were incurred. An order to show cause appears to be the appropriate process by which jurisdiction is obtained, since it can be used for that purpose in other contexts.

The order to show cause must be served on the corporation (not on the corporation's attorney) in the manner of serving a summons; and if the corporation fails to appear at the hearing after being duly served, it will be necessary to present (for filing) a proof of service before going ahead with the hearing. For discussion of service of process and forms for proof of service, see Ch. 518, *Service of Summons and Papers* .

[4] State Statutes

Jurisdiction sufficient to sustain record is jurisdiction over cause and parties. *Code Civ. Proc. § 1917*

[5] Decisions

Jurisdiction over parties is necessary to validity of in personam judgment. *Tiffany Records, Inc. v. M.B. Krupp Distributors, Inc. (1969) 276 Cal. App. 2d 610, 615, 81 Cal. Rptr. 320*

[6] Cross References

For a related form, *see § 167.200*.

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Chapter 167 CORPORATIONS: DIRECTORS AND MANAGEMENT
PART IV. FORMS
C. Indemnification For Defense Expenses

14-167 California Forms of Pleading and Practice--Annotated § 167.202

§ 167.202 Order Granting Motion for Indemnification for Defense Expenses [Corp. Code § 317]

[1] FORM Order Granting Motion for Indemnification for Defense Expenses [Corp. Code § 317]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER GRANTING MOTION TO COMPEL
Plaintiff,	)	CORPORATION TO INDEMNIFY AGENT FOR
vs.	)	DEFENSE EXPENSES
_____ [*name*], a Corporation,	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

This matter came on for hearing _____ [*date*]. _____ [*Name*], the moving party, appeared by _____ [*name*], counsel; _____ [*name of corporation*] _____ [appeared by _____ (*name*), counsel *or* failed to appear].

The court, having received evidence and heard the arguments of counsel, finds as follows:

[1. _____ (*Name of corporation*) was duly served with _____ (a notice of the motion *or* an order to show cause).]

2. _____ [*Name*] was made a defendant in the above-entitled _____ [action *or* proceeding] by reason of the fact that he/she is an agent of the corporation under the definition of agent in *Corporations Code Section 317*.

3. The above-entitled _____ [action *or* proceeding] is a proceeding as to which indemnification for defense expenses may be made by the corporation as provided in *Corporations Code Section 317*.

4. _____ [*Name*] was _____ [successful *or* partially successful *or* unsuccessful] in defending the above-entitled _____ [action *or* proceeding] on the merits, as shown by the judgment entered on _____ [*date*].

5. _____ [*Name*] has incurred and is obligated to pay or has paid the following amounts in connection with defending the above-entitled _____ [action *or* proceeding], which amounts are "expenses" subject to indemnification under *Corporations Code Section 317*: _____ [*list, identifying items and amount for each item*].

[6. _____ (*If claimant was not successful on the merits but did succeed with some special or technical defense, state finding that he/she adhered to the applicable standard of conduct required by Corp. Code § 317(b) or (c)*).]

[7. _____ (*If claimant was not successful in defending the action or proceeding, state circumstances justifying indemnification*).]

8. _____ [*Name*] _____ [is entitled to *or* should] have indemnity from the corporation for _____ [all of the *or* the following] defense expenses incurred by him/her as hereinabove found [, to wit: _____ (*specify*)].

Good cause appearing,

IT IS ORDERED that _____ [*name*] have and recover from _____ [*name of corporation*] the sum of $_____ as indemnification for defense expenses pursuant to *Corporations Code Section 317*.
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

This order is for use by a corporate "agent" [*see Corp. Code § 317(a)*] whose motion for an order compelling the corporation to provide indemnity is granted. This form may be used whether the motion is made on notice or on an order to show cause.

[3] Findings

Corp. Code § 317(e) implicitly requires findings as to the propriety of indemnification in the circumstances, except when the claimant is entitled to be indemnified because of success in defending on the merits (in which case the question of propriety does not arise, and no findings on that issue are necessary).

[4] Applicable Standard of Conduct

The applicable standard of conduct (the sixth finding) varies depending on the nature of the action or proceeding [*see Corp. Code § 317(b), (c)*; *see § 167.81[2]*].

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C. Indemnification For Defense Expenses

14-167 California Forms of Pleading and Practice--Annotated § 167.203

§ 167.203 Complaint for Money--Indemnification for Defense Expenses [Corp. Code § 317]

[1] FORM Complaint for Money--Indemnification for Defense Expenses [Corp. Code § 317]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONEY
_____ [*name of corporation*],	)	(Indemnification for Defense Expenses)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. _____ [*Name of corporation*] is, and at all times herein mentioned was, a corporation organized and existing under the _____ [*governing law, e.g.*, General Corporation Law of California] _____ [*if foreign corporation, add:* and subject to *Corporations Code Section 2115*].

2. Plaintiff is an agent of the corporation under the definition of that term in *Corporations Code Section 317* in that _____ [*specify*].

3. By reason of being an agent of the corporation, plaintiff was made a defendant in the _____ [action *or* proceeding] in this court, No. _____, entitled _____ [*style of case*].

4. Plaintiff successfuly defended that _____ [action *or* proceeding] on the merits.

5. In connection with the defense of that _____ [action *or* proceeding], plaintiff incurred and became obligated to pay, and has paid [some of], the following expenses: _____ [*list, identifying items and stating amount of each item*].

WHEREFORE, plaintiff prays for judgment as follows:

1. That plaintiff have and recover from _____ [*name of corporation*] the sum of $_____ as indemnification for defense expenses pursuant to *Corporations Code Section 317*;

2. For costs of suit herein incurred, including reasonable attorney's fees in the amount of $_____, pursuant to *Corporations Code Section 317*; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge except as to matters therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This complaint is for use by a corporate agent [*see Corp. Code § 317(a)*] claiming that he or she is entitled to have indemnity from the corporation for defense expenses incurred in a civil action or proceeding in which he or she was sued because of being an agent of the corporation and successfully defended the action or proceeding on the merits.

This form may also be used when the defense expenses were incurred in a criminal proceeding or an administrative or investigative proceeding, in which case the allegation in Paragraph 3 will have to be changed accordingly.

[3] Attorney's Fees and Costs

Attorney's fees and costs incurred by the plaintiff in obtaining a judgment for indemnification are also subject to

indemnity [*see Corp. Code § 317(a)*].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*]. In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the first paper must state whether the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[6] State Statutes

Indemnification for defense expenses. *Corp. Code § 317*

When foreign corporations are governed by the General Corporation Law. *Corp. Code § 2115*

[7] Decisions

When trial court was unable to segregate attorney hours spent on indemnifiable issues from those spent on nonindemnifiable issues, court acted properly in granting indemnity based on quantum meruit after considering usual and customary factors affecting what competent counsel would reasonably charge for similar services. *Fed-Mart Corp. v. Pell Enterprises, Inc. (1980) 111 Cal. App. 3d 215, 223-224, 168 Cal. Rptr. 525*

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Chapter 168 CORPORATIONS: DERIVATIVE ACTIONS

14-168 California Forms of Pleading and Practice--Annotated 168.syn

§ 168.syn Synopsis to Chapter 168: CORPORATIONS: DERIVATIVE ACTIONS

§ 168.01 Scope of Chapter

§§ 168.02-168.09 [Reserved]

§ 168.10 Governing Statutes

§ 168.11 Definitions

§ 168.12 When Shareholder Suit Is Derivative

§ 168.13 When Shareholder Suit Is Nonderivative

§ 168.14 Distinction Between Derivative and Nonderivative Suits

§ 168.15 Parties

[1] Plaintiff Must Be Shareholder

[2] Loss of Shareholder Status

[3] Corporation Must Be Party

§ 168.16 Demand on Board of Directors

§ 168.17 When Derivative Suit Requirements Inapplicable

§ 168.18 Derivative Actions Involving Savings and Loan Associations

§ 168.19 Discretionary Power of Board of Directors or Litigation Committee

§ 168.20 Court Control of Litigation

§ 168.21 Motion for Security

[1] In General

[2] Extension of Time to File Motion

[3] Hearing

[4] Ruling by Court Not Determination on Merits

[5] Fixing Nature and Amount of Security

[6] Effect of Failure to Furnish Security

[7] Voluntary Compliance With Security Requirements

[8] Enforcement of Liability on Bond

[9] Stay of Action When Motion for Security Is Filed

§ 168.22 Attorney's Fees

§ 168.23 Essential Allegations

§§ 168.24-168.39 [Reserved]

§ 168.40 California Points and Authorites

§ 168.41 State Statutes

§ 168.42 California Rules of Court

§ 168.43 Federal Rules of Civil Procedure

§ 168.44 Decisions

[1] Actions by Shareholders

[a] Derivative

[b] Nonderivative

[c] Rules Against Joinder

[2] Appellate Court's Review of Trial Court Decision

[3] Attorney's Fees

[4] Bankruptcy Proceedings

[5] Defenses

[6] Demand on Corporation

[7] Equitable Action

[8] Fiduciary Duty of Directors and Controlling Shareholders

[9] Parties

[10] Plaintiff as Fiduciary; Court's Control of Action

[11] Racketeer Influenced and Corrupt Organizations Act

[12] Right to Bring and Maintain Suit

[a] In General

[b] Duty of Board of Directors

[13] Savings and Loan Holding Companies

[14] Security

[a] Appeal

[b] Burden of Proof

[c] Constitutionality

[d] Effect of Dismissal

[e] Modification

[f] Motion

[g] Nature and Amount of Security

[h] When Applicable

[i] When Inapplicable

[15] Statutory Limits on Derivative Suits

[16] Stay Provisions

[17] Termination of Derivative Actions

§ 168.45 Law Reviews

§ 168.46 Text References

§§ 168.47-168.59 [Reserved]

§ 168.60 Complaint--Shareholder's Derivative Action [Corp. Code § 800(b)]--General Form

[1] FORM

[2] Use of Form

[3] Allegations Regarding Futility of Prefiling Demand

[4] Verification

[5] Jurisdiction

[6] State Statutes

[7] Decisions

[8] Text References

[9] Cross References

§ 168.61 Notice of Motion for Court Order Excusing Plaintiff From Contemporaneous Ownership Requirement [Corp. Code § 800(b)(1)]

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

§ 168.62 Affirmative Defense to Shareholder's Derivative Action--That Prosecution of Suit Is Not in Best Interests of Corporation

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

§ 168.63 Proceedings for Court Approval of Compromise and Settlement [Code Civ. Proc. § 998] of Shareholder's Derivative Action--Notice of Motion--By Plaintiff

[1] FORM

[2] Use of Form

[3] Decisions

§ 168.64 Proceedings for Court Approval of Compromise and Settlement [Code Civ. Proc. § 998] of Shareholder's Derivative Action--Declaration in Support of Motion--By Plaintiff

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 168.65 Proceedings for Court Approval of Compromise and Settlement [Code Civ. Proc. § 998] of Shareholder's Derivative Action--Judgment [Code Civ. Proc. § 577]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 168.66 Proceedings for Extension of Time to Move for Security [Corp. Code § 800(c); Cal. Rules of Ct., Rule 2.20] and to File Responsive Pleading [Code Civ. Proc. § 1054; Cal. Rules of Ct., Rule 2.20]--Notice of Motion--By Defendant Director or Officer of Corporation

[1] FORM

[2] Use of Form

[3] Extension of Time

[4] State Statutes

[5] California Rules of Court

[6] Decisions

[7] Text References

[8] Cross References

§ 168.67 Proceedings for Extension of Time to Move for Security [Corp. Code § 800(c); Cal. Rules of Ct., Rule 2.20] and to File Responsive Pleading [Code Civ. Proc. § 1054; Cal. Rules of Ct., Rule 2.20]--Declaration in Support of Motion--By Defendant Director or Officer of Corporation

[1] FORM

[2] Use of Form

[3] Disclosures Required

[4] Cross References

§ 168.68 Proceedings for Extension of Time to Move for Security [Corp. Code § 800(c); Cal. Rules of Ct., Rule 2.20] and to File Responsive Pleading [Code Civ. Proc. § 1054; Cal. Rules of Ct., Rule 2.20]--Order Granting Extension of Time

[1] FORM

[2] Use of Form

[3] Cross References

§ 168.69 Proceedings for Order Requiring Plaintiff to Furnish Security [Corp. Code § 800(c)]--Notice of Motion--By Defendant Director or Officer of Corporation

[1] FORM

[2] Use of Form

[3] Motion to Furnish Security

[4] State Statutes

[5] Decisions

[6] Cross References

§ 168.70 Proceedings for Order Requiring Plaintiff to Furnish Security [Corp. Code § 800(c)]--Declaration [Code Civ. Proc. § 2015.5] in Support of Motion

[1] FORM

[2] Use of Form

[3] Cross References

§ 168.71 Proceedings for Order Requiring Plaintiff to Furnish Security [Corp. Code § 800(c)]--Order [Code Civ. Proc. § 1003] Requiring Security

[1] FORM

[2] Use of Form

[3] Determination on Hearing

[a] In General

[b] No Determination on Merits

[4] State Statutes

[5] Decisions

[6] Cross References

§ 168.72 Proceedings for Judgment [Code Civ. Proc. § 577] Dismissing Shareholder's Derivative Action for Failure to Furnish Security [Corp. Code § 800(d)]--Notice of Motion

[1] FORM

[2] Use of Form

[3] Cross References

§ 168.73 Proceedings for Judgment [Code Civ. Proc. § 577] Dismissing Shareholder's Derivative Action for Failure to Furnish Security [Corp. Code § 800(d)]--Judgment Dismissing Action

[1] FORM

[2] Use of Form

[3] Dismissal for Failure to Furnish Security

[a] In General

[b] Not Bar to Another Action

[4] State Statutes

[5] Decisions

[6] Cross References

§ 168.74 Proceedings for Judgment [Code Civ. Proc. § 577] Dismissing Shareholder's Derivative Action for Loss of Shareholder Status [Corp. Code § 800(b)]--Notice of Motion

[1] FORM

[2] Use of Form

[3] Cross References

§ 168.75 Proceedings for Judgment [Code Civ. Proc. § 577] Dismissing Shareholder's Derivative Action for Loss of Shareholder Status [Corp. Code § 800(b)]--Judgment Dismissing Action

[1] FORM

[2] Use of Form

[3] Cross References

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Chapter 168 CORPORATIONS: DERIVATIVE ACTIONS
PART I. SCOPE

14-168 California Forms of Pleading and Practice--Annotated § 168.01

§ 168.01 Scope of Chapter

This chapter discusses shareholder's derivative actions and contains a general form for a complaint for use in a derivative suit [*see § 168.60*], a notice of motion for a court order excusing plaintiff from the contemporaneous ownership requirement [*see § 168.61*], an affirmative defense that prosecution of an action is not in the corporation's best interest [*see § 168.62*], forms for use in proceedings for court approval of compromise and settlement [*see* §§ 168.63-168.65], forms for use in requiring the plaintiff in a derivative action to furnish security [*see* §§ 168.66-168.73], and forms for use in obtaining dismissal of a derivative action when the plaintiff has lost the status of a shareholder of the corporation [*see §§ 168.74, 168.75*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsDerivative ActionsGeneral Overview

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14-168 California Forms of Pleading and Practice--Annotated §§ 168.02-168.09

[Reserved]

§§ 168.02[Reserved]

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PART II. LEGAL BACKGROUND

14-168 California Forms of Pleading and Practice--Annotated § 168.10

§ 168.10 Governing Statutes

Shareholder's derivative actions are governed generally by *Corp. Code § 800*. *Corp. Code § 800* was enacted in 1975 as part of the repeal and reenactment of the General Corporation Law and is in most respects identical to its predecessor, former Corp. Code § 834. Former Corp. Code § 834 applied to derivative actions that were pending on January 1, 1977, the effective date of the present General Corporation Law [*Corp. Code § 2312*].

A derivative action by a shareholder of a savings and loan association is governed by *Fin. Code § 6052*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsDerivative ActionsGeneral Overview

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14-168 California Forms of Pleading and Practice--Annotated § 168.11

§ 168.11 Definitions

As used in *Corp. Code § 800*, "corporation" includes an unincorporated association, "board" includes the managing body of an unincorporated association, "shareholder" includes a member of an unincorporated association, and "shares" includes memberships in an unincorporated association [*Corp. Code § 800(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGeneral OverviewBusiness & Corporate LawUnincorporated Associations

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14-168 California Forms of Pleading and Practice--Annotated § 168.12

§ 168.12 When Shareholder Suit Is Derivative

A derivative suit is essentially an equitable action [*Rosenfeld v. Zimmer (1953) 116 Cal. App. 2d 719, 722, 254 P.2d 137]* in which the shareholder filing the action represents the corporation which must itself have a cause of action [*McDermott v. Bear Film Co. (1963) 219 Cal. App. 2d 607, 611, 33 Cal. Rptr. 486]* . A shareholder's derivative suit seeks to recover for the benefit of the corporation and its whole body of shareholders when injury is caused to the corporation that may not otherwise be redressed because of the failure of the corporation to act. Thus, the action is derivative if the gravamen of the complaint is injury to the corporation or to the whole body of its stock and property without any severance or distribution among individual holders, or if the complaint seeks to recover assets for the corporation or to prevent the dissipation of its assets. Therefore, although the corporation is made a defendant in a derivative suit, the corporation nevertheless is the real plaintiff and it alone benefits from the decree; the stockholders derive no benefit except the indirect benefit resulting from a realization on the corporation's assets [*Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 106-107, 81 Cal. Rptr. 592, 460 P.2d 464]* .

For example, in an action for breach of fiduciary duty arising from alleged management improprieties and the attendant decline in the corporation's stock value, the gravamen of the complaint was harm to the corporation and thus the action was a derivative action that the plaintiff lacked standing to pursue [*Schuster v. Gardner (2005) 127 Cal. App. 4th 305, 309, 312-315, 25 Cal. Rptr. 3d 468* (affirming judgment of dismissal entered after trial court sustained demurrers without leave to amend)]. Similarly, in a case in which plaintiffs' allegations regarding mismanagement amounted to a claim of injury to the corporation itself, the court of appeal held that the trial court properly dismissed the shareholders' complaints [*Avikian v. WTC Financial Corp. (2002) 98 Cal. App. 4th 1108, 1115-1117, 120 Cal. Rptr. 2d 243]* . Furthermore, in a case in which causes of action for fraudulent transfer of a company's assets were brought by members of LLC, the court held that the action could be brought only as a derivative action on behalf of the LLC [*Paclink Communications International, Inc. v. Superior Court (2001) 90 Cal. App. 4th 958, 964-965, 109 Cal. Rptr. 2d 436]* .

Thus, two essential elements must exist to provide a basis for a derivative action. The first element is an injury to the corporation or to the whole body of its stockholders, and the second element is the derivative aspect of the cause of action which arises because the responsible official has failed or refused to act [*Starbird v. Lane (1962) 203 Cal. App. 2d 247, 255, 21 Cal. Rptr. 280]* .

Legal Topics:

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§ 168.13 When Shareholder Suit Is Nonderivative

A shareholder's suit is nonderivative or individual when it is brought to enforce a right against the corporation which the stockholder possesses as an individual. The individual wrong necessary to support a suit by a shareholder need not be unique to the shareholder but may affect a substantial number of shareholders. If the injury is not incidental to an injury to the corporation, an individual cause of action exists [*Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 107-108, 81 Cal. Rptr. 592, 460 P.2d 464* ; *see* *Vega v. Jones, Day, Reavis & Pogue (2004) 121 Cal. App. 4th 282, 296-297, 17 Cal. Rptr. 3d 26* (plaintiff's action was individual, not derivative, because in alleging defendant had deceived him into exchanging valuable stock in acquired corporation for worthless stock in acquiring corporation, he sought recovery for injury to himself); *Denevi v. LGCC (2004) 121 Cal. App. 4th 1211, 1223, 18 Cal. Rptr. 3d 276* (LLC member entitled to bring individual claim for fraudulent representations that induced him to transfer real estate purchase rights to LLC, notwithstanding facts that he had already successfully prosecuted derivative claim on behalf of LLC and damages awards in the two suits might be overlapping or duplicative); *see also* *Jara v. Suprema Meats, Inc. (2004) 121 Cal. App. 4th 1238, 1258, 18 Cal. Rptr. 3d 187* (minority shareholder's claim that majority stockholders paid themselves excessive compensation, thus depriving him of his proportionate share of corporate profits, came "within the scope of allowable individual actions"); *Nelson v. Anderson (1999) 72 Cal. App. 4th 111, 124-126, 84 Cal. Rptr. 2d 753* (minority shareholder as individual had no standing to bring action for breach of fiduciary duty against majority shareholder, but should have brought derivative action, when all acts allegedly causing injury constituted misfeasance in managing corporate business)]. For a shareholder to obtain a personal right of action there must be relations between him or her and the defendant independent of those which the shareholder derives through his or her interest in the corporate assets and business [*Shenberg v. DeGarmo (1943) 61 Cal. App. 2d 326, 333, 143 P.2d 74]* .

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§ 168.14 Distinction Between Derivative and Nonderivative Suits

The significance of the distinction between derivative and nonderivative shareholder suits is that the conditions and security requirements prescribed by *Corp. Code § 800* apply exclusively to the former [*Hagan v. Superior Court (1960) 53 Cal. 2d 498, 501-503, 2 Cal. Rptr. 288, 348 P.2d 896* (writ of prohibition may be used to restrain trial court from requiring plaintiff to post security in nonderivative suit)].

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§ 168.15 Parties

[1] Plaintiff Must Be Shareholder

The derivative action provisions of *Corp. Code § 800* apply to actions maintained in the right of any domestic or foreign corporation by any holder of shares or voting trust certificates. In order to sue derivatively, the plaintiff must allege in the complaint that he or she was a shareholder, of record or beneficially, or the holder of voting trust certificates at the time of the transaction or any part of the transaction of which plaintiff complains, or that plaintiff's shares or voting trust certificates thereafter devolved on plaintiff by operation of law from a holder who was a holder at the time of the transaction or any part of the transaction of which plaintiff complains [*Corp. Code § 800(b) see, e.g., Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 17, 108 P.2d 906* (if deceased shareholder met contemporaneous-ownership requirement before dying, then legal representative of shareholder's estate has standing to sue until distribution of shares to heirs and legatees, who thereupon acquire standing to sue)]. Although equitable ownership sometimes may confer standing on a plaintiff to sue derivatively [*see* discussion, *below*], a holder of an option to buy stock is not an equitable shareholder of the corporation for purposes of *Corp. Code § 800(b)(1)* and does not have standing to sue derivatively on a cause of action arising before the option is converted into actual ownership of stock [*Daly v. Yessne (2005) 131 Cal. App. 4th 52, 61, 31 Cal. Rptr. 3d 420]* .

Any shareholder who does not meet the contemporaneous ownership requirement may nevertheless be allowed in the discretion of the court to maintain a derivative action on a preliminary showing to, and determination by, the court, by motion and after a hearing, at which the court will consider the evidence, by affidavit or testimony, as it deems material, that all of the following conditions have been satisfied [*Corp. Code § 800(b)(1)*]:

- There is a strong prima facie case in favor of the claim asserted on behalf of the corporation.
- No other similar action has been, or is likely to be, instituted.
- The plaintiff acquired the shares before there was disclosure to the public or the plaintiff of the wrongdoing of which plaintiff complains.

- Unless the action can be maintained, the defendant may retain a gain derived from defendant's willful breach of a fiduciary duty.

- The requested relief will not result in unjust enrichment of the corporation or any shareholder of the corporation.

Since *Corp. Code § 800(b)(1)* permits a shareholder who was a beneficial owner at the time of the wrong to maintain a derivative action, shareholders who are not record shareholders, for example, those whose shares are held in "street name," are entitled to maintain a derivative action.

The concept of standing based on the beneficial ownership of shares extends also to a plaintiff who alleges that, at the critical time, the plaintiff (or a predecessor in interest) had a community property interest in shares of the corporation [*Patrick v. Alacer Corp. (2008) 167 Cal. App. 4th 995, 1011-1013, 84 Cal. Rptr. 3d 642*].

[2] Loss of Shareholder Status

Although *Corp. Code § 800(b)* does not explicitly deal with the question, the California Supreme Court has elected to follow the majority rule and, applying the basic principles that govern corporation law and shareholder litigation, hold that *Corp. Code § 800(b)* is properly construed as containing a continuous ownership requirement. That is, California law generally requires a plaintiff in a shareholder's derivative action to maintain continuous stock ownership throughout the pendency of the litigation. Consequently, when the shareholder relationship is terminated, whether voluntarily or involuntarily, the derivative-action plaintiff loses standing [*Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1115, 1119, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*]. Under this rule, for example, a derivative plaintiff who ceases to be a stockholder by reason of a merger ordinarily loses standing to continue the litigation, although equitable considerations may warrant an exception to the continuous ownership requirement if the merger itself is used to wrongfully deprive the plaintiff of standing, or if the merger is merely a reorganization that does not affect the plaintiff's ownership [*Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1115, 1119, 72 Cal. Rptr. 3d 129, 175 P.3d 1184* ; *e.g., Haro v. Ibarra (2009) 180 Cal. App. 4th 823, 837, 103 Cal. Rptr. 3d 340* (former shareholders of professional corporation presented equitable considerations that warranted exception to continuous ownership requirement, since complaint alleged that plaintiffs' shares were forfeited because plaintiffs refused to pay assessments imposed by controlling shareholders who were not required to pay assessments and did not suffer their shares to be forfeited)].

For a form for a notice of motion for dismissal of a derivative action based on the plaintiff's loss of shareholder status, see *§ 168.74*; and for a form for a judgment of dismissal on that ground, see *§ 168.75*.

[3] Corporation Must Be Party

The corporation is an indispensable party to a derivative action [*Beyerbach v. Juno Oil Co. (1954) 42 Cal. 2d 11, 27-28, 265 P.2d 1* (decided prior to enactment of *Code Civ. Proc. § 389*, dealing with compulsory joinder of parties)] and must be made a defendant on the ground that its consent to sue as plaintiff could not be obtained [*Code Civ. Proc. § 382*]. Dismissal of the corporation at any stage in a derivative action results in a discontinuance of the action against all other defendants for lack of jurisdiction [*Beyerbach v. Juno Oil Co. (1954) 42 Cal. 2d 11, 27-28, 265 P.2d 1]* .

The nominal defendant corporation, being actually interested as a reluctant plaintiff, generally may not defend a derivative action filed on its behalf. The corporation may only assert defenses contesting the plaintiff's right or decision to bring suit; for example, the corporation may assert the plaintiff's lack of standing [*see § 168.15[1]*] or the "special litigation committee" defense [*see § 168.19*]. The corporation has no ground to challenge the merits of a derivative claim filed on its behalf and from which it stands to benefit [*Patrick v. Alacer Corp. (2008) 167 Cal. App. 4th 995, 1005, 84 Cal. Rptr. 3d 642* (corporation could demur on ground that plaintiff lacked standing but not any other ground)]. To put this another way: because any defense on the merits would benefit only the real defendants (for

instance, culpable directors), it follows that if the real defendants were allowed to rely on the corporation to assert their defenses on the merits, the effect would be to shift the burden and cost of their defense to the corporation, which is the party they are alleged to have harmed [*Patrick v. Alacer Corp. (2008) 167 Cal. App. 4th 995, 1008, 84 Cal. Rptr. 3d 642* (trial court erred not merely in sustaining but even in entertaining, rather than striking, corporation's demurrer on all grounds except plaintiff's lack of standing)].

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§ 168.16 Demand on Board of Directors

The plaintiff in a derivative action must allege in the complaint with particularity his or her efforts to secure from the board such action as desired, or the reasons for not having made such an effort, and allege further that plaintiff has either informed the corporation or the board in writing of the ultimate facts of each cause of action against each defendant or delivered to the corporation or the board a true copy of the complaint which plaintiff proposes to file [*Corp. Code § 800(b)(2)*; *see Bader v. Anderson (2009) 179 Cal. App. 4th 775, 796, 101 Cal. Rptr. 3d 821* (no exception to demand requirement in instances in which underlying wrong concerns alleged misrepresentations or omissions in proxy statement)].

The plaintiff need not plead a demand and a refusal to act on the part of the board of directors if the facts that he or she alleges demonstrate that such a demand would have been futile [*Koshaba v. Koshaba (1942) 56 Cal. App. 2d 302, 308, 132 P.2d 854]* . No demand is necessary when conspiracy, fraud, or criminal conduct of the defendants is charged [*Reed v. Norman (1957) 152 Cal. App. 2d 892, 898, 314 P.2d 204]* . However, the conclusionary allegation "that further demand as stockholder would be futile" would not appear to meet the requirements of the statute [*Shields v. Singleton (1993) 15 Cal. App. 4th 1611, 1621-1622, 19 Cal. Rptr. 2d 459* ; *Fairchild v. Bank of America (1961) 192 Cal. App. 2d 252, 259, 13 Cal. Rptr. 491]* . The test for proving demand futility is whether the facts show a reasonable doubt that (1) the directors are disinterested and independent, and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment [*Oakland Raiders v. National Football League (2001) 93 Cal. App. 4th 572, 587, 113 Cal. Rptr. 2d 255]* .

The demand futility rule is not a mere pleading requirement that drops out of the case once a derivative suit survives a demurrer [*Oakland Raiders v. National Football League (2001) 93 Cal. App. 4th 572, 584-586, 113 Cal. Rptr. 2d 255* (rejecting contention that trial court erred by considering demand futility as element of derivative claims that is subject to proof)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 168.17 When Derivative Suit Requirements Inapplicable

The following actions may be brought by shareholders in the name of the corporation without regard to the derivative suit requirements of *Corp. Code § 800*:

- Suits by one or more "holders of shares outstanding" at the time of any loan or guarantee prohibited by *Corp. Code § 315* against any directors liable for approving those loans or guarantees if the holder has not consented to the action of the directors [*Corp. Code § 316(c)(3)*].

- Suits to enforce the liability of shareholders who have received distributions which violate the liquidation and dividend preferences of preferred shareholders who held shares outstanding at the time of the unlawful distribution [*Corp. Code § 506(b)(2)*].

- Depending upon the construction given *Corp. Code § 316(c)* (dealing with directors' liability for distributions, loans, and guarantees), it would also seem that suits to enforce the liability of directors for distributions described immediately above may be brought without regard to the derivative suit requirements of *Corp. Code § 800* [*Corp. Code § 316(c)(1)*].

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§ 168.18 Derivative Actions Involving Savings and Loan Associations

The provisions of the present General Corporation Law generally do not apply to savings and loan associations [*see Corp. Code § 102*]. Chapter 8, respecting derivative actions in the right of a corporation, does apply, however, to all domestic corporations and applies to savings and loan associations except to the extent that other laws applicable to them supersede the General Corporation Law. Under *Fin. Code § 6052*, the requirements for instituting or maintaining an action are the same as under *Corp. Code § 800* except that *Fin. Code § 6052* adds the requirement that the Savings and Loan Commissioner must have determined, after a hearing upon at least 20 days written notice to the association and each of its directors, that the action (1) is proposed in good faith and (2) is reasonably likely to benefit the association and its stockholders [*Fin. Code § 6052*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 168.19 Discretionary Power of Board of Directors or Litigation Committee

The management of a corporation owes a duty to its stockholders to take proper steps to enforce all claims which the corporation may have. When management fails to perform this duty, the stockholders have the right to do so by derivative suit [*Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 107, 81 Cal. Rptr. 592, 460 P.2d 464]* . Nevertheless, the directors have the same discretion with respect to the prosecution of claims on behalf of the corporation as they have in other business matters. A derivative action may not be maintained when the board of directors has acted in good faith within the scope of its discretionary power and reasonably believes its refusal to commence an action is good business judgment in the best interest of the corporation [*Findley v. Garrett (1952) 109 Cal. App. 2d 166, 174, 240 P.2d 421]* .

The rule regarding the board's discretion is an application of the business judgment rule, which is codified by *Corp. Code § 309*. The business judgment rule is premised on the notion that those to whom the management of the corporation has been entrusted, and not the courts, are best able to judge whether a particular transaction is one that is helpful to the conduct of the corporate affairs or expedient for the attainment of corporate purposes. The business judgment rule establishes a presumption that director's actions are based on sound business judgment [*Will v. Engebretson & Co. (1989) 213 Cal. App. 3d 1033, 1040, 261 Cal. Rptr. 868* ; *but see Everest Investors 8 v. McNeil Partners (2003) 114 Cal. App. 4th 411, 429-432, 8 Cal. Rptr. 3d 31* (triable issues of fact existed regarding general partner's business judgment rule defense in limited partners' action for breach of fiduciary duty in merger transaction)].

The business judgment rule permits a corporation to appoint a special litigation committee to decide whether the maintenance of a shareholder's derivative suit is in the corporation's best interests [*Will v. Engebretson & Co. (1989) 213 Cal. App. 3d 1033, 1040, 261 Cal. Rptr. 868]* . If the committee decides that the suit should be dismissed, its procedural options are demurrer, motion to dismiss, or motion for summary judgment [*Will v. Engebretson & Co. (1989) 213 Cal. App. 3d 1033, 1041, 261 Cal. Rptr. 868]* . The disinterested independence and good faith of the committee and the appropriateness and sufficiency of the investigative techniques chosen and pursued by the committee are subject to judicial review [*Will v. Engebretson & Co. (1989) 213 Cal. App. 3d 1033, 1041-1042, 261 Cal. Rptr. 868]* . However, if the committee proceeds by motion for summary judgment, traditional rules apply. The court cannot weigh any evidence regarding the aforementioned issues. If a triable issue of fact is raised regarding the disinterested independence or good faith of the committee or the appropriateness or sufficiency of the investigative techniques

chosen and pursued by the committee, the shareholders are entitled to a trial on those issues [*Will v. Engebretson & Co. (1989) 213 Cal. App. 3d 1033, 1041-1044, 261 Cal. Rptr. 868* ; *see Desaigoudar v. Meyercord (2003) 108 Cal. App. 4th 173, 179, 133 Cal. Rptr. 2d 408* (when asserted in connection with summary judgment motion, material issues of fact relevant to special litigation committee defense are independence of committee members and their good faith; neither merits of claim nor substance of committee's decision to reject claim are subject to judicial review at that stage)].

The "special litigation committee defense" has been held to be legally valid in California. Furthermore, it may be used by a homeowners association. The defense must be allowed whenever a committee of disinterested directors acting in good faith has determined that a derivative action is not in the best interests of the corporation--if possible on motion, but if necessary in a full trial [*Finley v. Superior Court (2000) 80 Cal. App. 4th 1152, 1161-1163, 96 Cal. Rptr. 2d 128* (finding that trial court did not abuse its discretion by bifurcating the trial on the defense)].

For further discussion of the business judgment rule, see *§ 167.30 et seq.*.

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§ 168.20 Court Control of Litigation

A shareholder bringing a derivative suit on behalf of the corporation does so as a fiduciary similar to a guardian ad litem [*Whitten v. Dabney (1915) 171 Cal. 621, 630-632, 154 P. 312* ; *see also Hogan v. Ingold (1952) 38 Cal. 2d 802, 809-812, 243 P.2d 1]* . Thus the plaintiff is not entitled to voluntarily dismiss the action without the consent of the trial court [*Ensher v. Ensher, Alexander & Barsoom (1960) 187 Cal. App. 2d 407, 410, 9 Cal. Rptr. 732* ; *Spellacy v. Superior Court (1937) 23 Cal. App. 2d 142, 147-148, 72 P.2d 262]* , nor may he or she enter into any effective settlement with the defendants until, after scrutiny and examination, the court determines that the corporation's rights are fully protected [*Whitten v. Dabney (1915) 171 Cal. 621, 632, 154 P. 312]* .

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§ 168.21 Motion for Security

[1] In General

In any derivative action, at any time within 30 days after service of summons on the corporation or on any defendant who is or was an officer or director of the corporation at the time of the acts complained of, the corporation or the defendant may move the court for an order, upon notice and hearing, requiring the plaintiff to furnish security. The motion should be based on one or both of the following grounds [*Corp. Code § 800(c)*]:

- That there is no reasonable possibility that the prosecution of the cause of action alleged in the complaint against the moving party will benefit the corporation or its shareholders; and/or

- That the moving party, if other than the corporation, did not participate in the transaction complained of in any capacity.

In making a determination as to whether or not there is a reasonable possibility that the prosecution of an action will benefit the corporation, the reviewing court must evaluate the possible defenses which plaintiffs would have to overcome before they could prevail at a trial [*Marble v. Latchford Glass Co. (1962) 205 Cal. App. 2d 171, 175, 22 Cal. Rptr. 789]* .

[2] Extension of Time to File Motion

The court, on application of the corporation or any defendant, may, for good cause shown, extend the 30-day period for an additional period or periods not exceeding 60 days [*Corp. Code § 800(c)*].

In addition, the parties themselves may generally stipulate to an extension of time in which to file motions and pleadings, and such a stipulation will suffice to extend the time allowed to file a motion for security [*see Consolidated Dock & Storage Co. v. Superior Court (1971) 18 Cal. App. 3d 949, 952, 96 Cal. Rptr. 254]* .

[3] Hearing

At the hearing on any motion pursuant to *Corp. Code § 800(c)*, the court must consider any evidence, written or oral, by witnesses or affidavit, that may be material (1) to the ground or grounds on which the motion is based, or (2) to a determination of the probable reasonable expenses, including attorney's fees, that the corporation and the moving party will incur in the defense of the action [*Corp. Code § 800(d)*].

The burden of proof is on the party moving for security to show by a preponderance of the evidence, either that there is no fair likelihood of benefit to the corporation or its security holders or that he or she did not participate in the transaction complained of [*Wood v. Gordon (1952) 112 Cal. App. 2d 374, 376, 246 P.2d 84]* .

[4] Ruling by Court Not Determination on Merits

A ruling by the court on the motion for security is not a determination of any issue in the action or of the merits thereof [*Corp. Code § 800(d)*].

[5] Fixing Nature and Amount of Security

If the court determines, after hearing the evidence adduced by the parties, that the moving party has established a probability in support of any of the grounds on which the motion is based, the court must fix the nature and amount of security, not to exceed $50,000, to be furnished by the plaintiff for reasonable expenses, including attorney's fees [*see § 168.22*], which the moving party and the corporation may incur in connection with the action, including expenses for which the corporation may become liable pursuant to *Corp. Code § 317* (indemnification by the corporation of corporate agents for expenses incurred in defense of certain proceedings) [*Corp. Code § 800(d)*]. The aggregate amount of security that a plaintiff may be required to provide pursuant to *Corp. Code § 800* is limited to $50,000 as to all moving parties [*Hale v. Southern California IPA Medical Group (2001) 86 Cal. App. 4th 919, 927-928, 103 Cal. Rptr. 2d 773* (examining legislative history of *Corp. Code § 800* and concluding that trial court erred in ordering plaintiff in derivative action against corporation and five directors to post six bonds for total of $250,000)].

Thereafter, the court, on its own motion or on a party's noticed motion supported by affidavit, may determine that the bond is or has become insufficient or is excessive, and may order that the amount of the bond be increased or decreased [*Code Civ. Proc. §§ 996.010, 996.030*].

If the court determines that a bond is insufficient, a sufficient bond must be given within the time required by the court order, or the court will on ex parte motion order that all rights obtained by giving the original bond immediately cease [*Code Civ. Proc. § 996.010(d)*].

The beneficiary may also object by noticed motion to the bond on the ground that the sureties are insufficient or the amount of the bond is insufficient. The motion must be made within 10 days after being served with a copy of the bond [*Code Civ. Proc. §§ 995.920, 995.930*]. For discussion and forms relating to objections to bonds, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[6] Effect of Failure to Furnish Security

If the court, upon a motion to furnish security, determines that security must be furnished by the plaintiff as to any one or more defendants, the action must be dismissed as to that defendant or defendants, unless plaintiff furnishes the security required within a reasonable time fixed by the court [*Corp. Code § 800(d)*].

[7] Voluntary Compliance With Security Requirements

If the plaintiff, either before or after a motion is made pursuant to *Corp. Code § 800(c)* or any order or determination pursuant to the motion, posts a bond in the aggregate amount of $50,000 to secure the reasonable expenses of the parties entitled to make the motion, the plaintiff has complied with the requirements of *Corp. Code § 800* and with any order

for a bond made, and any such motion then pending must be dismissed and no further or additional bond or other security will be required [*Corp. Code § 800(e)*].

[8] Enforcement of Liability on Bond

Liability on a bond given as security in a shareholder's derivative action may be enforced on noticed motion without the necessity of an independent action [*Code Civ. Proc. § 996.440(a)*]. The motion cannot be made until after entry of the final judgment in the action and after the time for appeal has expired or, if an appeal is taken, until after the appeal is finally determined [*Code Civ. Proc. § 996.440(b)*].

[9] Stay of Action When Motion for Security Is Filed

If a motion is filed pursuant to *Corp. Code § 800(c)*, no pleadings need be filed by the corporation or any other defendant and the prosecution of the action will be stayed until 10 days after the motion has been disposed of [*Corp. Code § 800(f)*].

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Volume 14: Corporations: Capacity thru Corporations: Dissolution and Winding Up-Chs. 160-173
Chapter 168 CORPORATIONS: DERIVATIVE ACTIONS
PART II. LEGAL BACKGROUND

14-168 California Forms of Pleading and Practice--Annotated § 168.22

§ 168.22 Attorney's Fees

Ordinarily a successful litigant is not entitled to attorney's fees as costs in the absence of special statutory authorization [*Freeman v. Goldberg (1961) 55 Cal. 2d 622, 625-626, 12 Cal. Rptr. 668, 361 P.2d 244*]. *Corp. Code § 800* [*see § 168.21*] is merely a security statute and does not provide for a prevailing defendant's recovery of attorney's fees and costs except by recourse to the bond that is posted pursuant to the statute, until the full amount of the bond has been exhausted. In order to recover attorney's fees or costs independently of the bond, or beyond the amount of the bond, a prevailing defendant would have to look to case law and statutory authority other than *Corp. Code § 800* [*West Hills Farms, Inc. v. RCO Ag Credit, Inc. (2009) 170 Cal. App. 4th 710, 719, 88 Cal. Rptr. 3d 458*].

It is a well-established doctrine of equity jurisprudence that when a common fund exists to which a number of persons are entitled and in their interest successful litigation is maintained for its preservation and protection, an allowance of counsel fees may properly be made from that fund. By this means all of the beneficiaries of the fund pay their share of the expense necessary to make it available to them [*Winslow v. Harold G. Ferguson Corp. (1944) 25 Cal. 2d 274, 277, 153 P.2d 714]* . If the successful party is a defendant against whom the case was dismissed, attorney's fees would only be payable out of any security posted under *Corp. Code § 800(d)*. If no security was posted or sought, such a successful defendant cannot recover attorney's fees [*Alcott v. M.E.V. Corp. (1987) 193 Cal. App. 3d 797, 799-800, 238 Cal. Rptr. 520]* . If security was voluntarily posted [*see Corp. Code § 800(e)*; 168.21[7]], the defendant may seek to enforce the security as the prevailing party at the conclusion of the case without having to meet retrospectively the normal statutory requirement [*see Corp. Code § 800(c)(1)*; § 168.21[1]] that, to force the posting of security, a defendant must show that the derivative suit has no reasonable possibility of benefitting the corporation or shareholders [*Donner Management Co. v. Schaffer (2006) 142 Cal. App. 4th 1296, 1305-1306, 48 Cal. Rptr. 3d 534* (as practical matter, defendant was prevailing party after plaintiff dismissed derivative suit without prejudice in view of board-appointed litigation committee's conclusion that maintaining suit was not in corporation's interest)].

Under the "substantial benefit" rule, a variant of the common fund doctrine, the successful plaintiff in a stockholder's derivative action may be awarded attorney's fees against the corporation if the latter received "substantial benefits" from the litigation, even though the benefits were not pecuniary and the action had not produced a fund from which they might be paid. Under the California rule, (1) an award of attorney's fees to a successful plaintiff may properly be measured by, and paid from, a common fund when his or her derivative action on behalf of a corporation has recovered

or protected a fund in fact; but (2) the existence of a fund is not a prerequisite of the award itself [*Fletcher v. A.J. Indus., Inc. (1968) 266 Cal. App. 2d 313, 320-322, 72 Cal. Rptr. 146]* .

The substantial benefit theory is not extended to successful defendants on the theory of reciprocity [*Alcott v. M.E.V. Corp. (1987) 193 Cal. App. 3d 797, 800-801, 238 Cal. Rptr. 520]* . The trial court has a duty to review an agreement to pay attorney's fees negotiated as part of the settlement of a shareholder derivative suit, but unlike the obligation of a court when fashioning a fee award, the court's task is simply to determine if the negotiated fee is fair and reasonable. The negotiated fee need not perfectly duplicate the fees that would be awarded under the "substantial benefit doctrine" [*Robbins v. Alibrandi (2005) 127 Cal. App. 4th 438, 443-444, 449, 25 Cal. Rptr. 3d 387* (reversing order approving settlement of attorney fees and remanding to trial court to determine if negotiated fee was fair and reasonable settlement of attorney's claim for fees)].

When the gravamen of a derivative action is breach of contract, and the contract contains an attorney's fee provision, *Civ. Code § 1717* governs the rights of parties to attorney's fees, and the bond provided for in *Corp. Code § 800* need not be applied [*Brusso v. Running Springs Country Club, Inc. (1991) 228 Cal. App. 3d 92, 103-108, 278 Cal. Rptr. 758* (majority had purchased country club shares from minority; purchase and sale agreement and lease both contained attorney's fees provision)]. In a derivative action for breach of contract, when the contract contains an attorney's fee provision, even the nonsignatory plaintiffs can be liable for the payment of attorney's fees to signing defendants if they would have been entitled to attorney's fees under the substantial benefit doctrine had they prevailed [*Brusso v. Running Springs Country Club, Inc. (1991) 228 Cal. App. 3d 92, 109-111, 278 Cal. Rptr. 758]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsDerivative ActionsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral Overview

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14-168 California Forms of Pleading and Practice--Annotated § 168.23

§ 168.23 Essential Allegations

A complaint in a shareholder's derivative suit should allege facts showing all of the following:

- That plaintiff was a shareholder, of record or beneficially, or the holder of voting trust certificates at the time of the transaction or any part of the transaction of which plaintiff complains, or that plaintiff's shares or voting trust certificates thereafter devolved upon plaintiff by operation of law from a holder who was a holder at the time of the transaction or any part of the transaction complained of; provided, however, that any shareholder who does not meet those requirements may nevertheless be allowed in the discretion of the court to maintain the action on a preliminary showing to, and determination by, the court, by motion and after a hearing, at which the court may consider any evidence, by affidavit or testimony, that it deems material, that [*Corp. Code § 800(b)(1)*]:

    - There is a strong prima facie case in favor of the claim asserted on behalf of the corporation;

    - No other similar action has been, or is likely to be, instituted;

    - The plaintiff acquired the shares before there was disclosure to the public or the plaintiff of the wrongdoing of which plaintiff complains;

    - Unless the action can be maintained, the defendant may retain a gain derived from defendant's willful breach of a fiduciary duty; and

    - The requested relief will not result in unjust enrichment of the corporation or any shareholder of the corporation (in this case, plaintiff should allege that he or she is a shareholder).

- The plaintiff's efforts to secure from the board such action as the plaintiff desires, or the reasons for not having made such an effort, and that he or she has either informed the corporation or the board in

writing of the ultimate facts of each cause of action against each defendant or delivered to the corporation or the board a true copy of the complaint which he or she proposes to file [*Corp. Code § 800(b)(2)*].

- A cause of action in the right of the corporation [*see Corp. Code § 800(b)*; *see also Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 106-107, 81 Cal. Rptr. 592, 460 P.2d 464* ; *McDermott v. Bear Film Co. (1963) 219 Cal. App. 2d 607, 611, 33 Cal. Rptr. 486]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureClass ActionsDerivative ActionsGeneral Overview

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14-168 California Forms of Pleading and Practice--Annotated §§ 168.24-168.39

[Reserved]

§§ 168.24[Reserved]

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14-168 California Forms of Pleading and Practice--Annotated § 168.40

§ 168.40 California Points and Authorites

For memoranda relating to shareholder derivative actions, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsDerivative ActionsGeneral Overview

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14-168 California Forms of Pleading and Practice--Annotated § 168.41

§ 168.41 State Statutes

Modification in amount of security necessary to maintain action. *Code Civ. Proc. §§ 996.010, 996.030*

Enforcement of liability on bond. *Code Civ. Proc. § 996.410 et seq.*

Requirements for instituting or maintaining shareholder's derivative action. *Corp. Code § 800*

Requirements for instituting or maintaining shareholder's derivative action against savings and loan associations. *Fin. Code § 6052*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawDepository InstitutionsState Savings AssociationsCivil ProcedureClass ActionsDerivative ActionsGeneral OverviewCivil ProcedureRemediesBondsGeneral Overview

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§ 168.42 California Rules of Court

Complex litigation. *Cal. Rules of Ct., Rule 3.400 et seq.*

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14-168 California Forms of Pleading and Practice--Annotated § 168.43

§ 168.43 Federal Rules of Civil Procedure

Derivative actions in federal district court. *Fed. R. Civ. P., Rule 23.1*

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-168 California Forms of Pleading and Practice--Annotated § 168.44

§ 168.44 Decisions

[1] Actions by Shareholders

[a] Derivative

Shareholder's action is derivative if gravamen of complaint is injury to corporation or to whole body of its stock or property without any severance or distribution among individual holders, or if the complaint seeks to recover assets for corporation or to prevent the dissipation of its assets. *Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 106-107, 81 Cal. Rptr. 592, 460 P.2d 464* ; *Gagnon Co., Inc. v. Nevada Desert Inn (1955) 45 Cal. 2d 448, 453, 289 P.2d 466* ; *Sutter v. General Petroleum Corp. (1946) 28 Cal. 2d 525, 530, 170 P.2d 898*

In shareholder's derivative suit, cause of action belongs to corporation and not to shareholder bringing action. *Melancon v. Superior Court (1954) 42 Cal. 2d 698, 708, 268 P.2d 1050*

In action for breach of fiduciary duty arising from alleged management improprieties and attendant decline in stock value, gravamen of complaint was harm to corporation and thus action was derivative action that plaintiff lacked standing to pursue; judgment of dismissal entered after trial court sustained demurrers without leave to amend affirmed. *Schuster v. Gardner (2005) 127 Cal. App. 4th 305, 309, 312-315, 25 Cal. Rptr. 3d 468*

Derivative plaintiff in action against securities brokerage was bound by arbitration clause in client agreement executed by corporation and brokerage; shareholder in derivative action is standing in shoes of corporation, and dispute fell with terms of arbitration clause. *Frederick v. First Union Securities, Inc. (2002) 100 Cal. App. 4th 694, 696-697, 122 Cal. Rptr. 2d 774*

When appellants' core claim was that defendants mismanaged corporation and entered into self-serving deals to sell its assets to third parties, trial court properly dismissed complaints. *Avikian v. WTC Financial Corp. (2002) 98 Cal. App 4th 1108, 1115-1117, 120 Cal. Rptr. 2d 243*

Members of LLC, who hold no direct ownership in company's assets, improperly pleaded causes of action for

fraudulent transfer; injury was to company itself and action could only be brought as derivative action on behalf of LLC. *Paclink Communications International, Inc. v. Superior Court (2001) 90 Cal. App. 4th 958, 964-965, 109 Cal. Rptr. 2d 436*

Minority shareholder as individual had no standing to bring action for breach of fiduciary duty against majority shareholder, but should have brought derivative action on behalf of corporation of which the two were sole shareholders; because all acts alleged to have caused individual's injury amounted to alleged misfeasance or negligence in managing corporation's business, causing business to be total failure, any obligations violated were duties owed directly and immediately to corporation. *Nelson v. Anderson (1999) 72 Cal. App. 4th 111, 124-126, 84 Cal. Rptr. 2d 753*

Secret profit to director is recoverable by derivative suit; officer and director who knowingly approved and participated in transaction is liable for loss suffered by corporation even though he or she personally received no consideration. *Burt v. Irvine Co. (1965) 237 Cal. App. 2d 828, 851, 47 Cal. Rptr. 392*

Stockholder is not entitled to maintain action in his or her own right against directors for destruction or diminution in value of stock; some individual injury is required if individual action is brought. *O'Hare v. Marine Elec. Co. (1964) 229 Cal. App. 2d 33, 36, 39 Cal. Rptr. 799*

Shareholder in derivative suit merely represents corporation which must itself have cause of action. *McDermott v. Bear Film Co. (1963) 219 Cal. App. 2d 607, 611, 33 Cal. Rptr. 486*

Shareholder's right to sue directors or wrongdoers when ultra vires, fraudulent, or illegal transaction has been consummated and wrong done to corporation is derivative and not primary, since any recovery must go to corporation for benefit of all stockholders. *Starbird v. Lane (1962) 203 Cal. App. 2d 247, 254-255, 21 Cal. Rptr. 280*

Essential elements for derivative suit are (1) injury to corporation or whole body of stockholders and (2) derivative aspect of cause of action which arises from fact that responsible officials fail or refuse to act. *Starbird v. Lane (1962) 203 Cal. App. 2d 247, 255, 21 Cal. Rptr. 280*

Action brought by stockholder to enforce liability under Corp. Code §§ 824, 825 is derivative in character. *Campbell v. Clark (1958) 159 Cal. App. 2d 432, 437, 324 P.2d 51*

[b] Nonderivative

Stockholder's individual suit is suit to enforce right against corporation which stockholder possesses as individual; individual wrong necessary to support suit is not required to be unique to that plaintiff but may affect substantial number of shareholders. *Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 107, 81 Cal. Rptr. 592, 460 P.2d 464* ; *Crain v. Electronic Memories & Magnetics Corp. (1975) 50 Cal. App. 3d 509, 521-522, 123 Cal. Rptr. 419*

Shareholder's class action on behalf of herself and other minority shareholders against majority shareholders for breach of fiduciary responsibility is nonderivative action when gravamen of cause of action is injury to plaintiff and other minority shareholders. *Jones v. H.F. Ahmanson & Co. (1969) 81 Cal. Rptr. 592, 460 P.2d 464*

Shareholder is entitled to sue as individual, rather than by derivative suit, when directly and individually injured though corporation may also have cause of action for same wrong. *Sutter v. General Petroleum Corp. (1946) 28 Cal. 2d 525, 530, 170 P.2d 898*

Minority shareholder's claim that majority stockholders paid themselves excessive compensation, thus depriving him of

his proportionate share of corporate profits, came "within the scope of allowable individual actions." *Jara v. Suprema Meats, Inc. (2004) 121 Cal. App. 4th 1238, 1258, 18 Cal. Rptr. 3d 187*

Plaintiff's action was individual, not derivative, when allegation was that defendant deceived him into exchanging valuable stock in acquired corporation for worthless stock in acquiring corporation; plaintiff therefore sought recovery for injury to himself. *Vega v. Jones, Day, Reavis & Pogue (2004) 121 Cal. App. 4th 282, 296-297, 17 Cal. Rptr. 3d 26*

As matter of law, shareholder is not entitled to recover damages for emotional distress for injury done to corporation; corporation is distinct legal entity. *Tan Jay Int't, Ltd. v. Canadian Indem. Co. (1988) 198 Cal. App. 3d 695, 706, 243 Cal. Rptr. 907*

Sole minority shareholder of subsidiary corporation who brought action against parent corporation and directors of subsidiary for allocating entire state and federal tax savings resulting from consolidated tax return to parent corporation properly stated causes of action in his individual capacity, rather than in derivative capacity, since he was seeking redress for injuries as sole minority shareholder rather than for injury to subsidiary. *Smith v. Tele-Communication, Inc. (1982) 134 Cal. App. 3d 338, 342-343, 184 Cal. Rptr. 571*

Suit is individual, not derivative, when corporation was about to be dissolved at time of sale of corporate stock and when corporation was dissolved promptly by purchaser; stockholder is capable of suing as individual when he or she is directly and individually injured. *Low v. Wheeler (1962) 207 Cal. App. 2d 477, 482-483, 24 Cal. Rptr. 538*

Fraud inducing plaintiff to sell stock to his or her damage creates individual, not derivative, cause of action. *Campbell v. Clark (1958) 159 Cal. App. 2d 439, 443, 324 P.2d 55*

[c] Rules Against Joinder

Action of personal nature resulting in injury to plaintiff individually is not joinable with derivative action for injuries to corporation. *Shenberg v. DeGarmo (1943) 61 Cal. App. 2d 326, 331, 143 P.2d 74* (decided prior to enactment of *Code Civ. Proc. § 427.10* (permissive joinder))

[2] Appellate Court's Review of Trial Court Decision

In determining whether trial judge abused discretion in deciding there was no reasonable possibility that prosecution of derivative suit would benefit corporation, appellate court is required to evaluate possible defenses plaintiffs would have to overcome at trial in order to prevail. *Marble v. Latchford Glass Co. (1962) 205 Cal. App. 2d 171, 175, 22 Cal. Rptr. 789*

[3] Attorney's Fees

Trial court has duty to review agreement to pay attorney fees negotiated as part of settlement of shareholder derivative suit; unlike obligation of court when fashioning fee award, court's task is to determine if negotiated fee is fair and reasonable; negotiated fee need not perfectly duplicate fees that would be awarded under "substantial benefit doctrine." *Robbins v. Alibrandi (2005) 127 Cal. App. 4th 438, 443-444, 449, 25 Cal. Rptr. 3d 387*

Defendant against whom case was dismissed is only able to recover attorney's fees out of any security posted under *Corp. Code § 800(d)*; if no security was posted or sought, successful defendant is unable to recover attorney's fees. *Alcott v. M.E.V. Corp. (1987) 193 Cal. App. 3d 797, 799-800, 238 Cal. Rptr. 520*

Substantial benefit theory is not extended to successful defendants on theory of reciprocity. *Alcott v. M.E.V. Corp. (1987) 193 Cal. App. 3d 797, 800-801, 238 Cal. Rptr. 520*

Defendant is not entitled to award of attorney's fees when security is not furnished and action is dismissed on that ground. *Freeman v. Goldberg (1961) 55 Cal. 2d 622, 626-627, 12 Cal. Rptr. 668, 361 P.2d 244*

Allowance of counsel fees from common fund is proper. *Winslow v. Harold G. Ferguson Corp. (1944) 25 Cal. 2d 274, 277, 153 P.2d 714*

Attorney's fees incurred by plaintiff in derivative suit is awardable out of moneys collected on behalf of corporation as result of suit. *Fox v. Hale & Norcross S.M. Co. (1895) 108 Cal. 475, 477, 41 P. 328* ; see also *Fletcher v. A.J. Indus., Inc. (1968) 266 Cal. App. 2d 313, 320, 322, 72 Cal. Rptr. 146*

Attorney's fees awardable to plaintiff in derivative suit directly against corporation when corporation derives a "substantial benefit" from suit, even though no "common fund" is recovered or protected by suit. *Fletcher v. A.J. Indus., Inc. (1968) 266 Cal. App. 2d 313, 323-324, 72 Cal. Rptr. 146*

[4] Bankruptcy Proceedings

Shareholders are required to obtain consent and authorization of bankruptcy court before bringing derivative suit when corporation has filed petition in bankruptcy in federal bankruptcy court. *Miller v. R.K.A. Management Corp. (1979) 99 Cal. App. 3d 460, 467, 160 Cal. Rptr. 164* (dicta)

[5] Defenses

"Special litigation committee defense" must be allowed whenever committee of disinterested directors acting in good faith has determined that derivative action is not in best interests of corporation--if possible on motion, but if necessary in full trial; defense can apply to homeowners association. *Finley v. Superior Court (2000) 80 Cal. App. 4th 1152, 1161-1163, 96 Cal. Rptr. 2d 128*

Doctrine of corporate ratification is not applicable in shareholder derivative actions in which shareholders, not corporation directly, claim breach of fiduciary duty by directors in approving contract or transaction. *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1274, 256 Cal. Rptr. 702 , disapproved on other grounds in Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16,72 Cal. Rptr. 3d 129, 175 P.3d 1184*

Shareholder ratification [*Corp. Code § 310(a)(1)*] is no defense to allegation in derivative action that directors breached their fiduciary duty in approving agreements; *Corp. Code § 310* only goes to contract's voidness or voidability and does not prevent attack on other grounds. *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1273, 256 Cal. Rptr. 702 , disapproved on other grounds in Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1119 n.16,72 Cal. Rptr. 3d 129, 175 P.3d 1184*

Stockholder in derivative suit is barred by laches when he or she fails to act as soon as learning of fraudulent or wrongful act. *Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp. (1962) 200 Cal. App. 2d 322, 326, 19 Cal. Rptr. 208*

Stockholder's derivative suit is equitable action to which doctrine of unclean hands is applicable. *Rosenfeld v. Zimmer (1953) 116 Cal. App. 2d 719, 722, 254 P.2d 137*

[6] Demand on Corporation

State law governs "demand" requirements in federal derivative action; federal court may not require demand if it would be excused as futile under state law. *Kamen v. Kemper Financial Services, Inc. (1991) 500 U.S. 90, 108-109, 111 S. Ct. 1711, 114 L. Ed. 2d 152* (action under Investment Securities Act of 1940, *15 U.S.C. § 80a-1 et seq.*, remanded for determination whether plaintiff had adequately pleaded futility)

Complaint in derivative action is required to allege demand on board of directors. *Starbird v. Lane (1962) 203 Cal. App. 2d 247, 260-261, 21 Cal. Rptr. 280*

Requirement that efforts to secure desired action by board of directors be alleged "with particularity" is not satisfied by allegation that "further demand as stockholder would be futile." *Fairchild v. Bank of America (1961) 192 Cal. App. 2d 252, 259, 13 Cal. Rptr. 491*

General rule that plaintiff in derivative action must plead demand on, and refusal by, directors to act, but demand and refusal are not required to be alleged if facts pleaded demonstrate it would have been futile. *Reed v. Norman (1957) 152 Cal. App. 2d 892, 898, 314 P.2d 204* ; *Pourroy v. Gardner (1932) 122 Cal. App. 521, 526* ; see also *Wickersham v. Crittenden (1895) 106 Cal. 329, 331, 39 P. 603* ; *Ashton v. Dashaway Asso. (1890) 84 Cal. 61, 70, 23 P. 1091*

Demand on directors not necessary when conspiracy, fraud, or criminal conduct of defendants is charged. *Reed v. Norman (1957) 152 Cal. App. 2d 892, 898, 314 P.2d 204*

When demand on board of directors was made and board was dominated by controlling shareholder, waiting for formal refusal before bringing derivative action was unnecessary because futile. *Koshaba v. Koshaba (1942) 56 Cal. App. 2d 302, 308, 132 P.2d 854*

[7] Equitable Action

Stockholders' derivative suit is equitable action to which doctrine of unclean hands applies. *Rosenfeld v. Zimmer (1953) 116 Cal. App. 2d 719, 722, 254 P.2d 137*

[8] Fiduciary Duty of Directors and Controlling Shareholders

Directors and controlling shareholders are fiduciaries. *Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 108, 81 Cal. Rptr. 592, 460 P.2d 464* ; *Brown v. Halbert (1969) 271 Cal. App. 2d 252, 264, 76 Cal. Rptr. 781* ; *Efron v. Kalmanovitz (1964) 226 Cal. App. 2d 546, 556, 38 Cal. Rptr. 148*

[9] Parties

Corporation is indispensable party to shareholder's derivative action; dismissal of action against corporation at any stage of proceeding results in discontinuance of action as to all other defendants for lack of jurisdiction. *Beyerbach v. Juno Oil Co. (1954) 42 Cal. 2d 11, 28, 265 P.2d 1* (decided prior to 1972 amendment of *Code Civ. Proc. § 389*)

Reorganization trustee is indispensable party in action by officers and directors of corporation involved in reorganization proceedings under federal *Bankruptcy Act. Miller v. R.K.A. Management Corp. (1979) 99 Cal. App. 3d 460, 467, 160 Cal. Rptr. 164*

Dismissal of suit proper in shareholder's derivative action when minimum contacts of individual defendants with state were not established leaving only corporations as named defendants. *Flick v. Exxon Corp. (1976) 58 Cal. App. 3d*

212, 221, 129 Cal. Rptr. 760

Pledgee-owner of security interest in stock has sufficient interest in stock to entitle him or her to bring derivative action. *Weingand v. Atlantic Savings & Loan Assn., (1970) 1 Cal. 3d 806, 818, 83 Cal. Rptr. 650, 464 P.2d 106*

[10] Plaintiff as Fiduciary; Court's Control of Action

Shareholder bringing derivative suit is fiduciary similar to guardian ad litem. *Whitten v. Dabney (1915) 171 Cal. 621, 630-631, 154 P. 312* (leading case); *see also Hogan v. Ingold (1952) 38 Cal. 2d 802, 809-812, 243 P.2d 1*

Composition agreement between shareholder and defendants in derivative suit not to be given "slightest efficacy" until, after scrutiny and examination, trial court determines that corporation's rights are fully protected. *Whitten v. Dabney (1915) 171 Cal. 621, 632, 154 P. 312*

Duty of plaintiff in derivative suit is analogous to duty of volunteer rescuer in that plaintiff's action must not increase harm or risk of harm to corporation or other shareholders. *Heckmann v. Ahmanson (1985) 168 Cal. App. 3d 119, 132-133, 214 Cal. Rptr. 177*

Shareholders who commenced derivative suit as part of their takeover strategy and later settled suit and sold their shares to corporation breached their fiduciary duty; imposition of constructive trust on shareholders' profits on sale of shares to corporation was proper remedy, and therefore, preliminary injunction restraining disposal of profits during pendency of suit was also proper. *Heckmann v. Ahmanson (1985) 168 Cal. App. 3d 119, 132-133, 135-136, 214 Cal. Rptr. 177*

Plaintiff in derivative action not entitled to voluntarily dismiss action without consent of trial court. *Ensher v. Ensher, Alexander & Barsoom (1960) 187 Cal. App. 2d 407, 410, 9 Cal. Rptr. 732* ; *Spellacy v. Superior Court (1937) 23 Cal. App. 2d 142, 148, 72 P.2d 262*

[11] Racketeer Influenced and Corrupt Organizations Act

Threat of shareholders' derivative action did not constitute predicate sufficient to state civil cause of action under RICO [*18 U.S.C. § 1961 et seq.*]. *First Pacific Bancorp, Inc. v. BRO (9th Cir. 1988) 847 F.2d 542, 547*

[12] Right to Bring and Maintain Suit

[a] In General

Shareholder who brought derivative action for short swing profits taken by insiders [*see* § 16(b) of Securities Exchange Act of 34, *15 U.S.C. § 78p(b)*] was not deprived of standing by merger in which plaintiff's shares were exchanged for those of parent corporation. *Gollust v. Mendell (1991) 501 U.S. 115, 126-127, 111 S. Ct. 2173, 115 L. Ed. 2d 109*

Shareholder of corporation that was incorporated in British Virgin Islands was not entitled to sue derivatively in California court without first obtaining leave from High Court of British Virgin Islands as required by British Virgin Islands Business Companies Act. *Vaughn v. LJ Internat., Inc. (2009) 174 Cal. App. 4th 213, 217, 94 Cal. Rptr. 3d 166*

Trust beneficiary, whose beneficial interest is in corporate stock registered in name of testamentary trustees, has standing to bring derivative action on behalf of corporation. *Pearce v. Superior Court (1983) 149 Cal. App. 3d 1058, 1060, 1062-1068, 197 Cal. Rptr. 238*

Pledgee of corporate stock has sufficient interest in stock to entitle him or her to bring suit in equity concerning preservation and protection of assets and property of corporation. *Weingand v. Atlantic Savings & Loan Assn., (1970) 1 Cal. 3d 806, 818, 83 Cal. Rptr. 650, 464 P.2d 106*

Motion to dismiss plaintiff's appeal in stockholder's derivative action not sustainable on ground that plaintiff no longer owned stock in corporation when plaintiff's affidavit stated that execution purchaser's bid was for, and on account of, plaintiff, and any rights or interest in shares sold at execution were for plaintiff's benefit. *Reed v. Norman (1957) 48 Cal. 2d 338, 342, 309 P.2d 809*

Legal representative of deceased stockholder was proper party to bring derivative action pending administration of estate; heir or legatee not entitled to bring action until distribution of shares. *Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 17, 108 P.2d 906*

Shareholder's derivative action for fraud accrues on discovery by particular shareholder bringing action of facts constituting fraud even though other shareholders discovered facts earlier but did not bring action. *Whitten v. Dabney (1915) 171 Cal. 621, 629, 154 P. 312*

Derivative lawsuit for malpractice against corporate outside counsel could not proceed due to unique attorney-client privilege issues; because shareholders are not holders of privilege, they cannot waive it merely by filing their action on corporation's behalf; in absence of corporate client's waiver, third party attorney is effectively foreclosed from mounting any meaningful defense to action. *McDermott, Will & Emery v. Superior Court (2000) 83 Cal. App. 4th 378, 383-385, 99 Cal. Rptr. 2d 622*

When complaint by minority shareholders contains facts which entitle them to individual, and not solely derivative, relief, judgment on pleadings is error. *Crain v. Electronic Memories & Magnetics Corp. (1975) 50 Cal. App. 3d 509, 524, 123 Cal. Rptr. 419*

Plaintiff who deposited and paid out moneys for benefit of corporation but who is not listed as shareholder, partner, director, officer, or fiduciary having legal fiduciary interest in corporation did not show legal nexus between self and corporation necessary for derivative action. *Stockton v. Ortiz (1975) 47 Cal. App. 3d 183, 195, 120 Cal. Rptr. 456*

Controlling shareholder in foreign corporation seeking redress in California courts was not able to circumvent California procedural and substantive law pertaining to derivative actions by asserting contract that benefits foreign corporation is one for his or her benefit and is not able to recover under third-party beneficiary theory when contract if entered into in foreign jurisdiction would be illegal and unenforceable. *Stockton v. Ortiz (1975) 47 Cal. App. 3d 183, 120 Cal. Rptr. 456*

Majority shareholder is liable to corporation in derivative action and to minority shareholders for sale of its shares to person who looted corporation when majority shareholder became directly aware of facts during negotiations for sale that would have alerted prudent person that looting was likely. *DeBaun v. First W. Bank & Trust Co. (1975) 46 Cal. App. 3d 686, 697, 120 Cal. Rptr. 354*

Complaint in derivative action is required to allege that plaintiff is "registered shareholder." *Fairchild v. Bank of America (1961) 192 Cal. App. 2d 252, 258-259, 13 Cal. Rptr. 491* (decided under former *Code Civ. Proc. § 834*)

Corporation is real party in interest in derivative action; if corporation is not in position to attack transaction, stockholders not able to maintain derivative suit. *Rosenfeld v. Zimmer (1953) 116 Cal. App. 2d 719, 722, 254 P.2d 137*

[b] Duty of Board of Directors

Management of corporation owes to stockholders duty to take proper steps to enforce all claims which corporation may have; shareholders has right to do so when management fails to perform that duty. *Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 107, 81 Cal. Rptr. 592, 460 P.2d 464*

Shareholder is not authorized to bring derivative suit when board of directors reasonably believes its refusal to commence action is good business judgment in best interest of corporation. *Beehan v. Lido Isle Community Assn. (1977) 70 Cal. App. 3d 858, 865, 137 Cal. Rptr. 528* ; *Marsili v. Pacific Gas & Elec. Co. (1975) 51 Cal. App. 3d 313, 324, 124 Cal. Rptr. 313* ; *Findley v. Garrett (1952) 109 Cal. App. 2d 166, 174, 240 P.2d 421*

Directors have same discretion with respect to prosecution of claims on behalf of corporation as they have in other business matters; mere fact that recovery for corporation would probably result from litigation does not require that action be commenced to enforce claim. *Findley v. Garrett (1952) 109 Cal. App. 2d 166, 177, 240 P.2d 421*

To warrant interference by court in favor of minority stockholders, case is required to plainly show that acts complained of are so far opposed to true interests of corporation itself as to lead to clear inference that they were done with intent to subserve some outside purpose. *Fornaseri v. Cosmosart Realty & Bldg. Corp. (1929) 96 Cal. App. 549, 558, 274 P. 597* ; *see also Fairchild v. Bank of America (1961) 192 Cal. App. 2d 252, 257, 13 Cal. Rptr. 491*

In absence of fraud, breach of trust, or transactions which are ultra vires, conduct of directors in management of affairs of corporation is not subject to attack by minority stockholders in suit in equity, when those acts are discretionary and are performed in good faith, reasonably believing them to be for best interest of corporation. *Fornaseri v. Cosmosart Realty & Bldg. Corp. (1929) 96 Cal. App. 549, 557, 274 P. 597* ; *see also Fairchild v. Bank of America (1961) 192 Cal. App. 2d 252, 257, 13 Cal. Rptr. 491*

Stockholders have no right to interfere with right of corporation to sue and be sued concerning corporate rights or liabilities except when governing directors or trustees refuse to act or are guilty of fraud in maintenance or defense of action. *Pourroy v. Gardner (1932) 122 Cal. App. 521, 526, 10 P.2d 815*

[13] Savings and Loan Holding Companies

Derivative suits brought by shareholders of savings and loan holding companies as governed by Corp. Code § 834 (predecessor of *Corp. Code § 800*) rather than former *Fin. Code § 7616* (*now see Fin. Code § 6052*). *Mueller v. MacBan (1976) 62 Cal. App. 3d 258, 267-268, 132 Cal. Rptr. 222*

[14] Security

[a] Appeal

Order denying motion for security is nonappealable order. *Efron v. Kalmanovitz (1960) 185 Cal. App. 2d 149, 152, 156-157, 8 Cal. Rptr. 107*

Judgment of dismissal is appealable in derivative action security order proceedings; order requiring plaintiff to furnish security is nonappealable order. *Woodman v. Ackerman (1967) 249 Cal. App. 2d 644, 652, 57 Cal. Rptr. 687*

[b] Burden of Proof

Burden of establishing statutory condition is on party moving for security. *Burt v. Irvine Co. (1965) 237 Cal. App. 2d 828, 868, 47 Cal. Rptr. 392*

[c] Constitutionality

Requirement of posting security is not unconstitutional. *Beyerbach v. Juno Oil Co. (1954) 42 Cal. 2d 11, 19-24, 265 P.2d 1*

[d] Effect of Dismissal

Dismissal of derivative suit for failure to furnish security is not determination of merits of any issue in action. *Ensher v. Ensher, Alexander & Barsoom (1960) 187 Cal. App. 2d 407, 411, 9 Cal. Rptr. 732*

[e] Modification

Motion to amend time for deposit provision of order to furnish security is required to be made on notice to adverse parties; ex parte order is ineffective. *Beyerbach v. Juno Oil Co. (1954) 42 Cal. 2d 11, 28, 265 P.2d 1*

Trial court has discretion in granting or denying motion to change form, amount, and time for furnishing security. *Beyerbach v. Juno Oil Co. (1954) 42 Cal. 2d 11, 29, 265 P.2d 1*

Trial court is entitled to order posting of additional security by plaintiff after plaintiff had appealed from judgment; purpose of remedy afforded by provision for security is to provide full indemnity for expenses of defense incurred throughout litigation. *Kaiser v. Easton (1957) 151 Cal. App. 2d 307, 314, 311 P.2d 108*

[f] Motion

Taking of depositions in course of preparing for eventual trial of shareholder's derivative suit is step in "prosecution" of action within "stay" provisions of Corp. Code § 834(c). *Melancon v. Superior Court (1954) 42 Cal. 2d 698, 707, 268 P.2d 1050*

Denial of motion to require security is improper when defendants' time to "move, answer or otherwise plead the complaint" was extended past 30 days after service of summons by series of written or oral stipulations between counsel. *Consolidated Dock & Storage Co. v. Superior Court (1971) 18 Cal. App. 3d 949, 951-952, 96 Cal. Rptr. 254*

Petition for writ of mandate is proper remedy when court refuses to hear motion for security on ground it was not timely. *Consolidated Dock & Storage Co. v. Superior Court (1971) 18 Cal. App. 3d 949, 953, 96 Cal. Rptr. 254*

Defendants in derivative suit entitled to order requiring plaintiff to furnish security when trial court found that there was no reasonable probability that prosecution of one out of three causes of action alleged would result in benefit to corporation or its security holders. *Bailey v. Fosca Oil Co. (1960) 180 Cal. App. 2d 289, 295-296, 4 Cal. Rptr. 474*

[g] Nature and Amount of Security

Trial court has discretion in fixing nature and amount of security. *Beyerbach v. Juno Oil Co. (1954) 42 Cal. 2d 11, 27, 265 P.2d 1*

Aggregate amount of security that plaintiff may be required to provide pursuant to *Corp. Code § 800* is limited to $50,000 as to all moving parties. *Hale v. Southern California IPA Medical Group (2001) 86 Cal. App. 4th 919, 927-928, 103 Cal. Rptr. 2d 773*

In derivative action, value or percentage of plaintiff's stock holdings in corporation has no bearing on issue whether security is to be required. *Suburban Water Sys. v. Superior Court (1968) 264 Cal. App. 2d 956, 961, 71 Cal. Rptr. 45*

[h] When Applicable

Requirement of security does not apply only to strike suits. *Wood v. Gordon (1952) 112 Cal. App. 2d 374, 377-378, 246 P.2d 84*

[i] When Inapplicable

Posting security was inapplicable to action by shareholders seeking to vindicate personal rights; prohibition was appropriate remedy to restrain court from requiring security. *Hagan v. Superior Court (1960) 53 Cal. 2d 498, 501-503, 2 Cal. Rptr. 288, 348 P.2d 896*

[15] Statutory Limits on Derivative Suits

Power of state over derivative actions is plenary. *Hogan v. Ingold (1952) 38 Cal. 2d 802, 812, 243 P.2d 1*

Corp. Code § 834 (predecessor of *Corp. Code § 800*) does not of itself create any liability; statute merely prescribes conditions on which equity suit may be brought and maintained. *Hogan v. Ingold (1952) 38 Cal. 2d 802, 812, 243 P.2d 1*

Corp. Code § 834 is not limited in application to strike suits, but applies as well to actions by bona fide shareholders holding very substantial interest in corporation. *Suburban Water Sys. v. Superior Court (1968) 264 Cal. App. 2d 956, 960, 71 Cal. Rptr. 45*

[16] Stay Provisions

Taking of depositions is step in "prosecution" of action and therefore is within stay provisions of Corp. Code § 834. *Melancon v. Superior Court (1954) 42 Cal. 2d 698, 707, 268 P.2d 1050*

[17] Termination of Derivative Actions

Federal courts are required to apply state law governing authority of independent directors to discontinue derivative suits to extent state law is consistent with policies of Investment Company Act (*15 U.S.C. § 80a-1 et seq.*) and Investment Advisers Act (*15 U.S.C. § 80b-1 et seq.*); neither states nor federal courts are required to absolutely forbid director termination of all nonfrivolous actions. *Burks v. Lasker (1979) 441 U.S. 471, 486, 99 S. Ct. 1831, 60 L. Ed. 2d 404*

Legal Topics:

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

Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesFiduciary ResponsibilitiesGeneral OverviewBusiness & Corporate LawCorporationsShareholdersShareholder Duties & LiabilitiesControlling ShareholdersFiduciary ResponsibilitiesCivil ProcedureEquityMaximsClean Hands PrincipleCivil ProcedureClass ActionsDerivative ActionsDemand RequirementCivil ProcedureClass ActionsDerivative ActionsOwnership Requirement

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§ 168.45 Law Reviews

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Comment, *California's New General Corporation Law: Prospects For Minority Shareholders, 7 Pac. L.J. 706 (1976)*

Comment, *Verification as a Safeguard Against Abuse of Stockholders' Derivative Suits, 18 Stan. L. Rev. 1221 (1966)*

Note, *Shareholder Derivative Suits Under Sections 10(b) and 14(a) of the Securities Exchange Act, 18 Stan. L. Rev. 1339 (1966)*

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Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesDefensesBusiness Judgment RuleBusiness & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesFiduciary ResponsibilitiesDuty of Good FaithCivil ProcedureClass ActionsDerivative ActionsGeneral OverviewCivil ProcedureClass ActionsDerivative ActionsOwnership Requirement

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§ 168.46 Text References

Ballantine and Sterling, California Corporation Laws (Matthew Bender)

Ch. 6, *Management: Duties and Liabilities of Directors and Controlling Shareholders*, §§ 100-110

Ch. 12, *Corporate Acquisitions, Mergers, and Reorganizations*, §§ 257-257.07

Ch. 14, *Litigation Involving Corporations and Shareholders*, §§ 290-294

Marsh, California Corporation Law and Practice, ch. X, *Fiduciary Duties of Promoters, Directors, Officers and Controlling Shareholders*, §§ 10.2-10.44; ch. XIV, *Shareholders' Rights*, §§ 14.20-14.37

Witkin, Summary of California Law, vol. 9, *Corporations, §§ 179-188* (9th ed. 1989)

Legal Topics:

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

§§ 168.47[Reserved]

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14-168 California Forms of Pleading and Practice--Annotated § 168.60

§ 168.60 Complaint--Shareholder's Derivative Action [Corp. Code § 800(b)]--General Form

[1] FORM Complaint--Shareholder's Derivative Action [Corp. Code § 800(b)]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR _____ [*specify, e.g.*, DAMAGES]
a Corporation, and _____	)	
[*name(s)*],	)	
Defendants.	)	
	)	

Plaintiff alleges:

1. Defendant _____ [*name*], hereinafter referred to as "corporation," is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California and has its principal place of business in _____ County, California.

2. _____ [*Allege capacity and residence of other defendants, e.g.*, Defendant is a resident of _____ County, California].

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

[4. At all times herein mentioned each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the scope of such agency.]

[*EITHER*]

5. At all times herein mentioned, and at the time of the transaction complained of herein, plaintiff was the _____ [_____ (record *or* beneficial) holder of _____ (*number*) shares of stock *or* holder of _____ (*number*) voting trust certificates for shares] of the corporation.

[*OR*]

5. Plaintiff is the _____ [_____ (record *or* beneficial) holder of _____ (*number*) shares of stock *or* holder of _____ (*number*) voting trust certificates for shares] of the corporation. _____ [That stock *or* Those voting trust certificates] devolved upon plaintiff by operation of law from _____ [*name*], who was a _____ [_____ (record *or* beneficial) holder of the _____ (stock *or* voting trust certificates)] at the time of the transaction complained of herein.

[*OR, if plaintiff will seek order excepting him/her from contemporaneous ownership requirement.*]

5. Plaintiff is a _____ [shareholder of record *or* beneficial owner of shares *or* holder of voting trust certificates representing shares] of the corporation.

[*CONTINUE*]

[6. *Allege facts stating cause of action against defendant(s), other than the corporation, which show injury to corporation.*]

[*EITHER*]

7. On or about _____ [*date*], plaintiff made the following efforts to secure action by the board of directors of the corporation to pursue the above claim against the aforementioned defendants: _____ [*set forth with particularity such efforts*]. On _____ [*date*], plaintiff _____ [informed the board of directors in writing of the ultimate facts of each cause of action herein alleged *or* delivered to the board of directors a true copy of the complaint which plaintiff proposed to file] and demanded that the board of directors take such action as is necessary for the corporation to prosecute the cause of action against the aforementioned defendant(s). The board of directors and the corporation refused, and continue to refuse, to prosecute this action and plaintiff's efforts to obtain such action have failed for the following reasons: _____ [*set forth reasons board of directors failed to act on the claim*]. In so refusing to prosecute this action the board of directors did not act in good faith or in any reasonable belief that its refusal to commence this action was good business judgment or in the best interest of the corporation. Rather, this refusal by the board of directors was in the exercise of bad faith and breach of its fiduciary duty to maintain and defend the interests of the corporation.

[*OR*]

7. Plaintiff did not make any effort to secure action from the board of directors in prosecuting this action since any such effort would have been futile in that _____ [*set forth facts demonstrating futility of demand*]. However, plaintiff, on _____ [*date*], _____ [informed the corporation in writing of the ultimate facts of each cause of action herein alleged against each defendant *or* delivered to the corporation a true copy of the complaint which plaintiff then proposed to file].

[*CONTINUE*]

8. If plaintiff is successful in this action, a substantial benefit will result to defendant corporation on whose behalf this action is prosecuted and plaintiff is entitled to his/her attorney's fees incurred herein in the sum of $_____ against the corporation.

WHEREFORE, plaintiff prays judgment against defendants _____ [*specify names of defendants but do not include the corporation*].

1. _____ [*Specify relief sought, e.g.*, For damages in the sum of $_____];

[2. For reasonable attorney's fees in the sum of $_____;]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This complaint is for use in shareholder's derivative actions. It alleges:

- That plaintiff was a record or beneficial holder of shares, or a holder of voting trust certificates at the time of all or part of the transaction complained of, or that his or her shares or voting trust certificates devolved on him or her by operation of law from one who was a holder at the time of all or part of the transaction complained of, or, if plaintiff is going to seek an order excepting him or her from the contemporaneous ownership requirement, that plaintiff is presently a record or beneficial holder of

shares or a holder of voting trust certificates (Paragraph 5) [*see Corp. Code § 800(b)*];

- The cause of action that accrued to the corporation (Paragraph 6) [*see Corp. Code § 800(b)*; *see also McDermott v. Bear Film Co. (1963) 219 Cal. App. 2d 607, 611, 33 Cal. Rptr. 486]* ; and

- Plaintiff's efforts to secure the desired action from the board of directors, plaintiff's written notice informing the board of the ultimate facts of each cause of action or delivery of a copy of the proposed complaint, and the reasons for plaintiff's failure to obtain the desired action or the reasons for not making such an effort (Paragraph 7) [*see Corp. Code § 800(b)*; *see also Reed v. Norman (1957) 152 Cal. App. 2d 892, 898, 314 P.2d 204* (allegations demonstrating futility of demand as justifiable reason for not making or pleading demand)].

The complaint also alleges that plaintiff's success in prosecuting the action will result in a substantial benefit to the corporation for which plaintiff is entitled to an award of his or her attorney's fees against the corporation (Paragraph 8) [*Fletcher v. A.J. Indus., Inc. (1968) 266 Cal. App. 2d 313, 323-324, 72 Cal. Rptr. 146* ; *see also Robbins v. Alibrandi (2005) 127 Cal. App. 4th 438, 443-444, 448, 25 Cal. Rptr. 3d 387* (discussing substantial benefit rule in context of court's duty to review agreement to pay attorney fees negotiated as settlement of derivative suit)].

For a complaint for a derivative action based on an illegal loan to a director or guaranty of a director's obligation, see *§ 167.183*.

[3] Allegations Regarding Futility of Prefiling Demand

The demand futility rule is not a mere pleading requirement that drops out of the case once a derivative suit survives a demurrer [*Oakland Raiders v. National Football League (2001) 93 Cal. App. 4th 572, 584-586, 113 Cal. Rptr. 2d 255* (rejecting contention that trial court erred by considering demand futility as element of derivative claims that is subject to proof)]. The test for proving demand futility is whether the facts show a reasonable doubt that (1) the directors are disinterested and independent, and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment [*Oakland Raiders v. National Football League (2001) 93 Cal. App. 4th 572, 587, 113 Cal. Rptr. 2d 255]* .

Broad conclusionary allegations that directors participated in, conspired in, aided, abetted, or benefitted from the activities alleged to have harmed the corporation are insufficient to establish that it would have been futile for plaintiff to demand action by the board of directors prior to filing a derivative action. The complaint must allege facts that show directors had knowledge of, participated in, or benefitted from the wrongdoing, or were otherwise disabled from exercising independent business judgment. The complaint must allege facts specific to each director from which the court can conclude that the particular director could or could not be expected to fairly evaluate the claims of the shareholder plaintiff [*Corp. Code § 800(b)(2)*; *Shields v. Singleton (1993) 15 Cal. App. 4th 1611, 1621-1622, 19 Cal. Rptr. 2d 459]* .

[4] Verification

Verification is not required, but verification of the complaint requires that each defendant file a verified answer [*Code Civ. Proc. § 446*], precluding a general denial [*Code Civ. Proc. § 431.30(d)*].

[5] Jurisdiction

A stockholder's derivative suit is an equitable action [*Rosenfeld v. Zimmer (1953) 116 Cal. App. 2d 719, 722, 254 P.2d 137]* and, therefore, is within the residual equity jurisdiction of the superior court as an unlimited civil case [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86*].

[6] State Statutes

Conditions on right to bring shareholder's derivative action. *Corp. Code § 800(b)*; *Fin. Code § 7616*

[7] Decisions

Corporation is indispensable party to shareholder's derivative action. *Beyerbach v. Juno Oil Co. (1954) 42 Cal. 2d 11, 28, 265 P.2d 1* (decided prior to 1972 amendment of *Code Civ. Proc. § 389*)

Plaintiff's attorney's fees is recoverable in derivative action. *Fox v. Hale & Norcross S.M. Co. (1895) 108 Cal. 475, 477, 41 P. 328* ; *Fletcher v. A.J. Indus., Inc. (1968) 266 Cal. App. 2d 313, 323-324, 72 Cal. Rptr. 146*

Plaintiff in derivative action represents corporation which must itself have cause of action. *McDermott v. Bear Film Co. (1963) 219 Cal. App. 2d 607, 611, 33 Cal. Rptr. 486*

Essential elements of derivative actions. *Starbird v. Lane (1962) 203 Cal. App. 2d 247, 254-255, 21 Cal. Rptr. 280*

General rule that plaintiff must plead demand on, and refusal by, directors to act, but such an allegation is not required if facts pleaded demonstrate demand would have been futile. *Reed v. Norman (1957) 152 Cal. App. 2d 892, 898, 314 P.2d 204*

Shareholder is not entitled to bring derivative suit where board of directors in good faith and within scope of discretionary powers refuses to commence suit. *Findley v. Garrett (1952) 109 Cal. App. 2d 166, 174, 240 P.2d 421* ; *see also Pourroy v. Gardner (1932) 122 Cal. App. 521, 526, 10 P.2d 815*

[8] Text References

Ballantine and Sterling, California Corporation Laws, Ch. 14, *Litigation Involving Corporations and Shareholders, §§ 290-294* (Matthew Bender)

[9] Cross References

For a related form, see *§ 162.43*.

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14-168 California Forms of Pleading and Practice--Annotated § 168.61

§ 168.61 Notice of Motion for Court Order Excusing Plaintiff From Contemporaneous Ownership Requirement [Corp. Code § 800(b)(1)]

[1] FORM Notice of Motion for Court Order Excusing Plaintiff From Contemporaneous Ownership Requirement [Corp. Code § 800(b)(1)]

[*Caption. See § 168.60.*]

To defendants _____ [*name of corporation and other defendant*(*s*)] and their attorneys of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, plaintiff will, and hereby does, move for an order allowing plaintiff to maintain this derivative action under the exception to the contemporaneous ownership requirement contained in *California Corporations Code Section 800(b)(1)*. The motion will be made on the following grounds:

1. That there is a strong prima facie case in favor of the claim asserted on behalf of the corporation;

2. That no other similar action has been, or is likely to be, instituted;

3. That the plaintiff acquired the shares of the corporation before there was disclosure to the public or to the plaintiff of the wrongdoing of which plaintiff complains;

4. That unless the action can be maintained, the defendant may retain a gain derived from his/her willful breach of a fiduciary duty; and

5. That the requested relief will not result in unjust enrichment of the corporation or any shareholder of the corporation.

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the

memorandum served and filed herewith, on the papers and records on file herewith, and on such oral and documentary evidence as may be presented at the hearing of the motion.

Dated _____.

_____ [*signature*]
Attorney for Plaintiff

CAUTION:

A memorandum must be filed and a copy served with this notice of motion [*Cal Rules of Ct, Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*].

The first page of the notice of motion must specify immediately below the case number: (1) the date, time, and, if ascertainable, location of the hearing and the name of the hearing judge; (2) the nature or title of any attached document (other than an exhibit); (3) the date of filing of the action; and (4) the trial date, if set [*Cal. Rules of Ct., Rule 3.1110(a), (b)*].

[2] Use of Form

When it appears on the face of the complaint that the plaintiff in a derivative action does not satisfy the contemporaneous ownership rule of *Corp. Code § 800(b)(1)*, a defendant may raise the issue, probably by way of demurrer. Since *Corp. Code § 800(b)(1)* states that a shareholder who does not meet the contemporaneous ownership requirements may be allowed to maintain a derivative action on a preliminary showing to, and determination by, the court by motion and after a hearing, this motion will be filed to meet the defendant's challenge to the plaintiff's capacity. However, since it is unlikely that the plaintiff will be able to file the motion quickly enough that the motion can be heard at the same time as the hearing on the demurrer, the plaintiff should probably move for a shortening of time for the hearing on the plaintiff's motion or for a continuance so that the hearing on the demurrer will be held at a later date.

At the hearing, plaintiff will rely on the statutory exception [*see Corp. Code § 800(b)(1)*] to the contemporaneous ownership rule, which contains the five grounds for excusing a shareholder from the requirements of *Corp. Code § 800(b)(1)*.

[3] Cross References

For alternative forms for notice of motion, see Ch. 372, *Motions and Orders*

For forms for offer, acceptance, and stipulation of compromise and settlement of claims generally, see Ch. 520, *Settlement and Release*

[4] State Statutes

Contents of notice of motion. *Code Civ. Proc. § 1010*

Grounds for exception from contemporaneous ownership rule. *Corp. Code § 800(b)(1)*

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14-168 California Forms of Pleading and Practice--Annotated § 168.62

§ 168.62 Affirmative Defense to Shareholder's Derivative Action--That Prosecution of Suit Is Not in Best Interests of Corporation

[1] FORM Affirmative Defense to Shareholder's Derivative Action--That Prosecution of Suit Is Not in Best Interests of Corporation

AS A [_____ (*if more than one, specify number, e.g.*, FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.*, SECOND) CAUSE OF ACTION], defendant alleges that immediately on receipt of plaintiff's demand, alleged in Paragraph _____ of the complaint, that the corporation prosecute this action, this defendant, through and by its board of directors, caused an investigation to be made of all the facts relating to the cause of action alleged in the complaint and referred the matter to its attorney. After that investigation, and on advice of defendant's attorney, defendant's board of directors resolved, in good faith and in the exercise of its business judgment, that due to the expense and disruption of defendant's business which would result from prosecuting this action, it was not, and is not, in the best interests of defendant to comply with plaintiff's demand or to bring this action.

[2] Use of Form

This affirmative defense is for use in an answer to a shareholder's derivative action. It alleges that the board of directors of the corporation had decided in good faith that prosecution of the suit would not be in the best interests of the corporation due to the expense and disruption of business which would result [*Findley v. Garrett (1952) 109 Cal. App. 2d 166, 174, 178-179, 240 P.2d 421]* .

Other procedural alternatives available to the board or board litigation committee are demurrer, motion to dismiss, or motion for summary judgment [*Will v. Engebretson & Co. (1989) 213 Cal. App. 3d 1033, 1041, 261 Cal. Rptr. 868* ; *see Desaigoudar v. Meyercord (2003) 108 Cal. App. 4th 173, 179, 133 Cal. Rptr. 2d 408* (affirming trial court's grant of defense motion for summary judgment on ground that special litigation committee made good faith determination not to prosecute claim)]. In any case, the disinterested independence and good faith of the committee and the appropriateness and sufficiency of the investigative techniques chosen and pursued by the committee are subject to judicial review [*Will v. Engebretson & Co. (1989) 213 Cal. App. 3d 1033, 1041-1042, 261 Cal. Rptr. 868* ; *see § 168.19*].

[3] State Statutes

Statement in answer of new matter constituting defense. *Code Civ. Proc. § 431.30(b)(2)*

[4] Decisions

Judicial review of decision of special litigation committee is governed by business judgment rule; when asserted in connection with summary judgment motion, material issues of fact are independence of committee members and good faith in conducting investigation; neither merits of derivative claim nor substance of committee's decision to reject claim is subject to judicial review at that stage. *Desaigoudar v. Meyercord (2003) 108 Cal. App. 4th 173, 179, 133 Cal. Rptr. 2d 408*

"Special litigation committee defense" must be allowed whenever committee of disinterested directors acting in good faith has determined that derivative action is not in best interests of corporation--if possible on motion, but if necessary in full trial; defense can apply to homeowners association. *Finley v. Superior Court (2000) 80 Cal. App. 4th 1152, 1161-1163, 96 Cal. Rptr. 2d 128*

Stockholder not authorized to bring derivative suit when board of directors, in refusing to commence action to redress alleged wrong to corporation, acts in good faith within scope of discretionary power and reasonably believes its refusal to commence action is good business judgment in best interest of corporation. *Findley v. Garrett (1952) 109 Cal. App. 2d 166, 174, 240 P.2d 421*

Directors have same discretion with respect to prosecution of claims on behalf of corporation as they have in other business matters; mere fact that recovery for corporation would probably result from litigation does not require that action be commenced to enforce claim. *Findley v. Garrett (1952) 109 Cal. App. 2d 166, 177, 240 P.2d 421* ; *see also Fornaseri v. Cosmosart Realty & Bldg. Corp. (1929) 96 Cal. App. 549, 557, 274 P. 597*

Duty of board of directors weighing advantages of recovery against cost of litigation in money, time, and disruption of business. *Findley v. Garrett (1952) 109 Cal. App. 2d 166, 178, 240 P.2d 421*

[5] Cross References

For a related form, *see § 168.60*.

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14-168 California Forms of Pleading and Practice--Annotated § 168.63

§ 168.63 Proceedings for Court Approval of Compromise and Settlement [Code Civ. Proc. § 998] of Shareholder's Derivative Action--Notice of Motion--By Plaintiff

[1] FORM Proceedings for Court Approval of Compromise and Settlement [Code Civ. Proc. § 998] of Shareholder's Derivative Action--Notice of Motion--By Plaintiff

[*Caption. See § 168.60.*]

To defendants _____ [*name of corporation and other defendant*] and their attorneys of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, plaintiff will, and hereby does, move for an order approving the proposed compromise and settlement agreed to by and among the parties hereto on _____ [*date*], and for judgment in accordance therewith. The motion will be made on the grounds that such proposed compromise and settlement is fair and equitable to the corporation.

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum served and filed herewith, on the papers and records on file herewith, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*signature*]
Attorney for Plaintiff

CAUTION:
A memorandum to be relied on is required to be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*].

The first page of the notice of motion must specify immediately below the case number: (1) the date, time, and, if ascertainable, location of the hearing and the name of the hearing judge; (2) the nature or title of any attached document (other than an exhibit); (3) the date of filing of the action; and (4) the trial date, if set [*Cal. Rules of Ct., Rule 3.1110(a), (b)*].

[2] Use of Form

This notice of motion is used in connection with obtaining court approval of a proposed settlement of a shareholder's derivative suit. It sets forth the date and time, the grounds on which the motion will be made, and the papers on which it is to be based [*see Code Civ. Proc. § 1010*].

[3] Decisions

Composition agreement between shareholder and defendants in derivative suit not to be given "slightest efficacy" until, after scrutiny and examination, trial court determines that corporation's rights are fully protected. *Whitten v. Dabney (1915) 171 Cal. 621, 632, 154 P. 312* ; *Russell v. Weyand (1935) 5 Cal. App. 2d 259, 260, 42 P.2d 381*

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14-168 California Forms of Pleading and Practice--Annotated § 168.64

§ 168.64 Proceedings for Court Approval of Compromise and Settlement [Code Civ. Proc. § 998] of Shareholder's Derivative Action--Declaration in Support of Motion--By Plaintiff

[1] FORM Proceedings for Court Approval of Compromise and Settlement [Code Civ. Proc. § 998] of Shareholder's Derivative Action--Declaration in Support of Motion--By Plaintiff

[*Caption. See § 168.60.*]

I, _____ [*name*], am the plaintiff in this action.

This action is a shareholder's derivative suit brought on behalf of _____ [*name of corporation*], a corporation. Trial has not yet commenced.

On _____ [*date*], I _____ [*specify, e.g.*, made *or* received] a written offer _____ [to *or* from] defendant _____ [*name*] to allow judgment to be taken against defendant _____ [*name*] in accordance with the terms and conditions stated therein, which offer is attached hereto as Exhibit A and made a part hereof. Such offer is expressly conditioned on approval by the court as to its fairness to the corporation.

On _____ [*date*], I _____ [received *or* gave] written notice of acceptance of the offer. Such notice of acceptance is attached hereto as Exhibit B and made a part hereof.

The plan of settlement set forth in Exhibit A is fair, just, and equitable to the corporation, in that _____ [*state facts from personal knowledge of plaintiff demonstrating that the proposed judgment is fair to the corporation*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

CAUTION:

The first page of each paper must specify immediately below the case number: (1) the date, time, and, if ascertainable, location of the hearing and the name of the hearing judge; (2) the nature or title of any attached document (other than an exhibit); (3) the date of filing of the action; and (4) the trial date, if set [*Cal. Rules of Ct., Rule 3.1110(b)*]. The caption of a declaration must state the name of the declarant and must specifically identify the motion or other proceeding that it supports or opposes [*Cal. Rules of Ct., Rule 3.1115*].

[2] Use of Form

The declaration is used in support of a motion for court approval of a proposed settlement of a shareholder's derivative action [*see § 168.63*]. The declaration sets forth the facts involving the offer and acceptance of the proposed settlement [*see Code Civ. Proc. § 998*], submits those instruments as exhibits, and states how the proposed settlement is fair and equitable to the corporation [*see Whitten v. Dabney (1915) 171 Cal. 621, 632, 154 P. 312* ; *Russell v. Weyand (1935) 5 Cal. App. 2d 259, 260, 42 P.2d 381]* . The declaration is executed in California under penalty of perjury [*see Code Civ. Proc. § 2015.5*].

[3] State Statutes

Use of affidavit on motion. *Code Civ. Proc. § 2009*

Declaration under penalty of perjury in lieu of affidavit. *Code Civ. Proc. § 2015.5*

[4] Cross References

See generally Ch. 15, *Affidavits, Certificates, and Declarations*

For a related form, *see § 168.63*.

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14-168 California Forms of Pleading and Practice--Annotated § 168.65

§ 168.65 Proceedings for Court Approval of Compromise and Settlement [Code Civ. Proc. § 998] of Shareholder's Derivative Action--Judgment [Code Civ. Proc. § 577]

[1] FORM Proceedings for Court Approval of Compromise and Settlement [Code Civ. Proc. § 998] of Shareholder's Derivative Action--Judgment [Code Civ. Proc. § 577]

[*Caption. See § 168.60.*]

Plaintiff's motion for approval by this court of a plan, agreed to by the parties herein, to compromise and settle all claims presented in this action and to allow judgment to be taken on behalf of _____ [*name of corporation*], a corporation, came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; _____ [*specify other appearances*].

On proof made to the satisfaction of the court that the motion should be granted,

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED that the plan to compromise and settle such claims, as represented by the offer dated _____ [*date*], and the notice of acceptance of the offer dated _____ [*date*], on file herein, is approved.

IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that the plaintiff, pursuant to, and in accordance with, the compromise and settlement references above, on behalf of _____ [*name of corporation*], recover from defendant _____ [*name*] as follows:

1. _____ [*Here and in subsequent paragraphs set forth each item of the judgment allowed against defendant pursuant to the settlement*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

CAUTION:

It is not clear whether the requirement of *Cal. Rules of Ct., Rule 3.1110(b)*, regarding the first page of each paper in law and motion proceedings as defined *Cal. Rules of Ct., Rule 3.1103(a)*, applies to this paper. Rule 3.1110(b) states that the first page of each paper must specify immediately below the case number: (1) the date, time, and, if ascertainable, location of the hearing and the name of the hearing judge; (2) the nature or title of any attached document (other than an exhibit); (3) the date of filing of the action; and (4) the trial date, if set [*Cal. Rules of Ct., Rule 3.1110(b)*].

[2] Use of Form

This judgment is used to express the court's approval of a settlement of a shareholder's derivative action and to incorporate the terms of the settlement as the final determination of the rights of the parties to the action [*see Code Civ. Proc. § 577*].

[3] State Statutes

Judgment defined. *Code Civ. Proc. § 577*

Entry of judgment. *Code Civ. Proc. § 664*

[4] Cross References

See generally Ch. 318, *Judgments*

For a related form, *see § 168.63*.

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14-168 California Forms of Pleading and Practice--Annotated § 168.66

§ 168.66 Proceedings for Extension of Time to Move for Security [Corp. Code § 800(c); Cal. Rules of Ct., Rule 2.20] and to File Responsive Pleading [Code Civ. Proc. § 1054; Cal. Rules of Ct., Rule 2.20]--Notice of Motion--By Defendant Director or Officer of Corporation

[1] FORM Proceedings for Extension of Time to Move for Security [Corp. Code § 800(c); Cal. Rules of Ct., Rule 2.20] and to File Responsive Pleading [Code Civ. Proc. § 1054; Cal. Rules of Ct., Rule 2.20]--Notice of Motion--By Defendant Director or Officer of Corporation

[*Caption. See § 168.60.*]

To plaintiff and his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*] at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, defendant _____ [*name of officer or director*] will, and hereby does, move for an order pursuant to *Corporations Code Section 800(c)* extending the 30-day period in which this defendant may move the court for an order requiring plaintiff to furnish security [*if a responsive pleading has not yet been filed, add*: or file a responsive pleading to the complaint herein]. Such motion will be for an additional period of _____ [*specify number not more than 60*] days. The motion will be made on the grounds that _____ [*specify, e.g.*, such further time is necessary so that this defendant may determine whether there is a reasonable possibility that the prosecution of the cause of action alleged in the complaint against this defendant will benefit the corporation or its security holders].

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*signature*]
Attorney for Defendant

CAUTION:

A memorandum to be relied on is required to be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*].

The notice of motion must state in the opening paragraph the nature of the order being sought and the grounds for issuance of the order. The first page of each paper must specify immediately below the case number: (1) the date, time, and, if ascertainable, location of the hearing and the name of the hearing judge; (2) the nature or title of any attached document (other than an exhibit); (3) the date of filing of the action; and (4) the trial date, if set [*Cal. Rules of Ct., Rule 3.1110(a), (b)*].

[2] Use of Form

This notice of motion is used to apply for an extension of the 30-day period prescribed by *Corp. Code § 800(c)* for making a motion to require plaintiff to furnish security. As an optional provision the form also gives notice that the moving defendant will move for an extension of time to file a responsive pleading to the complaint if he or she has not already filed one. The latter extension would be important to avoid default in the event the motion to require security is not filed [*see § 168.66[3]*]. A defendant who is, or was at the time of the acts complained of, an officer or director of the corporation makes the motion [*see Corp. Code § 800(c)*]. The corporation also could make it [*see Corp. Code § 800(c)*]. The notice of motion states when, and the grounds on which the motion will be made, and the papers on which it will be based [*see Code Civ. Proc. § 1010*].

[3] Extension of Time

The court on application of the corporation or "any defendant" may for good cause shown, extend the 30-day period in which a motion to furnish security is to be made, for an additional period or periods not exceeding 60 days [*Corp. Code § 800(c)*]. Though *Corp. Code § 800(c)* indicates that "any defendant" may move for the extension of time, the same section also provides that only the corporation or "any defendant who is an officer or director of the corporation, or held such a office at the time of the acts complained of" may move the court for an order requiring plaintiff to furnish security. Apparently, only a defendant who has standing to make the motion for security would have "good cause" to move for an extension of time to make such motion.

If a motion to furnish security is filed, no pleadings need be filed by the corporation or any other defendant, and the prosecution of the derivative action is stayed, until 10 days after the motion is disposed of [*see Corp. Code § 800(f)*]. If the motion is not filed, defendant would be required to file his or her responsive pleading within the 30-day period directed by the summons [*see Code Civ. Proc. § 412.20(a)(3)*]. Thus if there is any chance that the motion to furnish security will not be filed, an extension of time in which to plead should also be requested [*see Code Civ. Proc. § 1054* (extension of time allowed for any act required which relates to the pleadings in the action)]. Caution should be exercised in specifying the number of days requested since, absent the consent of the adverse party, an extension under *Code Civ. Proc. § 1054* "shall not exceed" 30 days, while an extension under *Corp. Code § 800(c)* may be of a period not exceeding 60 days.

[4] State Statutes

Time in which to file responsive pleading. *Code Civ. Proc. § 412.20(a)(3)*

Extension of time for acts relating to pleadings. *Code Civ. Proc. § 1054*

Extension of time to move for order requiring plaintiff in derivative action to furnish security. *Corp. Code § 800(c)*

Time to file pleading on behalf of corporation or other defendant in derivative action is automatically extended on filing motion for furnishing security. *Corp. Code § 800(f)*

[5] California Rules of Court

To whom application for extension of time must be made. *Cal. Rules of Ct., Rule 2.20(a)*

Written disclosures required when application is made for extension of time. *Cal. Rules of Ct., Rule 2.20(b)*

[6] Decisions

Stipulation of counsel for extension of time "to move, answer, or otherwise plead to the complaint" includes motion to require plaintiff to furnish security. *Consolidated Dock & Storage Co. v. Superior Court (1971) 18 Cal. App. 3d 949, 951-952, 96 Cal. Rptr. 254*

[7] Text References

Ballantine and Sterling, California Corporation Laws, Ch. 14, *Litigation Involving Corporations and Shareholders, § 393.01(2)* (Matthew Bender)

[8] Cross References

See generally Ch. 524, *Shortening and Extension of Time*

For a related form, *see § 168.63*.

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14-168 California Forms of Pleading and Practice--Annotated § 168.67

§ 168.67 Proceedings for Extension of Time to Move for Security [Corp. Code § 800(c); Cal. Rules of Ct., Rule 2.20] and to File Responsive Pleading [Code Civ. Proc. § 1054; Cal. Rules of Ct., Rule 2.20]--Declaration in Support of Motion--By Defendant Director or Officer of Corporation

[1] FORM Proceedings for Extension of Time to Move for Security [Corp. Code § 800(c); Cal. Rules of Ct., Rule 2.20] and to File Responsive Pleading [Code Civ. Proc. § 1054; Cal. Rules of Ct., Rule 2.20]--Declaration in Support of Motion--By Defendant Director or Officer of Corporation

[*Caption. See § 168.60.*]

I, _____ [*name*], am a defendant in this action.

This action is a suit by a shareholder of _____ [*name of corporation*], a corporation, on behalf of, and in the right of, such corporation for _____ [*specify, e.g.*, damages].

I _____ [am *or* was at the time of the acts complained of] _____[a director *or specify office held*] of _____ [*name of corporation*].

_____ [*Set forth facts constituting "good cause" for the extension, e.g.*, In order to determine whether there is a reasonable possibility that the prosecution of the cause of action alleged in the complaint against me will benefit the corporation or its security holders, an extension of time in the amount of _____ (*number not to exceed 60*) days is required so that I may have an opportunity to take the depositions of _____ (*names*)].

No extensions of time have previously been granted by order of court or by stipulation of counsel [*or specify any such previous extension*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

CAUTION:

The first page of each paper must specify immediately below the case number: (1) the date, time, and, if ascertainable, location of the hearing and the name of the hearing judge; (2) the nature or title of any attached document (other than an exhibit); (3) the date of filing of the action; and (4) the trial date, if set [*Cal. Rules of Ct., Rule 3.1110(b)*]. The caption of a declaration must state the name of the declarant and must specifically identify the motion or other proceeding that it supports or opposes [*Cal. Rules of Ct., Rule 3.1115*].

[2] Use of Form

This declaration is used in lieu of an affidavit [*see Code Civ. Proc. § 2015.5*] to support a motion [*see Code Civ. Proc. § 2009* (use of affidavit on a motion)] to extend the period in which the moving party may move the court for an order requiring plaintiff in a derivative suit to furnish security [*see § 168.66*]. It declares that the moving party is, or was at the time of the acts complained of, a director or officer of the corporation, and sets forth facts relied on as good cause for the extension which may be for a period not exceeding 60 days [*see Corp. Code § 800(c)*]. To satisfy the requirements of *Cal. Rules of Ct., Rule 2.20(b)*, the declaration also discloses the nature of the case and what extensions, if any, have previously been granted by order of court or stipulation of counsel.

[3] Disclosures Required

Applicants for orders extending time must disclose in writing the nature of the case and what extensions, if any, have previously been granted by order of court or stipulation of counsel [*Cal. Rules of Ct., Rule 2.20(b)*].

[4] Cross References

For a related form, *see § 168.64*.

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§ 168.68 Proceedings for Extension of Time to Move for Security [Corp. Code § 800(c); Cal. Rules of Ct., Rule 2.20] and to File Responsive Pleading [Code Civ. Proc. § 1054; Cal. Rules of Ct., Rule 2.20]--Order Granting Extension of Time

[1] FORM Proceedings for Extension of Time to Move for Security [Corp. Code § 800(c); Cal. Rules of Ct., Rule 2.20] and to File Responsive Pleading [Code Civ. Proc. § 1054; Cal. Rules of Ct., Rule 2.20]--Order Granting Extension of Time

[*Caption. See § 168.60.*]

The motion by defendant _____ [*name*] for an extension of the period in which _____ [he/she may move the court for an order requiring plaintiff in this action to furnish security *or* to file his/her responsive pleading to the complaint herein] came on regularly for hearing by the court on this date. Plaintiff appeared by counsel _____ [*name*]; defendant _____ [*name of moving party*] appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion should be granted,

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED that _____ [*name of moving party*] may have until and including _____ [*date*], to move this court for an order directing plaintiff to furnish security as provided in *Corporations Code Section 800(c)*, or to file his/her response to the complaint herein if such motion is not made.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

CAUTION:
The first page of each paper must specify immediately below the case number: (1) the date, time, and, if

ascertainable, location of the hearing and the name of the hearing judge; (2) the nature or title of any attached document (other than an exhibit); (3) the date of filing of the action; and (4) the trial date, if set [*Cal. Rules of Ct., Rule 3.1110(b)*].

[2] Use of Form

This order is used in granting a motion for extension of time to move for an order requiring plaintiff in a derivative action to furnish security [*see Corp. Code § 800(c)*].

[3] Cross References

For a related form, *see § 168.66*.

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14-168 California Forms of Pleading and Practice--Annotated § 168.69

§ 168.69 Proceedings for Order Requiring Plaintiff to Furnish Security [Corp. Code § 800(c)]--Notice of Motion--By Defendant Director or Officer of Corporation

[1] FORM Proceedings for Order Requiring Plaintiff to Furnish Security [Corp. Code § 800(c)]--Notice of Motion--By Defendant Director or Officer of Corporation

[*Caption. See § 168.60.*]

To plaintiff and his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, defendant _____ [*name of officer or director*] will, and hereby does, move for an order requiring plaintiff to furnish security, as provided in *Corporations Code Section 800(c)*, in the amount of $_____ [*specify an amount not exceeding $50,000*]. The motion will be made on the ground(s) that _____ [*specify one or more of the following grounds*: there is no reasonable possibility that the prosecution of the cause of action alleged in the complaint against this defendant will benefit the corporation or its security; *if other than the corporation*, this defendant did not participate in the transaction complained of in any capacity].

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum of points and authorities served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*signature*]
Attorney for Defendant

CAUTION:

A memorandum to be relied on is required to be served and filed with this notice of motion [*Cal. Rule of Ct., Rule 3.1113(a)*].

The first page of each paper must specify immediately below the case number: (1) the date, time, and, if ascertainable, location of the hearing and the name of the hearing judge; (2) the nature or title of any attached document (other than an exhibit); (3) the date of filing of the action; and (4) the trial date, if set [*Cal. Rules of Ct., Rule 3.1110(b)*].

[2] Use of Form

This notice of motion is used to apply for an order requiring the plaintiff in a shareholder's derivative suit to furnish security under *Corp. Code § 800(c)*. It alleges when and on what grounds it will be made and the papers on which it is to be based [*see Code Civ. Proc. § 1010*; *see also Corp. Code § 800(c)*].

[3] Motion to Furnish Security

In a shareholder's derivative action, at any time within 30 days after service of summons on the corporation or any defendant who is an officer or director of the corporation or who held that office at the time of the acts complained of, the corporation or that defendant may move the court for an order, on notice and hearing, requiring the plaintiff to furnish security as provided in *Corp. Code § 800(c)*. The motion must be based on one or more of the following grounds [*see Corp. Code §§ 15, 800(c)*]:

- That there is no reasonable possibility that the prosecution of the cause of action alleged in the complaint against the moving party will benefit the corporation or its security holders.

- That the moving party, if other than the corporation, did not participate in the transaction complained of in any capacity.

[4] State Statutes

Statutory bonds and undertakings (Bond and Undertaking Law). *Code Civ. Proc. § 995.010 et seq.*

Motion to furnish security. *Corp. Code § 800(c)*

Prosecution of derivative action as stayed on filing of motion to furnish security. *Corp. Code § 800(f)*

[5] Decisions

Taking of depositions in course of preparing for eventual trial of shareholder's derivative suit is step in "prosecution" of action within "stay" provisions of Corp. Code § 834. *Melancon v. Superior Court (1954) 42 Cal. 2d 698, 707, 268 P.2d 1050*

Aggregate amount of security that plaintiff may be required to provide pursuant to *Corp. Code § 800* is limited to $50,000 as to all moving parties. *Hale v. Southern California IPA Medical Group (2001) 86 Cal. App. 4th 919, 927-928, 103 Cal. Rptr. 2d 773* (trial court erred in ordering plaintiff in derivative action against corporation and five directors to post six bonds for total of $250,000)

Burden of establishing statutory condition is on party moving for security. *Burt v. Irvine Co. (1965) 237 Cal. App. 2d 828, 868, 47 Cal. Rptr. 392*

[6] Cross References

For a related form, *see § 168.63*.

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14-168 California Forms of Pleading and Practice--Annotated § 168.70

§ 168.70 Proceedings for Order Requiring Plaintiff to Furnish Security [Corp. Code § 800(c)]--Declaration [Code Civ. Proc. § 2015.5] in Support of Motion

[1] FORM Proceedings for Order Requiring Plaintiff to Furnish Security [Corp. Code § 800(c)]--Declaration [Code Civ. Proc. § 2015.5] in Support of Motion

[*Caption. See § 168.60.*]

I, _____ [*name*], am a defendant in this action.

This action is a suit by a shareholder of _____ [*name of corporation*], a corporation, on behalf of, and in the right of, that corporation for _____ [*specify, e.g.,* damages].

I _____ [am *or* was at the time of the acts complained of] _____ [a director *or, e.g.,* the president] of _____ [*name of corporation*].

_____ [*State facts supporting grounds of motion, e.g.,* the transaction complained of by plaintiff concerns actions taken by the board of directors of _____ (*name of corporation*) at a meeting held on _____ (*date*). I did not receive any notice of that meeting as required by the corporation's bylaws. I was unaware that the meeting would be held and of any matters to be conducted at the meeting. I did not attend the meeting or participate in any capacity in the decisions made at the meeting or in the actions taken subsequently pursuant thereto which form the basis of plaintiff's complaint.]

The probable reasonable expenses, including attorney's fees, which the corporation and I will incur in the defense of this action are $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

CAUTION:

The first page of each paper must specify immediately below the case number: (1) the date, time, and, if ascertainable, location of the hearing and the name of the hearing judge; (2) the nature or title of any attached document (other than an exhibit); (3) the date of filing of the action; and (4) the trial date, if set [*Cal. Rules of Ct., Rule 3.1110(b)*]. The caption of a declaration must state the name of the declarant and must specifically identify the motion or other proceeding that it supports or opposes [*Cal. Rules of Ct., Rule 3.1115*].

[2] Use of Form

This declaration is used to support a motion made by a defendant who is, or was at the time of the transaction complained of, a director or officer of the corporation to require the plaintiff in a derivative action to furnish security pursuant to *Corp. Code § 800(c)*. The declaration under penalty of perjury executed in California is used in lieu of an affidavit [*Code Civ. Proc. § 2015.5*]. It establishes the standing of the party to make the motion as a defendant who is a director or officer of the corporation or who held such an office at the time of the acts complained of and sets forth facts supporting the grounds of the motion and the amount of the security to be furnished [*see Corp. Code § 800(c)*].

[3] Cross References

For a related form, *see § 168.64*.

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14-168 California Forms of Pleading and Practice--Annotated § 168.71

§ 168.71 Proceedings for Order Requiring Plaintiff to Furnish Security [Corp. Code § 800(c)]--Order [Code Civ. Proc. § 1003] Requiring Security

[1] FORM Proceedings for Order Requiring Plaintiff to Furnish Security [Corp. Code § 800(c)]--Order [Code Civ. Proc. § 1003] Requiring Security

[*Caption. See § 168.60.*]

The motion of defendant _____ [*name*] for an order requiring plaintiff to furnish security pursuant to *Section 800(c) of the Corporations Code* came on regularly for hearing by the court on this date. Plaintiff appeared by counsel _____ [*name*]; _____ [*name of moving party*] appeared by counsel _____ [*name*].

Defendant [and plaintiff] submitted _____ [declarations *or* affidavits] and memoranda of points and authorities. Counsel argued the matter to which the court gave its full consideration.

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED that:

1. The motion of defendant _____ [*name*] for an order requiring plaintiff to furnish security be granted;

2. Plaintiff, within _____ days after the service of a copy of this order upon the attorney of record for plaintiff, must deposit with the clerk of this court security for the reasonable expenses and attorney's fees of defendant _____ [*name*], in the amount of $ _____ [*if more than one defendant, specify amount for each*];

3. This security may be deposited in the form of cash or in the form of a bond issued by a properly authorized surety company;

4. In the event that plaintiff fails to deposit security in the amount and form required by this order within the time allowed, this action will be dismissed as to the above-named defendant; and

5. Plaintiff must notify defendant when the security is deposited and the notification must be on the date of deposit.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

CAUTION:
The first page of each law and motion paper must specify immediately below the case number: (1) the date, time, and, if ascertainable, location of the hearing and the name of the hearing judge; (2) the nature or title of any attached document (other than an exhibit); (3) the date of filing of the action; and (4) the trial date, if set [*Cal. Rules of Ct., Rule 3.1110(b)*].

[2] Use of Form

This order is used to grant a motion to require a derivative-suit plaintiff to furnish security pursuant to *Corp. Code § 800(d)*. The form sets forth the judge's direction [*see Code Civ. Proc. § 1003*] to the plaintiff to furnish security not to exceed $50,000. The time for furnishing security, as fixed by the court, must be reasonable [*Corp. Code § 800(d)*].

The aggregate amount of security that a plaintiff may be required to provide pursuant to *Corp. Code § 800* is limited to $50,000 as to all moving parties [*Hale v. Southern California IPA Medical Group (2001) 86 Cal. App. 4th 919, 927-928, 103 Cal. Rptr. 2d 773* (defendants argued that trial court could require plaintiff to post up to $50,000 in security for each moving defendant)].

[3] Determination on Hearing

[a] In General

At the hearing on a motion to furnish security, the court considers any evidence, written or oral, by witnesses or affidavit, that may be material to the ground or grounds on which the motion is based, or to a determination of the probable reasonable expenses, including attorney's fees, that the corporation and the moving party will incur in the defense of the action. If the court determines after hearing the evidence that the moving party has established a probability in support of any of the grounds on which the motion is based, the court fixes the nature and amount of security, not to exceed $50,000, that plaintiff is to furnish for the reasonable expenses, including attorney's fees, that the moving party and the corporation may incur in connection with the action, including expenses for which the corporation may become liable pursuant to *Corp. Code § 317* (indemnification of officers, directors, or employees of corporation) [*Corp. Code § 800(d)*].

[b] No Determination on Merits

A determination by the court that security must or must not be furnished as to one or more defendants and not as to others is not deemed a determination of any one or more of the issues in the action or of the merits thereof [*Corp. Code § 800(d)*].

[4] State Statutes

Deposit in lieu of bond. *Code Civ. Proc. §§ 995.710* (applicable only to deposits made before January 1, 1999, for

deposits with the Secretary of State), 995.730

Objections to amount of bond. *Code Civ. Proc. § 995.910*

Determinations by court on hearing of motion to furnish security in shareholder's derivative suit. *Corp. Code § 800(d)*

[5] Decisions

Trial court has discretion in fixing nature and amount of security under Corp. Code § 834. *Beyerbach v. Juno Oil Co. (1954) 42 Cal. 2d 11, 27, 265 P.2d 1*

In derivative action, value or percentage of plaintiff's stock holdings in corporation has no bearing on issue whether security is to be required under Corp. Code § 834(b). *Suburban Water Sys. v. Superior Court (1968) 264 Cal. App. 2d 956, 961, 71 Cal. Rptr. 45*

Order granting or denying motion to furnish security is nonappealable order. *Woodman v. Ackerman (1967) 249 Cal. App. 2d 644, 652, 57 Cal. Rptr. 687* (order granting motion); *Efron v. Kalmanovitz (1960) 185 Cal. App. 2d 149, 152, 156-157, 8 Cal. Rptr. 107* (order denying motion)

In determining whether trial judge abused discretion in deciding that there is no reasonable possibility that prosecution of derivative action would benefit corporation or its security holders, appellate court is required to evaluate possible defenses plaintiffs would have to overcome at trial. *Marble v. Latchford Glass Co. (1962) 205 Cal. App. 2d 171, 175, 22 Cal. Rptr. 789*

Defendants in derivative suit are entitled to order requiring plaintiff to furnish security when trial court found that there was no reasonable probability that prosecution of one out of three causes of action alleged would result in benefit to corporation or its security holders. *Bailey v. Fosca Oil Co. (1960) 180 Cal. App. 2d 289, 295-296, 4 Cal. Rptr. 474*

[6] Cross References

For alternative forms for orders, see Ch. 372, *Motions and Orders*

For a related form, *see § 168.69*.

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14-168 California Forms of Pleading and Practice--Annotated § 168.72

§ 168.72 Proceedings for Judgment [Code Civ. Proc. § 577] Dismissing Shareholder's Derivative Action for Failure to Furnish Security [Corp. Code § 800(d)]--Notice of Motion

[1] FORM Proceedings for Judgment [Code Civ. Proc. § 577] Dismissing Shareholder's Derivative Action for Failure to Furnish Security [Corp. Code § 800(d)]--Notice of Motion

[*Caption. See § 168.60.*]

To plaintiff and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter can be heard in [_____ (Department *or* Division) _____ of] this court, defendant _____ [*name of moving party*] will, and hereby does, move for a judgment of dismissal of this action as to him/her. The motion will be made on the grounds that plaintiff failed to furnish security on or before _____ [*date specified in prior order to furnish security*], as directed by the court in its order dated _____.

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*signature*]
Attorney for Defendant
_____ [*typed name*]

CAUTION:
A memorandum to be relied on is required to be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*].

The first page of the notice of motion must specify immediately below the case number: (1) the date, time, and, if ascertainable, location of the hearing and the name of the hearing judge; (2) the nature or title of any attached document (other than an exhibit); (3) the date of filing of the action; and (4) the trial date, if set [*Cal. Rules of Ct., Rule 3.1110(a), (b)*].

[2] Use of Form

This notice of motion is used to apply for dismissal of a shareholder's derivative suit for failure of the plaintiff to furnish security as ordered by the court [*see Corp. Code § 800(d)*]. The declaration in support of the motion may be adapted from *see § 168.70*.

[3] Cross References

For a related form, *see § 168.69*.

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14-168 California Forms of Pleading and Practice--Annotated § 168.73

§ 168.73 Proceedings for Judgment [Code Civ. Proc. § 577] Dismissing Shareholder's Derivative Action for Failure to Furnish Security [Corp. Code § 800(d)]--Judgment Dismissing Action

[1] FORM Proceedings for Judgment [Code Civ. Proc. § 577] Dismissing Shareholder's Derivative Action for Failure to Furnish Security [Corp. Code § 800(d)]--Judgment Dismissing Action

[*Caption. See § 168.60* .]

The motion of defendant _____ [*name of moving party*] for dismissal of this action came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant _____ [*name of moving party*] appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that plaintiff failed to furnish the security ordered by the court within the time fixed by the court by its order dated _____, and that motion should therefore be granted,

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED that this action against defendant _____ [*name*] be dismissed without prejudice and that plaintiff take nothing by his/her complaint against defendant _____ [*name*] and that _____ [*name*] defendant be awarded his/her costs of suit in the sum of $ _____ against plaintiff.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This judgment is used to dismiss a shareholder's derivative action on failure by plaintiff to furnish security as ordered by the court for the reasonable expenses of defendant [*see Corp. Code § 800(d)*]. The judgment directs that the action against defendant be dismissed without prejudice and that plaintiff take nothing by his or her complaint against defendant [*see Corp. Code § 800(d)*], and that defendant be awarded his or her costs of suit [*see Code Civ. Proc. §*

1032(a)(4), (b)].

[3] Dismissal for Failure to Furnish Security

[a] In General

If the court, on a motion for security, makes a determination that plaintiff is to furnish security as to any one or more defendants, the action must be dismissed as to such defendant or defendants, unless the security required by the court has been furnished within such reasonable time as may be fixed by the court [*Corp. Code § 800(d)*].

[b] Not Bar to Another Action

The usual rule is that the dismissal of an action does not operate as a bar to another suit for the same cause of action as was stated in the suit which was dismissed. When the dismissal of an action does not purport to go to the merits of the case, the trial court has no authority to include within the judgment of dismissal an order which in effect precludes the plaintiff from instituting another action in which the merits of the controversy may be litigated. In a proceeding under *Corp. Code § 800* (derivative action), determination as to the furnishing of security is not a determination of the merits of any issue in the action and, therefore, a dismissal for failure to furnish security is without prejudice and does not bar another action [*Ensher v. Ensher, Alexander & Barsoom (1960) 187 Cal. App. 2d 407, 411, 9 Cal. Rptr. 732]* .

[4] State Statutes

Written order for dismissal. *Code Civ. Proc. § 581d*

"Prevailing party" as used in costs statutes includes party with net monetary recovery, defendant in whose favor dismissal is entered, defendant when neither plaintiff nor defendant obtains any relief, and defendant as against those plaintiffs who do not recover any relief against that defendant. *Code Civ. Proc. § 1032(a)(4)*

When party recovers other than monetary relief and in situations other than as specified, "prevailing party" is determined by court, which has discretion to allow costs or not and, if allowed, to apportion costs between parties on same or adverse sides pursuant to rules adopted [by Judicial Council] under *Code Civ. Proc. § 1034. Code Civ. Proc. § 1032(a)(4)*

Except as otherwise expressly provided by statute, prevailing party is entitled to recover costs in any action or proceeding as matter of right. *Code Civ. Proc. § 1032(b)*

Dismissal of shareholder's derivative suit for failure to furnish security ordered by court. *Corp. Code § 800(d)*

[5] Decisions

Attorney's fees not awardable to defendant on dismissal of shareholder's derivative suit for failure to furnish security. *Freeman v. Goldberg (1961) 55 Cal. 2d 622, 626, 12 Cal. Rptr. 668, 361 P.2d 244*

Trial court erred in entering judgment dismissing derivative action against corporation and five directors for plaintiff's failure to post six bonds for total of $250,000; aggregate amount of security that plaintiff may be required to provide pursuant to *Corp. Code § 800* is limited to $50,000 as to all moving parties. *Hale v. Southern California IPA Medical Group (2001) 86 Cal. App. 4th 919, 927-928, 103 Cal. Rptr. 2d 773*

Order requiring plaintiff to furnish security is not appealable. *Woodman v. Ackerman (1967) 249 Cal. App. 2d 644,*

652, 57 Cal. Rptr. 687

Dismissal of derivative suit for failure to furnish security is not a determination of merits of any issue in acton.
Ensher v. Ensher, Alexander & Barsoom (1960) 187 Cal. App. 2d 407, 411, 9 Cal. Rptr. 732

[6] Cross References

See generally Ch. 174, *Costs and Attorney's Fees*

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6-168 California Forms of Pleading and Practice--Annotated § 168.74

§ 168.74 Proceedings for Judgment [Code Civ. Proc. § 577] Dismissing Shareholder's Derivative Action for Loss of Shareholder Status [Corp. Code § 800(b)]--Notice of Motion

[1] FORM Proceedings for Judgment [Code Civ. Proc. § 577] Dismissing Shareholder's Derivative Action for Loss of Shareholder Status [Corp. Code § 800(b)]--Notice of Motion

[*Caption. See § 168.60*.]

To plaintiff and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter can be heard in _____ [(Department *or* Division) _____ of] this court, defendant _____ [*name*] will, and hereby does, move for a judgment of dismissal of this action. The motion will be made on the ground that plaintiff is no longer a shareholder of _____ [*name of corporation*] and therefore has no standing to maintain this action.

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant

_____ [*name*]

CAUTION:

A memorandum to be relied on must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. The first page of the notice of motion must specify immediately below the case number: (1) the date, time, and, if ascertainable, location of the hearing and the name of the hearing judge; (2) the nature or title of any attached document (other than an exhibit); (3) the date of filing of the action; and (4) the trial date, if set [*Cal. Rules of Ct., Rule 3.1110(a), (b)*].

[2] Use of Form

This notice of motion may be used to apply for dismissal of a shareholder's derivative suit when the plaintiff has lost the status of a shareholder of the corporation and therefore has no standing to maintain the action [*see Corp. Code § 800(d)*; *Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1115, 1119, 72 Cal. Rptr. 3d 129, 175 P.3d 1184*]. For discussion, see *§ 168.15[2]*.

[3] Cross References

For a related form for a judgment on the grounds asserted in this notice of motion, see *§ 168.75*.

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6-168 California Forms of Pleading and Practice--Annotated § 168.75

§ 168.75 Proceedings for Judgment [Code Civ. Proc. § 577] Dismissing Shareholder's Derivative Action for Loss of Shareholder Status [Corp. Code § 800(b)]--Judgment Dismissing Action

[1] FORM Proceedings for Judgment [Code Civ. Proc. § 577] Dismissing Shareholder's Derivative Action for Loss of Shareholder Status [Corp. Code § 800(b)]--Judgment Dismissing Action

[*Caption. See § 168.60*.]

The motion of defendant _____ [*name*] for dismissal of this action came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____[*name*]; defendant _____ [*name*] appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that plaintiff is no longer a shareholder of _____ [*name of corporation*], and that the motion therefore should be granted,

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED that this action be dismissed, that plaintiff take nothing by his/her complaint, and that defendant _____ [*name*] be awarded his/her costs of suit in the sum of $_____ against plaintiff.

Dated: _____.

_____ [signature]

Judge of the Superior Court

[2] Use of Form

This form is a judgment dismissing a shareholder's derivative action on the grounds that the plaintiff has lost the status of a shareholder of the corporation and therefore has no standing to maintain the action [*see Corp. Code § 800(d)*;

Grosset v. Wenaas (2008) 42 Cal. 4th 1100, 1115, 1119, 72 Cal. Rptr. 3d 129, 175 P.3d 1184]. For discussion, see *§ 168.15[2]*.

[3] Cross References

For a related form for a notice of motion on this ground, see *§ 168.74*.

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§ 169.02 Cross References

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[1] Overview

[2] Types of Reorganizations Defined

[a] Merger Reorganizations

[b] Exchange Reorganizations

[c] Sale-of-Assets Reorganizations

[3] Additional Definitions

§ 169.11 Sales of Assets That Are Not Reorganizations

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[2] Approvals Required

[a] Generally

[b] Sale to Controlling Buyer

[c] Effect of Failure to Obtain Approval

[3] Interested Party's Proposal for Sale of Assets

§ 169.12 Reorganizations

[1] Generally

[2] Approval by Board of Directors

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[a] General Rule

[b] Exception; Certain Preferred Shares

[c] Exception; Dilution Test

[d] Surviving Other Business Entities

[e] Close Corporations

[f] Personal Liability Imposed

[g] Surviving Nonprofit Corporations

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[i] Cancellation of Shares Without Consideration

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[4] Additional Requirements When Reorganization Proposed by Interested Party

[a] Opinion of Fairness

[b] Interested Party Defined

[c] Time for Delivery of Opinion

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§ 169.13 Approval of Share Exchange Tender Offers

§ 169.14 Protection of Minority Interests in Mergers; Conversion of Shares

§ 169.15 Short-Form Mergers

§ 169.16 Conversions

[1] When Conversion is Permitted

[2] When Conversion is Effective

[3] Applicable Definitions

[4] Plan of Conversion

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[b] Amending Plan

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[6] Certificate or Statement of Conversion

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[b] California Tax Liability

[7] Conversion of Other Business Entity or Foreign Other Business Entity into Corporation

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[a] Converting Entity Unchanged

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§ 169.17 Dissenters' Rights

[1] Rights Determined by Shareholder Voting Requirement

[2] Application to Conversions

[3] Dissenting Shares Defined

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§ 169.18 Procedure for Enforcing Dissenters' Rights

[1] Notice by Corporation of Reorganization Approval

[2] Demand by Shareholder That Corporation Purchase Shares

[3] Submission of Share Certificates

[4] Agreement and Payment for Shares

[5] Court Action to Enforce Dissenting Shareholders' Rights

[a] Right to Bring Action

[b] Determination of Value

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[6] Dividend and Other Rights of Dissenting Shares

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§ 169.19 Attacking Validity of Reorganization

[1] Dissenters' Rights as Exclusive Remedy

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§§ 169.20-169.39 [Reserved]

§ 169.40 California Legal Forms

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[1] Definitions

[2] Dissenters' Rights

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§ 169.42 Decisions

[1] Attacking Validity of Reorganization--Dissenters' Rights as Exclusive Remedy

[2] Dissenters' Rights

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[7] Liabilities of Combined Entities

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§ 169.43 Law Reviews

§ 169.44 Text References

§§ 169.45-169.59 [Reserved]

§ 169.60 Dissenting Shareholder's Demand for Purchase of Shares [Corp. Code §§ 1301(b), (c), 1302]

[1] FORM

[2] Use of Form

[3] Right to Demand Purchase--Shareholder Approval of Reorganization

[4] Dissenters' Rights Applicable in Conversions

[a] Generally

[b] Notice by Corporation of Reorganization Approval or Short-Form Merger

[c] Time for Demand

[d] Time for Submitting Dissenting Share Certificates

[5] Termination of Dissenting Share Status

[6] State Statutes

[7] Decisions

[a] Dissenters' Rights

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[c] Short-Form Mergers

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[9] Text References

§ 169.61 Complaint for Determination of Status of Shares as Dissenting Shares and of Fair Market Value of Dissenting Shares [Corp. Code § 1304]--By Dissenting Shareholder Against Corporation

[1] FORM

[2] Use of Form

[3] Allegations

[4] Modification of Form

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[6] State Statutes

[7] Cross References

§ 169.62 Order [Code Civ. Proc. § 1003] Appointing Appraiser(s) to Determine Value of Dissenting Shares [Corp. Code § 1304(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 169.63 Report of Appraiser(s) [Corp. Code § 1305(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 169.64 Notice of Motion [Code Civ. Proc. § 1010] for Confirmation of Report by Appraiser(s) [Corp. Code § 1305(a)]--By Plaintiff

[1] FORM

[2] Use of Form

[3] Motion to Confirm Report

[4] Cross References

§ 169.65 Order Confirming Report of Appraiser(s)

[1] FORM

[2] Use of Form

[3] Cross References

§ 169.66 Judgment [Code Civ. Proc. § 577] Determining Fair Market Value of Dissenting Shares [Corp. Code § 1305]

[1] FORM

[2] Use of Form

[3] Judgment Subject to Restrictions on Distributions

[4] Delivery of Certificates

[5] Costs

[6] Cross References

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Volume 14: Corporations: Capacity thru Corporations: Dissolution and Winding Up-Chs. 160-173
Chapter 169 CORPORATIONS: REORGANIZATIONS
PART I. SCOPE

14-169 California Forms of Pleading and Practice--Annotated § 169.01

§ 169.01 Scope of Chapter

This chapter discusses the various forms of corporate reorganization and merger, and the procedures prescribed to ensure that shareholders will be dealt with fairly. This chapter focuses on the rights of shareholders; an extensive discussion of the methods of corporate reorganization, related securities law and tax considerations, as well as the accounting treatment of corporate reorganizations are beyond the scope of this part. Some aspects of directors' duties and disclosure obligations in regard to mergers are discussed in Ch. 167, *Corporations: Directors and Management* , and in Ch. 515, *Securities and Franchise Regulation* , § 515.20 et seq. For a detailed discussion of corporate acquisitions and reorganizations, see Ballantine and Sterling, California Corporation Laws, Ch. 12, *Corporate Acquisitions, Mergers, and Reorganizations* , and California Legal Forms, Ch. 11, *Mergers and Acquisitions* (Matthew Bender).

This chapter includes the following forms:

- A demand that a corporation pay its shareholder the fair market value of his or her shares [*see § 169.60*].

- A complaint to determine that the shares are dissenting shares and the fair market value of the dissenting shares [*see § 169.61*].

- An order appointing an appraiser to determine the value of dissenting shares [*see § 169.62*], an appraiser's report [*see § 169.63*], and a notice of motion [*see § 169.64*] and order [*see § 169.65*] to confirm the report.

- A judgment awarding a shareholder the fair market value of his or her dissenting shares [*see § 169.66*].

Legal Topics:

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

Mergers & Acquisitions LawMergersGeneral OverviewMergers & Acquisitions LawTax-Free AcquisitionsMergers & Acquisitions LawTaxable AcquisitionsAsset AcquisitionsMergers & Acquisitions LawTaxable AcquisitionsStock Acquisitions

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14-169 California Forms of Pleading and Practice--Annotated § 169.02

§ 169.02 Cross References

For discussion of mergers involving limited partnerships, see Ch. 404, *Partnerships: Actions Between Limited Partners and Partnerships* .

Some aspects of directors duties and disclosure obligations in regard to mergers are discussed in *Ch. 515, Securities and Franchise Regulation, § 515.10* et seq.

For forms for use in actions involving the Corporate Securities Law of 1968 [*Corp. Code §§ 25000-25706*], see *Ch. 515, Securities and Franchise Regulation, § 515.10* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability PartnershipsBusiness & Corporate LawLimited PartnershipsGeneral OverviewMergers & Acquisitions LawMergersGeneral Overview

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Volume 14: Corporations: Capacity thru Corporations: Dissolution and Winding Up-Chs. 160-173
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PART I. SCOPE

14-169 California Forms of Pleading and Practice--Annotated §§ 169.03-169.09

[Reserved]

§§ 169.03[Reserved]

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PART II. LEGAL BACKGROUND

14-169 California Forms of Pleading and Practice--Annotated § 169.10

§ 169.10 Governing Law

[1] Overview

The General Corporation Law essentially classifies and regulates the following categories of business combinations involving corporations:

- Sales of all or substantially all of a corporation's assets.
- Mergers by or among corporations (including mergers involving foreign corporations and wholly owned or 90 percent or more owned subsidiaries) and mergers by or among corporations and other business entities.
- Transfers or exchanges of shares of one or more corporations to another corporation.
- Conversion of a corporation into a domestic other business entity.

Each of these types of combinations can take a variety of forms and involve varying types and amounts of consideration. Some of these combinations constitute "reorganizations" under the General Corporation Law. In general, if a combination is a reorganization, shareholders' consents or approvals may be required and the shareholders may have dissenting rights.

Sales of assets are governed by *Corp. Code §§ 1000-1002*. Mergers of corporations, including short-form mergers and mergers involving close corporations or foreign corporations, are governed by *Corp. Code §§ 1100-1112*. Corporate mergers involving other business entities are governed by *Corp. Code § 1113*. "Reorganizations," as that term is defined in *Corp. Code § 181*, are the subject of *Corp. Code §§ 1200-1203*. The rights of dissenting shareholders opposing a corporate reorganization to receive the fair market value for their shares are covered in *Corp. Code §§ 1300-1312*. Conversions of corporations are governed by *Corp. Code §§ 1150-1160*.

Foreign corporations governed by *Corp. Code § 2115*, that is, those referred to as "nominally foreign" for the purposes

of this chapter [*see* Ch. 160, *Corporations: Capacity*], are subject to certain provisions of the General Corporation Law with respect to sales of assets and reorganizations [*Corp. Code § 2115(b)*]. Specifically, *Corp. Code § 1001(d)* applies to foreign corporations [§ 169.11[2][b]]. Also applicable are the provisions governing conversion of shares in mergers [*see Corp. Code § 1101*; *see also § 169.14*]. Furthermore, *Corp. Code § 1151* (first sentence only), regarding limitations on conversions, and *Corp. Code § 1152*, listing the requirements of conversions [*see § 169.16*], apply to nominally foreign corporations. In addition, all provisions governing approval of reorganizations and dissenters' rights [*Corp. Code §§ 1200-1312*] apply to nominally foreign corporations.

[2] Types of Reorganizations Defined

[a] Merger Reorganizations

"Merger reorganizations" are mergers conducted pursuant to *Corp. Code §§ 1100-1113*, other than short-form mergers [*Corp. Code § 181(a)*]. The term "merger" is not specifically defined in the General Corporation Law; the law merely provides that any two or more corporations may be merged into one of those corporations, and that a corporation may merge with one or more domestic or foreign corporations [*see Corp. Code §§ 167, 171*] or other business entities [*see Corp. Code § 174.5* (defining "other business entity" to mean a domestic or foreign limited liability company, limited partnership, general partnership, business trust, real estate investment trust, unincorporated association other than a nonprofit association, or a domestic reciprocal insurer)] in accordance with procedures prescribed by statute [*Corp. Code §§ 1100, 1113*]. For discussion of mergers involving limited partnerships, see *Ch. 404, Partnerships: Actions Between Limited Partners and Partnerships, § 404.21*. For more detailed coverage of merger procedures involving various types of business entities, see California Legal Forms, Ch. 11, *Merger and Acquisition Issues*, Ch. 11C, *Merger*, Ch. 12C, *Limited Liability Companies*, Ch. 15, *General Partnerships*, Part C, *Conversions and Mergers of General Partnerships*; and Ch. 15C, *Conversions and Mergers of Limited Partnerships* (Matthew Bender).

A "short-form merger," which does not constitute a merger reorganization, is a merger pursuant to *Corp. Code § 1110* [*Corp. Code § 187*]. A short-form merger takes one of two forms: (1) a corporation merges with another corporation of which the former corporation owns all of the outstanding shares; and (2) a parent corporation owns at least 90 percent but not all of the outstanding shares of each class of its subsidiary and merges the subsidiary into the parent.

[b] Exchange Reorganizations

"Exchange reorganizations" are acquisitions by one domestic corporation, foreign corporation, or other business entity in exchange in whole or in party for its equity securities (or those of a domestic corporation, foreign corporation, or other business entity in control of the acquiring entity) of equity securities of another domestic corporation, foreign corporation, or other business entity if, immediately after the acquisition, the acquiring entity has control of the other entity [*Corp. Code § 181(b)*].

A "share exchange tender offer" is an acquisition by one corporation in exchange in whole or in part for its equity securities, or the equity securities of a corporation that is in control of the acquiring corporation, of shares of another corporation, other than an exchange reorganization [*Corp. Code § 183.5*]. Thus, a share exchange tender offer has the same elements as an exchange reorganization except that after the exchange the acquiring corporation is not in control of the corporation whose shares were acquired [*Corp. Code §§ 181(b), 183.5*]. Even though a share exchange tender offer is not an exchange reorganization, it is subject to similar approval requirements [*see Corp. Code § 1201.5*].

[c] Sale-of-Assets Reorganizations

A "sale-of-assets reorganization" is the acquisition by a domestic corporation, foreign corporation, or other business entity, in exchange wholly or partly for its equity securities (or the equity securities of a domestic corporation, a foreign corporation, or other business entity that is in control of the buyer), or for the buyer's debt securities (or the debt securities of a domestic corporation, a foreign corporation, or other business entity that is in control of the buyer) that

are not adequately secured and that have a maturity date in excess of five years after the consummation of the reorganization, or both of these types of equity and debt securities, of all or substantially all of the assets of another domestic corporation, foreign corporation, or other business entity [*Corp. Code § 181(c)*]. A sale-of-assets reorganization is subject to the reorganization provisions of the General Corporation Law [*see Corp. Code §§ 1200-1203*]; a sale-of-assets transaction that is not a reorganization is governed by *Corp. Code §§ 1000-1002* [*see § 169.11[1]*].

[3] Additional Definitions

The significance of the definitional provisions of the General Corporation Law in the area of corporate reorganizations cannot be overemphasized. The General Corporation Law makes a radical departure from prior law by regulating corporate combinations according to their substantive result rather than the particular method used. Accordingly, the three types of reorganizations are governed by substantially similar requirements regarding approvals by boards of directors and holders of outstanding shares and the rights of dissenting shareholders. To this end, the General Corporation Law relies heavily on terms of art specifically defined in Chapter 1 [*Corp. Code §§ 100-195*]. The term "reorganization" is *defined in § 169.10[2][a]* and subsequent headings; other key definitions are set forth below.

- "Approved by the board" or "approval of the board" means approved or ratified by the vote of the board of directors, or by the vote of a committee authorized to exercise the powers of the board (except as to matters not within the competence of the committee under *Corp. Code § 311*) [*Corp. Code § 151*; *see Corp. Code § 311* (committees lack authority to approve reorganizations that require shareholder approval)].

- "Approved by the outstanding shares" or "approval of the outstanding shares" means approved by the affirmative vote of a majority of the outstanding shares entitled to vote. The approval must include the affirmative vote of a majority of the outstanding shares of each class or series entitled, by any provision of the articles or of the General Corporation Law, to vote as a class or series on the subject matter of the vote and must also include the affirmative vote of any greater proportion (including all) of the outstanding shares of any class or series if that greater proportion is required by the articles or the General Corporation Law [*Corp. Code § 152*].

- "Approved by the shareholders" or "approval of the shareholders" means approved or ratified by (1) the affirmative vote of a majority of the shares represented and voting at a duly held meeting at which a quorum is present, which shares voting affirmatively also constitute at least a majority of the required quorum; (2) the written consent of the shareholders [*see Corp. Code § 603*]; or (3) the affirmative vote or written consent of any greater proportion (including all) of the shares of any class or series if that greater proportion is required by the articles or the General Corporation Law [*Corp. Code § 153*].

- "Control," for the purposes of *Corp. Code §§ 181* (defining "reorganization"), 1001 (governing sales of assets), and *Corp. Code § 1200* (governing board approval of reorganizations), means the ownership, directly or indirectly, of shares or equity securities possessing more than 50 percent of the voting power of a domestic corporation, a foreign corporation, or an other business entity [*Corp. Code § 160(b)*]. In all other situations, "control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a corporation [*Corp. Code § 160(a)*].

- "Constituent corporation" means a corporation that is merged with or into one or more corporations or one of more other business entities and includes a surviving corporation [*Corp. Code § 161*].

- "Disappearing corporation" means a constituent corporation that is not the surviving corporation [*Corp. Code § 165*].

- "Equity security" as used in *Corp. Code §§ 181* (defining "reorganization"), 1001 (governing sale of assets), 1113 (governing mergers of corporations and other business entities), 1200 (governing board approval of reorganizations), and 1201 (governing shareholder approval of reorganizations), means any share or membership of a domestic or foreign corporation; any partnership interest, membership interest, or equivalent equity interest in an other business entity; and any security convertible, with or without consideration into, or any warrant or right to subscribe to or purchase, any of the above [*Corp. Code § 168*].

- "Other business entity" means a domestic or foreign limited liability company, limited partnership, general partnership [*see Corp. Code § 16101(9)*], business trust (i.e., a business organization formed as a trust), real estate investment trust [*see I.R.C. § 856(a)*], unincorporated association (other than a nonprofit association) [*see Corp. Code § 18035*], or a domestic reciprocal insurer organized after 1974 to provide medical malpractice insurance [*see Ins. Code § 1550 et seq.*].

- "Parent," as used in *Corp. Code § 1001* (governing sales of assets), *Corp. Code § 1101* (governing agreements of mergers), and *Corp. Code § 1113* (governing mergers of corporations and other business entities), means a person in control of a domestic or foreign corporation, or other business entity, as "control" is defined in *Corp. Code § 160(b)*, set forth *above* [*Corp. Code § 175*]. Except as used in *Corp. Code §§ 1001* (governing sales of assets), 1101 (governing agreements of mergers), and *Corp. Code § 1113* (governing mergers of corporations and other business entities), a "parent" of a specified corporation is an affiliate in control [*see Corp. Code § 160(a)*, discussed *above*] of that corporation directly or indirectly through one or more intermediaries [*Corp. Code § 175*].

- "Proper county" means the county where the principal executive office of the corporation is located or, if the principal executive office is not located in California, or the corporation has no principal executive office, the County of Sacramento [*Corp. Code § 177*].

- "Surviving corporation" means a corporation into which one or more corporations or one or more limited partnerships are merged [*Corp. Code § 190*]. In a merger of a limited partnership and a corporation, the survivor could be a limited partnership. "Surviving limited partnership" means a limited partnership into which one or more other limited partnerships or one or more corporations are merged [*Corp. Code § 190.5*].

- "Voting power" means the power to vote for the election of directors at the time any determination of voting power is made, but does not include the right to vote on the occurrence of some condition or event that has not yet occurred. When different classes of shares are entitled to vote as separate classes for different members of the board, the determination of the percentage of voting power may be made on the basis of the total number of authorized directors that the shares in question (whether of one or more classes) have the power to elect in an election at which all shares then entitled to vote for the election of any directors are voted [*Corp. Code § 194.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawForeign BusinessesGeneral OverviewMergers & Acquisitions LawMergersGeneral OverviewMergers & Acquisitions LawSales of AssetsGeneral OverviewMergers & Acquisitions LawTakeovers & Tender OffersGeneral Overview

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14-169 California Forms of Pleading and Practice--Annotated § 169.11

§ 169.11 Sales of Assets That Are Not Reorganizations

[1] Separate Treatment

Sales of assets that are not reorganizations [*see Corp. Code § 181(c)*; § 169.10[2][c]] are governed by *Corp. Code §§ 1000-1002* [*Corp. Code § 1001(a)*]. Thus, unless the assets of the corporation are sold for equity securities or debt securities that are inadequately secured and have a maturity date in excess of five years after consummation of the acquisition, the board of directors and shareholder approvals prescribed by *Corp. Code §§ 1000* and *1001* apply.

[2] Approvals Required

[a] Generally

A corporation may sell, lease, convey, exchange, transfer, or otherwise dispose of all or substantially all of its assets provided that the principal terms of the transaction are approved by the board [*Corp. Code § 1001(a)*; *see Corp. Code § 151*; *see also Jeppi v. Brockman Holding Co., (1949) 34 Cal. 2d 11, 15-16, 206 P.2d 847]* . The sale or other type of disposition may be made on any terms and conditions, and for any consideration (money, securities or other property), that the board deems in the best interest of the corporation [*Corp. Code § 1001(c)*]. Further, unless the transaction is in the usual and regular course of business of the corporation, the principal terms of the transaction must also be approved by the outstanding shares of the corporation [*Corp. Code § 1001(a)*; *see Corp. Code § 152*]. The approval by the outstanding shares may occur before or after the approval by the board, and before or after the transaction [*Corp. Code § 1001(a)(2)*]. However, notwithstanding the approval of the outstanding shares, the board may abandon the proposed transaction without further action by the shareholders, subject to any contractual rights of third parties [*Corp. Code § 1001(b)*].

In contrast, any mortgage, deed of trust, pledge, or other hypothecation of all or any part of a corporation's property to secure the payment or performance of any contract or obligation of the corporation may be approved by the board [*Corp. Code § 1000*]. Unless the articles of incorporation otherwise require, this action need not be approved by the shareholders [*see Corp. Code § 153*] or the outstanding shares [*Corp. Code § 1000*; *see Corp. Code § 152*].

[b] Sale to Controlling Buyer

If the acquiring party in a transaction governed by *Corp. Code § 1001(a)* is in control of, or under common control with, the disposing corporation, the principal terms of the sale must be approved by at least 90 percent of the voting power of the disposing corporation [*Corp. Code § 1001(d)*; *see Corp. Code §§ 160(b), 194.5*]. This rule does not apply when the disposition is to a domestic or foreign corporation or other business entity in consideration of the nonredeemable common shares or nonredeemable equity securities of the acquiring party or its parent [*Corp. Code § 1001(d)*]. This rule is designed to prevent the freezing out of minority shareholders that own more than 10 percent of the voting power.

The 90-percent approval requirement does not apply to a transaction if the terms and conditions of the transaction, and their fairness, have been approved by the Commissioner of Corporations [*Corp. Code § 25142*], the Superintendent of Banks [*Fin. Code § 696.5*], the Insurance Commissioner [*Ins. Code § 838.5*], or the Public Utilities Commission [*Corp. Code § 1001(e)*; *see Pub. Util. Code § 822*].

[c] Effect of Failure to Obtain Approval

A failure to obtain the approval of the outstanding shares [*Corp. Code § 152*] before the sale of assets is not fatal to the transaction because the statute expressly permits approval either before or after board approval, and either before or after the transaction [*Corp. Code § 1001(a)*].

If the sale of a corporation's assets must be approved by the outstanding shares and that approval is never secured, apparently only the shareholders, and possibly creditors of the selling corporation, have the right to object to a sale in violation of the approval requirements [*Bickston v. Federal Firearms Corp. (1964) 227 Cal. App. 2d 574, 579-580, 38 Cal. Rptr. 793* ; *Long Construction Co. v. Empire Drive-In Theatres, Inc. (1962) 208 Cal. App. 2d 726, 735-738* ; *see Gunther v. Thompson (1931) 211 Cal. 631, 634, 296 P. 611* (transferee has no standing); *Associates Discount Corp. v. Tobb Co. (1966) 241 Cal. App. 2d 541, 549, 50 Cal. Rptr. 738* (corporation cannot rely on failure to obtain shareholders' consent to invalidate sale)]. It has been held that sales in violation of this approval requirement are only voidable [*see Solorza v. Park Water Co. (1948) 86 Cal. App. 2d 653, 658, 195 P.2d 523]* . For example, in *Long Construction Co. v. Empire Drive-In Theatres, Inc.*, the court held that even a creditor cannot object to a transfer of the corporation's assets on the ground that the transfer violated the statutory approval requirements; such a transfer was voidable because the requisite approval could be given after the transfer was complete, which would terminate any voidability [*Long Construction Co. v. Empire Drive-In Theatres, Inc. (1962) 208 Cal. App. 2d 726, 735*]. However, despite a shareholder's right to object to the sale, a shareholder who does not act promptly will be barred by laches [*Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp. (1962) 200 Cal. App. 2d 322, 326-327, 19 Cal. Rptr. 208* ; *King v. Los Angeles County Fair Association (1945) 70 Cal. App. 2d 592, 596, 161 P.2d 468]* . Although these cases were decided under prior law, there is no reason why they would not be equally applicable to the current law.

[3] Interested Party's Proposal for Sale of Assets

If a written proposal for approval of a sale of assets governed by *Corp. Code § 1001(a)* is made to some or all of a corporation's shareholders by an interested party, an affirmative written opinion as to the fairness of the consideration to the shareholders is required [*Corp. Code § 1203(a)*]. The requirements applicable to the fairness opinion are discussed in *§ 169.12[4][a]* and subsequent headings. However, this requirement is inapplicable to an interested party proposal if (1) the subject corporation does not have shares held of record by 100 or more persons [*see Corp. Code § 605*]; or (2) the transaction has been qualified under *Corp. Code § 25113* or *25121* and no stop order under *Corp. Code § 25140* or *25143(a)* is in effect regarding that qualification [*Corp. Code § 1203(a)*].

Similarly, if a a vote or written consent is being sought pursuant to an interested party proposal and a later written proposal for a sale of assets governed by *Corp. Code § 1001(a)* that would require a vote or written consent of shareholders is made to the corporation or its shareholders by a person other than an interested party ("later proposal") at least 10 days before the date for the vote or notice of shareholder approval, the provisions of *Corp. Code § 1203(b)*

apply [*Corp. Code § 1203(b)*]. These provisions are discussed under *§ 169.12[4][d]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawForeign BusinessesGeneral OverviewMergers & Acquisitions LawMergersGeneral OverviewMergers & Acquisitions LawSales of AssetsGeneral OverviewMergers & Acquisitions LawTakeovers & Tender OffersGeneral Overview

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§ 169.12 Reorganizations

[1] Generally

The General Corporation Law generally treats the three types of reorganizations (merger reorganizations, exchange reorganizations, and sale-of-assets reorganizations) [*Corp. Code § 181*; *see § 169.10[2][a]* and subsequent headings] similarly; these reorganizations are governed by substantially similar requirements as to approvals of the boards of participating corporations, the rights of holders of outstanding shares to approve the reorganization, and the rights of dissenting interest to receive cash in lieu of the proposed consideration. The focus of this Part is on the application of the provisions of Chapter 12 of the General Corporation Law [*Corp. Code §§ 1200-1203*], which govern the approvals necessary in any corporate reorganization [§ 169.12[2]]. Whether the approval of the shareholders is necessary will in turn determine whether they have dissenters' rights under Chapter 13 of the General Corporation Law [*Corp. Code §§ 1300-1312*; *see § 169.60[6]*].

Of the three types of corporate reorganizations, only a merger reorganization follows a specific statutory pattern with respect to the execution and filing of documents. These procedures are detailed in Chapter 11 of the General Corporation Law [*Corp. Code §§ 1100-1113*] and are not discussed here.

[2] Approval by Board of Directors

A reorganization [*Corp. Code § 181*] or a share exchange tender offer [*Corp. Code § 183.5*] must be approved by the board of directors of the following [*Corp. Code § 1200*]:

- Each constituent corporation in a merger reorganization;
- The acquiring corporation in an exchange reorganization;
- The acquiring corporation and the corporation whose property and assets are acquired in a sale-of-assets reorganization;
- The acquiring corporation in a share exchange tender offer [*Corp. Code § 183.5*]; and

- The corporation in control [*see Corp. Code § 160(b)* (defining "control")] of any constituent or acquiring domestic or foreign corporation or other business entity under Paragraph (1)-(3), and whose equity securities [*see Corp. Code § 168*] are issued, transferred, or exchanged in the reorganization.

The controlling corporation discussed in Paragraph (5), above is referred to as a "parent party" [*Corp. Code § 1200(e)*].

[3] Approval of Outstanding Shares

[a] General Rule

The principal terms of a reorganization must be approved by the outstanding shares [*Corp. Code § 152*] of each class of each corporation the approval of whose board is required under *Corp. Code § 1200* [*Corp. Code § 1201(a)*; *see § 169.12[2]*]. The type of vote required is a class vote of a majority of each class (unless the articles require a greater proportion), regardless of limitations or restrictions on their voting rights [*Corp. Code §§ 152, 1201(a)*; *see Corp. Code § 117*].

The approval of the outstanding shares may be given before or after the approval by the board. However, even after approval by the shareholders, the board may abandon the proposed reorganization without further action by the shareholders [*Corp. Code § 1201(h)* (board's abandonment of reorganization subject to any contractual rights of third parties)].

The two primary exceptions to this rule concerning certain preferred shares and de minimis dilutions in voting power [*Corp. Code § 1201(a), (b)*] are discussed in [b] and [c], *below*. The special rules apply to close corporations, surviving other business entities, and surviving nonprofit corporations [*Corp. Code §§ 1112, 1201(e), (f)*] are discussed in [e] and [g], *below*.

A special rule applies to sale-of-asset reorganizations involving a sale to a party that is in control of, or under common control with, the selling corporation [Corp. Code § 1001(a), (d), (e); *see § 169.11[2][b]*]. Additional requirements are imposed on reorganizations proposed by interested parties [*see § 169.12[4][a]*, and subsequent headings] and on share exchange tender offers [*see § 169.13*].

[b] Exception; Certain Preferred Shares

Unless otherwise provided in the articles, no approval of any class of outstanding preferred shares of a surviving or acquiring corporation or parent party is required if the rights, preferences, privileges, and restrictions granted to or imposed on that class remain unchanged [*Corp. Code § 1201(a)*]. However, in a merger reorganization, if any amendment is made to the articles of the surviving corporation that would otherwise require approval of such a class of outstanding preferred shares (such as an amendment creating a new class with priority over those shares [*see Corp. Code §§ 900-911*]) the approval of the outstanding preferred shares is still required [*Corp. Code § 1201(a), (c)*].

[c] Exception; Dilution Test

Because the fundamental purpose of requiring shareholder approval of a reorganization by shareholders of the continuing corporation is to prevent their interests in that corporation from being diluted, the General Corporation Law dispenses with the approval requirement when the dilution is not significant [*see Corp. Code § 1201(b)*]. No approval of the outstanding shares is required with respect to any corporation if it, or its shareholders immediately before the reorganization, or both, own immediately after the reorganization equity securities, other than any warrant or right to subscribe to or purchase equity securities, of the surviving or acquiring corporation or a parent party possessing more than five-sixths of the voting power of the surviving or acquiring corporation or parent party [*Corp. Code § 1201(b)*]. In calculating the more than five-sixths requirement, equity securities that were owned immediately before the

reorganization by shareholders who held shares in another party to the reorganization are disregarded [*Corp. Code § 1201(b)*]. That is, when Corporation A acquires Corporation B and a shareholder owns equity securities in both corporations, those securities will be disregarded in determining whether the dilution test is met with respect to either corporation. Further, for this purpose, the voting power of a corporation is to be calculated by assuming the conversion of all equity securities convertible (immediately or at some future time) into shares entitled to vote, but not assuming the exercise of any warrant or right to subscribe to or purchase such shares [*Corp. Code § 1201(b)*].

The dilution exception does not apply (and the principal terms of the reorganization must be approved by the outstanding shares of the surviving corporation) in a merger reorganization when an amendment is made to the articles of incorporation that would otherwise require shareholder approval [*Corp. Code § 1201(c)*]. An additional qualification to the dilution exception requires that the outstanding shares of any class of a corporation that is a party to a merger or sale-of-assets reorganization must approve the principal terms of the reorganization if the holders of shares of that class receive shares of the surviving or acquiring corporation or parent party that have different rights, preferences, privileges, or restrictions than those surrendered. Shares in a foreign corporation received in exchange for shares in a domestic corporation are deemed to have different rights, preferences, privileges, or restrictions [*Corp. Code § 1201(d)*].

[d] Surviving Other Business Entities

Notwithstanding the preferred shares and dilution exceptions discussed above [*Corp. Code § 1201(a), (b)*], the principal terms of a reorganization must be approved by the outstanding shares of any class of a corporation that is a party to a merger reorganization if the holders of shares of that class receive interests in a surviving other business entity in the merger [*Corp. Code § 1201(f*); *see also Corp. Code § 1113(g)(2)*].

[e] Close Corporations

Notwithstanding the majority vote requirement and the preferred shares and dilution exceptions discussed above [*Corp. Code § 1201(a), (b)*], the principal terms of a reorganization must be approved by the affirmative vote of at least two-thirds of each class of the outstanding shares of any close corporation [*see Corp. Code § 158*] if the reorganization would result in the shareholders receiving shares of a corporation that is not a close corporation [*Corp. Code § 1201(e)*; *see Corp. Code § 1111* (mergers)]. However, the articles of a close corporation may provide for a less than two-thirds vote, but not less than a majority of the outstanding shares of each class [*Corp. Code § 1201(e)*; *see Corp. Code § 1111* (mergers)].

[f] Personal Liability Imposed

Notwithstanding the preferred shares and dilution exceptions discussed *above* [*Corp. Code § 1201(a), (b)*], the principal terms of a reorganization must be approved by all shareholders of any class or series if, as a result of the reorganization, the holders of that class or series become personally liable for any obligations of a party to the reorganization, unless all holders of that class or series have the dissenters' rights set forth in *Corp. Code § 1300 et seq.* [*Corp. Code § 1201(g)*; *see § 169.17[1]*].

[g] Surviving Nonprofit Corporations

Notwithstanding the majority vote requirement and the preferred shares and dilution exceptions discussed above [*Corp. Code § 1201(a), (b)*], if a disappearing corporation in a merger is governed by the General Corporation Law and the surviving corporation is a nonprofit public benefit corporation, a nonprofit mutual benefit corporation, or a nonprofit religious corporation, the merger must be approved by all outstanding shares of all classes of the disappearing corporation, regardless of any limitations or restrictions on those shares [*Corp. Code § 1112*].

[h] Foreign Parents

If a parent party [*see Corp. Code § 1200(e)*] is a foreign corporation other than one to which *Corp. Code § 2115(a)* applies, any requirement or lack of requirement for approval by the outstanding shares of the foreign corporation must be based, not on *Corp. Code §§ 1200* and *1201*, but on the laws of the state of place of incorporation of the foreign corporation [*Corp. Code § 1202(c)*]. *Corp. Code § 2115* is discussed in Ch. 160, *Corporations: Capacity* .

[i] Cancellation of Shares Without Consideration

In addition to the requirements of *Corp. Code § 1201*, the principal terms of a merger reorganization must be approved by all the outstanding shares of a corporation if the agreement of merger provides that all of the outstanding shares of that corporation are canceled without consideration in the merger [*Corp. Code § 1202(a)*].

[j] Preferred Shares Receiving Less Than Articles Provide

In addition to the requirements of *Corp. Code § 1201*, if the terms of a merger reorganization or a sale-of-assets reorganization provide that a class or series of preferred shares is to have distributed to it a lesser amount than would be required by applicable article provisions, the principal terms of the reorganization must be approved by the same percentage of outstanding shares of that class or series that would be required to approve an amendment to the article provisions to provide for the distribution of that lesser amount [*Corp. Code § 1202(b)*].

[4] Additional Requirements When Reorganization Proposed by Interested Party

[a] Opinion of Fairness

When a tender offer, including a share exchange tender offer [*see Corp. Code § 183.5*], or a written proposal for approval of a reorganization [*Corp. Code § 1200*], or for a sale of assets subject to *Corp. Code § 1001(a)*, is made to some or all of a corporation's shareholders by an interested party [§ 169.12[4][b]], a written affirmative opinion on the fairness of the consideration to the shareholders of the corporation must be delivered to the corporation's board or shareholders [*Corp. Code § 1203(a)*; *see § 169.12[4][c]*]. However, this opinion is not required if (1) the corporation does not have shares held of record by 100 or more persons [*see Corp. Code § 605*]; or (2) if the transaction has been qualified under *Corp. Code § 25113* or *25121* and no order under *Corp. Code § 25140* or *25143(a)* is in effect with respect to that qualification [*Corp. Code § 1203(a)*].

The opinion of fairness must be provided by a person who is not affiliated with the offeror and who, for compensation, engages in the business of advising others regarding the value of properties, businesses, or securities. A person is not deemed to be affiliated with the offeror because he or she (1) has provided services for the offeror or a related entity, or (2) is simultaneously providing advice or assistance on the proposed transaction in a manner that makes his or her compensation contingent on the success of the proposed transaction [*Corp. Code § 1203(a)*].

[b] Interested Party Defined

An "interested party" is a person who is a party to the proposed transaction and satisfies one of the following requirements [*Corp. Code § 1203(a)*]:

- Directly or indirectly controls the corporation that is the subject of the tender offer or proposal;

- Is, or is directly or indirectly controlled by, an officer or director of the subject corporation; or

- Is an entity in which a material financial interest [*see Corp. Code § 310(a)*] is held by any director or executive officer of the subject corporation. An executive officer is a president; any vice-president in charge of a principal business unit, division, or function such as sales, administration, research or development, or finance; and any other officer or other person who performs policymaking functions or

has the same duties as those of a president or vice-president [*Corp. Code § 1203(a)*].

[c] Time for Delivery of Opinion

If no shareholder approval or acceptance is required for the consummation of the transaction, the opinion must be delivered to the corporation's board of directors no later than the time that the board authorizes and approves the consummation of the transaction [*Corp. Code § 1203(a)(1)*]. If a tender offer is made to the shareholders, the opinion must be delivered to the shareholders when the written tender offer is first made to them [*Corp. Code § 1203(a)(2)*]. If the tender offer is commenced by publication, and tender offer materials are subsequently mailed or otherwise distributed to the shareholders, the opinion may be omitted in that publication if the opinion is included in the materials distributed to the shareholders [*Corp. Code § 1203(a)(2)*].

If a shareholders' meeting is to be held to vote on approval of the transaction, the opinion must be delivered to the shareholders with the notice of the meeting [*Corp. Code § 1203(a)(3)*]. If shareholders' consents are solicited in writing, the opinion must be delivered at the same time as the solicitation [*Corp. Code § 1203(a)(4)*]. If shareholders' consents are not solicited in writing, the opinion must be delivered to each shareholder whose consent is solicited before that shareholder gives consent, and to all other shareholders when they are given the notice required by *Corp. Code § 603(b)* [*Corp. Code § 1203(a)(5)*].

[d] Later Proposal Made While Interested Party's Proposal Is Pending

When a tender offer or a written proposal for approval of a reorganization [*see Corp. Code § 1200*] or a sale of assets governed by *Corp. Code § 1001(a)* that would require a vote or written consent of shareholders is made to the corporation or its shareholders by a person other than an interested party at least 10 days before the date for acceptance of the tendered shares or the vote or the notice of shareholder approval on the interested party's proposal, the shareholders must be informed of that later proposal, and any written material provided by the later offeror must be forwarded to the shareholders at that offeror's expense. In addition, the shareholders must be afforded a reasonable opportunity to withdraw any vote, consent, or proxy previously given before the vote or written consent on the interested party's proposal becomes effective, or they must be given a reasonable time to withdraw any shares tendered before the purchase of the shares pursuant to the interested party's proposal. A delay of 10 days from the notice or publication of the later proposal constitutes a reasonable opportunity or time to effect withdrawal [*Corp. Code § 1203(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawClosely Held CorporationsGeneral OverviewBusiness & Corporate LawForeign BusinessesGeneral OverviewMergers & Acquisitions LawMergersGeneral OverviewMergers & Acquisitions LawSales of AssetsGeneral OverviewMergers & Acquisitions LawTakeovers & Tender OffersGeneral Overview

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§ 169.13 Approval of Share Exchange Tender Offers

The principal terms of a share exchange tender offer [*see Corp. Code § 183.5*; *see § 169.10[2][b]*] must be approved by the outstanding shares [*see Corp. Code § 152*] of each class of the corporation making the tender offer or whose shares are to be used in the tender offer.

There are two exceptions to this rule. First, no approval of the outstanding shares is required if the corporation, or its shareholders immediately before the tender offer, or both, will own (immediately after the completion of the share exchange proposed in the tender offer) equity securities (other than any warrant or right to subscribe to or purchase the equity securities) of the corporation making the tender offer or of the corporation whose shares were used in the tender offer, possessing more than five-sixths of the voting power of either corporation. In determining ownership by the shareholders of a corporation immediately after the tender offer of equity securities pursuant to the preceding sentence, equity securities that they owned immediately before the tender offer as shareholders of another party to the transaction are disregarded. For the purposes of *Corp. Code § 1201.5* only, the voting power of a corporation is calculated by assuming the conversion of all equity securities convertible (immediately or at some future time) into shares entitled to vote, but not assuming the exercise of any warrant or right to subscribe to, or purchase, shares [*Corp. Code § 1201.5(b)*].

Second, unless otherwise provided in the articles, no approval of any class of outstanding preferred shares of either corporation is required if the rights, preferences, privileges, and restrictions granted to or imposed on that class of shares remain unchanged. For purposes of this requirement, two classes of common shares differing only as to voting rights are considered as a single class of shares [*Corp. Code § 1201.5(a)*].

A share exchange tender offer must also be approved by the board of the acquiring corporation [*Corp. Code § 1200(d)*; *see § 169.12[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFinanceInitial Capitalization & Stock SubscriptionsClasses of StockBusiness &

Corporate LawCorporationsShareholdersMeetings & VotingVoting SharesFundamental ChangesMergers & Acquisitions LawTakeovers & Tender OffersGeneral OverviewMergers & Acquisitions LawTakeovers & Tender OffersDuties & Liabilities of Shareholders

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§ 169.14 Protection of Minority Interests in Mergers; Conversion of Shares

The General Corporation Law requires that agreements of merger must state the manner of converting the shares of each constituent corporation into shares or other securities of the survivor [*Corp. Code §§ 1101(d), 1113(b)(4)*]. If any shares of any constituent corporation are not to be converted solely into shares or other securities of the survivor, the agreement must state (1) the cash, rights, securities, or other property that the shareholders will receive in exchange (which cash, rights, securities, or other property may be in addition to or in lieu of of shares or other securities of the survivor) or (2) that the shares are canceled without consideration [*Corp. Code §§ 1101(d), 1113(b)(4)*; *see § 169.12[3][i]*].

Special provisions govern merger reorganizations with respect to the conversion of the shares of the constituent corporations into those of the survivor, which may involve shareholder approval requirements in addition to those that would apply to the transaction as a reorganization under *Corp. Code § 1201* [*see § 169.12[3]*]. To prevent the unfair treatment of minority shareholders through the conversion of shares incident to a merger, the General Corporation Law requires that each share of the same class or series of any constituent corporation (other than the cancellation of shares held by a party to the merger or its parent or a wholly owned subsidiary of either in another constituent corporation) must, unless all shareholders of the class or series consent and except as provided in *Corp. Code § 407* (fractional shares), be treated equally with respect to any distribution of cash, rights, securities, or other property [*Corp. Code §§ 1101, 1113(c)*]. Except in a short-form merger and in a merger of a corporation into its subsidiary in which it owns at least 90 percent of the outstanding shares of each class, the unredeemable common shares of a constituent corporation may be converted only into unredeemable common shares of the surviving corporation or a parent party, or unredeemable equity securities of a surviving party other than a corporation if another party to the merger or its parent directly or indirectly owns shares of another constituent corporation representing more than 50 percent of the voting power of the other constituent corporation before the merger, unless all of the shareholders of the class consent and except as provided in *Corp. Code § 407* (fractional shares) [*Corp. Code §§ 1101, 1113(c)*]. *Corp. Code § 407* essentially permits cashing out the minority by issuing fractional shares, holders of which are then paid cash, in accordance with the conversion schedule of the merger agreement, but only if that action would result in not more than 10 percent of the outstanding shares of any class being canceled [*Corp. Code §§ 407, 1101*].

The above requirements do not apply to any transaction if the Commissioner of Corporations, Commissioner of

Financial Institutions, the Insurance Commissioner, or the Public Utilities Commission has approved the terms and conditions of the transaction and the fairness of those terms and conditions [*Corp. Code § 1101.1*; *see Corp. Code § 25142*; *Ins. Code § 838.5*; *Fin. Code §§ 696.5, 5750, 5802*; *Pub. Util. Code § 822*]. Under both California and federal law, a finding of fairness by the appropriate commissioner under *Corp. Code § 1101.1* collaterally estops further challenge regarding the fairness of the merger price even if no review of that fairness decision is sought under *Code Civ. Proc. § 1094.5* [*Plaine v. McCabe (9th Cir. 1986) 797 F.2d 713, 718-721, 719 n.12*]. However, an action under *15 U.S.C. § 78n(e)* to recover damages sustained because of misstatements or omissions in the tender offer is not precluded by the fact that the merger occurred at a fair price [*Plaine v. McCabe (9th Cir. 1986) 797 F.2d 713, 718-722, 721, 722]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Mergers & Acquisitions LawMergersGeneral OverviewMergers & Acquisitions LawMergersDuties & Liabilities of ShareholdersMergers & Acquisitions LawMergersRights of Dissenting Shareholders

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§ 169.15 Short-Form Mergers

There are two types of short-form mergers [*see Corp. Code § 1110(a)*]:

- The merger of a parent with one or more wholly owned subsidiaries.

- The merger of a parent and one or more subsidiaries of which the parent owns at least 90 percent but not all of the outstanding shares of each class.

In either situation, the merger may be effected by a resolution or plan of merger adopted and approved by the board of the parent corporation [*Corp. Code § 1110(g)*; *but see Corp. Code § 1110(h)* (conditions for merger when parent is foreign corporation and at least one subsidiary is domestic corporation)]. If the parent corporation owns at least 90 percent but less than all the outstanding shares of each class of the subsidiary corporation, the board of that subsidiary must also approve both the resolution or plan of merger and the consideration to be received for each share of the subsidiary corporation that is not owned by the parent [*Corp. Code § 1110(b)*].

In either type of merger, if the parent is merged into a subsidiary, the boards of both the parent corporation and the surviving subsidiary corporation must approve the resolution or plan of merger [*Corp. Code § 1110(a), (c)*]. If the parent is merged into a subsidiary, and, but for the operation of *Corp. Code § 1110*, the merger would be a merger reorganization [*see Corp. Code § 181(a)*], the principal terms of which would be required to be approved by the outstanding shares of any class of the parent corporation pursuant to *Corp. Code § 1201(d)* [§ 169.12[3]], the principal terms of the resolution or plan of merger must be approved by the outstanding shares of that same class of the parent corporation [*Corp. Code § 1110(c)*].

If the parent owns less than all the outstanding shares of a domestic subsidiary corporation party to a short-form merger, the shareholders of that subsidiary corporation are entitled to 20 days notice before the effective date of the merger. The notice must contain a copy of the resolution or plan of merger and the information required by *Corp. Code § 1301(a)* [*Corp. Code § 1110(h)*]. The shareholders of that subsidiary have the right to demand payment of cash for their shares pursuant to *Corp. Code § 1301 et seq.* [*Corp. Code § 1110(h)*; *see § 169.17[1*]; *see also §§ 169.60, 169.61*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersScope of AuthorityGeneral OverviewMergers & Acquisitions LawMergersShort-Form Mergers

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§ 169.16 Conversions

[1] When Conversion is Permitted

Under Chapter 11.5 of the General Corporation Law [*Corp. Code §§ 1150-1160* (*see* Stats. 2002, ch. 480, § 6); *see also* Ballantine & Sterling, California Corporation Laws, Ch. 12, *Corporate Acquisitions, Mergers, and Reorganization* s, § 265], a corporation may be converted into a domestic "other business entity" (that is, a limited liability company, limited partnership, general partnership, business trust, real estate investment trust, unincorporated association other than a nonprofit association, or domestic reciprocal insurer organized after 1974 to provide medical malpractice insurance pursuant to *Ins. Code § 1550 et seq.*) [*Corp. Code § 1150(g)*; *see Corp. Code § 174.5*] if, pursuant to the proposed conversion [*Corp. Code § 1151(a)*]:

- Each share of the same class or series of the converting corporation would be treated equally with respect to any cash, rights, securities, or other property to be received by, or any obligations or restrictions to be imposed on, the holder of that share, unless all the shareholders of the class or series consent; and

- Nonredeemable common shares of the converting corporation would be converted only into nonredeemable equity securities of the converted entity unless all of the shareholders of the class consent.

The conversion of a corporation to a domestic other business entity may be effected only if both of the following conditions are met [*Corp. Code § 1151(b)*]:

- The law under which the converted entity will exist expressly permits the formation of that entity pursuant to a conversion.

- The corporation complies with any and all other requirements of any other law that applies to conversion to the converted entity.

[2] When Conversion is Effective

After the approval of a plan of conversion by the board and the outstanding shares of a corporation converting into a domestic other business entity [*see Corp. Code § 1152*; *see also § 169.16[4]*], the converting corporation must file all documents required by law to effect the conversion and create the converted entity, including a certificate of conversion or a statement of conversion [*see Corp. Code § 1155*; *see § 169.16[6]*]. The conversion will thereupon be effective [*Corp. Code § 1153(a)*].

A copy of the statement of partnership authority, certificate of limited partnership, or articles of organization complying with *Corp. Code § 1155*, duly certified by the Secretary of State on or after the effective date, is conclusive evidence of the conversion of the corporation [*Corp. Code § 1153(b)*].

[3] Applicable Definitions

Chapter 11.5 sets forth several definitions applicable to conversion procedures [*Corp. Code § 1150*]:

- "Converted corporation" means a corporation that results from a conversion of an other business entity or a foreign other business entity or a foreign corporation pursuant to *Corp. Code § 1157*.

- "Converted entity" means a domestic other business entity that results from a conversion of a corporation under Chapter 11.5.

- "Converting corporation" means a corporation that converts into a domestic other business entity pursuant to Chapter 11.5.

- "Converting entity" means an other business entity or a foreign other business entity or foreign corporation that converts into a corporation pursuant to *Corp. Code § 1157*.

For purposes of these definitions,"other business entity" means a domestic or foreign limited liability company, limited partnership, general partnership, business trust, real estate investment trust, an unincorporated association (other than a nonprofit association), or a domestic reciprocal insurer organized after 1974 to provide medical malpractice insurance pursuant to *Ins. Code § 1550 et seq.* [*Corp. Code § 1150(g)*; *see Corp. Code § 174.5*]. "Domestic other business entity" means an other business entity organized under the laws of California [*Corp. Code § 1150(e)*; *see Corp. Code § 167.7*]. "Foreign other business entity" means an other business entity organized under the laws of any state other than California, or of the District of Columbia, or under the laws of a foreign country [*Corp. Code § 1150(e)*; *see Corp. Code § 171.07*].

[4] Plan of Conversion

[a] Contents, Approvals, and Parties

A corporation that desires to convert to a domestic other business entity must approve a plan of conversion that states the terms and conditions of the conversion, as well as other information required by statute [*Corp. Code § 1152(a)*].

The plan of conversion must be approved by the board of the converting corporation [*Corp. Code § 151*], and the principal terms of the plan of the conversion must be approved by the outstanding shares [*Corp. Code § 152*] of each class of the converting corporation. The approval of the outstanding shares may be given before or after approval by the board [*Corp. Code § 1152(b)*]. Notwithstanding the above provisions, if a converting corporation is a close corporation, the conversion must be approved by the affirmative vote of at least two-thirds of each class of outstanding shares of that converting corporation. The articles, however, may provide for a lesser vote, but not less than a majority of the outstanding shares of each class [*Corp. Code § 1152(b)*].

If the corporation is converting into a general or limited partnership or into a limited liability company, then in addition to the approval of the shareholders set forth above, the plan of conversion must be approved by each shareholder who will become a general partner or manager, as applicable, of the converted entity pursuant to the plan of conversion unless the shareholders have dissenters' rights pursuant to *Corp. Code § 1159* and Chapter 13 of the Corporations Code [*Corp. Code § 1152(c)*; *see Corp. Code § 1300 et seq.*; *see also § 169.17*].

When the conversion becomes effective, all shareholders of the converting corporation, except those that exercise dissenters' rights as provided in *Corp. Code § 1159* and Chapter 13 will be deemed parties to any agreement or agreements constituting the governing documents for the converted entity adopted as part of the plan of conversion, irrespective of whether or not a shareholder has executed the plan of conversion or those governing documents for the converted entity. Any adoption of governing documents made pursuant thereto will be effective at the effective time or date of the conversion [*Corp. Code § 1152(d)*].

[b] Amending Plan

A plan of conversion may be amended before the conversion takes effect. The amendment must be approved by the board and, if it changes any of the principal terms of the plan of conversion, by the shareholders of the converting corporation in the same manner and to the same extent as was required for approval of the original plan of conversion [*Corp. Code § 1152(e)*].

[5] Abandoning Conversion

A plan of conversion may be abandoned by the board of a converting corporation, or by the shareholders of a converting corporation if the abandonment is approved by the outstanding shares, in each case in the same manner as required for approval of the plan of conversion, subject to the contractual rights of third parties, at any time before the conversion is effective [*Corp. Code § 1152(f)*].

[6] Certificate or Statement of Conversion

[a] Requirements

Upon conversion of a corporation, one of the following applies:

- If a corporation is converting into a domestic limited partnership, a statement of conversion must be completed on the certificate of limited partnership for the converted entity [*Corp. Code § 1155(a)(1)*].

- If the corporation is converting into a domestic partnership, a statement of conversion must be completed on the statement of partnership authority for the converted entity, or if no statement of partnership authority is filed, a certificate of conversion must be filed separately [*Corp. Code § 1155(a)(2)*].

- If the corporation is converting into a domestic limited liability company, a statement of conversion must be completed on the articles of organization for the converted entity [*Corp. Code § 1155(a)(3)*].

For the purposes of Chapter 11.5, the certificate of conversion must be on a form prescribed by the Secretary of State [*Corp. Code § 1155(c)*].

Any statement or certificate of conversion of a converting corporation must be executed and acknowledged by those officers of the converting corporation that would be required to sign an officers' certificate [*Corp. Code § 173*] and must set forth all of the following [*Corp. Code § 1155(b)*]:

- The name and the Secretary of State's file number of the converting corporation.

- A statement of the total number of outstanding shares of each class entitled to vote on the conversion, that the principal terms of the plan of conversion were approved by a vote of the number of shares of each class which equaled or exceeded the vote required under *Corp. Code § 1152*, specifying each class entitled to vote, and the percentage vote required of each class.

- The name, form, and jurisdiction of organization of the converted entity.

The filing with the Secretary of State of a statement of conversion on an organizational document or a certificate of conversion as set forth above will have the effect of the filing of a certificate of dissolution by the converting corporation. No converting corporation that has made the filing is required to file a certificate of election under *Corp. Code § 1901* or a certificate of dissolution under *Corp. Code § 1905* as a result of that conversion [*Corp. Code § 1155(d)*].

[b] California Tax Liability

The Secretary of State will notify the Franchise Tax Board of the conversion [*Corp. Code § 1155(e)*].

Upon the effectiveness of a conversion pursuant Chapter 11.5, a converted entity that is a domestic partnership, domestic limited partnership, or domestic limited liability company will be deemed to have assumed the liability of the converting corporation [*Corp. Code § 1155(e)*]:

- To prepare and file or cause to be prepared and filed all tax and information returns otherwise required of the converting corporation under the Bank and Corporation Tax Law [*see Rev. & Tax. Code § 23001 et seq*].

- To pay any tax liability determined to be due pursuant to the Bank and Corporation Tax Law.

[7] Conversion of Other Business Entity or Foreign Other Business Entity into Corporation

An other business entity, foreign other business entity, or a foreign corporation may be converted into a corporation pursuant to Chapter 11.5 only if the converting entity is authorized by the laws under which it is organized to effect the conversion [*Corp. Code § 1157(a)*]. An other business entity, foreign other business entity, or a foreign corporation that desires to convert into a corporation must approve a plan of conversion or other instrument that is required to be approved to effect the conversion pursuant to the laws under which that entity is organized [*Corp. Code § 1157(b)*].

The conversion must be approved by the number or percentage of the partners, members, shareholders, or other holders of interest of the converting entity that is required by the laws under which that entity is organized, or a greater or lesser percentage as may be set forth in the converting entity's partnership agreement, articles of organization, operating agreement, articles of incorporation or other governing document in accordance with applicable laws [*Corp. Code § 1157(c)*].

The conversion will be effective under Chapter 11.5 upon the filing with the Secretary of State of the articles of incorporation of the converted corporation, containing a statement of conversion that complies with specific requirements [*Corp. Code § 1157(d), (e)*]. The filing of such a statement will have the effect of the filing of a certificate of cancellation by a converting foreign limited liability company or foreign limited partnership, and no converting foreign limited liability company or foreign limited partnership that has made the filing is required to file a certificate of cancellation under *Corp. Code §§ 15696, 15909.07*, or *17455* as a result of that conversion. If a converting entity is a

foreign corporation qualified to transact business in California, the foreign corporation will, by virtue of the filing, automatically surrender its right to transact intrastate business [*Corp. Code § 1157(f)*].

The requirements of *Corp. Code § 1157* do not apply to a foreign corporation's conversion into another foreign corporation. Therefore, the capacity of a qualified foreign corporation to do business, and to appear in legal proceedings, in California cannot be affected by the corporation's noncompliance with that code section in the event that the corporation converts, for example, from a Nevada corporation into a Delaware corporation [*Capital Gold Group, Inc. v. Nortier (2009) 176 Cal. App. 4th 1119, 1130-1132, 98 Cal. Rptr. 3d 439*].

[8] Effect of Conversion on Rights and Liabilities of Converting Entity and Members

[a] Converting Entity Unchanged

An entity that converts into another entity pursuant to Chapter 11.5 is for all purposes (other than for the purposes of *Rev. & Tax. Code §§ 17001 et seq.*, *18401 et seq.*, and *23001 et seq.*) the same entity that existed before the conversion [*Corp. Code § 1158(a)*]. When the conversion takes effect, all of the following apply [*Corp. Code § 1158(b)*]:

- All the rights and property, whether real, personal, or mixed, of the converting entity or converting corporation are vested in the converted entity or converted corporation.

- All debts, liabilities, and obligations of the converting entity or converting corporation continue as debts, liabilities, and obligations of the converted entity or converted corporation.

- All rights of creditors and liens upon the property of the converting entity or converting corporation will be preserved unimpaired and remain enforceable against the converted entity or converted corporation to the same extent as against the converting entity or converting corporation as if the conversion had not occurred.

- Any action or proceeding pending by or against the converting entity or converting corporation may be continued against the converted entity or converted corporation as if the conversion had not occurred.

[b] Liability of Shareholders

A shareholder of a converting corporation is liable for [*Corp. Code § 1158(c)*]:

- All obligations of the converting corporation for which the shareholder was personally liable before the conversion, but only to the extent that the shareholder was personally liable for the obligations of the converting corporation before the conversion.

- All obligations of the converted entity incurred after the conversion takes effect if either:

  - The shareholder becomes a general partner of a converted entity that is a general or limited partnership and, as a general partner, has liability under the laws under which the converted entity is organized or under the converted entity's governing documents; or

  - The shareholder becomes a holder of other interests in the converted entity and, as a holder, has liability under the laws under which the converted entity is organized or under the converted entity's governing documents.

A shareholder of a converted corporation remains liable for any and all obligations of the converting entity for which

the shareholder was personally liable before the conversion, but only to the extent that the shareholder was personally liable for the obligations of the converting entity prior to the conversion [*Corp. Code § 1158(d)*].

If a party to a transaction with a converted corporation that converted from a partnership reasonably believes when entering into the transaction that a shareholder of the converted corporation continues to be a general partner of the converting entity after the conversion is effective, and the shareholder was a general partner of the partnership that converted into the converted corporation, the shareholder is liable for an obligation incurred by the converted corporation within 90 days after the conversion takes effect. The shareholder's liability for all other obligations of the converted corporation incurred after the conversion takes effect is that of a shareholder of a corporation [*Corp. Code § 1158(e)*].

A converted entity must cause written notice of the conversion to be given by mail within 90 days after the effective date of the conversion to all known creditors and claimants whose addresses appear on the records of the converting entity. Failure to comply with this requirement, however, will not affect the validity of the conversion, extend the 90-day period set forth in *Corp. Code § 1158(e)* or otherwise affect the rights of a creditor or claimant [*Corp. Code § 1158(f)*].

[c] Rights of Shareholders

The shareholders of a converting corporation will have all of the rights under Chapter 13 [*see Corp. Code § 1300 et seq.*; *see also § 169.17*] of the shareholders of a corporation involved in a reorganization requiring the approval of its outstanding shares [*see Corp. Code § 152*], and the converting corporation will have all of the obligations under Chapter 13 of a corporation involved in the reorganization. Solely for purposes of applying the provisions of Chapter 13 (and not for purposes of Chapter 12) [*see Corp. Code § 1200 et seq.*; *see also § 169.12*], a conversion pursuant to *Corp. Code § 1151* or *1157* will be deemed to constitute a reorganization [*Corp. Code § 1159*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersGeneral OverviewBusiness & Corporate LawCorporationsShareholdersShareholder Duties & LiabilitiesPersonal LiabilityBusiness & Corporate LawForeign BusinessesDomesticationBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpGeneral OverviewMergers & Acquisitions LawLiabilities & Rights of SuccessorsGeneral Overview

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Chapter 169 CORPORATIONS: REORGANIZATIONS
PART II. LEGAL BACKGROUND

14-169 California Forms of Pleading and Practice--Annotated § 169.17

§ 169.17 Dissenters' Rights

[1] Rights Determined by Shareholder Voting Requirement

If the approval of the outstanding shares [*Corp. Code § 152*] is required for a reorganization pursuant to *Corp. Code § 1201(a), (b), (e),* or *(f)* [§ 169.12[3]], each shareholder of that corporation entitled to vote on the transaction and each shareholder of a subsidiary corporation in a short-form merger may, by complying with *Corp. Code §§ 1300-1312*, require the corporation in which the shareholder holds shares to purchase for cash at their fair market value the shares owned by the shareholder that are dissenting shares [*Corp. Code § 1300(a)*]. Shareholders of subsidiary corporations in short-form mergers are also entitled to require the corporation to make a cash purchase of their dissenting shares [*Corp. Code § 1300(a)*].

The fair market value of dissenting shares is determined as of the day before the first announcement of the terms of the proposed reorganization or short-form merger, excluding any appreciation or depreciation in consequence of the proposed action, but adjusted for any subsequent stock split, reverse stock split, or share dividend [*Corp. Code § 1300(a)*].

Note that the shareholder will only have appraisal rights if he or she has the right under the enumerated subdivisions of *Corp. Code § 1201*. Thus, appraisal rights do not exist when the right to vote on a reorganization is conferred by *Corp. Code § 1201(c)* or *(d)*, that is, when the right to vote is premised on either an amendment to the articles of the surviving corporation or on a modification of the rights, preferences, privileges, or restrictions on shares received in a merger or sale-of-assets reorganization. The exception to the requirement that the shareholder have the right to vote in order to exercise dissenters' rights is in the case of a shareholder of a subsidiary corporation in a short-form merger [*see Corp. Code § 1300(a)*].

[2] Application to Conversions

Conversions pursuant to Chapter 11.5 of the Corporations Code [*see Corp. Code § 1150 et seq.*, discussed in *§ 169.41[4]*] are deemed to constitute a reorganization for purposes of applying the provisions of Chapter 13 only [*Corp. Code § 1313*]. The shareholders of a converting corporation will have all of the rights under Chapter 13 [*see Corp. Code § 1300 et seq.*] of the shareholders of a corporation involved in a reorganization requiring the approval of its outstanding

shares [*see Corp. Code § 152*], and the converting corporation will have all of the obligations under Chapter 13 of a corporation involved in the reorganization. Solely for purposes of applying the provisions of Chapter 13 (and not for purposes of Chapter 12) [*see Corp. Code § 1200 et seq.*; *see also § 169.12*], a conversion pursuant to *Corp. Code §§ 1151* or *1157* will be deemed to constitute a reorganization [*Corp. Code § 1159*].

[3] Dissenting Shares Defined

Even when dissenters' rights ordinarily would exist because the shareholders have the right to approve a reorganization (including one in which shareholders receive interests of a surviving limited partnership), the definition of "dissenting shares" in *Corp. Code § 1300(b)* further limits the right to dissent when the shares are publicly traded and can be sold at their fair market value, thus avoiding the costly and time-consuming appraisal process. The definition of dissenting shares also sets forth other requirements that, unless exactly complied with, may also disqualify shares from appraisal rights.

The term "dissenting shares" means shares that come within all of the following descriptions:

- Shares that were not immediately before the reorganization or short-form merger listed on any National Securities Exchange certified by the Commissioner of Corporations under *Corp. Code § 25100(o)*, and the notice of meeting of shareholders to act on the reorganization summarizes the provisions of *Corp. Code §§ 1300-1304*. However, this exclusion does not apply to any shares if their transfer is restricted by the corporation or by any law or regulation. This exclusion also is inapplicable to any class of shares if demands for payment are filed with respect to 5 percent or more of the outstanding shares of that class [*Corp. Code § 1300(b)(1)*];

- Shares that were outstanding on the record date for determination of the shareholders entitled to vote on the reorganization and either (1) were not voted in favor of the reorganization, or (2) if they were described in *Corp. Code § 1300(b)(1), above*, (without regard to the exclusions of that paragraph), were voted against the reorganization, or were held of record on the effective date of a short-form merger. However, clause (1) rather than clause (2) of this paragraph applies when the approval required by *Corp. Code § 1201* (reorganizations) is sought by written consent rather than at a meeting [*Corp. Code § 1300(b)(2)*];

- Shares that the dissenting shareholder has demanded that the corporation purchase at their fair market value in accordance with *Corp. Code § 1301* [*Corp. Code § 1300(b)(3)*]; and

- Shares that the dissenting shareholder has submitted for endorsement, in accordance with *Corp. Code § 1302* [*Corp. Code § 1300(b)(4)*].

"Dissenting shareholder" means the record holder of dissenting shares and includes a transferee of record [*Corp. Code § 1300(c)*].

[4] Rights Abrogated if Shares Provide for Specific Payment

The dissenters' rights, other than those in *Corp. Code § 1312* [*see § 169.42[1]*], do not apply to classes of shares whose terms and provisions specifically set forth the amount to be paid in respect to those shares in the event of a reorganization or merger [*Corp. Code § 1311*]. Any holder of shares of a class whose terms and provisions specifically state the amount to be paid in respect to those shares in the event of a reorganization or merger is entitled to payment in accordance with those terms [*Corp. Code § 1312(a)*]. However, if the holders of a class or series of preferred shares having specified rights of payment in a reorganization approve, by a vote sufficient to approve the amendment of the articles provision that creates that right, reorganization terms providing for a lesser amount than they would otherwise

be entitled to, the holders are entitled to payment in accordance with the terms and provisions of the approved reorganization [*Corp. Code § 1312(a)*; *see Corp. Code § 1202(b)*; *see also § 169.12[3][j]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Mergers & Acquisitions LawMergersRights of Dissenting ShareholdersMergers & Acquisitions LawSales of AssetsRights of Dissenting ShareholdersMergers & Acquisitions LawTakeovers & Tender OffersDuties & Liabilities of Shareholders

California Forms of Pleading and Practice--Annotated

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Chapter 169 CORPORATIONS: REORGANIZATIONS
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14-169 California Forms of Pleading and Practice--Annotated § 169.18

§ 169.18 Procedure for Enforcing Dissenters' Rights

[1] Notice by Corporation of Reorganization Approval

When any shareholders of a corporation that is party to a reorganization have a right under *Corp. Code § 1300* to require the corporation to purchase their shares for cash, the corporation must mail to each such shareholder a notice of the approval of the reorganization by the corporation's outstanding shares within 10 days after the date of that approval. The notice must be accompanied by a copy of *Corp. Code §§ 1300-1304*, which set forth dissenting shareholders' rights and the initial procedure required to enforce those rights, a statement of the price determined by the corporation to represent the fair market value of the dissenting shares, and a brief description of the procedure to be followed if a shareholder desires to exercise the shareholder's right under those statutes [*Corp. Code § 1301(a)*]. The statement of price constitutes an offer by the corporation to purchase any dissenting shares at that price unless the shares cease to be dissenting [*Corp. Code § 1301(a)*]. The notice need not, however, contain information regarding the corporation's rights [*Sturgeon Petroleums, Ltd. v. Merchants Petroleum Co. (1983) 147 Cal. App. 3d 134, 138, 195 Cal. Rptr. 29]* .

Similarly, a surviving parent in a short-form merger of a nonwholly owned domestic subsidiary must give notice to each shareholder of the subsidiary at least 20 days before the effective date [*Corp. Code § 1110(h)*; *see § 169.15*].

Shareholders on notice that the corporation is obligated by statute to provide a statement of the price determined by the corporation to represent the fair market value of the dissenting shares and that the statement constitutes an offer by the corporation to purchase the dissenting shares at the price stated [*Corp. Code § 1301(a)*] can act to protect their interests as potential dissenters by promptly demanding a buyout price from the corporation. If unsuccessful, the shareholders can seek judicial relief by petitioning for a writ of mandate to compel the corporation to immediately provide a statement of the buyout price as required by statute [*Singhania v. Uttarwar (2006) 136 Cal. App. 4th 416, 432, 38 Cal. Rptr. 3d 861* (there is no reason for derailing statutory buyout procedure if corporation sends notice of approval of reorganization which omits statement of fair market price for dissenters' shares, when corporation provides full text of *Corp. Code §§ 1300-1304*); *see Code Civ. Proc. § 1085* (right to petition for writ of mandate); *see also Code Civ. Proc. §§ 1027, 1032* (costs recoverable by prevailing party)].

[2] Demand by Shareholder That Corporation Purchase Shares

Any shareholder who has a right to require the corporation to purchase the shareholder's shares for cash, that is, a "dissenting shareholder" [*see Corp. Code § 1300*; *see also § 169.17[3]*], and who desires the corporation to purchase those shares, must make written demand on the corporation to purchase those shares and make payment to the shareholder in cash of their fair market value [*Corp. Code § 1301(b)*]. The demand must (1) state the number and class of the shares held of record by the shareholder for which purchase is demanded, and (2) contain a statement of what the shareholder claims to be a fair market value of those shares as of the day before the announcement of the proposed reorganization or short-form merger [*Corp. Code § 1301(c)*]. This demand constitutes an offer by the shareholder to sell at the demand price [*Corp. Code § 1301(c)*].

If the shares referred to in the demand are listed on a certified national securities exchange, the demand is not effective for any purpose unless it is received by the corporation or its transfer agent not later than the date of the shareholders' meeting to vote on the proposed reorganization [*Corp. Code § 1301(b)*]. In all other cases, the demand is not effective unless it is received by the corporation or its transfer agents within 30 days after the notice of approval by the outstanding shares [*see Corp. Code § 1301(a)*] or the announcement of a short-form merger [*see Corp. Code § 1110(h)*] was mailed to the shareholder [*Corp. Code § 1301(b)*].

A failure to timely perfect dissenters' rights is a de facto choice by a shareholder to accept a merger or other reorganization and forgo dissenters' rights [*Singhania v. Uttarwar (2006) 136 Cal. App. 4th 416, 434-435, 38 Cal. Rptr. 3d 861* (allegations or evidence of fraud might prevent application of this rule)].

[3] Submission of Share Certificates

Within 30 days after the date on which notice of the approval by the outstanding shares, or the notice pursuant to *Corp. Code § 1110(h)* (short-form mergers), was mailed to the shareholder, the shareholder must submit the following to the corporation at its principal office or at the office of its transfer agent [*Corp Code § 1302*]:

- If the shares are certificated securities, the shareholder's certificates representing any shares that the shareholder demands that the corporation purchase, to be stamped or endorsed with a statement that the shares are dissenting shares or to be exchanged for certificates of appropriate denomination so stamped or endorsed.

- If the shares are uncertificated securities, written notice of the number of shares that the shareholder demands that the corporation purchase.

On subsequent transfers of the dissenting shares on the books of the corporation, the new certificates, the initial transaction statement, and other written statements [*see Corp. Code § 171.1*] issued to the transferees must bear a like statement that the shares are dissenting shares and the name of the original dissenting holder of the shares [*Corp. Code § 1302*].

[4] Agreement and Payment for Shares

If the corporation and a dissenting shareholder agree that the shares are dissenting shares and agree on the price of the shares, the dissenting shareholder is entitled to the agreed price, with interest at the legal rate payable on judgments from the date of the agreement. Any agreement fixing the fair market value of any dissenting shares as between the corporation and the holders of the dissenting shares must be filed with the secretary of the corporation [*Corp. Code § 1303(a)*].

Unless otherwise provided by the agreement, payment of the fair market value of the dissenting shares must be made within the later of (1) 30 days after the agreement on the value of the shares or (2) 30 days after any statutory or contractual conditions to the reorganization are satisfied, and in the case of certificated securities, subject to surrender of

the certificates [*Corp. Code § 1303(b)*]. However, payment for dissenting shares is contingent on compliance with all requirements applicable to distributions involving share repurchases [*see Corp. Code § 1306*; *see also Corp. Code §§ 500-511*]. If the corporation is unable to comply with these requirements, a dissenting shareholder becomes a creditor of the corporation for the agreed value of the shares, with interest at the legal rate payable on judgments until paid. The debt becomes payable when the corporation can comply with these requirements. However, the shareholder-creditor is subordinate to all other creditors in any liquidation proceeding [*Corp. Code § 1306*].

[5] Court Action to Enforce Dissenting Shareholders' Rights

[a] Right to Bring Action

If a corporation denies that the shares are dissenting shares, or if a corporation and a dissenting shareholder fail to agree on the fair market value of dissenting shares, either the shareholder demanding purchase of the dissenting shares or any interested corporation, may file a complaint in the superior court of the proper county [*see Corp. Code § 177*; *see also § 169.10[3]*] praying the court to determine the issues [*Corp. Code § 1304(a)*]. The complaint must be filed within six months after the date on which notice of the reorganization's approval by the outstanding shares, or notice that the short-form merger will become effective [*see Corp. Code § 1110(h)*], was mailed to the shareholder [*Corp. Code § 1304(a)*]. The complaint may request that the court determine whether the shares are dissenting shares, the fair market value of the dissenting shares, or both [*Corp. Code § 1304(a)*].

Two or more dissenting shareholders may join as plaintiffs, or be joined as defendants, in any enforcement action, and two or more such actions may be consolidated [*Corp. Code § 1304(b)*]. In addition, an interested corporation or a dissenting shareholder may intervene in any pending enforcement action [*Corp. Code § 1304(a)*].

On the trial of the action, the court must determine the issues. If the status of the shares as dissenting shares is in issue, the court must first determine that issue. If the fair market value of the dissenting shares is in issue, the court must determine the fair market value of those shares or appoint one or more impartial appraisers to determine that value [*Corp. Code § 1304(c)*]. However, if litigation is instituted to test the sufficiency or regularity of the votes of the shareholders in authorizing a reorganization, any action brought to determine whether the shares are dissenting [*see Corp. Code § 1304*], or the fair market value of dissenting shares in an appraisal proceeding [*see Corp. Code § 1305*; *see also § 169.18[5][b]*], must be suspended until final determination of that litigation [*Corp. Code § 1310*; *see § 169.19*].

[b] Determination of Value

When the fair market value of dissenting shares is in issue, the court may determine that value itself, or may appoint appraisers [*see Corp. Code § 1304(c)*]. Particularly when there is no active market for his or her shares [*see Gallois v. West End Chemical Co. (1960) 185 Cal. App. 2d 765, 771-774, 8 Cal. Rptr. 596]* , a dissenting shareholder will most likely urge the appointment of appraisers. In the context of an actively-traded stock, for which there is an existing market, a court will be less likely to appoint an appraiser [*see Gallois v. West End Chemical Co. (1960) 185 Cal. App. 2d 765, 772-773, 8 Cal. Rptr. 596* (shareholder precluded from attacking fairness of market price by showing board informally determined not to call preferred shares)]. However, the mere existence of a market for the shares is not conclusive evidence of their fair market value: the fact that appraisal rights are generally withheld from listed securities is indicative of the conclusiveness with which their market prices are regarded [*see Corp. Code § 1300(b)*], but other securities traded over the counter may or may not be sold at prices that reflect their fair value; the volume of transactions in the shares and the actual sale prices as opposed to bid and ask prices should be considered in determining the fair market value [Ballantine & Sterling, California Corporation Laws, Ch. 12, *Corporate Acquisitions, Mergers, and Reorganizations* (Matthew Bender)].

If the court appoints an appraiser or appraisers, they must proceed forthwith to determine the fair market value per share

of the dissenting shares [*Corp. Code § 1305(a)*]. Within the time fixed by the court, the appraisers (or a majority of them) must make and file a report in the office of the clerk of the court. After its filing, and on the motion of any party, the report must be submitted to the court and considered on the evidence that the court deems relevant. If the court finds the report reasonable, the court may confirm it [*Corp. Code § 1305(a)*].

If a majority of the appointed appraisers fail to make and file a report within 10 days from the date of their appointment (or any extension allowed by the court) or the report is not confirmed by the court, the court must determine the fair market value of the dissenting shares [*Corp. Code § 1305(b)*]. In determining fair market value, the court may also consider evidence of fraud or other misconduct that negatively affected fair market value [*Sturgeon Petroleums Ltd. v. Merchants Petroleum Co. (1983) 147 Cal. App. 3d 134, 142, 195 Cal. Rptr. 29]* .

[c] Judgment

Subject to any restrictions on a corporation's right to repurchase its own shares [*see Corp. Code § 1306*; *see also § 169.18[4]*], judgment must be rendered against the corporation for payment of an amount equal to the fair market value of each dissenting share multiplied by the number of dissenting shares that any party or intervening dissenter is entitled to require the corporation to purchase. The judgment draws interest at the legal rate from the date on which the judgment is entered [*Corp. Code § 1305(c)*].

The judgment is payable immediately with respect to uncertificated securities, and on the endorsement and delivery to the corporation of the certificated securities, described in the judgment. Any party may appeal the judgment [*Corp. Code § 1305(d)*].

[d] Costs

The costs, including reasonable compensation to the appraisers as fixed by the court, may be assessed or apportioned as the court considers equitable [*Corp. Code § 1305(e)*]. However, if the appraised value exceeds the amount of the original corporate offer, the corporation must pay costs. If the value awarded by the court for the dissenting shares is more than 125 percent of the price offered by the corporation in the notice mailed to the shareholder [*see Corp. Code § 1301(a)*], the court may in its discretion impose additional costs on the corporation, including attorney's fees, fees of expert witness, and interest dating from the date of the submission of the dissenting shares for endorsement (certificated securities) or the submission of written notice (uncertificated securities) at the legal rate payable on judgments [*Corp. Code § 1305(e)*; *see Corp. Code §§ 1300-1302*].

[6] Dividend and Other Rights of Dissenting Shares

Cash dividends declared and paid by the corporation on dissenting shares after the date of approval of the reorganization by the outstanding shares and before payment by the corporation for the shares are credited against the total amount to be paid by the corporation for the dissenting shares [*Corp. Code § 1307*]. The price paid by the corporation must also be adjusted for any stock split, reverse stock split, or share dividend that becomes effective after the day before the first announcement of the terms of the proposed reorganization [*Corp. Code § 1300(a)*].

Except as expressly limited by the dissenters' rights provisions [*see Corp. Code §§ 1300-1312*], dissenting shareholders continue to have all the rights and privileges incident to their shares until the fair market value of their shares is determined [*Corp. Code § 1308*]. Thus, a dissenting shareholder would be entitled to new shares resulting from a stock split or stock dividend, but the price paid per share will have to be adjusted downward before it is multiplied by the number of shares now held by the dissenting shareholder.

The dissenting shareholder is not entitled, however, to dividends in shares or cash that are declared by the surviving corporation after consummation of the reorganization [*Gallois v. Stauffer Chemical Co. (1963) 221 Cal. App. 2d 328,*

332-333, 34 Cal. Rptr. 411] . Once a shareholder has made a demand for payment for his or her shares, the dissenting shareholder may not withdraw a demand without the corporation's consent [*Corp. Code § 1308*].

[7] Termination of Dissenting Share Status

Dissenting shares lose their status as such, and their holders cease to be dissenting shareholders entitled to require the corporation to purchase their shares, if any of the following occurs [*Corp. Code § 1309*]:

- The corporation abandons the reorganization. On abandonment, the corporation must pay on demand to any dissenting shareholder who has initiated proceedings in good faith to qualify the shares as dissenting or to have their fair market value determined, all necessary expenses incurred in those proceedings and reasonable attorney's fees.

- The shares are transferred before their submission for endorsement as dissenting shares [*see Corp. Code § 1302*] or are surrendered for conversion into shares of another class in accordance with the articles of incorporation.

- The dissenting shareholders and the corporation do not agree on the status of the shares as dissenting shares or on the purchase price, and neither files a complaint or intervenes in a pending action [*see Corp. Code § 1304*], within six months after the date on which notice of the approval by the outstanding shares or the announcement of a short-form merger was mailed to the shareholder.

- The dissenting shareholder, with the consent of the corporation, withdraws the shareholder's demand for purchase of the dissenting shares.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesRight to DividendsMergers & Acquisitions LawMergersRights of Dissenting ShareholdersMergers & Acquisitions LawSales of AssetsRights of Dissenting ShareholdersMergers & Acquisitions LawTakeovers & Tender OffersDuties & Liabilities of ShareholdersCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

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§ 169.19 Attacking Validity of Reorganization

[1] Dissenters' Rights as Exclusive Remedy

In general, no shareholder who has the right under *Corp. Code §§ 1300-1312* to demand payment in cash for dissenting shares has any right at law or in equity to attack the validity of a reorganization or short-form merger, or to have one set aside or rescinded [*Corp. Code § 1312(a)*; *Steinberg v. Amplica, Inc. (1986) 42 Cal. 3d 1198, 1205-1206, 233 Cal. Rptr. 249, 729 P.2d 683]* , except in an action to test whether the number of shares required to authorize or approve the reorganization were legally voted in favor of it [*Corp. Code § 1312(a)*; *Sturgeon Petroleums, Ltd. v. Merchants Petroleum Co. (1983) 147 Cal. App. 3d 134, 139-140, 195 Cal. Rptr. 29]* . This rule is subject to two qualifications:

- First, if the rights of holders of shares of a class whose terms and provisions specifically set forth the amount to be paid in respect to those shares in the event of a reorganization or merger or, if the principal reorganization terms are approved, in accordance with the terms of the approved reorganization, the holders are entitled to payment in accordance with those terms [*Corp. Code § 1312(a)*; *see § 169.17[4]*].

- Second, if one of the parties to a reorganization or short-form merger is controlled by or under common control with another party, the exclusive remedy rule does not apply to a shareholder of that party who has not demanded payment for dissenting shares [*Corp. Code § 1312(b), (c)*; *see also § 169.19[2]*]. Absent one of these qualifications, a dissenting shareholder's sole remedy for contesting the amount determined to be the dissenting shares' fair market value is to seek an appraisal proceeding [*see Corp. Code § 1304*; *see also Steinberg v. Amplica, Inc. (1986) 42 Cal. 3d 1198, 1209, 1214, 233 Cal. Rptr. 249, 729 P.2d 683* ; *Sturgeon Petroleums, Ltd. v. Merchants Petroleum Co. (1983) 147 Cal. App. 3d 134, 139-141, 195 Cal. Rptr. 29]* .

Corp. Code § 1312(a) precludes dissenters, after a merger is completed, from seeking damages based on alleged breaches of fiduciary duty involving a failure to comply with a lawful demand for inspection by dissenters seeking to evaluate whether to exercise their dissenters' rights [*Singhania v. Uttarwar (2006) 136 Cal. App. 4th 416, 431, 38 Cal. Rptr. 3d 861]* .

[2] Election of Remedies When Corporations Under Common Control

If one of the parties to a reorganization or a short-form merger is directly or indirectly controlled by, or under common control with, another party to the reorganization, the restriction on attacks on the validity of a reorganization discussed above does not apply to any shareholder of such party who has not demanded payment of cash for dissenting shares [*Corp. Code § 1312(b)*]. Because "control" means the power to direct or cause the direction of the management and policies of a corporation [*Corp. Code § 160(a)*], a parent-subsidiary short-form merger would always involve the control of one party by another. However, if a shareholder institutes an action to challenge the validity of the reorganization or short-form merger, or to have it set aside or rescinded, the shareholder forfeits his or her right to demand payment for dissenting shares [*Corp. Code § 1312(b)*]. The court, in any action attacking the validity of the reorganization or short-form merger, or to have the reorganization or merger set aside or rescinded, may not restrain or enjoin the consummation of the transaction except on 10 days prior notice to the corporation and on a determination by the court that clearly no other remedy will adequately protect the complaining shareholder or the class of shareholders of which the shareholder is a member [*Corp. Code § 1312(b)*]. In such an action, a party to a reorganization or short-form merger that controls another party to the transaction has the burden of proving that it is just and reasonable as to the shareholders of the controlled party. Similarly, a person controlling two or more parties to a reorganization has the burden of proving that it is just and reasonable as to the shareholders of any controlled party [*Corp. Code § 1312(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersAppraisal & Dissent RightsRight to DissentMergersMergers & Acquisitions LawMergersRights of Dissenting ShareholdersMergers & Acquisitions LawMergersShort-Form MergersMergers & Acquisitions LawSales of AssetsRights of Dissenting ShareholdersContracts LawRemediesElection of Remedies

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[Reserved]

§§ 169.20[Reserved]

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14-169 California Forms of Pleading and Practice--Annotated § 169.40

§ 169.40 California Legal Forms

For discussion of the transactional aspects of business reorganizations involving various types of business entities, including procedures, tax considerations, and forms, see the following chapters of California Legal Forms (Matthew Bender):
Ch. 2A, *Incorporating a Going Business*
Ch. 11, *Merger and Acquisition Issues*
Ch. 11A, *Cash Purchase of Shares*
Ch. 11B, *Cash Purchase of Assets*
Ch. 11C, *Mergers* (including coverage of corporate conversions)
Ch. 11D, *Acquisition of Shares for Shares*
Ch. 11E, *Acquisition of Assets for Shares*
Ch. 12C, *Limited Liability Companies*
Ch. 15, *General Partnerships*, Part C, Conversions and Mergers of General Partnerships
Ch. 15C, *Conversions and Mergers of Limited Partnerships*
Ch. 17, *Buying and Selling a Business or Professional Practice*
Ch. 68A, *Using Family Partnerships and Other Business Entities in Estate Planning*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFormationGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesGeneral OverviewMergers & Acquisitions LawMergersGeneral OverviewMergers & Acquisitions LawSales of AssetsGeneral OverviewMergers & Acquisitions LawTakeovers & Tender OffersGeneral Overview

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14-169 California Forms of Pleading and Practice--Annotated § 169.41

§ 169.41 State Statutes

[1] Definitions

"Approved by the board." *Corp. Code § 151*

"Approved by the outstanding shares." *Corp. Code § 152*

"Approved by the shareholders." *Corp. Code § 153*

"Close corporation." *Corp. Code § 158*

"Control." *Corp. Code § 160*

"Constituent corporation." *Corp. Code § 161*

"Constituent limited partnership." *Corp. Code § 161.5*

"Disappearing corporation." *Corp. Code § 165*

"Disappearing limited partnership." *Corp. Code § 165.5*

"Equity security." *Corp. Code § 168*

"Other business entity." *Corp. Code § 174.5*

"Parent." *Corp. Code § 175*

"Proper county." *Corp. Code § 177*

"Reorganization." *Corp. Code § 181*

"Share Exchange Tender Offer." *Corp. Code § 183.5*

"Short-form merger." *Corp. Code § 187*

"Surviving corporation." *Corp. Code § 190*

"Surviving limited partnership." *Corp. Code § 190.5*

"Voting power." *Corp. Code § 194.5*

[2] Dissenters' Rights

Dissenting shares defined. *Corp. Code § 1300*

Notice of reorganization and offer to purchase dissenting shares. *Corp. Code § 1301(a)*

Demand for purchase of dissenting shares. *Corp. Code § 1301(b), (c)*

Endorsement of shares. *Corp. Code § 1302*

Payment of agreed price. *Corp. Code § 1303*

Dissenter's action to determine status of shares and fair market value. *Corp. Code §§ 1304, 1305*

Dissenting shareholder's status as creditor. *Corp. Code § 1306*

Dividends on dissenting shares. *Corp. Code § 1307*

Rights and privileges of dissenting shares. *Corp. Code § 1308*

Termination of dissenting shareholder status. *Corp. Code § 1309*

Suspension of appraisal proceedings pending litigation attacking reorganization. *Corp. Code § 1310*

Shares exempt from dissenting share status. *Corp. Code § 1311*

Action attacking validity of reorganization. *Corp. Code § 1312*

Conversion pursuant to Chapter 11.5 deemed to constitute reorganization for purposes of applying Chapter 13. *Corp. Code § 1313*

[3] Mergers

Merger procedure generally. *Corp. Code §§ 1100-1109*

Short-form mergers. *Corp. Code § 1110*

Merger of close corporation. *Corp. Code § 1111*

Merger of nonprofit corporation. *Corp. Code § 1112*

Merger between California corporation and California or foreign other business entity. *Corp. Code § 1113*

[4] Conversions

Definitions and terminology. *Corp. Code § 1150*

Conditions of conversion. *Corp. Code § 1151*

Plan of conversion. *Corp. Code § 1152*

Effective date of conversion. *Corp. Code § 1153*

Certificate or statement of conversion. *Corp. Code § 1155*

Title to real property of converting corporation. *Corp. Code § 1156*

Conversion of other business entity into corporation. *Corp. Code § 1157*

Effect of conversion on rights and liabilities. *Corp. Code § 1158*

Dissenters' rights applicable in conversion. *Corp. Code § 1159*

Filing fees. *Corp. Code § 1160*

[5] Reorganizations

Board approval required. *Corp. Code § 1200*

Shareholder approval required. *Corp. Code § 1201*

Approval of share exchange tender offers. *Corp. Code § 1201.5*

Additional shareholder approval requirements. *Corp. Code § 1202*

Offers for reorganization or sale-of-assets merger by interested party. *Corp. Code § 1203*

[6] Sales of Assets

Authority of board to mortgage corporate property. *Corp. Code § 1000*

Sale or transfer of all corporate assets. *Corp. Code § 1001*

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§ 169.42 Decisions

[1] Attacking Validity of Reorganization--Dissenters' Rights as Exclusive Remedy

Recovery of fair market value of shares is only state remedy of dissenting shareholder except to test whether or not merger or consolidation was approved by requisite number of shares. *Steinberg v. Amplica, Inc. (1986) 42 Cal. 3d 1198, 1204-1206, 233 Cal. Rptr. 249, 729 P.2d 683* ; *Sturgeon Petroleums, Ltd. v. Merchants Petroleum Co. (1983) 147 Cal. App. 3d 134, 139-140, 195 Cal. Rptr. 29*

Dissenting shareholder may not forgo appraisal and seek recovery from directors, majority shareholders, and corporations in connection with alleged self-dealing and insider misconduct in connection with merger because dissenters' rights can be fully vindicated in appraisal proceeding. *Steinberg v. Amplica, Inc. (1986) 42 Cal. 3d 1198, 1207-1209, 233 Cal. Rptr. 249, 729 P.2d 683*

Neither failure of initial offering prospectus to state that merger candidates were being sought, nor any alleged misrepresentations in proxy statement relating to merger, constitute basis for action for damages by dissenting shareholders. *Steinberg v. Amplica, Inc. (1986) 42 Cal. 3d 1198, 1206-1207, 233 Cal. Rptr. 249, 729 P.2d 683*

Dissenting shareholders have no right to require unwinding of merger, or, if they did, to require disgorgement by directors and majority shareholders of allegedly ill-gotten gain because any disgorgement would return to corporation. *Steinberg v. Amplica, Inc. (1986) 42 Cal. 3d 1198, 1204 n.7, 233 Cal. Rptr. 249, 729 P.2d 683*

Corp. Code § 415 is not applicable to *Corp. Code § 1312(a)*, which limits rights of dissenting shareholders in connection with merger to appraisal and recovery of appraised value. *Steinberg v. Amplica, Inc. (1986) 42 Cal. 3d 1198, 1213-1214, 233 Cal. Rptr. 249, 729 P.2d 683*

[2] Dissenters' Rights

Corp. Code § 1301 requires corporation to provide only brief description of procedure to be followed if shareholders

desire to exercise rights under *Code Civ. Proc. §§ 1300-1304*; there is no corresponding duty to advise of the corporation's rights. *Sturgeon Petroleums, Ltd. v. Merchants Petroleum Co. (1983) 147 Cal. App. 3d 134, 138, 195 Cal. Rptr. 29*

Dissenting shareholder are not entitled to dividends in shares or cash declared by surviving corporation after consummation of merger but during pendency of shareholder's appeal in action for appraisal of shares owned in disappearing corporation. *Gallois v. Stauffer Chemical Co. (1963) 221 Cal. App. 2d 328, 332-333, 34 Cal. Rptr. 411*

[3] Duty of Disclosure

In civil 10b-5 (*15 U.S.C. § 78j(b)*) fraud actions, materiality of preliminary merger negotiations is dependent on probability that transaction will be consummated and on significance of merger to issuer; thus, materiality of preliminary merger negotiations is question of fact to be determined on case by case basis; factors to be considered include size of companies involved, indicia of interest of board members, whether investment banks have become involved, whether directors' resolution has been passed, and potential for stock involved to command premium in excess of market value. *Basic Incorporated v. Levinson (1988) 485 U.S. 224, 238-240, 250, 108 S. Ct. 978, 99 L. Ed. 2d 194*

In civil 10b-5 fraud actions relating to disclosure of preliminary merger negotiations, "agreement-in-principle" standard of materiality (no disclosure required until agreement in principle exists as to price and structure) is abrogated for artificially excluding from definition of materiality information that would otherwise be significant to trading decision of reasonable investor. *Basic Incorporated v. Levinson (1988) 485 U.S. 224, 236, 249, 108 S. Ct. 978, 99 L. Ed. 2d 194* ; *see Eldridge v. Tymshare, Inc. (1986) 186 Cal. App. 3d 767, 772-776, 230 Cal. Rptr. 815* (agreement in principle is standard used by California law)

In civil 10b-5 fraud actions relating to disclosure of preliminary merger negotiations, rule that negotiations become material by virtue of statement denying their existence is abrogated; falsity or incompleteness of statement is not sufficient to confer materiality on otherwise insignificant fact. *Basic Incorporated v. Levinson (1988) 485 U.S. 224, 237-238, 249 108 S. Ct. 978, 99 L. Ed. 2d 194*

Directors of corporation targeted for takeover have no duty to disclose merger negotiations to shareholders until agreement in principle has been reached even though withdrawal from prior agreement in principle and termination of earlier merger negotiations had been publicly announced. *Eldridge v. Tymshare, Inc. (1986) 186 Cal. App. 3d 767, 772-776, 230 Cal. Rptr. 815* ; *but see Basic Incorporated v. Levinson (1988) 485 U.S. 224, 238-240, 249, 108 S. Ct. 978, 99 L. Ed. 2d 194* (probably applicable to abrogate agreement-in-principle standard under California law)

[4] Effect of Merger Agreement

Merger agreement between boards of directors is valid, binding contract that governs their conduct before submission to shareholders for approval; directors are not barred by fiduciary duties from entering into exclusive merger agreement in which they agree to refrain from negotiating or accepting other offers until shareholders consider initial proposal; competitive justification is not defense in suit against third corporation for tortious interference with exclusive merger agreement. *Jewel Companies v. Pay Less Drug Stores Northwest (9th Cir. 1984) 741 F.2d 1555, 1564, 1568*

[5] Fairness Hearing

Under federal and state tests, California Corporations Commissioner's fairness finding under *Corp. Code § 1101.1* is collateral estoppel to challenge regarding fairness of merger price even if no review of fairness decision is sought under *Code Civ. Proc. § 1094.5*. *Plaine v. McCabe (9th Cir. 1986) 797 F.2d 713, 718-721*

[6] Federal Law

Indiana protective statute that imposes conditions on acquisition of "control shares" of Indiana corporations that opt for protection under it does not violate Williams Act (*15 U.S.C. §§ 78m(d), (e), 78n(d)-(f)*) or commerce clause. *CTS Corp. v. Dynamics Corp. of America (1987) 481 U.S. 69, 94, 107 S. Ct. 1637, 95 L. Ed. 2d 67*

Sale of 50 or 100 percent of stock of closely held business is "security" within meaning of Securities Exchange Acts of 1933 and 1934 so as to allow defrauded purchaser antifraud remedies of Acts; when instrument is stock, court need not look to economic substance of transaction to determine if it is "security"; sale of business doctrine, which would compel contrary result, is abrogated in sale of traditional stock of closely held corporation. *Gould v. Ruefenacht (1985) 471 U.S. 701, 704-706, 105 S. Ct. 2308, 85 L. Ed. 2d 708* ; *Landreth Timber Co. v. Landreth (1985) 471 U.S. 681, 685-692, 694-697, 105 S. Ct. 2297, 85 L. Ed. 2d 692*

Shareholders responding to tender offer have private right of action against corporation offering more favorable terms to some tendering shareholders than are offered to others under Williams Act requirement of equality of treatment among all shareholders tendering shares [*15 U.S.C. § 78n(d)(7)*]. *Epstein v. MCA (9th Cir. 1995) 50 F.3d 644, 652*

If ICC has approved tender offer and merger [*see 49 U.S.C. § 11341(a)*], transaction is exempt from attack under all other laws and no cause of action can be stated against directors of railroad for dishonesty or obtaining too low price; result not altered because merger was accomplished through voting trust. *Deutsch v. Flannery (9th Cir. 1989) 883 F.2d 60, 62-63 , cert. denied, 498 U.S. 818 (1990)*

California Corporations Commissioner's fairness finding under *Corp. Code § 1101.1* collaterally estops federal challenge to fairness of merger price; however, fair price does not preclude injury on account of misstatements or omissions in tender offer under *15 U.S.C. § 78n(e)*. *Plaine v. McCabe (9th Cir. 1986) 797 F.2d 713, 718-722*

[7] Liabilities of Combined Entities

When successor was sued for injuries arising from predecessor's chemical products, any assignment of predecessor's insurance benefits required consent of insurers, and no coverage existed when policy had no-assignment clause and insurers did not consent to assignment; although corporate successor that is involuntarily liable for the torts of its predecessor by operation of law may seek coverage for that liability under its predecessor's insurance policies, when a corporation voluntarily assumes liability by contract its rights are defined and limited by that contract. *Henkel Corp. v. Hartford (2003) 29 Cal. 4th 934, 941-943, 945, 129 Cal. Rptr. 2d 828, 62 P.3d 69*

Policies underlying strict liability in tort for defective product require departure from rule of nonliability of successor corporation when assets purchased in transaction; although corporation is not liable under any exception to general rule of nonliability, plaintiff would be without remedy and requiring successor to assume liability for products of predecessor was fair. *Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 30-31, 136 Cal. Rptr. 574, 560 P.2d 3* ; *Kaminski v. Western MacArthur Co. (1985) 175 Cal. App. 3d 445, 451-459, 220 Cal. Rptr. 895* (applied to successor distributor); *see also Maloney v. American Pharmaceutical Co. (1988) 207 Cal. App. 3d 282, 289-290, 255 Cal. Rptr. 1* (refusing to extend doctrine to include liability for negligence)

Successor by merger that did not itself discriminate is liable for attorney's fees expended by employees to compel enforcement of injunction issued against predecessor under Age Discrimination in Employment Act of 1967 (*29 U.S.C. §§ 621-634*) when there is continuity of operations and work force and successor had notice of predecessor's legal obligation and ability to provide adequate relief directly. *Criswell v. Delta Air Lines, Inc. (9th Cir. 1989) 869 F.2d 449, 450-452*

General rule that successor corporation that purchases assets in arms length transaction is liable for injuries caused by products manufactured by predecessor if predecessor has liquidated itself after sale of assets requires that sale contribute to liquidation; if predecessor operated for 20 years after sale and then filed for reorganization in bankruptcy, successor corporation is not liable. *Kline v. Johns-Manville (9th Cir. 1984) 745 F.2d 1217, 1219-1221*

In personal injury action for cancer caused by childhood exposure to second-hand asbestos carried home from workplace by decedent's parents, successor corporation did not expressly or impliedly assume tort liabilities of its predecessor, there was no de facto merger or mere continuation of predecessor, and successor was not a product line successor in interest to predecessor under *Ray v. Alad;* thus defendant corporation was not liable for injuries as successor in interest to company where decedent's parents had worked. *Franklin v. USX Corporation (2001) 87 Cal. App. 4th 615, 629-630, 105 Cal. Rptr. 2d 11*

Although finding of successor liability in tort does not entitle successor corporation, by operation of law, to insurance coverage of corporate predecessor, in case of de facto merger the benefits of insurance policies inure to successor entity; change in form of ownership company from one of corporate to limited partnership ownership--with same operations as before, under same name, with same equity interests, and under same control--fell within merger exception. *Westoil Terminals Co. (1999) 73 Cal. App. 4th 634, 639-640, 86 Cal. Rptr. 2d 636*

For purposes of successor liability in tort for asbestos-related injuries, successor did not expressly or impliedly assume other than specifically-identified obligations of predecessor from whom successor purchased line of business; corporate merger did not effectuate adoption of that liability; and corporation was not product line successor under principles set forth in *Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 30-31, 136 Cal. Rptr. 574, 560 P.2d 3* , discussed *above*. *Chaknova v. Wilbur-Ellis Co. (1999) 69 Cal. App. 4th 962, 967-970*

Judgment against corporation for products liability affirmed based on theory of successor liability set forth in *Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 30-31, 136 Cal. Rptr. 574, 560 P.2d 3* , discussed *above*; question of whether it is fair to impose successor liability is for court, but error in permitting jury to decide that question was harmless. *Rosales v. Thermex-Thermatron, Inc. (1998) 67 Cal. App. 4th 187, 191, 194-195, 78 Cal. Rptr. 2d 861*

Surviving corporation under statutory merger is responsible for all liabilities, whether known or unknown, of merged corporation. *Petrini v. Mohasco Corp. (1998) 61 Cal. App. 4th 1091, 1098-1099, 71 Cal. Rptr. 2d 910*

Corporation that purchased assets of manufacturer from its trustee in bankruptcy is not liable for injury caused by product when purchaser did not cause bankruptcy; this policy aided policy of discharge in bankruptcy. *Stewart v. Telex Communications, Inc. (1991) 1 Cal. App. 4th 190, 200, 1 Cal. Rptr. 2d 669*

Imposition of strict products liability on successor of manufacturer is not proper, although successor carried on manufacturing and marketing operations of acquired company, when successor was not cause of acquired company's dissolution. *Phillips v. Cooper Laboratories (1989) 215 Cal. App. 3d 1648, 1657-1659, 264 Cal. Rptr. 311* (acquired company operated as warehouse for related companies for 10 years after acquisition and then was dissolved)

Imposition of strict products liability on successor of manufacturer is generally not proper unless acquisition is by merger and successor is only surviving entity, or if acquired company continues operating as separate corporation and acquiring company expressly assumed its liabilities. *Phillips v. Cooper Laboratories (1989) 215 Cal. App. 3d 1648, 1660-1662, 264 Cal. Rptr. 311*

Corporation that was formed by former officer of defunct predecessor and that purchased approximately 10 percent of defunct predecessor's assets for fair consideration from creditor that liquidated predecessor is not continuation for fraudulent purpose that would make successor liable for injuries caused by products manufactured by predecessor.

Maloney v. American Pharmaceutical Co. (1988) 207 Cal. App. 3d 282, 287-289, 255 Cal. Rptr. 1

Successor is not liable for predecessor's defective products unless it played some role in curtailing or destroying injured plaintiff's remedy; changes in nature and size of business, other relevant considerations. *Lundell v. Sidney Machine Tool Co. (1987) 190 Cal. App. 3d 1546, 1553-1557, 236 Cal. Rptr. 70*

Surviving corporation is liable for liabilities, including punitive damages, of former subsidiary that manufactured defective product, merged into it, and became operating unit of it. *Marks v. Minnesota Mining & Manufacturing Co. (1986) 187 Cal. App. 3d 1429, 1437-1438, 232 Cal. Rptr. 594*

[8] Sales of Assets

Transferee of corporation's assets has no standing to attack sale for want of shareholder approval of sale. *Gunther v. Thompson (1931) 211 Cal. 631, 634, 296 P. 611*

Failure to observe procedures for calling meeting or giving notice in connection with seeking approval of sale of all assets does not invalidate sale if sufficient number of shareholders did in fact consent. *McDermott v. Bear Film Co. (1963) 219 Cal. App. 2d 607, 612, 33 Cal. Rptr. 486*

Corporation lacks standing to complain that sale of its assets had not received shareholder approval. *Associates Discount Corp. v. Tobb Co. (1966) 241 Cal. App. 2d 541, 549, 50 Cal. Rptr. 738*

[9] Shareholder's Rights

When corporate entity of target corporation is preserved as surviving corporation in "reverse triangular phantom merger," no approval of outstanding preferred shares is required under *Corp. Code § 1201(a)* if rights, preferences, privileges, and restrictions on those shares remain unchanged. *Kirschner Brothers Oil, Inc v. Natomas Co. (1986) 185 Cal. App. 3d 784, 790-791, 229 Cal. Rptr. 899*

Certificate of determination under which preferred shares were issued is inapplicable to merger in which issuer was surviving entity because certificate was silent as to voting rights except when issuer was merged into another entity. *Kirschner Brothers Oil, Inc v. Natomas Co. (1986) 185 Cal. App. 3d 784, 791-792, 229 Cal. Rptr. 899*

Neither California law nor certificate of determination under which preferred shares were issued entitles preferred shareholders to continued existence of public market for their shares. *Kirschner Brothers Oil, Inc v. Natomas Co. (1986) 185 Cal. App. 3d 784, 792-793, 229 Cal. Rptr. 899*

When reorganization involves surrender of shares in California corporation in exchange for shares of foreign corporation, shareholder approval is required by *Corp. Code § 1201(a).* *Kirschner Brothers Oil, Inc v. Natomas Co. (1986) 185 Cal. App. 3d 784, 793-794, 229 Cal. Rptr. 899*

Directors do not owe fiduciary duty to preferred shareholders to structure reorganization in manner that ensure preferred shareholders profitable return on their shares or anything above rights enumerated in certificate of determination. *Kirschner Brothers Oil, Inc v. Natomas Co. (1986) 185 Cal. App. 3d 784, 794-800, 229 Cal. Rptr. 899*

[10] Short-Form Mergers

Short-form merger statutes permitting minority shareholders to be cashed out of subsidiary create valid procedure that

does not contravene Rule 10b-5 [17 C.F.R. § 240.10b-5] under the Securities Exchange Act of 1934. *Santa Fe Industries, Inc. v. Green (1977) 430 US 462, 97 S. Ct. 1292, 51 L. Ed. 2d 480*

[11] Stock Purchases

Generally, corporate entity does not assume rights, duties and benefits of another entity that it acquires in stock purchase; the two entities are assumed to remain separate absent circumstances justifying their treatment as single entity, such as alter ego showing or asset purchase; corporation therefore did not have standing to seek dismissal of action based on forum selection clause in agreement signed by its subsidiary. *Berclain America Latina v. Baan Co. (1999) 74 Cal. App. 4th 401, 407-408, 87 Cal. Rptr. 2d 745*

[12] Successor in Interest

To be successor in interest one must continue to retain same rights as original owner without change in ownership and change must be in form only, not in substance, such as when corporation changes name; transferee is not successor in interest. *California Concrete Co. v. Beverly Hills Savings & Loan Assn. (1989) 215 Cal. App. 3d 260, 271-272, 261 Cal. Rptr. 484*

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For related research and practice materials, see the following legal topics:
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§ 169.60 Dissenting Shareholder's Demand for Purchase of Shares [Corp. Code §§ 1301(b), (c), 1302]

[1] FORM Dissenting Shareholder's Demand for Purchase of Shares [Corp. Code §§ 1301(b), (c), 1302]

DEMAND FOR PURCHASE OF SHARES

To _____ [*name of corporation*]:

1. I am the owner of _____ [*number*] of the _____ [*specify class*] shares of _____ [*name of corporation*]. These shares are held of record in my name, and are evidenced by Certificate No. _____.

2. I demand that _____ [*name of corporation*] purchase _____ [*number*] of these shares for cash at the price of $ _____ per share. This price is the fair market value of these shares as of _____ [*date*], the day that _____ [*name of corporation*] has stated is the day before the first announcement of the terms of the proposed reorganization between _____ [*name of shareholder's corporation*] and _____ [*name of other entity*].

3. I submit the certificate representing the shares for which I make this demand for purchase for the purpose of _____ [*either, if purchase demanded with respect to all shares* : stamping or endorsing the certificate with a statement that the shares are dissenting shares *or, if purchase demanded with respect to only portion of shares* : exchanging this certificate for a certificate representing _____ (*number of shares to be purchased*) shares, stamped or endorsed with a statement that these shares are dissenting shares, and a certificate representing _____ (*number of shares not to be purchased*) shares, as to which no demand for purchase is made]. The certificate(s) _____ [is *or* are] to be returned to me at the address stated below.
Dated:_____.

_____ [*signature*]
_____ [*typed name of shareholder*]
_____ [*address*]

[2] Use of Form

This form is a written demand that a corporation purchase all or a specific number of the shares of a shareholder who is dissenting to a proposed reorganization or short-form merger. The demand must state the number and class of the shares held of record by the shareholder that the shareholder demands that the corporation purchase, and must contain a statement of what the shareholder claims to be the fair market value of those shares as of the day before the announcement of the proposed reorganization or short-form merger [*Corp. Code § 1301(c)*].

The statement of fair market value constitutes an offer by the shareholder to sell the shares at that price [*Corp. Code § 1301(c)*]. If the price is the same as that specified by the corporation in its notice [*see § 169.60[4][b]*], it follows that the shareholder's demand would constitute acceptance of the corporation's offer.

This form also provides for the submission of certificates evidencing shares as to which the shareholder makes the demand for purchase. Although the certificates may be submitted under separate cover [*see Corp. Code § 1302*; *see also § 169.60[4][d]*], it may be more expeditious to make the demand and submit the certificates simultaneously. If the demand is for the purchase of uncertificated securities, this form satisfies the requirement that the shareholder submit, in lieu of certificates, a written notice of the number of securities to be purchased by the corporation [*see Corp. Code § 1302*].

[3] Right to Demand Purchase--Shareholder Approval of Reorganization

The right of a shareholder to demand purchase of his or her shares rather than accept a proposed reorganization or short-form merger depends, in the case of a reorganization [*see Corp. Code § 181*; *see also § 169.10[2]*], on whether that shareholder has the right to approve the reorganization, and whether the shares are "dissenting shares" [*see Corp. Code § 1300(b)*; *see also § 169.17[3]*]. In general, the principal terms of a reorganization must be approved by the outstanding shares of each class of each corporation whose board is required to approve the proposed reorganization [*see Corp. Code § 1201(a)*]. The rules applicable to these approvals are discussed in *§ 169.12[2]* and *[3][a]*, and subsequent headings.

[4] Dissenters' Rights Applicable in Conversions

[a] Generally

Conversions pursuant to Chapter 11.5 of the Corporations Code [*see Corp. Code § 1150 et seq.*, discussed in *§ 169.16*] are deemed to constitute a reorganization for purposes of applying the provisions of Chapter 13 only [*Corp. Code § 1313*]. The shareholders of a converting corporation will have all of the rights under Chapter 13 [*see Corp. Code § 1300 et seq.*] of the shareholders of a corporation involved in a reorganization requiring the approval of its outstanding shares [*see Corp. Code § 152*], and the converting corporation will have all of the obligations under Chapter 13 of a corporation involved in the reorganization. Solely for purposes of applying the provisions of Chapter 13 (and not for purposes of Chapter 12) [*see Corp. Code § 1200 et seq.*; *see also § 169.12*], a conversion pursuant to *Corp. Code § 1151* or *1157* will be deemed to constitute a reorganization [*Corp. Code § 1159*].

[b] Notice by Corporation of Reorganization Approval or Short-Form Merger

When any shareholders of a corporation that is a party to a reorganization have the right to require the corporation to purchase their shares for cash, that corporation must mail to each shareholder holding dissenting shares a notice of the approval of the reorganization by its outstanding shares within 10 days after the date of the approval, accompanied by a copy of *Corp. Code §§ 1300-1304* (governing dissenters' rights generally), a statement of the price that the corporation believes represents the fair market value of the dissenting shares, and a brief description of the procedure to be followed if the shareholder desires to exercise his or her right to demand purchase of his or her shares. This statement of price constitutes the corporation's offer to purchase any dissenting shares at that price unless they lose their status as

dissenting shares [*Corp. Code § 1301(a)*; *see Corp. Code § 1309*; *see also § 169.18[7]*].

In the case of short-form merger of a nonwholly owned domestic subsidiary, the surviving parent must give notice to each shareholder of the subsidiary at least 20 days before the effective date of the merger [*Corp. Code § 1110(h)*].

For forms for giving notice of approval of a reorganization and notices of the effective date of a short-form merger, see California Legal Forms, Ch. 11C, *Mergers* (Matthew Bender).

[c] Time for Demand

Any dissenting shareholder who desires the corporation to purchase his or her shares and has the right to require purchase must make a written demand on the corporation to the purchase the shares and make payment to the shareholder in cash of their fair market value [*Corp. Code § 1301(b)*]. If the shares specified in the demand are listed on a certified national securities exchange, the demand is only effective if it is received by the corporation or its transfer agent no later than the date of the shareholders' meeting to vote on the reorganization [*Corp. Code § 1301(b)*]. In all other cases, the demand is effective if it is received by the corporation or its transfer agent within 30 days after the date on which the notice of the approval of the reorganization by the outstanding shares, or notice of the effective date of a short-form merger, was mailed to the dissenting shareholder [*Corp. Code § 1301(b)*].

[d] Time for Submitting Dissenting Share Certificates

A shareholder who is demanding that the corporation purchase his or her shares must submit the certificate representing those shares to the corporation at its principal office or at the office of any transfer agent of the corporation. The certificates must be submitted within 30 days after the date on which the notice of the approval by the outstanding shares was mailed to the shareholder, or, in the case of a short-form merger, within 30 days after giving notice of the effective date of the short-form merger [*Corp. Code § 1302*; *see Corp. Code § 1110(h)*].

The certificates are submitted for the purpose of stamping or endorsing them with a statement that the shares are dissenting shares, or, if purchase is demanded with respect to only a portion of the shares represented by the certificate, for the purpose of exchanging the certificate for certificates of appropriate denominations so stamped or endorsed [*Corp. Code § 1302*].

[5] Termination of Dissenting Share Status

For a discussion of when dissenting shares and shareholders lose their status, see *§ 169.60[3]*.

[6] State Statutes

Merger procedure generally. *Corp. Code §§ 1100-1113*

Short-form mergers. *Corp. Code § 1110*

Dissenters' rights applicable in conversion. *Corp. Code § 1159*

Board approval. *Corp. Code § 1200*

Shareholder approval. *Corp. Code § 1201*

Dissenting shares defined. *Corp. Code § 1300*

Notice of reorganization and offer to purchase dissenting shares. *Corp. Code § 1301(a)*

Demand for purchase of dissenting shares. *Corp. Code § 1301(b), (c)*

Endorsement of shares. *Corp. Code § 1302*

Payment of agreed price. *Corp. Code § 1303*

Dissenter's action to determine status of shares and fair market value. *Corp. Code §§ 1304, 1305*

Dissenting shareholder's status as creditor. *Corp. Code § 1306*

Dividends on dissenting shares. *Corp. Code § 1307*

Rights and privileges of dissenting shares. *Corp. Code § 1308*

Termination of dissenting shareholder status. *Corp. Code § 1309*

Suspension of appraisal proceedings pending litigation attacking reorganization. *Corp. Code § 1310*

Shares exempt from dissenting share status. *Corp. Code § 1311*

Action attacking validity of reorganization. *Corp. Code § 1312*

Conversion pursuant to Chapter 11.5 deemed to constitute reorganization for purposes of applying Chapter 13. *Corp. Code § 1313*

[7] Decisions

[a] Dissenters' Rights

Recovery of fair market value of shares is only state remedy of dissenting shareholder except to test whether or not merger or consolidation was approved by requisite number of shares. *Steinberg v. Amplica, Inc. (1986) 42 Cal. 3d 1198, 1204-1206, 233 Cal. Rptr. 249, 729 P.2d 683* ; *Sturgeon Petroleums, Ltd. v. Merchants Petroleum Co. (1983) 147 Cal. App. 3d 134, 139-140, 195 Cal. Rptr. 29*

Dissenting shareholder is not entitled to dividends in shares or cash declared by surviving corporation after consummation of merger but during pendency of shareholder's appeal in action for appraisal of shares owned in disappearing corporation. *Gallois v. Stauffer Chemical Co. (1963) 221 Cal. App. 2d 328, 332-333, 34 Cal. Rptr. 411*

[b] Fair Market Value

Use of appraisers in determining fair market value of dissenting shares generally unnecessary when stock is actively traded. *Gallois v. West End Chemical Co. (1960) 185 Cal. App. 2d 765, 771-774, 8 Cal. Rptr. 596*

[c] Short-Form Mergers

Short-form merger statutes permitting minority shareholders to be cashed out of subsidiary set forth valid procedure

which does not contravene Rule 10b-5 [*17 C.F.R. § 240.10b-5*] under the Securities Exchange Act of 1934. *Santa Fe Industries, Inc. v. Green (1977) 430 U.S. 462, 473-474 97 S. Ct. 1292, 51 L. Ed. 2d 480*

[8] Law Reviews

Dunn, *Steinberg v. Amplica: The California Supreme Court Holds Appraisal to be the Dissenting Shareholder's Exclusive Remedy, 22 U.S.F. L. Rev. 293 (1988)*

[9] Text References

Ballantine and Sterling, California Corporation Laws, Ch. 12, *Corporate Acquisitions, Mergers, and Reorganizations* , § 262.05 (Matthew Bender)

California Legal Forms, Ch. 11C, *Mergers* (Matthew Bender)

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14-169 California Forms of Pleading and Practice--Annotated § 169.61

§ 169.61 Complaint for Determination of Status of Shares as Dissenting Shares and of Fair Market Value of Dissenting Shares [Corp. Code § 1304]--By Dissenting Shareholder Against Corporation

[1] FORM Complaint for Determination of Status of Shares as Dissenting Shares and of Fair Market Value of Dissenting Shares [Corp. Code § 1304]--By Dissenting Shareholder Against Corporation

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DETERMINATION OF
_____ [*name*],	)	STATUS OF SHARES AS DISSENTING SHARES
a corporation, Defendant.	)	AND OF FAIR MARKET VALUE OF DISSENT-
	)	ING SHARES
	)	[Amount demanded _____
		(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. This complaint is filed pursuant to *California Corporations Code Section 1304*.

2. Defendant is a corporation duly organized under the laws of the State of _____, with its principal executive office located in _____ County, California. [*If defendant is foreign corporation governed by Corp. Code § 2115, continue with allegation as to applicability of California law. See § 160.53*]

[*EITHER, for a merger reorganization, use:*]

3. On _____ [*date*], defendant entered into an agreement of merger with [_____ *name of entity*] to merge Defendant and _____ [*entity*] in accordance with the California Corporations Code.

[*OR, for an exchange reorganization, use:*]

3. On _____ [*date*], defendant acquired or entered into an agreement to acquire shares of _____ [*name of acquired entity*], in exchange in whole or in part for defendant's equity securities. Immediately after this acquisition, defendant _____ [had *or* will have] control of that other entity.

[*OR, for a sale of assets reorganization and acquired corporation dissenter, use:*]

3. Defendant has transferred or agreed to transfer all or substantially all of its assets in exchange in whole or in part for the equity securities of _____ [*name of acquiring corporation*], or for debt securities of _____ [*name of acquiring corporation*] that are not adequately secured and that have a maturity date that exceeds five years after the consummation of the transfer, or both.

[*OR, for a sale of assets reorganization and acquiring corporation dissenter, use:*]

3. Defendant has acquired or agreed to acquire in exchange in whole or in part for its equity securities or for its debt securities that are not adequately secured and that have a maturity date that exceeds five years after the consummation of the transfer, or both all or substantially all of the assets of _____ [*name of acquired corporation*].

[*OR, for short-form merger, use:*]

3. Defendant has been merged into _____ [*name of parent corporation*] in a short-form merger pursuant to *California Corporations Code Section 1110*].

[*OR, for a conversion, use:*]

3. On _____ [*date*], defendant approved a plan of conversion to convert into _____ [*type of entity, e.g.,* a California limited liability company] in accordance with the California Corporations Code.

[*CONTINUE*]

[*EITHER, for a reorganization, use:*]

4. Plaintiff is, and on the date for determination of shareholders of record entitled to vote at the shareholders' meeting called to approve the proposed reorganization described in Paragraph 3 was, a shareholder of record of _____ [*number*] shares of defendant's _____ [*specify class*] stock. These shares were not listed on any national securities exchange certified by the Commissioner of Corporations of California under *California Corporations Code Section 25100(o).* Approval of the outstanding _____ [*class held by*

plaintiff] shares of defendant (pursuant to *California Corporations Code Section 1300*) was required for the reorganization. Plaintiff's shares were not voted in favor of that reorganization.

[*OR, for a short-form merger, use:*]

4. Plaintiff is, and on _____ [*date*], the effective date of the short-form merger or conversion alleged in Paragraph 3 was, a shareholder of record of _____ [*number*] shares of defendant's _____ [*specify class*] stock. These shares were not listed on any national securities exchange certified by the Commissioner of Corporations of California under *California Corporations Code Section 25100(o)*.

[*CONTINUE*]

5. On _____ [*date*], in accordance with the provisions of *California Corporations Code Section 1301*, plaintiff made timely written demand on defendant for the purchase from plaintiff of _____ [*number*] of plaintiff's shares and payment to plaintiff in cash of their fair market value. The demand stated the number and class of the shares of defendant held of record by plaintiff that the plaintiff demanded that defendant purchase, and contained a statement, that is $_____ per share, of what plaintiff claimed to be the fair market value of the shares as of the day before the first announcement of the terms of the _____ [reorganization *or* short-form merger] alleged in Paragraph 3, *above*.

[*EITHER, for certificated securities, use:*]

6. On _____ [*date*], plaintiff submitted the certificates representing the shares that plaintiff has demanded that defendant purchase to _____ [defendant at its principal office *or* _____ (*name of defendant's transfer agent*), a transfer agent of defendant, at _____ (*transfer agent's address*)] to be stamped or endorsed with a statement that the shares are dissenting shares or to be exchanged for certificates of appropriate denomination so stamped or endorsed.

[*OR, for uncertificated securities, use:*]

6. On _____ [*date*], plaintiff submitted a written notice of the number of shares that plaintiff has demanded that defendant purchase to _____ [defendant at its principal office *or* _____ (*name of defendant's transfer agent*), a transfer agent of defendant, at _____ (*transfer agent's address*)].

[*CONTINUE*]

7. _____ [*Identify issues, e.g.*, Defendant denies that plaintiff's shares as to which purchase is demanded are dissenting shares *and/or* defendant and plaintiff are unable to agree upon the fair market value of plaintiff's shares as of _____ [*date*], the day before the first announcement of the terms of the _____ [reorganization *or* short-form merger or conversion] alleged in Paragraph 3, *above*.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. That plaintiff's shares are dissenting shares;

2. That the court determine, or appoint appraisers to determine, the fair market value of plaintiff's dissenting shares as of the day before the first announcement of the terms of the _____ [reorganization *or* short-form merger] alleged in this complaint;

3. For payment of an amount equal to the fair market value of each of plaintiff's dissenting share multiplied by the number of plaintiff's dissenting shares;

4. For interest as allowed by law;

5. For costs of suit herein incurred pursuant to *Section 1305(e) of the California Corporations Code*; and

6. For such other and further relief as the court may deem proper.

_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This complaint is for use in an action by a dissenting shareholder to determine that his or her shares are dissenting shares, if the corporation denies that contention, and to determine the fair market value of those dissenting shares as of the day before the first announcement of the terms of the proposed reorganization or short-form merger to which plaintiff dissents.

[3] Allegations

The complaint alleges the following:

- The capacity and principal office of the corporation (Paragraph 2) [*see Corp. Code § 1304(a)* (venue of action in superior court of proper county); *see also Corp. Code § 177*].

- That defendant is a party to a reorganization or the subsidiary in a short-form merger (Paragraph 3) [*see Corp. Code §§ 181, 187, 1110, 1313*].

- That plaintiff was a shareholder of record on the date of the approval of the reorganization, that plaintiff's shares are not listed securities or otherwise disqualified as dissenting shares, that the approval

of the outstanding shares was required and that plaintiff did not vote in favor of the reorganization (Paragraph 4, first alternative) [*see Corp. Code §§ 1201(a), (b), (e), 1300*], or that plaintiff was a shareholder of record on the effective date of a short-form merger of the corporation whose shares plaintiff holds (Paragraph 4, second alternative) [*see Corp. Code § 1300*].

- That plaintiff made a timely demand for purchase and payment for his or her shares, including their claimed fair market value (Paragraph 5) [*see Corp. Code § 1300(b)*; *see also Corp. Code § 1301*].

- That plaintiff submitted his or her shares for endorsement as dissenting shares (Paragraph 6, first alternative) [*see Corp. Code § 1300(b)*; *see also Corp. Code § 1302* (procedure for submitting certificates)], or that plaintiff submitted written notice of the number of dissenting shares in the case of uncertificated securities (Paragraph 6, second alternative).

- That defendant denies dissenting status of plaintiff's shares and/or is unable to agree with plaintiff as to their fair market value (Paragraph 7) [*see Corp. Code § 1304*].

[4] Modification of Form

Paragraph 3 of the complaint, which alleges that defendant is a party to a reorganization or the subsidiary in a short-form merger [*see Corp. Code §§ 181, 187, 1110, 1313*], contains several alternatives relating to the type of transaction. The second and third alternatives, which relate to exchange reorganizations and sale-of-assets reorganizations in which the dissenter is a shareholder of the acquiring corporation, need to be amended if (1) the equity securities of a corporation in control of the acquiring corporation will be issued in the transaction; or (2) the equity or debt securities of a corporation in control of the acquiring corporation will be issued in the transaction.

As noted above, Paragraph 4 of the complaint alleges that the plaintiff's shares are not listed securities. Ordinarily listed securities cannot be "dissenting shares" [*see Corp. Code § 1300(b)(1)*], and therefore the holder of those shares has no right to demand cash payment for them. However, if any restriction on transfer imposed by the corporation, any law, or regulation exists, or if 5 percent of any class of listed shares file demands for payment with the corporation, the shares will be "dissenting shares," provided that the other conditions of *Corp. Code § 1300(b)* are satisfied [*Corp. Code § 1300(b)(1)*]. In either situation, Paragraph 4 of this form will have to be modified to allege that the shares are listed and that they are subject to restrictions on transfer, or that demands for payment have been filed with respect to 5 percent or more of the outstanding shares of that class. This situation is unlikely, because few, if any, nationally traded securities are subject to transfer restrictions and nationally listed securities have an active market, limiting the probability of establishing a higher fair market value price than the market price [*see Gallois v. West End Chemical Co. (1960) 185 Cal. App. 2d 765, 772-773, 8 Cal. Rptr. 596]* .

[5] Judgment of Court; Costs

For a discussion of the court's judgment generally and of court costs, see *§ 169.18[5][c]* and *[d]*.

[6] State Statutes

Dissenting shares defined. *Corp. Code § 1300*

Demand for purchase. *Corp. Code § 1301*

Endorsement of dissenting shares. *Corp. Code § 1302*

Dissenter's action to have shares declared dissenting and for fair market value. *Corp. Code § 1304*

Appointment of appraisers; costs. *Corp. Code § 1305*

Suspension of appraisal proceedings pending litigation attacking validity of reorganization. *Corp. Code § 1310*

Conversion pursuant to Chapter 11.5 deemed to constitute reorganization for purposes of applying Chapter 13. *Corp. Code § 1313*

[7] Cross References

For a related form, *see § 169.60*.

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14-169 California Forms of Pleading and Practice--Annotated § 169.62

§ 169.62 Order [Code Civ. Proc. § 1003] Appointing Appraiser(s) to Determine Value of Dissenting Shares [Corp. Code § 1304(c)]

[1] FORM Order [Code Civ. Proc. § 1003] Appointing Appraiser(s) to Determine Value of Dissenting Shares [Corp. Code § 1304(c)]

[*Caption. See § 169.61.*]

IT IS HEREBY ORDERED that _____ [*name(s) of appraiser(s)*] _____ [is *or* are] appointed as appraiser(s) in this action. These appraiser(s) _____ [is *or* are] directed to determine the fair market value, pursuant to *Section 1300 of the California Corporations Code* of the _____ [*specify class*] shares of _____ [*name of corporation*], held of record by _____ [*name of plaintiff*], who is a shareholder of that corporation, as of _____ [*date*]. These appraiser(s) _____ [is *or* are] directed to make and file a report in the Office of the Clerk of this Court within _____ [*number*] days from the date of this order.
Dated:_____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is an order for use by the court to appoint one or more impartial appraisers for the purpose of determining the fair market value of plaintiff's shares. When the fair market value of dissenting shares is in issue, a court must either determine that fair market value or appoint one or more impartial appraisers to make that determination [*Corp. Code § 1304(c)*]. If the court appoints appraisers, they must make and file a report in the office of the clerk of the court within a time fixed by the court [*Corp. Code § 1305(a)*]. For further discussion of appraisal rights, *see § 169.18[5][b]*.

[3] State Statutes

Dissenter's action to have shares declared dissenting and for fair market value. *Corp. Code § 1304*

Appointment of appraisers; costs. *Corp. Code § 1305*

[4] Cross References

For related forms, *see §§ 169.60* and *169.61*.

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14-169 California Forms of Pleading and Practice--Annotated § 169.63

§ 169.63 Report of Appraiser(s) [Corp. Code § 1305(a)]

[1] FORM Report of Appraiser(s) [Corp. Code § 1305(a)]

[*Caption. See § 169.61.*]

The undersigned _____ [was *or* were] duly appointed as appraiser(s) by the court in this action to determine the fair market value of _____ [*number*] shares of _____ [*name*], a corporation, as of _____ [*date*]. The undersigned _____ [has *or* have] determined, in accordance with *Section 1300 of the California Corporations Code*, that the fair market value of those shares as of that date is $ _____ per share. This determination excludes any appreciation or depreciation in consequence of the _____ [reorganization *or* short-form merger] of the corporation [and has been adjusted for _____ (*specify any stock split, reverse stock split, or share dividend that became effective after the first announcement of the reorganization or short-form merger*)].
Dated:_____.

_____ [*signature(s)*]

[2] Use of Form

This form is a report to be presented to the court by the appraisers, or a majority of them, who were appointed by the court to determine the fair market value of dissenting shares [*Corp. Code § 1305(a)*]. The appraisal determines the fair market value of the dissenting shares as of the day before the first announcement of the terms of the proposed reorganization or short-form merger. This determination is made excluding any appreciation or depreciation in consequence of the proposed action, but is adjusted for any stock split, reverse stock split, or share dividend that becomes effective after the announcement [*Corp. Code § 1300(a)*].

[3] Cross References

For related forms, *see §§ 169.60* and *169.61*.

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14-169 California Forms of Pleading and Practice--Annotated § 169.64

§ 169.64 Notice of Motion [Code Civ. Proc. § 1010] for Confirmation of Report by Appraiser(s) [Corp. Code § 1305(a)]--By Plaintiff

[1] FORM Notice of Motion [Code Civ. Proc. § 1010] for Confirmation of Report by Appraiser(s) [Corp. Code § 1305(a)]--By Plaintiff

[*Caption. See § 169.61.*]

To _____ [*name of corporation*] and its attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard in Department _____ of this court, plaintiff will move for an order confirming the report by the appraiser(s) appointed in this matter that was filed on _____ [*date*], and for judgment in accordance that report.

The motion will be made on the ground that the report is reasonable.

The motion will be based on this notice of motion, on the declaration of _____ [*name*], the memorandum served and filed with this notice, on the report by the appraiser(s) filed with the clerk of this court, a copy of which accompanies this notice, on the papers and records on file, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated:_____.

_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

CAUTION:
A supporting memorandum is required to accompany notices of motion in law and motion proceedings

as defined in *Cal. Rules of Ct., Rule 3.1103* [*Cal. Rules of Ct., Rule 3.1113(a)*; for discussion and forms, *see* Ch. 417, *Points and Authorities*]. Note that if this is a law and motion proceeding within the meaning of Rule 3.1103(a), the format requirements of *Cal. Rules of Ct., Rule 3.1110* will apply to the notice of motion.

[2] Use of Form

This form is a notice of motion for use in applying for court confirmation of the appraiser's report determining the fair market value of plaintiff's dissenting shares. It states when, and the grounds on which, the motion will be made, and the papers on which it is based [*see Code Civ. Proc. § 1010*].

[3] Motion to Confirm Report

After the appraisers have filed their report in the office of the clerk of the court, the report is submitted to the court on the motion of any party. The report will be considered on any evidence that the court considers relevant. If the court finds the report reasonable, the court may confirm it [*Corp. Code § 1305(a)*]. If the court does not confirm the report, the court must determine the fair market value of the dissenting shares [*Corp. Code § 1305(b)*].

[4] Cross References

For related forms, *see §§ 169.60* and *169.61*.

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14-169 California Forms of Pleading and Practice--Annotated § 169.65

§ 169.65 Order Confirming Report of Appraiser(s)

[1] FORM Order Confirming Report of Appraiser(s)
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER CONFIRMING APPRAISER'S REPORT
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*], a Corporation,	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	
_____		

The report of _____ [*name(s) of appraiser(s)*], the appraiser(s) duly appointed by the court to determine the fair market value of the _____ [*specify class*] shares of _____ [*name of corporation*], a corporation, as of _____ [*date*], was duly filed on _____ [*date*]. This report determined the fair market value of these shares to be $_____ per share. On motion of _____ [plaintiff *or* defendant], the report is submitted to the court, and the court has taken the report on submission. Having considered all relevant evidence bearing on the report, and being fully advised, the court finds the award of the appraiser(s) to be reasonable.

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that the report of the appraiser(s) in the above-entitled action be and the same is hereby confirmed.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]
Judge of the Superior Court

[2] Use of Form

This form is an order for use in confirming the report of the appraisers, or a majority of them, that has been submitted to the court on the motion of any party [*Corp. Code § 1305(a)*].

[3] Cross References

For related forms, *see §§ 169.60*, *169.61*, and *169.64*.

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14-169 California Forms of Pleading and Practice--Annotated § 169.66

§ 169.66 Judgment [Code Civ. Proc. § 577] Determining Fair Market Value of Dissenting Shares [Corp. Code § 1305]

[1] FORM Judgment [Code Civ. Proc. § 577] Determining Fair Market Value of Dissenting Shares [Corp. Code § 1305]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	JUDGMENT
a Corporation,	)	
Defendant.	)	
	)	
	)	
_____		

The above-entitled action, having come on for trial on _____ [*date*], on the complaint of plaintiff and the answer of defendant, _____ [*name of corporation*], and the action having been tried before the court, plaintiff being represented by counsel, _____ [*name*], and defendant by counsel, _____ [*name*], and evidence, both oral and documentary, having been introduced and certain stipulations of facts having been made, and the court having considered all evidence and facts and the arguments of counsel and being fully advised in the premises, and having directed that judgment be entered in accordance therewith;

NOW, THEREFORE, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that:

1. Plaintiff have judgment entered against defendant in the sum of $ _____, representing the fair market value on _____ [*date*] of _____ [*number*] of _____ [

specify class] shares of _____ [*name of corporation*] owned by plaintiff, at the rate of $ _____ per share, with interest on that sum at the rate of 10 percent per annum from the date that judgment is entered in this action; provided, however, that the judgment shall be payable only on the endorsement and delivery to defendant of the certificates for the shares; and provided further, that to the extent *Sections 500 through 511 of the California Corporations Code* prevent payment of all or any part of the judgment, the part not payable shall be payable when permissible under those sections and that until payment plaintiff shall become a creditor of _____ [*name of corporation or successor*] for the amount remaining unpaid, together with interest at 10 percent per annum from the date that judgment is entered in this action.

[*EITHER*]

2. Plaintiff and defendant shall bear their respective costs of suit except that each party shall pay one-half the reasonable compensation of the appraiser(s) appointed in this action in the amount of $ _____.

[*OR, if value awarded exceeds corporation's offer* :]

2. Defendant shall pay plaintiff his/her costs of suit incurred in this action in the amount of $ _____, including the reasonable compensation of the appraiser(s) appointed in this action in the amount of $ _____.

[*OR, if value awarded plaintiff exceeds 125 percent of corporation's original offer* :]

2. Defendant shall pay plaintiff his/her costs of suit incurred in this action in the amount of $ _____, including the reasonable compensation of the appraiser(s) appointed in this action in the amount of $ _____, plaintiff's attorney's fees in the amount of $ _____, the fees of plaintiff's expert witnesses in the amount of $ _____, plus interest at 10 percent per annum from _____ [*date*], the date on which plaintiff complied with *Sections 1300*, *1301*, and *1302 of the California Corporations Code*].

[2] Use of Form

This judgment is for use in determining the fair market value of dissenting shares and will reflect the court's determination, whether made with or without the aid of appraisers, of the amount per share multiplied by the number of dissenting shares that the plaintiff is entitled to require the corporation to purchase, with interest at the legal rate [*Corp. Code § 1305(c)*]. Any party may appeal from the judgment [*Corp. Code § 1305(d)*].

[3] Judgment Subject to Restrictions on Distributions

The judgment of the court for payment to plaintiff of the fair market value of his or her dissenting shares is subject to the provisions of *Corp. Code § 1306* [*Corp. Code § 1305(c)*]. *Corp. Code § 1306* provides that to the extent the provisions of Chapter 5 [*Corp. Code §§ 500-511*] of the General Corporation Law prohibit the payment to any dissenting shareholders, they will become creditors of the corporation for the amount that cannot be paid, together with interest at the legal rate on judgments until the date of payment, but subordinate to all other creditors in any liquidation proceeding. The debt is payable when permissible under Chapter 5 [*Corp. Code § 1306*]. In particular, *Corp. Code §§ 500* and *501* prohibit distributions to shareholders when the distributions would jeopardize the corporation's financial position to the detriment of creditors and preferred shareholders. See Ch. 164, *Corporations: Dividends and Reacquisitions of Shares* , for a discussion of distributions to shareholders.

[4] Delivery of Certificates

With respect to certificated securities, any judgment for the fair market value of a dissenting shareholder's shares is payable only on the endorsement and delivery to the corporation of the certificates for the shares described in the judgment [*Corp. Code § 1305(d)*].

[5] Costs

The costs of an action to determine the fair market value of dissenting shares, including reasonable compensation to the appraisers as fixed by the court, must be assessed or apportioned as the court considers equitable [*Corp. Code § 1305(e)*]. However, if the appraisal exceeds the price offered by the corporation pursuant to the notice of approval of reorganization or notice of short-form merger [*see Corp. Code §§ 1110(h), 1301(a)*], then the corporation must pay costs [*Corp. Code § 1305(e)*]. If the value awarded by the court for the shares is more than 125 percent of the price offered by the corporation under *Corp. Code § 1301(a)*, the court may in its discretion, impose additional costs on the corporation, including attorney's fees, fees of expert witnesses, and interest at the legal rate on judgments from the date of the shareholder's compliance with *Corp. Code §§ 1300-1302* [*Corp. Code § 1305(e)*]. This form presents the alternative dates from which judgment interest with regards to costs accrues in Paragraph 2.

[6] Cross References

For related forms, *see §§ 169.60* and *169.61*.

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Chapter 170 CORPORATIONS: DISSOLUTION AND WINDING UP

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§ 170.61 Proceedings to Stay Winding Up and Dissolution and Ascertain Value of Moving Parties' Shares [Corp. Code § 2000]--Order Staying Proceedings and Appointing Appraisers to Ascertain Value of Shares

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[3] Cross References

§ 170.62 Proceedings to Stay Winding Up and Dissolution and Ascertain Value of Moving Parties' Shares [Corp. Code § 2000]--Decree for Winding Up and Dissolution Unless Payment for Moving Parties' Shares Made

[1] FORM

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[3] Cross References

§ 170.63 Final Dissolution--Petition for Order Declaring Corporation Duly Wound Up and Dissolved [Corp. Code § 1907(a)]

[1] FORM

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[1] FORM

[2] Use of Form

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[5] Cross References

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[1] FORM

[2] Use of Form

[3] Filing Court Order

[4] State Statutes

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Chapter 170 CORPORATIONS: DISSOLUTION AND WINDING UP
PART I. SCOPE

14-170 California Forms of Pleading and Practice--Annotated § 170.01

§ 170.01 Scope of Chapter

This chapter discusses the dissolution and winding up of California corporations. It covers both voluntary proceedings initiated by the board of directors or shareholders and involuntary dissolution by court proceedings This part focuses chiefly on the power of the court to supervise both voluntary and involuntary dissolution and winding up, including its powers and duties in connection with the provisions [*see Corp. Code § 2000*] permitting some shareholders or the corporation to avoid dissolution by purchasing the shares of the parties seeking dissolution. Also covered here are the steps taken in winding up the corporation's affairs including payment of creditors, the distribution of assets to shareholders, and the liabilities of directors and shareholders for improper distributions. For a detailed discussion of the matters covered in this part, see Ballantine and Sterling, California Corporation Laws, Ch. 15, *Dissolution and Winding Up* (Matthew Bender).

The forms in this chapter include:

- A petition for court supervision [*see § 170.50*] and related order to show cause [*see § 170.51*], and order granting the petition [*see § 170.52*].

- A complaint for involuntary dissolution [*see § 170.53*] and related order to wind up and dissolve [*see § 170.54*].

- A notice to creditors [*see § 170.55*] applicable in either voluntary or involuntary proceedings.

This chapter also contains forms related to staying both voluntary and involuntary dissolution for the purpose of purchasing the shares of the persons initiating the dissolution proceedings [*see* §§ 170.56-170.62].

This chapter additionally provides forms for final dissolution by court order applicable in voluntary and involuntary proceedings alike:

- A petition [*see § 170.63*]

- An order to show cause [*see § 170.64*].
- Final order [*see § 170.65*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDissolution & ReceivershipInvoluntary DissolutionBusiness & Corporate LawCorporationsDissolution & ReceivershipTermination & Winding UpGeneral OverviewBusiness & Corporate LawCorporationsDissolution & ReceivershipTermination & Winding UpDistribution of AssetsGeneral OverviewBusiness & Corporate LawCorporationsDissolution & ReceivershipVoluntary Dissolution

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14-170 California Forms of Pleading and Practice--Annotated § 170.02

§ 170.02 Cross References

For a complaint for use in a class action by a member of a dissolved association against its unincorporated parent body and officers to impress a constructive trust on fund seized by officers, see Ch. 61, *Associations and Clubs*

For a complaint to compel equitable distribution of church property, see Ch. 110, *Churches and Religious Organizations*

For a complaint by the state for forfeiture of a corporate charter, see Ch. 483, *Quo Warranto*

For a form of allegation for appointment of a receiver, in a complaint for dissolution, see Ch. 486, *Receivers*

For a complaint to recover franchise taxes collected for the period after dissolution, see Ch. 540, *Taxes and Assessments*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsCivil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsQuo WarrantoTax LawState & Local TaxesFranchise TaxGeneral Overview

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[Reserved]

§§ 170.03[Reserved]

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§ 170.10 Governing Statutes

The General Corporation Law's provisions governing dissolution and winding up comprise three separate chapters of that law:

- Chapter 18 [*Corp. Code §§ 1800-1809*] contains the provisions governing involuntary dissolution.
- Chapter 19 [*Corp. Code §§ 1900-1907*] deals with voluntary dissolution.
- Chapter 20 [*Corp. Code §§ 2000-2011*] sets forth the general provisions relating to both voluntary and involuntary dissolutions.

Although separated in this manner, the three chapters are interrelated. Thus, to the extent that a voluntary dissolution is conducted under court supervision, the provisions of Chapter 18, governing involuntary dissolutions, will apply [*Corp. Code § 1904*].

In addition, as noted, the general provisions of Chapter 20 will apply to both voluntary and involuntary dissolutions. In the interests of brevity and coherence, the discussion of voluntary dissolution in this part covers the general provisions of Chapter 20, except those relating to postdissolution actions, and cross references is made where the same provisions apply to involuntary dissolution. On the other hand, the scope of the court's jurisdiction will be covered in detail in connection with the discussion of involuntary dissolution, although this discussion will apply equally to voluntary proceedings under court supervision.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDissolution & ReceivershipInvoluntary DissolutionBusiness & Corporate LawCorporationsDissolution & ReceivershipVoluntary Dissolution

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PART II. LEGAL BACKGROUND

14-170 California Forms of Pleading and Practice--Annotated § 170.11

§ 170.11 Voluntary Dissolution

[1] Commencement of Proceedings

Voluntary proceedings for winding up the corporation are deemed to commence on the adoption of the resolution of the shareholders or directors of the corporation electing to wind up and dissolve, or on the filing with the corporation of a written consent of shareholders to the winding up and dissolution [*Corp. Code § 1903(a)*]. When proceedings for voluntary winding up have commenced, the board continues to act as a board and has full powers to wind up and settle the affairs of the corporation, both before and after the filing of the certificate of dissolution [*Corp. Code § 1903(b)*].

[2] Authorization to Wind Up and Dissolve

Any corporation may elect voluntarily to wind up and dissolve by the vote of shareholders holding shares representing 50 percent or more of the voting power [*Corp. Code § 1900(a)*; *see also Corp. Code § 194.5* (defining "voting power")]. However, shareholders representing 50 percent of the voting power do not have an absolute right to dissolve the corporation, and equity will intervene when the purpose of those seeking dissolution is to defraud other shareholders, freeze out a minority, or sell the assets at an inadequate price [*In re Security Fin. Co. (1957) 49 Cal. 2d 370, 376-377, 317 P.2d 1]* . On the other hand, as was held in *In re Security Fin. Co.* [*In re Security Fin. Co. (1957) 49 Cal. 2d 370, 378, 317 P.2d 1]* , a shareholder representing the requisite voting power is entitled to protect his or her investment by dissolving the corporation where all alternative methods are foreclosed, no advantage is secured over other shareholders, and no rights of third parties will be adversely affected. The *Security Financial Company* case was decided under the law as it existed prior to enactment of the present General Corporation Law and the shareholders opposing dissolution in that case did not have the statutory alternative of buying out the shareholder initiating dissolution, although the facts of that case indicate that they clearly had the resources to do so. Under present law, the opposing shareholders could compel the 50 percent shareholder to sell his or her shares to them [*Corp. Code § 2000*; *see* discussion in *§ 170.57[8]*].

Apart from an opportunity to avoid dissolution, shareholders under the present General Corporation Law also enjoy the protection of provisions designed to prevent cash-outs through the technique of dissolution and sale of the corporation's assets to the controlling shareholders. This device has been condemned in some decisions as a violation of the controlling shareholders' fiduciary duty to the minority [*see, e.g.,* *Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93,*

110, 81 Cal. Rptr. 592, 460 P.2d 464] . What may have been a breach of a fiduciary duty under prior law is, under present law, simply expressly prohibited. Thus, shareholder approval of the terms of a sale of assets for cash after dissolution proceedings have commenced is required when the buyer is in control of or under common control with the seller. Such a sale must be approved by 90 percent of the voting power of the disposing corporation [*see Corp. Code § 194.5* (defining "voting power")] unless the consideration for the sale is nonredeemable common shares or nonredeemable equity securities of the acquiring party or its parent [*Corp. Code §§ 1001(d), 2001(g)*; *see also Corp. Code § 175* (definition of "parent")].

When no purpose would be served in requiring shareholder approval of a dissolution, the law permits the board, acting alone, to elect to dissolve. Any of the following corporations may elect by approval of the board [*see Corp. Code § 151* (defining "approval of the board")] to wind up and dissolve [*Corp. Code § 1900(b)*]:

- A corporation which has been adjudged a bankrupt as to which an order for relief has been entered under Chapter 7 of the federal bankruptcy law;

- A corporation which has disposed of all its assets and has not conducted any business for a period of five years immediately preceding the adoption of the resolution electing to dissolve the corporation; or

- A corporation which has issued no shares.

[3] Statutory Procedure Mandatory

A voluntary dissolution of a corporation, whether by the election of shareholders or directors and with or without the supervision of the court, must be initiated under *Corp. Code § 1900*, and may only be accomplished under the conditions prescribed in the General Corporation Law [*Keeler v. Schulte (1956) 47 Cal. 2d 801, 803, 306 P.2d 430* ; *In re O'Brien Mach. Inc. (1964) 224 Cal. App. 2d 563, 570, 36 Cal. Rptr. 782]* . However, some deviation from the prescribed procedure will not necessarily invalidate the dissolution, for example, failure to file the certificate of election to wind up and dissolve with the Secretary of State, particularly in the absence of any showing of injury, will not undo a dissolution [*Herschfelt v. Knowles-Raymond Granite Co. (1955) 130 Cal. App. 2d 347, 351, 279 P.2d 104]* .

In addition, a corporation may be de facto wound up and dissolved even though the statutory procedure is largely ignored, although the corporation will not be regarded as actually dissolved [*see ABC Brewing Corp. v. Commissioner of Int. Rev. (9th Cir. [Cal] 1955) 224 F.2d 483, 485-487* (holding corporation which formally commenced voluntary dissolution and distributed assets but failed to file certificate of dissolution had undergone de facto dissolution for purpose of determining eligibility for tax credits)].

[4] Certificate of Election

When a corporation has elected to wind up and dissolve, a certificate evidencing that election must be filed in the office of the Secretary of State. The certificate must be an officers' certificate [*see Corp. Code § 173* (defining "officers' certificate")] or must be signed and verified [*see Corp. Code § 193* (defining "verified")] by at least a majority of the directors then in office or by at least one shareholder authorized to do so by shareholders holding shares representing 50 percent or more of the voting power. The required contents of the certificate are set forth in the General Corporation Law [*Corp. Code § 1901*].

[5] Cessation of Business

When a voluntary proceeding for winding up has commenced, the corporation must cease to carry on business except to the extent necessary for the beneficial winding up thereof, and except during that period as the board of directors may deem necessary to preserve the corporation's goodwill or going-concern value pending the sale of its business or assets

or both, in whole or in part [*Corp. Code § 1903(c)*].

[6] Notice of Commencement of Proceedings

The directors must forthwith cause written notice of the commencement of the proceeding for voluntary winding up to be given by mail to all shareholders, except those who voted in favor of the dissolution, and to all known creditors and claimants whose addresses appear on the records of the corporation [*Corp. Code § 1903(c)*].

[7] Revocation of Election

A voluntary election to wind up and dissolve may be revoked prior to distribution of any assets by the vote of shareholders holding shares representing a majority of the voting power, or by approval by the board if the election was by the board. A certificate evidencing such revocation must be signed, verified, and filed in the same manner as the original certificate of election [*§ 170.11[4]*]. The required contents of the certificate of revocation of the election are set forth in the General Corporation Law [*Corp. Code § 1902*].

[8] Powers of Directors and Officers During Dissolution

[a] Generally

When voluntary proceedings for dissolution and winding up of a corporation have commenced, the board of directors continues to act as a board and has full powers to wind up and settle the corporation's affairs. The powers of the board, or other persons appointed by a court when it has assumed jurisdiction [*§ 170.33[9][b]*], are enumerated in but not limited by *Corp. Code § 2001*, which specifically authorizes directors and officers to perform the following acts in the name of the corporation after commencement of a dissolution proceeding [*Corp. Code § 2001*]:.

- Elect officers and employ agents and attorneys to liquidate or wind up the corporation's affairs.

- Continue the conduct of the business insofar as necessary for the disposal or winding up of that business.

- Carry out contracts and collect, pay, compromise and settle debts and claims for or against the corporation.

- Defend suits brought against the corporation.

- Sue, in the name of the corporation, for all sums due or owing to the corporation, or to recover any of its property.

- Collect any amounts remaining unpaid on subscriptions to shares, or recover unlawful distributions.

- Sell at public or private sale, exchange, convey or otherwise dispose of all or any part of the assets of the corporation [for more detailed discussion, see [b], below], and execute bills of sale and deeds of conveyance in the name of the corporation.

- In general, make contracts and do any and all things in the name of the corporation which may be proper or convenient for the purposes of winding up, settling and liquidating the affairs of the corporation.

[b] Sales of Assets or Exchanges

One of the duties and powers enumerated in *Corp. Code § 2001* is the power to sell at public or private sale, to exchange, convey, or otherwise dispose of all or any portion of the assets of the corporation:

- For *cash* in an amount deemed reasonable by the board and without the shareholder approval normally required for a cash sale of all or substantially all the corporate assets [*see Corp. Code § 1001(a)*; *see also* Chapter 169, *Reorganizations*], unless the buyer controls or is under common control with the dissolving corporation [*Corp. Code § 2001(g)*; *see Corp. Code § 162* (definition of "control")]. If the buyer controls or is under common control with the seller (the dissolving corporation), a cash sale must be approved by at least 90 percent of the corporation's voting power [*see Corp. Code § 1001(d)*; *see also* discussion of significance of this rule in *§ 170.11[2]*]; or

- Upon the other terms and conditions and *for any consideration other than cash* as the board deems reasonable or expedient, with the approval of the board and either the approval of the outstanding shares or approval of the outstanding shares of each class, depending on precisely the kind of consideration received [*Corp. Code § 2001(g)*; *see Corp. Code §§ 151, 152* (defining, respectively, "approval of the board" and "approval of the outstanding shares")]. These are the approvals normally required for a sale of assets or a "sale-of-assets reorganization" as the latter term is defined in *Corp. Code § 181(c)* [*see Corp. Code §§ 1001, 1201*; *see also* Ch. 169, *Reorganizations* , for a complete discussion of the approvals required for a sale of assets and a sale-of-assets reorganization].

[9] Vacancy on Board

A vacancy on the board of directors can be filled during the winding up proceeding by approval of the board as defined in *Corp. Code § 151*, or, if the number of directors then in office is less than a quorum, by [*Corp. Code § 2002*; *see Corp. Code § 305(a)* and discussion in Ch. 167, *Directions and Management* with respect to filling vacancies on the board]:

- Unanimous written consent of the directors then in office;

- The affirmative vote of a majority of the directors then in office at a meeting held pursuant to notice or waivers of notice complying with *Corp. Code § 307*; or

- A sole remaining director.

Unless the articles or a bylaw adopted by the shareholders provide that the board may fill vacancies occurring in the board by reason of the removal of directors, such vacancies may be filled only by approval of the shareholders [*Corp. Code § 305(a)*].

The shareholders may elect a director at any time to fill any vacancy not filed by the directors. Any such election by written consent other than to fill a vacancy created by removal requires the consent of a majority of the outstanding shares entitled to vote [*Corp. Code §§ 305(a), 2002*].

[10] Identity and Capacity of Directors

When the identity of the directors or their right to hold office is in doubt, or if they are dead or unable to act, or if they fail or refuse to act, or their whereabouts cannot be ascertained, any interested person may petition the superior court of the proper county [*see Corp. Code § 177* (defining "proper county")] to determine the identity of the directors or, if there are no directors, to appoint directors to wind up the affairs of the corporation. Notice of the hearing to identify or appoint the directors must be given to the persons that the court directs [*Corp. Code § 2003*].

[11] Court Supervision

[a] Petition

If a corporation is in the process of voluntarily winding up, the superior court of the proper county, that is, the county in which the principal executive office of the corporation is located (or if that office is not located in California, Sacramento County) [*Corp. Code § 177*], may take jurisdiction over the winding up if it appears to be necessary for the protection of any parties in interest. Jurisdiction may be invoked on petition of:

- The corporation;

- A shareholder or shareholders holding shares representing five percent or more of the total number of any class of outstanding shares;

- Any shareholder or shareholders of a close corporation [*see Corp. Code § 158* (defining "close corporation")]; or

- Three or more creditors [*Corp. Code § 1904*].

The statute provides that the court "may take jurisdiction ... if that appears necessary for the protection of any parties in interest" [*Corp. Code § 1904*]. Former Corp. Code § 4607 also used the permissive "may" (without the additional language just quoted), and it was construed as absolutely entitling those given the right to petition for court supervision to such supervision [*In re Mayellen Apts., Inc. (1955) 134 Cal. App. 2d 298, 303-308, 285 P.2d 943]* . However, the Supreme Court refused to decide whether court supervision may be invoked when there is no possibility of disputes arising between the shareholders during dissolution [*In re Security Fin. Co. (1957) 49 Cal. 2d 370, 380, 317 P.2d 1]* . It was also held under prior law that court supervision was not violative of the right of minority shareholders, granted to them in the articles of incorporation, to purchase shares of persons desiring to sell, since the statutory provisions for court supervision form part of the contract between the corporation and the shareholders under the reserved power clause [*In re Mayellen Apts., Inc. (1955) 134 Cal. App. 2d 298, 304, 306, 285 P.2d 943]* . The present General Corporation Law appears to grant discretion to the court as to whether it will assume jurisdiction over the voluntary winding up of the corporation. Therefore, it becomes particularly important that the petitioner allege the basic facts or grounds of actual controversy which would warrant the supervision of the court.

Nonpetitioning shareholders are not automatically parties to the voluntary dissolution proceeding. Those shareholders are not parties unless they are named as defendants or they intervene, and they cannot be effectively named as defendants unless the petition seeks relief against them [*In re FairWageLaw (2009) 176 Cal. App. 4th 279, 286-288, 97 Cal. Rptr. 3d 652* (court's adjudication, in voluntary dissolution proceeding, of corporation's claim against nonpetitioning shareholder, who was not named as defendant in that proceeding, violated shareholder's right to due process, even though shareholder had intervened so as to pursue claim against corporation)].

[b] Advantage of Court Supervision

Even when neither shareholders nor creditors would be inclined to petition for court supervision of a voluntary dissolution, it may be to the corporation's advantage to do so, particularly when there are unmatured or contingent claims against the corporation. The court has the power to finally settle claims against the corporation and must award holders of unmatured claims the present value of the claim [*Corp. Code §§ 1807, 1808*]. Another advantage, at least for shareholders who are not directors, lies in the fact that court ordered distributions are immune from attack as having been made in derogation of the rights of creditors [*Corp. Code § 2009(a)*; *see* discussion in *§ 170.32[2]*].

[c] Scope of Court's Jurisdiction

If the court assumes jurisdiction over winding up proceedings, it may make any orders as to any and all matters concerning the winding up of the affairs of the corporation and for the protection of its shareholders that justice and equity require [*Corp. Code § 1904*]. The provisions governing the court's jurisdiction over *involuntary* dissolutions, except *Corp. Code §§ 1800* and *1801*, apply to those proceedings [*Corp. Code § 1904*]. For a full discussion of the jurisdiction conferred on the court during involuntary dissolution and court supervised voluntary dissolution, see *§ 170.12[6]*. Keep in mind that although many of the decisions under prior law concerning matters relating to the jurisdiction over involuntary proceedings were construing statutes that applied *only* to such proceedings, the present General Corporation Law makes no distinction with respect to the court's power in involuntary and voluntary proceedings under court supervision, and therefore, such decisions should remain good law when the statutory language is essentially unchanged.

[12] Avoidance of Dissolution

[a] Purchase of "Moving Parties' " Shares

Subject to any contrary provision in the articles, in any suit for involuntary dissolution, or in any proceeding for voluntary dissolution initiated by the vote of shareholders representing only 50 percent of the voting power, the corporation, or, if it does not elect to purchase, the holders of 50 percent or more of the voting power of the corporation (the "purchasing parties") may avoid the dissolution of the corporation and the appointment of any receiver by purchasing for cash the shares owned by the plaintiffs or by the shareholders so initiating the proceeding (the "moving parties") at their fair value [*Corp. Code § 2000(a)*].

Under prior law [*see* former Corp. Code § 4658], purchase of the shares of the parties seeking dissolution was only possible in involuntary proceedings, and had the purpose of preventing the minority from abusing its power to cause an involuntary dissolution [*Stumpf v. C.E. Stumpf & Sons, Inc. (1975) 47 Cal. App. 3d 230, 234, 120 Cal. Rptr. 671]* . Under present law, the statutory buy-out right has been extended to voluntary dissolutions when the shareholders are evenly divided on the issue of whether or not to dissolve. To avoid repetition, the procedures governing buy-out in both voluntary and involuntary proceedings are described here.

[b] Purchase Price

The fair value of the shares of the "moving parties" must be determined on the basis of the liquidation value as of the valuation date but taking into account the possibility, if any, of sale of the entire business as a going concern in a liquidation [*Corp. Code § 2000(a)*]; *see, e.g., Mart v. Severson (2002) 95 Cal. App. 4th 521, 535-536, 115 Cal. Rptr. 2d 717* (holding that trial court erred in finding that fair value was piecemeal liquidation value of $1.48 million, when appraisers unanimously had concluded that corporation could have been sold as ongoing concern for $5.6 million)]. The valuation date is the date on which the proceeding for voluntary dissolution was initiated. Upon the motion of any party, however, the court may designate some other date as the valuation date for good cause shown [*Corp. Code § 2000(f)*; *see, e.g., Trahan v. Trahan (2002) 99 Cal. App. 4th 62, 76-78, 120 Cal. Rptr. 2d 814* (substantial evidence supported court's confirmation of appraiser's determination of fair value as piecemeal sale of assets, even though it did not take into account existing but uncompleted contracts; parties could have requested court to set later valuation date to allow completion of unperformed contracts)].

In fixing the value, the amount of any damages resulting if the initiation of the dissolution is a breach by any moving party or parties of an agreement with the purchasing party or parties may be deducted from the amount payable to the moving party or parties, unless the ground for dissolution is that specified in *Corp. Code § 1800(b)(4)*, relating to fraud and mismanagement. Election by the corporation to purchase may be made by the approval of the outstanding shares [*Corp. Code § 152*] excluding shares held by the moving parties [*Corp. Code § 2000(a)*].

A determination of the fair value of the shares of the corporation must include an assessment of the value, if any, of a pending derivative action and the effect of the action on the fair value of the shares [*Cotton v. Expo Power Sys., Inc. (2009) 170 Cal. App. 4th 1371, 1374, 1380-1381, 89 Cal. Rptr. 3d 112* (derivative claim is property right that belongs to corporation and is properly viewed as asset of corporation)].

[c] Determination of Fair Value by Court

On application of the purchasing parties, the court must stay the winding up and dissolution, and proceed to ascertain and fix the fair value of the moving parties' shares, if the purchasing parties [*Corp. Code § 2000(b)*]:

- Elect to purchase the shares owned by the moving parties; and
- Are unable to agree with the moving parties on the fair market value of the shares; and
- Give bond with sufficient security to pay the estimated reasonable expenses (including attorney's fees) of the moving parties if those expenses are recoverable under *Corp. Code § 2000(c)* (i.e., dissolution granted because of failure of purchasing parties to make payment within time specified).

The application for court determination, in the case of involuntary proceedings, would be made to the court in which the involuntary dissolution proceeding is pending. Where dissolution has commenced voluntarily, the application is made by initiating a proceeding in the superior court of the "proper county" [*Corp. Code § 2000(b)*; *see Corp. Code § 177* (definition of "proper county")].

The statutory provisions for purchase of the "moving parties' " shares are mandatory [*Alvak Enterprises v. Phillips (1959) 167 Cal. App. 2d 69, 75, 334 P.2d 148]* , but when an involuntary dissolution proceeding has been dismissed, the court is without jurisdiction to order appraisers to be appointed to ascertain the value of the plaintiff's shares and cannot grant the relief sought by the defendant, that is, the buy-out of plaintiff's shares [*Cubalevic v. Superior Court (1966) 240 Cal. App. 2d 557, 562, 49 Cal. Rptr. 698]* . The court is also without jurisdiction to entertain further proceedings to determine the fair value of the shares when the conditions listed above are not met. Thus, the allegation that "if" the parties are unable to agree as to the purchase price, "then and in such event" court determination of the value of the shares would be sought has been held insufficient to stay proceedings for involuntary dissolution [*Merlino v. Fesno Macaroni Mfg. Co. (1944) 64 Cal. App. 2d 462, 464-465, 148 P.2d 884]* . While this narrow treatment of pleadings might no longer hold, it is probably sound practice to make a written offer to the moving parties which, when rejected, will stand as a factual allegation in the application for court determination.

[d] Appointment of Appraisers; Orders

The court must appoint three disinterested appraisers to appraise the fair value of the shares owned by the moving parties, and must make an order referring the matter to the appraisers and setting forth the time and manner of producing evidence, if evidence is required. The award of the appraisers, or a majority of them, when confirmed by the court, will be final and conclusive on all parties [*Corp. Code § 2000(c)*]. The court may not postpone the appraisal, or the completion of the appraisal, until some related matter is concluded (for instance, until a pending derivative action comes to an end), because *Corp. Code § 2000* contemplates a summary procedure. The court is required either to obtain a complete appraisal of the fair value of the shares from the appraisers, without delay, or to conduct a hearing forthwith to resolve the matter [*Cotton v. Expo Power Sys., Inc. (2009) 170 Cal. App. 4th 1371, 1381-1382, 89 Cal. Rptr. 3d 112]* .

The trial court has the duty, when convinced that an award of the appraisers is erroneous, to examine matters de novo and fix its own valuation [*Venables v. Credential Ins. Agency, Inc. (1956) 140 Cal. App. 2d 724, 727, 295 P.2d 547]* . However, a trial court that is convinced that one of two highly discordant appraisal reports accurately reflects the value of the shares in question may confirm that report without reinvestigating the matter [*Brown v. Allied Corrugated Box*

Co. (1979) 91 Cal. App. 3d 477, 491, 154 Cal. Rptr. 170 (former Corp. Code §§ 4658, 4659, *now see Corp. Code § 2000*)].

A shareholder is not entitled to an evidentiary hearing on the valuation set by the appraisers, nor is a shareholder entitled to depose the neutral appraiser [*Abrams v. Abrams-Rubaloff & Associates, Inc. (1980) 114 Cal. App. 3d 240, 247-248, 170 Cal. Rptr. 656]* .

[e] Decree and Appeal

When the award of the appraisers is confirmed by the court, the court must enter a decree which provides in the alternative for winding up and dissolution of the corporation unless payment is made for the shares of the moving parties within the time specified by the decree. This decree is appealable by any shareholder aggrieved [*Corp. Code § 2000(c)*; *see* *Esparza v. Kadam, Inc. (1959) 170 Cal. App. 2d 303, 305-306, 338 P.2d 492* (holding appraiser's award subject to review)]. However, since it has been held that findings of fact need not be made by either the court or the appraisers [*Esparza v. Kadam, Inc. (1960) 182 Cal. App. 2d 802, 807, 6 Cal. Rptr. 450]* , review of the appraisers' or court's award may be hampered by failure to make an adequate record in the trial court.

There is no automatic stay of the court's decree in the event of an appeal (because *Corp. Code § 2000* provides for a special proceeding, rather than a civil action, and does not expressly incorporate the Civil Code sections governing appeals in civil actions), but a reviewing court has discretion to issue a writ of supersedeas if a proper and sufficient showing is made [*Veyna v. Orange County Nursery, Inc. (2009) 170 Cal. App. 4th 146, 154-156, 87 Cal. Rptr. 3d 658* ; *see generally Ch. 43, Appeal: Stay of Proceedings, § 43.21*].

If the purchasing parties do not make payment for the shares within the time specified, judgment must be entered against them and the surety or sureties on the bond provided by the purchasing parties for the amount of the expenses (including attorney's fees) of the moving parties [*Corp. Code § 2000(c)*]. On the other hand, if the moving parties resist all efforts of the purchasing parties to purchase the former's shares, including the appointment of appraisers to determine the value of the shares, the court may properly award the purchasing parties one-half of the appraisers' fees as prevailing parties under former *Code Civ. Proc. § 1032(c)* (*now see Code Civ. Proc. § 1032(a)(4)*) [*Merlino v. Fresno Macaroni Mfg. Co. (1946) 74 Cal. App. 2d 120, 125, 168 P.2d 182]* .

[f] Payment and Transfer

If the purchasing parties desire to prevent the winding up and dissolution, they must pay to the moving parties the value of their shares, as ascertained and decreed, within the time specified or, in case of appeal, as fixed on appeal. On receiving payment or tender, the moving parties must transfer their shares to the purchasing parties [*Corp. Code § 2000(d)*].

[13] Distribution of Assets

[a] When and How Made

After determining that all the known debts and liabilities of a corporation in the process of winding up have been paid or adequately provided for [*see Corp. Code § 2005* (specifying two nonexclusive means for adequately providing for liabilities)], the board of directors must distribute all the remaining corporate assets among the shareholders according to their respective rights and preferences, or, if there are no shareholders, to the persons entitled to the assets. When dissolution of the corporation is by court proceeding or subject to court supervision, no distributions of assets may be made until after the expiration of any period for the presentation of claims which has been prescribed by the court [*Corp. Code § 2004*].

Distributions to the shareholders can be made either in money, property, or securities, and either in installments from

time to time or in whole, if this can be done fairly and ratably and in conformity with the provisions of the articles and the rights of the shareholders. The distributions must be made as soon as is reasonably consistent with the beneficial liquidation of the corporate assets [*Corp. Code § 2006*]. However, the corporation cannot adopt a plan of distribution which provides that the majority shareholders will take the plants and business property while the minority are compelled to take cash as their distributive share of the assets [*In re San Joaquin L. & P. Corp. (1942) 52 Cal. App. 2d 814, 824, 127 P.2d 29* ; *see also Zimmerman v. Tide Water etc. Co. (1943) 61 Cal. App. 2d 585, 592-594, 143 P.2d 409* (holding minority shareholder not barred by laches to assert claim for distribution of corporate assets in kind where majority shareholder not misled as to nonacquiescence in plan of distribution and no evidence to support view that plaintiff had notice of action taken at meeting to consider dissolution)].

[b] Dissenting and Unknown Shareholders or Creditors

When a corporation in the process of winding up has both preferred and common shares outstanding, a plan of distribution of its assets that is not in accordance with the liquidation rights of the preferred shares may nevertheless be adopted if it is approved by the board and the outstanding shares of each class. The plan may provide that the distribution will be in complete or partial satisfaction of the right of any of the shareholders upon distribution and liquidation of the assets [*Corp. Code § 2007(a)*]. If the plan is approved, it will be binding on all shareholders except those having a liquidation preference who dissent from the plan and file the written demand and follow the other procedures set forth in *Corp. Code § 2007(c)* [*Corp. Code § 2007(b)*]. *Corp. Code 2007* does not apply to a distribution in accordance with a reorganization plan, the principal terms of which had been approved pursuant to *Corp. Code § 1202(b)* (discussed in Ch. 169, *Reorganizations*) [*Corp. Code § 2007(e)*].

Another procedure is spelled out in *Corp. Code § 2008* for dealing with shareholders and creditors who are unknown, fail or refuse to accept payment, cannot be found, hold contingent, contested, or undetermined claims, or whose share ownership is the subject of dispute. The corporation may deposit any payment, dividend, or distribution, or the maximum amount of any claim, with the Controller in trust for the benefit of those lawfully entitled to the payment, dividend, distribution, or the amount of the claim [*Corp. Code § 2008(a)*]. With respect to money or property deposited with the Controller, it will be deemed paid or delivered under the Unclaimed Property Law [*Code Civ. Proc. §§ 1500 et seq.*], and may be recovered in the manner prescribed therein [*Corp. Code § 2008(b)*]. For a procedural guide and forms relating to making claims under the Unclaimed Property Law, see Ch. 252, *Escheat (Unclaimed Property)*.

[c] Liability of Directors for Improper Distribution

Directors of a corporation who approve the distribution of assets to shareholders after institution of dissolution proceedings without paying or adequately providing for all known liabilities of the corporation, excluding any claims not filed by creditors within the time limit set by the court in a notice given to creditors, may be jointly and severally liable to the corporation for the benefit of all creditors entitled to sue [*Corp. Code § 316(a)*].

The liability of directors will depend on whether they have breached the duty of care set forth in *Corp. Code § 309*. The extent of this duty, including the directors' right to rely on information, opinions, reports, or statements of others is fully discussed in Ch. 167, *Directions and Management* . Directors may also incur criminal liability by approving an unlawful distribution [*Corp. Code § 2253*].

The creditors entitled to sue in the name of the corporation to enforce the directors' liability are those whose debts or claims arose prior to the time of the distribution, whether or not the creditors have reduced their claims to judgment, provided that they have not consented to the distribution [*Corp. Code § 316(c)*].

The damages recoverable from a director under *Corp. Code § 316* consist of the amount of the illegal distribution, plus interest at the legal rate from the date of date of distribution until paid, together with reasonable appraisal or valuation costs. If the distribution consists of property, the damages consist of the fair market value of the property at the time of

the distribution. However, damages may not exceed the liabilities of the corporation owed to nonconsenting creditors at the time of the violation and the injury suffered by the nonconsenting shareholders, as the case may be [*see Corp. Code § 316(d)*].

Creditors will be barred from recovering amounts unlawfully distributed if they have not filed their claims within the time limit set "by the court in a notice given to creditors under Chapters 18 (commencing with Section 1800), 19 (commencing with Section 1900) and 20 (commencing with Section 2000)" [*Corp. Code § 316(a)(2)*]. The statutory language is curious since the only provision for the court's setting a time limit appears in *Corp. Code § 1807*. There is a reference to *Corp. Code § 1807* in *Corp. Code § 1907* (dealing with a petition for an order declaring a corporation wound up and dissolved, which corporation conducted the dissolution voluntarily), but Chapter 20 [*Corp. Code §§ 2000-2011*] has no provision for court set time limits. In any event, the reference in *Corp. Code § 316(a)(2)* to a time limit set by the court means that unless the jurisdiction of the court is sought at some point in the dissolution proceedings, directors of a corporation that has *voluntarily* dissolved might remain liable for improper distributions regardless of the fact that they notified all creditors pursuant to *Corp. Code § 1903(c)*. Under prior law [*see* former Corp. Code § 826] there was no time limit that would bar recovery by a creditor in an action *against directors*, and it was held that the creditor's cause of action was created at the time of the improper distribution and subject to the three-year statute of limitations contained in *Code Civ. Proc. § 359* [*Hoover v. Galbraith (1972) 7 Cal. 3d 519, 524-526, 102 Cal. Rptr. 733, 498 P.2d 981]* . This decision would still appear to be applicable, at least with respect to voluntary dissolutions where there is no court supervision nor any order declaring the corporation wound up and dissolved [*see Corp. Code § 1907*; *see also § 170.11[16]*].

[d] Liability of Shareholders for Improper Distribution

Whenever in the process of winding up a corporation any distribution of assets has been made, other than under an order of the court, without prior payment or adequate provision for payment of any of the debts and liabilities of the corporation, any amount so improperly distributed may be recovered by the corporation. Any of the shareholders who have received the improper distribution may be joined as defendants in the same action or brought in on the motion of any defendant [*Corp. Code § 2009(a)*]. For the purpose of applying all provisions imposing liability on shareholders for distributions in liquidation, "process of winding up" includes any proceedings in involuntary dissolution or voluntary dissolution whether or not court-supervised, and any other distribution of assets to shareholders made in contemplation of termination or abandonment of the business [*Corp. Code § 2009(d)*].

Suit to enforce the liability of the shareholders receiving improper liquidation distributions may be brought in the name of the corporation against any or all such shareholders by any one or more creditors of the corporation, whether or not they have reduced their claims of judgment [*Corp. Code § 2009(b)*]. The creditor's or corporation's right against the shareholder is *in personam*, and recovery can be had against the shareholders who received the improper distribution even though the assets are no longer in the hands of the shareholder [*Zinn v. Bright (1970) 9 Cal. App. 3d 188, 192, 87 Cal. Rptr. 736* ; *Penasquitos, Inc. v. Superior Court (1991) 53 Cal. 3d 1180, 1188-1191, 283 Cal. Rptr. 135, 812 P.2d 154* (discussed in *§ 170.13[3]*; rationale for allowing post-dissolution claims against dissolved corporation but not against shareholders)].

The right of a creditor under *Corp. Code § 2009(b)* to sue the shareholders of a dissolved corporation is limited to pursuing causes of action that arose before dissolution [*Pacific Scene, Inc. v. Penasquitos, Inc. (1988) 46 Cal. 3d 407, 411-414, 250 Cal. Rptr. 651, 758 P.2d 1182* ; *see also Corp. Code §§ 2010, 2011(a)* (discussed in *§ 170.13[1]* and *[6]*, respectively]. The "equitable trust fund" theory available under prior law was abrogated by enactment of *Corp. Code §§ 2009, 2011(a)* in 1977 [*United States v. Oil Resources (9th Cir. 1987) 817 F.2d 1429, 1433* ; *Pacific Scene, Inc. v. Penasquitos, Inc. (1988) 46 Cal. 3d 407, 410, 412-414, 250 Cal. Rptr. 651, 758 P.2d 1182]* .

Shareholders satisfying any liability to the corporation are granted a right of ratable contribution from other distributees similarly liable [*Corp. Code § 2009(c)*]. Any shareholder who has been compelled to return to the corporation more

than the shareholder's ratable share of the amount needed to pay the debts and liabilities of the corporation may require that the corporation recover from any or all of the other distributees such proportion of the amounts received by them upon the improper distribution as to give contribution to those held liable and make the distribution of the assets fair and ratable, according to the respective rights and preferences of the shares, after payment or adequate provision for the payment of all debts and liabilities of the corporation [*Corp. Code § 2009(c)*].

Note that if the court has ordered the distribution, the shareholders receiving it are not liable under *Corp. Code § 2009(a)*. This raises the question of whether the creditor could attack a decree of dissolution that had been procured on the basis of a petition for an order declaring the corporation wound up and dissolved [*see Corp. Code § 1907*; *see also § 170.11[16]*], on the grounds that the petition falsely alleged payment or provision for all creditors. One decision, in dictum, has stated that the jurisdiction of the court and the decree of dissolution are not collaterally assailable on the ground the decree was procured by fraud [*Crossman v. Vivienda Water Co. (1907) 150 Cal. 575, 579, 89 P. 335]* . Under these circumstances, the creditor's remedy would be against the directors pursuant to *Corp. Code § 316(a)*.

[14] Certificate of Dissolution

[a] Preparation

When a corporation has been completely wound up without court proceedings therefor, a majority of the directors then in office must sign and verify a certificate of dissolution containing the information required by the statute [*Corp. Code § 1905(a)*].

Except as otherwise provided by law, if the term of existence for which any corporation was organized expires without renewal or extension, the board must terminate its business and wind up its affairs. When the business and affairs have been wound up, the board must then execute and file a certificate of dissolution conforming to the requirements of *Corp. Code § 1905(a)* [*Corp. Code § 1906*].

[b] Filing; When Effective

The certificate of dissolution must be filed in the office of the Secretary of State. When the certificate of dissolution is filed, the corporate powers, rights, and privileges cease [*Corp. Code § 1905(b)*; *see Catalina Investments, Inc. v. Jones (2002) 98 Cal. App. 4th 1, 7-8, 119 Cal. Rptr. 2d 256* (as consequence of dissolved status, former corporation lacked capacity to submit purported certificate of revocation of dissolution more than four years later, in attempt to reinstate corporate existence)]. The Secretary of State notifies the Franchise Tax Board of the dissolution. The corporation is dissolved as of the date of filing the certificate of dissolution [*Corp. Code § 1905(b)*].

If a corporation filed a certificate of dissolution after January 1, 1992, and before September 29, 2006 (the effective date of the 2006 legislation amending *Corp. Code § 1905*) [*see* Stats. 2006, ch. 773], and the Franchise Tax Board had not made the determination required under former *Corp. Code § 1905(c)* relative to the corporation's outstanding tax liability as of September 29, 2006, the corporation will be dissolved as of the date of filing the certificate of dissolution, and its corporate existence will cease as of that date [*Corp. Code § 1905.1*].

[15] Corporation That Has Not Issued Shares

Notwithstanding any other provisions regarding dissolution, when a corporation has not issued shares, a majority of the directors (or, if no directors have been named in the articles or been elected, the incorporator or a majority of the incorporators) may sign and verify a certificate of dissolution that states the following [*Corp. Code § 1900.5(a)*]:

- That the certificate of dissolution is being filed within 12 months from the date the articles of incorporation were filed.

- That the corporation does not have any debts or other liabilities, except as provided below.

- That the tax liability will be satisfied on a taxes paid basis or that a person or corporation or other business entity assumes the tax liability, if any, of the dissolving corporation and is responsible for additional corporate taxes, if any, that are assessed and that become due after the date of the assumption of the tax liability.

- That a final franchise tax return has been or will be filed with the Franchise Tax Board as required [*see Rev. & Tax. Code § 18401 et seq.*].

- That the corporation has not conducted any business from the time of the filing of the articles of incorporation.

- That the known assets of the corporation remaining after payment of, or adequately providing for, known debts and liabilities have been distributed to the persons entitled to them or that the corporation acquired no known assets, as the case may be.

- That a majority of the directors, or, if no directors have been named in the articles or been elected, the incorporator or a majority of the incorporators authorized the dissolution and elected to dissolve the corporation.

- That the corporation has not issued any shares, and if the corporation has received payments for shares from investors, those payments have been returned to those investors.

- That the corporation is dissolved.

A signed and verified certificate of dissolution must be filed with the Secretary of State, who will and notify the Franchise Tax Board of the dissolution [*Corp. Code § 1900.5(b)*]. Upon filing the certificate of dissolution, a corporation will be dissolved and its powers, rights, and privileges will cease [*Corp. Code § 1900.5(c)*].

[16] Petition for Order Declaring Corporation Wound Up and Dissolved

In lieu of filing the certificate of dissolution, the board may petition the superior court of the proper county for an order declaring the corporation duly wound up and dissolved. The petition is filed in the name of the corporation [*Corp. Code § 1907(a)*].

On the filing of the petition, the court must make an order requiring all persons interested to show cause why an order should not be made declaring the corporation duly wound up and dissolved and must direct that the order be served by notice to all creditors, claimants, and shareholders in the same manner as the notice given to creditors in an involuntary proceeding under *Corp. Code § 1807(b)* [*Corp. Code § 1907(b)*; *see § 170.12[7][b]*].

Any person claiming to be interested as shareholder, creditor, or otherwise, may appear in the proceeding at any time before the expiration of 30 days from the completion of publication of the order to show cause and contest the petition. On failure to do so, that person's claim is barred [*Corp. Code § 1907(c)*]. Thereafter an order must be entered and filed and will have the effect prescribed in *Corp. Code §§ 1808* and *1809*--that is, the contents of the order and its filing with the Secretary of State will be governed by those provisions prescribing the final order of dissolution in involuntary or court-supervised dissolution [*Corp. Code § 1907(d)*]. For discussion of the contents and filing of the order declaring the corporation wound up and dissolved, see *§ 170.12[10]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesGeneral OverviewBusiness & Corporate LawCorporationsDissolution & ReceivershipTermination & Winding UpDistribution of AssetsShareholder RightsBusiness & Corporate LawCorporationsDissolution & ReceivershipVoluntary DissolutionBusiness & Corporate LawCorporationsShareholdersAppraisal & Dissent RightsGeneral OverviewBusiness & Corporate LawCorporationsShareholdersShareholder Duties & LiabilitiesPersonal Liability

California Forms of Pleading and Practice--Annotated

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Chapter 170 CORPORATIONS: DISSOLUTION AND WINDING UP
PART II. LEGAL BACKGROUND

14-170 California Forms of Pleading and Practice--Annotated § 170.12

§ 170.12 Involuntary Dissolution

[1] Persons Entitled to Initiate Proceedings

A verified complaint for involuntary dissolution of a corporation other than one subject to the Banking Law (*Fin. Code § 99 et seq.*), the Public Utilities Act (*Pub. Util. Code § 201 et seq.*), the Savings and Loan Association Law (*Fin. Code § 5000 et seq.*), or *Ins. Code § 1010 et seq.* may be filed in the superior court of the proper county [*see Corp. Code § 177* (definition of "proper county")] by any of the following persons:

- One half or more of the directors in office;

- A shareholder or shareholders holding shares representing not less than 331/3 percent of (1) the total number of outstanding shares (assuming conversion of any preferred shares convertible into common shares), (2) the outstanding common shares, or (3) the equity of the corporation, exclusive in each case of shares owned by persons who have personally participated in any of the transactions described in *Corp. Code § 1800(b)(4)* [*see Kline Hawkes California v. Superior Court (2004) 117 Cal. App. 4th 183, 196, 11 Cal. Rptr. 3d 581* (proper interpretation of *Corp. Code § 1800(a)(2)(iii)* gives preferred shareholders right to file for involuntary dissolution if their preferred shares represent 331/3 percent of corporation's equity)];

- Any shareholder or shareholders of a close corporation;

- Any shareholder if the ground for dissolution is that the period for which the corporation was formed has terminated without extension; or

- Any other person expressly authorized to do so in the articles [*Corp. Code § 1800(a)*].

With respect to the right granted to 331/3-percent share or equity holders described in the second item above, jurisdiction of the court, once acquired in involuntary proceedings, cannot be subsequently defeated by redemption of the plaintiff's shares so that he or she holds less than 331/3 percent [*Buss v. J.O. Martin Co. (1966) 241 Cal. App. 2d*

123, 131-133, 50 Cal. Rptr. 206] . The term "shareholder," for the purposes of *Corp. Code § 1800(a)*, includes a beneficial owner of shares who has entered into a voting trust or voting pool under *Corp. Code §§ 300* or *706*.

The Attorney General also may bring an action to procure a judgment dissolving the corporation against any domestic corporation or purported domestic corporation in the name of the people of the State of California, either upon the Attorney General's own information or upon the complaint of a private party. The grounds and procedures to be followed in such an action are set forth in *Corp. Code § 1801* [*see, e.g.,* *81 Ops. Cal. Att'y Gen. 240, 241 (1998), 81 Ops. Cal. Att'y Gen. 244, 245 (1998)* (both concluding that defendant was not, by virtue of single complaint of alleged unlawful deceptive practice, unlawfully holding or exercising its corporate franchise; leave to sue in quo warrento denied)]. For a complaint by the Attorney General to obtain forfeiture of a corporation's existence, see Ch. 483, *Quo Warranto* .

[2] Grounds

The grounds for involuntary dissolution are as follows:

- The corporation has abandoned its business for more than one year.

- The corporation has an even number of directors who are equally divided and cannot agree as to the management of its affairs, so that its business can no longer be conducted to advantage or so that there is danger that its property and business will be impaired or lost, and the holders of the voting shares of the corporation are so divided into factions that they cannot elect a board consisting of an uneven number.

- There is internal dissension and two or more factions of shareholders in the corporation are so deadlocked that its business can no longer be conducted with advantage to its shareholders or the shareholders have failed at two consecutive annual meetings at which all voting power was exercised, to elect successors to directors whose terms have expired or would have expired on election of their successors.

- Those in control of the corporation have been guilty of or have knowingly countenanced persistent and pervasive fraud, mismanagement, or abuse of authority or persistent unfairness toward any shareholders or its property is being misapplied or wasted by its directors or officers.

- In the case of a corporation with 35 or fewer shareholders (determined as provided in *Corp. Code § 605*), liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder or shareholders.

- The period for which the corporation was formed has terminated without extension of that period [*Corp. Code § 1800(b)*].

[3] Intervention

At any time prior to the trial of the action for involuntary dissolution, any shareholder or creditor may intervene [*Corp. Code § 1800(d)*]. A shareholder's right to intervene is unqualified and is not subject to any requirement that security be posted even if some of the intervenor's allegations are derivative in nature rather than personal [*Hagan v. Superior Court (1960) 53 Cal. 2d 498, 503, 2 Cal. Rptr. 288, 348 P.2d 896]* . Even when a default is entered against the corporation, its only effect is to admit that grounds exist for winding up and dissolution and that creditors or shareholders should make known their claims. Thus, prior to the hearing to determine whether an order to wind up and dissolve should be made [*see Corp. Code § 1804*; *see also § 170.12[5]*], intervention by shareholders is proper [*Rosner v. Benedict Heights, Inc. (1963) 219 Cal. App. 2d 1, 6-7, 32 Cal. Rptr. 764]* . An intervenor in involuntary

dissolution proceedings is entitled to any relief the court has jurisdiction to grant, including compelling registration of a shareholder's shares, enjoining expenditures pendente lite, or appointing a receiver to press claims of the corporation against directors or others [*Hagan v. Superior Court (1960) 53 Cal. 2d 498, 504, 2 Cal. Rptr. 288, 348 P.2d 896]* .

[4] Court's Power to Issue Provisional Orders

[a] Provisional Directors

If the ground for the complaint for involuntary dissolution of the corporation is a deadlock in the board as set forth in *Corp. Code § 1800(b)(2)*, the court may appoint a provisional director. The provisions of *Corp. Code § 308(c)* apply to any such appointed provisional director [*Corp. Code § 1802*]. The purpose in appointing a provisional director would be to attempt to avoid the necessity of dissolving the corporation by breaking the deadlock which is the ground for dissolution. Although it would seem that the court could appoint such a director on its own motion, the only decision under the predecessor of *Corp. Code § 1802* [*see* former Corp. Code § 4655] reveals that the motion to appoint a provisional director was made by one of the parties, and the order was made on the basis of the complaint and affidavits submitted by the parties, with no hearing nor evidence taken [*Edlund v. Los Altos Builders (1951) 106 Cal. App. 2d 350, 354, 235 P.2d 28]* . On appeal, it was held that an order appointing a provisional director in involuntary dissolution proceedings was a nonappealable interlocutory order [*Edlund v. Los Altos Builders (1951) 106 Cal. App. 2d 350, 354-355, 235 P.2d 28* ; *see also In re O'Brien Machinery Inc. (1964) 224 Cal. App. 2d 563, 571-572, 36 Cal. Rptr. 782* (order by court in *voluntary* dissolution proceedings appointing provisional director and enjoining disposition of corporate assets prior to approval of plan or liquidation was nonappealable)]. Thus, although a provisional director could be sought in an independent action (regardless of the pendency of the involuntary proceedings) by 331/3 percent of the voting power [*Corp. Code § 308(a)*; *see* Ch. 169, *Directions and Management* , for a discussion and forms related to appointment of a provisional director], and such a proceeding would result in an appealable judgment, an order appointing such a director during the pendency of involuntary dissolution proceedings can be reviewed only upon appeal from the order granting or denying dissolution [*Edlund v. Los Altos Builders (1951) 106 Cal. App. 2d 350, 356, 235 P.2d 28]* . An exception to this rule exists when the court somehow exceeds its jurisdiction, such as by appointing a provisional director who is a creditor or relative [*see Corp. Code § 308(c)* (prohibiting such persons from acting as provisional directors)], in which case a writ of prohibition would be the appropriate method of challenging the appointment [*see Code Civ. Proc. § 1102*].

[b] Appointment of Receiver

If, at the time of the filing of a complaint for involuntary dissolution or at any time thereafter, the court has reasonable grounds to believe that unless a receiver of the corporation is appointed the interests of the corporation and its shareholders will suffer pending the hearing and determination of the complaint, upon the application of the plaintiff, and after a hearing upon notice to the corporation as the court may direct, and upon the giving of security pursuant to *Code Civ. Proc. §§ 566* and *567*, the court may appoint a receiver to take over and manage the business and affairs of the corporation and to preserve its property pending the hearing and determination of the complaint for dissolution [*Corp. Code § 1803*]. Unlike an order appointing a provisional director, an order appointing a receiver is an appealable interlocutory order [*Code Civ. Proc. § 904.1(a)(7)*; *see Gold v. Gold Realty Co. (2003) 114 Cal. App. 4th 791, 804, 807-809, 8 Cal. Rptr. 3d 118* (order appointing receiver affirmed on appeal; no abuse of discretion in appointment of receiver to implement judgment calling for dissolution of corporation and liquidation of its sole assets)].

[c] Other Discretionary Orders

After hearing, the court may decree a winding up and dissolution of the corporation if cause therefor is shown, or, with or without winding up and dissolution, the court may make such orders and decrees and issue such injunctions as justice and equity require [*Corp. Code § 1804*].

[5] Conduct of Involuntary Proceedings

[a] When Proceedings Commence

Involuntary proceedings for winding up a corporation commence when the order for winding up is entered under *Corp. Code § 1804*, that is, after a hearing on the complaint [*Corp. Code § 1805(a)*]. Although this order merely commences the proceeding, it was held under prior law [*see* former Corp. Code § 4661] that the order was final for the purposes of appeal [*Reynolds v. Special Projects, Inc. (1968) 260 Cal. App. 2d 496, 499, 67 Cal. Rptr. 374]* .

[b] Powers and Duties of Board of Directors

When an involuntary proceeding for winding up has commenced, the board conducts the winding up of the affairs of the corporation, subject to supervision by the court, unless the court, on good cause shown, has appointed other persons to wind up the corporation. The directors or those other persons may, subject to any restrictions imposed by the court, exercise all their powers through the executive officers without any order of court [*Corp. Code § 1805(b)*].

The powers and duties of the board of directors (or other persons appointed by the court) include all the powers enumerated in *Corp. Code § 2001* [*§ 170.11[8]*], but the court has the power to countermand any actions taken by directors and does not merely act as a rubber stamp for the directors [*In re Trinity Tractor Co. (1970) 3 Cal. App. 3d 428, 441, 83 Cal. Rptr. 783* (holding court properly overturned preference given certain creditors of corporation by directors)].

[c] Cessation of Business

When an involuntary proceeding for winding up has commenced, the corporation must cease to carry on business except to the extent necessary for the beneficial winding up thereof and except during any period that the board deems necessary to preserve the corporation's goodwill or going-concern value pending a sale of its business or assets, or both, in whole or in part [*Corp. Code § 1805(c)*].

[d] Notice to Shareholders and Creditors

The directors must cause written notice of the commencement of the proceedings for involuntary winding up or dissolution to be given by mail to all shareholders and to all known creditors and claimants whose addresses appear on the records of the corporation, unless the order for winding up has been stayed by appeal therefrom or otherwise, or the execution of the order has been enjoined [*Corp. Code § 1805(c)*; *see* *Barnett v. Lewis (1985) 170 Cal. App. 3d 1079, 1086-1093, 217 Cal. Rptr. 80* (bankruptcy of minority shareholder does not toll period for enforcement of judgment of dissolution)].

[6] Jurisdiction of Court During Winding Up

In addition to its general authority to make orders and decrees and to issue injunctions [*Corp. Code § 1804*], the jurisdiction of the superior court during involuntary proceedings includes:

- The requirement of the proof of all claims and demands against the corporation, whether due or not yet due, contingent, unliquidated, or sounding only in damages, and the barring from participation of creditors and claimants failing to make and present claims and proof as required by any order [*Corp. Code § 1806(a)*].

- The determination or compromise of all claims of every nature against the corporation or any of its property, and the determination of the amount of money or assets required to be retained to pay or provide for the payment of claims [*Corp. Code § 1806(b)*].

- The determination of the rights of shareholders and of all classes of shareholders in and to the assets

of the corporation [*Corp. Code § 1806(c)*].

- The presentation and filing of intermediate and final accounts of the directors or other persons appointed to conduct the winding up and hearing, the allowance, disallowance, or settlement of accounts and the discharge of the directors or other persons from their duties and liabilities [*Corp. Code § 1806(d)*].

- The appointment of a commissioner to hear and determine any or all matters, with such power or authority as the court may deem proper [*Corp. Code § 1806(e)*].

- The filling of any vacancies on the board which the directors or shareholders are unable to fill [*Corp. Code § 1806(f)*].

- The removal of any director if it appears that the director has been guilty of dishonesty, misconduct, neglect, or abuse of trust in conducting the winding up or if the director is unable to act. The court may order an election to fill the vacancy so caused, and may enjoin, for any time that it considers proper, the reelection of the director so removed; or the court, in lieu of ordering an election, may appoint a director to fill the vacancy caused by removal. Any director so appointed by the court serves until the next annual meeting of shareholders or until a successor is elected or appointed [*Corp. Code § 1806(g)*].

- Staying the prosecution of any suit, proceeding, or action against the corporation and requiring the parties to present and prove their claims in the manner required of other creditors [*Corp. Code § 1806(h)*].

- The determination of whether adequate provision has been made for payment or satisfaction of all debts and liabilities not actually paid [*Corp. Code § 1806(i)*].

- The making of orders for the withdrawal or termination of proceedings to wind up and dissolve, subject to conditions for the protection of shareholders and creditors [*Corp. Code § 1806(j)*].

- The making of an order, on allowance or settlement of the final accounts of the directors or other persons, that the corporation has been duly wound up and is dissolved. On the making of the order, the corporate existence ceases except for purposes of further winding up if needed [*Corp. Code § 1806(k)*].

- The making of orders for the bringing in of new parties as the court deems proper for the determination of all questions and matters [*Corp. Code § 1806(l)*].

[7] Creditors' Claims

[a] Time for Presentation

All creditors and claimants may be barred from participation in any distribution of the general assets if they fail to make and present claims and proofs within the time that the court may direct, which must not be less than four nor more than six months after the first publication of notice to creditors unless it appears by affidavit that there are no claims, in which case the time limit may be three months. If it is shown that a claimant did not receive notice because of absence from the state or other cause, the court may allow a claim to be filed or presented at any time before distribution is completed [*Corp. Code § 1807(a)*].

[b] Notice to Creditors

Notice to creditors must be published not less than once a week for three consecutive weeks in some newspaper of general circulation published in the county in which the proceeding is pending, or if no such newspaper is published in that county, in a newspaper designated by the court, directing creditors and claimants to make and present claims and proofs to the person, at the place, and within the time limited by the order. A copy of the notice must be mailed to each person shown as a creditor or claimant by the books of the corporation at his or her last known address [*Corp. Code § 1807(b)*].

[8] Secured Claims

Holders of secured claims may prove for the whole debt in order to realize any deficiency. If creditors fail to present their claims they are barred only as to any right to claim against the general assets for any deficiency in the amount realized on their security [*Corp. Code § 1807(c)*].

[a] Unmatured, Contingent, or Disputed Claims

Before any distribution is made, the amount of any unmatured, contingent, or disputed claim against the corporation which has been presented and has not been disallowed, or the part of any such a claim that the holder would be entitled to if the claim were due, established, or absolute, must be paid into court and remain there to be paid over to the party when he or she becomes entitled to it. If he or she fails to establish his or her claim, the amount must be paid over or distributed with the other assets of the corporation to those entitled to it, or any other provision for the payment of the claim must be made that the court may deem adequate. If the creditor whose claim has been allowed but is not yet due consents to the payment of the present value of his or her claim, he or she is entitled to its present value on distribution [*Corp. Code § 1807(d)*].

[b] Suits on Rejected Claims

Suits against the corporation on claims which have been rejected must be commenced within 30 days after written notice of rejection is given to the claimant [*Corp. Code § 1807(e)*].

[9] Statutory Buy-Out to Avoid Dissolution

Subject to any contrary provision in the articles of incorporation, the shares of shareholders initiating involuntary dissolution proceedings may be purchased by the corporation, or, if it does not elect to purchase, by the holders of 50 percent or more of the voting power of the corporation [*Corp. Code § 2000(a)*]. The procedure and requirements for such a purchase are discussed in *§ 170.57[8]*.

[10] Order Declaring Corporation Wound Up and Dissolved

[a] Contents

Upon the final settlement of the accounts of the directors or other persons appointed pursuant to *Corp. Code § 1805* and the determination that the corporation's affairs are in condition for it to be dissolved, the court may make an order declaring the corporation duly wound up and dissolved [*Corp. Code § 1808(a)*]. The order must declare:

- That the corporation is duly wound up, that a final franchise tax return [*see Rev. & Tax. Code § 23332*] has been filed with the Franchise Tax Board, and that its other known debts and liabilities have been paid or adequately provided for, or that Those debts and liabilities have been paid as far as its assets permitted, as the case may be. If there are known debts or liabilities for payment of which adequate provision has been made, the order must state what provision has been made, setting forth the name and address of the corporation, person, or governmental agency that has assumed or guaranteed the payment, or the name and address of the depositary with which deposit has been made or any other information

necessary to enable the creditor or other person to whom payment is to be made to appear and claim payment of the debt or liability.

- That its known assets have been distributed to the persons entitled to receive them, or that it acquired no known assets, as the case may be.

- That the accounts of directors or other persons have been settled and that they are discharged from their duties and liabilities to creditors and shareholders.

- That the corporation is dissolved [*Corp. Code § 1808(a)*].

[b] Additional Orders

The court may make any additional orders and grant further relief that it deems proper on the evidence submitted [*Corp. Code § 1808(a)*].

[c] Effect of Order

On the making of the order declaring the corporation dissolved, corporate existence ceases except for the purposes of further winding up if needed, and the directors are discharged from their duties and liabilities, except in respect to completion of the winding up [*Corp. Code § 1808(b)*].

[d] Filing Court Order

When a corporation is dissolved or its existence forfeited by order, decree, or judgment of a court, a copy of the order, decree, or judgment, certified by the clerk of court, must immediately be filed in the office of the Secretary of State [*Corp. Code § 1809*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesGeneral OverviewBusiness & Corporate LawCorporationsDissolution & ReceivershipInvoluntary DissolutionBusiness & Corporate LawCorporationsDissolution & ReceivershipReceivershipsAppointment of ReceiversCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureRemediesProvisional RemediesGeneral Overview

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§ 170.13 Corporate Existence After Dissolution

[1] In General

A corporation that is dissolved nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it, and enabling it to collect and discharge obligations, dispose of and convey its property, and collect and divide its assets, but not for the purpose of continuing business except so far as necessary for the winding up thereof [*Corp. Code § 2010(a)*]. For example, as a consequence of its dissolved status, a former corporation lacked the capacity to submit a purported certificate of revocation of dissolution more than four years later, in an attempt to reinstate its corporate existence [*Catalina Investments, Inc. v. Jones (2002) 98 Cal. App. 4th 1, 7-8, 119 Cal. Rptr. 2d 256* (citing *Corp. Code §§ 1905, 2010(a)*)].

The dissolution of a corporation does not terminate its ability to enforce contracts [*see Trubowitch v. Riverbank Canning Co. (1947) 30 Cal. 2d 335, 345-346, 182 P.2d 182* (holding copartnership formed by shareholders of dissolved corporation to carry on corporation's business could enforce contract for sale of goods entered into by corporation)]. Actions or proceedings to which a corporation is a party do not abate as a result of its dissolution [*Corp. Code § 2010(b)*; *see Katenkamp v. Superior Court (1940) 16 Cal. 2d 696, 700, 108 P.2d 1* (injunctive relief granted against corporation in action commenced prior to dissolution as binding on sole shareholder and distributee of corporation's assets)]. Any assets inadvertently or otherwise omitted from the winding up continue in the dissolved corporation for the benefit of the persons entitled to those assets upon dissolution of the corporation, and on realization must be distributed accordingly [*Corp. Code § 2010(c)*].

[2] Actions Against Corporation Dissolved on or After January 1, 1992

A cause of action against a corporation dissolved on or after January 1, 1992, whether arising before or after the dissolution, may be enforced against the dissolved corporation to the extent of its undistributed assets, including any insurance assets held by the corporation that may be available to satisfy claims [*Corp. Code § 2011(a)(1)(A), (4)*].

[3] Actions Against Corporation Dissolved Before January 1, 1992

For corporations dissolved before January 1, 1992, actions against the dissolved corporation under *Corp. Code § 2010*

were limited to those based on predissolution activities [*Penasquitos, Inc. v. Superior Court (1991) 53 Cal. 3d 1180, 1193-1194, 283 Cal. Rptr. 135, 812 P.2d 154* ; *North American Asbestos Corp. v. Superior Court (1986) 180 Cal. App. 3d 902, 904-905, 225 Cal. Rptr. 877* ; *see Allen v. Southland Plumbing, Inc. (1988) 201 Cal. App. 3d 60, 63-64, 246 Cal. Rptr. 860* (reaching same conclusion based on policies underlying former *Corp. Code § 2011(a)*)]. Although an injured party whose claim arose after dissolution was generally precluded from pursuing a dissolved corporation's assets in the hands of its former shareholders, there was no legal barrier to suit against a dissolved corporation itself for injury or damage caused by the corporation's predissolution activities but that occurred or was discovered after the dissolution [*Penasquitos, Inc. v. Superior Court (1991) 53 Cal. 3d 1180, 1193-1194, 283 Cal. Rptr. 135, 812 P.2d 154* (distinguishing *Levin Metals Corp. v. Parr-Richmond Terminal Co. (9th Cir. 1987) 817 F.2d 1448* , to extent cause of action therein was based on statute enacted after dissolution, and concluding *Levin* is incorrect to extent it may be construed as holding that dissolved corporation cannot be sued on claim that arose after dissolution)]. Defending a lawsuit brought for injuries caused by predissolution activity is not the "doing of business by a going concern." A claim for damages based on a corporation's predissolution activities is an affair of the corporation needing to be wound up after the corporation's normal business activities have ceased. Participating in a judicial resolution of those claims is part of the winding-up process for which *Corp. Code § 2010* expressly requires the dissolved corporation's existence to continue [*Penasquitos, Inc. v. Superior Court (1991) 53 Cal. 3d 1180, 1188, 283 Cal. Rptr. 135, 812 P.2d 154]* .

Once the corporation's assets have been properly distributed to its shareholders, the assets are beyond the reach of plaintiffs possessing postdissolution claims and the dissolved corporation will not have any assets with which to satisfy any judgment against it. The only prospects of recovery are the dissolved corporation's liability insurance, undistributed assets, if any, or any assets the corporation discovers after dissolution [*Penasquitos, Inc. v. Superior Court (1991) 53 Cal. 3d 1180, 1191-1192, 283 Cal. Rptr. 135, 812 P.2d 154* ; *see also Westoil Terminals Co. v. Harbor Ins. Co. (1999) 73 Cal. App. 4th 634, 642, 86 Cal. Rptr. 2d 636* (under *Penasquitos*, dissolved corporation may bring suit against insurers to obtain insurance benefits for which it paid, assuming that its policies were not transferred to successor entity)].

Whether or not *Corp. Code § 2010* applies to suits against dissolved foreign corporations is a function of traditional conflict of law analysis. Thus, *Corp. Code § 2010* will be applicable to allow suit against a dissolved foreign corporation when necessary to protect California's interest in allowing California residents to recover for injuries incurred within California [*North American Asbestos Corp. v. Superior Court (1986) 180 Cal. App. 3d 902, 906-910, 225 Cal. Rptr. 877* ; *but see Riley v. Fitzgerald (1986) 178 Cal. App. 3d 871, 877-883, 223 Cal. Rptr. 889* (Texas law is determinative in suit involving rights of shareholders of dissolved Texas corporation)].

The proper procedure for determining the capacity of the dissolved corporation to sue and be sued under *Corp. Code § 2010* is a demurrer, motion for summary judgment, or other procedure, not a motion to quash service that was made in accordance with *Code Civ. Proc. § 412.20* [*North American Asbestos Corp. v. Superior Court (1982) 128 Cal. App. 3d 138, 141-143, 179 Cal. Rptr. 889* (motion to quash as only addressing court's jurisdiction)].

[4] Quiet Title Action

Every dissolved corporation continues to exist indefinitely for the purpose of being sued in any quiet title action. Any judgment rendered in any such action is binding on all of its shareholders or other persons having any equity or other interest in the corporation to the extent of their interest therein [*Corp. Code § 2011(c)*]. Such an action has the same force and effect as an action brought under *Code Civ. Proc. §§ 410.50* and *410.60*. Service of summons in such an action can either be made as provided in *Code Civ. Proc. § 413.10 et seq.*, or under the method provided in *Corp. Code § 2011(b)*, discussed in *§ 170.13[5]* [*Corp. Code § 2011(c)*].

[5] Service of Summons on Corporation

Summons or other process against a dissolved corporation may be served by delivering a copy to an officer, director, or

person having charge of its assets, or, if no such person can be found, to any agent upon whom process might be served at the time of dissolution. If none of these persons can be found with due diligence and it is so shown by affidavit to the satisfaction of the court, the court may make an order that summons or other process be served on the dissolved corporation by personally delivering a copy, together with a copy of the order, to the Secretary of State or an assistant or deputy Secretary of State. Service in this manner is deemed complete on the 10th day after deliver of the process to the Secretary of State. On receipt of process and the fee therefor, the Secretary of State is required to give notice to the corporation as provided in *Corp. Code § 1702* [*Corp. Code § 2011(b)*; *see also Code Civ. Proc. § 412.20* (discussed in Ch. 518, *Service of Summons and Papers*)].

[6] Suit Against Former Shareholders

[a] Corporation Dissolved Before January 1, 1992

As an alternative to suing a corporation after its dissolution, former *Corp. Code § 2011(a)(1)* as it existed prior to January 1, 1992, permitted any person having a cause of action against the corporation that arose prior to the dissolution to bring the action in the corporate name against the former shareholders [*see Corp. Code § 2011(a)(4)* (former law as applicable to corporation dissolved before January 1, 1992)].

[b] Corporation Dissolved on or After January 1, 1992

If any of the assets of a corporation dissolved on or after January 1, 1992, have been distributed to shareholders, a cause of action against that corporation, whether arising before or after the dissolution, may be enforced against shareholders of the dissolved corporation either to the extent of each shareholder's pro rata share of the claim or to the extent of the corporate assets distributed to them on the dissolution, whichever is less [*Corp. Code § 2011(a)(1)(B), (4)*]. A shareholder's liability under *Corp. Code § 2011(a)(1)(B)* may not exceed the total amount of assets of the dissolved corporation distributed to that shareholder on dissolution [*Corp. Code § 2011(a)(1)(B)*].

Except for quiet title actions, discussed in [4], *above,* proceedings on all claims against shareholders of corporations dissolved after January 1, 1992, must be commenced before the expiration of the statute of limitations applicable to the cause of action, but in no case later than four years after the dissolution of the corporation [*Corp. Code § 2011(a)(2), (4)*].

As a matter of procedure only, and not for purposes of determining liability, shareholders of a corporation dissolved on or after January 1, 1992, may be sued in the corporate name on any cause of action against the corporation. This authority does not affect the rights of the corporation or its creditors under *Corp. Code § 2009*, or the rights, if any, of creditors under the Uniform Fraudulent Transfer Act, which may arise against the shareholders of a corporation [*Corp. Code § 2011(a)(3), (4)*; for discussion of Uniform Fraudulent Transfer Act, *see* Ch. 270, *Fraudulent Conveyances*].

Amendment of *Corp. Code § 2011* in 1977 abrogated antecedent common law causes of action, including the "equitable trust fund" theory [*United States v. Oil Resources, Inc. (9th Cir. 1987) 817 F.2d 1429, 1433* ; *Pacific Scene, Inc. v. Penasquitos, Inc. (1988) 46 Cal. 3d 407, 410, 414-418, 250 Cal. Rptr. 651, 758 P.2d 1182]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDissolution & ReceivershipTermination & Winding UpLimited SurvivalBusiness & Corporate LawCorporationsShareholdersShareholder Duties & LiabilitiesPersonal LiabilityReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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[Reserved]

§§ 170.14[Reserved]

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14-170 California Forms of Pleading and Practice--Annotated § 170.30

§ 170.30 California Points and Authorities

For memoranda related to corporate dissolutions, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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14-170 California Forms of Pleading and Practice--Annotated § 170.31

§ 170.31 California Legal Forms

For corporate dissolution forms, see California Legal Forms, Ch. 12, *Winding Up and Dissolution* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 170.32 State Statutes

[1] Directors

Function of directors in dissolution proceedings. *Corp. Code §§ 1805(b), 1903(b), 2001*

Filling vacancy in board during winding up proceedings. *Corp. Code §§ 305, 2002*

Court proceedings to determine or appoint directors to wind up. *Corp. Code § 2003*

[2] Distribution of Assets

Authorization or ratification by directors of wrongful distribution of assets to shareholders; liability for. *Corp. Code § 316(a)(2)*

Distribution of assets to shareholders. *Corp. Code § 2004*

Provision for debts and liabilities of corporation. *Corp. Code § 2005*

Manner of distribution. *Corp. Code §§ 2006, 2007*

Distributions pursuant to plan. *Corp. Code § 2007*

Disposition of unclaimed distributions. *Corp. Code § 2008*

Recovery of improper distributions. *Corp. Code § 2009*; *see also Corp. Code § 316*

Distribution of assets inadvertently omitted from winding up. *Corp. Code § 2010(c)*

[3] Involuntary Dissolution

Action by Attorney General. *Corp. Code § 1801*

Appointment of provisional director. *Corp. Code § 1802*

Appointment of receiver. *Corp. Code § 1803*; *see also Code Civ. Proc. §§ 566, 567*

Avoiding dissolution by purchasing moving parties' shares; valuation. *Corp. Code § 2000*

Court decree for winding up and dissolution. *Corp. Code § 1804*

Court order declaring corporation dissolved. *Corp. Code § 1808*

Commencement of proceedings and cessation of activities. *Corp. Code § 1805*

Creditors' claims; notice to creditors. *Corp. Code § 1807*

Filing decree of dissolution with Secretary of State. *Corp. Code § 1809*

Grounds. *Corp. Code § 1800(b)*

Intervention by shareholders or creditors. *Corp. Code § 1800(c)*

Jurisdiction of court. *Corp. Code § 1806*

Persons entitled to file complaint. *Corp. Code § 1800(a)*

[4] Voluntary Proceedings

[a] Authorization

Authorization by shareholders. *Corp. Code § 1900(a)*

Authorization by directors. *Corp. Code § 1900(b)*

[b] Certificates

Certificate of election. *Corp. Code § 1901*

Certificate of revocation. *Corp. Code § 1902*

Certificate of winding up and dissolution. *Corp. Code §§ 1905-1907*

[c] Commencement

Commencement of proceedings. *Corp. Code § 1903(a)*

Cessation of business on commencement of proceedings; notice to shareholders and creditors. *Corp. Code § 1903(c)*

[d] Judicial Proceedings

Assumption of jurisdiction by court; application of provisions governing involuntary dissolution. *Corp. Code § 1904*

Petition for court order of winding up and dissolution; proceedings. *Corp. Code § 1907*

Effect of court order of dissolution. *Corp. Code § 1907(d)*

Filing order of dissolution. *Corp. Code § 1907(d)*

[e] Revocation of Authority

Revocation of authority to wind up. *Corp. Code § 1902*

[5] Status After Dissolution

Capacity of corporation after dissolution. *Corp. Code § 2010*

Suit against corporation dissolved on or after January 1, 1992; service of process; quiet title action. *Corp. Code § 2011*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDissolution & ReceivershipInvoluntary DissolutionBusiness & Corporate LawCorporationsDissolution & ReceivershipReceivershipsAppointment of ReceiversBusiness & Corporate LawCorporationsDissolution & ReceivershipTermination & Winding UpDistribution of AssetsGeneral OverviewBusiness & Corporate LawCorporationsDissolution & ReceivershipTermination & Winding UpLimited SurvivalBusiness & Corporate LawCorporationsDissolution & ReceivershipVoluntary Dissolution

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§ 170.33 Decisions

[1] Appeal

Order appointing provisional director during involuntary dissolution proceedings is nonappealable interlocutory order. *Edlund v. Los Altos Builders (1951) 106 Cal. App. 2d 350, 354-355, 235 P.2d 28*

Decree confirming award of commissioners as to value of plaintiff's shares is appealable order. *Esparza v. Kadam, Inc. (1959) 170 Cal. App. 2d 303, 305-306, 338 P.2d 492*

Orders made by court in voluntary dissolution proceedings appointing provisional director and enjoining disposition of corporate assets prior to approval of plan of liquidation were nonappealable orders. *In re O'Brien Machinery Inc. (1964) 224 Cal. App. 2d 563, 571-572, 36 Cal. Rptr. 782*

Order for winding up of corporation pursuant to complaint for involuntary dissolution had sufficient finality to support immediate appeal. *Reynolds v. Special Projects, Inc. (1968) 260 Cal. App. 2d 496, 500-501, 67 Cal. Rptr. 374*

[2] Avoidance of Dissolution

[a] Purchase of Moving Parties' Shares

Rule that justifies devaluation of minority shares in closely-held corporations for their lack of control has little validity when shares are to be purchased by one already in control of corporation. *Brown v. Allied Corrugated Box Co. (1979) 91 Cal. App. 3d 477, 486, 154 Cal. Rptr. 170* (former Corp. Code §§ 4658, 4659, *now see Corp. Code § 2000*)

Allegation that "if" plaintiffs and defendants unable to agree on price for plaintiffs' shares, defendants would seek court appointment of commissioners was insufficient allegation to stay appointment of a receiver pending hearing and determination of involuntary dissolution complaint. *Merlino v. Fresno Macaroni Mfg. Co. (1944) 64 Cal. App. 2d 462, 464-465, 148 P.2d 884*

Code provisions providing for stay of proceedings and purchase of plaintiffs' shares [former Corp. Code §§ 4658, 4659; *see now Corp. Code § 2000*] are mandatory. *Alvak Enterprises v. Phillips (1959) 167 Cal. App. 2d 69, 75, 334 P.2d 148*

Former Corp. Code § 4658 (now *Corp. Code § 2000*), giving "holders" of 50 percent or more of "outstanding" shares right to avoid involuntary dissolution proceedings and receivership of corporation on election to purchase plaintiffs' shares, afforded such right to subscribers of 50 percent or more of stock when no shares were outstanding. *Brodsky v. Seaboard Realty Co. (1962) 206 Cal. App. 2d 504, 516, 24 Cal. Rptr. 61*

Defendant's right, in involuntary dissolution proceedings, to seek stay in order to have appraisers appointed to ascertain value of plaintiff's shares is a right dependent on and ancillary to dissolution proceedings and upon dismissal of those proceedings, court is without jurisdiction to grant relief sought by defendant. *Cubalevic v. Superior Court (1966) 240 Cal. App. 2d 557, 562, 49 Cal. Rptr. 698*

Right of shareholder to be relieved of election to purchase shares of plaintiff in involuntary dissolution proceedings was within discretion of trial court. *Brodsky v. Seaboard Realty Co. (1962) 206 Cal. App. 2d 504, 517, 24 Cal. Rptr. 61*

Action for involuntary dissolution is special proceeding not requiring findings of fact by either the court or the commissioners appointed to determine the respective interests of the parties pursuant to defendant's motion to avoid dissolution and purchase plaintiff's shares. *Esparza v. Kadam, Inc. (1960) 182 Cal. App. 2d 802, 807, 6 Cal. Rptr. 450*

Trial court has duty, when convinced that award of commissioners is erroneous, to examine matters de novo and fix proper value. *Venables v. Credential Ins. Agency, Inc. (1956) 140 Cal. App. 2d 724, 727, 295 P.2d 547*

[b] Costs

When plaintiffs sought involuntary dissolution and appointment of receiver and resisted appointment of commissioners to appraise their shares, trial court properly awarded one-half of commissioners' fees to defendants as costs to which they were entitled as prevailing parties obtaining relief sought in form of order denying dissolution and ordering plaintiffs to surrender shares to defendants. *Merlino v. Fresno Macaroni Mfg. Co. (1946) 74 Cal. App. 2d 120, 125, 168 P.2d 182*

[3] De Facto Dissolution

Corporation that has formally commenced voluntary dissolution and distributed major assets, but that has failed to file certificate of dissolution with Secretary of State has undergone de facto dissolution for purpose of federal tax law provisions for excess profits carryback credit. *ABC Brewing Corp. v. Commissioner (9th Cir. [Cal] 1955) 224 F.2d 483, 485-487*

Corporate good will is property of corporation alone; award for loss of good will, based on one shareholder's breach of fiduciary duty by using corporation's good will for personal advantage while winding up corporation, is erroneous when made directly to plaintiff shareholder in dissolution action; award should be made to corporation for allocation among all parties. *Baker v. Pratt (1986) 176 Cal. App. 3d 370, 380-381, 222 Cal. Rptr. 253*

[4] Involuntary Dissolution and Costs

Action for dissolution is special proceeding in which prevailing party is entitled to costs under former *Code Civ. Proc.*

§ 1032(c) (*now see Code Civ. Proc § 1032(a)(4)*). *Merlino v. Fresno Macaroni Mfg. Co. (1946) 74 Cal. App. 2d 120, 124, 168 P.2d 182*

[5] Default

[a] Grounds

Corporation, by defaulting in proceedings for involuntary dissolution, in effect admits only that grounds exist for winding up and dissolving corporation and that creditors or shareholders should be required to make known their claims to be recognized in disposition of corporate assets. *Rosner v. Benedict Heights, Inc. (1963) 219 Cal. App. 2d 1, 7, 32 Cal. Rptr. 764*

Minority shareholders failed to raise triable issue of material fact as to right to involuntary dissolution under *Corp. Code § 1800(b)(5)*; dissolution of corporation was not reasonably necessary to protect their rights when, despite hostility between majority and minority shareholders, plaintiffs continued to receive dividends from corporation until filing of lawsuit. *Stuparich v. Harbor Furniture Manufacturing, Inc. (2000) 83 Cal. App. 4th 1268, 1279, 100 Cal. Rptr. 2d 313*

Corp. Code 1800(b)(4) "persistent unfairness" standard not interpreted in terms of minority shareholders' "reasonable expectations"; *Corp. Code 1800(b)(5)* requires trial court to determine whether minority shareholders require protection by considering relative misconduct of parties. *Bauer v. Bauer (1996) 46 Cal. App. 4th 1106, 1113-1114, 1116, 54 Cal. Rptr. 2d 377*

Involuntary dissolution pursuant to former Corp. Code § 4651(f) (as necessary for protection of rights and interests of complaining shareholders) was properly granted when evidence showed plaintiff excluded from corporation, received no salary, dividends or other revenue from corporation's investments. *Stumpf v. C.E. Stumpf & Sons, Inc. (1975) 47 Cal. App. 3d 230, 235, 120 Cal. Rptr. 671*

Protection of minority shareholders does not require establishment of other grounds such as persistent unfairness or deadlock, since ground specified by *Corp. Code § 1800(b)(5)* is independent and addressed to discretion of trial court which must be convinced that plaintiff's case is meritorious. *Stumpf v. C.E. Stumpf & Sons, Inc. (1975) 47 Cal. App. 3d 230, 234-235, 120 Cal. Rptr. 671*

In involuntary dissolution suit by minority shareholders, demurrer was properly sustained as to defendant shareholders alleged to be guilty of persistent unfairness to minority, when no relief was sought as to them and only dissolution of corporation was sought. *Weisman v. Odell (1970) 3 Cal. App. 3d 494, 499, 83 Cal. Rptr. 563*

Dissolution on grounds of deadlock and protection of shareholders was properly ordered when facts revealed diversion of corporate assets and revocation of license, use of which was sole purpose for corporation's existence. *Reynolds v. Special Projects, Inc. (1968) 260 Cal. App. 2d 496, 501, 67 Cal. Rptr. 374*

Complaint alleging lost business and personnel, destruction of goodwill of business, and operation of corporation as defendant's private affair alleged persistent mismanagement and abuse of authority and unfairness to minority, sufficient grounds for dissolution and was good against general demurrer. *Buss v. J.O. Martin Co. (1966) 241 Cal. App. 2d 123, 135, 50 Cal. Rptr. 206*

Decree ordering involuntary dissolution of corporation which had ceased lumber business but continued as holding company was proper when complaint based on ground that corporation had abandoned its business for more than one year and when dissolution appeared necessary to protect interest of minority shareholder. *Geisendorfer v. Rainbow*

Mill & Lbr. Co. (1945) 70 Cal. App. 2d 705, 709-710, 161 P.2d 561

[b] Intervenors

Shareholder's right to intervene in involuntary dissolution proceedings is unqualified right and not subject to requirement that security be posted even when some claims of shareholder are derivative in nature. *Hagan v. Superior Court (1960) 53 Cal. 2d 498, 503, 2 Cal. Rptr. 288, 348 P.2d 896*

Intervenor in involuntary dissolution proceedings is entitled to any relief court has jurisdiction to grant including compelling registration of shareholder's shares, enjoining expenditures pendente lite, or appointing receiver to press claims of corporation against directors or others. *Hagan v. Superior Court (1960) 53 Cal. 2d 498, 504, 2 Cal. Rptr. 288, 348 P.2d 896*

Entry of default against corporation in involuntary dissolution proceeding is not equivalent of trial for purpose of determining right of shareholder to intervene before trial when court did not enter order under former Corp. Code § 4660 (now *Corp. Code § 1804*) that corporation be wound up and dissolved and therefore proceedings had not commenced. *Rosner v. Benedict Heights, Inc. (1963) 219 Cal. App. 2d 1, 6-7, 32 Cal. Rptr. 764*

[c] Nature of Proceeding

Action for involuntary dissolution of corporation is in nature of special proceeding in that proceedings and relief sought are created by statute. *Weisman v. Odell (1970) 3 Cal. App. 3d 494, 496, 83 Cal. Rptr. 563*

Former Corp. Code § 4650 (now *Corp. Code § 1800*), permitting involuntary proceedings by shareholders to dissolve a corporation, is strictly construed. *Cardoza v. Millington (1956) 142 Cal. App. 2d 26, 34, 297 P.2d 778*

[d] Parties

When no direct relief or damages were sought against majority shareholders joined as defendants in involuntary dissolution proceedings, trial court acted properly by sustaining demurrer. *Weisman v. Odell (1970) 3 Cal. App. 3d 494, 497-499, 83 Cal. Rptr. 563*

[e] Receivers

Judge had authority under *Code Civ. Proc. § 564(b)(3), (4)* and *Corp. Code § 1803* to appoint receiver in order to carry dissolution judgment into effect and dispose of corporate property; order appointing receiver affirmed on appeal. *Gold v. Gold Realty Co. (2003) 114 Cal. App. 4th 791, 804-805, 809, 8 Cal. Rptr. 3d 118*

[f] Persons Entitled to File Complaint

Shareholder who told corporation's attorney that he wished to be removed immediately from corporate records as shareholder had constructively surrendered or abandoned his shares, and thus did not have standing to maintain action for involuntary dissolution. *Simon v. Steelman (1990) 224 Cal. App. 3d 1002, 1006-1007, 274 Cal. Rptr. 218*

Reference in former Corp. Code § 4650 (now *Corp. Code § 1800(a)*) to shareholders holding 331/3 percent of outstanding shares includes both voting and nonvoting shares. *Buss v. J.O. Martin Co. (1966) 241 Cal. App. 2d 123, 130-131, 50 Cal. Rptr. 206*

Jurisdiction of court, once acquired in involuntary proceeding, is not subsequently defeated by redemption of plaintiff's shares to reduce holdings below required 331/3 percent. *Buss v. J.O. Martin Co. (1966) 241 Cal. App. 2d 123, 131-133, 50 Cal. Rptr. 206*

[6] Interest

Shareholder not entitled to interest on value of shares to be purchased from date of valuation. *Abrams v. Abrams-Rubaloff & Associates, Inc. (1980) 114 Cal. App. 3d 240, 250, 170 Cal. Rptr. 656*

[7] Jurisdiction of Court Generally

Procedural requirements for establishing personal jurisdiction over persons to be joined as necessary parties to involuntary dissolution actions are satisfied by (1) proper notice to appear and be heard if joinder is on court's own motion, or (2) hearing in court in which matter has been proceeding after personal service of noticed motion or order to show cause if joinder is by motion of party. *Howard v. Data Storage Associates Inc. (1981) 125 Cal. App. 3d 689, 697-698, 178 Cal. Rptr. 269*

Court has jurisdiction in involuntary dissolution action to make orders after interlocutory judgment of dissolution, surcharging individual directors who were not named as parties in original complaint, if due process requirements for acquiring personal jurisdiction over directors were satisfied and directors had opportunity to be heard at dissolution hearing at which misconduct of directors was established. *Howard v. Data Storage Associates Inc. (1981) 125 Cal. App. 3d 689, 697, 698-699, 178 Cal. Rptr. 269*

Court is without jurisdiction to declare terms and conditions of dissolution "when and if it occurred at some future time" when there had been no election to dissolve corporation. *Escondido Mut. Water Co. v. George A. Hillebrecht, Inc. (1966) 241 Cal. App. 2d 410, 415-416, 50 Cal. Rptr. 495*

Jurisdiction of superior court to decree dissolution of any corporation exists only by virtue of statutory authority; superior court does not possess this authority by virtue of inherent general jurisdiction in equity. *Barber v. Irving (1964) 226 Cal. App. 2d 560, 564, 38 Cal. Rptr. 142*

Exercise of court jurisdiction in supervising winding up and dissolution of corporation does not violate any vested contract or property rights of shareholders. *In re Mayellen Apts., Inc. (1955) 134 Cal. App. 2d 298, 307, 285 P.2d 943*

[8] Postdissolution Proceedings

California law not preempted by CERCLA for purposes of determining corporation's capacity to be sued. *Levin Metals Corp. v. Parr-Richmond Terminal Co. (9th Cir. 1987) 817 F.2d 1448, 1451*

Injunctive relief granted against corporation in action commenced prior to its dissolution is binding on sole shareholder and distributee of corporation's assets on theory that he or she was bound as agent of corporation and action against corporation did not abate by reason of its dissolution. *Katenkamp v. Superior Court (1940) 16 Cal. 2d 696, 700, 108 P.2d 1*

Since assets of corporation are distributed to shareholders who become personally liable to creditors of corporation on existing contracts, suit by shareholders to enforce contract alleged by defendant to be nonassignable was properly maintained by copartnership formed by shareholders of dissolved corporation to carry on its business. *Trubowitch v.*

Riverbank Canning Co. (1947) 30 Cal. 2d 335, 345-346, 182 P.2d 182

Corporation that acted as subcontractor is subject to cross complaint by general contractor for indemnity in owner's suit filed only against general contractor prior to dissolution and based on construction defects that were known prior to dissolution; for purposes of former *Corp. Code § 2011(a)*, general contractor's claim for indemnity was cause of action arising before dissolution. *Allen v. Southland Plumbing, Inc. (1988) 201 Cal. App. 3d 60, 63-65, 246 Cal. Rptr. 860*

[9] Voluntary Dissolution

[a] Certificate of Election to Dissolve

Provisions for filing certificate of election to dissolve was enacted for convenience of Secretary of State and public and for protection of directors; strict compliance with filing requirement was unnecessary in absence of any showing of injury resulting from failure to comply. *Herschfelt v. Knowles-Raymond Granite Co. (1955) 130 Cal. App. 2d 347, 351, 279 P.2d 104*

[b] Court Supervision

Preservation of assets for payment of all creditors ratably as among purposes of court-supervised dissolution of corporation. *In re Trinity Tractor Co. (1970) 3 Cal. App. 3d 428, 441, 83 Cal. Rptr. 783*

Corporation filing petition for court supervision of voluntary dissolution had permitted or suffered "appointment of a receiver" within meaning of Bankruptcy Act (*see* former *11 U.S.C. § 21(a)(5)*) when, under California law, effect of corporate action was to require board of directors to operate as trustees under court supervision. *Crateo, Inc. v. Intermark, Inc. (9th Cir. [Cal] 1976) 536 F.2d 862, 865-866*

Attempt by majority shareholder to effect voluntary dissolution and plan of distribution which violate statutory dissolution provisions was grounds entitling minority shareholders to seek court supervision to determine controversy arising from plan of distribution; merger could not be accomplished through dissolution proceeding. *In re San Joaquin L. & P. Corp. (1942) 52 Cal. App. 2d 814, 826, 127 P.2d 29*

Provision in former Corp. Code § 4607 that court may take jurisdiction over voluntary dissolution entitled shareholder to court supervision as a matter of right. *In re Mayellen Apts., Inc. (1955) 134 Cal. App. 2d 298, 303-304, 285 P.2d 943*

Court's judicial supervision of voluntary dissolution did not violate of rights of minority under articles of incorporation to purchase shares of persons desiring to sell since statutory provisions authorizing dissolution and court's jurisdiction form part of contract between shareholders and corporation under reserved power clause. *In re Mayellen Apts., Inc. (1955) 134 Cal. App. 2d 298, 304-306, 285 P.2d 943*

Jurisdiction of court and decree of dissolution was not collaterally assailable upon ground that decree procured by fraud by reason of false allegation that all creditors of corporation had been paid or adequate provision made for payment. *Crossman v. Vivienda Water Co. (1907) 150 Cal. 575, 579, 89 P. 335*

[c] Good-Faith Requirement

Shareholder's agreement to unanimous consent requirement for corporate actions and to transfer restrictions which made shares virtually unsalable did not prevent him or her from dissolving corporation when unanimous consent

provisions were abused by other shareholders to benefit themselves at shareholder's expense. *In re Security Fin. Co. (1957) 49 Cal. 2d 370, 380, 317 P.2d 1*

Shareholders representing 50 percent of voting power did not have absolute right to dissolve corporation and, thus, had no right to dissolve corporation to defraud other shareholders or to freeze out minority shareholders, or to sell assets of dissolved corporation at inadequate price. *In re Security Fin. Co. (1957) 49 Cal. 2d 370, 376-377, 317 P.2d 1*

Dissolution of corporation through voluntary election by consent of shareholders was subject to equitable limitations. *In re Security Fin. Co. (1957) 49 Cal. 2d 370, 377, 317 P.2d 1*

Shareholder representing requisite voting power is entitled to protect investment by dissolution when all alternative methods are foreclosed, no advantage is secured over other shareholders, and no rights of third parties will be adversely affected. *In re Security Fin. Co. (1957) 49 Cal. 2d 370, 378, 317 P.2d 1*

[d] Plan of Distribution

Minority shareholder's complaint to compel distribution in kind of corporation's assets on dissolution was not barred by laches when shareholder refused to accept cash value of shares, did not mislead majority shareholder as to his or her nonacquiescence in plan of distribution, and no evidence offered to support view that plaintiff had notice of action taken at meeting to consider dissolution, or the time at which plaintiff first objected to plan of distribution. *Zimmerman v. Tide Water Associated Oil Co. (1943) 61 Cal. App. 2d 585, 592-594, 143 P.2d 409*

Corporation in process of voluntary winding up did not have right to adopt and carry out plan of distribution whereby business properties are distributed in kind to majority stockholder while minority stockholders are compelled to take their share of distributable assets in cash. *In re San Joaquin L. & P. Corp. (1942) 52 Cal. App. 2d 814, 824, 127 P.2d 29*

[e] Rights and Duties of Directors

Directors of corporation in process of winding up under court supervision are required to exercise powers subject to court's orders as to any and all matters concerning winding up. *In re Trinity Tractor Co. (1970) 3 Cal. App. 3d 428, 441, 83 Cal. Rptr. 783*

Director of dissolved corporation did not have right to inspect corporate records when there was no intimation that "further winding up" was needed. *Hartman v. Hollingsworth (1967) 255 Cal. App. 2d 579, 582-583, 63 Cal. Rptr. 563*

[f] Statutory Procedure Mandatory

Voluntary dissolution of corporation is invalid if statutory requirements regarding notice, waiver of notice, and voting are not met. *Ovadia v. Abdullah (1994) 24 Cal. App. 4th 1100, 1109-1111, 29 Cal. Rptr. 2d 527*

Voluntary dissolution of corporation, whether by election of shareholders or directors and with or without supervision of court was capable of being accomplished only under conditions prescribed in *General Corporation Law. Keeler v. Schulte (1956) 47 Cal. 2d 801, 803, 306 P.2d 430* ; *In re O'Brien Machinery Inc. (1964) 224 Cal. App. 2d 563, 570, 36 Cal. Rptr. 782*

[10] Trial

Voluntary dissolution petition was triable on basis of affidavits when parties, their counsel, and court are agreeable to that procedure and no objection was made prior to appeal. *In re O'Brien Machinery Inc. (1964) 224 Cal. App. 2d 563, 569, 570, 36 Cal. Rptr. 782*

Findings of fact not required in proceedings for dissolution of corporation. *Esparza v. Kadam, Inc. (1960) 182 Cal. App. 2d 802, 806-807, 6 Cal. Rptr. 450*

[11] Unlawful Distribution

[a] Liability of Director

Liability of director for unlawful distribution created at time of distribution and subject to three-year statute of limitations under *Code Civ. Proc. § 359.* *Hoover v. Galbraith (1972) 7 Cal. 3d 519, 524-526, 102 Cal. Rptr. 733, 498 P.2d 981*

[b] Liability of Shareholder

Right of corporation under former *Corp. Code § 5012* (*see now Corp. Code § 2009*) to recover improper distribution from shareholder is right in personam permitting recovery even though assets are no longer in hands of shareholder. *Zinn v. Bright (1970) 9 Cal. App. 3d 188, 192, 87 Cal. Rptr. 736*

[12] Valuation

Consideration of only price-earnings method in valuing minority interest in closely held corporation under *Corp. Code § 2000(a)* was prejudicial error; although price-earnings method may be used, consideration of only that method was improper; minority interest was not to be devalued because of its being minority or noncontrolling interest. *Ronald v. 4-C's Electronic Packaging, Inc., (1985) 168 Cal. App. 3d 290, 297-299, 214 Cal. Rptr. 225*

Legal Topics:

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Burcat & Wilson, *Post-Dissolution Liability of Corporations and Their Shareholders Under CERCLA, 50 Bus. Law. 1273 (1995)*

Comment, *Continuing Corporate Existence for Post-Dissolution Claims: The Defective Product Dilemma, 13 Pac. L.J. 1227 (1982)*

Comment, "Dissolution Under the California Corporations Code: A Remedy For Minority Shareholders," *22 UCLA L. Rev. 595 (1975)*

Meyer, "Some Practical Aspects of One-Month Liquidations," *49 LA Bar. B. 236 (1974)*

Brown, "Methods of Complete Liquidation," *49 LA Bar. B. 24 (1973)*

Legal Topics:

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§ 170.35 Text References

Ballantine and Sterling, California Corporation Laws, Ch. 15, *Dissolution and Winding Up* (Matthew Bender)

Marsh, California Corporation Law and Practice, Ch. XX, *Dissolution*

Witkin, Summary of California Law, Vol. 9, *Corporations*, §§ 32-45 (10th ed. 2005)

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[Reserved]

§§ 170.36[Reserved]

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§ 170.50 Voluntary Winding Up Under Court Supervision--Petition [Corp. Code § 1904]

[1] FORM Voluntary Winding Up Under Court Supervision--Petition [Corp. Code § 1904]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In re _____ [*name*], a Corporation in Process of Winding Up.	))))	NO. _____ PETITION FOR COURT SUPERVISION OF VOLUNTARY WINDING UP

_____

Petitioners allege:

1. _____ [*Name of corporation*] (hereinafter called "corporation") is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal office in _____ County, California.

2. Petitioners are the holders of _____ percent of the outstanding _____ [*specify class, e.g.*, common] shares of the corporation.

3. The corporation is in the process of winding up by virtue of the adoption, on _____ [*date*], of a resolution by the _____ [shareholders *or* directors] of the corporation electing to wind up and dissolve.

4. Supervision by the court over all matters concerning the voluntary winding up of the affairs of the corporation is necessary for the protection of the petitioners and all parties in interest in that _____ [*set forth in detail any facts indicating why court supervision is necessary to protect the interests of any party in interest*].

WHEREFORE, petitioners pray as follows:

1. That the court decree a winding up and dissolution of the corporation and make any orders as to any and all matters concerning the winding up of the affairs of the corporation and for the protection of its shareholders and creditors as justice and equity may require;

2. That the court give and make its order prescribing what notice shall be given to the corporation and other persons interested in the corporation as shareholders or creditors;

3. That on the hearing of the order to show cause this court give and make its order and decree assuming jurisdiction over the winding up of the affairs of the corporation, including all matters contained in *Corporations Code Sections 1802-1808*, inclusive; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]
Petitioner
_____ [*signature*]
Petitioner

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioners

VERIFICATION [*Code Civ. Proc. §§ 446, 2015.5*]

I, _____ [*name*], am [one of] the petitioner(s) in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true to my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This petition is used to invoke jurisdiction of the superior court in order that it may supervise a voluntary winding up and dissolution as authorized under *Corp. Code § 1904*. Jurisdiction may be taken only if it appears that it is necessary for the protection of a party in interest. Once the court has assumed jurisdiction, it may make any orders as to any and all matters concerning the winding up of the affairs of the corporation and for the protection of its shareholders and creditors that justice and equity may require [*Corp. Code § 1904*].

Note that Paragraph 4 of the petition calls for detailed facts concerning the propriety of the court's assuming jurisdiction. Although it was held under former Corp. Code § 4607 (now, in substance, *Corp. Code § 1904*) that even though that statute was couched in permissive language, stating that the court "may" take jurisdiction, the court nevertheless had a duty of doing so [*In re Mayellen Apts., Inc. (1955) 134 Cal. App. 2d 298, 303-304, 285 P.2d 943]* .

The California Supreme Court, however, refused to decide whether judicial supervision could be invoked where there is no possibility of dispute between shareholders [*In re Security Fin. Co. (1957) 49 Cal. 2d 370, 380, 317 P.2d 1]* . Under present law, the issue appears to have been resolved in favor of granting the court discretion as to whether to assume jurisdiction, and it therefore becomes necessary to indicate in the petition those facts warranting court supervision of the dissolution [*Corp. Code § 1904*].

[3] Who May Petition; Venue

If a corporation is in the process of voluntary winding up, the superior court of the "proper county," that is, the county in which the corporation's principal executive office is located, or Sacramento County if the corporation has no such office or it is not located in California [*Corp. Code § 177*] may assume jurisdiction over the voluntary winding up proceeding, upon the petition of:

- The corporation; or
- A shareholder or shareholders representing five percent or more of the total number of any class of outstanding shares; or
- Any shareholder or shareholders of a close corporation [*see Corp. Code § 158* (definition of "close corporation")]; or
- Three or more creditors [*Corp. Code § 1904*].

[4] Notice of Proceedings; Orders

Corp. Code § 1904 provides that the superior court may assume jurisdiction upon petition of the persons listed above, "... upon such notice to the corporation and to other persons interested in the corporation as shareholders and creditors as the court may order. ..." *see § 170.51*, for such an order. At the point it assumes jurisdiction, the court will determine the case under the provisions governing involuntary dissolution, *Corp. Code §§ 1802-1809* [*Corp. Code § 1904*]. Under *Corp. Code § 1804*, the court is given discretion to either order a winding up and dissolution or to make any orders and decrees, with or without winding up or dissolution, that justice and equity require.

Service of notice on nonpetitioning shareholders does not make them parties to the voluntary dissolution proceeding. Those shareholders are not parties unless they are named as defendants or they intervenem, and they cannot be effectively named as defendants unless the petition seeks relief against them [*In re FairWageLaw (2009) 176 Cal. App. 4th 279, 286-288, 97 Cal. Rptr. 3d 652* (court's adjudication, in voluntary dissolution proceeding, of corporation's claim against nonpetitioning shareholder, who was not named as defendant in that proceeding, violated shareholder's right to due process, even though shareholder had intervened so as to pursue claim against corporation)].

[5] California Points and Authorities

For a memorandum of points and authorities in support of a petition for court supervision of a voluntary winding up and dissolution, see California Points and Authorities, Ch. 52, *Corporations* , Pt. VI (Matthew Bender)

[6] State Statutes

Assumption of jurisdiction by court over voluntary dissolution; petition; application of provisions governing involuntary dissolution. *Corp. Code § 1904*

[7] Decisions

Preservation of assets for payment of all creditors ratably is among purposes of court-supervised dissolution of corporation. *In re Trinity Tractor Co. (1970) 3 Cal. App. 3d 428, 441, 83 Cal. Rptr. 783*

Attempt by majority shareholder to effect voluntary dissolution and plan of distribution which violated statutory dissolution provisions was grounds entitling minority shareholder to seek court supervision. *In re San Joaquin L. & P. Corp. (1942) 52 Cal. App. 2d 814, 826, 127 P.2d 29*

Court's judicial supervision of voluntary dissolution did not violate rights of minority under articles of incorporation to purchase shares of persons desiring to sell since statutory dissolution provisions for part of contract between shareholders and corporation under reserved power clause. *In re Mayellen Apts., Inc. (1955) 134 Cal. App. 2d 298, 304-306, 285 P.2d 943*

Shareholder's agreement to unanimous consent requirement for corporate actions and to transfer restrictions which made shares virtually unsalable did not prevent him from voluntarily dissolving corporation when unanimous consent provisions abused by other shareholders to benefit themselves at shareholder's expense. *In re Security Fin. Co. (1957) 49 Cal. 2d 370, 380, 317 P.2d 1*

Dissolution of corporation through voluntary election by consent of shareholders is subject to equitable limitations. *In re Security Fin. Co. (1957) 49 Cal. 2d 370, 377, 317 P.2d 1*

[8] Text References

Ballantine and Sterling, California Corporation Laws, Ch. 15, *Dissolution and Winding Up, § 315* (Matthew Bender)

Marsh, California Corporation Law and Practice, Ch. XX, *Dissolution*, § 20.15

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PART IV. FORMS

14-170 California Forms of Pleading and Practice--Annotated § 170.51

§ 170.51 Voluntary Winding Up Under Court Supervision--Order to Show Cause [Corp. Code § 1904]

[1] FORM Voluntary Winding Up Under Court Supervision--Order to Show Cause [Corp. Code § 1904]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER TO SHOW CAUSE (Petition for Court Su-
	)	pervision of Voluntary Winding up)
In re _____ [*name*]	)	Date of Hearing: _____
a Corporation in Process of Winding Up.	)	Time of Hearing: _____
	)	Location of Hearing: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
_____		

To _____ [*name of corporation and other persons interested as shareholders and creditors*]:

YOU ARE ORDERED to appear in [_____ (Department *or* Division) _____ of] this court on _____ [*date*], at _____ [*time*], then and there to show cause, if you have any, why the petition for supervision by this court over the voluntary winding up of _____ [*name*], a California corporation, filed herein by _____ [*names of petitioners*], should not be granted.

This order together with a copy of the petition on file herein shall be served on you in the manner prescribed by law for service of summons and complaint, at least _____ [*number*] days prior to the above date of hearing.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This order to show cause may be used to give the notice required by *Corp. Code § 1904* to the corporation and other persons interested as shareholders and creditors of the time and place of hearing of the petition for court supervision over the voluntary winding up of the corporation [*see In re Security Fin. Co. (1957) 49 Cal. 2d 370, 375, 317 P.2d 1* (court refers to order to show cause procedure without discussion)]. The order to show cause may serve both as a notice and as a citation giving the court personal jurisdiction over the parties served [*see Sturm v. Sturm (1955) 138 Cal. App. 2d 25, 28, 291 P.2d 527]* , and thus seems appropriate for use in connection with a petition for court supervision where the corporation or any other interested person has not appeared [*see In re Security Fin. Co. (1957) 49 Cal. 2d 370, 375, 317 P.2d 1* (order to show cause procedure used)].

[3] State Statutes

Notice to corporation and interested persons regarding petition for court supervision of winding up. *Corp. Code § 1904*

Service of summons. *Code Civ. Proc. §§ 413.10-417.40*

[4] Decisions

Hearing of petition for court supervision of voluntary dissolution conducted on order to show cause why petition should not be granted. *In re Security Fin. Co. (1957) 49 Cal. 2d 370, 375, 317 P.2d 1* (court referred to order to show cause procedure without discussion)

Order to show cause is action to appear. *Sturm v. Sturm (1955) 138 Cal. App. 2d 25, 28, 291 P.2d 527*

[5] Cross References

See generally Ch. 372, *Motions and Orders*

For a related form, *see § 170.50*.

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14-170 California Forms of Pleading and Practice--Annotated § 170.52

§ 170.52 Voluntary Winding Up Under Court Supervision--Order Granting Petition [Corp. Code §§ 1904, 1804-1807]

[1] FORM Voluntary Winding Up Under Court Supervision--Order Granting Petition [Corp. Code §§ 1904, 1804-1807]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In re _____ [*name*]	)	NO. _____
a Corporation in Process of Winding Up.	)	ORDER
	)	

_____

The petition of _____ [*names*] for supervision by this court of the voluntary winding up and dissolution of _____ [*name*], a California corporation, came on regularly for hearing by the court on this date. Petitioners appeared by counsel _____ [*name*]; _____ [*specify other appearances*].

On proof made to the satisfaction of the court that the petition should be granted, the court hereby takes jurisdiction of the winding up and dissolution of _____ [*name*], a California corporation, pursuant to *Corporations Code Section 1904*, and

IT IS ORDERED:

1. That the directors of the aforementioned corporation cause written notice of the commencement of these proceedings to be given by mail to all shareholders and to all known creditors and claimants whose addresses appear on the records of the corporation.

2. That notice to all creditors and claimants be published not less than once a week for three consecutive weeks in _____ [*name of newspaper*], a newspaper of general circulation printed and published in _____ County, California and that a copy of that notice be mailed to each person shown as a creditor or claimant by the books of the corporation at his/her last known address. The notice shall be sufficient if it is substantially in the following form: _____ [*set forth form of notice; see § 170.53*].

3. That all persons having or making claims or demands against the aforementioned corporation, whether the claims or demands are due or not yet due, contingent or unliquidated, or sounding only in damages, file their claims with the proof thereof with _____ [*name*] at the principal office of the corporation located at _____ [*address*], within _____ [*specify period not less than four nor more than six months*] after the first publication of the notice herein specified, or be barred from participation in any distribution of the general assets of the corporation if they fail to make and present claims and proofs within the time herein specified.

4. That _____ [*name*] be appointed as commissioner in this proceeding to hear and determine _____ [*specify, e.g.*, all matters that might arise during the winding up of the corporation].

[5. *Set forth any other appropriate order authorized by Corp. Code § 1806 within the scope of relief sought by the petition.*]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This order is for use by the court in assuming jurisdiction over the voluntary winding up and dissolution of a corporation pursuant to *Corp. Code § 1904*. That section makes applicable the provisions of the General Corporation Law which govern involuntary dissolution [*see Corp. Code §§ 1802-1809*]. However, some of these provisions are clearly inapplicable [*see Corp. Code § 1802* (referring to the court's power to break a deadlock by appointment of a provisional director if deadlock is the ground for involuntary dissolution)], and others seem to overlap the provisions in *Corp. Code § 1904*.

For example, *Corp. Code § 1904* provides for notice to all persons interested in the corporation as shareholders or creditors that voluntary proceedings are underway under court supervision [*Corp. Code § 1904*; *see § 170.51* (order to show cause complying with this requirement)]. This would be the second notice received by shareholders and creditors, since the board of directors is required to mail notices at the time the corporation has elected to wind up and dissolve [*Corp. Code § 1903(c)*]. *Corp. Code § 1805(c)*, which literally applies to court-supervised dissolutions by virtue of *Corp. Code § 1904*, requires yet another notice to shareholders and creditors "whose addresses appear on the records of the corporation," and this notice is to be mailed at the direction of the directors. Separate provision is made for the notice to creditors and claimants, by both publication and mail, as the court may direct [*Corp. Code § 1807*]. It would seem proper to combine at least the last two of these notices to creditors, and simply mail a single notice setting the time limits for presenting claims, that is, the notice sent on order of the court which is published in the newspaper. See *§ 170.55* for this notice.

[3] Other Orders

This form illustrates two of the orders that may be sought in connection with court supervision of voluntary dissolution, the requirement of proof of claims [*Corp. Code § 1806(a)*], and appointment of a commissioner [*Corp. Code § 1806(e)*]. Any other appropriate order authorized by *Corp. Code § 1803* or *1806* could be sought.

[4] Appeal

The order granting the petition for court supervision of a voluntary dissolution is apparently a final order for purposes of appeal [*see In re Security Fin. Co. (1957) 49 Cal. 2d 370, 375, 317 P.2d 1]* . However, that portion of an order appointing a provisional director or restraining disposition of corporate assets is probably not appealable [*see In re O'Brien Mach., Inc. (1964) 224 Cal. App. 2d 563, 571-572, 36 Cal. Rptr. 782* (assuming, without deciding, that such orders nonappealable); *but see Code Civ. Proc. § 904.1 (a)(6), (7)* which provide that orders granting an injunction or appointing a receiver are appealable orders].

[5] State Statutes

Matters within jurisdiction of court generally in proceedings for voluntary winding up. *Corp. Code §§ 1802-1809*

Jurisdiction of court includes presentation and proof of claims against corporation. *Corp. Code §§ 1806(a), 1807(a)*

Jurisdiction of court includes appointment of commissioner. *Corp. Code § 1806(e)*

[6] Decisions

Orders made by court in voluntary dissolution proceedings appointing provisional director and restraining disposition of assets prior to approval of plan of distribution are nonappealable. *In re O'Brien Mach., Inc. (1964) 224 Cal. App. 2d 563, 571-572, 36 Cal. Rptr. 782*

[7] Text References

Ballantine and Sterling, California Corporation Laws, Ch. 15, *Dissolution and Winding Up*, §§ 320-323 (Matthew Bender)

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14-170 California Forms of Pleading and Practice--Annotated § 170.53

§ 170.53 Involuntary Dissolution--Complaint [Corp. Code § 1800]

[1] FORM Involuntary Dissolution--Complaint [Corp. Code § 1800]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR INVOLUNTARY DISSOLU-
a Corporation,	)	TION OF A CORPORATION
Defendant.	)	
	)	
	)	

Plaintiff(s) allege(s):

1. Defendant is a corporation duly organized and existing under the laws of the State of California, and has its principal office located in _____ County, California.

2. Defendant is not subject to the Banking Law, Public Utilities Law, Savings and Loan Association Act, or *Sections 1010-1062 of the Insurance Code*.

[*EITHER*]

[*Complaint by directors* (*Corp. Code § 1800(a)(1)*).]

3. At a shareholders meeting of defendant corporation held on _____ [*date*], each of the plaintiffs was elected a director of defendant corporation, took the oath of office as a director, and ever since has been acting as a director of defendant corporation. The total number of directors of the corporation is _____, and the _____ [*number*] plaintiffs herein constitute [more than] one-half of the total number of acting directors of the corporation.

[*OR*]

[*Complaint by shareholders* (*Corp. Code § 1800(a)(2)*).]

3. Plaintiffs are the holders of record of an aggregate of _____ [*number*] [common] shares of stock on defendant corporation. The number of [common] shares of defendant corporation which are issued and outstanding is _____ shares. The shares held by plaintiffs constitute at least 331/3 percent of the number of outstanding [common] shares of defendant corporation [exclusive of the _____ (*number*) shares owned by _____ (*name*) who, as alleged herein, personally participated in the transactions complained of herein].

[*OR*]

[*Complaint by shareholder(s) of close corporation* (*Corp. Code § 1800(a)(2)* ; *Corp. Code § 158*).]

3. Plaintiff is the holder of record of _____ [*number*] shares of defendant corporation. Defendant corporation is a close corporation as evidenced by the statement to that effect contained in its articles of incorporation [, a copy of which is attached hereto as Exhibit A and made a part hereof].

[*OR*]

[*Complaint by shareholder on expiration of term of corporate existence* (*Corp. Code § 1800(a)(3)*).]

3. Plaintiff is the holder of record of _____ [*number*] shares of defendant corporation. Defendant corporation was duly formed on _____ [*date*], and its articles of incorporation provided that the term for which it was to exist was _____ [*number*] years from and after the date of its incorporation. That term of existence has expired without renewal or extension thereof.

[*OR*]

[*Complaint by person authorized in articles to seek dissolution* (*Corp. Code § 1800(a)(4)*).]

3. Plaintiff is expressly authorized by the articles of incorporation to file a complaint for involuntary dissolution of the corporation. [A copy of the articles of incorporation is attached hereto as Exhibit A and made a part hereof.]

[*CONTINUE; allege one or more of the following grounds as appropriate* :]

[*EITHER*]

4. Defendant corporation has abandoned its business for more than one year.

[*OR*]

4. The board of directors of defendant corporation consists of an even number of directors, specifically, _____ [*number*] directors. At a meeting of the shareholders on _____ [*date*], the following persons were elected as directors: _____ [*names*]. Each of those persons was qualified and accepted the office, and ever since has been acting as a director of defendant corporation. At a meeting of the board of directors, at which all of the each of the persons named above were present, held on _____ [*date*], the following matters concerning management of the affairs of the corporation were submitted for resolution and vote: _____ [*specify*]. The directors were evenly divided on all of those matters and _____ [*number*] voted in favor of, while _____ [*same number*] voted against, each matter. At that meeting and at all subsequent meetings of the board of directors the directors have been and continue to be unable to agree as to the management of the affairs of defendant corporation, and the holders of the voting shares of the corporation are so divided into factions that they cannot elect a board consisting of an uneven number, with the result that _____ [the business of the corporation can no longer be conducted to advantage *or* there is danger that the property and business of the corporation will be impaired and lost] in the following respects: _____ [*allege facts supporting conclusion*].

[*OR*]

4. There is internal dissension and two or more factions of shareholders in defendant corporation are so deadlocked that its business can no longer be conducted with advantage to its shareholders.

[*OR*]

4. The shareholders have failed at two consecutive annual meetings to elect successors to directors whose terms have expired or would have expired upon election of their successors.

[*OR*]

4. _____ [The directors *or* _____ (*names*), who are in control] of the corporation have _____ [been guilty of *or* knowingly countenanced] persistent _____ [*specify, e.g.*, fraud *or* mismanagement *or* abuse of authority *or* unfairness toward certain shareholders] in the following respects: _____ [*allege facts supporting conclusion*].

[*OR*]

4. Defendant corporation's property is being _____ [misapplied *or* wasted] by its

_____ [directors *or* officers] in the following respects: _____ [*specify*].

[*OR*]

4. Defendant corporation has _____ [*number, 35 or less*] shareholders, and liquidation is reasonably necessary for the protection of the rights and interests of plaintiff shareholder in that _____ [*set forth ultimate facts supporting ground*].

[*OR*]

4. Defendant corporation was duly formed on _____ [*date*], when its articles of incorporation were filed with the Secretary of State of California. Its articles of incorporation provide that the term of the corporation's existence is _____ [*specify*] from its date of incorporation. That period has terminated without having been extended.

WHEREFORE, plaintiff(s) pray(s) judgment as follows:

1. That the court decree a winding up and dissolution of defendant corporation;

2. That the court entertain such proceedings as may be necessary or proper for the involuntary winding up or dissolution of defendant corporation and, in that regard, make such orders for winding up and dissolution of defendant corporation as justice and equity require;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am [one of] the plaintiff(s) in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

CAUTION:

A complaint for involuntary dissolution must be verified [*Corp. Code § 1800(a)*].

[2] Use of Form

This complaint is used to initiate a proceeding under *Corp. Code § 1800* for involuntary dissolution of a corporation that is not subject to the Banking Law [*Fin. Code § 99 et seq.*], the Public Utilities Act [*Pub. Util. Code § 201 et seq.*], the Savings and Loan Association Law [*Fin. Code § 5000 et seq*], or *Ins. Code § 1010-1062* (insolvent insurance companies).

[3] Allegations

The complaint alleges the following:

- The county in which defendant has its principal executive office (Paragraph 1) [*see Corp. Code § 177*].

- That defendant is not a corporation subject to certain laws (listed in the first sentence above) specified by *Corp. Code § 1800(d)* (Paragraph 2).

- The basis of plaintiffs' standing to sue (Paragraph 3) [*see Corp. Code § 1800(a)*].

- The grounds for suit (Paragraph 4) [*see Corp. Code § 1800(b)*].

[4] State Statutes

Persons entitled to file complaint for involuntary dissolution. *Corp. Code § 1800(a)*

Grounds for involuntary dissolution. *Corp. Code § 1800(b)*

Court decree for winding up and dissolution. *Corp. Code § 1804*

Commencement of involuntary proceedings. *Corp. Code § 1805*

[5] Decisions

[a] Default

Corp. Code 1800(b)(4) "persistent unfairness" standard not interpreted in terms of minority shareholders' "reasonable expectations"; *Corp. Code 1800(b)(5)* requires trial court to determine whether minority shareholders require protection by considering relative misconduct of parties. *Bauer v. Bauer (1996) 46 Cal. App. 4th 1106, 1113-1114, 1116, 54 Cal. Rptr. 2d 377*

Corporation, by defaulting in proceedings for involuntary dissolution, in effect admitted only that grounds exist for winding up and dissolving corporation and that creditors or shareholders should be required to make known their claims to be recognized in disposition of corporate assets. *Rosner v. Benedict Heights, Inc. (1963) 219 Cal. App. 2d 1, 7, 32 Cal. Rptr. 764*

[b] Grounds

Minority shareholders failed to raise triable issue of material fact as to right to involuntary dissolution under *Corp. Code § 1800(b)(5)*; dissolution of corporation was not reasonably necessary to protect their rights when, despite hostility between majority and minority shareholders, plaintiffs continued to receive dividends from corporation until filing of lawsuit. *Stuparich v. Harbor Furniture Manufacturing, Inc. (2000) 83 Cal. App. 4th 1268, 1279, 100 Cal. Rptr. 2d 313*

Involuntary dissolution pursuant to former Corp. Code § 4651(f) (now *Corp. Code § 1800(b)(5)*) (as necessary for protection of rights and interests of complaining shareholders) was properly granted when evidence showed plaintiff excluded from corporation, received no salary, dividends or other revenue from corporation's investments. *Stumpf v. C.E. Stumpf & Sons, Inc. (1975) 47 Cal. App. 3d 230, 235, 120 Cal. Rptr. 671*

Protection of minority shareholders did not require establishment of other grounds such as persistent unfairness or deadlock, since ground specified by Corp. Code § 1800(b)(5) is independent and addressed to discretion of trial court which must be convinced that plaintiff's case is meritorious. *Stumpf v. C.E. Stumpf & Sons, Inc. (1975) 47 Cal. App. 3d 230, 234-235, 120 Cal. Rptr. 671*

In involuntary dissolution suit by minority shareholders, demurrer was properly sustained as to defendant shareholders alleged to be guilty of persistent unfairness to minority, when no relief was sought as to them and only dissolution of corporation was sought. *Weisman v. Odell (1970) 3 Cal. App. 3d 494, 499, 83 Cal. Rptr. 563*

Dissolution on grounds of deadlock and protection of shareholders was properly ordered when facts revealed diversion of corporate assets and revocation of license, use of which was sole purpose for corporation's existence. *Reynolds v. Special Projects, Inc. (1968) 260 Cal. App. 2d 496, 501, 67 Cal. Rptr. 374*

Complaint alleging lost business and personnel, destruction of goodwill of business and operation of corporation as defendant's private affair alleged persistent mismanagement and abuse of authority and unfairness to minority, sufficient grounds for dissolution and good against general demurrer. *Buss v. J.O. Martin Co. (1966) 241 Cal. App. 2d 123, 135, 50 Cal. Rptr. 206*

Decree ordering involuntary dissolution of corporation which had ceased lumber business but continued as holding company was proper when complaint based on ground that corporation had abandoned its business for more than one year and when dissolution appeared necessary to protect interest of minority shareholder. *Geisendorfer v. Rainbow Mill & Lbr. Co. (1945) 70 Cal. App. 2d 705, 709-710, 161 P.2d 561*

[c] Intervenors

Shareholder's right to intervene in involuntary dissolution proceedings is unqualified right and not subject to requirement that security be posted even when some claims of shareholder are derivative in nature. *Hagan v. Superior Court (1960) 53 Cal. 2d 498, 503, 2 Cal. Rptr. 288, 348 P.2d 896*

An intervenor in involuntary dissolution proceedings is entitled to any relief court has jurisdiction to grant including compelling registration of shareholder's shares, enjoining expenditures pendente lite, or appointing receiver to press claims of corporation against directors or others. *Hagan v. Superior Court (1960) 53 Cal. 2d 498, 504, 2 Cal. Rptr. 288, 348 P.2d 896*

Entry of default against corporation in involuntary dissolution proceeding is not equivalent of trial for purpose of determining right of shareholder to intervene before trial when court did not enter order under former Corp. Code § 4660 (now *Corp. Code § 1804*) that corporation be wound up and dissolved and therefore proceedings had not commenced. *Rosner v. Benedict Heights, Inc. (1963) 219 Cal. App. 2d 1, 6-7, 32 Cal. Rptr. 764*

[d] Nature of Proceeding

Action for involuntary dissolution of corporation is in nature of special proceeding in that proceedings and relief sought are created by statute. *Weisman v. Odell (1970) 3 Cal. App. 3d 494, 496, 83 Cal. Rptr. 563*

Former Corp. Code § 4650 (now *Corp. Code § 1800*), permitting involuntary proceedings by shareholders to dissolve a corporation, is strictly construed. *Cardoza v. Millington (1956) 142 Cal. App. 2d 26, 34, 297 P.2d 778*

[e] Parties

When no direct relief or damages sought against majority shareholders joined as defendants in involuntary dissolution proceedings, trial court acted properly by sustaining their general demurrer. *Weisman v. Odell (1970) 3 Cal. App. 3d 494, 497-499, 83 Cal. Rptr. 563*

[f] Persons Entitled to File Complaint

Preferred shareholders have right under *Corp. Code § 1800(a)(2)(iii)* to file for involuntary dissolution if their preferred shares represent 331/3 percent of corporation's equity. *Kline Hawkes California v. Superior Court (2004) 117 Cal. App. 4th 183, 196, 11 Cal. Rptr. 3d 581*

Reference in former Corp. Code § 4650 (now *Corp. Code § 1800(a)*) to shareholders holding 331/3 percent of outstanding shares includes both voting and nonvoting shares. *Buss v. J.O. Martin Co. (1966) 241 Cal. App. 2d 123, 130-131, 50 Cal. Rptr. 206*

Jurisdiction of court, once acquired in involuntary proceeding, is not subsequently defeated by redemption of plaintiff's shares to reduce holdings below required 331/3 percent. *Buss v. J.O. Martin Co. (1966) 241 Cal. App. 2d 123, 131-133, 50 Cal. Rptr. 206*

[g] Venue

Involuntary dissolution is local action; proper venue for involuntary dissolution action is county in which corporate defendant maintains its principal office. *Capp Care, Inc. v. Superior Court (1987) 195 Cal. App. 3d 504, 508, 241 Cal. Rptr. 741*

When two or more inconsistent venue provisions apply in same case, motion for change of venue is required to be granted if defendant is entitled to change of venue on any one cause of action. *Capp Care, Inc. v. Superior Court (1987) 195 Cal. App. 3d 504, 508, 241 Cal. Rptr. 741*

[6] Text References

Ballantine and Sterling, California Corporation Laws, Ch. 15, *Dissolution and Winding Up, § 320* (Matthew Bender)

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14-170 California Forms of Pleading and Practice--Annotated § 170.54

§ 170.54 Involuntary Dissolution--Order That Corporation Be Wound Up and Dissolved [Corp. Code §§ 1804-1807]

[1] FORM Involuntary Dissolution--Order That Corporation Be Wound Up and Dissolved [Corp. Code §§ 1804-1807]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER FOR INVOLUNTARY DISSOLUTION OF
a Corporation,	)	A CORPORATION
Defendant.	)	
	)	
	)	

The verified complaint of _____ [*name*], for involuntary winding up and dissolution of _____ [*name*], a California corporation, came on regularly for hearing before this court on this date. Plaintiff(s) appeared by counsel _____ [*name*]; _____ [*specify any other appearances*].

On proof to the satisfaction of the court that an order should be made directing that defendant corporation be wound up and dissolved,

IT IS HEREBY ORDERED AND DECREED:

1. That _____ [*name*], a California corporation, be wound up and dissolved.

2. That the present directors of the corporation, namely, _____ [*name of each director*], are directed to conduct the winding up of the affairs of the corporation, subject to the supervision of the court.

3. That the corporation shall cease to carry on business except to the extent necessary for the beneficial winding up thereof and except during the period that the board may deem necessary to preserve the corporation's goodwill or going-concern value pending a sale of its business or assets, or both, in whole or in part.

4. That the directors of the corporation cause written notice of the commencement of these proceedings to be given by mail to all shareholders and to all known creditors and claimants whose addresses appear on the records of the corporation.

5. That notice to all creditors and claimants be published not less than once a week for three consecutive weeks in _____ [*name of newspaper*], a newspaper of general circulation printed and published in _____ County, California and that a copy of the notice be mailed to each person shown as a creditor or claimant by the books of the corporation at his/her last known address. Notice shall be sufficient if it is substantially in the following form: _____ [*set forth form of notice; see § 170.55*].

6. That all persons having or making claims or demands against the aforementioned corporation, whether those claims or demands be due or not yet due, contingent, unliquidated, or sounding only in damages, file their claims with the proof thereof with _____ [*name*] at the principal office of the corporation located at _____ [*address*], within _____ [*specify period not less than four nor more than six months*] after the first publication of the notice herein specified, or be barred from participation in any distribution of the general assets of the corporation if they fail to make and present claims and proofs within the time herein specified.

[7. (*Set forth any other appropriate order authorized by Corp. Code § 1806 within the scope of relief sought by the complaint*).]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This order is used to decree the involuntary winding up and dissolution of a corporation. After a hearing on the complaint for involuntary winding up and dissolution, the court may enter this order if cause is shown, or, with or without winding up and dissolution, may make any orders and decrees and issue any injunctions in the case that justice and equity require [*Corp. Code § 1904*]. An example of the type of order which the court might make without ordering a winding up is one appointing a provisional director when the ground for the complaint is a deadlock on the board as set forth in *Corp. Code § 1800(b)(2)* [*Corp. Code § 1802*].

This form also serves as an order requiring the directors to give notice of the commencement of the proceedings to all known claimants and creditors whose addresses appear on the records of the corporation. Notice is required unless the order for winding up has been stayed by appeal or otherwise, or the proceeding or the execution of the order has been enjoined [*Corp. Code § 1805(c)*]. Since there is a separate provision under *Corp. Code § 1807* for notice to creditors and claimants, by both publication and mail, as the court may direct, it seems entirely proper and expeditious to include in the court's order its directions as to the manner of publication and the time and manner for presenting claims to avoid being barred from participation in the distribution of the corporation's assets [*Corp. Code §§ 1806(a), 1807*]. See *§ 170.55* for the notice to be published and mailed to creditors.

[3] Effect of Order to Wind Up and Dissolve

When the order for winding up is entered under *Corp. Code § 1904*, involuntary dissolution proceedings are deemed to commence [*Corp. Code § 1805(a)*]. Prior to this order being entered, there is no provision for notice to be given to any party except the corporation and any other defendants joined in the proceedings. As stated above, notice is given after the proceedings have "commenced" [*Corp. Code § 1805(c)*]. What effect commencement of the proceedings might have on the right of a shareholder or creditor to intervene "prior to the trial" [*Corp. Code § 1800(c)*] is uncertain, but case authority suggests that the trial has commenced once the order for winding up and dissolution has been entered [*see Rosner v. Benedict Heights, Inc. (1963) 219 Cal. App. 2d 1, 6-7, 32 Cal. Rptr. 764* (holding entry of default against corporation was not equivalent of trial when court did not enter order that corporation be wound up and dissolved)].

[4] State Statutes

Appointment of provisional director. *Corp. Code § 1802*

Court decree for winding up and dissolution. *Corp. Code § 1804*

Commencement of proceedings. *Corp. Code § 1805(a)*

Cessation of business and notice to creditors and shareholders. *Corp. Code § 1805(c)*

Jurisdiction of court. *Corp. Code § 1806*

Creditor's claims; notice to creditors. *Corp. Code § 1807*

[5] Decisions

Judge had authority under *Code Civ. Proc. § 564(b)(3), (4)* and *Corp. Code § 1803* to appoint receiver in order to carry dissolution judgment into effect and dispose of corporate property; order appointing receiver affirmed on appeal. *Gold v. Gold Realty Co. (2003) 114 Cal. App. 4th 791, 804-805, 809, 8 Cal. Rptr. 3d 118*

Bankruptcy of minority shareholder does not toll period for enforcement of judgment of dissolution, even if shareholder claims in bankruptcy petition to be sole shareholder. *Barnett v. Lewis (1985) 170 Cal. App. 3d 1079, 1086-1093, 217 Cal. Rptr. 80*

Corporation, by defaulting in proceedings for involuntary dissolution, in effect admits only that grounds exist for winding up and not equivalent of trial. *Rosner v. Benedict Heights, Inc. (1963) 219 Cal. App. 2d 1, 6-7, 32 Cal. Rptr. 764*

[6] Text References

Ballantine and Sterling, California Corporation Laws, Ch. 15, *Dissolution and Winding Up, §§ 322.01-322.06* (Matthew Bender)

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Chapter 170 CORPORATIONS: DISSOLUTION AND WINDING UP
PART IV. FORMS

14-170 California Forms of Pleading and Practice--Annotated § 170.55

§ 170.55 Involuntary Dissolution or Court-Supervised Voluntary Winding Up--Notice to Creditors for Presentation of Claims [Corp. Code § 1807(a), (b)]

[1] FORM Involuntary Dissolution or Court-Supervised Voluntary Winding Up--Notice to Creditors for Presentation of Claims [Corp. Code § 1807(a), (b)]

[*Caption. See § 170.50* (*involuntary dissolution*) *or 203* (*voluntary dissolution*).]

To creditors and claimants of _____ [*name*], a California corporation:

NOTICE IS HEREBY GIVEN that _____ [involuntary *or* voluntary] proceedings have been commenced for winding up and dissolution of _____ [*name*], a California corporation, and that the above-entitled court has assumed jurisdiction over those proceedings.

Pursuant to an order by the court dated _____ [*date*], all claims and demands against the aforementioned corporation, whether due or not yet due, contingent, unliquidated, or sounding only in damages must be filed with proof thereof with _____ [*name*] at the principal office of the corporation at _____ [*address*], within _____ [*specify period directed by court*] after the date of first publication of this notice, which is _____ [*date*].

Any creditor and claimant may be barred from participation in any distribution of the general assets of the aforementioned corporation if they fail to make and present claims and proofs within the time directed by the court.

_____
[*typed name of corporation*]
By: _____ [*signature*]
_____ [*typed name*]
_____ [*e.g.*, Secretary]

[2] Use of Form

This notice is given to creditors and claimants of the corporation to afford them an opportunity to present their claims to the person designated by the court. A copy is mailed to each person shown as a creditor or claimant on the books of the corporation at his or her last known address. The notice is also published not less than once a week for three consecutive weeks in a newspaper of general circulation published in the county where the corporation has its principal office, or, if there is no such newspaper published in that county, in a newspaper designated by the court. The notice directs creditors and claimants to present their claims and proofs to the person, at the place, and within the time limited by the court order [*see Corp. Code § 1807(a), (b)*].

[3] State Statutes

Notice to creditors; time within which to present claims. *Corp. Code § 1807(a)*

Notice to creditors; publication and mailing. *Corp. Code § 1807(b)*

[4] Cross References

For related forms, *see §§ 170.52* and *170.54*.

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14-170 California Forms of Pleading and Practice--Annotated § 170.56

§ 170.56 Proceedings to Stay Winding Up and Dissolution and Ascertain Value of Moving Parties' Shares [Corp. Code § 2000]--Petition in Voluntary Proceedings

[1] FORM Proceedings to Stay Winding Up and Dissolution and Ascertain Value of Moving Parties' Shares [Corp. Code § 2000]--Petition in Voluntary Proceedings

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioners,	)	
vs.	)	
_____ [*names of moving parties*],	)	NO. _____
and	)	PETITION TO AVOID VOLUNTARY DISSOLUTION AND ASCERTAIN VALUE OF MOVING PARTIES' SHARES
_____ [*name of corporation*], a Corporation,	)	
Respondents.	)	

Petitioners allege:

1. Respondent _____ [*name of corporation*] (herein called "corporation") is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California, with its principal office in _____ County, California.

2. Petitioners are the holders of 50 percent of the voting power of the corporation.

3. Respondents _____ [*names of shareholders initiating dissolution*] (hereinafter called "moving parties") are the holders of 50 percent of the voting power of the corporation.

4. On _____ [*date*], at a special meeting of shareholders duly called and noticed, the moving parties voted to elect to voluntarily wind up and dissolve the corporation.

5. The petitioners have elected to purchase the shares of stock in the corporation held by the moving parties, but are unable to agree with the moving parties upon the fair value of the shares. A copy of petitioners' written offer to purchase the moving parties' shares, which was rejected by them, is attached as Exhibit A and incorporated by reference.

6. Petitioners will furnish a bond with sufficient security, as determined by the court, to pay the estimated reasonable expenses (including attorney's fees) of the moving parties if petitioners fail to make payment for the moving parties' shares within the time specified by the court's order.

7. The purchase of the moving parties' shares will not constitute the breach of any agreement between petitioners and the moving parties, nor will it be in violation of any express provision of the articles of incorporation of the corporation.

WHEREFORE, petitioners pray as follows:

1. That the court stay the winding up and dissolution of the corporation and fix the fair value of the shares owned by the moving parties;

2. That the court appoint three disinterested appraisers to appraise the fair value of the shares owned by the moving parties, and make an order referring the matter to the appraisers so appointed for the purpose of ascertaining that value;

3. That the court enter a decree providing in the alternative for the winding up and dissolution of the corporation unless payment is made for the shares of the moving parties within the time specified by the court in that decree; and

4. For any other and further relief that the court may deem proper.

_____ [*signature*]
Petitioner
_____ [*signature*]
Petitioner

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioners

[*Verification, if desired. See § 170.50.*]

[2] Use of Form

This petition is for use when the shareholders of a corporation are evenly divided on the issue of whether to voluntarily dissolve the corporation, and one faction wishes to avoid dissolution by purchasing the shares of the parties initiating voluntary dissolution.

[3] Allegations

The petition alleges:

- Venue of the proceeding in the "proper county" (Paragraph 1) [*Corp. Code § 2000(b)*; *see Corp. Code § 177* (defining "proper county")].

- Petitioners' status as holders of 50 percent of the corporation's voting power (Paragraph 2) [*Corp. Code § 2000(a)*].

- Respondents' status as "moving parties" (Paragraph 3) [*Corp. Code § 2000(a)*].

- That the corporation is in the process of winding up and dissolution and that the petitioners have sought, unsuccessfully, to avoid dissolution by making an offer to purchase the moving parties' shares (Paragraphs 4, 5) [*Corp. Code § 2000(b)*].

- The willingness of petitioners to furnish a bond with sufficient security to pay the moving parties' estimated reasonable expenses in the event the petitioners fail to make payment for the shares of the moving parties (Paragraph 6) [*Corp. Code § 2000(b), (c)*].

- That the purchase of the moving parties' shares by petitioners will not violate an agreement or the articles of incorporation (Paragraph 7) [*Corp. Code § 2000(a)*].

The petition prays for a stay of all dissolution proceedings, appointment of commissioners under order to evaluate the shares, and an alternative decree ordering dissolution in the event petitioners fail to purchase the moving parties' shares [*Corp. Code § 2000(c)*].

[4] Avoidance of Dissolution

[a] Generally

Prior to January 1, 1977, the effective date of the present General Corporation Law, purchase of the shares of the shareholders seeking dissolution of a corporation was possible only in involuntary proceedings [*see* former Corp. Code § 4658]. Under present law, the buy-out option is available in voluntary proceedings as well, and, except for the manner in which the option is exercised, the same procedures will apply whether the dissolution is voluntary or involuntary. Consequently, the statutory provisions governing purchase of the moving parties' shares will be discussed here and not repeated following those forms relevant to the same procedure in involuntary proceedings [*see §§ 170.57* and *170.58*].

[b] Purchase of Plaintiffs' Shares

Subject to any contrary provision in the articles, in any suit for involuntary dissolution, or in any proceeding for voluntary dissolution initiated by the vote of shareholders representing only 50 percent of the voting power, the corporation, or, if it does not elect to purchase, the holders of 50 percent or more of the voting power of the corporation (the "purchasing parties") may avoid the dissolution of the corporation and the appointment of any receiver by purchasing for cash the shares owned by the plaintiffs or by the shareholders so initiating the proceeding (the "moving parties") at their fair value [*Corp. Code § 2000(a)*]. Note that the corporation has the option of purchasing the shares of the moving parties. Election by the corporation to purchase the shares may be made by approval of the outstanding shares [*see Corp. Code § 152* (defining "approval of the outstanding shares")], excluding the shares held by the moving parties [*Corp. Code § 2000(a)*]. If the corporation has the funds to make the purchase, and elects to do so, then the caption of this form will have to be altered to show that the corporation is the petitioner. As a practical matter, most small corporations would not have sufficient retained earnings on hand to repurchase 50 percent of their shares.

[c] Determining Fair Value

The fair value is determined on the basis of the liquidation value, taking into account the possibility, if any, of sale of the entire business as a going concern in a liquidation [*Corp. Code § 2000(a)*; *see, e.g.,* *Mart v. Severson (2002) 95 Cal. App. 4th 521, 535-536, 115 Cal. Rptr. 2d 717* (holding that trial court erred in finding that fair value was piecemeal liquidation value of $1.48 million, when appraisers unanimously had concluded that corporation could have been sold as ongoing concern for $5.6 million)]. The valuation date is the date on which the proceeding for voluntary dissolution was initiated. Upon the motion of any party, however, the court may designate some other date as the valuation date for good cause shown [*Corp. Code § 2000(f)*; *see, e.g.,* *Trahan v. Trahan (2002) 99 Cal. App. 4th 62, 76-78, 120 Cal. Rptr. 2d 814* (substantial evidence supported court's confirmation of appraiser's determination of fair value as piecemeal sale of assets, even though it did not take into account existing but uncompleted contracts; parties could have requested court to set later valuation date to allow completion of unperformed contracts)].

A determination of the fair value of the shares of the corporation must include an assessment of the value, if any, of a pending derivative action and the effect of the action on the fair value of the shares [*Cotton v. Expo Power Sys., Inc. (2009) 170 Cal. App. 4th 1371, 1374, 1380-1381, 89 Cal. Rptr. 3d 112* (derivative claim is property right that belongs to corporation and is properly viewed as asset of corporation)].

In fixing the value, the amount of any damages resulting if the initiation of the dissolution is a breach by any moving party or parties of an agreement with the purchasing party or parties may be deducted from the amount payable to that moving party or parties, unless the ground for dissolution is that specified in *Corp. Code § 1800(b)(4)*, relating to fraud and mismanagement [*Corp. Code § 2000(a)*].

[d] Appraisal

If the purchasing parties elect to purchase the shares owned by the moving parties, but are unable to agree with the moving parties on the fair value of those shares, and give bond with sufficient security to pay the estimated reasonable expenses (including attorney's fees) of the moving parties if those expenses are recoverable under *Corp. Code § 2000(c)*, the court, on application of the purchasing parties, either in the pending action or in a proceeding initiated in the superior court of the proper county by the purchasing parties in the case of a voluntary election to wind up and dissolve, must stay the winding up and dissolution proceeding and must proceed to ascertain and fix the fair value of the shares owned by the moving parties [*Corp. Code § 2000(b)*].

The court must appoint three disinterested appraisers to appraise the fair value of the shares, and must make an order referring the matter to the appointed appraisers [*Corp. Code § 2000(c)*]. The order must prescribe the time and manner of producing evidence, if evidence is required [*Corp. Code § 2000(c)*]. For a form for this order, see *§ 170.61*.

The award of the appraisers, or a majority of them, when confirmed by the court, shall be final and conclusive upon all parties. The trial court has the duty, when convinced that an award of the appraisers is erroneous, to examine matters de novo and fix its own valuation [*Venables v. Credential Ins. Agency, Inc. (1956) 140 Cal. App. 2d 724, 727, 295 P.2d 547]* .

[e] Decree

The order confirming the appraisal of the moving parties' shares will normally be combined with the decree which the court is required to enter in the alternative, that is, for the winding up and dissolution of the corporation unless the purchasing parties make payment for the moving parties' shares within the time limit specified in the decree [*Corp. Code § 2000(c)*; *Gov. Pacific Health Servs. (2009) 179 Cal. App. 4th 522, 530-531, 101 Cal. Rptr. 3d 736* (once *Corp. Code § 2*000 is invoked, it mandates entry of such alternative decree; summary proceeding authorized in that code section supplants any pending action for involuntary dissolution, and party in that action is not entitled to have it continue after invoking *Corp. Code § 2000*); *see § 170.61*]. This decree is appealable by any shareholder aggrieved thereby [*Corp. Code § 2000(c)*; *see* *Esparza v. Kadam, Inc. (1959) 170 Cal. App. 2d 303, 305-306, 338 P.2d 492*

(holding appraiser's award subject to review)]. There is no automatic stay of the court's decree in the event of an appeal (because *Corp. Code § 2000* provides for a special proceeding, rather than a civil action, and does not expressly incorporate the Civil Code sections governing appeals in civil actions), but a reviewing court has discretion to issue a writ of supersedeas if a proper and sufficient showing is made [*Veyna v. Orange County Nursery, Inc. (2009) 170 Cal. App. 4th 146, 154-156, 87 Cal. Rptr. 3d 658* ; *see generally Ch. 43, Appeal: Stay of Proceedings, § 43.21*].

If the purchasing parties do not make payment for the shares within the time specified, judgment must be entered against them and the surety or sureties on the bond provided by the purchasing parties for the amount of the expenses (including attorney's fees) of the moving parties [*Corp. Code § 2000(c)*; *see § 170.62*].

[f] Payment and Transfer

If the purchasing parties desire to prevent the winding up and dissolution, they must pay to the moving parties the value of their shares, as ascertained and decreed, within the time specified or, in case of appeal, as fixed on appeal. On receiving payment or tender, the moving parties must transfer their shares to the purchasing parties [*Corp. Code § 2000(d)*].

[5] State Statutes

Voting power defined. *Corp. Code § 194.5*

Stay of winding up and dissolution proceedings on election to purchase moving parties' shares. *Corp. Code § 2000*

[6] Decisions

Consideration of only price-earnings method in valuing minority interest in closely held corporation under *Corp. Code § 2000(a)* was prejudicial error; although price-earnings method may be used, consideration of only that method was improper; minority interest not to be devalued because of its being minority or noncontrolling interest. Ronald's v. 4-*C's Electronic Packaging, Inc. (1985) 168 Cal. App. 3d 290, 297-299, 214 Cal. Rptr. 225*

Code provisions providing for stay of proceedings and purchase of plaintiff's shares [*see* former Corp. Code §§ 4658, 4659; now *Corp. Code § 2000*] are mandatory. *Alvak Enterprises v. Phillips (1959) 167 Cal. App. 2d 69, 75, 334 P.2d 148*

Former Corp. Code § 4658 (now *Corp. Code § 2000*) giving "holders" of 50 percent or more of "outstanding" shares right to avoid involuntary dissolution on election to purchase plaintiff's shares afforded right to 50 percent of subscribers when no shares outstanding. *Brodsky v. Seaboard Realty Co. (1962) 206 Cal. App. 2d 504, 516, 24 Cal. Rptr. 61*

Order confirming award of commissioners as to value of plaintiff's shares is appealable order. *Esparza v. Kadam, Inc. (1959) 170 Cal. App. 2d 303, 305-306, 338 P.2d 492*

Trial court has duty when convinced that award of commissioner is erroneous, to examine matters de novo and fix proper value. *Venables v. Credential Ins. Agency, Inc. (1956) 140 Cal. App. 2d 724, 727, 295 P.2d 547*

[7] Text References

Ballantine and Sterling, California Corporation Laws, Ch. 15, *Dissolution and Winding Up, § 316* (Matthew Bender)

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14-170 California Forms of Pleading and Practice--Annotated § 170.57

§ 170.57 Proceedings to Stay Winding Up and Dissolution and Ascertain Value of Moving Parties' Shares [Corp. Code § 2000]--Complaint in Intervention [Corp. Code § 1800(c); Code Civ. Proc. § 387] in Involuntary Proceedings

[1] FORM Proceedings to Stay Winding Up and Dissolution and Ascertain Value of Moving Parties' Shares [Corp. Code § 2000]--Complaint in Intervention [Corp. Code § 1800(c); Code Civ. Proc. § 387] in Involuntary Proceedings

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	
vs.	)	
_____ [*name*], a Corporation,	)	NO. _____
Defendant.	)	COMPLAINT IN INTERVENTION
_____ [*name*],	)	
Intervenor.	)	
	)	
	)	

Intervenor, _____ [*name*], alleges:

1. Intervenor is, and at all times herein mentioned was, a holder of 50 percent or more of the voting power of defendant corporation.

2. Intervenor intervenes in this proceeding on the ground that intervenor has a substantial interest in the success of defendant in this proceeding in that the intervenor is a shareholder of the corporation which plaintiff is seeking to dissolve and intervenor's interest in the corporation will be directly affected by the result of this proceeding, as

hereinafter set out more particularly.

3. On _____ [*date*], plaintiff commenced this proceeding against defendant to cause defendant to be involuntarily wound up and dissolved. The action is now pending in this court and trial thereof has not been had.

4. Intervenor intervenes in this proceeding pursuant to *Corporations Code Section 1800(c)* in order to exercise his/her right, under *Corporations Code Section 2000*, to avoid the involuntary dissolution of defendant by purchasing for cash the shares held by plaintiff. The purchase of plaintiff's shares by intervenor is not contrary to any provision contained in the defendant's articles of incorporation, nor will it constitute a breach of any agreement between intervenor and plaintiff.

5. Intervenor has elected to purchase plaintiff's shares but has been unable to agree with plaintiff on the fair value of those shares. A copy of intervenor's written offer to purchase plaintiff's shares, which was rejected by plaintiff, is attached as Exhibit A and incorporated by reference.

6. Intervenor will furnish a bond with sufficient security, as determined by the court, to pay the estimated reasonable expenses (including attorney's fees) of plaintiff if intervenor fails to make payment for plaintiff's shares within the time specified by the court's order.

WHEREFORE, intervenor prays as follows:

1. That the court stay the winding up and dissolution of defendant corporation and fix the fair value of the shares owned by plaintiff;

2. That the court appoint three disinterested appraisers to appraise the fair value of the shares owned by plaintiff and make an order referring the matter to the appraisers so appointed for the purpose of ascertaining that value;

3. That the court enter a decree providing in the alternative for the winding up and dissolution of the corporation unless payment is made for the shares of plaintiff within the time specified by the court in such decree;

4. For costs of suit herein incurred; and

5. For any other and further relief that the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Intervenor

VERIFICATION

I, _____ [*name*], am the intervenor in the above-entitled proceeding. I have read the foregoing complaint in intervention and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form is a complaint in intervention in involuntary dissolution proceedings. Its purpose is to invoke the provisions of *Corp. Code § 2000*, which permit a shareholder or shareholders owning 50 percent or more of the voting power of a corporation to avoid the involuntary dissolution of the corporation by purchasing the plaintiff's shares. For a more detailed discussion of the provisions of *Corp. Code § 2000*, see *§ 170.56*.

[3] Appropriateness of Proceeding by Intervention

Under the General Corporation Law as it existed prior to January 1, 1977, the provisions for staying winding up and dissolution by purchasing the shares of the plaintiffs initiating involuntary dissolution proceedings did not specify how those holding 50 percent or more of the voting power should proceed [*see* former Corp. Code §§ 4658, 4659]. Present law provides that the court shall stay the winding up and dissolution "upon application of the purchasing parties ... in the pending action" [*Corp. Code § 2000(b)*]. Under prior law, the purchasing parties generally sought the relief authorized either by way of motion [*see, e.g., Cubalevic v. Superior Court (1966) 240 Cal. App. 2d 557, 562, 49 Cal. Rptr. 698* ; *Esparza v. Kadam, Inc. (1960) 182 Cal. App. 2d 802, 807, 6 Cal. Rptr. 450]* or by answer [*see, e.g., Venables v. Credential Ins. Agency, Inc. (1956) 140 Cal. App. 2d 724, 295 P.2d 547* ; *Merlino v. Fresno Macaroni Mfg. Co. (1946) 74 Cal. App. 2d 120, 168 P.2d 182]* . However, *Code Civ. Proc. § 431.30(c)* provides that affirmative relief may not be claimed in an answer. The motion procedure would only be appropriate: (1) when the purchasing parties were made parties defendant to the involuntary proceedings, which may be the case when some form of remedy, for example, restraints or damages, is sought against the majority shareholders; or (2) when the corporation is the purchasing party. Absent allegations that the majority shareholders are liable in damages or should be restrained from taking some action, the majority shareholders as such may not be joined against their will in the involuntary dissolution proceedings [*Weisman v. Odell (1970) 3 Cal. App. 3d 494, 83 Cal. Rptr. 563]* . On the other hand, the majority shareholders would be unlikely to object to being joined as defendants, even if no relief is sought against them, since presumably involuntary dissolution will vitally affect their interests. For a motion to stay involuntary dissolution proceedings, see *§ 170.61*.

When plaintiff, either for tactical reasons or because he or she seeks no relief against the majority shareholders, names only the corporation as defendant in involuntary proceedings, the purchasing shareholders would file a complaint in intervention. Intervention by any shareholder at any time prior to trial is an unqualified right [*Corp. Code § 1800(c)*; *Hagan v. Superior Court (1960) 53 Cal. 2d 498, 503-504, 2 Cal. Rptr. 288, 348 P.2d 896]* , but is accomplished by leave of the court in accordance with the provisions of *Code Civ. Proc. § 387*. To obtain leave to intervene, the intervenor may present the complaint in intervention ex parte or on noticed motion. For a detailed discussion of the procedure for filing a complaint in intervention, including a procedural guide and forms for motions, see Ch. 395, *Parties* .

[4] Proper Time to Intervene

Intervention must take place "before trial" [*Corp. Code § 1800(c)*; *Code Civ. Proc. § 387*]. Involuntary dissolution proceedings commence when the order for winding up the corporation is entered pursuant to *Corp. Code § 1804* [*Corp. Code § 1805*; *see Rosner v. Benedict Heights, Inc. (1963) 219 Cal. App. 2d 1, 6-7, 32 Cal. Rptr. 764* (holding entry of default against corporation was not equivalent of trial where court did not enter order that corporation be wound up and dissolved)]. That order is entered "after hearing" [*Corp. Code § 1804*], although there is no provision for notice of such a hearing to parties other than the defendant. In fact, except where the majority shareholders are made parties as explained above, they would receive no formal notice of the proceedings until they had "commenced," that is, the trial had begun and the time for intervention had therefore passed [*see Corp. Code § 1805(c)* (requiring the directors to send written notice to shareholders of commencement of the proceedings)]. However, as a practical matter, the majority

would of course have notice of the proceedings by virtue of the service on the corporation, and would seek to intervene either prior to or at the hearing prescribed by *Corp. Code § 1804*.

[5] State Statutes

Intervention by nonparty generally. *Code Civ. Proc. § 387*

Intervention by shareholder or creditor in involuntary dissolution proceedings. *Corp. Code § 1800(c)*

Commencement of involuntary dissolution proceedings; orders. *Corp. Code §§ 1804, 1805*

Stay of winding up and dissolution proceedings on election to purchase moving parties' shares. *Corp. Code § 2000*

Voting power defined. *Corp. Code § 194.5*

[6] Decisions

[a] Avoidance of Dissolution

Defendant's right, in involuntary dissolution, to seek stay in order to have appraisers appointed to ascertain value of plaintiff's shares is right dependent on and ancillary to dissolution proceedings and upon dismissal of those proceedings court is without jurisdiction to grant relief sought by defendant. *Cubalevic v. Superior Court (1966) 240 Cal. App. 2d 557, 562, 49 Cal. Rptr. 698*

Action for involuntary dissolution is special proceeding not requiring findings of fact be made by either court or appraisers appointed to determine the respective interests of the parties pursuant to defendant's motion to avoid dissolution and purchase plaintiff's shares. *Esparza v. Kadam, Inc. (1960) 182 Cal. App. 2d 802, 807, 6 Cal. Rptr. 450*

Right of shareholder to be relieved of election to purchase shares of plaintiff in involuntary dissolution proceedings is within discretion of trial court. *Brodsky v. Seaboard Realty Co. (1962) 206 Cal. App. 2d 504, 517, 24 Cal. Rptr. 61*

[b] Intervention

Shareholder's right to intervene in involuntary dissolution proceedings is unqualified right and not subject to requirement that security be posted even when some claims for relief are derivative in nature. *Hagan v. Superior Court (1960) 53 Cal. 2d 498, 503, 2 Cal. Rptr. 288, 348 P.2d 896*

Entry of default against corporation in involuntary dissolution proceeding is not equivalent of trial for purpose of determining right of shareholder to intervene before trial when court did not enter order under former Corp. Code § 4660 [now *Corp. Code § 1804*] that corporation be wound up and dissolved and therefore proceedings had not commenced. *Rosner v. Benedict Heights, Inc. (1963) 219 Cal. App. 2d 1, 6-7, 32 Cal. Rptr. 764*

[7] Cross References

For discussion, procedures, and forms related to complaints in intervention, see Ch. 395, *Parties*

For a related form, see *§ 170.56*.

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14-170 California Forms of Pleading and Practice--Annotated § 170.58

§ 170.58 Proceedings to Stay Winding Up and Dissolution and Ascertain Value of Moving Parties' Shares [Corp. Code § 2000]--Notice of Motion by Defendant in Involuntary Proceedings

[1] FORM Proceedings to Stay Winding Up and Dissolution and Ascertain Value of Moving Parties' Shares [Corp. Code § 2000]--Notice of Motion by Defendant in Involuntary Proceedings

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	NO. _____
vs.	)	NOTICE OF MOTION AND MOTION FOR OR-
_____ [name],	)	DER STAYING INVOLUNTARY DISSOLUTION
a Corporation,	)	AND APPOINTING APPRAISERS TO ASCER-
[and	)	TAIN VALUE OF PLAINTIFF'S SHARES
_____ (*name*(*s*))],	)	Date of Hearing: _____
Defendant(s).	)	Time of Hearing: _____
	)	Location of Hearing: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To plaintiff(s) and _____ [his *or* her *or* their] attorney(s) of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], California, defendant(s) will, and hereby do(es) move for an order to stay the proceedings herein and to appoint appraisers for the purpose of ascertaining the fair value of the shares of defendant corporation owned by plaintiff(s). The motion will be made on the

grounds that defendant(s) _____ [*name(s) of purchasing defendant*(*s*)], has/have] elected to purchase _____ [plaintiff's *or* plaintiffs'] shares _____ [by approval of its outstanding shares, excluding shares held by plaintiff(s) *or* and are holders of 50 percent or more of the voting power of defendant corporation], that defendant(s) is/are unable to agree with plaintiff(s) upon the fair value of those shares, and that defendant(s) will give bond with sufficient security to pay the estimated reasonable expenses, including attorney's fees, of plaintiff(s) if defendant(s) fail(s) to make payment for _____ [plaintiff's *or* plaintiffs'] shares within the time specified by the court.

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum served and filed herewith, on the papers and records on file herein, and on any oral and documentary evidence that may be presented at the hearing of the motion.
Dated: _____ [*date*].

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

CAUTION:

A supporting memorandum must accompany notices of motion in law and motion proceedings as defined in *Cal. Rules of Ct., Rule 3.1103(a)(2)* [*Cal. Rules of Ct., Rule 3.1113(a)*]; for discussion and forms, see Ch. 417, *Points and Authorities*]. Although it is not clear whether the definition in Rule 3.1103(a)(2), extends to the motion noticed in the form above, it is better practice to support the motion with a memorandum. Note that if this is a law and motion proceeding within the meaning of Rule 3.1103(a)(2), the format requirements of *Cal. Rules of Ct., Rule 3.1110* will apply to the notice of motion. For discussion and forms, see Ch. 372, *Motions and Orders* .

[2] Use of Form

This notice of motion is used by either the corporation or the shareholders holding 50 percent or more of the corporation's voting power [*see Corp. Code § 194.5* (defining "voting power")] when either has elected to purchase the shares of plaintiffs initiating involuntary dissolution proceedings pursuant to the provisions of *Corp. Code § 2000*. When the shareholders have elected to purchase, this motion would be the appropriate method of staying the involuntary dissolution proceedings only if the shareholders have been joined as defendants in the involuntary proceedings. See the discussion in *§ 170.57* with respect to the rights of nonparty shareholders to intervene. For a detailed discussion of the right of the corporation or the shareholders holding 50 percent or more of the voting power to stay dissolution, see *§ 170.56*.

[3] California Points and Authorities

For a memorandum in support of this motion, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

[4] Cross References

For related forms, see *§§ 170.56* and *170.57*.

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14-170 California Forms of Pleading and Practice--Annotated § 170.59

§ 170.59 Proceedings to Stay Winding Up and Dissolution and Ascertain Value of Moving Parties' Shares [Corp. Code § 2000]--Declaration in Support of Motion by Defendant Shareholders in Involuntary Proceedings

[1] FORM Proceedings to Stay Winding Up and Dissolution and Ascertain Value of Moving Parties' Shares [Corp. Code § 2000]--Declaration in Support of Motion by Defendant Shareholders in Involuntary Proceedings

[*Caption. See § 170.58.*]

I/We _____ [*name*(*s*)], declare:

The undersigned hold(s) _____ [*number*] shares of the stock of defendant corporation, which holdings represent [in excess of] 50 percent of the voting power of the corporation.

On _____ [*date*], the undersigned elected to purchase _____ [plaintiff's *or* plaintiffs'] shares by making a written offer to purchase them at $_____ per share. A copy of the written offer is attached as Exhibit A and incorporated by reference. Plaintiff(s) rejected this offer and plaintiff(s) and the undersigned are unable to agree upon the fair value of _____ [plaintiff's *or* plaintiffs'] shares.

The undersigned will obtain a bond with sufficient security, in the amount fixed by the court, to pay the estimated reasonable expenses, including attorney's fees of plaintiff(s), if the undersigned fail(s) to make payment for _____ [plaintiff's *or* plaintiffs'] shares within the time specified by the court's order.

I/We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature(s)*]
_____ [*typed name(s)*]

[2] Use of Form

This declaration [*Code Civ. Proc. § 2015.5*] is used in lieu of an affidavit [*see Code Civ. Proc. § 2009* (use of affidavit on motion)] to support a motion made by shareholders to stay involuntary dissolution proceedings in order that the plaintiffs' shares may be appraised and purchased by the defendants [*Corp. Code § 2000(b), (c)*].

It is not clear whether the motion supported by this declaration is a law and motion proceeding within the meaning of *Cal. Rules of Ct., Rule 3.1103(a)(2)*. If it is, the caption of the declaration must state the name of the declarant and must specifically identify the motion or other proceeding that it supports or opposes [*Cal. Rules of Ct., Rule 3.1115*], and comply with the format requirements for law and motion papers required by *Cal. Rules of Ct., Rule 3.1110*]. For discussion and forms, see Ch. 372, *Motions and Orders* .

[3] State Statutes

Use of affidavit on motion. *Code Civ. Proc. § 2009*

Use of declaration under penalty of perjury in lieu of affidavit. *Code Civ. Proc. § 2015.5*

[4] Cross References

For a related form, *see § 170.58*.

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14-170 California Forms of Pleading and Practice--Annotated § 170.60

§ 170.60 Proceedings to Stay Winding Up and Dissolution and Ascertain Value of Moving Parties' Shares [Corp. Code § 2000]--Declaration in Support of Motion by Defendant Corporation in Involuntary Proceedings

[1] FORM Proceedings to Stay Winding Up and Dissolution and Ascertain Value of Moving Parties' Shares [Corp. Code § 2000]--Declaration in Support of Motion by Defendant Corporation in Involuntary Proceedings

[*Caption. See § 170.58.*]

I, _____ [*name*], declare:

I am the _____ [*specify title, e.g.*, secretary] of defendant corporation and am authorized to make this declaration on behalf of the corporation.

On _____ [*date*], a resolution was introduced at a special meeting of shareholders called for the purpose of approving defendant's election to purchase shares owned by plaintiff(s) in order to avoid the involuntary dissolution of defendant. A copy of this resolution is attached as Exhibit A and incorporated by reference. The resolution received approval of the outstanding shares of defendant.

On _____ [*date*], pursuant to the aforementioned resolution a written offer was submitted to plaintiff(s) to purchase _____ [his *or* her *or* their] shares at $_____ per share. A copy of the written offer is attached as Exhibit B and incorporated by reference. Plaintiff(s) rejected the offer and consequently plaintiff(s) and defendant are unable to agree upon the fair value of _____ [plaintiff's *or* plaintiffs'] shares.

Defendant is prepared to furnish a bond with sufficient security, in the amount fixed by the court, to pay the estimated reasonable expenses, including attorney's fees of plaintiff(s), if defendant fails to make payment for _____ [plaintiff's *or* plaintiffs'] shares within the time specified by the court's order.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This declaration is used to support a motion made by the corporation when it has elected to purchase the shares of plaintiff shareholders in involuntary dissolution proceedings [*Corp. Code § 2000(a)-(c)*].

It is not clear whether the motion supported by this declaration is a law and motion proceeding within the meaning of *Cal. Rules of Ct., Rule 3.1103(a)*. If it is, the caption of the declaration must state the name of the declarant and must specifically identify the motion or other proceeding that it supports or opposes [*Cal. Rules of Ct., Rule 3.1115*], and comply with the format requirements for law and motion papers required by *Cal. Rules of Ct., Rule 3.1110*]. For discussion and forms, see Ch. 372, *Motions and Orders* .

[3] Cross References

For a related form, *see § 170.58*.

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14-170 California Forms of Pleading and Practice--Annotated § 170.61

§ 170.61 Proceedings to Stay Winding Up and Dissolution and Ascertain Value of Moving Parties' Shares [Corp. Code § 2000]--Order Staying Proceedings and Appointing Appraisers to Ascertain Value of Shares

[1] FORM Proceedings to Stay Winding Up and Dissolution and Ascertain Value of Moving Parties' Shares [Corp. Code § 2000]--Order Staying Proceedings and Appointing Appraisers to Ascertain Value of Shares

[*Caption. See § 170.56* (*voluntary dissolution*) *or see §§ 170.57* and *170.58* (*involuntary dissolution*).]

The _____ [*specify pleading, e.g.*, motion] of _____ [*specify purchasing party, e.g.*, defendant] to stay the winding up and dissolution of _____ [*name of corporation*] and appoint appraisers to appraise the fair value of shares held by _____ [*specify moving party, e.g.*, plaintiffs] came on regularly for hearing before the court on this date. _____ [*Specify purchasing party, e.g.*, Defendant] appeared by counsel _____ [*name*]; _____ [*specify moving party, e.g.*, plaintiffs] appeared by counsel _____ [*name*].

On proof to the satisfaction of the court that the relief sought in the _____ [*specify pleading, e.g.*, motion] should be granted,

IT IS HEREBY ORDERED:

1. That the proceeding for _____ [voluntary *or* involuntary] winding up and dissolution of _____ [*name of corporation*] is stayed pending ascertainment by the court of the fair value of _____ [*specify moving party, e.g.*, plaintiffs'] shares as ordered herein.

2. That _____ [*names of three appraisers*] are hereby appointed appraisers and they are directed to appraise the fair value of the shares owned by _____ [*specify moving party, e.g.*, plaintiffs] and to report such value to the court within _____ [*number*] days from the date of this order.

[*If evidence is required to be taken, set forth the time and manner of producing it.*]

Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This order is used to stay proceedings for either voluntary [*see Corp. Code §§ 1900-1907*] or involuntary [*see Corp. Code §§ 1800-1809*] dissolution of the corporation and to appoint appraisers to determine the value of the shares of the "moving parties"--that is, those seeking dissolution [*Corp. Code § 2000(a)*].

Although the order will be substantively the same whether the order is sought by petition in involuntary proceedings [*see § 170.56*], or by complaint in intervention [*see § 170.57*] or motion [*see § 170.58*] in involuntary proceedings, it is important that special attention be paid to the pleading referred to and the designation of the parties when filling in the blanks in this form.

For discussion of orders and notice of entry of orders generally, and related forms, see Ch. 372, *Motions and Orders* .

[3] Cross References

For related forms, see *§§ 170.56*, *170.57*, and *§ 170.58*.

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14-170 California Forms of Pleading and Practice--Annotated § 170.62

§ 170.62 Proceedings to Stay Winding Up and Dissolution and Ascertain Value of Moving Parties' Shares [Corp. Code § 2000]--Decree for Winding Up and Dissolution Unless Payment for Moving Parties' Shares Made

[1] FORM Proceedings to Stay Winding Up and Dissolution and Ascertain Value of Moving Parties' Shares [Corp. Code § 2000]--Decree for Winding Up and Dissolution Unless Payment for Moving Parties' Shares Made

[*Caption. See § 170.56* (*voluntary dissolution*) *or see §§ 170.57* and *170.58* (*involuntary dissolution*).]

The appraisers heretofore appointed by the court to ascertain the fair value of the shares of _____ [*name of corporation*] held by _____ [*specify moving party, e.g.*, plaintiffs] have made their report ascertaining such value to be $_____ per share and awarding to _____ [*specify moving party, e.g.*, plaintiffs] the sum of $_____ for _____ [*number*] shares.

IT IS THEREFORE DECREED:

1. That the award by the appraisers be, and it is, confirmed, final, and conclusive upon all parties.

2. That _____ [*specify moving party, e.g.*, plaintiffs] have payment of the sum of $_____ [*amount of appraisers' award*] against _____ [*name(s) of purchasing party*], payment to be made within _____ [*number*] days after entry of this decree; provided, however, that if payment is not made within that time, the winding up and dissolution of _____ [*name of corporation*] shall proceed forthwith and judgment shall be entered against _____ [*specify purchasing party, e.g.*, defendants] and against _____ [*name of surety on bond*] for the amount of the expenses, including attorney's fees, of _____ [*specify moving party, e.g.*, plaintiffs].

3. That _____ [*specify moving party, e.g.*, plaintiffs] transfer their _____ [*number*] shares to _____ [*name(s) of purchasing party*], appropriately endorsed, upon receipt of the payment or tender thereof as herein ordered.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This decree is used to alternatively award the moving parties the amount ascertained by appraisers to be the fair value of their shares, or to order the winding up and dissolution of the corporation and judgment against the purchasing parties and their surety for the moving parties' expenses, including attorney's fees [*Corp. Code § 2000(c)*]. If the purchasing parties wish to avoid winding up and dissolution, they must pay the amount awarded to the moving parties within the time specified in the court's decree. On receiving payment or tender, the moving parties must transfer their shares to the purchasing parties [*Corp. Code § 2000(d)*]. Although the provisions governing purchase of the moving parties' shares do not specify what further action must be taken to collect on the surety's bond should the purchasing parties fail to pay for the moving parties' shares, it would seem tha such a failure would have to be brought to the court's attention in the form of a motion stating that payment has not been made and that the moving parties are therefore entitled to collect on the bond.

[3] Cross References

For related forms, see *§§ 170.56*, *170.57*, and *§ 170.58*.

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14-170 California Forms of Pleading and Practice--Annotated § 170.63

§ 170.63 Final Dissolution--Petition for Order Declaring Corporation Duly Wound Up and Dissolved [Corp. Code § 1907(a)]

[1] FORM Final Dissolution--Petition for Order Declaring Corporation Duly Wound Up and Dissolved [Corp. Code § 1907(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In re _____ [*name*], _____ a Corporation in Process of Winding Up.	))))	NO. _____ PETITION FOR ORDER DECLARING CORPORATION DULY WOUND UP AND DISSOLVED

Petitioners allege:

1. _____ [*Name*] is a corporation duly organized and existing under the laws of the State of California and has its principal office in _____ County, California.

2. Petitioners are the duly elected, qualified, and acting directors of the corporation and constitute all of the directors thereof.

3. On _____ [*date*], an election was made by the corporation through _____ [*specify, e.g.*, the vote of shareholders representing 50 percent or more of the voting power of the corporation] to voluntarily wind up and dissolve the corporation. A certificate evidencing that election was filed in the office of the Secretary of State of California on _____ [*date*]. A copy of such certificate is attached as Exhibit A and incorporated by reference.

4. On or about _____ [*date*], the directors of the corporation caused written notice of the

commencement of the proceeding for voluntary winding up to be given by mail to all shareholders and all known creditors and claimants whose addresses appear on the records of the corporation.

5. The affairs of the corporation have been completely wound up in that:

a. A final franchise tax return has been filed with the Franchise Tax Board as required by *Revenue and Taxation Code Section 18401*.

b. The corporation's known debts and liabilities have been paid _____ [or adequately provided for *or* as far as its assets permitted].

c. All assets of the corporation remaining after payment of or adequate provision for the debts, liabilities, and taxes have been distributed among the shareholders according to their rights and preferences.

6. A copy of the final accounts of petitioners as directors of the corporation is attached as Exhibit B and incorporated by reference.

WHEREFORE, petitioners pray:

1. That the court give and make its order directing all persons interested to show cause why an order should not be made declaring the corporation duly wound up and dissolved, and directing that the order be served by publication of a copy thereof in a newspaper of general circulation in _____ County, California, once a week for three consecutive weeks; and

2. That on hearing the petition the court make its order, as provided in *Section 1808 of the Corporations Code*, declaring the corporation duly wound up and dissolved, and discharging petitioners from their duties and liabilities to creditors and shareholders of the corporation.

_____ [*signature*]
Petitioner
_____ [*signature*]
Petitioner
_____ [*signature*]
Petitioner

[*Verification, if desired. See § 170.50.*]

[2] Use of Form

This petition is filed if the winding up has been accomplished without court proceedings and the directors seek an order declaring the corporation duly wound up and dissolved in lieu of filing the certificate of winding up and dissolution specified in *Corp. Code § 1905* [*Corp. Code § 1907(a)*]. Use of this petition is not mandatory; the directors may instead file a certificate of winding up and dissolution with the Secretary of State. However, use of the instant procedure would seem advisable if there is a possibility that disputes may arise over payment of claims and distribution of assets; the alternative procedure of filing the certificate appears to be for informational purposes only.

[3] Allegations

The petition states:

- The location of the principal office of the corporation (Paragraph 1) [*Corp. Code § 1907(a)* (venue in proper county); *see Corp. Code § 177* (defining "proper county")].

- The status of petitioners as the directors of the corporation (Paragraph 2) [*Corp. Code § 1907(a)*].

- That the winding up was accomplished without court proceedings; in other words, that it is a voluntary proceeding (Paragraph 3) [*see Corp. Code § 1905(a]*.

- That the directors of the corporation caused written notice of commencement of the proceedings for voluntary winding up to be mailed to shareholders and creditors (Paragraph 4) [*see Corp. Code § 1903(c)*].

- That the affairs of the corporation have been completely wound up and dissolved (Paragraph 5) [*see Corp. Code § 1905(a)*].

The petition requests that the court issue its order to show cause why the corporation should not be declared duly wound up and dissolved and that on hearing the petition the court order that the corporation is duly wound up and dissolved and that petitioners are relieved of their obligations and liabilities as directors of the corporation [*see Corp. Code §§ 1808, 1809*]. The order to show cause is set forth in *§ 170.64*.

[4] California Points and Authorities

For memoranda supporting a petition for an order declaring a corporation wound up and dissolved, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

[5] State Statutes

Certificate of dissolution; filing. *Corp. Code § 1905*

Notice to shareholders and creditors of voluntary dissolution proceedings. *Corp. Code § 1903(c)*

Petition for court order declaring corporation duly wound up and dissolved. *Corp. Code § 1907*

[6] Text References

Ballantine and Sterling, California Corporation Laws, Ch. 15, *Dissolution and Winding Up, § 323* (Matthew Bender)

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14-170 California Forms of Pleading and Practice--Annotated § 170.64

§ 170.64 Final Dissolution--Order to Show Cause [Corp. Code § 1907(b)]

[1] FORM Final Dissolution--Order to Show Cause [Corp. Code § 1907(b)]

[*Caption. See § 170.63.*]

To all persons interested as creditors, claimants, and shareholders of _____ [*name of corporation*]:

YOU ARE ORDERED to appear in [_____ (Department *or* Division) _____ of] this court on _____ [*date*], at _____ [*time*], then and there to show cause, if you have any, why the petition for an order declaring _____ [*name*], a California corporation, duly wound up and dissolved, filed herein by _____ [*names of petitioners*], should not be granted.

This order shall be served on you by publication not less than once a week for three consecutive weeks in a newspaper of general circulation published in _____ County, California, and a copy of this order shall be mailed to each person shown as a creditor, claimant, or shareholder on the books of the corporation at his/her last known address.

Any person claiming to be interested as shareholder, creditor, or otherwise may appear in these proceedings at any time before 30 days from the completion of publication of this order and contest the petition. Upon failure to appear, that person's claim shall be barred.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form for an order to show cause is for use when a corporation has voluntarily wound up and dissolved without court proceedings and has petitioned the court for an order declaring it duly wound up and dissolved [*Corp. Code §*

1907(a); *see § 170.63*]. Upon the filing of the petition, the court must make an order requiring all persons interested to show cause why the corporation should not be declared duly wound up and dissolved. The court must direct that the order to show cause be served by notice to all creditors, claimants, and shareholders in the same manner as the notice given under *Corp. Code § 1807(b)* [*Corp. Code § 1907(b)*].

[3] Persons Who May Contest Petition

Any person claiming to be interested as a shareholder, creditor, or otherwise may appear in the proceedings at any time before the expiration of 30 days from the completion of publication of the order to show cause and contest the petition. If such a person fails to appear, his or her claim will be barred [*Corp. Code § 1907(c)*].

[4] State Statutes

Publication and mailing of notice to creditors. *Corp. Code § 1807(b)*

Order to show cause why corporation should not be declared wound up and dissolved. *Corp. Code § 1907(c)*

Persons entitled to contest petition; time limit. *Corp. Code § 1907(c)*

[5] Cross References

For a related form, see *§ 170.63*.

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14-170 California Forms of Pleading and Practice--Annotated § 170.65

§ 170.65 Final Dissolution--Order Declaring Corporation Wound Up and Dissolved [Corp. Code § 1808]

[1] FORM Final Dissolution--Order Declaring Corporation Wound Up and Dissolved [Corp. Code § 1808]

[*Caption. See § 170.63* (*voluntary dissolution*) *or § 170.53* (*involuntary dissolution*).]

On proof made to the satisfaction of the court that the accounts of _____ [*names of directors*] of _____ [*name of corporation*], a California corporation, have been finally settled and that the corporation's affairs are in condition for it to be dissolved,

IT IS THEREFORE ORDERED AND ADJUDGED:

1. That the corporation is duly wound up, that a final franchise tax return has been filed with the Franchise Tax Board as required by *Revenue and Taxation Code Section 18401* and that its known debts and liabilities have been paid or adequately provided for, or that those debts and liabilities have been paid as far as its assets permitted, as the case may be. [*If there are known debts or liabilities for payment of which adequate provision has been made, the order must state what provision has been made, setting forth the name and address of the corporation, person, or governmental agency that has assumed or guaranteed the payment, or the name and address of the depositary with which deposit has been made, or any other information that may be necessary to enable the creditor or other person to whom payment is to be made to appear and claim payment of the debt or liability*.]

2. That all known assets have been distributed to shareholders or wholly applied on account of the corporation's debts and liabilities.

3. That the accounts of directors or other persons have been settled and that they are discharged from their duties and liabilities to creditors and shareholders.

4. That the corporation is dissolved.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is an order declaring a corporation duly wound up and dissolved. It may be used in any of the following instances:

- When the corporation has undergone involuntary dissolution [*see Corp. Code § 1800*; *see also § 170.53*].

- When the corporation's winding up and dissolution have been voluntary but under court supervision [*see Corp. Code § 1904*; *see also § 170.50*].

- When the directors have petitioned the court for an order declaring the corporation duly wound up and dissolved after this has been accomplished without court proceedings [*see Corp. Code § 1907* and *see § 170.63*].

The contents of the order are prescribed by *Corp. Code § 1808*.

[3] Filing Court Order

Whenever a corporation is dissolved or its existence forfeited by order, decree, or judgment of a court, a copy of the order, decree, or judgment, certified by the clerk of the court, must forthwith be filed in the office of the Secretary of State [*Corp. Code § 1809*].

[4] State Statutes

Involuntary dissolution. *Corp. Code § 1800*

Contents of court order declaring corporation duly wound up and dissolved. *Corp. Code § 1808*

Filing of order. *Corp. Code § 1809*

Court-supervised voluntary proceedings. *Corp. Code § 1904*

Petition for order declaring corporation duly wound up and dissolved. *Corp. Code § 1907*

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Volume 15: Costs and Attorney's Fees thru Deeds-Chs. 174-189
Chapter 177 DAMAGES

15-177 California Forms of Pleading and Practice--Annotated 177.syn

§ 177.syn Synopsis to Chapter 177: DAMAGES

§ 177.01 Scope of Chapter

§ 177.02 Cross References

§§ 177.03-177.09 [Reserved]

§ 177.10 Governing Statutes

§ 177.11 Damages and Detriment Defined

§ 177.12 Pleading Damages

[1] General Requirements

[2] General Damages Need Not Be Specially Pleaded

[3] Special Damages Require Specific Pleading

[4] Specification of Damages

§ 177.13 Compensatory Damages

[1] Nature and Purpose

[2] Requirement of Certainty

[3] General and Special Damages

[4] Future Damages

§ 177.14 Recovery of Nominal Damages

[1] Generally

[2] Appeal of Failure to Award Nominal Damages

§ 177.15 Limitation on Amount of Damages

[1] Compensatory Damages Only

[2] Unconscionable or Oppressive Damages

§ 177.16 Election of Remedies

§ 177.17 Duty to Mitigate Damages

§ 177.18 Interest on Awarded Damages

§ 177.19 Excessive or Inadequate Damages

§§ 177.20-177.39 [Reserved]

§ 177.40 Governing Statutes

§ 177.41 Recovery of Compensatory Damages

[1] Generally

[2] Nominal Damages

§ 177.42 Convicted Felon Cannot Recover Damages in Negligence Action if Injury Caused by Commission of Felony or Flight

§ 177.43 Statement of Damages

§ 177.44 Economic and Noneconomic Damages

§ 177.45 Elements of Compensatory Damages for Personal Injuries

[1] General Damages for Pain and Suffering

[2] Limit on Amount in Action Against Health Care Provider

[3] Medical Expenses

[a] Generally

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§ 177.191 Allegation of Damages for Breach of Contract [Civ. Code § 3300]--Loss of Profits by Plaintiff Who Held Contract With Third Person

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[2] Use of Form

[3] Cross References

[4] State Statutes

[5] Decisions

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Chapter 177 DAMAGES

PART I. SCOPE

15-177 California Forms of Pleading and Practice--Annotated § 177.01

§ 177.01 Scope of Chapter

This chapter covers the general subject of damages in both tort and contract actions. The chapter discusses the damages that may be awarded in tort actions involving personal injuries and property damage. It includes general forms of allegations of tort damages for personal injuries and property damage [*see §§ 177.140 -177.155*] as well as a prayer for such damages [*see § 177.157*]. In addition, it includes forms for use in proceedings to obtain discovery of a defendant's financial condition in cases involving punitive damages [*see §§ 177.158 -177.157*.3]. It also includes forms for use in procedures to amend a complaint to state the amount of damages being sought in a personal injury or wrongful death action [*see §§ 177.162 -177.167*]. In addition, it includes a form for use in moving for a new trial on the ground of excessive or inadequate damages [*see § 177.168*] and forms of consent to an addition to [*see § 177.169*] or reduction of [*see § 177.170*] damages.

This chapter does not discuss the damages that may be awarded in specific categories of tort actions. For a discussion of damages in various specific categories of tort actions, see the following chapters: Ch. 58, *Assault and Battery,* Ch. 119, *Claim and Delivery,* Ch. 150, *Conversion,* Ch. 257, *False Imprisonment,* Ch. 269, *Fraud and Deceit,* Ch. 334, *Landlord and Tenant: Claims for Damages,* Ch. 340, *Libel and Slander,* Ch. 357, *Malicious Prosecution and Abuse of Process,* Ch. 362, *Mental Suffering and Emotional Distress,* Ch. 380, *Negligence,* Ch. 391, *Nuisance,* Ch. 421, *Premises Liability,* Ch. 429, *Privacy* , and Ch. 550, *Trespass* . For a discussion of damages in actions for injuries that resulted in death, see Ch. 181, *Death and Survival Actions* .

For discussion of damages in other specific tort actions, see Ch. 23, *Animals: Civil Liability* , Ch. 57, *Art* , Ch. 82A, *Automobiles: Damages* , Ch. 266, *Fences* , and Ch. 267, *Fires* . For additional discussions of injuries to personal and real property, see Ch. 150, *Conversion* , Ch. 391, *Nuisance* , and Ch. 550, *Trespass* .

For discussion of the cause of action for loss of consortium, and the damages that may be recovered in such an action, see Ch. 354, *Loss of Consortium* .

For discussion of the taxation of tort damages, see Levy, Golden, & Sacks, California Torts, Ch. 57 (Matthew Bender).

This chapter also discusses damages that occur because of the breach of an obligation arising from contract. It includes

a form of allegation of general damages [*see § 177.190*], forms of allegations of damages for use in specific contract actions [*see §§ 177.191 -177.195*], and forms of allegation of liquidated damages [§§ 177.196, 177.197]. In addition, it includes a form of a prayer for compensatory damages and interest [*see § 177.198*] and a form of affirmative defense alleging that the plaintiff failed to mitigate damages [*see § 177.199*]. For discussion, procedures, and forms for use in pleading a cause of action in contract, see Ch. 140, *Contracts* . Attorney's fees recoverable pursuant to a contract provision for attorney's fees are an element of costs [*Civ. Code § 1717(a)*; *see* Ch. 174, *Costs and Attorney's Fees*].

This chapter does not discuss damages awarded in actions involving specific contracts or damages based on fiduciary and statutory obligations arising from particular contracts, such as those between broker and client, employer and employee, partners, shareholders, or officers and directors. For discussion and forms relating to those actions, see Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act ;* Ch. 90, *Automobiles: Vehicle Leasing Act ;* Ch. 93, *Bailments* , Ch. 95, *Banks, Deposits, and Checks* , Ch. 103, *Brokers* , Ch. 104, *Building Contracts* , Ch. 109, *Carriers* , Ch. 121, *Common Counts* , Ch. 127, *Consumer Contracts and Loans* , Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* , Ch. 160, *Corporations: Capacity* , Ch. 162, *Corporations: Issuance of Shares ;* Ch. 163, *Corporations: Transfers of Shares ;* Ch. 213, *Documents of Title* , Ch. 249, *Employment Law: Termination and Discipline* , Ch. 308, *Insurance* , Ch. 334, *Landlord and Tenant: Claims for Damages* , Ch. 349, *Literary Property and Copyright* , Ch. 362, *Mental Suffering and Emotional Distress* , Ch. 370, *Motion Pictures* , Ch. 393, *Oil and Gas* , Ch. 401, *Partnerships: Actions Between General Partners and Partnership* , Ch. 413, *Personal Property Leases* , Ch. 538, *Securities and Franchise Regulation* , Ch. 555, *Trust Deeds and Real Property Mortgages* , Ch. 565, *Unfair Competition* , and Ch. 569, *Vendor and Purchaser* .

Damages authorized by Division 2 of the Commercial Code [*see Com. Code § 2701 et seq.*] are discussed in Ch. 500, *Sales: Sales Under the Commercial Code* .

Damages for breach of consumer contracts governed by the Unruh Retail Installment Sales Act or Truth in Lending Act are discussed in Ch. 501, *Sales: Retail Installment Sales* .

Damages for breach of warranties, whether determined under Division 2 of the Commercial Code [*see Com. Code §§ 2714-2719*], under the Song-Beverly Consumer Warranty Act [*see Civ. Code §§ 1794, 1794.1*], or under the Magnuson-Moss Act [*see 15 U.S.C. §§ 2301, 2310*] are discussed in Ch. 502, *Sales: Warranties* .

Complaints to recover damages arising from breach of obligations under secured transactions governed by Division 9 of the Commercial Code, and related forms for asserting affirmative defenses, are located in Ch. 503, *Sales: Secured Transactions*.

Damages arising from breaches of personal property lease agreements are discussed in Ch. 413, *Personal Property Leases* [*see Civ. Code § 3308*; *Com. Code § 10501 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesPunitive DamagesTortsDamagesCompensatory DamagesGeneral OverviewTortsDamagesPunitive DamagesGeneral Overview

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15-177 California Forms of Pleading and Practice--Annotated § 177.02

§ 177.02 Cross References

For discussion and forms relating to damages for encroachments to real property or for lateral and subjacent supports, see Ch. 11, *Adjoining Landowners*

For discussion and forms relating to damage to works of art, see Ch. 57, *Art*

For discussion, procedures, and forms relating to damages arising from the torts of assault and battery, see Ch. 58, *Assault and Battery*

For discussion and forms relating to damages for wrongful attachment, see Ch. 62, *Attachment*

For discussion and forms relating to tort damages arising from the operation of automobiles, see Ch. 82A, *Automobiles: Damages*

For discussion and forms relating to tort damages in actions involving buses and streetcars, see Ch. 106, *Buses and Streetcars*

For discussion and forms relating to damages in actions for the possession of personal property, see Ch. 119, *Claim and Delivery*

For discussion, procedures, and forms relating to tort damages in actions for conversion, see Ch. 150, *Conversion*

For discussion, procedures, and forms relating to the recovery of costs and attorney's fees, see Ch. 174, *Costs and Attorney's Fees*

For discussion and forms relating to the recovery of damages in wrongful death and survival actions, see Ch. 181, *Death and Survival Actions*

For discussion and forms relating to damages in actions for ejectment, see Ch. 241, *Ejectment*

For discussion, procedures, and forms relating to tort damages in actions for false imprisonment, see Ch. 257, *False Imprisonment*

For discussion and forms relating to tort damages in actions involving fences, see Ch. 266, *Fences*

For discussion, procedures, and forms relating to tort damages for fraud and deceit, see Ch. 269, *Fraud and Deceit*

For discussion and forms relating to contribution among joint tortfeasors, see Ch. 300, *Indemnity and Contribution*

For discussion and forms relating to damages for the wrongful use of or interference with irrigation waters, see Ch. 315, *Irrigation*

For discussion and forms relating to tort damages in actions by tenants against landlords, see Ch. 334, *Landlord and Tenant: Claims for Damages*

For discussion, procedures, and forms relating to damages in libel and slander actions and in actions for slander of title and trade libel, see Ch. 340, *Libel and Slander*

For discussion and forms relating to tort damages for plagiarism of a protected literary property, see Ch. 349, *Literary Property and Copyright*

For discussion and forms relating to damages in actions for the wrongful removal of or injury to timber, see Ch. 350, *Logs and Timber*

For discussion, procedures, and forms relating to damages for the torts of malicious prosecution and abuse of process, see Ch. 357, *Malicious Prosecution and Abuse of Process*

For discussion, procedures, and forms relating to tort damages arising from mental suffering and emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress*

For discussion, procedures, and forms relating to damages in negligence actions, see Ch. 380, *Negligence*

For discussion, procedures, and forms relating to tort damages for invasions of privacy, see Ch. 429, *Privacy*

For discussion and forms relating to subrogation of damages, see Ch. 536, *Subrogation*

For discussion, procedures, and forms relating to damages in actions for trespass, see Ch. 550, *Trespass*

For discussion and forms relating to damages in actions involving unfair competition, see Ch. 565, *Unfair Competition*

For a discussion and form for use in actions for damages for breach of a contract for sterilization, see Ch. 4, *Abortion and Birth Control Methods*

For discussion and forms for use in actions for damages for breach of contracts involving architectural services, see Ch. 56, *Architects*

For discussion and forms for use in actions for damages for breach of duties arising from statutes, agreements, and bailments relating to works of art, see Ch. 57, *Art*

For discussion and forms for use in an actions for damages for breach of contracts governed by the Rees-Levering Automobile Sales Finance Act, see Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act*

For discussion and forms for use in an actions for damages for breach of contracts of bailment, see Ch. 93, *Bailments*

For discussion and forms for use in an action for damages for the dishonor of checks, see Ch. 95, *Banks, Deposits, and Checks*

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For discussion and forms for use in actions for damages for breach of building contracts, see Ch. 104, *Building Contracts*

For discussion and forms for use in actions for damages for breach of contracts involving carriers, see Ch. 109, *Carriers*

For discussion of the calculation of damages under common counts, see Ch. 121, *Common Counts*

For discussion and forms for use in actions for damages for breach of consumer contracts, see Ch. 127, *Consumer Contracts and Loans* , and Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts*

For discussion, procedures, and forms for use in pleading a complete cause of action in contract, see Ch. 140, *Contracts*

For discussion and forms for use in actions for damages for breach of contracts relating to corporations, see Ch. 160, *Corporations: Capacity* , Ch. 162, *Corporations: Issuance of Shares* , and Ch. 163, *Corporations: Transfers of Shares*

For discussion and forms for use to recover attorney's fees provided for by a contract provision, see Ch. 174, *Costs and Attorney's Fees*

For discussion and forms for use to recover damages for breach of obligations arising from warehouse receipts and bills of lading, see Ch. 213, *Documents of Title*

For discussion and forms for use in acitons for damages for breach of employment contracts, see Ch. 249, *Employment Law: Termination and Discipline*

For discussion and forms for use in actions for damages for breach of insurance contracts, see Ch. 308, *Insurance*

For a discussion of liquidated damages provisions in real property leases, see Ch. 332, *Landlord and Tenant: The Tenancy*

For discussion and forms for use in actions for damages for breach of leases and covenants, see Ch. 332, *Landlord and Tenant: The Tenancy*

For discussion and forms for use in actions for damages for breach of agreements relating to copyrights, see Ch. 349, *Literary Property and Copyright*

For discussion of damages for mental suffering resulting from breach of contract, see Ch. 362, *Mental Suffering and Emotional Distress*

For discussion and forms for use in actions for damages for breach of agreements relating to production of motion pictures and actors contracts, see Ch. 370, *Motion Pictures*

For forms of complaints for damages for failure of a lessee to drill wells, see Ch. 393, *Oil and Gas*

For discussion and forms relating to actions between general partners and their partnerships, see Ch. 401, *Partnerships: Actions Between General Partners and Partnership*

For discussion and forms relating to actions between general partners or partnerships and third parties, see Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties*

For discussion and forms relating to actions between dissociated partners, the partnership, and third parties, see Ch. 403, *Partnerships: Actions By and Against Dissociated Partners*

For discussion and forms relating to actions between limited partners and the partnership, see Ch. 404, *Partnerships: Actions Between Limited Partners and Partnerships*

For discussion and forms relating to actions between limited partners or partnerships and third parties, see Ch. 405, *Partnerships: Actions Between Limited Partners or Partnerships and Third Parties*

For discussion and forms relating to the dissolution of partnerships, see Ch. 406, *Partnerships: Dissolution*

For discussion and forms for use in actions for damages for breach of personal property leases and bailments for hire, see Ch. 413, *Personal Property Leases*

For discussion and forms for use in actions for damages for breach of sales contracts governed by Division 2 of the Commercial Code, see Ch. 500, *Sales: Sales Under the Commercial Code*

For discussion and forms for use in actions for damages for breach of consumer contracts governed by the Unruh Retail Installment Sales Act or Truth in Lending Act, see Ch. 501, *Sales: Retail Installment Sales*

For discussion and forms for use in actions for damages for breach of warranties, see Ch. 502, *Sales: Warranties*

For discussion and forms for use in actions for damages for breach of obligations arising from secured transactions governed by Division 9 of the Commercial Code, see Ch. 503, *Sales: Secured Transactions*

For discussion and forms for use in actions for damages for breach of contracts relating to investment securities, franchise agreements, including automobile dealerships and petroleum marketing arrangements, and seller-assisted marketing plans, see Ch. 515, *Securities and Franchise Regulation*

For discussion and forms regarding damages in actions involving trust deeds or mortgages, and for waste or rent skimming, see Ch. 555, *Trust Deeds and Real Property Mortgages*

For discussion and forms for use in actions for damages for unfair competition, see Ch. 565, *Unfair Competition*

For discussion and forms for use in actions for damages for breach of contracts involving conveyances of real property, see Ch. 569, *Vendor and Purchaser*

Legal Topics:

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

§§ 177.03[Reserved]

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§ 177.10 Governing Statutes

Damages in general are governed by *Civ. Code § 3281 et seq.* The measure of damages in various situations is governed by *Civ. Code § 3300 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 177.11 Damages and Detriment Defined

As used in this chapter damages are the compensation in money that a person who suffers detriment from the unlawful act or omission of another may recover from the person at fault [*see Civ. Code § 3281*]. Detriment is the loss or harm suffered in person or property [*Civ. Code § 3282*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesMonetary Damages

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§ 177.12 Pleading Damages

[1] General Requirements

A complaint or cross complaint must contain a demand for judgment for the relief to which the pleader claims he or she is entitled. With two important exceptions, noted below, a cause of action seeking money damages must allege the amount of damages being sought [*Code Civ. Proc. § 425.10(b)*]. If this amount is not known, the complaint may state that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when it is ascertained. In this event counsel must remember to amend the complaint accordingly before judgment.

The first exception applies to an action that seeks to recover damages for personal injury or wrongful death. In this case the complaint must *not* state the amount of actual or punitive damages demanded for this particular cause of action [*Code Civ. Proc. § 425.10(a)(2)*]. The amount of damages sought in this type of cause of action is specified in a separate statement of damages, either on the defendant's request or before seeking entry of a default [*see Code Civ. Proc. § 425.11*; and for further discussion of statements of damages, *see § 177.43*].

The second exception applies to any claim for punitive damages, regardless of the type of case or cause of action. No such claim may state an amount sought [*Civ. Code § 3295(e)*; *see also Code Civ. Proc. § 425.115* (notice of reservation of right to recover punitive damages on default)]. Further, in a cause of action for damages based on the malpractice of a health care provider, no claim for punitive damages may be alleged initially, and a claim may added by subsequent amendment only in accordance with the requirements of *Code Civ. Proc. § 425.13*. For further discussion of punitive damages, see *§ 177.51*.

It is common practice to allege damages "according to proof." However, if there is no answer to the complaint or cross complaint, the relief granted cannot exceed the relief demanded in the complaint [*Code Civ. Proc. § 580*]. Therefore, the amount of damages sought must be specified if a default judgment is to be entered [*see Debbie S. v. Ray (1993) 16 Cal. App. 4th 193, 200, 19 Cal. Rptr. 2d 814* (failure to serve statement of damages precluded entry of default judgment in personal injury action in superior court); *Pino v. Campo (1993) 15 Cal. App. 4th Supp. 1, 4-6* (allegation in

municipal court complaint seeking damages "according to proof" and exceeding jurisdictional limit of municipal court could not be basis for default judgment of $25,000); *cf. Brown v. McAdoo (1987) 196 Cal. App. 3d Supp. 20, 23* (complaint in municipal court seeking damages according to proof, and remitting any amounts beyond jurisdiction of court, sufficient to support default judgment of $25,000)]. Given the conflict among the courts regarding the sufficiency of an allegation seeking the jurisdictional maximum, in a limited civil case, counsel should specify the amount of that limit. For detailed discussion of the requirements that must be satisfied before a default judgment may be entered, see Ch. 205, *Defaults and Default Judgments* .

[2] General Damages Need Not Be Specially Pleaded

General damages [*see § 177.13[3]* for definition] need not be specially pleaded, but may be proved under a general allegation of damage. A defendant is presumed to be aware of the damages that necessarily result from the act complained of, so that he or she is not taken by surprise when evidence of these damages is presented at trial [*Stoltz v. Converse (1946) 75 Cal. App. 2d 909, 914-915, 172 P.2d 78* ; *see Myers v. Stephens (1965) 233 Cal. App. 2d 104, 120, 43 Cal. Rptr. 420]* .

[3] Special Damages Require Specific Pleading

A defendant cannot be presumed to be aware of the special damages [*see § 177.13[3]* for definition] resulting from his or her act. Therefore, in order to prevent surprise, this type of damage must be specially set out in the complaint or the plaintiff will not be permitted to give evidence of it at trial [*Shook v. Pearson (1950) 99 Cal. App. 2d 348, 351-352* ; *Stoltz v. Converse (1946) 75 Cal. App. 2d 909, 914-915, 172 P.2d 78]* .

The plaintiff may allege lack of present knowledge in pleading the amounts of special damages in a complaint if he or she also requests leave to insert these amounts in the complaint when they are ascertained [*Hunter v. Freeman (1951) 105 Cal. App. 2d 129, 133, 233 P.2d 65]* . In such a situation, the allegation of special damages must be made definite by amendment before the close of trial [*Wilcox v. Sway (1945) 69 Cal. App. 2d 560, 574, 160 P.2d 154]* . These rules do not apply to a personal injury or wrongful death action, because the amounts of damages in those actions cannot be stated in the complaint [*see Code Civ. Proc. § 425.10(b)*].

[4] Specification of Damages

If a plaintiff fails to pray for compensatory damages in the complaint, he or she cannot recover compensatory damages for the detriment suffered [*Weiss v. Blumencranc (1976) 61 Cal. App. 3d 536, 542, 131 Cal. Rptr. 298* ; *see Code Civ. Proc. § 425.10(a)(2)*]. For examples of prayers for use in tort or contract actions, *see §§ 177.157* and *177.198*, respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsSpecial DamagesCivil ProcedureRemediesDamagesGeneral Overview

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§ 177.13 Compensatory Damages

[1] Nature and Purpose

Compensatory damages are for the purpose of justly compensating an injured person to a degree commensurate with the injury sustained by him or her [*People v. Southern Cal. Edison Co. (1976) 56 Cal. App. 3d 593, 604, 128 Cal. Rptr. 697]* . In a contract case the purpose of contractual damages is to give the nonbreaching party the benefit of its contractual bargain, and the threshold inquiry is what performance the parties bargained for [*Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist. (2004) 34 Cal. 4th 960, 971, 22 Cal. Rptr. 3d 340, 102 P.3d 257]* .

Any award of compensatory damages must be reasonable, but what constitutes a reasonable amount of damages in a particular instance is a question on which there legitimately may be a wide range of opinion [*Civ. Code § 3359*; *People v. Southern Cal. Edison Co. (1976) 56 Cal. App. 3d 593, 604, 128 Cal. Rptr. 697* ; *Risley v. Lenwell (1954) 129 Cal. App. 2d 608, 644-645, 277 P.2d 897]* . The selection of which measure of damages to apply is within the discretion of the trier of fact [*Acree v. General Motors Acceptance Corp. (2001) 92 Cal. App. 4th 385, 396-398, 112 Cal. Rptr. 2d 99* (jury was presented with reasonable basis for computing damages resulting from contract breach involving method used to calculate premium refunds); *GHK Assocs. v. Mayer Group, Inc. (1990) 224 Cal. App. 3d 856, 874, 274 Cal. Rptr. 168* (court emphasized that difficulty in quantifying plaintiff's loss was due to defendant's wrongful conduct; under those circumstances, award based on defendant's actual profit was within trial court's discretion)].

[2] Requirement of Certainty

The general rule is that before a plaintiff may recover compensatory damages, he or she must show with reasonable certainty that he or she has suffered damages by reason of the defendant's wrongful act [*Stott v. Johnston (1951) 36 Cal. 2d 864, 875, 229 P.2d 348* ; *see Civ. Code § 3301*; *see also Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist.(2004) 34 Cal. 4th 960, 975, 22 Cal. Rptr. 3d 340, 102 P.3d 257* (lost profits are often denied in breach of contract cases as too speculative); *Vestar Dev. v. General Dynamics Corp. (9th Cir. 2001) 249 F.3d 958, 961-962* (action for breach of agreement to negotiate was properly dismissed when the only damages sought were lost profits, which could not be proven with reasonable certainty as required by *Civ. Code § 3301*); *Copeland v. Baskin Robbins U.S.A. (2002) 96 Cal. App. 4th 1251, 1260-1264, 117 Cal. Rptr. 2d 875* (defendant entitled to summary judgment in

action for breach of agreement to negotiate when it showed that plaintiff could not establish reliance damages; no recovery for lost profits when no way to know what ultimate terms of agreement, if any, would be)]. Damages that are uncertain, contingent, or speculative cannot be recovered because they are not susceptible to the exactness of proof that is required to fix a liability [*Automatic Poultry Feeder Co. v. Wedel (1963) 213 Cal. App. 2d 509, 516, 28 Cal. Rptr. 795]* .

However, although uncertainty over whether any damages were sustained at all is fatal to recovery, uncertainty concerning the amount is not [*GHK Assocs. v. Mayer Group, Inc. (1990) 224 Cal. App. 3d 856, 873, 274 Cal. Rptr. 168* ; *Bruckman v. Parliament Escrow Corp. (1987) 190 Cal. App. 3d 1051, 1061, 235 Cal. Rptr. 813* ; *Fisher v. Hampton (1975) 44 Cal. App. 3d 741, 748, 118 Cal. Rptr. 811]* . Once the cause and existence of damages have been established, recovery is not denied because the amount of damage is not susceptible of exact proof or is uncertain, contingent, or difficult to ascertain [*Aronowicz v. Nalley's, Inc. (1972) 30 Cal. App. 3d 27, 53, 106 Cal. Rptr. 424]* . If some reasonable basis of computation can be used, the result reached may be only an approximation because the wrongdoer must bear the risk of the uncertainty that his or her own wrong created [*GHK Associates v. Mayer Group, Inc. (1990) 224 Cal. App. 3d 856, 873-876, 274 Cal. Rptr. 168* ; *Distribu-Dor, Inc. v. Karadanis (1970) 11 Cal. App. 3d 463, 470, 90 Cal. Rptr. 231]* .

If damages are uncertain but may be made certain by future acts or events, the court may properly reserve continuing jurisdiction to amend a judgment to insert the amount of additional damages when those amounts are determined [*GHK Assocs. v. Mayer Group, Inc. (1990) 224 Cal. App. 3d 856, 880, 274 Cal. Rptr. 168* (damages for lost profits depended on future sale price of property placed in receivership)].

[3] General and Special Damages

Compensatory or actual damages are classified as either general or special [*see* *Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist. (2004) 34 Cal. 4th 960, 968-969, 22 Cal. Rptr. 3d 340, 102 P.3d 257* (differences between and pleading requirements for general and special damages in contract cases); *Beeman v. Burling (1990) 216 Cal. App. 3d 1586, 1601, 265 Cal. Rptr. 719* ; *Colvig v. RKO Gen., Inc. (1965) 232 Cal. App. 2d 56, 69, 42 Cal. Rptr. 473]* . General damages are those that necessarily result from the act complained of and are implied by law to have thereby accrued to the plaintiff [*Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist. (2004) 34 Cal. 4th 960, 968, 22 Cal. Rptr. 3d 340, 102 P.3d 257* (nature of general damages in contract cases); *Beeman v. Burling (1990) 216 Cal. App. 3d 1586, 1599, 265 Cal. Rptr. 719* ; *Myers v. Stephens (1965) 233 Cal. App. 2d 104, 120, 43 Cal. Rptr. 420* ; *see Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co. (1977) 66 Cal. App. 3d 101, 125, 135 Cal. Rptr. 802* ; *Stoltz v. Converse (1946) 75 Cal. App. 2d 909, 914, 172 P.2d 78]* . Pain and suffering, including emotional distress, that results from tortious conduct is often the principal component of general damages [*see* *Beeman v. Burling (1990) 216 Cal. App. 3d 1586, 1599, 265 Cal. Rptr. 719* ; *Niles v. City of San Rafael (1974) 42 Cal. App. 3d 230, 244, 116 Cal. Rptr. 733]* . For discussion, see *§ 177.45[1]* and Ch. 362, *Mental Suffering and Emotional Distress* .

Special damages are those that do not arise from the wrongful act itself but depend on the circumstances peculiarliar to the infliction of each respective injury. They are the natural consequences of the act or omission complained of but not the necessary result [*Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist. (2004) 34 Cal.4th 960, 968-969, 22 Cal. Rptr. 3d 340, 102 P.3d 257* (nature of special damages in contract cases); *Beeman v. Burling (1990) 216 Cal. App. 3d 1586, 1599, 265 Cal. Rptr. 719* ; *Myers v. Stephens (1965) 233 Cal. App. 2d 104, 120-121, 43 Cal. Rptr. 420* ; *Brunvold v. Johnson (1939) 36 Cal. App. 2d 226, 230, 97 P.2d 489]* .

For discussion of general and special damages in contract actions, see *§ 177.75*.

[4] Future Damages

A plaintiff is entitled to recover damages for all the detriment certain to result in the future [*Civ. Code § 3283*]. Because

of the fundamental principle that damages should be compensatory only, future damages are reduced to present value [*Noble v. Tweedy (1949) 90 Cal. App. 2d 738, 747, 203 P.2d 778]* .

Future damages are subject to the same requirement with respect to certainty as are other compensatory damages. Thus, a claim for future damages may be maintained despite uncertainty of amount but may not be maintained if there is uncertainty as to its occurrence [*Guntert v. City of Stockton (1976) 55 Cal. App. 3d 131, 153, 126 Cal. Rptr. 690]* .

Certainty as to occurrence is satisfied by a showing of reasonable certainty that substantial future damages will result. An award of damages cannot be granted on the basis of anticipated future injuries or other purely hypothetical events. However, by analogy, hypothetical events do not constitute a sufficient basis for denying a recovery for damages that are otherwise reasonably certain to occur. In general, in estimating future damages, a court should consider only those contingencies that are reasonably probable to occur and are reducible to a present monetary value. Any degree of uncertainty introduced by the possibility of future events affecting the extent of injury is disregarded. The fact that the amount thereof may be difficult of exact measurement, or subject to various possible contingencies, does not bar a recovery. If there is a satisfactory method for obtaining a reasonably proximate estimation of the damages, the defendant whose wrongful act gave rise to the injury cannot complain that the amount thereof cannot be determined with mathematical precision [*Noble v. Tweedy (1949) 90 Cal. App. 2d 738, 745-746, 203 P.2d 778* ; *see Caminetti v. Pacific Mut. Life Ins. Co. (1943) 23 Cal. 2d 94, 103, 142 P.2d 741]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 177.14 Recovery of Nominal Damages

[1] Generally

A person may recover nominal damages when a breach of duty has caused no appreciable detriment to him or her [*Civ. Code § 3360*]. However, nominal damages properly may be awarded in only two circumstances. First, they may be recovered if no loss or injury has resulted from an act but the law recognizes a technical invasion of a plaintiff's rights or a breach of duty by a defendant [*Avina v. Spurlock (1972) 28 Cal. App. 3d 1086, 1088, 105 Cal. Rptr. 198]* . In this circumstance, the award of nominal damages is a trifling or token allowance, which compensates for the invasion of the right and, therefore, constitutes a recognition of that right and an admonition that it cannot be invaded with impunity [*see Kluge v. O'Gara (1964) 227 Cal. App. 2d 207, 210, 38 Cal. Rptr. 607* ; *Siminoff v. Jas. H. Goodman & Co. Bank (1912) 18 Cal. App. 5, 15, 121 P. 939]* .

The second circumstance in which nominal damages may be recovered is if real, actual injury has occurred and damages have been suffered, but the extent and amount of the injury and damages cannot be determined from the evidence presented [*Avina v. Spurlock (1972) 28 Cal. App. 3d 1086, 1088, 105 Cal. Rptr. 198]* . In an appropriate case, punitive damages may be awarded in addition to nominal damages of this type since actual damages are shown [*Kluge v. O'Gara (1964) 227 Cal. App. 2d 207, 210, 38 Cal. Rptr. 607]* .

Nominal damages are limited to an amount of a few cents or a dollar. An award other than a token or trifling sum would not be supported by substantial evidence [*Avina v. Spurlock (1972) 28 Cal. App. 3d 1086, 1089, 105 Cal. Rptr. 198]* .

[2] Appeal of Failure to Award Nominal Damages

The general rule is that the failure to award nominal damages is not alone ground for reversal of a judgment or a new trial. However, if a judgment awarding nominal damages would entitle the prevailing party to an award of costs, the failure to award nominal damages can constitute reversible error [*Sweet v. Johnson (1959) 169 Cal. App. 2d 630, 633, 337 P.2d 499* ; *cf. Staples v. Hoefke (1987) 189 Cal. App. 3d 1397, 1406, 235 Cal. Rptr. 165* (failure to award nominal damages not reversible when costs award would be discretionary under *Code Civ. Proc. § 1032(d)*)]. Moreover, if the object of the action is to determine some question of permanent right, the fact that a party can only recover nominal

damages will not prevent a reversal [*Sweet v. Johnson (1959) 169 Cal. App. 2d 630, 633, 337 P.2d 499]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 177.15 Limitation on Amount of Damages

[1] Compensatory Damages Only

Unless otherwise expressly provided by statute, no person can recover a greater amount in damages for the breach of an obligation than he or she could have gained by the full performance thereof on both sides [*Civ. Code § 3358*]. The injured party may not be placed in a better position than he or she would have been in had the wrong not been done [*Basin Oil Co. v. Baash-Ross Tool Co. (1954) 125 Cal. App. 2d 578, 606, 271 P.2d 122* ; *see GHK Assocs. v. Mayer Group, Inc. (1990) 224 Cal. App. 3d 856, 873-875, 274 Cal. Rptr. 168* (*Civ. Code § 3358* not violated by award of 40 percent of profits ordered by 1988 judgment for breach of contract to pay 40 percent of profits from sales that should have occurred in 1984)].

Therefore, damages for the same loss that are recoverable under different claims, counts, causes of action, or theories of recovery must be merged into a single amount in order to avoid a double recovery. Conversely, separate items of compensable damages are recoverable when shown by distinct and independent evidence, whether the amounts are reflected in a single verdict or in multiple verdicts referring to different claims [*Michelson v. Hamada (1994) 29 Cal. App. 4th 1566, 1582-1583, 36 Cal. Rptr. 2d 343]* .

[2] Unconscionable or Oppressive Damages

Damages must be reasonable, and if an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages contrary to substantial justice, no more than reasonable damages can be recovered [*Civ. Code § 3359*; *Coughlin v. Blair (1953) 41 Cal. 2d 587, 600, 262 P.2d 305* ; *Fisher v. Hampton (1975) 44 Cal. App. 3d 741, 747, 118 Cal. Rptr. 811* ; *see Postal Instant Press v. Sealy (1996) 43 Cal. App. 4th 1704, 1717, 51 Cal. Rptr. 2d 365* (franchisor could not recover for "lost future profits" under franchise agreement when franchisor elected to terminate franchise because franchisee failed to make past royalty payments; award would be "unconscionable and oppressive" within meaning of *Civ. Code § 3359* under circumstances)]. This requirement applies to actions in both tort and contract and to other causes of action involving obligations [*People v. Southern Cal. Edison Co. (1976) 56 Cal. App. 3d 593, 604, 128 Cal. Rptr. 697]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 177.16 Election of Remedies

The primary object of an award of damages in a civil action, and the fundamental principle on which it is based, are just compensation or indemnity for the loss or injury sustained by the plaintiff and no more [*Pat Rose Assocs. v. Coombe (1990) 225 Cal. App. 3d 9, 19, 275 Cal. Rptr. 1* ; *see § 177.16*]. One means of preventing excessive or duplicative recovery is the application of the doctrine of election of remedies. The doctrine of election of remedies allows a plaintiff to plead several causes of action or inconsistent remedies based on the same facts, but requires him or her to make an election after trial to collect only one award, so there is no duplicate recovery [*see* *Mansfield v. Pickwick Stages (1923) 191 Cal. 129, 130-131, 215 P. 389* (stating doctrine but holding it inapplicable); *Roam v. Koop (1974) 41 Cal. App. 3d 1035, 1039, 116 Cal. Rptr. 539* (tort claim and contract claim; attachment may have amounted to election to pursue only contract claim, but defendant never raised issue until appeal, so award of punitive damages was affirmed)].

The doctrine applies if a plaintiff seeks duplicate remedies in separate counts, one in contract and another in tort, for a single cause of action arising from the same set of facts [*DuBarry Int'l, Inc. v. Southwest Forest Indus., Inc. (1991) 231 Cal. App. 3d 552, 564, 282 Cal. Rptr. 181* ; *Pat Rose Assocs. v. Coombe (1990) 225 Cal. App. 3d 9, 18, 275 Cal. Rptr. 1* ; *see* *Barrett v. Superior Court (1990) 222 Cal. App. 3d 1176, 1182, 272 Cal. Rptr. 304* (distinction between cause of action and counts)]. The doctrine does not preclude a plaintiff from recovering distinct damages on two separate causes of action, one for breach of contract and the other in tort, if each action arose out of different obligations and different operative facts [*Pat Rose Assocs. v. Coombe (1990) 225 Cal. App. 3d 9, 18, 275 Cal. Rptr. 1* (election of remedies inapplicable to buyer's actions for fraud in sale of property and for breach of lease by seller-tenant); *see also Denevi v. LGCC, L.L.C. (2004) 121 Cal. App. 4th 1211, 1218-1219, 18 Cal. Rptr. 3d 276* (plaintiff's derivative suit to recover on behalf of limited liability company did not bar suit to recover for harm caused to plaintiff personally by earlier fraud used to induce plaintiff to join limited liability company)]. However, it does preclude recovery of the same measure of damages twice, even if distinct causes of action and invasions of different rights are involved [*DuBarry Int'l, Inc. v. Southwest Forest Indus., Inc. (1991) 231 Cal. App. 3d 552, 564, 282 Cal. Rptr. 181]* . In such a case, the jury should be instructed that duplicate damages may not be awarded [*DuBarry Int'l, Inc. v. Southwest Forest Indus., Inc. (1991) 231 Cal. App. 3d 552, 565 n.16, 282 Cal. Rptr. 181]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesElection of Remedies

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§ 177.17 Duty to Mitigate Damages

The doctrine of mitigation of damages holds that a plaintiff who suffers damage as a result of a tort has a duty to take reasonable steps to mitigate those damages and will not be able to recover for any losses that could have been avoided [*Shaffer v. Debbas (1993) 17 Cal. App. 4th 33, 41, 21 Cal. Rptr. 2d 110* ; *see Seaboard Music Co. v. Germano (1972) 24 Cal. App. 3d 618, 622-623, 101 Cal. Rptr. 255]* . A plaintiff may not recover for damage avoidable through ordinary care and reasonable exertion [*Mayes v. Sturdy N. Sales, Inc. (1979) 91 Cal. App. 3d 69, 85, 154 Cal. Rptr. 43* , *disapproved on other grounds, Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454* ; *see Valle de Oro Bank v. Gamboa (1994) 26 Cal. App. 4th 1686, 1691, 32 Cal. Rptr. 2d 329]* . However, a person who reasonably acts to minimize damages can recover the costs of such minimization as damages [*Sheffet v. County of Los Angeles (1970) 3 Cal. App. 3d 720, 730, 84 Cal. Rptr. 11]* .

There are, however, limitations on the application of the rule. The rule has no application if its effect would be to require the innocent party to sacrifice and surrender important and valuable rights [*Seaboard Music Co. v. Germano (1972) 24 Cal. App. 3d 618, 623, 101 Cal. Rptr. 255* ; *see Valle de Oro Bank v. Gamboa (1994) 26 Cal. App. 4th 1686, 1691, 32 Cal. Rptr. 2d 329]* . It is doubtful whether a duty to mitigate, alone, imposes any obligations on a plaintiff to take any action before the injury-producing event occurs [*see Valle de Oro Bank v. Gamboa (1994) 26 Cal. App. 4th 1686, 1691, 1694, 32 Cal. Rptr. 2d 329* (duty of mitigate does not, alone, impose duty on plaintiff to insure)]. Also, it is doubtful whether there is a duty to mitigate if the defendant's breach of duty consists solely of the failure to pay a liquidated sum of money when due [*see Vitagraph, Inc. v. Liberty Theatres Co. (1925) 197 Cal. 694, 698-699, 242 P. 709* ; *Valle de Oro Bank v. Gamboa (1994) 26 Cal. App. 4th 1686, 1692, 32 Cal. Rptr. 2d 329]* .

The rule requiring mitigation of damages does not require an injured person to do what is unreasonable or impracticable [*Guerrieri v. Severini (1958) 51 Cal. 2d 12, 23, 330 P.2d 635* ; *Valle de Oro Bank v. Gamboa (1994) 26 Cal. App. 4th 1686, 1691, 32 Cal. Rptr. 2d 329* ; *Davis v. Local Union No. 11, Int'l Bhd. of Elec. Workers (1971) 16 Cal. App. 3d 686, 696-697*]. What is reasonable must be judged in the light of the situation confronting the injured person at the time the loss was threatened and not by the judgment of hindsight. The fact that reasonable measures other than the one taken would have avoided damage is not, in and of itself, proof of the fact that the one taken, though unsuccessful, was unreasonable. It is sufficient if the party acted reasonably and with due diligence in good faith [*Green v. Smith (1968)*

261 Cal. App. 2d 392, 396, 67 Cal. Rptr. 796 ; *see Zanker Dev. Co. v. Cogito Sys., Inc. (1989) 215 Cal. App. 3d 1377, 1381-1383, 264 Cal. Rptr. 76* (commercial tenant is not required to relet premises to evicted tenant under terms and conditions other than those in defaulted lease)]. Moreover, the duty to mitigate has no application if its effect would be to require an innocent person to sacrifice and surrender important and valuable rights [*Seaboard Music Co. v. Germano (1972) 24 Cal. App. 3d 618, 623, 101 Cal. Rptr. 255]* .

The burden of proving the duty to mitigate damages is on the party asserting that duty [*Stiner v. Travelers Indem. Co. (1964) 226 Cal. App. 2d 128, 133, 37 Cal. Rptr. 813* ; *see Healdsburg Police Officers Assn. v. City of Healdsburg (1976) 57 Cal. App. 3d 444, 456, 129 Cal. Rptr. 216* (trial court did not err in ordering back pay to police officers because city failed to show that during their absence officers made or could have made earnings that would have mitigated their damages)]. The failure to mitigate is an affirmative defense that must be pleaded and proved [*Mayes v. Sturdy N. Sales Inc. (1979) 91 Cal. App. 3d 69, 86, 154 Cal. Rptr. 43* , *disapproved on other grounds, Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454]* .

The question of whether a party has acted reasonably to mitigate damages is ordinarily one of fact, which is subject to review on appeal only to determine whether substantial evidence supports the judgment [*Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 949, 122 Cal. Rptr. 470]* . However, if all of the facts are uncontested and the credibility of witness is not a factor, the issue of the reasonableness of steps taken is a question of law reviewable on appeal [*see Green v. Smith (1968) 261 Cal. App. 2d 392, 397-398, 67 Cal. Rptr. 796]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesAvoidable ConsequencesContracts LawSales of GoodsDamages & RemediesSeller's Damages & RemediesGeneral OverviewTortsDamagesMitigation

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§ 177.18 Interest on Awarded Damages

Every person who is entitled to recover damages certain or capable of being made certain by calculation as of a particular day is entitled to recover interest on those damages as of that day, except during time when the debtor was prevented by law or by the act of the creditor from paying the debt. This rule applies to the recovery of damages and interest from any debtor, including public entities [*Civ. Code § 3287(a)*; *see Code Civ. Proc. § 685.010(a)* (legal rate of interest is 10 percent); *but see Gov. Code § 970.1(b)*; *San Francisco Unified School Dist. v. San Francisco Classroom Teachers Assn. (1990) 222 Cal. App. 3d 146, 150-152, 272 Cal. Rptr. 38* (judgment against public entity as governed by *Gov. Code § 970 et seq.*, not *Code Civ. Proc. § 680.010 et seq.*, so postjudgment interest is payable at 7 percent under *Cal. Const. art. XV, § 1*, rather than at 10 percent under *Code Civ. Proc. § 685.010(b)*)]. Damages are deemed certain or capable of being made certain if there is essentially no dispute between the parties concerning the basis for computing damages should liability be resolved against the defendant [*Fireman's Fund Ins. Co. v. Allstate Ins. Co. (1991) 234 Cal. App. 3d 1154, 1172-1174, 286 Cal. Rptr. 146* ; *Esgro Cent., Inc. v. General Ins. Co. of Am. (1971) 20 Cal. App. 3d 1054, 1060, 98 Cal. Rptr. 153* ; *accord, Adams v. Johns-Manville Corp. (9th Cir. 1989) 876 F.2d 702, 710* (applying California law)]. Although this situation is most likely to occur with regard to a contract action, it may arise in certain tort actions, such as for damages for injury to property [*see, e.g., Adams v. Johns-Manville Corp. (9th Cir. 1989) 876 F.2d 702, 710* (applying California law); *Levy-Zentner Co. v. Southern Pac. Transp. Co. (1977) 74 Cal. App. 3d 762, 769, 770, 142 Cal. Rptr. 1* ; *see also Fireman's Fund Ins. Co. v. Allstate Ins. Co. (1991) 234 Cal. App. 3d 1154, 1172-1174, 286 Cal. Rptr. 146* (in declaratory relief action arising from dispute between insurers regarding which was primary insurer, amount was certain when settlement was paid to insured; interest was payable from that date)]. It may also arise in the context of benefits owedunder a governmental program [*see,e.g., Tripp v. Swoap (1976) 17 Cal. 3d 671, 682, 131 Cal. Rptr. 789, 552 P.2d 749 , overruled on other grounds, Frink v. Prod (1982) 31 Cal. 3d 166, 180, 181 Cal. Rptr. 893, 643 P.2d 476* ; *Aguilar v. Unemployment Ins. Appeals Bd. (1990) 223 Cal. App. 3d 239, 242, 272 Cal. Rptr. 696]* .

Entitlement to prejudgment interest under *Civ. Code § 3287(a)* on benefits owed under a governmental program is entirely unrelated to any distinction in the goals of various governmental programs. All that is necessary is that there be some underlying monetary obligation, including the obligation of a governmental entity [*Tripp v. Swoap (1976) 17 Cal. 3d 671, 681-682, 131 Cal. Rptr. 789, 552 P.2d 749 , overruled on other grounds, Frink v. Prod (1982) 31 Cal. 3d*

166, 180, 181 Cal. Rptr. 893, 643 P.2d 476 ; *Aguilar v. Unemployment Ins. Appeals Bd. (1990) 223 Cal. App. 3d 239, 242-243, 272 Cal. Rptr. 696]* . *Civ. Code § 3287(a)* entitles civil servants to interest on each installment of back salary awards from the date the salary fell due [*Goldfarb v. Civil Service Comm'n (1990) 225 Cal. App. 3d 633, 636, 275 Cal. Rptr. 284]* .

If an action involves both breach of contract and tort claims, prejudgment interest may be awarded under *Civ. Code § 3287(a)* if damages are readily ascertainable [*Marine Terminals Corp. v. Paceco, Inc. (1983) 145 Cal. App. 3d 991, 995, 193 Cal. Rptr. 687* (negligence and breach of contract)].

Requests for prejudgment interest under *Civ. Code § 3287* by a successful plaintiff must be made by way of motion prior to entry of judgment, or the request must be made in the form of a motion for new trial no later than the time allowed for filing such a motion. In a case in which damages were awarded but no interest was included in the verdict, and neither court nor jury had determined whether damages were liquidated or unliquidated, this rule was applied retroactively to plaintiffs who never sought prejudgment interest as part of damages and instead sought interest at the last minute as part of an order awarding costs [*North Oakland Med. Clinic v. Rogers (1998) 65 Cal. App. 4th 824, 829-831, 76 Cal. Rptr. 2d 743]* .

For further discussion of prejudgment interest in a tort action, see *§ 177.53* and Ch. 520, *Settlement and Release* . For further discussion of prejudgment interest in a contract action, see *§ 177.80*. For further discussion of postjudgment interest, see Ch. 318, *Judgments* . For discussion of interest in tort actions generally, see Levy, Golden, & Sacks, California Torts, Ch. 50, (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestPostjudgment InterestCivil ProcedureRemediesJudgment InterestPrejudgment InterestTortsDamagesInterestPostjudgment InterestTortsDamagesInterestPrejudgment Interest

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§ 177.19 Excessive or Inadequate Damages

The assessment of damages is generally left to the unbiased judgment of a jury. However, if a trial judge determines that an award of damages by a jury is either excessive or inadequate, he or she may grant the complaining party a new trial [*Code Civ. Proc. § 657(5)*; *see Butler v. Peluso (1957) 154 Cal. App. 2d 624, 630, 317 P.2d 57* ; *Sullivan v. Matt (1955) 130 Cal. App. 2d 134, 143, 278 P.2d 499* ; *see §§ 177.168 -177.170*]. Reduction of excessive damages must be through a motion for new trial and remittitur. A court may not grant judgment notwithstanding the verdict for a lesser amount of damages than awarded by the jury [*Teitel v. First Los Angeles Bank (1991) 231 Cal. App. 3d 1593, 1602-1606, 282 Cal. Rptr. 916]* .

The court should not grant a new trial on the ground of excessive or inadequate damages unless, after weighing the evidence, it is convinced from the entire record, including reasonable inferences therefrom, that the jury clearly should have reached a different verdict or decision [*Code Civ. Proc. § 657*]. However, if an award of compensatory damages does appear to be excessive, and especially if there is evidence or at least a presumption that the award was the result of passion or prejudice, the court may be required to act [*see California Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 Cal. App. 3d 1, 67-68, 221 Cal. Rptr. 171* (plaintiff's counsel improperly raised issue of punitive damages and urged jury to render excessive compensatory damages to justify award of punitive damages)].

If the court determines that an award is inadequate, it may grant an order for a new trial on the issue of damages unless the party against whom the verdict was rendered consents to an addition to the damages already awarded of an amount that the court determines to be fair and reasonable [*Code Civ. Proc. § 662.5(a)*]. Similarly, if the court decides that a jury's award of damages is excessive, it may grant an order for a new trial on the issue of damages unless the prevailing party agrees to a reduction of the damages by the amount determined by the court to be excessive [*Code Civ. Proc. § 662.5(b)*]. An addition to the amount of damages is termed additur and a reduction in the amount is referred to as remittitur [*see Jehl v. Southern Pac. Co. (1967) 66 Cal. 2d 821, 827-833, 59 Cal. Rptr. 276, 427 P.2d 988]* .

A motion for a new trial is a condition precedent to urging that damages are excessive or inadequate on appeal. Nevertheless, a party who has not moved for a new trial may appeal a decision claiming errors in the admission of evidence and errors in instructions even though the errors also affected the amount of damages [*Schroeder v. Auto*

Driveaway Co. (1974) 11 Cal. 3d 908, 918, 114 Cal. Rptr. 622, 523 P.2d 662 ; *Mendoyoma, Inc. v. Mendocino County (1970) 8 Cal. App. 3d 873, 877-878, 87 Cal. Rptr. 740]* .

In ruling on a motion for a new trial on the ground of excessive or inadequate damages, the trial court sits not in an appellate capacity but as an independent trier of fact. In granting an order for a new trial conditioned on additur or remittitur, the court, in effect, grants the order unless the affected party consents to the addition or reduction of so much of the verdict as the court, in its independent judgment, determines from the evidence to be fair and reasonable. On appeal, the order is reversed only if the trial court has plainly abused its discretion; and there is no abuse of discretion if there is a material conflict in the evidence regarding the extent of damage [*Neal v. Farmers Ins. Exch. (1978) 21 Cal. 3d 910, 932-933, 148 Cal. Rptr. 389, 582 P.2d 980* ; *see Wallis v. Farmers Group, Inc. (1990) 220 Cal. App. 3d 718, 739, 269 Cal. Rptr. 299 , disapproved on other grounds, Dore v. Arnold Worldwide, Inc. (2006) 39 Cal. 4th 384, 394 n.2*].

If a trial court grants a new trial, it must specify the reasons for the order in writing [*Code Civ. Proc. § 657*]. The requirement of a written specification of reasons for granting a new trial on damages serves the dual purpose of encouraging careful deliberation by the trial court before ruling on the motion, and of making a record sufficient to permit meaningful appellate review [*see Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 420, 185 Cal. Rptr. 654, 650 P.2d 1171* ; *Stewart v. Truck Ins. Exch. (1993) 17 Cal. App. 4th 468, 484, 21 Cal. Rptr. 2d 338]* .

The court must either give its written statement of reasons in the order granting new trial or in a separate statement filed within 10 days. The court may not delegate the task to counsel [*Code Civ. Proc. § 657*; *see Stewart v. Truck Ins. Exch. (1993) 17 Cal. App. 4th 468, 484, 21 Cal. Rptr. 2d 338]* . Oral statements are not sufficient, and substantial compliance is likewise insufficient; full and timely compliance with the statute is required [*Stewart v. Truck Ins. Exch. (1993) 17 Cal. App. 4th 468, 484-485, 21 Cal. Rptr. 2d 338]* .

For forms for use with regard to a motion for new trial on the grounds of excessive or inadequate damges, *see §§ 177.168 -177.170*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentAdditurs & RemittitursGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentAdditurs & RemittitursAdditursCivil ProcedureJudgmentsRelief From JudgmentAdditurs & RemittitursRemittitursCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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[Reserved]

§§ 177.20[Reserved]

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§ 177.40 Governing Statutes

Statutes governing the measure of damages in tort actions are contained in *Civ. Code §§ 3333-3344*, *3346*, *3355*, and *3356*. The pleading of damages for personal injury or wrongful death is governed by *Code Civ. Proc. §§ 425.10(b)*, *425.11*, and *425.115*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsSpecial DamagesTortsDamagesGeneral Overview

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§ 177.41 Recovery of Compensatory Damages

[1] Generally

Except as otherwise provided, the measure of damages for the breach of an obligation not arising from contract is the amount that will compensate for all the detriment proximately caused by the defendant's breach, whether it could have been anticipated or not [*Civ. Code § 3333*]. The purpose of *Civ. Code § 3333* is to make a successful plaintiff whole [*Overgaard v. Johnson (1977) 68 Cal. App. 3d 821, 824, 137 Cal. Rptr. 412]* . Damages are limited to those damages proximately caused by the tort forming the basis of the action [*State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co. (1970) 9 Cal. App. 3d 508, 528, 88 Cal. Rptr. 246]* .

In general, one who has been tortiously injured need not prove the extent of his or her damages with the same degree of certainty that is required for proof of the underlying tort and causation. The injured party need only establish the extent of the harm and the amount of money that will represent adequate compensation with as much certainty as the nature of the tort and the circumstances permit. Although it is desirable that an injured person prove the amount of damages with as much certainty as is reasonably possible, it is even more desirable that an injured person not be deprived of substantial compensation merely because he or she cannot prove with complete certainty the extent of harm suffered [*Clemente v. State of California (1985) 40 Cal. 3d 202, 219, 219 Cal. Rptr. 445, 707 P.2d 818]* .

[2] Nominal Damages

Nominal damages are not permitted in an action in which actual damages constitute an element of plaintiff's cause of action. For example, an action for negligence does not lie unless the plaintiff proves actual damages. A failure to prove actual damages, therefore, also defeats any right to nominal damages [*Fields v. Napa Milling Co. (1958) 164 Cal. App. 2d 442, 448, 330 P.2d 459* ; *see Walker v. Pacific Indem. Co. (1960) 183 Cal. App. 2d 513, 517, 6 Cal. Rptr. 924]* . For a further discussion of nominal damages, see *§ 177.14*.

Legal Topics:

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

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§ 177.42 Convicted Felon Cannot Recover Damages in Negligence Action if Injury Caused by Commission of Felony or Flight

Proposition 213, adopted by the voters at the election of November 5, 1996, added *Civ. Code § 3333.3*, which provides that in any actions for damages based on negligence, a person may not recover any damages if the plaintiff's injuries were in any way proximately caused by the plaintiff's commission of any felony, or immediate flight therefrom, and the plaintiff has been duly convicted of that felony [*Civ. Code § 3333.3*].

Legal Topics:

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

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§ 177.43 Statement of Damages

In an action for the recovery of actual or punitive damages for personal injury or wrongful death, the amount of damages are not to be stated in the complaint or cross complaint [*Code Civ. Proc. § 425.10(b)*]. The amount of damages may not be stated even by a later amendment to the pleading [*Austin v. Regents of Univ. of Cal. (1979) 89 Cal. App. 3d 354, 359, 152 Cal. Rptr. 420]* . Instead, the party against whom the action is brought may request, at any time, a statement setting forth the nature and amount of damages being sought. The request must be served on the party seeking damages, and that party must then serve a responsive statement within 15 days [*Code Civ. Proc. § 425.11(b)*; *see Beeman v. Burling (1990) 216 Cal. App. 3d 1586, 1599, 265 Cal. Rptr. 719* ; *Plotitsa v. Superior Court (1983) 140 Cal. App. 3d 755, 761-762, 189 Cal. Rptr. 769* (statement that does not include breakdown between general and special damages is insufficient)]. If a response is not served, the party requesting the statement of damages, on notice to the party seeking damages, may petition the court to order the party seeking damages to serve a responsive statement [*Code Civ. Proc. § 425.11(b)*].

If no request is made for a statement of damages, the plaintiff must still serve the statement on the defendant before a default may be taken [*Code Civ. Proc. § 425.11(c)*]. A default that has been entered even though the plaintiff failed to serve the required notice must be set aside [*Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 431-435, 280 Cal. Rptr. 83, 808 P.2d 226* (decided under former version of statute; disapproving language in *Morgan v. Southern Cal. Rapid Transit Dist. (1987) 192 Cal. App. 3d 976, 987, 237 Cal. Rptr. 756* , permitting award of damages in amount of superior court's minimum jurisdictional amount on default, even if no statement of damages is served)].

The plaintiff preserves the right to seek punitive damages under *Civ. Code § 3294* on a default judgment by serving on the defendant a statement as set forth in *Code Civ. Proc. § 425.115* [*Code Civ. Proc. § 425.115(b)*; *see* § 177.157.5]. If the defendant appears in the action, the plaintiff is not limited to the amount set forth in the statement [*Code Civ. Proc. § 425.115(c)*]. Notice of the amount of punitive damages sought must be given to a defendant before a default judgment including punitive damages may be entered [*Code Civ. Proc. § 425.115(f)*; *see* *Wiley v. Rhodes (1990) 223 Cal. App. 3d 1470, 1472-1474, 273 Cal. Rptr. 279* (due process requires notice of amount of punitive damages)]. The plaintiff may serve the statement preserving the right to seek punitive damages on the defendant pursuant to *Code Civ. Proc. § 425.115*, and may serve the statement as a part of the statement required by *Code Civ. Proc. § 425.11* (statement of

nature and amount of damages being sought) [*Code Civ. Proc. § 425.115(e)*].

The statement of damages must be served on a party who has not appeared in the action in the same manner as a summons [*Code Civ. Proc. § 425.11(d)(1)*; *see Code Civ. Proc. § 415.10 et seq.* (manner of service of summons)]. If a party has appeared in the action, the statement shall be served on his or her attorney, or on the party if he or she has appeared without an attorney, in the manner provided for service of a summons or in the manner provided by *Code Civ. Proc. §§ 1010-1020* [*Code Civ. Proc. § 425.11(d)(2)*].

It is not clear how much time must elapse after the statement of damages is served before a default may be entered. The Supreme Court has merely held that a defendant is entitled to actual notice of the liability to which he or she may be subjected, a reasonable period of time before default may be entered [*Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 435, 280 Cal. Rptr. 83, 808 P.2d 226]* . Some courts of appeal had held, before the Supreme Court's decision in *Schwab*, that the defendant must be given 30 days to respond before a default may be entered [*Plotitsa v. Superior Court (1983) 140 Cal. App. 3d 755, 761, 189 Cal. Rptr. 769* (likening statement of damages to amendment of complaint, which gives defendant 30 days to answer under *Code Civ. Proc. § 471.5*)]. However, the Court's statement of the requirement in terms of reasonableness indicates that less than 30 days may be reasonable under some circumstances, and at least one court of appeal has upheld a default entered less than 30 days after receiving the statement of damages [*California Novelties, Inc. v. Sokoloff (1992) 6 Cal. App. 4th 936, 944-945, 7 Cal. Rptr. 2d 795* (defendant accepted notice by mail 17 days before entry of default)]. The 1993 amendment of *Code Civ. Proc. § 425.11*, to specify that a defendant who has not appeared in the action must be served in the manner of a summons, may indicate that courts will require that defendants be given comparable time to respond.

There also appears to be a split of authority over whether a statement of damages is required before judgment may be entered against a defendant who has been served by publication and failed to respond [*compare Parish v. Peters (1991) 1 Cal. App. 4th 202, 210-214, 1 Cal. Rptr. 2d 836* (service required by due process); *with Candelaria v. Avitia (1990) 219 Cal. App. 3d 1436, 1440-1442, 269 Cal. Rptr. 32* (second service by publication is "idle act"); *see also Code Civ. Proc. § 585(c)* (entry of default not required before judgment may be entered against defendant served by publication)].

If an answer is filed and no request for a statement is made, the party seeking damages must give the notice at least 60 days prior to the date set for trial [*Code Civ. Proc. § 425.11*]. The failure to give the notice can be the basis for an order vacating a judgment, at least if the defendant has not appeared at trial [*Debbie S. v. Ray (1993) 16 Cal. App. 4th 193, 200, 200 n.3, 19 Cal. Rptr. 2d 814* (noting that, had defense counsel appeared at trial and presented defense without objecting to lack of statement, defect might have been waived; anomaly of giving nonappearing defendant greater remedy than defendant who appears held to be for legislature to address)]. If the notice is given and the case proceeds to trial, the plaintiff's damages are not limited to the amount requested in the statement of damages [*Damele v. Mack Trucks, Inc. (1990) 219 Cal. App. 3d 29, 38-42, 267 Cal. Rptr. 197]* . The proper procedure is to move after trial to amend the statement to conform to proof, although a failure to do so does not require reversal and retrial [*Damele v. Mack Trucks, Inc. (1990) 219 Cal. App. 3d 29, 42, 267 Cal. Rptr. 197* ; *see Castaic Clay Mfg. Co. v. Dedes (1987) 195 Cal. App. 3d 444, 450, 240 Cal. Rptr. 652]* .

An action for legal malpractice is not considered to be an action for personal injury for purposes of *Code Civ. Proc. § 425.11*. Thus, no statement of damages is required under that statute, although a plaintiff is limited to the amount of damages specified in the complaint if a default judgment is entered [*Levine v. Smith (2006) 145 Cal. App. 4th 1131, 1136-1137, 52 Cal. Rptr. 3d 197]* . If the complaint fails to state an amount of damages sought, constructive notice of the amount of potential liability on the part of the defendant is insufficient to support an award of damages through default judgment [*Stein v. York (2010) 181 Cal. App. 4th 320, 326-327, 105 Cal. Rptr. 3d 1]* .

For forms for use with regard to requesting and providing a statement of damages, *see §§ 177.163 -177.167*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsDamagesCompensatory DamagesGeneral OverviewTortsDamagesPunitive DamagesGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 15: Costs and Attorney's Fees thru Deeds-Chs. 174-189
Chapter 177 DAMAGES
PART II. LEGAL BACKGROUND
B. Tort Damages

15-177 California Forms of Pleading and Practice--Annotated § 177.44

§ 177.44 Economic and Noneconomic Damages

For purposes of the doctrine of joint and several liability, damages are classified as either economic or noneconomic damages [*see Civ. Code §§ 1431.1-1431.5*]. Economic damages are defined as objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment, and loss of business opportunities [*Civ. Code § 1431.2(b)(1)*]. Noneconomic damages are defined as subjective, nonmonetary losses, including but not limited to pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation [*Civ. Code § 1431.2(b)(2)*].

In any action for personal injury, property damage, or wrongful death, the liability of each defendant for noneconomic damages is several only. Each defendant is liable only for the percent of noneconomic damages that corresponds to that defendant's percentage of fault. Tortfeasors are jointly and severally liable for economic damages [*Civ. Code § 1431.2(a)*]. As a result, the effect of a settlement of one joint tortfeasor on the liability of nonsettling joint tortfeasors depends on an allocation of the settlement award between economic and noneconomic damages. Only the portion of the settlement that represents economic damages offsets the liability of the nonsettling tortfeasors for economic damages [*see Code Civ. Proc. § 877*; *Espinoza v. Machonga (1992) 9 Cal. App. 4th 268, 275-276, 11 Cal. Rptr. 2d 498]* . For further discussion of allocation of damages between joint tortfeasors, see Ch. 300, *Indemnity and Contribution* .

There is a similar distinction between economic and noneconomic damages that applies to an action for professional negligence against a health care provider [*see Civ. Code § 3333.2*]. For discussion, see *§ 177.45[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesLost IncomeGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsDamagesPunitive DamagesGeneral OverviewTortsProcedureMultiple DefendantsJoint & Several Liability

California Forms of Pleading and Practice--Annotated

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§ 177.45 Elements of Compensatory Damages for Personal Injuries

[1] General Damages for Pain and Suffering

Under *Civ. Code § 3333*, pain and suffering is a detriment for which a plaintiff may be compensated. Damages for pain and suffering are general damages and may be recovered under a general allegation of damages [*Beeman v. Burling (1990) 216 Cal. App. 3d 1586, 1599-1600, 265 Cal. Rptr. 719* ; *Niles v. City of San Rafael (1974) 42 Cal. App. 3d 230, 244, 116 Cal. Rptr. 733]* . Damages for pain and suffering include future pain and suffering as well as that incurred up to the time of trial [*see Mendoza v. Rudolf (1956) 140 Cal. App. 2d 633, 636-637, 295 P.2d 445]* .

Generally, the terms "pain" and "suffering" are not distinguished but constitute a single concept under which a plaintiff may recover for physical pain and mental suffering [*Capelouto v. Kaiser Found. Hosps. (1972) 7 Cal. 3d 889, 892-893, 103 Cal. Rptr. 856, 500 P.2d 880]* . The terms include physical pain, fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror, and ordeal [*Capelouto v. Kaiser Found. Hosps. (1972) 7 Cal. 3d 889, 892-893, 103 Cal. Rptr. 856, 500 P.2d 880* ; *Huff v. Tracy (1976) 57 Cal. App. 3d 939, 943, 129 Cal. Rptr. 551]* .

A pain and suffering award may include compensation for the plaintiff's loss of enjoyment of life, called hedonic damages. However, loss of enjoyment of life is only one component of a general damage award for pain and suffering. It is not calculated as a separate award [*Loth v. Truck-A-Way Corp. (1998) 60 Cal. App. 4th 757, 763, 70 Cal. Rptr. 2d 571]* . Expert testimony on the value of life and how to compute hedonic damages is inadmissible in a personal injury trial. Such expert testimony has the potential for misleading the jury to award double damages for the same injury; once based on pain and suffering and once based on loss of enjoyment of life. Further, the method of computing hedonic damages is not a matter for which expert testimony is admissible under *Evid. Code § 801* [*Loth v. Truck-A-Way Corp. (1998) 60 Cal. App. 4th 757, 766-767, 70 Cal. Rptr. 2d 571]* .

For a further discussion of the recovery of damages for mental distress and pain and suffering, see Ch. 362, *Mental Suffering and Emotional Distress* , and Levy, Golden, & Sacks, California Torts, Ch. 51 (Matthew Bender).

[2] Limit on Amount in Action Against Health Care Provider

In an action for injury against a health care provider based on professional negligence, the injured plaintiff may not recover more than $250,000 for noneconomic losses such as pain and suffering [*see Civ. Code § 3333.2*]. *Civ. Code § 3333.2* has been held to apply in a wrongful death action to limit the total recovery of noneconomic damages to $250,000, regardless of the number of heir-plaintiffs who bring the action [*Yates v. Pollock (1987) 194 Cal. App. 3d 195, 200-201, 239 Cal. Rptr. 383]* . However, it has been held to apply separately to a primary claim for professional medical negligence and to a spouse's adjunct claim for loss of consortium, permitting recovery of up to $250,000 on each claim [*Atkins v. Strayhorn (1990) 223 Cal. App. 3d 1380, 1394-1396, 273 Cal. Rptr. 231]* .

The trier of fact must first find the entire amount of the plaintiff's noneconomic damages. The amount is then reduced by the percentage of the plaintiff's comparative fault, if any. If what remains exceeds $250,000, the award is further reduced to that amount [*Atkins v. Strayhorn (1990) 223 Cal. App. 3d 1380, 1391-1393, 273 Cal. Rptr. 231* ; *see McAdory v. Rogers (1989) 215 Cal. App. 3d 1273, 1276-1281, 264 Cal. Rptr. 71]* .

It has been held that if more than one health care provider jointly contributes to a single injury, the plaintiff may recover only $250,000 for noneconomic damages from all defendants, not that amount from each defendant [*Gilman v. Beverly Cal. Corp. (1991) 231 Cal. App. 3d 121, 128, 283 Cal. Rptr. 17* ; *see Yates v. Pollock (1987) 194 Cal. App. 3d 195, 200-201, 239 Cal. Rptr. 383* (in wrongful death action, all plaintiffs are limited to single $250,000 recovery)]. Therefore, under the Fair Responsibility Act of 1986 (Proposition 51), which ended joint liability for noneconomic damages [*see Civ. Code § 1431.2(a)*; *see also* Ch. 300, *Indemnity and Contribution*], a plaintiff may recover only the proportionate share of $250,000 that corresponds to a defendant's comparative fault from that defendant. The court first must reduce the total award for noneconomic damages as found by the jury to $250,000; then $250,000 is to be multiplied by each defendant's percentage of comparative fault to determine the amount of noneconomic damages for which each defendant is severally liable [*see Mayes v. Bryan (2006) 139 Cal. App. 4th 1075, 1101, 44 Cal. Rptr. 3d 14* ; *Gilman v. Beverly Cal. Corp. (1991) 231 Cal. App. 3d 121, 126-130, 283 Cal. Rptr. 17* ; *see also Bell v. Sharp Cabrillo Hosp. (1989) 212 Cal. App. 3d 1034, 1038, 260 Cal. Rptr. 886* (court, without discussion, first reduced damages to $250,000, and then further reduced damages under *Code Civ. Proc. § 877* by amount of settlement with another defendant)].

For further discussion of damages in medical malpractice cases, see Ch. 415, *Physicians: Medical Malpractice* .

[3] Medical Expenses

[a] Generally

A plaintiff may recover as special damages the reasonable value of necessary medical services rendered to him or her in the treatment of an injury attributable to the defendant's wrongful conduct [*see Miller v. San Diego Gas & Elec. Co. (1963) 212 Cal. App. 2d 555, 561, 28 Cal. Rptr. 126* ; *Guerra v. Balestrieri (1954) 127 Cal. App. 2d 511, 520* ; *Wilcox v. Sway (1945) 69 Cal. App. 2d 560, 573-574, 160 P.2d 154]* . Such damages include medical expenses that he or she has incurred but not yet paid [*Brown v. Guarantee Ins. Co. (1957) 155 Cal. App. 2d 679, 691, 319 P.2d 69]* . Additionally, damages may be recovered for future medical expenses if the expenses are reasonably certain and are not speculative [*Augustus v. Shaffer (1959) 171 Cal. App. 2d 160, 340 P.2d 37* ; *see also § 177.13[2]*]. Examples of medical expenses for which a plaintiff may becompensated include fees for a doctor's services, even if the treating physician is not licensed to practice medicine in the state [*Gastine v. Ewing (1944) 65 Cal. App. 2d 131, 143, 150 P.2d 266]* ; costs of restorative surgery and necessary home nursing care [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 409, 115 Cal. Rptr. 765, 525 P.2d 669* ; *Johnston v. Long (1947) 30 Cal. 2d 54, 77, 181 P.2d 645]* ; and costs of special care necessitated by the accident, such as nursing or other services, provided by members of the injured person's family [*Bradford v. Edmands (1963) 215 Cal. App. 2d 159, 168, 30 Cal. Rptr. 185]* .

A plaintiff may also be able to recover for the change the injury causes in the family relationship resulting in a different

allocation of comfort, care, protection, and support among family members, if the change can be measured economically [*see Custodio v. Bauer (1967) 251 Cal. App. 2d 303, 323-324, 59 Cal. Rptr. 463* ; *Hair v. Monterey County (1975) 45 Cal. App. 3d 538, 541-542, 119 Cal. Rptr. 639 , overruled on other grounds, Baxter v. Superior Court (1977) 19 Cal. 3d 461, 138 Cal. Rptr. 315, 563 P.2d 871]* .

[b] Proof of Past Medical Expenses

In proving medical expenses, the cost alone of medical treatment or hospitalization does not govern the recovery of the expenses. It is essential to show that the amounts charged were reasonable and were for services reasonably required as a result of the defendant's tortious conduct [*see McAllister v. George (1977) 73 Cal. App. 3d 258, 264, 140 Cal. Rptr. 702* (medical costs not recoverable if evidence shows that services were only in part attributable to tortious conduct); *Calhoun v. Hildebrandt (1964) 230 Cal. App. 2d 70, 73, 40 Cal. Rptr. 690]* .

Medical bills, if paid, are admissible to show that the charges were reasonable if offered for the limited purpose of corroborating a witness's testimony, including the plaintiff's, that the services were performed, that plaintiff was billed for them, and that the bills were paid [*see McAllister v. George (1977) 73 Cal. App. 3d 258, 263, 140 Cal. Rptr. 702]* . Uncorroborated, unpaid bills alone are inadmissible [*see Calhoun v. Hildebrandt (1964) 230 Cal. App. 2d 70, 73, 40 Cal. Rptr. 690]* . There appears to be a split of authority as to whether or not a plaintiff's testimony concerning the receipt of unpaid bills is evidence of the reasonableness of the charges [*see Malinson v. Black (1948) 83 Cal. App. 2d 375, 379* (plaintiff's uncorroborated testimony as to estimate of medical expenses incurred as admissible as evidence of reasonable value); *Linde v. Emmick (1936) 16 Cal. App. 2d 676, 684, 61 P.2d 338* (both plaintiff's testimony and unpaid bills as inadmissible to show reasonableness of charges)].

There is disagreement among court of appeal opinions as to how much a plaintiff is entitled to recover when a health care provider agreed to accept less than the full amount that would normally have been charged for the services provided. Under the collateral source rule, which is discussed in *§ 177.50[2]*, if a plaintiff received some benefit for his or her injuries from a source wholly independent of the tortfeasor, such as a plaintiff's own insurer, that benefit is not used to reduce the recovery from the tortfeasor. Applying the collateral source rule, one court of appeal opinion held that when a plaintiff was contractually liable for the full amount that would normally have been charged for the health care services provided, the fact that the plaintiff's private health care insurer negotiated a lesser amount as payment in full for those services did not reduce the tortfeasor's liability for the full, reasonable value of the services. That court opinion concluded that because the plaintiff had the foresight to purchase health insurance, she, rather than the tortfeasor, should receive the benefit of that foresight, one benefit of which was the insurer's ability to negotiate a lower payment amount and extinguish plaintiff's contractual liability for the unpaid amount [*Howell v. Hamilton Meats & Provisions, Inc. (2009) 179 Cal. App. 4th 686, 699-700, 101 Cal. Rptr. 3d 805 , review granted, depublished,* 2010 Cal. LEXIS 2691].

However, not all court opinions have applied the collateral source rule to similar situations. In one case, for example, the court of appeal held that if a health care provider had an agreement with Blue Cross to accept a lesser amount as payment in full for services to a particular plaintiff, the amount that this plaintiff may recover for those past medical expenses is limited to the amount actually charged [*Nishihama v. City & County of San Francisco (2001) 93 Cal. App. 4th 298, 306-309, 112 Cal. Rptr. 2d 861] , overruled, Yanez v. SOMA Environmental Engineering, Inc. (2010) 185 Cal. App. 4th 1313, 1326-1327* . The court in that case analyzed the issue as a question of the hospital's lien rights under the Hospital Lien Act [*see § 177.54[3]*], rather than under the collateral source rule [*Nishihama v. City & County of San Francisco (2001) 93 Cal. App. 4th 298, 307-308, 112 Cal. Rptr. 2d 861] , overruled, Yanez v. SOMA Environmental Engineering, Inc. (2010) 185 Cal. App. 4th 1313, 1326-1327* . The court of appeal held in another case that if the plaintiff bears no personal liability for the underlying medical charges because the services were billed to Medi-Cal, the plaintiff is entitled to recover only the amount actually paid for the services [*Hanif v. Housing Authority (1988) 200 Cal. App. 3d 635, 643-644, 246 Cal. Rptr. 192]* . It should be noted that under these circumstances, the Director of Health Services would normally file a Medi-Cal lien against plaintiff's recovery to recoup the amount paid

by the Medi-Cal program [*see § 177.54[1]*].

If a medical provider sells plaintiff's account and lien to a third-party financial services company at a discount, but plaintiff remains liable to the financial services company for the full amount charged for the medical services, plaintiff may recover as damages the full amount charged if that is a reasonable amount for the services rendered [*Katiuzhinsky v. Perry (2007) 152 Cal. App. 4th 1288, 1296-1298, 62 Cal. Rptr. 3d 309]* .

Even if the health care provider has agreed to accept a compromise amount as payment in full for the services provided, evidence of the reasonable value of those services may be admitted at trial to provide a more complete picture of the extent of the injuries [*Olsen v. Reid (2008) 164 Cal. App. 4th 200, 204, 79 Cal. Rptr. 3d 255* ; *Katiuzhinsky v. Perry (2007) 152 Cal. App. 4th 1288, 1295-1296, 62 Cal. Rptr. 3d 309* ; *Greer v. Buzgheia (2006) 141 Cal. App. 4th 1150, 1157, 46 Cal. Rptr. 3d 780]* . If such evidence is admitted, it is incumbent on the defendant to ensure that the jury's verdict specifies what damages, if any, are being awarded for past medical expenses. This specification will make it possible for the court, on proper motion, to reduce the jury's award for past medical expenses to the amount that was actually paid for the health care services [*Greer v. Buzgheia (2006) 141 Cal. App. 4th 1150, 1158-1159, 46 Cal. Rptr. 3d 780]* . If under the collateral source rule a plaintiff is allowed to recover the full billed amount of medical services provided, rather than a lesser amount actually paid by plaintiff's private health insurer, no post-trial motion would be needed or permitted [*Howell v. Hamilton Meats & Provisions, Inc. (2009) 179 Cal. App. 4th 686, 706-707, 101 Cal. Rptr. 3d 805 , review granted, depublished, 2010 Cal. LEXIS 2691*].

If the plaintiff has paid for past medical services out of his or her own pocket, evidence of this payment is admissible to prove damages [*Smalley v. Baty (2005) 128 Cal. App. 4th 977, 984-987, 27 Cal. Rptr. 3d 575]* .

[c] Persons Who May Recover

As a general rule, it is the injured person who is entitled to recover the medical expenses resulting from the injury [*Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 662, 151 Cal. Rptr. 399]* . A third party who has paid the medical expenses of an injured person is generally not entitled to bring a direct action against a negligent tortfeasor to recover for those expenses or any related economic harm [*In re Tobacco Cases II (2001) 93 Cal. App. 4th 183, 199, 113 Cal. Rptr. 2d 120* (negligent misrepresentation case)]. However, under the appropriate circumstances, a third party may have a statutory lien on a plaintiff's recovery for medical expenses, as discussed in *§ 177.54*.

If the injured person's spouse has performed nursing services, the reasonable value of those services is recoverable in the action of the injured spouse. They are not an element of damages in the spouse's action for loss of consortium [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 409, 115 Cal. Rptr. 765, 525 P.2d 669* ; for discussion of damages in loss of consortium actions, *see Ch. 354, Loss of Consortium; § 177.50[1]*].

The parents of an injured minor are normally responsible for medical care that is furnished to a minor, and the cause of action to recover past medical expenses normally rests with the parents [*Bauman v. San Francisco (1940) 42 Cal. App. 2d 144, 163, 108 P.2d 989* ; *see Black v. County of Los Angeles (1976) 55 Cal. App. 3d 920, 935, 127 Cal. Rptr. 916* (parent must allege own cause of action to recover medical expenses in individual capacity)]. However, a parent may waive the right to recover unpaid past medical expenses by bringing the action as guardian ad litem on behalf of the child, in which case the child may recover these items, and the parents are estopped from recovering them on their own behalf [*White v. Moreno Valley Unified Sch. Dist. (1986) 181 Cal. App. 3d 1024, 1030, 226 Cal. Rptr. 742]* . Thus, a cause of action to recover medical expenses incurred on account of a minor's personal injuries belongs to both the parents and the child [*Laughner v. Bryne (1993) 18 Cal. App. 4th 904, 909, 22 Cal. Rptr. 2d 671]* .

Case authority appears to conflict regarding the respective rights of parents and children to recover for future medical expenses. In older cases, it has been held that the right to recover future medical expenses rests solely with the child [*Apodaca v. Haworth (1962) 206 Cal. App. 2d 209, 217, 23 Cal. Rptr. 461* ; *Rockwood v. Lansburgh (1930) 109 Cal.*

App. 581, 585, 293 P. 792] . However, a recent case finds that these cases no longer accurately state prevailing California law, and that future medical expenses to be incurred on behalf of a child, both before and after the age of majority, may be recovered by either the child or the parent, but not by both [*Laughner v. Bryne (1993) 18 Cal. App. 4th 904, 909-912, 22 Cal. Rptr. 2d 671* (release pursuant to minor's compromise of *all* child's damages estopped parent from recovering future medical expenses); *see Turpin v. Sortini (1982) 31 Cal. 3d 220, 237 n.11, 238 n.12, 182 Cal. Rptr. 337, 643 P.2d 954* ; *see also Fam. Code § 3910* (parental duty to support adult child incapacitated from earning a living and without sufficient means)].

The recovery for a minor's medical expenses may include the reasonable value of nursing services provided by a parent. However, the recovery may include only additional care required because of the injury, not the normal care that must be given to a child [*Bradford v. Edmands (1963) 215 Cal. App. 2d 159, 164-165, 30 Cal. Rptr. 185]* . Nor is recovery allowed for special care provided by a parent in excess of what would be provided by another person [*see Hair v. County of Monterey (1975) 45 Cal. App. 3d 538, 541, 119 Cal. Rptr. 639] , disapproved on other grounds, Baxter v. Superior Court (1977) 19 Cal. 3d 461* . Recovery for parental services may be awarded to either the parent or the minor [*Hair v. County of Monterey (1975) 45 Cal. App. 3d 538, 540-541, 119 Cal. Rptr. 639] , disapproved on other grounds, Baxter v. Superior Court (1977) 19 Cal. 3d 461* .

For further discussion of recovery of damages for medical expenses, see Levy, Golden, & Sacks, California Torts, Ch. 52 (Matthew Bender).

[4] Loss of Earning Capacity

An injured plaintiff may recover for the loss or impairment of his or her capacity to work and earn money. Loss of earning capacity is an element of general damages and can be inferred from the nature of the injury [*Connolly v. Pre-Mixed Concrete Co. (1957) 49 Cal. 2d 483, 489, 319 P.2d 343* ; *Beeman v. Burling (1990) 216 Cal. App. 3d 1586, 1600, 265 Cal. Rptr. 719* ; *Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 656, 151 Cal. Rptr. 399]* . The BAJI instructions classify lost earning capacity as economic damages for the purposes of imposing joint and several liability under *Civ. Code § 1431.2* [*see BAJI Nos. 14.11, 14.12* (7th ed.)]. For discussion of the distinctions between economic and noneconomic damages, see *§ 177.44*. General damages for lost earning capacity are measured from the date of injury, and thus, are allowed for the period between injury and trial, as well as for lost future capacity [*see Tornell v. Munson (1947) 80 Cal. App. 2d 123, 125, 181 P.2d 112]* .

The recovery for loss of earning capacity is not measured by what a person was actually earning at the time of the injury but by what he or she was and will be capable of earning [*Storrs v. Los Angeles Traction Co. (1901) 134 Cal. 91, 93, 66 P. 72* ; *see Neumann v. Bishop (1976) 59 Cal. App. 3d 451, 462-464, 130 Cal. Rptr. 786]* . Consequently, a plaintiff can recover for loss of earning capacity without proof of actual earnings before or after the injury [*Handelman v. Victor Equip. Co. (1971) 21 Cal. App. 3d 902, 907, 99 Cal. Rptr. 90]* . Even the fact that an injured person was not employed at the time of the injury does not deprive him or her of the right to compensation for the loss of earning capacity [*McCormack v. City & County of San Francisco (1961) 193 Cal. App. 2d 96, 101-102, 14 Cal. Rptr. 79]* .

To recover future damages for loss of earning power, a plaintiff may present testimony of actuaries and actuarial charts. For instance, economic data with respect to whether a plaintiff would have enjoyed continuous employment until the age of 65 but for the accident and whether other employment will be available when the plaintiff recovers his or her health is relevant to the determination of future loss of earnings. However, a plaintiff is prohibited from presenting testimony of his or her mere hopes or mere prospects of advancement [*Neumann v. Bishop (1976) 59 Cal. App. 3d 451, 462-464, 130 Cal. Rptr. 786]* .

If plaintiff's life expectancy has been shorted by defendant's act, damages for diminished earnings capacity properly include earnings for the so-called "lost years" [*Fein v. Permanente Med. Group (1985) 38 Cal. 3d 137, 153-154, 211 Cal. Rptr. 368, 695 P.2d 665]* . If economic damages are awarded for the period of time in which plaintiff's life

expectancy has been shortened, the award may include loss of future benefits such as Social Security and pension benefits, in addition to future wage loss damages [*Overly v. Ingalls Shipbuilding, Inc. (1999) 74 Cal. App. 4th 164, 172, 87 Cal. Rptr. 2d 626]* . However, these damages may only be recovered once, and a setoff may be proper if similar damages are sought in any subsequent wrongful death action [*Overly v. Ingalls Shipbuilding, Inc. (1999) 74 Cal. App. 4th 164, 173, 87 Cal. Rptr. 2d 626]* . For a discussion of the recovery of damages in a wrongful death action, including the effect of a shortening of the decedent's life expectancy, see Ch. 181, *Death and Survival Actions* . If damages are awarded for the loss of future economic benefits based on diminished life expectancy, those damages are not reduced by the amount of the plaintiff's expected living expenses during the lost years [*Overly v. Ingalls Shipbuilding, Inc. (1999) 74 Cal. App. 4th 164, 174-175, 87 Cal. Rptr. 2d 626* (speculation and uncertainty would be involved in attempting to prove future uses to which lost earnings would be put)].

[5] Lost Earnings or Income

If, as a result of tortious conduct, a person is disabled or impaired from attending to his or her usual occupation or pursuits of financial gain, damages flowing from this disability or impairment are recoverable [*Connolly v. Pre-Mixed Concrete Co. (1957) 49 Cal. 2d 483, 489, 319 P.2d 343* ; *McCormack v. City & County of San Francisco (1961) 193 Cal. App. 2d 96, 101-102*]. Damages for lost earnings include lost wages from employment [*Swanson v. Bogatin (1957) 149 Cal. App. 2d 755, 758, 308 P.2d 918* ; *see, e.g.,* *Helmer v. Bingham Toyota Isuzu (2005) 129 Cal. App. 4th 1121, 1130, 29 Cal. Rptr. 3d 136* (lost future income from prior employment is recoverable if plaintiff left prior employment due to false promises from prospective employer and if damages are not speculative or remote)]. They also include economic benefits that have been lost from a particular endeavor, such as a partnership [*Hoffmann v. Lane (1936) 11 Cal. App. 2d 655, 659, 54 P.2d 477]* .

Lost actual earnings must be distinguished from lost future earning capacity, which is an element of general damages [*see* *Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 656, 151 Cal. Rptr. 399* ; for discussion, see *§ 177.45[4]*]. Courts have also distinguished between actual lost earnings and lost earning capacity between the date of injury and the date of trial, which is also recoverable as an element of general damages [*Tornell v. Munson (1947) 80 Cal. App. 2d 123, 125, 181 P.2d 112]* .

The generally held view is that loss of actual earnings between the date of injury and the date of trial is an item of special damages, which may be recovered only if specifically pleaded [*Hoffmann v. Lane (1936) 11 Cal. App. 2d 655, 659, 54 P.2d 477* ; *see* *Edwards v. Hollywood Canteen (1946) 27 Cal. 2d 802, 812-813, 167 P.2d 729* ; *Handelman v. Victor Equip. Co. (1971) 21 Cal. App. 3d 902, 906, 99 Cal. Rptr. 90* ; *Swanson v. Bogatin (1957) 149 Cal. App. 2d 755, 758, 308 P.2d 918* ; *Martin v. Angel City Baseball Ass'n (1935) 3 Cal. App. 2d 586, 590, 40 P.2d 287]* . However, a few courts have stated that loss of earnings is an item of general damages [*Gersick v. Shilling (1950) 97 Cal. App. 2d 641, 649, 218 P.2d 583* ; *Tornell v. Munson (1947) 80 Cal. App. 2d 123, 125, 181 P.2d 112]* . This statement appears to be based on a view that the only damages recoverable are general damages for lost earning capacity, measured from the date of injury. Lost actual earnings is merely some evidence of lost earning capacity [*see* *Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 656-657, 151 Cal. Rptr. 399* ; *Tornell v. Munson (1947) 80 Cal. App. 2d 123, 125, 181 P.2d 112* ; *see also BAJI No. 14.11* (characterizing earnings as factor in determining reasonable value of working time lost to date)].

This latter view more clearly avoids the possibility of a double recovery of the same amount for both lost earnings and lost earning capacity. Under the view that actual lost earnings are special damages, the same amounts might be awarded as both special damages and general damages for lost earning capacity unless it is made clear to the jury that any amounts awarded as special damages for lost income must be subtracted from any award of general damages for lost earning capacity calculated from the date of the injury.

[6] Loss of Profits

A plaintiff may recover for loss of profits resulting from personal injuries sustained instead of for loss of earning capacity. As a loss of profits does not always result from such an injury, these damages are special and must be particularly alleged [*Shaw v. Southern Pac. R.R. Co. (1910) 157 Cal. 240, 242, 107 P. 108* ; *Hoffmann v. Lane (1936) 11 Cal. App. 2d 655, 659, 54 P.2d 477]* . Similar to the relationship between lost earning capacity and actual lost earnings, evidence of lost profits may be admitted as part of the proof of loss of earning capacity although damages for lost profits were not specially pleaded [*Shaw v. Southern Pac. R.R. Co. (1910) 157 Cal. 240, 242, 107 P. 108]* .

Lost anticipated profits cannot be recovered if it is uncertain whether any profit at all would have been derived from the undertaking. But lost prospective net profits may be recovered if the evidence shows, with reasonable certainty, both their occurrence and extent. It is enough to demonstrate a reasonable probability that profits would have been earned but for the defendant's conduct. The plaintiff has the burden to produce the best evidence available under the circumstances to attempt to establish a claim for lost profits [*S.C. Anderson, Inc. v. Bank of Am. (1994) 24 Cal. App. 4th 529, 536, 30 Cal. Rptr. 2d 286]* .

If the lost anticipated profits are from a business that was not yet in operation when the actionable conduct occurred, damages may be established with reasonable certainty using expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like [*Parlour Enterprises, Inc. v. Kirin Group, Inc. (2007) 152 Cal. App. 4th 281, 288, 61 Cal. Rptr. 3d 243]* . However, in order to ensure that the evidence is not deemed too speculative, the party offering such evidence must explain the factual underpinnings for the projections used and justify why the projections constitute reliable indicators of future anticipated profits [*see* *Parlour Enterprises, Inc. v. Kirin Group, Inc. (2007) 152 Cal. App. 4th 281, 289-292, 61 Cal. Rptr. 3d 243* (award for lost anticipated profits for unopened businesses reversed when projections made by expert witness lacked sufficient factual support)].

Evidence of loss of profits may be inadmissible to show plaintiff's damages to the extent that the profits are a return on capital or a result of the services of others [*Lombardi v. California St. Ry. Co. (1899) 124 Cal. 311, 319, 57 P. 66]* . In addition, a plaintiff cannot recover for both lost earnings and lost profits if such an award would result in double compensation for plaintiff's services [*Hollander v. Wilson Estate Co. (1932) 214 Cal. 582, 587, 7 P.2d 177]* .

A corporate shareholder does not have an ownership interest in corporate profits, and therefore a shareholder cannot recover individually for lost future profits suffered by the corporation [*Sole Energy Co. v. Petrominerals Corp. (2005) 128 Cal. App. 4th 212, 232, 26 Cal. Rptr. 3d 798]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesLost IncomeEarning CapacityTortsDamagesCompensatory DamagesMedical ExpensesTortsDamagesCompensatory DamagesPain & SufferingGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingFuture Pain & SufferingTortsDamagesConsortium DamagesGeneral Overview

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§ 177.46 Future Damages

[1] Proof

A plaintiff may recover damages for detriment resulting after the commencement of the action or certain to result in the future [*Civ. Code § 3283*]. Thus, future medical expenses, future pain and suffering, and future disability are all recoverable in an action for personal injury [*see, e.g., Niles v. City of San Rafael (1974) 42 Cal. App. 3d 230, 241-244, 116 Cal. Rptr. 733]* . Also, damages for future medical monitoring may be recovered in products liability cases involving toxic exposure without present injury [*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 1006-1007* ; *Miranda v. Shell Oil Co. (1993) 15 Cal. Rptr. 2d 569]* . However, when a plaintiff in such cases has an unrelated, preexisting condition that also requires future medical monitoring, the defendant is only liable for the costs of additional or different monitoring made necessary by the defendant's tortious conduct [*Gutierrez v. Cassiar Mining Corp. (1998) 64 Cal. App. 4th 148, 155-156, 75 Cal. Rptr. 2d 132* (error to refuse to instruct jury that asbestos-exposure defendant was not liable for costs of monitoring to which plaintiff would have to submit due to smoking and abnormal growth in lung); *see Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 1009 n.27, 25 Cal. Rptr. 2d 550, 863 P.2d 795]* .

In order to recover future damages, it must be shown, from all the evidence, that future consequences will occur with reasonable certainty [*Bellman v. San Francisco High School Dist. (1938) 11 Cal. 2d 576, 588, 81 P.2d 894* ; *Mendoza v. Rudolf (1956) 140 Cal. App. 2d 633, 637, 295 P.2d 445]* . Reasonable certainty must be found by the trier of fact based on all of the evidence [*Bauman v. San Francisco (1940) 42 Cal. App. 2d 144, 165, 108 P.2d 989* ; *see Ostertag v. Bethlehem Shipbuilding Corp. (1944) 65 Cal. App. 2d 795, 807, 151 P.2d 647]* .

Positive proof that an impairment of health or faculties will follow from a particular injury is often impossible to demonstrate. Therefore, it is necessary, in determining the question of reasonable certainty, to rely on the testimony of expert medical witnesses [*Bauman v. San Francisco (1940) 42 Cal. App. 2d 144, 165, 108 P.2d 989* ; *see Kuhlmann v. Pascal & Ludwig (1970) 5 Cal. App. 3d 144, 153, 85 Cal. Rptr. 199]* . However, the expert need not testify that he or she is reasonably certain that the future consequences will ensue [*Mendoza v. Rudolf (1956) 140 Cal. App. 2d 633, 637, 295 P.2d 445]* . Testimony of professional experience and observation is probative, and thus admissible, although

the testimony alone would be insufficient to prove reasonable certainty [*Bauman v. San Francisco (1940) 42 Cal. App. 2d 144, 163-165, 108 P.2d 989]* .

If a plaintiff seeks damages to compensate for a liability owed to a third party caused by defendant's actionable conduct, but plaintiff has not yet paid that third-party liability, plaintiff must provide more than just evidence of an obligation to pay. As with other types of prospective damage, a plaintiff must prove to a reasonable certainty that plaintiff could and would pay the liability. A statement by plaintiff that he or she agreed to pay the third party a certain amount is insufficient [*Green Wood Industrial Co. v. Forceman Internat. Development Group, Inc. (2007) 156 Cal. App. 4th 766, 777-778, 67 Cal. Rptr. 3d 624*].

[2] Reduction to Present Cash Value

An award for future damages should be reduced to present cash value, which is defined as the present sum of money that, together with interest thereon when invested so as to yield the highest rate of interest consistent with reasonable security, will pay to the plaintiff the equivalent of his or her loss of future benefits at the times, in the amounts, and for the period that the plaintiff would either have received the lost benefits, such as earnings, or be required to pay for future expenses, such as medical expenses [*see Wilson v. Gilbert (1972) 25 Cal. App. 3d 607, 613 n.2, 102 Cal. Rptr. 31* ; *Deshotel v. Atchison, Topeka & Santa Fe Ry. Co. (1956) 144 Cal. App. 2d 224, 230, 300 P.2d 910* ; *BAJI No. 14.70*]. To eliminate confusion, when future damages are sought, juries should be instructed to determine the amount in current dollars paid at the time of judgment, and absent such an instruction, awards of future damages are considered to be stated in terms of their present or current value unless the record clearly establishes otherwise [*Salgado v. County of Los Angeles (1998) 19 Cal. 4th 629, 646-647, 80 Cal. Rptr. 2d 46, 967 P.2d 585* ; *see also Wilson v. Gilbert (1972) 25 Cal. App. 3d 607, 613-614, 102 Cal. Rptr. 31* (jury may be instructed on necessity of finding present cash value after expert testimony on present cash value factor or when judicially noticed present cash value tables are included with instructions)]. For further discussion of calculation of future damages, see Levy, Golden, & Sacks, California Torts, Ch. 52 (Matthew Bender).

In medical malpractice cases, the court must, at the request of either party, order that future damages that equal or exceed $50,000 be paid, in whole or in part, by periodic payments rather than by a lump-sum payment [*Code Civ. Proc. § 667.7(a)*]. For further discussion, see Ch. 415, *Physicians: Medical Malpractice* .

[3] Effect of Inflation on Future Losses

A trier of fact may take into account future estimates of changes in the purchasing power of money in arriving at a damage award [*Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 662, 151 Cal. Rptr. 399* ; *see United States v. English (9th Cir. 1975) 521 F.2d 63, 74]* . Thus, damages may be increased to account for inflation, which may, at least partially, offset the effect of reducing damages to present value [*Fox v. Pacific Sw. Airlines (1982) 133 Cal. App. 3d 565, 570 n.5, 184 Cal. Rptr. 87* ; *see also § 177.46[2]*].

Under a total offset theory, the effect of inflation is viewed as equal to the reduction-to-present-value discount rate, so that neither should be taken into account in awarding future damages [*see, e.g., Neumann v. Bishop (1976) 59 Cal. App. 3d 451, 461, 130 Cal. Rptr. 786* (expert witness testified that inflation and reduction to present value would cancel each other)]. However, courts may not merely assume that the discount rate and the inflation rate will net to zero. The trier of fact must first compute future damages taking into account estimated changes in the purchasing power of the dollar (inflationary or deflationary), and then discount the future damages to its present value [*United States v. English (9th Cir. 1975) 521 F.2d 63, 75* (applying California law)]. For further discussion of computing the effect of inflation on future losses, see Levy, Golden, & Sacks, California Torts, Ch. 52 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 177.47 Compensatory Damages for Injury to Property

[1] Generally

There is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property (real or personal). Whatever formula is most appropriate to compensate the injured party for the loss sustained in the particular case will be adopted [*Heninger v. Dunn (1980) 101 Cal. App. 3d 858, 862, 162 Cal. Rptr. 104* ; *see Inyo Chem. Co. v. City of Los Angeles (1936) 5 Cal. 2d 525, 541, 55 P.2d 850]* . The guiding principle is the principle generally applicable to tortious conduct, that the plaintiff should recover all of the detriment proximately caused by the injury [*Frustuck v. City of Fairfax (1963) 212 Cal. App. 2d 345, 367, 28 Cal. Rptr. 357]* .

A plaintiff must generally sustain actual property damage or personal injury to recover for economic loss caused by negligent conduct. In *Aas v. Superior Court*, for example, the Supreme Court refused to allow homeowners or a homeowners association to recover in negligence from housing developers and contractors for deviations from applicable building codes and industry standards that had not yet caused property damage or personal injury or ripened into involuntary out-of-pocket repair costs [*Aas v. Superior Court (2000) 24 Cal. 4th 627, 643, 101 Cal. Rptr. 2d 718, 12 P.3d 1125]* . The Court noted that although any construction defect can diminish the value of a house, the difference between price paid and value received, and deviations from standards of quality that have not yet resulted in actual property damage or personal injury, are primarily the domain of contract and warranty law or the law of fraud, rather than the law of negligence [*Aas v. Superior Court (2000) 24 Cal. 4th 627, 636, 101 Cal. Rptr. 2d 718, 12 P.3d 1125]* .

While the general principles of the economic loss rule as enunciated in *Aas* are still valid, application of that rule in the context of defects arising from new residential construction has subsequently been abrogated by the Right to Repair Act, codified at *Civ. Code § 895 et seq.* [*see Greystone Homes, Inc. v. Midtec, Inc. (2008) 168 Cal. App. 4th 1194, 1202, 86 Cal. Rptr. 3d 196]* . Under that Act, which establishes a set of building standards for new residential construction, homeowners have a cause of action against builders, subcontractors, individual product manufacturers, and others for violation of the standards provided in the Act [*see Civ. Code §§ 896, 936*]. On a showing that a defendant has violated a particular standard, a homeowner may recover for economic loss from a builder, including the reasonable

value of repairing any violation of the standards provided in the Act, without having to show that the violation caused property damage or personal injury [*see Civ. Code §§ 896, 942*]. A builder liable under the Act may in turn recover for economic loss from a product manufacturer through an action for equitable indemnity, if the manufacturer's negligence or breach of contract caused a violation of the standards provided by the Act [*Greystone Homes, Inc. v. Midtec, Inc. (2008) 168 Cal. App. 4th 1194, 1213-1214, 86 Cal. Rptr. 3d 196]* . For further discussion of the Right to Repair Act, see Ch. 104, *Building Contracts* . For discussion of equitable indemnity principles generally, see Ch. 300, *Indemnity and Contribution* .

In a case dealing with an older building not covered by the Act, the court of appeal held that public entities, suing as the owners of buildings that contained lead-based paint, could not state a cause of action for negligence or strict liability against lead manufacturers because the plaintiffs could not allege any actual damage to the buildings themselves. Although persons inhaling the paint might have a cause of action, to recover as owners of the buildings, the plaintiffs were required to allege some other type of physical damage to the buildings themselves beyond the mere presence of lead-based paint on the walls [*County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal. App. 4th 292, 325, 40 Cal. Rptr. 3d 313]* .

A plaintiff may recover tort damages for economic loss without suffering property damage or personal injury. if the defendant committed the intentional tort of fraud in conjunction with a breach of contract. In one case, the California Supreme Court held that a helicopter manufacturer was entitled to recover tort damages, including punitive damages, from a parts manufacturer that provided vital parts knowing that they were not in conformity with manufacturing specifications as detailed in the contract between the parties. The parts manufacturer had committed the intentional tort of fraud when it provided certificates of compliance with the parts, despite knowing that the parts were not in compliance. The helicopter manufacturer relied on these affirmative misrepresentations to its detriment when it accepted the nonconforming parts, and in doing so it exposed itself to potential liability should the parts fail and cause damage to other persons or property. Under these circumstances, the fraudulent act of providing the false certificates of compliance was an independent tort separate from the breach of contract itself, which was the provision of the nonconforming parts [*Robinson Helicopter Co., Inc. v. Dana Corp., (2004) 34 Cal. 4th 979, 990-991, 22 Cal. Rptr. 3d 352, 102 P.3d 268]* .

Although the Supreme Court's holding in that case dealt with fraud that accompanied a breach of contract, a subsequent court of appeal opinion has held that the Court's conclusion, which allows recovery for economic loss without accompanying property damage or personal injury, is not restricted to actions that include a breach of contract. Instead, it applies to any action involving intentional, affirmative fraudulent conduct on the part of the defendant, if that fraudulent conduct exposes the plaintiff to liability to third parties [*County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal. App. 4th 292, 328, 40 Cal. Rptr. 3d 313* (owners of buildings containing lead-based paint could pursue fraud action against lead manufacturers)].

Although it is unclear to what extent the Court predicated its decision on these concerns, the Court also noted that the defendant's act in providing critical helicopter parts that were not in compliance with specifications placed the lives of people flying in the helicopters at risk and exposed the helicopter manufacturer to liability for personal damages beyond any damage to the helicopters, although the defective parts were discovered before any accidents actually occurred [*Robinson Helicopter Co., Inc. v. Dana Corp., (2004) 34 Cal. 4th 979, 991 n.7, 993, 22 Cal. Rptr. 3d 352, 102 P.3d 268]* .

For additional discussion of damages for injury to property, see Levy, Golden, & Sacks, California Torts, Ch. 52.

[2] Damage to Personal Property

If personal property is injured but not wholly destroyed, the general rule is that the plaintiff may recover the lesser of (1) depreciation in value, measured by the value of the property immediately before and after the injury, plus compensation

for loss of use; or (2) the reasonable cost of repairs plus loss of use while the repairs are being made [*Hand Elecs., Inc. v. Snowline Joint Unified Sch. Dist. (1994) 21 Cal. App. 4th 862, 870, 26 Cal. Rptr. 2d 446* ; *Smith v. Hill (1965) 237 Cal. App. 2d 374, 388, 47 Cal. Rptr. 49]* . Under these rules, the defendant has the burden of showing that recovery under the alternative measure of damages would be less than the one under which the plaintiff is claiming [*Mozzetti v. City of Brisbane (1977) 67 Cal. App. 3d 565, 576, 136 Cal. Rptr. 751* ; *Konda v. Frumpkin (1928) 90 Cal. App. 384, 386, 265 P. 955* ; *Santos v. Scharz (1927) 87 Cal. App. 758, 762, 262 P. 764* ; *Rhodes v. Firestone Tire & Rubber Co. (1921) 51 Cal. App. 569, 573, 197 P. 392]* .

If the damaged property cannot be completely repaired, the plaintiff may recover the difference between the value before the injury and the value after the repairs have been made, plus the reasonable cost of making the repairs. This rule gives the plaintiff the difference between the value of the property before the injury and its value after the injury, the amount being made up of the cost of repairs and the depreciation notwithstanding the repairs [*Merchant Shippers Ass'n v. Kellog Express & Draying Co. (1946) 28 Cal. 2d 594, 600, 170 P.2d 923]* .

If repairs have actually been made, it is not essential to introduce evidence as to the diminution in value. The court may not assume that the depreciation was of a lesser amount than the cost of the repairs. In such a case, the amount actually paid is some evidence of the reasonable value of the necessary repairs. If the repairs have not in fact been made, the estimated cost of reasonably necessary repairs requires expert testimony [*Smith v. Hill (1965) 237 Cal. App. 2d 374, 388, 47 Cal. Rptr. 49* ; *see Pfingsten v. Westenhaver (1952) 39 Cal. 2d 12, 24, 244 P.2d 395]* . However, if plaintiff is claiming depreciation, the owner of the property may, without being qualified as an expert on values, testify as to his or her opinion of the value of that which he or she owns [*Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 921, 114 Cal. Rptr. 622, 523 P.2d 662* ; *Newhart v. Pierce (1967) 254 Cal. App. 2d 783, 789, 62 Cal. Rptr. 553]* .

[3] Destruction of Personal Property

As a general rule, the measure of damages for the loss or destruction of personal property is the reasonable market value of the property at the time of the loss or destruction. The measure of damages is neither the cost of the property nor the money expended in replacing it [*Hand Elecs., Inc. v. Snowline Joint Unified Sch. Dist. (1994) 21 Cal. App. 4th 862, 870-871, 26 Cal. Rptr. 2d 446* ; *Lane v. Spurgeon (1950) 100 Cal. App. 2d 460, 463, 223 P.2d 889]* . The defendant, however, may show the salvage value of the property to reduce the amount of the loss [*Edrington v. Strong (1961) 194 Cal. App. 2d 218, 224, 15 Cal. Rptr. 34]* .

If the property has a peculiar value to the person recovering damages for its destruction, that value is the amount the plaintiff can recover if the defendant had notice of its peculiar value before incurring the liability for damages or willfully destroying the property [*see Civ. Code § 3355*; *King v. Karpe (1959) 170 Cal. App. 2d 344, 349, 338 P.2d 979]* . To recover damages for the peculiar value of the property to plaintiff under *Civ. Code § 3355*, the property must have some market value. If the property has no market value, the rule applied is that found in *Civ. Code § 3333*, which fixes the damages as the amount that would compensate the owner for all detriment proximately caused by its destruction whether or not it could have been anticipated. If the property has no market value, its value or plaintiff's damages must be ascertained in some rational way from elements such as the difficulty and expense to which plaintiff was put in acquiring the property and the nature and the character of use the plaintiff put the property to [*Zvolanek v. Bodger Seeds, Ltd. (1935) 5 Cal. App. 2d 106, 109, 42 P.2d 92]* . For discussion of the recoverability of damages for emotional distress caused by the tortious destruction of personal property, see Ch. 362, *Mental Suffering and Emotional Distress* .

[4] Injury to Crops

[a] Annual Crops

Damages for the destruction of crops that must be replanted annually, such as vegetables or grain, are calculated in

terms of loss of profit. The proper measure of damages for total destruction of an annual crop is thus calculated by determining the market value of the probable yield of the crop and deducting therefrom the costs of production and marketing [*Teller v. Bay & River Dredging Co. (1907) 151 Cal. 209, 212-213, 90 P. 924* ; *see Maggio, Inc. v. United Farm Workers (1991) 227 Cal. App. 3d 847, 871-876, 278 Cal. Rptr. 250]* . To the extent that the costs of production have already been paid by the plaintiff at the time of destruction of the crop, such costs should not be deducted from market value in calculating the amount of damages [*Dutra v. Cabral (1947) 80 Cal. App. 2d 114, 120, 181 P.2d 26]* . If only part of the crop is destroyed, damages are computed by determining loss of expected profit from production of the entire crop and deducting therefrom the actual net profit received from production of the part not destroyed [*see Solis v. Contra Costa County (1967) 251 Cal. App. 2d 844, 847-848, 60 Cal. Rptr. 99]* . When the action is brought by a lessee of land on shares, the value of the landlord's share should be deducted in computing the lessee's damages [*Teller v. Bay & River Dredging Co. (1907) 151 Cal. 209, 213, 90 P. 924]* .

[b] Perennial Crops

A perennial crop is one that does not require annual replanting, but regenerates itself every year [*Miller & Lux, Inc. v. Pinelli (1927) 84 Cal. App. 42, 47, 257 P. 573* ; *see Staub v. Muller (1936) 7 Cal. 2d 221, 228, 60 P.2d 283]* . The measure of damages for the destruction of a perennial crop is not totally clear, but seems to depend on the intended use for the crop. If the crop is used as pasturage for grazing, it has no market value, and thus, the measure of damages is based on the rental value of the land. The California Supreme Court has cast the proper measure as the difference between the rental value of the property with and without the crops [*Wolfsen v. Hathaway (1948) 32 Cal. 2d 632, 644, 198 P.2d 1]* . Another court has stated that damages are measured by the reasonable rental value of the land for pasture purposes [*Miller & Lux, Inc. v. Pinelli (1927) 84 Cal. App. 42, 47, 51, 257 P. 573]* . If the roots of the pasturage have been destroyed so as to prevent regeneration, damages include the cost of reseeding [*Miller & Lux, Inc. v. Pinelli (1927) 84 Cal. App. 42, 49, 257 P. 573]* . However, if a perennial crop is one that may be severed from the land and marketed, the measure of damages is the same as for an annual crop, that is, the lost profit from the crop, measured by the market value of the crop at the time of destruction minus the cost of production and marketing [*Staub v. Muller (1936) 7 Cal. 2d 221, 228, 60 P.2d 283* (alfalfa)].

[5] Injury to Trees and Timber

In the case of the conversion of timber, damages may be determined by the market value of the timber less the cost of marketing [*Crofoot Lumber, Inc. v. Ford (1961) 191 Cal. App. 2d 238, 249-250, 12 Cal. Rptr. 639]* . In the case of injury to trees resulting from a casual or involuntary trespass or if the defendant has probable cause to believe that he or she owned the land on which a trespass was committed, the plaintiff may recover damages of twice the amount that would compensate for the actual detriment [*Civ. Code § 3346(a)*]. Application of this double-damages provision is mandatory, and is not limited to the value of the trees as timber [*Heninger v. Dunn (1980) 101 Cal. App. 3d 858, 866-869, 162 Cal. Rptr. 104]* . While a 1970 court of appeal opinion held that the double damages provision of *Civ. Code § 3346* was inapplicable when the damage is caused by a fire that was the result of the defendant's negligent act [*Gould v. Madonna (1970) 5 Cal. App. 3d 404, 406-408, 85 Cal. Rptr.457]* , a 2009 opinion concluded that the plain language of the statute unambiguously mandated a doubling of the damages under those circumstances [*Kelly v. CB&I Constructors, Inc. (2009) 179 Cal. App. 4th 442, 462-463, 102 Cal. Rptr. 3d 32]* .

Statutes also provide for treble damages if the defendant acts willfully or maliciously [*see Civ. Code § 3346(a)*; *Code Civ. Proc. § 733*; *see also Crofoot Lumber, Inc. v. Ford (1961) 191 Cal. App. 2d 238, 247, 12 Cal. Rptr. 639]* . The trebling provisions are discretionary [*Heninger v. Dunn (1980) 101 Cal. App. 3d 858, 866-869* ; *see Ostling v. Loring (1994) 27 Cal. App. 4th 1731, 1742, 33 Cal. Rptr. 2d 391]* .

The measure of damages for the destruction of or injury to fruit, nut, or other productive trees is generally the difference in the value of the land before and after the destruction or injury, and the measure of damages may include the cost of replacing the trees or restoring the property to its pre-injury condition [*Santa Barbara Pistachio Ranch v. Chowchilla*

Water Dist. (2001) 88 Cal. App. 4th 439, 447, 105 Cal. Rptr. 2d 856] . In making these calculations, an analysis of the injured or destroyed trees' value may conceivably include the lost profits caused by the injury to or destruction of individual trees, especially if it is impossible to replace those injured or destroyed trees with other mature fruit-bearing trees [*Santa Barbara Pistachio Ranch v. Chowchilla Water Dist. (2001) 88 Cal. App. 4th 439, 447, 105 Cal. Rptr. 2d 856]* .

[6] Injury to Real Property

The general rule with regard to damages to real property is that, if the cost of repairing and restoring the premises to their original condition is less than the diminution in value of the property, the cost of repair is the proper measure of damages; if that cost exceeds the diminution in value, the diminution is the proper measure [*Armitage v. Decker (1990) 218 Cal. App. 3d 887, 904, 267 Cal. Rptr. 399* ; *Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 49, 162 Cal. Rptr. 238* ; *Heninger v. Dunn (1980) 101 Cal. App. 3d 858, 862, 162 Cal. Rptr. 104* ; *see Geddes & Smith, Inc. v. St. Paul Mercury Indem. Co. (1965) 63 Cal. 2d 602, 604-605, 47 Cal. Rptr. 564, 407 P.2d 868]* . If the property is a total loss, the plaintiff may not recover more than the preinjury value of the land [*Armitage v. Decker (1990) 218 Cal. App. 3d 887, 904, 267 Cal. Rptr. 399* ; *Heninger v. Dunn (1980) 101 Cal. App. 3d 858, 863, 162 Cal. Rptr. 104]* .

If the injury can be repaired, the value of the use of the premises for the period during which the plaintiff has been deprived of the property may be added to the cost of repair [*Natural Soda Prods. Co. v. City of Los Angeles (1943) 23 Cal. 2d 193, 201, 143 P.2d 12* ; *see also § 177.47[8]*]. For injury to commercial property, courts have also allowed damages for lost past and future profits, and increased operating expenses during repairs [*see Frustuck v. City of Fairfax (1963) 212 Cal. App. 2d 345, 367, 28 Cal. Rptr. 357* (citing cases)].

If the plaintiff establishes damages by showing diminution in the value of the property, the defendant has the burden of coming forward with proof that the cost of repair and restoration would be less [*Herzog v. Grosso (1953) 41 Cal. 2d 219, 226, 259 P.2d 429* ; *Armitage v. Decker (1990) 218 Cal. App. 3d 887, 905, 267 Cal. Rptr. 399]* . Conversely, if the plaintiff proves damages by showing the cost of repairs, the defendant must introduce evidence that the repair costs exceed the diminution in value of the property [*Armitage v. Decker (1990) 218 Cal. App. 3d 887, 905, 267 Cal. Rptr. 399]* .

Diminution in value is to be determined as of the time of injury, not the time of trial [*Safeco Ins. Co. v. J & D Painting (1993) 17 Cal. App. 4th 1199, 1203 n.1, 21 Cal. Rptr. 2d 903* ; *see Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 49, 162 Cal. Rptr. 238]* . However, cost of repair may be measured as of the time of trial rather than the time of injury [*Rovetti v. City & County of San Francisco (1982) 131 Cal. App. 3d 973, 977-978, 183 Cal. Rptr. 1]* . In any event, the tortfeasor is liable only for the reasonable cost of repairs; if the plaintiff has repairs performed that exceed the amount that is reasonable, the defendant can challenge the amount of damages alleged by the plaintiff [*Woodward-Gizienski & Assocs. v. Geotechnical Exploration, Inc. (1989) 208 Cal. App. 3d 64, 69, 255 Cal. Rptr. 800* (original tortfeasor may not settle with plaintiff for amount representing alleged excessive cost of repair and then seek equitable indemnity from person doing repairs)].

It would appear that in determining whether or not there has in fact been a diminution of value of real property, inflation may not be taken into account. Thus, if the dollar value of the property has increased from time A to time B, the court may not consider that the actual purchasing power of that dollar value may have declined during the period because of inflation [*see CMSH Co. v. Antelope Dev., Inc. (1990) 223 Cal. App. 3d 174, 181-183, 272 Cal. Rptr. 605* (rejecting use of consumer price index in determination of measure of damages for nonexpungement of lis pendens)].

Diminution in market value is not an absolute limitation on damages, and the plaintiff may recover even if the defendant's tortious conduct actually increases the value of the property. Restoration costs may be awarded even though they exceed the diminution in value if there is a reason personal to the plaintiff for restoring the land to its original

condition, or if there is reason to believe that the plaintiff will in fact make the repairs. The restoration must be possible at a cost that is not unreasonable in relation to the value of the land prior to the injury [*Orndorff v. Christiana Cmty. Builders (1990) 217 Cal. App. 3d 683, 687-690, 266 Cal. Rptr. 193* ; *Heninger v. Dunn (1980) 101 Cal. App. 3d 858, 863-866, 162 Cal. Rptr. 104* (defendant's road across plaintiff's property increased its value; however, plaintiff desired to preserve land in its natural state); *see also § 177.47[5]*]. The plaintiff's personal reason for wishing to repair does not require that the property be unique. Rather, all that is required is some personal use of the property and a bona fide desire to repair or restore. A desire by a homeowner to continue to reside in the home is sufficient [*Orndorff v. Christiana Cmty. Builders (1990) 217 Cal. App. 3d 683, 688-689, 266 Cal. Rptr. 193* (construction defects in mass-produced housing)].

Courts have not accepted the converse argument, however, that diminution in value may be awarded in unique cases even if it exceeds the cost of repair. Awarding cost of repair does not force the owners to remain in property that they prefer to sell; they may repair and then sell [*Shaffer v. Debbas (1993) 17 Cal. App. 4th 33, 46-47, 21 Cal. Rptr. 2d 110]* . A diminution in market value that occurs during the period of repair due to general market conditions is not a "special reason" justifying departure from the general rule, because the defendant's conduct is not a proximate cause of the decline in value attributable to market conditions [*Safeco Ins. Co. v. J & D Painting (1993) 17 Cal. App. 4th 1199, 1203-1206, 21 Cal. Rptr. 2d 903]* .

[7] Injury to Fixtures

As a general rule, damages to fixtures are measured by the diminution of the value of the land caused by the injury to the fixture [*Wilmerton v. Morton (1946) 74 Cal. App. 2d 891, 897, 169 P.2d 992]* . However, if an item that is a part of realty is destroyed and that item has a value that can be accurately ascertained without reference to the soil on which it stands or out of which it grows, the recovery for the damage may be the value of the thing destroyed or the cost of its repair [*Menzies v. Geophysical Serv., Inc. (1953) 116 Cal. App. 2d 419, 423, 254 P.2d 51]* .

[8] Loss of Use of Property

The ownership of personal property carries with it the right to its use, and if one party has wrongfully deprived the other of the right to use the property, an award of damages based on the reasonable value of the use is proper [*Story v. Gateway Chevrolet Co. (1965) 237 Cal. App. 2d 705, 709, 47 Cal. Rptr. 267* ; *see Valencia v. Shell Oil Co. (1944) 23 Cal. 2d 840, 844, 147 P.2d 558]* . The same rule applies to real property in that a plaintiff whose real property has been injured may recover for the loss of use of the property while it is being repaired [*Linforth v. San Francisco Gas & Elec. Co. (1909) 156 Cal. 58, 62, 103 P. 320* (allowance as may be made for loss of rental of building during reasonable time required to make repairs)]. However, if improvements to real property are totally destroyed and damages are to be measured by the diminution of value of the property, additional damages for loss of use may not be recovered [*Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 50-51, 162 Cal. Rptr. 238* ; *see also § 177.47[6]*].

The measure of damages for loss of use of personal property may be determined with reference to the rental value of similar property that the plaintiff can obtain during the period when he or she is deprived of the use of the property [*Collin v. American Empire Ins. Co. (1994) 21 Cal. App. 4th 787, 818, 26 Cal. Rptr. 2d 391* ; *see Salyer Grain & Milling Co. v. Henson (1970) 13 Cal. App. 3d 493, 502, 91 Cal. Rptr. 847]* . It is immaterial whether personal property was merely injured or totally destroyed. Damages are limited to the time that it takes to replace the property, and if the property can be replaced immediately, damages for loss of use are inappropriate [*Reynolds v. Bank of Am. (1959) 53 Cal. 2d 49, 50-51, 345 P.2d 926]* .

If personal property has been damaged but is repairable, the recovery for being deprived of its use is generally determined with reference to the period of time reasonably required for making repairs [*Valencia v. Shell Oil Co. (1944) 23 Cal. 2d 840, 844, 147 P.2d 558]* . In computing damages for this loss, the court may consider any necessary delay in procuring parts as bearing on the reasonable time for making the repairs [*Pfingsten v. Westenhaver (1952) 39*

Cal. 2d 12, 23, 244 P.2d 395] .

Damages for loss of use may be recovered even if the property is not used for a commercial purpose [*Malinson v. Black (1948) 83 Cal. App. 2d 375, 381, 188 P.2d 788* ; *see Owens v. Pyeatt (1967) 248 Cal. App. 2d 840, 848, 57 Cal. Rptr. 100* (personal automobile)]. Damages are recoverable even if the plaintiff has incurred no actual loss in seeking replacement property [*Malinson v. Black (1948) 83 Cal. App. 2d 375, 381, 188 P.2d 788]* . However, damages for loss of use are not recoverable if the plaintiff never intended to use the property before it could have been repaired or replaced [*Metz v. Soares (2006) 142 Cal. App. 4th 1250, 1257-1258, 48 Cal. Rptr. 3d 743* ; *see Johnson v. Central Aviation Corp. (1951) 103 Cal. App. 2d 102, 106, 229 P.2d 114]* .

[9] Loss of Profits Resulting From Injury to Property

A person whose property has been injured may also recover for profits lost as a result of the injury. However, he or she may not recover for both loss of profits and loss of use because that would result in a double recovery [*Tremeroli v. Austin Trailer Equip. Co. (1951) 102 Cal. App. 2d 464, 482-483, 227 P.2d 923]* . A person may, however, recover for both loss of use of the property and a loss of profits that would have been made from the sale of the property [*Johnson v. Central Aviation Corp. (1951) 103 Cal. App. 2d 102, 106, 229 P.2d 114]* . A plaintiff may recover profits earned by a trespasser from the use of real property only on a showing that the plaintiff had the capacity to put the land to the same use and generate the same profits [*Hammond v. County of Madera (9th Cir. 1988) 859 F.2d 797, 803-804]* .

The award of damages for loss of profits depends on whether or not there is a satisfactory basis for estimating what the probable earnings would have been had there been no tort [*Natural Soda Prods. Co. v. City of Los Angeles (1943) 23 Cal. 2d 193, 199, 143 P.2d 12]* . If no such basis exists, it may be necessary to deny recovery on the ground that the alleged loss of profits is uncertain, speculative, or remote [*Lucky Auto Supply v. Turner (1966) 244 Cal. App. 2d 872, 883, 53 Cal. Rptr. 628* ; *Johnson v. Central Aviation Corp. (1951) 103 Cal. App. 2d 102, 105-106, 229 P.2d 114]* . In one case, for example, owners of a children's toy store were not allowed to recover for profits that may have been lost because the defendant's tort prevented the plaintiffs from expanding their Internet web site. The plaintiffs, who had averaged only about $500 a year in revenue from their existing web site, presented no evidence that they actually would have made a profit from a greater Internet presence [*Kids' Universe v. In2Labs (2002) 95 Cal. App. 4th 870, 887-888* (plaintiffs' expert analysis comparing lost opportunity to that of another Internet toy retailer was too speculative)].

However, if there has been an operating experience sufficient to permit a reasonable estimate of probable income and expenses, damages for loss of profits are awarded [*Maggio, Inc. v. United Farm Workers (1991) 227 Cal. App. 3d 847, 871-876, 278 Cal. Rptr. 250* ; *Lucky Auto Supply v. Turner (1966) 244 Cal. App. 2d 872, 883, 53 Cal. Rptr. 628]* . Further, if the fact of lost profits is certain, the amount need not be established with exact certainty, particularly if it is the defendant's wrongful acts that have created the difficulty in proof [*GHK Associates v. Mayer Group, Inc. (1990) 224 Cal. App. 3d 856, 873-874, 274 Cal. Rptr. 168]* .

An award of damages for profits lost by an interrupted business is limited to the period of the interruption. Once a business has been resurrected, profits allegedly lost thereafter are not necessarily attributable to a defendant's negligence and become matters of speculation and conjecture [*Blake v. E. Thompson Petroleum Repair Co. (1985) 170 Cal. App. 3d 823, 834, 216 Cal. Rptr. 568]* .

The amount of damages must be reduced to their present value [*Inyo Chem. Co. v. City of Los Angeles (1936) 5 Cal. 2d 525, 543, 55 P.2d 850]* . For discussion, see *§ 177.46[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesProperty DamageGeneral OverviewTortsDamagesCompensatory DamagesProperty DamageAward CalculationsTortsDamagesCompensatory DamagesProperty DamageLoss of Use

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§ 177.48 Mitigation of Damages

A plaintiff, in both a personal injury action and an action for injury to property, is bound to exercise reasonable care and diligence to avoid loss and minimize the resulting damages and cannot recover for losses that might have been prevented by reasonable efforts and expenditures [*Valencia v. Shell Oil Co. (1944) 23 Cal. 2d 840, 844, 147 P.2d 558* (action for injury to property); *Pretzer v. California Transit Co. (1930) 211 Cal. 202, 208, 294 P. 382* (personal injury action); *see generally § 177.17*]. The doctrine of mitigation of damages applies both to negligence and to intentional torts [*Green v. Smith (1968) 261 Cal. App. 2d 392, 396, 67 Cal. Rptr. 796]* .

The plaintiff's failure to mitigate damages is an affirmative defense that must be pleaded and proved by the defendant [*Mayes v. Sturdy N. Sales, Inc. (1979) 91 Cal. App. 3d 69, 86, 154 Cal. Rptr. 43]* . For a form of affirmative defense asserting the failure to mitigate, Ch. 380, *Negligence*, see *§ 177.199*.

If, in a personal injury action, a plaintiff's injuries are such that a reasonable person would seek medical treatment, medical treatment must be secured [*Christiansen v. Hollings (1941) 44 Cal. App. 2d 332, 346, 112 P.2d 723* (plaintiff seeking medical care from doctor before turning to Christian Science)]. Generally, if a plaintiff exercises reasonable diligence in caring for his or her injury and uses reasonable means to prevent its aggravation and to effect a complete cure, he or she is not obligated to undergo a dangerous operation or amputation because it might minimize the loss to be suffered by the defendant [*Dodds v. Stellar (1946) 77 Cal. App. 2d 411, 423, 175 P.2d 607* ; *Karberg v. Southern Pacific Co. (1935) 10 Cal. App. 2d 234, 252, 52 P.2d 285]* . Thus, if the injuries appear slight, even the use of home treatments or remedies is permissible, even though plaintiff thereafter consults a physician when complications develop or the plaintiff realizes the serious nature of the injury [*Garrison v. Booth (1935) 10 Cal. App. 2d 738, 742-743, 52 P.2d 535* (home remedy used to treat abrasion that was later found to have developed blood poisoning)].

The failure or refusal of a parent to prevent the live birth of his or her child is not a defense in an action for wrongful birth and may not be considered in awarding damages [*Civ. Code § 43.6(b)*]. Nor are the parents required to give the child up for adoption [*Stills v. Gratton (1976) 55 Cal. App. 3d 698, 709, 127 Cal. Rptr. 652]* .

For further discussion of mitigation of damages, see Levy, Golden, & Sacks, California Torts, Ch. 53.

Legal Topics:

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

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§ 177.49 Benefit Conferred by Defendant

If the defendant's tortious conduct has caused harm to the plaintiff, but in so doing has also conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages to the extent that it is equitable [*Turpin v. Sortini (1982) 31 Cal. 3d 220, 236, 182 Cal. Rptr. 337, 643 P.2d 954* ; *Maben v. Rankin (1961) 55 Cal. 2d 139, 144, 10 Cal. Rptr. 353, 358 P.2d 681* ; *see Morris v. Frudenfeld (1982) 135 Cal. App. 3d 23, 35 n.7, 185 Cal. Rptr. 76* (rule applied in wrongful birth case); *Dakota Gardens Apartment Investors "B" v. Pudwill (1977) 75 Cal. App. 3d 346, 351, 142 Cal. Rptr. 126* (conversion)]. The "special benefits" doctrine reflects the basic compensatory theory underlying tort damages by restricting recovery to the harm actually incurred [*Heckert v. MacDonald (1989) 208 Cal. App. 3d 832, 839, 256 Cal. Rptr. 369]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentWrongful BirthTortsDamagesCompensatory DamagesAward CalculationsTortsDamagesMitigation

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§ 177.50 Double Recovery Barred

[1] Generally

A plaintiff is barred from a double recovery from multiple defendants or their insurers for the same injury. Consequently, if one of several tortfeasors makes a payment to a plaintiff because of an injury for which all of the tortfeasors are liable, the amount the plaintiff may recover from the remaining tortfeasors is reduced by that amount [*Laurenzi v. Vranizan (1945) 25 Cal. 2d 806, 813, 155 P.2d 633* ; *see Code Civ. Proc. § 877(a)* (effect of release or dismissal on joint tortfeasors); *Carr v. Cove (1973) 33 Cal. App. 3d 851, 854-855* ; *see generally* Ch. 300, *Indemnity and Contribution*]. However, this bar against a double recovery does not apply if a plaintiff's claim involves separate injuries caused by independent tortfeasors [*Ash v. Mortensen (1944) 24 Cal. 2d 654, 660, 150 P.2d 876* (personal injuries sustained in automobile accident and injuries sustained as result of malpractice in treatment following accident); *Carr v. Cove (1973) 33 Cal. App. 3d 851, 854, 109 Cal. Rptr. 449* ; *see Kardly v. State Farm Mut. Auto. Ins. Co. (1989) 207 Cal. App. 3d 479, 485-487, 255 Cal. Rptr. 40* (negligent driver and plaintiff's own insurance company are not joint tortfeasors for purposes of collateral source rule, and payments received from negligent driver in prior action are not set off against liability of insurer for breach of duty and bad faith with regard to its handling of plaintiff's first-party insurance claims arising from same accident)].

In addition, a plaintiff is barred from a double recovery in the form of two distinct measures of damages for one type of injury [*Mozzetti v. City of Brisbane (1977) 67 Cal. App. 3d 565, 575-576, 136 Cal. Rptr. 751* (in case involving damage to real property, plaintiff may recover lesser of cost of repairing and restoring the property or diminution in value of property but not both)]. However, the recovery of two distinct kinds of damages, such as compensatory and punitive damages, for the same injury does not constitute a prohibited double recovery [*Merlo v. Standard Life & Accident Ins. Co. (1976) 59 Cal. App. 3d 5, 20, 130 Cal. Rptr. 416* (award of compensatory and punitive damages in action for breach of covenant of good faith and fair dealing by insurer)].

Further, two different kinds of relief may not be ordered to redress the same harm. For example, problems corrected through equitable relief may not also be compensated through an award of damages for future harm [*Alexander v. McKnight (1992) 7 Cal. App. 4th 973, 978-980, 9 Cal. Rptr. 2d 453* (damages for diminution in property value due to

nuisance improper if nuisance ordered abated)].

For discussion of the appropriate measure of damages if the same facts constitute a breach of tort and contract, see *§ 177.76[3]*.

[2] Collateral Source Rule Exception

[a] Generally

If an injured party received some compensation for his or her injuries from a source wholly independent of the tortfeasor, the payment generally may not be deducted from the damages that the plaintiff would otherwise collect from the tortfeasor [*Maggio, Inc. v. United Farm Workers (1991) 227 Cal. App. 3d 847, 877, 278 Cal. Rptr. 250]* . The rule applies to public entities and their employees as well as to private entities and individuals [*Helfend v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 1, 14*]. However, *Gov. Code § 985* provides for a post-trial motion by a public entity defendant for reduction of the judgment to reflect certain payments of medical expenses [*see Scott v. County of Los Angeles (1994) 27 Cal. App. 4th 125, 154-155, 32 Cal. Rptr. 2d 643]* . For further discussion, see Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities* .

The most typical case in which the rule is applied is if the person suffering the damage has procured insurance against the loss, and the insurer pays him or her for the loss. The rule thus permits a person who has invested years of insurance premiums to assure his or her medical care to receive the benefits of his or her thrift. The tortfeasor should not benefit from the victim's providence [*Helfend v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 1, 6, 9, 10-11, 84 Cal. Rptr. 173, 465 P.2d 61* ; *see Anheuser-Busch, Inc. v. Starley (1946) 28 Cal. 2d 347, 349, 170 P.2d 448]* . Moreover, any potential double recovery is often avoided because the collateral source making payment may have subrogation or lien rights against any subsequent recovery from the tortfeasor [*see Helfend v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 1, 10-11, 84 Cal. Rptr. 173, 465 P.2d 61* ; *see also Lab. Code § 3856(b)* (employer's lien for workers' compensation benefits)].

Applying the collateral source rule, one court of appeal opinion held that when a plaintiff was contractually liable for the full amount that would normally have been charged for the health care services provided, the fact that the plaintiff's private health care insurer negotiated a lesser amount as payment in full for those services did not reduce the tortfeasor's liability for the full, reasonable value of the services. That court opinion concluded that because the plaintiff had the foresight to purchase health insurance, she, rather than the tortfeasor, should receive the benefit of that foresight, one benefit of which was the insurer's ability to negotiate a lower payment amount and extinguish plaintiff's contractual liability for the unpaid amount [*Howell v. Hamilton Meats & Provisions, Inc. (2009) 179 Cal. App. 4th 686, 699-700, 101 Cal. Rptr. 3d 805 , review granted, depublished, 2010 Cal. LEXIS 2691*].

The collateral source rule only applies to plaintiffs who are damaged by a tortfeasor. It does not apply to a tortfeasor who seeks to recover indemnity from a co-tortfeasor if the first tortfeasor's insurer has made payment on the tortfeasor's behalf to the underlying plaintiff. Under those circumstances, the insured tortfeasor may only recover indemnity on the amounts paid out of the insured's own pocket, although this may include deductible amounts required by the insurance policy [*Miller v. Ellis (2002) 103 Cal. App. 4th 373, 379-382, 126 Cal. Rptr. 2d 667]* .

Collateral sources include first-party insurance benefits, such as liability, health, medical, property, and life insurance [*see Helfend v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 1, 10, 84 Cal. Rptr. 173, 465 P.2d 61]* . A fidelity bond is also a collateral source [*Pacific Gas & Elec. Co. v. Superior Court (1994) 28 Cal. App. 4th 174, 180, 33 Cal. Rptr. 2d 522]* . Collateral sources also include employee benefits [*see Morse v. Southern Pac. Transp. Co. (1976) 63 Cal. App. 3d 128, 133-134, 133 Cal. Rptr. 577]* , workers' compensation [*see De Cruz v. Reid (1968) 69 Cal. 2d 217, 222-227, 70 Cal. Rptr. 550, 444 P.2d 342]* , Social Security benefits [*McKinney v. California Portland Cement Co. (2002) 96 Cal. App. 4th 1214, 1224-1226, 117 Cal. Rptr. 2d 849]* , and Medi-Cal [*Hanif v. Hous. Auth. (1988) 200*

Cal. App. 3d 635, 639-640, 246 Cal. Rptr. 192] .

Although employee benefits are generally considered a collateral source, the court of appeal held in one case that the collateral source rule did not prevent the defendant from introducing evidence that the plaintiff would receive disability pension benefits because of his injury [*Rotolo Chevrolet v. Superior Court (2003) 105 Cal. App. 4th 242, 248-249, 129 Cal. Rptr.2d 283]* . In that particular case, the plaintiff was forced to retire because of his injuries, and he intended to claim as damages both his lost income and his lost regular retirement pension. However, he sought to prevent the defendant from introducing evidence that he would be receiving a disability retirement pension instead of the regular retirement pension. The court of appeal concluded that it would be inequitable for the plaintiff to claim that he lost his retirement pension because of the injury, when in fact the injury merely caused him to receive a disability pension instead. The court also noted that allowing the plaintiff to prevent introduction of evidence about his disability pension would effectively allow the plaintiff to receive triple compensation for the injury, in the form of damages for lost income, damages for the lost regular pension, and benefits actually paid under the disability pension [*Rotolo Chevrolet v. Superior Court (2003) 105 Cal. App. 4th 242, 246-247, 129 Cal. Rptr. 2d 283]* . The court did recognize, however, that the plaintiff might be able to recover for the amount by which his regular pension would have exceeded his disability pension [*Rotolo Chevrolet v. Superior Court (2003) 105 Cal. App. 4th 242, 248, 129 Cal. Rptr. 2d 283]* .

One court has refused to treat uninsured motor vehicle insurance as a collateral source, instead considering the insurer as standing in the shoes of the uninsured tortfeasor [*Waite v. Godfrey (1980) 106 Cal. App. 3d 760, 766-776, 163 Cal. Rptr. 881* ; *see § 177.50[1]*]. However, another court has criticized, in dicta, the reasoning of this case, stating that it used "suspect analysis and ill-considered data" [*Pacific Gas & Elec. Co. v. Superior Court (1994) 28 Cal. App. 4th 174, 181, 33 Cal. Rptr. 2d 522]* . In the view of the latter court, the focus of the collateral source rule must be on who paid for the insurance, not on whose acts triggered coverage by the policy [*Pacific Gas & Elec. Co. v. Superior Court (1994) 28 Cal. App. 4th 174, 181-182, 33 Cal. Rptr. 2d 522* (rejecting argument that fidelity bond should not be considered collateral source because it represented payment made on account of conduct of joint tortfeasor, similar to uninsured motorist coverage)].

Some cases have stated the collateral source rule as applicable to gratuitious payments or gratuitiously provided services as well as to those provided pursuant to contract [*see* *Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 637, 7 Cal. Rptr. 377, 354 P.2d 1073* (citing cases)]. In at least one other case, a court permitted a plaintiff to recover the reasonable value of services provided gratuitously by his wife, without discussion of the collateral source rule [*Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 661-662, 151 Cal. Rptr. 399* (the court did note that payments made to plaintiff for nursing care by State Fund were deducted from jury award)]. However, the California Supreme Court has specifically reaffirmed its adherence to the collateral source rule only in those cases in which the collateral source is one for which the plaintiff has actually or constructively paid (such as insurance or pension benefits), or in which the collateral source will be recompensed from the plaintiff's tort recovery through subrogation or some other arrangement [*Helfend v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 1, 13-14, 84 Cal. Rptr. 173, 465 P.2d 61]* .

At least one subsequent court of appeal opinion has rejected the argument that the Supreme Court in *Helfend* created an exception to the collateral source rule for gratuitous benefits if the injured party has incurred no expense, obligation, or liability [*Arambula v. Wells (1999) 72 Cal. App. 4th 1006, 1010, 85 Cal. Rptr. 2d 584]* . Therefore, the court of appeal held that the plaintiff in the case before it was entitled to seek damages for lost wages, even though the plaintiff had been gratuitously paid his full weekly salary by his brother, who controlled the employing business, during a period when the plaintiff was unable to work [*Arambula v. Wells (1999) 72 Cal. App. 4th 1006, 1008, 85 Cal. Rptr. 2d 584; see also Smock v. State of California (2006) 138 Cal. App. 4th 883, 887-888, 41 Cal. Rptr. 3d 857 (collateral source rule applied to payment by law firm of partner's full salary during convalescence period, even if payment was considered gratuitous)]* . The court, noting that the plaintiff had not promised to repay the gratuitous salary [*see* *Arambula v. Wells (1999) 72 Cal. App. 4th 1006, 1008, 85 Cal. Rptr. 2d 584]* , concluded that the same public policy concerns that support application of the collateral source rule to receipt of insurance benefits support application of the

doctrine to receipt of gratuitous charitable assistance, especially if the assistance is received from a family member. The court concluded that a tortfeasor should not be entitled to reap a benefit merely because a family member of the victim chose to provide monetary assistance [*Arambula v. Wells (1999) 72 Cal. App. 4th 1006, 1012-1014, 85 Cal. Rptr. 2d 584]* . Thus, whether a truly gratuitious payment or service is a collateral source is currently open to question.

One court of appeal opinion has noted in dicta that collateral sources seem universally to involve payments that, if recovered in a tort action, would be characterized as special damages. The court questioned whether the collateral source rule should ever be applied to allow double recovery of general damages for pain and suffering [*Waite v. Godfrey (1980) 106 Cal. App. 3d 760, 773-774, 163 Cal. Rptr. 881]* . Nevertheless, another court has rejected such a limitation and invoked the collateral source rule to deny set off for general damages awarded in one action against a potential award of general damages in a second action [*Kardly v. State Farm Mut. Auto. Ins. Co. (1989) 207 Cal. App. 3d 479, 487, 255 Cal. Rptr. 40* (involving subsequent first-party insurance bad faith action after recovery against negligent driver in original action)].

The collateral source rule applies in legal malpractice actions, with the defendant attorney standing in the shoes of the underlying tortfeasor from whom recovery is impossible because of the malpractice. If the plaintiff's recovery would not be reduced with regard to the tortfeasor on account of the collateral source rule, it is not reduced with regard to the negligent attorney [*see Norton v. Superior Court (1994) 24 Cal. App. 4th 1750, 1758, 30 Cal. Rptr. 2d 217]* .

The collateral source rule is a rule of evidence as well as a rule of damages, and evidence of receipt of benefits from the collateral source is inadmissible unless relevant for purposes other than to reduce damages. However, even if arguably relevant for other purposes, it usually should be excluded under *Evid. Code § 352* because its prejudicial impact outweighs its probative value [*see Hrnjak v. Graymar, Inc. (1971) 4 Cal. 3d 725, 729-734, 94 Cal. Rptr. 623, 484 P.2d 599]* .

The fact that collateral source evidence may not be admissible at trial does not necessarily preclude discovery of the evidence; as long as the evidence sought in discovery is either admissible (regardless of whether it might be excluded at trial under *Evid. Code § 352* or some other objection) or reasonably calculated to lead to the discovery of admissible evidence, the evidence is likely to be subject to discovery [*see Norton v. Superior Court (1994) 24 Cal. App. 4th 1750, 1760-1762, 30 Cal. Rptr. 2d 217]* .

Often, the collateral source rule does not allow the plaintiff a double recovery because the collateral source will be reimbursed from the recovery through subrogation, lien rights, or some other arrangement [*see Helfend v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 1, 10-11, 84 Cal. Rptr. 173, 465 P.2d 61* ; *see also § 177.54*]. However, if the collateral source waives its right to subrogation, it inures to the benefit of the injured party, not the tortfeasor [*Pacific Gas & Elec. Co. v. Superior Court (1994) 28 Cal. App. 4th 174, 184, 33 Cal. Rptr. 2d 522]* .

For further discussion of the collateral source rule, see Levy, Golden, & Sacks, California Torts, Ch. 53 (Matthew Bander).

[b] Medical Malpractice Actions

A statutory exception to the collateral source rule has been enacted that governs personal injury actions against health care providers based on professional negligence. The defendant in such an action for personal injury may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to the United States Social Security Act; any state or federal income disability or worker's compensation act; any health, sickness, or income-disability insurance; any accident insurance that provides health benefits or income disability coverage; and any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services. However, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure his or her right to the insurance benefits concerning which the

defendant has introduced evidence [*Civ. Code § 3333.1(a)*; *see Fein v. Permanente Med. Group (1985) 38 Cal. 3d 137, 175-178, 211 Cal. Rptr. 368, 695 P.2d 665* (upholding constitutionality of *Civ. Code § 3333.1*)].

The statute dispenses with the collateral source rule as a rule of evidence rather than as a rule of damages. It does not expressly prohibit receipt of the same damages from both the tortfeasor and the collateral source, but rather relies on the fact finder to exclude payments from the collateral source in computing damages to be recovered from the tortfeasor [*see Brown v. Stewart (1982) 129 Cal. App. 3d 331, 336 n.2, 181 Cal. Rptr. 112]* . The collateral source is then prohibited from recovering its payments from the plaintiff, either by subrogation rights or otherwise [*Civ. Code § 3333.1(b)*].

For further discussion of limitations on the recovery of damages in actions against health care providers, see Ch. 295, *Hospitals* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCollateral Source RuleEmployment Benefits & Workers' CompensationTortsDamagesCollateral Source RuleGovernment BenefitsTortsDamagesCollateral Source RuleGratuitous BenefitsTortsDamagesCollateral Source RuleInsurance Payments

California Forms of Pleading and Practice--Annotated

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Chapter 177 DAMAGES
PART II. LEGAL BACKGROUND
B. Tort Damages

15-177 California Forms of Pleading and Practice--Annotated § 177.51

§ 177.51 Punitive Damages

[1] Generally

In a tort action, when it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff may recover, in addition to actual damages, damages for the sake of example, and by way of punishing the defendant [*Civ. Code § 3294(a)*].

Punitive damages are not available in a contract action. In the absence of an independent tort, punitive damages may not be awarded for breach of contract even if the defendant's conduct in breaching the contract was willful, fradulent, or malicious [*Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 516, 28 Cal. Rptr. 2d 475, 869 P.2d 454* ; *see, e.g.,* *Brewer v. Premier Golf Properties, LP (2008) 168 Cal. App. 4th 1243, 1255-1256, 86 Cal. Rptr. 3d 225* (punitive damages not available for violation of statutory provisions governing employee's right to unpaid wages and meal or rest breaks, as rights arose from employment contract)]. Even if a separate tort cause of action is alleged along with a breach of contract action, a punitive damage award is improper if the verdict is based only on the contract action [*Myers Bldg. Indus., Ltd., v. Interface Techn., Inc. (1993) 13 Cal. App. 4th 949, 960, 17 Cal. Rptr. 2d 242]* .

The fact that exemplary or punitive damages are recoverable under *Civ. Code § 3294(a)* in addition to actual damages reflects the fact that they are mere incidents to a cause of action and can never constitute the basis thereof [*All-W. Design, Inc. v. Boozer (1986) 183 Cal. App. 3d 1212, 1222, 228 Cal. Rptr. 736]* . Absent proof of the underlying cause of action, there can be no award of punitive damages [*see* *Orient Handel v. United States Fid. & Guar. Co. (1987) 192 Cal. App. 3d 684, 697, 237 Cal. Rptr. 667* (underlying fraud verdict and punitive damages award reversed)].

It is the exclusive province of the jury to determine whether or not a plaintiff is entitled to punitive damages. Absent a waiver of trial by jury, punitive damages cannot be awarded by summary judgment even if undisputed evidence establishes that the defendant committed oppression, fraud, or malice and, therefore, that punitive damages are permissible under *Civ. Code § 3294(a)* [*see* *Haines v. Parra (1987) 193 Cal. App. 3d 1553, 1559-1561, 239 Cal. Rptr. 178* (fraud)].

In the absence of a statute, punitive damages are allowed only to the immediate person injured [*People v. Superior Court (1973) 9 Cal. 3d 283, 287, 107 Cal. Rptr. 192, 507 P.2d 1400* ; *see also § 177.51[11]*].

[2] Purpose

The primary purposes of punitive damages are to punish wrongdoers and to deter the commission of wrongful acts [*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc. (1984) 155 Cal. App. 3d 381, 387, 202 Cal. Rptr. 204]* . In other words, punitive damages are addressed to the nature and gravity of the defendant's wrongful conduct, and they serve as an example or as a warning to others not to engage in such conduct. The object of punitive damages is to make the example as well as the punishment fit the offense [*Wetherbee v. United Ins. Co. of Am. (1971) 18 Cal. App. 3d 266, 270, 95 Cal. Rptr. 678* ; *see Castaic Clay Mfg. Co. v. Dedes (1987) 195 Cal. App. 3d 444, 450, 240 Cal. Rptr. 652]* . In this way, punitive damages are distinguished from compensatory damages which have as their object the compensation of an injured person for his or her injury [*Merlo v. Standard Life & Accident Ins. Co. (1976) 59 Cal. App. 3d 5, 20, 130 Cal. Rptr. 416]* .

[3] Compared to Statutory Damages

Punitive damages should not be equated with various statutory damages awarded in situations in which the legislature has determined that damages in excess of compensatory or actual damages are appropriate. These statutory damages may take the form of penalties, which impose damages in an arbitrary sum regardless of actual damages suffered, or may provide for the doubling or trebling of the actual or compensatory damages found by the trier of fact [*see, e.g., Civ. Code § 52* (damages up to three times actual damages, but no less than $1,000, for discrimination)]. Thus, although both punitive damages and statutory damages serve to motivate compliance with the law and punish wrongdoers, they are distinct legal concepts, one of which is entrusted to the fact finder and the other entrusted to the legislature. The standards applicable to punitive damages do not apply to these other statutory damage awards [*Kizer v. County of San Mateo (1991) 53 Cal. 3d 139, 146-148, 279 Cal. Rptr. 318, 806 P.2d 1353* (statutory penalties need not be based on showing of harm to plaintiff, and may be recovered from public entity notwithstanding *Gov. Code § 818*); *Beeman v. Burling (1990) 216 Cal. App. 3d 1586, 1597-1598, 1601, 265 Cal. Rptr. 719* (defendant's wealth irrelevant to award of statutory damages for violation of rent control ordinance)].

If a statutory penalty is imposed for a wrongful act, it does not automatically preclude recovery of punitive damages in a tort action if the necessary malice or oppression is shown [*Greenberg v. Western Turf Ass'n (1903) 140 Cal. 357, 363, 73 P. 1050* ; *Turnbull & Turnbull v. ARA Transp., Inc. (1990) 219 Cal. App. 3d 811, 826, 268 Cal. Rptr. 856]* . However, if the purpose of the penalty (for example, treble damages) is the same as that of punitive damages, the plaintiff cannot obtain a double recovery and must elect either the award of compensatory and punitive damages or the statutory damages [*Turnbull & Turnbull v. ARA Transp., Inc. (1990) 219 Cal. App. 3d 811, 826, 268 Cal. Rptr. 856* ; *Marshall v. Brown (1983) 141 Cal. App. 3d 408, 419, 190 Cal. Rptr. 392]* . If the statutory penalty is mandatory, the plaintiff has an election of remedies only if punitive damages are recoverable under another theory of liability or cause of action [*Turnbull & Turnbull v. ARA Transp., Inc. (1990) 219 Cal. App. 3d 811, 827, 268 Cal. Rptr. 856]* . Although a plaintiff may be required to elect between punitive damages and a statutory penalty, this election is made after a verdict is returned and need not be made at the pleading stage [*Clauson v. Superior Court (1998) 67 Cal. App. 4th 1253, 1256, 79 Cal. Rptr. 2d 747]* .

[4] Assignability of Punitive Damages Claim

Absent a statutory basis, punitive damages are generally allowed only to those directly injured by intentional tortious acts or omissions [*Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 942, 132 Cal. Rptr. 424, 553 P.2d 584]* . Because of this rule, and because purely personal tort causes of action are not assignable in California, a claim for punitive damages is generally not assignable [*Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 942, 132 Cal. Rptr. 424, 553 P.2d 584]* . If a single and indivisible cause of action is assigned, the assignor cannot thereafter sue for

punitive and personal tort damages arising out of that cause of action, even though the assignee is also barred from recovering those damages [*see Purcell v. Colonial Ins. Co. (1971) 20 Cal. App. 3d 807, 814, 97 Cal. Rptr. 874]* .

However, the result may be different if the plaintiff makes an assignment of his or her rights to another person but retains a reservation of the right to sue an insurer. In one case, for example, an insured assigned his right to bring an action against the insurer for failure to settle, including the right to sue for the amount of an excess verdict, but explicitly reserved the right to bring an action for physical injuries caused by the failure to settle. Under these circumstances, the insured was allowed to bring an action for punitive damages for himself, because of the reservation of the right to sue and because the suits were brought within the same action, thus protecting the defendant insurer from possible inconsistent judgments [*Cain v. State Farm Mut. Auto Ins. Co. (1975) 47 Cal. App. 3d 783, 794-796, 121 Cal. Rptr. 200]* .

A receiver may also pursue a claim for punitive damages for the benefit of the receivership estate without constituting an impermissible assignment [*see Baron v. Fire Ins. Exchange (2007) 154 Cal. App. 4th 1184, 1194-1196, 65 Cal. Rptr. 3d 502]* .

[5] Constitutionality

[a] Punitive Damages Awards Generally

Punitive damages imposed under California law have been upheld by courts against several constitutional challenges [*see Roberts v. Ford Aerospace & Commc'ns Corp. (1990) 224 Cal. App. 3d 793, 802-804, 274 Cal. Rptr. 139* ; *see also Maheu v. Hughes Tool Co. (9th Cir. 1978) 569 F.2d 459, 480* (statute not vague or overbroad); *Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 404-405, 89 Cal. Rptr. 78* (terms "oppression," "fraud," and "malice" not unconstitutionally vague); *Toole v. Richardson-Merrell Inc. (1967) 251 Cal. App. 2d 689, 719, 60 Cal. Rptr. 398* (statute not unconstitutional for lack of standards to measure punishment and monetary limits on award)]. Many of these cases were decided prior to 1980 and 1987 amendments that further defined terms and provided for proof by clear and convincing evidence (*see § 177.51[6][a], [c]*).

The United States Supreme Court has stated that unlimited discretion in a finder of fact in fixing punitive damages offends the *due process clause of the Fourteenth Amendment*. However, as long as discretion is exercised within reasonable constraints, due process is satisfied [*Pacific Mut. Life Ins. Co. v. Haslip (1991) 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1, 20-21* ; *cf. BMW of N. Am., Inc. v. Gore (1996) 517 U.S. 559, 574 116 S. Ct. 1589, 134 L. Ed. 2d 809* (award constitutionally excessive under specific circumstances of case)].

Sufficient discretion-limiting constraints may be found in a state's procedures and common law; statutory provisions are not required. Among the factors that support the constitutionality of punitive damages under due process standards are jury instructions explaining the nature andpurpose of punitive damages, trial court review for excessiveness, and the availability of appellate review under detailed substantive commmon-law standards. The application of these standards impose a meaningful constraint on the discretion of fact finders in awarding punitive damages [*see Pacific Mut. Life Ins. Co. v. Haslip (1991) 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1, 20-22* (construing Alabama law); *see also TXO Prod. v. Alliance Res. (1993) 509 U.S. 443, 462-466 113 S. Ct. 2711, 125 L. Ed. 2d 366* (procedure under West Virginia law did not violate defendant's due process rights); *cf. Honda Motor Corp. v. Oberg (1994) 512 U.S. 415, 426-430, 114 S. Ct. 2331, 129 L. Ed. 2d 336* (Oregon law precluding determination on review of whether award is excessive in amount violated defendants' due process rights)]. Several California appellate courts have found that California procedures meet the test set forth in *Haslip* [*see, e.g., Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal. App. 3d 1220, 1256-1259, 1 Cal. Rptr. 2d 301* ; *Liberty Transp., Inc. v. Harry W. Gorst Co. (1991) 229 Cal. App. 3d 417, 441, 280 Cal. Rptr. 159* , *disapproved on other grounds, Adams v. Murakami (1991) 54 Cal. 3d 105, 115-116, 284 Cal. Rptr. 318, 813 P.2d 1348]* . However, it remains possible that California courts may find some state-law basis for requiring review of punitive-damages awards for excessiveness beyond that already employed.

In a later case, the U.S. Supreme Court held that a specific award of punitive damages imposed by a state court against an automobile manufacturer was "grossly excessive," and therefore violative of the *Due Process Clause of the Fourteenth Amendment*. The award of $2 million in punitive damages was based on the defendant automobile manufacturer's practice of not disclosing to consmers that a particular automobile had been damaged and repainted before it was sold as a new vehicle. Plaintiff, who had purchased such a "new" vehicle, was awarded $4,000 in compensatory damages (based on diminished value of the vehicle) and $4 million in punitive damages, later remitted by the Alabama Supreme Court to $2 million [*BMW of N. Am., Inc. v. Gore (1996) 517 U.S. 559, 563-567, 116 S. Ct.1589, 134 L. Ed. 2d 809]* .

In determining whether or not a particular award is excessive, the Court held that the review must focus on the scope of the state's legitimate interests in punishing the defendant and deterring it from further misconduct. This "legitimacy" determination precludes a state from punishing a defendant for conduct in other states that is lawful in those states [*BMW of N. Am., Inc. v. Gore (1996) 517 U.S. 559, 572-573, 116 S. Ct. 1589, 134 L. Ed. 2d 809]* . In addition, the Court enunciated three guideposts to be used in determining whether the defendant received fair notice of the severity of the penalty that could be imposed for misconduct [*BMW of N. Am., Inc. v. Gore (1996) 517 U.S. 559, 574-585, 116 S. Ct. 1589, 134 L. Ed. 2d 809]* :

- The degree of reprehensibility of the misconduct;

- The disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and

- The difference between the award and the civil penalties authorized or imposed in comparable cases.

To comport with due process concerns in calculating a proper amount of punitive damages, a plaintiff may not litigate the merits of hypothetical claims of other parties [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 422-423, 123 S. Ct. 1513, 155 L. Ed. 2d 585]* . However, in determining the degree of reprehensibility of the defendant's conduct, evidence that the defendant committed acts of misconduct against other parties may be considered, although the other misconduct must be similar to the misconduct that was perpetrated against the plaintiff [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 422-423, 123 S. Ct. 1513, 1523, 155 L. Ed. 2d 585]* .

The California Supreme Court has interpreted this to mean that a state may, to further its legitimate goal in deterring future misconduct, consider whether the type of misconduct perpetrated against the particular plaintiff was an isolated event or was but one instance in a pattern of similar misconduct, in determining the reprehensibility of the defendant's conduct, which in turn will necessarily affect the amount of punitive damages awarded [*Johnson v. Ford Motor Co. (2005) 35 Cal. 4th 1191, 1206-1207, 29 Cal. Rptr.3d 401*]. Evidence of other misconduct by the defendant is inadmissible to prove either a right to or amount of punitive damages if that other misconduct is not sufficiently similar to the misconduct that allegedly damaged the plaintiff [*Holdgrafer v. Unocal Corp. (2008) 160 Cal. App. 4th 907, 928-932, 73 Cal. Rptr. 3d 216* (oil company's denials and concealments in relation to other oil spills and contaminations was inadmissible in suit involving amount of damage from subsurface contamination that was not denied or concealed)].

The United States Supreme Court has cautioned that while harm caused to nonparties may be considered when evaluating the reprehensibility of a defendant's conduct, such as when the evidence shows that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, an award of punitive damages specifically intended to punish for harm allegedly caused to nonparties violates due process [*Philip Morris USA v. Williams (2007) 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940, 951] , on remand, 344 Ore. 45 (2008)* .

In addition, assuming the evidence has probative value for a relevant issue, conduct that took place in another

jurisdiction may be considered even if the conduct was legal in the jurisdiction in which it took place, although out-of-state conduct, if legal, cannot be punished through punitive damages in a state in which it is tortious [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 422-423, 123 S. Ct. 1513, 1523, 155 L. Ed. 2d 585]* .

The U.S. Supreme Court has also rejected the contention that punitive damages awards in civil cases can violate the prohibition of *U.S. Const. amend. VIII*, on excessive fines, and also has held that punitive damages do not constitute a criminal penalty warranting special scrutiny for vagueness under the *Fourteenth Amendment Due Process Clause* [*Browning-Ferris v. Kelco Disposal (1989) 492 U.S. 257, 272-277, 109 S. Ct. 2909, 106 L. Ed. 2d 219* ; *see also Shore v. Gurnett (2004) 122 Cal. App. 4th 166, 173, 18 Cal. Rptr. 3d 583]* . The California court of appeal has also rejected the argument that an award of punitive damages to a private party violates the constitutional prohibition on double jeopardy if the defendant has previously been punished by the state in a criminal action for the same conduct [*Shore v. Gurnett (2004) 122 Cal. App. 4th 166, 172, 18 Cal. Rptr. 3d 583]* . Similarly, because an award of punitive damages in a civil claim does not constitute a criminal punishment, a statute reviving the limitations period for a common law tort cause of action, thus allowing a plaintiff to seek punitive damages after the time for filing the action had originally expired, does not violate the prohibition against ex post facto laws [*Roman Catholic Bishop of Oakland v. Superior Court (2005) 128 Cal. App. 4th 1155, 1165, 28 Cal. Rptr. 3d 355* (revival of claims for childhood sexual abuse under *Code Civ. Proc. § 340.1* did not implicate ex post facto doctrine)].

[b] Awards to Public Entity Plaintiffs

There is conflicting authority concerning the constitutionality of an award of punitive damages to a plaintiff public entity. One court has held that public policy prohibits the recovery of punitive damages by a public entity because a public entity has at its command the full force of its police power by which it may impose fines or other penal remedies. To allow public entities to recover punitive damages from private tortfeasors and yet prohibit a private party's recovery of those damages from a public entity [*see Gov. Code § 818*; *see § 177.51[9]*)] also raises the specter of a denial of equal protection of the laws [*City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1023, 1026, 244 Cal. Rptr. 507]* .

However, subsequent California court of appeal opinions have rejected *City of Los Angeles* in all regards, including statutory interpretation, public policy, and constitutional concerns [*see City of Glendale v. Superior Court (2002) 95 Cal. App. 4th 1266, 1270-1272, 116 Cal. Rptr. 2d 16* ; *City of Sanger v. Superior Court (1992) 8 Cal. App. 4th 444, 448-451, 10 Cal. Rptr. 2d 436]* . Under those opinions, nothing in *Civ. Code § 3294*, nor any other statute, evinces a legislative intent to limit the class of plaintiffs who may recover punitive damages to private parties [*City of Glendale v. Superior Court (2002) 95 Cal. App. 4th 1266, 1270, 116 Cal. Rptr. 2d 16* ; *City of Sanger v. Superior Court (1992) 8 Cal. App. 4th 444, 448-449, 10 Cal. Rptr. 2d 436]* . Furthermore, the public policy behind punitive damages is advanced even if the defendant could have been punished through the exercise of police power; that is, the punishment and deterrent effects of punitive damages do not depend on the capacity of the victim [*City of Glendale v. Superior Court (2002) 95 Cal. App. 4th 1266, 1270-1271, 116 Cal. Rptr. 2d 16* ; *City of Sanger v. Superior Court (1992) 8 Cal. App. 4th 444, 449, 10 Cal. Rptr. 2d 436]* . Finally, these court opinions find no equal protection bar, in that there is a rational basis for any lack of symmetry in allowing public entities to recover but not be liable for punitive damages [*City of Glendale v. Superior Court (2002) 95 Cal. App. 4th 1266, 1271-1272, 116 Cal. Rptr. 2d 16* ; *City of Sanger v. Superior Court (1992) 8 Cal. App. 4th 444, 449-450, 10 Cal. Rptr. 2d 436]* .

The federal Ninth Circuit Court of Appeals has also refused to apply the rationale of *City of Los Angeles* in a case involving a public water district as plaintiff. This court also found no constitutional impediment to allowing public entities to recover punitive damages while denying recovery from a public entity [*see Westlands Water Dist. v. Amoco Chem. Co. (9th Cir. 1991) 953 F.2d 1109, 1111-1113]* .

[6] Oppression, Fraud, and Malice

[a] Definitions

"Malice" means either (1) conduct that is intended by the defendant to cause injury to the plaintiff or (2) despicable conduct that is carried on by the defendant with a willful and conscious disregard of the rights or safety of others [*Civ. Code § 3294(c)(1)*].

"Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights [*Civ. Code § 3294(c)(2)*].

"Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury [*Civ. Code § 3294(c)(3)*].

These definitions reflect 1987 amendments to *Civ. Code § 3294(c)* [*see* Stats. 1987, ch. 1498, § 5]. These amendments apply in any action in which the initial trial did not commence prior to January 1, 1988 [*Civ. Code § 3294(e)*; *see Code Civ. Proc. § 581(a)(6)* (when trial is deemed to commence for purposes of dismissal)]. The definitions in effect under prior law therefore would apply in any action in which the trial commenced before this date [*see § 177.51[6][b]*]. For discussion of the effect of the 1987 amendments on case law decided on the basis of definitions under prior law, see *§ 177.51[6][c]*.

[b] Definitions Under Prior Law Compared

The existing definitions of oppression, fraud, and malice under *Civ. Code § 3294(c)* reflect 1987 amendments that apply only to actions in which the initial trial is commenced on or after January 1, 1988 [*see Civ. Code § 3294(e)* and § 177.51[6][a]]. Thus, definitions in effect under prior law apply in actions in which the initial trial commenced before that date.

Under prior law, the definition of "fraud" is the same as that currently set out in *Civ. Code § 3294(c)(3)* [*compare* Stats. 1983, ch. 408, *with Civ. Code § 3294(c)(3)*]. "Malice" and "oppression" are, however, defined somewhat differently. "Malice," under prior law, is defined as either (1) conduct intended by the defendant to cause injury to the plaintiff or (2) conduct that is carried on by the defendant with a conscious disregard for the rights or safety of others [*see* Stats. 1983, ch. 408]. In contrast, *Civ. Code § 3294(c)(1)* now defines the second type of malice as "despicable conduct" that is carried on by the defendant with a "willful and conscious disregard" of the rights and safety of others. Similarly, "oppression" under prior law is defined as subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights [*see* Stats. 1983, ch. 408], whereas it is now defined under *Civ. Code § 3294(c)(2)* to mean "despicable conduct" subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.

[c] Effect of 1987 Amendments

The 1987 amendments to *Civ. Code § 3294(c)* [discussed in *§ 177.51[6][b]*], by the addition of such words as "despicable" and "willful," are intended to provide narrower definitions of "oppression" and "malice" to provide greater assurance that punitive damages will be awarded only to punish conduct that is truly blameworthy and reprehensible [*see Mock v. Michigan Millers Mut. Ins. Co. (1992) 4 Cal. App. 4th 306, 331, 5 Cal. Rptr. 2d 594]* . It is consistent with this view that the 1987 amendments did not change either the definition of "fraud" or the definition of "malice" in which there is intent to injure, because both of these definitions involve intentional conduct that is inherently blameworthy. This interpretation is also supported by the fact that *Civ. Code § 3294(a)* was simultaneously amended to require that proof of oppression, fraud, or malice be made by "clear and convincing evidence" [*see § 177.51[7][a]*]. Therefore, cases decided under prior law, which uphold either a finding of "oppression" or a finding of "malice" not involving actual intent to injure, should be used with caution, and are cited in this chapter only as persuasive authority to the extent that they appear to remain consistent with the new definitions.

[d] Conscious Disregard

"Oppression" and "malice" sufficient to support an award of punitive damages do not require an intent to injure in all cases. Rather, either can be found if the defendant acts with a "conscious disregard" of the rights of others [*see Civ. Code § 3294(c)(1), (2)*; *see also § 177.51[6][a]*]. Thus, punitive damages are recoverable in some cases in connection with nonintentional torts [*Peterson v. Superior Court (1982) 31 Cal. 3d 147, 158, 181 Cal. Rptr. 784, 642 P.2d 1305* ; *SKF Farms v. Superior Court (1984) 153 Cal. App. 3d 902, 907, 200 Cal. Rptr. 497]* .

The parameters of what constitutes "conscious disregard" are not fully established. The generally accepted view, as set forth by the California Supreme Court, is that the plaintiff must establish that the defendant was aware of the probable dangerous consequences of the conduct and willfully and deliberately failed to avoid those consequences [*Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 402, 185 Cal. Rptr. 654, 650 P.2d 1171* ; *Taylor v. Superior Court (1979) 24 Cal. 3d 890, 895-896, 157 Cal. Rptr. 693, 598 P.2d 854* ; *see Mock v. Michigan Millers Mut. Ins. Co. (1992) 4 Cal. App. 4th 306, 329, 5 Cal. Rptr. 2d 594* ; *Penner v. Falk (1984) 153 Cal. App. 3d 858, 867, 200 Cal. Rptr. 661]* . This standard is considered as "subjective awareness," in that actual knowledge of the risk is required in all cases [*see Bell v. Sharp Cabrillo Hosp. (1989) 212 Cal. App. 3d 1034, 1045-1046, 260 Cal. Rptr. 886]* . Under it, grossly negligent or reckless conduct is insufficient to support punitive damages unless the element of deliberate failure to avoid the risk can be shown [*G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 32, 122 Cal. Rptr. 218* ; *see Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co. (1986) 185 Cal. App. 3d 1149, 1155, 230 Cal. Rptr. 276* ; *see also Lee v. Bank of Am. (1990) 218 Cal. App. 3d 914, 267 Cal. Rptr. 387* ; *Krusi v. Bear, Stearns & Co. (1983) 144 Cal. App. 3d 664, 679, 192 Cal. Rptr. 793]* .

Other courts, including the California Supreme Court in dicta on one occasion, have phrased the meaning of "conscious disregard" somewhat differently. Under this language, nonintentional conduct may support an award of punitive damages if the defendant intentionally performs an act for which he or she knows, or should know, that it is highly probable that harm will result [*Peterson v. Superior Court (1982) 31 Cal. 3d 147, 158-159, 181 Cal. Rptr. 784, 642 P.2d 1305* ; *see SKF Farms v. Superior Court (1984) 153 Cal. App. 3d 902, 907, 200 Cal. Rptr. 497* ; *Ford Motor Co. v. Home Ins. Co. (1981) 116 Cal. App. 3d 374, 381, 172 Cal. Rptr. 59]* . This standard is considered as "constructive awareness," in that actual knowledge of the risk is not required in all cases [*see Bell v. Sharp Cabrillo Hosp. (1989) 212 Cal. App. 3d 1034, 1045-1046, 260 Cal. Rptr. 886]* . Under it, wanton or reckless misconduct may support an award of punitive damages, even in absence of a showing of actual knowledge of the consequences, if the defendant's conduct is of such severity and such shocking character that it warrants the same treatment as that accorded willful misconduct [*Nolin v. National Convenience Stores, Inc. (1979) 95 Cal. App. 3d 279, 286, 157 Cal. Rptr. 32]* .

Whether these two varying explanations of "conscious disregard" are actually in conflict, and, if so, which should prevail, has not been resolved [*see Bell v. Sharp Cabrillo Hosp. (1989) 212 Cal. App. 3d 1034, 1046 n.11, 260 Cal. Rptr. 886]* . The effect of the 1987 amendment that changed the term "conscious disregard" to "willful and conscious disregard" in the statutory definition of malice must also be considered [*see Civ. Code § 3294(c)(1)*].

[e] Despicable Conduct

Nonintentional conduct constituting oppression or malice so as to support an award of punitive damages must be "despicable" [*see Civ. Code § 3294(c)(1), (2)*]. Despicable conduct has been defined as conduct that is so vile, base, contemptible, miserable, wretched, or loathsome that it would be looked down on and despised by ordinary decent people [*BAJI No. 14.72.1*; *see Mock v. Michigan Millers Mut. Ins. Co. (1992) 4 Cal. App. 4th 306, 331, 5 Cal. Rptr. 2d 594* ; *see also Stewart v. Truck Ins. Exch. (1993) 17 Cal. App. 4th 468, 483, 21 Cal. Rptr. 2d 338* (evidence of insurer's policy of delaying claims of elderly claimants insufficient to establish malice)]. It is error if the court fails at least to include the term "despicable" in jury intructions regarding the meaning of oppression or malice [*Mock v. Michigan Millers Mut. Ins. Co. (1992) 4 Cal. App. 4th 306, 331, 5 Cal. Rptr. 2d 594]* .

[7] Proof of Oppression, Fraud, and Malice

[a] In General

The words "oppression," "fraud," and "malice" as used in *Civ. Code § 3294(a)* are disjunctive, and proof of any of them will support an award of punitive damages [*Oakes v. McCarthy Co. (1968) 267 Cal. App. 2d 231, 262-263, 73 Cal. Rptr. 127]* . Malice and oppression may be inferred from the circumstances of a defendant's conduct. Evidence indicating that the defendant was aware of the probable consequences of his or her acts and willfully and deliberately failed to avoid those consequences is sufficient to establish conscious disregard of plaintiff's rights [*J. R. Norton Co. v. General Teamsters, Warehousemen & Helpers Union, Local 890 (1989) 208 Cal. App. 3d 430, 444-445*].

[b] Clear and Convincing Evidence Required

Civ. Code § 3294(a) was amended in 1987 to provide that punitive damages are allowable only if it is proven by "clear and convincing evidence" that defendant is guilty of oppression, fraud, or malice.

Under prior law, the standard of proof was not expressly stated and was therefore the same as that generally applicable in civil actions: proof by a preponderance of the evidence [*see Evid. Code § 115*]. Thus, the requirement of proof by clear and convincing evidence essentially imposes a higher standard of proof [*see People v. Reynolds (1976) 55 Cal. App. 3d 357, 367, 127 Cal. Rptr. 561* (clear and convincing evidence means proof by more than a preponderance of the evidence)].

Proof by clear and convincing evidence has been defined in other contexts as "clear, explicit, and unequivocal" proof, "so clear as to leave no substantial doubt," and "sufficiently strong to demand the unhesitating assent of every reasonable mind" [*People v. Martin (1970) 2 Cal. 3d 822, 833 n.14, 87 Cal. Rptr. 709, 471 P.2d 29* ; *see Mock v. Michigan Millers Mut. Ins. Co. (1992) 4 Cal. App. 4th 306, 331, 5 Cal. Rptr. 2d 594* ; *see also In re Marriage of Weaver (1990) 224 Cal. App. 3d 478, 487 n.8, 273 Cal. Rptr. 696* (criticizing *BAJI No. 2.62* as misleading and unnecessarily limited, and as setting forth evidentiary test significantly less rigorous than that propounded by the California Supreme Court)]. The addition of this requirement is part of a broader design to limit punitive damage awards to those cases in which the defendant's conduct is clearly blameworthy [*Mock v. Michigan Millers Mut. Ins. Co. (1992) 4 Cal. App. 4th 306, 332-333, 5 Cal. Rptr. 2d 594* ; *see § 177.51[6][c]*].

If the plaintiff fails to request, during the liability portion of trial, that the jury be instructed to determine whether there is clear and convincing evidence of oppression, malice, or fraud, the plaintiff is not entitled to a subsequent trial phase on punitive damages [*Westrec Marina Mgmt., Inc. v. Jardine Ins. Brokers Orange County, Inc. (2000) 85 Cal. App. 4th 1042, 1050, 102 Cal. Rptr. 2d 673]* .

[c] Malice in Particular Actions

In an action involving personal injury, an award of punitive damages usually depends on proof of malice. In the case of an intentional tort, malice usually consists of the defendant's intent to injure plaintiff [*see Civ. Code § 3294(c)(1)*; *see also § 177.154*]. In the case of a nondeliberate act, malice usually consists of defendant's willful and conscious disregard of plaintiff's safety [*see Civ. Code § 3294(c)(1)* and *see also § 177.155*; *G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 32, 122 Cal. Rptr. 218* (decided before the 1987 amendment of *Civ. Code § 3294(c)(1)*)]. For example, the act of operating a motor vehicle while intoxicated may constitute an action of malice under *Civ. Code § 3294* if performed under circumstances disclosing a willful and conscious disregard of the probable dangerous consequences [*see Taylor v. Superior Court (1979) 24 Cal. 3d 890, 892, 157 Cal. Rptr. 693, 598 P.2d 854* (decided prior to 1987 amendment of *Civ. Code § 3294(c)(1)*)].

In a products liability action, malice sufficient to support punitive damages may be found if the defendant placed the

defective product on the market in willful and conscious disregard of the safety of consumers and others. Thus, plaintiff must establish that the defendant was aware of the probable dangerous consequences of its conduct and that it willfully and deliberately failed to avoid those consequences [*see Ehrhardt v. Brunswick, Inc. (1986) 186 Cal. App. 3d 734, 741-742, 231 Cal. Rptr. 60* (decided prior to 1987 amendment of *Civ. Code § 3294(c)(1)*)]. However, punitive damages are not ordinarily recoverable in a products liability action when the injury threatened is merely economic injury, rather than personal injury [*Gawara v. United States Brass Corp. (1998) 63 Cal. App. 4th 1341, 1360-1363, 74 Cal. Rptr. 2d 663]* .

In an insurance bad faith action, evidence that the insurer has violated its duty of good faith and fair dealing is not necessarily sufficient to establish that it has acted with the requisite malice to justify an award of punitive damages [*Mock v. Michigan Millers Mut. Ins. Co. (1992) 4 Cal. App. 4th 306, 328, 5 Cal. Rptr. 2d 594* ; *Patrick v. Maryland Cas. Co. (1990) 217 Cal. App. 3d 1566, 1575, 267 Cal. Rptr. 24* ; *Travelers Ins. Co. v. Lesher (1986) 187 Cal. App. 3d 169, 200, 231 Cal. Rptr. 791]* . Punitive damages are warranted to punish a consistent and unremedied pattern of egregious insurer practices in disregard of the insured's rights. Mere inept and negligent handling of a claim may constitute bad faith, but is insufficient to support an award of punitive damages [*compare Campbell v. Cal-Gard Sur. Servs., Inc. (1998) 62 Cal. App. 4th 563, 570-571, 73 Cal. Rptr. 2d 64* (evidence that insurer had established practice of not investigating claims and delaying payment was sufficient to support punitive damages award); *with Patrick v. Maryland Cas. Co. (1990) 217 Cal. App. 3d 1566, 1576, 267 Cal. Rptr. 24* (characterizing insurer's claims-handling as "shoddy," "witless," and "infected with symptoms of bureaucratic inertia and inefficiency," but denying punitive damages)].

For discussion of the effect of 1987 amendments to *Civ. Code § 3294(c)(1)* on case law decided under prior law, see *§ 177.51[6][c]*.

For discussion and forms relating punitive damages in a tort action for fraud, see Ch. 269, *Fraud and Deceit* .

[8] Claim for Punitive Damages May Not State Amount

No claim for punitive damages may state an amount or amounts [*Civ. Code § 3295(e), (f)*; *see Code Civ. Proc. § 581(a)(6)* (when trial is deemed to commence for purposes of dismissal)]. Despite the statute, punitive damages may not be recovered from a defaulting defendant on the basis of a general allegation in the complaint of entitlement to them. Due process requires that some form of notice be given regarding the amount of punitive damages sought [*Wiley v. Rhodes (1990) 223 Cal. App. 3d 1470, 1471-1474, 273 Cal. Rptr. 279* ; *see Code Civ. Proc. § 425.11* (statement of special and general damages sought required before default may be entered; discussed in *§ 177.43*)]. For a form for use to give notice of the amount of punitive damages sought, see *§ 177.167*. For further discussion of requirements relating to pleading punitive damages, see *§§ 177.154* and *177.155*.

[9] Persons Exempt From Liability

A number of statutes exempt certain persons or entities from liability for exemplary or punitive damages.

A person of unsound mind or a minor is not liable for exemplary damages unless, at the time of the wrongful act, he or she was capable of knowing that it was wrongful [*Civ. Code § 41*]. In an action brought against the estate of the tortfeasor, an award may not be made for damages under *Civ. Code § 3294*, or other damages imposed, primarily for the sake of example and to punish defendant [*Code Civ. Proc. § 377.42*].

An owner, bailee of an owner, or personal representative of a decedent is not liable under *Veh. Code §§ 17000-17463* (civil liability of owners and operators of vehicles) for exemplary damages awarded against the operator of the vehicle [*Veh. Code § 17151*]. Also, no person is liable for such damages under *Veh. Code § 17707* (negligence of minor in driving motor vehicle) or 17708 (liability of parent or guardian for negligence of minor in driving motor vehicle) [*Veh.*

Code § 17709].

A public entity also is not liable for damages awarded under *Civ. Code § 3294* or other damages imposed primarily for the sake of example and to punish the defendant notwithstanding any other provisions of law [*Gov. Code § 818*; *but see Notrica v. State Comp. Ins. Fund (1999) 70 Cal. App. 4th 911, 950, 83 Cal. Rptr. 2d 89* (unique status and purpose of Fund did not protect it from liability for punitive damages, although policy considerations were relevant to question of whether award was excessive)]. Nor is the United States liable for punitive damages under the Federal Tort Claims Act [*28 U.S.C. § 2674*; *see Molzof v. United States (1992) 502 U.S. 301, 305-307, 112 S. Ct. 711, 116 L. Ed. 2d 731* ("punitive damages" under FTCA to be understood according to established common law meaning)].

Unlike the federal government, a federal instrumentality, such as a federal credit union, is not entitled to immunity from punitive damages merely by virtue of its status as a federal instrumentality. If Congress has provided that the instrumentality may sue and be sued, immunity from punitive damages is generally deemed to have been waived as an incident of suit [*McGee v. Tucoemas Federal Credit Union (2007) 153 Cal. App. 4th 1351, 1359, 63 Cal. Rptr. 3d 808* (federal credit union not immune from liability for punitive damages)]. Three exceptions to this presumption of waiver exist, however, if it can be shown that (1) punitive damages are inconsistent with the statutory or constitutional scheme; (2) an implied restriction of punitive damages is necessary to avoid grave interference with the performance of a governmental function; or (3) for other reasons, Congress plainly intended to use the "sue or be sued" clause in a narrow sense [*McGee v. Tucoemas Federal Credit Union (2007) 153 Cal. App. 4th 1351, 1359-1360, 63 Cal. Rptr. 3d 808* (quoting *Loeffler v. Frank (1988) 486 U.S. 549, 554, 108 S. Ct. 1965, 100 L. Ed. 2d 549*)].

Unless otherwise provided by statute, public employees, as individuals, may be liable for punitive damages if their conduct meets the requisite standard [*see Gov. Code § 820* (public employees liable for their acts and omissions to same extent as private persons)]. However, the governing body of a public entity other than the State of California is authorized, after making specified findings, to indemnify punitive damage judgments against its public employees [*Gov. Code § 825(b)*].

Gov. Code § 818 does not bar assessment of civil statutory penalties [§ 177.51[3]] against a public entity [*Kizer v. County of San Mateo (1991) 53 Cal. 3d 139, 147-148, 279 Cal. Rptr. 318, 806 P.2d 1353]* .

[10] Liability of Employer

Although an employer may be liable for an employee's tortious acts under the doctrine of respondeat superior, the employer is ordinarily not liable for punitive damages awarded for an employee's acts. However, an employer may be liable for such damages if the employer had advance knowledge of the unfitness of the employee and employed him or her with conscious disregard of the safety or rights of others or if the employer authorized or ratified the wrongful conduct for which the punitive damages were awarded. The employer may also be liable if he or she was personally guilty of oppression, fraud or malice [*Civ. Code § 3294(b) Greenfield v. Spectrum Inv. Corp. (1985) 174 Cal. App. 3d 111, 118-121, 219 Cal. Rptr. 805* (advance knowledge and ratification); *see Seymour v. Summa Vista Cinema, Inc. (9th Cir. 1987) 809 F.2d 1385, 1388* (deciding California law; citing *Krusi v. Bear, Stearns & Co. (1983) 144 Cal. App. 3d 664, 678-679, 192 Cal. Rptr. 793* , for reckless disregard theory and *Greenfield v. Spectrum Inv. Corp. (1985) 174 Cal. App. 3d 111, 118, 219 Cal. Rptr. 805* , and *Hobbs v. Bateman, Eichler, Hill Richards, Inc. (1985) 164 Cal. App. 3d 174, 193-194, 210 Cal. Rptr. 387* , for ratification theory)]. This statutory rule also applies to the principal-agent relationship [*see Liberty Transp., Inc. v. Harry W. Gorst Co. (1991) 229 Cal. App. 3d 417, 439, 280 Cal. Rptr. 159* , *disapproved on other grounds, Adams v. Murakami (1991) 54 Cal. 3d 105, 115-116, 284 Cal. Rptr. 318, 813 P.2d 1348]* . The plaintiff must prove these facts by clear and convincing evidence [*Barton v. Alexander Hamilton Life Ins. Co. of Am. (2003) 110 Cal. App. 4th 1640, 1644, 3 Cal. Rptr. 3d 258]* .

A finding that the employer was guilty of malice, oppression, or fraud is not required in order to justify an award of punitive damages when either of the other requirements are met [*Weeks v. Baker & McKenzie (1998) 63 Cal. App. 4th*

1128, 1153, 74 Cal. Rptr. 2d 510] . Additionally, the statutory liability of an employer for punitive damages based on the knowing employment of an unfit employee with a conscious disregard of the rights or safety of others does not impose a duty on the employer to fire an unfit employee to avoid liability for punitive damages. Rather, the employer's duty is to take reasonable measures to prevent a known harasser from committing future acts of harassment [*Weeks v. Baker & McKenzie (1998) 63 Cal. App. 4th 1128, 1157, 74 Cal. Rptr. 2d 510]* .

An employer cannot be liable for punitive damages based solely on its liability for the acts of its employee under the doctrine of respondeat superior [*College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 723, 34 Cal. Rptr. 2d 898, 882 P.2d 894]* . However, if the employee is determined to have acted under the direction of the employer, the employer participated in the act; and the employer's liability is based not on the acts of the employee, but on its own separate culpability. In such a case, punitive damages may be awarded against the employer even if none are assessed against the employee [*Roberts v. Ford Aerospace & Commc'ns Corp. (1990) 224 Cal. App. 3d 793, 800-802, 274 Cal. Rptr. 139]* . Thus, the award of punitive damages against the employer may be greater than the punitive damages award, if any, assessed against the offending employee [*Weeks v. Baker & McKenzie (1998) 63 Cal. App. 4th 1128, 1154-1155, 74 Cal. Rptr. 2d 510]* .

For an employer to be liable for punitive damages, the agent of the employer must have been acting as the organization's representative, not in some other capacity, in performing, ratifying, or approving the malicious conduct [*College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 723, 34 Cal. Rptr. 2d 898, 882 P.2d 894]* . Thus, an employer can be liable for punitive damages only if the individual whose conduct is the basis of the liability was acting in a corporate or employment capacity when the conduct occurred [*College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 723, 34 Cal. Rptr. 2d 898, 882 P.2d 894]* . *Civ. Code § 3294(b)* does not intend to punish an employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein [*College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 723-724, 34 Cal. Rptr. 2d 898, 882 P.2d 894]* .

With respect to a corporate employer, the conduct that constitutes a statutory ground for punitive damages must be that of an officer, director, or managing agent of the corporation [*Civ. Code § 3294(b)*]. The standard applicable to a corporation has been found to apply as well to an unincorporated association [*J. R. Norton Co. v. General Teamsters, Warehousemen & Helpers Union, Local 890 (1989) 208 Cal. App. 3d 430, 445* (labor union)].

A "managing agent" of a corporation, for purposes of establishing an entitlement to punitive damages under these provisions, includes only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy [*White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 566-567, 88 Cal. Rptr. 2d 19, 981 P.2d 944* ; *see, e.g.,* *Wysinger v. Automobile Club of Southern California (2007) 157 Cal. App. 4th 413, 428-429, 69 Cal. Rptr. 3d 1* (vice-president of district office operations for offices in four states was managing agent); *but see* *Cruz v. HomeBase (2000) 83 Cal. App. 4th 160, 168, 99 Cal. Rptr. 2d 435* (supervisor for security at single outlet of multi-store chain was not managing agent of corporate chain as matter of law)]. In one case, for example, the California Supreme Court held that an employee who supervised four employees in a company that employed over 20,000 was not a managing agent for purposes of establishing a punitive damages claim against the company [*Roby v. McKesson Corp. (2009) 47 Cal. 4th 686, 714, 101 Cal. Rptr. 3d 773, 219 P.3d 749]* . The mere ability of a supervisory employee to hire and fire employees does not, by itself, render a corporate employer liable for punitive damages under this standard [*White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 566, 88 Cal. Rptr. 2d 19, 981 P.2d 944]* .

Authorization and ratification are questions of fact that may be proved by direct or circumstantial evidence demonstrating adoption or approval of the employee's actions by the employer [*Fisher v. San Pedro Peninsula Hosp. (1989) 214 Cal. App. 3d 590, 621, 262 Cal. Rptr. 842* ; *Hartman v. Shell Oil Co. (1977) 68 Cal. App. 3d 240, 249-250, 137 Cal. Rptr. 244* ; *see* *Storage Services v. Oosterbaan (1989) 214 Cal. App. 3d 498, 516, 262 Cal. Rptr. 689* (ratification or approval inferred from employer's (1) close supervision of employee; (2) familiarity with transaction; (3) awareness of meetings between parties; and (4) subsequent discussions with employee about acts giving rise to tort)].

Proof that the employee whose conduct meets the standard for punitive damages was operating within the scope of employment at the time and with the consent of the employer is sufficient to prove the employer's authorization or approval of the employee's acts [*Kiseskey v. Carpenters' Trust for So. California (1983) 144 Cal. App. 3d 222, 235, 192 Cal. Rptr. 492]* .

Ratification requires actual knowledge of the wrongful act and cannot be based merely on the fact that a corporate officer, director, or managing agent could have learned of the misconduct [*Cruz v. HomeBase (2000) 83 Cal. App. 4th 160, 168, 99 Cal. Rptr. 2d 435]* . Ratification may be inferred from the fact that the employer, after learning of the employee's acts, does not fully investigate and fails to repudiate the employee's conduct by redressing the harm done and punishing or discharging the employee [*StreetScenes v. ITC Entm't Group, Inc. (2002) 103 Cal. App. 4th 233, 242, 126 Cal. Rptr. 2d 754* ; *Roberts v. Ford Aerospace & Commc'ns Corp. (1990) 224 Cal. App. 3d 793, 801, 274 Cal. Rptr. 139* ; *Fisher v. San Pedro Peninsula Hosp. (1989) 214 Cal. App. 3d 590, 621, 262 Cal. Rptr. 842]* . However, retention of the employee in service after knowledge of the facts does not always constitute ratification of the employee's conduct [*see Sullivan v. Matt (1955) 130 Cal. App. 2d 134, 144, 278 P.2d 499* (employee's special skill and experience was necessary to employer's business)].

[11] Death and Survival Actions

Punitive damages generally are not recoverable in wrongful death actions [*see Ford Motor Co. v. Superior Court (1981) 120 Cal. App. 3d 748, 751-753, 175 Cal. Rptr. 39]* . Punitive damages are recoverable by, but not against, the decedent's personal representative in a survival action [*Code Civ. Proc. §§ 377.34, 377.42*]. In either a wrongful death action under *Code Civ. Proc. § 377.60 et seq.* or a survival action under *Code Civ. Proc. § 377.20 et seq.*, based on a death that resulted from a homicide for which the defendant was convicted of a felony, punitive damages may be recovered under *Civ. Code § 3294(d)*. The procedures contained in *Code Civ. Proc. § 377.62* for joinder and consolidation of actions under the two statutes must be applied to prevent multiple recoveries of punitive damages based on the same wrongful act [*Civ. Code § 3294(d)*]. For further discussion of punitive damages in wrongful death and survival actions, see Ch. 181, *Death and Survival Actions* .

[12] Actual Damages Required

Punitive damages cannot be awarded unless actual damages are suffered [*Mother Cobb's Chicken Turnovers, Inc. v. Fox (1937) 10 Cal. 2d 203, 205, 73 P.2d 1185* ; *Esparza v. Specht (1976) 55 Cal. App. 3d 1, 6, 127 Cal. Rptr. 493]* . However, the requirement of actual damages is merely a requirement that a tortious act be proved. A plaintiff may have suffered actual damages justifying an award of punitive damages even though no monetary award is made for the wrongful suffering [*Wayte v. Rollins Int'l, Inc. (1985) 169 Cal. App. 3d 1, 16, 215 Cal. Rptr. 59* ; *Weiss v. Blumencranc (1976) 61 Cal. App. 3d 536, 543, 131 Cal. Rptr. 298* ; *Esparza v. Specht (1976) 55 Cal. App. 3d 1, 6, 127 Cal. Rptr. 493* ; *see Gagnon v. Continental Cas. Co. (1989) 211 Cal. App. 3d 1598, 1605, 260 Cal. Rptr. 305* (if no compensatory damages are awarded, jury must be instructed that punitive damages must bear reasonable relation to injury, harm, or damage actually suffered)]. Thus, a plaintiff may recover exemplary damages when the actual damages were only nominal in amount [*Aweeka v. Bonds (1971) 20 Cal. App. 3d 278, 281, 97 Cal. Rptr. 650]* , such as when the trier of fact is unable to determine the extent of the actual damages [*Sterling Drug, Inc. v. Benatar (1950) 99 Cal. App. 2d 393, 400-401, 221 P.2d 965]* , or when at least nominal damages are conclusively presumed from the violation of a technical legal right [*Clark v. McClurg (1932) 215 Cal. 279, 282, 9 P.2d 505* (libel per se); *Civic W. Corp. v. Zila Indus., Inc. (1977) 66 Cal. App. 3d 1, 18-19, 135 Cal. Rptr. 915* (trespass); *see also James v. Public Fin. Corp. (1975) 47 Cal. App. 3d 995, 999-1006, 121 Cal. Rptr. 670]* .

However, if suffering actual loss or damages is an element of the tort, a finding of breach of duty alone without actual damages cannot support an award of punitive damages [*Jackson v. Johnson (1992) 5 Cal. App. 4th 1350, 1355-1359, 7 Cal. Rptr. 2d 482* (legal malpractice)]. In addition, if compensatory damages for the only actual injury alleged are precluded by statute, then there may be no basis for an award of punitive damages [*Berkley v. Dowds (2007) 152 Cal.*

App. 4th 518, 530-532, 61 Cal. Rptr. 3d 304] . For example, if a decedent's representative files a survival action seeking to recover for injury sustained by the decedent before death, but the only injury alleged is emotional distress, there appears to be no basis for an award of punitive damages because the representative is precluded by statute from recovering for the decedent's pain and suffering [*Berkley v. Dowds (2007) 152 Cal. App. 4th 518, 530-532, 61 Cal. Rptr. 3d 304* ; *see Code Civ. Proc. § 377.34*]. Some court of appeal opinions have allowed punitive damages under these circumstances, however, so long as the amount of damages bears some reasonable relation to the amount of harm suffered by the decedent before death [*see, e.g.,* *Gagnon v. Continental Casualty Co. (1989) 211 Cal. App. 3d 1598, 1602-1605, 260 Cal. Rptr. 305]* .

[13] Discretion to Award Punitive Damages

Both the award and amount of punitive damages are within the discretion of the trier of fact, subject to the rule that the verdict must be supported by the evidence and that the damages must be in some reasonable proportion to the actual damages suffered [*Weisenburg v. Molina (1976) 58 Cal. App. 3d 478, 490, 129 Cal. Rptr. 813]* . Even though an act is shown to be malicious, it is still within the discretion of the jury to determine whether or not an award of punitive damages should be made [*see, e.g.,* *Sumpter v. Matteson (2008) 158 Cal. App. 4th 928, 936* (defendant's admission that he was under influence of drugs and knowingly failed to stop at red light did not entitle plaintiff to punitive damages as matter of right)]. A jury may properly conclude that a defendant has been punished enough and not award punitive damages *Browand v. Scott Lumber Co. (1954) 125 Cal. App. 2d 68, 74-75, 269 P.2d 891* (jury could determine that defendant who had been convicted and fined in justice court had been punished enough)]. For a defendant to attack a punitive damage award on the ground that other such awards have already sufficiently punished the defendant for the same conduct, evidence of the other awards must be presented to the jury [*Stevens v. Owens-Corning Fiberglas Corp. (1996) 49 Cal. App. 4th 1645, 1665, 57 Cal. Rptr. 2d 525]* .

Although a jury has a great deal of discretion in the awarding of punitive damages, a trial court may determine that such an award is improper if not supported by the evidence. In such a situation, the court may grant a new trial on the issue of damages [*Silberg v. California Life Ins. Co. (1974) 11 Cal. 3d 452, 463, 113 Cal. Rptr. 711, 521 P.2d 1103* ; *see § 177.19*].

On appeal, an award of punitive damages will be reversed as excessive only if the entire record, viewed most favorably to the judgment, indicates that the award was the result of passion and prejudice [*Downey Sav. & Loan Ass'n v. Ohio Casualty Ins. Co. (1987) 189 Cal. App. 3d 1072, 1099, 234 Cal. Rptr. 835* ; *but see* *Adams v. Murakami (1991) 54 Cal. 3d 105, 118-119 n.9, 284 Cal. Rptr. 318, 813 P.2d 1348* (expressing concern regarding whether this standard of review satisfies constitutional due process requirements)]. Nonetheless, the appellate court must ascertain whether the record indicates that there is substantial evidence to support a punitive damages award [*Liberty Transp., Inc. v. Harry W. Gorst Co. (1991) 229 Cal. App. 3d 417, 435-436, 280 Cal. Rptr. 159* , *disapproved on other grounds,* *Adams v. Murakami (1991) 54 Cal. 3d 105, 115-116, 284 Cal. Rptr. 318, 813 P.2d 1348*); *Mouchette v. Board of Educ. (1990) 217 Cal. App. 3d 303, 316, 266 Cal. Rptr. 1* ; *see* *Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 821, 169 Cal. Rptr. 691, 620 P.2d 141]* .

[14] Relevant Factors in Determining Amount of Damages

Certain established principles guide the determination of the amount of punitive damages to be awarded. These principles arise from the fact that the purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts.

One factor is the particular nature of the defendant's acts in light of the whole record. The more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. In fact, in considering the amount of punitive damages to impose, the United States Supreme Court has stated that the reprehensibility of the defendant's conduct is the most important consideration [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 419,*

123 S. Ct. 1513, 155 L. Ed. 2d 585] .

The Supreme Court has also provided its own factors to consider in evaluating the reprehensibility of a defendant's conduct for purposes of determining whether a punitive damages award comports with constitutional due process. Those factors include: whether the harm caused was physical rather than economic; whether the tortious conduct evinced an indifference to or reckless disregard for the health and safety of others; whether the target of the conduct was financially vulnerable; whether the conduct involved repeated actions or was a single incident; and whether the harm was the result of intentional malice, trickery, or deceit, rather than merely being an accident [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 419, 123 S. Ct. 1513, 155 L. Ed. 2d 585]* . The mere fact that one of these factors weighs in favor of the punitive damages award may not be enough to sustain the award, and if all weigh against it, the award must be considered suspect [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 419, 123 S. Ct. 1513, 155 L. Ed. 2d 585]* .

After considering this guidance provided by the United States Supreme Court, the California Supreme Court has concluded that a state may, to further its legitimate goal in deterring future misconduct, consider whether the type of misconduct perpetrated against the particular plaintiff was an isolated event or was but one instance in a pattern of similar misconduct, in determining the reprehensibility of the defendant's conduct, which in turn will necessarily affect the amount of punitive damages awarded [*Johnson v. Ford Motor Co. (2005) 35 Cal. 4th 1191, 1206-1207*]. However, evidence of other misconduct by the defendant is inadmissible to prove either a right to or amount of punitive damages if that other misconduct is not sufficiently similar to the misconduct that allegedly damaged the plaintiff [*Holdgrafer v. Unocal Corp. (2008) 160 Cal. App. 4th 907, 928-932, 73 Cal. Rptr. 3d 216* (oil company's denials and concealments in relation to other oil spills and contaminations was inadmissible in suit involving amount of damage from subsurface contamination that was not denied or concealed)].

The United States Supreme Court has cautioned that while harm caused to nonparties may be considered when evaluating the reprehensibility of a defendant's conduct, such as when the evidence shows that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, an award of punitive damages specifically intended to punish for harm allegedly caused to nonparties violates due process [*Philip Morris USA v. Williams (2007) 127 S. Ct. 1057, 166 L. Ed. 2d 940, 949950] , on remand, 344 Ore. 45 (2008)* . To this end, when there exists in a particular case a significant risk that the jury may be confused as to how evidence of harm to nonparties may be used, a court, upon request, must take steps to alleviate the confusion [*Philip Morris USA v. Williams (2007) 127 S. Ct. 1057, 166 L. Ed. 2d 940, 951 , on remand, 344 Or. 45 (2008)* ; *see, e.g., Bullock v. Philip Morris USA, Inc. (2008) 159 Cal. App. 4th 655, 693* (error for trial court to refuse to instruct jury not to impose punishment for harms suffered by persons other than plaintiff)].

In addition to the reprehensibility of the defendant's conduct, another factor relevant to the amount of punitive damages is the amount of compensatory damages awarded. In general, even if an act is considerably reprehensible, it will not justify a proportionally higher amount of punitive damages if the actual harm suffered thereby is small [*Neal v. Farmers Ins. Exch. (1978) 21 Cal. 3d 910, 928, 148 Cal. Rptr. 389, 582 P.2d 980* ; *see § 177.51[15]*].

The United States Supreme Court has also suggested that a reviewing court, in determining whether an award of punitive damages comports with due process, should consider the difference between the punitive damages award and any civil penalties that are authorized or imposed in comparable cases [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 416-418, 123 S. Ct. 1513, 155 L. Ed. 2d 585]* . However, this guideline is only for reviewing courts and need not be included in jury instructions [*Century Sur. Co. v. Polisso (2006) 139 Cal. App. 4th 922, 959-960, 43 Cal. Rptr. 3d 468]* .

Another consideration is the wealth of the particular defendant. The traditional view has been that the function of deterrence cannot be served if the wealth of the defendant allows him or her to absorb the award with little or no discomfort. Conversely, the function of punitive damages is not served by an award that, in light of defendant's wealth

and the gravity of the particular act, exceeds the level necessary to properly punish and deter [*Adams v. Murakami (1991) 54 Cal. 3d 105, 110, 284 Cal. Rptr. 318, 813 P.2d 1348* ; *Neal v. Farmers Ins. Exch. (1978) 21 Cal. 3d 910, 928, 148 Cal. Rptr. 389, 582 P.2d 980* ; *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc. (1984) 155 Cal. App. 3d 381, 389, 202 Cal. Rptr. 204* ; *Pistorius v. Prudential Ins. Co. (1981) 123 Cal. App. 3d 541, 554, 176 Cal. Rptr. 660* ; *see § 177.51[16]*].

However, under the United States Supreme Court's current constitutional jurisprudence, the defendant's wealth may not be used to justify an award of punitive damages that is otherwise unconstitutional [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 427, 123 S. Ct. 1513, 155 L. Ed. 2d 585]* . In light of these pronouncements, the California Supreme Court has concluded that although the wealth of a defendant alone cannot justify a high punitive damages award and cannot substitute for tailoring the award to the reprehensibility of the defendant's conduct or to the amount of compensatory damages, the state has a legitimate interest in deterring future misconduct and may still allow juries to consider the wealth of the defendant in awarding punitive damages. For example, if the amount of compensatory damages is relatively small, the wealth of a defendant in combination with a high degree of reprehensibility assigned to that defendant's conduct may justify a ratio between compensatory damages and punitive damages that is well beyond the single-digit ratios that are normally acceptable [*Simon v. San Paolo U.S. Holding Co., Inc. (2005) 35 Cal. 4th 1159, 1186, 29 Cal. Rptr. 3d 379, 113 P.3d 63]* .

One court has included in an opinion a chart analyzing the relationship between the amount of punitive damages and the wealth of a defendant and the relationship between punitive and compensatory damages in 16 California cases [*see Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc. (1984) 155 Cal. App. 3d 381, 393-396, 202 Cal. Rptr. 204]* . Another court, in analyzing this chart, found that punitive damages are generally not allowed to exceed 10 percent of the defendant's net worth, and that significantly lower percentages are the norm [*Storage Services v. Oosterbaan (1989) 214 Cal. App. 3d 498, 515, 262 Cal. Rptr. 689]* .

The importance of the policy violated by the defendant's conduct is also relevant to the appropriate amount of punitive damages [*Zhadan v. Downtown L.A. Motors (1976) 66 Cal. App. 3d 481, 499, 136 Cal. Rptr. 132]* . Acts that are part of a conscious course of conduct, firmly grounded in established companypolicy, may often call for punitive damages to deter socially unacceptable corporate conduct and to discourage theperpetuation of the objectionable policies [*Hughes v. Blue Cross of N. Cal. (1989) 215 Cal. App. 3d 832, 847, 263 Cal. Rptr. 850]* .

[15] Reasonable Relationship to Actual Damages Required

Punitive damages must bear a reasonable relationship to actual damages for the purpose of guarding against excessive damages [*Liodas v. Sahadi (1977) 19 Cal. 3d 278, 284, 137 Cal. Rptr. 635, 562 P.2d 316* ; *Finney v. Lockhart (1950) 35 Cal. 2d 161, 164, 217 P.2d 19]* . To ensure that there is a reasonable relationship between punitive and actual damages, punitive damages must be assessed at the same time as actual damages [*Liodas v. Sahadi (1977) 19 Cal. 3d 278, 284, 137 Cal. Rptr. 635, 562 P.2d 316* (when new trial is granted on issue of compensatory damages, amount of punitive damages must be redetermined concurrently)].

If compensatory damages are reduced on appeal, it may be appropriate for the appellate court to reduce punitive damages as well, in order to maintain the ratio established by the jury [*see Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal. App. 3d 1220, 1255, 1 Cal. Rptr. 2d 301]* . However, a reduction in compensatory damages will not necessarily mandate a corresponding reduction in punitive damages. For example, a trial court may issue a remittitur as to compensatory damages, but refuse to grant a reduction in punitive damages, so long as the punitive damage award still bears a reasonable relation to the reduced compensatory damage award and the award is not otherwise excessive [*McGee v. Tucoemas Federal Credit Union (2007) 153 Cal. App. 4th 1351, 1362, 63 Cal. Rptr. 3d 808]* .

A reasonable relationship involves more than a simple mathematical comparison between the two amounts [*Zhadan v.*

Downtown L.A. Motors (1976) 66 Cal. App. 3d 481, 499, 136 Cal. Rptr. 132] . Consequently, there is no fixed ratio by which to determine the proper proportion of punitive to actual damages [*Liodas v. Sahadi (1977) 19 Cal. 3d 278, 284, 137 Cal. Rptr. 635, 562 P.2d 316* ; *see Castaic Clay Mfg. Co. v. Dedes (1987) 195 Cal. App. 3d 444, 450, 240 Cal. Rptr. 652]* . However, if the ratio is grossly disproportionate, the award of punitive damages may be reversed or reduced [*Little v. Stuyvesant Life Ins. Co. (1977) 67 Cal. App. 3d 451, 469-470, 136 Cal. Rptr. 653* (reversing judgment where ratio in excess of 14 to one and punitive damages exceeded compensatory damages by over $2 million)].

The reasonableness of the relation between actual and punitive damages is not evaluated by any rigid formula, but rather by a fluid process of adding and subtracting different considerations [*Betts v. Allstate Ins. Co. (1984) 154 Cal. App. 3d 688, 711-712, 201 Cal. Rptr. 528]* . It carries more weight if the ratio is extremely high and the conduct is somewhat less reprehensible. The proper consideration is whether the punitive damage award bears a reasonable relationship to its principal purpose of punishment and deterrence [*Betts v. Allstate Ins. Co. (1984) 154 Cal. App. 3d 688, 711-712, 201 Cal. Rptr. 528* (affirmance when ratio was six to one and punitive award exceeded compensatory award by $2.5 million)]. If no compensatory damages are awarded (§ 177.102[15][a]), the jury must be instructed that the punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered [*Gagnon v. Continental Cas. Co. (1989) 211 Cal. App. 3d 1598, 1605, 260 Cal. Rptr. 305]* .

Recognizing that there is no bright-line ratio between compensatory and punitive damages that must be met to meet federal constitutional dueprocess requirements [*see § 177.51[5][a]*], the United States Supreme Court has suggested that single-digit ratios, such as 4 to 1 or 5 to 1, are more likely to comport with due process than larger ratios [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585]* . The Court admitted, however, that larger ratios may be acceptable in cases involving especially egregious conduct that results in a relatively small amount of economic damage. Conversely, a smaller ratio may be all that will be constitutionally tolerated if the defendant's conduct has resulted in a substantial award of compensatory damages [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 425, 428-429, 123 S. Ct. 1513, 155 L. Ed. 2d 585* (award with ratio of 145 to 1 was reversed because substantial compensatory damages award of $1 million fully compensated plaintiffs for emotional distress caused by failure of insurance company to settle third-party claim); *see, e.g., Diamond Woodworks, Inc. v. Argonaut Ins. Co. (2003) 109 Cal. App. 4th 1020, 1055-1057, 135 Cal. Rptr. 2d 736* (under *Campbell*, punitive damages award of $1,000,000 would be appropriate in action for bad faith and fraud against insurer because compensatory damages were reduced on appeal to $258,570)]. The California Supreme Court has interpreted these statements to mean that absent special justification, ratios between punitive damages and plaintiff's actual or potential compensatory damages that are greater than nine or 10 to one are constitutionally suspect and cannot survive appellate scrutiny under the due process clause [*Simon v. San Paolo U.S. Holding Co., Inc. (2005) 35 Cal. 4th 1159, 1182, 29 Cal. Rptr. 3d 379, 113 P.3d 63]* .

Applying these principles, the California court of appeal in one case reduced a punitive damages award from $7 million to $1.5 million. In that case, the plaintiff was awarded compensatory damages of $165,000. The court concluded that a punitive damages-to-compensatory damages ratio of just over 9 to 1 was justified because the defendant's conduct, which consisted of fraud and breach of fiduciary duties inflicted against other members of a business partnership, was highly reprehensible and because the amount of compensatory damages did not fully reflect the outrageousness of that conduct. The court also noted that given the defendant's estimated worth of between $600 million and $800 million, a lesser amount of punitive damages would not be sufficiently punitive [*Bardis v. Oates (2004) 119 Cal. App. 4th 1, 26-27, 14 Cal. Rptr. 3d 89]* .

Similarly, in reducing a punitive damages award against a tobacco company from $100 million to $50 million, in a case in which the compensatory damages award was $5.5 million, the court of appeal concluded that a 9-to-1 ratio was warranted. The court noted the extreme reprehensibility of the company's longstanding conduct in adding substances to its cigarettes to increase their addictiveness, gaining smokers by fraud and through its long denial of the dangers of smoking, and marketing a product that was more dangerous than consumers expected [*Boeken v. Philip Morris, Inc. (2005) 127 Cal. App. 4th 1640, 1703, 26 Cal. Rptr. 3d 638 , aff'd, Boeken v. Philip Morris USA, Inc. (2010) 48 Cal.*

4th 788, 108 Cal. Rptr. 3d 806, 230 P.3d 342].

The California Supreme Court held that a 1-to-1 ratio was the appropriate maximum in an employment harassment and termination case in which most of the actionable conduct was committed by a low-level supervisor and the conduct of the corporate employer in not responding to a single complaint brought by the employee was not very reprehensible. In that case, the Supreme Court noted that the plaintiff was awarded almost $2 million in compensatory damages, which included an award of $1.3 million in non-economic damages that may have included a punitive component reflecting the jury's indignation at the way the plaintiff was treated by her employer [*Roby v. McKesson Corp. (2009) 47 Cal. 4th 686, 718-719, 101 Cal. Rptr. 3d 773, 219 P.3d 749]* .

In some rare circumstances, it may be appropriate to proportion punitive damages to some measure of harm other than the actual amount of compensatory damages awarded. For example, punitive damages might be proportioned to uncompensated harm, or to potential damages that were not--but could have been--inflicted, if these potential damages are a truer measure of the risk created by the defendant's conduct [*Simon v. San Paolo U.S. Holding Co., Inc. (2005) 35 Cal. 4th 1159, 1173-1174, 29 Cal. Rptr. 3d 379, 113 P.3d 63]* . However, the use of potential harm as a measure must be limited to potential harm that was actually intended by the defendant or was reasonably likely to occur from the defendant's conduct [*see* *Simon v. San Paolo U.S. Holding Co., Inc. (2005) 35 Cal. 4th 1159, 1177, 29 Cal. Rptr. 3d 379, 113 P.3d 63]* . In addition, there must be a causal connection between the conduct for which punitive damages were awarded and any uncompensated harm to use that harm as the basis for establishing a proper amount of punitive damages [*Simon v. San Paolo U.S. Holding Co., Inc. (2005) 35 Cal. 4th 1159, 1175-1176, 29 Cal. Rptr. 3d 379, 113 P.3d 63]* .

[16] Evidence of Defendant's Wealth

In determining the amount necessary to impose the appropriate punitive effect, the court must consider the wealth of the defendant [*Adams v. Murakami (1991) 54 Cal. 3d 105, 109-116, 284 Cal. Rptr. 318, 813 P.2d 1348]* . However, the United States Supreme Court has cautioned that the wealth of a defendant may not be used to justify an award of punitive damages that is otherwise unconstitutional [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 427, 123 S. Ct. 1513, 155 L. Ed. 2d 585]* . In light of these pronouncements, the California Supreme Court has concluded that although the wealth of a defendant alone cannot justify a high punitive damages award and cannot substitute for tailoring the award to the reprehensibility of the defendant's conduct or to the amount of compensatory damages, the state has a legitimate interest in deterring future misconduct and may still allow juries to consider the wealth of the defendant in awarding punitive damages [*Simon v. San Paolo U.S. Holding Co., Inc. (2005) 35 Cal. 4th 1159, 1186, 29 Cal. Rptr. 3d 379, 113 P.3d 63* ; *see also* *Century Sur. Co. v. Polisso (2006) 139 Cal. App. 4th 922, 961, 43 Cal. Rptr. 3d 468* (no error for jury to consider evidence of defendant's wealth in determining amount of punitive damages necessary to punish and deter); *see generally § 177.51[14]*].

The plaintiff bears the burden of presenting evidence of the defendant's financial condition [*Adams v. Murakami (1991) 54 Cal. 3d 105, 119-123, 284 Cal. Rptr. 318, 813 P.2d 1348* ; *see Evid. Code § 500,* which includes showing not just the defendant's financial assets, but financial liabilities as well [*Baxter v. Peterson (2007) 150 Cal. App. 4th 673, 680-681, 58 Cal. Rptr. 3d 686* (punitive damages award reversed when plaintiff failed to present evidence of defendant's financial liabilities)]. This burden cannot be waived by the defendant's failure to object to a plaintiff's inadequate showing, because of the public interest in meaningful judicial oversight of punitive damages awards [*Tomaselli v. Transamerica Ins. Co. (1994) 25 Cal. App. 4th 1269, 1283, 31 Cal. Rptr. 2d 433]* . However, a defendant waives the right to complain about the plaintiff's lack of evidence of the defendant's financial condition if the defendant disobeys a lawful court order to provide financial records and if these records are the only means by which the plaintiff could meet the burden of proof [*Mike Davidov Co. v. Issod (2000) 78 Cal. App. 4th 597, 608-609, 92 Cal. Rptr. 2d 897* ; *see also StreetScenes v. ITC Entm't Group, Inc. (2002) 103 Cal. App. 4th 233, 243-244, 126 Cal. Rptr. 2d 754* (defendant ordered to produce evidence of net worth could not complain of lack of authentication of own documents)]. In addition, evidence that a defendant has systematically and deceitfully manipulated and concealed assets and net worth and

provided evasive or knowingly false testimony on the issue at trial provides a fact-finder or trial court with wide latitude to make inferences unfavorable to the defendant when setting an amount of punitive damages [*County of San Bernardino v. Walsh (2007) 158 Cal. App. 4th 533, 546-547*].

A defendant's net worth is generally considered the best measure of wealth for the purpose of assessing punitive damages [*Downey Sav. & Loan Ass'n v. Ohio Casualty Ins. Co. (1987) 189 Cal. App. 3d 1072, 1100, 234 Cal. Rptr. 835* ; *but see Adams v. Murakami (1991) 54 Cal. 3d 105, 116 n.7, 284 Cal. Rptr. 318, 813 P.2d 1348* (noting argument in favor of different measure of ability to pay, but without reaching issue)]. Evidence of the financial condition of the defendant is not limited to the defendant's financial condition as it relates to California, but properly includes the defendant's overall worth [*Buell-Wilson v. Ford Motor Co. (2006) 141 Cal. App. 4th 525, 566, 46 Cal. Rptr. 3d 147]* .

However, net worth is too easily manipulated to be the sole standard for measuring a defendant's ability to pay. For example, a punitive damages award of $300,000 against a corporation was upheld despite the fact that the corporation technically had a current net worth of negative $6.3 million [*Zaxis Wireless Commc'ns, Inc. v. Motor Sound Corp. (2001) 89 Cal. App. 4th 577, 579-580, 107 Cal. Rptr. 2d 308]* . The negative net worth was calculated only on the strength of accumulated depreciation of $4.9 million and a note to the corporation's sole shareholder of $6 million, although the corporation actually had annual revenues well in excess of $200 million, had cash on hand and a checking account balance of $19 million, and had a line of credit of $50 million, of which over $5 million was still available [*Zaxis Wireless Commc'ns, Inc. v. Motor Sound Corp. (2001) 89 Cal. App. 4th 577, 582-583, 107 Cal. Rptr. 2d 308]* .

It may also be appropriate to measure a defendant's financial condition by the profits gained by the defendant's misconduct [*Adams v. Murakami (1991) 54 Cal. 3d 105, 116 n.7, 284 Cal. Rptr. 318, 813 P.2d 1348* ; *Cummings Med. Corp. v. Occupational Med. Corp. (1992) 10 Cal. App. 4th 1291, 1299-1300, 13 Cal. Rptr. 2d 585]* . If the only evidence considered is the profitability of the defendant's misconduct, the award of punitive damages must be in line with that evidence [*Cummings Med. Corp. v. Occupational Med. Corp. (1992) 10 Cal. App. 4th 1291, 1299-1300, 13 Cal. Rptr. 2d 585* ; *but see Stevens v. Owens-Corning Fiberglas Corp. (1996) 49 Cal. App. 4th 1645, 1660, 57 Cal. Rptr. 2d 525* (sales of asbestos insulation product to which decedent was exposed approximated only two percent of defendant's total sales, and even smaller percentage of its total profits; thus, defendant's profits did not prove accurate indication of its financial condition or likely punitive and deterrent impacts of punitive damage award)]. If no monetary gain flowed from a defendant's misconduct, evidence of that defendant's net income, standing alone, is not adequate evidence of a defendant's financial condition [*Lara v. Cadag (1993) 13 Cal. App. 4th 1061, 1063-1066, 16 Cal. Rptr. 2d 811* (evidence of net income, without evidence of assets and liabilities, provided insufficient bas for reviewing court to determine whether award was excessive)].

The evidence must show the financial condition of the *defendant*, not defendant's corporate parent. If the alter ego doctrine is not established at trial (at which the party alleged to be the alter ego participated in the litigation, as due process requires) the parent's financial condition is not relevant to the determination of the proper amount of punitive damages to be awarded against the subsidiary [*Tomaselli v. Transamerica Ins. Co. (1994) 25 Cal. App. 4th 1269, 1284-1286, 31 Cal. Rptr. 2d 433]* . Moreover, a plaintiff may have a difficult time showing that the alter ego doctrine applies, given the requirement that plaintiff establish that failure to apply the doctrine would work an injustice. Courts have questioned whether such a showing can be made regarding punitive damages [*see Tomaselli v. Transamerica Ins. Co. (1994) 25 Cal. App. 4th 1269, 1285-1286, 31 Cal. Rptr. 2d 433* ; *Institute of Veterinary Pathology, Inc. v. California Health Labs., Inc. (1981) 116 Cal. App. 3d 111, 120, 172 Cal. Rptr. 74]* .

The inquiry regarding the defendant's financial condition examines that condition at the time of trial (or retrial), rather than at the time of injury [*Washington v. Farlice (1991) 1 Cal. App. 4th 766, 777, 2 Cal. Rptr. 2d 607* ; *see, e.g., Kelly v. Haag (2006) 145 Cal. App. 4th 910, 917, 52 Cal. Rptr. 3d 126]* . However, competent evidence of the defendant's future earning potential may also be considered in awarding punitive damages [*Rufo v. Simpson (2001) 86 Cal. App. 4th 573, 621, 103 Cal. Rptr. 2d 492* (evidence of present value of celebrity defendant's ability to exploit name

and likeness could be considered in calculating punitive damages award)].

To encourage the voluntary filing of accurate tax returns, California courts have recognized a privilege against disclosing tax returns [*Weingarten v. Superior Court (2002) 102 Cal. App. 4th 268, 274, 125 Cal. Rptr. 2d 371]* . In light of this privilege, the mere fact that a plaintiff seeks to recover punitive damages, or a fact finder has found a basis for imposing such damages, does not constitute a basis for compelling the disclosure of tax returns [*Weingarten v. Superior Court (2002) 102 Cal. App. 4th 268, 274-275, 125 Cal. Rptr. 2d 371]* .

However, disclosure of tax returns may be ordered if: (1) a defendant that has been found liable for punitive damages refuses to produce relevant, nonprivileged financial records, or has produced only meaningless and unreliable financial information in response to punitive damages discovery; (2) that defendant has engaged in a pattern of improperly obstructing efforts to obtain financial records through means that do not implicate the privilege, and it is reasonable to assume that this pattern of conduct will continue; and (3) less intrusive methods to obtain the financial records have been unsuccessful [*Weingarten v. Superior Court (2002) 102 Cal. App. 4th 268, 275-277, 125 Cal. Rptr. 2d 371]* .

For discussion of bifurcation of the issue of a defendant's financial condition, see *§ 177.51[17]*.

[17] Protective Orders re Punitive Damages Evidence

In the trial of an action in which punitive damages are claimed, the court, for good cause, may grant any defendant a protective order requiring theplaintiff to produce evidence of a prima facie case of liability for punitive damages prior to the introduction of evidence of either (1) the profits the defendant has gained by virtue of the wrongful course of conduct of the nature and type shown by the evidence or (2) the financial condition of the defendant [*Civ. Code § 3295(a)*]. Although the statute does not indicate the procedural requirements for making a motion for such a protective order, it is probably to be presented orally at the pretrial conference, or as a motion in limine at the outset of the trial. In both instances, other counsel probably will be present. In any case, an order probably will not be granted on an ex parte application, because the rights of the adverse party will be affected if a protective order is made pursuant to *Civ. Code § 3295(a)* [*see Consolidated Constr. Co. v. Pacific E. Ry. Co. (1920) 184 Cal. 244, 246, 193 P. 238]* . For discussion and forms relating to motions in limine, see Ch. 373, *Motions in Limine* .

In addition, *Civ. Code § 3295* provides that there may be no pretrial discovery of either the profits the defendant has gained by means of the wrongful course of conduct, or the financial condition of the defendant, unless the court makes an order permitting that discovery. However, the plaintiff may subpena documents or witnesses to be available at the trial for the purpose of establishing the profits or financial condition of defendant, and the defendant may be required to identify documents in the defendant's possession that are relevant and admissible for that purpose and the witnesses employed by or related to the defendant who would be most competent to testify to those facts [*Civ. Code § 3295(c)*].

An order permitting discovery must be made on plaintiff's motion supported by appropriate affidavits (or declaration under penalty of perjury) and after a hearing if the court deems that a hearing is necessary. An order is granted only if, after weighing the evidence submitted by both sides, the court finds that the plaintiff has established that there is a substantial probability that he or she will prevail on the punitive damages claim [*Civ. Code § 3295(c)*]. A mere finding that the plaintiff has made a prima facie showing sufficient to avoid summary judgment onthe punitive damages claim is an insufficient basis for an order [*Jabro v. Superior Court (2002) 95 Cal. App. 4th 754, 758, 115 Cal. Rptr. 2d 843]* . An order is not a determination on the merits of the claim or any defense thereto and cannot be given in evidence or referred to at the trial [*Civ. Code § 3295(c)*].

In actions in which the initial trial has not commenced prior to January 1, 1988, the court must, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for the plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with *Civ. Code § 3294*. Evidence of profit and financial condition is admissible only as to the

defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition must be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud [*Civ. Code § 3295(d)*].

A request for bifurcation is essentially a motion in limine and should be made before trial. Despite the statute's mandatory language, the failure to make a timely motion may constitute a waiver of the right to bifurcation. The motion may be denied if, in the court's discretion, it would be prejudicial to the other party [*Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal. App. 3d 1220, 1240-1242, 1 Cal. Rptr. 2d 301* (motion made after months of pretrial proceedings and five days of testimony (including some evidence of defendant's wealth), and as plaintiff was about to call out-of-town witness to present evidence on issue)].

The requirement that the same jury decide liability and punitive damages may be waived if the defendant fails to object to separate juries [*Medo v. Superior Court (1988) 205 Cal. App. 3d 64, 68-70, 251 Cal. Rptr. 924]* . In the absence of a clear understanding that two juries will be employed (in other words, if the defendant has not waived the statutory right to have all of the evidence heard by a single jury), plaintiffs must put on their entire case, including evidence relevant to the amount of punitive damages, before the jury is discharged. Failure to do so results in a forfeiture of the right to punitive damages [*City of El Monte v. Superior Court (1994) 29 Cal. App. 4th 272, 277, 280, 34 Cal. Rptr. 2d 490* (defendant had no obligation to inform plaintiff or court that discharge of jury would preclude punitive damages award)].

The same-trier-of-fact restriction [*Civ. Code § 3295(d)*] is intended to require the same jury to resolve all the issues when a defendant has requested and obtained bifurcation, thereby promoting judicial economy and avoiding delay [*Torres v. Automobile Club of S. Cal. (1997) 15 Cal. 4th 771, 778, 63 Cal. Rptr. 2d 859, 937 P.2d 290*]. Section 3295(d) does not strip appellate courts of their authority to order retrials limited to the issue of punitive damages or entitle a defendant to a new trial on liability and compensatory damages following a reversal of a punitive damage award [*Torres v. Automobile Club of S. Cal. (1997) 15 Cal. 4th 771, 779-780, 782, 63 Cal. Rptr. 2d 859, 937 P.2d 290* ; *Bullock v. Philip Morris USA., Inc. (2008) 159 Cal. App. 4th 655, 700-701* (appellate court ordered retrial on amount of punitive damages only, as compensatory damages and oppression, fraud, or malice had been determined by jury in original trial)]. Similarly, a trial court has the authority to order a retrial limited to the issues of malice and, if necessary, punitive damages, without a retrial of all issues relating to liability and compensatory damages, if the original jury deadlocks on the issue of malice [*Barmas, Inc. v. Superior Court (2001) 92 Cal. App. 4th 372, 374-377, 112 Cal. Rptr. 2d 71]* .

[18] Insurance Coverage

Punitive damages must be paid by the party against whom they are assessed and may not be indemnified by insurance. Insurance coverage for punitive damages contravenes California public policy that prohibits indemnity for willful wrongs [*City Prods. Corp. v. Globe Indem. Co. (1979) 88 Cal. App. 3d 31, 36-42, 151 Cal. Rptr. 494* ; *see Ins. Code § 533*]. The prohibition applies whether or not the underlying conduct is otherwise insurable or actually insured against [*Ford Motor Co. v. Home Ins. Co. (1981) 116 Cal. App. 3d 374, 382, 172 Cal. Rptr. 59]* . An insurer's duty to defend, however, is separate from its duty to indemnify, and thus an insurer may have an obligation to defend a suit against its insured in which punitive damages are sought [*Ohio Cas. Ins. Co. v. Hubbard (1984) 162 Cal. App. 3d 939, 943-947, 208 Cal. Rptr. 806]* .

The California rule precluding insurance coverage of punitive damages awards may raise a conflict of laws issue if the insurance contract is arguably governed by the law of a state that permits indemnification for punitive damages. For example, in *Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc. (1993) 14 Cal. App. 4th 637, 649, 17 Cal. Rptr. 2d 713* , a manufacturer of automobile batteries was headquartered in Wisconsin, a state that does not preclude coverage of punitive damages awards. However, a battery that it manufactured and sold in California injured a California resident, who recovered compensatory and punitive damages from the manufacturer in a California state court. The

manufacturer's insurer brought a declaratory relief action asserting that it had no duty to indemnify the portion of the judgment imposed as punitive damages; the manufacturer argued that, because its corporate headquarters were located in Wisconsin, the laws of that state permitting indemnification of punitive damages awards should govern.

The trial court entered summary judgment for the insurer, and the court of appeal affirmed. The appellate court found the existence of a true conflict between California and Wisconsin, and proceeded to apply the governmental interest analysis in order to determine which law should apply [*Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc. (1993) 14 Cal. App. 4th 637, 645, 17 Cal. Rptr. 2d 713]* . The court balanced the interests of the parties and the states involved, and concluded that the determinative factor was the location of the risk covered by the policy. The court adopted the "multiple risk" analysis, under which a multiple risk policy insuring against risks located in several states will be viewed as if it involved separate policies, each insuring an individual risk, and the law of the state of principal location of the particular risk involved will be applied [*Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc. (1993) 14 Cal. App. 4th 637, 646-647, 17 Cal. Rptr. 2d 713* ; *see also* Restatement (Second) of Conflict of Laws, § 193, cmt. f]. Because the risk involved was located in California, the court concluded that the manufacturer should reasonably have expected California law to apply to the battery it manufactured and sold in California, and that this expectation meant that application of the California rule would not seriously impair the Wisconsin interest in protecting the expectations of the parties to the insurance contract [*Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc. (1993) 14 Cal. App. 4th 637, 648-649, 17 Cal. Rptr. 2d 713]* .

The court stressed that it undertook this analysis because the insurance contract did not include a choice of law provision, and that such a provision in the contract is usually enforced [*Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc. (1993) 14 Cal. App. 4th 637, 645-646, 17 Cal. Rptr. 2d 713]* . Although dictum, the court's statement suggests that a choice of law provision specifying the law of a jurisdiction reasonably related to the policy might be given effect, even if the effect of the provision is to permit indemnification of a punitive damages award.

It is not clear if a conflict of interest that would require independent counsel to be appointed under *Civ. Code § 2860* may ever arise as a result of a claim for punitive damages. A conflict does *not* exist in a case in which the insurer cannot control the outcome of a coverage issue that was the basis of a reservation of rights, but only denies liability for punitive damages [*Civ. Code § 2860(b)*; *see also Foremost Ins. Co. v. Wilks (1988) 206 Cal. App. 3d 251, 259-263, 253 Cal. Rptr. 596* (decided under law in effect before effective date of *Civ. Code § 2860*; insurer's notification to insured that it would not indemnify insured for any punitive damages award pursuant to *Civ. Code § 1668* and *Ins. Code § 533* did not create conflict of interest)].

[19] Pretrial Determinations

The sufficiency of a plaintiff's showing regarding punitive damages may be raised by a defendant before trial, as in a motion for nonsuit [*see Code Civ. Proc. § 581c*] or a motion for summary judgment [*see Code Civ. Proc. § 437c*]. A pretrial determination on the merits of a claim for punitive damages can also be required if the action is against a health care provider or a religious corporation [*see Code Civ. Proc. §§ 425.13* (prima facie case for punitive damages must be shown before complaint may be amended to allege claim against health care provider), 425.14 (similar requirement for actions against religious corporations); *see also § 177.51[20][a],[b]*].

Because the standard of proof for punitive damages requires proof by clear and convincing evidence [*see Civ. Code § 3294(a)*; *see also § 177.51[7][b]*], the court must utilize different standards than it would in a motion involving the ordinary preponderance of the evidence standard. A court of appeal has set forth the standard to be applied in nonsuit motions: the nonsuit motion should be granted only if no reasonable jury could find that the plaintiff has presented clear and convincing evidence on the disputed issue [*Hoch v. Allied-Signal, Inc. (1994) 24 Cal. App. 4th 48, 60, 29 Cal. Rptr. 2d 615]* . A nonsuit is *not* appropriate merely because the trial court finds the plaintiff's evidence less than clear and convincing; instead the focus must be on the "reasonable jury" [*see Hoch v. Allied-Signal, Inc. (1994) 24 Cal. App. 4th 48, 59-61, 29 Cal. Rptr. 2d 615]* .

It seems clear that a similar standard will apply to summary judgment motions. Cases that have applied the clear and convincing evidence standard in other contexts have required the trial court to take the higher standard into account in deciding the summary judgment motion [*see Anderson v. Liberty Lobby, Inc. (1986) 477 U.S. 242, 254-256, 106 S. Ct. 2505, 91 L. Ed. 2d 202* (clear and convincing evidence standard applied to proof of actual malice in defamation actions by public figures must be considered in summary judgment motion); *Planned Protective Servs., Inc. v. Gorton (1988) 200 Cal. App. 3d 1, 8-9, 245 Cal. Rptr. 790* (same)].

[20] Special Procedures for Punitive Damages Claim in Specific Actions

[a] Action Against Health Care Provider

[i] Motion to Amend Complaint Required

In any action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages may be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed. The court may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits presented that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim under *Civ. Code § 3294*. The court may not grant a motion allowing the filing of an amended pleading that includes a claim for punitive damages if the motion for such an order is not filed within two years after the complaint or initial pleading is filed or not less than nine months before the date the matter is first set for trial, whichever is earlier [*Code Civ. Proc. § 425.13(a)*]. The date the matter is first set for trial is the initial trial date, not the date of the trial setting conference [*Brown v. Superior Court (1990) 224 Cal. App. 3d 989, 992-994, 274 Cal. Rptr. 442]* .

An implied exception to the requirement in *Code Civ. Proc. § 425.13(a)* permits the motion to be granted even if it is brought less than nine months before the assigned trial date if it is necessary to protect a plaintiff's right to a preferential trial date and the defendant receives or has had a reasonable opportunity to conduct discovery regarding the punitive damage claim [*Looney v. Superior Court (1993) 16 Cal. App. 4th 521, 536, 20 Cal. Rptr. 2d 182* (nine-month requirement was rendered impossible by entitlement to trial preference under *Code Civ. Proc. § 36(d)*)].

A similar exception has been allowed when a "fast track" trial court sets trial to begin in less than nine months [*see Goodstein v. Superior Court (1996) 42 Cal. App. 4th 1635, 1645, 50 Cal. Rptr. 2d 459*]. In those cases, a trial court may relieve a plaintiff from complying with the nine-month limitation period if the plaintiff can show by a preponderance of the evidence that: (1) plaintiff was unaware of facts or evidence necessary to make a proper motion under *Code Civ. Proc. § 425.13* more than nine months prior to the first trial date; (2) plaintiff made a diligent, reasonable, and good-faith effort to discover such necessary facts or evidence more than nine months prior to the first assigned trial date; (3) after the trial date was assigned, plaintiff made a diligent, reasonable, and good-faith effort to complete necessary discovery; (4) plaintiff filed a motion under *Code Civ. Proc. § 425.13* as soon as reasonably practicable after completing such discovery, but within two years after filing the original complaint; and (5) defendant will suffer no surprise or prejudice by reason of the shortened time period and will be given every reasonable opportunity to complete all necessary discovery in order to prepare to meet the punitive damages allegations [*Goodstein v. Superior Court (1996) 42 Cal. App. 4th 1635, 1645, 50 Cal. Rptr. 2d 459*]. In order to apply this narrow exception, a trial court must make specific findings showing that plaintiff has met each of the five steps [*Goodstein v. Superior Court (1996) 42 Cal. App. 4th 1635, 1645, 50 Cal. Rptr. 2d 459* ; *see, e.g., Freedman v. Superior Court (2008) 166 Cal. App. 4th 198, 206-207, 82 Cal. Rptr. 3d 563* (assuming test applied, plaintiff failed to meet either of first two steps)].

[ii] Actions to Which Requirement Applies

The language in *Code Civ. Proc. § 425.13(a)* making the provisions of the section applicable to actions "arising out of the professional negligence of a health care provider" does not make the provisions inapplicable to causes of action identified as intentional torts rather than as negligence. If an injured party seeks punitive damages for an injury that is directly related to the professional services provided by a health care provider acting in its capacity as such, the action is one arising out of professional negligence, and the party must comply with *Code Civ. Proc. § 425.13(a)* [*Central Pathology Serv. Med. Clinic, Inc. v. Superior Court (1992) 3 Cal. 4th 181, 191-192, 10 Cal. Rptr. 2d 208, 832 P.2d 924* (disapproving *Bommareddy v. Superior Court (1990) 222 Cal. App. 3d 1017, 272 Cal. Rptr. 246*)]. Thus, a cause of action against a health care provider for battery predicated on treatment exceeding or different from that to which plaintiff consented is governed by *Code Civ. Proc. § 425.13* because the injury arose out of the manner in which professional services are provided [*Central Pathology Serv. Med. Clinic, Inc. v. Superior Court (1992) 3 Cal. 4th 181, 192, 10 Cal. Rptr. 2d 208, 832 P.2d 924* (contrasting situation in which cause of action is for sexual battery; in most such cases, defendant's conduct would not be directly related to manner in which professional services were rendered); *see also Davis v. Superior Court (1994) 27 Cal. App. 4th 623, 629, 33 Cal. Rptr. 2d 6* (allegations that misrepresentations were product of conspiracy in context of workers' compensation system did not take action outside *Code Civ. Proc. § 425.13*)]. The Court held that the clear intent of the legislature was that any claim for punitive damages in an action against a health care provider be subject to the statute if the injury was caused by conduct directly related to the rendition of professional services [*Central Pathology Serv. Med. Clinic, Inc. v. Superior Court (1992) 3 Cal. 4th 181, 192, 10 Cal. Rptr. 2d 208, 832 P.2d 924]* .

The test of whether a health care provider's negligence constitutes professional negligence is whether the negligence occurred in rendering services for which the health care provider is licensed [*Williams v. Superior Court (1994) 30 Cal. App. 4th 318, 325, 36 Cal. Rptr. 2d 112* ; *Murillo v. Good Samaritan Hosp. (1979) 99 Cal. App. 3d 50, 57, 160 Cal. Rptr. 33]* . For example, a cause of action alleging that plaintiff was injured when she attempted to draw blood from a patient that the defendant knew was violent, but that defendant negligently failed to warn plaintiff of that known danger, was held to be within the statute notwithstanding plaintiff's argument that defendant could be held liable under a premises liability theory. The court held that the injury was directly related to the manner in which the defendant rendered its professional services, given the professional duty of a hospital to provide a safe environment for diagnosis, treatment, and recovery, as well as plaintiff's allegations that defendant's knowledge of the danger was based on its treatment of the patient [*Williams v. Superior Court (1994) 30 Cal. App. 4th 318, 325-327, 36 Cal. Rptr. 2d 112]* . Similarly, despite the absence of an actual physician-patient relationship, the statute applied to a claim brought against a sperm bank and the doctors that performed the genetic screening on the donor, because the collection, processing, and testing of sperm for use in artificial insemination requires the exercise of professional expertise and judgment [*Johnson v. Superior Court (2002) 101 Cal. App. 4th 869, 885-886, 124 Cal. Rptr. 2d 650]* .

The statute also applied to claims against a medical group made up of licensed physicians that provided health facility outpatient services under contract with a health care service plan, even though the allegedly actionable conduct occurred while the medical group was reviewing the medical necessity of the plaintiff's request for new prosthetics. The court rejected the plaintiff's argument that the medical group's conduct did not arise out of professional negligence because it was performing its contractual duties as a utilization review organization for the health care service plan at the time. The court noted that the medical group was required to exercise medical judgment and apply clinical standards in performing those duties [*Palmer v. Superior Court (2002) 103 Cal. App. 4th 953, 966-967, 972, 127 Cal. Rptr. 2d 252]* .

The statute applies whether or not a cause of action for professional negligence is pleaded along with the claim that is asserted to be based on a theory other than professional negligence [*see Central Pathology Service Medical Clinic, Inc. (1992) 3 Cal. 4th 181, 192, 10 Cal. Rptr. 2d 208, 832 P.2d 924]* .

As used in *Code Civ. Proc. § 425.13*, health care provider means any person licensed or certified pursuant to *Bus. & Prof. Code §§ 500-4998.7*, or licensed pursuant to the Osteopathic Initiative Act or the Chiropractic Initiative Act, or licensed pursuant to *Health & Safety Code §§ 1440-1498*; and any clinic, health dispensary, or health facility licensed

pursuant to *Health & Safety Code § 1200 et seq.*, and includes the legal representatives of a health care provider [*Code Civ. Proc. § 425.13(b)*; *see, e.g., Cryolife, Inc. v. Superior Court (2003) 110 Cal. App. 4th 1145, 1159-1160, 2 Cal. Rptr. 3d 396* (tissue bank constituted "health dispensary" under statute); *Johnson v. Superior Court (2002) 101 Cal. App. 4th 869, 883, 124 Cal. Rptr. 2d 650* (sperm bank constituted "health dispensary"].

For further discussion and forms for obtaining an order under *Code Civ. Proc. § 425.13*, see Ch. 415, *Physicians: Medical Malpractice* .

[iii] Substantive Requirements

Code Civ. Proc. § 425.13(a) achieves its purpose of protecting health care providers from the burden of defending against meritless punitive damages claims by requiring the plaintiff to both state and substantiate a legitimate, triable punitive damages claim [*College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 709, 34 Cal. Rptr. 2d 898, 882 P.2d 894]* . However, the statute does not authorize a trial court to reject a well pled and factually supported punitive damages claim simply because the court believes the evidence is not strong enough for probable success before a jury [*College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 709, 34 Cal. Rptr. 2d 898, 882 P.2d 894]* . Under the statute, the trial court does not weigh evidence or make an independent assessment of the relative strength of the evidence [*College Hospital, Inc. v. Superior Court (1994) 8 Cal. 4th 704, 719, 34 Cal. Rptr. 2d 898, 882 P.2d 894* ; *see Aquino v. Superior Court (1994) 21 Cal. App. 4th 847, 854-856, 26 Cal. Rptr. 2d 477* ; *Looney v. Superior Court (1993) 16 Cal. App. 4th 521, 539, 20 Cal. Rptr. 2d 182]* . The statute also does not contemplate a mini-trial, at which witness testimony is introduced; instead, like a summary judgment motion, the motion is decided entirely on an "affidavit" showing [*College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 719-720, 34 Cal. Rptr. 2d 898, 882 P.2d 894]* .

The court must deny the *Code Civ. Proc. § 425.13(a)* motion if the facts asserted in the proposed amended complaint are legally insufficient to support a punitive damages claim. The court must also deny the motion if the evidence provided in the "supporting and opposing affidavits" either negates or or fails to reveal the existence of a triable claim [*College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 719, 34 Cal. Rptr. 2d 898, 882 P.2d 894]* . The motion may be granted only if the plaintiff demonstrates that both requirements are met [*College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 719, 34 Cal. Rptr. 2d 898, 882 P.2d 894]* .

The requisite substantiation of a punitive damages claim occurs only if the factual recitials are made under penalty of perjury and set forth competent admissible evidence within the personal knowledge of the declarant [*College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 719-720, 34 Cal. Rptr. 2d 898, 882 P.2d 894]* .

[b] Action Against Religious Corporation or Religious Corporation Sole

No claim for punitive or exemplary damages against a religious corporation or religious corporation sole may be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive or exemplary damages to be filed. The court may allow the filing of an amended pleading that claims punitive or exemplary damages on a motion by a party seeking the amended pleading if, based on the supporting and opposing affidavits or declarations under penalty of perjury presented, the plaintiff has established evidence that substantiates that he or she will meet the clear and convincing standard under *Civ. Code § 3294* [*Code Civ. Proc. § 425.14*; *see Code Civ. Proc. § 2015.5* (declaration under penalty of perjury sufficient when affidavit required by statute)]. The statute does not require that the plaintiff satisfy the "clear and convincing" burden of proof at the time the motion is heard. Instead, the plaintiff need only demonstrate the existence of sufficient evidence to establish a prima facie case for punitive damages, having in mind the higher standard of proof [*Rowe v. Superior Court (1993) 15 Cal. App. 4th 1711, 1723, 1735, 19 Cal. Rptr. 2d 625]* .

For further discussion relating to religious corporations and religious corporations sole, and for forms to obtain an order

under *Code Civ. Proc. § 425.14*, see Ch. 110, *Churches and Religious Organizations* .

[21] Award in Contractual Arbitration

If parties to a contract intend to substitute arbitration for judicial dispute resolution and intend to present potential tort claims to arbitration, they are presumed to also have intended that the usual judicial remedies, including punitive damages, be available in arbitration. The crucial question is whether the arbitration agreement contemplates arbitration of claims giving rise to punitive damages. If the contract provides for arbitration of "any controversy" arising out of or relating to the contract, the arbitration agreement is sufficiently broad to include tort claims that have their roots in the relationship between the parties that was created by the contract. In absence of a clear expression in the arbitration agreement to the contrary, the arbitrator may award punitive damages under the same standards as would apply to a judicial resolution of the controversy [*Tate v. Saratoga Sav. & Loan Ass'n (1989) 216 Cal. App. 3d 843, 854-855, 265 Cal. Rptr. 440* ; *see* *Baker v. Sadick (1984) 162 Cal. App. 3d 618, 622-623, 208 Cal. Rptr. 676* ; *Bos Material Handling, Inc. v. Crown Controls Corp. (1982) 137 Cal. App. 3d 99, 105, 186 Cal. Rptr. 740* ; *see also* *J. Alexander Sec., Inc. v. Mendez (1993) 17 Cal. App. 4th 1083, 1090, 21 Cal. Rptr. 2d 826* (federal policy supports vesting arbitrators with authority to award punitive damages if parties' agreement contemplates it)].

Legal Topics:

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15-177 California Forms of Pleading and Practice--Annotated § 177.52

§ 177.52 Attorney's Fees as Element of Damages

Under limited circumstances, attorney's fees may be recovered, not as an award of attorney's fees as such, but as an element of damages arising from tortious conduct. A person who has been required by the tort of one person to act in the protection of his or her interests by bringing or defending an action against a third person is entitled to recover compensation for the reasonably necessary attorney's fees incurred [*Prentice v. North Am.. Title Guar. Corp. (1963) 59 Cal. 2d 618, 620, 30 Cal. Rptr. 821, 381 P.2d 645* ; *Saunders v. Cariss (1990) 224 Cal. App. 3d 905, 910, 274 Cal. Rptr. 186* ; *Heckert v. MacDonald (1989) 208 Cal. App. 3d 832, 837, 256 Cal. Rptr. 369]* .

Because attorney's fees in such a situation are an element of compensatory damages, they must be pleaded and proved to the trier of fact, as with any other recovery of damages [*Vacco Indus., Inc. v. Van Den Berg (1992) 5 Cal. App. 4th 34, 41, 56, 6 Cal. Rptr. 2d 602* (improper to tax as costs after posttrial motion)]. Further, all of the elements of a tort must be present between the tortfeasor and the person who incurred the attorney's fees, including duty if negligence is alleged as the basis for the damages [*see* *Sooy v. Peter (1990) 220 Cal. App. 3d 1305, 1309-1314, 270 Cal. Rptr. 151* (rejecting right of nonclient to recover attorney's fees incurred as result of attorney's alleged professional negligence)]. Attorney's fees may be awarded as damages under this doctrine in an action against the negligent party [*see* *Prentice v. North American Title Guaranty Corp. (1963) 59 Cal. 2d 618, 620-621, 530 Cal. Rptr. 821, 381 P.2d 645]* , or pursuant to a cross complaint for indemnity in which one defendant is awarded complete indemnity from the other [*see* *Heckert v. MacDonald (1989) 208 Cal. App. 3d 832, 838, 256 Cal. Rptr. 369]* .

The fees must have been incurred with regard to a dispute with a third party, regardless of the parties who are technically involved in the litigation [*see* *Golden W. Baseball Co. v. Talley (1991) 232 Cal. App. 3d 1294, 1304, 284 Cal. Rptr. 53* (fact that another party was tangentially involved in dispute that was essentially between plaintiff and defendant did not make doctrine applicable); *Schneider v. Friedman, Collard, Poswall & Virga (1991) 232 Cal. App. 3d 1276, 1281-1282, 283 Cal. Rptr. 882* (presence of interpleading party is irrelevant)]. The rule cannot be applied to one of several joint tortfeasors on the basis that the conduct of the one required fees to be incurred with regard to the others [*see* *Vacco Indus., Inc. v. Van Den Berg (1992) 5 Cal. App. 4th 34, 57, 6 Cal. Rptr. 2d 602]* . Thus, an employee cannot be required to pay attorney's fees incurred in an action against the employer arising from the employee's conduct within the scope of employment [*Golden W. Baseball Co. v. Talley (1991) 232 Cal. App. 3d 1294, 1302, 284 Cal.*

Rptr. 53] . Similarly, an attorney's former client who has incurred attorney's fees in defending against the attorney's attempt to collect or retain an unreasonable fee is not entitled to recover the fees from the attorney. In such a case, the attorney is not a "third party" and is therefore not subject to the exception [*Schneider v. Friedman, Collard, Poswall & Virga (1991) 232 Cal. App. 3d 1276, 1281-1282, 283 Cal. Rptr. 882]* .

In an action for malicious prosecution, the measure of compensatory damages includes attorney's fees and court costs incurred in defending the prior action [*Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 59, 118 Cal. Rptr. 184, 529 P.2d 608]* . Recovery is similarly allowed in an action based on false arrest or false imprisonment [*Nelson v. Kellogg (1912) 162 Cal. 621, 623-624, 123 P. 1115]* .

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§ 177.53 Prejudgment Interest

[1] At Discretion of Jury

In an action for the breach of an obligation not arising from contract and in every case of oppression, fraud, or malice, interest may be given in the discretion of the jury [*Civ. Code § 3288*]. An award of prejudgment interest under *Civ. Code § 3288* is in the nature of damages [*Michelson v. Hamada (1994) 29 Cal. App. 4th 1566, 1586, 36 Cal. Rptr. 2d 343]* . It does not constitute a granting of damages in excess of the losses incurred by a plaintiff but is merely a recognition of an element of a plaintiff's loss of the use of money or property [*Nordahl v. Department of Real Estate (1975) 48 Cal. App. 3d 657, 665-666, 121 Cal. Rptr. 794* ; *Greenfield v. Insurance Inc. (1971) 19 Cal. App. 3d 803, 813, 97 Cal. Rptr. 164* ; *see Redke v. Silvertrust (1971) 6 Cal. 3d 94, 106, 98 Cal. Rptr. 293, 490 P.2d 805* (interest as properly awarded in action involving constructive fraud)]. The rate of prejudgment interest is the constitutional 7 percent rate [*Michelson v. Hamada (1994) 29 Cal. App. 4th 1566, 1585-1586, 36 Cal. Rptr. 2d 343* ; *Continental Airlines Inc. v. McDonnell Douglas Corp. (1989) 216 Cal. App. 3d 388, 433-434, 264 Cal. Rptr. 779* ; *see Cal. Const. art. XV, § 1*]. Compound interest may be awarded in cases involving a fiduciary relationship [*Michelson v. Hamada (1994) 29 Cal. App. 4th 1566, 1586, 36 Cal. Rptr. 2d 343]* .

[2] By Trial Court Sitting as Trier of Fact

Although *Civ. Code § 3288* only grants authority to the "jury," the trial court, when acting as the trier of fact, may award prejudgment interest under this statute [*Bullis v. Security Pac. Nat'l Bank (1978) 21 Cal. 3d 801, 814 n.16, 148 Cal. Rptr. 22, 582 P.2d 109* ; *Michelson v. Hamada (1994) 29 Cal. App. 4th 1566, 1586-1587, 36 Cal. Rptr. 2d 343* ; *Segura v. McBride (1992) 5 Cal. App. 4th 1028, 1040 n.13, 7 Cal. Rptr. 2d 436]* . A general prayer for "other relief as the court deems proper" is sufficient for the court to invoke its power to award prejudgment interest [*Segura v. McBride (1992) 5 Cal. App. 4th 1028, 1041, 7 Cal. Rptr. 2d 436]* . Nevertheless, in a case tried to a jury, the court may not usurp the discretion conferred on the jury by the statute [*Barry v. Raskov (1991) 232 Cal. App. 3d 447, 457, 283 Cal. Rptr. 463]* .

[3] Relating to Unliquidated Damages

Discretionary interest under *Civ. Code § 3288* is allowable on unliquidated claims. However, it is limited to interest on a specific sum of money or on property subject to specific valuation. Recovery is not allowed on nonpecuniary damages that are not readily subject to precise calculation, such as the intangible, noneconomic aspects of mental and emotional injury [*Greater Westchester Homeowners Ass'n, Inc. v. City of Los Angeles (1979) 26 Cal. 3d 86, 102-103, 160 Cal. Rptr. 733, 603 P.2d 1329]* .

[4] When Interest Commences Accruing

Prejudgent interest under *Civ. Code § 3288* runs from the time when the plaintiff parted with the money or property for which damages are awarded. In a case of continuing loss over a period of time, it is error to compute the interest from the end of the period. Rather, the court should fashion an award that reasonably compensates the plaintiff for the loss of use of the money or property [*see* *Michelson v. Hamada (1994) 29 Cal. App. 4th 1566, 1588-1589, 36 Cal. Rptr. 2d 343* (using midpoint of divisible periods of loss); *cf.* *Cassinos v. Union Oil Co. (1993) 14 Cal. App. 4th 1770, 1790, 18 Cal. Rptr. 2d 574* (prejudgment interest may be awarded from inception of occurrence, but permitted on facts of case only from date complaint was filed because basis for computing damages was set forth in complaint)].

If a judgment against some joint tortfeasors follows a good-faith settlement with other joint tortfeasors, the plaintiff may recover prejudgment interest from the nonsettling defendants up to the date of the settlement on the total judgment, and prejudgment interest after the date of the settlement on the amount of the total judgment reduced by the settlement sum paid [*see* *Newby v. Vroman (1992) 11 Cal. App. 4th 283, 287-290, 14 Cal. Rptr. 2d 44]* . Good faith settlement is discussed in Ch. 300, *Indemnity and Contribution* .

[5] Pursuant to Offer to Settle

Civ. Code § 3291 provides for an award of prejudgment interest to the plaintiff in a personal injury action in which the plaintiff made an offer to compromise and settle under *Code Civ. Proc. § 998,* and the defendant refused the offer. However, such an award is not considered to be in the nature of additional damages, but rather as part of the award of costs [*see* *Mendez v. Kurten (1985) 170 Cal. App. 3d 481, 486-487, 215 Cal. Rptr. 924]* . Prejudgment interest awarded under *Civ. Code § 3291* is not an element of damages in a judgment [*Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc. (1997) 60 Cal. App. 4th 13, 18, 70 Cal. Rptr. 2d 41]* . For further discussion of *Code Civ. Proc. § 998* offers and prejudgment interest under *Civ. Code § 3291*, see Ch. 520, *Settlement and Release* .

[6] On Damages Certain or Capable of Being Made Certain

A plaintiff who is entitled to recover damages in an amount that is certain (or capable of being made certain by calculation) is entitled to recover prejudgment interest from the date on which the right to recover is vested [*Civ. Code § 3287(a)*]. This statute is most commonly relied on to recover interest on damages arising from breach of contract and, therefore, is discussed principally in § 177.80[2]. Nevertheless, it may apply in certain tort actions if the amount of the plaintiff's loss and the date from which the interest should be computed are capable of being calculated [*see* *Stein v. Southern Cal. Edison Co. (1992) 7 Cal. App. 4th 565, 571, 8 Cal. Rptr. 2d 907]* .

Under this standard, prejudgment interest is most likely to be awarded on damages for injury to property or other economic loss [*see* *Stein v. Southern Cal. Edison Co. (1992) 7 Cal. App. 4th 565, 571-573, 8 Cal. Rptr. 2d 907* (injury to property based on strict liability); *Levy-Zentner Co. v. Southern Pac. Transp. Co. (1977) 74 Cal. App. 3d 762, 769, 770, 142 Cal. Rptr. 1* (property damaged by fire); *Smith v. Rickards (1957) 149 Cal. App. 2d 648, 654, 308 P.2d 758* (fraud); *Petersen v. Lyders (1934) 139 Cal. App. 307, 309, 310, 33 P.2d 1032* (conversion)]. Generally, prejudgment interest under *Civ. Code § 3287(a)* is not allowed on damages for personal injuryor wrongful death because the determination of the amount of damages requires consideration of subjective factors such as pain and suffering and loss of society [*see* *Canavin v. Pacific Sw. Airlines (1983) 148 Cal. App. 3d 512, 524, 196 Cal. Rptr. 82* (wrongful death); *Curtis v. State of California ex rel. Dept. of Transportation (1982) 128 Cal. App. 3d 668, 686, 180 Cal. Rptr. 843*

(personal injury)].

[7] In Inverse Condemnation Actions

An award of damages for inverse condemnation must include interest computed from the date on which the taking or damaging was sustained, in order to fulfill the constitutional mandate for just compensation [*Holtz v. San Francisco Bay Area Rapid Transit Dist. (1976) 17 Cal. 3d 648, 657, 131 Cal. Rptr. 646, 552 P.2d 430* ; *Smith v. County of Los Angeles (1989) 214 Cal. App. 3d 266, 290, 262 Cal. Rptr. 754]* . In the case of a continuing injury to property, a cause of action accrues, and interest is computed, from the date on which the damaging activity has reached a level that substantially interferes with the owner's use and enjoyment of the property [*Smith v. County of Los Angeles (1989) 214 Cal. App. 3d 266, 291, 262 Cal. Rptr. 754* ; *see Smart v. City of Los Angeles (1980) 112 Cal. App. 3d 232, 235, 169 Cal. Rptr. 174]* .

Interest must be computed at the apportionment rate calculated by the state Controller as the rate of earnings by the Surplus Money Investment Fund for each calendar quarter [*Code Civ. Proc. §§ 1268.311, 1268.350*]. This rate is required for interest calculations for periods after January 1, 1987, but may serve as evidence of what a prudent investor would have earned during periods prior to that date [*Smith v. County of Los Angeles (1989) 214 Cal. App. 3d 266, 293-295, 262 Cal. Rptr. 754* (court did not commit error by using apportionment rate for periods prior to effective date of statutes)].

[8] Under Cartwright Act

Prejudgment interest may be awarded in an action for unfair competition under the Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*) if the court finds that such an award is just in the circumstances [*Bus. & Prof. Code §§ 16750(a), 16760(a)(2), 16761*]. The interest is calculated on the actual damages awarded at the rate of 10 percent per annum for the period beginning on the date of service of the plaintiff's complaint and ending on the date of judgment, or for any shorter period therein [*Bus. & Prof. Code § 16761*]. For a further discussion and forms relating to prejudgment interest in unfair competition actions, see Ch. 565, *Unfair Competition* .

[9] Waiver of Interest

Civ. Code § 3290 provides that accepting payment of the whole principal, as such, waives all claim to interest. This provision applies to all claimsto prejudgment interest as damages, but not to postjudgment interest [*San Francisco Unified Sch. Dist. v. San Francisco Classroom Teachers Ass'n (1990) 222 Cal. App. 3d 146, 150, 272 Cal. Rptr. 38*]. Presumably, it applies to all awards of interest under statutes found in Division 4, Part 1, Title 2, Chapter 1, Article 2, of the Civil Code (entitled "Interest as Damages"), including *Civ. Code §§ 3287* and *3288* (discussed in *§ 177.53[1]*), and *Civ. Code § 3291* (discussed in *§ 177.53[5]*) [*see San Francisco Unified School Dist. v. San Francisco Classroom Teachers Assn. (1990) 222 Cal. App. 3d 146, 150, 272 Cal. Rptr. 38* ; *but see Mendez v. Kurten (1985) 170 Cal. App. 3d 481, 486, 215 Cal. Rptr. 924* (prejudgment interest under *Civ. Code § 3291* pursuant to settlement offer under *Code Civ. Proc. § 998* is not in nature of additional damages)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestPrejudgment InterestGovernmentsCourtsAuthority to AdjudicateReal Property LawInverse CondemnationRemediesTortsDamagesInterestGeneral OverviewTortsDamagesInterestPrejudgment Interest

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Volume 15: Costs and Attorney's Fees thru Deeds-Chs. 174-189
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15-177 California Forms of Pleading and Practice--Annotated § 177.54

§ 177.54 Liens on Recovery

[1] Medi-Cal Lien

If medical expenses of the injured tort victim have been paid by the Medi-Cal program, the state Director of Health Services (the administrator of the Medi-Cal program) has a statutory first lien on any judgment against or settlement with the tortfeasor [*see Welf. & Inst. Code § 14124.74(a)*; Bonta v. Friedman (2001) *91 Cal. App. 4th 819, 823 (Medi-Cal lien applied to health care provided after child was born with birth defects and mother sued doctor for failing to warn that child would be born with defects)]* . However, lien recovery is permitted only if the damages recovered from the third-party tortfeasor include damages for the cost of medical treatment or other benefits provided by Medi-Cal [*Fitch v. Select Prods. Co. (2005) 36 Cal. 4th 812, 820, 31 Cal. Rptr. 3d 591, 115 P.3d 1233]* . Thus, for example, the Director may not assert a lien against a wrongful death recovery that does not include compensation for the decedent's medical expenses covered by Medi-Cal [*Fitch v. Select Prods. Co. (2005) 36 Cal. 4th 812, 819, 31 Cal. Rptr. 3d 591, 115 P.3d 1233]* . In addition, the state's lien is limited to the amount of the recovery that is allocated to medical expenses [*Welf. & Inst. Code § 14124.76(a)*; *Ark. HHS v. Ahlborn (2006) 547 U.S. 268, 284-285, 126 S. Ct. 1752, 164 L. Ed. 2d 459]* .

All reasonable efforts are to be made to get Medi-Cal's advance agreement as to what portion of a settlement, judgment, or award represents payment for medical expenses, but absent such advance agreement, the matter must be submitted to the court for decision [*Welf. & Inst. Code § 14124.76(a)*; *see also* *Lima v. Vouis (2009) 174 Cal. App. 4th 242, 260, 94 Cal. Rptr. 3d 183* (trial court erred in awarding entire lien amount to DHS without allocating settlement between past medical expenses and other damages); *Espericueta v. Shewry (2008) 164 Cal. App. 4th 615, 626, 79 Cal. Rptr. 3d 517* (court approval of minor's compromise and settlement, as required by statute and rule of court, allocating payment in full of Medi-Cal lien, constituted valid court allocation of amount for past medical expenses)]. When making its allocation and reimbursement decisions, the trial court should take guidance from the United States Supreme Court's decision in *Ark. Dep't of HHS v. Ahlborn*, as well as from other relevant case and statutory law [*Welf. & Inst. Code § 14124.76(a)*; *see* *Ark. HHS v. Ahlborn (2006) 547 U.S. 268, 274-282, 126 S. Ct. 1752, 164 L. Ed. 2d 49* ; *see, e.g., Bolanos v. Superior Court (2008) 169 Cal. App. 4th 744, 754-758, 87 Cal. Rptr. 3d 174* (trial court erred when refusing to allocate settlement amount attributable to past medical expenses)]. In *Ahlborn*, for example, the Supreme Court

approved one possible reimbursement methodology under which an unallocated settlement amount was expressed as a percentage of the estimated total value of the claim. That same percentage was then applied to the lien, with the Director recovering only that percentage from the total amount of benefits provided [*Ark. HHS v. Ahlborn (2006) 547 U.S. 268, 274-282, 126 S. Ct. 1752, 164 L. Ed. 2d 49*]. That is only one possible reimbursement method, however, and will not necessarily be appropriate in every case [*see Bolanos v. Superior Court (2008) 169 Cal. App. 4th 744, 754-755, 87 Cal. Rptr. 3d 174*].

The California Welfare and Institutions Code also provides that a health care provider who has rendered services to the victim and who has received payment from Medi-Cal has a second lien for all fees for services provided if the provider fully reimburses Medi-Cal for all fees received for the services [*Welf. & Inst. Code §§ 14124.74(a), 14124.791*]. However, under federal law, a medical care provider who accepts Medi-Cal payments for a patient is prohibited from billing that patient, or any financially responsible relative or representative, for any fees in excess of those paid by Medi-Cal [*see 42 U.S.C.S. § 1396a(a)(25); 42 C.F.R. § 447.15*]. The California Supreme Court has ruled that these federal restrictions on the right of a provider to recover from a patient preempt the California statutes that allow for a health care provider's lien, making any asserted lien under the state statutes invalid and unenforceable [*Olszewski v. Scripps Health (2003) 30 Cal. 4th 798, 819-821, 135 Cal. Rptr. 2d 1, 69 P.3d 927]* . The Court suggested, however, that a legislative amendment to restrict recovery by a provider to only that portion of a third-party recovery specifically allocated to medical expenses might cure the constitutional defect [*see Olszewski v. Scripps Health (2003) 30 Cal. 4th 798, 821-823, 135 Cal. Rptr. 2d 1, 69 P.3d 927]* .

Notice must be given to Medi-Cal, and to any provider entitled to a lien, of any action or claim brought against the party responsible for the injury [*Welf. & Inst. Code §§ 14124.73, 14124.791(b)*]. This obligation is imposed not only on the beneficiary, but also on the attorney, if any [*Welf. & Inst. Code § 14124.79*]. A party who fails to provide notice to Medi-Cal may be required to bear the burden of proving any facts necessary to support a reduction in the amount of an asserted Medi-Cal lien [*see McMillian v. Stroud (2008) 166 Cal. App. 4th 692, 702, 83 Cal. Rptr. 3d 261*].

While the Department must be given notice of any lawsuit in order to have the opportunity to protect its lien rights, the statute does not give to the Department any particular rights with respect to participation in settlement negotiations [*Lopez v. DaimlerChrysler Corp. (2009) 179 Cal. App. 4th 1373, 1387, 102 Cal. Rptr. 3d 285]* . However, even without participating in settlement negotiations, when a plaintiff provides evidence supporting a particular allocation, such as declarations or other evidence providing the full value of the case in order to support an *Ahlborn* allocation as described *above*, the Department may be required by the court to provide evidence of its own to support a different allocation. In the absence of any such evidence from the Department, a trial court can properly adopt an allocation supported by the plaintiff's evidence [*Lopez v. DaimlerChrysler Corp. (2009) 179 Cal. App. 4th 1373, 1387, 102 Cal. Rptr. 3d 285]* .

It is sometimes possible to obtain a waiver or reduction of the Medi-Cal lien if the lien would result in undue hardship on the injured person or his or her heirs [*see Welf. & Inst. Code § 14124.71(b)(2)*; *see also Wright v. Department of Benefit Payments (1979) 90 Cal. App. 3d 446, 449, 153 Cal. Rptr. 474* (lien may be waived for hardship in discretion of director)]. For example, *Gov. Code § 985(g)*, which applies to defendants that are public entities, gives a trial court the authority to deny reimbursement of any collateral source if necessary to avoid undue financial hardship on the injured person, and this provision may be applied to deny the repayment of a Medi-Cal lien [*Garcia v. County of Sacramento (2002) 103 Cal. App. 4th 67, 73-74, 126 Cal. Rptr. 2d 465* (lien properly denied because quadriplegic's recovery from county was insufficient to cover future medical expenses)].

In addition, if the beneficiary has incurred attorneys' fees and costs in obtaining the recovery, the Medi-Cal lien must be reduced by at least 25 percent to pay for attorneys' fees, and also by a share of the costs [*see Welf. & Inst. Code § 14124.72(d)*]. However, pursuant to *Welf. & Inst. Code § 14124.78*, the Medi-Cal lien cannot exceed the amount that the tort victim recovers after deducting the attorney's fees and litigation costs paid for by the tort victim from the settlement, judgment, or award, and if the amount of the Medi-Cal lien is determined under *Welf. & Inst. Code § 14124.78*, the 25 percent reduction described *above* does not apply [*Welf. & Inst. Code § 14124.78*]. Medi-Cal recovery

is limited to the amount derived from applying *Welf. & Inst. Code §§ 14124.72, 14124.76*, or *14124.78*, whichever is less [*Welf. & Inst. Code § 14124.785*].

In an action by the state administrator to enforce the Medi-Cal lien against a settlement, the state does not have to prove the tortfeasor's liability [*Kizer v. Hirata (1993) 20 Cal. App. 4th 841, 844, 25 Cal. Rptr. 2d 19]* .

[2] County Lien

If a county furnishes hospital, medical, surgical, or dental care to an injured person, and a third person has tort liability for the injuries that required the care, the county has a right to recover the reasonable value of the care and treatment from the third person [*Gov. Code § 23004.1(a)*]. The county may enforce this right by bringing a direct action against the third person [*Gov. Code § 23004.1(b)*]. If the injured person (or his or her representative) brings an action, the right of the county to bring an action abates during the pendency of the injured person's action, but the county has a first lien on any judgment recovered by the injured person [*Gov. Code § 23004.1(b)*]. However, according to the court of appeal, this right to a lien against a judgment in an action brought by the injured person (or his or her representative) does not provide a right to a lien against the proceeds of a settlement that is not transformed into a judgment [*Mares v. Baughman (2001) 92 Cal. App. 4th 672, 676-677, 112 Cal. Rptr. 2d 264]* .

If the injured person recovers a judgment from a third-party tortfeasor, the county is entitled to full recovery of its lien without contribution or apportionment of attorneys' fees or litigation expenses [*City & County of San Francisco v. Sweet (1995) 12 Cal. 4th 105, 124-125, 48 Cal. Rptr. 2d 42, 906 P.2d 1196* ; *Lindsey v. County of Los Angeles (1980) 109 Cal. App. 3d 933, 936, 167 Cal. Rptr. 527]* . The rationale for this result is that regardless of whether the injured person recovers from the third party, he or she has a debtor-creditor relationship with the county and is obligated to pay the county for the care and treatment received [*City & County of San Francisco v. Sweet (1995) 12 Cal. 4th 105, 116-118, 48 Cal. Rptr. 2d 42, 906 P.2d 1196* ; *Lindsey v. County of Los Angeles (1980) 109 Cal. App. 3d 933, 938-939, 167 Cal. Rptr. 527]* . However, treating the lien simply as a matter of contract may be highly inequitable, for example if the entire recovery falls far short of providing the plaintiff with compensation for all losses, including medical expenses, and there would be nothing left after payment on the lien. For further discussion, see *§ 177.54[5]*.

The right to payment of the full amount of the lien specifically provided by *Gov. Code § 23004.1* takes precedence over any court reduction of the lien that might result through application of any other statute of more general applicability [*Tapia v. Pohlmann (1998) 68 Cal. App. 4th 1126, 1132-1133, 81 Cal. Rptr. 2d 1* (relying also on county's right to recover for treatment under children's services provision, *Health & Safety Code § 123982*, reduction of lien under *Prob. Code § 3601* reversed)].

[3] Hospital Emergency Lien

Any hospital licensed in California that furnishes emergency and ongoing medical services has a lien on the damages if the injured person asserts or maintains a claim against any third person responsible for the injuries [*Civ. Code § 3045.1*; *see, e.g.,* *Newton v. Clemons (2003) 110 Cal. App. 4th 1, 12-13, 1 Cal. Rptr. 3d 90* (brief, unsuccessful attempt at treatment from other providers did not render subsequent follow-up treatment from county facilities something other than "ongoing" treatment, because treatment still stemmed from injury that county facility treated during emergency period)]. The lien does not apply if the injury resulted from an accident or wrongful act that is covered by the worker's compensation laws [*see Civ. Code § 3045.1*]. In addition, the lien does not apply in actions against certain common carriers [*see Civ. Code § 3045.6*]. The lienholder has one year from the date of payment to the patient to assert the lien [*Civ. Code § 3045.5*]. The lien applies whether damages are recovered or to be recovered by judgment, settlement, or compromise [*Civ. Code § 3045.2*].

This hospital lien act only provides for the creation of a lien against recovery from a third-party tortfeasor or his or her insurer. It does not provide for creation of a lien against recovery from the victim's own first-party insurer, even if the

victim's recovery from his or her own insurer carries uninsured motorist coverage that substitutes for recovery from a third-party tortfeasor who does not carry appropriate insurance coverage [*Weston Reid, LLC v. American Ins. Group, Inc. (2009) 174 Cal. App. 4th 940, 950-951, 94 Cal. Rptr. 3d 748]* .

Although a defendant may be liable for payments made to the plaintiff after notice of the lien [*see Civ. Code § 3045.4*], the lien is not effective until the defendant receives written notice of the lien conforming to statutory requirements [*see Civ. Code § 3045.3*]. The court of appeal has concluded that this language means that the lien is not created until proper notice is given to the defendant. In addition, if a competing lien exists that was created prior to the hospital lien, that competing lien has priority [*County of San Bernardino v. Calderon (2007) 148 Cal. App. 4th 1103, 1112-1113, 56 Cal. Rptr. 3d 333* (attorney's lien had priority due to date of creation)].

If proper notice of the lien is given, the hospital is entitled, at the time of disbursement of the funds of any judgment, compromise, or settlement, to the full amount of the lien claimed in the notice, or to as much as can be satisfied out of 50 percent of the recovery [Civ. Code § 2045.4]. If the hospital is not paid at the time of disbursement, the hospital's right to recover from the party making the disbursement is still limited to as much of the lien as can be satisfied from 50 percent of the recovery [*Mercy Hosp. & Med. Ctr. v. Farmers Ins. Group of Cos. (1997) 15 Cal. 4th 213, 216, 61 Cal. Rptr. 2d 638, 932 P.2d 210]* . A hospital cannot avoid this 50 percent limitation by asserting the full amount of a lien against the patient rather than the third-party payor [*Newton v. Clemons (2003) 110 Cal. App. 4th 1, 13-18, 1 Cal. Rptr. 3d 90]* .

A hospital's lien rights do not extend beyond the amount that the hospital agreed to receive as payment for the services provided to the particular plaintiff. For example, if a plaintiff (or the plaintiff's insurer) paid all amounts that were owed to the hospital under a reduced-rate managed health care contract, the hospital may not assert a lien on recovery from a third-party tortfeasor seeking compensation for the difference between the amount it agreed to receive from the plaintiff under its contract and the full-rate amount that the hospital would have charged to a patient not covered by the managed health care contract [*Parnell v. Adventist Health Sys./W. (2005) 35 Cal. 4th 595, 598, 26 Cal. Rptr. 3d 569, 109 P.3d 69* ; *see also Nishihama v. City & County of San Francisco (2001) 93 Cal. App. 4th 298, 306-308, 112 Cal. Rptr. 2d 861]* , *overruled, Yanez v. SOMA Environmental Engineering, Inc. (2010) 185 Cal. App. 4th 1313, 1326-1327* . However, a hospital may recover these additional amounts through assertion of a hospital lien if it explicitly preserved the right to do so in the managed health care contract applicable to that particular plaintiff [*see Parnell v. Adventist Health Sys./W. (2005) s35 Cal. 4th 595, 611, 26 Cal. Rptr. 3d 569, 109 P.3d 69]* .

As with county liens filed under *Gov. Code § 23004.1* [*see § 177.54[2]*], a plaintiff's attorney does not have a right to recover attorney's fees from a hospital asserting a lien under *Civ. Code § 3045.1* [*Day v. Alta Bates Med. Ctr. (2002) 98 Cal. App. 4th 243, 251-255, 119 Cal. Rptr. 2d 606]* . This appears to be the case regardless of whether the attorney seeks to reduce the hospital's lien recovery by its apportioned share of attorney's fees or recover the fees directly from the hospital [*see Day v. Alta Bates Med. Ctr. (2002) 98 Cal. App. 4th 243, 251-255, 119 Cal. Rptr. 2d 606]* .

[4] Workers' Compensation Lien

An employer who has paid workers' compensation benefits to or on behalf of an injured employee has a right to seek reimbursement for these benefits from a third party claimed to be responsible for the injury [*Lab. Code § 3852*]. Reimbursement may be obtained by a direct action against the third party [*Lab. Code § 3852*] or by asserting a first lien against the amount of any judgment for damages awarded to the employee in the employee's action against a third party [*Lab. Code § 3856(b)*].

However, the parties may settle their claim "exclusive" of the workers' compensation lien, avoiding application of the lien to the settlement proceeds, and limiting the employer (or its insurer) to the remedy of direct action against the third party [*see Lab. Code § 3859(b)*; *Aetna Cas. & Sur. Co. v. Superior Court (1993) 20 Cal. App. 4th 1502, 1507-1508, 25 Cal. Rptr. 2d 301]* .

The amount that the employer may recover under its lien is reduced by an amount sufficient to pay the fee of the employee's attorney on the employer's portion of the recovery to reflect the efforts of the employee's attorney that produced the recovery for the employer [*Lab. Code § 3856(b)*; *Quinn v. State of California (1975) 15 Cal. 3d 162, 175, 124 Cal. Rptr. 1, 539 P.2d 761]* . Even if the employer files a complaint in intervention [*see Lab. Code §§ 3852, 3853*; *Aetna Cas. & Sur. Co. v. Superior Court (1993) 20 Cal. App. 4th 1502, 1506-1507, 25 Cal. Rptr. 2d 301* (employer's right to seek reimbursement in action brought by employee)], the employee's attorney is entitled to a fee payable out of the employer's recovery if he or she did the work that produced the third-party recovery [*Kaplan v. Industrial Indem. Co. (1978) 79 Cal. App. 3d 700, 709-711, 145 Cal. Rptr. 219* ; *see Lab. Code § 3856(c)*]. However, if the employer's attorney "actively participates" in the litigation, the employer is not a mere passive beneficiary, and the employee's attorney is not entitled to attorney's fees paid from the lien [*see Walsh v. Woods (1986) 187 Cal. App. 3d 1273, 1279, 232 Cal. Rptr. 629]* .

If the employer and the employee are represented by the same attorney or by separate attorneys who both actively participate in achieving a settlement from a third-party tortfeasor, the settlement proceeds must be used first to pay litigation costs, including reasonable attorney's fees incurred by the employer and the employee, then to reimburse the employer for the cost of workers' compensation benefits provided to the employee, with the balance going to the employee [*see Lab. Code § 3860(e)*].

Under these circumstances, if the employer and the employee are represented by separate attorneys who both actively participate in gaining the settlement, the fees awarded to the employer's attorney and the employer's pro rata share of other litigation costs must be deducted from the amount paid to the employer out of the settlement proceeds as reimbursement for the employer's workers' compensation expenses [*Summers v. Newman (1999) 20 Cal. 4th 1021, 1024, 1036, 86 Cal. Rptr. 2d 303, 978 P.2d 1225]* .

In addition, if the amount of a settlement obtained through the efforts of separate attorneys is less than the amount of the employer's compensation lien, then the employee's amount of the recovery is zero and the employee's attorney is not entitled to fees payable from the settlement proceeds [*Draper v. Aceto (2001) 26 Cal. 4th 1086, 1094-1095, 113 Cal. Rptr. 2d 61, 33 P.3d 479]* .

If a settlement is effected, with or without suit, solely through the efforts of the employee's attorney, the reasonable expenses incurred in effecting the settlement must be deducted from the settlement amount, including a reasonable attorney's fee for the employee's attorney for the services performed in securing and effecting the settlement [*Lab. Code § 3860(c)*]. If the insurer's separate attorney participates in the case, but does not assist in effecting the settlement, the employee's attorney still has a right to fees [*Luque v. Herrera (2000) 81 Cal. App. 4th 558, 562, 96 Cal. Rptr. 2d 853]* . Moreover, assuming the employer's attorney does not assist in obtaining the settlement [*see Draper v. Aceto (2001) 26 Cal. 4th 1086, 1094-1095, 113 Cal. Rptr. 2d 61, 33 P.3d 479]* , the employee's attorney's right to fees is not affected by the fact that no actual benefit is conferred on the employee because the employer's lien amount happens to exceed the amount of the settlement [*Luque v. Herrera (2000) 81 Cal. App. 4th 558, 562-563, 96 Cal. Rptr. 2d 853]* .

The amount of the workers' compensation lien is also subject to reduction based on comparative negligence attributed to the employer [*see Associated Constr. & Eng'g Co. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 829, 150 Cal. Rptr. 888, 587 P.2d 684]* . If allegations of employer negligence are injected into the case, the mere filing of a lien is insufficient to protect the employer's claim for reimbursement. The employer must actively intervene and participate in the litigation [*Aetna Cas. & Sur. Co. v. Superior Court (1993) 20 Cal. App. 4th 1502, 1507-1509, 25 Cal. Rptr. 2d 301]* . This issue is also considered further in Ch. 577, *Workers' Compensation*.

[5] Contractual Liens

A health maintenance organization, health care plan, or medical provider may enter into an agreement with a member or

patient to receive a lien against any subsequent judgment or settlement obtained from a third-party tortfeasor. Such an agreement is generally enforceable and not in violation of public policy [*Samura v. Kaiser Found. Health Plan, Inc. (1993) 17 Cal. App. 4th 1284, 1292, 22 Cal. Rptr. 2d 20* ; *Lee v. State Farm Mut. Auto. Ins. Co. (1976) 57 Cal. App. 3d 458, 465-466, 129 Cal. Rptr. 271]* . Enforcement is justified based on the assumption that the recovery from the party at fault will create a fund from which medical costs may be paid without burdening the injured party [*Samura v. Kaiser Found. Health Plan, Inc. (1993) 17 Cal. App. 4th 1284, 1296, 22 Cal. Rptr. 2d 20]* .

Contractual medical lien holders are entitled to recovery of the lien without contribution or apportionment of attorney's fees or litigation expenses incurred by the injured party in seeking recovery from a third-party tortfeasor [*Lovett v. Carrasco (1998) 63 Cal. App. 4th 48, 55-57, 73 Cal. Rptr. 2d 496* ("common fund" doctrine inapplicable to contractual medical lien)]. However, in the event the recovery is insufficient to cover the liens, an attorney lien for fees and costs has priority over a medical lien, regardless of which lien was created first [*Gilman v. Dalby (2009) 176 Cal. App. 4th 606, 619, 98 Cal. Rptr. 3d 231*].

The doctrine of contract unconscionability may limit the enforceability of the lien in certain factual situations. If the tort victim does not recover enough from the third party to compensate for lost wages, future loss of earning capacity, or uninsured future medical expenses, the victim will also bear the burden of paying medical expenses from the tort recovery. In such a case, enforcement of the medical lien may represent a heavy burden on the injured party by reducing recovery of actual economic losses, and the victim may be able to present a defense to enforcement on the ground of unconscionability. Unconscionability involves (1) an inequality of bargaining power resulting in no real negotiation and the absence of meaningful choice and (2) surprise, which occurs if the terms of the bargain are hidden in a printed form drafted by the party seeking to enforce the disputed terms [*Samura v. Kaiser Found. Health Plan, Inc. (1993) 17 Cal. App. 4th 1284, 1296-1297, 22 Cal. Rptr. 2d 20* (but refusing to find that inclusion of lien rights in agreement undifferentiated between adequately and inadequately compensated members was unfair business practice per se)].

Legal Topics:

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

§§ 177.55[Reserved]

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§ 177.70 Governing Statutes

The measure of damages for breach of an obligation arising from contract is governed by *Civ. Code § 3300 et seq.* *Civ. Code § 3353 et seq.* establish general provisions relating to damages. *Civ. Code §§ 3287, 3289, 3289.5,* and *3290* govern interest on damages related to contracts. Liquidated damages are governed by *Civ. Code § 1671*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesForeseeable DamagesGeneral Overview

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§ 177.71 Nominal Damages

The maxim that a law will not be concerned with trifles does not ordinarily apply to a violation of a contractual right because a defendant's failure to perform a contractual duty is, in itself, a legal wrong that is fully distinct from the actual damages. Once a breach of contract has been proven, nominal damages are presumed to follow as a matter of law. Consequently, a plaintiff is entitled to recover nominal damages for a breach despite inability to show that actual damage was inflicted [*Civ. Code § 3360*; *Sweet v. Johnson (1959) 169 Cal. App. 2d 630, 632, 337 P.2d 499* ; *Ross v. Frank W. Dunne Co. (1953) 119 Cal. App. 2d 690, 700, 260 P.2d 104* ; *see also § 177.14*].

In contract actions, nominal damages are apt to be awarded when actual damages cannot be established, for example, if they are too speculative or conjectural [*see, e.g., Ericson v. Playgirl, Inc. (1977) 73 Cal. App. 3d 850, 859, 140 Cal. Rptr. 921* ; *Sweet v. Johnson (1959) 169 Cal. App. 2d 630, 634, 337 P.2d 499* ; *see also § 177.14[2]*]. However, because a judgment is not erroneous for failure to award nominal damages unless there is a permanent right involved or the judgment for nominal damages would carry costs, a plaintiff who can only allege speculative or remote damages and against whom judgment has been entered after a demurrer is sustained has no recourse [*see Kenyon v. Western Union Tel. Co. (1893) 100 Cal. 454, 458-459, 35 P. 75* (no primiary right, judgment arffirmed); *Colvig v. RKO General, Inc. (1965) 232 Cal. App. 2d 56, 68-70, 42 Cal. Rptr. 473* (primary right, judgment reversed to allow plaintiff to amend to plead special damages)].

Legal Topics:

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

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§ 177.72 Compensatory Damages

[1] Basic Measure of Damages

In a breach of contract action, except as otherwise provided by law, the aggrieved party may recover damages in an amount that will compensate him or her for all the detriment proximately caused by the breach, or that, in the ordinary course of things, would be likely to result from the breach [*Civ. Code § 3300*]. Damages awarded to an injured party for breach of contract seek to approximate the agreed-upon performance [*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 967, 22 Cal. Rptr. 3d 340, 102 P.3d 257* ; *Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 515, 28 Cal. Rptr. 2d 475, 869 P.2d 454]* . The goal is to put the plaintiff in as good a position as he or she would have occupied if the defendant had not breached the contract; in other words, the plaintiff is entitled to damages that are equivalent to the benefit of the plaintiff's contractual bargain [*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 967-968, 22 Cal. Rptr. 3d 340, 102 P.3d 257]* .

The injured party's damages cannot, however, exceed what it would have received if the contract had been fully performed on both sides [*Civ. Code § 3358*; *Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 968, 22 Cal. Rptr. 3d 340, 102 P.3d 257]* . Damages cannot be recovered for a breach of contract, however, unless they are clearly ascertainable in both their nature and origin [*Civ. Code § 3301*; *see, e.g., Vestar Development v. General Dynamics Corporation (9th Cir. 2001) 249 F.3d 958, 961-962* (action for breach of agreement to negotiate was properly dismissed when the only damages sought were lost profits, which could not be proven with reasonable certainty as required by *Civ. Code § 3301*); *see also § 177.13[2]*].

Damages recoverable for breach of contract are limited to those that were actually contemplated by or within the reasonable contemplation of the parties at the time they entered into the contract [*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 968-969, 22 Cal. Rptr. 3d 340, 102 P.3d 257* ; *Brandon & Tibbs v. George Kevorkian Accountancy Corp. (1990) 226 Cal. App. 3d 442, 457, 277 Cal. Rptr. 40]* . Thus, the contract measure of damages is not as broad as the tort measure of damages, which allows recovery for all damages caused by defendant's action or omission, whether anticipated or not [*see Civ. Code § 3333* (tort measure);

Weaver v. Bank of America (1963) 59 Cal. 2d 428, 434, 30 Cal. Rptr. 4, 380 P.2d 644 ; *California Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 Cal. App. 3d 1, 59, 221 Cal. Rptr. 171]* . The limitation placed on damages for breach of contract by the requirement that the breaching party have knowledge or notice of situations giving rise to special damages is based on the theory that a party is not and cannot assume limitless responsibilities for all consequences of his or her breach, and that, at the time of contracting, he or she must have been advised of the facts concering special harm that might result from a breach in order that he or she may determine whether to accept the risk of contracting [*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 968-969, 22 Cal. Rptr. 3d 340, 102 P.3d 257* ; *Martin v. U-Haul Co. of Fresno (1988) 204 Cal. App. 3d 396, 409, 251 Cal. Rptr. 17]* .

Generally, damages awarded in a breach of contract action should give the injured party the benefit of his or her bargain and, insofar as possible, place plaintiff in the same position he or she would have been in had the contract been performed [*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 967-968, 22 Cal. Rptr. 3d 340, 102 P.3d 257* *Brandon & Tibbs v. George Kevorkian Accountancy Corp. (1990) 226 Cal. App. 3d 442, 459, 277 Cal. Rptr. 40]* . Nevertheless, the plaintiff should not be awarded more than the benefit that he or she would have received had the promisor performed [*Civ. Code § 3358*; *Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 968, 22 Cal. Rptr. 3d 340, 102 P.3d 257* ; *Coughlin v. Blair (1953) 41 Cal. 2d 587, 600, 262 P.2d 305* ; *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co. (1977) 66 Cal. App. 3d 101, 123-124, 135 Cal. Rptr. 802* ; *Fisher v. Hampton (1975) 44 Cal. App. 3d 741, 752, 118 Cal. Rptr. 811]* .

For further discussion of the nature and purpose of compensatory damages, see *§ 177.13[1]*. For a form of allegation of general damages, *see § 177.190*.

[2] When More Than One Measure of Damages Is Applicable

There may be more than one rule for the measurement of damages in the same action. In those cases, the measure of damages that affords the better and more satisfactory means of reaching an accurate and certain result is preferred. If the facts show that either of two measures of damages will fully compensate plaintiff for his or her loss, that measure must be adopted that is less expensive to defendant [*A.A. Baxter Corp. v. Colt Industries, Inc. (1970) 10 Cal. App. 3d 144, 160, 88 Cal. Rptr. 842* ; *Rilovich. v. Raymond (1937) 20 Cal. App. 2d 630, 644, 67 P.2d 1062* ; *but see* *GHK Associates v. Mayer Group, Inc. (1990) 224 Cal. App. 3d 856, 874, 274 Cal. Rptr. 168* (selection of measure of damages as within sound discretion of trier of fact and will not be reversed unless abuse of discretion is established)].

When there is a more specific measure of damages than the general measure provided by *Civ. Code § 3300*, the more specific measure prevails. For example, *Civ. Code § 3306*, relating to damages for breach of agreement to convey real property, is a specific provision and would be applied to that situation rather than *Civ. Code §§ 3287* (interest on damages) and 3300, which are general provisions [*Boshes v. Miller (1953) 119 Cal. App. 2d 332, 336, 259 P.2d 447]* .

[3] Necessity of Distinguishing Total or Partial Breach

When a breach is partial, the aggrieved party may recover damages for nonperformance only up to the time of trial and not for anticipated future nonperformance. When the breach is total, the aggrieved party may recover all damages, past and prospective, in a single lawsuit, and the other party is absolved from any duty, continuing or otherwise, to perform the contract. Thus, when there is a total breach, an aggrieved party who fails to bring an action for all damages, general and special, is barred on the grounds of res judicata from bringing a subsequent action for additional damages [*Coughlin v. Blair (1953) 41 Cal. 2d 587, 598, 599, 262 P.2d 305* ; *Guntert v. City of Stockton (1976) 55 Cal. App. 3d 131, 150, 126 Cal. Rptr. 690]* . For a discussion of total and partial breaches, see Ch. 140, *Contracts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 177.73 Limitation on Damages for Breach of Contract With Termination Option

Damages for breach of a contract that contains a provision allowing either party to terminate the contract without cause by giving notice are limited to those that could potentially accrue during the period of the required notice [*see Civ. Code § 3358* (discussed in *§ 177.15[1]*); *Martin v. U-Haul Co. of Fresno (1988) 204 Cal. App. 3d 396, 409-411, 251 Cal. Rptr. 17* ; *see also Cal. Bev. etc. Co. v. Distillers Distrib. Corp. (1958) 158 Cal. App. 2d 758, 766, 323 P.2d 517* (damages for loss of good will are not recoverable for breach of distributorship agreement during month after notice of termination had been given because distributor had no expectation of patronage continuing after that month; damages for lost profits would be limited to those expected to be earned in that last month)].

Legal Topics:

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§ 177.74 Causation and Foreseeability

The damages that may be recovered in a breach of contract action are those "which, in the ordinary course of things, would be likely to result" from breach [*Civ. Code § 3300*; *Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 968, 22 Cal. Rptr. 3d 340, 102 P.3d 257]* . Contract damages must be proximately caused by the breach, that is, they must immediately follow and be produced by the act or omission complained of, or must, in the ordinary course of things, be likely to result from the breach [*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 968, 22 Cal. Rptr. 3d 340, 102 P.3d 257* ; *Friend & Terry L. Co. v. Miller (1885) 67 Cal. 464, 466, 8 P. 40* ; *McDonald v. John P. Scripps Newspaper (1989) 210 Cal. App. 3d 100, 104, 257 Cal. Rptr. 473* ; *J. Breuner Co. v. Western Union Tel. Co. (1930) 108 Cal. App. 243, 255, 291 P. 445* ; *see Civ. Code § 3300* (discussed in *§ 177.72[1]*)]. Because general damages are a natural and necessary consequence of a contract breach, they are often said to be within the contemplation of the parties, meaning that because their occurrence is sufficiently predictable the parties at the time of contracting are "deemed" to have contemplated them [*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 968, 22 Cal. Rptr. 3d 340, 102 P.3d 257]* .

For instance, a contestant in a spelling bee who misspelled a word could not recover damages for breach of contract on account of being defeated by another contestant who should not have been advanced under the contest rules. Plaintiff's loss did not result from the other contestant's advancement, but from plaintiff's own mistake [*McDonald v. John P. Scripps Newspaper (1989) 210 Cal. App. 3d 100, 104, 257 Cal. Rptr. 473]* . Similarly, gaming club patrons who lost money gambling could not recover damages for the club's alleged breach of implied contract or breach of covenant of good faith and fair dealing on account of other patrons' supposed cheating. Plaintiffs claimed that the club's failure to fulfill its implied promises of security from cheating enabled plaintiffs' competitors to cheat, which in turn caused plaintiffs' losses. The unpredictability of the outcome of games, however, places such contests outside the range of probabilities necessary for proof of actionable damages [*Vu v. California Commerce Club, Inc. (1997) 68 Cal. Rptr. 2d 31]* .

To be entitled to a judgment for damages for breach of contract, a plaintiff must prove that but for defendant's breach, the plaintiff would have been able to perform. This issue usually arises after a defendant has repudiated or committed an

anticipatory breach of a contract. A plaintiff who could not or would not perform the substantial equivalent of its obligations is not entitled to damages. The plaintiff does not have to allege its readiness or willingness to perform, but must prove its ability to perform [*Ersa Grae Corp. v. Fluor Corp. (1991) 1 Cal. App. 4th 613, 625, 2 Cal. Rptr. 2d 288* (real estate sale; plaintiff did not have to actually form consortium or obtain financing to prove ability to perform); *McDorman v. Moody (1942) 50 Cal. App. 2d 136, 140-141* ; *Dickey v. Kuhn (1930) 106 Cal. App. 300, 304]* .

Damages cannot be presumed to flow from the breach. The aggrieved party must establish the causal connection between the breach and his or her damages [*Metzenbaum v. R.O.S. Associates (1986) 188 Cal. App. 3d 202, 211-212, 232 Cal. Rptr. 741* ; *Never v. King (1969) 276 Cal. App. 2d 461, 479, 81 Cal. Rptr. 161]* . Thus, if the aggrieved party's performance had become impossible, his or her damages would be caused by that impossiblity, not by the other party's repudiation or breach [*see, e.g.,* *Metzenbaum v. R.O.S. Associates (1986) 188 Cal. App. 3d 202, 211-212, 232 Cal. Rptr. 741* ; *Never v. King (1969) 276 Cal. App. 2d 461, 471, 479, 81 Cal. Rptr. 161* (both exclusive loan broker agreements under which agreed financing could not have been obtained from broker's sources)]. In the context of a franchise relationship, a franchisee's failure to make *past* royalty payments is not a proximate or "natural and direct" cause of the franchisor's failure to receive *future* royalty payments after the franchisor terminated the franchise agreement as a result of the franchisee's failure to make past due payments [*see* *Postal Instant Press v. Sealy (1996) 43 Cal. App. 4th 1704, 1713, 51 Cal. Rptr. 2d 365]* .

On the other hand, defendant's breach need not be the sole cause of plaintiff's damages. Under the substantial-factor test, which is only seldom applied in breach of contract actions, the breaching party may be liable for all of the aggrieved party's damages even though other factors contributed. A plaintiff in that situation need not show the proportionate part played by defendant's breach among several factors causing injury. For instance, an escrow company sued for negligence and breach of contract because of its failure to forward preliminary title reports or any demand was held liable to the seller for attorney's fees and litigation expenses incurred in buyer's specific performance suit against the seller. The court reasoned that the escrow's failure to perform its duties with reasonable care and dispatch was a substantial factor in the collapse of the escrow and thus of seller's damages [*Bruckman v. Parliament Escrow Corp. (1987) 190 Cal. App. 3d 1051, 1063-1064, 235 Cal. Rptr. 813]* .

The foreseeability factor requires that the damages fairly and reasonably be considered to arise naturally from the breach of contract itself. The aggrieved party may recover for only those damages that may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of a breach [*Overstreet v. Merritt (1921) 186 Cal. 494, 503, 200 P. 11* , quoting Hadley v. Baxendale (1854) 9 Ex. 341, 156 Eng. Rep. 145; *California Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 Cal. App. 3d 1, 59, 221 Cal. Rptr. 171]* . Thus, for example, it is not reasonable for the parties to have contemplated that an insured would go out of business and sell all its assets in response to its insurer's refusal to assume the defense of a third party's action against it [*California Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 Cal. App. 3d 1, 60, 221 Cal. Rptr. 171]* .

This rule does not require the parties to have actually contemplated the very consequence that occurred if the consequence was one that the parties, in the light of all the facts known, or which should have been known to them, may be reasonably supposed to have considered as likely to follow, in the ordinary course of things, from a breach [*Hunt Bros. Co. v. San Lorenzo etc. Co. (1906) 150 Cal. 51, 56, 87 P. 1093* ; *A.A. Baxter Corp. v. Colt Industries, Inc. (1970) 10 Cal. App. 3d 144, 155, 88 Cal. Rptr. 842]* .

Foreseeability is determined as of the time the contract was entered into and not as of the time of the breach or some other subsequent event [*Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists (1971) 14 Cal. App. 3d 209, 220, 92 Cal. Rptr. 111* ; *see also* *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co. (1977) 66 Cal. App. 3d 101, 125, 135 Cal. Rptr. 802* (applicable measure of damages also determined as of time contract was formed)].

Legal Topics:

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§ 177.75 General and Special Damages

[1] Distinguished

Contractual damages are of two types--general damages (sometimes called direct damages) and special damages (sometimes called consequential damages) [*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 968, 22 Cal. Rptr. 3d 340, 102 P.3d 257]* . If damages are sought for injuries that the breaching party actually foresaw or had reason to foresee as a probable result of the breach when the contract was made, they are termed "general damages" [*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 968, 22 Cal. Rptr. 3d 340, 102 P.3d 257]* . "Unlike general damages, special damages are those losses that do not arise directly and inevitably from any similar breach of any similar agreement. Instead, they are secondary or derivative losses arising from circumstances that are particular to the contract or to the parties. Special damages are recoverable if the special or particular circumstances from which they arise were actually communicated to or known by the breaching party (a subjective test) or were matters of which the breaching party should have been aware at the time of contracting (an objective test). Special damages 'will not be presumed from the mere breach' but represent loss that 'occurred by reason of injuries following from' the breach. Special damages are among the losses that are foreseeable and proximately caused by the breach of a contract' " [*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 969, 22 Cal. Rptr. 3d 340, 102 P. 3d 257]* . Special damages are suffered as a consequence but not necessarily the certain result of the breach [*Automatic PoultryFeeder Co. v. Wedel (1963) 213 Cal. App. 2d 509, 514, 28 Cal. Rptr. 795* ; *Brunvold v. Johnson (1939) 36 Cal. App. 2d 226, 230, 97 P.2d 489* ; *see Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co. (1977) 66 Cal. App. 3d 101, 125, 135 Cal. Rptr. 802]* . If special circumstances under which a contract is actually made are communicated by the aggrieved party to the breaching party, and thus known to both parties, the damages resulting from the breach of that contract, which they would reasonably contemplate, is the amount of injury that would ordinarily follow from the breach under these special circumstances so known and communicated [*Overstreet v. Merritt (1921) 186 Cal. 494, 503, 200 P. 11* , quoting Hadley v. Baxendale (1854) 9 Ex. 341, 156 Eng. Rep. 145]. For discussion of general and special damages, see *§ 177.12[1]*.

[2] Requirement of Pleading Special Damages

To recover for damages not covered by the general liability for breach of contract, facts must be specially pleaded showing that the injury was one reasonably within the contemplation of the parties and that the conditions likely to result in the special injury complained of were brought to the attention of the defendant at the time the contract was made [*Shook v. Pearson (1950) 99 Cal. App. 2d 348, 351-352, 221 P.2d 757* ; *see Myers v. Stephens (1965) 233 Cal. App. 2d 104, 120, 43 Cal. Rptr. 420]* . Thus, if the defendant knows of the special purpose plaintiff intended to be accomplished and that the failure to accomplish it would cause greater damage than would ordinarily follow from a breach by the defendant, the plaintiff must allege the facts showing the special purpose and the knowledge of the defendant [*Mitchell v. Clarke (1886) 71 Cal. 163, 164, 168, 11 P. 882]* . For further discussion of pleading special damages, see *§ 177.12[2]* and *[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 177.76 Availability of Tort Damages in Breach of Contract Actions

[1] Fraudulent Inducement to Enter Contract

Some early cases stated that a person may recover all damages proximately caused by the breach of a contract, not just those that were foreseeable, if the breach was in bad faith or is deemed tortious [*see Overstreet v. Merritt (1921) 186 Cal. 494, 505, 200 P. 11* ; *Kline v. Guaranty Oil Co. (1914) 167 Cal. 476, 483, 140 P. 1* (referring to bad faith breach)]. Those cases, however, involved a contract that one of the parties had no intention of performing, and may be more properly characterized as actions for deceit [*see Civ. Code § 1710(4)*; *Walker v. Signal Companies, Inc. (1978) 84 Cal. App. 3d 982, 994-996, 149 Cal. Rptr. 119* ; for discussion of actions for deceit, *see* Ch. 269, *Fraud and Deceit*].

The California Supreme Court has more recently restated the law governing recovery of tort damages in breach of contract cases [*Robinson Helicopter Co., Inc. v. Dana Corp. (2004) 34 Cal. 4th 979, 989* ; *Erlich v. Menezes (1999) 21 Cal. 4th 543, 551, 87 Cal. Rptr. 2d 886, 981 P. 2d 978]* . Conduct amounting to breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law [*Robinson Helicopter Co., Inc. v. Dana Corp. (2004) 34 Cal. 4th 979, 989, 22 Cal. Rptr. 3d 352, 102 P.3d 268* ; *Erlich v. Menezes (1999) 21 Cal. 4th 543, 551, 87 Cal. Rptr. 2d 886, 981 P. 2d 978]* . The duty that gives rise to the tort must either be completely independent of the contract or arise from conduct that is both intentional and intended to harm. [*Robinson Helicopter Co., Inc. v. Dana Corp. (2004) 34 Cal. 4th 979, 989, 22 Cal. Rptr. 3d 352, 102 P.3d 268* ; *Erlich v. Menezes (1999) 21 Cal. 4th 543, 552, 87 Cal. Rptr. 2d 886, 981 P.2d 978]* . "Generally, outside the insurance context, 'a tortious breach of contract ... may be found when (1) the breach is accompanied by a traditional common law tort, such as fraud or conversion; (2) the means used to breach the contract are tortious, involving deceit or undue coercion; or (3) one party intentionally breaches the contract intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages' " [*Robinson Helicopter Co., Inc. v. Dana Corp. (2004) 34 Cal. 4th 979, 991, 22 Cal. Rptr. 3d 352, 102 P.3d 268 , quoting Erlich v. Menezes (1999) 21 Cal. 4th at 553-554, 87 Cal. Rptr. 2d 886, 981 P. 2d 978]* .

[2] Contract to Perform Services

A contract to perform services gives rise to a duty of care which requires that those services be performed in a

competent and reasonable manner. If the negligent performance of services results in a foreseeable economic loss, the plaintiff may be entitled to recover under a negligence theory for injury solely to its economic interests without needing to allege or prove injury to person or property [*North American Chemical Co. v. Superior Court (1997) 59 Cal. App. 4th 764, 774, 69 Cal. Rptr. 2d 466* (economic loss rule does not apply in cases involving the negligent performance of services which results in foreseeable economic loss)]. However, in order to do so plaintiff must be able to show facts demonstrating the existence of a special relationship between the parties to the contract as defined and required by *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 804, 157 Cal. Rptr. 407, 598 P.2d 60* . A special relationship is established by consideration of the following six factors [*North American Chemical Co. v. Superior Court (1997) 59 Cal. App. 4th 764, 782, 69 Cal. Rptr. 2d 466* , citing *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 804, 157 Cal. Rptr. 407, 598 P.2d 60]* :

(1) The extent to which the transaction was intended to affect the plaintiff;

(2) The foreseeability of harm to the plaintiff;

(3) The degree of certainty that the plaintiff suffered injury;

(4) The closeness of the connection between the defendant's conduct and the injury suffered;

(5) The moral blame attached to the defendant's conduct; and

(6) The policy of preventing future harm.

For example, a chemical manufacturer that contracted with a company to bag, containerize and transport its chemicals was entitled to pursue a negligence claim against the company based on its shipment of a contaminated product to one of the manufacturer's customers. The manufacturer alleged sufficient facts to demonstrate that the shipper had a legal duty to perform its contract in a reasonable and competent manner and that it negligently failed to do so. It also alleged, or asserted that it could allege facts demonstrating the existence of the special relationship defined and required by *J'Aire* so as to justify the recovery of the economic losses which it claimed legally resulted from the shipper's negligent acts [*North American Chemical Co. v. Superior Court (1997) 59 Cal. App. 4th 764, 787, 69 Cal. Rptr. 2d 466]* .

In a construction defect case brought by homeowners against a developer and contractors, however, the California Supreme Court, applying the *J'Aire* factors, found that they did not justify a broad rule permitting recovery of repair costs unaccompanied by property damage or personal injury. Therefore, the homeowners and homeowners association could not recover in negligence from the developer, contractor, and subcontractors who built their homes a money judgment representing the cost to repair, or the diminished value attributable to, construction defects that have not caused property damage [*Aas v. Superior Court (2000) 24 Cal. 4th 627, 645-647, 101 Cal. Rptr. 2d 718, 12 P.3d 1125]* (affirming trial court's grant of defense motions for orders in limine excluding evidence of alleged construction defects that have not caused property damage as to plaintiffs' tort claims).

[3] Same Facts Constitute Breach of Contract and Tort

When the same acts are both a breach of contract and a tort, the injured party may recover compensatory damages applicable under both theories, except that damages may not be duplicative [*Bruckman v. Parliament Escrow Corp. (1987) 190 Cal. App. 3d 1051, 1060, 235 Cal. Rptr. 813* (negligence and breach of escrow agreement); *Walker v. Signal Companies, Inc. (1978) 84 Cal. App. 3d 982, 993-996, 149 Cal. Rptr. 119* (tortious inducement to enter contract that was later breached)]. If the same act or omission constitutes both a tort and a breach of contract, the aggrieved party may elect whether to proceed in tort or on the contract [*Jones v. Kelly (1929) 208 Cal. 251, 255, 280 P. 942]* . Generally, the aggrieved party may proceed to the trier of fact on both theories and cannot be forced to an election until the verdict or judgment is returned [*Weaver v. Bank of America (1963) 59 Cal. 2d 428, 432, 30 Cal. Rptr. 4, 380 P.2d*

644] .

The danger in this approach is that the act may not be both a tort and a breach of contract [*but see* *Bruckman v. Parliament Escrow Corp. (1987) 190 Cal. App. 3d 1051, 1057-1058, 235 Cal. Rptr. 813* (negligence was also breach of express terms of contract, so four-year limitation period applied)]. If the cause of action arises from the breach of a promise set forth in the contract, the action is ex contractu; but if it arises from the breach of a duty imposed by law or growing out of the contract, it is ex delicto [*Eads v. Marks (1952) 39 Cal. 2d 807, 811, 249 P.2d 257* ; *Peterson v. Sherman (1945) 68 Cal. App. 2d 706, 711, 157 P.2d 863]* . If the cause of action arises from the breach of a contractual duty, the action is delictual, notwithstanding that it also involves a breach of contract [*Eads v. Marks (1952) 39 Cal. 2d 807, 811, 249 P.2d 257* ; *Jones v. Kelly (1929) 208 Cal. 251, 254-255, 280 P. 942]* . A tort may grow out of or be coincident with a contract, and the existence of a contractual duty does not immunize the tortfeasor from tort liability for his or her wrongful acts in breach of contract [*Eads v. Marks (1952) 39 Cal. 2d 807, 811, 249 P.2d 257* ; *Jones v. Kelly (1929) 208 Cal. 251, 254-255, 280 P. 942]* . To determine whether the action is one in tort or on the contract, it is sometimes necessary to consider the gravamen of the action [*Basler v. Sacramento etc. Ry. Co. (1913) 166 Cal. 33, 35-36, 134 P. 993* (injury to passenger as tort; contract only of significance to establish plaintiff's status as passenger)]. Another rule provides that the character of the action is to be determined by the nature of the grievance, rather than by the form of the pleading, and when it is not clear, the action will be construed in contract rather than in tort [*Peterson v. Sherman (1945) 68 Cal. App. 2d 706, 711, 157 P.2d 863]* .

Thus, as long as no statute of limitations problem is involved, counsel may wish to plead both the contract and the tort claims to maximize the potential recovery [*see, e.g.,* *Bruckman v. Parliament Escrow Corp. (1987) 190 Cal. App. 3d 1051, 1057-1058, 235 Cal. Rptr. 813]* .

[4] Bad Faith Breach of Implied Covenant

A breach of the implied covenant may support an award of tort damages if some special relationship exists between the parties to the contract [*see* *Crisci v. Security Ins. Co. (1967) 66 Cal. 2d 425, 429, 58 Cal. Rptr. 13, 426 P.2d 173* (insurance); *Wallis v. Superior Court (1984) 160 Cal. App. 3d 1109, 1116-1118, 207 Cal. Rptr. 123* (employment)]. This theory of action, however, is unlikely to be extended outside the context of insurance [*see* *Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal. 4th 85, 102-103, 44 Cal. Rptr. 2d 420, 900 P.2d 669* (holding tort remedy no longer available for noninsurance contract breach, at least in absence of violation of independent duty arising from principles of tort law other than the bad faith denial of existence of, or liability under, breached contract); *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 688-693, 254 Cal. Rptr. 211, 765 P.2d 373* (holding tort remedy no longer applicable to employer-employee relationships); *Gomez v. Volkswagen of America, Inc. (1985) 169 Cal. App. 3d 921, 924, 928-929* (denying tort remedy on finding statutory scheme adequately compensates plaintiff); *see* *Copesky v. Superior Court (1991) 229 Cal. App. 3d 678, 694, 280 Cal. Rptr. 338* (same court reversing its holding in *Commercial Cotton Co. v. United California Bank (1985) 163 Cal. App. 3d 511, 515-516, 209 Cal. Rptr. 551* , and finding that after *Foley*, bank-depositor relationship is not special enough to support tort damages)]. For further discussion of the California Supreme Court's holding in *Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal. 4th 85, 44 Cal. Rptr. 2d 420, 900 P.2d 669* , in which the California Supreme Court abolished the tort cause of action that has been referred to as the "tort of bad faith denial of the existence of a contract," as well as discussion of the "special relationship" test in the context of insurance contracts, see Ch. 140, *Contracts* . Specific elements of the tort measure of damages are discussed in the chapters relating to relationships that have been found to support it, such as in Ch. 308, *Insurance*, Ch. 334, *Landlord and Tenant: Damage Claims*, and Ch. 249, *Employment Law: Termination and Discipline*.

[5] Punitive or Exemplary Damages

Punitive or exemplary damages under *Civ. Code § 3294* are not recoverable in an action for breach of contract no matter how willful, malicious, or fraudulent the breach [*Civ. Code § 3294(a)*; *Haigler v. Donnelly (1941) 18 Cal. 2d 674, 680, 117 P.2d 331* ; *Myers Building Industries, Ltd. v. Interface Technology, Inc. (1993) 13 Cal. App. 4th 949, 959, 17 Cal.*

Rptr. 2d 242 ; *Quigley v. Pet, Inc. (1984) 162 Cal. App. 3d 877, 887, 208 Cal. Rptr. 394* ; *Walker v. Signal Companies, Inc. (1978) 84 Cal. App. 3d 982, 996, 149 Cal. Rptr. 119* ; *see Crogan v. Metz (1956) 47 Cal. 2d 398, 405, 303 P.2d 1029]* . The word "contract" in *Civ. Code § 3294* is used in its ordinary sense to mean an agreement between the parties, not an obligation imposed by law despite the absence of an agreement. Thus, if an obligation does not arise from contract but is imposed by law, a judgment for exemplary damages may be made [*Ward v. Taggart (1959) 51 Cal. 2d 736, 743, 336 P.2d 534* ; *see Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 921-922, 114 Cal. Rptr. 622, 523 P.2d 662]* .

Similarly, punitive damages are recoverable if the act or omission complained of involves both a breach of contract and a tort, and the aggrieved party establishes the other party's liability for tort damages and fraud, oppression, or malice sufficient to sustain the award of punitive damages [*Haigler v. Donnelly (1941) 18 Cal. 2d 674, 680-682, 117 P.2d 331* (conversion and money had and received); *Walker v. Signal Companies, Inc. (1978) 84 Cal. App. 3d 982, 996, 149 Cal. Rptr. 119* (fraudulent inducement to enter contract); *Foster v. Keating (1953) 120 Cal. App. 2d 435, 454-455, 261 P.2d 529* (fraud, conversion, breach of fiduciary duty; breach of joint venture agreement)].

When a case proceeds to a jury on both tort and contract causes of action, it is the responsibility of the party seeking punitive damages to elicit a special verdict finding on the tort cause of action to support an award of punitive damages [*see Myers Building Industries, Ltd. v. Interface Technology, Inc. (1993) 13 Cal. App. 4th 949, 961, 17 Cal. Rptr. 2d 242]* . The jury in *Myers* was instructed on both a contract cause of action and a fraud cause of action, but the special verdict form used only provided for findings and itemization of damages on the contract claim and for a finding regarding whether there was any oppression, fraud, or malice in defendant's conduct towards plaintiff. Although there was an affirmative finding of oppression, fraud, or malice, that special verdict was presented in the disjunctive and did not constitute a finding on the fraud cause of action. Thus, there was no special verdict finding on a tort cause of action to support a punitive damage award [*Myers Building Industries, Ltd. v. Interface Technology, Inc. (1993) 13 Cal. App. 4th 949, 960-961, 17 Cal. Rptr. 2d 242]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract InterpretationGood Faith & Fair DealingContracts LawRemediesGeneral OverviewContracts LawRemediesForeseeable DamagesGeneral OverviewContracts LawRemediesPunitive DamagesTortsDamagesGeneral Overview

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§ 177.77 Duty to Mitigate Damages

[1] Scope of Duty in Contract Actions

Ordinarily, a person injured by the breach of an obligation has the duty to minimize damages and avoid or reduce the loss suffered by the party who breached the contract [*Seaboard Music Co. v. Germano (1972) 24 Cal. App. 3d 618, 622, 101 Cal. Rptr. 255]* . This rule applies, for example, to (1) contracts for employment requiring a wrongfully discharged employee to seek employment comparable or substantially similar to that of which the employee has been deprived [*see Parker v. Twentieth Century-Fox Film Corp. (1970) 3 Cal. 3d 176, 182, 89 Cal. Rptr. 737, 474 P.2d 689]* ; and (2) construction contracts requiring a plaintiff who has wrongfully been given notice to stop performance to discontinue performance and not attempt to maximize his or her damages by fully performing [*see Bomberger v. McKelvey (1950) 35 Cal. 2d 607, 613-615, 220 P.2d 729]* . The particular requirements of mitigation in the situations used in these examples are discussed in Ch. 249, *Employment Law: Termination and Discipline* , and Ch. 104, *Building Contracts* , respectively. In addition, mitigation in other specific situations is discussed in other chapters [*see, e.g., Civ. Code § 1951.2* (governing real property leases, discussed in Ch. 332, *Landlord and Tenant: The Tenancy*); *Com. Code §§ 10527-10530* (governing leases executed on or after January 1, 1990, discussed in Ch. 413, *Personal Property Leases*)].

The duty to mitigate the damages caused by a breach of a contract does not mean that the aggrieved party must take measures that are unreasonable or impractical, would involve expenditures disproportionate to the loss sought to be avoided, or that may be beyond his or her financial means. It is sufficient if the aggrieved party acts reasonably and with due diligence in the light of the situation confronting him or her at the time the loss is threatened [*Green v. Smith (1968) 261 Cal. App. 2d 392, 396-397, 67 Cal. Rptr. 796* ; *see also Berge v. International Harvester Co. (1983) 142 Cal. App. 3d 152, 163, 190 Cal. Rptr. 815* (plaintiff financially unable to replace truck)]. The reasonableness of the aggrieved party's actions is not tested in hindsight or in retrospect. The fact that an alternative course of action is shown to have been feasible is not proof that the course of action actually pursued by the aggrieved party was unreasonable [*Zanker Development Co. v. Cogito Systems, Inc. (1989) 215 Cal. App. 3d 1377, 1381, 264 Cal. Rptr. 76* ; *Green v. Smith (1968) 261 Cal. App. 2d 392, 392, 398, 67 Cal. Rptr. 796]* . Whether a particular course of conduct undertaken by an injured party in an attempt to mitigate his or her damages is reasonable is a question of fact. Thus, on review, an

appellate court must sustain a finding of reasonableness if it is supported by substantial evidence [*Brandon & Tibbs v. George Kevorkian Accountancy Corp. (1990) 226 Cal. App. 3d 442, 460, 277 Cal. Rptr. 40]* .

The aggrieved party need not enter into other risky contracts, incur unreasonable inconvenience or expense, disorganize the business, or put himself or herself in a humiliating position or in one involving loss of honor and respect [*Bomberger v. McKelvey (1950) 35 Cal. 2d 607, 613-615, 220 P.2d 729* ; *see* Restatement of Contracts § 336(1), comment a]. For example, it is generally not necessary for an aggrieved party to renegotiate new terms with the party who has repudiated or breached the original agreement [*Zanker Development Co. v. Cogito Systems, Inc. (1989) 215 Cal. App. 3d 1377, 1382, 264 Cal. Rptr. 76]* .

Moreover, it is not generally the duty of the aggrieved party to assume the burden that the breaching party has violated or to incur relatively large expenses on that account [*Dutra v. Cabral (1947) 80 Cal. App. 2d 114, 122, 181 P.2d 26* (faced with defendant's refusal to provide water for irrigating plaintiff's crops, plaintiff was not required to procure water from another source at cost that was large compared to damages sustained)]. However, if the aggrieved party does expend sums in a reasonable effort

to avoid losses resulting from a breach of contract, those expenses are recoverable as damages. For instance, if a seller breaches an agreement for the sale of a business, and the injured party's commencement of a competing business in the same location is a reasonable attempt to mitigate damages, any operating losses sustained by the injured party during the the early years of its competing business are recoverable as damages [*Brandon & Tibbs v. George Kevorkian Accountancy Corp. (1990) 226 Cal. App. 3d 442, 460-461, 277 Cal. Rptr. 40]* .

[2] Affirmative Defense

The failure to mitigate damages is a matter of affirmative defense that must be pleaded and proved by the defendant [*Mayes v. Sturdy Northern Sales, Inc. (1979) 91 Cal. App. 3d 69, 86, 154 Cal. Rptr. 43* ; *Baruh v. Kuhl (1963) 213 Cal. App. 2d 266, 273, 28 Cal. Rptr. 573]* . For a form of affirmative defense alleging failure to mitigate damages, *see § 177.199*.

[3] When Mitigation Is Not Required

Mitigation of damages occassioned by a breach of contract is required because (1) ordinarily, a party to a contract is interested only in the profit to be made from the contract, and if he or she receives this, he or she obtains the full benefit of the bargain; and (2) performance by the aggrieved party might be useless to the other party, although he or she would have to pay the entire contract price if the aggrieved party were permitted to perform, and this would inflict damage on the other party without benefit to the aggrieved party. If these reasons are not applicable to the particular sitiation, the aggrieved party does not have to mitigate his or her damages. For example, if the aggrieved party is not interested solely in profit from the agreement but must proceed with the work in order to fulfill contract obligations to others, or if the aggrieved party has progressed so far in his or her performance that it would be impracticable to attempt to make a reasonable estimate of damages, or to complete the work would diminish damages or, at least, not enhance them, the aggrieved party may go forward and complete his or her performance [*Bomberger v. McKelvey (1950) 35 Cal. 2d 607, 614, 220 P.2d 729* ; *see* Restatement of Contracts § 336, comment a].

An aggrieved party is not required to mitigate its damages when its performance of the contract that has been breached relates to a small portion of its capacity and it is already engaged in contemporaneous performance of other contracts [*Seaboard Music Co. v. Germano (1972) 24 Cal. App. 3d 618, 622-623, 101 Cal. Rptr. 255* ; *Gollaher v. Midwood Constr. Co. (1961) 194 Cal. App. 2d 640, 651, 15 Cal. Rptr. 292]* .

Finally, the duty of mitigation has no application when the aggrieved party has fully performed his or her obligations under the contract at the time of the other party's breach [*see* *Capaldi v. Levy (1969) 1 Cal. App. 3d 274, 282, 81 Cal.*

Rptr. 629] .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 177.78 Liquidated Damages

[1] Rule Before 1978

Under former *Civ. Code § 1671*, a liquidated damages provision was enforceable only if the party seeking to enforce the provision pleaded and proved facts showing that actual damages would be impracticable or extremely difficult to fix and the provision reflected a reasonable endeavor to estimate actual damages [*see Garrett v. Coast & Southern Fed. Sav. & Loan Assn. (1973) 9 Cal. 3d 731, 738-739, 108 Cal. Rptr. 845, 511 P.2d 1197* ; *McCarthy v. Tally (1956) 46 Cal. 2d 577, 586, 297 P.2d 981]* . The judicial decisions interpreting and applying these requirements severely limited the use of liquidated damages provisions [*see* Sweet, *Liquidated Damages in California, 60 Cal. L. Rev. 84 (1972)*]. Cases decided under the former law may be helpful in dealing with liquidated damages clauses in consumer contracts [*Beasley v. Wells Fargo Bank (1991) 235 Cal. App. 3d 1383, 1399, 1 Cal. Rptr. 2d 446* (former common law rule codified in *Civ. Code § 1671(d)*, discussed in *§ 177.78[5]*, is retained for consumer actions), *disapproved on other grounds, Olson v. Automobile Club of So. Cal. (2008) 42 Cal. 4th 1142, 1153 n.6* ; *see H.S. Perlin Co. v. Morse Signal Devices (1989) 209 Cal. App. 3d 1289, 1298, 258 Cal. Rptr. 1]* .

For an allegation of liquidated damages for use in an action based on a consumer contract or a contract made before July 1, 1978, along with related case law references, *see § 177.196*.

[2] Current Rule

With respect to nonconsumer contracts executed on or after July 1, 1978, unless another statute prescribes the rule or standard for determining the validity of a liquidated damages provision, a provision in a contract liquidating the damages for the breach of a contract is valid unless the party seeking to invalidate it establishes that the provision was unreasonable under the circumstances existing at the time the contract was made [*Civ. Code § 1671(a), (b)*].

Thus, under *Civ. Code § 1671(b)*, when contracts involving consumer transactions or leases of dwellings are not involved, the burden of proof on the issue of reasonableness is on the party seeking to invalidate the liquidated damage provision. Moreover, the intent of the legislation is to judge the reasonableness of the provision in light of the circumstances confronting the parties at the time of the making of the contract and not by hindsight. Accordingly, the

amount of damages actually suffered should have no bearing on the validity of the liquidated damages provision [*see, e.g., Weber, Lipshie & Co. v. Christian (1997) 52 Cal. App. 4th 645, 60 Cal. Rptr. 2d 677, 679* (liquidated damages provision in partnership agreement, providing that damages to accounting firm for loss of fees from breach of covenant would be measured by doubling firm's time charges for clients lost due to breach for 12 months immediately preceding their loss, held to be enforceable); *H.S. Perlin Co. v. Morse Signal Devices (1989) 209 Cal. App. 3d 1289, 1298-1301, 258 Cal. Rptr. 1* (upholding $250 liquidated damages for $958,000 theft loss proximately caused by alarm company's failure to follow up on signal indicating service interruption); *Hong v. Somerset Associates (1984) 161 Cal. App. 3d 111, 115-116, 207 Cal. Rptr. 597* ($25,000 or 2 percent liquidated damages clause reasonable in contract for sale of 36-unit apartment); *see also* Cal. L. Revision Comm'n Comment to *Code Civ. Proc. § 1671(b)*].

The change reflected by the 1978 amendments was designed to favor enforcement of liquidated damages clauses, except against a consumer [*see Civ. Code § 1671(d)* (discussed in *§ 177.78[5], below*)], by shifting the burden of proof to parties who wish to invalidate the liquidated damage provision [*H.S. Perlin Co. v. Morse Signal Devices (1989) 209 Cal. App. 3d 1289, 1298, 258 Cal. Rptr. 1]* . Such a liquidated damages provision should be enforceable, therefore, unless the party opposing it submits evidence proving (not merely permitting an inference) that the provision was unreasonable when the agreement was made [*e.g., El Centro Mall, LLC v. Payless ShoeSource, Inc. (2009) 174 Cal. App. 4th 58, 64-65, 94 Cal. Rptr. 3d 43* (shopping center tenant's evidence, while permitting inference that provision in lease was arbitrary, did not "conclusively prove the point")].

The fact that a liquidated damages clause limits damages rather than predicts them does not remove the provision from *Civ. Code § 1671* [*H.S. Perlin Co. v. Morse Signal Devices (1989) 209 Cal. App. 3d 1289, 1300, 258 Cal. Rptr. 1* ; *see* 13 Cal. L. Revision Comm'n Rep. 1740-1741 (1976)].

For an allegation of liquidated damages for use in an action based on a contract made after July 1, 1978, *see § 177.197*.

[3] Factors Used in Determining Reasonableness

Although *Civ. Code § 1671(b)* does not provide specific factors to determine the reasonableness of a liquidated damages provision, the Cal. L. Revision Comm'n Comment to *Civ. Code § 1671(b)* states that the parties should be given considerable leeway in determining the damages for breach. All the circumstances existing at the time of the making of the contract are to be considered, including the relationship that the damages provided in the contract bear to the range of harm that reasonably could be anticipated at the time of the making of the contract. Other relevant considerations to determine if the amount is unreasonable include, but are not limited to, the relative equality of the bargaining power of the parties, whether the parties were represented by lawyers at the time the contract was made, the anticipation of the parties that proof of actual damages would be costly or inconvenient, the difficulty of proving causation and foreseeability, and whether the liquidated damages provision is included in a form contract [Cal. L. Revision Comm'n Comment to *Civ. Code § 1671(b)*].

When the parties do not have equal bargaining power, the liquidated damages clause should receive careful judicial scrutiny in an analysis that encompasses both procedural and substantive considerations [*H.S. Perlin Co. v. Morse Signal Devices (1989) 209 Cal. App. 3d 1289, 1297 n.5, 1299, 258 Cal. Rptr. 1]* . The fact that the liquidated damages provision is found in a preprinted form drafted by the party in the stronger bargaining position, and thus offers no real negotiating opportunity over that term of the contract, does not in itself make the liquidated damages provision unreasonable. The meaningfulness of a party's choice is based not only on his or her relationship to the other party, but also on his or her ability to obtain the goods or services from others [*H.S. Perlin Co. v. Morse Signal Devices (1989) 209 Cal. App. 3d 1289, 1299, 258 Cal. Rptr. 1* (in evaluating liquidated damages provision in burglar alarm service contract, insurance against risks of theft as available alternative service)].

A liquidated damages provision will not be held unreasonable because the party in the weaker negotiating position did not read the contract if the liquidated damages provision or references to it would have been readily apparent to anyone

who did read it [*H.S. Perlin Co. v. Morse Signal Devices (1989) 209 Cal. App. 3d 1289, 1299-1300, 258 Cal. Rptr. 1]* .

In evaluating substantive reasonableness, it is appropriate to compare the compensation being charged under the contract for the goods or services with the allocation of the risks made by the liquidated damages clause. For instance, a clause liquidating damages payable by a burglar alarm service company to $250 in a contract under which the subscriber made an initial payment of $300 and paid monthly fees of $50 was not an objectively unreasonable or unexpected allocation of risk considering that insurance on $500,000 of inventory would have cost the subscriber $25,000 a year [*H.S. Perlin Co. v. Morse Signal Devices (1989) 209 Cal. App. 3d 1289, 1297, 1300, 258 Cal. Rptr. 1* (citing 13 Cal. Law Revision Com. Rep. 1737, 1741 (1976), for proposition that limitation on liability is acceptable if beneficiary of limitation is in high-risk enterprise)].

Finally, although the doctrine of unconscionability [*see Civ. Code § 1670.5* (discussed in Ch. 140, *Contracts*)] applies to all contracts and thus to liquidated damages provisions, the reasonableness standard set forth in *Civ. Code § 1671(b)* provides for more judicial scrutiny than is allowed under the unconscionability standards. An unreasonable risk allocation could invalidate a liquidated damages clause without the clause being unconscionable; but a liquidated damages clause that is reasonable under *Civ. Code § 1671(b)* cannot be unconscionable [*H.S. Perlin Co. v. Morse Signal Devices (1989) 209 Cal. App. 3d 1289, 1301-1302, 258 Cal. Rptr. 1]* .

[4] Late Payment Fees

Charges for late payment of loan installments may be held unenforceable if they bear no reasonable relationship to the injury the creditor might suffer from late payments. For example, a clause in a promissory note which imposed a charge of six months' interest if the borrowers prepaid the loan principal, and also provided that the charge would not be imposed six months after execution of the note unless the borrowers had made a late interest payment or otherwise defaulted, was held to be an unenforceable penalty for late payment. The California Supreme Court found the provision unenforceable because it bore no relationship to the potential damages defendant would incur from a late interest payment [*Ridgley v. Topa Thrift and Loan Ass'n (1998) 17 Cal. 4th 970, 979-981, 73 Cal. Rptr. 2d 378, 953 P.2d 484]* .

[5] Consumer Contracts and Leases for Dwellings

When liquidated damages are sought to be recovered from a consumer or residential lessee pursuant to a liquidated damages provision in a contract (1) for the retail purchase, or rental, of personal property or services, primarily for personal, family, or household purposes, or (2) for the lease of real property for use as a dwelling by a party to the lease or those dependent on the party for support, the validity of the liquidated damages provision is tested under *Civ. Code § 1671(d)* rather than under *Civ. Code § 1671(b)* [*Civ. Code § 1671(c)*]. A liquidated damages provision in a consumer contract or residential lease is void except that the parties may agree on an amount that is presumed to be the amount of damages sustained by a breach thereof if, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damages [*Civ. Code § 1671(d)*; *see* 13 Cal. L. Revision Comm'n Rep. 1741 (1976)].

In other words, with respect to a liquidated damages provision in a consumer contract or a residential lease, the prior law under former *Civ. Code §§ 1670* and *1671* [*see § 177.78[1]*] is continued in *Civ. Code § 1671(d)*, and decisions interpreting those former code sections still apply in such a case [*Utility Consumers' Action Network, Inc. v. AT&T Broadband of S. Cal., Inc. (2006) 135 Cal. App. 4th 1023, 1029, 37 Cal. Rptr. 3d 827]* .

Thus, if a liquidated damages provision is included in a consumer contract or residential lease as described in *Civ. Code § 1671(c)*, the nonconsumer plaintiff must plead and prove the following [*McCarthy v. Tally (1956) 46 Cal. 2d 577, 586, 297 P.2d 981* (applying requirements of former *Civ. Code § 1671*, now limited to consumer contracts and leases of dwellings)]:

- At the time the contract was entered into, ascertaining the actual damages in the event of a breach would have been impracticable or extremely difficult;

- The sum agreed on represented a reasonable endeavor by the parties to ascertain what the actual damages would be; and

- A breach of the contract occurred.

No actual damages need to be proved in order to recover under the liquidated damages provision [*McCarthy v. Tally (1956) 46 Cal. 2d 577, 586, 297 P.2d 981]* . Note that, if a liquidated damages provision in a consumer contract or residential lease is to be enforced against the nonconsumer party, then the standard of *Civ. Code § 1671(b)* [*see § 177.78[2]*] is applicable to determine the validity of the provision [Cal. L. Revision Comm'n Comment to *Civ. Code § 1671(c)*].

The second requirement--that the sum agreed on as liquidated damages must represent a reasonable endeavor by the parties to ascertain what the actual damages would be--does not imply that there must always be bargaining between the parties, with the aim of settling on that sum. In the case of a standardized contract of adhesion offered to a very large number of consumers by a supplier of consumer services (for example, a contract for internet services), such bargaining is not practical with respect to small sums such as a late payment charge to a consumer. If the supplier endeavors reasonably to ascertain what the actual damages would be and the resulting amount specified in the contract is not unreasonable, then the requirement has been met and the liquidated damages provision is valid [*Utility Consumers' Action Network, Inc. v. AT&T Broadband of S. Cal., Inc. (2006) 135 Cal. App. 4th 1023, 1035-1038, 37 Cal. Rptr. 3d 827]* .

Civ. Code § 1671(d) represents a codification of common law and provides affirmative relief to a party who has paid sums in accordance with an invalid liquidated damages provision. The measure of the breaching party's recovery is the difference between the sums it paid under the invalid provision and the other party's actual damages for the four years (in the case of a written contract) prior to the commencement of the action [*Beasley v. Wells Fargo Bank (1991) 235 Cal. App. 3d 1383, 1398-1402, 1 Cal. Rptr. 2d 446 , disapproved on other grounds, Olson v. Automobile Club of So. Cal. (2008) 42 Cal. 4th 1142, 1153 n.6*]. An action for affirmative relief was, and remains, an equitable action in which the breaching plaintiff has no right to a jury trial [*Beasley v. Wells Fargo Bank (1991) 235 Cal. App. 3d 1383, 1392-1393, 1 Cal. Rptr. 2d 446* (but defendant's cross complaint to recover sums owed from certain members of class as creating defensive claim for relief on which there was right to jury trial), *disapproved on other grounds, Olson v. Automobile Club of So. Cal. (2008) 42 Cal. 4th 1142, 1153 n.6*]. However, even in the context of a legal defense, the question of the validity of the liquidated damages provision--whether the sum to be paid in the event of breach is an unlawful penalty or a valid liquidated damages provision--is to be decided by the judge. Thus, the court should first decide whether it was impracticable or extremely difficult to fix actual damages, and whether the nonbreaching party made a reasonable endeavor to estimate a fair average compensation for its loss, and then the jury should decide the amount of actual damages suffered by the nonbreaching party [*Beasley v. Wells Fargo Bank (1991) 235 Cal. App. 3d 1383, 1393, 1 Cal. Rptr. 2d 446 , disapproved on other grounds, Olson v. Automobile Club of So. Cal. (2008) 42 Cal. 4th 1142, 1153 n.6*].

[6] Deposit as Liquidated Damages

If parties provide for a deposit as security for the performance of a contractual obligation instead of promising to pay a fixed sum as liquidated damages in case of a breach, a court should determine if the parties intended the deposit to constitute liquidated damages or to be merely a fund to secure the payment of any actual damages. If the deposit was intended to be a liquidated damages provision, whether or not it may be enforced should be determined under the applicable provisions of *Civ. Code § 1671* [*see* Cal. L. Revision Comm'n Comment to *Civ. Code § 1671*].

[7] Contracts to Purchase Real Property

The validity of a liquidated damages clause in a contract for the purchase and sale of real property, providing for liquidated damages to the seller on the buyer's failure to complete the purchase of the property, is governed by *Civ. Code §§ 1675-1681*. These sections apply to contracts for the purchase and sale of residential as well as nonresidential property, but do not apply to real property sales contracts as defined in *Civ. Code § 2985(a)* [*Civ. Code § 1681*]. Application of *Civ. Code §§ 1675-1681* is limited to contractual clauses providing for liquidated damages to the seller on breach by the buyer. The validity of any other provision for liquidated damages in a contract to purchase and sell real property is governed by *Civ. Code § 1671* [*Civ. Code § 1679*]. Nothing in *Civ. Code §§ 1675-1681* affects any right a party to a contract for the purchase and sale of real property may have to obtain specific performance [*Civ. Code § 1680*]. For a detailed discussion of the provisions of *Civ. Code §§ 1675-1681* and *2985*, see Ch. 569, *Vendor and Purchaser* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 177 DAMAGES
PART II. LEGAL BACKGROUND
C. Damages in Contract Action

15-177 California Forms of Pleading and Practice--Annotated § 177.79

§ 177.79 Particular Elements of Recovery

[1] Damages for Physical and Mental Suffering

[a] Nature of Contract Makes Distress Foreseeable

Damages for physical suffering resulting from a breach of contract are generally not recoverable [*Westwater v. Grace Church (1903) 140 Cal. 339, 341, 73 P. 1055* ; *Cobler v. Stanley, Barber, Southard, Brown & Associates (1990) 217 Cal. App. 3d 518, 531, 265 Cal. Rptr. 868]* . Nevertheless, if a person contracts to do a particular thing and the failure to do it may result in anguish and distress of mind on the part of other contracting party, he or she is presumed to have contracted with reference to the payment of damages for physical suffering or illness in the event that type of damages accrues because of his or her breach of contract [*Cobler v. Stanley, Barber, Southard, Brown & Associates (1990) 217 Cal. App. 3d 518, 531, 265 Cal. Rptr. 868* ; *Westervelt v. McCullough (1924) 68 Cal. App. 198, 207-209, 228 P. 734* ; *but see Selden v. Dinner (1993) 17 Cal. App. 4th 166, 173-174, 21 Cal. Rptr. 2d 153* (discussed *below*, barring recovery for breach of contract to provide medical services)].

Application of this rule permits recovery of damages for mental or emotional suffering too, even when no physical injury is alleged [*Ross v. Forest Lawn Memorial Park (1984) 153 Cal. App. 3d 988, 995, 203 Cal. Rptr. 468* ; *Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 851, 88 Cal. Rptr. 39]* . Consequently, when the terms of a contract relate to matters that directly concern the comfort, happiness, or personal welfare of one of the parties, or the subject matter of the contract directly affects or moves the affection, self-esteem, or tender feelings of that party so that it is apparent from the particular subject matter of the contract and in the contemplation of the parties that mental suffering or emotional distress is a foreseeable and contemplated result of the breach, the aggrieved party may recover damages for physical or emotional suffering or illness proximately caused by the breach [*Chelini v. Nieri (1948) 32 Cal. 2d 480, 482, 196 P.2d 915* (physical illness occasioned by mortician's breach of contract to preserve body); *Rogoff v. Grabowski (1988) 200 Cal. App. 3d 624, 633, 246 Cal. Rptr. 185* (emotional suffering when hired driver abandoned drunken party-goer in wet swim clothes); *Wynn v. Monterey Club (1980) 111 Cal. App. 3d 789, 799-801, 168 Cal. Rptr. 878* (physical and emotional suffering due to breach of promise not to advance funds to allow spouse to gamble in defendant's establishment); *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co. (1970) 9 Cal. App. 3d 508, 527-528, 88 Cal. Rptr. 246* (physical and emotional suffering for failure to provide defense); *Windeler v. Scheers*

Jewelers (1970) 8 Cal. App. 3d 844, 851-852, 88 Cal. Rptr. 39 (physical suffering for breach of bailment contract involving cherished family rings; defendant knew of rings' sentimental value); *Christensen v. Superior Court (1991) 54 Cal. 3d 868, 891, 2 Cal. Rptr. 2d 79, 820 P.2d 181* (extending doctrine to allow recovery of damages for emotional distress by close family members as third party beneficiaries of contracts for funeral services)].

However, in a case to determine whether emotional distress damages were recoverable for the negligent breach of a contract to construct a house, the California Supreme Court held that when the contractor's negligence directly caused only economic injury and property damage, and breached no duty independent of the contract, the homeowners could not recover damages for emotional distress based on breach of the contract [*Erlich v. Menezes (1999) 21 Cal. 4th 543, 548, 558-560, 87 Cal. Rptr. 2d 886, 981 P.2d 978]* . The Court stated that the balance of policy considerations--the potential for significant increases in liability in amounts disproportionate to culpability, the court's inability to formulate appropriate limits on the availability of claims, and the magnitude of the impact on stability and predictability in commercial affairs--counseled against expanding contract damages to include mental distress claims in negligent construction cases [*Erlich v. Menezes (1999) 21 Cal. 4th 543, 558-561, 87 Cal. Rptr. 2d 886, 981 P.2d 978]* .

For a discussion of damages for mental suffering resulting from a breach of contract, see Ch. 362, *Mental Suffering and Emotional Distress* .

[b] Recovery Barred by Medical Standard of Care

Damages for emotional suffering as an element of a breach of contract claim arising from a physician's failure to provide promised medical services are not recoverable if the physician's failure to perform those services was consistent with his or her obligation to meet the professional standard of care in treating the plaintiff [*Selden v. Dinner (1993) 17 Cal. App. 4th 166, 173-174, 21 Cal. Rptr. 2d 153]* . *Selden* arose out of a contract to perform a preventative mastectomy and reconstructive surgery before plaintiff's medical coverage expired. On the day that surgery was scheduled, in a hospital where defendant's application for surgical privileges had not yet been approved, there was disagreement over whether the hospital would allow defendant to proceed. It was finally agreed that defendant could perform the surgery with another surgeon to monitor the operation, but by the time that agreement was reached, defendant felt too upset to perform the surgery properly, and postponed it for that reason. The court considered defendant's obligation to meet the standard of professional care critical, and was unwilling to create a substantial incentive that conflicts with that obligation. If the standard of care, which can only be established by way of expert medical testimony, required defendant to cancel the surgery because of defendant's emotional state, imposing liability for emotional distress damages on a breach of contract theory would create a powerful financial incentive for the physician to act below the standard of care [*Selden v. Dinner (1993) 17 Cal. App. 4th 166, 173, 21 Cal. Rptr. 2d 153]* .

[2] Lost Profits

[a] Nature of Contract

Lost profits can sometimes be used as the measure of general damages for breach of contract [*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 971, 22 Cal. Rptr. 3d 340, 102 P.3d 257]* . If loss of prospective profits is the natural and direct consequence of a breach of contract, they may be recovered [*see, e.g.,* *GHK Associates v. Mayer Group, Inc. (1990) 224 Cal. App. 3d 856, 876, 274 Cal. Rptr. 168* (development agreement under which plaintiff was to receive percent of profits from sales to third parties)]. Damages measured by lost profits expected to be earned on the contract at issue have been upheld when the breaching party's conduct prevented the other side from undertaking performance [*see, e.g.,* *Stark v. Shaw (1957) 155 Cal. App. 2d 171, 181, 317 P.2d 182* (contractor's delay in building subdivision prevented roofing subcontractor from performing); *De Flavio v. Estell (1959) 173 Cal. App. 2d 226, 232-233, 343 P.2d 150* (lost profit damages below contractor's estimated profit upheld when owner repudiated contract)].

Lost profits from collateral transactions as a measure of general damages for breach of contract typically arise when the contract involves crops, goods intended for resale, or an agreement creating an exclusive sales agency [*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 971-972, 22 Cal. Rptr. 3d 340, 102 P.3d 257* (collecting cases)]. In these types of cases the likelihood of lost profits from the related or derivative transactions is so obvious that the breaching party is deemed to have contemplated them at the inception of the contract [*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 972, 22 Cal. Rptr. 3d 340, 102 P. 3d 257* ; *Nelson v. Reisner (1958) 51 Cal. 2d 161, 171-172, 331 P.2d 17* (sharecrop lease for which consideration was percent of crop proceeds); *James v. Herbert (1957) 149 Cal. App. 2d 741, 749, 309 P.2d 91* (real estate investment joint venture to share profits)].

Recovery of lost profits is subject to the general rule that they must have been foreseeable in that they must have been within the contemplation of the parties when they contracted, and is further limited to profit on sales in the ordinary course of business [*Grupe v. Glick (1945) 26 Cal. 2d 680, 691-692, 160 P.2d 832* ; *Fraser v. Bentel (1911) 161 Cal. 390, 396, 119 P. 509]* . Loss of profits are recoverable if the breaching party had reason to know that such a loss would result. Actual knowledge is not required. If the seller knows the buyer is in the business of reselling, the seller is charged with knowledge of anticipated resales [*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 971-972, 22 Cal. Rptr. 3d 340, 102 P.3d 257* ; *Sun Maid Raisin Growers v. Victor Packing Co. (1983) 146 Cal. App. 3d 787, 791, 194 Cal. Rptr. 612* (based on *Com. Code § 2715(2)* standard for consequential damages); *see* Dunn, *Recovery of Damages for Lost Profits in California, 9 U.S.F. L. Rev. 415 (1975)* (arguing that despite language in some cases, foreseeability is no longer California law except in situations governed by *Com. Code § 2715*]. Conversely, when a person does not inform his or her vendor of the fact that he or she intends to resell, loss of resale profits are not recoverable [*Fraser v. Bentel (1911) 161 Cal. 390, 396, 119 P. 509* (breach of covenant against encumbrances)].

In addition, to be recoverable, the loss of profits must have been reasonable, proximately caused by the breach, and not too remote [*Grupe v. Glick (1945) 26 Cal. 2d 680, 688, 160 P.2d 832* ; *California Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 Cal. App. 3d 1, 59-60, 221 Cal. Rptr. 171* ; *see also § 177.74*]. For instance, for a four-month delay in completing construction of a premises the builder knew would be used as a pharmacy, neither lost profits nor the salary of another pharmacist were recoverable because the particular arrangement of the business in that way was not reasonable. Recovery was limited to the reasonable rental value of the property during the period of delay [*Sabraw v. Kaplan (1962) 211 Cal. App. 2d 224, 227-228, 27 Cal. Rptr. 81]* .

In an action for breach of a contract to negotiate an agreement [*see* *Copeland v. Baskin Robbins U.S.A. (2002) 96 Cal. App. 4th 1251, 1253, 117 Cal. Rptr. 2d 875* (holding that contract to negotiate agreement is distinguishable from so-called "agreement to agree," and can be formed and breached like any other contract); *see also Ch. 140, Contracts, § 140.22[6][c]*], a plaintiff cannot recover for lost expectations (profits) because there is no way of knowing what the ultimate terms of the agreement would have been, or even if there would have been an ultimate agreement. Damages for such a breach are measured by the injury the plaintiff suffered in relying on the defendant to negotiate in good faith. This measure encompasses the plaintiff's out-of-pocket costs in conducting the negotiations, and may or may not include lost opportunity costs [*Copeland v. Baskin Robbins U.S.A. (2002) 96 Cal. App. 4th 1251, 1260-1264, 117 Cal. Rptr. 2d 875* (defendant entitled to summary judgment in action for breach of agreement to negotiate when it showed that plaintiff could not establish reliance damages)].

In the context of a public contract, the California Supreme Court has held that bid preparation costs, but not lost profits, were available under a theory of promissory estoppel [*Kajima/Ray Wilson v. Los Angeles MTA (2000) 23 Cal. 4th 305, 315-317, 96 Cal. Rptr. 2d 747* (permitting recovery of lost profits would unduly punish tax-paying public while providing unfair windfall to bidders)].

Both the occurrence of, and the extent of, lost profits damages must be proven with certainty, although the amount of lost profits need not be established with absolute certainty [*Lewis Jorge Construction Management, Inc. v. Pomona*

Unified School District (2004) 34 Cal. 4th 960, 975, 22 Cal.Rptr.3d 340, 102 P.3d 257] . Demonstrating the reasonable probability that the profits would have been earned except for the breach of the contract is sufficient [*Nelson v. Reisner (1958) 51 Cal. 2d 161, 171-172, 331 P.2d 17* ; *California Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 Cal. App. 3d 1, 63, 221 Cal. Rptr. 171* ; *Fisher v. Hampton (1975) 44 Cal. App. 3d 741, 747, 118 Cal. Rptr. 811* (limited partnership for oil drilling; venture considered too risky for profit to be certain)].

[b] Established Business

In cases involving the loss of prospective profits from an established business because the working experience of the business affords a reasonable method of determining the loss, the aggrieved party may recover compensation for whatever profit he or she shows was reasonably certain to have been realized [*Overstreet v. Merritt (1921) 186 Cal. 494, 504, 200 P. 11* (joint venture; cattle); *Hoag v. Jenan (1948) 86 Cal. App. 2d 556, 563-564, 195 P.2d 451* (lease of additional space to be rented to operator of parking garage)]. The occurrence and extent of the loss can be determined with reasonable certainty from the working experience of the business, from its past volume, and from other data reflecting probable future volume [*Guntert v. City of Stockton (1976) 55 Cal. App. 3d 131, 143, 126 Cal. Rptr. 690* (commercial lease); *see Stott v. Johnston (1951) 36 Cal. 2d 864, 876-877, 229 P.2d 348* (breach of warranty regard ing paint; plaintiff was paint decorator; single stipulated sum as damages for both lost profits and loss of good will)].

[c] Unestablished Business

Formerly, loss of profits growing out of a breach of contract involving an unestablished business were considered too uncertain to constitute a basis for the computation of damages for the breach. A new business was viewed as an adventure and its profits were too speculative and remote, existing only in anticipation [*California Press Mfg. Co. v. Stafford Packing Co. (1923) 192 Cal. 479, 485, 221 P. 345, 211 P. 345* (fish processor claimed it could expand its capacity if machinery was not defective)]. Courts reasoned that without evidence of past profits on which to base an estimate of future profits, there was no other satisfactory way to establish the lost profits. The former rule, however, is now considered applicable only to determining if the fact of damage, as distinguished from the amount of damage, has been established with reasonable certainty [*Fisher v. Hampton (1975) 44 Cal. App. 3d 741, 748, 118 Cal. Rptr. 811* ; *Mahoney v. Founders' Ins. Co. (1961) 190 Cal. App. 2d 430, 436-437, 12 Cal. Rptr. 114* (mining)].

For example, in a breach of warranty action arising out of the sale of agricultural machinery for use in processing harvested tomatoes, after the machinery rendered the entire crop unmarketable, the plaintiff was allowed damages for anticipated profits from the sale of the entire crop even though the plaintiff had never grown tomatoes before, based on plaintiff's previous experience as a farmer and the fact that the crop was in good condition at the time it was harvested [*A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473, 493-494, 186 Cal. Rptr. 114]* .

Similarly, if the parties were developing a new venture together under a contract that required them to share the profits, damages based on the actual income of the project are proper [*GHK Associates v. Mayer Group, Inc. (1990) 224 Cal. App. 3d 856, 876, 274 Cal. Rptr. 168]* .

[d] Measure and Proof of Damages

The measure of damages for loss of anticipated profits is the amount of net profits, not gross profits; otherwise, a plaintiff would be unjustly enriched [*Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists (1971) 14 Cal. App. 3d 209, 222-223, 92 Cal. Rptr. 111* (sale of restaurant and bar equipment)]. In calculating the net profit, all the costs of producing the gross income should be deducted, including the value of labor, materials, rents, and all expenses, together with the interest of the capital employed [*Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists (1971) 14 Cal. App. 3d 209, 222-223, 92 Cal. Rptr. 111* ; *Carrey v. Boyes Hot Springs Resort, Inc. (1966) 245 Cal. App. 2d 618, 622, 54 Cal. Rptr. 199* (wrongful eviction from business premises)].

Fixed expenses and overhead costs are not taken into account if they would not have increased or decreased as a consequence of the nonperformance or performance of the contract [*see Oakland Cal. Towel Co. v. Sivils (1942) 52 Cal. App. 2d 517, 520, 126 P.2d 651* (linen supply contract)].

In some cases, lost profits may be based on profitability of similar businesses operating under similar conditions. The aggrieved party may rely on data from other enterprises only if it is shown that his or her business is operated under similar conditions, such as in the same area and with the same equipment. For example, in a breach of warranty action, the gross revenues of other truckers were revelant, but the use of average profit percentages to calculate what plaintiff's net profits would have been if the defective truck had been operable was not because plaintiff did not show that there was a similarity of operations [*Berge v. International Harvester Co. (1983) 142 Cal. App. 3d 152, 162-163, 190 Cal. Rptr. 815]* .

[e] Pleading

In cases involving breach of contract, loss of profits that were contemplated by the parties when they made the contract and that are the direct and natural result of the breach may be recovered as general damages without the necessity of pleading special allegations [*Myers v. Stephens (1965) 233 Cal. App. 2d 104, 121, 43 Cal. Rptr. 420* (original complaint for specific performance was amended to plead conversion; evidence of lost profits was admissible even though not specially pleaded in amended complaint); *Morello v. Growers Grape Prod. Ass'n (1947) 82 Cal. App. 2d 365, 375, 186 P.2d 463* (nature of business and right of first refusal made lost profits natural consequence of breach)]. Lost profits recoverable as special damages must be pled with particularity [*Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 975, 22 Cal. Rptr. 3d 340, 102 P.3d 257]* . If there is any question regarding defendant's knowledge of plaintiff's business or intentions regarding resale, it would seem prudent to include specific allegations [*see Fraser v. Bentel (1911) 161 Cal. 390, 396, 119 P. 509]* .

For a form of allegation for use in a complaint to allege lost profits, *see § 177.191*.

[3] Loss of Good Will

Damages for loss of good will and injury to a business resulting from a breach of contract may be recovered [*see Stott v. Johnston (1951) 36 Cal. 2d 864, 872, 229 P.2d 348* (action by decorator for breach of warranty regarding paint; single stipulated sum as damages for both lost profits and loss of good will); *Gregory v. Spieker (1895) 110 Cal. 150, 154, 42 P. 576* (action for breach of contract for sale of business and covenant not to compete); *Walpole v. Prefab Mfg. Co. (1951) 103 Cal. App. 2d 472, 489, 230 P.2d 36* (action for breach of contract to sell and deliver goods to plaintiff distributor)]. Loss of good will of a business conducted on premises taken by eminent domain is authorized by *Code Civ. Proc. § 1263.510*, and is discussed in Ch. 247, *Eminent Domain* .

The good will of a business is defined as the expectation of continued patronage of it by the public and constitutes a form of property that may be valued [*Bus. & Prof. Code § 14100*; *Baker v. Pratt (1986) 176 Cal. App. 3d 370, 380, 222 Cal. Rptr. 253* (corporate dissolution); *Cal. Bev. etc. Co. v. Distillers Distrib. Corp. (1958) 158 Cal. App. 2d 758, 766, 323 P.2d 517* (damages for loss of good will is not recoverable for breach of distributorship agreement during month after notice of termination had been given because distributor had no exprectation of continuing patronage)]. A going business has a value over and above the aggregate value of the tangible property employed in it, and good will is an indispensable element of the fair market value of such a business [*Baker v. Pratt (1986) 176 Cal. App. 3d 370, 380, 222 Cal. Rptr. 253]* . Apparently, however, the fair market value approach is relevant only when a business is being sold or dissolved. When a business is sold for its fair market value, the sale price received implicitly compensates the seller for any expected future earnings; recovery of both fair market value plus damages for loss of future profits constitutes impermissible double recovery [*California Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 Cal. App. 3d 1, 61, 221 Cal. Rptr. 171]* . *California Shoppers* addressed damages for lost profits. Nevertheless, if good will is defined as the expectation of continued patronage, it is the source of future profits, and thus, arguably, the same reasoning may

apply to establish that no good will is lost if a business is sold for its fair market value.

Good will results from the general public patronage and encouragement a business receives from constant or habitual customers because of its local position, common celebrity, reputation for skill or affluence, punctuality, or from other accidental circumstances, necessities, or even ancient partialities or prejudices. Stated in another way, it is the probability that the old customers will return to the old place and that the business will continue in the future as it did in the past, adding to the profits of the concern and contributing to the means of meeting its engagements as they come in. It is not a visible, tangible part of the business, but it is an element of strength and permanency that adds very much to the value of the business [*Bell v. Ellis (1867) 33 Cal. 620, 624-625* (replevin); *Piedmont Publishing Co. v. Rogers (1961) 193 Cal. App. 2d 171, 186, 14 Cal. Rptr. 133* (specific performance of stock option)]. In determining the value of the good will of a business, the court may take into consideration the situation of the business premises, the amount of patronage, the personality of the parties engaged in the business, the length of time the business has been established, and the habit of its customers in continuing to patronize the business [*In re Marriage of Foster (1974) 42 Cal. App. 3d 577, 583, 117 Cal. Rptr. 49* (action for dissolution of marriage involving determination of value of good will of husband's medical practice)].

The fact that the detriment due to loss of good will cannot be measured with mathematical accuracy is not a sufficent reason for denying compensation. Damages for loss of good will may be determined by making the best estimate possible from the evidence presented [*Johnson v. Snyder (1950) 99 Cal. App. 2d 86, 89-90, 221 P.2d 164* (constructive eviction of restaurant business)].

The measure of damages due to loss of good will occasioned by breach of a covenant not to compete (in a contract for the purchase and sale of a business) is the loss to the aggrieved party, not the profits earned by the breaching party [*Gregory v. Spieker (1895) 110 Cal. 150, 155, 42 P. 576* ; *see Laird v. Steinmann (1950) 97 Cal. App. 2d 781, 785-786, 218 P.2d 780* (affirming award of $5,200 when $18,000 of sale price had been allocated to customer list and good will)]. The validity of covenants not to compete is discussed in Ch. 565, *Unfair Competition* .

In other situations, damages for loss of good will are established much like damages for lost profits, on evidence of estimated profits that would likely have been earned except for the interruption in the business caused by the breach of the contract [*see, e.g., Johnson v. Snyder (1950) 99 Cal. App. 2d 86, 89, 221 P.2d 164* (sustaining award of $500 for loss of good will of restaurant business after constructive eviction based on evidence of $200 monthly net profit)]. There is a distinction, however; loss of profits are not the same as loss of good will [*Carrey v. Boyes Hot Springs Resort, Inc. (1966) 245 Cal. App. 2d 618, 622-623, 54 Cal. Rptr. 199* (combined award apparently based only on average annual profits reversed for retrial to separately assess damages for lost profits and for loss of good will; otherwise, defendant has no basis for attacking sufficiency of evidence for either award); *see also Ross v. Frank W. Dunne Co. (1953) 119 Cal. App. 2d 690, 701-703, 260 P.2d 104* (awarding both lost profits, based on estimated profits on nine lost contacts in which plaintiff would have used defective product, and loss of good will, based on plaintiff/distributor's time and efforts promoting the business); *Walpole v. Prefab Mfg. Co. (1951) 103 Cal. App. 2d 472, 481-484, 489-490, 230 P.2d 36* (sustaining award for lost profits based on expected net profit on limited number of specific contracts, but reversing and remanding for error in refusing to admit evidence of loss of good will)].

For a form of allegation for use in a complaint to allege loss of good will, *see § 177.192*.

[4] Loss of Publicity and Damage to Reputation

Unlike the concept of damage to the good will of a business, damages for injury to an individual's name, character, or personal reputation arising from a breach of contract are not generally recoverable because they are usually too uncertain, speculative, and remote [*Walpole v. Prefab Mfg. Co. (1951) 103 Cal. App. 2d 472, 489, 230 P.2d 36]* . Damages for loss of publicity caused by a breach of contract, however, may be recovered if they are related to the loss of publicity for some particular event or artistic work, such as a musical concert or composition, script, play, or a prize

fight, or to the loss of publicity for some continuing activity such as the conduct of a specific business at a specific location or the practice of a particular skill or art [*Ericson v. Playgirl, Inc. (1977) 73 Cal. App. 3d 850, 856, 140 Cal. Rptr. 921* (only nominal damages are recoverable for failure to feature little known actor's picture as one quarter of cover of annual "Best of Playgirl" magazine edition because publicity from magazine cover was not connected to plaintiff's profession as actor)].

When related to a particular work or business, damages for the loss of publicity do not present insuperable difficulties in calculation, because the artist's future earnings can be directly correlated to his or her box office appeal or known record of success [*Ericson v. Playgirl, Inc. (1977) 73 Cal. App. 3d 850, 857, 140 Cal. Rptr. 921]* . Still, such damages may be difficult to calculate and must be based on calculations, inferences, and observations that are reasonable [*Tamarind Lithography Workshop, Inc. v. Sanders (1983) 143 Cal. App. 3d 571, 577, 193 Cal. Rptr. 409* (failure to give screen credit to author, director, production manager)]. For example, no damage results from the failure to give screen credit to an associate director of a motion picture that was a failure [*Zorich v. Petroff (1957) 152 Cal. App. 2d 806, 811*]. Awards given to a particular work are relevant, and expert testimony may provide a basis for damages [*Tamarind Lithography Workshop, Inc. v. Sanders (1983) 143 Cal. App. 3d 571, 577, 577 n.6, 193 Cal. Rptr. 409]* .

In situations involving failure to give credit in some copies of the work, the fact that the aggrieved party is awarded injunctive relief requiring credit to be given on all copies of the work distributed in the future does not preclude an award of monetary damages for failure to give credit on previously distributed copies [*Tamarind Lithography Workshop, Inc. v. Sanders (1983) 143 Cal. App. 3d 571, 578-579, 193 Cal. Rptr. 409]* .

Unfavorable or emotionally upsetting publicity resulting from unauthorized distribution or publication may also be compensated as a breach of contract or as an invasion of privacy [*see* *Leavy v. Cooney (1963) 214 Cal. App. 2d 496, 498-501, 29 Cal. Rptr. 580* (emotional distress suffered by public prosecutor after unauthorized distribution of documentary film narrated by prosecutor, based on apprehension communicated to distributor when contract was signed that public would believe prosecutor was compensated for appearance, compensated as tort); *see also* Ch. 370, *Motion Pictures* , and Ch. 429, *Privacy*].

[5] Expenditures

[a] In Preparation for Performance of Contract

Reasonably necessary expenditures incurred in performing a contract and the value of services rendered by a contracting party not in default may be recovered as damages for breach of contract, if the aggrieved party also has not been awarded the full price or the value of the benefits expected under the contract. In addition to these expenses, the aggrieved party is entitled to the net profit he or she would have made on the entire contract, which is the contract price less the total amount of expenditures, including those already incurred, that the plaintiff would have made from the beginning to the end of the contract. If the plaintiff has recovered the full price or value of the benefits expected under the contract, he or she may not recover expenditures because he or she has already received the benefit of the bargain, it being presumed that he or she would pay the expenses for doing so [*Patty v. Berryman (1949) 95 Cal. App. 2d 159, 172-173, 212 P.2d 937* ; *see* Corbin on Contracts, vol. 5, ch. 57, § 1036 (West 1963); *see also* *Buxbom v. Smith (1944) 23 Cal. 2d 535, 541, 145 P.2d 305* ; *Walpole v. Prefab Mfg. Co. (1951) 103 Cal. App. 2d 472, 482, 230 P.2d 36]* . If the aggrieved party has established the amount that he or she has been induced to expend, the breaching party has the burden of establishing that those expenses were extravagant and unnecessary for the purpose of carrying out the contract [*Mendoyoma, Inc. v. County of Mendocino (1970) 8 Cal. App. 3d 873, 879, 87 Cal. Rptr. 740]* .

For a form of allegation for use in a complaint to allege expenses incurred in anticipation of performance, *see § 177.193*.

[b] Resulting From Breach

A person is entitled to recover all reasonable and necessary expenses that he or she was required to incur on account of a breach of contract if those expenses are proximately caused by the breach, in that they would not have been incurred but for the breach [*Ross v. Frank W. Dunne Co. (1953) 119 Cal. App. 2d 690, 700, 260 P.2d 104* ; *Walpole v. Prefab Mfg. Co. (1951) 103 Cal. App. 2d 472, 489, 230 P.2d 36* ; *see Royer v. Carter (1951) 37 Cal. 2d 544, 550, 233 P.2d 539]* . Additionally, if the aggrieved party incurs expenses that it would not otherwise have incurred in a good faith attempt to mitigate damages, and thereby succeeds in preventing a still greater loss, those expenses are recoverable [*W.C. Cook & Co. v. White Truck etc. Co. (1932) 124 Cal. App. 721, 727, 13 P.2d 549* (costs of reconditioning damaged figs and fig paste, which was less than loss of merchandise would have been, were recoverable)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesCompensatory DamagesConsequential DamagesContracts LawRemediesForeseeable DamagesLost Profits

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§ 177.80 Interest

[1] Provided for by Contract

If a contract stipulates a legal rate of interest, that rate remains chargeable after a breach of the contract, as before, until the contract is superseded by a verdict or other new obligation [*Civ. Code § 3289(a)*; *see Reid v. Balter (1993) 14 Cal. App. 4th 1186, 1196, 18 Cal. Rptr. 2d 287* (contract rate applied from date last installment of note was due until date of judgment); *see also Roodenburg v. Pavestone Co., L.P. (2009) 171 Cal. App. 4th 185, 191, 89 Cal. Rptr. 3d 558* (*Civ. Code § 3287(a)*, which requires, as condition for recovering prejudgment interest, that amount of damages must be certain or capable of being made certain by calculation, does not apply when prejudgment interest is part of amount owed)]. Under this provision, parties to a contract may stipulate in the contract the amount of interest to be paid in the event of a breach or in the case of nonpayment of an amount owed, and the party in default will be obligated to pay that rate of interest from the date of breach or the date that the money was due [*Ansco Const. Co. v. Ocean View Estates, Inc. (1959) 169 Cal. App. 2d 235, 238-239, 337 P.2d 146]* . The special agreement to pay interest gives a right of action to recover the interest whenever it becomes due under the contract. It is part of the contract and may be enforced either separately or in connection with other obligations of the same contract [*City of Los Angeles v. City Bank (1893) 100 Cal. 18, 20, 34 P. 510]* .

If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation bears interest at the rate of 10 percent per annum after breach. In this context, the term "contract" does not include a note secured by a deed of trust on real property [*Civ. Code § 3289(b)*]. If the contract was executed before January 1, 1986, the applicable rate of interest would be 7 percent per annum [*Cal. Const. art. XV, § 1*; *see Green v. Future Two (1986) 179 Cal. App. 3d 738, 744, 225 Cal. Rptr. 3]* .

A usurious rate of interest specified in a contract is void, but by application of *Civ. Code § 3289(b)*, the party not in default is still entitled to recover interest at the rate of 10 percent per annum from the date of breach [*Mark McDowell Corp. v. LSM 128 (1989) 214 Cal. App. 3d 1427, 1431-1433 , disapproved on other grounds, Southwest Concrete Products v. Gosh Construction Corp. (1990) 51 Cal. 3d 701, 704, 274 Cal. Rptr. 404, 798 P.2d 1247* (with respect to holding that interest rate was usurious)].

For purposes of *Civ. Code § 3289*, the rate of the contracted finance charge will be the legal rate of interest stipulated by a retail installment contract that is subject to *Civ. Code § 1801 et seq.* [*Civ. Code § 3289.5*]; *see* discussion of retail installment contracts in Ch. 501, *Sales: Retail Installment Sales.*

Interest is a form of compensation used to restore plaintiff for moneys that have been unavailable for a business or investment [*see Southwest Concrete Products v. Gosh Construction Corp. (1990) 51 Cal. 3d 701, 708-709, 274 Cal. Rptr. 404, 798 P.2d 1247* (between merchants, late charge of 18 percent per annum as valid liquidated damages provision under *Com. Code § 2207* and not payment for "loan or forbearance or money," and thus not subject to usury law; nonetheless, majority opinion characterized award as prejudment interest, a characterization disparaged by the dissent because if the charges are not interest of any kind, they are not prejudgment interest either); *Bronco Wine Co. v. Frank A. Logoluso Farms (1989) 214 Cal. App. 3d 699, 714-715, 262 Cal. Rptr. 899]* . The purpose of interest differs from that of a late fee or penalty. Thus, the two separate remedies may be awarded incident to the same principal breach [*Bronco Wine Co. v. Frank A. Logoluso Farms (1989) 214 Cal. App. 3d 699, 714-715, 262 Cal. Rptr. 899]* .

[2] Damages Certain

If the contract does not make any provision for interest, the right to recover prejudgment interest is governed by *Civ. Code § 3287(a)*. That section states that any person entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover is vested in him or her on a particular day, is entitled also to recover interest thereon from that day, except during any period the debtor is prevented by law or by an act of the creditor from paying the debt [*Civ. Code § 3287(a)*]. This section applies to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state [*Civ. Code § 3287(a)*].

Damages are deemed certain or capable of being made certain within the provisions of *Civ. Code § 3287(a)* if the parties' essential dispute does not concern the basis of computation of damages, if any are recoverable, but rather concerns the issue of liability giving rise to damages [*Olson v. Cory (1983) 35 Cal. 3d 390, 402, 197 Cal. Rptr. 843, 673 P.2d 720* ; *National Farm Workers Service Center, Inc. v. M. Caratan, Inc. (1983) 146 Cal. App. 3d 796, 808-811, 194 Cal. Rptr. 617* ; *Elliano v. Assurance Co. of America (1975) 45 Cal. App. 3d 170, 182, 119 Cal. Rptr. 653]* . Damages are also considered capable of being made certain if they can be calculated by reference to well established, ascertainable market values [*Burnett & Doty Development Co. v. Phillips (1978) 84 Cal. App. 3d 384, 391, 148 Cal. Rptr. 569* ; *see Block v. Laboratory Procedures, Inc. (1970) 8 Cal. App. 3d 1042, 1046-1047, 87 Cal. Rptr. 778* (refusing to award prejudgment interest for breach of stock option contract when record disclosed no established market for shares)]. If the amount of damages cannot be ascertained, however, except by the resolution of conflicting evidence, interest may not be awarded under *Civ. Code § 3287(a)* [*City of Salinas v. Souza & McCue Construction Co. (1967) 66 Cal. 2d 217, 230, 57 Cal. Rptr. 337, 424 P.2d 921 , disapproved on other grounds, Helfend v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 1, 14* ; *Marine Terminals Corp. v. Paceco, Inc. (1983) 145 Cal. App. 3d 991, 995, 193 Cal. Rptr. 687]* .

When damages are certain or capable of being made certain, the plaintiff is entitled to an award of prejudgment interest as a matter of right. The fact that there is a slight difference between the amount of the damages claimed and the amount of the award does not preclude an award of prejudgment interest [*Marine Terminals Corp. v. Paceco, Inc. (1983) 145 Cal. App. 3d 991, 996-997, 193 Cal. Rptr. 687* (fact that invoices included some inapplicable charges as not precluding award of prejudgment interest if applicable charges were readily ascertainable); *Block v. Laboratory Procedures, Inc. (1970) 8 Cal. App. 3d 1042, 1046-1047, 87 Cal. Rptr. 778* ; *see Coleman Engineering Co. v. North American Aviation, Inc. (1966) 65 Cal. 2d 396, 407-409, 55 Cal. Rptr. 1, 420 P.2d 713]* . Furthermore, the rule of *Civ. Code § 3287(a)*, entitling the buyer to interest on deposits in escrow when the amount of advanced payments is fixed and certain, does not conflict with the rule that the nondefaulting party's damages are limited to the benefit of the bargain. Benefit-of-the-bargain compensatory damages do not apply to prejudgment interest on the compensatory damages [*see*

Al-Husry v. Nilsen Farms Mini-Market, Inc. (1994) 25 Cal. App. 4th 641, 648-650, 31 Cal. Rptr. 2d 28] . A buyer's right to recover interest on payments made toward a purchase price, as damages for breach of contract, is not limited to sales of real property but applies to sales in general [*Al-Husry v. Nilsen Farms Mini-Market, Inc. (1994) 25 Cal. App. 4th 641, 648, 31 Cal. Rptr. 2d 28]* .

The right to recover prejudgment interest under *Civ. Code § 3287(a)* does not vary in accordance with the particular fund out of which the underlying debt is payable [*Olson v. Cory (1983) 35 Cal. 3d 390, 406, 197 Cal. Rptr. 843, 673 P.2d 720* (judges' retirement fund, a trust fund)].

The exception in *Civ. Code § 3287(a)*, relating to nonaccrual of interest while the debtor is prevented by law from paying the debt, applies regardless of equitable considerations, such as the fact that the debtor gets to use the money while the litigation is pending [*Olson v. Cory (1983) 35 Cal. 3d 390, 408, 197 Cal. Rptr. 843, 673 P.2d 720]* . An order refusing to enforce settlement agreements based on a theory of lack of settlement authority is not a prevention by law from paying the debt and does not fall within this exception. Thus, when the settlement agreements were ultimately affirmed, an award of prejudgement interest on the amounts stipulated by the agreements was proper [*Adams v. Johns-Manville Corp. (9th Cir. 1989) 876 F.2d 702, 710* (applying California law)].

When a plaintiff sues for a liquidated sum and the defendant establishes an offsetting claim, even one that is unliquidated, interest is properly allowed on the balance found to be due from the time it became due [*Burnett & Doty Development Co. v. Phillips (1978) 84 Cal. App. 3d 384, 391, 148 Cal. Rptr. 569* ; *Leaf v. Phil Rauch, Inc. (1975) 47 Cal. App. 3d 371, 376, 120 Cal. Rptr. 749]* . The amount of the plaintiff's liquidated claim is to be offset against the defendant's unliquidated claim as of date the plaintiff's claim became due, and only the balance bears interest [*Burnett & Doty Development Co. v. Phillips (1978) 84 Cal. App. 3d 384, 391, 148 Cal. Rptr. 569]* . Similarly, a reduction in damages due to plaintiff's efforts to mitigate damages does not preclude an award of prejudgment interest [*Coleman Engineering Co. v. North American Aviation, Inc. (1966) 65 Cal. 2d 396, 407-409, 55 Cal. Rptr. 1, 420 P.2d 713]* . Requests for prejudgment interest under *Civ. Code § 3287* by a successful plaintiff must be made by way of motion prior to entry of judgment, or the request must be made in the form of a motion for new trial no later than the time allowed for filing such a motion [*North Oakland Medical Clinic v. Rogers (1998) 65 Cal. App. 4th 824, 829-831, 76 Cal. Rptr. 2d 743]* .

[3] Unliquidated Amounts

Every person who is entitled under any judgment to receive damages based on a cause of action in contract and whose claim was unliquidated may recover interest on the claim from a date prior to the entry of judgment as the court may, in its discretion, fix, but not earlier than the date the action was filed [*Civ. Code § 3287(b)*; *see* *Gebert v. Yank (1985) 172 Cal. App. 3d 544, 555-556, 218 Cal. Rptr. 585* (upholding prejudgment interest awarded in judge's discretion even though jury verdict stated that no prejudgment interest should be awarded)]; *see also* *Lewis C. Nelson & Sons, Inc. v. Clovis Unified School District (2001) 90 Cal. App. 4th 64, 73, 108 Cal. Rptr. 2d 715* (*Civ. Code § 3287(b)* is applicable to those public entities described in *Civ. Code § 3287(a)*); *see generally § 177.80[2]*]. Requests for prejudgment interest under *Civ. Code § 3287* by a successful plaintiff must be made by way of motion prior to entry of judgment, or the request must be made in the form of a motion for new trial no later than the time allowed for filing such a motion [*North Oakland Medical Clinic v. Rogers (1998) 65 Cal. App. 4th 824, 829-831, 76 Cal. Rptr. 2d 743* (in circumstances in which damages were awarded but no interest was included in verdict and neither court nor jury had determined whether damages were liquidated or unliquidated, this rule was applied retroactively to plaintiffs, who never sought prejudgment interest as part of damages and sought interest at last minute as part of order awarding costs)].

[4] Settlement Expenses

Prejudgment interest should not be awarded on the portion of the damages attributable to settlement expenses because these expenses obviously are not incurred until after the date of termination or breach. Interest on this portion of an

award should date only from the judgment [*Colemen Engineering Co. v. North American Aviation, Inc. (1966) 65 Cal. 2d 396, 409, 55 Cal. Rptr. 1, 420 P.2d 713]* .

[5] Acceptance of Principal

Accepting payment of the whole principal, as such, waives all claims to interest [*Civ. Code § 3290*]. *Civ. Code § 3290* applies only to interest claimed as damages for nonpayment or default in payment of a debt, not to interest claimed as part of a debt on the basis of a contract provision to pay interest, for example, when invoices remain unpaid 90 days after delivery of goods. When the obligation arises out of a contract to pay interest, the interest is part of the debt, an accretion to principal, it is not part of damages. In those situations, payment of less than the aggregate of principal and interest constitutes nothing more than a payment on account and does not extinguish the right to interest in the principal [*Kawasho Internat. U.S.A., Inc. v. Lakewood Pipe Service, Inc. (1983) 152 Cal. App. 3d 785, 794-795, 201 Cal. Rptr. 640]* .

Because application of *Civ. Code § 3290* is limited to interest as damages, it is inapplicable to postjudgment interest [*San Francisco Unified School Dist. v. San Francisco Classroom Teachers Assn. (1990) 222 Cal. App. 3d 146, 150, 272 Cal. Rptr. 38* (cashing check in amount of judgment does not imply waiver of claim to postjudgment interest)].

[6] Tender of Sums Owed

Although an offer of payment stops the running of interest on an obligation, an offer to pay part of an amount owed will not stop the running of prejudgment interest if it is conditioned on the creditor's dropping a demand for other sums claimed [*see Civ. Code §§ 1494, 1504*; *Klinger v. Realty World Corp. (1987) 196 Cal. App. 3d 1549, 1553-1554, 242 Cal. Rptr. 592]* . Tender and deposit of the amount owing pursuant to *Civ. Code § 1500*, however, will stop the running of interest [*Klinger v. Realty World Corp. (1987) 196 Cal. App. 3d 1549, 1554 n.2, 242 Cal. Rptr. 592* ; *see* discussion of *Civ. Code § 1500* in Ch. 140, *Contracts*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment InterestContracts LawPerformanceAccord & SatisfactionContracts LawRemediesCompensatory DamagesInterest

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§ 177.81 Setoff Against Awarded Damages

[1] Each Party Has Claim Against Other on Same Contract

In an action for breach of contract, if the defendant pleads a claim against the plaintiff based on defective performance of the same contract, and damages are awarded to both parties on their claims against each other, then each party is entitled to have the two awards set off against each other, regardless of whether the defendant pleaded a tort claim (such as negligent performance) or a contract claim against the plaintiff [*Great W. Drywall, Inc. v. Roel Constr. Co. (2008) 166 Cal. App. 4th 761, 770, 83 Cal. Rptr. 3d 235]* .

[2] No Setoff for Tax Benefits Plaintiff Derived From Contract

The collateral source rule has never been extended to breach of contract actions [*DePalma v. Westland Software House (1990) 225 Cal. App. 3d 1534, 1538, 276 Cal. Rptr. 214]* . Nevertheless, in a matter of first impression in California, one court of appeal has concluded that it is not appropriate to allow a defendant a setoff to compensatory damages in the form of credit for income tax benefits that plaintiff may have derived from a breached or rescinded contract [*DePalma v. Westland Software House (1990) 225 Cal. App. 3d 1534, 1539-1546, 276 Cal. Rptr. 214* (exclusion at trial of plaintiff's tax returns, on which plaintiff depreciated computer equipment purchased from defendant and took investment tax credits, upheld on appeal)]. The court based its decision on several grounds: (1) the federal "tax benefit rule" cancels out most windfalls to plaintiffs [*DePalma v. Westland Software House (1990) 225 Cal. App. 3d 1534, 1541-1542, 276 Cal. Rptr. 214]* ; (2) estimating tax benefits is not useful because it is speculative, time-consuming, and confusing; and (3) public policy is better served by having defendants pay the full amount of the damages they have caused by breaching their contracts [*DePalma v. WestlandSoftware House (1990) 225 Cal. App. 3d 1534, 1540-1541, 276 Cal. Rptr. 214]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 177.82 Damages Payable in Foreign Currencies

[1] Law Governing Currency Conversion

If the determination of damages requires a court to consider currencies that fluctuate with respect to each other, the date for conversion of the foreign currency can have a significant effect on the amount awarded [*see, e.g., Levi Strauss & Co. v. Aetna Casualty & Surety Co. (1986) 184 Cal. App. 3d 1479, 237 Cal. Rptr. 473]* . The parties to a transaction may agree, before or after commencement of an action or distribution proceeding or the entry of judgment, with regard to all or some aspects of the conversion calculation [*Code Civ. Proc. § 676.3*]. If the parties have not otherwise agreed on the proper money to be used for all or some aspects of the transaction, any action or distribution proceeding commenced or or after January 1, 1992, involving a foreign-money claim arising from the transaction is governed by the Uniform Foreign-Money Claims Act (*Code Civ. Proc. § 676 et seq.*) [*Code Civ. Proc. §§ 676.2(a), 676.16*]. For the law governing currency conversion calculations in actions or distribution proceedings commenced before January 1, 1992, see *§ 177.82[3]*.

[2] Uniform Foreign-Money Claims Act

[a] Definitions

An "action" within the meaning of the Uniform Foreign-Money Claims Act is a judicial proceeding or arbitration in which a payment in money may be awarded or enforced with respect to a foreign-money claim [*Code Civ. Proc. § 676.1(1)*].

A "foreign-money claim" means a claim on an obligation to pay, or a claim for recovery of a loss, expressed in or measured by a foreign money [*Code Civ. Proc. § 676.1(6)*].

"Foreign money" is money other than money of the United States of America [*Code Civ. Proc. § 676.1(5)*].

A "distribution proceeding" is a judicial or nonjudicial proceeding for the distribution of a fund in which one or more foreign-money claims is asserted and includes an accounting, an assignment for the benefit of creditors, a foreclosure,

the liquidation or rehabilitation of a corporation or other entity, and the distribution of an estate, trust, or other fund [*Code Civ. Proc. § 676.1(4)*].

[b] Partial Application to Different Aspects of Transaction

The parties may agree to terms other than those imposed by the Uniform Foreign-Money Claims Act. The parties to a transaction may agree on the money to be used in a transaction giving rise to a foreign-money claim and may agree to use different moneys for different aspects of the transaction. Stating the price in a foreign money for one aspect of a transaction does not alone require the use of that money for other aspects of the transaction [*Code Civ. Proc. § 676.3(b)*].

[c] Determining Currency in Which Claim Is Payable

The money in which the parties to a transaction have agreed that payment is to be made is the proper money of the claim for payment [*Code Civ. Proc. § 676.4(a)*].

If the parties to a transaction have not otherwise agreed, the proper money of the claim, as in each case may be appropriate, is one of the following [*Code Civ. Proc. § 676.4(b)*]:

- The money regularly used between the parties as a matter of usage or course of dealing;
- The money used at the time of a transaction in international trade, by trade usage or common practice, for valuing or settling transactions in the particular commodity or service involved; or
- The money in which the loss was ultimately felt or will be incurred by the party claimant.

[d] Determining Appropriate Date for Conversion Calculation

If an amount contracted to be paid in a foreign money is measured by a specified amount of a different money, the amount to be paid is determined on the conversion date [*Code Civ. Proc. § 676.5(a)*]. The conversion date is the banking day next preceding the date on which money, in accordance with the Uniform Foreign-Money Claims Act, is [*Code Civ. Proc. § 676.1(3)*]:

- Paid to a claimant in an action or distribution proceeding;
- Paid to the official designated by law to enforce a judgment or award on behalf of a claimant; or
- Used to recoup, setoff, or counterclaim in different moneys in an action or distribution proceeding.

[e] Determining Rate of Exchange; Substitution of Market Rate After Default

The "rate of exchange" means the rate at which money of one country may be converted into money of another country in a free financial market convenient to or reasonably usable by a person obligated to pay or to state a rate of conversion. If separate rates of exchange apply to different kinds of transactions, the term means the rate applicable to the particular transaction giving rise to the foreign-money claim [*Code Civ. Proc. § 676.1(10)*].

If an amount contracted to be paid in a foreign money is to be measured by a different money at the rate of exchange prevailing on a date before default, that rate of exchange applies only to payments made within a reasonable time after default, not exceeding 30 days. Thereafter, conversion is made at the bank-offered spot rate on the conversion date [*Code Civ. Proc. § 676.5(b)*]. This has the effect of substituting the market conversion rate for the contract conversion rate on expiration of a reasonable time after default, and thus minimizes any unfortunate consequences of a bad choice

of a contract conversion rate.

A "spot rate" is a rate of exchange at which foreign money is sold by a bank or other dealer in foreign exchange for immediate or next day availability or for settlement by immediate payment in cash or equivalent, by charge to an account, or by an agreed delayed settlement not exceeding two days [*Code Civ. Proc. § 676.1(11)*; *see Code Civ. Proc. § 676.1(2)* ("bank-offered spot rate" is spot rate of exchange at which bank will sell foreign money at spot rate)].

A monetary claim is neither usurious nor unconscionable because the agreement on which it is based provided that the amount of the debtor's obligation to be paid in the debtor's money, when received by the creditor, will equal a specified amount of the foreign money of the country of the creditor [*Code Civ. Proc. § 676.5(c)*].

The rate of exchange applied in a distribution proceeding is the rate of exchange prevailing at or near the close of business on the day the distribution proceeding is initiated [*Code Civ. Proc. § 676.8*].

[f] Amendment of Judgment or Award to Market Rate

If, because of unexcused delay in payment of a judgment or award, the amount received by the creditor does not equal the amount of the foreign money specified in the agreement, the court or arbitrator must amend the judgment or award accordingly [*Code Civ. Proc. § 676.5(c)*].

[g] Pleading Entitlement to Foreign-Money Judgment

A person may assert a claim in a specified foreign money. If a foreign-money claim is not asserted, the claimant makes the claim in United States dollars [*Code Civ. Proc. § 676.6(a)*]. A person may assert a defense, setoff, recoupment, or counterclaim in any money without regard to the money of other claims [*Code Civ. Proc. § 676.6(c)*]. A foreign-money claimant in a distribution proceeding must assert its claim in the named foreign money and show the amount of United States dollars resulting from a conversion as of the date the proceeding was initiated [*Code Civ. Proc. § 676.8*].

An opposing party may allege and prove that a claim, in whole or in part, is in a different money than that asserted by the claimant [*Code Civ. Proc. § 676.6(b)*].

The determination of the proper money of the claim is a question of law [*Code Civ. Proc. § 676.6(d)*].

[h] Form and Effect of Foreign-Money Judgment

Except that costs must be assessed in United States dollars, a judgment or award on a foreign-money claim must be stated in an amount of the money of the claim [*Code Civ. Proc. § 676.7(a)*; *see Code Civ. Proc. § 676.1(8)* ("money of the claim" as determined by agreement or under *Code Civ. Proc. § 676.4(a)*, discussed in *§ 177.82[2][c]*)]. A statutory form of judgment that complies with this requirement is set forth in *Code Civ. Proc. § 676.7(f)*.

The debtor has the option of paying a judgment or award on a foreign-money claim in that foreign money or in the amount of United States dollars that will purchase that foreign money on the conversion date at a bank-offered spot rate [*Code Civ. Proc. § 676.7(b)*; *see Code Civ. Proc. § 676.1(2), (3)* (definitions of "bank-offered spot rate" and "conversion date," respectively, discussed in *§ 177.82[2][e]*)].

Each payment in United States dollars must be accepted and credited on a judgment or award on a foreign-money claim in the amount of the foreign money that could be purchased by the dollars at a bank-offered spot rate of exchange at or near the close of business on the conversion date for that payment [*Code Civ. Proc. § 676.7(d)*; *see Code Civ. Proc. § 676.1(2), (3)*].

For a form for a judgment on a foreign-money claim and discussion of related calculations, see Ch. 318, *Judgments* .

[i] Substitution of New Money

If, after an obligation is expressed or a loss is incurred in a foreign money, the country issuing or adopting that money substitutes a new money in place of that money, the obligation or the loss is treated as if expressed or incurred in the new money at the rate of conversion the issuing country establishes for the payment of like obligations or losses denominated in the former money [*Code Civ. Proc. § 676.12(a)*]. If the issuing country makes the substitution after a judgment or award is entered on a foreign-money claim, the court or arbitrator must amend the judgment or award by a like conversion of the former money [*Code Civ. Proc. § 676.12(b)*].

[j] Interest on Foreign-Money Claims, Judgments, and Awards

With respect to a foreign-money claim, recovery of prejudgment or preaward interest and the rate of interest to be applied in the action or distribution proceeding are matters of the substantive law governing the right to recovery under the conflict-of-laws rules of California, except in the case of settlement offers, which are governed by *Code Civ. Proc. § 676.9(b)* [*Code Civ. Proc. § 676.9(a)*].

A judgment or award on a foreign-money claim bears interest at the rate applicable to judgments in California [*Code Civ. Proc. § 676.9(c)*; *see* Ch. 318, *Judgments*].

[k] Law Merchant and Equity Incorporated; Rules of Construction

Unless displaced by particular provisions of the Uniform Foreign-Money Claims Act, the principles of law and equity, including the law merchant, and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating causes supplement its provisions [*Code Civ. Proc. § 676.13*].

The Uniform Foreign-Money Claims Act is to be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this title among states enacting it [*Code Civ. Proc. § 676.14*; *see generally* Unif. Foreign-Money Claims Act, 13 U.L.A. 25 (Supp. 1991) (uniform act as approved by Nat. Conf. of Comrs. on Unif. State Laws)].

If any provision of the Uniform Foreign-Money Claims Act or its application to any person or circumstance is held invalid, that invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of the Uniform Foreign-Money Claims Act are severable [*Code Civ. Proc. § 676.15*].

[3] Conversion in Actions Commenced Before January 1, 1992

When the determination of damages in an action commenced before January 1, 1992, requires the conversion of foreign currency, courts generally apply the judgment-day rule or the breach-day rule [*see Code Civ. Proc. § 676.16* (application of Uniform Foreign-Money Claims Act)]. Which rule is applicable depends on whether the obligation arose under foreign law or under American law. If the obligation arose under foreign law, the judgment-day rule applies, and damages incurred in foreign currency are converted into dollars at the rate prevailing on the date of final judgment [*Levi Strauss & Co. v. Aetna Casualty & Surety Co. (1986) 184 Cal. App. 3d 1479, 1486-1487, 237 Cal. Rptr. 473]* .

If the cause of action arises under American law, the breach-day rule applies, and the currency loss is determined using the rate in effect when the cause of action arose [*Levi Strauss & Co. v. Aetna Casualty & Surety Co. (1986) 184 Cal. App. 3d 1479, 1487, 237 Cal. Rptr. 473* ; *see Compania Engraw Com'l E. Ind. v. Schenley Dist. Corp. (9th Cir. 1950) 181 F.2d 876, 878-879* (accord, applying California law)]. The purpose of the breach-day rule is to restore the plaintiff

to the position it would have enjoyed had the contract been performed. The rule may fail to compensate the plaintiff fully if the foreign currency has appreciated relative to the dollar, but a clearly defined rule is considered important in commercial transactions. Thus, to give the plaintiff the fullest possible recovery, the breach date selected should be the date on which the contract was broken and the loss incurred.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesCompensatory DamagesInterestCriminal Law & ProcedureSentencingCruel & Unusual Punishment

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§§ 177.83[Reserved]

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§ 177.100 Related Tort Actions

For discussion and forms relating to tort liability for abortion or sterilization procedures, see Ch. 4, *Abortion and Birth Control Methods*

For discussion and forms relating to tort liability for false advertising, see Ch. 14, *Advertising*

For discussion and forms relating to tort liability arising from the operation of airplanes and airports, see Ch. 16, *Airplanes and Airports*

For discussion and forms relating to tort liability of intoxicated persons, see Ch. 19, *Alcoholic Beverages: Civil Liability*

For discussion and forms relating to actions for injuries to animals, injuries to people by animals, and trespassing animals, see Ch. 23, *Animals: Civil Liability*

For discussion and forms relating to tort actions against architects, see Ch. 56, *Architects*

For discussion and forms relating to tort actions by members against associations and clubs, see Ch. 61, *Associations and Clubs*

For discussion and forms relating to malpractice actions against attorneys, see Ch. 76, *Attorney Professional Liability*

For discussion and forms relating to tort actions against auctions and auctioneers, see Ch. 77, *Auctions and Auctioneers*

For discussion and forms relating to tort actions arising from bailment contracts, see Ch. 93, *Bailments*

For discussion and forms relating to personal injury actions against beauty salons and barber shops, see Ch. 97,

Barbering and Cosmetology

For discussion and forms relating to negligence actions involving bicyclists, see Ch. 98, *Bicycles*

For discussion and forms relating to personal injuries involving bridges, see Ch. 102, *Bridges*

For discussion and forms relating to personal injury actions against carriers, see Ch. 109, *Carriers*

For discussion and forms relating to malpractice actions against dentists, see Ch. 209, *Dentists*

For discussion and forms relating to the tort liability of pharmacists, see Ch. 214, *Drugs and Pharmacists*

For discussion and forms relating to tort liability in actions involving elevators and escalators, see Ch. 244, *Elevators and Escalators*

For discussion and forms relating to tort liability for emergency vehicles, see Ch. 246, *Emergency Vehicles*

For discussion and forms relating to liability for torts committed by an employee, see Ch. 248, *Employer's Liability for Employee's Torts*

For discussion and forms relating to actions for wrongful discharge, see Ch. 249, *Employment Law: Termination and Discipline*

For discussion and forms relating to tort liability for explosives and explosions, see Ch. 256, *Explosives*

For discussion and forms relating to tort liability in actions involving the negligent setting or controlling of fires, see Ch. 267, *Fires*

For discussion and forms relating to tort liability in actions involving the use or consumption of defective food products, see Ch. 268, *Food*

For discussion and forms relating to tort liability for personal injuries to spectators and participants in sports activities, see Ch. 273, *Games, Sports and Athletics*

For discussion and forms relating to tort liability of garage and service station operators, see Ch. 274, *Garages and Gas Stations*

For discussion and forms relating to tort liability of gas and electric companies, see Ch. 277, *Gas and Electricity*

For discussion and forms relating to the tort liability of hospitals, see Ch. 295, *Hospitals*

For discussion and forms relating to tort liability involving hotels and motels, see Ch. 297, *Hotels and Motels*

For discussions and forms relating to tort actions brought by mental patients, see Ch. 304, *Insane and Other Incompetent Persons*

For discussion and forms relating to actions for the tortious breach of insurance contracts, see Ch. 308, *Insurance*

For discussion and forms relating to tort actions by and against minors, see Ch. 367A, *Minors: Tort Actions*

For discussion and forms relating to tort actions between parent and child, see Ch. 367A, *Minors: Tort Actions*

For discussion and forms relating to the tort liability of notaries for misconduct or nelgect, see Ch. 390, *Notaries Public*

For discussion, procedures, and forms relating to actions for nuisance, see Ch. 391, *Nuisance*

For discussion and forms relating to tort actions involving manufacturers and suppliers of oil and gas products, see Ch. 393, *Oil and Gas*

For discussion and forms relating to malpractice actions against physicians, see Ch. 415, *Physicians: Medical Malpractice*

For discussion and forms relating to tort actions against polluters, see Ch. 418, *Pollution and Environmental Matters*

For discussion and forms relating to tort actions based on personal injury or property damage arising out of the defenant's use or maintenance of real property, see Ch. 421, *Premises Liability*

For discussion, procedures, and forms relating to complaints in products liability actions, see Ch. 460, *Products Liability*

For discussion and form relating to the tort liability of public accountants, see Ch. 462, *Public Accountants*

For discussion and forms relating to tort claims against public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

For discussion and forms relating to tort actions involving railroads and injured employees, injured passengers, and collisions with persons or objects on tracks, see Ch. 485, *Railroads*

For discussion and forms relating to tort liability of sanitation and sewerage districts, see Ch. 511, *Sanitation and Sewerage Districts*

For discussion and forms relating to tort liability for injuries to pupils, see Ch. 513, *Schools: Student Rights and Responsibilities* .

For discussion and forms relating to personal injury actions by passengers and workers against shipowners, see Ch. 522, *Ships and Shipping*

For discussion and forms relating to actions for slip and fall, see Ch. 525, *Slip and Fall*

For discussion and forms relating to actions against taxicab owners and drivers for personal injuries, see Ch. 544, *Taxicabs*

For discussion and forms relating to tort liability of telephone and telegraph companies, see Ch. 545, *Telephone and Telegraph Communication*

For discussion and forms relating to tort actions against theater owners, see Ch. 547, *Theaters, Shows, and Amusement Places*

For discussion and forms relating to tort liability of title insurance companies, see Ch. 548, *Title Insurance*

For discussion and forms relating to personal injury actions against the owners and drivers of trucks and trailers, see Ch. 553, *Trucks*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsTortsDamagesCompensatory DamagesGeneral OverviewTortsMalpractice & Professional LiabilityAttorneysTortsPremises Liability & PropertyGeneral OverviewTortsStrict LiabilityHarm Caused by AnimalsGeneral Overview

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§ 177.101 State Statutes

Prejudgment interest in unfair competition actions. *Bus. & Prof. Code §§ 16750(a), 16760(a)(2), 16761*

Court must direct jury to find special verdict in writing separating punitive from compensatory damages in all cases in which punitive damages issue is presented to jury. Civ. Code § 625

Damages and attorney's fees and costs for unauthorized use of name, voice, signature, photograph or likeness of deceased personality. *Civ. Code § 990*

Recovery for future damages. *Civ. Code § 3283*

Interest at discretion of jury in tort actions. *Civ. Code § 3288*

Prejudgment interest in personal injury action. *Civ. Code § 3291*

Conditions warranting award of punitive damages. *Civ. Code § 3294(a)*

Liability of employer for punitive damages because of acts of employees. *Civ. Code § 3294(b)*

Oppression, fraud, and malice defined. *Civ. Code § 3294(c)*

Punitive damages for death resulting from homicide for which defendant was convicted of felony. *Civ. Code § 3294(d)*

Limited pretrial discovery of defendant's assets, and limited introduction of evidence thereon at trial, in case involving punitive damage. *Civ. Code § 3295*

Procedure for restricting discovery of defendant's financial condition until after actual damages awarded and defendant

found guilty of malice, oppression, or fraud. *Civ. Code § 3295(d)*

Prohibition on stating amount in claim for punitive damages. *Civ. Code § 3295(e)*

Measure of damages in tort actions is proximately caused detriment. *Civ. Code § 3333*

Recovery for pain and suffering in medical malpractice cases is limited to $250,000. *Civ. Code § 3333.2(b)*

Damages and attorney's fees and costs for unauthorized use of name, voice, signature, photograph, or likeness of deceased personality. *Civ. Code § 3344.1*

Damages for property with peculiar value to plaintiff. *Civ. Code § 3355*

Damages recoverable in action surviving plaintiff's death are limited to loss or damage that decedent sustained or incurred before death, including any penalties or punitive damages, but not including damages for pain, suffering, or disfigurement. *Code Civ. Proc. § 377.34*

Punitive or exemplary damages are not recoverable in survival action against deceased defendant. *Code Civ. Proc. § 377.42*

In wrongful death action, damages that are just under all circumstances of case are permissible, but cannot include damages recoverable under *Code Civ. Proc. § 377.34*. *Code Civ. Proc. § 377.61*

In action for recovery of damages for personal injury or wrongful death, amount of damages not to be stated in complaint. *Code Civ. Proc. § 425.10(b)*

Request for statement of nature and extent of damages sought. *Code Civ. Proc. § 425.11*

Procedure for claiming punitive damages from health care provider. *Code Civ. Proc. § 425.13(a)*

Claim for punitive damages against religious corporation or religious corporation sole is not permitted to be included in complaint or other pleading absent court order; procedure and grounds for obtaining order. *Code Civ. Proc. § 425.14*

Conditions warranting amendment of pleadings. *Code Civ. Proc. § 473*

Judge is permitted to allow amendment of pleadings at any stage of proceedings. *Code Civ. Proc. § 576*

Excessive or inadequate damages as grounds for granting of new trial. *Code Civ. Proc. § 657(5)*

Motion for new trial on grounds of excessive or inadequate damages must be made on minutes of court. *Code Civ. Proc. § 658*

Procedure for moving for new trial. *Code Civ. Proc. § 659*

Consent to addition to or reduction of damages awarded. *Code Civ. Proc. § 662.5*

Unlicensed person causing injury or damage as result of providing goods or performing services for which specified license is required is liable for award of treble amount of damages assessed, not to exceed $10,000. *Code Civ. Proc. § 1029.8*

Declaration under penalty of perjury. *Code Civ. Proc. § 2015.5*

Legal Topics:

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

[1] Appeal

Point that damages are excessive must be raised in motion for new trial before trial court; not cognizable when raised for first time on appeal. *Hanif v. Hous. Auth. (1988) 200 Cal. App. 3d 635, 645, 246 Cal. Rptr. 192*

[2] Collateral Source Rule

Civ. Code § 3333.1(b), precluding collateral source which has provided medical expenses to plaintiff in medical malpractice case from obtaining reimbursement from medical malpractice defendant, is not unconstitutional as applied to city barred from seeking reimbursement for worker's compensation benefits paid to policeman who suffered heart attack while on duty and who subsequently sued hospital and doctors for negligently causing brain damage during heart surgery. *Barme v. Wood (1984) 37 Cal. 3d 174, 179-182, 207 Cal. Rptr. 816, 689 P.2d 446*

Question posed to witness by defense counsel during cross-examination suggesting possibility that plaintiff had insurance did not warrant new trial when court admonished jury to disregard question and twice instructed jury to disregard possibility that plaintiff had insurance. *Bell v. Bayerische Motoren Werke Aktiengesellschaft (2010) 181 Cal. App. 4th 1108, 1123, 105 Cal. Rptr. 3d 485*

In plaintiff's action against several defendants for separate torts, one defendant's settlement that includes assignment of that party's equitable indemnity claim against nonsettling codefendants based on comparative fault is collateral source in action against remaining defendants; recovery of damages plus assigned indemnity does not constitute double recovery. *Bush v. Superior Court (1992) 10 Cal. App. 4th 1374, 1384-1388, 13 Cal. Rptr. 2d 382*

Plaintiff's recovery of special damages of amount paid for injury-related medical care and services is not affected by fact that payments were made by Medi-Cal on plaintiff's behalf; under collateral source rule, plaintiff is deemed to have personally paid or incurred liability for these services and is entitled to compensation accordingly; result is not

unreasonable or unfair in light of Medi-Cal's subrogation and judgment lien rights. *Hanif v. Hous. Auth. (1988) 200 Cal. App. 3d 635, 639-640, 246 Cal. Rptr. 192*

Defense counsel's misconduct in mentioning collateral source of compensation is not prejudicial when damages appeared to have been calculated without deduction for collateral source and plaintiff failed to ask for curative instruction. *Da Silva v. Pacific King, Inc. (1987) 195 Cal. App. 3d 1, 9-10, 240 Cal. Rptr. 395*

Collateral source rule applies to exclude evidence of FHA-approved rent increases that would reduce damages sustained by purchaser of FHA-insured apartment complex as result of seller's fraudulent representations regarding building's state of repair. *Philip Chang & Sons Assocs. v. La Casa Novato (1986) 177 Cal. App. 3d 159, 167-173, 222 Cal. Rptr. 800*

Collateral source rule is judicial doctrine under which defendants are prohibited from entering evidence of collateral benefits for purpose of reducing personal injury damage awards against them. *Miller v. Sciaroni (1985) 172 Cal. App. 3d 306, 310, 218 Cal. Rptr. 219*

Civ. Code § 3333.1(a) abrogates collateral source rule in actions against health care providers for personal injury based on professional negligence. *Miller v. Sciaroni (1985) 172 Cal. App. 3d 306, 310, 218 Cal. Rptr. 219*

Civ. Code § 3333.1 is not unconstitutional as applied to bar plaintiff's employer from obtaining reimbursement for worker's compensation benefits paid to plaintiff, even though those benefits were not introduced in evidence, when defendant had entered other benefits in evidence in plaintiff's medical malpractice action against physician and hospital. *Miller v. Sciaroni (1985) 172 Cal. App. 3d 306, 313-315, 218 Cal. Rptr. 219*

Trial court properly did not apply *Civ. Code § 3333.1* in medical malpractice action when injury occurred prior to effective date of *Civ. Code § 3333.1*, and did not abuse discretion in admitting evidence of plaintiff's receipt of Social Security disability benefits after carefully weighing potential prejudicial impact of evidence against its relevance and probative value. *Lafayette v. County of Los Angeles (1984) 162 Cal. App. 3d 547, 552-553, 208 Cal. Rptr. 668*

When collateral source provision of *Civ. Code § 3333.1* did not encompass Medi-Cal payments paid to plaintiff, trial court erroneously concluded that statute abrogated state agency's right to lien in medical malpractice action. *Brown v. Stewart (1982) 129 Cal. App. 3d 331, 333-340, 181 Cal. Rptr. 112*

Civ. Code § 3333.1, abolishing collateral source rule in actions against health care providers for personal injury based on professional negligence, not applied retroactively. *Robinson v. Pediatric Affiliates Med. Group, Inc. (1979) 98 Cal. App. 3d 907, 912, 159 Cal. Rptr. 791*

[3] Compensatory Damages: Employment Discrimination

Fair Employment and Housing Commission not authorized to award compensatory damages in administrative proceeding under Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*) for employment discrimination. *Peralta Cmty. Coll. Dist. v. Fair Employment & Hous. Comm'n (1990) 52 Cal. 3d 40, 276 Cal. Rptr. 114, 801 P.2d 357*

[4] Double Recovery Barred

Reduction of award against nonsettling tortfeasor by discounted value of note taken in settlement with joint tortfeasor proper when discount reflects probability of nonpayment. *Seymour v. Summa Vista Cinema, Inc. (9th Cir. 1987) 809 F.2d 1385, 1389-1390*

Bar against double recovery inapplicable when plaintiff receives compensation from collateral source wholly independent from tortfeasor. *Salinas v. Souza & McCue Constr. Co. (1967) 66 Cal. 2d 217, 226-227, 57 Cal. Rptr. 337, 424 P.2d 921*

Payments by one tortfeasor on account of harm for which tortfeasor and another were liable diminishes amount of claim against other tortfeasor whether or not so agreed at time of payment and whether or not made before judgment. *Laurenzi v. Vranizan (1945) 25 Cal. 2d 806, 813, 155 P.2d 633*

Bar against double recovery inapplicable when injured person's claim embraces separate injuries caused by independent tortfeasors. *Ash v. Mortensen (1944) 24 Cal. 2d 654, 660, 150 P.2d 876*

In plaintiff's action against several defendants for separate torts, one defendant's settlement that includes assignment of that party's equitable indemnity claim against nonsettling codefendants based on comparative fault was collateral source in action against remaining defendants; recovery of damages plus assigned indemnity not double recovery. *Bush v. Superior Court (1992) 10 Cal. App. 4th 1374, 1384-1388, 13 Cal. Rptr. 2d 382*

Code Civ. Proc. § 887(a) mandates that award against nonsettling joint tortfeasors be reduced only by present cash value of structured settlement calling for periodic future payments. *Franck v. Polaris E-Z Go Div. of Textron, Inc. (1984) 157 Cal. App. 3d 1107, 1120, 204 Cal. Rptr. 321*

Compensatory damages for battery as well as damages for intentional infliction of emotional distress does not constitute impermissible double recovery in action arising out of rape when evidence that defendant abused and manipulated his position of trust as friend and his conduct following rape formed independent bases for jury to conclude that plaintiff suffered additional humiliation and emotional distress apart from rape. *Delia S. v. Torres (1982) 134 Cal. App. 3d 471, 482-483, 184 Cal. Rptr. 787*

Plaintiffs, who recovered for their losses from fire insurance company and entered into subrogation agreement with insurer, not entitled to additional recovery against tortfeasor. *Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 47, 162 Cal. Rptr. 238*

Injured party entitled to only one satisfaction of judgment for single harm, so that if judgment was satisfied by one tortfeasor after federal court action, liability of concurrent tortfeasor must be discharged in later state court action. *Fletcher v. California Portland Cement Co. (1979) 99 Cal. App. 3d 97, 99, 159 Cal. Rptr. 915*

Code Civ. Proc. § 877, reducing plaintiff's claim against remaining tortfeasors by amount paid by one tortfeasor, prevents double recoveries for same wrong but is not applied to tortfeasors involved in separate torts when no danger of double recovery ordinarily exists. *Carr v. Cove (1973) 33 Cal. App. 3d 851, 854, 109 Cal. Rptr. 449*

[5] Elements of Compensatory Damages for Personal Injuries

[a] Future Damages

In personal injury action, evidence regarding plaintiff's citizenship properly excluded from determination of plaintiff's claim for future loss of earnings, when plaintiff had been gainfully employed in country, and speculation that he might be deported was so remote as to make issue of citizenship irrelevant to damages question. *Clemente v. State of California (1985) 40 Cal. 3d 202, 220-221, 219 Cal. Rptr. 445, 707 P.2d 818*

No error to submit jury instruction on recovery of loss of earning capacity even absent expert evidence on that loss. *Gargir v. B'Nei Akiva (1998) 66 Cal. App. 4th 1269, 1282, 78 Cal Rptr. 2d 557*

Plaintiff entitled to recover for future pain and suffering in action for sexual harassment in workplace based on expert medical opinion that considered plaintiff's particular circumstances, expert's experience with similar cases, and plaintiff's life expectancy. *Bihun v. AT&T Info. Sys., Inc. (1993) 13 Cal. App. 4th 976, 996, 16 Cal. Rptr. 2d 787*

Whenever plaintiff whose citizenship is challenged seeks to recover for loss of future earnings, plaintiff's status in United States is properly decided by trial court as preliminary question of law to be determined outside presence of jury. *Rodriguez v. Kline (1986) 186 Cal. App. 3d 1145, 1148-1149, 232 Cal. Rptr. 157*

In determining future damages for impaired earning capacity, test is not what plaintiff would have earned, but what plaintiff could have earned. *Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 656, 151 Cal. Rptr. 399*

Plaintiff is entitled to recover for cost of future medical care when he or she shows that he or she is not fully recovered and will continute to need treatment and care. *Augustus v. Shaffer (1959) 171 Cal. App. 2d 160, 170, 340 P.2d 37*

Plaintiff is entitled to recover for future pain and suffering and for cost of future medical care. *Mendoza v. Rudolf (1956) 140 Cal. App. 2d 633, 636-637, 295 P.2d 445*

Plaintiff is entitled to recover for permanent loss of earning power as manual laborer resulting from severe injuries sustained in assault and battery. *Dutro v. Castoro (1936) 16 Cal. App. 2d 116, 117, 60 P.2d 182*

[b] Loss of Earnings

Damage award is not inadequate as matter of law for lack of compensation for loss of future earnings; award for future medical expenses possible without loss of future earnings. *Da Silva v. Pacific King, Inc. (1987) 195 Cal. App. 3d 1, 10-11, 240 Cal. Rptr. 395*

Issue of failure to distinguish loss of past earnings from loss of future earnings was not allowed to be raised for first time on appeal. *Sharp v. Bragg Crane Serv., Inc. (1985) 168 Cal. App. 3d 993, 995-996, 214 Cal. Rptr. 620*

[c] Loss of Profits

Award of damages for lost profits based on bank's wrongful conduct was supported by substantial evidence that bank's conduct caused plaintiff's inability to obtain financing for promising and profitable venture. *Sanchez-Corea v. Bank of Am. (1985) 38 Cal. 3d 892, 907-908, 215 Cal. Rptr. 679, 701 P.2d 826*

Award of damages for lost business profits arising from property damage to business was confined to period of time reasonably necessary to get business back into operation at former capacity. *Blake v. E. Thompson Petroleum Repair Co. (1985) 170 Cal. App. 3d 823, 834, 216 Cal. Rptr. 568*

In action against party breaching lease and against party who tortiously induced breach, when parties could have reasonably anticipated loss of profits as result of their action, that loss is proper measure of damage under either *Civ. Code § 3300* (measure of damages for breach of contractual obligation) or 3333 (measure of damages for breach of obligation not arising from contract). *Seaboard Music Co. v. Germano (1972) 24 Cal. App. 3d 618, 622, 101 Cal. Rptr. 255*

[d] Medical Care and Treatment

Person injured by another's tortious conduct is entitled to recover reasonable value of medical care and services reasonably required and attributable to tort, but award of damages for past medical expenses in excess of what medical care and services actually cost constitutes overcompensation; hence, award of special damages of reasonable value of past medical care and services that exceeded actual amount paid by Medi-Cal on plaintiff's behalf was error. *Hanif v. Hous. Auth. (1988) 200 Cal. App. 3d 635, 640, 641, 643-644, 246 Cal. Rptr. 192*

When medical expenses were sought by minor and were part of settlement in prior action against defendant, parents were estopped from seeking damages from defendant for medical expenses incurred on behalf of minor child; indemnity from minor was proper source of those damages. *Faitz v. Ruegg (1981) 114 Cal. App. 3d 967, 972, 171 Cal. Rptr. 149*

Plaintiff was entitled to recover reasonable value of home nursing services gratuitously provided by spouse. *Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 662, 151 Cal. Rptr. 399*

Plaintiff was permitted to recover damages for physical injuries and emotional disturbances resulting from defendant's tortious conduct, such as miscarriage resulting from fright and shock occasioned by defendant's outrageous conduct. *Vargas v. Ruggiero (1961) 197 Cal. App. 2d 709, 717-718, 17 Cal. Rptr. 568*

Plaintiff's recovery for medical expenses was limited to amount prayed for in complaint despite testimony that he had spent considerably more. *Sills v. Soto (1954) 124 Cal. App. 2d 539, 546, 269 P.2d 98* (decided prior to enactment of *Code Civ. Proc. § 425.10(b)* prohibiting specifying amount of damages)

Injured person is entitled to recover money paid for professional services necessitated by injuries even though professional services rendered by unlicensed physician. *Gastine v. Ewing (1944) 65 Cal. App. 2d 131, 143, 150 P.2d 266*

Although parents of minor child ordinarily responsible for expenses of child's medical and hospital care, child is also responsible and is permitted to recover for these expenses in action against tortfeasor. *Bauman v. San Francisco (1940) 42 Cal. App. 2d 144, 162-163, 108 P.2d 989*

[e] Nursing Services

Reasonable value of nursing services required by defendant's tortious conduct may be recovered from defendant even though services were rendered by members of injured person's family and without agreement or expectation of payment; when attendance and nursing services are rendered by member of plaintiff's family, amount for which defendant is liable is amount for which reasonably competent nursing and attendance by others could have been obtained; fact that injured party had legal right to nursing services (as in case of spouse) does not generally prevent recovery of their value. *Hanif v. Hous. Auth. (1988) 200 Cal. App. 3d 635, 644-645, 246 Cal. Rptr. 192*

[f] Pain and Suffering

"Pain and suffering" is unitary concept under which plaintiff may recover for physical pain, fright, nevousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror, or ordeal. *Capelouto v. Kaiser Found. Hosps. (1972) 7 Cal. 3d 889, 892-893, 103 Cal. Rptr. 856, 500 P.2d 880* ; *Huff v. Tracy (1976) 57 Cal. App. 3d 939, 943, 129 Cal. Rptr. 551*

In absence of explicit evidence showing pain and suffering, jury is permitted to award damages therefor if it infers pain and suffering from injuries sustained. *Capelouto v. Kaiser Found. Hosps. (1972) 7 Cal. 3d 889, 895-896, 103 Cal. Rptr. 856, 500 P.2d 880*

Plaintiff was permitted to employ per diem argument in suggesting damages for pain and suffering in particular case since argument constitutes permissible inference to be drawn from evidence presented. *Beagle v. Vasold (1966) 65 Cal. 2d 166, 173, 176-177, 53 Cal. Rptr. 129, 417 P.2d 673*

Trial court did not abuse discretion in medical malpractice action by admitting evidence that plaintiff's illegitimate child was born two months before surgery at issue, when existence and cause of plaintiff's depression, allegedly caused by surgery, were contested damage issues. *Lafayette v. County of Los Angeles (1984) 162 Cal. App. 3d 547, 553, 208 Cal. Rptr. 668*

Trial court is not permitted to instruct on loss of enjoyment of life in addition to or distinct from instruction on pain and suffering, since enjoyment of life instruction creates possibility of double recovery. *Huff v. Tracy (1976) 57 Cal. App. 3d 939, 943-944, 129 Cal. Rptr. 551*

[6] Excessive or Inadequate Damages

Use of remittitur under *Code Civ. Proc. § 662.5* is strictly limited to those cases in which jury error is confined to issue of damages. *Schelbauer v. Butler Mfg. Co. (1984) 35 Cal. 3d 442, 453, 198 Cal. Rptr. 155, 673 P.2d 743*

Where notice of motion for new trial clearly states grounds on which it will be made, motion is not permitted to be denied solely on ground that it did not state whether it would be made on affidavits, minutes of the court, or both. *Nichols v. Hast (1965) 62 Cal. 2d 598, 601, 43 Cal. Rptr. 641, 400 P.2d 753*

Whether verdict is excessive is to be determined solely from consideration of evidence in case and whether it will fairly sustain conclusion of jury and not by showing of extrinsic facts, by affidavits, or otherwise. *Harrison v. Sutter St. Ry. Co. (1897) 116 Cal. 156, 162, 47 P. 1019*

In determining whether or not punitive damage award is excessive, comparison with awards in other cases and fact that award's size may set precedent are invalid considerations. *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 818-819, 174 Cal. Rptr. 348*

In deciding whether or not award of punitive damages is excessive as matter of law, following factors should be considered: degree of reprehensibility of defendant's conduct, wealth of defendant, amount of compensatory damages, and amount which would have deterrent effect. *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 819, 174 Cal. Rptr. 348*

Court's order granting new trial on issue of damages, when punitive damages are primary concern, was upheld when based on combination of considerations, including ratio of punitive to compensatory damages, degree of reprehensibility of defendant's conduct, wealth of defendant, defendant's profit generating capacity, magnitude of award, and amount by which it exceeded compensatory award. *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 822, 174 Cal. Rptr. 348*

Although retrial may be limited to issue of damages when evidence of liability is overwhelming, new trial on all issues is required when evidence on liability is in sharp conflict, and award is manifestly so inadequate as to suggest compromise verdict. *Wilson v. R.D. Werner Co. (1980) 108 Cal. App. 3d 878, 883, 166 Cal. Rptr. 797*

Notice of motion for new trial is required to set forth grounds for motion in order to apprise court and opposing counsel of basis of motion. *Girch v. Cal-Union Stores, Inc. (1968) 268 Cal. App. 2d 541, 548, 74 Cal. Rptr. 125*

[7] Fraud

Measure of damages for negligent or intentional misrepresentation is that provided by *Civ. Code §§ 1709* and *3333*, plus any punitive damages that may be awarded. *Foggy v. Ralph F. Clark & Assocs., Inc. (1987) 192 Cal. App. 3d 1204, 1214, 238 Cal. Rptr. 130*

[8] General and Special Damages

Damages that necessarily result from act complained of are denominated general damages, and are proved under *ad damnum* clause or general allegation of damage, while those that are natural consequences of act complained of, and not necessary result of it, are termed special damages. *Andalon v. Superior Court (1984) 162 Cal. App. 3d 600, 613, 208 Cal. Rptr. 899*

General damages include physical pain, fright, nervousness, grief, anxiety, worry, mortification, humiliation, indignity, embarrassment, apprehension, terror, or ordeal, and mental suffering. *Niles v. City of San Rafael (1974) 42 Cal. App. 3d 230, 244, 116 Cal. Rptr. 733*

Damages that necessarily result from tort are general damages and damages that are natural consequence of tort, but do not necessarily result from tort, are special damages. *Stoltz v. Converse (1946) 75 Cal. App. 2d 909, 914, 172 P.2d 78*

[9] Injury to Property

Plaintiff was able to recover for loss of use of property whether property was injured or totally destroyed. *Reynolds v. Bank of Am. (1959) 53 Cal. 2d 49, 50-51, 345 P.2d 926*

If damaged property cannot be completely repaired, measure of damages is difference between value before injury and value after repairs have been made plus reasonable cost of making repairs. *Merchant Shippers Ass'n v. Kellogg Express & Draying Co. (1946) 28 Cal. 2d 594, 600, 170 P.2d 923*

Plaintiff whose real property has been injured is able to recover for loss of use of property during repair. *Linforth v. San Francisco Gas & Elec. Co. (1909) 156 Cal. 58, 62, 103 P. 320*

Recovery for unjust enrichment is inappropriate when plaintiff can obtain full redress for loss of profits under action for interference with contractual relations. *Ramona Manor Convalescent Hosp. v. Care Enters. (1986) 177 Cal. App. 3d 1120, 1140, 225 Cal. Rptr. 120*

Damages recoverable for destroyed real property are measured by value at time of destruction. *Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 48-49, 162 Cal. Rptr. 238*

Where defendants repudiated joint venture agreement and appropriated joint venture property to their own use and benefit, court properly determined fair market value of property and price at which property could have been sold in order to determine profits lost by plaintiffs as result of defendants' actions. *Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 571-572, 140 Cal. Rptr. 330*

Plaintiff is able to recover for loss of use of injured personal property. *Story v. Gateway Chevrolet Co. (1965) 237 Cal. App. 2d 705, 709, 47 Cal. Rptr. 267*

Where defendant has wrongfully injured personal property of plaintiff, plaintiff is able to recover difference between

market value of property immediately before and immediately after injury or reasonable cost of repair if cost is less than depreciation in value. *Smith v. Hill (1965) 237 Cal. App. 2d 374, 388, 47 Cal. Rptr. 49*

No fixed rule exists for determining measure of damages for injury to or destruction of real property; formula most appropriate to compensate injured party for loss sustained in particular case is rule that will be adopted. *Basin Oil Co. v. Baash-Ross Tool Co. (1954) 125 Cal. App. 2d 578, 606, 271 P.2d 122*

Measure of damages for destruction of personal property is reasonable market value of property at time of destruction and not cost of property nor money expended in replacing it. *Lane v. Spurgeon (1950) 100 Cal. App. 2d 460, 463, 223 P.2d 889* ; *Tatone v. Chin Bing (1936) 12 Cal. App. 2d 543, 544, 55 P.2d 933*

[10] Interest

Prejudgment interest under *Civ. Code § 3291* (interest from date of first rejected settlement offer under *Code Civ. Proc. § 998*) are available for both compensatory and punitive damages. *Greenfield v. Spectrum Inv. Corp. (1985) 174 Cal. App. 3d 111, 124, 219 Cal. Rptr. 805*

Neither *Civ. Code § 3291* (judgment bears 10-percent rate of interest from date of first rejected settlement offer under *Code Civ. Proc. § 998*) nor *Code Civ. Proc. § 685.010(a)* (judgment bears 10 percent rate of interest from date judgment rendered) violates of *Cal. Const. art. XV, § 1*, because sections are not applied cumulatively to give 20 percent rate of interest, but are applied separately or conjunctively to permit recovery of no more than 10 percent rate of interest. *Mendez v. Kurten (1985) 170 Cal. App. 3d 481, 487, 215 Cal. Rptr. 924*

State of California is obligated by *Cal. Const. art. XV, § 1*, to pay interest on judgment obtained against it in tort action. *Harland v. State of California (1979) 99 Cal. App. 3d 839, 841, 160 Cal. Rptr. 613* ; *see Straughter v. State of California (1980) 108 Cal. App. 3d 412, 414-415, 169 Cal. Rptr. 471*

[11] Interest as Damages

Award of prejudgment interest from date of unauthorized withdrawal of funds from bank by coexecutor of estate was proper under *Civ. Code § 3288* in action against bank to recover funds misappropriated from account by coexecutor. *Bullis v. Security Pac. Nat'l Bank (1978) 21 Cal. 3d 801, 813-815, 148 Cal. Rptr. 22, 582 P.2d 109*

Plaintiff is entitled to recover prejudgment interest under *Civ. Code § 3288* either for breach of obligation not arising from contract or for oppression, fraud, or malice; award of prejudgment interest is permitted even if plaintiff's damages are not liquidated. *Bullis v. Security Pac. Nat'l Bank (1978) 21 Cal. 3d 801, 814, 148 Cal. Rptr. 22, 582 P.2d 109* (plaintiff need not prove both breach of noncontractual obligation and oppression, fraud, or malice)

In judgment against some joint tortfeasors after good faith settlement with other joint tortfeasors, prejudgment interest against nonsettling tortfeasors was computed from date of filing of complaint to date of settlement on total judgment amount, and after date of settlement on amount of total judgment minus settlement sum paid. *Newby v. Vroman (1992) 11 Cal. App. 4th 283, 287-290, 14 Cal. Rptr. 2d 44*

Trial court had power to award prejudgment interest under *Civ. Code § 3288* for certain sums awarded against sole majority shareholder who breached fiduciary duties even though those sums were unliquidated. *Baker v. Pratt (1986) 176 Cal. App. 3d 370, 377-380, 222 Cal. Rptr. 253*

Civ. Code § 3291 (interest from date of first rejected settlement offer under *Code Civ. Proc. § 998*) is inapplicable to arbitration proceedings. *Woodard v. Southern Cal. Permanente Med. Group (1985) 171 Cal. App. 3d 656, 666, 217*

Cal. Rptr. 514

Prejudgment interest allowed by *Civ. Code § 3291* is not considered itself to be in nature of damages. *Mendez v. Kurten (1985) 170 Cal. App. 3d 481, 486, 215 Cal. Rptr. 924*

In action for breach of contract and fraud, in which plaintiff recovered pursuant to liquidated damages clause which provided for payment of interest from date of breach, trial court, as trier of fact, did not abuse discretion under *Civ. Code § 3288* by awarding interest from date of fraudulent inducement prior to date of breach, since judgment was based on finding of promissory fraud as well as breach of contract. *Zlotoff v. Tucker (1984) 154 Cal. App. 3d 988, 994, 201 Cal. Rptr. 692*

Civ. Code § 3291, authorizing prejudgment interest on amount of damages award exceeding first settlement offer by plaintiff, does not have retroactive application to judgments entered on or before statute's effective date of January 1, 1982. *Gutierrez v. State Ranch Servs. (1983) 150 Cal. App. 3d 83, 88, 198 Cal. Rptr. 16*

Propriety of award of interest under *Civ. Code § 3288* was properly submitted to jury in action to recover damages to aircraft caused by negligence or strict product liability of defendant. *Harsany v. Cessna Aircraft Co. (1983) 148 Cal. App. 3d 1139, 1144, 196 Cal. Rptr. 374*

Trial court's failure to award prejudgment interest under *Civ. Code § 3288* was permissible where trier of fact not shown to have abused discretion in considering circumstances of individual case. *Pepitone v. Russo (1976) 64 Cal. App. 3d 685, 690, 134 Cal. Rptr. 709*

When plaintiff deprived of money or property by defendant's fraud or breach of fiduciary duty and therefore obliged to resort to litigation to recover it, inclusion of interest in award of damages is necessary to make plaintiff whole. *Nordahl v. Department of Real Estate (1975) 48 Cal. App. 3d 657, 665, 121 Cal. Rptr. 794*

Civ. Code § 3288, allowing interest as damages, recognizes fact that one of elements of direct loss by person deprived of use of money or other property is value of its use in form of interest at legal rate. *Nordahl v. Department of Real Estate (1975) 48 Cal. App. 3d 657, 666, 121 Cal. Rptr. 794*

Civ. Code § 3288 authorizes interest in fraud actions at discretion of trier of fact. *Greenfield v. Insurance Inc. (1971) 19 Cal. App. 3d 803, 813, 97 Cal. Rptr. 164*

[12] Measure of Damages

Civ. Code § 3333 (measure of tort damages as detriment proximately caused by tort) does not authorize attorney's fees as element of compensatory damages awarded in judgment against fiduciary based on finding of fraud; "third-party tort" exception (attorney's fees incurred in prior action involving third party that was caused by tort deemed recoverable in later action against tortious party) is not applicable; *Pederson v. Kennedy (1982) 128 Cal. App. 3d 976, 978-980, 180 Cal. Rptr. 740*

Purpose of *Civ. Code § 3333* (measure of tort damages as detriment proximately caused by tort) is to make successful plaintiff whole. *Overgaard v. Johnson (1977) 68 Cal. App. 3d 821, 824, 137 Cal. Rptr. 412*

Motion for leave to amend personal injury complaint to increase general damages allegation and prayer was properly granted when full nature and extent of plaintiff's injuries not known at time complaint filed but injuries subsequently became known together with medical recommendations for treatment. *Campain v. Safeway Stores, Inc. (1972) 29 Cal. App. 3d 362, 365, 104 Cal. Rptr. 752*

Damages under *Civ. Code § 3333* are limited to those damages proximately caused by tort forming basis of action. *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co. (1970) 9 Cal. App. 3d 508, 528, 88 Cal. Rptr. 246*

Trial court did not abuse its discretion in permitting plaintiff in malpractice action to amend complaint to change date of termination of treatments by defendant physician. *Burford v. Baker (1942) 53 Cal. App. 2d 301, 309, 127 P.2d 941*

[13] Mitigation of Damages

In action for wrongful birth, mother, whether married or unmarried, is not required to undergo abortion or place unwanted child up for adoption in order to mitigate damages. *Morris v. Frudenfeld (1982) 135 Cal. App. 3d 23, 30-32, 185 Cal. Rptr. 76*

[14] Notification of Damages Amount

Default judgment was properly set aside when plaintiff failed to serve statement of damages before entry of clerk's default in compliance with *Code Civ. Proc. § 425.11*; complaint requesting unspecified general and special damages and $100,000 in punitive damages did not provide adequate notice of total amount of damages sought. *Hamm v. Elkin (1987) 196 Cal. App. 3d 1343, 1346, 242 Cal. Rptr. 545*

Purpose of *Code Civ. Proc. § 425.11* is to give notice of damages claim, and that notice is required to be reasonable to be effective. *Connelly v. Castillo (1987) 190 Cal. App. 3d 1583, 1588-1590, 236 Cal. Rptr. 112*

Default judgment for trespass, assault, conversion, intentional infliction of emotional distress, and wrongful repossession was properly set aside when plaintiff had failed to inform defendant of amount of damages sought were required by *Code Civ. Proc. § 425.11*; nonpersonal injury claims as so closely tied to personal injury claims as to require *Code Civ. Proc. § 425.11* disclosure for all causes of action. *Jones v. Interstate Recovery Serv. (1984) 160 Cal. App. 3d 925, 929-930, 206 Cal. Rptr. 924*

Default judgment was improper when defendant was never notified of amount of damages, as required by *Code Civ. Proc. § 425.11*. *Petty v. Manpower, Inc. (1979) 94 Cal. App. 3d 794, 797, 798, 156 Cal. Rptr. 622* (holding that default judgment was erroneously entered on personal injury complaint in which there was no designation of amout of damages in compliance with *Code Civ. Proc. § 425.10*, and when defendant was not thereafter notified of amount of damages sought)

[15] Pleading Basis for Award

In legal malpractice action against attorney and his law firm, punitive damages allegation devoid of any factual assertions supporting conclusion that attorney acted with oppression, fraud, or malice, is subject to motion to strike. *Smith v. Superior Court (1992) 10 Cal. App. 4th 1033, 1041-1042, 13 Cal. Rptr. 2d 133*

In tenant's action for negligence of landlords, complaint pleads malice sufficient to support award of punitive damages if it alleges facts showing landlords' lengthy awareness of conditions dangerous to tenants, their ability to take curative measures, and their failure to do so. *Penner v. Falk (1984) 153 Cal. App. 3d 858, 867, 200 Cal. Rptr. 661*

Complaint sufficiently stated malicious act punishable by assessment of punitive damages by alleging that defendants intentionally dusted their own crops in way that they knew or should have known would result in high probability of harm to others. *SKF Farms v. Superior Court (1984) 153 Cal. App. 3d 902, 906-907, 200 Cal. Rptr. 497*

Language in complaint that defendant acted "wrongfully and intentionally" or that defendant is guilty of "oppression, fraud, and malice" properly pleads claim for punitive damages if sufficient facts are also alleged. *Perkins v. Superior Court (1981) 117 Cal. App. 3d 1, 6-7, 172 Cal. Rptr. 427*

To support award of punitive damages, complaint must plead ultimate facts of defendant's oppression, fraud, or malice. *Cyrus v. Haveson (1976) 65 Cal. App. 3d 306, 316-317, 135 Cal. Rptr. 246*

If body of complaint sets forth facts supporting award of punitive damages, failure to expressly mention punitive damages in prayer of complaint does not preclude award. *Weiss v. Blumencranc (1976) 61 Cal. App. 3d 536, 544, 131 Cal. Rptr. 298*

If malice is basis of award of punitive damages and if plaintiff alleges intentional wrong, prayer for exemplary damages may be supported by pleading that wrong was committed willfully or with design to injure. *G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 29, 122 Cal. Rptr. 218*

In pleading grounds for exemplary damages where nondeliberate tort is involved, allegation that defendant acted in conscious disregard of safety of others properly describes animus malus which may justify punitive damages award. *G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 32, 122 Cal. Rptr. 218*

[16] Proof of Damages

Tortiously injured plaintiff is entitled to be compensated for harm and must establish by proof extent of harm and amount of money representing adequate compensation; law does not require proof with certainty if plaintiff's inability to prove damages is due to defendant's actions. *Clemente v. State of California (1985) 40 Cal. 3d 202, 218-220, 219 Cal. Rptr. 445, 707 P.2d 818*

"Day-in-the-life" videotape admissible to show extent of damages to plaintiff. *Jones v. City of Los Angeles (1993) 20 Cal. App. 4th 436, 439-446, 24 Cal. Rptr. 2d 528* (also discussing probative value and admissibility generally)

[17] Punitive Damages

[a] Actual Damages Required

Punitive damages award reversed when jury specifically decided to award no compensatory damages. *California v. Altus Finances S.A. (9th Cir. 2008) 540 F.3d 992, 1002*

Punitive damages not recoverable unless actual damages suffered. *Mother Cobb's Chicken Turnovers, Inc. v. Fox (1937) 10 Cal. 2d 203, 205, 73 P.2d 1185* ; *Esparza v. Specht (1976) 55 Cal. App. 3d 1, 6, 127 Cal. Rptr. 493*

Although punitive damages are not precluded as matter of law in asbestos litigation, neither market-share rule of liability, nor fraud-on-the-market doctrine, can be basis for liability in asbestos personal injury litigation. *Stevens v. Owens-Corning Fiberglas Corp. (1996) 49 Cal. App. 4th 1645, 1668, 57 Cal. Rptr. 2d 525*

Award of punitive damages precluded due to lack of actual damages only when plaintiff has *sustained* no actual damage; fact that plaintiff was *awarded* no actual damages not preclusive. *Tan Jay Int'l, Ltd. v. Canadian Indem. Co. (1988) 198 Cal. App. 3d 695, 706, 709, 243 Cal. Rptr. 907*

Punitive damages recoverable if claimant proves actual damage due to alleged misconduct, even if there is no award, or

nominal award, of compensatory damages. *Carr v. Progressive Cas. Ins. Co. (1984) 152 Cal. App. 3d 881, 892, 199 Cal. Rptr. 835*

Plaintiff entitled to recover punitive damages when nominal damages are awarded. *Civic W. Corp. v. Zila Indus., Inc. (1977) 66 Cal. App. 3d 1, 18, 19, 135 Cal. Rptr. 915*

To justify award of punitive damages, plaintiff must be shown to have suffered actual damages even though monetary award is not made for wrong suffered. *Weiss v. Blumencranc (1976) 61 Cal. App. 3d 536, 543, 131 Cal. Rptr. 298* ; *Esparza v. Specht (1976) 55 Cal. App. 3d 1, 6, 127 Cal. Rptr. 493*

[b] Bad Faith by Insurer

Punitive damages recoverable in addition to compensatory damages in action against insurer for breach of duty of good faith and fair dealing if plaintiff has shown that defendant has acted with oppression, fraud, or malice. *Downey Sav. & Loan Ass'n v. Ohio Casualty Ins. Co. (1987) 189 Cal. App. 3d 1072, 1096-1097, 234 Cal. Rptr. 835* ; *Delos v. Farmers Group Inc. (1979) 93 Cal. App. 3d 642, 656-657, 155 Cal. Rptr. 843* ; *Merlo v. Standard Life & Accident Ins. Co. (1976) 59 Cal. App. 3d 5, 20, 130 Cal. Rptr. 416*

In bad faith action, evidence that insurer violated its duty of good faith and fair dealing did not establish that it acted with requisite intent to justify award of punitive damages; insurer's unreasonable actions did not necessarily constituting malice. *Travelers Ins. Co. v. Lesher (1986) 187 Cal. App. 3d 169, 200, 231 Cal. Rptr. 791 , disapproved on other grounds, Buss v. Superior Court (1997) 16 Cal. 4th 35, 65 Cal. Rptr. 2d 366, 939 P.2d 766*

Award of punitive damages proper in action against insurer for breach of covenant of good faith and fair dealing when insurer unreasonably and deliberately terminated and then delayed resumption of disability payments in disregard of plaintiff's established eligibility. *Pistorius v. Prudential Ins. Co. (1981) 123 Cal. App. 3d 541, 552-553, 176 Cal. Rptr. 660*

Punitive damage award of $150,000 against insurer for breach of implied covenant of good faith and fair dealing proper when insurer never informed insured of settlement offer, never allowed insured to contribute towards possible settlement, and exposed insured to damages of $11,000 when his claim could have been compromised for half that amount. *Miller v. Elite Ins. Co. (1980) 100 Cal. App. 3d 739, 758, 161 Cal. Rptr. 322*

Punitive damages awarded against insurer for bad-faith refusal of uninsured motorist coverage. *Delos v. Farmers Group Inc. (1979) 93 Cal. App. 3d 642, 657-658, 155 Cal. Rptr. 843*

Insured entitled to recover punitive damages when insurer makes fraudulent misrepresentations to him or her. *Miller v. National Am. Life Ins. Co. (1976) 54 Cal. App. 3d 331, 338, 126 Cal. Rptr. 731* ; *Wetherbee v. United Ins. Co. of Am. (1971) 18 Cal. App. 3d 266, 269, 95 Cal. Rptr. 678*

[c] Discretion to Award

Jury determines both award and amount of award of punitive damages. *Weisenburg v. Molina (1976) 58 Cal. App. 3d 478, 490, 129 Cal. Rptr. 813*

Granting or withholding of award of punitive damages is wholly within discretion of trier of fact. *Sullivan v. Matt (1955) 130 Cal. App. 2d 134, 143-144, 278 P.2d 499*

Jury properly concluded that defendant had been punished enough by conviction and payment of fine and accordingly

did not award punitive damages. *Browand v. Scott Lumber Co. (1954) 125 Cal. App. 2d 68, 74-75, 269 P.2d 891*

[d] Effect of Prior Class Action Settlement

Plaintiff, who had previously opted out of class action suit against corporate defendant, not barred by prior settlement in class action from recovering punitive damages against same defendant. *Lemer v. Boise Cascade, Inc. (1980) 107 Cal. App. 3d 1, 7-9, 165 Cal. Rptr. 555* (fraud in sale of real estate)

[e] Election Between Punitive and Treble Damages

Imposition of statutory treble damages for particular wrongful act did not preclude award of punitive damages in tort action when necessary malice and oppression shown. *Marshall v. Brown (1983) 141 Cal. App. 3d 408, 418, 190 Cal. Rptr. 392*

[f] Fraud

Fraud alone is adequate ground for awarding punitive damages. *Orient Handel v. United States Fid. & Guar. Co. (1987) 192 Cal. App. 3d 684, 697, 237 Cal. Rptr. 667* (punitive damages award reversed because finding of fraud reversed)

[g] Insurance Coverage

Absent applicable and enforceable choice-of-law provision in policy, California public policy against indemnifying punitive damages applicable to out-of-state insured if insured risk is located in California; insurer not required to indemnify Wisconsin manufacturer for punitive damages awarded for personal injuries caused by exploding car battery made in California, sold to California retailer, and purchased by California resident who was injured in California. *Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc. (1993) 14 Cal. App. 4th 637, 649*

Insurance coverage for punitive damage awards contravenes California public policy that prohibits indemnity for willful wrongs. *City Prods. Corp. v. Globe Indem. Co. (1979) 88 Cal. App. 3d 31, 36-42, 151 Cal. Rptr. 494* ; *see Ins. Code § 533*

[h] Nature and Purpose

Law does not favor punitive damages; punitive damages properly granted with greatest caution. *Dyna-Med, Inc. v. Fair Employment & Hous. Comm'n (1987) 43 Cal. 3d 1379, 1392, 241 Cal. Rptr. 67, 743 P.2d 1323*

Punitive damages by definition intended not to compensate injured party, but rather to punish tortfeasor whose wrongful action was intentional or malicious, and to deter tortfeasor and others from similar extreme conduct. *Dyna-Med, Inc. v. Fair Employment & Hous. Comm'n (1987) 43 Cal. 3d 1379, 1387, 241 Cal. Rptr. 67, 743 P.2d 1323*

Primary purpose of punitive damages is to deter wrongdoers and others from repeating wrongful conduct in future. *Peterson v. Superior Court (1982) 31 Cal. 3d 147, 155, 181 Cal. Rptr. 784, 642 P.2d 1305*

Deterrence is one function of punitive damages; function not served by award that exceeds level necessary properly to punish and deter in light of defendant's wealth and gravity of particular act. *Goshgarian v. George (1984) 161 Cal. App. 3d 1214, 1226-1227, 208 Cal. Rptr. 321* (amount of punitive damages reduced on appeal due to jury passion and

prejudice)

Punitive damages awarded to punish and deter sufficiently culpable conduct. *Ford Motor Co. v. Home Ins. Co. (1981) 116 Cal. App. 3d 374, 380, 172 Cal. Rptr. 59*

Punitive damages awarded to punish wrongdoer and make example of him or her, while compensatory damages awarded to compensate injured party for his or her injury. *Merlo v. Standard Life & Accident Ins. Co. (1976) 59 Cal. App. 3d 5, 20, 130 Cal. Rptr. 416*

[i] Nonintentional Torts

Nonintentional torts form basis for punitive damages if conduct constituted conscious disregard of rights or safety of others; nonintentional conduct is within definition of malicious acts punishable by assessment of punitive damages if party intentionally performed act from which he or she knew, or should have known, it was highly probable that harm would result. *Peterson v. Superior Court (1982) 31 Cal. 3d 147, 158, 181 Cal. Rptr. 784, 642 P.2d 1305* ; *Slaughter v. Legal Process & Courier Serv. (1984) 162 Cal. App. 3d 1236, 1252, 209 Cal. Rptr. 189*

Com. Code § 4402 precludes award of punitive damages for bank's negligent dishonor of check. *Lee v. Bank of Am. (1990) 218 Cal. App. 3d 914, 920, 267 Cal. Rptr. 387* .

Violation of National Marine Fisheries Service regulation, enforcement of which had been suspended by Service pending reconsideration of its appropriateness, was not conscious disregard of safety of others sufficient to support punitive damages. *Da Silva v. Pacific King, Inc. (1987) 195 Cal. App. 3d 1, 7, 240 Cal. Rptr. 395*

[j] Protective Evidentiary Orders

Civ. Code § 3295 does not preclude discovery of defendant's financial records if information sought is fundamental to case and is only way plaintiff can prove case; protective order limiting access to financial information under *Civ. Code § 3295* available if only reason for seeking that information is to give tactical edge to party obtaining discovery in form of pressure in settlement negotiations. *Rawnsley v. Superior Court (1986) 183 Cal. App. 3d 86, 91, 227 Cal. Rptr. 806*

[k] Public Entities

Recovery of punitive damages by public entity constitutional, and not precluded by *Civ. Code § 3294(a)* (rejecting contrary reasoning of *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 244 Cal. Rptr. 507*). *Westlands Water Dist. v. Amoco Chemical Co. (9th Cir. 1991) 953 F.2d 1109, 1111-1113* ; *City of Glendale v. Superior Court (2002) 95 Cal. App. 4th 1266, 1270-1272, 116 Cal. Rptr. 2d 16* ; *City of Sanger v. Superior Court (1992) 8 Cal. App. 4th 444, 448-451, 10 Cal. Rptr. 2d 436*

Punitive damages recoverable neither from nor by public entity; reasons for rule. *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1023-1026, 244 Cal. Rptr. 507*

[l] Reasonable Relation to Actual Damages

Punitive damages must bear reasonable relationship to actual damages. *Liodas v. Sahadi (1977) 19 Cal. 3d 278, 284, 137 Cal. Rptr. 635, 562 P.2d 316*

Punitive damages reduced to $1.5 million when compensatory damages were just in excess of $1.5 million, most of which was for emotional distress caused when insurance company refused to tender defense of claim. *Walker v. Farmers Ins. Exchange (2007) 153 Cal. App. 4th 965, 974, 63 Cal. Rptr. 3d 507*

1 to 1 ratio of punitive to compensatory damages was appropriate when harm was entirely economic in nature and involved business fraud perpetrated by fiduciary against experienced business, rather than against vulnerable victim, and substantial compensatory damages awarded were largely restitution. *Jet Source Charter, Inc. v. Doherty (2007) 148 Cal. App. 4th 1, 11, 55 Cal. Rptr. 3d 176*

Because no special justification existed, court adopted ratio of punitive-to-compensatory damages of just under 10-to-1, in case with compensatory damages award of approximately $18,000, in imposing punitive damages against large car manufacturer for policies designed to avoid lemon laws. *Johnson v. Ford Motor Co. (2005) 135 Cal. App. 4th 137, 149-150, 37 Cal. Rptr. 3d 283*

Punitive damages reduced on appeal to $360,000 in case in which compensatory damages were approximately *$90,000. Textron Fin. Corp. v. Nat'l Union Fire Ins. Co. (2004) 118 Cal. App. 4th 1061, 1083-1085 13 Cal. Rptr. 3d 586*

Punitive damages award that was 70 times award of compensatory damages was not excessive when award was only five percent of defendant's net worth. *Weeks v. Baker & McKenzie (1998) 63 Cal. App. 4th 1128, 1166, 74 Cal. Rptr. 2d 510*

In bad faith insurance action brought by financial institution, punitive damages equal to 32 times award of compensatory damages are not unreasonable as matter of law; fact that plaintiff was solvent corporation with substantial assets belied defendant's contention that award was result of passion and prejudice. *Downey Sav. & Loan Ass'n v. Ohio Casualty Ins. Co. (1987) 189 Cal. App. 3d 1072, 1099, 234 Cal. Rptr. 835*

Trial court reduction of punitive damages award of $5 million to $1 million was proper based on court's conclusion that punitive damages award was too great in relation to compensatory damages award of $100,000 and in relation to defendant's net income. *Sprague v. Equifax, Inc. (1985) 166 Cal. App. 3d 1012, 1052, 213 Cal. Rptr. 69*

No fixed ratio determines reasonable relationship between punitive damages and damages actually suffered; calculation of punitive damages involves fluid mathematical process depending on nature of acts, effect on parties, and worth of defendant; punitive damages 27 times compensatory damages was not unreasonable as matter of law. *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc. (1984) 155 Cal. App. 3d 381, 390, 202 Cal. Rptr. 204*

Award of punitive damages unsupportable when disproportionately high in relation to compensatory damages and harm suffered, even though underlying act was reprehensible. *Burnett v. National Enquirer, Inc. (1983) 144 Cal. App. 3d 991, 1011, 193 Cal. Rptr. 206*

Punitive damages award excessive when it does not reasonably relate to either compensatory damages or nature of defendant's conduct, and when it is so grossly disproportionate as to be indicative of passion and prejudice on part of jury. *Rosener v. Sears, Roebuck & Co. (1980) 110 Cal. App. 3d 740, 749-754, 168 Cal. Rptr. 237*

Award of punitive damages reversed or reduced when ratio between punitive and actual damages is grossly disproportionate. *Little v. Stuyvesant Life Ins. Co. (1977) 67 Cal. App. 3d 451, 469-470, 136 Cal. Rptr. 653*

Reasonable relationship between actual and punitive damages involves more than simple mathematical comparison between two amounts. *Zhadan v. Downtown L.A. Motors (1976) 66 Cal. App. 3d 481, 499, 136 Cal. Rptr. 132*

[m] Relevant Factors in Awarding Punitive Damages

Either defendant's net worth or profit gained by defendant's misconduct was appropriate measure of defendant's financial condition in awarding punitive damages. *Adams v. Murakami (1991) 54 Cal. 3d 105, 116 n.7, 284 Cal. Rptr. 318, 813 P.2d 1348* ; *Cummings Med. Corp. v. Occupational Med. Corp. (1992) 10 Cal. App. 4th 1291, 1299-1300, 13 Cal. Rptr. 2d 585*

Award of exemplary damages must be based on sufficient evidence of defendant's financial condition to provide reviewing court with basis for determining whether award is excessive. *Adams v. Murakami (1991) 54 Cal. 3d 105, 108-110, 116, 284 Cal. Rptr. 318, 813 P. 2d 1348*

In action in which punitive damages are sought, defendant's financial condition is discoverable and relevant to such issues as "punishment" of defendant. *Coy v. Superior Court (1962) 58 Cal. 2d 210, 223, 23 Cal. Rptr. 393, 373 P.2d 457* (prior law)

In notorious case involving sports celebrity found civilly liable for violently killing his former wife and her friend, punitive damages totaling $25 million were not excessive, even though amount exceeded current net worth, in light of heinousness of conduct, evidence that defendant was wealthy man with prospects to gain more wealth in future, and fact that defendant had pension funds worth $4.1 million that were exempt from execution to pay damages award, guaranteeing that he would continue to enjoy comfortable living. *Rufo v. Simpson (2001) 86 Cal. App. 4th 573, 624-625, 103 Cal. Rptr. 2d 492*

Punitive damages award amounting to 28 percent of net worth was excessive; 10 percent of net worth is usual maximum award. *Michelson v. Hamada (1994) 29 Cal. App. 4th 1566, 1596, 36 Cal. Rptr. 2d 343*

Evidence of defendant's net profits and part-time earnings was inadequate proof of defendant's financial condition for purposes of supporting award of punitive damages. *Lara v. Cadag (1993) 13 Cal. App. 4th 1061, 1063-1066, 16 Cal. Rptr. 2d 811*

If defendant's misconduct did not result in monetary gain, evidence of defendant's income from net profits and part-time earnings insufficient to allow reviewing court to determine whether punitive damages award is excessive; net income, standing alone, is inadequate evidence of defendant's financial condition. *Lara v. Cadag (1993) 13 Cal. App. 4th 1061, 1063-1066, 16 Cal. Rptr. 2d 811*

Guiding factors in awarding punitive damages include nature of defendant's acts in light of whole record, amount of compensatory damages awarded, and wealth of particular defendant. *Goshgarian v. George (1984) 161 Cal. App. 3d 1214, 1226-1227* (amount of punitive damages reduced on appeal due to jury passion and prejudice)

Punitive damages award of 10 percent of defendant's net worth was reasonable compromise between punishment and leniency; mere fact that punitive damages awarded equaled 10 percent of tortfeasor's net worth was not of itself grounds for reversal because excessive. *Goshgarian v. George (1984) 161 Cal. App. 3d 1214, 1227-1228, 208 Cal. Rptr. 321* (amount of punitive damages reduced on appeal due to jury passion and prejudice)

Toleration level for damages is not different for business and individual in percentage of net worth. *Goshgarian v. George (1984) 161 Cal. App. 3d 1214, 1228, 208 Cal. Rptr. 321* (amount of punitive damages reduced on appeal due to jury passion and prejudice)

Net income of corporation for purposes of determining punitive damages includes dividends, but excludes federal income taxes. *Moore v. American United Life Ins. Co. (1984) 150 Cal. App. 3d 610, 637, 197 Cal. Rptr. 878*

Factors determining amount of punitive damages are: (1) particular nature of defendant's acts in light of whole record; (2) amount of compensatory damages awarded; and (3) wealth of particular defendant; in libel action, award was excessive because amount constituted 35 percent of defendant's net worth and half its net income for period under consideration. *Burnett v. National Enquirer, Inc. (1983) 144 Cal. App. 3d 991, 1011, 193 Cal. Rptr. 206*

Nature of defendant's acts in light of record, amount of compensatory damages, and wealth of defendant are proper considerations in determining amount of punitive damages award. *Pistorius v. Prudential Ins. Co. (1981) 123 Cal. App. 3d 541, 554, 176 Cal. Rptr. 660*

To accomplish punitive and deterrent purpose of punitive damages, award must be assessed against party actually responsible for wrong, and amount of award must be related to wealth of responsible party. *Ford Motor Co. v. Home Ins. Co. (1981) 116 Cal. App. 3d 374, 380, 172 Cal. Rptr. 59*

Jury award of $5,260 compensatory damages and $90,000 punitive damages for violations of Business and Professions Code provisions which are designed to protect consumers from unauthorized and shoddy automobile repairs was not excessive because (1) award was less that 7 percent of defendant's net worth, (2) important public policy of consumer protection was effectuated, and (3) there is no set ratio between actual and punitive damages. *Zhadan v. Downtown L.A. Motors Distribs., Inc. (1979) 100 Cal. App. 3d 821, 835-837, 161 Cal. Rptr. 225* (appeal from new trial granted in *Zhadan v. Downtown L.A. Motors (1976) 66 Cal. App. 3d 481, 136 Cal. Rptr. 132*)

Remittitur of $4 million punitive damages award was proper due to likelihood of several jury-imposed punitive damage awards, each of which would be sufficient to punish in entirety for misconduct involved. *Delos v. Farmers Group Inc. (1979) 93 Cal. App. 3d 642, 667, 155 Cal. Rptr. 843*

Importance of policy violated by defendant's conduct, and degree and extent, both qualitatively and quantitatively, of violation are considered in awarding punitive damages. *Zhadan v. Downtown L.A. Motors (1976) 66 Cal. App. 3d 481, 499, 136 Cal. Rptr. 132*

Because primary purpose of punitive damages is to punish defendant and make example of defendant, award of punitive damages must be larger when defendant is wealthy and smaller when defendant is poorer. *Merlo v. Standard Life & Accident Ins. Co. (1976) 59 Cal. App. 3d 5, 18, 130 Cal. Rptr. 416*

[n] Review of Award

In reviewing award of punitive damages, appellate court must apply substantial evidence test, reviewing record in light most favorable to judgment. *Travelers Ins. Co. v. Lesher (1986) 187 Cal. App. 3d 169, 200, 231 Cal. Rptr. 791 , disapproved on other grounds, Buss v. Superior Court (1997) 16 Cal. 4th 35, 65 Cal. Rptr. 2d 366, 939 P.2d 766*

[o] Showing of Oppression, Fraud, or Malice

Rule of Taylor v. Superior Court (1979) 24 Cal. 3d 890, 892, 157 Cal. Rptr. 693, 598 P.2d 854 , that punitive damages are recoverable from intoxicated driver who causes personal injuries, applies retroactively to accidents that occurred and complaints that were filed prior to judicial decision establishing rule. *Peterson v. Superior Court (1982) 31 Cal. 3d 147, 150, 152-158, 181 Cal. Rptr. 784, 642 P.2d 1305* (disapproving *Mau v. Superior Court (1980) 101 Cal. App. 3d 875, 161 Cal. Rptr. 895* ; decided prior to 1987 amendment of *Civ. Code § 3294*)

Elements of punitive damages can be proven directly or by implication. *Colonial Life & Accident Ins. Co. v. Superior Court (1982) 31 Cal. 3d 785, 792, 183 Cal. Rptr. 810, 647 P.2d 86* (pattern of unfair settlement practices by

insurer may establish elements of punitive damages; decided prior to 1987 amendment of *Civ. Code § 3294*)

Punitive damages are recoverable from intoxicated automobile driver since person who voluntarily drinks to point of intoxication knowing he or she must drive motor vehicle demonstrates such conscious and deliberate disregard of others that his or her conduct is willful or wanton. *Taylor v. Superior Court (1979) 24 Cal. 3d 890, 892, 157 Cal. Rptr. 693, 598 P.2d 854* (decided before 1987 amendment of *Civ. Code § 3294*)

Under provisions of *Civ. Code § 3294*, permitting award of punitive damages, showing of oppression, fraud, or malice is required for award of punitive damages. *Silberg v. California Life Ins. Co. (1974) 11 Cal. 3d 452, 462, 113 Cal. Rptr. 711, 521 P.2d 1103* ; *Mason v. Mercury Cas. Co. (1976) 64 Cal. App. 3d 471, 474, 134 Cal. Rptr. 545*

Sexual harassment is conduct that subjects person to cruel and unjust hardship in conscious disregard of that person's rights, and therefore is sufficient to support punitive damages allegations. *Fisher v. San Pedro Peninsula Hosp. (1989) 214 Cal. App. 3d 590, 621, 262 Cal. Rptr. 842* (court reversed dismissal of complaint and remanded to permit plaintiffs to amend complaint)

Evidence of defendant's litigation conduct and plaintiff's attorney's fees is irrelevant to proving defendant's state of mind for award of punitive damages. *Palmer v. Ted Stevens Honda, Inc. (1987) 193 Cal. App. 3d 530, 540, 238 Cal. Rptr. 363* (decided prior to 1987 amendment of *Civ. Code § 3294*)

To support award of punitive damages for malice under *Civ. Code § 3294(c)(1)* on basis of conscious disregard for safety of others, plaintiff must establish that defendant was aware of probable dangerous consequences of his or her conduct, yet willfully and deliberately failed to avoid those consequences. *Travelers Ins. Co. v. Lesher (1986) 187 Cal. App. 3d 169, 200, 231 Cal. Rptr. 791* (decided prior to 1987 amendment of *Civ. Code § 3294*), *disapproved on other grounds, Buss v. Superior Court (1997) 16 Cal. 4th 35, 65 Cal. Rptr. 2d 366, 939 P.2d 766* ; *Penner v. Falk (1984) 153 Cal. App. 3d 858, 867, 200 Cal. Rptr. 661* (decided prior to 1987 amendment of *Civ. Code § 3294*)

Title insurance company was not liable for punitive damages for negligently disbursing funds in breach of fiduciary duty when evidence failed to show conscious disregard for plaintiff's rights. *Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co. (1986) 185 Cal. App. 3d 1149, 1153-1155, 230 Cal. Rptr. 276* (decided prior to 1987 amendment of *Civ. Code § 3294*)

Proof that tort was maliciously perpetrated does not require establishment of specific intent to injure person wronged. *Ramona Manor Convalescent Hosp. v. Care Enters. (1986) 177 Cal. App. 3d 1120, 1141, 225 Cal. Rptr. 120* (decided prior to 1987 amendment of *Civ. Code § 3294*)

Allegations of sexual harassment under Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*) are sufficient to plead recovery of punitive damages under *Civ. Code § 3294* when complaint alleged that employer refused to investigate or correct harassment and engaged in systematic course of retaliation. *Monge v. Superior Court (1986) 176 Cal. App. 3d 503, 510-512, 222 Cal. Rptr. 64* (decided prior to 1987 amendment of *Civ. Code § 3294*)

Manufacturer's intentional concealment of high level of formaldehyde fumes in mobilehome and its failure substantially to comply with express warranty justified award of exemplary damages on grounds of oppression, fraud, or malice. *Troensegaard v. Silvercrest Indus., Inc. (1985) 175 Cal. App. 3d 218, 226, 220 Cal. Rptr. 712* (decided prior to 1987 amendment of *Civ. Code § 3294*)

Punitive damages are not available in product liability case when sole basis of defendant's liability is based on market share theory; defendant product manufacturer is required to be actually identified as one furnishing product in order to show necessary malice, oppression, and fraud evidencing conscious disregard of rights and safety of general public and knowledge that product would cause serious injury; mere showing of defendant's share of market in production of DES

was inadequate to justify punitive damages for personal injuries of daughter of woman ingesting DES. *Magallanes v. Superior Court (1985) 167 Cal. App. 3d 878, 883-890* (decided prior to 1987 amendment of *Civ. Code § 3294*)

Plaintiff was entitled to have jury consider punitive damages claim based on substantial evidence that defendant was aware of probable dangerous consequences of its conduct in marketing product, and wilfully and deliberately failed to avoid those consequences. *Hilliard v. A.H. Robins Co. (1983) 148 Cal. App. 3d 374, 397, 196 Cal. Rptr. 117* (decid ed prior to 1987 amendment of *Civ. Code § 3294*)

In libel action, malice for purposes of determining liability is malice in law to be distinguished from malice in fact or actual malice, which is proved by evidence of evil motive and intent, and which supports punitive damages under *Civ. Code § 3294*. *Burnett v. National Enquirer, Inc. (1983) 144 Cal. App. 3d 991, 1006-1007, 193 Cal. Rptr. 206* (decided prior to 1987 amendment of *Civ. Code § 3294*)

Jury instruction that punitive damages are recoverable for defendant's fraud, malice, or oppression was proper without showing of actual fraud, when action in tort against insurance company for bad faith is proven. *Pistorius v. Prudential Ins. Co. (1981) 123 Cal. App. 3d 541, 556, 176 Cal. Rptr. 660* (decided prior to 1987 amendment of *Civ. Code § 3294*)

Conduct is sufficiently culpable to warrant assessment of punitive damages only if it involves fraud, oppression, or malice. *Ford Motor Co. v. Home Ins. Co. (1981) 116 Cal. App. 3d 374, 380, 172 Cal. Rptr. 59* (decided prior to 1987 amendment of *Civ. Code § 3294*)

[p] Unavailable in Contract Action

Punitive damages award is improper in action alleging both contract and tort violations when jury verdict is based only on contract cause of action. *Myers Bldg. Indus., Ltd., v. Interface Tech., Inc. (1993) 13 Cal. App. 4th 949, 960, 17 Cal. Rptr. 2d 242*

[q] When Awarded Against Employer of Tortfeasor

"Managing agent" of corporation for purposes of establishing entitlement to punitive damages under *Civ. Code § 3294(b)* includes only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy; mere ability of supervisory employee to hire and fire employees is not, by itself, sufficient. *White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 566-567, 88 Cal. Rptr. 2d 19, 981 P.2d 944* .

Employer was liable for punitive damages arising out of emotional distress intentionally inflicted by employee acting in managerial capacity. *Agarwal v. Johnson (1979) 25 Cal. 3d 932, 947, 160 Cal. Rptr. 141, 603 P.2d 58* (decided prior to 1980 amendment to *Civ. Code § 3294*)

Fact that tortfeasor was plaintiff's supervisor was insufficient to establish liability of corporate employer; evidence that tortfeasor had no authority to make corporate policy established that he was not "managing agent" under *Civ. Code § 3294(b)*. *Kelly-Zurian v. Wohl Shoe Co. (1994) 22 Cal. App. 4th 397, 421-422, 27 Cal. Rptr. 2d 457*

Punitive damages under *Civ. Code § 3294* are available in judicial action for sex harassment pleaded under the Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*). *Bihun v. AT&T Info. Sys., Inc. (1993) 13 Cal. App. 4th 976, 996, 16 Cal. Rptr. 2d 787 , disapproved on other grounds, Lakin v. Watkins Associated Indus. (1993) 6 Cal. 4th 644, 25 Cal. Rptr. 2d 109, 863 P.2d 179*

In sexual harassment case, evidence of defendant's sexual misconduct with other female employees was relevant to

issue of punitive damages available under *Civ. Code § 3294(b)* and not unduly prejudicial. *Bihun v. AT&T Info. Sys., Inc. (1993) 13 Cal. App. 4th 976, 996, 16 Cal. Rptr. 2d 787 , disapproved on other grounds, Lakin v. Watkins Associated Indus. (1993) 6 Cal. 4th 644, 25 Cal. Rptr. 2d 109, 863 P.2d 179*

[r] Wrongful Death Actions

Rule prohibiting recovery of punitive damages in wrongful death actions does not violate equal protection provisions of United States and California Constitutions. *Ford Motor Co. v. Superior Court (1981) 120 Cal. App. 3d 748, 751-753* ; *Georgie Boy Mfg., Inc. v. Superior Court (1981) 115 Cal. App. 3d 217, 226, 171 Cal. Rptr. 382* ; *In re Paris Air Crash (9th Cir. 1980) 622 F.2d 1315, 1318-1324*

[s] Wrongful Discharge

Trial court's sustaining demurrer of employer to employee's cause of action for punitive damages was error when employee's action based on common law cause of action for wrongful discharge on basis of retaliatory firing and not on *Lab. Code § 6312*, which provided for Labor Commissioner to maintain suit. *Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 304, 188 Cal. Rptr. 159*

[18] Taxation

Any tax benefits enjoyed by class members resulting from partnership investment are irrelevant in restitution award of damages in action based on fraudulent misrepresentation and nondisclosure to induce investment. *Danzig v. Jack Grynberg & Assocs. (1984) 161 Cal. App. 3d 1128, 1139-1140, 208 Cal. Rptr. 336*

Instruction that personal injury damages are nontaxable is given or rejected within trial court's discretion. *Fox v. Pacific Sw. Airlines (1982) 133 Cal. App. 3d 565, 571, 184 Cal. Rptr. 87*

Trial court did not err in refusing to admit evidence of future tax consequences to affect determination of awards to personal injury plaintiffs. *Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 668, 151 Cal. Rptr. 399*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesLost IncomeEarning CapacityTortsDamagesCompensatory DamagesMedical ExpensesTortsDamagesCompensatory DamagesPain & SufferingFuture Pain & SufferingTortsDamagesInterestPrejudgment InterestTortsDamagesMitigation

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Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCollateral Source RuleGeneral OverviewTortsDamagesCompensatory DamagesLost IncomeEarning CapacityTortsDamagesInterestGeneral OverviewTortsDamagesMitigationTortsDamagesPunitive DamagesGeneral Overview

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Personal Injury: Actions, Defenses, Damages, Vol. 9, *Damages*

Witkin, Summary of California Law, Vol. 6, Torts, § 1545 et seq. (10th ed. 2005)

Witkin, California Procedure, Vols. 5 and 6, *Pleading*, § 456, 457, 887, 888, 892, 893, 1113-1119, 1126-1148, Vol. 8, *Attack on Judgment in Trial Court*, § 18-20, 35-37 (4th ed. 1997)

Legal Topics:

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

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§ 177.120 State Statutes

[1] Generally

Damages must be proximately caused by breach. *Civ. Code § 3300*

Damages must be clearly ascertainable. *Civ. Code § 3301*

Method of estimating damages to property of seller or buyer. *Civ. Code §§ 3353, 3354*

Method of estimating value of written instrument. *Civ. Code § 3356*

[2] Attorney's Fees

Attorney's fees in contract actions. *Civ. Code §§ 1717, 1717.5*; *Code Civ. Proc. § 1021*

[3] Breach of Obligation to Pay Money

Damages for breach of obligation to pay money. *Civ. Code § 3302*

[4] Breach of Warranty of Agent's Authority

Damages for breach of warranty of agent's authority. *Civ. Code § 3318*

[5] Damages for Specific Actions Pertaining to Land

Liquidated damages to seller in contract for purchase and sale of real property on buyer's breach. *Civ. Code § 1675 et seq.*

Damages for breach of covenant of seisin, right to convey, warranty, or quiet enjoyment. *Civ. Code § 3304*

Damages for breach of covenant against encumbrances. *Civ. Code § 3305*

Damages for breach of agreement to convey estate in real property. *Civ. Code § 3306*

Damages for breach of agreement to execute and deliver quit-claim deed. *Civ. Code § 3306a*

Damages for breach of agreement to purchase estate in real property. *Civ. Code § 3307*

Agreement as to measure of damages for termination of lease, other than personal property lease governed by *Com. Code §§ 10101 et seq.* *Civ. Code § 3308*

Damages (trebled) for forged trust deed involving residential realty. *Code Civ. Proc. §§ 749, 749.5*

[6] Damages in Actions Involving Carriers

Damages for breach of carrier's obligation to accept passengers, freight, and messages. *Civ. Code § 3315*

Damages for breach of carrier's obligation to deliver freight. *Civ. Code § 3316*

Damages for carrier's delay in delivery of freight. *Civ. Code § 3317*

[7] Interest

Offer of payment or other performance stops accrual of interest on obligation. *Civ. Code § 1504*

Interest on amount certain or capable of being made certain. *Civ. Code § 3287(a)*

Interest in contract action on unliquidated claim. *Civ. Code § 3287(b)*

Stipulated interest on obligation after breach. *Civ. Code §§ 3289, 3289.5*

[8] Liquidated Damages

Charges for late payments on real property loan installments. *Bus. & Prof. Code § 10242.5*

Liquidated damages generally. *Civ. Code § 1671*

Liquidated damages provisions applicable under Division 2 of Commercial Code. *Com. Code § 2718*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewContracts

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§ 177.121 California Rules of Court

Inclusion of interest in judgment. *Cal. Rules of Ct., Rule 3.1802*

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§ 177.122 Decisions

[1] Breach of Contract as Tort

Breach of contract for professional career consultation is only that, not professional malpractice. *Cobler v. Stanley, Barber, Southard, Brown & Associates (1990) 217 Cal. App. 3d 518, 532, 265 Cal. Rptr. 868*

[2] Damages Not Recoverable

Action for breach of agreement to negotiate was properly dismissed when the only damages sought were lost profits, which could not be proven with reasonable certainty as required by *Civ. Code § 3301*. *Vestar Development v. General Dynamics Corporation (9th Cir. 2001) 249 F.3d 958, 961-962*

No cause of action for breach of contract is stated based on use of copyrighted work beyond scope of license agreement because any damages awarded to copyright holder on contract claim would duplicate those recoverable under copyright infringement claim. *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc. (9th Cir. 1989) 886 F.2d 1545, 1556*

Under *Civ. Code § 3294(a)*, punitive damages are not recoverable for breach of contract. *Miller v. Fairchild Industries (9th Cir. 1989) 885 F.2d 498, 510* (wrongful termination)

Damages for lost profits not recoverable for breach of contract to negotiate agreement; plaintiff cannot recover for lost expectations because there is no way of knowing what ultimate terms of agreement, if any, would have been; defendant entitled to summary judgment when it showed that plaintiff could not establish reliance damages. *Copeland v. Baskin Robbins U.S.A. (2002) 96 Cal. App. 4th 1251, 1260-1264, 117 Cal. Rptr. 2d 875*

Damages for pain and suffering or medical expenses not ordinarily available for breach of commercial contract. *Quigley v. Pet, Inc. (1984) 162 Cal. App. 3d 877, 887, 208 Cal. Rptr. 394*

[3] Emotional Distress Damages

Damages for emotional distress were improper for negligent breach of contract to construct a house, when contractor's negligence directly caused only economic injury and property damage and breached no duty independent of the contract. *Erlich v. Menezes (1999) 21 Cal. 4th 543, 548, 558-560, 87 Cal. Rptr. 2d 886, 981 P.2d 978*

Unrelated person who contracts with crematorium for services regarding decedent is entitled to recover damages for emotional distress arising out of breach of contract. *Saari v. Jongordon Corp. (1992) 5 Cal. App. 4th 797, 802-804, 7 Cal. Rptr. 2d 82*

Service contract for professional career consultation is not one for breach of which emotional distress damages may be awarded. *Cobler v. Stanley, Barber, Southard, Brown & Associates (1990) 217 Cal. App. 3d 518, 531, 265 Cal. Rptr. 868*

Damages for emotional distress were proper in action against insurance company for tortious breach of covenant of good faith and fair dealing. *Pistorius v. Prudential Insurance Co. (1981) 123 Cal. App. 3d 541, 552, 176 Cal. Rptr. 660*

Award of general damages to compensate plaintiff for insomnia and emotional distress caused by bank's breach of oral contract to obtain and maintain insurance on plaintiff's vehicles is improper. *Sawyer v. Bank of America (1978) 83 Cal. App. 3d 135, 139, 145 Cal. Rptr. 623*

Damages for emotional distress erroneously awarded for contractor's tortious breach of contract that did not cause any physical injuries but only psychological mental anguish. *Fuentes v. Perez (1977) 66 Cal. App. 3d 163, 172, 136 Cal. Rptr. 275*

[4] Exemplary Damages

In action for mortician's failure to preserve body of plaintiff's mother, exemplary damages are not recoverable because cause of action was based only on contract; however, exemplary damages might have been recoverable if cause of action had been pleaded based on fraud. *Chelini v. Nieri (1948) 32 Cal. 2d 480, 487, 196 P.2d 915*

Federal instrumentality immune from punitive damages in absence of express statutory authorization for punitive damages award. *Woodland Production Credit Assn. v. Nicholas (1988) 201 Cal. App. 3d 123, 129, 130 n.13, 251 Cal. Rptr. 791* (federally chartered farm credit association; plaintiff prevailed on causes of action for breach of contract and negligent interference with prospective business advantage)

In action by insurance agency corporation against insurer based on commissions dispute, asserting breach of covenant of good faith and fair dealing and breach of contract, punitive damages award reversed because jury was inadequately instructed regarding elements of bad faith causes of action. *Multiplex Ins. Agency, Inc. v. California Life Ins. Co. (1987) 189 Cal. App. 3d 925, 937, 235 Cal. Rptr. 12*

[5] Foreseeability

In action on contract to furnish water and install fire hydrant, until actual assumption of duty to protect against fire, damage by fire was not within contemplation of parties as possible consequence of breach and no damage may be held to have been caused by breach. *Hunt Bros. Co. v. San Lorenzo etc. Co. (1906) 150 Cal. 51, 58-59, 87 P. 1093*

Trial court need not question apparent concession of breaching party that he or she knew, because of his or her own education, training, information, circumstances of contracting, and nature of contract itself, that other party would suffer lost profits as result of breach. *Brandon & Tibbs v. George Kevorkian Accountancy Corp. (1990) 226 Cal. App. 3d 442, 459, 277 Cal. Rptr. 40*

Without any evidence that parties contemplated at time of contracting that plaintiff's performance would be financed through loans, plaintiff's obligation to pay interest on loans was not forseeable; thus, award of interest as part of damages was error. *Mendoyoma, Inc. v. County of Mendocino (1970) 8 Cal. App. 3d 873, 880, 87 Cal. Rptr. 740*

[6] Implied Contracts

Terms of unenforceable contract to which parties had agreed was evidence of reasonable value of services rendered under implied contract if agreed price either assigns dollar value to promised performance or provides formula by which ultimate sum is readily ascertainable. *LuMetta v. U.S. Robotics, Inc. (9th Cir. 1987) 824 F.2d 768, 770* (diversity case applying California law); *George v. Double-D Foods, Inc (1984) 155 Cal. App. 3d 36, 42, 201 Cal. Rptr. 870*

Value of benefit conferred is evidence of reasonable value of services rendered under implied contract. *LuMetta v. U.S. Robotics, Inc. (9th Cir. 1987) 824 F.2d 768, 770* (diversity case applying California law); *Ferrier v. Commercial Steel Corp. (1956) 142 Cal. App. 2d 424, 426-427, 298 P.2d 555*

[7] Interest

[a] When Request for Prejudgment Interest Must Be Made

Requests for prejudgment interest under *Civ. Code § 3287* by successful plaintiff must be made by way of motion prior to entry of judgment, or request must be made in form of motion for new trial no later than time allowed for filing such a motion. *North Oakland Medical Clinic (1998) 65 Cal. App. 4th 824, 829-831, 76 Cal. Rptr. 2d 743* (in circumstances in which damages were awarded but no interest was included in verdict and neither court nor jury had determined whether damages were liquidated or unliquidated, this rule was applied retroactively to plaintiffs who never sought prejudgment interest as part of damages and sought interest at last minute as part of order awarding costs)

[b] Discretionary Award on Unliquidated Damages

Discretionary award of prejudgment interest under *Civ. Code § 3287(b)* was proper because (1) over seven years passed until judgment was entered; (2) fact that length of time was not losing party's fault is irrelevant; (3) court was permitted to take cognizance of exceedingly higher market interest rates during that period; and (4) court was permitted to view losing party's offer of settlement as placing prejudgment interest at risk. *A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473, 495-497, 186 Cal. Rptr. 114*

[8] On Sum Certain

[b] Generally

Parties' stipulation, which provided that calculation of net cash recovery and judgment remain open until resolution of litigation on related issues, to arbitrate one issue did not amount to waiver of interest under *Civ. Code § 3287(a)*on basic amount of arbitration award on that issue. *FDIC v. Air Florida System, Inc. (9th Cir. 1987) 822 F.2d 833, 843*

Invalid statute voluntarily enacted and promulgated by state did not provide defense (based on debtor's being prevented

by law from paying underlying debt) against state's obligation to pay interest under *Civ. Code § 3287(a)* on back salary and pension payments awarded to state judicial employees. *Olson v. Cory (1983) 35 Cal. 3d 390, 404, 197 Cal. Rptr. 843, 673 P.2d 720*

In successful action for breach of fiduciary duty against plaintiff's former partners, when plaintiff's entitlement to damages for breach was established, amount of damages was calculable and requirement of *Civ. Code § 3287(a)*regarding certainty of damages was met, thus entitling plaintiff to prejudgment interest on sum awarded from time sum became due. *Leff v. Gunter (1983) 33 Cal. 3d 508, 519-520, 189 Cal. Rptr. 377, 658 P.2d 740*

Trial court erred in awarding interest from date action was brought because value of property on which extent of damages depended was not certain and could not be made certain by calculation, and parties did not stipulate to its value until 10 months after action was commenced. *Caplan v. Schroeder (1961) 56 Cal. 2d 515, 521, 15 Cal. Rptr. 145, 364 P.2d 321*

Civ. Code § 3287(a) is exception to general rule that interest cannot be recovered against state or municipality; damages are capable of being made certain within meaning of *Civ. Code § 3287(a)*when reviewing court orders county board to determine salaries in dispute. *Santa Clara County Environmental Health Assn. v. County of Santa Clara (1985) 173 Cal. App. 3d 74, 84-85, 218 Cal. Rptr. 678*

Damages in action for breach of lease agreement is not sum certain entitling plaintiff to award of prejudgment interest, because damages were in dispute and could not be computed with certainty by defendant. *Polster, Inc. v. Swing (1985) 164 Cal. App. 3d 427, 434-436, 210 Cal. Rptr. 567*

Court is unable to assign interest rate above legal rate of interest on implied loan agreement, even if sitting as court of equity. *Armstrong v. Picquelle (1984) 157 Cal. App. 3d 122, 128-129, 203 Cal. Rptr. 552* (accounting on dissolution of partnership)

Award of prejudgment interest was error when defendant's liability was not ascertainable on information reasonably available to it at time claim was filed. *Chesapeake Industries, Inc. v. Togova Enterprises, Inc. (1983) 149 Cal. App. 3d 901, 907, 197 Cal. Rptr. 348*

In action for indemnity from liability, construction company and insurer were entitled to prejudgment interest from date they made payment in satisfaction of underlying personal injury judgment. *E. L. White, Inc. v. City of Huntington Beach (1982) 138 Cal. App. 3d 366, 377, 187 Cal. Rptr. 879 , superseded by statute on other grounds as stated in Baur v. Workers' Comp. Appeals Bd., 176 Cal. App. 4th 1260, 1267, 98 Cal. Rptr. 3d 493*

Defendant insurer not liable for interest because it was not clear whether failure to include in offer amount for additional living expenses or for cleanup was because amount of damages was disputed or because coverage was denied, when amounts involved in coverage aggregated only 15 percent of total amount offered by defendant, and when defendant made pretrial offer that was over one and three quarters times as much as plaintiff was awarded. *Elliano v. Assurance Co. of America (1975) 45 Cal. App. 3d 170, 183, 119 Cal. Rptr. 653*

Trial court properly concluded that defendants could not ascertain exact amount due although defendants had some records involved because liabilities of parties were in dispute and hinged on determination of number of complex factual and legal issues. *Distefano v. Hall (1968) 263 Cal. App. 2d 380, 389, 69 Cal. Rptr. 691*

Defendant who had been supplied by invoice or statement with data necessary to determine amount due was properly charged with interest for failure to pay plaintiff's claim. *Maurice L. Bein, Inc. v. Housing Authority (1958) 157 Cal. App. 2d 670, 686, 321 P.2d 753*

[b] Provided for by Contract

Award of interest provided for by contact was not duplicative of late charge penalty imposed in related administrative proceeding pursuant to *Food & Agric. Code § 55881* because *Food & Agric. Code § 55437* provides that penalty was cumulative. *Bronco Wine Co. v. Frank A. Logoluso Farms (1989) 214 Cal. App. 3d 699, 713-715, 262 Cal. Rptr. 899*

[9] Liquidated Damages

Credit card agreement encompasses convenience "services" in addition to extension of credit, and, thus, is consumer contract for retail purchase of services and is subject to *Civ. Code § 1671(d)*, governing validity of liquidated damages provisions. *Hitz v. First Interstate Bank (1995) 38 Cal. App. 4th 274, 287-288, 44 Cal. Rptr. 2d 890*

Liquidated damages provision in burglar alarm system contract limiting damages payable by supplier in event of burglary during system malfunction to $250 upheld although jewelry store owner suffered $103,500 loss; causal connection between alarm malfunction and loss would be impossible to prove. *Guthrie v. American Protection Industries (1984) 160 Cal. App. 3d 951, 953-955, 206 Cal. Rptr. 834* ; *but see Helm v. K.O.G. Alarm Co. (1992) 4 Cal. App. 4th 194, 201-203, 5 Cal. Rptr. 2d 615* (fraud case, based on misrepresentation that alarm system would work if telephone to which it was connected was severed, criticizing *Guthrie's* (1) implication that cause required proof that system would have prevented burglary, and (2) failure to consider mitigation of loss likely to have been provided by operating alarm system)

Agreement by developer to deposit fees with city to participate in low-interest home financing program was not valid provision for liquidated damages under *Civ. Code § 1671(b)*, absent expression of agreement to forfeit fees as liquidated damages for some breach of contract; provision for liquidated dameages normally including stipulation of preestimate of damages so that parties know with reasonable certainty extent of liability for breach. *ABI, Inc. v. City of Los Angeles (1984) 153 Cal. App. 3d 669, 684-685, 200 Cal. Rptr. 563*

Liquidated damages clause in contract gives rise (under former *Civ. Code § 1671* and Evidence Code) to rebuttable presumption that liquidated damages constitute actual loss, which imposes on party using presumption the burden of introducing evidence and proving foundational facts from which presumption will flow. *Barbera v. Sokol (1980) 101 Cal. App. 3d 725, 732-733, 161 Cal. Rptr. 843*

[10] Lost Profit Damages

Lost profits on unspecified potential future construction contracts did not qualify as general or special damages for breach of contract because they were neither within the parties' contemplation, nor actually foreseen or reasonably foreseeable to defendant at the time of contract formation. *Lewis Jorge Construction Management, Inc. v. Pomona Unified School District (2004) 34 Cal. 4th 960, 22 Cal. Rptr. 3d 340, 102 P.3d 257*

Possibility of spontaneous rainfall destroying raisin crop as foreseeable for purpose of determining lost profits when such rains have always occurred at sporadic intervals. *Sun Maid Raisin Growers v. Victor Packing Co. (1983) 146 Cal. App. 3d 787, 794, 194 Cal. Rptr. 612*

In action by lessor of farm for damages for lessees' breach of contract to plant land and share crop, measure of damages was loss of profits that ordinarily and naturally in usual course of things would have been derived from defendant's performance of contract and rental value of land. *Parkinson v. Langdon (1918) 36 Cal. App. 80, 87, 171 P. 710*

[11] Measure of Damages

In action for damages for breach of limited partnership agreement to drill well, plaintiffs' damages not properly measured by cost of drilling well; proper measure is value of performance to promisee (or loss of anticipated profit from well); because profits were uncertain and venture speculative, denial of any relief was proper. *Fisher v. Hampton (1975) 44 Cal. App. 3d 741, 752, 118 Cal. Rptr. 811*

Without evidence that equipment owned by plaintiff and related personnel would or could have been used elsewhere or could have been rented if it had not been kept at job site in anticipa tion of delivery of item involved in breached contract, rental value of idled equipment and overhead for personnel was improper measure of damages. *A.A. Baxter Corp. v. Colt Industries, Inc. (1970) 10 Cal. App. 3d 144, 159-160, 88 Cal. Rptr. 842*

In action for damages for late delivery of truck scale being leased by subcontractor, hourly rate for delay stipulated in prime contract was not proper measure of damages; proper measure was either allowance for depreciation in value of equipment during period of delay, or return of interest on its value at reasonable rate together with payments made to idle personnel. *A. A. Baxter Corp. v. Colt Industries, Inc. (1970) 10 Cal. App. 3d 144, 157-160, 88 Cal. Rptr. 842*

In action for damages for breach of contract to manufacture soap, measure of damages was difference between plaintiff's actual expenditures in creating market for soap, including value of plaintiff's own services, and sum received from sales made of soap up to time market was destroyed by breach of contract when defendants knew that plaintiff intended to permanently establish market for soap of superior quality. *Grosse v. Petersen (1916) 30 Cal. App. 482, 486, 158 P. 511*

[12] Mitigation of Damages

Award of expenses incurred in reconditioning injured goods, which increased their value beyond expense of reconditioning, was proper because defendant has benefit of increased value. *W.C. Cook & Co. v. White Truck, etc. Co. (1932) 124 Cal. App. 721, 727-728, 13 P.2d 549*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 177.123 Law Reviews

Note, *The Uniform Foreign-Money Claims Act: No Solution to an Old Problem, 69 Tex. L. Rev. 1203 (1991)*

Shropshire, *Opportunistic Sports Franchise Relocations: Can Punitive Damages in Actions Based Upon Contract Strike a Balance? 22 Loy. L.A. L. Rev. 569 (1989)*

Note, *Contract Damages and Cross-Subsidization, 61 S. Cal. L. Rev. 1125 (1988)*

Pettit, *Private Advantage and Public Power: Reexamining the Expectation and Reliance Interests in Contract Damages, 38 Hastings L.J. 417 (1987)*

Cooter and Eisenberg, *Damages for Breach of Contract, 73 Cal. L. Rev. 1432 (1985)*

Comment, *Loss Sharing Among Contract Defendants: English Parts for the American Motorcycle, 12 Pac. L.J. 893 (1981)*

Comment, *Title 4.5: California Liquidated Damages, 16 San Diego L. Rev. 967 (1979)*

Jackson, *"Anticipatory Repudiation" and the Temporal Element of Contract Law: An Economic Inquiry Into Contract Damages in Cases of Prospective Nonperformance, 31 Stan. L. Rev. 69 (1978)*

Tuohey, *Negligent Infliction of Emotional Distress Arising From a Breach of Contract: Jarchow v. Transamerica Title Insurance Company, 8 Sw. U.L. Rev. 655 (1976)*

Dunn, *Recovery of Damages for Lost Profits in California, 9 U.S.F. L. Rev. 415 (1975)*

Comment, *Plaintiff's Measure of Recovery for Tortious Inducement of Breach of Contract--Profits or Losses? 19*

Hastings L.J. 1119 (1968)

Note, *Damages: Mental Suffering Arising From Breach of Contract, 49 Cal. L. Rev. 758 (1961)*

Dresser, *Procedural Control of Damages by Election of Remedies, 12 Hastings L.J. 171 (1960)*

Note, *Mitigation: Sources and Applications of Rule in California; Anticipatory Breach Cases, 12 Hastings L.J. 215 (1960)*

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California Breach of Contract Remedies, ch. 4, *Recovery of Money Damages* (Cal. C.E.B. 1980)

California Attorney's Damages Guide, ch. 1, *Contract*, §§ 1.2-1.36 (Cal. C.E.B. 1974)

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 503-549 (10th ed. 2005)

Witkin, California Procedure, vol. 5, *Pleading*, §§ 887, 888, 896-898 (4th ed. 1997)

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§ 177.140 Allegation of Compensatory Damages [Civ. Code § 3333] for Personal Injuries--Pain and Suffering

[1] FORM Allegation of Compensatory Damages [Civ. Code § 3333] for Personal Injuries--Pain and Suffering

As a proximate result of the _____ [*describe tortious conduct, e.g.,* negligence] of defendant[s, and each of them], plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has suffered general damages according to proof.

[2] Use of Form

This allegation is for use by a plaintiff in alleging compensatory damages for pain and suffering in a personal injury action. Damages which necessarily result from a tort are general damages and may be proved under a general allegation of damage [*Stoltz v. Converse (1946) 75 Cal. App. 2d 909, 914, 172 P.2d 78]* . General damages are recoverable for physical pain, fright, nervousness, grief, anxiety, worry, mortification, humiliation, indignity, embarrassment, apprehension, terror or ordeal, and mental suffering [*Niles v. San Rafael (1974) 42 Cal. App. 3d 230, 244, 116 Cal. Rptr. 733]* . For a discussion of damages pain and suffering, see *§ 177.45[1]*.

A plaintiff is not required to allege specifically each physical injury sustained or which may have resulted. It is sufficient if such injuries can be traced to the occurrence complained of and are such as might naturally result from the injury [*Foster v. Hudson (1939) 33 Cal. App. 2d 705, 708, 92 P.2d 959]* .

In an action for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

[3] Cross References

For discussion of damages for emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress*

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§ 177.141 Allegation of Compensatory Damages [Civ. Code § 3333] for Personal Injuries--Pain and Suffering From Injuries and From Medical Treatment

[1] FORM Allegation of Compensatory Damages [Civ. Code § 3333] for Personal Injuries--Pain and Suffering From Injuries and From Medical Treatment

Plaintiff was treated by doctors and nurses for the injuries sustained by him/her as hereinabove alleged, both during the time he/she was hospitalized and for a long period of months thereafter in his/her home. Throughout that time he/she suffered severe and excruciating pain both by reason of his/her injuries and by reason of the treatments thereof, [and hereafter he/she will suffer severe pain permanently because of his/her injuries and because of future treatment thereof] to his/her damage according to proof.

[2] Use of Form

This allegation is for use by a plaintiff in a personal injury action in alleging pain and suffering both from injuries and from medical treatment received for the injuries.

In an action for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

[3] Cross References

For a related form, see *§ 177.140*

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15-177 California Forms of Pleading and Practice--Annotated § 177.142

§ 177.142 Allegation of Compensatory Damages [Civ. Code § 3333] for Personal Injuries--Future Damages [Civ. Code § 3283] for Pain and Suffering

[1] FORM Allegation of Compensatory Damages [Civ. Code § 3333] for Personal Injuries--Future Damages [Civ. Code § 3283] for Pain and Suffering

Plaintiff is informed and believes and thereon alleges that he/she will continue to suffer extreme mental, physical, and nervous pain and suffering in the future as a result of the injuries alleged herein.

[2] Use of Form

This allegation is for use by a plaintiff in an action for personal injuries in alleging damages for future pain and suffering. It should be used when plaintiff has separately alleged damages for past pain and suffering but he or she also wants to recover damages for any pain and suffering which might occur in the future. Damages may be awarded for detriment certain to result in the future [*Civ. Code § 3283*; *Mella v. Hooper (1927) 200 Cal. 628, 631, 254 P. 256]* . For a discussion of future damages, see *§ 177.13[4]*.

In an action for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

[3] Cross References

For a related form, see *§ 177.140*

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15-177 California Forms of Pleading and Practice--Annotated § 177.143

§ 177.143 Allegation of Compensatory Damages [Civ. Code § 3333] for Personal Injury--Medical Expenses

[1] FORM Allegation of Compensatory Damages [Civ. Code § 3333] for Personal Injury--Medical Expenses

[*EITHER*]

As a [further] proximate result of the _____ [*describe tortious conduct, e.g.,* negligence] of defendants, plaintiff has been damaged in that he/she has been required to expend money and incur obligations for medical services, X rays, drugs, and sundries reasonably required in the treament and relief of the injuries herein alleged according to proof.

[*OR*]

As a [further] proximate result of the _____ [*describe tortious conduct, e.g.,* negligence] of defendants, plaintiff has incurred, and will continue to incur, medical and related expenses.

[2] Use of Form

These allegations are for use by a plaintiff in alleging damages for medical expenses in a tort action. The first alternative alleges past medical expenses only. The second alternative alleges both past and future medical expenses.

In an action for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Damages that constitute the natural consequences of a tort but do not necessarily result from the commission of the tort are special damages and must be specially set forth in the complaint [*Stoltz v. Converse (1946) 75 Cal. App. 2d 909, 914-915, 172 P.2d 78]* . Medical expenses are special damages [*see Miller v. San Diego Gas & Elec. Co. (1963) 212 Cal. App. 2d 555, 561, 28 Cal. Rptr. 126]* .

[3] Cross References

For a related form, see *§ 177.140*

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15-177 California Forms of Pleading and Practice--Annotated § 177.144

§ 177.144 Allegation of Compensatory Damages [Civ. Code § 3333] for Personal Injury--General Damages for Lost Earning Capacity

[1] FORM Allegation of Compensatory Damages [Civ. Code § 3333] for Personal Injury--General Damages for Lost Earning Capacity

As a further proximate result of the acts of defendants, plaintiff's present and future earning capacity has been greatly impaired.

[2] Use of Form

This form is for use to allege general damages for lost earning capacity if the plaintiff's general ability to work has been diminished in any way as a result of the defendant's tortious conduct. It should be used in all cases in which any future disability is alleged, because lost earning capacity is not limited by actual employment at the time of injury [*see, e.g., Flynn v. Grand Cent. Pub. Mkt. (1959) 176 Cal. App. 2d 243, 247-249, 1 Cal. Rptr. 237]* . If plaintiff also has lost a specific amount of earnings from his or her employment or occupation, the allegation set forth in this form may be used in addition to that set forth in *see § 177.146*.

In an action for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

[3] General Damages for Lost Earning Capacity

Lost earning capacity is loss of the ability to work, as distinguished from lost earnings from actual employment [*see McCormack v. City & County of San Francisco (1961) 193 Cal. App. 2d 96, 101, 14 Cal. Rptr. 79]* . Loss of earning capacity is an element of general damages, which can be inferred from the nature of the injury [*Connolly v. Pre-Mixed Concrete Co. (1957) 49 Cal. 2d 483, 489, 319 P.2d 343* ; *Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 656, 151 Cal. Rptr. 399]* . General damages for lost earning capacity are measured from the date of injury and, thus, are allowed for the period between injury and trial, as well as for lost future capacity [*see Tornell v. Munson (1947) 80 Cal. App. 2d 123, 125, 181 P.2d 112]* . For further discussion, see *§ 177.45[4]*.

[4] Cross References

For related forms, see *§§ 177.140* and *177.145*

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15-177 California Forms of Pleading and Practice--Annotated § 177.145

§ 177.145 Allegation of Compensatory Damages [Civ. Code § 3333] for Personal Injury--Lost Past and Future Earnings

[1] FORM Allegation of Compensatory Damages [Civ. Code § 3333] for Personal Injury--Lost Past and Future Earnings

[*EITHER*]

As a further proximate result of the acts of defendants, plaintiff was prevented from attending to his/her usual occupation as a _____ [*state occupation*] for a period of _____ [*specify, e.g.,* 2 months] and thereby lost earnings to his/her damage according to proof.

[*OR*]

As a further proximate result of the acts of defendants, plaintiff was prevented from attending to his/her usual occupation as a _____ [*state occupation*] for a period of _____ [*specify, e.g.,* 2 months] as of the date of this complaint and continuing for an as yet undetermined period.

[2] Use of Form

This form is for use to allege actual lost earnings from employment. The first alternative alleges lost past earnings only. The second alternative alleges both past and future lost earnings.

In an action for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Actual lost earnings are distinct from lost earning capacity [*McCormack v. City & County of San Francisco (1961) 193 Cal. App. 2d 96, 101, 14 Cal. Rptr. 79* ; *see § 177.144*]. Therefore, both this form and § 177.144 may be used

together--for example, if the plaintiff had some actual lost earnings, but was not working full-time at the time of injury. For further discussion § 177.45[4].

[3] Characterization of Damages for Lost Actual Earnings

Numerous California cases characterize damages for lost actual earnings as special damages, which must be specifically pleaded to be recovered [*see, e.g., Handelman v. Victor Equip. Co. (1971) 21 Cal. App. 3d 902, 906, 99 Cal. Rptr. 90]* . Nevertheless, a few courts have stated that loss of earnings is an item of general damages [*see, e.g., Gersick v. Shilling (1950) 97 Cal. App. 2d 641, 649, 218 P.2d 583]* . For further discussion, see *§ 177.45[5]*.

[4] Cross References

For related forms, see *§§ 177.140* and *177.144*

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15-177 California Forms of Pleading and Practice--Annotated § 177.146

§ 177.146 Allegation of Compensatory Damages [Civ. Code § 3333] for Damage to Property--Reasonable Cost of Repairs

[1] FORM Allegation of Compensatory Damages [Civ. Code § 3333] for Damage to Property--Reasonable Cost of Repairs

As a [further] proximate result of the _____ [*specify tortious conduct, e.g.,* negligence] of defendants, plaintiff's _____ [*specify property, e.g.,* automobile] was damaged to such an extent that repairs were necessary [in the sum of $_____, which is the reasonable value of the repairs necessitated by the damage].

[2] Use of Form

This allegation is for use by a plaintiff in an action for personal injury and property damage or in an action for property damage in which plaintiff seeks to recover the reasonable cost of repairing the property damaged. This form may be used for injuries to either real and personal property, or both.

If the property injured can be entirely repaired at less expense than the diminution in value because of the injury, the measure of damages is the reasonable cost of repairs. Conversely, if the diminution in value is less than the cost of repairs, the measure of damages is the diminution in value. In both cases, the burden is on the defendant to show that the other measure of damages is less than the one under which the plaintiff is claiming [*Mozzetti v. City of Brisbane (1977) 67 Cal. App. 3d 565, 576, 136 Cal. Rptr. 751]* . For further discussion, see *§ 177.47*.

[3] Cross References

For a related form, see *§ 177.140*

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15-177 California Forms of Pleading and Practice--Annotated § 177.147

§ 177.147 Allegation of Compensatory Damages [Civ. Code § 3333] for Damage to Property--Depreciation in Market Value

[1] FORM Allegation of Compensatory Damages [Civ. Code § 3333] for Damage to Property--Depreciation in Market Value

As a [further] proximate result of the _____ [*specify tortious conduct, e.g.,* negligence] of defendants, plaintiff's _____ [*specify property, e.g.,* automobile] was damaged and depreciated in value. [Immediately before the injury, it had a reasonable market value of $_____ and immediately after the injury, it had a reasonable market value of only $_____, to plaintiff's damage in the sum of $_____.]

[2] Use of Form

This allegation is for use by a plaintiff in action for personal injury and property damage or an action for property damage in which plaintiff seeks to recover the depreciation in market value of the property injured. This form may be used for injuries to either real and personal property, or both. For further discussion, see *§ 177.47*.

[3] Cross References

For related forms, see *§§ 177.140* and *177.146*

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15-177 California Forms of Pleading and Practice--Annotated § 177.148

§ 177.148 Allegation of Compensatory Damages [Civ. Code § 3333] for Damage to Property--Reasonable Market Value of Destroyed Personal Property

[1] FORM Allegation of Compensatory Damages [Civ. Code § 3333] for Damage to Property--Reasonable Market Value of Destroyed Personal Property

As a [further] proximate result of the _____ [*specify tortious conduct, e.g.,* negligence] of defendant's, plaintiff's _____ [*specify personal property, e.g.,* automobile] was totally destroyed. [On _____ [*date*], this _____ (*specify personal property, e.g.,* automobile) had a fair and reasonable market value of $_____; plaintiff was therefore damaged in the sum of $_____.]

[2] Use of Form

This allegation is for use by a plaintiff in an action for personal injury and property damage or in an action for property damage in which some personal property of plaintiff has been totally destroyed. The measure of damages for the destruction of personal property is the reasonable market value of the property at the time of destruction [*Lane v. Spurgeon (1950) 100 Cal. App. 2d 460, 463, 223 P.2d 889]* . For further discussion, see *§ 177.47[3]*.

[3] Cross References

See *§§ 177.140* and *177.147*

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15-177 California Forms of Pleading and Practice--Annotated § 177.149

§ 177.149 Allegation of Compensatory Damages [Civ. Code § 3333] for Damage to Property--Destruction of Property With Special Value to Plaintiff--Item With Market Value [Civ. Code § 3355]

[1] FORM Allegation of Compensatory Damages [Civ. Code § 3333] for Damage to Property--Destruction of Property With Special Value to Plaintiff--Item With Market Value [Civ. Code § 3355]

As a [further] proximate result of _____ [*specify tortious conduct, e.g.,* negligence] of defendants, the following property belonging to plaintiff was destroyed: _____ [*specify, e.g.,* one registered Hereford cow]. This property had a market value [of $_____]. It had a special value to plaintiff in that _____ [*set forth reason for special valuation*]. _____ [Defendant had notice of this special value before he/she destroyed the property *or* Defendant's destruction of this property was willful]. [The destruction of the above-listed item has damaged plaintiff in the sum of $_____.]

[2] Use of Form

This allegation is for use by a plaintiff in an action for personal injury and property damage or in an action for property damage in which the property damaged had a market value and a special value to the plaintiff.

If property has a peculiar value to the person recovering damages for its destruction, that value is the amount the plaintiff can recover if the defendant had notice of its peculiar value before incurring the liability for damages [*see Civ. Code § 3355*].

In order to recover damages for the peculiar value of property under *Civ. Code § 3355*, the property must have some market value [*Willard v. Valley Gas & Fuel Co. (1915) 171 Cal. 9, 14-15, 151 P. 286]* .

[3] Cross References

For related forms, see *§§ 177.140* and *177.148*

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15-177 California Forms of Pleading and Practice--Annotated § 177.150

§ 177.150 Allegation of Compensatory Damages [Civ. Code § 3333] for Damage to Property--Destruction of Property With Special Value to Plaintiff--Item With No Market Value

[1] FORM Allegation of Compensatory Damages [Civ. Code § 3333] for Damage to Property--Destruction of Property With Special Value to Plaintiff--Item With No Market Value

As a [further] proximate result of _____ [*specify tortious conduct, e.g.,* negligence] of defendants the following property of plaintiff's was destroyed: _____ [*describe property, e.g.,* scrapbooks of newspaper clippings kept by plaintiff for 20 years]. Although this property had no market value, it had a special value to plaintiff in that _____ [*set forth reason for special valuation*] [, and its destruction resulted in plaintiff's damage in the sum of $_____].

[2] Use of Form

This allegation is for use by a plaintiff in an action for personal injury and property damage or in an action for property damage in which the property had a special value to plaintiff but no market value. If the property has no market value, the rule to be applied in measuring damages is that found in *Civ. Code § 3333,* which fixes the damages as the amount that compensates the owner for all detriment proximately caused by its destruction, whether it could have been anticipated or not [*Willard v. Valley Gas & Fuel Co. (1915) 171 Cal. 9, 14-15, 151 P. 286]* . Because the plaintiff, in this situation, does not need to plead notice by defendant of the special value to plaintiff, the pleading requirements are less stringent than in the case of injury to property with special value to plaintiff that also has a market value [*see Civ. Code § 3355*; *see § 177.149*].

[3] Cross References

For related forms, see *§§ 177.140* and *177.148*

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15-177 California Forms of Pleading and Practice--Annotated § 177.151

§ 177.151 Allegation of Compensatory Damages [Civ. Code § 3333] for Damage to Property--Lost Profits

[1] FORM Allegation of Compensatory Damages [Civ. Code § 3333] for Damage to Property--Lost Profits

As a further proximate result of the _____ [*specify tortious conduct, e.g.*, negligence] of defendants and the _____ [injury to *or* destruction of] plaintiff's _____ [real *or* personal *or* real and personal] property as heretofore alleged, plaintiff was unable to conduct his/her/its business known as _____ [*name of business*] for a period of _____ days while the property was being _____ [repaired *or* replaced], and therefore, plaintiff lost business profits [in the sum of $_____].

[2] Use of Form

This form is for use as an allegation of lost business profits resulting from injury to or destruction of plaintiff's property. It should be used with an allegation of injury to or destruction of real or personal property [*see §§ 177.146 -177.149*.5]. This form may not be used together with an allegation of damages for loss of use of property (*see § 177.152*), as the two measures are mutually exclusive [*Tremeroli v. Austin Trailer Equip. Co. (1951) 102 Cal. App. 2d 464, 227 P.2d 923]* . For further discussion, see *§ 177.47[9]*.

[3] Cross References

See *§§ 177.140* and *177.146*

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§ 177.152 Allegation of Compensatory Damages [Civ. Code § 3333] for Damage to Property--Loss of Use

[1] FORM Allegation of Compensatory Damages [Civ. Code § 3333] for Damage to Property--Loss of Use

As a [further] proximate result of the _____ [*specify tortious conduct, e.g.*, negligence] of defendants, plaintiff lost the use of plaintiff's _____ [*specify property, e.g.*, automobile] for a period of _____ days while it was being _____ [repaired *or* replaced][, to plaintiff's damage in the sum of $_____].

[2] Use of Form

This allegation is for use by a plaintiff in an action for personal injury and property damage, or in an action for property damage only, in alleging damages for the loss of use of the property. For discussion, see *§ 177.47[8]*.

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15-177 California Forms of Pleading and Practice--Annotated § 177.153

§ 177.153 Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12; Cal. Rules of Ct., Rule 1.45(a)]--Exemplary Damages [Civ. Code § 3294] Attachment to Complaint or Cross Complaint [Cal. Judicial Council Form PLD-PI-001(6)]

[1] FORM Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12; Cal. Rules of Ct., Rule 1.45(a)]--Exemplary Damages [Civ. Code § 3294] Attachment to Complaint or Cross Complaint [Cal. Judicial Council Form PLD-PI-001(6)]

Click here to view image.

[2] Use of Form

This form illustrates the Judicial Council approved attachment for use in alleging exemplary damages [*see Civ. Code § 3294*; *Code Civ. Proc. § 425.12*; Cal. Judicial Council Form PLD-PI-001(6)]. This form of attachment may be attached to any approved form of complaint or cross complaint for which exemplary damages are appropriate [*see Cal. Rules of Ct., Rule 1.45(b)*].

A complete set of Judicial Council trial court pleading forms is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. For general information relating to the use of Judicial Council complaint forms, see Ch. 123, *Complaints and Cross Complaints* .

[3] Judicial Council Trial Court Forms

Code Civ. Proc. § 425.12 requires the Judicial Council to develop and approve official forms for use in California trial courts for any complaint, cross complaint, or answer in any action based on personal injury, property damage, wrongful death, unlawful detainer, breach of contract, or fraud. Use of the forms is optional [*see Code Civ. Proc. § 425.12*].

[4] Filling Out Exemplary Damages Attachment Form

[a] Attachment and Page Designation

Although the exemplary damages attachment form might be used in conjunction with other approved forms, the sample form presented here presumes its use with either the approved complaint or cross complaint form for a personal injury or property damage action. For samples of completed complaint and cross complaint forms for personal injury or property damage, and for comments related to filling out those forms, see Ch. 380, *Negligence* .

Counsel must check the box indicating the pleading to which the attachment refers. Counsel must also indicate the page number of the exemplary damages attachment as one of the pages of the complaint or cross complaint. The approved complaint and cross complaint forms for personal injury and property damage consist of three standard pages each. In addition, at least one cause of action form must be attached to the complaint form, and one or more cause of action forms may be attached to the cross complaint form. Thus, if the exemplary damages form is attached to a complaint, as in the example presented here, and if one cause of action attachment has been attached to the complaint, the exemplary damages attachment would be page number 5.

[b] Malice, Fraud, or Oppression (Paragraph EX-1)

In **Paragraph EX-1**, the name or names of defendant or defendants from whom exemplary damages are being sought must be indicated. Counsel must check at least one of the three boxes in **Paragraph EX-1**, since *Civ. Code § 3294(a)* requires that to be liable for punitive damages a defendant must have been guilty of oppression, fraud, or malice. Statutory definitions of oppression, fraud, and malice are set forth in *Civ. Code § 3294(c)* [*see § 177.51[6]*].

[c] Facts Supporting Claim (Paragraph EX-2)

The sample form presented contains allegations of defendant's malice [*Civ. Code § 3294(c)(1)*]. If alleging fraud and oppression instead of, or in addition to malice, counsel should modify the allegations accordingly [*see Civ. Code § 3294(c)(2), (3)*; *see also §§ 177.51[7], 177.154, 177.155*]. For allegations of punitive damages in an action involving an intentional tort, see *§ 177.154*. For allegations of punitive damages in an action involving a nondeliberate injury, see *§ 177.155*.

If, in alleging facts, counsel requires more space than that provided on the form, he or she should prepare an additional attachment, labeled "EX-2. Attachment," and should cross refer to the attachment in the space provided for **Paragraph EX-2**. In preparing any attachment that is not an official approved form, counsel should follow the format requirements of *Cal. Rules of Ct., Rule Title 2, Div. 2, Ch. 1*, relating to the size of paper, pagination, spacing and so forth [*see Cal. Rules of Ct., Rule 1.45(c)*]. For purposes of determining the amount of space required to allege facts, counsel should note that instructions on the form do not require that typed information on the form be double-spaced.

For additional discussion relating to pleading punitive damages, see *§ 177.154*.

[d] Amount of Damages (Paragraph EX-3)

In **Paragraph EX-3**, box **a** has been checked to indicate that the action is one brought for personal injury or wrongful death, and therefore the amount of exemplary damages is not stated [*Code Civ. Proc. § 425.10(b)*]. Box **b** should be checked for other situations. In actions in which the initial trial has not commenced prior to January 1, 1988, no claim for punitive damages may state an amount or amounts [*Civ. Code § 3295(e), (f)*; *see Code Civ. Proc. § 581(a)(6)* (when trial is deemed to commence for purposes of dismissal)].

For discussion relating to determining the amount of punitive damages to be awarded, see *§ 177.51[13] -[15]*.

[5] Cross References

For general comments relating to filling out the complaint and cross complaint forms to which this form would be attached, see Ch. 380, *Negligence*

For comments relating to filling out the exemplary damages attachment to a complaint in a products liability action, see Ch. 460, *Products Liability*

For a related form, see *§ 177.154*

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§ 177.154 Allegation of Punitive Damages [Civ. Code § 3294] in Action Involving Intentional Tort

[1] FORM Allegation of Punitive Damages [Civ. Code § 3294] in Action Involving Intentional Tort

The aforementioned conduct of defendant[s, and each of them] was willful and was intended to cause injury to the plaintiff. Plaintiff is therefore entitled to an award of exemplary or punitive damages.

[2] Use of Form

This allegation is for use by a plaintiff in alleging punitive damages in an action for personal injuries resulting from an intentional tort. It alleges the ultimate fact of malice on the part of defendant, in that the defendant acted with the intent to cause injury to the plaintiff [*see Civ. Code § 3294(c)(1)*; *see also §§ 177.51[6], [7][c], [8]*]. The amount of punitive damages is not stated, pursuant to *Civ. Code § 3295(e)* [*see § 177.51[8]*].

For discussion and forms relating to pleading punitive damages in an intentional tort action for fraud, see Ch. 269, *Fraud and Deceit* .

[3] Pleading Basis for Award of Punitive Damages

To support an award of punitive damages, a complaint must plead the ultimate facts of a defendant's oppression, fraud, or malice [*see Civ. Code § 3294(c)* (defining oppression, fraud, and malice); *see also § 177.51[6]*]. The basis for the award cannot be pleaded in conclusory terms [*Smith v. Superior Court (1992) 10 Cal. App. 4th 1033, 1041-1042* ; *Cyrus v. Haveson (1976) 65 Cal. App. 3d 306, 316-317, 135 Cal. Rptr. 246]* . The facts and circumstances that set out the basis of the award must be set out clearly, concisely, and with particularity [*Lehto v. Underground Constr. Co. (1977) 69 Cal. App. 3d 933, 944, 138 Cal. Rptr. 419]* . Generally, however, if malice, oppression, or fraud is the basis of the award of punitive damages and the plaintiff alleges an intentional wrong, a prayer for exemplary damages may be supported by pleading that the wrong was committed willfully or with a design to injure [*see G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 29, 122 Cal. Rptr. 218]* .

[4] Prayer for Punitive Damages

If the body of a complaint sets forth facts supporting an award of punitive damages, the failure expressly to mention punitive damages in the prayer of the complaint does not preclude an award of punitive damages in a contested trial [*Godfrey v. Steinpress (1982) 128 Cal. App. 3d 154, 183, 180 Cal. Rptr. 95* ; *Weiss v. Blumencranc (1976) 61 Cal. App. 3d 536, 544, 131 Cal. Rptr. 298* ; *Forte v. Nolfi (1972) 25 Cal. App. 3d 656, 687, 102 Cal. Rptr. 455]* . However, if defendant defaults, a prayer for general relief will not support an award of punitive damages [*Gudarov v. Hadjieff (1952)38 Cal. 2d 412, 416-417, 240 P.2d 621]* . Further, due process requires some form of notice of the amount of punitive damages sought must be given before punitive damages can be recovered from a defaulting defendant. A general allegation in the complaint of entitlement to punitive damages is insufficient [*Wiley v. Rhodes (1990) 223 Cal. App. 3d 1470, 1472-1474, 273 Cal. Rptr. 279]* . For a form that may be used to give notice of the amount of punitive damages sought, see *§ 177.167*.

[5] Cross References

For discussion of the requirement of a special verdict in all cases in which the issue of punitive damages is presented to a jury, see Ch. 326A, *Jury Verdicts*

For related forms, see *§§ 177.140* and *177.155*

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§ 177.155 Allegation of Punitive Damages [Civ. Code § 3294] in Action Involving Nondeliberate Injury

[1] FORM Allegation of Punitive Damages [Civ. Code § 3294] in Action Involving Nondeliberate Injury

[*EITHER*]

At all times herein mentioned, defendant knew that _____ [*allege knowledge by defendant of danger to plaintiff, e.g.,* the pipes carrying acid were in poor condition and the situation was unreasonably dangerous to personnel] and that _____ [*allege additional knowledge by defendant of likelihood of danger occurring which would result in injury, e.g.,* it was likely that the pipe containing the acid would rupture resulting in a serious injury to personnel]. Notwithstanding this knowledge, defendant, in willful and conscious disregard of the safety of such persons and of plaintiff herein, _____ [*specify action or omission, e.g.,* failed and refused to fix the pipes].

[*OR*]

At all times herein mentioned, defendant knew that _____ [*specify knowledge by defendant of plaintiff's rights, e.g.,* plaintiff had a policy with the defendant insurance company pursuant to which defendant was subject to the implied covenant of good faith and fair dealing]. Notwithstanding this knowledge, defendant subjected plaintiff to cruel and unjust hardship in conscious disregard of plaintiff's rights in that _____ [*specify facts showing oppressive or cruel and unjust treatment by defendant, e.g.,* defendant breached its implied covenant of good faith and fair dealing by wrongfully refusing to settle within the insured's policy limit and, after a verdict had been rendered against plaintiff, defendant refused to accept any responsibility for the amount in excess of the policy limits and, contrary to advice of its own counsel, rejected an offer to settle the verdict even though it was aware that its plaintiff's assets would be unable to satisfy the excess verdict, thereby forcing him/her into bankruptcy].

[*OR*]

At all times herein mentioned, defendant knew _____ [*specify defendant's knowledge of danger to plaintiff, e.g.,* that a man had raped several tenants of the apartment complex and that conditions indicated a likelihood that he would repeat his attacks]. Notwithstanding this knowledge, defendant, in willful and conscious disregard of plaintiff's safety, _____ [*specify facts showing that defendant intentionally misled plaintiff in order to advance defendant's interest, e.g.,* assured plaintiff that the premises were safe and were patrolled at all times in order to advance his/her pecuniary interest in renting the apartment].

[2] Use of Form

These allegations are for use by a plaintiff in an action for damages involving a nondeliberate injury. The first alternative, for use when defendant was guilty of malice, will generally be used in personal injury actions [*see Civ. Code § 3294(c)(1)*; *see also § 177.51[7][c]*]. The second alternative, for use when defendant was guilty of oppression, may be used in cases involving tortious breach of insurance contracts or in other situations in which one party has superior bargaining power [*see* Civ. Co de § 3294(c)(2)]. The third alternative is for use when defendant was guilty of fraud. [*see Civ. Code § 3294(c)(3)*; *see also* Ch. 269, *Fraud and Deceit*]. When all three bases for punitive damages--malice, fraud, and oppression--are present, the allegations should be used together since the presence of all three bases of punitive damages magnifies the harm done by defendant and consequently the award of punitive damages also may be increased.

[3] Pleading Punitive Damages for Nondeliberate Conduct

[a] In General

Failure to plead the statutory terms, such as malice, oppression, or fraud, in describing the defendant's conduct does not defeat a claim for punitive damages when the complaint alleges sufficient facts to apprise defendants of the basis on which relief is sought [*Blegen v. Superior Court (1981) 125 Cal. App. 3d 959, 963, 178 Cal. Rptr. 470]* .

Punitive damages may be awarded only on proof "by clear and convincing evidence" that the defendant is guilty of malice, oppression, or fraud [*Civ. Code § 3294(a)*; *see § 177.51[7]*].

[b] Nondeliberate Conduct as "Malice"

Cases involving punitive damages based on nondeliberate conduct have typically relied on the standard that punitive damages are proper to punish and deter conduct that, while nondeliberate, is carried on with a conscious disregard of the rights or safety of others [*see, e.g., G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 32, 122 Cal. Rptr. 218]* . This standard has essentially been codified under the statutory definition of malice [*see Civ. Code § 3294(c)(1)*; *see also § 177.51[7][c]*], which is set out as the first alternative in this form.

The statutory definition of malice was amended in 1987 to define nonintentional malice as follows: despicable conduct carried on with a willful and conscious disregard of the rights or safety of others [*Civ. Code § 3294(c)(1)*; *see also § 177.51[6][b]*]. This definition applies to actions in which the trial is commenced on or after January 1, 1988 [*Civ. Code § 3294(e)*; *see § 177.51[6][a]*]. Because this amended definition appears to impose a somewhat more stringent standard in establishing nonintentional malice, cases relying on the prior standard should be used with caution, and are discussed below as persuasive, rather than controlling, authority [*see also § 177.51[6][c]*].

Under prior case law, when nondeliberate conduct is charged, allegations that the defendant's conduct was wrongful, willful, wanton, reckless, or unlawful do not support a claim for exemplary damages since such allegations do not charge malice, oppression, or fraud. In pleading the grounds for exemplary damages when a nondeliberate tort is involved, an allegation that the defendant acted in conscious disregard of the safety of others properly describes the

animus malus which may justify an exemplary damage award [*Cyrus v. Haveson (1976) 65 Cal. App. 3d 306, 316-317, 135 Cal. Rptr. 246* (decided prior to 1987 amendment of *Civ. Code § 3294*); *G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 32, 122 Cal. Rptr. 218* (decided prior to 1987 amendment of *Civ. Code § 3294*, and holding that award of punitive damages in wrongful eviction action was improper when plaintiff pleaded that defendant acted maliciously and in wanton disregard of plaintiff's rights but failed to allege that defendant intentionally disregarded plaintiff's right to possession or was aware that plaintiff had not received notice to quit premises)]. A conscious disregard of the safety of others means that the defendant has acted with conscious disregard of the probability that his or her conduct will result in injury to others. A conscious disregard of possible results is not a sufficiently accurate statement of the rule [*Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 809, 816-817, 174 Cal. Rptr. 348* (decided prior to 1987 amendment of *Civ. Code § 3294*)].

[c] Nondeliberate Conduct as "Oppression" or "Fraud"

The statement in *G.D. Searle & Co. v. Superior Court* [*G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 30, 122 Cal. Rptr. 218* (decided prior to 1987 amendment of *Civ. Code § 3294*)], that a plaintiff must prove that a defendant acted with conscious disregard of the plaintiff's safety, has been considered subse quently by the courts as the basis for an award of punitive damages on grounds other than malice, even though *Searle* addressed itself only to the issue of malice [*see O' Hara v. Western Seven Trees Corp. (1977) 75 Cal. App. 3d 798, 806, 142 Cal. Rptr. 487* (decided prior to 1987 amendment of *Civ. Code § 3294*; relying on *Searle* even though plaintiff sought punitive damages based on misrepresentations as to safety of apartment complex); *Cyrus v. Haveson (1976) 65 Cal. App. 3d 306, 316-317, 135 Cal. Rptr. 246* (decided prior to 1987 amendment of *Civ. Code § 3294*)]. Thus, this form includes alternative allegations based on "oppression" and "fraud" as well as nonintentional "malice."

[4] Action Against Health Care Provider

In an action against a health care provider, no complaint or other pleading may include a claim for punitive damages absent a court order permitting the claim to be filed as part of an amended pleading. The order may be granted on motion by the plaintiff when the supporting and opposing affidavits or declarations establish a substantial probability that the plaintiff will prevail on the claim. This motion must be filed within two years after the filing of the complaint or initial pleading or not less than nine months before the date the matter is first set for trial, whichever is earlier [*Code Civ. Proc. § 425.13(a)*; see *Code Civ. Proc. § 425.13(b)* (definition of health care provider)]. For further discussion and forms for obtaining an order under *Code Civ. Proc. § 425.13*, *see* Ch. 415, *Physicians: Medical Malpractice* .

[5] Action Against Religious Corporation

In an action against a religious corporation or religious corporation sole, no complaint or other pleading may include a claim for punitive damages absent a court order permitting the claim to be filed as part of an amended pleading. The order may be granted on motion by the plaintiff when the supporting and opposing affidavits or declarations establish evidence that substantiates that the plaintiff will prevail on the claim [*Code Civ. Proc. § 425.14*]. For further discussion and forms for obtaining an order under *Code Civ. Proc. § 425.14*, see Ch. 110, *Churches and Religious Organizations* .

[6] Cross References

For an allegation of exemplary damages for use in a products liability action, see Ch. 460, *Products Liability*

For related forms, see *§§ 177.140* and *177.154*

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15-177 California Forms of Pleading and Practice--Annotated § 177.156

§ 177.156 Allegation of Treble Damages [Code Civ. Proc. § 1029.8(a)]--Injury or Damage Caused by Unlicensed Person Providing Goods or Rendering Services for Which License Is Required

[1] FORM Allegation of Treble Damages [Code Civ. Proc. § 1029.8(a)]--Injury or Damage Caused by Unlicensed Person Providing Goods or Rendering Services for Which License Is Required

At all times herein mentioned, defendant did not have the license required by _____ [*specify statute requiring license, e.g., Section 4110 of the Business and Professions Code*] to _____ [provide _____ (*specify goods provided, e.g.,* prescription drugs) *or* perform _____ (*specify services performed, e.g.,* legal services)]. Plaintiff was _____ [injured *or* damaged] as a result of defendant's _____ [provision of goods *or* performance of services] in that _____ [*describe injury or damage, e.g.,* plaintiff became ill as a result of taking the prescription drug _____ [*name of drug*] prepared by defendant].

[2] Use of Form

This allegation is for use by the plaintiff in a tort action when the plaintiff seeks treble damages. The ground asserted for the treble damages award is that the defendant was an unlicensed person who caused injury or damage as a result of providing goods or performing services for which a license is required by specified statutes [*see Code Civ. Proc. § 1029.8(a)*]. For detailed discussion of situations in which treble damages are available under *Code Civ. Proc. § 1029.8(a)*, see *Ch. 471B, Licensing by Public Agencies, § 471B.71[4]*.

[3] Cross References

For a related form, see *§ 177.140*

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15-177 California Forms of Pleading and Practice--Annotated § 177.157

§ 177.157 Prayer [Code Civ. Proc. § 425.10(b)] for General and Special Compensatory Damages [Civ. Code § 3333], Interest [Civ. Code § 3291], and for Punitive Damages [Civ. Code § 3294]--By Plaintiff in Tort Action for Personal Injuries and Property Damage

[1] FORM Prayer [Code Civ. Proc. § 425.10(b)] for General and Special Compensatory Damages [Civ. Code § 3333], Interest [Civ. Code § 3291], and for Punitive Damages [Civ. Code § 3294]--By Plaintiff in Tort Action for Personal Injuries and Property Damage

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For general damages according to proof;

2. _____ [*In this and as many subsequent paragraphs as needed, set forth special damages such as medical expenses or loss of profits*];

3. _____ [*In this and as many subsequent paragraphs as needed, set forth damages to property, e.g., to plaintiff's automobile*];

4. For interest as allowed by law;

5. For punitive damages;

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

This prayer is for use by a plaintiff in a tort action when the plaintiff seeks general and special compensatory damages and punitive damages for personal injury and property damage. This prayer may not state a specific amount of general or special damages sought in connection with a cause of action for personal injury or wrongful death, although it must include the amount of damages sought in connection with other causes of action, such as for injury to property [*Code Civ. Proc. § 425.10(b)*]. The language in this prayer likewise reflects the prohibition against stating an amount of any claim for punitive damages, regardless of the cause of action or case [*Civ. Code § 3295(e)*].

[3] Cross References

For alternative forms for prayers, see Ch. 420, *Prayers*

For related forms, see *§§ 177.140* and *177.155*

[4] State Statutes

[5] Decisions

[6] Text References

Witkin, California Procedure, vols. 5 and 6, *Pleading*, §§ 456, 457, 892, 893 (4th ed. 1997)

Witkin, Summary of California Procedure, vol. 6, *Torts*, §§ 1718-1719, 1727-1730 (10th ed. 2005)

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15-177 California Forms of Pleading and Practice--Annotated § 177.158

§ 177.158 Proceedings for Order Permitting Pretrial Discovery of Defendant's Profits and/or Financial Condition [Civ. Code § 3295(c)]--Notice of Motion--General Form

[1] FORM Proceedings for Order Permitting Pretrial Discovery of Defendant's Profits and/or Financial Condition [Civ. Code § 3295(c)]--Notice of Motion--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____[*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER PERMITTING DISCOVERY OF DEFEND-
vs.	)	ANT'S PROFITS AND FINANCIAL CONDITION
_____[*name*],	)	[AND REQUEST FOR HEARING]
Defendant	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To the parties herein and to their attorneys of record:

NOTICE IS GIVEN that plaintiff hereby moves the court for an order authorizing discovery into _____ [defendant _____'s (*name*) financial condition *or* the profits which defendant _____ (*name*) has gained by the wrongful course of conduct *or both*]. This motion will be, and hereby is, made on the ground that there is a substantial probability that plaintiff will prevail on his/her punitive damages claim.

[Plaintiff further requests that the court set this motion for hearing, because _____ (*specify facts showing necessity for hearing, e.g.*, the facts are complex, and thus better suited to oral presentation).]

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name*] and the memorandum of points and authorities served and filed herewith, on the papers and records on file herein, and, if there is a hearing on this motion, on such evidence as may be presented at the hearing.
Dated: _____.

_____[*firm name, if any*]
By: _____[*signature*]
_____[*typed name*]
Attorney for Plaintiff _____[*name*]

CAUTION:

A memorandum of points and authorities must be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form of notice of motion is for use by a plaintiff who has claimed punitive damages in an action, and who wishes to conduct pretrial discovery into defendant's financial condition or profits gained by means of defendant's wrongful conduct. If plaintiff desires a hearing, the optional sentence requesting a hearing should be included, since *Civ. Code § 3295(c)* provides for a hearing if the court deems it necessary.

Once plaintiff has obtained an order pursuant to this motion, defendant may then move for a protective order to limit the discovery [*see, e.g. Code Civ. Proc. § 2025.420*; *see also* Ch. 190, *Depositions and Discovery*].

This and the following forms may be modified for use by a cross complainant, or someone other than the plaintiff, if that party seeks punitive damages.

[3] Supporting Declarations and Affidavits

This motion should be supported by affidavits and declarations [*Civ. Code § 3295(c)*]. It is advisable that the supporting affidavits and declarations be as detailed as those which are used to support a motion for summary judgment. They should set forth the evidentiary facts which plaintiff can use to support his or her claim for punitive damages, including any statements of witnesses which are available in the form of deposition transcripts, answers to interrogatories, responses to requests for admissions, and the like. For an example, see *§ 177.159*.

[4] Hearing

A hearing may be required if the court deems it necessary [*Civ. Code § 3295(c)*].

[5] Cross References

For discussion and forms relating to protective orders, see Ch. 190, *Depositions and Discovery*

For memoranda of points and authorities relating to protective orders, see California Points and Authorities, Ch. 80, *Discovery* (Matthew Bender)

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§ 177.159 Proceedings for Order Permitting Pretrial Discovery of Defendant's Profits and/or Financial Condition [Civ. Code § 3295(c)]--Supporting Declaration

[1] FORM Proceedings for Order Permitting Pretrial Discovery of Defendant's Profits and/or Financial Condition [Civ. Code § 3295(c)]--Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____
vs.	)	[*name*] IN SUPPORT OF MOTION FOR ORDER
_____[*name*],	)	PERMITTING DISCOVERY OF DEFENDANT'S
Defendant.	)	PROFITS AND/OR FINANCIAL CONDITION
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for plaintiff, _____ (*name*)].

2. This is an action _____ [*specify the subject matter and issues of the action, including the claim for*

punitive damages, specifically referring to pleadings or other documents on file, and summarizing or attaching portions of those pleading or documents as exhibits, where appropriate].

3. _____ [*Set forth evidentiary sources from which plaintiff will claim that he/she has a substantial probability of prevailing on the punitive damages claim, e.g.,* On _____ [*date*], plaintiff received answers to his/her first set of interrogatories to defendant _____ (*name*), and on _____ [*date*], plaintiff received responses to his/her second set of requests for admissions to defendant _____ (*name*). Answers to interrogatories 70-75 of that first set (attached as Exhibit A and incorporated by reference), and responses to requests for admissions 12-27 of that second set (attached hereto as Exhibit B and made a part hereof) show that there is a substantial probability that plaintiff will prevail on his/her punitive damages claim].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*typed name*]
_____ [*signature*]

[2] Use of Form

This declaration is for use in support of a motion to permit pretrial discovery of defendant's financial condition. This declaration should be accompanied by others which are given by plaintiff and potential witnesses, if any, for the purpose of setting forth facts which the plaintiff will use to show that he or she has a substantial probability of prevailing on the punitive damages claim. The argument that the facts which are set forth constitute malice, oppression, or fraud, which are the bases for an award of punitive damages [*Civ. Code § 3294(a)*], should be made in the accompanying memorandum of points and authorities. For discussion of the statutory definitions of malice, fraud, and oppression, in *Civ. Code § 3294(c)*, see *§ 177.51[6][a]*.

[3] Cross References

For a related form, see *§ 177.158*

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15-177 California Forms of Pleading and Practice--Annotated § 177.160

§ 177.160 Proceedings for Order Permitting Pretrial Discovery of Defendant's Profits and/or Financial Condition [Civ. Code § 3295(c)]--Order Granting Motion

[1] FORM Proceedings for Order Permitting Pretrial Discovery of Defendant's Profits and/or Financial Condition [Civ. Code § 3295(c)]--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____[*name*],	)	ORDER
Defendant.	)	
	)	
	)	

_____

[*EITHER*]

The motion of plaintiff _____ [*name*] for an order authorizing discovery into _____ [the financial condition of defendant _____ (*name*) *or* the profits that defendant _____ (*name*) has gained by the wrongful course of conduct *or both*] was filed with the court on _____ [*date*].

[*OR*]

The motion of plaintiff _____ [*name*] for an order authorizing discovery into _____ [the financial condition of defendant _____ (*name*) *or* the profits that defendant _____ (*name*) has gained by the wrongful course of conduct *or both*] came on regularly for hearing on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

Proof having been made to the satisfaction of the court, and good cause appearing therefor,

IT IS ORDERED THAT plaintiff _____ [*name*] may conduct discovery into [the financial assets of defendant _____ (*name*) *and/or* the profits gained by defendant _____ (*name*) by the virtue of the defendant's wrongful course of conduct]. Such discovery may be by way of depositions, interrogatories, requests for identification, production and inspection of documents and other tangible things, requests for admissions, and by any other appropriate means of discovery.
Dated: _____.

_____ [*signature*]
Judge of the _____Court

[2] Use of Form

This form of order is for use when the court has granted plaintiff's motion for discovery into defendant's financial condition or profits [*see Civ. Code § 3295(c)*]. It may be modified to mention only those methods of discovery which plaintiff's counsel is contemplating, if these methods are known at the time the order is granted.

If a hearing has been requested, and granted, the second paragraph should be used. If no hearing has been requested, the first paragraph, referring only to a written motion, should be used.

[3] Cross References

For a related form, see *§ 177.158*

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15-177 California Forms of Pleading and Practice--Annotated § 177.161

§ 177.161 Statement Reserving Right to Punitive Damages
[Code Civ. Proc. § 425.115(b)]

[1] FORM Statement Reserving Right to Punitive Damages
[Code Civ. Proc. § 425.115(b)]

NOTICE TO _____ [*name of defendant or cross defendant*]. _____ [*Name of plaintiff or cross-complainant*] reserves the right to seek $_____ in punitive damages when _____ [*name of plaintiff or cross-complainant*] seeks a judgment in the suit filed against you.

_____ [*date*]

_____
[*name of attorney or party appearing in propria persona*]

[2] Use of Form

This form is for use by a plaintiff or cross-complainant who is seeking punitive damages under *Civ. Code § 3294* to notify the party from whom punitive damages are sought of the amount of punitive damages sought. The statement set forth in *Code Civ. Proc. § 425.115* or its substantial equivalent must be served on the defendant before a default may be taken, if the motion for a default judgment includes a request for punitive damages [*Code Civ. Proc. § 425.115(f)*]. A plaintiff who serves a statement on the defendant pursuant to *Code Civ. Proc. § 425.115* will be deemed to have complied with *Code Civ. Proc. §§ 425.10* and *580*, and *Civ. Code § 3295* [*Code Civ. Proc. § 425.115(d)*]. For further discussion and forms concerning the entry of default judgments, see Ch. 205, *Defaults and Default Judgments* .

Although not required by *Code Civ. Proc. § 425.115*, counsel may wish to add information to this form, specifying the title of the action in which punitive damages are sought and the case number, in order to ensure that the notice is not later ruled inadequate for due process notice.

[3] Judicial Council Form

The Judicial Council has promulgated a mandatory form of statement of damages for use in a personal injury or wrongful death action [*see Code Civ. Proc. § 425.11(b)*; Cal. Judicial Council Form 982(a)(24); *see § 177.167*]. That form includes a reservation of the right to seek punitive damages [*see Code Civ. Proc. § 425.11(e)* (permitting statement of damages to be combined with reservation of right to seek punitive damages on default judgment)]. It is not clear whether the Judicial Council form will be considered mandatory in cases in which a statement of damages is not filed; in such a case the form would need substantial modification, and so it would seem that a form meeting the requirements of *Code Civ. Proc. § 425.115* should suffice.

[4] Service of Notice

This form must be served by one of the following methods [*Code Civ. Proc. § 425.115(g)*]:

- If the party has not appeared in the action, the statement must be served in the same manner as a summons, pursuant to *Code Civ. Proc. § 415.10 et seq.*

- If the party has appeared in the action, the statement must be served on his or her attorney, or on the party if he or she has appeared without an attorney, either in the same manner as a summons, pursuant to *Code Civ. Proc. § 415.10 et seq.*, or in the manner provided by *Code Civ. Proc. § 1010 et seq.*

The plaintiff may also serve the statement as part of the statement of damages pursuant to *Code Civ. Proc. § 425.11* [*Code Civ. Proc. §§ 425.11(e), 425.115(e)*]. For a form for use in providing that statement of damages, *see § 177.167*.

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15-177 California Forms of Pleading and Practice--Annotated § 177.162

§ 177.162 Notice of Motion for Order Granting Leave to Amend Complaint [Code Civ. Proc. §§ 473(a), 576] to State Fully Nature and Extent of Damages and to Increase Amount of Damages Being Sought

[1] FORM Notice of Motion for Order Granting Leave to Amend Complaint [Code Civ. Proc. §§ 473(a), 576] to State Fully Nature and Extent of Damages and to Increase Amount of Damages Being Sought

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____[*name*],	)	NOTICE OF MOTION AND MOTION TO
Plaintiff,	)	AMEND COMPLAINT
vs.	)	Date: _____
_____[*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To defendant _____ [*name*], and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in the courtroom of [_____ (Department *or* Division) _____ of] this court located at _____ [*address*], _____ [*city*], plaintiff will, and hereby does, move for an order allowing him/her to file the _____ [amended *or* amendment to the] complaint, a copy of which is attached hereto, for the purpose of fully and correctly stating the nature and extent of damages sustained by plaintiff. This motion will be made on the ground that the amendment is in

the furtherance of justice in that _____ [*specify, e.g.,* the full nature and extent of plaintiff's injuries and damages should be set forth to conform to the evidence developed in the discovery proceedings in this action, the injuries and damages as presently stated in Paragraph(s) _____ (-_____) do not fully and completely state the injuries and damages sustained by plaintiff, and the present amount of damages being sought in Paragraph(s) _____ (-_____) is inadequate to compensate plaintiff for the detriment suffered by him/her in view of the nature and extent of his/her injuries].

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum of points and authorities served and filed herewith, on the papers and records on file herein [, including the depositions and _____ (*specify, e.g.,* medical) records produced in discovery proceedings in this action], and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____[*firm name, if any*]
By: _____[*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____[*name*]

CAUTION:
A memorandum of points and authorities must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This notice of motion is for use by a plaintiff in obtaining an order allowing him or her to amend the complaint in a tort action to allege and pray for increased damages [*Campain v. Safeway Stores, Inc. (1972) 29 Cal. App. 3d 362, 365, 104 Cal. Rptr. 752* ; for discussion of the limitations on stating the amount of damages sought in actions for personal injury or wrongful death brought in superior court, *see 177.16[3]*]. A plaintiff may move for such an order at any time before or after commencement of the trial of the action even at the conclusion of trial [*Code Civ. Proc. § 576*; *Soares v. Carter (1952) 114 Cal. App. 2d 325, 327, 250 P.2d 164* ; *Burford v. Baker (1942) 53 Cal. App. 2d 301, 309, 127 P.2d 941]* .

[3] Personal Injury or Wrongful Death Action

The complaint must not state the amount of actual or punitive damages demanded for any cause of action for personal injury or wrongful death [*Code Civ. Proc. § 425.10(b)*]. Further, the plaintiff may not subsequently amend the complaint to pray for a specific amount of damages [*Austin v. Regents of Univ. of Cal. (1979) 89 Cal. App. 3d 354, 359, 152 Cal. Rptr. 420]* . However, this form may be used if it is necessary to amend the complaint to allege a category of special damages (for example, future medical expenses) that was not alleged or prayed for in the original complaint.

[4] Cross References

For discussion, procedures, and forms for use in amending pleadings generally, see Ch. 21, *Amended and Supplemental Pleadings*

For discussion, procedures, and forms for use in making motions generally, see Ch. 372, *Motions and Orders*

[5] Decisions

[6] Text References

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 1113-1119, 1126-1148 (4th ed. 1997)

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15-177 California Forms of Pleading and Practice--Annotated § 177.163

§ 177.163 Ascertaining Amount of Damages Being Sought in Personal Injury or Wrongful Death Action in Superior Court [Code Civ. Proc. § 425.11]--Request for Statement of Damages by Defendant

[1] FORM Ascertaining Amount of Damages Being Sought in Personal Injury or Wrongful Death Action in Superior Court [Code Civ. Proc. § 425.11]--Request for Statement of Damages by Defendant

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____[*name*],	)	REQUEST FOR STATEMENT OF DAMAGES
Defendant.	)	
	)	
	)	

_____

Defendant hereby requests that plaintiff serve on him/her a statement setting forth the nature and amount of damages being sought in _____ [this *or, if there are multiple causes of action*, plaintiff's _____ (*specify, e.g.*, second) cause of] action.
Dated: _____.

_____[*firm name, if any*]
By: _____[*signature*]
_____ [*typed name*]
Attorney for Defendant _____[*name*]

[2] Use of Form

This request is for use by a defendant in an action for personal injury or wrongful death. With respect to these causes of action, the complaint in such an action may not state the amount of actual or punitive damages being sought, although the complaint must state the amount of damages sought for other causes of action, such as for injury to property [*Code Civ. Proc. § 425.10(b)*]. Thus, when *Code Civ. Proc. § 425.10(b)* applies to preclude a statement of the amount of damages in a complaint, the defendant may ascertain the omitted amounts by filing this request for a statement that sets out the nature and amount of damages being sought [*Code Civ. Proc. § 425.11*].

This form of request may be modified for use by a cross defendant when damages are being sought in a cross complaint [*see Code Civ. Proc. § 425.11*].

[3] Cross References

For discussion and forms relating to wrongful death actions, see Ch. 181, *Death and Survival Actions*

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15-177 California Forms of Pleading and Practice--Annotated § 177.164

§ 177.164 Ascertaining Amount of Damages Being Sought in Personal Injury or Wrongful Death Action in Superior Court [Code Civ. Proc. § 425.11]--Notice of Motion for Order Compelling Responsive Statement--By Defendant

[1] FORM Ascertaining Amount of Damages Being Sought in Personal Injury or Wrongful Death Action in Superior Court [Code Civ. Proc. § 425.11]--Notice of Motion for Order Compelling Responsive Statement--By Defendant

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____[*name*],	)	NOTICE OF MOTION AND MOTION TO COM-
Plaintiff,	)	PEL RESPONSE TO REQUEST FOR STATEMENT
vs.	)	OF DAMAGES
_____[*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To plaintiff _____ [*name*], and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in the courtroom of [_____ (Department *or* Division) _____ of] this court located at _____ [*address*], _____ [*city*],

defendant will, and hereby does, move for an order directing plaintiff to serve on defendant a responsive statement setting forth the nature and amount of damages being sought in _____ [this *or, if there are multiple causes of action*, plaintiff's _____ (*specify, e.g.,* second) cause of] action. This motion will be made on the ground that on _____, [*date*] defendant served on plaintiff a written request for a statement as to the nature and amount of damages sought herein and plaintiff has not responded. Defendant does not know the nature and amount of damages sought and is unable _____ [*specify, e.g.,* to prepare adequately for the trial of this action] until the same are ascertained.

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum of points and authorities served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

CAUTION:
A memorandum of points and authorities must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This notice of motion is for use in an action that is not a limited civil case for personal injuries or wrongful death when defendant has requested a statement setting forth the nature and amount of damages being sought and plaintiff has not served a responsive statement within 15 days [*Code Civ. Proc. § 425.11*].

This notice of motion may be modified for use by a cross defendant when damages are being sought in a cross complaint [*see Code Civ. Proc. § 425.11*].

[3] Cross References

For discussion and forms relating to notice of motion, see Ch. 372, *Motions and Orders*

For a related form, see *§ 177.163*

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15-177 California Forms of Pleading and Practice--Annotated § 177.165

§ 177.165 Ascertaining Amount of Damages Being Sought in Personal Injury or Wrongful Death Action in Superior Court [Code Civ. Proc. § 425.11]--Declaration in Support of Motion for Order Compelling Responsive Statement--By Attorney for Defendant

[1] FORM Ascertaining Amount of Damages Being Sought in Personal Injury or Wrongful Death Action in Superior Court [Code Civ. Proc. § 425.11]--Declaration in Support of Motion for Order Compelling Responsive Statement--By Attorney for Defendant

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
[*name*], _____[*name*],	)	DECLARATION OF _____ [*name*]
Plaintiff,	)	IN SUPPORT OF MOTION TO COMPEL RE-
vs.	)	SPONSE TO REQUEST FOR STATEMENT OF
_____[*name*],	)	DAMAGES
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

I am an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record for _____ [*name*], defendant herein.

On _____ [*date*], I served on _____ [*name*], _____ [*specify, e.g.,* plaintiff's attorney herein], a written request for a statement setting forth the nature and amount of damages being sought herein by _____ [*specify method of service, e.g.,* first-class mail].

Plaintiff has not responded to the foregoing written request.

Defendant is unable _____ [*specify, e.g.,* to prepare adequately for the trial of this action] until the nature and amount of damages being sought is ascertained.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct _____ [*date*].

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

This declaration should be attached to a motion by defendant for an order compelling the plaintiff to serve a responsive statement setting forth the nature and amount of damages being sought in a personal injury or wrongful death action [*Code Civ. Proc. § 425.11*].

[3] Cross References

For forms of affidavits and declarations under penalty of perjury, see Ch. 15, *Affidavits, Certificates, and Declarations*

For related forms, see *§§ 177.163* and *177.164*

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15-177 California Forms of Pleading and Practice--Annotated § 177.166

§ 177.166 Ascertaining Amount of Damages Being Sought in Personal Injury or Wrongful Death Action in Superior Court [Code Civ. Proc. § 425.11]--Order Compelling Plaintiff to Serve Responsive Statement

[1] FORM Ascertaining Amount of Damages Being Sought in Personal Injury or Wrongful Death Action in Superior Court [Code Civ. Proc. § 425.11]--Order Compelling Plaintiff to Serve Responsive Statement

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____[*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____[*name*],	)	Dept: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of defendant for an order compelling plaintiff to serve a responsive statement setting forth the nature and amount of damages sought in the above-entitled action came on regularly for hearing by the court on this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

Upon proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and plaintiff is directed to serve on defendant a responsive statement setting forth the nature and amount of damages sought in the above-entitled action.

Dated: _____.

_____[*signature*]
Judge of the Superior Court

[2] Use of Form

This order is for use in granting a motion to compel a plaintiff in a personal injury or wrongful death action to serve a responsive statement setting forth the nature and amount of damages being sought [*Code Civ. Proc. § 425.11*].

[3] Cross References

For related forms, see *§§ 177.163 -177.165*

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15-177 California Forms of Pleading and Practice--Annotated § 177.167

§ 177.167 Ascertaining Amount of Damages Being Sought in Personal Injury or Wrongful Death Action in Superior Court [Code Civ. Proc. § 425.11]--Statement of Damages by Plaintiff--Judicial Council Form [Cal. Judicial Council Form CIV-050]

[1] FORM Ascertaining Amount of Damages Being Sought in Personal Injury or Wrongful Death Action in Superior Court [Code Civ. Proc. § 425.11]--Statement of Damages by Plaintiff--Judicial Council Form [Cal. Judicial Council Form CIV-050]

Click here to view image.

[2] Use of Form

This form is an illustration of the mandatory Judicial Council form of a statement of damages for use in an action for personal injury or wrongful death [*see* Cal. Judicial Council Form CIV-050]. It is used if the defendant has requested a statement of damages, in which case plaintiff must serve the responsive statement within 15 days of the request. In addition, a plaintiff must use this form to give defendant notice of the amount of damages being sought before a default is taken if the defendant has not requested for a statement [*Code Civ. Proc. § 425.11*]. For further discussion, see *§ 177.43*.

This form may also be used to give defendant notice of the amount of punitive damages sought, if any [*Code Civ. Proc. § 425.11(e)*; *see Civ. Code § 3295(e)* (complaint may not state amount of punitive damages)]. Due process requires that this notice be given before punitive damages may be recovered from a defaulting defendant [*Wiley v. Rhodes (1990) 223 Cal. App. 3d 1470, 1472-1474, 273 Cal. Rptr. 279]* . This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Cross References

For related forms, see *§§ 177.163 -177.166*

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15-177 California Forms of Pleading and Practice--Annotated § 177.168

§ 177.168 Notice of Intention to Move for New Trial [Code Civ. Proc. § 659] on Ground of Excessive or Inadequate Damages
[Code Civ. Proc. § 657(5)]

[1] FORM Notice of Intention to Move for New Trial [Code Civ. Proc. § 659] on Ground of Excessive or Inadequate Damages
[Code Civ. Proc. § 657(5)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____[*name*],	)	NOTICE OF INTENTION TO MOVE FOR NEW
Defendant.	)	TRIAL ON GROUND OF _____
	)	[EXCESSIVE *or* INADEQUATE] DAMAGES
	)	

To _____ [*name of adverse party, e.g.,* plaintiff], _____ [*name*], and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that _____ [*moving party, e.g.,* defendant] intends to move the above-entitled court to vacate and set aside the _____ [verdict of the jury *or* decision of the court] rendered in this action in favor of _____ [*adverse party, e.g.,* plaintiff] and against _____ [*moving party, e.g.,* defendant] and to grant _____ [*moving party, e.g.,* defendant] a new trial on the issue of damages. This motion will be made on the ground that the damages awarded by the _____ [jury *or* court] in this action are _____ [excessive *or* inadequate] in that

_____ [*specify, e.g.*, the punitive damages awarded are so grossly disproportionate to the wealth of the defendant and to the compensatory damages awarded that they suggest passion and prejudice on the part of the jury].

The motion will be based on this notice of intention to move for a new trial, on the minutes of the court, on the memorandum of points and authorities served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

CAUTION:
A memorandum of points and authorities must be served and filedwithin 10 days after filing this intention to move for a new trial [*Cal. Rules of Ct., Rule 3.1600*]. For discussion and forms, see Ch. 417, *Points and Authorities*

[2] Use of Form

This notice of intention to move for a new trial on the issue of damages is for use by a party in whose favor or against whom a verdict or decision is rendered when that party seeks a new trial on the ground of excessive or inadequate damages.

When the ground of the motion is excessive or inadequate damages, the motion must be made on the minutes of the court [*Code Civ. Proc. § 658*]. Whether a verdict is excessive is to be determined solely from a consideration of the evidence in the case and not by a showing of extrinsic facts, by affidavits, or otherwise [*Harrison v. Sutter St. Ry. Co. (1897) 116 Cal. 156, 162, 47 P. 1019]* . For further discussion of excessive or inadequate damages, see *§ 177.19*.

[3] Preparation of Order for New Trial

When a motion for a new trial is granted, the court must prepare the order and the specification of reasons and must not direct the attorney for a party to prepare either or both the order and the specification of reasons [*Code Civ. Proc. § 657*]. The fact that the order may be a conditional order for a new trial contingent on the plaintiff's failure to consent to remittitur or the defendant's failure to consent to additur does not excuse compliance with the requirements of *Code Civ. Proc. § 657* merely because the subsequent entry of a plaintiff's or defendant's consent transforms the order into an unconditional denial of the motion for a new trial. The reasons underlying the requirement of specification of reasons--that is, encouraging careful deliberation by the trial court before ruling on the new trial motion and making a sufficiently precise record to permit meaningful appellate review--are equally applicable whether or not the plaintiff or defendant chooses to accede to the alteration of the jury's verdict [*Neal v. Farmers Ins. Exch. (1978) 21 Cal. 3d 910, 930-931, 148 Cal. Rptr. 389, 582 P.2d 980]* .

Although, generally, a motion for a new trial granted on the ground of excessive damages should indicate the respects in which the evidence dictated a less sizeable verdict, when the amount of punitive damages is the court's primary concern, the specification of reasons is sufficient if the order makes reference to those aspects of the trial proceedings which, in the court's view, improperly led the jury to inflate its award [*Neal v. Farmers Ins. Exch. (1978) 21 Cal. 3d 910, 932, 148 Cal. Rptr. 389, 582 P.2d 980* ; *Gerard v. Ross (1988) 204 Cal. App. 3d 968, 978, 251 Cal. Rptr. 604]* . In such cases, the court's specification is adequate if it enables a reviewing court to determine whether or not there was a substantial basis, in law and fact, for the order [*Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 822, 174 Cal. Rptr. 348]* .

[4] Cross References

For discussion, procedures, and forms relating to motions for new trial generally, see Ch. 371, *Motions After Trial*

For memoranda of points and authorities relating to motions for a new trial on the ground of excessive or inadequate damages, see California Points and Authorities, Ch. 65, *Damages*

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15-177 California Forms of Pleading and Practice--Annotated § 177.169

§ 177.169 Consent to Addition to Damages [Code Civ. Proc. § 662.5(a)]--By Defendant

[1] FORM Consent to Addition to Damages [Code Civ. Proc. § 662.5(a)]--By Defendant

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	
Plaintiff,	)	
vs.	)	No. _____
_____[*name(s)*],	)	CONSENT TO ADDITION TO DAMAGES
Defendant[s].	)	
	)	
	)	

_____

Defendant[s, individually and jointly,] hereby consent(s) to an addition of damages from the sum of $_____ specified in the verdict in the above entitled action to the sum of $_____ provided that plaintiff's motion for a new trial on the issue of damages be denied.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

This form of consent is for use by a defendant against whom a verdict has been rendered when the trial court has granted the motion for a new trial on the issue of damages unless defendant consented to an addition to the amount of damages awarded in an amount fixed by the trial court [*Code Civ. Proc. § 662.5(a)*].

[3] State Statutes

[4] Cross References

For a related form, see *§ 177.169*

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15-177 California Forms of Pleading and Practice--Annotated § 177.170

**§ 177.170 Consent to Reduction of Damages [Code Civ. Proc. § 662.5(b)]--
By Plaintiff**

[1] FORM Consent to Reduction of Damages [Code Civ. Proc. § 662.5(b)]--
By Plaintiff

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____[*name(s)*],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____[*name*],	)	CONSENT TO REDUCTION OF DAMAGES
Defendant.	)	
	)	
	)	

_____

Plaintiff[s, individually and jointly,] hereby consent(s) to a reduction of damages from the sum of $_____ specified in the verdict in the above entitled action to the sum of $_____ provided that defendant's motion for a new trial on the issue of damages be denied.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

This form of consent is for use by a plaintiff in whose favor a verdict has been rendered, if the trial court has granted a motion for a new trial on the issue of damages unless the plaintiff consents to a reduction of the amount of damages awarded in an amount fixed by the trial court [*Code Civ. Proc. § 662.5(b)*].

[3] Cross References

For related forms, see *§§ 177.168* and *177.169*

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[Reserved]

§§ 177.171[Reserved]

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B. Damages in Contract Action

15-177 California Forms of Pleading and Practice--Annotated § 177.190

§ 177.190 Allegation of Damages for Breach of Contract [Civ. Code § 3300]--General Damages

[1] FORM Allegation of Damages for Breach of Contract [Civ. Code § 3300]--General Damages

As a proximate result of defendant's breach of the contract as herein alleged, plaintiff has suffered damages in the sum of $_____.

[2] Use of Form

This allegation is for use by plaintiff to allege general compensatory damages resulting from a breach of contract [*see Civ. Code § 3300*]. General damages are those that naturally arise from the breach or that might have been reasonably contemplated or foreseen by the parties at the time they contracted as the probable result of a breach [*Glendale Fed. Sav. & Loan Ass'n v. Marina View Heights Dev. Co. (1977) 66 Cal. App. 3d 101, 125, 135 Cal. Rptr. 802]* . They need not be specially pleaded [*Myers v. Stephens (1965) 233 Cal. App. 2d 104, 120, 43 Cal. Rptr. 420]* . Moreover, it is not necessary to point out in detail the nature and extent of general damages. The question as to how they arose from the breach of contract, otherwise than as disclosed by the general allegation of damages, is the subject of evidence, rather than pleading [*Colvig v. RKO General, Inc. (1965) 232 Cal. App. 2d 56, 68-69, 42 Cal. Rptr. 473]* .

[3] State Statutes

Damages defined. *Civ. Code § 3281*

Detriment defined. *Civ. Code § 3282*

Damages awardable for future detriment. *Civ. Code § 3283*

Measure of damages for breach of contract. *Civ. Code § 3300*

[4] Text References

Witkin, California Procedure, vol. 5, *Pleading*, § 896 (4th ed. 1997)

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15-177 California Forms of Pleading and Practice--Annotated § 177.191

§ 177.191 Allegation of Damages for Breach of Contract [Civ. Code § 3300]--Loss of Profits by Plaintiff Who Held Contract With Third Person

[1] FORM Allegation of Damages for Breach of Contract [Civ. Code § 3300]--Loss of Profits by Plaintiff Who Held Contract With Third Person

At the time of contracting, _____ [plaintiff told defendant *or* defendant knew, or had reason to know,] that plaintiff had a contract with _____ [*name of third party*], and that plaintiff's purpose in entering into the contract with defendant was to obtain _____ [*specify the item(s) involved in the contract, e.g.,* Italian marble] so that plaintiff could perform his/her contract with _____ [*name of third party*]. As a result of defendant's breach, plaintiff was unable to carry out the contract with _____ [*name of third party*], and as a conse quence plaintiff lost the profits he/she was expecting to receive from that contract, all to his/her damage in the sum of $_____.

[2] Use of Form

This allegation is for use by plaintiff in a complaint for damages for breach of contract when that plaintiff had entered into a contract with a third party, defendant knew or had reason to know of this contract, and defendant's breach rendered plaintiff unable to perform the contract with the third party. When a loss of profits is the direct and natural result of a breach, damages for such loss are recoverable without special allegations [*Myers v. Stephens (1965) 233 Cal. App. 2d 104, 121, 43 Cal. Rptr. 420]* . If, however, the loss of profits is not a direct and natural result of defendant's breach, special allegations of such loss apparently would need to be made, including the allegation that the parties contemplated such a loss in the event of a breach [*Fraser v. Bentel (1911) 161 Cal. 390, 396, 119 P. 509]* .

For a discussion of damages for lost profits, see *§ 177.79[3]*.

[3] Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 879-882 (10th ed. 2005)

[4] Cross References

See *§ 177.190*

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15-177 California Forms of Pleading and Practice--Annotated § 177.192

§ 177.192 Allegation of Damages for Breach of Contract [Civ. Code § 3300]--Loss of Good Will of Business

[1] FORM Allegation of Damages for Breach of Contract [Civ. Code § 3300]--Loss of Good Will of Business

1. At the time of contracting, the parties to the contract realized that any breach of the contract would result in a loss of good will to plaintiff's business in that _____ [*specify, e.g.,* plaintiff told defendant that it would be relying on the equipment to be supplied by defendant to provide the majority of its capacity, and if the equipment did not function properly or was not delivered on time, an interruption in plaintiff's business would result].

2. As a result of defendant's breach of the contract, plaintiff has suffered the loss of good will in that _____ [*specify, e.g.,* a number of customers have stopped doing business with plaintiff because, during the time it took to repair the equipment, plaintiff could not give its customers same-day service], all to plaintiff's damage in the sum of $_____.

[2] Use of Form

This allegation is for use by plaintiff in a complaint for damages for breach of contract when plaintiff's business has suffered a loss of good will as a result of defendant's breach. The facts with respect to damages to plaintiff's business and its good will should be alleged with particularity and should be sufficient to show that the loss of good will resulted directly and naturally in the ordinary course of events from the breach of contract [*Walpole v. Prefab Mfg. Co. (1951) 103 Cal. App. 2d 472, 490, 230 P.2d 36]* .

For a discussion of damages for the loss of good will, see *§ 177.79[3]*.

[3] State Statutes

Good will defined. *Bus. & Prof. Code § 14100*

[4] Decisions

Damages for loss of good will resulting from contract breach as recoverable. *Stott v. Johnston (1951) 36 Cal. 2d 864, 872, 229 P.2d 348* ; *Gregory v. Spieker (1895) 110 Cal. 150, 154, 42 P. 576* ; *Walpole v. Prefab Mfg. Co. (1951) 103 Cal. App. 2d 472, 490, 230 P.2d 36*

Fact that detriment due to loss of good will cannot be measured with mathematical accuracy is not sufficient for denial of compensation. *Johnson v. Snyder (1950) 99 Cal. App. 2d 86, 89, 221 P.2d 164*

[5] Cross References

See *§ 177.190*

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15-177 California Forms of Pleading and Practice--Annotated § 177.193

§ 177.193 Allegation of Damages for Breach of Contract [Civ. Code § 3300]--Expenses Incurred in Anticipation of Performance of Agreement by Defendant

[1] FORM Allegation of Damages for Breach of Contract [Civ. Code § 3300]--Expenses Incurred in Anticipation of Performance of Agreement by Defendant

In reliance on the promises and agreements of defendant as set forth in the [written] agreement, plaintiff incurred expenses in anticipation of defendant's performance of the contract in that _____ [*specify expenses incurred, e.g.*, plaintiff became obligated under a contract to have a third party build an addition on to plaintiff's factory to house the equipment that defendant was to deliver], all to plaintiff's damage in the sum of $_____.

[2] Use of Form

This allegation is for use by plaintiff in a complaint for damages for breach of contract when that plaintiff incurred expenses in anticipation of defendant's performance. For a discussion of expenses as damages, see *§ 177.79[5]*.

[3] Decisions

Amount and items giving rise to special damages must be pleaded with particularity. *Shook v. Pearson (1950) 99 Cal. App. 2d 348, 352, 221 P.2d 757*

[4] Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, § 883 (10th ed. 2005)

Witkin, California Procedure, vol. 5, *Pleading*, §§ 888, 897 (4th ed. 1997)

[5] Cross References

See *§ 177.190*

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15-177 California Forms of Pleading and Practice--Annotated § 177.194

§ 177.194 Allegation of Damages for Breach of Contract [Civ. Code § 3300]--Property Had Peculiar Value to Plaintiff [Civ. Code § 3355]

[1] FORM Allegation of Damages for Breach of Contract [Civ. Code § 3300]--Property Had Peculiar Value to Plaintiff [Civ. Code § 3355]

In entering into the contract, the parties agreed that _____ [*specify item, e.g,* the gas torches to be manufactured by defendant] had a peculiar value to plaintiff in the amount of $_____ [and that it/they could not be obtained on the open market]. As a result of defendant's breach of contract as herein alleged, plaintiff has suffered damage in the sum of $_____.

[2] Use of Form

This allegation is for use by plaintiff in an action for damages for breach of contract if the subject matter of the contract had a peculiar value to plaintiff and defendant had notice of this value before entering into the contract. If property has a peculiar value to the aggrieved party, and the breaching party had notice of that special value before incurring liability with respect to that property, the special value applies to determine liability for damages for deprivation or injury of the property [*see Civ. Code § 3355*].

For allegations regarding *Civ. Code § 3355* in the tort context, *see §§ 177.149* and *177.149*.5.

[3] State Statutes

Damages for deprivation of property with peculiar value to owner; necessity of notice to defendant of value. *Civ. Code § 3355*

[4] Decisions

Civ. Code § 3355 is applicable to determine damages for delay in delivering scenery for play. *Artists' Embassy v. Hunt (1958) 157 Cal. App. 2d 371, 374-375, 320 P.2d 924*

Complaint alleging that defendant had notice of peculiar value to plaintiffs before liability was incurred and that contract was executed with that understanding held to plead all elements necessary to bring case within *Civ. Code § 3355*. *Forster v. Carouso (1931) 114 Cal. App. 303, 305, 299 P. 741* ; *see* *Drinkhouse v. Van Ness (1927) 202 Cal. 359, 377-378, 260 P. 869*

[5] Cross References

See *§§ 177.190* and *177.193*

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15-177 California Forms of Pleading and Practice--Annotated § 177.195

§ 177.195 Allegation of Damages for Breach of Contract [Civ. Code § 3300]--Failure to Pay Money [Civ. Code § 3302]

[1] FORM Allegation of Damages for Breach of Contract [Civ. Code § 3300]--Failure to Pay Money [Civ. Code § 3302]

As a result of defendant's failure and refusal to pay plaintiff the money owed under the contract, or any part of it, plaintiff has been damaged in the sum of $_____, together with interest thereon at _____ [*specify rate provided by contract, e.g.,* 10 percent per annum, as provided by the note *or* the legal rate] from and after the date payment was due, which was _____ [*specify date*].

[2] Use of Form

This allegation is for use by plaintiff in a complaint for damages for breach of a contract to pay money only. The detriment caused by the breach of an obligation to pay money only is the amount due by the terms of the obligation with interest thereon [*Civ. Code § 3302*; *see also Civ. Code § 3289* (stipulated rate)].

If, however, the "obligation to pay money" is an obligation to pay interest-only installment payments on a note, *Civ. Code §§ 3357* and *3358* prevent the award of prejudgment interest on the delinquent interest, unless there is an agreement that provides for compounding [*Ninety Five Ten v. Crain (1991) 231 Cal. App. 3d 36, 39-41, 282 Cal. Rptr. 141* (disapproving *Daum Development Corp. v. Yuba Plaza, Inc. (1970) 11 Cal. App. 3d 65, 89 Cal. Rptr. 458* , to extent it may be construed to sanction award of interest on interest in absence of agreement)].

[3] State Statues

Measure of damages for breach of obligation to pay money only. *Civ. Code § 3302*

[4] Decisions

If contract involves factors in addition to payment of money, *Civ. Code § 3302* is not applicable. *Venturi v. Zurich General A. & L. Co. (1936) 14 Cal. App. 2d 89, 90, 57 P.2d 1002*

[5] Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, § 908 (10th ed. 2005)

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§ 177.196 Allegation of Liquidated Damages [Civ. Code § 1671]--Consumer Contract or Contract Made Before July 1, 1978

[1] FORM Allegation of Liquidated Damages [Civ. Code § 1671]--Consumer Contract or Contract Made Before July 1, 1978

At the time the parties entered into the contract, the parties realized that it would be extremely difficult or impracticable to ascertain damages in the event of a breach of the contract because _____ [*specify why damages would be difficult to establish, e.g.,* the product being introduced and marketed was new and unique and, thus, its acceptance and inital sales volume would be difficult to predict]. Therefore, the parties agreed that, if a breach occurred, the sum of $_____ would be paid by the breaching party as liquidated damages. This sum represented a reasonable endeavor by the parties to ascertain what damages resulting from a breach would be. Because a breach has occurred, plaintiff is entitled to recover from defendant the liquidated damages in the sum of $_____.

[2] Use of Form

This allegation is for use by plaintiff in a complaint for liquidated damages following breach of either (1) a contract entered into before July 1, 1978, or (2) a contract entered into after that date that is for the retail purchase or rental of personal property or services, primarily for personal, family, or household purposes, or for the lease of real property for use as a dwelling by a party to the lease or those dependent on the party for support [*Civ. Code § 1671(c)*]. In the case of a consumer contract or lease entered into after July 1, 1978, these allegations are only necessary when the liquidated damages provision is sought to be enforced against the consumer [*see* Cal. Law Revision Comm. Comment to *Civ. Code § 1671(c)*].

In all other situations not governed by specific statutes, a liquidated damages provision is presumed valid and, consequently, a special allegation need not be made [*see Civ. Code § 1671*; *see also § 177.197*].

For a discussion of liquidated damages, see *§ 177.78*.

[3] Right to Jury Trial

At common law, a party in breach was not entitled to a jury trial in an action for affirmative relief from a penalty for breach; exclusive jurisdiction of affirmative recovery remained in equity courts. The right to a jury trial was limited to defensive relief in the form of assessment of actual damages when the nonbreaching party sued at law to recover the penalty [*Beasley v. Wells Fargo Bank (1991) 235 Cal. App. 3d 1383, 1392-1393, 1 Cal. Rptr. 2d 446* (but cross complaint by nonbreaching party may create defensive claim for relief for which there is right to jury trial), *disapproved on other grounds, Olson v. Automobile Club of So. Cal. (2008) 42 Cal. 4th 1142, 1153 n.6*]. For further discussion, see *§ 177.78*.

[4] State Statutes

General liquidated damages provision. *Civ. Code § 1671*

[5] Decisions

Even after invalidating liquidated damages provision in consumer contract, nonbreaching party is entitled to recover its actual damages resulting from consumer's default; in context of late charges, measure of damages accounts for period of time money was wrongfully withheld plus administrative costs reasonably related to collecting and accounting for late payment. *Garrett v. Coast & Southern Fed. Sav. & Loan Ass'n (1973) 9 Cal. 3d 731, 741, 108 Cal. Rptr. 845, 511 P.2d 1197* ; *Beasley v. Wells Fargo Bank (1991) 235 Cal. App. 3d 1383, 1402, 1 Cal. Rptr. 2d 446 , disapproved on other grounds, Olson v. Automobile Club of So. Cal. (2008) 42 Cal. 4th 1142, 1153 n.6*

Passing on of fees charged by collection agency, pursuant to agreement signed by patients requiring them to pay hospital's collection costs, was invalid attempt to collect liquidated damages, in that there was no advance agreement regarding amount, and no effort made to estimate fair compensation for plaintiffs' breach. *Bondanza v. Peninsula Hospital & Medical Center (1979) 23 Cal. 3d 260, 266-268, 152 Cal. Rptr. 446, 590 P.2d 22* (contract made in 1973, 1974, thus former law or *Civ. Code § 1671(c), (d)* was applicable)

Provision in lease for liquidated damages for failure to pay rent is ordinarily not enforceable because there is no presumption that amount of damages that may result from tenant's breach of covenant to pay rent is impossible or extremely difficult to fix. *McCarthy v. Tally (1956) 46 Cal. 2d 577, 583, 297 P.2d 981* (*now see Civ. Code §§ 1671(c), (d), 1951.5*)

After invalidating liquidated damages provision in consumer contract, nonbreaching party's actual damages do not properly include fees it paid to collection agency based on percentage of collected debts, even if nonbreaching party actually paid those fees, when they did not necessarily represent actual expense required to collect late balances. *Beasley v. Wells Fargo Bank (1991) 235 Cal. App. 3d 1383, 1405-1406, 1 Cal. Rptr. 2d 446 , disapproved on other grounds, Olson v. Automobile Club of So. Cal. (2008) 42 Cal. 4th 1142, 1153 n.6*

Whether measure of nonbreaching party's actual damages includes its indirect costs is factual question turning on causation. *Beasley v. Wells Fargo Bank (1991) 235 Cal. App. 3d 1383, 1404-1405, 1 Cal. Rptr. 2d 446 , disapproved on other grounds, Olson v. Automobile Club of So. Cal. (2008) 42 Cal. 4th 1142, 1153 n.6*

Liquidated damages clause in contract gives rise to rebuttable presumption (under former *Civ. Code § 1671* and Evidence Code) that liquidated damages constitute actual loss, imposing on party using presumption burden of introducing evidence and proving foundational facts from which presumption will flow. *Barbera v. Sokol (1980) 101 Cal. App. 3d 725, 732-733, 161 Cal. Rptr. 843*

Provision in nonconsumer sales contract for excessive interest on upaid balance was invalid liquidated damages clause in that parties made no attempt to agree beforehand on amount that would constitute fair average compensation for losses sustained. *Crestwood Lumber Co. v. Citizen's Sav. & Loan Ass'n (1978) 83 Cal. App. 3d 819, 826, 827, 148 Cal. Rptr. 129*

[6] Law Reviews

Note, *A Critique of the Penalty Limitation on Liquidated Damages, 50 S. Cal. L. Rev. 1055 (1977)*

Note, *Late-Payment Charges: Meeting the Requirements of Liquidated Damages, 27 Stan. L. Rev. 1133 (1975)*

Comment, *The High Cost of Borrowing--Late Fees, Alternative Performance, and Garrett v. Coast and Southern Federal Savings and Loan Association, 14 Santa Clara Law. 706 (1974)*

Sweet, *Liquidated Damages in California, 60 Cal. L. Rev. 84 (1972)*

Comment, *Liquidated Damages and the "No Harm Rule," 9 Stan. L. Rev. 381 (1957)*

Note, *Contracts: Liquidated Damages; Necessity of Actual Damages, 4 UCLA L. Rev. 126 (1956)*

[7] Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 503-542 (9th ed. 1987)

13 Cal. Law Revision Comm. Rep. 1740

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§ 177.197 Allegation of Liquidated Damages [Civ. Code § 1671]--Contract Made After July 1, 1978

[1] FORM Allegation of Liquidated Damages [Civ. Code § 1671]--Contract Made After July 1, 1978

[*EITHER*]

The parties agreed in Paragraph _____ of the contract that _____ [in the event of a breach by either party *or specify conditions under which liquidated damages provision would apply, e.g.,* if the film was not ready for distribution by _____ (*date*)], plaintiff would be entitled to recover _____ [*specify amount of damages and/or formula for determining amount, e.g,* $_____ per week for every week thereafter until three hundred prints of the film had been delivered to the distributor].

[*OR*]

On entering into the contract with plaintiff, defendant provided a deposit of $_____ as security for the performance of his/her/its contractual obligations. The contract provided that this deposit would be liquidated damages in the event of a breach of the contract. Defendant has breached the contract as herein alleged, entitling plaintiff to the sum of $_____ as damages.

[2] Use of Form

Either of these allegations may be used by a plaintiff in a complaint for liquidated damages following a breach of a contract entered into after July 1, 1978, as long as the liquidated damages provision is not sought to be enforced against a consumer or residential lessee [*see Civ. Code § 1671(c), (d)* (consumer exceptions)]. These allegations may also be modified by insertion of an appropriate preamble for use as an affirmative defense to a complaint that seeks damages in excess of those provided for by the liquidated damage provision.

The party seeking to invalidate the liquidated damages provision has the burden of establishing that the provision was unreasonable under the circumstances existing at the time the contract was made [*Civ. Code § 1671(a), (b)*; *see also § 177.78[5]*].

The first alternative should be used if a liquidated damages provision is included in the contract. The second alternative is for use when defendant has made a deposit which the contract stipulates will be liquidated damages in the event of a breach.

[3] Decisions

Clause in promissory note imposing charge of six months' interest if borrowers prepaid loan principal and providing that charge would not be imposed six months after execution of note unless borrowers made late interest payment or otherwise defaulted was held to be unenforceable penalty for late payment as it bore no relationship to potential damages defendant would incur from late interest payment. *Ridgley v. Topa Thrift & Loan Assn. (1998) 17 Cal. 4th 970, 979-981, 73 Cal. Rptr. 2d 378, 953 P.2d 484*

Defendant having failed to prove that interest of 1.5 percent per month on balance due for assembly work and remaining unpaid after 30 days was unreasonable, interest provision was validated liquidated damages provision under *Civ. Code § 1671(b)* and *Com. Code § 2718*; in addition, parties were merchants and bound to provision under *Com. Code § 2718*. *O'Connor v. Televideo System, Inc. (1990) 218 Cal. App. 3d 709, 718-719, 267 Cal. Rptr. 237*

[4] Cross References

See *§ 177.196*

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§ 177.198 Prayer for Compensatory Damages [Civ. Code § 3300] and Interest [Civ. Code § 3287]--By Plaintiff in Action for Damages for Breach of Contract

[1] FORM Prayer for Compensatory Damages [Civ. Code § 3300] and Interest [Civ. Code § 3287]--By Plaintiff in Action for Damages for Breach of Contract

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For compensatory damages, in the sum of $_____;

2. For interest at the _____ [legal rate *or specify other rate provided for by the contract, e.g.*, rate of 8 percent per annum] on the sum of $_____ from and after _____ [*date*];

3. For costs of suit herein incurred; and

4. For other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

This prayer is for use in a complaint for damages for breach of a contract and for interest on the damages. A complaint for money damages generally must state the amount of damages demanded [*Code Civ. Proc. § 425.10(a)(2)*; *but see Code Civ. Proc. § 425.10(b)* (excepting any action in which damages are sought for personal injury or wrongful death)].

Attorney's fees recoverable under a contract provision or statute are an item of costs and need not be separately prayed for [*Civ. Code §§ 1717, 1717.5* (contract); *Code Civ. Proc. § 1033.5(a)(10), (c)(5)* (statute); *see* Ch. 174, *Costs and*

Attorney's Fees].

[3] Cross References

For alternative forms of prayers, see Ch. 420, *Prayers*

[4] State Statutes

If damages are demanded, amount is required to be stated except in superior court action other than limited civil case to recover damages for personal injury or wrongful death. *Code Civ. Proc. § 425.10(a)(2), (b)*

[5] Decisions

If prejudgment interest is allowable, judgment can be rendered therefor even though not prayed for in complaint. *Benson v. City of Los Angeles (1963) 60 Cal. 2d 355, 366, 33 Cal. Rptr. 257, 384 P.2d 649* ; *Katz v. Enos (1945) 68 Cal. App. 2d 266, 278, 156 P.2d 461*

Requests for prejudgment interest under *Civ. Code § 3287* by successful plaintiff must be made by way of motion prior to entry of judgment, or request must be made in form of motion for new trial no later than time allowed for filing such a motion. *North Oakland Medical Clinic v. Rogers (1998) 65 Cal. App. 4th 824, 829-831, 76 Cal. Rptr. 2d 743* (in circumstances in which damages were awarded but no interest was included in verdict and neither court nor jury had determined whether damages were liquidated or unliquidated, this rule was applied retroactively to plaintiffs who never sought prejudgment interest as part of damages and sought interest at last minute as part of order awarding costs)

Assignee for benefit of creditors entitled to prejudgment interest under *Civ. Code § 3282(a)* on amount of preference recovered from date of demand letter that requested exact amount awarded; demand letter set forth exact amounts and manner of their calculation. *Credit Managers' Assn. v. Brubaker (1991) 233 Cal. App. 3d 1587, 1595, 285 Cal. Rptr. 417*

If rate of interest specified in a contract is usurious, by application of *Civ. Code § 3289(b)*, party not in default is entitled to recover interest at 10 percent per annum from date of breach. *Mark McDowell Corp. v. LSM 128 (1989) 214 Cal. App. 3d 1427, 1431-1433* (disapproved in *Southwest Concrete Products v. Gosh Construction Corp. (1990) 51 Cal. 3d 701, 704, 274 Cal. Rptr. 404, 798 P.2d 1247* , with respect to holding that interest rate was usurious)

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§ 177.199 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Failure to Mitigate Damages

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Failure to Mitigate Damages

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges the following:

By the exercise of reasonable effort, plaintiff could have mitigated the amount of damages he/she/it suffered by _____ [*specify ability to mitigate damages and means of doing so, e.g.,* renting another truck to use in his/her/its business; vehicles that would have satisfied plaintiff's requirements were available at rates that plaintiff could have afforded]; but plaintiff failed and refused, and continues to fail and refuse, to exercise a reasonable effort to mitigate the damages.

[2] Use of Form

This affirmative defense is for use by a defendant in an action for damages for breach of contract to place in issue plaintiff's failure to use a reasonable effort to mitigate damages. The failure to mitigate damages is a matter of affirmative defense that must be pleaded and proved by the defendant [*Mayes v. Sturdy Northern Sales, Inc. (1979) 91 Cal. App. 3d 69, 86, 154 Cal. Rptr. 43 , disapproved on other grounds, Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521, 869 P.2d 454* ; *Baruh v. Kuhl (1963) 213 Cal. App. 2d 266, 273, 28 Cal. Rptr. 573]* .

For a discussion of mitigation of damages, see *§ 177.77*.

[3] Decisions

Duty to mitigate damages predicated on rule that person must use reasonable care to prevent unwarranted piling up of damages. *Guerrieri v. Severini (1958) 51 Cal. 2d 12, 23, 330 P.2d 635*

Burden of proving that losses could have been avoided by reasonable effort and expense as borne by breaching party. *Brandon & Tibbs v. George Kevorkian Accountancy Corp. (1990) 226 Cal. App. 3d 442, 460, 277 Cal. Rptr. 40*

Burden of proof is on party whose breach caused damage to establish matters relied on to mitigate damage. *Healdsburg Police Officers Assn. v. City of Healdsburg (1976) 57 Cal. App. 3d 444, 456, 129 Cal. Rptr. 216*

Defense of duty to mitigate damages required to be pleaded. *Camrosa County Water Dist. v. Southwest Welding & Mfg. Co. (1975) 49 Cal. App. 3d 951, 956, 123 Cal. Rptr. 93*

Rule of mitigation does not apply in all situations. *Seaboard Music Co. v. Germano (1972) 24 Cal. App. 3d 618, 623, 101 Cal. Rptr. 255*

In action for damages for breach of employment contract, defendant is required to plead as affirmative defense plaintiff's failure to mitigate if plaintiff did not obtain another job but could have done so with exercise of reasonable diligence and effort. *Erler v. Five Points Motors, Inc. (1967) 249 Cal. App. 2d 560, 568, 57 Cal. Rptr. 516*

[4] Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 914-921 (10th ed. 2005)

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§ 180.02 Cross References

§§ 180.03-180.09 [Reserved]

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[a] Decedent by Means of Written Directions

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[5] Tortious Interference With Right to Dispose of Remains

[6] Jurisdiction of Disputes Regarding Disposition of Remains

§ 180.13 Action for Breach of Contract

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[1] Duty Owed to Close Family Members

[2] Nature of Tort

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§ 180.15 Disinterment

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§ 180.30 Related Matthew Bender Publications

§ 180.31 State Statutes

[1] Autopsy

[2] Bodies

[3] Cemeteries, Mausoleums, and Columbariums

[4] Contracts for Disposition of Remains

[5] Crematory

[6] Licensing

[7] Native American Burial Grounds

§ 180.32 Decisions

[1] Airlines

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[3] Contracts for Disposition of Remains

[4] Interment

[5] Liability of Coroner

[6] Mental Suffering

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[8] Native American Burial Grounds

[9] Negligence

[10] Perpetual Care Gifts

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[12] Property Rights in Human Remains

[13] Public Cemeteries

§ 180.33 Attorney General Opinions

§ 180.34 Law Reviews

§ 180.35 Text References

§§ 180.36-180.49 [Reserved]

§ 180.50 Complaint for Damages [Civ. Code § 3333] for Mental Anguish for Tortious Interference With Decedent's Remains--By Child of Decedent [Health & Safety Code § 7100] Against Decedent's Father

[1] FORM

[2] Use of Form

[3] Allegations

[4] Parties Plaintiff

[5] Specification of Damages

[6] Verification

[7] Jurisdiction

[8] Cross References

§ 180.51 Complaint for Damages [Civ. Code § 3333] for Mental Anguish for Tortious Interference With Decedent's Remains--By Widow [Health & Safety Code § 7100] Against Hospital and Doctor for Unauthorized Retention [Health & Safety Code § 7102], Autopsy [Health & Safety Code § 7113], and Mutilation of Husband's Remains

[1] FORM

[2] Use of Form

[3] Allegations

[4] Autopsy Authorization

[5] Form of Authorization

[6] Certificate of Religious Belief Limiting Autopsy

[7] Coroner's Immunity in Case of Autopsy of Infant Who Died Suddenly and Unexpectedly

[8] Cross References

§ 180.52 Complaint for Damages [Civ. Code § 3333] Based on Negligence--By Close Relative of Decedent, for Whose Benefit Funeral-Related Services Were Performed, Against Funeral Service Provider--Mishandling of Remains

[1] FORM

[2] Use of Form

[3] Allegations

[4] "Close Relative" Requirement

[5] Causation Requirements

[6] Cross References

§ 180.53 Petition [Health & Safety Code § 7105] for Order Providing for Interment of Human Remains [Health & Safety Code § 7107]--By Cemetery or Relative--Persons With Right to Control Interment Cannot Agree on Disposition

[1] FORM

[2] Use of Form

[3] Jurisdiction and Venue

[4] Verification

§ 180.54 Petition for Permission of Court [Health & Safety Code § 7526] to Remove Remains [Health & Safety Code § 7525]--By Relation of Decedent Against Cemetery or Next of Kin Listed in Health & Safety Code § 7525

[1] FORM

[2] Use of Form

[3] Notice Requirements

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15-180 California Forms of Pleading and Practice--Annotated § 180.01

§ 180.01 Scope of Chapter

This chapter discusses the rights and liabilities of parties with respect to the care and interment of human remains. It includes the following forms:

- Complaints for tortious interference with a decedent's remains [*see §§ 180.50, 180.51*].
- Complaint for negligence against a funeral service provider brought by a plaintiff who is a close relative of the decedent and for whose benefit funeral-related services were performed [*see § 180.52*].
- Petition to compel the interment of human remains [*see § 180.53*].
- Petition for permission to disinter human remains for reburial [*see § 180.54*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentHuman RemainsGeneral Overview

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§ 180.02 Cross References

- For a discussion of procedure and forms relating to establishment of the fact of death, see Ch. 99, *Birth and Death, Establishing Fact of.*

- For a discussion of procedure and forms relating to actions for wrongful death, see Ch. 181, *Death and Survival Actions* .

- For a discussion of procedure and forms relating to probate and administration of estates, see Ch. 442, *Probate: Initiating Probate Administration* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewTortsWrongful Death & Survival ActionsGeneral OverviewTortsWrongful Death & Survival ActionsSurvival Actions

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[Reserved]

§§ 180.03[Reserved]

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15-180 California Forms of Pleading and Practice--Annotated § 180.10

§ 180.10 Governing Statutes

Custody, care, and interment of dead bodies are governed by *Health & Safety Code §§ 7000-7355*. Disinterment and removal of dead bodies are governed generally by *Health & Safety Code §§ 7051-8005*.

Cemeteries generally are governed by *Health & Safety Code §§ 8100-8115*, and more specifically by the following:

- Private cemeteries are governed by *Health & Safety Code §§ 8250-8829*.

- Public cemetery districts are governed by *Health & Safety Code §§ 9000-9093*.

- Dedication of public lands, acquisition of land, and management of cemeteries are governed by *Health & Safety Code §§ 8125-8136* (including general regulations concerning public cemeteries.

Operation of crematories is governed by *Health & Safety Code §§ 8340-8347*.

Licensing and regulation of cemetery operations and of funeral directors and embalmers are governed by *Bus. & Prof. Code §§ 9600-9770*, and *7600-7742*, respectively.

Registration and regulation of cremated remains disposers are governed by *Bus. & Prof. Code §§ 9607.6*, *9740-9750*, *9760.5*, and *9760.6*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentHuman RemainsGeneral OverviewHealthcare LawTreatmentHuman RemainsProperty Rights

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15-180 California Forms of Pleading and Practice--Annotated § 180.11

§ 180.11 Definitions

[1] Human Remains

Dead bodies are referred to in *Health & Safety Code § 7001* as "human remains" or "remains." These remains are defined as the body of a deceased person, including the body in any stage of decomposition as well as cremated remains [*Health & Safety Code § 7001*]. "Cremated remains" means the ashes and bone fragments of a human body that are left after cremation in a crematory, and includes ashes from the cremation container, but does not include foreign materials, pacemakers, or prostheses [*Health & Safety Code § 7002*].

[2] Cemeteries

Cemeteries include burial parks, mausoleums, and crematories or columbariums, or any combination of these, when used, or intended to be used, and dedicated for cemetery purposes [*Health & Safety Code § 7003*]. Six or more human bodies buried in one place constitute a cemetery [*Health & Safety Code § 7003*].

[3] Burial Park, Mausoleum, Columbarium, Crematory

A burial park is a tract of land for the burial of human remains in the ground, used or intended to be used, and dedicated, for cemetery purposes [*Health & Safety Code § 7004*].

A mausoleum is a structure or building for the entombment of uncremated human remains in crypts or vaults located in a place used, or intended to be used,and dedicated for cemetery purposes [*Health & Safety Code §§ 7005, 9504*].

A columbarium is a structure, room, or other space, in a building or structure containing niches for the inurnment of cremated human remains, which is located in a place used, or intended to be used, and dedicated for cemetery purposes [*Health & Safety Code §§ 7007, 9506*]. A columbarium may be built within a mausoleum [*Health & Safety Code § 9504*].

A crematory is a building or structure containing one or more furnaces for the reduction of bodies of deceased persons to cremated remains [*Health & Safety Code § 7006*]. A cremation chamber is the enclosed space within which the

cremation of human remains is performed [*Health & Safety Code § 7006.3*]. A cremation container is a combustible, closed container resistant to leakage of bodily fluids into which the body of a deceased person is placed prior to insertion in a cremation chamber for cremation [*Health & Safety Code § 7006.5*]. A cremated remains container is a receptacle in which cremated remains are placed after cremation [*Health & Safety Code § 7006.7*]. Pursuant to *Health & Safety Code §§ 7003, 8340*, a crematory is a cemetery and must have in conjunction with its operation either a mausoleum, a burial park, or a columbarium that is equipped at all times for the interment of remains of bodies cremated at the crematory [*see 55 Ops. Cal. Att'y Gen. 402 (1972)* (this requirement is constitutional and reasonable exercise of state's police power)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentHuman RemainsGeneral OverviewHealthcare LawTreatmentHuman RemainsProperty Rights

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15-180 California Forms of Pleading and Practice--Annotated § 180.12

§ 180.12 Property Rights and Interment of Human Remains

[1] Nature of Quasi-Property Right

There is a quasi-property right in the possession of a dead body, recognized for the limited purpose of determining who may have its custody for burial [*Sinai Temple v. Kaplan (1976) 54 Cal. App. 3d 1103, 1110, 1110 n.13, 127 Cal. Rptr. 80*]. Custody may be determined by testamentary disposition [*see Health & Safety Code § 7150 et seq.* (Uniform Anatomical Gift Act); *Estate of Henderson (1936) 13 Cal. App. 2d 449, 453, 57 P.2d 212* (direction in will regarding place and manner of disposition)].

In the absence of testamentary disposition or other directions given by the decedent pursuant to *Health & Safety Code § 7100.1*, the next of kin has the statutory right and duty to preserve the decedent's remains and to bury the corpse and is entitled to the custody of the corpse for these purposes [*Health & Safety Code §§ 7100, 7102*]. Although the next of kin does not "own" the body of the deceased in the full proprietary sense, he or she does have property rights in the body that will be protected and is entitled to indemnification for a violation of those rights [*see Christensen v. Superior Court (1991) 54 Cal. 3d 868, 890, 2 Cal. Rptr. 2d 79, 820 P.2d 181* (quoting from *O'Donnell v. Slack (1899) 123 Cal. 285, 289, 55 P. 906*)].

[2] Persons Entitled to Control Disposition of Remains

[a] Decedent by Means of Written Directions

The primary right to dispose of a decedent's remains is held by the decedent, if the decedent leaves directions pursuant to *Health & Safety Code § 7100.1* [*see Health & Safety Code § 7100(a)*]. Section 7100.1 provides that a person, prior to death, may give written directions for the disposition of the person's remains, and may specify funeral goods and services to be provided. Unless a statement to the contrary is signed and dated by the person, the directions may not be changed in any material way, except as required by law [*Health & Safety Code § 7100.1(a)*]. The directions must be faithfully carried out on the person's death, provided that [*Health & Safety Code § 7100.1(a)*]:

- The directions clearly and completely set forth the person's final wishes in sufficient detail so as to preclude any material ambiguity with regard to the instructions.

- Provision is made for the costs of disposition and funeral goods and services either by being held in trust pursuant to *Bus. and Prof. Code § 7735*, funded through insurance, or otherwise set aside in a designated fund or funds, so as to preclude the payment of any funds by any survivors who might otherwise retain the right to control disposition and funeral matters.

If only one of either the cost of disposition or of funeral goods and services are set aside, the decedent's remaining wishes must be carried out only to the extent possible using the decedent's assets, unless persons who have the right to control disposition and funeral matters agree to assume the costs [*Health & Safety Code § 7100.1(b)*].

If the directions are contained in a will, they must be immediately carried out regardless of the validity of the will in other respects, and regardless of whether the will is offered for or admitted to probate [*Health & Safety Code § 7100.1(c)*].

The right of a surviving spouse to control the disposition of a decedent's body is superseded by the terms of a written donation agreement executed by the decedent. The surviving spouse's actions in delivering the body to the donee are not cognizable as reliance for purposes of a claim of deceit, inasmuch as the decedent's gift was already irrevocable upon his death. The donee had the exclusive right to control the disposition of the body pursuant to *Health & Safety Code § 7100.1(a)*, limited only by the donation agreement itself [*Conroy v. Regents of the University of California (2009) 45 Cal. 4th 1244, 1257, 91 Cal. Rptr. 3d 532, 203 P.3d 1127]* .

[b] Next of Kin or Others

If the decedent has not left directions pursuant to *Health & Safety Code § 7100.1*, the right to control the disposition of the remains of a deceased person and the location and conditions of interment, and the right to arrange for funeral goods and services, vests in, and the duty of disposition and the liability for the reasonable cost of disposition of the remains, devolves on the following persons in the order listed below [*Health & Safety Code § 7100(a)*]:

- An agent under a power of attorney for health care who has the right and duty of disposition under Division 4.7 (*Prob. Code § 4600 et seq.*), except that the agent is liable for the costs of disposition only if the agent makes a specific agreement to pay the costs of disposition or if, in the absence of a specific agreement, the agent makes decisions concerning disposition that incur costs, in which case the agent is liable only for the reasonable costs incurred as a result of the agent's decisions, to the extent that the decedent's estate or other appropriate fund is insufficient.

- The competent surviving spouse.

- The sole surviving competent adult child of the decedent, or if there is more than one competent adult child of the decedent, the majority of the surviving competent adult children. However, less than one-half of the surviving adult children are vested with these rights and duties if they have used reasonable efforts to notify all other surviving competent adult children of their instructions and are not aware of any opposition to those instructions on the part of more than one-half of all surviving competent adult children.

- The surviving competent parent or parents of the decedent. If one of the surviving competent parents is absent, the remaining competent parent is vested with these rights and duties after reasonable efforts to locate the absent surviving competent parent have been unsuccessful.

- The sole surviving competent adult sibling of the decedent, or if there is more than one surviving competent adult sibling, the majority of those siblings. Less than the majority of the surviving competent

adult siblings are vested with these rights and duties if they have used reasonable efforts to notify all other surviving competent adult siblings of their instructions and are not aware of any opposition to those instructions by the majority of all surviving competent adult siblings.

- The surviving competent adult person or persons respectively in the next degrees of kindred, and if there is more than one surviving competent adult person of the same degree of kindred, the majority of those persons. Less than the majority of surviving competent adult persons of the same degree of kindred are vested with these rights and duties if those persons have used reasonable efforts to notify all other surviving competent adult persons of the same degree of kindred of their instructions and are not aware of any opposition to those instructions on the part of one-half or more of all surviving competent adult persons of the same degree of kindred.

- The public administrator, if the deceased has sufficient assets.

In applying these rules, "adult" means a person who has attained 18 years of age, "child" includes a natural or adopted child of the decedent, and "competent" means a person who has not been declared incompetent by a court of law or who has been declared to be competent following a declaration of incompetence [*Health & Safety Code § 7100(g)*].

If any of the above-listed persons with the right to control the disposition of the body fails to act, or fails to delegate his or her authority to act to some other person, within seven days after the date when the right to control devolved upon that person, or within 10 days after that date if the controlling person is a competent surviving spouse, the right to control the body is relinquished and passed on to the next person or persons in the priority provided by the list [*Health & Safety Code § 7105(a)*]. Similarly, if any of the above-listed persons with the right to control the disposition of the body cannot be found, after reasonable inquiry, within seven days after the date when the right to control devolved upon that person, or within 10 days after that date if the controlling person is a competent surviving spouse, the right to control the body is relinquished and passed on to the next person or persons in the priority provided by the list [*Health & Safety Code § 7105(b)*].

If the person to whom the right of control has vested pursuant to *Health & Safety Code § 7100(a)* has been charged with first or second degree murder or voluntary manslaughter in connection with the decedent's death and those charges are known to the funeral director or cemetery authority, the right of control will be relinquished and passed on to the next of kin in accordance with *Health & Safety Code § 7100(a)* [*Health & Safety Code § 7100(b)(1)*]. If the charges against the person are dropped, or if the person is acquitted of the charges, the right of control will be returned to the person [*Health & Safety Code § 7100(b)(2)*]. Nevertheless, a person who has been charged with first or second degree murder or voluntary manslaughter in connection with the decedent's death, and to whom the right of control has not been returned, has no right to control disposition pursuant to *Health & Safety Code § 7100(a)*, to the extent the funeral director or cemetery authority know about the charges [*Health & Safety Code § 7100(c)*].

A funeral director or cemetery authority has complete authority to control the disposition of the remains, and to proceed under this chapter to recover usual and customary charges for the disposition, when both of the following apply [*Health & Safety Code § 7100(c)*]:

- The funeral director or cemetery authority has knowledge that none of the persons described in *Health & Safety Code § 7100(a)(1)-(6)* exists, or they cannot be found after reasonable inquiry, or contacted by reasonable means.

- The public administrator fails to assume responsibility for disposition of the remains within seven days after written notice of the facts. The notice may be delivered by hand, U.S. mail, facsimile transmission, or telegraph.

If any persons from the list who would otherwise have equal rights to control the disposition of the body, excluding a public administrator, fail to agree on disposition and funeral goods and services within seven days after the date on which control over the body passed to that group of persons, either the cemetery or funeral establishment with possession of the remains, or any person sharing inequal right to control disposition of the body, may petition the superior court in the county in which the decedent resided at the time of death, or in which the remains are located, to have the court determine who will have control over disposition and to direct that selected person to inter the remains [*Health & Safety Code § 7105(c)*]. In these circumstances, the court in its order must also establish an alternate order specifying who will have the right to control disposition of the body if the person first selected fails to act within seven days [*Health & Safety Code § 7105(c)*].

[3] Autopsy

In cases in which the coroner is required by law to investigate the cause of death, the coroner has a paramount right to custody, including the right to conduct an autopsy, until the conclusion of the autopsy or medical investigation by the coroner [*Health & Safety Code § 7102*; *Gov. Code §§ 27491, 27491.4, 27491.41*; *Walsh v. Caidin (1991) 232 Cal. App. 3d 159, 162, 283 Cal. Rptr. 326]* . In other cases, the person charged with the duty of interment and entitled to custody of the remains for the purpose of interment under *Health & Safety Code § 7102* may, but is not required to, authorize an autopsy [*see Health & Safety Code § 7113*].

An exception to this rule applies if the decedent executed a written "certificate of religious belief" against autopsy, which precludes an autopsy except in limited circumstances [*see Gov. Code § 27491.43*; *Walsh v. Caidin (1991) 232 Cal. App. 3d 159, 164, 283 Cal. Rptr. 326]* .

After the coroner completes any autopsy or investigation, the right to control disposition of the remains of a deceased and the duty of interment devolve on the family of the deceased [*see Health & Safety Code § 7100*; *People v. McNeill (1980) 112 Cal. App. 3d 330, 337-338, 169 Cal. Rptr. 313]* . The coroner, however, may retain tissues removed at autopsy for scientific investigation [*Gov. Code § 27491.45* (including consent requirement in case of persons dying in a state hospital)].

[4] No Duty to Preserve Body as Evidence for Civil Discovery

Neither the statutes relating to dead bodies nor the statutes relating to civil discovery authorize a court to order an autopsy for civil discovery purposes. A court has no inherent authority to make such an order in the absence of statute [*Walsh v. Caidin (1991) 232 Cal. App. 3d 159, 162, 283 Cal. Rptr. 326* ; *Holm v. Superior Court (1986) 187 Cal. App. 3d 1241, 1248-1249, 232 Cal. Rptr. 432]* . Thus, a person with the right to control disposition of a decedent's remains owes no duty to an opposing party in civil litigation to preserve the dead body as evidence [*Walsh v. Caidin (1991) 232 Cal. App. 3d 159, 163, 283 Cal. Rptr. 326]* . Additionally, courts have held that human corpses are different from other types of physical evidence and are not subject to civil discovery to the same extent as other types of physical evidence [*see Walsh v. Caidin (1991) 232 Cal. App. 3d 159, 163, 283 Cal. Rptr. 326* ; *People v. Vick (1970) 11 Cal. App. 3d 1058, 1064, 90 Cal. Rptr. 236]* .

[5] Tortious Interference With Right to Dispose of Remains

A cause of action may be stated against a close relative, as well as against a mortician or cemetery, for tortious interference with the statutory right to dispose of a decedent's remains and improper burial procedures contrary to the beliefs of the statutory right holder that would constitute interference with that person's rights [*see Christensen v. Superior Court (1991) 54 Cal. 3d 868, 890, 2 Cal. Rptr. 2d 79, 820 P.2d 181* ; *Sinai Temple v. Kaplan (1976) 54 Cal. App. 3d 1103, 1112, 127 Cal. Rptr. 80]* . For a form of complaint alleging this cause of action, see *§ 180.50*.

However, *Health & Safety Code § 7100* limits the liability of a funeral director or cemetery authority that carries out

instructions given by the decedent or by the person entitled to control the disposition of the decedent's remains [*Health & Safety Code § 7100(f)*; *see Health & Safety Code § 7100(a)* (persons entitled to control disposition of decedent's remains when decedent has not given instructions pursuant to *Health & Safety Code § 7100.1*); for further discussion, *see § 180.12[2]*]. A funeral director or cemetery has complete authority to control the disposition of a decedent's remains if none of the decedent's relatives can be found and the public administrator has not assumed responsibility [*Health & Safety Code § 7100(c)*].

A cause of action may also be based on mutilation of the remains, as in a case in which the remains have been mutilated as a consequence of an unauthorized autopsy. For an action for damages based on an unauthorized autopsy to lie, the complaint must set forth the circumstances that make the autopsy illegal [*Gray v. Southern Pac. Co. (1937) 21 Cal. App. 2d 240, 245, 68 P.2d 1011* ; *see § 180.51*].

In addition to the statutory right holder's cause of action against a person who has usurped that right, if misconduct in the provision of funeral-related services occurs in secret and its consequences are not apparent to members of the decedent's family, all close family members for whom mortuary services are performed may recover for the emotional distress they suffer when the misconduct comes to light, regardless of which family member held the statutory right or actually contracted for the services [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 890, 2 Cal. Rptr. 2d 79, 820 P.2d 181]* . This cause of action is discussed under *§ 180.14*.

Health & Safety Code § 7104 imposes a duty of interment on the coroner, if no other accommodations for interment of a decedent have been made and if the duty of interment has not devolved to another person who can be located with reasonable diligence within the state [*Health & Safety Code § 7104(a)*]. How ever, this statutory provision does not impose a duty on the person having custody of the remains of a decedent that is enforceable in tort by persons who in fact have the right to inter the remains [*Spates v. Dameron Hosp. Ass'n (2003) 114 Cal. App. 4th 208, 218, 7 Cal. Rptr. 3d 597]* . In one case, for example, a hospital that turned a decedent's remains over to the coroner for cremation was not liable to the decedent's daughter under *Health & Safety Code § 7104* for failing to contact her. The hospital, which had taken custody of the decedent from a nursing home and had no preexisting relationship with the daughter, had tried unsuccessfully to locate the daughter before turning the decedent's remains over to the coroner. The court of appeal held that *Health & Safety Code § 7104* creates a condition of last resort with respect to the expense of interment of an unclaimed decedent and was designed to protect the county treasury, not the decedent's family members [*Spates v. Dameron Hosp. Ass'n (2003) 114 Cal. App. 4th 208, 219, 7 Cal. Rptr. 3d 597]* .

[6] Jurisdiction of Disputes Regarding Disposition of Remains

Jurisdiction of disputes over disposition of remains is in the civil court, not in probate, when the decedent's will is silent regarding disposition of his or her remains [*Estate of Jimenez (1997) 56 Cal. App. 4th 733, 741, 65 Cal. Rptr. 2d 710]* . A person entitled to dispose of decedent's remains may state a civil cause of action under *Health & Safety Code § 7100* or file a petition under *Health & Safety Code § 7526* for removal of decedent's remains when decedent's wishes regarding funeral arrangements, as expressed outside the decedent's will, have not been carried out. [*Estate of Jimenez (1997) 56 Cal. App. 4th 733, 740-742, 65 Cal. Rptr. 2d 710]* . It is unclear whether the probate court is the proper venue to hear disputes when decedent's wishes regarding disposition of remains are contained in decedent's will [*see Estate of Jimenez (1997) 56 Cal. App. 4th 733, 741, 65 Cal. Rptr. 2d 710]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewHealthcare LawTreatmentHuman RemainsDuties of Coroners & Medical ExaminersHealthcare LawTreatmentHuman RemainsProperty RightsTortsNegligenceActionsInterference With Dead BodiesGeneral Overview

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§ 180.13 Action for Breach of Contract

Health & Safety Code § 7100 specifies the right to control the disposition of a decedent's remains, and to arrange for funeral goods and services to be provided, unless other directions have been given by the decedent. Thus, the decedent and another person, such as a longtime companion, may contract with a funeral provider for the disposition of the decedent's remains, and that person may recover damages for breach of that contract [*see Saari v. Jongordon Corp. (1992) 5 Cal. App. 4th 797, 802, 7 Cal. Rptr. 2d 82]* .

Although in the typical contract case, it is not foreseeable that a breach will cause emotional distress, and damages for these injuries are therefore generally not recoverable, some contracts, including mortuary and crematorium contracts, so affect the vital concerns of the contracting parties that severe emotional distress is a foreseeable result of a breach [*see Saari v. Jongordon Corp. (1992) 5 Cal. App. 4th 797, 803-804, 7 Cal. Rptr. 2d 82* (citing *Chelini v. Nieri (1948) 32 Cal. 2d 480, 481-482, 196 P.2d 915* , and *Allen v. Jones (1980) 104 Cal. App. 3d 207, 211, 163 Cal. Rptr. 445*); *see also Christensen v. Superior Court (1991) 54 Cal. 3d 868, 894-895, 2 Cal. Rptr. 2d 79, 820 P.2d 181* (in dictum, Court noted that emotional distress damages have been permitted in actions for breach of contract for provision of services related to disposition of human remains, because of unique nature of services)]. Thus, emotional distress damages may be recovered in an action for breach of this type of contract [*Saari v. Jongordon Corp. (1992) 5 Cal. App. 4th 797, 803-804, 7 Cal. Rptr. 2d 82]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachGeneral OverviewHealthcare LawTreatmentHuman RemainsGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressGeneral Overview

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§ 180.14 Negligence in Performance of Funeral-Related Services

[1] Duty Owed to Close Family Members

The mortuary or other provider assumes a duty with regard to the disposition of remains, pursuant to its agreement to provide funeral or other related services. It thereby creates a special relationship obligating it to perform those services properly and nonnegligently [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 886-888, 890, 2 Cal. Rptr. 2d 79, 820 P.2d 181]* . These services are performed for the benefit of the living family members. Thus, the duty extends to close family members who were aware that the services were being performed and on whose behalf or for whose benefit the services were rendered [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 876-890, 2 Cal. Rptr. 2d 79, 820 P.2d 181* (disapproving *Cohen v. Groman Mortuary, Inc. (1964) 231 Cal. App. 2d 1, 41 Cal. Rptr. 481* , which held that liability for interference with dead bodies runs only to family members having statutory right to dispose of remains); *see also Quesada v. Oak Hill Improvement Co. (1989) 213 Cal. App. 3d 596, 610, 261 Cal. Rptr. 769]* .

The duty is not limited to the contracting party or to the holder of the statutory right to control the disposition of the decedent's remains [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 887, 2 Cal. Rptr. 2d 79, 820 P.2d 181* ; *see Health & Safety Code § 7100* (setting forth classes of persons with statutory right to control disposition)]. For a form of complaint alleging a cause of action based on negligence, see *§ 180.52*.

Close family members have been held to include relatives residing in the same household or parents, siblings, children, and grandparents of the victim [*Thing v. La Chusa (1989) 48 Cal. 3d 644, 668 n.10, 257 Cal. Rptr. 865, 771 P.2d 814* ; *see also Christensen v. Superior Court (1991) 54 Cal. 3d 868, 882 n.12, 2 Cal. Rptr. 2d 79, 820 P.2d 181* (noting without comment that court of appeal had defined "close relative" to include categories listed in *Thing* plus grandchildren)]. Exceptional circumstances may enlarge the group to include other relatives [*Thing v. La Chusa (1989) 48 Cal. 3d 644, 668 n.10, 257 Cal. Rptr. 865, 771 P.2d 814* ; *see also Quesada v. Oak Hill Improvement Co. (1989) 213 Cal. App. 3d 596, 610,261 Cal. Rptr. 769* (allowing niece opportunity to prove that she was within group)].

[2] Nature of Tort

Although the "negligent mishandling of a corpse" has sometimes been viewed as a separate tort, the California Supreme Court pointed out that it is not an independent tort, but simply an application of the tort of negligence to facts involving

the disposition of remains [*see* *Christensen v. Superior Court (1991) 54 Cal. 3d 868, 884, 2 Cal. Rptr. 2d 79, 820 P.2d 181]* . The elements of duty, breach of duty, causation, and damages must be pleaded and proved [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 882, 2 Cal. Rptr. 2d 79, 820 P.2d 181]* . Reports of a general pattern of misconduct are not sufficient, in and of themselves, to establish that defendants' misconduct included mishandling of the remains of each plaintiff's decedent; a generalized concern that the remains of a relative may have been involved, arising out of a media report of a pattern of misconduct, is insufficient to satisfy the requirement that there be a direct connection between a defendant's conduct and the injury suffered by the plaintiff [*Conroy v. Regents of the University of California (2009) 45 Cal. 4th 1244, 1251, 91 Cal. Rptr. 3d 532, 203 P.3d 1127]* .

[3] Examples of Misconduct

Mortuary misconduct has occurred in a variety of ways, including:

- Removing organs and body parts prior to cremation without permission, cremating more than one body at the same time and commingling the remains in containers presented to family members, and removing and selling gold from cremated remains [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 879, 2 Cal. Rptr. 2d 79, 820 P.2d 181* ; *see also Health & Safety Code §§ 8343-8345, 8347*].

- Losing remains in shipment [*Allen v. Jones (1980) 104 Cal. App. 3d 207, 213-214, 163 Cal. Rptr. 445]* .

- Preparing remains for burial in accordance with religious customs that are not those of the next of kin [*Allen v. Jones (1980) 104 Cal. App. 3d 207, 214-215, 163 Cal. Rptr. 445]* .

- Presenting another person's corpse to family member instead of decedent's [*Quesada v. Oak Hill Improvement Co. (1989) 213 Cal. App. 3d 596, 605, 261 Cal. Rptr. 769]* .

- Burying another person's corpse in decedent's place [*Quesada v. Oak Hill Improvement Co. (1989) 213 Cal. App. 3d 596, 605, 261 Cal. Rptr. 769]* .

- Failing to provide adequate protection for decedent's remains [*Draper Mortuary v. Superior Court (1982) 135 Cal. App. 3d 533, 535, 185 Cal. Rptr. 396* ; *see also* *Ross v. Forest Lawn Mem'l Park (1984) 153 Cal. App. 3d 988, 996-997, 203 Cal. Rptr. 468]* .

While a mortuary that contracts to provide funeral services and arrange for the cremation of a decedent has a duty of due care to perform its services nonnegligently [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 886-888, 890-891, 2 Cal. Rptr. 2d 79, 820 P.2d 181]* , the mortuary may delegate the duty to carry out the cremation in a respectful and dignified manner to a subcontractor crematory. Since a mortuary has no statutory right to perform or oversee cremations, so long as the mortuary fulfills its duty to use due care in selecting the crematory, the mortuary is not vicariously liable for the wrongful cremation practices of the crematory [*Hansell v. Santos Robinson Mortuary (1998) 64 Cal. App. 4th 608, 612-617, 75 Cal. Rptr. 2d 361]* .

[4] Willed Body Programs

While a mortuary or crematorium may be liable for emotional distress for negligent mishandling of a corpse [*see* [1]-[3], *above*], a research institution that obtains willed bodies for medical dissection, research, and teaching purposes, and does not purport to provide funeral-related services, does not owe the same duties to the family members of donated corpses [*Melican v. Regents of University of California (2007) 151 Cal. App. 4th 168, 179, 59 Cal. Rptr. 3d 672]* . A research institution that contractually agrees only to dispose of a decedent's remains in accordance with state law has no duty to return any remains to the decedent's family [*see* *Conroy v. Regents of University of California (2009) 45 Cal.*

4th 1244, 1253, 91 Cal. Rptr. 3d 532, 203 P.3d 1127] . It may voluntarily undertake to do so, however, although such a voluntary undertaking will not support the imposition of liability if the remains returned have been commingled with the remains of another corpse [*Melican v. Regents of University of California (2007) 151 Cal. App. 4th 168, 180-181, 59 Cal. Rptr. 3d 672]* . Evidence of a general pattern of mishandling of donated bodies by a willed-body program will not support liability for negligence absent evidence demonstrating to a "well-founded substantial certainty" that the body of plaintiff's decedent was actually mishandled [*Conroy v. Regents of University of California (2009) 45 Cal. 4th 1244, 1251, 91 Cal. Rptr. 3d 532, 203 P.3d 1127]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentHuman RemainsGeneral OverviewTortsNegligenceDutyAffirmative Duty to ActSpecial RelationshipsGeneral Overview

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15-180 California Forms of Pleading and Practice--Annotated § 180.15

§ 180.15 Disinterment

A body may be disinterred as provided in *Health & Safety Code §§ 7500, 7501,* and *7525*. A reasonable cause must be shown for the removal of a body. The following factors are considered in deciding to disinter a body [*In re Terra (1952) 111 Cal. App. 2d 452, 458, 244 P.2d 921* ; *In re Keck (1946) 75 Cal. App. 2d 846, 849, 171 P.2d 933]* :

- The due interest of the public.
- The wishes of the decedent.
- The rights and feelings of those entitled to be heard by reason of relationship or association.
- The rights and principles of the religious body or other institution that granted the right to inter the body at the first place of burial.
- Whether consent was given to the burial in the first place of interment.

A presumption against removal grows stronger with remoteness of the connection with the decedent [*In re Terra (1952) 111 Cal. App. 2d 452, 458, 244 P.2d 921* ; *In re Keck (1946) 75 Cal. App. 2d 846, 849, 171 P.2d 933]* .

The procedure for removal of a decedent's body from a cemetery by the person entitled by law to remove the remains appears to consist of applying to the local registrar of the county in which the cemetery premises are located for a removal permit. The local registrar must then issue a permit to the cemetery authority allowing removal of the interred remains [*Health & Safety Code § 7501*]. A written order from the health department having jurisdiction or by the superior court of the county in which the cemetery is located also must be issued in order for the remains of a decedent to be disinterred [*Health & Safety Code § 7500*]. Additionally, consent by the cemetery authority and the written consent of the nearest surviving relative of the decedent are mandatory [*Health & Safety Code § 7525*].

Permission of the court may be obtained by petition if the cemetery authority or the nearest surviving relative refuses to give consent [*Health & Safety Code § 7526*; for a form of petition, *see § 180.54*]. A greater showing must be made

justifying disinterment than for the initial interment decision [*see Estate of Jimenez (1997) 56 Cal. App. 4th 733, 739, 65 Cal. Rptr. 2d 710* (citing *In re Keck (1946) 75 Cal. App. 2d 846, 851, 171 P.2d 933*); *see also Maffei v. Woodlawn Mem'l Park (2005) 130 Cal. App. 4th 119, 126-130, 29 Cal. Rptr. 3d 679* (no abuse of discretion for trial court to deny surviving spouse's disinterment request made 20 years after burial)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentHuman RemainsGeneral Overview

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15-180 California Forms of Pleading and Practice--Annotated § 180.16

§ 180.16 Liability for Interment and Disinterment Expense

The liability for the reasonable cost of final disposition devolves jointly and severally on all kin of the decedent in the same degree of kindred and on the decedent's estate. If, however, a person accepts the anatomical gift of an entire body under the Uniform Anatomical Gift Act, that person, subject to the terms of the gift, will be liable for the reasonable cost of final disposition of the decedent [*Health & Safety Code § 7100(d)*].

The decedent's estate is primarily liable for funeral and interment expenses; the decedent's next of kin are only secondarily liable [*see Health & Safety Code § 7101* (estate liable for reasonable costs of funeral, plot, and interment); *Walker v. Konitzer (1963) 217 Cal. App. 2d 654, 660, 31 Cal. Rptr. 906]* . If authorized by ordinance, however, coroner's charges of up to $100 for the actual expenses of taking a dead body into custody may be collected from the person entitled to control the disposition of the remains or, if not paid by that person, from the decedent's estate as a funeral expense, unless either (1) the body is that of a child under the age of 14 or (2) the coroner ascribes the death to the criminal act of another, unless the coroner has reasonable grounds to believe that the deceased was involved in any criminal activity that contributed to his or her own death [*Gov. Code § 27472*].

By contrast, one who causes the disinterment and reburial of the body of a relative in a family plot is not entitled to recover the costs of reburial from the beneficiaries of the decedent's estate or from the decedent's next of kin [*Walker v. Konitzer (1963) 217 Cal. App. 2d 654, 660-661, 31 Cal. Rptr. 906]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsDebt LiabilityHealthcare LawTreatmentHuman RemainsGeneral OverviewHealthcare LawTreatmentHuman RemainsProperty Rights

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§ 180.17 Notice of Proposed Change of Cemetery Use

A city or county is required to give notice pursuant to *Gov. Code §§ 65091-65094* whenever a person applies to the city or county for a zoning variance, special use permit, conditional use permit, zoning ordinance amendment, general or specific plan amendment, or any entitlement for use that would permit all or any part of a cemetery to be used for other than cemetery purposes [*Gov. Code § 65096*].

Under these provisions, notice must be given to owners of real property located within a specified distance of the cemetery property, the cemetery property owner or his or her agent, and each public agency expected to provide essential facilities or services to the project [*see Gov. Code § 65091*]. Notice must also be given to any person who has filed a written request for notice pursuant to *Gov. Code § 65092*. The local agency may not, however, require annual renewal of the request [*Gov. Code § 65096(c)*]. For a discussion of the requirements of *Gov. Code §§ 65091-65094*, see Ch. 579, *Zoning and Planning* .

After 1989, the cemetery authority must provide written notice to each person who purchases or agrees to purchase interment rights of that person's ability to receive notice of a proposed change in the use of the cemetery for other than cemetery purposes. The written notice must be substantially as follows [*Health & Safety Code § 8120*]:

> "State law gives you the right to know about future plans to use this cemetery for any other purpose. If you want to receive information about a future change, you must contact the local planning office and pay a small fee."

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentHuman RemainsGeneral OverviewReal Property LawZoning & Land UseSpecial Permits & Variances

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[Reserved]

§§ 180.18[Reserved]

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§ 180.30 Related Matthew Bender Publications

For forms of interrogatories dealing with remedies and liabilities with respect to disposition and care of a body following death, see Bender's Forms of Discovery, *Dead Bodies*

For legal forms relating to a testator's disposition of his or her remains, see California Legal Forms, Ch. 69, *Charitable Dispositions*
Personal Injuries Actions Defenses Damages, *Dead Bodies*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesFormHealthcare LawTreatmentHuman RemainsGeneral Overview

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15-180 California Forms of Pleading and Practice--Annotated § 180.31

§ 180.31 State Statutes

[1] Autopsy

Coroner's inquest. *Gov. Code § 27490*

Coroner's autopsy. *Gov. Code § 27491.4*

Immunity for removal of corneal tissue by or at direction of coroner or medical examiner. *Gov. Code §§ 27491.43, 27491.47*

Authorization for autopsy. *Health & Safety Code §§ 7113, 7114*

[2] Bodies

Disposal of cremated remains. *Bus. & Prof. Code §§ 9607.6, 9740-9750, 9760.5, 9760.6*

Interment and disinterment. *Health & Safety Code §§ 7051-7055, 7500-7528*

Prohibition of cremation of one person with another or scattering or commingling cremated remains of one person with another without permission; misdemeanor. *Health & Safety Code § 7054.7*

Right of control, duty, and liability for disposition of remains. *Health & Safety Code §§ 7100-7112*

Decedent's written instructions regarding disposition of remains and funeral goods and services to be provided, are required to be faithfully carried out on death. *Health & Safety Code § 7100.1*

Sea burial of cremated remains. *Health & Safety Code §§ 7102, 7117, 7501, 10376*

Uniform Anatomical Gift Act. *Health & Safety Code § 7150 et seq.*

Uniform Determination of Death Act. *Health & Safety Code §§ 7180-7183*

General acute care hospitals required to develop protocols for identifying potential organ and tissue donors. *Health & Safety Code § 7184*

Unclaimed dead. *Health & Safety Code §§ 7200, 7202-7207*

Embalming and transportation of dead bodies. *Health & Safety Code §§ 7300-7355*

Prohibition on sale of human organs. *Penal Code § 367f*

[3] Cemeteries, Mausoleums, and Columbariums

Cemetery lots and improvements as property exempt from execution. *Code Civ. Proc. § 704.200*

Notice of hearing requirements for proposed change of cemetery use. *Gov. Code § 65096*; *Health & Safety Code § 8120*

Cemeteries generally. *Health & Safety Code §§ 8100-8115*

Public cemeteries. *Health & Safety Code §§ 8125-8136*

Private cemeteries. *Health & Safety Code §§ 8250-8829*

Public cemetery districts. *Health & Safety Code §§ 9000-9093*

Mausoleums and columbariums. *Health & Safety Code §§ 9501-9677*

Malicious destructive acts in cemetery or interference with carrying of human remains or funeral service are misdemeanors. *Penal Code § 594.35*

[4] Contracts for Disposition of Remains

Funeral director who knowingly fails to present pre-need agreement to survivor of deceased, or to responsible party, is liable for civil fine. *Bus. & Prof. Code § 7745*

[5] Crematory

Crematory licensee who prohibits relatives or responsible party from viewing cremation process, must disclose that policy in writing to persons entitled to custody of remains, prior to signing of contract. *Bus. & Prof. Code § 9784.5*

[6] Licensing

Regulation of funeral directors and embalmers. *Bus. & Prof. Code §§ 7600-7742*

Cemetery regulations. *Bus. & Prof. Code §§ 9600-9770*

[7] Native American Burial Grounds

Records of Native American burial grounds exempted from disclosure under Public Records Act (*Gov. Code §§ 6250-6267*). *Gov. Code § 6254(r)*

Notification of Native American Heritage Commission of discovery of Native American burial ground. *Health & Safety Code § 7050.5*

Powers and duties of Native American Heritage Commission regarding burial grounds. *Pub. Res. Code §§ 5097.94, 5097.98*

Obtaining or possessing Native American artifacts from burial ground as unlawful. *Pub. Res. Code § 5097.99*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawAnatomical GiftsHealthcare LawTreatmentBlood & Organ DonationsUniform Anatomical Gift ActHealthcare LawTreatmentHuman RemainsGeneral OverviewHealthcare LawTreatmentHuman RemainsDuties of Coroners & Medical ExaminersHealthcare LawTreatmentHuman RemainsTribal Remains

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15-180 California Forms of Pleading and Practice--Annotated § 180.32

§ 180.32 Decisions

[1] Airlines

Air carrier is entitled to limit its liability for loss or destruction of luggage only if it allows passenger to protect luggage by either carrying it on board or purchasing excess valuation insurance; ticket agent's refusal to allow widow to carry husband's cremated remains on board violated this rule and tariff requiring that valuables be personally carried by passesnger; limitation on airline's liability was therefore unenforceable. *Coughlin v. Trans World Airlines, Inc. (9th Cir. 1988) 847 F.2d 1432, 1433-1434*

[2] Autopsy

Absent express statutory language, California courts are without legal authority, inherent or expressly conferred, to authorize or direct disinterment or autopsy of human remains for discovery purposes. *Holm v. Superior Court (1986) 187 Cal. App. 3d 1241, 1245, 1248-1249, 232 Cal. Rptr. 432*

Coroner was not liable and no cause of action existed where allegations against coroner for wrongful performance of autopsy failed to show that coroner was not authorized to perform autopsy under the circumstances. *Gray v. Southern Pac. Co. (1937) 21 Cal. App. 2d 240, 245-246, 68 P.2d 1011*

[3] Contracts for Disposition of Remains

Under *Health & Safety Code § 7100 et seq.*, decedent's surviving spouse was bound by contracts between cemetery and son and son-in-law of decedent, because two men acted as if they were chosen representatives of decedent's family. *Sinai Mem'l Chapel v. Dudler (1991) 231 Cal. App. 3d 190, 198, 282 Cal. Rptr. 263* (also noting that spouse stated she had authorized contracts)

Contracts between cemetery and family of decedent are not vitiated by grief arising from death of close relative. *Sinai*

Mem'l Chapel v. Dudler (1991) 231 Cal. App. 3d 190, 199, 282 Cal. Rptr. 263

[4] Interment

Other relatives lack right or control to dispose of remains of deceased person if there is a surviving spouse since right to dispose of remains and duty of interment and liability therefor vest in surviving spouse. *Cohen v. Groman Mortuary, Inc. (1964) 231 Cal. App. 2d 1, 5, 41 Cal. Rptr. 481*

Duty of interment and liability of reasonable cost thereof devolves on surviving spouse, if any; but reasonable cost of interment is charged against estate if decedent leaves estate in California. *Estate of Cornitius (1957) 154 Cal. App. 2d 422, 427, 316 P.2d 438*

Charge for funeral expenses is not debt of decedent but of estate; when surviving spouse paid funeral expenses under compulsion of suit against her by undertaker, surviving spouse did not volunteer payment and was entitled to repayment from estate. *Estate of Cornitius (1957) 154 Cal. App. 2d 422, 427-430, 316 P.2d 438*

Wish of deceased and his widow do not affect court's power and jurisdiction to authorize executors to perform duty of seeking order fixing permanent place of interment for decedent's body when body was temporarily deposited in vault and court had duty to make such order. *In re Estate of Seymour (1911) 15 Cal. App. 287, 293-294, 114 P. 1023*

[5] Liability of Coroner

Although county coroner ordinarily has no duty to notify decedent's next of kin, failure to so notify may possibly give rise to cause of action for negligent infliction of emotional distress if county voluntarily assumes duty to assist in locating victim and then fails to act in careful and reasonably diligent manner in carrying out that duty. *Bock v. County of Los Angeles (1983) 150 Cal. App. 3d 65, 72-73, 197 Cal. Rptr. 470*

In action against county for allegedly hiring and retaining coroner who negligently performed autopsy on plaintiff's wife, causing plaintiff's wrongful charge with murder, deputy coroner was immune from liability under *Gov. Code §§ 821.6* and *815.2* and that immunity also inured to benefit of county. *Stearns v. County of Los Angeles (1969) 275 Cal. App. 2d 134, 138, 79 Cal. Rptr. 757*

[6] Mental Suffering

Relatives of decedent who died while in constructive police custody at state-run hospital could not recover from hospital for emotional distress caused by hospital's failure to locate and notify relatives, because relevant statutory provisions placed duty to take charge of and dispose of remains on coroner, not hospital, and hospital had no special relationship with relatives that created any duty owed directly to them. *Aguirre-Alvarez v. Regents of Univ. of Cal. (1998) 67 Cal. App. 4th 1058, 1063-1070, 79 Cal. Rptr. 2d 580*

Claim by deceased's mother for damages for mental suffering was compensable for defendant cemetery's alleged negligent breach of oral promise to exclude uninvited persons from funeral service, which was consequently disrupted by deceased's uninvited punk rocker friends. *Ross v. Forest Lawn Mem'l Park (1984) 153 Cal. App. 3d 988, 992-995, 203 Cal. Rptr. 468*

Recovery for mental distress is permitted for negligent breach of contract to prepare and ship dead body. *Allen v. Jones (1980) 104 Cal. App. 3d 207, 213, 163 Cal. Rptr. 445*

[7] Mortuary Operations

Mortuary and cemetery situated together may properly advertise that fact through paid advertisements and sign, and failure to make reference therein to separate corporate structures and details of separate licensing arrangement with state does not constitute misleading advertising in violation of *Bus. & Prof. Code § 17500*. *State Bd. of Funeral Dirs. v. Mortuary in Westminster Mem'l Park (1969) 271 Cal. App. 2d 638, 643, 76 Cal. Rptr. 832*

Mortuaries may be properly operated on cemetery premises. *State Bd. of Funeral Dirs. v. Mortuary in Westminster Mem'l Park (1969) 271 Cal. App. 2d 638, 642, 76 Cal. Rptr. 832*

[8] Native American Burial Grounds

Pub. Res. Code § 5097.99 is not constitutionally vague despite statute's failure to define terms "Native American" and "grave"; provisions prohibiting obtaining or possessing Native American artifacts taken from Native American grave do not violate defendant archeologists' rights to practice their profession and to due process. *People v. Van Horn (1990) 218 Cal. App. 3d 1378, 1402-1403, 267 Cal. Rptr. 804*

[9] Negligence

Reports of a general pattern of misconduct are not sufficient, in and of themselves, to establish that defendants' misconduct included mishandling of the remains of each plaintiff's decedent; a generalized concern that the remains of a relative may have been involved, arising out of a media report of a pattern of misconduct, is insufficient to satisfy the requirement that there be a direct connection between a defendant's conduct and the injury suffered by the plaintiff. *Conroy v. Regents of the University of California (2009) 45 Cal. 4th 1244, 1251, 91 Cal. Rptr. 3d 532, 203 P.3d 1127*

Sister of decedent is foreseeable plaintiff in action alleging that negligent mishandling of remains by county and mortuary caused severe emotional distress; issue of fact existed regarding whether severe emotional distress to decedent's niece was foreseeable. *Quesada v. Oak Hill Improvement Co. (1989) 213 Cal. App. 3d 596, 610, 261 Cal. Rptr. 769*

Once mortuary undertakes to accept care, custody, and control of remains, duty of care is found running to members of decedent's family; whether or not duty has been breached by failure to lock premises so as to prevent access to remains by unauthorized persons was question of fact for jury. *Draper Mortuary v. Superior Court (1982) 135 Cal. App. 3d 533, 538, 185 Cal. Rptr. 396*

[10] Perpetual Care Gifts

Bequest to benevolent association for perpetual care of testator's lot in public cemetery was void as rule against perpetuities since bequest did not benefit sufficiently broad class of persons so as to constitute charitable gift nor come within exception to rule as in cases of bequests to cemetery authorities for care of plot in private cemetery. *Estate of Pfund (1949) 93 Cal. App. 2d 444, 445-447, 209 P.2d 52*

[11] Private Cemeteries

Absent fraud or collusion, interpretation of religious law by governing body of private cemetery is accepted in litigation before secular courts as conclusive, even if decision affects civil rights of decedent's surviving spouse and even if decision is arbitrary; prohibition of portraits from gravestones is reasonable exercise of authority granted by

statutes to administer cemetery property for general good, and to make choices that are against wishes of some individuals. *Sinai Mem'l Chapel v. Dudler (1991) 231 Cal. App. 3d 190, 199-200, 282 Cal. Rptr. 263*

[12] Property Rights in Human Remains

The right of a surviving spouse to control the disposition of a decedent's body is superseded by the terms of a written donation agreement executed by the decedent, and a university to which the decedent had donated his remains for scientific and anatomical studies had the exclusive right to control the disposition of the body pursuant to *Health & Safety Code § 7100.1(a)*, limited only by the donation agreement itself. *Conroy v. Regents of the University of California (2009) 45 Cal. 4th 1244, 1257, 91 Cal. Rptr. 3d 532, 203 P.3d 1127*

Deceased's mother's right of disposition of deceased's body includes power to exclude uninvited friends and relatives of deceased from funeral service. *Ross v. Forest Lawn Mem'l Park (1984) 153 Cal. App. 3d 988, 994-995, 203 Cal. Rptr. 468*

Law recognizes quasi-property right to possession of decedent's body for purposes of determining who shall have possession for burial, though no property right as such in body of decedent. *Sinai Temple v. Kaplan (1976) 54 Cal. App. 3d 1103, 1110, 127 Cal. Rptr. 80* ; *Gray v. Southern Pac. Co. (1937) 21 Cal. App. 2d 240, 246-247, 68 P.2d 1011*

Removal of body from original burial place does not in itself constitute ground for recovery of damages since there is no property right in a dead body. *Steen v. Whittington (1935) 9 Cal. App. 2d 445, 446-447, 50 P.2d 118*

Person possesses certain elements of proprietary interest in his or her body which enable him or her to make valid directions as to place and manner of interment; directions are judicially enforceable if reasonable and appropriate. *Estate of Henderson (1936) 13 Cal. App. 2d 449, 453-454, 57 P.2d 212*

Where dispute between wishes of deceased and relatives as to manner or place of burial arises, court in accordance with principles of equity will attempt to carry out wishes of deceased where possible. *Estate of Henderson (1936) 13 Cal. App. 2d 449, 454-455, 57 P.2d 212*

[13] Public Cemeteries

In action to enjoin further excavation of Native American burial ground, trial court properly found that site was not public cemetery because there was no prescriptive use of land as public cemetery continuously and without interruption for five years subsequent to enactment of prescriptive use provision of former Political Code §§ 3105-3107 (*now see Health & Safety Code 8100-9677*). *Wana the Bear v. Community Constr., Inc. (1982) 128 Cal. App. 3d 536, 541, 180 Cal. Rptr. 423*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewHealthcare LawTreatmentHuman RemainsDuties of Coroners & Medical ExaminersHealthcare LawTreatmentHuman RemainsProperty RightsTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsNegligenceActionsInterference With Dead BodiesGeneral Overview

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§ 180.33 Attorney General Opinions

Cemetery authority cannot transfer endowment care fund to corporation that is not bank or trust company. *65 Ops. Cal. Att'y Gen. 393 (1982)*

Cost of moving body from place of death to mortuary on coroner's order to investigate cause of death, is not chargeable to deceased's estate or to person responsible for interment, unless transportation was also necessary in performance of coroner's duty to inter remains or unless person responsible for interment cost agreed to pay for transportation. *65 Ops. Cal. Att'y Gen. 141 (1982)*

Holding human bodies in cryonic suspension does not constitute operation of cemetery within meaning of *Health & Safety Code § 7003* or *8100*; Uniform Anatomical Gift Act [*Health & Safety Code § 7150 et seq.*] requirements are not met by placing body in cryonic suspension. *63 Ops. Cal. Att'y Gen. 879 (1980)*

Coroner is required to take possession of infant's body and perform autopsy where suspected cause of death is sudden infant death syndrome, unless there is prior objection by parents or certification of sudden infant death syndrome by attending physician. *58 Ops. Cal. Att'y Gen. 563 (1975)*

Crematory is a cemetery and is mandated to have in conjunction with its operation either mausoleum, burial park, or columbarium equipped at all times for interment of remains of bodies cremated at crematory. *55 Ops. Cal. Att'y Gen. 402 (1972)*

County coroner violates *Gov. Code § 1090* by assigning coroner cases to mortuaries in which coroner has financial interest. *42 Ops. Cal. Att'y Gen. 151 (1963)*

Coroner or autopsy surgeon are not civilly or criminally liable for body tissue or organs removed according to law and not returned prior to burial where retention is reasonably necessary to determine cause of death. *27 Ops. Cal. Att'y Gen. 46 (1956)*

Coroner is not authorized to investigate cause of death of person who was injured in his or her county but who dies outside county, though coroner must investigate every death occurring by violence or other circumstances mandating investigation in that county even if body is elsewhere. *27 Ops. Cal. Att'y Gen. 75 (1956)*

Coroner is obligated to sign death certificate if death occurs in county even if body has been removed. *27 Ops. Cal. Att'y Gen. 75 (1956)*

Coroner lacks official status beyond limits of own county and lacks authority beyond own county to call or question witnesses, though coroner may travel beyond county and base report on information gained outside county limits. *27 Ops. Cal. Att'y Gen. 75 (1956)*

Discretion as to need for autopsy is vested in coroner whose decision is subject to question only if grossly unreasonable, arbitrary, or capricious. *20 Ops. Cal. Att'y Gen. 143 (1952)*

Coroner has right to immediate possession of body where death occurs without physician in attendance, even though there are no circumstances to suggest criminal cause, suicide, or accident; coroner may prohibit removal of body without his or her permission under these circumstances. *5 Ops. Cal. Att'y Gen. 65 (1945)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentHuman RemainsGeneral OverviewHealthcare LawTreatmentHuman RemainsDuties of Coroners & Medical ExaminersHealthcare LawTreatmentHuman RemainsProperty Rights

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15-180 California Forms of Pleading and Practice--Annotated § 180.34

§ 180.34 Law Reviews

Katz, *Increasing the Supply of Human Organs for Transplantation: A Proposal for a System of Mandated Choice*, 18 Bev. Hills B.J. (1984)

Bucklin, *Forensic Pathology for Attorneys, 12 Cal. West. L. Rev. 197 (1976)*

Richards, *Medical--Legal Problems of Organ Transplantation; The Uniform Anatomical Gift Act, 21 Hastings L.J. 92 (1969)*

Note, *Special Treatment of Cemeteries, 40 S. Cal. L. Rev. 716 (1967)*

Comment, *Autopsy Laws--An Examination of Rules and Policies, 25 S. Cal. L. Rev. 68 (1951)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawAnatomical GiftsHealthcare LawTreatmentGeneral OverviewHealthcare LawTreatmentBlood & Organ DonationsUniform Anatomical Gift ActHealthcare LawTreatmentHuman RemainsGeneral OverviewHealthcare LawTreatmentHuman RemainsDuties of Coroners & Medical Examiners

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§ 180.35 Text References

Witkin, Summary of California Law, vol. 13, *Personal Property*, § 5 et seq. (10th ed. 2005)

25 C.J.S., *Dead Bodies*, §§ 1-9

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Volume 15: Costs and Attorney's Fees thru Deeds-Chs. 174-189
Chapter 180 DEAD BODIES AND CEMETERIES
PART III. RESEARCH GUIDE

15-180 California Forms of Pleading and Practice--Annotated §§ 180.36-180.49

[Reserved]

§§ 180.36[Reserved]

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Volume 15: Costs and Attorney's Fees thru Deeds-Chs. 174-189
Chapter 180 DEAD BODIES AND CEMETERIES
PART IV. FORMS

15-180 California Forms of Pleading and Practice--Annotated § 180.50

§ 180.50 Complaint for Damages [Civ. Code § 3333] for Mental Anguish for Tortious Interference With Decedent's Remains--By Child of Decedent [Health & Safety Code § 7100] Against Decedent's Father

[1] FORM Complaint for Damages [Civ. Code § 3333] for Mental Anguish for Tortious Interference With Decedent's Remains--By Child of Decedent [Health & Safety Code § 7100] Against Decedent's Father

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____[*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Tortious Interference with Decedent's Remains)
_____ [*name*],	)	[Amount demanded _____
Defendant.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. Plaintiff is the surviving child of _____ [*name of decedent*], hereinafter referred to as "decedent."

2. Defendant _____ [*name*] is _____ [*specify, e.g.*, the surviving father of the decedent] and resides in _____ [*city*], _____ County, California.

3. _____ [*Name of decedent*] died on _____ [*date*], in _____ [*city*], _____ County, California.

4. By reason of the relationship of plaintiff and decedent, plaintiff was at all times herein mentioned entitled to

immediate custody and possession of the decedent's remains.

5. On or about _____ [*date*], defendant _____ [negligently *or* willfully] interfered with the plaintiff's right to dispose of and inter the remains of the decedent contrary to the wishes and beliefs of plaintiff by _____ [*specify, e.g.,* conducting funeral services which contravene the beliefs of plaintiff and decedent in that _____ (*specify manner in which services contravened plaintiff's religious beliefs*)].

6. This interference was _____ [negligent *or* willful] in that _____ [*specify, e.g.,* defendant failed to obtain the permission or authorization of plaintiff as _____ (*specify, e.g.,* surviving child) of decedent and the person possessing the legal right to determine the disposition and burial of decedent's remains prior to defendant's tortious interference].

7. Defendant's disposition of the decedent's body is and was repugnant, offensive, and insulting to plaintiff and his/her beliefs and learning of defendant's disposition of decedent's body, and thereafter, caused the plaintiff extreme mental anguish and disgust and disturbed his/her peace of mind causing him/her to become permanently sick in mind and body.

8. By reason of defendant's acts plaintiff has been damaged.

WHEREFORE, plaintiff prays judgment as follows:

1. For compensatory damages according to proof;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [firm name, if any]

By: _____ [signature]

_____ [typed name]

Attorney for Plaintiff _____ [name]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form of complaint is for use in an action by a decedent's child based on the tortious interference with decedent's remains by decedent's father who lacked the paramount right to dispose of and inter decedent's remains [*see Health & Safety Code § 7100*].

[3] Allegations

The complaint alleges the following:

- Plaintiff's relationship to the decedent (Paragraph 1).
- Defendant's name, residence, and relationship to the decedent (Paragraph 2).
- Decedent's name and the date and place of his or her death. (Paragraph 3).
- Plaintiff's entitlement to the decedent's remains (Paragraph 4) [*Health & Safety Code § 7100*].
- Defendant's interference with plaintiff's right to dispose of the decedent's remains (Paragraph 5) [*see Sinai Temple v. Kaplan (1976) 54 Cal. App. 3d 1103, 1112, 127 Cal. Rptr. 80 , Sinai Temple v. Kaplan (1976) 54 Cal. App. 3d 1103, 1112, 127 Cal. Rptr. 80]* .
- Defendant's failure to obtain plaintiff's permission prior to interfering with decedent's remains (Paragraph 6).
- Injury and damages proximately caused as a result of defendant's tortious interference (Paragraphs 7, 8).

[4] Parties Plaintiff

The proper parties plaintiff are those persons with the paramount right to control disposition of the decedent's remains. The order of devolution, unless other instructions have been given by the decedent, is as follows [*Health & Safety Code § 7100*]:

- An attorney-in-fact under a durable power of attorney for health care executed pursuant to *Probate Code § 4600 et seq.*
- The surviving spouse.
- The sole surviving adult child of the decedent, or if there is more than one adult child of the decedent, one-half or more of the surviving adult children.
- The surviving parent or parents of the decedent.
- The surviving competent adult person or persons respectively in the next degrees of kindred.
- The public administrator if the deceased has sufficient assets.

If the proper plaintiff is a minor, he or she must be represented by a guardian ad litem for the purposes of prosecuting the action and appropriate modifications should be made in Paragraph 1 of the form [*Code Civ. Proc. §§ 372-373*; for

discussion and forms, *see* Ch. 291, *Guardians ad Litem*].

[5] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought if they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[7] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[8] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to Fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter Jurisdiction*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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15-180 California Forms of Pleading and Practice--Annotated § 180.51

§ 180.51 Complaint for Damages [Civ. Code § 3333] for Mental Anguish for Tortious Interference With Decedent's Remains--By Widow [Health & Safety Code § 7100] Against Hospital and Doctor for Unauthorized Retention [Health & Safety Code § 7102], Autopsy [Health & Safety Code § 7113], and Mutilation of Husband's Remains

[1] FORM Complaint for Damages [Civ. Code § 3333] for Mental Anguish for Tortious Interference With Decedent's Remains--By Widow [Health & Safety Code § 7100] Against Hospital and Doctor for Unauthorized Retention [Health & Safety Code § 7102], Autopsy [Health & Safety Code § 7113], and Mutilation of Husband's Remains

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____[*names*],	)	(Unauthorized Retention, Autopsy, and Mutilation of
[and DOES-I through _____,]	)	Human Remains)
Defendants.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff is the widow and surviving spouse of _____ [*name*], referred to below as "decedent," who died on _____ [*date*], at _____ [*time*] in _____ [*specify, e.g.,* _____ Hospital] in _____ [*city*], _____ County, California.

2. Defendant _____ [*name of hospital*] is, and at all times herein mentioned was, a corporation duly

organized and existing under the laws of the State of California with its principal place of business in _____ [*city*], _____ County, California [*or allege other capacity of defendant and basis of venue as appropriate*].

3. Defendant _____ [*name of doctor*] is, and at all times herein mentioned was, a physician and surgeon duly licensed to practice medicine and perform surgery in California with offices in _____ County, California.

[4. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes, and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.)]

5. [Plaintiff is informed and believes and thereon alleges that] [A]t all times herein mentioned each of the defendants was the agent and employee of the other defendant and, in doing the things hereinafter alleged, was acting within the course and scope of such agency.

6. By reason of the relationship of plaintiff and decedent, plaintiff was at all times herein mentioned entitled to immediate custody and possession of the decedent's remains.

7. The decedent's death was due to natural causes consisting of _____ [*specify, e.g.*, coronary thrombosis as attested by decedent's attending physician]. While the decedent's remains were in the defendant's custody in _____ County, California, the defendants and each of them unlawfully, without any legal authorization as specified in *Section 27491 of the Government Code* or permission of the next of kin, and without plaintiff's knowledge or consent, and against her will, permitted, performed, and assisted in an autopsy on the decedent's remains, and in doing so mutilated, desecrated, violated, and outraged the remains of the decedent, as follows _____ [*specify acts of defendants in performing autopsy*].

8. When viewed by the plaintiff and thereafter, the mutilation, desecration, violation, and outraging of the _____ [*specify, e.g.*, head and body] of the decedent were repugnant, offensive and insulting to the plaintiff, and the defendants' acts, and each of them, caused the plaintiff physical shock, mental anguish, and extreme disgust, and disturbed permanently her peace of mind causing her to become permanently sick in mind and body.

9. By reason of the acts of the defendants, plaintiff has been damaged.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For compensatory damages according to proof;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 180.50*]

[2] Use of Form

This form of complaint is for use in an action based on tort [*see Huntly v. Zurich Gen. Accident & Liab. Ins. Co., (1929) 100 Cal. App. 201, 212-213, 280 P. 163*] by a widow against a hospital and a doctor for the unauthorized retention, autopsy [*Health & Safety Code § 7114*], and mutilation [*Health & Safety Code § 7052*] of her husband's remains.

With appropriate modification, the form may be used by a surviving husband, parent, child, or other persons entitled to bring a cause of action pursuant to *Health & Safety Code § 7100*.

[3] Allegations

This complaint alleges:

- The capacity of defendants (Paragraphs 2 and 3).

- The relationship of plaintiff to the decedent entitling plaintiff to decedent's remains (Paragraphs 1 and 6) [*Health & Safety Code § 7100*].

- Defendants' performance of an autopsy on decedent's remains under circumstances which did not warrant an autopsy [*Gov. Code § 27491*] and without permission to perform an autopsy (Paragraph 7).

- Injury and damages to plaintiff as a result of the unauthorized autopsy (Paragraphs 8 and 9).

[4] Autopsy Authorization

An autopsy may be authorized by the decedent by will or other written instrument or by the following living persons: (a) the surviving spouse, (b) a surviving child or parent, (c) a surviving brother or sister, (d) any other kin or person who has acquired the right to control the disposition of the remains [*Health & Safety Code §§ 7100, 7102*], (e) a public administrator, or (f) a coroner [*Gov. Code §§ 27491, 27491.2, 27491.4*] or any other duly authorized public officer [*Health & Safety Code § 7113*].

[5] Form of Authorization

Autopsy authorization, given by persons other than the decedent, may be written, by telegram, or obtained by telephone and recorded on tape or other recording device [*Health & Safety Code § 7113*]. Verbal authorization is not acceptable if it is made known to the physician who is to perform the autopsy that the deceased was at the time of his or her death a member of a religion, church, or denomination which relies solely on prayer for the healing of disease [*Health & Safety Code § 7113*].

A licensed hospital [*Gov. Code § 815*] or its authorized personnel [*Gov. Code §§ 820-821.6*] is not liable for permitting or assisting an autopsy, and a physician is not liable for performing an autopsy pursuant to authorization [*see Division of Labor Law Enforcement v. Gifford (1955) 137 Cal. App. 2d 259, 263-264, 290 P.2d 281]* unless he or she or it has actual notice that the person giving the authorization has represented his or her status falsely [*Health & Safety Code § 7113*].

A coroner's autopsy is subject to question only when grossly unreasonable, arbitrary, or capricious [*see 20 Ops. Cal. Att'y Gen. 143, 145 (1952)]* .

[6] Certificate of Religious Belief Limiting Autopsy

Despite any other provision of law, except as otherwise provided in *Gov. Code § 27491.43*, in any case in which the coroner, before beginning an autopsy, dissection, or removal of corneal tissue, pituitary glands, or any other organ, tissue, or fluid, has received a certificate of religious belief executed by the decedent as provided in *Gov. Code § 27491.43(b)* (form and content of certificate), that the procedure would be contrary to his or her religious belief, the coroner shall not perform that procedure on the body of the decedent. If, before beginning the procedure, the coroner is informed by a relative or a friend of the decedent that the decedent had executed a certificate of religious belief, the coroner shall not perform the procedure, except as otherwise provided in *Gov. Code § 27491.43*, for 48 hours. If the certificate is produced within 48 hours, the case shall be governed by *Gov. Code § 27491.43*. If it is not produced within that time, the case shall be governed by the other provisions of *Gov. Code §§ 27490-27512* (inquests) [*Gov. Code § 27491.43(a)*].

Gov. Code § 27491.43 provides exceptions that allow the coroner to perform an autopsy or other procedure on a reasonable suspicion that the death was caused by a criminal act or by a contagious disease that is a public health hazard, and in other cases the coroner may petition the court to allow an autopsy or other procedure [*see Gov. Code § 27491.43(c), (d)*]. The coroner is not liable for damages in a civil action for any act or omission taken in compliance with *Gov. Code § 27491.43* [*Gov. Code §§ 27491.43(f), 27491.41(h)*].

[7] Coroner's Immunity in Case of Autopsy of Infant Who Died Suddenly and Unexpectedly

The coroner may, and in some instances must, perform an autopsy in any case in which infant has died suddenly and unexpectedly [*see Gov. Code § 27491.41(c)*]. No consent of any person is required to authorize this autopsy [*see Gov. Code § 27491.41(i)*]. In addition, the coroner may take tissue samples for research in such cases without consent of a responsible adult if tissue removal is not likely to result in visible disfigurement [*see Gov. Code § 27491.41(g)*].

The coroner cannot be held liable for damages in a civil action for any act or omission done in compliance with *Gov. Code § 27491.41* [*see Gov. Code § 27491.41(h)*].

[8] Cross References

For additional comments and cross references relating to complaints, see *§ 180.50[2]* et seq.

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§ 180.52 Complaint for Damages [Civ. Code § 3333] Based on Negligence--By Close Relative of Decedent, for Whose Benefit Funeral-Related Services Were Performed, Against Funeral Service Provider--Mishandling of Remains

[1] FORM Complaint for Damages [Civ. Code § 3333] Based on Negligence--By Close Relative of Decedent, for Whose Benefit Funeral-Related Services Were Performed, Against Funeral Service Provider--Mishandling of Remains

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Negligence)
[and DOES-I through _____,]	)	[Amount demanded _____
Defendant.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff Alleges:

1. _____ [*Allege capacity of each defendant and basis of venue as appropriate, e.g.,* Defendant _____ (*name*) is, and at all times herein mentioned was, a corporation, organized and existing under the laws of California, with its principle place of business in _____ (*city*), _____ County, California].

2. Defendant _____ [*name*] is, and at all times herein mentioned was, engaged in the business of

_____ [*specify, e.g.*, funeral director and cemetery].

[3. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes, and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.)]

[4. (Plaintiff is informed and believes and thereon alleges that) at all times herein mentioned each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the scope of that agency.]

[*EITHER, if plaintiff is a parent, sibling, child, or grandparent of decedent*]

5. Plaintiff is the _____ [father *or* mother *or* brother *or* sister *or* son *or* daughter *or* grandfather *or* grandmother] of _____ [*decedent's name*] ("decedent").

[*OR, if plaintiff is related to decedent, but not as a parent, sibling, child, or grandparent*]

5. Plaintiff is the _____ [*specify relationship, e.g.*, aunt] of _____ [*decedent's name*] ("decedent"). In addition, plaintiff _____ [*set forth facts that tend to show a close relationship between the plaintiff and the decedent sufficient to make plaintiff's emotional distress foreseeable, e.g.*, lived with decedent at their residence at _____ (*address*), from _____ (*date*), until the time of decedent's death].

[*Here and in as many subsequent paragraphs as necessary, identify any additional plaintiff, and specify his/her close family relationship to the decedent*]

[*CONTINUE*]

6. On or about _____ [*date*], at defendant's facility located at _____ [*address*], defendant received possession and custody of _____ [*decedent's name*] ("the decedent") for the purpose of proper disposition of the decedent's remains.

7. At that time and place, defendant[s, and each of them,] undertook and agreed to provide funeral-related services, and to accomplish the _____ [burial *or* cremation] of the remains of decedent for the benefit of plaintiff, and with the dignity and respect due plaintiff in accordance with his/her wishes, in keeping with public sensibilities, and in accordance with the law.

8. Plaintiff, at all material times, was aware of the death of his/her decedent, and the nature of the funeral-related services that were to be performed.

9. On or about _____ [*date*], defendant[s, and each of them,] _____ [*allege acts or omissions of defendant that would foreseeably cause mental suffering in plaintiff, e.g.*, mishandled and mutilated decedent's remains and commingled his/her remains with the remains of other persons; removed, harvested, and sold organs and body parts from decedent without authorization and permission; cremated decedent's remains in a disrespectful manner at a pottery kiln; took and sold gold and other metals from decedent's remains; and placed

decedent's remains in containers without preserving the integrity and identity of the remains].

10. _____ [*Allege facts showing how plaintiff learned of defendant's misconduct and that plaintiff knew or had substantial reason to believe that his/her particular decedent was a victim of defendant's misconduct*].

11. As a proximate result of the negligence of defendant[s, and each of them], plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has suffered general damages in an amount according to proof.

[12. As a further proximate result of the negligence of defendant(s, and each of them,) plaintiffs have incurred(, and will continue to incur,) medical and related expenses in an amount according to proof].

[13. As a further proximate result of the negligence of defendant[s, and each of them], plaintiff's earning capacity has been greatly impaired, both in the past and present, in an amount according to proof.]

WHEREFORE, plaintiff prays judgment against defendant's and each of them, as follows:

1. For general damages according to proof;

[2. For medical and related expenses according to proof;]

[3. For loss of earnings _____ according to proof;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 180.50*]

[2] Use of Form

This form of complaint is for use in an action by a close relative of a deceased person who was aware that funeral and/or crematory services were being performed, and on whose behalf or for whose benefit the services were rendered. The fact pattern set forth by way of example was adapted from the facts of *Christensen v. Superior Court (1991) 54 Cal. 3d 868, 2 Cal. Rptr. 2d 79, 820 P.2d 181* [*see also Quesada v. Oak Hill Improvement Co. (1989) 213 Cal. App. 3d 596, 610, 261 Cal. Rptr. 769]* .

If the plaintiff himself or herself has contracted with the defendant for the disposition of the decedent's remains, or has the statutory right to direct disposition, the form may be modified to allege that relationship [*see, e.g., Chelini v. Nieri*

(1948) 32 Cal. 2d 480, 481, 196 P.2d 915 (award of general damages in action against mortician for breach of contract to preserve body of plaintiff's mother as proper); *see also Carey v. Lima, Salmon & Tully Mortuary (1959) 168 Cal. App. 2d 42, 43, 335 P.2d 181]* . However, the cause of action is no longer limited to those plaintiffs [*see Christensen v. Superior Court (1991) 54 Cal. 3d 868, 886-891, 2 Cal. Rptr. 2d 79, 820 P.2d 181]* .

[3] Allegations

The form alleges:

- The status, capacity, residence or place of business, and business of the defendant (Paragraphs 1 and 2);

- The identification of any fictitiously named defendants, if applicable (Paragraph 3);

- The requisite agency relationship in order to establish vicarious liability, if applicable (Paragraph 4);

- Facts regarding plaintiff's relationship to the decedent (Paragraph 5). The "close relative" limitation on permissible plaintiffs is *discussed under § 180.52[4]* [*see Thing v. La Chusa (1989) 48 Cal. 3d 644, 668 n.10, 257 Cal. Rptr. 865, 771 P.2d 814* ; *see also Quesada v. Oak Hill Improvement Co. (1989) 213 Cal. App. 3d 596, 610, 261 Cal. Rptr. 769]* .

- The circumstances that establish defendant's duty toward the plaintiff (Paragraphs 66-88). A defendant funeral-services provider owes a duty only to the close relatives of a decedent who were aware of both the death of the decedent, and of the nature of the funeral-related services that were to be performed on their behalf [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 890, 896, 2 Cal. Rptr. 2d 79, 820 P.2d 181]* .

- Actions or omissions of defendant that constitute the breach of duty (Paragraph 9).

- Facts showing how plaintiff learned of defendant's misconduct and that plaintiff knew or had substantial reason to believe that their particular decedent was a victim of defendant's misconduct, or that the alleged continuing emotional distress each plaintiff suffers is based on knowledge that his or her decedent's remains have been mishandled (Paragraph 10) [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 901, 2 Cal. Rptr. 2d 79, 820 P.2d 181]* . The requirements regarding pleading and proof of causation are *discussed under § 180.52[8]*.

- The defendant's negligence proximately caused plaintiff's damages (Paragraphs 11-13). Note that the misconduct alleged is not the negligent mishandling of human remains, but rather lies in causing emotional distress to the plaintiff [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 884 n.14, 2 Cal. Rptr. 2d 79, 820 P.2d 181* , *see also Johnson v. American Airlines, Inc. (9th Cir. 1987) 834 F.2d 721, 723-724*].

[4] "Close Relative" Requirement

In *Christensen*, the Supreme Court stressed that the class of persons who could recover was limited in number, as it encompassed only "close relatives" [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 900, 2 Cal. Rptr. 2d 79, 820 P.2d 181*]. "Close relatives" has been defined, in the context of actions for negligent infliction of emotional distress based on a "bystander" theory, to include parents, siblings, children, and grandparents of the victim, and other relatives who reside in the same household [*Thing v. La Chusa (1989) 48 Cal. 3d 644, 668 n.10, 257 Cal. Rptr. 865, 771 P.2d 814*]. In adopting this definition as a factor limiting the permissible number of plaintiffs in an action to recover

damages for emotional distress caused by misconduct involving a corpse, the California Supreme Court implied that grandchildren may also be proper plaintiffs [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 882 n.12, 2 Cal. Rptr. 2d 79, 820 P.2d 181* (noting without comment that court of appeal had defined "close relative" to include categories listed in *Thing* plus grandchildren)]. Exceptional circumstances may enlarge the group to include other relatives [*Thing v. La Chusa (1989) 48 Cal. 3d 644, 668 n.10, 257 Cal. Rptr. 865, 771 P.2d 814* ; *see also* *Quesada v. Oak Hill Improvement Co. (1989) 213 Cal. App. 3d 596, 610, 261 Cal. Rptr. 769* (allowing niece opportunity to prove that she was within group)].

[5] Causation Requirements

In *Christensen*, the California Supreme Court emphasized that a plaintiff may recover damages only for an injury resulting from defendant's breach of a duty owed to the plaintiff [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 901, 2 Cal. Rptr. 2d 79, 820 P.2d 181]* . The Court stated that media reports of a general pattern of misconduct are not sufficient, in and of themselves, to establish that a defendant's misconduct included mishandling of the remains of each plaintiff's decedent [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 901, 2 Cal. Rptr. 2d 79, 820 P.2d 181]* . However, an allegation that plaintiff learned from media reports that "his" or "her" decedent had been improperly treated has been held to be sufficient to allege the direct causation required [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 901, 2 Cal. Rptr. 2d 79, 820 P.2d 181]* . The Court noted that the plaintiffs' ability to prove either that he or she knew, or had substantial reason to believe, at the time he or she learned of the misconduct that his or her decedent was a victim of the defendants' misconduct, or that the alleged continuing emotional distress each plaintiff suffers is based on knowledge that his or her decedent's remains have been mishandled, were not before the Court [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 901, 901 n.27, 2 Cal. Rptr. 2d 79, 820 P.2d 181* (also noting that trial court had discretion to permit amendment of complaint to allege that new evidence permits identification of decedents whose remains were mishandled, and that some plaintiffs suffer emotional distress due to inability to ascertain whether or not their decedents' remains were mishandled)].

Although the Court did not make clear the precise requirements for pleading and proving causation, counsel should allege with as much specificity as possible that plaintiff's emotional distress was caused by defendant's breach of the duty toward the specific decedent with whom plaintiff had the requisite relationship.

[6] Cross References

For discussion and forms relating to negligence actions, see Ch. 380, *Negligence*

For additional comments and cross references relating to complaints, see *§§ 180.50[2] et seq.* and, *180.51[2] et seq.*

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Volume 15: Costs and Attorney's Fees thru Deeds-Chs. 174-189
Chapter 180 DEAD BODIES AND CEMETERIES
PART IV. FORMS

15-180 California Forms of Pleading and Practice--Annotated § 180.53

§ 180.53 Petition [Health & Safety Code § 7105] for Order Providing for Interment of Human Remains [Health & Safety Code § 7107]--By Cemetery or Relative--Persons With Right to Control Interment Cannot Agree on Disposition

[1] FORM Petition [Health & Safety Code § 7105] for Order Providing for Interment of Human Remains [Health & Safety Code § 7107]--By Cemetery or Relative Persons With Right to Control Interment Cannot Agree on Disposition

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION FOR ORDER OF INTERMENT
_____ [*name*],	)	(Failure to Inter Remains)
Respondent.	)	
	)	
	)	

Petitioner alleges:

1. Petitioner is, and at all times herein mentioned was, _____ [*specify, e.g.,* son of the decedent, with a share of the right to control the disposition of the decedent's remains, *or* a (nonprofit) corporation duly organized and existing under the laws of the State of California, with its principal place of business in _____ (*city*), _____ County, California, for the purpose of engaging in and transacting the business of a cemetery known as _____ (*specify, e.g.,* Memorial Park Cemetery) located within the boundaries of _____ County, California].

2. Respondent is _____ [*specify, e.g.,* the daughter of the decedent who shares in the duty of, and

liability for, the interment of decedent's remains].

3. _____ [*Name of decedent*] died on _____ [*date*], in _____ [*city*], _____ County, California.

4. _____ [Decedent at the time of his/her death was a resident of _____ County, California *or* The remains of decedent are located in _____ (*city*), _____ County, California].

5. _____ [*If petitioner is a relative of decedent, allege:* The remains of the decedent are in the possession of _____ (*name of cemetery, mortuary, etc.*) *or if petitioner is a cemetery authority, allege:* Petitioner has possession of the remains of the decedent].

6. _____ [*Specify parties who have right to control disposition of remains, e.g., if petitioner is relative of decedent,* Petitioner and respondent] acquired the right to control the disposition of the remains of the decedent on _____ [*date*], when _____ [*specify how right to control disposition devolved to parties, e.g.,* the decedent died].

7. _____ [*Specify parties who have right to control disposition of remains, e.g., if petitioner is relative of decedent,* Petitioner and respondent] have failed to agree on the disposition of the decedent's remains and failed to agree on funeral goods and services within seven days after acquiring the right to control the disposition of the decedent's remains, and the remains of the decedent have not been interred.

WHEREFORE, petitioner prays judgment as follows:

1. For an order giving to one party the right to control the disposition of the decedent's remains and directing that party to make interment of the remains.

2. For an alternate order giving to another party the right to control disposition of the remains if the first selected party fails to act within seven days after the court's original order.

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification, if desired. See § 180.50*]

[2] Use of Form

This form of petition is for use by a cemetery or funeral home, or a relative of the decedent, in commencing a proceeding to assign one relative to take control over the disposition of a decedent's remains if a group of relatives share

equal right to control, but cannot agree on disposition plans, and to compel the assigned relative to then inter the remains [*Health & Safety Code § 7105(c)*]. If any persons from the list provided in *Health & Safety Code § 7100* who would otherwise have equal rights to control the disposition of the body, excluding a public administrator, fail to agree on disposition and funeral goods and services within seven days after the date on which control over the body passed to that group of persons, either the cemetery or funeral establishment with possession of the remains, or any person sharing in equal right to control disposition of the body, may petition to have a court determine who will have control over disposition and to direct that selected person to inter the remains [*Health & Safety Code § 7105(c)*].

In these circumstances, the court in its order must also establish an alternate order specifying who will get the right to control disposition of the body if the person first selected fails to act within seven days [*Health & Safety Code § 7105(c)*].

[3] Jurisdiction and Venue

The petition must be filed in superior court and is not a limited civil case [*Code Civ. Proc. § 85*; *Health & Safety Code § 7105(c)*; for further discussion of jurisdiction, *see § 180.12[6]*].

Venue lies in the county in which the decedent resided at the time of death or in which the remains are located [*Health & Safety Code § 7105(c), see also Health & Safety Code § 7107*].

[4] Verification

Verification of this petition is not required, but assuming the same rules apply as in the case of a complaint, verification of the petition will require the defendant to file a verified answer [*see Code Civ. Proc. § 446*] and will preclude the respondent from making a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

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Chapter 180 DEAD BODIES AND CEMETERIES
PART IV. FORMS

15-180 California Forms of Pleading and Practice--Annotated § 180.54

§ 180.54 Petition for Permission of Court [Health & Safety Code § 7526] to Remove Remains [Health & Safety Code § 7525]--By Relation of Decedent Against Cemetery or Next of Kin Listed in Health & Safety Code § 7525

[1] FORM Petition for Permission of Court [Health & Safety Code § 7526] to Remove Remains [Health & Safety Code § 7525]--By Relation of Decedent Against Cemetery or Next of Kin Listed in Health & Safety Code § 7525

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR PERMISSION TO REMOVE AND
Respondent.	)	REINTER REMAINS
	)	
	)	

Petitioner alleges:

1. Petitioner is, and at all times herein mentioned was _____ [*specify, e.g.*, a surviving brother of the decedent].

[*EITHER*]

2. Respondent is, and at all times herein mentioned was, a corporation, organized and existing under the laws of the State of California, with its principal place of business in _____ [*city*], _____ County, California, for the purpose of engaging in and transacting the business of a cemetery within _____ County, California. The cemetery is known as _____ [*specify, e.g.*, Memorial

Park Cemetery] and is located within the boundaries of _____ County, California.

[*OR*]

2. Respondent[s] is/are the surviving _____ [spouse *or* child(ren) *or* parent(s) *or* brother(s) *or* sister(s)] of the decedent.

3. _____ [*Name of decedent*], died on _____ [*date*], in _____ [*city*], _____ County, California and was buried in _____ Cemetery in _____ [*city*], California.

4. _____ [*Specify reasons that petitioner wants decedent's remains disinterred, e.g.,* Respondent breached its contract with petitioner for the perpetual care of the grave by allowing the grave to become overgrown with weeds and, although it has been notified of the condition of the grave, respondent has failed and refused to remedy the condition].

5. On _____ [*date*], petitioner secured from _____ [*specify, e.g.,* the Registrar of Vital Statistics, Registration District No. _____] a permit for the removal of the remains of decedent from the cemetery to _____. A copy of the permit is attached hereto as Exhibit A and made a part hereof.

6. On _____ [*date*], petitioner obtained from the health department having jurisdiction an order for the removal of decedent's remains.

[*EITHER*]

7. The closest surviving next of kin has/have consented in writing to the removal of the body of decedent.

[*OR*]

7. The cemetery has consented to the removal of the body of decedent.

8. Thereafter, on _____ [*date*], the petitioner signed a written demand and request to the _____ [cemetery *or specify* surviving kin] requesting the removal of the remains of decedent. A copy of the request is attached hereto as Exhibit B and made a part hereof.

Notwithstanding this demand, respondent has failed and refused and still fails and refuses to consent to or allow the removal of the remains of decedent from the cemetery.

WHEREFORE, petitioner prays that this court make its order fixing the time and place for the hearing of this petition and the person or association on whom service of notice of the hearing shall be given, and that at the hearing an order be made by this court authorizing the removal of the remains of the decedent from the cemetery for interment in _____ [*name of cemetery where remains are to be interred*].

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner_____ [*name*]

[*Verification, if desired. See § 180.50.*]

[2] Use of Form

This form of petition is for use by a relative of a decedent in a proceeding to compel the cemetery or next of kin to permit the petitioner to disinter the decedent's remains for reinterment in another place.

The remains of a decedent can only be removed with the consent of the cemetery and the written consent of the deceased's next of kin [*Health & Safety Code § 7525, see also Health & Safety Code § 7980* (rules for religious cemeteries) and *In re Terra (1952) 111 Cal. App. 2d 452, 459-460, 244 P.2d 921]* . If the cemetery's consent or the consent of the closest next of kin cannot be obtained, this petition may be used to obtain permission from the superior court of the county in which the cemetery is situated [*Health & Safety Code §§ 7500, 7526*; for further discussion of jurisdiction, *see § 180.12[6]*].

This form assumes that the persons listed in *Health & Safety Code § 7100* as having the right to control the remains of a deceased person for purposes of interment (*see § 180.50[4]*) are the only persons entitled to bring a petition for permission to disinter the body. However, no statute limits the persons entitled to bring the petition, and a close friend was permitted to appeal the denial of a petition, although the court admitted there might be some doubt about the friend's legal right to maintain the appeal [*In re Keck (1946) 75 Cal. App. 2d 846, 849, 171 P.2d 933]* .

For further discussion of disinterment, see *§ 180.15*.

[3] Notice Requirements

The petitioner must give personally at least 10 days prior notice to the cemetery authority or other person not consenting to disinterment or at least 15 days prior notice if by mail [*Health & Safety Code § 7527*].

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Chapter 181 DEATH AND SURVIVAL ACTIONS

15-181 California Forms of Pleading and Practice--Annotated 181.syn

§ 181.syn Synopsis to Chapter 181: DEATH AND SURVIVAL ACTIONS

§ 181.01 Scope of Chapter

§§ 181.02-181.09 [Reserved]

§ 181.10 Governing Law

§ 181.11 Definitions

§ 181.12 Wrongful Death Action

[1] Nature

[2] Separate Action From Decedent's Action

[3] Effect of Decedent's Negligence

[4] Effect of Decedent's Assumption of Risk

[5] Effect of Decedent's Agreement to Arbitrate

[6] Res Judicata Effect of Judgment in Decedent's Action

[7] Action as Joint, Single, and Indivisible

[8] Omitted Heirs

[9] Prior Adjudication of Issue of Liability

§ 181.13 Elements of Wrongful Death Action

§ 181.14 Plaintiffs

[1] In General

[2] Statutory Categories of Plaintiffs

[3] Personal Representation

§ 181.15 Defendants

[1] In General

[2] Joinder of Unwilling Plaintiffs as Defendants

§ 181.16 Award of Damages

[1] In General

[2] Distinct From Survival Damages

[3] Punitive Damages Generally Not Allowed

[4] Punitive Damages in Actions Based on Felony Homicide

§ 181.17 Damages Limited to Pecuniary Loss

[1] In General

[2] Present Value of Future Contributions

[3] Value of Personal Service, Advice, or Training

[4] Loss of Society and Companionship

[5] Funeral Expenses

[6] Prejudgment Interest

§ 181.18 Damages Determined at Time Decedent Died

[1] General Rule and Burden of Proof

[2] Decedent's Life Expectancy Considered

§ 181.19 Recovery of Lump Sum Damages

§ 181.20 Distribution of Damages

§ 181.21 Limitation on Recovery in Medical Malpractice Cases

§ 181.22 Limitation on Attorney's Fees in Medical Malpractice Cases

§ 181.23 Statute of Limitations for Wrongful Death Action

[1] Two-Year Period and Tolling

[2] Actions Against Health Care Providers

§ 181.24 Vicarious Liability of Parent for Death Caused by Minor

§§ 181.25-181.39 [Reserved]

§ 181.40 Governing Statutes

§ 181.41 Definitions

§ 181.42 Survival Action

[1] Availability

[2] In Family Law Matters

[3] Invasion of Privacy and Defamation

[4] Injury to Child or Ward

[5] Action to Establish Decedent's Insured Liability

[6] Cause of Action Accruing Before Plaintiff's Death

§ 181.43 Cause of Action Commenced or Continued by Decedent's Successor in Interest

§ 181.44 Statute of Limitations

[1] Decedent's Cause of Action

[2] Cause of Action Against Decedent

§ 181.45 Damages Recoverable in Survival Action

[1] In General

[2] Medical Expenses

[3] Loss of Earnings

[4] Punitive Damages

§ 181.46 Recovery of Damages Against Deceased Defendant

[1] Availability

[2] Punitive Damages Not Recoverable

§§ 181.47-181.59 [Reserved]

§ 181.60 Governing Statutes

§ 181.61 Joinder and Consolidation of Wrongful Death and Survival Actions

§§ 181.62-181.79 [Reserved]

§ 181.80 State Statutes

§ 181.81 Decisions

[1] Actions of Decedent

[2] Amendment of Complaint

[3] Award of Damages

[a] Amount Discretionary

[b] Authority

[c] Damages Limited to Pecuniary Loss

[d] Detriment Suffered by Decedent Before Death Not Recoverable

[e] Distinct From Survival Damages

[f] Emotional Distress Damages Not Allowed

[g] Interest

[h] No Recovery Without Loss

[4] Defenses

[5] Distribution of Damages

[a] Determination

[b] Loss to Each Wrongful Death Plaintiff

[6] Elements of Pecuniary Loss

[a] Funeral Expenses as Recoverable

[b] Grief, Wounded Feelings, and Sorrow Not Basis for Recovery

[c] Medical Expenses as Not Recoverable

[d] Present Value of Future Contributions

[e] Reasonably Expected Benefits

[f] Value of Personal Service, Advice, or Training

[g] Value of Society and Companionship

[7] Nature of Cause of Action

[a] In General

[b] Action Entirely Statutory

[c] Arising From Tortious Conduct

[d] Effect of Judgment in Decedent's Action

[e] New Cause of Action

[f] Wrongful Death and Survival Actions

[8] Plaintiffs

[a] In General

[b] Characterization of Action With Respect to Plaintiffs

[c] Compulsory Joinder of Wrongful Death Plaintiffs

[d] Dependency on Decedent

[e] Guardian ad Litem for Minor Plaintiffs

[f] Personal Representative Acts Only on Behalf of Others

[g] Parents

[h] Waiver of Joinder Requirement

[9] Proof of Damages

[10] Recovery of Lump Sum Damages

[11] Statute of Limitations

[12] Statutory Remedies Exclusive

[13] Time at Which Loss Measured

§§ 181.82-181.99 [Reserved]

§ 181.100 State Statutes

§ 181.101 Decisions

[1] Action by or Against Personal Representative

[2] Cause of Action Accruing Before Death

[3] Nonsurvivable Causes of Action

[a] Invasion of Privacy

[b] Libel and Slander

[c] Marriage

[4] Recovery of Damages for Deceased Plaintiff

[a] Availability

[b] Loss of Earnings

[c] Medical Expenses

[d] Pain and Suffering Damages Not Recoverable

[e] Punitive Damages

[f] Wrongful Death Damages Additional

[5] Survivable Causes of Action

[6] Wrongful Death and Survival Actions

§§ 181.102-181.119 [Reserved]

§ 181.120 State Statutes

§ 181.121 Decisions

§§ 181.122-181.139 [Reserved]

§ 181.140 Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12; Cal. Rules of Ct., Rule 1.45(a)]--Complaint [Code Civ. Proc. § 425.10] for Wrongful Death Based on Negligence [Code Civ. Proc. § 377.60; Cal. Judicial Council Forms PLD-PI-001, PLD-PI-001(1), PLD-PI-001(2), MC-025]

[1] FORM

[2] Use of Form

[3] Filling Out Wrongful Death Complaint

[a] In General

[b] Caption

[c] Venue (Paragraph 8)

[d] Relationship to Deceased and Damages (Paragraph 12)

[e] Damages Suffered (Paragraph 11)

[f] Causes of Action Attached (Paragraph 10)

[g] Specification of Damages (Paragraph 14)

[4] Verification

[5] Filling Out General Negligence Cause of Action

[6] Trial Court Delay Reduction Considerations

§ 181.141 Complaint for Damages for Wrongful Death [Code Civ. Proc. § 377.60]--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Personal Representative of Decedent

[5] Verification

[6] Venue

[7] Specification of Damages

[8] Trial Court Delay Reduction Considerations

[9] Cross References

[10] State Statutes

[11] Decisions

[a] Allegation of Capacity as Personal Representative

[b] Allegation of Existence of Entitled Persons

[c] Allegations of Damages

[d] Cause of Action

[e] Guardian ad Litem

[12] Text References

[13] Cross References

§ 181.142 Allegation--Plaintiff Is Person Entitled to Assert Wrongful Death Cause of Action--Plaintiff Is Decedent's Surviving Spouse, Child, or Issue of Deceased Child [Code Civ. Proc. § 377.60(a)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Text References

[5] Cross References

§ 181.143 Allegation--Plaintiff Is Person Entitled to Assert Wrongful Death Cause of Action--Plaintiff Would Be Entitled to Property of Decedent by Intestate Succession, and There Exists No Surviving Spouse, Child, or Issue of Deceased Child of Decedent [Code Civ. Proc. § 377.60(a)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Text References

[5] Cross References

§ 181.144 Allegation--Plaintiff Is Person Entitled to Assert Wrongful Death Cause of Action--Plaintiff Is Putative Spouse, Child of Putative Spouse, Stepchild, or Parent of Decedent Who Was Dependent on Decedent [Code Civ. Proc. § 377.60(b)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Text References

[6] Cross References

§ 181.145 Allegation--Plaintiff Is Person Entitled to Assert Wrongful Death Cause of Action--Plaintiff Is Minor

Who Resided With Decedent and Who Was Dependent on Decedent for One Half or More of Minor's Support [Code Civ. Proc. § 377.60(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Text References

[5] Cross References

§ 181.146 Allegation--Person Entitled to Assert Wrongful Death Action, Who Has Not Consented to Joining Action as Plaintiff, Should Be Joined as Defendant [Code Civ. Proc. § 382]

[1] FORM

[2] Use of Form

[3] Text References

[4] Cross References

§ 181.147 Demurrer [Code Civ. Proc. § 430.30(a)] to Complaint [Code Civ. Proc. § 425.10] for Wrongful Death [Code Civ. Proc. § 377.60]--Failure to Join All Entitled Persons as Parties [Code Civ. Proc. § 430.10(d)]

[1] FORM

[2] Use of Form

[3] Objection to Nonjoinder of Plaintiffs

[4] Cross References

[5] State Statutes

[6] Decisions

[7] Text References

§ 181.148 Demurrer [Code Civ. Proc. § 430.30(a)] to Complaint [Code Civ. Proc. § 425.10] for Wrongful Death [Code Civ. Proc. § 377.60]--Statute of Limitations [Code Civ. Proc. §§ 335.1, 430.10(e)]

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

[5] Decisions

[6] Text References

§ 181.149 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Wrongful Death [Code Civ. Proc. § 377.60]--Action Estopped by Judgment in Prior Action Brought by Decedent [Code Civ. Proc. § 1908]

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

[5] Decisions

[6] Text References

§ 181.150 Complaint [Code Civ. Proc. § 425.10] in Interpleader [Code Civ. Proc. § 386]--Adverse Claims Made on Attorney by Wrongful Death Plaintiffs for Distribution of Damages Received in Settlement of Wrongful Death Claim or Action [Code Civ. Proc. § 377.60]

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

[5] Decisions

[6] Text References

§§ 181.151-181.169 [Reserved]

§ 181.170 Complaint for Damages [Civ. Code § 3333] for Surviving Cause of Action [Code Civ. Proc. § 377.30] by Personal Representative or Successor in Interest of Decedent--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

[5] State Statutes

[6] Decisions

[a] Recoverable Damages

[i] Medical and Related Expenses

[ii] Punitive Damages

[b] Survival of Plaintiff's Action

[9] Text References

§ 181.171 Caption and Introduction of Complaint for Damages [Civ. Code § 3333] for Surviving Cause of Action [Code Civ. Proc. § 377.40] With Allegations of Capacity--Against Decedent's Personal Representative or Successor in Interest

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

§§ 181.172-181.189 [Reserved]

§ 181.190 Captions, Introduction, Format, and Prayer of Complaint [Code Civ. Proc. § 425.10] for Wrongful Death by Plaintiff [Code Civ. Proc. § 377.60] and Surviving Cause of Action [Code Civ. Proc. § 377.30]--By Decedent's Personal Representative or Successor in Interest

[1] FORM

[2] Use of Form

[3] Cross References

§ 181.191 Notice of Motion for Order Consolidating Wrongful Death [Code Civ. Proc. § 377.60] and Survival [Code Civ. Proc. § 377.30] Actions Arising From Same Wrongful Act or Neglect [Code Civ. Proc. §§ 377.62(b), 1048]

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

[5] Decisions

[6] Text References

§ 181.192 Notice of Motion for Order to Consolidate Wrongful Death Action [Code Civ. Proc. § 377.60] and Surviving Action for Injuries to Minor Child [Code Civ. Proc. § 376]

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

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PART I. SCOPE

15-181 California Forms of Pleading and Practice--Annotated § 181.01

§ 181.01 Scope of Chapter

This chapter discusses actions by a decedent's surviving spouse, child, or grandchild, and other persons specified in *Code Civ. Proc. § 377.60* for the wrongful death of the decedent.

This chapter includes the Judicial Council form of complaint for personal injury, property damage, or wrongful death to which the Judicial Council general negligence cause of action has been attached [*see § 181.140*], a general form of complaint for wrongful death [*see § 181.141*], forms of allegation regarding who may be a plaintiff in a wrongful death action and who should be joined [*see §§ 181.142 -181.146*], forms of demurrer [§§ 181.147, 181.148] and affirmative defense [*see § 181.149*] to a complaint for wrongful death, and a form of complaint in interpleader for distribution of wrongful death damages [*see § 181.150*].

This chapter also discusses actions by or against a decedent's personal representative based on causes of action the decedent held prior to his or her death or causes of action for which a decedent would have been liable and which survived his or her death under *Code Civ. Proc. §§ 377.20-377.43*. This chapter includes a general form of complaint in a survival action brought by the personal representative or successor in interest of a deceased plaintiff [*see § 181.170*], and a form of caption and introduction for a complaint in a cause of action against a defendant who has died [*see § 181.171*].

This chapter discusses permissive joinder or consolidation of wrongful death and survival actions that arise out of the same wrongful act or neglect. This chapter includes a form of caption, introduction, and prayer for use in a complaint for damages that joins a wrongful death action by a qualified wrongful death plaintiff and a survival action by a decedent's personal representative or successor in interest [*see § 181.190*] and forms of notice of motion for consolidation of wrongful death and surviving causes of action [§§ 181.191, 181.192].

For discussion of procedure for consolidation of actions, generally, and applicable forms, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsWrongful Death & Survival ActionsGeneral Overview

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15-181 California Forms of Pleading and Practice--Annotated §§ 181.02-181.09

[Reserved]

§§ 181.02[Reserved]

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Chapter 181 DEATH AND SURVIVAL ACTIONS
PART II. LEGAL BACKGROUND
A. Wrongful Death Actions

15-181 California Forms of Pleading and Practice--Annotated § 181.10

§ 181.10 Governing Law

Wrongful death actions are governed by *Code Civ. Proc. §§ 377.60-377.62*. A parent's vicarious liability for wrongful death caused by a minor's willful misconduct is governed by *Civ. Code § 1714.1(a)*. The requirement that a claim be submitted before filing a wrongful death action against a government entity is governed by *Gov. Code § 911.2*.

A two-year (one-year, prior to January 1, 2003) statute of limitations governs most wrongful death actions [*see Code Civ. Proc. §§ 312, 335.1*; *see also* former *Code Civ. Proc. § 340(3)*; Ch. 345, *Limitation of Actions*, § 345.14]. However, the limitations period may be tolled in some circumstances [*see Code Civ. Proc. § 352*]. If a wrongful death action survives the death of a potential wrongful death plaintiff, a special statute of limitations provision applies [*see Code Civ. Proc. § 366.1*]. In addition, special limitations rules may apply for certain types of harm [*see, e.g., Code Civ. Proc. §§ 340.2* (death caused by asbestos), 340.5 (action against health care provider)].

The leading case stating the general rule that all wrongful death plaintiffs should join in a single action or be joined as defendants is *Cross v. Pacific Gas & Elec. Co. (1964) 60 Cal. 2d 690, 694, 36 Cal. Rptr. 321, 388 P.2d 353* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Relationships & TortsTort LiabilityChild TortsGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral OverviewTortsWrongful Death & Survival ActionsGeneral OverviewTortsWrongful Death & Survival ActionsDefensesStatutes of Limitations

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Chapter 181 DEATH AND SURVIVAL ACTIONS
PART II. LEGAL BACKGROUND
A. Wrongful Death Actions

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§ 181.11 Definitions

Code Civ. Proc. § 377.60 limits a claim for wrongful death to the death of "a person." A person is legally dead if brain functions or circulatory and respiratory functions have irreversibly ceased [*see Health & Safety Code § 7180*; *Dority v. Superior Court (1983) 145 Cal. App. 3d 273, 277, 193 Cal. Rptr. 288]* . An unborn fetus is not a person under *Code Civ. Proc. § 377.60* [*Justus v. Atchison (1977) 19 Cal. 3d 564, 580, 139 Cal. Rptr. 97, 565 P.2d 122* ; *Reyna v. City & County of San Francisco (1977) 69 Cal. App. 3d 876, 880, 138 Cal. Rptr. 504* (interpreting former *Code of Civ. Proc. § 377* (*now see Code Civ. Proc. § 377.60*))].

Code Civ. Proc. § 377.60 creates an action for wrongful death only when the death "is caused by the wrongful act or neglect of another." The phrase "wrongful act" has been construed to mean "tortious act," and includes actions based on either negligence or intentional wrongful conduct [*see Barrett v. Superior Court (1990) 222 Cal. App. 3d 1176, 1183, 1191, 272 Cal. Rptr. 304* (interpreting former *Code Civ. Proc. § 377* (*now see Code Civ. Proc. § 377.60*))]. It appears, however, that a wrongful death action cannot be based solely on a breach of contract [*Kaiser Found. Hosps. v. Superior Court (1967) 254 Cal. App. 2d 327, 334-335, 62 Cal Rptr. 330* ; *Moxon v. County of Kern (1965) 233 Cal. App. 2d 393, 399, 43 Cal. Rptr. 481*].

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§ 181.12 Wrongful Death Action

[1] Nature

A wrongful death action is an action for damages for the death of one person when that death is caused by the wrongful act or neglect of another [*Code Civ. Proc. § 377.60*]. In California, the action is considered entirely a creature of statute [*Justus v. Atchison (1977) 19 Cal. 3d 564, 571-575, 139 Cal. Rptr. 97, 565 P.2d 122]* . Although the statute is remedial and should be liberally construed, the action itself exists only so far and in favor of such person as the legislature may declare [*Justus v. Atchison (1977) 19 Cal. 3d 564, 575, 579-580, 139 Cal. Rptr. 97, 565 P.2d 122* ; *Steed v. Imperial Airlines (1974) 12 Cal. 3d 115, 119-120, 115 Cal. Rptr. 329, 524 P.2d 801* ; *see Moxon v. County of Kern (1965) 233 Cal. App. 2d 393, 397, 43 Cal. Rptr. 481]* . Thus, for example, because the legislature did not intend that a fetus be considered a person within the meaning of former *Code Civ. Proc. § 377* (*now see Code Civ. Proc. § 377.60*), a wrongful death action cannot be maintained for the death of an unborn child [*Justus v. Atchison (1977) 19 Cal. 3d 564, 580, 139 Cal. Rptr. 97, 565 P.2d 122]* . The action is personal to those persons authorized by statute to maintain it, and it may not be assigned [*Mayo v. White (1986) 178 Cal. App. 3d 1083, 1090, 224 Cal. Rptr. 373* (interpreting former *Code Civ. Proc § 377* (*now see Code Civ. Proc. § 377.60*))].

The purpose of the action is to compensate persons who have a relationship with the decedent that is delineated by statute for the pecuniary loss suffered by them as a result of the death of the decedent [*see Estate of Riccomi (1921) 185 Cal. 458, 461, 197 P. 97* ; *Pease v. Beech Aircraft Corp. (1974) 38 Cal. App. 3d 450, 460-461, 113 Cal. Rptr. 416]* and to deter the conduct by defendants that wrongfully takes life [*see Hurtado v. Superior Court (1974) 11 Cal. 3d 574, 583, 114 Cal. Rptr. 106, 522 P.2d 666]* .

[2] Separate Action From Decedent's Action

A wrongful death action is not an asset in the estate of the decedent [*Mayo v. White (1986) 178 Cal. App. 3d 1083, 1091, 224 Cal. Rptr. 373]* . It is a new cause of action and is not a continuation or revival of an old action or an action that subsisted prior to a decedent's death. A plaintiff entitled to sue under the statute has a new right, entirely distinct from any right vesting in the injured person before his or her death [*see Norman v. Murphy (1954) 124 Cal. App. 2d 95, 98, 268 P.2d 178* ; *Secrest v. Pacific Elec. Ry. Co. (1943) 60 Cal. App. 2d 746, 747-748, 141 P.2d 747* ; *see also*

Schwarder v. United States (9th Cir. 1992) 974 F.2d 1118, 1123 (decedent's settlement of personal injury action did not preclude heirs' recovery of damages in wrongful death action); *Coe v. State Farm Mut. Auto. Ins. Co. (1977) 66 Cal. App. 3d 981, 992, 136 Cal. Rptr. 331* (decedent's settlement of claim as not barring wrongful death action)].

Because the action is distinct and not derivative, a plaintiff's compliance with certain procedures that are a prerequisite to the filing of the personal injury suit, such as the filing of a tort claim against a governmental entity, does not excuse persons entitled to a wrongful death cause of action from compliance with the same procedures prior to filing a wrongful death action arising out of the same personal injuries [*see Lewis v. City & County of San Francisco (1971) 21 Cal. App. 3d 339, 341, 98 Cal. Rptr. 407* (claim filed prior to personal injury action did not satisfy requirement of filing claim for wrongful death)]. Conversely, a rule that restricts or prohibits the filing of a personal injury action may not necessarily apply to a wrongful death action for the same injuries [*see Garcia v. State of California (1967) 247 Cal. App. 2d 814, 816-817, 56 Cal. Rptr. 80* (state's immunity from liability for injuries to prisoner did not exclude wrongful death plaintiffs from filing wrongful death action against state)].

Although a wrongful death action is separate and not derivative, a defendant may have a right, as noted in the subsections that follow, to assert a defense that could have been asserted against the decedent had he or she lived. However, each case must be examined within its particular context [*Horwich v. Superior Court (1999) 21 Cal. 4th 272, 283, 87 Cal. Rptr. 2d 222, 980 P.2d 927]* . If a statutory defense is being asserted against a wrongful death plaintiff on the grounds that it could have been asserted against the decedent, courts will generally treat the issue as one of statutory construction, allowing the defense or not according to the express terms of the statute, while respecting the independent status of a wrongful death action [*Horwich v. Superior Court (1999) 21 Cal. 4th 272, 286, 87 Cal. Rptr. 2d 222, 980 P.2d 927]* .

For example, the exclusive remedy doctrine of the workers' compensation statute may be asserted as a defense against a wrongful death plaintiff because the language of the statute leads to that result [*see Horwich v. Superior Court (1999) 21 Cal. 4th 272, 286, 87 Cal. Rptr. 2d 222, 980 P.2d 927* ; *Lab. Code § 3600*]. By contrast, a wrongful death plaintiff whose decedent was the uninsured operator of a motor vehicle involved in a fatal accident is not precluded by *Civ. Code § 3333.4* from recovering nonpecuniary damages for loss of care, comfort, and society, because the statutory language suggests that this particular nonpecuniary damages limitation was intended to apply only to the actual uninsured owner or operator of the vehicle [*Horwich v. Superior Court (1999) 21 Cal. 4th 272, 276-283, 87 Cal. Rptr. 2d 222, 980 P.2d 927* ; *see Civ. Code § 3333.4*].

[3] Effect of Decedent's Negligence

The plaintiff in a wrongful death action stands in the shoes of the decedent for many purposes [*Argonaut Ins. Co. v. Superior Court (1985) 164 Cal. App. 3d 320, 324*]. For example, an award for wrongful death must be reduced by the proportionate share of the decedent's negligence [*see Cavallaro v. Michelin Tire Corp. (1979) 96 Cal. App. 3d 95, 109-110, 157 Cal. Rptr. 602* ; *cf. Willis v. Gordon (1978) 20 Cal. 3d 629, 636-638, 143 Cal. Rptr. 723, 574 P.2d 794* (Mosk, J., concurring, arguing that wrongful death award should not be reduced by decedent's negligence)]. The contributory negligence of a wrongful death plaintiff reduces his or her recovery proportionately [*Southern Pac. Transp. Co. v. State of California (1981) 115 Cal. App. 3d 116, 119-121, 171 Cal. Rptr. 187]* , but it does not affect the award to which any other wrongful death plaintiff is entitled [*Perkins v. Robertson (1956) 140 Cal. App. 2d 536, 544, 295 P.2d 972* (decided under former law that made contributory negligence bar to recovery).]

[4] Effect of Decedent's Assumption of Risk

In executing a preinjury waiver and release by which he or she assumes all the risks of a particular activity, one may not effectively waive a cause of action for wrongful death, because that cause of action lies not in the releasor but in persons designated in wrongful death statute [*Madison v. Superior Court (1988) 203 Cal. App. 3d 589, 596, 250 Cal. Rptr. 299* ; *Scroggs v. Coast Cmty. Coll. Dist. (1987) 193 Cal. App. 3d 1399, 1402-1403, 239 Cal. Rptr. 916]* . This results

from the fact that a wrongful death action is not derivative but, rather, a separate and distinct right belonging to the entitled persons set forth by statute that does not arise until the decedent dies. Thus, any provision in a written waiver and release that waives or purports to waive a cause of action for wrongful death is legally ineffective to bar a wrongful death action by or on behalf of those persons entitled to sue under the wrongful death statute [*Madison v. Superior Court (1988) 203 Cal. App. 3d 589, 596, 250 Cal. Rptr. 299* ; *see also Scroggs v. Coast Cmty. Coll. Dist. (1987) 193 Cal. App. 3d 1399, 1402, 239 Cal. Rptr. 916]* .

However, as noted in § 181.12[2], a wrongful death action may be subject to defenses that could have been asserted against the decedent had he or she lived [*Paralift, Inc. v. Superior Court (1993) 23 Cal. App. 4th 748, 755, 29 Cal. Rptr. 2d 177* ; *Madison v. Superior Court (1988) 203 Cal. App. 3d 589, 597, 600, 250 Cal. Rptr. 299* ; *Scroggs v. Coast Cmty. Coll. Dist. (1987) 193 Cal. App. 3d 1399, 1402-1403, 239 Cal. Rptr. 916]* . Such defenses include an express agreement by the decedent to waive and release a defendant from liability for future negligence and to assume all risks of an activity [*Saenz v. Whitewater Voyages, Inc. (1990) 226 Cal. App. 3d 758, 763-764, 276 Cal. Rptr. 672]* , provided that the activity is not one affecting the public interest (making the release invalid pursuant to *Civ. Code § 1668*) [*see Tunkl v. Regents of Univ. of Cal. (1963) 60 Cal. 2d 92, 101-104, 32 Cal. Rptr. 33, 383 P.2d 441* (release from liability for future negligence imposed as a condition for admission to a charitable research hospital is invalid)]. In other words, a distinction must be made between the legal ineffectiveness of a decedent's preinjury release of a subsequent wrongful death action available under the wrongful death statute and the legal effectiveness of an express release of negligence by a decedent, provided the activity is not one affecting the public interest. Thus, although a preinjury release and express assumption of the risk cannot *bar* a wrongful death action, it may provide a complete defense to it [*see Madison v. Superior Court (1988) 203 Cal. App. 3d 589, 597, 600, 250 Cal. Rptr. 299* (release and waiver provisions of an agreement, involving a scuba diving training class that did not affect the public interest, whereby the decedent assumed all risks of injury or death, whether caused by defendants' negligence or otherwise, provided a complete defense to the wrongful death action); *see also Scroggs v. Coast Cmty. Coll. Dist. (1987) 193 Cal. App. 3d 1399, 1404, 239 Cal. Rptr. 916* (reversing summary judgment for defendants in a wrongful death action in which the release, also involving a scuba diving training class, contained no language indicating decedent intended to assume all risks of activity involved and did not encompass waiver of defendants' negligence)].

For further discussion of the defense of assumption of risk based on express or implied consent and forms of defenses based on assumption of risk, including a defense based on a preinjury waiver and release agreement not affecting the public interest, which may be included in an answer to acomplaint for damages for wrongful death, see Ch. 380, *Negligence* .

[5] Effect of Decedent's Agreement to Arbitrate

Court of appeal opinions are in disagreement over whether a person before his or her death may legally bind other family members to arbitrate subsequent wrongful death claims. One line of cases holds that an enforceable agreement requiring the arbitration of claims, if covering the tortious act that is the basis of the wrongful death action, requires that the wrongful death action be submitted to arbitration even if the plaintiffs were not signatories to the arbitration agreement [*see, e.g., Herbert v. Superior Court (1985) 169 Cal. App. 3d 718, 722-727, 215 Cal. Rptr. 477* ; *Hawkins v. Superior Court (1979) 89 Cal. App. 3d 413, 416-419, 152 Cal. Rptr. 491*].

However, another line of cases holds that, while a person may have the authority to bind minor children to arbitrate claims brought after the person's death, a person does not generally have the authority to bind a spouse or adult children to arbitrate their claims, including wrongful death claims [*see, e.g., Ruiz v. Podolsky (2009) 175 Cal. App. 4th 227, 238-247, 95 Cal. Rptr. 3d 828* (*review granted* Oct. 14, 2009; adult children not bound); *Rhodes v. California Hospital Medical Center (1978) 76 Cal. App. 3d 606, 608-610, 143 Cal. Rptr. 59* (spouse not bound); *see also Baker v. Birnbaum (1988) 202 Cal. App. 3d 288, 291-294, 248 Cal. Rptr. 336* (husband's loss of consortium claim not subject to arbitration)]. Those cases note that a wrongful death action in California is separate and distinct from any cause of action that the decedent may have had had he or she survived, and a decedent generally has no authority to bind adult

family members to arbitrate their personal claims [*see, e.g.,* *Ruiz v. Podolsky (2009) 175 Cal. App. 4th 227, 238-247, 95 Cal. Rptr. 3d 828* (*review granted* Oct. 14, 2009)].

In addition, if some but not all plaintiffs are bound to arbitrate, a wrongful death defendant may be deemed to have waived the right to a single action by compelling arbitration of those claims that are covered by the arbitration agreement [*Ruiz v. Podolsky (2009) 175 Cal. App. 4th 227, 236, 95 Cal. Rptr. 3d 828* (*review granted* Oct. 14, 2009)].

The issue is currently pending before the California Supreme Court [*see* *Ruiz v. Podolsky (2009) 175 Cal. App. 4th 227, 95 Cal. Rptr. 3d 828* (*review granted* Oct. 14, 2009)].

[6] Res Judicata Effect of Judgment in Decedent's Action

Although the wrongful death action is distinct from the decedent's personal injury action, a judgment rendered in a personal injury action, in which a person entitled to a wrongful death cause of action was also a plaintiff, that is adverse to that person is binding on him or her, and estops a wrongful death action against the same defendant based on the same facts and circumstances [*Secrest v. Pacific Elec. Ry. Co. (1943) 60 Cal. App. 2d 746, 749-751, 141 P.2d 747]* . Persons entitled to a wrongful death cause of action who were not parties to the decedent's action are also collaterally estopped from relitigating issues of liability determined adversely to the decedent in a prior action. The requirement of privity is satisfied as long as the wrongful death plaintiffs' interests were adequately protected in the prior action. Privity is not defeated because the parties raise a different theory or cause of action in support of their rights of recovery [*Brown v. Rahman (1991) 231 Cal. App. 3d 1458, 1461-1464, 282 Cal. Rptr. 815* ; *Evans v. Celotex Corp. (1987) 194 Cal. App. 3d 741, 743-747, 238 Cal. Rptr. 259* ; *see* *Aguilar v. Los Angeles County (9th Cir. 1985) 751 F.2d 1089, 1093* ; *but see* *Kaiser Found. Hosps. v. Superior Court (1967) 254 Cal. App. 2d 327, 333-334, 62 Cal. Rptr. 330* (plaintiff is not bound by prior judgment to which he or she was not party, unless actual privity established)].

If an injured person recovers a judgment for personal injury and then dies from the injury, the persons who have a wrongful death cause of action are not precluded from bringing that action against the same defendants. The damages of the wrongful death plaintiffs on account of the person's death are distinct from those recovered by the decedent for the injury [*Blackwell v. American Film Co. (1922) 189 Cal. 689, 693-694, 209 P. 999* (but holding that recovery of lost income in decedent's action bars recovery by heir of lost support)]. In such a case, the wrongful death plaintiffs may assert collateral estoppel against the defendant on the issue of liability [*Brown v. Rahman (1991) 231 Cal. App. 3d 1458, 1460-1461 n.3, 282 Cal. Rptr. 815]* .

[7] Action as Joint, Single, and Indivisible

An action for wrongful death is considered joint, single, and indivisible. It is joint in that (1) all the potential wrongful death plaintiffs should join in the action or be joined as defendants, even though no relief may be demanded of them and no judgment taken against them, and (2) a single verdict should be rendered for all recoverable damages [*see* *Cross v. Pacific Gas & Elec. Co. (1964) 60 Cal. 2d 690, 694, 36 Cal. Rptr. 321, 388 P.2d 353* ; *Watkins v. Nutting (1941) 17 Cal. 2d 490, 498-499, 110 P.2d 384]* . It is single in that only one action may be brought for the wrongful death, regardless of whether the action is instituted by all or one of the persons entitled to a wrongful death cause of action or by the personal representative on behalf of the wrongful death plaintiffs. It is indivisible because there cannot be a series of suits by the entitled persons for their individual damages [*Cross v. Pacific Gas & Elec. Co. (1964) 60 Cal. 2d 690, 694, 36 Cal. Rptr. 321, 388 P.2d 353]* . However, there are several qualifications and exceptions to this characterization of the action as joint, single, and indivisible.

First, the requirement that all entitled persons be joined is not jurisdictional but procedural [*Cross v. Pacific Gas & Elec. Co. (1964) 60 Cal. 2d 690, 692, 36 Cal. Rptr. 321, 388 P.2d 353* ; *Helling v. Lew (1972) 28 Cal. App. 3d 434, 437, 104 Cal. Rptr. 789]* . It may be waived by a defendant's failure to object by demurrer, answer, or at trial that all the persons entitled to a wrongful death cause of action have not been made parties [*see* *Knott v. McGilvray (1899) 124*

Cal. 128, 129-130, 56 P. 789 ; *Helling v. Lew (1972) 28 Cal. App. 3d 434, 437, 104 Cal. Rptr. 789]* . Furthermore, it may be waived if the defendant voluntarily settles an action brought by only some of the entitled persons, knowing of the existence, identity, and status of an omitted plaintiff, whom the defendant failed to join [*Valdez v. Smith (1985) 166 Cal. App. 3d 723, 731, 212 Cal. Rptr. 638]* . Moreover, if a defendant has knowledge that an additional potential plaintiff exists and that defendant could reasonably have discovered that this additional potential party was in fact a dependent of the decedent, knowledge of the potential plaintiff's status as a dependent of the decedent may be imputed to the defendant [*Gonzales v. Southern Cal. Edison Co. (1999) 77 Cal. App. 4th 485, 490-491, 91 Cal. Rptr. 2d 530]* . In any event, nonjoinder is not reversible error if the complaining party has not been prejudiced by the nonjoinder [*see Walker v. Etcheverry (1941) 42 Cal. App. 2d 472, 475, 109 P.2d 385* (defendant not prejudiced by nonjoinder of heir who neither claimed nor sustained any damages as result of decedent's death)].

Second, it has generally been stated that a persons entitled to a wrongful death cause of action, who is not a party to the action, is precluded from bringing an independent action against the defendant [*see Rabe v. Western Union Tel. Co. (1926) 198 Cal. 290, 299, 244 P. 1077* ; *Mayerhoff v. Kaiser Found. Health Plan, Inc. (1977) 71 Cal. App. 3d 803, 806-807, 138 Cal. Rptr. 319]* . However, a plaintiff who knows of excluded entitled persons and fails to join them is liable for the resulting damage [*Watkins v. Nutting (1941) 17 Cal. 2d 490, 499, 110 P.2d 384* ; *Helling v. Lew (1972) 28 Cal. App. 3d 434, 437 n.2, 104 Cal. Rptr. 789]* . Moreover, it has been held, without discussion of the general rule, that in the case of illegitimate minors who were not made parties to a wrongful death action brought by the surviving spouse and whose interests were not otherwise represented, a judgment in favor of the surviving spouse did not collaterally estop these excluded plaintiffs from asserting their claims in a subsequent wrongful death action [*see Arizmendi v. System Leasing Corp. (1971) 15 Cal. App. 3d 730, 739, 93 Cal. Rptr. 411* ; *see also Valdez v. Smith (1985) 166 Cal. App. 3d 723, 731* , *212 Cal. Rptr. 638* (settlement and dismissal made with knowledge that another heir was not party to action did not bar subsequent action by omitted heir)].

Third, there is no requirement that the plaintiffs must join all causes of action and all potential defendants in a single action. The general rule that joint tortfeasors may be sued either jointly or severally applies to wrongful death actions. However, the plaintiffs are precluded from recovering damages in a subsequent action if the amount they received by settlement or judgment in a prior action constitutes complete satisfaction of all damages sustained as a result of the decedent's death [*Helling v. Lew (1972) 28 Cal. App. 3d 434, 438-439, 104 Cal. Rptr. 789* (amount of prior settlement obtained in action against one defendant should be reduced from verdict obtained in subsequent action against second defendant)].

Finally, each wrongful death plaintiff is regarded as having a personal and separate cause of action. Thus, although the damages recovered should be in a lump sum, each wrongful death plaintiff is required to prove his or her own right to take as a plaintiff and his or her damages as a plaintiff [*Changaris v. Marvel (1964) 231 Cal. App. 2d 308, 312, 41 Cal. Rptr. 774* ; *see Helling v. Lew (1972) 28 Cal. App. 3d 434, 438, 104 Cal. Rptr. 789]* .

The cases that have articulated exceptions to the so-called "one action rule" fully recognize the individual nature of each plaintiff's cause of action for wrongful death. The concern in each case is the fairness, under unusual circumstances, of permitting wrongful death plaintiffs to assert their separate wrongful death claims individually rather than in one joint action, a concern that both reflects the procedural nature of the one-action rule and acknowledges the separateness of each wrongful death plaintiff's cause of action. Therefore, nothing in the rule requires a person entitled to a wrongful death action to bring an action; nor does it prevent a wrongful death plaintiff from abandoning an action before trial. However, the rule does require a wrongful death plaintiff who wishes to pursue a claim for wrongful death to bring his or her action jointly with all other potential plaintiffs, thereby protecting a defendant from having to defend several cases [*National Metal & Steel Corp. v. Colby Crane & Mfg. Co. (1988) 200 Cal. App. 3d 1111, 1116, 246 Cal. Rptr. 435]* .

If some of the plaintiffs are contractually obligated to arbitrate their wrongful death claim, the other plaintiffs may be required to join the arbitration in order to keep the action consolidated. However, plaintiffs cannot be forced to arbitrate

their wrongful death claim if none of the plaintiffs are contractually obligated to arbitrate the claim, and the fact that the decedent would have been required to arbitrate any claims against the defendant will not obligate the decedent's heirs to arbitrate their wrongful death action [*see Fitzhugh v. Granada Healthcare & Rehabilitation Center, LLC (2007) 150 Cal. App. 4th 469, 474-475, 58 Cal. Rptr. 3d 585]* .

[8] Omitted Heirs

Omitted heirs are necessary parties, and plaintiff heirs have a mandatory duty to join all known omitted heirs in a single action for wrongful death. Proper joinder requires satisfying the statutory requirements for service. Naming a defendant as a nominal defendant in a wrongful death action is legally insufficient to accomplish joinder, as is providing the named defendant with actual notice of the lawsuit. A wrongfully omitted heir has a remedy against the wrongful death plaintiffs who received the proceeds of a wrongful death suit: the heir is entitled to sue the plaintiffs who failed to join him or her for damages [*Ruttenberg v. Ruttenberg (1997) 53 Cal. App. 4th 801, 808-809, 62 Cal. Rptr. 2d 78]* .

If an actual plaintiff joins a potential plaintiff as a nominal defendant, but fails to serve that nominal party with a summons and complaint, that nominal defendant is not a party to the action and he or she is not barred from bringing a separate wrongful death action if the initial action is settled. It is not a defense to the one-action rule that the defendant was unaware that a known heir joined as a nominal defendant was not properly served. The defendant has the burden and means of determining whether an heir has been served [*Romero v. Pacific Gas & Elec. Co. (2007) 156 Cal. App. 4th 211, 218-219, 67 Cal. Rptr. 3d 236]* .

Although an omitted heir may have an action against an actual plaintiff for failing to join the omitted heir, the omitted heir does not have an action against the actual plaintiff's attorney for the omission, because the attorney owes no duty to a non-client under those circumstances [*Hall v. Superior Court (2003) 108 Cal. App. 4th 706, 714-715, 133 Cal. Rptr. 2d 806]* . Should the omitted heir recover from the actual plaintiff, however, the actual plaintiff may have an action for indemnity or contribution against the attorney [*see Hall v. Superior Court (2003) 108 Cal. App. 4th 706, 715, 133 Cal. Rptr. 2d 806]* .

[9] Prior Adjudication of Issue of Liability

The doctrine of collateral estoppel may be used to prevent a wrongful death defendant from litigating his or her liability, if the identical issue was litigated and decided against the defendant in a prior proceeding. In one case, for example, a wrongful death defendant filed for bankruptcy in an attempt to have all debts discharged, including the potential debt of a judgment in a pending wrongful death action. The defendant chose to have the judge in the bankruptcy court rule on whether a wrongful death judgment would be dischargeable. After discovery and a bench trial, the bankruptcy judge concluded that the judgment would not be dischargeable, which required a finding that the defendant's conduct in causing the deaths was intentional and malicious. The trial court in the wrongful death action subsequently held that the doctrine of collateral estoppel prevented the defendant from relitigating the issue of his liability. Despite the fact that the defendant was not afforded a jury trial in the bankruptcy court, the trial court in the wrongful death action concluded that the defendant had a full and fair opportunity to litigate his liability before the bankruptcy court, and the court of appeal agreed [*Roos v. Red (2005) 130 Cal. App. 4th 870, 878-888 , cert. denied, 126 S. Ct. 1341*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataTortsWrongful Death & Survival ActionsGeneral OverviewTortsWrongful Death & Survival ActionsDefensesComparative & Contributory NegligenceTortsWrongful

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§ 181.13 Elements of Wrongful Death Action

Code Civ. Proc. § 377.60, applicable to wrongful death actions arising on or after January 1, 1993, creates a cause of action for wrongful death if the death is "caused by the wrongful act or neglect of another." The term "wrongful act" has been construed to mean "tortious act" and includes theories of recovery based on strict products liability, as well as negligence and intentional wrongful conduct [*Barrett v. Superior Court (1990) 222 Cal. App. 3d 1176, 1183, 1185-1186, 272 Cal. Rptr. 304]* . Thus, the commission of a tortious act and a resulting death causing pecuniary loss to persons entitled to a cause of action under the wrongful death statute are the necessary elements in a cause of action for wrongful death [*Moxon v. County of Kern (1965) 233 Cal. App. 2d 393, 398-399, 43 Cal. Rptr. 481]* . The action does not lie if the only affirmative duty shown to have been breached was wholly contractual [*Moxon v. County of Kern (1965) 233 Cal. App. 2d 393, 399, 43 Cal. Rptr. 481]* .

If defendant's tortious conduct is a substantial cause of death, the existence of a nontortious concurrent cause, such as disease or congenital defect, does not absolve the defendant from liability for the death [*Bird v. Saenz (2001) 86 Cal. App. 4th 167, 177, 103 Cal. Rptr. 2d 131* (triable issue of fact existed as to whether defendant's negligence was substantial factor in death)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsProducts LiabilityStrict LiabilityTortsWrongful Death & Survival ActionsGeneral OverviewTortsWrongful Death & Survival ActionsCausation

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§ 181.14 Plaintiffs

[1] In General

Only those persons described in *Code Civ. Proc. § 377.60*, or a personal representative on behalf of those persons, may maintain a wrongful death action [*Code Civ. Proc. § 377.60*; *see §§ 181.142 -181.145*]. The right to bring a wrongful death action is strictly limited to those persons described by the statute [*Von Batsch v. American Dist. Tel. Co. (1985) 175 Cal. App. 3d 1111, 1119, 222 Cal. Rptr. 239* (interpreting former *Code Civ. Proc. § 377* (*now see Code Civ. Proc. § 377.60*))]. However, *Code Civ. Proc. § 377.60* specifically provides that its enactment in 1992 was not intended to eliminate the standing of persons who had standing under former *Code Civ. Proc. § 377* [*Code Civ. Proc. § 377.60(e)*].

Under prior law, a complaint for wrongful death had to show that the decedent left heirs at law [*Carr v. Progressive Cas. Ins. Co. (1984) 152 Cal. App. 3d 881, 887 n.2, 199 Cal. Rptr. 835* ; *Estate of Bright v. Western Air Lines (1951) 104 Cal. App. 2d 827, 830, 232 P.2d 523* (interpreting former *Code Civ. Proc. § 377* (*now see Code Civ. Proc. § 377.60*))].

A person who feloniously and intentionally kills a decedent may not bring a wrongful death action or benefit from an action brought by the decedent's personal representative [*Prob. Code § 258* (effective January 1, 1993)]. Before 1993, the Probate Code generally prohibited a person who feloniously and intentionally killed a decedent from succeeding to benefits, interest, or property accruing due to the decedent's death [*see Prob. Code §§ 250-253*].

[2] Statutory Categories of Plaintiffs

For the purposes of *Code Civ. Proc. § 377.60*, there are three categories of persons entitled to bring a wrongful death action. The first category consists of the decedent's surviving spouse, domestic partner, children, and issue of deceased children or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession [*Code Civ. Proc. § 377.60(a)*; *see Prob. Code § 6400 et seq.* (governing acquisition of title to property of one who dies without disposing of it by will)]. A person survives the decedent for these purposes if the person outlives the decedent, even if that person dies before actually filing a wrongful death action, in which case the cause of action survives and may be brought by that person's

personal representative or successor in interest [*Chavez v. Carpenter (2001) 91 Cal. App. 4th 1433, 1441-1444, 111 Cal. Rptr. 2d 534* (because daughter outlived decedent, but died one month later before suit was filed, decedent's parents had no standing as heirs to bring wrongful death suit)].

The right to sue as a surviving domestic partner, which was added as a plaintiff class effective in 2002, is limited to members of the same sex over the age of 18 and opposite-sex couples in which at least one person is over the age of 62 and meets the eligibility criteria for old-age social security benefits [*Fam. Code § 297(a), (b)(4), (5)*; *see Code Civ. Proc. § 377.60(f)*]. In addition, those partners who meet the criteria for a formal domestic partnership must still register as a domestic partnership with the Secretary of State to acquire the rights of a recognized domestic partnership [*Fam. Code § 297(b)*], although domestic partners otherwise meeting the statutory criteria may sue for wrongful death, even without registration, if the death occurred prior to 2002 [*see Code Civ. Proc. § 377.60(f)(2), (3)*]. A party must register with the Secretary of State to acquire rights under the Domestic Partnership Act [*Armijo v. Miles (2005) 127 Cal. App. 4th 1405, 1414, 26 Cal. Rptr. 3d 623]* .

One court of appeal decision has held that domestic partners who have failed to comply with the registration requirements, but who held a reasonable, good-faith belief that they had registered with the Secretary of State, are entitled under the putative spouse doctrine, discussed *below*, to the same rights granted to domestic partners who have properly registered [*In re Domestic Partnership of Ellis & Arriaga (2008) 162 Cal. App. 4th 1000, 1008-1009, 76 Cal. Rptr. 3d 401*]. The court in that case distinguished an earlier decision in which the court of appeal held that the putative spouse doctrine could not be applied when the domestic partners had registered only with the city and had made no attempt to register with the Secretary of State [*In re Domestic Partnership of Ellis & Arriaga (2008) 162 Cal. App. 4th 1000, 1009-1012, 76 Cal. Rptr. 3d 401* (distinguishing holding in *Velez v. Smith (2006) 142 Cal. App. 4th 1154, 48 Cal. Rptr. 3d 642*)].

The statutory right to sue for deaths occurring prior to January 1, 2002, which was added by legislative amendment effective January 1, 2005, has been applied retroactively by the court of appeal to actions filed prior to the amendment that were not yet finalized by the effective date of the amendment [*Armijo v. Miles (2005) 127 Cal. App. 4th 1405, 1409, 26 Cal. Rptr. 3d 623* ; *Bouley v. Long Beach Mem'l Med. Ctr. (2005) 127 Cal. App. 4th 601, 607-608, 25 Cal. Rptr. 3d 813]* .

Unmarried cohabitants who do not meet these criteria do not have standing to sue for wrongful death [*Holguin v. Flores (2004) 122 Cal. App. 4th 428, 435-437, 18 Cal. Rptr. 3d 749]* . The legislative decision not to provide the right to sue for wrongful death to all opposite-sex couples who cohabit is justified by the fact that other opposite-sex couples have the right to marry, thus establishing their status as spouses, and will not suffer adverse social security consequences for doing so. The court of appeal has upheld this distinction against a constitutional equal protection challenge [*Holguin v. Flores (2004) 122 Cal. App. 4th 428, 437-443, 18 Cal. Rptr. 3d 749]* .

Under prior law, all persons entitled to the decedent's property by intestate succession were included in this category, without distinguishing the decedent's surviving spouse, children, and issue of deceased children from other potential heirs by intestate succession [*see* former *Code Civ. Proc. § 377(b)(1)*; *California State Auto. Ass'n, Inter-Ins. Bureau v. Jacobson (1972) 24 Cal. App. 3d 850, 853, 101 Cal. Rptr. 366* ; *Kunakoff v. Woods (1958) 166 Cal. App. 2d 59, 62, 332 P.2d 773]* . To be an heir by intestate succession, a person must show that he or she was entitled to succeed to some part of the estate at the time decedent died. For example, the mother of a deceased son was held not to be an heir under former *Code Civ. Proc. § 377(b)(1)* (*now see Code Civ. Proc. § 377.60(a)*), because the son left a surviving spouse and living children who would succeed to his estate under the succession statutes before the estate devolved to the mother [*Evans v. Shanklin (1936) 16 Cal. App. 2d 358, 362, 60 P.2d 554]* . Further, a more remote relative may not rely on other provisions of the Probate Code to discount the otherwise-entitled heir under intestacy and to step up as the person entitled to bring the wrongful death action [*see* *Lewis v. Regional Ctr.of E. Bay (1985) 174 Cal. App. 3d 350, 352-355, 220 Cal. Rptr. 89* (disclaimer of decedent-child's parents and siblings to all interest in estate does not elevate grandparents as heirs entitled to bring wrongful death action)].

Despite somewhat ambiguous statutory language, under the current provisions enacted effective January 1, 1993, the laws of intestate succession still determine whether standing to bring a wrongful death action exists under the first category described above [*Cheyanna M. v. A.C. Nielsen Co. (1998) 66 Cal. App. 4th 855, 864-865, 78 Cal. Rptr. 2d 335]* . The purpose of the 1992 amendment was to clarify that a decedent's children and issue of deceased children may maintain a wrongful death action even if the decedent's entire estate passes to a surviving spouse under community property laws [*Cheyanna M. v. A.C. Nielsen Co. (1998) 66 Cal. App. 4th 855, 864-865, 78 Cal. Rptr. 2d 335]* . California laws of intestate succession govern who may bring a wrongful death action in California, even if a foreign plaintiff is an heir under foreign law [*Rosales v. Battle (2003) 113 Cal. App. 4th 1178, 1184-1185, 7 Cal. Rptr. 3d 13]* .

Under the laws of intestate succession found in the Probate Code, a relationship of parent and child exists between a person and the person's natural parents, regardless of the marital status of the natural parents [*Prob. Code § 6450(a)*]. If a paternity dispute exists, paternity may be established by clear and convincing evidence that the father has openly held out the child as his own [*Prob. Code § 6453(b)(2)*]. If it was impossible for the father to have held the child out as his own, the paternity of the biological father may be established by any clear and convincing evidence [*Prob. Code § 6453(b)(3)*]. For purposes of establishing the paternity of a child born after the death of the alleged father, it is deemed to be impossible for the decedent to have held the as-yet-unborn child out as his own, and thus, the child may subsequently attempt to prove paternity through any clear and convincing evidence [*Cheyanna M. v. A.C. Nielsen Co. (1998) 66 Cal. App. 4th 855, 874, 78 Cal. Rptr. 2d 335]* . The Probate Code also specifies procedures for establishing the paternity of a child who is conceived, after the death of the father, with the father's preserved genetic material [*see Prob. Code §§ 249.5, 6453(c)*].

If a child is born out of wedlock, a natural parent may not inherit from or through the child on the basis of the parent-child relationship unless the parent acknowledged the child, and contributed to the child's support or care [*Prob. Code § 6452*]. Thus, to bring a wrongful death action for a child born out of wedlock, a father must have acknowledged the child, but the acknowledgment need not be after the child's birth, nor in a written and witnessed document [*see Lozano v. Scalier (1996) 51 Cal. App. 4th 843, 844, 848, 59 Cal. Rptr. 2d 346* (plaintiff, who signed medical form identifying himself as child's father five months before child's birth, and who orally represented himself as child's father after child's birth, was entitled to maintain wrongful death action)].

If a court order finally and conclusively terminates the relationship between a birth parent and his or her child, that child loses standing to sue for the wrongful death of that parent, regardless of whether the child has been adopted by another at the time of the birth parent's death [*Jackson v. Fitzgibbons (2005) 127 Cal. App. 4th 329, 335, 25 Cal. Rptr. 3d 478* ; *see also Phraner v. Cote Mark, Inc. (1997) 55 Cal. App. 4th 166, 171, 63 Cal. Rptr. 2d 740* (because adoption severs relationship between child and birth parent, adopted child has no standing to sue for wrongful death of birth parent)].

If a court order has terminated the parental rights of a child's biological parents, a biological grandparent has standing to bring a wrongful death action after the death of the child, at least if the termination order had no effect on the legal rights of the grandparent with respect to the child and the child had not been adopted at the time of death [*see Fraizer v. Velkura (2001) 91 Cal. App. 4th 942, 946-947, 110 Cal. Rptr. 2d 918]* .

The second category of persons entitled to bring a wrongful death action includes, if they were dependent on the decedent, a decedent's putative spouse, children of the decedent's putative spouse, stepchildren of the decedent, and parents of the decedent, whether or not these persons were qualified under *Code Civ. Proc. § 377.60(a)* [*Code Civ. Proc. § 377.60(b)*; *see § 181.144*]. For the purpose of this provision, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to believe in good faith that the marriage to the decedent was valid [Code Civ. Proc. § 337.60(b)]. To establish dependency, it appears that, at least with respect to parents, the person must have been actually dependent to some extent on the decedent for the necessities of life at the time the decedent died. It is not sufficient that the parent relied on the decedent for comfort and affection and for support and pecuniary advantages

to which he or she may have been entitled in the future [*Hazelwood v. Hazelwood (1976) 57 Cal. App. 3d 693, 698, 129 Cal. Rptr. 384* (interpreting former *Code Civ. Proc. § 377(b)(2)* (*now see Code Civ. Proc. § 377.60(b)*))]. A former spouse, even if dependent on the deceased for support, is not entitled to bring a wrongful death action [*Villacampa v. Russell (1986) 178 Cal. App. 3d 906, 910, 224 Cal. Rptr. 73]* .

The third category of persons entitled to bring a wrongful death cause of action includes any minor, whether or not qualified as a plaintiff under Code Civ. Proc. § 377.60(a) or (b), who resided for the 180 days prior to a decedent's death in the decedent's household and who was dependent on the decedent for one-half or more of his or her support [*Code Civ. Proc. § 377.60(c)* (restating former *Code Civ. Proc. § 377(b)(3)*)].

A wrongful death action may not be brought by or on behalf of persons who are merely potential heirs under the laws of intestate succession [*see Prob. Code § 6402*] if actual heirs at law exist [*see Mayo v. White (1986) 178 Cal. App. 3d 1083, 1090, 224 Cal. Rptr. 373* (interpreting former *Code Civ. Proc. § 377(b)(1)* (*now see Code Civ. Proc. § 377.60(a)*); entitled persons include, but are not limited to, certain heirs)]. Any attempted renunciation of heirship or disclaimer of interest in the decedent's estate [*see Prob. Code § 275 et seq.*] by the actual wrongful death plaintiffs who are heirs does not alter this rule because (1) the action for wrongful death is not an asset in the decedent's estate and hence is not affected by the disclaimer; and (2) if it were affected by the disclaimer, the disclaimer would be an invalid attempt to assign a nonassignable cause of action [*Mayo v. White (1986) 178 Cal. App. 3d 1083, 1088-1091, 224 Cal. Rptr. 373* (interpreting former *Code Civ. Proc. § 377(b)(1)* (*now see Code Civ. Proc. § 377.60(a)*); entitled persons include, but are not limited to, certain heirs)].

For further discussion of actions by minors and by parents for injuries to their minor children, see Ch. 367A, *Minors: Tort Actions* , and Ch. 394, *Parent and Child* .

[3] Personal Representation

If decedent's personal representative (executor or administrator) brings the action, he or she acts solely in the capacity of a statutory trustee to recover damages for the benefit of persons entitled to a wrongful death cause of action based on their relationship to the decedent, and as such, has no interest in the matter [*Jones v. Leonardt (1909) 10 Cal. App. 284, 286, 101 P. 811]* . No prejudice to defendants occurs if the entitled persons themselves are substituted as plaintiffs in lieu of the personal representative [*Everett v. Howard Buick Co. (1936) 15 Cal. App. 2d 544, 545-546, 59 P.2d 506]* or if a general administrator or executor is substituted for a special administrator who had commenced the wrongful death action [*Ruiz v. Santa Barbara Gas & Elec. Co. (1912) 164 Cal. 188, 193, 128 P. 330]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewTortsWrongful Death & Survival ActionsPotential Plaintiffs

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§ 181.15 Defendants

[1] In General

The action is brought against the person causing the death by his or her wrongful act or neglect. If the wrongdoer dies, whether before or after the death of the person injured by him or her, the action may be brought against his or her personal representative or his or her successor in interest [*see Code Civ. Proc. §§ 377.20, 377.40, see also § 181.42*].

If the defendant dies after commencement of the action, the court on motion must allow the action to be continued against his or her personal representative or successor in interest [*Code Civ. Proc. § 377.41, see § 181.42*; *see generally* Ch. 21, *Amended and Supplemental Pleadings*].

[2] Joinder of Unwilling Plaintiffs as Defendants

Defendants may also include those persons who should have been joined as plaintiffs but refused to consent to joinder as plaintiffs [*see Estate of Kuebler v. Superior Court (1978) 81 Cal. App. 3d 500, 503-504, 146 Cal. Rptr. 481* , and *see § 181.146*; *see also Valdez v. Smith (1985) 166 Cal. App. 3d 723, 731, 212 Cal. Rptr. 638]* . Although designated as defendants, unwilling plaintiffs are treated as actual plaintiffs. For example, they are not barred from proceeding with the action if the designated plaintiffs settle, and they have standing to request a new trial [*Watkins v. Nutting (1941) 17 Cal. 2d 490, 499, 110 P.2d 384* ; *Estate of Kuebler v. Superior Court (1978) 81 Cal. App. 3d 500, 504, 146 Cal. Rptr. 481]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsWrongful Death & Survival ActionsJoinder Requirements

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§ 181.16 Award of Damages

[1] In General

Code Civ. Proc. § 377.61 restates former *Code Civ. Proc. § 377*, providing that in every wrongful death action, such damages may be given as are just under all the circumstances of the case. This is the only statutory authority for an award of damages in a wrongful death action [*Carr v. Pacific Tel. Co. (1972) 26 Cal. App. 3d 537, 544, 103 Cal. Rptr. 120* (decided before amendment of *Civ. Code § 3294* to allow punitive damages if defendant was convicted of felony homicide)]. Thus, the amount of damages to be awarded in a particular case is within the broad discretion of the trier of fact and depends on the circumstances presented by the evidence [*Dickinson v. Southern Pac. Co. (1916) 172 Cal. 727, 731, 158 P. 183* ; *Syah v. Johnson (1966) 247 Cal. App. 2d 534, 547, 55 Cal. Rptr. 741]* . A judgment for damages having substantial support in the evidence will not be disturbed on appeal as excessive unless it clearly appears to be the result of passion, prejudice [*Foerster v. Direito (1946) 75 Cal. App. 2d 323, 333, 170 P.2d 986]* , or corruption [*Mize v. Atchison, Topeka & Santa Fe Ry. Co. (1975) 46 Cal. App. 3d 436, 453, 120 Cal. Rptr. 787]* on the part of the jurors that may be said to shock the conscience of the court [*Swails v. General Elec. Co. (1968) 264 Cal. App. 2d 82, 87, 70 Cal. Rptr. 143]* .

The limitations on the recovery of damages for noneconomic loss in actions for medical malpractice [*see Civ. Code § 3333.2(b)*] also apply to actions against medical practitioners for wrongful death [*Yates v. Pollock (1987) 194 Cal. App. 3d 195, 199*]. For discussion of these limitations, see Ch. 414, *Physicians: Medical Malpractice* .

[2] Distinct From Survival Damages

Damages awarded in a wrongful death action may not include those damages recoverable in a survival action under *Code Civ. Proc. § 377.34* [*Code Civ. Proc. § 377.61*; *see § 181.45[1]*]. The actions are conceptually separate: a wrongful death action is a statutory action based on the death of the decedent, while a survival action is merely a continuation of a cause of action that the decedent had before he or she died [*see* *Grant v. McAuliffe (1953) 41 Cal. 2d 859, 864, 264 P.2d 944]* . For example, medical expenses incurred for the treatment of the injured decedent and punitive damages are generally not recoverable in a wrongful death action [*Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 450, 131 Cal. Rptr. 14, 551 P.2d 334* (punitive damages); *Follansbee v. Benzenberg (1954) 122 Cal. App. 2d*

466, 474, 265 P.2d 183 (medical expenses)], while both items may be recovered in a survival action [*Code Civ. Proc. § 377.34* (permitting recovery of damages for loss decedent sustained or incurred before death, including punitive damages, but not including damages for pain, suffering, or disfigurement); *see Stencel Aero Eng'g Corp. v. Superior Court (1976) 56 Cal. App. 3d 978, 985, 128 Cal. Rptr. 691* (punitive damages recoverable in survival action, not in wrongful death action); *Patterson v. Sharp (1970) 10 Cal. App. 3d 990, 1000-1001, 89 Cal. Rptr. 396* (medical expenses recoverable in survival action, not in wrongful death action)]. For further discussion of punitive damages in wrongful death actions, see *§ 181.16[3]*; for discussion of punitive damages in survival actions, see *§ 181.45[4]*.

Damages for the pain and suffering of a decedent are not available in either a survival action or a wrongful death action [*see Code Civ. Proc. § 377.34* (damages for pain, suffering, or disfigurement not available in survival action); *Carr v. Pacific Tel. Co. (1972) 26 Cal. App. 3d 537, 545, 103 Cal. Rptr. 120* ; *Love v. Wolf (1967) 249 Cal. App. 2d 822, 840, 58 Cal. Rptr. 42* (both cases applying substantially similar provision of former *Prob. Code 573(c)*); *see also Parsons v. Easton (1921) 184 Cal. 764, 770, 195 P. 419* (damages for pain and suffering of decedent not available in wrongful death action)]. Although a federal district court purporting to apply California law has held that damages for pre-death pain and suffering are available in a wrongful death action because they are expressly precluded from recovery in survival actions [*see In re Air Crash Disaster at Sioux City, Iowa (N.D. Ill. 1991) 760 F. Supp. 1283, 1285]* , the analysis used by that court should be viewed as unsupported by California courts.

[3] Punitive Damages Generally Not Allowed

Punitive damages are generally not available in a wrongful death action [*see Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 450, 131 Cal. Rptr. 14, 551 P.2d 334* ; *Lange v. Schoettler (1896) 115 Cal. 388, 391, 47 P. 139* ; *Pease v. Beech Aircraft Corp. (1974) 38 Cal. App. 3d 450, 461-462, 113 Cal. Rptr. 416* ; *but see Civ. Code § 3294(d)* (permitting punitive damages in wrongful death action based on homicide if defendant has been convicted of felony); *see generally § 181.16[4]*]. This is true even if there is no survival action under which they may be recovered [*Pease v. Beech Aircraft Corp. (1974) 38 Cal. App. 3d 450, 459-462, 113 Cal. Rptr. 416]* . Thus, conduct causing death may support a claim for punitive damages under *Civ. Code § 3294* [*see* Ch. 177, *Damages*] only in a survival action, when the victim died after he or she had a cause of action based on that conduct [*see Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 833, 174 Cal. Rptr. 348* ; *see also § 181.45[4]*]. Despite this often arbitrary result, the bar on the recovery of punitive damages in wrongful death actions has been held constitutional [*see Ford Motor Co. v. Superior Court (1981) 120 Cal. App. 3d 748, 751-753, 175 Cal. Rptr. 39* ; *Georgie Boy Mfg., Inc. v. Superior Court (1981) 115 Cal. App. 3d 217, 224-226, 171 Cal. Rptr. 382* ; *see also In re Paris Air Crash (9th Cir. 1980) 622 F.2d 1315, 1318-1324]* .

[4] Punitive Damages in Actions Based on Felony Homicide

Punitive damages pursuant to *Civ. Code § 3294* may be recovered in an action under *Code Civ. Proc. §§ 377.10-377.62* based on a death that resulted from a homicide for which the defendant has been convicted of a felony, whether the decedent died instantly or survived the fatal injury for some period of time [*Civ. Code § 3294(d)*]. The procedures for joinder and consolidation contained in *Code Civ. Proc. § 377.62* apply to prevent multiple recoveries of punitive damages based on the same wrongful act [*Civ. Code § 3294(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesGeneral OverviewTortsWrongful Death & Survival ActionsRemediesPunitive DamagesTortsWrongful Death & Survival ActionsSurvival Actions

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§ 181.17 Damages Limited to Pecuniary Loss

[1] In General

Recovery for the wrongful death of a decedent is limited to the pecuniary losses suffered by the plaintiffs [*Krouse v. Graham (1977) 19 Cal. 3d 59, 67, 137 Cal. Rptr. 863, 562 P.2d 1022]* . A wrongful death plaintiff who has not suffered a loss cannot recover damages; the fact of his or her relationship to the decedent is not sufficient to establish a pecuniary loss [*Cross v. Pacific Gas & Elec. Co. (1964) 60 Cal. 2d 690, 692, 36 Cal. Rptr. 321, 388 P.2d 353* ; *Burk v. Arcata & Mad River R.R. Co. (1899) 125 Cal. 364, 367, 57 P. 1065]* . Furthermore, a wrongful death plaintiff may not recover damages for the pain and suffering of a decedent [*Parsons v. Easton (1921) 184 Cal. 764, 770, 195 P. 419]* , even though these damages are not available in a survival action brought on behalf of a decedent [*see Code Civ. Proc. § 377.34* (damages for pain, suffering, or disfigurement not available in survival action); *Carr v. Pacific Tel. Co. (1972) 26 Cal. App. 3d 537, 545, 103 Cal. Rptr. 120* ; *Love v. Wolf (1967) 249 Cal. App. 2d 822, 840* (both cases applying substantially similar provision of former *Prob. Code 573(c)*)].

[2] Present Value of Future Contributions

The present value of future contributions from a decedent to a wrongful death plaintiff is one of the elements of pecuniary loss [*Carr v. Pacific Tel. Co. (1972) 26 Cal. App. 3d 537, 544-545, 103 Cal. Rptr. 120]* . It includes the loss arising from the deprivation of something to which the wrongful death plaintiffs would have been legally entitled if the decedent had lived [*Parsons v. Easton (1921) 184 Cal. 764, 770, 195 P. 419]* , such as the right to direct financial support [*Mize v. Atchison, Topeka & Santa Fe Ry. Co. (1975) 46 Cal. App. 3d 436, 453, 120 Cal. Rptr. 787* (decedent parent's legal obligation to provide monthly support payments to two minor children)].

When a spouse sues for the wrongful death of his or her spouse, the chief element of damages to be considered in awarding damages is the present value of the earnings the deceased spouse would have contributed to the family during the period of his or her life expectancy [*Riley v. California Erectors, Inc. (1973) 36 Cal. App. 3d 29, 32, 111 Cal. Rptr. 459]* . The same is true when a child sues for the death of a parent [*see Syah v. Johnson (1966) 247 Cal. App. 2d 534, 547, 55 Cal. Rptr. 741]* . In proving these damages, it is presumed that the decedent's earning capacity would have increased [*Foerster v. Direito (1946) 75 Cal. App. 2d 323, 333, 170 P.2d 986]* and, correspondingly, that the

contributions of the decedent to the plaintiffs would also have increased [*Karwoski v. Grant (1938) 30 Cal. App. 2d 171, 180, 85 P.2d 944]* .

The present value of future contributions also includes the loss arising from the deprivation of benefits reasonably expected by the wrongful death plaintiffs but not based solely on a legal right to support. The expectation of benefits may originate in a purely moral obligation on the part of the decedent [*Swails v. General Elec. Co. (1968) 264 Cal. App. 2d 82, 86, 70 Cal. Rptr. 143]* . For example, a sister was entitled to recover the anticipated future contributions that she could have reasonably expected from her deceased brother, who had supported her during his lifetime, because she showed the moral obligation undertaken by the deceased brother to provide for her support and her reasonable belief that she would continue to be the recipient of his bounty and support [*Wilson v. City & County of San Francisco (1951) 106 Cal. App. 2d 440, 444, 235 P.2d 81* ; *see also Karwoski v. Grant (1938) 30 Cal. App. 2d 171, 180, 85 P.2d 944* (parents' recovery of contributions they reasonably expected from son)].

[3] Value of Personal Service, Advice, or Training

Wrongful death plaintiffs may recover for the pecuniary loss of the value of any personal service, advice, or training that they reasonably expected to be given by the decedent [*Mize v. Atchison, Topeka & Santa Fe Ry. Co. (1975) 46 Cal. App. 3d 436, 453, 120 Cal. Rptr. 787* ; *Carr v. Pacific Tel. Co. (1972) 26 Cal. App. 3d 537, 545, 103 Cal. Rptr. 120]* . Such recovery may include, for example, the loss of a spouse's household services, such as cooking, cleaning, and general management of the family's affairs, as well as the loss of a parent's care and counseling of an adolescent child [*Torres v. Los Angeles (1962) 58 Cal. 2d 35, 54, 22 Cal. Rptr. 866, 372 P.2d 906* ; *see also McKinney v. California Portland Cement Co. (2002) 96 Cal. App. 4th 1214, 1228-1229, 117 Cal. Rptr. 2d 849]* .

[4] Loss of Society and Companionship

Although the damages recoverable in a wrongful death action are generally limited to pecuniary losses, a wrongful death plaintiff may recoverreasonable compensation for the loss of the decedent's love, companionship, comfort, affection, society, solace, or moral support, any loss of enjoyment of sexual relations, and any loss of the decedent's physical assistance. Thus, the services of children, elderly parents, or nonworking spouses that do not result in measurable net income to the family unit nevertheless represent a substantial injury to the family, for which just compensation should be paid. In proving such damages, evidence of the closeness of the family unit, the warmth of feeling between family members, and the character of the deceased is admissible [*Krouse v. Graham (1977) 19 Cal. 3d 59, 67-68, 137 Cal. Rptr. 863, 562 P.2d 1022* ; *Wright v. City of Los Angeles (1990) 219 Cal. App. 3d 318, 355, 268 Cal. Rptr. 309]* .

However, no damages may be recovered for grief, wounded feelings, or sorrow attendant on the death of a loved one [*Krouse v. Graham (1977) 19 Cal. 3d 59, 69, 137 Cal. Rptr. 863, 562 P.2d 1022* ; *see Zeller v. Reid (1938) 26 Cal. App. 2d 421, 424, 79 P.2d 449]* . In addition, the amount awarded for loss of society or companionship must not be excessive under the facts of the case--for example, if the evidence shows that the plaintiffs had not seen the decedent or relied on him or her for many years [*see Nelson v. County of Los Angeles (2003) 113 Cal. App. 4th 783, 793-794, 6 Cal. Rptr. 3d 650]* . Similarly, evidence that a decedent's marriage was strained and unhappy at the time of death may suffice to negate or minimize a surviving spouse's damages for loss of the decedent's society, comfort, and protection. However, mere declarations made by the decedent that he or she was unhappy in his or her marriage and was considering divorce are insufficient evidence to support a finding that the marriage was in fact about to end, although such declarations may be used to corroborate other evidence [*see Corder v. Corder (2007) 41 Cal. 4th 644, 665-666, n.12, 62 Cal. Rptr. 3d 660*].

Mental retardation does not necessarily render a child less able to suffer loss of companionship damages in a wrongful death action than a child with no such mental disability [*Knowles v. Superior Court (2004) 118 Cal. App. 4th 1290, 1302, 13 Cal. Rptr. 3d 700]* . California courts have rejected the notion that mental retardation necessarily limits a

person's capacity to appreciate parental comfort and support [*Knowles v. Superior Court (2004) 118 Cal. App. 4th 1290, 1303, 13 Cal. Rptr. 3d 700]* .

[5] Funeral Expenses

In a wrongful death action, funeral expenses are an element of recovery [*Francis v. Sauve (1963) 222 Cal. App. 2d 102, 124, 34 Cal. Rptr. 754* ; *Wilson v. City & County of San Francisco (1951) 106 Cal. App. 2d 440, 445, 235 P.2d 81]* . Recovery of such damages is proper whether the plaintiffs have paid or are liable for the burial or funeral expenses [*Adams v. Southern Pac. Co. (1935) 4 Cal. 2d 731, 743, 53 P.2d 121* ; *Little v. Yanagisawa (1924) 70 Cal. App. 303, 308, 233 P. 357]* , or the decedent's estate has paid the expenses [*Robison v. Leigh (1957) 153 Cal. App. 2d 730, 733, 315 P.2d 42* ; *Gibson v. State (1960) 184 Cal. App. 2d 6, 11, 7 Cal. Rptr. 315]* . Damages for funeral expenses are not recoverable if it would permit a double recovery to the wrongful death plaintiffs [*Patterson v. Sharp (1970) 10 Cal. App. 3d 990, 1000, 89 Cal. Rptr. 396* (award including decedent's burial expenses properly reduced when burial expenses were paid by workers' compensation insurer prior to wrongful death trial)].

[6] Prejudgment Interest

A plaintiff may recover prejudgment interest under *Civ. Code § 3288* on those damages attributable to an ascertainable economic value, such as loss of household services or earning capacity, as well as funeral and related expenses [*Canavin v. Pacific Sw. Airlines (1983) 148 Cal. App. 3d 512, 527, 196 Cal. Rptr. 82]* . Interest may be awarded only regarding damages that represent past economic losses, and not to the extent that an award of damages is for future earnings after the date of the verdict [*Canavin v. Pacific Southwest Airlines (1983) 148 Cal. App. 3d 512, 528*]. However, an award of prejudgment interest under *Civ. Code § 3288* cannot be based on damages for noneconomic losses such as lost comfort, society, companionship, care, and protection [*Canavin v. Pacific Sw. Airlines (1983) 148 Cal. App. 3d 512, 527, 196 Cal. Rptr. 82* ; *see also Greater Westchester Homeowners Ass'n v. City of Los Angeles (1979) 26 Cal. 3d 86, 102-103, 160 Cal. Rptr. 733, 603 P.2d 1329* (prejudgment interest award improperly included interest on intangible, noneconomic damages)].

Prejudgment interest may also be awarded under *Civ. Code § 3291* pursuant to an offer to settle under *Code Civ. Proc. § 998* if a more favorable judgment is obtained [*McKinney v. California Portland Cement Co. (2002) 96 Cal. App. 4th 1214, 1230-1232, 117 Cal. Rptr. 2d 849* ; *see* Ch. 520, *Settlement and Release*]. However, each wrongful death plaintiff must make a separate 998 offer [*Gilman v. Beverly Cal. Corp. (1991) 231 Cal. App. 3d 121, 124-126, 283 Cal. Rptr. 17]* . For consideration of particular problems caused by this rule in medical malpractice cases, see N. Levy, M. Golden & L. Sacks, eds., California Torts, Ch. 55 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsWrongful Death & Survival ActionsRemediesCompensatory DamagesGeneral OverviewTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesConsortiumTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesFinancial ContributionsTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesFuneral ExpensesTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesLoss of Services

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§ 181.18 Damages Determined at Time Decedent Died

[1] General Rule and Burden of Proof

Each plaintiff in a wrongful death action has the burden of proving his or her own damages with reasonable certainty [*see Helling v. Lew (1972) 28 Cal. App. 3d 434, 437, 104 Cal. Rptr. 789* ; *Fields v. Riley (1969) 1 Cal. App. 3d 308, 313, 81 Cal. Rptr. 671]* . The pecuniary loss is determined by the conditions existing at the time the deceased died because each plaintiff is being compensated for the destruction of his or her expectations of what he or she would have received from the deceased if the deceased had lived [*Riley v. California Erectors, Inc. (1973) 36 Cal. App. 3d 29, 33, 111 Cal. Rptr. 459]* . Accordingly, damages are not measured by events occurring after the death of the deceased [*Riley v. California Erectors, Inc. (1973) 36 Cal. App. 3d 29, 32, 111 Cal. Rptr. 459]* . For example, the probability of a surviving spouse's remarriage is not a proper basis for mitigating damages [*Wood v. Alves Serv. Transp., Inc. (1961) 191 Cal. App. 2d 723, 727, 13 Cal. Rptr. 114]* nor is the subsequent marriage of a parent of a deceased child [*Riley v. California Erectors, Inc. (1973) 111 Cal. Rptr. 459]* . However, a jury may consider the pecuniary loss to plaintiffs in light of the probability of the reduced purchasing power of the dollar as well as the inflation in wages that may continue into the future [*Mize v. Atchison, Topeka & Santa Fe Ry. Co. (1975) 46 Cal. App. 3d 436, 454, 120 Cal. Rptr. 787* ; *Tyson v. Romey (1948) 88 Cal. App. 2d 752, 758, 199 P.2d 721]* .

[2] Decedent's Life Expectancy Considered

In compensating plaintiffs for the wrongful death of a decedent, a jury may consider the remaining life expectancy of the decedent as one of thevariables it considers in arriving at an award of damages [*see Torres v. Los Angeles (1962) 58 Cal. 2d 35, 54, 22 Cal. Rptr. 866, 372 P.2d 906* ; *Syah v. Johnson (1966) 247 Cal. App. 2d 534, 547, 55 Cal. Rptr. 741]* . For this purpose, tables of mortality may be introduced into evidence, although they are not conclusive on the issue of a decedent's life expectancy [*Sumrall v. Butler (1951) 102 Cal. App. 2d 515, 522-523, 227 P.2d 881]* . If no evidence is offered to show the probable life expectancy of a decedent, a trial court may take judicial notice of tables of mortality in common use [*Dickinson v. Southern Pac. Co. (1916) 172 Cal. 727, 730, 158 P. 183]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewTortsWrongful Death & Survival ActionsRemediesAward CalculationsTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesGeneral Overview

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§ 181.19 Recovery of Lump Sum Damages

Lump sum damages are required in a wrongful death action regardless of whether the action has gone to trial or is settled without a trial. This sum is computed by adding together the awards made to each of the plaintiffs in the action [*Changaris v. Marvel (1964) 231 Cal. App. 2d 308, 312, 41 Cal. Rptr. 774]* . The total recovery is the aggregate of the various plaintiffs' separate interests in the deceased's life [*Cross v. Pacific Gas & Elec. Co. (1964) 60 Cal. 2d 690, 692, 36 Cal. Rptr. 321, 388 P.2d 353]* . There can be no substantial recovery for plaintiffs who have not suffered substantial pecuniary injury, and their recovery is limited to nominal damages only [*see* *Estate of Riccomi (1921) 185 Cal. 458, 461, 197 P. 97* ; *Burk v. Arcata & Mad River R.R. Co. (1899) 125 Cal. 364, 369, 57 P. 1065* (collateral heirs)].

In calculating the lump-sum award appropriate to compensate the plaintiffs for future lost support, the total lost support must be reduced by an appropriate formula to a present lump sum that, when invested to yield the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the times, in the amounts, and for the period that the future benefits would have been received [*Canavin v. Pacific Sw. Airlines (1983) 148 Cal. App. 3d 512, 521, 196 Cal. Rptr. 82]* . In making this calculation, it is error for the court to allow evidence of the estimated amount of income tax the decedent would have had to pay on his or her income [*Canavin v. Pacific Sw. Airlines (1983) 148 Cal. App. 3d 512, 522, 539-543, 196 Cal. Rptr. 82* (concurring and dissenting opinions constitute majority holding on this point)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsWrongful Death & Survival ActionsRemediesAward CalculationsTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesGeneral Overview

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§ 181.20 Distribution of Damages

Each wrongful death plaintiff is entitled to share in the award of damages in the proportion that his or her personal damages bear to the damages suffered by the other plaintiffs [*Changaris v. Marvel (1964) 231 Cal. App. 2d 308, 313, 41 Cal. Rptr. 774]* . The respective rights of the plaintiffs in any award of damages must be determined by the court [*Code Civ. Proc. § 377.61*] in an appropriate proceeding [*Rose v. San Diego Elec. Ry. Co. (1933) 133 Cal. App. 646, 651, 24 P.2d 838]* . Their rights can be determined by means of special interrogatories submitted to jurors inquiring into how they arrived at the total amount of damages [*Bowen v. Kizirian (1930) 105 Cal. App. 286, 289, 287 P. 570* ; *see* Ch. 322, *Juries and Verdicts*]. They can also be determined in an interpleader action brought by the personal representative to apportion damages resulting from a compromise or settlement worked out between plaintiffs and the tortfeasor [*see Changaris v. Marvel (1964) 231 Cal. App. 2d 308, 313, 41 Cal. Rptr. 774* ; *see § 181.150* and Ch. 314, *Interpleader*].

However, an interpleader action is not always required. For example, if a wrongful death action has been brought to trial against non-settling defendants, that trial court has jurisdiction to apportion the proceeds from a settlement with other defendants when the plaintiff heirs cannot agree to an allocation [*Corder v. Corder (2007) 41 Cal. 4th 644, 654, 62 Cal. Rptr. 3d 660]* . In allocating settlement proceeds between adverse plaintiffs, the assessments and intentions of the settling defendant in settling the case for the amount it did are irrelevant [*Corder v. Corder (2007) 41 Cal. 4th 644, 659, 62 Cal. Rptr. 3d 660]* .

Apportionment of damages among wrongful death plaintiffs by a court does not deprive the plaintiffs of the right to a jury trial, even if the plaintiffs are not members of the same family. An action for apportionment is a special proceeding raising an equitable issue, and as such, no right to a jury trial exists [*Kim v. Yi (2006) 139 Cal. App. 4th 543, 548-550, 42 Cal. Rptr. 3d 841* (apportionment made after settlement with wrongful death defendant)].

In any case involving the compromise of a minor's claim in the proceeds of a settlement of a wrongful death claim or action, the guardian of the estate, or the minor's parents if there is no such guardian, must petition the proper court for approval of the compromise [*see Code Civ. Proc. § 372* (action pending); *Prob. Code § 3500* (no action pending); *Hazelwood v. Hazelwood (1976) 57 Cal. App. 3d 693, 696, 129 Cal. Rptr. 384]* . For further discussion and forms for

use in petitioning a court to approve the compromise of a minor's claim, see Ch. 366, *Minors: Claims and Property of Minors* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewTortsWrongful Death & Survival ActionsRemediesApportionmentTortsWrongful Death & Survival ActionsRemediesAward CalculationsTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesGeneral Overview

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§ 181.21 Limitation on Recovery in Medical Malpractice Cases

The Medical Injury Compensation Reform Act of 1975 (MICRA) limits recovery of noneconomic losses to compensate for nonpecuniary damage to $250,000 in an action against a health care provider for professional negligence [*Civ. Code § 3333.2(b)*]. This limitation applies to damages in a wrongful death action for loss of society, companionship, protection, care, and other similar damages [*Yates v. Pollock (1987) 194 Cal. App. 3d 195, 199-200, 239 Cal. Rptr. 383]* . MICRA is discussed further in Ch. 414, *Physicians: Medical Malpractice*.

It has been held that the $250,000 limitation applies in the aggregate, regardless of the number of wrongful death plaintiffs joining in a wrongful death action, so that the total recovery may not exceed $250,000 [*Yates v. Pollock (1987) 194 Cal. App. 3d 195, 200-201, 239 Cal. Rptr. 383* ; *but see Cross v. Pacific Gas & Elec. Co. (1964) 60 Cal. 2d 690, 693, 36 Cal. Rptr. 321, 388 P.2d 353* ; *Gilman v. Beverly Cal. Corp. (1991) 231 Cal. App. 3d 121, 126, 283 Cal. Rptr. 17* (each plaintiff in wrongful death action should be regarded as having personal and separate cause of action); *see also §§ 181.19* and *181.20*]. For further discussion of the implications of this rule, see N. Levy, M. Golden & L. Sacks, eds., California Torts, Ch. 55 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersDoctors & PhysiciansTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsWrongful Death & Survival ActionsRemediesAward CalculationsTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesGeneral Overview

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§ 181.22 Limitation on Attorney's Fees in Medical Malpractice Cases

Attorney's fees in a wrongful death action based on professional medical negligence are limited by *Bus. & Prof. Code § 6146*, which allows a fee of 40 percent of the first $50,000 recovery, and lesser percentages of greater amounts. This statute is discussed in Ch. 414, *Physicians: Medical Malpractice* . The percentage limitations are to be applied to the lump-sum recovery, not to the separate amounts apportioned to each wrongful death plaintiff [*Yates v. Law Offices of Samuel Shore (1991) 229 Cal. App. 3d 583, 588-590, 280 Cal. Rptr. 316]* . Apportionment of damages among plaintiffs is discussed in *§ 181.19*. Damage limitations in medical malpractice actions are discussed in *§ 181.21*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsLegal EthicsClient RelationsAttorney FeesExcessive FeesTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesGeneral Overview

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§ 181.23 Statute of Limitations for Wrongful Death Action

[1] Two-Year Period and Tolling

The statute of limitations for a wrongful death action is two years (one year, prior to January 1, 2003) [*Code Civ. Proc. §§ 312, 335.1*; *see* former *Code Civ. Proc. § 340(3)*; Ch. 345, *Limitation of Actions,* § 345.14]. The statute begins to run on the date that the decedent died, not the date the decedent was injured [*Walton v. Southern Pac. Co. (1935) 8 Cal. App. 2d 290, 304, 48 P.2d 108* ; *Tann v. Western Pac. Ry. Co. (1919) 39 Cal. App. 377, 379-380, 178 P. 971]* .

Even though each wrongful death plaintiff must join in a single action [*see § 181.12[7]*], the claim of each plaintiff is for a separate and personal loss. Thus, the running of the statute of limitations as to one plaintiff does not bar the cause of action of another [*Cross v. Pacific Gas & Elec. Co. (1964) 60 Cal. 2d 690, 692-694, 36 Cal. Rptr. 321, 388 P.2d 353* ; *see Washington v. Nelson (1979) 100 Cal. App. 3d 47, 52, 160 Cal. Rptr. 644]* . Conversely, because each wrongful death plaintiff has a separate and personal cause of action against which the period of limitations will run, if an attempt is made to add a plaintiff to a timely-filed wrongful death action, the limitations period runs to the time of amendment or intervention for that plaintiff and the "relation back" doctrine does not apply. Thus, a plaintiff attempting to join the suit after the limitations period has run may be barred from doing so even though the original complaint was timely filed [*San Diego Gas & Elec. Co. v. Superior Court (2007) 146 Cal. App. 4th 1545, 1552-1553, 53 Cal. Rptr. 3d 722* ; *Andersen v. Barton Mem'l Hosp., Inc. (1985) 166 Cal. App. 3d 678, 681-685, 212 Cal. Rptr. 626]* . However, as wrongful death and loss of consortium claims do not relate back to personal injury claims brought by a decedent before his or her death, time limits applicable to the original personal injury action would not apply to the subsequent wrongful death and loss of consortium claims [*Brumley v. FDCC California, Inc. (2007) 156 Cal. App. 4th 312, 326, 67 Cal. Rptr. 3d 292* (five-year limit for bringing decedent's case to trial under *Code Civ. Proc. § 583.310* inapplicable to wrongful death and loss of consortium claims)].

If a plaintiff is below the age of majority at the time the action accrues, the statute is tolled for the time of the disability even though adult plaintiffs are barredin the same action by the running of the statute [*Cross v. Pacific Gas & Elec. Co. (1964) 60 Cal. 2d 690, 693, 36 Cal. Rptr. 321, 388 P.2d 353* ; *Helling v. Lew (1972) 28 Cal. App. 3d 434, 438, 104 Cal. Rptr. 789]* . The statute may also be tolled if the plaintiff does not discover the allegedly tortious conduct due to the

defendant's misrepresentations [*see Baker v. Beech Aircraft Corp. (1974) 39 Cal. App. 3d 315, 324-325, 114 Cal. Rptr. 171* ; *Wohlgemuth v. Meyer (1956) 139 Cal. App. 2d 326, 330-331*]. For complete discussion of statutes of limitation and the various doctrines that may toll a statute of limitation, see Ch. 345, *Limitation of Actions* .

[2] Actions Against Health Care Providers

If the wrongful death action is against a health care provider and is based on professional negligence, the more specific statute of limitations contained in *Code Civ. Proc. § 340.5* controls [*Washington v. Nelson (1979) 100 Cal. App. 3d 47, 52, 160 Cal. Rptr. 644]* . In such a case, the time for commencement of the action is three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event is the time for commencement of the legal action to exceed three years unless tolled for any of the following: (1) proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person [*Code Civ. Proc. § 340.5*; *see Code Civ. Proc. § 340.5(1)* (health care provider defined), (2) (professional negligence defined)]. Even though the statute of limitations for professional negligence provides that the time begins to run from the "injury," this does not change the general rule in wrongful death cases that the statute of limitations begins to run from death. The word "injury" in *Code Civ. Proc. § 340.5* has been construed to refer to the wrongfully caused death of the plaintiff's decedent [*Larcher v. Wanless (1976) 18 Cal. 3d 646, 659, 135 Cal. Rptr. 75, 557 P.2d 507]* . The limitation period of *Code Civ. Proc. § 340.5* also applies to the individual claim of a person seeking to intervene in a wrongful death action that is otherwise filed within the period. If the complaint in intervention asserts a new cause of action, the application for leave to intervene must be filed within the limitation period [*Anderson v. Barton Mem'l Hosp. (1985) 166 Cal. App. 3d 678, 682, 685, 212 Cal. Rptr. 626]* .

The statute of limitations applicable to actions against health care providers based on professional negligence, set forth in *Code Civ. Proc. § 340.5*, is tolled for 90 days if the plaintiff gives the 90-day notice of intent to sue required by *Code Civ. Proc. § 364* in the last 90 days of the period of limitation [*Woods v. Young (1991) 53 Cal. 3d 315, 328, 279 Cal. Rptr. 613, 807 P.2d 455]* .

Actions by minors against health care providers based on professional negligence must be commenced within three years from the date of the alleged wrongful action, except that an action by a minor under the full age of six years must be commenced within three years or prior to his or her eighth birthday, whichever provides a longer period. This time limitation is tolled for a minor for any period during which a parent or guardian and a defendant's insurer or health care provider have committed fraud or collusion in the failure to bring an action on behalf of the injured minor for professional negligence [*Code Civ. Proc. § 340.5*]. The statute of limitations runs from the death of the malpractice victim that qualifies the minor as a wrongful death plaintiff rather than from the time the malpractice occurred [*Ferguson v. Dragul (1986) 187 Cal. App. 3d 702, 708-709, 232 Cal. Rptr. 79]* .

For further discussion of actions against health care providers, see Ch. 414, *Physicians: Medical Malpractice* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLegislationStatutes of LimitationsTollingTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsWrongful Death & Survival ActionsGeneral OverviewTortsWrongful Death & Survival ActionsDefensesStatutes of Limitations

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§ 181.24 Vicarious Liability of Parent for Death Caused by Minor

Any act of willful misconduct of a minor that results in another person's death is imputed to the parent or guardian having custody or control of the minor for all purposes of civil damages. The parent or guardian is jointly and severally liable with the minor for any damages resulting from the willful misconduct [*Civ. Code § 1714.1(a)*]. The liability of a parent or guardian may not exceed $25,000 for each tort of the child [*Civ. Code § 1714.1(a)*]; however, insurer liability is limited to $10,000 [Civ. Code. § 1714.1(e)]. For discussion and forms related to parental liability for the torts of their children, see Ch. 367A, *Minors: Tort Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Relationships & TortsTort LiabilityChild TortsFamily LawParental Duties & RightsDutiesLiability for Minor's Actions

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[Reserved]

§§ 181.25[Reserved]

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§ 181.40 Governing Statutes

Survival actions are generally governed by *Code Civ. Proc. §§ 377.20-377.50*. An action to establish an insured decedent's liability is governed by *Code Civ. Proc. § 377.50* and *Prob. Code §§ 550-555*. The statute of limitations governing survival actions generally is set out in *Code Civ. Proc. § 366.1*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsTortsWrongful Death & Survival ActionsDefensesStatutes of LimitationsTortsWrongful Death & Survival ActionsSurvival Actions

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§ 181.41 Definitions

As used in this part, the term "decedent's successor in interest" means the beneficiary of a decedent's estate or another successor in interest who succeeds to a decedent's cause of action or to property of a decedent that is the subject of a cause of action [*Code Civ. Proc. § 377.32(a)*; *see also Code Civ. Proc. § 377.10* (definition of beneficiary of decedent's estate)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewTortsWrongful Death & Survival ActionsSurvival Actions

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§ 181.42 Survival Action

[1] Availability

A survival action is an action that, by virtue of the provisions of *Code Civ. Proc. §§ 377.20-377.43* (substantially restating former *Prob. Code § 573*), may be maintained or continued by or against the personal representative or, in some cas es, a successor in interest, based on a cause or causes of action that accrued in the lifetime of the decedent. A survival action may be brought or continued by a decedent's successor in interest if there is no personal representative and if the successor in interest files an affidavit or declaration including specified information [*Code Civ. Proc. §§ 377.30, 377.32(a)*]. A survival action may be brought or continued against a decedent's successor in interest if another statute provides for direct liability of the successor [*Code Civ. Proc. § 377.40*].

A survival action is not a new cause of action created for the benefit of the persons who qualify as wrongful death plaintiffs by their relationship to the decedent but is, instead, a continuation of the cause of action the decedent held [*see Grant v. McAuliffe (1953) 41 Cal. 2d 859, 864, 264 P.2d 944* (interpreting former *Prob. Code § 573* (*now see Code Civ. Proc. §§ 377.30, 377.31*))]. Indeed, a complaint for wrongful death cannot be amended to state a survival cause of action if the statute of limitations applicable to the survival cause of action has run. Given the distinctions between the actions, the amendment does not relate back to the filing of the original complaint [*Parker v. Superior Court (1985) 175 Cal. App. 3d 1082, 1088, 223 Cal. Rptr. 292* ; *see § 181.44*].

Generally, a cause of action is not lost because of the death of a person. *Code Civ. Proc. § 377.20(a)* (restating former Proc. Code § 573(a)) states a comprehensive rule of survivability. The former distinction between survivable and nonsurvivable causes of actions, often turning on the issue of whether or not the cause of action was assignable [*see Estate of Blair (1954) 42 Cal. 2d 728, 731-732, 269 P.2d 612]* , is now largely an historical one. Today, virtually all causes of action that a decedent held at the time he or she died may be maintained by his or her personal representative [*Poon v. Poon (1966) 244 Cal. App. 2d 746, 753, 53 Cal. Rptr. 365* (interpreting former *Prob. Code § 573(a)* (*now see Code Civ. Proc. §§ 377.20-377.31*))].

[2] In Family Law Matters

The death of one spouse abates a cause of action for dissolution of marriage, and if a spouse dies before the marriage is dissolved, the court has no further jurisdiction to determine property matters [*Estate of Blair (1988) 199 Cal. App. 3d 161, 167, 244 Cal. Rptr. 627* ; *see In re Marriage of Hilke (1992) 4 Cal. 4th 215, 220-221, 14 Cal. Rptr. 2d 371, 841 P.2d 891]* . However, if a judgment of dissolution of marriage as to status only has been entered, the subsequent death of a spouse does not deprive the court of jurisdiction to determine collateral property rights [*In re Marriage of Hilke (1992) 4 Cal. 4th 215, 220, 14 Cal. Rptr. 2d 371, 841 P.2d 891* ; *see also Poon v. Poon (1966) 244 Cal. App. 2d 746, 750-751, 53 Cal. Rptr. 365* (interspousal causes of action to recover property and set aside fraudulent transfer do not abate on death of one spouse)].

It has been held that the death of a married person abates an action for nullity of the marriage brought by a third person [*Greene v. Williams (1970) 9 Cal. App. 3d 559, 563, 88 Cal. Rptr. 261* (action by parent to annul child's marriage after child's death)]. However, death does not abate a pending action for nullity brought by one of the putative spouses during his or her lifetime [*In re Marriage of Goldberg (1994) 22 Cal. App. 4th 265, 268-277, 27 Cal. Rptr. 2d 298* (finding no "precedential tension" with *Greene,* but declining to follow it, if apposite)].

[3] Invasion of Privacy and Defamation

Before 1984, The California Supreme Court held that a decedent's heirs had no protectable interest in the decedent's name or likeness if the decedent did not exercise the right on his or her own behalf during lifetime [*Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 818-824, 160 Cal. Rptr. 323, 603 P.2d 425]* . This rule was abrogated by statute [*see Civ. Code § 3344.1*; *see generally* Ch. 429, *Privacy*]; however, the holding rested on the premise that rights of privacy are personal and do not survive the death of the person [*see Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 818-824, 160 Cal. Rptr. 323, 603 P.2d 425* ; *see also Flynn v. Higham (1983) 149 Cal. App. 3d 677, 683, 197 Cal. Rptr. 145* ; *Hendrickson v. California Newspapers, Inc. (1975) 48 Cal. App. 3d 59, 62, 121 Cal. Rptr. 429* (both involving actions by decedents' families for invasion of their privacy based on information about decedent published after death)]. There is a similar rule that defamation of a deceased person does not give rise to a right of action in favor of the surviving family members of the decedent [*see Flynn v. Higham (1983) 149 Cal. App. 3d 677, 680, 197 Cal. Rptr. 145]* .

Whether an action for invasion of privacy that accrued and was commenced by the decedent during his or her lifetime would abate on death has not been directly addressed. Under *Code Civ. Proc. § 377.21*, a pending action will abate on the death of a party if the cause of action does not survive [*but see Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 824, 160 Cal. Rptr. 323, 603 P.2d 425* (suggesting that rule of nonsurvival might not apply with regard to rights actually exercised by decedent during lifetime)]. If the decedent took no action whatsoever to assert the right during his or her lifetime, it would seem that the personal representative could not maintain the suit as a survival action.

[4] Injury to Child or Ward

In addition to the general survival action authorized under *Code Civ. Proc. §§ 377.20* and *377.30* (restating former *Prob. Code § 573*), a parent's or guardian's cause of action for injuries sustained by their legitimate or illegitimate unmarried minor child or ward who is injured as a result of the wrongful act or neglect of another is not abated by the child's or ward's death [*Code Civ. Proc. § 376*; *see generally* Ch. 394, *Parent and Child*].

[5] Action to Establish Decedent's Insured Liability

An action to establish a decedent's liability for claims covered by insurance may be commenced or continued against the decedent's estate [*see Code Civ. Proc. § 377.50*; *Prob. Code §§ 550-555*] without joining the decedent's personal representative [*see Prob. Code § 550(a)*]. If the limitation period otherwise applicable to the action has not expired at the time of the decedent's death, an action under these provisions may be commenced within one year after the expiration of the limitation period otherwise applicable [*see Prob. Code § 551*]. This limitations provision applies

notwithstanding *Code Civ. Proc. § 366.2* (time for commencing survival action if prospective defendant dies before expiration of statute of limitations), which normally overrides the statute of limitations otherwise applicable to provide that the action must be commenced within one year after the decedent's death [*see Prob. Code § 551*]. This action may be pursued concurrently with other remedies available [*Prob. Code § 550(b)*]. For further discussion, see Ch. 454, *Probate: Claims Against the Estate* .

[6] Cause of Action Accruing Before Plaintiff's Death

Generally, the survival of a cause of action in favor of a deceased plaintiff does not depend on whether or not the decedent instituted a lawsuit before his or her death. Thus, an action survives whether or not a decedent has commenced suit at the time of his or her death [*Dunwoody v. Trapnell (1975) 47 Cal. App. 3d 367, 370, 120 Cal. Rptr. 859* (interpreting former *Prob. Code § 573* (*now see Code Civ. Proc. § 377.30*))].

A surviving "cause of action" has been construed to include a thing in action, including a right that, although accruing before the decedent's death, is not a mature, actionable claim at that time. Thus, a third-party claim against an insurer under *Ins. Code § 790.03(h)(5)* (requiring insurer to make good faith attempt to settle third-party claim when liability is reasonably clear) was held to survive under former *Prob. Code § 573* [*now see Code Civ. Proc. § 377.30*]. The alleged misconduct occurred before the claimant's death, although the claim itself did not become actionable until after his death, at the conclusion of the claimant's action against the insured [*Carr v. Progressive Cas. Ins. Co. (1984) 152 Cal. App. 3d 881, 888-891, 199 Cal. Rptr. 835* ; *but see Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58* (prospectively abrogating cause of action based on violation of *Ins. Code § 790.03(h)*)]. Subsequently, one court has held that, if immature rights can ripen into a cause of action following death, it must also be true that they can also ripen into an action at death [*Granquist v. Sandberg (1990) 219 Cal. App. 3d 181, 187, 268 Cal. Rptr. 109* (claim for legal malpractice for failure to seek preferential trial setting for elderly and ill plaintiff under *Code Civ. Proc. § 36(a)* ripened when plaintiff died before trial)].

In cases in which the same tortious conduct causes both death and another potentially actionable loss such as property damage, the action survives only if the other loss occurs before death, however briefly [*see Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 829, 833, 174 Cal. Rptr. 348]* . For further discussion, see *§ 181.45[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityAbatement on Death of PartyGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsIntentional TortsInvasion of PrivacyGeneral OverviewTortsWrongful Death & Survival ActionsDefensesStatutes of LimitationsTortsWrongful Death & Survival ActionsSurvival Actions

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§ 181.43 Cause of Action Commenced or Continued by Decedent's Successor in Interest

A cause of action that survives the death of a person entitled to bring an actionpasses to the decedent's successor in interest [*Code Civ. Proc. § 377.30*]. Generally, a survival action is commenced or continued by the decedent's personal representative. However, if the decedent has no personal representative, the survival action may be commenced or continued by the successor in interest [*Code Civ. Proc. §§ 377.30, 377.31*], who must execute and file an affidavit or declaration providing information required by law [*Code Civ. Proc. § 377.32*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSubstitutionsGeneral OverviewCivil ProcedurePartiesSubstitutionsDeath of PartyTortsWrongful Death & Survival ActionsSurvival Actions

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15-181 California Forms of Pleading and Practice--Annotated § 181.44

§ 181.44 Statute of Limitations

[1] Decedent's Cause of Action

A survival action on behalf of a decedent may be brought six months after the decedent's death or within the limitation period that would have applied if the person had not died, whichever is later [*Code Civ. Proc. § 366.1*].

A survival action only provides damages for injury to the decedent, while a wrongful death action provides damages for injury caused to the surviving heirs. Because the two actions seek recovery for different injuries, a survival action does not "relate back" to a previously-filed cause of action for wrongful death, and a plaintiff must state any survivor action within the applicable limitations period or it will not be timely [*Quiroz v. Seventh Ave. Ctr. (2006) 140 Cal. App. 4th 1256, 1278-1279, 45 Cal. Rptr. 3d 222]* .

[2] Cause of Action Against Decedent

A survival action against a decedent's estate generally may be brought within a year after the decedent's death, without regard to the limitation period that would have applied if the decedent had not died [*Code Civ. Proc. § 366.2(a)*]. An action is timely if it is commenced against the decedent within the applicable period; it does not have to be commenced against the personal representative within that time. The subsequent amended complaint substituting the personal representative for the decedent relates back to the initial time of filing, provided that it seeks recovery on the same general set of facts as the original complaint [*Burgos v. Tamulonis (1994) 28 Cal. App. 4th 757, 762-764, 33 Cal. Rptr. 2d 728* (plaintiff had no notice of decedent's death at time action was filed)]. The limitations period of *Code Civ. Proc. § 366.2* applies to a claim filed in California even if the decedent's personal representative resides outside of California or the estate is in probate in another state [*Farb v. Superior Court (2009) 174 Cal. App. 4th 678, 684, 94 Cal. Rptr. 3d 586]* .

The survival action statute provides that its limitation period is not tolled or extended for any reason [*Code Civ. Proc. § 366.2(b)*]. Nevertheless, it also provides that it is subject to the requirements on filing creditor claims against a decedent's estate, to the requirements on payment of claims, debts, and expenses from revocable trust of deceased settlor, and to the requirements of no contest clauses as they existed before repeal in 2008 [*Code Civ. Proc. §*

366.2(b)(2)-(4); *see Prob. Code §§ 9000 et seq.* (creditors' claims), 19000 et seq. (payments from deceased settlor's revocable trust), former 21300 et seq. (no contest clauses)]. Each of these statutes contains limitations-tolling provisions [*see Prob. Code §§ 9353* (time for commencing action against estate after rejection of claim), 9370 (claim against estate prerequisite to continuation of action), 19100 (time for filing claim against revocable trust), former 21308 (tolling statute of limitations to determine if beneficiary's act constitutes contest within terms of no contest clause)]. In addition, the statute of limitations may be extended if the last day of the limitations period is a holiday [*Code Civ. Proc. § 366.2(b)(1)*; *see Code Civ. Proc. §§ 12B*]. As it is not listed in the statutory exceptions, this statute of limitations is not tolled due to the minority of the plaintiff [*Farb v. Superior Court (2009) 174 Cal. App. 4th 678, 683, 94 Cal. Rptr. 3d 586]* . For further discussion, see Ch. 345, *Limitiation of Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationClaims Against EstatesTime LimitationsGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsWrongful Death & Survival ActionsDefensesStatutes of LimitationsTortsWrongful Death & Survival ActionsSurvival Actions

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§ 181.45 Damages Recoverable in Survival Action

[1] In General

Generally, in the case of a person who dies before judgment, the damages recoverable by his or her personal representative or successor in interest are limited to loss or damages that the decedent sustained or incurred prior to his or her death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to had he or she lived [*Code Civ. Proc. § 377.34* (restating former *Prob. Code § 573(c)*); § 181.170[7][b]]. The damages recoverable in favor of such a decedent do not include damages for pain, suffering, or disfigurement [*Code Civ. Proc. § 377.34*; *see Carr v. Pacific Tel. Co. (1972) 26 Cal. App. 3d 537, 545, 103 Cal. Rptr. 120* ; *Love v. Wolf (1967) 249 Cal. App. 2d 822, 840, 58 Cal. Rptr. 42* (both cases applying substantially similar provision of former *Prob. Code § 573(c)*; court in *Love* also noted Law Revision Commission's report that damages for loss of life expectancy may not be recovered)]. However, a specific statute may permit such a recovery [*see, e.g., Welf. & Inst. Code § 15657(b)* (permitting recovery of decedent's pain and suffering damages in action for elder abuse notwithstanding limits of former *Prob. Code § 573(c)* (*now Code Civ. Proc. § 377.34*)); *see also ARA Living Ctrs.-Pac., Inc. v. Superior Court (1993) 18 Cal. App. 4th 1556, 1563-1565, 23 Cal. Rptr. 2d 224* (amendment permitting recovery of decedent's pain and suffering damages not applied retroactively)].

The limitation on damages in *Code Civ. Proc. § 377.34* applies whenever the decedent dies "before judgment," which refers to a final judgment. Thus, for example, the limitation applies to a plaintiff who dies after a trial court grants a motion for a new trial on the issue of damages [*Love v. Wolf (1967) 249 Cal. App. 2d 822, 840, 58 Cal. Rptr. 42]* . However, judgment may be entered nunc pro tunc if the plaintiff dies after the jury verdict, or after the close of evidence, but before judgment is rendered [*Cadlo v. Metalclad Insulation Corp. (2007) 151 Cal. App. 4th 1311, 1321-1323, 61 Cal. Rptr. 3d 104* (plaintiff died two days after jury verdict); [*see Williamson v. Plant Insulation Co. (1994) 23 Cal. App. 4th 1406, 1414, 1415-1417, 28 Cal. Rptr. 2d 751* ; *see also Code Civ. Proc. § 669* (court may render judgment if party dies before judgment, but after trial and submission of case to judge sitting without jury, or after verdict on any issue of fact)]. In such cases, the plaintiff is responsible for requesting that the trial court exercise its nuncpro tunc authority [*Kellogg v. Asbestos Corp. Ltd. (1996) 41 Cal. App. 4th 1397, 1405, 49 Cal. Rptr. 2d 256]* .

Code Civ. Proc. § 377.34 does not bar recovery for pain and suffering damages awarded in a judgment if the plaintiff dies after that judgment is rendered but while an appeal is pending [*Sullivan v. Delta Air Lines, Inc. (1997) 15 Cal. 4th 288, 305, 63 Cal. Rptr. 2d 74, 935 P.2d 781]* . In *Sullivan*, the Supreme Court traced the statutory history of survival law and determined that the current statute, *Code Civ. Proc. § 377.34*, did not apply to bar pain and suffering awards under those circumstances [*Sullivan v. Delta Air Lines, Inc. (1997) 15 Cal. 4th 288, 305, 63 Cal. Rptr. 2d 74, 935 P.2d 781]* .

[2] Medical Expenses

The damages recoverable in favor of a decedent include medical expenses he or she incurred [*Follansbee v. Benzenberg (1954) 122 Cal. App. 2d 466, 474, 265 P.2d 183* (referring to former *Civ. Code § 956*)]. It is immaterial if the medical expenses are paid by one other than the decedent unless that person was under statutory obligation to do so [*see Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 635, 637, 7 Cal. Rptr. 377, 354 P.2d 1073]* . For example, a surviving spouse cannot recover medical expenses he or she paid for the deceased spouse because he or she is under a legal obligation to pay these expenses. Nevertheless, the surviving spouse may prosecute an individual claim for the expenses, which is separate from the claim prosecuted by the decedent's estate [*see Follansbee v. Benzenberg (1954) 122 Cal. App. 2d 466, 475-476, 265 P.2d 183]* .

[3] Loss of Earnings

The damages recoverable in a survival action include the loss of earnings the decedent suffered prior to death [*see DeMeo v. St. Francis Hosp. (1974) 39 Cal. App. 3d 174, 176, 114 Cal. Rptr. 280]* . These damages include temporary disability indemnity related to a decedent's loss of earnings while he or she lived [*Patterson v. Sharp (1970) 10 Cal. App. 3d 990, 1000-1001, 89 Cal. Rptr. 396]* .

[4] Punitive Damages

Because punitive damages are recoverable in a survival action [*see Code Civ. Proc. § 377.34*; *see also § 181.45*], but generally not in a wrongful death action [*see Code Civ. Proc. § 377.61*; *see also § 181.16[3]*], there is a significant advantage to being able to bring both a survival action and a wrongful death action for tortious conduct that led to the death of the victim, if the defendant's conduct meets the standard for punitive damages [*see* Ch. 177, *Damages*]. Cases interpreting former *Prob. Code § 573* [*now see Code Civ. Proc. § 377.34*] have held that, if an interval of time, no matter how brief, elapses between the injury to the person or to his or her or property and the death, the claim for punitive damages survives [*Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 829, 833, 174 Cal. Rptr. 348* (victim survived for three days); *Stencel Aero Eng'g Corp. v. Superior Court (1976) 56 Cal. App. 3d 978, 986-988, 128 Cal. Rptr. 691* ($10-million punitive damage claim proper on allegation that decedent airplane pilot suffered $200 property damages on ejection, and died seconds later onstriking ground)]. If the victim dies simultaneously with the infliction of the other potentially actionable injury, however, the cause of action does not survive and punitive damages may not be recovered from the tortfeasor [*Pease v. Beech Aircraft Corp. (1974) 38 Cal. App. 3d 450, 459-462, 113 Cal. Rptr. 416* (personal property destroyed in same plane crash in which victims died)]. Thus, entitlement to punitive damages depends on whether it can be proved that the decedents suffered some injury other than death, such asproperty damages, before (albeit only instantly before) death resulting from the tortious conduct [*see Stencel Aero Eng'g Corp. v. Superior Court (1976) 56 Cal. App. 3d 978, 987-988 n.6, 128 Cal. Rptr. 691]* . The constitutionality of this distinction has been questioned on equal protection grounds [*see Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 832-836, 174 Cal. Rptr. 348]* .

Punitive damages may be recovered in a survival action in which the decedent's death resulted from a homicide for which the defendant has been convicted of a felony, whether or not the decedent died instantly or survived the fatal injury for some period of time [*Civ. Code § 3294(d)*].

Under certain circumstances, a personal representative in a survival action may be able to recover punitive damages but no compensatory damages. For example, the decedent's damages may have consisted entirely of damages for pain, suffering, or disfigurement, which are not recoverable in a survival action [*see Code Civ. Proc. § 377.34* (restating former *Prob. Code § 573(c)*)]. At least one court of appeal opinion has allowed recovery of punitive damages under these circumstances, provided the amount of punitive damages bears some reasonable relation to the actual harm or injury suffered by the decedent during lifetime [*Gagnon v. Continental Cas. Co. (1989) 211 Cal. App. 3d 1598, 1602-1605, 260 Cal. Rptr. 305]* . However, another court opinion has rejected the right to recover punitive damages when the decedent's only actual injury was emotional distress [*Berkley v. Dowds (2007) 152 Cal. App. 4th 518, 530-532, 61 Cal. Rptr. 3d 304]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesMedical ExpensesTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesFinancial ContributionsTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesPain & SufferingTortsWrongful Death & Survival ActionsRemediesPunitive DamagesTortsWrongful Death & Survival ActionsSurvival Actions

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15-181 California Forms of Pleading and Practice--Annotated § 181.46

§ 181.46 Recovery of Damages Against Deceased Defendant

[1] Availability

In an action brought or continued against a personal representative or the decedent's successor in interest under *Code Civ. Proc. §§ 377.40, 377.41*, all damages may be awarded that could have been recovered against the decedent if he or she had lived, except punitive damages [*Code Civ. Proc. § 377.42*]. In addition, in an action maintained by the parents or guardian of a minor child or ward for injuries sustained as a result of a decedent's wrongful act or neglect, thedamages recoverable against the personal representative or successor in interest of the person causing the injury are governed by the provisions of Prob. Code § 377.42 [*Code Civ. Proc. § 376(g)(2)*].

[2] Punitive Damages Not Recoverable

Ordinarily, recoverable damages in an action against a decedent's personal representative or successor in interest do not include damages recoverable under *Civ. Code § 3294* (punitive damages for oppression, fraud, or malice), or other punitive or exemplary damages [*Code Civ. Proc. § 377.42* (restating former *Prob. Code § 573(b)*)]. Thus, a claim for punitive damages against a deceased defendant based on a breach of fiduciary duty does not survive the defendant's death [*Bancroft-Whitney Co. v. Glen (1966) 64 Cal. 2d 327, 357, 49 Cal. Rptr. 825, 411 P.2d 921]* . However, the right to punitive damages is extinguished only if the defendant dies before judgment is entered. If the defendant dies before an appeal becomes final, the plaintiff may enforce a money judgment for punitive damages [*Whelan v. Rallo (1997) 52 Cal. App. 4th 989, 992, 996, 60 Cal. Rptr. 2d 876]* .

For further discussion and forms for use in bringing an action against an estate, see Ch. 454, *Probate: Claims Against the Estate* .

Legal Topics:

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

Estate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewTortsDamagesCompensatory DamagesGeneral OverviewTortsDamagesPunitive DamagesGeneral Overview

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[Reserved]

§§ 181.47[Reserved]

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§ 181.60 Governing Statutes

Joinder of wrongful death and survival actions arising out of the same wrongful act or neglect is governed by *Code Civ. Proc. § 377.62(a)*. Consolidation of these actions is governed by *Code Civ. Proc. § 377.62(b)*. The consolidation provisions of *Code Civ. Proc. § 377.62(b)* specifically apply to survival actions against a defendant convicted of a felony based on the same wrongful act [Civ. Code. § 3294(d)]. Consolidation of an action brought under the basic wrongful death provisions of *Code Civ. Proc. § 377.60*, and an action brought under the provisions of *Code Civ. Proc. § 376* regarding a surviving action for injuries to a minor child, is governed by *Code Civ. Proc. § 376(h)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePretrial MattersConsolidation of ActionsTortsWrongful Death & Survival ActionsGeneral OverviewTortsWrongful Death & Survival ActionsJoinder RequirementsTortsWrongful Death & Survival ActionsSurvival Actions

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§ 181.61 Joinder and Consolidation of Wrongful Death and Survival Actions

Any survival action brought by the personal representative or successor in interest of a decedent pursuant to *Code Civ. Proc. § 377.30* may be joined or consolidated for trial with any action for wrongful death arising out of the same wrongful act or neglect brought pursuant to *Code Civ. Proc. § 377.60* [*Code Civ. Proc. § 377.62*]. Joinder or consolidation is proper even though the actions are separate and distinct and the damages to be awarded mutually exclusive [*see Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 76, 38 Cal. Rptr. 490* (interpreting former *Code Civ. Proc. § 377(a)* (*now see Code Civ. Proc. § 377.62*))].

An action that may be brought by a parent or guardian based on an injury to aminor child under *Code Civ. Proc. § 376* may be consolidated for trial with a wrongful death action arising out of the same wrongful act or neglect [*Code Civ. Proc. § 376(h)*; *see Code Civ. Proc. § 376(f)* (death of child does not abate action for damages accruing before child's death)]. In a survival action pursuant to *Civ. Code § 3294(d)* for punitive damages against a defendant convicted of a felony based on the same wrongful act, the joinder and consolidation provisions of *Code Civ. Proc. § 377.62* apply to prevent multiple recoveries of punitive damages [*Civ. Code § 3294(d)*]. For discussion of procedure for consolidation of actions and applicable forms, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePretrial MattersConsolidation of ActionsTortsWrongful Death & Survival ActionsGeneral OverviewTortsWrongful Death & Survival ActionsJoinder RequirementsTortsWrongful Death & Survival ActionsSurvival Actions

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15-181 California Forms of Pleading and Practice--Annotated §§ 181.62-181.79

[Reserved]

§§ 181.62[Reserved]

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A. Wrongful Death Actions

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§ 181.80 State Statutes

Parent's vicarious liability for death caused by minor's willful misconduct. *Civ. Code § 1714.1(a)*

Punitive damages available for death resulting from homicide for which defendant was convicted of felony. *Civ. Code § 3294(d)*

Two years in which to bring action for death of one caused by the wrongful act or neglect of another. *Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)* (one-year period prior to 2003)

Tolling of statute of limitations if plaintiff below age of majority at time action accrues. *Code Civ. Proc. § 352*

Action for damages for injury to child or ward by parent or guardian. *Code Civ. Proc. § 376*

Wrongful death action as brought by decedent's surviving spouse, domestic partner, child, or grandchild, by other persons defined by statute, or by decedent's personal representative. *Code Civ. Proc. § 377.60*

Proper county in which to bring action for death from wrongful act or neglect. *Code Civ. Proc. § 395(a)*

Wrongful death actions against government entities as requiring timely filing of claim for damages with entity. *Gov. Code § 911.2*

Person who feloniously and intentionally kills decedent as prohibited from bringing wrongful death action or benefiting from an action brought by decedent's personal representative. *Prob. Code § 258*

Legal Topics:

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

TortsWrongful Death & Survival ActionsGeneral OverviewTortsWrongful Death & Survival ActionsDefensesStatutes of LimitationsTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesGeneral OverviewTortsWrongful Death & Survival ActionsRemediesPunitive DamagesTortsWrongful Death & Survival ActionsSurvival Actions

California Forms of Pleading and Practice--Annotated

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Chapter 181 DEATH AND SURVIVAL ACTIONS
PART III. RESEARCH GUIDE
A. Wrongful Death Actions

15-181 California Forms of Pleading and Practice--Annotated § 181.81

§ 181.81 Decisions

[1] Actions of Decedent

Decedent's assumption of risk as binding on wrongful death plaintiffs; assumption of all risks as authorizing otherwise wrongful behavior, and wrongful death action as not able to be predicated on authorized behavior. *Coates v. Newhall Land & Farming, Inc. (1987) 191 Cal. App. 3d 1, 8-9, 236 Cal. Rptr. 181*

[2] Amendment of Complaint

Amendment of complaint to name individual wrongful death plaintiffs as allowed in wrongful death action brought by administrator of decedent's estate. *Mayo v. White (1986) 178 Cal. App. 3d 1083, 1092, 224 Cal. Rptr. 373*

When amended complaint for wrongful death does not attempt to state new cause of action but merely attempts to add matters essential to make original cause of action complete, amendment, though made after expiration of period of limitations, as relating back to time action was commenced. *Mayo v. White (1986) 178 Cal. App. 3d 1083, 1092, 224 Cal. Rptr. 373*

[3] Award of Damages

[a] Amount Discretionary

Amount of damages to be awarded in particular case as discretionary with trier of fact and dependent on circumstances presented by evidence. *Dickinson v. Southern Pac. Co. (1916) 172 Cal. 727, 731, 158 P. 183* ; *Syah v. Johnson (1966) 247 Cal. App. 2d 534, 547, 55 Cal. Rptr. 741*

Amount awarded in wrongful death action as sufficient if it appears to bear reasonable relation to elements of loss entitled to be considered by jury, and amount fixed was within sound discretion of jury, and of trial court in determining

motion for new trial. *Fagerquist v. Western Sun Aviation, Inc. (1987) 191 Cal. App. 3d 709, 728, 236 Cal. Rptr. 633*

Judgment for damages for wrongful death having substantial support in evidence as not disturbed on appeal as excessive unless it clearly appears to reviewing court that judgment resulted from passion or prejudice on part of jury. *Fagerquist v. Western Sun Aviation, Inc. (1987) 191 Cal. App. 3d 709, 727, 236 Cal. Rptr. 633* (citing *Seffert v. Los Angeles Transit Lines (1961) 56 Cal. 2d 498, 506-507, 15 Cal. Rptr. 161, 364 P.2d 337* ; *Foerster v. Direito (1946) 75 Cal. App. 2d 323, 333, 170 P.2d 986*)

[b] Authority

Former *Code Civ. Proc. § 377* [*now see Code Civ. Proc. § 377.61*] as providing only statutory authority for award of damages in wrongful death action. *Carr v. Pacific Tel. Co. (1972) 26 Cal. App. 3d 537, 544, 103 Cal. Rptr. 120*

[c] Damages Limited to Pecuniary Loss

Damages as properly recoverable only for pecuniary loss suffered by wrongful death plaintiffs. *Krouse v. Graham (1977) 19 Cal. 3d 59, 67, 137 Cal. Rptr. 863, 562 P.2d 1022*

Loss to wrongful death plaintiffs caused by decedent's death as basis for recovery in wrongful death action. *Burk v. Arcata & Mad River R.R. Co. (1899) 125 Cal. 364, 368, 57 P. 1065*

Damages for lost value of (1) economic contributions, (2) personal service, advice, or training that would probably have been given, and (3) society, comfort, care, protection, and companionship as required to be monetarily quantified. *Fox v. Pacific Sw. Airlines (1982) 133 Cal. App. 3d 565, 569, 184 Cal. Rptr. 87*

Damages for wrongful death as required to be reduced to present value. *Fox v. Pacific Sw. Airlines (1982) 133 Cal. App. 3d 565, 569, 184 Cal. Rptr. 87*

Damages for wrongful death as not limited to compensation for losses with ascertainable economic value, but as including value of benefits plaintiffs could reasonably expect to receive from deceased if he or she had lived, including personal services, advice, and training plaintiffs would have received from deceased, and value of his or her society and companionship. *Allen v. Toledo (1980) 109 Cal. App. 3d 415, 423, 167 Cal. Rptr. 270*

[d] Detriment Suffered by Decedent Before Death Not Recoverable

Damages for pain and suffering of decedent are not recoverable by wrongful death plaintiff. *Parsons v. Easton (1921) 184 Cal. 764, 770, 195 P. 419*

[e] Distinct From Survival Damages

Recovery of punitive damages as barred in wrongful death actions. *Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 450, 131 Cal. Rptr. 14, 551 P.2d 334* ; *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 829, 174 Cal. Rptr. 348*

Cause of action under survival statute as separate and distinct from cause of action under former *Code Civ. Proc § 377* [*now see Code Civ. Proc. § 377.60* (plaintiffs as not permitted to amend wrongful death cause of action to seek punitive damages)]. *Parker v. Superior Court (1985) 175 Cal. App. 3d 1082, 1088, 223 Cal. Rptr. 292* ; *Grimshaw v. Ford*

Motor Co. (1981) 119 Cal. App. 3d 757, 831, 174 Cal. Rptr. 348

Plaintiffs barred from seeking punitive damages in wrongful death action as not denied equal protection, because avoidance of double punishment and double recovery is rational basis for distinction of wrongful death actions from survival actions. *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 835-836, 174 Cal. Rptr. 348*

Damages awarded in wrongful death action as in addition to recovery sought by decedent's estate pursuant to former *Prob. Code § 573* [*now see Code Civ. Proc. § 377.30*]. *Carr v. Pacific Tel. Co. (1972) 26 Cal. App. 3d 537, 545, 103 Cal. Rptr. 120*

[f] Emotional Distress Damages Not Allowed

Emotional distress damages as not recoverable in wrongful death action. *Westfield Ins. Co. v. DeSimone (1988) 201 Cal. App. 3d 598, 604, 247 Cal. Rptr. 291*

[g] Interest

Interest awarded in jury's discretion as proper, even when no oppression, malice, or fraud is found, under *Civ. Code § 3288* in wrongful death action as to damages attributable to ascertainable economic value such as loss of household services or earning capacity, as well as funeral and related expenses. *Canavin v. Pacific Sw. Airlines (1983) 148 Cal. App. 3d 512, 526-527, 196 Cal. Rptr. 82* (rejecting contrary conclusion of *Fox v. Pacific Sw. Airlines (1982) 133 Cal. App. 3d 565, 573, 184 Cal. Rptr. 87*)

Absent oppression, fraud, or malice, prejudgment interest pursuant to *Civ. Code § 3288* as generally not awarded in wrongful death action. *Fox v. Pacific Sw. Airlines (1982) 133 Cal. App. 3d 565, 573, 184 Cal. Rptr. 87*

[h] No Recovery Without Loss

Wrongful death plaintiff as not entitled to recover damages in absence of proof of pecuniary damage. *Helling v. Lew (1972) 28 Cal. App. 3d 434, 437, 104 Cal. Rptr. 789*

Jury as properly failing to award damages to father for wrongful death of child when it concluded that father suffered no pecuniary loss through child's death. *Fields v. Riley (1969) 1 Cal. App. 3d 308, 314, 81 Cal. Rptr. 671*

[4] Defenses

Facts that establish justifiable homicide under Penal Code [*see Penal Code §§ 196, 197*] as constituting privileged conduct, and defense to civil liability for wrongful death. *Gilmore v. Superior Court (1990) 230 Cal. App. 3d 416, 422, 281 Cal. Rptr. 343*

[5] Distribution of Damages

[a] Determination

Respective rights of wrongful death plaintiffs in award of damages as determined by court in appropriate proceeding. *Rose v. San Diego Elec. Ry. Co. (1933) 133 Cal. App. 646, 651, 24 P.2d 838*

Respective rights of wrongful death plaintiffs in award of damages as determined by means of special interrogatories to jurors inquiring into how jury arrived at total amount of damages. *Bowen v. Kizirian (1930) 105 Cal. App. 286, 289, 287 P. 570*

[b] Loss to Each Wrongful Death Plaintiff

Trial court as not erring in apportioning compromise award as provided by laws of succession when trial judge had heard evidence bearing on relative damage to each plaintiffs. *Hernandez v. Fujioka (1974) 40 Cal. App. 3d 294, 301, 114 Cal. Rptr. 844*

Each wrongful death plaintiff as required to prove his or her own damages. *Helling v. Lew (1972) 28 Cal. App. 3d 434, 437, 104 Cal. Rptr. 789*

Each wrongful death plaintiff as entitled to share in award of damages in proportion that his or her personal damages bears to damages suffered by other plaintiffs. *Changaris v. Marvel (1964) 231 Cal. App. 2d 308, 313, 41 Cal. Rptr. 774*

Damages as not distributed as provided by laws of succession but shared on basis of pecuniary loss to each wrongful death plaintiff. *Bowen v. Kizirian (1930) 105 Cal. App. 286, 289, 287 P. 570*

[6] Elements of Pecuniary Loss

[a] Funeral Expenses as Recoverable

Funeral expenses as recoverable when plaintiffs are liable for such expenses. *Adams v. Southern Pac. Co. (1935) 4 Cal. 2d 731, 743, 53 P.2d 121*

Funeral expenses as not recoverable if double recovery would result. *Patterson v. Sharp (1970) 10 Cal. App. 3d 990, 1000, 89 Cal. Rptr. 396*

Funeral expenses as element of recovery in wrongful death actions. *Francis v. Sauve (1963) 222 Cal. App. 2d 102, 124, 34 Cal. Rptr. 754* ; *Wilson v. City & County of San Francisco (1951) 106 Cal. App. 2d 440, 445, 235 P.2d 81*

[b] Grief, Wounded Feelings, and Sorrow Not Basis for Recovery

Sorrow attendant on death of loved one as not basis for recovery of damages. *Krouse v. Graham (1977) 19 Cal. 3d 59, 69, 137 Cal. Rptr. 863, 562 P.2d 1022*

Trial court as not required to give pecuniary loss instruction to jury for sole purpose of excluding elements of grief, wounded feelings, and sorrow from jury's consideration. *Krouse v. Graham (1977) 19 Cal. 3d 59, 69, 137 Cal. Rptr. 863, 562 P.2d 1022*

[c] Medical Expenses as Not Recoverable

Medical expenses incurred for treatment of injured decedent as not recoverable in wrongful death action. *Follansbee v. Benzenberg (1954) 122 Cal. App. 2d 466, 474, 265 P.2d 183*

[d] Present Value of Future Contributions

Chief element of damages recoverable by surviving spouse in wrongful death action as present value of earnings deceased spouse would have contributed to family during period of his or her life expectancy. *Riley v. California Erectors, Inc. (1973) 36 Cal. App. 3d 29, 32, 111 Cal. Rptr. 459*

Chief element of damages recoverable by child of decedent in wrongful death action as present value of earnings deceased parent would have contributed to family during period of his or her life expectancy. *Syah v. Johnson (1966) 247 Cal. App. 2d 534, 547, 55 Cal. Rptr. 741*

Trier of fact as permitted to presume that decedent's earning capacity would have increased. *Foerster v. Direito (1946) 75 Cal. App. 2d 323, 333, 170 P.2d 986*

[e] Reasonably Expected Benefits

Sister as entitled to recover anticipated future contributions from deceased brother when she showed moral obligation undertaken by brother to provide for her support and her reasonable belief that he would continue to so provide. *Wilson v. City & County of San Francisco (1951) 106 Cal. App. 2d 440, 444, 235 P.2d 81*

Parents as entitled to recover anticipated future contributions from deceased minor son when they showed that son had helped them by contributing to maintenance of their home and to liquidation of mortgage on home, and that they had reasonable belief that son's contributions would continue for full period of expectancy of life common to son and parents. *Karwoski v. Grant (1938) 30 Cal. App. 2d 171, 180, 85 P.2d 944*

[f] Value of Personal Service, Advice, or Training

Recovery as allowed for spouse's household services, such as cooking, cleaning, and general management of family affairs, as well as for parental care and counseling of adolescent child. *Torres v. Los Angeles (1962) 58 Cal. 2d 35, 54, 22 Cal. Rptr. 866, 372 P.2d 906*

Personal service, advice, and training as part of plaintiff's reasonable expectations of benefits from deceased, and therefore proper basis of damages award. *Mize v. Atchison, Topeka & Santa Fe Ry. Co. (1975) 46 Cal. App. 3d 436, 453, 120 Cal. Rptr. 787*

[g] Value of Society and Companionship

Only pecuniary value of loss of decedent's society, comfort, and protection as proper element of damages. *Krouse v. Graham (1977) 19 Cal. 3d 59, 68, 137 Cal. Rptr. 863, 562 P.2d 1022*

Assessing loss of companionship or society in pecuniary terms in wrongful death action as similar to assessment in action for loss of consortium. *Priola v. Paulino (1977) 72 Cal. App. 3d 380, 387 n.1, 140 Cal. Rptr. 186*

[7] Nature of Cause of Action

[a] In General

Fetus as not "person" within meaning of former *Code Civ. Proc. § 377* [*now see Code Civ. Proc. § 377.60*] and, thus, no wrongful death action maintainable for death of unborn child. *Justus v. Atchison (1977) 19 Cal. 3d 564, 580, 139 Cal. Rptr. 97, 565 P.2d 122*

Purpose of wrongful death action as compensation of decedent's heirs for pecuniary loss suffered by them as result of decedent's death. *Estate of Riccomi (1921) 185 Cal. 458, 461, 197 P. 97* ; *Pease v. Beech Aircraft Corp. (1974) 38 Cal. App. 3d 450, 461, 113 Cal. Rptr. 416*

[b] Action Entirely Statutory

Cause of action for wrongful death as wholly statutory. *Steed v. Imperial Airlines (1974) 12 Cal. 3d 115, 119-120, 115 Cal. Rptr. 329, 524 P.2d 801* ; *Von Batsch v. American Dist. Tel. Co. (1985) 175 Cal. App. 3d 1111, 1119, 222 Cal. Rptr. 239* ; *Moxon v. County of Kern (1965) 233 Cal. App. 2d 393, 397, 43 Cal. Rptr. 481* ; *Jones v. Leonardt (1909) 10 Cal. App. 284, 286, 101 P. 811*

Wrongful death action as completely within jurisdiction of legislature to grant, withhold, or restrict as it sees fit. *Moxon v. County of Kern (1965) 233 Cal. App. 2d 393, 397, 43 Cal. Rptr. 481*

[c] Arising From Tortious Conduct

Former *Code Civ. Proc. § 377* [*now see Code Civ. Proc. § 377.60*] as authorizing wrongful death action only for tortious acts, and as contemplating liability based only on tortious acts. *Moxon v. County of Kern (1965) 233 Cal. App. 2d 393, 399-400, 43 Cal. Rptr. 481*

Commission of tortious act and resulting death causing pecuniary loss to potential wrongful death plaintiffs as necessary elements in cause of action for wrongful death. *Moxon v. County of Kern (1965) 233 Cal. App. 2d 393, 398-399, 43 Cal. Rptr. 481*

Cause of action for intentional infliction of mental distress as sufficient to sustain action for wrongful death, provided mental distress is alleged to be substantial factor in causing decedent to commit suicide. *Tate v. Canonica (1960) 180 Cal. App. 2d 898, 909, 5 Cal. Rptr. 28*

Cause of action in negligence as sufficient to sustain action for wrongful death provided complaint alleges what was done negligently. *Potter v. Richards (1955) 132 Cal. App. 2d 380, 384, 282 P.2d 113*

[d] Effect of Judgment in Decedent's Action

Cause of action for wrongful death as not necessarily precluded by decedent's settlement with defendant of personal-injury action. *Coe v. State Farm Mut. Auto. Ins. Co. (1977) 66 Cal. App. 3d 981, 992, 136 Cal. Rptr. 331* ; *Robison v. Leigh (1957) 153 Cal. App. 2d 730, 732, 733, 315 P.2d 42*

When plaintiff in wrongful death action was stranger to prior personal injury action brought by decedent, defense of estoppel as not available against plaintiff. *Kaiser Found. Hosp. v. Superior Court (1967) 254 Cal. App. 2d 327, 333-334, 62 Cal. Rptr. 330*

When issue of liability determined adversely to decedent and spouse in personal injury action due to contributory negligence of spouse, spouse estopped from bringing wrongful death action on same facts and circumstances. *Secrest v. Pacific Elec. Ry. Co. (1943) 60 Cal. App. 2d 746, 747, 751, 141 P.2d 747*

If decedent had established defendant's liability in personal-injury action, defendant's liability in wrongful death action based on same facts as established by collateral estoppel. *Secrest v. Pacific Elec. Ry. Co. (1943) 60 Cal. App. 2d 746,*

751, 141 P.2d 747

[e] New Cause of Action

Wrongful death plaintiffs as failing to render substantial compliance with statutes requiring claims for damages to be submitted to governmental entities [*see Gov. Code § 911.2*] when plaintiffs failed to file claim after death of decedent; claim based on decedent's injuries, filed before death, as not encompassing wrongful death action. *Lewis v. City & County of San Francisco (1971) 21 Cal. App. 3d 339, 341, 98 Cal. Rptr. 407*

Wrongful death action as new cause of action, not continuation or revival of old action or action that subsisted prior to decedent's death. *Norman v. Murphy (1954) 124 Cal. App. 2d 95, 98, 268 P.2d 178* ; *Secrest v. Pacific Elec. Ry. Co. (1943) 60 Cal. App. 2d 746, 747-748, 141 P.2d 747*

[f] Wrongful Death and Survival Actions

Former *Prob. Code § 573* [*now see Code Civ. Proc. §§ 377.20-377.43*] as not creating new cause of action but as preventing abatement of decedent's cause of action for enforcement by or against decedent's personal representative. *Grant v. McAuliffe (1953) 41 Cal. 2d 859, 864, 264 P.2d 944*

Joinder of wrongful death and survival actions as permitted, even though actions are separate and distinct and damages to be awarded are mutually exclusive. *Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 76, 38 Cal. Rptr. 490*

[8] Plaintiffs

[a] In General

Right to bring wrongful death action as limited to those persons described in statute. *Steed v. Imperial Airlines (1974) 12 Cal. 3d 115, 119, 115 Cal. Rptr. 329, 524 P.2d 801* (applying former *Code Civ. Proc. § 377* (*now see Code Civ. Proc. § 377.60*)); *Von Batsch v. American Dist. Tel. Co. (1985) 175 Cal. App. 3d 1111, 1119, 222 Cal. Rptr. 239* (same); *Knowlton v. Pacific Sw. Airlines (1980) 113 Cal. App. 3d 152, 154, 169 Cal. Rptr. 668* (same)

"Concubine" under Mexico law has no standing to file wrongful death action in California, because relationship, although conferring some legal rights, does not confer all rights and duties of marriage. *Rosales v. Battle (2003) 113 Cal. App. 4th 1178, 1184, 7 Cal. Rptr. 3d 13*

Plaintiff who made no attempt to comply with procedural requirements for lawful California marriage, despite having been married and divorced twice before, could not show objectively reasonable belief in validity of marriage to decedent and thus could not maintain wrongful death action. *Welch v. State of California (2000) 83 Cal. App. 4th 1374, 1379, 100 Cal. Rptr. 2d 430*

Surviving parent as required to establish that decedent had no issue in order to bring wrongful death action under former *Code Civ. Proc. § 377(b)(1)* [*now see Code Civ. Proc. § 377.60(a)*]. *Coats v. K-Mart Corp. (1989) 215 Cal. App. 3d 961, 969, 264 Cal. Rptr. 12* ; *see Prob. Code § 6402(a),(b)* (governing intestate succession)

Even though one-action rule required widow to pursue claim for wrongful death of husband with all other plaintiffs, rule as not precluding her from waiving claim and abandoning action, even though remaining plaintiffs continued to pursue claims to settlement, because plaintiff's claim was separate, personal right. *National Metal & Steel Corp. v. Colby Crane & Mfg. Co. (1988) 200 Cal. App. 3d 1111, 1116-1117, 246 Cal. Rptr. 435*

Man who was given legal custody of boy "pending adoption" by English court and who raised him for 17 years but never formally adopted him as not permissible plaintiff in wrongful death action for that boy's death; equitable adoption as not creating right in alleged "parent" to bring wrongful death action. *Reynolds v. City of Los Angeles (1986) 176 Cal. App. 3d 1044, 1050-1053, 222 Cal. Rptr. 517*

Summary judgment against mother of decedent as plaintiff in wrongful death action as error when based on claims of alleged natural child of decedent; triable issue of material fact regarding existence of that parent-child relationship as precluding summary judgment against mother. *Gabehart v. Simonsen (1986) 176 Cal. App. 3d 672, 676-678, 222 Cal. Rptr. 336*

Complaint for wrongful death as fatally defective if it fails to allege existence of heirs. *Carr v. Progressive Cas. Ins. Co. (1984) 152 Cal. App. 3d 881, 887 n.2, 199 Cal. Rptr. 835* (interpreting former *Code Civ. Proc. § 377*; *but see Code Civ. Proc. § 377.60(a)* (statute now requires existence not of heirs, but of entitled persons, including certain heirs))

Plaintiff who met all elements of definition of putative spouse under former *Code Civ. Proc. § 377(b)(2)* [*now see Code Civ. Proc. § 377.60(b)*] as not required to show she and decedent participated in marriage solemnization ceremony as prerequisite to wrongful death action; statute as requiring only that plaintiff had good faith belief in validity of marriage to decedent. *Wagner v. County of Imperial (1983) 145 Cal. App. 3d 980, 983, 193 Cal. Rptr. 820* ; *but see Centinela Hosp. Med. Ctr. v. Superior Court (1989) 215 Cal. App. 3d 971, 975-976, 263 Cal. Rptr. 672* (holding, as matter of law, that belief in validity of common-law marriage cannot be in good faith, in that common-law marriages were abolished in California in 1895)

Former *Code Civ. Proc. § 377* [*now see Code Civ. Proc. § 377.60*], which includes spouses and putative spouses within class of persons having standing to bring action for wrongful death, but excludes unmarried cohabitant, as bearing rational relationship to legitimate state purpose and as not denying equal protection to unmarried cohabitant. *Nieto v. City of Los Angeles (1982) 138 Cal. App. 3d 464, 469-472, 188 Cal. Rptr. 31*

Meretricious spouse as not proper plaintiff within meaning of former *Code Civ. Proc. § 377(b)(1)* [*now see Code Civ. Proc. § 377.60*]; fiance and cohabitant of decedent not proper party to death action instituted by decedent's heirs. *Garcia v. Douglas Aircraft Co. (1982) 133 Cal. App. 3d 890, 893-895, 184 Cal. Rptr. 390*

Meretricious spouse (unmarried cohabitant) as not permitted to bring action for wrongful death under former *Code Civ. Proc. § 377* [*now see Code Civ. Proc. § 377.60(b)*]. *Harrod v. Pacific Sw. Airlines, Inc. (1981) 118 Cal. App. 3d 155, 157, 173 Cal. Rptr. 68* ; *see Centinela Hosp. Med. Ct. v. Superior Court (1989) 215 Cal. App. 3d 971, 974-976, 263 Cal. Rptr. 672*

Mother of decedent as not "heir" under succession statutes [*see* former *Code Civ. Proc. § 377(b)(1)* (*now see Code Civ. Proc. § 377.60(a)*, permitting persons who would be entitled to decedent's property by intestate succession to bring action if decedent left neither surviving spouse, children, or issue of deceased child)], and therefore not entitled to sue for wrongful death of son, when son left surviving spouse and living children who would succeed to his estate under succession statutes before estate devolved to mother. *Evans v. Shanklin (1936) 16 Cal. App. 2d 358, 362, 60 P.2d 554*

[b] Characterization of Action With Respect to Plaintiffs

Action for wrongful death as considered joint in that all entitled persons should join in action or be joined, with single verdict rendered for all recoverable damages. *Cross v. Pacific Gas & Elec. Co. (1964) 60 Cal. 2d 690, 694, 36 Cal. Rptr. 321, 388 P.2d 353* ; *Perkins v. Robertson (1956) 140 Cal. App. 2d 536, 543, 295 P.2d 972*

Action for wrongful death as considered single in that only one action may be brought for wrongful death regardless of who institutes the suit, and indivisible in that there cannot be series of suits by plaintiffs against tortfeasor for their individual damages. *Cross v. Pacific Gas Elec. Co. (1964) 60 Cal. 2d 690, 694, 36 Cal. Rptr. 321* ; *Perkins v. Robertson (1956) 295 P.2d 972*

When tortfeasor is insured by liability policy containing "per person" liability limitation, plaintiffs in wrongful death action under former *Code Civ. Proc. § 377* [*now see Code Civ. Proc § 377.60*] as jointly entitled to that limit, constituting separate elements of damages arising from bodily injury to decedent; each plaintiff's claim as not constituting a separate bodily injury to him or her under policy. *Westfield Ins. Co. v. DeSimone (1988) 201 Cal. App. 3d 598, 601-602, 247 Cal. Rptr. 291* ; *see United Servs. Auto. Ass'n v. Lilly (1990) 217 Cal. App. 3d 1396, 1399-1404, 266 Cal. Rptr. 691*

One-action rule as not requiring plaintiffs to join all causes of action and all potential defendants in single action. *Helling v. Lew (1972) 28 Cal. App. 3d 434, 438, 104 Cal. Rptr. 789*

[c] Compulsory Joinder of Wrongful Death Plaintiffs

All entitled persons as required to be made parties to action in some capacity so that their rights can be determined. *Watkins v. Nutting (1941) 17 Cal. 2d 490, 498, 110 P.2d 384*

Plaintiff knowing of excluded potential plaintiffs, who fails to join them, as liable for resulting damage. *Watkins v. Nutting (1941) 17 Cal. 2d 490, 499, 110 P.2d 384* ; *Helling v. Lew (1972) 28 Cal. App. 3d 434, 437 n.1, 104 Cal. Rptr. 789*

Settlement of wrongful death action brought by some persons entitled to wrongful death cause of action, and subsequent dismissal of action with prejudice, as not preventing omitted plaintiff from bringing independent action if defendant knew of omitted plaintiff's existence, identity, and status, and failed to join omitted plaintiff as party to action. *Valdez v. Smith (1985) 166 Cal. App. 3d 723, 731, 212 Cal. Rptr. 638*

Potential plaintiff not made a party to wrongful death action in some capacity as thereafter precluded from bringing independent action against defendant. *Helling v. Lew (1972) 28 Cal. App. 3d 434, 437, 104 Cal. Rptr. 789*

When separate interests of excluded entitled persons not before court in wrongful death action, judgment as not barring claims of those persons. *Arizmendi v. System Leasing Corp. (1971) 15 Cal. App. 3d 730, 739, 93 Cal. Rptr. 411*

Potential plaintiff refusing to join as plaintiff as required to be made defendant in action with reason stated in complaint. *Rose v. San Diego Elec. Ry. Co. (1933) 133 Cal. App. 646, 652, 24 P.2d 838*

[d] Dependency on Decedent

Whether groceries and $50 a month provided mother by deceased son made her dependent on son, in light of her $400 per month income, as triable issue of fact not properly determinable on summary judgment motion. *Perry v. Medina (1987) 192 Cal. App. 3d 603, 608, 610, 237 Cal. Rptr. 532*

[e] Guardian ad Litem for Minor Plaintiffs

Interests of any minor plaintiffs in wrongful death action as required to be represented by guardian ad litem. *Redfield v. Oakland Consol. St. Ry. Co. (1895) 110 Cal. 277, 291, 42 P. 822*

Guardian ad litem for minor heirs as permitted to be party plaintiff in same action. *See Hernandez v. Fujioka (1974) 40 Cal. App. 3d 294, 297-303, 114 Cal. Rptr. 844*

[f] Personal Representative Acts Only on Behalf of Others

Personal representative plaintiff as acting solely in capacity of statutory trustee. *Estate of Riccomi (1921) 185 Cal. 458, 461, 197 P. 97*

Personal representative as having no interest in matter and as bringing wrongful death action only because authorized to do so by statute. *Jones v. Leonardt (1909) 10 Cal. App. 284, 286, 101 P. 811*

[g] Parents

In proving standing as proper plaintiff, uncontradicted testimony by nondependent parent of decedent that decedent had no children is sufficient to meet parent's burden of proving that fact. *Nelson v. County of Los Angeles (2003) 113 Cal. App. 4th 783, 788-790, 6 Cal. Rptr. 3d 650*

Legislation including dependent parents within class of persons who can sue for wrongful death as enacted to remedy situation in which parent, although not otherwise entitled to wrongful death cause of action, has depended on deceased child for support and maintenance. *Perry v. Medina (1987) 192 Cal. App. 3d 603, 609, 237 Cal. Rptr. 532* (construing amendment to former *Code Civ. Proc. § 377(b)(2)* (*now see Code Civ. Proc. § 377.60(b)*))

Financial, not emotional, dependency as test for parents who are not otherwise entitled to wrongful death cause of action to maintain action for wrongful death under former *Code Civ. Proc. § 377(b)(2)* [*now see Code Civ. Proc. 377.60(b)*]; however, once financial dependency is shown, parent as able to recover for loss of child's comfort and society and subsequent protections that child may afford to parent, provided these elements are considered in reasonable relation to primary loss. *Perry v. Medina (1987) 192 Cal. App. 3d 603, 608, 237 Cal. Rptr. 532*

Dependency as determined on case-by-case basis; parents as required to show that they were actually dependent, to some extent, on decedent for necessaries of life (such things as shelter, clothing, food, and medical treatment that one cannot and should not do without) and not merely for financial support that makes available to them some niceties of life they might not otherwise be able to afford. *Perry v. Medina (1987) 192 Cal. App. 3d 603, 608, 237 Cal. Rptr. 532*

[h] Waiver of Joinder Requirement

Requirement of joinder as procedural, not jurisdictional. *Cross v. Pacific Gas & Elec. Co. (1964) 60 Cal. 2d 690, 692, 36 Cal. Rptr. 321, 388 P.2d 353* ; *Helling v. Lew (1972) 28 Cal. App. 3d 434, 437, 104 Cal. Rptr. 789*

Joinder requirement as waived by defendant's failure to make objection that all persons entitled to wrongful death cause of action as result of decedent's death must be made parties. *Salmon v. Rathjens (1907) 152 Cal. 290, 295-296, 92 P. 733*

Defendant who voluntarily settled action brought by only some persons entitled to wrongful death cause of action, knowing of existence, identity, and status of omitted plaintiff whom defendant failed to join, as waiving right to insist on single wrongful death action. *Valdez v. Smith (1985) 166 Cal. App. 3d 723, 731, 212 Cal. Rptr. 638*

[9] Proof of Damages

In wrongful death action, life expectancy of deceased as question of fact for jury to decide considering all relevant factors including deceased's health, lifestyle, and occupation; life expectancy figures from mortality tables as admissible but not conclusive. *Allen v. Toledo (1980) 109 Cal. App. 3d 415, 424, 167 Cal. Rptr. 270*

Plaintiff in wrongful death action as having burden of proving damages with reasonable certainty even when presenting prima facie case of negligence against defendant. *Fields v. Riley (1969) 1 Cal. App. 3d 308, 313, 81 Cal. Rptr. 671*

Jury as properly considering remaining life expectancy of decedent as one of variables in arriving at award of damages. *Syah v. Johnson (1966) 247 Cal. App. 2d 534, 547, 55 Cal. Rptr. 741*

Trial court as permitted to take judicial notice of estimated life expectancy of person of decedent's age and sex as contained in almanac citing to United States Bureau of Census. *Foerster v. Direito (1946) 75 Cal. App. 2d 323, 333*

[10] Recovery of Lump Sum Damages

Recovery in wrongful death action as aggregate of various plaintiffs' separate interests in deceased's life. *Cross v. Pacific Gas & Elec. Co. (1964) 60 Cal. 2d 690, 692, 36 Cal. Rptr. 321, 388 P.2d 353* ; *see Helling v. Lew (1972) 28 Cal. App. 3d 434, 437, 104 Cal. Rptr. 789*

Lump sum damages as computed by adding together awards made to each of claimants in action. *Changaris v. Marvel (1964) 231 Cal. App. 2d 308, 312, 41 Cal. Rptr. 774*

[11] Statute of Limitations

Assuming, without so holding, that discovery rule may be applied when determining when statute of limitations begins to run in wrongful death action, action filed six years after death of plaintiffs' daughter was not timely; when applying discovery rule, date of accrual is date on which plaintiff comes at least to suspect, or have reason to suspect, factual basis for elements of cause of action. *Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 87 Cal. Rptr. 2d 453, 981 P.2d 79*

Wrongful death action required to be brought within one year by former *Code Civ. Proc. § 340(3)* [*now see Code Civ. Proc. § 335.1* (within two years, beginning in 2003)]. *Ruiz v. Santa Barbara Gas & Elec. Co. (1912) 164 Cal. 188, 190, 128 P. 330* ; *Moxon v. County of Kern (1965) 233 Cal. App. 2d 393, 397, 43 Cal. Rptr. 481*

Amendment of wrongful death complaint to state survival cause of action as not allowed when survival action barred by statute of limitation. *Parker v. Superior Court (1985) 175 Cal. App. 3d 1082, 1088, 223 Cal. Rptr. 292*

Amended complaint adding emotional distress causes of action to wrongful death causes of action as relating back to date of original complaint, and therefore as avoiding bar of statute of limitations, because amendment seeks recovery for same accident, i.e., electrocution of decedent, and for same injury, i.e., loss of plaintiff's son. *Rowland v. Superior Court (1985) 171 Cal. App. 3d 1214, 1218, 217 Cal. Rptr. 786*

Limitation period of *Code Civ. Proc. § 340.5* (actions for wrongful death brought against health care provider based on professional negligence) as applying to individual claim of plaintiff seeking to intervene in wrongful death action otherwise filed within limitations period; application for leave to intervene as required to be filed within limitations period if complaint in intervention asserts new cause of action. *Anderson v. Barton Mem'l Hosp. (1985) 166 Cal. App. 3d 678, 682, 685, 212 Cal. Rptr. 626* .

When both claim of individual plaintiff, and claim by all potential plaintiffs, have been filed and rejected, statute of limitations of *Gov. Code § 945.6(a)(1)* runs from denial of claim filed by all plaintiffs. *Norwood v. Southern Cal. Rapid Transit Dist. (1985) 164 Cal. App. 3d 741, 744, 211 Cal. Rptr. 6*

Amended complaint for wrongful death filed after statute of limitations has run as relating back to plaintiff's timely action for loss of consortium, when both actions based on same set of facts. *Lamont v. Wolfe (1983) 142 Cal. App. 3d 375, 377-379, 190 Cal. Rptr. 874*

Plaintiff's delayed wrongful death action against manufacturer based on negligence or products liability as not barred by statute of limitations where plaintiff was blamelessly ignorant of cause of action at time of decedent's death; one-year period in which to bring wrongful death suit as commencing on date on which plaintiff discovers or should have discovered cause of action. *Frederick v. Calbio Pharms. (1979) 89 Cal. App. 3d 49, 53, 54, 152 Cal. Rptr. 292*

Statute of limitations for wrongful death actions as calculated from date of death, rather than from date of injury. *Tann v. Western Pac. Ry. Co. (1919) 39 Cal. App. 377, 379-380, 178 P. 971*

[12] Statutory Remedies Exclusive

Former *Code Civ. Proc. § 377* and remedies contained therein [*now see Code Civ. Proc. §§ 377.60-377.62*] as completely occupying field of wrongful death to exclusion of any other action or remedy and as prevailing over *Pub. Util. Code § 2106* (authorizing award of exemplary damages to "persons affected" by public utility's willful acts or omissions); award of exemplary damages to parents of child killed by speeding train as improper. *Vander Lind v. Superior Court (1983) 146 Cal. App. 3d 358, 364-367, 194 Cal. Rptr. 209*

[13] Time at Which Loss Measured

Pecuniary loss to wrongful death plaintiffs as determined by conditions existing at time of death of deceased. *Riley v. California Erectors, Inc. (1973) 36 Cal. App. 3d 29, 33, 111 Cal. Rptr. 459*

Subsequent marriage of parent of deceased child as not proper basis for mitigating damages. *Riley v. California Erectors, Inc. (1973) 36 Cal. App. 3d 29, 33, 111 Cal. Rptr. 459*

Finder of fact as permitted to consider prospect of inflation or deflation in arriving at verdict in wrongful death action. *Tyson v. Romey (1948) 88 Cal. App. 2d 752, 758, 199 P.2d 721*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsWrongful Death & Survival ActionsGeneral OverviewTortsWrongful Death & Survival ActionsRemediesApportionmentTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesConsortiumTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesFinancial ContributionsTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesPain & Suffering

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15-181 California Forms of Pleading and Practice--Annotated §§ 181.82-181.99

[Reserved]

§§ 181.82[Reserved]

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§ 181.100 State Statutes

Statute of limitations for survival action as later of six months after plaintiff's death or the limitations period that would have applied if plaintiff had not died. *Code Civ. Proc. § 366.1*

Survival of cause of action and recovery of damages by or against personal representative of decedent. *Code Civ. Proc. §§ 377.20-377.43*

Cause of action for or against a person as surviving that person's death, subject to the applicable limitations period. *Code Civ. Proc. § 377.20*

Decedent's personal representative or successor in interest as authorized to commence cause of action that survived death of person entitled to bring it. *Code Civ. Proc. § 377.30*

Court as required to continue action that survives death of plaintiff on motion of decedent's personal representative or successor in interest. *Code Civ. Proc. § 377.31*

Decedent's successor in interest as required to file affidavit or declaration including certain information in order to commence or continue survival action. *Code Civ. Proc. § 377.32(a)*

Recovery of damages in survival action as limited to damages sustained before plaintiff's death, including punitive or exemplary damages, but not including damages for pain, suffering, or disfigurement. *Code Civ. Proc. § 377.34*

Cause of action that survives death of wrongdoer as permitted to be brought against decedent's personal representative or successor in interest. *Code Civ. Proc. § 377.40*

Court as required, on motion, to allow action that survives death of wrongdoer to be continued against decedent's personal representative or successor in interest. *Code Civ. Proc. § 377.41*

Recovery of damages in survival action brought or continued against decedent's personal representative or successor in interest as allowed to the extent allowed had decedent lived except for punitive or exemplary damages. *Code Civ. Proc. § 377.42*

Action to establish insured decedent's liability as authorized to be commenced or continued against decedent's estate under *Prob. Code §§ 550-555*. *Code Civ. Proc. § 377.50*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSubstitutionsDeath of PartyTortsWrongful Death & Survival ActionsDefensesStatutes of LimitationsTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesGeneral OverviewTortsWrongful Death & Survival ActionsRemediesPunitive DamagesTortsWrongful Death & Survival ActionsSurvival Actions

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§ 181.101 Decisions

[1] Action by or Against Personal Representative

Cause of action as maintained against executors and administrators of persons who would have been defendants if they had lived. *Hunt v. Authier (1946) 28 Cal. 2d 288, 292, 169 P.2d 913*

Wrongful death action against an estate, arising after the death of testator, as a claim required to be filed in a timely manner with estate pursuant to former Prob. Code § 707 (repealed effective July 1, 1988; *see Prob. Code §§ 9350-9399*) prior to maintenance of action. *Nunez v. Superior Court (1983) 143 Cal. App. 3d 476, 481, 191 Cal. Rptr. 893*

Cause of action as maintained by executors and administrators of persons who would have been plaintiffs if they had lived. *Follansbee v. Benzenberg (1954) 122 Cal. App. 2d 466, 473, 265 P.2d 183*

[2] Cause of Action Accruing Before Death

Cause of action as not surviving in favor of decedent if it arises simultaneously with decedent's death. *Stencel Aero Eng'g Corp. v. Superior Court (1976) 56 Cal. App. 3d 978, 987, 128 Cal. Rptr. 691* ; *Pease v. Beech Aircraft Corp. (1974) 38 Cal. App. 3d 450, 460, 113 Cal. Rptr. 416*

Cause of action as arising in favor of decedent only if it accrues during decedent's lifetime. *Pease v. Beech Aircraft Corp. (1974) 38 Cal. App. 3d 450, 459-460, 113 Cal. Rptr. 416*

[3] Nonsurvivable Causes of Action

[a] Invasion of Privacy

Cause of action for invasion of privacy does not survive death of person whose privacy was allegedly invaded; right to

privacy is personal right that cannot be asserted by anyone except person whose privacy is invaded. *Flynn v. Higham (1983) 149 Cal. App. 3d 677, 683, 197 Cal. Rptr. 145* ; *Hendrickson v. California Newspapers, Inc. (1975) 48 Cal. App. 3d 59, 62, 121 Cal. Rptr. 429*

[b] Libel and Slander

Defamation of deceased person does not give rise to cause of action for spouse or relatives who are not themselves defamed. *Flynn v. Higham (1983) 149 Cal. App. 3d 677, 680-681, 197 Cal. Rptr. 145*

[c] Marriage

General rule of survivability of causes of action under former *Prob. Code § 573* [*now see Code Civ. Proc. § 377.20*] does not apply to matrimonial causes of action. *Greene v. Williams (1970) 9 Cal. App. 3d 559, 563, 88 Cal. Rptr. 261* (annulment); *Poon v. Poon (1966) 244 Cal. App. 2d 746, 751, 53 Cal. Rptr. 365* (dissolution)

[4] Recovery of Damages for Deceased Plaintiff

[a] Availability

Damages recoverable under former *Prob. Code § 573* [*now see Code Civ. Proc. 377.34*] are awarded to decedent's "executor or administrator" only. *Stencel Aero Eng'g Corp. v. Superior Court (1976) 56 Cal. App. 3d 978, 985, 128 Cal. Rptr. 691*

Term "dies before judgment" in former *Prob. Code § 573(c)* [*now see Code Civ. Proc. § 377.34*] does not condition survivability of decedent's claim for damages on decedent's having commenced action before death. *Dunwoody v. Trapnell (1975) 47 Cal. App. 3d 367, 369-370, 120 Cal. Rptr. 859*

Term "before judgment" in former *Prob. Code § 573* [*now see Code Civ. Proc. 377.34*] refers to final judgment and applies when plaintiff dies after trial court grants motion for new trial on issue of damages. *Love v. Wolf (1967) 249 Cal. App. 2d 822, 840, 58 Cal. Rptr. 42*

[b] Loss of Earnings

Recoverable damages under former *Prob. Code § 573* [*now see Code Civ. Proc. § 377.34*] include temporary disability indemnity relating to decedent's loss of earnings while alive. *Patterson v. Sharp (1970) 10 Cal. App. 3d 990, 1000-1001, 89 Cal. Rptr. 396*

[c] Medical Expenses

Decedent's estate is permitted to recover cost of medical expenses and treatment paid for by other than decedent unless person paying expenses is under legal obligation to do so. *Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 635, 637, 7 Cal. Rptr. 377, 354 P.2d 1073*

Medical expenses recoverable in survival action brought under former *Prob. Code § 573* [*now see Code Civ. Proc. § 377.34*]. *Patterson v. Sharp (1970) 10 Cal. App. 3d 990, 1000-1001, 89 Cal. Rptr. 396*

[d] Pain and Suffering Damages Not Recoverable

Prohibition on recovery of damages for decedent's pain and suffering found in *Code Civ. Proc. § 377.34* applies to civil rights action brought in state court under *42 U.S.C. § 1983*, at least if plaintiff's death was unrelated to alleged civil rights violation. *County of Los Angeles v. Superior Court (1999) 21 Cal. 4th 292, 87 Cal. Rptr. 2d 441, 981 P.2d 68*

Recoverable damages do not including damages for pain and suffering. *Kellogg v. Asbestos Corp. Ltd. (1996) 41 Cal. App. 4th 1397, 1407, 49 Cal. Rptr. 2d 256* ; *Carr v. Pacific Tel. Co. (1972) 26 Cal. App. 3d 537, 545, 103 Cal. Rptr. 120* ; *Love v. Wolf (1967) 249 Cal. App. 2d 822, 840, 58 Cal. Rptr. 42*

[e] Punitive Damages

Administrator entitled to plead and prove punitive damages arising from decedent's loss of certain personal property shortly before death. *Stencel Aero Eng'g Corp. v. Superior Court (1976) 56 Cal. App. 3d 978, 987, 128 Cal. Rptr. 691*

[f] Wrongful Death Damages Additional

Damages awarded in wrongful death action are in addition to any damages awarded in favor of decedent's estate pursuant to former *Prob. Code § 573* [*now see Code Civ. Proc. § 377.34*]. *Carr v. Pacific Tel. Co. (1972) 26 Cal. App. 3d 537, 545, 103 Cal. Rptr. 120*

[5] Survivable Causes of Action

Action for money due as family allowance to widow does not survive death of widow when no order granting money issued before widow's death and, hence, there is no assignable right to money in widow. *Estate of Blair (1954) 42 Cal. 2d 728, 733, 269 P.2d 612*

Former *Prob. Code § 573* [*now see Code Civ. Proc. §§ 377.20 through 377.50*] as general survival statute. *Estate of Denton (1971) 17 Cal. App. 3d 1070, 1075, 95 Cal. Rptr. 347*

Because former *Prob. Code § 573* [*now see Code Civ. Proc. § 377.20*] is a comprehensive rule of survivability, classification of survivable and nonsurvivable causes of action is not generally required. *Poon v. Poon (1966) 244 Cal. App. 2d 746, 753, 53 Cal. Rptr. 365*

Action to recover property and to set aside fraudulent conveyance survived death of plaintiff even though cause of action arose and was pleaded in conjunction with nonsurviving cause of action for dissolution. *Poon v. Poon (1966) 244 Cal. App. 2d 746, 752, 754, 53 Cal. Rptr. 365*

Cause of action for wrongful death survives death of plaintiff bringing action. *Johnson v. Key Sys. Transit Lines (1962) 210 Cal. App. 2d 440, 442, 26 Cal. Rptr. 574*

[6] Wrongful Death and Survival Actions

Former *Prob. Code § 573* [*now see Code Civ. Proc. §§ 377.20 through 377.43*] as not creating new cause of action but as preventing abatement of decedent's cause of action for enforcement by or against decedent's personal representative. *Grant v. McAuliffe (1953) 41 Cal. 2d 859, 864, 264 P.2d 944*

Complete cause of action not required to exist at time of decedent's death in order for rights, which may later mature

into actionable claim, to survive under former *Prob. Code § 573* [*now see Code Civ. Proc. §§ 377.20-377.43*]. *Carr v. Progressive Cas. Ins. Co. (1984) 152 Cal. App. 3d 881, 888-891, 199 Cal. Rptr. 835*

Joinder of wrongful death and survival actions is permitted even when actions are separate and distinct and damages to be awarded are mutually exclusive. *Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 76, 38 Cal. Rptr. 490*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityAbatement on Death of PartyTortsWrongful Death & Survival ActionsGeneral OverviewTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesPain & SufferingTortsWrongful Death & Survival ActionsRemediesPunitive DamagesTortsWrongful Death & Survival ActionsSurvival Actions

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[Reserved]

§§ 181.102[Reserved]

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§ 181.120 State Statutes

Application of consolidation provisions of *Code Civ. Proc. § 377.62(b)* to preclude double recovery of punitive damages from defendant convicted of a felony based on wrongful act resulting in death. *Civ. Code § 3294(d)*

Permissive consolidation of basic wrongful death action with surviving action for injuries to a minor child. *Code Civ. Proc. § 376(h)*

Permissive joinder of wrongful death and survival actions arising out of same wrongful act or neglect. *Code Civ. Proc. § 377.62(a)*

Permissive consolidation of wrongful death and survival actions arising out of same wrongful act or neglect. *Code Civ. Proc. § 377.62(b)*

Provisions regarding consolidation of civil actions generally are set forth in *Code Civ. Proc. § 1048*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConsolidation of ActionsTortsWrongful Death & Survival ActionsGeneral OverviewTortsWrongful Death & Survival ActionsJoinder RequirementsTortsWrongful Death & Survival ActionsSurvival Actions

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§ 181.121 Decisions

Consolidation of wrongful death and survival actions as permitted even when actions are separate and distinct and damages to be awarded are mutually exclusive. *Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 76, 38 Cal. Rptr. 490* (interpreting former *Code Civ. Proc. § 377(a)* (*now see Code Civ. Proc. § 377.62*))

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConsolidation of ActionsTortsWrongful Death & Survival ActionsGeneral OverviewTortsWrongful Death & Survival ActionsSurvival Actions

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[Reserved]

§§ 181.122[Reserved]

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PART IV. FORMS
A. Wrongful Death Actions

15-181 California Forms of Pleading and Practice--Annotated § 181.140

§ 181.140 Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12; Cal. Rules of Ct., Rule 1.45(a)]--Complaint [Code Civ. Proc. § 425.10] for Wrongful Death Based on Negligence [Code Civ. Proc. § 377.60; Cal. Judicial Council Forms PLD-PI-001, PLD-PI-001(1), PLD-PI-001(2), MC-025]

[1] FORM Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12; Cal. Rules of Ct., Rule 1.45(a)]--Complaint [Code Civ. Proc. § 425.10] for Wrongful Death Based on Negligence [Code Civ. Proc. § 377.60; Cal. Judicial Council Forms PLD-PI-001, PLD-PI-001(1), PLD-PI-001(2), MC-025]

Click here to view image.

[2] Use of Form

This complaint may be used in any action for wrongful death under *Code Civ. Proc. § 377.60*. It consists of the Judicial Council complaint for personal injury, property damage, or wrongful death, to which a Judicial Council general negligence cause of action has been attached [*see Code Civ. Proc. § 425.12*; Cal. Judicial Council Forms PLD-PI-001, PLD-PI-001(2)]. These forms have been approved by the Judicial Council for optional use [*Cal. Rules of Ct., Rule 1.45(a)*], and must be accepted for filing by all courts [*Cal. Rules of Ct., Rule 1.35(a)*].

These forms areavailable in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge. For general information relating to the use of Judicial Council complaint forms, see Ch. 123, *Complaints and Cross Complaints* .

[3] Filling Out Wrongful Death Complaint

[a] In General

For a detailed explanation of filling out the Judicial Council form of complaint for personal injury, property damage, or wrongful death generally, see the Comments to that form in Ch. 380, *Negligence* . Information particularly applicable to filling out the complaint form in wrongful death actions is set out in these Comments. For a detailed discussion of

filling out the general negligence cause of action, see the Comments to that form of cause of action in Ch. 380, *Negligence*.

[b] Caption

In the heading of the complaint form, boxes are provided for designating the type of action being brought. In addition, counsel should designate the appropriate cause of action by checking the box marked "Motor Vehicle" in automobile actions [*see* Ch. 83, *Automobiles: Bringing the Action*], or by checking the box marked "Other" and designating the appropriate cause of action; for example, "Negligence" was inserted in the sample form. When using the complaint form in an action for wrongful death, counsel should check the box marked "Wrongful Death."

[c] Venue (Paragraph 8)

Counsel should check the appropriate box in **Paragraph 8** stating that the proper court for venue purposes has been selected. In an action for death from wrongful act or negligence, the proper county for trial of the action is either the county in which the injury causing death occurred, or the county in which the defendants or some of them reside at the commencement of the action [*Code Civ. Proc. § 395(a)*].

[d] Relationship to Deceased and Damages (Paragraph 12)

When preparing a wrongful death action, counsel should check the box for **Paragraph 12** and state the damages claimed for wrongful death and the relationships of plaintiff to the deceased. The information may be alleged either in the space allowed for **Paragraph 12** or on a separate sheet of paper labeled "Complaint--Attachment 12."

In a wrongful death action, damages may be given as are just under all the circumstances of the case, but an award may not include damages recoverable in a survival action under *Code Civ. Proc. § 377.34* [*Code Civ. Proc. § 377.61*; *see § 181.81[3][e]*]. Recovery for wrongful death is limited to pecuniary losses suffered by the plaintiffs, including loss of earnings, society, and companionship, as well as funeral expenses [*see § 181.81[3][c]*].

Persons who are entitled to bring a wrongful death action include the following [*see § 181.81[8]*]:

- The decedent's surviving spouse, domestic partner, children, and issue of deceased children [*Code Civ. Proc. § 377.60(a)*];

- If the decedent has no surviving issue, persons, including the surviving spouse or domestic partner, entitled to property of the decedent by intestate succession [*Code Civ. Proc. § 377.60(a)*; *see Prob. Code § 6400 et seq.* (governing acquisition of property of person who dies without disposing of it by will)];

- A putative spouse, children of the putative spouse, stepchildren, and parents, if they were dependent on the decedent [*Code Civ. Proc. § 377.60(b)*]; and

- A minor who resided in the decedent's household for the previous 180 days and who was dependent on the decedent for one-half or more of his or her support [*Code Civ. Proc. § 377.60(c)*].

The relationships to the deceased of persons who are plaintiffs or represented by a plaintiff must be listed in **Paragraph 12** or in Complaint--Attachment 12.

[e] Damages Suffered (Paragraph 11)

Paragraph 11 provides boxes for designating the damages being requested by plaintiff. Although it is included as a mandatory paragraph, **Paragraph 11** appears unnecessary in wrongful death actions because the damages are stated in

Paragraph 12. Thus, it appears that counsel may merely cross refer in **Paragraph 11** to the damage allegations contained in **Paragraph 12**.

[f] Causes of Action Attached (Paragraph 10)

Counsel must check the box or boxes in **Paragraph 10** stating the causes of action that have been attached to the complaint. The box for "General Negligence" is marked in the sample form. Other causes of action for which forms are available are Motor Vehicle [*see* Ch. 83, *Automobiles: Bringing the Action*], Intentional Tort [*see* Ch. 58, *Assault and Battery*], Premises Liability [*see* Ch. 380, *Negligence* , and Ch. 421, *Premises Liability*], and Products Liability [*see* Ch. 460, *Products Liability*].

The attachment states "Use a separate cause of action form for each cause of action." If there is more than one plaintiff in the action, each one has a separate cause of action. If this direction is strictly adhered to, a separate general negligence attachment for each plaintiff would have to be attached to the complaint. It is not clear if this is what is intended by the direction at the top of the attachment; although the complaint form refers to "plaintiff" (singular) in the caption, it seems intended for use by more than one plaintiff due to the wording of **Paragraph 3** of the General Complaint Form.

[g] Specification of Damages (Paragraph 14)

Paragraph 14 of the form is the prayer for damages, filled out to indicate that compensatory damages are being sought, in whatever amount is justified by proof. No dollar amount may be alleged in an action to recover damages for personal injury or wrongful death [*see Code Civ. Proc. § 425.10(b)*].

[4] Verification

Counsel may attach a verification of the complaint, if desired. Verification of the complaint is not required, but verification of the complaint requires the defendant to file a verified answer in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Filling Out General Negligence Cause of Action

The facts supporting a cause of action for negligence have been omitted from this example of a general negligence cause of action attached to a wrongful death complaint. For a completed example and a detailed explanation of filling out the Judicial Council form of general negligence cause of action, see that form, and the Comments thereto, in Ch. 380, *Negligence*.

[6] Trial Court Delay Reduction Considerations

Counsel should note that some counties throughout the state have implemented local court rules designed to achieve the objectives of the Trial Court Delay Reduction Act [*see Gov. Code § 68600 et seq.*]. For example, some of these rules require that counsel file with a complaint information that will facilitate discovery [*see, e.g.,* Alameda Co. Super. Ct. Rules, Rule 4.2(2)(b)]. Counsel should be aware of any similar rules in the county in which he or she plans to file the action.

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15-181 California Forms of Pleading and Practice--Annotated § 181.141

§ 181.141 Complaint for Damages for Wrongful Death [Code Civ. Proc. § 377.60]--General Form

[1] FORM Complaint for Damages for Wrongful Death [Code Civ. Proc. § 377.60]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*],	)	
[Individually, and	)	
_____(*name(s)*), (a) Minor(s),	)	
by _____(*name*), his/her/	)	
their Guardian ad Litem,]	)	NO. _____
[_____(*name*) as	)	COMPLAINT FOR
_____	)	DAMAGES FOR
(*specify capacity, e.g.,* Adminis-	)	WRONGFUL DEATH
trator of the Estate *or* Executor of	)	[Amount demanded _____
the Will) of _____ (*name*),	)	(exceeds *or* does not exceed) $10,000]
Deceased]	)	[LIMITED CIVIL CASE]
Plaintiff(s),	)	
vs.	)	
_____ [*name(s)*],	)	
Defendant(s).	)	
	)	

_____

Plaintiff(s), _____ [*name(s)*], allege(s):

1. _____ [*Allegations of capacity. See §§ 181.142 -181.145. If more than one paragraph is used, renumber succeeding paragraphs of this complaint accordingly.*]

[2. *If one or more plaintiffs are minors, allege capacity of guardian as litem, e.g.,* For the purpose of this action, _____ (*name*) was duly appointed guardian ad litem of plaintiff(s) _____ (*name(s)*) by order of the above-captioned court on _____ (*date*).]

[3. *If action is brought by decedent's personal representative on behalf of entitled plaintiffs, allege capacity of personal representative, e.g.,* On or about _____ (*date*), plaintiff was issued letters _____ (*specify, e.g.,* of administration of the estate *or* testamentary of the will) of _____ (*name*), deceased, by the Superior Court of California, County of _____. Plaintiff brings this action as the duly appointed, qualified, and acting personal representative of the estate of _____ (*name*) on behalf persons entitled to a cause of action for the wrongful death of _____ (*name*), the decedent, as follows: _____ (*specify names and qualifying relationship to decedent; see §§ 181.142 -181.145*).]

4. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California [*or allege capacity and other basis of venue as appropriate*].

[5. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1- _____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of said fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that the injuries herein alleged were proximately caused by said negligence.)]

6. _____ [*Allege specific facts showing tortious conduct of defendant that caused decedent's death.*]

7. _____ [*Allege decedent's death as a result of such tortious conduct, e.g.,* As a proximate result of the _____ (*specify, e.g.,* negligence) or defendant(s)(, and each of them), decedent died on _____ (*date*)].

8. _____ [*Describe relationship of decedent and wrongful death plaintiffs, e.g.,* Prior to the death of decedent, plaintiffs lived with decedent and were totally dependent on him/her for their support and maintenance. At all times prior to his/her death, decedent was a faithful and dutiful _____ (*specify, e.g.,* husband and father) to these plaintiffs.]

9. As a proximate result of the _____ [*specify, e.g.,* negligence] of defendant[s, and each of them,] and of the death of decedent, plaintiffs have sustained pecuniary loss resulting from the loss of the society, comfort, attention, services, and support of decedent.

10. As a further proximate result of the _____ [*specify, e.g.,* negligence] of defendant[s, and each of them], and of the death of decedent, _____ [*name*], _____ [*specify, e.g., name of plaintiff(s) or* decedent's personal representative], has incurred funeral and burial expenses.

WHEREFORE, plaintiff(s) pray(s) judgment as follows:

1. For general damages according to proof;

2. For funeral and burial expenses for _____ [*name*], _____ [*specify, e.g.,* plaintiff(s) *or* decedent's personal representative], according to proof;

3. For interest on all economic damages in the legal amount from _____ (*date of death of decedent*), to the date of judgment;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff(s)

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of complaint is for use by a decedent's personal representative or persons entitled to a wrongful death cause of action in bringing a wrongful death action arising from a defendant's tortious conduct.

[3] Allegations

This form of complaint alleges capacity (Paragraph 1) [*see §§ 181.142 -181.145*; *see also Code Civ. Proc. § 377.60*], the existence of a guardian ad litem if one or more of the plaintiffs is a minor (Paragraph 2) [*see Code Civ. Proc. § 372(a)*], the capacity of a personal representative who brings an action on behalf of entitled plaintiffs (Paragraph 3) [*Code Civ. Proc. § 377.60*, the basis of venue (Paragraph 4) [*Code Civ. Proc. § 395*], and any fictitious names (Paragraph 5).

It also alleges defendant's commission of a tortious act, either negligence or another wrongful act, and decedent's resulting death (Paragraphs 6, 7) [*Moxon v. County of Kern (1965) 233 Cal. App. 2d 393, 398-399, 43 Cal. Rptr. 481]* . In addition, this complaint alleges the relationship of decedent and plaintiffs (Paragraph 8) and the pecuniary loss suffered by the plaintiffs as a result of decedent's death (Paragraph 9) [*Moxon v. County of Kern (1965) 233 Cal. App. 2d 393, 398-399, 43 Cal. Rptr. 481]* . Although a complaint is not required to allege specifically the loss of decedent's society, comfort, protection, or services [*Bond v. United R.R. (1911) 159 Cal. 270, 286, 113 P. 366]* , and is not required to allege specifically a pecuniary loss on the part of a plaintiff occasioned by the decedent's death [*Ward v. Southern Pac. Co. (1919) 42 Cal. App. 182, 189-190, 183 P. 594]* , it must allege damages generally [*Bond v. United R.R. (1911) 159 Cal. 270, 286, 113 P. 366]* .

When applicable, the complaint may also allege the decedent's funeral or burial expenses as damages and that such expenses were reasonable (Paragraph 10) [*Adams v. Southern Pac. Co. (1935) 4 Cal. 2d 731, 743, 53 P.2d 121* ; *Francis v. Sauve (1963) 222 Cal. App. 2d 102, 124, 34 Cal. Rptr. 754* ; *see § 181.17[5]*].

The prayer seeks prejudgment interest under *Civ. Code § 3288*, awarded in the discretion of the jury, on economic damages such as loss of household services or earning capacity, as well as funeral and related expenses [*Canavin v.*

Pacific Sw. Airlines (1983) 148 Cal. App. 3d 512, 527, 196 Cal. Rptr. 82 ; *see § 181.17[6]*].

[4] Personal Representative of Decedent

A wrongful death action may be brought by the personal representative of a decedent on behalf of the persons who are entitled to a wrongful death cause of action under the statute [*Code Civ. Proc. § 377.60*]. The personal representative may be a general or special administrator [*Dominguez v. Galindo (1953) 122 Cal. App. 2d 76, 80-81, 264 P.2d 213* ; *see Prob. Code § 8540* (special administrator)], or the executor of a decedent's estate [*see Prob. Code § 8420*], an administrator with will annexed [*see Prob. Code § 8440*], or an administrator appointed due to intestacy [*see Prob. Code § 8460*]. Similarly, the personal representative may be a foreign administrator or executor [*Wallan v. Rankin (9th Cir. 1949) 173 F.2d 488, 493]* .

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Venue

In an action for death from a wrongful act or negligence, either the county where the injury causing death occurs or the county where the defendants, or some of them, reside at the commencement of the action is a proper county for the trial of the action [*Code Civ. Proc. § 395*].

[7] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[8] Trial Court Delay Reduction Considerations

Counsel should note that some counties throughout the state have implemented local court rules designed to achieve the objectives of the Trial Court Delay Reduction Act [*see Gov. Code § 68600 et seq.*]. For example, some of these rules require that counsel file with a complaint information that will facilitate discovery [*see, e.g.,* Alameda Co. Super. Ct. Rules, Rule 4.2(2)(b)]. Counsel should be aware of any similar rules in the county in which he or she plans to file the action.

[9] Cross References

For discussion and forms for use in wrongful death actions involving airplane accidents, see Ch. 16, *Airplanes and Airports*

For discussion and forms for use in wrongful death actions involving passengers and nonpassengers on buses and streetcars, see Ch. 106, *Buses and Streetcars*

For discussion, procedures, and forms relating to the appointment of guardians ad litem, see Ch. 291, *Guardians ad Litem*

For discussion, procedures, and forms relating to the appointment of executors, administrators, and administrators with will annexed, see Ch. 442, *Probate: Initiating Probate Administration*

[10] State Statutes

Appointment and powers of guardian ad litem. *Code Civ. Proc. § 372*

Persons entitled to assert wrongful death cause of action. *Code Civ. Proc. § 377.60*

Damages recoverable in wrongful death actions. *Code Civ. Proc. § 377.61*

Executors. *Prob. Code §§ 8420-8425*

Administrators with will annexed. *Prob. Code §§ 8440-8442*

Administrators. *Prob. Code §§ 8460-8468*

Special administrators. *Prob. Code §§ 8540-8547*

[11] Decisions

[a] Allegation of Capacity as Personal Representative

Allegation of official capacity as administrator as sufficient if it states that plaintiff is the duly appointed, qualified, and acting administrator of the decedent's estate. *Collins v. O'Laverty (1902) 136 Cal. 31, 33, 68 P. 327*

Allegation of official capacity as executor as sufficient if it states that letters testamentary issued to executor who is duly qualified and acting executor of decedent's will. *Vragnizan v. Savings Union Bank & Trust Co. (1916) 31 Cal. App. 709, 715*

[b] Allegation of Existence of Entitled Persons

Personal representative as required to plead that there are heirs of decedent in order to maintain wrongful death action. *Guidera v. Lapiana (1921) 52 Cal. App. 460, 462, 199 P. 557* (interpreting former *Code Civ. Proc. § 377* (*now see Code Civ. Proc. 377.60*))

[c] Allegations of Damages

Complaint as not required to allege specifically loss of society, comfort, protection, or services of decedent so long as

allowance is made therefor under general allegation of damages. *Bond v. United R.R. (1911) 159 Cal. 270, 286, 113 P. 366*

Allegation that funeral and burial expenses incurred as sufficient to support award of damages that included funeral expenses, even when bill not paid by plaintiffs in wrongful death action. *Koehl v. Carpenter (1920) 47 Cal. App. 642, 646, 191 P. 43*

Surviving spouse's allegation that he or she was damaged through defendant's negligence and death of spouse as sufficient even though he or she did not positively allege pecuniary loss. *Ward v. Southern Pac. Co. (1919) 42 Cal. App. 182, 189-190, 183 P. 594*

[d] Cause of Action

Elements of cause of action for wrongful death as (1) tort, (2) resulting death, and (3) damages consisting of pecuniary loss suffered by plaintiffs. *Moxon v. County of Kern (1965) 233 Cal. App. 2d 393, 398-399, 43 Cal. Rptr. 481* (interpreting former *Code Civ. Proc. § 377* (*now see Code Civ. Proc. § 377.60*); entitled persons include, but are not limited to, certain heirs)

[e] Guardian ad Litem

Guardian ad litem for minor heirs in wrongful death action as not affecting interest of minor heirs in judgment nor as vesting any interest in such judgment in himself or herself. *Redfield v. Oakland Consol. St. Ry. Co. (1895) 110 Cal. 277, 291, 42 P. 822*

Heir bringing wrongful death action only as guardian ad litem for other persons as estopped from thereafter bringing action in his or her own right. *Walker v. Etcheverry (1941) 42 Cal. App. 2d 472, 476, 109 P.2d 385*

[12] Text References

Witkin, California Procedure, Vol. 4, *Pleading*, §§ 537-576 (4th ed. 1997)

Witkin, Summary of California Law, Vol. 6, *Torts*, § 1385-1402 (10th ed. 2005)

[13] Cross References

For related forms, see *§§ 181.142 -181.145*

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15-181 California Forms of Pleading and Practice--Annotated § 181.142

§ 181.142 Allegation--Plaintiff Is Person Entitled to Assert Wrongful Death Cause of Action--Plaintiff Is Decedent's Surviving Spouse, Child, or Issue of Deceased Child [Code Civ. Proc. § 377.60(a)]

[1] FORM Allegation--Plaintiff Is Person Entitled to Assert Wrongful Death Cause of Action--Plaintiff Is Decedent's Surviving Spouse, Child, or Issue of Deceased Child [Code Civ. Proc. § 377.60(a)]

Plaintiff(s) _____ [*name(s)*] is/are the sole surviving [spouse, domestic partner, children, *and/or* issue of deceased children] of _____ [*name*], deceased (hereinafter referred to as "decedent"). His/Her/Their relationship(s) to decedent is/are as follows:

Name	Relationship to Decedent
_____	_____
_____	_____
_____	_____

[2] Use of Form

This form of allegation is for use in a complaint for wrongful death brought by the sole surviving spouse, domestic partner, children, or issue of deceased children of a decedent. If not all of the persons entitled to bring the action are plaintiffs, counsel should use the allegation in *see § 181.146* to join those potential plaintiffs as defendants in the action.

[3] State Statutes

Surviving spouse, domestic partner, children, and issue of deceased children entitled to bring wrongful death action. *Code Civ. Proc. § 377.60(a)* (eliminating requirement of former *Code Civ. Proc. § 377* that all plaintiffs must be

entitled to succeed to decedent's property under laws of intestate succession)

[4] Text References

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 1388, 1389, 1394, 1397 (10th ed. 2005)

[5] Cross References

For a related form, see *§ 181.141*

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15-181 California Forms of Pleading and Practice--Annotated § 181.143

§ 181.143 Allegation--Plaintiff Is Person Entitled to Assert Wrongful Death Cause of Action--Plaintiff Would Be Entitled to Property of Decedent by Intestate Succession, and There Exists No Surviving Spouse, Child, or Issue of Deceased Child of Decedent [Code Civ. Proc. § 377.60(a)]

[1] FORM Allegation--Plaintiff Is Person Entitled to Assert Wrongful Death Cause of Action--Plaintiff Would Be Entitled to Property of Decedent by Intestate Succession, and There Exists No Surviving Spouse, Child, or Issue of Deceased Child of Decedent [Code Civ. Proc. § 377.60(a)]

1. Plaintiff(s) would be entitled to the property of _____ [*name*], deceased (hereinafter referred to as "decedent"), under the laws of intestate succession. His/Her/Their relationship to decedent is/are as follows:

Name	Relationship to Decedent
_____	_____
_____	_____
_____	_____

Persons of this degree of kinship would be entitled to the property of the decedent by intestate succession pursuant to the provisions of _____ [*specify applicable Probate Code provision, e.g., Probate Code Section 6402(d)*].

2. The decedent has no surviving spouse, domestic partner, children, or issue of deceased children.

[2] Use of Form

This form of allegation is for use in a complaint for wrongful death brought by a person or persons who would be entitled to the property of the decedent by intestate succession. Those persons are entitled to assert a wrongful death action on that basis only if there is no surviving spouse, domestic partner, children, or issue of deceased children [*Code Civ. Proc. § 377.60(a)*].

[3] State Statutes

Persons who would be entitled to property of decedent by intestate successions as permitted to assert wrongful death cause of action if decedent has no surviving spouse, domestic partner, children, or issue of deceased children. *Code Civ. Proc. § 377.60(a)*

Succession to property. *Prob. Code §§ 6400-6414, 6450-6455*

[4] Text References

Witkin, Summary of California Law, Vol. 6, *Torts*, § 1388 (10th ed. 2005)

[5] Cross References

For a related form, see *§ 181.141*

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15-181 California Forms of Pleading and Practice--Annotated § 181.144

§ 181.144 Allegation--Plaintiff Is Person Entitled to Assert Wrongful Death Cause of Action--Plaintiff Is Putative Spouse, Child of Putative Spouse, Stepchild, or Parent of Decedent Who Was Dependent on Decedent [Code Civ. Proc. § 377.60(b)]

[1] FORM Allegation--Plaintiff Is Person Entitled to Assert Wrongful Death Cause of Action--Plaintiff Is Putative Spouse, Child of Putative Spouse, Stepchild, or Parent of Decedent Who Was Dependent on Decedent [Code Civ. Proc. § 377.60(b)]

[*EITHER*]

1. Plaintiff _____ [*name*] was the putative spouse of the decedent and was dependent on decedent for his/her support. _____ [*Specify factual basis for status as putative spouse, e.g.,* Plaintiff _____ (*name*) and decedent were married in a ceremony that took place on or about _____ (*date*), but the marriage was voidable because decedent was already married, although the spouse had not been present for over five years and plaintiff had no knowledge of this prior marriage. Plaintiff believed in good faith that the marriage with decedent was valid.]

[*OR*]

1. Plaintiff(s) _____ [*name(s)*] was/were the _____ [child *or* children] of _____ [*name*], decedent's putative spouse. _____ [*If decedent's putative spouse is not also a plaintiff to the action, allege facts supporting his/her status as putative spouse, as set forth in previous paragraph*.]

[*OR*]

1. Plaintiff(s) _____ [*name(s)*] was/were the _____ [stepchild *or* stepchildren] of the decedent.

[*OR*]

1. Plaintiff(s) _____ [*name(s)*] was/were the parent(s) of decedent.

[*CONTINUE*]

2. Plaintiff(s) _____ [*name(s)*] _____ was/were dependent on the decedent for the necessities of life.

[2] Use of Form

These allegations are for use in a complaint for wrongful death brought by a putative spouse, child of putative spouse, stepchild, or parent of decedent, who was dependent on the decedent [*see Code Civ. Proc. § 377.60(b)*].

[3] State Statutes

Persons entitled to bring wrongful death action if they were dependent on decedent. *Code Civ. Proc. § 377.60(b)*

[4] Decisions

To bring wrongful death action under former *Code Civ. Proc. § 377(b)(2)* [*now see Code Civ. Proc. § 377.60(b)*], parent as required to have been actually dependent on decedent to some extent for necessities of life at time decedent died. *Hazelwood v. Hazelwood (1976) 57 Cal. App. 3d 693, 698, 129 Cal. Rptr. 384*

[5] Text References

55 Cal. Jur. 2d, *Wrongful Death,* § 30

[6] Cross References

For related forms, see *§§ 181.141* and *181.142*

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15-181 California Forms of Pleading and Practice--Annotated § 181.145

§ 181.145 Allegation--Plaintiff Is Person Entitled to Assert Wrongful Death Cause of Action--Plaintiff Is Minor Who Resided With Decedent and Who Was Dependent on Decedent for One Half or More of Minor's Support [Code Civ. Proc. § 377.60(c)]

[1] FORM Allegation--Plaintiff Is Person Entitled to Assert Wrongful Death Cause of Action--Plaintiff Is Minor Who Resided With Decedent and Who Was Dependent on Decedent for One Half or More of Minor's Support [Code Civ. Proc. § 377.60(c)]

1. [*Guardian ad litem allegation. See § 181.141, Paragraph 2.*]

2. Plaintiff(s) _____ (*name(s) of minor(s)*) resided for the 180 days prior to the date decedent died as herein alleged in the household of decedent and was/were dependent on decedent for at least one-half or more of his/her/their support.

[2] Use of Form

This allegation is for use in a complaint for wrongful death brought by a minor who has resided for 180 days in the decedent's household and was dependent on decedent for one-half or more of his or her support [*Code Civ. Proc. § 377.60(c)*].

[3] State Statutes

Minors meeting dependency and residence requirements as entitled to bring wrongful death action. *Code Civ. Proc. § 377.60(c)*

Appointment and powers of guardian ad litem. *Code Civ. Proc. § 372*

[4] Text References

Witkin, California Procedure, Vol. 4, *Pleading*, §§ 61-73 (4th ed. 1997)

35 Cal. Jur. 3d, Pt. 2, *Guardianship and Conservatorship*, §§ 195-199

[5] Cross References

For related forms, see *§§ 181.141* and *181.142*

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15-181 California Forms of Pleading and Practice--Annotated § 181.146

§ 181.146 Allegation--Person Entitled to Assert Wrongful Death Action, Who Has Not Consented to Joining Action as Plaintiff, Should Be Joined as Defendant [Code Civ. Proc. § 382]

[1] FORM Allegation--Person Entitled to Assert Wrongful Death Action, Who Has Not Consented to Joining Action as Plaintiff, Should Be Joined as Defendant [Code Civ. Proc. § 382]

Although defendant(s) _____ [*name(s)*] is/are [a] person[s] entitled to bring this action pursuant to *Code of Civil Procedure Section 377.60*, he/she/they is/are named as defendant(s) in this action pursuant to *Code of Civil Procedure Section 382* because he/she/they is/are unwilling to be joined as plaintiff(s) in this action for the following reason(s): _____ [*specify, e.g.,* _____ (defendant's *or* defendants') consent to be joined was sought and refused].

[2] Use of Form

This allegation is for use in a complaint for wrongful death brought by plaintiffs entitled to bring an action for wrongful death of a decedent, and joining as defendants the qualified potential plaintiffs who do not consent to be joined as plaintiffs.

If the consent of any person who should have been joined as a plaintiff cannot be obtained, he or she should be made a defendant, and the reason therefor should be stated in the complaint [*see Code Civ. Proc. § 382*; *Salmon v. Rathjens (1907) 152 Cal. 290, 294-295, 92 P. 733* ; *Estate of Kuebler v. Superior Court (1978) 81 Cal. App. 3d 500, 503-504, 146 Cal. Rptr. 481]* . Although this requirement has been applied only to those heirs qualified under prior law [*see* former *Code Civ. Proc. § 377(b)* (*now see Code Civ. Proc. § 377.60*)] to succeed to the decedent's estate under the succession statutes [*Prob. Code § 6400 et seq.*], it would appear that any person entitled to bring a wrongful death action under *Code Civ. Proc. § 377.60* who is unwilling to join as a plaintiff in the action should be joined as a defendant [*see Watkins v. Nutting (1941) 17 Cal. 2d 490, 499, 110 P.2d 384* (action by some but not all of heirs not authorized by former *Code Civ. Proc. § 377* (*now see Code Civ. Proc. § 377.60*)).

[3] Text References

Witkin, California Procedure, Vol. 4, *Pleading*, § 158 (4th ed. 1997)

66 Cal. Jur. 3d, *Wrongful Death*, §§ 17-19

[4] Cross References

For related forms, see *§§ 181.141* and *181.142*

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15-181 California Forms of Pleading and Practice--Annotated § 181.147

§ 181.147 Demurrer [Code Civ. Proc. § 430.30(a)] to Complaint [Code Civ. Proc. § 425.10] for Wrongful Death [Code Civ. Proc. § 377.60]--Failure to Join All Entitled Persons as Parties [Code Civ. Proc. § 430.10(d)]

[1] FORM Demurrer [Code Civ. Proc. § 430.30(a)] to Complaint [Code Civ. Proc. § 425.10] for Wrongful Death [Code Civ. Proc. § 377.60]--Failure to Join All Entitled Persons as Parties [Code Civ. Proc. § 430.10(d)]

[*Caption. As on papers previously filed in action. See, e.g., § 181.141*.]

Defendant demurs to the complaint herein on the following ground:

There is a defect or misjoinder of parties in this action for wrongful death in that plaintiff has failed to name in his/her complaint all proper plaintiffs as parties to the action.

WHEREFORE, defendant prays that this demurrer be sustained [without leave to amend], that plaintiff take nothing by his/her complaint, that defendant have judgment for his/her costs, and for all other proper relief.
Dated: _____.

_____ [*signature*]
Attorney for Defendant

CAUTION:
A party filing a demurrer must serve and file therewith a notice of hearing and a memorandum of points and authorities in support of each ground thereof [*Cal. Rules of Ct., Rules 3.1103(c), 3.1113(a), 3.1320(c)*]. For discussion and forms regarding a supporting memorandum, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form of demurrer is for use by a defendant in a wrongful death action when the plaintiff has failed to name all of the persons entitled to a wrongful death cause of action as parties to the wrongful death action.

[3] Objection to Nonjoinder of Plaintiffs

If it appears on the face of the complaint that there are other potential plaintiffs who are not joined, the defendant may demur. If it does not appear on the face of the complaint that there are other potential plaintiffs, the nonjoinder of such persons can be alleged in the answer. If the defendant fails to object to the nonjoinder of potential plaintiffs by either demurrer or answer, the defendant is deemed to have waived the objection [*Knott v. McGilvray (1899) 124 Cal. 128, 129-130, 56 P. 789]* . When a timely objection is made by a defendant, the action for wrongful death must be abated or the other potential plaintiffs joined as parties [*Salmon v. Rathjens (1907) 152 Cal. 290, 295, 92 P. 733]* .

An alternative procedure to demurring to the complaint is to move directly for an order compelling the plaintiff to join the omitted plaintiff under *Code Civ. Proc. § 382*. For discussion and forms for use in compelling a plaintiff to join an omitted party, see Ch. 395, *Parties* .

[4] Cross References

For related forms, see *§§ 181.140 -181.146*

For discussions, procedures, and forms relating to demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

[5] State Statutes

Defect or misjoinder of parties as ground for objection to complaint. *Code Civ. Proc. § 430.10(d)*

Objection by demurrer when ground appears on face of complaint. *Code Civ. Proc. § 430.30(a)*

Time in which to demur to complaint. *Code Civ. Proc. § 430.40(a)*

Demurrer as taken to all or part of complaint. *Code Civ. Proc. § 430.50(a)*

Demurrer as required to specify ground for objection. *Code Civ. Proc. § 430.60*

Objections as waived by failures to object. *Code Civ. Proc. § 430.80*

[6] Decisions

When timely objection by defendant to nonjoinder of heirs, action for wrongful death as required to be abated or other heirs joined as parties. *Salmon v. Rathjens (1907) 152 Cal. 290, 295, 92 P. 733* (interpreting former *Code Civ. Proc. § 377* (*now see Code Civ. Proc. § 377.60*); entitled persons include, but are not limited to, certain heirs)

Defendant as permitted to demur when it appears on face of complaint for wrongful death that there are other heirs who are not joined. *Knott v. McGilvray (1899) 124 Cal. 128, 129, 56 P. 789* (interpreting former *Code Civ. Proc. § 377* (*now see Code Civ. Proc. § 377.60*); entitled persons include, but are not limited to, certain heirs)

[7] Text References

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 900-903, 921, 925, 932-935 (4th ed. 1997)

Witkin, Summary of California Law, Vol. 6, *Torts*, § 1385, 1386 (10th ed. 2005)

66 Cal. Jur. 3d, *Wrongful Death*, §§ 17, 18, 53

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15-181 California Forms of Pleading and Practice--Annotated § 181.148

§ 181.148 Demurrer [Code Civ. Proc. § 430.30(a)] to Complaint [Code Civ. Proc. § 425.10] for Wrongful Death [Code Civ. Proc. § 377.60]--Statute of Limitations [Code Civ. Proc. §§ 335.1, 430.10(e)]

[1] FORM Demurrer [Code Civ. Proc. § 430.30(a)] to Complaint [Code Civ. Proc. § 425.10] for Wrongful Death [Code Civ. Proc. § 377.60]--Statute of Limitations [Code Civ. Proc. §§ 335.1, 430.10(e)]

[*Caption. As on papers previously filed in action. See, e.g., § 181.141*.]

Defendant demurs to the complaint herein on the following ground:

The complaint does not state facts sufficient to constitute a cause of action for wrongful death in that a cause of action for wrongful death is barred by *Code of Civil Procedure Section 335.1* if it is not brought within two year.

WHEREFORE, defendant prays that this demurrer be sustained [without leave to amend], that plaintiff take nothing by his/her complaint, that defendant have judgment for his/her costs, and for all other proper relief.
Dated: _____.

_____ [*signature*]
Attorney for Defendant

CAUTION:
A party filing a demurrer must serve and file therewith a notice of hearing and a memorandum of points and authorities in support of each ground thereof [*Cal. Rules of Ct., Rules 3.1103(c), 3.1113(a), 3.1320(c)*]. For discussion and forms regarding a supporting memorandum, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form of demurrer is for use by a defendant in a wrongful death action when the adult plaintiff bringing the action has not brought it within one year of the decedent's death. For a discussion of when a wrongful death action must be brought, see *§ 181.23*.

[3] Cross References

For related forms, see *§§ 181.140 -181.147*

For discussion and forms relating to statutes of limitations, see Ch. 345, *Limitation of Actions*

[4] State Statutes

Two years in which to bring action for wrongful death. *Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)* (one-year period prior to 2003)

Failure to state facts sufficient to state cause of action as ground for objection to complaint. *Code Civ. Proc. § 430.10(e)*

[5] Decisions

Day of decedent's death as earliest day from which cause of action for wrongful death can run. *Vecchione v. Carlin (1980) 111 Cal. App. 3d 351, 357, 168 Cal. Rptr. 571*

Demurrer raising statute of limitations as bar to wrongful death action as erroneously sustained when complaint based on medical malpractice could have been amended to allege doctor's misrepresentations to plaintiff and plaintiff's reliance on misrepresentations. *Wohlgemuth v. Meyer (1956) 139 Cal. App. 2d 326, 330-331, 293 P.2d 816*

Statute of limitations on cause of action for wrongful death as running from date of death, not date of accident. *Walton v. Southern Pac. Co. (1935) 8 Cal. App. 2d 290, 304, 48 P.2d 108*

[6] Text References

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 906, 914-915 (4th ed. 1997)

Witkin, Summary of California Law, Vol. 6, *Torts*, § 1379 (10th ed. 2005)

66 Cal. Jur. 3d, *Wrongful Death*, §§ 2, 50

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15-181 California Forms of Pleading and Practice--Annotated § 181.149

§ 181.149 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Wrongful Death [Code Civ. Proc. § 377.60]--Action Estopped by Judgment in Prior Action Brought by Decedent [Code Civ. Proc. § 1908]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Wrongful Death [Code Civ. Proc. § 377.60]--Action Estopped by Judgment in Prior Action Brought by Decedent [Code Civ. Proc. § 1908]

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

1. On _____ [*date*], and prior to the filing of the complaint herein, Action No. _____ was commenced against _____ [*name*], the defendant herein, in the Superior Court of _____ County, California.

2. The prior action against the defendant herein was brought by _____ [*name*][, a plaintiff in the present action, and by _____ (*name*), the decedent herein]. The prior action was for _____ [*specify, e.g.,* damages] for _____ [*describe basis for prior action, e.g.,* personal injuries arising from the alleged negligence of the defendant herein in the operation of his/her motor vehicle].

3. In the prior action, a verdict was rendered in favor of _____ [*name*], the defendant herein, and judgment was entered in accordance with the verdict on _____ [*date*]. The judgment is final in that it has _____ [not been appealed from and the time for appeal has expired *or* been appealed and the judgment affirmed on _____ (*date*)]. The judgment has never been vacated or modified. A copy of the judgment is attached hereto as Exhibit A and made a part hereof.

4. The present action is one for the wrongful death of _____ [*name*][, who was a plaintiff in the prior action]. The liability of defendant in the present action is predicated on his/her alleged _____ [*specify, e.g.,* negligence] as adjudicated in the prior action.

5. By reason of the foregoing, plaintiff is estopped from asserting defendant's liability for _____ [*specify, e.g.,* negligence in the operation of his/her motor vehicle] and is estopped from maintaining this action.

[2] Use of Form

This affirmative defense may be used in a wrongful death action when the issue to be decided has been adjudicated in a prior action with judgment in favor of the defendant. It may be inserted in the Judicial Council form of answer for use in wrongful death actions [*see Code Civ. Proc. § 425.12*; for a sample form, *see* Ch. 380, *Negligence*]. For a discussion of the res judicata effect of a judgment in a prior personal injury brought by the decedent, see *§ 181.12[6]*. This form is based on the factual situation in *Secrest v. Pacific Elec. Ry. Co. (1943) 60 Cal. App. 2d 746, 141 P.2d 747* .

[3] Cross References

For related forms, see *§§ 181.140 -181.146*

For discussion and forms relating to actions estopped by prior adjudications on the same issues, see Ch. 491, *Res Judicata*

[4] State Statutes

Judgment as conclusive to issue adjudicated. *Code Civ. Proc. § 1908*

[5] Decisions

Adverse judgment in personal injury action brought by injured plaintiff prior to death as collaterally estopping heirs from any new lawsuit for wrongful death arising from same injury. *Evans v. Celotex Corp. (1987) 194 Cal. App. 3d 741, 744-747, 238 Cal. Rptr. 259*

Res judicata as not applicable against claims of minors who were natural children of decedent and not represented in successful suit by decedent's surviving spouse against tortfeasor for wrongful death because their separate interests and losses suffered by them were not before court in surviving spouse's action. *Arizmendi v. System Leasing Corp. (1971) 15 Cal. App. 3d 730, 739, 93 Cal. Rptr. 411*

Res judicata as not applicable against person bringing wrongful death action who was not a party, in privity with, or a successor to the interests of the person bringing an action for personal injuries on identical issues. *Kaiser Found. Hosp. v. Superior Court (1967) 254 Cal. App. 2d 327, 333-335, 62 Cal. Rptr. 330* ; *but see Aguilar v. Los Angeles County (9th Cir. 1985) 751 F.2d 1089, 1093* (suggesting that *Kaiser* no longer valid under California law)

When issues in action for wrongful death identical to issues determined adversely to plaintiffs in prior personal injury action, defense of estoppel by judgment as required to be sustained. *Secrest v. Pacific Elec. Ry. Co. (1943) 60 Cal. App. 2d 746, 751, 141 P.2d 747*

[6] Text References

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 1009, 1053-1054 (4th ed. 1997)

Witkin, Summary of California Law, Vol. 6, *Torts*, § 1402 (10th ed. 2004)

66 Cal. Jur. 3d, *Wrongful Death*, § 27

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§ 181.150 Complaint [Code Civ. Proc. § 425.10] in Interpleader [Code Civ. Proc. § 386]--Adverse Claims Made on Attorney by Wrongful Death Plaintiffs for Distribution of Damages Received in Settlement of Wrongful Death Claim or Action [Code Civ. Proc. § 377.60]

[1] FORM Complaint [Code Civ. Proc. § 425.10] in Interpleader [Code Civ. Proc. § 386]--Adverse Claims Made on Attorney by Wrongful Death Plaintiffs for Distribution of Damages Received in Settlement of Wrongful Death Claim or Action [Code Civ. Proc. § 377.60]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT IN INTERPLEADER
_____ [*names*],	)	[Amount demanded _____
Defendants.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, an attorney-at-law duly licensed to practice in California and acting in such representative capacity [for defendants, and each of them].

2. _____ [*Capacity and residence of defendants. See § 181.141, Paragraph 3.*]

3. At all times herein mentioned, plaintiff acted as the attorney for defendants _____ [*names*] in their _____ [claim *or* action] for the wrongful death of _____ [*name*], deceased

(hereinafter referred to as "decedent"). [On _____ (*date*), plaintiff commenced Action No. _____ against _____ (*name(s)*) in the Superior Court of _____ County, California.]

4. On or about _____ [*date*], defendants' _____ [claim *or* action] for wrongful death was settled and compromised for the total sum of $_____. Each and every defendant agreed that the sum was a just and fair settlement under all the circumstances of the case and no defendant attacked the claim of any other defendant.

5. On or about _____ [*date*], plaintiff received a negotiable draft in the sum of $_____ in full settlement and payment of defendants' _____ [claim *or* action]. Thereafter, plaintiff executed and delivered to _____ [*name of alleged tortfeasor*] in the wrongful death _____ [claim *or* action] a _____ [*specify, e.g.,* dismissal with prejudice and a release of all claims].

6. _____ [*State defendants' conflicting claims that have been made on plaintiff with respect to amount of settlement, e.g.,* Defendant(s) _____ (*name(s)*) assert(s) that defendant _____ (*name*) is not entitled to recover any part of the settlement proceeds in that _____ (*specify, e.g.,* he/she was neither validly married to the decedent and, thus, not a surviving spouse entitled to recover damages for the wrongful death of decedent nor dependent on decedent as provided in *Code of Civil Procedure Section 377.60(b)*)].

7. Plaintiff is indifferent with respect to which defendant or defendants plaintiff should pay the sum of money and claims no interest in such sum.

8. The respective claims made by defendants are adverse and conflicting and are made without plaintiff's collusion. Plaintiff is unable to decide the validity of _____ [any *or* either] of the claims and to whom he/she should pay the sum of money.

9. Plaintiff has deposited the sum of $_____, being the _____ [*describe, e.g.,* entire amount in dispute *or* amount of defendants' settlement less plaintiff's fees and costs] _____ [*specify, e.g.,* with the clerk of this court on the filing of this complaint *or* in plaintiff's trustee account pending the resolution of defendants' various claims by this court].

[10. Plaintiff has incurred attorney's fees and costs as a result of these proceedings.]

WHEREFORE, plaintiff prays judgment as follows:

1. That defendants be ordered to interplead and litigate their respective rights to the sum of money described above;

2. That plaintiff be discharged from any and all liability on account of the claims of each of the defendants;

[3. That plaintiff be awarded costs and reasonable attorney's fees to be determined by the court and to be paid out of the sum of money _____ (deposited with the court *or* in dispute);] and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 181.141.*]

[2] Use of Form

This form of complaint in interpleader is for use by an attorney when wrongful death plaintiffs dispute the distribution of funds obtained by the attorney in settlement of the plaintiffs' claim or action for the decedent's wrongful death.

[3] Cross References

For discussion and alternative forms relating to interpleader, see Ch. 314, *Interpleader*

[4] State Statutes

Complaint in interpleader. *Code Civ. Proc. § 386*

Deposit of funds in interpleader. *Code Civ. Proc. § 386.1*

Costs and attorney's fees in interpleader. *Code Civ. Proc. § 386.6*

[5] Decisions

Participation in settlement negotiations contributing to achievement of acquiesced-in settlement as not estopping wrongful death plaintiff from attacking claims of other plaintiffs to share in settlement when adverse claim of plaintiff was heard and determined at time compromise was approved. *Hazelwood v. Hazelwood (1976) 57 Cal. App. 3d 693, 698-699, 129 Cal. Rptr. 384*

Interpleader action by attorney against wrongful death plaintiffs in death of decedent to determine distribution of money paid by tortfeasor in compromise of wrongful death action. *Changaris v. Marvel (1964) 231 Cal. App. 2d 308, 310, 41 Cal. Rptr. 774*

In interpleader action for distribution of wrongful death settlement among wrongful death plaintiffs, trial court as properly receiving evidence of damage suffered by each party whose rights were compromised and as properly rejecting evidence as to wrongful death plaintiff's right to recover from tortfeasor. *Changaris v. Marvel (1964) 231 Cal. App. 2d 308, 313, 41 Cal. Rptr. 774*

[6] Text References

Witkin, California Procedure, Vol. 4, *Pleading*, §§ 341-365 (4th ed. 1997)

Witkin, Summary of California Law, Vol. 6, *Torts*, § 1380 (10th ed. 2005)

66 Cal. Jur. 3d, *Wrongful Death*, §§ 69, 70

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[Reserved]

§§ 181.151[Reserved]

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15-181 California Forms of Pleading and Practice--Annotated § 181.170

§ 181.170 Complaint for Damages [Civ. Code § 3333] for Surviving Cause of Action [Code Civ. Proc. § 377.30] by Personal Representative or Successor in Interest of Decedent--General Form

[1] FORM Complaint for Damages [Civ. Code § 3333] for Surviving Cause of Action [Code Civ. Proc. § 377.30] by Personal Representative or Successor in Interest of Decedent--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	
as _____ [*specify, e.g.,*	)	
Administrator of the Estate *or*	)	
Executor of the Will, Successor in	)	NO. _____
Interest] of _____ [*name*],	)	COMPLAINT FOR DAMAGES FOR
deceased,	)	_____ [*specify, e.g.,* PERSONAL
Plaintiff,	)	INJURIES]
vs.	)	[Amount demanded _____
_____ [*name(s)*],	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

[*EITHER*]

1. On or about _____ [*date*], plaintiff was issued letters _____ [*specify, e.g.,* of

administration of the estate *or* testamentary of the will] of _____ [*name*], deceased, by the Superior Court of California, County of _____.

2. Plaintiff is the personal representative of the estate of _____ [*name*].

[*OR*]

1. Plaintiff is a successor in interest of [*name*] and succeeds to this cause of action because there is no personal representative of the estate of _____ [*name*]. He/she brings this complaint in the capacity of successor in interest. Plaintiff has executed and filed the [affidavit *or* declaration under penalty of perjury] required by *Code of Civil Procedure Section 377.32*.

2. [*Venue allegation. See § 181.141, Paragraph 3.*]

[*CONTINUE*]

3. [*Fictitious name allegation, if desired. See § 181.141, Paragraph 4*].

4. _____ [*Allege specific facts showing defendant's acts or omissions giving rise to cause of action.*]

5. _____ [*Allege decedent's death as occurring after cause of action arose in his/her favor, e.g.,* On or about _____ (*date*), after the foregoing cause of action arose in his/her favor, _____ (*name*), who would have been the plaintiff in this action if he/she had lived.]

[6. *Allege loss or damage sustained by decedent before his/her death, e.g.,* As a proximate result of the _____ (*specify, e.g.,* negligence) of defendant(s, and each of them), decedent was required to and did employ physicians and surgeons to examine, treat, and care for him/her, and did incur medical and incidental expenses.]

[7. *Allege any property loss sustained prior to decedent's death, e.g.,* On or about _____ (*date*), and (immediately) prior to decedent's death, personal property of decedent valued at $_____ was destroyed as approximate result of defendant's _____ (*specify, e.g.,* negligent design and manufacture of the aircraft in which decedent was a passenger).]

[8. *Allege any additional loss or damage sustained by decedent before his or her death, e.g.,* At the time of the events described herein decedent was gainfully employed as _____ (*specify*). As a further proximate result of the _____ (*specify, e.g.,* negligence) of defendant(s, and each of them), decedent was prevented from attending to his/her usual occupation for the period of _____ (*specify, e.g.,* the date of his/her injury to the date of his/her death), all to his/her damage in loss of earnings.]

[9. *Allege basis for any punitive damages sought by plaintiff, e.g.,* In doing the acts herein alleged, defendant(s, and each of them,) acted with oppression, fraud, and malice, and plaintiff is entitled to punitive damages.]

WHEREFORE, plaintiff prays judgment as follows:

[1. For medical and related expenses according to proof;]

[2. For loss of earnings according to proof;]

[3. For damages to personal property (in the sum of $_____);]

[4. For punitive damages;]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 181.141.*]

[2] Use of Form

This form of complaint is for use by a decedent's personal representative or successor in interest in bringing a survival action. It is a general form of complaint, which may be adapted for use in any action that survives the death of a person who would have been a plaintiff if he or she had lived.

[3] Allegations

The complaint alleges:

- The basis of venue (First Alternative Paragraph 1, Second Alternative Paragraph 2) [*Code Civ. Proc. § 395*].

- The capacity in which the plaintiff brings the action (First Alternative Paragraph 2, Second Alternative Paragraph 1) [*Code Civ. Proc. § 377.30*].

- Any fictitious names (Paragraph 3).

- The elements of a cause of action not lost by reason of the death of a person (Paragraph 4) [*see Code Civ. Proc. § 377.20*].

- The decedent's death after the alleged cause of action arose (Paragraph 5) [*see Pease v. Beech Aircraft Corp. (1974) 38 Cal. App. 3d 450, 459-460, 113 Cal. Rptr. 416]* .

In addition the complaint alleges a right to damages sustained or incurred by the decedent prior to his or her death [*Code Civ. Proc. § 377.34*]. Damages recoverable in a survival action include:

- Medical expenses a decedent incurred (Paragraph 6) [*Follansbee v. Benzenberg (1954) 122 Cal. App. 2d 466, 474, 265 P.2d 183]* .

- Damages for loss of personal property (Paragraph 7) [*Stencel Aero Eng'g Corp. v. Superior Court (1976) 56 Cal. App. 3d 978, 986-987, 128 Cal. Rptr. 691]* .

- Loss of earnings the decedent sustained (Paragraph 8) [*see Patterson v. Sharp (1970) 10 Cal. App. 3d 990, 1000-1001, 89 Cal. Rptr. 396* (temporary disability indemnity)].

- Punitive damages that the decedent would have been entitled to recover if he or she had lived

(Paragraph 9) [*Code Civ. Proc. § 377.34*; *see Civ. Code § 3295(e)* (no claim for punitive damages may state an amount)].

It is essential that decedent have sustained some loss prior to his or her death for the action to survive and to sustain a recovery for punitive damages [*see Stencel Aero Eng'g Corp. v. Superior Court (1976) 56 Cal. App. 3d 978, 986-987*].

[4] Cross References

For discussion and forms relating to pleadings to abate an action, see Ch. 3, *Abatement of Actions*

For discussion, procedures, and forms for use in substituting personal representatives for decedents, see Ch. 21, *Amended and Supplemental Pleadings*

[5] State Statutes

Deceased person's cause of action passes to successor in interest; action is properly commenced by decedent's personal representative, or successor in interest if no personal representative. *Code Civ. Proc. § 377.30*

Successor in interest required to execute and file affidavit or declaration under penalty of perjury, containing specified information, in order to commence or continue surviving cause of action. *Code Civ. Proc. § 377.32*

Damages recoverable in survival action. *Code Civ. Proc. § 377.34*

[6] Decisions

[a] Recoverable Damages

[i] Medical and Related Expenses

In medical malpractice action brought by decedent's surviving spouse and administrator, damages include medical expenses and loss of earnings incurred by decedent prior to death. *See DeMeo v. St. Francis Hosp. (1974) 39 Cal. App. 3d 174, 176, 114 Cal. Rptr. 280* (action was barred, however, by statute of limitations)

Damages for decedent's pain and suffering not recoverable. *Carr v. Pacific Tel. Co. (1972) 26 Cal. App. 3d 537, 545, 103 Cal. Rptr. 120*

Decedent's cause of action for expenditures made by him or her for medical expenses survives death. *Follansbee v. Benzenberg (1954) 122 Cal. App. 2d 466, 474*

[ii] Punitive Damages

Former *Prob. Code § 573(c)* [*now see Code Civ. Proc. § 377.34*] permits personal representative to recover punitive damages on decedent's cause of action if cause of action arose in decedent's lifetime, survived decedent, and decedent could have recovered punitive damages on cause of action if he or she had lived. *Stencel Aero Eng'g Corp. v. Superior Court (1976) 56 Cal. App. 3d 978, 983, 128 Cal. Rptr. 691*

Although no cause of action survives in favor of decedent whose death occurs simultaneously with loss or damage to personal property, cause of action for such loss is survivable when pleaded as occurring prior to decedent's death.

Stencel Aero Eng'g Corp. v. Superior Court (1976) 56 Cal. App. 3d 978, 986-987, 128 Cal. Rptr. 691 (applying former *Prob Code § 573(d)* (*now see Code Civ. Proc. § 377.20(b)*))

Former *Prob. Code § 573(c)* [*now see Code Civ. Proc. § 377.20*] expressly provides for survival of decedent's punitive damage claims whether or not decedent filed suit on claim before his or her death. *Dunwoody v. Trapnell (1975) 47 Cal. App. 3d 367, 370, 120 Cal. Rptr. 859*

[b] Survival of Plaintiff's Action

Plaintiff's death does not abate any cause of action that may have rested in plaintiff. *Barnes v. Hartman (1966) 246 Cal. App. 2d 215, 219, 54 Cal. Rptr. 514* (applying former *Prob. Code § 573(a)* (*now see Code Civ. Proc. 377.20(a)*))

Cause of action survives in favor of executors and administrators of deceased persons who would have been plaintiffs if they had lived. *Follansbee v. Benzenberg (1954) 122 Cal. App. 2d 466, 473, 265 P.2d 183* (interpreting prior law to add that successor in interest may bring survival action if there is no personal representative; *now see Code Civ. Proc. § 377.30*)

[9] Text References

Witkin, California Procedure, Vol. 3, *Actions,* §§ 64-69 (4th ed. 1996)

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15-181 California Forms of Pleading and Practice--Annotated § 181.171

§ 181.171 Caption and Introduction of Complaint for Damages [Civ. Code § 3333] for Surviving Cause of Action [Code Civ. Proc. § 377.40] With Allegations of Capacity--Against Decedent's Personal Representative or Successor in Interest

[1] FORM Caption and Introduction of Complaint for Damages [Civ. Code § 3333] for Surviving Cause of Action [Code Civ. Proc. § 377.40] With Allegations of Capacity--Against Decedent's Personal Representative or Successor in Interest

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*],	)	
Plaintiff(s),	)	
vs.	)	
_____ [*name*]	)	
as	)	NO. _____
_____ [*specify capacity*,	)	COMPLAINT FOR DAMAGES FOR
e.g., Administrator of the Estate,	)	_____ [*specify*, *e.g.*, PERSONAL
Executor of the Will, *or* Successor	)	INJURIES]
in Interest] of _____ [*name*],	)	[Amount demanded _____
deceased,	)	(exceeds *or* does not exceed) $10,000]
Defendant	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff(s) allege(s):

[*EITHER*]

1. On or about _____ [*date*], defendant was issued letters _____ [*specify, e.g.,* of administration of the estate *or* testamentary of the will] of _____ [*name*], deceased, by the Superior Court of California, County of _____.

2. Defendant is the personal representative of the estate of _____.

[*OR*]

1. Defendant is a successor in interest of [*name*] and succeeds to property that is the subject of this cause of action. This complaint is brought against him/her in that capacity.

2. There is no personal representative of the estate of _____ [*name*].

[2] Use of Form

This form of caption, introduction, and allegations is for use in a complaint brought against a decedent's personal representative or successor in interest. If the decedent, who was originally named as the defendant in the action, has died after the action was commenced against him or her, the proper procedure to follow is to move to substitute the decedent's personal representative as the defendant in the action. For discussion and forms for use in substituting a personal representative for a deceased party, see Ch. 21, *Amended and Supplemental Pleadings*

[3] State Statutes

Cause of action against deceased person may be maintained against decedent's personal representative or, if there is no personal representative, against decedent's successor in interest. *Code Civ. Proc. § 377.40*

[4] Decisions

Cause of action survives against executors and administrators of deceased persons who would have been defendants if they had lived. *Hunt v. Authier (1946) 28 Cal. 2d 288, 292, 169 P.2d 913* (action brought under former Prob. Code § 574 against personal representative of tortfeasor's estate)

[5] Cross References

For related forms, see *§§ 181.141 -181.170*

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Chapter 181 DEATH AND SURVIVAL ACTIONS
PART IV. FORMS
B. Survival Actions

15-181 California Forms of Pleading and Practice--Annotated §§ 181.172-181.189

[Reserved]

§§ 181.172[Reserved]

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Chapter 181 DEATH AND SURVIVAL ACTIONS
PART IV. FORMS
C. Joinder and Consolidation Of Wrongful Death and Survival Actions

15-181 California Forms of Pleading and Practice--Annotated § 181.190

§ 181.190 Captions, Introduction, Format, and Prayer of Complaint [Code Civ. Proc. § 425.10] for Wrongful Death by Plaintiff [Code Civ. Proc. § 377.60] and Surviving Cause of Action [Code Civ. Proc. § 377.30]--By Decedent's Personal Representative or Successor in Interest

[1] FORM Captions, Introduction, Format, and Prayer of Complaint [Code Civ. Proc. § 425.10] for Wrongful Death by Plaintiff [Code Civ. Proc. § 377.60] and Surviving Cause of Action [Code Civ. Proc. § 377.30]--By Decedent's Personal Representative or Successor in Interest

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name of wrongful death plaintiff*] and _____ [*name*] as _____ [*specify capacity, e.g.,* Administrator of the Estate, Executor of the Will, *or* Successor in Interest] of _____ [*name*], deceased, Plaintiffs, vs. _____ [*name(s)*], Defendant(s).	)	NO. _____ COMPLAINT FOR DAMAGES FOR WRONGFUL DEATH AND FOR _____ [*specify, e.g.,* PERSONAL INJURIES] [Amount demanded _____ (exceeds *or* does not exceed) $10,000] [LIMITED CIVIL CASE]

CAUSE OF ACTION OF _____ [*name of wrongful death plaintiff*]
(Wrongful Death)

Plaintiff _____ [*name of wrongful death plaintiff*] alleges:

1. _____ [*Allegations establishing cause of action for wrongful death. See § 181.141.*]

CAUSE OF ACTION OF _____ [*name of personal representative or successor in interest*] (_____ (*specify, e.g.,* Personal Injuries))

Plaintiff as _____ [*specify capacity, e.g.,* Administrator of the Estate, Executor of the Will *or* successor in interest] of _____ [*name*], deceased, alleges:

2. _____ [*Allegations establishing cause of action surviving decedent's death. See § 181.170.*]

WHEREFORE, plaintiffs pray judgment as follows:

On the CAUSE OF ACTION of _____ [*name of wrongful death plaintiff*]:

1. For general damages according to proof;

2. For funeral and burial expenses according to proof;

On the CAUSE OF ACTION of _____ [*name of personal representative*]:

3. For medical and related expenses according to proof;

4. For loss of earnings according to proof;

5. For punitive damages;

On both CAUSES OF ACTION:

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[2] Use of Form

This form of caption, introduction, format, and prayer is for use in an action brought by a proper wrongful death plaintiff for damages for the wrongful death of the decedent, and by the decedent's personal representative or successor in interest for cause of action surviving in favor of the decedent.

[3] Cross References

For related forms, see *§§ 181.141 -181.170*

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15-181 California Forms of Pleading and Practice--Annotated § 181.191

§ 181.191 Notice of Motion for Order Consolidating Wrongful Death [Code Civ. Proc. § 377.60] and Survival [Code Civ. Proc. § 377.30] Actions Arising From Same Wrongful Act or Neglect [Code Civ. Proc. §§ 377.62(b), 1048]

[1] FORM Notice of Motion for Order Consolidating Wrongful Death [Code Civ. Proc. § 377.60] and Survival [Code Civ. Proc. § 377.30] Actions Arising From Same Wrongful Act or Neglect [Code Civ. Proc. §§ 377.62(b), 1048]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*],	)	NO. _____
Plaintiff(s),	)	NOTICE OF MOTION AND MOTION TO CON-
vs.	)	SOLIDATE [FOR TRIAL] WRONGFUL DEATH
_____ [*name(s)*],	)	ACTION AND SURVIVING CAUSE OF ACTION
Defendant(s).	)	IN _____ [*specify*]
	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Name of Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*specify, e.g.,* plaintiff] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____

of] this court, located at _____ [*address*], _____ [*city*], _____ [*moving party, e.g.*, defendant] will move, and hereby does, for an order consolidating the above-captioned action [for trial] with Action No. _____, brought under the provisions of *Code of Civil Procedure Section 377.62(b)* in the Superior Court of _____ County, California, by the [personal representative *or* successor in interest] of _____ [*name*], deceased. The motion will be made on the grounds that the above-captioned action and Action No. _____ are separate actions arising from the same [allegedly] wrongful act or neglect.

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the attached memorandum of points and authorities in support of motion, the papers and records on file, and such oral and documentary evidence as may be presented at the hearing on this motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

CAUTION:
A party filing a notice of motion must serve and file therewith a memorandum of points and authorities to be relied on [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form of notice is for use in a wrongful death action to move for the consolidation of that action with a surviving cause of action arising from the same wrongful act or neglect. For forms of a declaration in support of the motion and an order to consolidate, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

[3] Cross References

For alternative forms of notices for motions, see Ch. 372, *Motions and Orders*

[4] State Statutes

Permissive consolidation for trial of wrongful death and survival actions arising out of same wrongful act or neglect. *Code Civ. Proc. § 377.62(b)*

Notice of motion. *Code Civ. Proc. § 1005*

Consolidation of actions generally. *Code Civ. Proc. § 1048*.

[5] Decisions

Wrongful death and survival actions as permitted to be consolidated for trial. *Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 76, 38 Cal. Rptr. 490* (interpreting former *Prob. Code § 573* and former *Code Civ. Proc. § 377(a)* (*now see Code Civ. Proc. § 377.62(b)*))

No abuse of discretion when trial court directed consolidation, over objection of defendants, of cause of action for wrongful death brought by decedent's surviving spouse and sister as heirs at law and cause of action for personal injuries brought by decedent's surviving spouse that arose from same airplane crash and involved similar testimony. *Johnson v. Western Air Express Corp. (1941) 45 Cal. App. 2d 614, 621-622, 114 P.2d 688* (interpreting prior law; *now see Code Civ. Proc. § 377.62(b)*)

[6] Text References

Witkin, California Procedure, Vol. 4, *Pleading,* §§ 305, 306, 308 (4th ed. 1997)

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15-181 California Forms of Pleading and Practice--Annotated § 181.192

§ 181.192 Notice of Motion for Order to Consolidate Wrongful Death Action [Code Civ. Proc. § 377.60] and Surviving Action for Injuries to Minor Child [Code Civ. Proc. § 376]

[1] FORM Notice of Motion for Order to Consolidate Wrongful Death Action [Code Civ. Proc. § 377.60] and Surviving Action for Injuries to Minor Child [Code Civ. Proc. § 376]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name(s)*],	)	NO. _____
Plaintiff(s),	)	NOTICE OF MOTION AND MOTION TO CON-
vs.	)	SOLIDATE FOR TRIAL WRONGFUL DEATH
_____ [*name(s)*],	)	ACTION AND SURVIVING CAUSE OF ACTION
Defendant(s).	)	FOR INJURY TO _____ [CHILD
	)	*or* WARD]
	)	Date: _____
	)	Time: _____
	)	Dept: _____
		Name of Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*moving party, e.g.,* defendant] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____

of] this court, located at _____ [*address*], _____ [*city*], _____ [*moving party, e.g.*, plaintiff] will move, and hereby does, for an order consolidating the above-captioned action for trial with Action No. _____, brought under the provisions of *Code of Civil Procedure Section 377.62(b)* in the _____ Superior Court of _____ County, California, by the _____ [heirs *or* personal representative] of _____ [*name*], deceased. The motion will be made on the grounds that the above-captioned action and Action No. _____ are separate actions arising from the same [allegedly] wrongful act or neglect.

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the attached memorandum of points and authorities insupport of motion, the papers and records on file, and such oral and documentary evidence as may be presented at the hearing on this motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

CAUTION:
A memorandum of points and authorities must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form of notice is for use in an action for injuries to a child or ward to move for the consolidation of that action with a wrongful death action arising from the same wrongful act or neglect. For forms of a declaration in support of the motion and of an order to consolidate, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

[3] Cross References

For a related form, see *§ 181.191*

For discussion and forms relating to parents' recovery for injuries to their child, see Ch. 394, *Parent and Child*

[4] State Statutes

Surviving cause of action for injury to child or ward and wrongful death action arising out of same wrongful act or neglect as permitted to be consolidated for trial. *Code Civ. Proc. § 376(h)*

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Chapter 182 DECLARATORY RELIEF

15-182 California Forms of Pleading and Practice--Annotated 182.syn

§ 182.syn Synopsis to Chapter 182: DECLARATORY RELIEF

§ 182.01 Scope of Chapter

§ 182.02 Cross References

§§ 182.03through 182.09 [Reserved]

§ 182.10 Governing Statutes

§ 182.11 Nature of Action

§ 182.12 Purpose of Remedy

§ 182.13 When Action Under Code Civ. Proc. § 1060 Lies

[1] Declaration of Rights or Duties

[2] Examples

[3] To Test Validity of Administrative Regulation

[4] Exhaustion of Administrative Remedies

[5] To Test Validity of Precedent Decision of Unemployment Insurance Appeals Board

[6] Resolution of Unsettled Issue of California Law Following Federal Court Abstention

[7] Immunity of Public Entity or Officer as Defense

§ 182.14 Actual Controversy Required

[1] Justiciability

[2] Effect of Defendant's Inability to Grant Affirmative Relief

[3] Ripeness and Standing

[4] Past Wrongs or Speculative Dispute

§ 182.15 Seeking Other Relief in Same or Subsequent Action

§ 182.16 Jurisdiction

[1] Subject Matter

[2] Not Enlarged by Declaratory Relief Statute

[3] Response to Lack of Jurisdiction

§ 182.17 Sufficiency of Complaint

§ 182.18 Statute of Limitations

§ 182.19 Res Judicata

§ 182.20 Discretion of Court to Refuse Relief

[1] General Rule

[2] Specific Grounds for Refusing Relief

[3] Staying Action Pending Determination of Related Case

[4] Court's Action After Determining to Refuse Relief

[5] Statutes and Ordinances

[a] General Rule

[b] Penal Statutes or Ordinances

§ 182.21 Motion for Judgment on the Pleadings by Defendant

§ 182.22 Precedence of Action on Trial Calendar

§ 182.23 Jury Trial

§ 182.24 Judgment on the Merits

§ 182.25 Actions in Federal Courts

§§ 182.26-182.39 [Reserved]

§ 182.40 Related Matthew Bender Publications

§ 182.41 Federal Statutes and Rules

§ 182.42 State Statutes

[1] Declaratory Relief

[2] Related Actions and Proceedings

§ 182.43 Decisions

[1] Appeal

[2] Attorney's Fees

[3] Availability of Declaratory Relief on Denial of Certiorari

[4] Complaint

[5] Controversy

[6] Cross Complaint

[7] Defenses

[8] Demurrer

[9] Enforcement of Judgment

[10] Exhaustion of Administrative Remedies

[11] Failure to Seek Coercive Relief in Declaratory Action

[12] Improper Actions

[13] Injunctive Relief

[14] Judgment

[15] Jurisdiction

[16] Jury and Nonjury Trial

[17] Limitation of Actions

[18] Nature of Action

[19] Parties

[20] Past Wrongs Providing No Basis for Relief

[21] Power and Function of Court

[22] Proper Actions

[a] Constitution, Statutes, Ordinances, and Regulations

[b] Charges and Fees

[c] Contract

[d] Indemnity

[e] Insurance

[f] Legality of Proposed Plan

[g] Liability for Test

[h] Pension

[i] Real Property

[j] Resolution of Issue Following Abstention by Federal Court

[k] Review of Administrative Agency Policy

[23] Purpose and Function of Action

[24] Refusing Declaratory Relief

[25] Ripeness

[26] Standing to Sue

[27] Summary Judgment

[28] Use of Mandate

§ 182.44 Law Reviews

§ 182.45 Text References

§§ 182.46-182.59 [Reserved]

§ 182.60 Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--General Form

[1] FORM

[2] Use of Form

[3] Complaint

[a] Caption

[b] Essential Allegations

[i] Proper Matter for Declaratory Relief

[ii] Existence of Actual Controversy

[iii] Request for and Necessity of Declaration

[c] Legal Capacity

[d] Standing to Sue Distinguished

[e] Venue

[4] Failure to State Cause of Action

[5] Verification

[6] Costs and Attorneys' Fees

[7] Cross References

[8] Text References

§ 182.61 Allegations in Complaint for Declaration as to Validity of Written Instrument [Code Civ. Proc. § 1060]--Existence of Controversy Relating to Validity

[1] FORM

[2] Use of Form

§ 182.62 Allegations in Complaint for Declaration Construing Written Instrument [Code Civ. Proc. § 1060]--Existence of Controversy Relating to Interpretation

[1] FORM

[2] Use of Form

[3] Cross References

§ 182.63 Allegations in Complaint for Declaration as to Validity of Defendant's Claim Against Plaintiff [Code Civ. Proc. § 1060]--Existence of Controversy Relating to Creation of Rights in Defendant as Result of Transaction

[1] FORM

[2] Use of Form

[3] Cross References

§ 182.64 Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--To Determine Validity of Ordinance--By Individual Against Public Entity and Enforcement Officer

[1] FORM

[2] Use of Form

[3] Caption

[4] Cross References

§ 182.65 Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--To Declare State Statutes Unconstitutional--By City and Affected Public Officials Against District Attorney

[1] FORM

[2] Source of Form

[3] Use of Form

[4] Cross References

§ 182.66 Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--To Declare Special Legislative Act Constitutional--By City and City Department

[1] FORM

[2] Use of Form

[3] Cross References

§ 182.67 Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--To Determine Validity of Administrative Regulation [Gov. Code § 11350]

[1] FORM

[2] Use of Form

[3] Cross References

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Chapter 182 DECLARATORY RELIEF
PART I. SCOPE

15-182 California Forms of Pleading and Practice--Annotated § 182.01

§ 182.01 Scope of Chapter

This chapter discusses the judicial remedy of declaratory relief and contains forms for use in declaratory relief actions. The forms include:

- A general form of complaint [*see § 182.60*] which may be adapted for use in any declaratory relief action.
- Alternative allegations for use in such a complaint [*see §§ 182.61 -182.63*].
- Complaints for use in specific cases:
  - To determine the validity of an ordinance [*see § 182.64*].
  - To declare a statute unconstitutional [*see § 182.65*].
  - To declare a special legislative act constitutional [*see § 182.66*].
  - To determine the validity of an administrative regulation [*see § 182.67*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral Overview

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Chapter 182 DECLARATORY RELIEF
PART I. SCOPE

15-182 California Forms of Pleading and Practice--Annotated § 182.02

§ 182.02 Cross References

For forms of complaints for declaratory relief and judgments for use in specific cases see:

- Ch. 60, *Assignments*
- Ch. 61, *Associations and Clubs*
- Ch. 72, *Attorney Practice and Ethics*
- Ch. 88, *Automobiles: Automobile Insurance*
- Ch. 95, *Banks, Deposits, and Checks,* § 95.310 et seq.,
- Ch. 104, *Building Contracts,* § 104.10 et seq.,
- Ch. 122, *Community Property*
- Chs. 160, *Corporations: Capacity,* 166, *Corporations: Shareholders' Meetings and Votings,* and 167, *Corporations: Directors and Management*
- Ch. 189, *Deeds*
- Ch. 265, *Federal Courts: Jurisdiction and Removal,*;
- Ch. 270, *Fraudulent Conveyances,* § 270.70 et seq.;
- Ch. 278, *Gifts*
- Ch. 300, *Indemnity and Contribution,* § 300.30 et seq.;

- Ch. 307, *Insolvency*
- Ch. 308, *Insurance*, § 308.190 et seq.;
- Ch. 316, *Joint Tenancy and Tenancy in Common*
- Ch. 334, *Landlord and Tenant: Claims for Damages*
- Ch. 359, *Marriage*
- Ch. 401, *Partnerships: Actions Between General Partners and Partnership*
- Ch. 412, *Paternity*
- Ch. 470B, *Public Agency Meetings*
- Ch. 471B, *Licensing by Public Agencies*,
- Ch. 472B, *Review of Agency Rulemaking*
- Ch. 520, *Settlement and Release*
- Ch. 527, *Social Services*,
- Ch. 536, *Subrogation*
- Ch. 538, *Suretyship, Bonds, and Undertakings*, § 538.40 et seq.,
- Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts.*
- Ch. 569, *Vendor and Purchaser*
- Ch. 575, *Waters*, Pts. I(E), II
- Ch. 579, *Zoning and Planning*, § 579.30 et seq.

For forms of cross complaints for declaratory relief for use in specific cases, see:

- Ch. 244, *Elevators and Escalators*
- Ch. 270, *Fraudulent Conveyances*, § 270.30 et seq.,
- Ch. 300, *Indemnity and Contribution*, § 300.60 et seq.,
- Ch. 308, *Insurance*, § 308.10 et seq., and
- Ch. 460, *Products Liability*
- For a form of demand for jury trial, see Ch. 322, *Juries and Jury Selection*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral Overview

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[Reserved]

§§ 182.03[Reserved]

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Chapter 182 DECLARATORY RELIEF
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15-182 California Forms of Pleading and Practice--Annotated § 182.10

§ 182.10 Governing Statutes

Declaratory relief is authorized by *Code Civ. Proc. § 1060* and the action is governed by *Code Civ. Proc. §§ 1060-1062.5*. These provisions are found in Part Two of the Code of Civil Procedure entitled "Civil Actions" and, hence, a declaratory relief action under *Code Civ. Proc. § 1060* is a civil action [*see also Code Civ. Proc. § 30* (defining civil action, among other things, as an action prosecuted by one party against another for the declaration of a right); *Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719, 733, 146 P.2d 673]* , and not a special proceeding of a civil nature. Being a civil action, it is subject to the other applicable provisions of Part Two of the Code of Civil Procedure, that is, to the applicable provisions in *Code Civ. Proc. § 307 et seq.*

The action authorized by *Code Civ. Proc. § 1060* is the most common form of judicial proceeding for declaratory relief. But there are many other statutes authorizing declaratory relief for specific purposes. Examples include:

- A civil action to determine and declare the validity of a marriage [*Fam. Code § 309*].

- A civil action to declare the existence or nonexistence of a parent-child relationship [*Fam. Code § 7630 et seq.*].

- A civil action to determine adverse interests in real property arising out of any public improvement assessment or bond [*Code Civ. Proc. § 801.1 et seq.*].

- A civil action to determine the validity of various acts of public agencies [*Code Civ. Proc. § 860 et seq.*].

- A civil action to determine adverse claims for money or property on an alleged obligation [*Code Civ. Proc. § 1050*].

- A civil action to determine the validity of the election or appointment of a director of a corporation [*Corp. Code § 709*].

- A proceeding to judicially establish the fact, time, and place of birth, death, or marriage [*Health & Safety Code § 103450 et seq.*].

- A civil action by an individual claiming to be a nonresident of California for the purposes of the Personal Income Tax Law to determine the fact of residence [*Code Civ. Proc. § 1060.5* (requiring the action to be brought in the Superior Court of Sacramento County, Los Angeles County, or the City and County of San Francisco)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral Overview

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15-182 California Forms of Pleading and Practice--Annotated § 182.11

§ 182.11 Nature of Action

By statute, declaratory relief is a form of specific relief [*see Civ. Code § 3367(3)*], and does not involve strictly preventive [*see Civ. Code §§ 3274*, 3366, 3368, 3420-3423] or compensatory relief [*see Civ. Code §§ 3274, 3281-3360*].

Although the action is said to be equitable in nature [*see, e.g., Westerholm v. 20th Century Ins. Co. (1976) 58 Cal. App. 3d 628, 632*], it is neither strictly legal nor equitable but is sui generis in nature [*Transamerica Occidental Life Ins. Co. v. DiGregorio (9th Cir. 1987) 811 F.2d 1249, 1251* ; *Moss v. Moss (1942) 20 Cal. 2d 640, 643, 128 P.2d 526]* . That is, it may involve both legal and equitable issues.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral Overview

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15-182 California Forms of Pleading and Practice--Annotated § 182.12

§ 182.12 Purpose of Remedy

The purpose of declaratory relief is to eliminate uncertainties and controversies that may result in future litigation [*Marina Development Co. v. County of Los Angeles (1984) 155 Cal. App. 3d 435, 443, 202 Cal. Rptr. 377* ; *Fagerstedt v. Continental Ins. Co. (1968) 266 Cal. App. 2d 370, 372, 72 Cal. Rptr. 126]* and, hence, to quiet or stabilize an uncertain or disputed legal relations [*City of Tiburon v. Northwestern Pac. R.R. Co. (1970) 4 Cal. App. 3d 160, 173, 84 Cal. Rptr. 469]* by permitting a prompt adjudication of the respective rights and obligations of the parties [*Lortz v. Connell (1969) 273 Cal. App. 2d 286, 301, 78 Cal. Rptr. 6]* . It enables the parties to shape their future conduct so as to avoid the breach of an obligation [*see* *Babb v. Superior Court of Sonoma County (1971) 3 Cal. 3d 841, 848, 92 Cal. Rptr. 179, 479 P.2d 379* ; *Watson v. Sansone (1971) 19 Cal. App. 3d 1, 3, 96 Cal. Rptr. 387]* . While declaratory relief statutes necessarily deal with present rights, the present right contemplated is the right to have immediate judicial assurance that advantages will be enjoyed or liabilities escaped in the future [*see* *Eye Dog Foundation v. State Board of Guide Dogs for the Blind (1967) 67 Cal. 2d 536, 541 n.2, 63 Cal. Rptr. 21, 432 P.2d 717]* .

The declaratory procedure operates prospectively, and not merely for the redress of past wrongs. By serving to set controversies at rest, the remedy is to be used in the interest of preventive justice, to declare rights rather than to execute them [*County of San Diego v. State (2008) 164 Cal. App. 4th 580, 607-608, 79 Cal. Rptr. 3d 489* ("The portion of the judgment awarding the Counties the amount of their reimbursement claims *as declaratory relief* does not operate prospectively to declare future rights; it redresses the State's 'past wrongs' in failing to meet its constitutional obligations ... ." (emphasis in original)); *Travers v. Louden (1967) 254 Cal. App. 2d 926, 931, 62 Cal. Rptr. 654* ; *see also* *Babb v. Superior Court of Sonoma County (1971) 3 Cal. 3d 841, 848, 92 Cal. Rptr. 179, 479 P.2d 379* ; *Watson v. Sansone (1971) 19 Cal. App. 3d 1, 3, 96 Cal. Rptr. 387* ; *LePage v. Oakland (1970) 13 Cal. App. 3d 689, 692, 91 Cal. Rptr. 806]* .

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§ 182.13 When Action Under Code Civ. Proc. § 1060 Lies

[1] Declaration of Rights or Duties

Code Civ. Proc. § 1060 presently allows any person "interested under a written instrument, excluding a will or trust, or under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a watercourse" to seek a judicial declaration of his, her, or its rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract [*see § 182.60*].

The section uses the disjunctive, "or," between the phrases "written instrument" and "under a contract." Hence, there is no requirement that the contract referred to in the section be written, and an action to resolve a controversy relating to oral contracts and obligations is authorized [*Zimmer v. Gorelnik (1941) 42 Cal. App. 2d 440, 445, 109 P.2d 34]* .

Prior to amendments that became operative January 1, 1995, *Code Civ. Proc. § 1060* expressly permitted, among others, any person interested under "a deed, will, or other written instrument, or under a contract ... " to seek declaratory relief under the statute [*see* former *Code Civ. Proc. § 1060*]. As of January 1, 1995, the reference to "deed" has been omitted, but the statute permits a person interested under a "*written instrument*, excluding a will or trust, or under a contract. ... " to seek a declaration of rights [*see Code Civ. Proc. § 1060* (emphasis added)]. The intent of this amendment is unclear. Because deeds are a form of written instrument and are not specifically excluded from consideration, an action seeking a declaration of rights regarding a deed would still appear to be permitted under the statute, although this remains subject to further statutory or judicial clarification. For a complete discussion of the validity and interpretation of deeds, see Ch. 184, *Deeds* .

Although wills and trusts are now expressly excluded from the statutory scheme for a declaration of rights under *Code Civ. Proc. § 1060*, note that a determination of rights under these instruments can be obtained by various Probate Code proceedings [*see generally Prob. Code §§ 11700 et seq.* (petitions to determine heirship), 17200 et seq. (proceedings concerning trusts), 21320 et seq. (proceedings to determine if act constitutes violation of no contest clause of will)]. Interpretation of the terms of a "will, trust, deed, and any other instrument" is subject to the rules set forth in *Prob. Code § 21101 et seq.* "[u]nless the provision or context otherwise requires" [*Prob. Code § 21101*]. For a complete discussion

of these proceedings, see Chs. 444, *Probate: Will Contests* and 458, *Probate: Determination of Heirship* , and Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

[2] Examples

Under the express wording of *Code Civ. Proc. § 1060*, declaratory relief actions are proper to secure an adjudication of rights and duties between parties interested under a written instrument, excluding a will or trust, and a number of actions filed involve such matters. The section also authorizes declaratory relief to secure an adjudication of rights and duties between the parties under a contract, and there are many cases declaring the rights and duties of the parties to a written or oral contract, lease, insurance policy, and so forth [*see, e.g., §§ 182.61 -182.63*].

Declaratory relief actions are also proper under *Code Civ. Proc. § 1060* to secure an interpretation of city charter provisions [*see, e.g., LePage v. Oakland (1970) 13 Cal. App. 3d 689, 692-693, 91 Cal. Rptr. 806]* , statutes, and ordinances [*see, e.g., Walker v. County of Los Angeles (1961) 55 Cal. 2d 626, 637, 12 Cal. Rptr. 671, 361 P.2d 247* ; *Cristmat, Inc. v. County of Los Angeles (1971) 15 Cal. App. 3d 590, 594, 93 Cal. Rptr. 325* ; *see § 182.64*], and to test the constitutionality of initiative measures [*see, e.g., Weaver v. Jordan (1966) 64 Cal. 2d 235, 240, 49 Cal. Rptr. 537, 411 P.2d 289* , *cert. denied, 385 U.S. 844]* , statutes [*see, e.g., Nevada County v. MacMillen (1974) 11 Cal. 3d 662, 666, 114 Cal. Rptr. 345, 522 P.2d 1345* ; *see §§ 182.65, 182.66*], and ordinances [*see, e.g., Pennell v. City of San Jose (1986) 42 Cal. 3d 365, 367, 228 Cal. Rptr. 726, 721 P.2d 1111* , *aff'd, 485 U.S. 1* ; *State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 251, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *Subriar v. Bakersfield (1976) 59 Cal. App. 3d 175, 194-195, 130 Cal. Rptr. 853]* . The challenge may be to the constitutionality of a statute or ordinance on its face or as applied to a particular party or situation [*Pennell v. City of San Jose (1986) 42 Cal. 3d 365, 367, 228 Cal. Rptr. 726, 721 P.2d 1111* , *aff'd, 485 U.S. 1* ; *State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 251-252, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *Eye Dog Foundation v. State Board of Guide Dogs for the Blind (1967) 67 Cal. 2d 536, 541, 63 Cal. Rptr. 21, 432 P.2d 717]* .

A controversy regarding the status of one claiming membership in a corporation has also been held to be a proper subject of a declaratory judgment, and the nature of the controversy is essentially the same whether it is presented by the claimant or by the corporation [*Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719, 731, 146 P.2d 673]* . For additional examples of proper declaratory relief actions under *Code Civ. Proc. § 1060*, see the entries in *§ 182.43[22] below* .

[3] To Test Validity of Administrative Regulation

In addition to *Code Civ. Proc. § 1060*, *Gov. Code § 11350(a)*, relating to administrative regulations, expressly authorizes any "interested person" who desires to obtain a judicial declaration as to the validity of any "regulation" to bring an action for declaratory relief "in accordance with the Code of Civil Procedure," that is, in accordance with the provisions of *Code Civ. Proc. § 1060 et seq.* Also, *Gov. Code § 11350.3* authorizes any interested person who wishes to obtain a judicial declaration as to the validity of a regulation which the Office of Administrative Law has disapproved or ordered repealed pursuant to *Gov. Code § 11349.3*, *11349.6*, or *11349.7*, to bring an action for declaratory relief to do so in accordance with the provisions of the Code of Civil Procedure. For a form of allegation to determine the validity of an administrative regulation, see *§ 182.67*. For forms of complaint for declaratory relief under *Gov. Code § 11350* or *11350.3*, see Ch. 472B, *Review of Agency Rulemaking* .

As used in *Gov. Code §§ 11350* and *11350.3*, "regulation" means "every rule, regulation, order or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." The term does not mean or include legal rules of counsel issued by the Franchise Tax Board or State Board of Equalization, or any form prescribed by a state agency or any instructions relating to the use of that form, but this provision is not a limitation on any requirement that a regulation be adopted when one is needed to implement the law

under which the form is issued [*Gov. Code § 11342(g)*]. Moreover, case law has established that the term "regulation" does not include an administrative order, ruling, or decision reviewable by administrative mandate (*Code Civ. Proc. § 1094.5*), and declaratory relief may not be used to attack such order or decision [*see State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 249, 115 Cal. Rptr. 497, 524 P.2d 1281* (denial by California Coastal Zone Conservation Commission of permit to develop coastal properties); *Scott v. City of Indian Wells (1972) 6 Cal. 3d 541, 546, 99 Cal. Rptr. 745, 492 P.2d 1137* (order granting zoning variance but holding that complaint by adjoining landowner for declaratory relief to review order should have been regarded as petition for writ of mandate for purposes of ruling on general demurrer)].

Rules, regulations, orders, and general standards. relating only to the internal management of state agencies are also excepted from the definition of "regulation" [*Gov. Code § 11342(g)*]. However, this exception should be regarded narrowly so as to encompass only accounting techniques and the like [*Poschman v. Dumke (1973) 31 Cal. App. 3d 932, 943, 107 Cal. Rptr. 596* (overruled on other grounds in *Armistead v. State Personnel Board (1978) 22 Cal. 3d 198, 204, 149 Cal. Rptr. 1, 583 P.2d 744*)]. For further discussion of the adoption of administrative regulation and a form of complaint for declaratory and injunctive relief to test the validity of an administrative regulation, see Ch. 472B, *Review of Agency Rulemaking* .

[4] Exhaustion of Administrative Remedies

A party aggrieved by the application of a statute or ordinance must normally invoke and exhaust any administrative remedies provided before he or she may resort to the courts for relief [*Pan Pacific Properties, Inc. v. County of Santa Cruz (1978) 81 Cal. App. 3d 244, 249, 146 Cal. Rptr. 428* ; *but see Greener v. Workers' Comp. Appeals Bd. (1993) 6 Cal. 4th 1028, 1045-1046, 25 Cal. Rptr. 2d 539* (discussing use of writ of mandate from appellate court as alternative to administrative exhaustion in challenging constitutionality of statute)]. This rule, the exhaustion of administrative remedies doctrine, is jurisdictional [*McHugh v. County of Santa Cruz (1973) 33 Cal. App. 3d 533, 538-539, 109 Cal. Rptr. 149]* and applies to actions for declaratory relief [*see Honeywell, Inc. v. State Bd. of Equalization (1975) 48 Cal. App. 3d 907, 911-912, 122 Cal. Rptr. 243* ; *Pacific MotorTransp. Co. v. State Bd. of Equalization (1972) 28 Cal. App. 3d 230, 235, 104 Cal. Rptr. 558* ; *Walker v. Munro (1960) 178 Cal. App. 2d 67, 71, 2 Cal. Rptr. 737]* .

Thus, if the party chooses to violate a statute, ordinance, or regulation before seeking declaratory relief and a criminal action or administrative proceeding is pending as a result of the violation, declaratory relief normally will be denied on the ground that the validity of the proceeding, such as its constitutionality, can be adjudicated in the criminal action or administrative proceeding; that is, the criminal action or administrative proceeding constitutes another available remedy providing speedy and adequate relief and justifying a refusal to grant declaratory relief [*see Miller v. California (1970) 6 Cal. App. 3d 202, 204-205, 85 Cal. Rptr. 801* (criminal action pending); *Holden v. Arnebergh (1968) 265 Cal. App. 2d 87, 91-92, 71 Cal. Rptr. 401* ; *California Water & Tel. Co. v. Los Angeles County (1967) 253 Cal. App. 2d 16, 25, 61 Cal. Rptr. 618]* . On the other hand, if the ordinance or law provides the party with no mechanism for resolving his or her constitutional challenge to the entire structure under which the ordinance or law operates, then the exhaustion doctrine does not apply [*Andal v. City of Stockton (2006) 137 Cal. App. 4th 86, 91-94, 40 Cal. Rptr. 3d 34]* . For discussion of the conditions for the application of the rule and the various exceptions to its application, see Ch. 474, *Availability of Judicial Review of Agency Decisions* .

The exhaustion of administrative remedies doctrine does not require that a party exhaust all possible alternative remedies before seeking declaratory relief. For example, a party alleging that a county department of social services has a policy of ignoring statutory deadlines in juvenile dependency proceedings need not pursue habeas corpus relief before seeking declaratory relief [*Imperial County Dep't of Soc. Servs. v. J.E. (In re Claudia E.) (2008) 163 Cal. App. 4th 627, 635-636, 77 Cal. Rptr. 3d 722* (because alleged policy of department would result in recurring violations, declaratory relief was more efficient than case-by-case adjudication of habeas petitions)].

[5] To Test Validity of Precedent Decision of Unemployment Insurance Appeals Board

Any interested person or organization may bring an action for declaratory relief in superior court in accordance with the provisions of the Code of Civil Procedure to obtain a judicial declaration as to the validity of any precedent decision of the Unemployment Insurance Appeals Board issued under *Unemp. Ins. Code § 409* or *409.1* [*Unemp. Ins. Code § 409.2*]. For further discussion and forms for use in such a proceeding, see *Ch. 564, Unemployment and Disability Insurance, § 564.30* et seq.

[6] Resolution of Unsettled Issue of California Law Following Federal Court Abstention

Under the federal court practice of abstention, a federal court will defer consideration of an action properly before it to allow a state court to decide important issues of state law [*see Colorado River Water Cons. Dist. v. U.S. (1976) 424 U.S. 800, 814, 96 S. Ct. 1236, 47 L. Ed. 2d 483* ; *see also* Ch. 265, *Federal Courts: Jurisdiction and Removal*]. When a federal court has abstained from resolution of an issue in deference to the state court, a declaratory relief action seeking to resolve the issue is a proper exercise of the jurisdiction of the court. As long as the action is not collusive, or seeking to resolve a purely hypothetical dispute, justiciability will be found. This is especially true when the dispute is on a subject of great public importance, as in those situations any doubts as to justiciability will be resolved in favor of justiciability [*National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419, 432-433 n.14, 189 Cal. Rptr. 346, 658 P.2d 709]* .

[7] Immunity of Public Entity or Officer as Defense

The state or any public agency may be sued in declaratory relief only where governmental immunity does not exist or is waived [*see California Physicians' Serv. v. Garrison (1946) 28 Cal. 2d 790, 800, 172 P.2d 4* ; *Lord v. Garland (1946) 27 Cal. 2d 840, 852, 168 P.2d 5* ; *Grier v. Alameda-Contra Costa Transit Dist. (1976) 55 Cal. App. 3d 325, 333, 127 Cal. Rptr. 525]* . If governmental immunity does apply, it is a defense to the declaratory relief action [*see People v. Buellton Dev. Co. (1943) 58 Cal. App. 2d 178, 185, 136 P.2d 793]* . However, governmental immunity does not apply generally to declaratory relief actions brought against public officials to adjudge and declare the obligations of their office with respect to a given fact situation [*Los Angeles County v. State Dep't of Public Health (1958) 158 Cal. App. 2d 425, 444, 322 P.2d 968]* .

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§ 182.14 Actual Controversy Required

[1] Justiciability

An action for declaratory relief is authorized only when an actual controversy relating to the legal rights and duties of the respective parties exists [*see Code Civ. Proc. § 1060*]. Thus, it is improper for a court to issue a "declaratory" judgment that merely specifies the amount of money the defendant owes the plaintiff, when the parties do not dispute the amount owed [*County of San Diego v. State (2008) 164 Cal. App. 4th 580, 605-607, 79 Cal. Rptr. 3d 489* (plaintiff counties did not seek declaration of amount owed them by state, which was undisputed, but rather declaration that state was constitutionally and statutorily required to pay *promptly* and *fully*)].

The controversy must be of a character that admits of specific and conclusive relief by a judgment within the field of judicial determination, as distinguished from an advisory opinion on a particular or hypothetical state of facts. The fact that an issue raised in a declaratory relief action is of broad general interest does not justify the granting of such relief in the absence of a true justiciable controversy [*Zetterberg v. State Dept. of Public Health (1974) 43 Cal. App. 3d 657, 662, 118 Cal. Rptr. 100]* . A justiciable controversy must be definite, concrete, and touching the legal relations of parties having adverse interests [*LePage v. Oakland (1970) 13 Cal. App. 3d 689, 692, 91 Cal. Rptr. 806]* . The judgment must decree, not suggest, what the parties may or may not do [*BKHN, Inc. v. Department of Health Services (1992) 3 Cal. App. 4th 301, 308, 4 Cal. Rptr. 2d 188* ; *Sherwyn v. Department of Social Services (1985) 173 Cal. App. 3d 52, 58, 218 Cal. Rptr. 778]* .

There need not, however, have been any breach of the obligation in respect to which the declaration is sought [*Code Civ. Proc. § 1060*]. Thus, a court may issue declaratory relief to resolve an actual controversy over the parties' obligations under their contract, even if the declaratory judgment does not resolve any particular cause of action for a coercive remedy [*Supervalu, Inc. v. Wexford Underwriting Managers, Inc. (2009) 175 Cal. App. 4th 64, 81, 96 Cal. Rptr. 3d 316* (*Code Civ. Proc. § 1060* "permits a declaration of the parties' rights and duties even if no other relief is requested, and even if there has not been a breach of contract")].

A trial court may properly grant declaratory relief on a question that is not in dispute when it is necessary for the court to determine that question before it can decide the issue in dispute for which declaratory relief is proper [*see*

Application Group, Inc. v. Hunter Group, Inc. (1998) 61 Cal. App. 4th 881, 893-894, 72 Cal. Rptr. 2d 73] .

[2] Effect of Defendant's Inability to Grant Affirmative Relief

At least one court has indicated that the element of a justiciable actual controversy is lacking when the complaint seeks a declaratory judgment against a party who has no power to grant plaintiff any affirmative relief. In *Pinnacle Holdings, Inc. v. Simon (1995) 31 Cal. App. 4th 1430, 37 Cal. Rptr. 2d 778* , a landlord that had unsuccessfully sought authority for a rent increase from a county rent control board brought a proceeding for mandate and for declaratory relief against the rent control board. In the declaratory relief action, the plaintiff landlord also sought to join as defendants four tenants who had spoken in opposition to the proposed rent increase during proceedings before the board. The court of appeal affirmed the dismissal of the action as to the tenants following the trial court's sustaining of their demurrers. The court noted that a declaratory relief action requires the existence of an actual, present controversy over a proper subject and concluded that this requirement was lacking because the action sought no affirmative relief from the tenants and because the tenants had no power to grant plaintiff the relief it sought (i.e., approval for the rent increase) [*see Pinnacle Holdings, Inc. v. Simon (1995) 31 Cal. App. 4th 1430, 1436-1437, 37 Cal. Rptr. 2d 778]* .

[3] Ripeness and Standing

The concept of justiciability involves the intertwined criteria of ripeness and standing. The controversy is ripe when it has reached but has not passed the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made. A plaintiff has standing to raise the controversy if he or she, or those whom he or she properly represents, has a real interest in the ultimate adjudication, that is, if he or she has suffered or is about to suffer an injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented [*California Water & Tel. Co. v. Los Angeles County (1967) 253 Cal. App. 2d 16, 22-23, 61 Cal. Rptr. 618]* .

A plaintiff may bring an action for declaratory relief before an actual invasion of rights has occurred. However, the action must be based on an actual controversy with known parameters [*see, e.g., Environmental Def. Project v. County of Sierra (2008) 158 Cal. App. 4th 877, 886-887, 70 Cal. Rptr. 3d 474* (probable future controversy over whether defendant county's streamlined zoning procedure complied with Planning and Zoning Law was ripe for adjudication, because defendant's past conduct clearly delineated how defendant would interpret and apply that law in future)]. If the parameters are as yet unknown, the controversy is not yet ripe for declaratory relief, and any decision a court might render would be an impermissible advisory opinion [*Sanctity of Human Life Network v. California Highway Patrol (2003) 105 Cal. App. 4th 858, 872, 129 Cal. Rptr. 2d 708]* .

For example, an injured party generally may not obtain declaratory relief against an insurer to establish that the injury is covered under the alleged tortfeasor's liability insurance policy, if the injured party's suit against the tortfeasor is still pending. Until the claim against the alleged tortfeasor is adjudicated, any controversy between the injured party and the insurer is not ripe for adjudication, because it remains unknown whether the injured party will ultimately be able to make a claim against the proceeds of the liability insurance policy as a judgment creditor. Declaratory relief is therefore inappropriate, since the injured party's interests in the policy are contingent upon his or her prevailing against the insured, and until such liability is settled, the court cannot be certain that a controversy will arise between the injured party and the insurer [*Otay Land Co. v. Royal Indemnity Co. (2008) 169 Cal. App. 4th 556, 565-567, 86 Cal. Rptr. 3d 408]* .

Although the issues of justiciability may involve whether a court has jurisdiction to entertain the action [*see California Water & Tel. Co. v. Los Angeles County (1967) 253 Cal. App. 2d 16, 23 n.11, 61 Cal. Rptr. 618]* , as well as whether the complaint states a cause of action [*see* discussion in *§ 182.17 below*], the concepts of ripeness and standing have also been stated to be guidelines for the exercise of judicial discretion in granting or withholding declaratory relief [*see California Water & Tel. Co. v. Los Angeles County (1967) 253 Cal. App. 2d 16, 23, 61 Cal. Rptr. 618* ; *see* discussion in *§ 182.20 below*].

[4] Past Wrongs or Speculative Dispute

Because declaratory relief actions deal with present rights to have immediate judicial assurance that advantages will be enjoyed or liabilities escaped in the future, when only past wrongs are involved there is no basis for declaratory relief [*County of San Diego v. State (2008) 164 Cal. App. 4th 580, 607-608, 79 Cal. Rptr. 3d 489* ("The portion of the judgment awarding the Counties the amount of their reimbursement claims *as declaratory relief* does not operate prospectively to declare future rights; it redresses the State's 'past wrongs' in failing to meet its constitutional obligations ... ." (emphasis in original)); *Baldwin v. Marina City Properties, Inc. (1978) 79 Cal. App. 3d 393, 405, 145 Cal. Rptr. 406]* . If the possibility of a future dispute is speculative, it does not present an actual controversy that can be resolved by means of a declaratory judgment [*Cardellini v. Casey (1986) 181 Cal. App. 3d 389, 396-397, 226 Cal. Rptr. 659]* . But if there is a reasonable expectation that the past wrong or wrongs will be repeated in the future, the controversy does not present mere academic questions resulting from mootness or other considerations and declaratory relief should not be denied [*Southern Counties Gas Co. v. Ventura Pipeline Constr. Co. (1971) 19 Cal. App. 3d 372, 381, 96 Cal. Rptr. 825* ; *see also* *Mascarin Professional Pharmacy v. Hart (1970) 13 Cal. App. 3d 462, 465, 91 Cal. Rptr. 560]* .

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§ 182.15 Seeking Other Relief in Same or Subsequent Action

The remedy of declaratory relief is cumulative and does not restrict any other remedy, provisional or otherwise, provided by law for the benefit of any party to the action [*Code Civ. Proc. § 1062*]. That is, the remedy is in addition to, and not in lieu of, other legal remedies [*Walker v. Munro (1960) 178 Cal. App. 2d 67, 72, 2 Cal. Rptr. 737]* .

Plaintiff may seek declaratory relief either alone or with other relief in the same action [*Code Civ. Proc. § 1060*], for example, with damages for past wrongs [*see Southern Counties Gas Co. v. Ventura Pipeline Constr. Co. (1971) 19 Cal. App. 3d 372, 380, 96 Cal. Rptr. 825* ; *Travers v. Louden (1967) 254 Cal. App. 2d 926, 931, 62 Cal. Rptr. 654]* , or with injunctive relief [*see, e.g., Eye Dog Foundation v. State Board of Guide Dogs for the Blind (1967) 67 Cal. 2d 536, 544, 63 Cal. Rptr. 21, 432 P.2d 717* ; *Subriar v. Bakersfield (1976) 59 Cal. App. 3d 175, 194-195, 130 Cal. Rptr. 853]* . However, additional or other relief in a declaratory relief action is considered consequential or incidental, and the failure to seek such relief is not a bar to proceeding either by petition filed in the declaratory action or by a separate and independent suit or action subsequently filed that is predicated on the declaration of rights contained in the declaratory judgment [*see Lortz v. Connell (1969) 273 Cal. App. 2d 286, 300, 78 Cal. Rptr. 6* ; *see also Southern Counties Gas Co. v. Ventura Pipeline Constr. Co. (1971) 19 Cal. App. 3d 372, 382, 96 Cal. Rptr. 825]* .

The rule is stated in *Code Civ. Proc. § 1062*, which provides that the declaratory judgment does not "preclude any party from obtaining additional relief based on the same facts." This rule enables a party to get a prompt adjudication of rights and duties without a dispute over, for example, the damages suffered. In many cases further proceedings will beunnecessary because the right of the party who might claim damages is not established, or because if his or her right is established no damages ensue, or, if ensuing, damages may be established without further litigation [*Lortz v. Connell (1969) 273 Cal. App. 2d 286, 301, 78 Cal. Rptr. 6]* .

Code Civ. Proc. § 1062, which carves out an exception to the bar of res judicata (claim preclusion), applies only if the plaintiff's initial action seeks purely declaratory relief. Thus, if the plaintiff decides to seek any additional coercive relief in a declaratory relief action, the ordinary rules of res judicata apply, and the judgment will bar a subsequent action for any further coercive relief arising from the same cause of action [*Mycogen Corp. v. Monsanto Co. (2002) 28 Cal. 4th 888, 897-904, 123 Cal. Rptr. 2d 432, 51 P.3d 297* (applying exception to res judicata principles in case involving request for coercive relief would create uncertain preclusion rules and would threaten to swallow rule against claim

splitting)]. Moreover, even if the initial action sought purely declaratory relief, a judgment in that action would have a res judicata effect as to those issues and claims expressly and unambiguously declared in the judgment [*Aerojet-General Corp. v. American Excess Ins. Co. (2002) 97 Cal. App. 4th 387, 401-414, 117 Cal. Rptr. 2d 427]* .

The court's ability to combine otherwise appropriate declaratory relief with other forms of relief does not justify the issuance of a "declaratory" judgment that merely specifies the amount of money the defendant owes the plaintiff, when there is no actual controversy as to the amount owed [*County of San Diego v. State (2008) 164 Cal. App. 4th 580, 608, 79 Cal. Rptr. 3d 489* (plaintiff counties did not seek declaration of amount owed them by state, which was undisputed, but rather declaration that state was constitutionally and statutorily required to pay *promptly* and *fully*)].

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§ 182.16 Jurisdiction

[1] Subject Matter

An original action or cross complaint for declaratory relief may be brought in the superior court; it may be brought as a limited civil case in the superior court to the extent allowed by *Code Civ. Proc. § 85 et seq.* [*Code Civ. Proc. §§ 580(b)(4), 1060*; *see Gov. Code §§ 11350, 11350.3*; *Unemp. Ins. Code § 409.2*; *see also Cal. Const., art. VI, §§ 5(e), 10* (superior court's jurisdiction)]. Superior courts have jurisdiction of actions that are limited civil cases for declaratory relief when brought pursuant to either of the following [*Code Civ. Proc. § 86(a)(7)*]:

> (A) By way of cross complaint regarding a right of indemnity with respect to the relief demanded in the complaint or a cross complaint in an action or proceeding that is otherwise a limited civil case; or
>
> (B) To conduct a trial after a nonbinding fee arbitration between an attorney and client, pursuant to *Bus. & Prof. Code § 6200 et seq.*, when the amount in controversy is $25,000 or less.

[2] Not Enlarged by Declaratory Relief Statute

The declaratory relief statute [*Code Civ. Proc. § 1060*] involves matters of practice and procedure only and is not intended in any way to enlarge the jurisdiction of the courts over parties and subject matter. The statue is intended merely to provide an additional procedure for utilizing the existing jurisdiction of the courts [*San Ysidro Irrigation Dist. v. Superior Court of San Diego County(1961) 56 Cal. 2d 708, 715, 16 Cal. Rptr. 609, 365 P.2d 753* ; *Hoyt v. Board of Civil Service Commrs. (1942) 21 Cal. 2d 399, 403, 132 P.2d 804* ; *Independent Laundry v. Railroad Comm'n (1945) 70 Cal. App. 2d 816, 821, 161 P.2d 827]* .

Consequently, if a particular statute limits the class of persons who may raise certain issues by judicial action, that statute is not superseded by *Code Civ. Proc. § 1060* and may not be circumvented by a declaratory relief action brought by a person who is not within the class. For example, a declaratory relief action may not be used by a private individual to challenge the exercise of a franchise in an attempt to circumvent the statutory provisions [*Code Civ. Proc. §§ 803, 811*] authorizing such actions to be brought only by the Attorney General or by a county or municipality [*see San Ysidro Irr. Dist. v. Superior Court (1961) 56 Cal. 2d 708, 715-716, 16 Cal. Rptr. 609, 365 P.2d 753]* . Nor may such an

action be used to interfere in the intermediate states of an administrative proceeding [*Imperial Mut. Life Ins. Co. v. Caminetti (1943) 59 Cal. App. 2d 501, 505, 139 P.2d 691]* , or when administrative remedies provided by statute have not been exhausted [*Walker v. Munro (1960) 178 Cal. App. 2d 67, 71, 2 Cal. Rptr. 737* ; *see* discussion *§ 182.13[4] above*].

[3] Response to Lack of Jurisdiction

If the court's lack of subject matter jurisdiction appears from the face of the complaint or cross complaint or from matters of which the court must or may take judicial notice [*see Evid. Code §§ 451, 452*], the pleading is subject to a general demurrer on that ground [*Code Civ. Proc. §§ 430.10(a), 430.30(a)*; *see generally* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*]. If the defect does not so appear, the objection may be taken by answer [*Code Civ. Proc. §§ 430.30(b), 431.30(b)(2)*; *see generally* Ch. 26, *Answers*] and separate trial of that issue [*see Code Civ. Proc. § 597*] or by a motion to dismiss [*see Code Civ. Proc. § 396*; *see generally* Ch. 324, *Jurisdiction: Subject Matter*]. But if there is any court in California having jurisdiction of the subject matter, statute requires that the case be transferred to that court rather than be dismissed [*Code Civ. Proc. § 396*]. If there is no court in California having jurisdiction of the subject matter, the court's only power is to dismiss the action [*Watson v. Sansone (1971) 19 Cal. App. 3d 1, 4-5, 96 Cal. Rptr. 387]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewEvidenceJudicial NoticeGeneral Overview

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§ 182.17 Sufficiency of Complaint

A complaint for declaratory relief is legally sufficient if it sets forth facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument or contract and requests that these rights and duties be adjudged by the court [*Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719, 728, 146 P.2d 673* ; *see also Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 549-550, 305 P.2d 20* ; *Southern Counties Gas Co. v. Ventura Pipeline Constr. Co. (1971) 19 Cal. App. 3d 372, 377, 96 Cal. Rptr. 825* ; *City of Tiburon v. Northwestern Pac. R.R. Co. (1970) 4 Cal. App. 3d 160, 170, 84 Cal. Rptr. 469]* . A complaint is sufficient if a decree would serve in a practical way to stabilize a dispute that otherwise may lead to disastrous results or, if it involves a contract, defer the realization of the purposes of the contract [*Southern Counties Gas Co. v. Ventura Pipeline Constr. Co. (1971) 19 Cal. App. 3d 372, 377, 96 Cal. Rptr. 825* (quoting from *Ralphs Grocery Co. v. Amalgamated Meat Cutters (1950) 98 Cal. App. 2d 539, 543, 220 P.2d 802*); *see § 182.60*].

Because *Code Civ. Proc. § 1060* contains no suggestion that the plaintiff must allege facts entitling him or her to a favorable decision [*Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719, 730, 146 P.2d 673]* , if the complaint meets these requirements, the court must declare the rights of the parties whether or not the facts alleged establish that plaintiff is entitled to a favorable judgment [*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 550, 305 P.2d 20* ; *Southern Counties Gas Co. v. Ventura Pipeline Constr. Co. (1971) 19 Cal. App. 3d 372, 377, 96 Cal. Rptr. 825* ; *City of Tiburon v. Northwestern Pac. R.R. Co. (1970) 4 Cal. App. 3d 160, 170, 173, 84 Cal. Rptr. 469* ; *see also Zeitlin v. Arnebergh (1963) 59 Cal. 2d 901, 908, 31 Cal. Rptr. 800, 383 P.2d 152]* . If the plaintiff is not entitled to a favorable determination, the court should render a judgment embodying such determination and not merely dismiss the action [*Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719, 731, 146 P.2d 673* ; *Patel v. Athow (1973) 34 Cal. App. 3d 727, 734, 110 Cal. Rptr. 460]* . To sustain a demurrer to such a complaint without leave to amend or to enter judgment on the pleadings dismissing the action is error [*Wilson v. Board of Retirement (1957) 156 Cal. App. 2d 195, 200, 319 P.2d 426* ; *see Safeway Stores, Inc. v. Royal Indem. Co. (1971) 21 Cal. App. 3d 44, 47, 98 Cal. Rptr. 234* ; *City of Tiburon v. Northwestern Pac. R.R. Co. (1970) 4 Cal. App. 3d 160, 172 n.5, 84 Cal. Rptr. 469]* . In such a case, if the issue is purely one of law, and the appellate court agrees with the trial court's resolution of the issue against the plaintiff, the appellate court need not reverse the trial court's dismissal and remand the case for a trial. Instead, the appellate court may consider the merits, and its judgment will constitute the declaration of the parties' rights concerning the matter in controversy [*Taxpayers for Improving Pub. Safety v. Schwarzenegger (2009) 172 Cal. App. 4th 749, 769, 91 Cal.*

Rptr. 3d 370 ("[T]he issue presented in this matter is one of law, which we may resolve without reference to evidence. Therefore, it would be an idle act to reverse the order sustaining defendants' demurrers."); *Levi v. O'Connell (2006) 144 Cal. App. 4th 700, 706, 50 Cal. Rptr. 3d 691]* .

If justiciable issues are presented and can be disposed of as a matter of law, they may be resolved by summary judgment [*see Code Civ. Proc. § 437c*; *see generally* Ch. 537, *Summary Judgment*] with an express declaration of the rights of the parties [*City of Tiburon v. Northwestern Pac. R.R. Co. (1970) 4 Cal. App. 3d 160, 172 n.5, 84 Cal. Rptr. 469* ; *see also Siemon v. Russell (1961) 194 Cal. App. 2d 592, 595, 15 Cal. Rptr. 218* ; *Spencer v. Hibernia Bank (1960) 186 Cal. App. 2d 702, 712, 9 Cal. Rptr. 867]* . Summary adjudication of a properly pleaded claim for declaratory relief is not precluded merely because other claims are asserted in the same action, or because the issues subject to declaratory relief are present in other causes of action [*Supervalu, Inc. v. Wexford Underwriting Managers, Inc. (2009) 175 Cal. App. 4th 64, 81-83, 96 Cal. Rptr. 3d 316* ; *Southern Cal. Edison Co. v. Superior Court (1995) 37 Cal. App. 4th 839, 845-846, 44 Cal. Rptr. 2d 227*]. However, once the parties are engaged in litigation over claims for coercive remedies, a party cannot select issues (other than duty and punitive damages) implicated in one or more causes of action, amend its pleading to add a claim for declaratory relief as to those issues, and then obtain a summary adjudication of the declaratory relief claim. This would subvert *Code Civ. Proc. § 437c(f)(1)*, which requires that a summary judgment dispose of an entire cause of action or affirmative defense (or the issues of duty or punitive damages) [*Hood v. Superior Court (1995) 33 Cal. App. 4th 319, 321-324, 39 Cal. Rptr. 2d 296* (declaratory relief cause of action was unnecessary and superfluous, as issues invoked in that cause of action were already fully engaged by other causes of action); *see Supervalu, Inc. v. Wexford Underwriting Managers, Inc. (2009) 175 Cal. App. 4th 64, 82-83, 96 Cal. Rptr. 3d 316*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityCase or Controversy RequirementsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral Overview

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§ 182.18 Statute of Limitations

If declaratory relief is sought with reference to an obligation that has been breached, and the right to commence an action for "coercive" relief on the cause of action arising from the breach is barred by the statute of limitations, then the right to declaratory relief is likewise barred [*Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719, 734, 146 P.2d 673* ; *Pena v. Los Angeles (1970) 8 Cal. App. 3d 257, 262-263, 87 Cal. Rptr. 326* ; *see generally* Ch. 345, *Limitation of Actions*].

On the other hand, if declaratory relief is sought before there has been a breach of the obligation in respect to which the declaration is sought or within the statutory period after the breach, the right to relief is not barred by lapse of time [*Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719, 734, 146 P.2d 673* ; *United Pacific/Reliance Ins. Co. v. DiDomenico (1985) 173 Cal. App. 3d 673, 674-677, 219 Cal. Rptr. 119]* .

In the case of local ordinances, local law may prescribe a period of limitations on when an action arising under the ordinance may be brought [*see Pan Pacific Properties, Inc. v. County of Santa Cruz (1978) 81 Cal. App. 3d 244, 252, 146 Cal. Rptr. 428* (action challenging zoning ordinance as untimely when it was filed 180 days after the enactment of the ordinance and local ordinance provided 90-day period of limitation)].

If the action is barred by the statute of limitations and that fact appears from the face of the complaint or from matter of which the court must or may take judicial notice [*see Evid. Code §§ 451, 452*], the objection may be raised by general demurrer to the complaint (or by motion for judgmenton the pleadings) on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*] in that it appears that the action is barred by the statute of limitations [*see Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 550, 305 P.2d 20* ; *Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719, 733-735, 146 P.2d 673* ; *see generally* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*].

If the bar of the statute does not so appear, the objection may be taken by answer [*Code Civ. Proc. §§ 430.30(b), 431.30(b)(2)*; *see generally* Ch. 26, *Answers*] and separate trial of that defense [*see Code Civ. Proc. § 597*] or raised by motion for summary judgment [*see Code Civ. Proc. § 437c*; *see generally* Ch. 537, *Summary Judgment*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 182.19 Res Judicata

When the entire controversy between the parties has been settled by a prior judgment, the action is subject to the defense of res judicata [*see generally* Ch. 491, *Res Judicata*]. When the prior settlement appears from the face of the complaint, or from matter of which the court must or may take judicial notice [*see Evid. Code §§ 451, 452*; *Code Civ. Proc. § 430.30(a)*], the complaint is subject to a general demurrer (or to a motion for judgment on the pleadings) on the ground that the complaint does not state facts sufficient to constitute a cause of action in that it appears that the action is res judicata, unless facts are alleged that will justify setting the prior judgment aside [*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 550, 554, 305 P.2d 20]* .

When the defense of res judicata exists but does not appear from the face of the complaint or from judicially noticed matter, the objection may be raised by answer [*Code Civ. Proc. §§ 430.30(b), 431.30(b)(2)*] and separate trial of that issue [*see Code Civ. Proc. § 597*] or by a motion for summary judgment [*see Code Civ. Proc. § 437c*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 182.20 Discretion of Court to Refuse Relief

[1] General Rule

Code Civ. Proc. § 1061 provides that the court may refuse to exercise the power to grant declaratory relief in any case in which its declaration or determination is not necessary or proper at the time under all the circumstances. Thus, the trial court has discretion to refuse to make a binding declaration of rights and duties, including a determination of any question of construction or validity arising under a written instrument or contract [*see Code Civ. Proc. § 1060*], when its declaration or determination is not necessary or proper at the time under all the circumstances [*see International Ass'n of Fire Fighters v. City of Palo Alto (1963) 60 Cal. 2d 295, 301, 32 Cal. Rptr. 842, 384 P.2d 170* ; *BKHN, Inc. v. Department of Health Services (1992) 3 Cal. App. 4th 301, 308* ; *State Farm Mut. Auto. Ins. Co. v. Superior Court of San Francisco (1956) 304 P.2d 13* ; *Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719, 730, 146 P.2d 673]* .

Whether a determination is proper is a matter within the trial court's discretion and its decision to grant or deny relief will not be disturbed on appeal unless it be clearly shown that the discretion was abused [*Farmers Ins. Exchange v. Adams (1985) 170 Cal. App. 3d 712, 723, 216 Cal. Rptr. 287* (overruled on other grounds in *Garvey v. State Farm Fire & Casualty Co. (1989) 48 Cal. 3d 395, 411, 257 Cal. Rptr. 292, 770 P.2d 704*); *Fagerstedt v. Continental Ins. Co. (1968) 266 Cal. App. 2d 370, 372, 72 Cal. Rptr. 126* ; *see also Zetterberg v. State Dept. of Public Health (1974) 43 Cal. App. 3d 657, 665, 118 Cal. Rptr. 100* ; *CJL Construction, Inc. v. Universal Plumbing (1993) 18 Cal. App. 4th 376, 391, 22 Cal. Rptr. 2d 360* (defendant may be precluded from asserting declaratory relief claim by way of cross-complaint when claim could have been asserted as affirmative defense); *Allstate Ins. Co. v. Fisher (1973) 31 Cal. App. 3d 391, 395, 107 Cal. Rptr. 251]* . But, although the court has a measure of discretion in determining whether to grant declaratory relief in any particular case, it may not refuse to assume jurisdiction when the complaint sets forth facts showing that a declaratory adjudication is entirely appropriate [*Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 762, 161 P.2d 217* ; *AICCO, Inc. v. Insurance Co. of N. Am. (2001) 90 Cal. App. 4th 579, 590, 109 Cal. Rptr. 2d 359* (abuse of discretion for trial court to decline to exercise jurisdiction when legally sufficient complaint sets forth facts showing that declaratory adjudication is appropriate)].

The court has considerable discretion to deny declaratory relief when such relief would have little practical effect in terms of altering the parties' behavior [*Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 646-648, 88 Cal. Rptr.*

3d 859, 200 P.3d 295 ("[D]eclaratory relief is designed in large part as a practical means of resolving controversies, so that parties can conform their conduct to the law and prevent future litigation.")]. For example, in a case involving an actual controversy regarding the enforceability of a contractual arbitration provision, the California Supreme Court concluded that the trial court had not abused its discretion in denying declaratory relief. The Court found it significant that the parties' current controversy was primarily over the enforceability of certain contractual remedies should a future dispute over substantive contractual rights arise. Because no dispute had arisen that would cause those remedial provisions to come into play, and the plaintiffs had not alleged that the continuation of the contractual relationship depended on the resolution of the current controversy, the denial of declaratory relief was within the trial court's discretion [*Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 88 Cal. Rptr. 3d 859, 200 P.3d 295]* . The Supreme Court did acknowledge, however, that under different circumstances the settlement of questions of the validity of contractual remedies may have practical consequences, such as when a party's decision to enter into a contract reasonably turns on the answer to those questions, or when a party alleges with sufficient particularity that the continuation of a contractual relationship plausibly hinges on the answers to those questions [*Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 648, 88 Cal. Rptr. 3d 859, 200 P.3d 295* ; *see, e.g.,* *Baker Pac. Corp. v. Suttles (1990) 220 Cal. App. 3d 1148, 1154, 269 Cal. Rptr. 709* (parties' decision to enter contract depended on whether contract provision releasing other party from liability for fraud and intentional acts was valid)].

[2] Specific Grounds for Refusing Relief

The fact that the party seeking judicial aid has unclean hands may justify the trial court in concluding that its adjudication would not be proper. In addition, the availability of another adequate remedy may condition the necessity for declaratory relief, although before the court may properly exercise its discretion to refuse relief on this ground, it must clearly appear that the asserted alternative remedies are available to the plaintiff and that they are speedy and adequate or as well suited to plaintiff's needs as declaratory relief [*Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719, 730-732, 146 P.2d 673* ; *see also* *City of Tiburon v. Northwestern Pac. R.R. Co. (1970) 4 Cal. App. 3d 160, 177, 84 Cal. Rptr. 469* ; *London Assur. Co. v. Anderson (1961) 194 Cal. App. 2d 418, 422, 15 Cal. Rptr. 13* ; *Broffman v. Klassman (1960) 183 Cal. App. 2d 117, 126, 6 Cal. Rptr. 717]* .

If the Legislature has specified an exclusive procedure for litigating particular disputes, it is an abuse of discretion for the superior court to bypass the statutory procedure and hear an ordinary declaratory relief action. For example, the California Public Records Act (CPRA) specifies the exclusive procedure for litigating disputes regarding a person's right to obtain disclosure of public records under the CPRA [*see Gov. Code § 6250 et seq.*]. The CPRA provides, among other things, that only a person seeking disclosure--not the public agency in possession of the records--may seek a judicial declaration regarding the agency's obligation to disclose a document [*Gov. Code § 6258*]. Therefore, a superior court has no discretion to bypass this statutory procedure and grant declaratory relief in an action initiated by a public agency under *Code of Civil Procedure Section 1060* [*Filarsky v. Superior Court (2002) 28 Cal. 4th 419, 429-435, 121 Cal. Rptr. 2d 844, 49 P.3d 194]* . Similarly, a court may properly refuse declaratory relief if a local ordinance provides a procedure to resolve the dispute that is simpler and more affordable than a declaratory-relief action [*DeLaura v. Beckett (2006) 137 Cal. App. 4th 542, 545-547, 40 Cal. Rptr. 3d 253* (local rent ordinance provided procedure for determining whether tenant was entitled to protected status under that ordinance)].

The existence of a statutory scheme that generally governs a particular kind of proceeding does not preclude the issuance of otherwise appropriate declaratory relief in such a proceeding, if the statutory scheme does not expressly bar such relief. For example, juvenile dependency proceedings are governed, in general, by the Welfare and Institutions Code [*see Welf. & Inst. Code § 300 et seq.*], but that Code does not expressly restrict the availability of declaratory relief. Therefore, the juvenile court may grant declaratory relief in a case in which it is alleged that a county department of social services has a policy of ignoring statutory deadlines in juvenile dependency proceedings [*Imperial County Dep't of Soc. Servs. v. J.E. (In re Claudia E.) (2008) 163 Cal. App. 4th 627, 634-637, 77 Cal. Rptr. 3d 722* (declaratory relief may be granted under *Code Civ. Proc. § 1060* as well as juvenile court's inherent power)].

That a plaintiff abuses leave to amend a complaint, for example by failing to make averments called for by demurrers sustained to earlier complaints, is not a ground for the exercise of a trial court's discretion to refuse declaratory relief under *Code Civ. Proc. § 1061*. Instead, the trial court may refuse to permit the filing of the amendment or may strike the amended pleading from the files, as it may in any type of action [*Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719, 732, 146 P.2d 673]* .

[3] Staying Action Pending Determination of Related Case

The court properly stays an action for declaratory relief pending the determination of an underlying action when the issue in the declaratory relief action turns on factual issues that will necessarily be determined in the underlying action [*California Ins. Guarantee Assn. v. Superior Court (1991) 231 Cal. App. 3d 1617, 1623-1624, 1628, 283 Cal. Rptr. 104]* . For example, the court must stay a declaratory judgment action between an insurer and insured to adjudicate coverage issues under a liability policy if factual issues presented in the declaratory judgment action will necessarily be resolved in the underlying action brought by a third party against the insured [*Great Am. Ins. Co. v. Superior Court (2009) 178 Cal. App. 4th 221, 235, 100 Cal. Rptr. 3d 258* ; *see California Ins. Guarantee Assn. v. Superior Court (1991) 231 Cal. App. 3d 1617, 1621-1622, 1628, 283 Cal. Rptr. 104]* . But if the declaratory judgment action can be resolved on legal issues or factual issues unrelated to those in the underlying action, whether to stay the declaratory judgment action is a matter within the trial court's discretion. In exercising its discretion, the trial court should consider the possible prejudice to the insured if the declaratory judgment action is not stayed, as well as the possible prejudice to the insurer if the action is stayed [*Great Am. Ins. Co. v. Superior Court (2009) 178 Cal. App. 4th 221, 235-237, 100 Cal. Rptr. 3d 258]* .

[4] Court's Action After Determining to Refuse Relief

When facts appear from the face of the complaint (or from matter of which the court must or may take judicial notice [*see Evid. Code §§ 451, 452*]) that would justify the trial court in concluding that its determination is not necessary or proper, the court may sustain a general demurrer [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*] to the complaint for declaratory relief [*Moss v. Moss (1942) 20 Cal. 2d 640, 642, 128 P.2d 526]* or grant a motion for judgment on the pleadings. If those facts do not so appear, the objection may be taken by answer [*see Code Civ. Proc. §§ 430.30(b), 431.30(b)(2)*] and a separate trial of that issue [*see Code Civ. Proc. § 597*] or, if there is no dispute as to the facts, that is, if there is no triable issue as to any material fact in the case, by motion for summary judgment [*see Code Civ. Proc. § 437c*].

When the court refuses to exercise its power to grant declaratory relief, it should enter a judgment decreeing expressly that the party is not entitled to that relief rather than dismissing the case [*see International Ass'n of Fire Fighters v. City of Palo Alto (1963) 60 Cal. 2d 295, 302, 32 Cal. Rptr. 842, 384 P.2d 170* (involving cross complaint for declaratory relief)], that is, that the court's declaration or determination is not necessary or proper at the time under all the circumstances [*see Code Civ. Proc. § 1061*].

[5] Statutes and Ordinances

[a] General Rule

The factors affecting exercise of judicial discretion to grant declaratory relief in regard to statutes and ordinances include the penal character of the statute or ordinance attacked, the need for a present determination of its validity, the character of the interest of the parties and the public in the subject matter, and the existence of any alternative remedies [*California Water & Tel. Co. v. Los Angeles County (1967) 253 Cal. App. 2d 16, 24, 61 Cal. Rptr. 618]* .

Although statutes and ordinances are inherently proper subjects for declaratory relief, a declaratory judgment may not be rendered in disregard of the customary limitations on the granting of relief, and a difference in opinion as to the interpretation of a statute between a citizen and a governmental agency does not constitute a justiciable controversy

subject to declaratory relief [*Zetterberg v. State Dept. of Public Health (1974) 43 Cal. App. 3d 657, 661-662, 118 Cal. Rptr. 100]* . Any doubt as to the justiciability of a controversy must be resolved in favor of present adjudication when the public is interested in settlement of the dispute [*Stocks v. City of Irvine (1981) 114 Cal. App. 3d 520, 533, 170 Cal. Rptr. 724* ; *California Water & Tel. Co. v. Los Angeles County (1967) 253 Cal. App. 2d 16, 26, 61 Cal. Rptr. 618]* .

[b] Penal Statutes or Ordinances

Declaratory relief is not foreclosed simply because the subject matter of the action is a penal statute or ordinance, but declaratory relief is properly denied if the factual matrix is insufficiently set to permit a useful and intelligent adjudication to be made or if the issues can be better decided in a criminal proceeding. The character of the challenged statute or ordinance is merely one factor to be considered with all the other circumstances to determine the propriety of granting declaratory relief [*California Water & Tel. Co. v. Los Angeles County (1967) 253 Cal. App. 2d 16, 24, 61 Cal. Rptr. 618]* . A person need not violate or plan to violate a penal statute or ordinance before he or she can obtain a declaration construing it and deciding its application to him or her [*California Water & Tel. Co. v. Los Angeles County (1967) 253 Cal. App. 2d 16, 24, 61 Cal. Rptr. 618]* .

When the applicant for declaratory relief seeks interpretation of a penal statute or ordinance and a determination that it does or does not apply to him or her, but no constitutional issue is raised, relief has been denied when the applicant's activity was undertaken purely for personal pleasure, but granted when the activity was business related [*compare Manchel v. County of Los Angeles (1966) 245 Cal. App. 2d 501, 507-511, 54 Cal. Rptr. 53* (whether or not card game played for pleasure was game of chance within meaning of ordinance) *with Finster v. Keller (1971) 18 Cal. App. 3d 836, 847, 96 Cal. Rptr. 241* (whether or not distribution of blank horse racing forms involved lottery)].

Declaratory relief is proper to determine whether material is obscene within the meaning of a penal statute when the plaintiff contends that the matter is not obscene and that he or she wishes to sell it, but the defendant intends to prosecute anyone who sells the material [*Zeitlin v. Arnebergh (1963) 59 Cal. 2d 901, 904-908, 31 Cal. Rptr. 800, 383 P.2d 152]* . Once criminal charges have been brought, however, there is a speedy and adequate method available in the criminal proceeding for determining whether the material in question is obscene, and declaratory judgment is not necessary [*Miller v. State of California (1970) 6 Cal. App. 3d 202, 204-205, 85 Cal. Rptr. 801]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsState JudgmentsDiscretionCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsMultiple Claims & PartiesContracts LawRemediesEquitable ReliefUnclean HandsGovernmentsLegislationTypes of Statutes

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§ 182.21 Motion for Judgment on the Pleadings by Defendant

A defendant may move for a judgment on the pleadings on the grounds either that (1) the court has no jurisdiction of the subject of the cause of action alleged in the complaint, or (2) the complaint does not state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 438(c)(1)(B)*; *see generally* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*]. The grounds for the motion must appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice [*Code Civ. Proc. § 438(d)*; *see Evid. Code §§ 451, 453*]. The motion may granted with or without leave to amend [*Code Civ. Proc. § 438(h)(1)*].

Under common law, a motion for judgment on the pleadings may admit as true all the well-pleaded facts alleged in it and seek, as a matter of law, particular declarations of the rights and duties of the parties as set forth in the notice of motion with respect to the admitted allegations. The motion may be granted without giving plaintiff an opportunity to amend, in which case a judgment on the merits declaring the rights of the parties may be entered [*Wilson v. Board of Retirement (1957) 156 Cal. App. 2d 195, 199-200, 319 P.2d 426* ; *see also Code Civ. Proc. § 438(h)(3)* (granting statutory motion without leave to amend)].

Thus, a motion for judgment on the pleadings may be used in an action for declaratory relief to obtain a declaratory judgment on the merits in the defendant's favor rather than a dismissal of the plaintiff's suit [*Fisher v. City of Berkeley (1984) 37 Cal. 3d 644, 679 n.31, 209 Cal. Rptr. 682, 693 P.2d 261* ; *Vehicular Residents Assn. v. Agnos (1990) 222 Cal. App. 3d 996, 998, 272 Cal. Rptr. 216]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the Pleadings

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§ 182.22 Precedence of Action on Trial Calendar

Except as provided in *Code Civ. Proc. § 1062.3(b)* (discussed *below*) actions for declaratory relief under *Code Civ. Proc. § 1060* are required to be set for trial at the earliest possible date and to take precedence of all other cases, except older matters of the same character and matters to which special precedence may be given by law [*Code Civ. Proc. § 1062.3(a)*]. In order for an action to come within the purview of this requirement, however, it must, in fact and in substance, be one for declaratory relief. If an action is mistitled as one for declaratory relief for the sole purpose of obtaining a preference on the calendar, the court has power to prohibit the preference [*Kessloff v. Pearson (1951) 37 Cal. 2d 609, 613-614, 233 P.2d 899]* . Undeserving cases should be disposed of in a summary manner, as on demurrer [*Travers v. Louden (1967) 254 Cal. App. 2d 926, 932, 62 Cal. Rptr. 654]* .

If plaintiff seeks relief in addition to a declaration of rights and duties, the action will take precedence only on noticed motion and a showing that the action requires a speedy trial [*Code Civ. Proc. § 1062.3(b)*; *see* discussion and forms in Ch. 425, *Pretrial Proceedings*].

Code Civ. Proc. § 1062.3 does not purport to override the discretionary power given the trial court to deny declaratory relief in any case when its declaration or determination is not necessary or proper at the time under all the circumstances [*see Code Civ. Proc. § 1061*; *see also* discussion in *§ 182.20 above*]. It also does not compel the trial court to delay the trial of coercive actions until after trial of the declaratory relief action merely because coercive actions might involve the determination of the same or a somewhat similar issue [*State Farm Mut. Auto. Ins. Co. v. Superior Court (1956) 47 Cal. 2d 428, 433, 304 P.2d 13]* . However, a trial court must stay a declaratory judgment action if resolution of that action would require determination of factual issues that will necessarily be determined in the underlying coercive action [*see Great Am. Ins. Co. v. Superior Court (2009) 178 Cal. App. 4th 221, 235, 100 Cal. Rptr. 3d 258* ; *California Ins. Guarantee Assn. v. Superior Court (1991) 231 Cal. App. 3d 1617, 1623-1624, 1628, 283 Cal. Rptr. 104* ; *see also § 182.20[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsState JudgmentsDiscretionCivil ProcedureDeclaratory Judgment ActionsState JudgmentsDiscretionCivil ProcedurePretrial MattersConferencesCase Management

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§ 182.23 Jury Trial

Whether a right to jury trial [*see Cal. Const., Art I, § 16*] exists depends on whether the issues to be tried in the declaratory relief action are equitable or legal in nature [*Interinsurance Exchange v. Savior (1975) 51 Cal. App. 3d 691, 694, 124 Cal. Rptr. 239*]. This may be determined from the relief sought as well as from the nature of the facts stated in the complaint [*Dills v. Delira Corp. (1956) 145 Cal. App. 2d 124, 128, 302 P.2d 397*]. If the issues to be tried are legal and there was a common law right to trial of those issues by jury in 1850 when California became a state, the right to trial by jury exists [*Interinsurance Exchange v. Savior (1975) 51 Cal. App. 3d 691, 693-694, 124 Cal. Rptr. 239* ; *Dills v. Delira Corp. (1956) 145 Cal. App. 2d 124, 128, 302 P.2d 397* ; *see generally* Ch. 322, *Juries and Jury Selection*]. For example, if the declaratory relief action is in effect a substitute for an action at law for breach of contract, the parties are entitled to a jury trial as a matter of right [*Interinsurance Exchange v. Savior (1975) 51 Cal. App. 3d 691, 694, 124 Cal. Rptr. 239* ; *Patterson v. Insurance Co. of North America (1970) 6 Cal. App. 3d 310, 315, 85 Cal. Rptr. 665* ; *see also Code Civ. Proc. § 592*; *Evid. Code § 312*].

Although the gist of the action may be equitable, particular significant and separate issues that were actionable at common law must be heard by a jury if there is an appropriate demand [*Dills v. Delira Corp. (1956) 145 Cal. App. 2d 124, 128, 302 P.2d 397* ; *see State Farm Mut. Auto. Ins. Co. v. Superior Court (1956) 47 Cal. 2d 428, 431, 304 P.2d 13]* . The equitable issues are tried first since they may determine the lawsuit and prevent a more costly jury trial [*Dills v. Delira Corp. (1956) 145 Cal. App. 2d 124, 129, 302 P.2d 397]* .

If the action is addressed solely to the equity powers of the court, the matter is one for the trial court, alone or sitting with an advisory jury [*Dills v. Delira Corp. (1956) 145 Cal. App. 2d 124, 128, 302 P.2d 397]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureTrialsJury TrialsRight

to Jury Trial

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§ 182.24 Judgment on the Merits

The court may make a binding declaration of the rights and duties of the parties whether further relief is or could be claimed at the time, and such declaration may be had before there has been any breach of the obligation in respect to which the declaration is sought [*Code Civ. Proc. § 1060*; *see also Zeitlin v. Arnebergh (1963) 59 Cal. 2d 901, 905-906, 31 Cal. Rptr. 800, 383 P.2d 152* ; *Chas. L. Harney, Inc. v. Contractors' Bd. (1952) 39 Cal. 2d 561, 564, 247 P.2d 913* ; *Walker v. Munro (1960) 178 Cal. App. 2d 67, 74-75, 2 Cal. Rptr. 737]* . The declaration may be either affirmative or negative in form and effect and has the force of a final judgment [*Code Civ. Proc. § 1060*].

The court is under a duty to make a complete determination and disposition of the controversy. Hence, it should resolve all questions actually involved in the case as between the respective parties and make a full and complete declaration, disposing of all questions of rights, status, or other legal relations encountered in construing the instrument or other matter before it [*see Amerson v. Christman (1968) 261 Cal. App. 2d 811, 823, 68 Cal. Rptr. 378* ; *see also Anderson v. Southern Pac. Co. (1968) 264 Cal. App. 2d 230, 234, 70 Cal. Rptr. 389]* . Jurisdiction to completely settle all questions includes legal as well as equitable issues [*Anderson v. Southern Pac. Co. (1968) 264 Cal. App. 2d 230, 234, 70 Cal. Rptr. 389]* . In addition to declaring the rights of the parties, the court may grant any relief consistent with the evidence and the pleadings [*Kroepsch v. Muma (1969) 272 Cal. App. 2d 467, 474, 77 Cal. Rptr. 348]* .

The judgment must decree, and not suggest, what the parties may or may not do [*Zetterberg v. State Dept. of Public Health (1974) 43 Cal. App. 3d 657, 661, 664, 118 Cal. Rptr. 100]* . But that does not preclude any party from obtaining additional relief based on the same facts [*Code Civ. Proc. § 1062*; *see* discussion in *§ 182.15, above*]. That is, one who obtains a declaratory judgment has not thereby forfeited the right to obtain coercive relief in the same or a subsequent action, although a litigant who is determined not to have any rights may not relitigate the claim in quest of different relief [*Dills v. Delira Corp. (1956) 145 Cal. App. 2d 124, 130-131, 302 P.2d 397]* .

Legal Topics:

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

Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsState JudgmentsScope

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§ 182.25 Actions in Federal Courts

In a case of actual controversy within its jurisdiction, except with respect to taxes, any federal court may, on the filing of an appropriate pleading, declare the rights and other legal relations of any interested party seeking such determination, whether or not further relief is or could be sought [*28 U.S.C. § 2201*; *see* Ch. 265, *Federal Courts: Jurisdiction and Removal*]. Further necessary or proper relief based on a declaratory judgment may be granted, after notice and hearing, against any adverse party whose rights have been determined by such a judgment [*28 U.S.C. § 2202*]. The Federal Rules of Civil Procedure contain a rule implementing these provisions [*see Fed. R. Civ. P., Rule 57*].

For detailed discussion of declaratory relief actions in federal courts, see Moore's Federal Practice, Third Edition, Ch. 57, *Declaratory Judgments* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityCase or Controversy RequirementsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsFederal JudgmentsScope

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[Reserved]

§§ 182.26[Reserved]

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§ 182.40 Related Matthew Bender Publications

For memoranda of points and authorities relating to forms in this chapter, see California Points and Authorities, Ch. 67, *Declaratory Relief*

For discussion of declaratory relief actions in federal courts, see Moore's Federal Practice, Third Edition, Ch. 57, *Declaratory Judgments*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral Overview

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§ 182.41 Federal Statutes and Rules

Declaratory relief in federal courts. *28 U.S.C. §§ 2201, 2202*; *Fed. R. Civ. P., Rule 57*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 182.42 State Statutes

[1] Declaratory Relief

Jurisdiction of cross actions. *Code Civ. Proc. §§ 86(a)(7), 1060*

Jurisdiction of action. *Code Civ. Proc. § 1060*; *Gov. Code § 11350*; *Unemp. Ins. Code § 409.2*

When action lies. *Code Civ. Proc. § 1060*

Generally. *Code Civ. Proc. §§ 1060-1062.5*

Power of court to refuse. *Code Civ. Proc. § 1061*

Nature of remedy as cumulative. *Code Civ. Proc. § 1062*

Precedence of action on calendar. *Code Civ. Proc. § 1062.5*

Action to test validity of administrative regulation. *Gov. Code § 11350*

Action to test validity of regulation ordered repealed or disapproved by Office of Administrative Law. *Gov. Code § 11350.3*

Action to test validity of precedent decision of Unemployment Insurance Appeals Board. *Unemp. Ins. Code § 409.2*

[2] Related Actions and Proceedings

Action to determine adverse interests in real property arising out of public improvement assessment or bond. *Code Civ. Proc. § 801.1 et seq.*

Action to determine validity of bonds, warrants, contracts, obligations, and evidences of indebtedness of public agency. *Code Civ. Proc. § 860 et seq.*

Action to determine residence or nonresidence for personal income tax purposes. *Code Civ. Proc. § 1060.5*

Action to declare rights, duties, and obligations under policy of professional liability insurance issued to health care provider. *Code Civ. Proc. § 1062.5*

Action by public entity or nonprofit organization owning property sought to be condemned for state highway purposes to determine which public use is best and most necessary public use for property. *Code Civ. Proc. § 1240.690*

Action by regional park district when lands are sought to be condemned for city or county road, street, or highway purposes to determine which public use is best and most necessary public use for such property. *Code Civ. Proc. § 1240.700*

Escheat proceeding. *Code Civ. Proc. § 1410 et seq.*

Action to determine validity of election or appointment of director of corporation. *Corp. Code § 709*

Action to determine and declare validity of marriage. *Fam. Code § 309*

Action to declare existence or nonexistence of parent-child relationship. *Fam. Code § 7630 et seq.*

Proceeding to judicially establish fact, time, and place of birth, death, or marriage. *Health & Safety Code § 103450 et seq.*

Proceeding to determine heirship. *Prob. Code § 11700 et seq.*

Proceeding to establish and report fact of death affecting interest in real or personal property. *Prob. Code § 200 et seq.*

Action for declaration of rights in jointly used conduits, wells, or pumping plants. *Water Code § 7005 et seq.*

Action to determine validity of water district assessment. *Water Code § 30066*

Action for declaratory and equitable relief to restrain violation of Coastal Act, cease and desist order, or restoration order. *Pub. Res. Code § 30803*

Legal Topics:

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

[1] Appeal

Appellate court has authority to determine as matter of law whether declaratory relief is proper remedy when facts are undisputed, even though "abuse of discretion" standard ordinarily applies to trial court's demurrer-dismissal of declaratory relief action. *CJL Construction, Inc. v. Universal Plumbing (1993) 18 Cal. App. 4th 376, 391, 22 Cal. Rptr. 2d 360*

Review of trial court's decision in declaratory relief action as limited to abuse of discretion from which it appears that injury resulting from wrong is sufficiently grave to amount to manifest miscarriage of justice. *Interstate Marina Development Co. v. County of Los Angeles (1984) 155 Cal. App. 3d 435, 443-444, 202 Cal. Rptr. 377*

Although appeal in declaratory relief action presenting only abstract or academic questions should as general rule be dismissed as moot, appeal as not moot or subject to dismissal if question to be decided is of general public interest or if there is likelihood of recurrence of controversy between same parties or others, or if there remain material questions for court's determination. *Grier v. Alameda-Contra Costa Transit Dist. (1976) 55 Cal. App. 3d 325, 330, 127 Cal. Rptr. 525*

Judgment dismissing cross complaint for declaratory relief after trial court improperly sustained demurrer thereto as affirmed when reversal of judgment inevitably will result in judgment adverse to appellant as matter of law. *Pylon, Inc. v. Olympic Ins. Co. (1969) 271 Cal. App. 2d 643, 657, 77 Cal. Rptr. 72*

Judgment in declaratory relief action that fails to determine all rights between parties under lease as subject to modification on appeal to supply that which should have been determined by trial court, under rule of liberal construction of constitutional and statutory provisions empowering reviewing court to affirm, modify, or direct entry of final judgment, toward end that cause may be disposed of on single appeal. *Cinmark Investment Co. v. Reichard (1966) 246 Cal. App. 2d 498, 502, 54 Cal. Rptr. 810*

[2] Attorney's Fees

Mutuality of remedy provision under *Civ. Code § 1717* as entitling nonsigning defendant, who is sued as if party to contract, to recover attorney's fees if he or she prevails, when contract provides for recovery of fees by prevailing party. *Reynolds Metals Co. v. Alperson (1979) 25 Cal. 3d 124, 128, 158 Cal. Rptr.1* ; *Milman v. Shukhat (1994) 22 Cal. App. 4th 538, 543, 27 Cal. Rptr. 2d 526*

Attorney's fees incurred by insured, whether in capacity of plaintiff seeking declaration of rights under insurance policy or as defendant in declaratory relief action brought by insurer as being burden of insured, and in absence of some special statute or particular provision in policy as being required to be borne by insured. *Carroll v. Hanover Insurance Co. (1968) 266 Cal. App. 2d 47, 49-51, 71 Cal. Rptr. 868* ; *see also Twentieth Century-Fox Film Corp. v. Harbor Ins. Co. (1978) 85 Cal. App. 3d 105, 112-115, 149 Cal. Rptr. 313* (and cases there discussed)

[3] Availability of Declaratory Relief on Denial of Certiorari

Judgment of superior court affirming judgment of conviction in justice court under admittedly unconstitutional statute as not subject to attack by writ of certiorari in court of appeal or Supreme Court for reason that superior court has jurisdiction to decide appeal wrongly as well as rightly; availability of declaratory relief to challenge constitutionality of statute or ordinance as sufficient answer to claim that nonavailability of certiorari deprives persons whose rights have been prejudiced by action of tribunals of inferior jurisdiction under unconstitutional statutes of all recourse to higher courts. *Portnoy v. Superior Court (1942) 20 Cal. 2d 375, 378, 125 P.2d 487*

[4] Complaint

Sufficiency of complaint for declaratory relief. *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 549-550, 305 P.2d 20* ; *Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719, 728, 730, 146 P.2d 673* ; *Southern Counties Gas Co. v. Ventura Pipeline Constr. Co. (1971) 19 Cal. App. 3d 372, 377, 96 Cal. Rptr. 825* *Jones v. Daly (1981) 122 Cal. App. 3d 500, 511, 176 Cal. Rptr. 130*

Action for declaratory relief as not requiring plaintiff to allege damages in complaint. *Twain Harte Homeowners Assn. v. Patterson (1987) 193 Cal. App. 3d 184, 188, 239 Cal. Rptr. 316*

Declaratory relief as required to be granted when facts justifying that course are sufficiently alleged. *Walker v. County of Los Angeles (1961) 55 Cal. 2d 626, 636* ; *Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 762, 161 P.2d 217* ; *LePage v. Oakland (1970) 13 Cal. App. 3d 689, 693, 91 Cal. Rptr. 806*

Declaratory relief complaint challenging constitutionality of ordinance as not required to plead specifics. *Subriar v. Bakersfield (1976) 59 Cal. App. 3d 175, 212, 130 Cal. Rptr. 853*

To state cause of action for declaratory relief under *Code Civ. Proc. § 1060*, one invoking that remedy as required to allege facts from which court may determine that actual controversy relating to legal rights and duties of respective parties exists. *Lord v. Garland (1946) 27 Cal. 2d 840, 851, 168 P.2d 5*

Existence of actual controversy between parties as required to be alleged. *Alturas v. City of Gloster (1940) 16 Cal. 2d 46, 48, 104 P.2d 810* ; *Escondido Mut. Water Co. v. George A. Hillebrecht, Inc. (1966) 241 Cal. App. 2d 410, 412-413, 50 Cal. Rptr. 495*

Complaint alleging actual controversy as to ordinance as entitling plaintiff to declaratory relief. *C. Dudley De Velbiss Co. v. Kraintz (1951) 101 Cal. App. 2d 612, 615, 225 P.2d 969*

Failure to allege facts in complaint from which court may assume that actual controversy exists between parties and alleging mere bare conclusion to that effect as insufficient. *Alturas v. Gloster (1940) 16 Cal. 2d 46, 48, 104 P.2d 810* ; *see American Mission Army Inc. v. Lynwood (1956) 138 Cal. App. 2d 817, 819, 292 P.2d 533*

Party seeking declaratory relief as required to plead facts rather than conclusions of law and as required to show a controversy of concrete actuality as opposed to one which is merely academic or hypothetical. *Hagan v. Fairfield (1965) 238 Cal. App. 2d 197, 202, 47 Cal. Rptr. 600* ; *Auberry Union School Dist. v. Rafferty (1964) 226 Cal. App. 2d 599, 603, 38 Cal. Rptr. 223*

Complaint seeking declaratory relief as required to allege facts which justify declaration of rights or obligations in respect of matter of "controversy," the controversy being "actual" within purview of *Code Civ. Proc. § 1060*, and involving justiciable rights. *Wilson v. Los Angeles County Civ. Serv. Com. (1951) 106 Cal. App. 2d 572, 577, 235 P.2d 620* (adding that requirement is met by allegations showing controversy respecting rights of parties to written instrument, accompanied by request that these rights be determined and declared)

Complaint for declaratory relief by sublessor against sublessee alleging that owner of premises claims leased premises were damaged in amount in excess of $2,400 during defendant's and its predecessor's subtenancy, that owner has made demand on plaintiff for payment of such damages, that if damages were done, defendant is liable for it, that defendant denies such liability, and praying for declaration as to whether damage was done and if so whether defendant is liable for it as good against general demurrer. *Schafer v. Wholesale Frozen Foods, Inc. (1959) 171 Cal. App. 2d 232, 235, 340 P.2d 308*

Complaint seeking declaration that by reason of federal price freeze under federal legislation, defendant's option to renew lease, with renewal rental subject to agreement or arbitration, had become impossible to perform as stating cause of action for declaratory relief. *Patel v. Athow (1973) 34 Cal. App. 3d 727, 731-734, 110 Cal. Rptr. 460*

Rule that complaint is to be liberally construed as particularly applicable to one for declaratory relief. *City of Tiburon v. Northwestern Pac. R.R. Co. (1970) 4 Cal. App. 3d 160, 170, 84 Cal. Rptr. 469* ; *Strozier v. Williams (1960) 187 Cal. App. 2d 528, 531, 9 Cal. Rptr. 683*

[5] Controversy

In action by third party under *Ins. Code § 790.03(h)* (duty to settle insurance claim in good faith), absence of prior final determination of civil action between insured and insurers, as required, rendered any declaration advisory only; declaratory relief not available based on speculative and hypothetical contingencies. *Green v. Travelers Indemnity Co. (1986) 185 Cal. App. 3d 544, 557, 230 Cal. Rptr. 13* ; *but see Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58* (abrogating private third-party claims under *Ins. Code § 790.03*)

Under *Code Civ. Proc. § 1060*, action in declaratory relief as required to be based on "actual controversy" between parties. *State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 249, 115 Cal. Rptr. 497, 524 P.2d 1281* ; see *Pittenger v. Home Sav. & L. Ass'n (1958) 166 Cal. App. 2d 32, 36, 332 P.2d 399*

Fact that issue raised in declaratory relief action is of broad general interest as no ground for courts to grant such relief in absence of true justiciable controversy. *Zetterberg v. State Dept. of Public Health (1974) 43 Cal. App. 3d 657, 662, 118 Cal. Rptr. 100*

Justiciable controversy as required to be definite, concrete, and touching legal relations of parties having adverse interests. *LePage v. Oakland (1970) 13 Cal. App. 3d 689, 692, 91 Cal. Rptr. 806*

Whether justiciability exists in jurisdictional sense in declaratory relief action as within sound discretion of trial court. *Tehachapi-Cummings County Water Dist. v. Armstrong (1975) 49 Cal. App. 3d 992, 998, 122 Cal. Rptr. 918*

Citizen's mere dissatisfaction with performance of either legislative or executive branch of government or disagreement with its policies, or difference of opinion as to interpretation of a statute between citizen and governmental agency, as not giving rise to a justiciable controversy. *Zetterberg v. State Dept. of Public Health (1974) 43 Cal. App. 3d 657, 662, 118 Cal. Rptr. 100*

Justiciable controversy as existing in declaratory relief action by lessee against lessor in determining duty of lessor under lease to replace worn out elevator where dispute presents question to which there is more than one answer. *Western Motors Corp. v. Land Dev. & Inv. Co. (1957) 152 Cal. App. 2d 509, 511-512, 313 P.2d 927*

Action for declaratory relief as dismissed where it appears that no justiciable controversy exists. *Pittenger v. Home Sav. & L. Ass'n (1958) 166 Cal. App. 2d 32, 36, 332 P.2d 399*

[6] Cross Complaint

Defendant precluded from bringing declaratory relief claim by way of a cross complaint that could have been asserted as affirmative defense. *C.J.L. Construction, Inc. v. Universal Plumbing (1993) 18 Cal. App. 4th 376, 391, 22 Cal. Rptr. 2d 360*

Cause of action solely for declaratory relief as permitted to be set up by cross complaint. *Sattinger v. Newbauer (1954) 123 Cal. App. 2d 365, 370, 266 P.2d 586* ; *see also People ex rel. Dept. of Parks and Recreation v. West-A-Rama, Inc. (1973) 35 Cal. App3d 786, 789, 111 Cal. Rptr. 197* ; *Pylon, Inc. v. Olympic Ins. Co. (1969) 271 Cal. App. 2d 643, 647, 77 Cal. Rptr. 72*

[7] Defenses

In declaratory relief action by former husband seeking determination of his obligations under property settlement agreement where complaint on its face shows agreement was illegal, doctrine of in pari delicto (unclean hands) as element properly considered by trial court in concluding that declaratory relief was not proper under facts of case. *Moss v. Moss (1942) 20 Cal. 2d 640, 644, 128 P.2d 526*

When statute of limitations bars action for declaratory relief. *Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719, 734, 146 P.2d 673* ; *Pena v. Los Angeles (1970) 8 Cal. App. 3d 257, 262-263, 87 Cal. Rptr. 326* ; *see also Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 559, 305 P.2d 20*

When action for declaratory relief is barred by laches. *Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719, 735-737, 146 P.2d 673*

When action for declaratory relief is barred by res judicata. *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 550, 554, 305 P.2d 20*

Fact that governmental immunity applies to liability on which declaratory relief action is based as defense to latter action. *People v. Buellton Dev. Co. (1943) 58 Cal. App. 2d 178, 185, 136 P.2d 793*

[8] Demurrer

General demurrer is not appropriate means of testing merits of controversy in declaratory relief action, because plaintiff is entitled to declaration of rights even if it is adverse; however, if issue is purely one of law, reviewing court may consider merits of legal controversy on appeal from judgment of dismissal following order sustaining demurrer, and opinion of reviewing court will constitute declaration of legal rights and duties of parties concerning matter in controversy. *Taxpayers for Improving Pub. Safety v. Schwarzenegger (2009) 172 Cal. App. 4th 749, 769, 91 Cal. Rptr. 3d 370*

In action for declaratory relief under *Ins. Code § 790.03(h)* (duty to settle third party insurance claim in good faith), which requires prior final determination of insured-insurer litigation, demurrer as properly sustained when underlying action was not finally determined, because no present and actual controversy exists between parties. *Green v. Travelers Indemnity Co. (1986) 185 Cal. App. 3d 544, 557, 230 Cal. Rptr. 13* ; *but see Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58* (abrogating private third-party claims under *Ins. Code § 790.03*)

Trial court's error in sustaining general demurrer to complaint that satisfied requirements for declaratory relief as not prejudicial when it is clear on face of complaint that plaintiff's position was untenable and matter would be ended by declaration adverse to plaintiff despite *Code Civ. Proc. § 1060* provision entitling party to declaration of rights and duties even if eventual declaration is adverse to party's interests. *Jones v. Daly (1981) 122 Cal. App. 3d 500, 511, 176 Cal. Rptr. 130*

Trial court as properly sustaining general demurrer to complaint where facts pleaded by plaintiff justify refusal of relief under *Code Civ. Proc. § 1061*, authorizing court to refuse relief where its declaration or determination is not necessary or proper at time under all the circumstances. *Lord v. Garland (1946) 27 Cal. 2d 840, 852, 168 P.2d 5*

Complaint for declaratory relief that shows on its face that action is barred by statute of limitations as subject to general demurrer. See *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 550, 305 P.2d 20* ; *Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719, 733-735, 146 P.2d 673*

Complaint for declaratory relief that shows on its face that entire controversy has been settled by prior judgment as subject to general demurrer on ground of res judicata. *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 550, 305 P.2d 20*

Trial court as acting within its discretion in sustaining without leave to amend demurrer to plaintiffs' complaint seeking declaratory relief with respect to enforcement of police commission regulation requiring every officer, when off duty or on duty in civilian dress, to be equipped with revolver, notwithstanding plaintiffs' contention that complaint for declaratory relief is not vulnerable to demurrer if actual controversy is well stated where no controversy about meaning of regulation exists. *Stribling v. Mailliard (1970) 6 Cal. App. 3d 470, 475, 85 Cal. Rptr. 924*

Declaratory relief complaint of store and its employee, sued as third-party tortfeasors following accident in which trucking company operator was injured during unloading operations at store, seeking adjudication that defendant insurance company was obligated to defend and pay any judgment in tort action brought by employee of defendant's insured as sufficient against general demurrer. *Safeway Stores, Inc. v. Royal Indem. Co. (1971) 21 Cal. App. 3d 44, 48-50*

Demurrer to complaint for declaratory relief as not to be sustained without leave to amend where, although complaint is indefinitely or defectively drawn, it reflects that plaintiff has a cause of action and is subject to amendment. *London Assur. Co. v. Anderson (1961) 194 Cal. App. 2d 418, 422-423, 15 Cal. Rptr. 13* ; see *Strozier v. Williams (1960) 187 Cal. App. 2d 528, 531, 9 Cal. Rptr. 683*

[9] Enforcement of Judgment

Jurisdiction of court to enforce its decrees as coextensive with its jurisdiction to determine rights of parties. *Klinker v. Klinker (1955) 132 Cal. App. 2d 687, 694, 283 P.2d 83*

[10] Exhaustion of Administrative Remedies

Requirement that party aggrieved by application of statute or ordinance must invoke and exhaust administrative remedies provided before resorting to courts for relief. *Pan Pac. Properties, Inc. v. Santa Cruz County (1978) 81 Cal. App. 3d 244, 249, 146 Cal. Rptr. 428*

Exhaustion of administrative remedies as jurisdictional prerequisite to court review. *McHugh v. County of Santa Cruz (1973) 33 Cal. App. 3d 533, 538-539, 109 Cal. Rptr. 149* ; *see also Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 292-293, 109 P.2d 942* ; *Mountain View Chamber of Commerce v. City of Mountain View (1978) 77 Cal. App. 3d 82, 88, 143 Cal. Rptr. 441*

Fact some of plaintiffs are proceeding via class action as not per se making an exception to exhaustion doctrine. *Mountain View Chamber of Commerce v. City of Mountain View (1978) 77 Cal. App. 3d 82, 96, 143 Cal. Rptr. 441*

Fact that statute is challenged on constitutional grounds as not excusing failure to exhaust administrative remedies. *Subriar v. Bakersfield (1976) 59 Cal. App. 3d 175, 193, 130 Cal. Rptr. 853*

California law as settled that doctrine of exhaustion of administrative remedies applies to constitutional challenges of zoning ordinances. *Mountain View Chamber of Commerce v. City of Mountain View (1978) 77 Cal. App. 3d 82, 93, 143 Cal. Rptr. 441*

Exceptions to exhaustion of administrative remedies doctrine. *Ogo Associates v. City of Torrance (1974) 37 Cal. App. 3d 830, 834, 112 Cal. Rptr. 761* ; *see also Mountain View Chamber of Commerce v. City of Mountain View (1978) 77 Cal. App. 3d 82, 88-98, 143 Cal. Rptr. 441*

[11] Failure to Seek Coercive Relief in Declaratory Action

Failure in declaratory relief action to seek coercive relief which plaintiff may then possess as part of application for declaratory judgment as not barring future proceedings to enforce rights determined by declaratory judgment. *Southern Counties Gas Co. v. Ventura Pipeline Constr. Co. (1971) 19 Cal. App. 3d 372, 382, 96 Cal. Rptr. 825* ; *Lortz v. Connell (1968) 273 Cal. App. 2d 286, 300, 78 Cal. Rptr. 6*

[12] Improper Actions

Superior court lacked subject matter jurisdiction to grant declaratory relief in form of determination that Workers' Compensation statute (*Lab. Code § 5955*) is invalid, given statutory scheme for review of these statutes, which recognizes that such invalidation would interfere with ability of Workers' Compensation Appeals Board to comply with its duties. *Greener v. Workers' Comp. Appeals Bd. (1993) 6 Cal. 4th 1028, 1040, 1042-1043, 25 Cal. Rptr. 2d 539*

Cause of action for declaratory relief is improper when it is pleaded as alternate means of recovering damages from defendant who is shielded by statutory immunity. *Tokeshi v. State of California (1990) 217 Cal. App. 3d 999, 1008-1009, 266 Cal. Rptr. 255*

Declaratory relief actions brought by firefighters' union and individuals were not maintainable to determine validity of local propositions adopted by city electorate that amended city charter, because exclusive method of attack on city charter amendments lies in quo warranto action that may only be brought by Attorney General. *International Assn. of Firefighters v. City of Oakland (1985) 174 Cal. App. 3d 687, 694-698*

Declaratory relief is not appropriate method of judicial review of administrative order or decision. *State of Cal. v. Superior Court (1974) 12 Cal. 3d 237, 249, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 127, 109 Cal. Rptr. 799, 514 P.2d 111*

Declaratory relief action is not maintainable to determine validity and construction of proposed, as opposed to existing, contract. *Escondido Mut. Water Co. v. George A. Hillebrecht, Inc. (1966) 241 Cal. App. 2d 410, 412, 50 Cal. Rptr. 495*

Declaratory relief action is improper where only matters raised are constitutional points in which plaintiff has no interest greater than that of public generally. *Rowland School Dist. v. State Bd. of Educ. (1968) 264 Cal. App. 2d 589, 593, 70 Cal. Rptr. 504*

Dispute which is subject of another action pending between same parties is not subject to independent action for declaratory relief. *Taliaferro v. Taliaferro (1960) 179 Cal. App. 2d 787, 791, 4 Cal. Rptr. 689*

Court lacks jurisdiction to declare terms and conditions of dissolution of corporation to occur at some future time. *Escondido Mut. Water Co. v. George A. Hillebrecht, Inc. (1966) 241 Cal. App. 2d 410, 415-416, 50 Cal. Rptr. 495*

Dismissal of automobile liability insurer's action seeking declaration that insured's employee was not acting as insured's agent or driving insured vehicle with permission at time of accident was proper where previous action for damages for personal injury and property damage was pending and issue sought to be determined was same as that involved in pending action. *Allstate Ins. Co. v. Fisher (1973) 31 Cal. App. 3d 391, 394-398, 107 Cal. Rptr. 251*

Declaratory relief that book is not obscene was not available to publisher where book has already been distributed and criminal complaint against plaintiff is already on file. *Miller v. California (1970) 6 Cal. App. 3d 202, 203-205, 85 Cal. Rptr. 801*

Dismissal of action for declaration that *Penal Code § 311.2*, which prohibits exhibition and sale of obscene material, is unconstitutional and that plaintiffs had constitutional right to judicial determination respecting obscenity of items seized was proper where plaintiffs had adequate remedy at law [*see Penal Code §§ 1538.5-1540*] to test validity of seizures of property claimed to be obscene. *Holden v. Arnebergh (1968) 265 Cal. App. 2d 87, 91-92, 71 Cal. Rptr. 401*

Declaratory relief action is not available to challenge existence of de facto or de jure municipal corporations where party seeking relief is one who could not maintain quo warranto action in own name and statutory remedy provided is action in quo warranto. *Cooper v. Leslie Salt Co. (1969) 70 Cal. 2d 627, 634, 75 Cal. Rptr. 766, 451 P.2d 406*

Declaratory relief to determine collectibility of tax is improper where tax statute provides that no injunction, writ of mandate, or other legal or equitable process shall issue to prevent or enjoin collection of tax and demurrer to complaint was properly sustained without leave to amend. *Casey v. Bonelli (1949) 93 Cal. App. 2d 253, 254-255, 208 P.2d 723* ; *see also Honeywell, Inc. v. State Bd. of Equalization (1975) 48 Cal. App. 3d 907, 912, 122 Cal. Rptr. 243* (and cases there cited)

[13] Injunctive Relief

Where plaintiff has failed to prove any facts which would entitle him to any affirmative relief beyond declaration of his rights, issuance of injunction as error. *California Water & Tel. Co. v. Los Angeles County (1967) 253 Cal. App. 2d 16, 32, 61 Cal. Rptr. 618*

[14] Judgment

Proof of contract produced by defendant rather than of contract alleged by plaintiff as matter of variance of proof, not fatal failure of proof, because defendant was not surprised or prejudiced and contracts covered same subject matter; thus, judgment could be entered in plaintiff's favor; cause of action for breach of contract and declaratory relief as not so different that court cannot grant latter based on evidence actually produced at trial of action for breach of contract and accounting. *Fineberg v. Niekerk (1985) 175 Cal. App. 3d 935, 939-941, 221 Cal. Rptr. 106*

Judgment on the merits after granting motion for judgment on the pleadings seeking particular declaration of rights of parties. *Wilson v. Board of Retirement (1957) 156 Cal. App. 2d 195, 199-201, 319 P.2d 426*

Court as properly granting any relief consistent with evidence and pleadings. *Kroepsch v. Muma (1969) 272 Cal. App. 2d 467, 474, 77 Cal. Rptr. 348*

Damages as proper part of judgment holding plaintiff aggrieved by action of municipality in discharging plaintiff civil service employee under unconstitutional statute prohibiting political activity. *Kinnear v. City & County of San Francisco (1964) 61 Cal. 2d 341, 343-344, 38 Cal. Rptr. 631, 392 P.2d 391* ; *see also Southern Counties Gas Co. v. Ventura Pipeline Constr. Co. (1971) 19 Cal. App. 3d 372, 380, 96 Cal. Rptr. 825* ; *Travers v. Louden (1967) 254 Cal. App. 2d 926, 931, 62 Cal. Rptr. 654*

[15] Jurisdiction

Jurisdiction of court to render money judgment in action for declaratory relief. *California Bank v. Diamond (1956) 144 Cal. App. 2d 387, 390, 301 P.2d 60*

Court as assuming jurisdiction of entire controversy where complaint for declaratory relief pleads facts sufficient to entitle plaintiff to some equitable relief. *Mills v. Mills (1956) 147 Cal. App. 2d 107, 116, 305 P.2d 61* ; *see also Klinker v. Klinker (1955) 132 Cal. App. 2d 687, 694, 283 P.2d 83*

[16] Jury and Nonjury Trial

If declaratory relief action is addressed to equity powers of court, matter as one for trial court alone or sitting with an advisory jury. *Dills v. Delira Corp. (1956) 145 Cal. App. 2d 124, 128, 302 P.2d 397*

Where declaratory relief action is in effect substitute for action at law for breach of contract, parties as entitled to jury trial as matter of right. *State Farm Mut. Auto. Ins. Co. v. Superior Court of San Francisco (1956) 304 P.2d 13* (disapproving *Kaliterna v. Wright (1949) 94 Cal. App. 2d 926, 212 P.2d 32*); *Interinsurance Exchange v. Savior (1975) 51 Cal. App. 3d 691, 694, 124 Cal. Rptr. 239* ; *Patterson v. Insurance Co. of North America (1970) 6 Cal. App. 3d 310, 315, 85 Cal. Rptr. 665*

[17] Limitation of Actions

Action on contract for declaratory relief, brought before any breach of contract, as not barred by statute of limitations because no cause of action for coercive remedy has yet accrued and no statute of limitations has yet been set in motion. *United Pacific/Reliance Ins. Co. v. DiDomenico (1985) 173 Cal. App. 3d 673, 676-677, 219 Cal. Rptr. 119*

Declaratory relief sought before breach of obligation in respect to which declaration is sought or within statutory period after breach as not barred by lapse of time. *Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719, 734, 146 P.2d 673*

Right to declaratory relief as barred by statute of limitations where relief sought is in reference to obligation which has been breached and right to commence action for coercive relief on cause of action arising from breach is barred by statute of limitations. *Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719, 734, 146 P.2d 673* ; *Pena v. Los Angeles (1970) 8 Cal. App. 3d 257, 262-263, 87 Cal. Rptr. 326* ; *Leahey v. Department of Water & Power (1946) 76 Cal. App. 2d 281, 286, 173 P.2d 69*

[18] Nature of Action

Equitable nature of action for declaratory relief. *Westerholm v. 20th Century Ins. Co. (1976) 58 Cal. App. 3d 628, 632* ; *Hollenbeck Lodge v. Wilshire Blvd. Temple (1959) 175 Cal. App. 2d 469, 476, 346 P.2d 422* ; *Mills v. Mills (1956) 147 Cal. App. 2d 107, 116, 305 P.2d 61*

Declaratory relief as not strictly legal or equitable, but as sui generis in nature. *Moss v. Moss (1942) 20 Cal. 2d 640, 643, 128 P.2d 526* ; *Patterson v. Insurance Co. of N. America (1970) 6 Cal. App. 3d 310, 315, 85 Cal. Rptr. 665*

Nature of action as determinable from relief sought and nature of facts stated in complaint. *Dills v. Delira Corp. (1956) 145 Cal. App. 2d 124, 128, 302 P.2d 397*

[19] Parties

Declaratory relief actions against public officials to adjudge and declare obligations of their office with respect to given factual situation as authorized. *Los Angeles County v. State Dep't of Public Health (1958) 158 Cal. App. 2d 425, 444, 322 P.2d 968* ; *see also Bess v. Park (1955) 132 Cal. App. 2d 49, 52-53, 281 P.2d 556*

Specific consent as not requisite to action for declaratory relief brought against public officials and designed to adjudge and declare obligations of their office with respect to given factual situation. *Los Angeles County v. State Dep't of Public Health (1958) 158 Cal. App. 2d 425, 444, 322 P.2d 968*

Declaratory relief actions against state or any public agency as permitted where governmental immunity does not exist or is waived. *California Physicians' Service v. Garrison (1946) 28 Cal. 2d 790, 800, 172 P.2d 4* ; *Hoyt v. Board of Civil Service Commrs. (1942) 21 Cal. 2d 399, 401, 132 P.2d 804* ; *Grier v. Alameda-Contra Costa Transit Dist. (1976) 55 Cal. App. 3d 325, 333, 127 Cal. Rptr. 525*

"Interested person" as used in *Gov. Code § 11440* [repealed, now see *Gov. Code § 11350*] and *Unemp. Ins. Code § 409.2*, authorizing declaratory relief actions to test validity of administrative regulations and predecent decisions of Unemployment Insurance Appeals Board, respectively, as including "interested organization." *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1977) 74 Cal. App. 3d 150, 154, 141 Cal. Rptr. 474*

"Interested party" entitled under *Gov. Code § 11440* [repealed, *now see Gov. Code § 11350*] to obtain judicial declaration as to validity of administrative regulation. *Pacific Motor Transp. Co. v. State Bd. of Equalization (1972) 28 Cal. App. 3d 230, 237-238, 104 Cal. Rptr. 558* (comparing language of *Gov. Code § 11440* and *Code Civ. Proc. §*

1060)

When declaratory relief action is brought against very agency charged with duty of administering or enforcing law and merely challenges validity of agency's ruling, plaintiff as not required to join everyone who may ultimately be affected by court's decision. *City of San Joaquin v. State Bd. of Equalization (1970) 9 Cal. App. 3d 365, 374, 88 Cal. Rptr. 12*

[20] Past Wrongs Providing No Basis for Relief

Declaratory relief as operating prospectively, and not merely to redress past wrongs. *Sych v. Insurance Co. of North America (1985) 173 Cal. App. 3d 321, 329 n.5, 220 Cal. Rptr. 692*

[21] Power and Function of Court

Broad power of court to grant declaratory relief. *Adams v. Cook (1940) 15 Cal. 2d 352, 362, 101 P.2d 484*

Proper function of trial court in declaratory relief action as being to make full and complete declaration disposing of all questions of rights, status, or other legal relations encountered in construing instruments before it. *Anderson v. Southern Pac. Co. (1968) 264 Cal. App. 2d 230, 234, 70 Cal. Rptr. 389*

Gov. Code § 11440 [repealed, *now see Gov. Code § 11350*] authorizes courts, among other things, to declare emergency regulation invalid on ground that facts recited in statement of emergency do not constitute an emergency within meaning of *Gov. Code § 11421(b)*. *Poschman v. Dumke (1973) 31 Cal. App. 3d 932, 941, 107 Cal. Rptr. 596* (overruled on other grounds in *Armistead v. State Personnel Board (1978) 22 Cal. 3d 198, 204, 149 Cal. Rptr. 1, 583 P.2d 744*); *California Medical Assn. v. Brian (1973) 30 Cal. App. 3d 637, 649, 106 Cal. Rptr. 555*

Function of court in reviewing administrative regulations as being to inquire into their legality, not their wisdom. *Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal. 3d 392, 411, 128 Cal. Rptr. 183, 546 P.2d 687* ; *California Medical Assn. v. Brian (1973) 30 Cal. App. 3d 637, 641, 106 Cal. Rptr. 555* ; *Pacific Motor Transp. Co. v. State Bd. of Equalization (1972) 28 Cal. App. 3d 230, 239, 104 Cal. Rptr. 558* .

Court in declaratory relief action as required to do complete justice once jurisdiction has been assumed, and relief thus granted as encompassing future and contingent legal rights. *Eye Dog Foundation v. State Board of Guide Dogs for the Blind (1967) 67 Cal. 2d 536, 541, 63 Cal. Rptr. 21, 432 P.2d 717*

Determination of future rights as proper when declaration of present and actual controversy is dependent on adjudication of such future rights. *Klinker v. Klinker (1955) 132 Cal. App. 2d 687, 693, 283 P.2d 83*

When party comes into court pleading facts entitling him or her to equitable relief, court as assuming jurisdiction of entire controversy and granting relief which proof warrants though it may not be the same as that prayed for. *Zimmer v. Gorelnik (1941) 42 Cal. App. 2d 440, 448, 109 P.2d 34*

Trial court, in declaratory relief action, as having power to determine disputed questions of fact. *Zimmer v. Gorelnik (1941) 42 Cal. App. 2d 440, 446, 109 P.2d 34*

To construe regulatory statutes to determine whether business enterprise is subject to them. *California Physicians' Serv. v. Garrison (1946) 28 Cal. 2d 790, 800-801, 172 P.2d 4*

To determine validity of ordinances. *State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 251, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *Walker v. County of Los Angeles (1961) 55 Cal. 2d 626, 636, 12 Cal. Rptr. 671, 361 P.2d*

247 ; *Abbott v. City of Los Angeles (1960) 53 Cal. 2d 674, 677-678, 3 Cal. Rptr. 158, 349 P.2d 974* (questioned on another point in *Bishop v. San Jose (1969) 1 Cal. 3d 56, 62 n. 5, 81 Cal. Rptr. 465, 460 P.2d 137*); *McCarthy v. Manhattan Beach (1953) 41 Cal. 2d 879, 882, 264 P.2d 932* ; *La Franchi v. Santa Rosa (1937) 8 Cal. 2d 331, 332, 65 P.2d 1301* ; *Mountain View Chamber of Commerce v. City of Mountain View (1978) 77 Cal. App. 3d 82, 85-86, 143 Cal. Rptr. 441* ; *Subriar v. Bakersfield (1976) 59 Cal. App. 3d 175, 194-195, 130 Cal. Rptr. 853*

[22] Proper Actions

[a] Constitution, Statutes, Ordinances, and Regulations

In action to determine validity of municipal initiative ordinance, party challenging its constitutionality as having burden of showing that it is not reasonably related to promoting public health, safety, comfort, and welfare or that means adopted to accomplish that promotion are not reasonably appropriate for purpose. *Higgins v. Santa Monica (1964) 62 Cal. 2d 24, 30-31, 41 Cal. Rptr. 9, 396 P.2d 41*

Regulation, adopted by state administrative agency pursuant to delegation of rulemaking authority by Legislature, as having force and effect of statute. *Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal. 3d 392, 401, 128 Cal. Rptr. 183, 546 P.2d 687*

To determine validity of statutes. *Nevada County v. MacMillen (1974) 11 Cal. 3d 662, 666, 114 Cal. Rptr. 345, 522 P.2d 1345* ; *City of Carmel-by-the-Sea v. Young (1970) 2 Cal. 3d 259, 263, 85 Cal. Rptr. 1, 466 P.2d 225* ; *Eye Dog Foundation v. State Bd. of Guide Dogs for the Blind (1967) 67 Cal. 2d 536, 541, 63 Cal. Rptr. 21, 432 P.2d 717* ; *Zeitlin v. Arnebergh (1963) 59 Cal. 2d 901, 904-907, 31 Cal. Rptr. 800, 383 P.2d 152* ; *Lord v. Garland (1946) 27 Cal. 2d 840, 852, 168 P.2d 5* ; *Portnoy v. Superior Court (1942) 20 Cal. 2d 375, 378, 125 P.2d 487* ; *Sandelin v. Collins (1934) 1 Cal. 2d 147, 149, 33 P.2d 1009* ; *Hetherington v. State Personnel Bd. (1978) 82 Cal. App. 3d 582, 586, 147 Cal. Rptr. 300* ; *California Teachers Assn. v. Board of Trustees (1978) 82 Cal. App. 3d 249, 251, 146 Cal. Rptr. 850* ; *Holden v. Arnebergh (1968) 265 Cal. App. 2d 87, 91-92, 71 Cal. Rptr. 401* *Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal. 3d 458, 464, 474, 475* (holding discrimination against homosexuals unconstitutional and unlawful, as contravening *Cal. Const., art. I, § 7(a),* and *Pub. Util. Code § 453*)

By privately owned water utilities to determine validity of county water ordinance where constitutional amenability of utilities to local regulations has continuing effect on conduct and plans of their business. *California Water & Tel. Co. v. Los Angeles County (1967) 253 Cal. App. 2d 16, 26, 61 Cal. Rptr. 618*

To secure interpretation of statutes and ordinances. *Walker v. County of Los Angeles (1961) 55 Cal. 2d 626, 637, 12 Cal. Rptr. 671, 361 P.2d 247* ; *Finster v. Keller (1971) 18 Cal. App. 3d 836, 847, 96 Cal. Rptr. 241* ; *see also* *Zeitlin v. Arnebergh (1963) 59 Cal. 2d 901, 905-906, 31 Cal. Rptr. 800, 383 P.2d 152* ; *Wollam v. Palm Springs (1963) 59 Cal. 2d 276, 279, 29 Cal. Rptr. 1, 379 P.2d 481*

To secure interpretation of city charter provisions. *Le Page v. City of Oakland (1970) 13 Cal. App. 3d 689, 693, 91 Cal. Rptr. 806* ; *Squire v. City & County of San Francisco (1970) 12 Cal. App. 3d 974, 979, 91 Cal. Rptr. 347*

To determine validity of administrative regulation. *Chas. L. Harney, Inc. v. Contractors' Bd. (1952) 39 Cal. 2d 561, 564, 247 P.2d 913* ; *California Optometric Assn. v. Lackner (1976) 60 Cal. App. 3d 500, 505-506, 131 Cal. Rptr. 744* ; *Honeywell, Inc. v. State Bd. of Equalization (1975) 48 Cal. App. 3d 907, 912, 122 Cal. Rptr. 243* ; *Antoine v. Department of Public Health (1973) 33 Cal. App. 3d 215, 220, 108 Cal. Rptr. 689*

Statute [*Gov. Code § 11440* (repealed, now see *Gov. Code § 11350*)] as authorizing any interested party to secure judicial declaration as to validity of administrative regulation. *Chas. L. Harney, Inc. v. Contractors' Bd. (1952) 39*

Cal. 2d 561, 564, 247 P.2d 913 ; *California Optometric Assn. v. Lackner (1976) 60 Cal. App. 3d 500, 505-506, 131 Cal. Rptr. 744* ; *Honeywell, Inc. v. State Bd. of Equalization (1975) 48 Cal. App. 3d 907, 912, 122 Cal. Rptr. 243*

Declaratory relief as available to determine validity of administrative regulation without performing any act which subjects plaintiff to criminal or disciplinary proceedings. *Chas. L. Harney, Inc. v. Contractors' Bd. (1952) 39 Cal. 2d 561, 564, 247 P.2d 913* ; *see also Honeywell, Inc. v. State Bd. of Equalization (1975) 48 Cal. App. 3d 907, 912, 122 Cal. Rptr. 243*

By municipal employee claiming he was entitled to certain civil service rating that had been denied him; such employee as permitted to seek declaratory judgment of his rights, apply for writ of mandate to compel civil service commission to admit him to position to which he claims he was entitled, or seek both forms of relief concurrently. *Leahey v. Department of Water & Power (1964) 76 Cal. App. 2d 281, 285, 173 P.2d 69*

To test validity of senatorial reappointment. *Yorty v. Anderson (1963) 60 Cal. 2d 312, 317, 33 Cal. Rptr. 97, 384 P.2d 417*

To test constitutionality of initiative measure relating to free television. *Weaver v. Jordan (1966) 64 Cal. 2d 235, 240, 49 Cal. Rptr. 537, 411 P.2d 289*

To challenge validity of county ordinance imposing gross receipts tax. *Franklin v. Peterson (1948) 87 Cal. App. 2d 727, 729-730, 197 P.2d 788* (upholding validity)

To test validity of municipal zoning ordinance. *Andrews v. City of Piedmont (1929) 100 Cal. App. 700, 700-701, 281 P. 78*

[b] Charges and Fees

To resolve controversy over charge imposed on county by Water District in connection with county's use of district's sewerage facilities. *County of Riverside v. Idyllwild County Water Dist. (1978) 84 Cal. App. 3d 655, 657, 148 Cal. Rptr. 650*

[c] Contract

To determine controversy based on oral contract. *Zimmer v. Gorelnik (1941) 42 Cal. App. 2d 440, 445, 109 P.2d 34* ; *see also Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 760-761, 161 P.2d 217*

To determine existence of oral contract. *Howard v. Howard (1955) 131 Cal. App. 2d 308, 313, 280 P.2d 802*

By owner of gasoline service station for declaratory relief and damages against oil corporation for latter's failure to honor clause in its gasoline purchasing contract guaranteeing plaintiff discount on purchase of gasoline for 10 years where such was agreement of parties but written contract without plaintiff's knowledge substituted for 10-year clause a clause giving defendant right to decrease or terminate discount at any time. *Steiner v. Mobil Oil Corp. (1977) 20 Cal. 3d 90, 93-94, 141 Cal. Rptr. 157, 569 P.2d 751*

[d] Indemnity

Code Civ. Proc. § 1060 as authorizing court to declare party's rights or duties in controversy before breach of obligation with respect to which declaration is sought; cross complaint for equitable indemnity as proper subject for

declaratory relief action; cross complainant's right to file cross complaint as arising when complaint is filed. *Allen v. Southland Plumbing, Inc. (1988) 201 Cal. App. 3d 60, 64, 246 Cal. Rptr. 860*

By franchisor for declaration that one of franchisee's insurers and insurer of automobile involved in accident between automobile being used by franchisee (but not owned by franchisee) and pedestrian had, as a result of their failure to defend franchisor in action by pedestrian against car driver and franchisor, become liable to indemnify franchisor for its contribution to settlement. *Chicken Delight of Cal., Inc. v. State Farm Mut. Auto. Ins. Co. (1973) 35 Cal. App. 3d 841, 843, 111 Cal. Rptr. 79* (trial court's rejection of franchisor's contention affirmed on appeal)

To secure determination of duty to indemnify where basic action is pending and undecided. *Mascarin Professional Pharmacy v. Hart (1970) 13 Cal. App. 3d 462, 465, 91 Cal. Rptr. 560*

By cross complaint in wrongful death action by defendant third-party tortfeasor against decedent's employer for declaration of defendant's right to indemnity from cross defendant pursuant to written indemnity agreement drafted before decedent's death but not signed until after commencement of wrongful death action. *Solano Concrete Co. v. Lund Constr. Co. (1976) 64 Cal. App. 3d 572, 573-574, 134 Cal. Rptr. 552*

By city against water district to resolve dispute over which party would have to bear cost of relocating district's pipelines made necessary by city's construction of undercrossing for street under railroad right of way. *Anaheim v. Metropolitan Water Dist. of So. Cal. (1978) 82 Cal. App. 3d 763, 765, 147 Cal. Rptr. 336*

[e] Insurance

In a declaratory relief action, an insured seeking to establish that "property damage" caused by asbestos-containing building material falls within policy's coverage may rely upon allegations of injury without evidence of such injury. For the purpose of a declaratory relief action, the court may assume injury even though that assumption may ultimately be disproved in a trial against the insured. *Armstrong World Industries, Inc. v Aetna Casualty & Surety Co. (1996) 45 Cal. App. 4th 1, 88-89, 93-94, 52 Cal. Rptr. 2d 690*

To secure declaration of validity of endorsement to life insurance policy. *Estate of Murphy (1978) 82 Cal. App. 3d 304, 306, 147 Cal. Rptr. 258*

By insurer for construction of its policy with insured after insured denied request to defend negligence action for destruction of private plane a few days after insured sold it. *Insurance Co. of N. America v. Sam Harris Constr. Co. (1978) 22 Cal. 3d 409, 411, 149 Cal. Rptr. 292, 583 P.2d 1335*

To determine whether automobile liability policy, providing coverage to members of insured's household, covered insured's wife where spouse had agreed to trial separation and insured was living in apartment at time of accident but family home was still a residence of insured. *Reserve Insurance Co. v. Apps (1978) 85 Cal. App. 3d 228, 230, 149 Cal. Rptr. 223*

Between insurance companies to determine obligations under *Ins. Code § 11580.9* where each company's policy covered same motor vehicle involved in accident out of which liability arose. *Zurich-American Ins. Co. v. Liberty Mut. Ins. Co. (1978) 85 Cal. App. 3d 481, 483, 149 Cal. Rptr. 472* ; *see also Ohio Cas. Ins. Co. v Aetna Ins. Co. (1978) 85 Cal. App. 3d 521, 522, 149 Cal. Rptr. 562*

To secure adjudication as to whether union members remained insured under group life insurance policy after cancellation of policy by union and subsequent cancellation of coverage by insurer. *Garage Employees Union v. Pacific Mut. Life Ins. Co. (1969) 2 Cal. App. 3d 706, 711, 82 Cal. Rptr. 821*

To determine whether employer's amendment to employees' pension plan and its conduct pursuant to amendment resulted in wrongful diversion of pension trust funds, for actual damages, and for exemplary damages for fraudulent concealment of amendment from employees. *Werschkull v. United California Bank (1978) 85 Cal. App. 3d 981, 985-986, 149 Cal. Rptr. 829*

[f] Legality of Proposed Plan

By wholesale distributor of horse-racing publications and liquor store owner who was his customer to determine their right to possess and distribute blank application forms for a "5-10" scheme operated by race track in Mexico for last six races on regular racing days where they alleged threat of prosecution and seizure of forms; defendant district attorney and Attorney General as entitled to affirmative ruling on specially pleaded issue that distribution of such forms was violation of law. *Finster v. Keller (1971) 18 Cal. App. 3d 836, 847-851, 96 Cal. Rptr. 241*

By corporate jeweler to determine whether its diamond sales promotional plan constituted sale of securities within meaning of *Corp. Code § 25019* where Department of Corporations contended that it did. *Hamilton Jewelers v. Department of Corps. (1974) 37 Cal. App. 3d 330, 332, 112 Cal. Rptr. 387*

[g] Liability for Test

By person seeking to have prior default judgment set aside on ground of extrinsic fraud, to have judgment in that action entered in his favor, and to obtain declaration that earlier suit had been maliciously prosecuted where parties stipulated in joint pretrial statement that if default judgment were set aside and an opposite judgment entered, one of issues to be decided was whether former action had been maliciously prosecuted. *Munson v. Linnick (1967) 255 Cal. App. 2d 589, 594-595, 63 Cal. Rptr. 340* (explained and disapproved on another point in *Babb v. Superior Court (1971) 3 Cal. 3d 841, 849-850, 92 Cal. Rptr. 179, 479 P.2d 379*)

[h] Pension

By retired union employees against trustees of their pension fund to determine validity of termination of benefits. *Lix v. Edwards (1978) 82 Cal. App. 3d 573, 576, 147 Cal. Rptr. 294*

[i] Real Property

To secure determination of rights under final decree of distribution to sell property. *Talcott v. Talcott (1942) 54 Cal. App. 2d 743, 747-748, 129 P.2d 946*

By vendee of real property against beneficiary of trust deed to declare that exercise of "due-on-sale" clause in trust deed, without any showing that beneficiary's security had been impaired as result of sale of property to plaintiff, constituted an unreasonable restraint on alienation in violation of California law. *Wellenkamp v. Bank of America (1978) 21 Cal. 3d 943, 947, 148 Cal. Rptr. 379, 582 P.2d 970*

[j] Resolution of Issue Following Abstention by Federal Court

Declaratory relief action is proper when federal court has abstained from considering state law issue of public importance and action is not collusive or hypothetical. *National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419, 432-433 n.14, 189 Cal. Rptr. 346, 658 P.2d 709*

[k] Review of Administrative Agency Policy

Declaratory relief is available under *Code Civ. Proc. § 1060* to challenge an administrative agency policy of ignoring or violating applicable laws and regulations, even though no specific agency decision is challenged. *Californians for Native Salmon etc. Assn. v Department of Forestry (1990) 221 Cal. App. 3d 1419, 1429-1431, 271 Cal. Rptr. 270*

In a declaratory relief action to challenge an administrative agency policy, trial court may consider evidence of agency's policies and practices beyond the record that would have been before an administrative agency if a particular administrative action had been challenged by administrative mandamus. *East Bay Mun. Utility Dist. v Department of Forestry & Fire Protection (1996) 43 Cal. App. 4th 1113, 1122-1124, 51 Cal. Rptr. 2d 299*

[23] Purpose and Function of Action

Purpose of declaratory relief. *Lachman Bros. v. Muenzer (1956) 143 Cal. App. 2d 520, 524, 300 P.2d 295*

Purpose of declaratory judgment as being to serve some practical end in quieting disputed jural relation. *American Mission Army Inc. v. Lynwood (1956) 138 Cal. App. 2d 817, 819, 292 P.2d 533*

Purpose of action as being to liquidate uncertainties and controversies which might result in future litigation. *Interstate Marina Development Co. v. County of Los Angeles (1984) 155 Cal. App. 3d 435, 443, 202 Cal. Rptr. 377* ; *Fagerstedt v. Continental Ins. Co. (1968) 266 Cal. App. 2d 370, 372, 72 Cal. Rptr. 126*

Salutary purpose of declaratory relief provisions as being to permit prompt adjudication of respective rights and obligations of parties in order to relieve them from uncertainty and insecurity with respect to rights, status, and other legal relations. *Lortz v. Connell (1969) 273 Cal. App. 2d 286, 301, 78 Cal. Rptr. 6*

Purpose of judicial declaration of rights in advance of actual tortious incident as being to enable parties to shape their conduct so as to avoid breach. *Babb v. Superior Court (1971) 3 Cal. 3d 841, 848, 92 Cal. Rptr. 179, 479 P.2d 379* ; *Watson v. Sansone (1971) 19 Cal. App. 3d 1, 3, 96 Cal. Rptr. 387*

Declaratory procedure as operating prospectively and not merely for redress of past wrongs; remedy as used in interests of preventive justice to declare rights rather than to execute them. *Travers v. Louden (1967) 254 Cal. App. 2d 926, 931, 62 Cal. Rptr. 654* ; *see also Babb v. Superior Court (1971) 3 Cal. 3d 841, 848, 92 Cal. Rptr. 179, 479 P.2d 379*

Function of declaratory relief action as being to determine rights and duties of parties on existing state of facts, although this may include, where necessary, declaration of contingent future rights; action as not having function to declare in advance earliest possible date on which indefinite future event must necessarily occur. *Sugarman v. Federal Ins. Co. (1968) 265 Cal. App. 2d 563, 567, 71 Cal. Rptr. 542*

[24] Refusing Declaratory Relief

If parties' controversy is primarily over enforceability of certain contractual remedies should future dispute over substantive rights arise, and declaratory relief would have little practical effect in terms of altering parties' behavior, denial of declaratory judgment is within court's discretion. *Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 646-648, 88 Cal. Rptr. 3d 859, 200 P.3d 295*

If Legislature has specified exclusive procedure for litigating particular disputes, it is abuse of discretion for superior court to bypass statutory procedure and hear ordinary declaratory relief action. *Filarsky v. Superior Court (2002) 28*

Cal. 4th 419, 429-435, 121 Cal. Rptr. 2d 844, 49 P.3d 194

Court may properly refuse declaratory relief if local ordinance provides procedure to resolve dispute that is simpler and more affordable than declaratory-relief action. *DeLaura v. Beckett (2006) 137 Cal. App. 4th 542, 545-547, 40 Cal. Rptr. 3d 253*

Whether to grant or deny declaratory relief as within discretion of trial court. *Fagerstedt v. Continental Ins. Co. (1968) 266 Cal. App. 2d 370, 372, 72 Cal. Rptr. 126* ; *see also Zetterberg v. State Dept. of Public Health (1974) 43 Cal. App. 3d 657, 665, 118 Cal. Rptr. 100* ; *Allstate Ins. Co. v. Fisher (1973) 31 Cal. App. 3d 391, 395, 107 Cal. Rptr. 251*

Whether determination is necessary and proper as matter within discretion of trial court. *California Physicians' Serv. v. Garrison (1946) 28 Cal. 2d 790, 801, 172 P.2d 4* ; *Bess v. Park (1955) 132 Cal. App. 2d 49, 52, 281 P.2d 556*

Discretion defined. *Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 762, 161 P.2d 217* ; *Wilson v. Los Angeles County Civ. Serv. Com. (1951) 106 Cal. App. 2d 572, 577, 235 P.2d 620*

Factors affecting trial court's exercise of judicial discretion to grant or deny declaratory relief seeking determination of validity of penal ordinance. *California Water & Tel. Co. v. Los Angeles County (1967) 253 Cal. App. 2d 16, 23-24, 61 Cal. Rptr. 618*

Declaration of rights as unnecessary where complaint shows on its face that all relief is barred by statute of limitations. *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 550, 305 P.2d 20*

Declaration of rights as unnecessary where complaint shows on its face that entire controversy has been settled by prior judgment. *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 550, 305 P.2d 20*

Propriety or necessity for declaratory relief as not dependent on which party to controversy seeks judicial aid. *Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719, 731, 146 P.2d 673*

Declaratory relief as refused in discretion of trial court if it appears that determination is not necessary or proper at the time under all the circumstances; but this rule as inapplicable where, under facts stated, plaintiff is entitled to some relief in connection with matter which occasioned controversy. *Lord v. Garland (1946) 27 Cal. 2d 840, 852, 168 P.2d 5* ; see *Wilson v. Los Angeles County Civ. Serv. Com. (1951) 106 Cal. App. 2d 572, 578, 235 P.2d 620* ; *Zimmer v. Gorelnik (1941) 42 Cal. App. 2d 440, 448, 109 P.2d 34*

Trial court as not permitted to refuse to assume jurisdiction of declaratory relief action where complaint sets forth facts showing that declaratory adjudication is entirely appropriate. *Cinmark Investment Co. v. Reichard (1966) 246 Cal. App. 2d 498, 501, 54 Cal. Rptr. 810* ; *Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 762, 161 P.2d 217* ; *Wilson v. Los Angeles County Civ. Serv. Com. (1951) 106 Cal. App. 2d 572, 577-578, 235 P.2d 620*

Fact that plaintiff may not be entitled to favorable declaration as not a proper ground for refusing declaratory relief. *Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719, 728-729, 731, 146 P.2d 673* ; *see also Southern Counties Gas Co. v. Ventura Pipeline Constr. Co. (1971) 19 Cal. App. 3d 372, 377, 96 Cal. Rptr. 825*

Dismissal of complaint for declaratory relief on ground that relief is neither necessary nor proper at time under all circumstances pursuant to *Code Civ. Proc. § 1061* as abuse of discretion where complaint shows controversy as to meaning and operation of city charter and civil service commission rules as they relate to civil service promotional lists. *Wilson v. Los Angeles County Civ. Serv. Com. (1951) 106 Cal. App. 2d 572, 576, 578, 235 P.2d 620*

Fact that party has another remedy available as not depriving court of power to grant declaratory relief under the law. *Bess v. Park (1955) 132 Cal. App. 2d 49, 53, 281 P.2d 556* ; *Jones v. Robertson (1947) 79 Cal. App. 2d 813, 819, 180 P.2d 929*

Availability of another form of relief that is adequate as usually justifying refusal to grant declaratory relief. *Allstate Ins. Co. v. Fisher (1973) 31 Cal. App. 3d 391, 395, 107 Cal. Rptr. 251*

For court to refuse to grant declaratory relief on ground other adequate remedy exists, asserted alternative remedy as required to clearly appear and be as speedy and adequate or as well suited to plaintiff's needs as declaratory relief. *Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719, 730-732, 146 P.2d 673* ; *City of Tiburon v. Northwestern Pac. R.R. Co. (1970) 4 Cal. App. 3d 160, 177, 84 Cal. Rptr. 469*

Decision of trial court to grant or deny declaratory relief as not disturbed on appeal absent clear showing of abuse of discretion. *California Physicians' Serv. v. Garrison (1946) 28 Cal. 2d 790, 801, 172 P.2d 4* ; *Fagerstedt v. Continental Ins. Co. (1968) 266 Cal. App. 2d 370, 372, 72 Cal. Rptr. 126* ; *see also Zetterberg v. State Dept. of Public Health (1974) 43 Cal. App. 3d 657, 665, 118 Cal. Rptr. 100* ; *Allstate Ins. Co. v. Fisher (1973) 31 Cal. App. 3d 391, 395, 107 Cal. Rptr. 251*

[25] Ripeness

Tort plaintiff whose action against alleged tortfeasor has not yet been adjudicated may not obtain declaratory relief against alleged tortfeasor's insurer to establish whether there should be insurance coverage for potential tort liability; as long as plaintiff's action against alleged tortfeasor is still pending, any controversy between plaintiff and insurer is not ripe for adjudication, because it remains unknown whether plaintiff will ultimately be able to make claim against proceeds of liability-insurance policy as judgment creditor. *Otay Land Co. v. Royal Indemnity Co. (2008) 169 Cal. App. 4th 556, 565-567, 86 Cal. Rptr. 3d 408*

Ripeness doctrine as primarily based on recognition that judicial decisionmaking is best conducted in context of actual set of facts so that issues will be framed with sufficient definiteness to enable court to make decree finally disposing of controversy. *Sherwyn v. Department of Social Services (1985) 173 Cal. App. 3d 52, 57, 218 Cal. Rptr. 778*

[26] Standing to Sue

Plaintiff who lacks standing as not able to state valid cause of action; contention based on plaintiff's lack of standing as not subject to waiver under *Code Civ. Proc. § 430.80* (failure to object to pleadings), and therefore, may be raised at any time in proceeding. *Sherwyn v. Department of Social Services (1985) 173 Cal. App. 3d 52, 58, 218 Cal. Rptr. 778*

One who invokes judicial process as not having standing if he or those whom he properly represents does not have real interest in ultimate adjudication because actor has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all relevant facts and issues will be adequately presented. *Zetterberg v. State Dept. of Public Health (1974) 43 Cal. App. 3d 657, 662, 118 Cal. Rptr. 100* ; *California Water & Tel. Co. v. Los Angeles County (1967) 253 Cal. App. 2d 16, 22-23, 61 Cal. Rptr. 618*

Nonprofit civic corporation, membership of which consists of families residing in geographical area of city, as having standing to sue city for declaratory relief as to validity of variance granted which would, as alleged, result in destroying existing residential community of plaintiffs' members by requiring removal of their homes. *Residents of Beverly Glen, Inc. v. City of Los Angeles (1973) 34 Cal. App. 3d 117, 121-127, 109 Cal. Rptr. 724*

Nonprofit corporations active in, and having important, valid, and legitimate interests in welfare of prison inmates,

prison reform, and assistance to prison inmates and parolees and their families has standing to maintain proceeding in mandate to compel Department of Corrections and Adult Authority, in formulating their rules and regulations, to comply with Administrative Procedure Act. *American Friends Service Committee v. Procunier (1973) 33 Cal. App. 3d 252, 255-256* (overruled on other grounds in *Engelmann v. State Bd. of Education (1991) 2 Cal. App. 4th 47, 59, 3 Cal. Rptr. 2d 264*)

[27] Summary Judgment

Summary judgment with express declaration of rights of parties as proper to resolve justiciable issues presented by complaint for declaratory relief which can be disposed of as matter of law. *City of Tiburon v. Northwestern Pac. R.R. Co. (1970) 4 Cal. App. 3d 160, 172 n. 5, 84 Cal. Rptr. 469* ; *Siemon v. Russell (1961) 194 Cal. App. 2d 592, 595, 15 Cal. Rptr. 218* ; *Spencer v. Hibernia Bank (1960) 186 Cal. App. 2d 702, 712, 9 Cal. Rptr. 867*

[28] Use of Mandate

Mandate is remedy to test validity of school district's rules affecting employees in case of present and actual controversy between employees and district as to validity of those rules. *California Sch. Employees Assn. v. Los Angeles City Unified Sch. Dist. (1976) 65 Cal. App. 3d 848, 851-852, 134 Cal. Rptr. 424*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityCase or Controversy RequirementsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 182.44 Law Reviews

Doernberg and Mushlin, *History Comes Calling: Dean Griswold Offers New Evidence About the Jurisdictional Debate Surrounding the Enactment of the Declaratory Judgment Act, 37 UCLA L. Rev. 139 (1989)*

Comment, "Steffel v. Thompson: Federal Declaratory Relief and the State Criminal Process--A Compromise of Comity and Primacy," *9 U.S.F. L. Rev. 87 (1974)*

Note, "The Res Judicata Effect of Declaratory Relief in the Federal Courts," *6 So. Cal. L. Rev. 803 (1973)*

Note, "The Role of Declaratory Relief and Collateral Estoppel in Determining the Insurer's Duty to Defend and Indemnify," *21 Hastings L.J. 191 (1969)*

Note, "Administrative Declaratory Orders," *13 Stan. L. Rev. 307 (1961)*

Note, "Procedure: Declaratory Relief: Controversy Requirement for Declaratory Relief," *41 Cal. L. Rev. 341 (1953)*

Note, "Declaratory Judgments: Patent Litigation: Justiciable Controversy," *37 Cal. L. Rev. 506 (1949)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityCase or Controversy RequirementsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsFederal JudgmentsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

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§ 182.45 Text References

California Civil Procedure Before Trial, Vol. 2, Ch. 42, *Declaratory Relief* (Cal. CEB 3d ed 2000)

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 805-833 (4th ed. 1997)

Legal Topics:

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[Reserved]

§§ 182.46[Reserved]

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PART IV. FORM

15-182 California Forms of Pleading and Practice--Annotated § 182.60

§ 182.60 Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--General Form

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DECLARATORY RELIEF
Defendant.	)	
	)	
	)	

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence*].

2. _____ [*Set out essential facts of transaction giving rise to the adverse contentions of the parties, e.g., execution of written agreement between parties*].

3. An actual controversy has arisen and now exists between plaintiff and defendant concerning their respective rights and duties in that plaintiff contends _____ [*plaintiff's contentions as to legal consequences resulting from facts alleged in preceding paragraph*], whereas defendant disputes these contentions and contends that _____ [*defendant's contentions*].

4. Plaintiff desires a judicial determination of his/her/its rights and duties, and a declaration as to

_____ [*specify, e.g.*, whether the written agreement is valid *or* which party's interpretation of the agreement is correct].

5. A judicial declaration is necessary and appropriate at this time under the circumstances in order that plaintiff may ascertain his/her/its rights and duties _____ [*specify, e.g.*, under the written agreement]. [_____ (*Allege facts showing that declaratory relief would have practical effect, for example, by informing parties' future conduct or by lessening financial or other burden being caused plaintiff by the unsettled state of affairs*).]

[6. _____ (*Allege detriment and damages incurred, if any, to date if damages are sought*).]

[7. _____ (*Allege exhaustion of administrative remedies, if such is the fact, and steps taken by plaintiff showing that administrative remedies have been exhausted. Copies of administrative rulings may be attached to the complaint as exhibits, each being separately identified by a letter and incorporated in the pleading by reference*).]

[*Allege any additional causes of action plaintiff may have and wish to include. Statute does not require that the causes of action be separately stated, but the better practice is to separately state them where there are multiple defendants not all of whom are defendants in both or all the causes of action alleged or where failure to do so might subject the complaint to a demurrer for misjoinder (Code Civ. Proc. § 430.10(d)) or uncertainty (Code Civ. Proc. § 430.10(f)). If causes of action are separately stated, they must be separately numbered (Cal. Rules of Ct., Rule 2.112; see Ch. 123, Complaints and Cross Complaints).*]

WHEREFORE, plaintiff prays judgment as follows:

1. For a declaration that _____ [*state the determination the court is requested to render, e.g.*, the written instrument hereinabove described is void and of no force or effect];

[2. For damages in the sum of $_____; (*This relief should be requested only where the complaint contains allegations stating a cause of action for damages, whether or not separately stated*.)]

[3. For issuance of a temporary restraining order, preliminary injunction, and permanent injunction restraining and enjoining defendant from _____ (*specify*); (*This relief should be requested only where the complaint contains allegations stating a cause of action for injunctive relief, whether or not separately stated.*)]

[4. _____ (*State any other relief desired to which plaintiff is entitled by the facts alleged in the complaint, whether in the declaratory relief action or in a separately stated cause of action*);]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The general skeletal form of complaint in [1], *above*, may be adapted for use in any declaratory relief action under the provisions of *Code Civ. Proc. § 1060*. *See also Code Civ. Proc. §§ 1061-1062*. For alternative forms of complaints, see *§§ 182.64 -182.67*.

[3] Complaint

[a] Caption

The caption should clearly identify the relief sought, for example, COMPLAINT FOR DECLARATORY RELIEF, or COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF, or COMPLAINT FOR DECLARATORY RELIEF AND DAMAGES, etc. [*see Cal. Rules of Ct., Rule 2.111(6)*]. If the action is joined with a petition for writ of mandate, the caption would read: COMPLAINT FOR DECLARATORY RELIEF AND PETITION FOR WRIT OF MANDATE. In such a case, the parties would be uniformly referred to as "plaintiff" and "defendant" [*see Code Civ. Proc. §§ 308, 1063*].

[b] Essential Allegations

[i] Proper Matter for Declaratory Relief

A complaint for declaratory relief must allege facts showing that the subject of the actions is a proper matter for declaratory relief, that is, that the matter is proper for declaratory relief under the provisions of *Code Civ. Proc. § 1060*, or of some special statute authorizing declaratory relief, or that declaratory relief in the particular fact situation has been held proper by case law. The fact situation suggested in this complaint (Paragraph 2) involves a written contract and hence brings the action within the express provisions of *Code Civ. Proc. § 1060*. *Code Civ. Proc. § 1060* does not, however, require that the contract be written and, hence, an action may be brought to determine a controversy based on an oral contract as well [*Zimmer v. Gorelnik (1941) 42 Cal. App. 2d 440, 445, 109 P.2d 34]* .

[ii] Existence of Actual Controversy

The complaint must allege the existence of an actual controversy between the parties [*see Code Civ. Proc. § 1060*; *Alturas v. City of Gloster (1940) 16 Cal. 2d 46, 48, 104 P.2d 810* ; *Escondido Mut. Water Co. v. George A. Hillebrecht, Inc. (1966) 241 Cal. App. 2d 410, 412-413, 50 Cal. Rptr. 495* ; *Fairchild v. Bank of America (1961) 192 Cal. App. 2d 252, 261-262, 13 Cal. Rptr. 491]* .

For the court to exercise its discretion to declare rights, the controversy involved must be a justiciable one which permits specific and conclusive relief by judgment within the field of judicial determination, rather than a mere difference or dispute of a hypothetical or abstract character or a controversy that is academic or moot [*see Southern Cal. Edison Co. v. State Farm Mut. Auto. Ins. Co. (1969) 271 Cal. App. 2d 744, 747, 76 Cal. Rptr. 909* ; *Hagan v. Fairfield (1965) 238 Cal. App. 2d 197, 202, 47 Cal. Rptr. 600* ; *Auberry Union School Dist. v. Rafferty (1964) 226 Cal. App. 2d 599, 602-603, 38 Cal. Rptr. 223]* .

The pleading requirement may be satisfied by alleging that an actual controversy exists between the parties and setting forth the parties' conflicting contentions (Paragraph 3) showing that an actual justiciable controversy exists. A mere allegation that a controversy exists is insufficient [*see Alturas v. Gloster (1940) 16 Cal. 2d 46, 48, 104 P.2d 810* ; *American Mission Army Inc. v. Lynwood (1956) 138 Cal. App. 2d 817, 819, 292 P.2d 533* ; *see also Hagan v. Fairfield (1965) 238 Cal. App. 2d 197, 202, 47 Cal. Rptr. 600]* , and a complaint that shows on its face that no actual controversy exists is subject to a general demurrer for failure to state a cause of action [*see State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 249, 115 Cal. Rptr. 497, 524 P.2d 1281]* .

[iii] Request for and Necessity of Declaration

An allegation that plaintiff desires a declaration of his, her, or its rights under the circumstances (Paragraph 4) should be included [*see Code Civ. Proc. § 1060*], as well as an allegation that such declaration is necessary and appropriate at the time (Paragraph 5) under all the circumstances to enable plaintiff to ascertain his, her, or its legal position in the premises [*see Code Civ. Proc. §§ 1060, 1061*]. The complaint should also allege specific facts showing that declaratory relief would have practical consequences, such as by informing the plaintiff's decision whether to enter into or continue a contractual relationship, or by lessening financial or other burdens suffered by the plaintiff because of uncertainty about the parties' rights and duties [*see Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 646-648, 88 Cal. Rptr. 3d 859, 200 P.3d 295* (court has considerable discretion to deny declaratory relief when such relief would have little practical effect in terms of altering parties' behavior)].

[c] Legal Capacity

This complaint assumes that the parties are adult persons suing and being sued in their individual capacities, and hence the separate legal capacity of the parties is not alleged. That defendant is an adult, competent person being sued in his or her individual capacity is, nevertheless, implied by the residence allegation in Paragraph 1.

But, as with other complaints, a complaint for declaratory relief should allege the capacities of the parties if they are other than adult persons suing or being sued in their individual capacity (e.g., a corporation, unincorporated association, public entity or official, executor or administrator, or a trustee of an express trust). For forms of such allegations, see Ch. 20, *Allegations Commonly Used* .

The objection that plaintiff lacks legal capacity to sue may be raised by special demurrer [*Code Civ. Proc. § 430.10(b)*] where that fact appears onthe face of the complaint or from any matter of which the court must or may take judicial notice [*Code Civ. Proc. §§ 430.30(a), 430.70*; *Evid. Code §§ 451-456*]. Where the lack of legal capacity does not so appear but nonetheless exists, the objection may be taken by answer [*Code Civ. Proc. §§ 430.30(b), 431.30(b)(2)*]. The objection is a mere plea in abatement, however, not favored by the law. Consequently, defendant's failure to raise it by demurrer or answer constitutes a waiver of the objection [*Code Civ. Proc. § 430.80(a)*]. For further discussion, see Ch. 3, *Abatement of Actions* , and Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[d] Standing to Sue Distinguished

Lack of legal capacity to sue, that is, the legal disability of the plaintiff to maintain a cause of action which he or she or it has, must be distinguished from lack of standing to sue, that is, the statement of a cause of action in someone other

than plaintiff. Whether or not plaintiff has standing to sue is normally a question of law and will be determined from the allegations of the complaint showing the relationship of the parties to each other and to the subject of the action. Objection to a complaint on the ground that plaintiff lacks standing to sue is taken by general, rather than by special, demurrer [for discussion, *see § 182.60[4], below*].

[e] Venue

The complaint should contain one or more allegations showing that the action has been commenced in the proper county for trial [*see generally Code Civ. Proc. §§ 392-396b*; *Civ. Code §§ 1812.10, 2984.4*]. This complaint lays venue on the basis of defendant's residence (Paragraph 1), although, since it assumes the action arises out of contract, other counties might in a particular case be a proper place of trial [*see Code Civ. Proc. § 395*; *Civ. Code §§ 1812.10, 2984.4*; *see also* Ch. 571, *Venue*].

[4] Failure to State Cause of Action

Failure to state a cause of action for declaratory relief renders the complaint subject to a general demurrer (or to a nonstatutory motion for judgment on the pleading) on that ground [*Code Civ. Proc. § 430.10(e)*; *Orloff v. Metropolitan Trust Co. (1941) 17 Cal. 2d 484, 489, 110 P.2d 396* ; *Rowland School Dist. v. State Bd. of Educ. (1968) 264 Cal. App. 2d 589, 594-595, 70 Cal. Rptr. 504* ; *San Martin Vineyards v. R. & W. Floor Coverings, Inc. (1962) 204 Cal. App. 2d 677, 679, 22 Cal. Rptr. 628]* where the objection appears on the face of the complaint or from matter of which the court must or may take judicial notice [*Code Civ. Proc. § 430.30(a)*]. Matter of which the court must or may take judicial notice is listed in *Evid. Code §§ 451* and *452*, and the manner of raising and determining the issue is provided for in *Code Civ. Proc. § 430.70* and *Evid. Code §§ 453-456*.Where the objection does not so appear, it may be raised by answer [*Code Civ. Proc. §§ 430.30(b), 431.30(b)(2)*]. Failure to raise the objection by demurrer or answer does not constitute a waiver of the objection [*Code Civ. Proc. § 430.80(a)*].

With respect to a plaintiff's standing to sue, the general rule makes clear that lack of standing is a lack of a right to relief and goes to the existence of a cause of action. Thus, where the complaint states a cause of action in someone but not in the plaintiff, a general demurrer, or a nonstatutory motion for judgment on the pleadings, will be sustained [*Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 19, 108 P.2d 906* (distinguishing lack of standing to sue from lack of legal capacity to sue); *Oakland Municipal Improvement League v. City of Oakland (1972) 23 Cal. App. 3d 165, 170, 100 Cal. Rptr. 29]* . Nevertheless, as a practical matter, failure to state facts sufficient to constitute a cause of action and lack of standing should be distinguished to avoid unnecessary ambiguity. For example, in a case in which the trial court in its minute order granting a defendant's motion for judgment on the pleadings stated the basis to be the plaintiff's lack of standing but in its formal judgment stated the basis to be the complaint's failure to state facts sufficient to state a cause of action, the court of appeal found sufficient ambiguity to require it to review the allegations of the complaint to decide in addition to the standing issue whether or not sufficient facts for a cause of action were alleged [*see Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1977) 74 Cal. App. 3d 150, 157, 141 Cal. Rptr. 474]* .

If, for some reason, plaintiff's lack of standing to sue does not appear from the face of the complaint or from matter of which the court must or may take judicial notice, the objection may be raised by answer [*see Code Civ. Proc. §§ 430.30(b), 431.30(b)(2)*], or by a motion for summary judgment provided there is no triable issue as to any material fact with respect to plaintiff's lack of standing [*see Code Civ. Proc. § 437c*].

[5] Verification

Verification of this complaint is not required, but verification of the complaint requires verification of the answer [*Code Civ. Proc. §§ 92(b), 446*], and precludes a general denial *Code Civ. Proc. § 431.30(d)*]. Verification may be required, however, when the complaint seeks relief in addition to a declaratory judgment [*see, e.g., Code Civ. Proc. § 527(a), (c)* (relating to preliminary injunctions and temporary restraining orders)].

If the optional language in the form seeking injunctive relief is used, verification will be required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

[6] Costs and Attorneys' Fees

The award of costs is governed by *Code Civ. Proc. § 1021 et seq.* For when costs must or may be awarded to the prevailing party, see *Code Civ. Proc. § 1032(b)*. Costs may be awarded against the state or public entity or agency or any officer thereof in his or her official capacity on the same basis as against any other party [*Code Civ. Proc. §§ 1028, 1029*; see generally Ch. 174, *Costs and Attorney's Fees*]. Absent a special statute or contract provision, attorney's fees are normally not recoverable from the other side in declaratory relief actions [*see Twentieth Century-Fox Film Corp. v. Harbor Ins. Co. (1978) 85 Cal. App. 3d 105, 112-115, 149 Cal. Rptr. 313* ; *Carroll v. Hanover Insurance Co. (1968) 266 Cal. App. 2d 47, 49-51, 71 Cal. Rptr. 868]* .

[7] Cross References

For listing of other chapters in this publication containing forms of complaints and cross complaints for declaratory relief, see *§ 182.02, above*.

[8] Text References

Witkin, California Procedure, Vol. 5, *Pleading*, § 809 (4th ed. 1997)

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15-182 California Forms of Pleading and Practice--Annotated § 182.61

§ 182.61 Allegations in Complaint for Declaration as to Validity of Written Instrument [Code Civ. Proc. § 1060]--Existence of Controversy Relating to Validity

[1] FORM Allegations in Complaint for Declaration as to Validity of Written Instrument [Code Civ. Proc. § 1060]--Existence of Controversy Relating to Validity

An actual controversy has arisen and now exists relating to the rights and duties of the parties herein in that plaintiff contends that the _____ [*instrument, e.g.,* contract] is valid [and enforceable] in all respects, whereas defendant contends that the _____ [*instrument, e.g.,* contract] is invalid [and unenforceable] for the reason that _____ [*state reason*]. Plaintiff disputes defendant's contention and asserts that the reason asserted by defendant does not affect the _____ [validity *or* enforceability] of the _____ [*instrument, e.g.,* contract].

[2] Use of Form

The form of allegation in [1], *above,* is for insertion in the complaint set out in *§ 182.60[1]* in lieu of Paragraph 3 in that form. A breach of obligationneed not be established before it may be included in a declaratory relief action [*London Assur. Co. v. Anderson (1961) 194 Cal. App. 2d 418, 422, 15 Cal. Rptr. 13]* . Declaratory relief exists to enable party to contract to determine rights and liabilities before he or she has incurred costs and subjected himself or herself to risk [*Rubin v. Toberman (1964) 226 Cal. App. 2d 319, 326, 38 Cal. Rptr. 32]* .

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15-182 California Forms of Pleading and Practice--Annotated § 182.62

§ 182.62 Allegations in Complaint for Declaration Construing Written Instrument [Code Civ. Proc. § 1060]--Existence of Controversy Relating to Interpretation

[1] FORM Allegations in Complaint for Declaration Construing Written Instrument [Code Civ. Proc. § 1060]--Existence of Controversy Relating to Interpretation

An actual controversy has arisen and now exists relating to the rights and duties of the parties herein in that plaintiff contends that the words "_____" in the _____ [*instrument, e.g.,* contract] were intended by _____ [*names of parties to agreement or person executing document*] to mean: _____ [*state plaintiff's interpretation*]; whereas defendant contends that these words were intended to mean: _____ [*state defendant's interpretation*].

[2] Use of Form

The form of allegation in [1], *above,* is for insertion in the complaint set out in *§ 182.60[1]* in lieu of Paragraph 3 in that form.

[3] Cross References

For additional comments, see *§ 182.61[2]*

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15-182 California Forms of Pleading and Practice--Annotated § 182.63

§ 182.63 Allegations in Complaint for Declaration as to Validity of Defendant's Claim Against Plaintiff [Code Civ. Proc. § 1060]--Existence of Controversy Relating to Creation of Rights in Defendant as Result of Transaction

[1] FORM Allegations in Complaint for Declaration as to Validity of Defendant's Claim Against Plaintiff [Code Civ. Proc. § 1060]--Existence of Controversy Relating to Creation of Rights in Defendant as Result of Transaction

An actual controversy has arisen and now exists relating to the rights and duties of the parties herein in that defendant contends that the transaction referred to in Paragraph _____ hereof gave rise to a _____ [*specify, e.g.,* contract between the parties] and created in defendant the right to _____ [*specify*], whereas plaintiff contends that the transaction did not give rise to any _____ [*specify, e.g.,* contract] of any nature nor create any rights in defendant.

[2] Use of Form

The form of allegation in [1], *above,* is for insertion in the complaint set out in *§ 182.60[1]* in lieu of Paragraph 3 in that form. The court has theright to determine whether an oral contract was made [*see Howard v. Howard (1955) 131 Cal. App. 2d 308, 313, 280 P.2d 802]* .

[3] Cross References

For additional comments and cross references, see *§ 182.60[2]* et seq.

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15-182 California Forms of Pleading and Practice--Annotated § 182.64

§ 182.64 Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--To Determine Validity of Ordinance--By Individual Against Public Entity and Enforcement Officer

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--To Determine Validity of Ordinance--By Individual Against Public Entity and Enforcement Officer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	
_____	)	NO. _____
[*name and description of public entity*]	)	COMPLAINT FOR DECLARATORY RELIEF
and _____	)	(To Determine Validity of Ordinance)
[*name and title of enforcement officer*],	)	
Defendants.	)	
	)	
	)	

Plaintiff alleges:

1. Defendant _____ [*municipality or county or administrative agency of municipality or county*] is _____ [a municipal corporation organized and existing under the constitution and laws of the State of California, *or* a county, *or* a political subdivision of the state, *or* an administrative agency of a _____ (municipality *or* county) *or other as appropriate*]. Defendant _____ [*name*] is the _____ [*title, e.g.,* Director of _____ (*agency*)] and the person charged by law with _____ [*duties, e.g.,* administering the ordinance hereinafter specified].

2. On _____ [*date*], _____ [*specify legislative body or quasi-judicial agency as appropriate*] enacted an ordinance entitled _____ [*title*], _____ [providing as follows: "_____" *or* a true copy of which is attached hereto as Exhibit A and made a part hereof]. The ordinance has since its enactment been, and now is, in full force and effect and is enforced by defendants herein.

3. _____ [*Set out facts showing that ordinance is being applied by municipality, county, or agency to activity of plaintiff, to plaintiff's detriment, and, where appropriate, facts showing that plaintiff has exhausted available administrative remedies or is excused from doing so*].

4. An actual controversy has arisen and now exists between plaintiff and defendants relative to their respective rights and duties in that plaintiff contends that the ordinance is invalid and unenforceable, both on its face and as construed by defendants, in that _____ [*allege facts whichshow invalidity of enactment as applied to plaintiff's activity, e.g.*, it violated the *equal protection clause of the Fourteenth Amendment to the United States Constitution* and of *Article I, Section 7 of the California Constitution*]. Defendants dispute _____ [this *or* these] contention(s) and contend that the ordinance and its application to plaintiff's above-described activity are valid.

5. Plaintiff desires a declaration as to the validity of the ordinance, both on its face and as applied to plaintiff's activities, and if it is found to be valid, whether plaintiff's above-described activities are violative of it. A judicial declaration is necessary and appropriate at this time so that plaintiff may ascertain his/her/its rights and duties in the premises without first subjecting himself/herself/itself to liability by violating the ordinance. [_____ (*Allege any additional facts which show that irreparable injury will result to plaintiff unless the declaration is made*).]

WHEREFORE, plaintiff prays for a declaratory judgment as follows:

1. Declaring the respective rights and duties of the parties under the ordinance in question, that the ordinance is unconstitutional, invalid, and void on its face or as applied to plaintiff, or, if the ordinance is found to be valid, it does not apply to plaintiff's activities hereinabove described.

[*Prayer for costs, injunctive, and general relief. See § 182.60.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 182.60.*]

[2] Use of Form

The form of complaint in [1], *above*, is for use to secure a judicial declaration [*Walker v. County of Los Angeles (1961) 55 Cal. 2d 626, 637, 12 Cal. Rptr. 671, 361 P.2d 247* ; *Finster v. Keller (1971) 18 Cal. App. 3d 836, 847, 96 Cal. Rptr. 241]* as to the construction and validity [*State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 251, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *Mountain View Chamber of Commerce v. City of Mountain View (1978) 77 Cal. App. 3d 82, 85-86, 143 Cal. Rptr. 441;]* of an ordinance. For a complaint for declaratory relief to determine the validity of a statute or an administrative regulation, see *§§ 182.65* and *182.67*, respectively [*see also Code Civ. Proc. §*

459].

[3] Caption

The caption should clearly identify the relief sought, for example, COM PLAINT FOR DECLARATORY RELIEF or COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF [*see Cal. Rules of Ct., Rule 2.111(6)*]. If theaction is joined with a petition for writ of mandate, the caption would read: COMPLAINT FOR DECLARATORY RELIEF AND PETITION FOR WRIT OF MANDATE. In such a case, the parties would be uniformly referred to as "plaintiff" and "defendant" [*see Code Civ. Proc. §§ 308, 1063*].

[4] Cross References

For additional comments and cross references relating to complaints for declaratory relief, see *§ 182.60*

For a form of complaint for declaratory and injunctive relief to declare a local licensing ordinance invalid and to restrain its enforcement, see Ch. 471B, *Licensing by Public Agency*

For a discussion of some common grounds on which the constitutionality of statutes and ordinances may be attacked, see Ch. 531, *Statutes and Ordinances*

For a form of complaint for declaratory and injunctive relief declaring a county regulatory ordinance unconstitutional as applied to plaintiff and enjoining its enforcement, see *Ch. 575, Waters, § 565.190* et seq., Form 67.

For a form of complaint for declaratory relief declaring a zoning ordinance unconstitutional and revocation of a building permit ineffectual, see Ch. 579, *Zoning and Planning* , Form 94

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15-182 California Forms of Pleading and Practice--Annotated § 182.65

§ 182.65 Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--To Declare State Statutes Unconstitutional--By City and Affected Public Officials Against District Attorney

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--To Declare State Statutes Unconstitutional--By City and Affected Public Officials Against District Attorney

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], a Municipal Corporation, and [*names of public officials*],	)	NO. _____
Plaintiffs,	)	COMPLAINT FOR DECLARATORY RELIEF
vs.	)	(To Determine Validity of State Statutes)
_____ [*name*], District Attorney of the County of _____,	)	
Defendant.	)	

Plaintiffs allege:

1. Plaintiff _____ [*name*], hereinafter referred to as the "city," is a municipal corporation organized and existing under the Constitution and laws of the State of California. Plaintiffs _____ [*names*] are duly elected or appointed officials of plaintiff city.

2. Defendant _____ [*name*] is the District Attorney of the County of _____ and the person charged by law with the duty of enforcing the statutes hereinafter referred to.

3. _____ [On _____ (*date*), *or* In _____ (*year*), operative _____ (*date*)], the Legislature of the State of California enacted Sections _____ [*specify, e.g.*, 3600-3704] of the _____ Code, known as the _____, hereinafter

referred to as the "statutes[,]" [a true copy of which is attached hereto as Exhibit A and made a part hereof]. The statutes since their adoption have been, and now are, in full force and effect.

4. On _____ [*date*], the City Council of the city unanimously adopted Resolution No. _____, a true copy of which is attached hereto as Exhibit [B] and made a part hereof. The resolution directs and authorizes the filing and prosecution of this action.

5. The statutes provide, inter alia, _____ [*state, e.g.,* "that every public officer shall file, as a public record, a statement describing the nature and extent of his or her investments, including the ownership in shares of any corporation or the ownership of a financial interest in any business entity, which is subject to regulation by any state or local public agency, if such investment is in excess of $10,000.00 in value at the time of the statement." The statutes also provide that "public officer" means "any officer of a public agency." This phrase is not defined, but apparently includes, although it is not clear, all councilmembers, planning commissioners, boards of supervisors, school boards, department heads, and all other elected and appointed officials and all boards and commissions].

6. Any person who violates the statutes with knowledge of the unlawfulness of such act or omission is guilty of a felony; the statutes have received considerable notoriety and all public officers of the city have knowledge of them.

7. Within the government of the city _____ [*allege adverse effect of statute, e.g.,* three councilmembers, four planning commissioners, three library board members, and one department head will resign rather than file the statement of assets disclosing their financial affairs. (See Declaration of City Clerk attached hereto as Exhibit (C) and made a part hereof.)]

[8. No formal action was taken prior to the date of this complaint because plaintiffs believed that the California Legislature intended to enact legislation ameliorating or at least postponing the effect of the statutes and plaintiffs did not wish to burden the courts with unnecessary litigation.]

[9. Resignation of the above-enumerated public officers of the city will have a crippling effect on the affairs of municipal government; important rights of citizens will be jeopardized by the inability of the city to act due to the impossibility of convening a quorum of the various governmental bodies.]

10. Plaintiffs contend that the statutes are unconstitutional in that _____ [*specify, e.g.:*

a. The statutes are unconstitutionally vague; men and women of common intelligence must necessarily guess at their meaning and differ as to their application, under pain of a felony conviction for failure to guess properly.

b. The statutes are unconstitutionally overbroad in that they invade the fundamental right of privacy without serving a reasonable legislative objective or purpose.

c. The statutes are unconstitutional in that they impose excessive fines and cruel and unusual punishment; an improper interpretation of this ambiguous law, or an honest insistence on retaining the right of privacy in one's personal affairs incurs felony punishments, including arrest, fines, imprisonment, forfeiture of public office and private trust, and civil death.

d. The statutes are an unconstitutional delegation of power to a private individual; the individual public officer or candidate for public office must decide, at peril of prosecution for a felony, the meaning of terms (such as "nature and extent of his or her investments") that even municipal law authorities are unable to agree on.]

11. Defendant contends that the statutes are constitutional, and defendant will enforce them and will prosecute any violation of them by virtue of defendant's contentions and that of plaintiffs aforesaid in Paragraph 10 above, an actual

controversy has arisen and now exists between plaintiffs and defendant concerning their respective rights, duties, and responsibilities.

12. Plaintiffs desire a declaration of their rights with respect to the constitutionality and application or nonapplication of the statutes and ask the court to make a declaration of such rights, duties, and responsibilities, and to make a declaration as to the validity and constitutionality of the statutes. Such a declaration is necessary and appropriate at this time in order that plaintiffs may proceed under the law. There are no administrative remedies available to plaintiffs.

13. A timely declaration by this court is urgent for the following reasons: _____.

14. Plaintiffs [and numerous other public bodies] will suffer irreparable and lasting injury unless declaratory relief is granted. [See Declarations in re Disclosure of Assets Law, attached hereto as Exhibit (D) and made a part hereof.]

WHEREFORE, plaintiffs pray for a declaratory judgment as follows:

1. That the court declare the respective rights, duties, and responsibilities of plaintiffs and defendant under the statutes in question and that by its declaration and judgment the court declare that the statutes have no application to plaintiffs in this matter, and that the statutes are unconstitutional, invalid, and void;

2. That defendant and all others acting in his/her office, be enjoined from enforcing the provisions of the statutes against plaintiffs or any of the city's public officers;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court deems proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[2] Source of Form

The complaint in [1], *above*, is based on the one filed in *City of Carmel-by-the-Sea v. Young (1970) 2 Cal. 3d 259, 85 Cal. Rptr. 1, 466 P.2d 225* , in which the Supreme Court held the 1969 Financial Disclosure Law [former *Gov. Code §§ 3600-3704*] unconstitutional as an overbroad intrusion into the right of privacy of public officers and candidates and as invalidly restricting the right to seek or hold public office or employment. The constitutionality of subsequent legislation enacted by the state to replace the Financial Disclosure Law of 1969 was upheld in *Nevada County v. MacMillen (1974) 11 Cal. 3d 662, 666, 114 Cal. Rptr. 345, 522 P.2d 1345* .

[3] Use of Form

The form of complaint in [1], *above*, is for use by a municipality and public officials to secure [*Walker v. County of Los Angeles (1961) 55 Cal. 2d 626, 637, 12 Cal. Rptr. 671, 361 P.2d 247* ; *Finster v. Keller (1971) 18 Cal. App. 3d 836, 847, 96 Cal. Rptr. 241]* a judicial declaration as the constitutionality [*Hetherington v. State Personnel Bd. (1978) 82 Cal. App. 3d 582, 586, 147 Cal. Rptr. 300* ; *California Teachers Assn. v. Board of Trustees (1978) 82 Cal. App. 3d*

249, 251, 146 Cal. Rptr. 850] of a state statute. *Evid. Code § 451(a)* requires courts take judicial notice of state statutes.

[4] Cross References

For a discussion of some common grounds on which the constitutionality of statute and ordinances may be attacked, see Ch. 531, *Statutes and Ordinances*

For additional comments and cross references, see *§ 182.60[2]* et seq.

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15-182 California Forms of Pleading and Practice--Annotated § 182.66

§ 182.66 Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--To Declare Special Legislative Act Constitutional--By City and City Department

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--To Declare Special Legislative Act Constitutional--By City and City Department

[*Caption, introduction. See § 182.65*.]

1. Plaintiff City of _____, hereinafter referred to as the "plaintiff city," is now, and was at all times herein mentioned, a municipal corporation, duly organized and existing under and by virtue of the laws of the State of California.

2. Plaintiff Department of _____ [*specify, e.g.,* Water and Power] of the City of _____, hereinafter referred to as the "plaintiff department," is now, and was at all times herein mentioned, a department of plaintiff city, created and existing under and by virtue of the _____ [*specify, e.g.,* Charter of plaintiff city].

3. Plaintiff department has the power and duty _____ [*specify, e.g.,* to construct, operate, maintain, extend, manage, and control works and property for the purpose of supplying plaintiff city and its inhabitants with water, and to acquire and take, by purchase, lease, condemnation, or otherwise, and to hold, in the name of plaintiff city, any and all property situated within or without plaintiff city and within or without the State of California, that may be necessary or convenient for such purpose].

4. Pursuant to the foregoing power, plaintiff department constructed and put into operation the _____ Reservoir located in the City of _____ and adjacent to the _____ Oil Field. This reservoir was operated by plaintiff department until _____ [*date*], as a facility for the storage and distribution of water to the inhabitants of plaintiff city.

5. At all times herein mentioned, defendant _____ [*name*] was and is _____ [*specify,*

e.g., a corporation duly organized and existing under and by virtue of the laws of _____ (*state or county*), and is authorized to transact and is transacting business in the State of California].

6. At all times herein mentioned, defendant _____ [*name*] was and is an individual _____ [*specify, e.g.*, doing business in California under the name of _____ Oil Company].

[7. Defendants named herein as DOES I-_____, inclusive, are sued under fictitious names because their true names and capacities, corporate or otherwise, are not known to plaintiffs at this time. Plaintiffs will amend this complaint to insert their true names and capacities when ascertained.]

[8. Defendants DOES _____ (*specify*) have participated, aided, and encouraged, and have received profits resulting from, the acts of defendants hereinafter described.]

[9. Defendants DOES _____ (*specify*) were and are the owners and holders of property interests in the real property which is contained in the _____ Oil Field.]

10. On _____ [*date*], _____ [*allege acts of defendants bringing them within purview of statute, e.g.*, oil was discovered in the area known as the _____ Oil Field. This area encompasses approximately _____ surface acres and is located partially in plaintiff city and partially outside plaintiff city but within the County of _____].

[11. Plaintiffs are informed and believe and thereon allege that the defendants named in Paragraphs 5 and 6 and DOES _____ (*specify*), have, since the time oil was discovered, extracted petroleum, water, and natural gas from the _____ Oil Field by means of wells bored to depths ranging from _____ feet to _____ feet below the surface, and during the period from _____ [*date*] to _____ [*date*], injected fluids into the earth underlying the _____ Oil Field through abandoned or nonproducing oil wells in an effort to increase the production of petroleum, water, and natural gas from the other wells.]

[12. Plaintiffs are informed and believe and thereon allege that these defendants extracted a net volume of approximately _____ barrels of petroleum and water from the earth beneath the _____ Oil Field and surrounding properties in the period between _____ (*year oil discovered*) and _____ (*year of injury*); plaintiffs are further informed and believe and thereon allege that these same defendants also withdrew about _____ cubic feet of natural gas from the earth beneath the _____ Oil Field during the same period.]

[13. As a direct and proximate consequence of defendants' extraction of petroleum, water, and natural gas from the subsurface strata of the _____ Oil Field, and as a direct and proximate consequence of their injection of fluids into the same subsurface strata, the surface area of the oil field and surrounding properties on or about _____ (*date*), subsided and compression and tension forces and strains resulted in numerous cracks in the earth's surface in this region.]

[14. On _____ (*date*), the subsidence resulted in a sudden downward and horizontal movement in a portion of the earth's surface underlying the _____ Reservoir and Dam. This movement caused a crack in the earth's surface which ruptured the lining of the _____ Reservoir and precipitated the collapse of the _____ Dam. The water from the dam thus escaped from the reservoir and flooded hundreds of dwellings and commercial buildings, caused severe damage to real and personal property of more than _____ property owners, caused the death of at least _____ persons, and resulted in personal injuries to numerous others.]

15. Plaintiffs contend that _____ [*specify, e.g.,* the subsidence, earth movement, cracking in the earth underlying the _____ Reservoir, rupture of the reservoir lining, and failure of the reservoir dam, the subsequent flooding and damage to persons and property, were each the direct and proximate consequence of the extraction of petroleum, water, and natural gas from the subsurface strata of the _____ Oil Field by the defendants as described herein].

16. _____ [*Allege acts of plaintiffs done pursuant to statute, e.g.,* In doubt as to whether they would be held liable for the damage to persons and property caused by the escape of water from the _____ Reservoir, and being aware that, as bodies politic, they had an interest in mitigating the loss, hardship, and suffering to a substantial number of the members of the public and that litigation to determine the parties responsible for the losses would have required extended periods of time and would have frustrated prompt settlement of the claims of the persons, corporations, and entities damaged by the flood, plaintiffs paid a reasonable amount in settlement of these claims. The present aggregate amount of claims so paid exceeds $_____].

17. Plaintiffs contend that _____ [*specify, e.g.,* in the event that plaintiffs are held jointly liable for such damages that plaintiffs are entitled to contribution from the defendants pursuant to the following statute: _____ (*set forth statute in full, e.g.:*

"Chapter I

"An act relating to contribution among joint and several tortfeasors, and declaring the urgency thereof, to take effect immediately.

"Section 1. This act is applicable only to injuries to persons or property and wrongful deaths resulting from the failure of the _____ Reservoir and Dam in the City of _____ on _____ [*date*].

"Section 2. The right of contribution provided by this act is in addition to any other rights of contribution, and any other remedies that exist.

"Section 3. (a) Where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them which shall arise when one tortfeasor has discharged by payment the common liability or has paid more than his or her pro rata share thereof, although judgment has not been rendered against all or any of them in an action on the tort.

"(b) Such right of contribution shall be administered _____ (*continue, quoting statute in full*")].

18. Defendants contend that the foregoing _____ [statute *or* act] is unconstitutional in that _____ [*specify, e.g.:*

a. It violates the constitutional guarantees against special and arbitrary legislation because it provides for a different right of contribution among tortfeasors who may be liable for injuries caused by the _____ Dam disaster from that appliable to tortfeasors in general.

b. It cannot be justified as disaster relief legislation because that purpose is not reflected in its title].

19. Plaintiffs contend that _____ [*specify, e.g.:*

a. The _____ (statute *or* act) is general, and not special, legislation, since a law, to be general in its scope, need not include all classes of individuals in the state, nor need it embrace within it every other class which

might be included.

b. The title of the _____ (statute *or* act) indicates that it concerns contribution among tortfeasors and is an urgency measure, and hence suggests the field of legislation which is included in the text of the _____ (statute *or* act), and therefore complies with the constitutional requirement that the subject of a _____ (statute *or* act) be expressed in its title. Moreover, the purpose of the _____ (statute *or* act) to afford disaster relief is amply shown by the recitals and declarations in the text of the _____ (statute *or* act)].

WHEREFORE, plaintiffs pray judgment against defendants, and each of them, as follows:

1. For a declaration by this court that the foregoing quoted _____ [statute *or* act] is constitutional;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court deems proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiffs

[*Verification, if desired. See § 182.60*]

[2] Use of Form

The illustrative form in [1], *above*, is for use where a public entity, or a private person or entity, which has a beneficial interest, seeks a judicial declaration of the constitutionality of a special legislative act.

The form is based on the complaint filed in *City of Los Angeles v. Standard Oil Co. (1968) 262 Cal. App. 2d 118, 68 Cal. Rptr. 512* , to declare the constitutionality of an enactment relating to contribution among joint and several tortfeasors with respect to the Baldwin Hills Dam disaster of 1963.

[3] Cross References

For additional comments and cross references, see *§§ 182.60[2] et seq. and 182.65[3], [4]*

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Chapter 182 DECLARATORY RELIEF
PART IV. FORM

15-182 California Forms of Pleading and Practice--Annotated § 182.67

§ 182.67 Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--To Determine Validity of Administrative Regulation [Gov. Code § 11350]

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--To Determine Validity of Administrative Regulation [Gov. Code § 11350]

[*Caption, introduction. See § 182.65*]

1. Defendant _____ [*name of administrative agency*], hereinafter referred to as the "defendant agency," is an agency of _____ [*state, county, or municipality*], duly organized and existing under the _____ [Constitution *and/or* laws] of _____ [*political entity*]. Defendant _____ [*name*] is the _____ [*title, e.g.,* director] of defendant agency and the person charged by law with administering defendant agency and the rules and regulations thereof.

2. On _____ [*date*], defendant agency duly adopted Regulation No. _____, hereinafter referred to as the "regulation," _____ [providing as follows: "_____" *or* a true copy of which is attached hereto as Exhibit A and made a part hereof]. The regulation has since its adoption been, and now is, in full force and effect.

3. _____ [*Set out specific facts showing that regulation is being applied by agency to activity of plaintiff, to plaintiff's detriment*].

4. An actual controversy has arisen and now exists between plaintiff and defendants relating to their respective rights and duties in that plaintiff contends that the regulation is invalid and unenforceable, both on its face and as construed by defendants, in that _____ [*allege facts showing invalidity of regulation or of its application of regulation to plaintiff's activity*], whereas defendants dispute this contention and contend that the regulation and its application to plaintiff are valid.

5. Plaintiff desires a declaration of his/her/its rights with respect to the application or nonapplication of the regulation to

plaintiff, with particular reference as to the legality of _____ [*specify plaintiff's activity that defendant threatens*].

6. Such a declaration is necessary and appropriate at this time under the circumstances in order that plaintiff may ascertain his/her/its rights and duties in the premises. [_____ (*Allege any financial or other burden that is being caused plaintiff by unsettled state of affairs and facts showing that any and all administrative remedies have been exhausted, if such is the case, or facts showing plaintiff is excused from doing so*).]

WHEREFORE, plaintiff prays for declaratory judgment as follows:

1. That the court declare the respective rights and duties of plaintiff and defendants under the regulation in question and that by its declaration and judgment the court declare that the regulation has no application to plaintiff in this matter or that, if it does, it is unconstitutional, invalid, and void.

[*Prayer for costs and general relief. See §§ 182.65, 182.66*.]

[*Verification. See § 182.60*]

[2] Use of Form

The form of complaint in [1], *above,* is for use to test the validity of an administrative regulation pursuant to *Gov. Code § 11350*. With appropriate modifications, it may also be used to test the validity of a precedent decision of the Unemployment Insurance Appeals Board pursuant to *Unemp. Ins. Code § 409.2* [*see also Code Civ. Proc. §§ 1060-1062a*].

[3] Cross References

For a discussion of the allegations of the complaint, see *§ 182.60[2]* et seq.

For discussion and an alternative form of complaint for declaratory and injunctive relief to determine the validity of an administrative regulation, see Ch. 472B, *Review of Agency Rulemaking* .

For a form of class action complaint for declaratory and injunctive relief to enjoin state cutbacks in Medical Assistance Program for failure to have complied with Administrative Procedure Act, see Ch. 527, *Social Services* .

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Chapter 183 DEDICATION

15-183 California Forms of Pleading and Practice--Annotated 183.syn

§ 183.syn Synopsis to Chapter 183: DEDICATION

§ 183.01 Scope of Chapter

§ 183.02 Cross References

§§ 183.03through 183.09 [Reserved]

§ 183.10 Governing Statutes

§ 183.11 Common Law Dedication

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[7] Abandonment

[a] Power to Abandon

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§ 183.12 Statutory Dedication

[1] Dedication Under Gov. Code § 7050

[2] Dedication Under Subdivision Map Act

[a] Dedication When Land Is Subdivided

[b] Ordinance Requiring Street Dedication

[c] Acceptance, Termination, and Abandonment

[i] Acceptance or Rejection on Approval of Final Map

[ii] Acceptance, Termination, or Abandonment After Initial Rejection

[3] Dedication Under Open-Space Easement Act of 1974

[4] Comprehensive Index of Conservation Easements by County Recorder

§ 183.13 Title to Dedicated Property

[1] Fee or Easement

[2] Title Under Subdivision Map Act

§ 183.14 Actions to Determine Title

§ 183.15 Change in Dedicated Use

[1] Restrictions on Use

[2] Remedies

§§ 183.16through 183.19 [Reserved]

§ 183.20 Related Matthew Bender Publications

§ 183.21 State Statutes

[1] Abandonment and Vacation

[2] Acceptance

[3] Adverse Possession of Dedicated Land

[4] Implied Dedication

[5] Statutory Dedication

[a] Dedication Under Gov. Code § 7050

[b] Dedication Under Open-Space Easement Act of 1974

[c] Dedication Under Subdivision Map Act

[6] Use of Dedicated Land

§ 183.22 Decisions

[1] Abandonment

[2] Acceptance

[3] Implied Dedication

[4] Offer of Dedication

[5] Title to Dedicated Property

[6] Use of Dedicated Land

§ 183.23 Attorney General Opinions

§ 183.24 Law Reviews

§ 183.25 Text References

§§ 183.26through 183.29 [Reserved]

§ 183.30 Complaint to Quiet Title to Real Property--By Purchaser From Dedicating Owner Against City--Nonacceptance of Dedication By Nonuse for 25 Years [Code Civ. Proc. §§ 771.010, 771.020]

[1] FORM

[2] Use of Form

[3] Required Allegations

[4] Who Must Be Defendants

[5] Verification

[6] Jurisdiction and Venue

[7] Service of Summons

[8] Lis Pendens

[9] Cross References

§ 183.31 Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527], and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. §§ 526, 526a]--Taxpayer's Suit Against City and Public Officers to Restrain Nonconforming Use of Dedicated Land and Illegal Expenditure of Public Funds

[1] FORM

[2] Use of Form

[3] Allegations

[4] Plaintiff's Identity and Capacity

[5] Cause of Action Required for Preliminary Injunction

[6] Service Required Before Hearing

[7] Verification

[8] Jurisdiction

[9] Venue

[10] Cross References

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PART I. SCOPE

15-183 California Forms of Pleading and Practice--Annotated § 183.01

§ 183.01 Scope of Chapter

This chapter discusses common law and statutory dedication [*see §§ 183.11[1]* (common law "dedication" defined), *183.12* (statutory dedication)]. The chapter contains forms of complaints for use in the following actions:

- An action to quiet title to land when a conclusive presumption of nonacceptance applies under *Code Civ. Proc. § 748.5* [*see § 183.30*].

- A taxpayer's action to enjoin diversion of dedicated land to a use inconsistent with the terms of the dedication as well as expenditures in connection with the diversion [*see § 183.31*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral OverviewReal Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedure

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15-183 California Forms of Pleading and Practice--Annotated § 183.02

§ 183.02 Cross References

- For discussion of the requirements for a valid deed and interpretation of deeds, and for forms that may be adapted for use in canceling a deed containing an offer of dedication and quieting title to the affected land, see Ch. 184, *Deeds* .

- For discussion and forms for use in eminent domain and condemnation proceedings, see Ch. 247, *Eminent Domain* .

- For discussion and forms for use in actions involving gifts of real property to individuals, see Ch. 278, *Gifts* .

- For discussion and forms for use in actions involving injuries sustained on public land, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

- For general discussion, procedures, and forms for use in actions to quiet title to real property, see Ch. 482, *Quieting Title* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPersonal GiftsGeneral OverviewReal Property LawDeedsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview

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[Reserved]

§§ 183.03[Reserved]

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15-183 California Forms of Pleading and Practice--Annotated § 183.10

§ 183.10 Governing Statutes

Statutory dedication is governed by *Gov. Code § 7050*, the Subdivision Map Act [*Gov. Code § 66410 et seq.*], and the Open-Space Easement Act of 1974 [*Gov. Code § 51070 et seq.*].

Dedication implied by use is governed by *Civ. Code § 1009*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral OverviewReal Property LawOwnership & TransferTransfer Not By DeedDedicationElements

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Chapter 183 DEDICATION
PART II. LEGAL BACKGROUND

15-183 California Forms of Pleading and Practice--Annotated § 183.11

§ 183.11 Common Law Dedication

[1] "Dedication" Defined

Common law dedication is a voluntary transfer of an interest in land effected by (1) an offer, clearly and unequivocally indicated by the landowner's words or acts, to dedicate the land to a public use [*see* [2], *below*], and (2) an acceptance by the public of the offer [*Union Transp. Co. v. Sacramento County (1954) 42 Cal. 2d 235, 240, 267 P.2d 10* ; *Ackley v. City & County of San Francisco (1970) 11 Cal. App. 3d 108, 112, 89 Cal. Rptr. 480* ; *see* [6], *below*]. The offer of dedication and acceptance by the public may be express or implied in fact.

In addition, a distinct type of dedication, which does not depend on the owner's intent, may be implied in law when the owner fails to interrupt a continuous public use of the land for more than five years [*see County of Orange v. Chandler-Sherman Corp. (1976) 54 Cal. App. 3d 561, 563, 564, 126 Cal. Rptr. 765* ; *Cherokee Valley Farms, Inc. v. Summerville Elementary School Dist. (1973) 30 Cal. App. 3d 579, 585, 106 Cal. Rptr. 467* ; *see also* [3], *below*].

An attempted statutory dedication [*see § 183.12*] that fails may nevertheless qualify as a common law dedication [*People v. County of Marin (1894) 103 Cal. 223, 229, 37 P. 203* ; *see Hanshaw v. Long Valley Road Assn. (2004) 116 Cal. App. 4th 471, 477, 11 Cal. Rptr. 3d 357* ; *Tischauser v. City of Newport Beach (1964) 225 Cal. App. 2d 138, 144, 37 Cal. Rptr. 141* ; *City of Sacramento v. Jensen (1956) 146 Cal. App. 2d 114, 118, 303 P.2d 549]* .

[2] Offer of Dedication

[a] Intent to Dedicate

To establish dedication of land for a public use, an unequivocal and clear manifestation of the owner's intent to dedicate must be shown [*Faus v. County of Los Angeles (1967) 256 Cal. App. 2d 604, 610, 64 Cal. Rptr. 181]* . The intent need not be evidenced by express words or documents but instead can be manifested by the acts or conduct of the owner, including a knowing acquiescence in the long and open public use of the property [*Cherokee Valley Farms, Inc. v. Summerville Elementary School Dist. (1973) 30 Cal. App. 3d 579, 585, 106 Cal. Rptr. 467* ; *see* [3], *below*].

[b] Express Grant

An offer of dedication may be made by an express grant to a public or governmental agency [*City of Los Angeles v. Pacific Elec. Ry. Co. (1959) 168 Cal. App. 2d 224, 232, 335 P.2d 1042]* . The conveyance may be in the form of a grant in fee simple [*see, e.g., County of Sacramento v. Lauszus (1945) 70 Cal. App. 2d 639, 644, 645, 161 P.2d 460]* , a transfer for a specific purpose [*see, e.g., Slavich v. Hamilton (1927) 201 Cal. 299, 303, 304, 257 P. 60]* , or a grant of an easement [*see, e.g., Los Angeles v. Pacific Elec. Ry. Co. (1959) 168 Cal. App. 2d 224, 227-233, 335 P.2d 1042]* . A defeasible fee can be acquired by dedication if the express language in the deed or other evidence clearly shows that such a limitation on the fee is intended [*Cherokee Valley Farms, Inc. v. Summerville Elementary School Dist. (1973) 30 Cal. App. 3d 579, 587, 106 Cal. Rptr. 467]* . The conveyance may also expressly reserve specified uses to the grantor [*see, e.g., City of Palos Verdes Estates v. Willett (1946) 75 Cal. App. 2d 394, 398, 399, 171 P.2d 26]* .

[c] Description in Conveyance

An offer to dedicate land may be evidenced in a deed to adjacent property by a reference to the land as belonging to the public [*Smith v. Kraintz (1962) 201 Cal. App. 2d 696, 700, 20 Cal. Rptr. 471* (reservation); *see Eureka v. Gates (1902) 137 Cal. 89, 90-93, 69 P. 850* (boundary description)]. In determining whether the owner intended to make an offer of dedication, such a reference will be considered in light of the circumstances and conditions existing at the time it was made [*see, e.g., Santa Ana v. Santa Ana Valley Irrigation Co. (1912) 163 Cal. 211, 218, 219, 124 P. 847* (reservation in deed of strip of land for "road purposes" when part of strip was being used by public as road, and subsequent references to land as reserved for "streets," warranted finding of offer of dedication of land); *but see Flavio v. McKenzie (1963) 218 Cal. App. 2d 549, 552-555, 32 Cal. Rptr. 535* (when strip of land has been referred to as private road in several deeds and posted as such, reference to it as public highway in a single deed is not sufficient to show offer of dedication)].

[d] Map or Plat

Although an unrecorded map may constitute evidence of an intent to dedicate land for public use [*see Morse v. Miller (1954) 128 Cal. App. 2d 237, 239, 247, 275 P.2d 545]* , the mere making of a map designating certain areas for public or common use does not, of itself, constitute an offer of dedication [*People v. Reed (1889) 81 Cal. 70, 77, 78, 22 P. 474]* . However, the act of filing for record a map showing lots separated by defined areas named as streets or parks operates as an offer to dedicate those areas to public use, and sales of lots by reference to the recorded map will repeat and reinforce the offer [*Archer v. Salinas City (1892) 93 Cal. 43, 49, 50, 28 P. 839* (park); *Tischauser v. Newport Beach (1964) 225 Cal. App. 2d 138, 144, 37 Cal. Rptr. 141* (streets)].

[3] Dedication by Public Use

[a] Acquiescence in Public Use

Except as provided in *Civ. Code § 1009* [*see* [4], *below*], the public use of private property can result in a common law dedication by acquiescence of the owner in the use of the land in circumstances negating a conclusion that the use is under a license [*Gion v. City of Santa Cruz (1970) 2 Cal. 3d 29, 38, 84 Cal. Rptr. 162, 465 P.2d 50]* . This type of dedication is implied in fact and called dedication by acquiescence in public use [*Union Transp. Co. v. Sacramento County (1954) 42 Cal. 2d 235, 241, 267 P.2d 10]* .

When dedication by acquiescence for a period less than five years is claimed, the owner's actual consent to the dedication must be shown [*Gion v. City of Santa Cruz (1970) 2 Cal. 3d 29, 38, 84 Cal. Rptr. 162, 465 P.2d 50]* .

[b] Adverse Public Use

Alternatively, the public use of private property can result in a common law dedication by open and continuous use of the land by the public for five years [*Gion v. City of Santa Cruz (1970) 2 Cal. 3d 29, 38, 84 Cal. Rptr. 162, 465 P.2d*

50] . This type of dedication is implied in law and termed dedication by adverse user [*Union Transp. Co. v. Sacramento County (1954) 42 Cal. 2d 235, 241, 267 P.2d 10]* .

When a litigant seeks to prove dedication by adverse use, the inquiry shifted from the intent and activities of the owner to those of the public. The question is whether the public used the land for more than five years with the owner's full knowledge, without asking or receiving permission to do so and without objection being made by anyone [*Gion v. City of Santa Cruz (1970) 2 Cal. 3d 29, 38, 84 Cal. Rptr. 162, 465 P.2d 50]* .

[4] Statutory Protection Against Dedication By Adverse Use (Civ. Code § 1009)

[a] No Right to Continue Use in Absence of Written Offer of Dedication

Civ. Code § 1009 protects owners from the threat of loss of their lands through dedication inferred from public recreational use [*see Civ. Code § 1009(a)*; *see also* [3], *above*].

Generally, no use of private real property by the public after March 4, 1972, will ever confer on the public or any governmental body or unit a vested right to continue that use permanently in the absence of an express written irrevocable offer of dedication of the property to that use and acceptance of the offer by the county, city, or other public body to which it was made [*Civ. Code § 1009(b)*; for exceptions, *see* [b] and [c], *below*].

An irrevocable offer of dedication may be made, accepted, or terminated in the manner prescribed in *Gov. Code § 7050* or by any procedure authorized by law and not prohibited by *Civ. Code § 1009* [*Civ. Code § 1009(c)*; *see § 183.12[1]* (coverage of *Gov. Code § 7050*); *see also California Legal Forms, Ch. 27A, Dedication, § 27A.200* (Matthew Bender) (irrevocable offer of dedication form)].

Although *Civ. Code § 1009(b)* refers to "use" of the property by the public, it is clear from the provisions of *Civ. Code § 1009(a)* that the statute was intended to apply solely to public recreational use of property [*see Civ. Code § 1009(a)(1)* (it is in best interests of state to encourage owners of private real property to make their lands available for public recreational use), (2) (owners of private real property are confronted with threat of loss of rights in their property if they allow public to use, enjoy, or pass over their property for recreational purposes)].

Civ. Code § 1009 and a related amendment of *Civ. Code § 813* [*see* [c][ii], [d], *below*] *prospectively* abrogated the holding in *Gion v. City of Santa Cruz (1970) 2 Cal. 3d 29, 84 Cal. Rptr. 162, 465 P.2d 50* . There is no public policy manifest in the statutory enactment restricting the application of *Gion* to claims preceding March 4, 1972, which was the operative date of the foregoing legislation [*Friends of the Trails v. Blasius (2000) 78 Cal. App. 4th 810, 823, 93 Cal. Rptr. 2d 193]* .

[b] Exception for Coastal and Tidal Property; Preventing Dedication Under This Exception

[i] 1000 Yards Inland of High Tide Line

The general rule of *Civ. Code § 1009* does not apply to any coastal property within 1,000 yards inland of the mean high tide line of the Pacific Ocean, and harbors, estuaries, bays, and inlets of that ocean, but not including any property lying inland of the Carquinez Straits bridge and not including property between the mean high tide line and the nearest public road or highway, whichever distance is less [*Civ. Code § 1009(e)*].

[ii] Preventing Dedication Under This Exception

An owner of coastal or tidal property may prevent dedication under this exception by granting to the public permission to use the property. This permission may be granted by any of the following means [*Civ. Code § 1009(f)*]:

- Posting signs, as provided in *Civ. Code § 1008*, and renewing them, if they are removed, at least once a year [for further discussion of this procedure, see *California Legal Forms, Ch. 27A, Dedication, § 27A.122* (Matthew Bender)].

- Publishing annually, pursuant to *Gov. Code § 6066*, in a newspaper of general circulation in the county or counties in which the land is located, a statement describing the property and reading substantially as follows: "Right to pass by permission and subject to control of owner: *Section 1008, Civil Code*."

- Recording a notice of consent to use of the land, as provided in *Civ. Code § 813* [for such a notice, see *California Legal Forms, Ch. 28A, Easements and Licenses, § 28A.234* (Matthew Bender)].

- Entering into a written agreement with any federal, state, or local agency providing for the public use of the land [for such an agreement, see *California Legal Forms, Ch. 27A, Dedication, § 27A.203* (Matthew Bender)].

For additional discussion of the permission required to prevent dedication, see [d], *below*,

[c] Exception for Publicly Improved or Maintained Property; Preventing Dedication Under This Exception

[i] Improvements or Clearing Puts Owner on Notice of Public Use

The general rule of *Civ. Code § 1009* notwithstanding, a governmental entity may, after five years, acquire a vested right to continue to use land for the purpose for which it was making use of the land, when the entity has used private land by an expenditure of public funds on visible improvements on or across the land or on the cleaning or maintenance related to the public use of the lands in a manner so that the owner knew or should have known that the public was making that use of the land, and the owner did not give express permission to continue the use nor take reasonable steps to enjoin, remove, or prohibit the use [*Civ. Code § 1009(d)*].

[ii] Preventing Dedication Under This Exception

To prevent dedication under this exception, the owner of real property may record a notice of consent to use of the land, as provided in *Civ. Code § 813* [*see California Legal Forms, Ch. 28A, Easements and Licenses, § 28A.234* (Matthew Bender) (sample notice of consent)]. In any judicial proceeding involving the issue of whether or not all or any portion of the land has been dedicated to public use, such a recorded notice is conclusive evidence that subsequent use of the land by the public during the time the notice is in effect, other than a use expressly allowed by a written or recorded map, agreement, deed, or dedication, is permissive and with consent [*Civ. Code § 813*; *see* [4][a], *above* (*Civ. Code §§ 813* and *1009* prospectively abrogated holding in *Gion v. Santa Cruz (1970) 84 Cal. Rptr. 162, 465 P.2d 50*)].

For additional discussion of the permission required to prevent dedication, see [d], *below*,

[d] Permissible Public Use

After taking any of the actions provided to prevent dedication under either of the two exceptions discussed in [b] and [c], *above*, and during the time the action is effective, the owner of coastal or other real property must not prevent, by physical obstruction, notice, or otherwise, any public use that is appropriate under the permission granted [*Civ. Code §§ 813, 1009(f)*].

The permission for public use may be conditioned on reasonable restrictions on the time, place, and manner of public use. No use in violation of reasonable restrictions will be considered public use for purposes of a finding of implied dedication [*Civ. Code §§ 813, 1009(g)*].

[5] Revocation of Offer

A common law offer of dedication must be accepted within a reasonable time. Until it is accepted, the owner or a successor in interest may expressly or implicitly revoke it [*Eltinge v. Santos (1915) 171 Cal. 278, 282-283, 152 P. 915* (successor in interest); *People v. Reed (1889) 81 Cal. 70, 80, 22 P. 474* (owner)].

An implicit revocation may be evidenced by acts inconsistent with the use for which the land was allegedly dedicated, such as filing a map or plat on which the property is delineated as private property, conveying the property to a third person without recognizing the public's easement [*Myers v. City of Oceanside (1907) 7 Cal. App. 87, 92, 93 P. 686]* , applying the property to an inconsistent use, or changing the offer of dedication. The dedicator's death may also effect a revocation [*County of Orange v. Cole (1950) 96 Cal. App. 2d 163, 170, 215 P.2d 41]* .

[6] Acceptance

[a] Essential Element of Dedication; Express or Implied

The public's acceptance of the offer of dedication within a reasonable time after the offer was made is an essential element of dedication [*Union Transp. Co. v. Sacramento County (1954) 42 Cal. 2d 235, 240, 267 P.2d 10* (elements of dedication); *City of Santa Clara v. Ivancovich (1941) 47 Cal. App. 2d 502, 511, 118 P.2d 303* (acceptance must be made within reasonable time)], except in the case of a formal dedication by the state or a municipality [*Mills v. City of Los Angeles (1891) 90 Cal. 522, 531, 27 P.354* (city); *California v. United States (9th Cir. 1948) 169 F.2d 914, 921-922]* .

Acceptance may be express or implied. It is express when formal acceptance is made by the proper authorities [*County of Inyo v. Given (1920) 183 Cal. 415, 418, 191 P. 688]* . Acceptance may be implied by official acts of dominion over the property, such as performance of maintenance and repair work, or from public use [*Tischauser v. Newport Beach (1964) 225 Cal. App. 2d 138, 145, 37 Cal. Rptr. 141* ; *see* [4], *above*].

In another case, a city ordinance did not constitute or memorialize an unconditional acceptance of a donation deed with a park use restriction, when acceptance was expressly subject to execution of an agreement between the parties regarding certain matters, the parties continued to negotiate the terms of the dedication and acceptance after the ordinance was enacted, and there was no evidence that the agreement as contemplated by the ordinance was ever executed [*Baldwin v. City of Los Angeles (1999) 70 Cal. App. 4th 819, 839, 83 Cal. Rptr. 2d 178]* .

[b] No Public Liability for Road Maintenance Prior to Acceptance

No city or county will be held liable for failure to maintain any road unless and until it has been accepted into the county road or city street systems, whichever is applicable, by resolution of the board of supervisors of the county or governing body of the city [*Sts. & Hy. Code §§ 941, 1806*; *see* *Hanshaw v. Long Valley Road Assn. (2004) 116 Cal. App. 4th 471, 479-480, 11 Cal. Rptr. 3d 357* (common law dedication does not result in public liability for road maintenance or damages caused by poor maintenance; there is no liability unless dedication is unconditionally accepted by public entity)].

[c] Conditions Triggering Conclusive Presumption of Nonacceptance

A conclusive presumption that the offered dedication was not accepted arises when all of the following conditions are satisfied [*Code Civ. Proc. § 771.010*; *see § 183.30*]:

- The offer to dedicate land for public improvement was made by map only.
- No acceptance of the dedication was made and recorded within 25 years after the offer.

- The land was not used for the purpose for which the dedication was offered, for 25 years.

- The land was sold to a third person after the filing of the map and was used as if free of the dedication.

In a suit to quiet title to the land [*see § 183.30*], the governmental agency to which the dedication was made by map must be a defendant, and the decree in favor of the plaintiff will clear the title and remove the cloud created by the offered dedication [*Code Civ. Proc. § 771.020*].

A roadway that was depicted on a subdivision map and was formally accepted into the city's system of public streets in 1935 but never used as a public street or for any other public purpose did not come within the conclusive presumption of nonacceptance in *Code Civ. Proc. § 771.010*. First, the city accepted the dedication 20 years before the predecessor statute to § 771.010 was enacted, and there was no indication the statute was intended to operate retroactively. In addition, the complaint did not allege that the street was used "as if free of the dedication." To the contrary, it alleged that the street had not been used for any purpose, public or private, since the 1888 offer to dedicate was made. Thus, abutting property owners who were seeking to quiet title in a portion of the dedicated street did not meet the fourth criteria essential for the statute's application [*Wright v. City of Morro Bay (2006) 144 Cal. App. 4th 767, 771-772, 50 Cal. Rptr. 3d 719]* .

PRACTICE TIP:

Presumption Used in Other Actions. The presumption may be used in other types of actions, such as an action in inverse condemnation [*Paris v. Santa Clara County (1969) 270 Cal. App. 2d 691, 699, 76 Cal. Rptr. 66]* .

[7] Abandonment

[a] Power to Abandon

The appropriate governmental authority, acting in its legislative capacity, has the power to abandon the rights of the public in dedicated property [*see Gov. Code § 38440* (abandonment of park owned by city); *Gov. Code § 38501* (power of legislative body of city to abandon city park); *Health & Safety Code § 5400* (power of board of supervisors to abandon easements for sewage or drainage); *Sts. & Hy. Code §§ 901, 954, 954.5* (power of board of supervisors to abandon county highways), *§ 8320* (city counsel's power to vacate streets)].

[b] Reversion of Title or Other Disposition of Property

On abandonment of an easement for streets or highways, title reverts to the owner of the underlying fee; or, if the public owns the property, the appropriate governmental authority may dispose of the property as provided by statute [*Sts. & Hy. Code §§ 118, 8355-8357* (streets); *Safwenberg v. Marquez (1975) 50 Cal. App. 3d 301, 308, 123 Cal. Rptr. 405* (abandonment of easement for city streets)]. If there is no express or implied reservation of a right of reversion in the dedication or instrument of purchase, park lands abandoned pursuant to the Municipal Park Abandonment Law of 1939 [*Gov. Code § 38501 et seq.*] will not revert to private ownership [*Gov. Code § 38510*; *see Gov. Code § 38501* (situations in which park may be abandoned)].

[c] Effect on Easements or Other Rights in Property

An abandonment or sale of a park pursuant to the Municipal Park Abandonment Law of 1939 [*Gov. Code § 38501 et seq.*] does not affect any private easement or other right in lands acquired or owned by any private person or corporation, or any right, easement, or interest owned or under the control of any other governmental agency for public use other than park purposes [*Gov. Code § 38510*].

The vacation of a street or highway extinguishes all private easements in it claimed by reason of the purchase of a lot by reference to a map or plat on which the street or highway is shown, other than a private easement of ingress and egress to the lot from or to the street or highway [*Sts. & Hy. Code § 8353(a)*]. Such a private easement is not extinguished if within two years after the date the vacation is complete, the claimant records a verified notice describing the easement [*Sts. & Hy. Code § 8353(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdverse PossessionClaims By & Against Governmental EntitiesReal Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral OverviewReal Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedureReal Property LawOwnership & TransferTransfer Not By DeedDedicationTermination

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§ 183.12 Statutory Dedication

[1] Dedication Under Gov. Code § 7050

With the consent of the city, county, or city and county, an offer of dedication of real property for any public purpose may be executed, acknowledged, and recorded in the manner of a conveyance of real property. Such an offer of dedication, when recorded in the office of the county recorder, is irrevocable and may be accepted at any time by the city council of the city within which the real property is located, or if the property is located in an unincorporated territory, by the board of supervisors of the county within which the property is situated. This procedure is an alternative to any other procedure authorized by law [*Gov. Code § 7050*].

Such an offer of dedication may be terminated, and the right to accept it may be abandoned, in the same manner prescribed for abandonment or vacation of streets and highways [*Gov. Code § 7050*; *see Sts. & Hy. Code §§ 901, 954-960.5* (abandonment of county highways); *Sts. & Hy. Code § 8300 et seq.* (vacation of city streets)].

[2] Dedication Under Subdivision Map Act

[a] Dedication When Land Is Subdivided

The Subdivision Map Act [*Gov. Code § 66410 et seq.*] sets out the procedure and requirements for dedication of land for streets or other public purposes when a tract of land is subdivided [*see Gov. Code § 66424* (subdivision defined)].

Dedications of or offers to dedicate interests in real property for specified public purposes are made by a statement on the final map, signed and acknowledged by all persons having any record title interest in the real property being subdivided, subject to *Gov. Code § 66436* (requirement of statement of consent to final map) [*Gov. Code § 66439(a)*]. If any street shown on a final map is not offered for dedication, the certificate may contain a statement to this effect. If such a statement appears on the map, and if the map is approved by the legislative body, the use of any such street or streets by the public will be permissive only. An offer of dedication of real property for street or public utility easement purposes will be deemed not to include any public utilities facilities located on or under the real property unless, and only to the extent that, an intent to dedicate the facilities is expressly declared in the statement [*Gov. Code § 66439(b), (c)*].

If a subdivider is required to make a dedication for specified public purposes on a final map, the local agency must specify whether the dedication is to be in fee or as an easement [*Gov. Code § 66439(d)(1)*], and the subdivider must include specified language in the dedication clause on the final map or any separate instrument--"The real property described below is dedicated [in fee *or* as an easement] for public purposes:"--preceding a description of the dedicated property or easement that is adequate to convey it [*Gov. Code § 66439(d)(2), (3)*].

Acceptance by the public may operate as a common-law dedication following an incomplete or rejected dedication under the Subdivision Map Act. The provisions of the Act do not supercede or bar application of common-law dedication principles [*Hanshaw v. Long Valley Road Assn. (2004) 116 Cal. App. 4th 471, 477-478, 11 Cal. Rptr. 3d 357* ; *see § 183.11* for coverage of common-law dedication].

[b] Ordinance Requiring Street Dedication

A local ordinance may require dedication or an irrevocable offer of dedication of real property within a subdivision for streets, alleys, including access rights and abutter's rights, drainage, public utility easements, and other public easements [*Gov. Code § 66475*; *see Gov. Code § 66475 et seq.*].

Land dedicated after 1989 for any purpose other than for open space, parks, and schools must be returned to the subdivider if the public entity determines that the public purpose for which it was dedicated no longer exists [*Gov. Code § 66477.5(a), (c), (e)*].

[c] Acceptance, Termination, and Abandonment

[i] Acceptance or Rejection on Approval of Final Map

At the time the legislative body or the official designated pursuant to *Gov. Code § 66458* approves a final map, the legislative body or designated official must also accept, accept subject to improvement, or reject any offer of dedication [*Gov. Code § 66477.1*; *see Gov. Code § 66458(d)*].

[ii] Acceptance, Termination, or Abandonment After Initial Rejection

If, when the final map is approved, any offers of dedication of land for storm drainage easements or for streets, paths, alleys, public utility easements, or transit rights-of-way that directly benefit the residents of the subdivision are rejected, the offer of dedication will remain open, and the legislative body may by resolution at any later date and without further action by the subdivider rescind its rejection and accept any such offers [*Gov. Code § 66477.2(a)*]. However, the rejected offers may be terminated and abandoned in the manner prescribed for abandonment or vacation of streets and highways [*Gov. Code § 66477.2(c)*; *see Sts. & Hy. Code § 8300 et seq.* (vacation of city streets)].

Before revocation, an offer of dedication can be accepted in two ways. If the offeror engages in acts sufficient to revoke the offer under common law principles [*see § 183.11*], then the offer is revoked as to the public at large, such that it cannot be implicitly accepted by further public use. The offer continues to remain open, however, for formal acceptance by the public entity [*Biagini v. Beckham (2008) 163 Cal. App. 4th 1000, 1016, 78 Cal. Rptr. 3d 171*].

There are time limits for acceptance of offers of dedication of specific easements in subdivisions fronting the ocean or a bay shoreline, any public waterway, river, or stream, or any lake or reservoir owned in part or entirely by any public agency [*see Gov. Code § 66477.2(b)*]. Such an offer of dedication that is not accepted within the specified time limit will be deemed abandoned [*Gov. Code § 66477.2(d)*]. Additionally, a conclusive presumption of nonacceptance may arise when the land has not been used for its dedicated purpose for 25 years [*see Code Civ. Proc. § 771.010(b)*; *Paris v. County of Santa Clara (1969) 270 Cal. App. 2d 691, 695-698, 76 Cal. Rptr. 66* ; *see also § 183.11[6][c]*].

Except as provided in *Gov. Code §§ 66499.16-66499.18* (regarding findings and conditions necessary to, and the effect on dedication and offers of, a reversion of acreage), if a resubdivision or reversion to acreage of the tract is subsequently filed for approval, any offer of dedication previously rejected will be deemed terminated on the approval of the map by the legislative body. The map must contain a notation identifying the offer or offers of dedication deemed terminated [*Gov. Code § 66477.2(e)*].

[3] Dedication Under Open-Space Easement Act of 1974

Under the Open-Space Easement Act of 1974 [*Gov. Code § 51070 et seq.*], any county or city that has an adopted open-space plan may accept or approve a grant of an open-space easement on privately owned land within its boundaries [*Gov. Code § 51080*].

The execution and acceptance of a deed or other instrument granting any right or interest in perpetuity or for a term of years in open-space land and imposing restrictions that, through limitation of future use, will effectively preserve for public use or enjoyment the natural or scenic character of the open-space land, constitutes a dedication to the public of the open-space character of the land for the term specified [*Gov. Code §§ 51075(d), 51081*].

[4] Comprehensive Index of Conservation Easements by County Recorder

Each county recorder must develop and maintain, within the county's existing indexing system, a comprehensive index of conservation easements and Notices of Conservation Easements on land within the county. This index must include all conservation easements, as defined, recorded on or after January 1, 2002 [*Gov. Code § 27255(a), (f)*]. In addition, a conservation easement recorded before January 1, 2002, may be included in the index if a party to the easement fills out and records a Notice of Conservation Easement for the previously recorded easement, and files the notice in the county in which the affected real property is located [*Gov. Code § 27255(c), (d)*].

For purpose of inclusion in the comprehensive index, a "conservation easement" means any limitation in a recorded instrument that [*Gov. Code § 27255(b)*]:

- Contains an easement, restriction, covenant, condition, or offer to dedicate, which is or has been executed by or on behalf of the owner of the land subject to that limitation.

- Is binding on successive owners of the land.

- Has as its purpose to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition.

Included in the definition of "conservation easement" for these purposes are conservation easements as defined in *Civ. Code § 815.1* [*see* Ch. 240, *Easements*], open-space easements as defined in *Gov. Code § 51075* [*see § 183.12[3]*], and agricultural conservation easements as defined in *Pub. Res. Code § 10211* [*Gov. Code § 27255(b)*; *see* Ch. 579, *Zoning and Planning*].

For additional information on the county recorder's comprehensive index of conservation easements, as well as an example of the required statutory form to file the notice of a conservation easement, see Ch. 240, *Easements* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsConservation EasementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By

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§ 183.13 Title to Dedicated Property

[1] Fee or Easement

Whether the property interest acquired by the public by a common law dedication is a fee or an easement depends on the facts of the particular case [*see Cherokee Valley Farms, Inc. v. Summerville Elementary School Dist. (1973) 30 Cal. App. 3d 579, 586, 587, 106 Cal. Rptr. 467]* .

When land is dedicated for use as a street or highway, the public ordinarily acquires only an easement for the right of way for purposes of travel, with any incidents that are appurtenant or necessary for reasonable enjoyment, construction, or maintenance. Title to the underlying fee remains in the original owner and, in absence of a clear expression to the contrary in the deed, passes to the successors in ownership of the abutting land [*Safwenberg v. Marquez (1975) 50 Cal. App. 3d 301, 307, 308, 123 Cal. Rptr. 405]* .

When land is dedicated for use as a park, the public generally acquires a fee simple [*Morse v. E.A. Robey & Co. (1963) 214 Cal. App. 2d 464, 469, 29 Cal. Rptr. 734]* .

[2] Title Under Subdivision Map Act

Title to land dedicated under the Subdivision Map Act [*Gov. Code § 66410 et seq.*] passes when the final map or a resolution of acceptance by the legislative body is filed in the office of the county recorder [*Gov. Code § 66477.3*]. The Subdivision Map Act does not specify the interest acquired at that time; however, by analogy to cases involving offers of dedication made by the filing of a subdivision map and accepted by the public, the same general rules set forth in [1], *above*, may apply [*Elliott v. McIntosh (1919) 41 Cal. App. 763, 766, 183 P. 692* (streets); *see Washington etc. Co. v. Los Angeles (1940) 38 Cal. App. 2d 135, 138, 100 P.2d 828* (parks)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsPublic EasementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By

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§ 183.14 Actions to Determine Title

Questions as to whether land has been dedicated to the public use and questions regarding the extent of the interest acquired by the public are generally litigated in actions to quiet title to the real property [*see, e.g., Safwenberg v. Marquez (1975) 50 Cal. App. 3d 301, 304, 123 Cal. Rptr. 405* (quiet title action to determine title to portion of abandoned street); *Cherokee Valley Farms, Inc. v. Summerville Elementary School Dist. (1973) 30 Cal. App. 3d 579, 582, 584-586, 106 Cal. Rptr. 467* (quiet title action to determine title to property used for school purposes)].

For a form of complaint to quiet title for use when a conclusive presumption of nonacceptance of an offer of dedication has arisen pursuant to *Code Civ. Proc. § 771.010* [*see § 183.11[6][c]*], see *§ 183.30*.

These issues may also arise in an action against a public entity for damages for personal injuries based on a dangerous condition of land allegedly dedicated to the public use [*see, e.g., Union Transp. Co. v. Sacramento County (1954) 42 Cal. 2d 235, 238-245, 267 P.2d 10* ; *Ackley v. City & County of San Francisco (1970) 11 Cal. App. 3d 108, 112-114, 89 Cal. Rptr. 480]* . For general forms suitable for use in such a case, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 183.15 Change in Dedicated Use

[1] Restrictions on Use

Generally, when a tract is dedicated with a restriction on its use, a governmental authority cannot change the use of the property to purposes inconsistent with the terms of the dedication [*Spinks v. City of Los Angeles (1934) 220 Cal. 366, 368, 31 P.2d 193* ; *Big Sur Properties v. Mott (1976) 62 Cal. App. 3d 99, 103, 104, 132 Cal. Rptr. 835]* .

The uses to which the property may be devoted depend to some extent on whether it was dedicated by a private donor or by public use. Dedications by private donors are strictly construed according to the terms of the grant [*see, e.g., Big Sur Properties v. Mott (1976) 62 Cal. App. 3d 99, 103, 132 Cal. Rptr. 835* (when private dedication of land exclusively for park purposes was involved, public trust on which state held that land prohibited private access rights-of-way authorized by *Pub. Res. Code § 5003.5*)], while less strict constructions are adopted regarding dedications by public use [*Slavich v. Hamilton (1927) 201 Cal. 299, 303, 257 P. 60* ; *see, e.g., Spinks v. City of Los Angeles (1934) 220 Cal. 366, 368, 369, 31 P.2d 193* (in case involving public dedication for park purposes, city was allowed to extend street across park in order to meet changing conditions)].

[2] Remedies

Diversion of dedicated land to purposes inconsistent with the terms of the dedication may be enjoined [*see City of Hermosa Beach v. Superior Court (1964) 231 Cal. App. 2d 295, 300, 41 Cal. Rptr. 796* ; for a form of complaint, *see § 183.31*].

When the deed provides for a reversion of the property if conditions as to use are not satisfied, the dedicator or successors in interest may, on breach of those conditions, sue to quiet title and recover the property [*see, e.g., Abbot Kinney Co. v. City of Los Angeles (1963) 223 Cal. App. 2d 668, 669, 674, 36 Cal. Rptr. 113* ; *see also Civ. Code § 826*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewReal Property LawEstatesFuture InterestsReverter &

ReversionsReal Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral OverviewReal Property LawOwnership & TransferTransfer Not By DeedDedicationTermination

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[Reserved]

§§ 183.16[Reserved]

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§ 183.20 Related Matthew Bender Publications

For transactional forms relating to dedication, see California Legal Forms, Ch. 27A, *Dedication* (Matthew Bender)

For discussion of statutory dedication under the Subdivision Map Act, see California Real Estate Law and Practice, Ch. 290, *The Subdivision Map* (Matthew Bender)

For discussion of common law dedication of real property, see California Real Estate Law and Practice, Ch. 361, *Dedication* (Matthew Bender)

For discussion of the use of dedication to obtain an inter vivos transfer of land, see Powell & Rohan, Powell on Real Property, Ch. 84, *Inter Vivos Transfer of Land Otherwise Than by Deed* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral OverviewReal Property LawSubdivisionsState Regulation

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§ 183.21 State Statutes

[1] Abandonment and Vacation

Abandonment of park owned by city. *Gov. Code § 38440*

Municipal Park Abandonment Law of 1939. *Gov. Code § 38501 et seq.*

Abandonment of county highways. *Sts. & Hy. Code §§ 901, 954, 954.5, 960.5*

Vacation of public streets, highways, and service easements. *Sts. & Hy. Code § 8300 et seq.*

[2] Acceptance

Conclusive presumption of nonacceptance when land is not used for dedicated purpose for 25 years. *Code Civ. Proc. §§ 771.010, 771.020*

Acceptance of road into county road system and liability for maintenance. *Sts. & Hy. Code § 941*

Acceptance of road or street by governing body of city and liability for maintenance. *Sts. & Hy. Code § 1806*

[3] Adverse Possession of Dedicated Land

Property dedicated to public use is exempt from acquisition of title by adverse possession or prescription. *Civ. Code § 1007*

[4] Implied Dedication

Recording notice of consent to use of land. *Civ. Code § 813*

Dedication implied from public use. *Civ. Code § 1009*

Route of travel used by public is not permitted to become county highway by use. *Sts. & Hy. Code § 904*

[5] Statutory Dedication

[a] Dedication Under Gov. Code § 7050

Irrevocable offer of dedication is made by execution, acknowledgment, and recordation of offer in same manner as conveyance. *Gov. Code § 7050*

[b] Dedication Under Open-Space Easement Act of 1974

Open-Space Easement Act of 1974. *Gov. Code § 51070 et seq.*

"Open-space easement" defined. *Gov. Code § 51075(d)*

County or city that has adopted open-space plan is entitled to accept or approve grant of open-space easement. *Gov. Code § 51080*

Dedication of open-space easement. *Gov. Code § 51081*

[c] Dedication Under Subdivision Map Act

Subdivision Map Act. *Gov. Code § 66410 et seq.*

Statement of consent requirements and exceptions. *Gov. Code § 66436*

Statement of dedication and offers to dedicate. *Gov. Code § 66439*

Certificate of dedication and offers to dedicate. *Gov. Code § 66440*

Requirement of dedication or irrevocable offer of dedication imposed by local ordinance. *Gov. Code § 66475*

Bicycle paths. *Gov. Code § 66475.1*

Local transit facilities. *Gov. Code § 66475.2*

Waiver of direct access rights. *Gov. Code § 66476*

Dedications for park and recreational purposes. *Gov. Code § 66477*

Acceptance or rejection of offers of dedication. *Gov. Code § 66477.1*

Continuation of offer of dedication after rejection, termination, and abandonment. *Gov. Code § 66477.2*

When acceptance of offer of dedication is effective. *Gov. Code § 66477.3*

Dedication for school purposes. *Gov. Code § 66478*

Necessity of provision for dedication of public easement along portion of bank of public waterway, river, or stream. *Gov. Code § 66478.5*

Necessity of provision for dedication of public easement for access to coastline or shoreline in plan not approved by local agency before 1969. *Gov. Code § 66478.11*

Necessity of provision for dedication of public easement for access to lake or reservoir owned in part or entirely by public agency. *Gov. Code § 66478.12*

Necessity of provision for reasonable public access to coastline, shoreline, lake, or reservoir when parcel to be developed is in excess of 40 acres and was created as such parcel after 1969. *Gov. Code § 66478.13*

[6] Use of Dedicated Land

Authorization of private access rights-of-way across state parks. *Pub. Res. Code § 5003.5*

Dedication of county park land for highway purposes. *Pub. Res. Code § 5160*

Lease by city of dedicated land for extraction of minerals, oil, or gas. *Pub. Res. Code § 7057*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdverse PossessionClaims By & Against Governmental EntitiesReal Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral OverviewReal Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationTermination

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§ 183.22 Decisions

[1] Abandonment

Abandonment of easement or public use of property acquired by grant to public authorities requires clear manifestation of intention to abandon. *Humboldt County v. Van Duzer (1920) 48 Cal. App. 640, 644, 192 P. 192*

Mere nonuse of easement acquired by grant to public authorities does not amount to abandonment. *Humboldt County v. Van Duzer (1920) 48 Cal. App. 640, 644, 192 P. 192*

[2] Acceptance

Ordinance accepting all offers of dedication of streets and alleys within city is sufficient formal acceptance of specific street when offer of dedication had been made by reference to street in recorded deed; acceptance need not mention street by name. *City of Eureka v. Armstrong (1890) 83 Cal. 623, 625, 22 P. 928*

City ordinance did not constitute or memorialize unconditional acceptance of donation deed with park use restriction, because acceptance was expressly subject to execution of agreement between the parties regarding certain matters, parties continued to negotiate terms of dedication and acceptance after ordinance was enacted, and there was no evidence that agreement as contemplated by ordinance was ever executed. *Baldwin v. City of Los Angeles (1999) 70 Cal. App. 4th 819, 839, 83 Cal. Rptr. 2d 178*

Acceptance of dedication in recorded map, which was conditional on improvement of road that never occurred, did not create public easement for road. *Mikels v. Rager (1991) 232 Cal. App. 3d 334, 352-354, 284 Cal. Rptr. 87*

When offer of dedication for public road in recorded map is accepted by public use, entire width shown in map is dedicated, not just part used. *Hays v. Vanek (1989) 217 Cal. App. 3d 271, 284-286, 266 Cal. Rptr. 856*

[3] Implied Dedication

Gion-Dietz rule of implied dedication was applied retroactively to implied dedication based on facts arising before Gion-Dietz decision. *County of Los Angeles v. Berk (1980) 26 Cal. 3d 201, 212-216, 161 Cal. Rptr. 742, 605 P.2d 381*

Civ. Code § 1009 barred claim for recreational easement based on creation and use of network of trails on undeveloped private property. *Bustillos v. Murphy (2002) 96 Cal. App. 4th 1277, 1281, 117 Cal. Rptr. 2d 895*

Continuous, regular, and open use by public of irrigation canal road from 1940's to 1971 was sufficient to establish dedication to public use; *Civ. Code § 1009*, which operated prospectively only, did not abrogate doctrine established in *Gion v. Santa Cruz (1970) 2 Cal. 3d 29, 84 Cal. Rptr. 162* P.2d 50. *Friends of the Trails v. Blasius (2000) 78 Cal. App. 4th 810, 825-826, 93 Cal. Rptr. 2d 193*

Showing necessary for public dedication is only that persons using property believed public had right to such use; required showing is not same as for easement by prescription. *Bess v. County of Humboldt (1992) 3 Cal. App. 4th 1544, 1549-1550, 5 Cal. Rptr. 2d 399*

Public use and county maintenance of road for seven years before acceptance of road into county system of highways was implied-in-fact dedication of land as public road. *Brumbaugh v. County of Imperial (1982) 134 Cal. App. 3d 556, 561-563, 184 Cal. Rptr. 11*

Public use that is adverse and under claim of legal right must be shown when open fields and hillsides of inland areas are involved. *Richmond Ramblers Motorcycle Club v. Western Title Guar. Co. (1975) 47 Cal. App. 3d 747, 754-759, 121 Cal. Rptr. 308*

[4] Offer of Dedication

Reference in deed to map showing proposed subdivision and streets did not indicate grantor's intent to dedicate streets when reference was only for purpose of description of land conveyed, map was prepared by others, and grantor expressly repudiated map for all other purposes and prevented recordation of map. *City of Eureka v. Fay (1895) 107 Cal. 166, 171, 40 P. 235*

Mere statement of owner of land that it is part of street, while not being offer to dedicate, is probative fact of value in determining whether owner had previously dedicated land. *Cerf v. Pfleging (1892) 94 Cal. 131, 136, 29 P. 417*

[5] Title to Dedicated Property

Owner of fee in land over which public highway has been laid retains right in land for all purposes that are consistent with full enjoyment of easement acquired by public. *Wright v. Austin (1904) 143 Cal. 236, 239, 76 P. 1023*

[6] Use of Dedicated Land

Lease of park land for subsurface parking lot was not inconsistent with dedication by public authority for park purposes when revenue was to go to park fund and public would suffer only temporary deprivation of park use during construction and permanent deprivation of only 6.5 percent of park surface used for entrances and exits. *San Francisco v. Linares (1940) 16 Cal. 2d 441, 444-448, 106 P.2d 369*

Whether particular use amounts to diversion from purpose for which dedication was made depends on circumstances of

dedication and intention of party making it. *Wattson v. Eldridge (1929) 207 Cal. 314, 320, 278 P. 236*

Dedicator is presumed to have intended dedicated property to be used in such way by public as will be most convenient and comfortable, and according to not only proprieties and usages known at time of dedication but also those justified by lapse of time and change in conditions. *Wattson v. Eldridge (1929) 207 Cal. 314, 320, 278 P. 236*

When property was dedicated for public library, proposed use of property as patio for neighboring commercial development did not directly contribute to library purposes and was subject to injunction. *Save the Welwood Murray Memorial Library v. City Council (1989) 215 Cal. App. 3d 1003, 1014-1016, 263 Cal. Rptr. 896*

Filling of park area with rubbish for purpose of providing level land on which to build play facilities was not inconsistent with dedicator's intent. *Griffith v. City of Los Angeles (1959) 175 Cal. App. 2d 331, 339, 340, 346 P.2d 49*

Public must strictly comply with terms of offer of dedication if dedication is accepted, and public is thereafter barred from substantially impairing or destroying reservation of rights in dedicated land without dedicator's consent or payment of just compensation. *Hill v. City of Oxnard (1920) 46 Cal. App. 624, 628, 189 P. 825* ; *see Wofford Heights Associates v. County of Kern (1963) 219 Cal. App. 2d 34, 40-42, 32 Cal. Rptr. 870*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral OverviewReal Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationTermination

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§ 183.23 Attorney General Opinions

Requirement of signature of trustee under deed of trust that encumbers property being subdivided as condition of approval of final map is not permitted to be suspended or modified by local legislative body when there has been dedication or offer of dedication in connection with parcel map. *59 Ops. Cal. Att'y Gen. 386 (1976)*

Termination of offer of dedication of land. *54 Ops. Cal. Att'y Gen. 230 (1971)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationTerminationReal Property LawSubdivisionsState Regulation

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§ 183.24 Law Reviews

Comment, *Fear and Loathing on the California Coastline: Are Coastal Commission Property Exactions Constitutional? 14 Pepperdine L. Rev. 357 (1987)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral Overview

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§ 183.25 Text References

Miller & Starr, Current Law of California Real Estate, ch. 21, *Dedication* (2d ed., 1989)

Witkin, Summary of California Law, vol. 12, *Real Property*, §§ 239-253 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral Overview

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[Reserved]

§§ 183.26[Reserved]

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§ 183.30 Complaint to Quiet Title to Real Property--By Purchaser From Dedicating Owner Against City--Nonacceptance of Dedication By Nonuse for 25 Years [Code Civ. Proc. §§ 771.010, 771.020]

[1] FORM Complaint to Quiet Title to Real Property--By Purchaser From Dedicating Owner Against City--Nonacceptance of Dedication By Nonuse for 25 Years [Code Civ. Proc. §§ 771.010, 771.020]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO QUIET TITLE TO REAL PROP-
_____ [*name*],	)	ERTY
Defendant.	)	(Nonacceptance of Dedication)
	)	
	)	

Plaintiff alleges:

1. Defendant _____ [*name of city*] is, and at all times herein mentioned was, a municipal corporation organized and existing under the laws of the State of California and situated in the County of _____ [*or allege other capacity of defendant as appropriate*].

2. Plaintiff is the sole owner of real property located in the County of _____ and described as follows: _____ [*set forth legal description and street address or common designation, if any*].

3. Plaintiff was _____ [seised *or* possessed] of the property in question within five years before the commencement of this action.

4. On _____ [*date more than 25 years past*], plaintiff's predecessor in title offered the above-described property to defendant, dedicating the tract for _____ [*set forth public purpose, e.g.,* park purposes]. That offer of dedication was made by map, and recorded in the Official Records of the County of _____, California, Book/Reel _____, page/image _____. A copy of that map is attached hereto as Exhibit A and made a part hereof. Defendant's claim, against which plaintiff is seeking to quiet title, is based on that offer of dedication.

5. No acceptance of that offer of dedication has been recorded, and the offer of dedication has not been accepted.

6. From _____ [*date more than 25 years past*], to the date of the filing of this complaint, the above real property has not been used for the purpose for which the dedication was proposed, but has been used for the purpose of _____ [*specify purpose, e.g.,* growing crops].

7. On _____ [*date*], plaintiff purchased the property from _____ [*name*] by deed, a copy of which is attached hereto as Exhibit B and made a part hereof. Since this purchase, the property has been used as if free of the proposed dedication and for the purpose of _____ [*specify, e.g.,* growing crops].

8. Plaintiff seeks to quiet title against the claim of defendant based on the attempted dedication described in Paragraph 4 of this complaint. This claim is without any right, and defendant has no right, title, estate, lien, or interest in the above real property.

9. Plaintiff seeks to quiet title as of _____ [*date*] _____ [for the reason that _____ (*if date is other than date complaint is filed, allege why determination as of that date is sought*)].

WHEREFORE, plaintiff prays for judgment as follows:

1. That plaintiff is the _____ [*specify interest claimed e.g.,* owner in fee simple] of the property and that defendant has no interest in the property adverse to plaintiff;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action to quiet title to real property based on the conclusive presumption that arises in certain cases in which, after an offer of dedication is made by map alone, the land has not been accepted or used for its dedicated purpose for a period of 25 years [*see Code Civ. Proc. §§ 771.010, 771.020*; *Paris v. County of Santa Clara (1969) 270 Cal. App. 2d 691, 698, 76 Cal. Rptr. 66* (county was unable to avoid effect of conclusive presumption of nonacceptance merely by undertaking to accept offer of dedication more than 25 years after it was made but before commencement of suit by property owner); *see also § 183.11[6][c]*].

[3] Required Allegations

The complaint must include the following allegations [*Code Civ. Proc. § 761.020*]:

- A description of the property that is the subject of the action (Paragraph 2), including both the legal description and the street address or common designation, if any.

- The plaintiff's title as to which a determination is sought and the basis of the title (Paragraph 7).

- The adverse claims to the plaintiff's title against which a determination is sought (Paragraphs 4 and 8).

- The date as of which the determination is sought (Paragraph 10). If the determination is sought as of a date other than the date the complaint is filed, the complaint must include a statement of the reasons why a determination as of that date is sought.

[4] Who Must Be Defendants

The plaintiff must name as defendants the persons having adverse claims to the plaintiff's title against which a determination is sought [*Code Civ. Proc. § 762.010*]. In this form, there is only one actual defendant: the city (or other public entity) to which the offer of dedication was made. Additional defendants who might normally be sued in quiet title actions [*see, e.g., Code Civ. Proc. §§ 762.060, 763.010(c), 764.030* (unknown claimants); *see* Ch. 482, *Quieting Title*] would not be sued in the present case.

[5] Verification

The complaint must be verified [*Code Civ. Proc. § 761.020*].

[6] Jurisdiction and Venue

Quiet title actions are in the jurisdiction of the superior court and are not limited civil cases [*Code Civ. Proc. §§ 85, 86, 580(b)(3), 760.040(a)*]. Subject to the power of the court to transfer actions, the proper county for the trial of an action to quiet title to real property is the county in which the real property, or some of it, is located [*Code Civ. Proc. § 760.050(a)*].

[7] Service of Summons

The form, content, and manner of the service of summons is the same as in civil actions generally [*Code Civ. Proc. § 763.010(a)*]. If unknown defendants are named, there must also be service by publication and posting [*Code Civ. Proc. § 763.010(b)*]. The requirements for service by publication and posting are discussed in Ch. 482, *Quieting Title* . The procedure for service of summons is set forth in Ch. 518, *Service of Summons and Papers* .

[8] Lis Pendens

Immediately on the commencement of a quiet title action, the plaintiff must file a lis pendens in the office of the county recorder of each county in which any real property described in the complaint is located [*Code Civ. Proc. § 761.010(b)*]. The lis pendens gives constructive notice of the pendency of the action to subsequent purchasers or encumbrancers [*Code Civ. Proc. § 405.24*]. For further discussion of lis pendens, see Ch. 348, *Lis Pendens* .

[9] Cross References

For alternative allegations as to agency, capacity, and residence of parties, as well as fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For a discussion and forms for use in actions for inverse condemnation, see Ch. 247, *Eminent Domain*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to quiet title actions, see Ch. 482, *Quieting Title*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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§ 183.31 Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527], and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. §§ 526, 526a]--Taxpayer's Suit Against City and Public Officers to Restrain Nonconforming Use of Dedicated Land and Illegal Expenditure of Public Funds

[1] FORM Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527], and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. §§ 526, 526a]--Taxpayer's Suit Against City and Public Officers to Restrain Nonconforming Use of Dedicated Land and Illegal Expenditure of Public Funds

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAIN FOR TEMPORARY RESTRAINING
_____ [*names*],	)	ORDER AND PRELIMINARY AND PERMANENT
Defendants.	)	INJUNCTIONS
	)	(Nonconforming Use of Dedicated Land)
	)	

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Against _____ (*city*)),
(To Enjoin Nonconforming Use)

1. Plaintiff _____ [*name*] _____ [has been assessed for and is liable to pay *and/or* within one year before the commencement of this action has paid] a tax in _____ [*city*], _____ County, California. [Plaintiff is a resident of _____ (*city*), California.]

2. Defendant City of _____ (the City) is, and at all times mentioned in this complaint was, a municipal corporation duly organized and existing under the laws of the State of California and situated in the County of _____.

3. On _____ [*date*], _____ [*name of grantor*] granted by deed to the City real property situated in the City and described as follows (the Dedicated Land): _____ [*set forth legal description of property*]. By the provisions of the deed, the Dedicated Land was conveyed on condition that _____ [*specify conditions as to dedicated uses, e.g.,* it be used exclusively and in perpetuity as a public park, that it be held in perpetuity as one contiguous parcel of land, and that no street, road, or highway be constructed on or across it. The deed further provides that, on breach of these conditions, the Dedicated Land is to revert to the grantor or his/her heirs].

4. _____ [*Allege facts showing acceptance of offer of dedication, e.g.,* On _____ (*date*), by adoption of Resolution No. _____, the City Council of the City expressly accepted the deed, set apart and dedicated the Dedicated Land for the use of the public as a public park, placed it under the supervision and control of the Department of Parks of the City, and provided that it be designated "City Park"].

5. _____ [*Allege facts showing that defendant city is diverting dedicated land to nonconforming use, e.g.,* At its regular meeting on _____ (*date*), the City Council adopted Resolution No. _____, by which it granted permission to the Board of Public Works to construct a street across City Park].

[*EITHER*]

6. On _____ [*date*], plaintiff demanded that _____ [*specify official or agency with responsibility and authority to stop nonconforming use of dedicated land, e.g.,* the City Council of the City] take appropriate steps to stop and prevent the nonconforming use of the Dedicated Land; however, _____ [*specify, e.g.,* the City Council] refused and failed, and continues to refuse and fail, to take any steps to stop and prevent the nonconforming use of the Dedicated Land.

[*OR*]

6. For plaintiff to make a demand of _____ [*specify official or agency with responsibility and authority to stop nonconforming use of dedicated land, e.g.,* the City Council of the City] to take appropriate steps to stop and prevent the nonconforming use of the Dedicated Land would be unavailing in that _____ [*state facts, e.g.,* the City Council, by adoption of Resolution No. _____, appropriated funds to be used to construct the street, and the Department of Public Works is preparing to begin construction imminently].

[*CONTINUE*]

7. Unless and until enjoined and restrained by order of this court, the [threatened] nonconforming use of the Dedicated Land will cause great and irreparable injury to plaintiff in that _____ [*specify facts, e.g.,* if a street is constructed across City Park, plaintiff and the inhabitants of the City will be permanently deprived of the use of that portion of the park, and by the provision in the deed for reversion of the property to the grantor and the grantor's heirs on breach of the conditions in the deed, plaintiff may be permanently deprived of the use of the entire park].

8. Plaintiff has no adequate remedy at law for the injuries _____ [currently being suffered *or* that are threatened] in that _____ [*specify facts to show inadequacy of any legal remedy, e.g.,* it will be impossible to compensate plaintiff for the threatened injury by any payment of damages].

SECOND CAUSE OF ACTION
(Against _____ (*names*)),
(To Enjoin Illegal Expenditure of Public Funds)

9. Plaintiff refers to and incorporates Paragraphs 1 and 3-8, inclusive, of the First Cause of Action.

10. Defendants _____ [*names*] (the Officers) are public officials of the City who are charged with the duty of disbursing its funds.

11. The Officers have expended funds of the City and threaten and will continue to spend funds for the illegal purpose of _____ [*specify, e.g.,* constructing a street across City Park in contravention of the terms of the dedication of the park].

WHEREFORE, plaintiff prays for judgment as follows:

On the First Cause of Action:

1. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining the City and its agents, servants, and employees, and all persons acting under, in concert with, or for it, from diverting the Dedicated Land from use for _____ [*specify dedicated use, e.g.,* park purposes] to use as _____ [*specify proposed use, e.g.,* a city street];

On the Second Cause of Action:

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining the Officers and each of them, and their agents, servants, and employees, and all persons acting under, in concert with, or for them, from expending the funds of the City for the _____ [*specify, e.g.,* construction of a street across the Dedicated Land];

3. For reasonable attorney's fees in the sum of $_____;

On all causes of action:

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 183.30[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action to enjoin a city from diverting dedicated land to a use inconsistent with the terms of the dedication and to enjoin public officials from illegal expenditures of public funds in the performance of acts that contravene the terms of the dedication.

[3] Allegations

The First Cause of Action alleges:

- Plaintiff's taxpayer status [*see Code Civ. Proc. § 526a*] (Paragraph 1).

- The defendant city's identity and capacity (Paragraph 2).

- The terms and conditions of the deed offering to dedicate the land (Paragraph 3).

- The city's acceptance of the dedication (Paragraph 4).

- Facts showing that the city is engaging or threatening to engage in diverting the dedicated land to a use not conforming with the terms of the dedication [*Griffith v. City of Los Angeles (1947) 78 Cal. App. 2d 796, 800, 804, 178 P.2d 793]* (Paragraph 5).

- A statement that a demand was made on the city council to stop and prevent the nonconforming use and that the city council refused [*see Schaefer v. Berinstein (1956) 140 Cal. App. 2d 278, 292, 293, 295 P.2d 113]* , or a statement that such a demand would be unavailing [*see Briare v. Matthews (1927) 202 Cal. 1, 8, 9, 258 P. 939* ; *Citizens' Comm. for Old Age Pensions v. Board of Supervisors (1949) 91 Cal. App. 2d 658, 660, 205 P.2d 761]* (Paragraph 6).

- Facts showing that the city's conduct will produce great and irreparable harm [*see Code Civ. Proc. §§ 526(a)(2), 527(c)(1)*; *see also E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1]* (Paragraph 7).

- Facts showing that the plaintiff has no adequate remedy at law [*see Civ. Code § 3422(1)-(3)*; *Code Civ. Proc. § 526(a)(4)-(6)*] (Paragraph 8).

The Second Cause of Action incorporates appropriate allegations of the First Cause of Action and further alleges:

- Identities and capacities of the defendants who are public officials (Paragraph 10).

- Those officials' expenditure of public funds in the performance of acts that contravene the terms of the dedication and are therefore illegal [*see City of Hermosa Beach v. Superior Court (1964) 231 Cal. App. 2d 295, 300, 41 Cal. Rptr. 796]* (Paragraph 11).

For further discussion of taxpayer's suits, inlcuding discussion of the recovery of attorney's fees, see Ch. 466, *Public Entities and Officers: Taxpayers' Actions* .

For discussion of the procedure and additional forms for obtaining a temporary restraining order and a preliminary

injunction, as well as discussion of permanent injunctive relief, see Ch. 303, *Injunctions* .

[4] Plaintiff's Identity and Capacity

If the plaintiff is not a natural person, the complaint should allege the plaintiff's identity as an existing legal entity entitled to come into court [*see Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6]* . The plaintiff's status as a taxpayer of the city named as defendant or on behalf of which the defendant public officers are acting must also be alleged [*see Code Civ. Proc. § 526a*]. An individual resident or nonresident taxpayer or a corporate taxpayer may bring suit under *Code Civ. Proc. § 526a* [*Irwin v. Manhattan Beach (1966) 65 Cal. 2d 13, 18-20, 51 Cal. Rptr. 881, 415 P.2d 769]* .

[5] Cause of Action Required for Preliminary Injunction

A preliminary injunction is warranted only if a complaint is on file that states a sufficient cause of action for injunctive relief of the character embraced in the preliminary injunction. The essential conditions for granting temporary injunctive relief are that the complaint must allege facts that appear to be sufficient to constitute a cause of action for an injunction and that the injunction is reasonably necessary to protect the legal rights of the plaintiff during the pending litigation [*Moreno Mut. Irrigation Co. v. Beaumont Irrigation Dist. (1949) 94 Cal. App. 2d 766, 778, 211 P.2d 928]* .

[6] Service Required Before Hearing

The party who obtained the temporary restraining order must, within five days after the date the order is issued or two days before the hearing, whichever is earlier, serve the following on the opposing party [*Code Civ. Proc. § 527(d)(2)*]:

- A copy of the complaint, if not previously served.
- The order to show cause, which must state the date, time, and place of the hearing.
- Any affidavits to be used in the application.
- A copy of the points and authorities in support of the application.

The court, for good cause on the applicant's motion or on its own motion, may shorten the time required for service on the opposing party [*Code Civ. Proc. § 527(d)(2)*]. When the matter first comes up for hearing, if service has not been effected as stated above, the court will dissolve the temporary restraining order [*Code Civ. Proc. § 527(d)(3)*]. However, on the filing of an affidavit by which the applicant swears that the opposing party could not be served within the required time, the court may reissue any temporary restraining order previously issued [*Code Civ. Proc. § 527(d)(5)*].

For further discussion and forms relating to the procedures governing a temporary restraining orders, see Ch. 303, *Injunctions* .

[7] Verification

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

A public entity need not verify its answer even though the complaint is verified [*see Code Civ. Proc. § 446*]. The verification of a complaint against a public entity does, however, preclude a general denial in superior court and some limited civil cases [*see Code Civ. Proc. § 431.30(d)*].

[8] Jurisdiction

An action seeking permanent injunctive relief is in the jurisdiction of the superior court and may not be a limited civil case except as otherwise authorized by statute [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86, 580(b)(2)*]. When title or right to possession is to be tired, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*Code Civ. Proc. § 88*].

The granting of either a provisional or final injunction requires personal jurisdiction over the person enjoined [*see Comfort v. Comfort (1941) 17 Cal. 2d 736, 741, 112 P.2d 259* (permanent injunction); *Rothschild v. Erda (1968) 258 Cal. App. 2d 750, 753, 66 Cal. Rptr. 209* (preliminary injunction)].

[9] Venue

The proper county in which to bring an action against a city (or county, city and county, or local agency) to enjoin an improper use of land dedicated for a particular purpose is the county in which the defendant is situated, unless the action is brought by a county, city, city and county, or local agency, in which case the action may be tried in any county, or city and county, not a party to the action and in which the plaintiff city or local agency is not situated [*see Code Civ. Proc. § 394*].

The proper county in which to bring an action against a public officer for an act performed by virtue of the office is the county in which the cause of action, or some part of it, arose [*Code Civ. Proc. § 393(b)*], which in the present case would be the county in which the illegal expenditure was made [*see Code Civ. Proc. § 526a*].

[10] Cross References

For cross references relating to complaints generally, see *§ 183.30[9]*

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[2] Use of Form

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[6] Cross References

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[8] Decisions

[9] Text References

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[2] Use of Form

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[4] Cross References

§ 184.195 Complaint [Code Civ. Proc. § 425.10] for Declaratory Relief [Code Civ. Proc. § 1060] and to Quiet Title [Code Civ. Proc. §§ 760.010-764.080] to Cancel Use Restrictions--Changed Conditions in Neighborhood

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[b] Quiet Title

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[7] Jurisdiction and Venue

[8] Cross References

[9] State Statutes

[10] Decisions

[a] Declaratory and Quiet Title Actions

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§ 184.196 Allegation--Change in Public Policy

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[2] Use of Form

[3] Allegations

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§ 184.197 Complaint [Code Civ. Proc. § 425.10] to Compel Reconveyance of Real Property for Breach of Condition Subsequent [Civ. Code § 1109] and to Quiet Title [Code Civ. Proc. §§ 760.010-764.080]--By Grantor's Successor in Interest Against Grantee

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[2] Use of Form

[3] Allegations

[4] Limitation of Action

[5] Cross References

§ 184.198 Affirmative Defense Allegation--Power of Termination Expired [Civ. Code §§ 885.030, 885.040(a), 885.060(b)]

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[2] Use of Form

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15-184 California Forms of Pleading and Practice--Annotated § 184.01

§ 184.01 Scope of Chapter

This chapter discusses and contains forms for use in actions for cancellation of a deed and to quiet title to real property [*see §§ 184.150 -184.156*], and includes a form for use in obtaining a declaration of rights under a deed [*see § 184.157*].

This chapter also discusses implied and express covenants of title and contains a form for use in an action for damages for breach of an implied covenant against encumbrances [*see § 184.170*].

This chapter also discusses covenants and conditions that restrict the use of real property. It contains the following forms:

- A form of compliant to enjoin a violation of subdivision restrictions that are enforceable as equitable servitudes [*see § 184.190*].

- Forms of allegation for use in a complaint to enjoin violation of covenants running with the land [*see §§ 184.191, 184.192*].

- Allegations of affirmative defense based on waiver or laches [*see § 184.193*] and on acquiescence in violations [*see § 184.194*].

- A form of complaint for declaration that restrictions are unenforceable and to quiet title [*see § 184.195*].

- A form of affirmative defense based on violation of public policy [*see § 184.196*].

- A form of complaint to quiet title and compel reconveyance of real property for breach of a condition subsequent [*see § 184.197*].

- A form of affirmative defense based on the expiration or obsolescence of a power of termination [*see § 184.198*].

Covenants, conditions, and restrictions relating to condominiums, community apartment projects, and planned developments managed by homeowners' associations are discussed in Ch. 124, *Condominiums and Other Common Interest Developments* . Covenants for easements made by an owner of real property to a city or county under *Gov. Code § 65870 et seq.* are discussed in Ch. 240, *Easements* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsCovenants of TitleReal Property LawDeedsRemediesCancellation & RescissionReal Property LawRestrictive CovenantsCovenants Running With LandReal Property LawRestrictive CovenantsEnforcementReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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15-184 California Forms of Pleading and Practice--Annotated § 184.02

§ 184.02 Cross References

For a discussion and forms of certificates of acknowledgment, and for a discussion, forms, and procedures for proving proper execution of unacknowledged instruments, see Ch. 9, *Acknowledgments*

For a discussion and forms relating to the rights of adjoining landowners, see Ch. 22, *Adjoining Landowners*

For a discussion and forms for use in actions involving acquisition of title by adverse possession, see Ch. 13, *Adverse Possession*

For a discussion and forms relating to boundary disputes and construction of boundary descriptions, see Ch. 101, *Boundaries*

For a discussion and forms relating to transfers of community real property, see Ch. 122, *Community Property*

For a discussion of the interpretation of contracts, see Ch. 140, *Contracts*

For a discussion and forms for use in actions involving property held in escrow, see Ch. 253, *Escrows*

For a discussion of the nature of title acquired at an execution sale of real property and related forms, see Ch. 254, *Executions and Enforcement of Judgments*

For a discussion and form for use in an action to establish a boundary and quiet title to real property, for a permanent injunction against construction and maintenance of a fence, and for damages, see Ch. 266, *Fences*

For a discussion and forms for use in actions to set aside fraudulent conveyances, see Ch. 270, *Fraudulent Conveyances*

For a discussion and forms for use in actions involving gifts of real property, see Ch. 278, *Gifts*

For a discussion and forms for use in actions involving conveyance of realty by guardians and conservators, see Ch. 287, *Guardianship and Conservatorship: General Management Powers*

For a discussion and forms for use in a proceeding for adjudication of the identity of a person in the record chain of title where a discrepancy exists between the name in which the person acquired an interest in real property and the name in which the person transferred or left the property on death, see Ch. 299, *Identity, Establishment of*

For a discussion and forms for use in actions involving deeds creating joint interests, see Ch. 316, *Joint Tenancy and Tenancy in Common*

For a discussion of creation of life estates by deed, see Ch. 344, *Life Estates and Remainders*

For a discussion and forms for use in filing expunging notices of lis pendens, see Ch. 348, *Lis Pendens*

For a discussion and forms for use in an action to restore destroyed land records, see Ch. 356, *Lost Papers*

For a discussion and forms relating to the sale of estate property by court confirmation, see Ch. 455, *Probate: Sale of Estate Property*

For forms for use in an action for reformation of a deed, see Ch. 488, *Reformation of Instruments*

For a discussion and forms for use in actions involving trust deeds, see Ch. 555, *Trust Deeds and Real Property Mortgages*

For a discussion and forms for use in actions involving trusts of real property, see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts*

For a discussion and forms for use in actions involving contracts for the sale of real property, see Ch. 569, *Vendor and Purchaser*

For a discussion of transfers of condominiums, see Ch. 579, *Zoning and Planning*

For a discussion and forms for use in actions involving title insurance, see Ch. 548, *Title Insurance*

For forms relating to covenants for use in actions involving leases, see Ch. 93, *Bailments* , Ch. 332, *Landlord and Tenant: The Tenancy* , and Ch. 333, *Landlord and Tenant: Eviction Actions*

For forms relating to covenants for use in actions involving condominiums and other common interest developments, see Ch. 124, *Condominiums and Other Common Interest Developments*

For discussion of covenants relating to easements, see Ch. 240, *Easements* and Ch. 579, *Zoning and Planning*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersBoundariesReal Property LawAdverse PossessionGeneral OverviewReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawPriorities & RecordingLis Pendens

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15-184 California Forms of Pleading and Practice--Annotated §§ 184.03-184.09

[Reserved]

§§ 184.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Transfer By Deed

15-184 California Forms of Pleading and Practice--Annotated § 184.10

§ 184.10 Governing Statutes

Statutes governing the transfer of real property by deed are contained in *Civ. Code §§ 1039-1112*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral Overview

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PART II. LEGAL BACKGROUND
A. Transfer By Deed

15-184 California Forms of Pleading and Practice--Annotated § 184.11

§ 184.11 Definitions

A "deed" is a written instrument, signed by the grantor, by which title to realty is transferred from one person to another [Black's Law Dictionary (4th ed), p. 502]. A "transfer" is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another [*Civ. Code § 1039*]. A transfer in writing is called a grant, conveyance, or bill of sale. As used in the statutes contained in the Civil Code relating to mode of transfer, interpretation of grants, and effect of transfer, the term "grant" includes all these instruments, unless the term is specially applied to real property [*Civ. Code § 1053*]. The terms "grant" and "convey" or "conveyance" are used interchangeably in this chapter.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral Overview

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A. Transfer By Deed

15-184 California Forms of Pleading and Practice--Annotated § 184.12

§ 184.12 Principal Types of Deeds

[1] Grant Deed

A grant deed is one in which the word "grant" is used as the operative word of transfer [*see Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618, 91 Cal. Rptr. 112, 37 O.&G.R. 194* ; *see also Civ. Code § 1092*]. In the absence of an exception, limitation, or reservation, a grant deed is presumed to convey the grantor's entire interest in the property [*American Enterprise, Inc. v. Van Winkle (1952) 39 Cal. 2d 210, 220, 246 P.2d 935]* . A fee simple title is presumed to be intended to pass by the grant deed, unless it appears from the deed that a lesser estate was intended [*Civ. Code § 1105*].

Generally, covenants against prior conveyances and against encumbrances are implied from the grantor's use of a grant deed [*Civ. Code § 1113*].

[2] Quitclaim Deed

A quitclaim deed is one in which the grantor transfers or does "remise, release, and forever quitclaim" all "right, title, and interest" in real property [*see, e.g., Dunn v. Carroll (1929) 101 Cal. App. 209, 210-211, 281 P. 506* ; *Lombardi v. Sinanides (1925) 71 Cal. App. 272, 276, 235 P. 455]* . It operates to convey whatever present right or interest the grantor has in the property, including legal, equitable, and inchoate rights [*Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 880, 42 Cal. Rptr. 400* ; *Soares v. Steidtmann (1955) 130 Cal. App. 2d 401, 404, 278 P.2d 953*]. Since a quitclaim deed is not necessarily or even usually a "grant of real property," the presumption that a fee simple title is intended to pass is not applicable [*Winchell v. Lambert (1956) 146 Cal. App. 2d 575, 579, 304 P.2d 149* ; *see Civ. Code § 1105*].

Since a quitclaim deed does not purport to grant an estate of inheritance or a fee simple, no covenants are implied when a quitclaim deed is used, even if the word "grant" appears in the deed [*Southern Pac. Co. v. Dore (1917) 34 Cal. App. 521, 522-523, 168 P. 147* ; *see Civ. Code § 1113*].

[3] Warranty Deed

A warranty deed is a deed that contains an express covenant of warranty [Black's Law Dictionary (4th ed), p. 1759]. It usually contains other express covenants as well, such as a covenant for quiet possession or enjoyment, a covenant of seisin, a covenant for further assurance, and a covenant of right to convey [*see § 184.42*]. Warranty deeds are seldom used in California because purchasers rely instead on title insurance for protection as to the title conveyed [*see California Real Estate Law and Practice, Ch. 80, Deeds and Transfer of Title, § 80.22* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesBargain & SaleReal Property LawDeedsTypesQuit Claim DeedsReal Property LawDeedsTypesWarranty

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A. Transfer By Deed

15-184 California Forms of Pleading and Practice--Annotated § 184.13

§ 184.13 Property Transferred

[1] Estates Subject to Transfer

Generally, property of any kind may be transferred [*Civ. Code § 1044*], including future interests [*Civ. Code § 699*] and a right of reentry or of repossession for breach of a condition subsequent [*Civ. Code § 1046*]. However, a mere possibility, not coupled with an interest, cannot be transferred [*Civ. Code § 1045*].

[2] Exceptions and Reservations

[a] Distinctions

Although the terms "reservation" and "exception" are frequently used interchangeably and while in a conveyance each detracts from what a grantee would otherwide receive, there are material differences between them [*Main v. Legnitto (1964) 230 Cal. App. 2d 667, 677, 41 Cal. Rptr. 223]* . A reservation allows a grantor's whole interest in the property to pass to the grantee, but revests a newly created interest in the grantor or in a third party. In contrast, an exception prevents some part of the grantor's interest from passing to the grantee. Thus, an exception cannot vest an interest in a third party, and the excepted interest remains in the grantor [*Willard v. First Church of Christ, Scientist (1972) 7 Cal. 3d 473, 476-479, 102 Cal. Rptr. 739, 498 P.2d 987]* .

[b] Interpretation

While a definite and important distinction exists between a reservation and an exception, the question of whether a particular provision in a deed is an exception or a reservation is not conclusively determined by the use of the terms alone and depends on the real intention of the parties as ascertained from the whole conveyance [*Main v. Legnitto (1964) 230 Cal. App. 2d 667, 677-678, 41 Cal. Rptr. 223]* . Thus, for example, words of reservation may be construed to create an exception when appropriate to effect the intent of the parties [*Caffroy v. Fremlin (1961) 198 Cal. App. 2d 176, 182, 17 Cal. Rptr. 668, 16 O.&G.R. 1* ; *see § 184.24*].

[c] Creation of Reservation

A reservation may be made in the deed [*see, e.g., Willard v. First Church of Christ, Scientist (1972) 7 Cal. 3d 473, 475, 102 Cal. Rptr. 739, 498 P.2d 987]* or through an instrument collateral to the deed [*Caffroy v. Fremlin (1961) 198 Cal. App. 2d 176, 182, 17 Cal. Rptr. 668, 16 O.&G.R. 1]* . A reservation may also be implied, but when the owner of land conveys it by deed purporting to convey it fully and without reservations, rights should be held to be reserved in the grantor by implication only when the circumstances very clearly indicate that the grantee knew or should have known that such was the grantor's real intention [*Holmes v. Nay (1921) 186 Cal. 231, 237, 199 P. 325]* .

[3] After-Acquired Title

[a] In General

A deed purporting to convey a greater interest in real property than is owned by the grantor is valid only to the extent of the grantor's interest in the land [*Goldman v. Goldman (1953) 116 Cal. App. 2d 227, 242, 253 P.2d 474]* . However, when a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title, or claim of title to the property, the title or claim of title passes by operation of law to the grantee or the grantee's successors [*Civ. Code § 1106*]. Additionally, regardless of whether a grant of a fee simple or of a lesser estate is involved, the grantor and those in privity with him or her may be estopped to assert an after-acquired title. Thus, if the grantor sets forth on the face of the instrument, by way of recital or averment, that the grantor owns a particular estate in the land, and the deed purports to convey that estate, or if the ownership or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with the grantor will be estopped from denying that the grantor owned that estate at the time the conveyance was made [*Clark v. Baker (1860) 14 Cal. 612, 629* ; *see also Barberi v. Rothchild (1936) 7 Cal. 2d 537, 540, 541, 61 P.2d 760]* .

An after-acquired title passes to the grantee only so long as the grantee has some estate, interest, or claim in or to the property granted [*Garabaldi v. Shattuck (1886) 70 Cal. 511, 513, 11 P. 778*]. If the grantor subsequently acquires an independent title by adverse possession or at an execution sale, the doctrine of after-acquired title does not apply [*Garabaldi v. Shattuck (1886) 70 Cal. 511, 512, 513, 11 P. 778* (adverse possession); *McCune v. McCune (1937) 23 Cal. App. 2d 295, 297, 72 P.2d 883* (execution sale)].

[b] Instruments Passing After-Acquired Title

A grant deed operates to transfer an after-acquired title [*Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618, 91 Cal. Rptr. 112, 37 O.&G.R. 194]* . A warranty deed that purports to convey a fee simple or is presumed to pass a fee simple [*Civ. Code § 1105*] transfers an after-acquired title [*see Civ. Code § 1106*], and the grantor and those in privity with the grantor are estopped from asserting an after-acquired title [*Barberi v. Rothchild (1936) 7 Cal. 2d 537, 540-541, 61 P.2d 760]* . In addition, the doctrine of after-acquired title applies to mortgages [*Civ. Code § 2930*] and deeds of trust [*Barberi v. Rothchild (1936) 7 Cal. 2d 537, 538-540, 61 P.2d 760]* .

Since by a quitclaim deed the grantor does not purport to convey a fee simple or a particular estate in land, but merely to transfer whatever present interest the grantor has in the property, a quitclaim deed generally does not operate to transfer an after-acquired title [*see Civ. Code § 1106*; *Taylor v. Coachella Valley Water Dist. (1952) 108 Cal. App. 2d 743, 745, 239 P.2d 454]* . However, when the quitclaim deed conveys only the grantor's equitable interest, a later legal title vested in the grantor is deemed to be transferred [*Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618-619, 91 Cal. Rptr. 112, 37 O.&G.R. 194]* . If there are recitals or covenants in the deed showing an intention not to limit the interest conveyed merely to that which the grantor had at the time, or expressly or impliedly affirming the existence of a particular estate which the parties intended should pass by the conveyance, the grantor may also be estopped from asserting an after-acquired title or interest in contradiction of the terms or implications of the deed, even though the granting clause is in the form of a quitclaim [*Estate of Wilson (1941) 40 Cal. App. 2d 229, 232-233, 104 P.2d 716]* .

[c] Effect of Sale to Bona Fide Purchaser

A grantor may purport to convey a fee simple estate before acquiring title, and after acquiring title sell the same estate to a bona fide purchaser for value. Under the doctrine of after-acquired title, the title acquired by the grantor would pass immediately to the first grantee [*Civ. Code § 1106*], so that the grantor would have no title to convey to the subsequent purchaser. However, if the first grantee records before the grantor acquires title, the record would not be constructive notice to the subsequent purchaser of the first grantee's title, since a deed made before the grantor acquires title is not in the purchaser's chain of title [*see Ludy v. Zumwalt (1927) 85 Cal. App. 119, 129, 133, 259 P. 52]* . Rather, the grantor would be the record title holder, and under the recording statutes the first grantee's deed would seem to be void as against the bona fide purchaser for value [*see Civ. Code §§ 1107, 1214*; *Ludy v. Zumwalt (1927) 85 Cal. App. 119, 129, 133, 259 P. 52* ; *see also* Comment, *Titles: Estoppel by Deed: Priority Under the Recording Acts, 16 Cal. L. Rev. 341, 341*-346 (1928)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesFuture InterestsReverter & ReversionsReal Property LawEstatesPresent EstatesGeneral OverviewReal Property LawOwnership & TransferTransfer Not By DeedAcquisition by After-Acquired TitleReal Property LawPriorities & RecordingBona Fide Purchasers

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§ 184.14 Requisites of Valid Deed

The features that are essential to make an instrument operative as a deed are as follows:

- The grant must be in writing and must be subscribed by the grantor or by an authorized agent of the grantor [*see § 184.15*].
- The instrument must be delivered to and accepted by the grantee [*see § 184.22*].
- The grantor must be in existence and must have the mental capacity to convey [*see § 184.17*].
- The grantor and grantee must be identified by name or by a sufficient description in the deed [*see § 184.16*].
- The grantee must be another person, in existence, and capable of taking and holding title to real property [*see § 184.18*].
- The instrument must contain words indicating an intent to convey [*see § 184.20*].
- The instrument must contain a description of the property sufficient to identify it [*see § 184.19*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawDeedsExecution FormalitiesReal Property LawDeedsProperty DescriptionsReal Property LawDeedsStatutes of Frauds

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§ 184.15 Statute of Frauds

An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law or by an instrument in writing [*Civ. Code § 1091*; *see also Code Civ. Proc. § 1971*]. Redelivering the deed to the grantor, or canceling it, does not operate to retransfer the title [*Civ. Code § 1058*], because redelivery would be an attempted reconveyance of the property to the grantor, which requires that the grantee execute and deliver a new deed [*Shelton v. Vance (1951) 106 Cal. App. 2d 194, 197, 234 P.2d 1012]* .

Legal Topics:

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§ 184.16 Designation of Parties

[1] Identification of Grantor; Designation of Grantee

To be valid, a deed must identify the grantor. When the grantor is not named in the deed, this requirement may be met if the grantor's identity is ascertainable with certainty from a consideration of the entire instrument, such as when the grantor signs and acknowledges the deed as the owner of the interest to be conveyed [*Childs v. Newfield (1934) 136 Cal. App. 217, 222-223, 28 P.2d 924]* .

Similarly, a deed must designate a grantee [*Green v. MacAdam (1959) 175 Cal. App. 2d 481, 485, 346 P.2d 474]* . However, the grantee need not be mentioned by name in the deed. A description or designation is sufficient if it affords the means for identifying the grantee [*Whitson v. Goudeseune (1955) 137 Cal. App. 2d 445, 447-448, 290 P.2d 590]* . Thus, a grant to the heirs or devisees of a decedent is valid [*California Trust Co. v. Kerckhoff-Cuzner Mill & Lbr. Co. (1936) 5 Cal. 2d 628, 629-630, 55 P.2d 865]* .

[2] Assumed or Fictitious Names

A natural person may assume any name in which to receive title to property, and a subsequent conveyance under the assumed name passes good title [*Knaugh v. Baender (1927) 84 Cal App 142, 148, 257 P. 606* ; *see Civ. Code § 1096*]. When a partnership acquires an interest in real property in the partnership name, the title so acquired can be conveyed only in the partnership name [*Corp. Code §§ 15008(3)* (Uniform Partnership Act), 16302 (Uniform Partnership Act of 1994); *see Corp. Code § 16111* (applicability of these Acts); *see also Corp. Code §§ 15010* (Uniform Partnership Act), 16302 (Uniform Partnership Act of 1994) (effect of conveyances by partners)].

[3] Subsequent Name Changes

When a party changes his or her name after acquiring title to real property, any subsequent deed of the property must set forth the name in which title was taken. If the grantor fails to include the name in which title was obtained, recording the deed will not impart constructive notice of its contents, but the deed is valid as between the parties and those who have notice of the deed [*Civ. Code § 1096*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsExecution Formalities

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§ 184.17 Capacity of Grantor

[1] In General

A person entirely without understanding has no power to make a contract of any kind [*Civ. Code § 38*], and a deed made by such a person is void [*Mattos v. Kirby (1955) 133 Cal. App. 2d 649, 653, 285 P.2d 56]* . Similarly, a deed executed after the grantor has been judicially declared incompetent is void, not merely voidable [*Gibson v. Westoby (1953) 115 Cal. App. 2d 273, 276, 251 P.2d 1003* ; *see Civ. Code § 40*].

A conveyance by a person of unsound mind, but not entirely without understanding, made before incapacity is judicially determined, is subject to rescission [*Civ. Code § 39*] and cancellation [*see Peterson v. Ellebrecht (1962) 205 Cal. App. 2d 718, 720-721, 23 Cal. Rptr. 349* ; *see also Civ. Code §§ 1692, 3412*]. A rebuttable presumption affecting the burden of proof that a person is of unsound mind exists for purposes of *Civ. Code § 39* if the person is substantially unable to manage his or her own financial resources or resist fraud or undue influence. Substantial inability may not be proved solely by isolated incidents of negligence or improvidence [*Civ. Code § 39(b)*].

Cases decided prior to the 1995 enactment of the above statutory presumption held that relief under *Civ. Code § 39* does not require a showing of incompetence to enter into any kind of contract or to transact any business. Rather, the test is whether or not the party is mentally competent to deal with the subject matter with a full understanding of his or her rights [*Peterson v. Ellebrecht (1962) 205 Cal. App. 2d 718, 721, 23 Cal. Rptr. 349]* . If the grantor can comprehend the nature of his or her act, the character of his or her property, and the grantor's relation to the natural objects of his or her bounty, the grantor has the capacity to dispose of real property [*Marback v. Marback (1965) 235 Cal. App. 2d 354, 356, 45 Cal. Rptr. 341]* .

[2] Intoxication

Because one deprived of his or her reason and understanding by reason of drunkenness is as unable to consent to the terms of a contract as is one who lacks mental capacity by reason of mental illness or mental retardation, a deed may be set aside on the grounds of the grantor's mental incapacity due to voluntary intoxication [*Guidici v. Guidici (1935) 2 Cal. 2d 497, 502, 503, 41 P.2d 932]* .

[3] Minors

A minor cannot make a contract relating to real property or any interest in real property [*Fam. Code § 6701*]. A deed executed by a minor is void and the minor is under no legal duty on disaffirming the deed to restore the consideration received for the property [*Sparks v. Sparks (1950) 101 Cal. App. 2d 129, 137, 225 P.2d 238]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAgeContracts LawFormationCapacity of PartiesMental CapacityReal Property LawDeedsEnforceabilityReal Property LawDeedsRemediesCancellation & Rescission

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§ 184.18 Capacity of Grantee

The grantee must be a living person [*Civ. Code § 1039*] capable of taking and holding title to real property [*Rixford v. Zeigler (1907) 150 Cal. 435, 437-438, 88 P. 1092]* . A child conceived, but not yet born, is deemed an existing person, so far as may be necessary for its interests, including the child's interest in inheritance or property rights in the event of the child's subsequent birth [*Civ. Code § 43.1*; *Scott v. McPheeters (1939) 33 Cal. App. 2d 629, 631-632, 92 P.2d 678, 93 P.2d 562]* . Legally existing corporations [*Cavin Memorial Corp. v. Requa (1970) 5 Cal. App. 3d 345, 354, 85 Cal. Rptr. 107* ; *see also Corp. Code § 207*], partnerships [*Corp. Code §§ 15008(3)* (Uniform Partnership Act), 16302 (Uniform Partnership Act of 1994); *see Corp. Code § 16111* (applicability of these Acts)], and unincorporated associations may also acquire title to real property [*Corp. Code §§ 18105, 18110*; *see Corp. Code § 21200* (capacity of unincorporated association that is organized as medical society)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawUnincorporated AssociationsContracts LawFormationCapacity of PartiesAgeContracts LawFormationCapacity of PartiesMental CapacityReal Property LawDeedsEnforceability

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§ 184.19 Description of Property

[1] Requirements

For a deed to be valid, the description of the property conveyed must either (1) identify the property or (2) afford a means for its identification [*Podd v. Anderson (1963) 215 Cal. App. 2d 660, 665, 30 Cal. Rptr. 345* ; *see also Civ. Code § 1092*]. A vague and uncertain description renders the deed void [*Du Bois v. Larke (1959) 175 Cal. App. 2d 737, 748-749, 346 P.2d 830]* .

[2] Parol Evidence

When an ambiguity in the description of the property appears on the face of the deed, parol evidence is admissible to determine the intention of the parties [*Hixson v. Jones (1967) 253 Cal. App. 2d 860, 864, 61 Cal. Rptr. 883]* . For example, parol evidence is admissible to explain the description of the land that constitutes the subject matter of the deed, or to show that the land described by some name or designation is generally known by that name [*Corona Unified School Dist. v. Vejar (1958) 165 Cal. App. 2d 561, 564-567, 332 P.2d 294]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDocumentary EvidenceParol EvidenceReal Property LawDeedsProperty Descriptions

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§ 184.20 Words of Conveyance

A valid deed must contain words indicative of an intent to transfer an interest in the described property from one person to another [*Cordano v. Wright (1911) 159 Cal. 610, 618, 115 P. 227]* . However, no precise words are required as long as the language used discloses an intent to make a present conveyance [*Carman v. Athearn (1947) 77 Cal. App. 2d 585, 596, 175 P.2d 926]* .

Legal Topics:

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

[1] Requirements

A deed must be subscribed by the grantor or the grantor's agent, authorized in writing to do so [*Civ. Code § 1091*]. However, a subscription is valid if the grantor orally requests a third party to sign the deed for the grantor and the signature is written in the presence of the grantor, or if the third party aids the grantor in signing the deed and the signature is acknowledged by words or acts [*Rich v. Ervin (1948) 86 Cal. App. 2d 386, 395, 194 P.2d 809]* .

In executing a deed, one acting under a power of attorney must sign both the grantor's name and his or her own name as attorney in fact [*Civ. Code § 1095*]. Failure to comply with this requirement invalidates the transaction [*Hodge v. Hodge (1967) 257 Cal. App. 2d 31, 33-36, 64 Cal. Rptr. 587]* . Notwithstanding the above, when one person is authorized to execute a deed for another, a failure to sign as attorney in fact does not invalidate the deed against a third party who reasonably relied on the signature [*In re Nelson (9th Cir. 1985) 761 F.2d 1320, 1322-1323* ; *Foote v. Posey (1958) 164 Cal. App. 2d 210, 216-217, 330 P.2d 651]* .

[2] Deed Executed in Blank

A deed executed in blank, without designation of a grantee, is generally void and cannot be made the foundation of good title, even under the equitable doctrine of bona fide purchaser [*Bryce v. O'Brien (1936) 5 Cal. 2d 615, 616, 55 P.2d 488]* . However, the grantor may be estopped from attacking the validity of the deed against an innocent purchaser when the grantor is guilty of negligence or other misconduct that contributed to the purchaser's taking a void deed [*Trout v. Taylor (1934) 220 Cal. 652, 656, 32 P.2d 968* ; *Green v. MacAdam (1959) 175 Cal. App. 2d 481, 485, 486, 346 P.2d 474* ; *see Civ. Code § 3543*].

A deed delivered in blank to an escrow holder with escrow instructions in writing specifically giving authority to the escrow agent to insert the name of the grantee is not within this general rule. A grantee who accepts the blank deed and fulfills the conditions of the escrow may at any time instruct the escrow holder to insert the name of the grantee [*Tumansky v. Woodruff (1936) 14 Cal. App. 2d 279, 283, 57 P.2d 1372]* .

The name of the grantor or grantee or a description of the property cannot be validly inserted by an agent for the grantor, in the grantor's absence, unless the agent has written authorization to do so [*Green v. MacAdam (1959) 175 Cal. App. 2d 481, 486, 346 P.2d 474* ; *see Civ. Code § 1091*]. However, a deed that is void because it was executed in blank and the blanks later filled in by a third party without the required written authorization may be ratified in writing by the grantor [*see Jones v. Coulter (1925) 75 Cal. App. 540, 551-552, 243 P. 487* ; *see also Civ. Code § 2310*].

Legal Topics:

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§ 184.22 Delivery

[1] Intent to Transfer Title, Generally

A deed takes effect, so as to vest the interest intended to be transferred, only on its delivery by the grantor with the intent to transfer title [*Civ. Code § 1054*; *Perry v. Wallner (1962) 206 Cal. App. 2d 218, 221, 23 Cal. Rptr. 352]* .

Actual manual tradition or change of possession of a deed is not required [*Lavely v. Nonemaker (1931) 212 Cal. 380, 387, 298 P. 976]* . The deed is deemed constructively delivered when (1) by agreement of the parties at the time of execution, the deed is understood to be delivered, and the grantee is entitled to immediate delivery; or (2) the deed is delivered to a stranger for the benefit of the grantee, and the grantee's assent is shown or may be presumed [*Civ. Code § 1059*]. To establish constructive delivery, it must be shown that the grantor manifested, either by words or conduct, that the grantor considered the deed completely executed and the title conveyed [*Perry v. Wallner (1962) 206 Cal. App. 2d 218, 222, 23 Cal. Rptr. 352]* .

When a deed was delivered before an abstract of judgment was recorded, the transfer was complete when the deed was delivered without regard to whether the deed was recorded, and there was nothing to which the later-recorded abstract could attach [*Casey v. Gray (1993) 13 Cal. App. 4th 611, 614, 16 Cal. Rptr. 2d 538]* .

[2] Conditional Delivery

A deed cannot be conditionally delivered to the grantee [*Civ. Code § 1056*]. When a deed, absolute in form, is delivered to the grantee, title vests in the grantee, discharged of any condition on which the delivery was made [*Civ. Code § 1056*; *Ivancovich v. Sullivan (1957) 149 Cal. App. 2d 160, 165, 307 P.2d 989]* . However, this rule applies only when there has been a delivery, which requires an intent that the deed become operative, either absolutely or conditionally [*Estate of Pieper (1964) 224 Cal. App. 2d 670, 687, 37 Cal. Rptr. 46]* . Additionally, although the condition is discharged as far as vesting of title is concerned, if the condition comprised part of an agreement made by the parties, an action for damages for breach of the agreement may lie [*Ivancovich v. Sullivan (1957) 149 Cal. App. 2d 160, 166, 307 P.2d 989]* .

If the deed contains express conditions precedent, title passes only on performance of the conditions [*Civ. Code § 1110*].

[3] Intention to Transfer Title

[a] Mutual Intention

To constitute a valid delivery, there must be a mutual intention on the part of the parties, and particularly on the part of the grantor, to immediately pass title to the property. Thus, for example, if the deed is manually delivered, but the evidence shows that the parties or the grantor intended it to become operative only on the grantor's death, the document is testamentary in character and void as a deed [*Meyer v. Wall (1969) 270 Cal. App. 2d 24, 27, 75 Cal. Rptr. 236]* .

[b] Escrows

A deed may be deposited by the grantor with a third person, to be delivered on performance of a condition, and the deed will take effect on its delivery by the depositary. In this case, while the deed is in the possession of the third person, and subject to condition, it is called an escrow [*Civ. Code § 1057*].

[c] Death or Survivorship as Condition

Manual delivery of a deed to the grantee with the intent that it become operative only on the grantor's death constitutes an attempted testamentary disposition, and the deed is void [*Meyer v. Wall (1969) 270 Cal. App. 2d 24, 27, 75 Cal. Rptr. 236]* . However, deposit of a deed granting a fee simple with a third person, with instructions that it be transmitted to the grantee on the death of the grantor, conveys a remainder interest in fee simple with a life estate reserved in the grantor, if the grantor intends the deposit to be irrevocable [*Osborn v. Osborn (1954) 42 Cal. 2d 358, 362, 267 P.2d 333]* .

Delivery of a deed to a third person with instructions to deliver it to the grantee only if the grantee survives the grantor, and to otherwise return it to the grantor, indicates an intention to retain title rather than to pass an immediate and irrevocable title. Therefore, delivery is not accomplished, and the deed is invalid [*Stone v. Daily (1919) 181 Cal. 571, 574-577, 185 P. 665* ; *Rothney v. Rothney (1940) 41 Cal. App. 2d 566, 571-573, 107 P.2d 294]* .

[4] Proof of Delivery

Delivery and intent to pass title, an essential element of delivery, are questions of fact [*Meyer v. Wall (1969) 270 Cal. App. 2d 24, 27, 75 Cal. Rptr. 236*]. Evidence of the circumstances surrounding the transaction is admissible on this issue [*Coffey v. Cooper (1960) 185 Cal. App. 2d 464, 468, 8 Cal. Rptr. 358]* . Declarations of the alleged grantor made before and after the making of the deed are admissible as an exception to the hearsay rule for the limited purpose of showing the grantor's intent, and it is immaterial that the declarations are self-serving [*Mecchi v. Picchi (1966) 245 Cal. App. 2d 470, 478, 54 Cal. Rptr. 1* ; *see Evid. Code § 1251(b)*]. However, if the statements, written instructions, or acts of the grantor at the time of physical delivery are undisputed, and clearly and unambiguously show an intent to pass title, evidence of the grantor's subsequent acts or declarations is not admissible [*Mecchi v. Picchi (1966) 245 Cal. App. 2d 470, 486, 54 Cal. Rptr. 1* ; *Hodges v. Lochhead (1963) 217 Cal. App. 2d 199, 202, 31 Cal. Rptr. 879]* .

[5] Acceptance

Acceptance of the deed by the grantee or the grantee's representative is necessary to make a delivery effective and the deed operative [*Perry v. Wallner (1962) 206 Cal. App. 2d 218, 222, 23 Cal. Rptr. 352* ; *Steitz v. Irwin (1949) 94 Cal. App. 2d 871, 875, 211 P.2d 919]* . Actual acceptance need not be formal or express but may be shown by the acts and conduct of the parties [*Steitz v. Irwin (1949) 94 Cal. App. 2d 871, 876, 211 P.2d 919* ; *Canal Oil Co. v. National Oil Co. (1937) 19 Cal. App. 2d 524, 536, 66 P.2d 197* (corporate grantee)]. Constructive acceptance of a deed may be

presumed, even if the grantee has no knowledge of the deed, if the conveyance is beneficial to the grantee and the deed is delivered to a third party for the benefit of the grantee [*Steitz v. Irwin (1949) 94 Cal. App. 2d 871, 875, 211 P.2d 919* ; *Windiate v. Moore (1962) 201 Cal. App. 2d 509, 515, 19 Cal. Rptr. 860* ; *see Civ. Code § 1059(2)*].

If the debtor records a deed to the creditor and the creditor does not want to accept the deed, the creditor may record a notice of nonacceptance. The notice must identify the security interest, contain a legal description of the property, and properly identify the parties to the deed, the date the deed is recorded, the county in which the project is located, and the county assessor's parcel number referenced in the deed [*Civ. Code § 1058.5(a)*].

[6] Presumptions and Inferences

The grantee's possession of the deed raises a rebuttable inference of delivery [*Meyer v. Wall (1969) 270 Cal. App. 2d 24, 28, 75 Cal. Rptr. 236* ; *see Jones v. Jones (1960) 183 Cal. App. 2d 468, 472, 6 Cal. Rptr. 819* (acceptance)]. Circumstances considered in refuting this inference may include various acts of dominion inconsistent with delivery, such as the grantor's retention of possession of the property, payment of taxes and insurance, collection of rents, and attempted second conveyances [*Meyer v. Wall (1969) 270 Cal. App. 2d 24, 29, 75 Cal. Rptr. 236* ; *Mecchi v. Picchi (1966) 245 Cal. App. 2d 470, 484, 54 Cal. Rptr. 1]* .

The grantor's possession of the deed raises a presumption that the deed was never delivered, unless actual delivery is established and it is further shown that the grantor's possession is merely for safekeeping or a similar purpose [*Miller v. Jansen (1943) 21 Cal. 2d 473, 477, 478, 132 P.2d 801* ; *Condencia v. Nelson (1960) 187 Cal. App. 2d 300, 303, 9 Cal. Rptr. 759]* .

Recordation is prima facie evidence of execution and delivery [*Evid. Code § 1600*]. This is a rebuttable presumption affecting the burden of proof [*see Evid. Code §§ 601, 602, 1601(b)*; *see also Evid. Code § 606*].

A duly executed deed is presumed to have been delivered at its date [*Civ. Code § 1055*]. Because a deed is deemed duly executed when it has been subscribed and delivered, this presumption arises only as to the date, not the fact of delivery [*Code Civ. Proc. § 1933*; *Miller v. Jansen (1943) 21 Cal. 2d 473, 132 P.2d 801]* .

A beneficial conveyance to a person incapable of accepting, such as an infant or one who is mentally incompetent, is conclusively presumed to be accepted [*Estate of Kalt (1940) 16 Cal. 2d 807, 813, 108 P.2d 401]* . In the case of an adult donee, a rebuttable presumption of acceptance of a gift deed arises when the conveyance is beneficial [*Herman v. Mortensen (1945) 72 Cal. App. 2d 413, 419-421, 164 P.2d 551]* . Acceptance by one joint owner raises a presumption of acceptance by the other joint owners when the grant is beneficial to them, even though they have no knowledge of the deed [*Blackburn v. Drake (1963) 211 Cal. App. 2d 806, 816, 27 Cal. Rptr. 651]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPersonal GiftsElements of Valid GiftsAcceptanceReal Property LawDeedsConstruction & InterpretationReal Property LawDeedsTypesGift DeedsReal Property LawDeedsDelivery

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15-184 California Forms of Pleading and Practice--Annotated § 184.23

§ 184.23 Matters Not Essential to Validity

[1] Consideration

A deed does not require consideration to be valid [*Freeman v. LaMorte (1957) 148 Cal. App. 2d 670, 673, 307 P.2d 734* ; *see Civ. Code § 1040*]. Therefore, the deed generally may not be rescinded on the ground of failure of consideration, unless performance or payment of the consideration is made a condition subsequent [*Lavely v. Nonemaker (1931) 212 Cal. 380, 383, 298 P. 976]* . For example, the deed may be rescinded or cancelled or a reconveyance compelled when the grant is conditioned on performance of a promise to maintain and support the grantor [*Teel v. Bank of Eureka (1941) 42 Cal. App. 2d 807, 809-811, 110 P.2d 78]* .

One acting under a power of attorney conferred for the benefit of the principal cannot make a conveyance without consideration, for a consideration of love and affection, for a nominal consideration, or for a consideration running to the agent [*Bertelsen v. Bertelson (1942) 49 Cal. App. 2d 479, 484, 122 P.2d 130]* .

[2] Acknowledgment and Recordation

Acknowledgment of the deed is not essential to the deed's validity [*Osterberg v. Osterberg (1945) 68 Cal. App. 2d 254, 262, 156 P.2d 46]* . In addition, recordation is not a prerequisite to the validity of a deed if the rights of innocent third persons are not involved [*Devereaux v. Frazier Mountain Park & Fisheries Co. (1967) 248 Cal. App. 2d 323, 328, 56 Cal. Rptr. 345* ; *see Civ. Code § 1217*]. If a deed is delivered before an abstract of judgment is recorded, the transfer is complete when the deed is delivered without regard to whether the deed was recorded, and there is nothing to which the later-recorded abstract can attach [*Casey v. Gray (1993) 13 Cal. App. 4th 611, 614, 16 Cal. Rptr. 2d 538]* . However, a deed must be acknowledged before it may be recorded [*Gov. Code § 27287*; *see also Gov. Code § 27288*]. If the deed is acknowledged or proved and certified and recorded, it constitutes constructive notice of its contents to subsequent purchasers and mortgagees [*Civ. Code § 1213*].

[3] Documentary Transfer Tax

Any county or city and county may impose a tax on transfers of real property [*Rev. & Tax. Code § 11911*]. The recorder

may not record a deed subject to a transfer tax unless the tax is paid at the time of recording. However, if the deed is recorded anyway, failure to collect the tax due does not affect constructive notice otherwise imparted by recording the deed [*Rev. & Tax. Code § 11933*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawConsiderationGeneral OverviewReal Property LawDeedsEnforceabilityReal Property LawDeedsExecution FormalitiesReal Property LawPriorities & RecordingBona Fide PurchasersReal Property LawPriorities & RecordingRecording Acts

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15-184 California Forms of Pleading and Practice--Annotated § 184.24

§ 184.24 Interpretation of Deeds

[1] In General

The primary objective in construing a deed is to give effect to the intention of the parties as shown by the language they used [*Willard v. First Church of Christ, Scientist (1972) 7 Cal. 3d 473, 476, 102 Cal. Rptr. 739, 498 P.2d 987* ; *Rousselot v. Spanier (1976) 60 Cal. App. 3d 238, 243, 131 Cal. Rptr. 438, 55 O.&G.R. 12]* . Therefore, deeds are generally to be interpreted in the same way as contracts [*Civ. Code § 1066*; *City of Manhattan Beach v. Superior Court (1996) 13 Cal. 4th 232, 238, 52 Cal. Rptr. 2d 82, 914 P.2d 160 , cert. denied, 519 U.S. 1008, 117 S. Ct. 511, 136 L. Ed. 2d 400* ; *City and County of San Francisco v. Union Pacific R.R. Co. (1996) 50 Cal. App. 4th 987, 994, 58 Cal. Rptr. 2d 1* ; for a discussion of the interpretation of contracts, *see Ch. 140, Contracts, § 140.30* et seq.].

There are, however, certain statutory rules of interpretation specifically applicable to deeds. A deed is to be interpreted in favor of the grantee, except that a reservation in any grant and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor [*Civ. Code § 1069*]. If the operative words of a deed are doubtful, recourse may be had to its recitals to assist in construction [*Civ. Code § 1068*; *see City and County of San Francisco v. Union Pacific R.R. Co. (1996) 50 Cal. App. 4th 987, 995, 58 Cal. Rptr. 2d 1* (granting clause that did not contain the words fee, easement, or right-of-way conveyed fee simple title in light of other deed provisions reserving certain rights to grantors)]. A clear and distinct limitation in a deed is not controlled by other words less clear and distinct [*Civ. Code § 1067*]. If several parts of a grant are absolutely irreconcilable, the former part prevails [*Civ. Code § 1070*].

[2] Parol and Extrinsic Evidence

The intention of the parties to a deed is to be gathered, if possible, from the language itself and is determined by a proper construction of the language used rather than by resorting to extrinsic evidence [*White v. State of California (1971) 21 Cal. App. 3d 738, 757, 99 Cal. Rptr. 58]* . Therefore, if the language of a deed is plain, certain, and unambiguous, neither parol nor extrinsic evidence will be considered to add to, detract from, or vary its terms [*French v. Brinkman (1963) 60 Cal. 2d 547, 552, 35 Cal. Rptr. 289, 387 P.2d 1* ; *Safwenberg v. Marquez (1975) 50 Cal. App. 3d 301, 309, 123 Cal. Rptr. 405]* . However, extrinsic evidence is admissible to determine whether the deed's

language is reasonably susceptible of an interpretation contrary to its "plain meaning." If the trial court then decides that the language of the deed in light of all the circumstances is susceptible of either one of the two interpretations contended for, extrinsic evidence relevant to prove either of the meanings is admissible [*Murphy Slough Assn. v. Avila (1972) 27 Cal. App. 3d 649, 653-655, 104 Cal. Rptr. 136* ; *see Code Civ. Proc. §§ 1856, 1860*]. Parol evidence is also admissible to show fraud or mistake [*French v. Brinkman (1963) 60 Cal. 2d 547, 552, 553, 35 Cal. Rptr. 289, 387 P.2d 1* (mutual mistake); *Kent v. First Trust & Savings Bank (1950) 101 Cal. App. 2d 361, 370, 225 P.2d 625* (fraud); *see Code Civ. Proc. § 1856*].

When the terms of a deed are ambiguous, the actual conduct of the parties may be used to establish their intention. Thus, when a deed for a railroad right-of-way was ambiguous regarding whether it granted a fee interest or an easement, the grantor's subsequent conduct was admissible to indicate its intention to convey a fee interest [*City of Manhattan Beach v. Superior Court (1996) 13 Cal. 4th 232, 246, 52 Cal. Rptr. 2d 82, 914 P.2d 160 , cert. denied, 519 U.S. 1008, 117 S. Ct. 511, 136 L. Ed. 2d 400]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDocumentary EvidenceParol EvidenceReal Property LawDeedsConstruction & Interpretation

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§ 184.25 Theories of Action

Generally, when one of the requisites of a valid deed is lacking and the deed is not void on its face, it is subject to cancellation and the plaintiff may have his or her title quieted with respect to the adverse claim made under the deed [*see Civ. Code § 3412*; *Code Civ. Proc. § 760.010 et seq.*; *see also §§ 184.150 -184.157*]. A deed's validity as well as matters of interpretation appear to also be determinable in an action for declaratory relief [*see Code Civ. Proc. § 1060*; *see also § 184.157*].

When, through fraud or a mutual mistake of the parties, or a mistake of one party, the deed does not truly express the intention of the parties, it may be revised or reformed so as to express that intention so far as it can be done without prejudice to rights acquired by third persons, in good faith, and for value [*see Civ. Code § 3399* and Ch. 488, *Reformation of Instruments*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewReal Property LawDeedsConstruction & InterpretationReal Property LawDeedsEnforceabilityReal Property LawDeedsRemediesCancellation & RescissionReal Property LawDeedsRemediesReformation

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[Reserved]

§§ 184.26[Reserved]

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§ 184.40 Governing Statutes

Implication of covenants in a grant deed is governed by *Civ. Code § 1113*. Damages for breach of covenants of title are governed by *Civ. Code §§ 3304* and *3305*. Statutes governing covenants running with the land are contained in *Civ. Code §§ 1460 through 1471*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsCovenantsReal Property LawDeedsCovenants of TitleReal Property LawDeedsRemediesDamages

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§ 184.41 Implied Covenants

[1] Covenants Implied From Grant Deed

From the use of the word "grant" in any deed by which an estate of inheritance or fee simple is to be passed, the following covenants, and none other, on the part of the grantor for the grantor and the grantor's heirs to the grantee and the grantee's heirs and assigns are implied, unless restrained by express terms contained in the deed [*Civ. Code § 1113*]:

- That previous to the time of the execution of the deed, the grantor has not conveyed the same estate, or any right, title, or interest in the estate, to any person other than the grantee; and

- That the estate is at the time of the execution of the deed free from encumbrance done, made, or suffered by the grantor, or any person claiming under him or her.

Thus, a grant deed generally carries with it implied covenants against prior conveyances and encumbrances by the grantor [*see Civ. Code § 1113*; *Snyder v. Pine Grove Lbr. Co. (1940) 40 Cal. App. 2d 660, 663-664, 105 P.2d 369]* . However, these covenants are not implied if the deed in which the word "grant" is used is a gift deed, that is, a deed given without consideration [*Estate of Porter (1930) 138 Cal. 618, 624-625, 72 P. 173]* or a quitclaim deed [*Southern Pac. Co. v. Dore (1917) 34 Cal. App. 521, 522-523, 168 P. 147* ; *see § 184.12[2]*].

These implied covenants may be sued on in the same manner as if they had been expressly inserted in the conveyance [*Civ. Code § 1113*].

[2] Covenant Against Prior Conveyances

The implied covenant against prior conveyances [*Civ. Code § 1113*] is personal to the grantee and does not run with the land. It is breached, if at all, at the time the deed is executed [*Lawrence v. Montgomery (1869) 37 Cal. 183, 188-189]* .

[3] Covenant Against Encumbrances

An encumbrance is any right to or interest in land that may subsist in another to the diminution of the value of the land, but which is consistent with the passing of the fee. An encumbrance may include whatever charges, burdens, obstructs, or impairs the use of an estate in land or impedes its transfer [*American Title Co. v. Anderson (1975) 52 Cal. App. 3d 255, 258, 259, 125 Cal. Rptr. 24]* . The term "encumbrances" also includes taxes, assessments, and all liens on real property [*Civ. Code § 1114*].

There are two categories of encumbrances, those that affect title, such as a mortgage or lien, and those that affect only the physical condition of the property, such as a public road or right of way. If an encumbrance affecting title exists at the time of transfer, and was done, made, or suffered by the grantor, the implied covenant against encumbrances is breached. In this case, the vendee's prior knowledge or notice of the encumbrance is immaterial. However, if the encumbrance consists of a physical burden on the land, permanent in character, of an open and notorious nature, and affecting only the physical condition of the property, it is not an encumbrance that breaches the implied covenant against encumbrances [*Civ. Code § 1113*; *Evans v. Faught (1965) 231 Cal. App. 2d 698, 709, 42 Cal. Rptr. 133]* .

The implied covenant against encumbrances imposes a personal obligation on the grantor, and where there are two or more grantors, the obligation is joint and several [*Evans v. Faught (1965) 231 Cal. App. 2d 698, 712, 42 Cal. Rptr. 133]* . The covenant is also personal to the grantee, and does not run with the land. Thus, a succeeding grantee may not maintain an action in his or her own name for breach [*Babb v. Weemer (1964) 225 Cal. App. 2d 546, 550, 551, 37 Cal. Rptr. 533]* .

[4] Damages for Breach of Implied Covenants

The implied covenant against prior conveyances [*Civ. Code § 1113(1)*] seems to be a statutory modification of the covenant of seisin [Comment, *Covenants of Title Running With the Land in California, 49 Cal. L. Rev. 931, 933 (1961)*]. The measure of damages for breach of a covenant of seisin and, by analogy, for breach of the implied covenant against prior conveyances is (1) the price paid to the grantor or, if the breach is only partial, such proportion of the price as the value of the property affected by the breach bore at the time of the grant to the value of the whole property; (2) interest on this amount for the time during which the grantee derived no benefit from the property, not exceeding five years; and (3) any expenses properly incurred by the covenantee in defending his or her possession [*Civ. Code § 3304*].

The usual measure of damages for breach of the implied covenant against encumbrances [*Civ. Code § 1113(2)*] is the amount which has been actually expended by the covenantee in extinguishing either the principal or interest of the encumbrance. However, if the principal is extinguished, this sum must not exceed a proportion of the price paid to the grantor equivalent to the relative value at the time of the grant of the property affected by the breach, as compared with the whole, or if the interest is extinguished, this sum is not to exceed interest on a like amount [*Civ. Code § 3305*].

This rule refers to encumbrances such as mortgages and other liens which may be satisfied by the payment of money. It is not applicable to encumbrances such as easements or restrictions on the use of land which cannot be extinguished at the will of the owner by the payment of any sum. In the latter instance, the measure of damages is based on the natural and proximate consequences to the plaintiff of the existence and continuance of the encumbrance, and just compensation for the breach is estimated by the amount by which the existence of the encumbrance reduces the market value of the land [*Evans v. Faught (1965) 231 Cal. App. 2d 698, 712-713, 42 Cal. Rptr. 133]* . However, since the covenant against encumbrances is merely one of indemnity, no more than nominal damages can be recovered on account of an encumbrance that has inflicted no actual injury on the grantee [*Fraser v. Bentel (1911) 161 Cal. 390, 394, 119 P. 509]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsCovenants of TitleReal Property LawDeedsRemediesDamages

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§ 184.42 Express Covenants

[1] Covenant of Warranty

A covenant of warranty in a deed is an undertaking by the covenantor that on the total or partial failure of the title which the deed purports to convey by setting up a superior title, the covenantor will compensate the covenantee in money for the loss sustained by the failure of title [*Tropico Land & Improvement Co. v. Lambourn (1915) 170 Cal. 33, 38, 148 P. 206]* . A grantor who warrants the title purportedly conveyed also covenants to defend such title against all lawful claims [*Barberi v. Rothchild (1936) 7 Cal. 2d 537, 540, 61 P.2d 760]* .

The covenant of warranty is made for the direct benefit of the property and runs with the land [*Civ. Code §§ 1462, 1463*]. The covenant is breached only when the covenantee or his or her assignee is actually or constructively evicted, and the covenantor's liability runs directly to the person evicted [*see Civ. Code § 1460*; *McGary v. Hastings (1870) 39 Cal. 360, 364-367* ; *Blackwell v. Atkinson (1859) 14 Cal. 470, 471]* .

[2] Covenant for Quiet Enjoyment

A covenant for quiet enjoyment is similar to the covenant of warranty. It also runs with the land [*Civ. Code § 1463*], and is breached when the covenantee or his or her assignee is actually evicted or when one holding a paramount title asserts it in such manner that the covenantee is compelled to yield possession or buy the outstanding superior title [*see McCormick v. Marcy, (1913) 165 Cal. 386, 389, 132 P. 449* ; *see also Civ. Code § 1460*].

[3] Covenant for Further Assurance

A covenant for further assurance is a covenant by the grantor to perform further acts or execute additional deeds for the purpose of perfecting the grantee's title [*see, e.g., Wholey v. Cavanaugh (1891) 88 Cal. 132, 135, 25 P. 1112]* . The covenant runs with the land [*Civ. Code § 1463*], and is breached when the additional acts required are not performed within a reasonable time [*Vance v. Pena (1871) 41 Cal. 686, 692, 693]* . The covenant may be specifically enforced [Powell on Real Property, Ch. 81, *Intervivos Transfer by Deed*, P 910; Comment, *Covenants of Title Running With the Land in California, 49 Cal. L. Rev. 931, 936 (1961)*].

[4] Covenant of Seisin

A covenant of seisin is a covenant that the grantor owns or is seised with the estate purportedly conveyed [*see McCormick v. Marcy (1913) 165 Cal. 386, 388, 132 P. 449]* . The covenant is personal to the covenantee, and is breached, if at all, at the time of transfer [*Lawrence v. Montgomery (1869) 37 Cal. 183, 188, 189]* .

[5] Covenant of Right to Convey

The covenant of right to convey is similar to the covenant of seisin, but protects the covantee in situations in which, regardless of ownership, the grantor does not have the right to convey the property [*see* Powell on Real Property, Ch. 81, *Intervivos Transfer by Deed*, P 906]. The covenant is personal, and is breached, if at all, at the time of transfer [*Lawrence v. Montgomery (1869) 37 Cal. 183, 188, 189]* .

[6] Covenant Against Encumbrances

An express covenant against encumbrances is similar to that implied by the use of the word "grant," but is greater in scope, generally warranting against all existing encumbrances, not just those made or suffered by the grantor [Curtis, *Title Assurance in Sales of California Residential Realty: A Critique of Title Insurance and Title Covenants With Suggested Reforms*, 7 Pacific L.J. 1, 23 (1976); *see also § 184.41[2]* and *[3]*]. The covenant is personal to the covenantee, and is breached, if at all, at the time of transfer [*Lawrence v. Montgomery (1869) 37 Cal. 183, 188, 189]* .

[7] Damages for Breach of Express Covenants

Damages for breach of a covenant of seisin, right to convey, warranty, or quiet enjoyment are the same as for breach of the implied covenant against prior conveyances, and damages for breach of an express covenant against encumbrances are the same as for breach of the implied covenant against encumbrances [*see Civ. Code §§ 3304, 3305*; *see also § 184.41[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsCovenants of TitleReal Property LawDeedsRemediesDamages

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15-184 California Forms of Pleading and Practice--Annotated § 184.43

§ 184.43 Additional Remedies for Failure of Title

When a deed purporting to convey a greater estate than the grantor owns is executed pursuant to a purchase agreement, the grantee may recover on the theory of failure of consideration or breach of agreement to convey real property. Alternatively, the grantee may seek rescission on the ground of mistake as to the status of the grantor's title, whether the grantor also mistakenly believed in the validity of his or her title or knew of the defect and failed to disclose it [*American Title Co. v. Anderson (1975) 52 Cal. App. 3d 255, 259, 125 Cal. Rptr. 24* ; *see Civ. Code §§ 1577, 1578*; *see also § 184.154*].

The grantee may also be able to collect on his or her title insurance policy. When the title insurance company pays or settles the grantee's claim, the company may be subrogated to the rights of the grantees, and sue the grantor for damages for breach of covenant or proceed against the grantor on one or more of the theories mentioned above [*American Title Co. v. Anderson (1975) 52 Cal. App. 3d 255, 258-260, 125 Cal. Rptr. 24]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionBreach of WarrantyInsurance LawProperty InsuranceTitle InsuranceReal Property LawDeedsRemediesCancellation & RescissionReal Property LawDeedsRemediesDamagesReal Property LawPurchase & SaleContracts of SaleEnforceabilityMistake

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[Reserved]

§§ 184.44[Reserved]

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§ 184.60 Governing Law

Restrictive covenants are governed generally by *Civ. Code §§ 1460-1471*, which set forth the prerequisites for binding legal covenants between private parties to restrict the use of land. Discriminatory covenants are governed by *Civ. Code §§ 51.2, 51.3, 53, 782*, and *782.5*. Enforcement of restrictive covenants as equitable servitudes is governed by common law [*see Werner v. Graham (1919) 181 Cal. 174, 179-186, 183 P. 945]* .

Conditions, including conditions subsequent, are generally governed by *Civ. Code § 1434 et seq. Civ. Code § 707 et seq.* specifically govern conditions affecting ownership of land. Remedies for breach of conditions subsequent are generally governed by *Civ. Code §§ 791, 793* (notice before action or reentry), *Civ. Code § 1046* (right of reentry as transferable), and *Civ. Code § 1109* (duty to reconvey property on breach of condition). The duration and exercise of the power of termination, or right of reentry, are governed by *Civ. Code § 880.020 et seq.* and *Civ. Code § 885.010 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsCovenantsReal Property LawEstatesFuture InterestsRight of EntryReal Property LawRestrictive CovenantsGeneral Overview

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§ 184.61 Restrictions on Use of Property

[1] Methods Available

The use and enjoyment of property may be restricted by several methods. The restrictions are often imposed for the benefit of another parcel of property, but may also be for the mutual benefit of the property restricted and other property, or may not be for the benefit of property at all. Restrictions are commonly imposed by the following methods:

- Personal covenants, created in agreements or deeds, binding only the immediate parties to them [*see, e.g., Lyford v. North Pac. Coast R.R. Co. (1891) 92 Cal. 93, 95-96, 28 P. 103]* ;

- Covenants that run with the land, created in agreements or deeds, and binding some or all successors in interest to the burdened and benefited properties [*see, e.g., Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 172-175, 195 Cal. Rptr. 14]* ;

- Equitable servitudes, which also bind successors in interest [*see, e.g., Sain v. Silvestre (1978) 78 Cal. App. 3d 461, 466, 144 Cal. Rptr. 478* (disapproved on other grounds in *Reynolds Metals Co. v. Alperson (1979) 25 Cal. 3d 124, 129, 158 Cal. Rptr. 1, 599 P.2d 83*)]; and

- Conditions subsequent, which afford the grantor and the grantor's heirs and assigns (as opposed to successors to the grantor's interest in property) the power to terminate the grantee's or grantee's successor's estate in the property conveyed if the condition occurs [*see Civ. Code §§ 885.010, 885.020, 1109*].

[2] On Individual Lots

Restrictions on the use of or benefiting individual lots, as opposed to lots in a subdivision, may be accomplished by a covenant, which may or may not run with the land, or by the imposition of a condition subsequent [*see, e.g., Carlson v. Lindauer (1953) 119 Cal. App. 2d 292, 297-299, 304-305, 259 P.2d 925, 2 O.&G.R. 1363* (covenant by holder of mineral rights to execute quitclaim deed to owner of surface rights if production in paying quantities was not attained in

five-year period); *Rosecrans v. Pacific Elec. Ry. Co. (1943) 21 Cal. 2d 602, 603-605, 134 P.2d 245* (condition subsequent providing that on grantee's cessation of use of right of way for passenger trains, grantors, or grantors' heirs or assigns, have right to enter and take possession)]. The theory of equitable servitudes may also apply [*see MacDonald Properties, Inc. v. Bel-Air Country Club (1977) 72 Cal. App. 3d 693, 696-697, 699-700, 140 Cal. Rptr. 367* ; *see also Marra v. Aetna Construction Co. (1940) 15 Cal. 2d 375, 378, 101 P.2d 490]* .

With respect to covenants, a grantor and grantee may execute an agreement in which either party promises to do or refrain from doing some act on his or her own land for the benefit of the land of the other [*see Civ. Code § 1468*; *see, e.g., Doo v. Packwood (1968) 265 Cal. App. 2d 752, 753, 71 Cal. Rptr. 477* (grantee covenanted not to use property conveyed for retail sale of groceries)]. Similarly, two landowners not in the relationship of grantee-grantor can execute an agreement imposing restrictions on the use of one or both of their properties [*see Civ. Code § 1468*; *see, e.g., Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 174-175, 195 Cal. Rptr. 14* (agreement by developer with home owners to maintain land adjacent to subdivision as golf course)].

[3] On Lots in Subdivision

Covenants may be used to establish use restrictions in a subdivision, most commonly by restricting all the lots in the subdivision to residential use, and by imposing a variety of restrictions for aesthetic purposes [*see, e.g., Seligman v. Tucker (1970) 6 Cal. App. 3d 691, 693-694, 86 Cal. Rptr. 187]* . This is usually accomplished by incorporating covenants restricting use in a "Declaration of Covenants, Conditions, and Restrictions," also commonly known as "CC&Rs," a declaration of restrictions, or a declaration. In *Citizens for Covenant Compliance v. Anderson* [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 47 Cal. Rptr. 2d 898, 906 P.2d 1314]* , the California Supreme Court held that if a declaration establishing a common plan for the ownership of property in a subdivision and containing restrictions on the use of the property as part of the common plan is recorded before the execution of a contract for the sale of any lot in the subdivision, describes the property it is to govern, and states that it is intended to bind all purchasers and their successors, then subsequent purchasers who have constructive notice of the recorded declaration are deemed to intend and agree to be bound by, and to accept the benefits of, the common plan. The restrictions need not be additionally cited in a deed or other document at the time of the sale of parcels in the subdivision [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 355, 47 Cal. Rptr. 2d 898, 906 P.2d 1314* ; for further discussion of this opinion, *see § 184.63[3]*].

The *Citizens* Court noted that the issue before it was narrow and involved how a covenant is created. It saw no difference regarding this issue between covenants that run with the land and equitable servitudes, and held that the rule it adopted applies equally to both [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 355, 47 Cal. Rptr. 2d 898, 906 P.2d 1314]* . However, the Court also provided a brief overview of the doctrines of the two doctrines, and noted that California courts have traditionally analyzed CC&Rs under the doctrine of equitable servitudes, at least before the 1968 and 1969 amendments of *Civ. Code § 1468* [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 353-354, 47 Cal. Rptr. 2d 898, 906 P.2d 1314* , citing *Scaringe v. J.C.C. Enterprises, Inc. (1988) 205 Cal. App. 3d 1536, 1544, 253 Cal. Rptr. 344* ; *Richardson v. Callahan (1931) 213 Cal. 683, 686, 3 P.2d 927* ; for discussion of the development of *Civ. Code § 1468, see § 184.134[3]*].

[4] Enforceability Against Successive Owners of Property

Subdivision CC&Rs will be binding on subsequent purchasers if the CC&Rs are recorded prior to the sale of any lots in the subdivision and otherwise satisfy the requirements set forth in *Citizens for Covenant Compliance v. Anderson* [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 355, 47 Cal. Rptr. 2d 898, 906 P.2d 1314]* . When the *Citizens* rule does not apply, the requirements set forth below will determine whether use restrictions are enforceable against subsequent owners.

The enforceability of the benefit or burden of a covenant by or against subsequent owners of the property in addition to

the parties to the deed or agreement that contains the covenant, depends on whether or not the "covenant runs with the land" or is a mere personal covenant, which does not fulfill the requisites of a covenant running with the land [*see Taormina Theosophical Community, Inc. v. Silver (1983) 140 Cal. App. 3d 964, 972, 190 Cal. Rptr. 38* ; *Anthony v. Brea Glenbrook Club (1976) 58 Ca App3d 506, 510, 130 Cal. Rptr. 32]* . A personal covenant, as opposed to one that runs with the land, is enforceable only between the two parties to the covenant [*Lyford v. North Pac. Coast R.R. Co. (1891) 92 Cal. 93, 95-96, 28 P. 103* (grantee's covenant to maintain railroad on easement in contract granting easement held to be personal and unenforceable by plaintiff who did not hold assignment from grantor); *see Barrows v. Jackson (1952) 112 Cal. App. 2d 534, 538, 247 P.2d 99]* .

Whether or not a covenant runs with the land is governed by statute. Prior to 1969, both the benefit and burden of a covenant could run with the land under *Civ. Code § 1468* when the covenant was in an agreement between two landowners. *Civ. Code § 1468*, however, did not apply to covenants between a grantee and grantor, and under *Civ. Code § 1462*, a covenant made in a deed could only run with the land if it benefited the land conveyed in the deed [*Marra v. Aetna Construction Co. (1940) 15 Cal. 2d 375, 377-378, 101 P.2d 490* ; *see Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 174-175, 195 Cal. Rptr. 14* (covenant referred to in deeds did not run under *Civ. Code § 1462* because it burdened land, but covenant was made between landowners and met other criteria so as to run under *Civ. Code § 1468*)]. Since 1969, both the benefit and the burden of a covenant made by a grantor in a conveyance has run with the land under *Civ. Code § 1468*, and since 1970, grantees' covenants have been similarly enforceable [for further discussion, *see § 184.134[3]*].

Even though a covenant will not run with the land, it may nonetheless be enforceable against successors in interest as an equitable servitude [*see Marra v. Aetna Construction Co. (1940) 15 Cal. 2d 375, 378, 101 P.2d 490* ; *see also § 184.63*].

By its nature, a condition subsequent is enforceable against successors in interest to the grantee [*see Civ. Code § 1109*]. However, the power of termination used to enforce such a condition may expire by the passage of time or due to obsolescence [*see Civ. Code § 885.010 et seq.*; for discussion, *see § 184.70*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesFuture InterestsRight of EntryReal Property LawRestrictive CovenantsCovenants Running With LandReal Property LawRestrictive CovenantsCreationReal Property LawRestrictive CovenantsEnforcementReal Property LawRestrictive CovenantsSubdivisions

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Volume 15: Costs and Attorney's Fees thru Deeds-Chs. 174-189
Chapter 184 DEEDS
PART II. LEGAL BACKGROUND
C. Restrictive Covenants

15-184 California Forms of Pleading and Practice--Annotated § 184.62

§ 184.62 Restrictive Covenant

[1] Defined

A covenant is a promise respecting the use of land, whether in the affirmative to use the land in a particular manner or in the negative to refrain from doing certain things in regard to its use. A restrictive covenant is a covenant restricting the use of the land, and has been described as a negative easement [*Sackett v. Los Angeles City School Dist. (1931) 118 Cal. App. 254, 257, 5 P.2d 23]* . Restrictions are construed to be covenants rather than conditions when that can reasonably be done, but that construction will not be adopted contrary to the parties' intention [*Rosecrans v. Pacific Elec. Ry. Co. (1943) 21 Cal. 2d 602, 605, 134 P.2d 245* ; *but see MacDonald Properties, Inc. v. Bel-Air Country Club (1977) 72 Cal. App. 3d 693, 699, 140 Cal. Rptr. 367* ; for further discussion, *see § 184.70[2]*]. A covenant may be personal and enforceable only by the parties to the agreement, or it may run with the land and be binding and enforceable by the successive owner of the dominant and servient tenements [*see § 184.134[3]*]. The covenantee, or person benefited by a restriction on the use of land, holds a property interest in the land [*see Southern Cal. Edison Co. v. Bourgerie (1973) 9 Cal. 3d 169, 171, 107 Cal. Rptr. 76, 507 P.2d 964* ; *Redevelopment Agency v. Tobriner (1984) 153 Cal. App. 3d 367, 374-375, 200 Cal. Rptr. 364]* .

[2] Personal Covenants

A personal covenant is one that by its nature is a mere personal undertaking, and not intended to have any binding effect beyond the immediate parties to the instrument [*Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 175, 195 Cal. Rptr. 14]* .

Determination of whether a covenant is personal, runs with the land, or is enforceable as an equitable servitude rests on the resolution of factual matters such as intent, notice, and equitable factors [*McCaffrey v. Preston (1984) 154 Cal. App. 3d 422, 436, 201 Cal. Rptr. 252]* . The express terms of the restrictions, the length of the restrictions on the land, and testimony as to the understanding of the original covenanting parties are all relevant to whether a covenant was intended to be personal or intended to bind later grantees [*see Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 175, 195 Cal. Rptr. 14]* .

[3] Covenants Running With Land

[a] Nature

Both the liability of a covenant that runs with the land and the power to enforce it pass with the transfer of the estate in the property so that the covenant remains binding on subsequent transferees of the property even though they have not contractually assumed any responsibility for its performance [*see Civ. Code § 1460*; *Anthony v. Brea Glenbrook Club (1976) 58 Cal. App. 3d 506, 510, 130 Cal. Rptr. 32]* . Only those covenants specified by statute, and those that are incidental thereto, run with the land [*Civ. Code § 1461*]. The two most important statutes that are applicable to determine whether a covenant runs with the land to bind subsequent purchasers of that land are *Civ. Code §§ 1462* and *1468* [*see Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 174, 195 Cal. Rptr. 14]* . *Civ. Code § 1462* provides that a covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property conveyed, or some part of it then in existence, runs with the land. Under California decisions narrowly applying *Civ. Code § 1462*, a restrictive covenant that burdens, rather than benefits, property does not run with the land to bind successors under that section [*Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 174, 195 Cal. Rptr. 14* ; *see Marra v. Aetna Construction Co. (1940) 15 Cal. 2d 375, 377-378, 101 P.2d 490]* .

Even though a restrictive covenant will not run under *Civ. Code § 1462* because it burdens land, it may run with the land if it satisfies the requirements of *Civ. Code § 1468*, under which both burdens and benefits may be enforced [*Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 174, 195 Cal. Rptr. 14]* .

A third statute, *Civ. Code § 1471*, applies notwithstanding *Civ. Code § 1468* or any other provision of law and governs covenants running with the land that impose environmental restrictions intended to protect present or future human health or safety or the environmental as a result of hazardous materials [*see § 194.62[3][c]*].

Whether or not a covenant runs with the land and binds subsequent purchasers is determined by the statutes in effect when the covenant was created [*see Taormina Theosophical Community, Inc. v. Silver (1983) 140 Cal. App. 3d 964, 968, 190 Cal. Rptr. 38* (amendments of *Civ. Code § 1468* not applied retroactively); *Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 174 n. 4, 195 Cal. Rptr. 14]* . *Civ. Code § 1462* has not been amended since 1872. However, *Civ. Code § 1468*, enacted in 1905, was amended in 1968 and 1969, as discussed in *§ 184.62[3][b]*.

A special rule, applicable to both covenants that run with the land and equitable servitudes, governs the creation of a general plan of restrictions for a subdivision that is to bind all purchasers and successors. In *Citizens for Covenant Compliance v. Anderson* [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 47 Cal. Rptr. 2d 898, 906 P.2d 1314]* , the California Supreme Court held that if a declaration establishing a common plan for the ownership of property in a subdivision and containing restrictions on the use of the property as part of the common plan is recorded before the execution of a contract for the sale of any lot in the subdivision, describes the property it is to govern, and states that it is intended to bind all purchasers and their successors, then subsequent purchasers who have constructive notice of the recorded declaration are deemed to intend and agree to be bound by, and to accept the benefits of, the common plan. The restrictions need not be additionally cited in a deed or other document at the time of the sale of parcels in the subdivision [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 355, 47 Cal. Rptr. 2d 898, 906 P.2d 1314* ; for further discussion of this opinion, *see § 184.63[3]*].

If a covenant does not run with the land, it may nonetheless be enforceable against successors in interest under another theory, as discussed in *§ 184.62[4]*.

[b] Covenants That Run Under Civ. Code § 1468

[i] Agreements Before 1969

Civ. Code § 1468 was enacted in 1905, and prior to its amendment, effective January 1, 1969, provided that a covenant made by the owner of land with the owner of other land to do or refrain from doing some act on his or her own land, which doing or refraining was expressed to be for the benefit of the land of the covenantee, and which was made by the covenantor expressly for his or her assigns or to the assigns of the covenantee, ran with both parcels of land [*Civ. Code § 1468* (1905 Stats., ch. 450)]. To enforce a legal covenant running with the land created prior to 1968, a plaintiff must show that (1) the covenant concerns some act on the covenantor's property, (2) the covenant is for the benefit of the covenantee, (3) the covenant states it is binding on the assigns of the covenantor, and (4) the covenantor and covenantee were owners of the land at the time the covenant was made [*Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 174-175, 195 Cal. Rptr. 14]* .

Because former *Civ. Code § 1468* applied only to covenants between landowners, and did not encompass covenants between a grantor and a grantee, restrictions referred to in a pre-1969 deed cannot be enforced against remote grantees unless they satisfy the requirements of *Civ. Code § 1462*. That is, the restrictions must benefit rather than burden the grantee's land [*Taormina Theosophical Community, Inc. v. Silver (1983) 140 Cal. App. 3d 964, 968, 972, 972 n. 3, 190 Cal. Rptr. 38* ; for further discussion of *Civ. Code § 1462, see § 184.134[3]*].

[ii] Deed or Agreement in 1969

In 1969, *Civ. Code § 1468*, as amended by 1968 Stats., ch. 680, § 1, was in effect. This amendment expanded the enforceability of covenants against successive owners by providing that in addition to covenants between landowners, a covenant made by a grantor of land with a grantee, for the benefit of the land conveyed to the grantee, would run with both the grantor's and grantee's land, if specified requirements, which were also added to the statute, were met [*Civ. Code § 1468* (1968 Stats., ch. 680, § 1); for a form of allegation to enforce a covenant restricting the use of a grantor's property, *see § 184.191*]. In addition, the 1968 amendment imposed the same new requirements on covenants made between landowners as it imposed on covenants between a grantor and grantee [*Civ. Code § 1468* (1968 Stats., ch. 680, § 1); for discussion of those requirements, *see § 184.62[3][b][iii]*].

[iii] Deed or Agreement After 1969

Effective January 1, 1970, *Civ. Code § 1468* was amended again to provide that a grantee can covenant with a grantor, for the expressed benefit of land belonging to either the grantee or the grantor, to do or refrain from doing certain acts relating to the use of the land, its maintenance, repair, or improvement, or the payment of taxes and assessments on the land or some part of it [*see Civ. Code § 1468*; 1969 Stats., ch. 245, § 1]. Such an agreement can be enforced as a covenant running with both the land of the grantee and grantor [*Civ. Code § 1468*].

For a covenant to run with the land under *Civ. Code § 1468*, benefiting successive owners of the benefited land and binding successive owners of the burdened land, the following requirements must be met [*Civ. Code § 1468*]:

- The land of the covenantor that is to be affected by the covenants, and the land of the covenantee to be benefited, are particularly described in the instrument containing the covenants;

- The successive owners of the land are, in the instrument containing the covenants, expressly bound by the covenants for the benefit of the land owned by, granted by, or granted to the covenantee;

- Each act that the covenantor is to do or refrain from doing relates to the use, repair, maintenance or improvement of, or payment of taxes and assessments on, the land or some part of the land, or, if the land owned by or granted to each consists of undivided interests in the same parcel or parcels, to the suspension of the right of partition or sale in lieu of partition for a period that is reasonable in relation to

the purpose of the covenant (the express reference to partition or sale in lieu of partition was added in 1973, but was expressed by the Legislature to be declaratory of existing law in 1973 Stats., ch. 474, §§ 1, 2); and

- The instrument containing the covenants is recorded in the office of the recorder of each county in which the land or some part of the land is situated.

Despite *Civ. Code § 1465*, which provides that a covenant running with the land binds only those who acquire the whole estate of the covenantor in some part of the property, a covenant meeting the requirements of *Civ. Code § 1468* benefits and is binding on (1) each successive owner, during his or her ownership, of any portion of the land affected by the covenant; and (2) each person having any interest therein derived through any owner of the land, unless the instrument creating the covenant specifically provides otherwise [*Civ. Code § 1468*].

When several persons are subject to the burden of a covenant under *Civ. Code § 1468*, the burden must be apportioned among them according to the value of the burdened property held by them respectively, if this value can be ascertained, and if not, then according to their respective interests in point of quantity, except that when only a portion of the land is burdened by the covenant, the apportionment must be only among the several owners of that portion [*see Civ. Code §§ 1467*, *1468*]. A mortgagee, trustee, or beneficiary of a mortgage or deed of trust on land or any part of land affected by a covenant under *Civ. Code § 1468* is subject to the provisions of *Civ. Code § 1468*, but only for the period during which he or she is in possession of the land in his or her capacity as mortgagee, trustee, or beneficiary [*Civ. Code § 1468*].

For a form of allegation for use in a complaint to enforce a covenant restricting the use of a grantee's property, or a covenant restricting the use of a grantor's or landowner's property under *Civ. Code § 1468* as amended in 1969, see *§§ 184.191* and *184.192*.

[c] Covenants That Run Under Civ. Code § 1471

A covenant imposing land use restrictions that are reasonably necessary to protect human health or safety or the environment from hazardous materials present on the land will run with the land if the conditions set forth in *Civ. Code § 1471* are satisfied. Under § 1471, if an owner or grantee of land makes a covenant to do or refrain from doing some act on his or her own land, and the doing or refraining from doing of the act is expressed to be for the benefit of the covenantee, the covenant runs with the land owned or granted to the covenantor when all of the following requirements are met [*Civ. Code § 1471(a)*]:

- The covenantor's land that is to be affected by the covenant is particularly described in the instrument containing the covenant.

- The instrument containing the covenant provides that the successive owners of the land are bound by the covenant for the benefit of the covenantee.

- Each act described in the covenant relates to the use of land, and each such act is reasonably necessary to protect present or future human health or safety or the environment as a result of the presence on the land of hazardous materials, as defined in *Health & Safety Code § 25260*.

- The instrument containing the covenant is recorded in the office of the recorder of each county in which the land or some portion of it is situated, and the instrument includes in its title the following words: "Environmental Restriction."

Except as provided in *Civ. Code § 1466* (relating to breaches of covenants occurring before acquisition or after relinquishment of land) [*see § 184.62[3][d]*] or as specifically provided in the instrument creating the covenant, such a

covenant will be binding on each successive owner, during his or her ownership, of any portion of the land affected thereby and on each person having any interest in the land derived through any owner of it [*Civ. Code § 1471(b)*].

When several persons are subject to the burden of any such covenant, it must be apportioned among them pursuant to *Civ. Code § 1467* [*see § 184.62[3][b][iii]*], except that when only a portion of the land is so affected by the covenant, the apportionment must be only among the several owners of that portion [*Civ. Code § 1471(c)*].

Civ. Code § 1471 applies notwithstanding *Civ. Code § 1468* or any other provision of law [*Civ. Code § 1471(a)*]. Further, it applies regardless of whether or not it is for the benefit of land owned by the covenantee. Finally, it applies to the mortgagee, trustee, or beneficiary of a mortgage or deed of trust on the land or any part of it, but only while he or she, in this capacity, is in possession of the land [*Civ. Code § 1471(d)*].

If an instrument containing a covenant is recorded in accordance with *Civ. Code § 1471(e)(1)* as an "Environmental Restriction," the office of the county recorder may send a certified copy of the instrument to the California Environmental Protection Agency, for posting on its Web site, for informational purposes only, pursuant to *Health & Safety Code § 57012*, unless the instrument indicates that it is required by a board or department specified in *Health & Safety Code § 57012(d)(1)-(3)* [*Civ. Code § 1471(e)(1)*]. The county recorder's office may assess a reasonable fee, as determined by resolution of its governing body, to cover the costs of taking these actions [*Civ. Code § 1471(f)*]. In any case, however, the county recorder's office and its employees are not subject to liability under any state law or in any action for damages if the office of the recorder does not send a certified copy of the instrument pursuant to *Civ. Code § 1471(e)(1)* [*Civ. Code § 1471(e)(2)*].

[d] Persons Bound

A covenant running with the land binds the assigns of the covenantor and vests in the assigns of the covenantee, in the same manner as if they had personally entered into them [*Civ. Code § 1460*]. However, no one, merely by reason of acquiring an estate subject to a covenant running with the land, is liable for a breach of covenant before he or she acquired the estate, or after he or she has parted with or ceased to enjoy its benefits [*Civ. Code §§ 1466, 1468*]. To part with property or cease to enjoy its benefits within the meaning of *Civ. Code § 1466*, a property owner must not only vacate the property but voluntarily relinquish it with the intention of terminating his or her ownership, possession, and control and without vesting ownership in another person [*Cerro de Alcala Homeowners Assn. v. Burns (1985) 169 Cal. App. 3d Supp. 1, 4, 216 Cal. Rptr. 84*].

[4] Enforcement as Easements, Liens, or Equitable Servitudes

Covenants that do not meet the requirements of covenants running with the land may be enforceable as liens or easements on property. The easement theory has been used to enforce a landowner's promise to furnish water to an adjacent parcel when a subsequent owner of the parcel brought an action against the landowner's transferee who had notice of the agreement but refused to continue supplying water [*Relovich v. Stuart (1931) 211 Cal. 422, 424, 428-429, 295 P. 819]* . If, however, the easement claimed is not one recognized at law, such as an easement for light and air, the covenant must meet requirements of either a statutory covenant or an equitable servitude to be enforceable against subsequent transferees [*see Sher v. Leiderman (1986) 181 Cal. App. 3d 867, 876-877, 885-888, 226 Cal. Rptr. 698]* . For discussion and forms relating to easements, see Ch. 240, *Easements* .

A recorded covenant has also been construed to create an equitable lien on land in the amount that the covenantee's successors would have benefited had the covenant not been violated [*see Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 174-178, 195 Cal. Rptr. 14]* .

Restrictive covenants that fall short of the statutory requirements and do not run with the land may also be enforceable against remote grantees if the facts support imposition of the covenant's burden and benefit under the theory of equitable

servitudes [*see, e.g., MacDonald Properties, Inc. v. Bel-Air Country Club (1977) 72 Cal. App. 3d 693, 699-700, 140 Cal. Rptr. 367* ; *see also § 184.63*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With LandReal Property LawRestrictive CovenantsCreationReal Property LawRestrictive CovenantsEnforcementReal Property LawSubdivisionsState Regulation

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§ 184.63 Equitable Servitudes

[1] Nature and Purpose

Like a covenant running with the land, an equitable servitude restricts the use of one parcel of land for the benefit of another parcel, not merely between the original parties to a covenant but also between their respective grantees [*see Werner v. Graham (1919) 181 Cal. 174, 180, 183 P. 945]* . The doctrine of equitable servitudes, however, does not rest on the technical form of the covenant but on the equitable notion that one who takes property with notice of a valid agreement concerning it cannot refuse to be bound by that agreement [*Richardson v. Callahan (1931) 213 Cal. 683, 687, 3 P.2d 927]* . When a restrictive covenant is unenforceable because of a failure to comply with the recording statutes or some other essential requirement of a covenant running with the land, a court has the power in the appropriate case to enforce the restriction in equity against the covenantor's successor in interest who took the burdened land with knowledge of the terms of the use restrictions [*Hudson Oil Co. v. Shortstop (1980) 111 Cal. App. 3d 488, 493-494, 168 Cal. Rptr. 801* (enforcement in equity of restriction when covenant in lease restricting use of lessor's contiguous land was not enforceable against successive owner under *Civ. Code § 1470*); *see § 184.134[3]*].

Equitable servitudes are most commonly used to impose restrictions on subdivisions, but can also be created between two parcels of property [*see MacDonald Properties, Inc. v. Bel-Air Country Club (1977) 72 Cal. App. 3d 693, 696-701, 140 Cal. Rptr. 367* ; for further discussion, *see § 184.63[2]*]. Although equitable servitudes in land are usually created by CC&Rs or a deed conveying the land, use restrictions contained in a lease are also enforceable against assignees who take with notice of the restrictions [*see Hudson Oil Co. v. Shortstop (1980) 111 Cal. App. 3d 488, 491, 493-495, 168 Cal. Rptr. 801]* .

[2] Use as Subdivision Restrictions

When a tract is subdivided, ordinarily a general plan of restrictions is recorded by the subdivider-grantor for the purpose of ensuring the uniform and orderly development and use of the entire tract by all the original purchasers as well as their successors in interest [*see Sain v. Silvestre (1978) 78 Cal. App. 3d 461, 466, 144 Cal. Rptr. 478* (disapproved on other grounds in *Reynolds Metals Co. v. Alperson (1979) 25 Cal. 3d 124, 129, 158 Cal. Rptr. 1, 599 P.2d 83*)]. The plan usually takes the form of a "Declaration of Covenants, Conditions, and Restrictions," also known as "CC&Rs" [*see*

Diamond Bar Dev. Corp. v. Superior Court (1976) 60 Cal. App. 3d 330, 332, 131 Cal. Rptr. 458] , a declaration of restrictions, or a declaration [*see Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 350 n.1, 47 Cal. Rptr. 2d 898, 906 P.2d 1314]* . The restrictions are imposed on each parcel within the tract and are used to limit the type of activity permitted on the property, prohibiting such things as commercial use or development within the tract, limiting the height of buildings or landscaping, imposing setback restrictions, protecting views, or imposing similar restrictions [*see Atlas Terminals, Inc. v. Sokol (1962) 203 Cal. App. 2d 191, 193-194, 21 Cal. Rptr. 293* (commercial use); *Mock v. Shulman (1964) 226 Cal. App. 2d 263, 265-266, 38 Cal. Rptr. 39* (landscaping); *Seligman v. Tucker (1970) 6 Cal. App. 3d 691, 693-694, 86 Cal. Rptr. 187* (view); *Zabrucky v. McAdams (2005) 129 Cal. App. 4th 618, 629, 28 Cal. Rptr. 3d 592* (view)].

If equitable servitudes are properly created and recorded, the tract restrictions are enforceable not only by the original subdivider but by subsequent owners of lots within the same tract [*see Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 350 n.1, 47 Cal. Rptr. 2d 898, 906 P.2d 1314* ; *Werner v. Graham (1919) 181 Cal. 174, 177, 180, 183 P. 945* ; *see § 184.63[3]*].

[3] Method of Creation

[a] *Citizens* Rule Regarding Recordation of Subdivision CC&Rs

In *Citizens for Covenant Compliance v. Anderson* [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 47 Cal. Rptr. 2d 898, 906 P.2d 1314]* , the California Supreme Court considered the issue of how a general plan of restrictions for a subdivision is created in the first place [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* . It adopted the following rule, which applies whether the restrictions are considered to be equitable servitudes or covenants that run with the land: If a declaration establishing a common plan for the ownership of property in a subdivision and containing restrictions on the use of the property as part of the common plan is recorded before the execution of a contract of sale for land in the subdivision, describes the property it is to govern, and states that it is intended to bind all purchasers and their successors, then subsequent purchasers who have constructive notice of the recorded declaration are deemed to intend and agree to be bound by, and to accept the benefits of, the common plan. Thus, the restrictions are not unenforceable merely because they are not additionally cited in a deed or other document at the time of the sale [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 355, 363, 47 Cal. Rptr. 2d 898, 906 P.2d 1314]* .

The mere recording of subdivision restrictions does not create mutual servitudes because a developer cannot unilaterally make an agreement. The mutual servitudes are not effective, that is, they do not spring into existence, until an actual conveyance subject to them is made [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 365, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314* ; *Werner v. Graham (1919) 181 Cal. 174, 183, 183 P. 945]* . The purchase of property subject to such recorded restrictions, with knowledge of the restrictions, evinces the buyer's intent to accept their burdens and benefits. Thus, mutual servitudes are created at the time of the conveyance of the property, and the property is subject to the previously recorded restrictions, even if there is no additional reference to them in the deed [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 363, 365, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* .

[b] Overview of Relationship of *Citizens* Rule to Other Equitable Servitude Cases

The Court in *Citizens for Covenant Compliance* noted that no prior decision by the Court invalidating restrictions involved a written plan that was applicable to an entire tract and was recorded before conveyancing [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 359, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* . In particular, it noted that neither *Werner v. Graham* [*Werner v. Graham (1919) 181 Cal. 174, 183 P. 945* ; *see § 184.63[3][c]*] nor *Riley v. Bear Creek Planning Committee* [*Riley v. Bear Creek Planning Committee (1976) 17 Cal. 3d 500, 131 Cal. Rptr. 381, 551 P.2d 1213* ; *see § 184.63[3][d]*] involved such a prior recorded document [*Citizens for Covenant*

Compliance v. Anderson (1995) 12 Cal. 4th 345, 359, 363, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314] . However, the Court also noted that some intermediate appellate decisions had held that recorded uniform restrictions do not take effect unless they are at least referenced in a deed or other instrument at the time of an actual conveyance [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 359, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314* , citing *Stell v. Jay Hales Development Co. (1992) 11 Cal. App. 4th 1214, 1229-1230, 15 Cal. Rptr. 2d 220* ; *Scaringe v. J. C. C. Enterprises, Inc. (1988) 205 Cal. App. 3d 1536, 1543, 253 Cal. Rptr. 344* ; *Trahms v. Starrett (1973) 34 Cal. App. 3d 766, 770-772, 110 Cal. Rptr. 239* ; *Anderson v. Pacific Avenue Inv. Co. (1962) 201 Cal. App. 2d 260, 262-264, 19 Cal. Rptr. 829* ; *Murry v. Lovell (1955) 132 Cal. App. 2d 30, 281 P.2d 316]* . These decisions required some reference in the deed, however vague, to the recorded restrictions. The *Citizens for Covenant Compliance* Court disapproved the inconsistent language and holdings of these other cases [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 355, 363, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* .

The *Citizens for Covenant Compliance* Court found that its holding should operate retrospectively because it is consistent with the rationale of prior California Supreme Court cases and would undermine no legal or policy concerns expressed in those cases [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 367-368, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* . Further, it is not inconsistent with the statutes governing covenants that run with the land because neither the current nor former versions of these statutes directly answer the narrow question the Court was considering (that is, how a covenant is created) [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 368, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* .

The laws in effect prior to *Citizens for Covenant Compliance* continue to apply, to the extent they are is not inconsistent with that decision. For coverage of these laws, see the remaining subsections.

[c] Rule in *Werner v. Graham*

The Supreme Court noted that the rule it established in *Citizens for Covenant Compliance* is consistent with the rationale of prior cases, including *Werner v. Graham* [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 359, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314* ; *see Werner v. Graham (1919) 181 Cal. 174, 181-184, 183 P. 945]* . *Werner* involved a subdivision that was not subject to a recorded declaration of restrictions. It held that a parcel in the subdivision was not subject to restrictions that appeared in a deed to a previous owner of the parcel because the deed to the current plaintiff-owner did not contain the restrictions [*Werner v. Graham (1919) 181 Cal. 174, 184-185, 183 P. 945]* . The *Citizens* rule is fully consistent with the facts of *Werner* because *Werner* did not involve a prior recorded document providing a common plan and stating that restrictions were to apply to every parcel. Instead, the only documents from which the mutual intent and agreement of the parties in *Werner* could be discerned were the deeds themselves [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 359, 367, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314* ; *see Werner v. Graham (1919) 181 Cal. 174, 184, 183 P. 945]* . Consequently, *Werner* continues to apply to cases that do not involve pre-recorded declarations.

Under *Werner* and its line of cases, a court will find that mutual equitable servitudes exist in a subdivided tract only if the court makes certain findings, including the following [*Werner v. Graham (1919) 181 Cal. 174, 181-184, 183 P. 945* ; *Terry v. James (1977) 72 Cal. App. 3d 438, 442, 140 Cal. Rptr. 201]* :

- Both the grantor and grantee intended that the land conveyed was to be restricted pursuant to a general plan [*see Fig Garden Etc. Assn. v. Assemi Corp. (1991) 233 Cal. App. 3d 1704, 1710, 285 Cal. Rptr. 303* ; *see also Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 363, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314]* .

- The dominant and servient tenements were adequately shown [*see Martin v. Ray (1946) 76 Cal. App. 2d 471, 479, 173 P.2d 573* ; *Kent v. Koch (1958) 166 Cal. App. 2d 579, 586-588, 333 P.2d 411* ; *see also Marra v. Aetna Construction Co. (1940) 15 Cal. 2d 375, 378, 101 P.2d 490* (the servitude must

be appurtenant to other benefited property; it cannot exist in gross); *Chandler v. Smith (1959) 170 Cal. App. 2d 118, 120, 338 P.2d 522* (a covenant that does not run with the land must restrict the use of one parcel [the servient tenement] for the benefit of another [the dominant tenement])].

Werner also appeared to require that the servitude be created by deed [*Werner v. Graham (1919) 181 Cal. 174, 181-184, 183 P. 945]* , but the *Citizens for Covenant Compliance* Court noted that this language has been disregarded. Servitudes may be created in other types of documents, including leases and prior recorded uniform plans of development [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 376, 47 Cal. Rptr. 2d 898, 906 P.2d 1314* ; *see Hudson Oil Co. v. Shortstop (1980) 111 Cal. App. 3d 488, 495, 168 Cal. Rptr. 801* (creation by lease)].

The *Werner* Court also held that mutual servitudes "spring into existence" as between the first subdivided parcel conveyed and the balance of the parcels at the time of the first conveyance [*Werner v. Graham (1919) 181 Cal. 174, 183, 183 P. 945]* . The *Citizens* Court agreed that mutual servitudes spring into existence only on an actual conveyance [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 365, 47 Cal. Rptr. 2d 898, 906 P.2d 1314]* .

[d] Rule in *Riley v. Bear Creek Planning Committee*

In *Riley v. Bear Creek Planning Committee* [*Riley v. Bear Creek Planning Committee (1976) 17 Cal. 3d 500, 131 Cal. Rptr. 381, 551 P.2d 1213]* , a developer conveyed property by a grant deed that contained no restrictions. Nine months later, the developer recorded a declaration of covenants, conditions, restrictions, and reservations that purported to establish restrictions on the previously conveyed property and other lots. The Court held that the acknowledgment and recordation of a declaration of restrictions by the grantor after a conveyance cannot affect property in which the grantor no longer has any interest [*Riley v. Bear Creek Planning Committee (1976) 17 Cal. 3d 500, 507, 131 Cal. Rptr. 381, 551 P.2d 1213]* . Further, the Court determined that parol evidence was not admissible to establish that the mutual intention of the parties was that the conveyance be subject to restrictions identical to those contained in the declaration subsequently recorded by the grantor [*Riley v. Bear Creek Planning Committee (1976) 17 Cal. 3d 500, 507-512, 131 Cal. Rptr. 381, 551 P.2d 1213]* .

The *Citizens for Covenant Compliance* Court found that the rule stated in that opinion [*see § 184.63[3]*] was fully consistent with the facts of *Riley* because the restrictions in *Riley* (unlike those in *Citizens*) were recorded after the sale [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 367, 47 Cal. Rptr. 2d 898, 906 P.2d 1314]* . The *Citizens* Court also noted, however, that language in *Riley* appearing to require that a servitude be created by deed has been disregarded [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 376, 47 Cal. Rptr. 2d 898, 906 P.2d 1314]* .

[4] Enforcement

Once it is determined that an equitable servitude was properly created, it will be enforced only against those subsequent transferees who have actual or constructive notice of the restrictions [*MacDonald Properties, Inc. v. Bel-Air Country Club (1977) 72 Cal. App. 3d 693, 699-700, 140 Cal. Rptr. 367]* . If the covenant is properly recorded prior to the sale of a subdivided parcel, subsequent purchasers will have constructive notice and will be bound by the covenant [*Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 363, 47 Cal. Rptr. 2d 898, 906 P. 2d 1314* ; *see Wayt v. Patee (1928) 205 Cal. 46, 52, 269 P. 660]* . However, a declaration recorded after the conveyance of specific subdivision lots is not enforceable against the grantees of those lots even though they had actual knowledge of the plan of mutual restrictions [*Riley v. Bear Creek Planning Committee (1976) 17 Cal. 3d 500, 507, 131 Cal. Rptr. 381, 551 P.2d 1213]* .

Legal Topics:

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

Real Property LawLimited Use RightsGeneral OverviewReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsEnforcementReal Property LawRestrictive CovenantsSubdivisions

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§ 184.64 Judicial Interpretation of Restrictive Covenants

Restrictive covenants are construed strictly against the person seeking to enforce them and in favor of the unencumbered use of the property [*Terry v. James (1977) 72 Cal. App. 3d 438, 443, 140 Cal. Rptr. 201* ; *Biagini v. Hyde (1970) 3 Cal. App. 3d 877, 880, 83 Cal. Rptr. 875]* . The primary object, however, in construing restrictive covenants, as in construing all contracts, is to effectuate the legitimate desires of the covenanting parties [*Hannula v. Hacienda Homes (1949) 34 Cal. 2d 442, 444-445, 211 P.2d 302]* . The intent of the parties and the object of the deed or restriction should govern, giving the instrument a just and fair interpretation [*Lincoln Sav. & Loan Assn. v. Riviera Estates Assn. (1970) 7 Cal. App. 3d 449, 463, 87 Cal. Rptr. 150]* . A tract restriction, for example, that prohibits any improvement that would "unreasonably obstruct" the view from other lots is not necessarily too vague or uncertain for judicial enforcement [*Seligman v. Tucker (1970) 6 Cal. App. 3d 691, 693, 697-699, 86 Cal. Rptr. 187]* .

The restrictive covenant document must be construed as a whole so as to give effect to every part, and particular words or clauses will be subordinated to general intent [*Ezer v. Fuchsloch (1979) 99 Cal. App. 3d 849, 861, 160 Cal. Rptr. 486]* . In ascertaining the intent of the language expressing the covenant, the court will look to the purpose for which the restriction was imposed [*Smith v. North (1966) 244 Cal. App. 2d 245, 248, 53 Cal. Rptr. 94]* . One court, for example, interpreted a restriction on trees or structures that obstructed views from any other lots as a limitation on height of trees to roof-top level, in view of all the restrictions contained in a declaration of restrictions, the topography of the tract, the elevation of the lots, and a limitation on structures to single-family dwellings one story in height [*Ezer v. Fuchsloch (1979) 99 Cal. App. 3d 849, 862, 160 Cal. Rptr. 486]* .

For general principles governing interpretation of deeds, see *§ 184.24*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsCovenantsReal Property LawDeedsConstruction & InterpretationReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsEnforcement

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§ 184.65 Particular Types of Restrictions

[1] Limits on Trade or Business

A restrictive covenant is unenforceable if it is intended to create a monopoly in violation of public policy [*Burdell v. Grandi (1907) 152 Cal. 376, 383, 92 P. 1022]* . However, courts will enforce a covenant prohibiting certain commercial uses of property when the covenant is intended to protect the grantor in the operation of a business, it does not set up a monopoly, and it does not restrain the grantee from pursuing an entire business, trade, or profession [*Doo v. Packwood (1968) 265 Cal. App. 2d 752, 756, 71 Cal. Rptr. 477]* . Residential-only restrictions, which prohibit all forms of commercial activity in a subdivision, are regularly upheld as valid [*see Biagini v. Hyde (1970) 3 Cal. App. 3d 877, 880, 83 Cal. Rptr. 875* (beauty parlor); *see County of Butte v. Bach (1985) 172 Cal. App. 3d 848, 857-858, 218 Cal. Rptr. 613* (law practice)]. For a discussion of restraint of trade, see Ch. 565, *Unfair Competition* .

It is not uncommon for restrictions on business or trade to appear in commercial leases, and when the developer of an industrial park retains right to disapprove projects that would adversely affect or compete with existing projects, such a covenant is valid [*Samuelson National v. Kaiser-Aetna (1979) 99 Cal. App. 3d 553, 557-559, 160 Cal. Rptr. 395]* . For a discussion of covenants not to compete in commercial leases, see Ch. 332, *Landlord and Tenant: The Tenancy* .

[2] Approval of Improvements

Restrictions that require a grantee to obtain the approval of the grantor or a homeowner's association before improving or landscaping a lot are enforceable as long as the approval or disapproval is reasonable [*Palos Verdes Homes Assn. v. Rodman (1986) 182 Cal. App. 3d 324, 328, 227 Cal. Rptr. 81* (homeowner's association); *Samuelson National v. Kaiser-Aetna (1979) 99 Cal. App. 3d 553, 557, 160 Cal. Rptr. 395* (grantor)].

A homeowners' association must exercise its authority to approve or disapprove an individual homeowner's construction or improvement plans in conformity with the declaration of restrictions, and in good faith [*Hannula v. Hacienda Homes (1949) 34 Cal. 2d 442, 447, 211 P.2d 302]* . A court will review the association's decision to insure that it was neither arbitrary nor in violation of the restrictions [*Cohen v. Kite Hill Community Assn. (1983) 142 Cal. App. 3d 642, 652, 191 Cal. Rptr. 209* ; *see also Ironwood Owners Assn. IX v. Solomon (1986) 178 Cal. App. 3d 766, 771-773, 224*

Cal. Rptr. 18] .

A lot owner cannot directly enjoin other owners in a development from violating a construction restriction if the grantor or a homeowner's association reserves the sole right to determine whether proposed construction violates the restrictions and the construction was approved [*see Trahms v. Starrett (1973) 34 Cal. App. 3d 766, 769-772, 110 Cal. Rptr. 239* (grantor)]. If the approval was arbitrary or unreasonable, however, a lot owner may be able to state a cause of action against a homeowner's association for breach of covenants, breach of fiduciary duty, breach of duty of good faith and fair dealing, negligence, and intentional misconduct [*see Cohen v. Kite Hill Community Assn. (1983) 142 Cal. App. 3d 642, 647, 191 Cal. Rptr. 209]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawRestrictive CovenantsCovenants Running With LandReal Property LawRestrictive CovenantsEnforcementReal Property LawRestrictive CovenantsSubdivisions

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§ 184.66 Modification and Termination of Restrictions

[1] By Agreement

Owners of lots in a subdivided tract can by mutual agreement remove or modify restrictions [*Hirsch v. Hancock (1959) 173 Cal. App. 2d 745, 760, 343 P.2d 959, 11 O.&G.R. 167]* . Typically a declaration of covenants, conditions, and restrictions will provide for modification or termination by written instrument duly executed by a stated percentage of the then owners of lots in the subdivision [*see Diamond Bar Dev. Corp. v. Superior Court (1976) 60 Cal. App. 3d 330, 332-333, 131 Cal. Rptr. 458]* . Restrictive covenants may be modified by less than all the affected landowners when the original scheme of restrictions contains a provision so authorizing and the procedure established is followed [*Taormina Theosophical Community, Inc. v. Silver (1983) 140 Cal. App. 3d 964, 970, 190 Cal. Rptr. 38]* .

For a discussion and forms for use in amending a declaration of a common interest development, see Ch. 124, *Condominiums and Other Common Interest Developments* .

[2] By Operation of Law

[a] Foreclosure of Senior Lien

When subdivided property is subject to a deed of trust recorded before any tract restrictions are recorded, the deed of trust is a senior lien on the tract and, in the event of a default, the purchaser at a foreclosure sale acquires title free from the restrictions whether or not the purchaser has knowledge of them [*Sain v. Silvestre (1978) 78 Cal. App. 3d 461, 471-475, 144 Cal. Rptr. 478* (disapproved on other grounds in *Reynolds Metals Co. v. Alperson (1979) 25 Cal. 3d 124, 129, 158 Cal. Rptr. 1, 599 P.2d 83*)]. Similarly, the restrictions cannot be enforced against any grantees who receive the lot from that purchaser [*Sain v. Silvestre (1978) 78 Cal. App. 3d 461, 471, 144 Cal. Rptr. 478* (disapproved on other grounds in *Reynolds Metals Co. v. Alperson (1979) 25 Cal. 3d 124, 129, 158 Cal. Rptr. 1, 599 P.2d 83*)].

Mere knowledge on the part of a lender that restrictions and a general plan have been created is not enough to evidence an intent or consent to be bound by the restrictions or an intent to pass the restrictions on to its grantee. However, consent to the establishment of restrictions, such as by approving or consenting to the recording of the restrictions or

any subdivision map or general plan, might be grounds for enforcing the mutual equitable servitudes against the lender or beneficiary of a deed of trust and their grantees, because under these circumstances a court would not withhold equitable relief [*Sain v. Silvestre (1978) 78 Cal. App. 3d 461, 473, 144 Cal. Rptr. 478* (dictum; case disapproved on other grounds in *Reynolds Metals Co. v. Alperson (1979) 25 Cal. 3d 124, 129, 158 Cal. Rptr. 1, 599 P.2d 83*)].

[b] By Recording Modification Document

[i] Procedures

A person who holds an ownership interest of record in property and believes that the interest is the subject of an unlawfully restrictive covenant in violation of *Gov. Code § 12955*(*l*) may record a document titled "Restrictive Covenant Modification." The county recorder may choose to waive the fee prescribed for recording and indexing instruments [*see Gov. Code § 27361*] in the case of the modification document. The modification document must include a complete copy of the original document containing the unlawfully restrictive language with the unlawfully restrictive language struck out [*Gov. Code § 12956.2(a)*].

Before recording the modification document, the county recorder must submit the modification document and the original document to the county counsel, who must determine whether the original document contains an unlawful restriction based on race, color, religion, sex, sexual orientation, familial status, marital status, disability, national origin, source of income [*see Gov. Code § 12955(p)* (definition)], or ancestry. The county counsel must return the documents and inform the county recorder of the determination. The county recorder must refuse to record the modification document if the county counsel finds that the original document does not contain an unlawful restriction [*Gov. Code § 12956.2(b)*].

The modification document must be indexed in the same manner as the original document being modified. It must contain a recording reference to the original document in the form of a book and page or instrument number and the date of the recording [*Gov. Code § 12956.2(c)*].

Subject to covenants, conditions, and restrictions that were recorded after the recording of the original document that contains the unlawfully restrictive language and subject to covenants, conditions, and restrictions that will be recorded after the modification document, the restrictions in the modification document, once recorded, are the only restrictions having effect on the property. The effective date of the terms and conditions of the modification document must be the same as the effective date of the original document [*Gov. Code § 12956.2(d)*].

The county recorder must make available to the public "Restrictive Covenant Modification" forms [*Gov. Code § 12956.2(e)*].

If the holder of an ownership interest of record in property causes a modified document to be recorded that contains modifications not authorized by *Gov. Code § 12956.2*, the county recorder will not incur liability for recording the document. Any liability that may result from the unauthorized recordation is the sole responsibility of the holder of the ownership interest of record who caused the document to be recorded [*Gov. Code § 12956.2(f)*].

Gov. Code § 12956.2 does not apply to persons holding an ownership interest in property that is part of a common interest development [*see Civ. Code § 1351(c)* (definition)] if the board of directors of that common interest development is subject to the requirements of *Civ. Code § 1352.5(b)*, which proscribes restrictive covenants in any declaration or other governing document for the development [*Gov. Code § 12956.2(g)*].

Any person who records a document for the express purpose of adding a racially restrictive covenant is guilty of a misdemeanor. Notwithstanding any other provision of law, a prosecution for a violation must commence within three years after the discovery of the recording of the document. The county recorder will not incur any liability for recording

the document [*Gov. Code § 12956.1(c)*].

[ii] Duty to Inform Persons That Unlawful Restrictions Are Removable

A county recorder, title insurance company, escrow company, real estate broker, real estate agent, or association that provides a copy of a declaration, governing document, or deed to any person must place a cover page or stamp on the first page of the previously recorded document or documents stating, in at least 14-point boldface type, the following [*Gov. Code § 12956.1(a), (b)(1)*; *see Civ. Code § 1351* (definitions of "association," "governing document," and "declaration")]:

> If this document contains any restriction based on race, color, religion, sex, sexual orientation, familial status, marital status, disability, national origin, source of income as defined in subdivision (p) of Section 12955, or ancestry, that restriction violates state and federal fair housing laws and is void, and may be removed pursuant to *Section 12956.2 of the Government Code*. Lawful restrictions under state and federal law on the age of occupants in senior housing or housing for older persons shall not be construed as restrictions based on familial status.

However, this requirement does not apply to documents being submitted for recordation to a county recorder [*Gov. Code § 12956.1(b)(2)*].

[c] By Judicial Action

A property owner may test the enforceability of covenants or servitudes asserted against his or her property in a judicial action and is not required to violate the restrictions at the risk of suffering the penalties that might result from such a breach in order to ascertain his or her legal rights [*see Marra v. Aetna Construction Co. (1940) 15 Cal. 2d 375, 377, 101 P.2d 490]* . A declaratory relief action is an appropriate means to test the enforceability of covenants or servitudes asserted against the plaintiff's property [*Marra v. Aetna Construction Co. (1940) 15 Cal. 2d 375, 377, 101 P.2d 490* ; *Ross v. Harootunian (1967) 257 Cal. App. 2d 292, 294, 64 Cal. Rptr. 537* ; *see Code Civ. Proc. § 1060*]. A quiet title may also lie to remove a cloud on title created by unenforceable restrictions [*Marra v. Aetna Construction Co. (1940) 15 Cal. 2d 375, 377, 101 P.2d 490]* . For a discussion of the elements of valid covenants, see *§ 184.62*; for discussion of the elements of valid equitable servitudes, see *§ 184.63*.

Restrictions in the form of otherwise valid equitable servitudes may be terminated by a court's determination that, for equitable reasons, the restrictions should no longer be enforced [*see Hess v. Country Club Park (1931) 213 Cal. 613, 614-616, 2 P.2d 782* (declaratory judgment); *Marra v. Aetna Construction Co. (1940) 15 Cal. 2d 375, 377, 101 P.2d 490* (quiet title)]. For discussion of equitable grounds on which courts hold restrictions to be unenforceable, see *§ 184.70[4]*. For forms for use in an action for declaratory relief and to quiet title to cancel use restrictions based on changed conditions and violation of public policy, see *§§ 184.195* and *184.196*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsEnforcementReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 184.67 Enforcement of Restrictive Covenants

[1] Actions Available

[a] Injunctions

To obtain injunctive relief, the plaintiff normally will have to establish one of the grounds for relief set forth in *Civ. Code § 3422* (permanent relief) or *Code Civ. Proc. § 526* (preliminary relief) (for discussion of these grounds, see Ch. 303, *Injunctions*). For example, when an improvement that will block a plaintiff's view in violation of a restriction is under construction, the plaintiff may be able to obtain preliminary injunctive relief to halt construction and mandatory injunctive relief requiring removal or redesign of the structure to remove the violation [*see Seligman v. Tucker (1970) 6 Cal. App. 3d 691, 695, 86 Cal. Rptr. 187* (finding that interference with plaintiff's enjoyment was an irreparable injury that money damages could not compensate)]. However, it has been held that when an injunction or other equitable relief is sought to enforce a building restriction, the establishment of a violation is all that is required. It is not necessary to prove actual or substantial injury to the owner enforcing the covenant [*Morgan v. Veach (1943) 59 Cal. App. 2d 682, 690-691, 139 P.2d 976* ; *Joyce v. Krupp (1927) 83 Cal. App. 391, 398-399, 257 P. 124]* .

A mandatory injunction to dismantle an improvement may be denied when the violation is slight and made innocently on the ground that the damage to the owner of the buildings by their removal would be greatly disproportionate to the plaintiff's injury (balancing the relative conveniences of the parties) [*Morgan v. Veach (1943) 59 Cal. App. 2d 682, 689-690, 139 P.2d 976* ; *see Seligman v. Tucker (1970) 6 Cal. App. 3d 691, 696, 86 Cal. Rptr. 187* (recognizing issue, which was not raised)]. However, willfulness on the part of the defendant in continuing the violation of the restrictions after warning by the complainant, especially after suit is brought, is a ground for equitable relief by mandatory injunction even when the loss caused by it will be disproportionate to the good accomplished by the injunction [*Morgan v. Veach (1943) 59 Cal. App. 2d 682, 689-690, 139 P.2d 976* (house substantially completed)]. A court also has the power to issue a mandatory injunction as an alternative, ordering that a party who constructed improvements in violation of building restrictions either tear down the construction or, in the alternative, pay damages to the plaintiff [*see Morgan v. Veach (1943) 59 Cal. App. 2d 682, 692-694, 139 P.2d 976]* . For further discussion of balancing the conveniences of the parties, see Ch. 11, *Adjoining Landowners* .

For a form for use in obtaining a temporary restraining order, preliminary injunction, and permanent injunction to enforce equitable servitudes against a lot owner in a subdivision, see *§ 184.190*.

[b] Damages

An action for damages will lie for breach of a restrictive covenant [*Atlas Terminals, Inc. v. Sokol (1962) 203 Cal. App. 2d 191, 208, 21 Cal. Rptr. 293* ; *see Doo v. Packwood (1968) 265 Cal. App. 2d 752, 758-759, 71 Cal. Rptr. 477* (both injunctive relief and damages based on previous violation of noncompetition covenant as proper)]. The action may be based on a breach of contract theory if the litigants are the original parties to a covenant [*see Atlas Terminals, Inc. v. Sokol (1962) 203 Cal. App. 2d 191, 208, 21 Cal. Rptr. 293]* . A lot owner who brings an action to enforce equitable servitudes against another lot in a subdivision may recover damages based on the defendant's interference with a property right [*Mock v. Shulman (1964) 226 Cal. App. 2d 263, 265-266, 269-270, 38 Cal. Rptr. 39]* .

The measure of damages is the amount of depreciated value sustained by plaintiff's land as a result of the violation [*Joyce v. Krupp (1927) 83 Cal. App. 391, 399, 257 P. 124]* . In addition to damages resulting from past violation of restrictions, a plaintiff may also pray for injunctive relief enjoining defendants from further violations [*see Knox v. Streatfield (1978) 79 Cal. App. 3d 565, 569, 576, 145 Cal. Rptr. 39]* .

For a form for use in obtaining damages for a violation of subdivision restrictions, see *§ 184.190*.

[2] Standing to Enforce Equitable Servitude

Standing to enforce an equitable servitude [*see § 184.63*] depends on the intention of the persons creating the covenant, as well as on the equitable factors involved. If the covenants, conditions, and restrictions (or CC&R's) imposed on property located in a multi-unit subdivision make it clear that the developer and its successors in interest may enforce the covenants, the developer's successor in interest may bring an action for enforcement even if it no longer owns an interest in the dominant tenant, as it is unreasonable to require individual landowners to assume the burden of enforcement [*B.C.E. Development, Inc. v. Smith (1989) 215 Cal. App. 3d 1142, 1148-1150, 264 Cal. Rptr. 55* ; *but see La Mancha Dev. Corp. v. Sheegog (1978) 78 Cal. App. 3d 9, 14, 144 Cal. Rptr. 59* (grantor of property lacks standing to enforce restriction on use of property when he or she has not retained an interest in any property benefited by the restriction)]. If, however, the CC&R's do not evidence a clear intention of the parties allowing enforcement by a nonowner, the developer does not have standing to bring an enforcement action if it no longer owns any lots in the subdivision [*see Kent v. Koch (1958) 166 Cal. App. 2d 579, 583-588, 333 P.2d 411]* . If a homeowners association is granted enforcement rights by the CC&R's, it may bring an equitable enforcement action [*Russell v. Palos Verdes Estates (1963) 218 Cal. App. 2d 754, 764-765, 32 Cal. Rptr. 488]* .

When an equitable servitude exists in favor of several lot owners and some, but not all, the lot owners bring an action to enforce the restrictions, the other lot owners are not necessary parties to the action, and need not be joined [*Burkhardt v. Lofton (1944) 63 Cal. App. 2d 230, 237, 146 P.2d 720]* .

If many lot owners are affected by the violation of lot restrictions, however, one or several lot owners may be able to bring a class action to enforce the restrictions. A class action can be maintained when an ascertainable class of lot owners are affected by the defendant's breach of the restrictive covenants and when there exists a well-defined community of interest in common questions of law and fact involved in the litigation [*see Code Civ. Proc. § 382*; *Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 704, 63 Cal. Rptr. 724, 433 P.2d 732]* . On the other hand, a class action is improper if the interests of the named plaintiff or plaintiffs are in direct conflict with those of the remaining lot owners [*Horton v. Citizens Nat. etc. Bank (1948) 86 Cal. App. 2d 680, 681, 685, 195 P.2d 494]* . For example, when a plaintiff sued on behalf of all lot owners in a tract to enforce certain procedures for appointing members of a tract's architectural committee, a court found that the underlying controversy arose between different groups of owners, some of whom already had received the committee's approval for their improvements, some of whom wanted more

burdensome restrictions on improvements, and others whose lots were still unimproved; therefore, the court found a class action inappropriate and required instead that all the lot owners be brought in as parties to the action [*see Horton v. Citizens Nat. etc. Bank (1948) 86 Cal. App. 2d 680, 683-684, 195 P.2d 494]* . While an action brought on behalf of all owners in a subdivision except those who allegedly committed violations will satisfy the requirement that there be an ascertainable class, the common questions requirement is not met when each plaintiff's recovery depends on the characteristics of his or her particular parcel of land, such as the distance from the lots where the alleged violations occurred and whether the particular plaintiff tried to sell his or her parcel [*Knox v. Streatfield (1978) 79 Cal. App. 3d 565, 571-574, 145 Cal. Rptr. 39]* . For discussion and forms relating to class actions in general, see Ch. 120, *Class Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewReal Property LawDeedsRemediesDamagesReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsEnforcement

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§ 184.68 Action for Violation of Restriction--Statute of Limitation

An action for violation of a restriction, as defined in *Civ. Code § 784*, must be commenced within five years [*Code Civ. Proc. § 336(b)*]. Under § 784, "restriction" means a limitation on, or provision affecting, the use of real property in a deed, declaration, or other instrument, whether in the form of a covenant, equitable servitude, condition subsequent, negative easement, or other form of restriction [*Civ. Code § 784*].

This five-year period runs from the time the person seeking to enforce the restriction discovered or, through the exercise of reasonable diligence, should have discovered the violation. A failure to commence an action within this period does not result in a waiver of the right to commence an action for any other violation of the restriction, and does not, in itself, create an implication that the restriction is abandoned, obsolete, or otherwise unenforceable [*Code Civ. Proc. § 336(b)*].

Code Civ. Proc. § 336(b) will not bar commencement of an action for violation of a restriction before January 1, 2001, and, until that date, any other applicable statutory or common law limitation will continue to apply to that action [*Code Civ. Proc. § 336(b)*]. For discussion of other applicable limitations, *see § 184.195[5]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawRestrictive CovenantsGeneral Overview

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§ 184.69 Defenses

[1] Acquiescence or Waiver

It is a law of equity that landowners in a subdivided tract waive any right they may have to enforce building restrictions when they acquiesce in similar breaches by other owners of land in the subdivision [*Johnstone v. Bettencourt (1961) 195 Cal. App. 2d 538, 542, 16 Cal. Rptr. 6]* . The defense of acquiescence or waiver may invalidate a restriction when there has been a pattern of noncompliance with the restriction so that it was no longer in force due to disregard [*Seligman v. Tucker (1970) 6 Cal. App. 3d 691, 699-700, 86 Cal. Rptr. 187* (pattern not established)]. A plaintiff's prior acquiescence in the breach of a covenant may also give rise to a defense of laches [*see § 184.69[5]*]. Enforcement of a restriction will not be precluded by showing a pattern of violation of an unrelated restriction [*Seligman v. Tucker (1970) 6 Cal. App. 3d 691, 700, 86 Cal. Rptr. 187* (pattern of violations of restriction against television antennas did not prevent enforcement of view restriction)]. For a form of affirmative defense based on acquiescence in violations, see *§ 184.194*.

Some cases have analyzed the failure to include restrictions in all the original deeds to lots in a tract as a waiver by the original owner of any right to enforce the restrictions against those lot owners who have restrictions in their deeds [*see Hanna v. Rodeo-Vallejo Ferry Co. (1928) 89 Cal. App. 462, 467, 265 P. 287* (no general plan appeared in deeds); *see also Maderis v. Pattavina (1941) 46 Cal. App. 2d 615, 617, 116 P.2d 495* (no general plan appeared in deeds)]. However, the better analysis in such a case is that the failure to insert restrictions in some deeds means the original grantor did not intend to create a common plan and so no equitable servitude was ever created [*see Terry v. James (1977) 72 Cal. App. 3d 438, 444-445, 140 Cal. Rptr. 201* ; *Moe v. Gier (1931) 116 Cal. App. 403, 409-410, 2 P.2d 852]* . Once the intent to create a general plan has been expressed in the first deed, restrictions are enforceable against owners of lots subsequently severed from the tract [*see Martin v. Holm (1925) 197 Cal. 733, 738-740, 745-748, 242 P. 718* ; *see also § 184.61[3]*].

[2] Changed Conditions

Equity courts will not enforce restrictive covenants by injunction when, by reason of a change in the character of the surrounding neighborhood, not resulting from any breach of the covenants, it would be oppressive and inequitable to

give the restriction effect, such as when the enforcement of the covenant would have no other result than to harass or injure the defendant, without benefiting the plaintiff [*Hurd v. Albert (1931) 214 Cal. 15, 17, 23, 3 P.2d 545* (residential restriction)].

In determining whether there has been such a change of conditions as to warrant a refusal to enforce, or a cancellation of, restrictions, the courts give greater weight to the changes occurring within the restricted area than to those occurring outside the area, because changes within the tract are more likely to render the original purposes of the restriction obsolete [*see* *County of Butte v. Bach (1985) 172 Cal. App. 3d 848, 868, 218 Cal. Rptr. 613]* . Nevertheless, changes outside the tract, coupled with substantial evidence that enforcement of the covenant would cause irreparable injury to the defendant, without materially benefiting the plaintiff, are sufficient to sustain a judgment denying injunctive relief [*Hurd v. Albert (1931) 214 Cal. 15, 23, 3 P.2d 545* (trial court found lots no longer had any market value for residential purposes)]. Although increased traffic and congestion alone are not sufficient to warrant releasing affecting property from covenants restricting it to residential use, these changes can be properly considered by the trial court in determining whether or not they should be enforced [*Hurd v. Albert (1931) 214 Cal. 15, 22, 3 P.2d 545]* .

Courts have denied enforcement of single-family residence use restrictions based on evidence that the property was no longer "suitable" for residential use [*see* *Key v. McCabe (1960) 54 Cal. 2d 736, 737-738, 8 Cal. Rptr. 425, 356 P.2d 169* ; *Wolff v. Fallon (1955) 44 Cal. 2d 695, 696-697, 284 P.2d 802]* . However, the more recent trend suggests that the fact that a residential lot has become less desirable for residential use and more desirable for commercial use because of adjacent commercial development is not sufficient to preclude enforcement of a covenant for residential uses based on changed conditions [*County of Butte v. Bach (1985) 172 Cal. App. 3d 848, 868-869, 218 Cal. Rptr. 613]* . One court has held, for example, that when property subject to a residential restriction had become less desirable for use as a single-family dwelling because of increased traffic, litter, and unsightly views of neighboring commercial uses, and had a value of $150,000 if free for a commercial use as compared to $80,000 as a residential lot, the restrictions remained enforceable because the purpose of the restrictive covenant was still attainable [*County of Butte v. Bach (1985) 172 Cal. App. 3d 848, 868-869, 218 Cal. Rptr. 613* ; *cf.* *Hurd v. Albert (1931) 214 Cal. 15, 23-25, 3 P.2d 545* (refusing to enforce restriction when property had no market value for residential purposes)].

In addition, when the perimeter of a residential tract becomes commercial, either through relinquishment or removal of conditions, enforcement of the restrictions may nevertheless continue to benefit and effectuate the purposes of the restrictions with respect to the other lots in the tract as a buffer between business and residential use, even though enforcement on those particular lots will not be of any value of benefit to them [*Atlas Terminals, Inc. v. Sokol (1962) 203 Cal. App. 2d 191, 193-194, 201-202, 21 Cal. Rptr. 293]* . The decisive question is whether the continued enforcement of the restrictions would be of substantial benefit to the remaining properties in the tract [*Atlas Terminals, Inc. v. Sokol (1962) 203 Cal. App. 2d 191, 193-194, 203, 204-205, 21 Cal. Rptr. 293]* .

For a form of complaint for declaratory relief and to quiet title for use by the owner of a subdivision lot who is seeking to cancel a use restriction due to changed conditions in the neighborhood, see *§ 184.195*.

[3] Conflict With Zoning

Land use in violation of a restrictive covenant can be enjoined even though the use is permissible under the applicable zoning ordinance [*Mullally v. Ojai Hotel Co. (1968) 266 Cal. App. 2d 9, 11-12, 71 Cal. Rptr. 882* ; *see* *Wilkman v. Banks (1954) 124 Cal. App. 2d 451, 455, 269 P.2d 33]* . Although the mere fact that a change in the zoning of an area occurs after restrictions have been placed on the property does not abrogate the restrictions, the zoning change may have some evidentiary value to show the change in character of the surrounding area [*see* *Wolff v. Fallon (1955) 44 Cal. 2d 695, 696-698, 284 P.2d 802* ; *cf.* *Wilkman v. Banks (1954) 124 Cal. App. 2d 451, 455, 269 P.2d 33* ; *see also § 184.69[2]*].

[4] Statute of Limitations

[a] Restrictive Covenants

An action for violation of a covenant or other "restriction" (as defined in *Civ. Code § 784*) must be commenced within five years. This limitations period does not bar commencement of an action for violation of a restriction before January 1, 2001, and, until that date, any other applicable statutory or common law limitation will continue to apply to the action [*Code Civ. Proc. § 336(b)*]. For further discussion of this limitations period, *see § 184.68*.

Under a statutory limitation applicable to actions commenced before January 1, 2001, an action for damages for breach of a written covenant must be brought by an original party to the covenant within four years after the breach [*Code Civ. Proc. § 337(1)*; *see Lawrence Barker, Inc. v. Briggs (1952) 39 Cal. 2d 654, 661, 248 P.2d 897]* .

[b] Equitable Servitudes

An action for violation of an equitable servitude or other "restriction" (as defined in *Civ. Code § 784*) must be commenced within five years. This limitations period does not bar commencement of an action for violation of an equitable servitude before January 1, 2001, and, until that date, any other applicable statutory or common law limitation will continue to apply to the action [*Code Civ. Proc. § 336(b)*]. For further discussion of this limitations period, see *§ 184.68*.

Under a statutory limitation that applies to actions commenced before January 1, 2001, any action for relief not provided for in the Code of Civil Procedure, such as equitable enforcement of a covenant when there is no privity of contract, must be commenced within four years after the cause of action has accrued [*Code Civ. Proc. § 343*].

[5] Laches or Waiver

Laches is an unreasonable delay in asserting a right that causes prejudice to an adverse party that renders the granting of relief inequitable [*Butler v. Holman (1956) 146 Cal. App. 2d 22, 28, 303 P.2d 573]* . A court will not find a plaintiff seeking to enforce a restriction guilty of laches when there is no evidence that plaintiff was put on notice of the violation [*Wilkman v. Banks (1954) 124 Cal. App. 2d 451, 456-457, 269 P.2d 33]* . Notice includes actual notice of circumstances sufficient to put a prudent person on inquiry as to a particular fact, or constructive notice of the fact [*Wilkman v. Banks (1954) 124 Cal. App. 2d 451, 456-457, 269 P.2d 33* ; *see Civ. Code § 19*].

Some courts have considered the argument that a plaintiff's delay in enforcing restrictions constitutes a waiver of the alleged violations [*see, e.g.,* *Morgan v. Veach (1943) 59 Cal. App. 2d 682, 689, 139 P.2d 976]* . In this context, however, visible repairs or alterations do not require the plaintiff to scrutinize a neighbor's activities to ascertain whether restrictions are being violated and, until the fact of a violation is ascertained, there can be no waiver of a violation [*Morgan v. Veach (1943) 59 Cal. App. 2d 682, 689, 139 P.2d 976]* .

For a form of affirmative defense allegation for use by a defendant in an action to enjoin the violation of subdivision restrictions when the plaintiff has been guilty of laches or has waived the violations, see *§ 184.193*.

[6] Unclean Hands

A party cannot enforce equitable restrictions against another property owner within the tract if the party seeking enforcement has materially violated the restriction [*Bryant v. Whitney (1918) 178 Cal. 640, 642-643, 174 P. 32* ; *Diederichsen v. Sutch (1941) 47 Cal. App. 2d 646, 650, 118 P.2d 863]* . In an action brought by multiple plaintiffs, however, even if some of the plaintiffs have violated building restrictions, the other plaintiffs would not be by that reason prevented from obtaining injunctive relief if they were otherwise entitled to it and had no knowledge that the restrictions had been violated by any person other than the defendants [*Morgan v. Veach (1943) 59 Cal. App. 2d 682, 685, 692, 139 P.2d 976]* .

[7] Discriminatory Restrictions

[a] In General

Private covenants that directly foster an unconstitutional and invidious form of discrimination, most commonly racial discrimination, are denied judicial enforcement [*Shelley v. Kraemer (1948) 334 U.S. 1, 12-21, 68 S. Ct. 836, 92 L. Ed. 1161* ; *Abstract Investment Co. v. Hutchinson (1962) 204 Cal. App. 2d 242, 245-247, 22 Cal. Rptr. 309]* . The same rule applies to covenants that violate state laws, such as the Unruh Civil Rights Act (*Civ. Code § 51*) or the California Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*).

Any restriction or prohibition, whether by way of covenant, condition on use or occupation, or on transfer of title to real property, is void if it directly or indirectly limits the acquisition, use, or occupation of that property because of sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation [*Civ. Code §§ 51(b), 53*; *see Civ. Code § 51(e)* (definitions); *see also Civ. Code § 782.5* (restrictions based on invidious discrimination are deemed omitted from covenants, conditions, and restrictions)]. For example, a restrictive covenant limiting sale and occupancy to one who has been a member of a Theosophical Society for three years and who is over 50 years of age has been held unenforceable and a violation of *Civ. Code § 53(b)* [*Taormina Theosophical Community, Inc. v. Silver (1983) 140 Cal. App. 3d 964, 974-976, 190 Cal. Rptr. 38]* .

Under *Gov. Code § 12956.1*, any person who holds an ownership interest of record in property that he or she believes is the subject of a restrictive covenant, as defined, may file an application with the Department of Fair Employment and Housing (Department) requesting a determination of whether the restrictive covenant violates fair housing laws and is void [*Gov. Code § 12956.1(c)(1)*; *see Gov. Code § 12956.1(b)(1)*]. The Department must process the application within 90 days of receipt [*Gov. Code § 12956.1(c)(2)*]. If the Department determines that a document contains an unlawful restrictive covenant, it must provide the applicant with a written statement entitled "RACIALLY OR OTHERWISE UNLAWFULLY RESTRICTIVE COVENANT MODIFICATION" [*Gov. Code § 12956.1(c)(2)*; *see Gov. Code § 12956.1(c)(3)*]. The applicant may then strike out the void restrictive covenant, complete, sign, and attach a copy of the Department's statement to the front of the document, and have the modified document recorded [*Gov. Code § 12956.1(c)(3)*]. For additional coverage of this procedure, see *§ 184.66[2][b]*.

Any person who holds an ownership interest of record in property that he or she believes is the subject of an unlawfully restrictive covenant in violation of *Gov. Code § 12955*(*l*) may submit a modified document striking out the unlawfully restrictive covenant to the county recorder of the county in which the property is located for recordation [*Gov. Code § 12956.1(g)(1)*]. Under *Gov. Code § 12955*(*l*), it is unlawful to have a restrictive covenant that discriminates and makes housing opportunities unavailable because of race, color, religion, sex, sexual orientation, familial status, marital status, disability, national origin, source of income, or ancestry. The existence of a restrictive covenant, regardless of whether it is accompanied by a statement that the restrictive covenant is repealed or void, constitutes unlawful discrimination [*Gov. Code § 12955*(*l*); *see § 184.66[2][c]*].

For a discussion of the Unruh Civil Rights Act, see Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

[b] Age

The Unruh Civil Rights Act (*Civ. Code § 51 et seq.*) prohibits covenants that exclude minors from residency except in a senior citizen housing development [*see Civ. Code §§ 51.2-51.3*; *Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 736-745, 180 Cal. Rptr. 496, 640 P.2d 115* , *cert. denied*, *459 U.S. 858, 103 S. Ct. 129, 74 L. Ed. 2d 111* ; *see also* Stats. 2005, ch. 420, § 2(d) (*Marina Point* holding is not affected by Civil Rights Act of 2005)]. In the case of such a development, the Act requires the covenants, conditions, and restrictions (and other documents and written policy) to set forth the limitations on occupancy, residency, or use on the basis of age. Any such limitation must not be more exclusive than to require that one person in residence in each dwelling unit be a senior citizen and that each other

resident in the same dwelling unit be a qualified permanent resident, a permitted health care resident, or a person under 55 years of age whose occupancy is permitted under *Civ. Code § 51.3(h)* (authorizing continuing occupancy by a person who had the right to occupy on January 1, 1985) or under *Civ. Code § 51.4(b)* (authorizing continuing occupancy by someone who had the right, prior to January 1, 1990, to occupy a dwelling in a development that relied on the exemption to the special design requirement provided by § 51.4). The limitation may be less exclusive, but must at least require that the persons commencing any occupancy of a dwelling unit include a senior citizen who intends to reside in the unit as his or her primary residence on a permanent basis [*Civ. Code § 51.3(c)*]. Further, the covenants, conditions, and restrictions, or other documents or written policy, must permit temporary residency, as a guest of a senior citizen or qualified permanent resident, by a person of less than 55 years of age for periods of time, not less than 60 days in any year, that are specified in the covenants, conditions, and restrictions or other documents or written policy [*Civ. Code § 51.3(d)*]. Several of the terms used above, including "senior citizen" and "senior citizen housing development," are defined in *Civ. Code § 51.3(b).*

For discussion of the legality of excluding families with children from owning condominiums, see Ch. 124, *Condominiums and Other Common Interest Developments* .

[c] Number of Residents

Restrictive covenants that limit the number of residents in a household, without any reference to square footage and absent any showing that these personal living arrangements adversely impact the neighborhood, violate a resident's right of privacy in choosing living companions under *Cal. Const., art. I, § 1*, and can be voided if the restrictions involve state action [*Park Redlands Covenant Control Committee v. Simon (1986) 181 Cal. App. 3d 87, 95-99, 226 Cal. Rptr. 199* ; *see City of Santa Barbara v. Adamson (1980) 27 Cal. 3d 123, 131-137, 164 Cal. Rptr. 539, 610 P.2d 436* (covenants required by city for approval of conditional use permit)].

[8] Change in Public Policy

Courts refuse to enforce restrictive covenants that directly violate those constitutional and statutory provisions that express public policy concerning civil rights [*see § 184.69[7]*]. A court also may deny enforcement of a restrictive covenant against uses favored by public policy as expressed in a statute, even when that statute does not by its terms directly prohibit enforcement of the covenant [*see Welsch v. Goswick (1982) 130 Cal. App. 3d 398, 405-407, 181 Cal. Rptr. 703]* .

For example, a portion of the Community Care Facilities Act (*Health & Safety Code § 1566 et seq.*) was passed to regulate zoning interference with residential care facilities and, for purposes of private restrictive covenants entered into after January 1, 1979, the legislation defined "residential use" to include operation of residential care facilities for six or fewer residents [*see Welsch v. Goswick (1982) 130 Cal. App. 3d 398, 406, 181 Cal. Rptr. 703]* . Finding that the policy of the legislation was to encourage development of residential care facilities for disabled people and seniors, a court applied that policy to a covenant entered into *before* January 1, 1979, and held that a lot owner in a residential subdivision could not be enjoined from operating a care facility because there was a strong statement of public policy in favor of a broad interpretation of single family residential use in the area of community care [*Welsch v. Goswick (1982) 130 Cal. App. 3d 398, 401, 406-408, 181 Cal. Rptr. 703]* . Therefore, when the issue is one of changed circumstances in a rapidly developing area of social concern, a court will not enjoin a use of property in a residential subdivision if the use is no longer inconsistent with single-family residential purposes [*Welsch v. Goswick (1982) 130 Cal. App. 3d 398, 401, 407 n.7, 407-408, 181 Cal. Rptr. 703]* . However, at least one other court has reached a contrary result, holding that the community care legislation cannot be applied retroactively to pre-January 1, 1979, private covenants [*Barrett v. Lipscomb (1987) 194 Cal. App. 3d 1524, 1533, 240 Cal. Rptr. 336]* . The court did not discuss the *Welsch* court's changed circumstances analysis but instead reasoned that the Legislature's express intent, codified in *Health & Safety Code § 1566.5* (prospective application to private covenants), cannot be overridden by the Legislature's broad statement of public policy [*Barrett v. Lipscomb (1987) 194 Cal. App. 3d 1524, 1531-1532, 240 Cal. Rptr. 336]* .

For a form of allegation for use in a complaint for declaratory relief and to quiet title to cancel use restrictions when the restrictions violate a public policy expressed in a statute, see *§ 184.196*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewContracts LawContract Conditions & ProvisionsWaiversGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawZoning & Land UseGeneral Overview

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§ 184.70 Condition Subsequent

[1] Defined

A condition is a provision contained in the instrument of conveyance that tends to modify or rescind the conveyance in the event of the failure of the grantee or the grantee's successors to fulfill the provision [*Pedro v. Potter (1926) 197 Cal. 751, 758-759, 242 P. 926]* . A fee simple subject to a condition subsequent is an estate that may be terminated by the grantor or the grantor's successors if a stated event occurs [*People ex rel. Dept. of Public Works v. City of Fresno (1962) 210 Cal. App. 2d 500, 504-505, 26 Cal. Rptr. 853]* . If the grant is defeated by the nonperformance of the condition subsequent, the person otherwise entitled to hold the grant must reconvey the property to the grantor, or to his or her successors, by a recorded grant [*Civ. Code § 1109*]. A breach of a condition on which an estate is granted works a forfeiture of the estate, while a breach of a covenant is merely grounds for the recovery of damages [*Knight v. Black (1912) 19 Cal. App. 518, 522, 126 P. 512* (disapproved on other grounds in *Green v. Superior Court (1974) 10 Cal. 3d 616, 633 n. 19, 111 Cal. Rptr. 704, 517 P.2d 1168*)].

Conditions subsequent, like equitable servitudes, have been used to restrict the improvement and use of lots in subdivisions [*see Strong v. Shatto (1919) 45 Cal. App. 29, 30-31, 187 P. 159* ; *see also § 184.63*]. However, while valid tract restrictions may be created by conveyances subject to the condition that title will revert on breach of the restrictions, the right to forfeit title on breach of the restrictions originates in each separate deed and, being vested only in the grantor and his or her assigns, cannot be exercised by owners of other lots in the same subdivision [*Girard v. Miller (1963) 214 Cal. App. 2d 266, 271, 29 Cal. Rptr. 359* ; *see Civ. Code § 1046* (right of repossession for breach of condition subsequent as transferable)]. These conditions may also be inserted in grants of land made for charitable purposes [*see City of Palm Springs v. Living Desert Reserve (1999) 70 Cal. App. 4th 613, 622, 82 Cal. Rptr. 2d 859* (when deed conveyed gift of land to city to be used as nature reserve and stated that if land were not so used, city would forfeit its interest in favor of a third party, deed granted fee simple subject to a condition subsequent rather than create a charitable trust); *Civ. Code § 885.040* (exemption of gift grants from certain rules governing powers of termination)].

[2] Construed as Covenant to Avoid Forfeiture

A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created [*Civ. Code*

§ 1442]. Whenever possible, the law favors construing conditions as personal covenants to avoid forfeiture [*Mac Donald Properties, Inc. v. Bel-Air Country Club (1977) 72 Cal. App. 3d 693, 697, 699, 140 Cal. Rptr. 367* ; *Rosecrans v. Pacific Elec. Ry. Co. (1943) 21 Cal. 2d 602, 605, 134 P.2d 245]* . For example, when grantors conveyed a right-of-way for the purpose of running a railway, using a deed which stated that the grant was made on the "express condition" that railway service be maintained, and when the deed further stated that the condition was "declared to be a condition and not a personal covenant" and that on breach "the right of way hereby granted shall revert to the first party, his heirs or assigns ... [who] shall have the right to enter upon said right of way and take possession thereof," the court found that the deed contained a condition subsequent [*see* *Rosecrans v. Pacific Elec. Ry. Co. (1943) 21 Cal. 2d 602, 603-605, 134 P.2d 245]* . In contrast, another court held that building restrictions in a grant of residential property adjoining a golf course, intended by the parties to be maintained as a "rough" for golfers, constituted a covenant rather than a condition subsequent even when the deed stated that the "restrictions constitute express conditions subsequent, breach of which gives rise to a right of reverter in the grantor" [*see* *MacDonald Properties, Inc. v. Bel-Air Country Club (1977) 72 Cal. App. 3d 693, 696-697, 699, 140 Cal. Rptr. 367]* . Therefore, no condition in a deed relied on to create a condition subsequent will be so interpreted if the language of the provision will bear any other reasonable construction [*Hawley v. Kafitz (1905) 148 Cal. 393, 394-395, 83 P. 248* ; *Springmeyer v. City of South Lake Tahoe (1982) 132 Cal. App. 3d 375, 380, 382, 183 Cal. Rptr. 43]* . However, a covenant instead of a condition will not be implied contrary to the clear intent of the parties [*Knight v. Black (1912) 19 Cal. App. 518, 522-523, 126 P. 512* (*disapproved on other grounds in* *Green v. Superior Court (1974) 10 Cal. 3d 616, 633 n. 19, 111 Cal. Rptr. 704, 517 P.2d 1168*); *but see* *MacDonald Properties, Inc. v. Bel-Air Country Club (1977) 72 Cal. App. 3d 693, 699, 140 Cal. Rptr. 367]* .

Before enforcing language in a deed that purports to be a condition subsequent, a court will require that the deed both clearly express the grantor's intent to create a condition and plainly express the precise event that triggers a forfeiture of the estate [*Springmeyer v. City of South Lake Tahoe (1982) 132 Cal. App. 3d 375, 380-381, 183 Cal. Rptr. 43]* . Extrinsic evidence may not be considered in resolving a latent ambiguity in the terms of a reversion condition [*Springmeyer v. City of South Lake Tahoe (1982) 132 Cal. App. 3d 375, 381, 183 Cal. Rptr. 43]* . In the case of a patent ambiguity, however, the question of the parties' intent must be resolved on the basis of evidence of what the parties said, both orally and in writing, and from evidence of the circumstances surrounding the conveyance [*Mason v. Superior Court (1985) 163 Cal. App. 3d 989, 998-999, 210 Cal. Rptr. 63* ; *Mission Valley East, Inc. v. County of Kern (1981) 120 Cal. App. 3d 89, 97-99, 174 Cal. Rptr. 300]* .

For example, in a deed containing no provision for reverter in the event defendant should fail to perform, the language "This deed is given subject to the provision that Grantee shall, at the expense of Grantee ..." gives rise to a patent ambiguity sufficient to preclude summary judgment on the issue of whether the deed creates a condition subsequent or a mere covenant [*Mason v. Superior Court (1985) 163 Cal. App. 3d 989, 997-999, 210 Cal. Rptr. 63]* . On the other hand, the language "the continuance of any such breach may be enjoined, abated or remedied by appropriate proceedings by such grantors, their heirs or assigns" has been held to create a covenant rather than a condition subsequent [*see* *McCaffrey v. Preston (1984) 154 Cal. App. 3d 422, 435 n.5, 435-436, 201 Cal. Rptr. 252]* .

[3] Power of Termination

[a] Retained by Grantor

The future interest retained by a grantor who conveys a fee simple subject to a restriction in the form of a condition subsequent is a power of termination, regardless of whether the power is characterized in the instrument that creates or evidences it as a power of termination, right of entry or reentry, right of possession or repossession, reserved power of revocation, or otherwise [*Civ. Code § 885.010(a)*]. *Civ. Code § 885.010* was enacted in 1982 as part of a substantial revision of the law relating to reversionary interests [*see Civ. Code § 885.010 et seq.*]. The Legislature abolished fees simple determinable and possibilities of reverter. Every estate that would be at common law a fee simple determinable is deemed to be a fee simple subject to a restriction in the form of a condition subsequent, and every estate that would

be a possibility of reverter at common law is deemed to be and is enforceable as a power of termination [*Civ. Code §§ 885.010(b), 885.020*]. Code Civ. Proc. § 885.010 et seq. affect all powers of termination executed or recorded before, on, or after the date they became operative [*Civ. Code § 885.070(a)*]. Reversionary interests conditioned on the continued production or removal of oil, gas, or other minerals are expressly excluded from these provisions, as are reversionary interests in separately owned improvements or fixtures conditioned on the continued leasehold or possessory interest in the underlying land [*Civ. Code § 885.015*].

Statutes referring to "right of reentry," "right of repossession for breach of condition subsequent," or comparable terms now apply to powers of termination [*Civ. Code § 885.010(b)*; *see Civ. Code §§ 791, 793, 1046*].

The power of termination is an interest in the fee simple estate, consisting of the power to terminate the fee should the stated condition occur, and is transferable [*Civ. Code § 885.010*; *see Civ. Code § 1046*].

[b] Duration

A power of termination of record will normally expire 30 years after the date the instrument reserving, transferring, or otherwise evidencing the power is recorded [*Civ. Code § 885.030(a)(1)*]. However, the expiration date may be extended for up to 30 years at a time by recordation of a notice of intent to preserve the power [*Civ. Code § 885.030(a)(2)*; *see Civ. Code § 880.340* (form of notice of intent to preserve interest)]. When extended past the ordinary statutory period, a power of termination expires at the later of the following times:

- Thirty years after the date the notice of intent to preserve the power of termination is recorded, if the notice is recorded within 30 years after the date the instrument reserving, transferring, or otherwise evidencing the power is recorded [*Civ. Code § 885.030(a)(2)*]; or

- Thirty years after the date an instrument reserving, transferring, or otherwise evidencing the power of termination or a notice of intent to preserve the power of termination is recorded, if the instrument or notice is recorded within 30 years after the date such an instrument or notice was last recorded [*Civ. Code § 885.030(a)(3)*].

If the instrument or other recorded document provides an earlier expiration date than that provided by statute, the power of termination expires on the earlier date [*Civ. Code § 885.030(b)*].

Conservation easements are not subject to the 30-year expiration provisions [*Civ. Code § 880.240(d)*].

[c] Transition Provisions

If a power of termination would have expired by operation of *Civ. Code §§ 885.030, 885.040* before, on, or within five years after the operative date of the legislation, January 1, 1983, the holder was afforded a five-year grace period, until January 1, 1988, during which he or she could record an effective notice of intent to preserve the power [*Civ. Code §§ 885.070, 880.370*]. If the exercise of a power of termination would have been barred by the absolute-limitation period for enforcement established by *Civ. Code § 885.050*, the holder had a grace period in which to exercise the power, amounting to either the time allowed under the law in effect prior to 1982 or five years, whichever was earlier [*Civ. Code § 885.070(b)*]. Under prior law, the grantor, or the grantor's successor, was required to take positive action, within a reasonable time, to regain possession of the property [*Lincoln v. Narom Development Co. (1970) 10 Cal. App. 3d 619, 624, 89 Cal. Rptr. 128* ; *People ex rel. Dept. of Public Works v. City of Fresno (1962) 210 Cal. App. 2d 500, 504-505, 26 Cal. Rptr. 853* ; *City of Santa Monica v. Jones (1951) 104 Cal. App. 2d 463, 470, 232 P.2d 55* ; *but cf. Code Civ. Proc. § 320* (five-year statute of limitation for action to enforce right of entry); *Sanders v. East Bay Mun. Utility Dist. (1992) 16 Cal. App. 4th 125, 130-132, 20 Cal. Rptr. 2d 1* (Section 320 applicable to actions to enforce power of termination)].

[d] Exercise by Self-Help

After a breach of a condition subsequent, the grantor may physically reenter and take possession of the premises [*see Lincoln v. Narom Development Co. (1970) 10 Cal. App. 3d 619, 624, 89 Cal. Rptr. 128]* . Before exercising the right of reentry, however, the person holding the power of termination must give a three-day notice to quit in the same manner as a landlord seeking an eviction for nonpayment of rent [*Civ. Code § 791*; *see Code Civ. Proc. §§ 1161, 1162*]. The required notice must be given within five years after breach of the restriction to which the fee simple estate is subject [*Civ. Code § 885.050*]. A longer period may be agreed to by the parties by a waiver or extension recorded before expiration of the five-year period [*Civ. Code § 885.050*].

For a discussion and forms of notice for exercise of right of reentry, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

[e] Exercise by Bringing Action

Once a condition subsequent is breached and the duty to reconvey the estate arises, the right of reentry may be enforced by an action to forfeit title [*see Girard v. Miller (1963) 214 Cal. App. 2d 266, 269, 29 Cal. Rptr. 359]* . An action for declaratory relief will also lie to secure a judgment declaring forfeiture [*Lincoln v. Narom Development Co. (1970) 10 Cal. App. 3d 619, 624, 89 Cal. Rptr. 128]* . An injunction can be obtained to prevent a breach of the condition subsequent or an owner can bring an action requesting forfeiture if the injunction is disobeyed [*Johnston v. City of Los Angeles (1917) 176 Cal. 479, 485-487, 168 P. 1047* ; *Arrowhead Mut. Service Co. v. Faust (1968) 260 Cal. App. 2d 567, 578-580, 67 Cal. Rptr. 325]* .

No notice need be given before filing an action to enforce a right of reentry [*Civ. Code § 793*]. The civil action must be commenced within five years after breach of the restriction to which the fee simple estate is subject [*Civ. Code § 885.050*]. A longer period may be agreed to by the parties by a waiver or extension recorded before expiration of the five-year period [*Civ. Code § 885.050*].

For a form of complaint to compel reconveyance of real property for breach of a condition subsequent, see *§ 184.197*.

[4] Defenses to Enforcement

[a] Expiration of Power by Passage of Time

Restrictions appearing in a condition subsequent are unenforceable once the power of termination held by the grantor, or the grantor's successors, expires [*Civ. Code § 885.060*]. The power of termination expires automatically after 30 years from the date it is recorded, unless extended by recording of the proper notice [*Civ. Code § 885.030*; *see § 184.70[3][b]*].

Once a power of termination expires, the restriction to which the fee simple was subject becomes unenforceable and no action for injunction or damages will lie [*Civ. Code § 885.060(b)*]. Record title to the property becomes cleared by operation of law because the expiration is, for all purposes, equivalent to a termination of the power of record and a quitclaim of the power to the owner of the fee simple estate. No execution and recording of a termination and quitclaim is necessary to terminate or evidence the termination of the power [*Civ. Code § 885.060(a)*]. However, the termination of the restriction does not apply to a restriction for which a power of termination has expired pursuant to *Civ. Code § 885.010 et seq.* if the restriction is also an equitable servitude alternatively enforceable by injunction. Such an equitable servitude remains enforceable by injunction and any other available remedies but is not enforceable by a power of termination. This provision may not be construed to make enforceable any illegal restriction [*Civ. Code § 885.060(c)*].

For a form of affirmative defense allegation based on the expiration of a power of termination due to the passage of time

and for use in an action to compel reconveyance of property for breach of condition subsequent, see *§ 184.198*.

[b] Expiration of Power by Obsolescence

If a power of termination becomes obsolete, the power expires, the restriction to which the fee simple was subject becomes unenforceable, and no action for injunction or damages will lie [*Civ. Code §§ 885.040(a), 885.060(b)*]. Record title to the property is also cleared by operation of law when a power of termination expires due to obsolescence [*Civ. Code §§ 885.040(a), 885.060(a)*]. A power of termination is obsolete if any of the following circumstances apply:

- The relevant restriction is of no actual and substantial benefit to the holder of the power. Reversionary interests will not be enforced if the restriction does not benefit the holder of the interests [*Civ. Code § 885.040(b)(1)*; *see Young v. Cramer (1940) 38 Cal. App. 2d 64, 69, 100 P.2d 523* (holder of "reversion" no longer owner of property in tract)].

- Enforcement of the power would not effectuate the purpose of the restriction [*Civ. Code § 885.040(b)(2)*].

- It would be otherwise inequitable to enforce the power because of changed conditions or circumstances [*Civ. Code § 885.040(b)(3)*; *see Arrowhead Mut. Service Co. v. Faust (1968) 260 Cal. App. 2d 567, 576-577, 581-582, 67 Cal. Rptr. 325* ; *Shields v. Bank of America (1964) 225 Cal. App. 2d 330, 334-335, 338, 37 Cal. Rptr. 360* ; *Townsend v. Allen (1952) 114 Cal. App. 2d 291, 294-295, 250 P.2d 292* (defenses applicable to equitable servitudes apply to conditions subsequent)].

If, however, the power of termination arises from a grant by a natural person without consideration to a public entity or to a tax-exempt organization, the power will not expire due to obsolescence during the life of the grantor [*Civ. Code § 885.040(c)*].

In addition to the defenses specifically set out by statute, the principles of waiver and estoppel, laches, and other equitable defenses apply in actions to exercise a power of termination [*Civ. Code § 880.030(a)*; *see City of Santa Monica v. Jones (1951) 104 Cal. App. 2d 463, 470, 232 P.2d 55* ; *Wedum-Aldahl Co. v. Miller (1937) 18 Cal. App. 2d 745, 751-753, 64 P.2d 762]* .

For a form of affirmative defense allegation based on the expiration of a power of termination due to obsolescence and for use in an action to compel reconveyance of property for breach of condition subsequent, see *§ 184.198*.

[c] Statute of Limitations Applicable to Restrictions

An action for violation of a condition subsequent or other "restriction" (as that term is defined in *Civ. Code § 784*) must be commenced within five years. This limitations period does not bar commencement of an action for violation of a restriction before January 1, 2001, and, until that date, any other applicable statutory or common law limitation will continue to apply to the action [*Code Civ. Proc. § 336(b)*]. For further discussion of this limitations period, see *§ 184.68*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawDeedsConstruction & InterpretationReal Property LawEstatesFuture InterestsRight of EntryReal Property LawRestrictive CovenantsGeneral Overview

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15-184 California Forms of Pleading and Practice--Annotated § 184.90

§ 184.90 California Points and Authorities

For memoranda of points and authorities relating to cancellation of an instrument executed by an insane or incompetent person, see California Points and Authorities, Ch. 117, *Insane and Incompetent Persons* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesGeneral OverviewReal Property LawDeedsEnforceabilityReal Property LawDeedsRemediesCancellation & Rescission

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15-184 California Forms of Pleading and Practice--Annotated § 184.91

§ 184.91 Forms of Discovery

For forms of interrogatories for use in actions involving assertion of a claim under a deed, see Bender's Forms of Discovery, Ch. 62, *Deeds* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewReal Property LawDeedsGeneral Overview

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15-184 California Forms of Pleading and Practice--Annotated § 184.92

§ 184.92 California Legal Forms

For legal forms relating to this chapter, see California Legal Forms, Ch. 27, *Deeds and Recording* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral Overview

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15-184 California Forms of Pleading and Practice--Annotated § 184.93

§ 184.93 California Real Estate Law and Practice

For discussion of the transfer of real property by deed and of evidentiary problems involved in actions concerning deeds, see California Real Estate Law and Practice, Ch. 80, *Deeds and Transfer of Title* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral OverviewReal Property LawOwnership & TransferGeneral Overview

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15-184 California Forms of Pleading and Practice--Annotated § 184.94

§ 184.94 State Statutes

[1] Acknowledgment and Recordation

Constructive notice afforded by recorded deed. *Civ. Code § 1213*

Instruments subject to requirement of acknowledgment of execution before recordation. *Gov. Code § 27287*

Requirement of acknowledgment or proof of agreement affecting interest in real property. *Gov. Code § 27288*

[2] After-Acquired Title

After-acquired title vests on acquisition. *Civ. Code § 1106*

After-acquired title of mortgagor. *Civ. Code § 2930*

[3] Capacity of Parties

Minor's incapacity to contract as to real property. *Fam. Code § 6701*

Persons entirely without understanding. *Civ. Code § 38*

Deed made before incapacity judicially determined. *Civ. Code § 39*

Deed made after incapacity judicially determined. *Civ. Code § 40*

Capacity to take, hold, and dispose of property, generally. *Civ. Code § 671*

Corporate powers. *Corp. Code § 207*

Authority to mortgage corporation's real property. *Corp. Code § 1000*

Certificate of secretary on conveyance by corporation, *Corp. Code § 1002*

Powers of unincorporated associations regarding property. *Corp. Code §§ 18105-18125*

Powers of medical associations regarding property. *Corp. Code § 21200*

Contracts for acquisition of real property by state. *Gov. Code § 11005*

Conveyance of interest of state in real property. *Gov. Code § 11005.2*

[4] Definitions

"Transfer" defined. *Civ. Code § 1039*

"Voluntary transfer" defined. *Civ. Code § 1040*

Transfer in writing as grant, conveyance, or bill of sale. *Civ. Code § 1053*

"Execution" defined. *Code Civ. Proc. § 1933*

[5] Delivery and Acceptance

Deed as taking effect on delivery. *Civ. Code § 1054*

Deed as presumed to be delivered at its date. *Civ. Code § 1055*

Delivery as required to be absolute. *Civ. Code § 1056*

Delivery in escrow. *Civ. Code § 1057*

Regulations of escrow agents. *Civ. Code § 1057.5*

Redelivery or cancellation ineffective as retransfer. *Civ. Code § 1058*

Constructive delivery. *Civ. Code § 1059*

When incidents pass. *Civ. Code § 1084*

Recordation as prima facie evidence of execution and delivery. *Evid. Code § 1600*

Certificate or resolution consenting to conveyance to political corporation or governmental agency for public purposes. *Gov. Code § 27281*

[6] Designation of Parties

Conveyance after owner's name is changed. *Civ. Code § 1096*

Persons bound by deed. *Civ. Code § 1107*

Acquisition and conveyance of real property by partnership. *Corp. Code §§ 15008(3)* (Uniform Partnership Act), 16302 (Uniform Partnership Act of 1994); *see Corp. Code § 16111* (applicability of these acts)

Effect of conveyance by partners. *Corp. Code §§ 15010* (Uniform Partnership Act), 16302 (Uniform Partnership Act of 1994)

[7] Documentary Evidence

Record of deed as prima facie evidence of existence and content of original. *Evid. Code § 1600*

Abstract of title to prove contents of lost or destroyed public records. *Evid. Code § 1601*

Deeds executed pursuant to legal process as prima facie evidence of conveyance. *Evid. Code § 1603*

Certificate of purchase or location of lands as prima facie evidence of ownership. *Evid. Code § 1604*

Admissibility of copies of Spanish title papers. *Evid. Code § 1605*

[8] Documentary Transfer Tax

Recordation subject to payment of tax. *Rev. & Tax. Code § 11933*

Authorization for documentary transfer tax. *Rev. & Tax. Code § 11911*

[9] Estates Subject to Transfer

Transfer of future interests. *Civ. Code § 699*

Property that may be transferred. *Civ. Code § 1044*

Mere possibility as unable to be transferred. *Civ. Code § 1045*

Transfer of right of reentry. *Civ. Code § 1046*

Transfer by person claiming title by adverse possession. *Civ. Code § 1047*

[10] Execution

Execution by attorney in fact. *Civ. Code § 1095*

Transfer fee limitation. *Civ. Code § 1097*

Delivery of structural pest control inspection report before transfer of title. *Civ. Code § 1099*

Sale of community real property. *Fam. Code § 1102*

Disposition of community property when one or both spouses are incompetent. *Fam. Code § 1103*

Validity of deed signed by certain corporate officers. *Corp. Code § 313*

Execution and recordation of deeds by unincorporated associations. *Corp. Code §§ 18115-18120*

[11] Interpretation of Deeds

Presumption of ownership free of trust unless beneficiary designated in deed. *Prob. Code § 18104*

Prob. Code § 21101 et seq. applies to deed and any other instrument, unless provision or instrument requires otherwise. *Prob. Code § 21101*

Deeds construed in same way as contracts. *Civ. Code § 1066*

Clear limitation as prevailing over words less clear. *Civ. Code § 1067*

Use of recitals to assist construction. *Civ. Code § 1068*

Interpretation in favor of grantee or if deed by public officer or body, in favor of grantor. *Civ. Code § 1069*

Prior parts as prevailing over later conflicting clauses. *Civ. Code § 1070*

Words of inheritance or succession as unnecessary to transfer fee. *Civ. Code § 1072*

[12] Principal Types of Deeds

Statutory form for grant deed. *Civ. Code § 1092*

[13] Property Transferred

Transfer of real property as passing all easements attached. *Civ. Code § 1104*

Fee simple presumptively granted. *Civ. Code § 1105*

Lesser estate as vesting on grant of fee. *Civ. Code § 1108*

Breach of condition subsequent. *Civ. Code § 1109*

Effect of conditions precedent. *Civ. Code § 1110*

Grants of rents, remainders, or reversions. *Civ. Code § 1111*

Grants bordering highways. *Civ. Code § 1112*

[14] Statute of Frauds

Writing necessary for transfer of estate in real property. *Civ. Code § 1091*

Transfer, trust, or power over realty as required to be in writing and subscribed by grantor. *Code Civ. Proc. § 1971*

[15] Statute of Limitations

Limitations on action founded on guaranty of title of real property. *Code Civ. Proc. § 339(1)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsDeliveryReal Property LawDeedsEnforceabilityReal Property LawDeedsExecution FormalitiesReal Property LawEstatesFuture InterestsRight of EntryReal Property LawPurchase & SaleEscrow

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§ 184.95 Decisions

[1] After-Acquired Title

Agreement reserving mineral rights met essential requirements of grant deed and transferred after-acquired title pursuant to *Civ. Code § 1106*. *Klamath Land & Cattle Co. v. Roemer (1970) 12 Cal. App. 3d 613, 618-619, 91 Cal. Rptr. 112, 37 O.&G.R. 194*

[2] Capacity of Parties

Deed executed to oneself is void because transfer of property requires that title be conveyed by one living person to another [*Civ. Code § 1039*]. *Clark v. Carter (1968) 265 Cal. App. 2d 291, 295, 296, 70 Cal. Rptr. 923*

Test of mental capacity to execute deed is whether grantor can comprehend nature of his or her act, character of his or her property, and grantor's relation to natural objects of his or her bounty. *Marback v. Marback (1965) 235 Cal. App. 2d 354, 356, 45 Cal. Rptr. 341*

Degree of mental competency required to sustain validity of deed is same as that required to execute will. *Marback v. Marback (1965) 235 Cal. App. 2d 354, 356, 45 Cal. Rptr. 341*

[3] Delivery and Acceptance

Valid delivery requires mutual intention of parties to immediately pass title to property. *Meyer v. Wall (1969) 270 Cal. App. 2d 24, 27, 75 Cal. Rptr. 236* ; *Henneberry v. Henneberry (1958) 164 Cal. App. 2d 125, 129, 330 P.2d 250*

Proof of physical delivery of deed establishes prima facie case of delivery. *Smith v. Carey (1965) 238 Cal. App. 2d 438, 440, 48 Cal. Rptr. 12*

Delivery to one joint owner constitutes delivery to both. *Belli v. Bonavia (1959) 167 Cal. App. 2d 275, 280, 334 P.2d 196*

Delivery by escrow agent to grantee related back to delivery by grantor to agent when valid escrow agreement existed and death of grantor intervened prior to delivery by escrow agent to grantee. *Brunoni v. Brunoni (1949) 93 Cal. App. 2d 215, 219, 208 P.2d 1028*

Formal acceptance of deed by corporation by written consent or resolution is unnecessary. *Canal Oil Co. v. National Oil Co. (1937) 19 Cal. App. 2d 524, 536, 66 P.2d 197*

[4] Description of Property

Reference to map in description of property incorporates map into deed. *Ramirez v. Mookini (1962) 207 Cal. App. 2d 42, 48, 24 Cal. Rptr. 354*

[5] Effect of Fraud

Quitclaim deed that was executed and delivered but altered before it was recorded validly transferred property interest to, and vested title in, original transferee. *Lee v. Lee (2009) 175 Cal. App. 4th 1553, 1558, 97 Cal. Rptr. 3d 516*

Deed obtained by fraud and duress is voidable, not void, and rights of bona fide encumbrancer for value are protected. *Fallon v. Triangle Management Services, Inc. (1985) 169 Cal. App. 3d 1103, 1106, 215 Cal. Rptr. 748*

[6] Execution

Deed executed in blank without designation of grantee is void. *Bryce v. O'Brien (1936) 5 Cal. 2d 615, 616, 55 P.2d 488*

Corporate executive officer does not require written authorization to sell corporation land because officer is representative of corporation rather than mere agent. *Monteleone v. Southern California Vending Corp. (1968) 264 Cal. App. 2d 798, 806, 70 Cal. Rptr. 703*

Proof that deed at time of execution lacked data such as designation of grantee raises presumption that authority of agent subsequently filling in blanks was not in writing. *Alton v. Haywood (1934) 136 Cal. App. 191, 193, 28 P.2d 385*

Party claiming that in absence of written authorization, changes and additions to deed were made in immediate presence of principal has burden of affirmatively establishing this fact. *Alton v. Haywood (1934) 136 Cal. App. 191, 193, 28 P.2d 385*

[7] Interpretation of Deeds

When terms of deed are ambiguous, actual conduct of parties may be used to establish their intention; thus, when deed for railroad right-of-way was ambiguous regarding whether it granted fee interest or easement, grantor's subsequent conduct was admissible to indicate its intention to convey fee interest. *City of Manhattan Beach v. Superior Court (1996) 13 Cal. 4th 232, 246, 52 Cal. Rptr. 2d 82, 914 P.2d 160 , cert. denied, 519 U.S. 1008, 117 S. Ct. 511, 136 L. Ed. 2d 400*

Conduct of parties acting under deed is factor in determining construction to be placed on deed. *People v. Ocean Shore Railroad (1948) 32 Cal. 2d 406, 414, 196 P.2d 570*

Conduct of parties is admissible to interpret deed when deed is ambiguous, but conduct is not admissible when deed is not ambiguous, such as when it refers to subdivision map. *Baker v. Ramirez (1987) 190 Cal. App. 3d 1123, 1133-1134, 235 Cal. Rptr. 857*

Requirement of *Evid. Code § 662*, requiring clear and convincing evidence to overcome presumption that owner of legal title has beneficial title, is not changed by fact that confidential relationship is alleged to exist between parties. *Toney v. Nolder (1985) 173 Cal. App. 3d 791, 794-796, 219 Cal. Rptr. 497*

Nontechnical words in deed to be given their ordinary and plain meaning unless context shows they are used in different sense. *Welch v. Kai (1970) 4 Cal. App. 3d 374, 380, 84 Cal. Rptr. 619*

Actual uses of property at time of conveyance as well as uses within reasonable contemplation of parties are factors in determining intent of parties. *Everett v. Bosch (1966) 241 Cal. App. 2d 648, 653, 50 Cal. Rptr. 813*

Every part of deed is to be given effect if reasonably practicable and consistent with evident purpose of grant, each clause helping to interpret others. *City of Los Angeles v. Savage (1958) 165 Cal. App. 2d 1, 5, 331 P.2d 211*

[8] Marketable Record Title Act

Amendments to *Civ. Code § 882.020* enacted in 2007 codified holding in *Ung v. Koehler (2005) 135 Cal. App. 4th 186, 37 Cal. Rptr. 3d 311* that notice of default is not part of the record for purposes of determining applicable statute of limitations under *MRTA. Schmidli v. Pearce (2009) 178 Cal. App. 4th 305, 315-316, 100 Cal. Rptr. 3d 343*

Notice of default did not trigger new 10-year statute of limitations when notice was recorded after 10-year period had expired. *Ung v. Koehler (2005) 135 Cal. App. 4th 186, 190-191, 37 Cal. Rptr. 3d 311*

Under *Civ. Code § 880.260* (real property interest does not expire or expire of record when action is timely commenced and notice of action recorded), running of limitations period under Marketable Record Title Act is reset and new 10-year limitations period commences on date of recording of lis pendens. *Slintak v. Buckeye Retirement Co., LLC, Ltd. (2006) 139 Cal. App. 4th 575, 587, 43 Cal. Rptr. 3d 131*

Conveyance to railroad in 1901 that provided right-of-way would revert to grantors or their assigns if railroad operations ceased for six months conveyed fee interest subject to condition subsequent rather than easement; because successor in interest failed to record intent to preserve future interest as required by Marketable Record Title Act [*Civ. Code § 880.020 et seq.*], power of termination expired and owner's quiet title action was barred. *Severns v. Union Pacific Railroad (2002) 101 Cal. App. 4th 1209, 1220-1221, 125 Cal. Rptr. 2d 100*

Marketable Record Title Act [*Civ. Code § 880.020 et seq.*], requiring recordation to preserve certain types of interest, including power of termination, does not effect unconstitutional impairment of contracts or take property in violation of due process. *Severns v. Union Pacific Railroad (2002) 101 Cal. App. 4th 1209, 1222, 1228, 125 Cal. Rptr. 2d 100*

[9] Merger of Prior Agreements

Deed executed in consummation of agreement between parties merges all prior negotiations and agreements, and therefore prevails over inconsistent contract pursuant to which it was executed. *Cochran v. Union Lumber Co. (1972)*

26 Cal. App. 3d 423, 429, 102 Cal. Rptr. 632

[10] Parol and Extrinsic Evidence

When terms of deed are ambiguous, actual conduct of parties may be used to establish their intention; thus, when deed for railroad right-of-way was ambiguous regarding whether it granted fee interest or easement, grantor's subsequent conduct was admissible to indicate its intention to convey fee interest. *City of Manhattan Beach v. Superior Court (1996) 13 Cal. 4th 232, 246, 52 Cal. Rptr. 2d 82, 914 P.2d 160 , cert. denied, 519 U.S. 1008, 117 S. Ct. 511, 136 L. Ed. 2d 400*

Parol evidence is admissible to resolve patent ambiguity as to whether clause in deed is covenant or condition. *Mason v. Superior Court (1985) 163 Cal. App. 3d 989, 998-999, 210 Cal. Rptr. 63*

Test of admissibility of extrinsic evidence to explain deed is whether or not offered evidence is relevant to prove meaning to which language of instrument is reasonably susceptible. *Murphy Slough Assn. v. Avila (1972) 27 Cal. App. 3d 649, 653-655, 104 Cal. Rptr. 136*

Erroneously admitted parol evidence was unable to support a judgment, even though admitted without objection. *White v. State of California (1971) 21 Cal. App. 3d 738, 757, 99 Cal. Rptr. 58*

[11] Reservations

Common law rule that one cannot reserve interest in real property to stranger to title is abandoned. *Willard v. First Church of Christ, Scientist (1972) 7 Cal. 3d 473, 476-479, 102 Cal. Rptr. 739, 498 P.2d 987*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsDeliveryReal Property LawDeedsEnforceabilityReal Property LawDeedsExecution FormalitiesReal Property LawDeedsProperty DescriptionsReal Property LawDeedsRemediesAfter-Acquired Property

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15-184 California Forms of Pleading and Practice--Annotated § 184.96

§ 184.96 Law Reviews

Note, *Avoiding the Un-Real Estate Deal: Has the Uniform Electronic Transactions Act Gone Too Far? 35 J. Marshall L. Rev. 311 (2002)*

Note, *Property Transfers Under Section 727 of the Bankruptcy Code: Defining the Moment of Transfer, 72 S. Cal. L. Rev. 1179 (1999)*

Bernhardt, *Teaching Real Property Law as Real Estate Lawyering, 23 Pepp. L. Rev. 1099 (1996)*

Knox, *Procedures to Delay Real Property Foreclosures, 23 W. St. U.L. Rev. 303 (1996)*

Seavey, *Formalizing Interspousal Transfers of Real and Personal Property in California, 30 San Diego L. Rev. 425 (1993)*

Murray, *Deeds in Lieu of Foreclosure: Practical and Legal Considerations, 26 Real Prop. Prob. & Tr. J. 459 (1991)*

Jones, *Structuring the Deed in Lieu of Foreclosure Transaction, 19 Real Prop. Prob. & Tr. J. 58 (1984)*

Brussack, *Reform of American Conveyancing Formality, 32 Hastings L.J. 561 (1981)*

Note, *The Use of Extrinsic Evidence to Interpret Real Property Conveyances: A Suggested Limitation, 65 Cal. L. Rev. 897 (1977)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsProperty RightsGeneral OverviewReal Property LawBankruptcySalesReal Property

LawDeedsConstruction & InterpretationReal Property LawFinancingMortgages & Other Security InstrumentsDeed in Lieu of ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral Overview

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15-184 California Forms of Pleading and Practice--Annotated § 184.97

§ 184.97 Text References

Powell on Real Property, vols. 1-4, 6 (Matthew Bender)

Witkin, Summary of California Law, vol. 12, *Real Property*, §§ 254-335 (10th ed. 2005)

Miller & Starr, California Real Estate, vol. 3, Ch. 8, Deeds (3d ed., West Group 2000).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral Overview

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15-184 California Forms of Pleading and Practice--Annotated § 184.110

§ 184.110 State Statutes

[1] Covenant Running With Land

Appurtenant covenants as running with land. *Civ. Code § 1460*

Covenants running with land. *Civ. Code § 1461*

"Covenant running with land" defined. *Civ. Code § 1462*

Covenants of warranty, for quiet enjoyment, and for further assurance as running with land. *Civ. Code § 1463*

[2] Express Covenants

When warranties binding on heirs and devisees. *Civ. Code § 1115*

[3] Damages

Damages for breach of covenant of seisin, right to convey, warranty, or quiet enjoyment. *Civ. Code § 3304*

Damages for breach of covenant against encumbrances. *Civ. Code § 3305*

[4] Implied Covenants

Covenants implied from use of word "grant." *Civ. Code § 1113*

"Encumbrances" defined. *Civ. Code § 1114*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsCovenants of TitleReal Property LawDeedsRemediesDamagesReal Property LawRestrictive CovenantsCovenants Running With Land

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§ 184.111 Decisions

[1] Express Covenants

Covenant for quiet enjoyment is not breached until there has been eviction by true owner, or assertion by him or her of paramount right in such manner that holder through covenantor is compelled to yield possession or buy outstanding superior title. *McCormick v. Marcy (1913) 165 Cal. 386, 389, 132 P. 449*

Covenant of warranty is breached only when covenantee actually or constructively evicted. *McGary v. Hastings (1870) 39 Cal. 360, 364-367*

Covenants of seisin, right to convey, and against encumbrances are personal to covenantee, and breached, if at all, at time of transfer. *Lawrence v. Montgomery (1864) 37 Cal. 183, 188, 189*

Liability of vendor under covenant of warranty is directly to person evicted and not exclusively to immediate vendee. *Blackwell v. Atkinson (1859) 14 Cal. 470, 471*

[2] Implied Covenants

Covenants against encumbrances are personal, not running with land, do not run with the land, and do not entitle succeeding grantee to maintain action in own name for breach. *Babb v. Weemer (1964) 225 Cal. App. 2d 546, 550, 37 Cal. Rptr. 533*

Encumbrance consisting of physical burden on land, permanent in character, of open and notorious nature, and affecting only physical condition of property is not encumbrance that breaches implied covenant against encumbrances. *Evans v. Faught (1965) 231 Cal. App. 2d 698, 709, 42 Cal. Rptr. 133*

Trust deed is encumbrance. *Babb v. Weemer (1964) 225 Cal. App. 2d 546, 551, 37 Cal. Rptr. 533*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsCovenants of Title

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§ 184.112 Law Reviews

Note, *Termination of Servitudes: Expanding the Remedy for "Changed Conditions," 31 UCLA L. Rev. 226 (1983)*

Curtis, *Title Insurance In Sales of California Residential Realty: A Critique of Title Insurance and Title Covenants With Suggested Reforms, 7 Pacific L.J. 1 (1976)*

Comment, *Covenants of Title Running With the Land in California, 49 Cal. L. Rev. 931 (1961)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With Land

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§ 184.113 Text References

Powell on Real Property, Ch. 60, *Covenants as to Property Use* (Matthew Bender)

Miller and Starr, Current Law of California Real Estate, Vol. 2, Ch. 14, *Deeds*, §§ 14:3-14:9

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsCovenants of TitleReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With Land

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15-184 California Forms of Pleading and Practice--Annotated § 184.130

§ 184.130 California Points and Authorities

For a form of points and authorities in support of an application to enjoin violation of a restrictive covenant, see California Points and Authorities, Ch. 116, *Injunctions* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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15-184 California Forms of Pleading and Practice--Annotated § 184.131

§ 184.131 California Legal Forms

For a form of declaration of restrictions for a residential subdivision, see *California Legal Forms, Ch. 28C, Covenants, Conditions, and Restrictions, § 28C.200* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawRestrictive CovenantsGeneral Overview

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§ 184.132 California Real Estate Law and Practice

For a discussion of covenants, conditions, and restrictions relating to subdivisions, see California Real Estate Law & Practice, Ch. 470, *Subdivisions* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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15-184 California Forms of Pleading and Practice--Annotated § 184.133

§ 184.133 State Statutes

[1] Restrictions in General

Definition of "restriction." *Civ. Code § 784*

Limitations period for action for violation of restriction. *Code Civ. Proc. § 336(b)*

[2] Conditions

Condition on enjoyment of property defined. *Civ. Code § 707*

Conditions are either precedent or subsequent. *Civ. Code § 708*

Illegal conditions are void. *Civ. Code § 709*

Conditions restraining marriage are generally void; exception for minors. *Civ. Code § 710*

Conditions restraining alienation are void; exception for public housing loans. *Civ. Code §§ 711-711.5*

Restrictions on right of property owner to display "for sale" sign are void. *Civ. Code §§ 712, 713*

Duty to reconvey property on breach of condition subsequent. *Civ. Code § 1109*

Conditional obligations generally. *Civ. Code § 1434 et seq.*

Conditions involving forfeiture are strictly construed. *Civ. Code § 1442*

[3] Covenants

Covenants running with land defined. *Civ. Code § 1460*

Covenants running with land are only those specified in *Civ. Code §§ 1460-1471*, and those incidental thereto. *Civ. Code § 1461*

Covenant made for direct benefit of granted property runs with land. *Civ. Code § 1462*

Covenants of warranty, and other specified covenants running with land. *Civ. Code § 1463*

Persons bound by covenant running with land. *Civ. Code § 1465*

No liability for breach of covenant running with land before acquisition or after relinquishment. *Civ. Code § 1466*

Apportionment of joint benefit or burden of covenant running with land. *Civ. Code § 1467*

Covenants running with land of both covenantor and covenantee. *Civ. Code § 1468*

Environmental covenants. *Civ. Code § 1471*

Limitations Period for Action for Violation of Covenant or Other Restriction. *Code Civ. Proc. § 336(b)*

County recorders and certain other real estate related persons, when providing copy of already recorded document, also must provide cover page, or must stamp copy, with statement that restrictions based on specified invidious discrimination are void and may be removed from recorded documents. *Gov. Code § 12956.1(a), (b)*

Obtaining recordation of any document for express purpose of adding racially restrictive covenant is misdemeanor. *Gov. Code § 12956.1(c)*

Owner may record "Restrictive Covenant Modification" for purpose of removing unlawfully restrictive covenant. *Gov. Code § 12956.2*

[4] Discrimination

Age discrimination by business establishment in sale or rental of housing is generally prohibited. *Civ. Code § 51.2*

Age restrictions are allowable in certain senior citizen housing developments. *Civ. Code § 51.3*

Restrictions on ownership or use of property based on invidious discrimination (because of sex, race, color, religion, etc.) are void. *Civ. Code § 53*

Restrictions in deeds based on invidious discrimination are void. *Civ. Code § 782*

Covenants containing restrictions based on invidious discrimination are deemed revised to omit provisions. *Civ. Code § 782.5(a)*

[5] Miscellaneous

Covenant, restriction, or condition restricting or prohibiting installation or use of solar energy system are unenforceable; allowable reasonable restrictions defined. *Civ. Code § 714*

Covenants, conditions, restrictions, or other management documents cannot prohibit sale, lease, or use of property on basis that structure intended for occupancy is constructed offsite and moved to property in sections or modules. *Civ. Code § 714.5*

Benefit of condition or covenant allowed to vest in unnamed person. *Civ. Code § 1085*

Condominium covenants and restrictions. *Civ. Code § 1354*

Procedure for owners to extend term of covenants, conditions, and restrictions that do not provide for their own extension. *Civ. Code § 1357*

Quiet title. *Code Civ. Proc. § 760.010 et seq.*

[6] Power of Termination

Three-day notice required before exercising right of reentry. *Civ. Code § 791*

Notice under *Civ. Code § 791* is not prerequisite to action to enforce right of reentry. *Civ. Code § 793*

Civ. Code § 880.020 et seq. do not limit application of equitable principles and recording statutes. *Civ. Code § 880.030*

Interests not subject to *Civ. Code § 880.020 et seq.* *Civ. Code § 880.240*

Times prescribed for expiration, enforcement, bringing action, or other required act is not extended by any disability, lack of knowledge, tolling provisions, or statute of limitations. *Civ. Code § 880.250*

Real property interest does not expire or expire of record when action is timely commenced and notice of action recorded. *Civ. Code § 880.260*

Recordation of notice of intent to preserve interest. *Civ. Code § 880.310*

Persons who may record notice. *Civ. Code § 880.320*

Contents of notice. *Civ. Code § 880.330*

Form of notice. *Civ. Code § 880.340*

Place and manner of recording. *Civ. Code § 880.350*

Notice recorded to slander title prohibited; availability of costs, attorney fees, and damages. *Civ. Code § 880.360*

Time to record notice is extended when prescribed period expires before, on, or within five years after operative date of prescribing statute. *Civ. Code § 880.370*

Power of termination defined. *Civ. Code § 885.010*

Power of termination is transferable. *Civ. Code §§ 885.010, 1046*

Civ. Code § 885.010 et seq. are not applicable to certain reversionary interests. *Civ. Code § 885.015*

Fees simple determinable and possibilities of reverter abolished and deemed to be powers of termination. *Civ. Code § 885.020*

Expiration of power of termination after 30-year period; extension of period. *Civ. Code § 885.030*

Expiration of power of termination by obsolescence. *Civ. Code § 885.040*

Exercise of power of termination by notice or civil action. *Civ. Code § 885.050*

Restrictions as unenforceable after expiration of power of termination. *Civ. Code § 885.060*

Duty to reconvey property on breach of condition subsequent. *Civ. Code § 1109*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With LandReal Property LawRestrictive CovenantsSubdivisions

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§ 184.134 Decisions

[1] Changed Conditions

Restrictive covenant is unenforceable when change in neighborhood has been such that enforcement would have no other result than to harass or injure defendant, without benefiting plaintiff. *Hurd v. Albert (1931) 214 Cal. 15, 17, 23, 3 P.2d 545* (residential restriction)

Cancellation of residential-only restriction is unjustified when purpose of covenant is still attainable. *County of Butte v. Bach (1985) 172 Cal. App. 3d 848, 868-869, 218 Cal. Rptr. 613*

Enforcement of residential-only restrictions is proper when they would serve as buffer against business area and therefore be of substantial benefit to other lots in tract. *Atlas Terminals, Inc. v. Sokol (1962) 203 Cal. App. 2d 191, 194, 201-204, 21 Cal. Rptr. 293*

[2] Conditions Subsequent

When deed conveyed gift of land to city to be used as nature reserve and stated that if land were not so used, city would forfeit its interest in favor of a third party, deed granted fee simple subject to a condition subsequent rather than create a charitable trust. *City of Palm Springs v. Living Desert Reserve (1999) 70 Cal. App. 4th 613, 622, 82 Cal. Rptr. 2d 859*

Right of reentry if property used for other than residential use was personal when it did not specify land to be benefited and did not meet statutory standards for creation of covenant running with land or contain a common neighborhood plan. *McCaffrey v. Preston (1984) 154 Cal. App. 3d 422, 436-437, 201 Cal. Rptr. 252*

Extrinsic evidence is not admissible to clarify latent ambiguity in terms of reversion condition; thus, showing of latent ambiguity is insufficient to survive demurrer in action by party asserting reversion provision; if language in deed will bear reasonable construction that will avoid reversion, that construction must be adopted. *Springmeyer v. City of South*

Lake Tahoe (1982) 132 Cal. App. 3d 375, 381-382, 183 Cal. Rptr. 43

Clear expression of intent as to when reversion occurs is required, and interpretation avoiding reversion is favored. *Springmeyer v. City of South Lake Tahoe (1982) 132 Cal. App. 3d 375, 380-381, 183 Cal. Rptr. 43*

Restriction drafted as condition subsequent with power of termination in grantor is normally enforceable on behalf of grantor or grantor's transferee unless it is shown that changed circumstances make such enforcement inequitable. *MacDonald Properties, Inc. v. Bel-Air Country Club (1977) 72 Cal. App. 3d 693, 699, 140 Cal. Rptr. 367*

Common law rule that one cannot reserve interest in property to stranger to title has been abandoned; although in some cases balancing of competing interests may warrant application of common law rule to presently existing deeds, it could not defeat reservation in favor of church of easement for parking purposes during church hours. *Willard v. First Church of Christ, Scientist (1972) 7 Cal. 3d 473, 476-479, 102 Cal. Rptr. 739, 498 P.2d 987*

[3] Covenants Running With Land

If declaration establishing common plan for ownership of property in subdivision and containing restrictions on use of property as part of the common plan is recorded before execution of sales agreement for any land in subdivision and satisfies other specified requirements, subsequent purchasers who have constructive notice of recorded declaration are deemed to intend and agree to be bound by common plan; rule applies to covenants running with the land and equitable servitudes. *Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 355, 47 Cal. Rptr. 2d 898, 906 P.2d 1314*

Deed restriction recorded with final subdivision map requiring all the units in housing projects to be affordable to very low, low, and moderate income households provided constructive notice to subsequent purchasers that their properties, if sold, had to be affordable to persons of very low to moderate incomes. *Alfaro v. Community Housing Improvement System & Planning Assn., Inc. (2009) 171 Cal. App. 4th 263, 281, 89 Cal. Rptr. 3d 659*

Covenant was not enforceable against bona fide purchaser with no knowledge of covenant, even though covenant was recorded after purchase. *Reiner v. Danial (1989) 211 Cal. App. 3d 682, 689-690, 259 Cal. Rptr. 570*

Covenant running with land as required to meet statutory requirements in effect when covenant was created; *Civ. Code § 1468* as not applicable retroactively. *Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 174-175, 195 Cal. Rptr. 14* ; *Taormina Theosophical Community, Inc. v. Silver (1983) 140 Cal. App. 3d 964, 972 n. 3, 190 Cal. Rptr. 38*

Deed restrictions burdening grantee's land as not enforceable against remote grantees because restrictions were created before 1969 amendment to *Civ. Code § 1468*; preamendment statute as authorizing running covenants only when they burden grantor's land or were made between two landowners. *Taormina Theosophical Community, Inc. v. Silver (1983) 140 Cal. App. 3d 964, 968, 972 n. 3, 190 Cal. Rptr. 38*

[4] Equitable Servitudes

If declaration establishing common plan for ownership of property in subdivision and containing restrictions on use of property as part of the common plan is recorded before execution of sales agreement for any land in subdivision and satisfies other specified requirements, subsequent purchasers who have constructive notice of recorded declaration are deemed to intend and agree to be bound by common plan; rule applies to equitable servitudes and covenants running with the land. *Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 355, 47 Cal. Rptr. 2d 898, 906 P.2d 1314*

Formal requirements of restrictions that operate to create equitable servitudes. *Werner v. Graham (1919) 181 Cal. 174, 179-186, 183 P. 945* (no valid servitudes created); *Terry v. James (1977) 72 Cal. App. 3d 438, 442-443, 140 Cal. Rptr. 201*

Condition that landscaping be approved by lessor was unenforceable by lessee who was allegedly damaged by another lessee's trees blocking sunlight. *Sher v. Leiderman (1986) 181 Cal. App. 3d 867, 885-888, 226 Cal. Rptr. 698*

Restrictive covenant enforceable was equitable servitude even though not in deed when purchaser had actual notice of covenant. *Mackinder v. OSCA Development Co. (1984) 151 Cal. App. 3d 728, 735-737, 198 Cal. Rptr. 864*

Unenforceable restrictive covenant in lease enforceable was equitable servitude when in written lease and party against whom it was to be enforced had actual notice of covenant. *Hudson Oil Co. v. Shortstop (1980) 111 Cal. App. 3d 488, 493, 496-497, 168 Cal. Rptr. 801*

Equitable servitude or building restriction is encumbrance that is eliminated by foreclosure of senior lien. *Sain v. Silvestre (1978) 78 Cal. App. 3d 461, 475, 144 Cal. Rptr. 478* (disapproved on another point in *Reynolds Metals Co. v. Alperson (1979) 25 Cal. 3d 124, 129, 158 Cal. Rptr. 1, 599 P.2d 83*)

Third-party beneficiary theory is no substitute for creation of mutual equitable servitudes pursuant to general plan of building development. *Terry v. James (1977) 72 Cal. App. 3d 438, 445-446, 140 Cal. Rptr. 201* ; *Trahms v. Starrett (1973) 34 Cal. App. 3d 766, 772, 110 Cal. Rptr. 239*

Action to enjoin other owners of development from violating restriction relating to interference with view does not state cause of action when restriction reserved to grantor sole right to determine whether proposed structure would constitute interference with view. *Trahms v. Starrett (1973) 34 Cal. App. 3d 766, 770, 110 Cal. Rptr. 239*

Deed lacking language to indicate it was part of general plan for common benefit of designated larger tract did not create equitable easement either in lands retained by seller or those later to be conveyed. *Ross v. Harootunian (1967) 257 Cal. App. 2d 292, 295, 64 Cal. Rptr. 537*

[5] Homeowners' Associations

Covenants, conditions, and restrictions requiring that addition of eight trees to lot be submitted to architectural review committee were enforceable on showing by homeowner's association that it followed its own standards and procedures, that procedures were fair, and that substantive decision was made in good faith and was reasonable. *Ironwood Owners Assn. IX v. Solomon (1986) 178 Cal. App. 3d 766, 771-773, 224 Cal. Rptr. 18*

Summary judgment was properly granted in favor of subdivision homeowners challenging assessment by corporation authorized to enforce declaration of protective restrictions when assessment was for purpose of financing action against city to abate noise from nearby airport and restrictions were concerned only with activities carried on property. *Spitser v. Kentwood Home Guardians (1972) 24 Cal. App. 3d 215, 218-220, 100 Cal. Rptr. 798*

[6] Interpretation of Restrictive Covenants

Covenants, conditions, and restrictions in contracts of members of homeowners association are interpreted to give effect to main purpose of contract; when contract is susceptible of two meanings, courts are required to construe contract to make it lawful, operative, definite, reasonable, and capable of being carried into effect. *Battram v. Emerald Bay Community Ass'n (1984) 157 Cal. App. 3d 1184, 1189, 204 Cal. Rptr. 107* (provision allowing change of method in

membership fee assessment only by unanimous vote conflicted with main purpose of contract due to effect of Cal. Const., art. XIIIA, § 1)

Reasonable interpretation of restrictive covenant was suspect to change with time, circumstances, and evolution of public policy; subsequent legislative enactment signaled change in public policy justifying change in reasonable interpretation of covenant despite fact that legislation did not directly affect covenant. *Welsch v. Goswick (1982) 130 Cal. App. 3d 398, 405-407, 181 Cal. Rptr. 703*

Restrictive covenant is interpreted against person seeking enforcement, but intent of parties governs so as to give instrument just and fair interpretation. *White v. Dorfman (1981) 116 Cal. App. 3d 892, 897, 172 Cal. Rptr. 326*

Split-level dwelling did not violate of restrictive covenant that proscribed dwelling with more than one floor above ground because ground floor was not basement garage but was low split-level [*Smith v. North (1966) 244 Cal. App. 2d 245, 247-249, 53 Cal. Rptr. 94]* .

[7] Restrictive Covenant as Property Right

Restrictive covenant is property for purposes of eminent domain and therefore condemning agency is required to compensate landowners for any use of condemned property that violates covenant. *Southern Cal. Edison v. Bourgerie (1973) 9 Cal. 3d 169, 170-171, 107 Cal. Rptr. 76, 507 P.2d 964*

Private use restriction is not taken into account when determining property tax assessment even if it adversely affects property value. *Carlson v. Assessment Appeals Bd. I (1985) 167 Cal. App. 3d 1004, 1008-1010, 213 Cal. Rptr. 555*

[8] Types of Restrictions Enforced

Deed restriction that ensured residential property would remain affordable to very low, low, and moderate income households as long as restriction was beneficial was reasonable restraint on alienation. *Alfaro v. Community Housing Improvement System & Planning Assn., Inc. (2009) 171 Cal. App. 4th 263, 286, 89 Cal. Rptr. 3d 659*

Provision in development's CC&Rs that "No fences or hedges exceeding three feet in height shall be erected or permitted to remain between the street and the front set-back line nor shall any tree, shrub or other landscaping be planted or any structures erected that may at present or in the future obstruct the view from any other lot ..." prohibited homeowners from building additions on homes that would unreasonably interfere with other homeowners' views. *Zabrucky v. McAdams (2005) 129 Cal. App. 4th 618, 629, 28 Cal. Rptr. 3d 592*

Covenants, conditions, and restrictions that impose reasonable restrictions on solar energy systems are valid under *Civ. Code § 714* if restrictions do not significantly increase cost of system or significantly decrease its effectiveness. *Palos Verdes Homes Assn. v. Rodman (1986) 182 Cal. App. 3d 324, 327-328, 227 Cal. Rptr. 81*

Covenants, conditions, and restrictions requiring that addition of eight trees to lot be submitted to architectural review committee were enforceable on showing by homeowner's association that it followed its own standards and procedures, that procedures were fair, and that substantive decision was made in good faith and was reasonable. *Ironwood Owners Assn. IX v. Solomon (1986) 178 Cal. App. 3d 766, 771-773, 224 Cal. Rptr. 18*

Recorded covenant restricting land to use as golf course for benefit of neighboring development was enforceable as covenant and as equitable servitude by imposing equitable lien on land in amount of benefits lost by inhabitants of development. *Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 174-178, 195 Cal. Rptr. 14*

Restrictive covenant by which developer of industrial park retained right to disapprove projects that would adversely affect or compete with existing projects was valid. *Samuelson National v. Kaiser-Aetna (1979) 99 Cal. App. 3d 553, 557-559, 160 Cal. Rptr. 395*

Restriction prohibiting any improvement that would "unreasonably obstruct" view from other lots was not so vague or uncertain as to preclude enforcement of restriction. *Seligman v. Tucker (1970) 6 Cal. App. 3d 691, 693, 697-699, 86 Cal. Rptr. 187*

Part-time use of home for operation of beauty parlor in violation of residential restrictive covenants was properly enjoined even though there was no advertisement of services, external evidence of activities, or inconvenience caused to any of the neighbors. *Biagini v. Hyde (1970) 3 Cal. App. 3d 877, 880-881, 83 Cal. Rptr. 875*

[9] Violation of Civil and Constitutional Rights

Health & Safety Code § 1597.40(c), providing that family day care centers are residential uses and permitted in all areas zoned for residential use, bars restrictive covenants made prior to enactment of statute. *Barrett v. Dawson (1998) 61 Cal. App. 4th 1048, 1054, 71 Cal. Rptr. 2d 899*

Enforcement of covenant whose intent is simply to prohibit commercial uses, rather than to bar particular users, does not constitute age discrimination under Unruh Civil Rights Act (*Civ. Code § 51*) or violation of constitutional right of privacy. *Barrett v. Lipscomb (1987) 194 Cal. App. 3d 1524, 1533-1534, 240 Cal. Rptr. 336* (upholding application of residential-only restriction against operator of residential care facility for disabled people and seniors)

Public policy in favor of community care facilities does not constitute grounds to prevent enforcement of "private residences" restriction against operator of commercial residential care facility because *Health & Safety Code § 1566.5* expressly preserves validity of preexisting covenants. *Barrett v. Lipscomb (1987) 194 Cal. App. 3d 1524, 1526-1527, 1531-1532, 240 Cal. Rptr. 336* (questioning *Welsch v. Goswick (1982) 130 Cal. App. 3d 398, 181 Cal. Rptr. 703*)

Covenants, conditions, and restrictions that limited number of residents to three without reference to square footage violated owner's right to privacy; requisite state action existed when CC&Rs were required for conditional use permit by city. *Park Redlands Covenant Control Committee v. Simon (1986) 181 Cal. App. 3d 87, 95-99, 226 Cal. Rptr. 199*

Covenants, conditions, and restrictions that discriminate against persons under 45 in facilities not designed for elderly persons violate *Civ. Code § 53*. *Park Redlands Covenant Control Committee v. Simon (1986) 181 Cal. App. 3d 87, 93-95, 226 Cal. Rptr. 199*

Restrictive covenant limiting sale to one who had been member of Theosophical Society for 3 years and who was over 50 years of age as not enforceable because it was unreasonable restraint on alienation and violated *Civ. Code § 53*. *Taormina Theosophical Community, Inc. v. Silver (1983) 140 Cal. App. 3d 964, 970-977, 190 Cal. Rptr. 38*

Even though *Health & Safety Code § 1566.5* (operation of residential care facilities) expressly preserves validity of pre-existing covenants, enforcement of residential-only restriction to prevent operation of care facility in housing developments was properly withheld on public policy grounds; statute constituted strong statement of public policy in favor of broad interpretation of single-family residential use in area of community care facilities *Welsch v. Goswick (1982) 130 Cal. App. 3d 398, 406-407, 181 Cal. Rptr. 703*

Welf. & Inst. Code §§ 5115, 5116, providing that use of property for care of six or fewer mentally retarded persons is residential use for purposes of zoning, did not impair enforceability of recorded deed restriction limiting tract to

single-family dwellings for residential use; enforcement of restriction did not unconstitutionally discriminate against mentally retarded because restrictions aimed at commercial aspect of defendant's activity. *Seaton v. Clifford (1972) 24 Cal. App. 3d 46, 50-52, 100 Cal. Rptr. 779*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewReal Property LawEstatesFuture InterestsRight of EntryReal Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With LandReal Property LawRestrictive CovenantsSubdivisions

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§ 184.135 Law Reviews

Korngold, *Single Family Use Covenants: For Achieving a Balance Between Traditional Family Life and Individual Autonomy, 22 U.C. Davis L. Rev. 951 (1989)*

Comment, *Termination of Servitudes: Expanding the Remedies for Changed Conditions, 31 UCLA L. Rev. 226 (1983)*

French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands, 55 So. Cal. L. Rev. 1261 (1982)*

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Comment, *Equitable Servitudes: A Rule of Property in Need of a Rule of Reason, 10 Pacific L.J. 905 (1979)*

Note, *Covenants and Equitable Servitudes in California, 29 Hastings L.J. 545 (1978)*

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Newman and Losey, *Covenants Running With the Land, and Equitable Servitudes; Two Concepts, or One, 21 Hastings L.J. 1319 (1970)*

Comment, *Covenants: California's New Legislative Approach to Covenants Running With the Land, 9 Santa Clara Lawyer 285 (1969)*

Note, *Real Property: Restrictive Covenants: Equitable Servitudes and Changing Conditions, 2 Santa Clara Lawyer 86 (1962)*

Burby, *Land Burdens in California: Equitable Land Burdens, 10 So. Cal. L. Rev. 281 (1937)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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15-184 California Forms of Pleading and Practice--Annotated § 184.136

§ 184.136 Text References

Powell on Real Property, Vol. 5, Ch. 60, *Covenants Respecting the Use of Land*, §§ 672, 676 (Matthew Bender)

Bowman, Ogden's Revised California Real Property Law (Cal CEB 1975), Vol. 2, Ch. 23, *Covenants, Conditions, and Restrictions*

Witkin, Summary of California Law, Vol. 12, *Real Property*, §§ 18-21, 431-457 (10th ed. 2005)

Miller & Starr, Current Law of California Real Estate, Chs. 22, 25, *Covenants, Conditions, and Restrictions* (Bancroft-Whitney 2nd ed. 1990)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawRestrictive CovenantsGeneral OverviewReal Property LawRestrictive CovenantsCovenants Running With Land

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[Reserved]

§§ 184.137[Reserved]

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Volume 15: Costs and Attorney's Fees thru Deeds-Chs. 174-189
Chapter 184 DEEDS
PART IV. FORMS
A. Transfer By Deed

15-184 California Forms of Pleading and Practice--Annotated § 184.150

§ 184.150 Complaint for Cancellation [Civ. Code § 3412] of Deed and to Quiet Title [Code Civ. Proc. §§ 760.010-764.080] to Real Property--General Form

[1] FORM Complaint for Cancellation [Civ. Code § 3412] of Deed and to Quiet Title [Code Civ. Proc. §§ 760.010-764.080] to Real Property--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s) of known defendant(s)*] [*if unknown defendants are included, add:*; and all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to Plaintiff's title, or any cloud on Plaintiff's title thereto] [; and DOES I-_____, inclusive],	)	COMPLAINT FOR CANCELLATION OF DEED AND TO QUIET TITLE TO REAL PROPERTY
Defendant(s).		

_____

Plaintiff alleges:

FIRST COUNT

(Cancellation of Deed)

[1. Plaintiff, _____ (*name*), is, and at all times herein mentioned was, _____ (*specify entity if other than natural person, e.g.,* a national banking association incorporated under the laws of the United States, engaged in doing business as a trust company in the State of California with its principal place of business in the County of _____,) _____ (*specify special capacity, if any, in which plaintiff sues, e.g.,* and executor of the estate of _____ (*name*), deceased).]

[2. Defendant, _____ (*name*), is, and at all times mentioned in this complaint was, _____ (*specify entity if any defendant is other than natural person, e.g.,* a national banking association incorporated under the laws of the United States, engaged in doing business as a trust company in the State of California with its principal place of business in the County of _____,) _____ (*specify special capacity, if any, in which defendant is sued, e.g.,* and executor of the estate of _____ (*name*), deceased).]

[3. Defendants DOES I-_____, inclusive, are sued in this complaint under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities in this complaint. Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants claim some right, title, estate, lien, or interest in the described property adverse to plaintiff's title; that each of them is responsible in some manner for the (threatened) wrongful conduct alleged; and that their claims, and each of them, constitute a cloud on plaintiff's title to that property.]

4. There is in existence a certain written instrument that purports to be a deed to certain real property located in the County of _____, described in the deed. The form and contents of the purported deed are _____ [as set out in the copy of it that is attached hereto as Exhibit A and made a part of this complaint *or* as follows: _____ (*set out instrument verbatim, following its form as closely as possible*)]. The purported deed is _____ [in the possession *or* under control] of defendant.

5. _____ [*Allege facts making deed void or voidable against plaintiff, e.g.,* Plaintiff did not on _____ (*date*), or at any other time, make, sign, or acknowledge the purported deed or authorize any person or persons to do so. Plaintiff is, and at all times mentioned was, the owner of the land purported to be conveyed by the deed].

6. _____ [*Allege facts showing a reasonable apprehension that if left outstanding the instrument may cause serious injury to plaintiff, e.g.,* On _____ (*date*), the purported deed was recorded in the Official Records of the County of _____, Book/Reel _____, page/image _____. On or about _____ (*date*), defendant _____ (*name*) listed the property with a licensed broker for sale. If the recorded deed is left outstanding, plaintiff may lose his/her/its property to a purchaser from defendant _____ (*name*) for value and without notice of the deed's invalidity].

[*If offering to restore consideration, allege EITHER*]

[7. Plaintiff offers to restore all consideration furnished by defendant _____ (*name*) for the purported deed, on condition that defendant _____ (*name*) deliver the deed to the court for cancellation.]

[*OR*]

[7. On or about _____ (*date*), plaintiff offered to restore to defendant _____ (*name*) all consideration given by him/her on condition that defendant _____ (*name*) reconvey to plaintiff the land described in the purported deed. Defendant _____ (*name*) refused, and continues to refuse, to reconvey the property.]

[*CONTINUE*]

[8. _____ (*Allege facts establishing a basis for a claim for damages as additional relief, if any, e.g.,* On _____ (*date*), plaintiff was dispossessed of the above-described property by defendant _____ (*name*) claiming title under the deed that purportedly conveyed the property to defendant _____ (*name*). As a result of such dispossession, plaintiff was deprived of the rent on the premises at the rate of $_____ per month, from _____, to _____ (*dates*)).]

[9. _____ (*Allege facts establishing a basis for a claim for exemplary damages, if any, e.g.,* The conduct of defendant(s, and each of them,) in procuring the (forged) deed (and dispossessing plaintiff of the property) was willful and was intended to injure plaintiff and to deprive plaintiff of the property purportedly conveyed by the deed. Plaintiff therefore seeks exemplary and punitive damages in the sum of $_____.]

SECOND COUNT

(Quiet Title)

10. Plaintiff refers to and herein incorporates Paragraphs 1-8, inclusive, of the First Count.

11. Plaintiff is, and at all times herein mentioned was, the owner in fee simple and in possession and control of that real property situated in _____ County, known as _____ [*street address*], _____ [*city*], California, and more particularly described as follows: _____ [*legal description*].

12. The basis of plaintiff's title is _____ [*describe basis of plaintiff's title, e.g.,* a deed from _____ (*name of grantor*) granting the above-described property in fee simple to plaintiff dated _____ (*date*), and recorded in the Official Records of the County of _____, Book/Reel _____, page/image _____].

13. Plaintiff is seeking to quiet title against the claims of defendant(s) as follows: defendant(s) _____ [*name(s) of the named defendant(s)*], who claims/claim some right, title, estate, lien, or interest in and to the lands of plaintiff as described in this complaint, based on the purported deed described in Paragraph 4 [_____ (*continue with whichever are applicable:*; the claims of the successor defendants described in Paragraph _____; the claims of all unknown defendants described in Paragraph 14, whether or not the claim or cloud is known to plaintiff; and the unknown, uncertain, or contingent claim, if any, of _____ (*name*) more fully described in Paragraph 15)]. Defendant's (Defendants') claim(s) is/are without any right whatever and that/those defendant(s) has/have no right, title, estate, lien, or interest whatever in the above-described property, or any part of that property[, except the following: _____ (*set forth any claims of which plaintiff admits the validity, e.g.,* the utility easement held by Pacific Gas and Electric Company)].

[14. *If "all persons unknown" are named as defendants, allege:* The defendants named as "all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to

plaintiff's title, or any cloud on plaintiff's title thereto" (sometimes referred to as "the unknown defendants") are unknown to plaintiff. These unknown defendants, and each of them, claim some right, title, estate, lien, or interest in the previously described property adverse to plaintiff's title; and their claims, and each of them, constitute a cloud on plaintiff's title to that property.]

[15. *If the claim of a named defendant is unknown, uncertain, or contingent, allege:* The claim of _____ (*name of defendant*) is _____ (unknown *or* uncertain *or* contingent). *If the lack of knowledge, uncertainty, or contingency is caused by a transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, a vested remainder subject to defeasance, an executory interest, or a similar disposition, allege:* _____ (*Name*), age _____, is the person who would be entitled to an adverse claim if _____ (*describe contingency*) had occurred prior to the commencement of this action. *If the person is subject to a legal disability, allege:* The person is subject to _____ (*specify legal disability*).]

[16. *In a case governed by Code Civ. Proc. § 318, allege:* Plaintiff was _____ (seized *or* possessed) of the above-described property within five years of the commencement of this action.]

17. Plaintiff seeks to quiet title as of _____ [*date*]. [*If the date is a date other than the date the complaint is filed, allege why a determination as of that date is sought.*]

WHEREFORE, plaintiff prays judgment against defendants as follows:

On the FIRST COUNT:

1. For a declaration that the purported deed is void;

2. That defendant deliver the purported deed forthwith to the clerk of the court for cancellation;

[3. For damages in the sum of $_____;]

[4. For exemplary or punitive damages in the sum of $_____;]

On the SECOND COUNT:

5. For a judgment that plaintiff is _____ [*specify interest claimed, e.g.,* the owner in fee simple] of the property and that defendant(s) has/have no interest in the property adverse to the plaintiff;

On all COUNTS:

6. For costs of suit herein incurred; and

7. For such other further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents of the complaint. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature*]

CAUTION:

This form does not contain any allegations regarding defendants who are personal representatives [*Code Civ. Proc. § 762.030(a)*] or heirs and intestate or testate successors [*Code Civ. Proc. § 762.030(b)*] of persons known or believed by the plaintiff to be deceased. If those defendants are necessary in your particular situation, use the appropriate allegations from Ch. 482, *Quieting Title*.

[2] Use of Form

This form is a complaint that may be used to obtain cancellation of a deed that is void or voidable against the plaintiff and to determine the adverse claim asserted under the deed [*see Civ. Code § 3412*]. A "claim" includes a legal or equitable right, title, estate, lien, or interest in property or cloud on title [*Code Civ. Proc. § 760.010(a)*]. A plaintiff who intends to add a quiet title count naming unknown persons as defendants may wish to obtain a title report before commencing the action, because an examination of the record title and an inspection of the property will be necessary [*see Code Civ. Proc. § 762.060(b)*]. Also, the court may order plaintiff to obtain a title report and keep it available for inspection and copying by the parties [*Code Civ. Proc. § 762.040(b)*].

[3] Allegations

[a] Single Cause of Action

If there is a reasonable apprehension that a deed left outstanding may cause serious injury to a person against whom it is void or voidable, the deed may, on that person's application, be so adjudged and ordered to be delivered up or canceled [*Civ. Code § 3412*; *see Zakaessian v. Zakaessian (1945) 70 Cal. App. 2d 721, 724-725, 161 P.2d 677* (sufficiency of allegations to state cause of action for cancellation of deed)].

An action to quiet title may be brought to establish title against adverse claims to real property [*Code Civ. Proc. § 760.020(a)*].

A complaint seeking both to quiet title and to cancel the deed under which the defendant claims an interest in and to realty states only one cause of action, even if set out as multiple counts in the complaint [*Kejr v. Construction Engineers, Inc. (1952) 111 Cal. App. 2d 817, 819, 245 P.2d 21]* . Further, when the count to quiet title depends on the factual allegations of the count to cancel a deed, as in this form, the complaint will stand or fall on the sufficiency of the allegations in the cancellation count [*Leeper v. Beltrami (1959) 53 Cal. 2d 195, 214, 1 Cal. Rptr. 12, 347 P.2d 12* ; *Ephraim v. Metropolitan Trust Co. (1946) 28 Cal. 2d 824, 833, 172 P.2d 501]* .

For clarity, this form of complaint is set out as one cause of action in two counts, one for cancellation and one to quiet title. Although both forms of relief are generally sought, there may be situations in which counsel would not wish to seek the further relief to be obtained by the quiet title count. In that case, the second count may be omitted. Chapter 107,

Cancellation of Instruments, may be consulted for a general form for cancellation of a written instrument.

[b] Cancellation

[i] Elements

The first count of this complaint alleges all of the following:

- The identity and capacity of the plaintiff, to be included if the plaintiff is not a natural person suing in his or her own behalf (Paragraph 1) [*see Parker v. Bowron (1953) 40 Cal. 2d 344, 350-352, 254 P.2d 6]* ;

- The identity and capacity of the defendant, to be included if the defendant is not a natural person or is sued in a particular capacity (Paragraph 2) [*see Katleman v. First Nat'l Bank of Nevada (1963) 212 Cal. App. 2d 520, 524, 28 Cal. Rptr. 135* (discharged executor is not subject to suit in representative capacity); *Tanner v. Best (1940) 40 Cal. App. 2d 442, 445, 104 P.2d 1084* (requirement of naming existing entity as defendant)];

- Plaintiff's ignorance of the names of defendants designated by fictitious names (Paragraph 3) [*Code Civ. Proc. § 474*];

- The existence of the purported deed and that it is in the possession or under the control of the defendant (Paragraph 4) [*see Consol. Concessions Co. v. McConnell (1919) 40 Cal. App. 443, 445, 180 P. 842]* ;

- Facts showing the deed's actual invalidity (Paragraph 5) [*Civ. Code § 3412*; *see Hughes v. Beekley (1927) 85 Cal. App. 313, 316, 259 P. 337]* ;

- Facts showing a reasonable apprehension that if left outstanding the deed may cause serious injury to plaintiff (Paragraph 6) [*Civ. Code § 3412*];

- An offer to restore consideration received for the deed (Paragraph 7) [*see § 184.150[3][b][iii]*];

- Facts establishing a basis for a claim for damages as additional relief (Paragraph 8); and

- Facts establishing a basis for a claim for exemplary or punitive damages (Paragraph 9) [*Civ. Code § 3294*; *see § 184.190[9]*].

For further discussion of the allegations necessary to state a cause of action for cancellation of a written instrument, see Ch. 107, *Cancellation of Instruments* .

[ii] Multiple Grounds of Invalidity

If more than one ground of invalidity exists, each of them must be alleged in separate counts, even if inconsistent [*Dryer v. Dryer (1964) 231 Cal. App. 2d 441, 446, 41 Cal. Rptr. 839* ; *Little v. Smith (1920) 47 Cal. App. 8, 12-15, 189 P. 1059* ; *see North Confidence Mining & Dev. Co. v. Morrice (1922) 56 Cal. App. 145, 147, 204 P. 851]* . For additional forms of allegation relating to other grounds of invalidity, see *§§ 184.151 -184.156*.

[iii] Restoration of Value Received

As a condition of obtaining cancellation of a voidable deed, the party seeking relief is generally required to restore or

offer to restore to the defendant everything of value received in the underlying transaction. However, if the deed is void, as in the case of fraud in the execution or forgery, restoration is not necessary [*see Fleming v. Kagan (1961) 189 Cal. App. 2d 791, 796, 797, 11 Cal. Rptr. 737* (action to cancel note, deed of trust, and contract of sale)]. If the complaint clearly shows that the plaintiff has suffered damages in the transaction equal to or in excess of the sum that would have to be restored to the defendant, the plaintiff need not restore or offer to restore what was received from the defendant [*Peterson v. Wagner (1921) 52 Cal. App. 1, 12, 198 P. 25* (action to cancel contracts of sale); *see* Ch. 107, *Cancellation of Instruments*].

[iv] Rescission of Underlying Contract

In some cases, the right to cancel the deed depends on the right to rescind the underlying contract [*see, e.g., Leeper v. Beltrami (1959) 53 Cal. 2d 195, 211-216, 1 Cal. Rptr. 12, 347 P.2d 12]* . In these situations, a cause of action for rescission should be included in the complaint. For a discussion and forms for use in an action to rescind a contract, see Ch. 490, *Rescission and Restitution* .

[v] Damages

In an action for cancellation, the court may grant any relief consistent with the case made by the plaintiff and embraced within the issues, including any monetary relief necessary to do complete equity between the parties [*Wright v. Rogers (1959) 172 Cal. App. 2d 349, 367, 342 P.2d 447* ; *see Oswald v. City of El Centro (1930) 211 Cal. 45, 52, 292 P. 1073* (damages of rental value for term that owner deprived of possession because coerced into executing lease)]. Exemplary or punitive damages may also be recovered if the defendant has been guilty of oppression, fraud, or malice [*Civ. Code § 3294; Wright v. Rogers (1959) 172 Cal. App. 2d 349, 368, 342 P.2d 447* (exemplary or punitive damages available in action for cancellation when restitution would have little or no deterrent effect)].

[c] Quieting Title

[i] Elements

By statute, a quiet title complaint must include all of the following allegations:

- A description of the property that is the subject of the action. In the case of real property, the description must include both its legal description and its street address or common designation, if any (Paragraph 11) [*Code Civ. Proc. § 761.020(a)*]. This requirement does not preclude the joinder of several properties or of real and personal property, if appropriate (Paragraph 11) [15 Calif. L. Rev. Comm. 1198 (1979)].

- The title of the plaintiff as to which a determination is sought and the basis of the title (Paragraphs 11, 12) [*Code Civ. Proc. § 761.020(b)*].

- The adverse claims to the title of the plaintiff against which a determination is sought (Paragraphs 13-15) [*Code Civ. Proc. § 761.020(c)*]. If the plaintiff admits the validity of any adverse claim, the complaint must so state (Paragraph 13) [*Code Civ. Proc. § 762.060(c)*]. If the claim or the share or quantity of the claim of a person required to be named as a defendant is unknown, uncertain, or contingent, the plaintiff must so state in the complaint. If the lack of knowledge, uncertainty, or contingency is caused by transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, a vested remainder subject to defeasance, an executory interest, or a similar disposition, the plaintiff must also state in the complaint, so far as is known to the plaintiff, the name, age, and legal disability, if any, of the person in being who would be entitled to the claim had the contingency on which the claim depends occurred before the commencement of the action (Paragraph 15) [*Code Civ. Proc. § 762.020(b)*].

- The date as of which the determination is sought. If the determination is sought as of a date other than the date the complaint is filed, the complaint must include a statement of the reasons why a determination as of that date is sought (Paragraph 17) [*Code Civ. Proc. § 761.020(d)*].

- A prayer for the determination of the title of the plaintiff against the adverse claims [*Code Civ. Proc. § 761.020(e)*].

Some cases consider a quiet title action to be one for the recovery of real property or its possession, and thus, subject to *Code Civ. Proc. § 318*, which requires the plaintiff to have been seized or possessed of the property within five years prior to commencement of the action (Paragraph 16) [*see Kenney v. Parks (1902) 137 Cal. 527, 530, 70 P. 556* ; *Schoenfeld v. Pritzker (1967) 257 Cal. App. 2d 117, 121, 64 Cal. Rptr. 592]* . That limitation period does not run against a party in possession [*Muktarian v. Barmby (1965) 63 Cal. 2d 558, 560, 47 Cal. Rptr. 483, 407 P.2d 659]* . More importantly, when quiet title is merely incidental relief sought to remedy some other wrong, the action is governed by laches or the limitation period applicable to the basic cause of action giving rise to plaintiff's right to relief [*Leeper v. Beltrami (1959) 53 Cal. 2d 195, 214, 1 Cal. Rptr. 12, 347 P.2d 12* ; *see § 184.150[4]*].

For a complete discussion of the allegations necessary to state a cause of action to quiet title to real property, see Ch. 482, *Quieting Title* .

[ii] Required Defendants

The plaintiff must name as defendants the persons having adverse claims to the title of the plaintiff against which a determination is sought [*Code Civ. Proc. § 762.010*]. If the name of a person required to be named as a defendant is not known to plaintiff, the plaintiff must so state in the complaint and must name as parties all persons unknown in the manner described in § 184.150[3][c][iii] [*Code Civ. Proc. § 762.020(a)*].

The court on its own motion may, and on motion of any party must, make any orders that appear appropriate for joinder of any additional parties as are necessary or proper [*Code Civ. Proc. § 762.040(a)*].

If a person required to be named as a defendant is dead and the plaintiff knows of a personal representative, the plaintiff must join the personal representative [*Code Civ. Proc. § 762.030(a)*]. If a person required to be named as a defendant is dead, or is believed by the plaintiff to be dead, and the plaintiff knows of no personal representative, the plaintiff must state these facts in an affidavit filed with the complaint [*Code Civ. Proc. § 762.030(b)(1)*; *see generally* Ch. 15, *Affidavits, Certificates, and Declarations*]. When it is stated in the affidavit that such person is dead, the plaintiff may join as defendants "the testate and intestate successors of _____ (*name of deceased person*), deceased, and all persons claiming by, through, or under such decedent," naming them in that manner [*Code Civ. Proc. § 762.030(b)(2)*].

If a person required to be named as a defendant is believed by plaintiff to be deceased, the person believed to be deceased may be named as a defendant as may that person's successors. The successors must be denominated as follows: "the testate and intestate successors of _____ (*name of person believed to be deceased*), believed to be deceased, and all persons claiming by, through, or under such person" [*Code Civ. Proc. § 762.030(b)(3)*].

[iii] Unknown Defendants

In addition to the persons required to be named as defendants in the action, the plaintiff may name as defendants "all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud upon plaintiff's title thereto," naming them in that manner (Paragraph 14) [*Code Civ. Proc. § 762.060(a)*]. If unknown defendants are named, the plaintiff must name as defendants the

persons having adverse claims that are of record or known to the plaintiff or reasonably apparent from an inspection of the property [*Code Civ. Proc. § 762.060(b)*]. Naming unknown defendants and serving them by publication [*see § 184.150[7]*] will entitle plaintiff to a judgment against all persons known and unknown who were parties to the action and all persons not parties to the action and unknown to plaintiff who had a claim that was not recorded when the lis pendens was filed [*Code Civ. Proc. § 764.030*], except that a person who is in open and actual possession of the property cannot be named as an unknown defendant [*Code Civ. Proc. § 763.010(c)*].

Some people also additionally designate testate and intestate successors and "all persons unknown" as DOES. That is not recommended because it differs from the statutory language of *Code Civ. Proc. §§ 762.030(b)(2), (3)* and *762.060*, by which those defendants are to be designated, and because it may limit the in rem effect of the judgment by limiting the number of adverse claimants in those classes [*see Code Civ. Proc. § 763.030(b)*]. However, fictitious defendants may be named as DOES pursuant to *Code Civ. Proc. § 474* [*see Code Civ. Proc. § 760.060* (rules governing civil actions generally as applicable in quiet title actions unless they are inconsistent with quiet title provisions)].

[4] Statute of Limitations and Laches

Various statutes of limitation have been held to apply to quiet title actions: *Code Civ. Proc. § 318* has been applied when the action is essentially one to recover real property or possession of real property; the four-year limitation of *Code Civ. Proc. § 434* has been applied when the action was to cancel a deed; and *Code Civ. Proc. § 338(d)* has been held applicable to an action for cancellation and recovery of real property on the theory that the gravamen of the action was considered fraud [*Leeper v. Beltrami (1959) 53 Cal. 2d 195, 212, 1 Cal. Rptr. 12, 347 P.2d 12]* . The current view is that it is ordinarily necessary to refer to the underlying theory of relief to determine which statute applies [*Muktarian v. Barmby (1965) 63 Cal. 2d 558, 560, 47 Cal. Rptr. 483, 407 P.2d 659* ; *Leeper v. Beltrami (1959) 53 Cal. 2d 195, 214, 1 Cal. Rptr. 12, 347 P.2d 12]* . When the right to quiet title depends on the right to cancellation, as in this form, the court will look to the basis of the right to cancellation to determine the appropriate statute of limitations [*Leeper v. Beltrami (1959) 53 Cal. 2d 195, 211-216, 1 Cal. Rptr. 12, 347 P.2d 12]* . For example, if the gravamen of the action is fraud, the three-year provision of *Code Civ. Proc. § 338(d)* applies, even if the relief prayed for is cancellation and the recovery of real property [*Turner v. Milstein (1951) 103 Cal. App. 2d 651, 659, 230 P.2d 25]* . If the right to cancellation depends on the right to rescind the underlying contract, the action must be brought promptly after discovery of the facts that entitle the plaintiff to rescind [*Leeper v. Beltrami (1959) 53 Cal. 2d 195, 215, 1 Cal. Rptr. 12, 347 P.2d 12* ; *see Civ. Code § 1691*].

If the party seeking to quiet title is in possession of the land, it is unnecessary to determine which statute would otherwise apply, because no statute of limitations runs against a party seeking to quiet title while the party is in possession of the property [*Muktarian v. Barmby (1965) 63 Cal. 2d 558, 561, 47 Cal. Rptr. 483, 407 P.2d 659]* . However, the one-year period of limitation on an action to set aside a deed to any taxing agency by reason of a tax delinquency [*Rev. & Tax. Code § 175*] applies even if the plaintiff is in possession [*Sears v. County of Calaveras (1955) 45 Cal. 2d 518, 521, 522, 289 P.2d 425]* . Additionally, the doctrine of laches may still bar the action to quiet title if the plaintiff's delay in bringing the action has prejudiced the adverse claimant [*Muktarian v. Barmby (1965) 63 Cal. 2d 558, 561, 47 Cal. Rptr. 483, 407 P.2d 659]* .

For the foregoing reasons, it may be necessary to insert additional allegations to establish that the action is not barred. For instance, it may be necessary to allege when the plaintiff discovered a particular fraud or mistake or other facts to show that the plaintiff acted soon after discovering the problem.

[5] Verification

The complaint must be verified [*Code Civ. Proc. § 761.020*].

[6] Jurisdiction and Venue

Because only the superior court has jurisdiction in quiet title actions [*Code Civ. Proc. § 760.040(a)*], a combined action to cancel a deed and quiet title must be brought in superior court. The action is not a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86, 580(b)(3)*]. Jurisdiction over actions for cancellation is discussed in Ch. 107, *Cancellation of Instruments* . Subject to the power of the court to transfer actions, the superior court in the county where the real property, or some part of it, is situated is the proper court for the trial of an action to cancel a deed and to quiet title to real property [*Code Civ. Proc. §§ 392(a), 760.050(a)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

[7] Service of Summons

The form, content, and manner of the service of summons in quiet title actions is the same as in civil actions generally [*Code Civ. Proc. § 763.010(a)*]. If unknown defendants are named, there must also be service by publication and posting [*Code Civ. Proc. § 763.010(b)*]. The requirements for service by publication and posting are discussed in Ch. 482, *Quieting Title* . The procedure for service of summons is set forth in Ch. 518, *Service of Summons and Papers* .

[8] Lis Pendens

Immediately on the commencement of a quiet title action, which occurs by filing the complaint, the plaintiff must file a lis pendens in the office of the county recorder of each county in which any real property described in the complaint is located [*Code Civ. Proc. § 761.010(a)*]. The lis pendens gives constructive notice of the pendency of the action to subsequent purchasers or encumbrancers [*Code Civ. Proc. § 405.24*]. For forms of lis pendens, see Ch. 348, *Lis Pendens* .

[9] Cross References

For a discussion and forms relating to amendment of pleadings for use when an unknown defendant is sued by a fictitious name, see Ch. 21, *Amended and Supplemental Pleadings*

For a discussion and procedures for use in an action for cancellation of a written instrument, and for forms of allegations for use in such an action where the rescission of the underlying transaction is sought or where facts are discovered making the deed voidable, as well as of a form of judgment for cancellation of a deed, see Ch. 107, *Cancellation of Instruments*

For a discussion and alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For a discussion of and forms for use in seeking injunctive relief in connection with an action for cancellation of a deed, see Ch. 303, *Injunctions*

For a discussion and procedures for use in actions to quiet title, and for forms of complaints for use in actions to quiet title to tax-deeded property and to quiet title against the United States and of an answer and judgment for use in quiet title actions, see Ch. 482, *Quieting Title*

[10] Decisions

[a] Jurisdiction

Actions to try title to real property are within jurisdiction of superior court. *Martin v. Pacific S.W. Royalties (1940) 41 Cal. App. 2d 161, 167, 106 P.2d 443*

[b] Quieting Title

General rule that fraud must be specifically pleaded applies to quiet title actions. *Moss Estate Co. v. Adler (1953) 41 Cal. 2d 581, 584, 261 P.2d 732*

[c] Statute of Limitations and Laches

No statute of limitations runs against party seeking to quiet title while party is in possession of property, although doctrine of laches may still bar action. *Muktarian v. Barmby (1965) 63 Cal. 2d 558, 560, 561, 47 Cal. Rptr. 483, 407 P.2d 659*

When right to quiet title depends on right to rescind, plaintiff must act promptly or is barred under *Civ. Code § 1691*. *Leeper v. Beltrami (1959) 53 Cal. 2d 195, 214, 1 Cal. Rptr. 12, 347 P.2d 12*

Plaintiff is required to prove seisin or possession pursuant to *Code Civ. Proc. § 318* when action for reformation of deed is merely incidental to action to quiet title based on plaintiff's adverse possession. *Safwenberg v. Marquez (1975) 50 Cal. App. 3d 301, 310, 311, 123 Cal. Rptr. 405*

Action to cancel deed on ground of nondelivery is governed by four-year period of limitation provided in *Code Civ. Proc. § 343*. *Estate of Pieper (1964) 224 Cal. App. 2d 670, 689, 37 Cal. Rptr. 46*

Action to cancel deed is generally governed by four-year period of limitation provided in *Code Civ. Proc. § 343*. *Zakaessian v. Zakaessian (1945) 70 Cal. App. 2d 721, 725, 161 P.2d 677*

Action to cancel deed is governed by three-year period of limitation provided in former *Code Civ. Proc. § 338(4)* (*now see Code Civ. Proc. § 338(d)*) when gravamen of action stated involves fraud or mistake. *Zakaessian v. Zakaessian (1945) 70 Cal. App. 2d 721, 725, 161 P.2d 677* ; *see* *Turner v. Milstein (1951) 103 Cal. App. 2d 651, 659, 230 P.2d 25*

[d] Venue

Action is transitory and proper county for trial is county in which defendants, or some of them, reside when primary purpose of action is to cancel note and deed of trust securing it, and action to quiet title is merely incidental thereto. *Nelson v. Crocker Nat'l Bank (1975) 51 Cal. App. 3d 536, 540, 541, 124 Cal. Rptr. 229* ; *Vaughan v. Roberts (1941) 45 Cal. App. 2d 246, 253, 113 P.2d 884*

County in which real property or some part of it is situated as proper county for trial of action for cancellation of recorded contract conveying timber and to quiet title to real property. *Kejr v. Construction Engineers, Inc. (1952) 111 Cal. App. 2d 817, 819, 245 P.2d 21*

Action for cancellation of deed as involving determination of right or interest of plaintiff in real property, and venue as therefore in county in which real property or part of it is situated. *Stanley v. Barney (1932) 123 Cal. App. 139, 140-142, 10 P.2d 1022*

[11] Text References

Witkin, California Procedure, vol. 3, *Actions*, §§ 344-388, 459, 618 (4th ed. 1996); vol. 5, *Pleading*, §§ 613, 633 (4th ed. 1997)

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PART IV. FORMS
A. Transfer By Deed

15-184 California Forms of Pleading and Practice--Annotated § 184.151

§ 184.151 Allegation--Grantor Incompetent to Execute Deed [Civ. Code § 39]

[1] FORM Allegation--Grantor Incompetent to Execute Deed [Civ. Code § 39]

At the time the deed was executed, _____ [*name of grantor and designation, if any, e.g.,* plaintiff] was substantially unable to manage his or her own financial resources or resist fraud or undue influence and was otherwise of unsound mind.

[2] Use of Form

This form of allegation may be used to plead the invalidity of a deed due to the grantor's incapacity to execute it [*see § 184.17*]. The allegation in this form may be substituted for Paragraph 5 of § 184.150 or included in a separate count.

[3] State Statutes

Conveyance by person of unsound mind but not entirely without understanding is subject to rescission. *Civ. Code § 39(a)*

Rebuttable presumption affecting burden of proof that person is of unsound mind exists if person is substantially unable to manage his or her own financial resources or resist fraud or undue influence. *Code Civ. Proc. § 39(b)*

[4] Decisions

Deed by grantor without mental capacity to execute conveyance as subject to cancellation. *Peterson v. Ellebrecht (1962) 205 Cal. App. 2d 718, 720, 721, 23 Cal. Rptr. 349*

[5] Cross References

For a related form, see *§ 184.150*.

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15-184 California Forms of Pleading and Practice--Annotated § 184.152

§ 184.152 Allegation--Deed Procured by Fraud [Civ. Code §§ 1571-1574]

[1] FORM Allegation--Deed Procured by Fraud [Civ. Code §§ 1571-1574]

1. On or about _____ [*date*], defendant falsely and fraudulently represented to plaintiff that _____ [*allege in exact language or as close to exact language as possible the statements of material fact or legal effect of the deed claimed by plaintiff to be false, e.g.,* by executing the deed it would not be necessary to probate plaintiff's estate in order to make defendant the owner of the property in the event of plaintiff's death before the death of defendant; that notwithstanding the execution of the grant deed, plaintiff would remain the owner of the property; and that defendant would not cause the deed to be recorded prior to plaintiff's death].

2. The representations made by defendant were in fact false. The true facts were: _____ [*specify*].

3. When defendant made these representations he/she knew them to be false, and these representations were made by defendant with the intent to defraud and deceive plaintiff and with the intent to induce plaintiff to execute the deed _____ [described above *or* attached hereto as Exhibit A].

[4. _____ (*Allege facts showing that defendant stood in a relation of trust and confidence to plaintiff or purported to have expert knowledge concerning the matter, e.g.,* Prior to and at the time the representations were made by defendant and the deed executed by plaintiff, defendant was plaintiff's wife and a practicing attorney, and plaintiff relied on defendant for business and legal advice).]

5. At the time these representations were made by defendant and at the time plaintiff executed the deed, plaintiff was ignorant of the falsity of defendant's representations and believed them to be true. In reliance on these representations, plaintiff was induced to and did execute the deed. Had plaintiff known the actual facts, he/she would not have executed the deed. Plaintiff's reliance on defendant's representations was justified because _____ [*specify, e.g.,* plaintiff had made no prior real estate transactions, was unfamiliar with the effect of a deed, had relied on defendant's expertise as an attorney, trusted defendant as plaintiff's wife and a knowledgeable attorney to truthfully advise plaintiff as to the effect of the deed, and believed that defendant would not cause the deed to be recorded prior to plaintiff's

death].

6. As a result of these representations, plaintiff has been and continues to be wrongfully deprived of the real property purportedly conveyed by the deed.

[2] Use of Form

This form of allegation may be used to plead actual fraud in the form of an intentional misrepresentation of fact or of the legal effect of a deed as grounds for cancellation of a deed. The allegation in this form may be substituted for Paragraph 5 of § 184.150 or included in a separate count. When the misrepresentation involves the legal effect of the deed, the bracketed allegation regarding the parties' relation of trust and confidence or that the defendant purported to have expert knowledge concerning the matter should be included [*see Steiner v. Steiner (1958) 160 Cal. App. 2d 665, 669, 670, 325 P.2d 109* ; *cf. Seeger v. Odell (1941) 18 Cal. 2d 409, 414, 115 P.2d 977* (action to set aside mortgage foreclosure sale and rescind oil lease procured by fraud)].

For a discussion and forms of allegations of fraud involving negligent misrepresentation of fact, suppression of fact, or a promise made without intention to perform, see Ch. 269, *Fraud and Deceit* . These forms may be adapted for use in alleging such alternate types of fraud as grounds for cancellation of a deed.

For a discussion and forms of allegations of constructive fraud, duress, menace, and mistake, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

[3] Allegations

The form alleges: (1) the false representations made by the defendant (Paragraph 1); (2) the falsity of the statements and the true facts (Paragraph 2); (3) that defendant knew of the falsity of the representations (Paragraph 3); (4) that the misrepresentations were made with the intent to deceive and defraud plaintiff and to induce plaintiff to execute the deed (Paragraph 3) [*cf. Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 811, 94 Cal. Rptr. 796, 484 P.2d 964* (tort action for fraud)]; (5) that defendant stood in a relationship of trust and confidence to plaintiff or purported to have expert knowledge concerning the legal effect of the deed, to be included if misrepresentations as to the legal effect of the deed are involved (Paragraph 4) [*see Steiner v. Steiner (1958) 160 Cal. App. 2d 665, 669, 670, 325 P.2d 109* ; *cf. Seeger v. Odell (1941) 18 Cal. 2d 409, 414, 115 P.2d 977* (action to set aside mortgage foreclosure sale and rescind oil lease procured by fraud)]; (6) actual and justifiable reliance by plaintiff on the misrepresentations (Paragraph 5); and (7) that plaintiff has been wrongfully deprived of the real property as a result of defendant's misrepresentations (Paragraph 6) [*cf. Seeger v. Odell (1941) 18 Cal. 2d 409, 414, 415, 417, 115 P.2d 977* (action to set aside mortgage foreclosure sale and rescind oil lease procured by fraud)].

For further discussion of the allegations necessary to plead fraud, see Ch. 269, *Fraud and Deceit* .

[4] Strict Pleading Requirement

Facts and circumstances which constitute actual fraud must be set forth with particularity in order to enable the court to determine whether, on the facts pleaded, there is any foundation for the charge [*La Vista Cemetery Ass'n v. American Sav. & L. Ass'n (1970) 12 Cal. App. 3d 365, 369, 90 Cal. Rptr. 722*].

[5] Elements of Fraud

A deed secured by fraud is invalid and subject to cancellation [*Steiner v. Steiner (1958) 160 Cal. App. 2d 665, 668, 669, 325 P.2d 109* ; *see Civ. Code §§ 1040, 1565-1568, 1571, 1572*]. Actual fraud consists of any of the following acts, committed by a party to the deed, or with such party's connivance, with intent to deceive another party or to induce the party to make the deed: (1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though the person believes it to be true; (3) the suppression of that which is true, by one having knowledge or belief of the fact; (4) a promise made without any intention of performing it; or (5) any other act fitted to deceive [*see Civ. Code §§ 1040, 1572*].

The elements of actual fraud are: (1) a false representation or concealment of a material fact (or, in some cases, an opinion) susceptible of knowledge, (2) made with knowledge of its falsity or without sufficient knowledge on the subject to warrant a representation, (3) with the intent to induce the person to whom it is made to act on it; and such person must (4) act in reliance upon the representation (5) to his or her damage [*South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 Cal. App. 3d 750, 765, 102 Cal. Rptr. 286]* .

For further discussion, procedures, and forms for use in actions involving fraud in the sale of land, and for a form for use in alleging a reason for failure to discover fraud before the running of the period of limitation, see Ch. 269, *Fraud and Deceit* .

[6] State Statutes

Essential elements of consent to contract. *Civ. Code § 1565*

Contract entered into without free consent as voidable. *Civ. Code § 1566*

Apparent consent as not free when obtained through fraud. *Civ. Code § 1567*

When consent deemed to have been obtained through fraud. *Civ. Code § 1568*

Types of fraud. *Civ. Code § 1571*

Actual fraud. *Civ. Code § 1572*

Constructive fraud. *Civ. Code § 1573*

Actual fraud as question of fact. *Civ. Code § 1574*

[7] Decisions

[a] Allegations

Allegation that plaintiff has been wrongfully deprived of certain property by misrepresentation without details of extent to which plaintiff has been damaged as sufficient allegation of damages in action for rescission based on fraud. *Seeger v. Odell (1941) 18 Cal. 2d 409, 417, 115 P.2d 977*

Facts and circumstances which constitute actual fraud as required to be set forth with particularity in order to enable court to determine whether, on facts pleaded, there is any foundation for charge. *La Vista Cemetery Assn. v. American Sav. & L. Ass'n (1970) 12 Cal. App. 3d 365, 369, 90 Cal. Rptr. 722*

[b] Cancellation for Fraudulent Inducement

Person who has been induced by fraudulent misrepresentations to make a conveyance as able to have conveyance set

aside and secure restitution of benefits lost by transaction. *Seeger v. Odell (1941) 18 Cal. 2d 409, 414, 115 P.2d 977*

Deed secured by fraud as invalid and subject to cancellation. *Steiner v. Steiner (1958) 160 Cal. App. 2d 665, 668, 669, 325 P.2d 109*

Cancellation of deed as proper when a person standing in relation of trust and confidence to grantor obtains deed through false representations as to legal effect of deed. *Steiner v. Steiner (1958) 160 Cal. App. 2d 665, 669, 670, 325 P.2d 109*

[c] Elements of Fraud

Elements of actual fraud. *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 811, 94 Cal. Rptr. 796, 484 P.2d 964* ; *South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 Cal. App. 3d 750, 765, 102 Cal. Rptr. 286*

Plaintiff as not able to justifiably rely on mere statements of opinion, including legal conclusions drawn from true statement of facts, unless person expressing opinion purports to have expert knowledge concerning matter or occupies position of confidence and trust. *Seeger v. Odell (1941) 18 Cal. 2d 409, 414, 115 P.2d 977*

[d] Quieting Title

Grantor may have his or her title quieted against interest obtained by a fraudulent misrepresentation of extent of grantor's ownership. *Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1029, 84 Cal. Rptr. 538*

[8] Text References

Witkin, California Procedure, vol. 3, *Pleading*, §§ 667-689 (4th ed. 1997)

[9] Cross References

For related forms, see *§§ 184.150* and *184.153*.

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15-184 California Forms of Pleading and Practice--Annotated § 184.153

§ 184.153 Allegation--Deed Procured by Undue Influence--Confidential Relationship [Civ. Code § 1575(1)]

[1] FORM Allegation--Deed Procured by Undue Influence--Confidential Relationship [Civ. Code § 1575(1)]

1. Defendant occupied the position of _____ [*describe confidential relationship, e.g.,* friend and business adviser] to _____ [*name or designation of grantor, e.g.,* plaintiff] for a period of approximately _____ [*specify number of months or years*] before, up to, and including the time the deed was executed.

2. During this period and at the time the deed was executed, _____ [*specify, e.g.,* plaintiff] reposed great trust and confidence in defendant and defendant exercised a controlling influence over the mind and actions of _____ [*specify, e.g.,* plaintiff].

3. Taking advantage of this trust, confidence, and influence, defendant [had the deed prepared for _____ (*specify, e.g.,* plaintiff's) signature, and] induced and persuaded _____ [*specify, e.g.,* plaintiff] to execute the deed conveying his/her property to defendant. _____ [*specify, e.g.,* Plaintiff] would not have executed the deed had defendant not taken advantage of the trust and confidence reposed in him/her by _____ [*specify, e.g.,* plaintiff], and had defendant not induced and persuaded _____ [*specify, e.g.,* plaintiff] to execute the deed.

[4. Defendant gave and _____ (*specify, e.g.,* plaintiff) received no consideration for the deed.]

[2] Use of Form

This form of allegation may be used to plead the invalidity of a deed on the ground that it was procured by the exercise of undue influence by a grantee who had a confidential relationship with the grantor. The allegation in this form may be substituted for Paragraph 5 of § 184.150 or included in a separate count.

For a discussion and form for use in actions involving undue influence consisting of taking an unfair advantage of another's weakness of mind, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

[3] Confidential Relationship

[a] Existence Of

While the mere fact that a relationship is friendly and intimate does not necessarily amount to a confidential relationship, a confidential relationship may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another. The existence of a confidential relationship is a question of fact that must be determined on a case by case basis [*O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 153, 119 Cal. Rptr. 245]* .

[b] Trustee-Beneficiary Transactions

A transaction between the trustee and a beneficiary that occurs during the existence of the trust or while the trustee's influence with the beneficiary remains and by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee's fiduciary duties, unless the transaction relates to the hiring or compensation of the trustee [*Prob. Code § 16004(c)*; *but see Prob. Code § 16015* (compensated services provided by regulated financial institution or its affiliates not violation)]. The presumption affects the burden of proof [*Prob. Code § 16004(c)*]. Whether decisional law interpreting the predecessor statute has relevance to *Prob. Code § 16004(c)* is unclear [*see* former *Civ. Code § 2235* (presumption of undue influence); *see, e.g.,* *Rebmann v. Major (1970) 5 Cal. App. 3d 684, 688, 85 Cal. Rptr. 399* (trustee has burden of proof as to nonexistence of presumed undue influence)].

[4] Undue Influence

Undue influence consists of the following: (1) the use, by one in whom a confidence is reposed by another or who holds a real or apparent authority over another, of this confidence or authority for the purpose of obtaining an unfair advantage over the other person; (2) taking an unfair advantage of another's weakness of mind; or (3) taking a grossly oppressive and unfair advantage of another's necessities or distress [*Civ. Code § 1575*].

For the purposes of applying this presumption, everyone who voluntarily assumes a relation of personal confidence with another is deemed a trustee, not only as to the person who reposes this confidence, but also as to all persons of whose affairs the trustee thus acquires information that was given to the trustee in like confidence or over whose affairs the trustee, by this confidence, obtains any control [*Civ. Code § 2219*; *Connor v. Stanley (1887) 72 Cal. 556, 559, 14 P. 306]* . Accordingly, the presumption of undue influence applies to relationships such as attorney-client [*Rebmann v. Major (1970) 5 Cal. App. 3d 684, 688, 85 Cal. Rptr. 399]* , agent-principal, broker-client [*Smith v. Zak (1971) 20 Cal. App. 3d 785, 792, 793, 98 Cal. Rptr. 242* ; *see Civ. Code § 2322(c)*], parent-minor child [*Morgan v. Morgan (1963) 220 Cal. App. 2d 665, 679, 680, 34 Cal. Rptr. 82]* , guardian-ward [*Alvez v. Toprahanian (1940) 39 Cal. App. 2d 126, 132, 102 P.2d 566* ; *see Prob. Code § 2351*], and spiritualist-advisee [*Connor v. Stanley (1887) 72 Cal. 556, 559, 14 P. 306]* .

When a confidential relationship exists between the parties to a deed, and the one in whom confidence is reposed actively participates in a transaction whereby he or she obtains a gift from, or advantage over, the other, a presumption of undue influence arises and casts on the party who has gained the gift or advantage the burden of rebutting it and showing fairness and good faith [*Krug v. Meeham (1952) 109 Cal. App. 2d 274, 278, 279, 240 P.2d 732*]. If the grantee fails to meet this burden, the presumption will support a finding of undue influence [*O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 154, 155, 119 Cal. Rptr. 245* ; *Sparks v. Mendoza (1948) 83 Cal. App. 2d 511, 514, 189 P.2d 43]* .

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Volume 15: Costs and Attorney's Fees thru Deeds-Chs. 174-189
Chapter 184 DEEDS
PART IV. FORMS
A. Transfer By Deed

15-184 California Forms of Pleading and Practice--Annotated § 184.154

§ 184.154 Allegation--Deed Procured by Mistake of Fact [Civ. Code § 1577]

[1] FORM Allegation--Deed Procured by Mistake of Fact [Civ. Code § 1577]

1. At the time the deed was executed [and physically delivered] by _____ [*grantor's name and designation, if any, e.g.,* plaintiff], he/she believed that _____ [*specify material mistake of fact, e.g.,* he/she was signing formal instruments required to close escrow].

2. The true fact was that _____ [*state fact about which grantor was mistaken, e.g.,* plaintiff was signing a deed conveying the property to defendant].

3. _____ [*Allege facts showing that mistake of fact was not caused by the neglect of a legal duty on part of party making mistake, e.g.,* At the time the deed was executed, defendant was acting as plaintiff's broker with regard to the sale of the property purportedly conveyed by the deed to defendant. Plaintiff had had previous dealings with defendant and reposed great trust and confidence in him/her. Plaintiff executed the deed and gave it to defendant in reliance on defendant's false representations that it was merely a formal document required to close escrow, that plaintiff need not read it, and that defendant would protect plaintiff's interests].

4. _____ [*Specify grantor, e.g.,* Plaintiff] would not have executed [and physically delivered] the deed had he/she not believed the facts to be as stated in Paragraph 1.

[2] Use of Form

This form of allegation may be used to plead the invalidity of a deed on the ground that it was executed or delivered under a mistake of fact vitiating consent. The allegation in this form may be substituted for Paragraph 5 of § 184.150 or included in a separate count.

For a form that may be adapted for use when a party is unconsciously ignorant or forgetful of a past or present fact that is material to the deed, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

[3] Mistake

[a] In General

Because a deed's validity depends in part on the grantor's intent to make a present transfer, a deed is subject to cancellation when it would not have been executed or delivered had the grantor not been acting under a mistake of law or fact vitiating consent [*see Civ. Code §§ 1040, 1565-1568, 1576*; *Hotaling v. Hotaling (1924) 193 Cal. 368, 382, 224 P. 455* ; *Taylor v. Taylor (1944) 66 Cal. App. 2d 390, 398, 152 P.2d 480* ; *see §§ 184.21, 184.22*.

A mistake of fact vitiating consent is one that is not caused by the neglect of a legal duty on the part of the person making the mistake, and consists of: (1) an unconscious ignorance or forgetfulness of a past or present fact that is material to the deed; or (2) a belief in the present existence of a thing material to the deed which does not exist, or in the past existence of a thing that has not existed [*Civ. Code § 1577*]. A mistake of foreign laws is also a mistake of fact [*Civ. Code § 1579*].

[b] Materiality

The mistake must affect the execution and a material element of the transaction, not merely some collateral matter [*Civ. Code § 1577*; *cf. Bellwood Discount Corp. v. Empire Steel Buildings Co. (1959) 175 Cal. App. 2d 432, 435, 346 P.2d 467* (action to rescind building contract)]. It must be shown that consent to the deed would not have been given had the mistake not existed [*Civ. Code § 1568*].

[c] Neglect of Legal Duty

Ordinary negligence does not constitute the neglect of legal duty as that term is used in *Civ. Code § 1577* [*Goldner v. Jaffe (1959) 171 Cal. App. 2d 751, 755, 341 P.2d 354]* . However, neglect of a legal duty may be found when the mistake is caused by a party's gross negligence [*see White v. Berrenda Mesa Water Dist. (1970) 7 Cal. App. 3d 894, 903-904, 87 Cal. Rptr. 338]* . For example, neglect of legal duty will be found when, in the absence of fraud and imposition, a person with the capacity of reading and understanding an instrument signs it without reading it [*see Goldner v. Jaffe (1959) 171 Cal. App. 2d 751, 755, 341 P.2d 354]* .

[4] State Statutes

Mistake may be of fact or law. *Civ. Code § 1576*

Mistake of fact defined. *Civ. Code § 1577*

Mistake of law defined. *Civ. Code § 1578*

Mistake of foreign law is mistake of fact. *Civ. Code § 1579*

[5] Decisions

[a] Cancellation for Mistake

Deed is subject to cancellation when grantor signs it without reading it in reliance on false representations as to its contents and confidential relation exists between parties. *Kane v. Mendenhall (1936) 5 Cal. 2d 749, 758, 56 P.2d 498*

Mistake in opinion or conclusion concerning an uncertain future occurrence is no ground for cancellation. *Taylor v.*

Taylor (1944) 66 Cal. App. 2d 390, 397, 152 P.2d 480

Mutual mistake or mistake attended by fraud of adversary party is basis for cancellation. *Taylor v. Taylor (1944) 66 Cal. App. 2d 390, 398, 152 P.2d 480*

[b] Neglect of Legal Duty

Person with capacity of reading and understanding instrument is bound by its contents when, in absence of fraud and imposition, person signs instrument. *Goldner v. Jaffe (1959) 171 Cal. App. 2d 751, 755, 341 P.2d 354*

Complainant is denied relief in equity if only showing is his or her own inexcusable neglect or if complainant has failed to make inquiry or had within his or her reach true statement of facts. *Taylor v. Taylor (1944) 66 Cal. App. 2d 390, 398, 152 P.2d 480*

[c] Quieting Title

Grantor may have his or her title quieted against interest obtained due to mutual mistake of law and fact. *Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1029, 84 Cal. Rptr. 538*

Defendant is entitled to have title to disputed strip of land quieted in him or her without first adjudging that deed be reformed when, due to mutual mistake of parties, deed did not include entire block. *Mings v. Compton City School Dist. (1933) 129 Cal. App. 413, 419, 18 P.2d 967*

[6] Cross References

For a related form, see *§ 184.150*.

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15-184 California Forms of Pleading and Practice--Annotated § 184.155

§ 184.155 Allegation--Deed Procured by Mistake of Law [Civ. Code § 1578]

[1] FORM Allegation--Deed Procured by Mistake of Law [Civ. Code § 1578]

1. At the time the deed was executed [and physically delivered] by _____ [*grantor's name and designation, if any, e.g.,* plaintiff], he/she believed that _____ [*specify material mistake of law, e.g.,* the deed would not have any effect as a conveyance until plaintiff's signature was acknowledged].

[*EITHER*]

2. At that time, all parties to the deed supposed that they knew and understood the law as to _____ [*specify nature of law about which parties were mistaken, e.g.,* the effect of the lack of acknowledgment of plaintiff's signature on the validity and effect of a deed], and they all believed the law to be substantially as stated in Paragraph 1.

[*OR*]

2. At that time, the defendant was aware of _____ [*specify grantor, e.g.,* plaintiff's] mistake as to _____ [*specify nature of law about which party was mistaken, e.g.,* the necessity of acknowledgment of plaintiff's signature to the validity and effect of the deed], but did not rectify the mistake.

3. _____ [*Specify grantor, e.g.,* Plaintiff] would not have executed [and physically delivered] the deed had he/she not believed and understood the law to be as stated in Paragraph 1.

[2] Use of Form

This form contains an allegation that may be substituted for Paragraph 5 of § 184.150 or included in a separate count to plead the invalidity of a deed on the ground that it was executed or delivered under a mistake of law vitiating consent.

A mistake of law constitutes a mistake vitiating consent only when it arises from (1) a misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or (2) a misapprehension of the law by one party, of which the others are aware at the time of execution, but which they do not rectify [*Civ. Code § 1578*].

[3] State Statutes

Mistake of law defined. *Civ. Code § 1578*

[4] Decisions

Deed is voidable when grantee was aware of grantor's mistake of law and takes advantage of it to procure beneficial conveyance. *Hotaling v. Hotaling (1924) 193 Cal. 368, 384, 224 P. 455*

Deed is invalid and subject to cancellation when grantor signed and manually delivered deed to grantee under mistaken belief, shared by all parties, that deed would be of no effect whatever until recorded. *Hotaling v. Hotaling (1924) 193 Cal. 368, 382, 224 P. 455*

[5] Cross References

For a related form, see *§ 184.154*.

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A. Transfer By Deed

15-184 California Forms of Pleading and Practice--Annotated § 184.156

§ 184.156 Allegation--No Valid Delivery [Civ. Code § 1054]--No Intent to Deliver--Attempted Testamentary Disposition

[1] FORM Allegation--No Valid Delivery [Civ. Code § 1054]--No Intent to Deliver--Attempted Testamentary Disposition

1. When the deed [described above *or* attached as Exhibit A] was signed by _____ [*name or designation of grantor, e.g.,* plaintiff] on _____ [*date*], it was his/her intention that the deed would have no effect [and would not be physically delivered to the grantee(s) named in the deed] [until after _____ (*specify event on which deed was to become operative or be delivered, e.g.,* plaintiff's death)].

[2. On or about _____ [*date*], plaintiff told defendant that he/she intended to execute the deed for testamentary purposes on condition that the deed would not be recorded until after plaintiff's death, and that plaintiff would continue to own the property (and _____ (*specify acts of dominion, e.g.,* live on the property)) as long as plaintiff lived.]

[2] Use of Form

This form contains an allegation that may be used to plead invalidity of a deed due to the grantor's lack of intent to make a present transfer and, if applicable, to physically deliver the deed [*see § 184.22*]. The allegation in this form may be substituted for Paragraph 5 of § 184.150 or included in a separate count.

[3] State Statutes

Deed takes effect on delivery by grantor. *Civ. Code § 1054*

[4] Decisions

Manual delivery of deed to grantee with intent that it become operative only on grantor's death constitutes attempted testamentary disposition and void. *Meyer v. Wall (1969) 270 Cal. App. 2d 24, 27, 75 Cal. Rptr. 236*

[5] Cross References

For a related form, see *§ 184.150*.

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15-184 California Forms of Pleading and Practice--Annotated § 184.157

§ 184.157 Complaint [Code Civ. Proc. § 425.10] for Declaration of Rights Under Deed [Code Civ. Proc. § 1060]--General Form

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Declaration of Rights Under Deed [Code Civ. Proc. § 1060]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DECLARATORY RELIEF
Defendant.	)	
	)	
	)	

Plaintiff alleges:

[*1. Capacity and residence of plaintiff, if appropriate. See § 184.150, Paragraph 1.*]

[*2. Capacity and residence of defendant, if appropriate. See § 184.150, Paragraph 2.*]

[*3. Fictitious name allegation, if appropriate. See § 184.150, Paragraph 3.*]

4. On _____ [*date*], _____ [*grantor's name or designation, if a party, e.g.,* defendant] executed and delivered a deed to plaintiff. [The deed was recorded on _____ [*date*], in Volume _____ of Deeds at page _____ in the office of the County Recorder of

_____ County.] A copy of the deed is attached hereto as Exhibit A and made a part hereof.

[5. _____ (*If grantor is deceased, allege that defendant is the successor in interest, e.g.*, Defendant is the heir at law and successor in interest to _____ (*specify grantor*)).]

6. An actual controversy has arisen and now exists between plaintiff and defendant concerning their respective rights and duties under the deed in that plaintiff contends that the provision _____ [*set forth the provision in the deed requiring judicial interpretation and plaintiff's contentions regarding its interpretation, e.g.,* "... subject however to the right of first party to purchase the land herein described, if it is abandoned for school purposes, for the consideration herein mentioned" created a right personal only to grantor that terminated on his/her death, whereas defendant disputes these contentions and contends that _____ [*set forth defendant's contentions regarding its interpretation, e.g.,* the provision is valid and will be enforceable if plaintiff abandons use of the property for school purposes, as plaintiff plans to do].

7. Plaintiff requests a judicial determination of his/her rights and duties under the deed, and a declaration as to _____ [*state type of declaration desired, e.g.,* which party's interpretation of the deed is correct].

8. Such a declaration is necessary and appropriate at this time so that plaintiff may ascertain his/her rights and duties under the deed. [_____ (*Allege any financial or other burden that is being caused plaintiff by the unsettled state of affairs and, if appropriate, the fact that administrative remedies have been exhausted*).]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a declaration by the court of the rights and duties of the parties to this action under the above-described deed, and specifically for a declaration that _____ [*specify declaratory judgment sought, e.g.,* the provision in the deed described above created a right personal only to the grantor that terminated on his/her death or, in the alternative, that the provision was void at its inception];

2. For costs of suit herein incurred; and

3. For such other further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 184.150.*]

[2] Use of Form

This form may be used to obtain a declaration of the rights and duties of the parties under a deed in which the plaintiff was designated the grantee when the deed's interpretation is at issue. The form may also be adapted for use when the deed's validity is questioned, by altering Paragraphs 6 and 7 accordingly.

Before amendments that became operative January 1, 1995, *Code Civ. Proc. § 1060* expressly permitted, among others, any person interested under "a deed, will, or other written instrument, or under a contract ... " to seek declaratory relief under the statute [*see* former *Code Civ. Proc. § 1060*]. As of January 1, 1995, the reference to "deed" has been omitted. However, the statute still permits a person interested under a " *written instrument*, excluding a will or trust, or under a contract. ... " to seek a declaration of rights [*see Code Civ. Proc. § 1060* (emphasis added)]. The intent of this

amendment is unclear. Because deeds are a form of written instrument and are not specifically excluded from consideration, seeking a declaration of rights regarding a deed would still appear to be permitted under the statute, though this remains subject to further statutory or judicial clarification.

For discussion and forms for use in an action for declaratory relief to be relieved from restrictive covenants in a deed, see *§§ 184.62, 184.195*.

[3] Jurisdiction

An action for declaratory relief is within the jurisdiction of the superior court and is not a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. § 1060*; *see Code Civ. Proc. §§ 85, 86(a)(7), 580(b)(4)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

[4] Allegations

A complaint for declaratory relief is sufficient if it sets forth facts showing the existence of a controversy relating to the legal rights and duties of the parties under a written instrument and requests that those rights and duties be adjudicated [*Taschner v. City Council (1973) 31 Cal. App. 3d 48, 57, 107 Cal. Rptr. 214* (municipal ordinance), *disapproved on other grounds in Assoc. Home Builders of the Greater East Bay v. City of Livermore (1976) 18 Cal. 3d 582, 593, 135 Cal. Rptr. 41, 557 P.2d 473* ; *Strozier v. Williams (1960) 187 Cal. App. 2d 528, 531, 532, 9 Cal. Rptr. 683* (deed)]. Accordingly, the complaint alleges the following:

- The execution and delivery of a deed to plaintiff by defendant or defendant's predecessor in interest (Paragraphs 4, 5).

- The provision in the deed requiring judicial interpretation and the existence of an actual, present controversy between the parties as to its proper interpretation (Paragraph 6).

- A request that the rights and duties of the parties be adjudicated (Paragraph 7).

- A statement that declaratory relief is necessary and appropriate at this time, supported by allegations of any financial or other burden that is being caused plaintiff by the fact that he or she does not know his or her legal rights and duties under the deed (Paragraph 8).

For a complete discussion of the allegations required to state a cause of action for declaratory relief, see Ch. 182, *Declaratory Relief* .

[5] Venue

When the plaintiff does not seek to recover possession of, to quiet the title to, or to enforce a lien on realty, but merely seeks a declaration of rights in the property between the parties to the action, the decree does not operate directly on the property or affect the title. Therefore, the action is transitory and need not be brought in the county in which the property is situated [*Mills v. Mills (1956) 147 Cal. App. 2d 107, 118, 305 P.2d 61* ; *see Code Civ. Proc. § 392*; *see also Code Civ. Proc. §§ 393-395.5* (proper venue in transitory actions)].

[6] Cross References

For a related form, see *§ 184.150*.

For a discussion, procedure, and forms relating generally to actions for declaratory relief, and for a form of judgment, see Ch. 182, *Declaratory Relief*

[7] State Statutes

Limited civil cases. *Code Civ. Proc. § 86*

Existence of statute relating to authority of court in limited civil case or unlimited civil case, does not, by itself, imply that same authority does or does not exist in other type of civil case. *Code Civ. Proc. § 89*

Action for declaration of rights and duties in premises, including determination of questions of construction and validity of written instrument. *Code Civ. Proc. § 1060*

Action for declaratory relief involving real property in which state has remainder or undivided fractional interest. *Gov. Code § 956*

[8] Decisions

An action for a declaration of rights of parties to out-of-state realty is transitory and properly maintainable in county where defendants reside. *Mills v. Mills (1956) 147 Cal. App. 2d 107, 118, 305 P.2d 61*

[9] Text References

Witkin, California Procedure (4th ed. 1997), Vol. 5, *Pleading,* §§ 805-836

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[Reserved]

§§ 184.158[Reserved]

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B. Covenants of Title

15-184 California Forms of Pleading and Practice--Annotated § 184.170

§ 184.170 Complaint for Damages for Breach of Implied Covenant Against Encumbrances [Civ. Code § 1113]--General Form

[1] FORM Complaint for Damages for Breach of Implied Covenant Against Encumbrances [Civ. Code § 1113]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR BREACH OF
_____ [*name*],	)	IMPLIED COVENANT AGAINST ENCUM-
[; and DOES I through _____,]	)	BRANCES
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[*1. Capacity and residence of plaintiff, if appropriate. See § 184.150, Paragraph 1.*]

[*2. Capacity and residence of defendant, if appropriate. See § 184.150, Paragraph 2.*]

[*3. Fictitious name allegation, if appropriate. See § 184.150, Paragraph 3.*]

4. On _____ [*date*], in consideration of the sum of $_____ paid to defendant, defendant executed and delivered a grant deed conveying to plaintiff a _____ [*specify interest conveyed, e.g.,* fee simple

title] in real property in _____ County, California, more particularly described as follows: _____ [*set forth legal description of property*]. A copy of the deed is attached to this complaint as Exhibit A and made a part hereof.

5. Pursuant to *Civil Code Section 1113*, defendant covenanted that the estate granted was at the time of execution of the deed free from any encumbrance done, made, or suffered by defendant, or any person claiming under him/her.

6. All relevant conditions precedent to _____ [occur *and/or* be performed by plaintiff] under the deed have _____ [occurred *and/or* been performed].

7. At the time of execution of the deed, the property was [, and continues to be,] subject to _____ [*specify outstanding encumbrance, e.g.,* a county tax duly assessed and levied on the property by the Assessor for the County of _____, California, for the fiscal year _____ [*specify*]. The tax due and unpaid at the time of execution of the deed was the sum of $_____, including penalties and costs].

[*EITHER*]

8. On _____ [*date*], in order to extinguish the _____ [principal *and/or* interest] on the above encumbrance, plaintiff paid to _____ [*name or authority, e.g.,* the Office of the Assessor for the County of _____, California,] the sum of $_____.

[*OR*]

8. As a result of the existence of the above encumbrance and of defendant's breach of his/her covenant against encumbrances, the fair market value of the property conveyed to plaintiff has been reduced by the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages [in the sum of $_____];

2. For costs of suit herein incurred; and

3. For such other further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 184.150.*]

[2] Use of Form

This form of complaint is for use by a grantee to recover damages from his or her grantor for breach of an implied

covenant against encumbrances.

[3] Allegations

An action for breach of covenant is essentially an action on a contract [*Barrows v. Jackson (1952) 112 Cal. App. 2d 534, 538, 247 P.2d 99* (racial restrictive covenant)]. Accordingly, this complaint alleges the following:

- Execution and delivery of the deed for consideration (Paragraph 4);
- The covenant against encumbrances implied pursuant to *Civ. Code § 1113* (Paragraph 5);
- Performance or occurrence of conditions precedent to plaintiff's rights under the deed (Paragraph 6);
- The existence of an encumbrance at the time of execution of the deed, in breach of the implied covenant (Paragraph 7) [*see Civ. Code § 1113*]; and
- The sum expended by plaintiff in extinguishing either the principal, interest, or both, of the encumbrance, or alternatively, the sum by which the value of the property has been decreased by the existence of an encumbrance that cannot be extinguished by the payment of money (Paragraph 8) [*see Civ. Code § 3305*; *Evans v. Faught (1965) 231 Cal. App. 2d 698, 712, 713, 42 Cal. Rptr. 133]* .

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

In limited civil cases, the first page of the first paper must state that it is a limited civil case and whether the amount demanded exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

An action for damages for breach of covenant is transitory, and venue generally lies in the county in which the defendants or some of them reside [*see Code Civ. Proc. §§ 394-395.5*; *Hannon v. Nuevo Land Co. (1910) 14 Cal. App. 700, 705, 112 P. 1103* ; *cf. Platner v. Vincent (1921) 187 Cal. 443, 448, 449, 202 P. 655]* .

[6] Limitations

An action for damages for breach of covenant must be brought within four years after the breach [Civ. Code § 337; *cf. Lawrence Barker, Inc. v. Briggs (1952) 39 Cal. 2d 654, 661, 248 P.2d 897* (action for breach of covenant in lease)].

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Chapter 184 DEEDS
PART IV. FORMS
B. Covenants of Title

15-184 California Forms of Pleading and Practice--Annotated §§ 184.171-184.189

[Reserved]

§§ 184.171[Reserved]

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Chapter 184 DEEDS
PART IV. FORMS
C. Restrictive Covenants

15-184 California Forms of Pleading and Practice--Annotated § 184.190

§ 184.190 Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction, and Damages to Enforce Equitable Servitudes Against Lot in Subdivision--Subdivider Inserted Use in Recorded CC&Rs

[1] FORM Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction, and Damages to Enforce Equitable Servitudes Against Lot in Subdivision--Subdivider Inserted Use in Recorded CC&Rs

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR TEMPORARY RESTRAINING
[and DOES I through_____,]	)	ORDER, PRELIMINARY AND PERMANENT IN-
Defendant(s).	)	JUNCTIONS[, AND DAMAGES]
	)	(Equitable Servitudes)
	)	

Plaintiff alleges:

[1. *Capacity and residence of plaintiff, if appropriate. See § 184.150, Paragraph 1.*]

[2. *Capacity and residence of defendant, if appropriate. See § 184.150, Paragraph 2.*]

3. Plaintiff is, and at all times herein mentioned was, _____ [*specify plaintiff's interest in estate, e.g.,* the owner in fee simple] of a lot numbered _____ in that tract of land situated in _____ County, California, and known as _____ [*name of subdivision*]. Plaintiff's lot

is known as _____ [*street address*], _____ [*city*], California, and is more particularly described as follows: _____ [*legal description*].

4. Defendant is the owner of, or claims some interest in, a lot numbered _____ in the tract of land described above, which lot is known as _____ [*street address*], _____ [*city*], California, and is more particularly described as follows: _____ [*legal description*].

[5. Defendants DOES I through _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants claims some right, title, estate, lien, or interest in the property described above and that each of them is responsible in some manner for the [threatened] wrongful conduct herein alleged.]

6. A Declaration of Restrictions for _____ [*name of subdivision*] was executed by _____ [*name of original owner who had document prepared*] on _____ date, and recorded in the office of the County Recorder of _____ County, on _____ date, in Book _____, page _____, a copy of which is attached to this complaint as Exhibit "_____" and made a part of this complaint. This recordation took place prior to the sale of any lots in the tract.

7. The Declaration of Restrictions established a common plan for the ownership of property in the tract described above and contains restrictions on the use of the property as a part of the common plan. It was recorded by the original owner[s] in order to induce the purchase of lots for _____ [*state general contents of restrictions, e.g.*, one-story, single-family residences], and to maintain the tract as _____ [*state general purpose of plan, e.g.*, a desirable residential district of single-family homes enjoying unobstructed views of the ocean]. In addition to setting forth restrictions on the use of the above tract as part of the common plan, the Declaration of Restrictions describes the tract and states that it is intended to bind all purchasers and their successors.

[8. The deed by which defendant obtained title or interest in the lot numbered _____ was executed by _____ (*name of defendant's immediate predecessor in interest*) on _____ (*date*), and referred to the recorded Declaration of Restrictions. The deed was recorded in the office of the County Recorder of _____ County, on _____ (*date*), in Book _____, page _____, a copy of which is attached to this complaint as Exhibit "_____" and made a part of this complaint.]

9. Defendant had constructive notice of the restrictions set forth in the Declaration of Restrictions, in that the Declaration of Restrictions was recorded prior to the sale of any of the lots in the tract [, and Defendant's deed referred to the Declaration of Restrictions, as stated in Paragraph 8].

10. Paragraph _____ of the Declaration of Restrictions _____ [reads *or* reads in part] as follows: _____ [*set out verbatim those restrictions alleged to be violated*].

11. Despite the existence of the restrictions described above, under which defendant acquired title or interest to his/her lot, defendant _____ [*allege facts showing defendant is doing, threatening to do, or permitting to be done, activities in violation of tract restrictions, e.g.*, has partially constructed on his/her lot a building which will, unless its construction is enjoined by this Court, obstruct the view from plaintiff's lot toward _____ (*specify direction or subject of view*)].

12. Defendant's [threatened] wrongful conduct, unless and until enjoined and restrained by order of this court, will cause great and irreparable injury to plaintiff in that _____ [*specify particular facts that will constitute great and irreparable injury, e.g.*, the view from plaintiff's lot will be substantially obstructed, greatly decreasing plaintiff's

enjoyment of his/her property and the value thereof].

13. Plaintiff has no plain, speedy, or adequate remedy at law for the injuries _____ [currently being suffered *or* that are threatened] in that _____ [*allege facts showing that plaintiff has no remedy at law, or that the remedy at law is inadequate, e.g.,* it will be impossible for plaintiff to determine the precise amount of damages that he/she will suffer if defendant's conduct is not restrained *or* plaintiff will be forced to institute a multiplicity of suits to obtain adequate compensation for his/her injuries].

[14. _____ (*Allege facts establishing a basis for a claim for damages as additional relief, if any, e.g.,* From the commencement of defendant's construction through the date of this complaint, plaintiff has suffered annoyance, inconvenience, discomfort, and interference with his/her rightful use and enjoyment of his/her property, constituting damages in the sum of $_____).]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an order requiring defendant to show cause, if any he/she has, why he/she should not be enjoined as set forth in this complaint, during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant and his/her agents, servants, and employees, and all persons acting under, in concert with, or for them, from _____ [*specify each of the acts defendant is to be prohibited from doing, commencing, or maintaining, e.g.,* erecting or constructing on lot numbered _____ any structure or addition that, when completed, will exceed in height the roof of a single-story residence];

[3. For damages in the sum of $_____;]

[4. For reasonable attorney's fees (in the amount of $_____ *or* according to proof);]

5. For costs of suit incurred in this action; and

6. For such other and further relief as the court deems proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification. See § 184.150.*]

[2] Use of Form

This form of complaint is for use by a lot owner to bring an action to enjoin another lot owner's violation of tract restrictions based on the theory of equitable servitudes. It may be used when the subdivider included the restrictions in a declaration and recorded it before the execution of a sales agreement for any land in the subdivision [*see Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 355, 47 Cal. Rptr. 2d 898, 906 P.2d 1314]* .

[3] Allegations

This complaint alleges the following:

- Plaintiff's and defendant's ownership of lots in the same subdivided tract (Paragraphs 3, 4) [*see Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P.2d 1314]* .

- The ownership interest of fictitiously named defendants sued pursuant to *Code Civ. Proc. § 474* (optional Paragraph 5).

- Recordation, prior to the execution of any contract of sale for land in the subdivision, of a declaration of restrictions that (1) establishes a common plan for the ownership of property in the subdivided tract, (2) contains restrictions on the use of the property as part of the common plan, (3) describes the property it is to govern, and (4) states that it is intended to bind all purchasers and their successors (Paragraphs 6, 7) [*see Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P.2d 1314* ; *Werner v. Graham (1919) 181 Cal. 174, 184, 183 P. 945]* .

- The inclusion in defendant's deed of a reference to the recorded declaration of restrictions (optional Paragraph 8; this language is optional because a deed to a subdivided lot need not refer to the type of recorded declaration described above) [*see Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P.2d 1314]* .

- Defendant's constructive notice of the restrictions (Paragraph 9) [*see Citizens for Covenant Compliance v. Anderson (1995) 12 Cal. 4th 345, 349, 47 Cal. Rptr. 2d 898, 906 P.2d 1314]* .

- Defendant's violation of the restrictions (Paragraphs 10, 11) [*see Morgan v. Veach (1943) 59 Cal. App. 2d 682, 691, 139 P.2d 976]* .

- A basis for preliminary and permanent injunctive relief to enjoin defendant's continuing violation, as well as a basis for damages, if appropriate (Paragraphs 12, 13) [Civ. Code § 4322; *Code Civ. Proc. § 526(a)(2), (4)*; *see Knox v. Streatfield (1978) 79 Cal. App. 3d 565, 569, 145 Cal. Rptr. 39* ; *see generally* Ch. 303, *Injunctions*].

- Facts establishing a basis for a claim for damages, if any (Paragraph 14) [*see Mock v. Shulman (1964) 226 Cal. App. 2d 263, 269-270, 38 Cal. Rptr. 39]* .

[4] Verification

Verification [*Code Civ. Proc. § 446*] is required if the plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*]. Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer in an action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446*] and precludes a general denial in superior court and some limited civil cases [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction

An action seeking permanent injunctive relief is in the jurisdiction of the superior court and is not a limited civil action [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86*]. When title or right to possession is to be tried, or permanent

injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

[6] Venue

The benefit of a restrictive covenant running with the land is an estate in the land [*Redevelopment Agency v. Tobriner (1984) 153 Cal. App. 3d 367, 374-375, 200 Cal. Rptr. 364* ; *Southern Cal. Edison Co. v. Bourgerie (1973) 9 Cal. 3d 169, 171, 107 Cal. Rptr. 76, 507 P.2d 964]* . An action for the determination of a right or interest in real property, or for injury to real property, is local and must be tried in the superior court in the county in which the real property is situated [*Code Civ. Proc. § 392(a)(1)*]. For a discussion of local and transitory actions, see Ch. 571, *Venue* .

[7] Statute of Limitations

An action for violation of a "restriction" (as defined in *Civ. Code § 784*) must be commenced within five years. This limitations period does not bar commencement of an action for violation of a restriction before January 1, 2001, and, until that date, any other applicable statutory or common law limitation will continue to apply to the action [*Code Civ. Proc. § 336(b)*]. For further discussion of this limitations period, see *§ 184.68*.

Under a statutory limitation applicable to actions commenced before January 1, 2001, an action for damages for breach of a written covenant must be brought within four years after the breach [*Code Civ. Proc. § 337(1)* (written contracts)]. Any action for relief not provided for in the Code of Civil Procedure, such as equitable enforcement of a covenant, must be commenced within four years after the cause of action has accrued [*Code Civ. Proc. § 343*].

[8] Class Action

Plaintiff, as sole representative or together with other owners of lots in the tract, may be able to maintain the action as a class action on behalf of all other property owners in the tract who are benefited by the restrictions plaintiff seeks to enforce [*Code Civ. Proc. § 382*; *see Horton v. Citizens Nat. etc. Bank (1948) 86 Cal. App. 2d 680, 681, 685, 195 P.2d 494]* . Similarly, when the class of owners violating the restrictions is sufficiently numerous, defendants may also be sued individually or as representatives of a class. For the requirements of an ascertainable class and common questions, see *§ 184.67[2]*. For discussion and forms relating to class actions in general, see Ch. 120, *Class Actions* .

[9] Damages

Damages may be recovered in an action to enjoin the violation of tract restrictions if plaintiff proves that there has been past interference with plaintiff's rightful use and enjoyment of his or her property [*Mock v. Shulman (1964) 226 Cal. App. 2d 263, 269-270, 38 Cal. Rptr. 39]* . For discussion of general principles of interference with a property right, see Ch. 391, *Nuisance* .

[10] Cross References

For a discussion, procedure, and forms relating generally to actions for injunctive relief, see Ch. 303, *Injunctions*

[11] California Points and Authorities

For points and authorities in support of an application for a temporary restraining order and a preliminary injunction to enforce a restrictive covenant, see California Points and Authorities, Ch. 116, *Injunctions* (Matthew Bender)

[12] California Real Estate Law and Practice

For a discussion of covenants, conditions, and restrictions relating to subdivisions, see California Real Estate Law & Practice, Ch. 470, *Subdivisions* (Matthew Bender)

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15-184 California Forms of Pleading and Practice--Annotated § 184.191

§ 184.191 Allegation--Grantor and Grantee Created Statutory Covenant Restricting Use of Grantee's or Grantor's Property [Civ. Code § 1468]

[1] FORM Allegation--Grantor and Grantee Created Statutory Covenant Restricting Use of Grantee's or Grantor's Property [Civ. Code § 1468]

[*EITHER, if the restrictions burden the grantee's land*]

[1. On or about _____ [*date on or after November 11, 1969*] [the predecessors in title of] plaintiff [*grantor whose land was or is benefited by the restrictive covenant*] and [the predecessors in title of] defendant, in consideration of the mutual benefit to themselves and to their respective properties, executed _____ [*name of agreement, e.g.,* an "Agreement Imposing Restrictions"]. The Agreement was recorded in the office of the County Recorder of _____ County, on _____ [*date*], in Book _____, page _____, a copy of which is attached hereto as Exhibit "_____" and made a part hereof.]

[*OR, if the restrictions burden the grantor's land*]

[1. On or about _____ [*date on or after November 14, 1968*] [the predecessors in title of] plaintiff [*grantee whose land was or is benefited by the restrictive covenant*] and [the predecessors in title of] defendant, in consideration of the mutual benefit to themselves and to their respective properties, executed _____ [*name of agreement, e.g.,* an "Agreement Imposing Restrictions"]. The Agreement was recorded in the office of the County Recorder of _____ County, on _____ [*date*], in Book _____, page _____, a copy of which is attached hereto as Exhibit "_____" and made a part hereof.]

2. The Agreement particularly described the real property of [the predecessors in title of] defendant, which was to be

burdened by the restrictions, as follows: _____ [*legal description as it appears in agreement*].

3. By the terms of the Agreement, each of the signors agreed in writing to bind the signor and all successive owners of their respective real properties by a continuing covenant for the express benefit of the real property of plaintiff['s predecessor in title], which was particularly described in the agreement as follows: _____ [*legal description of plaintiff's property as it appears in the agreement*]. The covenant related to the use of defendant's [predecessor in title's] land in the following particulars: _____ [*set out restriction, e.g.,* that no part of defendant's real property, described therein, should ever be used ex-residential purposes]. The Agreement was agreed to be a covenant to run with the land of plaintiff['s predecessor in title] and with the land of defendant['s predecessor in title].

[2] Use of Form

This allegation is for insertion in § 184.190 in lieu of Paragraphs 6 through 10 in that form. The allegation is for use by a grantor, or his or her successor in interest, in a complaint to enjoin a violation of a restrictive covenant created to burden the land of a grantee pursuant to *Civ. Code § 1468*, as amended in 1969 [*see* Stats. 1969, ch. 245, § 1 (effective January 1, 1970)]. It can also be used by a grantee, or by his or her successor in interest, to enforce a restriction imposed on the grantor's land pursuant to *Civ. Code § 1468*, as amended in 1968 [*see* Stats. 1968, ch. 680, § 1 (effective January 1, 1969)].

[3] Allegations

This form alleges the following:

- An agreement was executed by a grantor of land with the grantee of the land conveyed on or after January 1, 1970, or was executed by the grantee of land conveyed with the grantor of the land on or after January 1, 1969, (Paragraph 1) [*Civ. Code § 1468*];

- The land of the covenantor, which was to be affected by the covenants, and the land of the covenantee, which was to be benefited, were particularly described in the instrument (Paragraphs 2, 3) [*Civ. Code § 1468(a)*;

- The successive owners of the land affected by the covenant were, in the instrument, expressed to be bound for the benefit of the land granted by or to the covenantee (Paragraph 3) [*Civ. Code § 1468(b)*]; and

- The agreement was recorded (Paragraph 1) [*Civ. Code § 1468(d)*.

In addition, the complaint must show that the restrictive covenant was violated during the period of the time the defendant owned the land burdened by the restrictions [*see Civ. Code §§ 1466, 1468*].

[4] Amendments to Civ. Code § 1468

As provided by the 1968 amendment to *Civ. Code § 1468*, which took effect on January 1, 1969, a grantor may covenant with a grantee to do or refrain from doing some act on the grantor's own land, for the benefit of the land conveyed to the grantee [*Civ. Code § 1468*; *see* Stats. 1968, ch. 680, § 1]. Such a covenant runs with both the land of the covenantor and the covenantee [*Civ. Code § 1468*]. The 1969 amendment to *Civ. Code § 1468*, which took effect on January 1, 1970, provided that a grantee can also make a similar promise, enforceable as a covenant running with the land, to a grantor [*Civ. Code § 1468*; *see* Stats. 1969, ch. 245, § 1].

For a discussion of the requirements for creation of a valid statutory covenant under the various amendments to *Civ. Code § 1468*, see *§ 184.62[3][b]*.

[5] Parties

Unless the agreement specifically provides otherwise, an action to enforce a valid covenant under *Civ. Code § 1468* can be brought by or against the owner of any portion of the land affected by the covenant, and by or against any person who derives some interest in the land through an owner of the land [*Civ. Code § 1468*]. In addition, a mortgagee or trustee who is in possession of land in his or her capacity as mortgagee or trustee may be joined in an action to enjoin violation of a restrictive covenant [*see Civ. Code § 1468*].

When several persons are made defendants in an action to enforce a statutory covenant, the burden of the covenant will be apportioned among them according to the value of the burdened property held by them respectively, if this value can be ascertained, and if not, then according to their respective interests in point of quantity [*see Civ. Code §§ 1467, 1468*].

[6] State Statutes

Covenants running with land defined. *Civ. Code § 1460*

Covenants running with land are only those specified in *Civ. Code §§ 1460-1470*, and incidental thereto. *Civ. Code § 1461*

Covenant made for direct benefit of granted property run with land. *Civ. Code § 1462*

Persons bound by covenant running with land. *Civ. Code § 1465*

No liability for breach of covenant running with land before acquisition or after relinquishment. *Civ. Code § 1466*

[7] Decisions

Covenant running with land must meet statutory requirements in effect when covenant was created; *Civ. Code § 1468* is not applicable retroactively. *Taormina Theosophical Community, Inc. v. Silver (1983) 140 Cal. App. 3d 964, 968, 972, 972 n. 3, 190 Cal. Rptr. 38* ; see *Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 174 n. 4, 195 Cal. Rptr. 14* (dictum); *McCaffrey v. Preston (1984) 154 Cal. App. 3d 422, 436, 201 Cal. Rptr. 252* (applying *Civ. Code § 1468* as it read before amendments)

[8] Cross References

For a related form, see *§ 184.190*.

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15-184 California Forms of Pleading and Practice--Annotated § 184.192

§ 184.192 Allegation--Landowners Created Statutory Covenant Restricting Use of One Landowner's Property [Civ. Code § 1468]

[1] FORM Allegation--Landowners Created Statutory Covenant Restricting Use of One Landowner's Property [Civ. Code § 1468]

[*EITHER, if restrictive covenant was created on or after January 1, 1969*]

1. On or about _____ [*date*], [the predecessors in title of] plaintiff [*owner whose land was or is benefited by the restrictive covenant*] and [the predecessors in title of] defendant were owners, respectively, of the real property described above and, in consideration of the mutual benefit to themselves and to their respective properties, executed _____ [*name of agreement, e.g.,* an "Agreement Imposing Restrictions"]. The Agreement was recorded in the office of the County Recorder of _____ County, on _____ [*date*], in Book _____, page _____, a copy of which is attached hereto as Exhibit "_____" and made a part hereof.

2. [*Allegation that agreement particularly described burdened property. See § 184.191, Paragraph 2.*]

3. [*Allegation that restrictions benefited plaintiff's property and ran with the land. See § 184.191, Paragraph 3.*]

[*OR, if restrictive covenant was created before January 1, 1969*]

1. On or about _____ [*date*], [the predecessors in title of] plaintiff [*owner whose land was or is benefited by the restrictive covenant*] and [the predecessors in title of] defendant were owners, respectively, of the real property described above and, in consideration of the mutual benefit to themselves and to their respective properties, executed _____ [*name of agreement, e.g.,* an "Agreement Imposing Restrictions"]. The Agreement was recorded in the office of the County Recorder of _____ County, on _____ [*date*],

in Book _____, page _____, a copy of which is attached to this complaint as Exhibit "_____" and made a part hereof.]

2. By the terms of the Agreement, defendant['s predecessor in interest] promised to do or refrain from doing some act on his/her own property, in the following particulars: _____ [*set out restriction, e.g.,* that no part of defendant's real property, described in the Agreement, should ever be used to conduct a retail grocery business].

3. By the terms of the Agreement, defendant['s predecessor in interest] agreed to bind himself/herself and all his/her assigns by a continuing covenant, enforceable by plaintiff['s predecessor in interest] and his/her assigns, for the express benefit of the property of plaintiff['s predecessor in title].

[2] Use of Form

This allegation is for insertion in § 184.190 in lieu of Paragraphs 6 through 10 in that form. The allegation can be used by one landowner, or by his or her successor in interest, in a complaint to enjoin a violation of a restrictive covenant created to burden the property of another landowner, whether the restrictive covenant was created prior or subsequent to the 1968 amendments to *Civ. Code § 1468*.

[3] Allegations

For those covenants created on or after January 1, 1969, the form alleges that an agreement was executed by an owner of land with the owner of other land, and provides those further allegations required by *Civ. Code § 1468* [*see § 184.191*].

For those covenants created before January 1, 1969, when the statutory requirements were not as strict, the form alleges that (1) a covenant was made by the owner of land with the owner of other land (Paragraph 1), (2) the covenator promised to do or refrain from doing some act on his or her own land (Paragraph 2), (3) the doing or refraining was expressed to be for the benefit of the land of the covenantee (Paragraph 3), and (4) the covenant was made by the covenantor expressly for his or her assigns or to the assigns of the covenantee (Paragraph 3) [former *Civ. Code § 1468* (Stats. 1905, ch. 450, § 1); *see Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 174-175, 195 Cal. Rptr. 14]* .

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15-184 California Forms of Pleading and Practice--Annotated § 184.193

§ 184.193 Affirmative Defense to Complaint for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction to Prevent Violation of Tract Restrictions--Waiver or Laches

[1] FORM Affirmative Defense to Complaint for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction to Prevent Violation of Tract Restrictions--Waiver or Laches

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. As of _____ [*date*], plaintiff had _____ [actual notice of *or* actual notice of circumstances sufficient to put a prudent person on inquiry concerning] those actions of defendant alleged to be in violation of the restrictions. After the time plaintiff had notice of the _____ [violations *or* actions] described above, _____ [*number*] months elapsed before defendant notified plaintiff that defendant objected to those actions of defendant alleged to be in violation of the restrictions. By so failing to object, defendant waived the violations alleged in the complaint.

2. After the time plaintiff had notice of the _____ [violations *or* actions] described above, plaintiff delayed an unreasonable time before filing this action.

3. Enforcement of the restrictions described above would severely prejudice defendant, in that _____ [*specify injury resulting from enforcement, e.g.,* construction of defendant's patio improvement has been substantially completed and its removal would damage defendant in the amount of $_____], and the prejudice is of such a degree that it would be unjust, oppressive, and inequitable to enforce them.

[2] Use of Form

This form of affirmative defense is for use by a lot owner in an answer to a complaint to enjoin the violation of tract restrictions when, due to the passage of time, plaintiff has either waived the restrictions or is guilty of laches. The form may also be used as a defense in an action to reconvey property for breach of condition subsequent [*see Wedum-Aldahl*

Co. v. Miller (1937) 18 Cal. App. 2d 745, 746, 752-753, 64 P.2d 762 ; *see also § 184.198*].

This form alleges (1) the date that plaintiff had actual or constructive notice of the violations [*see Wilkman v. Banks (1954) 124 Cal. App. 2d 451, 456-457, 269 P.2d 33* (laches); *Morgan v. Veach (1943) 59 Cal. App. 2d 682, 689, 139 P.2d 976* (waiver)] (Paragraph 1); (2) that plaintiff delayed an unreasonable time after notice in notifying defendant of objection [*see Butler v. Holman (1956) 146 Cal. App. 2d 22, 28, 303 P.2d 573* (laches)] (Paragraph 2); and (3) that enforcement of the restrictions would work an inequitable burden on defendant [*Butler v. Holman (1956) 146 Cal. App. 2d 22, 28, 303 P.2d 573* (laches); *Morgan v. Veach (1943) 59 Cal. App. 2d 682, 689, 139 P.2d 976* (waiver)] (Paragraph 3).

[3] Limitations Period for Actions Commenced After January 1, 2001

An action for violation of a "restriction" (as that term is defined in *Civ. Code § 784*) must be commenced within five years. However, this limitations period does not bar commencement of an action for violation of a restriction before January 1, 2001, and, until that date, any other applicable statutory or common law limitation will continue to apply to the action [*Code Civ. Proc. § 336(b)*]. This form, and others in this chapter, do not reflect this statutory limitations period due to the restriction on its applicability prior to the year 2001. For further discussion of the statutory limitations period, see *§ 184.68*.

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C. Restrictive Covenants

15-184 California Forms of Pleading and Practice--Annotated § 184.194

§ 184.194 Affirmative Defense to Complaint for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction to Prevent Violation of Tract Restrictions--Acquiescence in Similar Violations

[1] FORM Affirmative Defense to Complaint for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction to Prevent Violation of Tract Restrictions--Acquiescence in Similar Violations

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that, since taking title to his/her lot, and more particularly within the last _____ [*number*] years, plaintiff has acquiesced while violations similar to those violations of the restrictions described in the complaint have been committed by other owners of land within the subdivision, and more particularly: _____ [*specify facts showing that other violations have occurred within tract*]. The number and type of breaches described above are such that the purpose of the restriction has been undermined and abandoned.

[2] Use of Form

This form of affirmative defense is for use by a lot owner in an answer to a complaint to enjoin the violation of tract restrictions. The defense can be used when the tract restrictions have become unenforceable due to numerous violations of the same restrictions by other lot owners within the tract, constituting a pattern of noncompliance [*see Seligman v. Tucker (1970) 6 Cal. App. 3d 691, 699 n.7, 700, 86 Cal. Rptr. 187* ; *see also* Restatement of Property, Cal. Annot. (1950) § 561 (defense of acquiescence arises when plaintiff has failed to enforce restriction against other violators and now seeks to enforce same type of restriction against defendant)]. The form alleges that plaintiff has acquiesced while violations similar to those violations of the restrictions described in the complaint have been committed by other owners of land within the subdivision [*see Johnstone v. Bettencourt (1961) 195 Cal. App. 2d 538, 542, 16 Cal. Rptr. 6]* , and that the number and type of breaches described above are such that the purpose of the restriction has been undermined and abandoned [*see Bryant v. Whitney (1918) 178 Cal. 640, 643, 174 P. 32* ; *Seligman v. Tucker (1970) 6 Cal. App. 3d 691, 699 n.7, 700, 86 Cal. Rptr. 187]* .

[3] Decisions

Acquiescence precludes enforcement when there has been no uniform observance of restriction, substantially all owners have so conducted themselves as to indicate abandonment of the right to enforce restriction, enforcement will not tend to materially restore character imposed on district by general scheme, and violation does not diminish value of other lots. *Bryant v. Whitney (1918) 178 Cal. 640, 641-643, 174 P. 32* (setback restriction violated on eight other lots in 28-lot tract)

Acquiescence or waiver is defense to action to enforce tract restrictions only when there have been so many violations that purpose of the general plan is undermined. *Seligman v. Tucker (1970) 6 Cal. App. 3d 691, 699 n.7, 700, 86 Cal. Rptr. 187*

Right to enforce building restrictions is waived by lot owners who acquiesce in similar breaches by other owners of land in the subdivision. *Johnstone v. Bettencourt (1961) 195 Cal. App. 2d 538, 542, 16 Cal. Rptr. 6* (building breakwater)

[4] Cross References

For a related form, see *§ 184.190*.

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Volume 15: Costs and Attorney's Fees thru Deeds-Chs. 174-189
Chapter 184 DEEDS
PART IV. FORMS
C. Restrictive Covenants

15-184 California Forms of Pleading and Practice--Annotated § 184.195

§ 184.195 Complaint [Code Civ. Proc. § 425.10] for Declaratory Relief [Code Civ. Proc. § 1060] and to Quiet Title [Code Civ. Proc. §§ 760.010-764.080] to Cancel Use Restrictions--Changed Conditions in Neighborhood

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Declaratory Relief [Code Civ. Proc. § 1060] and to Quiet Title [Code Civ. Proc. §§ 760.010-764.080] to Cancel Use Restrictions--Changed Conditions in Neighborhood

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*	)	COMPLAINT FOR DECLARATORY RELIEF
of known defendant(s)] [*if unknown defendants are*	)	AND TO QUIET TITLE
included, add:; all persons unknown, claiming any	)	
legal or equitable right, title, estate, lien, or interest in	)	
the property described in the complaint adverse to	)	
Plaintiff's title, or any cloud on Plaintiff's title thereto]		
[; and DOES I-_____, inclusive],		
Defendant(s).		

_____

Plaintiff alleges:

FIRST COUNT
(Declaration That Restrictions Are Unenforceable)

[1. *Capacity and residence of plaintiff, if appropriate. See § 184.150, Paragraph 1.*]

[2. *Capacity and residences of known defendant(s), if appropriate. See § 184.150, Paragraph 2.*]

3. Defendant(s) is/are _____ [the only *or* all] known owner(s) of, and claimant(s) to, the property comprising that tract of land situated in _____ County, California, known as _____ [*name of subdivision*], and more particularly described as _____ [*legal description of subdivision*].

[4. *Fictitious defendants. See § 184.150, Paragraph 3.*]

[5. *Allegation of ownership of plaintiff's lot. See § 184.190, Paragraph 3.*]

[6. *Allegation of existence and terms of Declaration of Restrictions. See § 184.190, Paragraphs 6-7.*]

7. At the time the Declaration of Restrictions was recorded, the property was in _____ [*describe neighborhood prior to change, e.g.,* an unincorporated rural area devoted to agricultural uses].

8. Since the date of recording of the Declaration of Restrictions, the use of property in the neighborhood of plaintiff's property has changed in that _____ [*state facts showing change in surrounding neighborhood, e.g.,* Ventura Street, on which plaintiff's lot fronts, has grown from a two-lane street to a six-lane thoroughfare on which there are now numerous places of business to both the East and West within two blocks of plaintiff's lot].

9. As a result of the changed circumstances and conditions of the neighborhood in which plaintiff's property is located, plaintiff's property is no longer suitable for _____ [*specify use to which property is restricted, e.g.,* single-family residential purposes] and its value is greatly diminished as long as it is restricted to that use. Moreover, the original purpose of the restrictions, _____ [*specify purpose that was originally served by restrictions, e.g.,* to maintain the tract as a residential district free from proximity to commercial activity] has been destroyed by acts for which plaintiff and defendants are not responsible and is no longer attainable. Enforcement of the restrictions against plaintiff's lot would no longer serve to benefit and effectuate the purposes of the restrictions with respect to the other lots in the tract, nor would it be of any substantial benefit to the remaining properties in the tract.

10. Continued enforcement of the restrictions described above against plaintiff's lot is unjust, oppressive, and inequitable, in that such enforcement will not materially benefit any of defendants yet will greatly diminish the value of plaintiff's property and furthermore cause irreparable injury to plaintiff, in that _____ [*specify facts showing injury, e.g.,* plaintiff is ready, able, and willing to improve his/her lot for business purposes and, if prevented from doing so, will be deprived of a unique commercial opportunity].

11. An actual controversy has arisen and now exists between plaintiff and defendants in that plaintiff contends that the restrictions described above are no longer binding or enforceable in equity, whereas defendants dispute these contentions and contend that the restrictions are valid and enforceable.

SECOND COUNT
(Quiet Title)

12. Plaintiff refers to and herein incorporates Paragraphs 1-10, inclusive, of the First Count.

[13. *If "all persons unknown" are named as defendants, allege:* The defendants herein named as "all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud on plaintiff's title thereto" (hereinafter sometimes referred to as "the unknown defendants") are unknown to plaintiff. These unknown defendants, and each of them, claim some right, title, estate, lien, or interest in

the above-described property adverse to plaintiff's title; and their claims, and each of them, constitute a cloud on plaintiff's title to that property.]

14. [*Allegation of basis of plaintiff's title. See § 184.150, Paragraph 12.*]

15. Plaintiff is seeking to quiet title against the claims of all defendant(s)[, including the named defendant(s); _____ (*continue with whichever are applicable:* successor defendants described in Paragraph _____; the unknown defendants described in Paragraph 13; _____ (*name*), whose unknown, uncertain, or contingent claim, if any, is fully described in Paragraph 16)]. Each of the defendants[, except _____ (*insert name of any defendants with claims other than those based on the servitude, e.g.,* Pacific Gas and Electric Company,)] claims some right, title, estate, lien, or interest in and to the real property of plaintiff described above, based on the Declaration of Restrictions described in Paragraph 6, above, and consisting of equitable servitudes that burden the property of plaintiff for the benefit of the lot of each defendant named herein, and with the right of enforcement of the restrictions contained in the Declaration of Restrictions, and each of them, vested in each defendant named herein. Defendants' claims, and each of them, are without any right whatever and defendants, and each of them, have no right, title, estate, lien, or interest whatever in the above-described property, or any part of that property[, except the following: _____ (*set forth any adverse claims of which plaintiff admits the validity, e.g.,* the utility easement held by Pacific Gas and Electric Company)].

[16. *Allegation of unknown, uncertain, or contingent claims of named defendants. See § 184.150, Paragraph 15.*]

17. Plaintiff seeks to quiet title as of _____ [*date*]. [*If the date is a date other than the date the complaint is filed, allege why a determination as of that date is sought*.]

WHEREFORE, plaintiff prays judgment against defendants as follows:

On the FIRST COUNT:

1. For a declaration by the court that the covenant, conditions, and restrictions described above are, by reason of the changed conditions set forth in this complaint, no longer binding or enforceable;

2. For a declaration that plaintiff holds the real property free of any cloud, equitable servitude, or reversionary interest based on the unenforceable restrictions described above;

On the SECOND COUNT:

3. For a judgment quieting plaintiff's title to the real property as against defendants, and all persons claiming under defendants, and determining those adverse claims to, and clouds on, plaintiff's real property consisting of covenants, conditions, and restrictions that are no longer binding or enforceable;

On all COUNTS:

4. For costs of suit incurred herein; and

5. For such other further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification. See § 184.150.*]

[2] Use of Form

This form of complaint is for use by the owner of a lot in a subdivision to bring an action to cancel a use restriction, in the form of an equitable servitude, when enforcement has become inequitable due to changed conditions in the neighborhood [*see Code Civ. Proc. § 1060* (declaratory action); *Marra v. Aetna Construction Co. (1940) 15 Cal. 2d 375, 377, 101 P.2d 490* (quiet title); *Hess v. Country Club Park (1931) 213 Cal. 613, 615-616, 2 P.2d 782* (declaratory relief)].

A plaintiff who intends to add a quiet title count naming unknown persons as defendants should obtain a title report before commencing the action, because an examination of the record title and an inspection of the property will be necessary [*see Code Civ. Proc. § 762.060(b)*]. Also, the court may order plaintiff to obtain a title report and keep it available for inspection and copying by the parties [*Code Civ. Proc. § 762.040(b)*].

[3] Changed Conditions as Defense

The allegations in Paragraphs 7-10 of this form of complaint may be used as an affirmative defense for insertion in an answer to a complaint seeking to enjoin a violation of tract restrictions, when those restrictions have become unenforceable due to changed conditions [*see § 184.190*]. Those allegations may also serve as an affirmative defense [*see Townsend v. Allen (1952) 114 Cal. App. 2d 291, 294-296, 250 P.2d 292* ; *see also § 184.196*].

[4] Allegations

[a] Declaratory Relief

In the first count, for declaratory relief, this form alleges the following:

- The capacity of the parties, if appropriate (Paragraphs 1, 2, 4);

- The ownership of lots in a tract by defendant and by plaintiff (Paragraphs 3, 5) [*see Trahms v. Starrett (1973) 34 Cal. App. 3d 766, 771, 110 Cal. Rptr. 239]* ;

- Recordation of a declaration of restrictions pursuant to a general plan (Paragraph 6) [*see Werner v. Graham (1919) 181 Cal. 174, 184, 183 P. 945]* ;

- The change in neighborhood from the time when restrictions were recorded to the present (Paragraphs 7-8) [*see Hess v. Country Club Park (1931) 213 Cal. 613, 614-616, 2 P.2d 782]* ;

- That the changes have made the purpose of the restrictions unattainable (Paragraph 9) [*see County of Butte v. Bach (1985) 172 Cal. App. 3d 848, 868-869, 218 Cal. Rptr. 613]* ;

- That enforcement of restrictions is inequitable (Paragraph 10) [*see Hurd v. Albert (1931) 214 Cal. 15, 23, 3 P.2d 545]* ; and

- That an actual controversy exists relating to the legal rights and duties of the parties under a deed

containing restrictions (Paragraph 11) [*see Code Civ. Proc. § 1060*; *Hess v. Country Club Park (1931) 213 Cal. 613, 614-616, 2 P.2d 782]* .

For a complete discussion of the allegations required to state a cause of action for declaratory relief, see Ch. 182 *Declaratory Relief* .

[b] Quiet Title

In Paragraph 12 of the second count, this form incorporates the allegations of Paragraphs 1-10 of the first count, most importantly (1) the identity of known defendants having adverse claims to the title of plaintiff against which a determination is sought (Paragraph 3) [*Code Civ. Proc. § 762.010*], and (2) the legal description and street address of the property that is the subject of the action (Paragraph 5) [*Code Civ. Proc. § 761.020(a)*]. In addition, it alleges the following:

- The title of the plaintiff regarding which a determination is sought and the basis of the title (Paragraph 14) [*Code Civ. Proc. § 761.020(b)*];

- The adverse claims to plaintiff's title against which a determination is sought, including unknown, uncertain, or contingent claims, if appropriate (Paragraphs 15, 16) [*Code Civ. Proc. §§ 761.020(c), 762.020(a)*; *see also Code Civ. Proc. § 762.030* (when person known or believed to be deceased is required defendant in quiet title action) and § 184.150[3][c][ii], [iii]], as well as any claims that plaintiff admits are valid (Paragraph 15) [Code Civ. Proc. § 720.060(c)]; and

- The date as of which the determination is sought (Paragraph 17) [*Code Civ. Proc. § 761.020(d)*].

The quiet title count in this form does not contain any allegations regarding defendants who are personal representatives [*Code Civ. Proc. § 762.030(a)*] or heirs and intestate or testate successors [*Code Civ. Proc. § 762.030(b)*] of persons known or believed by the plaintiff to be deceased. If those defendants are necessary in a particular case [*see § 184.150[3][c]*], counsel should use the appropriate allegations from Ch. 482, *Quieting Title*.

[5] Statute of Limitations

No statute of limitations commences to run against a claim for declaratory relief before there has been a breach of the obligation in respect to which the declaration is sought; the controversy may be an ancient one, but the action may nevertheless be maintained [*Maguire v. Hibernia Sav. & L. Soc'y (1944) 23 Cal. 2d 719, 734, 146 P.2d 673* ; *United Pacific/Reliance Ins. Co. v. DiDomenico (1985) 173 Cal. App. 3d 673, 676-677, 219 Cal. Rptr. 119]* .

There is no statute of limitations governing quiet title actions as such and so ordinarily it is necessary to refer to the underlying theory of relief to determine which statute applies [*Muktarian v. Barmby (1965) 63 Cal. 2d 558, 560, 47 Cal. Rptr. 483, 407 P.2d 659* ; *but see Code Civ. Proc. § 318* (which does not run against a plaintiff who is in possession)]. For a discussion of the limitations period for enforcement of a restrictive covenant, see *§ 184.190[7]*.

[6] Verification

A complaint seeking to quiet title to real property must be verified [*Code Civ. Proc. § 761.020*].

[7] Jurisdiction and Venue

The superior court has jurisdiction of a quiet title action [*Code Civ. Proc. § 760.040(a)*]. Jurisdiction of an action for declaratory relief is also in the superior court. Neither action is a limited civil case [*see Code Civ. Proc. §§ 85, 86, 580(b)(3), (4)*]. Therefore, a combined action for declaratory relief and to quiet title must be brought in superior court

and is not a limited civil case. Subject to the power of the court to transfer actions, the proper county for the trial of a quiet title action is the county in which the real property, or some part thereof, is located [*Code Civ. Proc. § 760.050(a)*]. In any case, the existence of a statute relating to the authority of the court in a limited civil case does not, by itself, imply that the same authority does or does not exist in an unlimited civil case. Similarly, the existence of a statute relating to the authority of the court in an unlimited civil case does not, by itself, imply that the same authority does or does not exist in a limited civil case [*Code Civ. Proc. § 89*].

[8] Cross References

For a related form, see *§ 184.150*.

For a discussion, procedure, and forms relating generally to actions for declaratory relief, and for a form of judgment, see Ch. 182, *Declaratory Relief*

For a discussion, procedure, and forms relating generally to actions to quiet title, see Ch. 482, *Quieting Title*

[9] State Statutes

Court's refusal to grant declaratory relief when declaration or determination not necessary or proper. Civ. Code § 1061

Procedure for quieting title and effect of judgment. *Code Civ. Proc. §§ 760.010-764.080*

Declaratory relief actions generally. *Code Civ. Proc. § 1060*

[10] Decisions

[a] Declaratory and Quiet Title Actions

Quiet title action is properly brought to remove cloud created by unenforceable restrictions. *Marra v. Aetna Construction Co. (1940) 15 Cal. 2d 375, 377, 101 P.2d 490*

Declaratory judgment is proper when residential tract restrictions are no longer enforceable because of change in character of neighborhood. *Hess v. Country Club Park (1931) 213 Cal. 613, 614-616, 2 P.2d 782*

Declaratory relief action is appropriate means to test enforceability of covenants or servitudes asserted against property. *Ross v. Harootunian (1967) 257 Cal. App. 2d 292, 294, 64 Cal. Rptr. 537*

[b] Changed Conditions

Change in zoning that occurs after restrictions have been placed on property has evidentiary value to show change in character of surrounding area. *Wolff v. Fallon (1955) 44 Cal. 2d 695, 698, 284 P.2d 802*

Restrictions that are not enforceable as to every lot in tract as possibly may be enforced on part of tract if such part is of sufficient extent and so located that original purpose of restrictions can be accomplished. *Fairchild v. Raines (1944) 24 Cal. 2d 818, 828, 151 P.2d 260*

Changes outside tract, coupled with substantial evidence that to enforce the covenant would cause irreparable injury to defendant, without materially benefiting the plaintiff, is sufficient to sustain judgment denying injunctive relief. *Hurd*

v. Albert (1931) 214 Cal. 15, 22-25, 3 P.2d 545

Restrictive covenant is unenforceable when change in neighborhood has been such that enforcement would have no other result than to harass or injure defendant, without benefiting plaintiff. *Hurd v. Albert (1931) 214 Cal. 15, 23, 3 P.2d 545* (residential restriction)

Cancellation of residential-only restriction is unjustified when purpose of covenant is still attainable. *County of Butte v. Bach (1985) 172 Cal. App. 3d 848, 868-869, 218 Cal. Rptr. 613*

Enforcement of residential-only restrictions is proper when it would serve as buffer against business area and therefore be of substantial benefit to other lots in tract. *Atlas Terminals, Inc. v. Sokol (1962) 203 Cal. App. 2d 191, 193-194, 201-203, 21 Cal. Rptr. 293*

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15-184 California Forms of Pleading and Practice--Annotated § 184.196

§ 184.196 Allegation--Change in Public Policy

[1] FORM Allegation--Change in Public Policy

1. Since _____ [*date*], plaintiff has _____ [engaged *or* desired to engage] in _____ [*specify activity proscribed by tract restrictions, e.g.,* the operation of a licensed residential care facility for six or fewer persons].

2. As applied to the activities described above, the restrictions alleged in Paragraph 6 of this complaint are in conflict with the public policy expressed in _____ [*specify statute*], that is, _____ [*describe legislative purpose of statute, e.g.,* to encourage development of community residential care facilities for disabled people and seniors].

3. Defendant's activities are not inconsistent with the contemporary purposes of the restrictions.

4. Enforcement of the restrictions so as to proscribe the activities of defendant would conflict with a strong statement of public policy in favor of a broad interpretation of restrictions such as those alleged in Paragraph 6 of this complaint.

[2] Use of Form

This allegation is for insertion in § 184.195 in lieu of Paragraphs 7 through 10 in that form. The allegation is for use when application of the tract restrictions to defendant's use of the property conflicts with public policy as expressed in a statute, even though the statute does not directly prohibit enforcement of the restrictions [*see Welsch v. Goswick (1982) 130 Cal. App. 3d 398, 405-407, 181 Cal. Rptr. 703* ; *but see Barrett v. Lipscomb (1987) 194 Cal. App. 3d 1524, 1531-1532, 240 Cal. Rptr. 336]* .

[3] Allegations

The form alleges that (1) plaintiff is engaged in or wishes to engage in activities that may be violative of the restrictions (Paragraph 1) [*see Welsch v. Goswick (1982) 130 Cal. App. 3d 398, 402, 181 Cal. Rptr. 703* ; *see also Code Civ. Proc.*

§ 1060; *Hess v. Country Club Park (1931) 213 Cal. 613, 615-616, 2 P.2d 782]* ; (2) a statute expresses public policy with which the restrictions, as applied to defendant's activities, conflict (Paragraph 2) [*see Welsch v. Goswick (1982) 130 Cal. App. 3d 398, 406-407, 181 Cal. Rptr. 703]* ; (3) defendant's activities are not inconsistent with the purposes of the restrictions (Paragraph 3) [*see Welsch v. Goswick (1982) 130 Cal. App. 3d 398, 407 n.7, 408, 181 Cal. Rptr. 703]* ; and (4) enforcement of the restrictions against defendant's activities would conflict with a strong statement of public policy in favor of a broad interpretation of the restrictions (Paragraph 4) [*see Welsch v. Goswick (1982) 130 Cal. App. 3d 398, 407, 181 Cal. Rptr. 703]* .

[4] Decisions

Public policy in favor of community care facilities does not constitute grounds to prevent enforcement of "private residences" restriction against operator of commercial residential care facility because *Health & Safety Code § 1566.5* expressly preserves validity of preexisting covenants. *Barrett v. Lipscomb (1987) 194 Cal. App. 3d 1524, 1526-1527, 1531-1532, 240 Cal. Rptr. 336* (questioning *Welsch v. Goswick (1982) 130 Cal. App. 3d 398, 181 Cal. Rptr. 703*)

Reasonable interpretation of restrictive covenant is subject to change with time, change in circumstances, and evolution of public policy; subsequent legislative enactment is able to signal change in public policy justifying change in reasonable interpretation of covenant despite fact that legislation does not directly affect covenant. *Welsch v. Goswick (1982) 130 Cal. App. 3d 398, 405-407, 181 Cal. Rptr. 703*

[5] Cross References

For a related form, see *§ 184.195*.

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15-184 California Forms of Pleading and Practice--Annotated § 184.197

§ 184.197 Complaint [Code Civ. Proc. § 425.10] to Compel Reconveyance of Real Property for Breach of Condition Subsequent [Civ. Code § 1109] and to Quiet Title [Code Civ. Proc. §§ 760.010-764.080]--By Grantor's Successor in Interest Against Grantee

[1] FORM Complaint [Code Civ. Proc. § 425.10] to Compel Reconveyance of Real Property for Breach of Condition Subsequent [Civ. Code § 1109] and to Quiet Title [Code Civ. Proc. §§ 760.010-764.080]--By Grantor's Successor in Interest Against Grantee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*	)	COMPLAINT TO COMPEL RECONVEYANCE
of known defendant(s)] [*if unknown defendants are*	)	OF REAL PROPERTY FOR BREACH OF CONDI-
included, add:; all persons unknown, claiming any	)	TION SUBSEQUENT AND TO QUIET TITLE
legal or equitable right, title, estate, lien, or interest in	)	
the property described in the complaint adverse to	)	
Plaintiff's title, or any cloud on Plaintiff's title thereto]		
[; and DOES I-_____, inclusive],		
Defendant(s).		

_____

Petitioner alleges:

[1. *Capacity and residence of plaintiff, if appropriate. See § 184.150, Paragraph 1.*]

[2. *Capacity and residence of defendant, if appropriate. See § 184.150, Paragraph 2.*]

[3. *Fictitious defendants, if appropriate. See § 184.150, Paragraph 3.*]

[4. *Allegations regarding "all persons unknown," if named as defendants. See § 184.150, Paragraph 14.*]

[5. *Allegation of unknown, uncertain, or contingent claims of named defendants, if appropriate. See § 184.150, Paragraph 15.*]

6. Plaintiff is the transferee, grantee, and successor in interest in and to all of the right, title, and interest of _____ [*defendant's grantor*] to the real property described below and to all of the restrictions, reservations, conditions, covenants, and reversionary interests appertaining to the real property, by virtue of a deed dated _____ [*date*], which was duly recorded in the office of the County Recorder of _____ County, on _____ [*date*], in Book/Reel _____, page/image _____. A copy of the deed with the endorsements of record is attached as Exhibit "_____" and made a part of this complaint.

7. Prior to _____ [*date*], _____ [*defendant's grantor*] was the owner fee simple of that certain real property situated in _____ County, known as _____ [*street address*], _____ [*city*], California, and more particularly described as follows: _____ [*legal description*].

8. On _____ [*date*], _____ [*defendant's grantor*] executed and delivered a grant deed to the property described above to _____ [*defendant*]. On _____ [*date*], the deed was duly recorded in the office of the County Recorder of _____ County, on _____ [*date*], in Book/Reel _____, page/image _____, a copy of which is attached as Exhibit "_____" and made a part of this complaint.

9. Defendant's deed contained the following conditions: _____ [*set forth verbatim conditions, including those alleged to be breached*].

10. Defendant's deed was, on delivery of the deed, accepted by defendant on the conditions described above.

11. [*Allege acts by defendant constituting breach of conditions.*]

12. Defendant's acts constitute a breach of the conditions, the estate of defendant in the property has terminated and become void, and the land has reverted to plaintiff in fee simple absolute, without any claim, right, title, or interest therein or thereto in favor of defendant.

[13. After the breach of the conditions described above, plaintiff exercised his/her right of reentry, reversion, and forfeiture. On or about _____ (*date*), and before the commencement of this action, plaintiff demanded of defendant the possession of the premises. Defendant failed and refused and does still fail and refuse, to deliver the premises to plaintiff.]

14. Plaintiff is seeking to quiet title against the claims of all defendant(s)[, including the named defendant(s); _____ (*continue with whichever are applicable:* successor defendants described in Paragraph _____; the unknown defendants described in Paragraph 4; and _____ (*name*), whose unknown, uncertain, or contingent claim, if any, is fully described in Paragraph 5)]. Defendants' claims, and each of them, are without any right whatever and defendants, and each of them, have no right, title, estate, lien, or interest whatever in the above-described property, or any part of that property[, except the following: _____ (*set forth any adverse claims of which plaintiff admits the validity, e.g.,* the utility easement held by Pacific Gas and

Electric Company)].

15. [*Date as of which plaintiff seeks to quiet title. See § 184.195, Paragraph 17.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a judgment declaring that the real property has reverted to plaintiff;

2. For a judgment quieting plaintiff's title to the real property as against defendant, and all persons claiming under defendant, and that the defendant be perpetually enjoined from asserting any claim whatsoever against the real property;

3. For a judgment commanding defendant to convey the real property to plaintiff and to give plaintiff possession of the real property;

[4. For reasonable attorney's fees (in the amount of $_____ *or* according to proof).]

5. For costs of suit incurred herein; and

6. For such other further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification. See § 184.150.*]

CAUTION:

A complaint seeking to quiet title to real property must be verified [*Code Civ. Proc. § 761.020*]. Immediately on the commencement of a quiet title action, plaintiff must file a notice of pendency of action (lis pendens) in the office of the county recorder of the county in which the real property described in the complaint is located [*Code Civ. Proc. § 761.010(b)*; *see Code Civ. Proc. § 405.20*; for further discussion *see § 184.195*]. Moreover, if a lis pendens has been filed, the right of reentry, or power of termination, will not expire or expire of record once the action has been brought [*see Civ. Code § 880.260*; *see also Civ. Code § 885.010*]. Also, note that this form does not contain any allegations regarding defendants who are personal representatives [*Code Civ. Proc. § 762.030(a)*] or heirs and intestate or testate successors [*Code Civ. Proc. § 762.030(b)*] of persons known or believed by the plaintiff to be deceased. If those defendants are necessary in a particular situation, the complaint should include the appropriate allegations from Ch. 482, *Quieting Title*.

[2] Use of Form

This form of complaint is for use by the holder of a power of termination against a property owner who has breached a condition subsequent appearing in the deed that created the power of termination [*Thornton v. Middletown Educational Corp. (1937) 21 Cal. App. 2d 707, 710, 70 P.2d 234* ; *see Civ. Code § 1109* (duty to reconvey property on breach of condition subsequent); *Rosecrans v. Pacific Elec. Ry. Co. (1943) 21 Cal. 2d 602, 603-605, 134 P.2d 245* (quiet title); *see also Civ. Code § 885.010* (power of termination defined)].

A plaintiff who intends to add "all persons unknown" as defendants should obtain a title report before commencing the action, because an examination of the record title and an inspection of the property will be necessary [*see Code Civ. Proc. § 762.060(b)*]. Also, the court may order plaintiff to obtain a title report and to keep it available for inspection and

copying by the parties [*Code Civ. Proc. § 762.040(b)*].

[3] Allegations

This form of complaint alleges (1) the capacity of the plaintiff, if appropriate (Paragraph 1); (2) the capacity of the defendant, if appropriate (Paragraph 2); (3) plaintiff's succession in interest to defendant's grantor (Paragraph 6) [*see Civ. Code § 1109*; *People ex rel. Dept. of Public Works v. City of Fresno (1962) 210 Cal. App. 2d 500, 504-505, 26 Cal. Rptr. 853]* ; (4) conveyance of a deed to defendant containing a condition subsequent (Paragraphs 7-10) [*see Pedro v. Potter (1926) 197 Cal. 751, 758-759, 242 P. 926]* ; (5) defendant's breach of the conditions and termination of the estate (Paragraphs 11, 12) [*see Knight v. Black (1912) 19 Cal. App. 518, 522, 126 P. 512* (*disapproved on other grounds* in *Green v. Superior Court (1974) 10 Cal. 3d 616, 633 n.19, 111 Cal. Rptr. 704, 517 P.2d 1168*)]; (6) plaintiff's notice to defendant of right of reentry, if appropriate (Paragraph 13) [*see Civ. Code § 885.050*; *Lincoln v. Narom Development Co. (1970) 10 Cal. App. 3d 619, 624, 89 Cal. Rptr. 128]* ; (7) the adverse claims against which plaintiff seeks to quiet title (Paragraph 14) [*Code Civ. Proc. § 761.020(c)*] as well as any claims that plaintiff admits are valid [*Code Civ. Proc. § 762.060(c)*]; and (8) the date as of which plaintiff wishes title quieted (Paragraph 15) [*Code Civ. Proc. § 761.020(d)*].

For discussion of allegations for use in a complaint to quiet title, see *§§ 184.150* and *184.195*.

[4] Limitation of Action

There is no statute of limitations governing quiet title actions as such and so ordinarily it is necessary to refer to the underlying theory of relief to determine which statute applies [*Muktarian v. Barmby (1965) 63 Cal. 2d 558, 560, 47 Cal. Rptr. 483, 407 P.2d 659]* . To exercise a power of termination by bringing a civil action, the action must be commenced within five years after breach of the restriction, or within a longer period agreed on by the parties if they record a waiver or extension before expiration of the five-year period [*Civ. Code § 885.050*].

[5] Cross References

For related forms, see *§§ 184.190* and *184.195*.

For a procedural guide and alternative forms, see Ch. 482, *Quieting Title*

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Volume 15: Costs and Attorney's Fees thru Deeds-Chs. 174-189
Chapter 184 DEEDS
PART IV. FORMS
C. Restrictive Covenants

15-184 California Forms of Pleading and Practice--Annotated § 184.198

§ 184.198 Affirmative Defense Allegation--Power of Termination Expired [Civ. Code §§ 885.030, 885.040(a), 885.060(b)]

[1] FORM Affirmative Defense Allegation--Power of Termination Expired [Civ. Code §§ 885.030, 885.040(a), 885.060(b)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

[*EITHER, if power of termination expired by passage of time*]

The action is barred by *Civil Code Sections 885.030* and *885.060(b)* in that _____ [*state facts showing that plaintiff's power of termination has expired by the passage of time under Civ. Code § 885.030, e.g.,* 30 years have passed after the date the instrument _____ (reserving *or* transferring *or specify manner in which the recorded instrument otherwise evidenced the power*) to plaintiff the power he/she is seeking to assert was recorded and no notice of intent to preserve the power of termination has been recorded *or* thirty years have passed after the date a notice of intent to preserve plaintiff's power of termination was recorded and no further notice of intent to preserve the power of termination has been recorded *or* the plaintiff's power of termination has expired by its own terms].

[*AND/OR if power of termination expired by obsolescence*]

The action is barred by *Civil Code §§ 885.040* and *885.060(b)* in that _____ [*state facts showing that plaintiff's power of termination has become obsolete under Civ. Code § 885.040, e.g.,* the restriction is of no actual and substantial benefit to plaintiff *or* enforcement of plaintiff's power of termination would not effectuate the purpose of the restriction *or* it would be inequitable to enforce the power because of changed conditions or circumstances, in that _____ (*state facts showing changed conditions sufficient to deny enforcement of condition subsequent*

)].

[2] Use of Form

This form of affirmative defense is for use by a property owner in an answer to a complaint to quiet title and reconvey the property for breach of a condition subsequent. The form alleges either or both that the plaintiff's power of termination has expired either due to the passage of time [*see Civ. Code § 885.030*] or due to obsolescence [*see Civ. Code § 885.040*] and therefore is no longer enforceable [*Civ. Code § 885.060(b)*].

Civ. Code § 885.040 (obsolescence) codifies equitable defenses that existed in common law, and therefore, cases that antedate the statute may still be persuasive in indicating when it is inequitable to enforce a condition subsequent [*see* 16 Cal. Law Revision Comm'n Rep. 2163 (1982) (Senate Report Comment to *Civ. Code § 885.040*; also noting that the section imposes a limitation on equitable principles denying enforcement in the case of public or charitable donations); *see, e.g., Arrowhead Mut. Service Co. v. Faust (1968) 260 Cal. App. 2d 567, 576-577, 581-582, 67 Cal. Rptr. 325* (changed conditions); *Hess v. Country Club Park (1931) 213 Cal. 613, 614-616, 2 P.2d 782* (changed conditions); *Wedum-Aldahl Co. v. Miller (1937) 18 Cal. App. 2d 745, 746, 749, 751-753, 64 P.2d 762* (changed conditions and waiver); for further discussion of changed conditions, *see § 184.195*].

[3] Cross References

For a related form, see *§ 184.197*.

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Chapters 185-189 [RESERVED]

15-185 California Forms of Pleading and Practice--Annotated Chapters 185-189

[RESERVED]

Chapters 185[RESERVED]

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 190 DISCOVERY: SCOPE, REGULATION, AND TIMING

16-190 California Forms of Pleading and Practice--Annotated 190.syn

§ 190.syn Synopsis to Chapter 190: DISCOVERY: SCOPE, REGULATION, AND TIMING

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§ 190.02 Cross References

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[2] Discovery in Particular Proceedings

[3] Other Related Chapters

§§ 190.03-190.09 [Reserved]

§ 190.10 Governing Law

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[1] Civil Actions and Proceedings Generally

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§ 190.12 Purpose of Discovery Act

§ 190.13 Interpretation of Discovery Act

[1] Liberal Construction to Further Purpose of Act

[2] Reporter's Notes to Proposed Discovery Act

[3] Case Law Interpreting Prior Acts

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[5] Definitions Generally Applicable in Construing Discovery Act Provisions

§ 190.14 Effect of Discovery Act on Informal Investigation

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§ 190.15 Effect of Trial Delay Reduction Programs

§§ 190.16-190.19 [Reserved]

§ 190.20 General Scope of Civil Discovery

[1] Matter That Is Relevant

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[2] Defendant's Financial Condition

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§ 190.22 Particular Methods of Discovery Authorized Under Discovery Act

§ 190.23 Discovery in Limited Civil Cases

[1] Limited Civil Cases Subject to Economic Litigation Provisions

[2] Discovery Act Modified by Economic Litigation Provisions

[3] Restrictions on Discovery Under Economic Litigation Provisions

[a] Notice and Format Requirements of Discovery Act Apply

[b] Interrogatories, Demands for Production and Inspection of Tangible Evidence, and Requests for Admissions

[c] Depositions

[d] Subpoena Duces Tecum

[e] Physical and Mental Examinations

[f] Exchange of Expert Witness Information

[4] Authorization for Additional Discovery

[a] By Motion

[b] By Stipulation

[5] Motion to Withdraw Action From Limited Civil Case Procedures

§ 190.24 Discovery of Electronically Stored Information

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[2] Electronic Discovery Act

§ 190.25 Discovery in Actions Pending Outside California

§§ 190.26-190.29 [Reserved]

§ 190.30 Proceeding to Limit General Scope When Hardship Outweighs Usefulness

§ 190.31 Proceeding to Restrict Frequency or Extent of Use of Discovery Methods

§ 190.32 Proceeding to Establish Manner, Sequence, or Timing of Discovery

[1] General Rule

[2] Electronic Filing and Service Generally

[a] Rules for Electronic Filing

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[3] Use of Technology in Certain Cases

§ 190.33 General Provisions for Regulating Discovery Proceedings

[1] Requirement of Good-Faith Effort at Informal Resolution of Disputes

[2] Discovery Sanctions

§ 190.34 Protective Orders in Context of Particular Discovery Proceedings

§ 190.35 Regulating Discovery by Stipulation

§ 190.36 Limiting Disclosure of Discovered Matter for Nonlitigation Purposes

§ 190.37 Procedure to Seal Confidential Records

§ 190.38 Stay of Discovery

[1] Pending Determination of Validity of Cause of Action

[2] Pending Parallel Criminal Action

§ 190.39 Delegation of Discovery Matters by Discovery Referee

[1] Referee Appointment and Challenge Procedures

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§ 190.50 Requirements for Completing Discovery Before Trial

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§ 190.51 Extending, Shortening or Modifying Time Requirements

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§ 190.64 Decisions

[1] General Principles of Discovery

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[3] International Discovery

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§ 190.65 Attorney General Opinions

§ 190.66 Law Reviews

§ 190.67 Text References

§§ 190.68-190.79 [Reserved]

§ 190.80 Proceedings for Protective Order Limiting Scope of Discovery [Code Civ. Proc. § 2017.020] or Restricting Extent or Use of Discovery Methods [Code Civ. Proc. § 2019.030]--Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Monetary Sanction

§ 190.81 Proceedings for Protective Order Limiting Scope of Discovery [Code Civ. Proc. § 2017.020] or Restricting Extent or Use of Discovery Methods [Code Civ. Proc. § 2019.030]--Order

[1] FORM

[2] Use of Form

§§ 190.82-190.89 [Reserved]

§ 190.90 Proceedings for Order Extending Time for Discovery or Reopening Discovery Proceedings [Code Civ. Proc. § 2024.050]--Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Notice

[4] Monetary Sanction

§ 190.91 Proceedings for Order Extending Time for Discovery or Reopening Discovery Proceedings [Code Civ. Proc. § 2024.050]--Order

[1] FORM

[2] Use of Form

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 190 DISCOVERY: SCOPE, REGULATION, AND TIMING
PART I. SCOPE

16-190 California Forms of Pleading and Practice--Annotated § 190.01

§ 190.01 Scope of Chapter

This chapter introduces the coverage of civil discovery continued in Chapters 191-200.

Part II includes discussion of general provisions of the Civil Discovery Act and related law in the following subparts:

- Subpart A (*see § 190.10* et seq.) covers the general applicability, purpose, and interpretation of the Civil Discovery Act.

- Subpart B (*see § 190.20* et seq.) discusses the general provisions of the Civil Discovery Act that delineate the permissible scope of discovery, the methods of discovery that may be utilized, and the limits on the extent of discovery imposed by the economic litigation provisions that generally govern limited civil cases. Also included is coverage of the Interstate and International Depositions and Discovery Act, *Code Civ. Proc. § 2029.100 et seq.*, governing civil discovery in actions pending outside California.

- Subpart C (*see § 190.30* et seq.) discusses the general provisions of the Civil Discovery Act and related law by which the trial court may regulate civil discovery proceedings that are otherwise conducted informally by the parties.

- Subpart D (*see § 190.50* et seq.) discusses the general provisions of the Civil Discovery Act that set out the deadlines for completing civil discovery as well as procedures for reopening or conducting late discovery.

The forms in Part IV include the following:

- A motion and related papers for use in obtaining a protective order that generally limits the scope of discovery in a particular case or that generally establishes the manner, sequence, and timing of discovery in a particular case [*see §§ 190.80, 190.81*].

- A motion and related papers for use in obtaining leave to reopen discovery or to conduct discovery beyond the general deadlines for completing discovery [*see §§ 190.90, 190.91*].

Legal Topics:

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

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Chapter 190 DISCOVERY: SCOPE, REGULATION, AND TIMING
PART I. SCOPE

16-190 California Forms of Pleading and Practice--Annotated § 190.02

§ 190.02 Cross References

[1] Related Discovery Chapters

- For detailed discussion of evidentiary privileges and other statutory or constitutional protections against disclosure, see Ch. 191, *Discovery: Privileges and Other Discovery Limitations* .

- For discussion and forms relating to discovery sanctions generally, see Ch. 192, *Discovery: Sanctions for Discovery Misuse* .

- For detailed discussion of discovery of electronically stored evidence (e-discovery), see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*.

- For discussion and forms relating to the use of particular discovery methods authorized by the Civil Discovery Act, see the following chapters covering each method:

  - Ch. 193, *Discovery: Depositions*.

  - Ch. 194, *Discovery: Interrogatories*.

  - Ch. 195, *Discovery: Inspection of Tangible Evidence*.

  - Ch. 196, *Discovery: Requests for Admissions*.

  - Ch. 197, *Discovery: Physical and Mental Examinations*.

  - Ch. 198, *Discovery: Exchange of Expert Witness Information*.

- For discussion and forms relating to the use of specified discovery methods for the purpose of preserving testimony or other evidence prior to the commencement of an action or pending an appeal,

see Ch. 199, *Discovery: Preservation of Evidence* .

- For discussion and forms relating to the review of interlocutory discovery orders in certain circumstances by petition for writ of mandate or prohibition, see Ch. 200, *Discovery: Review of Discovery Orders* .

[2] Discovery in Particular Proceedings

For discussion and forms relating to discovery in particular actions or proceedings, see the following:

- Ch. 7, *Accounting, Action for* (discussion of discovery in an action for accounting).

- Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* (discussion of discovery in arbitration proceedings).

- Ch. 70, *Attorney Admission* and Ch. 71, *Attorney Discipline* (discussion of discovery in State Bar disciplinary proceedings).

- Ch. 85, *Automobiles: Discovery* (discussion and forms relating to discovery in vehicle collision actions).

- Ch. 295, *Hospitals* (discussion of discovery of hospital records).

- Ch. 345A, *Limited Civil Cases* (additional discussion and forms relating to the Economic Litigation procedures under *Code Civ. Proc. § 90 et seq.* applicable in limited civil cases).

- Ch. 473B, *Discovery in Agency Adjudications* (discussion forms relating to discovery in administrative trials under the Administrative Procedure Act of *Gov. Code § 11340 et seq.*).

- Ch. 577, *Workers' Compensation* (discussion and forms relating to discovery in workers' compensation proceedings).

[3] Other Related Chapters

- For discussion of and general forms relating to law and motion procedures generally, see Ch. 372, *Motions and Orders* .

- For discussion of and forms for stipulation and orders shortening and extending time generally, see Ch. 524, *Shortening and Extension of Time* .

- For discussion and forms relating to subpoenas and subpoena duces tecum generally, see Ch. 535, *Subpoena* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresDiscoveryGeneral OverviewCivil ProceduresDiscoveryMisconductCivil ProceduresDiscoveryPrivileged MattersGeneral OverviewCivil ProceduresPretrial MattersSubpoenas

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16-190 California Forms of Pleading and Practice--Annotated §§ 190.03-190.09

[Reserved]

§§ 190.03[Reserved]

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Chapter 190 DISCOVERY: SCOPE, REGULATION, AND TIMING
PART II. LEGAL BACKGROUND
A. Overview of Discovery Act and Related Law

16-190 California Forms of Pleading and Practice--Annotated § 190.10

§ 190.10 Governing Law

[1] Discovery Act

Civil discovery is generally governed by *Code Civ. Proc. §§ 2016.010 et seq.* These provisions are otherwise known as the Civil Discovery Act [*Code Civ. Proc. § 2016.010*].

Code Civ. Proc. §§ 94 and *95*, part of the provisions entitled Economic Litigation for Limited Civil Cases (*Code Civ. Proc. § 90 et seq.*), apply in limited civil cases to limit the discovery otherwise permitted under the Discovery Act [*see § 190.23*].

[2] Related Statutes

[a] Rules of Court

Statewide rule provisions relating to the format of discovery papers and motions, the service of discovery papers on nonparty deponents, and discovery sanctions are set out in *Cal. Rules of Ct., Rules 3.1000, 3.1345, 3.1346, 3.1347,* and *3.1348*.

Case management requirements relating to discovery of electronically stored information are set out in *Cal. Rules of Ct., Rule 3.724(8)*. For detailed discussion of these requirements, see *Ch. 195A, Discovery: Discovery of Electronically Stored Evidence (E-Discovery), § 195A.14*.

Local rules of court relating to the field of pretrial civil discovery are preempted by the Judicial Council, and any such rule is void unless permitted or required by statute or statewide rule [*see Cal. Rules of Ct., Rule 3.20*].

[b] Evidentiary Privileges and Other Protections Against Disclosure

Evidentiary privileges are governed by *Evid. Code §§ 900-1070*. The protection against disclosure of an attorney's work product is set out in the Discovery Act under *Code Civ. Proc. § 2018.010 et seq.* Various other statutory provisions also

provide protection against disclosure of certain matters. For example, *Civ. Code § 3295(c)* sets out a procedure protecting against unrestricted pretrial discovery of a defendant's financial information in an action seeking punitive damages.

Evidentiary privileges and similar protections against disclosure are covered in detail in Ch. 191, *Discovery: Privileges and Other Discovery Limitations* .

[c] Provisions Governing Subpoenas Generally

Deposition subpoenas are governed by *Code Civ. Proc. § 2020.010 et seq.* Discovery subpoenas in actions pending outside California are governed by the Interstate and International Depositions and Discovery Act, *Code Civ. Proc. § 2029.100 et seq.* Subpoenas in discovery proceedings are also governed by the provisions applicable to subpoenas generally, *Code Civ. Proc. § 1985 et seq.*, to the extent these are not superseded by more specifically applicable provisions of *Code Civ. Proc. § 2020.010 et seq.* For detailed coverage of *Code Civ. Proc. § 2020.010 et seq.* and *Code Civ. Proc. § 1985 et seq.*, see respectively Ch. 193, *Discovery: Depositions* , and Ch. 535, *Subpoena* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresDiscoveryGeneral OverviewCivil ProceduresDiscoveryPrivileged MattersGeneral OverviewCivil ProceduresDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProceduresPretrial MattersSubpoenas

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PART II. LEGAL BACKGROUND
A. Overview of Discovery Act and Related Law

16-190 California Forms of Pleading and Practice--Annotated § 190.11

§ 190.11 Application of Discovery Act

[1] Civil Actions and Proceedings Generally

In view of the definition of "action" [*see Code Civ. Proc. § 2016.020(a)* and § 190.13[4]], discovery under the Civil Discovery Act is available in special civil proceedings as well as in civil actions. Counsel should consult the provisions governing a particular special proceeding to determine if they modify, in the context of that proceeding, the application of *Code Civ. Proc. § 2016.010 et seq.* [*see, e.g.,* discussion in [3], *below*].

The Civil Discovery Act governs all discovery proceedings filed on or after its operative date, July 1, 2005 [Stats. 2004, ch. 182, § 64].

[2] Limited Civil Cases

Code Civ. Proc. § 2016.010 et seq. applies to limited civil cases only to the extent provided in *Code Civ. Proc. §§ 94* and *95* [*see Code Civ. Proc. § 94*]. Limited civil cases are those cases involving a limited amount in controversy, formerly in the jurisdiction of the municipal courts and now within the jurisdiction of the unified superior courts [*see Code Civ. Proc. § 86; see also* Ch. 345A, *Limited Civil Cases*].

For more detailed discussion of the restrictions imposed on the extent of discovery in limited civil cases, see *§ 190.23*.

[3] Particular Proceedings

[a] Enforcement of Money Judgments

Code Civ. Proc. § 2016.010 et seq. apply to discovery in aid of enforcement of a money judgment only to the extent provided in *Code Civ. Proc. §§ 708.010-708.020* (written interrogatories to judgment debtor) [*Code Civ. Proc. § 2016.070*]. For further discussion of *Code Civ. Proc. § 708.010 et seq.*, see Ch. 254, *Executions and Enforcement of Judgments* .

[b] Judicial Arbitration Proceedings

Parties to judicial arbitration under *Code Civ. Proc. § 1141.10 et seq.* are entitled to obtain discovery in accordance with the Discovery Act, except that all discovery must be completed no later than 15 days before the date set for the arbitration absent an order extending the time [*Cal. Rules of Ct., Rule 3.822*]. Other modifications of the general discovery provisions include, for example, a prohibition of discovery after an arbitration award, absent a stipulation or court order to the contrary [*see Code Civ. Proc. § 1141.24*; *but see McMillan v. Superior Court (1983) 146 Cal. App. 3d 1014, 1019, 194 Cal. Rptr. 670* (*Code Civ. Proc. § 1141.24* not applicable when plaintiff has requested expedited arbitration); *see also Roe v. Superior Court (1990) 224 Cal. App. 3d 642, 645-647, 273 Cal. Rptr. 745* (discovery permissible after arbitration proceedings have been completely vacated)].

In any judicial arbitration proceeding, no party may require the production of evidence specified in *Civ. Code § 3295(a)* (regarding a claim for punitive damages) at the arbitration, unless the court enters an order permitting pretrial discovery of that evidence pursuant to *Civ. Code § 3295(c)* [*Code Civ. Proc. § 1141.19.5*].

All discovery disputes involving an arbitration proceeding must be submitted first to the arbitrator, not to the court [*Berglund v. Arthroscopic & Laser Surgery Center of San Diego, L.P. (2008) 44 Cal. 4th 528, 532, 79 Cal. Rptr. 3d 370, 187 P.3d 86* ; *see Code Civ. Proc. § 1283.05*]. While a *party* is entitled to only limited judicial review of arbitrator discovery orders, a *nonparty* is entitled to full judicial review of an arbitrator's adverse discovery order [*Berglund v. Arthroscopic & Laser Surgery Ct. of San Diego (2008) 44 Cal. 4th 528, 532, 534-536, 79 Cal. Rptr. 3d 370, 187 P.3d 86*].

For further discussion of the rules and procedures for discovery in judicial arbitration proceedings, see *§ 190.50[2]* and Ch. 36, *Judicial Arbitration* .

[c] Sexually Violent Predators Act

The Third and Sixth Appellate Districts have held that the Discovery Act applies to proceedings under the Sexually Violent Predators Act (SVPA) (*Welf. & Inst. Code § 6600 et seq.*). The Third Appellate District held the trial court erred denying a motion to compel exchange of expert witness information based on its erroneous conclusion that the civil discovery procedures did not apply [*Leake v. Superior Court (2001) 87 Cal. App. 4th 675, 682, 104 Cal. Rptr. 2d 767 , overruled on other grounds, People v. Yartz (2005) 37 Cal. 4th 529, 537, 36 Cal. Rptr. 3d 328, 123 P.3d 604]* . The Sixth Appellate District agreed that the Civil Discovery Act (*Code of Civ. Proc. § 2016.010 et seq.*) applies to proceedings under the SVPA, including the right to notice depositions; however, the court noted that the right to discovery in SVPA proceedings is also subject to those provisions of the Civil Discovery Act which expressly authorize the trial court to manage discovery and to prevent misuse of discovery procedures; accordingly, in managing discovery in SVPA proceedings, the trial court must keep in mind both the narrow scope of permissible discovery and the need for expeditious adjudication. The scope of discovery in SVPA proceedings is circumscribed by the two narrow issues presented at trial: (1) whether the person sought to be committed has been convicted of a sexually violent offense against two or more victims, and (2) whether the person has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior [*Lee v. Superior Court (2009) 177 Cal. App. 4th 1108, 1128, 99 Cal. Rptr. 3d 712* (scope of appropriate discovery in SVPA proceedings is limited, citing *Cheek*); *People v. Superior Court (Cheek) (2001) 94 Cal. App. 4th 980, 987-991, 114 Cal. Rptr. 2d 760]* .

However, the Fourth Appellate District, Division Three, held, as a matter of first impression, that requests for admissions may not be propounded in SVPA proceedings because their use would eviscerate the SVPA's requirement that the state prove its case beyond a reasonable doubt and, when the case is tried to a jury, obtain a unanimous verdict before a person may be committed. To relieve the state of this burden would deprive a person of liberty interests in violation of the right to due process [*Murillo v. Superior Court (2006) 143 Cal. App. 4th 730, 739-740, 49 Cal. Rptr.*

3d 511] . The Fourth Appellate District, Division Two, held that a civil commitment proceeding under the SVPA requires application of the civil discovery rules, because it is a special proceeding of a civil nature [*People v. Dixon (2007) 148 Cal. App. 4th 414, 443, 56 Cal. Rptr. 3d 33*]. However, the court did not address whether all of the specific procedures afforded under the Civil Discovery Act apply to SVPA proceedings, noting Division Three's holding that, in SVPA proceedings, the use of requests for admission under *Code Civ. Proc. § 2019.010(e)* would violate defendant's due process rights [*People v. Dixon (2007) 148 Cal. App. 4th 414, 442 n.2, 56 Cal. Rptr. 3d 33* ; *see Murillo v. Superior Court (2006) 143 Cal. App. 4th 730, 740, 49 Cal. Rptr. 3d 511*].

[d] Competency Determination Under Penal Code § 1367 et seq.

The First Appellate District has held that the Discovery Act applies to competency hearings under *Penal Code § 1369* [*Baqleh v. Superior Court (People) (2002) 100 Cal. App. 4th 478, 122 Cal Rptr. 2d 673* ; *see Penal Code § 1367 et seq.* (mentally incompetent immune from trial or punishment; determination of competency)]. The appellate court ruled the trial court may order a criminal defendant to submit to a mental examination by an expert designated by the prosecution in order to evaluate mental competence under *Pen. Code § 1369*, but the order must comply with Discovery Act, specifying the time, place, manner, conditions, scope and nature of the examination, and the identity and specialty of persons performing the examination, in accordance with *Code Civ. Proc. § 2032.310(b)* [*Baqleh v. Superior Court (People) (2002) 100 Cal. App. 4th 478, 506, 122 Cal Rptr. 2d 673* (decided under former *Code Civ. Proc. § 2032(d)*)].

[e] Other Proceedings

Code Civ. Proc. § 2016.010 et seq. apply to discovery in probate proceedings except as otherwise provided by the Probate Code or by the rules adopted by the Judicial Council [*Prob. Code § 1000*; *see, e.g., Mota v. Superior Court (2007) 156 Cal. App. 4th 351, 353, 67 Cal. Rptr. 3d 303* (petitioner was entitled to conduct discovery relevant to her objections to distribution petition)]. They apply in uninsured motorist proceedings as provided for and limited by *Ins. Code § 11580.2(f)* [*see Miranda v. 21st Century Ins. Co. (2004) 117 Cal. App. 4th 913, 926* (superior court has exclusive jurisdiction under uninsured motorist law to hear discovery matters arising in uninsured motorist arbitrations; thus, court had power to dismiss case as terminating sanction)].

The Discovery Act also applies in a formal State Bar proceeding as adopted or limited by the Rules of Procedure of the State Bar of California, such as Rule 300 et seq. [Rules of Procedure, Rule 315; *see* Ch. 70, *Attorney Admission* , and Ch. 71, *Attorney Discipline*].

Depositions are available under some circumstances in proceedings before the Workers' Compensation Appeals Board [*see Lab. Code § 5710*]. Discovery procedures, except those provided for by *Code Civ. Proc. § 2030.010 et seq.* (interrogatories), may be authorized to apply if deemed appropriate in proceedings by the New Motor Vehicle Board [*Veh. Code §§ 3050.1, 3050.2*; *see, e.g., Nader Automotive Group, LLC v. New Motor Vehicle Bd. (2009) 178 Cal. App. 4th 1478, 1486, 101 Cal. Rptr. 3d 152* (dismissing plaintiffs' protests under *Veh. Code § 3050.2(b)*, based on plaintiffs' failure to comply with authorized discovery without substantial justification)].

Family law litigants are entitled to all the discovery provided by the Civil Discovery Act (*Code Civ. Proc. § 2016.010 et seq.*) [*Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 711, 21 Cal. Rptr. 2d 200, 854 P.2d 1117]* . For example, *Fam. Code § 3666* specifically makes the usual practices of civil discovery applicable to the enforcement of expedited family law discovery [*Fam. Code § 3666*; *see In re Marriage of Loh (2002) 93 Cal. App. 4th 325, 327, 330-331, 112 Cal. Rptr. 2d 893* (reversing child support order based on "lifestyle" evidence consisting of photos of ex-spouse at his girlfriend's home and with different cars, because such evidence "is not a cheap substitute for proper discovery of income reported on tax returns," when ex-wife made no motions to compel production of those documents)].

The family court, like any other court presiding over a civil proceeding, also has discretion to limit discovery [*see, e.g., In re Marriage of Hixson (2003) 111 Cal. App. 4th 1116, 1121, 4 Cal. Rptr. 3d 483* (family court did not abuse its

discretion in preventing unnecessary discovery with respect to parties' stock)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewFamily LawGeneral OverviewLegal EthicsSanctionsDisciplinary ProceedingsInvestigations

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§ 190.12 Purpose of Discovery Act

The Civil Discovery Actis intended, among other things, to accomplish the following [*Province v. Center for Women's Health & Family Birth (1993) 20 Cal. App. 4th 1673, 1683-1684, 25 Cal. Rptr. 2d 667* , *disapproved on other grounds in Heller v. Norcal Mutual Ins. Co. (1994) 8 Cal. 4th 30, 41, 32 Cal. Rptr. 2d 200, 876 P.2d 999* ; *Beverly Hospital v. Superior Court (1993) 19 Cal. App. 4th 1289, 1294-1296, 24 Cal. Rptr. 2d 238]* :

- Assist the parties and the trier of fact in ascertaining the truth.
- Encourage settlement by educating the parties as to the strengths of their claims and defenses.
- Expedite and facilitate preparation and trial.
- Prevent delay.
- Safeguard against surprise.

In addition, the current Act was intended to reduce the voluminous litigation generated by the former Discovery Act of 1956 [*Beverly Hospital v. Superior Court (1993) 19 Cal. App. 4th 1289, 1296, 24 Cal. Rptr. 2d 238]* .

The Supreme Court interpreted the former Discovery Act to accomplish similar goals: primarily to educate the parties concerning their claims and defenses so as to encourage settlements and to expedite and facilitate trial. Other related goals included the following [*Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 376, 15 Cal. Rptr. 90, 364 P.2d 266]* :

- Prevent perjury.
- Detect and expose false, fraudulent, and sham claims and defenses.

- Make available facts that otherwise could not be proved except with great difficulty.
- Simplify and narrow the issues.

The Supreme Court has since stated that its conclusions in *Greyhound* apply equally to the Discovery Act, which retains the same expansive scope as the former act [*Emerson Electric Co. v. Superior Court (1997) 16 Cal. 4th 1101, 1107-1108, 68 Cal. Rptr. 2d 883, 946 P.2d 841* ; *see also § 190.13[1]*].

Legal Topics:

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

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§ 190.13 Interpretation of Discovery Act

[1] Liberal Construction to Further Purpose of Act

Courts held that the former Discovery Act of 1956 was to be construed liberally in favor of disclosure, and that disclosure is a matter of right unless statutory or public policy considerations clearly prohibit it [*see Shepherd v. Superior Court (1976) 17 Cal. 3d 107, 118, 130 Cal. Rptr. 257, 550 P.2d 161* ; *Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 377-378, 15 Cal. Rptr. 90, 364 P.2d 266]* . They also held that, as a matter of general statutory construction, the interpretation of any one discovery section should be determined in context with the entire Discovery Act [*Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 371, 15 Cal. Rptr. 90, 364 P.2d 266]* .

These general propositions of liberal construction apply equally to the Civil Discovery Act [*see Emerson Electric Co. v. Superior Court (1997) 16 Cal. 4th 1101, 1107-1108, 68 Cal. Rptr. 2d 883, 946 P.2d 841* (affirming that its conclusions in prior landmark decision of *Greyhound* apply equally to Discovery Act, which retains expansive scope of former act, and that Discovery Act must similarly be construed liberally in favor of disclosure)].

[2] Reporter's Notes to Proposed Discovery Act

A State Bar-Judicial Council Joint Commission on Discovery proposed the Civil Discovery Act of 1986 (the predecessor to the current Civil Discovery Act) to the Legislature. This commission also published the notes of its Reporter, Professor James Hogan, which explained many of the proposed sections. These "Reporter's Notes to Proposed *Code Civ. Proc. §§ 2016-2036*" are sometimes cited as a guide in interpreting the 1986 Act, whenever they appear to remain consistent with the Act as it is currently constituted. For the full text of the Reporter's Notes, together with text of the Discovery Act as proposed by the Joint Commission, see Hogan and Weber, California Civil Discovery, Appendix C (Matthew Bender).

[3] Case Law Interpreting Prior Acts

The Civil Discovery Act was passed in 2004 and became effective July 1, 2005. It repealed and renumbered the Civil Discovery Act of 1986 but did not substantively change the law of civil discovery [Stats. 2004, ch. 182 §§ 22, 23, 61].

Thus cases decided under the Civil Discovery Act of 1986 remain controlling authority. The 1986 Act repealed and replaced the Discovery Act of 1956 and related statutes (former *Code Civ. Proc. §§ 2016-2037.9*) [*see* Stats. 1986, chs. 1334, 1336, as amended by Stats. 1987, ch. 86]. Although the 1986 Act implemented numerous changes in the prior law, in many instances it also continued provisions of the prior law or codified decisions construing prior law. Decisions construing the 1956 Discovery Act are thus sometimes cited in this chapter as persuasive, rather than controlling, authority to the extent that they appear to remain consistent with the provisions of the 1986 and 2004 Acts.

[4] Case Law Interpreting Federal Discovery Rules

The Discovery Act of 1956 essentially adapted the federal rules relating to civil discovery existing at that time [*see* Report of the Committee on Administration of Justice, 31 State BJ 204-231 (1956)]. Thus, courts held that the Act had the same meaning, force, and effect as that which the federal courts gave to the federal rules on which the Act was based [*see Gorman Rupp Industries, Inc. v. Superior Court (1971) 20 Cal. App. 3d 28, 30, 97 Cal. Rptr. 377* ; *see also Kahn v. Kahn (1977) 68 Cal. App. 3d 372, 387, 137 Cal. Rptr. 332* (federal interpretations made after adoption of Act deemed persuasive but not binding authority)].

The state and federal discovery provisions have since diverged in a number of particulars. Nevertheless, the Civil Discovery Act of 1986 in some instances adopted or continued provisions that reflect the federal rules [*see* Reporter's Notes to Proposed *Code Civ. Proc. §§ 2017(a), (b), 2019(a), (b), (d), 2021, 2023(b), 2025(l), 2028(a), 2030(f), (m), (n), 2031(a), (c), (g), 2033(m)-(o)*; *see also* [2], *above*]. Thus, federal case law may sometimes be useful as persuasive authority in interpreting provisions of the current Discovery Act, to the extent it construes federal rules that are substantially identical. For further discussion comparing the state and federal discovery provisions, see DeMeo, California Deposition and Discovery Practice, Ch. 7, *Discovery in Federal Actions Compared* (Matthew Bender).

[5] Definitions Generally Applicable in Construing Discovery Act Provisions

The following definitions apply to the Civil Discovery Act:

- "Action" includes a civil action and any special proceeding of a civil nature [*Code Civ. Proc. § 2016.020(a)*].

- "Court" means the trial court in which the action is pending, unless otherwise specified [*Code Civ. Proc. § 2016.020(b)*].

- "Document" and "writing" mean a writing as defined in *Evid. Code § 250* [*Code Civ. Proc. § 2016.020(c)*; *see Rubio v. Superior Court (1988) 202 Cal. App. 3d 1343, 1347, 249 Cal. Rptr. 419* (*Evid. Code § 250* definition of "writing" includes videotapes)].

- "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities [*Code Civ. Proc. § 2016.020(d)*].

- "Electronically stored information" is information that is stored in an electronic medium [*Code Civ. Proc. § 2016.020(e)*].

Legal Topics:

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

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§ 190.14 Effect of Discovery Act on Informal Investigation

[1] Lawful Informal Investigation Not Precluded

Informal discovery techniques, such as interviews and investigations, remain a viable and often important alternative or adjunct to formal discovery under the Discovery Act [*see Pillsbury, Madison & Sutro v. Schectman (1997) 55 Cal. App. 4th 1279, 1289, 64 Cal. Rptr. 2d 698* (dictum); *see also Pullin v. Superior Court (2000) 81 Cal. App. 4th 1161, 1164-1165, 97 Cal. Rptr. 2d 447* (noting that there is little authority on the distinction between formal discovery and informal investigation, "with everyone apparently assuming that everyone else knows the difference"; citing examples)].

For example, one court has held that there is nothing in the Discovery Act to prevent a party from conducting a unilateral investigation without resort to any statutory discovery device, provided that the investigation is otherwise lawful. In that case, a plaintiff's expert in a slip-and-fall case successfully conducted tests on the floor of defendant store, when the store was open to the public during business hours, without recourse to a formal demand to inspect the premises under former *Code Civ. Proc. § 2031* (*now see Code Civ. Proc. § 2031.010 et seq.*) [*Pullin v. Superior Court (2000) 81 Cal. App. 4th 1161, 1164-1165, 97 Cal. Rptr. 2d 447* (defendant had denied prior formal demand for inspection)]. The court in *Pullin* noted also that, since a lawful investigation of this type does not constitute "discovery" within the meaning of the Discovery Act, it is immaterial to the conduct of the investigation that the cut-off date may have passed for completing formal discovery prior to trial [*Pullin v. Superior Court (2000) 81 Cal. App. 4th 1161, 1165 n.4, 97 Cal. Rptr. 2d 447]* .

Similarly, a plaintiff in an action against a public agency may, either directly or indirectly through a representative such as his or her counsel, file a request under the Public Records Act (*Gov. Code § 6250 et seq.*) to obtain public records for use in the plaintiff's civil action. The requested documents must be produced unless one of the statutory exemptions set forth in the Public Records Act applies or the documents are otherwise privileged [*County of Los Angeles v. Superior Court (2000) 82 Cal. App. 4th 819, 826-830, 98 Cal. Rptr. 2d 564* (holding that plaintiff could seek discovery of public records under Public Records Act, even though previous motions for formal discovery of the identical documents had been denied, when not all elements of collateral estoppel doctrine were present)].

Public agencies have argued that they need not comply with requests for documents under the Public Records Act when the requests originate from litigants, because of an exemption applicable to records pertaining to pending litigation [*see Gov. Code § 6254(b)*]. This exemption, however, applies only to records prepared specifically for the purpose of the pending litigation, and not to records created in the ordinary course of business before the pending litigation began [*see Fairley v. Superior Court (1998) 66 Cal. App. 4th 1414, 1419-1421, 78 Cal. Rptr. 2d 648* ; *Wilder v. Superior Court (1998) 66 Cal. App. 4th 77, 83, 77 Cal. Rptr. 2d 629* ; *71 Ops. Cal. Att'y Gen. 235, 238-239 (1988)* ; Hansen, *Using the Public Records Act to Supplement Discovery, 22 Civil* Litigation Reporter 201 (Cal. CEB 2000); § 191.128]. For further discussion of the Public Records Act and its procedures and exemptions, see Ch. 470C, *Public Records Act* .

Informal discovery using online sources may be particularly useful in finding and investigating corporate and business records and filings. For further discussion of these options, see Matthew Bender [(R)] Practice Guide: California Civil Discovery, Ch. 5, *Discovery of Electronic Information* . For discussion of electronic discovery ("e-discovery") generally, see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*.

[2] Illegal "Self-Help" Precluded

The fact that counsel still conduct much pretrial preparation and discovery without judicial assistance does not mean parties to litigation can operate outside the applicable parameters of the Discovery Act or may violate other laws or common law strictures in their zeal to pursue litigation [*Pillsbury, Madison & Sutro v. Schectman (1997) 55 Cal. App. 4th 1279, 1288, 64 Cal. Rptr. 2d 698]* . Any "self-help" discovery that violates ownership or privacy interests, or that is unjustified by any exception to the jurisdiction of the courts to administer the orderly resolution of disputes, is not permitted. For example, any litigant or potential litigant who, acting outside the legal process, converts, interdicts, or otherwise purloins documents in the pursuit of litigation does so without the general protections afforded by the laws of discovery. That litigant risks being found to have violated protected rights [*Pillsbury, Madison & Sutro v. Schectman (1997) 55 Cal. App. 4th 1279, 1289, 64 Cal. Rptr. 2d 698]* . Thus, self-help evidence gathering by employees for use in contemplated litigation against their soon-to-be former employer, through the unauthorized removal of confidential personnel documents from the employer's offices, was wrong. Discovery in the litigation context presupposes ownership of documents will remain with whomever holds title, while allowing access to the trier of fact, and litigants, in specifically delineated legal proceedings [*Pillsbury, Madison & Sutro v. Schectman (1997) 55 Cal. App. 4th 1279, 1284-1289, 64 Cal. Rptr. 2d 698* (injunction requiring return to status quo existing at time documents were taken was least severe sanction)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewGovernmentsCourtsCourt RecordsLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionTrade Secrets

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§ 190.15 Effect of Trial Delay Reduction Programs

Under the Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*), many local courts have adopted delay reduction or "fast track" programs for non-complex cases. The Discovery Act, however, continues to govern discovery in cases subject to these programs, except in arbitration proceedings. Local rules are not allowed to shorten time periods set forth in the Discovery Act [*Gov. Code § 68616(f)*; *see, e.g., Wagner v. Superior Court (1993) 12 Cal. App. 4th 1314, 1317-1320, 16 Cal. Rptr. 2d 534* (trial court erred when it set discovery cutoff date when no trial date had been set, in conflict with former *Code Civ. Proc. § 2024(a)* (*now see Code Civ. Proc. § 2024.020*)]. In limited civil cases, discovery is governed in addition by the economic litigation provisions of *Code Civ. Proc. §§ 94* and *95*, and discovery subject to these provisions is also not affected by the provisions of a trial court delay reduction program [*Gov. Code § 68620(c)*].

Nonetheless, local delay reduction programs may include rules providing for the court to regulate all discovery, consistent with these laws [*see, e.g., Code Civ. Proc. § 2017.730* (allowing use of technology); *Code Civ. Proc. § 2019.020(b)* (court may make order establishing particular sequence and timing for discovery in interests of justice); *see also § 190.32*]. In such cases, the trial court may, for example, inquire of the parties at status conferences as to the nature and extent of discovery remaining [Los Angeles Super. Ct. Rules, Rule 7.9(b)(2)].

For further coverage of the trial delay reduction programs and rules, see Ch. 552, *Trial Court Delay Reduction* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedurePretrial MattersConferencesCase Management

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[Reserved]

§§ 190.16[Reserved]

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§ 190.20 General Scope of Civil Discovery

[1] Matter That Is Relevant

[a] General Rule

Except when limited by a court order in accordance with the Discovery Act, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action if the matter either is itself admissible in evidence or appears to be reasonably calculated to lead to the discovery of admissible evidence [*Code Civ. Proc. § 2017.010*]. For discussion relating to the admissibility of evidence generally, see Ch. 551, *Trial* .

Discovery may relate to [*Code Civ. Proc. § 2017.010*]:

- The claim or defense of the party seeking discovery or of any other party to the action.
- The identity and location of persons having knowledge of any discoverable matter.
- The existence, description, nature, custody, condition, and location of any document, tangible thing, or land or other property.

[b] Relevance to Subject Matter

The "subject matter" of the action is the circumstances and facts out of which the cause of action arises. It is the property, contract, or other thing involved in the dispute, and describes physical facts in relation to which the suit is prosecuted [*Darbee v. Superior Court (1962) 208 Cal. App. 2d 680, 688, 25 Cal. Rptr. 520]* . Subject matter is therefore broader than the precise issues presented by the pleading, and relevance to the subject matter, for the purpose of determining whether an unprivileged matter is subject to discovery, is a broader concept than relevance to the issues [*see Pettie v. Superior Court (1960) 178 Cal. App. 2d 680, 687, 3 Cal. Rptr. 267* ; *see also* Reporter's Notes to Proposed *Code Civ. Proc. § 2017* and discussion in *§ 190.13[2]*]. Thus, for example, relevance to the subject matter

includes relevance to potential as well as to actual issues in the case [*see* *Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 172-173, 84 Cal. Rptr. 718, 465 P.2d 854* ; *Union Mut. Life Ins. Co. v. Superior Court (1978) 80 Cal. App. 3d 1, 10, 145 Cal. Rptr. 316]* . For discovery purposes, information is relevant if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement [*Lipton v. Superior Court (1996) 48 Cal. App. 4th 1599, 1616, 56 Cal. Rptr. 2d 341]* .

On the other hand, a court should sustain an objection to discovery based on lack of relevance to the subject matter when the information sought relates to matters of little or no practical benefit to the party seeking disclosure [*Covell v. Superior Court (1984) 159 Cal. App. 3d 39, 42-43, 205 Cal. Rptr. 371]* . For example, an attorney's profit margin is not relevant to the issue of whether the attorney's fee is unconscionable; what *is* relevant is whether the client received the services he or she paid for, as measured in the marketplace [*Shaffer v. Superior Court (1995) 33 Cal. App. 4th 993, 1000-1003, 39 Cal. Rptr. 2d 506* (case of first impression)].

The question of relevance to subject matter is determined in each case according to reason and judicial experience [*Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 172, 84 Cal. Rptr. 718, 465 P.2d 854* ; *Morris Stulsaft Foundation v. Superior Court (1966) 245 Cal. App. 2d 409, 416, 54 Cal. Rptr. 12]* . The standard of relevance to the subject matter must be reasonably applied according to the liberal policies in favor of discovery, and any doubts are generally to be resolved in favor of permitting discovery [*Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 173, 84 Cal. Rptr. 718, 465 P.2d 854]* .

Courts take the view that, whenever possible, objections to discovery should be resolved by protective orders addressing the specific harm shown by the objecting party, as opposed to a more general attack on the relevancy of the information the proponent seeks to discover [*Norton v. Superior Court (1994) 24 Cal. App. 4th 1750, 1761, 30 Cal. Rptr. 2d 217]* .

[c] Matter Need Not Be Admissible at Trial

A determination of "admissibility" is not a prerequisite to determining whether a discovery request is proper. At this early stage of a case, it is difficult to define exactly what evidence is needed, and the party seeking discovery is entitled to substantial leeway [*Norton v. Superior Court (1994) 24 Cal. App. 4th 1750, 1761, 30 Cal. Rptr. 2d 217]* . The possibility that the material a party seeks to discover might be excluded at trial pursuant to an evidentiary objection is not a proper consideration for the trial court in ruling on a discovery motion [*Volkswagen of Am., Inc. v. Superior Court, (2006) 139 Cal. App. 4th. 1481, 1497, 43 Cal. Rptr. 3d 723* (trial court erroneously limited discovery on basis that documents might be inadmissible at trial or because they were prepared or signed by plaintiff's attorney rather than plaintiff; accordingly, discovery order had to be reevaluated based on whether requested information was reasonably calculated to lead to admissible evidence, as provided by *Code Civ. Proc. § 2017.010*); *Norton v. Superior Court (1994) 24 Cal. App. 4th 1750, 1760-1761, 30 Cal. Rptr. 2d 217* (evidence inadmissible under collateral source rule was discoverable for purpose of determining plaintiff's motive in bringing malpractice action)].

[2] Matter That Is Not Privileged

As discussed in [1], *above*, relevant matter is discoverable so long as it is "not privileged" [*Code Civ. Proc. § 2017.010*]. Thus, the evidentiary privileges and related provisions protecting against disclosure are the chief means of resisting discovery. For detailed discussion of privileges, see Ch. 191, *Discovery: Privileges and Other Discovery Limitations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryRelevance

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§ 190.21 Specific Limits on General Scope

[1] Insurance Coverage

A party may obtain discovery of the existence and contents of any agreement under which any insurance carrier may be liable to satisfy in whole or in part a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. The discovery may include the identity of the carrier and the nature and limits of the coverage. A party may also obtain discovery concerning whether that insurance carrier is disputing the agreement's coverage of the claim involved in the action, but not concerning the nature and substance of the dispute. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial [*Code Civ. Proc. § 2017.210*; *see also Smith v. Superior Court (1961) 189 Cal. App. 2d 6, 11, 11 Cal. Rptr. 165* ; *Pettie v. Superior Court (1960) 178 Cal. App. 2d 680, 683, 3 Cal. Rptr. 267]* .

A party does not have the same broad right to discover an insurance company's reinsurance agreements. Reinsurance is a "contract ... by which an insurer procures a third person to insure him against loss or liability by reason of such original insurance" [*Ins. Code § 620*]. A reinsurance contract is a contract of indemnity for the benefit of the insurance company. The original "insured" has no interest in it [*Ins. Code § 623*; *Ascherman v. Gen. Reinsurance Corp. (1986) 183 Cal. App. 3d 307, 312, 228 Cal. Rptr. 1* ("The reinsurance contract is not with the insured/policyholder. When a valid claim is made, the insurance company pays the first level insured, and the reinsurance company pays the insurance company. The reinsurance company's obligation is to the insurance company, and the insurance company vis-a-vis the reinsurer is thus the insured, or more appropriately, the 'reinsured.' ")]. Accordingly, *Code Civ. Proc. § 2017.210* does not authorize discovery of reinsurance policies by an injured plaintiff to facilitate settlement of the underlying tort action [*Catholic Mut. Relief Soc'y v. Superior Court (2007) 42 Cal. 4th 358, 372-374, 64 Cal. Rptr. 3d 434, 165 P.3d 154* (nonparty insurer's reinsurance information generally is irrelevant to plaintiff in tort actions brought against liability insurance policyholder and could lead to burdensome discovery requests directed at nonparties)].

The California Supreme Court has observed in dicta that there may be "unusual circumstances" in which the discovery of reinsurance agreements would be appropriate, as when, for example, those agreements are "directly on the risk to satisfy a judgment" or are the subject matter of the litigation, as in a coverage dispute between a liability insurer and its

reinsurer [*Catholic Mut. Relief Soc'y v. Superior Court (2007) 42 Cal. 4th 358, 374, 64 Cal. Rptr. 3d 434, 165 P.3d 154* (dicta)]. However, in the only reported California decision to allow the discovery of an insurer's reinsurance information [*Lipton v. Superior Court (1996) 48 Cal. App. 4th 1599, 1611-1612, 56 Cal. Rptr. 2d 341]* , discoverability turned on whether the requested information was relevant to an issue in the case. In that case, the discovery was allowed because the insurer was the defendant in a bad faith action and the information was relevant to the issues in the case. Discovery was limited to unprivileged communications between the insurer and reinsurer concerning coverage issues and potential liability. That discovery was allowed under the general relevancy test of former *Code Civ. Proc. § 2017(a)* (*now see Code Civ. Proc. § 2017.010*), without reference to former *Code Civ. Proc. § 2017(b)* (*now see Code Civ. Proc. § 2017.210*) [*Lipton v. Superior Court (1996) 48 Cal. App. 4th 1599, 1617-1618, 56 Cal. Rptr. 2d 341* (observing that before ordering production of any such documents, trial court should conduct in camera review and tailor its order based on their contents); *see Fireman's Fund Insurance Co. v. Superior Court (1991) 233 Cal. App. 3d 1138, 1141, 286 Cal. Rptr. 50* (because case involved request for production of documents, court premised its discussion on requirements of protective order authorized by former *Code Civ. Proc. § 2031(e)(5), (6)* (*now see Code Civ. Proc. §§ 2031.060(b)(5), 2031.060(b)(6)*))].

[2] Defendant's Financial Condition

In an action for damages, a plaintiff generally is entitled to seek information directly relevant to the issue of damages even though the issue of defendant's liability has not been tried and determined [*Columbia Broadcasting Sys., Inc. v. Superior Court (1968) 263 Cal. App. 2d 12, 22, 69 Cal. Rptr. 348]* . Thus, he or she may discover information relating to defendant's financial condition in an action in which plaintiff is seeking punitive damages because that condition is relevant to the issue of punitive damages [*Coy v. Superior Court (1962) 58 Cal. 2d 210, 223, 23 Cal. Rptr. 393, 373 P.2d 457* ; *cf. Doak v. Superior Court (1968) 257 Cal. App. 2d 825, 828, 838, 65 Cal. Rptr. 193* (defendant's assets not discoverable absent claim for punitive damages)].

Pretrial discovery of a defendant's financial condition or the profits that he or she has gained by means of the wrongful course of conduct, is, however, regulated by statute. The plaintiff seeking discovery must obtain an order permitting discovery, based on a showing of substantial probability that he or she will prevail on the punitive damages claim under *Civ. Code § 3294* [*Civ. Code § 3295(c)*; *but see Rawnsley v. Superior Court (1986) 183 Cal. App. 3d 86, 90-91, 227 Cal. Rptr. 806* (*Civ. Code § 3295(c)* not applicable when financial information sought is fundamental to establish plaintiff's case)]. For further discussion and forms relating to a motion for an order permitting discovery under *Civ. Code § 3295(c)*, see *Ch. 177, Damages § 213.10* et seq.

Before a trial court may enter an order allowing discovery of financial condition information under *Civ. Code § 3295(c)*, it must weigh the evidence presented by both sides, and make a finding that it is very likely the plaintiff will prevail on his or her claim for punitive damages [*Jabro v. Superior Court (2002) 95 Cal. App. 4th 754, 755, 115 Cal. Rptr. 2d 843]* .

[3] Civil Action Involving Sexual Misconduct

In any civil action alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, any party seeking discovery concerning the plaintiff's sexual conduct with individuals other than the alleged perpetrator is required to establish specific facts showing good cause for that discovery, and that the matter sought to be discovered is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence [*Code Civ. Proc. § 2017.220(a)*; *see Barrenda L. v. Superior Court (1998) 65 Cal. App. 4th 794, 800-803, 76 Cal. Rptr. 2d 727* (discovery solely for impeachment purposes is improper)].The sexual conduct protected from discovery includes nonconsensual, as well as consensual, sexual activity [*Knoettgen v. Superior Court (1990) 224 Cal. App. 3d 11, 13-14, 273 Cal. Rptr. 636]* . This showing must be made by noticed motion and shall not be made or considered by the court at an ex parte hearing [*Code Civ. Proc. § 2017.220(a)*; *Mendez v. Superior Court (1988) 206 Cal. App. 3d 557, 567-574, 253 Cal. Rptr. 731* (good cause not shown)]. The motion must be accompanied by a declaration stating

facts showing a good faith attempt at an informal resolution of each issue presented by the motion.

The court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2017.220(b)*; for discussion of monetary sanctions under *Code Civ. Proc. § 2023.010 et seq., see Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*].

If an action for sexual harassment, sexual assault, or sexual battery is combined with a related cause of action such as intentional infliction of emotional distress, the individual may waive some of his or her privacy rights in view of the importance of allowing necessary discovery, although any waiver will be very narrowly drawn. Thus, in a case involving an action for sexual harassment and intentional infliction of severe emotional distress, since the plaintiff's mental and emotional condition was directly relevant to her emotional distress claim and essential to a fair resolution of her suit, she waived her right to privacy in that respect, and discovery of those issues was allowed. However, she did not waive her right to privacy with respect to her sexual history and practices since she had made no contention that the alleged acts were detrimental to her present sexuality, and neither her sexual history nor practices were relevant, and discovery was not permitted [*see Vinson v. Superior Court (1987) 43 Cal. 3d 833, 840-844, 239 Cal. Rptr. 292, 740 P.2d 404* (decided under prior law)].

A patient may have a cause of action against his or her psychotherapist or former psychotherapist for injury caused by sexual contact with the psychotherapist [*see Civ. Code § 43.93*; for discussion and forms relating to actions for sexual contact, *see* Ch. 414, *Physicians: Licensing and Discipline*]. In an action for sexual contact, evidence of the plaintiff's sexual history is not subject to discovery and is not admissible as evidence unless the plaintiff claims damage to sexual functioning, or the defendant requests a hearing prior to conducting discovery and makes an offer of proof of the relevancy of the history, and the court finds that the history is relevant and the probative value of the history outweighs its prejudicial effect. The court will allow the discovery or introduction as evidence only of specific information or examples of the plaintiff's conduct that are determined by the court to be relevant. The court's order must detail the information or conduct that is subject to discovery [*Civ. Code § 43.93(d)*].

Courts do not have the power to expand the methods of discovery beyond those authorized by statute. Similarly, the courts' power to compel discovery is circumscribed by statute. A court has no jurisdiction to compel a party to perform acts that are beyond the scope of the Discovery Act [*Stermer v. Superior Court (1993) 20 Cal. App. 4th 777, 781, 24 Cal. Rptr. 2d 577* (disapproved on other grounds in *Emerson Electric Co. v. Superior Court (1997) 16 Cal. 4th 1101, 1113, 68 Cal. Rptr. 2d 883, 946 P.2d 841*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryRelevanceTortsIntentional TortsAssault & BatteryGeneral Overview

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§ 190.22 Particular Methods of Discovery Authorized Under Discovery Act

The available methods of discovery are [*Code Civ. Proc. § 2019.010*]:

- Oral and written depositions [*see* Ch. 193, *Discovery: Depositions*].
- Interrogatories to a party [*see* Ch. 194, *Discovery: Interrogatories*].
- Inspections of documents, things, and land [*see* Ch. 195, *Discovery: Inspection of Tangible Evidences*].
- Requests for admissions [*see* Ch. 196, *Discovery: Requests for Admissions*].
- Physical and mental examinations [*see* Ch. 197, *Discovery: Physical and Mental Examinations*].
- Exchange of expert witness information [*see* Ch. 198, *Discovery: Exchange of Expert Witness Information*].

In general, any of these methods is available to obtain discovery from another party in a pending action. By contrast, only (1) oral and written depositions, (2) inspections of documents, things, and places, and (3) physical and mental examination are available for the purpose of perpetuating testimony or preserving evidence before an action has been filed or pending appeal [*Code Civ. Proc. §§ 2035.020, 2036.020*; for further discussion, *see* Ch. 199, *Discovery: Preservation of Evidence*]. The methods available to obtain discovery from a nonparty are further limited to oral and written depositions and to depositions limited to or including the production of documents or things [*Code Civ. Proc. § 2020.010*; for further discussion, *see* Ch. 193, *Discovery: Depositions*].

Legal Topics:

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

Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsWritten Depositions

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16-190 California Forms of Pleading and Practice--Annotated § 190.23

§ 190.23 Discovery in Limited Civil Cases

[1] Limited Civil Cases Subject to Economic Litigation Provisions

An limited civil case is one in which the following apply [*Code Civ. Proc. § 85*]:

- The amount in controversy does not exceed $25,000, that is, the amount of the demand, the recovery sought, the value of the property, or the amount of the lien, exclusive of attorney's fees, interest, and costs.

- The relief sought is a type that may be granted in a limited civil case, and is exclusively of a type described in one or more statutes that classify an action or special proceeding as a limited civil case or that provide that an action or special proceeding is within the original jurisdiction of the municipal court.

Thus, a limited civil cases is one involving a limited amount in controversy, which was formerly within the jurisdiction of the municipal courts and now within the jurisdiction of the unified superior courts [*see Code Civ. Proc. § 86*; *see also* Ch. 345A, *Limited Civil Cases*].

Limited civil cases, with certain exceptions, are subject to the provisions entitled Economic Litigation for Limited Civil Cases (*Code Civ. Proc. § 90 et seq.*) [*Code Civ. Proc. § 91(a)*; *see Code Civ. Proc. § 91(b)* (economic litigation provisions do not apply to small claims actions or unlawful detainer proceedings)].

[2] Discovery Act Modified by Economic Litigation Provisions

The economic litigation provisions (*see* [1], *above*) modify the application of the Discovery Act in limited civil cases. Parties to limited civil cases that are subject to these provisions may conduct discovery only to the extent permitted by *Code Civ. Proc. §§ 94* and *95* [*Code Civ. Proc. § 94(a)*; *see* discussion in [3] and [4], *below*].

[3] Restrictions on Discovery Under Economic Litigation Provisions

[a] Notice and Format Requirements of Discovery Act Apply

Discovery in a limited civil case must comply with the notice and format requirements of the particular method of discovery as provided in the Discovery Act [*Code Civ. Proc. § 94*].

[b] Interrogatories, Demands for Production and Inspection of Tangible Evidence, and Requests for Admissions

In a limited civil case, each party, as to each adverse party, may use any combination of 35 of the following forms of discovery [*Code Civ. Proc. § 94(a)*]:

- Interrogatories (with no subparts) under *Code Civ. Proc. § 2030.010 et seq.* [*see* Ch. 194, *Discovery: Interrogatories*].

- Demands to produce documents, things, and electronically stored information under *Code Civ. Proc. § 2031.010 et seq.* [*see* Ch. 195, *Discovery: Inspection of Tangible Evidence*].

- Requests for admissions (with no subparts) under *Code Civ. Proc. § 2033.010 et seq.* [*see* Ch. 196, *Discovery: Requests for Admissions*].

[c] Depositions

In a limited civil case, each party, as to each adverse party, may use one oral or written deposition under *Code Civ. Proc. §§ 2025.010 et seq.*-2028.010 et seq. [*Code Civ. Proc. § 94(b)*; *see* Ch. 193, *Discovery: Depositions*].

[d] Subpoena Duces Tecum

In a limited civil case, each party, as to each adverse party, may serve on any person a deposition subpoena duces tecum requiring the person served to mail copies of documents, books or records to the party's counsel at a specified address, along with an affidavit complying with *Evid. Code § 1561* [*Code Civ. Proc. § 94(c)*]. The party who issues the deposition subpoena must mail a copy of the response to any other party who tenders the reasonable cost of copying it [*Code Civ. Proc. § 94(c)*]. For discussion and forms relating to deposition subpoenas, see Ch. 193, *Discovery: Depositions* .

[e] Physical and Mental Examinations

In a limited civil case, each party, as to each adverse party, may obtain discovery by means of physical and mental examinations under *Code Civ. Proc. § 2032.010 et seq.* [*Code Civ. Proc. § 94(d)*; *see* Ch. 197, *Discovery: Physical and Mental Examinations*].

[f] Exchange of Expert Witness Information

In a limited civil case, each party, as to each adverse party, may obtain discovery relating to the identity of expert witnesses under *Code Civ. Proc. § 2034.010 et seq.* [*Code Civ. Proc. § 94(e)*; *see* Ch. 198, *Discovery: Exchange of Expert Witness Information*].

[4] Authorization for Additional Discovery

[a] By Motion

The court, on noticed motion and subject to just terms and conditions, may authorize a party to conduct additional

discovery, but only on a showing that the moving party will be unable to prosecute or defend the action effectively without the additional discovery. In making the determination, the court must take into account whether the moving party has used all applicable discovery in good faith, and has attempted to secure the additional discovery by stipulation or by means other than formal discovery [*Code Civ. Proc. § 95(a)*]. For a general discussion and forms relating to noticed motions, see Ch. 372, *Motions and Orders* .

[b] By Stipulation

The parties may stipulate to additional discovery [*Code Civ. Proc. § 95(b)*]. For a general discussion and forms relating to stipulations, see Ch. 533, *Stipulations* .

[5] Motion to Withdraw Action From Limited Civil Case Procedures

A limited civil case may, on noticed motion, be withdrawn from the economic litigation provisions of *Code Civ. Proc. § 90 et seq.*, on a showing that it is impractical to prosecute or defend the action within the limitations of these provisions [*Code Civ. Proc. § 91(c)*; for general discussion and forms relating to noticed motions, *see* Ch. 372, *Motions and Orders*]. If the action is withdrawn, it becomes subject to the provisions of the Discovery Act for purposes of discovery.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedurePretrial MattersSubpoenas

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16-190 California Forms of Pleading and Practice--Annotated § 190.24

§ 190.24 Discovery of Electronically Stored Information

[1] Governing Law

Discovery of electronically stored information (ESI) pursuant to the Civil Discovery Act [*Code Civ. Proc. §§ 2016.010-2036.050*] is governed generally by the Electronic Discovery Act [*Code Civ. Proc. §§ 1985.8, 2031.010-2031.510*], which was enacted in 2009.

Related provisions of the Civil Discovery Act include the provisions governing discovery generally, set out in *Code Civ. Proc. §§ 2016.010-2019.030, 2023.010-2023.040*.

The extent of discovery permitted under the Civil Discovery Act is restricted in limited civil cases by the economic litigation provisions of *Code Civ. Proc. §§ 94* and *95*. The use of demands for the production or inspection of tangible evidence is limited specifically by *Code Civ. Proc. § 94(a)*. For further discussion, see *§§ 190.11[2], 190.23[2][a]*.

Case management requirements regarding discovery of electronically stored information is set out in *Cal. Rules of Ct., Rule 3.724(8)*. Statewide rule provisions relating to the format, content, and service of discovery papers and motions, and to discovery sanctions, are set out in *Cal. Rules of Ct., Rules 3.1000, 3.1020, 3.1025,* and *3.1030*.

"[E]lectronic evidence is no less discoverable than paper evidence" [*Advante Int'l Corp. v. Mintel Learning Tech. (N.D. Cal. 2006) 2006 U.S. Dist. LEXIS 45859, at *3* , quoting *Zubulake v. UBS Warburg LLC (S.D.N.Y. 2003) 217 F.R.D. 309, 317* ; *see* [2], *below*]. However, the computer age has generated "new and challenging" issues for attorneys, clients, and courts during the civil discovery process [*Advante Int'l Corp. v. Mintel Learning Tech. (N.D. Cal. 2006) 2006 U.S. Dist. LEXIS 45859, at *3*]. "As individuals and corporations increasingly do business electronically--using computers to create and store documents, make deals, and exchange e-mails--the universe of discoverable material has expanded exponentially" [*Zubulake v. UBS Warburg LLC (S.D.N.Y. 2003) 217 F.R.D. 309, 311*]. Electronic data in discovery presents particular problems with respect to preservation and production or spoliation of evidence, privacy, and privilege.

[2] Electronic Discovery Act

For many years before the passage of the Electronic Discovery Act, California courts allowed discovery and often admission of electronically stored information into evidence under prior discovery statutes [*see, e.g., People v. Lugashi (1988) 205 Cal. App. 3d 632, 640, 252 Cal. Rptr. 434* (allowing admission of bank computer records); *R.S. Creative v. Creative Cotton (1999) 75 Cal. App. 4th 486, 89 Cal. Rptr. 2d 353* (terminating sanctions for actions including spoliation of evidence on computers)]. However, there are few reported California state court decisions on this topic, and trial courts had to apply general discovery principles to electronic evidence on a case by case basis.

In 2009, the California legislature passed the Electronic Discovery Act to address the problems created by application of the general Discovery Act rules to the specific issues that typically arise in e-discovery. The Electronic Discovery Act is modeled on federal rules governing e-discovery that took effect December 1, 2006 [*see Fed. R. Civ. P., Rules 16(b)(3)(B)(iii), (iv), 26(b)(2)(B), (b)(5), (f)(3)(c), 34(b)(1)(C), (b)(2)(D), (b)(2)(E), 37(e)*]. The federal rules were one of the first attempts nationally to address e-discovery in a comprehensive manner, and as a result state courts have often looked to these rules in attempting to resolve e-discovery issues in the absence of state law. As a result, California courts may be expected to look to federal decisions construing the federal rules for guidance, at least until California courts have had a chance to interpret its Electronic Discovery Act.

For more detailed discussion of the Electronic Discovery Act and related cases, *see* Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery).*

For a detailed step-by-step guide to the discovery of electronic evidence, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence.

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16-190 California Forms of Pleading and Practice--Annotated § 190.25

§ 190.25 Discovery in Actions Pending Outside California

Effective January 1, 2010 [Stats. 2008 ch. 231, § 3; *Code Civ. Proc. § 2029.900*], the Interstate and International Depositions and Discovery Act [*Code Civ. Proc. § 2029.100 et seq.*] governs depositions in California for out-of-state actions. The Act is California's version of the Uniform Interstate Depositions and Discovery Act [*see Code Civ. Proc. § 2029.700*]. The Act governs depositions for the production of tangible items and inspection of premises, in addition to those requiring testimony [*see Code Civ. Proc. § 2029.200(e)*]. The Act broadens the range of documents issued by an out-of-state court pursuant to which a California court may issue a subpoena, and includes electronically stored information [*see Code Civ. Proc. § 2029.200(e)(2)*]. The Act clarifies that a request for the issuance of a subpoena does not constitute an appearance in a California court [*see Code Civ. Proc. § 2029.300(a)*].

The Act specifies the process for obtaining a subpoena--requiring payment of a fee, to be deposited in the Trial Court Trust Fund, and submitting the subpoena of the out-of-state court with a specified application [*see Code Civ. Proc. § 2029.300*]. A party is not required to retain a local attorney to depose a witness in these circumstances. The Act permits an active member of the California State Bar who is retained by a party to an out-of-state court proceeding to issue a deposition subpoena [*Code Civ. Proc. § 2029.350(a)*; *see Code Civ. Proc. § 2029.350(b)* (content and format requirements)].

The Act provides a dispute resolution process for discovery conducted in California in connection with an out-of-state proceeding [*see Code Civ. Proc. §§ 2029.600-2029.630*]. It permits a party to appeal court orders in connection with a dispute by extraordinary writ to the court of appeal [*see Code Civ. Proc. § 2029.650*].

For a detailed discussion of the Act, see *Ch. 193, Discovery: Depositions, § 193.130* et seq. Judicial Council forms (application and subpoenas) for use under the Interstate and International Depositions and Discovery Act are reproduced in Ch. 193, *Discovery*: Depositions, §§ 280-282, Ch. 195, *Discovery: Inspection of Tangible Evidence*, § 195.70, and Ch. 535, *Subpoena*, § 535.85.

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[Reserved]

§§ 190.26[Reserved]

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16-190 California Forms of Pleading and Practice--Annotated § 190.30

§ 190.30 Proceeding to Limit General Scope When Hardship Outweighs Usefulness

The court is required to limit the scope of discovery if it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence [*Code Civ. Proc. § 2017.020(a)*; *see Calcor Space Facility, Inc. v. Superior Court (1997) 53 Cal. App. 4th 216, 223, 61 Cal. Rptr. 2d 567]* .

The court may make this determination pursuant to a motion for protective order by a party or other affected person [*Code Civ. Proc. § 2017.020(a)*; *see also Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 383-384, 15 Cal. Rptr. 90, 364 P.2d 266]* .

This motion must be accompanied by a declaration stating facts showing a good faith attempt at an informal resolution of each issue presented by the motion. The court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2017.020(b)*]. For further discussion of these general provisions for a declaration regarding attempt at informal resolution and for monetary sanctions, see *§ 190.33* and *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

For a form for a motion for a protective order under *Code Civ. Proc. § 2017.020*, see *§ 190.80*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryUndue BurdensCriminal Law & ProcedureDiscovery & InspectionDiscovery MisconductGeneral Overview

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16-190 California Forms of Pleading and Practice--Annotated § 190.31

§ 190.31 Proceeding to Restrict Frequency or Extent of Use of Discovery Methods

The court, on motion for a protective order by a party or other affected person, must restrict the frequency or extent of use of the discovery methods if it determines either of the following [*Code Civ. Proc. § 2019.030(a)*]:

- The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.

- The selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation.

This motion must be accompanied by a declaration stating facts showing a good faith attempt at an informal resolution of each issue presented by the motion. The court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2019.030(c)*]. For further discussion of these general provisions for a declaration re attempt at informal resolution and for monetary sanctions, see *§ 190.33* and *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

The trial court has considerable discretion under *Code Civ. Proc. § 2019.030* [*Carter v. Superior Court (1990) 218 Cal. App. 3d 994, 998, 267 Cal. Rptr. 290* (interpreting former *Code Civ. Proc. § 2019(b)*)]. This discretion may, however, be limited to the extent that a more specific provision limiting discovery applies. For example, if a party propounding interrogatories fails to follow the procedure for obtaining further responses, he or she waives any right to compel further responses under *Code Civ. Proc. § 2030.300*. In this situation, the court essentially has no discretion to permit the propounding party to avoid the waiver under *Code Civ. Proc. § 2030.300(c)* by serving the same questions in a second set of interrogatories [*see Professional Career Colleges, Magna Institute, Inc. v. Superior Court (1989) 207 Cal. App. 3d 490, 493-494, 255 Cal. Rptr. 5]* .

On the other hand, a specific provision limiting one method of discovery does not apply to the use of other methods. For

example, if a party has waived its right to compel further inspection of documents under *Code Civ. Proc. § 2031.310(c)*, that party is not automatically barred from employing another method to obtain disclosure of those documents, such as a deposition at which the deponent is required to produce the records. In this situation the court may exercise its discretion under *Code Civ. Proc. § 2019.030* to determine whether use of the second method of discovery is burdensome or duplicative [*see Carter v. Superior Court (1990) 218 Cal. App. 3d 994, 996-998, 267 Cal. Rptr. 290* (interpreting former *Code Civ. Proc. § 2019(b)*)].

For a form for a motion for a protective order under *Code Civ. Proc. § 2019.030*, see *§ 190.80*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryUndue BurdensCriminal Law & ProcedureDiscovery & InspectionDiscovery MisconductGeneral Overview

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 190 DISCOVERY: SCOPE, REGULATION, AND TIMING
PART II. LEGAL BACKGROUND
C. General Regulatory Provisions and Procedures

16-190 California Forms of Pleading and Practice--Annotated § 190.32

§ 190.32 Proceeding to Establish Manner, Sequence, or Timing of Discovery

[1] General Rule

As a general rule, the methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or another method, will not operate to delay the discovery of any other party. This is the rule unless there is a Judicial Council or local court rule or local uniform written policy to the contrary [*Code Civ. Proc. § 2019.020(a)*].

However, on motion and for good cause shown, the court may establish the sequence and timing of discovery for the convenience of parties and witnesses and in the interests of justice [*Code Civ. Proc. § 2019.020(b)*].

For a form for a motion that may be modified for use as a motion under *Code Civ. Proc. § 2019.020(b)*, see *§ 190.80*.

[2] Electronic Filing and Service Generally

[a] Rules for Electronic Filing

Electronic filing and service are governed by *Cal. Rules of Ct., Rule 2.250 et seq.* In general, a court may permit electronic filing of a document in any action or proceeding, unless the rules in *Cal. Rules of Ct., Rule 2.250 et seq.* or other legal authority expressly prohibit electronic filing [*Cal. Rules of Ct., Rule 2.252(a)*]. In a proceeding that requires the filing of an original document, an electronic filer may file a scanned copy of a document if the original document is then filed with the court within 10 calendar days [*Cal. Rules of Ct., Rule 2.252(b)*]. The court may file electronically any notice, order, minute order, judgment, or other document prepared by the court [*Cal. Rules of Ct., Rule 2.252(d)*].

A document that the court or a party files electronically under these rules has the same legal effect as a document in paper form [*Cal. Rules of Ct., Rule 2.252(e)(1)*]. Moreover, filing a document electronically does not alter any filing deadline [*Cal. Rules of Ct., Rule 2.252(e)(2)*].

In specified actions, a court, on the motion of any party or on its own motion, after finding that such an order would not

cause undue hardship or significant prejudice to any party, may order all parties to file all documents electronically. These actions include any class action, a consolidated action, a group of actions, a coordinated action, or an action that is complex under *Cal. Rules of Ct., Rule 3.403* [*Cal. Rules of Ct., Rule 2.253(a)(2), (3)*]. Filing in paper format may be allowed when it is not feasible to convert a document to electronic form [*see Cal. Rules of Ct., Rule 2.253(c)*].

A document that is filed electronically with the court must be in a format specified by the court unless it cannot be created in that format [*see Cal. Rules of Ct., Rule 2.256(b)*].

Additional rules concerning signature requirements and payment of filing fees are covered in *Cal. Rules of Ct., Rule 2.257* and Rule 2.258, respectively.

[b] Rules for Electronic Service

In specified types of actions, the court, on the motion of any party or on its own motion, after finding that such an order would not cause undue hardship or significant prejudice to any party, may order all parties to serve all documents electronically, unless personal service is required by statute or rule [*Cal. Rules of Ct., Rule 2.253(a)(1), (3)*]. These actions include any class action, a consolidated action, a group of actions, a coordinated action, or an action that is complex under *Cal. Rules of Ct., Rule 3.403* [*Cal. Rules of Ct., Rule 2.253(a)*]. The court also may order that when the court sends confirmation of filing to all parties, receipt of the confirmation constitutes service of the filing, if the filed document is available electronically [*Cal. Rules of Ct., Rule 2.253(b)(2)*].

When a notice may be served by mail, express mail, overnight delivery, or fax transmission, electronic service of the notice is permitted when authorized by the rules governing electronic service and filing [*Cal. Rules of Ct., Rule 2.260(a)(1)*; *see Cal. Rules of Ct., Rule 2.250 et seq.* (electronic filing and service rules)]. A party indicates that he or she agrees to accept electronic service by [*Cal. Rules of Ct., Rule 2.260(a)(2)*]:

- Filing and serving a notice that the party accepts electronic service; or
- Electronically filing any document with the court.

The notice also must include the electronic notification address at which the party agrees to accept service [*Cal. Rules of Ct., Rule 2.260(a)(2)*].

A party that has consented to electronic service and has used an electronic filing service provider to file and serve documents in a case consents to service on that electronic filing service provider as the designated agent for service for the party in the case, until the party designates a different agent for service [*Cal. Rules of Ct., Rule 2.260(a)(3)*].

Electronic service is complete at the time of transmission [*Cal. Rules of Ct., Rule 2.260(e)(1)*]. If a document is served electronically, any period of notice, or any right or duty to act or respond within a specified period or on a date certain after service of the document, is extended by two court days [*Cal. Rules of Ct., Rule 2.260(e)(2)*; *see Cal. Rules of Ct., 2.260(e)(3)* (this extension does not extend time for filing (1) notice of intent to move for new trial, (2) notice of intent to move to vacate judgment under *Code Civ. Proc. § 663a*; or (3) notice of appeal)]. Service that occurs after the close of business is deemed to have occurred the next court day [*Cal. Rules of Ct., Rule 2.260(e)(4)*].

Proof of electronic service may be by any of the methods provided in *Code Civ. Proc. § 1013* (*see § 190.51[4]*), except that the proof of service must state [*Cal. Rules of Ct., Rule 2.260(f)(1)*]:

- The electronic notification address of the person making the service, in addition to that person's residence or business address;

- The date and time of the electronic service, instead of the date and place of deposit in the mail;

- The name and electronic notification address of the person served, in place of that person's name and address as shown on the envelope; and

- That the document was served electronically, in place of the statement that the envelope was sealed and deposited in the mail with postage fully prepaid.

Proof of electronic service may be in electronic form and may be filed electronically with the court [*Cal. Rules of Ct., Rule 2.260(f)(2)*]. Proof of service of the moving papers must be filed at least five calendar days before the hearing [*Cal. Rules of Ct., Rule 2.260(f)(3)*; *see Cal. Rules of Ct., Rule 3.1300(c)* (proof of service of moving papers must be filed no later than five court days before time of hearing)]. The party filing the proof of electronic service must maintain the printed form of the document bearing the declarant's original signature and must make the document available for inspection and copying on the request of the court or any party to the action or proceeding in which it is filed, in the manner provided in *Cal. Rules of Ct., Rule 2.257(a)* [*Cal. Rules of Ct., Rule 2.260(f)(4)*].

The court may serve electronically any notice, order, judgment, or other document prepared by the court in the same manner as parties may serve documents by electronic service [*Cal. Rules of Ct., Rule 2.260(g)*].

[3] Use of Technology in Certain Cases

In certain cases under *Code Civ. Proc. § 2017.730(a)* (cases designated as complex pursuant to Section 19 of the Judicial Administration Standards, cases ordered to be coordinated pursuant to *Code Civ. Proc. § 404 et seq.*, exceptional cases exempt from case disposition time goals pursuant to *Gov. Code § 68600 et seq.*, or cases assigned to Plan 3 pursuant to Cal. Rules of Ct., Rule § 2105(b)(3)), the court may enter orders for the use of technology in conducting discovery. Technology includes such devices as telephone, e-mail, CD-ROM, Internet web sites, electronic documents, electronic document depositories, Internet depositions and storage, videoconferencing, and other electronic technology [*Code Civ. Proc. § 2017.710*]. The technology service provider must be appointed by the court under a contract approved by the court. Under *Code Civ. Proc. § 2017.730(c)*, the court must find, or the parties must stipulate, that the procedures adopted in the order do all of the following:

- Promote cost-effective and efficient discovery or related motions.

- Do not impose or require undue expenditures of time or money.

- Do not create an undue economic burden or hardship on any person.

- Promote open competition among vendors and providers of services in order to facilitate the highest quality service at the lowest reasonable cost to the litigants.

- Do not require parties or counsel to purchase exceptional or unnecessary services, hardware, or software.

The court may prescribe procedures relating to the use of electronic technology in conducting discovery, including orders for the service of requests for discovery and responses, service and presentation of motions, production, storage, and access to information in electronic form, and the conduct of discovery in electronic media [*Code Civ. Proc. § 2017.730(d)*].

The court must appoint any technology provider agreed upon by the parties, and must approve the contract agreed upon by the parties and the service provider. If the parties do not agree on a provider, each party must submit to the court up

to three nominees together with a contract acceptable to the nominee and the court will make an appointment from among the nominees. If there are no nominees, the court will appoint the provider. The court may condition its appointment on the acceptance of modifications in the terms of the contract. Pursuant to noticed motion at any time and upon a showing of good cause, the court may order the removal of the service provider or vacate any agreement between the parties and the service provider, or both, effective as of the date of the order. The continued service of the service provider is subject to review periodically, as agreed by the parties and the service provider, or annually if they do not agree. Any disputes involving the contract or the duties, rights, and obligations of the parties or service providers may be determined on noticed motion in the action [*Code Civ. Proc. § 2017.740(b)*].

The rights and duties of the parties must not be diminished by the use of technology [*Code Civ. Proc. § 2017.720(a)*], and allowing its use has no bearing on the appointment or requirement for a stenographic court reporter [*Code Civ. Proc. § 2017.720(b), (c)*; *see Code Civ. Proc. § 2025.330(b)*].

For a detailed discussion of electronic discovery (e-discovery), see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryUndue Burdens

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16-190 California Forms of Pleading and Practice--Annotated § 190.33

§ 190.33 General Provisions for Regulating Discovery Proceedings

[1] Requirement of Good-Faith Effort at Informal Resolution of Disputes

The Discovery Act is designed so that civil discovery will be self-executing, that is, that it will be conducted as much as possible by the parties without assistance from the courts. A party may always obtain the trial court's assistance or intervention by making a motion for a discovery order, but the Discovery Act utilizes two general devices to discourage unmerited recourse to motion proceedings.

The first device requires that a moving party generally show that he or she has initiated a motion proceeding only after making an attempt to resolve the discovery dispute informally. In most instances in which the Civil Discovery Act provides for a particular motion for a discovery order, particularly those which compel or limit discovery, the motion must be accompanied by a declaration stating facts that show a "reasonable and good faith attempt at an informal resolution of each issue presented by the motion" as required by *Code Civ. Proc. § 2016.040* [*see Code Civ. Proc. §§ 2017.020(a), 2019.030(b)* (protective orders generally), 2024.050(a) (motion to hear discovery motion closer to trial date or to reopen discovery), 2025.260(a), 2025.410(c), 2025.420(a), 2025.450(b)(2), 2025.480(b), 2025.520(g) (depositions), 2028.040(b) (deposition by written questions), 2030.090(a), 2030.300(b), 2030.310(a) (interrogatories), 2031.060(a), 2031.310(b)(2) (inspection, copying, testing, or sampling of documents, tangible things, places, or electronically stored information), 2032.250(a), 2032.310(b), 2032.620(a), 2032.650(a) (physical or mental examinations), 2033.080(a), 2033.290(b) (requests for admission), 2034.250(a), 2034.470(b), 2034.610(c), 2034.710(c) (exchange of expert witness lists)]. In the case of a party who is served a notice of deposition and fails to attend the deposition or produce the documents or things described in the deposition notice without serving a valid objection, a motion to compel must be accompanied by a declaration showing a reasonable and good faith attempt at an informal resolution or by a declaration stating that the petitioner contacted the deponent to inquire about the nonappearance [*Code Civ. Proc. § 2025.450(b)(2)*]. One court has held that implicit in the requirement of former *Code Civ. Proc. § 2025(j)(3)(B)* (*now see Code Civ. Proc. § 2025.450(b)(2)*) that counsel contact the deponent about a nonappearance is the requirement that counsel listen to the reasons offered and make a good faith attempt to resolve the issue. Accordingly, either declaration submitted with a motion of compel under *Code Civ. Proc. § 2025.450(b)(2)* must show a reasonable and good faith attempt to resolve each issue presented, including those relating to the nonappearance [

Blago Leko v. Cornerstone Home Inspection (2001) 86 Cal. App. 4th 1109, 1124, 103 Cal. Rptr. 2d 858 (attorney sanctioned under former *Code Civ. Proc. § 2023(a)(3), (9)* (*now see Code Civ. Proc. § 2023.010(c), (i)*) for improperly filing motion to compel attendance when attorney completely disregarded his obligation to attempt to informally resolve discovery issue)].

For discussion of monetary sanctions for failure to attempt an informal resolution as a misuse of the discovery process, pursuant to *Code Civ. Proc. § 2023.020*, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

[2] Discovery Sanctions

Of the two general devices designed to make discovery proceedings self-executing [*see* [1], *above*], the second is the provision for monetary sanctions in most motion proceedings. The trial court in a discovery motion proceeding generally is *required* to impose such sanctions against the losing party, that is, the party who unsuccessfully brought or opposed the motion. The court may decline to impose the sanction only if it finds explicitly that the party subject to the sanction acted with substantial justification or that other circumstances exist that would make imposition of the sanction unjust [*see Code Civ. Proc. §§ 2017.020(b), 2019.030(c)* (protective orders generally), 2024.050(c) (motion to hear discovery motion closer to trial date or to reopen discovery), 2025.260(d), 2025.410(d), 2025.420(d), 2025.450(c), 2025.420(d), 2025.480(f), 2025.520(h) (depositions), 2028.040(c), 2028.050(c) (deposition by written questions), 2030.090(d), 2030.300(d), 2030.310(d) (interrogatories), 2031.060(h), (i), 2031.300(c), (d), 2031.310(h), (j), 2031.320(b), (d) (inspection, copying, testing, sampling of documents, tangible things, places, or electronically stored information), 2032.250(b), 2032.620(b), 2032.650(b) (physical or mental examinations), 2033.080(d), 2033.290(d) (requests for admission), 2034.250(d)), 2034.470(g), 2034.630, 2034.730 (exchange of expert witness lists)].

For further discussion of these provisions for monetary sanctions for unsuccessful prosecution of or opposition to a discovery motion, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, § 192.15[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel

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§ 190.34 Protective Orders in Context of Particular Discovery Proceedings

In addition to the protective orders available under the general provisions of *Code Civ. Proc. §§ 2017.020* and *2019.030* [*see §§ 190.30*, *190.31*], the code sections governing each particular discovery method also provide for a motion for a protective order within the context of that particular method. These generally provide that the court, for good cause shown, may make any order that justice requires to protect any party or person from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense. They also enumerate specific orders that are included within, but which do not exclusively limit, the court's power to fashion an order as justice requires [*see Code Civ. Proc. §§ 2025.420*, *2025.470*, *2028.070* (depositions), 2030.090(b) (interrogatories), 2031.060(b) (inspection, copying, testing, sampling of documents, tangible things, places, or electronically stored information), 2033.080(b) (requests for admission), 2034.250(b) (exchange of expert witness information); *see also Code Civ. Proc. § 2032.510* (protective order during physical or mental examination)]. For further discussion of these provisions, see the chapter discussing the pertinent discovery method [*see* Ch. 193, *Discovery: Depositions* , through Ch. 198, *Discovery: Exchange of Expert Witness Information*].

Code Civ. Proc. § 2018.010 et seq., governing attorneys' work product protection, also authorizes a protective order on good cause shown to ensure the confidentiality of an attorney's work product that is relevant to issues of breach of duty by the attorney in a disciplinary hearing [*see Code Civ. Proc. § 2018.070(b)*; *see also* discussion in *§ 190.11[3][c]*].

Legal Topics:

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

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§ 190.35 Regulating Discovery by Stipulation

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, on any notice, and in any manner, and when so taken may be used like other depositions; and (2) modify the procedures provided under *Code Civ. Proc. § 2016.010 et seq.* for other methods of discovery [*Code Civ. Proc. § 2016.030*].

Stipulations relating to discovery, and notices of these stipulations, are not to be filed with the court unless offered as relevant to the determination of an issue in a law and motion proceeding or other hearing, or ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(7), (18)*; *see also Cal. Rules of Ct., Rule 3.250(b)* (retention of originals)].

For discussion and forms relating to stipulations generally, see Ch. 533, *Stipulations* .

Legal Topics:

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

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16-190 California Forms of Pleading and Practice--Annotated § 190.36

§ 190.36 Limiting Disclosure of Discovered Matter for Nonlitigation Purposes

A litigant's right of freedom of speech under *U.S. Const., amend. I*, does not include an absolute right to use information obtained by discovery for nonlitigation purposes. A protective order does not violate *U.S. Const., amend. I*, if it prohibits the dissemination, publication, or use of discovered information for any purpose other than the litigation at hand, when that order has been entered on a showing of good cause, is limited to the context of pretrial discovery, and does not restrict the dissemination of the information if gained from other sources [*Seattle Times Co. v. Rhinehart (1984) 467 U.S. 20, 36-37, 104 S. Ct. 2199, 81 L. Ed. 2d 17* (upholding order issued in libel action that prohibited defendant publisher from making use of specified information obtained by court ordered discovery); *see also Coalition Against Police Abuse v. Superior Court (1985) 170 Cal. App. 3d 888, 896-906, 216 Cal. Rptr. 614* (relying on *Seattle Times* in upholding order issued after litigation requiring return of documents not already disseminated that had been discovered subject to protective orders)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryProtective Orders

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§ 190.37 Procedure to Seal Confidential Records

Court records of a civil proceeding generally are available to the public unless otherwise provided by law [*see NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 Cal. 4th 1178, 1212, 1217-1218, 86 Cal. Rptr. 2d 778, 980 P.2d 337] . Cal. Rules of Ct., Rules 2.550-2.551* establish a procedure for obtaining a court order to seal otherwise public court records when there is an overriding interest that overcomes the general right of public access to court records [*see Cal. Rules of Ct., Rule 2.550(d)*]. "Overriding interests" that support such an order may include privileges, trade secrets, contractual nondisclosure obligations, privacy interests, and other similar protections against the disclosure of confidential material [*see NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 Cal. 4th 1178, 1222 n.46, 86 Cal. Rptr. 2d 778, 980 P.2d 337* ; *see, e.g., Huffy Corp. v. Superior Court (2003) 112 Cal. App. 4th 97, 105-111, 4 Cal. Rptr. 3d 823* (documents in insurance coverage dispute, including settlement agreement with confidentiality clause which contained exception for court-ordered disclosure; papers revealing sources of payments to settle claims; documents containing admissions that defendant may have violated pollution laws; papers revealing identity of witnesses to possible violations of laws; and documents disclosing identity of other entities that may have violated laws, could not remain sealed, absent Rule 243.1 showing of prejudice to an overriding interest); *see also* Advisory Committee Comment to *Cal. Rules of Ct., Rule 2.550*].

The procedure for sealing court records under *Cal. Rules of Ct., Rules 2.550-2.551*, does *not* apply to discovery motions, nor to records filed or lodged in court in connection with discovery motions or proceedings [*Cal. Rules of Ct., Rule 2.550(a)(3)*]. Thus, the presumed right of public access discussed in *NBC Subsidiary*, discussed *above*, and *Cal. Rules of Ct., Rules 2.550-2.551*, did not apply to discovery materials designated confidential under a protective order and later filed with the court and not used at trial or submitted as a basis for adjudication [*Mercury Interactive Corp. v. Klein (2007) 158 Cal. App. 4th 60, 103-108, 70 Cal. Rptr. 3d 88* (stressing that "the issue we decide here is a rather narrow one" and acknowledging that "there may exist instances in which an attachment to a complaint to which a demurrer is interposed may constitute a document submitted as a basis for adjudication and thereby fall within the presumption of public access," such as "a challenged complaint in which a contract is attached and in which the demurrer concerns the viability of the contract"; remanding case to allow defendants to challenge plaintiff's confidentiality designations by following procedures in stipulated protective order)]. Accordingly, the procedures under the Discovery Act for obtaining protective orders remain the chief means of protecting against public disclosure of

sensitive or confidential materials during pretrial discovery.

The procedure for sealing records under *Cal. Rules of Ct., Rules 2.550-2.551*, does apply to discovery materials, however, once a party seeks to use them at trial or otherwise submit them to the court as a basis for adjudication [*Cal. Rules of Ct., Rule 2.550(a)(3)*; *see also* Advisory Committee Comment to *Cal. Rules of Ct., Rule 2.550*, citing *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 Cal. 4th 1178, 1208-1209 n.25, 86 Cal. Rptr. 2d 778, 980 P.2d 337]* . For detailed discussion and forms relating to the procedure for sealing records under *Cal. Rules of Ct., Rules 2.550-2.551*, see Ch. 551, *Trial* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryProtective OrdersGovernmentsCourtsCourt RecordsTrade Secrets LawCivil ActionsDiscovery

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§ 190.38 Stay of Discovery

[1] Pending Determination of Validity of Cause of Action

If a potential plaintiff is unable to state a viable cause of action on the basis of the facts already available to him or her, that individual will be unable to employ any of the discovery methods in order to ascertain the facts essential to state a cause of action [*see generally Terminals Equipment Co. v. City and County of San Francisco (1990) 221 Cal. App. 3d 234, 247, 270 Cal. Rptr. 329]* . This is in keeping with the general purpose of discovery, that of clarifying the underlying facts and the contentions of the parties in litigation [*see* discussion in *§ 190.12*]. Indeed, most of the methods of discovery link the timing of permissible discovery to the service of summons on, or appearance by, the party from whom discovery is sought [*see, e.g., Code Civ. Proc. §§ 2025.210* (oral deposition), 2030.020 (written interrogatories), 2031.020 (inspection, copying, testing, or sampling), 2032.220(b) (physical examination), 2033.020 (request for admission)]. Thus, unless and until a plaintiff files a viable complaint stating at least one triable cause of action, permitting discovery of the purported defendant would only be an unnecessary and burdensome expense to that individual [*see Terminals Equipment Co. v. City and County of San Francisco (1990) 221 Cal. App. 3d 234, 247, 270 Cal. Rptr. 329]* .

Frequently, however, discovery is sought after the validity of the cause of action alleged in the plaintiff's complaint has been challenged, and before a determination of validity has been made. In such a case, a stay of discovery is an appropriate method of preserving the rights of both parties. For example, in an inverse condemnation action, during the course of discovery, the plaintiffs filed a far-reaching demand for inspection of documents. After the defendant city responded, the plaintiffs sought to have the city produce additional materials, and filed a motion to compel production of those documents. The city refused to produce them, asserting that they were confidential documents protected by *Evid. Code § 1040*, and demurred on the ground that the complaint failed to state a cause of action. The trial court stayed the plaintiffs' motion to compel production, pending resolution of the demurrer, which was eventually sustained with leave to amend. After a hearing on the plaintiff's motion to compel production, the court ordered that the discovery stay remain in effect until the plaintiffs filed an amended complaint that was not subject to demurrer. The court of appeal upheld the continuance of the stay. It said that if the plaintiffs were unable to state a viable cause of action on the basis of the facts already available, nothing in the disputed documents could do anything to change that. Once it is

recognized that a complaint shows that a plaintiff has no claim, all concerned should be spared the expense of further proceedings [*Terminals Equipment Co. v. City and County of San Francisco (1990) 221 Cal. App. 3d 234, 247, 270 Cal. Rptr. 329* (plaintiffs elected to stipulate to judgment and appealed that judgment to the court of appeal)].

The party resisting discovery may choose to file an application for a stay either as an initial response to the discovery request, or in response to a motion to compel discovery. In either case, it is advisable to make a good faith attempt at some sort of dispute resolution with the other party in order to avoid sanctions [*see Code Civ. Proc. § 2023.020*, discussed in *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*; *see also § 190.33[1]*]. When the discovery is sought through the use of an oral deposition, and the notice of deposition is not in statutory compliance, there is specific authority for imposing a stay on the taking of that deposition and the quashing of that deposition notice [*see Code Civ. Proc. § 2025.410*, discussed in Ch. 193, *Discovery: Depositions*].

As an alternative to seeking a stay of discovery, the party resisting discovery may seek a protective order that limits the scope or the extent of discovery [*see Code Civ. Proc. §§ 2017.020, 2019.030*; *see* discussion in *§§ 190.30, 190.31*].

[2] Pending Parallel Criminal Action

In *Avant! Corp. v. Superior Court (2000) 79 Cal. App. 4th 876, 94 Cal. Rptr. 2d 505* , one court of appeal considered, as an issue of first impression in California, whether a corporation that is a defendant in related criminal and civil actions may obtain stay of discovery in a civil action while the criminal action is pending. In this case, petitioner corporation sought a writ of mandate to vacate an order denying its motion to stay civil proceedings or to stay discovery in respondent's suit for defamation, intentional infliction of emotional distress, and other torts, pending the disposition of a related criminal case [*Avant! Corp. v. Superior Court (2000) 79 Cal. App. 4th 876, 878-879, 94 Cal. Rptr. 2d 505]* . Petitioner argued that the *Fifth Amendment* privilege against self-incrimination of the corporation's employees compelled a stay. The court denied the writ of mandate, holding that the trial court did not abuse its discretion in denying the stay because a corporation has no right against self-incrimination and the employees' *Fifth Amendment* rights were protected by the trial court's discovery order, which provided that the corporation's officers, employees, and agents were required to provide only non-privileged information in their custody or control [*Avant! Corp. v. Superior Court (2000) 79 Cal. App. 4th 876, 886-887, 94 Cal. Rptr. 2d 505]* .

The court articulated the standard to be applied in deciding whether to stay civil proceedings until disposition of the criminal matter. In the discovery context, the trial court's decisions on these matters are reviewed under the abuse of discretion standard, not on *Fifth Amendment* grounds [*Avant! Corp. v. Superior Court (2000) 79 Cal. App. 4th 876, 886, 94 Cal. Rptr. 2d 505]* . The court explained that the weight of authority holds that while the implication of the right against self-incrimination must be given serious consideration, staying a civil discovery process to await the outcome of a related criminal case does not implicate constitutional issues, even when the defendant raising the question is an individual defendant [*Avant! Corp. v. Superior Court (2000) 79 Cal. App. 4th 876, 882-886, 94 Cal. Rptr. 2d 505* (citing cases)]. A court, however, has discretion to stay civil proceedings, to postpone discovery, or to impose protective orders and conditions when the interests of justice seem to require such action. In making that decision, the court should consider five factors, including the plaintiff's interest in proceeding expeditiously with the litigation, the burden on the defendants, the court's convenience in managing its cases, the interests of nonparties to the civil litigation, and the interest of the public in the pending civil and criminal litigation [*Avant! Corp. v. Superior Court (2000) 79 Cal. App. 4th 876, 885, 94 Cal. Rptr. 2d 505]* .

In another case, plaintiffs sued for tort damages based on an alleged beating by store security guards and sought to depose defendant guards. Fearing criminal prosecution, these defendants sought a stay until the criminal statute of limitations expired. The stay was denied, in that it would run counter to the courts' interest in expeditious and efficient resolution of cases, and expose both sides of the litigation to the risk of diminished memory and lost records. Instead, during the defendants' depositions, they could claim their privilege against self-incrimination and the trial court could then fashion whatever protective order it deemed reasonable to balance the interests of the parties and the judicial

system [*Fuller v. Superior Court (2001) 87 Cal. App. 4th 299, 302, 309-310, 104 Cal. Rptr. 2d 525]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryProtective OrdersEvidencePrivilegesSelf-Incrimination PrivilegeScope

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16-190 California Forms of Pleading and Practice--Annotated § 190.39

§ 190.39 Delegation of Discovery Matters by Discovery Referee

[1] Referee Appointment and Challenge Procedures

A trial court, on a determination that it is necessary, may appoint a referee in any pending action in order to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation on them [*Code Civ. Proc. § 639(a)(5)*; *see Taggares v. Superior Court (1998) 62 Cal. App. 4th 94, 104, 72 Cal. Rptr. 2d 387* (emphasizing use of word "necessary" in former *Code Civ. Proc. § 639(e)* (*see now Code Civ. Proc. § 639(a)(5)*)]. The court may appoint a referee on the written motion of any party, or on its own motion, when the parties do not consent to it [*Code Civ. Proc. § 639(a)*; *see, e.g., Sauer v. Superior Court (1987) 195 Cal. App. 3d 213, 216, 225-226, 240 Cal. Rptr. 489]* .

When a referee is appointed under *Code Civ. Proc. § 639(a)(5)*, the order must indicate whether the referee is being appointed for all discovery purposes in the action [*Code Civ. Proc. § 639(c)*; *see also Code Civ. Proc. § 639(d)* (required contents of written order)].

The court may appoint a referee even in the absence of a current discovery dispute. Such an appointment may be very helpful because complex cases will invariably involve complex discovery disputes, and unless managed, a case with many separately represented parties has the potential for burdensome and duplicative discovery. Even in the unlikely absence of disputes, the referee can work with the attorneys in developing a discovery plan and scheduling discovery in the most efficient, rational, and least oppressive manner [*Lu v. Superior Court (1997) 55 Cal. App. 4th 1264, 1269-1270, 64 Cal. Rptr. 2d 561]* .

A peremptory challenge under *Code Civ. Proc. § 170.6* may be made against a discovery referee [*Autoland, Inc. v. Superior Court (1988) 205 Cal. App. 3d 857, 859-862, 252 Cal. Rptr. 662]* . If a discovery referee has been appointed for all discovery purposes, any motion to disqualify the referee by peremptory challenge under *Code Civ. Proc. § 170.6* must be made to the court by a party either (1) within 10 days after notice of the appointment or (2) within 10 days after the party's appearance if the party had not yet appeared in the action at the time of notice of appointment [*Code Civ. Proc. § 639(b)(A)*]. If the discovery referee has been assigned only for limited discovery purposes and the referee

assigned is known at least 10 days before the date set for hearing, a motion to disqualify the referee by peremptory challenge under *Code Civ. Proc. § 170.6* must be made at least five days before the date set for hearing [*Code Civ. Proc. § 639(b)(B)*].

For forms that may be adapted for use in obtaining the appointment of a referee, see Ch. 38, *Reference* . For discussion and forms relating to disqualification under *Code Civ. Proc. § 170.6* generally, see Ch. 317, *Judges* .

[2] Trial Court Acceptance of Referee's Report

A trial court may accept a discovery referee's report without holding a hearing. Although the report is advisory rather than determinative, and the trial court must independently consider the referee's findings before acting on his or her recommendations, the trial court is not required to hold a hearing as a matter of law. If the court's order demonstrates a considered and careful review, not only of the referee's report, but also of the transcript of the proceedings before the referee, and of the objections, replies, and other papers filed after the referee's report was submitted, the court fulfills its judicial responsibilities [*Marathon Nat. Bank v. Superior Court (1993) 19 Cal. App. 4th 1256, 1260-1261, 24 Cal. Rptr. 2d 40]* .

[3] Allocating Costs of Reference

The prevailing party may not recover the costs of a discovery referee as a matter of right [*Baker-Hoey v. Lockheed Martin Corp. (2003) 111 Cal. App. 4th 592, 594, 3 Cal. Rptr. 3d 593* (rejecting defendant's argument that it was entitled to recover costs of discovery referee as expert witness fees under *Code Civ. Proc. § 1033.5(a)(8)*)].

The trial court may order the party who requests the referee to pay the referee's fees [*Marathon Nat. Bank v. Superior Court (1993) 19 Cal. App. 4th 1256, 1261-1262, 24 Cal. Rptr. 2d 40]* . However, it is the trial court's responsibility to form a fair means of discovery dispute resolution that considers the parties' financial status. If appointment of a discovery referee is inappropriate because of the costs that would be incurred by the parties, the trial court should consider alternatives, including a pro bono referee, a retired judge of the superior court sitting by assignment, or retention of the matter by the trial court [*Solorzano v. Superior Court (1993) 18 Cal. App. 4th 603, 616, 22 Cal. Rptr. 2d 401* (abuse of discretion to order indigent plaintiffs to pay half of referee's fee)].

It is an abuse of discretion for a trial court to order discovery disputes to be heard by a private referee, with the parties sharing the costs equally, without considering the economic impact on the parties. If the issue of economic hardship is raised by a party before the referee commences work, the referring court must determine a fair and reasonable apportionment of the reference costs before issuing its order [*McDonald v. Superior Court (1994) 22 Cal. App. 4th 364, 368-370, 27 Cal. Rptr. 2d 310* (plaintiff's declaration was competent evidence of her ability to pay referee's fees)]. "Fair and reasonable" does not necessarily mean, however, that the court should impose the entire cost of reference on an objecting party that is financially able to pay because the other party is indigent [*Taggares v. Superior Court (1998) 62 Cal. App. 4th 94, 104, 72 Cal. Rptr. 2d 387]* .

In determining whether a party has established an inability to pay the referee's fees [*see Code Civ. Proc. § 639(d)(6)(A)* (requiring that court to make this determination)], the court must consider only the ability of the party, not the party's counsel, to pay these fees. If a party is proceeding *in forma pauperis*, the party must be deemed by the court to have an economic inability to pay the referee's fees. However, a determination of economic inability to pay the fees is not limited to parties that proceed *in forma pauperis*. For those parties who are not proceeding *in forma pauperis*, the court, in determining whether a party has established an inability to pay the fees, must consider, among other things, the estimated cost of the referral and the impact of the proposed fees on the party's ability to proceed with the litigation [*Code Civ. Proc. § 639(d)(6)(B)*]. For discussion and forms relating generally to proceedings *in forma pauperis*, see Ch. 174, *Costs and Attorney's Fees* .

The allocation of the referee's fees must be made by the court and not by the referee [*McDonald v. Superior Court (1994) 22 Cal. App. 4th 364, 370, 27 Cal. Rptr. 2d 310]* .

One court, in dictum, has suggested that, in a proper case, the burden of paying referee's fees may be placed on an erring attorney under the sanction provisions of the Discovery Act [*see Andrews v. Superior Court (2000) 82 Cal. App. 4th 779, 782-783, 98 Cal. Rptr. 2d 426* (holding, however, that trial court erred in imposing such sanctions on attorney under *Code Civ. Proc. § 128* rather than under relevant discovery statutes)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureJudicial OfficersReferencesCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

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16-190 California Forms of Pleading and Practice--Annotated §§ 190.40-190.49

[Reserved]

§§ 190.40[Reserved]

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16-190 California Forms of Pleading and Practice--Annotated § 190.50

§ 190.50 Requirements for Completing Discovery Before Trial

[1] General Requirements

Any party is entitled as a matter of right to complete discovery proceedings on or before the 30th day, and to have motions concerning discovery heard on or before the 15th day, before the date initially set for the trial of the action, except as otherwise provided in *Code Civ. Proc. § 2024.010 et seq.* [*Code Civ. Proc. § 2024.020(a)*]. When either of these deadline dates falls on a Saturday, Sunday, or holiday, the deadline date in that instance becomes the next court day closer to the trial date [*Code Civ. Proc. § 2016.060*; *see also Code Civ. Proc. § 10* (designated holidays)].

A given instance of discovery is considered completed on the day a response is due or on the day a deposition begins. Except as provided in *Code Civ. Proc. § 2024.050* (discussed in *§ 190.51*), a continuance or postponement of the trial date does not operate to reopen discovery proceedings [*Code Civ. Proc. § 2024.020(b)*].

Any party is entitled as a matter of right to complete discovery proceedings pertaining to a witness identified under *Code Civ. Proc. § 2034.010 et seq.* on or before the 15th day, and to have motions concerning that discovery heard on or before the 10th day, before the date initially set for the trial of the action [*Code Civ. Proc. § 2024.030*]. If either of those days falls on a Saturday, Sunday, or holiday, the last day becomes the next court day closer to the trial date [*Code Civ. Proc. § 2016.060*; *see Code Civ. Proc. § 10* (designated holidays); *see also* Ch. 198, *Discovery: Exchange of Expert Witness Information*].

The deadlines for completing discovery proceedings and motions are determined by reference to the "date initially set for the trial of the action" [*Code Civ. Proc. § 2024.020(a)*]. When a new trial or retrial has been ordered, this refers to date initially set for the new trial or retrial, and not to the date initially set for the original trial. Thus, in the case of mistrial, an order granting a new trial, or remand for new trial after reversal of judgment on appeal, the last day for completing discovery is 15 days before the date initially set for the *new* trial [*Fairmont Ins. Co. v. Superior Court (2000) 22 Cal. 4th 245, 247-249, 92 Cal. Rptr. 2d 70, 991 P.2d 156]* .

[2] Requirements Applicable to Judicial Arbitration Proceedings

The time limit on completing discovery in an action to be arbitrated under *Code Civ. Proc. § 1141.10 et seq.* is subject to Judicial Council Rule [*Code Civ. Proc. § 2024.040(a)*; *see Cal. Rules of Ct., Rule 3.822*]. When all arbitration proceedings have been completely vacated by the striking of the at-issue memorandum, discovery is permissible following the vacation. The timing of that discovery is then limited only by any new dates set either for trial or arbitration [*Roe v. Superior Court (1990) 224 Cal. App. 3d 642, 645-647, 273 Cal. Rptr. 745]* . After an award in a case ordered to judicial arbitration, completion of discovery is limited by *Code Civ. Proc. § 1141.24* [*Code Civ. Proc. § 2024.040(a)*]. For further discussion, see *§ 190.11[3][b]*.

[3] Inapplicability to Proceedings for Eminent Domain or Possession of Real Property

The time limits for completing discovery under *Code Civ. Proc. § 2024.010 et seq.* do not apply to summary proceedings for obtaining possession of real property governed by *Code Civ. Proc. § 1159 et seq.*, in which discovery must be completed on or before the fifth day before the date set for trial except as provided in *Code Civ. Proc. §§ 2024.050* and *2024.060*; or eminent domain proceedings governed by *Code Civ. Proc. § 1230.010 et seq.* [*Code Civ. Proc. § 2024.040(b)*]. For discussion relating to these proceedings generally see respectively Ch. 333, *Landlord and Tenant: Eviction Actions* , and Ch. 247, *Eminent Domain* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementReal Property LawEminent Domain ProceedingsProcedureReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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16-190 California Forms of Pleading and Practice--Annotated § 190.51

§ 190.51 Extending, Shortening or Modifying Time Requirements

[1] Motion Proceeding

On motion of any party, the court may grant leave to complete discovery proceedings, or to have a motion concerning discovery heard, closer to the initial trial date, or to reopen discovery after a new trial date has been set. The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [*Code Civ. Proc. § 2024.050(a)*; *see Pelton-Shepherd Industries, Inc. v. Delta Packaging Products, Inc. (2008) 165 Cal. App. 4th 1568, 1587, 82 Cal. Rptr. 3d 64* (trial court erred by granting defendant's motion to compel discovery filed after discovery motion cutoff date, because defendant failed to file motion to reopen discovery under *Code Civ. Proc. § 2024.050* before or simultaneously with filing its motion to compel)].

In exercising its discretion to grant or to deny the motion, the court must take into consideration any relevant matter, including, but not limited to, the following: [*Code Civ. Proc. § 2024.050(b)*]:

- The necessity and the reasons for the discovery;

- The diligence or lack of diligence of the moving party, and the reasons that the discovery was not completed or that the discovery motion was not heard earlier;

- Any likelihood that granting the motion will prevent the case from going to trial on the date set, or otherwise interfere with the trial calendar, or result in prejudice to any other party; and

- The length of time that has elapsed between any date previously set, and the date presently set, for the trial of the action; *see Pelton-Shepherd Industries, Inc. v. Delta Packaging Products, Inc. (2008) 165 Cal. App. 4th 1568, 1571, 1587-1588, 82 Cal. Rptr. 3d 64* (trial court abused its discretion by granting defendant's motion to compel discovery filed after discovery motion cutoff date, without requiring defendant to file motion to reopen discovery under *Code Civ. Proc. § 2024.050*; trial court

should have considered all relevant circumstances in determining whether to hear motion after cutoff date, including plaintiff's reasons for seeking discovery, and its diligence or lack of diligence)].

For example, death or serious illness of a trial attorney or a party should, under normal circumstances, be considered good cause for granting the continuance of a trial date, as well as good cause to reopen discovery after a trial date has been continued [*Hernandez v. Superior Court (2004) 115 Cal. App. 4th 1242, 1247-1248, 9 Cal. Rptr. 3d 821* ; *see* Cal. Stds. Jud. Admin., *§ 9, Code Civ. Proc.* § 2024.050(b)].

The court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to extend or reopen discovery, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2024.050(c)*]. For further discussion of these general provisions for monetary sanctions, see *§ 190.33[2]* and *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

For a form for a motion for use in obtaining leave to extend the time completing discovery, or to reopen discovery, see *§ 190.90*.

[2] Stipulation

The parties to the action may agree to extend the time for the completion of discovery proceedings or for the hearing of motions concerning discovery, or to reopen discovery after a new date for trial of the action has been set. The agreement may be informal, but it must be confirmed in a writing that specifies the extended date, and must be consented to by any party affected by it. The agreement does not under any circumstances require a court to grant a continuance or postponement of the trial of the action [*Code Civ. Proc. § 2024.060*]. For discussion and forms relating to stipulations generally, see Ch. 533, *Stipulations* .

[3] Automatic Extension of Time

When the last day to perform or complete any act provided for in the California Civil Discovery Act (*Code Civ. Proc. § 2016.010 et seq.*), falls on a Saturday, Sunday, or holiday, the time limit is extended until the next court day closer to the trial date that is not a Saturday, Sunday, or holiday [*Code Civ. Proc. § 2016.060*; *see Code Civ. Proc. § 10* (definition of holiday)].

[4] Time Extensions When Service Is by Mail

The provisions of *Code Civ. Proc. § 1013(a)* that relate to extensions of time when service is made by mail apply to any discovery method or motion in *Code Civ. Proc. §§ 2016.010-2036.010 et seq.* [*see Code Civ. Proc. § 2016.050*]. Under *Code Civ. Proc. § 1013(a)*, any period of notice prescribed by statute or court rule and any right or duty to do any act or make any response is extended by five calendar days, upon service by mail, if the place of address and the place of mailing is in California, 10 calendar days if either the place of mailing or the place of address is outside California but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States. This extension applies in the absence of a specific exception provided for by any statute or court rule [*Code Civ. Proc. § 1013(a)*]. The period is extended two court days if service is by Express Mail or by fax [*Code Civ. Proc. § 1013(c), (e)*]. For further discussion of *Code Civ. Proc. § 1013*, see Ch. 518, *Service of Summons and Papers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsTime LimitationsComputationCivil ProceduresPleading & PracticePleadingsTime LimitationsExtensionsCivil ProceduresDiscoveryGeneral OverviewCivil ProceduresDiscoveryDisclosuresSanctionsCivil ProceduresDiscoveryMethodsStipulations

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16-190 California Forms of Pleading and Practice--Annotated §§ 190.52-190.59

[Reserved]

§§ 190.52[Reserved]

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16-190 California Forms of Pleading and Practice--Annotated § 190.60

§ 190.60 Matthew Bender Publications

For comprehensive discussion and forms relating to discovery under the California Civil Discovery Act and related California law, see DeMeo, California Deposition and Discovery Practice (Matthew Bender), and Hogan & Weber, California Civil Discovery (Matthew Bender)

For memoranda relating to discovery under the California Civil Discovery Act and related California law, see California Points and Authorities, Ch. 80, *Discovery: Scope, Regulation and Timing* , through Ch. 89A, *Discovery: Review of Discovery Orders* (Matthew Bender)

For discussion of and forms relating to civil discovery, see Bender's Forms of Discovery, vols. 1-16 (Matthew Bender)

For detailed discussion, procedural checklists, practice tips, and forms covering all aspects of the discovery of electronically stored information (e-discovery), see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence

Legal Topics:

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

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16-190 California Forms of Pleading and Practice--Annotated § 190.61

§ 190.61 California Constitution

Right to privacy. *Cal. Const., art. I, § 1*

Immunity from contempt for press and media for refusal to disclose source or unpublished information. *Cal. Const., art. I, § 2(b)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureSanctionsContemptCivil ContemptEvidencePrivilegesJournalist's PrivilegeGeneral Overview

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16-190 California Forms of Pleading and Practice--Annotated § 190.62

§ 190.62 State Statutes

[1] Discovery Act Provisions

Reference of discovery matters. *Code Civ. Proc. § 639*

Scope of discovery. *Code Civ. Proc. § 2017.010 et seq.*

Work product protection. *Code Civ. Proc. § 2018.010 et seq.*

Methods of discovery. *Code Civ. Proc. § 2019.010 et seq.*

Stipulation modifying procedures. *Code Civ. Proc. § 2016.030*

Sanctions. *Code Civ. Proc. § 2023.010 et seq.*

Time limitations. *Code Civ. Proc. § 2024.010 et seq.*

Depositions. *Code Civ. Proc. §§ 2025.010 et seq.*

Discovery subpoenas in actions pending outside California. *Code Civ. Proc. § 2029.100 et seq.*

Interrogatories. *Code Civ. Proc. § 2030.010 et seq.*

Inspection of documents, tangible things, land, and electronically stored information. *Code Civ. Proc. § 2031.010 et seq.*

Physical, mental, and blood examinations. *Code Civ. Proc. § 2032.010 et seq.*

Requests for admission of matters of fact or genuineness of documents. *Code Civ. Proc. § 2033.010 et seq.*

Exchange of expert lists. *Code Civ. Proc. § 2034.010 et seq.*

Perpetuation of testimony. *Code Civ. Proc. §§ 2035.010 et seq., 2036.010 et seq.*

[2] Other Statutes Relating to Civil Discovery

Records pertaining to treatment of persons who are impaired by alcohol or dangerous drugs and who are subject to licensing governed by Departmentof Consumer Affairs are not subject to discovery. *Bus. & Prof. Code § 156.1(b)*

Records pertaining to treatment of pharmacist under Pharmacists Recovery Program (*Bus. & Prof. Code § 4360 et seq.*) are not discoverable. *Bus. & Prof. Code § 4372*

Written offer or required communication of settlement offer are discoverable by either party in action where existence or communication of offer is issue. *Bus. & Prof. Code § 6103.5(b)*

Records of video recording sales or rental services are discoverable without written consent of individual who is subject of records when disclosure is made pursuant to proper use of discovery. *Civ. Code § 1799.3(b)(2)*

Restrictions on application of Discovery Act in limited civil cases. *Code Civ. Proc. §§ 94-95*

Subpoenas. *Code Civ. Proc. § 1985 et seq.*

Privileges. *Evid. Code §§ 900-1170*

Evidence of anything said or admission in course of mediation or mediation consultation is not admissible or discoverable and disclosure of evidence cannot be compelled. *Evid. Code § 1119(a)*

Records and proceedings of specified committees organized to evaluate quality of health care are not discoverable. *Evid. Code §§ 1157-1157.7*

Special procedure to obtain inexpensive discovery of income and expenses prior to action to modify order for child or spousal support. *Fam. Code § 3660 et seq.*

Assets of public employer are not discoverable in action in which it is alleged that public employee is liable for punitive damages. *Gov. Code § 825(b)*

Public Records Act. *Gov. Code § 6250 et seq.*

Court is authorized to limit discovery by person initiating false claims action under *Gov. Code § 12652*. *Gov. Code § 12652(h), (i)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsStipulations

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§ 190.63 California Rules of Court

Filing records under seal. *Cal. Rules of Ct., Rules 2.550-2.551*

Format of supplemental and further interrogatories and responses. *Cal. Rules of Ct., Rule 3.1000*

Format of discovery motions; separate statement required to accompany motion to compel. *Cal. Rules of Ct., Rule 3.1345*

Service of motion papers on nonparty deponent. *Cal. Rules of Ct., Rule 3.1346*

Discovery motions in summary proceedings (unlawful detainer or other actions brought under *Code Civ. Proc. § 1159 et seq.*) involving possession of real property. *Cal. Rules of Court, Rule 3.1347*

Discovery sanctions; effect of lack of opposition to motion to compel. *Cal. Rules of Ct., Rule 3.1348*

Filing and retention of specified discovery papers. *Cal. Rules of Ct., Rule 3.250(a)(1)-(19), (b)*

Case management requirements, including those relating to e-discovery. *Cal. Rules of Ct., Rule 3.724, 3.728*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCriminal Law & ProcedureDiscovery & InspectionDiscovery MisconductGeneral Overview

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16-190 California Forms of Pleading and Practice--Annotated § 190.64

§ 190.64 Decisions

[1] General Principles of Discovery

In case of mistrial, order granting new trial, or remand for new trial after reversal of judgment on appeal, last day for completing discovery is 15 days before date initially set for the new trial, not the date initially set for the original trial. *Fairmont Ins. Co. v. Superior Court (2000) 22 Cal. 4th 245, 247, 249, 92 Cal. Rptr. 2d 70, 991 P.2d 156* (construing language in former *Code Civ. Proc. § 2024(a)* (*now see Code Civ. Proc. § 2024.020(a)*) referring to date action was "initially" set for trial in calculating discovery cutoff)

Information is discoverable under discovery statutes if unprivileged and either relevant to subject matter of action or reasonably calculated to reveal admissible evidence. *Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 711, 21 Cal. Rptr. 2d 200, 854 P.2d 1117* ; *Valley Bank of Nevada v. Superior Court (1975) 15 Cal. 3d 652, 655-656, 125 Cal. Rptr. 553, 542 P.2d 977* (interpreting statutes before enactment of Discovery Act of 1986)

California discovery statutes are liberally construed in favor of disclosure. *Shepherd v. Superior Court (1976) 17 Cal. 3d 107, 118, 130 Cal. Rptr. 257, 550 P.2d 161* ; *Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 377-378, 15 Cal. Rptr. 90, 364 P.2d 266*

Trial court erred reversibly by granting defendant's motion to compel discovery filed after discovery motion cutoff date, without requiring defendant to file motion to reopen discovery under *Code Civ. Proc. § 2024.050*; trial court should have considered all relevant circumstances in determining whether to hear motion after cutoff date, including plaintiff's reasons for seeking discovery, and its diligence or lack of diligence. *Pelton-Shepherd Industries, Inc. v. Delta Packaging Products, Inc. (2007) 165 Cal. App. 4th 1568, 1571, 1587-1588, 82 Cal. Rptr. 3d 64*

As a special proceeding of a civil nature, civil commitment proceeding under SVPA requires application of civil discovery rules. *People v. Dixon (2007) 148 Cal. App. 4th 414, 443, 56 Cal. Rptr. 3d 33*

In SVPA proceedings, use of requests for admission under *Code Civ. Proc. § 2019.010(e)* would violate defendant's due process rights. *Murillo v. Superior Court (2006) 143 Cal. App. 4th 730, 740, 49 Cal. Rptr. 3d 511*

Trial court erroneously limited discovery on basis that documents might be inadmissible at trial or because they were prepared or signed by plaintiff's attorney rather than plaintiff; accordingly, discovery order had to be reevaluated based on whether requested information was reasonably calculated to lead to admissible evidence, as provided in *Code Civ. Proc. § 2017.010*. *Volkswagen of Am., Inc. v. Superior Court (2006) 139 Cal. App. 4th. 1481, 1497, 43 Cal. Rptr. 3d 723*

Trial court did not abuse its discretion in permitting discovery to ascertain suitable class representative, provided that letter to be sent to prospective class action plaintiffs protected their privacy interests by stating that recipients were free to ignore information request and that neutral third party sender would not disclose their identities. *Best Buy Stores, L.P. v. Superior Court (2006) 137 Cal. App. 4th 772, 779, 40 Cal. Rptr. 3d 575*

Appellant attorney's false assurances that he would produce documents after they were due, along with other delaying conduct, estopped him from relying on discovery motion cut-off date specified in former *Code Civ. Proc. § 2024(a)* (*now see Code Civ. Proc. § 2024.020(a)*). *Sears, Roebuck and Co. v. Nat'l Union Fire Ins. Co. (2005) 131 Cal. App. 4th 1342, 1351-1352, 32 Cal. Rptr. 3d 717*

In determining whether to grant to party responding to summary judgment motion a continuance for discovery under *Code Civ. Proc. § 437c(h)*, trial court may consider whether that party has been diligent in completing discovery. *Cooksey v. Alexakis (2004) 123 Cal. App. 4th 246, 257, 19 Cal. Rptr. 3d 810*

Death or serious illness of trial attorney or party should, under normal circumstances, be considered good cause for granting the continuance of trial date, as well as good cause to reopen discovery after a trial date has been continued. *Hernandez v. Superior Court (2004) 115 Cal. App. 4th 1242, 1247-1248, 9 Cal. Rptr. 3d 821* (attorney suffered from pancreatic cancer during closing phases of discovery and died five days after initial trial date)

Trial court has inherent power to issue injunction to prevent potential destruction of evidence pending discovery, based on trial court's inherent power to make orders facilitating discovery and presentation of evidence, when Discovery Act does not provide an adequate remedy at law. *Dodge, Warren & Peters Ins. Serv., Inc. v. Riley (2003) 105 Cal. App. 4th 1414, 1419-1420, 130 Cal. Rptr. 2d 385* (in action by employer against terminated employees for misappropriation of trade secrets, unfair business practices, breach of fiduciary duty and breach of contract, trial court properly issued preliminary injunction against defendants, requiring preservation of electronic evidence by prohibiting defendants from destroying, deleting or secreting from discovery any of their electronic storage media)

Discovery Act applies to competency hearings under *Penal Code § 1369*; thus, trial court may order criminal defendant to submit to mental examination by expert designated by prosecution in order to evaluate mental competence under *Pen. Code § 1369*, but order must comply with Discovery Act, specifying time, place, manner, conditions, scope and nature of examination, and identity and specialty of persons performing examination, in accordance with *Code Civ. Proc. § 2032.310(b)*. *Baqleh v. Superior Court (People) (2002) 100 Cal. App. 4th 478, 506, 122 Cal Rptr. 2d 673* (interpreting former *Code Civ. Proc. § 2032(d)*)

Discovery Act applies to proceedings under Sexually Violent Predators Act (*Welf. & Inst. Code § 6600 et seq.*), including right to notice depositions. *People v. Superior Court (Cheek) (2001) 94 Cal. App. 4th 980, 987-991*

Discovery Act applies to Sexually Violent Predators Act (*Welf. & Inst. Code § 6600 et seq.*); trial court erred in concluding that civil discovery procedures do not apply to SVPA proceedings and in denying petitioner's motion to compel exchange of expert witness information. *Leake v. Superior Court (2001) 87 Cal. App. 4th 675, 682, 104 Cal. Rptr. 2d 767 , overruled on other grounds, People v. Yartz (2005) 37 Cal. 4th 529, 537, 36 Cal. Rptr. 3d 328, 123 P.3d 604*

Implicit in requirement under *Code Civ. Proc. § 2025.450(b)(2)* that counsel contact deponent to inquire about nonappearance is requirement that counsel make a good faith effort to resolve the issue. *Blago Leko v. Cornerstone Home Inspection (2001) 86 Cal. App. 4th 1109, 1124, 103 Cal. Rptr. 2d 858* (interpreting former *Code Civ. Proc. § 2025(j)(3)(B)*)

Initial burden of determining whether potentially relevant documents exist should lie with the party demanding the information. While it may be necessary to take a preliminary deposition of a records custodian prior to issuing a subpena for documents or making a request under *Code Civ. Proc. § 2031.010 et seq.*, this procedure is preferable to serving unduly burdensome document requests accompanied by lengthy lists of definitions and instructions. *Calcor Space Facility, Inc. v. Superior Court (1997) 53 Cal. App. 4th 216, 223-223, 61 Cal. Rptr. 2d 567* (interpreting former *Code Civ. Proc. § 2031*)

Pleading deficiencies does not affect right to discovery and defendant is obliged to comply with discovery request despite defendant's pending demurrer to complaint. *Mattco Forge, Inc. v. Arthur Young & Co. (1990) 223 Cal. App. 3d 1429, 1436, 1436 n.3, 273 Cal. Rptr. 262*

Discovery is not permitted in either small claims action itself or de novo proceeding on appeal. *Bruno v. Superior Court (1990) 219 Cal. App. 3d 1359, 1362-1364, 269 Cal. Rptr. 142*

Even though discovery remains to be done, granting of summary judgment is not premature unless discovery is relevant to issues on summary judgment. *Korens v. R.W. Zukin Corp. (1989) 212 Cal. App. 3d 1054, 1061-1062, 261 Cal. Rptr. 137*

Discovery statutes are designed to educate parties before trial about real value of their claims and defenses, thereby encouraging settlements. *Lehman v. Superior Court (1986) 179 Cal. App. 3d 558, 564, 224 Cal. Rptr. 572*

When demurrer with leave to amend has been granted, plaintiff is entitled to reasonable discovery, even to disclose facts essential to stating cause of action. *Budget Fin. Plan v. Superior Court (1973) 34 Cal. App. 3d 794, 797-798, 110 Cal. Rptr. 302*

[2] Insurance Coverage

In a legal malpractice action brought by real party in interest client against attorneys who represented him in obtaining settlement from another law firm that had represented him in real estate deal, non-party law firm's subpoenaed business records, including information about its financial condition and liability insurance polices, were discoverable, subject to protective order, because information was relevant and material to prove that better result should have been obtained for him by current attorney defendants. *Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court (2006) 137 Cal App. 4th 579, 595, 40 Cal. Rptr. 3d 446*

In suit alleging bad faith based on unpleaded theory that defendant insurer had pattern and practice of discriminatory claims handling practice for auto theft claims filed by Hispanic, African-American, and/or low income insured, plaintiff could discover theft claim files because they could lead to information supporting plaintiff's discrimination theory, but she could do so only after obtaining authorizations from all of the insureds whose claims files were to be produced. *Permanent Gen. Assurance Corp. v. Superior Court (2004) 122 Cal. App. 4th 1493, 1495, 19 Cal. Rptr. 3d 597*

In insurance bad faith claim, insurer's loss reserves could be discoverable; state law requires insurers to set aside funds sufficient to cover all pending claims, and loss reserves established for particular claim may be evidence of how insurer viewed potential obligations to insured, whether it had conducted proper investigation, and whether it recognized likelihood that the insured could face excess verdict. *Lipton v. Superior Court (1996) 48 Cal. App. 4th 1599,*

1613-1618, 56 Cal. Rptr. 2d 341

[3] International Discovery

Discovery in foreign country subscribing to Hague Convention is not required to proceed first under Hague Convention before discovery is attempted under federal rules, specifically rejecting rule of first resort announced in *Volkswagenwerk Aktiengesellschaft v. Superior Court (1981) 123 Cal. App. 3d 840, 176 Cal. Rptr. 874* ; rather, interests of international comity demand "a more particularized analysis" involving "prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to [Hague Convention] procedures will prove effective." *Societe Nationale Industrielle Aerospatiale v. United States District Court (1987) 482 U.S. 522, 544, 107 S. Ct. 2542, 96 L. Ed. 2d 461*

Trial court properly refused to apply Hague Convention discovery procedures in suit against French corporation, after performing *Aerospatiale's* prescribed case-by-case balancing of facts, sovereign interests, and likelihood of successful discovery, disapproving *Volkswagenwerk Aktiengesellschaft v. Superior Court (1981) 123 Cal. App. 3d 840, 858, 176 Cal. Rptr. 874* ; and terminating sanction for discovery abuses was not abuse of discretion. *American Home Assurance Co. v. Societe Commerciale Toutelectric (2002) 104 Cal. App. 4th 406, 436-437, 128 Cal. Rptr. 2d 430*

Party seeking to utilize Hague Convention procedures has burden of convincing the trial court that they are justified by considerations of international comity. *American Home Assurance Co. v. Societe Commerciale Toutelectric (2002) 104 Cal. App. 4th 406, 427, 128 Cal. Rptr. 2d 430*

[4] Juveniles

When juvenile court records are sealed under *Welf. & Inst. Code § 781*, juvenile's privacy rights are subject to constitutional confrontation rights ofcriminal defendant in event of conflict, but civil party's ability to establish constitutional right to sealed information is doubtful. *Parmett v. Superior Court (1989) 212 Cal. App. 3d 1261, 1269, 262 Cal. Rptr. 387*

[5] Limitations on Discovery Generally

Neither California nor federal law recognizes union representative-union member evidentiary privilege that would prevent disclosure of relevant information in civil action, and court was not free to create new privilege as matter of judicial policy, unless constitutionally compelled. *American Airlines v. Superior Court (2003) 114 Cal. App. 4th 881, 891-895, 8 Cal. Rptr. 3d 146*

Courts are precluded from creating exceptions to privileges not specified by statute by policy of *Evid. Code § 911* (limiting privileges to those specified by statute). *Dickerson v. Superior Court (1982) 135 Cal. App. 3d 93, 99, 185 Cal. Rptr. 97*

[6] Protective Orders

Preexisting secrecy agreement between parties is extinguished when incorporated into protective order and violation of agreement will not support a breach of contract action. *Westinghouse Electric Corp. v. Newman & Holtzinger (1995) 39 Cal. App. 4th 1194, 1206, 46 Cal. Rptr. 2d 151*

Superior court was within its discretion in issuing protective order providing that certain discovery produced by

defendants (1) may be designated by defendants as confidential or trade secret, (2) may be used by plaintiffs solely for purposes of this litigation, and (3) may be disclosed by plaintiff's counsel to counsel in other pending similar litigation if plaintiff's counsel notifies defense counsel. *Raymond Handling Concepts Corp. v. Superior Court (1995) 39 Cal. App. 4th 584, 588-590, 45 Cal. Rptr. 2d 885*

Declaration in support of motion for protective order that contains no facts except for conclusion of necessity for order and other statements made on information and belief is not a sufficient basis for court to grant protective order on basis of annoyance, embarrassment, or oppression. *Goodman v. Citizens Life & Cas. Ins. Co. (1967) 253 Cal. App. 2d 807, 819-820, 61 Cal. Rptr. 682* (decided under prior law)

[7] Relevance to Subject Matter

Even assuming non-party petitioner law firm had protectible financial privacy rights, those rights did not preclude discovery that was relevant to essential issues, such as collectibility, in this legal malpractice action brought by real party in interest client against other attorneys, because malpractice plaintiff could show that requested financial and insurance information was relevant and material to prove that better result should have been obtained for him by current attorney defendants (or would lead to admissible evidence). *Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court (2006) 137 Cal App. 4th 579, 595, 40 Cal. Rptr. 3d 446*

Trustee beneficiary was not entitled to conduct discovery related to trustees' accounting, without first filing "response and objections" under *Prob. Code § 1043(a)*. Absent specific objections, there was no contested proceeding that would require assignment for trial and conduct of discovery, and no way to determine what discovery, if any, was "relevant to the subject matter involved in the *pending action*" (quoting former *Code Civ. Proc. § 2017(a)* (*now see Code Civ. Proc. § 2017.010*), italics added). *Forthmann v. Boyer (2002) 97 Cal. App. 4th 977, 985, 118 Cal. Rptr. 2d 715*

In wrongful termination action for violation of employer's policy against misuse of office equipment, trial court erred in denying production of employee's employer-provided home computer; computer was indisputably relevant, as its hard drive could confirm that employee had accessed sexually explicit web-sites at home, thereby undermining his story that, at work, such sites "popped up" involuntarily. *TBG Ins. Serv. Corp. v. Superior Court (2002) 96 Cal. App. 4th 443, 449, 117 Cal. Rptr. 2d 155*

Transcripts of testimony given before the SEC in the course of an investigation were relevant and discoverable in a civil litigation where the party from whom discovery was sought failed to show that any parties to the testimony believed the SEC investigation to be private or confidential, and the party had possession and ready access to the documents and transcripts. *Kirkland v. Superior Court (2002) 95 Cal. App. 4th 92, 97-99, 115 Cal. Rptr. 2d 279*

Objections to discovery should be resolved by protective orders addressing the specific harm shown by the objecting party, as opposed to a more general attack on the relevancy of the information the proponent seeks to discover. *Norton v. Superior Court (1994) 24 Cal. App. 4th 1750, 1761, 30 Cal. Rptr. 2d 217*

Research and opinions of city attorney concerning intent in drafting ordinance as neither relevant nor calculated to lead to discovery of admissible evidence on issue of interpretation of ordinance. *City of Los Angeles v. Superior Court (1985) 170 Cal. App. 3d 744, 752-753, 216 Cal. Rptr. 311*

[8] Stay of Discovery

Security guards who feared criminal prosecution arising from alleged beating incident that formed basis of civil suit against them were not entitled to stay of discovery in civil action until the criminal statute of limitations expired; such a stay would run count to courts' interest in expeditious and efficient resolution of cases, and expose both side of litigation

to risk of diminished memory and lost records. *Fuller v. Superior Court (2001) 87 Cal. App. 4th 299, 302, 309-310, 104 Cal. Rptr. 2d 525*

Corporation that was defendant in related criminal and civil actions could not obtain stay of discovery in civil action while criminal action was pending; however, trial court has discretion to stay civil proceedings, to postpone discovery, or to impose protective orders and conditions when interests of justice so require. *Avant! Corp. v. Superior Court (2000) 79 Cal. App. 4th 876, 885, 94 Cal. Rptr. 2d 505*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresMandatory DisclosuresCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevance

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§ 190.65 Attorney General Opinions

With respect to employment discrimination complaint filed against county employee who is a peace officer, county affirmative action officer may not lawfully furnish copy of completed investigation report to complainant who is not a peace officer. *73 Ops. Cal. Att'y Gen. 90 (1990)*

Person appointed as referee to hear and determine discovery motions and paid by parties is not entitled by statute to defense and indemnification by county against claims or actions seeking monetary damages in connection with duties as referee. *72 Ops. Cal. Att'y Gen. 94 (1989)*

City attorney's advice to city council member regarding whether or not official action taken by that member violates Political Reform Act is protected by attorney-client privilege. *71 Ops. Cal. Att'y Gen. 255 (1988)*

Confidentiality and disclosure provisions of *Penal Code § 832.7* bar public agency from compiling or releasing statistical information regarding types of citizen complaints and from releasing summary of records maintained pursuant to *Penal Code § 832.5*. *71 Ops. Cal. Att'y Gen. 247 (1988)*

Lawyer-client privilege and work product rule, when relied on by public officer, do not automatically terminate with settlement or adjudication of underlying claim. *71 Ops. Cal. Att'y Gen. 5 (1988)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesAppointmentsGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsLocal GovernmentsEmployees & OfficialsLabor & Employment LawAffirmative ActionCourt & Government Imposed PlansLabor & Employment LawAffirmative ActionDiscrimination

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§ 190.66 Law Reviews

Stuart, *Inadvertent Disclosure of Confidential Information: What Does a California Lawyer Need to Know? 37 Santa Clara L. Rev. 547 (1997)*

Frank, *Discovery Made Easier by Computer*, 22 Colorado Lawyer 2419(2) (1993)

Comment, *The California Discovery Act of 1986: Discovery the New-Fashioned Way! 18 Sw. U.L. Rev. 233 (1990)*

Comment, *Judicial Misapplication of State of Mind Discovery in Media Libel Cases: The Actual Malice Standard Betrayed, 26 Santa Clara L. Rev. 643 (1986)*

Lay, *Plaintiff's Practical Uses of Discovery Techniques*, 30(5) The Practical Lawyer 61 (1984)

Underwood, *The New Federal Civil Procedure Rules: Greater Attorney Responsibility and More Judicial Control*, 29 The Practical Lawyer 13 (l983)

Note, *A Balanced Approach to Affirmative Action Plan Discovery in Title VII Suits, 32 Hastings L.J. 1013 (1981)*

Note, *Pretrial Discovery of Net Worth in Punitive Damages Cases, 54 So. Cal. L. Rev. 1141 (1981)*

Levine, *Using the Freedom of Information Act as a Discovery Device*, 36 The Business Lawyer 45 (1980)

Note, *Discovery of Internal Corporate Investigations, 32 Stan. L. Rev. 1163 (1980)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersAttorney-Client

PrivilegeCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewGovernmentsCourtsCourt RecordsGovernmentsLocal GovernmentsEmployees & Officials

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§ 190.67 Text References

California Civil Discovery Practice, Ch. 1, *Planning Discovery*, Ch. 2, *Understanding Key Discovery Principles* (3d ed. Cal. CEB 2000)

Witkin, California Evidence, Ch. X, *Discovery*, §§ 1-28 (4th ed. 2000)

Legal Topics:

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

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[Reserved]

§§ 190.68[Reserved]

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§ 190.80 Proceedings for Protective Order Limiting Scope of Discovery [Code Civ. Proc. § 2017.020] or Restricting Extent or Use of Discovery Methods [Code Civ. Proc. § 2019.030]--Motion and Supporting Declaration

[1] FORM Proceedings for Protective Order Limiting Scope of Discovery [Code Civ. Proc. § 2017.020] or Restricting Extent or Use of Discovery Methods [Code Civ. Proc. § 2019.030]--Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	NOTICE OF MOTION AND MOTION FOR PRO-
	)	TECTIVE ORDER RESTRICTING DISCOVERY,
_____ [*name*],	)	SUPPORTING
Plaintiff,	)	DECLARATION OF
vs.	)	_____ [*name*], AND MEMOR-
_____ [*name*],	)	ANDUM OF POINTS AND AUTHORITIES
Defendant.	)	(Limiting Scope of Discovery
	)	or Restricting Extent or Use of Discovery Method)
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify moving party or other affected person, e.g.,* Defendant] will, and hereby does, move for a protective order _____ [limiting the scope of discovery *or* restricting the frequency and extent of use of discovery methods], specifically, that _____ [*specify order sought, e.g.,* the deposition of Defendant, which was to be taken on _____ (*date*), at _____ (*time*), at _____ (*place*), pursuant to notice served on _____ (*date*), not be taken at all]. _____ [*Identify moving party, e.g.,* Defendant] will also move for the imposition of a monetary sanction against _____ [*identify opposing party and/or his/her attorney, e.g.,* Plaintiff _____ (*name*) and his/her attorney _____ (*name*)]. The motion for protective order will be made on the ground that _____ [*specify, grounds, e.g.,* the selected method of discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name* (*s*)] and the memorandum of points and authorities served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*identify party or other affected person, e.g.,* Defendant) in the above-described action].

2. Good cause exists for the protective order sought by _____ [*identify moving party or person, e.g.,* Defendant] in that _____ [*set forth facts showing good cause for particular order sought, e.g.,* the amount in controversy is less than $7,000, and the sole question in issue is whether _____ (*name*) was employed by defendant at the time of the alleged accident].

3. _____ [*State facts showing reasonable and good faith attempt to resolve informally issues presented by motion, including description of conferring or attempting to confer with other parties in person, by telephone, or by letter.*]

4. [*Statement of expenses incurred as result of opposing party's conduct. See Form 1, Paragraph 7.*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

The motion and supporting declaration set out in [1], *above*, is for use by any party or other affected person, to obtain a protective order that either limits the scope of discovery under *Code Civ. Proc. § 2017.020*, or restricts the frequency or extent of use of a particular discovery method or methods under *Code Civ. Proc. § 2019.030*. The motion must be made in the court in which the action is pending [*see Code Civ. Proc. § 2019.030*].

For discussion of the bases for a protective order under *Code Civ. Proc. § 2017.020* or *Code Civ. Proc. § 2019.030*, see *§§ 190.30* and *190.31*, respectively.

The motion must be accompanied by a declaration stating facts showing a good faith attempt at an informal resolution of each issue presented by the motion (Paragraph 3 of Supporting Declaration) [*Code Civ. Proc. §§ 2017.020(a), 2019.030(b)*]. The declaration must also set forth facts supporting the amount of any monetary sanction sought (Paragraph 4 of Supporting Declaration) [*Code Civ. Proc. § 2023.040*].

Usually this form may be combined with a motion for a protective order authorized under the more specific provisions governing each particular method of discovery [*see* discussion in *§ 190.34*]. For further discussions and forms, see the Chapter discussing the pertinent discovery method [*see* Ch. 193, *Discovery: Depositions* , through Ch. 198, *Discovery: Exchange of Expert Witness Information*].

A supporting memorandum is required to be served and filed with this form [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; *see also* discussion and forms in Ch. 417, *Points and Authorities*].

[3] Monetary Sanction

The court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes this motion, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust [*Code Civ. Proc. §§ 2017.020(b), 2019.030(c)*; *see Code Civ. Proc. § 2023.030(a)* (monetary sanction)].

Under *Code Civ. Proc. § 2023.020*, the court is required to impose a monetary sanction against any party or attorney who fails to confer in an attempt to resolve informally any dispute concerning discovery, in favor of anyone who incurs expenses, including attorney's fees, as a result of that conduct, when the section of the Civil Discovery Act governing a particular discovery motion requires a declaration showing that an attempt has been made. This sanction is to be imposed regardless of the outcome of the particular discovery motion [*Code Civ. Proc. § 2023.020*].

A monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* is an order that one who engaged in a misuse of the discovery process, his or her attorney if the attorney advised the conduct, or both, pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct [*Code Civ. Proc. § 2023.030(a)*].

A monetary sanction may only be imposed after notice to any affected party, person, or attorney, and after opportunity

for hearing [*Code Civ. Proc. § 2023.030*].

A request for a sanction, in the notice of motion, must identify every party, person, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion must be supported by a memorandum of points and authorities, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought [*Code Civ. Proc. § 2023.040*].

For further discussion of monetary sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

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§ 190.81 Proceedings for Protective Order Limiting Scope of Discovery [Code Civ. Proc. § 2017.020] or Restricting Extent or Use of Discovery Methods [Code Civ. Proc. § 2019.030]--Order

[1] FORM Proceedings for Protective Order Limiting Scope of Discovery [Code Civ. Proc. § 2017.020] or Restricting Extent or Use of Discovery Methods [Code Civ. Proc. § 2019.030]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify moving party or person, e.g.*, Defendant] for a protective order directing that the _____ [scope of discovery be limited *or* frequency or extent of use of discovery methods be restricted], specifically, that _____ [*describe motion, e.g.*, the deposition of _____ (*name*), set to be taken on _____ (*date*), not be taken], came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

[*EITHER*]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[*OR*]

On proof made to the satisfaction of the court, and good cause appearing therefor, that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that _____ [*describe order, e.g.,* the deposition of _____ (*name*), set to be taken on _____ (*date*), is hereby directed not to be taken].

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*identify unsuccessful party, person, or attorney, e.g.,* Plaintiff _____ (*name*) and his/her attorney _____ (*name*)] pay forthwith to _____ [*identify successful party, e.g.,* Defendant] _____ [*name*] the sum of $_____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____ [*identify unsuccessful party, person, or attorney, e.g.,* pPlaintiff _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The proposed order set our in [1], *above*, is for use when the court has granted or denied a motion by a party or other person for a protective order pursuant to the general provisions of *Code Civ. Proc. §§ 2017.020* and *2019.030* [*see § 190.80*].

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 190 DISCOVERY: SCOPE, REGULATION, AND TIMING
PART IV. FORMS

16-190 California Forms of Pleading and Practice--Annotated §§ 190.82-190.89

[Reserved]

§§ 190.82[Reserved]

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 190 DISCOVERY: SCOPE, REGULATION, AND TIMING
PART IV. FORMS

16-190 California Forms of Pleading and Practice--Annotated § 190.90

§ 190.90 Proceedings for Order Extending Time for Discovery or Reopening Discovery Proceedings [Code Civ. Proc. § 2024.050]--Motion and Supporting Declaration

[1] FORM Proceedings for Order Extending Time for Discovery or Reopening Discovery Proceedings [Code Civ. Proc. § 2024.050]--Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER _____
vs.	)	[EXTENDING TIME FOR DISCOVERY *or* REOPENING DISCOVERY PROCEEDINGS], SUPPORTING DECLARATION OF _____
_____ [*name*],	)	[*name*], AND SUPPORTING MEMORANDUM
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* Defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* Plaintiff] will, and hereby does, move for an order granting him/her leave to _____ [complete discovery proceedings after _____ (*date*), *or* have a motion concerning discovery heard after _____ (*date*), *or* reopen discovery after the setting of the new trial date on _____ (*date*). _____ [*Identify moving party, e.g.,* Plaintiff] will also move for the imposition of a monetary sanction against _____ [*identify opposing party and/or his/her attorney, e.g.,* Defendant _____ (*name*) and his/her attorney _____ (*name*)]. The motion will be made on the ground that _____ [*specify ground* (*s*), *e.g.,* Defendant's amended answer to Interrogatory No. _____ in Plaintiff's first set of interrogatories to Defendant has raised issues of which Plaintiff was previously unaware. Plaintiff requires the additional discovery to learn facts and determine issues relevant to the subject matter involved in the pending action prior to trial].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name* (*s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

1. I _____ [*name*], declare:

2. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*identify moving party, e.g.,* Defendant) _____ (*name*)].

3. _____ [*Set forth basis for motion, e.g.,* On _____ (*date*), Plaintiff _____ (*name*) served his first set of interrogatories on Defendant _____ (*name*). A copy of Interrogatory No. _____ is attached as Exhibit A and incorporated by reference. On _____ (*date*), Defendant _____ (*name*) served plaintiff _____ (*name*) with his initial response to the interrogatories, a copy of which is attached as Exhibit B and incorporated by reference; and on _____ (*date*), served plaintiff _____ (*name*) with his amended answer to Interrogatory No. _____, a copy of which is attached as Exhibit C and incorporated by reference].

4. The trial in the above-entitled action is set for _____ [*date*].

5. There is good cause for the order sought by _____ [*identify party, e.g.,* Plaintiff] _____ [*name*] in that _____ [*set forth facts, e.g.,* Defendant's amended answer to Interrogatory No. _____ of the above-described set of interrogatories sets forth facts relating to several accidents involving a vehicle manufactured by Defendant that are relevant to the above-entitled action in that plaintiff was injured by a similar vehicle and in a similar manner as those described in the amended answer. Plaintiff requires additional time for discovery regarding those accidents, in order to ascertain whether any issues may be resolved with respect thereto prior to trial]. Therefore, justice requires that _____ [*identify, e.g.,* plaintiff] be allowed to

_____ [continue *or* reopen] discovery after _____, [*date*].

6. _____ [*State facts showing reasonable and good faith attempt to resolve informally issues presented by motion, including description of conferring or attempting to confer with other parties in person, by telephone, or by letter.*]

7. _____ [*Identify moving party, e.g.*, Plaintiff] has incurred expenses as follows in making this motion: _____ [*itemize reasonable expenses, including attorney's fees, and explain basis of computing each expense*], for a total of $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

The notice of motion and motion set out in [1], *above*, is for use by a party to seek an order granting leave to complete discovery proceedings or to have a motion concerning discovery heard closer to the initial trial date than otherwise allowed, or to reopen discovery after a new trial date has been set [*Code Civ. Proc. § 2024.050*]. The motion must be brought in the court in which the action is pending [*Code Civ. Proc. § 2019.030*].

For further discussion, including the factors to be considered in granting or denying a motion under *Code Civ. Proc. § 2024.050*, see *§ 190.51*.

The supporting declaration in this form includes a statement of facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by the motion, as required by *Code Civ. Proc. § 2024.050(a)* (Paragraph 6 of Supporting Declaration). The declaration must also set forth facts supporting the amount of any monetary sanction sought (Paragraph 7 of Supporting Declaration) [*Code Civ. Proc. § 2023.040*]. For discussion of a stipulation to the relief sought in this form, see *§ 190.51[2]*.

A supporting memorandum is required to be served and filed with this form [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; *see also* discussion and forms in Ch. 417, *Points and Authorities*].

[3] Notice

Although *Code Civ. Proc. § 2024.050* does not specifically require that this motion be noticed, the imposition of a monetary sanction requires notice and an opportunity for hearing [*see Code Civ. Proc. § 2023.030*; *see* [4], *below*].

Generally, *Code Civ. Proc. § 1013*, regarding methods of service, applies to any method of discovery or service of a motion for discovery in *Code Civ. Proc. §§ 2016.010 et seq.*-2036.010 et seq. [*Code Civ. Proc. § 2016.050*]. However, the provisions of *Code Civ. Proc. § 1013(a)* that relate to extensions of time when service is made by mail apply only in the absence of a specific exception provided for by any statute or court rule [*Code Civ. Proc. § 1013(a)*]. For example, the extensions do not apply to the 16-court-day notice period of *Code Civ. Proc. § 1005* because that section

specifically states that *Code Civ. Proc. § 1013* does not apply [*Code Civ. Proc. § 1005(b)*]. For further discussion of *Code Civ. Proc. § 2016.050*, see *§ 190.51[4]*. For general discussion of *Code Civ. Proc. §§ 1005(b)* and *1013(a)*, see Ch. 372, *Motions and Orders* .

[4] Monetary Sanction

The court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes this motion, unless it finds that the one subject to the sanction acted with substantial justification of the sanction unjust [*Code Civ. Proc. § 2024.050(c)*; *see* further discussion in *§ 190.80[4]*].

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Chapter 190 DISCOVERY: SCOPE, REGULATION, AND TIMING
PART IV. FORMS

16-190 California Forms of Pleading and Practice--Annotated § 190.91

§ 190.91 Proceedings for Order Extending Time for Discovery or Reopening Discovery Proceedings [Code Civ. Proc. § 2024.050]--Order

[1] FORM Proceedings for Order Extending Time for Discovery or Reopening Discovery Proceedings [Code Civ. Proc. § 2024.050]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER _____
Defendant.	)	
	)	
	)	

The motion of _____ [*identify party, e.g.,* plaintiff] _____ [*name*] for an order granting him/her leave to _____ [complete discovery proceedings after _____ (*date*) *or* have a motion concerning discovery heard after _____ (*date*), *or* reopen discovery after the setting of the new trial date on _____ (*date*)], came on regularly for hearing on _____ (*date*). Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

[*EITHER*]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[*OR*]

On proof made to the satisfaction of the court, and good cause appearing therefor, that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted, and that _____ [*identify party, e.g.,* Plaintiff] is permitted to _____ [complete discovery proceedings until _____ (*date*) *or* have a motion concerning discovery heard until _____ (*date*) *or* reopen discovery after the setting of the new trial date on _____ (*date*)].

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*identify unsuccessful party, person, or attorney, e.g.,* Defendant _____ (*name*) and his/her attorney _____ (*name*)] pay forthwith to _____ [*identify successful party, e.g.,* plaintiff] _____ [*name*] the sum of $_____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____ [*identify unsuccessful party, person, or attorney, e.g.,* Defendant _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*identify unsuccessful party, person, or attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The proposed order set out in [1], *above*, is for use by a party to grant or deny leave to complete discovery proceedings or to have a motion concerning discovery heard closer to the initial trial date than otherwise allowed, or to reopen discovery after a new trial date has been set [*Code Civ. Proc. § 2024.050*; *see § 190.90*].

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Chapter 191 DISCOVERY: PRIVILEGES AND OTHER DISCOVERY LIMITATIONS

16-191 California Forms of Pleading and Practice--Annotated 191.syn

§ 191.syn Synopsis to Chapter 191: DISCOVERY: PRIVILEGES AND OTHER DISCOVERY LIMITATIONS

§ 191.01 Scope of Chapter

§ 191.02 Cross References

[1] Related Discovery Chapters

[2] Discovery in Particular Proceedings

[3] Other Related Chapters

§§ 191.03-191.09 [Reserved]

§ 191.10 Governing Law

[1] Civil Discovery Act

[2] Evidentiary Privileges and Other Protections Against Disclosure

§ 191.11 General Scope of Discovery Limited by Privileges and Other Protections

§ 191.12 Privileges Exist Only by Express Statutory Provision

[1] General Rule

[2] Exception for Privilege Required by Constitutional Law

§ 191.13 Burden of Proof Relating to Privilege

[1] Burden on Claiming Party to Show Existence of Privilege

[2] Burden on Opposing Party to Show Lack of Confidentiality or Exception to Privilege

§ 191.14 Standing of Non-Party to Assert Privilege

§ 191.15 Waiver of Privileges Generally

[1] Waiver for Failure to Make Timely Objection or Response to Discovery Demand

[2] Waiver by Disclosure or Consent to Disclosure

[a] Applicable to Confidential Communications

[b] Statement or Conduct Must Indicate Consent to Effect Waiver

[3] Waiver Implied by Placing Privileged Matter in Issue

[a] General Rule

[b] Scope of Implied Waiver Narrowly Construed

[4] Disclosure by One of Two or More Joint Holders

[5] Necessary Disclosure Does Not Constitute Waiver

[6] Disclosure That Is Privileged Does Not Waive Privilege

[7] Inadvertent Disclosure Absent Consent Does Not Waive Privilege

[a] General Rule

[b] Ethical Duty of Attorney Who Receives Inadvertent Disclosure

§ 191.16 Presumptions Involving Confidential Relationship Privileges

§§ 191.17-191.29 [Reserved]

§ 191.30 Privilege Against Self-Incrimination

§ 191.31 Privilege Limited to Matters Subjecting Holder to Criminal, Not Civil, Liability

§ 191.32 Privilege May Be Asserted Only in Reference to Particular Questions or Demands for Disclosure

§ 191.33 Plaintiff May Not Use Privilege to Avoid Discovery Relevant to His or Her Action

§ 191.34 Personal Nature of Privilege

§ 191.35 Compelling Disclosure During Civil Discovery

§§ 191.36-191.39 [Reserved]

§ 191.40 Attorney-Client Privilege

[1] Purpose of Privilege: To Foster Open Communications With Counsel

[2] Privilege Held by Client to Prevent Disclosure of Confidential Communications

[3] Protected Communications

§ 191.41 Claiming the Attorney-Client Privilege

[1] General Rule

[2] When Attorney Must Claim Privilege

[3] Claim of Privilege by Non-Party

[4] Claim of Privilege in Conjunction With Attorney Work Product Claim

§ 191.42 Privilege Held by Client Corporation or Similar Entity

[1] Shareholder of Corporate Client May Not Claim or Waive Privilege

[2] Members of Client Unincorporated Association May Not Claim or Waive Privilege

§ 191.43 Situations in Which Privilege Does Not Exist

§ 191.44 Termination of Privilege Subsequent to Death of Client

§ 191.45 Application of Privilege to Recipient of Paralegal Services

§ 191.46 Application of Privilege to Client of Tax Practitioner

[1] Statutory Extension of Privilege

[2] Extension Under Case Law

§ 191.47 Application of Privilege to Welfare Recipient

§ 191.48 Application of Privilege to Trustee

[1] Privilege Held by Office of Trustee Rather Than by Individual Trustee

[2] Trustee's Confidential Communications to Attorney Are Privileged Against Trust Beneficiaries

§§ 191.49-191.59 [Reserved]

§ 191.60 Physician-Patient Privilege

[1] Privilege Held by Patient to Prevent Disclosure of Confidential Communications

[2] Protected Communications

§ 191.61 Claiming the Physician-Patient Privilege

[1] General Rule

[2] When Physician Must Claim Privilege

[3] Claim of Privilege by Parent as Guardian of Child Patient

[4] Claim of Privilege by Third-Party Recipient of Confidential Communication

§ 191.62 Situations in Which Privilege Does Not Exist

[1] When Patient Is Litigant

[a] General Rule

[b] Exception to Privilege Narrowly Construed

[2] Other Situations When Privilege Does Not Exist

§ 191.63 Subpoena of Confidential Communication for Coroner's Inquest

§§ 191.64-191.69 [Reserved]

§ 191.70 Psychotherapist-Patient Privilege

[1] Privilege Held by Patient to Prevent Disclosure of Confidential Communications

[2] Protected Communications

[3] Scope of Privilege

§ 191.71 Claiming the Psychotherapist-Patient Privilege

[1] General Rule

[2] When Psychotherapist Must Claim Privilege

[3] Existence of Privilege Subsequent to Death of Client

[4] Burden of Proving Claim of Privilege

[a] Claimant Has Burden

[b] Dominant Purpose Test

[c] Effect When Burden Met

§ 191.72 Situations in Which Privilege Does Not Exist

[1] When Patient Is Litigant

[2] Other Situations When Privilege Does Not Exist

§§ 191.73-191.79 [Reserved]

§ 191.80 Other Confidential Relationship Privileges

[1] Confidential Relationship Privileges Generally

[2] Confidential Marital Communications

[3] Privilege Not to Testify Against Spouse

[4] Clergy-Penitent Privilege

[5] Sexual Assault Counselor-Victim Privilege

[6] Domestic Violence Counselor-Victim Privilege

[7] Human Trafficking Caseworker-Victim Privilege

§ 191.81 Official Information Privilege

[1] Definition

[2] When Privilege Is Absolute

[3] When Privilege Is Conditional

[4] Waiver of Conditional Official Information Privilege

§ 191.82 Trade Secret Privilege

[1] General Rule

[2] Effect of Privilege in Action for Misappropriation of Trade Secret

[3] Limiting Disclosure After Waiver of Privilege

§§ 191.83-191.99 [Reserved]

§ 191.100 Attorney Work Product Protection

§ 191.101 Policy Considerations Underlying Work Product Protection

§ 191.102 Definition of Work Product

§ 191.103 Discovery of Work Product

[1] General Rule of Conditional Protection

[2] Expert Consultants

[3] Attorney's Written Opinions and Legal Theories

§ 191.104 State Bar Disciplinary Investigations

§ 191.105 Action Involving Client

§ 191.106 Standing to Claim Work Product Protection

§§ 191.107-191.119 [Reserved]

§ 191.120 Right to Privacy

[1] Nonstatutory Privilege Based on Constitutional Guarantee of Privacy

[2] Examples of Matters Protected From Disclosure

[3] Balancing of Privacy Interest With State Interest in Disclosure

[4] Disclosure Required by Compelling State Interest May Be Limited by Protective Order or Similar Measures

[5] Waiver of Privacy Right

[6] Assertion of Third Person's Privacy Rights

[a] Availability and Balancing Conflicting Interests

[b] Dissolution of Marriage Proceedings

§ 191.121 Statutory Protections Relating to Subpoenaed Records Containing Personal Information

[1] Consumer Records

[2] Employee Records

[3] In Connection With Actions Involving Free Speech Rights

§ 191.122 News Reporter's Qualified First Amendment Privilege

§ 191.123 Newsperson's Immunity From Contempt

[1] "Shield Law" Protection Against Disclosure of Sources or Unpublished Information

[2] Scope of Immunity

[a] Limited to Protection From Contempt Proceedings

[b] Unpublished Information

[c] Identity of Source

[3] Determining When Shield Law Applies

[4] Limitations on Contempt Immunity

[a] Criminal Activity

[b] Violation of Court Order

[c] Newsperson Not Engaged in News Gathering

[5] Related Subpoena Procedures

[6] Appellate Review

§ 191.124 Tax Returns

[1] Protected Documents and Information

[2] Waiver or Inapplicability of Protection

§ 191.125 Settlement Efforts

§ 191.125A Mediation Efforts

[1] Protected Communications

[2] Communications Subject to Discovery

§ 191.126 Medical or Other Health Care Committees

§ 191.127 Information Pertaining to AIDS Blood Test

§ 191.128 Litigation Documents of Public Agency

§ 191.129 Defendant's Financial Information in Action Seeking Punitive Damages

§§ 191.130-191.149 [Reserved]

§ 191.150 Matthew Bender Publications

§ 191.151 California Constitution

§ 191.152 State Statutes

[1] Disclosure Limits Under Discovery Act and Evidence Code

[2] Other Statutes Relating to Disclosure Limitations

§ 191.153 Decisions

[1] Discovery Permitted If Matter Is Relevant and Unprivileged

[2] Privileges Generally

[3] Privilege Against Self Incrimination

[4] Attorney-Client Privilege

[a] Claiming the Attorney-Client Privilege

[b] Corporation or Unincorporated Association as Client

[c] Crime or Fraud Exception

[d] Disclosure to Third Persons

[e] Joint Client Exception

[f] Initial Consultation

[g] Legal Malpractice Action

[h] Matter Put in Issue

[i] Public Entity Client

[j] Scope of Privilege

[k] Trustee

[l] Waiver

[5] Clergy-Penitent Privilege

[6] Marital Privileges

[a] Confidential Marital Communication

[b] Privilege Not to Testify Against Spouse

[7] Medical or Other Health Care Committee Records

[8] Newsperson's Immunity From Contempt

[a] In General

[b] Limitations on Scope of Immunity

[c] Scope of Contempt Immunity

[9] News Reporter's Qualified First Amendment Privilege

[10] Official Information Privilege

[11] Peer Review Records of Hospitals and Medical Organizations

[12] Physician-Patient Privilege

[13] Police Officer Personnel Records

[14] Privacy

[15] Psychotherapist-Patient Privilege

[16] Sealed Court Records

[16A] Settlement or Mediation Efforts

[17] State Secret Privilege

[18] Tax Returns

[19] Vehicle Accident Reports

[20] Waiver of Privilege Generally

[21] Trade Secrets Privilege

[22] Work Product Protection

§ 191.154 Attorney General Opinions

§ 191.155 Law Reviews

§ 191.156 Text References

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Chapter 191 DISCOVERY: PRIVILEGES AND OTHER DISCOVERY LIMITATIONS
PART I. SCOPE

16-191 California Forms of Pleading and Practice--Annotated § 191.01

§ 191.01 Scope of Chapter

This chapter discusses the evidentiary privileges set out in *Evid. Code § 900 et seq.*, the attorney work-product protection of *Code Civ. Proc. § 2018.010 et seq.*, and similar statutes and provisions that protect against disclosure and therefore limit the scope of matters otherwise subject to civil discovery.

The legal background is divided into subparts discussing:

- General principles applicable to evidentiary privileges [*see § 191.10* et seq.].
- The privilege against self-incrimination [*see § 191.30* et seq.].
- The attorney-client privilege [*see § 191.40* et seq.].
- The physician-patient privilege [*see § 191.60* et seq.].
- The psychotherapist-patient privilege [*see § 191.70* et seq.].
- Other evidentiary privileges [*see § 191.80* et seq.].
- The attorney work product protection [*see § 191.100*].
- Other miscellaneous protections against disclosure [*see § 191.120* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewEvidencePrivilegesGeneral Overview

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16-191 California Forms of Pleading and Practice--Annotated § 191.02

§ 191.02 Cross References

[1] Related Discovery Chapters

- For discussion and forms relating to the general provisions of the Civil Discovery Act, including the provisions relating to the purpose, general scope, general regulation, and timing of civil discovery, see Ch. 190, *Discovery: Scope, Regulation, and Timing* .

- For discussion and forms relating to discovery sanctions generally, see Ch. 192, *Discovery: Sanctions for Discovery Misuse* .

- For detailed discussion of discovery of electronically stored evidence (e-discovery), including the special rules governing inadvertent disclosure of privileged electronically stored information, see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*.

- For discussion and forms relating to the use of particular discovery methods authorized by the Civil Discovery Act, see the following chapters covering each method:

  - Ch. 193, *Discovery: Depositions*.

  - Ch. 194, *Discovery: Interrogatories*.

  - Ch. 195, *Discovery: Inspection of Tangible Evidence*.

  - Ch. 196, *Discovery: Requests for Admissions*.

  - Ch. 197, *Discovery: Physical and Mental Examinations*.

  - Ch. 198, *Discovery: Exchange of Expert Witness Information*.

- For discussion and forms relating to the use of specified discovery methods for the purpose of preserving testimony or other evidence prior to the commencement of an action or pending an appeal, see Ch. 199, *Discovery: Preservation of Evidence* .

- For discussion and forms relating to the review of interlocutory discovery orders in certain circumstances by petition for writ of mandate or prohibition, see Ch. 200, *Discovery: Review of Discovery Orders* .

[2] Discovery in Particular Proceedings

- For discussion and forms relating to discovery and privileges or other protections against disclosure in particular actions or proceedings, see the following:

  - Ch. 71, *Attorney Discipline* (discussion of discovery in State Bar disciplinary proceedings).

  - Ch. 295, *Hospitals* (discussion of discovery of hospital records).

  - Ch. 473B, *Discovery in Agency Adjudications* (discussion forms relating to discovery in administrative trials under the Administrative Procedure Act of *Gov. Code § 11340 et seq.*).

  - Ch. 577, *Workers' Compensation* (discussion and forms relating to discovery in workers' compensation proceedings).

[3] Other Related Chapters

- For discussion and forms relating to subpoenas and subpoenas duces tecum generally, including discussion of the notice and objection provisions that provide procedural protections in the disclosure, by production pursuant to subpoena duces tecum, of business records containing personal information about consumers or employees, see Ch. 535, *Subpoena* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedurePretrial MattersSubpoenas

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16-191 California Forms of Pleading and Practice--Annotated §§ 191.03-191.09

[Reserved]

§§ 191.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Privileges in General

16-191 California Forms of Pleading and Practice--Annotated § 191.10

§ 191.10 Governing Law

[1] Civil Discovery Act

Civil discovery is generally governed by *Code Civ. Proc. §§ 2016.010-2036.050*. These provisions are otherwise known as the Civil Discovery Act [*Code Civ. Proc. § 2016.010*]. The protection against disclosure of an attorney's work product is set out in the Civil Discovery Act under *Code Civ. Proc. § 2018.010 et seq.*

The recovery of privileged electronically stored information that was inadvertently disclosed in the course of discovery is governed by *Code Civ. Proc. § 2031.285*. For discussion, see *Ch. 195A, Discovery: Discovery of Electronically Stored Evidence, § 195A.21*. The obligations of counsel who receive inadvertent disclosures of privileged produced in discovery is governed by the California Supreme Court's decision in *Rico v. Mitsubishi Motors Corp.* [*Rico v. Mitsubishi Motors Corp. (2007) 42 Cal. 4th 807, 68 Cal. Rptr. 3d 758, 171 P.3d 1092* ; *see* discussion in *§ 191.15[7]*].

[2] Evidentiary Privileges and Other Protections Against Disclosure

Evidentiary privileges are governed by *Evid. Code §§ 900-1070*. Various other statutory or constitutional provisions also provide protection against disclosure of certain matters. For example, the right to privacy under *Cal. Const., art. I, § 1*, has been construed by courts to limit discovery in some instances [*see Britt v. Superior Court (1978) 20 Cal. 3d 844, 852-856, 143 Cal. Rptr. 695, 574 P.2d 766]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewConstitutional LawSubstantive Due ProcessPrivacyGeneral OverviewEvidencePrivilegesGeneral Overview

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§ 191.11 General Scope of Discovery Limited by Privileges and Other Protections

The general scope of discovery is limited not only to matters that are relevant to subject matter of the action, but also to matters that are "not privileged" [*Code Civ. Proc. § 2017.010*; *see also Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.20* et seq., for discussion relating to relevancy and to specific provisions of the Discovery Act that qualify the general scope of discovery].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryRelevance

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16-191 California Forms of Pleading and Practice--Annotated § 191.12

§ 191.12 Privileges Exist Only by Express Statutory Provision

[1] General Rule

Statutory privileges against disclosure are set out in primarily in Division 8 of the Evidence Code [*see Evid. Code § 900 et seq.*]. Generally, unless there is such a statutory provision to the contrary, no person has a privilege to (1) refuse to be a witness, (2) refuse to disclose any matter or to produce any writing, object, or other thing, or (3) prevent another from being a witness, disclosing any matter, or producing any writing, object, or other thing [*Evid. Code § 911*].

Evid. Code § 911 codifies a legislative determination that evidentiary privileges are available only as defined by statute. Consequently, courts may neither add to the statutory privileges, nor imply unwritten exceptions to existing statutory privileges [*Roberts v. City of Palmdale (1993) 5 Cal. 4th 363, 373, 20 Cal. Rptr. 2d 330, 853 P.2d 496]* . The statutory privileges are exclusive, and courts may not create new privileges as a matter of judicial policy [*Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 711-712, 21 Cal. Rptr. 2d 200, 854 P.2d 1117]* .

Miscellaneous statutes, in addition to the evidentiary privileges set out in *Evid. Code § 900 et seq.*, also protect against discovery. These confer various types of protection against disclosure to specified matter. One of the more significant examples is the protection of an attorney's work product under *Code Civ. Proc. § 2018.010 et seq.*, which is discussed in *§ 191.100* et seq. Another example is found in the portion of the Evidence Code that provides for the exclusion of evidence based on extrinsic policies: the provisions of *Evid. Code § 1156 et seq.* protect against discovery of certain health care committee records and proceedings. For discussion of a number of these miscellaneous statutory protections, see *§ 191.120*.

[2] Exception for Privilege Required by Constitutional Law

Under the general rule set out in [1], *above*, courts may not add to the statutory privileges. The one exception to this are privileges that courts have necessarily implied from a constitutional provision. In other words, courts have recognized nonstatutory privileges required by state or federal constitutional law [*Roberts v. City of Palmdale (1993) 5 Cal. 4th 363, 373, 20 Cal. Rptr. 2d 330, 853 P.2d 496]* . Thus, for example, courts have interpreted the right to privacy under *Cal. Const., art. I, § 1*, to limit discovery in certain instances [*see Britt v. Superior Court (1978) 20 Cal. 3d 844,*

852-856, 143 Cal. Rptr. 695, 574 P.2d 766 , discussed in *§ 191.120[1]*]. Similarly, the right of a free press under *U.S. Const., amend. I* and *Cal. Const., art. I, § 2(a)* gives rise to a qualified privilege against disclosure of a confidential news source [*see Mitchell v. Superior Court (1984) 37 Cal. 3d 268, 274, 279, 283-284, 208 Cal. Rptr. 152, 690 P.2d 625* , discussed in *§ 191.122*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewEvidencePrivilegesGeneral Overview

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16-191 California Forms of Pleading and Practice--Annotated § 191.13

§ 191.13 Burden of Proof Relating to Privilege

[1] Burden on Claiming Party to Show Existence of Privilege

Under *Evidence Code sections 900-1070*, the party claiming a privilege has the burden of proof on the preliminary facts [*San Diego Professional Assn. v. Superior Court (1962) 58 Cal. 2d 194, 199, 23 Cal. Rptr. 384, 373 P.2d 448* ; *Chronicle Pub. Co. v. Superior Court (1960) 54 Cal. 2d 548, 565, 7 Cal. Rptr. 109, 354 P.2d 637]* .

[2] Burden on Opposing Party to Show Lack of Confidentiality or Exception to Privilege

The opponent of the claim of privilege based on a confidential communication has the burden of proof to establish that the communication was not confidential [*Evid. Code § 917*]. In other words, to overcome the presumption of confidentiality, the opposing party must persuade the presiding officer that the communication was not made in confidence. The fact that the communication was made under circumstances in which others could easily overhear is a strong indication that the communication was not intended to be confidential and is, therefore, unprivileged [Assembly Judiciary Comm. Comment to *Evid. Code § 917*; *see also* discussion in *§ 191.16*].

The opposing party also has the burden of proof on any preliminary fact necessary to show that an exception to the privilege is applicable [Assembly Judiciary Comm. Comment to *Evid. Code § 405*; *but see Abbott v. Superior Court (1947) 78 Cal. App. 2d 19, 21, 177 P.2d 317* (suggesting that a prima facie showing by the opposing party is sufficient when the issue is whether a communication between attorney and client was made in contemplation of crime)].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesGeneral OverviewEvidencePrivilegesAttorney-Client PrivilegeGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofAllocation

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16-191 California Forms of Pleading and Practice--Annotated § 191.14

§ 191.14 Standing of Non-Party to Assert Privilege

A holder of a privilege generally has standing to assert a privilege in a proceeding to prevent disclosure of privileged material, even though not a party to the proceeding. For example, if a party to a proceeding seeks to disclose privileged material, a non-party holder of the privilege may make a motion in that proceeding to prevent its disclosure [*Mylan Laboratories Inc. v. Soon-Shiong (1999) 76 Cal. App. 4th 71, 80-81, 90 Cal. Rptr. 2d 111* (holding that non-party client should properly make motion to assert privilege, but need not and may not move to intervene as party to proceeding solely to obtain "standing" to prevent disclosure); *see, e.g., Code Civ. Proc. § 2017.020(a)* (motion for protective order to limit discovery generally may be made either by party or "other affected person")].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewConstitutional LawThe JudiciaryCase or ControversyStandingGeneral OverviewEvidencePrivilegesGeneral Overview

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16-191 California Forms of Pleading and Practice--Annotated § 191.15

§ 191.15 Waiver of Privileges Generally

[1] Waiver for Failure to Make Timely Objection or Response to Discovery Demand

The Civil Discovery Act expressly provides in a number of instances that a failure to make a timely and specific objection to discovery, on the ground that the matter sought to be discovered is privileged or subject to attorney work product protection, constitutes a waiver of the privilege or protection [*see, e.g., Code Civ. Proc. § 2025.460(a)* (waiver for failure to object during oral deposition); *Code Civ. Proc. § 2028.050(a)* (waiver for failure to object to written deposition question); *Code Civ. Proc. § 2030.290(a)* (waiver for failure to make timely response to interrogatory); *Code Civ. Proc. 2031.300(a)* (waiver for failure to make timely response to demand for production of tangible evidence); *see Monarch Healthcare v. Superior Court (2000) 78 Cal. App. 4th 1282, 1284, 93 Cal. Rptr. 2d 619* (petitioner nonparty deponent's objection to records-only discovery request for privileged information was timely and sufficient when made at time and place for production of records; nonparty deponent was not required to file a motion to quash)].

[2] Waiver by Disclosure or Consent to Disclosure

[a] Applicable to Confidential Communications

Generally, the right of any person to claim the following privileges for a protected communication is waived if any holder of the privilege has, without coercion, disclosed a significant part of the communication or has consented to such disclosure made by anyone [*Evid. Code § 912(a)*]:

- Attorney-client privilege under *Evid. Code § 954*.
- Privilege for confidential marital communications under *Evid. Code § 980*.
- Physician patient privilege under *Evid. Code § 994*.
- Psychotherapist-patient privilege under *Evid. Code § 1014*.

- Penitent's privilege under *Evid. Code § 1033*.
- Clergy's privilege under *Evid. Code § 1034*.
- Sexual assault counselor-victim privilege under *Evid. Code § 1035.8*.
- Domestic violence counselor-victim privilege under *Evid. Code § 1037.5*.

[b] Statement or Conduct Must Indicate Consent to Effect Waiver

Consent to a disclosure is manifested by any statement or other conduct by the holder of the privilege that indicates consent, including failure to claim the privilege when the holder has the standing and opportunity to claim it [*Evid. Code § 912(a)*]. Consent may also be inferred. For instance, consent of an attorney's client may be inferred from a disclosure by the attorney for the client's benefit during negotiations on behalf of the client [*Klang v. Shell Oil Co. (1971) 17 Cal. App. 3d 933, 938, 95 Cal. Rptr. 265]* .

Mere disclosure of the fact that a privileged communication has occurred does not amount to a disclosure of the specific content of that communication, and does not necessarily constitute a waiver of the privilege [*Southern Cal. Gas Co. v. Public Utilities Com. (1990) 50 Cal. 3d 31, 49, 265 Cal. Rptr. 801, 784 P.2d 1373* (attorney-client privilege); *Mitchell v. Superior Court (1984) 37 Cal. 3d 591, 601-602, 208 Cal. Rptr. 886, 691 P.2d 642* (attorney-client privilege)]. Nor does testifying about facts that might have been discussed in confidential conversations waive a privilege, because it is not equivalent to disclosure of the actual content of those conversations [*Maas v. Municipal Court (1985) 175 Cal. App. 3d 601, 606, 221 Cal. Rptr. 245* (attorney-client privilege)].

[3] Waiver Implied by Placing Privileged Matter in Issue

[a] General Rule

Implied waiver is established by showing that "the client put the otherwise privileged communication directly at issue and that disclosure is essential for a fair adjudication of the action" [*Venture Law Group v. Superior Court (2004) 118 Cal. App. 4th 96, 105, 12 Cal. Rptr. 3d 656* (attorney-client privilege)]. A communication goes to the heart of the claim in controversy when [*Chicago Title Ins. Co. v. Superior Court (1985) 174 Cal. App. 3d 1142, 1149, 220 Cal. Rptr. 507* (attorney-client privilege)]:

- There is a legitimate need to reach the evidence.
- The evidence is relevant and material to the issue before the court.
- The information cannot be secured from any less intrusive source.

[b] Scope of Implied Waiver Narrowly Construed

The scope of the implied waiver is narrowly defined and the information required to be disclosed must fit strictly within the confines of the waiver [*Transamerica Title Ins. Co. v. Superior Court (1987) 188 Cal. App. 3d 1047, 1052, 233 Cal. Rptr. 825* (attorney-client privilege)].

For example, in one case, an attorney who had been sued for malpractice by a former client filed a cross complaint against the client's successor attorney for comparative equitable indemnity. The defendant and cross complainant argued that the client's commencement of a malpractice action impliedly waived any privilege with respect to communications between the client and defendant, but also with respect to those between the client and the successor attorney, at least as to communications relevant to the joint representation [*Kroll & Tract v. Paris & Paris (1999) 72 Cal. App. 4th 1537,*

1544, 86 Cal. Rptr. 2d 78] . The appellate court held that communications with the successor attorney were not impliedly waived, because the client, as holder of the privilege, expressly preserved it as to its successor attorney by choosing not to sue that attorney for malpractice [*Kroll & Tract v. Paris & Paris (1999) 72 Cal. App. 4th 1537, 1540-1544, 86 Cal. Rptr. 2d 78* (affirming demurrer to cross complaint, noting that if the indemnity action were allowed, the successor attorney would be unable to defend to the extent the defense depended on privileged client communications)].

One court stated that a waiver might be shown in an employment discrimination action alleging a hostile work environment if the employer, hoping to prevail by showing that it had its attorney investigate an employee's complaint, and took action appropriate to the findings of that investigation, places the adequacy of that investigation directly at issue. When the adequacy of such an investigation is directly at issue, the attorney-client privilege and attorney work product protection regarding that investigation are waived [*Wellpoint Health Networks, Inc. v. Superior Court (1997) 59 Cal. App. 4th 110, 125-129, 68 Cal. Rptr. 2d 844* (remanding for determination as to waiver, which could not be determined on appeal from dismissal following order sustaining demurrer to second amended complaint)].

The attorney-client privilege and work product protection are not, however, waived in every case in which an employer puts the adequacy of its prelitigation investigation at issue. For example, waiver does not occur when an employer conducts its investigation using non-attorney personnel, produces documents disclosing the substance of the investigation, and seeks to protect only specified communications between those personnel and the client's attorney, because disclosure of these privileged communications is not essential to determine the adequacy of the investigation [*Kaiser Found. Hospitals v. Superior Court (1998) 66 Cal. App. 4th 1217, 1227, 78 Cal. Rptr. 2d 543* (remanding for inspection of employer's privilege log and for *in camera* inspection of documents for which work product protection was claimed to evaluate extent of protection)].

Moreover, in a case in which plaintiff alleged defective construction of a reservoir near her home, documents dealing with defendant's *post*-construction investigation were irrelevant to plaintiff's claim that defendant waived the work product privilege by placing its pre-construction investigation at issue, and therefore were not discoverable [*Laguna Beach County Water Dist. v. Superior Court (2004) 124 Cal. App. 4th 1453, 1458, 22 Cal. Rptr. 3d 387]* .

In a case construing waiver of the psychotherapist-patient privilege, arising out of plaintiff's injury while crossing defendant trolley company's tracks, the court of appeal held that defendant trolley driver did not waive her privilege by revealing, both in her deposition in this case and in her previous workers' compensation claims for stress-related anxiety due to a previous work-related incident, that she was seeing a psychiatrist. The driver's willingness to put her psychotherapeutic relationship somewhat at risk in the workers' compensation proceedings, and any resulting limited disclosure, did not support the inference that she meant her relationship with her psychiatrist could continue to be put at risk following the disposition of her claims [*San Diego Trolley, Inc. v. Superior Court (2001) 87 Cal. App. 4th 1083, 1094, 105 Cal. Rptr. 2d 476]* . Moreover, in her testimony in this case, the driver disclosed only the fact that she was being treated for anxiety by a psychiatrist and the medications the psychiatrist prescribed. Nothing in this testimony could be construed as disclosing any significant part of her communications with her psychiatrist [*San Diego Trolley, Inc. v. Superior Court (2001) 87 Cal. App. 4th 1083, 1094, 105 Cal. Rptr. 2d 476]* .

In a case construing the physician-patient privilege, a real party in interest, the father in a marital dissolution and custody action, waived the physician-patient privilege under *Evid. Code §§ 912(a)* and *992* with respect to certain medical records, because the mother was present during the father's intake exam with his neurologist and the father consented to disclosure of a significant part of his communications with the neurologist on that date [*Manela v. Superior Court (2009) 177 Cal. App. 4th 1139, 1146-1147, 99 Cal. Rptr. 3d 736*]. Further, the father's filing of another physician's declaration, stating that he had treated the father for the past nine years, waived the privilege with respect to those records [*Manela v. Superior Court (2009) 177 Cal. App. 4th 1139, 1147-1148, 99 Cal. Rptr. 3d 736*]. However, in keeping with the fact that the scope of the waiver of a privilege generally is construed narrowly, the disclosure of the father's communications with his current physicians did not relate back to father's communications to another doctor

who had treated him for seizures as a teenager. Access to the earlier records would undermine the father's interest in disclosing all necessary information to his current treating physician. Therefore, the father's waiver of the physician-patient privilege with respect to his two current physicians did not waive the privilege with respect to the doctor who treated him as a child [*Manela v. Superior Court (2009) 177 Cal. App. 4th 1139, 1148, 99 Cal. Rptr. 3d 736*].

[4] Disclosure by One of Two or More Joint Holders

If two or more persons are joint holders of a attorney-client privilege, physician-patient privilege, psychotherapist-patient privilege, sexual assault counselor-victim privilege, or domestic violence counselor-victim privilege, the waiver of the right to claim the privilege by one joint holder does not affect the right of another joint holder to claim the privilege [*Evid. Code § 912(b)*; *see, e.g.,* *American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 591, 595-596, 113 Cal. Rptr. 561* (insured unable to waive insurer's privilege of confidential communications with mutual attorney)]. Similarly, a waiver by one spouse of the privilege for confidential marital communications does not affect the right of the other spouse to claim the privilege [*Evid. Code § 912(b)*].

[5] Necessary Disclosure Does Not Constitute Waiver

A disclosure in confidence of a communication that is protected by the attorney-client, physician-patient, psychotherapist-patient, or sexual assault counselor-victim privilege is not a waiver of that privilege if the disclosure is reasonably necessary to accomplish the purpose of the consultation [*Evid. Code § 912(d)*].

Thus, the "[attorney-client] privilege extends to communications which are intended to be confidential, if they are made to attorneys, to family members, business associates, or agents of the party or his attorneys on matters of joint concern, when disclosure of the communication is reasonably necessary to further the interest of the litigant" [*Ins. Co. of N. Am. v. Superior Court (1980) 108 Cal. App. 3d 758, 767, 166 Cal. Rptr. 880]* . While the involvement of "an *unnecessary* third person" in attorney-client communications destroys confidentiality, involvement of third persons to whom disclosure is reasonably necessary to further the purpose of the legal consultation preserves the confidentiality of the communication [*Ins. Co. of N. Am. v. Superior Court (1980) 108 Cal. App. 3d 758, 765, 166 Cal. Rptr. 880* (italics in original)]. For example, a disclosure made at the request of defense counsel for purposes of evaluation in preparation of the defense case is reasonably necessary, and remains protected by the attorney-client privilege [*Rodriguez v. Superior Court (1993) 14 Cal. App. 4th 1260, 1266, 18 Cal. Rptr. 2d 120]* .

Similarly, sending letters containing an attorney's work product to auditors of defendant public agency, at the agency's direction, did not waive the right to assert the work product privilege with respect to those letters [*Laguna Beach County Water Dist. v. Superior Court (2004) 124 Cal. App. 4th 1453, 1461, 22 Cal. Rptr. 3d 387]* . The letters themselves made clear that the attorney did not intend to waive protection; he sent the letters only to comply with defendant's request, and the third party auditors had an interest in maintaining the confidentiality of the work product [*Laguna Beach County Water Dist. v. Superior Court (2004) 124 Cal. App. 4th 1453, 1459-1461, 22 Cal. Rptr. 3d 387]* .

Similarly, a disclosure made to promote a patient's treatment is reasonably necessary [*Blue Cross v. Superior Court (1976) 61 Cal. App. 3d 798, 801, 132 Cal. Rptr. 635* ; *see also* *Rudnick v. Superior Court (1974) 11 Cal. 3d 924, 930-931, 114 Cal. Rptr. 603, 523 P.2d 643]* .

Disclosure of confidential legal advice and strategy among an insurer's employees can be protected by the attorney-client privilege, even if the insurer's attorneys were not directly involved and the documents at issue did not include excerpts of direct communications from the attorneys, provided that the employees involved were third persons to whom disclosure was reasonably *necessary* to further the purpose of the legal consultation [*Zurich Am. Ins. Co. v. Superior Court (2007) 155 Cal. App. 4th 1485, 1503, 66 Cal. Rptr. 3d 833* (remanding to make this determination)].

One court of appeal has held that production of documents to the government by energy suppliers under criminal and regulatory investigation did not waive the attorney-client privilege and work product protection when production was coerced by the threat of indictment if the corporations failed to cooperate [*Regents of Univ. of Cal. v. Superior Court (2008) 165 Cal. App. 4th 672, 675, 683-684, 81 Cal. Rptr. 3d 186* (*Evid. Code § 919* anticipates that privilege holder will not have to make strenuous efforts to resist disclosure; only reasonable efforts are required)].

Under some circumstances, disclosure to codefendants might be reasonably necessary [*see Raytheon Co. v. Superior Court (1989) 208 Cal. App. 3d 683, 689, 256 Cal. Rptr. 425]* . For example, when parties negotiating a business transaction entered into a joint defense agreement in anticipation of litigation by a third party, in camera review was required to determine whether the disclosure of the documents in the course of the transaction waived attorney-client privilege. While the joint defense agreement was not void as matter of public policy, it could not serve as sole ground for withholding the documents [*OXY Resources California LLC v. Superior Court (2004) 115 Cal. App. 4th 874, 879, 893, 9 Cal. Rptr. 3d 621]* .

However, disclosures from an attorney to an expert that are reasonably necessary to further the attorney's representation of the client's interests are not protected by the attorney-client privilege once the expert is designated a trial witness. The decision to use the expert as a witness manifests the client's consent to the disclosure of the information [*Shadow Traffic Network v. Superior Court (1994) 24 Cal. App. 4th 1067, 1078-1079, 29 Cal. Rptr. 2d 693* ; *see also* discussion in *§ 191.103[2]*].

[6] Disclosure That Is Privileged Does Not Waive Privilege

A disclosure that is privileged is not a waiver of any privilege [*Evid. Code § 912(c)*].

[7] Inadvertent Disclosure Absent Consent Does Not Waive Privilege

[a] General Rule

Inadvertent disclosure of a privileged communication does not necessarily constitute waiver of the privilege. In determining whether waiver has occurred, the trial court must examine the subjective intent of the privilege holder and the relevant surrounding circumstances for any manifestation of holder's consent to disclose. If the client or privilege holder clearly did not consent or intend to disclose privileged matter, the accidental, inadvertent disclosure of such matter by another, such as the holder's attorney, does not constitute a waiver under *Evidence Code § 912* [*State Comp. Ins. Fund v. WPS, Inc. (1999) 70 Cal. App. 4th 644, 652-654, 82 Cal. Rptr. 2d 799* (attorney-client privilege)].

[b] Ethical Duty of Attorney Who Receives Inadvertent Disclosure

The California Supreme Court has adopted an "objective standard," to be applied prospectively when an attorney inadvertently receives obviously confidential or privileged material [*Rico v. Mitsubishi Motors Corp. (2007) 42 Cal. 4th 807, 817, 68 Cal. Rptr. 3d 758, 171 P.3d 1092]* . Under this standard, when an attorney receives materials obviously subject to attorney-client privilege, or otherwise clearly confidential and privileged, and it is reasonably apparent that they were made available through inadvertence, that attorney should refrain from examining them any more than is essential to ascertain if they are privileged, and must immediately notify the sender that he or she has possession of materials that appear to be privileged. The attorney must also notify the party entitled to the privilege. The parties then may proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and such other judicial intervention as may be justified [*Rico v. Mitsubishi Motors Corp. (2007) 42 Cal. 4th 807, 817, 68 Cal. Rptr. 3d 758, 171 P.3d 1092* ; *State Comp. Ins. Fund v. WPS, Inc. (1999) 70 Cal. App. 4th 644, 656-657, 82 Cal. Rptr. 2d 799* ; *see, e.g., Bak v. MCL Financial Group, Inc. (2009) 170 Cal. App. 4th 1118, 1126-1127, 88 Cal. Rptr. 3d 800* (affirming award of sanctions against defense attorney who should have sought guidance from arbitration panel, rather than unilaterally copying allegedly privileged material plaintiffs had inadvertently produced and sending it to panel)].

In applying the preceding rule, courts must consider whether reasonably competent counsel, knowing the circumstances of the litigation, would have concluded the materials were privileged, how much review was reasonably necessary to draw that conclusion, and when counsel's examination should have ended [*Rico v. Mitsubishi Motors Corp. (2007) 42 Cal. 4th 807, 818, 68 Cal. Rptr. 3d 758, 171 P.3d 1092* (standard was "properly and easily" applied in this case, and disqualification was appropriate)].

When seeking to hold an attorney accountable for misuse of privileged materials received through inadvertence, the complaining attorney has the burden to demonstrate persuasively the inadvertence. Otherwise, an attorney might attempt to gain an advantage by sending privileged matter deliberately and then moving to disqualify the recipient. Mere exposure to the material alone does not warrant disqualification, although disqualification may be proper for an attorney who violates the standard now set for handling inadvertently disclosed privileged matter [*State Comp. Ins. Fund v. WPS, Inc. (1999) 70 Cal. App. 4th 644, 656-657, 82 Cal. Rptr. 2d 799]* .

For general discussion of an attorney's ethical obligations with respect to privileged materials, see Ch. 72, *Attorney Practice and Ethics* (Matthew Bender). For discussion of inadvertent disclosure in the context of electronic discovery (e-discovery), see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*, § 195A.21. For a detailed discussion of counsel's duties in the context of production of electronically stored information (e-discovery), including inadvertent production, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 3, *Ethical Issues for Attorneys in E-Discovery*.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesAttorney-Client PrivilegeWaiverEvidencePrivilegesClergy CommunicationsWaiverEvidencePrivilegesDoctor-Patient PrivilegeWaiverEvidencePrivilegesMarital PrivilegesConfidential CommunicationsWaiverLegal EthicsClient RelationsConfidentiality of Information

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§ 191.16 Presumptions Involving Confidential Relationship Privileges

When a claim of privilege is made on the ground that the matter is a confidential communication made in the course of the attorney-client, physician-patient, psychotherapist-patient, clergyman-penitent, spousal relationship, sexual assault counselor-victim relationship, or domestic violence counselor-victim relationship, the communication is presumed to have been made in confidence [*Evid. Code § 917(a)*]. Moreover, the opponent of the claimant of the privilege has the burden of proving that the communication was not confidential [*Evid. Code § 917(a)*; *Palay v. Superior Court (1993) 18 Cal. App. 4th 919, 926 n.7, 22 Cal. Rptr. 2d 839]* .

A communication between persons in a relationship listed in *Evid. Code § 917(a)* does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication [*Evid. Code § 917(b)*; *see Evid. Code § 917(c)*; *Civ. Code § 1633.2* ("electronic" defined)].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceInferences & PresumptionsPresumptionsEvidencePrivilegesAttorney-Client PrivilegeGeneral OverviewEvidencePrivilegesClergy CommunicationsGeneral OverviewEvidencePrivilegesDoctor-Patient PrivilegeGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

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[Reserved]

§§ 191.17[Reserved]

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§ 191.30 Privilege Against Self-Incrimination

To the extent that the privilege exists in the United States Constitution and California Constitution, every person has the privilege to refuse to disclose any matter that may tend to incriminate him or her [*Evid. Code § 940*; *see U.S. Const., amends. V, XIV*; *Cal. Const., art. I, § 15*; *see also People v. Berry (1991) 230 Cal. App. 3d 1449, 1453-1454, 281 Cal Rptr. 543* (burden of claiming privilege is on person seeking its protection, although when judge would be aware from circumstances of case of potential for self-incrimination, he or she should act to protect witness)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessSelf-Incrimination PrivilegeEvidencePrivilegesSelf-Incrimination PrivilegeGeneral OverviewEvidencePrivilegesSelf-Incrimination PrivilegeScopeEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

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16-191 California Forms of Pleading and Practice--Annotated § 191.31

§ 191.31 Privilege Limited to Matters Subjecting Holder to Criminal, Not Civil, Liability

The privilege in *Evid. Code § 940* may be asserted in a civil as well as in a criminal proceeding, but is limited to matters that would incriminate the person in the commission of a punishable crime [*People v. Whelchel (1967) 255 Cal. App. 2d 455, 460, 65 Cal. Rptr. 258* ; *see also Black v. State Bar (1972) 7 Cal. 3d 676, 685, 103 Cal. Rptr. 288, 499 P.2d 968]* . A witness invoking the privilege in a civil proceeding must demonstrate that the fear of incrimination is reasonable and not fanciful or merely imagined, because the privilege protects against real dangers, not remote or speculative possibilities [*Warford v. Medeiros (1984) 160 Cal. App. 3d 1035, 1043-1044, 207 Cal. Rptr. 94* ; *see, e.g., In re the Marriage of Sachs (2002) 95 Cal. App. 4th 1144, 1161-1162, 116 Cal. Rptr. 2d 273* (ex-husband could not invoke privilege against self-incrimination in judgment debtor proceeding, because silence about his income would not have incriminated him, but instead, would have prevented him from defending against contempt charges for failure to comply with support orders)]. The reasonableness of the fear must be demonstrated by some nexus between the information requested and the risk of criminal prosecution and conviction [*Troy v. Superior Court (1986) 186 Cal. App. 3d 1006, 1012-1013, 231 Cal. Rptr. 108]* .

The privilege against self-incrimination is not applicable to matters that will subject the witness only to civil liability. While the privilege of a criminal defendant is absolute, in civil case a witness or party may be required to waive the privilege or accept the civil consequences of silence if he or she exercises the privilege [*Blackburn v. Superior Court (1993) 21 Cal. App. 4th 414, 425-426, 27 Cal. Rptr. 2d 204]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesSelf-Incrimination PrivilegeScope

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16-191 California Forms of Pleading and Practice--Annotated § 191.32

§ 191.32 Privilege May Be Asserted Only in Reference to Particular Questions or Demands for Disclosure

There is no blanket right to refuse to answer questions in a civil proceeding, and a person claiming the privilege against self-incrimination must do so with specific reference to particular questions asked or other evidence sought. The trial court should inquire about each specific claim of privilege to determine whether the claimant has sustained the burden of showing justification for the claim [*Warford v. Medeiros (1984) 160 Cal. App. 3d 1035, 1045, 207 Cal. Rptr. 94]* . Thus, the privilege may not be asserted with respect to potential questions that have not yet been asked [*see Fuller v. Superior Court (2001) 87 Cal. App. 4th 299, 308, 104 Cal. Rptr. 2d 525* (denying writ of prohibition that would have preclude witness from testifying on matters as to which the witness might invoke the privilege; testimony preclusion premature and court could not ascertain whether or not claim of privilege was well founded)]. It is within the trial court's discretion to make the inquiry in camera or in open court [*Warford v. Medeiros (1984) 160 Cal. App. 3d 1035, 1045-1048, 207 Cal. Rptr. 94]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureTrialsExamination of WitnessesGeneral OverviewEvidencePrivilegesSelf-Incrimination PrivilegeElementsEvidencePrivilegesSelf-Incrimination PrivilegeScope

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16-191 California Forms of Pleading and Practice--Annotated § 191.33

§ 191.33 Plaintiff May Not Use Privilege to Avoid Discovery Relevant to His or Her Action

A party seeking civil relief in the courts is not able to refuse to testify on matters relevant to his or her recovery on the ground of privilege against self-incrimination [*Shepherd v. Superior Court (1976) 17 Cal. 3d 107, 117, 130 Cal. Rptr. 257, 550 P.2d 161* ; *Newson v. Oakland (1974) 37 Cal. App. 3d 1050, 1055-1057, 112 Cal. Rptr. 890]* . A plaintiff may not avoid discovery by relying on the privilege against self-incrimination, but may be required to choose between waiver of the privilege and dismissal of the action [*Fremont Indemnity Co. v. Superior Court (1982) 137 Cal. App. 3d 554, 560, 187 Cal. Rptr. 137* ; *see also Dwyer v. Crocker National Bank (1987) 194 Cal. App. 3d 1418, 1431-1432, 240 Cal. Rptr. 297* (plaintiff who refused to answer questions or produce documents at deposition on basis of self-incrimination privilege was prohibited from introducing evidence at trial or supporting or opposing designated claims or defenses to which deposition questions or documents related) and discussion in *§ 191.35*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesSelf-Incrimination PrivilegeScope

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§ 191.34 Personal Nature of Privilege

The privilege against self-incrimination is personal in nature. Thus, it may not be asserted by a corporation or other artificial entity [*see People v. Superior Court (Keuffel & Esser Co.) (1986) 181 Cal. App. 3d 785, 788, 227 Cal. Rptr. 13* (corporation)]. Moreover, it may not be asserted by an individual with respect to papers or effects unless they are his or her personal property, or at least in his or her possession in a purely personal capacity. The latter rule applies even though the evidence might incriminate the holder personally [*see People ex rel. Clancy v. Superior Court (1985) 39 Cal. 3d 740, 745, 218 Cal. Rptr. 24, 705 P.2d 347* (employee not entitled to assert privilege with respect to property possessed in representative capacity as employee of artificial entity)].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesSelf-Incrimination PrivilegeScope

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§ 191.35 Compelling Disclosure During Civil Discovery

A witness who refuses to answer questions on the ground of the constitutional privilege against self-incrimination may be compelled to answer if granted immunity against prosecutorial use of the answers, or evidence derived therefrom, in subsequent criminal proceedings against the witness [*Daly v. Superior Court (1977) 19 Cal. 3d 132, 142-143, 137 Cal. Rptr. 14, 560 P.2d 1193]* . A request from a prosecuting agency is not a prerequisite to a judicial grant of immunity [*Daly v. Superior Court (1977) 19 Cal. 3d 132, 146, 137 Cal. Rptr. 14, 560 P.2d 1193]* . However, the party seeking to obtain a protective order granting immunity must first give adequate notice to the appropriate prosecuting official, and afford it an opportunity to object to the granting of the order, in order sufficiently to establish the absence of any unduly detrimental effect of a proposed immunity order on future criminal proceedings [*Daly v. Superior Court (1977) 19 Cal. 3d 132, 147-148, 137 Cal. Rptr. 14, 560 P.2d 1193* (interpreting former *Code Civ. Proc. § 2019*, now superseded by various provisions for protective orders particularized to each discovery method, e.g., *Code Civ. Proc. § 2025.420* regarding depositions)].

However, when a civil defendant faces possible criminal prosecution on the basis of the same facts involved in the civil action, but immunity is denied due to objection by the criminal prosecutors, it is improper to punish the defendant for invoking the privilege against self-incrimination and refusing to disclose evidence. One way the court may properly protect both parties to the civil action is to stay discovery until disposition of the criminal matter or expiration of the criminal statute of limitations [*Pacers, Inc. v. Superior Court (1985) 162 Cal. App. 3d 686, 688-690, 208 Cal. Rptr. 743]* . In contrast, sanctions may be imposed, and no stay need be granted, when a *plaintiff* is seeking damages in a civil action refuses to respond to discovery on the basis of the privilege against self-incrimination [*Dwyer v. Crocker National Bank (1987) 194 Cal. App. 3d 1418, 1431-1432, 240 Cal. Rptr. 297]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryProtective OrdersEvidencePrivilegesSelf-Incrimination PrivilegeScope

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[Reserved]

§§ 191.36[Reserved]

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§ 191.40 Attorney-Client Privilege

[1] Purpose of Privilege: To Foster Open Communications With Counsel

The fundamental purpose behind the attorney-client or lawyer-client privilege is to promote full and open discussion of the facts and tactics surrounding individual legal matters [*Mitchell v. Superior Court (1984) 37 Cal. 3d 591, 599, 208 Cal. Rptr. 886, 691 P.2d 642* ; *People v. Godlewski (1993) 17 Cal. App. 4th 940, 945, 21 Cal. Rptr. 2d 796]* . It has been held that the nature of the privileged communication between attorney and client is broad [*see American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 593, 113 Cal. Rptr. 561* ; *see also Evid. Code § 917* (presumption of confidentiality)].

However, the Supreme Court has stated that the attorney-client privilege is to be strictly construed because it tends to suppress relevant facts [*Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 396-397, 15 Cal. Rptr. 90, 364 P.2d 266]* .

[2] Privilege Held by Client to Prevent Disclosure of Confidential Communications

As a general rule, a client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and attorney, subject however to waiver under *Evid. Code § 912*, and except as otherwise provided in *Evid. Code §§ 950-962* [*Evid. Code § 954*]. For discussion of waiver under *Evid. Code § 912*, see *§ 191.15*.

A "client" is a person who, directly or through an authorized representative, consults an attorney for the purpose of retaining the attorney or securing legal service or advice from the attorney in the latter's professional capacity. "Client" includes both an incompetent who directly consults an attorney as well as a guardian or conservator who so consults an attorney on behalf of an incompetent [*Evid. Code § 951*].

An attorney or "lawyer" for purposes of the privilege refers to a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation [*Evid. Code § 950*].

[3] Protected Communications

The privilege attaches to a confidential communication between the attorney and the client and bars discovery of the communication. A "confidential communication" is defined as information transmitted between a client and attorney in the course of their relationship and in confidence by a means that, so far as the client is aware, does not disclose the information to any third person other than those present to further the interest of the client in the consultation, or those to whom disclosure is reasonably necessary to transmit the information or accomplish the purpose for which the attorney is consulted. It includes legal opinions formed and advice given by the attorney in the course of that relationship [*Evid. Code § 952*]. The privilege applies irrespective of whether or not the communication also includes unprivileged material [*Costco Wholesale Corp. v. Superior Court (2009) 47 Cal. 4th 725, 734, 219 P.3d 736* ("[w]hen the communication is a confidential one between attorney and client, the entire communication, including its recitation or summary of factual material, is privileged"); *see Mitchell v. Superior Court (1984) 37 Cal. 3d 591, 600, 208 Cal. Rptr. 886, 691 P.2d 642* ("[n]either the statutes articulating the attorney-client privilege nor the cases which have interpreted it make any differentiation between 'factual' and 'legal' information")].

Confidential communications between an insurer's employees regarding legal advice and strategy can be privileged, because confidential communications under *Evid. Code § 952* includes information transmitted to persons to whom disclosure was reasonably necessary to further the interest of the litigant. Thus, even if the insurer's attorneys were not directly involved, and the documents did not include excerpts of direct communications from the attorneys, communications reflecting a discussion of litigation strategy and expressing that the strategy was in response to advice of counsel would come within the privilege [*Zurich Am. Ins. Co. v. Superior Court (2007) 155 Cal. App. 4th 1485,1502-1505, 66 Cal. Rptr. 3d 833* (remanding to determine whether employees with whom advice of counsel was shared came within these principles)].

The attorney-client privilege is inapplicable when the defendant speaks in a way that enables third persons to overhear his or her comment and see his or her gesture, even if defendant's attorney is seated right next to the defendant and the defendant intended that the communication be confidential [*People v. Urbano (2005) 128 Cal. App. 4th 396, 403, 26 Cal. Rptr. 3d 871]* .

A communication between a client and his or her attorney does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication [*see Evid. Code § 917(b)*; *see also Evid. Code § 917(c)*; *Civ. Code § 1633.2* ("electronic" defined)].

When the communication between an attorney and possible client proceeds "beyond initial or peripheral contacts" to the attorney's acquisition of information that would be confidential were there to be representation, the privilege applies [*People ex rel. Dep't of Corporations v. SpeeDee Oil Change Sys., Inc. (1999) 20 Cal. 4th 1135, 1148, 86 Cal. Rptr. 2d 816, 980 P.2d 371 (Cal. 1999)* (attorney's involvement rose to level at which fiduciary duties of confidentiality and loyalty could be imposed); *see Barton v. United States District Court (9th Cir. 2005) 410 F.3d 1104, 1111* (California attorney-client privilege applied to Internet questionnaires completed by four plaintiffs, in tort action against drug manufacturer, even though plaintiffs filled out questionnaires before law firm represented them and with no assurance that it would; law firm's disclaimer of attorney-client relationship was not disclaimer of confidentiality, and "prospective clients' communications with a view to obtaining legal services are plainly covered by the attorney-client privilege under California law, regardless of whether they have retained the lawyer, and regardless of whether they ever retain the lawyer")]. Thus, the privilege applies to confidential communications during preliminary negotiations with a attorney, even if employment is declined [*Rosso, Johnson, Rosso & Ebersold v. Superior Court (1987) 191 Cal. App. 3d 1514, 1518, 237 Cal. Rptr. 242]* .

The privilege encompasses not only oral or written statements, but also actions, signs, or other means of communicating information. It covers the transmission of documents that are available to the public, and not merely information in the

sole possession of the attorney or client, because discovery of the transmission of specific public documents might very well reveal the attorney's intended strategy. It also covers the communication of factual information as well as legal advice [*Mitchell v. Superior Court (1984) 37 Cal. 3d 591, 600-601, 208 Cal. Rptr. 886, 691 P.2d 642]* . The identity of an attorney's clients is not generally protected by the attorney-client privilege. However, when so much is already known of the attorney-client relationship that to disclose a client's name would betray a confidential communication, the identity of a client may be treated as a privileged information [*Tien v. Superior Court (2006) 139 Cal. App. 4th 528, 537-541, 43 Cal. Rptr. 3d 121* (compelling disclosure of identities of putative class members who contacted plaintiff's counsel did not violate attorney-client privilege because no personal, confidential information was sought; however, discovery would violate class members' privacy rights); *Rosso, Johnson, Rosso & Ebersold v. Superior Court (1987) 191 Cal. App. 3d 1514, 1518-1519, 237 Cal. Rptr. 242* (names of clients who were injured by intrauterine device were protected because nature of medical problem was confidential communication)].

Not all information that passes privately between an attorney and client is entitled to remain confidential. The identification of potential witnesses, for example, may be subject to disclosure in response to discovery requests. The privilege only protects against disclosure of communications, not against disclosure of the underlying facts on which communications are based [*Aerojet-General Corp. v. Transport Indemnity Insurance (1993) 18 Cal. App. 4th 996, 1004, 22 Cal. Rptr. 2d 862]* .

Forwarding nonprivileged material to counsel will not render that material privileged if no privilege existed previously [*see* *Sullivan v. Superior Court (1972) 29 Cal. App. 3d 64, 71, 105 Cal. Rptr. 241* ; *see, e.g.,* *Green & Shinee v. Superior Court (2001) 88 Cal. App. 4th 532, 537, 105 Cal. Rptr. 2d 886* (supplemental incident reports prepared by police officers and transmitted to law firm for review and legal advice were not privileged materials, because reports were public records, prepared in performance of official duties)].

For discussion of the confidentiality in the context of electronic discovery (e-discovery), see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*, § 195A.21.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesAttorney-Client PrivilegeGeneral OverviewEvidencePrivilegesAttorney-Client PrivilegeScope

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§ 191.41 Claiming the Attorney-Client Privilege

[1] General Rule

The privilege may be claimed by the holder [*Evid. Code § 954*]. It may also be claimed by either of the following [*Evid. Code § 954*]:

- A person authorized by the holder to claim the privilege.

- The person who was the attorney at the time of the confidential communication, unless the holder is no longer in existence or the attorney has been otherwise instructed by a person authorized to permit disclosure.

The "holder of the privilege" is generally the client. If the client has a guardian or conservator, the latter is the holder. If the client is dead, his or her personal representative is the holder. If the client is a corporation or other entity no longer in existence, its successor, assign, trustee in dissolution, or similar representative (including a personal representative appointed pursuant to *Prob. Code § 12252* if subsequent administration of an estate is necessary after the personal representative has been discharged) is the holder [*see Evid. Code § 953*; *see, e.g., Venture Law Group v. Superior Court (2004) 118 Cal. App. 4th 96, 105-106, 12 Cal. Rptr. 3d 656* (successor corporation was holder of attorney-client privilege of merged client corporation, and absent waiver by successor corporation, legal advice to client merged corporation was protected)].

When there is a prima facie claim of attorney-client privilege, the trial judge must accord a full hearing, with oral argument, before ordering disclosure of client confidences and, in effect, compelling attorney testimony against a client [*Titmas v. Superior Court (2001) 87 Cal. App. 4th 738, 740, 104 Cal. Rptr. 2d 803* (shareholder derivative action)].

Generally, a court may not require disclosure of matter claimed to be privileged in order to rule on the privilege, [*Evid. Code § 915(a)*], subject to exceptions when the communication sought to be disclosed is official information, the identity of an informer, trade secrets, or attorney work product [*Evid. Code § 915(b)*]. However, after the court has

determined the privilege is waived or an exception applies generally, the court--to protect the claimant's privacy--may conduct or order an in camera review of the communication at issue to determine if some protection is warranted notwithstanding the waiver or exception [*Costco Wholesale Corp. v. Superior Court (2009) 47 Cal. 4th 725, 740, 219 P.3d 736]* . [*Evid. Code § 915(a)*].

[2] When Attorney Must Claim Privilege

The attorney who received or made a communication subject to the privilege must claim the privilege whenever that attorney is present when the communication is sought to be disclosed and the attorney is authorized to claim the privilege under *Evid. Code § 954(c)* [*Evid. Code § 955*].

[3] Claim of Privilege by Non-Party

The client is holder of the privilege whether or not the client is a party to the proceeding in which the disclosure of privileged material is sought [*see Evid. Code § 954*]. Thus, a client, though not a party to a proceeding, has standing to assert the privilege in that proceeding to prevent disclosure of privileged material. For example, if a party to a proceeding seeks to disclose privileged material, a non-party holder of the privilege may make a motion in that proceeding to prevent its disclosure [*Mylan Laboratories Inc. v. Soon-Shiong (1999) 76 Cal. App. 4th 71, 80-81, 90 Cal. Rptr. 2d 111* (holding that non-party client should properly make motion to assert privilege, but need not and may not move to intervene as party to proceeding solely to obtain "standing" to prevent disclosure); *see, e.g., Code Civ. Proc. § 2017.020(a)* (motion for protective order to limit discovery generally may be made either by party or "other affected person")].

[4] Claim of Privilege in Conjunction With Attorney Work Product Claim

The attorney-client privilege is often claimed in conjunction with the work product protection [*see, e.g.,* *Kaiser Found. Hospitals v. Superior Court (1998) 66 Cal. App. 4th 1217, 1227, 78 Cal. Rptr. 2d 543* ; *Wellpoint Health Networks, Inc. v. Superior Court (1997) 59 Cal. App. 4th 110, 125-129, 68 Cal. Rptr. 2d 844]* . For discussion of work product protection, see *§ 191.100* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewEvidencePrivilegesAttorney-Client PrivilegeGeneral OverviewEvidencePrivilegesAttorney-Client PrivilegeElementsEvidencePrivilegesAttorney-Client PrivilegeScopeLegal EthicsClient RelationsConfidentiality of Information

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§ 191.42 Privilege Held by Client Corporation or Similar Entity

[1] Shareholder of Corporate Client May Not Claim or Waive Privilege

There is no shareholder exception to the corporate attorney-client privilege [*see McDermott, Will & Emery v. Superior Court (2000) 83 Cal. App. 4th 378, 383-385, 99 Cal. Rptr. 2d 622* ; *National Football League Properties, Inc. v. Superior Court (1998) 65 Cal. App. 4th 100, 107, 75 Cal. Rptr. 2d 893*)]. Although shareholders have some rights to corporate information that are not enjoyed by the general public, they do not have unfettered access to corporate confidences and secrets, and they are not entitled to claim attorney-client privilege to discover otherwise protected information [*National Football League Properties, Inc. v. Superior Court (1998) 65 Cal. App. 4th 100, 107-108, 75 Cal. Rptr. 2d 893]* . Because shareholders are not the holder of the privilege, they cannot effect a waiver of that privilege merely by initiating their own derivative action on behalf of the corporation [*McDermott, Will & Emery v. Superior Court (2000) 83 Cal. App. 4th 378, 383, 99 Cal. Rptr. 2d 622]* . One court held that, for this reason, shareholders could not proceed with their derivative suit for malpractice brought against outside counsel retained by the corporation. If such a suit were allowed to proceed, a third-party attorney would be effectively foreclosed from mounting any meaningful defense, since any waiver of the privilege would have to be made not by the shareholder litigants but by the holder of the privilege, the corporation [*McDermott, Will & Emery v. Superior Court (2000) 83 Cal. App. 4th 378, 383-385, 99 Cal. Rptr. 2d 622]* .

[2] Members of Client Unincorporated Association May Not Claim or Waive Privilege

Unincorporated associations, like corporations, enjoy the benefit of the attorney-client privilege when the entity (rather than its individual members) has retained the attorney to act on its behalf [*see Smith v. Laguna Sur Villas Community Assn. (2000) 79 Cal. App. 4th 639, 644, 94 Cal. Rptr. 2d 321]* . For example, a condominium association that brings a construction defect lawsuit on its own behalf is the holder of the attorney-client privilege and the individual condominium owners, who are not individually named as plaintiffs in the litigation, cannot demand production of privileged documents [*Smith v. Laguna Sur Villas Community Assn. (2000) 79 Cal. App. 4th 639, 643, 94 Cal. Rptr. 2d 321* (likening relationship between individual members of condominium association and association itself to that of shareholders to their corporation, and refusing to create condominium-owners exception to attorney-client privilege)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGeneral OverviewBusiness & Corporate LawUnincorporated AssociationsEvidencePrivilegesAttorney-Client PrivilegeGeneral OverviewEvidencePrivilegesAttorney-Client PrivilegeScopeEvidencePrivilegesAttorney-Client PrivilegeWaiver

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§ 191.43 Situations in Which Privilege Does Not Exist

The privilege does not exist in the following situations:

- When the client sought or obtained the attorney's services to aid anyone to commit or plan to commit a crime or a fraud [*Evid. Code § 956*].

- When the attorney reasonably believes that disclosure of a confidential communication relating to the representation of a client is necessary to prevent the client from committing a criminal act that the attorney believes is likely to result in death or substantial bodily harm [*Evid. Code § 956.5*]. Effective July 1, 2004, the statute instead makes this exception applicable if the lawyer reasonably believes disclosure is necessary to prevent any criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm to an individual [*Evid. Code § 956.5*; *see* 2003 Stats., ch. 765 § 2].

- When the confidential communication is relevant to an issue between parties who all claim the privilege through a deceased client, whether the claims are by testate or intestate succession , nonprobate transfer, or inter vivos transaction [*Evid. Code § 957*]. This provision refers to communications between the decedent and the decedent's attorney [*Fletcher v. Superior Court (1996) 44 Cal. App. 4th 773, 779, 52 Cal. Rptr. 2d 65]* .

- When the confidential communication is relevant to an issue of breach, by either the client or the attorney, of a duty arising from the attorney-client relationship [*Evid. Code § 958*].

- When the confidential communication is relevant to an issue concerning the intention or competence of a client executing a document to which the attorney was an attesting witness, or concerning the execution or attestation of such a document [*Evid. Code § 959*].

- When the confidential communication is relevant to an issue concerning the intention of a deceased client regarding a deed of conveyance, will, or other writing executed by the client that purports to affect

an interest in property, or concerning the validity of such a deed, will, or other writing [*Evid. Code §§ 960, 961*].

- When two or more clients retained or consulted an attorney on a matter of common interest, and the confidential communication is offered in a civil proceeding between two such clients or their successors [*Evid. Code § 962*].

The attorney-client privilege has also been statutorily abrogated in other situations, such as in specified types of meetings of state or local bodies subject to the Bagley-Keene Open Meeting Act (*Gov. Code § 11120 et seq.*) and the Brown Act (*Gov. Code § 54950 et seq.*), respectively [*see Gov. Code §§ 54956.9, 11126*; for further discussion, *see* Ch. 470B, *Public Agency Meetings*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-191 California Forms of Pleading and Practice--Annotated § 191.44

§ 191.44 Termination of Privilege Subsequent to Death of Client

If the client is dead, his or her personal representative is the holder of the privilege [*Evid. Code § 953(c)*; *see Swidler & Berlin v. United States (1998) 524 U.S. 399, 405 n.2, 118 S. Ct. 2081, 141 L. Ed. 2d 379* (under federal rules of evidence, attorney-client privilege survives client's death and may be asserted by client's attorney in subsequent criminal proceeding)]. For this purpose, "personal representative" includes a personal representative appointed pursuant to *Prob. Code § 12252* [*Evid. Code § 953(c)*]. The court must appoint a personal representative under *Prob. Code § 12252* if subsequent administration of an estate is necessary after the personal representative has been discharged [*see Prob. Code § 12252(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesAttorney-Client PrivilegeGeneral OverviewEvidencePrivilegesAttorney-Client PrivilegeScope

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16-191 California Forms of Pleading and Practice--Annotated § 191.45

§ 191.45 Application of Privilege to Recipient of Paralegal Services

A paralegal is subject to the same duty as an attorney under *Bus. & Prof. Code § 6068(e)*, to maintain inviolate the confidentiality, and at every peril to himself or herself to preserve the attorney-client privilege, of a consumer for whom the paralegal has provided any of the services described in *Bus. & Prof. Code § 6450(a)* [*Bus. & Prof. Code § 6453*]. Under *Bus. & Prof. Code § 6450(a)*, a paralegal may perform services that include but are not limited to case planning, development, and management, legal research, interviewing clients, fact gathering and retrieving information, drafting and analyzing legal documents, collecting, compiling, and utilizing technical information to make an independent decision and recommendation to a supervising attorney, and representing clients before agencies when such representation is permitted by statute, rule, or regulation.

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-191 California Forms of Pleading and Practice--Annotated § 191.46

§ 191.46 Application of Privilege to Client of Tax Practitioner

[1] Statutory Extension of Privilege

The attorney-client privilege under *Evid. Code § 950 et seq.* extends to communications regarding tax advice between a client-taxpayer and a federally authorized tax practitioner [*Rev. & Tax Code §§ 7099.1(a)(1), 21028(a)(1)*; *Unemp. Ins. Code § 13019(a)(1)*; *see I.R.C. § 7525* (similar extension of common law attorney-client privilege under federal income tax law)].

A "federally authorized tax practitioner" means any individual who is authorized under federal law to practice before the IRS [*Rev. & Tax Code §§ 7099.1(a)(3)(A), 21028(a)(3)(A)*; *Unemp. Ins. Code § 13019(a)(3)(A)*]. This may include certified public accountants, enrolled agents, and enrolled actuaries [*see 31 U.S.C. § 330*; *31 C.F.R. § 10.3*].

"Tax advice" means advice given by an individual with respect to a state tax matter. Tax advice may include federal tax advice related to a state tax matter [*Rev. & Tax Code §§ 7099.1(a)(3)(B), 21028(a)(3)(B)*; *Unemp. Ins. Code § 13019(a)(3)(B)* ("federal tax advice" means advice given by individuals within scope of their authority to practice before Internal Revenue Service on noncriminal matters)].

The privilege may be asserted only in noncriminal tax proceedings before the State Board of Equalization, the Franchise Tax Board, or the Employment Development Department [*Rev. & Tax Code §§ 7099.1(a)(2)*, 21028(a)(2); *Unemp. Ins. Code § 13019(a)(2)*]. The privilege does not apply to written communications between tax practitioners and certain corporate representatives regarding the promotion of corporate tax shelters [*Rev. & Tax Code §§ 7099.1(b), 21028(b)*; *Unemp. Ins. Code § 13019(b)*; *see Rev. & Tax Code §§ 7099.1(a)(3)(C), 21028(a)(3)(C)* ("tax shelter" defined); *Unemp. Ins. Code § 13019(a)(3)(C)* (same)]. In addition, the privilege may not be asserted to prevent the disclosure of information in any proceeding to revoke or otherwise discipline any license or right to practice by any governmental agency [*Rev. & Tax Code §§ 7099.1(b), 21028(b)*; *Unemp. Ins. Code § 13019(b)*].

The privilege is effective with regard to communications made on or after January 1, 2001 until its repeal on January 1, 2009 [*Rev. & Tax Code §§ 7099.1(c), (d), 21028(c), (d)*; *Unemp. Ins. Code § 13019(c), (d)*]. The privilege also is

effective for communications made on or after October 11, 2009 [*Rev. & Tax Code §§ 7099.1(c), 21018(c)*; *Unemp. Ins. Code § 13019(c)*; *see* Stats. 2009, ch. 411 (urgency legislation effective October 11, 2009)]. This leaves a (presumably unintended) gap from January 1, 2009, through October 10, 2009, under which communications made during that time period apparently were not protected under the privilege.

Under the privilege, the same statutory protections of confidentiality which apply to a communication between a taxpayer and an attorney under *Evid. Code § 950 et seq.* apply to a communication between a taxpayer and any federally authorized tax practitioner [*Rev. & Tax Code §§ 7099.1(a)(1), 21028(a)(1)*; *Unemp. Ins. Code § 13019(a)(1)*]. This privilege does not modify the attorney-client privilege, other than to extend it to tax practitioners. Accordingly, communications between a taxpayer and an authorized tax practitioner are privileged only if the communications would have been privileged between an attorney and the attorney's client. For example, information disclosed to an attorney for the purpose of preparing a tax return generally is not privileged under present law [*see United States v. Arthur Young & Co. (1984) 465 U.S. 805, 817, 104 S. Ct. 1495, 79 L. Ed. 2d 826* (rejecting work-product immunity for independent auditor's tax workpapers; creation of privilege was "misplaced" and in conflict with "clear intent of Congress")].

[2] Extension Under Case Law

Communications to an accountant or other tax practitioner will be protected under the attorney-client relationship if it can be shown that the accountant was employed, preferably by the attorney, to assist the attorney in the attorney's rendition of legal services [*see United States v. Judson (9th Cir. 1963) 322 F.2d 460, 462* (statement of client's net worth and related work papers prepared by accountant were protected by attorney-client privilege when they were "prepared at the [client's] attorney's request, in the course of an attorney-client relationship, for the purpose of advising and defending his clients"].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesAccountant-Client PrivilegeElementsEvidencePrivilegesAccountant-Client PrivilegeScopeEvidencePrivilegesAttorney-Client PrivilegeElementsEvidencePrivilegesAttorney-Client PrivilegeScope

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16-191 California Forms of Pleading and Practice--Annotated § 191.47

§ 191.47 Application of Privilege to Welfare Recipient

A privilege comparable to that between attorney and client impliedly exists between an authorized representative of a welfare recipient and the recipient, during a hearing on discontinuation of the recipient's welfare benefits [*Welfare Rights Organization v. Crisan (1983) 33 Cal. 3d 766, 772, 190 Cal. Rptr. 919, 661 P.2d 1073* ; *see Welf. & Inst. Code § 10950* (fair hearing with representation by counsel or other authorized representative)].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesAttorney-Client PrivilegeScope

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§ 191.48 Application of Privilege to Trustee

[1] Privilege Held by Office of Trustee Rather Than by Individual Trustee

An attorney-client relationship may exist between a trustee and an attorney consulted on behalf of the trust [*Moeller v. Superior Court (1997) 16 Cal. 4th 1124, 1129-1130, 69 Cal. Rptr. 2d 317, 947 P.2d 279]* . The privilege vests in the office of the trustee and not in any particular individual or entity who at one time is the trustee. When a successor trustee takes over administration of the trust, the predecessor trustee loses, and the successor trustee acquires, the privilege to refuse to disclose confidential attorney-client communications regarding the predecessor trustee's administration of the trust [*Moeller v. Superior Court (1997) 16 Cal. 4th 1124, 1130-1133, 69 Cal. Rptr. 2d 317, 947 P.2d 279]* .

Thus, when a successor trustee objected to the predecessor trustee's accounting and settlement petition and formally demanded production and inspection of certain documents and records related to the predecessor trustee's administration of the trust, the predecessor trustee was not permitted to refuse to produce those documents on the basis of attorney-client privilege [*Moeller v. Superior Court (1997) 16 Cal. 4th 1124, 1139, 69 Cal. Rptr. 2d 317, 947 P.2d 279]* .

[2] Trustee's Confidential Communications to Attorney Are Privileged Against Trust Beneficiaries

A trustee may assert the attorney-client privilege to withhold privileged communications or documents from the trust beneficiaries, regardless of their subject matter [*Wells Fargo Bank v. Superior Court (2000) 22 Cal. 4th 201, 206, 91 Cal. Rptr. 2d 716, 990 P. 2d 591]* . Thus, in an action for an accounting, the beneficiaries were not entitled to privileged documents relating to trust administration or to petitioner trustee's personal liability [*Wells Fargo Bank v. Superior Court (2000) 22 Cal. 4th 201, 206, 91 Cal. Rptr. 2d 716, 990 P.2d 591]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEvidencePrivilegesAttorney-Client

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[Reserved]

§§ 191.49[Reserved]

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§ 191.60 Physician-Patient Privilege

[1] Privilege Held by Patient to Prevent Disclosure of Confidential Communications

As a general rule, a patient, whether or not a party to the litigation, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and physician, subject to waiver under *Evid. Code § 912*, and except as otherwise provided in *Evid. Code §§ 991-1007* [*Evid. Code § 994*]. For discussion of waiver under *Evid. Code § 912*, see *§ 191.15*.

A "patient" is a person who consults a physician or submits to an examination by a physician for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of a physical, mental, or emotional condition [*Evid. Code § 991*; *cf. Johnson v. Superior Court (2000) 80 Cal. App. 4th 1050, 1063, 95 Cal. Rptr. 2d 864* (physician-patient relationship was not established when sperm donor consulted sperm bank's physicians and medical personnel for sole purpose of selling his sperm)].

A "physician" for purposes of the privilege refers to a person authorized or reasonably believed by the patient to be authorized to practice medicine in any state or nation [*Evid. Code § 990*].

[2] Protected Communications

A "confidential communication" subject to the protection of the physician-patient privilege is information, including information obtained by an examination of the patient, transmitted in confidence between a patient and physician in the course of the physician-patient relationship. The communication is considered confidential if it is transmitted by a means which, as far as the patient is aware, does not disclose the information to any third person other than one who is present to further the patient's interest in the consultation or to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the patient consulted the physician. A confidential communication includes a diagnosis made and the advice given by the physician in the course of the relationship [*Evid. Code § 992*; *see Manela v. Superior Court (2009) 177 Cal. App. 4th 1139, 1146-1147, 99 Cal. Rptr. 3d 736* (in marital dissolution and custody action brought by father against mother, father waived physician-patient privilege under *Evid. Code §§ 912(a)* and *992* with respect to specified medical records because mother was present

during father's intake exam with neurologist and father consented to disclosure of significant part of his communications with neurologist on that date)].

Photographs of a patient's physical condition taken by a physician for the sole purpose of obtaining confidential and private information regarding the patient's condition to assist in rendering a proper diagnosis and treatment are confidential communications [*see Binder v. Superior Court (1987) 196 Cal. App. 3d 893, 897, 242 Cal. Rptr. 231]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 191.61 Claiming the Physician-Patient Privilege

[1] General Rule

The privilege may be claimed by the holder [*Evid. Code § 994(a)*]. The "holder of the privilege" is generally the patient. If the patient has a guardian or conservator, the latter is the holder. If the patient is dead, his or her personal representative is the holder [*see Evid. Code § 993*].

The privilege may also be claimed by either of the following:

- A person authorized by the holder to claim the privilege [*Evid. Code § 994(b)*].

- The person who was the physician at the time of the confidential communication, unless the holder is no longer in existence or the physician has been otherwise instructed by a person authorized to permit disclosure [*Evid. Code § 994(c)*].

For purposes of determining the "person who was the physician" at the time of the communication, a physician-patient relationship exists between a patient and a medical or podiatry corporation (as defined in *Bus. & Prof. Code § 2000 et seq.*). It also exists between a patient and a licensed physician or surgeon who is employed by such a corporation to render services to the patient [*Evid. Code § 994(c)*]. A "person who was the physician" under *Evid. Code § 994(c)* also includes partnerships, limited liability companies, corporations, associations, and other groups and entities [*Evid. Code § 994(c)*].

[2] When Physician Must Claim Privilege

The physician who received or made a communication subject to the physician-patient privilege must claim the privilege on behalf of the holder whenever he or she is present when disclosure is sought and he or she is authorized to claim the privilege under *Evid. Code § 994(c)* [*Evid. Code § 995*].

The privilege is the patient's privilege, and the physician does not have the power to waive it [*Roberts v. Superior*

Court (1973) 9 Cal. 3d 330, 341, 107 Cal. Rptr. 309, 508 P.2d 309 ; *City & County of San Francisco v. Superior Court (1951) 37 Cal. 2d 227, 233, 231 P.2d 26* (interpreting former *Code Civ. Proc. § 1881(4)*)].

[3] Claim of Privilege by Parent as Guardian of Child Patient

As noted in [1], *above*, if the patient has a guardian or conservator, the guardian or conservator is the holder of the privilege [*Evid. Code § 993(b)*]. Although a parent's right to assert the privilege as guardian on behalf of his or her child is generally unquestioned, that right is not absolute, and under certain circumstances, such as when the interests of the parent and child conflict, the parent may not possess the right [*see In re Troy D. (1989) 215 Cal. App. 3d 889, 900, 263 Cal. Rptr. 869* (dictum)].

For example, in a juvenile dependency proceeding in which it was alleged that the child was born under the influence of dangerous drugs and that his parents were unable to protect him, the court of appeal questioned the appropriateness of the mother asserting the privilege to prevent disclosure of the child's medical records, since the interests of the mother and child were potentially conflicting [*In re Troy D. (1989) 215 Cal. App. 3d 889, 900-901, 263 Cal. Rptr. 869* ; *see also In re Fred J. (1979) 89 Cal. App. 3d 168, 178-179, 152 Cal. Rptr. 327* (expressing doubt that mother had ability to claim child's privilege to prevent psychiatrist from testifying about examination of child in dependency hearing)].

[4] Claim of Privilege by Third-Party Recipient of Confidential Communication

A third-party recipient of privileged matter has standing to claim the privilege on behalf of an absent patient who does not consent to disclosure [*Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 675, 156 Cal. Rptr. 55* (privilege claimed by hospital); *see also Rudnick v. Superior Court (1974) 11 Cal. 3d 924, 932, 114 Cal. Rptr. 603, 523 P.2d 643* (privilege claimed by drug manufacturer)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 191.62 Situations in Which Privilege Does Not Exist

[1] When Patient Is Litigant

[a] General Rule

There is no physician-patient privilege regarding a communication relevant to an issue concerning the condition of the patient if the condition was tendered by any of the following [*Evid. Code § 996*; *Palay v. Superior Court (1993) 18 Cal. App. 4th 919, 928, 22 Cal. Rptr. 2d 839* (issue tendered by filing personal injury action)]:

- The patient.
- A party claiming through or under the patient.
- A party claiming the privilege as a beneficiary of the patient through a contract to which the patient was or is a party.
- The plaintiff in an action brought under *Code Civ. Proc. § 376* (action for injury to minor child) or former *Code Civ. Proc. § 377* (wrongful death) for damages for injury or death of the patient (former *Code Civ. Proc. § 377* has been repealed and replaced by *Code Civ. Proc. § 377.60 et seq.*).

In a medical malpractice action, a nonparty physician who formerly treated the plaintiff was permitted to testify as an expert for the defense by reviewing factual information about the diagnosis and treatment delivered by the defendant physician and render an expert opinion on whether medical negligence occurred. This was not because the patient-litigant exception of *Evid. Code § 996* meant that the privilege did not exist as to communications between the plaintiff and this physician. Rather, the physician's testimony was conditioned on the fact it would not require a violation of the privilege through the consideration and disclosure of confidential communications obtained in the earlier treatment [*see Torres v. Superior Court (1990) 221 Cal. App. 3d 181, 184-187, 270 Cal. Rptr. 401* , disapproved on other grounds in *Heller v. Norcal Mutual Ins. Co. (1994) 8 Cal. 4th 30, 41, 8332 Cal. Rptr. 2d 200, 876 P.2d 999]* . The court noted that in this type of situation, to ensure that the information protected by the privilege

remained protected, a trial court may restrict ex parte communications between the expert physician and the defense during the course of discovery [*Torres v. Superior Court (1990) 221 Cal. App. 3d 181, 188, 270 Cal. Rptr. 401* , disapproved on other grounds in *Heller v. Norcal Mutual Ins. Co. (1994) 8 Cal. 4th 30, 41, 8332 Cal. Rptr. 2d 200, 876 P.2d 999]* .

[b] Exception to Privilege Narrowly Construed

The courts have placed a narrow interpretation on *Evid. Code § 996*, the patient-litigant exception to the physician-patient privilege discussed in [a], *above*. Although a litigant seeking recovery for physical injuries waives his or her physician-patient privilege regarding the medical conditions that the litigant has put in issue and that are in question, all of the litigant's past medical history is not open to scrutiny [*Britt v. Superior Court (1978) 20 Cal. 3d 844, 864, 143 Cal. Rptr. 695, 574 P.2d 766]* .

For example, in one case, petitioner sought relief from an order of a workers' compensation judge directing her to answer questions relating to her general past medical history, asserting that the information was protected by her privacy rights and by the physician-patient privilege. Citing *Britt*, the court of appeal declined to determine with precision which portion of the requested discovery information was privileged and which was not, because the discovery authorized by the challenged order was clearly too broad. The court held that on remand, the defendant would bear responsibility for framing narrower, more precisely tailored discovery that did not improperly impinge on privileged information, noting that defendant's own medical expert's analysis of plaintiff's workers' compensation claim, based on injury to her wrist, narrowed the scope of discovery to something far less broad than a general inquiry into plaintiff's hospitalization history prior to 1965 [*Allison v. Workers Comp. Appeals Bd. (1999) 72 Cal. App. 4th 654, 661, 84 Cal. Rptr. 2d 915]* . The court added, for the guidance of the parties, that an attorney claiming a privilege on behalf of his or her client does not have a right unilaterally to determine the validity of the claim, but must advise opposing counsel so that opposing counsel can bring the matter before a workers' compensation appeals judge for determination of the validity of the claim [*Allison v. Workers Comp. Appeals Bd. (1999) 72 Cal. App. 4th 654, 661, 84 Cal. Rptr. 2d 915]* .

[2] Other Situations When Privilege Does Not Exist

Situations in which the privilege does not exist, other than the patient-litigant exception discussed in [1], *above*, include the following:

- When the patient sought or obtained the physician's services to aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort [*Evid. Code § 997*].

- In a criminal proceeding [*Evid. Code § 998*].

- When the confidential communication is relevant to an issue concerning the condition of the patient in a proceeding to recover damages on account of the conduct of the patient if good cause for disclosure of the communication is shown [*Evid. Code § 999*].

- When the confidential communication is relevant to an issue between parties who all claim the privilege through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction [*Evid. Code § 1000*].

- When the confidential communication is relevant to an issue of breach, by either the patient or the physician, of duty arising out of the physician-patient relationship [*Evid. Code § 1001*].

- When the confidential communication is relevant to an issue concerning the intention of a deceased patient regarding a deed of conveyance, will, or other writing executed by the patient that purports to affect an interest in property, or concerning the validity of such a deed, will, or other writing [*Evid. Code §§ 1002, 1003*].

- In a proceeding to commit the patient, or place the patient, or the patient's protperty, or both, under the control of another because of the patient's alleged mental or physical condition, or in a competency proceeding brought by or on behalf of a patient [*Evid. Code §§ 1004, 1005*].

- With regard to information that the physician or patient is required to report to a public employee, or information required to be recorded in a public office, if the report or record is open to public inspection [*Evid. Code § 1006*].

- In a proceeding by a public entity to determine whether a right, authority, license, or privilege should be revoked, suspended, terminated, limited, or conditioned [*Evid. Code § 1007*].

Legal Topics:

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§ 191.63 Subpoena of Confidential Communication for Coroner's Inquest

When the coroner seeks a confidential communication of a deceased person that is privileged under the physician-patient privilege or the psychotherapist-patient privilege, by means of a subpoena or subpoena duces tecum, for the purpose of inquiry into and determination of the circumstances, manner, and cause of death as set forth in *Gov. Code § 27491* (death requiring coroner's inquest), or for the sole purpose of being introduced as evidence at a coroner's inquest proceeding, the coroner must provide notice to the decedent's personal representative appointed by the court, if any. If no personal representative has been appointed by the court, the coroner must provide notice to the decedent's personal representative. This notice must be served personally or at the representative's last known address not less than 15 days before the date the records are to be delivered to the court. The notice must inform the personal representative that he or she may present to the court written objection to any disclosure on or before the date specified for delivery [*Gov. Code § 27491.8(a)*; for further discussion of *Gov. Code § 27491* and related provisions, *see* Ch. 180, *Dead Bodies and Cemeteries*].

The custodian must deliver the records to the presiding judge of the superior court in a confidential manner. The judge must examine the records *in camera*, and, if there is good cause, must direct the custodian to disclose to the coroner those portions of the records that are relevant to the coroner's inquiry or inquest [*Gov. Code § 27491.8(a)*]. A communication made available to the coroner under these circumstances is confidential and may not be distributed or made available to any other person, agency, firm, or corporation, except when introduced into evidence at a coroner's inquest proceeding [*Gov. Code § 27491.8(b)*]. Additionally, the communication is not admissible as former testimony pursuant to *Evid. Code § 1290 et seq.* [*Gov. Code § 27491.8(c)*].

After the investigation or inquest has terminated, the court must order these records sealed to protect the confidentiality of the decedent's medical or mental health information [*Gov. Code § 27491.8(d)*].

Legal Topics:

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

§§ 191.64[Reserved]

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16-191 California Forms of Pleading and Practice--Annotated § 191.70

§ 191.70 Psychotherapist-Patient Privilege

[1] Privilege Held by Patient to Prevent Disclosure of Confidential Communications

As a general rule, a patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist, subject to waiver under *Evid. Code § 912*, and except as otherwise provided in *Evid. Code §§ 1010-1027* [*Evid. Code § 1014*]. For discussion of waiver under *Evid. Code § 912*, see *§ 191.15*.

A "patient" is a person who consults a psychotherapist or submits to an examination by a psychotherapist for the purpose of securing a diagnosis or preventive, palliative, or curative treatment of a mental, or emotional condition, or who submits to an examination of his or her mental or emotional condition for the purpose of scientific research on mental or emotional problems [*Evid. Code § 1011*].

A "psychotherapist" for purposes of the privilege may be any one of the following:

- A person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation who devotes, or is reasonably believed by the patient to devote, a substantial portion of his or her time to the practice of psychiatry [*Evid. Code § 1010(a)*].

- A licensed psychologist [*Evid. Code § 1010(b)*].

- A licensed clinical social worker engaged in nonmedical applied psychotherapy [*Evid. Code § 1010(c)*].

- A school psychologist who is credentialed to provide such service [*Evid. Code § 1010(d)*].

- A licensed marriage and family therapist [*Evid. Code § 1010(e)*].

- A person registered as a psychological assistant who is under the supervision of an appropriately licensed psychologist or board-certified psychiatrist, or a person registered as a marriage and family therapist intern who is under the supervision of a licensed marriage and family therapist, clinical social worker, psychologist, or physician certified in psychiatry [*Evid. Code § 1010(f)*].

- A person registered as an associate clinical social worker who is under the supervision of a licensed clinical social worker, psychologist, or a board-certified psychiatrist [*Evid. Code § 1010(g)*].

- A person exempt from the Psychology Licensing Law (*Bus. & Prof. Code § 2900 et seq.*) pursuant to *Bus. & Prof. Code § 2909*, who is under the supervision of a licensed psychologist or board-certified psychiatrist [*Evid. Code § 1010(h)*].

- A psychological intern as defined in *Bus. & Prof. Code § 2911*, who is under the supervision of a licensed psychologist or board-certified psychiatrist [*Evid. Code § 1010(i)*].

- A marriage and family counseling trainee, fulfilling his or her required supervised practicum under the supervision of a licensed psychologist, board-certified psychiatrist, licensed clinical social worker, or a licensed marriage and family therapist [*Evid. Code § 1010(j)*].

- A licensed registered nurse who has a master's degree in psychiatric-mental health nursing and is listed as a psychiatric-mental health nurse by the Board of Registered Nursing [*Evid. Code § 1010(k)*].

- An advanced practice registered nurse who is certified as a clinical nurse specialist and who participates in expert clinical practice in the specialty of psychiatric-mental health nursing [*Evid. Code § 1010(l)*].

- A person rendering mental health treatment or counseling services as authorized by *Fam. Code § 6924* (mental health treatment or counseling of minor) [*Evid. Code § 1010(m)*].

The term may also be applied, as a practical matter, to a licensed educational psychologist [*see Evid. Code § 1010.5* (application to educational psychologist-patient communications)].

[2] Protected Communications

A "confidential communication" subject to the protection of the psychotherapist-patient privilege is information, including information obtained by an examination of the patient, transmitted in confidence between a patient and psychotherapist in the course of the psychotherapist-patient relationship. The communication is considered confidential if it is transmitted by a means which, as far as the patient is aware, does not disclose the information to any third person other than one who is present to further the patient's interest in the consultation or to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the patient consulted the psychotherapist [*Evid. Code § 1012*; *see, e.g., Roman Catholic Archbishop of Los Angeles v. Superior Court (People) (2005) 131 Cal. App. 4th 417, 450-454, 32 Cal. Rptr. 3d 209 , modified, 2005 Cal. App. LEXIS 1274* (discussing case law illustrating disclosures to third persons that are "reasonably necessary" to accomplish purpose for which psychotherapist was consulted, and finding only one document prepared by Archbishop's staff was protected by privilege, in grand jury investigation of allegations of child sexual abuse by two priests because this document supplied troubled priest's therapeutic team with information about his personal history as an aid to diagnosis and treatment)]. A confidential communication includes a diagnosis made and the advice given by the psychotherapist in the course of the relationship [*Evid. Code § 1012*].

Some courts, primarily in the juvenile dependency context, have relied on *Evid. Code § 1012* (defining "confidential

communications to exclude "those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the psychotherapist is consulted") to permit limited disclosure of matters that would reasonably assist the court in evaluating whether further orders are necessary for the minor's benefit, while preserving the confidentiality of the details of the minor's therapy [*see, e.g., In re Mark L. (2001) 94 Cal.App. 4th 573, 583-584, 114 Cal. Rptr. 2d 499* ; *In re Kristine W. (2001) 94 Cal. App. 4th 521, 528-529, 114 Cal. Rptr. 2d 369* ; *see also In re Christopher M. (2005) 127 Cal. App. 4th 684, 695, 26 Cal. Rptr.3d 61 , amended 2005 Cal. App. LEXIS 382* (probation conditions that required all records related to juvenile defendant's treatment be made available on request to court and probation department were reasonable and did not violate juvenile's right of privacy or his psychotherapist-patient privilege, given state's legitimate countervailing interest in protecting public against defendant's violent, anti-social conduct and in determining whether he was fully complying with his probation conditions); *In re Pedro M. (2000) 81 Cal. App. 4th 550, 554-555, 96 Cal. Rptr. 2d 839* (psychotherapist-patient privilege did not preclude therapist from testifying concerning juvenile offender's participation and progress in court-ordered treatment plan)].

The psychotherapist-patient privilege does not require that the communication be and remain confidential to be protected. It encompasses a communication that was never, in fact, confidential so long as it was made in confidence. The communication need only comprise information transmitted between a patient and a psychotherapist in the course of their relationship and in confidence by a means which, *so far as the patient is aware,* discloses the information to no outside third person. Similarly, the privilege can cover a communication that has lost its confidential status [*Menendez v. Superior Court (1992) 3 Cal. 4th 435, 447, 11 Cal. Rptr. 2d 92, 834 P.2d 786]* .

[3] Scope of Privilege

Because of the unique nature of the psychotherapist-patient relationship, the privilege provides a greater degree of protection than that afforded the physician-patient relationship [*Smith v. Superior Court (1981) 118 Cal. App. 3d 136, 139-140, 173 Cal. Rptr. 145]* . For example, the privilege protects against disclosure of the names, addresses, and telephone numbers of a psychotherapist's patients [*Smith v. Superior Court (1981) 118 Cal. App. 3d 136, 141, 173 Cal. Rptr. 145]* , and of the fact that a party has obtained psychiatric treatment [*City of Alhambra v. Superior Court (1980) 110 Cal. App. 3d 513, 518, 168 Cal. Rptr. 49* ; *see Pollock v. Superior Court (2001) 93 Cal. App. 4th 817, 821, 113 Cal. Rptr. 2d 453* (names of insurance company's psychiatric disability claimants were not discoverable because disclosure of claimants' names would reveal not only their identity but also nature of their psychiatric disability)].

However, the *Smith* rule, declaring the patient's identity to be a privileged communication, should not rigidly apply in every case. In extraordinary cases of need for disclosure, a court retains discretion to order the patients' identity revealed. When the need for disclosure is crucial to the cause of action and to the ability to conduct meaningful discovery, disclosure may be compelled [*County of Alameda v. Superior Court (1987) 194 Cal. App. 3d 254, 261, 263-264, 239 Cal. Rptr. 400* (this is narrow limitation on privilege; trial court properly ordered disclosure of name of mental patient who raped plaintiff, another mental patient in county hospital)].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesPsychotherapist-Patient PrivilegeElementsEvidencePrivilegesPsychotherapist-Patient PrivilegeScope

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16-191 California Forms of Pleading and Practice--Annotated § 191.71

§ 191.71 Claiming the Psychotherapist-Patient Privilege

[1] General Rule

The privilege may be claimed by the holder [*Evid. Code § 1014(a)*]. The "holder of the privilege" is generally the patient. If the patient has a guardian or conservator, the latter is the holder. If the patient is dead, his or her personal representative is the holder [*see Evid. Code § 1013*].

The privilege may also be claimed by either of the following:

- A person authorized by the holder to claim the privilege [*Evid. Code § 1014(b)*].

- The person who was the psychotherapist at the time of the confidential communication, unless the holder is no longer in existence or the psychotherapist has been otherwise instructed by a person authorized to permit disclosure [*Evid. Code § 1014(c)*].

For purposes of determing the "person who was the psychotherapist" at the time of the communication, a psychotherapist-patient relationship exists between a patient and a psychological corporation (as defined in *Bus. & Prof. Code § 2995 et seq.*), a marriage, family, and child counseling corporation (as defined in *Bus. & Prof. Code § 4987.5 et seq.*), a licensed clinical social workers corporation (as defined in *Bus. & Prof. Code § 4998 et seq.*). It also exists between a patient and a psychotherapist who is employed by such a corporation to render services to the patient [*Evid. Code § 1014(c)*]. A "person" under *Evid. Code § 1014(c)* also includes partnerships, limited liability companies, corporations, associations, and other groups and entities [*Evid. Code § 1014(c)*].

[2] When Psychotherapist Must Claim Privilege

The psychotherapist who received or made a communication subject to the privilege must claim the privilege whenever he or she is present when the communication is sought to be disclosed and is authorized to claim the privilege under *Evid. Code § 1014(c)* [*Evid. Code § 1015*]. The privilege belongs to the patient, and the psychotherapist has no power to waive it [*Roberts v. Superior Court (1973) 9 Cal. 3d 330, 341, 107 Cal. Rptr. 309, 508 P.2d 309* ; *see Evid. Code §*

1013 (defining holder of privilege)].

[3] Existence of Privilege Subsequent to Death of Client

The psychotherapist-patient privilege was intended to survive the death of the patient, to be exercised or waived as the interests of the estate of the deceased patient might warrant [*see* *Boling v. Superior Court (1980) 105 Cal. App. 3d 430, 439, 164 Cal. Rptr. 432* ; *cf.* discussion in *§ 191.44*].

[4] Burden of Proving Claim of Privilege

[a] Claimant Has Burden

The party claiming the psychotherapist-patient privilege has the burden of proving the preliminary facts to show that the privilege exists [*People v. Cabral (1993) 12 Cal. App. 4th 820, 827, 15 Cal. Rptr. 2d 866* ; *see also* discussion in *§ 191.13*].

[b] Dominant Purpose Test

If the purpose for a consultation is in issue, a "dominant purpose" test is applied. If the dominant purpose of the communication is for transmittal to a psychotherapist in the course of professional counseling, that communication is within the privilege. Whether a particular communication is predominantly in furtherance of the psychotherapist-patient relationship is a question of fact [*People v. Cabral (1993) 12 Cal. App. 4th 820, 828, 15 Cal. Rptr. 2d 866* (unsolicited letter from man accused of molesting his daughter in which he admitted charges and requested admittance into rehabilitation program for admitted sex offenders failed dominant purpose test and was not privileged); *see also Menendez v. Superior Court (1992) 3 Cal. 4th 435, 454, 11 Cal. Rptr. 2d 92, 834 P.2d 786* (motive for psychotherapy is generally immaterial in that participants do not participate in psychotherapy for its own sake)].

One court of appeal has rejected the dominant purpose test of *Cabral* "to the extent the test would automatically preclude the application of the psychotherapist-privilege to records generated as the result of psychotherapy attended by a defendant as a condition of probation" [*Story v. Superior Court (2003) 109 Cal. App. 4th 1007, 1016, 135 Cal. Rptr. 2d 532]* . In that case, the court held that the fact that defendant was motivated to participate in psychotherapy as a condition of probation did not bar application of the psychotherapist-patient privilege to records of that psychotherapy [*Story v. Superior Court (2003) 109 Cal. App. 4th 1007, 1016-1017, 135 Cal. Rptr. 2d 532* (explaining that dominant purpose of probation-conditioned psychotherapy must always be therapeutic, regardless of defendant's motive, because *Pen. Code § 1203.1(j)* expressly provides that the general purpose of all probation conditions is "the reformation and rehabilitation of the probationer")]. Accordingly, records of psychotherapy ordered as a condition of probation were protected from disclosure in a subsequent criminal action when the prosecution sought evidence regarding defendant's commission of a previous sexual offense [*Story v. Superior Court (2003) 109 Cal. App. 4th 1007, 1019, 135 Cal. Rptr. 2d 532]* . The court noted, however, that the psychotherapy records of an adult probationer may be disclosed under *Evid. Code § 1012* to the extent necessary for the court to monitor the defendant's participation and progress in the psychotherapy ordered as a condition of probation [*Story v. Superior Court (2003) 109 Cal. App. 4th 1007, 1018-1019, 135 Cal. Rptr. 2d 532* (citing *In re Pedro M. (2000) 81 Cal. App. 4th 550, 96 Cal. Rptr. 2d 839* , discussed in *§ 191.70[2]*)].

[c] Effect When Burden Met

Once the requisite psychotherapist-patient relationship has been established, it is liberally construed in favor of the patient. This conforms to the basic policy behind the privilege, which is to promote the relationship by safeguarding the confidential disclosures of the patient and the advice given [*People v. Cabral (1993) 12 Cal. App. 4th 820, 827, 15 Cal. Rptr. 2d 866]* . Moreover, it is a recognition that compelled disclosure could encroach on constitutionally protected rights of privacy [*Roberts v. Superior Court (1973) 9 Cal. 3d 330, 337, 107 Cal. Rptr. 309, 508 P.2d 309* ; *In re*

Lifschutz (1970) 2 Cal. 3d 415, 423, 431-432, 437, 85 Cal. Rptr. 829, 467 P.2d 557] .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesPsychotherapist-Patient PrivilegeElementsEvidencePrivilegesPsychotherapist-Patient PrivilegeScopeEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

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16-191 California Forms of Pleading and Practice--Annotated § 191.72

§ 191.72 Situations in Which Privilege Does Not Exist

[1] When Patient Is Litigant

The privilege does not apply to a communication relevant to the patient's mental or emotional condition when that issue was tendered by any of the following [*Evid. Code § 1016*]:

- The patient.
- A party claiming through or under the patient.
- A party claiming the privilege as a beneficiary of the patient through a contract to which the patient was or is a party.
- The plaintiff in an action brought under *Code Civ. Proc. § 376* (action for injury to minor child) or former *Code Civ. Proc. § 377* (wrongful death) for damages for injury or death of the patient (former *Code Civ. Proc. § 377* has been repealed and replaced by *Code Civ. Proc. § 377.60 et seq.*).

The abrogation of the privilege under this exception is limited, and authorizes disclosure only of matters directly relevant to the nature of the specific emotional or mental condition that the patient voluntarily disclosed and tendered in the pleadings or in answer to discovery inquiries [*In re Lifschutz (1970) 2 Cal. 3d 415, 431, 435, 85 Cal. Rptr. 829, 467 P.2d 557* ; *see San Diego Trolley, Inc. v. Superior Court (2001) 87 Cal. App. 4th 1083, 1094, 105 Cal. Rptr. 2d 476* (neither defendant trolley driver's workers' compensation claims for stress-related anxiety due to previous work-related accident nor her voluntary disclosure of any confidential communications with her psychiatrist during those proceedings supported access to her confidential communications with her psychiatrist in this suit for personal injuries; driver's willingness to put her psychotherapeutic relationship somewhat at risk in workers' compensation proceedings, and resulting limited disclosure, did not support inference that she meant her relationship with her psychiatrist could continue to be put at risk following disposition of her claims)]. In determining whether disclosure should be required under this section, the court must heed the patient's basic interests in privacy and construe the

privilege liberally, in favor of the patient [*In re Lifschutz (1970) 2 Cal. 3d 415, 437, 85 Cal. Rptr. 829, 467 P.2d 557]* .

[2] Other Situations When Privilege Does Not Exist

Situations in which the privilege does not exist, other than the patient-litigant exception discussed in [1], *above*, include the following:

- When the patient sought or obtained the psychotherapist's services to aid anyone to commit or plan to commit a crime or a tort or to escape detection or apprehension after the commission of a crime or a tort [*Evid. Code § 1018*].

- When the confidential communication is relevant to an issue between parties who all claim the privilege through a deceased patient, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction [*Evid. Code § 1019*].

- When the confidential communication is relevant to an issue of breach, by either the patient or the psychotherapist, of duty arising out of the psychotherapist-patient relationship [*Evid. Code § 1020*].

- When the confidential communication is relevant to an issue concerning the intention of a deceased patient regarding a deed of conveyance, will, or other writing executed by the patient that purports to affect an interest in property, or concerning the validity of such a deed, will, or other writing [*Evid. Code §§ 1021, 1022*].

- In a proceeding initiated by a criminal defendant to determine his or her sanity [*Evid. Code § 1023*].

- When the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to self or to the person or property of another and that disclosure is necessary to prevent the threatened danger [*Evid. Code § 1024*].

- In a competency proceeding brought by or on behalf of a patient [*Evid. Code § 1025*].

- With regard to information that the psychotherapist or patient is required to report to a public employee, or information required to be recorded in a public office, if the report or record is open to public inspection [*Evid. Code § 1026*].

- When the patient is child under the age of 16 years and the psychotherapist has reasonable cause to believe that the patient has been a victim of a crime and that disclosure is in the best interest of the child [*Evid. Code § 1027*].

- When the psychotherapist was appointed by court order to examine the patient (except when appointed on request of a defendant's attorney in a criminal proceeding to provide the attorney with information needed to advise the defendant regarding a please based on insanity, or regarding a defense based on mental condition), or when the psychotherapist was appoint by the Board of Prison Terms to examine a patient under *Penal Code § 2960 et seq.* [*Evid. Code § 1017*].

For discussion of procedures by which a coroner may subpoena confidential communications otherwise protected by the psychotherapist-patient privilege for the limited purpose of an inquest into the patient's cause of death, see *§ 191.63*.

Legal Topics:

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

§§ 191.73[Reserved]

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16-191 California Forms of Pleading and Practice--Annotated § 191.80

§ 191.80 Other Confidential Relationship Privileges

[1] Confidential Relationship Privileges Generally

Like the evidentiary privileges previously discussed in detail [*see 191.40* et seq. (attorney-client privilege), § 191.60 et seq. (physician-patient-privilege), § 191.70 et seq. (psychotherapist-patient privilege)], the privileges summarized in [2]-[6], *below*, are based on the existence of relationships of a confidential nature, in which communications made in confidence are protected as a matter of public policy. The provisions governing these "confidential relationship" privileges are for the most part similar to those discussed previously. For discussion of these privileges in greater detail, see DeMeo, California Deposition and Discovery Practice Ch. 20 et seq. (Matthew Bender).

[2] Confidential Marital Communications

Under the privilege for confidential marital communications, set forth in *Evid. Code § 980 et seq.*, a spouse, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication made between him or her and the other spouse when the spouses were married, subject to waiver under *Evid. Code § 912*, and except as otherwise provided in *Evid. Code §§ 980-987* [*Evid. Code § 980*]. For discussion of waiver under *Evid. Code § 912*, see *§ 191.15*.

Situations in which the privilege does not apply include communications in furtherance of a crime or a fraud, in proceedings to establish competence or incompetence of either spouse, in proceedings between the spouses or those claiming through them, in juvenile court proceedings, and in certain criminal proceedings [*Evid. Code §§ 981-987*].

[3] Privilege Not to Testify Against Spouse

Under the privilege of one spouse not to testify against the other, set out in *Evid. Code § 970 et seq.*, a married person has a privilege not to testify against his or her spouse in any proceeding, and a privilege not be called as a witness by the adverse party in a proceeding to which his or her spouse is a party [*Evid. Code §§ 970, 971*]. The privilege contains no limitation requiring that a viable marital relationship exist [*Jurcoane v. Superior Court (2001) 93 Cal. App. 4th 886, 889, 113 Cal. Rptr. 2d 483* ; *see Evid. Code § 972* (exceptions to privilege)]. Thus, the bright line of divorce is

necessary to terminate the privilege [*Jurcoane v. Superior Court (2001) 93 Cal. App. 4th 886, 897, 113 Cal. Rptr. 2d 483* (upholding claim of privilege, even though petitioner had not seen her husband in 17 years and her assertion of privilege might deprive government of crucial evidence in double murder case)].

Situations in which the privilege does not apply include proceedings in which the spouses are adverse parties, proceedings to establish competence or incompetence of the spouse, juvenile court proceedings, certain proceedings involving spousal or child support, and certain criminal proceedings [*Evid. Code § 972*].

[4] Clergy-Penitent Privilege

Under the clergy-penitent privilege, set forth in *Evid. Code § 1030 et seq.*, a penitent, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a penitential communication, subject to waiver under *Evid. Code § 912* [*Evid. Code § 1033*]. The clergyperson also has a privilege not disclose a penitential communication, subject to waiver under *Evid. Code § 912* [*Evid. Code § 1034*].

A "penitent" is any "person who has made a penitential communication to a member of the clergy" [*Evid. Code § 1031*]. The penitent is not required to be a member of any particular church or to be of the same faith as the clergy member to whom he or she makes the penitential communication, unless the discipline of that church limits the clergy member's authority to receive penitential communications to church members only [Doe 2 v. *Superior Court (Mark Calkins) (2005) 132 Cal. App. 4th 1504, 1517, 34 Cal. Rptr. 3d 458* (reasoning that *Evid. Code § 1032 et seq.* make no other requirements regarding the penitent; remanding to determine whether clergy-penitent privilege may apply to communications to Methodist pastor by persons who were not members of United Methodist Church)].

A penitential communication is a confidential communication made to a clergy person who is authorized to hear and obligated to keep secret that communications [*Evid. Code § 1032*]. However, not every statement made to a member of the clergy is privileged. "In order for a statement to be privileged, it must satisfy all of the conceptual requirements of a penitential communication: (1) it must be intended to be in confidence; (2) it must be made to a member of the clergy who in the course of his or her religious discipline or practice is authorized or accustomed to hear such communications; and (3) such member of the clergy has a duty under the discipline or tenets of the church, religious denomination or organization to keep such communications secret" [*People v. Edwards (1988) 203 Cal. App. 3d 1358, 1362-1363, 248 Cal. Rptr. 53]* . This definition does not require, however, that the communication in question be a "confession" [Doe 2 v. *Superior Court (Mark Calkins) (2005) 132 Cal. App. 4th 1504, 1517, 34 Cal. Rptr. 3d 458* (quoting Cal. Law Revision Comm'n comment to *Evid. Code § 1032*, "Section 1032 extends the protection that traditionally has been provided only to those persons whose religious practice involves 'confessions' ")].

Thus, for example, documents generated in the course of "troubled-priest interventions," subpoenaed from the Roman Catholic Archbishop of Los Angeles and two priests for an investigation into allegations that the priests sexually assaulted children, were not protected by the clergy-penitent privilege because both parties to the original communications knew they likely would be transmitted to a third person [*Roman Catholic Archbishop of Los Angeles v. Superior Court (People) (2005) 131 Cal. App. 4th 417, 444-445, 32 Cal. Rptr. 3d 209 , modified, 2005 Cal. App. LEXIS 1274]* . Furthermore, the subpoenaed documents themselves demonstrated that communications to and from the individual priests were routinely shared by other Archdiocese employees. This sharing of information vitiated any privilege under *Evid. Code § 1032*, or, alternatively, constituted a waiver of the privilege under *Evid. Code § 912(a)* [*Roman Catholic Archbishop of Los Angeles v. Superior Court (People) (2005) 131 Cal. App. 4th 417, 445, 32 Cal. Rptr. 3d 209 , modified, 2005 Cal. App. LEXIS 1274]* .

For discussion of waiver under *Evid. Code § 912*, see *§ 191.15*.

[5] Sexual Assault Counselor-Victim Privilege

Under the sexual assault counselor-victim privilege, set out in *Evid. Code § 1035 et seq.*, a victim of sexual assault, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication made between the victim and his or her sexual assault counselor [*Evid. Code § 1035.8*; *see Evid. Code § 1035.2* ("sexual assault counselor" defined)].

[6] Domestic Violence Counselor-Victim Privilege

Under the domestic violence counselor-victim privilege, set out in *Evid. Code § 1037 et seq.*, a victim of domestic violence, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication made between the victim and his or her counselor [*Evid. Code § 1037.5*].

[7] Human Trafficking Caseworker-Victim Privilege

Evid. Code § 1038 et seq. establishes a human trafficking victim-caseworker privilege. A trafficking victim, whether or not a party to the action, has a qualified privilege to refuse to disclose, or to prevent another from disclosing, a confidential communication between the victim and the caseworker [*Evid. Code § 1038(a)*; *see Evid. Code § 1038.1* (compelled disclosure)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 191.81 Official Information Privilege

[1] Definition

Official information is information acquired in confidence by a public employee in the course of the employee's duty and not openly or officially disclosed to the public prior to the time the claim of privilege is made [*Evid. Code § 1040(a)*].

[2] When Privilege Is Absolute

A public entity has an absolute privilege to refuse to disclose official information if the privilege is claimed by a person authorized by the public entity to do so and disclosure is forbidden by an act of the United States Congress or by a California statute [*see Evid. Code § 1040(b)(1)*; *Shepherd v. Superior Court (1976) 17 Cal. 3d 107, 123, 130 Cal. Rptr. 257, 550 P.2d 161]* .

[3] When Privilege Is Conditional

Evid. Code § 1040(b)(2) provides a conditional privilege against disclosure of official information that attaches when the court determines that disclosure of official information, other than under *Evid. Code § 1040(a)*, is against the public interest because the need to preserve the confidentiality of the information outweighs the need for disclosure in the interest of justice [*see Shepherd v. Superior Court (1976) 17 Cal. 3d 107, 123, 130 Cal. Rptr. 257, 550 P.2d 161]* . In determining whether disclosure is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered [*Evid. Code § 1040(b)(2)*]. If a court denies discovery, it must find that disclosure would be against the public interest within the meaning of *Evid. Code § 1040(b)(2)* [*Parnes v. Superior Court (1978) 81 Cal. App. 3d 831, 836, 146 Cal. Rptr. 818* ; *see also Shepherd v. Superior Court (1976) 17 Cal. 3d 107, 125, 130 Cal. Rptr. 257, 550 P.2d 161]* .

In weighing the necessity for preserving confidentiality against the need for disclosure, a court may tailor its discovery order to the unique facts of the situation. For example, when a hospital denied designation as a regional trauma center sought to discover documents connected with the review process, a court found that the raw data examined by the

review committee was discoverable, whereas informal notes and memoranda of actual deliberations were not [*County of San Diego v. Superior Court (1986) 176 Cal. App. 3d 1009, 1025-1027, 222 Cal. Rptr. 484* ; *see also* *Rider v. Superior Court (1988) 199 Cal. App. 3d 278, 287, 244 Cal. Rptr. 770* (order limiting use of police records regarding alleged rape of minor in defamation action)].

Other examples involving the conditional privilege include the following:

- Police files in an ongoing criminal investigation into a child's murder were held to be conditionally privileged when weighed against the need for discovery in the suspect-parents' civil suit, which was based on their public identification by police as suspects. The appropriate remedy was for the trial court to stay discovery of the investigative information in the civil action in order to allow the police the necessary time to investigate; in the future, the trial court could determine that there has not been enough progress in the investigation to justify continued protection [*County of Orange v. Superior Court (2000) 79 Cal. App. 4th 759, 768-769, 94 Cal. Rptr. 2d 261* (also suggesting that trial court look for guidance from trade secret cases in determining what parts of file to disclose when passage of time reversed balance of competing interests)].

- Memoranda from state agency to governor's office were held to be conditionally privileged when sought by a defendant in pending civil litigation. The trial court was required to consider the defendant's need for disclosure in the interest of justice, and determine whether that interest was outweighed by the public interest in preserving confidentiality [*Marylander v. Superior Court (2000) 81 Cal. App. 4th 1119, 1126, 97 Cal. Rptr. 2d 439* (rejecting trial court's conclusion that correspondence to Governor was exempt from disclosure under Public Records Act and by common law "deliberative process" privilege)].

[4] Waiver of Conditional Official Information Privilege

The conditional privilege under *Evid. Code § 1040(b)(2)* may not be claimed if any person authorized to claim the privilege consented to the disclosure of the information in the proceeding [*Evid. Code § 1040(b)(2)*; *see, e.g.,* *People ex rel. Dept. of Public Works v. McNamara Corp. Ltd. (1972) 28 Cal. App. 3d 641, 651, 104 Cal. Rptr. 822* (state submitted data to state engineer performing adjudicatory function)]. Furthermore, under the definition of "official information," information is neither conditionally nor absolutely privileged if it was not acquired in confidence or if it was officially disclosed to the public prior to the time the claim of privilege was made [*see Evid. Code § 1040(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeGeneral OverviewEvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeDeliberative Process PrivilegeEvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeReports PrivilegeEvidencePrivilegesGovernment PrivilegesWaiver

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16-191 California Forms of Pleading and Practice--Annotated § 191.82

§ 191.82 Trade Secret Privilege

[1] General Rule

If a trade secret's owner, or an agent or employee of the owner, claims the privilege, the owner has a privilege to refuse to disclose the trade secret and to prevent another from disclosing it if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice [*Evid. Code § 1060*].

The party claiming the trade secret privilege has the burden of establishing its existence. Then, the party seeking discovery must make a prima facie, particularized showing that the information sought is relevant and necessary to the proof of, or defense against, a material element of one or more causes of action presented in the case and that it is reasonable to conclude that the information is essential to a fair resolution of the lawsuit. The trial court should then balance the interests of both sides and should consider the feasibility of discovery under the terms of a protective order as well as any less intrusive alternatives to disclosure proposed by the parties [*Bridgestone/Firestone, Inc. v. Superior Court (1992) 7 Cal. App. 4th 1384, 1393, 9 Cal. Rptr. 2d 709* ; *see, e.g., Citizens of Humanity, LLC v. Costco Wholesale Corp. (2009) 171 Cal. App. 4th 1, 13, 15-16, 89 Cal. Rptr. 3d 455* (identity of defendant's suppliers was protectable trade secret and less burdensome alternatives were available to plaintiff to establish that jeans sold by defendant were stolen)].

The holder of the privilege must then demonstrate any claimed disadvantages of a protective order. Either party may propose or oppose less intrusive alternatives to disclosure of the trade secret. The claimant of the privilege has the burden of demonstrating that an alternative to disclosure will not be unduly burdensome to the opposing side and that it will maintain the same fair balance in the litigation that would have been achieved by disclosure [*Bridgestone/Firestone, Inc. v. Superior Court (1992) 7 Cal. App. 4th 1384, 1393, 9 Cal. Rptr. 2d 709]* .

In one case, plaintiffs forfeited the right to proceed with their claim by insisting on an absolute withholding of all privileged information when they could have agreed to a more typical, less extreme protective order, which would have allowed defendant to obtain the needed information while strictly confining its use [*Steiny & Co. v. California Electric Supply Co. (2000) 79 Cal. App. 4th 285, 292, 93 Cal. Rptr. 2d 920]* . Although plaintiffs had the right to stand

on the privilege, they did not have the right to proceed on their claim while at the same time insisting on withholding key evidence from their adversary [*Steiny & Co. v. California Electric Supply Co. (2000) 79 Cal. App. 4th 285, 288, 93 Cal. Rptr. 2d 920* (trial court properly barred plaintiffs' damage evidence at trial when plaintiffs' proper invocation of trade secret privilege, and blanket protective order they obtained, prevented defendant from examining key evidence needed to test reasonableness of settlement which formed the basis for plaintiffs' damage claim)].

Evid. Code §§ 1061-1063 set forth procedures for the owner of a trade secret to assert his or her trade secret privilege under *Evid. Code § 1060* in a criminal proceeding. For general discussion of these procedures, see *Ch. 565, Unfair Competition, § 565.100* et seq.

[2] Effect of Privilege in Action for Misappropriation of Trade Secret

In any action alleging the misappropriation of a trade secret under the Uniform Trade Secrets Act (*Civ. Code § 3426 et seq.*), before beginning discovery relating to the trade secret, the party alleging the misappropriation must identify the trade secret with reasonable particularity subject to any orders that may be appropriate under *Civ. Code § 3426.5* [*Code Civ. Proc. § 2019.210*]. A trade secret has been described with "reasonable particularity" sufficient to permit discovery to begin when the plaintiff makes a showing that is "reasonable"--that is, "fair, proper, just, rational" [*Advanced Modular Sputtering, Inc. v. Superior Court (Sputtered Films, Inc.) (2005) 132 Cal. App. 4th 826, 903, 907-908, 33 Cal. Rptr. 3d 901* (observing that sufficient showing of "reasonable particularity" is "a flexible inquiry"); *cf. Perlan Therapeutics, Inc. v. Superior Court (2009) 178 Cal. App. 4th 1333, 1350-1352, 101 Cal. Rptr. 3d 211* (while trade secret identification does not require "every minute detail" or the "greatest degree of particularity possible[,]" trade secret claimant's *Code Civ. Proc. § 2019.210* trade secret statement was insufficient, in light of its broad language, surplusage, and voluminous attachments)]. If the trade secret designation is adequate to permit a defendant to investigate whether plaintiff's alleged trade secrets were within the public domain and to prepare a defense, and to permit the trial court to determine the scope of relevant discovery, plaintiff is not required to particularize how the alleged trade secrets differ from matters within the general knowledge of skilled persons in the field [*Brescia v. Angelin (2009) 172 Cal. App. 4th 133, 143, 90 Cal. Rptr. 3d 842*].

In a trade secret civil discovery case of first impression, one appellate court held that *Code Civ. Proc. § 2019.210* is not limited in its application to a cause of action under the Uniform Trade Secrets Act, for misappropriation of the trade secret, but extends to any cause of action that relates to the trade secret [*Advanced Modular Sputtering, Inc. v. Superior Court (Sputtered Films, Inc.) (2005) 132 Cal. App. 4th 826, 903, 33 Cal. Rptr. 3d 901]* . The court reasoned that, by its express terms, *Code Civ. Proc. § 2019.210* is not "cause of action" specific, but instead refers to "any 'action,' i.e. the entire lawsuit. " The court noted that it made no sense to bar discovery on the cause of action for misappropriation but permit it on others, when every cause of action was dependent on the misappropriation allegation [*Advanced Modular Sputtering, Inc. v. Superior Court (Sputtered Films, Inc.) (2005) 132 Cal. App. 4th 826, 907, 33 Cal. Rptr. 3d 901]* .

Under *Civ. Code § 3426.5*, a court is required to preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

For general discussion and forms relating to actions under *Civ. Code § 3426 et seq.*, see *Ch. 565, Unfair Competition, § 565.100* et seq.

[3] Limiting Disclosure After Waiver of Privilege

If the trade secret privilege is waived by a failure to assert the privilege in response to a demand for the production of documents [*see Code Civ. Proc. § 2031.240(b)*], the party waiving the privilege may still seek a protective order under

Code Civ. Proc. § 2031.060(b)(5), in order to set terms and conditions on the disclosure of its trade secrets that were subject to discovery [*Stadish v. Superior Court (1999) 71 Cal. App. 4th 1130, 1144, 84 Cal. Rptr. 2d 350* (decided under former *Code Civ. Proc. § 2031(f)(5)*]. In determining whether there was good cause for an protective order in such a case, a trial court should refer to the procedures for a protective order set out in *Evid. Code § 1061*. These detailed procedures, although applicable to the disclosure of trade secrets in a criminal proceeding, "have a utility in a civil action and should be followed" [*Stadish v. Superior Court (1999) 71 Cal. App. 4th 1130, 1145, 84 Cal. Rptr. 2d 350* ; for further discussion regarding demands for the production of documents, *see* Ch. 195, *Discovery: Inspection of Tangible Evidence*]. For discussion of procedures under *Evid. Code § 1061*, see *Ch. 565, Unfair Competition, § 565.100* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesTrade SecretsElementsEvidencePrivilegesTrade SecretsExceptionsEvidencePrivilegesTrade SecretsScopeEvidencePrivilegesTrade SecretsWaiverEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

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[Reserved]

§§ 191.83[Reserved]

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§ 191.100 Attorney Work Product Protection

The provisions in the Civil Discovery Act relating to attorney work product protection, set out in *Code Civ. Proc. § 2018.010 et seq.*, are a restatement or codification of case law doctrine. They are not intended to expand or reduce the extent to which work product is discoverable under existing law in any action, with one exception. *Code Civ. Proc. § 2018.050* eliminates work product protection when an attorney is suspected of knowingly participating in a crime or fraud in any official investigation, proceeding, or action brought by a public prosecutor on behalf of the People of the State of California, if the attorney's services were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud [*Code Civ. Proc. § 2018.050*].

These provisions generally provide for conditional protection of an attorney's work product. That is, it is protected from discovery absent a showing of special circumstances supporting discovery [*see Code Civ. Proc. § 2018.030(b)*; *see also City of Long Beach v. Superior Court (1976) 64 Cal. App. 3d 65, 71, 134 Cal. Rptr. 468]* .

An exception is provided for an attorney's written impressions or legal research. These are absolutely protected from discovery [*see Code Civ. Proc. § 2018.030(a)*; *see also Williamson v. Superior Court (1978) 21 Cal. 3d 829, 834, 148 Cal. Rptr. 39, 582 P.2d 126]* .

For further discussion of conditional and absolute protections, see *§ 191.103*. For discussion of the claim of work product protection in the context of e-discovery, see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*, § 195A.21.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 191.101 Policy Considerations Underlying Work Product Protection

Work product protection under *Code Civ. Proc. § 2018.010 et seq.* is designed (1) to preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases; and (2) to prevent attorneys from taking undue advantage of their adversary's industry and efforts [*Code Civ. Proc. § 2018.020*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 191.102 Definition of Work Product

Code Civ. Proc. § 2018.010 et seq. provides no general definition of work product [*see* Reporter's Notes to Former *Code Civ. Proc. § 2018(b)* (work product not expressly defined because of conclusion that its meaning is still evolving under case law); *see also* discussion in *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.13[2]*].

Case law generally defines work product as including certain materials prepared by an attorney acting for his or her client in anticipation of litigation [*PSC Geothermal Services Co. v. Superior Court (1994) 25 Cal. App. 4th 1697, 1709-1710, 31 Cal. Rptr. 2d 213]* . For example, work product may include a list of nonexpert trial witnesses [*In re Jeanette H. (1990) 225 Cal. App. 3d 25, 34-37]* , or material of a derivative character such as diagrams prepared for trial, audit reports, appraisals, and other expert opinions developed as a result of the initiative of counsel in preparing for trial [*Williamson v. Superior Court (1978) 21 Cal. 3d 829, 834, 148 Cal. Rptr. 39, 582 P.2d 126* , citing *Mack v. Superior Court (1968) 259 Cal. App. 2d 7, 10, 66 Cal. Rptr. 280]* .

On the other hand, information regarding events provable at trial or the identity and location of physical evidence is not deemed to be work product simply because it has been transmitted to the attorney [*Long Beach v. Superior Court (1976) 64 Cal. App. 3d 65, 72, 134 Cal. Rptr. 468* , quoting from *Mack v. Superior Court (1968) 259 Cal. App. 2d 7, 10, 66 Cal. Rptr. 280]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 191.103 Discovery of Work Product

[1] General Rule of Conditional Protection

Subject to *Code Civ. Proc. § 2018.030(a)* (discussed in [3], *below*), the work product of an attorney is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice [*Code Civ. Proc. § 2018.030(b)*].

There is no crime-fraud exception that allows discovery of work product. However, when an attorney is suspected of knowingly participating in a crime or fraud, there is no work product protection under *Code Civ. Proc. § 2018.010 et seq.* in any official investigation by a law enforcement agency, proceeding, or action brought by a public prosecutor in the name of the People of the State of California, if the attorney's services were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud [*Code Civ. Proc. § 2018.050*]. There is no limitation, however, on an attorney's ability to request an in camera hearing as provided for in *People v. Superior Court (Laff) (2001) 25 Cal. 4th 703, 107 Cal. Rptr. 2d 323, 23 P. 3d 563* [*Code Civ. Proc. § 2018.060*; *see People v. Superior Court (Laff) (2001) 25 Cal. 4th 703, 709, 107 Cal. Rptr. 2d 323, 23 P. 3d 563* (superior court has an obligation to determine claims of privilege regarding materials seized from attorneys, whether or not attorneys are suspected of criminal conduct, and court properly may conduct a hearing to resolve these claims)].

In addition, absolute work product protection continues to protect the contents of a writing delivered to the client in confidence, and is not restricted to only those writings in the attorney's possession [*BP Alaska Exploration, Inc. v. Superior Court (1988) 199 Cal. App. 3d 1240, 1249-1251, 1253-1260, 245 Cal. Rptr. 682]* .

[2] Expert Consultants

Expert services rendered in an advisory capacity, that is, developed as a result of the initiative of counsel in preparing for trial, clearly constitute attorney work product that is subject to the conditional or qualified protection under *Code Civ. Proc. § 2018.030(b)* (discussed in [1], *above*) [*Williamson v. Superior Court (1978) 21 Cal. 3d 829, 834, 148 Cal. Rptr. 39, 582 P.2d 126* ; *Scotsman Mfg. Co. v. Superior Court (1966) 242 Cal. App. 2d 527, 531, 51 Cal. Rptr. 511]* .

Expert services that qualify the expert as a witness are, however, subject to discovery under *Code Civ. Proc. § 2034.010 et seq.* when they are severable from those services that are protected under *Code Civ. Proc. § 2018.010 et seq.* [*see National Steel Products Co. v. Superior Court (1985) 164 Cal. App. 3d 476, 488-492, 210 Cal. Rptr. 535]* .

Thus, under the work product doctrine, reports prepared by the expert as a consultant are protected if the expert is not designated as a witness [*Shadow Traffic Network v. Superior Court (1994) 24 Cal. App. 4th 1067, 1079, 29 Cal. Rptr. 2d 693]* . However, once it becomes reasonably certain that an expert will give a professional opinion as a witness on a material matter in dispute, the opinion becomes a factor in the cause, subject to evaluation by appropriate pretrial discovery [*Williamson v. Superior Court (1978) 21 Cal. 3d 829, 835, 148 Cal. Rptr. 39, 582 P.2d 126* , citing *Swartzman v. Superior Court (1964) 231 Cal. App. 2d 195, 203, 41 Cal. Rptr. 721* ; *see Sanders v. Superior Court (1973) 34 Cal. App. 3d 270, 279, 109 Cal. Rptr. 770* (discussing attorney-client privilege and work product protection)].

A party may withdraw a consultant-expert who has been named as a potential witness at any time prior to the expert's deposition [*County of Los Angeles v. Superior Court (1990) 222 Cal. App. 3d 647, 656, 271 Cal. Rptr. 698* (withdrawal does not require noticed motion)]. In that event, the work product protection is revived with respect to that expert's knowledge or opinion previously made discoverable because it was relevant to his or her expected testimony [*County of Los Angeles v. Superior Court (1990) 222 Cal. App. 3d 647, 655-658, 271 Cal. Rptr. 698* ; *see Williamson v. Superior Court (1978) 21 Cal. 3d 829, 835, 148 Cal. Rptr. 39, 582 P. 2d 126* (decided under prior law; dicta)]. Materials generated as a result of the expert's advisory services, protection of which was not withdrawn due to the expert's designation as a potential witness, remain protected work product [*see County of Los Angeles v. Superior Court (1990) 222 Cal. App. 3d 647, 655, 271 Cal. Rptr. 698]* .

Advisory services are those that are designed to assist the attorney in such matters as preparation of pleadings, the manner of presentation of proof, and cross examination of opposing expert witnesses; that is, matters that are often reflective of the mental processes of the attorney under whose direction the expert works. Services that qualify a person as an expert witness are those that contain findings and opinions of the expert that go to the establishment or denial of a principal fact in issue [*see National Steel Products Co. v. Superior Court (1985) 164 Cal. App. 3d 476, 488-492, 210 Cal. Rptr. 535]* .

Similarly, the designation of a party as an expert trial witness is not in itself an implied waiver of the party's attorney-client privilege. If the designation is withdrawn before the party discloses a significant part of a privileged communication, or before it is known with reasonable certainty that the party will actually testify as an expert, the privilege is secure. However, if the party produces privileged documents or testifies as an expert (such as by stating an opinion in a declaration or at a deposition), the privilege is waived [*Shooker v. Superior Court (2003) 111 Cal. App. 4th 923, 930, 4 Cal. Rptr. 3d 334* (party did not waive his attorney-client privilege by designating himself as expert witness, when, at deposition, he asserted attorney-client privilege and did nothing more than identify his charts and previously disclosed documents, and no confidential information was disclosed); *see Lohman v. Superior Court (1978) 81 Cal. App.3d 90, 95, 146 Cal. Rptr. 171* ("the intent to disclose does not operate as a waiver, waiver comes into play after a disclosure has been made"); *see also Tennenbaum v. Deloitte & Touche, 77 F.3d 337, 341 (9th Cir. (1996)* (in determining whether privilege has been waived, "triggering event is disclosure, not a promise to disclose")].

Code Civ. Proc. § 2034.010 et seq. governs the discovery of expert witnesses, providing for the exchange of names and expected testimony, as well as certain expert witnesses' discoverable reports and writings concerning proposed testimony and preparations to testify. For further discussion of *Code Civ. Proc. § 2034.010 et seq.*, see generally Ch. 198, *Discovery: Exchange of Expert Witness Information* .

[3] Attorney's Written Opinions and Legal Theories

Any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not

discoverable under any circumstances [*Code Civ. Proc. § 2018.030(a)*; *see Rico v. Mitsubishi Motors Corp. (2007) 42 Cal. 4th 807, 815, 68 Cal. Rptr. 3d 758, 171 P.3d 1092*]. Thus, the work product rule creates an absolute privilege for the attorney against disclosure of such writings, whereas there is only a qualified privilege against discovery of general work product [*see BP Alaska Exploration, Inc. v. Superior Court (1988) 199 Cal. App. 3d 1240, 1250, 245 Cal. Rptr. 682]* .

Apparently, Evidence Code exceptions to the attorney-client rule are not applicable to documents protected by the absolute work product rule [*see, e.g., BP Alaska Exploration, Inc. v. Superior Court (1988) 199 Cal. App. 3d 1240, 1249-1251, 245 Cal. Rptr. 682* (*Evid. Code § 956* crime-fraud exception to attorney-client privilege is not applicable to absolute work product); *but see Code Civ. Proc. § 2018.050* (eliminating work product protection when attorney is suspected of knowingly participating in crime or fraud in any official criminal investigation, proceeding, or action brought by a public prosecutor, if attorney's services were sought or obtained to enable or aid anyone to commit or plan to commit a crime or fraud)].

Absolute work product protection continues concerning the contents of a writing after it is delivered to a client in confidence; the protection is not restricted to only those writings in the attorney's possession [*BP Alaska Exploration, Inc. v. Superior Court (1988) 199 Cal. App. 3d 1240, 1253-1260, 245 Cal. Rptr. 682]* .

An attorney who inadvertently receives work product has the ethical duty not to examine the material any more closely than is necessary to ascertain that it is privileged. Once it appears that the document is privileged, the attorney should immediately notify opposing counsel and try to resolve the situation, by agreement or with the court's guidance [*see Rico v. Mitsubishi Motors Corp. (2007) 42 Cal. 4th 807, 817, 68 Cal. Rptr. 3d 758, 171 P.3d 1092* (finding disqualification proper when plaintiffs' attorney, who inadvertently obtained privileged work product, used it during deposition to impeach defense expert); *see also § 191.15[7][b]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 191.104 State Bar Disciplinary Investigations

The State Bar may discover the work product of an attorney against whom disciplinary charges are pending when it is relevant to issues of breach of duty by the attorney. This discoverability is subject to applicable client approval and to a protective order, when requested and for good cause, to ensure the confidentiality of work product except for its use by the State Bar in disciplinary investigations and its consideration under seal in State Bar Court proceedings. For these purposes, whenever a client has initiated a complaint against an attorney, the requisite client approval is deemed to have been granted [*Code Civ. Proc. § 2018.070(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 191.105 Action Involving Client

In an action between an attorney and a client or former client, no work product protection under *Code Civ. Proc. § 2018.010 et seq.* exists if the work product is relevant to an issue of breach by the attorney of a duty to his or her client arising out of the attorney-client relationship [*Code Civ. Proc. § 2018.080*].

For purposes of *Code Civ. Proc. § 2018.010 et seq.*, "client" means a person who, directly or through an authorized representative, consults an attorney for the purpose of retaining the attorney or securing legal service or advice from that attorney in his or her professional capacity. Client includes an incompetent (1) who himself or herself so consults the attorney or (2) whose guardian or conservator so consults the attorney on behalf of the incompetent [*Code Civ. Proc. § 2018.010*; *Evid. Code § 951*].

Legal Topics:

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§ 191.106 Standing to Claim Work Product Protection

Work product protection, unlike the attorney-client privilege, protects the attorney in preparing a case for trial by protecting the fruits of the attorney's labor from discovery [*Lohman v. Superior Court (1978) 81 Cal. App. 3d 90, 100-101, 146 Cal. Rptr. 171* (interpreting former *Code Civ. Proc. § 2016*; *now see Code Civ. Proc. § 2018.020*, discussed in *§ 191.101*)]. Therefore, statutory work product protection has been interpreted to provide a type of "privilege" that is held by the attorney and, accordingly, may be claimed or waived by the attorney [*Lohman v. Superior Court (1978) 81 Cal. App. 3d 90, 100, 101, 146 Cal. Rptr. 171* (interpreting former *Code Civ. Proc. § 2016*; *now see Code Civ. Proc. § 2018.010 et seq.*); *see also American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 594, 113 Cal. Rptr. 561]* .

A litigant acting *in propria persona* may assert the statutory work product protection [*Dowden v. Superior Court (1999) 73 Cal. App. 4th 126, 136, 86 Cal. Rptr. 2d 180]* . The court of appeal that reached this conclusion reasoned that the use of the word "attorney" in former *Code Civ. Proc. § 2018* (*now see Code Civ. Proc. § 2018.010 et seq.*) is ambiguous: The statute does not define the term, and it has been applied to other statutes without distinguishing between attorneys and unrepresented litigants [*Dowden v. Superior Court (1999) 73 Cal. App. 4th 126, 129-130, 86 Cal. Rptr. 2d 180]* . Further, the stated purpose of and the underlying reasons for *Code Civ. Proc. § 2018.010 et seq.* emphasize the need to limit discovery to promote diligence in preparing one's own case, rather than depending on an adversary's efforts. This policy is important not only for attorneys representing clients, but also for litigants acting *in propria persona* [*Dowden v. Superior Court (1999) 73 Cal. App. 4th 126, 133, 86 Cal. Rptr. 2d 180]* . Finally, allowing litigants appearing *in propria persona* to assert the privilege furthers the statute's intended purpose of promoting the adversary system [*Dowden v. Superior Court (1999) 73 Cal. App. 4th 126, 134, 86 Cal. Rptr. 2d 180]* .

There is also case authority holding that the protection was created for the client as well as for the attorney [*see Mack v. Superior Court (1968) 259 Cal. App. 2d 7, 10, 66 Cal. Rptr. 280]* . The apparently contradictory holdings were reconciled by the view that although work product protection belongs to the attorney, it may be claimed by the client on behalf of the attorney. Consequently, in the attorney's absence, the client has standing to assert work product protection on behalf of the attorney, who is the only holder of the privilege. If the attorney waives the privilege, however, a former client may not object [*Fellows v. Superior Court (1980) 108 Cal. App. 3d 55, 64-65, 166 Cal. Rptr. 274]* .

Legal Topics:

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[Reserved]

§§ 191.107[Reserved]

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§ 191.120 Right to Privacy

[1] Nonstatutory Privilege Based on Constitutional Guarantee of Privacy

The right to privacy guaranteed by *Cal. Const., art. I, § 1*, may be invoked by a litigant to justify refusing to answer questions that unreasonably intrude on that right [*Vinson v. Superior Court (1987) 43 Cal. 3d 833, 239 Cal. Rptr. 292, 740 P.2d 404* ; *Boler v. Superior Court (1987) 201 Cal. App. 3d 467, 473, 247 Cal. Rptr. 185* ; *Rider v. Superior Court (1988) 199 Cal. App. 3d 278, 282-287, 244 Cal. Rptr. 770* ; *Kahn v. Superior Court (1987) 188 Cal. App. 3d 752, 769-770, 233 Cal. Rptr. 662]* .

As a general rule, the privilege based on privacy is conditional. Answers to questions that fall in an established zone of privacy, such as associational privacy, personal financial affairs, medical history, personnel files, or sexual relations, may not be required absent a compelling state interest [*Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 712, 21 Cal. Rptr. 2d 200, 854 P.2d 1117]* . For discussion of the balancing of state interests against the right to privacy, see [3], *below*.

The privilege based on the right to privacy is the chief example of the exception to general rule against nonstatutory privileges, that is, of a privilege necessarily implied from a constitutional provision [*see* *Britt v. Superior Court (1978) 20 Cal. 3d 844, 852-856, 143 Cal. Rptr. 695, 574 P.2d 766* ; *see* discussion in *§ 191.12[2]*; *see also* discussion of qualified privilege based on constitutional guarantee of freedom of the press in § 199.122].

[2] Examples of Matters Protected From Disclosure

Courts have upheld nondisclosure based on the right to privacy in instances including the following:

- Information the disclosure of which would compromise an individual's right to associational privacy [*see* *Britt v. Superior Court (1978) 20 Cal. 3d 844, 859-862, 864-865, 574 P.2d 766* (associational privacy)].

- Personal financial affairs [*see* *Valley Bank of Nevada v. Superior Court (1975) 15 Cal. 3d 652,*

656-658, 125 Cal. Rptr. 553, 542 P.2d 977 ; *Fortunato v. Superior Court (2003) 114 Cal. App 4th 475, 480-482, 8 Cal. Rptr. 3d 82* (bank customer has reasonable expectation of privacy in confidential information submitted with loan application, and when waiver of confidentiality of tax returns is argued, court should conduct in camera inspection to balance need for discovery against interests in privacy)].

- Medical records [*Heda v. Superior Court (1990) 225 Cal. App. 3d 525, 529-530, 275 Cal. Rptr. 136]* .

- HIV-positive status under appropriate circumstances when patient has reasonable expectation of privacy [*see* *Urbaniak v. Newton (1991) 226 Cal. App. 3d 1128, 1135-1136, 1140-1141, 277 Cal. Rptr. 354*)].

- Disciplinary records of nonparty employees, when interrogatories listing disciplinary acts by type and race would accomplish plaintiff's objective [*Perez v. County of Santa Clara (2003) 111 Cal. App. 4th 671, 678, 3 Cal. Rptr. 3d 867]* .

[3] Balancing of Privacy Interest With State Interest in Disclosure

As noted in [1], *above*, matters that fall within an established zone of privacy are protected from disclosure absent a compelling state interest. The state's compelling interest must be carefully balanced against the fundamental right of privacy [*Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 712, 21 Cal. Rptr. 2d 200, 854 P.2d 1117* ; *Lantz v. Superior Court (1994) 28 Cal. App. 4th 1839, 1857, 34 Cal. Rptr. 2d 358* (case remanded because trial court determined merely that medical records were relevant, and failed to balance privacy interests against state's needs for records)].

The state's interest in facilitating ascertainment of the truth in connection with legal proceedings is a compelling state interest [*Save Open Space Santa Monica Mountains v. Superior Court (2001) 84 Cal. App. 4th 234, 255, 100 Cal. Rptr. 2d 725* ; *Fults v. Superior Court (1979) 88 Cal. App. 3d 899, 904, 152 Cal. Rptr. 210]* . However, even though a compelling state interest is present, an adequate foundation must be laid from which it can be inferred that the inquiry will likely be productive, not merely relevant, and any compelled disclosure must be precise and narrowly drawn to ensure maximum protection of the constitutional right [*Save Open Space Santa Monica Mountains v. Superior Court (2001) 84 Cal. App. 4th 234, 252-253, 100 Cal. Rptr. 2d 725* ; *Fults v. Superior Court (1979) 88 Cal. App. 3d 899, 904-905, 152 Cal. Rptr. 210]* .

Examples involving this balancing of privacy interests with the state's interest in disclosure of relevant evidence include the following:

- In a marital dissolution action brought by father against mother to determine whether the father should be granted joint custody over the couple's 4-year-old son, the court rejected the father's claim that his medical records were protected by his constitutional right to privacy. That right is not absolute and, in this case, the father's privacy interests were outweighed by the state's compelling interest in protecting the child's best interests [*Manela v. Superior Court (2009) 177 Cal. App. 4th 1139, 1150, 99 Cal. Rptr. 3d 736*].

- In a case addressing whether an opt-out notice was sufficient to protect the privacy rights of potential class members (customers who had complained to seller that its DVD players were defective), the Supreme Court held that as a matter of policy, requiring an affirmative waiver from persons whose personal identifying information is sought by others could hamper litigation designed to remedy social problems, including consumer rights litigation, and reduce the effectiveness of class actions in securing consumer relief. It seemed unlikely that these customers, who already had voluntarily disclosed their identifying information to the seller in hopes of gaining some relief, would have a reasonable expectation

that their information would be kept private and withheld from a class action plaintiff, unless they expressly consented to such disclosure. Moreover, the proposed disclosure was not particularly sensitive, because it did not involve disclosing personal medical history or current medical condition or details about personal finances or other financial information. Thus, the trial court could reasonably conclude that, on balance, the named plaintiff's interest in obtaining the customers' contact information outweighed the possibility that some customers might fail to receive their notice and thus lose the opportunity to object to disclosure [*Pioneer Electronics (USA), Inc. v. Superior Court (2007) 40 Cal. 4th 360, 372-374, 53 Cal. Rptr. 3d 513, 150 P.3d 198* ; *see Belaire-West Landscape, Inc. v. Superior Court (2007) 149 Cal. App. 4th 554, 561-562, 57 Cal. Rptr. 3d 197* (applying *Pioneer* analysis to conclude that opt-out notice requiring potential class members to object in writing in order to prevent their names and contact information from being disclosed to real party in interest employees in putative class action lawsuit alleging wage and hour violations was sufficient to protect potential class members' privacy rights); *Puerto v. Superior Court (2008) 158 Cal. App. 4th 1242, 1259, 70 Cal. Rptr. 3d 701* (applying *Pioneer* and *Belaire* to conclude that opt-in notice, requiring class action petitioners to obtain non-party potential witnesses' affirmative consent to disclosure of their addresses and phone numbers, exceeded protections necessary to safeguard witnesses' right to privacy in their contact information)].

- In a writ proceeding addressing the permissibility of discovery aimed at uncovering petitioner husband's HIV status, a divided Supreme Court allowed discovery, with specified limitations, of evidence that the husband knew or should have known that he had HIV, because this issue was fundamental to the causes of action for intentional and negligent infliction of emotional distress, fraud, and negligence. After balancing the wife's right to discover relevant evidence against the husband's right to privacy, the Court concluded that the wife was entitled to discovery concerning husband's sexual history and HIV status. The wife had "amply" established good cause for disclosure of the husband's medical records concerning HIV and AIDS. Discovery might reasonably lead to evidence of husband's awareness of his HIV status. Discovery would also serve "the historically important state interest of facilitating the ascertainment of truth in connection with legal proceedings," as well as the state's compelling interest in preventing the spread of AIDS. While the wife's interrogatories and requests for admission sought information that fell within the zone of the husband's right to sexual privacy, he had a diminished privacy interest in his HIV status, since he had admitted his status in court filings and informally. Moreover, the husband also alleged in the complaint that the wife infected him. By thus putting his own medical condition at issue, the husband had a "substantially lowered" expectation of privacy. The Court agreed that the court of appeal had appropriately limited, as overly broad and speculative, the wife's discovery of the identities of the husband's previous sexual partners and admissions concerning his "lifestyle." However, the Court further narrowed discovery in light of husband's negative HIV test on August 17, 2000, which restricted the window period of possible infection to the six months preceding the negative test. Accordingly, the Court reversed the court of appeal's order compelling responses to plaintiff's discovery requests to the extent they sought information about the husband's sexual history outside the six-month time frame. On remand, however, the wife could overcome this temporal limitation by offering some basis to question the accuracy or reliability of the husband's negative HIV test [*John B. v. Superior Court (2006) 38 Cal. 4th 1177, 1182, 45 Cal. Rptr. 3d 316, 137 P.3d 153]* .

- In employment law cases, fundamental policy considerations tip the balance of opposing interests toward permitting access to relevant information necessary to pursue the litigation. For example, in a case alleging wage and hour violations, an order restricting the disclosure of potential witnesses' contact information through the use of an opt-in letter exceeded the protections necessary to safeguard the legitimate privacy interests in the addresses and telephone numbers of the witnesses, and as such was an abuse of discretion [*Puerto v. Superior Court (2008) 158 Cal. App. 4th 1242, 1258, 70 Cal. Rptr. 3d 701]* . In a class action lawsuit alleging improper reclassification of class members from employees to

independent contractors, a trial court committed reversible error by denying a motion to compel disclosure of independent contractor names and addresses using an opt-out procedure in [*Lee v. Dynamex, Inc. (2008) 166 Cal. App. 4th 1325, 1338, 83 Cal. Rptr. 3d 241* (discovery of potential class members' contact information should not be restricted unless trial court can identify privacy concerns or potential discovery abuses which outweigh plaintiff's right to discovery)]. And in a pending class action litigation to enforce employees' statutory wage and overtime rights, the violation of the employees' right to privacy did not outweigh plaintiffs' right to discover the class members' names, addresses, and telephone numbers, using an opt-out notice [*Crab Addison, Inc. v. Superior Court (2008) 169 Cal. App. 4th 958, 974-975, 87 Cal. Rptr. 3d 400]* . Moreover, the fact that employees had signed forms indicating they did not want their contact information disclosed did not compel a different result. Public policy concerns weighed against enforcing a release form that had the effect of waiving an employee's right to notice of a pending class action lawsuit concerning the employer's alleged violations of overtime and wage statutes. In this case, the employees who had indicated that they did not want their contact information disclosed were unaware of the litigation [*Crab Addison, Inc. v. Superior Court (2008) 169 Cal. App. 4th 958, 974, 87 Cal. Rptr. 3d 400]* .

- In deciding a motion for attorneys' fees and expenses under *Code Civ. Proc. § 1021.5*, the court of appeal balanced real parties' interest in discovering the donors to petitioner nonprofit organization's litigation fund, which implicated the right of privacy and a derivative right of confidentiality, with the interests compelling disclosure. Real parties in this case had a legitimate interest in ensuring that attorney fees were not awarded when the statutory requirements set forth in *Code Civ. Proc. § 1021.5* had not been met. A trial court ruling on a motion for attorney fees could not realistically assess the interests of a fee applicant if the applicant (and thus the nature and extent of the applicant's interest) could be hidden behind a public interest organization. Moreover, because attorney fee awards paid by the County were necessarily paid from taxpayer funds, county taxpayers had an interest in limiting unwarranted attorney fee awards. The state (and thus all taxpayers) had an interest in ensuring that charitable contributions are not shams--and that the donated funds truly became the property of the charity that received them. Equally as important as these interests was the state's compelling interest, as reflected in its broad discovery statutes, in facilitating the ascertainment of truth in connection with legal proceedings. The court concluded that real parties demonstrated a need for the discovery that would justify an invasion of the privacy interests involved, since the evidence sought by real parties was crucial to the court's thorough analysis of petitioner's attorney fee request [*Save Open Space Santa Monica Mountains v. Superior Court (2001) 84 Cal. App. 4th 234, 252-254, 100 Cal. Rptr. 2d 725]* .

- In a writ proceeding, an abortion clinic challenged a superior court discovery ruling that required it to disclose, pursuant to a protective order, to active participants in the anti-abortion movement, the names, residential addresses, and telephone numbers of staff and volunteers with knowledge relevant to the litigation. The court of appeal held that disclosure violated the non-parties' rights to freedom of association and their rights to residential privacy, and concluded that their privacy interests were strong because disclosure would threaten their peace and safety. In contrast, the state's interest in promoting truth in litigation was weak. Real parties failed to demonstrate any real need for the discovery that justified this intrusive order. Precluding discovery of the information furthered the state's interest in preserving residential privacy and advanced the state's strong interest in protecting individuals who provide lawful services in connection withpregnancy [*Planned Parenthood Golden Gate v. Superior Court (2001) 83 Cal. App. 4th 347, 367, 99 Cal. Rptr. 2d 627]* .

- In an action in which plaintiff alleged that he was molested while a member of a boy scout troop, plaintiff sought discovery of certain confidential records maintained by the Boy Scouts, which identified individuals unrelated to the action who had been determined to be "unfit" to serve as scouting volunteers and documenting this determination of ineligibility. The trial court appointed a referee, who conducted

an *in camera* review of the requested records and determined that they were subject to protection from disclosure by the right of privacy. The court of appeal affirmed the trial court's protective order issued on the basis of this determination, holding that plaintiff had not shown that the files were relevant to any disputed issue in the litigation, nor that there was a compelling need for disclosure of this information that would outweigh the right of privacy of the many individuals who were not parties to the lawsuit [*Juarez v. Boy Scouts of America, Inc. (2000) 81 Cal. App. 4th 377, 384-385, 391-392, 97 Cal. Rptr. 2d 12]* .

- In an action against a sperm bank on behalf of child born with a congenital birth defect, the court of appeal considered the privacy interest of the anonymous sperm donor in his medical history, and that of the state in evidence directly relevant to the action, and ordered the donor's deposition to proceed, subject to a protective order to be fashioned by the trial court that would protect the confidentiality of the identity of the donor and that of his family [*Johnson v. Superior Court (2000) 80 Cal. App. 4th 1050, 1067-1072, 95 Cal. Rptr. 2d 864* ; *see also Allison v. Workers' Comp. Appeals Bd. (1999) 72 Cal. App. 4th 654, 661, 84 Cal. Rptr. 2d 915* (defendant seeking disclosure of plaintiff's general past medical history required on remand to frame narrower, more precisely tailored discovery)].

[4] Disclosure Required by Compelling State Interest May Be Limited by Protective Order or Similar Measures

One method of ensuring that compelled disclosure is narrowly drawn is to permit those individuals whose privacy rights may be threatened to seek a protective order prior to disclosure. For example, in an action for injunctive relief under the Unruh Civil Rights Act [*Civ. Code § 51*] against a club based on its allegedly racially discriminatory membership practices, the prosecuting city asked the club for a list of the names and business addresses of those applicants who had been recently rejected for membership. The club resisted, citing the applicants' right of associational privacy. The court weighed those rights against the important, compelling interest the state has in upholding fundamental societal principles, such as nondiscrimination. It held that disclosure was appropriate, but that prior to that disclosure, the applicants should be informed that their identities were sought, and advised that they should petition the court for protective orders if they sought anonymity. The names of those applicants who obtained protective orders would be removed from the list ultimately furnished by the club to the city [*Olympic Club v. Superior Court (1991) 229 Cal. App. 3d 358, 364, 282 Cal. Rptr. 1* ; *see Harris v. Superior Court (1992) 3 Cal. App. 4th 661, 668, 4 Cal. Rptr. 2d 564* (person living with child-support-paying parent is presumptively entitled to protective order limiting disclosure of financial information in rare circumstances in which this information is at all discoverable)]. For discussion of *Civ. Code § 51,* see Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

[5] Waiver of Privacy Right

Privacy rights are subject to waiver in much the same way as are privileges, except that waivers of constitutional rights are not lightly found. The court may consider the standards of *Evid. Code § 912* (waiver of privileges) in deciding whether an individual has waived the right to privacy by disclosure [*see Heda v. Superior Court (1990) 225 Cal. App. 3d 525, 530, 275 Cal. Rptr. 136* ; *see also Urbaniak v. Newton (1991) 226 Cal. App. 3d 1128, 1135-1136, 1140-1141, 277 Cal. Rptr. 354* (patient's HIV-positive status protected if status only disclosed to ensure that proper precautions were taken to sterilize medical equipment)].

The scope of any waiver of a privacy right must be narrowly rather than expansively construed so that plaintiffs are not unduly deterred from instituting lawsuits because of fear of exposure of their private associational affiliations and activities. Any implied waiver of a party's constitutional rights encompasses only discovery directly relevant to the plaintiff's claim and essential to the fair resolution of the lawsuit. For example, the mere initiation of a sexual harassment suit, even with an extreme mental and emotional damage claim, does not waive all the plaintiff's privacy interests, but it may implicitly bring about a partial waiver of his or her constitutional right of associational privacy [

Vinson v. Superior Court (1987) 43 Cal. 3d 833, 841-842, 239 Cal. Rptr. 292, 740 P.2d 404] . Because sexual misconduct civil cases are governed by *Code Civ. Proc. § 2017.220*, which requires a showing of good cause prior to discovery of the plaintiff's sexual conduct with individuals other than the alleged perpetrator, a separate weighing of privacy interests against discovery in determining the scope of a waiver is not generally necessary. It should normally suffice for the court, in ruling on whether good cause exists for probing into the intimate life of a victim of sexual misconduct, to evaluate the showing of good cause in light of the legislative purpose in enacting *Code Civ. Proc. § 2017.220* and the plaintiff's constitutional right to privacy [*see Vinson v. Superior Court (1987) 43 Cal. 3d 833, 844, 239 Cal. Rptr. 292, 740 P.2d 404* (decided under prior law)].

Similarly, the filing of a personal injury lawsuit, even with a claim for pain and suffering, does not waive the plaintiff's privacy interests in all of her medical records. For example, the privacy interests in records of a personal injury plaintiff's psychotherapy were not waived when the plaintiff limited the damages claimed for pain and suffering to those resulting from injuries sustained in the automobile accident generating the lawsuit [*Davis v. Superior Court (1992) 7 Cal. App. 4th 1008, 1013, 9 Cal. Rptr. 2d 331* (records of psychotherapy pertained to substance abuse); *see also Allison v. Workers Comp. Appeals Bd. (1999) 72 Cal. App. 4th 654, 661, 84 Cal. Rptr. 2d 915* (in action by plaintiff for injury to wrist, defendant, seeking disclosure of plaintiff's general past medical history, required on remand to frame discovery requests more narrowly)]. The mere speculation by a defendant that the records requested might contain relevant material is not sufficient to overcome the privacy protection [*Davis v. Superior Court (1992) 7 Cal. App. 4th 1008, 1017-1018, 9 Cal. Rptr. 2d 331]* .

However, when a party to litigation affirmatively places his or her medical condition in controversy, that party does have a "substantially lowered" expectation of privacy in medical records relating to that condition [*John B. v. SuperiorCourt (2006) 38 Cal. 4th 1177, 1199, 45 Cal. Rptr. 3d 316, 137 P.3d 153* . Thus, for example, a husband waived his privacy interests in information concerning his HIV status and in information contained in his medical records within the six-month timeframe in which he could have been infected, in a suit brought by his wife for infecting her with HIV, by relying on what he claimed were negative test results in support of a summary judgment motion and by alleging in the complaint that his former wife infected him [*John B. v. Superior Court (2006) 38 Cal. 4th 1177, 1197-1198, 45 Cal. Rptr. 3d 316, 137 P.3d 153]* . The husband could not affirmatively rely on his HIV test results, while at the same time prevent discovery that could refute the truthfulness of his contentions [*John B. v. Superior Court (2006) 38 Cal. 4th 1177, 1200-1201, 45 Cal. Rptr. 3d 316, 137 P.3d 153]* .

A patient did not waive his right to privacy, in a suit to enforce an administrative subpoena by the California Medical Board against the patient's physician, by showing park rangers the letter as proof that he was a qualified patient entitled to protection from prosecution for marijuana use [*Bearman v. Superior Court (2004) 117 Cal. App. 4th 463, 473-474, 11 Cal. Rptr. 3d 644, 652-653]* . Moreover, the Medical Board failed to produce evidence sufficient to support a finding of good cause to invade the patient's right to privacy in his medical records. Rather, the accusations that the physician indiscriminately recommended the medicinal use of marijuana to this patient were unsupported speculations and conclusory statements drawn solely from the physician's letter and the simple fact that he recommended using marijuana [*Bearman v. Superior Court (2004) 117 Cal. App. 4th 463, 472, 11 Cal. Rptr. 3d 644, 650]* .

When an actress's suit for various employment related claims based on pregnancy discrimination included a claim for damages for mental and emotional anxiety and distress, the court of appeal likewise held that she had waived only some of her privacy rights. She was found to have waived her right of privacy concerning her psychological condition, but only as it related to termination of the employment contract. Before the defendants could obtain information regarding any emotional distress from her marital relationship, they had to identify the specific emotional injuries allegedly the result of the contract termination and demonstrate a nexus between damages from termination and those that might arise out of the marital relationship. Similarly, questions regarding the actress's pregnancy fell directly within her right to privacy, and the defendants had to demonstrate a compelling public interest for the information for it to be discoverable [*Tylo v. Superior Court (1997) 55 Cal. App. 4th 1379, 1386-1390, 64 Cal. Rptr. 2d 731]* .

[6] Assertion of Third Person's Privacy Rights

[a] Availability and Balancing Conflicting Interests

Litigants who are the recipients of discovery demands affecting the privacy rights of third persons not present may assert the privacy rights of those persons [*Denari v. Superior Court (1989) 215 Cal. App. 3d 1488, 1498-1499, 264 Cal. Rptr. 261* (county properly asserted privacy rights of arrestees when civil rights plaintiff sought to discover their names, addresses, and telephone numbers); *see Valley Bank of Nevada v. Superior Court (1975) 15 Cal. 3d 652, 125 Cal. Rptr. 553, 542 P.2d 977* (when customer sued bank and sought financial records of other customers, bank properly asserted privacy rights of its other customers)].

A court has a duty to reconcile the conflicting interests of litigants in obtaining necessary discovery and of third parties in maintaining privacy. In evaluating claims for the protection of third parties, the court is vested with the same discretion that it generally exercises in passing on other confidentiality claims. The court must consider the following factors [*Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 712, 21 Cal. Rptr. 2d 200, 854 P.2d 1117* ; *see Tien v. Superior Court (2006) 139 Cal. App. 4th 528, 540-541, 43 Cal. Rptr. 3d 121* (privacy rights of putative class members who contacted employees' counsel outweighed employer's need to discover their identities, citing Hooser); Hooser v. Superior Court (2001) 84 Cal. App. 4th997, 1004, *101 Cal. Rptr. 2d 341* (citing *Schnabel*); *Sehlmeyer v. Department of General Services (1993) 17 Cal. App. 4th 1072, 1081, 21 Cal. Rptr. 2d 840* (same factors applied in administrative proceedings)]:

- The purpose of the information sought.
- The effect that disclosure will have on the parties and on the trial.
- The nature of the objections urged by the party resisting disclosure.
- The court's ability to make an alternative order that may grant partial disclosure, disclosure in another form, or disclosure only in the event that the party seeking the information undertakes certain specified burdens that appear just under the circumstances.

For example, in a defamation action by a hospital against a physician and an organization whose members were anonymous, the hospital served a deposition subpoena on a local newspaper which had published paid advertisements that were critical of the hospital, seeking disclosure of the authors. The newspaper, asserting the associational privacy rights of the anonymous authors of the "advertorials," sought to quash the subpoena. Applying the balancing test, the court of appeal noted that the "advertorials" involved core political speech. One admitted purpose of the hospital in seeking the names was to add potential new defamation claims against additional defendants. The court found this to be a classic *first amendment* example of why the speakers may have chosen anonymity in the first place: to avoid being swept into litigation purely out of spite for speaking out on hotly contested issues. The court deemed the impact of the proposed discovery on protected constitutional rights to be severe.

The hospital argued that the authors of the advertisements were the same as those who authored the defamatory statements alleged in hospital's complaint, due to thematic and stylistic similarities between the two sets of materials. The court concluded that this conjecture was not enough to overcome the qualified privilege of associational privacy, and the relationship between the advertisements and the defamatory statements were too attenuated to justify shutting off political discourse on an important public issue [*Rancho Publications v. Superior Court (1999) 68 Cal. App. 4th 1538, 1546-1551, 81 Cal. Rptr. 2d 274]* .

In another case, a consolidated class action suit by television writers asserting an industry-wide pattern and practice of age discrimination, the writers served subpoenas on third parties, seeking disclosure of their personal

information--beyond contact information--from which the writers could prepare a statistical analysis to support their claims of age discrimination. Approximately 7,700 individuals filed objections to the disclosure on privacy grounds. The writers moved to overrule the objections, but the trial court sustained the objections in their entirety. The court of appeal issued a writ of mandate directing the trial court to vacate its orders and to enter a new and different order granting the writers access to the requested information. The court concluded that the trial court abused its discretion when it sustained all objections to the disclosure of the requested information on privacy grounds. The trial court used a "broad brush to deny the writers access to *all* data about the objectors out of hand," without considering whether "a more nuanced approach" to the different categories of data would satisfy the balance between privacy interests and the litigants' need for discovery [*Alch v. Superior Court (2008) 165 Cal. App. 4th 1412, 1421-1422, 82 Cal. Rptr. 3d 470*]. The writers could not prove their disparate impact claims without access to the directly relevant evidence from which they could perform a statistical analysis. The trial court erred in its purported balancing of the objectors' privacy rights and the countervailing interests of the litigants and the state, erred in failing to analyze the types of information requested, failing to consider the state's interest in preventing discrimination, and erroneously concluding the writers could proceed with a statistical analysis without information from the objectors [*Alch v. Superior Court (2008) 165 Cal. App. 4th 1412, 1428-1438, 82 Cal. Rptr. 3d 470*].

The court should impose partial limitations rather than an outright denial of discovery when it is possible to do so. For example, the court may conduct an *in camera* hearing to further accommodate the conflicting interests [*Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 712, 21 Cal. Rptr. 2d 200, 854 P.2d 1117* ; *see, e.g.,* *Alch v. Superior Court (2008) 165 Cal. App. 4th 1412, 1422, 82 Cal. Rptr. 3d 470* (trial court erred, in consolidated class action by petitioner television writers asserting industry-wide pattern and practice of age discrimination, in denying access to all requested information from third party objectors on privacy grounds, without considering whether "a more nuanced approach" to different categories of data would satisfy balance between privacy interests and litigants' need for discovery); *Save Open Space Santa Monica Mountains v. Superior Court (2001) 84 Cal. App. 4th 234, 252-254, 100 Cal. Rptr. 2d 725* (in motion for attorneys' fees under private attorney general doctrine, public interest organization would be required to provide, in increments and *in camera*, information about amounts donated to its litigation fund and, if needed, names of donors)].

A judge also may consider making an alternative order granting partial discovery, disclosure in another form, or disclosure only in the event theparty seeking the information undertakes certain specified burdens that appear just under the circumstances [*Sehlmeyer v. Department of General Services (1993) 17 Cal. App. 4th 1072, 1081, 21 Cal. Rptr. 2d 840* ; *see, e.g.,* *Perez v. County of Santa Clara (2003) 111 Cal. App. 4th 671, 678, 3 Cal. Rptr. 3d 867* (in employment discrimination case, disciplinary records of nonparty employees were protected by their privacy rights, when interrogatories listing disciplinary acts by type and race would accomplish plaintiff's objective); *Planned Parenthood Golden Gate v. Superior Court (2001) 83 Cal. App. 4th 347, 350, 358-359, 367, 99 Cal. Rptr. 2d 627* (disclosure of nonparty identity denied in favor of alternative procedure that would party access to potential nonparty witnesses without invading their privacy rights); *Hooser v. Superior Court (2001) 84 Cal. App. 4th 997, 1007-1009, 101 Cal. Rptr. 2d 341* (identity of nonparty clients not disclosed in favor of alternative means of obtaining information needed from judgment debtor attorney)].

To the extent the third party's records come within a statutory privilege, additional considerations must be balanced, for example, the existence of the privilege and questions of waiver [*Sehlmeyer v. Department of General Services (1993) 17 Cal. App. 4th 1072, 1081, 21 Cal. Rptr. 2d 840]* .

[b] Dissolution of Marriage Proceedings

In a marriage dissolution proceeding, when one spouse seeks discovery from a third party, the court must balance the spouse's need for discovery against the privacy interests of the third party. In weighing the spouse's need, the court should consider how the requested information would help resolve the issues that remain between the spouses, any relationship between either spouse and the third party, the information that the other spouse or the third party has

already provided or agreed to provide, and any specific reasons to distrust the adequacy or reliability of the information already obtained or offered. In weighing the privacy interests of the third party, the court should consider the nature of the information sought, its inherent intrusiveness, and any specific showing of a need for privacy, including any specific harm that disclosure of the information might cause [*Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 714, 21 Cal. Rptr. 2d 200, 854 P.2d 1117]* .

On request, the court should review the information in camera before production to assess its value to the requesting spouse and the harm disclosure might cause to the third party. The court should carefully tailor any discovery order to protect the interests of the requesting spouse in obtaining a fair resolution of the issues, while not unnecessarily invading the third party's privacy. The court should also consider appropriate protective orders on request [*Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 714, 21 Cal. Rptr. 2d 200, 854 P.2d 1117]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawSubstantive Due ProcessPrivacyGeneral OverviewConstitutional LawSubstantive Due ProcessScope of ProtectionHealthcare LawTreatmentEnd-of-Life DecisionsAbortionRight to Privacy

California Forms of Pleading and Practice--Annotated

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PART II. LEGAL BACKGROUND
H. Other Protections Against Disclosure

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§ 191.121 Statutory Protections Relating to Subpoenaed Records Containing Personal Information

[1] Consumer Records

The privacy interests that individuals or certain entities have in records containing private information about them, which are maintained by third-party professionals or businesses with whom they have had business transactions or from whom they have received services, are protected to some extent by statutory safeguards that apply when such records are the subject of a subpoena duces tecum.

Thus, *Code Civ. Proc. § 1985.3* contains certain protections for consumers (as defined in *Code Civ. Proc. § 1985.3(a)(2)*) when their personal records are the subject of a subpoena duces tecum, including a deposition subpoena under *Code Civ. Proc. § 2020.020*.

Personal records are books, documents, other writings, or electronic data maintained by any witness that is a physician, dentist, ophthalmologist, optometrist, chiropractor, physical therapist, acupuncturist, podiatrist, veterinarian, veterinary hospital, veterinary clinic, pharmacist, pharmacy, hospital, medical center, clinic, radiology or MRI center, clinical or diagnostic laboratory, state or national bank, state or federal association as defined under *Fin. Code § 5102*, state or federal credit union, trust company, anyone authorized by the state to make or arrange loans that are secured by real property, security brokerage firm, insurance company, underwritten title company, title insurance company, escrow agent (either licensed under *Fin. Code § 17000 et seq.* or exempt from licensing), attorney, accountant, institution of the Farm Credit System as specified in *12 U.S.C. § 2002*, telephone corporation that is a public utility as defined in *Pub. Util. Code § 216*, psychotherapist, as defined in *Evid. Code § 1010*, or a private or public preschool, elementary school, secondary school, or post secondary school as described in *Educ. Code § 76244* [*see Code Civ. Proc. § 1985.3(a)(1)*].

The protections set out in *Code Civ. Proc. § 1985.3* also apply to records containing personal information pertaining to public employees and other natural persons that are maintained by specified public agencies and are exempt from required disclosure under the Public Records Act (*Gov. Code § 6250 et seq.*), to the extent that they constitute private information [*Code Civ. Proc. § 1985.4*; *see Gov. Code § 6254(c)* (disclosure exemption for private information)].

Code Civ. Proc. § 1987.1 provides for an order to protect a consumer or witness from oppressive demands in a subpoena duces tecum, including unreasonable violations of the right of privacy [*see Code Civ. Proc. § 1987.1(a)*]. However, nothing in *Code Civ. Proc. § 1987.1* requires a person to move to quash, modify, or condition any subpoena duces tecum of personal records of any consumer served under *Code Civ. Proc. § 1985.3(b)(1)* [*Code Civ. Proc. § 1987.1(c)*].

For further discussion of deposition subpoenas generally, see Ch. 193, *Discovery: Depositions* . For further discussion and forms relating to the notice requirements and objection procedures when personal consumer records are subpoenaed, see Ch. 535, *Subpoena* .

[2] Employee Records

The privacy interests that employees have in records concerning them, which are maintained by their employers, are protected in much the same fashion as the interests of consumers discussed in [1], *above*. Thus, *Code Civ. Proc. § 1985.6* contains certain protections for employees when employment records are the subject of a subpoena duces tecum [*Code Civ. Proc. § 1985.6*; *see generally Code Civ. Proc. § 1985.3*]. An "employee" is any individual who is or has been employed by a witness subject to a subpoena duces tecum [*Code Civ. Proc. § 1985.6(a)(2)*]. "Employee" also means any individual who is or has been represented by a labor organization that is a witness subject to a subpoena duces tecum [*Code Civ. Proc. § 1985.6(a)(2)*; *see Code Civ. Proc. § 1985.6(a)(4)* ("labor organization" defined)].

The term "employment records" is defined as the original or any copy of books, documents, other writings or electronic data pertaining to the employment of any employee maintained by the current or former employer of the employee, or by a labor organization that has represented or currently represents the employee [*Code Civ. Proc. § 1985.6(a)(3)*; *see Code Civ. Proc. § 1985.6(a)(4)* ("labor organization" defined)]. Any employee whose employment records are sought by a subpoena duces tecum under *Code Civ. Proc. § 1985.6* may bring a motion to quash or modify the subpoena under *Code Civ. Proc. § 1987.1* [*Code Civ. Proc. § 1985.6(f)(1)*; *see Code Civ. Proc. § 1987.1(a)*]. However, nothing in *Code Civ. Proc. § 1987.1* requires a person to move to quash, modify, or condition any subpoena duces tecum of employment records of any employee served under *Code Civ. Proc. § 1985.6(b)(1)* [*Code Civ. Proc. § 1987.1(c)*].

The protections under *Code Civ. Proc. § 1985.6* for employment records extend to deposition subpoenas [*see Code Civ. Proc. §§ 2020.410(d),* 2020.510(c), (d)].

For further discussion and forms relating to employment records, see Ch. 535, *Subpoena* .

[3] In Connection With Actions Involving Free Speech Rights

A person whose personally identifying information is sought in connection with an action involving that person's free speech rights may bring a motion under *Code Civ. Proc. § 1987.1(a)* to quash or modify the subpoena [*Code Civ. Proc. § 1987.1(a)*]. For this purpose, "personally identifying information" includes the following [*Civ. Code § 1798.79*.8]:

- First and last name or last name only.

- Home or other physical address, including, but not limited to, a street name or ZIP Code, other than an address obtained pursuant to the California Safe At Home program or a business mailing address for the victim service provider.

- Electronic mail address or other online contact information such as an instant messaging user identifier or a screen name that reveals an individual's electronic mail address.

- Telephone number, other than a business telephone number for a victim service provider.

- Social security number.
- Date of birth, with the exception of the year of birth.
- Internet protocol address or host name that identifies an individual.
- Any other information, including, but not limited to, the first and last names of children and relatives, racial or ethnic background, or religious affiliation, that, in combination with any other nonpersonally identifying information, would serve to identify any individual.

For further discussion and forms relating to protection of this information when it is sought in connection with an action involving a person's free speech rights, see Ch. 535, *Subpoena* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSubpoenasComputer & Internet LawPrivacy & SecurityState RegulationLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationGeneral OverviewLabor & Employment LawEmployee PrivacyPrivacy ActGeneral Overview

California Forms of Pleading and Practice--Annotated

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§ 191.122 News Reporter's Qualified First Amendment Privilege

In addition to the newsperson's shield of immunity from contempt, discussed in *§ 191.123*, the Supreme Court has recognized that a reporter, editor, or publisher has a qualified privilege to withhold disclosure of the identity of confidential sources and of unpublished information supplied by those sources. This privilege arises under the constitutional protections for freedom of the press (*U.S. Const., amend. I*; *Cal. Const., art. I, § 2(a)*) [*Mitchell v. Superior Court (1984) 37 Cal. 3d 268, 274, 279, 283-284, 208 Cal. Rptr. 152, 690 P.2d 625* ; *see also Anti-Defamation League of B'Nai B'rith v. Superior Court (1998) 67 Cal. App. 4th 1072, 1083, 79 Cal. Rptr. 2d 597* ; *Shoen v. Shoen (9th Cir. 1993) 5 F.3d 1289, 1292-1296* ; *KSDO v. Superior Court (1982) 136 Cal. App. 3d 375, 384-386, 186 Cal. Rptr.211]* . The privilege is available to online journalists [*O'Grady v. Superior Court (2006) 139 Cal. App. 4th 1423, 1468, 44 Cal. Rptr.3d 72]* . Each case should be determined by balancing the following considerations:

- The nature of the litigation and whether the newsperson is a party [*Mitchell v. Superior Court (1984) 37 Cal. 3d 268, 279-280, 208 Cal. Rptr. 152, 690 P.2d 625* (disclosure generally appropriate when newsperson is defendant in defamation action)]. If the newsperson is not a party, consideration of the qualified privilege may be unnecessary in view of the separate contempt immunity afforded under *Cal. Const., art. I, § 2(b)*, and *Evid. Code § 1070* [*see* *Playboy Enterprises, Inc. v. Superior Court (1984) 154 Cal. App. 3d 14, 23-29, 201 Cal. Rptr. 207]* .

- The degree of relevance of the information sought to the plaintiff's cause of action. Disclosure should be denied unless the information goes to the heart of the plaintiff's claim [*Mitchell v. Superior Court (1984) 37 Cal. 3d 268, 280-282, 208 Cal. Rptr. 152, 690 P.2d 625* (discovery of information relating to alleged libel may be essential to prove actual malice)].

- Whether the party seeking discovery has exhausted all alternative sources of obtaining the needed information, because compulsory disclosure of sources is a last resort, permissible only if there is no other practical means of obtaining the information [*Mitchell v. Superior Court (1984) 37 Cal. 3d 268, 282, 208 Cal. Rptr. 152, 690 P.2d 625* ; *see, e.g.,* *O'Grady v. Superior Court (2006) 139 Cal. App. 4th*

1423, 1468-1480, 44 Cal. Rptr.3d 72 (applying Mitchell's balancing process to conclude that dis- covery of petitioner online news magazines' sources was barred by news reporter's qualified *first amendment* privilege against compulsory disclosure of confidential sources, because real party in interest failed to show that it had exhausted alternative avenues of investigation)].

- The importance of protecting confidentiality in the case at bench [*Mitchell v. Superior Court (1984) 37 Cal. 3d 268, 282-283, 208 Cal. Rptr. 152, 690 P.2d 625* (nondisclosure proper if information of great public importance and risk of harm to source substantial)].

- In a defamation action in which a newsperson is a defendant, the court may, before permitting discovery, require plaintiff first to make a prima facie showing that the alleged defamatory statements are false [*Mitchell v. Superior Court (1984) 37 Cal. 3d 268, 283, 208 Cal. Rptr. 152, 690 P.2d 625]* .

The newsperson's qualified privilege protects freedom of the press by protecting confidential sources. Consequently, the privilege is properly used as a "shield," not as a "sword." In other words, a newsperson is not entitled to assert the privilege as plaintiff or cross complainant when placing in issue the veracity or existence of the confidential news source [*see* *Dalitz v. Penthouse International, Ltd. (1985) 168 Cal. App. 3d 468, 477, 214 Cal. Rptr. 254* (dismissal of publisher's action appropriate after reporters refused to reveal sources essential to defense)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechFree PressGeneral OverviewEvidencePrivilegesJournalist's PrivilegeElementsEvidencePrivilegesJournalist's PrivilegeExceptionsEvidencePrivilegesJournalist's PrivilegeScope

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16-191 California Forms of Pleading and Practice--Annotated § 191.123

§ 191.123 Newsperson's Immunity From Contempt

[1] "Shield Law" Protection Against Disclosure of Sources or Unpublished Information

To protect the free flow of information, the California Legislature enacted the "shield law" [*Evid. Code § 1070*] to provide news reporters with immunity against being held in contempt for refusing to answer questions concerning information sources or unpublished information [*Evid. Code § 1070*; *see Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 217, 124 Cal. Rptr. 427]* . The California Constitution was amended in 1980 to add essentially the same provision that is contained in *Evid. Code § 1070* [*see Cal. Const., art. I, § 2(b)*; *see also Code Civ. Proc. § 1986.1*, discussed in [5], *below*].

Evid. Code § 1070(a) protects publishers, editors, or other persons connected with or employed either on a newspaper, magazine, or other periodical publication or by a press association or wire service, or persons who have been so connected or employed, by providing that such persons cannot be adjudged in contempt by a judicial, legislative, or administrative body, or by any other body having the power to issue subpoenas, for refusing to disclose in a proceeding [*see Evid. Code § 901*] the source of any information procured while so connected or employed for publication in a newspaper, magazine, or other periodical publication or for refusing to disclose unpublished information obtained or prepared in the gathering, receiving, or processing of information for communication to the public [*Evid. Code § 1070(a)*; *see Cal. Const., art. I, § 2(b)*; *see New York Times Co. v. Superior Court (1990) 51 Cal. 3d 453, 458, 273 Cal. Rptr. 98, 796 P.2d 811* ; *Delaney v. Superior Court (1990) 50 Cal. 3d 785, 796-797, 268 Cal. Rptr. 753, 789 P.2d 934]* . One court of appeal has held that the phrase "newspaper, magazine, or other periodical publication" includes online news "magazines" [*O'Grady v. Superior Court (2006) 139 Cal. App. 4th 1423, 1460-1466, 44 Cal. Rptr.3d 72* (online news publishers were protected by shield law)].

Evid. Code § 1070(b) affords the same protection to radio or television news reporters, or other persons connected with or employed by radio or television stations, or persons who have been so connected or employed, by providing that such persons cannot be adjudged in contempt for refusing to disclose the source of any information procured while so connected or employed for news or news commentary purposes on radio or television or for refusing to disclose any unpublished information obtained or prepared in the gathering, receiving, or processing of information for

communication to the public [*Evid. Code § 1070(b)*; *see Cal. Const., art. I, § 2(b)*].

[2] Scope of Immunity

[a] Limited to Protection From Contempt Proceedings

Although the California newsperson's "shield law" is codified under *Evid. Code § 1070* in the same division of the Evidence Code that sets outstatutory privileges, it is not actually an evidentiary privilege. The "shield law" of *Cal. Const., art. I, § 2(b)* and *Evid. Code § 1070* provides only immunity from contempt [*New York Times Co. v. Superior Court (1990) 51 Cal. 3d 453, 458, 273 Cal. Rptr. 98, 796 P.2d 811* ; *Delaney v. Superior Court (1990) 50 Cal. 3d 785, 797 n.6, 268 Cal. Rptr. 753, 789 P.2d 934* (disapproving, to the extent they suggest the contrary, *Hammarley v. Superior Court (1979) 89 Cal. App. 3d 388, 153 Cal. Rptr. 608* , and *CBS, Inc. v. Superior Court (1978) 85 Cal. App. 3d 241, 149 Cal. Rptr. 421*)].

This immunity from contempt grants to nonparty witnesses virtually absolute protection against compelled disclosure, because contempt is generally the only effective remedy against nonparty witnesses [*Mitchell v. Superior Court (1984) 37 Cal. 3d 268, 274, 208 Cal. Rptr. 152, 690 P.2d 625* ; *see also Playboy Enterprises, Inc. v. Superior Court (1984) 154 Cal. App. 3d 14, 23-28, 201 Cal. Rptr. 207* ; *Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 217-219, 124 Cal. Rptr. 427]* . However, the immunity does not provide protection against sanctions other than contempt that may be invoked against a party to civil litigation [*Mitchell v. Superior Court (1984) 37 Cal. 3d 268, 274, 208 Cal. Rptr. 152, 690 P.2d 625* ; *KSDO v. Superior Court (1982) 136 Cal. App. 3d 375, 383, 186 Cal. Rptr. 211]* .

For discussion of a separate, qualified news reporter's privilege, which may be applicable in civil litigation, see *§ 191.122*.

[b] Unpublished Information

The scope of the newsperson's immunity from prosecution for contempt contained in *Evid. Code § 1070(a), (b)* extends to unpublished information which includes information not disseminated to the public by the reporter from whom disclosure is sought, whether or not related information has been disseminated. The immunity also includes, but is not limited to, all notes, out takes, photographs, tapes, or other data of whatever sort not itself disseminated to the public through a medium of communication, whether or not published information based on or related to such material has been disseminated [*Evid. Code § 1070(c)*; *see Cal. Const., art. I, § 2(b)*; *see Delaney v. Superior Court (1990) 50 Cal. 3d 785, 799, 268 Cal. Rptr. 753, 789 P.2d 934]* .

Thus, "unpublished information" includes a news reporter's unpublished, nonconfidential eyewitness observations of an occurrence in a public place, and is not restricted to information obtained in confidence by a newsperson [*Delaney v. Superior Court (1990) 50 Cal. 3d 785, 797-800, 268 Cal. Rptr. 753, 789 P.2d 934* (disapproving *CBS, Inc. v. Superior Court (1978) 85 Cal. App. 3d 241, 149 Cal. Rptr. 421* , to the extent it holds or suggests that the shield law protects only confidential information); *see also New York Times Co. v. Superior Court (1990) 51 Cal. 3d 453, 461, 273 Cal. Rptr. 98, 796 P.2d 811]* .

"Unpublished information," however, does not include information relating to paid advertisements or "advertorials," expressing the views of thosewho paid for the advertisements, when the newspaper or other entity in which the paid advertisements were published has not shown that it obtained the advertisements for the journalistic purpose of communicating information to the public. A newspaper or other entity asserting the shield law must make a threshold showing of intent to publish such advertisements as part of its editorial process or as a communication of news or commentary on matters of public interest [*Rancho Publications v. Superior Court (1999) 68 Cal. App. 4th 1538, 1546, 81 Cal. Rptr. 2d 274* (basing its holding on fact that publisher relinquished any newsgathering function, sold its editorial

prerogatives, and "acted as nothing more than a paid mouthpiece," but emphasizing that it did not reach the issue of what legitimate journalistic activities are encompassed by the shield law's phrase "information for communication to the public")].

Direct testimony regarding published information does not constitute a waiver of the right to refuse to discuss related unpublished information, because the shield law explicitly provides that unpublished information remains protected whether or not related information has been disseminated [*Fost v. Superior Court (2000) 80 Cal. App. 4th 724, 735, 95 Cal. Rptr. 2d 620]* .

If a trial court holds a journalist in contempt of court in a criminal proceeding notwithstanding the constitutional immunity of *Cal. Const., art. I, § 2(b)*, the court must set out findings, either in writing or on the record, stating, at a minimum, why the information will be of material assistance to the party seeking evidence, and why alternate sources of the information are not sufficient to satisfy the defendant's right to a fair trial under the *Sixth Amendment* [*Code Civ. Proc. § 1986.1(c)*; *see also* discussion in [5], *below*].

[c] Identity of Source

The shield law's contempt immunity extends not only to the identity of the source but, in the absence of any constitutional or other limitation on the exercise of the immunity, to the disclosure of any information, in whatever form, which may tend to reveal the source of the information. As in the case of the privilege against self-incrimination, the burden is on the reporter claiming the privilege to show that the testimony may tend to lead to that source. However, this burden is not a heavy one [*Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 217-218, 124 Cal. Rptr. 427]* .

[3] Determining When Shield Law Applies

In determining whether a news reporter may invoke the immunity in response to a question, the court must consider not only the questioner's offered evidence but the matters disclosed in argument, the implication of the question, the setting in which it is asked, and all other relevant factors [*Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 218, 124 Cal. Rptr. 427]* .

[4] Limitations on Contempt Immunity

[a] Criminal Activity

Evid. Code § 1070(a) and *(b)* may not be used to shield news reporters from testifying about criminal activity in which they have participated or which they have observed. In this respect, the protection afforded news reporters by *Evid. Code § 1070(a), (b)*, as well as the rights guaranteed by the *U.S. Const., amend. I*, do not reach so far as to override the interest of the public in insuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons [*Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 218-219, 124 Cal. Rptr. 427* (quoting in part from *Branzburg v. Hayes (1972) 408 U.S. 665, 691-692, 92 S. Ct. 2646, 33 L. Ed. 2d 626*); *see also* *Hammarley v. Superior Court (1979) 89 Cal. App. 3d 388, 400-401, 153 Cal. Rptr. 608* (privilege does not exclude evidence required to enforce defendant's constitutional right meaningfully to confront and cross-examine primary accuser with benefit of all evidence reasonably available); disapproved to the extent the court characterizes the protection afforded news reporters by *Evid. Code § 1070(a), (b)* as a "privilege" in *Delaney v. Superior Court (1990) 50 Cal. 3d 785, 797 n.7, 268 Cal. Rptr. 753, 789 P.2d 934]* .

Since the newsperson's contempt immunity is a constitutional as well as a statutory protection, the court must balance the immunity against a criminal defendant's right to a fair trial, to consider whether the latter right may be compromised if the newsperson fails to disclose his or her source [*In re Willon (1996) 47 Cal. App. 4th 1080, 1090, 55 Cal. Rptr. 2d 245]* . The court's balancing test should encompass two principal considerations [In *Willon (1996) 47 Cal. App. 4th 1080, 1099, 55 Cal. Rptr. 2d 245]* :

- Whether there is a "substantial probability of future violations or 'leaks' " that will impair defendant's right to a fair trial; and

- Whether there are reasonable alternatives to disclosure.

Shield-law immunity is not overcome by the *prosecutor's* need for evidence in a criminal prosecution. The prosecution's right to due process is not equivalent to a criminal defendant's right to due process and, therefore, does not carry the same weight as the federal rights enjoyed by a criminal defendant [*Miller v. Superior Court (1999) 21 Cal. 4th 883, 896-897, 89 Cal. Rptr. 2d 834, 986 P.2d 170* (prosecution in criminal proceeding does not have constitutional interest sufficient to require disclosure of information otherwise protected by shield law)]. Consequently, prosecutors are not entitled to unpublished information because they can show that it is relevant to their case [*Miller v. Superior Court (1999) 21 Cal. 4th 883, 897, 89 Cal. Rptr. 2d 834, 986 P.2d 170* (unbroadcast portion of interview with criminal defendant by newsperson is "unpublished information" within meaning of *Cal. Const., art. I, § 2(b)* and is thus protected by that constitutional provision)]. Rather, a newsperson's protection under the shield lawis absolute and yields only to a "conflicting federal or, perhaps, state constitutional right" [*Miller v. Superior Court (1999) 21 Cal. 4th 883, 901, 89 Cal. Rptr. 2d 834, 986 P.2d 170* ; *see, e.g.,* *Fost v. Superior Court (2000) 80 Cal. App. 4th 724, 733-734, 95 Cal. Rptr. 2d 620* (when defense witness in criminal proceeding resists cross-examination on the basis of shield law, court may properly strike that witness's direct testimony, unless defendant can show that to do so would deprive defendant of the constitutional right to fair trial and that defendant's right, under the circumstances of the case, transcends that of the witness under the shield law; on such showing the court may admit the witness' direct testimony and the witness may be held in contempt for refusing to respond to proper cross-examination seeking information otherwise be protected under shield law)].

[b] Violation of Court Order

Evid. Code § 1070(a) and *(b)* may not be used as a shield against being required to answer any question which may tend to identify who, if anyone, among those subject to a court's order, may have violated that order. This second limitation springs from the inherent power of the judiciary as a separate and coequal branch of the tripartite governmental structure to control its own proceedings and officers. Thus, a court has the necessary power to explore the violation of its orders by those subject thereto as a means of enforcing its own orders, such as orders fulfilling its constitutional obligation to prevent prejudicial publicity from emanating from its officers [*Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 221, 222, 224, 124 Cal. Rptr. 427* ; *Farr v. Superior Court (1971) 22 Cal. App. 3d 60, 68-71, 99 Cal. Rptr. 342]* .

[c] Newsperson Not Engaged in News Gathering

The immunity provides no protection for information obtained by a newsperson not directly engaged in gathering, receiving, or processing news. When a newsperson is not on the job, he or she is no different from any other citizen [*Delaney v. Superior Court (1990) 50 Cal. 3d 785, 797-798 n.8, 268 Cal. Rptr. 753, 789 P.2d 934* ; *see* *O'Grady v. Superior Court (2006) 139 Cal. App. 4th 1423, 1459, 44 Cal. Rptr.3d 72* ("open and deliberate" publication on news-oriented Web site of news gathered for that purpose by site's operators was indistinguishable from publishing a newspaper with respect to application of shield law)].

[5] Related Subpoena Procedures

One of the subpoena statutes, *Code Civ. Proc. § 1986.1*, provides additional protections and procedures with respect to the news reporter's contempt immunity set out in *Cal. Const., art. I, § 2(b)*, as follows:

- No testimony or other evidence given by a journalist under subpoena may be construed as a waiver

of the immunity rights provided by *Cal. Const., art. I, § 2(b)* [*Code Civ. Proc. § 1986.1(a)*; *see Code Civ. Proc. § 1986.1(d)* (defining "journalist" as person specified in *Cal. Const., art. I, § 2(b)*)].

- Except in exigent circumstances, a journalist who is subpoenaed must be given at least five days' notice that his or her appearance will be required [*Code Civ. Proc. § 1986.1(b)*].

- If a trial court holds a journalist in contempt of court in a criminal proceeding despite the constitutional provision [*see* discussion in [4][a], *above*], the court must set out findings, either in writing or on the record, stating, at a minimum, why the information will be of material assistance to the party seeking evidence, and why alternate sources of the information are not sufficient to satisfy the defendant's right to a fair trial under the *Sixth Amendment* [*Code Civ. Proc. § 1986.1(c)*].

For detailed discussion and forms relating to general subpoena procedures, see Ch. 535, *Subpoena* .

[6] Appellate Review

Because the shield law (*Cal. Const., art. I, § 2(b)*; *Evid. Code § 1070*) provides only an immunity from contempt, and not a privilege, a newsperson may not seek extraordinary writ relief from an adverse trial court ruling under the shield law before the newsperson is adjudged in contempt. Thus, a newsperson's petition for extraordinary relief is premature until a judgment of contempt has been entered [*New York Times Co. v. Superior Court (1990) 51 Cal. 3d 453, 458-460, 273 Cal. Rptr. 98, 796 P.2d 811* (disapproving the contrary holding in *CBS, Inc. v. Superior Court (1978) 85 Cal. App. 3d 241, 247, 149 Cal. Rptr. 421* .

To avoid confinement under a contempt judgment that may subsequently be set aside, a trial court should stay its judgment to allow the contemner newsperson sufficient time to seek writ relief if the trial court believes there is any colorable argument the contemner can make against the judgment. If the trial court nevertheless declines to issue a stay, the reviewing court should do so pending its decision [*New York Times Co. v. Superior Court (1990) 51 Cal. 3d 453, 460, 273 Cal. Rptr. 98, 796 P.2d 811]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptCivil ContemptConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechFree PressGeneral OverviewEvidencePrivilegesJournalist's PrivilegeElementsEvidencePrivilegesJournalist's PrivilegeExceptionsEvidencePrivilegesJournalist's PrivilegeScope

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§ 191.124 Tax Returns

[1] Protected Documents and Information

Various statutes have been interpreted as providing a privilege not to disclose tax returns or the information that they contain [*Wilson v. Superior Court (1976) 63 Cal. App. 3d 825, 828, 134 Cal. Rptr. 130]* . This privilege applies to the following:

- Federal and state income taxes [*see* *Webb v. Standard Oil Co. (1957) 49 Cal. 2d 509, 513-514, 319 P.2d 621* ; *King v. Mobile Home Rent Review Bd. (1990) 216 Cal. App. 3d 1532, 1538, 265 Cal. Rptr. 624* (cases construing former *Rev. & Tax. Code § 19282*; *now see Rev. & Tax. Code § 19542 et seq.*)].

- Individual income tax returns submitted to a bank for the purpose of obtaining a loan [*see* *Fortunato v. Superior Court (2003) 114 Cal. App 4th 475, 480-482, 8 Cal. Rptr. 3d 82* (reasoning that compliance with bank's requirement of submitting tax returns with loan application is not "entirely voluntary relinquishment," and noting that bank customer also has reasonable expectation of privacy in confidential information submitted with loan application and that when waiver of confidentiality of tax returns is argued, court should conduct in camera inspection to balance need for discovery against interests in privacy)].

- Estate tax returns [*see* *Deary v. Superior Court (2001) 87 Cal. App. 4th 1072, 1077-1078, 105 Cal. Rptr. 2d 132* (statutory tax return privilege protected estate tax returns from disclosure, given that defendants had not waived privilege and plaintiffs did not demonstrate any supervening public policy)].

- W-2 forms [*Brown v. Superior Court (1977) 71 Cal. App. 3d 141, 142-144, 139 Cal. Rptr. 237]* .

- Corporate income taxes [*see* *Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 718-722, 21 Cal. Rptr. 2d 200, 854 P. 2d 1117]* ;[*see* *Aday v. Superior Court (1961) 55 Cal. 2d 789, 796-797, 13 Cal. Rptr. 415, 362 P.2d 47* (cases construing former *Rev. & Tax. Code § 26451 et seq.*; *now see Rev. & Tax.*

Code § 19542 et seq.)].

- Employment taxes [*see Unemp. Ins. Code §§ 1094, 2111*; *Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 718-722, 21 Cal. Rptr. 2d 200, 854 P. 2d 1117* (payroll taxes); *Crest Catering Co. v. Superior Court (1965) 62 Cal. 2d 274, 276-277, 42 Cal. Rptr. 110, 398 P.2d 150]* .

- Sales taxes [*see Rev. & Tax. Code § 7056*; *Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal. 3d 1, 607, 123 Cal. Rptr. 283, 539 P.2d 739]* .

[2] Waiver or Inapplicability of Protection

The discovery privilege for tax information is not absolute [*Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 721, 21 Cal. Rptr. 2d 200, 854 P.2d 1117]* . The privilege against disclosing state or federal income tax returns may be waived or does not apply under any of the following circumstances:

- When there is an intentional relinquishment [*Crest Catering Co. v. Superior Court (1965) 62 Cal. 2d 274, 278, 42 Cal. Rptr. 110, 398 P.2d 150* ; *National Football League Properties, Inc. v. Superior Court (1998) 65 Cal. App. 4th 100, 106-107, 75 Cal. Rptr. 2d 893]* .

- The gravamen of the lawsuit is so inconsistent with the continued assertion of the taxpayer's privilege as to compel the conclusion that the privilege has in fact been waived [*Wilson v. Superior Court (1976) 63 Cal. App. 3d 825, 830, 134 Cal. Rptr. 130]* .

- A public policy greater than that of confidentiality of tax returns is involved [*Miller v. Superior Court (1977) 71 Cal. App. 3d 145, 149, 139 Cal. Rptr. 521* (proceedings to enforce child support obligations); *see In re Marriage of Sammut (1980) 103 Cal. App. 3d 557, 560, 163 Cal. Rptr. 193* (summarizing of decisions)]. The public-policy exception is construed narrowly, and only applies if warranted by a legislatively declared public policy [*Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 721, 21 Cal. Rptr. 2d 200, 854 P.2d 1117]* . For example, the tax privilege was inapplicable when the record showed that defendant in a civil suit engaged in conduct precluding plaintiffs from obtaining relevant nonprivileged financial information necessary to support plaintiffs' punitive damages claim, and there was no less intrusive alternative for plaintiffs to obtain the information [*Weingarten v. Superior Court (2002) 102 Cal. App. 4th 268, 271, 125 Cal. Rptr. 2d 371* (requiring that defendant's husband receive notice and opportunity to be heard before court could compel disclosure of joint tax returns)]. Further, the privilege does not extend to foreign tax returns [*Firestone v. Hoffman (2006) 140 Cal. App. 4th 1408, 1420, 45 Cal. Rptr. 3d 534* (neither *Civ. Code § 1799.1a* nor *Bus. & Prof. Code § 17530.5* creates privilege shielding litigant from discovery of litigant's own tax returns or making those returns inadmissible at trial, and neither statute applies to foreign tax returns; although California case law does create privilege for tax returns, that privilege does not apply to foreign taxes)].

In addition, statutory provisions may preclude application of the privilege against disclosure of state and federal tax returns. For example, state and federal tax returns of a party to any proceeding involving child or spousal support are specifically discoverable [*Fam. Code § 3552*; *see Thomas B. v. Superior Court (1985) 175 Cal. App. 3d 255, 261-263, 220 Cal. Rptr. 577* (former *Civ. Code § 4700.7, now see Fam. Code § 3552*, applies only when parentage has been conclusively established); *see also Rev. & Tax. Code § 19548* (FTB disclosure to California Parent Locator Service)].

In a marital dissolution proceeding, a spouse is entitled to discovery of tax records involving the other spouse, since the Legislature has established a strong policy of full disclosure in dissolution proceedings. Thus, for example, a spouse is entitled to discovery of the corporate tax returns of a close corporation in which the other spouse has an interest, since such returns are related to the parties' interest in determining the value of the corporation and in ascertaining their

financial status. The spouse is also entitled to discovery of the corporation's quarterly payroll tax returns regarding the other spouse, but is not entitled to discovery of the corporation's quarterly payroll tax returns identifying third persons absent a specific showing of relevance or need for those returns [*Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 722-723, 21 Cal. Rptr. 2d 200, 854 P.2d 1117* ; *see also* discussion in *§ 191.120[6][b]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Tax Administration & ProcedureAudits & InvestigationsDisclosure of Information (IRC secs. 6103-6104, 6108-6110, 6713, 7213, 7216, 7431, 7435)Confidentiality of Returns & Return InformationTax LawFederal Tax Administration & ProcedureAudits & InvestigationsDisclosure of Information (IRC secs. 6103-6104, 6108-6110, 6713, 7213, 7216, 7431, 7435)Disclosure of Returns & Return InformationTax LawState & Local TaxesAdministration & ProceedingsGeneral Overview

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§ 191.125 Settlement Efforts

Settlement offers or negotiations that are inadmissible under *Evid. Code § 1152* are not privileged [*Covell v. Superior Court (1984) 159 Cal. App. 3d 39, 42, 205 Cal. Rptr. 371]* . However, they are not subject to discovery unless they are relevant to the subject matter of the pending action or reasonably calculated to lead to the discovery of admissible evidence [*Covell v. Superior Court (1984) 159 Cal. App. 3d 39, 42-44, 205 Cal. Rptr. 371* ; *see, e.g., Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc. (2000) 78 Cal. App. 4th 847, 915, 93 Cal. Rptr. 2d 364* (in insurance litigation, evidence of settlement negotiations was properly admitted to prove failure to process claim fairly and in good faith, not to prove insurer's liability for original loss); *see also Code Civ. Proc. § 2017.210* and discussion in *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.20*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediationsEvidenceRelevanceCompromise & Settlement Negotiations

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16-191 California Forms of Pleading and Practice--Annotated § 191.125A

§ 191.125A Mediation Efforts

[1] Protected Communications

Evid. Code § 1115 et seq. governs all mediation proceedings except Family Conciliation Court proceedings under *Fam. Code § 1800 et seq.*, Mediation of custody and visitation issue proceedings under *Fam. Code § 3160 et seq.*, and mandatory settlement conferences under *Cal. Rules of Ct., Rule 3.1380* [*Evid. Code § 1117*].

Evidence of anything said, or of any admission made, in the course of the mediation is inadmissible, not subject to discovery, and disclosure of the evidence may not be compelled [*Evid. Code § 1119(a)*]. In addition, any writing, as defined in *Evid. Code § 250*, prepared for the purpose of, in the course of, or pursuant to the mediation is inadmissible, not subject to discovery, and its disclosure may not be compelled [*Evid. Code § 1119(b)*].

Communications between an attorney and the attorney's client cannot be considered "for the purpose of, in the course of, or pursuant to" a mediation under *Evid. Code § 1119(a)* [*Porter v. Wyner (2010) 183 Cal. App. 4th 949, 961, 107 Cal. Rptr. 3d 653* , *modified*, 5/10/2010 ("A mediation is not conducted to resolve a dispute between a lawyer and the client the attorney represents.")]. Thus, for example, in a case in which plaintiff clients alleged that their attorneys had promised, during a mediation of a lawsuit in which the attorneys had represented them, to pay the clients certain proceeds from their attorney's fees, evidence of those communications was not protected by the mediation privilege. The disputants in mediation are not the attorney and the attorney's client; they are the parties who file the lawsuit. Thus, the communications at issue were not communications between disputants and a mediator within the meaning of *Evid. Code § 1115(a)*, and were not inadmissible under *Evid. Code, § 1119(a)* [*Porter v. Wyner (2010) 183 Cal. App. 4th 949, 961-962, 107 Cal. Rptr. 3d 653* , *modified*, 5/10/2010].

Under *Evid. Code § 1119(b)*, photographs, videotapes, witness statements, and raw test data from physical samples, prepared "for the purpose of, in the course of, or pursuant to, a mediation," are protected by the mediation privilege, and therefore are not admissible at trial and not subject to discovery [*Rojas v. Superior Court (2004) 33 Cal. 4th 407, 423, 15 Cal. Rptr. 3d 643, 93 P. 3d 260* (court of appeal's contrary conclusion that so-called "non-derivative" materials (raw test data, photographs, and witness statements taken for purposes of mediation) are not protected under *Evid. Code §*

1119 is directly at odds with plain language of mediation confidentiality provisions and inconsistent with legislative history and intent)]. Moreover, there is no "good cause" exception to *Evid. Code § 1119(b)*'s protection [*Rojas v. Superior Court (2004) 33 Cal. 4th 407, 423-424, 15 Cal. Rptr. 3d 643, 93 P. 3d 260* (rejecting court of appeal's conclusion that "derivative" materials, such as charts, diagrams, information compilations, and expert opinions and reports, are still discoverable under *Evid. Code § 1119(b)* "upon a showing of good cause")]. Similarly, estoppel cannot be applied to prevent a defendant from tardily claiming mediation confidentiality [*Simmons v. Ghaderi (2008) 44 Cal. 4th 570, 584, 80 Cal. Rptr. 3d 83, 187 P.3d 934* (legislative intent was to promote mediation by ensuring confidentiality, not to adopt scheme to ensure good behavior in mediation and litigation process)]. Thus, disclosure of communications made during mediation is "unqualifiedly bar[red]," absent express statutory exception [*Foxgate Homeowners Assn. v. Bramalea Cal. (2001) 26 Cal. 4th 1, 15, 108 Cal. Rptr. 2d 642, 25 P.3d 1117* ; *see, e.g.,* *Wimsatt v. Superior Court (2007) 152 Cal. App. 4th 137, 142, 158-163, 61 Cal. Rptr. 3d 200* (rejecting nonstatutory "good cause" exception even if strict limitations of mediation confidentiality shielded perjury and inconsistent statements)].

Additionally, all communications, negotiations, or settlement discussions by and between participants or mediators in the mediation are confidential [*Evid. Code § 1119(c)*]. Thus, no evidence of communications made during the mediation may be admitted or considered in support of an assertion that a party to the mediation engaged in conduct that warrants sanctions under *Code Civ. Proc. § 128.5(a)* [*Foxgate Homeowners Ass'n. v. Bramalea California (2001) 26 Cal. 4th 1, 15, 108 Cal. Rptr. 2d 642* (assuming, without deciding, that court that ordered mediation may impose sanctions under *Code Civ. Proc. § 128.5(a)* based on conduct during mediation, but declining to create judicial exception for reporting bad faith conduct or for imposition of sanctions under that section when doing so would require disclosure of communications or mediator's assessment of party's conduct)]. Moreover a party cannot impliedly waive mediation confidentiality through litigation conduct, because *Evid. Code § 1122* requires waiver to be express, not implied [*Simmons v. Ghaderi (2008) 44 Cal. 4th 570, 587-588, 80 Cal. Rptr. 3d 83, 187 P.3d 934* (mediation confidentiality statutes precluded plaintiffs from proving existence of oral settlement agreement between plaintiffs and defendant during mediation, even though defendant had relied on mediation confidentiality to shield from the court facts she had stipulated to be true and had extensively litigated without raising that defense); *Eisendrath v. Superior Court (2003) 109 Cal. App. 4th 351, 360-361, 134 Cal. Rptr. 2d 716* (mediation participants cannot impliedly waive confidentiality by raising claim about agreement reached through mediation, relying on *Foxgate*].

[2] Communications Subject to Discovery

Evid. Code § 1122 provides that a communication or writing [*see Evid. Code § 250*], made or prepared for during the course of a mediation, is admissible, and subject to discovery, if either of the following conditions is satisfied:

- All persons who conduct or otherwise participate in the mediation expressly agree in writing, or orally in accordance with *Evid. Code § 1118*, to disclosure of the communication, document, or writing [*Evid. Code § 1122(a)(1)*].

- The communication, document, or writing was prepared by or on behalf of fewer than all the mediation participants, those participants expressly agree in writing, or orally in accordance with *Evid. Code § 1118*, to its disclosure, and the communication, document, or writing does not disclose anything said or done or any admission made in the course of the mediation [*Evid. Code § 1122(a)(2)*].

Evid. Code § 1122(a)(2) prevents the disclosure of admissions even by the party who made them [Doe 1 v. *Superior Court (Roman Catholic Archbishop of Los Angeles) (2005) 132 Cal. App. 4th 1160, 1168, 34 Cal. Rptr. 3d 248]* . Thus, for example, the Los Angeles Archbishop, the principal defendant in some 500 lawsuits, could not disclose written summaries made of the personnel records of numerous priests accused of sexually molesting minors. Because those summaries were prepared for purposes of an ongoing mediation process, contained admissions of liability by the Archdiocese, and revealed something about the mediation discussion, their disclosure would violate *Evid. Code § 1122(a)(2)* [Doe 1 v. *Superior Court (Roman Catholic Archbishop of Los Angeles) (2005) 132 Cal. App. 4th 1160,*

1163, 1168, 34 Cal. Rptr. 3d 248] . Although *Evid. Code § 1122(a)(1)* permitted disclosure of mediation communications if all participants agreed to the disclosure, that provision did not apply because petitioners were mediation participants [Doe 1 v. *Superior Court (Roman Catholic Archbishop of Los Angeles) (2005) 132 Cal. App. 4th 1160, 1169, 34 Cal. Rptr. 3d 248]* .

In addition, all or any part of a written settlement agreement made during the course of mediation is admissible, and subject to discovery, to show fraud, duress, or illegality if relevant to an issue in dispute [*Evid. Code § 1123(d)*], provided the agreement is signed by the settling parties and provides that it is admissible, or enforceable, or "words to that effect," and all parties to the agreement expressly agree in writing, or orally in accordance with *Evid. Code § 1118*, to its disclosure [*Evid. Code § 1123(a)-(c)*]. There is no requirement that the agreement regarding disclosure be made at or after the time of the settlement [*Estate of Thottam (2008) 165 Cal. App. 4th 1331, 1339, 81 Cal. Rptr. 3d 856* (mediation and confidentiality agreement satisfied exception to mediation confidentiality, even though it was executed before parties allegedly entered into settlement agreement); *see Evid. Code § 1123(c)*].

A settlement agreement is admissible under *Evid. Code § 1123* and is not rendered unenforceable simply because it has not been signed personally by each of the litigants, provided that the written waiver was signed by each of the settling parties or their respective counsel [*Stewart v. Preston Pipeline Inc. (2005) 134 Cal. App. 4th 1565, 1569, 36 Cal. Rptr. 3d 901* (rejecting plaintiff's contention that settlement agreement signed after mediation was inadmissible in subsequent action to enforce settlement, because parties' counsel (as opposed to the parties themselves) signed mediation-confidentiality waiver)].

However, a settlement agreement prepared in mediation that includes an arbitration provision is not deprived of confidentiality under *Evid. Code § 1123(b)*--which provides that such an agreement is not protected from disclosure if it is signed by the settling parties and the "agreement provides that it is enforceable or binding or words to that effect"--simply by including the arbitration provision [*Fair v. Bakhtiari (2006) 40 Cal. 4th 189, 51 Cal. Rptr. 3d 871, 147 P.3d 653]* . To satisfy *Evid. Code § 1123(b)*, a settlement agreement must include "a statement that it is 'enforceable' or 'binding,' or a declaration in other terms" that makes clear that it reflects an agreement and is not simply a memorandum of terms to be included in a future agreement [*Fair v. Bakhtiari (2006) 40 Cal. 4th 189, 199-200, 51 Cal. Rptr. 3d 871, 147 P.3d 653* (observing that the "statute leaves room for various formulations")]. Although the writing need not be in "finished form" to be admissible under *Evid. Code § 1123(b)*, it must be signed by the parties and include a "direct statement to the effect that it is enforceable or binding" [*Fair v. Bakhtiari (2006) 40 Cal. 4th 189, 192, 51 Cal. Rptr. 3d 871, 147 P.3d 653* ; *see, e.g.,* *Estate of Thottam (2008) 165 Cal. App. 4th 1331, 1340, 81 Cal. Rptr. 3d 856* (chart designating specific allocations of listed assets in decedent's estate was "written settlement agreement" within meaning of *Evid. Code § 1123*; items on chart, while "lacking in formality," were sufficiently clear to determine obligations to which parties agreed).]. However, "arbitration clauses, forum selection clauses, choice of law provisions, terms contemplating remedies for breach, and similar commonly employed enforcement provisions typically negotiated in settlement discussions" do not qualify an agreement for admission under *Evid. Code § 1123(b)* [*Fair v. Bakhtiari (2006) 40 Cal. 4th 189, 200, 51 Cal. Rptr. 3d 871, 147 P.3d 653* (arbitration clause included in handwritten single-page memorandum captioned "settlement terms," signed after mediation session, did not satisfy *Evid. Code § 1123(b)*'s requirement that written settlement agreement "provides that it is enforceable or binding or words to that effect," and thus settlement memorandum was inadmissible)].

Finally, evidence otherwise admissible or subject to discovery outside of mediation cannot be made inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation [*Evid. Code § 1120(a)*; *see, e.g., Cassel v. Superior Court (2009) 179 Cal. App. 4th 152, 164, 101 Cal. Rptr. 3d 501* (communications between client and his law firm, two weeks before trial, were for trial strategy preparation, not just for mediation of underlying lawsuit, and therefore were not protected by either *Evid. Code § 1119(a), (b)*, or *Evid. Code § 1119(c)*; firm failed to demonstrate sufficiently close link between communications and mediation to require application of mediation confidentiality protection)].

For general discussion of mediation, including confidentiality, see Ch. 31, *Mediation* .

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§ 191.126 Medical or Other Health Care Committees

Records and proceedings of the following committees organized to evaluate and improve the quality of health care are not subject to discovery under certain circumstances:

- Committees of medical, dental, pediatric, dietetic, psychological, or veterinary staffs in hospitals that evaluate or improve the quality of care rendered in the hospital [*Evid. Code § 1157(a)*; *see Fox v. Kramer (2000) 22 Cal. 4th 531, 540-548, 93 Cal. Rptr. 2d 497, 994 P.2d 374* (hospital's peer-review committee records are immune from discovery under *Evid. Code § 1157(a)*, and defendants could not obtain the equivalent of discovery of contents of hospital peer-review committee records by subpoenaing state investigator to give expert testimony or refer at trial to his draft preliminary report when his conclusions were based on hospital peer-review committee records reviewed in course of his official duties for public agency); *County of Los Angeles v. Superior Court (2006) 139 Cal. App. 4th 8, 14-15, 42 Cal. Rptr. 3d 390* (documents pertaining to review of medical and mental health care complaints by quality assurance committee for county's jail mental health services agency were exempt from disclosure because they met criteria of *Evid. Code § 1157* for documents generated by peer review bodies, and of *Evid. Code § 1157.6* for correctional treatment quality assurance committees)].

- Review committees of state or local medical, dental, dental hygenist, pediatric, dietetic, psychological, marriage and family therapist, licensed clinical social worker, chiropractic, acupuncturist, or veterinary societies or associations that evaluate or improve the quality of care [*Evid. Code § 1157(a)*].

- Committees of nonprofit medical care foundations or professional standards review organizations that review professional competence in relation to medical necessity, quality of care, charges for, or level of care [*Evid. Code § 1157.5*].

- Local government agency committees established to monitor the necessity, quality, and level of specialty health services [*Evid. Code § 1157.7*].

- Committees established by statute to evaluate and improve county mental health care [*Evid. Code § 1157.6*; *see County of Los Angeles v. Superior Court (2006) 139 Cal. App. 4th 8, 14-15, 42 Cal. Rptr. 3d 390* (documents pertaining to review of medical and mental health care complaints by quality assurance committee for county's jail mental health services agency were exempt from disclosure because they met criteria of *Evid. Code § 1157.6* for correctional treatment quality assurance committees, as well as of *Evid. Code § 1157*); *see also Evid. Code §§ 1156, 1156.1* (records and proceedings of certain committees subject to discovery but inadmissible under certain circumstances)].

- Committees of health care plans, and nonprofit hospital service plans issuing comprehensive health care contracts that review the quality of care, performance of medical personnel, utilization of services and facilities, and costs [*Health & Safety Code § 1370*].

- Peer review bodies (defined in *Bus. & Prof. Code § 805*) that evaluate and improve the quality of care rendered by their members [*Evid. Code § 1157(a)*].

For further discussion of protection against discovery under *Evid. Code § 1156 et seq.*, see Ch. 295, *Hospitals* .

A similar statutory protection exists in favor of records pertaining to treatment of a pharmacist under the Pharmacists Recovery Program (*Bus. & Prof. Code § 4360 et seq.*) [*see Bus. & Prof. Code § 4372*; *see also Bus. & Prof. Code § 156.1(b)* (records pertaining to treatment of persons who are impaired by alcohol or dangerous drugs and who are subject to licensing governed by Department of Consumer Affairs are not subject to discovery)].

Evid. Code § 1157 exempts from discovery the proceedings, written evaluations and related records of a "Resident Evaluation Committee" that evaluated physician-residents enrolled in a post-graduate surgical training program [*University of Southern California v. Superior Court (1996) 45 Cal. App. 4th 1283, 1289, 53 Cal. Rptr. 2d 260]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationGeneral OverviewHealthcare LawBusiness Administration & OrganizationPeer ReviewGeneral OverviewHealthcare LawManaged HealthcareGeneral Overview

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§ 191.127 Information Pertaining to AIDS Blood Test

Except as provided in *Health & Safety Code § 1603.1* (required tests and reports for AIDS and viral hepatitis), 1603.3 (notice to donors of AIDS test and disclosure to local public health officer), or *Health & Safety Code § 121022* (required reporting of cases of HIV infection to local health officers and to state Department of Health Services using patient names), no person will be compelled in any state, county, city, or other local, civil, criminal, administrative, legislative, or other proceeding to identity or provide identifying characteristics that would identify any individual who is the subject of a blood test to detect antibodies to HIV [*Health & Safety Code § 120975*; *see also Health & Safety Code §§ 120980* (civil and criminal liability for wrongful disclosure of HIV test results), 121010 (permissible disclosure without written authorization), discussed in *Ch. 429, Privacy, § 429.60* et seq.].

In keeping with its purpose of protecting the privacy of individuals who are the subject of blood testing for antibodies to HIV, *Health & Safety Code § 120975* is construed in strict accordance with protecting an individual's identity [*see, e.g., Irwin Memorial Blood Bank v. Superior Court (1991) 229 Cal. App. 3d 151, 279 Cal. Rptr. 911* (construing former *Health & Safety Code § 199.20*)]. For example, in a negligence action against a blood bank brought by individuals who had become infected with AIDS through transfusions of blood collected by the blood bank, the court of appeal denied the plaintiffs access to any information that might reveal the identity of any possible donor of the contaminated blood. The trial court had issued orders permitting discovery under very limited conditions that were carefully crafted to preserve the anonymity of each donor. The court of appeal found the procedures inadequate in light of former *Health & Safety Code § 199.20* [*now see Health & Safety Code § 120975*]. The donor would be seen or heard during discovery, by at least the referee and the reporter, and a person's appearance and voice are obviously identifying characteristics. Moreover, the very production of a donor for deposition is an identification, in that until the donor arrivesto be deposed, he or she is a number unconnected to a person. Once the association between the number and person is made, the person has become identified [*Irwin Memorial Blood Bank v. Superior Court (1991) 229 Cal. App. 3d 151, 156-157, 279 Cal. Rptr. 911]* .

Although the court in *Irwin* found former *Health & Safety Code § 199.20* to be determinative, and specifically did not address the issue of the donors' constitutional right to privacy, in some AIDS blood test cases privacy may be an issue [*Irwin Memorial Blood Bank v. Superior Court (1991) 229 Cal. App. 3d 151, 153, 279 Cal. Rptr. 911* ; *see* discussion in

§ 191.120[2]].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceScientific EvidenceAIDS & HIVEvidenceScientific EvidenceBlood & Bodily FluidsPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsAIDS & HIV

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§ 191.128 Litigation Documents of Public Agency

The Public Records Act (*Gov. Code § 6250 et seq.*), modeled initially on the federal Freedom of Information Act (*5 U.S.C. § 552*) provides procedures for obtaining information maintained in state public records. As such it is useful investigative tool that may be used outside the provisions of the Civil DiscoveryAct of 1986 [*see* discussion in *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.14[1]*].

Gov. Code § 6254(b) provides one of more common exemptions from disclosure under the Public Records Act. Under this provision a public agency need not disclose records pertaining to pending litigation to which the agency is a party. This exemption applies to litigation-related documents the parties to the litigation do not intend to be revealed outside the litigation, when sought by non-party persons or entities [*Board of Trustees of California State Univ. v. Superior Court (The Copley Press, Inc.) (2005) 132 Cal. App. 4th 889, 894, 34 Cal. Rptr. 3d 82* (parties intended that correspondence between them not be disclosed to third parties)]. However, deposition transcripts are not subject to the pending litigation exemption because they are available to the public under *Code Civ. Proc. § 2025.570* [*Board of Trustees of California State Univ. v. Superior Court (The Copley Press, Inc.) (2005) 132 Cal. App. 4th 889, 894, 34 Cal. Rptr. 3d 82]* .

This exemption essentially provides to public agencies a protection similar to the attorney-client privilege and attorney work product protection, which applies for a limited period while there is ongoing litigation.

Once the litigation is concluded, however, the exemption does not apply, and an individual may utilize the Public Records Act (*Gov. Code § 6250 et seq.*) to obtain documents generated in the litigation [*see City of Los Angeles v. Superior Court (1996) 41 Cal. App. 4th 1083, 1085, 49 Cal. Rptr. 2d 35]* .

The pending litigation exemption of *Gov. Code § 6254(b)* applies only to records created specifically for the purpose of pending litigation, and not to records created beforehand in the ordinary course of business [*see 71 Ops. Cal. Att'y Gen. 235, 238-239 (1988)* ; Hansen, *Using the Public Records Act to Supplement Discovery, 22 Civil* Litigation Reporter 201 (Cal. CEB2000)]. The latter documents, not subject to the exemption, may thus be obtained by an individual under the Public Records Act, notwithstanding the fact that the individual is a party to pending litigation involving the public

agency [*see, e.g., County of Los Angeles v. Superior Court (2000) 82 Cal. App. 4th 819, 826-830, 98 Cal. Rptr. 2d 564]* .

For further discussion and forms relating to the Public Records Act generally, see Ch. 470C, *Public Records Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationFreedom of InformationDefenses & ExemptionsStatutory ExemptionsAdministrative LawGovernmental InformationFreedom of InformationDisclosure RequirementsPublic Inspection

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§ 191.129 Defendant's Financial Information in Action Seeking Punitive Damages

Civ. Code § 3295 provides procedural safeguards against the disclosure of a defendant's financial information in an action seeking punitive damages. In particular, *Civ. Code § 3295(c)* limits pretrial discovery on these matters absent a court order. For further discussion and forms relating to *Civ. Code § 3295*, see *Ch. 177, Damages, § 177.40* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureRemediesDamagesPunitive Damages

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[Reserved]

§§ 191.130[Reserved]

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§ 191.150 Matthew Bender Publications

For comprehensive discussion and forms relating to evidentiary privileges and other protections against disclosure, see DeMeo, California Deposition and Discovery Practice Ch. 20 et seq. (Matthew Bender); *see also* Hogan & Weber, California Civil Discovery, Ch.12, *Privilege* , and Ch. 13, *Work Product Protection* (LEXIS Law Publishing)

For memoranda relating to privileges and other protections against disclosure, see California Points and Authorities, Ch. 81, *Discovery: Privileges and Other Discovery Limitations* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 191.151 California Constitution

Right to privacy giving rise to privilege not to disclose matters within established zone of privacy absent compelling state interest. *Cal. Const., art. I, § 1*

Freedom of press guarantee giving rise to qualified news reporter privilege not to disclose confidential sources. *Cal. Const., art. I, § 2(a)*

Immunity from contempt for press and media for refusal to disclose source or unpublished information. *Cal. Const., art. I, § 2(b)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawSubstantive Due ProcessPrivacyGeneral OverviewEvidencePrivilegesJournalist's PrivilegeElementsEvidencePrivilegesJournalist's PrivilegeExceptionsEvidencePrivilegesJournalist's PrivilegeScope

California Forms of Pleading and Practice--Annotated

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 191 DISCOVERY: PRIVILEGES AND OTHER DISCOVERY LIMITATIONS
PART III. RESEARCH GUIDE

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§ 191.152 State Statutes

[1] Disclosure Limits Under Discovery Act and Evidence Code

Scope of discovery. *Code Civ. Proc. § 2017.010 et seq.*

Work product protection. *Code Civ. Proc. § 2018.010 et seq.*

Recovery of privileged electronically stored information that was inadvertently disclosed in the course of discovery. *Code Civ. Proc. § 2031.285*

General provisions relating to privileges. *Evid. Code §§ 900-920*

Privilege against self incrimination. *Evid. Code §§ 930, 940*

Attorney-client privilege. *Evid. Code §§ 950-962*

Privilege not to testify against spouse. *Evid. Code §§ 970-973*

Privilege for confidential marital communications. *Evid. Code §§ 980-987*

Physician-patient privilege. *Evid. Code §§ 990-1007*

Psychotherapist-patient privilege. *Evid. Code §§ 1010-1027*

Clergy-penitent privileges. *Evid. Code §§ 1030-1034*

Sexual assault counselor-victim privilege. *Evid. Code §§ 1035-1036.2*

Domestic violence counselor-victim privilege. *Evid. Code §§ 1037-1037.7*

Protection of official information and identity of informer. *Evid. Code §§ 1040-1047*; *Penal Code § 832.7*

Privilege not to disclose vote. *Evid. Code § 1050*

Trade secret privilege. *Evid. Code § 1060*

Assertion of trade secret privilege in criminal proceeding. *Evid. Code §§ 1061-1063*

Newsperson's immunity. *Evid. Code § 1070*

[2] Other Statutes Relating to Disclosure Limitations

Records pertaining to treatment of persons who are impaired by alcohol or dangerous drugs and who are subject to licensing governed by Department of Consumer Affairs are not subject to discovery. *Bus. & Prof. Code § 156.1(b)*

Records pertaining to treatment of pharmacist under Pharmacists Recovery Program (*Bus. & Prof. Code § 4360 et seq.*) are not discoverable. *Bus. & Prof. Code § 4372*

Written offer or required communication of settlement offer are discoverable by either party in action where existence or communication of offer is issue. *Bus. & Prof. Code § 6103.5(b)*

Records of video recording sales or rental services are discoverable without written consent of individual who is subject of records when disclosure is made pursuant to proper use of discovery. *Civ. Code § 1799.3(b)(2)*

Limits on pretrial discovery of defendant's financial information in action involving punitive damages claim. *Civ. Code § 3295(c)*

Procedural protections on subpoenaing consumer or employee records. *Code Civ. Proc. §§ 1985.3, 1985.6*

Evidence of anything said or admission in course of mediation or mediation consultation is not admissible or discoverable and disclosure of evidence cannot be compelled. *Evid. Code § 1119(a)*

Records and proceedings of specified committees organized to evaluate quality of health care are not discoverable. *Evid. Code §§ 1157-1157.7*

Assets of public employer are not discoverable in action in which it is alleged that public employee is liable for punitive damages. *Gov. Code § 825(b)*

Litigation exception to disclosure under Public Records Act. *Gov. Code § 6254(b)*

Court is authorized to limit discovery by person initiating false claims action under *Gov. Code § 12652*. *Gov. Code § 12652(h), (i)*

Neither physician-patient or psychotherapist privilege applies in any court proceeding or administrative hearing to information required to be reported under *Penal Code § 11160 et seq.* with respect to any patient suffering from any wound or other physical injury inflicted by his or her own act or inflicted by another when the injury is by means of a firearm or any patient suffering from any wound or other physical injury that is result of assaultive or abusive conduct. *Penal Code §§ 11160(a), 11163.2*

Exception to physician and psychotherapist privileges for required report of child abuse information. *Penal Code § 11171.2(b).*

Information regarding redemption rates and recycling rates may be disclosed only to government entity and only under conditions that protect its confidential nature. *Pub. Res. Code § 14551.4*

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesAttorney-Client PrivilegeGeneral OverviewEvidencePrivilegesJournalist's PrivilegeGeneral OverviewEvidencePrivilegesMarital PrivilegesConfidential CommunicationsGeneral OverviewEvidencePrivilegesSelf-Incrimination PrivilegeGeneral OverviewEvidencePrivilegesTrade SecretsGeneral Overview

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§ 191.153 Decisions

[1] Discovery Permitted If Matter Is Relevant and Unprivileged

Information is discoverable under discovery statutes if unprivileged and either relevant to subject matter of action or reasonably calculated to reveal admissible evidence. *Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 711, 21 Cal. Rptr. 2d 200, 854 P.2d 1117* ; *Valley Bank of Nevada v. Superior Court (1975) 15 Cal. 3d 652, 655-656, 125 Cal. Rptr. 553, 542 P.2d 977* (interpreting statutes prior to 1986 enactment of Discovery Act)

[2] Privileges Generally

Courts are precluded from creating exceptions to privileges not specified by statute by policy of *Evid. Code § 911* (limiting privileges to those specified by statute). *Dickerson v. Superior Court (1982) 135 Cal. App. 3d 93, 99, 185 Cal. Rptr. 97*

Trial court has authority to hold in camera hearing to determine (1) validity of assertion of attorney-client privilege by attorney suspected of criminal activity, and (2) whether work-product privilege applies to seized client files. *People v. Superior Court (Bauman & Rose) (1995) 37 Cal. App. 4th 1757, 1767, 44 Cal. Rptr. 2d 734*

[3] Privilege Against Self Incrimination

Although permitted to be called as witness, person in any proceeding is able to refuse to testify regarding any criminal conduct engaged in or concerning any other matter implicating criminal activity. *Cramer v. Tyars (1979) 23 Cal. 3d 131, 138, 151 Cal. Rptr. 653, 588 P.2d 793*

Ex-husband could not invoke privilege against self-incrimination in judgment debtor proceeding, because silence about his income would not have incriminated him, but instead, would have prevented him from defending against contempt charges for failure to comply with support orders. *In re the Marriage of Sachs (2002) 95 Cal. App. 4th 1144,*

1161-1162, 116 Cal. Rptr. 2d 273

Plaintiff who refused to answer questions or produce documents at deposition on grounds of self-incrimination privilege is properly precluded from introducing evidence at trial or supporting or opposing designated claims or defenses to which deposition questions or documents related. *Dwyer v. Crocker National Bank (1987) 194 Cal. App. 3d 1418, 1431-1432, 240 Cal. Rptr. 297*

Civil defendants facing possible criminal prosecution based on same facts as civil case are able to assert privilege against self-incrimination. *Brown v. Superior Court (1986) 180 Cal. App. 3d 701, 708, 711, 226 Cal. Rptr. 10*

Privilege against self-incrimination is not applicable to matters that will subject witness to civil rather than criminal liability. *Warford v. Medeiros (1984) 160 Cal. App. 3d 1035, 1039 n.1, 207 Cal. Rptr. 94*

Order striking part of answer and proceeding to default is excessively harsh penalty for civil defendant's exercise of constitutional privilege against self-incrimination; appropriate penalty depends on whether party is plaintiff ordefendant. *Alvarez v. Sanchez (1984) 158 Cal. App. 3d 709, 712-713, 715, 204 Cal. Rptr. 864*

Availability of privilege against self-incrimination turns on degree of likelihood of claimant's undergoing punishment following conviction based on answers to interrogatories. *Gonzales v. Superior Court (1981) 117 Cal. App. 3d 57, 68, 358 Cal. Rptr. 178*

[4] Attorney-Client Privilege

[a] Claiming the Attorney-Client Privilege

Attorney-client privilege attaches to confidential communication between attorney and client and bars discovery of communication irrespective of whether it includes unprivileged material. *Costco Wholesale Corp. v. Superior Court (2009) 47 Cal. 4th 725, 734, 219 P.3d 736*

When there is a prima facie claim of attorney-client privilege, trial judge must accord a full hearing, with oral argument, before ordering revelation of client confidences. *Titmas v. Superior Court (2001) 87 Cal. App. 4th 738, 740, 104 Cal. Rptr. 2d 803*

Non-party had standing to make motion to assert attorney-client privilege to prevent disclosure of privileged material sought to be disclosed by party; non-party could not, however, move to intervene as party solely to assert privilege. *Mylan Lab., Inc. v. Soon-Shiong (1999) 76 Cal. App. 4th 71, 73-74, 90 Cal. Rptr. 2d 111*

Determination of whether particular employee statement was that of independent witness, and not related to scope of employee's duties, rests with trial court. *Martin v. Workers' Comp. Appeals Bd. (1997) 59 Cal. App. 4th 333, 346-347, 69 Cal. Rptr. 2d 138* (remand to W.C.A.B. with directions to return case to workers' compensation judge for evidentiary hearing); *overruled on other grounds, Costco Wholesale Corp. v. Superior Court (2009) 47 Cal. 4th 725, 739, 219 P.3d 736*

[b] Corporation or Unincorporated Association as Client

Successor corporation was holder of attorney-client privilege of merged client corporation, and absent waiver by successor corporation, legal advice to client merged corporation was protected. *Venture Law Group v. Superior Court (2004) 118 Cal. App. 4th 96, 105-106, 12 Cal. Rptr. 3d 656*

Confidential occurrence reports prepared by hospital were protected by attorney-client privilege in wrongful death medical malpractice case because dominant purpose of reports was not accident prevention but rather was for transmittal to attorney in course of professional attorney-client relationship under circumstances in which hospital expected confidentiality. *Scripps Health v. Superior Court (2003) 109 Cal. App. 4th 529, 534-536, 135 Cal. Rptr. 2d 126*

Because shareholders are not holders of attorney-client privilege, they do not effect waiver of that privilege by filing derivative suit; shareholder derivative suit for legal malpractice against corporation's outside counsel, brought inequity, could not proceed because shareholders could not waive privilege and absent waiver by corporate client, third-party attorney was effectively foreclosed from mounting any meaningful defense. *McDermott, Will & Emery v. Superior Court (2000) 83 Cal. App. 4th 378, 383-385, 99 Cal. Rptr. 2d 622*

Condominium association that brought construction defect lawsuit on its own behalf is holder of attorney-client privilege; individual condominium owners, who are not individually named as plaintiffs in the litigation, are not holders of privilege and cannot demand production of privileged documents. *Smith v. Laguna Sur Villas Community Assn. (2000) 79 Cal. App. 4th 639, 643, 94 Cal. Rptr. 2d 321*

Issue of ex parte communication prohibited by *Cal. Rules Prof. Conduct, Rule 2-100*, and attorney-client privilege frequently arises in same case; scope and applicability of each to former corporate employee are not necessarily identical. *Nalian Truck Lines, Inc. v. Nakano Warehouse & Transportation Corp. (1992) 6 Cal. App. 4th 1256, 1261-1265, 8 Cal Rptr. 2d 467*

Ex parte contact by governmental authorities with employees and certain former employees of corporate defendant in civil and criminal proceedings involving alleged illegal dumping of hazardous waste did not violate privilege, when information sought concerns witnesses' nonprivileged observations occurring outside any attorney-client relationship; mere possibility that authorities may inadvertently or improperly obtain privileged information is insufficient basis for injunction preventing such contact. *Triple A Machine Shop, Inc. v. State of California (1989) 213 Cal. App. 3d 131, 143-144, 261 Cal. Rptr. 493*

Former employees who were not officers or agents responsible for directing company's actions in response to legal advice are third-party witnesses who may be contacted ex parte by opposing counsel; corporate party is entitled to seek protective order if it knew or suspected former employee was privy to privileged information and believed there was danger of disclosure in ex parte interview. *Bobele v. Superior Court (1988) 199 Cal. App. 3d 708, 713-714, 245 Cal. Rptr. 144*

Telephone conversations between members of redevelopment agency and its counsel were not privileged under attorney-client privilege, but constituted meeting in violation of Brown Act (*Gov. Code §§ 54950-54961*), because communications were not legal consultation regarding threatened or pending lawsuit and were not genuine occasion for attorney-client confidentiality. *Stockton Newspapers, Inc. v. Redevelopment Agency (1985) 171 Cal. App. 3d 95, 104-105, 214 Cal. Rptr. 561*

Attorney-client privilege exists for all corporations with no exception for shareholders of closely held corporations. *Hoiles v. Superior Court (1984) 157 Cal. App. 3d 1192, 1198-1199, 204 Cal. Rptr. 111*

No exception to attorney-client privilege exists under state law when client is corporation sued by shareholder in derivative suit. *Dickerson v. Superior Court (1982) 135 Cal. App. 3d 93, 99, 185 Cal. Rptr. 97*

[c] Crime or Fraud Exception

Probable cause sufficient for issuance of search warrant is not sufficient to establish prima facie crime-fraud exception to attorney-client privilege. *Geilim v. Superior Court (1991) 234 Cal. App. 3d 166, 174-175, 285 Cal. Rptr. 602*

[d] Disclosure to Third Persons

Statements made by minor to guardian ad litem are protected by attorney-client privilege when statements made at request of minor's attorney for purpose of preparing minor's answers to interrogatories or to assist attorney in preparing for trial. *De Los Santos v. Superior Court (1980) 27 Cal. 3d 677, 682-685, 166 Cal. Rptr. 172, 613 P.2d 233*

Corporate attorney-client privilege can extend to confidential communications between client's employees regarding legal advice and strategy, even though corporation's attorneys were directly involved and communications did not include excerpts of direct communications from attorneys, provided that employees involved were third persons to whom disclosure was reasonably necessary to further purpose of legal consultation. *Zurich Am. Ins. Co. v. Superior Court (2007) 155 Cal. App. 4th 1485,1502-1505, 66 Cal. Rptr. 3d 833*

Attorney-client privilege is inapplicable when defendant speaks in a way that enables third persons to overhear his comment and see his gesture, even if defendant's attorney is seated right next to him and defendant intended communication to be confidential. *People v. Urbano (2005) 128 Cal. App. 4th 396, 403, 26 Cal. Rptr. 3d 871*

Supplemental incident reports prepared by police officers and transmitted to law firm for review and legal advice were not privileged materials, because reports were public records, prepared in performance of official duties. *Green & Shinee v. Superior Court (2001) 88 Cal. App. 4th 532, 537, 105 Cal. Rptr. 2d 886*

Pursuant to *Evid. Code § 952*, attorney-client communications disclosed to clerks, secretaries, interpreters, physicians, spouses, parents, business associates, or joint clients, when reasonably necessary to accomplish purpose of consultation, remain privileged. *Insurance Co. of N. America v. Superior Court (1980) 108 Cal. App. 3d 758, 771, 166 Cal. Rptr. 880*

[e] Joint Client Exception

Common interest doctrine allowed defense attorneys, in action alleging personal injuries caused by workplace exposure to toxic chemical products, to share reasonably necessary communications about the case with counsel for other defendants, as authorized by case management conference order, without waiving their attorney-client privilege and work product protection. *Meza v. H. Muehlstein & Co., Inc. (2009) 176 Cal. App. 4th 969, 982-983, 98 Cal. Rptr. 3d 422*

Joint client exception attaches to insurer-insured relationship only if insurer has employed attorney to defend its insured. *State Farm Fire & Casualty Co. v. Superior Court (1988) 206 Cal. App. 3d 1428, 1432, 254 Cal. Rptr. 543*

Evid. Code § 962 is intended to provide joint clients access to communications with jointly related attorney which touch on matters affecting both clients; only matters involving purely private or personal interests of one of partners are privileged. *Hecht v. Superior Court (1987) 192 Cal. App. 3d 560, 566-567, 237 Cal. Rptr. 528* ; *Wortham & Van Liew v. Superior Court (1987) 188 Cal. App. 3d 927, 932, 233 Cal. Rptr. 725*

Joint client exception is not available regarding communications by insurance company to attorney prior to time that company accepted obligations under policy. *Aetna Casualty & Surety Co. v. Superior Court (1984) 153 Cal. App. 3d 467, 474, 200 Cal. Rptr. 471*

When insurer employs counsel to defend insured, as required by contract of insurance, any communication with

attorney concerning handling of claim against insured is matter of common interest under *Evid. Code § 962*. *Glacier Gen. Assurance Co. v. Superior Court (1979) 95 Cal. App. 3d 836, 842, 157 Cal. Rptr. 435*

[f] Initial Consultation

California attorney-client privilege applied to Internet questionnaires completed by four plaintiffs, in tort action against drug manufacturer, even though plaintiffs filled out questionnaires before law firm represented them and with no assurance that it would; law firm's disclaimer of attorney-client relationship was not disclaimer of confidentiality, and "prospective clients' communications with a view to obtaining legal services are plainly covered by the attorney-client privilege under California law, regardless of whether they have retained the lawyer, and regardless of whether they ever retain the lawyer." *Barton v. United States District Court (9th Cir. 2005) 410 F.3d 1104, 1111*

Attorney-client privilege applies to videotaped communication between personal injury victim and her attorney brother made while she was in hospital following accident; although record did not indicate whether plaintiff believed attorney-client relationship existed or whether she considered their communication confidential, such beliefs could be inferred from circumstances surrounding their videotaped communication. *Hiott v. Superior Court (1993) 16 Cal. App. 4th 712, 717-718, 20 Cal. Rptr. 2d 157*

Person claiming privilege has burden of proof that materials sought constitute or contain information transmitted between party and attorney during course of attorney-client relationship. *Schaff v. Superior Court (1983) 146 Cal. App. 3d 921, 925, 194 Cal. Rptr. 546*

Discussion with attorney for purpose of obtaining legal advice is privileged even though no actual employment ensued and most or all of relevant disclosures or communications came from attorney instead of client. *Benge v. Superior Court (1982) 131 Cal. App. 3d 336, 347, 182 Cal. Rptr. 275*

[g] Legal Malpractice Action

In disciplinary hearing against client's original attorney, communications between that client and second attorney pertaining to that matter are not within exception of *Evid. Code § 958* (communication relevant to breach). *Brockway v. State Bar (1991) 53 Cal. 3d 51, 63-64, 278 Cal. Rptr. 836, 806 P.2d 308*

Communications between client and attorney representing client in malpractice action against former attorney are privileged; privilege is not limited by *Evid. Code § 958* (communication relevant to breach), nor waived by tendering issue on which requested information may be relevant. *Schlumberger Ltd. v. Superior Court (1981) 115 Cal. App. 3d 386, 392-393, 171 Cal. Rptr. 413*

[h] Matter Put in Issue

Implied waiver of privilege occurs when plaintiff has placed in issue communication going to heart of claim in controversy. *Chicago Title Ins. Co. v. Superior Court (1985) 174 Cal. App. 3d 1142, 1149 220 Cal. Rptr. 507*

Privilege is unavailable with respect to matters regarding attorney competence put in issue in habeas corpus proceeding. *In re Gray (1981) 123 Cal. App. 3d 614, 616, 176 Cal. Rptr. 721*

[i] Public Entity Client

In action brought by real party in interest irrigation district to challenge local agency formation commission's denial of district's application to provide retail electric service, deliberative process privilege protected from discovery the commissioners' reasoning process and evidence they relied on in rejecting district's application. *San Joaquin Cty. Local Agency Formation Comm'n v. Superior Court (2008) 162 Cal. App. 4th 159, 172, 76 Cal. Rptr. 3d 93*

Documents relating to legislators' mental processes or reasons for enacting ordinance that imposed limits on operation of card rooms were irrelevant and not discoverable; even assuming that ulterior purpose behind ordinance were relevant to its validity, that discovery would violate "mental processes principle." *Sutter's Place Inc. v. Superior Court (2008) 161 Cal. App. 4th 1370, 1376, 75 Cal. Rptr. 3d 9*

Challengers of reapportionment legislation were not entitled to depose legislative staff member on legislators' subjective motivations; evidence relating to individual legislators' mental processes is irrelevant and not discoverable, because validity of legislation does not depend on its drafters' subjective motivation. *Nadler v. Schwarzenegger (2006) 137 Cal. App. 4th 1327, 1336-1337, 41 Cal. Rptr. 3d 92*

Brown Act, *Gov. Code § 54956.9*, which permits legislative body of local agency to hold closed-session meetings with its legal counsel to discuss litigation to which it is a party, did not allow nonprofit corporation created by city to hold closed-session meetings with legal counsel for the city Redevelopment Agency to discuss Agency's pending litigation to which non-profit corporation was not a party. *Shapiro v. Board of Directors of the Centre City Dev. Corp. (2005) 134 Cal. App. 4th 170, 185, 35 Cal. Rptr. 3d 826*

Pending litigation exemption of *Gov. Code § 6254(b)* applies to litigation-related documents parties to litigation do not intend to be revealed outside litigation, when sought by nonparty persons or entities; however, deposition transcripts are not subject to this exemption because they are available to the public under *Code Civ. Proc. § 2025.570*. *Board of Trustees of California State Univ. v. Superior Court (The Copley Press, Inc.) (2005) 132 Cal. App. 4th 889, 894, 34 Cal. Rptr. 3d 82*

Brown Act, California's open meeting law, did not require disclosure of closed session minutes pursuant to subpoena in civil discovery proceeding. *County of Los Angeles v. Superior Court (Union of American Physicians and Dentists) (2005) 130 Cal. App. 4th 1099, 1102, 30 Cal. Rptr. 3d 708*

Public entities has right to assert attorney-client privilege. *Roberts v. City of Palmdale (1993) 5 Cal. 4th 363, 370-371, 20 Cal. Rptr. 2d 330, 853 P.2d 496*

Public Records Act (*Gov. Code § 6250 et seq.*) did not require disclosure of letter that city attorney prepared for city council in which attorney expressed legal opinions concerning resident's pending appeal of parcel map; although letter was "public record" within meaning of act, it was also confidential communication within attorney-client privilege; city was entitled to assert privilege without alleging that letter was document pertaining to pending litigation. *Roberts v. City of Palmdale (1993) 5 Cal. 4th 363, 373, 20 Cal. Rptr. 2d 330, 853 P.2d 496*

Brown Act (*Gov. Code § 54950 et seq.*) did not require disclosure of letter that city attorney prepared for city council; this act broadly preserves attorney-client privilege for local governing bodies; language in *Gov. Code § 54956.9* abrogating privilege applied to open meeting requirements only and does not regulate transmission of documents such as city attorney's letter. *Roberts v. City of Palmdale (1993) 5 Cal. 4th 363, 373-381, 20 Cal. Rptr. 2d 330, 853 P.2d 496*

[j] Scope of Privilege

Attorney-client privilege applies to communications made in course of professional employment that are intended to be

confidential. *Roberts v. City of Palmdale (1993) 5 Cal. 4th 363, 371, 20 Cal. Rptr. 2d 330, 853 P.2d 496*

Privilege applies not only to communications made in anticipation of litigation, but also to legal advice when no litigation is threatened. *Roberts v. City of Palmdale (1993) 5 Cal. 4th 363, 371, 20 Cal. Rptr. 2d 330, 853 P.2d 496*

Privilege has strong basis in public policy and administration of justice in that it seeks to ensure the right of every person to freely and fully confer andconfide in attorney so that person may have adequate legal advice. *Roberts v. City of Palmdale (1993) 5 Cal. 4th 363, 380, 20 Cal. Rptr. 2d 330, 853 P.2d 496*

Attorney-client privilege is not limited to judicial proceedings, and applies in administrative law setting; when agency has power to compel testimony, this power is tempered by attorney-client privilege absent unambiguous statutory directive to contrary. *Southern Cal. Gas Co. v. Public Utilities Com. (1990) 50 Cal. 3d 31, 38, 265 Cal. Rptr. 801, 784 P.2d 1373*

Attorney-client privilege protects client's identity when known facts concerning attorney's representation of anonymous client operate to implicate that client in unlawful activities, and disclosure of client's name might expose client to criminal or civil liability. *Hays v. Wood (1979) 25 Cal. 3d 772, 785, 160 Cal. Rptr. 102, 603 P.2d 19*

Attorney-client privilege does not protect against disclosure of underlying facts on which communications are based. *Coy v. Superior Court (1962) 58 Cal. 2d 210, 219-220, 23 Cal. Rptr. 393, 373 P.2d 457* ; *Benge v. Superior Court (1982) 131 Cal. App. 3d 336, 349, 182 Cal. Rptr. 275*

Compelling disclosure of identities of putative class members who contacted plaintiff's counsel did not violate attorney-client privilege because no personal, confidential information was sought; however, discovery would violate class members' privacy rights. *Tien v. Superior Court (2006) 139 Cal. App. 4th 528, 540-541, 43 Cal. Rptr. 3d 121*

When fiduciary retains attorney for advice or assistance in discharge of his or her fiduciary obligations, attorney-client relationship exists between fiduciary and attorney; those communications are absolutely protected from disclosure to everyone, including persons who are ultimate beneficiaries of fiduciary's actions. *Shannon v. Superior Court (1990) 217 Cal. App. 3d 986, 993-995, 266 Cal. Rptr. 242* (receiver)

Persons encompassed within scope of attorney-client privilege are not necessarily equivalent to those encompassed within *California Rules of Professional Conduct, Rule 2-100*, with whom ex parte communication is barred. *Triple A Machine Shop, Inc. v. State of California (1989) 213 Cal. App. 3d 131, 141, 261 Cal. Rptr. 493*

Statement made by insured to his or her liability insurance company, concerning event that might be basis of covered claim, is privileged communication if policy requires insurer to defend insured through its attorney, and communication is intended to assist attorney in that defense. *Soltani-Rastegar v. Superior Court (1989) 208 Cal. App. 3d 424, 427, 256 Cal. Rptr. 255*

Attorney-client privilege only protects against disclosure of communications; it does not protect against disclosure of underlying facts by those who communicated with attorney. *Bobele v. Superior Court (1988) 199 Cal. App. 3d 708, 713-714, 245 Cal. Rptr. 144*

Attorney-client privilege is applicable to confidential communications during preliminary negotiations with attorney, even if employment is denied. *Rosso, Johnson, Rosso & Ebersold v. Superior Court (1987) 191 Cal. App. 3d 1514, 1518, 237 Cal. Rptr. 242*

In action between partners in which partnership information is sought from attorney representing partnership, attorney-client privilege protects from disclosure only information representing purely private or personal interests of

one of partners. *McCain v. Phoenix Resources, Inc. (1986) 185 Cal. App. 3d 575, 580-581, 230 Cal. Rptr. 25*

Attorney-client privilege is not designed to afford client protection against diversion of his or her attorney's resources. *People v. Superior Court (Keuffel & Esser Co.) (1986) 181 Cal. App. 3d 785, 789, 227 Cal. Rptr. 13*

Interrogatory in action between former law partners seeking facts concerning allegation that client files were kept confidential by agreement between parties did not impinge on attorney-client privilege when it did not attempt to discover information contained in any client's file and when it was primarily concerned with mutual claims that each of former associates was diverting clients in derogation of other's rights. *Willis v. Superior Court (1980) 112 Cal. App. 3d 277, 293-294, 169 Cal. Rptr. 301*

Interrogatories in action between former law partners requiring disclosure of clients was not protected when information sought was relevant and when plaintiff made no showing that information was protected confidential communication. *Willis v. Superior Court (1980) 112 Cal. App. 3d 277, 294-295, 169 Cal. Rptr. 301*

[k] Trustee

Trustee may assert attorney-client privilege to withhold privileged communications or documents from trust beneficiaries, regardless of their subject matter; thus, in action for accounting, beneficiaries were not entitled to privileged documents relating to trust administration or to petitioner trustee's personal liability. *Wells Fargo Bank v. Superior Court (2000) 22 Cal. 4th 201, 206, 91 Cal. Rptr. 2d 716, 990 P.2d 591*

[l] Waiver

Law firm's disclaimer of representation on its Internet questionnaire did not act as waiver of confidentiality afforded under attorney-client privilege; therefore, questionnaires completed by four plaintiffs, before their representation by law firm in class action suit against drug manufacturer, were not discoverable, in order to compare questionnaire to what same individual said at deposition. *Barton v. United States District Court (9th Cir. 2005) 410 F.3d 1104, 1111*

If attorney accidentally discloses privileged material, such as by erroneously including documents that were not intended to be among those produced to opponent, attorney-client privilege may not be waived; rather, court must take into account privilege holder's subjective intent and relevant surrounding circumstances in order to decide whether privilege is waived. *Rico v. Mitsubishi Motors Corp. (2007) 42 Cal. 4th 807, 810, 819-820, 68 Cal. Rptr. 3d 758, 171 P.3d 1092*

Disclosure by client of fact and conclusion of communication to attorney is not waiver of privilege when there is no disclosure of significant part of communications concerning litigation. *Southern Cal. Gas Co. v. Public Utilities Com. (1990) 50 Cal. 3d 31, 39-42, 46-49, 265 Cal. Rptr. 801, 784 P.2d 1373*

No implied waiver of privilege occurs, even though conclusion of consultation with attorney was revealed, unless attorney's advice or state of mind is placed in issue. *Southern Cal. Gas Co. v. Public Utilities Com. (1990) 50 Cal. 3d 31, 39-42, 46-49, 265 Cal. Rptr. 801, 784 P.2d 1373*

Mere disclosure of fact that privileged communication has occurred does not amount to disclosure of content of that communication, and does not necessarily constitute waiver of privilege. *Mitchell v. Superior Court (1984) 37 Cal. 3d 591, 601-603, 208 Cal. Rptr. 886, 691 P.2d 642*

Defendant county's disclosure to codefendant developers of documents sent by outside law firm retained to provide advice on California Environmental Quality Act compliance issues did not waive attorney-client privilege, because

common interest doctrine codified in *Evid. Code § 912(d)* applied; county and developers both sought to defend environmental impact report in litigation, and disclosure of advice was reasonably necessary to further purpose of original legal consultation. *California Oak Foundation v. County of Tehama (2009) 174 Cal. App. 4th 1217, 1222, 94 Cal. Rptr. 3d 902*

Award of sanctions against defense attorney who unilaterally copied allegedly privileged material plaintiffs had inadvertently produced and sent it to arbitration panel affirmed; in keeping with rule first enunciated in *State Compensation Ins. Fund v. WPS, Inc. (1999) 70 Cal. App. 4th 644, 82 Cal. Rptr. 2d 799* and approved in *Rico v. Mitsubishi Motors Corp. (2007) 42 Cal. 4th 807, 68 Cal. Rptr. 3d 758, 171 P.3d 1092* , attorney should have sought guidance from panel. *Bak v. MCL Financial Group, Inc. (2009) 170 Cal. App. 4th 1118, 1126-1127, 88 Cal. Rptr. 3d 800*

Implied waiver is established by showing that "*the client* put the otherwise privileged communication directly at issue and that disclosure is essential for a fair adjudication of the action"; thus, in writ proceeding challenging trial court's discovery order compelling attorney to answer deposition questions about legal advice given to law firm's corporate client regarding merger, individual defendants (collectively, majority shareholders of merged corporation) could not impliedly waive attorney-client privilege by asserting advice of counsel defense because they were not holders of merged corporation's privilege. *Venture Law Group v. Superior Court (2004) 118 Cal. App. 4th 96, 105-106, 12 Cal. Rptr. 3d 656*

Corporation that was target of government investigation regarding improperly recorded revenues waived attorney-client privilege and work product protection when it shared privileged documents with government, despite confidentiality agreements that accompanied disclosures; "common interest" doctrine did not preclude disclosure because there was no real alignment of interests between government and corporation under investigation for securities law violations. *McKesson HBOC, Inc. v. Superior Court (2004) 115 Cal. App. 4th 1229, 1237-1241, 9 Cal. Rptr. 3d 812, 818-821*

When parties negotiating business transaction entered into joint defense agreement in anticipation of litigation by a third party, in camera review was required to determine whether disclosure of documents in course of transaction waived attorney-client privilege. Joint defense agreement was not void as matter of public policy; agreement evidenced expectation of confidentiality necessary to avoid waiver by disclosure to someone outside attorney-client relationship, but could not protect documents from disclosure, unless they contained or reflected attorney-client communications or attorney work product. *OXY Resources California LLC v. Superior Court (2004) 115 Cal. App. 4th 874, 891-895, 9 Cal. Rptr. 3d 621*

Designation of party as expert trial witness is not in itself implied waiver of party's attorney-client privilege; if designation is withdrawn before party discloses significant part of privileged communication, or before it is known with reasonable certainty that party will actually testify as expert, privilege is secure, but if party produces privileged documents or testifies as expert, privilege is waived. *Shooker v. Superior Court (2003) 111 Cal. App. 4th 923, 930, 4 Cal. Rptr. 3d 334*

Inadvertent disclosure of privileged material by client's attorney does not constitute waiver of attorney-client privilege under *Evidence Code § 912* if client or privilege holder clearly did not consent or intend to disclose privileged matter. *State Comp. Ins. Fund v. WPS, Inc. (1999) 70 Cal. App. 4th 644, 652-654, 656-657, 82 Cal. Rptr. 2d 799* (also providing standard for attorney conduct on receipt of inadvertently disclosed privileged matter)

Inadvertent disclosure during discovery of information protected by attorney-client privilege was not waiver of privilege, and information could be excluded at trial. *O'Mary v. Mitsubishi Electronics America (1997) 59 Cal. App. 4th 563, 577, 69 Cal. Rptr. 2d 389*

Defendant in defamation action does not waive attorney-client privilege by alleging that statements were made in

anticipation of litigation, and were therefore protected by litigation privilege. *Aronson v. Kinsella (1997) 58 Cal. App. 4th 254, 268-269, 68 Cal. Rptr. 2d 305*

Personal injury plaintiff waives attorney-client privilege with respect to videotaped conversation between plaintiff and her attorney made while she was in hospital; in verified response to defendant's discovery request, plaintiff revealed videotape's existence and indicated that defendant was welcome to copy; plaintiff's verified response to request while represented by three attorneys constituted express consent to disclosure within the meaning of *Evid. Code § 912*. *Hiott v. Superior Court (1993) 16 Cal. App. 4th 712, 719-720, 20 Cal. Rptr. 2d 157*

Client's waiver of attorney-client privilege regarding one aspect of protected attorney-client relationship does not necessarily waive privilege as to other aspects; disclosure of client's privileged psychological report pursuant to court order does not waive privilege regarding deleted section containing client's remarks to psychologist concerning offenses with which he had been charged. *Rodriguez v. Superior Court (1993) 14 Cal. App. 4th 1260, 1270, 18 Cal. Rptr. 2d 120*

When insurer provides insured with independent counsel in liability action against insured, if insured later brings bad faith action against insurer for denial of coverage, confidential communications between adjuster and insurer's coverage counsel are privileged and are not discoverable by insured. *State Farm Fire & Casualty Co. v. Superior Court (1989) 216 Cal. App. 3d 1222, 1228, 265 Cal. Rptr. 372*

Evid. Code § 912 is exclusive means by which attorney-client privilege may be waived; forced waiver for some technical shortfall under discovery statutes is at odds with *Evid. Code § 912* and is excessive sanction when there was timely assertion of privilege. *Blue Ridge Ins. Co. v. Superior Court (1988) 202 Cal. App. 3d 339, 347, 248 Cal. Rptr. 346*

Waiver occurs through actual disclosure or consent to disclose; consent to disclose is required to be voluntary and knowing, with sufficient awareness of relevant circumstances and likely consequences. *Maas v. Municipal Court (1985) 175 Cal. App. 3d 601, 606-607, 221 Cal. Rptr. 245*

Determination of whether implied waiver has occurred requires need to reach evidence sought to be shielded, showing of relevance and materiality of that evidence, and showing by fair preponderance of evidence that information cannot be secured from any less intrusive source. *Chicago Title Ins. Co. v. Superior Court (1985) 174 Cal. App. 3d 1142, 1153, 220 Cal. Rptr. 507*

Failure to provide timely factual basis for claim of attorney-client privilege does not constitute waiver of privilege. *Motown Record Corp. v. Superior Court (1984) 155 Cal. App. 3d 482, 492, 202 Cal. Rptr. 227*

[5] Clergy-Penitent Privilege

Trial court abused its discretion because it failed to apply correct legal standard in determining that clergy-penitent privilege did not apply; fact that term "incident" in discovery requests was not ambiguous, and that statements at issue would be disclosed subject to protective order, were irrelevant to whether communications were penitential. Doe 2 v. *Superior Court (Mark Calkins) (2005) 132 Cal. App. 4th 1504, 1517, 34 Cal. Rptr. 3d 458*

In grand jury investigation of allegations of child sexual assault against two priests, documents generated in the course of "troubled-priest interventions" were not privileged as penitential communications under *Evid. Code § 1032* because both parties to the original communications knew they would be transmitted to third persons. *Roman Catholic Archbishop of Los Angeles v. Superior Court (People) (2005) 131 Cal. App. 4th 417, 445, 32 Cal. Rptr. 3d 209*

Absolute clergy-penitent privilege (*Evid. Code §§ 1030-1034*) is inapplicable to nonpenitential pastoral consultations by woman who sought guidance and counseling from priest regarding her embezzling of moneys. *People v. Edwards (1988) 203 Cal. App. 3d 1358, 1365, 248 Cal. Rptr. 53*

Communication is privileged by clergy-penitent privilege only when it meets all requirements of penitential communication: (1) it must be intended to be in confidence; (2) it must be made to member of clergy who in course of his or her religious discipline or practice is authorized or accustomed to hear such communications; and (3) that member of clergy has duty under discipline or tenets of church, religious denomination, or organization to keep such communications secret. *People v. Edwards (1988) 203 Cal. App. 3d 1358, 1362-1363, 248 Cal. Rptr. 53*

[6] Marital Privileges

[a] Confidential Marital Communication

Defendant's wife was properly permitted to testify regarding incriminating statements made to her by her husband while he was severely beating her; statements were not made under mantle of confidentiality in that husband's beating of wife was also abuse of relationship on which privilege was based. *People v. Johnson (1991) 233 Cal. App. 3d 425, 437-438, 284 Cal. Rptr. 579*

Evid. Code § 980 marital privilege is applicable to written as well as oral communications; fact of communicating, as opposed to substance of communication, is not privileged; privilege is not applicable to communications in hands of third party, even eavesdropper. *Rubio v. Superior Court (1988) 202 Cal. App. 3d 1343, 1347-1348, 249 Cal. Rptr. 419*

Marital communication privilege is inapplicable when information sought relates to existence of assets of married couple, not to confidential communications between married couple. *Troy v. Superior Court (1986) 186 Cal. App. 3d 1006, 1013, 231 Cal. Rptr. 108*

Presumption that communication to spouse is confidential is overcome when criminal defendant repeatedly made communication to spouse in presence of others, continued to make communication to spouse after separation, and made identical communication to other persons. *People v. Gomez (1982) 134 Cal. App. 3d 874, 879, 185 Cal. Rptr. 155*

Privilege protecting communications between spouses is not extended to unmarried persons living together or in status tantamount to marriage. *People v. Hunt (1982) 133 Cal. App. 3d 543, 559, 184 Cal. Rptr. 197*

[b] Privilege Not to Testify Against Spouse

Court may compel spousal testimony under *Evid. Code § 972(e)(2)*, even if no accusatory pleading charges defendant with crime against his or her spouse, "whenever the crime against the third person and the crime against the spouse (1) are part of a continuous course of criminal conduct, and (2) bear some logical relationship to each other." *People v. Sinohui (2002) 28 Cal. 4th 205, 212, 120 Cal. Rptr. 2d 783, 47 P. 3d 629*

Petitioner wife could properly assert marital testimonial privilege, even though she had not seen her husband in 17 years and her assertion of privilege might deprive government of crucial evidence in double murder case, because bright line of divorce is necessary to terminate privilege, absent any express statutory exception under *Evid. Code § 972. Jurcoane v. Superior Court (2001) 93 Cal. App. 4th 886, 897, 113 Cal. Rptr. 2d 483*

In action for dissolution and accounting of partnership assets, plaintiff's spouse who is not named as party, signatory to partnership agreement, or record holder of any real property in issue, is not person for whose immediate benefit action was brought; exception under *Evid. Code § 973(b)* does not apply to compel spouse's deposition. *Duggan v. Superior*

Court (1981) 127 Cal. App. 3d 267, 269-272, 179 Cal. Rptr. 410

[7] Medical or Other Health Care Committee Records

Staff privilege exception of *Evid. Code § 1157(c)*, permitting discovery of hospital staff review committee records to persons requesting hospital staff privileges, is not applicable in action for damages. *California Eye Institute v. Superior Court (1989) 215 Cal. App. 3d 1477, 1481, 264 Cal. Rptr. 83*

[8] Newsperson's Immunity From Contempt

[a] In General

Cal. Const., art. I, § 2(b) and *Evid. Code § 1070* provide only immunity from contempt; until newsperson has been adjudged in contempt, there is nothing from which to seek relief and newsperson's petition for extraordinary relief is premature. *New York Times Co. v. Superior Court (1990) 51 Cal. 3d 453, 459-461, 273 Cal. Rptr. 98, 796 P.2d 811*

Shield law protections are not waived if newsperson consents to *in camera* review of unpublished material while expressly reserving its right to choose between complying with order to disclose material or to suffer judgment of contempt. *SCI-Sacramento, Inc. v. Superior Court (1997) 54 Cal. App. 4th 654, 662, 62 Cal. Rptr. 2d 868*

Court must balance news reporter's immunity against possibility that defendant's constitutional right to a fair trial will be compromised if the news reporter fails to disclose his or her source, and court's balancing test should encompass two principal considerations: (1) whether there is a "substantial probability of future violations or 'leaks' " that will impair defendant's right to a fair trial and (2) whether there are reasonable alternatives to disclosure. *In re Willon (1996) 47 Cal. App. 4th 1080, 1099, 55 Cal. Rptr. 2d 245*

News reporter's immunity under *Evid. Code § 1070* is merely immunity from contempt and not privilege against disclosure. *KSDO v. Superior Court (1982) 136 Cal. App. 3d 375, 383-384, 186 Cal. Rptr. 211*

Evid. Code § 1070 is intended to protect free flow of information and to provide news reporters with privilege against being held in contempt for refusing to answer questions concerning sources of their information. *Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 217, 124 Cal. Rptr. 427*

[b] Limitations on Scope of Immunity

Prosecution in criminal proceeding does not have constitutional interest sufficient to require disclosure of information otherwise protected by shield law; thus unbroadcast portion of interview with criminal defendant by newsperson is protected by *Cal. Const., art. I, § 2(b).* *Miller v. Superior Court, 21 Cal. 4th 883, 896-897, 89 Cal. Rptr. 2d 834, 986 P.2d 170*

News reporter's privilege does not override public's interest in ensuring that neither reporter nor source invades rights of other citizens through reprehensible conduct forbidden to all other persons. *Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 219, 124 Cal. Rptr. 427* (quoting *Branzburg v. Hayes (1972) 408 U.S. 665, 691-692, 92 S. Ct. 2646, 33 L. Ed. 2d 626*)

News reporter's privilege does not shield news reporters from testifying about criminal activity in which they have participated or which they have observed. *Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 218-219, 124 Cal. Rptr. 427* (quoting *Branzburg v. Hayes (1972) 408 U.S. 665, 691-692, 92 S. Ct. 2646, 33 L. Ed. 2d 626*)

Key to court's power to compel news reporter to answer in face of *Evid. Code § 1070* is the necessity for exploring violation of court's orders as means of enforcing court's constitutional obligation to prevent prejudicial pretrial publicity from emanating from its officers. *Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 221, 222, 124 Cal. Rptr. 427* ; *Farr v. Superior Court (1971) 22 Cal. App. 3d 60, 68-71, 99 Cal. Rptr. 342*

Limitation on protection afforded by shield law is applicable only when questions asked may tend to identify who, if anyone, among those subject to court's order, may have violated it. *Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 224, 124 Cal. Rptr. 427*

Evid. Code § 1070 does not grant reporter immunity from contempt for refusal to name sources of information when sources were earlier identified by reporter as judicial officers subject to court's order banning publicity during notorious murder trial. *In re Farr (1974) 36 Cal. App. 3d 577, 582, 111 Cal. Rptr. 649*

[c] Scope of Contempt Immunity

Immunity from contempt under *Cal. Const., art. I, § 2(b)*, and *Evid. Code § 1070* grants to nonparty witnesses virtually absolute protection against compelled disclosure, because generally contempt is only effective remedy against these witnesses; however, immunity does not constitute privilege against disclosure, because it does not provide protection against sanctions other than contempt which may be invoked against party to civil litigation. *Mitchell v. Superior Court (1984) 37 Cal. 3d 268, 274, 208 Cal. Rptr. 152, 690 P.2d 625*

Immunity extends not only to identity of source but also, in absence of constitutional or other limitation, to disclosure of information which may tend to reveal source of information. *Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 217-218, 124 Cal. Rptr. 427*

Burden, though not heavy, is on reporter to show that his or her testimony may tend to reveal source. *Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 218, 124 Cal. Rptr. 427*

In determining applicability of news reporter's immunity, court as considering not only offered evidence but also matters disclosed in argument, implication of the question, setting in which it is asked, and other relevant factors. *Rosato v. Superior Court (1975) 51 Cal. App. 3d 190, 218, 124 Cal. Rptr. 427*

[9] News Reporter's Qualified First Amendment Privilege

Review of factors to be weighed in applying journalist's qualified *First Amendment* privilege to refuse to disclose news sources; analysis of scope journalistic activities protected by the privilege. *Anti-Defamation League of B'Nai B'rith v. Superior Court (1998) 67 Cal. App. 4th 1072, 1080, 1092-1093, 79 Cal. Rptr. 2d 597* ; *KSDO v. Superior Court (1982) 136 Cal. App. 3d 375, 385-386, 186 Cal. Rptr. 375*

[10] Official Information Privilege

Veh. Code § 1808.5 does not create a privilege, independent of *Evid. Code § 1040*, to withhold information in DMV records required to be produced by subpoena; although information relating to real party in interest's driver'slicense involved "official information" within meaning of Evid. Code § 1040, Veh. Code § 1808.5 does not forbid disclosure of that official information within meaning of *Evid. Code § 1040(b)(1)*; and, under *Evid. Code § 1040(b)(2)*, necessity for disclosure of complete copies of real party in interest's driving records outweighed DMV's interest in preserving confidentiality. *Dep't of Motor Vehicles v. Superior Court (2002) 100 Cal. App. 4th 363, 366, 122 Cal. Rptr. 2d 504*

Where party seeking discovery of county records was father at risk of losing custody of his child because of alleged acts of violence against another child, court erred by not conducting an in camera review of county records related to the investigation of the child's death; the juvenile court was required to examine the investigative files in camera and carefully weigh the parties' respective, colliding interests in disclosure and confidentiality as to each item petitioner sought to discover, before ruling on the applicability of the conditional privilege under *Evid. Code § 1040(b)(2)* to that item. *Michael P. v. Superior Court (2001) 92 Cal. App. 4th 1036, 1045-1046, 113 Cal. Rptr. 2d 11*

Where plaintiff was a discharged police officer seeking damages and injunctive relief based on County's releasing allegedly false information to other potential employers (law enforcement agencies), officer's legitimate need for reports summarizing the County's background check and polygraph examination on him outweighed any possible need for confidentiality under the official information privilege. *County of Riverside v. Superior Court (2000) 86 Cal. App. 4th 211, 216-217, 103 Cal. Rptr. 2d 62*

Police files in ongoing criminal investigation into child's murder were held to be privileged under *Evid. Code § 1040(b)(2)* when weighed against need for discovery in suspect-parents' civil suit, based on their public identification by police as suspects; however, trial court could later determine that investigation had not progressed sufficiently to justify continued protection of most of the files. *County of Orange v. Superior Court (2000) 79 Cal. App. 4th 759, 768-769, 94 Cal. Rptr. 2d 261*

In defamation action based on public charges by minor's father that plaintiff had raped minor, police reports containing minor's statements about alleged rape were not absolutely protected from discovery by *Evid. Code § 1040*; plaintiff's interest in preserving reputation against charges outweighed minor's interest in sexual privacy, particularly when disclosure of reports would not involve intrusion into minor's sexual experiences beyond that already revealed. *Rider v. Superior Court (1988) 199 Cal. App. 3d 278, 282-287, 244 Cal. Rptr. 770*

Evid. Code § 1040 is exclusive means by which public entity may assert claim of governmental privilege based on necessity for secrecy; *Evid. Code § 1040* authorizes exclusion of privileged official information, not dismissal of action. *Rubin v. City of Los Angeles (1987) 190 Cal. App. 3d 560, 583, 235 Cal. Rptr. 516*

California Public Records Act (*Gov. Code § 6250 et seq.*) does not serve as basis of absolute privilege under *Evid. Code § 1040*. *Rubin v. City of Los Angeles (1987) 190 Cal. App. 3d 560, 585, 235 Cal. Rptr. 516*

Proceeding to establish paternity and recover support funds paid to child's mother under AFDC program was directly connected with administrationof program, and *Welf. & Inst. Code § 10850* did not prohibit production of related welfare records. *Nevada County v. Kinicki (1980) 106 Cal. App. 3d 357, 165 Cal. Rptr. 57*

[11] Peer Review Records of Hospitals and Medical Organizations

Hospital's peer review committee records are immune from discovery under *Evid. Code § 1157(a)*, and defendants could not obtain the equivalent of discovery of contents of hospital peer review committee records by subpoenaing state investigator to give expert testimony or refer at trial to his draft preliminary report when his conclusions were based on hospital peer review committee records reviewed in course of his official duties for a public agency. *Fox v. Kramer (2000) 22 Cal. 4th 531, 540-548, 93 Cal. Rptr. 2d 497, 994 P.2d 374*

Documents pertaining to review of medical and mental health care complaints by quality assurance committee for county's jail mental health services agency were exempt from disclosure because they met criteria of *Evid. Code §§ 1157* and *1157.6*, for documents generated by peer review bodies and correctional treatment quality assurance committees. *County of Los Angeles v. Superior Court (2006) 139 Cal. App. 4th 8, 14-15, 42 Cal. Rptr. 3d 390*

[12] Physician-Patient Privilege

In marital dissolution action, husband waived physician-patient privilege with respect to certain medical records because wife was present during his intake exam and he consented to disclosure of his communications with neurologist on that date; husband's filing of another physician's declaration, stating that he had treated father for past nine years, also waived privilege with respect to those records, but disclosure of husband's communications with his current physicians did not relate back to his communications to another doctor who had treated him as teenager. *Manela v. Superior Court (2009) 177 Cal. App. 4th 1139, 1146-1148, 99 Cal. Rptr. 3d 736*

Although, as a rule of evidence, physician-patient privilege protects patients from forced disclosure in course of litigation, it may not be extended to cover dissemination of information already know outside litigation; thus, privilege did not apply to non-party patients' confidential medical information obtained independently of discovery, because, in these circumstances, privilege constituted improper restraint of free speech. *Hurvitz v. Hoefflin (2001) 84 Cal. App. 4th 1232, 1243, 101 Cal. Rptr. 2d 558*

Evid. Code § 999 exception to physician-patient privilege (action for damages for conduct of patient) permitted disclosures concerning plaintiff when his or her conduct was relevant to proximate causation, as might arise when defendant alleges contributory negligence or files cross complaint. *Slagle v. Superior Court (1989) 211 Cal. App. 3d 1309, 1315, 260 Cal. Rptr. 122*

Physician-patient privilege requires physician-patient relationship; individual who contacted physician as part of group health study to determine effect of waste facility on public health is not a patient communicating with physician for purpose of securing diagnosis or treatment. *Kizer v. Sulnick (1988) 202 Cal. App. 3d 431, 439, 248 Cal. Rptr. 712*

Physician-patient privilege is unavailable to plaintiff in personal injury suit based on alleged damage to neighborhood caused by waste facility, since pursuit of such a claim is inconsistent with reasonable expectation of privacy concerning plaintiff's medical condition. *Kizer v. Sulnick (1988) 202 Cal. App. 3d 431, 439, 248 Cal. Rptr. 712*

Photographs of patient's physical condition taken by physician for sole purpose of obtaining confidential information regarding patient's condition to assist in rendering proper diagnosis and treatment are "confidential communication" and protected by physician-patient privilege. *Binder v. Superior Court (1987) 196 Cal. App. 3d 893, 897, 242 Cal. Rptr. 231*

In action for injuries allegedly caused when plaintiff's mother ingested drug while pregnant with plaintiff, exceptions to physician-patient privilege contained in *Evid. Code §§ 996(b), (c),* and *999* are inapplicable to deposition of mother, although she waived privilege by testifying freely. *Jones v. Superior Court (1981) 119 Cal. App. 3d 534, 544-546, 174 Cal. Rptr. 148*

Husband asserting right to visitation in marriage dissolution proceeding did not tender his mental or emotional condition under *Evid. Code § 996* so as to waive his physician-patient privilege. *Simek v. Superior Court (1981) 117 Cal. App. 3d 169, 176, 172 Cal. Rptr. 564*

Patient-litigant exception under *Evid. Code § 996* was not applicable to permit discovery of mother's medical records in proceeding to modify custody order when mother never tendered her medical condition as issue. *Koshman v. Superior Court (1980) 111 Cal. App. 3d 294, 298, 168 Cal. Rptr. 558*

[13] Police Officer Personnel Records

Trial court's erroneous denial of *Pitchess* motion is not reversible per se; failure to disclose relevant information in confidential personnel files, like other discovery errors, is reversible only if there were reasonable probability of different result had that information been disclosed. *People v. Gaines (2009) 46 Cal. 4th 172, 176, 92 Cal. Rptr. 3d 627, 205 P.3d 1074*

After counsel won second *Pitchess* disclosure, involving same officer and same complainant information, counsel could then refer to derivative information uncovered as part of earlier followup investigation without violating *Evid. Code § 1045(e)* protective order; purpose of *Evid Code § 1045(e)* protective order to safeguard confidential police officer personnel records is not served by requiring counsel to perform a duplicate investigation before using, at trial, derivative information counsel already possesses. *Chambers v. Superior Court (2007) 42 Cal. 4th 673, 681, 68 Cal. Rptr. 3d 43, 170 P.3d 617*

Names and salaries of public employees earning $100,000 or more per year, including peace officers, are not exempt from public disclosure under California Public Records Act (*Gov. Code §§ 6250 et seq.*); *Penal Code §§ 832.7* and *832.8* do not mandate that peace officer salary information be excluded from disclosure under Act. *International Federation of Professional & Technical Engineers v. Superior Court (2007) 42 Cal. 4th 319, 64 Cal. Rptr. 3d 693, 165 P.3d 488 , disapproving City of Los Angeles v. Superior Court (2003) 111 Cal. App. 4th 883, 3 Cal. Rptr. 3d 915*

California Public Records Act, *Gov. Code § 6254(c),* does not exempt from disclosure names and salaries of public employees earning $100,000 or more per year, including peace officers, because disclosure does not constitute "an unwarranted invasion of personal privacy." *Internat'l Federation of Professional and Technical Engineers v. Superior Court (Contra Costa Newspapers, Inc.) (2007) 42 Cal. 4th 319, 329, 346, 64 Cal. Rptr. 3d 693, 165 P.3d 488*

California Public Records Act, *Gov. Code § 6254(c),* does not protect from disclosure to newspaper publisher of names, employing departments, and hiring and termination dates of California peace officers included in database of Commission on Peace Officer Standards and Training; privacy and safety interests of peace officers in general did not outweigh public's interest in disclosure. *Comm'n on Police Officer Standards and Training v. Superior Court (Los Angeles Times Communications, LLC) (2007) 42 Cal. 4th 278, 299-303, 64 Cal. Rptr. 3d 661, 165 P.3d 462*

Criminal defendant is entitled to file sealed declaration in support of *Pitchess* motion on grounds that it contains information protected from disclosure by attorney-client privilege and attorney work protection; if trial court concludes that supporting declaration contains privileged information that must remain confidential, that information must be redacted and redacted version served on opposing counsel. *Garcia v. Superior Court (City of Santa Ana) (2007) 42 Cal. 4th 63, 73, 63 Cal. Rptr. 3d 948, 163 P.3d 939*

California Public Records Act did not require disclosure to newspaper publisher of county civil service commission disciplinary records related to peace officer's administrative appeal; these files were confidential files of "employing agency" under *Pen. Code, §§ 832.5, 832.8,* because commission was authorized by statute and by county charter to hear those appeals, and officer's identity was confidential under *Pen. Code § 832.7*. *Copley Press, Inc. v. Superior Court (2006) 39 Cal. 4th 1272, 1286, 48 Cal. Rptr. 3d 183, 141 P.3d 288*

Showing of good cause under *Evid. Code § 1043(b)(3),* which is measured by "relatively relaxed standards that serve to insure the production for trial court review of all potentially relevant documents," to obtain in-chambers review of relevant documents or information in personnel records of police officer accused of misconduct against defendant, requires only that defendant demonstrate that scenario of alleged officer misconduct could or might have occurred. *Warrick v. Superior Court (City of Los Angeles Police Dep't) (2005) 35 Cal. 4th 1011, 1016, 29 Cal. Rptr. 3d 2*

Supreme Court outlined procedure trial courts should use to keep a record of evidence considered when ruling on *Pitchess* motion, because without any record of documents examined by trial court, party's ability to obtain review of trial court's decision, whether to disclose or not to disclose, is nonexistent. *People v. Mooc (2001) 26 Cal. 4th 1216,*

1228-1229, 114 Cal. Rptr. 2d 482, 36 P.3d 21

Evid. Code § 1043 permits access to police officer personnel records to discover discipline imposed after investigation based on citizen complaints; disclosure exemption of *Evid. Code § 1045(b)(2)* only excludes disclosure of investigating officer's conclusions, not discipline imposed. *City of San Jose v. Superior Court (1993) 5 Cal. 4th 47, 54-57, 19 Cal. Rptr. 2d 73, 850 P.2d 621* (juvenile proceeding)

Evid. Code § 1043 does not require that affidavit accompanying criminal defendant's motion for discovery of prior complaints of excessive force filed against arresting officer be based on personal knowledge of material facts or of existence of particular prior complaints; use of affidavits based on information and belief are sufficient. *City of Santa Cruz v. Municipal Court (1989) 49 Cal. 3d 74, 84-93, 94, 260 Cal. Rptr. 520, 776 P.2d 222*

Good cause for *Pitchess* discovery requires "a logical link between the defense proposed and the pending charge," and describing with some specificity how discovery would support that defense or impeach officer's version of events; here, defendant's version of events was not plausible. *People v. Sanderson (2010) 181 Cal. App. 4th 1334, 1340, 105 Cal. Rptr. 3d 326*

Defendant's bare assertion, "the officer lied and will do so again" failed to show a plausible factual scenario of officer misconduct sufficient to require *Pitchess* review of officer's personnel file. *Eulloqui v. Superior Court (2010) 181 Cal. App. 4th 1055, 1069, 105 Cal. Rptr. 3d 248*

Trial court properly denied defendant's *Pitchess* motion to discover police officers' personnel records under standard enunciated in *Warrick v. Superior Court*, because defendant failed to present specific factual scenario of officer misconduct that was plausible when read in light of pertinent documents. *People v. Galan (2009) 178 Cal. App. 4th 6, 13, 100 Cal. Rptr. 3d 103*

City was entitled to proper notice under *Evid. Code § 1043* and *Code Civ. Proc. § 1005* before any additional information could be disclosed based on real party in interest's second *Pitchess* motion; although second motion flowed from original *Pitchess* motion, it was more than "a mere continuation" and therefore was subject to safeguards of properly noticed motion. *City of Tulare v. Superior Court (2008) 169 Cal. App. 4th 373, 383-384, 86 Cal. Rptr. 3d 707*

Police review commission's (PRC) investigative and public hearing process violated confidentiality of police officer personnel records under *Penal Code § 832.7*; PRC's records and findings were protected from disclosure under *Penal Code § 832.7(a)*, as records maintained by any state or local agency pursuant to *Penal Code § 832.5* and as personnel records. *Berkeley Police Assn. v. City of Berkeley (2008) 167 Cal. App. 4th 385, 404-405, 84 Cal. Rptr. 3d 130*

Although res judicata and collateral estoppel effectively preclude relitigation of issues that were or could have been decided in first appeal, defendant retains right to appeal from judgment for limited purpose of challenging *Pitchess* findings. *People v. Wycoff (2008) 164 Cal. App. 4th 410, 415, 78 Cal. Rptr. 3d 907*

Defendant's *Pitchess* motion met *Warrick's* "relatively low threshold" for establishing good cause necessary to compel trial court review by presenting scenario that was plausible because it asserted specific police misconduct that was internally consistent and supported defense to charges of resisting arrest. *Uybungco v. Superior Court (2008) 163 Cal. App. 4th 1043, 1049-1051, 78 Cal. Rptr. 3d 30*

Pitchess does not apply to Commission on Judicial Performance; therefore, judge's statements to Commission in response to criminal defendant's complaint about judge's handling of motion to suppress evidence were not subject to discovery by means of *Pitchess* motion or subpoena duces tecum. *Comm'n on Judicial Performance v. Superior Court (2007) 156 Cal. App. 4th 617, 623, 67 Cal. Rptr. 3d 434*

Because *Pitchess* motion must "set forth the materiality [of the desired personnel records] to the *subject matter involved in the pending litigation*" defendant was required to show that requested records were material to his new trial claiming ineffective assistance of counsel, not to his defense to the underlying prosecution. *People v. Nguyen (2007) 151 Cal. App. 4th 1473, 1478, 60 Cal. Rptr. 3d 773* (italics in original)

Trial court remanded for new hearing on defendant's *Pitchess* motion in conformance with procedures described in *People v. Mooc*, because record was insufficient to determine whether trial court properly denied discovery; records custodian, did not produce entire personnel file for trial court's review, did not establish on the record what documents were included in complete personnel file, and did not explain his decision to withhold them. *People v. Guevara (2007) 148 Cal. App. 4th 62, 68-69, 55 Cal. Rptr. 3d 581*

Citizen complaints against husband, a former sheriff's deputy, were discoverable under *Pitchess* statutes in wife's marital dissolution action, because complaints, which were made by women and could include evidence of husband's violence or brutality, were potentially relevant to custody dispute, to bolster wife's claims of domestic violence or otherwise reflect on husband's fitness as parent. *Slayton v. Superior Court (2006) 146 Cal. App. 4th 55, 61, 52 Cal. Rptr. 3d 731*

Under *Warrick* standard, trial court reasonably concluded that defendant failed to show good cause for discovery because he did not present specific factual scenario of officer misconduct that was plausible when read in light of pertinent documents and undisputed circumstances. *People v. Thompson (2006) 141 Cal. App. 4th 1312, 1318-1319, 46 Cal. Rptr. 3d 884*

Defendant could file sealed affidavit in support of *Pitchess* motion on grounds that it contains privileged information; if, after ex parte in camera review, trial court concludes supporting declaration contains privileged information, that information must be redacted, and redacted version served on opposing counsel, to avoid revealing privileged material to prosecution and police. *Williams v. Superior Court (2006) 140 Cal. App. 4th 1422, 1434-1435, 45 Cal. Rptr. 3d 452*

Trial court correctly denied defendant's *Pitchess* motion because defendant did not demonstrate specific factual scenario of officer misconduct that was plausible when read in light of pertinent documents. *People v. Hill (2005) 131 Cal. App. 4th 1089, 1098-1099, 31 Cal. Rptr. 3d 891* ; *overruled on other grounds by People v. French (2008) 43 Cal. 4th 36, 48, 73 Cal. Rptr. 3d 605, 178 P.3d 1100*

Limited release to individual officer of information contained in his own file, absent *Pitchess* motion, would not disturb balance between petitioner's right to a fair trial and officer's right to privacy; because officer had right to obtain and then share that information with prosecution, in preparation for trial, officer practically could give to prosecution that which it could not get directly. *Beccarada v. Superior Court (2005) 131 Cal. App. 4th 409, 415, 31 Cal. Rptr. 3d 735*

Whether defendant's account of his interaction with officer was less believable than officer's account did not bear on whether defendant established "materiality" under *Evid. Code § 1043(b)(3)*; rather, defendant satisfied materiality for discovery of arresting officer's disciplinary records relating to dishonesty or filing false reports by establishing sufficient factual foundation showing that officer's truthfulness was material to his defense, and trial court committed reversible error when it denied defendant's *Pitchess* motion without in camera hearing in accordance with *Evid. Code § 1045(b). Johnson v. Superior Court (2004) 118 Cal. App. 4th 292, 303-304, 12 Cal. Rptr. 3d 885*

Sheriff's department internal affairs report was relevant, and therefore discoverable, in civil action against deputy alleging use of excessive force, after portions of report reflecting investigating officer's analysis and conclusions were redacted; court did not abuse its discretion in refusing to limit *Pitchess* discovery to names, addresses, and telephone numbers of witnesses identified in internal affairs report. *Haggerty v. Superior Court (2004) 117 Cal. App. 4th 1079, 1089-1090, 12 Cal. Rptr. 3d 467*

Trial court abused its discretion in failing to find materiality and good cause for information sought under hybrid *Brady/Pitchess* motion. *Abatti v. Superior Court (2003) 112 Cal. App. 4th 39, 60, 4 Cal. Rptr. 3d 767*

District attorney properly had access to information in confidential peace officer personnel files to investigate conduct of off-duty officers, but that information may not be publicly disclosed or disseminated absent compliance with *Code Civ. Proc. § 1043 et seq.*, including judicial determination of relevance of that information in civil or criminal action and need for protective order. *Fagan v. Superior Court (2003) 111 Cal. App. 4th 607, 618-619, 4 Cal. Rptr. 3d 239*

Defendant failed to demonstrate good cause required for discovery under *Evid. Code § 1043* (disclosure of police officer personnel records), because there was insufficient similarity between defendant's allegation of excessive force and prior officer misconduct consisting of filing false police report and of time card irregularities. *California Highway Patrol v. Superior Court (2001) 84 Cal. App. 4th 1010, 1025 101 Cal. Rptr. 2d 379*

There are no substantive or procedural obstacles to governmental agency and its attorney conducting contained and limited review of peace officer personnel files within custody and control of agency, for some relevant purpose. *Michael v. Gates (1995) 38 Cal. App. 4th 737, 745, 45 Cal. Rptr. 2d 163*

Privilege accorded police officer personnel records extend to protect all information in those files without regard to whether information could also be obtained from another source. *Hackett v. Superior Court (1993) 13 Cal. App. 4th 96, 99-101, 16 Cal. Rptr. 2d 405*

Evid. Code §§ 1043-1045 (discovery of peace officer personnel records) are not abrogated by criminal discovery provisions of Proposition 115; *Penal Code § 1054(e)*, enacted by Proposition 115, contains language excluding *Evid. Code §§ 1043-1045*. *Albritton v. Superior Court (1990) 225 Cal. App. 3d 961, 962-963, 275 Cal. Rptr. 314*

Evid. Code § 1043 procedures take precedence over general discovery rules of Code of Civil Procedure; party's noncompliance with requirements of *Evid. Code § 1043* is not excused by waiver provision generally applicable to discovery method that party used. *County of Los Angeles v. Superior Court (1990) 219 Cal. App. 3d 1605, 1611, 269 Cal. Rptr. 187*

Evid. Code § 1045 provides that when issue in litigation concerns policies or patterns of conduct of employing agency, trial court is required to consider availability of comparable information from sources other than personnel records. *City of Azusa v. Superior Court (1987) 191 Cal. App. 3d 693, 696, 236 Cal. Rptr. 621*

Parties seeking discovery of files on citizen complaints are only entitled to names and addresses of complainants unless good cause is shown; complainants' unavailability for interviews or failure to remember details of events complained of are good cause. *City of Azusa v. Superior Court (1987) 191 Cal. App. 3d 693, 696-697, 236 Cal. Rptr. 621*

Penal Code §§ 832.7 and *832.8*, which protect police officer personnel records and information contained in them from discovery, also bar discovery of identical information from police officers' personal recollection. *City of San Diego v. Superior Court (1982) 136 Cal. App. 3d 236, 239, 186 Cal. Rptr. 112*

Good cause under *Evid. Code § 1043* shown for discovery limited to records of citizens' complaints against arresting officers and for names and addresses of complainants and witnesses. *Arcelona v. Municipal Court (1980) 113 Cal. App. 3d 523, 530-532, 169 Cal. Rptr. 877*

Motion under *Evid. Code § 1043* for disclosure of police officer personnel records or records maintained under *Penal Code § 832.5* (citizen's complaints against police officers) is subject to balancing test of *Evid. Code § 1040(b)(2)*. *Dominguez v. Superior Court (1980) 101 Cal. App. 3d 6, 11-13, 161 Cal. Rptr. 407*

[14] Privacy

Search of plaintiffs' text messages violated their *Fourth Amendment* and California constitutional privacy rights because they had reasonable expectation of privacy in content of those messages, given employer's informal policy of not auditing messages on payment of usage overages; even assuming that plaintiffs' text messages were public records as defined by California Public Records Act, that Act did not diminish public employee's (and text message recipients') reasonable expectation of privacy. *Quon v. Arch Wireless Operating Co., Inc. (9th Cir. 2008) 529 F.3d 892, 907 , cert. granted, City of Ontario v. Quon (Dec. 14, 2009) 175 L. Ed. 2d 617*

Opt-out notice was sufficient to protect privacy rights of potential class members, who had already voluntarily disclosed their contact information to DVD seller, and named plaintiff's interest in obtaining this information outweighed possibility that some customers might fail to receive their notice and thus lose opportunity to object to disclosure. *Pioneer Electronics (USA), Inc. v. Superior Court (2007) 40 Cal. 4th 360, 372-374, 53 Cal. Rptr. 3d 513, 150 P.3d 198*

Discovery of identities of husband's previous sexual partners and admissions concerning his "lifestyle" were properly excluded, in a suit brought by a wife against her husband for infecting her with HIV, as overly broad and speculative; however, within specified temporal limitations, discovery of other evidence that husband knew or should have known that he had HIV was allowed, because this issue was fundamental to causes of action for intentional and negligent infliction of emotional distress, fraud, and negligence. *John B. v. Superior Court (2006) 38 Cal. 4th 1177, 1200-1201, 45 Cal. Rptr. 3d 316, 137 P.3d 153*

In marital dissolution action brought by father against mother to determine whether father should be granted joint custody over couple's 4-year-old son, father's constitutional right to privacy in medical records was outweighed by state's compelling interest in protecting child's best interests. *Manela v. Superior Court (2009) 177 Cal. App. 4th 1139, 1150, 99 Cal. Rptr. 3d 736*

Plaintiff in action for sexual harassment and intentional infliction of emotional distress waives right to privacy concerning alleged mental ailments, but does not implicitly waive privacy right concerning her sexual history and practices. *Vinson v. Superior Court (1987) 43 Cal. 3d 833, 842, 239 Cal. Rptr. 292, 740 P.2d 404*

Violation of employees' right to privacy did not outweigh right to discover class members' names, addresses, and telephone numbers in pending litigation to enforce their statutory wage and overtime rights through class action lawsuit, and plaintiffs were entitled to employees' contact information using opt-out notice. *Crab Addison, Inc. v. Superior Court (2008) 169 Cal. App. 4th 958, 974-975, 87 Cal. Rptr. 3d 400*

Trial court erred by denying motion to compel disclosure of independent contractor names and addresses using opt-out procedure in class action lawsuit alleging improper reclassification of class members from employees to independent contractors; discovery of potential class members' contact information should not be restricted unless trial court can identify privacy concerns or potential discovery abuses that outweigh plaintiff's right to discovery. *Lee v. Dynamex, Inc. (2008) 166 Cal. App. 4th 1325, 1338, 83 Cal. Rptr. 3d 241*

In consolidated class action by petitioner television writers asserting industry-wide pattern and practice of age discrimination, trial court erred in denying access to all requested information from third-party objectors on privacy grounds, without considering whether "a more nuanced approach" to different categories of data would satisfy balance between privacy interests and litigants' need for discovery. *Alch v. Superior Court (2008) 165 Cal. App. 4th 1412, 1422, 82 Cal. Rptr. 3d 470*

In appeal arising from denial of anonymous Internet poster's motion to quash plaintiff's subpoena served on California

message-board host seeking poster's identity, plaintiff could not make required prima facie showing of elements of libel necessary to overcome defendant's *First Amendment* right to speak anonymously; accordingly, court quashed subpoena. *Krinsky v. Doe 6 (2008) 159 Cal. App. 4th 1154, 72 Cal. Rptr. 3d 231*

Original plaintiff who lacked standing in *Code Civ. Proc. § 382* class action should be allowed to obtain precertification discovery of identities of potential plaintiffs with standing, subject to balancing test weighing danger of potential abuses against parties's rights. *Cashcall, Inc. v. Superior Court (2008) 159 Cal. App. 4th 273, 286, 71 Cal. Rptr. 3d 441*

Opt-in notice, requiring class action petitioners to obtain non-party potential witnesses' affirmative consent to disclosure of their addresses and phone numbers, exceeded protections necessary to safeguard witnesses' legitimate privacy interests in their contact information. *Puerto v. Superior Court (2008) 158 Cal. App. 4th 1243, 1259, 70 Cal. Rptr. 3d 701*

Opt-out notice requiring potential class members to object in writing in order to prevent their names and contact information from being disclosed to real party in interest employees in putative class action lawsuit alleging wage and hour violations was sufficient to protect potential class members' privacy rights. *Belaire-West Landscape, Inc. v. Superior Court (2007) 149 Cal. App. 4th 554, 561-562, 57 Cal. Rptr. 3d 197*

In putative class action alleging wage and hour violations, privacy rights of putative class members who contacted plaintiffs' counsel outweighed employer's need for disclosure of their identities, because class members had significant interest in maintaining their privacy, particularly in the employment context, and employer had no compelling need to learn their identities. *Tien v. Superior Court (2006) 139 Cal. App. 4th 528, 540-541, 43 Cal. Rptr. 3d 121*

Letter to non-parties requesting information about whether they were subject to inaccurate credit reporting was relevant to plaintiff's claim for punitive damages under Fair Credit Reporting Act and thus was permissible, provided that letter protected privacy rights of recipients by requiring their written consent to be contacted and limiting contact to those who gave signed authorization. *Experian Info. Solutions, Inc. v. Superior Court (2006) 138 Cal. App. 4th 122, 41 Cal. Rptr. 3d 219*

Using neutral third party to facilitate class action precertification communications helps protect recipients' privacy rights. *Best Buy Stores, L.P. v. Superior Court (2006) 137 Cal. App. 4th 772, 778-779, 40 Cal. Rptr. 3d 575*

Patient did not waive his right to privacy, in suit to enforce administrative subpoena by California Medical Board against patient's physician, by showing physician's letter to park rangers as proof that he was a qualified patient entitled to protection from prosecution for using marijuana; and Medical Board failed to produce evidence sufficient to support finding of good cause to invade patient's right to privacy in his medical records. *Bearman v. Superior Court (2004) 117 Cal. App. 4th 463, 472-474, 11 Cal. Rptr. 3d 644, 652-653*

Order compelling deposition testimony, in wrongful termination suit, of one member of termination review board established pursuant to employment agreement did not violate member's state constitutional right to privacy because information sought by former employee did not relate to private affairs of any other employee, and parties had not anticipated that review board proceeding would be confidential. *Saeta v. Superior Court (2004) 117 Cal. App. 4th 261, 273-274, 11 Cal. Rptr. 3d 610*

Right of associational privacy was not implicated, in employment discrimination case, by deposition questions posed to union representative that generally related to names of employees who allegedly used racial slurs toward real party in interest and whose arbitration testimony was allegedly coerced, and that did not ask him to reveal any private associational affiliations and activities. *American Airlines v. Superior Court (2003) 114 Cal. App. 4th 881, 895, 8 Cal. Rptr. 3d 146*

Bank customer has reasonable expectation of privacy in confidential information submitted with loan application, and when waiver of confidentiality of tax returns is argued, court should conduct in camera inspection to balance need for discovery against interests in privacy. *Fortunato v. Superior Court (2003) 114 Cal. App 4th 475, 483, 8 Cal. Rptr. 3d 82*

In employment discrimination case, disciplinary records of nonparty employees were protected by their privacy rights, when interrogatories listing disciplinary acts by type and race would accomplish plaintiff's objective. *Perez v. County of Santa Clara (2003) 111 Cal. App. 4th 671, 678, 3 Cal. Rptr. 3d 867*

When crime victim sued alleged perpetrator and perpetrator's criminal defense attorney for invasion of victim's constitutional right of privacy based on their unauthorized reading of victim's mental health records, victim's claim was barred because they obtained victim's medical and psychiatric records through court's normal processes, including a court order. *Mansell v. Otto (2003) 108 Cal. App. 4th 265, 277, 133 Cal. Rptr. 2d 276*

Bank customer has both reasonable expectation of privacy and right to notice and opportunity to be heard when bank records are subpoenaed. *Athearn v. State Bar (1977) 20 Cal. 3d 232, 235, 142 Cal. Rptr. 171, 571 P.2d 628*

Nonparty patients' right of privacy did not justify restrictions on dissemination of confidential information obtained outside of discovery process. *Hurvitz v. Hoefflin (2001) 84 Cal. App. 4th 1232, 1244-1245, 101 Cal. Rptr. 2d 558*

Judgment creditor did not make sufficient showing of need to obtain names of judgment debtor attorney's undisclosed clients or client-specific information regarding funds held by attorney in his client trust account to overcome privacyrights of undisclosed clients; although disclosure might lead to discovery of information helpful to creditor in her collection efforts, alternative, less intrusive methods existed to determine whether clients had paid fees to attorney, without sacrificing clients's privacy rights. *Hooser v. Superior Court (2001) 84 Cal. App. 4th 997, 1007-1009, 101 Cal. Rptr. 2d 341*

Rights to freedom of association and to residential privacy of defendant abortion clinic's nonparty staff and volunteers outweighed plaintiff anti-abortionist's rights to discover their names, residential addresses, and telephone numbers, given that disclosure would threaten nonparties' peace and safety, while plaintiff failed demonstrate any real need that would justify this intrusive order, and state's interest in preserving residential privacy and in protecting individuals who provide lawful services in connection with pregnancy was strong. *Planned Parenthood Golden Gate v. Superior Court (2001) 83 Cal. App. 4th 347, 367, 99 Cal. Rptr. 2d 627*

Real parties' legitimate interest in ensuring that attorney fees were not awarded when statutory requirements set forth in California's "private attorney general" stature (*Code Civ. Proc. § 1021.5*) had not been met, and state's compelling interest in promoting truth in litigation, outweighed the associational privacy interests of contributors to plaintiff nonprofit organization's legal fund. *Save Open Space Santa Monica Mountains v. Superior Court (2001) 84 Cal. App. 4th 234, 252-254, 100 Cal. Rptr. 2d 725*

State's interests in truth in court proceedings, compliance with subpoenas and discovery orders, and insuring that injured receive full redress for injuries based on actionable conduct, and petitioner parents' interest in obtaining medical information directly relevant to their litigation against sperm bank which allegedly transmitted serious kidney disease to their child outweighed anonymous sperm donor's privacy interests. *Johnson v. Superior Court (2000) 80 Cal. App. 4th 1050, 1067-1072, 95 Cal. Rptr. 2d 864*

Hospital's mere conjecture that authors of nondefamatory advertisements critical of hospital's affiliation with for-profit HMO were also authors of defamatory statements alleged in hospital's defamation action complaint was not enough to overcome right to privacy, or warrant shutting off political discourse on important public issues, when advertisements

were not directly relevant to defamation action. *Rancho Publications v. Superior Court (1999) 68 Cal. App. 4th 1538, 1551, 81 Cal. Rptr. 2d 274*

Confidential agreement in settlement of class-action litigation is entitled to same level of privacy protection as other personal financial matters, such as bank accounts or tax information. *Hinshaw, Winkler, Draa, Marsh & Still v. Superior Court (1996) 51 Cal. App. 4th 233, 241, 58 Cal. Rptr. 2d 791*

Public need for ascertainment of truth in connection with legal claims was outweighed by right of privacy of those participating in meetings, during which plaintiff claimed that admission was made that she had been treated unfairly, because communications related to private affairs of employees and were maintained in confidence, and discussions were conducted appropriately to resolve workplace dispute. *Garstang v. Superior Court (1995) 39 Cal. App. 4th 526, 532, 536-537, 46 Cal. Rptr. 2d 84*

Psychotherapist-patient privilege and right of privacy are both interrelated and separate; communications with psychotherapist are within zone of privacy. *Davis v. Superior Court (1992) 7 Cal. App. 4th 1008, 1013, 9 Cal. Rptr. 2d 331*

Person residing with child support-paying parent does not waive right to privacy of his or her financial records; in proceedings to increase amount of child support, monetary contributions made by third person are discoverable in assessing parent's ability to pay increased support due to reduced living expenses. *Harris v. Superior Court (1992) 3 Cal. App. 4th 661, 664-665, 667-668, 4 Cal. Rptr. 2d 564*

Defendant's medical records are protected by right to privacy from discovery in support of plaintiff's motion for trial preference based on defendant's ill health; although defendant changed location of deposition based on his poor health and admitted to heart attacks and bypass surgery, these admissions did not constitute waiver of privacy right. *Heda v. Superior Court (1990) 225 Cal. App. 3d 525, 528-529, 275 Cal. Rptr. 136*

Court properly conducted *in camera* review of videotape of couple engaged in sexual activities in order to weigh their right of privacy against competing due process rights of defendant accused of molesting their daughter when defendant claimed daughter made up molestation story after viewing that videotape. *Rubio v. Superior Court (1988) 202 Cal. App. 3d 1343, 1349-1351, 249 Cal. Rptr. 419*

Right to privacy did not support blanket denial of subpoena duces tecum for records of group health study when records were relevant to investigation of waste facility's impact on public health, but did support deletion of named medical records and information that identified individual participants. *Kizer v. Sulnick (1988) 202 Cal. App. 3d 431, 438-439, 248 Cal. Rptr. 712*

Discovery order requiring defendant in workplace sexual harassment action to answer deposition questions regarding identities of all female coworkers with whom he had sexual contact was impermissibly intrusive into sexual privacy of defendant and unknown women. *Boler v. Superior Court (1987) 201 Cal. App. 3d 467, 474-475, 247 Cal. Rptr. 185*

In defamation action based on public charges by minor's father that plaintiff had raped minor, minor's interest in sexual privacy was outweighed by plaintiff's interest in preserving reputation. *Rider v. Superior Court (1988) 199 Cal. App. 3d 278, 282-287, 244 Cal. Rptr. 770*

Corporation's confidential customer list constituted "sensitive information" entitled to qualified protection depending on balancing of factors for and against disclosure. *Hofmann Corp. v. Superior Court (1985) 172 Cal. App. 3d 357, 362-363, 218 Cal. Rptr. 355*

Protective order limiting disclosure of discovered financial information to attorney and prohibiting disclosure to

discovering party was permissible, but good cause was not presumed when information went to heart of cause of action itself and was not merely needed for punitive damages. *GT, Inc. v. Superior Court (1984) 151 Cal. App. 3d 748, 754-755, 198 Cal. Rptr. 892* (interpreting former *Code Civ. Proc. § 2019(b)* (*now see Code Civ. Proc. § 2025(i)*))

Party against whom financial information is sought is presumptively entitled to protective order restricting dissemination to persons for whom information isnecessary for trial preparation. *Moskowitz v. Superior Court (1982) 137 Cal. App. 3d 313, 317-318, 187 Cal. Rptr. 4*

Court is required to balance interest of private litigant to discover relevant facts against conflicting right of others to maintain reasonable privacy regarding financial affairs. *Rifkind v. Superior Court (1981) 123 Cal. App. 3d 1045, 1050-1051, 177 Cal. Rptr. 82 , disapproved on other grounds* in *Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 723, 21 Cal. Rptr. 2d 200, 854 P.2d 1117*

In defamation action against university and faculty members, compelled disclosure of defendant faculty member's personnel files was wrongfulinvasion of privacy right, when files had no direct relevance to issues in action and no compelling state interest requiring disclosure existed. *Board of Trustees v. Superior Court (1981) 119 Cal. App. 3d 516, 526-527, 174 Cal. Rptr. 160*

Interrogatories in action between former law partners seeking marginally private information as to client identification, final disposition of cases, and amount of fees awarded did not violate nonlitigant clients' rights of privacy. *Willis v. Superior Court (1980) 112 Cal. App. 3d 277, 297-298, 169 Cal. Rptr. 301*

Names and addresses of nonlitigant church members are protected from discovery by right of associational privacy absent waiver of right, showing of illegal activities, and demonstration of compelling state interest. *Church of Hakeem, Inc. v. Superior Court (1980) 110 Cal. App. 3d 384, 387-390, 168 Cal. Rptr. 13*

In action alleging conspiracy to defame, *First Amendment* right to associational privacy is not impinged by compelling limited discovery of individual defendants' affiliation with defendant organization. *Bodenheimer v. Superior Court (1980) 108 Cal. App. 3d 885, 888-890, 167 Cal. Rptr. 26*

Right to privacy in sexual matters is not limited to marital relationship. *Morales v. Superior Court (1979) 99 Cal. App. 3d 283, 290, 160 Cal. Rptr. 194*

[15] Psychotherapist-Patient Privilege

Evid. Code § 1012 (defining nature of psychotherapist-patient privilege) and *Evid. Code § 1024* (providing exception to privilege when psychotherapist believes patient to be dangerous to himself or another) did not authorize parole authority to require parolee's waiver of psychotherapist-patient privilege to allow his privately retained psychotherapist to communicate with parole authority. *In re Corona (2008) 160 Cal. App. 4th 315, 322, 72 Cal. Rptr. 3d 736*

Discussing case law illustrating disclosures to third persons that are "reasonably necessary" to accomplish purpose for which psychotherapist was consulted, and holding, in grand jury investigation of allegations of child abuse against two priests, that only one of several documents prepared by Archbishop's staff was protected by psychotherapist-patient privilege, because this document supplied troubled priest's therapeutic team with information about his personal history as an aid to diagnosis and treatment. *Roman Catholic Archbishop of Los Angeles v. Superior Court (People) (2005) 131 Cal. App. 4th 417, 450-455, 32 Cal. Rptr. 3d 209*

Evid. Code § 1017, providing that psychotherapist-patient privilege applies to court-appointed expert in a criminal proceeding, does not apply in Sexually Violent Predator Act (SVPA) proceeding, because proceeding is deemed

"criminal" for these purposes; therefore, court-appointed psychological evaluations performed at defendant's request in SVPA case were not confidential. Because evaluations were relevant under former *Code Civ. Proc. § 2017(a)* (*now see Code Civ. Proc. § 2017.010*) and were not privileged, they were discoverable. *People v. Angulo (2005) 129 Cal. App. 4th 1349, 1364-1367, 30 Cal. Rptr. 3d 189*

Probation conditions that required all records related to juvenile defendant's treatment be made available on request to court and probation department were reasonable and did not violate juvenile's right of privacy or his psychotherapist-patient privilege, given state's legitimate countervailing interest in protecting public against defendant's violent, anti-social conduct and in determining whether he was fully complying with his probation conditions. *In re Christopher M. (2005) 127 Cal. App. 4th 684, 695, 26 Cal. Rptr. 3d 61*

When psychotherapist, pursuant to *Evid. Code § 1024*, warned potential victim of patient's threats, psychotherapist is permitted to testify in later trial or proceeding about both substance of warning and patient's statements that caused or prompted warning. *People v. Wharton (1991) 53 Cal. 3d 522, 554, 563, 280 Cal. Rptr. 631, 809 P. 2d 290*

Exception to psychotherapist-patient privilege for reports of suspected child abuse under *Penal Code § 11171(b)* (*now see Penal Code § 11171.2(b)*) did not extend to disclosures already reported. *People v. Stritzinger (1983) 34 Cal. 3d 505, 514, 194 Cal. Rptr. 431, 668 P.2d 738*

Fact that defendant was motivated to participate in psychotherapy as condition of probation did not bar application of psychotherapist-patient privilege to records of that psychotherapy; therefore, records of psychotherapy ordered as condition of probation were protected from disclosure in subsequent criminal action when prosecution sought evidence regarding defendant's commission of a previous sexual offense. *Story v. Superior Court (2003) 109 Cal. App. 4th 1007, 1016-1019, 135 Cal. Rptr. 2d 532*

In juvenile dependency context, psychotherapist-patient privilege protected minor's confidential communications and the details of his therapy, but did not preclude his therapist from giving "circumscribed information to accomplish the information-gathering goal of therapy." *In re Mark L. (2001) 94 Cal. App. 4th 573, 583-584, 114 Cal. Rptr. 2d 499*

In juvenile dependency context, psychotherapist-patient privilege permitted limited disclosure of matters that would reasonably assist court in evaluating whether further orders are necessary for minor's benefit, while preserving the confidentiality of details of her therapy. *In re Kristine W. (2001) 94 Cal. App. 4th 521, 528-529, 114 Cal. Rptr. 2d 369*

In action alleging insurer's bad faith termination of benefits under disability policy, plaintiff was not entitled to discover names and addresses of other claimants whose psychiatric disability claims had been denied, because disclosure of claimants' names would reveal not only their identity but also nature of their psychiatric disability. *Pollock v. Superior Court (2001) 93 Cal. App. 4th 817, 821, 113 Cal. Rptr. 2d 453*

Defendant patient was entitled to prevent disclosure of any confidential communication she had with her psychiatrist, even though she revealed, both in her deposition in this case and in her previous workers' compensation claims for stress-related anxiety due to previous work-related incident, that she was seeing a psychiatrist; however, under *Evid. Code § 1024*, she could not prevent disclosure of any warning defendant employer received about her. *San Diego Trolley, Inc. v. Superior Court (2001) 87 Cal. App. 4th 1083, 1096-1097, 105 Cal. Rptr. 2d 476*

Psychotherapist-patient privilege did not preclude therapist from testifying concerning juvenile offender's participation and progress in court-ordered treatment plan. *In re Pedro M. (2000) 81 Cal. App. 4th 550, 554-555, 96 Cal. Rptr. 2d 839*

Evid. Code § 1017 exception to psychiatrist-patient privilege (court-appointed psychiatrist) is for purpose of determining, for patient's or court's information, patient's mental or emotional condition; this exception is inapplicable

when psychiatrist is appointed by the court for some reason other than gathering such information. *In re Eduardo A. (1989) 257 Cal. Rptr. 23*

Mere disclosure of patient's identity violates psychotherapist-patient privilege; policy requiring psychotherapist to warn of proclivities of dangerous patients in order to prevent harm to others is not implicated when persons sought to be identified are not sources of danger to public. *Scull v. Superior Court (1988) 206 Cal. App. 3d 784, 789, 792-793, 254 Cal. Rptr. 24*

Group therapy participants are persons who are present to further interest of patient and reasonably necessary to accomplish purpose for which psychotherapist was consulted, and confidential communications with them are within psychotherapist-patient privilege. *Farrell L. v. Superior Court (1988) 203 Cal. App. 3d 521, 527, 250 Cal. Rptr. 25*

Plaintiffs who received *Code Civ. Proc. § 1985.3* notice that psychiatrist had been served with subpoena duces tecum requiring production of their psychotherapeutic records and that they had right to object waived psychotherapist-patient privilege by failing to take action to prevent unwanted disclosure. *Inabnit v. Berkson (1988) 199 Cal. App. 3d 1230, 1236-1239, 245 Cal. Rptr. 525*

Communications between patient and unlicenced clinical social worker were privileged under *Evid. Code § 1012*, because communication by patient was to person reasonably necessary to transmit information to or assist psychotherapist in treatment. *Luhdorff v. Superior Court (1985) 166 Cal. App. 3d 485, 489-492, 212 Cal. Rptr. 516*

If psychotherapist reasonably believed that patient was dangerous within meaning of *Evid. Code § 1024*, then psychotherapist-patient privilege does not protect communications, and psychotherapist's records are subject to discovery. *Mavroudis v. Superior Court (1980) 102 Cal. App. 3d 594, 603-604, 162 Cal. Rptr. 724* ; *see also Lemelle v. Superior Court (1978) 77 Cal. App. 3d 148, 157-162, 143 Cal. Rptr. 450*

[16] Sealed Court Records

When juvenile court records are sealed under *Welf. & Inst. Code § 781*, juvenile's privacy rights are subject to constitutional confrontation rights of criminal defendant in event of conflict, but civil party's ability to establish constitutional right to sealed information is doubtful. *Parmett v. Superior Court (1989) 212 Cal. App. 3d 1261, 1269, 262 Cal. Rptr. 387*

[16A] Settlement or Mediation Efforts

Party cannot impliedly waive mediation confidentiality through litigation conduct, because *Evid. Code § 1122* requires waiver to be express, not implied; and estoppel could not be applied to prevent defendant from tardily claiming mediation confidentiality, given that estoppel is not express statutory exception to mediation confidentiality. *Simmons v. Ghaderi (2008) 44 Cal. 4th 570, 584-588, 80 Cal. Rptr. 3d 83, 187 P.3d 934*

Under *Evid. Code § 1119(b)*, photographs, videotapes, witness statements, and raw test data from physical samples, prepared "for the purpose of, in the course of, or pursuant to, a mediation" are protected by mediation privilege, and therefore are not admissible at trial and not subject to discovery; moreover, there is no "good cause" exception to statute's protection. *Rojas v. Superior Court (2004) 33 Cal. 4th 407, 423-424, 15 Cal. Rptr. 3d 643, 93 P. 3d 260*

Court assumed, without deciding, that court that ordered mediation may impose sanctions under *Code Civ. Proc. § 128.5(a)* based on conduct during mediation, but declined to create judicial exception for reporting bad faith conduct or for imposition of sanctions under that section when doing so would require disclosure of communications or mediator's assessment of party's conduct. *Foxgate Homeowners Ass'n v. Bramalea Cal. (2001) 26 Cal. 4th 1, 15, 108 Cal. Rptr.*

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Communications between an attorney and client are not within mediation confidentiality. *Porter v. Wyner (2010) 183 Cal. App. 4th 949, 961-962, 107 Cal. Rptr. 3d 653 , modified,* 5/10/2010

Communications between client and his law firm, two weeks before trial, were for trial strategy preparation, not just for mediation of underlying lawsuit, and therefore were not protected by either *Evid. Code § 1119(a), (b),* or by *Evid. Code § 1119(c)*; firm failed to demonstrate sufficiently close link between communications and mediation to require application of mediation confidentiality protection. *Cassel v. Superior Court (2009) 179 Cal. App. 4th 152, 164, 101 Cal. Rptr. 3d 501*

Mediation confidentiality statutes protect mediation briefs and related e-mails; there is no nonstatutory "good cause" exception, even if strict limitations of mediation confidentiality shielded perjury and inconsistent statements. *Wimsatt v. Superior Court (2007) 152 Cal. App. 4th 137, 142, 158-163, 61 Cal. Rptr. 3d 200*

Settlement agreement signed after mediation was admissible in subsequent action to enforce settlement, even though parties' counsel (as opposed to the parties themselves) signed mediation-confidentiality waiver; settlement agreement is admissible under *Evid. Code § 1123* and is not rendered unenforceable simply because it has not been signed personally by each of the litigants, provided that the written waiver was signed by each of the settling parties or their respective counsel. *Stewart v. Preston Pipeline Inc. (2005) 134 Cal. App. 4th 1565, 1569, 36 Cal. Rptr. 3d 901*

Evid. Code § 1122(a)(2) prevented defendant Los Angeles Archbishop from disclosing written summaries made of personnel records of priests accused of sexually molesting minors, because those summaries were prepared for purposes of ongoing mediation process, contained admissions of liability by the Archdiocese, and revealed something about mediation discussion; further, although *Evid. Code § 1122(a)(1)* permitted disclosure of mediation communications if all participants agreed, that provision did not apply because petitioners were mediation participants. *Doe 1 v. Superior Court (2005) 132 Cal. App. 4th 1160, 1163*

Termination review proceeding, held pursuant to an employment contract, was neither an arbitration nor a mediation, therefore *Evid. Code §§ 703.5* and *1119*, privileges applicable to those proceedings, did not apply. *Saeta v. Superior Court (2004) 117 Cal. App. 4th 261, 267, 11 Cal. Rptr. 3d 610, 612*

Mediation participants cannot waive their confidentiality rights in implied manner, by raising claim about agreement reached through mediation; thus, absent suitable express waivers from husband and wife, evidence of confidential conversations between them was inadmissible. *Eisendrath v. Superior Court (2003) 109 Cal. App. 4th 351, 364-365, 134 Cal. Rptr. 2d 716*

[17] State Secret Privilege

State secrets privilege is available only to federal government to block discovery of any information that, if disclosed, would adversely affect national security; privilege is applied to prevent discovery relating to nation's defense capabilities, intelligence gathering methods, and diplomatic foreign relations. *Rubin v. City of Los Angeles (1987) 190 Cal. App. 3d 560, 576-577, 235 Cal. Rptr. 516*

[18] Tax Returns

Neither *Civ. Code § 1799.1a* nor *Bus. & Prof. Code § 17530.5* creates privilege shielding litigant from discovery of litigant's own tax returns or making those returns inadmissible at trial, and neither statute applies to foreign tax returns; although California case law does create privilege for tax returns, that privilege does not apply to foreign taxes.

Firestone v. Hoffman (2006) 140 Cal. App. 4th 1408, 1420, 45 Cal. Rptr. 3d 534

Submitting individual income tax return to bank to obtain loan does not effect waiver of privilege against forced disclosure of tax returns, because compliance with bank's requirement of submitting tax returns with loan application is not "an entirely voluntary relinquishment." Bank customer also has reasonable expectation of privacy in confidential information submitted with loan application, and when waiver of confidentiality of tax returns is argued, court should conduct in camera inspection to balance need for discovery against interests in privacy. *Fortunato v. Superior Court (2003) 114 Cal. App 4th 475, 482-483, 8 Cal. Rptr. 3d 82*

Tax privilege was inapplicable when record showed that defendant in civil suit engaged in conduct precluding plaintiffs from obtaining relevant nonprivileged financial information necessary to support plaintiffs' punitive damages claim, and there was no less intrusive alternative for plaintiffs to obtain the information, but requiring that defendant's husband receive notice and opportunity to be heard before court could compel disclosure of joint tax returns. *Weingarten v. Superior Court (2002) 102 Cal. App. 4th 268, 271, 125 Cal. Rptr. 2d 371*

Statutory tax return privilege protected estate tax returns from disclosure, given that defendants had not waived privilege and plaintiffs did not demonstrate any supervening public policy. *Deary v. Superior Court (2001) 87 Cal. App. 4th 1072, 1077-1078, 105 Cal. Rptr. 2d 132*

Former *Civ. Code §§ 4700.7, 4721(d)* (*now see Fam. Code § 3552*) requiring production of state income tax returns in action for child support, is inapplicable until parent-child relationship is conclusively established. *Thomas B. v. Superior Court (1985) 175 Cal. App. 3d 255, 261-263, 220 Cal. Rptr. 577*

[19] Vehicle Accident Reports

Veh. Code § 20012 (confidentiality of accident reports) does not preclude state's discovery of data regarding prior accidents at certain location, provided data does not reveal identities or compromise privacy interests of reporting parties. *Davies v. Superior Court (1984) 36 Cal. 3d 291, 300, 204 Cal. Rptr. 154, 682 P.2d 349* (disapproving prior inconsistent case law); *see People v. Ansbro (1984) 153 Cal. App. 3d 273, 278, 200 Cal. Rptr. 210* (withholding relevant accident report information in criminal case as denial of due process)

California Highway Patrol accident investigation reports are within class of reports expressly declared by *Veh. Code § 20014* to be for confidential use of designated state and local entities having jurisdiction over highway matters, and are not discoverable by private litigants, even though they contain information that is not confidential. *Nelson v. Superior Court (1986) 184 Cal. App. 3d 444, 450-451, 229 Cal. Rptr. 94*

[20] Waiver of Privilege Generally

Corporations' production of documents to government did not waive attorney-client privilege and work product protection when production was coerced by threat of indictment if corporations failed to cooperate. *Regents of Univ. of Cal. v. Superior Court (2008) 165 Cal. App. 4th 672, 675, 683-684, 81 Cal. Rptr. 3d 186*

Sending letters containing attorney's work product to auditors of defendant public agency, at defendant's direction, did not waive right to assert work product privilege with respect to those letters; letters themselves made clear that attorney did not intend to waive protection, he sent letters only to comply with defendant's request, and third party auditors had an interest in maintaining confidentiality of work product. *Laguna Beach County Water Dist. v. Superior Court (2004) 124 Cal. App. 4th 1453, 1459-1461, 22 Cal. Rptr. 3d 387*

Employer did not waive attorney-client privilege or work product protections by pleading adequacy of its prelitigation

investigation as defense to action for sexual discrimination and harassment or by providing claimants substantial discovery of employer's nonattorney in-house investigation report, unless it could be established through other discovery that significant part of any particular communication had already been disclosed to third parties. *Kaiser Found. Hospitals v. Superior Court (1998) 66 Cal. App. 4th 1217, 1227, 78 Cal. Rptr. 2d 543*

Under *Evid. Code § 919(b)* (improperly compelling disclosure), failure to seek review of prior court order compelling discovery was not waiver of privileges so as to prevent seeking relief from subsequent order requiring production. *Schlumberger Ltd. v. Superior Court (1981) 115 Cal. App. 3d 386, 391-392, 171 Cal. Rptr. 413*

[21] Trade Secrets Privilege

Public inspection provision of *10 Cal. Code Reg. § 2646.6*, which requires insurance companies to provide certain statistical data relating to insurer's California business to Insurance Commissioner, is valid, and trade secret privilege does not exempt that information from disclosure. *State Farm Mut. Auto. Ins. Co. v. Garamendi (2004) 32 Cal. 4th 1029, 1037, 12 Cal. Rptr. 3d 343, 88 P.3d 71*

While trade secret identification does not require "every minute detail" or "the greatest degree of particularity possible[,]" trade secret claimant's *Code Civ. Proc. § 2019.210* trade secret statement was insufficient, in light of its broad language, surplusage, and voluminous attachments. *Perlan Therapeutics, Inc. v. Superior Court (2009) 178 Cal. App. 4th 1333, 1350-1352, 101 Cal. Rptr. 3d 211*

If trade secret designation is adequate to permit defendant to investigate whether plaintiff's alleged trade secrets were within public domain and to prepare a defense, and to permit trial court to determine scope of relevant discovery, plaintiff is not required to particularize how alleged secret differs from matters already known to skilled persons in the field. *Brescia v. Angelin (2009) 172 Cal. App. 4th 133, 143, 90 Cal. Rptr. 3d 842*

Identity of defendant's suppliers was protectable trade secret, because it was information that derived economic value from not being generally known, defendant had taken reasonable efforts to maintain secrecy of its sources, and less burdensome alternatives were available to plaintiff to establish that jeans sold by defendant were stolen. *Citizens of Humanity, LLC v. Costco Wholesale Corp. (2009) 171 Cal. App. 4th 1, 13, 15-16, 89 Cal. Rptr. 3d 455*

Code Civ. Proc. § 2019.210 is not limited in its application to causes of action under Uniform Trade Secrets Act, *Civ. Code § 3426 et seq.*, for misappropriation of the trade secret, but extends to any cause of action that relates to the trade secret; trade secret has been described with "reasonable particularity" sufficient to permit discovery to begin when plaintiff makes a showing that is "reasonable"--that is, "fair, proper, just, rational." *Advanced Modular Sputtering, Inc. v. Superior Court (Sputtered Films, Inc.) (2005) 132 Cal. App. 4th 826, 903, 33 Cal. Rptr. 3d 901*

When plaintiffs' proper invocation of trade secret privilege, and blanket protective order they obtained, prevented defendant from examining key evidence which formed basis of plaintiffs' damage claim, trial court properly barred plaintiffs' damage evidence at trial. *Steiny & Co. v. California Electric Supply Co. (2000) 79 Cal. App. 4th 285, 288, 93 Cal. Rptr. 2d 920*

Employer's affirmative action plan and self-critical analyses prepared in compliance with federal contractor regulations are not protected by trade secrets privilege in employment discrimination litigation. *Cloud v. Superior Court (1996) 50 Cal. App. 4th 1552, 1560, 58 Cal. Rptr. 2d 365*

[22] Work Product Protection

Notes that contained defense counsel's thoughts and impressions were absolutely protected work product, and plaintiffs'

attorney acted unethically by examining document more closely than was necessary to determine that its contents were confidential, failing to notify defense that he had a copy, and surreptitiously using it to plaintiffs' gain; disqualification was proper under these circumstances. *Rico v. Mitsubishi Motors Corp. (2007) 42 Cal. 4th 807, 815, 817, 68 Cal. Rptr. 3d 758, 171 P.3d 1092*

Work product did not lose its protection when it was disclosed to auditor in audit response letters, when letters themselves made clear that attorney did not intend to waive protection; he sent letters only to comply with defendant's request, and third party auditors had an interest in maintaining confidentiality of work product. *Laguna Beach County Water Dist. v. Superior Court (2004) 124 Cal. App. 4th 1453, 1459-1461, 22 Cal. Rptr. 3d 387*

Appellant attorney retained by two trustees of inter vivos trust waived right to claim work product privilege with respect to successor trustee because appellant attorney disclosed those documents to another attorney who was an agent of one, if not both, predecessor trustees; thus, appellant attorney effectively disclosed the documents to predecessor trustees, thereby waiving privilege with respect to both predecessor trustees and successor trustee. *Eddy v. Fields (2004) 121 Cal. App. 4th 1543, 1549-1550, 18 Cal. Rptr. 3d 487*

Corporation that was target of government investigation regarding improperly recorded revenues waived attorney-client privilege and work product protection when it shared privileged documents with government, despite confidentiality agreements that accompanied disclosures; "common interest" doctrine did not preclude disclosure, because there was no real alignment of interests between government and corporation under investigation for securities law violations. *McKesson HBOC, Inc. v. Superior Court (2004) 115 Cal. App. 4th 1229, 1240, 9 Cal. Rptr. 3d 812, 818-821*

When parties negotiating business transaction entered into joint defense agreement in anticipation of litigation by a third party, in camera review was required to determine whether disclosure of documents in course of transaction waived work product protection or attorney-client privilege. Joint defense agreement was not void as matter of public policy; agreement evidenced expectation of confidentiality necessary to avoid waiver by disclosure to someone outside attorney-client relationship, but could not protect documents from disclosure, unless they contained or reflected attorney-client communications or attorney work product. *OXY Resources California LLC v. Superior Court (2004) 115 Cal. App. 4th 874, 891-895, 9 Cal. Rptr. 3d 621*

Qui tam plaintiff who entered into joint prosecution agreement with government entity had work product interest in reports of expert retained as consultant, but not designated as witness, that counsel for government entity could not waive; no substantial evidence supported trial court's conclusion that denial of access to expert's information would unfairly prejudice defendant. *Armenta v. Superior Court (2002) 101 Cal. App. 4th 525, 535-536, 124 Cal. Rptr. 2d 273 (2002)*

Law firm that had represented corporation in merger transaction waived any right to protect its absolute work product created during merger from disclosure to corporation by undertaking to represent majority shareholders in separate action by corporation against shareholders arising from merger transaction. *Metro-Goldwyn-Mayer, Inc. v. Superior Court (1994) 25 Cal. App. 4th 242, 246-249, 30 Cal. Rptr. 2d 371*

Work product protection "is not waived except by a disclosure wholly inconsistent with the purpose of the privilege, which is to safeguard the attorney's work product and trial preparation." *Raytheon Co. v. Superior Court (1989) 208 Cal. App. 3d 683, 689, 256 Cal. Rptr. 425*

Crime-fraud exception to attorney-client privilege is not applicable to absolute work product; absolute work product protection continues to protect contents of writing delivered to client in confidence, and is not restricted to only those writings in attorney's possession. *BP Alaska Exploration, Inc. v. Superior Court (1988) 199 Cal. App. 3d 1240, 1249-1251, 1253-1260, 245 Cal. Rptr. 682*

Work product protection is not applicable to attorney's notes made while attorney acted as business agent of client in real estate contract negotiations. *Watt Indus., Inc. v. Superior Court (1981) 115 Cal. App. 3d 802, 805, 171 Cal. Rptr. 503*

Work product protection extends beyond termination of litigation for which documents were prepared. *Fellows v. Superior Court (1980) 108 Cal. App. 3d 55, 63, 166 Cal. Rptr. 274* ; *Popelka, Allard, McCowan & Jones v. Superior Court (1980) 107 Cal. App. 3d 496, 502, 165 Cal. Rptr. 748* (interpreting former *Code Civ. Proc. § 2106* (*now see Code Civ. Proc. § 2018.010 et seq.*))

Party claiming conditional work product protection has initial burden of establishing that matter comes within protection, but party seeking disclosure has burden of establishing that denial of disclosure will unfairly prejudice preparation of claim or defense. *Fellows v. Superior Court (1980) 108 Cal. App. 3d 55, 67, 166 Cal. Rptr. 274* (interpreting former *Code Civ. Proc. § 2017* (*now see Code Civ. Proc. § 2018.010 et seq.*))

Law firm's interoffice memoranda concerning previous action were writings reflecting attorney's impressions, conclusions, opinions, legal research, or theories, and as such were absolutely privileged from discovery. *Popelka, Allard, McCowan & Jones v. Superior Court (1980) 107 Cal. App. 3d 496, 500, 165 Cal. Rptr. 748*

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesAttorney-Client PrivilegeGeneral OverviewEvidencePrivilegesClergy CommunicationsGeneral OverviewEvidencePrivilegesDoctor-Patient PrivilegeGeneral OverviewEvidencePrivilegesMarital PrivilegesConfidential CommunicationsGeneral OverviewEvidencePrivilegesSelf-Incrimination PrivilegeGeneral Overview

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§ 191.154 Attorney General Opinions

With respect to employment discrimination complaint filed against county employee who is a peace officer, county affirmative action officer may not lawfully furnish copy of completed investigation report to complainant who is not a peace officer. *73 Ops. Cal. Att'y Gen. 90 (1990)*

City attorney's advice to city council member regarding whether or not official action taken by that member violates Political Reform Act is protected by attorney-client privilege. *71 Ops. Cal. Att'y Gen. 255 (1988)*

Confidentiality and disclosure provisions of *Penal Code § 832.7* bar public agency from compiling or releasing statistical information regarding types of citizen complaints and from releasing summary of records maintained pursuant to *Penal Code § 832.5*. *71 Ops. Cal. Att'y Gen. 247 (1988)*

Attorney-client privilege and work product rule, when relied on by public officer, do not automatically terminate with settlement or adjudication of underlying claim. *71 Ops. Cal. Att'y Gen. 5 (1988)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationFreedom of InformationDefenses & ExemptionsStatutory ExemptionsEvidencePrivilegesAttorney-Client PrivilegeGeneral Overview

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§ 191.155 Law Reviews

Rice, *The Corporate Attorney-Client Privilege: Loss of Predictability Does Not Justify Crying Wofinbarger, 55 Bus. Law. 735 (2000)*

Stuart, *Inadvertent Disclosure of Confidential Information: What Does a California Attorney Need to Know? 37 Santa Clara L. Rev. 547 (1997)*

Note, *"Delaney v. Superior Court": Balancing the Interests of Criminal Defendants and Newspersons Under California's Shield Law, 22 Pac. L.J. 1371 (1991)*

Note, *The White Knight Privilege in Litigated Takeovers: Leveling the Playing Field in Discovery, 43 Stan. L. Rev. 445 (1991)*

Comment, *Applying the Attorney-Client and Work Product Privileges to Allied Party Exchange of Information in California, 36 UCLA L. Rev. 151 (1989)*

Comment, *The Attorney-Client Privilege and its Availability to Insured Persons, 36 UCLA L. Rev. 977 (1989)*

Note, *Compelled Consent to Release of Foreign Records-Taking the Fifth: Doe v. United States, 23 U.S.F. L. Rev. 291 (1989)*

Note, *Attorney-Client Privilege for the Government Entity, 97 Yale L.J. 1725 (1988)*

Note, *Reconciling Section 1157, Elam, and West Covina Hospital: Is the Sanctity of the Hospital Peer Review Committee Salvageable? 61 S. Cal. L. Rev. 183 (1987)*

Langstraat, *Client Identity and the Attorney-Client Privilege: The Tax Attack Continues, 23 Cal. W.L. Rev. 42 (1986)*

Comment, *Attorney-Client Privilege: The Necessity of Intent to Waive the Privilege inInadvertent Disclosure Cases, 18 Pac. L.J. 59 (1986)*

Swanson, *Privacy Limitations on Civil Discovery in Federal and California Practice, 17 Pacific L.J. 1 (1985)*

Comment, *The Deconstruction of the Marital Privilege, 12 Pepperdine L. Rev. 723 (1985)*

Wolfson, *Civil Discovery and the Privilege Against Self-Incrimination, 15 Pac. L.J. 785 (1984)*

Comment, *Vanishing Exception to the Psychotherapist-Patient Privilege: The Child Abuse Reporting Act, 16 Pacific L.J. 335 (1984)*

Yellin, *The History and Current Status of the Clergy-Penitent Privilege, 23 Santa Clara L. Rev. 95 (1983)*

Buck, *Self-Incrimination in Civil Litigation: The Evolution of California's Judicially Created Immunities from "Murphy v. Waterfront Commission," 9 Hastings Const. L.Q. 351 (1982)*

Note, *Pretrial Discovery of Net Worth in Punitive Damages Cases, 54 So. Cal. L. Rev. 1141 (1981)*

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Legal Topics:

For related research and practice materials, see the following legal topics:
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Witkin, California Evidence, Ch. IX, *Witnesses*, § 59 et seq. (4th ed. 2000)

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§ 192.01 Scope of Chapter

This chapter discusses discovery sanctions under the Civil Discovery Act [*Code Civ. Proc. § 2016.010 et seq.*]. It includes general forms for motions, together with proposed orders, for use in seeking an issue, evidence, or terminating sanction [*see §§ 192.50 -192.53*], or a contempt sanction [*see §§ 192.60, 192.61*].

The Civil Discovery Act includes numerous provisions for the imposition of sanctions in the context of particular proceedings involving a particular discovery method. For further discussion of these provisions, and forms for use in seeking specific discovery orders that include the imposition of sanctions authorized in that specific proceeding, see the chapters relating to the specific methods of discovery [*see* Ch. 193, *Discovery: Depositions* , through Ch. 198, *Discovery: Exchange of Expert Witness Information*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureSanctionsGeneral Overview

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PART I. SCOPE

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§ 192.02 Cross References

[1] Related Discovery Chapters

For discussion and forms relating to the general purpose, scope, regulation, and timing of civil discovery, see Ch. 190, *Discovery: Scope, Regulation, and Timing* . For discussion relating to evidentiary privileges and other protections against disclosure as limits on the scope of discovery, see Ch. 191, *Discovery: Privileges and Other Discovery Limitations* . For detailed discussion of discovery of electronically stored information, see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*.

For discussion and forms relating to the use of particular discovery methods authorized by the Civil Discovery Act, including specific sanctions authorized in the context of proceedings involving these methods, see the following chapters covering each method:

- Ch. 193, *Discovery: Depositions*.
- Ch. 194, *Discovery: Interrogatories*.
- Ch. 195, *Discovery: Inspection of Tangible Evidence*.
- Ch. 196, *Discovery: Requests for Admissions*.
- Ch. 197, *Discovery: Physical and Mental Examinations*.
- Ch. 198, *Discovery: Exchange of Expert Witness Information*.

For discussion and forms relating to the use of specified discovery methods for the purpose of preserving testimony or other evidence prior to the commencement of an action or pending an appeal, see Ch. 199, *Discovery: Preservation of Evidence* .

For discussion and forms relating to the review of interlocutory discovery orders in some circumstances by petition for writ of mandate or prohibition, see Ch. 200, *Discovery: Review of Discovery Orders* .

[2] Other Related Chapters

For discussion of and general forms relating to law and motion procedures generally, see Ch. 372, *Motions and Orders* .

For discussion and forms relating to the imposition of sanctions in the trial courts and reviewing courts generally, see Ch. 510, *Sanctions* , and Ch. 49, *Appeal: Sanctions* , respectively.

For discussion and forms relating to subpoenas and subpoenas duces tecum generally, see Ch. 535, *Subpoena* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryPrivileged MattersGeneral Overview

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PART I. SCOPE

16-192 California Forms of Pleading and Practice--Annotated §§ 192.03-192.09

[Reserved]

§§ 192.03[Reserved]

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16-192 California Forms of Pleading and Practice--Annotated § 192.10

§ 192.10 Governing Law

Discovery sanctions are governed generally by *Code Civ. Proc. § 2023.010 et seq.*, which provides a nonexclusive list of discovery misuses, and lists the types of sanctions that may used to prevent and correct such misuses, and specifies general requirements for a motion seeking discovery sanctions. Provisions authorizing the imposition of sanctions in specific situations are also found throughout the Civil Discovery Act [*Code Civ. Proc. § 2016.010 et seq.*; *see* discussion in *§§ 192.14[1]* and *192.15[1]*].

The statewide rules of court include provisions applicable to discovery motions in which sanctions are authorized or sought. *Cal. Rules of Ct., Rule 3.1348*, authorizes the imposition of sanctions in favor or a party who seeks an order compelling discovery even when no opposition was filed, opposition was withdrawn, or requested discovery was provided after the filing of the motion, although it also provides that such conduct by the opposing party is not to be deemed an admission that the motion was proper or that sanctions should be awarded. *Cal. Rules of Ct., Rule 3.1345(a)*, requires the filing of a separate statement with any motion seeking an issue or evidentiary sanction [*see also Cal. Rules of Ct., Rule 3.1345(c)* (contents of separate statement)].

Legal Topics:

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

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16-192 California Forms of Pleading and Practice--Annotated § 192.11

§ 192.11 Discovery Sanctions: To Prevent and Correct Discovery Misuses

The purpose of discovery sanctions is not to provide a weapon for punishment, forfeiture, or avoidance of trial on the merits. Rather, the sanctions are designed to prevent abuses in the discovery process and to correct the problem presented in a specific case. The penalty imposed should not exceed that which is required to protect the interest of the party entitled to, but denied, discovery. The sanction should not operate to put the prevailing party in a better position than that party would have been in if he or she had obtained the discovery sought and it had been completely favorable to the party's case [*McGinty v. Superior Court (1994) 26 Cal. App. 4th 204, 210-216, 31 Cal. Rptr. 2d 292]* .

Discovery sanctions should be appropriate to the dereliction and should not exceed that which is required to protect the interests of the party entitled to but denied discovery. The court may not impose sanctions which are designated not to accomplish the objects of discovery but to impose punishment [*Vallbona v. Springer (1996) 43 Cal. App. 4th 1525, 1545, 51 Cal. Rptr. 2d 311]* .

Legal Topics:

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

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16-192 California Forms of Pleading and Practice--Annotated § 192.12

§ 192.12 Discovery Misuses Defined

Misuses of the discovery process include, but are not limited to, the following [*Code Civ. Proc. § 2023.010*]:

- Persisting, over objection and without substantial justification, in an attempt to obtain information or materials that are outside the scope of permissible discovery.

- Using a discovery method in a manner that does not comply with its specified procedures.

- Employing a discovery method in manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.

- Failing to respond or submit to an authorized method of discovery.

- Making, without substantial justification, an unmeritorious objection to discovery.

- Making an evasive response to discovery.

- Disobeying a court order to provide discovery.

- Making or opposing, unsuccessfully and without substantial justification, a motion to compel or to limit discovery.

- Failing to confer in person, by telephone, or by letter with an opposing party or attorney in a reasonable and good faith attempt to resolve informally any dispute concerning discovery, if the section governing a particular discovery motion requires the filing of a declaration stating facts showing that the attempt has been made. Notwithstanding the outcome of the particular discovery motion, the court must impose a monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct [*Code Civ. Proc. § 2023.020*].

Sanctionable misconduct not specifically listed includes attorney's participating in discovery for corporate client that attorney knew was a suspended corporation and therefore disabled from litigation [*Palm Valley Homeowners Assoc., Inc. v. Design MTC (2001) 85 Cal. App. 4th 553, 563-564, 102 Cal. Rptr. 2d 350* (example of sanctions imposed for conduct not specifically listed); *see also Mattco Forge, Inc. v. Arthur Young & Co. (1990) 223 Cal. App. 3d 1429, 1437-1438, 273 Cal. Rptr. 262]* .

Legal Topics:

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

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§ 192.13 Types of Discovery Sanctions

[1] In General

To the extent authorized by the section governing any particular discovery method or any other provision of the Civil Discovery Act (*Code Civ. Proc. § 2016.010 et seq.*), the trial court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct constituting a misuse of the discovery process [*Code Civ. Proc. § 2023.030*]:

- A monetary sanction [*Code Civ. Proc. § 2023.030(a)*; *see* [2], *below*].
- An issue, evidence, or terminating sanction [*Code Civ. Proc. § 2023.030(b)-(d)*; *see* [3], *below*].
- A contempt sanction [*Code Civ. Proc. § 2023.030(e)*; *see* [4], *below*].

For discussion of what constitutes a discovery "misuse," see *§ 192.12*. For discussion of specific provisions of the Discovery Act that authorize the imposition of one or more of the foregoing sanctions, see *§§ 192.14* and *192.15*.

[2] Monetary Sanction

[a] Defined

To the extent authorized by a specific provision of the Civil Discovery Act, after notice and an opportunity for hearing [*see* [1], *above*, and § 192.14], the trial court may impose a monetary sanction against one who engages in a misuse of the discovery process, or any attorney advising that conduct, or both [*Code Civ. Proc. § 2023.030(a)*]. The court also may impose a monetary sanction against one who unsuccessfully asserts that another has engaged in the misuse of the discovery process, or on any attorney who advised that assertion, or on both [*Code Civ. Proc. § 2023.030(a)*].

Many particular motions for a discovery order must be supported by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by the motion [*see* discussion in *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*]. In these situations, a monetary sanction must be imposed

against one who fails to confer with an opposing party or attorney concerning the dispute, regardless of the outcome of the motion [*see Code Civ. Proc. § 2023.020*, discussed in *§ 192.12*]. When appropriate, the court also may impose monetary sanctions on a party who made some effort to obtain informal resolution when it was required by statute, but whose effort is found to be inadequate [*see Obregon v. Superior Court (1998) 67 Cal. App. 4th 424, 435, 79 Cal. Rptr. 2d 62* ; *but see Clement v. Alegre (2009) 177 Cal. App. 4th 1277, 1293-1294, 99 Cal. Rptr. 3d 791* (fact that defendant "never compromised his position" that interrogatories were proper did not constitute failure to meet and confer, and plaintiff's argument that defendant failed to properly engage in meet and confer process was without merit when exchange of letters reflected that parties were at an impasse that could not be resolved through meet and confer)].

[b] Monetary Sanction Is Generally Required When Authorized

If a monetary sanction is authorized by any provision of *Code Civ. Proc. § 2016.010 et seq.*, the court *must* impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2023.030(a)*].

This requirement effectively shifts the burden of showing substantial justification on the party against whom sanctions are sought [*see* Reporter's Notes to Proposed (former) *Code Civ. Proc. § 2023(b)*; *cf.* former *Code Civ. Proc. § 2034* (authorizing imposition of monetary sanction only on finding of lack of substantial justification); *see also Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.13[2]*].

Most of the provisions in the Discovery Act that specifically authorize a monetary sanction also require the sanction to be imposed, absent a showing of substantial justification or other mitigating circumstances, either for unsuccessfully making or opposing a particular motion [*see, e.g., Code Civ. Proc. §§ 2017.220(b), 2019.030(c)*; *see also Code Civ. Proc. § 2023.010* (discussed in *§ 192.12*)], or for other conduct [*see, e.g., Code Civ. Proc. § 2025.450(c)(1)*]. For further discussion of this issue, see *§ 192.15[2]*.

The court may award sanctions in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed [*Cal. Rules of Ct., Rule 3.1348*]. The court may not, however, deem the opposing party's failure to file written opposition, failure to appear at a hearing, or voluntary provision discovery to be an admission that the motion was proper or that sanctions should be awarded [*Cal. Rules of Ct., Rule 3.1348*].

The fact that a party is not represented by counsel is not, by itself, necessarily sufficient reason for the court to find that imposition of a monetary sanction against that party would be unjust [*see Midwife v. Bernal (1988) 203 Cal. App. 3d 57, 65, 249 Cal. Rptr. 708* (decided under prior law)].

Although *Code Civ. Proc. § 1283.05(b)* gives arbitrators the power to enforce the rights, remedies, procedures, duties, liabilities, and obligations of discovery, the arbitrator retains certain discretion and flexibility in ruling on discovery motions, and therefore is not required to impose sanctions, even if a trial court would be required to do so in the same circumstances [*Alexander v. Blue Cross of California (2001) 88 Cal. App. 4th 1082, 1089, 106 Cal. Rptr. 2d 431]* .

[c] Amount of Monetary Sanction Equals Reasonable Expenses Incurred

An order imposing a monetary sanction directs the person against whom the sanction is imposed to pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of the discovery misuse [*Code Civ. Proc. § 2023.030(a)*].

The amount of a monetary sanction must reflect the actual amount of attorney's fees and costs incurred by the party in whose favor the sanction is awarded, for example, in an attempt to obtain compliance with a discovery request. Moreover, the trial court must determine that such amount spent or incurred was reasonable [*In re Marriage of Niklas*

(1989) 211 Cal. App. 3d 28, 37-38, 258 Cal. Rptr. 921] .

For example, an attorney who is party to an action acting *in propria persona* does not actually "incur" attorney's fees, because he or she does not become liable to pay compensation for legal representation. Such a party is therefore not entitled to an award of monetary sanctions under former *Code Civ. Proc. § 2023(b)(1)* (*now see Code Civ. Proc. § 2023.030(a)*) when the amount is based on attorney's fees that he or she purportedly incurred in compelling compliance with a discovery request [*Argaman v. Ratan (1999) 73 Cal. App. 4th 1173, 1180, 86 Cal. Rptr. 2d 917* (reasoning that awarding sanctions under these circumstances would result in disparate treatment between self-represented lawyer-litigants and self-represented non-lawyers involved in discovery disputes)]. Even if the value of this *pro se* litigant's time and effort were considered a "reasonable expense" [*see Code Civ. Proc. § 2023.030(a)*], it would not be compensable under the statute because it has not actually been incurred [*Argaman v. Ratan (1999) 73 Cal. App. 4th 1173, 1179-1180, 86 Cal. Rptr. 2d 917]* .

One court of appeal, however, has held that a party represented by pro bono counsel was entitled to an award of sanctions under former *Code Civ. Proc. § 2025(j)(3)* (*now see Code Civ. Proc. § 2025.450(c)*) and former *Code Civ. Proc. § 2023* (*now see Code Civ. Proc. § 2023.010 et seq.*). The opposing party twice failed to appeal at a noticed deposition. Even though the party did not actually "incur" additional fees as a result of the opposing party's conduct, there was no finding that the failure to appeal was "with substantial justification or that other circumstances make the imposition of the sanction unjust" [*Do v. Superior Court (2003) 109 Cal. App. 4th 1210, 1213, 135 Cal. Rptr. 2d 855]* . The court distinguished *Argaman*, in which the court of appeal concluded that awarding sanctions in the form of fees for discovery abuses by their opponents to lawyers representing themselves would result in disparate treatment between self-represented lawyer-litigants and self-represented non-lawyers. Rather, in this case, the court reasoned that "to permit lawyers who do not charge their clients to obtain monetary discovery sanctions in the form of fees does not result in disparate treatment; rather, the opposite is true" [*Do v. Superior Court (2003) 109 Cal. App. 4th 1210, 1217, 135 Cal. Rptr. 2d 855]* . The court noted that to hold that parties represented by lawyers who provide their services free of charge are not entitled to sanctions, while parties who have to pay fees are, would be unfair, in effect creating two separate classes of discovery and granting different rights and remedies to each [*Do v. Superior Court (2003) 109 Cal. App. 4th 1210, 1217-1218, 135 Cal. Rptr. 2d 855]* .

[d] Monetary Sanctions Against Attorney

Unlike monetary sanctions against a party, which are based on the party's misuse of the discovery process, monetary sanctions against a party's attorney require a finding that the attorney advised the conduct [*Ghanooni v. Super Shuttle (1993) 20 Cal. App. 4th 256, 261, 24 Cal.Rptr.2d 501* (unrebutted declarations of plaintiff's counsel were sufficient to establish that plaintiff's refusal to submit to X-rays was *not* based on counsel's advice)].

When monetary sanctions are sought against an attorney for his or her advice to a client engaging in a discovery abuse, the attorney, rather than the party seeking sanctions, has the burden of proving that the discovery misuse was not based on his or her advice [*see* *Corns v. Miller (1986) 181 Cal. App. 3d 195, 200, 226 Cal. Rptr. 247* (interpreting former *Code Civ. Proc. § 2034(b)(2)(D)*; *now see Code Civ. Proc. § 2023.030(a)*)].

[e] Written Findings Regarding Monetary Sanctions

Code Civ. Proc. § 2023.010 et seq. does not require the trial court to make findings before it issues monetary sanctions [*see Code Civ. Proc. § 2023.010 et seq.*; *Ghanooni v. Super Shuttle (1993) 20 Cal. App. 4th 256, 261, 24 Cal. Rptr. 2d 501]* . Nor do any of the provisions specifically authorizing monetary sanctions [*see, e.g., Code Civ. Proc. §§ 2025.410(d), 2025.420(d), 2025.450(c), 2025.480(f), 2025.520(h)* (deposition), 2028.040(c) (deposition by written questions), 2030.090(d), 2030.290(c), 2030.300(d), 2030.310(d) (interrogatory), 2031.060(h), (i), 2031.300(c), (d), 2031.310(h), (j), 2031.320(b), (d) (inspection, copying, testing, sampling of documents, tangible things, places, or electronically stored information), 2032.240(c), 2032.250(b), 2032.410, 2032.420, 2032.510(f), 2032.620(b),

2032.650(b) (physical or mental examination), 2033.080(d), 2033.280(c), 2033.290(d) (requests for admissions), 2034.250(d), 2034.470(g), 2034.630, 2034.730 (exchange of expert witness information)].

The court's failure to make written findings when issuing monetary sanctions against a party whose discovery misuse consisted of taking an unsuccessful position on a motion that provided for monetary sanctions against the unsuccessful party is not a violation of procedural due process [*see Estate of Ruchti (1993) 12 Cal. App. 4th 1593, 1603-1604, 16 Cal. Rptr. 2d 151]* .

On the other hand, written findings *are* necessary when the trial court determines that monetary sanctions are *not* to be imposed when they otherwise required, because it has found that their imposition would be unjust under the circumstances, for example, in that the person subject to the sanction acted with substantial justification [*Estate of Ruchti (1993) 12 Cal. App. 4th 1593, 1603, 16 Cal. Rptr. 2d 151* (monetary sanctions under former *Code Civ. Proc. § 2025(i)* (*now see Code Civ. Proc. § 2025.420(d)*); Mattco Forge, Inc. v. Arthur Young & Co. (10) *223 Cal. App. 3d 1429, 1438, 273 Cal. Rptr. 262* (monetary sanctions under former *Code Civ. Proc. § 2031(e)(6)*; *see now Code Civ. Proc. § 2031.060(h)*)].

If an party subject to monetary sanctions desires written findings, he or she is not precluded from requesting them from the trial court [*see Estate of Ruchti (1993) 12 Cal. App. 4th 1593, 1604, 16 Cal. Rptr. 2d 151* (noting that unsuccessful party failed to request findings from the trial court, and thus waived any entitlement to successfully raise the issue on appeal)].

[f] Procedural Considerations

A party who seeks sanctions must file a noticed motion [*see Code Civ. Proc. § 2023.030*; [a]-[b], *above*]. For practical purposes, the notice of intent to seek sanctions ordinarily is included in the body of the discovery motion [*see, e.g., § 192.50[1]*]. However, one court of appeal has held that a separate motion for discovery monetary sanctions may be made after an underlying motion to compel further response to an inspection demand is litigated [*London v. Dri-Honing Corp. (2004) 117 Cal. App. 4th 999, 1001, 12 Cal. Rptr. 3d 240* (employee's separate motion for sanctions was legally authorized, properly noticed, and timely made)]. While the better practice may be to include the request for monetary sanctions in the motion to compel further response, there is no legal requirement to do so [*London v. Dri-Honing Corp. (2004) 117 Cal. App. 4th 999, 1008, 12 Cal. Rptr. 3d 240]* . The timeliness of a separate motion for sanctions is subject to the trial court's discretion, rather than the 45-day limit from the time of the initial service of the response under *Code Civ. Proc. § 2031.310(c)* [*London v. Dri-Honing Corp. (2004) 117 Cal. App. 4th 999, 1009, 12 Cal. Rptr. 3d 240]* .

Discovery sanctions may not be ordered ex parte, and an order purporting to do so is void [*Parker v. Wolters Kluwer United States, Inc. (2007) 149 Cal. App. 4th 285, 296, 57 Cal. Rptr. 3d 18* ; *Sole Energy Co. v. Hodges (2005) 128 Cal. App. 4th 199, 208, 26 Cal. Rptr. 3d 823]* . For further discussion of the notice requirements of the discovery statute and due process considerations, see *§ 192.19*.

[g] Monetary Sanctions Under Non-Discovery Act Provisions

Sanctions under *Code Civ. Proc. § 128.7* (governing pleading abuses) may not be sought in connection with abuses of the discovery process [*Code Civ. Proc. § 128.7(g)*]. The California Supreme Court has clarified that former *Code Civ. Proc. § 128.5* (allowing sanctions for frivolous actions or delaying tactics to be sought in connection with misuses of the discovery process) does not authorize trial courts to impose sanctions for any form of litigation misconduct arising "from a complaint filed, or a proceeding initiated" after December 31, 1994. The Court held that *Code Civ. Proc. § 128.7* and former *Code Civ. Proc. § 128.5* establish mutually exclusive sanctions regimes, with *Code Civ. Proc. § 128.5* controlling in proceedings initiated before January 1, 1995, and *Code Civ. Proc. § 128.7* controlling after that date [*Olmstead v. Arthur J. Gallagher & Co. (2004) 32 Cal. 4th 804, 811-812, 11 Cal. Rptr. 3d 298, 86 P.3d 354* (rejecting

court of appeal's interpretation that former *Code Civ. Proc. § 128.5* applies after 1994 to sanctions for conduct not involving pleadings)].

A trial court also has general authority to impose monetary sanctions for a violation of the applicable statewide rules of court [*see Cal. Rules of Ct., Rule 2.30(b)*; *see also Code Civ. Proc. § 575.2* (authorizing trial courts to adopt local rules providing for the imposition of sanctions for violation of local rules)].

For further discussion of provisions under general law relating to monetary sanctions, see Ch. 510, *Sanctions* .

[3] Issue, Evidence, and Terminating Sanctions

[a] Defined

[i] Issue Sanction

To the extent authorized by a specific provision of the Discovery Act, after notice and an opportunity for hearing [*see* [1], *above*, and § 192.14], the trial court may impose an issue sanction [*Code Civ. Proc. § 2023.030(b)*].

An order imposing an issue sanction directs that designated facts be taken as established in the action in accordance with the claim of the party adversely affected by a misuse of the discovery process. Such an order may also direct that a party engaging in a misuse of the discovery process be prohibited from supporting or opposing designated claims or defenses [*Code Civ. Proc. § 2023.030(b)*].

[ii] Evidence Sanction

To the extent authorized by a specific provision of the Discovery Act, after notice and an opportunity for hearing [*see* [1], *above*, and § 192.14], the trial court may impose an evidence sanction [*Code Civ. Proc. § 2023.030(c)*].

An evidence sanction is an order prohibiting any party engaging in a misuse of the discovery process from introducing designated matters in evidence [*Code Civ. Proc. § 2023.030(c)*].

[iii] Terminating Sanction

To the extent authorized by a specific provision of the Discovery Act, after notice and an opportunity for hearing [*see* [1], *above*, and § 192.14], the trial court may impose a terminating sanction [*Code Civ. Proc. § 2023.030(d)*].

An order imposing a terminating sanction is one of the following [*Code Civ. Proc. § 2023.030(d)*]:

- An order striking out the pleadings or parts of the pleadings of a party engaging in a misuse of the discovery process.

- An order staying further proceedings by a party engaging in a misuse of the discovery process until an order for discovery is obeyed.

- An order dismissing the action, or any part of the action, of a party engaging in a misuse of the discovery process.

- An order rendering a judgment by default against a party engaging in a misuse of the discovery process.

This power to impose evidentiary sanctions under the Civil Discovery Act (*Code Civ. Proc. § 2016.010 et seq.*) as a

remedy for litigation misconduct supplements, but does not supplant, a court's inherent power to deal with litigation abuse [*Peat, Marwick, Mitchell & Co. v. Superior Court (1988) 200 Cal. App. 3d 272, 285-291, 245 Cal. Rptr. 873]* . Thus, in a case of first impression, one court of appeal has held that a trial court, when faced with pervasive, deliberate, and egregious misconduct--abuse that makes lesser sanctions inadequate to ensure a fair trial--may use its inherent judicial power to dismiss the action [*Stephen Slesinger, Inc. v. The Walt Disney Co. (2007) 155 Cal. App. 4th 736, 758, 66 Cal. Rptr. 3d 268]* . In that case, the trial court properly terminated litigation for discovery misconduct "run riot," including plaintiff's employment of an investigator to steal confidential documents from defendant's secure facilities and trash receptacles, altering those documents with the intent to mislead, and lying about the source and number of the stolen documents in its verified discovery responses [*Stephen Slesinger, Inc. v. The Walt Disney Co. (2007) 155 Cal. App. 4th 736, 744-756, 66 Cal. Rptr. 3d 268* ; *compare New Albertsons, Inc. v. Superior Court (2008) 168 Cal. App. 4th 1403, 1431-1434, 1426, 86 Cal. Rptr. 3d 457* (imposition of evidence and issue sanctions based on court's inherent power to control litigation, absent defendant's failure to obey order compelling discovery, was abuse of discretion when there was no order compelling defendant to produce video recordings, and real parties had waived right to compel further response or inspection; sanctions based on court's inherent power are reserved for egregious violations of discovery process)].

[b] Determining Whether Issue, Evidence, or Terminating Sanction Is Proper

[i] Court Has Discretionary Power to Make Determination

Issue, evidence, and terminating sanctions generally are authorized to be imposed against a party who fails to obey an order compelling discovery [*see also* discussion in *§ 192.15[3]*]. In these situations the court is expressly empowered to make any order that is just, including the imposition of an issue, evidence, or terminating sanction, or in addition to or in lieu of these, a monetary sanction [*see Code Civ. Proc. §§ 2025.450(d), 2025.480(g), 2030.290(c), 2030.300(e),* 2031.300(c), (d), 2031.310(i), (j), 2031.320(c), (d)].

Although the provisions authorizing issue, evidence, or terminating sanctions typically involve a refusal to comply with an order compelling discovery, these sanctions may be appropriate absent a prior order compelling discovery, or its equivalent, if the misconduct is sufficiently egregious [*see New Albertsons, Inc. v. Superior Court (2008) 168 Cal. App. 4th 1403, 1408, 1426, 86 Cal. Rptr. 3d 457* (collecting cases); *Karlsson v. Ford Motor Co. (2006) 140 Cal. App. 4th 1202, 1214-1215, 45 Cal. Rptr. 3d 265* (violation of discovery order was not prerequisite to issue and evidentiary sanctions based on pattern of discovery abuse that effectively led to loss of evidence, citing *Vallbona* and *Do It Urself Moving & Storage, Inc.*); *Vallbona v. Springer (1996) 43 Cal. App. 4th 1525, 1545, 51 Cal. Rptr. 2d 311* (evidence and issue sanctions were properly imposed without violation of order compelling production of documents, when requiring requesting party to seek order would have been futile, given responding party's claim that requested documents had been stolen); *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns (1992) 7 Cal. App. 4th 27, 35-37, 9 Cal. Rptr. 2d 396* (evidence sanctions were appropriate despite absence of order compelling discovery, when sanctioned party concededly could not provide audit it had promised)].

The court's discretionary power in determining which sanction to impose in these situations appears to remain limited, as under prior law, by the principle that discovery sanctions are remedial rather than punitive [*see Kahn v. Kahn (1977) 68 Cal. App. 3d 372, 381, 137 Cal. Rptr. 332]* . That is, the discretionary imposition of a sanction is proper when it is suitable and necessary to enable the party seeking discovery to obtain the objects of the discovery sought, but not when it places the prevailing party in a better position than if discovery had been obtained [*see Wilson v. Jefferson (1985) 163 Cal. App. 3d 952, 958, 210 Cal. Rptr. 464* ; *Caryl Richards, Inc. v. Superior Court (1961) 188 Cal. App. 2d 300, 303-304, 10 Cal. Rptr. 377]* .

Thus, imposition of an issue, evidence, or terminating sanction must be appropriate to the dereliction and must not exceed that required to protect the interests of the party wrongfully denied discovery [*In re Marriage of Economou (1990) 224 Cal. App. 3d 1466, 1475, 274 Cal. Rptr. 473* ; *see In re Marriage of Michaely (2007) 150 Cal. App. 4th*

802, 810, 59 Cal. Rptr. 3d 56 (sanctions, in form of factual findings, were properly imposed on husband in marital dissolution proceeding, based on his egregious abuse of discovery process, both in his document production and in his answers to questions)]. For example, one court of appeal declined to impose an issue preclusion sanction against a party for its failure to produce, as specified in deposition notices, and to answer at appropriate depositions, absent violation of an order to compel [*Maldonado v. Superior Court (2001) 94 Cal. App. 4th 1390, 1399, 115 Cal. Rptr. 2d 137]* . Although the court noted that some courts have imposed more serious sanctions under former *Code Civ. Proc. § 2023* (*now see Code Civ. Proc. § 2023.010 et seq.*), even when no specific order was violated, those cases involved repeated and willful refusals to permit discovery or produce documents over a lengthy period of time, resulting in evidence becoming unavailable [*Maldonado v. Superior Court (2001) 94 Cal. App. 4th 1390, 1398-1399, 115 Cal. Rptr. 2d 137* (noting, however, that monetary sanctions might well be warranted under former *Code Civ. Proc. § 2025(o)* (*now see Code Civ. Proc. § 2025.480*))].

For forms for use in seeking the imposition of issue, evidence, or terminating sanctions for failure to obey a discovery order, see *§§ 192.50 -192.53*.

[ii] When Issue or Evidence Sanction Proper

An issue or evidence sanction may be appropriate when a party repeatedly and willfully fails to provide relevant, non-privileged evidence to the opposing party as required by the discovery rules, even if the sanction proves determinative in terminating the plaintiff's case [*see* *Karlsson v. Ford Motor Co. (2006) 140 Cal. App. 4th 1202, 1215-1216, 45 Cal. Rptr. 3d 265* (evidence preclusion sanctions against manufacturer on issues of warnings and technical feasibility of safer, alternative seat belt design in minivan were proper under *Code Civ. Proc. § 2023.030*, in product liability suit, because manufacturer's repeated pattern of abuse led to loss of evidence on failure to warn); *Juarez v. Boy Scouts of America, Inc. (2000) 81 Cal. App. 4th 377, 385, 97 Cal. Rptr. 2d 12* (in action alleging sexual abuse of plaintiff by employee of defendant, court upheld evidence sanctions against plaintiff, conclusively establishing that no information was available to defendants to cause them to suspect that scoutmaster had propensity to molest children before he was accused of molesting plaintiff, following plaintiff's repeated failures to comply with discovery orders to produce any tangible evidence which would have put defendants on notice that scoutmaster was predisposed toward misconduct); *Wells Fargo Bank v. DiLeonardo (1994) 22 Cal. App. 4th 873, 878-879, 28 Cal. Rptr. 2d 16* (issue sanctions properly applied to beneficiary's objections to trustee's account after beneficiary refused to comply with court order compelling production of documents); *Waicis v. Superior Court (1991) 226 Cal. App. 3d 283, 287, 276 Cal. Rptr. 45* (testimony of uncooperative deponent was excluded); *Deyo v. Kilbourne (1978) 84 Cal. App. 3d 771, 792, 149 Cal. Rptr. 499* ; *see also* *Young v. Rosenthal (1989) 212 Cal. App. 3d 96, 117-118, 260 Cal. Rptr. 369* (when party had repeatedly failed to comply with discovery requests and with order enforcing stipulation for discovery, court properly deemed established facts solicited by unanswered interrogatories, precluded noncomplying party from using requested documents that were never identified or produced, and prohibited noncomplying party from testifying); *Sauer v. Superior Court (1987) 195 Cal. App. 3d 213, 228-229, 240 Cal. Rptr. 489* (order precluding plaintiff in wrongful discharge action from proving economic damages is proper when he willfully failed to obey order compelling production of financial records)].

The rationale behind these cases is "that a persistent refusal to comply with an order for the production of evidence is tantamount to an admission that the disobedient party really has no meritorious claim" [*Juarez v. Boy Scouts of America, Inc. (2000) 81 Cal. App. 4th 377, 390, 97 Cal. Rptr. 2d 12* (quoting *Kahn v. Kahn (1977) 68 Cal. App. 3d 372, 382, 137 Cal. Rptr. 332*)]. This rationale, however, did not justify imposition of an evidence sanction based on the failure to supplement a response promptly, when no order compelling further answers had been sought or entered, and the trial court made no finding that the initial responses were willfully false [*see* *Biles v. Exxon Mobil Corp. (2004) 124 Cal. App. 4th 1315, 1327, 22 Cal. Rptr. 3d 282]* .

[iii] When Terminating Sanction Proper

Of the terminating sanctions, default and dismissal were held under prior law to be drastic remedies to be used only sparingly [*see Garza v. Delano Union Elementary School Dist. (1980) 110 Cal. App. 3d 303, 315, 167 Cal. Rptr. 629* (dismissal improper when lesser sanction would have been sufficient); *Kaplan v. Eldorado Ins. Co. (1976) 55 Cal. App. 3d 587, 591, 127 Cal. Rptr. 699* (default)]. Under current law, dismissal is considered a proper sanction for failure to comply with a rule or an order only if the court's authority "cannot be vindicated through the imposition of a less severe alternative" [*Rail Serv. of Am. v. State Comp. Ins. Fund (2003) 110 Cal. App. 4th 323, 331-332, 1 Cal. Rptr. 3d 700]* . The trial court may impose sanctions that "are suitable *and necessary* to enable the party seeking discovery to obtain the objects of the discovery he [or she] seeks but the court may *not* impose sanctions which are designed *not to accomplish the objects of the discovery but to impose punishment*" [*Rail Services of America v. State Comp. Ins. Fund (2003) 110 Cal. App. 4th 323, 331-332, 1 Cal. Rptr. 3d 700* (italics in original)]. In other words, discovery sanctions exist "not to provide a weapon for punishment for past violations or penalty for past conduct but to secure compliance with orders of the court" [*Welgoss v. End (1967) 252 Cal. App. 2d 982, 992, 61 Cal. Rptr. 52* , quoted with approval in *Electronic Funds Solutions, LLC v. Murphy (2005) 134 Cal. App. 4th 1161, 1183, 36 Cal. Rptr. 3d 663]* .

A trial court generally will impose a terminating sanction after considering the totality of the circumstances: conduct of the party to determine if the action is willful; the detriment to the propounding part; and the number of formal and informal attempts to obtain the discovery [*see Lang v. Hochman (2000) 77 Cal. App. 4th 1225, 1246, 92 Cal. Rptr. 2d 322* (citing cases imposing terminating sanctions when offending party spent months avoiding or evading discovery)].

One situation in which dismissal is appropriate is when a party has persistently failed to provide information; that conduct gives rise to a presumption that party's cause of action is without merit [*see Kahn v. Kahn (1977) 68 Cal. App. 3d 372, 383, 137 Cal. Rptr. 332* ; *see also Lang v. Hochman (2000) 77 Cal. App. 4th 1225, 1246-1247, 92 Cal. Rptr. 2d 322* (terminating sanctions under former *Code Civ. Proc. § 2023(b)(4)* (*now see Code Civ. Proc. § 2023.030(d)*) and $22 million default judgment against defendants were appropriate when substantial record showed that defendants failed to turn over all documents requested or to respond to interrogatories and requests for admission after numerous discovery requests and court orders); *Laguna Auto Body v. Farmers Ins. Exchange (1991) 231 Cal. App. 3d 481, 486-491, 282 Cal. Rptr. 530* (dismissal sanction was appropriate, even without imposition of prior monetary sanctions, when it was culmination of history of acts in which sanctioned party obstructed discovery, failed to honor stipulation with opposing counsel that it would comply, and defied court; disapproved by *Garcia v. McCutchen (1997) 16 Cal. 4th 469, 478 n.4, 66 Cal. Rptr. 2d 319, 940 P.2d 906* , to extent it suggests in dicta that *Gov. Code § 68608(b)* controls over *Code Civil Proc. § 575.2(b)* to allow terminating sanction in fast track matters when attorney, but not party, has violated local rules)].

Destroying evidence in response to a discovery request after litigation has begun is a misuse of the discovery process with the meaning of Code Civil Proc. § 2023.101, as is destruction in anticipation of a discovery request [*see Cedars-Sinai Med. Ctr. v. Superior Court (1998) 18 Cal. 4th 1, 12, 74 Cal. Rptr. 2d 248, 954 P.2d 511* (examining broad range of sanctions available under former *Code Civ. Proc. § 2023* (*now see Code Civ. Proc. § 2023.010 et seq.*) as deterrents to litigant's spoliation of evidence)]. Thus, for example, a court may properly apply a terminating sanction for repeated violations of stipulations and court orders, for the forging of a document offered as true, and for the deliberate destruction of evidence pertinent to exposing that fact of forgery [*R.S. Creative, Inc. v. Creative Cotton, Ltd. (1999) 75 Cal. App. 4th 486, 496, 89 Cal. Rptr. 2d 353]* . A terminating sanction also was merited under *Code Civ. Proc. §§ 2023.010(d)* and *2023.030(d)* when plaintiff had intentionally allowed material unfavorable to his legal malpractice claims to be destroyed [*Williams v. Russ (2008) 167 Cal. App. 4th 1215, 1224-1225, 84 Cal. Rptr. 3d 813*].

Similarly, a terminating sanction was appropriate under former *Code Civ. Proc. § 2023(b)(4)(A)* (*now see Code Civ. Proc. § 2023.030(d)(1)*) for "pervasive and consistent" misuse of the discovery process, including failure to comply with any discovery orders regarding plaintiffs' document inspection demands and specially prepared interrogatories, and the intentional, "brazen" destruction of data on the hard drives of several computers [*Electronic Funds Solutions, LLC v. Murphy (2005) 134 Cal. App. 4th 1161, 1183-1184, 36 Cal. Rptr. 3d 663]* .

In an action for violation of the Song-Beverly Consumer Warranty Act (*Civ. Code § 1790 et seq.*), breach of express warranty, breach of implied warranty, and fraud, the trial court abused its discretion by failing to impose terminating sanctions against defendant for its consistent and serious misuse of the discovery process. Defendant had engaged in repeated and egregious violations of the discovery laws--including failure to timely produce relevant and properly demanded, but potentially damaging, documents--that "not only impaired plaintiff's rights, but threatened the integrity of the judicial process" [*Doppes v. Bentley Motors, Inc. (2009) 174 Cal. App. 4th 967, 971, 993, 94 Cal. Rptr. 3d 802]* .

In contrast, dismissal is not appropriate when it is ordered as punishment for failure to pay a monetary sanction [*Newland v. Superior Court (1995) 40 Cal. App. 4th 608, 615, 47 Cal. Rptr. 2d 24* ; *Hurtado v. Western Medical Center (1990) 222 Cal. App. 3d 1198, 1204, 272 Cal. Rptr. 324]* . Dismissal under those circumstances constitutes a violation of the plaintiff's due process rights [*Hurtado v. Western Medical Center (1990) 222 Cal. App. 3d 1198, 1204, 272 Cal. Rptr. 324]* . The dismissal sanction is based on a party's disobedience of a court order compelling discovery, and will not be imposed in the absence of such an order [*Ruvalcaba v. Government Employees Ins. Co. (1990) 222 Cal. App. 3d 1579, 1581, 272 Cal. Rptr. 541* (dismissal inappropriate sanction against party who, despite two extensions to respond, failed to comply with repeated demands for production of documents because there had been no court order compelling discovery)]. However, one court of appeal found the trial court was justified in imposing terminating sanctions without evidence of violation of a court order. In that case, a stipulation signed by both parties waived the right to insist on formal order compelling responses to specific interrogatories and requests for production of documents as a precursor to imposing terminating sanctions, given that plaintiff's discovery violations were willful, preceded by a history of abuse, and evidence showed that less severe sanctions would not produce compliance [*Mileikowsky v. Tenet Healthsystem (2005) 128 Cal. App. 4th 262, 279-280, 26 Cal. Rptr. 3d 831* ("the stipulation can be seen as tantamount to the requisite order"); *see Garber & Assoc. v. Eskandarian (2007) 150 Cal. App. 4th 813, 821-822, 59 Cal. Rptr. 3d 1* (imposition of terminating sanctions was appropriate, even though defendants claimed that they had had no contact with their attorney and thus had no notice of trial court's orders; defendants "could not disappear in the midst of a pending case and avoid the consequences of such a tactic")]. Further, default as a sanction for defendant's extreme misuse of the discovery process does not apply when defendant simply fails to appear at trial [*Heidary v. Yadollahi (2002) 99 Cal. App. 4th 857, 864, 121 Cal. Rptr. 2d 695]* .

A terminating sanction is an appropriate sanction for a defendant's repeated abuses of the discovery process. For example, it is entirely appropriate for a court to strike the defendants' answer to the complaint and to enter their default when they have repeatedly attempted to thwart the plaintiff's legitimate attempts to obtain information from them [*Reedy v. Bussell (2007) 148 Cal. App. 4th 1272, 1293, 56 Cal. Rptr. 3d 216* (terminating sanctions were appropriate based on defendants' recalcitrance "in virtually every aspect of discovery," including repeated willful failure to produce documents or provide answers to discovery and to complete depositions as ordered); *Collisson & Kaplan v. Hartunian (1994) 21 Cal. App. 4th 1611, 1617-1620, 26 Cal. Rptr. 2d 786* (defendants failed to respond entirely, responded in stock phrases, or made meritless objections to plaintiff's interrogatories, requests for documents, and requests for admissions; numerous formal and informal attempts to secure requested information were unavailing); *see also Electronic Funds Solutions, LLC v. Murphy (2005) 134 Cal. App. 4th 1161, 1183-1184, 36 Cal. Rptr. 3d 663* (striking defendants' answer as sanction for "pervasive and consistent" misuse of discovery process, including failure to comply with any discovery orders regarding plaintiffs' document inspection demands and interrogatories, intentional, "brazen" destruction of data on hard drives of several computers, violation of discovery stay, interference with service of subpoena, and failure to respond to supplemental inspection demand)].

Similarly, a trial court does not abuse its discretion by dismissing a *plaintiff's* complaint, based on the plaintiff's continued refusal to cooperate with discovery with respect to the complaint against the defendant [*Parker v. Wolters Kluwer United States, Inc. (2007) 149 Cal. App. 4th 285, 297, 57 Cal. Rptr. 3d 18* (terminating sanctions were justified after plaintiff refused to testify at his first deposition, disrupted and unilaterally terminated his second deposition, violated order to appear for his third deposition, and violated order to provide verified supplemental answers to

interrogatories); *see R.S. Creative, Inc. v. Creative Cotton, Ltd. (1999) 75 Cal. App. 4th 486, 89 Cal. Rptr. 2d 353* (dismissing plaintiffs' complaint appropriate sanction for repeated violations of stipulations and court orders, forgery of document offered as true, and deliberate destruction of evidence pertinent to exposing forgery)].

If a default judgment is entered as a terminating sanction, the judgment cannot exceed the relief demanded in the complaint [*Electronic Funds Solutions, LLC v. Murphy (2005) 134 Cal. App. 4th 1161, 1175, 36 Cal. Rptr. 3d 663* (affirming that *Code Civ. Proc. § 580*, limiting award of compensatory damages to amount specified in complaint, continues to govern amount of damages available on default judgment entered as discovery sanction); *Greenup v. Rodman (1986) 42 Cal. 3d 822, 830, 231 Cal. Rptr. 220, 726 P.2d 1295]* . This rule applies if the default is entered as a result of discovery sanctions [*Reedy v. Bussell (2007) 148 Cal. App. 4th 1272, 1294, 56 Cal. Rptr. 3d 216* , citing *Greenup v. Rodman (1986) 42 Cal. 3d 822, 826, 231 Cal. Rptr. 220, 726 P.2d 1295]* . However, if the complaint fails to specify the amount of damages sought, the trial court may impose a more limited discovery sanction that precludes litigation of other aspects of the case, while leaving the parties to have a contested trial on damages [*Reedy v. Bussell (2007) 148 Cal. App. 4th 1272, 1294, 56 Cal. Rptr. 3d 216* (trial court erred in granting default judgments on two petitions that did not specify amount of damages, remanding to reconsider whether limited sanctions, relating to liability only, would be appropriate)].

Similarly, before the defendant's answer may be stricken and a default judgment entered as a discovery sanction, notice of the amount of damages sought in a personal injury or wrongful death action, as required by *Code Civ. Proc. § 425.11*, must be given [*Morgan v. Southern Cal. Rapid Transit Dist. (1987) 192 Cal. App. 3d 976, 986, 237 Cal. Rptr. 756* , disapproved, to extent it suggests damages in amount of court's jurisdictional minimum may be awarded absent notice of amount sought in complaint or statement of damages, by *Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 434, 280 Cal. Rptr. 83, 808 P.2d 226]* .

The terminating sanction of dismissal of the complaint may be imposed for refusal to comply with an order of production made pursuant to *Code Civ. Proc. § 2031.010 et seq.* Moreover, a plaintiff may not avoid a dismissal by voluntarily dismissing without prejudice before the hearing on the motion to dismiss [*Hartbrodt v. Burke (1996) 42 Cal. App. 4th 168, 174-176, 49 Cal. Rptr. 2d 562]* .

[c] Relief From Terminating Sanction

A party may seek relief from a dismissal or default under *Code Civ. Proc. § 473(b)* on grounds of mistake, inadvertence, surprise, or excusable neglect [*see, e.g., Crummer v. Beeler (1960) 185 Cal. App. 2d 851, 860, 8 Cal. Rptr. 698* (default)]. The *mandatory* provision for relief under *Code Civ. Proc. § 473(b)*, however, applies only when the client is innocent and the attorney is solely at fault for the discovery misconduct. Thus, while a court *may* grant relief on grounds of mistake, inadvertence, surprise, or excusable neglect under *Code Civ. Proc. § 473(b)*, it is not *required* to do so under the mandatory relief provision when it finds that both the attorney and the client were at fault for the discovery misconduct [*Lang v. Hochman (2000) 77 Cal. App. 4th 1225, 1251-1252, 92 Cal. Rptr. 2d 322]* .

Further, the mandatory provision for relief under *Code Civ. Proc. § 473(b)* applies only to those situations in which the attorney's mistake causes a total failure to oppose a dismissal motion or a failure to appear [*Gotschall v. Daley (2002) 96 Cal. App. 4th 479, 484, 116 Cal. Rptr. 2d 882]* . Thus, mandatory relief was not available when counsel mistakenly believed it was unnecessary, under former *Code Civ. Proc. § 2034* (*now see Code Civ. Proc. § 2034.010 et seq.*), to name treating physicians who would give expert opinion testimony in the expert witness disclosure, and the trial court dismissed the case for lack of proof of causation. In that situation, the appellate court observed that applying *Code Civ. Proc. § 473(b)* to this case, in which counsel simply failed to present evidence of causation properly, would allow plaintiffs to circumvent the expert witness disclosure requirements,knowing any resulting dismissal could be undone. Such an approach would be contrary to public policy considerations and would provide attorneys with a "perfect escape hatch" for any and all tactical errors and mistaken judgments [*Gotschall v. Daley (2002) 96 Cal. App. 4th 479, 484-485, 116 Cal. Rptr. 2d 882]* .

Relief under *Code Civ. Proc. § 473(b)* also may be properly denied for neglect the trial court finds to be inexcusable. This is true even if the order imposing the sanction is subject to reversal on appeal for being inexcusably harsh [*see Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal. 3d 892, 898, 900-901, 187 Cal. Rptr. 592, 654 P.2d 775* ; *see also Cornwall v. Santa Monica Dairy Co. (1977) 66 Cal. App. 3d 250, 252, 135 Cal. Rptr. 761* (dismissal as discovery sanction held to be appealable judgment)].

For detailed discussion and forms relating to relief under *Code Civ. Proc. § 473(b)*, see Ch. 489, *Relief From Judgments and Orders* .

[4] Contempt Sanction

To the extent authorized by a specific provision of the Civil Discovery Act, after notice and an opportunity for hearing [*see* [1], *above* and § 192.14], the trial court may impose a contempt sanction [*Code Civ. Proc. § 2023.030(e)*].

An order imposing a contempt sanction is one that treats a misuse of the discovery process as a contempt of court [*Code Civ. Proc. § 2023.030(e)*].

The specific provisions authorizing a contempt sanction do so when a nonparty witness refuses to obey a deposition subpoena or discovery order [*see Code Civ. Proc. §§ 2020.240* (deposition subpoena), 2025.480(g) (deponent); *see also Code Civ. Proc. § 2025.440(b)*]. Under cases interpreting prior law, this was the only manner in which a court could proceed against a disobedient nonparty witness [*see Lund v. Superior Court (1964) 61 Cal. 2d 698, 713, 39 Cal. Rptr. 891, 394 P.2d 707* (interpreting former *Code Civ. Proc. § 2034* (*now see Code Civ. Proc. § 2034.010 et seq.*)]. *Code Civ. Proc. § 2020.240* now provides, however, that anyone who fails to appear pursuant to a deposition subpoena or a court order is also subject to the penalty and damages provisions under *Code Civ. Proc. § 1992*, which penalty and damages may be recovered in a separate civil action. Further, the court may issue a warrant for contempt [*see Code Civ. Proc. § 2020.240*] or, in the alternative, issue a warrant for the arrest of the witness or person who fails to appear [*Code Civ. Proc. § 1993(a)(1)*; *see Code Civ. Proc. §§ 1993(a)(2), (b), 1993.1-1993.2* (procedures); *see also* Ch. 535, *Subpoena*].

The imposition of a contempt sanction under *Code Civ. Proc. § 2025.480(g)* is not limited to nonparty deponents; the failure of any deponent to obey an order compelling discovery under *Code Civ. Proc. § 2025.480(g)* may be treated as a contempt of court.

It is unclear whether an attorney is subject to a contempt sanction for advising conduct that subjects his or her client to a contempt sanction. This was apparently the case under prior law [*In re Bongfeldt (1971) 22 Cal. App. 3d 465, 476, 99 Cal. Rptr. 428* (dictum)]. Although an attorney is expressly subject to monetary sanctions for advising conduct that constitutes a misuse of the discovery process pursuant to *Code Civ. Proc. § 2023.030(a)*, there is no corresponding provision expressly subjecting an attorney to a contempt sanction for giving advice to a client.

For forms for use in seeking the imposition of a contempt sanction, see *§§ 192.60, 192.61*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDismissalsInvoluntary DismissalsFailures to ComplyCivil ProcedureSanctionsContemptCivil Contempt

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§ 192.14 Discovery Sanctions May Be Imposed Only When Specifically Authorized

[1] General Rule

To the extent authorized by the section governing any particular discovery method or any other provision of *Code Civ. Proc. § 2016.010 et seq.*, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose a monetary sanction, issue sanction, evidence sanction, terminating sanction, or contempt sanction against anyone engaging in conduct constituting a misuse of the discovery process [*Code Civ. Proc. § 2023.030*].

Consequently, the availability of and procedure for sanctions in any given instance is specifically determined by the statute governing the particular method of discovery involved [*see, e.g., Code Civ. Proc. §§ 2020.240* (deposition subpoena), 2025.410(d), 2025.420(d), 2025.450(c), 2025.480(f), 2025.520(h) (deposition), 2028.040(c) (deposition by written questions), 2030.290(c), 2030.310(d) (interrogatory), 2031.060(h), (i), 2031.300(c), (d), 2031.310(h)-(j), 2031.320(b)-(d) (inspection, copying, testing, sampling of documents, tangible things, places, or electronically stored information), 2032.240(c), 2032.250(b), 2032.410, 2032.420, 2032.510(f), 2032.620(b), 2032.650(b) (physical or mental examination), 2033.080(d), 2033.280(c), 2033.290(d) (requests for admission), 2034.250(d), 2034.470(g), 2034.630, 2034.730 (exchange of expert witness information)].

[2] Exception When Misconduct Precludes Seeking Specifically Authorized Sanction

At least one court has created an exception to the rule that sanctions under *Code Civ. Proc. § 2023.010 et seq.* must be authorized by another more specific provision of the Civil Discovery Act [*see* discussion in [1], *above*]. In this case, the applicable discovery statute authorized monetary sanctions only in the context of a motion to compel further responses to a demand for the production of documents [*see Code Civ. Proc. § 2031.010 et seq.*]. Nevertheless, the court ruled that a motion to compel was not a prerequisite for monetary sanctions when defendant's misconduct essentially precluded plaintiffs from making the motion [*Sherman v. Kinetic Concepts, Inc. (1998) 67 Cal. App. 4th 1152, 1157-1158, 79 Cal. Rptr. 2d 641* (in response to plaintiff's demand for production of documents under former *Code Civ. Proc. § 2031* (*now see Code Civ. Proc. § 2031.010 et seq.*) seeking records of all complaints regarding product in issue in product liability action, defendants provided only three of some 20 complaints and lied at trial, saying there were no others)].

In effect, the defendant's deceptive conduct made it impossible for the plaintiffs to determine that defendant's original

responses were incomplete or evasive and that a motion to compel further response was needed. Plaintiffs had no reason even to suspect that the original responses were incomplete and evasive until they fortuitously received information from a nonparty after the conclusion of the case. Because the case was over, sanctions other than monetary sanctions, such as issue, evidence, or terminating sanctions, were not available. It was therefore appropriate for plaintiffs to seek monetary sanctions under former *Code Civ. Proc. § 2023* (*now see Code Civ. Proc. § 2031.010 et seq.*) in connection with a motion for new trial [*Sherman v. Kinetic Concepts, Inc. (1998) 67 Cal. App. 4th 1152, 1162-1163, 79 Cal. Rptr. 2d 641]* .

Legal Topics:

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

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16-192 California Forms of Pleading and Practice--Annotated § 192.15

§ 192.15 Specific Provisions Authorizing Discovery Sanctions

[1] General Categories of Authorizing Provisions

As discussed in *§ 192.14[1]*, a court generally may impose sanctions under *Code Civ. Proc. § 2023.010 et seq.* only when they are specifically authorized by another provision of the Discovery Act. These specific sanction provisions are found throughout the Act, and are tailored to particular proceedings involving particular methods of discovery. Most specific sanction provisions, fall into one of three general categories:

- A monetary sanction in the context of a motion proceedings [*see* discussion in [2], *below*].

- An issue, evidence, or terminating sanction in the context of a party's failure to obey an order compelling discovery (with a monetary sanction also authorized in lieu or in addition to such sanction) [*see* discussion in [3], *below*].

- A contempt sanction in the context of disobeying a deposition subpoena or an order compelling deposition testimony or evidence [*see* discussion in [4], *below*].

In a number of instances provisions authorizing a sanction are unique to the particular situation or method of discovery [*see, e.g., Code Civ. Proc. §§ 2032.620(c), 2032.650(c)* (authorizing evidence sanction in form of exclusion at trial of testimony of examiner or practitioner whose report has not been provided by a party ordered to do so), 2033.280(c), 2033.290(e) (authorizing issue sanction in form of deeming matters to be admitted on failure to provide response or failure to obey order requiring further response related to request for admissions), 2034.300 (authorizing evidence sanction in form of exclusion at trial of party's expert testimony on that party's failure to comply with demand for exchange of expert witness information)].

Each of the specific authorizing provisions is discussed further in the chapters dealing with the particular discovery methods authorized by the Act [*see* Ch. 193, *Discovery: Depositions* , through Ch. 198, *Discovery: Exchange of Expert Witness Information*].

[2] Provisions Authorizing Monetary Sanction

Monetary sanctions are authorized in the context of almost all of the motion proceedings under the Civil Discovery Act [*see Code Civ. Proc. §§ 2017.020(b), 2019.030(c)* (protective orders generally), 2024.050(c) (motion to hear discovery motion closer to trial date or to reopen discovery), 2025.260(d), 2025.410(d), 2025.420(d), 2025.450(c)(1), 2025.480(f), 2025.520(h) (depositions), 2028.040(c) (deposition by written questions), 2030.090(d), 2030.290(c) 2030.300(d) (interrogatories), 2031.060(h), (i), 2031.300(c), (d), 2031.310(h), (j), 2031.320(b), (d) (inspection, copying, testing, sampling of documents, tangible things, places, or electronically stored information), 2032.250(b), 2032.410, 2032.420, 2032.620(b), 2032.650(b) (physical or mental examinations), 2033.080(d), 2033.290(d) (requests for admission), 2034.250(d), 2034.470(g), 2034.630, 2034.730 (exchange of expert witness lists)].

Generally, these provisions *require* the trial court to impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against a party, person, or attorney who unsuccessfully makes or opposes a motion for a discovery order, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*see, e.g., Code Civ. Proc. §§ 2017.020(b), 2019.030(c)*; *see also* discussion in *§ 192.13[2][b]*].

The provisions authorizing sanctions of this type are by far the most common. They are designed generally to encourage self-executing discovery proceedings by discouraging recourse to the trial court through the unmeritorious making or opposing of discovery motions [*see also* discussion in *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33*].

For further discussion of this type of sanction, see *§ 192.13[2]*.

[3] Provisions Authorizing Issue, Evidence, or Terminating Sanction

An issue, evidence, or terminating sanction is authorized in the context of a party's failure to obey an order compelling discovery (with a monetary sanction also authorized in lieu or in addition to such sanction) [*see Code Civ. Proc. §§ 2025.450(d), 2025.480(g)* (depositions), 2030.290(c), 2030.300(e) (interrogatories), 2031.300(c), (d), 2031.310(i), (j), 2031.320(c), (d) (inspection, copying, testing, sampling of documents, tangible things, places, or electronically stored information), 2032.240(d), 2032.410, 2032.420, 2032.620(c), 2032.650(c) (physical or mental examinations)].

For further discussion of these types of sanctions, see *§ 192.13[3]*. For a form for a motion seeking to impose an issue, evidence, or terminating sanction, see *§ 192.50*.

[4] Provisions Authorizing Contempt Sanction

A contempt sanction is authorized in the context of disobeying a deposition subpoena or an order compelling deposition testimony or evidence [*Code Civ. Proc. §§ 2020.240, 2025.440(b), 2025.480(g)*].

For further discussion of this type of sanction, see *§ 192.13[4]*. For a form for a motion seeking to impose a contempt sanction, see *§ 192.60*.

Legal Topics:

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

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16-192 California Forms of Pleading and Practice--Annotated § 192.16

§ 192.16 Willfulness or Intent as Element of Sanctionable Conduct

Code Civ. Proc. § 2023.010 et seq. does not include the term "willful," either in its list of acts constituting misuse of the discovery process [*see Code Civ. Proc. § 2023.010*] or in its list of the types of sanctions available for these misuses [*see Code Civ. Proc. § 2023.030*]. Accordingly, some courts have stated that willfulness is not a prerequisite for the imposition of sanctions [*see Clement v. Alegre (2009) 177 Cal. App. 4th 1277, 1286-1287, 99 Cal. Rptr. 3d 791* ; *Ghanooni v. Super Shuttle (1993) 20 Cal. App. 4th 256, 260, 24 Cal. Rptr. 2d 501* ; *Kohan v. Cohan (1991) 229 Cal. App. 3d 967, 971* (interpreting imposition of monetary sanctions under former *Code Civ. Proc. § 2023(b)(1)* (*now see Code Civ. Proc. § 2023.030(a)*)]. However, other courts have stated that the failure to comply must be willful [*see Vallbona v. Springer (1996) 43 Cal. App. 4th 1525, 1545, 51 Cal. Rptr. 2d 311* (only two facts are absolutely prerequisite to imposition of sanctions: (1) there must be a failure to comply and (2) the failure must be wilful) (awarding evidence sanctions based on futility of obtaining court order when responding party, after willfully refusing to provide documents, claimed that documents were nonexistent or missing); *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns (1992) 7 Cal. App. 4th 27, 36, 9 Cal. Rptr. 2d 396* (citing a 1983 case); *cf. Mileikowsky v. Tenet Healthsystem (2005) 128 Cal. App. 4th 262, 279-280, 26 Cal. Rptr. 3d 831* (stipulation signed by both parties waived right to insist on formal order compelling responses as precursor to imposing terminating sanctions when discovery violation was willful, preceded by history of abuse, and evidence showed that less severe sanctions would not produce compliance)].

Even if willfulness is not a statutory prerequisite, it is relevant as it indicates the intent or state of mind of the party to be sanctioned. Intent may indicate that the party acted with substantial justification, and thereby eliminate the imposition of a monetary sanction [*see Code Civ. Proc. § 2023.030(a)*]. Additionally, the lack of a malicious intent may influence the trial court when it decides whether or not to impose an issue, evidence, terminating, or contempt sanction [*see generally Code Civ. Proc. § 2023.030(a)-(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 192.17 Sanctions for Continuing Discovery Misuse

Under some circumstances, sanctions may be imposed more than once when the misuse of the discovery process is continuing [*see e.g., Mattco Forge, Inc. v. Arthur Young & Co. (1990) 223 Cal. App. 3d 1429, 1437-1438, 273 Cal. Rptr. 262]* . For example, when a defendant moved for reconsideration of the monetary sanctions imposed on it for its improper objections to a request for production of documents, but did not seek reconsideration of the court's order that the requested documents be produced, the court ordered additional monetary sanctions, concluding that the motion for reconsideration was merely a continuation of the defendant's earlier unmeritorious objections, constituting misuse of the discovery process [*Mattco Forge, Inc. v. Arthur Young & Co. (1990) 223 Cal. App. 3d 1429, 1437-1438, 273 Cal. Rptr. 262]* .

Legal Topics:

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

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16-192 California Forms of Pleading and Practice--Annotated § 192.18

§ 192.18 Standing to Seek Sanctions

In one case, the standing to seek monetary sanctions is expressly stated [*see, e.g., Code Civ. Proc. § 2025.450(c)(2)* (monetary sanctions for expenses incurred by parties attending deposition)]. Otherwise it appears that any party has standing to seek monetary sanctions when they are authorized, to the extent that he or she has incurred expenses as a result of the opposing party's conduct [*see Code Civ. Proc. § 2023.030(a)* and discussion in *§ 192.13[2]*]. Courts of appeal are divided on the issue of sanctions in the form of fees for discovery abuses. For example, in *Kravitz v. Superior Court (2001) 91 Cal. App. 4th 1015, 111 Cal. Rptr. 2d 385* , the court of appeal held that self-represented litigants, whether lawyers or not, cannot recover fees as discovery sanctions, although they may recover reasonable expenses incurred, including photocopying, computer-assisted legal research, and other identifiable and allocable costs [*Kravitz v. Superior Court (2001) 91 Cal. App. 4th 1015, 1017, 111 Cal. Rptr. 2d 385]* . In contrast, *Do v. Superior Court (2003) 109 Cal. App. 4th 1210, 135 Cal. Rptr. 2d 855* held that a party represented by pro bono counsel was entitled to an award of sanctions under former *Code Civ. Proc. § 2025(j)(3)* (*now see Code Civ. Proc. § 2025.450(c)*) and former *Code Civ. Proc. § 2023* (*now see Code Civ. Proc. § 2023.010 et seq.*) against the opposing party, who twice failed to appeal at a noticed deposition. Even though the party did not actually "incur" additional fees as a result of the opposing party's conduct, there was no finding that the failure to appeal was "with substantial justification or that other circumstances make the imposition of the sanction unjust" [*Do v. Superior Court (2003) 109 Cal. App. 4th 1210, 1213, 135 Cal. Rptr. 2d 855* (reasoning that to hold otherwise would create two separate classes of discovery litigants); see *§ 192.13[2][b]*].

With regard to other sanctions, for example, issue, evidence, or terminating sanctions for failure to obey an order compelling discovery, standing is not expressly stated [*see, e.g., Code Civ. Proc. § 2025.480(g)*]. In these situations, it appears that a party not seeking discovery may nonetheless seek sanctions based on an opposing party's failure to obey an order obtained by the party seeking discovery [*see Trail v. Cornwell (1984) 161 Cal. App. 3d 477, 483 n.4, 207 Cal. Rptr. 679* ; *Calvert Fire Ins. Co. v. Cropper (1983) 141 Cal. App. 3d 901, 905, 190 Cal. Rptr. 593* (interpreting former *Code Civ. Proc. § 2034*)].

Legal Topics:

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

Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductConstitutional LawThe JudiciaryCase or ControversyStandingGeneral Overview

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§ 192.19 Requirements for Motions Seeking Discovery Sanctions

The statute authorizing sanctions for abuse or misuse of discovery requires notice [former *Code Civ. Proc., § 2023(b)* (*now see Code Civ. Proc. § 2023.030*) ("To the extent authorized by the section governing any particular discovery method or any other provision of this article, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process")].

The statute also provides specific guidelines on what the notice of motion must contain:

- A request for sanctions must identify, in the notice of motion, every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought [*Code Civ. Proc. § 2023.040*].

- A notice of motion requesting sanctions must be supported by a memorandum of points and authorities, and by a declaration setting for facts supporting the amount of any monetary sanction sought [*Code Civ. Proc. § 2023.040*].

- A motion involving the content of a discovery request or the responses to such a request must be accompanied by a separate statement [*Cal. Rules of Ct., Rule 3.1345(a)*]. This includes a motion for issue or evidentiary sanctions [*Cal. Rules of Ct., Rule 3.1345(a)(7)*]. The separate statement is a separate document that sets forth all the information necessary to understand each discovery request and all the responses to it that are in issue. It must be full and complete so that no reference to any other document will be necessary to determine the motion; material may not be incorporated into the statement by reference [*Cal. Rules of Ct., Rule 3.1345(c)*]. For further discussion, see *§ 192.52[3]*.

Discovery sanctions may not be ordered ex parte, and an order purporting to do so is void [*Sole Energy Co. v. Hodges (2005) 128 Cal. App. 4th 199, 208, 26 Cal. Rptr. 3d 823]* . For example, in *Alliance Bank v. Murray (1984) 161 Cal. App. 3d 1, 207 Cal. Rptr. 233* , the appellate court concluded the portion of a discovery order conditionally authorizing a party to apply ex parte for monetary sanctions and conditionally ordering the award of those sanctions violated the

notice requirements of the discovery statute and due process [*Alliance Bank v. Murray (1984) 161 Cal. App. 3d 1, 6, 207 Cal. Rptr. 233]* .

Similarly, in *O'Brien v. Cseh (1983) 148 Cal. App. 3d 957, 196 Cal. Rptr. 409* , the court of appeal reversed an order awarding sanctions under *Code Civ. Proc. § 128.5* because the order had been issued based on an ex parte application. "Adequate notice prior to imposition of sanctions is mandated not only by statute, but also by the due process clauses of both the state and federal Constitutions" [*O'Brien v. Cseh (1983) 148 Cal. App. 3d 957, 961, 196 Cal. Rptr. 409]* . "Plaintiff's rush to compel sanctions against defendant on an ex parte basis was a flagrant violation of due process principles. The California Supreme Court has ruled that due process requires fair warning and an opportunity to respond before penalties can be imposed for prosecution of a frivolous appeal. ... Ex parte imposition of sanctions by a superior court, as in the case at bench, is equally offensive" [*O'Brien v. Cseh (1983) 148 Cal. App. 3d 957, 962, 196 Cal. Rptr. 409]* .

In *Sole Energy Co. v. Hodges (2005) 128 Cal. App. 4th 199, 26 Cal. Rptr. 3d 823* , the court of appeal reversed a $27 million default judgment against defendants because they did not receive notice their defaults might be entered as a discovery sanction and were not provided an opportunity to be heard on the matter. Thus, defendants were denied due process because sanctions for the abuse or misuse of discovery may not be awarded ex parte [*Sole Energy Co. v. Hodges (2005) 128 Cal. App. 4th 199, 208, 26 Cal. Rptr. 3d 823* (citing former *Code Civ. Proc. § 2023(b)* (*now see Code Civ. Proc. § 2023.030*) and holding that notice of motion for discovery sanctions was also deficient under former *Code Civ. Proc. 2023(c)* (*now see Code Civ. Proc. § 2023.040*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 192.20 Imposition of Sanction in Absence of Opposition to Motion to Compel

The trial court may award sanctions under the Discovery Act in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed [*Cal. Rules of Ct., Rule 3.1348(a)*]. On the other hand, failure to file written opposition, or failure to appear, or the voluntary provision of discovery after a motion to compel is filed is not to be deemed an admission that the motion was proper or that sanctions should be awarded [*Cal. Rules of Ct., Rule 3.1345(b)*].

Legal Topics:

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

§§ 192.21[Reserved]

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§ 192.30 Matthew Bender Publications

For comprehensive discussion and forms relating to civil discovery sanctions under the California Civil Discovery Act and related California law, see DeMeo, California Deposition and Discovery Practice, Ch. 42, *Sanctions for Misuse of Discovery Process* (Matthew Bender), and Hogan & Weber, California Civil Discovery, Ch. 15, *Sanctions* (Matthew Bender)

For points and authorities relating to discovery sanctions under the California Civil Discovery Act of 2005 and related California law, see California Points and Authorities, Ch. 82, *Discovery: Sanctions for Discovery Misuse* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-192 California Forms of Pleading and Practice--Annotated § 192.31

§ 192.31 California Constitution

Due process of law required before person may be deprived of property. *Cal. Const., art. I, § 7(a)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral Overview

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16-192 California Forms of Pleading and Practice--Annotated § 192.32

§ 192.32 State Statutes

Stay of execution of contempt order. *Code Civ. Proc. § 128(b)-(e)*

Contempt proceedings generally. *Code Civ. Proc. § 1209 et seq.*

Sanctions in the conduct of arbitration proceedings. *Code Civ. Proc. §§ 1283.05, 1283.1*

Sanctions for discovery misuse generally. *Code Civ. Proc. § 2023.010 et seq.*

Civil Discovery Act provisions authorizing monetary sanctions in motion proceedings. *Code Civ. Proc. §§ 2017.020(b), 2019.030(b)* (protective orders generally), 2024.050(c) (motion to hear discovery motion closer to trial date or to reopen discovery), 2025.410(d), 2025.420(d), 2025.450(c), 2025.480(f), 2025.520(h) (depositions), 2028.040(c) (deposition by written questions), 2030.090(d), 2030.290(c), 2030.300(d), 2030.310(d) (interrogatories), 2031.060(h), (i), 2031.300(c), (d), 2031.310(h), (j), 2031.320(b), (d) (inspection, copying, testing, sampling of documents, tangible things, places, or electronically stored information), 2032.240(c), 2032.250(b), 2032.410, 2032.420, 2032.510(f), 2032.620(b), 2032.650(b) (physical or mental examinations), 2033.080(d), 2033.290(d) (requests for admission), 2034.250(d), 2034.470(g), 2034.630, 2034.730 (exchange of expert witness lists)

Civil Discovery Act provisions authorizing issue, evidence, or terminating sanctions, and monetary sanction in lieu of or in addition to issue, evidence, or terminating sanction. *Code Civ. Proc. §§ 2025.450(d), 2025.480(g)* (depositions), 2030.290(c), 2030.300(e) (interrogatories), 2031.300(c), (d), 2031.310(i), (j), 2031.320(c), (d) (inspection, copying, testing, sampling of documents, tangible things, places, or electronically stored information), 2032.240(d), 2032.410, 2032.620(c), 2032.650(c) (physical or mental examinations)

Civil Discovery Act provisions authorizing contempt sanction. *Code Civ. Proc. §§ 2020.240, 2025.440(b), 2025.480(g)*

Civil Discovery Act provisions authorizing evidence sanction in form of excluding specified testimony. *Code Civ. Proc. §§ 2032.620(c), 2032.650(c)* (exclusion at trial of testimony of examiner or practitioner whose report has not been

provided by a party ordered to do so), 2034.300 (exclusion at trial of party's expert testimony on that party's failure to comply with demand for exchange of expert witness information)

Civil Discovery Act provisions authorizing issue sanction in form of deeming specified matters to be admitted. *Code Civ. Proc. §§ 2033.280(b), 2033.290(e)* (matters deemed admitted on failure to provide response or failure to obey order requiring further response)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMisconduct

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§ 192.33 California Rules of Court

Separate statement required to be filed with motion seeking issue or evidence sanction. *Cal. Rules of Ct., Rule 3.1345(a)(7)*; *see also Cal. Rules of Ct., Rule 3.1345(c)* (contents of separate statement)

Sanctions may be imposed in favor or a party who seeks an order compelling discovery even when no opposition was filed, opposition was withdrawn, or requested discovery was provided after the filing of the motion. *Cal. Rules of Ct., Rule 3.1348(a)*

Failure to oppose, withdrawal of opposition, or voluntary provision of discovery in context of motion to compel discovery is not be deemed admission that motion was proper or that sanctions should be imposed. *Cal. Rules of Ct., Rule 3.1348(b)*

Legal Topics:

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

[1] Contempt Sanction

Commitment order based on contempt is required to demonstrate on its face that citee is guilty of contempt and to recite specific facts giving rise to contempt and finding of present ability to perform; lack of recitals requires annulment of order. *In re de la Parra (1986) 184 Cal. App. 3d 139, 144, 228 Cal. Rptr. 864*

Court is able to impose contempt sanctions against attorney as well as client when attorney advised disobedience of trial court's order. *In re Bongfeldt (1971) 22 Cal. App. 3d 465, 476, 99 Cal. Rptr. 428*

Alleged condemner is able to appear as directed through order to show cause by counsel instead of in person. *Morelli v. Superior Court (1968) 262 Cal. App. 2d 262, 268-270, 68 Cal. Rptr. 572*

[2] Issue, Evidence, and Terminating Sanctions

Trial court abused its discretion by failing to impose terminating sanction under *Code Civ. Proc. §§ 2025.450(d), 2023.030*, for defendant's flagrant discovery misconduct under *Code Civ. Proc. § 2023.010(d)-(g)*. *Doppes v. Bentley Motors, Inc. (2009) 174 Cal. App. 4th 967, 971, 993, 94 Cal. Rptr. 3d 802*

Imposition of evidence and issue sanctions based on court's inherent power to control litigation, absent defendant's failure to obey order compelling discovery, was abuse of discretion when there was no order compelling defendant to produce video recordings and real parties had waived right to compel further response or inspection; sanctions based on court's inherent power are reserved for egregious violations of the discovery process. *New Albertsons, Inc. v. Superior Court (2008) 168 Cal. App. 4th 1403, 1431-1434, 1426, 86 Cal. Rptr. 3d 457*

A terminating sanction was appropriate under *Code Civ. Proc. §§ 2023.010(d)* and *2023.030(d)* when plaintiff had intentionally allowed material unfavorable to his legal malpractice claims to be destroyed. *Williams v. Russ (2008) 167 Cal. App. 4th 1215, 1224-1225, 84 Cal. Rptr. 3d 813*

Terminating sanctions were appropriate in light of defendant's months-long, willful lack of cooperation in providing straightforward information, witnesses, and documents to support its claims, as well as its failure to meet and confer. *Liberty Mutual Fire Ins. Co. v. LcL Administrators, Inc. (2008) 163 Cal. App. 4th 1093, 1101, 78 Cal. Rptr. 3d 200*

When faced with pervasive, deliberate, and egregious misconduct--abuse that makes lesser sanctions inadequate to ensure fair trial--trial court need not rely on inherent authority to impose *evidentiary sanctions* as remedy for litigation misconduct, but may use its inherent judicial power to dismiss the action. *Stephen Slesinger, Inc. v. The Walt Disney Co. (2007) 155 Cal. App. 4th 736, 758, 66 Cal. Rptr. 3d 268*

Terminating sanctions were appropriate, even though defendants claimed that they had had no contact with their attorney and thus had no notice of trial court's orders. *Garber & Assoc. v. Eskandarian (2007) 150 Cal. App. 4th 813, 821-822, 59 Cal. Rptr. 3d 1*

Sanctions, in form of factual findings, were properly imposed on husband in marital dissolution proceeding, based on his egregious abuse of discovery process. *In re Marriage of Michaely (2007) 150 Cal. App. 4th 802, 810, 59 Cal. Rptr. 3d 56*

Terminating sanctions were justified after plaintiff's repeated abuse of discovery process. *Parker v. Wolters Kluwer United States, Inc. (2007) 149 Cal. App. 4th 285, 297, 57 Cal. Rptr. 3d 18*

If complaint fails to specify amount of damages sought, trial court may impose more limited discovery sanction that precludes litigation of other aspects of case, while leaving parties to have contested trial on damages. *Reedy v. Bussell (2007) 148 Cal. App. 4th 1272, 1293, 56 Cal. Rptr. 3d 216*

Evidence preclusion sanctions against manufacturer on issues of warnings and technical feasibility of safer, alternative seat belt design in minivan were proper under *Code Civ. Proc. § 2023.030*, in product liability suit, because manufacturer's repeated pattern of abuse led to loss of evidence on failure to warn. *Karlsson v. Ford Motor Co. (2006) 140 Cal. App. 4th 1202, 1215-1216, 45 Cal. Rptr. 3d 265*

Trial court did not abuse its discretion by striking defendants' answer as terminating sanction for "pervasive and consistent" misuse of discovery process, including failure to comply with any discovery orders, intentional, "brazen" destruction of data on hard drives of several computers, violation of discovery stay, interference with service of subpoena, and failure to respond to supplemental inspection demand. *Electronic Funds Solutions, LLC v. Murphy (2005) 134 Cal. App. 4th 1161, 1183-1184, 36 Cal. Rptr. 3d 663*

Stipulation signed by both parties waived right to insist on formal order compelling responses as precursor to imposing terminating sanctions when plaintiff's discovery violation was willful, preceded by history of abuse, and evidence showed that less severe sanctions would not produce compliance. *Mileikowsky v. Tenet Healthsystem (2005) 128 Cal. App. 4th 262, 279-280, 26 Cal. Rptr. 3d 831*

Opportunity to be heard to defendants that their defaults might be entered as discovery sanction violated notice requirements of former *Code Civ. Proc. § 2023(b)* (*now see Code Civ. Proc. § 2023.030*) and due process, because sanctions for abuse or misuse of discovery may not be awarded *ex parte. Sole Energy Co. v. Hodges (2005) 128 Cal. App. 4th 199, 208, 26 Cal. Rptr. 3d 823*

Failure to supplement an interrogatory answer promptly did not constitute grounds for excluding evidence under former *Code Civ. Proc. § 2030(k), (l)* [*now see Code Civ. Proc. §§ 2030.290(c), 2030.300(e)*], when no order compelling further answers had been sought or entered, and trial court made no finding that initial responses were willfully false. *Biles v. Exxon Mobil Corp. (2004) 124 Cal. App. 4th 1315, 1325, 1327, 22 Cal. Rptr. 3d 282*

Former *Code Civ. Proc. § 2023(b)(4)* (*now see Code Civ. Proc. § 2023.030(d)(4)*), authorizing default as sanction for defendant's extreme misuse of discovery process, does not apply when defendant simply fails to appear at trial. *Heidary v. Yadollahi (2002) 99 Cal. App. 4th 857, 864, 121 Cal. Rptr. 2d 695*

Mandatory relief under *Code Civ. Proc. § 473(b)* is available only if the attorney's mistake causes a total failure to oppose a dismissal motion or a failure to appear; thus, mandatory relief was not available when counsel mistakenly believed it was unnecessary, under former *Code Civ. Proc. § 2034* (*now see Code Civ. Proc. § 2034.010 et seq.*), to name treating physicians, who would give expert opinion testimony in the expert witness disclosure, and the trial court dismissed the case for lack of proof of causation. *Gotschall v. Daley (2002) 96 Cal. App. 4th 479, 484, 116 Cal. Rptr. 2d 882*

Issue sanctions were not justified, even though real party in interest failed to produce as specified in deposition notices, and to answer at appropriate depositions, when no specific court order had been violated, because party's attitude, although "cavalier," did not involve repeated and willful refusals to permit discovery or produce documents over a lengthy period of time. *Maldonado v. Superior Court (2001) 94 Cal. App. 4th 1390, 1398-1399, 115 Cal. Rptr. 2d 137*

Mandatory relief under *Code Civ. Proc. § 473(b)* is not available when attorney and client are both responsible for discovery misconduct that results in default judgment or dismissal; such mandatory relief is available only when attorney is solely at fault. *Lang v. Hochman (2000) 77 Cal. App. 4th 1225, 1246-1247, 92 Cal. Rptr. 2d 322*

Trial court did not abuse its discretion in dismissing plaintiffs' complaint as sanction for repeated violations of stipulations and court orders, forgery of document offered as true, and deliberate destruction of evidence pertinent to exposing forgery. *R.S. Creative, Inc. v. Creative Cotton, Ltd. (1999) 75 Cal. App. 4th 486, 496, 89 Cal. Rptr. 2d 353*

No abuse of discretion to apply evidence sanction against party who repeatedly assured opposing party that all relevant documents had been obtained, but then attempted to introduce undisclosed documents during trial; trial court properly disallowed any evidence relating to undisclosed documents because party had made a deliberate attempt to thwart discovery for purpose of obtaining tactical advantage and no other sanction would have served useful purpose at trial stage. *Pate v. Channel Lumber Co. (1997) 51 Cal. App. 4th 1447, 1454-1455, 59 Cal. Rptr. 2d 919*

Issue sanction designating certain facts as established leads to consequential results such as precluding arguments based on those facts. *Kuhns v. State of California (1992) 8 Cal. App. 4th 982, 987-988, 10 Cal. Rptr. 2d 773*

Imposition of evidence sanction is permissible without prior court order when formal order to comply would be futile. *Do It Urself Moving & Storage, Inc. v. Brown, Leifer, Slatkin & Berns (1992) 7 Cal. App. 4th 27, 35-37, 9 Cal. Rptr. 2d 396*

Issue sanctions in marital dissolution proceeding precluding husband from offering any evidence, making any objections, or conducting cross examination at trial on any issue except dissolution, custody, or visitation is proper when husband failed to comply with series of discovery orders, thereby frustrating wife's efforts to obtain information about community assets that he had concealed, and provided no evidence supporting reasons for his noncompliance. *In re Marriage of Economou (1990) 224 Cal. App. 3d 1466, 1476, 274 Cal. Rptr. 473*

Dismissal is inappropriate terminating sanction in absence of prior court order compelling plaintiff to comply with demand for production of documents. *Ruvalcaba v. Government Employees Ins. Co. (1990) 222 Cal. App. 3d 1579, 1583, 272 Cal. Rptr. 541*

Court's use of ultimate sanction of dismissal of action, following late arrival of plaintiff's attorney at hearing on cross-defendant's motion to strike complaint, is manifestly excessive when defendant's attorney had neglected to inform

court that plaintiff's attorney would be late and plaintiff's attorney expressed willingness to produce client for deposition demanded by cross-defendant and to pay previously imposed sanctions. *Brown v. Presley of So. California (1989) 213 Cal. App. 3d 612, 620, 261 Cal. Rptr. 779*

Under egregious circumstances of case, flagrant and repeated violations by party of terms of discovery order issued pursuant to stipulation justified "death knell" evidentiary sanctions leading to entry of summary judgment against party. *Young v. Rosenthal (1989) 212 Cal. App. 3d 96, 116-117, 260 Cal. Rptr. 369*

Default judgment is inappropriate sanction to impose against defendants for failure to appear at deposition ordered pursuant to *Civ. Code § 3295* in light of purpose of deposition (discovery of defendant's financial condition) and minimal potential prejudice to plaintiff. *McArthur v. Bockman (1989) 208 Cal. App. 3d 1076, 1080-1081, 256 Cal. Rptr. 522*

Issue sanction precluding plaintiff in wrongful discharge action from proving economic damages was proper when plaintiff willfully failed to obey order compelling production of financial records. *Sauer v. Superior Court (1987) 195 Cal. App. 3d 213, 228-229, 240 Cal. Rptr. 489*

[3] Monetary Sanction

Sanctions were warranted when plaintiffs' objection to term "economic damages" was without "substantial justification" and their responses to interrogatories propounded by defendants were evasive, citing *Code Civ. Proc. §§ 2023.030(a), 2023.010(e), (f).* *Clement v. Alegre (2009) 177 Cal. App. 4th 1277, 1286-1287, 99 Cal. Rptr. 3d 791*

Monetary sanctions were properly awarded under former *Code Civ. Proc. §§ 2020(a), 2023(a)(4), (5), (6)* (*now see Code Civ. Proc. §§ 2020.010(a), 2023.010(d), (e), (f)*) because evidence showed appellant attorney, in fact, knew he was obliged to produce documents to respondent's attorneys and repeatedly failed to do so; and appellant's contention that he complied with respondent's subpoenas by producing the documents to himself was "preposterous," even though subpoenas mistakenly identified appellant as deposition officer to whom he should deliver subpoenaed documents. *Sears, Roebuck and Co. v. Nat'l Union Fire Ins. Co. (2005) 131 Cal. App. 4th 1342, 1350-1351, 32 Cal. Rptr. 3d 717*

Separate motion for discovery monetary sanctions may be made after underlying motion to compel further response to an inspection demand is litigated, even though better practice may be to include request for monetary sanctions in motion to compel further response; timeliness of this separate motion for sanctions is subject to trial court's discretion, rather than 45-day limit from time of initial service of the response under former *Code Civ. Proc. § 2031(m)* (*now see Code Civ. Proc. § 2031.310(c)*). *London v. Dri-Honing Corp. (2004) 117 Cal. App. 4th 999, 1008-1009, 12 Cal. Rptr. 3d 240*

Party represented by pro bono counsel was entitled to award of sanctions under *Code Civ. Proc. § 2025(j)(3)* (*now see Code Civ. Proc. § 2025.450*) and former *Code Civ. Proc. § 2023* (*now see Code Civ. Proc. § 2023.010 et seq.*) against opposing party, who twice failed to appeal at noticed deposition, even though party did not actually "incur" additional fees as result of opposing party's conduct, when there was no finding that the failure to appeal was "with substantial justification or that other circumstances make the imposition of the sanction unjust." *Do v. Superior Court (2003) 109 Cal. App. 4th 1210, 1213, 135 Cal. Rptr. 2d 855*

Sanctions pursuant to former *Code Civ. Proc. § 2033(o)* (*now see Code Civ. Proc. § 2033.420*), which provides for reasonable expenses and attorney fees when an opposing party fails to admit the genuineness of any document or the truth of any matter when requested to do so, are available to a party that prevails upon the issues at summary judgment. *Barnett v. Penske Truck Leasing Co. (2001) 90 Cal. App. 4th 494, 497-499, 108 Cal. Rptr. 2d 821*

Trial court did not abuse its discretion in imposing sanctions pursuant to *Code Civ. Proc. § 128.5* (frivolous actions taken in bad faith) and former *Code Civ. Proc. § 2023* (*now see Code Civ. Proc. § 2023.010 et seq.*) (discovery abuses), based on law firm's conduct in litigating on behalf of defendant client knowing that defendant was a suspended corporation, even though law firm did not engage in any abuse of the discovery process itself. *Palm Valley Homeowners Assoc., Inc. v. Design MTC (2001) 85 Cal. App. 4th 553, 563-564, 102 Cal. Rptr. 2d 350*

Motion to compel under former *Code Civ. Proc. § 2031* (*now see Code Civ. Proc. § 2031.300*) was not a prerequisite for monetary sanctions under former *Code Civ. Proc. § 2023* (*now see Code Civ. Proc. § 2023.010 et seq.*) when defendant's misconduct essentially precluded plaintiffs from making the motion; court authorized sanctions in context of motion for a new trial. *Sherman v. Kinetic Concepts, Inc. (1998) 67 Cal. App. 4th 1152, 1162-1163, 79 Cal. Rptr. 2d 641*

Imposition of sanctions under former *Code Civ. Proc. § 128.5* against party and his attorneys was proper when motions, insisted upon by party, reargued matters already determined in previously issued order for sanctions for discovery abuses, and falsely accused opposing counsel of fraud in connection with execution of stipulation for discovery; party and attorney are joint debtors for purposes of right to contribution under *Code Civ. Proc. § 882* when sanctions under former *Code Civ. Proc. § 128.5* are imposed against them jointly and severally. *Young v. Rosenthal (1989) 212 Cal. App. 3d 96, 127-128, 130, 260 Cal. Rptr. 369*

Imposition of monetary sanctions under former *Code Civ. Proc. § 128.5* for bringing motion for protective order to prevent taking of defendant's initial deposition was improper when motion was "arguably meritorious." *Weisman v. Bower (1987) 193 Cal. App. 3d 1231, 1238-1239, 238 Cal. Rptr. 756*

Imposition of monetary sanctions under former *Code Civ. Proc. § 128.5* against attorney for advising his client's wife, who was not represented by counsel, that she need not testify at deposition because of marital privilege not to testify was improper. *Sabado v. Moraga (1987) 189 Cal. App. 3d 1, 9-10, 234 Cal. Rptr. 249*

[4] Purpose of Discovery Sanctions

Purpose of discovery sanctions is to prevent abuse of discovery process and to correct problem presented in a specific case, not to provide weapon for punishment, forfeiture, or avoidance of trial on merits; penalty imposed should not exceed that which is required to protect interests of party entitled to, but denied, discovery. *McGinty v. Superior Court (1994) 26 Cal. App. 4th 204, 210-216, 31 Cal. Rptr. 2d 292*

Sanctions are not properly for use to put prevailing party in better position than if discovery had been obtained, nor as form of punishment. *Kahn v. Kahn (1977) 68 Cal. App. 3d 372, 381, 137 Cal. Rptr. 332* (interpreting former *Code Civ. Proc. § 2034(b), (d)* (now see *Code Civ. Proc. § 2023.030(a)*))

Court may impose sanctions that are suitable and necessary to obtain objects of discovery sought but may not impose sanctions designed to impose punishment rather than obtain objects of discovery. *Caryl Richards, Inc. v. Superior Court (1961) 188 Cal. App. 2d 300, 303-304, 10 Cal. Rptr. 377*

[5] Pro Per Litigants

Litigant proceeding in forma pauperis held to same standard of conduct in conducting litigation as any other party, and sanctions as equally available against such litigants. *Midwife v. Bernal (1988) 203 Cal. App. 3d 57, 65, 249 Cal. Rptr. 708* (decided under prior law)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMisconductCivil ProcedureDismissalsInvoluntary DismissalsFailures to ComplyCivil ProcedureSanctionsContemptCivil Contempt

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[Reserved]

§§ 192.35[Reserved]

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16-192 California Forms of Pleading and Practice--Annotated § 192.43

§ 192.43 Attorney General Opinions

Person appointed as referee to hear and determine discovery motions and paid by parties is not entitled by statute to defense and indemnification by county against claims or actions seeking monetary damages in connection with duties as referee. *72 Ops. Cal. Att'y Gen. 94 (1989)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureJudicial OfficersReferencesCivil ProcedureDiscoveryGeneral OverviewGovernmentsLocal GovernmentsClaims By & Against

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16-192 California Forms of Pleading and Practice--Annotated § 192.44

§ 192.44 Law Reviews

Comment, *The California Discovery Act of 1986: Discovery the New-Fashioned Way! 18 Sw. U.L. Rev. 233 (1999)*

Comment, *The Sanction Provision of the New California Civil Discovery Act, Section 2023: Will it Make a Difference or Is It Just Another "Paper Tiger?" 15 Pepperdine L. Rev. 401 (1988)*

Note, *Discovery Abuse Under the Federal Rules: Causes and Cures, 92 Yale L.J. 352 (1982)*

Legal Topics:

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

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16-192 California Forms of Pleading and Practice--Annotated § 192.45

§ 192.45 Text References

Witkin, California Evidence, Ch. X, *Discovery*, § 239 et seq., § 249 et seq. (4th ed. 2000)

Legal Topics:

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

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[Reserved]

§§ 192.46[Reserved]

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16-192 California Forms of Pleading and Practice--Annotated § 192.50

§ 192.50 Proceedings for Order Imposing Issue, Evidence, or Terminating Sanction and Monetary Sanction [Code Civ. Proc. § 2023.030]--Failure of Party or Party-Affiliated Deponent to Obey Discovery Order [Code Civ. Proc. §§ 2025.450, 2025.480, 2030.290, 2030.300, 2031.300, 2031.310, 2031.320, 2032.240, 2032.410, 2032.420, 2032.620, 2032.650]--Motion and Supporting Declaration

[1] FORM Proceedings for Order Imposing Issue, Evidence, or Terminating Sanction and Monetary Sanction [Code Civ. Proc. § 2023.030]--Failure of Party or Party-Affiliated Deponent to Obey Discovery Order [Code Civ. Proc. §§ 2025.450, 2025.480, 2030.290, 2030.300, 2031.300, 2031.310, 2031.320, 2032.240, 2032.410, 2032.420, 2032.620, 2032.650]]--Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR OR-
vs.	)	DER IMPOSING _____ [ISSUE
	)	*and/or* EVIDENCE *and/or* TERMINATING] SANC-
_____ [*name*],	)	TION AGAINST _____ [*identify*
Defendant.	)	*party, e.g.,* DEFENDANT _____
	)	(*name*)] AND IMPOSING MONETARY SANC-
	)	TION AGAINST _____ [*identify*
	)	*party and/or his/her attorney, e.g.,* DEFENDANT _____ (*name*) AND HIS/HER AT- TORNEY _____ (*name*)] FOR FAILURE TO OBEY ORDER COMPELLING _____ [*specify, e.g.,* RESPONSE TO INTERROGATORIES], SUPPORTING DE- CLARATION OF _____ [*name*], AND SUPPORTING MEMORANDUM Date: _____ Time: _____

Location: _____
Judge: _____
Date Action Filed: _____
Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* plaintiff] will, and hereby does, move for an order that _____ [an issue *and/or* an evidence *and/or* a terminating] sanction be imposed against _____ [*identify party, e.g.,* defendant _____ (*name*)], specifically that _____ [*specify order*(*s*) *requested; see § 192.51[1]*]. _____ [*Identify party, e.g.,* Plaintiff] will further move for an order imposing a monetary sanction against _____ [*identify party and/or his/her attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] and in favor of _____ [*identify moving party, e.g.,* plaintiff] in the amount of $_____. The motion will be made on the ground that _____ [*identify party, e.g.,* defendant] has failed to obey the order of this court dated _____ (*date*), compelling _____ [*specify, e.g.,* response to Interrogatories No. _____ in plaintiff _____'s (*name*) first set of interrogatories on or before _____, (*date*)].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name*(*s*)], on the separate statement served and filed herewith pursuant to *Cal. Rules of Ct., Rule 3.1345*, on the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____[*firm name, if any*]
By: _____[*signature*]
_____ [*typed name*]
Attorney for _____[*moving party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*identify moving party, e.g.,* plaintiff) _____ (*name*)].

2. On _____ [*date*], this court entered an order compelling _____ [*identify responding party, e.g.,* defendant] _____ [*name*] to _____ [*describe order, e.g.,* respond to Interrogatories No. _____ plaintiff _____ (*name*)'s first set of interrogatories on or before _____ (*date*)], a certified copy of which is attached as Exhibit A and incorporate by reference.

3. _____ [*Identify responding party, e.g.,* Defendant] _____ [*name*] has failed to _____ [*describe failure to act, e.g.,* respond to those interrogatories in any manner whatever].

4. As a result of the failure of _____ [*identify responding party, e.g.,* defendant] _____ [*name*] to obey the above-described court order, _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] has incurred expenses as follows: _____ [*itemize reasonable expenses incurred, including attorney's fees, and explain basis of computing each expense*], for a total of $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion.*]

[2] Use of Form

The notice of motion and declaration in [1], *above*, is for use by a party to impose an issue, evidence, or terminating sanction under *Code Civ. Proc. § 2023.030(b)-(d)* against another party, and also to impose a monetary sanction under *Code Civ. Proc. § 2023.030(a)* against that other party or his or her attorney, for the latter party's failure to obey an order compelling discovery under *Code Civ. Proc. §§ 2025.450(c)* or *2025.480(g)* (depositions), 2030.290(c) or 2030.300(e) (interrogatories), 2031.060(h), (i), 2031.300(c), (d), 2031.310(h)-(j), 2031.320(b)-(d) (inspection, copying, testing, sampling of documents, tangible things, places, or electronically stored information), or 2032.240(d), 2032.410, 2032.420, 2032.620(c), or 2032.650(c) (physical or mental examinations). The motion must be brought in the court in which the action is pending [*Code Civ. Proc. § 2016.020*].

Code Civ. Proc. § 2032.410 similarly provides for the imposition of sanctions against a party, not only for failure to obey an order under *Code Civ. Proc. § 2032.240(d)* or *2032.250(b)*, but also for failure to obey a stipulation for an examination under *Code Civ. Proc. § 2032.320(c)*. For forms for use in seeking sanctions for failure to obey such a stipulation, see Ch. 197, *Discovery: Physical and Mental Examinations* .

Requests for the specific orders authorized as issue, evidence, or terminating sanctions under *Code Civ. Proc. § 2023.030(b)(d)* are *set out in § 192.51*, and may be inserted in line eight of the first paragraph of the notice of motion in this form, in accordance with the instruction to specify the order being requested.

A request for a sanction must identify, in the notice of motion, every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion must be supported by a memorandum and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought [*Code Civ. Proc. § 2023.040*; *see also Code Civ. Proc. §§ 1005(b), 1010, Cal. Rules of Ct., Rule 3.1113(a)* (memorandum)]. For discussion and forms relating to memoranda generally, see Ch. 417, *Points and Authorities* . For memoranda relating to motions for discovery sanctions generally, see California Points and Authorities, Ch. 82, *Discovery: Sanctions for Discovery Misuse* (Matthew Bender).

The declaration supporting a request for monetary sanctions should be detailed. In particular, it should contain more than a cursory description of the services for which the requested fees and costs were incurred [*In re Marriage of Niklas (1989) 211 Cal. App. 3d 28, 37-38, 258 Cal. Rptr. 921* (criticizing declaration in motion under former *Code Civ. Proc. § 2025(o)* (*now see Code Civ. Proc. § 2025.480*) containing itemized entries supported by general descriptions such as "research," "review," and "lette r"); *see also Code Civ. Proc. § 2023.040* (declaration must set forth facts supporting amount of any monetary sanctions sought), and discussion in *§§ 192.13[2][c], 192.19*].

One court of appeal has held that a separate motion for discovery monetary sanctions may be made after an underlying motion to compel further response to an inspection demand is litigated [*London v. Dri-Honing Corp. (2004) 117 Cal. App. 4th 999, 1001, 12 Cal. Rptr. 3d 240]* . Even though the better practice may be to include the request for monetary sanctions in the motion to compel further response, there is no legal requirement to do so [*London v. Dri-Honing Corp. (2004) 117 Cal. App. 4th 999, 1008, 12 Cal. Rptr. 3d 240]* . The timeliness of a separate motion for sanctions is subject to the trial court's discretion, rather than the 45-day limit from the time of the initial service of the response under former *Code Civ. Proc. § 2031(m)* (*now see Code Civ. Proc. § 2031.310(c)*) [*London v. Dri-Honing Corp. (2004) 117 Cal. App. 4th 999, 1009, 12 Cal. Rptr. 3d 240]* . For further discussion, *see Ch. 195, Discovery: Inspection of Tangible Evidence, § 195.20[3][a]*.

If the motion seeks an issue or evidence sanction, as distinguished from a terminating sanction, the motion must be accompanied by a separate statement that sets forth all the informtion necessary to understand and determine the motion [*Cal. Rules of Ct., Rule 3.1345(a)(7), (c)*]. For further discussion and a form for a separate statement, see *§ 192.52*.

[3] Imposition of Sanctions Against Party

The court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *Code Civ. Proc. § 2023.030* against a party who fails to obey an order requiring the following:

- Attendance, testimony, and production of specified documents or things by a party deponent or a party-affiliated deponent [*Code Civ. Proc. § 2025.450(d)*; *see* Ch. 193, *Discovery: Depositions*].

- An answer to a question or production of a document or thing by a party deponent or a party-affiliated deponent [*Code Civ. Proc. § 2025.480(g)*; *see* Ch. 193, *Discovery: Depositions*].

- Response or further response to interrogatories [*Code Civ. Proc. §§ 2030.290(c), 2030.300(e)*; *see* Ch. 194, *Discovery: Interrogatories*].

- Response or further response to a demand for inspection, copying, testing, sampling of documents, tangible things, places, or electronically stored information [*Code Civ. Proc. § 2031.300(c), (d), 2031.310(i), (j)*; *see* Ch. 195, *Discovery: Inspection of Tangible Evidence*].

- Compliance in accordance with a party's response to a demand for, copying, testing, sampling documents, tangible things, places, or electronically stored information [*Code Civ. Proc. § 2031.320(c), (d)*; *see* Ch. 195, *Discovery: Inspection of Tangible Evidence*].

- Response and compliance by a plaintiff with a demand for a physical examination [*Code Civ. Proc. § 2032.240(d)*; *see* Ch. 197, *Discovery: Physical and Mental Examinations*].

- Submission to an examination or production of another for examination [*Code Civ. Proc. §§ 2032.410, 2032.420*; *see* Ch. 197, *Discovery: Physical and Mental Examinations*].

- Delivery of medical reports regarding examinations [*Code Civ. Proc. §§ 2032.620(c), 2032.650(c)*; *see* Ch. 197, *Discovery: Physical and Mental Examinations*].

In lieu of or in addition to an issue, evidence, or termination sanction, the court may impose a monetary sanction pursuant to *Code Civ. Proc. § 2023.030(a)* against the following:

- A party deponent or party-affiliated deponent [*Code Civ. Proc. §§ 2025.450(d), 2025.480(g)*].

- A party [*Code Civ. Proc. §§ 2030.290(c), 2030.300(e), 2031.300(c),* 2031.310(i), *2031.320(c)*].

- An attorney who advised a client to engage in a misuse of the discovery process [*Code Civ. Proc. § 2023.030(a)*].

For further discussion of issue, evidence, terminating, and monetary sanctions generally, see *§§ 192.13[3], 192.15[3]*. For discussion and forms relating to the discovery orders enumerated *above*, see the chapter covering the particular discovery method involved.

[4] Imposition of Sanctions for Conduct of Party-Affiliated Deponent

In the context of depositions, a party is subject to the sanctions sought by the foregoing form not only for his or her own failure or refusal to obey, but also for the failure of any deponent that is affiliated with that party as its officer, director, managing agent, employee, or designated representative [*see Code Civ. Proc. §§ 2025.450(d), 2025.480(g)*; for further discussion, *see* Ch. 193, *Discovery: Depositions*].

[5] Imposition of Contempt Sanction

A party deponent or party-affiliated deponent who disobeys an order under *Code Civ. Proc. § 2025.480* may be held in contempt of court [Code *Civ. Proc. § 2025.480(g)*]. The contempt sanction is also available, in lieu of other sanctions, against a nonparty deponent who disobeys an order under *Code Civ. Proc. § 2025.480(g)*. For further discussion and forms relating to a contempt sanction, see *§§ 192.13[4], 192.15[4], 192.60, 192.61*.

[6] Showing for Default Judgment

Code Civ. Proc. § 585(b) requires the plaintiff to present evidence as the basis for a default judgment if a defendant has not answered or otherwise responded to a complaint in an action that is not subject to default by clerk. Counsel seeking a default judgment as a discovery sanction might therefore consider presenting evidence required under *Code Civ. Proc. § 585(b)*. For further discussion and related forms, see Ch. 205, *Defaults and Default Judgments* .

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16-192 California Forms of Pleading and Practice--Annotated § 192.51

§ 192.51 Proceedings for Order Imposing Issue, Evidence, or Terminating Sanction and Monetary Sanction [Code Civ. Proc. § 2023.030]--Failure of Party or Party-Affiliated Deponent to Obey Discovery Order [Code Civ. Proc. §§ 2025.450, 2025.480, 2030.290, 2030.300, 2031.300, 2031.310, 2031.320, 2032.240, 2032.410, 2032.420, 2032.620, 2032.650]--Clauses to Be Used in Motion

[1] FORM Proceedings for Order Imposing Issue, Evidence, or Terminating Sanction and Monetary Sanction [Code Civ. Proc. § 2023.030]--Failure of Party or Party-Affiliated Deponent to Obey Discovery Order [Code Civ. Proc. §§ 2025.450, 2025.480, 2030.290, 2030.300, 2031.300, 2031.310, 2031.320, 2032.240, 2032.410, 2032.420, 2032.620, 2032.650]--Clauses to Be Used in Motion

[*Insert any of the following, in accordance with instruction to specify order requested, in line 8 of 1st paragraph of Notice of Motion in § 192.50[1], after the words:* specifically that]

[*EITHER, if issue sanction is sought*]

the following facts be taken as established as stated for the purposes of this action: _____ [*designate facts sought to be established in accordance with claims of moving party adversely affected by opposing party's failure to obey order*]

[*AND/OR, if issue sanction is sought*]

_____ [*identify disobedient party or party with whom disobedient deponent is affiliated, e.g.,* defendant _____ (*name*)] be prohibited from _____ [supporting *or* opposing] the following _____ [claims *or* defenses] in this action: _____ [*specify*]

[*AND/OR, if evidence sanction is sought*]

_____ [*identify disobedient party or party with whom disobedient deponent is affiliated, e.g.,* defendant _____ (*name*)] be prohibited from introducing the following matters in evidence in this action: _____ [*specify*]

[*AND/OR, if terminating sanction is sought*]

_____ [all of the *or* the following] pleadings of _____ [*identify disobedient party or party with whom disobedient deponent is affiliated, e.g.,* defendant _____ (*name*)] be striken in this action[: _____ (*specify part of pleadings sought to be stricken*)]

[*AND/OR, if terminating sanction is sought*]

further proceedings in this action be stayed until _____ [*identify disobedient party or deponent affiliated with party, e.g.,* defendant _____ (*name*)] obeys the discovery dated _____ [*date*], compelling him/her to _____ [*specify, e.g.,* respond to Interrogatories No. _____ in plaintiff _____(*name*)'s first set of interrogatories to defendant _____ (*name*)]

[*AND/OR, if terminating sanction is sought*]

the _____ [action *or* _____ (*specify part thereof, e.g.,* defendant _____'s (*name*) cross complaint against plaintiff _____ (*name*))] be dismissed with prejudice as to _____ [*identify moving party, e.g.,* plaintiff]

[*AND/OR, if terminating sanction is sought*]

a default judgment be entered in favor of _____ [*identify moving party, e.g.,* plaintiff _____ (*name*)] and against _____ [*identify disobedient party or party with whom disobedient deponent is affiliated, e.g.,* defendant _____ (*name*)] in the amount of $_____

[2] Use of Form

The clauses set out in [1], *above*, are adapted from the list of orders expressly defining issue, evidence, and terminating sanctions under *Code Civ. Proc. § 2023.030(b)-(d)*, and are intended to be inserted, when appropriate, in the first paragraph of the notice of motion for a order imposing sanctions *set out in § 192.50[1],* in accordance with the instruction in that form to specify the order requested.

For further discussion of the specific orders enumerated in *Code Civ. Proc. § 2023.030(b)-(d)*, see *§ 192.13[3][a]*.

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§ 192.52 Proceedings for Order Imposing Issue, Evidence, or Terminating Sanction and Monetary Sanction [Code Civ. Proc. § 2023.030]--Failure of Party or Party-Affiliated Deponent to Obey Discovery Order [Code Civ. Proc. §§ 2025.450, 2025.480, 2030.290, 2030.300, 2031.300, 2031.310, 2031.320, 2032.240, 2032.410, 2032.420, 2032.620, 2032.650]--Separate Statement Supporting Motion for Issue or Evidence Sanction [Cal. Rules of Ct., Rule 3.1345(a)(7)]

[1] FORM Proceedings for Order Imposing Issue, Evidence, or Terminating Sanction and Monetary Sanction [Code Civ. Proc. § 2023.030]--Failure of Party or Party-Affiliated Deponent to Obey Discovery Order [Code Civ. Proc. §§ 2025.450, 2025.480, 2030.290, 2030.300, 2031.300, 2031.310, 2031.320, 2032.240, 2032.410, 2032.420, 2032.620, 2032.650]--Separate Statement Supporting Motion for Issue or Evidence Sanction [Cal. Rules of Ct., Rule 335(a)(7)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	SEPARATE STATEMENT IN SUPPORT OF MO-
Plaintiff,	)	TION FOR ORDER IMPOSING ISSUE OR EVID-
vs.	)	ENCE SANCTION
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

This separate statement is submitted in support of the motion by _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] for an order imposing on _____ [*specify party from whom discovery is sought, e.g.,* defendant] _____ [*name*] an issue or evidentiary sanction)]. As required

under *Cal. Rules of Ct., Rule 3.1345*, it provides information relating to the discovery requests at issue in the motion, as follows:

_____ [*Specify particular discovery request, e.g.,* INSPECTION DEMAND NO. _____ (*set number and individual number*)]

1. Text of Discovery Request: _____ [*specify*].

2. Text of Response(s): _____ [*specify text of response, and any further responses, to the specific request*].

[3. Related Definitions and Instructions: _____ (*specify, if necessary, the text of all definitions, instructions, and other matters required to understand the specific request and the responses to it.*)]

[4. Related Requests and Responses: _____ (*if the response to the specific request is dependent on the response given to another discovery request, or if the reasons a further response is deemed necessary are based on the response to some other discovery request, specify the text of the other request and the reponse to it.*)]

[5. Related Pleadings and Other Documents: _____ (*summarize any pleadings or other documents in the file, if any, that are relevant to the motion and are relied on by the moving party.*)]

6. Statement of Reasons for Compelling Further Response(s): _____ [*state factual and legal reasons for compelling further responses to the specific request*].

[*Set out separately, as above, any further specific demands with related information, with respect to which the motion is seeking to compel further response.*]
Dated: _____

_____[*firm name, if any*]
By: _____[*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name*]

[2] Use of Form

The separate statement set out in [1], *above*, is required to accompany a motion, such as that *set out in § 192.50*, seeking the imposition of an issue or evidence sanction [*see Cal. Rules of Ct., Rule 3.1345(a)(7)*].

[3] Contents of Separate Statement

Any motion involving the content of a discovery request or the responses to such a request must be accompanied by a separate statement [*Cal. Rules of Ct., Rule 3.1345*]. The motions that require a separate statement include a motion for issue or evidentiary sanctions [*Cal. Rules of Ct., Rule 3.1345(a)(7)*].

This separate statement is a separate document filed and served with the motion. It must set forth all the information necessary to understand each discovery request (in this instance each inspection demand) and all the responses to it that are at issue [*Cal. Rules of Ct., Rule 3.1345*]. It must be full and complete, so that no person is required to review any other document in order to determine the full request and the full response. Material may not be incorporated into the

separate statement by reference [*Cal. Rules of Ct., Rule 3.1345(c)*].

The separate statement must include, for each discovery request (in this instance each inspection demand) to which a further response is requested, the following [*Cal. Rules of Ct., Rule 3.1345(c)*]:

- The text of the request, and the text of each response, answer, or objection, and any further responses or answers [*Cal. Rules of Ct., Rule 3.1345(c)(1), (2)*].

- A statement of the factual and legal reasons for compelling further responses, answers, or production as to each matter in dispute [*Cal. Rules of Ct., Rule 3.1345(c)(3)*].

- If necessary, the text of all definitions, instructions, and other matters required to understand each discovery request and the responses to it [*Cal. Rules of Ct., Rule 3.1345(c)(4)*].

- If the response to a particular discovery request is dependent on the response given to another discovery request, or if the reasons a further response to a particular discovery request is deemed necessary are based on the response to some other discovery request, the other request and the response to it must be set forth [*Cal. Rules of Ct., Rule 3.1345(c)(5)*].

- If the pleadings, other documents in the file, or other items of discovery are relevant to the motion, a summary of each relevant document by the party relying on the document [*Cal. Rules of Ct., Rule 3.1345(c)(6)*].

In most instances the separate statement is required when seeking a motion to compel discovery [*see Cal. Rules of Ct., Rule 3.1345(a)(1)-(6)*], and the information described above assists the court in determining whether it is proper to compel discovery in a particular instance. In contrast, a motion seeking an issue or evidence sanction usually *follows* a proceeding for an order compelling discovery, once that order has been issued and a party has failed to obey it [*see § 192.15[3]*]. The purpose of a separate statement in this instance is to demonstrate, by reference to specific requests for discovery, why it is appropriate in the absence of this discovery to impose a sanction that requires certain facts to be deemed established or prohibits a party from introducing certain matters into evidence.

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 192 DISCOVERY: SANCTIONS FOR DISCOVERY MISUSE
PART IV. FORMS

16-192 California Forms of Pleading and Practice--Annotated § 192.53

§ 192.53 Proceedings for Order Imposing Issue, Evidence, or Terminating Sanction and Monetary Sanction [Code Civ. Proc. § 2023.030]--Failure of Party or Party-Affiliated Deponent to Obey Discovery Order [Code Civ. Proc. §§ 2025.450, 2025.480, 2030.290, 2030.300, 2031.300, 2031.310, 2031.320, 2032.240, 2032.410, 2032.420, 2032.620, 2032.650]--Order

[1] FORM Proceedings for Order Imposing Issue, Evidence, or Terminating Sanction and Monetary Sanction [Code Civ. Proc. § 2023.030]--Failure of Party or Party-Affiliated Deponent to Obey Discovery Order [Code Civ. Proc. §§ 2025.450, 2025.480, 2030.290, 2030.300, 2031.300, 2031.310, 2031.320, 2032.240, 2032.410, 2032.420, 2032.620, 2032.650]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

_____

The motion of _____ [*identify party, e.g.*, plaintiff] _____ [*name*] for an order imposing a(n) _____ [issue *and/or* evidence *and/or* terminating] sanction against _____ [*identify party, e.g.*, defendant] _____ [*name*] and imposing a monetary sanction against _____ [*identify party and/or his/her attorney, e.g.*, defendant _____ (*name*) and his/her counsel _____ (*name*)], for failure to obey the order of this court dated _____ [*date*], compelling _____ [*identify, e.g.*, him/her to serve a response to Interrogatories No. _____ in plaintiff _____'s (*name*) first set of interrogatories to defendant _____ (*name*)], came on regularly for hearing on _____ [*date*]. Plaintiff appeared by

counsel _____ [*name*]; defendant appeared by counsel _____ [*name*(*s*)].

On proof being made to the satisfaction of the court [_____ (*state findings of court, e.g.,* that defendant _____ (*name*) failed to obey the order of this court dated _____, that he/she respond to Interrogatories No. _____ in plaintiff _____ (*name*)'s first set of interrogatories to defendant _____ (*name*), and that his/her counsel _____ (*name*) advised defendant _____ (*name*) to disobey this order)], and on this court's finding that the requested order ought to be _____ [denied *or* granted],

[*EITHER*]

IT IS ORDERED that the motion be, and hereby is, denied.

[*OR*]

IT IS ORDERED that the motion be, and hereby is, granted and that _____ [*specify precise issue, evidence, or terminating sanction granted, e.g.,* a default judgment be entered in favor of plaintiff _____ (*name*) and against defendant _____ (*name*) in the amount of $_____].

[*EITHER, if imposing monetary sanction in addition to or in lieu of imposition of other sanctions*]

IT IS [FURTHER] ORDERED that _____ [*identify party or person subject to monetary sanction, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] pay forthwith to _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] the sum of $_____ as reasonable expenses and attorney's fees.

[*OR, if not imposing monetary sanction*]

On further proof made to the satisfaction of the court that _____ [*identify party or person subject to monetary sanction, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*identify unsuccessful party, person, or attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The proposed order set out in [1], *above*, is for use when the court has granted or denied a motion by a party to impose

an issue, evidence, or terminating sanction pursuant to *Code Civ. Proc. §§ 2025.450(d)* or *2025.480(g)*, *2030.290(c)* or *2030.300(e)*, 2031.300(c), (d), 2031.310(i), (j), 2031.320(c), (d), or *2032.240(d)*, *2032.410*, *2032.420*, or *2032.650(c)*. Optional language is included stating the basis for the court's ruling. Although there is no express requirement that the court state its findings, cases construing prior law have held that, when a trial court imposes the ultimate sanction of dismissal, it should state its reasons so that the order can be subject to meaningful review [*Deyo v. Kilbourne (1978) 84 Cal. App. 3d 771, 797, 149 Cal. Rptr. 499]* . This reasoning appears to apply equally to other terminating sanctions such as an order striking pleadings or directing entry of a default judgment.

[3] Monetary Sanction

The provisions providing for the imposition of an issue, evidence, or terminating sanction also provide that, "[i]n lieu of or in addition to this sanction, the court may impose a monetary sanction" [*see Code Civ. Proc. §§ 2025.450(d)*, *2030.290(c)*, *2030.300(e)*, 2031.060(h), (i), 2031.300(c), (d), 2031.310(h), (j), 2031.320(b), (d), 2032.240(d), 2032.410, 2032.420, 2032.620(c), 2032.650(c)]. These provisions are apparently designed to provide a court with discretion to impose a monetary sanction as an alternate, or even additional, sanction. As such, there appears to be some conflict with *Code Civ. Proc. § 2023.030(a)*, which requires a court to impose a monetary sanction whenever one is "authorized," unless it finds that the party or person subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust. Thus, the last two paragraphs in this form provide either for the imposition of a monetary sanction in addition to or in lieu of any other sanction imposed, or, alternatively, in compliance with *Code Civ. Proc. § 2023.030(a)*, that no monetary sanction should be imposed on a finding of mitigating circumstances.

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16-192 California Forms of Pleading and Practice--Annotated §§ 192.54-192.59

[Reserved]

§§ 192.54[Reserved]

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Volume 16: Depositions and Discovery-Chs. 190-204
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16-192 California Forms of Pleading and Practice--Annotated § 192.60

§ 192.60 Proceedings for Order Imposing Contempt Sanction [Code Civ. Proc. § 2023.030(e)]--Failure of Witness to Obey Deposition Subpoena or Discovery Order [Code Civ. Proc. §§ 2020.240, 2025.440(b), 2025.480(g)]--Order to Show Cause re Contempt [Code Civ. Proc. § 1212] and Supporting Declaration

[1] FORM Proceedings for Order Imposing Contempt Sanction [Code Civ. Proc. § 2023.030(e)]--Failure of Witness to Obey Deposition Subpoena or Discovery Order [Code Civ. Proc. §§ 2020.240, 2025.440(b), 2025.480(g)]--Order to Show Cause re Contempt [Code Civ. Proc. § 1212] and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
	)	AND ORDER TO SHOW CAUSE RE CONTEMPT
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

DECLARATION OF _____ [*name*]

I _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*identify moving party,*

e.g., plaintiff) _____ (*name*)].

2. On _____ [*date*], _____ [*set forth facts describing initiation of discovery, e.g.*, plaintiff served a notice of taking the deposition of _____ (*name*) at _____ (*location*) on _____ (*date*), at _____ (*time*). True copies of this notice and proof of service are attached hereto as Exhibits A and B, respectively, and made a part of this order].

[*EITHER, if contempt order is sought for disobedience of deposition subpoena under Code Civ. Proc. §§ 2020.240 or 2025.440(b)*]

3. _____ [*Set forth facts showing issuance of a deposition subpoena and cited person's consequent failure to attend or to be sworn as a witness.*]

[*OR, if contempt order is sought for disobedience by deponent of order compelling answer or production of items under Code Civ. Proc. § 2025.480(g)*]

3. _____ [*Set forth facts describing order compelling an answer to a deposition question, or production of a writing or tangible thing under the deponent's control, and cited person's failure to comply therewith*].

[*CONTINUE*]

4. _____ [At all times mentioned in this order *or* at the time he/she was to perform the acts described above], _____ [*name of person to be cited*] [has] had the ability to do so.

5. _____'s [*Name of person to be cited*] failure to act as described above has been willful and with the intent to frustrate the processes of this court and to deprive _____ [*identify party seeking contempt order, e.g.*, plaintiff] of the benefits to which he/she is entitled under the order, in that _____ [*describe*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____[*signature*]
_____ [*typed name*]

ORDER TO SHOW CAUSE

To _____ [*name of person to be cited*] _____ [*name*] [and to his/her attorney of record]:

IT IS HEREBY ORDERED that you, _____ [*name of person to be cited*], appear in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], on _____ [*date*], at _____ [*time*], then and there to show cause, if any, why an order should not be made adjudging you to be in contempt and punished for that contempt, pursuant to Section _____[2020.240 or 2025.440(b),

2025.480(g)] of the Code of Civil Procedure, for your failure to _____ [*specify, e.g.,* attend the taking of your deposition on _____ [*date*], at _____ [*time*], at _____ (*location*), pursuant to the deposition subpoena issued out of and by the clerk of this court], of which you were duly notified, as set out in the declaration of _____ [*name*], served with this order.

[IT IS FURTHER ORDERED that at the time and place stated above you show cause why you should not be required to pay to _____ (*identify party seeking contempt order, e.g.,* plaintiff _____ (*name*)) the reasonable expenses including attorney's fees that he/she incurs in obtaining an order of this court adjudging you in contempt, which expenses are set out in the attached declaration of _____ (*name*).]

IT IS FURTHER ORDERED that the service of this order to show cause and a copy of the supporting declaration of _____ [*name*] be made on _____ [*name of person to be cited*] at least _____ days before the date and time set for the hearing of this order to show cause.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of declaration and order to show cause set out in [1], *above*, is for use by a party seeking discovery to bring a person, typically a nonparty deponent, before the court to answer why that person should not be adjudged in contempt of court.

A contempt sanction, that is, an order that a misuse of the discovery process be treated as a contempt of court [*Code Civ. Proc. § 2023.030(e)*], is expressly authorized to be imposed against a deponent for disobedience of a deposition subpoena [*see Code Civ. Proc. § 2020.240*]. The deponent may be punished for contempt without the necessity of a prior court order directing compliance by the witness [*Code Civ. Proc. § 2020.240*]. Disobedience of a deposition subpoena includes, specifically, any failure (1) to attend and testify, if so commanded by the deposition subpoena; (2) to comply with any specified production, inspection, testing, or sampling; or (3) to appear at a court session to consider any issue arising out of the refusal to be sworn, to answer any question, to produce specified items, or to permit inspection or photocopying, if the subpoena so specifies, or specified testing and sampling of the items produced [*Code Civ. Proc. §§ 2020.220(c), 2020.240*; *see also Code Civ. Proc. § 2025.440(b)* (deponent served with a deposition subpoena who fails to attend a deposition, or refuses to be sworn as witness, is subject to imposition of the sanctions described in *Code Civ. Proc. § 2020.240*)].

A deponent's failure to obey an order compelling an answer or production of a writing or tangible thing may also be treated as a contempt of court [*Code Civ. Proc. § 2025.480(g)*]. Although *Code Civ. Proc. § 2025.480(g)* does not expressly refer to a contempt sanction under *Code Civ. Proc. § 2023.030(e)*, it would nonetheless appear to be appropriate to refer to *Code Civ. Proc. § 2023.030(e)* in requesting a contempt sanction under *Code Civ. Proc. § 2025.480(g)*, in view of the similarity of language in *Code Civ. Proc. §§ 2023.030(e)* and *2025.480(g)* [*see also Code Civ. Proc. § 2023.010(d), (g)* (failure to respond or submit to authorized discovery method and disobedience of court order to provide discovery as abuse of discovery process)].

If a deponent is a party or is affiliated with a party, he or she, or the party with whom he or she is affiliated, may be subject to an additional issue, evidence, or terminating sanction, as well as a monetary sanction, for disobedience of an order under *Code Civ. Proc. § 2025.480(g)*. For forms for imposing these sanctions, see *§ 192.50* et seq. A person who fails to appear pursuant to a deposition subpoena or a court order is also subject to the penalty and damages set out in *Code Civ. Proc. § 1992* [*Code Civ. Proc. § 2020.240*; *see also Code Civ. Proc. § 2025.440(b)*], but these must be sought in a separate civil action [*Code Civ. Proc. § 1992*]. As an alternative to a contempt warrant [*see Code Civ. Proc. § 2020.240*] the court may issue a warrant for the arrest of the witness or person who fails to appear [*Code Civ. Proc. §*

1993(a)(1); *see Code Civ. Proc. §§ 1993(a)(2), (b), 1993.1-1993.2* (procedures); *see also* Ch. 535, *Subpoena*].

For further discussion of contempt sanctions in discovery proceedings, see *§§ 192.13[4], 192.15[4]*. For further discussion and forms relating to general indirect contempt proceedings, see Ch. 135, *Contempt* .

For memoranda of points and authorities relating to contempt proceedings, see California Points and Authorities, Ch. 47, *Contempt* (Matthew Bender). For forms of memoranda of points and authorities relating to motions for contempt sanctions in discovery proceedings, see California Points and Authorities, Ch. 82, *Discovery: Sanctions for Discovery Misuse* (Matthew Bender).

[3] Personal Service of Order to Show Cause

A court may not punish a contempt committed out of its presence without a full hearing at which the alleged condemner appears by reason of arrest under a warrant or through personal service of an order to show cause [*see Code Civ. Proc. §§ 1211, 1212*; *see also Lund v. Superior Court (1964) 61 Cal. 2d 698, 713, 39 Cal. Rptr. 891, 394 P.2d 707]* .

A court may direct service to be made on the attorney of record for an alleged condemner if it appears that he or she is concealing himself or herself to avoid service of the order to show cause or is remaining outside the state for that purpose [*Kroneberger v. Superior Court (1961) 196 Cal. App. 2d 206, 210, 16 Cal. Rptr. 339* ; *see also* Ch. 135, *Contempt*].

[4] Declaration for Issuance of OSC

Before an order to show cause will issue in a general proceeding for indirect contempt, the party initiating the contempt proceeding must file an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) that states facts constituting the contempt [*Code Civ. Proc. § 1211*; *see also Arthur v. Superior Court (1965) 62 Cal. 2d 404, 408, 42 Cal. Rptr. 441, 398 P.2d 777* ; *Lund v. Superior Court (1964) 61 Cal. 2d 698, 713, 39 Cal. Rptr. 891, 394 P.2d 707]* . Because the discovery provisions do not establish any distinct procedure for contempt proceedings in the discovery context, the foregoing form of declaration sets forth facts necessary to establish a general contempt for disobedience of a court order or other lawful process [*see Code Civ. Proc. § 1209(a)(5)*]. For example, the facts must show that the condemner willfully disobeyed the order, in that he or she disobeyed notwithstanding the capacity to obey and actual knowledge of the order or process [*see In re Liu (1969) 273 Cal. App. 2d 135, 140, 78 Cal. Rptr. 85* (willful disobedience of order as one of facts essential to establish jurisdiction for contempt proceeding); *Warner v. Superior Court (1954) 126 Cal. App. 2d 821, 824, 826, 273 P.2d 89* (affidavit fatally defective for failure to allege willfulness)].

An alleged condemner, when directed to appear by an order to show cause, may do so by counsel instead of in person [*Morelli v. Superior Court (1968) 262 Cal. App. 2d 262, 268-270, 68 Cal. Rptr. 572]* .

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16-192 California Forms of Pleading and Practice--Annotated § 192.61

§ 192.61 Proceedings for Order Imposing Contempt Sanction [Code Civ. Proc. § 2023.030(e)]--Failure of Witness to Obey Deposition Subpoena or Discovery Order [Code Civ. Proc. §§ 2020.240, 2025.440(b), 2025.480(g)]--Order Holding Person in Contempt [Code Civ. Proc. §§ 1218, 2023.030(e)]

[1] FORM Proceedings for Order Imposing Contempt Sanction [Code Civ. Proc. § 2023.030(e)]--Failure of Witness to Obey Deposition Subpoena or Discovery Order [Code Civ. Proc. §§ 2020.240, 2025.440(b), 2025.480(g)]--Order Holding Person in Contempt [Code Civ. Proc. §§ 1218, 2023.030(e)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER HOLDING
_____ [*name*],	)	_____[*name*]
Defendant.	)	IN CONTEMPT FOR MISUSE OF
	)	DISCOVERY PROCESS
	)	

_____

This cause came on regularly for hearing on _____ [*date*], pursuant to the order of this court directing _____ [*name of condemner*], to appear and show cause why he/she should not be adjudged in contempt of this court. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*]. [_____ (*Name*) appeared as counsel for _____ (*name of condemner*).]

Proof having been made to the satisfaction of the court that _____ [*name of condemner*] is in contempt of this court because of his/her failure to _____ [*describe failure to act, e.g.,* attend his/her deposition hearing after being duly notified] [,although able to do so]:

IT IS ORDERED that _____ [*name of condemner*] is in contempt of this court and _____ [*specify punishment, e.g.*, the Sheriff of _____ County is hereby directed to take into his/her custody the person of _____ [*name of condemner*] and commit him/her to _____ [*specify place*] until that time that he/she purges himself/herself of contempt by _____ [*specify acts to be done, e.g.*, attending the taking of his deposition at time and place agreed to by the plaintiff and condemner].

_____ [*date and place*]
_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use when a court has adjudged a person in contempt of court for misuse of the discovery process [*see Code Civ. Proc. §§ 2020.240, 2025.440(b)* (deposition subpoena), 2025.480(g) (depositions)].

[3] Requirements of Order of Contempt

A record in an indirect contempt proceeding must contain findings on which the order is based [*In re Morelli (1970) 11 Cal. App. 3d 819, 850-851, 91 Cal. Rptr. 72]* . Moreover, a contempt order under *Code Civ. Proc. § 1219(a)* (confinement until act performed) must specify the act to be performed and must include a finding that the act is within the power of the condemner to perform [*see Lake County v. Superior Court (1977) 67 Cal. App. 3d 815, 817, 136 Cal. Rptr. 830]* .

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Chapter 193 DISCOVERY: DEPOSITIONS

16-193 California Forms of Pleading and Practice--Annotated 193.syn

§ 193.syn Synopsis to Chapter 193: DISCOVERY: DEPOSITIONS

§ 193.01 Scope of Chapter

§ 193.02 Cross References

[1] Related Discovery Chapters

[2] Other Related Chapters

§§ 193.03-193.09 [Reserved]

§ 193.10 Governing Law

§ 193.11 General Scope and Availability of Discovery by Oral Deposition

§ 193.12 Subsequent Deposition of Natural Person Limited

§ 193.13 Limits on Deposition of Opposing Counsel

§ 193.14 Modification of Deposition Procedures by Stipulation

§§ 193.15-193.19 [Reserved]

§ 193.20 Time Requirements

[1] Initiating Discovery by Oral Deposition

[2] Scheduling Oral Deposition

§ 193.21 Notice Requirements

[1] General Requirements

[2] Special Requirements When Subpoenaing Consumer or Employee Records

[3] Effect of Deposition Notice

[a] Duty of Party Deponent to Attend

[b] Duty of Nonnatural Deponent to Designate Agent

§ 193.22 Place Requirements

[1] When Deponent Is Natural Person

[2] When Deponent Is Organization

[3] Deposition by Telephone, Videoconference or Remote Electronic Means

§ 193.23 Opposing Deposition for Failure to Satisfy Time, Notice, and Place Requirements

§§ 193.24-193.29 [Reserved]

§ 193.30 Deposition Subpoena

[1] Required for Nonparty Deponent

[2] Application of General Subpoena Provisions

§ 193.31 Types of Deposition Subpoena

[1] For Personal Appearance Only, for Appearance and Production of Tangible Evidence, or for Production Only of Business Records

[2] Business Records Defined

[3] Service of Subpoena Commanding Production of Consumer or Employee Records

§ 193.32 Special Requirements for Copying Business Records

[1] Qualifications of Deposition Officer

[2] Compliance With Subpoena

§ 193.33 [Reserved]

§ 193.34 Punishment for Disobedience of Deposition Subpoena

§ 193.35 Objection to Deposition Subpoena

[1] By Motion to Quash or Modify

[2] By Objection at Time of Testimony or Production

§§ 193.36-193.39 [Reserved]

§ 193.40 Qualifications of Deposition Officer

§ 193.41 Taking Deponent's Testimony

[1] In General

[2] Examination by Written Questions

[3] Recording Testimony

[a] Stenographic Record

[b] Additional Record by Audio or Video Technology

[i] By Notice or Agreement

[ii] Making Audio or Video Recordings

§ 193.42 Subsequent Use of Audio or Video Record

[1] Availability to Other Parties

[2] Prerequisites for Use at Trial

§ 193.43 Objections During Oral Deposition

[1] Privilege, Work Product, or Other Protection Against Disclosure

[2] Error or Irregularity in Deposition Proceeding

[3] Competency, Relevancy, Materiality, or Admissibility of Matter Sought

[4] "Legal Contention" Questions or Requests for Demonstrations

§ 193.44 Adjournment of Deposition or Completion of Examination on Deponent's Failure to Answer Question or Produce Item

§ 193.45 Suspension of Deposition Pending Motion for Protective Order

§§ 193.46-193.49 [Reserved]

§ 193.50 Availability of Protective Orders

§ 193.51 Burden of Proof

[1] Generally on Moving Party

[2] Exception When Corporate Officer Defendant Is Deponent

[3] Ruling on Motion

§ 193.52 Types of Protective Orders

§§ 193.53-193.59 [Reserved]

§ 193.60 Order Compelling Compliance by Deponent

[1] On Failure of Party or Party-Affiliated Deponent to Appear, Proceed, or Produce Item

[2] On Failure of Deponent to Answer Question or Produce Item During Deposition

[3] Monetary Sanctions

§ 193.61 Order Imposing Sanctions

[1] Against Party Giving Notice for Failure to Proceed With Deposition or to Serve Subpoena

[2] Against Nonparty Deponent for Failure to Attend or Be Sworn

[3] Against Party Deponent or Deponent-Affiliated Party for Failure to Obey Order Compelling Compliance

§§ 193.62-193.69 [Reserved]

§ 193.70 Transcript of Deposition Testimony

§ 193.71 Stenographic Transcript Is Official Record

§ 193.72 Notice of Availability of Transcript or Tape Recording

§ 193.73 Change of Transcript or Recording by Deponent

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[2] Deliver Notice and Questions to Deposition Officer

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§ 193.220 Proceedings by Plaintiff for Leave to Serve Deposition Notice Earlier Than 20 Days After Service of Summons or Appearance by Any Defendant [Code Civ. Proc. § 2025.210(b)] and to Shorten Time for Scheduling Deposition [Code Civ. Proc. § 2025.270]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Notice of Motion

[4] Cross References

§ 193.221 Proceedings by Plaintiff for Leave to Serve Deposition Notice Earlier Than 20 Days After Service of Summons or Appearance by Any Defendant [Code Civ. Proc. § 2025.210(b)] and to Shorten Time for Scheduling Deposition [Code Civ. Proc. § 2025.270]--Application for Ex Parte Orders

[1] FORM

[2] Use of Form

[3] Ex Parte Application

[a] Notice Requirements

[b] Form and Content Requirements

[c] Service Requirements

[d] Presenting Application to Judge

§ 193.222 Proceedings by Plaintiff for Leave to Serve Deposition Notice Earlier Than 20 Days After Service of Summons or Appearance by Any Defendant [Code Civ. Proc. § 2025.210(b)] and to Shorten Time for Scheduling Deposition [Code Civ. Proc. § 2025.270]--Order

[1] FORM

[2] Use of Form

§ 193.223 Proceedings to Take Deposition of Party or Party-Affiliated Deponent at Place More Distant Than That Permitted Under Code Civ. Proc. § 2025.250(a) [Code Civ. Proc. § 2025.260]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Notice

[4] Court's Exercise of Discretion to Grant or Deny Motion

[5] Order Conditioned on Advancement of Expenses and Costs

[6] Monetary Sanctions

§ 193.224 Proceedings to Take Deposition of Party or Party-Affiliated Deponent at Place More Distant Than That Permitted Under Code Civ. Proc. § 2025.250(a) [Code Civ. Proc. § 2025.260]--Order

[1] FORM

[2] Use of Form

§ 193.225 Notice of Taking Deposition on Oral Examination [Code Civ. Proc. §§ 2025.220-2025.240]

[1] FORM

[2] Use of Form

[3] Contents of Deposition Notice

[4] Scheduled Date of Deposition

[5] Service of Notice and Copy of Deposition Subpoena

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[1] FORM

[2] Use of Form

[3] Deposition Subpoena

[a] Issuance

[b] Contents: Deposition Subpoena Commanding Only Attendance and Testimony

[c] Service

[d] Witness Fees

[e] Location of Deposition

§ 193.227 Deposition Subpoena for Personal Appearance and Production of Documents and Things [Code Civ. Proc. §§ 2020.020-2020.510]--Cal. Judicial Council Form SUBP-020]

[1] FORM

[2] Use of Form

[3] Deposition Subpoena

[a] Issuance

[b] Contents: Deposition Subpoena Commanding Appearance and Production of Documents or Things

[c] Subpoena for Production of Consumer or Employee Records

[d] Service

[e] Witness Fees

[f] Location of Deposition

§ 193.228 Deposition Subpoena for Production of Business Records [Code Civ. Proc. §§ 2020.410-2020.440]--Cal. Judicial Council Form SUBP-010]

[1] FORM

[2] Use of Form

[3] Deposition Subpoena for Copying Business Records

[a] Contents

[b] Accompanying Papers

[c] Service

[d] Fees

§ 193.229 Written Objection to Errors and Irregularities in Deposition Notice [Code Civ. Proc. § 2025.410]

[1] FORM

[2] Use of Form

[3] Service of Objection

§ 193.230 Proceedings to Stay Deposition and Quash Deposition Notice [Code Civ. Proc. § 2025.410]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Notice

[4] Monetary Sanctions

§ 193.231 Proceedings to Stay Deposition and Quash Deposition Notice [Code Civ. Proc. § 2025.410]--Order

[1] FORM

[2] Use of Form

§ 193.232 Proceedings to Obtain Protective Order [Code Civ. Proc. § 2025.420]--Application for Ex Parte Order and Order Staying Deposition Until Determination of Motion [Code Civ. Proc. § 2025.270]

[1] FORM

[2] Use of Form

§ 193.233 Proceedings to Obtain Protective Order [Code Civ. Proc. § 2025.420]--General Form of Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Notice

[4] Monetary Sanctions

[5] Court's Discretion to Order That Which Justice Requires

§ 193.234 Proceedings to Obtain Protective Order [Code Civ. Proc. § 2025.420]--Clauses to Be Used in Notice of Motion

[1] FORM

[2] Use of Form

§ 193.235 Proceedings to Obtain Protective Order [Code Civ. Proc. § 2025.420]--Order

[1] FORM

[2] Use of Form

§ 193.236 Proceedings to Obtain Protective Order Terminating or Limiting Deposition in Progress [Code Civ. Proc. § 2025.470]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Notice

[4] Monetary Sanctions

[5] Transcript

§ 193.237 Proceedings to Obtain Protective Order Terminating or Limiting Deposition in Progress [Code Civ. Proc. § 2025.470]--Order

[1] FORM

[2] Use of Form

§ 193.238 Proceedings to Compel Party or Party-Affiliated Deponent to Attend and Testify at Deposition and to Produce Document or Thing [Code Civ. Proc. § 2025.450]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Separate Statement

[4] Notice

[5] Monetary Sanctions

§ 193.239 Proceedings to Compel Party or Party-Affiliated Deponent to Attend and Testify at Deposition and to Produce Document or Thing [Code Civ. Proc. § 2025.450]--Separate Statement [Cal. Rules of Ct., Rule 3.1345]

[1] FORM

[2] Use of Form

[3] Contents of Separate Statement

§ 193.240 Proceedings to Compel Party or Party-Affiliated Deponent to Attend and Testify at Deposition and to Produce Document or Thing [Code Civ. Proc. § 2025.450]--Order

[1] FORM

[2] Use of Form

§ 193.241 Proceedings to Compel Deponent to Answer Deposition Questions and to Produce Document or Thing [Code Civ. Proc. § 2025.480]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Separate Statement

[4] Notice

[5] Lodging Transcript With Court

[6] Monetary Sanctions

§ 193.242 Proceedings to Compel Deponent to Answer Deposition Questions and to Produce Document or Thing [Code Civ. Proc. § 2025.480]--Separate Statement [Cal. Rules of Ct., Rule 3.1345]

[1] FORM

[2] Use of Form

[3] Contents of Separate Statement

§ 193.243 Proceedings to Compel Deponent to Answer Deposition Questions and to Produce Document or Thing [Code Civ. Proc. § 2025.480]--Order

[1] FORM

[2] Use of Form

§ 193.244 Proceedings to Impose Monetary Sanction Against Party Noticing Deposition for Failure to Attend [Code Civ. Proc. § 2025.430] or Failure to Subpoena Deponent [Code Civ. Proc. § 2025.440]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Notice

§ 193.245 Proceedings to Impose Monetary Sanction Against Party Noticing Deposition for Failure to Attend [Code Civ. Proc. § 2025.430] or Failure to Subpoena Deponent [Code Civ. Proc. § 2025.440]--Order

[1] FORM

[2] Use of Form

§ 193.246 Proceedings for Order Suppressing Deposition [Code Civ. Proc. § 2025.520(g) or 2025.530(e)]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Notice

[4] Monetary Sanctions

§ 193.247 Proceedings for Order Suppressing Deposition [Code Civ. Proc. § 2025.520(g) or 2025.530(e)]--Order

[1] FORM

[2] Use of Form

§ 193.248 Proceedings for Order Granting Leave to Take Subsequent Deposition of Natural Person [Code Civ. Proc. § 2025.610]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

§ 193.249 Proceedings for Order Granting Leave to Take Subsequent Deposition of Natural Person [Code Civ. Proc. § 2025.610]--Order

[1] FORM

[2] Use of Form

§ 193.250 Proceedings for Order to Allow Nonparty Deponent to Appear by Telephone [Code Civ. Proc. § 2025.310]

[1] FORM

[2] Use of Form

§ 193.251 Order Allowing Nonparty Deposition to Proceed by Telephone [Code Civ. Proc. § 2025.310]

[1] FORM

[2] Use of Form

§§ 193.252-193.259 [Reserved]

§ 193.260 Deposition by Written Questions [Code Civ. Proc. §§ 2028.010-2028.080]--Notice of Deposition [Code Civ. Proc. §§ 2025.220-2025.240, 2028.020]

[1] FORM

[2] Use of Form

§ 193.261 Deposition by Written Questions [Code Civ. Proc. § 2028.010-2028.080]--Written Questions to Be

Propounded on Direct, Cross, Redirect, or Recross Examination [Code Civ. Proc. § 2028.030]

[1] FORM

[2] Use of Form

§ 193.262 Deposition by Written Questions [Code Civ. Proc. §§ 2028.010-2028.080]--Objections to Written Questions [Code Civ. Proc. §§ 2028.040, 2028.050]

[1] FORM

[2] Use of Form

§ 193.263 Deposition by Written Questions [Code Civ. Proc. §§ 2028.010-2028.080]--Proceedings for Order Sustaining or Overruling Objections to Written Questions [Code Civ. Proc. §§ 2028.040, 2028.050]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Notice

[4] Monetary Sanctions

§ 193.264 Deposition by Written Questions [Code Civ. Proc. §§ 2028.010-2028.080]--Proceedings for Order Sustaining or Overruling Objections to Written Questions [Code Civ. Proc. §§ 2028.040, 2028.050]--Order

[1] FORM

[2] Use of Form

§ 193.265 Deposition by Written Questions [Code Civ. Proc. §§ 2028.010-2028.080]--Proceedings for Protective Order [Code Civ. Proc. §§ 2025.420, 2028.070]--Clauses to Be Used in Notice of Motion [Code Civ. Proc. § 2028.070]

[1] FORM

[2] Use of Form

§§ 193.266-193.269 [Reserved]

§ 193.270 Proceedings for Issuance of Commission, Letters Rogatory, or Letter of Request to Take Deposition Outside of California [Code Civ. Proc. §§ 2026.010(f), 2027.010(e)]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

§ 193.271 Proceedings for Issuance of Commission, Letters Rogatory, or Letter of Request to Take Deposition Outside of California [Code Civ. Proc. §§ 2026.010(f), 2027.010(e)]--Order

[1] FORM

[2] Use of Form

§ 193.272 Commission to Take Deposition Outside California--Cal. Judicial Council Form DISC-030 [Code Civ. Proc. § 2026.010(f)]

[1] FORM

[2] Use of Form

[3] Issuance by Court

§ 193.273 Proceedings for Issuance of Commission, Letters Rogatory, or Letter of Request to Take Deposition Outside of California [Code Civ. Proc. § 2027.010(e)]--Letters Rogatory

[1] FORM

[2] Use of Form

§ 193.274 Proceedings for Issuance of Commission, Letters Rogatory, or Letter of Request to Take Deposition Outside of California [Code Civ. Proc. § 2027.010(e)]--Letter of Request [Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 UST 2555, TIAS No. 7444]

[1] FORM

[2] Use of Form

§§ 193.275-193.279 [Reserved]

§ 193.280 Application for Discovery Subpoena in Action Pending Outside California [Code Civ. Proc. § 2029.100 et seq.; Cal. Judicial Council Form SUBP-030]

[1] FORM

[2] Use of Form

[3] Procedure for Obtaining Subpoena

§ 193.281 Deposition Subpoena for Personal Appearance in Action Pending Outside California [Code Civ. Proc. § 2029.100 et seq.; Cal. Judicial Council Form SUBP-040]

[1] FORM

[2] Use of Form

[3] Procedure for Obtaining Subpoena

[4] Subpoena Form and Contents

[5] Party Not Required to Retain Local Attorney

[6] Service of Subpoena

[7] Witness Fees

§ 193.282 Deposition Subpoena for Personal Appearance and Production of Documents and Things in Action Pending Outside California [Code Civ. Proc. § 2029.100 et seq.; Cal. Judicial Council Form SUBP-045]

[1] FORM

[2] Use of Form

[3] Affidavit Supporting Subpoena Duces Tecum

§§ 193.283-193.289 [Reserved]

§ 193.290 Proceedings for Order Authorizing Deposition of Prisoner [Code Civ. Proc. §§ 1995, 1996; Penal Code § 2623]--Notice of Motion

[1] FORM

[2] Use of Form

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Chapter 193 DISCOVERY: DEPOSITIONS
PART I. SCOPE

16-193 California Forms of Pleading and Practice--Annotated § 193.01

§ 193.01 Scope of Chapter

This chapter covers discovery under the Civil Discovery Act using the discovery methods of oral deposition and deposition by written questions.

Part II includes discussion of deposition proceedings in the following subparts:

- Subpart A [*see § 193.10* et seq.] covers oral depositions. This subpart includes coverage of the requirements relating to notice, time, and place of a deposition [*see § 193.20* et seq.], deposition subpoenas [*see § 193.30* et seq.], conduct of the depositions [*see § 193.40* et seq.], motions for a protective order [*see § 193.50* et seq.] or order compelling compliance [*see § 193.60* et seq.], recording, transcribing, and certifying a deposition [*see § 193.70* et seq.], and using a deposition at trial [*see § 193.90* et seq.].

- Subpart B [*see § 193.100* et seq.] covers depositions by written questions.

- Subpart C [*see § 193.120* et seq.] covers the taking of depositions in a foreign state or nation.

- Subpart D [*see § 193.130* et seq.] covers proceedings to take a deposition in California, when the deposition relates to an action pending outside California.

- Subpart E [*see § 193.140* et seq.] covers special requirements applicable to the taking of a prisoner's deposition.

The procedural checklists in Part IV include the following:

- Subpart A includes checklists for oral deposition proceedings, for the party taking a deposition [*see § 193.170* et seq.] and for the deponent or a party opposing discovery [*see § 193.180* et seq.].

- Subpart B includes checklists for use by a party taking a deposition on written questions [*see §*

193.190 et seq.], and a party or other person responding to a notice of deposition on written questions [*see § 193.200* et seq.].

- Subpart C includes checklists for use by a party to a proceeding pending in a foreign jurisdiction when seeking to depose a person within California [*see § 193.210* et seq.].

The forms in Part V include the following:

- Subpart A includes forms for obtaining orders permitting a plaintiff to take a deposition at an earlier time than is permitted without a court order [*see § 193.220* et seq.], forms for obtaining an order permitting a deposition to be taken at a place more distant from the deponent's residence than that permitted without leave of court [*see § 193.223*et seq.], a form for a deposition notice [*see § 193.225*], forms for deposition subpoenas [*see § 193.226* et seq.], a form for written objection to a deposition notice [*see § 193.229*], forms for obtaining an order to quash a deposition notice [*see § 193.230* et seq.], forms for obtaining protective orders [*see § 193.232* et seq.], forms for obtaining an order compelling compliance with deposition notice or subpoena [*see § 193.238* et seq.], forms for obtaining a monetary sanction for a deposition proponent's failure to attend or to serve the deponent with a deposition subpoena [*see § 193.244* et seq.], forms for obtaining an order suppressing a deposition [*see § 193.246* et seq.], and forms for obtaining an order granting leave to take a subsequent deposition [*see § 193.248* et seq.].

- Subpart B includes a form for notice of a written deposition [*see § 193.260*], forms to be used for propounding direct, cross, redirect, or recross written questions [*see § 193.261*], a form for objecting to written questions [*see § 193.262*], forms to be used in proceedings for obtaining an order sustaining or overruling an objection to a written question [*see § 193.263* et seq.], and a form containing clauses to be included in a motion for a protective order concerning a written deposition [*see § 193.265*].

- Subpart C includes forms to be used in proceedings to take a deposition in another state or nation: forms for obtaining issuance of a commission or letters rogatory or letter of request [*see § 193.270* et seq.], a form for a commission and instructions to the Commissioner [*see § 193.272*], a form for letters rogatory [*see § 193.273*], and a form for a letter of request [*see § 193.274*].

- Subpart D includes forms to be used in actions pending outside California relating to discovery subpoenas, include an application to request a discovery subpoena, a discovery subpoena for personal appearance only, and a discovery subpoena for personal appearance and production of documents and things [*see §§ 193.280 -193.282*].

- Subpart E includes a form for a motion to be used in proceedings for obtaining an order authorizing the deposition of a prisoner [*see § 193.290*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsWritten Depositions

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16-193 California Forms of Pleading and Practice--Annotated § 193.02

§ 193.02 Cross References

[1] Related Discovery Chapters

For discussion and forms relating to the general purpose, scope, regulation, and timing of civil discovery, see Ch. 190, *Discovery: Scope, Regulation, and Timing* .

For detailed discussion of evidentiary privileges and other statutory or constitutional protections against disclosure, see Ch. 191, *Discovery: Privileges and Other Discovery Limitations* .

For discussion and forms relating to discovery sanctions generally, see Ch. 192, *Discovery: Sanctions for Discovery Misuse* .

For detailed discussion of discovery of electronically stored evidence (e-discovery), see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*.

For discussion and forms relating to the use of other particular discovery methods authorized by the Civil Discovery Act, see the following chapters covering each method:

- Ch. 194, *Discovery: Interrogatories*.
- Ch. 195, *Discovery: Inspection of Tangible Evidence*.
- Ch. 196, *Discovery: Requests for Admissions*.
- Ch. 197, *Discovery: Physical and Mental Examinations*.
- Ch. 198, *Discovery: Exchange of Expert Witness Information*.

For discussion and forms relating to the use of specified discovery methods for the purpose of preserving testimony or

other evidence prior to the commencement of an action or pending an appeal, see Ch. 199, *Discovery: Preservation of Evidence* .

For discussion and forms relating to the review of interlocutory discovery orders in certain circumstances by petition for writ of mandate or prohibition, see Ch. 200, *Discovery: Review of Discovery Orders* .

[2] Other Related Chapters

For discussion and forms relating to subpoenas and subpoena duces tecum generally, see Ch. 535, *Subpoena* .

For discussion of and general forms relating to law and motion procedures generally, see Ch. 372, *Motions and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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[Reserved]

§§ 193.03[Reserved]

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Chapter 193 DISCOVERY: DEPOSITIONS
PART II. LEGAL BACKGROUND
A. Oral Depositions
1. General Provisions

16-193 California Forms of Pleading and Practice--Annotated § 193.10

§ 193.10 Governing Law

Oral depositions taken in California for use in a state civil action are governed by *Code Civ. Proc. §§ 2025.010-2025.620*. In addition, oral depositions are subject to the general provisions of *Code Civ. Proc. §§ 2016.010-2019.030, 2023.010-2024.060* (scope, limitations, regulation, timing, and other provisions governing discovery generally).

The extent of discovery permitted under the Civil Discovery Act is restricted in limited civil cases by the Economic Litigation provisions of *Code Civ. Proc. §§ 94* and *95*. The use of depositions in such cases is limited specifically by *Code Civ. Proc. § 94(b)*. For further discussion, see *Ch. 190, Discovery: Scope, Regulation, and Timing, §§ 190.11[2], 190.23[2][b]*.

Deposition subpoenas are governed by *Code Civ. Proc. § 2020.010 et seq.* Deposition subpoenas in actions pending outside California are governed by the Interstate and International Depositions and Discovery Act [*Code Civ. Proc. § 2029.100 et seq.*; *see Code Civ. Proc. § 2029.500*]. The provisions governing subpoenas generally, *Code Civ. Proc. §§ 1985-1997* and *Evid. Code §§ 1560-1566*, apply to deposition subpoenas to the extent that these provisions are not superseded by more specific provisions in *Code Civ. Proc. § 2020.010 et seq.*

Statewide rule provisions relating to the format and content of discovery papers and motions, the service of discovery papers on nonparty deponents, and discovery sanctions, are set out in *Cal. Rules of Ct., Rules 3.1000, 3.1345, 3.1346, 3.1347, 3.1348*, and *3.768*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedurePretrial MattersSubpoenasCriminal Law & ProcedureDiscovery & InspectionDiscovery MisconductGeneral Overview

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16-193 California Forms of Pleading and Practice--Annotated § 193.11

§ 193.11 General Scope and Availability of Discovery by Oral Deposition

Discovery by oral deposition must be within the scope delimited by *Code Civ. Proc. § 2017.010 et seq.*, and is subject to the restrictions set forth in *Code Civ. Proc. § 2019.010 et seq.* [*Code Civ. Proc. § 2025.010*]. For discussion concerning the general scope and restrictions on discovery under *Code Civ. Proc. §§ 2017.010 et seq.* and *2019.010 et seq.*, see *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.20 et seq. and § 190.30* et seq.

Discovery by oral deposition is available to any party, and may be taken of "any person," including any party to the action. The person deposed may be a natural person, an organization such as a public or private corporation, a partnership, an association, or a governmental agency [*Code Civ. Proc. § 2025.010*]. When a party deposes a person who is an expert witness designated under *Code Civ. Proc. § 2034.010 et seq.*, special rules apply [*see Code Civ. Proc. §§ 2034.410-2034.470*, discussed in Ch. 198, *Discovery: Exchange of Expert Witness Information*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsOral Depositions

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16-193 California Forms of Pleading and Practice--Annotated § 193.12

§ 193.12 Subsequent Deposition of Natural Person Limited

Generally, once any party has taken the deposition of any natural person, including that of a party to the action, neither the party who gave nor any other party who received notice of the deposition may take a subsequent deposition of that deponent without leave of court [*Code Civ. Proc. § 2025.610*; for discussion concerning notice of deposition, *see § 193.21*]. However, this rule does not apply to the subsequent deposition of a natural person whose previous deposition was due to his or her designation to testify on behalf of a nonnatural deponent under *Code Civ. Proc. § 2025.230*. In addition, one subsequent deposition may be taken, pursuant to a court order under *Code Civ. Proc. § 485.230*, for the limited purpose of discovering, under *Code Civ. Proc. § 485.230*, the identity, location, and value of property in which the deponent has an interest [*Code Civ. Proc. § 2025.610(c)(2)*; *see* discussion in *§ 193.21[3][b]*].

PRACTICE TIP:

Subsequent Deposition by Later Appearing Party. The limit of subsequent depositions under *Code Civ. Proc. § 2025.610* applies only to the party taking the deposition and parties receiving notice of the deposition. Notice of the deposition, in turn, is required to be given to other parties who have appeared in the action [*Code Civ. Proc. § 2025.240(a)*; *see § 193.21*]. A party making a late appearance in the action is therefore not precluded from deposing a natural person whose previous deposition was noticed *before* that party's appearance.

The court may grant leave to take a subsequent deposition of a natural person for good cause shown [*Code Civ. Proc. § 2025.610(b)*]. Good cause might include, for example, a showing that the previous deposition was taken before the existence of the fact that the party now seeks to examine [*see Carlson v. Superior Court (1961) 56 Cal. 2d 431, 439, 15 Cal. Rptr. 132, 364 P.2d 308* (under prior law, fact that prior deposition had been taken was not valid ground for protective order precluding oral examination on issue of fact not previously existing)]. For forms for use in obtaining an order permitting a subsequent deposition, see *§§ 193.248, 193.249*.

Additionally, the parties, with the consent of any deponent who is not a party, may stipulate that a subsequent deposition be taken [*Code Civ. Proc. § 2025.610(b)*; *see also* discussion in *§ 193.14*].

Legal Topics:

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

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16-193 California Forms of Pleading and Practice--Annotated § 193.13

§ 193.13 Limits on Deposition of Opposing Counsel

The practice of taking the deposition of opposing counsel is severely restricted and permitted only on a showing of extremely good cause [*Fireman's Fund Ins. Co. v. Superior Court (1977) 72 Cal. App. 3d 786, 790, 140 Cal. Rptr. 677* ; *Trade Center Properties, Inc. v. Superior Court (1960) 185 Cal. App. 2d 409, 411, 8 Cal. Rptr. 345]* . The circumstances under which opposing counsel may be deposed are limited to those when (1) no other means exist to obtain the information than to depose opposing counsel, (2) the information sought is relevant and not privileged, and (3) the information is crucial to the preparation of the case [*Estate of Ruchti (1993) 12 Cal. App. 4th 1593, 1600-1601, 16 Cal. Rptr. 2d 151* ; *Spectra-Physics, Inc. v. Superior Court (1988) 198 Cal. App. 3d 1487, 1496, 244 Cal. Rptr. 258]* .

Legal Topics:

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

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16-193 California Forms of Pleading and Practice--Annotated § 193.14

§ 193.14 Modification of Deposition Procedures by Stipulation

The requirements of the Discovery Act discussed in this Subpart, concerning the person before whom a deposition may be taken, the time and place it may be taken, and the manner in which it may be taken, may be modified by written stipulation of the parties [*Code Civ. Proc. § 2016.030*]. For further discussion of the use of stipulations to modify discovery procedures generally, see *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.35*. For discussion and forms relating to stipulations generally, see Ch. 533, *Stipulations* .

Legal Topics:

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

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[Reserved]

§§ 193.15[Reserved]

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16-193 California Forms of Pleading and Practice--Annotated § 193.20

§ 193.20 Time Requirements

[1] Initiating Discovery by Oral Deposition

Subject to *Code Civ. Proc. §§ 2025.270* and *2025.610*, the parties may take an oral deposition as follows [*Code Civ. Proc. § 2025.210*]:

- A defendant may serve a deposition notice without leave of court at any time after that defendant has been served or has appeared in the action, whichever occurs first [*Code Civ. Proc. § 2025.210(a)*].

- A plaintiff may serve a deposition notice without leave of court on any date that is 20 days after the service of the summons on, or appearance by, any defendant [*Code Civ. Proc. § 2025.210(b)*].

Use of the term "any defendant" suggests that service on or appearance by any one defendant is sufficient to start this 20-day period, even if plaintiff is noticing either a deposition of another defendant who has not been served or who has not appeared more than 20 days prior to the dateon which service of the notice of deposition is desired, or a deposition of a nonparty [*see Code Civ. Proc. § 2025.210(b)*; *see also Waters v. Superior Court (1962) 58 Cal. 2d 885, 892, 27 Cal. Rptr. 153, 377 P.2d 265* (decided under former *Code Civ. Proc. § 2016*)].

On motion with or without notice, the court, for good cause shown, may grant leave to a plaintiff to serve a deposition notice on an earlier date [*Code Civ. Proc. § 2025.210(b)*; *see* the procedural checklist *set out in § 193.170[3]*, and the forms *set out in § 193.220* et seq.].

"Good cause" for leave to serve a deposition notice before a defendant has been served or has appeared may well be lacking when the plaintiff's purpose in taking the deposition is merely to initiate a "fishing expedition" to find potential defendants [*see* Pearlson v. Does 1 to 646 *(1999) 76 Cal. App. 4th 1005, 1011-1012, 90 Cal. Rptr. 2d 787* (plaintiff failed to show good cause under *Code Civ. Proc. § 2025.210(b)* to conduct discovery on unnamed third parties, for purpose of learning identity of unnamed defendants in complaint, when plaintiff failed to identify any particular

defendant or subset of viable defendants or to demonstrate that requested discovery was anything other than fishing expedition; court not only denied leave but properly dismissed action under *Code Civ. Proc. § 583.150*)].

For discussion of *Code Civ. Proc. §§ 2025.270* and *2025.610*, see respectively [2], *below*, and § 193.12.

[2] Scheduling Oral Deposition

An oral deposition generally must be scheduled for a date at least 10 days after service of the deposition notice [*Code Civ. Proc. § 2025.270(a)*], with the following exceptions:

- In an unlawful detainer action or other proceeding under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), an oral deposition must be scheduled for a date at least five days after service of the deposition notice, but not later than five days before trial [*Code Civ. Proc. § 2025.270(b)*].

- Second, if the party giving notice is the subpoenaing party [*see Code Civ. Proc. §§ 1985.3, 1985.6* (applicable definitions)], and the deponent is a witness commanded to produce a consumer's personal records or an employee's employment records, the deposition must be scheduled for at least 20 days

after issuance of that subpoena [*Code Civ. Proc. § 2025.270(a)*; *see* discussion in *§ 193.21[2]* and general discussion and forms relating to the production of a consumer's personal records under *Code Civ. Proc. § 1985.3* in Ch. 535, *Subpoena*].

When the deposition notice is served by mail, the minimum scheduling periods set out above are extended by five calendar days, upon service by mail, if the place of address and the place of mailing is within the state of California, 10 calendar days if either the place of mailing or the place of address is outside the state of California but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States [*Code Civ. Proc. § 2016.050* (incorporating by reference provisions of *Code Civ. Proc. § 1013(a)*)].

On motion or ex parte application of any party or deponent, for good cause shown, the court may shorten or extend the time for scheduling a deposition [*Code Civ. Proc. § 2025.270(d)*; *see § 193.220* et seq.]. For discussion and forms relating to shortening and extending time periods generally, see Ch. 524, *Shortening and Extension of Time* .

For discussion and forms relating to the general time requirements for completing discovery under *Code Civ. Proc. § 2024.010 et seq.*, see *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.50* et seq.

Legal Topics:

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

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§ 193.21 Notice Requirements

[1] General Requirements

A party desiring to take the oral deposition of any person must give written notice to every other party who has appeared in the action. However, when, under *Code Civ. Proc. §§ 2020.410-2020.440*, only the production by a nonparty of business records for copying is desired, a copy of the deposition subpoena serves as the notice of deposition [*Code Civ. Proc. § 2025.240*]. For a discussion of the process by which a nonparty is required only to produce business records for copying, see *§ 193.31*.

The notice must include the time and place of the deposition, information identifying the deponent and any material to be produced by the deponent, and any other information required under *Code Civ. Proc. § 2025.220* [*see Code Civ. Proc. §§ 2025.220-2025.240*]. The notice, or the accompanying proof of service, must also include a list of all the parties or attorneys for parties on whom it is served [*Code Civ. Proc. § 2025.240(a)*]. For further discussion of *Code Civ. Proc. §§ 2025.220-2025.240* and a form for a deposition notice, see *§ 193.225*.

[2] Special Requirements When Subpoenaing Consumer or Employee Records

If the party giving notice is the subpoenaing party [*see Code Civ. Proc. §§ 1985.3, 1985.6* (applicable definitions)], and the deponent is a witness commanded by a deposition subpoena to produce personal records of a consumer or employment records of an employee, the subpoenaing party is required to serve on that consumer or employee (1) a notice of the deposition, (2) a notice of privacy rights specified in *Code Civ. Proc. § 1985.3(e)*, or *Code Civ. Proc. § 1985.6(e)*, and *(3)* a copy of the deposition subpoena (discussed in *§ 193.31*) [*Code Civ. Proc. § 2025.240(b)*; for discussion and a form of notice of privacy rights under *Code Civ. Proc. § 1985.3(e)* (personal records) and *Code Civ. Proc. § 1985.6* (employment records), *see* Ch. 535, *Subpoena*].

[3] Effect of Deposition Notice

[a] Duty of Party Deponent to Attend

Service of the deposition notice under *Code Civ. Proc. § 2025.220* is effective to require any deponent who is a party to the action or who is an officer, director, managing agent, or employee of a party to attend and testify at the deposition, as well as to produce any document or tangible thing for inspection and copying [*Code Civ. Proc. § 2025.280(a)*; *see also Waters v. Superior Court (1962) 58 Cal. 2d 885, 895-896, 27 Cal. Rptr. 153, 377 P.2d 265* (subpoena need not also be served; "managing agent" under prior law construed to be person who may exercise judgment and discretion in dealing with corporate matters, and who can be expected to comply with employer's directive to appear for pretrial examination and to identify self with interests of corporation)].

In a case construing *Code Civ. Proc. § 2025.280(a)* in the context of deposition notices served on the state of California to obtain documents and witnesses from nonparty state agencies, the court of appeal held that to obtain documents and witnesses from state agencies, other than documents reflecting an agency's investigation related to the litigation, the party seeking discovery is required to serve subpoenas directly on the agencies that have the information they seek. The court reasoned that service on the state was insufficient, because a nonparty state agency could not be considered an "officer, director, managing agent, or employee" of the state by prosecuting an action [*People ex rel. Lockyer v. Superior Court (2004) 122 Cal. App. 4th 1060, 1076-1077, 19 Cal. Rptr. 3d 324]* . For discussion of the process by which a nonparty deponent is required to attend, see *§ 193.30* et seq.

[b] Duty of Nonnatural Deponent to Designate Agent

If the deponent named is not a natural person, the deposition notice must describe with reasonable particularity the matters on which examination is requested. The deponent must then designate and produce at the deposition those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to those matters to the extent of any information known or reasonably available to the deponent [*Code Civ. Proc. § 2025.230*]. Thus, a party seeking discovery may name an organization as the deponent when he or she wishes to obtain testimony concerning matters known by someone connected with a public or private corporation, a partnership, an association, or a governmental agency, but does not know who the particular person is or has no preference as to who testifies.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedurePretrial MattersSubpoenas

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16-193 California Forms of Pleading and Practice--Annotated § 193.22

§ 193.22 Place Requirements

[1] When Deponent Is Natural Person

When the deponent is a natural person, whether or not a party to the action, his or her deposition must be taken at a place that is, at the option of the party seeking discovery, either within 75 miles of the deponent's residence, or within the forum county and within 150 miles of the deponent's residence, unless the court orders otherwise under *Code Civ. Proc. § 2025.260* [*Code Civ. Proc. § 2025.250(a)*].

Under *Code Civ. Proc. § 2025.260*, the party seeking discovery may move for an order that the deposition be taken at a place that is more distant than that permitted under *Code Civ. Proc. § 2025.250(a)*, if the deponent is a natural person who is a party to the action or who is an officer, director, managing agent, or employee of a party. For further discussion and a form for a motion under *Code Civ. Proc. § 2025.260*, see *§ 193.223*.

[2] When Deponent Is Organization

When the deponent is an organization that is a party to the action, the deposition must be taken at a place that is, at the option of the party seeking discovery, either within 75 miles of the organization's principal executive or business office in California, or in the forum county and within 150 miles of that office [*Code Civ. Proc. § 2025.250(b)*].

When the deponent is an organization that is not a party, the deposition must be taken within 75 miles of the organization's principal executive or business office in California, unless the organization consents to a more distant place [*Code Civ. Proc. § 2025.250(c)*].

If a deponent organization has not designated a principal executive or business office in California, the deposition must be taken at a place that is, at the option of the party seeking discovery, either within the forum county, or within 75 miles of any executive or business office of the organization in California [*Code Civ. Proc. § 2025.250(d)*].

[3] Deposition by Telephone, Videoconference or Remote Electronic Means

A person may take, and any person other than the deponent may attend, a deposition by telephone, videoconference, or other remote electronic means [*Code Civ. Proc. § 2025.310(a)*; *Cal. Rules of Ct., Rule 3.1010(c), (d)*]. Any party may *take* an oral deposition by telephone, videoconference or other remote electronic means, provided [*Cal. Rules of Ct., Rule 3.1010(a)*]:

- Notice is served with the notice of deposition or the subpoena.

- That party makes all arrangements for any other party to participate in thedeposition in an equivalent manner. However, each party soappearing must pay all expenses incurred by it or properly allocated to it.

- Any party may be personally present at the deposition without giving prior notice.

Any party (other than the deponent) may *appear* and participate in an oral deposition by telephone, videoconference, or other remote electronic means, provided [*Cal. Rules of Ct., Rule 3.100(b)*; *see Code Civ. Proc. § 2025.310(a)* (deponent must appear in person)]:

- Written notice of the appearance is served by personal delivery or fax at least three court days before the deposition.

- The party appearing by telephone, videoconference, or other electronic means makes all arrangements and pays all expenses incurred for the appearance.

The court may expressly provide that a nonparty deponent may appear at his or her deposition by telephone if it finds there is good cause and no prejudice to any party [*Code Civ. Proc. § 2025.310(b)*; *Cal. Rules of Ct., Rule 3.1010(d)*]. The nonparty deponent must be sworn in the presence of the deposition officer or by any other means stipulated to by the parties or ordered by the court. Any party may be personally present at the deposition [*Cal. Rules of Ct., Rule 3.1010(d)*]. A party deponent, however, must appear at his or her deposition in person and be in the presence of the deposition officer [*Code Civ. Proc. § 2025.310(b)*; *Cal. Rules of Ct., Rule 3.1010(c)*].

The court in a specific action may make other orders as appropriate to implement an appearance by telephone, videoconference or other remote electronic means [*Cal. Rules of Ct., Rule 3.1010(e)*; *see Code Civ. Proc. § 2025.310*].

The notice of intention to take an oral deposition by telephone, videoconference or other remote electronic means may not be filed with the court, unless offered as relevant under a law and motion proceeding or other hearing or ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(6)*]. Instead, the serving party retains the original and the proof of service until six months after final disposition of the cause, unless otherwise ordered by the court for cause [*Cal. Rules of Ct., Rule 3.250(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsStipulations

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16-193 California Forms of Pleading and Practice--Annotated § 193.23

§ 193.23 Opposing Deposition for Failure to Satisfy Time, Notice, and Place Requirements

Any party served with a deposition notice that does not comply with *Code Civ. Proc. §§ 2025.210-2025.270* (discussed in *§§ 193.20 -193.22*) may serve a written objection, specifying any error or irregularity, on the party seeking to take the deposition and on any other attorney or party on whom the deposition notice was served [*Code Civ. Proc. § 2025.410*]. For a form of written objection, see *§ 193.229*.

The objection must be served no less than three calendar days before the date on which the deposition is scheduled, or the party served with the deposition notice waives the error or irregularity [*Code Civ. Proc. § 2025.410(a)*; for further discussion of service requirements, *see § 193.229[3]*].

In addition to serving a written objection to the deposition notice, a party may also move for an order staying the taking of the deposition and quashing the deposition notice. The motion is required to be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by the motion. The taking of the deposition is stayed pending the determination of this motion [*Code Civ. Proc. § 2025.410(c)*]. For forms for use in obtaining an order quashing a deposition notice and staying the taking of the deposition, see *§§ 193.230, 193.231*.

The court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes a motion to quash a deposition notice, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust [*Code Civ. Proc. § 2025.410(d)*]. For further discussion of monetary sanctions under *Code Civ. Proc. § 2023.030*, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

Unless the objecting party moves for a stay of the deposition and to quash the deposition notice under *Code Civ. Proc. § 2025.410*, the deposition will proceed to take place [*see, e.g., Snyder v. Superior Court (1970) 9 Cal. App. 3d 579, 586, 89 Cal. Rptr. 534* (holding under prior law that objection is not substitute for protective order)]. Any party, however, who has timely served written objection to the notice of deposition may then raise the objection if an attempt

is made to use the deposition in court. If the objecting party did not attend the deposition, and if the court determines that the written objection was a valid one, the deposition shall not be used against the objecting party under *Code Civ. Proc. § 2025.620* [*Code Civ. Proc. § 2025.410(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral Depositions

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[Reserved]

§§ 193.24[Reserved]

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16-193 California Forms of Pleading and Practice--Annotated § 193.30

§ 193.30 Deposition Subpoena

[1] Required for Nonparty Deponent

Except as provided in *Code Civ. Proc. § 2025.280(a)*, the process by which anonparty is required to provide discovery is deposition subpoena [*Code Civ. Proc. § 2020.010 et seq.*]. Thus, to require the attendance and testimony of a nonparty deponent, as well as his or her production of any document or tangible thing for inspection and copying, the party seeking discovery must serve on that deponent a deposition subpoena under *Code Civ. Proc. § 2020.010 et seq.* [*Code Civ. Proc. § 2025.280(b)*]. For discussion of procedure under *Code Civ. Proc. § 2025.280(a)*, for requiring the attendance of nonparty who is an employee, agent, or officer of a party, see *§ 193.21[3][a]*].

In a case of first impression, one court of appeal considered whether defendant could demand, through requests for production of documents under *Code of Civil Procedure Section 2031.010 et seq.*, that the state produce items in the possession of state agencies that were not parties to the litigation. The court held that those discovery requests are not proper, unless the propounding party is requesting documents related to an investigation by that state agency related to the litigation at issue [*People ex rel. Lockyer v. Superior Court (2004) 122 Cal. App. 4th 1060, 1076-1077, 19 Cal. Rptr. 3d 324]* . The court also concluded that the state, merely by prosecuting an action, was not considered to have possession, custody, or control over documents of any state agency [*People ex rel. Lockyer v. Superior Court (2004) 122 Cal. App. 4th 1060, 1078, 19 Cal. Rptr. 3d 324]* . Accordingly, defendant was required to serve subpoenas directly on the state agencies to obtain their documents or witnesses [*People ex rel. Lockyer v. Superior Court (2004) 122 Cal. App. 4th 1060, 1078, 19 Cal. Rptr. 3d 324]* .

Personal service of any deposition subpoena is effective to require of any deponent who is a resident of California at the time of service (1) personal appearance and testimony, if the subpoena so specifies; (2) any specified production, inspection, testing, and sampling; and (3) the deponent's attendance at a court session to consider any issue arising out of the deponent's refusal to be sworn, to answer any question, to produce specified items, or to permit inspection or photocopying, if the subpoena so specifies, or specified testing and sampling of the items produced [*Code Civ. Proc. § 2020.220(c)*].

For illustrative forms of deposition subpoena adopted by the Judicial Council for mandatory use, together with related discussion concerning issuance, contents, service, and accompanying witness fees, see *§§ 193.226 -193.228*.

If the party giving notice of the deposition fails to serve a required subpoena on a nonparty deponent and, as a result, the deponent fails to appear for the deposition, any party who, in person or by attorney, attended the deposition at the specified time and place in the expectation that the deponent's testimony would be taken should seek the imposition of a monetary sanction under *Code Civ. Proc. § 2023.030(a)* against the noticing party or the attorney for that party, or both [*Code Civ. Proc. § 2025.440(a)*]. For a form of motion for imposition of sanctions under *Code Civ. Proc. § 2025.440*, see *§ 193.244*.

[2] Application of General Subpoena Provisions

Subpoenas requiring attendance at a civil trial or other court proceeding are governed generally by *Code Civ. Proc. §§ 1985-1997* and *Evid. Code § 1560 et seq.* These provisions also apply to a deposition subpoena requiring attendance at a deposition held pursuant to *Code Civ. Proc. § 2025.010 et seq., except* as modified by *Code Civ. Proc. § 2020.010 et seq.* [*Code Civ. Proc. § 2020.030*].

Discussion of deposition subpoenas in this subpart focuses on the specific provisions of *Code Civ. Proc. § 2020.010 et seq.* For detailed discussion of the more general provisions of *Code Civ. Proc. §§ 1985-1997* and *Evid. Code § 1560 et seq.*, see Ch. 535, *Subpoena* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedurePretrial MattersSubpoenas

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16-193 California Forms of Pleading and Practice--Annotated § 193.31

§ 193.31 Types of Deposition Subpoena

[1] For Personal Appearance Only, for Appearance and Production of Tangible Evidence, or for Production Only of Business Records

The deposition subpoena may command any of the following [*Code Civ. Proc. § 2020.020*]:

- Only the attendance and testimony of the deponent under *Code Civ. Proc. § 2020.310*.
- Only the production of business records for copying under *Code Civ. Proc. §§ 2020.410-2020.440*.
- Both the attendance and testimony of the deponent as well as the production of business records, other documents, and tangible things under *Code Civ. Proc. § 2020.510*.

For further discussion concerning the contents of a deposition subpoena required under *Code Civ. Proc. §§ 2020.310* or *2020.510*, see *respectively § 193.226[3][b]* and *§ 193.227[3][b]*. For further discussion concerning the contents of deposition subpoena required under *Code Civ. Proc. §§ 2020.410-2020.440*, see *§ 193.228[3][a]*. For further discussion relating to the copying of business records under *Code Civ. Proc. §§ 2020.410-2020.440*, see [2], *below*, and § 193.32. For discussion of special service requirements applicable if a deposition subpoena under *Code Civ. Proc. §§ 2020.410-2020.440* or *2020.510* commands the production of personal records of a consumer see [3], *below*.

[2] Business Records Defined

Code Civ. Proc. §§ 2020.410-2020.440, relating to the production only of business records for copying [*see* [1], *above*], do not define "business record." One court that had occasion to consider the matter stated that a "business record" means an item, collection, or grouping of information about a business entity. It does not include documents that constitute the product of a business entity [*Urban Pacific Equities Corp. v. Superior Court (1997) 59 Cal. App. 4th 688, 692-693, 69 Cal. Rptr. 2d 635]* .

Accordingly, a party could not utilize a deposition subpoena for business records in order to compel production of a deposition transcript that had been made by an employee of the reporter service that had been served with the subpoena [*Urban Pacific Equities Corp. v. Superior Court (1997) 59 Cal. App. 4th 688, 694, 69 Cal. Rptr. 2d 635* (noting that use of the subpoena in this circumstance was a "creative" but unfortunately improper, use by which the subpoenaing party sought to avoid paying clearly excessive copying fees charged by the reporter service)].

[3] Service of Subpoena Commanding Production of Consumer or Employee Records

If the subpoenaed individual or entity is a witness commanded to produce business records that are personal records pertaining to a consumer or employee, as defined under *Code Civ. Proc. § 1985.3* or Code Civ. Proc. § 1895.6, the service of the deposition subpoena must be accompanied by either one of the following [*Code Civ. Proc. §§ 2020.410(d), 2020.510*]:

- A copy of proof of service on the consumer or employee of the notice regarding his or her privacy rights required under *Code Civ. Proc. § 1985.3(e)* (consumer) or Code Civ. Proc. § 1895.6(b) (employee).

- The consumer's or employee's written authorization to release the personal records under *Code Civ. Proc. § 1985.3(c)(2)* (consumer), or Code Civ. Proc. § 1895.6(c)(2) (employee) [*see also Code Civ. Proc. § 1985.3(f)* (consumer's authorization only is sufficient in the case of telephone records)].

The language of *Code Civ. Proc. § 2020.410(d)* refers only to the "personal records pertaining to a consumer," and to the necessity of showing, when serving the subpoena, either proof of service of notice to the "consumer" or that "consumer's" authorization to release records. This provision was, however, amended in 1999 to refer not only to the requirements of Code Civ. Proc. § 1895.3 (personal records of consumer), but also to those of Code Civ. Proc. § 1895.6, which impose almost identical requirements relating to the employment records of an employee when a subpoena seeks their production from an employer. *Code Civ. Proc. § 2020.410(d)* should therefore be read, as indicated above, to provide that, when a deposition subpoena is directed to a witness seeking the production of "employment records" maintained by that witness (as defined in *Code Civ. Proc. § 1985.6(a)*), the service of that subpoena must be accompanied by proof of service of notice to the employee whose records are sought, described in *Code Civ. Proc. § 1985.6(b)*, or by the employee's written authorization to release the records, as described in *Code Civ. Proc. § 1985.6(c)(2)*.

For further discussion and forms relating to subpoenas requesting personal consumer or employee records, see Ch. 535, *Subpoena* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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16-193 California Forms of Pleading and Practice--Annotated § 193.32

§ 193.32 Special Requirements for Copying Business Records

[1] Qualifications of Deposition Officer

The officer for a deposition at which only business records are to be copied, that is, a deposition for which a subpoena has been issued in accordance with *Code Civ. Proc. §§ 2020.410-2020.440*, is required to be a professional photocopier registered under *Bus. & Prof. Code § 22450 et seq.* or a person exempted from those registration requirements under *Bus. & Prof. Code § 22451*. This deposition officer must not be financially interested in the action or be a relative or employee of any attorney of the parties. Objections to the qualifications of the deposition officer must be made before the date of production or as soon thereafter as the ground for that objection becomes known or could be discovered by reasonable diligence. Otherwise, any objection to the qualifications is waived [*Code Civ. Proc. § 2020.420*].

[2] Compliance With Subpoena

Unless directed to make the records available for inspection or copying by the subpoenaing party's attorney or a representative of that attorney at the witness's business address under *Evid. Code § 1560(e)*, the custodian of the records, or other qualified person, is required, either personally, by messenger, or by mail, to deliver only to the deposition officer (1) a true, legible, and durable copy of the records, and (2) an affidavit complying with *Evid. Code § 1561* [*Code Civ. Proc. § 2020.430(a)*; *see Code Civ. Proc. § 2020.430(f)* (*Evid. Code § 1562* concerning admissibility of custodian's affidavit as applicable)]. For further discussion of *Evid. Code §§ 1560(e)* and *1561* and a form of affidavit or declaration under *Evid. Code § 1561*, see Ch. 535, *Subpoena* .

If the delivery is made to the office of the deposition officer, the copy of the records is required to be enclosed, sealed, and directed as described in *Evid. Code § 1560(c)* [*Code Civ. Proc. § 2020.430(b)*; for discussion of *Evid. Code § 1560(c)*, *see* Ch. 535, *Subpoena*].

If the delivery is made at the office of the business whose records are the subject of the deposition subpoena, the custodian of those records or other qualified person must permit the deposition officer specified in the deposition subpoena to make a copy of the originals of the designated business records during normal business hours as defined in

Evid. Code § 1560(e). Alternatively, the custodian or other qualified person must deliver to that deposition officer a true, legible, and durable copy of the records on receipt of payment in cash or by check, by or on behalf of the party serving the deposition subpoena, of the reasonable costs of preparing that copy, and an itemized statement for the cost of preparation, as determined under to *Evid. Code § 1563(b)*. This copy need not be delivered in a sealed envelope [*Code Civ. Proc. § 2020.430(c)*; for discussion of Evid. Code § 1563(b), *see* the procedural checklists *set out in § 193.180[4]* and Ch. 535, *Subpoena*].

Unless the parties, and a consumer or employee if the records are those of a consumer or employee as defined in *Code Civ. Proc. § 1985.3* or *Code Civ. Proc. § 1985.6*, stipulate to an earlier date, the custodian of the records must not deliver to the deposition officer the business records that are the subject of the deposition subpoena prior to the date and time specified in the deposition subpoena [*Code Civ. Proc. § 2020.430(d)* (form for deposition subpoena contains warning of this requirement); *see § 193.228*].

Promptly on or after the deposition date and after the receipt or the making of a copy of business records under *Code Civ. Proc. §§ 2020.410-2020.440*, the deposition officer is required to provide that copy to the party at whose instance the deposition subpoena was served, and a copy of those records to any other party to the action who then or subsequently, within a period of six months following the settlement of a case, notifies the deposition officer that the party desires to purchase a copy of those records [*Code Civ. Proc. § 2020.440*].

Legal Topics:

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

§ 193.33[Reserved]

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16-193 California Forms of Pleading and Practice--Annotated § 193.34

§ 193.34 Punishment for Disobedience of Deposition Subpoena

A deponent who disobeys a deposition subpoena in any manner described in *Code Civ. Proc. § 2020.220(c)* (discussed in *§ 193.30[1]*) may be punished for contempt under *Code Civ. Proc. § 2023.030* without the necessity of a prior order of court directing compliance by the witness [*Code Civ. Proc. § 2020.240*; *see Gregori v. Bank of America (1989) 207 Cal. App. 3d 291, 311, 254 Cal. Rptr. 853* (decided under prior law)]. That deponent is also subject to the forfeiture and the payment of damages set forth in *Code Civ. Proc. § 1992* [*Code Civ. Proc. § 2020.240*]. As an alternative to a contempt sanction, the court may issue a warrant for the arrest of witness or person who fails to appear [*Code Civ. Proc. § 1993(a)(1)*; *see Code Civ. Proc. §§ 1993(a)(2), (b), 1993.1-1993.2* (procedures); Ch. 535, *Subpoena*].

For further discussion and forms relating to contempt under *Code Civ. Proc. § 2023.010 et seq.*, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[4], 192.15[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedurePretrial MattersSubpoenasCivil ProcedureSanctionsContemptCivil Contempt

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16-193 California Forms of Pleading and Practice--Annotated § 193.35

§ 193.35 Objection to Deposition Subpoena

[1] By Motion to Quash or Modify

The court, on motion reasonably made by a party, a witness, a consumer under *Code Civ. Proc. § 1985.3*, an employee under *Code Civ. Proc. § 1985.6*, or a person whose personally identifying information [*see Civ. Code § 1798.79*.8 (definition)] is sought in connection with an action involving that person's free speech rights, or on its own motion after giving counsel notice and opportunity to be heard, may make an order quashing the deposition subpoena entirely, an order modifying the subpoena, or other appropriate protective order [*Code Civ. Proc. § 1987.1(a)*]. For further discussion and forms, see Ch. 535, *Subpoena* .

[2] By Objection at Time of Testimony or Production

A deposition subpoena is effective to require (1) personal attendance, (2) specified production, testing, inspection, or sampling, or (3) attendance at a court session to consider any issue arising from the deponent's refusal to be sworn, refusal to answer any questions, or refusal to produce items or permit copying, testing, inspection or sampling of items as specified in the subpoena [*see Code Civ. Proc. § 2020.220(c)*, discussed in *§ 193.30[1]*]. Disobedience of these requirements subjects a nonparty deponent to contempt sanctions without any prior order directing compliance [*see Code Civ. Proc. § 2020.240*, discussed in *§ 193.34*]. To avoid potential contempt sanctions, the safer and more typical course for nonparty deponents is to challenge or object to a deposition subpoena by a motion to quash or modify the subpoena under *Code Civ. Proc. § 1987.1(a)*, as discussed in [1], *above*.

A nonparty deponent is not necessarily *required* to file a motion to quash, however, in order to preserve and raise objections. For example, a nonparty deponent named in a records-only deposition subpoena may appear and comply with the subpoena by producing some items but refusing, for stated objections such as privilege, to produce others [*see Monarch Healthcare v. Superior Court (2000) 78 Cal. App. 4th 1282, 1284-1290, 93 Cal. Rptr. 2d 619* (as matter of first impression, petitioner nonparty's objection based on privilege was not waived by failure to move to quash or modify subpoena, but was sufficient and timely when made at the time specified for production)]. The court in *Monarch* reasoned that discovery procedures are generally designed to be less onerous to nonparties, who are less likely to be

represented by counsel, familiar with the issues, or able to react promptly before responses are due. Thus, a nonparty deponent having partial objections to matters specified in a deposition subpoena is not required to move to quash or modify, but may simply wait and object, placing the onus on the proponent to move to compel [*Monarch Healthcare v. Superior Court (2000) 78 Cal. App. 4th 1282, 1287, 1289-1290, 93 Cal. Rptr. 2d 619* ; *see Code Civ. Proc. § 2025.480* (procedure for motion to compel when "deponent fails to answer any question or to produce any document or tangible thing under the deponent's control that is specified in ... a deposition subpoena")]. The deponent remains safe from contempt sanctions, to the extent that he or she complies with the requirement of "attendance at a court session to consider any issue arising out of the deponent's refusal" to answer any question or produce items specified in the subpoena [*see Code Civ. Proc. § 2020.220(c)*].

Legal Topics:

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

§§ 193.36[Reserved]

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16-193 California Forms of Pleading and Practice--Annotated § 193.40

§ 193.40 Qualifications of Deposition Officer

Except as provided under *Code Civ. Proc. § 2020.420* (discussed in *§ 193.32[1]*), an oral deposition must be conducted under the supervision of an officer who is authorized to administer an oath [*Code Civ. Proc. § 2025.320*].

This deposition officer is subject to the following qualifications and requirements:

- The officer must not be financially interested in the action and must not be a relative or employee of any attorney of the parties, or of any of the parties [*Code Civ. Proc. § 2025.320(a)*].

- The services and products offered or provided by the deposition officer or by the entity providing the services of the deposition officer to any party, or to any party's attorney or third party who is financing all or part of the action, must be offered in turn to all other parties or their attorneys attending the deposition. No service or product may be offered or provided by the deposition officer or by the entity providing the services of the deposition officer to any party, or to any party's attorney or third party who is financing all or part of the action, unless it is also offered or provided to all other parties or their attorneys attending the deposition. All services and products offered or provided must be made available at the same time to all parties or their attorneys [*Code Civ. Proc. § 2025.320(b)*].

- The deposition officer or the entity providing the services of the deposition officer must not provide to any party, nor to any party's attorney or third party who is financing all or part of the action, any service or product that consists of the deposition officer's notations or comments regarding the demeanor of any witness, attorney, or party present at the deposition. The deposition officer or entity providing the services of the deposition officer must not collect any personal identifying information about the witness as a service or product to be provided to any party or third party who is financing all or part of the action [*Code Civ. Proc. § 2025.320(c)*].

- On the request of any party or any party's attorney attending a deposition, any party or any party's

> attorney attending the deposition must enter in the record of the deposition all services and products that are being made available by the deposition officer or by the entity providing the services of the deposition officer to that party, or to that party's attorney or third party who is financing all or part of the action. A party in the action who is not represented by an attorney must be informed by the noticing party or the party's attorney that the unrepresented party may request this statement [*Code Civ. Proc. § 2025.320(d)*].

Violation of these requirements by any person may result in a civil penalty of up to $5,000 [*Code Civ. Proc. § 2025.320(f)*].

Any objection to the qualifications of the deposition officer is waived unless it is made before the deposition begins or as soon thereafter as the ground for that objection becomes known or could be discovered by reasonable diligence [*Code Civ. Proc. § 2025.320(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-193 California Forms of Pleading and Practice--Annotated § 193.41

§ 193.41 Taking Deponent's Testimony

[1] In General

The deposition officer must put the deponent on oath. Examination and cross examination of the deponent then proceeds as permitted at trial under the provisions of the Evidence Code [*Code Civ. Proc. § 2025.330*; *see Evid. Code §§ 760-778* (examination of witness at trial) and discussion in Ch. 551, *Trial*].

[2] Examination by Written Questions

In lieu of participating in the oral examination, parties may transmit written questions in a sealed envelope to the party taking the deposition for delivery to the deposition officer, who shall unseal the envelope and propound them to the deponent after the oral examination has been completed [*Code Civ. Proc. § 2025.330(e)*]. For discussion and forms relating to depositions by written questions only under *Code Civ. Proc. § 2028.010 et seq.*, see *§ 193.100* et seq.

[3] Recording Testimony

[a] Stenographic Record

Unless the parties agree or the court orders otherwise, the testimony, as well as any stated objections, must be taken stenographically by a person certified in accordance with *Bus. & Prof. Code § 8020 et seq.* [*Code Civ. Proc. § 2025.330(b)*]. A verbatim record of an oral deposition may ordinarily be made only by a certified shorthand reporter [*see Bus. & Prof. Code §§ 8016, 8017*]. For discussion of the preparation of a transcript from the stenographic recording, see *§ 193.70* et seq.

If the deposing party has indicated in the deposition notice an intention to do so, the testimony may be recorded by stenographic method, through the instant visual display of the testimony [*Code Civ. Proc. § 2025.220(a)(5)*]. Any offer to provide the instant visual display of the testimony or to provide rough draft transcripts to any party which is accepted before, or offered at, the deposition must also be made by the deposition officer at the deposition to all parties in

attendance [*Code Civ. Proc. § 2025.220(a)(5)*]. Any party or attorney requesting the instant visual display of the testimony, or rough draft transcripts, must pay the reasonable cost of those services, which may be no greater than the costs charged to any other party or attorney [*Code Civ. Proc. § 2025.220(a)(5)*].

[b] Additional Record by Audio or Video Technology

[i] By Notice or Agreement

In addition to recording testimony stenographically, the party noticing the deposition may record the testimony by means of audio or video technology, if that party has stated an intention to also record the testimony by either of those methods in the deposition notice, or if all the parties have so agreed [*Code Civ. Proc. § 2025.330(c)*].

Any other party, at his or her expense, may make a simultaneous audio or video record of the deposition, provided that the other party promptly, and in no event less than three calendar days before the date for which the deposition is scheduled, serves a written notice of this intention to record the deposition testimony by means of audio or video technology on the party or attorney who noticed the deposition, on all other parties or attorneys on whom the deposition notice was served under *Code Civ. Proc. § 2025.240*, and on any deponent whose attendance is compelled by deposition subpoena under *Code Civ. Proc. § 2020.010 et seq.* [*Code Civ. Proc. § 2025.330(c)*]. The notice of intention to record testimony by audio or video technology may not be filed with the court, unless offered as relevant under a law and motion proceeding or other hearing or ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(5)*]. Instead, the serving party retains the original and the proof of service until six months after final disposition of the cause, unless otherwise ordered by the court for cause [*Cal. Rules of Ct., Rule 3.250(b)*]. For a form for a deposition notice that may be adapted to provide such notice of another party's intent to record a deposition by video or audio technology, see *§ 193.225*.

For discussion concerning the viewing, hearing, or copying of audio or video recordings, see *§ 193.42[1]*. For discussion of the requirements for offering the recordings into evidence, see *§ 193.42[2]*.

[ii] Making Audio or Video Recordings

The following procedures must be observed if the deposition is being recorded by means of audio or video technology [*Code Civ. Proc. § 2025.340*]:

- The area used for recording the deponent's oral testimony is required to be suitably large, adequately lighted, and reasonably quiet [*Code Civ. Proc. § 2025.340(a)*].

- The operator of the recording equipment is required to be competent to set up, operate, and monitor the equipment in the manner prescribed in *Code Civ. Proc. § 2025.340*. The operator may be an employee of the attorney taking the deposition unless the operator is also the deposition officer. However, if a video recording of deposition testimony of a treating or consulting physician or expert witness to be used under *Code Civ. Proc. § 2025.620(d)* (discussed in *§ 193.94*), the operator of the recording equipment is required to be a person who is authorized to administer an oath, and may not be financially interested in the action or be a relative or employee of an attorney of any of the parties, unless all parties attending the deposition agree on the record to waive these qualifications and restrictions [*Code Civ. Proc. § 2025.340(b), (c)*; *see also Code Civ. Proc. § 2025.220(a)(6)*].

- Services and products offered or provided by the deposition officer or operator, or by the entity that is providing the services of the deposition officer or operator, to any party, or to that party's attorney or a third party who is financing all or part of the action, must be offered to all other parties or their attorneys attending the deposition. No service or product may be offered or provided by the deposition officer or

operator, or by the entity providing the services of the deposition officer or operator, unless it is offered or provided to all parties or their attorneys attending the deposition. All services and products offered or provided must be made available at the same time to all parties or their attorneys [*Code Civ. Proc. § 2025.340(d)*]. The deposition officer or operator, or the entity providing the services of the deposition officer or operator, must not provide to any party, nor to any party's attorney or third party who is financing all or part of the action, any service or product consisting of the deposition officer's notations or comments regarding the demeanor of any witness, attorney, or party present at the deposition. The deposition officer or entity providing the services of the deposition officer also may not collect any personal identifying information about the witness as a service or product to be provided to any party or to any third party who is financing all or part of the action [*Code Civ. Proc. § 2025.340(e)*].

- On the request of any party or any party's attorney attending a deposition, any party or any party's attorney attending the deposition must enter in the record of the deposition all services and products that are being made available to that party or party's attorney or third party who is financing all or part of the action by the deposition officer or operator or by the entity providing the services of the deposition officer. A party in the action who is not represented by an attorney must be informed by the noticing party or that party's attorney that the unrepresented party may request this statement [*Code Civ. Proc. § 2025.340(f)*].

- The operator may not distort the appearance or the demeanor of participants in the deposition by the use of camera or sound recording techniques [*Code Civ. Proc. § 2025.340(g)*].

- The deposition is required to begin with an oral or written statement on camera or on the audio recording that includes the operator's name and business address, the name and business address of the operator's employer, the date, time, and place of the deposition, the caption of the case, the name of the deponent, a specification of the party on whose behalf the deposition is being taken, and any stipulations by the parties [*Code Civ. Proc. § 2025.340(h)*].

- Counsel for the parties are required to identify themselves on camera or on the audio recording [*Code Civ. Proc. § 2025.340(i)*].

- The deposition officer is required to administer the oath or affirmation to the deponent on camera or on the audio recording [*Code Civ. Proc. §§ 2025.330(a), 2025.340(j)*].

- If the length of a deposition requires the use of more than one unit of tape or electronic storage, the end of each unit and the beginning of each succeeding unit is required to be announced on camera or on the audio recording [*Code Civ. Proc. § 2025.340(k)*].

- At the conclusion of a deposition, a statement shall be made on camera or on the audio recording that the deposition is ended. A statement shall be made on camera or on the audio tape setting forth any stipulations made by counsel concerning the custody of the audio tape or video recording and the exhibits, or concerning other pertinent matters [*Code Civ. Proc. § 2025.340(l)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 193.42 Subsequent Use of Audio or Video Record

[1] Availability to Other Parties

At the request of any other party to the action, including a party who did not attend the taking of the deposition testimony, any party who records or causes the recording of testimony at a deposition by means of audio or video technology is required to promptly permit that other party to hear the audio or to view the video recording [*Code Civ. Proc. § 2025.510(f)*].

Notwithstanding *Code Civ. Proc. § 2025.320(b)* (discussed in *§ 193.40*), the recording party must furnish a copy of the audio or video recording to that other party, on receipt of payment of the reasonable cost of making the copy of the tape [*Code Civ. Proc. § 2025.510(f)(2)*].

[2] Prerequisites for Use at Trial

A party may offer an audio or video recording of a deposition in evidence under *Code Civ. Proc. § 2025.620* (discussed in *§ 193.90* et seq.) if that party has notified the court and all parties in writing of (1) the intent to offer into evidence, and (2) the parts of the deposition to be offered. The notice must be given within sufficient time for objections to be made and ruled on by the judge to whom the case is assigned for trial or hearing, and for any editing of the recording [*Code Civ. Proc. § 2025.340(m)*].

The offer is required to be accompanied by a stenographic transcript prepared from the recording, if no stenographic record of the deposition testimony has previously been made [*Code Civ. Proc. § 2025.340(m)*; *see* discussion in *§ 193.70* et seq.].

Objections to all or part of the deposition must be made in writing. The court may permit further designations of testimony and objections, as justice may require. With respect to those portions of an audio or video record of deposition testimony that are not designated by any party or that are ruled to be objectionable, the court may order that the party offering the recording of the deposition at the trial or hearing suppress those portions, or that an edited version

of the deposition recording be prepared for use at the trial or hearing [*Code Civ. Proc. § 2025.340(m)*].

Regardless of whether an edited version of the recording is prepared, the original audio or video recording of the deposition is required to be preserved unaltered [*Code Civ. Proc. § 2025.340(m)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureTrialsDepositionsEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsDeposition Transcripts

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16-193 California Forms of Pleading and Practice--Annotated § 193.43

§ 193.43 Objections During Oral Deposition

[1] Privilege, Work Product, or Other Protection Against Disclosure

A specific objection to the disclosure of information, on the ground that it is privileged or that it is protected work product under *Code Civ. Proc. § 2018.010 et seq.*, is waived unless timely made [*Code Civ. Proc. § 2025.460(a)*; *see Monarch Healthcare v. Superior Court (2000) 78 Cal. App. 4th 1282, 1284, 93 Cal. Rptr. 2d 619* (as matter of first impression, petitioner nonparty deponent's objection to records-only discovery request for privileged information was timely and sufficient when made at time and place for production of records; nonparty deponent was not required to file a motion to quash)].

One court of appeal has suggested that the waiver rule applies only to matters of evidentiary privilege and attorney work product, and that a *privacy right*, such as sexual privacy, is not waived by failure to state that ground as a basis for objecting to a deposition question [*Boler v. Superior Court (1987) 201 Cal. App. 3d 467, 472 n.1, 247 Cal. Rptr. 185]* .

For discussion of evidentiary privileges, attorney work product protection, and other protections against disclosure such as that based on the constitutional right of privacy, *see* Ch. 191, *Discovery: Privileges and Other Discovery Limitations* .

[2] Error or Irregularity in Deposition Proceeding

An objection based on any error or irregularity of any kind that occurs at the oral examination, and that might be cured if the objection is promptly presented, is waived unless a specific objection to the error or irregularity is made during the deposition. These errors and irregularities include, but are not limited to, those relating to the manner of taking the deposition, to the oath or affirmation administered, to the conduct of a party, attorney, deponent, or deposition officer, or to the form of any question or answer [*Code Civ. Proc. § 2025.460(b)*].

Unless the objecting party demands that the taking of the deposition be suspended pending a motion for a protective

order under *Code Civ. Proc. § 2025.470*, the deposition will proceed subject to the objection [*Code Civ. Proc. § 2025.460(b)*; for discussion of the motion procedure under *Code Civ. Proc. § 2025.470, see § 193.45*].

[3] Competency, Relevancy, Materiality, or Admissibility of Matter Sought

It is not necessary to object to the competency of the deponent, or to the relevancy, materiality, or admissibility at trial of the testimony or of the materials produced. Failure to make these objections before or during the deposition does not waive the objection [*Code Civ. Proc. § 2025.460(c)*]. In fact, deponent's counsel should not even raise an objection to a question counsel believes will elicit irrelevant testimony at a deposition. Relevance objections should be held in abeyance until an attempt is made to use the testimony at trial [*Stewart v. Colonial W. Agency, Inc. (2001) 87 Cal. App. 4th 1006, 1014, 105 Cal. Rptr. 2d 115]* . The fact that suspension of the deposition under *Code Civ. Proc. § 2025.470* is available only when an interrogation reveals bad faith or an underlying purpose to harass, annoy, embarrass, or oppress indicates that witnesses are expected to endure an occasional irrelevant question without disrupting the deposition process [*see Stewart v. Colonial W. Agency, Inc. (2001) 87 Cal. App. 4th 1006, 1014-1015, 105 Cal. Rptr. 2d 115* (relevancy objections at deposition are unnecessary and improper, unless deposing counsel's insistence on inquiring into irrelevant areas could arguably justify suspension under *Code Civ. Proc. § 2025.470* based on counsel's intent to harass, annoy, embarrass, or oppress)].

[4] "Legal Contention" Questions or Requests for Demonstrations

A deponent's counsel should object to any "legal contention" questions, for example, to state all facts, list all witnesses, and identify all documents that support or pertain to a particular contention in the deponent's pleadings. These questions, while entirely appropriate for written interrogatories, are not proper at a party's deposition [*Rifkind v. Superior Court (1994) 22 Cal. App. 4th 1255, 1259-1263, 27 Cal. Rptr. 2d 822]* . Questions asking a deponent about the basis for, or information concerning, a factual conclusion or assertion, however, are appropriate questions for a deposition. For example, if a party states that a certain event happened at a particular time or place, it is entirely proper to ask the party at deposition how he or she became aware of the event, his or her knowledge about the event, and for similar information of a factual nature [*Rifkind v. Superior Court (1994) 22 Cal. App. 4th 1255, 1259, 27 Cal. Rptr. 2d 822]* .

The 1993 holding of *Stermer v. Superior Court (1993) 20 Cal. App. 4th 777, 24 Cal. Rptr. 2d 577* formerly allowed counsel also to object to their deponent's responding to any request for a demonstration, diagram, or reenactment performance. This holding, however, was expressly disapproved by the *Supreme Court in Emerson Electric Co. v. Superior Court (1997) 16 Cal. 4th 1101, 1106-1107, 1113, 68 Cal. Rptr. 2d 883, 946 P.2d 841* , with respect to such requests when made during a videotaped deposition. The court in *Emerson* ruled that such requests for non-verbal reenactment were consistent with former *Code Civ. Proc. § 2025*(*l*)(1) (*now see Code Civ. Proc. § 2025.330*), which provides that deposition examinations are to proceed as permitted under the Evidence Code. Under the Evidence Code a witness may be required to perform a physical reenactment or demonstration of an incident at trial [*Emerson Electric Co. v. Superior Court (1997) 16 Cal. 4th 1101, 1107, 68 Cal. Rptr. 2d 883, 946 P.2d 841* , citing *e.g., DiRosario v. Havens (1987) 196 Cal. App. 3d 1224, 1230-1233]* . The court also concluded that such reenactment or demonstration was consistent with the legislative purpose and history underlying the enactment of *Code Civ. Proc. § 2025.480* [*Emerson Electric Co. v. Superior Court (1997) 16 Cal. 4th 1101, 1107-1109, 68 Cal. Rptr. 2d 883, 946 P.2d 841* (decided under prior law)]. Thus, *Code Civ. Proc. § 2025.480* should be construed to allow nonverbal as well as verbal responses at a videotaped deposition, which may require a deponent to perform a demonstration or reenactment at the request of a party [*Emerson Electric Co. v. Superior Court (1997) 16 Cal. 4th 1101, 1111-1112, 68 Cal. Rptr. 2d 883, 946 P.2d 841* (decided under prior law)]. Refusal to comply with such a request may subject the reusing party to discovery sanctions [*Emerson Electric Co. v. Superior Court (1997) 16 Cal. 4th 1101, 1112, 68 Cal. Rptr. 2d 883, 946 P.2d 841]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewEvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsEvidenceRelevanceGeneral Overview

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§ 193.44 Adjournment of Deposition or Completion of Examination on Deponent's Failure to Answer Question or Produce Item

If a deponent fails to answer any question or to produce any document or tangible thing under the deponent's control that is specified in the deposition notice or a deposition subpoena, the party seeking that answer or production may adjourn the deposition or complete the examination on other matters without waiving the right to move for an order compelling that answer or production under *Code Civ. Proc. § 2025.480* [*Code Civ. Proc. § 2025.460(d)*; for discussion of motion procedure under *Code Civ. Proc. § 2025.480, see § 193.60[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionEvidenceProcedural ConsiderationsObjections & Offers of ProofObjections

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16-193 California Forms of Pleading and Practice--Annotated § 193.45

§ 193.45 Suspension of Deposition Pending Motion for Protective Order

The deposition officer must not suspend the taking of testimony, without stipulation of all parties present, unless any party attending the deposition, including the deponent, demands that the deposition officer suspend taking the testimony to enable that deponent or party to move for a protective order on the ground that the examination is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses that deponent or party [*Code Civ. Proc. § 2025.470*; *see also Stewart v. Colonial W. Agency, Inc. (2001) 87 Cal. App. 4th 1006, 1014-1015, 105 Cal. Rptr. 2d 115* (fact that suspension is available under *Code Civ. Proc. § 2025.470* only when interrogation into improper matters reveals bad faith or underlying purpose to annoy, harass, embarrass, or oppress indicates that witnesses are expected to endure occasional irrelevant questions without disrupting deposition process)]. This motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [*Code Civ. Proc. § 2025.420(a)*; *see also St. Paul Fire & Marine Ins. Co. v. Superior Court (1984) 156 Cal. App. 3d 82, 86, 202 Cal. Rptr. 571* (proper notice and hearing required for similar motion under prior law)].

The court, for good cause shown, may order the examination terminated, or it may limit the scope and manner of taking the deposition by means of a protective order authorized under *Code Civ. Proc. § 2025.420* (discussed in *§ 193.50* et seq.). If the order terminates the examination, the deposition shall not thereafter be resumed, except on order of the court [*Code Civ. Proc. § 2025.420(b)(16)*].

The court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes a motion for this protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust [*Code Civ. Proc. § 2025.420(d)*; for further discussion of monetary sanctions under *Code Civ. Proc. § 2023.030*, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*]. For forms for use in obtaining an order under *Code Civ. Proc. §§ 2025.420* and *2025.470*, see *§§ 193.236, 193.237*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryProtective Orders

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[Reserved]

§§ 193.46[Reserved]

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16-193 California Forms of Pleading and Practice--Annotated § 193.50

§ 193.50 Availability of Protective Orders

Any party, any deponent, or any other affected natural person or organization may promptly move for a protective order before, during, or after a deposition. This motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [*Code Civ. Proc. § 2025.420(a)*].

If the motion for a protective order is made before the deposition is taken, the moving party or deponent may also move, and the court may so order, that the taking of the deposition be stayed pending determination of the motion for the protective order [*Code Civ. Proc. § 2025.270(d)* (deposition may also be stayed as result of ex parte application made after motion for protective order)]. If it is made during a deposition, the deposition officer must suspend the taking of the deposition pending determination of the motion on demand by the moving party or deponent [*Code Civ. Proc. § 2025.470*; for further discussion, *see § 193.45*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 193.51 Burden of Proof

[1] Generally on Moving Party

The moving party has the burden of showing good cause for a protective order. This burden arises out of the deposing party's general right to obtain discovery without prior court approval [*see Code Civ. Proc. § 2025.210*; *Southern California Edison Co. v. Superior Court (1972) 7 Cal. 3d 832, 843, 103 Cal. Rptr. 709, 500 P.2d 621]* . Such a showing calls for a factual exposition of a reasonable ground for the order sought [*Goodman v. Citizens Life & Cas. Ins. Co. (1967) 253 Cal. App. 2d 807, 819, 61 Cal. Rptr. 682]* .

[2] Exception When Corporate Officer Defendant Is Deponent

When a plaintiff seeks to depose a president or other official at the highest level of management within a defendant corporation, and that official moves for a protective order to prohibit the deposition, the trial court should first determine whether the plaintiff has shown good cause that the official has unique or superior personal knowledge of discoverable information. If not, as is often the case in the instance of a large national or international corporation, the trial court should issue the protective order and require the plaintiff to first obtain the necessary discovery through less-intrusive methods [*Liberty Mutual Ins. Co. v. Superior Court (1992) 10 Cal. App. 4th 1282, 1289, 13 Cal. Rptr. 2d 363]* .

Should less-intrusive methods of discovery be exhausted, and the plaintiff make a colorable showing of good cause that the high-level official possesses information necessary to the case, the trial court then may lift the protective order and allow the deposition to proceed [*Liberty Mutual Ins. Co. v. Superior Court (1992) 10 Cal. App. 4th 1282, 1289, 13 Cal. Rptr. 2d 363]* .

Such a shifting of the burden will not frustrate a plaintiff's ability to penetrate high levels of corporate management in a search for information. It only applies with high-level officials, and may be overcome by showing that the high-level official does possess pertinent knowledge. Moreover, lower-level corporate officials with some probable connection to theplaintiff's case are not permitted to avoid being deposed through filing conclusory affidavits of ignorance [*Liberty*

Mutual Ins. Co. v. Superior Court (1992) 10 Cal. App. 4th 1282, 1289-1290, 13 Cal. Rptr. 2d 363] .

[3] Ruling on Motion

In ruling on the motion, the court, on a showing of good cause, may make any protective order that justice requires to protect any party, deponent, or other natural person or organization from unwarranted annoyance, embarrrassment, or oppression, or undue burden and expense [*Code Civ. Proc. § 2025.420(b)*; for discussion of specific types of orders, *see § 193.52*].

If the court denies the motion in whole or in part, it may order that the deponent provide or permit the discovery against which protection was sought on those terms and conditions that are just [*Code Civ. Proc. § 2025.420(c)*].

The court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust [*Code Civ. Proc. § 2025.420(d)*; for further discussion of monetary sanctions under *Code Civ. Proc. § 2023.030*, *see Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*].

For forms for use in obtaining a protective order under *Code Civ. Proc. §§ 2025.420* and *2025.470*, see *§§ 193.232 -193.235*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryProtective OrdersEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

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§ 193.52 Types of Protective Orders

A protective order issued in the context of oral deposition proceedings may include, but is not limited to, one or more of the following directions [*Code Civ. Proc. § 2025.420(b)*]:

- That the deposition not be taken at all [*Code Civ. Proc. § 2025.420(b)(1)*].

- That the deposition be taken at a different time [*Code Civ. Proc. § 2025.420(b)(2)*].

- That a video recording of the deposition of a treating or consulting physician or of any expert witness, intended for possible use at trial under *Code Civ. Proc. § 2025.620(d)* be postponed until the moving party has had an adequate opportunity to prepare, by discovery deposition of the deponent, or other means, for cross-examination [*Code Civ. Proc. § 2025.420(b)(3)*; for further discussion *see § 193.94*].

- That the deposition be taken at a place other than that specified in the deposition notice, if it is within a distance permitted by *Code Civ. Proc. §§ 2025.250* and *2025.260* [*Code Civ. Proc. § 2025.420(b)(4)*].

- That the deposition be taken only on certain specified terms and conditions [*Code Civ. Proc. § 2025.420(b)(5)*].

- That the deponent's testimony be taken by written, instead of oral, examination [*Code Civ. Proc. § 2025.420(b)(6)*].

- That the method of discovery be interrogatories to a party instead of an oral deposition [*Code Civ. Proc. § 2025.420(b)(7)*].

- That the testimony be recorded in a manner different from that specified in the deposition notice [

Code Civ. Proc. § 2025.420(b)(8)].

- That certain matters not be inquired into [*Code Civ. Proc. § 2025.420(b)(9)*].

- That the scope of the examination be limited to certain matters [*Code Civ. Proc. § 2025.420(b)(10)*].

- That all or certain of the writings or tangible things designated in the deposition notice not be produced, inspected, or copied [*Code Civ. Proc. § 2025.420(b)(11)*].

- That designated persons, other than the parties to the action and their officers and counsel, be excluded from attending the deposition [*Code Civ. Proc. § 2025.420(b)(12)*].

- That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only to specified persons or only in a specified way [*Code Civ. Proc. § 2025.420(b)(13)*].

- That the parties simultaneously file specified documents enclosed in sealed envelopes to be opened as directed by the court [*Code Civ. Proc. § 2025.420(b)(14)*].

- That the deposition be sealed and thereafter opened only on order of the court [*Code Civ. Proc. § 2025.420(b)(15)*].

- That the examination of the deponent be terminated [*Code Civ. Proc. § 2025.420(b)(16)*].

Legal Topics:

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

§§ 193.53[Reserved]

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16-193 California Forms of Pleading and Practice--Annotated § 193.60

§ 193.60 Order Compelling Compliance by Deponent

[1] On Failure of Party or Party-Affiliated Deponent to Appear, Proceed, or Produce Item

If, after service of a deposition notice, a party to the action or an officer, director, managing agent, or employee of a party, or a person designated by an organization that is a party under *Code Civ. Proc. § 2025.230* (discussed in *§ 193.21[3][b]*), fails to appear for examination, to proceed withit, or to produce for inspection any document or tangible thing described in the deposition notice, without having served a valid objection under *Code Civ. Proc. § 2025.410* (discussed in *§ 193.23*), the party giving the notice may move for an order compelling the deponent's attendance and testimony, and the production for inspection of any document or tangible thing described in the deposition notice [*Code Civ. Proc. § 2025.450(a)*].

The motion must set forth specific facts showing good cause justifying the production for inspection of any document or tangible thing described in the deposition notice. The motion must also be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by it or, when the deponent fails to attend the deposition and produce the documents or things described in the deposition notice, by a declaration stating that the petitioner has contacted the deponent to inquire about the nonappearance [*Code Civ. Proc. § 2025.450(b)*]. One court has held that implicit in the requirement of former *Code Civ. Proc. § 2025(j)(3)(B)* (*now see Code Civ. Proc. § 2025.450(b)(2)*) that counsel contact the deponent about a nonappearance is the requirement that counsel listen to the reasons offered and make a good faith attempt to resolve the issue. Thus, either declaration submitted with a motion of compel under *Code Civ. Proc. § 2025.450(b)(2)* must show a reasonable and good faith attempt to resolve each issue presented, including those relating to a nonappearance [*Blago Leko v. Cornerstone Home Inspection (2001) 86 Cal. App. 4th 1109, 1124, 103 Cal. Rptr. 2d 858* (attorney sanctioned under former Code Civ. Proc. § 20223(a)(3), (9) (*now see Code Civ. Proc. § 2023.010(c), (i)*) for improperly filing motion to compel attendance when attorney completely disregarded his obligation to attempt to informally resolve discovery issue)]. For forms for use in obtaining this order, see *§ 193.238* et seq. For discussion concerning sanctions for failure to obey an order to compel under *Code Civ. Proc. § 2025.450*, see *§ 193.61[3]*.

In certain circumstances, the motion must also be accompanied by a separate statement [Cal. Rules of Ct., Rule 3.145(a)(4) (separate statement required for motion to compel answers at deposition); Cal. Rules of Ct., Rule 3.145(a)(5) (separate statement required for motion to compel, or quash, production of documents or tangible things at deposition); *see also* Cal. Rules of Ct., Rule 3.145(b) (separate statement not required when no response provided to discovery request)]. The separate statement is a separate document, with prescribed contents, filed and served with the motion to compel [*see* Cal. Rules of Ct., Rule 3.145(c)]. For further discussion of this separate statement requirement and a form, see *§ 193.239*.

If the motion is granted, the court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.030* against the deponent or the party with whom the deponent is affiliated, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust [*Code Civ. Proc.§ 2025.450(c)(1)*]. The court is also required to impose a monetary sanction under *Code Civ. Proc. § 2023.030*, on motion of any other party who, in person or by attorney, attended at the time and place specified in the deposition notice in the expectation that the deponent's testimony would be taken, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust [*Code Civ. Proc. § 2025.450(c)(2)*; for further discussion of these general provision, *see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[2]*].

The court may award sanctions in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed [*Cal. Rules of Ct., Rule 3.1348(a)*]. The court may not, however, deem the opposing party's failure to file written opposition, failure to appear at a hearing, or voluntary provision discovery to be an admission that the motion was proper or that sanctions should be awarded [*Cal. Rules of Ct., Rule 3.1348(b)*].

For more detailed discussion of monetary sanctions generally, including requirements generally applicable in proceedings to impose such sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

For forms that may be adapted for use in obtaining an order imposing monetary sanctions under *Code Civ. Proc. § 2025.450*, see *§ 193.244* et seq.

[2] On Failure of Deponent to Answer Question or Produce Item During Deposition

If a deponent fails to answer any question or to produce any document or tangible thing under the deponent's control that is specified in the deposition notice or a deposition subpoena, the party seeking that answer or production may move for an order compelling that answer or production [*Code Civ. Proc. § 2025.480(a)*; *see also Code Civ. Proc. § 2025.460(d)*, discussed in *§ 193.44*]. The motion must be made no later than 60 days after the completion of the record of the deposition, and must also be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [*Code Civ. Proc. § 2025.480(b)*; *see Unzipped Apparel, LLC v. Bader (2007) 156 Cal. App. 4th 123, 132-135, 67 Cal. Rptr. 3d 111* (60-day period for filing motion to compel under *Code Civ. Proc. § 2025.480(b)* applies to subpoenas for business records, as well as to subpoenas for oral or written depositions)].

Although depositions are different from other methods of discovery in that the presence of counsel for both parties permits instantaneous discussion of an objection or other disputed issue and attempts at informal resolution, a reasonable and good faith attempt at informal resolution entails something more than argument. Counsel are required to attempt to talk the matter over, compare their views, consult, and deliberate [*Townsend v. Superior Court (1998) 61 Cal. App. 4th 1431, 1434-1438, 72 Cal. Rptr. 2d 333* ; *see, e.g., Stewart v. Colonial W. Agency, Inc. (2001) 87 Cal. App. 4th 1006, 1016-1017, 105 Cal. Rptr. 2d 115* (counsel's efforts to meet and confer were adequate when counsel engaged in off-the-record discussion with opposing counsel at deposition, in an attempt to resolve one simple relevancy

issue, in light of imminent trial date and cut-off dates for discovery, and opposing counsel's announced unavailability before trial)].

The declaration also should state facts showing a reasonable relationship between the materials sought to be produced and the issues involved in the case, particularly when the motion seeks to compel document discovery from a non-party deponent under former *Code Civ. Proc. § 2020(d)* (*now see Code Civ. Proc. §§ 2020.410-2020.440*) [*Calcor Space Facility, Inc. v. Superior Court (1997) 53 Cal. App. 4th 216, 218-219* ; *61 Cal. Rptr. 2d 567]* .

For a form for a motion under *Code Civ. Proc. § 2025.480*, see *§ 193.241*.

If the court determines that the answer or production sought is subject to discovery, it orders that the answer be given or the production be made on the resumption of the deposition [*Code Civ. Proc. § 2025.480(e)*; *see § 193.243*].

[3] Monetary Sanctions

The court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel answer or production, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust [*Code Civ. Proc. § 2025.480(f)*; for further discussion of these general provisions, *see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[2]*].

The appellate courts are split on whether discovery sanctions can be awarded in favor of parties who did not propound the discovery that triggered the sanctions. For example, in *Calvert Fire Ins. Co. v. Cropper (1983) 141 Cal. App. 3d 901, 190 Cal. Rptr. 593* , the court relied on former *Code Civ. Proc. § 2034(b), (d)* (*now see Code Civ. Proc. § 2030.300(e)*), which, the court concluded, empowered the trial court to sanction a party who "refuses to obey" and a party who "willfully fails" to comply with discovery orders without any limitation on who may request the sanction [*Calvert Fire Ins. Co. v. Cropper (1983) 141 Cal. App. 3d 901, 905, 190 Cal. Rptr. 593* (decided under prior law)]. In contrast, in *Townsend v. Superior Court (1998) 61 Cal. App. 4th 1431, 72 Cal. Rptr. 2d 333* , the court relied exclusively on the language in former *Code Civ. Proc. § 2025(o)* (*now see Code Civ. Proc. § 2025.480(a)*), stating that "the party seeking discovery may move the court for an order compelling [an] answer," to conclude that "outsiders [are] not entitled to be awarded sanctions" [*Townsend v. Superior Court (1998) 61 Cal. App. 4th 1431, 1438, 72 Cal. Rptr. 2d 333]* . In *Parker v. Wolters Kluwer United States, Inc. (2007) 149 Cal. App. 4th 285, 57 Cal. Rptr. 3d 18* , the court struck a middle ground, relying on *Code Civ. Proc. §§ 2025.480(g)* and *2030.300(e)*--which instruct the trial court to "make those orders that are just" when imposing discovery sanctions--to hold that an award of sanctions in favor of a party who did not propound the discovery is justified only if the nonpropounding party shows that it suffered a detriment as the result of the sanctioned party's misuse of the discovery process [*Parker v. Wolters Kluwer United States, Inc. (2007) 149 Cal. App. 4th 285, 301-302, 57 Cal. Rptr. 3d 18* (trial court erred in imposing terminating sanctions in favor of parties who did not propound discovery or show how they were prejudiced by plaintiff's failure to comply with discovery requests propounded by others)]. The court clarified that it did not hold that a nonpropounding party should *never* be awarded discovery sanctions. Rather, the trial court has discretion to determine whether, in a particular case, the interests of the propounding party and a coparty "are sufficiently aligned so that a sanction award to both would be just" [*Parker v. Wolters Kluwer United States, Inc. (2007) 149 Cal. App. 4th 285, 301-302, 57 Cal. Rptr. 3d 18* (discovery interests of propounding party and a coparty may be so closely aligned it would be "a useless duplication of effort for both parties to pursue the same discovery and invoke the same remedies against an opposing party")].

The court may award sanctions in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed [*Cal. Rules of Ct., Rule 3.1348(a)*]. The court may not, however, deem the opposing party's failure to file written opposition, failure to appear at a hearing, or voluntary provision discovery to be

an admission that the motion was proper or that sanctions should be awarded [*Cal. Rules of Ct., Rule 3.1348*].

For more detailed discussion of monetary sanctions generally, including requirements generally applicable in proceedings to impose such sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

For discussion concerning sanctions for failure to obey an order under *Code Civ. Proc. § 2025.480*, see *§ 193.61[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel

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16-193 California Forms of Pleading and Practice--Annotated § 193.61

§ 193.61 Order Imposing Sanctions

[1] Against Party Giving Notice for Failure to Proceed With Deposition or to Serve Subpoena

If the party giving notice of the deposition fails to attend or to proceed with it, the court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against that party, the attorney for that party, or both, and in favor of any party attending in person or by attorney, unless the court finds thatthe one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust [*Code Civ. Proc. § 2025.430*].

If a deponent does not appear for a deposition because the party giving notice of the deposition failed to serve a required deposition subpoena, the court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against that party, the attorney for that party, or both, and in favor of any other party who, in person or by attorney, attended at the time and place specified in the deposition notice in the expectation that the deponent's testimony would be taken, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust [*Code Civ. Proc. § 2025.440(a)*].

For forms for use in obtaining an order imposing monetary sanctions under *Code Civ. Proc. §§ 2025.430* or *2025.440*, see *§§ 193.244, 193.245*. For further discussion of monetary sanctions under *Code Civ. Proc. § 2023.010 et seq.*, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

[2] Against Nonparty Deponent for Failure to Attend or Be Sworn

If a deponent on whom a deposition subpoena has been served fails to attend a deposition or refuses to be sworn as a witness, the court may impose on the deponent the sanctions described in *Code Civ. Proc. § 2020.240* [*Code Civ. Proc. § 2025.440(b)*]. For further discussion of *Code Civ. Proc. § 2020.240*, see *§ 193.34*.

[3] Against Party Deponent or Deponent-Affiliated Party for Failure to Obey Order Compelling Compliance

If a party or party-affiliated deponent fails to obey an order compelling compliance under *Code Civ. Proc. § 2025.450* (discussed in *§ 193.60[1]*), the court may make those orders that are just, including the imposition of an issuesanction, an evidence sanction, or a terminating sanction under *Code Civ. Proc. § 2023.030* against that party deponent or against the party with whom the deponent is affiliated. The court may also impose a monetary sanction under *Code Civ. Proc. § 2023.030(a)* in lieu of or in addition to this sanction, against that deponent or against the party with whom the deponent is affiliated, and in favor of any party who, in person or by attorney, attended in the expectation that the deponent's testimony would be taken pursuant to that order [*Code Civ. Proc. § 2025.450(d)*].

If any deponent, whether or not a party, fails to obey an order compelling compliance under *Code Civ. Proc. § 2025.480* (discussed in *§ 193.60[2]*), the failure may be considered a contempt of court. In addition, if the disobedient deponent is a party to the action, or is an officer, director, managing agent, or employee of a party, the court may make those orders that are just against the disobedient party, or against the party with whom the disobedient deponent is affiliated, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *Code Civ. Proc. § 2023.030*. The court may also impose a monetary sanction under *Code Civ. Proc. § 2023.030(a)* in lieu of or in addition to this sanction, against that party deponent or against any party with whom the deponent is affiliated [*Code Civ. Proc. § 2025.480(g)*; *see, e.g., In re Marriage of Niklas (1989) 211 Cal. App. 3d 28, 37-38, 258 Cal. Rptr. 921]* .

For further discussion regarding issue, evidence, and terminating sanctions, and general forms for use in seeking such sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[3], 192.15[3]*, and *192.50* et seq. For further discussion regarding a contempt sanction, and general forms for use in seeking this sanction, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[4], 192.15[4]*, and *192.60* et seq. For further discussion regarding monetary sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMisconductCivil ProcedurePretrial MattersSubpoenas

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[Reserved]

§§ 193.62[Reserved]

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16-193 California Forms of Pleading and Practice--Annotated § 193.70

§ 193.70 Transcript of Deposition Testimony

The testimony at any deposition recorded by stenographic means must be transcribed, unless the parties agree otherwise [*Code Civ. Proc. § 2025.510(a)*; *see also Code Civ. Proc. § 2025.330(b)* (deposition required to be recorded stenographically absent contrary order or stipulation)]. If no transcript is produced, the stenographic notes of the deposition must be kept by the reporter for at least eight years from the date of the deposition; if a transcript is produced, stenographic notes must be kept by the reporter for at least one year from the date of the deposition [*Code Civ. Proc. § 2025.510(e)*].

The party noticing the deposition bears the cost of this transcription, unless the court, on motion and for good causeshown, orders that the cost be borne or shared by another party [*Code Civ. Proc. § 2025.510(b)*]. In addition, the requesting attorney or a party representing himself or herself has the obligation to timely pay the deposition officer or entity providing those services for that transcription, and to timely pay for any other deposition products or services [*see Code Civ. Proc. § 2025.510(i)* (definition)] requested, unless responsibility for the payment is otherwise provided by law or the deposition officer or entity is notified in writing that the party or another identified person will be responsible for payment [*Code Civ. Proc. § 2025.510(h)(1), (2)*]. However, these statutory provisions do not prohibit or supersede an agreement between an attorney and a party allocating responsibility for the payment of deposition costs to the party [*Code Civ. Proc. § 2025.510(h)(3)*].

Notwithstanding *Code Civ. Proc. § 2025.320(b)* (discussed in *§ 193.40*), any other party, at his or her expense, may obtain a copy of the transcript [*Code Civ. Proc. § 2025.510(c)*; *see also* discussion in *§ 193.76*]. Further, the trial court in a pending action has the authority to require a deposition reporter to provide a copy of a transcript to a nonnoticing party for a reasonable fee [*Serrano v. Stefan Merli Plastering Co. (2008) 162 Cal. App. 4th 1014, 1035, 76 Cal. Rptr. 3d 559* (court's failure to determine whether amounts that plaintiffs were required to pay for copies of deposition transcripts were reasonable was reversible error)]. In the event of a dispute, the trial court may determine the amount of the reasonable fee [*Serrano v. Stefan Merli Plastering Co. (2008) 162 Cal. App. 4th 1014, 1038, 76 Cal. Rptr. 3d 559* (assuming no controlling contractual relationship between reporter and nonnoticing party relating to cost of deposition copy)].

If the deposition officer receives a request from a party for an original or a copy of the deposition transcript, or a portion of the transcript, and that document will be available to that requesting party before the time the original or copy would be available to any other party, the deposition officer must immediately notify all other parties who attended the deposition of the receipt of this request. Upon request by any party so notified, the deposition officer must make the requested full or partial transcript copy available to parties at the same time [*Code Civ. Proc. § 2025.510(d)*].

For discussion concerning the availability or copying of audio or video recordings of depositions, see *§ 193.42[3]*.

Legal Topics:

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

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16-193 California Forms of Pleading and Practice--Annotated § 193.71

§ 193.71 Stenographic Transcript Is Official Record

If the testimony at the deposition is recorded both stenographically and by audio or video technology, the stenographic transcript is the official record of the testimony for the purpose of the trial and any subsequent hearing or appeal [*Code Civ. Proc. § 2025.510(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsDeposition Transcripts

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16-193 California Forms of Pleading and Practice--Annotated § 193.72

§ 193.72 Notice of Availability of Transcript or Tape Recording

When the deposition testimony is stenographically recorded, the deposition officer is required to send written notice to the deponent and to all parties attending the deposition when the original transcript of the testimony for each session of the deposition is available for reading, correcting, and signing. The written notice is not required, however, if the deponent and attending parties agree on the record to waive the reading, correcting, and signing of the transcript, or to read, correct, and sign the transcript after the entire deposition has been concluded or at some other specific time [*Code Civ. Proc. § 2025.520(a)*].

When no stenographic transcription of the deposition is made, the deposition officer is required to send written notice to the deponent and to all parties attending the deposition that the recording is available for review, unless the deponent and all these parties agree on the record to waive the hearing or viewing of an audio or video recording of the testimony [*Code Civ. Proc. § 2025.530(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsDeposition Transcripts

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16-193 California Forms of Pleading and Practice--Annotated § 193.73

§ 193.73 Change of Transcript or Recording by Deponent

For 30 days following each such notice of the availability of the transcript for reading, correcting, and signing (discussed in *§ 193.72*), unless theattending parties and the deponent agree on the record or otherwise in writing to a longer or shorter time period, the deponent may change the form or the substance of the answer to any question, and may either approve the transcript of the deposition by signing it, or refuse to approve the transcript by not signing it [*Code Civ. Proc. § 2025.520(b)*]. Alternatively, within this same period, the deponent may change the form or the substance of the answer to any question and may approve or refuse to approve the transcript by means of a letter to the deposition officer signed by the deponent that is mailed by certified or registered mail with return receipt requested. A copy of that letter must be sent by first-class mail to all parties attending the deposition. For good cause shown, the court may shorten the 30-day period for making changes, approving, or refusing to approve the transcript [*Code Civ. Proc. § 2025.520(c), (d)*; *see* Ch. 524, *Shortening and Extension of Time*].

If there is no stenographic transcription, for 30 days following the notice of the availability of the tape recording for review, the deponent, either in person or by a signed letter to the deposition officer, may change the substance of the answer to any question [*Code Civ. Proc. § 2025.530(b)*].

If the notice of availability of the transcript or recording was served by mail, the response period is extended five days, upon service by mail, if the place of address and the place of mailing is within the state of California, 10 calendar days if either the place of mailing or the place of address is outside the state of California but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States [*Code Civ. Proc. § 2016.050* (incorporating by reference provisions of *Code Civ. Proc. § 1013(a)*)].

In the case of a transcript, the deposition officer must indicate on the original of the transcript, if the deponent has not already done so at the office of the deposition officer, any action taken by the deponent and indicate on the original of the transcript, the deponent's approval of, or failure or refusal to approve, the transcript. The deposition officer must also notify in writing the parties attending the deposition of any changes that the deponent timely made in person [*Code Civ. Proc. § 2025.520(e)*]. In the case of an audio or video recording, the deposition officer must set forth in writing to

accompany the recording any changes made by the deponent, as well as either the deponent's signature identifying the deposition as his or her own, or a statement of the deponent's failure to supply that signature, or to contact the officer within the allotted period [*Code Civ. Proc. § 2025.530(c)*].

In the case of a transcript, when the deponent fails or refuses to approve the transcript within the allotted period, the deposition is given the same effect as though it had been approved, subject to any changes timely made by the deponent [*Code Civ. Proc. § 2025.520(f)*; *see Chavez v. Zapata Ocean Resources, Inc. (1984) 155 Cal. App. 3d 115, 121-122, 201 Cal. Rptr. 887* (failure of deponent to review, correct, and sign, does not preventparty from using unsigned deposition of unavailable witness, decided under prior law)]. In the case of an audio or video recording, when a deponent fails to contact the officer within the allotted period, or expressly refuses by a signature to identify the deposition as his or her own, the deposition will be given the same effect as though signed [*Code Civ. Proc. § 2025.530(d)*]. With either type of recording, however, the court may grant a motion to suppress the deposition (discussed in *§ 193.74*) [*Code Civ. Proc. § 2025.520(g), 2025.530(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsDeposition Transcripts

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16-193 California Forms of Pleading and Practice--Annotated § 193.73A

§ 193.73A Perjury and Attempted Perjury

Perjury is committed by every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which the oath may by law of the State of California be administered, willfully and contrary to the oath, states as true any material matter which he or she knows to be false [*Pen. Code § 118*].

For purposes of establishing the crime of perjury, *Pen. Code § 124* provides that the making of a deposition, affidavit or certificate is deemed to be complete from the time when it is delivered by the accused to any other person, with the intent that it be uttered or published as true. For depositions, affidavits, and certificates, it is the finality of the writing and its delivery, and not merely speaking the false words, which constitutes an essential element of the crime of perjury. The mere making of the affidavit or giving testimony at a deposition cannot constitute the crime of perjury [*People v. Post (2001) 94 Cal. App. 4th 467, 480-484, 114 Cal. Rptr. 2d 356* (rejecting government's argument that more flexible deposition procedures adopted by Civil Discovery Act of 1986, now contained in *Code Civ. Proc. §§ 2025.520* and *2032.010 et seq.*, deleted delivery and signature requirement of *Pen. Code § 124* for purposes of perjury liability, and holding that unless deposition transcript in a workers' compensation proceeding was executed by deponent, crime of perjury could not be committed; recommending, however, that legislature revise definition of perjury to eliminate over 129-year old signature and delivery requirements under *Pen. Code § 124* and adopt federal standard that crime of perjury is complete once a materially false statement is spoken at a deposition); *Collins v. Superior Court (2001) 89 Cal App. 4th 1244, 1248-1249, 108 Cal. Rptr. 2d 123* (without executed deposition transcript, defendant could not be convicted of completed offense of perjury, explaining that pertinent question was not whether appellant's deposition could be used in civil matter, in accordance with *Code Civ. Proc. § 2025.520*, but whether document had been completed and delivered as required by *Pen. Code § 124*); *cf. Code Civ. Proc. §§ 2025.520(f), 2025.530(d)* (deponent's failure to sign and correct transcript or tape recording within 30 days renders it legally conclusive in civil case); *see § 193.73*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCriminal Law & ProcedureCriminal OffensesInchoate CrimesAttemptGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesPerjuryElements

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16-193 California Forms of Pleading and Practice--Annotated § 193.74

§ 193.74 Motion to Suppress Deposition

On a seasonable motion to suppress the deposition, the court may determine that the reasons given for the deponent's failure or refusal to approve the transcript or for the deponent's refusal to sign the writing identifying the deposition as his or her own require rejection of the deposition in whole or in part. The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [*Code Civ. Proc. § 2025.520(g), 2025.530(e)* (*Code Civ. Proc. § 2025.520(g)* refers to a "seasonable" motion to suppress a stenographic transcript, whereas *Code Civ. Proc. § 2025.530(e)* refers to a "reasonable" motion to suppress a nonstenographic transcript--these provisions are otherwise analogous)].

The court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to suppress a deposition, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust [*Code Civ. Proc. § 2025.520(h), 2025.530(f)*; for further discussion of monetary sanctions under *Code Civ. Proc. § 2023.010 et seq., see Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*].

For forms for use in obtaining an order suppressing all or part of a deposition, see *§§ 193.246, 193.247*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsDeposition Transcripts

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16-193 California Forms of Pleading and Practice--Annotated § 193.75

§ 193.75 Certification of Record by Deposition Officer

The deposition officer must certify on the transcript of the deposition, or in the writing accompanying an audio or video record of deposition testimony as described in *Code Civ. Proc. § 2025.530*, that the deponent was duly sworn, and that the transcript or recording is a true record of the testimony given [*Code Civ. Proc. § 2025.540(a)*].

When prepared as a rough draft transcript, the transcript of the deposition may not be certified and may not be used, cited, or transcribed as the certified transcript of the deposition proceedings. The rough draft transcript may not be cited or used in any way or at any time to rebut or contradict the certified transcript of the deposition proceedings that are provided by the deposition officer [*Code Civ. Proc. § 2025.540(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureTrialsDepositionsEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsDeposition Transcripts

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16-193 California Forms of Pleading and Practice--Annotated § 193.76

§ 193.76 Availability of Copies of Deposition Transcript or Recording

Notwithstanding *Code Civ. Proc. § 2025.320(b)* (discussed in *§ 193.40*), and unless the court issues an order to the contrary, a copy of the transcript of the deposition testimony, made by, or at the direction of, any party, or an audio or video recording of the deposition testimony, if still in the possession of the deposition officer, must be made available by the deposition officer to any person requesting a copy, upon payment of a reasonable charge set by the deposition officer [*Code Civ. Proc. § 2025.570(a)*].

PRACTICE TIP:

Obtaining Deposition Transcripts or Recordings. Note that deposition recorders, unlike official court reporters, are privately engaged, and the "reasonable charge" of providing copies by deposition recorders therefore is not subject to the fee limits applicable to official court reporters (*i.e.*, those who prepare reporter's transcripts of trial proceedings) under *Gov. Code §§ 69950, 69951*.

However, in *Serrano v. Stefan Merli Plastering Co.*, one appellate court held that the trial court in a pending action has the authority to require a deposition reporter to provide a copy of a transcript to a nonnoticing party for a reasonable fee [*Serrano v. Stefan Merli Plastering Co. (2008) 162 Cal. App. 4th 1014, 1035, 76 Cal. Rptr. 3d 559*]. In the event of a dispute, the trial court may determine the amount of the reasonable fee [*Serrano v. Stefan Merli Plastering Co. (2008) 162 Cal. App. 4th 1014, 1038, 76 Cal. Rptr. 3d 559*]. This rule applies only if (1) there is no relevant contractual relationship between the deposition reporter and the nonnoticing party relating to the cost of a copy of the deposition transcript, and (2) court intervention is required to ensure that the deposition reporter provides a copy of a deposition transcript to a nonnoticing party in a pending action in which the reporter has either refused to provide a copy or is willing to do so only on the condition that the nonnoticing party pay what it believes to be an unreasonable fee [*Serrano v. Stefan Merli Plastering Co. (2008) 162 Cal. App. 4th 1014, 1038, 76 Cal. Rptr. 3d 559*]. In this case, the trial court's failure to determine whether the amounts plaintiffs were required to pay for copies of the deposition transcripts were reasonable was reversible error [*Serrano v. Stefan Merli Plastering Co. (2008) 162 Cal. App. 4th 1014, 1039, 76 Cal. Rptr. 3d*

559].

The court in *Serrano* rejected the suggestion in *Urban Pacific Equities Corp. v. Superior Court* [*Urban Pacific Equities Corp. v. Superior Court (1997) 59 Cal. App. 4th 688, 69 Cal. Rptr. 2d 635*] that the trial court has no authority to limit to a reasonable amount the amount a party is required to pay to obtain a copy of a transcript in a pending action [*Serrano v. Stefan Merli Plastering Co. (2008) 162 Cal. App. 4th 1014, 1037, 76 Cal. Rptr. 3d 559*]. *Urban Pacific* held that a deponent's attorney could not use a business records deposition subpoena to compel a certified shorthand reporter to make a deposition transcript in a pending action available for copying, rather than paying the reporter what the court characterized as an "unconscionable" fee for a copy [*Urban Pacific Equities Corp. v. Superior Court (1997) 59 Cal. App. 4th 688, 692-694, 69 Cal. Rptr. 2d 635*]. The court in *Urban Pacific* reasoned that the transcript was not a "business record[]" within the meaning of former *Code Civ. Proc. § 2020(d)* (*now see Code Civ. Proc. § 2020.410(a)*) [*Urban Pacific Equities Corp. v. Superior Court (1997) 59 Cal. App. 4th 688, 692-693, 69 Cal. Rptr. 2d 635*]. The court stated further, "[a]lthough the fees charged by court-retained reporters are fixed by statute (*Gov. Code, §§ 69947, 69948, 69950*), there is no statute regulating the fees charged by private reporting firms, and deposition reporters are free to charge all the market will bear" [*Urban Pacific Equities Corp. v. Superior Court (1997) 59 Cal. App. 4th 688, 691-692, 69 Cal. Rptr. 2d 635*].

The *Serrano* court observed that the *Urban Pacific* reference to the "market" had little relevance to the factual context presented by this case in which a party with no contractual relationship with the reporter could be placed at the mercy of the reporter's arbitrary pricing policy, absent timely judicial intervention. The *Serrano* court found support for its conclusion that the trial court has the authority to act in these circumstances in the language of *Code Civ. Proc. § 2025.510(c)*, discussed above, and of *Code Civ. Proc. § 2025.570(a)*, which expressly requires that the fee charged by a deposition officer to "any person requesting a copy" of the transcript be "reasonable," and in *Code Civ. Proc. § 128(a)*, which confirms some of the court's inherent powers to control the conduct of ministerial officers in pending actions in order to protect the administration of justice [*Serrano v. Stefan Merli Plastering Co. (2008) 162 Cal. App. 4th 1014, 1034-1035, 1037, 76 Cal. Rptr. 3d 559*].

If a copy is requested from the deposition officer, the deposition officer must mail a notice to all parties attending the deposition and to the deponent at his or her last known address advising them that (1) the copy is being sought, (2) the name of the person requesting the copy, and (3) the right to seek a protective order pursuant to *Code Civ. Proc. § 2025.420* (discussed in *§ 193.50*)]. If a protective order is not served on the deposition officer within 30 days of the mailing of the notice, the deposition officer must make the copy available to the person requesting the copy [*Code Civ. Proc. § 2025.570(b), (c)*].

Code Civ. Proc. § 2025.570 applies only to recorded testimony taken at depositions occurring on or after January 1, 1998 [*Code Civ. Proc. § 2025.570(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsDeposition Transcripts

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7. Transcription, Certification, and Storage of Record

16-193 California Forms of Pleading and Practice--Annotated § 193.77

§ 193.77 Storage of Record

[1] Transcript

The certified transcript of a deposition is not filed with the court. Instead, the deposition officer must securely seal the transcript in an envelope orpackage, endorsed with the title of the action, and marked: "Deposition of (here insert name of deponent)." Then, the deposition officer must promptly transmit the sealed transcript to the attorney for the party who noticed the deposition [*Code Civ. Proc. § 2025.550(a)*].

This attorney must, in turn, store the sealed transcript under conditions that will protect it against loss, destruction, or tampering. He or she must retain custody of it until six months after final disposition of the action. At that time, the transcript may be destroyed, unless the court, on motion of any party and for good cause shown, orders that the transcript be preserved for a longer period [*Code Civ. Proc. § 2025.550*].

[2] Audio or Video Record

An audio or video recording of deposition testimony, including a certified recording made by an operator qualified under *Code Civ. Proc. § 2025.340*, is not to be filed with the court. Instead, the operator must retain custody of that recording, and store it under conditions that will protect it against loss, destruction, or tampering, and preserve as far as practicable the quality of the recording and the integrity of the testimony and the images it contains [*Code Civ. Proc. § 2025.560(a)*].

At the request of any party to the action, including a party who did not attend the taking of the deposition testimony, or at the request of the deponent, the operator must promptly permit the one making the request to hear or to view the recording on receipt of payment of a reasonable charge for providing the facilities for hearing or viewing the recording. The operator must also promptly furnish a copy of the audio or the video recording to the one making the request on receipt of payment of the reasonable cost of making that copy of the tape [*Code Civ. Proc. § 2025.560(b)*; *see also Code Civ. Proc. § 2025.510*, discussed in *§§ 193.42[1]*, *193.70*].

The attorney or operator who has custody of an audio or video recording of deposition testimony is required to retain custody of it until six months after final disposition of the action. At that time, the audio or video recording may be destroyed or erased, unless the court, on motion of any party and for good cause shown, orders that the recording be preserved for a longer period [*Code Civ. Proc. § 2025.560(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsDeposition Transcripts

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16-193 California Forms of Pleading and Practice--Annotated §§ 193.78-193.89

[Reserved]

§§ 193.78[Reserved]

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16-193 California Forms of Pleading and Practice--Annotated § 193.90

§ 193.90 Admissibility of Deposition Into Evidence Generally

At the trial or any other hearing in the action, any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition, or who had due notice of the deposition and did not serve a valid objection under *Code Civ. Proc. § 2025.410*, sofar as is admissible under the rules of evidence applied as though the deponent were then present and testifying as a witness, in accordance with the provisions of *Code Civ. Proc. § 2025.620* (discussed in *§§ 193.91 -193.94*) [*Code Civ. Proc. § 2025.620*; for general discussion of rules of evidence, *see* California Trial Guide (Matthew Bender)].

Subject to the requirements of *Code Civ. Proc. § 2025.620*, a party may offer in evidence all or any part of a deposition. If the party introduces only part of the deposition, any party may introduce any other parts that are relevant to the parts introduced [*Code Civ. Proc. § 2025.620(e)*].

The first page of any deposition used as an exhibit must state the name of the deponent and the date of the deposition. Other than the title page, the exhibit should contain only the relevant pages of the transcript. The original page number of any deposition page must be clearly visible. The relevant portion of any testimony in the deposition must be marked in a manner that calls attention to the testimony [*Cal. Rules of Ct., Rule 3.1116*].

For discussion of requirements for offering audio or video recordings into evidence, see *§ 193.42[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureTrialsDepositionsEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsDeposition TranscriptsEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral Overview

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16-193 California Forms of Pleading and Practice--Annotated § 193.91

§ 193.91 To Impeach Deponent

Any party may use a deposition for the purpose of contradicting or impeaching the testimony of the deponent as a witness, or for any other purpose permitted by the Evidence Code [*Code Civ. Proc. § 2025.620(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsEvidenceTestimonyCredibilityImpeachmentGeneral Overview

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16-193 California Forms of Pleading and Practice--Annotated § 193.92

§ 193.92 Use of Party's Deposition by Adverse Party

An adverse party may use, for any purpose, a deposition of a party to the action, or of anyone who at the time of taking the deposition was an officer, director, managing agent, employee, agent, or designee under *Code Civ. Proc. § 2025.230* of a party [*Code Civ. Proc. § 2025.620(b)*]. When a party to the action seeks to use the deposition of an adverse party under *Code Civ. Proc. § 2025.620(b)*, it is not ground for objection that the deponent is available, has testified, or will testify, at the trial or other hearing [*Code Civ. Proc. § 2025.620(b)*].

If part of a party's deposition has been introduced by an adverse party, other portions of the deposition may be introduced by the party deposed. For example, the other portions may be admissible under *Evid. Code § 356* when they are relevant to or necessary for an understanding of the part already admitted, or under *Evid. Code § 791(a)* as a prior consistent statement [*see Sprague v. Equifax, Inc. (1985) 166 Cal. App. 3d 1012, 1035-1036, 213 Cal. Rptr. 69]* .

Legal Topics:

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

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16-193 California Forms of Pleading and Practice--Annotated § 193.93

§ 193.93 Use of Deposition for Any Purpose

Any party may use for any purpose the deposition of any person or organization, including that of any party to the action, if the court finds any of the following [*Code Civ. Proc. § 2025.620(c)*]:

(A) The deponent resides more than 150 miles from the place of the trial or other hearing;

(B) The deponent, without the procurement or wrongdoing of the proponent of the deposition for the purpose of preventing testimony in open court, is: (i) exempted or precluded on the ground of privilege from testifying concerning the matter to which the deponent's testimony is relevant, (ii) disqualified from testifying, (iii) dead or unable to attend or testify because of existing physical or mental illness or infirmity, (iv) absent from the trial or other hearing and the court is unable to compel the deponent's attendance by its process, or (v) absent from the trial or other hearing and the proponent of the deposition has exercised reasonable diligence but has been unable to procure the deponent's attendance by the court's process; or

(C) Exceptional circumstances exist that make it desirable to allow the use of any deposition in the interests of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court.

Legal Topics:

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

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16-193 California Forms of Pleading and Practice--Annotated § 193.94

§ 193.94 Use of Video Recording of Deposition of Physician or Expert Witness

Any party may use a video recording of the deposition of a treating or consulting physician or of any expert witness, even though the deponent is available to testify, if the deposition notice under *Code Civ. Proc. § 2025.220* reserved the right to use the deposition at trial, and if that party has complied with *Code Civ. Proc. § 2025.340(m)* by timely notifying the court and all parties of that party's intent to use the deposition and of the parts of the deposition to be offered in evidence [*Code Civ. Proc. § 2025.620(d)*; *see § 193.225[3]*]. For further discussion see *§§ 193.41[3][b]* and *193.42[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureTrialsDepositionsEvidenceTestimonyExpertsGeneral Overview

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16-193 California Forms of Pleading and Practice--Annotated § 193.95

§ 193.95 Use of Deposition in Related Subsequent Action

When an action has been brought in any court of the United States or of any state, and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the initial action may be used in the subsequent action as if originally taken in that subsequent action. A deposition previously taken may also be used as permitted by the Evidence Code [*Code Civ. Proc. § 2025.620(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSubstitutionsTransfers of InterestsCivil ProcedureDiscoveryMethodsOral Depositions

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16-193 California Forms of Pleading and Practice--Annotated § 193.96

§ 193.96 Effect of Substitution of Parties

Substitution of parties does not affect the right to use depositions taken previously [*Code Civ. Proc. § 2025.620(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureParties SubstitutionsGeneral OverviewCivil ProcedureDiscoveryMethodsOral Depositions

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16-193 California Forms of Pleading and Practice--Annotated §§ 193.97-193.99

[Reserved]

§§ 193.97[Reserved]

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16-193 California Forms of Pleading and Practice--Annotated § 193.100

§ 193.100 Governing Law

Depositions by written questions are governed generally by *Code Civ. Proc. § 2028.010 et seq.* The provisions of *Code Civ. Proc. §§ 2025.010-2027.010*, governing oral depositions, also apply, except as modified by *Code Civ. Proc. §§ 2028.010-2028.080* [*Code Civ. Proc. § 2028.010*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsWritten Depositions

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16-193 California Forms of Pleading and Practice--Annotated § 193.101

§ 193.101 Deposition by Written Questions in General

Any party may obtain discovery by taking a deposition by written questions instead of by oral examination [*Code Civ. Proc. §§ 2019.010(a), 2028.010*]. Except as modified by *Code Civ. Proc. § 2028.010 et seq.*, the procedures for taking oral depositions under *Code Civ. Proc. §§ 2025.010-2027.010* apply to written depositions [*Code Civ. Proc. § 2028.010*].

For discussion of *Code Civ. Proc. § 2025.010 et seq.*, relating to oral depositions generally, see Subpart A, § 193.10 et seq. For discussion of *Code Civ. Proc. §§ 2026.010* and *2027.010*, relating to oral depositions taken outside California, see Subpart C, § 193.120 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsWritten Depositions

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16-193 California Forms of Pleading and Practice--Annotated § 193.102

§ 193.102 Notice of Written Deposition

A party initiating a written deposition must provide notice in accordance with the notice requirements applicable to oral depositions under *Code Civ. Proc. §§ 2025.220*, *2025.230*, and *2025.240(c)*, with the following exceptions [*Code Civ. Proc. § 2028.020*]:

- The name or descriptive title, as well as the address, of the deposition officer must be stated.

- The date, time, and place for commencement of the deposition may be left to future determination by the deposition officer.

For discussion of the notice requirements of *Code Civ. Proc. §§ 2025.220*, *2025.230*, and *2025.240(c)*, see *§ 193.21* and *§ 193.225[2] -[5]*. For a form of notice of written deposition, see *§ 193.260*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsWritten Depositions

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16-193 California Forms of Pleading and Practice--Annotated § 193.103

§ 193.103 Service of Written Questions

[1] Direct Questions

The questions to be propounded to the deponent by direct examination must accompany the notice of written deposition [*Code Civ. Proc. § 2028.030(a)*]. For a form that may be used in propounding direct questions, see *§ 193.261*.

[2] Cross, Redirect, and Recross Questions

A party who seeks to cross examine the deponent must serve his or her cross questions on all other parties entitled to notice of the deposition within 30 days after service of the deposition notice and direct questions [*Code Civ. Proc. § 2028.030(b)*].

The proponent of the deposition must serve any redirect questions on all other parties entitled to notice of the deposition within 15 days after service of the cross questions [*Code Civ. Proc. § 2028.030(c)*].

A party who seeks further cross examination of the deponent must serve any recross questions on all other parties entitled to notice of the deposition within 15 days after service of the redirect questions [*Code Civ. Proc. § 2028.030(d)*].

The time periods for the interchange of cross, redirect, and recross questions are extended under *Code Civ. Proc. § 1013(a)* when the service triggering the period is by mail [*Code Civ. Proc. § 2016.050*]. Specifically, they are extended by five calendar days if the place of address is within California, 10 calendar days if the place of address is outside California but within the United States, or 20 calendar days if the place of address is outside the United States [*see Code Civ. Proc. § 1013(a)*]. The period is extended two court days if service is by Express Mail or Fax [*Code Civ. Proc. § 1013(c), (e)*].

The court may, for good cause shown, extend or shorten the time periods for the interchange of cross, redirect, and recross questions [*Code Civ. Proc. § 2028.030(e)*]. For discussion and forms relating to extending or shortening time periods generally, see Ch. 524, *Shortening and Extension of Time* .

For a form that may used in propounding written cross, redirect, or recross questions, see *§ 193.261*.

Legal Topics:

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

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16-193 California Forms of Pleading and Practice--Annotated § 193.104

§ 193.104 Objections to Written Questions

A party may object to the form of any question, or may object to any question on the ground that it calls for information that is privileged or is protected work product under *Code Civ. Proc. § 2018.010 et seq.*, by serving a specific objection to that question on all parties entitled to notice of the deposition within 15 days after service of the question [*Code Civ. Proc. §§ 2028.040, 2028.050*]. This 15-day response period is extended under *Code Civ. Proc. § 1013(a)* when service of the question is by mail [*Code Civ. Proc. § 2016.050*; for discussion of provisions of *Code Civ. Proc. § 1013(a)*, see *§ 193.103[2]*], and is extended under *Code Civ. Proc. § 1013(c), (e)* when service is by Express Mail or by fax, respectively.

A party who fails to serve a timely objection to the form of a question, or an objection on the grounds that the question calls for information that is privileged or protected work product under *Code Civ. Proc. § 2018.010 et seq.*, waives that objection [*Code Civ. Proc. §§ 2028.040, 2028.050*]. For a form of objection, see *§ 193.262*.

If an objection is based on the form of a question, the objecting party must promptly move the court to sustain it [*Code Civ. Proc. § 2028.040(b)*]. If it is based on privilege or work product protection, the party propounding the question may then move the court for an order overruling the objection [*Code Civ. Proc. § 2028.050(b)*]. In either case, the motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the objection and motion. In ruling on the motion, the court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to sustain or to overrule an objection, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust [*Code Civ. Proc. §§ 2028.040(c), 2028.050(c)*; for further discussion of monetary sanctions under *Code Civ. Proc. § 2023.010 et seq.*, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*]. For a form of motion to sustain or overrule an objection under *Code Civ. Proc. §§ 2028.040* and *2028.050*, see *§ 193.263*.

If an objection is based on the form of the question, the deposition officer must propound the question objected to subject to that objection, unless the court has sustained the objection [*Code Civ. Proc. § 2028.040(b)*]. On the other hand, if the objection is based on privilege or work product protection, the deposition officer must not propound any

question to which a written objection on those grounds has been served, unless the court has overruled the objection [*Code Civ. Proc. § 2028.050(b)*].

For discussion concerning objections to discovery on the basis of privilege or work product protection, see Ch. 191, *Discovery: Privileges and Other Discovery Limitations* . For discussion concerning evidentiary objections generally, see Ch. 551, *Trial* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductWaiversEvidenceProcedural ConsiderationsObjections & Offers of ProofObjections

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16-193 California Forms of Pleading and Practice--Annotated § 193.105

§ 193.105 Protective Orders

In addition to any appropriate protective order listed in *Code Civ. Proc. § 2025.420(b)*, the court may order any of the following:

- That the deponent's testimony be taken by oral, instead of written, examination [*Code Civ. Proc. § 2028.070(a)*].

- That one or more of the parties receiving notice of the written deposition be permitted to attend in person or by attorney and to propound questions to the deponent by oral examination [*Code Civ. Proc. § 2028.070(b)*].

- That objections under *Code Civ. Proc. §§ 2028.040* and *2028.050* be sustained or overruled (discussed in *§ 193.104*) [*Code Civ. Proc. § 2028.070(c)*].

- That the deposition be taken before an officer other than the one named or described in the deposition notice [*Code Civ. Proc. § 2028.070(d)*].

For full discussion of the procedures applicable in obtaining an protective order under *Code Civ. Proc. § 2025.420*, see *§ 193.50* et seq. For a general form of motion for a protective order under *Code Civ. Proc. § 2025.420*, see *§ 193.233*. For a form of clauses that may used with the general form of motion for a protective order, when seeking an order expressly authorized under *Code Civ. Proc. § 2028.070*, see *§ 193.265*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureDiscoveryProtective Orders

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16-193 California Forms of Pleading and Practice--Annotated § 193.106

§ 193.106 Review of Written Questions by Deponent

The party taking the deposition may forward to the deponent a copy of the questions on direct examination for study prior to the deposition. However, no party or attorney may permit the deponent to preview the form or the substance of any cross, redirect, or recross questions [*Code Civ. Proc. § 2028.060*].

Legal Topics:

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

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16-193 California Forms of Pleading and Practice--Annotated § 193.107

§ 193.107 Conduct of Written Deposition

The party taking the deposition is required to deliver to the officer designated in the deposition notice a copy of that notice and of all questions served under *Code Civ. Proc. § 2028.030*. The deposition officer must then proceed "promptly" to propound the questions, and to take and record the testimony of the deponent in response to the questions [*Code Civ. Proc. § 2028.080*].

For further discussion concerning the conduct of the deposition, see *§ 193.40* et seq. For father discussion of recording deposition testimony and use of a deposition transcript at trial, see *respectively § 193.70 et seq. and § 193.90* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureDiscoveryMethodsWritten Depositions

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16-193 California Forms of Pleading and Practice--Annotated §§ 193.108-193.119

[Reserved]

§§ 193.108[Reserved]

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C. Taking Depositions Outside California

16-193 California Forms of Pleading and Practice--Annotated § 193.120

§ 193.120 Governing Law

The taking of oral depositions outside of California for use in California, is governed by *Code Civ. Proc. §§ 2026.010* (another state or territory of United States) and 2027.010 (foreign nation).

The provisions of *Code Civ. Proc. § 2025.010 et seq.* (oral depositions in California) also apply, except as modified by *Code Civ. Proc. §§ 2026.010* and *2027.010* [*see Code Civ. Proc. §§ 2026.010(a), 2027.010(a)*].

The law of the jurisdiction where the deposition is to be taken governs the process or procedure to be used in compelling a nonparty deponent's attendance, testimony, and production of documents or things at a deposition taken outside California [*Code Civ. Proc. §§ 2026.010(c), 2027.010(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsOral Depositions

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C. Taking Depositions Outside California

16-193 California Forms of Pleading and Practice--Annotated § 193.121

§ 193.121 Oral Depositions Outside of California

[1] In General

Any party may obtain discovery by taking an oral deposition, as described in *Code Civ. Proc. § 2025.010*, in another state of the United States, in a territory or an insular possession subject to its jurisdiction [*Code Civ. Proc. § 2026.010(a)*], or in a foreign nation [*Code Civ. Proc. § 2027.010(a)*]. For discussion of *Code Civ. Proc. § 2025.010*, see *§ 193.11*.

Except as modified by *Code Civ. Proc. §§ 2026.010* and *2027.010*, the procedures for taking oral depositions in California set forth in *Code Civ. Proc. § 2025.010 et seq.* apply to an oral deposition taken outside of California [*Code Civ. Proc. §§ 2026.010(a), 2027.010(a)*]. For discussion relating to the taking of oral depositions under *Code Civ. Proc. § 2025.010 et seq.*, see Subpart A, § 193.10 et seq.

[2] When Deponent Is Party

If a deponent is a party to the action or is an officer, a director, a managing agent, or an employee of a party, service of a deposition notice is effective to compel him or her to attend and to testify at a deposition to be taken outside of California for use in an action in California, as well as to produce at that deposition any document or tangible thing for inspection and copying [*Code Civ. Proc. §§ 2026.010(b), 2027.010(b)*].

If the deposition is to be taken in another state, territory or insular possession of the United States, the deposition notice must specify, as the place for taking the deposition, a place that is within 75 miles of the residence or a business office of the deponent [*Code Civ. Proc. § 2026.010(b)*]. There is no similar provision or requirement regarding the location of a deposition to be taken in a foreign nation [*see Code Civ. Proc. § 2027.010*].

Otherwise, the requirements for a deposition notice under *Code Civ. Proc. § 2025.010 et seq.* apply [*Code Civ. Proc. §§ 2026.010(a), 2027.010(a)*]. For further discussion relating to deposition notices, see *§ 193.21*. For a form of deposition notice that may be adapted for use in providing notice of deposition outside of California, see *§ 193.225*.

As an alternative to proceeding under *Code Civ. Proc. § 2026.010*, counsel may follow the procedures described by *Code Civ. Proc. § 2025.260* (deposition of party at more distant location) and obtain an order to depose an out-of-state resident in California [*Glass v. Superior Court (1988) 204 Cal. App. 3d 1048, 1052-1053, 251 Cal. Rptr. 690* (decided under prior law); for a form for use in seeking a deposition at a more distant place, see *§ 193.223*].

[3] When Deponent Is Nonparty

If the deponent is neither a party to the action nor an officer, a director, a managing agent, or an employee of a party, the party serving a deposition notice under *Code Civ. Proc. § 2026.010* or *2027.010* (*see* [2], *above*) must use any process and procedure required and available under the laws of the state, territory, insular possession, or foreign nation in which the deposition is to be taken in order to compel the deponent's attendance, testimony, and production of documents and things at the deposition [*Code Civ. Proc. §§ 2026.010(c), 2027.010(c)*]. For further discussion concerning steps to obtain foreign process to compel the attendance and testimony of a nonparty deponent, see *§ 193.123*.

Although the laws of the place govern the process for compelling the nonparty deponent to attend, testify, and produce documents, those processes are the only things relating to the deposition that are governed by such law [*see International Ins. Co. v. Montrose Chemical Corp. (1991) 231 Cal. App. 3d 1367, 1370-1371, 282 Cal. Rptr. 783]* . Thus, when a plaintiff sought from the defendant the production of documents that had been used to refresh the memory of a nonparty deponent, California law governed that production request. The defendant was not the deponent, and the request directed to it to produce documents was not within the parameters of *Code Civ. Proc. § 2026.010(c)* [*International Ins. Co. v. Montrose Chemical Corp. (1991) 231 Cal. App. 3d 1367, 1370-1371, 282 Cal. Rptr. 783]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionInternational LawDispute ResolutionEvidenceWitnesses

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§ 193.122 Deposition Officer

A deposition taken in another state, territory, or possession of the United States under *Code Civ. Proc. § 2026.010* must be conducted either (1) under the supervision of a person who is authorized to administer oaths by the laws of the United States or those of the place in which the examination is to be held, and who is not otherwise disqualified under *Code Civ. Proc. § 2025.320* or *Code Civ. Proc. § 2025.340*, or *(2)* before a person appointed by the court [*Code Civ. Proc. § 2026.010(d)*]. An appointment by the court is effective to authorize that person to administer oaths and to take testimony [*Code Civ. Proc. § 2026.010(e)*].

A deposition taken in a foreign nation under *Code Civ. Proc. § 2027.010* must be conducted under the supervision of (1) a person who is authorized to administer oaths or their equivalent by the laws of the United States or of the foreign nation, and who is not otherwise disqualified under *Code Civ. Proc. § 2025.320*, or *Code Civ. Proc. § 2025.340*, *(2)* a person or officer appointed by commission or under letters rogatory, or (3) any person agreed to by all the parties [*Code Civ. Proc. § 2027.010(d)*].

For discussion of the requirements under *Code Civ. Proc. § 2025.320*, see *§ 193.40*. For discussion of commission and letters rogatory, see *§ 193.123*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionInternational LawDispute ResolutionEvidenceWitnesses

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§ 193.123 Commission, Letters Rogatory, or Letters of Request

[1] Definitions

A commission authorizes a designated individual to take the deposition of a named witness, while a letter rogatory is a judicial request, addressed to a foreign court, that a witness be examined within the latter's territorial jurisdiction by written questions, or, if the foreign court permits, by oral questions. The commission is entirely under the control of the court that issues the commission. However, when letters rogatory are used, the deposition is under the control of the foreign tribunal whose assistance is sought in the administration of justice [*see Volkswagenwerk Aktiengesellschaft v. Superior Court (1973) 33 Cal. App. 3d 503, 506-507, 109 Cal. Rptr. 219 , overruled on other grounds, American Home Assurance Co. v. Societe Commerciale Toutelectric (2002) 104 Cal. App. 4th 406, 128 Cal. Rptr. 2d 430]* . While common law nations generally regard the deposition of a willing witness as a private matter in which their courts have no interest, in civil law nations a deposition in aid of a foreign proceeding is a public matter requiring the participation and consent of their own courts. Thus, in a civil law nation, a letter rogatory is the usual and accepted method of taking depositions [*see Volkswagenwerk Aktiengesellschaft v. Superior Court (1973) 33 Cal. App. 3d 503, 507, 109 Cal. Rptr. 219 , overruled on other grounds, American Home Assurance Co. v. Societe Commerciale Toutelectric (2002) 104 Cal. App. 4th 406, 128 Cal. Rptr. 2d 430]* .

A letter of request is a method of international discovery provided under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters [23 UST 2555, TIAS No. 7444, set forth in the Note to *28 U.S.C.A. § 1781*], which has many signatories including Barbados, Cyprus, Czechoslovakia, Denmark, Finland, France, Federal Republic of Germany, Israel, Italy, Luxemburg, Netherlands, Norway, Portugal, Singapore, Sweden, United Kingdom, and the United States [*see* [2], *below*, for discussion of when obtaining discovery under the Hague Convention may be required]. The letter of request is transmitted to the foreign nation's central authority, requesting an appropriate judicial authority in that country to obtain evidence or perform some other judicial act [Convention, Article 1]. The letter of request must include specified information concerning the parties, the proceedings, and the evidence to be obtained [*see* Convention, Article 3], and may be written in English unless the contracting state has reserved otherwise [Convention, Article 4]. However, counsel should be forewarned that some countries [*e.g.*, France, Germany, Italy, and the United Kingdom; *see* Convention, ns. 4, 5, 6a, 13] limit the use of letters of request and, in signing the Convention, have

adopted a policy of refusing to execute letters of request "issued for the purpose of obtaining pretrial discovery of documents as known in Common Law countries" [*see* Convention, Article 23].

For further discussion of commissions, letters rogatory, and letters of request, see DeMeo, California Deposition and Discovery Practice, Ch. 6, *Discovery Outside California* (Matthew Bender) [*see also* 1 Deposition Strategy, Law and Forms, Ch. 2, *Deposition Law*, § 2.05 (Matthew Bender); Bender' S Forms of Discovery, Ch. 2, *Depositions*, §§ 2.05, 2.06 (Matthew Bender) (commissions and letters rogatory in proceedings under *Fed. R. Civ. P., Rule 28*)]. For forms of commission, letters rogatory, and letter of request, see *§§ 193.272 -193.274*.

[2] When Necessary

The United States Supreme Court has held that the Hague Convention was intended to establish *optional* procedures that would facilitate the taking of evidence abroad [*Societe Nationale Industrielle Aerospatiale v. United States District Court (1987) 482 U.S. 522, 544, 107 S. Ct. 2542, 96 L. Ed. 2d 461]* . The Supreme Court noted that in "many situations, the Letter of Request procedure authorized by the Hague Convention would be unduly time consuming and expensive, as well as less certain to produce needed evidence than direct use of the Federal Rules" [*Societe Nationale Industrielle Aerospatiale v. United States District Court (1987) 482 U.S. 522, 542, 107 S. Ct. 2542, 96 L. Ed. 2d 461]* . However, the Court also observed that "in other instances a litigant's first use of the Hague Convention procedures can be expected to yield more evidence abroad more promptly than use of the normal procedures governing pre-trial civil discovery. In those instances, the calculations of the litigant will naturally lead to a first-use strategy" [*Societe Nationale Industrielle Aerospatiale v. United States District Court (1987) 482 U.S. 522, 542 n.26, 107 S. Ct. 2542, 96 L. Ed. 2d 461]* . Accordingly, a court must conduct a case-by-case balancing of facts, sovereign interests, and the likelihood that resort to Convention procedures will prove effective before requiring resort to those procedures [*Societe Nationale Industrielle Aerospatiale v. United States District Court (1987) 482 U.S. 522, 543-544, 107 S. Ct. 2542, 96 L. Ed. 2d 461]* .

In *American Home Assurance Co. v. Societe Commerciale Toutelectric (2002) 104 Cal. App. 4th 406, 128 Cal. Rptr. 2d 430* , the First District Court of Appeal held that the balancing test provided in *Societe Nationale Industrielle Aerospatiale* has superseded the rule of first resort to the Hague Convention announced in *Volkswagenwerk Aktiengesellschaft v. Superior Court (1981) 123 Cal. App. 3d 840, 858, 176 Cal. Rptr. 874* [*American Home Assurance Co. v. Societe Commerciale Toutelectric (2002) 104 Cal. App. 4th 406, 423, 128 Cal. Rptr. 2d 430* (trial court properly refused to apply Hague Convention discovery procedures in a suit against French corporation, after performing *Aerospatiale's* prescribed case-by-case balancing of facts, sovereign interests, and likelihood of successful discovery)]. (*Volkswagenwerk Aktiengesellschaft* held that, even when a foreign defendant is subject to California jurisdiction, a California litigant must, as a matter of international comity, attempt to comply with the provisions of the Convention before attempting any discovery in the signatory nation). The party seeking to utilize the Hague Convention procedures has the burden of convincing the trial court that they are justified by considerations of international comity [*American Home Assurance Co. v. Societe Commerciale Toutelectric (2002) 104 Cal. App. 4th 406, 427, 128 Cal. Rptr. 2d 430]* . Moreover, because Hague Convention procedures are only an optional method of pursuing discovery abroad, they may be waived by failing to properly raise the issue [*American Home Assurance Co. v. Societe Commerciale Toutelectric (2002) 104 Cal. App. 4th 406, 429, 128 Cal. Rptr. 2d 430 , overruling Pierburg GmbH & Co. KG v. Superior Court (1982) 137 Cal. App. 3d 238, 186 Cal. Rptr. 876]* . However, a party's neglect of its right to request application of the Hague Convention procedures must be substantial to support a finding of waiver [*American Home Assurance Co. v. Societe Commerciale Toutelectric (2002) 104 Cal. App. 4th 406, 430, 128 Cal. Rptr. 2d 430* (trial court properly found party responding to discovery had waived its right to insist on Hague Convention procedures because party's tactics were inconsistent with those procedures)].

Issuance of a commission, letters rogatory, or a letter of request does not appear to be necessary to compel a party or party-affiliated deponent to attend, testify, or produce documents at a deposition under *Code Civ. Proc. §§ 2026.010* or *2027.010*, because those sections provide that service of the deposition notice is effective to compel that deponent to

give the deposition [*Code Civ. Proc. §§ 2026.010(b), 2027.010(b)*; *see also Snyder v. Superior Court (1970) 9 Cal. App. 3d 579, 582, 89 Cal. Rptr. 534* (commission not required to take deposition of party outside California but within United States under former *Code Civ. Proc. § 2024*)].

In cases in which discovery will be obtained under the Hague Convention, a commission, letters rogatory, or a letter or request may be necessary to compel the attendance and deposition of a nonparty deponent. These devices give the jurisdiction in which the deposition is to be taken official evidence of the pending action and thus a foundation for a subpoena or other process to compel the nonparty or nonparty-affiliated deponent to give the deposition.

[3] Issuance by Court

A commission, letters rogatory, or letter of request is issued by the court in which the action is pending. In the case of a deposition in another state, territory, or insular possession of the United States, the clerk of the court, upon request, will issue a commission authorizing the deposition, requesting that process issue in the place where the examination is to be held, and requiring attendance and enforcing the obligations of the deponents to produce documents and answer questions [*Code Civ. Proc. § 2026.010(f)*]. Any party in any action pending in the court's venue may obtain issuance of the commission without a noticed motion or court order [*Code Civ. Proc. § 2026.010(f)*]. The commission may contain such terms as are required by the foreign jurisdiction to initiate the process [*Code Civ. Proc. § 2026.010(f)*]. If a court order is required by the foreign jurisdiction, an order for a commission may be obtained by ex parte application [*Code Civ. Proc. § 2026.010(f)*].

Similarly, in the case of a deposition in a foreign nation under *Code Civ. Proc. § 2027.010*, the court issues a commission, letters rogatory, or a letter of request, including any terms and directions that are just and appropriate, after determining that one is necessary or convenient on motion of the party seeking to take the deposition [*Code Civ. Proc. § 2027.010(e)*]. In the latter instance, the deposition officer may be designated by name or by descriptive title in the deposition notice and in a commission, while letters rogatory or a letter of request may be addressed, "To the Appropriate Judicial Authority in [name of foreign nation]" [*Code Civ. Proc. § 2027.010(e)*].

For a form for a motion for the issuance of a commission, letters rogatory, or letter of request, see *§ 193.270*. For an illustration of Judicial Council Form DISC-030, Commission to Take Deposition Outside California [Cal. Judicial Council Form DISC-030], approved by the Judicial Council for optional use, see *§ 193.272*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 193.124 Deposition by Written Questions Outside of California

Any party may obtain discovery by taking a deposition by written questions instead of by oral examination. Depositions by written questions are governed generally by *Code Civ. Proc. §§ 2028.010-2028.080*. The procedures for taking oral depositions set forth in *Code Civ. Proc. §§ 2025.010 et seq., 2026.010*, and *2027.010* apply to written depositions taken outside California for use in California, except as modified by *Code Civ. Proc. § 2028.010 et seq.* In some instances a deposition by written questions may be the only practical method of discovery.

A party seeking a commission, letters rogatory, or letter of request in order to take an out-of-state deposition on written questions should schedule the hearing on the motion to allow sufficient time, as required under *Code Civ. Proc. § 2028.030*, for the parties to present cross, redirect, and recross questions prior to the hearing on that motion. For detailed discussion of the depositions by written questions, see *§ 193.100* et seq.

Legal Topics:

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

§§ 193.125[Reserved]

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16-193 California Forms of Pleading and Practice--Annotated § 193.130

§ 193.130 Governing Law

Effective January 1, 2010 [Stats. 2008 ch. 231, § 3; *Code Civ. Proc. § 2029.900*], the Interstate and International Depositions and Discovery Act [*Code Civ. Proc. § 2029.100 et seq.*] governs depositions in California for out-of-state actions. The Act applies to requests for discovery in cases pending on or after its effective date [*Code Civ. Proc. § 2029.800*].

The Act is California's version of the Uniform Interstate Depositions and Discovery Act [*see Code Civ. Proc. § 2029.700*]. In applying and construing the Act, consideration must be given to the "need to promote uniformity of the law with respect to its subject matter among the states that enact it" [*Code Civ. Proc. § 2029.700(b)*].

Code Civ. Proc., Title 3, [*Code Civ. Proc. § 1985 et seq.* (means and manner of production) and Code Civ. Proc., Title 4 [The Civil Discovery Act, *Code Civ. Proc. § 2016.010 et seq.*], and any other California law or court rule governing a deposition, a production of documents or other tangible items, or an inspection of premises, including any law or court rule governing payment of court costs or sanctions, apply to discovery under the Act [*Code Civ. Proc. § 2029.500*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsWritten DepositionsInternational LawDispute ResolutionEvidenceHague Convention on Taking Evidence AbroadInternational LawDispute ResolutionEvidenceWitnesses

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16-193 California Forms of Pleading and Practice--Annotated § 193.131

§ 193.131 Definitions

For purposes of the Act, "foreign jurisdiction" is either a state other than California or a foreign nation [*Code Civ. Proc. § 2029.200(a)*].

A "foreign subpoena" is a subpoena issued under authority of a court of record of a foreign jurisdiction [*Code Civ. Proc. § 2029.200(b)*].

A "person" is an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity [*Code Civ. Proc. § 2029.200(c)*].

A "state" means a state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States [*Code Civ. Proc. § 2029.200(d)*].

A "subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to do any of the following [*Code Civ. Proc. § 2029.200(e)*]:

- Attend and give testimony at a deposition.

- Produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person.

- Permit inspection of premises under the control of the person.

Legal Topics:

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

Civil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsWritten DepositionsInternational LawDispute ResolutionEvidenceWitnesses

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16-193 California Forms of Pleading and Practice--Annotated § 193.132

§ 193.132 Procedure for Obtaining Subpoena

To request issuance of a subpoena under the Interstate and International Depositions and Discovery Act [*Code Civ. Proc. § 2029.100 et seq.*], a party must submit the original or a true and correct copy of a foreign subpoena to the clerk of the superior court in the California county in which discovery is sought to be conducted [*Code Civ. Proc. § 2029.300(a)*]. A request for the issuance of a subpoena in these circumstances does not constitute making an appearance in the California courts [*Code Civ. Proc. § 2029.300(a)*].

In addition to submitting a foreign subpoena, as described above, a party seeking discovery must do both of the following [*Code Civ. Proc. § 2029.300(b)*]:

- Submit an application requesting that the superior court issue a subpoena with the same terms as the foreign subpoena. The application must be on a form prescribed by the Judicial Council [*see § 193.280* (form)].

- Pay the specified fee [*see Gov. Code § 70626*].

When these requirements are satisfied, the court clerk must promptly issue a subpoena for service on the person to which the foreign subpoena is directed [*Code Civ. Proc. § 2029.300(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedurePretrial MattersSubpoenasInternational LawDispute ResolutionEvidenceWitnesses

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16-193 California Forms of Pleading and Practice--Annotated § 193.133

§ 193.133 Subpoena Form and Contents

A subpoena issued under *Code Civ. Proc. § 2029.300* must do all of the following [*Code Civ. Proc. § 2029.300(d)*]:

- Incorporate the terms used in the foreign subpoena.
- Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.
- Bear the caption and case number of the out-of-state case to which it relates.
- State the name of the court that issues it.
- Be on the prescribed Judicial Council form [*see Code Civ. Proc. § 2029.390*].

Judicial Council forms (application and subpoenas) are reproduced in §§ 193.280-193.282.

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16-193 California Forms of Pleading and Practice--Annotated § 193.134

§ 193.134 Party Not Required to Retain Local Attorney

A party is not required to retain a local attorney to depose a witness in these circumstances. An active member of the California State Bar who is retained by a party to an out-of-state court proceeding may issue a deposition subpoena [*Code Civ. Proc. § 2029.350(a)*]. A deposition subpoena that issues under *Code Civ. Proc. § 2029.350(a)* must do all of the following [*Code Civ. Proc. § 2029.350(b)*]:

- Incorporate the terms used in the foreign subpoena.
- Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.
- Bear the caption and case number of the out-of-state case to which it relates.
- State the name of the superior court of the county in which the discovery is to be conducted.
- Be on the prescribed Judicial Council form [*see Code Civ. Proc. § 2029.390*].

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§ 193.135 Service of Subpoena

A discovery subpoena issued under the Act must be personally served in compliance with California law, including, without limitation, *Code Civ. Proc. § 1985* [*Code Civ. Proc. § 2029.400*]. For discussion of service of the deposition subpoena, see *§ 193.281[6]*. For discussion of service of subpoenas generally, see *Ch. 535, Subpoena, § 535.17*

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§ 193.136 Resolution of Disputes

If a dispute arises relating to discovery under the Interstate and International Depositions and Discovery Act [*Code Civ. Proc. § 2029.100 et seq.*], any request for a protective order, to enforce, quash, or modify a subpoena, or for other relief may be filed in the superior court in the county in which discovery is to be conducted [*Code Civ. Proc. § 2029.600(a)*]. In these circumstances, the request for relief (the "petition") must comply with the applicable California rules or statutes [*Code Civ. Proc. § 2029.600(a)*; *see Code Civ. Proc. § 2029.600(b)* (request for relief is a "petition," regardless of whether request for relief would be referred to as a motion, or by another term, if it were brought in proceeding pending in this state); *see also Code Civ. Proc. § 2029.610(a), (c)* (fees); *Code Civ. Proc. § 2029.610(d)* (content requirements)].

If a petition has been filed under *Code Civ. Proc. § 2029.600* and another dispute later arises relating to discovery being conducted in the same county for purposes of the same out-of-state proceeding, the deponent or other disputant may file a petition for appropriate relief in the same superior court as the previous petition [*Code Civ. Proc. § 2029.620(a)*; *see Code Civ. Proc. § 2029.620(b), (e), (f)* (content requirements); *Code Civ. Proc. § 2029.620(c), (d)* (fees)].

A petition under *Code Civ. Proc. § 2029.600* or § 2029.620 is subject to the requirements of *Code Civ. Proc. § 1005*, relating to notice and to filing and service of papers [*Code Civ. Proc. § 2029.630*].

If a party to a proceeding pending in a foreign jurisdiction seeks discovery from a witness in California by properly issued notice or by agreement, that party is not required to obtain a subpoena under the Act to be able to seek relief under *Code Civ. Proc. §§ 2029.600* or *2029.620*. The deponent or any other party may also seek relief under *Code Civ. Proc. §§ 2029.600* or *2029.620* in those circumstances, regardless of whether the deponent was subpoenaed under the Act [*Code Civ. Proc. § 2029.640*].

A party may appeal a court order in connection with a dispute by extraordinary writ to the appropriate court of appeal [*see Code Civ. Proc. § 2029.650*]. No other court order or action is appealable under the Act [*Code Civ. Proc. § 2029.650*].

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16-193 California Forms of Pleading and Practice--Annotated §§ 193.137-193.139

[Reserved]

§§ 193.137[Reserved]

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E. Depositions of Prisoners

16-193 California Forms of Pleading and Practice--Annotated § 193.140

§ 193.140 Governing Law

Depositions of prisoners for use in civil actions are governed by *Penal Code § 2623* (prisoners confined in state prison) and *Code Civ. Proc. §§ 1995-1997* (prisoners confined in jail in California).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil Rights LawPrisoner RightsGeneral Overview

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16-193 California Forms of Pleading and Practice--Annotated § 193.141

§ 193.141 Deposition of Prisoner in State Prison

The deposition of a prisoner confined in a state prison may be taken in a civil action as provided for in *Penal Code § 2623*. A motion for an order for the prisoner to be examined in the state prison is made to the court in which the action is pending, unless it is pending in a small claims court. In that case, the motion is made in the superior court of the county in which the action is pending [*Penal Code § 2623*]. The motion must be made on an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) showing the nature of the action, the testimony expected from the witness, and its materiality [*Penal Code § 2623*].

The deposition, when ordered, is taken pursuant to *Penal Code § 2622*, which relates to the taking of the deposition of a prisoner in state prison for use in a criminal case [*Penal Code § 2623*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil Rights LawPrisoner RightsGeneral Overview

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16-193 California Forms of Pleading and Practice--Annotated § 193.142

§ 193.142 Deposition of Prisoner in County Jail

The deposition of a prisoner confined to a jail within California, such as a county jail, may be taken pursuant to *Code Civ. Proc. §§ 1995-1997*. A motion for an order for the examination of the prisoner in the jail, or for the prisoner's temporary removal or production before a court or officer, is made to the court in which the action is pending, unless it is pending in a small claims court. In that case, the motion is made before a justice of the Supreme Court, or in the superior court of the county in which the action is pending [*see Code Civ. Proc. §§ 1995, 1996*]. The motion must be made on an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) showing the nature of the action, the testimony expected from the witness, and its materiality [*Code Civ. Proc. § 1996*].

The examination of a prisoner confined to a jail may only be taken on a deposition, unless the prisoner is in a jail in the county in which the action is pending. In that case, production of the prisoner may be required [*Code Civ. Proc. § 1997*]. It appears that *Code Civ. Proc. § 1997* refers to production of a prisoner for appearance and testimony at trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil Rights LawPrisoner RightsGeneral Overview

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16-193 California Forms of Pleading and Practice--Annotated §§ 193.143-193.149

[Reserved]

§§ 193.143[Reserved]

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16-193 California Forms of Pleading and Practice--Annotated § 193.150

§ 193.150 Matthew Bender Publications

For comprehensive discussion and forms relating to discovery by oral depositions or depositions on written questions, see DeMeo, California Deposition and Discovery Practice, Chs. 50-53 (Matthew Bender), and Hogan & Weber's California Civil Discovery, Chs. 2-4 (Matthew Bender)

For comprehensive discussion and forms relating to discovery sanctions, see DeMeo, California Deposition and Discovery Practice, Ch. 42, *Sanctions for Misuse of Discovery Process* (Matthew Bender), and Hogan & Weber, California Civil Discovery, Ch. 15, *Sanctions* (LEXIS Law Publishing)

For memoranda relating to discovery by means of depositions and discovery sanctions, see California Points and Authorities , Ch. 82, *Discovery: Sanctions for Discovery Misuse* , and Ch. 83, *Discovery: Depositions* (Matthew Bender)

For discussion of and forms relating to civil discovery in federal courts and generally, see Bender's Forms of Discovery, vols. 1-16 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-193 California Forms of Pleading and Practice--Annotated § 193.151

§ 193.151 International Treaties

Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. 23 UST 2555, TIAS No. 7444, set forth in Note to *28 U.S.C.A. § 1781*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsWritten DepositionsInternational LawDispute ResolutionEvidenceHague Convention on Taking Evidence Abroad

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16-193 California Forms of Pleading and Practice--Annotated § 193.152

§ 193.152 Federal Statutes

Convention on the taking of evidence abroad in civil or commercial matters. *28 U.S.C. § 1781*

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-193 California Forms of Pleading and Practice--Annotated § 193.153

§ 193.153 Federal Rules

Taking depositions in foreign countries. *Fed. R. Civ. P., Rule 28(b)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsWritten DepositionsInternational LawDispute ResolutionEvidenceHague Convention on Taking Evidence AbroadInternational LawDispute ResolutionEvidenceWitnesses

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16-193 California Forms of Pleading and Practice--Annotated § 193.154

§ 193.154 State Statutes

Restrictions on depositions in limited civil cases. *Code Civ. Proc. §§ 91, 94(b), (c), 95*

Subpoenas in general. *Code Civ. Proc. §§ 1985-1997*

Scope and limitations on discovery in general. *Code Civ. Proc. §§ 2016.010 et seq., 2019.010 et seq.*

Deposition subpoenas. *Code Civ. Proc. § 2020.010 et seq.*

Stipulation of parties regarding deposition procedures. *Code Civ. Proc. § 2016.030*

Oral depositions taken in California for use in action pending in *California. Code Civ. Proc. § 2025.010 et seq.*

Availability of copies of deposition transcripts. *Code Civ. Proc. § 2025.570*

Taking deposition in foreign state or nation for action pending in *California. Code Civ. Proc. §§ 2026.010, 2027.010*

Depositions on written questions. *Code Civ. Proc. § 2028.010 et seq.*

Deposition in California for action pending outside California. *Code Civ. Proc. § 2029.100 et seq.*

Interstate and International Depositions and Discovery Act [*Code Civ. Proc. § 2029.100 et seq.*, operative 1/1/2010 [Stats 2008 ch. 231, § 3; *Code Civ. Proc § 2029.900*]

Subpoenas to produce business records. *Evid. Code §§ 1560-1566*

Deposition of prisoner confined to state prison. *Penal Code §§ 2622, 2623*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedurePretrial MattersSubpoenasEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsDeposition Transcripts

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16-193 California Forms of Pleading and Practice--Annotated § 193.155

§ 193.155 California Rules of Court

Format of supplemental and further discovery and responses. *Cal. Rules of Ct., Rule 3.1000*

Format of discovery motions; separate statement required to accompany motion to compel. *Cal. Rules of Ct., Rule 3.1345*

Service of motion papers on nonparty deponent. *Cal. Rules of Ct., Rule 3.1346*

Discovery motions in summary proceedings (unlawful detainer or other actions brought under *Code Civ. Proc. § 1159 et seq.*) involving possession of real property. *Cal. Rules of Court, Rule 3.1347*

Discovery sanctions; effect of lack of opposition to motion to compel. *Cal. Rules of Ct., Rule 3.1348*

Filing and retention of specified discovery papers relating to depositions. *Cal. Rules of Ct., Rule 3.250(a)(1)-(19), (b)*

Discovery from unnamed class members in class action. *Cal. Rules of Ct., Rule 3.768*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsWritten DepositionsEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsDeposition Transcripts

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16-193 California Forms of Pleading and Practice--Annotated § 193.156

§ 193.156 Decisions

[1] Oral Depositions

[a] Class Actions

Good cause was shown by defendants for taking depositions of unnamed class members when plaintiffs had previously referred to such members in more significant capacity than other unnamed members (decided under prior law, now see *Code Civ. Proc. § 2025.220(a)(3)* permitting deposition notice to set forth general description sufficient to identify particular class). *Spoon v. Superior Court (1982) 130 Cal. App. 3d 735, 747-748, 182 Cal. Rptr. 44*

[b] Compelling Answers

Trial court erred by denying plaintiffs' motions to compel, after finding that plaintiffs had the right, under former *Code Civ. Proc. § 2025(d)(4), (o)* (*now see Code Civ. Proc. §§ 2025.220(a)(4), 2025.480*), to ask person most knowledgeable to bring in all supporting documents, finding that defendant should have been ordered to bring their witnesses back to depositions with requested documents and with proof that witnesses had undertaken some effort to familiarize themselves with the areas of their supposed "knowledge." *Maldonado v. Superior Court (2001) 94 Cal. App. 4th 1390, 1397, 115 Cal. Rptr. 2d 137*

Although private investigator cannot be compelled to divulge information acquired during investigation, he or she can be compelled to answer deposition questions concerning identity of his or her client. *Flynn v. Superior Court (1997) 57 Cal.App. 4th 990, 993-995, 67 Cal. Rptr. 2d 491*

Order compelling deponent to answer questions propounded is required to apprise deponent of specific questions that he or she is compelled to answer, and may be successfully challenged as being vague and overbroad if it does not do so. *BP Alaska Exploration, Inc. v. Superior Court (1988) 199 Cal. App. 3d 1240, 1270, 245 Cal. Rptr. 682*

Trial court's denial of motion for further responses had no basis when responses were not either by intelligible answer

or appropriate objection or when objection was made that question was previously answered but no indication was made of previous answer. *Fuss v. Superior Court (1969) 273 Cal. App. 2d 807, 818, 78 Cal. Rptr. 583*

Purpose of award of deponent's expenses of defending motion to compel is to compensate witness for having to defend when answers clearly could not be compelled, that is, when matter was clearly privileged or not relevant to subject matter of pending action. *Ascherman v. Superior Court (1967) 254 Cal. App. 2d 506, 514, 62 Cal. Rptr. 547*

In order compelling answers, trial court was justified in assessing attorney's fees against counsel who without justification invoked rules patently not on point (decided under prior law, *now see Code Civ. Proc. §§ 2023.030(a), 2025.430-2025.450, 2025.480*). *Wilson v. Superior Court (1964) 226 Cal. App. 2d 715, 724, 38 Cal. Rptr. 255*

[c] Documents Used to Refresh Memory

Requirement of *Evid. Code § 771(a)* to produce documents used to refresh memory of witness is applicable to depositions. *International Ins. Co. v. Montrose Chemical Corp. (1991) 231 Cal. App. 3d 1367, 1372-1373, 282 Cal. Rptr. 783*

[d] Objections

Fact that opposing counsel, not deposition officer, gave plaintiff oral notice of motion to compel and directed his attendance was harmless error, because plaintiff clearly heard and understood notice and responded that he would not be there. *Parker v. Wolters Kluwer United States, Inc. (2007) 149 Cal. App. 4th 285, 295-296, 57 Cal. Rptr. 3d 18*

Relevancy objections at deposition are unnecessary and improper, unless deposing counsel's insistence on inquiring into irrelevant areas could arguably justify suspension under former *Code Civ. Proc. § 2025(n)* (*now see Code Civ. Proc. § 2025.470*) based on counsel's intent to harass, annoy, embarrass, or oppress. *Stewart v. Colonial W. Agency, Inc. (2001) 87 Cal. App. 4th 1006, 1014-1015, 105 Cal. Rptr. 2d 115*

Petitioner nonparty's timely objection to records only discovery request for privileged information was sufficient; nonparty was not required to file a motion to quash to object to request. *Monarch Healthcare v. Superior Court (2000) 78 Cal. App. 4th 1282, 1284, 93 Cal. Rptr. 2d 619*

Objection that notice of taking deposition was not served on nonparty witness or his attorney was waived when both appeared at and willingly participated in deposition, and when witness demanded, received, and cashed check for fee. *In re Marriage of Lemen (1980) 113 Cal. App. 3d 769, 779, 170 Cal. Rptr. 642*

Pre-1986 *Code Civ. Proc. § 2021(a)* (objections to errors and irregularities in notice; *now see Code Civ. Proc. § 2025.410*) was not intended as alternative or substitute for protective order procedure of pre-1986 *Code Civ. Proc. § 2019(b)(1)* (*now see Code Civ. Proc. §§ 2025.420, 2025.470*), but was referring to certain errors and irregularities which are waived after attempt to use deposition in court. *Snyder v. Superior Court (1970) 9 Cal. App. 3d 579, 586, 89 Cal. Rptr. 534*

[e] Protective Orders

Pre-1986 *Code Civ. Proc. § 2019(b)(1)* (*now see Code Civ. Proc. § 2025.420*) is construed as granting court discretion in limiting discovery which, while it may come within rules established by other code sections, offends sense of justice and reason. *Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 379, 15 Cal. Rptr. 90, 364 P.2d 266*

Court's broad authority under former *Code Civ. Proc. § 2025(i)(9)* (*now see Code Civ. Proc. § 2025.420(b)(9)*) to order that certain matters not be inquired into protects party from being compelled to disclose identity of whistle-blower or informant whose safety would be jeopardized by disclosure. *John Z. v. Superior Court (1991) 1 Cal. App. 4th 789, 791-792, 2 Cal. Rptr. 2d 556*

Modified protective order allowing one officer, in addition to deponent, to be present at each deposition of each officer of small, closely held corporation was appropriate exercise of judicial discretion, since court was unable to exclude all officers, yet presence of all of them at each deposition would lead to abuse. *Lowy Development Corp. v. Superior Court (1987) 190 Cal. App. 3d 317, 321-322, 235 Cal. Rptr. 401*

Provision of former *Code Civ. Proc. § 2019(b)(1)* (*now see Code Civ. Proc. § 2025.420(b)(12)*), that protective order may exclude persons from attending deposition except parties to action and their officers or counsel, expressly precluded order prohibiting party from attending deposition. *Willoughby v. Superior Court (1985) 172 Cal. App. 3d 890, 892-893, 218 Cal. Rptr. 486*

Order terminating deposition must be made pursuant to noticed motion. *St. Paul Fire & Marine Ins. Co. v. Superior Court (1984) 156 Cal. App. 3d 82, 85-86, 202 Cal. Rptr. 571*

Defendant county in suit to overturn ordinance on grounds of unconstitutionality was entitled to protective order under former *Code Civ. Proc. § 2019(b)(1)* (annoyance and oppression; *now see Code Civ. Proc. § 2025.420*) when constitutionality of identical ordinance had already been upheld in other counties. *County of Sacramento v. Superior Court (1982) 137 Cal. App. 3d 448, 455, 187 Cal. Rptr. 154*

In cross action against insurance company for wrongful refusal to settle, blanket protective order preventing depositions of attorneys for insured and quashing subpoena duces tecum for records of attorneys' firm was improper. *Meritplan Insurance Co. v. Superior Court (1981) 124 Cal. App. 3d 237, 240-242, 177 Cal. Rptr. 236*

Party seeking protective order to prevent taking of deposition in civil action has burden of establishing good cause for such an order. *Department of Health Services v. Superior Court (1980) 104 Cal. App. 3d 80, 83-84, 163 Cal. Rptr. 414*

When inquiry into confidential relationship between psychotherapist and patient takes place during discovery, patient or psychotherapist is able to apply to trial court for protective order to limit scope of inquiry or to regulate procedure of inquiry so as to best preserve rights of patient. *In re Lifschutz (1970) 2 Cal. 3d 415, 437, 85 Cal. Rptr. 829, 467 P.2d 557*

Good cause for protective order under former *Code Civ. Proc. § 2019(b)(1)* (*now see Code Civ. Proc. § 2025.420*) calls for factual exposition of reasonable ground for order sought; declaration in support of motion for protective order which contains no facts except for conclusion of necessity for order and other statements made on information and belief is not sufficient basis for court to grant protective order on basis of annoyance, embarrrassment, or oppression. *Goodman v. Citizens Life & Cas. Ins. Co. (1967) 253 Cal. App. 2d 807, 819-820, 61 Cal. Rptr. 682*

Order of court ostensibly made under former *Code Civ. Proc. § 2019(b)(1)* (*now see Code Civ. Proc. § 2025.420*) for payment of counsel's expenses in attending deposition out of town, when made in absence of any facts tending to prove annoyance, embarrassment, or oppression, was abuse of court's discretion. *Goodman v. Citizens Life & Cas. Ins. Co. (1967) 253 Cal. App. 2d 807, 820, 61 Cal. Rptr. 682*

Fact that affidavits or declarations containing facts that will be sought in deposition already exist was not ground for prohibiting taking of deposition; allegations in declaration in support of motion to prohibit taking of depositions which merely state declarant's opinion or conclusion that depositions are being taken for purposes of harassment had no

probative value. *Carlson v. Superior Court (1961) 56 Cal. 2d 431, 439-440, 15 Cal. Rptr. 132, 364 P.2d 308*

[f] Sanctions

Payment of sanctions for failure to appear at deposition is payable to party who made appearance; direct payment to attorney of party who appeared, as compensation for his or her expenses, is improper because former *Code Civ. Proc. § 2019(g)(1)* (*now see Code Civ. Proc. § 2025.430*) specifies payment to party. *Poe v. Diamond (1987) 191 Cal. App. 3d 1394, 1398-1399, 237 Cal. Rptr. 80*

[g] Subpoena

Plaintiff's deposition subpoena, requesting defense expert to provide precise information about number of cases in which he had testified and amount of compensation he had received relating to his defense and plaintiff-related medical-legal work was unnecessarily burdensome; court, instead, directed expert to provide more limited information. *Stony Brook I Homeowners Ass'n v. Superior Court (2001) 84 Cal. App. 4th 691, 699-700, 101 Cal. Rptr. 2d 67*

Party against whom discovery sought is entitled to protective order quashing subpoena duces tecum when same or substantially same information as that sought can be obtained through less obtrusive means of discovery, such as questions at deposition. *Allen v. Superior Court (1984) 151 Cal. App. 3d 447, 453, 198 Cal. Rptr. 737*

Strict compliance with *Code Civ. Proc. § 1987(a)*, requiring personal service of subpoena, is prerequisite to punishment for disobedience to process, and thus service of subpoena duces tecum on attorney for nonparty witness was insufficient to support contempt finding. *In re Abrams (1980) 108 Cal. App. 3d 685, 689-695, 166 Cal. Rptr. 749*

[h] Subsequent Deposition

Good cause to take subsequent deposition was shown when previous deposition was taken before existence of facts which have since given rise to new issue. *Carlson v. Superior Court (1961) 56 Cal. 2d 431, 439, 15 Cal. Rptr. 132, 364 P.2d 308*

[i] Time Requirements

Under former *Code Civ. Proc. § 2016(a)*, providing that plaintiff may serve a deposition notice without leave of court on any date that is 20 days after service of summons on or appearance by defendant, 20-day period runs from date when *any one defendant* has been served, not date when *all defendants* have been served. *Waters v. Superior Court of Los Angeles County (1962) 58 Cal. 2d 885, 892-893, 27 Cal. Rptr. 153, 377 P.2d 265* (Note that this rule subsequently was codified in *Code Civ. Proc. § 2025.210(b)*, which provides that the period is 20 days after service of summons on, or appearance by, *any* defendant.)

60-day period for filing motion to compel under *Code Civ. Proc. § 2025.480(b)* applied to subpoena for business records (as distinguished from subpoena for oral or written deposition); therefore, motion to compel filed more than 60 days after date set for production was untimely, because objections served in response to business records subpoenas constituted "a record of the deposition," for purposes of determining when to bring motion to compel. *Unzipped Apparel, LLC v. Bader (2007) 156 Cal. App. 4th 123, 132-135, 67 Cal. Rptr. 3d 111*

Motions by defendant to depose expert witness during direct examination was properly denied under former Cal. Rules of Ct., Rule 222 (*now see Code Civ. Proc. §§ 2024.020, 2024.030*), when defendant failed to exercise due diligence in

conducting pretrial discovery and when granting motions would have caused undue interruption in orderly progression of trial. *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 784-785, 174 Cal. Rptr. 348*

[j] Use of Depositions at Trial

Deposition testimony of witness alleged to be unavailable under *Evid. Code § 240(a)(3)* requires proper foundation of unavailability. *Ritter v. State Bar (1985) 40 Cal. 3d 595, 601, 221 Cal. Rptr. 134, 709 P.2d 1303*

Trial court did not abuse its discretion in refusing to admit deposition of unavailable witness that was introduced by defendant when evidence submitted by plaintiff in his motion to exclude deposition showed that he did not have fair opportunity to complete his cross-examination of deponent. *Sprague v. Equifax, Inc. (1985) 166 Cal. App. 3d 1012, 1041-1042, 213 Cal. Rptr. 69*

Even if trial court erroneously excludes deposition testimony, error does not warrant reversal on appeal unless it is shown to be prejudicial. *Sprague v. Equifax, Inc. (1985) 166 Cal. App. 3d 1012, 1042-1044, 213 Cal. Rptr. 69*

[k] Nonappearance

Implicit in requirement under former *Code Civ. Proc. § 2025(j)(3)(B)* (*now see Code Civ. Proc. § 2025.450(b)(2)*) that counsel contact deponent to inquire about nonappearance is requirement that counsel make a good faith effort to resolve the issue. *Blago Leko v. Cornerstone Home Inspection (2001) 86 Cal. App. 4th 1109, 1124, 103 Cal. Rptr. 2d 858*

[*l*] Fees for Deposition Transcripts

Trial court in pending action has authority to require deposition reporter to provide copy of transcript to nonnoticing party for reasonable fee; if in dispute, trial court may determine amount of reasonable fee. *Serrano v. Stefan Merli Plastering Co. (2008) 162 Cal. App. 4th 1014, 1035, 76 Cal. Rptr. 3d 559*

Deponent's attorney could not use business records deposition subpoena to compel certified shorthand reporter to make deposition transcript in pending action available for copying, rather than paying the reporter what court characterized as "unconscionable" fee. *Urban Pacific Equities Corp. v. Superior Court (1997) 59 Cal. App. 4th 688, 692-694, 69 Cal. Rptr. 2d 635*

[2] Written Depositions

Although party initiating proceeding has choice of designating that deposition be taken on either oral examination or written questions, trial court is vested with discretion after hearing to direct whether questions will be oral or written and elements of convenience and expense may, among others, be properly considered. *Beverly Hills Nat. Bank & Trust Co. v. Superior Court (1961) 195 Cal. App. 2d 861, 867, 16 Cal. Rptr. 236* (decided under prior law)

[3] Depositions in Foreign State or Nation

Discovery in foreign country subscribing to Hague Convention is not required to proceed first under Hague Convention before discovery is attempted under federal rules, specifically rejecting rule of first resort announced in *Volkswagenwerk Aktiengesellschaft v. Superior Court (1981) 123 Cal. App. 3d 840, 176 Cal. Rptr. 874* ; rather, interests of international comity demand "a more particularized analysis" involving "prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to [Hague Convention] procedures will prove effective." *Societe*

Nationale Industrielle Aerospatiale v. United States District Court (1987) 482 U.S. 522, 544, 107 S. Ct. 2542, 96 L. Ed. 2d 461

Rule of first resort to the Hague Convention enunciated in *Volkswagenwerk Aktiengesellschaft v. Superior Court (1981) 123 Cal. App. 3d 840, 858, 176 Cal. Rptr. 874* has been superseded by the balancing test provided in *Societe Nationale Industrielle Aerospatiale*; thus, trial court properly refused to apply Hague Convention discovery procedures in suit against French corporation, after performing *Aerospatiale's* prescribed case-by-case balancing of facts, sovereign interests, and likelihood of successful discovery; and terminating sanction for discovery abuses was not abuse of discretion. *American Home Assurance Co. v. Societe Commerciale Toutelectric (2002) 104 Cal. App. 4th 406, 436-437, 128 Cal. Rptr. 2d 430*

Party seeking to utilize Hague Convention procedures has burden of convincing trial court that those procedures are justified by considerations of international comity. *American Home Assurance Co. v. Societe Commerciale Toutelectric (2002) 104 Cal. App. 4th 406, 427, 128 Cal. Rptr. 2d 430*

Because Hague Convention procedures are only an optional method of pursuing discovery abroad, they may be waived by failing to properly raise the issue, *overruling Pierburg GmbH & Co. KG v. Superior Court (1982) 137 Cal. App. 3d 238, 186 Cal. Rptr. 876* ; however, party's neglect of its right to request application of Hague Convention procedures must be substantial to support finding of waiver. *American Home Assurance Co. v. Societe Commerciale Toutelectric (2002) 104 Cal. App. 4th 406, 430, 128 Cal. Rptr. 2d 430*

Mandamus is proper remedy to require issuance of commission to take testimony out of California and burden as on petitioner to make clear showing in appellate court of trial court's abuse of discretion in refusing to issue commission. *Dow Chemical Co. v. Superior Court (1969) 2 Cal. App. 3d 1, 8, 82 Cal. Rptr. 288*

[4] Depositions of Prisoners

Prisoner is not entitled to appear personally in civil action to which he or she is party. *Wood v. Superior Court (1974) 36 Cal. App. 3d 811, 813, 112 Cal. Rptr. 157* , disapproved on other grounds in *Payne v. Superior Court (1976) 17 Cal. 3d 908, 923 n. 7, 132 Cal. Rptr. 405, 553 P.2d 565* ; *In re Bagwell (1938) 26 Cal. App. 2d 418, 419-421, 79 P.2d 395*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryProtective OrdersCivil ProcedurePretrial MattersSubpoenas

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16-193 California Forms of Pleading and Practice--Annotated § 193.157

§ 193.157 Law Reviews

Williams, *Obtaining Evidence from Canada and Other Foreign Jurisdictions, 35 Prac. Law. 77 (1989)*

Peters, *Preparing the Medical Malpractice Defendant for Deposition, 34 Prac. Law. 71 (1988)*

Underwood, "The Videotape Deposition: Using Modern Technology for Effective Discovery, Part I," 31(3) Prac. Law. 61 (1985)

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Aronoff, "Discovery in Bankruptcy Court: Depositions v. Rule 2004 Examinations," 18 Bev. Hills B.J. 194 (1984)

Note, *Obtaining Testimony Outside the United States: Problem for the California Practitioner, 29 Hastings L.J. 1237 (1978)*

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Kornblum, "Videotape in Civil Cases," *24 Hastings L.J. 9 (1972)*

Stern, *International Judicial Assistance Part II: Depositions Under Letters Rogatory*, 15(1) Prac. Law. 55 (1969)

Letwin, "Waiver of Objections to Former Testimony," *15 UCLA L. Rev. 118, 125*-127 (1967)

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationExaminations of DebtorsCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsInternational LawDispute ResolutionEvidenceWitnesses

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§ 193.158 Text References

Witkin, California Evidence, *Discovery*, § 29 et seq., § 218 et seq. (4th ed. 2000)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsWritten DepositionsInternational LawDispute ResolutionEvidenceHague Convention on Taking Evidence AbroadInternational LawDispute ResolutionEvidenceWitnesses

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[Reserved]

§§ 193.159[Reserved]

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PART IV. PROCEDURAL CHECKLISTS
A. Oral Depositions

16-A California Forms of Pleading and Practice--Annotated Scope

Scope

NOTE: The following checklists set out procedures commonly involved in taking depositions on oral examination; they are not intended to be exhaustive.

California Forms of Pleading and Practice--Annotated

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A. Oral Depositions
1. Checklists for Party Seeking Discovery

16-193 California Forms of Pleading and Practice--Annotated § 193.170

§ 193.170 Initiating Deposition and Requiring Deponent's Attendance, Testimony, and Production

[1] Stipulation

1. Obtain agreement of other parties, by telephone or letter to their attorney, as to: (a) person before whom deposition is to be taken, (b) time or place of deposition, (c) notice, and/or (d) manner of taking deposition.

2. Prepare written stipulation setting forth agreed terms [*see Code Civ. Proc. § 1021*; *see generally* forms in Ch. 533, *Stipulations*].

3. Submit original stipulation to all counsel involved for their signatures.

4. Sign stipulation on behalf of party seeking deposition.

5. Keep original until six months after final disposition of the cause, and do not file with court unless offered as relevant to a law and motion proceeding or other hearing or ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(7), (18), (b)*].

6. Send copies of signed stipulation to all counsel for their files.

[2] Notice Without Court Order

1. Prerequisites.

a. If plaintiff serves deposition notice, 20 days must have passed since service of summons on, or appearance by, any defendant in the action [*Code Civ. Proc. § 2025.210(b)*].

b. If defendant serves deposition notice, defendant must have been served or have appeared in the action [*Code Civ. Proc. § 2025.210(a)*].

2. Place of deposition.

a. If deponent is a natural person, set the deposition to take place either [*Code Civ. Proc. § 2025.250(a)*]:
(1) Within 75 miles of the deponent's residence, or

(2) Within the county in which the action is pending and within 150 miles of the deponent's residence.

b. If deponent is an organization that is a party to the action, set the deposition to take place either [*Code Civ. Proc. § 2025.250(b)*]:

(1) Within 75 miles of the organization's principal executive or business office in California, or if none designated, within 75 miles of any of its executive or business offices in California, or

(2) In the county in which the action is pending, and within 150 miles of the principal executive or business office if one has been designated.

c. If deponent is an organization that is not a party to the action, set the deposition to take place [*Code Civ. Proc. § 2025.250(c), (d)*]:

(1) Within 75 miles of the organization's principal executive or business office in California,

(2) If none designated, within 75 miles of any of its executive or business offices in California, or within the county in which the action is pending, or

(3) At a more distant place, if the organization consents.

3. Select time for deposition.

NOTE:
The deposition must be held at least 10 days after service of notice of deposition, or 15, 20, or 30 days if the deposition notice is served by mail. If the deponent is a witness commanded by a deposition subpoena to produce personal records of a consumer, the time must at least 20 days after issuance of that subpoena, or 25, 30, or 40 days if the deposition notice is served by mail [***Code Civ. Proc. §§ 2016.050, 2025.270*****;** *see Code Civ. Proc. § 1985.3(a)*].

NOTE:
In unlawful detainer actions or other proceedings under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), an oral deposition must be scheduled for a date at least five days after service of the deposition notice, but not later than five days before trial [*Code Civ. Proc. § 2025.270(b)*]. For discussion, forms, and a procedural guide relating to unlawful detainer proceedings, *see* Ch. 333, *Landlord and Tenant: Eviction Actions*].

4. Prepare notice for taking deposition, including:

NOTE:

If, under *Code Civ. Proc. §§ 2020.410-2020.440*, only the production by a nonparty of business records for copying is desired, a copy of the deposition subpoena serves as the notice of deposition [*Code Civ. Proc. § 2025.220(b)*; *see* discussion of the deposition subpoena in [6], *below*].

a. Address, date, and time of deposition [*Code Civ. Proc. § 2025.220(a)(1), (2)*],

b. List of all parties or attorneys for parties on whom the notice is being served [*Code Civ. Proc. § 2025.240(a)* (alternatively, list can appear on proof of service accompanying deposition notice); *see* Paragraph 6, *below*],

c. Name of each deponent, and address and telephone number, if known, of any nonparty deponent or general description of deponent if not known [*Code Civ. Proc. § 2025.220(a)(3)*],

d. If deponent is not a natural person, description of matters to be examined [*Code Civ. Proc. § 2025.230*],

e. Specification of materials to be produced by deponent [*Code Civ. Proc. § 2025.220(a)(4)*],

f. Any intention to record testimony by audio or video technology [*Code Civ. Proc. §§ 2025.220(a)(5), 2025.330*],

g. Any intention to record the testimony by stenographic method through the instant visual display of the testimony [*Code Civ. Proc. § 2025.220(a)(5)* (if so, give copy of deposition notice to deposition officer)], and

h. Any intention to reserve right to use video recording of deposition of physician or other expert witness at trial [*Code Civ. Proc. §§ 2025.220(a)(6), 2025.620(d)*].

i. Any intention to take oral deposition by telephone, videoconference or other remote electronic means [*Cal. Rules of Ct., Rule 3.1010(a)(1)*; *see Code Civ. Proc. § 2025.310*].

For a form for notice of taking a deposition, see *§ 193.225*.

5. Serve notice on every party who has appeared in the action [*Code Civ. Proc. § 2025.240(a)*].

If deponent is neither a party nor affiliated with a party to the action and deposition subpoena is necessary to require attendance, serve copy of subpoena with notice [*Code Civ. Proc. § 2025.240(c)*]. For discussion of further requirements, see [6], *below*.

6. Proof of service.

Prepare or have proof of service prepared and executed, being sure to include any orders served with notice [*Code Civ. Proc. § 1013a*; *see* Ch. 518. *Service of Summons and Papers*]. If not included in the notice of deposition, list in proof of service all parties or attorneys for parties on whom deposition notice is served [*see Code Civ. Proc. § 2025.240(a)*; *see* Paragraph 4, *above*].

7. Filing.

Keep original of deposition notice and proof of service until six months after final disposition of the

cause. Do not file deposition notice with the court, unless offered as relevant to a law andmotion proceeding or other hearing or ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(9), (b)*].

[3] Order Permitting Plaintiff to Serve Deposition Notice Earlier Than 20 Days After Service of Summons on or Appearance by Any Defendant

NOTE:

An order is required to permit a plaintiff to serve a deposition notice on any date earlier than 20 days after the service of the summons on, or appearance by, any defendant. The order is obtained on motion with or without notice [*Code Civ. Proc. § 2025.210(b)*].

To shorten the time between service of the notice of deposition and the date of the deposition, plaintiff will need to obtain an additional order, shortening time for scheduling the deposition [*see Code Civ. Proc. § 2025.270* (order may be obtained by motion or ex parte application); *see* discussion of proper time period before the scheduled deposition in [2], *above*]. For the procedure in obtaining the order shortening time, see Paragraph [4], *below*.

Plaintiff may combine the motions for earlier deposition and to shorten time. For forms combining the two, see *§ 193.220* et seq.

1. Order is necessary only if 20 days have not elapsed since service of the summons on or appearance by any defendant.

2. Showing of good cause is required [*Code Civ. Proc. § 2025.210(b)*].

3. Without notice.

NOTE:

For requirements for granting ex parte applications, see *Cal. Rules of Ct., Rules 3.1200-3.1207* and § 193.221.

a. Prepare an application for ex parte order, which includes declarations [§ 193.221]; prepare supporting memorandum; and prepare order [*see § 193.222*].

b. Present application and order to court in which action is pending, for judge's signature.

NOTE:

In some courts the proper judge to sign the order will be the presiding judge of the court. In other superior courts, however, the proper judge to sign the order may, by local court rule, be the judge assigned to discovery or law and motion matters. Counsel, if unfamiliar with local court practices, should contact the clerk of court.

c. File originals, including signed order.

d. Serve each party with copy of order permitting early service ofnotice of deposition at same time notice of deposition is served [*see* [2], *above*].

e. File original of proof of service.

4. With notice.

a. Prepare notice of motion, declaration, and supporting memorandum as required by *Cal. Rules of Ct., Rule 3.1113(a)* [§ 193.220; for discussion and forms, *see* Ch. 417, *Points and Authorities*], and proof of service of these documents [*see Code Civ. Proc. § 1013a*; *see also* Ch. 518, *Service of Summons and Papers*].

b. Serve documents.

NOTE:
These documents must be served at least 16 court days before the date set for hearing of the motion or any longer period as required by local court rule, or by *Code Civ. Proc. § 1005(b)* when the notice of motion is being served by mail [*see Code Civ. Proc. § 1005(b)*]. Every party to the action or proceeding must be served with copies of the documents listed in Paragraph a, *above* [*see Code Civ. Proc. §§ 1010-1020*; *see also* Ch. 518, *Service of Summons and Papers*].

c. File documents.

NOTE:
File the signed originals of the notice of motion, supporting declaration, memorandum, and proof of service with the court [*see* Ch. 372, *Motions and Orders*].

File the signed originals of the notice of motion, supporting declaration, memorandum, and proof of service with the court.

d. Proceed as usual for noticed motion [*see* Ch. 372, *Motions and Orders*].

e. Order.

(1) Prepare order [§ 193.222] if the court grants motion or as otherwise directed by the court.

(2) If required by local court rule or practice, have opposing party approve the order as to form.

(3) Present order to judge for signature.

(4) File original signed order and serve each party with copy of order stamped "endorsed filed."

(5) Give each party notice of the court's order (*see* Ch. 372, *Motions and Orders*) granting or denying the motion, in the manner provided in *Code Civ. Proc. §§ 1010-1020* (*see* Ch. 518, *Service of Summons and Papers*), unless notice is waived [*see Code Civ. Proc. § 1019.5*].

(6) Serve copy of notice of deposition at same time as order permitting early service of notice on all parties, along with any other orders or related papers.

[4] Order Shortening Time Between Service of Notice of and Taking Deposition

NOTE:
§ 193.220 et seq. are for use in obtaining this order concurrently with the order discussed in [3], *above*. Those forms may be modified for use in obtaining this order alone.

1. Showing of good cause is required [*Code Civ. Proc. § 2025.270(d)*].

2. Without notice.

NOTE:
Follow the procedure set out in [3], *above*, making any necessary modifications.

3. With notice.

Follow the procedure set out in [3], *above* **, making any necessary modifications.**

[5] Order for Deposition of Natural Person Who Is Party or Party-Affiliate to Be Taken at More Distant Place Than Otherwise Permitted

NOTE:
This order is necessary to take the deposition of a natural person who is a party to the action, or is an officer, director, managing agent, or employee of a party, at a place more distant than that permitted under *Code Civ. Proc. § 2025.250*. The order may not be obtained for any other deponent.

Unsuccessfully making or opposing a motion, without substantial justification, to increase travel limits for a party or party-affiliated deponent will result in the imposition of a monetary sanction unless the court finds circumstances making imposition of the sanction unjust [*Code Civ. Proc. § 2025.260(d)*].

1. Showing that the interests of justice will be served by granting the motion is required [*Code Civ. Proc. § 2025.260(b)*].

2. Prepare notice of motion [*see Code Civ. Proc. §§ 1005(a)(8), 2023.030, 2023.040, 2025.260*].

NOTE:
See *§ 193.223* to prepare a notice of motion. See [3], *above*, for procedures that may be adapted for use in making this motion.

3. Prepare declaration stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by the motion [§ 193.223].

4. Prepare declaration setting forth facts supporting the amount of monetary sanction sought [§ 193.223].

5. Arrange for advancement of the reasonable expenses and costs to the deponent for travel to the place of deposition, if the court so conditionsthe order.

6. Use *form in § 193.224* to prepare the order.

[6] Deposition Subpoena

NOTE:

A deposition subpoena is required to compel the attendance and testimony of, and production of documents or tangible things by, a deponent who is not a party to the action, and is not an officer, director, managing agent, or employee of a party [*Code Civ. Proc. §§ 2020.010(b), 2020.410, 2025.280(b)*]. The subpoena is not required, however, for a party or party-affiliated deponent, because the service of the deposition notice is alone sufficient to compel his or her attendance, testimony, and production [*Code Civ. Proc. § 2025.280(a)*].

The deposition subpoena is governed by *Code Civ. Proc. § 2020.010 et seq.*, and by *Code Civ. Proc. §§ 1985-1997* and *Evid. Code §§ 1560-1566* as modified by *Code Civ. Proc. § 2020.010 et seq.* [*Code Civ. Proc. § 2020.030*]. For further discussion of procedures regarding subpoenas in general, see Ch. 535, *Subpoena* .

Unless the parties stipulate otherwise pursuant to *Code Civ. Proc. § 2016.030*, the location of the deposition must comply with the distance provisions in *Code Civ. Proc. § 2025.250* [*see* [2], *above*]. Additionally, a witness is not obliged to attend as a witness before any court, judge, justice, or any other officer unless the witness is a resident within the state at the time of service [*Code Civ. Proc. §§ 1989*].

The manner of compelling the attendance at a deposition by subpoena of certain persons such as employees in the Department of Justice who are peace officers or analysts in a technical field, peace officers of the Department of the California Highway Patrol, sheriffs, city police officers, or fire fighters, is governed by *Gov. Code §§ 68097.1-68097.5* [*Gov. Code § 68097.6*].

1. Ascertain whether one of the other parties is willing and able to produce the witness at the deposition. If so, prepare a stipulation instead of a subpoena and follow the procedure in [1], *above*.

2. Prepare a notice of deposition as required by *Code Civ. Proc. §§ 2025.220-2025.240* to give notice in writing of the deposition to every other party [*see § 193.225*] using applicable procedures set out in [1] and [5], *above*.

3. Have a deposition subpoena issued [*see Code Civ. Proc. § 2020.010 et seq.*; § 193.226 et seq.], by either of the following methods [*see Code Civ. Proc. § 2020.210*]:

a. If party to the action, request the clerk of the court in which the action is pending to issue a deposition subpoena signed and sealed, but otherwise in blank, or

b. If attorney of record in the action, sign and issue a deposition subpoena, which need not be sealed; the attorney may serve a copy of the subpoena on the nonparty deponent and retain the original.

4. Fill in deposition subpoena, to include the following information:

a. If deposition subpoena commands the attendance and testimony of the deponent [*Code Civ. Proc. § 2020.310*; *see § 193.226*]:

(1) The time and place of the deposition,

(2) A summary of the nature of a deposition, the deponent's rights and duties, and the penalties for disobedience of the subpoena,

(3) If applicable, that the deposition will be recorded using audio or video technology;

(4) If applicable, that the deposition testimony will be conducted using instant visual display; and

(5) If the deponent is an organization, a description with reasonable particularity of the matters on which examination is requested and an advisement of the organization's duty to designate those employees or agents who will attend the deposition.

b. If deposition subpoena commands both the attendance and testimony of the deponent as well as the production of business records, documents, and tangible things, it need not be accompanied by an affidavit or declaration showing good cause for the production of the documents and things designated [*Code Civ. Proc. 2020.510(b)*; *see § 193.227*]:

(1) The items specified in Paragraph a, *above*,

(2) Specific description of each individual item or reasonable particularization of each category of item to be produced, and

(3) Specification of any testing or sampling, if any.

c. If deposition subpoena commands the production of business records for copying [*Code Civ. Proc. § 2020.410*; *see § 193.228*]:

NOTE:
A deposition subpoena that commands only the production of business records for copying must be directed to the custodian of those records or another person qualified to certify the records. It need not be accompanied by an affidavit or declaration showing good cause for the production of the documents and things designated [*Code Civ. Proc. § 2020.410(c)*].

(1) Specific description of each individual item or reasonable particularization of each category of item to be produced (specific information identifiable only to the deponent's record system, such as a policy number or the date the consumer interacted with the witness, is not required).

(2) Command of compliance with *Code Civ. Proc. § 2020.430* on a date that is no earlier than 20 days after the issuance, or 15 days after the service, of the deposition subpoena, whichever date is later.

5. Serve deponent with the deposition subpoena [*Code Civ. Proc. § 2020.220*].

a. If deponent is a natural person, personally deliver to that person.

b. If deponent is an organization, personally deliver to any officer, director, custodian of records, or agent or employee authorized by the organization to accept service of a subpoena.

c. Accompany service with payment of witness fees, unless fees will be paid at the time the deponent attends the depositionto testify. For the amount of fees to be paid to a deponent whose personal attendance is required, see *Gov. Code § 68070 et seq.*; for those to be paid to a deponent whose personal attendance is not required, see *Evid. Code § 1563(b)(6)*. If an expert witness, see Ch. 198, *Discovery:*

Exchange of Expert Witness Information .

d. If, under *Code Civ. Proc. § 1985.3* or *1985.6*, subpoena commands witness to produce business records that are personal records of consumer or employment records of employee, accompany service with either proof of service or written authorization described in [7], *below* [*see Code Civ. Proc. §§ 1985.3(c)(2), (e),* 1985.6(c)(2), (e), *2020.410(d), 2020.510*].

NOTE:
If the records sought are personal records maintained by a telephone corporation which is a public utility, the subpoena must be accompanied by a consent to release, signed by the consumer whose records are requested, as required by *Pub. Util. Code § 2891* [*see Code Civ. Proc. § 1985.3(f)*].

e. Serve within sufficient time in advance of deposition to provide deponent with reasonable opportunity to locate and produce documents, and/or to travel to place of deposition, and within time period described in [2], *above*.

f. Do not file subpoena unless it is offered as relevant to law and motion proceeding or other hearing or is ordered filed for good cause; instead, retain original and original proof of service until six months after final disposition of the cause [*see Cal. Rules of Ct., Rule 3.250(a)(1), (2), (b)*].

[7] Notices Pertaining to Personal Records of Consumer or Employment Records of Employee

NOTE:
When, under *Code Civ. Proc. § 1985.3* or *Code Civ. Proc. § 1985.6*, the deposition subpoena commands a witness to produce personal records of a consumer or employment records of an employee, the party noticing the deposition must follow additional procedures, described in [6], *above*.

1. Serve following on consumer [*Code Civ. Proc. § 2025.240(b)*]:

a. Copy of deposition notice,

b. Copy of deposition subpoena, and

c. Notice of privacy rights under *Code Civ. Proc. § 1985.3(e)* (personal records) and *Code Civ. Proc. § 1985.6(e)* (employment records).

NOTE:
For forms for notices of privacy rights, see Ch. 535, *Subpoena* .

2. Serve a copy of the proof of service of the notice of privacy rights [*see* Paragraph (1)(c), *above*] with the deposition notice and the deposition subpoena, on all parties [*Code Civ. Proc. §§ 1985.3(e), 1985.6, 2020.410(d), 2020.510*]. Retain original of notice of privacy rights and proof of service until six months after final disposition of the cause. Do not file with court, unless offered as relevant to a law and motion proceeding or other hearing or ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(4), (b)*].

NOTE:
An alternative to serving a copy of the proof of service is to obtain a written authorization to release the records, signed by the consumer or employee or by his or her attorney of record [*Code*

***Civ. Proc. §§ 1985.3(c)(2), 1985.6(c)(2), 2020.410(d), 2020.510*]. However, because the consumer or employee will already be served with a notice of privacy rights, this alternative requires an additional step.**

[8] Obtaining Items From Party Before Deposition

1. Obtain any necessary documents or other items from other parties before deposition [*see Code Civ. Proc. § 2031.010 et seq.*].

NOTE:
For discussion, procedures, and forms for requesting documents under *Code Civ. Proc. § 2031.010 et seq.*, see Ch. 195, *Discovery: Inspection of Tangible Evidence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedurePretrial MattersSubpoenas

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16-193 California Forms of Pleading and Practice--Annotated § 193.171

§ 193.171 Conduct of Deposition Hearing

[1] Oath

Have deposition officer administer oath to deponent [*see Code Civ. Proc. § 2025.330*; *see also Code Civ. Proc. §§ 2094* (form of oath)]. See [2], *below*, regarding administering oath in a taped proceeding.

[2] Recording Deposition

1. Have testimony and stated objections recorded stenographically, by person certified in accordance with *Bus. & Prof. Code § 8020 et seq.*, unless the parties agree or the court orders otherwise [*see Code Civ. Proc. § 2025.330(b)*].

2. If deposition notice stated an intention to do so, or if the parties so agree, have testimony recorded by audio or video technology. If another party has properly served notice of the intent to so record as well, permit that party to make a simultaneous audio or video record of the deposition [*Code Civ. Proc. § 2025.330(c)*]. In conducting the recording, use the following procedure:

a. Use area for recording that is suitably large, adequately lighted, and reasonably quiet [*Code Civ. Proc. § 2025.340(a)*].

b. Use operator of recording equipment who is properly qualified and who will not distort the appearance or demeanor of participants [*see Code Civ. Proc. § 2025.340(b), (g)*].

c. Begin deposition with oral or written statement on camera or audio recording, including [*Code Civ. Proc. § 2025.340(h)*]:
(1) Name and business address of operator and operator's employer,

(2) Date, time, and place of deposition,

(3) Caption of case,

(4) Name of deponent,

(5) Specification of party on whose behalf deposition is being taken, and

(6) Any stipulations by the parties.

d. Have counsel for all parties identify themselves on camera or audio recording [*Code Civ. Proc. § 2025.340(i)*].

e. Have deposition officer administer oath to deponent on camera or audio recording [*Code Civ. Proc. § 2025.340(j)*].

f. Announce on camera or audio recording the end of each unit of tape or electronic storage and the beginning of each succeeding unit [*Code Civ. Proc. § 2025.340(k)*].

g. At conclusion of deposition, make statement on camera or audio recording that the deposition is ended, and set forth any stipulations made by counsel concerning the custody of the audio or video recording and the exhibits, or concerning other pertinent matters [*Code Civ. Proc. § 2025.340*(*l*)].

h. Within sufficient time for objections to be made and ruled on by judge to whom case is assigned for trial or hearing, and for any editing of recording, notify the court and all parties in writing of any intent to offer the recording in evidence under *Code Civ. Proc. § 2025.620*, and of those parts of the deposition intended to be offered. Objections to all or part of deposition must be made in writing [*Code Civ. Proc. § 2025.340(m)*].

[3] Stipulations

Read into the record any stipulations, such as stipulations relating to the following:

1. Waiving objections to qualifications of the deposition officer;

2. Preparing and marking of exhibits;

3. Instructing the witness not to answer; or

4. Noticing of the deposition or production of the deponent pursuant to stipulation.

If the deposition is recorded by means of audio or video technology, follow procedure discussed in [2], *above*.

[4] Examination of Deponent

Examination and cross examination of the deponent are to proceed as permitted at trial under the Evidence Code [*Code Civ. Proc. § 2025.330(d)*; *see Evid. Code §§ 760-778* (examination of witnesses at trial) and Ch. 551, *Trial*; *see also* California Trial Guide (Matthew Bender)].

[5] Objections

Make sure that all stated objections are recorded stenographically, and by means of audio or video technology, if being so recorded [*see Code Civ. Proc. § 2025.330*]. Note that objections to all or part of audio or video recording ofdeposition intended to be offered in evidence must be made in writing [*see Code Civ. Proc. § 2025.340(m)*; *see also* [2], *above*].

Unless the objecting party demands that the deposition be suspended to permit a motion for a protective order under *Code Civ. Proc. § 2025.470* [*see § 193.183*], or moves the court for a stay of the deposition pending the determination of a motion for a protective order under *Code Civ. Proc. § 2025.420* [*see Code Civ. Proc. § 2025.270*; *see also § 193.182*], the deposition will proceed subject to these objections [*Code Civ. Proc. §§ 2025.460(b), 2025.470*].

Attorneys may object to:

1. The qualifications of the deposition officer taking the examination [*Code Civ. Proc. § 2025.320(e)*].

NOTE:
The objection is waived unless made before the deposition begins or as soon thereafter as the ground for that objection becomes known or could be discovered with reasonable diligence [*Code Civ. Proc. § 2025.320(e)*].

2. Errors and irregularities of any kind occurring at the oral examination that might be cured if promptly presented, e.g., those relating to the manner of taking the deposition; the oath or affirmation administered; the conduct of a party, attorney, deponent, or deposition officer; the form of any question or answer [*Code Civ. Proc. § 2025.460(b)*].

NOTE:
These objections are waived unless timely made during the deposition [*Code Civ. Proc. § 2025.460(b)*].

3. The disclosure of privileged information or protected work product under *Code Civ. Proc. § 2018.010 et seq.* [*Code Civ. Proc. § 2025.460(a)*; *see Evid. Code §§ 900-1070* (privilege); *Code Civ. Proc. § 2018.010 et seq.* (work product); *see also* discussion in Ch. 191, *Discovery: Privileges and Other Discovery Limitations*].

NOTE:
These objections are waived unless timely made during the deposition [*Code Civ. Proc. § 2025.460(a)*].

4. The competency of the deponent, or the relevancy or materiality or admissibility at trial of the testimony or of the materials produced [*Code Civ. Proc. § 2025.460(c)*].

NOTE:
These objections are not necessary, and are not waived by failure to make them before or during the deposition [*Code Civ. Proc.§ 2025.460(c)*]. In fact, deponent's counsel should not even raise an objection to a question counsel believes will elicit irrelevant testimony at a deposition. Relevance objections should be held in abeyance until an attempt is made to use the testimony at trial [*Stewart v. Colonial W. Agency, Inc. (2007) 87 Cal. App. 4th 1006, 1014, 105 Cal. Rptr. 2d 115]* . The fact that suspension of the deposition under *Code Civ. Proc. § 2025.470* is available only when an interrogation reveals bad faith or an underlying purpose to harass, annoy, embarrass, or oppress indicates that witnesses are expected to endure an occasional irrelevant question without disrupting the deposition process [*see Stewart v.*

***Colonial W. Agency, Inc. (2001) 87 Cal. App. 4th 1006, 1014-1015, 105 Cal. Rptr. 2d 115* (relevancy objections at deposition are unnecessary and improper, unless deposing counsel's insistence on inquiring into irrelevant areas could arguably justify suspension under former *Code Civ. Proc. § 2025(n)* (*now see Code Civ. Proc. § 2025.470*) based on counsel's intent to harass, annoy, embarrass, or oppress)].**

[6] Written Questions

After the oral examination has been completed, have the deposition officer propound to deponent any written questions transmitted to the deposition officer pursuant to *Code Civ. Proc. § 2025.330(e)* by a party who did not participate in the oral examination [*Code Civ. Proc. § 2025.330(e)*].

[7] Refusal by Deponent to Answer Question or Produce Items

Follow procedures *set out in § 193.172*.

[8] Protective Order

Follow procedures *set out in §§ 193.182, 193.183*, adapting them as necessary.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureDiscoveryPrivileged MattersGeneral Overview

California Forms of Pleading and Practice--Annotated

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16-193 California Forms of Pleading and Practice--Annotated § 193.172

§ 193.172 Compelling Appearance, Answers, and Production

NOTE:

***Code Civ. Proc. § 2025.450*, providing for a motion to compel a deponent to appear for or proceed with examination, and/or produce for inspection any document or thing, only applies to a deponent who is a party to the action, or a party's officer, director, managing agent, employee, or designee of an organization, and who has not served a valid objection to the deposition notice under *Code Civ. Proc. § 2025.410*.**

However, *Code Civ. Proc. § 2025.480*, providing for a motion to compel an answer or production, applies to any deponent who has been served with a deposition notice or a deposition subpoena. If the deponent is served with a deposition subpoena and fails to attend or refuses to be sworn as a witness, punishment by contempt or forfeiture and damages may be imposed pursuant to *Code Civ. Proc. § 2020.240* [*Code Civ. Proc. § 2025.440*].

[1] Motion Against Party or Party-Affiliated Deponent

NOTE:

The procedure outlined below is for use by the proponent of the deposition. However, any other party who, in person or by attorney, attended at the time and place specified in the deposition notice in the expectation that the deponent's testimony would be taken may also make a motion to obtain a monetary sanction pursuant to *Code Civ. Proc. §§ 2023.030(a)* and *2025.450*, in which case the procedure below should be modified accordingly [*see also* Note accompanying Paragraph 8, *below*].

1. Preliminary Determinations

a. Whether the deponent is a party or party-affiliated deponent served with a deposition

notice.

b. Whether the deponent failed to serve a valid objection to the deposition notice under *Code Civ. Proc. § 2025.410*.

c. Whether the deponent failed to appear.

d. Whether the deponent failed to proceed with the examination.

e. Whether the deponent failed to produce for inspection the document or tangible thing described in the deposition notice.

f. Proper court for motion is the court in which the action is pending [*see Code Civ. Proc. §§ 2016.020(b), 2025.450*].

2. Motion is noticed, because a monetary sanction is sought [*see Code Civ. Proc. §§ 2023.030, 2023.040, 2025.450*; § 193.238[4]]. See procedure outlined in [3], *above*.

3. Prepare papers.

a. Notice of motion [§ 193.238]. Be sure to include request for imposition of monetary sanction under *Code Civ. Proc. §§ 2023.030(a), 2023.040*, and *2025.450*.

b. Supporting declaration [§ 193.238].

NOTE:
The supporting declaration must state facts showing a reasonable and good faith attempt at informal resolution of each issue presented by motion or, when the deponent fails to attend the deposition and produce documents or things described in deposition notice, showing that the petitioner has contacted the deponent to inquire about the nonappearance. It must also set forth specific facts showing good cause justifying the production for inspection of any document or tangible thing described in the deposition notice [*Code Civ. Proc. § 2025.450*]. One court has held that implicit in the requirement of former *Code Civ. Proc. § 2025(j)(3)(B)* (*now see Code Civ. Proc. § 2025.450(b)(2)*) that counsel contact the deponent about a nonappearance is the requirement that counsel listen to the reasons offered and make a good faith attempt to resolve the issue. Thus, either declaration submitted with a motion of compel under *Code Civ. Proc. § 2025.450(b)(2)* must show a reasonable and good faith attempt to resolve each issue presented, including those relating to a nonappearance [*Blago Leko v. Cornerstone Home Inspection (2001) 86 Cal. App. 4th 1109, 1124, 103 Cal. Rptr. 2d 858* (attorney sanctioned under *Code Civ. Proc. §§ 2023.010(c), (i), 2023.020* for improperly filing motion to compel attendance when attorney completely disregarded his obligation to attempt to informally resolve discovery issue)].

In addition, a separate statement must accompany a motion to compel answers at a deposition or to compel the production of documents or tangible things at a deposition [*Cal. Rules of Ct., Rule 3.1345(a)(4), (5)*], essentially providing all the information necessary to determine the issues presented by the motion [*see* **§ 193.239]**

c. Supporting Memorandum [*see § 193.238*].

NOTE:
A supporting memorandum is required to be served and filed with a notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; *see also* discussion and forms in Ch. 417, *Points and Authorities*].

d. Proof of service.

4. Serve papers on parties to action pursuant to *Code Civ. Proc. §§ 1010-1020*.

5. File papers.

6. Proceed as for usual noticed motion. See Ch. 372, *Motions and Orders* .

7. File and serve order.

a. When appropriate, prepare order granting motion [§ 193.239].

b. File original and serve copies of order on attorneys for all parties.

8. Obtain sanction if deponent fails to obey order, by moving for issue, evidence, terminating sanction, or any other just order, against the party deponent or the party with whom the deponent is affiliated, pursuant to Code Civ. Proc. §§ and 2025.450. For forms for use in obtaining these sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, § 192.50* et seq. Follow basic procedure outlined above for bringing the motion.

NOTE:
In lieu of or in addition to this sanction, the court may impose a monetary sanction under *Code Civ. Proc. § 2023.030(a)* against the deponent or against the party with whom the deponent is affiliated, and in favor of any party who, in person or by attorney, attended in the expectation that the deponent's testimony would be taken pursuant to that order [*Code Civ. Proc. § 2025.450*].

[2] Motion Against Any Deponent

NOTE:
Unsuccessfully making or opposing a motion to compel, without substantial justification, will result in the imposition of a monetary sanction unless the court finds circumstances making imposition of the sanction unjust [*Code Civ. Proc. § 2025.480(f)*].

1. Preliminary Determinations

a. Whether the deponent failed to answer a question propounded on examination during the taking of a deposition;

b. Whether the deponent failed to produce any document or tangiblething under his or her control as specified in the deposition notice or deposition subpoena;

c. Whether no more than 60 days have passed since the completion of the record of the deposition; and

NOTE:

The 60-day period for filing a motion to compel under *Code Civ. Proc. § 2025.480(b)* applies to subpoenas for business records, as well as to subpoenas for oral or written depositions [*Unzipped Apparel, LLC v. Bader (2007) 156 Cal. App. 4th 123, 132-135, 67 Cal. Rptr. 3d 111*].

d. Whether the moving party has made a reasonable and good faith attempt at an informal resolution of any issue to be presented by the motion, e.g., by attempting to confer in person, by telephone, or by letter with opposing party or attorney to resolve the dispute informally [*see Code Civ. Proc. § 2023.010(g)*; *see also Stewart v. Colonial W. Agency, Inc. (2001) 87 Cal. App. 4th 1006, 1016-1017, 105 Cal. Rptr. 2d 115* (counsel's efforts to meet and confer were adequate when he engaged in off-the-record discussion with opposing counsel at deposition, in attempt to resolve one simple relevancy issue, in light of imminent trial date and cut-off dates for discovery, and opposing counsel's announced unavailability for lengthy periods before trial)].

e. Proper court for motion is the court in which the action is pending [*see Code Civ. Proc. §§ 2016.020(b), 2025.480*].

2. Complete Examination on Other Matters or Adjourn Deposition

NOTE:
If the deponent fails to answer any question or to produce any document or tangible thing under the deponent's control that is specified in the deposition notice or deposition subpoena, the party seeking that answer or production has the choice of either adjourning the deposition and moving for an order compelling the answer or production pursuant to *Code Civ. Proc. § 2025.480*, or completing the examination on other matters and moving for the order at a later time [*Code Civ. Proc. § 2025.460(d)*].

3. Give Notice of Motion to Compel

a. Give notice to deponent, by either of the following methods:

(1) Notify deponent orally at the examination that proponent will apply to the court for an order under *Code Civ. Proc. § 2025.480*, and have the deposition officer direct the deponent to attend a session of the court at the time specified in the oral notice [*see* Paragraph c, *below*]; or

(2) Serve written notice on deponent.

NOTE:
If the moving party is seeking a monetary sanction, written notice of both the motion to compel and the request for imposition of a sanction should be given to deponent, and to any other person or attorney against whom the sanction is sought [*see Code Civ. Proc. §§ 2023.030, 2023.040* (notice and hearing requirement for imposition of sanction)]. This notice can be in lieu of or in addition to oral notice of the motion to compel.

b. Give timely notice to all parties.

NOTE:

Use the *form in § 193.241* to prepare the notice of motion. If written notice is given, serve it at least 16 court days before the time of the hearing [*Code Civ. Proc. § 1005(b)*].

c. Prepare motion.

NOTE:
The motion must be made no later than 60 days after the completion of the record of the deposition [*Code Civ. Proc. § 2025.480(b)*].

d. Schedule hearing.

NOTE:
The hearing must be held at least five days after a certified copy of a stenographic and/or audio/video transcript of the relevant parts of the deposition can be prepared and lodged with the court [*see Code Civ. Proc. § 2025.480(d)*].

4. Prepare Papers

a. Notice of motion [§ 193.241].

b. General supporting declaration [§ 193.241].

c. Declaration stating facts showing reasonable and good faith attempt at informal resolution of each issue presented by motion [§ 193.241].

d. Declaration setting forth facts supporting the amount of any monetary sanction sought [§ 193.241].

e. Accompanying papers.

NOTE:
A motion to compel answers to questions propounded at a deposition or to compel production of documents or tangible things at a deposition must be accompanied by a separate document that sets forth all the information relating to questions and responses in issue, so that no reference to another document is necessary to determine the motion. Material must not be incorporated by reference [*see Cal. Rules of Ct., Rule 3.1345(c)*; § 193.242].

f. Supporting Memorandum [*see § 193.241*].

NOTE:
A supporting memorandum must be served and filed with a notice of motion [*Code Civ. Proc. § 2025.240*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

g. Prepare proof of service of appropriate papers listed in Paragraphs a-f on parties, deponent, and on any other person against whom monetary sanction is sought.

5. Lodge Transcript

a. Direct reporter to prepare stenographic transcript of the relevant parts of the deposition proceedings.

b. If deposition is recorded by audio or video technology, have certified copy of relevant parts of transcript prepared.

c. Lodge, or have reporter lodge, original transcript or transcripts with court at least five days prior to hearing on motion [*Code Civ. Proc. § 2025.480(d)*].

NOTE:

Counsel may wish to include a stamped, self-addressed envelope when lodging a deposition transcript with the court, so that the clerk can return the transcript to the submitting party. Some courts, such as Los Angeles County Superior Court, require counsel to submit a return envelope. Counsel should check with the clerk to ascertain any further local requirements, such as a cover letter to identify the use of the transcript.

6. Serve Papers

a. On parties to the action pursuant to *Code Civ. Proc. §§ 1010-1020*.

b. Personally, on nonparty deponent.

c. Personally, on any attorney of party against whom monetary sanction is sought.

7. File papers, including notice of motion, supporting documents, and proof of service.

File notice of motion, supporting documents, and proof of service.

8. Proceed as for Usual Noticed Motion [*see* Ch. 372, *Motions and Orders*].

9. File and Serve Order

a. When appropriate, prepare order granting motion [§ 193.243].

b. File original and serve copies of order on attorneys for all parties and personally serve copy of order on nonparty deponent, and on any attorney of party against whom monetary sanction is awarded.

10. Obtain Sanctions for Failure to Obey Order Compelling Answer or Production

NOTE:

Unsuccessfully making or opposing a motion for a protective order, without substantial justification, will result in the imposition of a monetary sanction unless the court finds circumstances making imposition of the sanction unjust [*Code Civ. Proc. § 2025.420(d), 2025.480(f), (g)*]. For discussion of monetary sanctions, see *§ 193.241*. For discussion of imposition of issue, evidence, or terminating sanctions against the party deponent or the party with whom the deponent is affiliated, see Ch. 192, *Discovery: Sanctions for Discovery Misuse* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsDeposition Transcripts

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16-193 California Forms of Pleading and Practice--Annotated § 193.173

§ 193.173 Opposing Motion for Protective Order

[1] Before, During, or After Deposition Under Code Civ. Proc. § 2025.420

NOTE:

Notwithstanding any other provision of *Code Civ. Proc. § 1005*, all papers opposing a motion and all reply papers must be served by personal delivery, facsimile transmission, express mail, or other means consistent with *Code Civ. Proc. §§ 1010, 1011, 1012*, and *1013*, and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers, as applicable, are filed. The court, or a judge thereof, may prescribe a shorter time [*Code Civ. Proc. § 1005(c)*].

1. Serve and file memorandum and declaration in opposition to motion, including applicable facts and arguments such as the following:

NOTE:

Serve and file a memorandum and declaration in opposition at least nine court days before the time appointed for the hearing [*Code Civ. Proc. § 1005(b)*].

a. Moving party did not file declaration that stated facts showing reasonable and good faith attempt at informal resolution of each issue presented by the motion, and that opposing party engaged in unsuccessful but reasonable and good faith attempt at informal resolution, e.g., by attempting to confer in person, by telephone, or by letter with moving party or attorney to informally resolve the dispute [*see Code Civ. Proc. §§ 2023.010(i), 2023.020, 2025.420*].

b. Moving party did not show good cause for granting motion.

c. Moving party did not show that justice requires granting of requested order to protect a party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.

d. Opposing party has priority by prior service of notice of deposition [*see Code Civ. Proc. § 2019.020*].

e. Lesser or different limitation on deposition than one requested in motion is proper.

2. Request monetary sanctions, as appropriate.

[2] During Deposition Under Code Civ. Proc. § 2025.470

NOTE:

Notwithstanding any other provision of *Code Civ. Proc. § 1005*, all papers opposing a motion and all reply papers must be served by personal delivery, facsimile transmission, express mail, or other means consistent with *Code Civ. Proc. §§ 1010, 1011, 1012*, and *1013*, and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers, as applicable, are filed. The court, or a judge thereof, may prescribe a shorter time [*Code Civ. Proc. § 1005(c)*].

1. Serve and file memorandum and declaration in opposition to motion, including applicable facts and arguments such as the following:

NOTE:

Serve and file a memorandum and declaration in opposition at least nine court days before the time appointed for the hearing [*Code Civ. Proc. § 1005(b)*].

a. Moving party did not file declaration that stated facts showing reasonable and good faith attempt at an informal resolution of each issue presented by motion, and that opposing party engaged in unsuccessful but reasonable and good faith attempt at informal resolution, e.g., by attempting to confer in person, by telephone, or by letter with moving party or attorney to resolve the dispute informally [see *Code Civ. Proc. §§ 2023.010(i), 2023.020, 2025.420*].

b. The examination was not being conducted in bad faith.

c. The examination was not being conducted in manner that unreasonably annoys, embarrasses, or oppresses the deponent or party.

d. Moving party did not show good cause for granting motion.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryProtective Orders

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16-193 California Forms of Pleading and Practice--Annotated § 193.174

§ 193.174 Transcription of Testimony

[1] Agreement for No Stenographic Transcription

1. Contact all other parties and enter into a written agreement, if you do not want stenographic transcription to be the official record.

NOTE:
Attorneys sometimes prefer that audio or video recording of the deposition be the official record, rather than a stenographic transcription.

2. Be aware that if you take no action, stenographic recording will be transcribed and will be official record for purposes of trial and any subsequent hearing or appeal [*see Code Civ. Proc. § 2025.510(a), (g)*].

[2] Access of Other Party to Audiotape or Video Recordings

1. On request of any other party, permit other party to hear audio recording or view video recording [*see Code Civ. Proc. § 2025.510(f)*].

2. On receipt of payment of the reasonable cost of copying, furnish copy of recording to requesting party [*see Code Civ. Proc. § 2025.510(f)*].

[3] Motion for Cost to Be Borne by Other Party

1. Bring motion for order that cost of stenographic transcription be borne or shared by another party.

NOTE:
Absent such a motion, you will bear the cost of the transcription [***Code Civ. Proc. §***

***2025.510(b)*; *see Code Civ. Proc. § 2025.510(h)* (defining responsibilities for payment)].**

2. Follow normal motion procedure [*see § 193.170[3]*].

[4] Review of Transcript or Recording

1. Carefully review stenographic transcript, as soon as you receive notice from deposition officer that it is available for review [*see Code Civ. Proc. §§ 2025.520, 2025.530*].

2. Carefully review recording, if no stenographic transcript has been prepared, as soon as you receive notice from the deposition officer that it is available for review [*see Code Civ. Proc. § 2025.530*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & TranscriptsEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsDeposition Transcripts

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16-193 California Forms of Pleading and Practice--Annotated § 193.175

§ 193.175 Motion to Take Subsequent Deposition of Natural Person

NOTE:

Once any party has taken the deposition of a natural person, neither the party who gave nor any party who received notice of the deposition may take a subsequent deposition of that deponent without leave of the court or agreement of the parties. However, a party may take one subsequent deposition of (1) a natural person who was previously deposed as a designee of an organization pursuant to *Code Civ. Proc. § 2025.230*, or *(2)*, pursuant to a court order under *Code Civ. Proc. § 485.230*, for the limited purpose of discovering, under *Code Civ. Proc. § 485.230*, the identity, location, and value of property in which the deponent has an interest [*Code Civ. Proc. § 2025.610*].

[1] Obtaining Leave of Court to Take Subsequent Deposition

1. Make motion, following basic motion procedure [*see, e.g., § 193.170[3]*, making any necessary modifications]. Use § 193.248 to prepare the necessary documents.

2. Make showing of good cause.

[2] Obtaining Stipulation to Take Subsequent Deposition

1. Obtain stipulation of all parties to take subsequent deposition.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsStipulations

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[Reserved]

§§ 193.176[Reserved]

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16-193 California Forms of Pleading and Practice--Annotated

NOTE: The following checklist is designed to be illustrative only of the procedures commonly used by parties and nonparty or party deponents opposing various aspects of the taking of a deposition.

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16-193 California Forms of Pleading and Practice--Annotated § 193.180

§ 193.180 General Responses to Deposition Notice or Deposition Subpoena

[1] Attendance and Testimony at Deposition Pursuant to Deposition Notice or Deposition Subpoena

1. To stay taking of deposition before it begins, either:

a. Serve objections to deposition notice, and move to quash deposition notice and stay taking of deposition, pursuant to *Code Civ. Proc. § 2025.410* [*see § 193.181[2]*]; and/or

b. Seek order staying taking of deposition, and simultaneously move for protective order pursuant to *Code Civ. Proc. § 2025.420* [*see Code Civ. Proc. § 2025.270*; § 193.192].

2. To challenge deposition subpoena, move to quash deposition subpoena, pursuant to *Code Civ. Proc. §§ 1987.1, 2020.010-2020.030* [*see § 193.181[3]*].

3. If the deposition is not stayed, attend and testify as directed in the deposition notice or deposition subpoena, or be subject to sanctions [*see Code Civ. Proc. §§ 2020.240*, (failure to obey deposition subpoena), 2025.450 (failure to obey deposition notice); *see § 193.172[1]*; *see also § 193.239* et seq.]. If appearing pursuant to deposition subpoena, be sure that witness fees have been paid at time of service of subpoena or at time of attendance to testify [*see Code Civ. Proc. § 2020.230*].

4. If necessary, demand that deposition officer suspend the taking of testimony during the deposition, and move for protective order pursuant to *Code Civ. Proc. § 2025.470* [*see § 193.183*].

[2] Production of Documents and Other Tangible Things Pursuant to Deposition Notice

1. To procedurally challenge the deposition notice, serve objections to deposition notice and move to quash pursuant to *Code Civ. Proc. § 2025.410* [*see § 193.181[2]*].

2. To challenge the substance of the deposition notice, seek a protective order pursuant to *Code Civ. Proc. § 2025.420* [*see § 193.182*].

3. If notice is not to be challenged, then comply with deposition notice and produce specified writings and other tangible things.

[3] Production of Documents and Other Tangible Things Pursuant to Deposition Subpoena

1. To challenge deposition subpoena, move to quash deposition subpoena, pursuant to *Code Civ. Proc. §§ 1987.1, 2020.010-2020.030* [*see § 193.181[3]*].

2. To challenge deposition notice as well, follow procedure outlined in [2], *above*.

3. If neither is challenged, comply with deposition subpoena. If deposition subpoena does not compel your personal attendance, follow the procedure described in [4], *below*.

[4] Compliance With Deposition Subpoena That Requires Only Production of Business Records for Copying

1. Be sure that the service of the subpoena is accompanied by cash or check for the witness fee required by *Evid. Code § 1563(b)(6)* [*Code Civ. Proc. § 2020.230*].

2. Unless directed otherwise, decide whether to deliver the records to the office of the deposition officer, or to make delivery at the office of the business whose records are the subject of the deposition subpoena (presumably your office).

3. If delivery is to be made at the deposition officer's office [*Code Civ. Proc. § 2020.430*]:

a. Prepare a true, legible, and durable copy of the records.

b. Prepare an affidavit in compliance with *Evid. Code § 1561* [for form of affidavit, *see* Ch. 535, *Subpoena*].

c. Enclose and seal these in envelopes, and direct the outer envelope, in compliance with *Evid. Code § 1560(c)*.

d. Prepare an itemized statement for the costs of preparation, submit to the party requesting the production, and demand that payment of the costs be made simultaneously with the actual delivery of the records [*see Code Civ. Proc. § 2020.010-2020.030*; *Evid. Code § 1563(b)(1)-(3)*]. Until the payment of costs is made, you will not be under obligation to deliver the records [*Evid. Code § 1563(b)(2)*].

If you do not make the demand, you will have to recover the costs at a later time [*see Evid. Code § 1563(b)(1)*], and you will be under obligation to comply with the subpoena within the required time period [*Evid. Code § 1563(b)(2)*].

e. Deliver, or have other qualified person deliver, the records and the affidavit to the deposition officer:

(1) Either in person, by messenger, or by mail.

(2) Within 20 days after the issuance of the subpoena, or within 15 days after its service, whichever is later [*Code Civ. Proc. § 2020.410*].

4. If delivery is made at the office of the business whose records are the subject of the deposition subpoena [*Code Civ. Proc. § 2020.430*]:

a. Comply with either Paragraph b or c, *below*, 20 days after the issuance of the subpoena, or 15 days after its service, whichever is later [*Code Civ. Proc. § 2020.410*].

b. Permitting deposition officer to copy originals.

(1) Personally, or have other qualified person, permit the deposition officer to make a copy of the originals of the designated business records during normal business hours [*see Evid. Code § 1560(e)* (defining "normal business hours" for this purpose)].

(2) Prepare an affidavit in compliance with *Evid. Code § 1561* [for form of affidavit, *see* Ch. 535, *Subpoena*], and deliver to officer at the time he or she makes the copy.

c. Delivery copy on payment of preparation costs.

(1) Prepare a true, legible, and durable copy of the records. It is optional whether or not to place in a sealed envelope.

(2) Prepare an affidavit in compliance with *Evid. Code § 1561* [for form of affidavit, *see* Ch. 535, *Subpoena*].

(3) Prepare itemized statement for cost of preparation, as determined by *Evid. Code § 1563(b)*].

(4) Submit itemized statement for the costs [see *Evid. Code § 1563(b)(3)*] to the party serving the deposition subpoena, who is required to pay those costs either by cash or check at the time of delivery.

(5) When the cash or check is received, make delivery of the copy and the affidavit to the deposition officer, at the office of the business records.

[5] Party's Intention to Record Deposition by Audio or Video Technology

1. Party Noticing Deposition.

a. Party noticing deposition stated intention to so record in the deposition notice, or

b. All parties agree that the party noticing the deposition will so record the deposition.

Audio or video recording will be simultaneous with like recording by party noticing deposition.

2. Other Parties.

No less than three calendar days before deposition date, serve a written notice of the intention to

make an audio or video record of the deposition testimony on the party or attorney who noticed the deposition, on all other parties or attorneys on whom the deposition notice was served under *Code Civ. Proc. § 2025.240*, and on any nonparty deponent whose attendance is compelled by deposition subpoena. Notice given three calendar days before deposition date must be personally served under *Code Civ. Proc. § 1011*.

Keep original of notice of intention and proof of service until six months after final disposition of the cause. Do not file with court, unless offered as relevant to a law and motion proceeding or other hearing or ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(5), (b)*].

3. If the party noticing the deposition is not going to make an audio or video record of the deposition testimony, or if you did not timely serve the written notice of intention, you might still be able to record the deposition using audio or video technology, if you can obtain the written stipulation of all parties pursuant to *Code Civ. Proc. § 2016.030* [*see* Ch. 533, *Stipulations*].

4. At and after deposition, follow procedures *outlined in § 193.171[2], above*.

[6] Party's Participation by Transmission of Written Questions

If you would prefer to participate by having the deposition officer propound your questions which would be written, rather than to participate in the oral examination, transmit your written questions in a sealed envelope to the party taking the deposition. That party will deliver the questions to the deposition officer, who will unseal the envelope and propound the questions to the deponent after the oral examination is completed.

NOTE:

If you would prefer that the entire deposition be taken on written questions [*see* ***Code Civ. Proc. § 2028.010 et seq.*****; § 193.190 et seq.,** ***below*****], that would be submitted to the deponent and the parties before the deposition, move for a protective order under** ***Code Civ. Proc. § 2025.420(b)(6)*****. If the deponent is a party, you might consider moving for a protective order under** ***Code Civ. Proc. § 2025.420(b)(7)*** **that the method of discovery be by written interrogatories [*****see Code Civ. Proc. § 2028*** **.010 et seq.**; Ch. 194, *Discovery: Interrogatories*]. For the procedure for moving for a protective order, see *§ 193.182*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedurePretrial MattersSubpoenas

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16-193 California Forms of Pleading and Practice--Annotated § 193.181

§ 193.181 Objections and Motions to Quash

[1] Party's Objection to Notice of Deposition

NOTE:
Any party served with a deposition notice that does not comply with *Code Civ. Proc. §§ 2025.210-2025.270* waives any error or irregularity unless that party timely serves a written objection [*Code Civ. Proc. § 2025.410(a)*].

1. Prepare papers.

a. Objections to errors and irregularities in deposition notice [*Code Civ. Proc. § 2025.210-2025.270*; § 193.229].

b. Proof of service of objections [*see Code Civ. Proc. § 1013a*; Ch. 518, *Service of Summons and Papers*].

2. Serve papers.

a. Promptly serve the party seeking to take the deposition at least three calendar days before the scheduled deposition.

If objecting three calendar days before the scheduled deposition date, personally serve the noticing party, pursuant to *Code Civ. Proc. § 1011*.

b. Serve any other attorney or party on whom the deposition notice was served, no less than three calendar days before the scheduled deposition date.

3. Keep original and proof of service until six months after final disposition of the cause, and do not file with court unless offered as relevant to a law and motion proceeding or other hearing or ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(3), (b)*].

NOTE:

If the deposition proceeds to be taken, the court may still later determine that the objection was valid, and the deposition will then not be used against the objecting party under *Code Civ. Proc. § 2025.620*, if that party did not attend the deposition. However, to prevent this, the objecting party should move for an order staying the deposition and quashing the deposition notice, described in [2], *below*.

[2] Party's Motion to Stay Deposition and Quash Deposition Notice

NOTE:

The taking of the deposition is stayed pending the determination of a motion under *Code Civ. Proc. § 2025.410*.

Before bringing the motion, make a reasonable and good faith attempt to resolve informally the dispute [*see Code Civ. Proc. §§ 2023.010(i), 2023.020, 2025.410*].

Unsuccessfully making or opposing a motion to quash a deposition notice, without substantial justification, will result in the imposition of a monetary sanction unless the court finds circumstances making imposition of the sanction unjust [*Code Civ. Proc. § 2025.410*].

1. Make motion in addition to serving timely objection to deposition notice under *Code Civ. Proc. § 2025.410* [*see* [1], above].

NOTE:

Failure to timely object will result in waiver of the error or irregularity in the deposition notice [*Code Civ. Proc. § 2025.410*].

2. Motion is made with notice, because monetary sanction is sought [*see Code Civ. Proc. §§ 2023.030, 2025.410*]. See procedure *outlined in § 193.170[3]*.

3. Prepare papers.

a. Notice of motion [§ 193.230]. Be sure to include request for imposition of monetary sanction under *Code Civ. Proc. §§ 2023.030(a)* and *2025.410*.

b. General supporting declaration [§ 193.230].

c. Declaration stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by the motion [§ 193.230].

d. Declaration setting forth facts supporting the amount of monetary sanction sought [§ 193.230].

e. Supporting Memorandum [*see § 193.230*].

A supporting memorandum is required to be served and filed with a notice of motion

[*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; *see also* discussion and forms in Ch. 417, *Points and Authorities*].

f. Proof of service.

4. Serve papers on parties to action pursuant to *Code Civ. Proc. §§ 1010-1020*, and on any nonparty or attorney against whom a sanction is sought.

5. File papers.

6. Proceed as for usual noticed motion. See Ch. 372, *Motions and Orders* .

7. File and serve order.

a. When appropriate, prepare order granting motion [§ 193.231].

b. File original and serve copies of order on attorneys for all parties. Serve copy on any nonparty or attorney against whom a sanction is imposed.

[3] Motion by Party, Deponent, or Consumer to Quash or Modify Deposition Subpoena

1. Motion may be made by:

a. Any party;

b. Deponent;

c. Consumer described in *Code Civ. Proc. § 1985.3*, if deposition subpoena requires production of that consumer's personal records; or

d. The court, *sua sponte*.

2. Follow the procedures set forth in *Code Civ. Proc. § 1987.1(a)*. For the forms for the notice of motion, declaration, and order for use in quashing or modifying a subpoena or subpoena duces tecum (which should be modified to be a motion to quash or modify a "deposition subpoena"), see Ch. 535, *Subpoena* .

NOTE:

Although a person served with a deposition subpoena may make a motion to quash or modify, he or she is not required to do so, but may simply refuse to attend, and then oppose any motion seeking to compel attendance, testimony, answers, or production [*see, e.g., Johnson v. Superior Court (1968) 258 Cal. App. 2d 829, 837-839, 66 Cal. Rptr. 134* (prior law; motion to compel production)]. Counsel should note, however, that under *Code Civ. Proc. §§ 2020.220(c)* and *2020.240*, a person who fails to appear pursuant to a deposition subpoena or a court order, by failing to attend and testify; produce or allow inspection or photocopying, if the subpoena so specifies, testing, and sampling; or attend court session to consider any issue arising out of deponent's refusal to comply with a deposition subpoena may be punished for contempt without the necessity of a prior court order directing compliance, and is subject to a civil action under *Code Civ. Proc. § 1992* to recover a $500 forfeiture and damages, if any, incurred as a result of the disobedience. If, after a refusal to attend or to be sworn, the party who served the deposition subpoena seeks to impose a contempt sanction under *Code Civ. Proc. § 2020.240* without first

moving for an order to compel compliance, he or she must present an initiating affidavit or declaration and obtain an order to show cause under *Code Civ. Proc. §§ 1211, 1212,* and counsel must oppose this contempt proceeding. For general forms and discussion relating to a motion to quash or modify a subpoena under *Code Civ. Proc. § 1987.1,* and relating to indirect contempt proceedings under *Code Civ. Proc. §§ 1211, 1212,* see respectively Ch. 535, *Subpoena* , and Ch. 135, *Contempt* . As an alternative to ordering that a misuse of discovery process be treated as contempt of court, the court may use issue a warrant of arrest [*Code Civ. Proc. § 1993(a)(1)*; *see Code Civ. Proc. §§ 1993(a)(2), (b), 1993.1-1993.2* (procedures)].

[4] Objections During Deposition

For the procedures to be followed in making other objections during the taking of the deposition, *see § 193.171[5]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProceduresPretrial MattersSubpoenas

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16-193 California Forms of Pleading and Practice--Annotated § 193.182

§ 193.182 Protective Order Before, During, or After Deposition Under Code Civ. Proc. § 2025.420

NOTE:

Any party, deponent, or other affected natural person or organization may promptly move for a protective order under *Code Civ. Proc. § 2025.420* before, during, or after a deposition [*Code Civ. Proc. § 2025.420(a)*].

If the deposition is in progress, a party or deponent may make a motion for a protective order pursuant to either or both of *Code Civ. Proc. §§ 2025.420* and *2025.470*. For discussion and procedureconcerning the motion under *Code Civ. Proc. § 2025.470*, see *§ 193.183*.

Before bringing the protective order motion, make a reasonable and good faith attempt to informally resolve the dispute [*see* *Code Civ. Proc. §§ 2023.010(i), 2023.020, 2025.420*].

Unsuccessfully making or opposing a motion for a protective order, without substantial justification, will result in the imposition of a monetary sanction unless the court finds circumstances making imposition of the sanction unjust [*Code Civ. Proc. § 2025.420, 2025.470*].

[1] Order Staying Deposition

NOTE:

A motion for a protective order under *Code Civ. Proc. § 2025.420* does not automatically stay the taking of a deposition. Instead, you must make a motion for an order granting a stay pending determination of the motion for the protective order [*see Code Civ. Proc. § 2025.270*].

If time is of the essence, you might additionally file an ex parte motion for order shortening time for notice of motion of the protective order [*see Code Civ. Proc. § 1005(b)*]. See Ch. 372, *Motions and Orders* , and Ch. 524, *Shortening and Extension of Time* **.**

1. Motion may be with or without notice. However, because in most instances the deposition must be immediately stayed, it is preferable to proceed ex parte, as described below. If proceeding with noticed motion, adapt the procedure *outlined in § 193.181[2]*.

2. Ex parte procedure.

NOTE:
For requirements for granting ex parte applications, see *Cal. Rules of Ct., Rules 3.1200-3.1207*. See also Comments to § 193.221.

a. Prepare application for ex parte order staying deposition combined with the order and a supporting memorandum [§ 193.232].

b. Have declaration portion of application signed by the person who has personal knowledge of facts stated therein.

c. Present combined application and order to court in county in which action is pending for judge's signature on order.

NOTE:
This may be done at time of filing papers for motion for protective order [*see* [2], *below*], if counsel gives reasonable notice to the parties and to the deponent that the deposition is being stayed.

d. File original application and order and have clerk stamp copies as "endorsed filed".

e. Serve endorsed-filed copies on the parties, on the deponent if he or she is not a party, and on the deposition officer [*see Code Civ. Proc. §§ 1010-1020*; Ch. 518, *Service of Summons and Papers*].

NOTE:
Under *Code Civ. Proc. § 1019.5(a)*, when a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order (*see* Ch. 372, *Motions and Orders*) must be given by the prevailing party to all other parties or their attorneys, in the manner provided in *Code Civ. Proc. §§ 1010-1020* (*see* Ch. 518, *Service of Summons and Papers*), unless notice is waived by all parties in open court and is entered in the minutes.

[2] Motion for Protective Order

1. Preliminarily determine:

a. Whether justice requires an order to protect any party, deponent, or other natural person or organization from unwarranted annoyance, embarrrassment, or oppression, or undue burden and expense.

b. If deposition is in progress, whether examination is being conducted in bad faith or in a manner that unreasonably annoys, embarrrasses, or oppresses the deponent or party; if so, you should combine your motion with a motion for a protective order under *Code Civ. Proc. § 2025.470* [*see § 193.183*].

c. Whether you can meet your burden of showing good cause for the protective order [*see, e.g., Southern California Edison Co. v. Superior Court (1972) 7 Cal. 3d 832, 843, 103 Cal. Rptr. 709, 500 P.2d 621* ; *Goodman v. Citizens Life & Cas. Ins. Co. (1967) 253 Cal. App. 2d 807, 819, 61 Cal. Rptr. 682]* .

d. Whether you have engaged in a reasonable and good faith attempt to resolve informally the issues involved.

2. Prepare papers.

a. Motion is made with notice, because monetary sanction is sought [*see Code Civ. Proc. §§ 2023.030, 2025.420*]. Use general form of notice of motion for protective order [§ 193.233], filling in request for particular order from either § 193.234 or other particular order in interests of justice as allowed by *Code Civ. Proc. § 2025.420*. The motion is to be made in the court in which the action is pending [*see Code Civ. Proc. §§ 2016.020(b), 2025.420*].

Be sure to include request for imposition of monetary sanction pursuant to *Code Civ. Proc. § 2023.030(a)*.

b. General supporting declaration [§ 193.233].

c. Declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [§ 193.233].

d. Declaration setting forth facts supporting amount of monetary sanction sought [§ 193.233].

e. Supporting memorandum required by *Code Civ. Proc. § 2023.040* and *Cal. Rules of Ct., Rule 3.1113(a)* [§ 193.233; for discussion and forms, *see*, Ch. 417, *Points and Authorities* and California Points and Authorities , Ch. 83, *Discovery: Depositions* (Matthew Bender)].

f. Proof of service of documents listed in Paragraphs a.-e., above [*see Code Civ. Proc. § 1013a*; Ch. 518, *Service of Summons and Papers*].

3. Serve and file documents as for usual noticed motion [*see § 193.233*], except that less than 16 court days' (or longer period required by *Code Civ. Proc. § 1005(b)* if notice served by mail) notice of motion will be given if an order shortening time for notice of motion [*see* NOTE in [1], *above*] has been obtained.

4. Prepare order.

Prepare order [§ 193.235] if court grants motion, and follow procedures *set out in § 193.170[3], above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryProtective OrdersEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

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16-193 California Forms of Pleading and Practice--Annotated § 193.183

§ 193.183 Protective Order During Deposition Under Code Civ. Proc. § 2025.470

NOTE:

Any party or deponent may make a motion for a protective order pursuant to *Code Civ. Proc. § 2025.470* while a deposition is in progress.

This motion might be properly combined with a motion for a protective order under *Code Civ. Proc. § 2025.420*. For discussion and procedure concerning the motion under *Code Civ. Proc. § 2025.420*, see *§ 193.182*.

Before bringing the protective order motion, make a reasonable and good faith attempt to informally resolve the dispute [*see Code Civ. Proc. §§ 2023.010(i), 2023.020, 2025.420(a)*].

Unsuccessfully making or opposing a motion for a protective order, without substantial justification, will result in the imposition of a monetary sanction unless the court finds circumstances making imposition of the sanction unjust [*Code Civ. Proc. § 2025.420(d)*].

[1] Suspend Examination

During the examination, either have all parties present stipulate to suspend the taking of testimony, or have any party attending the deposition, including the deponent, demand that the deposition officer suspend the taking of testimony, to enable you to move for a protective order under *Code Civ. Proc. § 2025.470*.

[2] Preliminarily Determine

1. Whether examination is being conducted in bad faith or in a manner that unreasonably annoys, embarrrasses, or oppresses the deponent or party.

2. Whether justice requires an order to protect any party, deponent, or other natural person or

organization from unwarranted annoyance, embarrrassment, or oppression, or undue burden and expense; if so, you should combine your motion with a motionfor a protective order under *Code Civ. Proc. § 2025.420* [*see § 193.182*].

3. Whether you can meet your burden of showing good cause for the protective order.

4. Whether you have engaged in a reasonable and good faith attempt to informally resolve each issue involved.

[3] Prepare Papers

NOTE:
A motion for a protective order under *Code Civ. Proc. § 2025.470* is made in the court in which the action is pending [*Code Civ. Proc. §§ 2016.020(b), 2025.420*].

1. Motion is made with notice, because monetary sanction is sought [*see Code Civ. Proc. §§ 2023.030, 2025.420, 2025.470*]. Use § 193.236 to request an order:

a. Either terminating the examination, or

b. Limiting the scope and manner of taking the deposition as provided in *Code Civ. Proc. § 2025.420*; and

c. Imposing a monetary sanction under *Code Civ. Proc. § 2023.030(a)*.

2. General supporting declaration [§ 193.236]

3. Declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [§ 193.236].

4. Declaration setting forth facts supporting amount of monetary sanction sought [§ 193.236].

5. Supporting memorandum [*Code Civ. Proc. § 2023.040*; *Cal. Rules of Ct., Rule 3.1113(a)*; § 193.236; *see* Ch. 417, *Points and Authorities* ; for forms of memoranda *see also* California Points and Authorities , Ch. 83, *Discovery: Depositions* (Matthew Bender)].

6. Proof of service of papers listed in Paragraphs 1-4, *above* [*see Code Civ. Proc. § 1013a*; Ch. 518, *Service of Summons and Papers*].

[4] Serve and File Papers

Serve and file the original papers using usual procedure [*see § 193.170[3]*; Ch. 372, *Motions and Orders*].

[5] Serve and File Order

1. Prepare order [§ 193.237]. If court grants motion, follow procedures in Paragraph I(C)(4)(e), *above*.

2. File the signed original and have the clerk certify one copy of the order and stamp the remaining copies as "endorsed filed" [*see Gov. Code §§ 26833* (fee for certifying copy), 26837 (fee for comparing copy with original)].

3. Personally serve the certified copy of the protective order on the deposition officer and prepare and execute an affidavit or declaration showing that service.

4. Serve endorsed-filed copies on the parties to the action, and on any nonparty (including an attorney) against whom monetary sanction is awarded.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryProtective Orders

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16-193 California Forms of Pleading and Practice--Annotated § 193.184

§ 193.184 Opposition to Motion to Compel Appearance, Answer, or Production

[1] Opposition to Motion Under Code Civ. Proc. § 2025.450

Serve and file a memorandum and a declaration in opposition to the motion showing that the motion should be denied. Include facts and arguments, e.g., that you had served a valid objection to the deposition notice pursuant to *Code Civ. Proc. § 2025.410*, or that the deposition failed to proceed because of the behavior of the proponent rather than that of the deponent.

[2] Opposition to Motion Under Code Civ. Proc. § 2025.480

NOTE:

Unsuccessfully opposing a motion to compel, without substantial justification, will result in the imposition of a monetary sanction unless the court finds circumstances making imposition of the sanction unjust [*Code Civ. Proc. § 2025.480(f)*].

1. As a preventative measure in expectation that such a motion might be brought, establish a record at the deposition of all of your objections during the examination. For discussion of these objections, see *§ 193.171[5]*.

In making an objection at the deposition, be sure to state the grounds on which the objection is made, or the objection may not be considered by the court.

2. After other party files motion to compel, serve and file a memorandum and a declaration in opposition to the motion showing that the motion should be denied, and showing either substantial justification for opposing motion or existence of other circumstances that would make imposition of monetary sanction unjust. Include facts and arguments showing, when applicable, the following:

a. The evidence called for is not relevant to the subject matter of the action, or is not otherwise subject to discovery [*Code Civ. Proc. §§ 2017.010 et seq.* (scope of discovery), 2025.480].

b. A factual basis exists for application of an evidentiary privilege or the work product doctrine [*see Code Civ. Proc. § 2025.460(a)*; *see also* discussion of privileges and work product in Ch. 191, *Discovery: Privileges and Other Discovery Limitations*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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16-193 California Forms of Pleading and Practice--Annotated § 193.185

§ 193.185 Motion for Monetary Sanction for Failure of Deposition to Proceed Because of Fault of Proponent

[1] Party Noticing Deposition Fails to Attend or Proceed

NOTE:
This motion may be brought by any party who attended the deposition in person or by attorney.

When the party noticing the deposition fails to attend or proceed with the deposition, bring a noticed motion for the imposition of a monetary sanction under *Code Civ. Proc. § 2023.030(a)*. Use § 193.244 to prepare the necessary documents. Follow usual noticed motion procedure [*see* Ch. 372, *Motions and Orders*].

[2] Party Noticing Deposition Fails to Serve Deponent With Deposition Subpoena, and Deponent Fails to Appear for Deposition

NOTE:
This motion may be brought by any party who attended the deposition in person or by attorney, in the expectation that the deponent's testimony would be taken.

When the deponent fails to appear at the deposition because he or she was not served with a deposition subpoena, bring a noticed motion for the imposition of a monetary sanction under *Code Civ. Proc. § 2023.030(a)*. Use §§ 193.244, 193.245 to prepare the necessary documents. Follow usual noticed motion procedure [*see* Ch. 372, *Motions and Orders*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedurePretrial MattersSubpoenas

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16-193 California Forms of Pleading and Practice--Annotated § 193.186

§ 193.186 Transcription of Testimony and Motion to Suppress

[1] Agreement for No Stenographic Transcription

If you have reason not to wish a stenographic transcription to be the official record, contact all other parties and enter into a written agreement. Otherwise, the stenographic recording will be transcribed and will be the official record for purposes of trial and any subsequent hearing or appeal [*Code Civ. Proc. § 2025.510*].

[2] Access to Audio or Video Recordings

If the proponent records the deposition using audio or video technology, request that party to promptly permit your party to hear or view the recording, and request a copy of the recording. When you deliver payment of the reasonable cost of making that copy of the recording, the proponent will give you the copy [*Code Civ. Proc. § 2025.510(f)*].

If you have made an audio or video recording of the deposition, any other party may request that you permit that party to hear or view the recording,and to furnish that party with a copy on delivery of payment of the reasonable cost of copying [*Code Civ. Proc. § 2025.510(f)*; *see Code Civ. Proc. § 2025.510(h)* (defining responsibilities for payment)].

[3] Review of Transcript

Carefully read or review the stenographic transcript, or the recording if no stenographic transcript has been prepared, as soon as you receive notice from the deposition officer that it is available for reading or review [*see Code Civ. Proc. §§ 2025.520, 2025.530*].

[4] Motion to Suppress Deposition

NOTE: Unsuccessfully making or opposing a motion to suppress, without substantial justification, will result in the imposition of a monetary sanction unless the court finds that the one subject to the sanction acted with substantial justification or that there are other circumstances making imposition of the sanction unjust [*Code Civ. Proc. §§ 2025* .520(h), 2025.530(f)].

1. Prerequisites:

a. Deponent has failed or refused to approve the transcript [*Code Civ.Proc. § 2025.520*] or statement identifying deposition as his or her own [*Code Civ. Proc. § 2025.530*].

b. You have engaged in reasonable and good faith attempt to resolve dispute [*see Code Civ. Proc. §§ 2023.010(i), 2023.020, 2025.520(g), 2025.530(e)*].

2. Make seasonable motion. Follow normal motion procedure, adapting that *outlined in § 193.170[3]*. Use §§ 193.246, 193.247 to prepare the necessary documents.

a. Be sure to accompany motion with declaration stating facts showing reasonable and good faith attempt at informal resolution of each issue presented by motion [§ 193.246].

b. Include declaration setting forth facts supporting amount of monetary sanction sought [§ 193.246].

c. Include in motion a request for a monetary sanction under *Code Civ. Proc. § 2023.030*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsOral DepositionsEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsDeposition Transcripts

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2. Checklists for Deponent or Party Opposing Discovery

16-193 California Forms of Pleading and Practice--Annotated §§ 193.187-193.189

[Reserved]

§§ 193.187[Reserved]

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Chapter 193 DISCOVERY: DEPOSITIONS
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B. Depositions on Written Questions
1. Checklists for Party Noticing Deposition on Written Questions

16-193 California Forms of Pleading and Practice--Annotated § 193.190

§ 193.190 Noticing Deposition

[1] When Court Order Required

A plaintiff must obtain leave of the court if he or she wishes to serve a notice of written deposition within 20 days of service of summons on orappearance by any defendant [*see Code Civ. Proc. §§ 2025.210(b), 2028.010*]. For the procedure to obtain such an order, see *§ 193.170[3]*. The *forms in § 193.220* et seq. may be adapted for use when the deposition is to be taken on written questions. After obtaining the order, follow the procedure in [2], *below*, serving a copy of the order with the other papers.

[2] Notice Without Court Order

1. Prepare notice of written deposition [*Code Civ. Proc. §§ 2025.220, 2028.020*; *see § 193.260*].

Include in the notice the contents *set forth in § 193.170[2]*, except [*Code Civ. Proc. § 2028.020*]:

a. State the name or descriptive title of the deposition officer and his or her address.

b. The date, time, and place for commencement of the deposition may be left for future determination by the deposition officer. If you decide to include a date and time in the notice, allow sufficient time for service of cross (30 days), redirect (15 days), and recross questions (15 days), plus additional time to allow for any extensions or for court hearings on any objections or motions for protective orders [*see Code Civ. Proc. § 2028.030-2028.050, 2028.070*]. If the service triggering these time periods is by mail, the time period is extended five calendar days if the place of address is within California, 10 calendar days if the place of address is outside California but within the United States, or 20 calendar days if the place of address is outside the United States [*see Code Civ. Proc. §§ 1013(a), 2016.050*]. The time period is extended two court days if service is by Express Mail or Fax [*Code Civ. Proc. § 1013(c), (e)*].

2. Prepare written direct questions to be attached to notice of deposition [*Code Civ. Proc. § 2028.030*; § 193.261].

3. If deponent is not a party or an employee or agent of a party, obtain deposition subpoena, serve subpoena on deponent, and prepare copies of subpoena to be served with each deposition notice [*Code Civ. Proc. §§ 2020.010(b), 2025.220, 2025.240, 2025.280, 2025.310, 2028.010*; *see § 193.170[6]* and *§ 193.226* et seq.].

4. Prepare proof of service of above documents [*see Code Civ. Proc. § 1013a* and Ch. 518, *Service of Summons and Papers*].

5. Serve each other party who has appeared in the action with copy of deposition notice, copy of deposition subpoena if served, direct questions, and proof of service [*see Code Civ. Proc. §§ 2025.220-2025.240, 2028.010, 2028.030* and Ch. 518, *Service of Summons and Papers*]. Keep originals and original proofs of service until six months after final disposition of the cause, and do not file withcourt unless offered as relevant to a law and motion proceeding or other hearing or ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(1)-(3), (b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedurePretrial MattersSubpoenas

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16-193 California Forms of Pleading and Practice--Annotated § 193.191

§ 193.191 Response to Cross Questions or Recross Questions

NOTE:
A party served with direct questions may, within 30 days, serve cross questions on the other parties [*Code Civ. Proc. § 2028.030*; *see § 193.200[1]*; *see also Code Civ. Proc. § 2016.050* (extension of time periods when service is by mail pursuant to *Code Civ. Proc. § 1013(a), (c), (e)*; by five calendar days if address is in California, 10 calendar days if address is out-of-state but in United States, 20 calendar days if address is outside United States, or two court days when service is by Express Mail or fax)].

[1] Redirect Questions

NOTE:
These questions are in response to cross questions.

1. Prepare redirect questions [§ 193.261].

2. Serve redirect questions on all other parties entitled to deposition notice within 15 days after cross questions are served (or within 20, 25, or 35 days, respectively, if cross questions served by mail and place of address is within California, outside California but within the United States, or outside the United States) [*see Code Civ. Proc. §§ 2016.050, 2028.030*]. If necessary, obtain extension of time to serve redirect questions, either by stipulation or by court order for good cause shown [*see Code Civ. Proc. § 2028.030* and Ch. 524, *Shortening and Extension of Time*].

3. Keep copy of questions, cross questions, redirect questions, and recross questions in response to redirect questions for transmittal to officer taking deposition [*Code Civ. Proc. § 2028.080*; *see § 193.192[2]*].

[2] Objections to Cross and Recross Questions

1. Prepare written objection to any cross or recross question, specifying objection to form of question or objection based on privilege or work product protection [*Code Civ. Proc. §§ 2028.040, 2028.050*; § 193.262].

2. Serve objection on all parties entitled to notice of the deposition within 15 days after service of question to which objection is made (or within 20, 25, or 35 days, respectively, if objection served by mail and place of address is within California, outside California but within the United States, or outside the United States) [*Code Civ. Proc. §§ 2016.050, 2028.040, 2028.050*].

3. Engage in reasonable and good faith attempt to resolve informally each issue presented by the objection.

NOTE:
Failure to do so will not only preclude bringing a motion to sustain an objection based on the form of the question [*see Code Civ. Proc. § 2028.040*], but may also result in the imposition of monetary sanctions [*see Code Civ. Proc. §§ 2023.010(i), 2023.020, 2023.030(a)*].

4. If attempt at informal resolution is unsuccessful, promptly move to sustain any objection based on the form of the question, and to impose a monetary sanction against any party, person, or attorney who unsuccessfully opposes the motion [*Code Civ. Proc. § 2028.040*; see *Code Civ. Proc. §§ 2023.010(i), 2023.020, 2023.030(a), 2023.040*].

NOTE:
If the court does not sustain the objection, the deposition officer will propound the question subject to the objection based on form [*Code Civ. Proc. § 2028.040*]. With respect to any objection based on privilege or work product protection, the party who propounds the question must bring a motion to overrule the objection, and the deposition officer cannot propound the question unless the court overrules the objection [*Code Civ. Proc. § 2028.050*].

a. Prepare notice of motion, supporting declaration including a statement of facts showing attempt at informal resolution of each issue presented by objection and motion, and supporting amount of monetary sanction requested, and memorandum of points and authorities [§ 193.263].

b. Prepare and execute, or have prepared and executed, a proof of service of the above documents [*see Code Civ. Proc. § 1013a* and Ch. 518, *Service of Summons and Papers*].

c. Serve copies of above documents on all affected parties, persons, or attorneys.

d. If court grants motion, prepare order [§ 193.264].

[3] Opposition to Objections to Direct or Redirect Questions

1. Engage in a reasonable and good faith attempt at informal resolution of each issue presented by the objection.

NOTE:
Failure to engage in the attempt at informal resolution may result in imposition of monetary sanction [*Code Civ. Proc. §§ 2023.010(i), 2023.020, 2028.040, 2028.050*].

2. When attempt at informal resolution is unsuccessful.

a. Oppose any motion by objecting party to sustain objection to form of question. Include points and authorities and declarations showing substantial justification for conduct, or existence of other circumstances that make imposition of monetary sanction unjust [*Code Civ. Proc. § 2028.040*].

NOTE:
If the court does not sustain the objection, the deposition officer will propound the question subject to the objection based on form [*Code Civ. Proc. § 2028.040*].

b. Make motion to overrule any objection based on privilege or work product protection, and to impose a monetary sanction against any party, person, or attorney who unsuccessfully opposes the motion [*Code Civ. Proc. § 2028.050*; see *Code Civ. Proc. § 2023.030(a), 2023.040*].

(1) Prepare notice of motion, supporting declaration including a statement of facts showing attempt at informal resolution of each issue presented by objection and motion, and supporting amount of monetary sanction requested, and supporting memorandum [§ 193.263].

(2) Prepare and execute, or have prepared and executed, a proof of service of the above documents [*see Code Civ. Proc. § 1013a* and Ch. 518, *Service of Summons and Papers*].

(3) Serve copies of above documents on all affected parties, persons, or attorneys.

(4) If court grants motions, prepare order [§ 193.264].

NOTE:
If the court does not overrule the objection, the deposition officer may not propound the question [*Code Civ. Proc. § 2028.050*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedurePretrial MattersSubpoenasEvidenceProcedural ConsiderationsObjections & Offers of ProofObjections

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16-193 California Forms of Pleading and Practice--Annotated § 193.192

§ 193.192 Taking Deposition

[1] Nonparty Deponent

1. Require attendance of nonparty deponent by service of deposition subpoena [*see § 193.190[2]*].

2. Preview of questions by deponent.

If desired, forward to any nonparty deponent a copy of the direct questions for study prior to the deposition. However, do not forward copies of any cross, redirect, or recross questions to the deponent [*Code Civ. Proc. § 2028.060*].

NOTE:
Any party deponent will receive a copy of the direct questions with the deposition notice [*Code Civ. Proc. § 2028.030*].

[2] Deliver Notice and Questions to Deposition Officer

1. Deliver copies of the deposition notice and all questions to the deposition officer [*see Code Civ. Proc. § 2028.080*].

2. Although not specified in *Code Civ. Proc. §§ 2028.010-2028.080*, it is advisable to deliver to the deposition officer copies of objections to questions based on privilege or work product protection that have not been overruled by the court, because questions to which objections on these grounds have not been overruled may not be propounded by the deposition officer [*see Code Civ. Proc.§ 2028.050*]. Also, deliver a copy of a court order sustaining objections to the form of certain questions, because questions to which objections on this ground have been sustained also may not be propounded by the deposition officer [*see Code Civ. Proc. § 2028.040*].

[3] Conduct Deposition Hearing

1. Have the officer before whom the deposition is to be taken put the deponent under oath or have the deponent affirm to tell the truth [*see Code Civ. Proc. §§ 2025.330, 2028.010*].

2. Have testimony and objections recorded stenographically, unless the parties agree or the court orders otherwise [*see Code Civ. Proc. §§ 2025.330, 2028.010*].

If the deposition is to be recorded by another method in addition to stenography, follow the procedures *outlined in § 193.171[2]*.

3. Have the officer before whom the deposition is being taken propound, in the following order, the questions contained in:

a. The written questions prepared by you.

b. The cross questions submitted by other parties.

c. The redirect questions prepared by you.

d. The recross questions submitted by other parties.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewEvidenceProcedural ConsiderationsObjections & Offers of ProofObjections

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16-193 California Forms of Pleading and Practice--Annotated §§ 193.193-193.199

[Reserved]

§§ 193.193[Reserved]

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16-193 California Forms of Pleading and Practice--Annotated § 193.200

§ 193.200 Response to Direct and Redirect Questions

[1] Cross Questions

1. Prepare cross questions [§ 193.261].

2. Serve cross questions on all other parties entitled to deposition notice within 30 days after deposition notice and direct questions are served (or within 35, 40, or 55 days, respectively, if deposition notice and direct questions served by mail and place of address is within California, outside California but within the United States, or outside the United States) [*see Code Civ. Proc. § 2028.030*]. If necessary, obtain extension of time to serve cross questions, either by stipulation or by court order for good cause shown [*see Code Civ. Proc. § 2028.030* and Ch. 524, *Shortening and Extension of Time*].

[2] Recross Questions

1. Prepare recross questions [§ 193.261].

2. Serve recross questions on all other parties entitled to deposition notice within 15 days after redirect questions are served (or within 20, 25, or 35 days, respectively, if redirect questions served by mail and place of address is within California, outside California but within the United States, or outside the United States) [*see Code Civ. Proc. § 2028.030*]. If necessary, obtain extension of time to serve cross questions, either by stipulation or by court order for good cause shown [*see Code Civ. Proc. § 2028.030* and Ch. 524, *Shortening and Extension of Time*].

[3] Objections to Direct and Redirect Questions

The procedures *set out in § 193.191[2]*, for objecting to cross and recross questions may be adapted for objecting to direct or redirect questions.

[4] Opposition to Objections to Cross or Recross Questions

The procedures *set out in § 193.191[3]*, should be adapted for defending against objections to cross or recross questions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsWritten DepositionsEvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsInternational LawDispute ResolutionEvidenceHague Convention on Taking Evidence AbroadInternational LawDispute ResolutionEvidenceWitnesses

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16-193 California Forms of Pleading and Practice--Annotated § 193.201

§ 193.201 Motion for Protective Order

[1] Attempt to Resolve Issue Informally

Engage in reasonable and good faith attempt to resolve informally each issue presented by the motion.

NOTE:

Failure to do so will preclude bringing a motion for a protective order [*see* *Code Civ. Proc. §§ 2025.420, 2028.010, 2028.070*], and may result in imposition of monetary sanction [***see*** *Code Civ. Proc. §§ 2023.010(i), 2023.020, 2025.420(a)*].

[2] Motion for Protective Order

If unable to informally resolve the issues, bring motion for protective order [*see Code Civ. Proc. §§ 2025.420, 2028.010, 2028.070*; *see also § 193.182* (checklist) and §§ 193.233, 193.265 (forms)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureDiscoveryProtective Orders

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16-193 California Forms of Pleading and Practice--Annotated §§ 193.202-193.209

[Reserved]

§§ 193.202[Reserved]

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C. Depositions in California for Actions Pending in Another Jurisdiction

16-193 California Forms of Pleading and Practice--Annotated § 193.210

§ 193.210 Checklists for Party Seeking to Take Depositions

[1] Preliminary Determinations

Consider preliminary matters, including (1) selection of California counsel to assist in setting up deposition and compelling attendance of deponent; (2) selection of place in California at which deposition is to be taken [*see* discussion in *§ 193.32*]; (3) selection of time for taking deposition [*see* discussion in *§ 193.20*]; (4) selection of deposition officer and reporter before whom deposition is to be taken [*see* discussion in *§ 193.40*].

NOTE:

For depositions taken in 2009, attorneys should be aware that a degree of uncertainty exists regarding the applicable law in light of the inadvertent repeal of *Code Civ. Proc. § 2029.010* as of January 1, 2009 [*see* Stats 2008 ch. 231, § 2], a year earlier than was intended. For discussion of the repeal, and a summary of the provisions of the successor statute, the Interstate and International Depositions and Discovery Act [*Code Civ. Proc. § 2029.100 et seq.* (operative January 1, 2010)], see *§ 193.130*. Until the successor statute becomes effective, it is advisable to confirm whether or not the appropriate local court will continue to follow the former procedure.

[2] Prepare Documents

[a] Stipulation

NOTE:

It appears that if the deponent agrees to appear voluntarily, a deposition subpoena will not be necessary, so long as the stipulation is adequate under the laws of the jurisdiction in which the action is pending to permit use of the deposition testimony in that jurisdiction [*see Code Civ. Proc. § 2016.030*].

If the deponent and parties are agreeable, prepare a stipulation for taking the deposition, including the following information [*see also* discussion in *§ 193.170[1]*]:

1. The names of the parties.

2. The title of the action or proceeding, the court or other body before which it is pending, and the general nature of the action or proceeding.

3. The name and address of the witness whose testimony is to be taken by deposition and a description of documents or things sought to be produced at the deposition.

4. The time, place, and manner of taking the deposition and the deposition officer before whom it is to be taken.

5. An agreement for the use of the testimony or documents in the action or proceeding.

[b] Writ, Letters Rogatory, Letter of Request, or Commission

In lieu of a stipulation between the parties for taking the deposition [*see* [a], *above*], prepare those papers required by the law of the jurisdiction in which the action or proceeding is pending to authorize the taking of the deposition in California.

[c] Deposition Subpoena

The Judicial Council forms for deposition subpoenas [*see § 193.226* et seq.] may be adapted by changing the caption at the top of the form to show that the action is pending in another jurisdiction [*see, e.g.,* caption in § 193.280[1]].

Counsel may also wish to prepare affidavit or declaration in support of issuance of deposition subpoena [§ 193.280].

[3] Issuance and Service of Deposition Subpoena

Follow the procedures *set out in § 193.170[6]*. If affidavit or declaration in support of issuance of deposition subpoena was prepared, present it toclerk of superior court of county in which deposition is to take place [*see Code Civ. Proc. § 1986(b)*].

[4] Conduct of Deposition

The deposition should be conducted in the same manner as a deposition taken by oral or written examination for use in a California action [*see* former *Code Civ. Proc. § 2029.010* (repealed 1/1/09 by Stats. 2208 ch. 231 § 2; *see also* discussion in *§ 193.130*)]. For discussion of the procedures applicable to oral and written depositions, see *respectively § 193.171* and *§ 193.192[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsForeign DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsWritten DepositionsInternational LawDispute ResolutionEvidenceHague Convention on Taking Evidence AbroadInternational LawDispute ResolutionEvidenceWitnesses

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16-193 California Forms of Pleading and Practice--Annotated §§ 193.211-193.219

[Reserved]

§§ 193.211[Reserved]

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PART V. FORMS
A. Oral Depositions

16-193 California Forms of Pleading and Practice--Annotated § 193.220

§ 193.220 Proceedings by Plaintiff for Leave to Serve Deposition Notice Earlier Than 20 Days After Service of Summons or Appearance by Any Defendant [Code Civ. Proc. § 2025.210(b)] and to Shorten Time for Scheduling Deposition [Code Civ. Proc. § 2025.270]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings by Plaintiff for Leave to Serve Deposition Notice Earlier Than 20 Days After Service of Summons or Appearance by Any Defendant [Code Civ. Proc. § 2025.210(b)] and to Shorten Time for Scheduling Deposition [Code Civ. Proc. § 2025.270]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDERS ALLOWING
vs.	)	SERVICE OF DEPOSITION NOTICE AND SHORTENING
_____ [*name*],	)	TIME FOR SCHEDULING DEPOSITION OF
	)	_____
Defendant.	)	[*name*], SUPPORTING DECLARATION OF
	)	_____ [*name*], AND SUPPORTING MEMORANDUM
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [defendant *or* the parties herein] and to his/her/their attorney(s) of record:

NOTICE IS HEREBY GIVEN that on _____, [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], plaintiff _____ [*name*] will, and hereby does, move for an order granting him/her leave to serve notice of the takingof the deposition of _____ [*name*] on _____, [*date*], so that the deposition may be commenced on _____, [*date*], and to shorten the time for scheduling the deposition. The motion will be made on the grounds that good cause exists for these orders in that _____ [*set forth fact* (*s*) *constituting good cause for accelerating date for serving notice of deposition, e.g.,* _____ (*name of prospective deponent*), who has knowledge of matters relevant to the subject matter involved in this action in that he/she witnessed the automobile accident in which plaintiff was injured, is in such ill health that his/her testimony should be obtained as soon as possible].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name* (*s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for plaintiff in the above-described action].

[*EITHER*]

2. The summons in this action was served on defendant(s) _____ [*name* (*s*)] on _____ [*date*] [and _____], [*date*], [respectively].

[*OR*]

2. Defendant(s) _____ [*name* (*s*)] appeared in this action on _____, [*date*].

[*CONTINUE*]

3. Good cause exists for permitting early service of the deposition notice, for permitting the deposition of _____ [*name*] to be taken early, and for permitting that deposition to be taken on short notice in that

_____ [*state facts personally known to declarant showing good cause for excusing plaintiff from time requirements of Code Civ. Proc. §§ 2025.210(b), 2025.270, e.g.,* _____ (name of prospective deponent) has knowledge of matters relevant to the subject matter involved in this action in that he/she was an eyewitness to the collision out of which this action arose, and he/she intends to leave the State of California on _____ [*date*], and take up residence in _____ (*place*)].

4. On the basis of the foregoing facts, it is necessary for plaintiff to depose _____ [*name*] on _____ [*date*], and to serve the notice of taking the deposition on _____ [*date*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The notice of motion and motion set out in [1], *above*, is for use by a plaintiff to obtain leave of court to serve a deposition notice at an earlier date than 20 days after service of summons on, or appearance by, any defendant pursuant to *Code Civ. Proc. § 2025.210(b)*, and to obtain an order shortening the time for scheduling a deposition.

Unless the time for scheduling a deposition is shortened by court order, a deposition must be scheduled for a date at least 10 days after service of the deposition notice [*Code Civ. Proc. § 2025.270(a)*]. In unlawful detainer proceedings, or other proceedings under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), a deposition must be scheduled at least five days after service of the deposition notice, but not later than five days before trial [*Code Civ. Proc. § 2025.270(b)*]. If the personal records of a consumer or the employment records of an employee, are being subpoenaed, the deposition must be scheduled for a date at least 20 days after issuance of that subpoena [*Code Civ. Proc. § 2025.270(c)*; *see also Code Civ. Proc. §§ 1985.3*(*l*), 1985.6(k) (when notice to consumer or employee and delivery of documents specified in *Code Civ. Proc. §§ 1985.3(b)* or *1985.6(b)* is not required); Ch. 535, *Subpoena*.].

The time requirements for scheduling the deposition are extended in accordance with *Code Civ. Proc. § 1013(a)* when service of the deposition notice is by mail (that is, five calendar days if the place of address is within California, 10 calendar days if the place of address is outside California but within the United States, or 20 calendar days if the place of address is outside the United States) [*see Code Civ. Proc. § 2016.050*].

A plaintiff wishing to serve a deposition notice within 20 days of the service of summons on or appearance by any defendant will usually have to move the court also to shorten the time for scheduling the deposition as well. For further discussion, see *§ 193.20*. For discussion of additional requirements under Code Civ. Proc. and 2020.510 that may affect

the timefor taking a deposition when business records are being subpoenaed, see *§§ 193.21[2], 193.227[3][c]*, and *193.228[3][b]*.

This motion is to be made before the court in which the action is pending [*Code Civ. Proc. § 2016.020(b)*].

The motion may be granted on a showing of good cause [*see Code Civ. Proc. §§ 2025.210(b)*, 2025.270(d)].

A supporting memorandum is required to be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For general discussion and forms, see Ch. 417, *Points and Authorities* .

[3] Notice of Motion

Due to time constraints, this notice of motion will usually be combined with an application for an order under *Code Civ. Proc. § 1005* shortening the time required for giving the notice of motion. For forms of applications and orders shortening the time for notice of motions, see Ch. 372, *Motions and Orders* , and Ch. 524, *Shortening and Extension of Time* .

In lieu of this form and notice procedure, however, counsel may wish to use the application without notice *set out in § 193.221*. A motion for leave under *Code Civ. Proc. § 2025.210(b)* is expressly permitted to be made with or without notice; an order shortening time under *Code Civ. Proc. § 2025.270(d)* may be on motion or ex parte application.

[4] Cross References

See the following chapters relating to law and motion proceedings generally:

- For discussion and forms concerning declarations in general, see Ch. 15, *Affidavits, Certificates, and Declarations*

- For discussion and forms relating to noticed motions and accompanying papers in general, see Ch. 372, *Motions and Orders*

- For discussion and forms concerning service of papers and proof of service, see Ch. 518, *Service of Summons and Papers*

- For further discussion and forms concerning shortening or extending time requirements in general, see Ch. 524, *Shortening and Extension of Time*

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 193 DISCOVERY: DEPOSITIONS
PART V. FORMS
A. Oral Depositions

16-193 California Forms of Pleading and Practice--Annotated § 193.221

§ 193.221 Proceedings by Plaintiff for Leave to Serve Deposition Notice Earlier Than 20 Days After Service of Summons or Appearance by Any Defendant [Code Civ. Proc. § 2025.210(b)] and to Shorten Time for Scheduling Deposition [Code Civ. Proc. § 2025.270]--Application for Ex Parte Orders

[1] FORM Proceedings by Plaintiff for Leave to Serve Deposition Notice Earlier Than 20 Days After Service of Summons or Appearance by Any Defendant [Code Civ. Proc. § 2025.210(b)] and to Shorten Time for Scheduling Deposition [Code Civ. Proc. § 2025.270]--Application for Ex Parte Orders

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	APPLICATION FOR EX PARTE ORDERS AL-
vs.	)	LOWING SERVICE OF DEPOSITION NOTICE
_____ [*name*],	)	AND SHORTENING TIME FOR SCHEDULING
	)	DEPOSITION OF _____ [*name*],
Defendant.	)	SUPPORTING DECLARATION OF
	)	_____ [*name*],
	)	SUPPORTING MEMORANDUM, AND ORDER
	)	Date: _____
	)	Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

APPLICATION

I, _____ [*name*], hereby apply on behalf of plaintiff _____ [*name*] for orders granting him/her leave, pursuant to *Code of Civil Procedure Sections 2025.210(b)* and *2025.270(d)*, to serve notice of the taking of the deposition of _____ [*name*] on _____ [*date*], and to commence taking the deposition on _____ [*date*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

SUPPORTING DECLARATION OF _____ [*name*]

[*Insert body of declaration set out in § 193.220[1]*].

DECLARATION RE NOTICE

[*Add declaration concerning notice given to other parties or why notice should not be required. If notice was provided later than 10:00 a.m. the court day before the ex parte appearance, explain exceptional circumstances that justify shorter notice. See discussion in [3][b], below.*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add supporting memorandum.*]

ORDER

[*Insert body of proposed order set out in § 193.222[1].*]

[2] Use of Form

The application for ex parte orders set out in [1], *above*, is for use by a plaintiff to obtain leave of court to serve a deposition notice at an earlier date than 20 days after service of summons on, or appearance by, any defendant pursuant to *Code Civ. Proc. § 2025.210(b)*, and to obtain an order shortening the time for scheduling a deposition pursuant to *Code Civ. Proc. § 2025.270(d)*. The ex parte application may be used in lieu of the noticed motion *set out in § 193.220* [*see also* discussion in *§§ 193.20[1], 193.220[2] -[4]*].

[3] Ex Parte Application

[a] Notice Requirements

Although *Code Civ. Proc. § 2025.210(b)* provides that the court may grant a plaintiff leave to notice an early deposition on a motion made "with or without notice," it appears that an ex parte application made for that purpose must nevertheless conform to the requirements applicable to ex parte applications generally under *Cal. Rules of Ct., Rules 3.1200-3.1207*. Thus, the ex parte application will not be granted unless one of the following appears by declaration [*Cal. Rules of Ct., Rule 3.1204(b)*]:

- The notice given, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected and that, within the applicable time under Rule 3.1203, the applicant informed the opposing party where and when the application would be made;

- The applicant in good faith attempted to inform the opposing party but was unable to do so, specifying the efforts made to inform the opposing party;

- That, for reasons specified, the applicant should not be required to inform the opposing party.

This form of application, as well as the supporting declaration incorporated from § 193.220, should therefore be modified as necessary to satisfy the requirements of *Cal. Rules of Ct., Rule 3.1201*, as discussed in [b], *below*.

[b] Form and Content Requirements

A request for ex parte relief must be in writing and must include all of the following:

- **Required documents** [*Cal. Rules of Ct., Rule 3.1201*]:

  - An application containing the case caption and stating the relief requested;

  - A declaration in support of the application making the factual showing required under *Cal. Rules of Ct., Rule 3.1202(c)* (*see* Contents of Application, *below*);

  - A declaration based on personal knowledge of the notice given under *Cal. Rules of Ct., Rule 3.1204*;

  - A memorandum; and

  - A proposed order.

In this case, a supporting memorandum should simply state that, under *Code Civ. Proc. § 2025.210(b)*, the court is authorized to grant leave to a plaintiff to notice a deposition at an earlier date on a motion made with or without notice, on a showing of good cause, and provide argument why the facts in the supporting declarations demonstrate good cause for granting the order requested. For a form of order that may be adapted for use as a proposed order granting the ex parte application, see *§ 193.222*.

The application must include [*Cal. Rules of Ct., Rule 3.1202*]:

- **Identification of attorney of party**: The name, address, and telephone number of any attorney known to the applicant to be an attorney for any party or, if no such attorney is known, the name, address, and telephonenumber of the party if known to the applicant.

- **Disclosure of previous applications:** If an ex parte application has been refused in whole or in part, any subsequent application of the same character or for the same relief, although made upon an alleged

different state of facts, must include a full disclosure of all previous applications and of the court's actions.

- **Affirmative factual showing:** An affirmative factual showing in a declaration containing competent testimony based on person knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte. In this case, the supporting declaration should state the relevant statutory bases, for example, the court's authority under *Code Civ. Proc. § 2025.270(d)* to grant the relief for "good cause" even if the request is made by an ex parte application or motion "without notice." The declaration should also present the facts showing "good cause."

A party seeking an ex parte order must notify all parties [*Cal. Rules of Ct., Rule 3.1203(a)*]. Notice must be given no later than 10:00 a.m. the court day before the ex parte appearance, absent a showing of exceptional circumstances that justify a shorter time for notice [*Cal. Rules of Ct., Rule 3.1203(a)*; *see Cal. Rules of Ct., Rule 3.1203(b)* (time of notice in unlawful detainer proceedings)]. However, if the applicant fails to comply with the requirements of *Cal. Rules of Ct., Rule 3.1203*, the clerk must not reject an ex parte application for filing and must promptly present the application to the appropriate judicial officer for consideration [*Cal. Rules of Ct., Rule 3.1205*].

The notice must [*Cal. Rules of Ct., Rule 3.1204(a)*]:

- State with specificity the nature of the relief to be requested and the date, time, and place for the presentation of the application; and

- Attempt to determine whether the opposing party will appear to oppose the application.

A declaration regarding notice must accompany the ex parte application [*Cal. Rules of Ct., Rule 3.1204(b)*]. The declaration regarding the notice must state, as applicable [*Cal. Rules of Ct., Rule 3.1204(b)*]:

- The notice given, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected and that, within the applicable time under *Cal. Rules of Ct., Rule 3.1203*, the applicant informed the opposing party where and when the application would be made;

- That the applicant in good faith attempted to inform the opposing party but was unable to do so, specifying the efforts made to inform the opposing party; or

- That, for reasons specified, the applicant should not be required to inform the opposing party.

If notice was provided later than 10:00 a.m. the court day before the ex parte appearance [*see Cal. Rules of Ct., Rule 3.1203(a)*], the declaration regarding notice must explain [*Cal. Rules of Ct., Rule 3.1204(c)*]:

- The exceptional circumstances that justify the shorter notice; or

- In unlawful detainer proceedings, why the notice given is reasonable.

[c] Service Requirements

Parties appearing at the ex parte hearing must serve their application (or written opposition) on all other appearing parties at the first reasonable opportunity. Absent exceptional circumstances, such service must be made before the hearing will be conducted [*Cal. Rules of Ct., Rule 3.1206*].

[d] Presenting Application to Judge

An ex parte motion or application is made to the judge of the court, when there is only one judge. In a court with more than one judge, an ex parte application or motion is made to the judge or commissioner before whom the matter is pending [*see, e.g., Cal. Rules of Ct., Rule 2.20(a)*]. If the case has not yet been assigned to a judge or department, local court rules should be consulted to determine whether the application should be made to the presiding judge or to the law and motion judge.

An ex parte application seeking leave to notice an early deposition will not be considered without a personal appearance of the applicant [*see Cal. Rules of Ct., Rule 3.1207* (ex parte application will be considered without a personal appearance only in application either to file memorandum in excess of applicable page limits, applications for extensions of time to serve pleadings, application to set hearing date on alternative writ or order to show cause, or stipulations by the parties for an order of the court)].

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A. Oral Depositions

16-193 California Forms of Pleading and Practice--Annotated § 193.222

§ 193.222 Proceedings by Plaintiff for Leave to Serve Deposition Notice Earlier Than 20 Days After Service of Summons or Appearance by Any Defendant [Code Civ. Proc. § 2025.210(b)] and to Shorten Time for Scheduling Deposition [Code Civ. Proc. § 2025.270]--Order

[1] FORM Proceedings by Plaintiff for Leave to Serve Deposition Notice Earlier Than 20 Days After Service of Summons or Appearance by Any Defendant [Code Civ. Proc. § 2025.210(b)] and to Shorten Time for Scheduling Deposition [Code Civ. Proc. § 2025.270]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

[*EITHER, if orders grant noticed motion*]

The motion of plaintiff for orders granting him/her leave to serve notice of the taking of the deposition of _____ [*name*] on _____, [*date*], and shortening the time for scheduling that deposition, came on regularly for hearing by the court on _____, [*date*]. Plaintiff appeared by counsel

_____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted, and good cause appearing therefor,

[*OR, if orders grant ex parte application*]

Application having been made by plaintiff with proof having been made to the satisfaction of the court, and good cause appearing therefor,

[*CONTINUE*]

IT IS ORDERED that the motions be, and hereby are, granted and that plaintiff is granted leave to serve notice of the taking of the oral deposition of _____ [*name and address or description of deponent*], on _____, [*date*].

IT IS FURTHER ORDERED that the time for scheduling this deposition be shortened, and that the notice of the taking of the deposition be served no later than _____ [*number*] _____ [days *or* hours] before the time set for taking the deposition.

[*If deponent to be served with deposition subpoena requiring production of personal records of consumer*]

IT IS FURTHER ORDERED that the deposition subpoena be issued no later than _____ [*number*] _____ [days *or* hours] before the time set for taking the deposition.

[*Continue with further orders as appropriate.*]

Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use in granting plaintiff leave under *Code Civ. Proc. § 2025.210(b)* to serve a deposition notice at an earlier date than 20 days after the service of a summons on or the appearance by any defendant, and to grant an order shortening the time requirements for scheduling the deposition under *Code Civ. Proc. § 2025.270* [*see § 193.221*; *see also* discussion in *§§ 193.20[1]*, *193.220[2] -[4]*].

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16-193 California Forms of Pleading and Practice--Annotated § 193.223

§ 193.223 Proceedings to Take Deposition of Party or Party-Affiliated Deponent at Place More Distant Than That Permitted Under Code Civ. Proc. § 2025.250(a) [Code Civ. Proc. § 2025.260]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Take Deposition of Party or Party-Affiliated Deponent at Place More Distant Than That Permitted Under Code Civ. Proc. § 2025.250(a) [Code Civ. Proc. § 2025.260]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	NO. _____
Plaintiff,	NOTICE OF MOTION AND MOTION FOR ORDER THAT _____
vs.	[*name*] ATTEND AS A DEPONENT FOR DEPOSITION AT _____
_____ [*name*],	[*place*], AND FOR ORDER IMPOSING A MONETARY SANCTION AGAINST
Defendant.	_____ [*identify prospective deponent or opposing party and/or his/her attorney, e.g.,* DEFENDANT _____ (*name*) AND HIS/HER ATTORNEY _____ (*name*)], SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
	Date: _____
	Time: _____
	Location: _____

Judge: _____
Date Action Filed: _____
Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____, [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* plaintiff] will,and hereby does, move for an order that _____ [*name*], [_____ (an officer of *or* a director of *or* a managing agent of *or* an employee of) _____ (*party's name*), who is] a party to this action, attend as a deponent for oral deposition at _____ [*place, e.g.,* the law offices of _____ (*name*) located at _____ (*address*), _____ (*city*), California], a place _____ [*describe distance, e.g.,* more than 150 miles from his/her residence *or other distance greater than that permitted under Code Civ. Proc. § 2025.250(a)*]. _____ [*Identify moving party, e.g.,* Plaintiff] will further move for an order imposing a monetary sanction against _____ [*identify prospective deponent or opposing party and/or his/her attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] in the amount of $_____. The motion will be made on the ground that the interests of justice will be served by requiring this deponent's attendance at this more distant place.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name* (*s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*specify party, e.g.,* plaintiff) in the above-described action].

2. _____ [*Identify moving party, e.g.,* Plaintiff] _____ [*name*] is seeking an order of this court that _____ [*name of prospective deponent*] attend as a deponent for oral deposition at _____ [*place, e.g.,* the law offices of _____ (*name*) located at _____ (*address*), _____ (*city*), California], a place _____ [*describe distance, e.g.,* a place more than 150 miles from his/her residence *or other distance greater than that*

permitted under Code Civ. Proc. § 2025.250(a)].

[*EITHER*]

3. _____ [*Name of prospective deponent*] is a _____ [plaintiff *or* defendant] named in the complaint and is therefore a party to this action.

[*OR*]

3. _____ [*Name of prospective deponent*] is _____ [*specify title, e.g.,* chairman of the board of directors of _____ (*name*)] and istherefore a(n) _____ [officer *or* director *or* managing agent or employee] of _____ [*identify party, e.g.,* defendant _____ (*name*)].

[*CONTINUE*]

4. The interests of justice will be served by requiring the deponent to appear for his/her deposition at a place _____ [*describe distance, e.g.,* a place more than 150 miles from his/her residence *or other distance greater than that permitted under Code Civ. Proc. § 2025.250(a)*] for the following reasons: _____ [*set forth specific facts personally known to declarant including, when applicable, discussion of whether moving party selected forum, whether deponent will be present to testify at trial, convenience of deponent, feasibility of conducting the deposition by written questions pursuant to Code Civ. Proc. § 2028.010 et seq.* or of using a discovery method other than a deposition, number of depositions sought to be taken at a place more distant that permitted under *Code Civ. Proc. § 2025.250(a)*, expense to the parties of requiring the deposition to be taken within the distance permitted under *Code Civ. Proc. § 2025.250(a)*, whereabouts of deponent at time deposition is scheduled to be taken, and all other factors tending to show that interests of justice will be served by requiring deponent to appear for deposition at place more distant than that permitted under *Code Civ. Proc. § 2025.250(a)*].

5. _____ [*Provide statement of facts showing reasonable and good faith attempt to resolve informally issues presented by motion, including description of conferring or attempting to confer with other parties in person, by telephone, or by letter, e.g.,* On January 6, I attempted to telephone the defendant's attorney, Mr. Harrison, on three occasions, but each time was told that Mr. Harrison was not available. I left messages for him to telephone me, but he did not return my calls. The next day, I again tried to telephone, and did speak with Mr. Harrison, who told me that he was not willing to travel to a distant place, after which Mr. Harrison hung up the telephone. I then wrote a letter to Mr. Harrison explaining the situation, a copy of which is attached as Exhibit A, but received no response].

6. _____ [*Identify moving party, e.g.,* Plaintiff] has incurred expenses as follows in making this motion: _____ [*itemize reasonable expenses incurred, including attorney's fees, and explain basis of computing each expense*], for a total of $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form of notice of motion and motion set out in [1], *above*, is for use by a party desiring to take a deposition of a natural person who is a party or a party-affiliate, to obtain an order that the deponent attend for deposition at a place that is more distant than that permitted under *Code Civ. Proc. § 2025.250(a)*, and to obtain an order imposing a monetary sanction against any party, person, or attorney opposing the motion [*see Code Civ. Proc. § 2025.260*]. For further discussion, see *§ 193.22*.

The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by the motion (Paragraph 5 of Supporting Declaration) [*Code Civ. Proc. § 2025.260*]. When monetary sanctions are sought, an accompanying declaration must also set out facts supporting the amount of any monetary sanction sought (Paragraph 6 of Supporting Declaration) [*Code Civ. Proc. § 2023.040*].

A supporting memorandum is required to be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see* Ch. 417, *Points and Authorities* ; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*]. For memoranda of points and authorities relating to a motion under *Code Civ. Proc. § 2025.260*, see California Points and Authorities , Ch. 83, *Discovery: Depositions* (Matthew Bender).

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 193.220[4]*.

[3] Notice

Written notice, as prescribed in *Code Civ. Proc. § 1005(b)*, must be given for a motion for an order to take a deposition under *Code Civ. Proc. § 2025.260* [*Code Civ. Proc. § 1005(a)(8)*].

Code Civ. Proc. § 1005(b) provides generally that all moving and supporting papers must be served and filed at least 16 court days before the time appointed for the hearing [*Code Civ. Proc. § 1005(b)*; *see also Cal. Rules of Ct., Rule 3.1300(a)*]. If, however, the notice is served by mail, the required 16-day period of notice before the time appointed for the hearing must be increased by five calendar days if the place of mailing and the place of address are within the State of California, by 10 calendar days if either the place of mailing or the place of address is outside the State of California but within the United States, or by 20 calendar days if either the place of mailing or the place of address is outside the United States [*Code Civ. Proc.§ 1005(b)*; *see also Cal. Rules of Ct., Rule 3.1300(c)* (proof of service of notice to be filed at least five court days before time set for hearing)]. The court, or a judge of the court, may prescribe a shorter time for notice [*Code Civ. Proc. § 1005(b)*; *see Cal. Rules of Ct., Rule 3.1300(b)*; *see also Code Civ. Proc. § 1005(c)* (service of papers opposing motion and reply papers)].

No paper may be rejected for filing on the ground that it was untimely submitted. If the court, in its discretion, refuses to consider a late-filed paper, the minutes or order must so indicate [*Cal. Rules of Ct., Rule 3.1300(d)*]. A paper

submitted before the close of the clerk's office to the public on the day the paper is due is deemed timely filed [*Cal. Rules of Ct., Rule 3.1300(e)*].

[4] Court's Exercise of Discretion to Grant or Deny Motion

In exercising its discretion to grant or deny this motion, the court shall take into consideration any factor tending to show whether the interests of justice will be served by requiring the deponent's attendance at that more distant place, including, but not limited to, the following [*see Glass v. Superior Court (1988) 204 Cal. App. 3d 1048, 1053-1054, 251 Cal. Rptr. 690* (trial court ordered to set aside and vacate its orders denying motion and assessing sanctions)]:

- Whether the moving party selected the forum [*Code Civ. Proc. § 2025.260(b)(1)*].

- Whether the deponent will be present to testify at the trial of the action [*Code Civ. Proc. § 2025.260(b)(2)*].

- The convenience of the deponent [*Code Civ. Proc. § 2025.260(b)(3)*].

- The feasibility of conducting the deposition by written questions pursuant to *Code Civ. Proc. § 2028.010 et seq.*, or of using a discovery method other than a deposition [*Code Civ. Proc. § 2025.260(b)(4)*].

- The number of depositions sought to be taken at a place more distant than that permitted under *Code Civ. Proc. § 2025.250(a)* [*Code Civ. Proc. § 2025.260(b)(5)*].

- The expense to the parties of requiring the deposition to be taken within the distance permitted under *Code Civ. Proc. § 2025.250(a)* [*Code Civ. Proc. § 2025.260(b)(6)*].

- The whereabouts of the deponent at the time for which the deposition is scheduled [*Code Civ. Proc. § 2025.260(b)(7)*].

The supporting declaration in this form should therefore state facts showing that, in consideration of all the circumstances, including those enumerated in *Code Civ. Proc. § 2025.260(b)*, it is in the interest of justice to grant the order (Paragraph 4 of Supporting Declaration).

[5] Order Conditioned on Advancement of Expenses and Costs

If the court grants the motion, it may issue an order that is conditioned on the advancement by the moving party of the reasonable expenses andcosts to the deponent for travel to the place of deposition [*Code Civ. Proc. § 2025.260(c)*].

[6] Monetary Sanctions

The court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes a motion to increase travel limits for a party-deponent, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust [*Code Civ. Proc. § 2025.260(d)*]. For further discussion of monetary sanctions, including notice and hearing requirements for motions seeking the imposition of a monetary sanction, see *§ 193.230[4]* [*see also Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*].

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16-193 California Forms of Pleading and Practice--Annotated § 193.224

§ 193.224 Proceedings to Take Deposition of Party or Party-Affiliated Deponent at Place More Distant Than That Permitted Under Code Civ. Proc. § 2025.250(a) [Code Civ. Proc. § 2025.260]--Order

[1] FORM Proceedings to Take Deposition of Party or Party-Affiliated Deponent at Place More Distant Than That Permitted Under Code Civ. Proc. § 2025.250(a) [Code Civ. Proc. § 2025.260]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.*, plaintiff] for an order that _____ [*name*] attend as a deponent for oral deposition at a place _____ [*describe distance, e.g.*, more than 150 miles from his/her residence *or other distance greater than that permitted under Code Civ. Proc. § 2025.250(a)*], and for an order imposing a monetary sanction against _____ [*identify prospective deponent or opposing party and/or his/her attorney, e.g.*, defendant _____ (*name*) and his/her attorney _____ (*name*)], came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be _____ [denied *or* granted],

IT IS ORDERED that the motion be, and hereby is, _____ [denied *or* granted and that _____ (*name*) (, _____ (an officer *or* a director *or* a managing agent *or* an employee) of _____ (*party's name*)) a party to this action, attend as a deponent for oral deposition at _____ (*place, e.g.,* the law offices of _____ (*name*) located at _____ (*address*), _____ (*city*), California)].

[IT IS FURTHER ORDERED THAT the taking of the above-described deposition is conditioned on the advancement by _____ [*identify moving party, e.g.,* plaintiff] of the reasonable expenses and costs to the deponent for travel to the place of deposition, in the sum of $ _____.]

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*identify unsuccessful party, person, or attorney, e.g.,* defendant _____ (*name*) and his/her attorney_____ (*name*)] pay forthwith to _____ [*identify successful party, e.g.,* plaintiff] _____ [*name*] the sum of $ _____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____ [*identify unsuccessful party, person, or attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*identify unsuccessful party, person, or attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use when the court has granted or denied a motion under *Code Civ. Proc. § 2025.260* for an order that a party or party-affiliated deponent attend for deposition at a place more distant than that permitted under *Code Civ. Proc. § 2025.250(a)* [*see § 193.223*]. The optional paragraph should be used when the court conditions its order on the advancement by the moving party of the deponent's reasonable expenses and costs for travel to the place of deposition [*see Code Civ. Proc. § 2025.260*].

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16-193 California Forms of Pleading and Practice--Annotated § 193.225

§ 193.225 Notice of Taking Deposition on Oral Examination [Code Civ. Proc. §§ 2025.220-2025.240]

[1] FORM Notice of Taking Deposition on Oral Examination [Code Civ. Proc. §§ 2025.220-2025.240]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF TAKING DEPOSITION OF
_____ [*name*],	)	_____ [*name*]
Defendant.	)	ON ORAL
	)	EXAMINATION [AND FOR PRODUCTION OF
	)	_____
		(WRITING(S) *and/or* (OTHER) TANGIBLE THING(S))]

_____

To _____ [*list all parties or attorneys for parties who have appeared in the action*]:

PLEASE TAKE NOTICE that _____ [*specify party, e.g.,* plaintiff] _____ [*name*] will take the deposition, on oral examination, of _____ [*name, if known, of prospective deponent, and address and telephone number, if known, if prospective deponent is not a party, including, if desired, his/her status, e.g.,* defendant *or if name not known, give general description sufficient to identify prospective deponent or class or group to which he/she belongs*]. The deposition will be taken on _____, [*date*], commencing at _____ [*time*], at _____ [*address where deposition will be taken*].

[*Add, if deponent is not a natural person*]

NOTICE IS FURTHER GIVEN that the matters on which examination is requested are as follows: _____ [*specify matters with reasonable particularity*]. [Pursuant to the provisions of *Section 2025.230 of the Code of Civil Procedure*, _____ (*name of deponent organization*) shall designate and produce at the deposition one or more of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to the above-described matters to the extent of any information known or reasonably available to the deponent.] [It is hereby requested that _____ (*name of deponent organization*) provide prompt notification in writing to the undersigned as to the name, address, telephone number, capacity, and job title of each person so designated to testify and the matters on which this person will testify.]

[*Add if deponent is to produce writings or other tangible things*]

NOTICE IS FURTHER GIVEN that _____ [_____ (*name of deponent*) *or* the above-described deponent *or* the person designated by the_____ (*name of deponent organization*) to testify on its behalf] shall bring and produce at the deposition, at the time and place set out above, the following _____ [writing(s) *and/or* (other) tangible thing(s)]: _____ [*specify with reasonable particularity any materials or category of materials to be produced by deponent*].

[*ADD, if noticing party intends to record deposition using audio or video technology*]

NOTICE IS FURTHER GIVEN that _____ [*specify party noticing deposition, e.g.*, plaintiff] intends to record the testimony at the above-described deposition by _____ [audio *or* video] recording, in addition to recording this testimony by the stenographic method.

[*ADD, if noticing party intends to record testimony by stenographic method, through instant visual display of testimony*]

NOTICE IS FURTHER GIVEN that _____ [*specify party noticing deposition, e.g.*, plaintiff] intends to record the testimony at the above-described deposition by stenographic method, through instant visual display of testimony.

[*Add if deponent is a treating or consulting physician or expert witness, and noticing party intends to reserve right to use videotape recording of deposition at trial*]

NOTICE IS FURTHER GIVEN that _____ [*specify party noticing deposition, e.g.*, plaintiff] intends to reserve the right to use at trial the video recording of the deposition testimony, under *Section 2025.620(d) of the Code of Civil Procedure.*

[*CONTINUE*]

The deposition will be taken before _____ [*name of deposition officer and his/her descriptive title, if any, or* a deposition officer] who is authorized to administer an oath. If the deposition is not completed on the date set out above, the taking of the deposition will be continued from day to day thereafter, except for Sundays and holidays, at the same place, until completed.

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*noticing party's status and name*]

[2] Use of Form

The notice of deposition set out in [1], *above*, is for use by a party to notice the taking of a deposition [*Code Civ. Proc. §§ 2025.220-2025.240*; *see § 193.21*]. A deposition notice is required for the taking of a deposition of any person, except when the deposing party seeks only the production of business records by a nonparty pursuant to *Code Civ. Proc. §§ 2020.410-2020.440*. It the latter event, a copy of the deposition subpoena serves as the notice of deposition [*Code Civ. Proc. § 2025.220(b)*; for a form for a deposition subpoena for the production of business records only, *see § 193.228*].

For procedural checklists that may be used in noticing a deposition and in compelling the attendance of the deponent, see *§ 193.170*.

[3] Contents of Deposition Notice

This deposition notice includes a list of all parties or the attorneys of parties on whom the notice is to be served, that is, all those parties or their attorneys who have appeared in the action. This list may be contained in either the deposition notice or the accompanying proof of service [*Code Civ. Proc. § 2025.240(a)*]. In addition, the form includes the following required information:

- The address where the deposition will be taken [*Code Civ. Proc. § 2025.220(a)(1)*; *see* discussion in *§ 193.22*; *see also § 193.223* (form of motion to take deposition at place more distant than permitted without leave of court)].

- The date of the deposition, selected under *Code Civ. Proc. § 2025.270*, and the time it will commence [*Code Civ. Proc. § 2025.220(a)(2)*; *see* discussion in [4], regarding selection of date)].

- The name of each deponent, and the address and telephone number, if known, of any deponent who is not a party to the action. If the name of the deponent is not known, the notice must provide a general description sufficient to identify the person or particular class to which the person belongs [*Code Civ. Proc. § 2025.220(a)(3)*].

- The specification with reasonable particularity of any materials or category of materials to be produced by the deponent [*Code Civ. Proc. § 2025.220(a)(4)*].

- The intention, if any, to record the deposition by audio or video technology, in addition to stenographic recording [*Code Civ. Proc. § 2025.220(a)(5)*; *see* discussion in *§ 193.41[3][b]*].

- The intention, if any, to record the testimony by stenographic method, through instant visual display of testimony [*Code Civ. Proc. § 2025.220(a)(5)*; *see* discussion in *§ 193.41[3][a]*].

- The intention, if any, to reserve the right to use a video recording of a treating or consulting physician or other expert witness under *Code Civ. Proc. § 2025.620(d)* [*Code Civ. Proc. §*

2025.220(a)(6); *see* discussion in *§ 193.94*].

If the deponent is not a natural person, the notice also must include a description with reasonable particularity of the matters on which examination is requested [*Code Civ. Proc. § 2025.230*]. This triggers the deponent's duty to designate persons who are qualified to testify as to these matters, to attend and testify on its behalf [*see Code Civ. Proc. § 2025.230* and discussion in *§ 193.21[3][a]*]. Optional language is included in the form to advise the deponent of this duty; such language is mandatory in a deposition subpoena served on a nonparty deponent organization [*see §§ 193.226[1], 193.227[1]*]. Optional language is also included in the form requesting a deponent organization to provide the noticing party with information concerning the designated person. The form also includes information identifying the deposition officer, if desired [*see Code Civ. Proc. § 2025.320* and discussion in *§ 193.40*].

[4] Scheduled Date of Deposition

The scheduled date of the deposition depends on the date of service of the deposition notice. It may also by affected by the date of issuance of a deposition subpoena requiring the production of personal records of a consumer or employment records of an employee [*see Code Civ. Proc. §§ 2025.220(a)(2), 2025.270*]. For further discussion, see *§§ 193.20[2]* and *193.220[2]*.

[5] Service of Notice and Copy of Deposition Subpoena

The party noticing the deposition must serve the deposition notice on all parties who have appeared in the action [*Code Civ. Proc. § 2025.240(a)*; *see Code Civ. Proc. §§ 1010-1020*]. If the deponent is not a party or a party-affiliate, a copy of the deposition subpoena commanding his or her attendance must be served with the deposition notice [*Code Civ. Proc. § 2025.240(c)*; *see Code Civ. Proc. §§ 2020.010, 2020.020, 2025.280*]. For a form for a deposition subpoena commanding personal appearance, or appearance plus the production of documents or things, see *§§ 193.226, 193.227*.

If the deponent is a witness commanded by subpoena to produce personal records of a consumer or employment records of an employee, the deposition notice must also be served on that consumer or employee, together with a copy of the deposition subpoena and a notice of privacy rights under *Code Civ. Proc. § 1985.3(e)* (personal records) or *Code Civ. Proc. § 1985.6(e)* (employment records) [*Code Civ. Proc. § 2025.240(b)*; for further discussion, *see § 193.21[2]*].

If the party noticing the deposition intends to record the testimony by stenographic method, through instant visual display of testimony, a copy of the deposition notice must also be given to the deposition officer [*Code Civ. Proc. § 2025.220(a)(5)*; *see* discussion in *§ 193.41[3][a]*].

Neither the deposition notice nor the notice to the consumer or employee may be filed with the court, unless offered as relevant to a law and motion proceeding or other hearing or ordered filed for good cause. Instead, the serving party retains the original and the original proof of service until sixmonths after final disposition of the cause, unless otherwise ordered by the court for cause [*Cal. Rules of Ct., Rule 3.250(a)(3), (4), (b)*].

For discussion and forms relating to the earliest time for serving a deposition notice, see *§§ 193.20[1]* and *193.220[2]*. For discussion and forms relating to the latest time for service, that is, relating to the time requirements for completing discovery, see *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.50 et seq. and § 190.90* et seq.

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16-193 California Forms of Pleading and Practice--Annotated § 193.226

§ 193.226 Deposition Subpoena for Personal Appearance [Code Civ. Proc. § 2020.010 et seq.]--Cal. Judicial Council Form SUBP-015]

[1] FORM Deposition Subpoena for Personal Appearance [Code Civ. Proc. § 2020.010 et seq.]--Cal. Judicial Council Form SUBP-015]

Click here to view image.

[2] Use of Form

The deposition subpoena set out in [1], *above*, is a reproduction of Cal. Judicial Council Form SUBP-015, adopted by the Judicial Council for mandatory use [*see* Cal. Rules of Ct., Appendix, Div. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

The form is for use in requiring a nonparty witness to make a personal appearance and testify at a deposition, or, if the nonparty witness is not a natural person, to designate one or more persons to appear and testify on behalf of the witness [*see Code Civ. Proc. §§ 2020.010-2020.030, 2020.310, 2020.510, 2025.280(b)*; *see also* discussion in *§ 193.30* et seq.]. If the witness is a party, service of the deposition notice alone is sufficient to require attendance and testimony [*Code Civ. Proc. § 2025.280(a)*].

For separate deposition subpoena forms for use in requiring the production of records or tangible things in addition to a personal attendance, or requiring only the production of business records, see *respectively § 193.227* and *§ 193.228*.

For a discussion and forms for subpoenas generally, see Ch. 535, *Subpoena* .

[3] Deposition Subpoena

[a] Issuance

The clerk of the court in which the action is pending issues a signed and sealed deposition subpoena, but otherwise blank, to a party requesting it, who fills it in before service. In lieu of the court-issued deposition subpoena, an attorney of record for any party may sign and issue a deposition subpoena; the deposition subpoena in that case need not be sealed, and the attorney may retain the original and serve a copy on the nonparty [*Code Civ. Proc. § 2020.210*].

[b] Contents: Deposition Subpoena Commanding Only Attendance and Testimony

A deposition subpoena that commands only the attendance and testimony of the nonparty deponent is required to contain the following [*Code Civ. Proc. § 2020.310*]:

- A specification of the time when and the place where the deponent is commanded to attend the deposition.

- A summary of (1) the nature of a deposition, (2) the rights and duties of the deponent, and (3) the penalties for disobedience of a deposition subpoena described in *Code Civ. Proc. § 2020.240* (discussed in *§ 193.34*).

- If the deposition testimony will be conducted using instant visual display, a statement that it will be conducted in that manner [*see Code Civ. Proc. § 2020.310(d)*].

- If the deposition is to be recorded using audio or video technology by, or at the direction of, the noticing party under *Code Civ. Proc. § 2025.340*, a statement that it will be recorded in that manner [*see Code Civ. Proc. §§ 2020.310(c), 2025.330(c)*].

- If the deposition testimony will be recorded by stenographic method using instant visual display, a statement that it will be recorded in that manner [*see Code Civ. Proc. § 2025.220(a)(5)*].

- If the deponent is an organization, a description with reasonable particularity of the matters on which examination is requested and an advisement to the organization of its duty to make the designation of employees or agents who will attend described in *Code Civ. Proc. § 2020.310(e)* (discussed in *§ 193.21[3][b]*).

[c] Service

The party noticing the deposition must effectuate service of the deposition subpoena on the nonparty deponent in advance of the deposition within a reasonable time to travel to the place of deposition [*Code Civ. Proc. § 2020.220(a)*].

Any person may serve the subpoena by personal delivery of a copy of it to the deponent if the deponent is a natural person. If the deponent is an organization, service may be by personal delivery of a copy of the subpoena to any officer, director, or custodian of records or to any agent or employee authorized by the organization to accept service of a subpoena [*Code Civ. Proc. § 2020.220(b)*]. Service may be accompanied by payment of witness fees [*see Code Civ. Proc. § 2020.230*], as discussed in [d], *below.*

Personal service of any deposition subpoena is effective to require the personal attendance and testimony of any deponent who is a resident of California at the time of service or any production, inspection, testing, and sampling if the subpoena so specifies. Personal service is also effective to require that deponent's attendance at a court session to consider any issue arising out of the deponent's refusal to be sworn, to answer any questions, to produce specified items, or to permit inspection or specified testing and sampling of the items produced [*Code Civ. Proc. § 2020.220(c)*].

If the party giving notice of the deposition fails to serve a required subpoena on a nonparty or non-party-affiliated deponent and, as a result, the deponent fails to appear for the deposition, any party who, in person or by attorney, attended the deposition at the specified time and place in theexpectation that the deponent's testimony would be taken should seek the imposition of a monetary sanction under *Code Civ. Proc. § 2023.030(a)* against the noticing party [*Code Civ. Proc. § 2025.440(a)*; *see § 193.244*].

[d] Witness Fees

If a deposition subpoena requires the personal attendance of the deponent, pursuant to *Code Civ. Proc. §§ 2020.310 et seq.* and *2020.510 et seq.*, the party noticing the deposition is required to pay to the deponent in cash or by check the same witness fee and mileage required by *Gov. Code § 68070 et seq.*, for attendance and testimony before the court in which the action is pending. This payment, whether or not demanded by the deponent, must be made, at the option of the party noticing the deposition, either at the time of service of the deposition subpoena or at the time the deponent attends for the taking of testimony [*Code Civ. Proc. § 2020.230(a)*].

[e] Location of Deposition

Unless the court orders otherwise [*see Code Civ. Proc. § 2025.260*] or the witness otherwise agrees, the deposition of a witness being deposed as an individual (whether or not a party to the action) must take place within 75 miles of the deponent's residence, or within 150 miles of the deponent's residence, if the deposition is taken within the county of the court in which the action is pending [*Code Civ. Proc. § 2025.250(a)*; *see Code Civ. Proc. § 2025.250(b)-(d)* (deposition of organization)].

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16-193 California Forms of Pleading and Practice--Annotated § 193.227

§ 193.227 Deposition Subpoena for Personal Appearance and Production of Documents and Things [Code Civ. Proc. §§ 2020.020-2020.510]--Cal. Judicial Council Form SUBP-020]

[1] FORM Deposition Subpoena for Personal Appearance and Production of Documents and Things [Code Civ. Proc. §§ 2020.020-2020.510]--Cal. Judicial Council Form SUBP-020]

Click here to view image.

[2] Use of Form

The deposition subpoena set out in [1], *above*, is a reproduction of Cal. Judicial Council Form SUBP-020, adopted by the Judicial Council for mandatory use [*see* Cal. Rules of Ct., Appendix, Div. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

The form is analogous to a civil subpoena duces tecum, and is for use in requiring a nonparty witness to make a personal appearance and testify at a deposition and also to produce specified documents or other tangible things, or, if the nonparty witness is not a natural person, to designate one or more persons to appear on behalf of the witness to testify and produce the documents or things specified in the subpoena [*see Code Civ. Proc. §§ 2020.010-2020.030, 2020.310, 2020.510, 2025.280(b)*; *see also* discussion in *§ 193.30* et seq.]. If the witness is a party, service of the deposition notice alone is sufficient to require attendance, testimony, and the production of specified documents or things [*Code Civ. Proc. § 2025.280(a)*].

For separate forms for deposition subpoenas for use in requiring personal attendance and testimony only, or requiring only the production of business records without any personal appearance, see *§§ 193.226* and *§ 193.228*, expectively.

For a discussion and forms for subpoenas duces tecum generally, see Ch. 535, *Subpoena* .

[3] Deposition Subpoena

[a] Issuance

The clerk of the court in which the action is pending issues a signed and sealed deposition subpoena, but otherwise blank, to a party requesting it, who fills it in before service. In lieu of the court-issued deposition subpoena, an attorney of record for any party may sign and issue a deposition subpoena; the deposition subpoena in that case need not be sealed, and the attorney may retain the original and serve a copy on the nonparty witness [*Code Civ. Proc. § 2020.210*].

[b] Contents: Deposition Subpoena Commanding Appearance and Production of Documents or Things

A deposition subpoena that commands both the attendance and testimony of the nonparty deponent, as well as the production of businessrecords, documents, and tangible things, is required to include the following [*Code Civ. Proc. § 2020.510(a)*]:

- The content required to be included in a deposition subpoena commanding only personal appearance and testimony under *Code Civ. Proc. § 2020.310* [*see § 193.226[3][b]*].

- A designation of the business records, documents, and tangible things to be produced either by specifically describing each individual item or by reasonably particularizing each category of item.

- A specification of any testing or sampling that is being sought.

The deposition subpoena need not be accompanied by an affidavit or declaration showing good cause for the production of the documents and things designated [*Code Civ. Proc. § 2020.510(b)*].

[c] Subpoena for Production of Consumer or Employee Records

If the deposition subpoena commands the production of personal records of a consumer or the employment records of an employee, the subpoenaing party must serve that consumer or employee with a notice of privacy rights specified in *Code Civ. Proc. § 1985.3(e)* and in *Code Civ. Proc. § 1985.6(e)*, as well as with a deposition notice and a copy of the deposition subpoena [*Code Civ. Proc. § 2025.240(b)*; *see* discussion in *§§ 193.21[2]* and *193.225[5]*]. In addition, the deposition subpoena must be served on the deponent with either a proof of service on the consumer or employee of this notice of privacy rights or a written authorization by the consumer or employee to release the records [*Code Civ. Proc. §§ 2020.410(d), 2020.510(c), (d)*; *see Code Civ. Proc. §§ 1985.3(e), 1985.6(e)*; *see also* discussion in *§ 193.31[3]*]. For forms for notices of privacy rights under *Code Civ. Proc. § 1985.3(e)* and *Code Civ. Proc. § 1985.6*, see Ch. 535, *Subpoena* .

[d] Service

The party noticing the deposition must effectuate service of the deposition subpoena on the nonparty deponent in advance of the deposition within a time sufficient to provide the deponent with a reasonable opportunity to locate and produce any designated business records, documents, and tangible things as described in *Code Civ. Proc. §§ 2020.410-2020.440* [*Code Civ. Proc. § 2020.220(a)*].

Any person may serve the subpoena by personal delivery of a copy of it to the deponent if the deponent is a natural person. If the deponent is an organization, service may be by personal delivery of a copy of the subpoena to any officer, director, or custodian of records or to any agent or employee authorized by the organization to accept service of a subpoena [*Code Civ. Proc. § 2020.220(b)*]. Service may be accompanied by payment of witness fees [*see Code Civ. Proc. § 2020.230*], as discussed in [e], *below*.

Personal service of any deposition subpoena is effective to require the personal attendance and testimony of any

deponent who is a resident ofCalifornia at thetime of service or any production, inspection, testing, and sampling if the subpoena so specifies. Personal service is also effective to require that deponent's attendance at a court session to consider any issue arising out of the deponent's refusal to be sworn, to answer any questions, to produce specified items, or to permit inspection or photocopying, if the subpoena so specifies, or specified testing and sampling of the items produced [*Code Civ. Proc. § 2020.220(c)*].

If the party giving notice of the deposition fails to serve a required subpoena on a nonparty or non-party-affiliated deponent and, as a result, the deponent fails to appear for the deposition, any party who, in person or by attorney, attended the deposition at the specified time and place in the expectation that the deponent's testimony would be taken should seek the imposition of a monetary sanction under *Code Civ. Proc. § 2023.030(a)* against the noticing party [*Code Civ. Proc. § 2025.440(a)*; *see § 193.244*].

[e] Witness Fees

If a deposition subpoena requires the personal attendance of the deponent, pursuant to *Code Civ. Proc. § 2020.310 et seq.* or *2020.510 et seq.*, the party noticing the deposition is required to pay to the deponent in cash or by check the same witness fee and mileage required by *Gov. Code § 68070 et seq.*, for attendance and testimony before the court in which the action is pending. This payment, whether or not demanded by the deponent, must be made, at the option of the party noticing the deposition, either at the time of service of the deposition subpoena or at the time the deponent attends for the taking of testimony [*Code Civ. Proc. § 2020.230(a)*].

[f] Location of Deposition

Unless the court orders otherwise [*see Code Civ. Proc. § 2025.260*] or the witness otherwise agrees, the deposition of a witness being deposed as an individual (whether or not a party to the action) must take place within 75 miles of the deponent's residence, or within 150 miles of the deponent's residence, if the deposition is taken within the county of the court in which the action is pending [*Code Civ. Proc. § 2025.250(a)*; *see Code Civ. Proc. § 2025.250(b)-(d)* (deposition of organization)].

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16-193 California Forms of Pleading and Practice--Annotated § 193.228

§ 193.228 Deposition Subpoena for Production of Business Records [Code Civ. Proc. §§ 2020.410-2020.440]--Cal. Judicial Council Form SUBP-010]

[1] FORM Deposition Subpoena for Production of Business Records [Code Civ. Proc. §§ 2020.410-2020.440]--Cal. Judicial Council Form SUBP-010]

Click here to view image.

[2] Use of Form

The deposition subpoena set out in [1], *above*, is reproduction of Cal. Judicial Council Form SUBP-010, adopted by the Judicial Council for mandatory use [*see* Cal. Rules of Ct., Appendix, Div. A]. This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

The form is for use in requiring a nonparty witness to produce business records designated in the subpoena for the purpose of copying or, alternatively, to provide the copies [*see Code Civ. Proc. §§ 2020.010-2020.030, 2020.410-2020.440, 2020.510, 2025.280(b)*; *Evid. Code § 1560 et seq.*; *see also* discussion in *§ 193.32*]. If the witness is a party, service of the deposition notice alone is sufficient to require attendance, testimony, and the production of specified records [*Code Civ. Proc. § 2025.280(a)*].

For deposition subpoena forms for use in requiring personal attendance and testimony only, or requiring personal attendance as well as the production of documents or other things, see *respectively §§ 193.226* and *193.227*.

[3] Deposition Subpoena for Copying Business Records

[a] Contents

A deposition subpoena that commands only the production of business records for copying is directed to the custodian

of those records or another person qualified to certify the records [*Code Civ. Proc. § 2020.410(c)*].

The subpoena is required to designate the business records to be produced either by specifically describing each individual item or by reasonably particularizing each category of item. However, specific information identifiable only to the deponent's record system, such as a policy number or the date the consumer interacted with the witness, is not required [*Code Civ. Proc. § 2020.410(a), (b)*]. The subpoena is also required to command compliance in accordance with *Code Civ. Proc. § 2020.430* within 20 days of issuance, or within 15 days after service, of the deposition subpoena, whichever date is later [*Code Civ. Proc. § 2020.410(c)*]. As required by *Code Civ. Proc. § 2020.430(d)*, the form includes a warning that the custodian must not deliver records before date and time specified.

For further discussion of requirements for producing and copying records in compliance with a deposition subpoena under *Code Civ. Proc. §§ 2020.410-2020.440*, see *§ 193.32*.

[b] Accompanying Papers

A deposition subpoena that commands only the production of business records for copying need not be accompanied by an affidavit or declaration showing good cause for the production of the designated business records [*Code Civ. Proc. § 2020.410(c)*].

If the deposition subpoena commands the production of personal records of a consumer or an employee, the service of the deposition subpoena must be accompanied by either a copy of the proof of service of the notice required by *Code Civ. Proc. § 1985.3(e)*, or *Code Civ. Proc. § 1985.6(b)*, as applicable, or the consumer's written authorization for release [*Code Civ. Proc. § 2020.410(d)*; *see § 193.31[3]* and *§ 193.227[3][c]*; *see also Code Civ. Proc. §§ 1985.3(l), 1985.6(k)* (when notice to consumer or employee and delivery of documents specified in *Code Civ. Proc. § 1985.3(b)* or *1985.6(b)* is not required); Ch. 535, *Subpoena*].

[c] Service

A deposition subpoena that commands only the production of business records for copying is directed to the custodian of those records or another person qualified to certify the records [*Code Civ. Proc. § 2020.410(c)*]. Because a copy of a deposition subpoena under *Code Civ. Proc. §§ 2020.410-2020.440* serves as the notice of deposition, copies must be served on every other party who has appeared in the action [*Code Civ. Proc. §§ 2025.220(b), 2025.240(a)*].

The "deposition hold" specified in *Code Civ. Proc. § 2025.210(b)* applies to deposition subpoenas issued under *Code Civ. Proc. §§ 2020.410-2020.440*. Thus, a plaintiff may not serve a nonparty witness with a deposition subpoena seeking discovery of business records before serving the summons and complaint on the only named defendant, and without notice of the deposition to any defendant [*California Shellfish, Inc. v. United Shellfish Co. (1997) 56 Cal. App. 4th 16, 25, 64 Cal. Rptr. 2d 797* ; *see § 193.20[1]*].

For further discussion of service of a deposition subpoena, see *§§ 193.226[3][c]* and *193.227[3][d]*.

[d] Fees

A deposition subpoena that commands only the production of business records for copying must be accompanied, whether or not demanded by the deponent, by a payment by cash or by check of the witness fee required by *Evid. Code § 1563(b)(6)* [*Code Civ. Proc. § 2020.230(b)*].

If the custodian prepares a copy of the records, he or she will be entitled to receive payment in cash or by check for the reasonable costs of preparing that copy, as determined by *Evid. Code § 1563*, in addition to the witness fee [*see Evid. Code § 1563(b)*]. For further discussion of payment for reasonable costs, see the procedural checklist in *§ 193.180[4]*.

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16-193 California Forms of Pleading and Practice--Annotated § 193.229

§ 193.229 Written Objection to Errors and Irregularities in Deposition Notice [Code Civ. Proc. § 2025.410]

[1] FORM Written Objection to Errors and Irregularities in Deposition Notice [Code Civ. Proc. § 2025.410]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	OBJECTION TO NOTICE OF TAKING DEPOS-
_____ [*name*],	)	ITION OF
Defendant.	)	_____ [*name*]
	)	[*Code Civ. Proc. § 2025.410*]
	)	

To _____ [*identify party who served deposition notice and any other party or his/her attorney on whom deposition notice was served, e.g.,* plaintiff and to his/her attorney of record]:

NOTICE IS HEREBY GIVEN that _____ [*identify objecting party, e.g.,* defendant] _____ [*name*] objects to the purported notice of the taking of the deposition of _____ [*name*], which served on _____ [him/her *or* his/her attorney] on _____, [*date*], by _____ [*identify party who gave notice of deposition, e.g.,* plaintiff] _____ [*name*], on the following grounds:

_____ [*State error or irregularity of deposition notice not complying with requirements of Code Civ. Proc. § 2025.210-(f), e.g.,* The prospective deponent is not sufficiently named or described to enable _____ (*identify objecting party, e.g.,* defendant) _____ (*name*) to identify him/her or the particular class or group to which he/she belongs, depriving _____ (*identify objecting party, e.g.,*

defendant) _____ (*name*) of the opportunity to prepare adequately to participate in his/her examination].

_____ [*Continue further errors or irregularities of deposition notice under Code Civ. Proc. §§ 2025.210-2025.270, e.g.,* The notice was not served sufficiently in advance of the date noticed for the taking of the deposition as required by law].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*objecting party's status and name*]

[2] Use of Form

The form of objection set out in [1], *above*, is for use by a party to serve a specific written objection to any error or irregularity in deposition notice that does not comply with the requirements of *Code Civ. Proc. §§ 2025.210-2025.270*. This type of objection is waived absent timely service [*Code Civ. Proc. § 2025.410*; *see* discussion in [3], *below*]. For discussion of the deposition notice requirements of *Code Civ. Proc. §§ 2025.210-2025.270*, see *§ 193.20 et seq. and § 193.225[2] -[5]*. For further discussion of a written objection under *Code Civ. Proc. § 2025.410*, including its effect on subsequent use of the deposition, see *§ 193.23*.

This form may served in conjunction with a motion for an order staying the taking of the deposition and quashing the deposition notice [*see Code Civ. Proc. § 2025.410* and the form of motion *set out in § 193.230*].

Objections to matters that technically comply with *Code Civ. Proc. § 2025.210-2025.270*, such as, for example, a request that the deposition be taken at a different time or place that is otherwise permissible, should be made by way of a motion for a protective order under *Code Civ. Proc. § 2025.420* [*see § 193.232* et seq.].

[3] Service of Objection

The objection must be served promptly, and in no event less than three calendar days before the date for which the deposition is scheduled, or it is waived. If the objection is made three calendar days before the deposition date, the objecting party must make personal service of that objection, pursuant to *Code Civ. Proc. § 1011*, on the party who gave notice of the deposition [*Code Civ. Proc. § 2025.410(a), (b)*].

A response to a deposition notice may not be filed with the court, unless offered as relevant to a law and motion proceeding or other hearing or ordered filed for good cause. Instead, the responding party retains the original and the original proof of service until six months after final disposition of the cause, unless otherwise ordered by the court for cause [*Cal. Rules of Ct., Rule 3.250(a)(3), (b)*].

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Chapter 193 DISCOVERY: DEPOSITIONS
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A. Oral Depositions

16-193 California Forms of Pleading and Practice--Annotated § 193.230

§ 193.230 Proceedings to Stay Deposition and Quash Deposition Notice [Code Civ. Proc. § 2025.410]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Stay Deposition and Quash Deposition Notice [Code Civ. Proc. § 2025.410]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER STAYING DEPOSITION OF _____ [*name*] AND QUASHING NOTICE OF THAT DEPOSITION, AND FOR ORDER IMPOSING A MONETARY SANCTION AGAINST _____ [*identify opposing party and/or his/her attorney, e.g.,* DEFENDANT _____ (*name*) AND HIS/HER ATTORNEY _____ (*name*)], SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	
	)	
	)	
	)	
	)	
	)	
	)	

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____, [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* plaintiff] will, and hereby does, move for an order that the deposition of _____ [*name*] be stayed and that the notice of the taking of that deposition be quashed, and will further move for the imposition of a monetary sanction against _____ [*identify opposing party and/or his/her attorney, e.g,* defendant _____ (*name*) and his/her attorney _____ (*name*)] in the amount of $_____. The motion for stay and to quash will be made on the ground that _____ [*specify, e.g.,* the deposition notice, attached hereto as Exhibit A, contains errors and irregularities (, as described in the written objection that was timely served on the parties and is attached hereto as Exhibit B,) which warrant the quashing of the notice and which the _____ (*identify party noticing deposition, e.g.,* defendant), who noticed the deposition, has failed to correct].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name*(*s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*specify party, e.g.,* plaintiff) in the above-described action].

2. _____ [*Identify moving party, e.g.,* Plaintiff] _____ [*name*] is seeking an order of this court that the taking of the deposition of _____ [*name*] be stayed and that the notice of the taking of the deposition of _____ [*name*] be quashed.

3. On _____, [*date*], _____ [*identify party noticing deposition, e.g.,* defendant] served a notice to take the deposition of _____ [*name*] on _____, [*date*], at _____ [*place*]. A true and correct copy of this notice is attached as Exhibit _____ to the motion of _____ [*identify moving party, e.g.,* plaintiff] for an order staying the taking of the deposition and quashing the deposition notice and made a part hereof.

[4. On _____, [*date*], _____ (*identify moving party, e.g.*, plaintiff) timely served a written objection to the deposition notice on _____ (*identify party noticing deposition, e.g.*, defendant) (and on all other parties or their attorneys on whom the deposition notice was served). A true and correct copy of this objection is attached as Exhibit _____ to the motion of _____ (*identify moving party, e.g.*, plaintiff) for an order staying the taking of the deposition and quashing the deposition notice and made a part hereof.]

5. The motion of _____ [*identify moving party, e.g.*, plaintiff] for an order staying the taking of the deposition and quashing the deposition notice should be granted for the following reasons: _____ [*set forth specific facts personally known to declarant showing that errors or irregularities objected to have not been corrected*].

6. _____ [*Provide statement of facts showing reasonable and good faith attempt to resolve informally issues presented by motion, including description of conferring or attempting to confer with other parties in person, by telephone, or by letter*].

7. _____ [*Identify moving party, e.g.*, Plaintiff] has incurred expenses as follows in making this motion: _____ [*itemize reasonable expenses incurred, including attorney's fees, and explain basis of computing each expense*], for a total of $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's party's status and name*]

[2] Use of Form

The form of notice of motion and motion set out in [1], *above*, is for use by a party to move for an order staying the taking of a deposition and quashing the deposition notice, and for imposition of a monetary sanction [*see Code Civ. Proc. § 2025.410*; see *§ 193.23* and *§ 193.229[2],[3]*]. The motion is made before the court in which the action is pending [*Code Civ. Proc. § 2016.020(b)*].

The supporting declaration must include facts showing that the moving party unsuccessfully attempted, reasonably and in good faith, to resolve informally any issue presented by the motion (Paragraph 6 of Supporting Declaration) [*see Code Civ. Proc. § 2025.410(c)*]. The declaration must also set forth facts supporting the amount of any monetary sanction sought (Paragraph 7 of Supporting Declaration) [*Code Civ. Proc. § 2023.040*].

A supporting memorandum is required to be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; *see also* discussion and forms in Ch. 417, *Points and Authorities*]. For memoranda relating to a motion under *Code Civ. Proc. § 2025.410, see* California Points and Authorities, Ch. 83, *Discovery: Depositions* (Matthew Bender). For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 193.220[4]*.

[3] Notice

Although *Code Civ. Proc. § 2025.410* does not specifically require that the foregoing motion be noticed, the imposition of a monetary sanction requires notice and an opportunity for hearing [*see Code Civ. Proc. § 2023.030*; *see* discussion in [4], *below*].

[4] Monetary Sanctions

Under *Code Civ. Proc. § 2025.410*, the court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes a motion to quash a deposition notice, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust [*Code Civ. Proc. § 2025.410(d)*; *see Code Civ. Proc. § 2023.030(a)* (monetary sanction)].

Under *Code Civ. Proc. §§ 2023.010(i), 2023.020*, the court is required to impose a monetary sanction against any party or attorney who fails to confer in an at tempt to resolve informally any dispute concerning discovery, in favor of anyone who incurs expenses, including attorney's fees, as a result of that conduct, when the section of the Civil Discovery Act governing a particular discovery motion requires a declaration showing that an attempt has been made. This sanction is to be imposed regardless of the outcome of the particular discovery motion [*Code Civ. Proc. §§ 2023.010(i), 2023.020*].

A monetary sanction under *Code Civ. Proc. § 2023.030* is an order that one who engaged in a misuse of the discovery process or any attorney advising that conduct, or both, pay the reasonable expenses, including attorney fees, incurred by anyone as a result of that conduct [*Code Civ. Proc. § 2023.030(a)*].

A monetary sanction may only be imposed after notice to any affected party, person, or attorney, and after opportunity for hearing [*Code Civ. Proc. § 2023.030*].

A request for a sanction must, in the notice of motion, identify every party, person, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion must be supported by a memorandum, and accompanied by adeclaration setting forth facts supporting the amount of any monetary sanction sought [*Code Civ. Proc. § 2023.040*].

For further discussion of monetary sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

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16-193 California Forms of Pleading and Practice--Annotated § 193.231

§ 193.231 Proceedings to Stay Deposition and Quash Deposition Notice [Code Civ. Proc. § 2025.410]--Order

[1] FORM Proceedings to Stay Deposition and Quash Deposition Notice [Code Civ. Proc. § 2025.410]--Order
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.*, plaintiff] for an order that the taking of the deposition of _____ [*name*] be stayed, that the notice of the taking of the deposition of _____ [*name*] be quashed, and an order imposing a monetary sanction against _____ [*identify opposing party and/or his/her attorney, e.g.*, defendant _____ (*name*) and his/her counsel _____ (*name*)], came on regularly for hearing by the court on _____, [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be _____ [denied *or* granted],

IT IS ORDERED that the motion be, and hereby is, _____ [denied *or* granted and that the taking of

the deposition of _____ (*name*) is hereby stayed and the notice of the taking of the deposition of _____ (*name*) is hereby quashed].

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*identify unsuccessful party, person, or attorney, e.g.*, defendant _____ (*name*) and his/her attorney _____ (*name*)] pay forthwith to _____ [*identify successful party, e.g.*, plaintiff] _____ [*name*] the sum of $_____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____ [*identify unsuccessful party, person, or attorney, e.g.*, defendant _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*identify unsuccessful party, person, or attorney, e.g.*, defendant _____ (*name*) and his/her attorney _____ (*name*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use when the court has granted or denied a motion under *Code Civ. Proc. § 2025.410* for an order that a deposition be stayed, that the deposition notice quashed, and that a monetary sanction be, or not be, imposed on the losing party [*see § 193.230*].

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16-193 California Forms of Pleading and Practice--Annotated § 193.232

§ 193.232 Proceedings to Obtain Protective Order [Code Civ. Proc. § 2025.420]--Application for Ex Parte Order and Order Staying Deposition Until Determination of Motion [Code Civ. Proc. § 2025.270]

[1] FORM Proceedings to Obtain Protective Order [Code Civ. Proc. § 2025.420]--Application for Ex Parte Order and Order Staying Deposition Until Determination of Motion [Code Civ. Proc. § 2025.270]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	NO. _____
Plaintiff,	APPLICATION FOR EX PARTE ORDER AND ORDER STAYING DEPOSITION PENDING HEARING ON MOTION FOR PROTECTIVE ORDER, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
vs.	
_____ [*name*],	
Defendant.	Date: _____
	Time: _____
	Location: _____
	Judge: _____
	Date Action Filed: _____
	Trial Date: _____

_____

APPLICATION

I _____ [*name of attorney*], hereby apply on behalf of _____ [*identify party or prospective deponent, e.g.,* defendant] _____ [*name*] for an order staying the deposition of _____ [*name*], which has been noticed to be taken by _____ [*identify party noticing deposition, e.g.,* plaintiff] on _____, [*date*], at _____ [*time*], until the determination of the motion by _____ [*identify party or prospective deponent, e.g.,* defendant] _____ [*name*] for a protective order.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name or moving nonparty's name*]

DECLARATION

I _____ [*name of attorney*], declare:

I am an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ [*identify moving party or person, e.g.,* defendant] _____ [*name*].

The deposition of _____ [*name*] has been noticed for taking by _____ [*identify party, e.g.,* plaintiff] _____ [*name*] on _____, [*date*], at _____ [*time*] A copy of this notice is attached hereto as Exhibit _____ and made a part hereof.

A motion by _____ [*identify party or person seeking protective order, e.g.,* defendant] _____ [*name*] for a protective order _____ [*specify nature of order sought, e.g.,* limiting the scope of the examination of _____ (*name of deponent*)] has been set for hearing by this court on _____, [*date*].

_____ [*Specify facts showing that moving party or person informed opposing party of intent to apply for order, attempt to so inform opposing party, or reasons why moving party or person should be excused from such attempt, e.g.* On _____, [*date*], I requested that _____ (*name*), counsel for _____ (*identify party noticing deposition, e.g.,* plaintiff) _____ (*name*), stipulate that the above-described deposition be stayed pending the hearing and determination of the above-described motion for a protective order, but he/she refused to enter into that stipulation. I then informed him/her that I would apply for an ex parte order staying the deposition until the hearing and determination of the motion for a protective order].

There is good cause for granting this application in that _____ [*specify facts showing good cause*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

DECLARATION RE NOTICE

[*Add declaration concerning notice given to other parties or why notice should not be required. If notice was provided later than 10:00 a.m. the court day before the ex parte appearance, explain exceptional circumstances that justify shorter notice. See discussion in Ch. 193, Discovery: Depositions, § 193.221[3][b].*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

ORDER STAYING DEPOSITION
[*Code Civ. Proc. § 2025.270*]

Proof having been made to the satisfaction of the court, and good cause appearing therefor,

IT IS HEREBY ORDERED that the deposition of _____ [*name*] set on notice to be taken on _____, [*date*], be and hereby is stayed and may not be taken, if at all, until after the determination of _____ [*identify moving party or person, e.g.,* defendant] _____'s [*name*] motion for a protective order which is set for hearing on _____, [*date*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of application for ex parte order set out in [1], *above*, includes a supporting declaration and a place for inserting the supporting memorandum. It also includes a proposed order granting the application. It is for use by a party or a deponent who has filed or is concurrently filing a motion for a protective order under *Code Civ. Proc. § 2025.420* prior to the taking of the deposition [*Code Civ. Proc. § 2025.270*; see *§ 193.233*]. The form should be presented to the judge of the court in which the action is pending [*see Code Civ. Proc. § 2016.020(b)*] for his or her signature on the portion of the form which constitutes the order staying the deposition.

The declaration regarding the notice must state, as applicable [*Cal. Rules of Ct., Rule 3.1204(b)*]:

- The notice given, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected and that, within the applicable time under *Cal. Rules of Ct., Rule 3.1203*, the applicant informed the opposing party where and when the application would be made;

- That the applicant in good faith attempted to inform the opposing party but was unable to do so, specifying the efforts made to inform the opposing party; or

- That, for reasons specified, the applicant should not be required to inform the opposing party.

A party seeking an ex parte order must notify all parties [*Cal. Rules of Ct., Rule 3.1203(a)*]. Notice must be given no later than 10:00 a.m. the court day before the ex parte appearance, absent a showing of exceptional circumstances that justify a shorter time for notice [*Cal. Rules of Ct., Rule 3.1203(a)*; *see Cal. Rules of Ct., Rule 3.1203(b)* (time of notice in unlawful detainer proceedings)]. However, if the applicant fails to comply with the requirements of *Cal. Rules of Ct., Rule 3.1203*, the clerk must not reject an ex parte application for filing and must promptly present the application to the appropriate judicial officer for consideration [*Cal. Rules of Ct., Rule 3.1205*].

For more detailed discussion of the requirements applicable to ex parte applications under *Cal. Rules of Ct., Rules 3.1200-3.1207*, including discussion of required contents of the application and supporting declarations, other accompanying, service, and appearance, see *§ 193.221[3]*.

Instead of applying for an ex parte order staying the deposition as provided for in this form, the party filing the notice of motion for protective order might also present the court with an ex parte application for an order shortening the time for the notice of the motion for a protective order to allow the court to hear the motion before the deposition. However, counsel should consult local court rules and procedures for requirements.

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16-193 California Forms of Pleading and Practice--Annotated § 193.233

§ 193.233 Proceedings to Obtain Protective Order [Code Civ. Proc. § 2025.420]--General Form of Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Obtain Protective Order [Code Civ. Proc. § 2025.420]--General Form of Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	NO. _____ NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER RESTRICTING DISCOVERY AND IMPOSING MONETARY SANCTION AGAINST _____ [*name of opposing party and/or his/her attorney, e.g.,* PLAINTIFF _____ (*name*) AND HIS/HER ATTORNEY _____ (*name*)], SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM (Deposition) Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____, [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify moving party or deponent or affected natural person or organization, e.g.,* defendant] will, and hereby does, move for a protective order that the deposition of _____ [*name*], which _____ [was to be taken *or* commenced *or* was taken] on _____, [*date*], at _____ [*time*], at _____ [*place*], pursuant to notice served on _____, [*date*], _____ [*specify order requested, e.g.,* not betaken at all *or* specify other protective order sought; see additional clauses *set out in § 193.234[1]*]. _____ [*Identify moving party or deponent or affected natural person or organization, e.g.,* defendant] will also move for the imposition of a monetary sanction against _____ [*identify opposing party and/or his/her attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)]. The motion for protective order will be made on the ground that good cause exists for this order in that _____ [*specify facts, e.g.,* (*identify party, e.g.,* plaintiff) noticed the deposition less than 30 days before trial without a court order and the taking of this deposition will prevent the action from proceeing to trial as scheduled], and that justice requires this order to protect _____ [*identify party, deponent, or natural person or organization, e.g.,* defendant] from _____ [unwarranted annoyance, embarrrassment, or oppression *and/or* undue burden and expense].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name* (*s*)] and the memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name, or moving nonparty's name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*identify party, e.g.,* defendant) in the above-described action].

2. _____ [*Identify moving party, deponent, affected natural person, or affected organization, e.g.,* Defendant] _____ [*name*] is seeking a protective order from this court concerning the deposition of _____[*name of deponent*], notice of which was served on _____, [*date*]. A true and correct copy of the deposition notice is _____ [attached hereto as Exhibit A and made a part hereof *or*

attached as Exhibit A to _____ (*identify moving party, deponent, person, or organization, e.g.,* defendant) _____'s (*name*) Ex Parte Application for Order and Order Staying Deposition Pending Hearing on Motion for Protective Order filed concurrently with this motion for a protective order and made a part hereof].

3. Good cause exists for the order sought by _____ [*identify moving party, deponent, person, or organization, e.g.,* defendant] in that_____ [*set forth facts showing good cause for particular order sought, e.g., facts showing that deposition was noticed to be taken less than 30 days before trial without prior court order, party seeking to take deposition was not diligent, and permitting deposition would prevent case from going to trial on date set*].

4. _____ [*Provide statement of facts showing reasonable and good faith attempt to resolve informally issues presented by motion, including description of conferring or attempting to confer with other parties in person, by telephone, or by letter*].

5. _____ [*Identify moving party, e.g.,* Plaintiff] has incurred expenses as follows in making this motion: _____ [*itemize reasonable expenses incurred, including attorney's fees, and explain basis of computing each expense*], for a total of $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM

[*Add memorandum supporting motion.*]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name, or moving nonparty's name*]

[2] Use of Form

The form of notice of motion and motion set out in [1], *above*, is for use by any party, deponent, or other affected natural person or organization, to obtain a protective order before, during, or after a deposition, and to impose a monetary sanction against any party, person, or attorney opposing the motion. The motion must be brought "promptly" [*Code Civ. Proc. § 2025.420*]. For a form of ex parte application to stay the taking of a deposition pending determination of a motion for a protective order, see *§ 193.232*. If the deposition is already in progress, a party or deponent may either bring a motion for a protective order under *Code Civ. Proc. § 2025.470* [§ 193.236], or may combine that motion with this form, to seek a protective order under both *Code Civ. Proc. §§ 2025.420* and2025.470. The motion is made before the court in which the action is pending [*see Code Civ. Proc. § 2016.020(b)*].

Requests for the specific protective orders authorized under *Code Civ. Proc. § 2025.420* are *set out in § 193.234*, and

may be inserted in line eight of the first paragraph of the notice of motion in this form, in accordance with the instruction to specify the order being sought [*see also § 193.265* (forms of clauses for use when protective order is sought in context of deposition on written questions)].

The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion (Paragraph 4 of Supporting Declaration) [*Code Civ. Proc. § 2025.420*]. It must also be accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought (Paragraph 5 of Supporting Declaration) [*Code Civ. Proc. § 2023.040*].

A supporting memorandum is required to be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; *see also* discussion and forms in Ch. 417, *Points and Authorities*]. For memoranda relating to protective orders, *see* California Points and Authorities, Ch. 83, *Discovery: Depositions* (Matthew Bender).

For further discussion of protective orders, see *§ 193.50* et seq. For a procedural checklist to be used when seeking a protective order, see *§ 193.182*. For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 193.220[4]*.

[3] Notice

Although *Code Civ. Proc. § 2025.420* does not specifically require notice to be given of the foregoing motion, notice of a motion for the imposition of a monetary sanction pursuant to *Code Civ. Proc. § 2023.030(a)* and opportunity for hearing must be given to any affected party, person, or attorney [*see Code Civ. Proc. § 2023.030*; *see also* discussion in [4], *below*].

[4] Monetary Sanctions

The court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes the motion, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust [*Code Civ. Proc. § 2025.420(d)*]. For further discussion of monetary sanctions, see *§ 193.230[4]* [*see also Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*].

[5] Court's Discretion to Order That Which Justice Requires

On a showing of good cause, the court may make any order that justice requires to protect any party, deponent, or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense. If the court denies the motion in whole or in part, it may nevertheless order that the deponent provide or permit the discovery against which protection was sought on those terms and conditions that are just [*Code Civ. Proc. § 2025.420*]. For further discussion see *§ 193.50* et seq. For clauses illustrating the types of orders that may be granted, see *§ 193.234[1]*.

For discussion and forms relating to procedure for obtaining or restricting discovery of defendant's financial condition for purposes of claim for punitive damages, see *Ch. 177, Damages, § 177.40* et seq. [*see also Ch. 191, Discovery: Privileges and Other Discovery Limitations, § 191.129*].

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16-193 California Forms of Pleading and Practice--Annotated § 193.234

§ 193.234 Proceedings to Obtain Protective Order [Code Civ. Proc. § 2025.420]--Clauses to Be Used in Notice of Motion

[1] FORM Proceedings to Obtain Protective Order [Code Civ. Proc. § 2025.420]--Clauses to Be Used in Notice of Motion

[*Insert any of the following, in accordance with instruction to specify order requested, in line 8 of 1st paragraph of Notice of Motion in § 193.233[1], after the words:* pursuant to notice served
on _____, [*date*]

[*EITHER*]

not be taken at all.

[*and/or*]

be taken, if at all, at _____ [*state place or date and time or all three, which differ from the one(s) set out in the notice of deposition*] rather than at the _____ [place *or* time *or* place and time] set forth in the notice of deposition.

[*AND/OR, if deposition is of treating or consulting physician or*
other expert witness, and any party intends to record
deposition using video technology and reserve right to use video recording at trial pursuant to
Code Civ. Proc. § 2025.620(d)]

be postponed until _____, [*date*], when _____ [*specify moving party, e.g.,* defendant] will have had an adequate opportunity to prepare, by discovery, deposition of the deponent, or other means, for cross-examination.

[*and/or*]

be taken only on the following terms and conditions: _____ [*specify*].

[*and/or*]

be taken by written questions, instead of oral examination.

[*and/or*]

not be taken but instead that the method of discovery be interrogatories to a party.

[*and/or*]

not be recorded _____ [*specify, e.g.,* by means of video technology], as is specified in the deposition notice, but instead be recorded as follows: _____ [*specify, e.g.,* by means of audio technology].

[*and/or*]

be limited by prohibiting the following matters from being inquired into: _____ [*specify*].

[*and/or*]

be limited by narrowing the scope of the examination to the following matters: _____ [*specify*].

[*and/or*]

be limited by prohibiting the following _____ [writings *and/or* tangible things] designated in the deposition notice from being produced, inspected, or copied: _____ [*specify*].

[*and/or*]

be limited by excluding the following persons, who are not parties to the action or their officers or counsel, from attending the deposition: _____ [*identify*].

[*and/or*]

be limited by prohibiting any information concerning _____ [*specify trade secret or other confidential research, development, or commercial information*] from being disclosed [, or if disclosed, by allowing disclosure only to the following person(s) in the following way: _____ (*specify*)].

[*and/or*]

be allowed to proceed only if the parties simultaneously file the following documents enclosed in sealed envelopes, to be opened as directed by the court: _____ [*specify documents*].

[*and/or*]

be sealed and thereafter opened only on order of the court.

[2] Use of Form

The clauses set out in [1], *above*, are adapted from the list of protective orders expressly enumerated in *Code Civ. Proc. § 2025.420*, and are intended to be inserted, when appropriate, in the first paragraph of the notice of motion for a protective order *set out in § 193.233[1]*, in accordance with the instruction in that form to specify the order requested. Note that a protective order is not limited to those expressly enumerated [*see Code Civ. Proc. § 2025.420*]. For further discussion of the orders enumerated in *Code Civ. Proc. § 2025.420*, see *§ 193.52*. With regard to protective orders relating to trade secret disclosures, see also discussion Ch. 191, *Discovery: Privileges and Other Discovery Limitations*, § 191.82.

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16-193 California Forms of Pleading and Practice--Annotated § 193.235

§ 193.235 Proceedings to Obtain Protective Order [Code Civ. Proc. § 2025.420]--Order

[1] FORM Proceedings to Obtain Protective Order [Code Civ. Proc. § 2025.420]--Order
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify moving party, deponent, affected natural person, or affected organization, e.g.,* defendant] for a protective order directing that the deposition of _____ [*name*], _____ [taken *or* commenced *or* set to be taken] on _____, [*date*], _____ [*specify relief sought, e.g.,* not be taken], and for an order imposing a monetary sanction against _____ [*identify opposing party and/or his/her attorney, e.g.,* plaintiff _____ (*name*) and his/her counsel _____ (*name*)], came on regularly for hearing by the court on _____, [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

[*EITHER*]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[*OR*]

On proof made to the satisfaction of the court, and good cause appearing therefor, that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted and that the deposition of _____ [*name*], _____ [taken *or* commenced *or* set to be taken] on _____, [*date*], is hereby directed _____ [*specify order, e.g.,* not be taken].

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney_____ (*name*)] pay forthwith to _____ [*identify successful party, e.g.,* defendant] _____ [*name*] the sum of $ _____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use when the court has granted or denied a motion by a party or other person for a protective order before, during, or after a deposition under *Code Civ. Proc. § 2025.420* [*see §§ 193.233, 193.234*].

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16-193 California Forms of Pleading and Practice--Annotated § 193.236

§ 193.236 Proceedings to Obtain Protective Order Terminating or Limiting Deposition in Progress [Code Civ. Proc. § 2025.470]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Obtain Protective Order Terminating or Limiting Deposition in Progress [Code Civ. Proc. § 2025.470]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER _____ [TERMINATING *or* LIMITING SCOPE AND MANNER OF] DEPOSITION OF _____ [*name*] AND FOR ORDER IMPOSING MONETARY SANCTION AGAINST _____ [*name of opposing party and/or his/her attorney, e.g.,* PLAINTIFF _____ (*name*) AND HIS/HER ATTORNEY _____ (*name*)], SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	
	)	
	)	
	)	

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____, [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify moving party or deponent, e.g.,* defendant] will, and hereby does, move for a protective order that the deposition of _____ [*name*], which commenced on _____, [*date*], at _____ _____. M., at _____ [*place*], pursuant to notice served on _____, [*date*], be _____ [terminated *or* limited in scope and the manner of its taking (by _____ (specify method provided in *Code Civ. Proc. § 2025.420*; see clauses provided in § 193.234[1])). _____ [*Identify moving party or deponent, e.g.,* Defendant] will also move for the imposition of a monetary sanction against _____ [*identify opposing party and/or his/her attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)]. The motion for protective order will be made on the ground that the examination is being conducted in _____ [bad faith *and/or* a manner that is unreasonably _____ (annoying *and/or* embarrrassing *and/or* oppressive) to _____ (*identify moving party or deponent, e.g.,* the defendant)], and that good cause exists for _____ [terminating *or* limiting] the taking of the deposition, in that _____ [*specify facts, e.g.,* _____ (*identify opposing party, e.g.,* plaintiff, through his/her attorney,) persists in asking the deponent, in an embarrrassing and threatening manner, to disclose obviously privileged information].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name* (*s*)] and the memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name, or moving nonparty's name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*identify party, e.g.,* defendant) in the above-described action].

2. _____ [*Identify moving party or deponent, e.g.,* Defendant] _____ [*name*] is seeking a protective order from this court concerning the deposition of _____ [*name of deponent*], which commenced on _____ [*date*], at _____ [*place*].

3. The above-described deposition is being conducted in _____ [bad faith *and/or* a manner that is

unreasonably _____ (annoying *and/or* embarrrassing *and/or* oppressing) to _____ (*identify moving party or deponent, e.g.,* the defendant)], in that _____ [*specify facts, e.g.,* plaintiff's attorney _____ (*name*) continuously argued with the deponent, did not allow him/her to finish his/her responses, and insulted the deponent by calling him/her _____ (*specify*).] This questioning appears on the following pages and lines of the transcript of deponent's testimony: _____ [*specify*]. Copies of the applicable pages are attached to this declaration as Exhibit A and made a part hereof, and the original transcript will be lodged with this court _____ [with the filing of this motion *or* prior to the hearing on this motion].

4. Good cause exists for the protective order _____ [terminating *or* limiting the scope and manner of] the deposition, sought by _____ [*identify moving party or deponent, e.g.,* defendant], in that _____ [*set forth facts showing good cause for particular order sought, e.g.,* plaintiff's attorney _____ (*name*) has been conducting the deposition in the manner described above, and has exhibited similar behavior during the depositions of _____ (*name*) and _____ (*name*), as evidenced by the protective orders issued by this court on _____ [*date*], and _____ [*date*], and it is apparent that this type of conduct will continue unless the deposition of _____ (*name*) is permitted to proceed only before a commissioner or judge of this court].

5. _____ [*Provide statement of facts showing reasonable and good faith attempt to resolve informally issues presented by motion, including description of conferring or attempting to confer with other parties in person, by telephone, or by letter*].

6. _____ [*Identify moving party, e.g.,* Defendant] has incurred expenses as follows in making this motion: _____ [*itemize reasonable expenses incurred, including attorney's fees, and explain basis of computing each expense*], for a total of $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form of notice of motion and motion set out in [1], *above*, is for use by a party or other deponent in obtaining an order limiting or terminating a deposition on oral examination that is currently in progress, on theground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrrasses, or oppresses the party or deponent, and an order imposing a monetary sanction against any party, person, or attorney opposing the motion. The deposition

officer must suspend the taking of testimony on stipulation of all parties present, or if any party attending the deposition, including the deponent, demands that the deposition officer suspend taking the testimony pending determination of the motion [*see Code Civ. Proc. § 2025.470*]. For further discussion, see *§ 193.45*. The motion is made before the court in which the action is pending [*Code Civ. Proc. § 2016.020(b)*].

The court may limit the scope and manner of the taking of the deposition as provided in *Code Civ. Proc. § 2025.420* [*see Code Civ. Proc. § 2025.470*]. If good cause also exists for a protective order under *Code Civ. Proc. § 2025.420*, counsel may combine this form with those *set out in §§ 193.233* and *193.234* to bring a motion under both *Code Civ. Proc. §§ 2025.420* and *2025.470*.

The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion (Paragraph 5 of Supporting Declaration) [*Code Civ. Proc. § 2025.470(a)*]. It must also be accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought (Paragraph 6 of Supporting Declaration) [*Code Civ. Proc. § 2023.040*].

A supporting memorandum is required to be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; *see also* discussion and forms in Ch. 417, *Points and Authorities*]. For memoranda in support of motions for orders limiting or terminating depositions which have begun, see California Points and Authorities , Ch. 83, *Discovery: Depositions* (Matthew Bender).

For further discussion of protective orders, see *§ 193.50* et seq. For a procedural checklist to be used when seeking a protective order under *Code Civ. Proc. § 2025.470*, see *§ 193.183*. For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 193.220[4]*.

[3] Notice

Although *Code Civ. Proc. § 2025.470* does not specifically require notice to be given of the foregoing motion, notice of a motion for the imposition of a monetary sanction pursuant to *Code Civ. Proc. § 2023.030(a)* and opportunity for hearing must be given to any affected party, person, or attorney [*see Code Civ. Proc. § 2023.030*; *see* discussion in [4], *below*].

[4] Monetary Sanctions

The court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes the motion, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust [*Code Civ. Proc. § 2025.420(d)*; for further discussion of these general provision, *see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[2]*].

For more detailed discussion of monetary sanctions, including requirements generally applicable in proceedings to impose such sanctions, see *§ 193.230[4]* and *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

[5] Transcript

The moving party should be sure that the original transcript of the deposition proceedings is filed with the court prior to the hearing of the motion.

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16-193 California Forms of Pleading and Practice--Annotated § 193.237

§ 193.237 Proceedings to Obtain Protective Order Terminating or Limiting Deposition in Progress [Code Civ. Proc. § 2025.470]--Order

[1] FORM Proceedings to Obtain Protective Order Terminating or Limiting Deposition in Progress [Code Civ. Proc. § 2025.470]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	[*Code Civ. Proc. §§ 2023.030(a), 2025.420, 2025.470*]
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Trial Date: _____]

_____

The motion of _____ [*identify moving party or deponent, e.g.,* defendant] for a protective order directing that the deposition of _____ [*name*], commenced on _____, [*date*], be _____ [terminated *or* limited in the scope and manner of its taking], and for an order imposing a monetary sanction against _____ [*identify opposing party and/or his/her attorney, e.g.,* plaintiff _____ (*name*) and his/her counsel _____ (*name*)], came on regularly for hearing by the court on _____, [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

[*EITHER*]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[*OR*]

On proof made to the satisfaction of the court, and good cause appearing therefor, that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that the deposition of _____ [*name*], commenced on _____, [*date*], is hereby directed to be terminated, and shall not be resumed except on order of this court.

[*OR*]

IT IS ORDERED that the motion be, and it hereby is, granted and that the deposition of _____ [*name*], commenced on _____, [*date*], is hereby directed to be limited in scope and manner as follows: _____ [*specify*].

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] pay forthwith to _____ [*identify successful party, e.g.,* defendant] _____ [*name*] the sum of $_____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)].
Dated: _____, [*date*].

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use when the court has granted or denied a motion under *Code Civ. Proc. § 2025.470* to terminate or limit a deposition which has already begun [*see § 193.236*].

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16-193 California Forms of Pleading and Practice--Annotated § 193.238

§ 193.238 Proceedings to Compel Party or Party-Affiliated Deponent to Attend and Testify at Deposition and to Produce Document or Thing [Code Civ. Proc. § 2025.450]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Compel Party or Party-Affiliated Deponent to Attend and Testify at Deposition and to Produce Document or Thing [Code Civ. Proc. § 2025.450]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	)))))))))))	NO. _____ NOTICE OF MOTION AND MOTION FOR ORDER TO COMPEL _____ [*identify party or party-affiliated deponent, e.g.,* DEFENDANT] TO _____ [ATTEND AND TESTIFY AT DEPOSITION *and/or* PRODUCE FOR INSPECTION _____ [DOCUMENTS *and/or* TANGIBLE THINGS] DESCRIBED IN DEPOSITION NOTICE] AND FOR ORDER IMPOSING MONETARY SANCTION AGAINST _____ [*identify party deponent or party with whom deponent is affiliated and/ or his/her attorney, e.g.,* DEFENDANT _____ (*name*) AND HIS/HER ATTORNEY _____ (*name*)], SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM

Date: _____
Time: _____

Location: _____
Judge: _____
Date Action Filed: _____
Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____, [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify moving party, e.g.,* plaintiff] will, and hereby does, move for an order to compel _____ [*name of party or party-affiliated deponent*] to _____ [attend and testify at a deposition *and/or* produce for inspection those _____ (documents *and/or* tangible things) described in the deposition notice served on _____, [*date*]],and will further move for an order imposing a monetary sanction against _____ [*identify party deponent or party with whom deponent is affiliated and/or his/her attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] and in favor of _____ [*identify moving party, e.g.,* plaintiff], in the amount of $_____. The motion to compel will be made on the ground that _____ [*name of party or party-affiliated deponent*] failed to _____ [attend and testify at the deposition as scheduled *and/or* produce for inspection those documents and tangible things described] in the deposition notice, which was served on _____ [*name of deponent or party with whom deponent is affiliated*] on _____, [*date*], a copy of which is attached hereto as Exhibit A. [he motion to compel production for inspection of those _____ (documents *and/or* tangible things) described in the deposition notice will be made on the further ground that good cause exists for compelling production.] The motion for imposition of a monetary sanction will be made on the ground that _____ [*identify moving party, e.g.,* plaintiff] incurred reasonable expenses in the amount specified above as a result of _____ [*name of deponent*]'s failure to comply with the deposition notice.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name* (*s*)], [on the separate statement served and filed herewith pursuant to *Cal. Rules of Ct., 3.1345*,] on the memorandum served and filed herewith, and on the records and file herein and such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*specify party, e.g.,* plaintiff) in the above-described action].

2. _____ [*Identify moving party, e.g.*, plaintiff] _____ [*name*] is seeking an order of this court to compel _____ [*name of party or party-affiliated deponent*] to _____ [attend and testify at a deposition *and/or* produce for inspection those documents and things described in the deposition notice served on _____ (*date*)], and an order imposing a monetary sanction against _____ [*name of party deponent or party with whom deponent is affiliated and/or his/her attorney, e.g.*, defendant _____ (*name*) and his/her attorney _____ (*name*)].

3. On _____ [*date*], _____ [*identify moving party, e.g.*, plaintiff] served the deponent, _____ [*name*], with a notice to take his/her/its deposition on _____ [*date*], at _____ [*place*]. A true and correct copy of this notice is attached as Exhibit A to the above-described motion.

[*EITHER*]

4. The deponent, _____ [*name*], is a party to and _____ [*identify party, e.g.*, the defendant] in this action.

[*OR*]

4. The deponent, _____ [*name*], is a(n) _____ [officer *or* director *or* managing agent *or* employee] of _____ [*name of party with whom deponent affiliated*], a party to and _____ [*identify party, e.g.*, defendant] in this action.

[*OR*]

4. On _____ [*date*], the deponent, _____ [*name of party organization served with deposition notice*], a party to and _____ [*identify party, e.g.*, defendant] in this action but not a natural person, designated _____ [*name*] to attend and testify at the deposition as scheduled in the deposition notice], as its _____ [officer *or* director *or* managing agent *or* employee *or* agent] most qualified to testify on its behalf as to the matters specified in the deposition notice.

[*CONTINUE*]

5. _____ [*Name of party deponent or party with whom deponent is affiliated*] did not timely serve a valid objection to the deposition notice pursuant to *Section 2025.410 of the Code of Civil Procedure.*

6. The _____ [deponent *or* designee of the deponent], _____ [*name*] failed to _____ [attend and testify at the deposition as scheduled *and/or* produce for inspection those documents and tangible things specified below and described] in the deposition notice.

[*ADD, if moving party seeking to compel production of document or tangible thing*]

7. Good cause exists for the production of the documents and tangible things specified in the deposition notice as

follows:

a. _____ [*Specify, in successively lettered or enumerated subparagraphs, the particular documents or tangible things specified in the deposition notice, and state specific facts showing good cause justifying production of each item*].

[*EITHER, if deponent appeared but did not proceed or procduce required documents*]

8. _____ [*Provide statement of facts showing reasonable and good faith attempt to resolve informally issues presented by motion, includingdescription of conferring or attempting to confer with other parties in person, by telephone, or by letter*].

[*OR, if deponent failed to appear*]

8. On or about _____ [*date*], _____ [*identify moving party, e.g.,* plaintiff], contacted the _____ [deponent *or* attorney for the deponent] to inquire about his/her nonappearance [but has received no response and _____ [*provide statement of facts showing reasonable and good faith attempt to resolve informally issues relating to deponent's nonappearance*]].

[*CONTINUE*]

9. As a result of this failure by _____ [*name of party or party-affiliated deponent*], _____ [*identify moving party, e.g.,* plaintiff] has incurred expenses as follows: _____ [*itemize reasonable expenses, including attorney's fees, incurred, with explanation of the basis for computation of each amount*], for a total of $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The notice of motion and motion set out in [1], *above*, is for use by a party noticing a deposition to compel the attendance and testimony of, and production of documents and tangible things by, a party deponent, a party-affiliated deponent, or a deponent designated by a party deponent organization under *Code Civ. Proc. § 2025.230*, who, in the absence of a valid objection to the deposition notice under *Code Civ. Proc. § 2025.410*, has failed to appear and proceed or produce as specified in the deposition notice. It is also for use to obtain an order, if the motion to compel is granted, imposing a monetary sanction against the party deponent or the party with whom the deponent is affiliated, against the attorney for either the party deponent or the party with whom the deponent is affiliated, if the attorney advised the conduct, or both [*Code Civ. Proc. §§ 2023.030(a)*, 2025.450]. With appropriate modifications, the form may also be used by a party other than the one who served notice of the deposition, to obtain an order imposing a monetary sanction only against the party deponent or the party with whom the deponent is affiliated, on the ground that the moving party incurred expenses in attending the deposition at which the deponent failed to attend or produce items [*Code Civ. Proc. § 2025.450*]. For further discussion, see [5], *below*, and § 193.60[1].

The motion is made before the court in which the action is pending [*see Code Civ. Proc. § 2016.020(b)*].

The motion must set forth specific facts showing good cause justifying the production for inspection of any document or tangible thing, if any, described in the deposition notice (Paragraph 7 of Supporting Declaration) [*Code Civ. Proc. § 2025.450(b)(1)*].

The motion also must be accompanied by a declaration showing that the moving party unsuccessfully attempted, reasonably and in good faith, to informally resolve each issue presented by the motion or, if the deponent failed to attend the deposition and produce the documents or things described in the deposition notice, showing that the petitioner has contacted the deponent to inquire about the nonappearance (Paragraph 8 of Supporting Declaration), as well as by a declaration setting forth facts supporting the amount of any monetary sanction sought (Paragraph 9 of Supporting Declaration) [*Code Civ. Proc. § 2025.450*]. If the deponent failed to appear but there were also efforts made to resolve the issues, then counsel may wish to include both the statement regarding nonappearance and a description of those efforts [*see Code Civ. Proc. § 2025.450(b)(2)*]. One court has held that implicit in the requirement of *Code Civ. Proc. § 2025.450(b)(2)* that counsel contact the deponent about a nonappearance is the requirement that counsel listen to the reasons offered and make a good faith attempt to resolve the issue. Accordingly, either declaration submitted with a motion to compel under former *Code Civ. Proc. § 2025(j)(3)(B)* (*now see Code Civ. Proc. § 2025.450(b)(2)*) must show a reasonable and good faith attempt to resolve each issue presented, including those relating to a nonappearance [*Blago Leko v. Cornerstone Home Inspection (2001) 86 Cal. App. 4th 1109, 1124, 103 Cal. Rptr. 2d 858* (attorney sanctioned under former *Code Civ. Proc. § 2023(a)(3)* (*now see Code Civ. Proc. §§ 2023.010(c), (i), 2023.020*) for improperly filing motion to compel attendance when attorney completely disregarded his obligation to attempt to informally resolve discovery issue)]. Thus, if the deponent fails to appear, it appears that the better, if not the required, practice is to make a good faith effort to resolve the issue, and to include a description of those efforts in the supporting declaration [*see Code Civ. Proc. § 2025.450(b)(2)*].

A supporting memorandum must be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; *see also* discussion and formsin Ch. 417, *Points and Authorities*]. For memoranda relating to a motion to compel under *Code Civ. Proc. § 2025.450*, see California Points and Authorities , Ch. 83, *Discovery: Depositions* . (Matthew Bender).

For further discussion of motions to compel, see *§ 193.60* et seq. For a procedural checklist to be used when seeking an order under *Code Civ. Proc. § 2025.450*, see *§ 193.172*. For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 193.220[4]*.

[3] Separate Statement

A motion to compel answers to questions propounded at a deposition or to compel the production of documents or tangible things at a deposition must be accompanied by a separate statement [*Cal. Rules of Ct., Rule 3.1345(a)(4), (5)*]. This is a separate document filed and served with the motion that sets out all the information necessary to understand all the questions and responses that are in issue [*see Cal. Rules of Ct., Rule 3.1345(c)*]. For a form for the separate statement, together with further discussion of its requirements, see *§ 193.239*. A separate statement is required expressly to support motions seeking *further* response to a discovery request, that is, when a response has been made but is deemed insufficient. It is not required when "no response has been provided to the request for discovery" [*see Cal. Rules of Ct., Rule 3.1345(b)*]. It appears, therefore, that no separate statement is required to accompany a motion to compel under *Code Civ. Proc. § 2025.450*, at least in those instances in which the deponent has made no response, through a complete failure to appear, proceed, or produce items. The notice of motion in [1], *above*, includes optional language indicating that a separate statement is among the papers on which the motion is to be based, for use when there has been some response, but the response is coupled with a categorical failure to respond, for example, when the deponent appeared, but failed to produce any documents or things, or refused to proceed. For a motion to compel a further response in relation to individual questions or items to be produced, pursuant to *Code Civ. Proc. § 2025.480*, see *§ 193.241*.

[4] Notice

Although *Code Civ. Proc. § 2025.450* does not specifically require that this motion be noticed, the imposition of a monetary sanction requires notice and an opportunity for hearing [*see Code Civ. Proc. § 2023.030*; *see* discussion in [5], *below*].

[5] Monetary Sanctions

If the motion to compel is granted, the court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against the deponent or the party with whom the deponent is affiliated, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust. The court also must impose a monetary sanction under *Code Civ. Proc. § 2023.030(a)*, on motion of any other party who, in person or by attorney, attended at the time and place specified in the deposition notice in the expectation that the deponent's testimony would be taken, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust [*Code Civ. Proc. § 2025.450*; for further discussion of these general provision, *see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[2]*].

The court may award sanctions in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed [*Cal. Rules of Ct., Rule 3.1348(a)*]. However, the court may not deem the opposing party's failure to file written opposition, failure to appear at a hearing, or voluntary provision discovery to be an admission that the motion was proper or that sanctions should be awarded [*Cal. Rules of Ct., Rule 3.1348(b)*].

For more detailed discussion of monetary sanctions, including requirements generally applicable in proceedings to impose such sanctions, see *§ 193.230[4]* and *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

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Chapter 193 DISCOVERY: DEPOSITIONS
PART V. FORMS
A. Oral Depositions

16-193 California Forms of Pleading and Practice--Annotated § 193.239

§ 193.239 Proceedings to Compel Party or Party-Affiliated Deponent to Attend and Testify at Deposition and to Produce Document or Thing [Code Civ. Proc. § 2025.450]--Separate Statement [Cal. Rules of Ct., Rule 3.1345]

[1] FORM Proceedings to Compel Party or Party-Affiliated Deponent to Attend and Testify at Deposition and to Produce Document or Thing [Code Civ. Proc. § 2025.450]--Separate Statement [Cal. Rules of Ct., Rule 3.1020]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	SEPARATE STATEMENT IN SUPPORT OF MO-
vs.	)	TION FOR ORDER COMPELLING
_____ [*name*],	)	_____ [*identify party or party-*
	)	*affiliated deponent, e.g.,* DEFENDANT] TO
Defendant.	)	_____ [TESTIFY AT DEPOS-
	)	ITION *and/or* PRODUCE FOR INSPECTION
	)	_____ [DOCUMENTS *and/or*
	)	TANGIBLE THINGS] DESCRIBED IN DEPOS-
		ITION NOTICE]
		Date: _____
		Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

This separate statement is submitted in support of the motion by _____ [*identify moving party, e.g.,*

plaintiff] _____ [*name*] to compel _____ [*specify party from whom testimony and/or production is sought, e.g.,* defendant] _____ [*name*] to attend and testify and produce documents or things specified in the deposition notice. As required under *Cal. Rules of Ct., Rule 3.1345*, it provides information relating to the discovery request and the responses at issue in the motion, as follows:

1. Text of Discovery Request: _____ [*specify text of discovery request, e.g., item for production described in deposition notice*].

2. Text of Response(s): _____ [*specify text of response, and any further responses, to the notice*].

[3. Related Definitions and Instructions: _____ (*specify, if necessary, the text of all definitions, instructions, and other matters required to understand the specific discovery request and the responses to it.*)]

[4. Related Demands and Responses: _____ (*if the response to the specific discovery request is dependent on the response given to another discovery request, or if the reasons a further response is deemed necessary are based on the response to some other discovery request, specify the text of the other request and the reponse to it.*)]

[5. Related Pleadings and Other Documents: _____ (*summarize any pleadings or other documents in the file, if any, that are relevant to the motion and are relied on by the moving party.*)]

6. Statement of Reasons for Compelling Further Response(s): _____ [*state factual and legal reasons for compelling further responses to the specific discovery request*]. [*Set out separately, as above, any further specific discovery requests with related information, with respect to which the motion is seeking to compel a response.*].
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name*]

[2] Use of Form

The separate statement set out in [1], *above*, must accompany any motion, such as that *set out in § 193.238*, to compel a deponent to testify or produce documents or other things at a deposition [*see Cal. Rules of Ct., Rule 3.1345(a)(4),(5)*].

[3] Contents of Separate Statement

Any motion involving the content of a discovery request or the responses to such a request must be accompanied by a separate statement [*Cal. Rules of Ct., Rule 3.1345(a)*]. The motions that require a separate statement include a motion to compel answers at a deposition [*Cal. Rules of Ct., Rule 3.1345(a)(4)*] and one to compel or quash the production of documents or tangible things at a deposition [*Cal. Rules of Ct., Rule 3.1345(a)(5)*]. A separate statement is *not* required, however, when no response has been provided to the request for discovery [*Cal. Rules of Ct., Rule 3.1345 (b)*]. Thus, this statement would not be necessary when a motion under *Code Civ. Proc. § 2025.450* seeks to compel attendence by a deponent who failed completely to appear and testify or produce things.

This separate statement is a separate document filed and served with the motion. It must set forth all the information necessary to understand each discovery request (in this instance a request to appear and testify and/or produce items) and all the responses to it that are at issue [*Cal. Rules of Ct., Rule 3.1345(c)*]. It must be full and complete, so that no personis required to review any other document in order to determine the full request and the full response. Material

may not be incorporated into the separate statement by reference [*Cal. Rules of Ct., Rule 3.1345(c)*].

The separate statement must include, for each discovery request to which a further response is requested, the following [*Cal. Rules of Ct., Rule 3.1345 (c)*]:

- The text of the request, and the text of each response, answer, or objection, and any further responses or answers [*Cal. Rules of Ct., Rule 3.1345(c)(1), (2)*].

- A statement of the factual and legal reasons for compelling further responses, answers, or production as to each matter in dispute [*Cal. Rules of Ct., Rule 3.1345(c)(3)*].

- If necessary, the text of all definitions, instructions, and other matters required to understand each discovery request and the responses to it [*Cal. Rules of Ct., Rule 3.1345(c)(4)*].

- If the response to a particular discovery request is dependent on the response given to another discovery request, or if the reasons a further response to a particular discovery request is deemed necessary are based on the response to some other discovery request, the other request and the response to it must be set forth [*Cal. Rules of Ct., Rule 3.1345(c)(5)*].

- If the pleadings, other documents in the file, or other items of discovery are relevant to the motion, a summary of each relevant document by the party relying on the document [*Cal. Rules of Ct., Rule 3.1345(c)(6)*].

The primary function of the separate statement appears to be that of providing a summary, in a single document, of all matters, taken from all pleadings and all other papers, that may be necessary to determine the motion. By including a statement of the factual and legal reasons for compelling further responses to each matter in dispute [*Cal. Rules of Ct., Rule 3.1345(c)(3)*], it appears that a separate statement, when required under *Cal. Rules of Ct., Rule 3.1345(c)*, also serves the same function as the supporting memorandum [*see Cal. Rules of Ct., Rule 3.1113(b)* (memorandum consists of statement of facts and statement of law, evidence and argument, discussing the statutes, cases, and textbooks cited as support)].

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16-193 California Forms of Pleading and Practice--Annotated § 193.240

§ 193.240 Proceedings to Compel Party or Party-Affiliated Deponent to Attend and Testify at Deposition and to Produce Document or Thing [Code Civ. Proc. § 2025.450]--Order

[1] FORM Proceedings to Compel Party or Party-Affiliated Deponent to Attend and Testify at Deposition and to Produce Document or Thing [Code Civ. Proc. § 2025.450]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.*, plaintiff] for an order to compel _____ [*name of party or party-affiliated deponent*] to _____ [attend and testify at a deposition *and/or* produce for inspection those _____ (documents *and/or* tangible things) described in the deposition notice served on _____, [*date*]], as well as for the imposition of a monetary sanction against _____ [*identify party deponent or party with whom deponent is affiliated and/or his/her attorney, e.g.*, defendant _____ (*name*) and his/her counsel _____ (*name*)], came on regularly for hearing by the court on _____, [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*] [; deponent appeared _____ (in person

and/or by counsel)].

On proof made to the satisfaction of the court [, and good cause appearing therefor,] that the motion ought to be _____ [denied *or* granted],

[*EITHER*]

IT IS ORDERED that the motion be, and hereby is, denied.

[*OR*]

IT IS ORDERED that the motion be, and hereby is, granted and that _____ [*name of party or party-affiliated deponent*] is hereby compelled to _____ [attend and testify at a deposition *and/or* produce for inspection those _____ (documents *and/or* tangible things) described in the deposition noticed], on _____, [*date*], at _____ [*time*], at _____ [*place*].

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*identify unsuccessful party, person, or attorney, e.g.,* defendant _____ (*name*) and his/her attorney_____ (*name*)] pay forthwith to _____ [*identify successful party, e.g.,* plaintiff] _____ [*name*] the sum of $_____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____ [*identify unsuccessful party, person, or attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*identify unsuccessful party, person, or attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)].
Dated: _____, [*date*].

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The proposed order set out in [1], *above*, is for use when the court has granted or denied a motion under *Code Civ. Proc. § 2025.450* for an order compelling the attendance and testimony of, and production of documents and tangible things by, a party or party-affiliated deponent who has failed to appear and proceed or to produce as specified in the deposition notice, and has ordered that a monetary sanction be, or not be, imposed on that party deponent or the party with whom that deponent is affiliated [*see § 193.238*].

If the deponent fails to obey an order compelling attendance, testimony, or production of items under *Code Civ. Proc. § 2025.450*, the court may make a further order imposing an issue, evidence, or terminating sanctions, or a monetary sanction in lieu of or in addition to these sanctions [*Code Civ. Proc. § 2025.450(d)*]. For further discussion of these sanctions and forms for use in seeking them following a failure to obey an order compelling discovery, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[3], 192.15[3]*, and *192.50* et seq.

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16-193 California Forms of Pleading and Practice--Annotated § 193.241

§ 193.241 Proceedings to Compel Deponent to Answer Deposition Questions and to Produce Document or Thing [Code Civ. Proc. § 2025.480]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Compel Deponent to Answer Deposition Questions and to Produce Document or Thing [Code Civ. Proc. § 2025.480]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER TO COMPEL _____ [*identify deponent, e.g.,* DEFENDANT _____ (*name*)] TO _____ [ANSWER QUESTIONS AT DEPOSITION *and/or* PRODUCE FOR INSPECTION _____ (DOCUMENTS *and/or* TANGIBLE THINGS) DESCRIBED IN DEPOSITION _____ (NOTICE *or* SUBPOENA)] AND FOR ORDER IMPOSING MONETARY SANCTION AGAINST _____ [*identify opposing party and/or his/her attorney, e.g.,* DEFENDANT _____ (*name*) AND HIS/HER ATTORNEY _____ (*name*)], SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	
	)	
	)	
	)	
	)	
	)	
	)	Date: _____

Time: _____
Location: _____
Judge: _____
Date Action Filed: _____
Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____, [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify moving party, e.g.,* plaintiff] will, and hereby does, move for an order to compel _____ [*name of deponent*] to _____ [answer those questions, listed in the attached declaration, which he/she failed to answer at the taking of his/her deposition *and/or* produce for inspection those _____ (writings *and/or* things) under his/hercontrol, listed in the attached declaration, as described in the deposition _____ (notice *and/or* subpoena) served on him/her on _____, [*date*]], and will further move for an order imposing a monetary sanction against _____ [*identify opposing party and/or his/her attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] and in favor of _____ [*identify moving party, e.g.,* plaintiff] in the sum of $ _____. The motion to compel will be made on the grounds that the information sought by the _____ [questions *and/or* inspection of _____ (documents *and/or* tangible things)] is properly subject to discovery.

The motion will be based on this notice of motion [and the oral notice given to _____ (*name of deponent*) at the deposition], on the declaration(s) of _____ [*name* (*s*)], on the separate statement served and filed herewith pursuant to *Cal. Rules of Ct., Rule 3.1345*, on the memorandum served and filed herewith, on the records and file herein, on the certified copy of [the relevant parts of] the _____ [stenographic *or* audio *or* video recording] transcript of the deposition, _____ [lodged herewith as Exhibit _____ *or* which will be lodged with the court before the hearing on the motion], and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*identify party, e.g.,* plaintiff) in the above-described action].

2. _____ [*Identify moving party, e.g.,* plaintiff] _____ [*name*] is seeking an order of this court to compel _____ [*name of deponent*] to _____ [answer questions that he/she failed to answer at the taking of his/her deposition *and/or* produce for inspection those _____ (documents *and/or* tangible things) under his/her control that he/she has failed to produce pursuant to the deposition notice (and subpoena)], and an order imposing a monetary sanction against _____ [*identify opposing party and/or his/her attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)].

3. The above-described action is one for _____ [*set forth facts showing the subject matter of the action*].

4. On _____, [*date*], _____ [*identify moving party, e.g.,* plaintiff] served on _____ [*identify all other parties to the action*] a notice of thedeposition, [including a specification of the _____ (documents *and/or* tangible things) to be produced at the deposition by the deponent _____ (*name*)]. A true and correct copy of this notice is attached as Exhibit A to the above-described motion.

[5. On _____, [*date*], _____ (*identify moving party, e.g.,* plaintiff) served the deponent _____ (*name*) with a deposition subpoena, directing him/her to _____ [attend and testify at a deposition *and/or* produce specified _____ (documents *and/or* tangible things) under his/her control] at the time and place specified in the deposition notice. A true and correct copy of this subpoena is attached as Exhibit B to the above-described motion.]

[*EITHER, if moving party seeking to compel answers*]

6. The deposition of _____ [*name of deponent*] was commenced in this action on _____, [*date*], at _____ [*place*], before _____ [*name of deposition officer*] pursuant to the deposition notice.

7. During the taking of testimony at the deposition, _____ [*name of deponent*] failed to answer questions as detailed in the separate statement accompanying this motion[, and as appears in the transcript of the deposition which _____ (is being lodged with this court and is attached hereto as Exhibit _____ and made a part hereof *or* will be lodged with this court)].

[*AND/OR, if moving party seeking to compel production of items*]

8. On _____, [*date*], [at the taking of the deposition,] _____ [*name of deponent*] failed to produce the following documents and tangible things under his/her control as required in the deposition _____ [notice *or* subpoena] as detailed in the separate statement accompanying this motion[, and as appears in the transcript of the deposition which _____ (is being lodged with this court and is attached hereto as Exhibit _____ and made a part hereof *or* will be lodged with this court)].

[*CONTINUE*]

9. The information sought which deponent has failed to provide is relevant to the subject matter involved in this action and is not privileged, as set forth in the separate statement accompanying this motion.

[*If deponent was given oral notice of motion to compel, add*]

10. When _____ [*name of deponent*] failed to _____ [answer the questions *and/or* produce the _____ (documents *and/or* tangible things)], _____ [declarant *or name of attorney if not declarant*] orally notified the deponent that he/she, on behalf of his/her client _____ [*identify, e.g.,* plaintiff], would apply to this court on _____, [*date*], at _____ [*time*], or as soon thereafter as the matter could be heard, for an order compelling him/her to _____ [answer the questions *and/or* produce the _____ (documents *and/or* tangible things)]. The officer taking the deposition then directed the deponent to appear and attend a session of this court at _____ [*date and time specified in the oral notice of motion*]. The oral notice of motion and the officer's direction to deponent appear in the transcript of the deposition, which _____ [is being *or* will be] lodged with this court, at page(s) _____, line(s) _____, and pages(s) _____, lines(s) _____, respectively. [True copies of these transcript pages are attached hereto as Exhibit _____ for the court's convenience and made a part hereof.]

[*CONTINUE*]

11. _____ [*Provide statement of facts showing reasonable and good faith attempt to resolve informally issues presented by motion, including description of conferring or attempting to confer with other parties in person, by telephone, or by letter*].

12. _____ [*Identify moving party, e.g.,* Plaintiff] has incurred expenses as follows in making this motion: _____ [*itemize reasonable expenses incurred, including attorney's fees, and explain basis of computing each expense*], for a total of $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The notice of motion and motion set out in [1], *above*, is for use by the party seeking discovery to obtain an order compelling a deponent to answer questions at a deposition and/or produce documents and other tangible things under

the deponent's control as specified in the deposition notice or subpoena, and an order imposing a monetary sanction against any party, person, or attorney opposing the motion. The motion must be made no later than 60 days after the completion of the record of the deposition [*Code Civ. Proc. § 2025.480*; for further discussion, see *§ 193.60[2]*]. It is to be made before the court in which the action is pending [*see Code Civ. Proc. § 2016.020(b)*]. The 60-day period for filing a motion to compel under *Code Civ. Proc. § 2025.480(b)* applies to subpoenas for business records, as well as to subpoenas for oral or written depositions. The deadline is mandatory [*Unzipped Apparel, LLC v. Bader (2007) 156 Cal. App. 4th 123, 132-135, 67 Cal. Rptr. 3d 111*].

A supporting declaration must include facts showing that the moving party unsuccessfully attempted, reasonably and in good faith, to resolve informally each issue presented by the motion (Paragraph 11 of Supporting Declaration). It must also set forth facts supporting the amount of any monetary sanction sought (Paragraph 12 of Supporting Declaration) [*Code Civ. Proc. § 2023.040*].

A supporting memorandum must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; *see also* discussion and forms in Ch. 417, *Points and Authorities*]. For memoranda relating to a motion to compel under *Code Civ. Proc. § 2025.480*, see California Points and Authorities , Ch. 83, *Discovery: Depositions* . (Matthew Bender).

For further discussion of motions to compel, see *§ 193.60* et seq. For a procedural checklist to be used when seeking an order under *Code Civ. Proc. § 2025.480*, see *§ 193.172*. For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 193.220[4]*.

[3] Separate Statement

A motion to compel answers to questions propounded at a deposition or to compel the production of documents or tangible things at a deposition must be accompanied by a separate statement [*Cal. Rules of Ct., Rule 3.1345(a)(4), (5)*]. This is a separate document filed and served with the motion that sets out all the information necessary to understand all the questions and responses that are in issue [*see Cal. Rules of Ct., Rule 3.1345(c)*]. For a form for this separate statement, together with further discussion of its requirements, see *§ 193.242*.

[4] Notice

Notice of the motion must be given to all parties. In addition, notice of motion must be given to the deponent, either orally at the examination or by subsequent service in writing [*Code Civ. Proc. § 2025.480(c)*]; *see Parker v. Wolters Kluwer United States, Inc. (2007) 149 Cal. App. 4th 285, 295-296, 57 Cal. Rptr. 3d 18* (fact that opposing counsel, not deposition officer, gave plaintiff oral notice of motion to compel and directed his attendance was harmless error, because plaintiff clearly heard and understood notice and responded he would not be there)]. If the notice of the motion is given orally, the deposition officer must direct the deponent to attend a session of the court at the time specified in the notice [*Code Civ. Proc. § 2025.480(c)*]. If notice to a nonparty deponent is given in writing, the written notice and all moving papers supporting the motion must be personally served on the nonparty deponent unless that deponent agrees to accept service by mail at an address specified on the deposition record [*Cal. Rules of Ct., Rule 3.1346*].

When the motion includes a request for the imposition of a monetary sanction pursuant to *Code Civ. Proc. § 2023.030*, notice and opportunity for hearing must be given to any affected party, person, or attorney [*Code Civ. Proc. § 2023.030*; *see* discussion in [6], *below*].

[5] Lodging Transcript With Court

Not less than five days prior to the hearing on the motion, the moving party must lodge with the court a certified copy of any parts of the stenographic transcript of the deposition that are relevant to the motion. If a deposition is recorded by

audio or video technology, the moving party is required to lodge a certified copy of a transcript of any parts of the deposition that are relevant to the motion [*Code Civ. Proc. § 2025.480(d)*]. Counsel may wish to attach copies of the pertinent pages of the deposition as exhibits to the above form; unless a large number of pages is involved, this method provides the court with more convenient access to the relevant portions of the deposition.

[6] Monetary Sanctions

The court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes the motion, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust [*Code Civ. Proc. § 2025.480(f)*; for further discussion of this general provision, *see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[2]*].

The court may award sanctions in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed [*Cal. Rules of Ct., Rule 3.1348(a)*]. The court may not, however, deem the opposing party's failure to file written opposition, failure to appear at a hearing, or voluntary provision discovery to be an admission that the motion was proper or that sanctions should be awarded [*Cal. Rules of Ct., Rule 3.1348(b)*].

For more detailed discussion of monetary sanctions generally, including requirements generally applicable in proceedings to impose such sanctions, see *§ 193.230[4]* and *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

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16-193 California Forms of Pleading and Practice--Annotated § 193.242

§ 193.242 Proceedings to Compel Deponent to Answer Deposition Questions and to Produce Document or Thing [Code Civ. Proc. § 2025.480]--Separate Statement [Cal. Rules of Ct., Rule 3.1345]

[1] FORM Proceedings to Compel Deponent to Answer Deposition Questions and to Produce Document or Thing [Code Civ. Proc. § 2025.480]--Separate Statement [Cal. Rules of Ct., Rule 3.1020]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	SEPARATE STATEMENT IN SUPPORT OF MOTION
vs.	)	FOR ORDER COMPELLING
_____ [*name*],	)	_____ [*identify deponent, e.g.,* DEFENDANT _____ (*name*)] TO
Defendant.	)	_____ [ANSWER QUESTIONS AT DEPOSITION *and/or* PRODUCE FOR INSPECTION _____ (DOCUMENTS *and/or* TANGIBLE THINGS) DESCRIBED IN DEPOSITION _____ (NOTICE *or* SUBPOENA)]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

This separate statement is submitted in support of the motion by _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] to compel _____ [*specify party from whom testimony and/or production is sought, e.g.,* defendant] _____ [*name*] to answer questions or produce documents or things specified in the deposition notice. As required under *Cal. Rules of Ct., Rule 3.1345*, it provides information relating to the discovery request and the responses at issue in the motion, as follows:

DEPOSITION QUESTION _____ [*identify specific question, e.g., by transcript page and line*]

1. Text of Question: _____ [*specify text of question*].

2. Text of Response(s): _____ [*specify text of response*].

3. Related Definitions and Instructions: _____ (*specify, if necessary, the text of all definitions, instructions, and other matters required to understand the specific question and the response to it.*)]

4. Related Requests and Responses: _____ (*if the response to the specific discovery request is dependent on the response given to another discovery request, or if the reasons a further response is deemed necessary are based on the response to some other discovery request, specify the text of the other request and the reponse to it.*)]

5. Related Pleadings and Other Documents: _____ (*summarize any pleadings or other documents in the file, if any, that are relevant to the motion and are relied on by the moving party.*)]

6. Statement of Reasons for Compelling Further Response(s): _____ [*state factual and legal reasons for compelling further responses to the specific discovery request*]. [*Set out separately, as above, any further specific questions or items to be produced at a deposition, together with any related information, with respect to which the motion is seeking to compel a response.*].
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name*]

[2] Use of Form

The separate statement set out in [1], *above*, must accompany a motion, such as that *set out in § 193.241*, to compel a deponent to testify or produce documents or other things at a deposition [*see Cal. Rules of Ct., Rule 3.1345(a)(4), (5)*].

[3] Contents of Separate Statement

Any motion involving the content of a discovery request or the responses to such a request must be accompanied by a separate statement [*Cal. Rules of Ct., Rule 3.1345(a)*]. The motions that require a separate statement include a motion to compel answers at a deposition [*Cal. Rules of Ct., Rule 3.1345(a)(4)*] and one to compel or quash the production of documents or tangible things at a deposition [*Cal. Rules of Ct., Rule 3.1345(a)(5)*]. A separate statement is not required when no response has been provided to the request for discovery [*Cal. Rules of Ct., Rule 3.1345(b)*].

This separate statement is a separate document filed and served with the motion. It must set forth all the information

necessary to understand each discovery request (in this instance each question at a deposition or item to be produced at a deposition) and all the responses to it that areat issue [*Cal. Rules of Ct., Rule 3.1345(c)*]. It must be full and complete, so that no person is required to review any other document in order to determine the full request and the full response. Material may not be incorporated into the separate statement by reference [*Cal. Rules of Ct., Rule 3.1345(c)*].

The separate statement must include, for each discovery request to which a further response is requested, the following [*Cal. Rules of Ct., Rule 3.1345(c)*]:

- The text of the request, and the text of each response, answer, or objection, and any further responses or answers [*Cal. Rules of Ct., Rule 3.1345(c)(1), (2)*].

- A statement of the factual and legal reasons for compelling further responses, answers, or production as to each matter in dispute [*Cal. Rules of Ct., Rule 3.1345(c)(3)*].

- If necessary, the text of all definitions, instructions, and other matters required to understand each discovery request and the responses to it [*Cal. Rules of Ct., Rule 3.1345(c)(4)*].

- If the response to a particular discovery request is dependent on the response given to another discovery request, or if the reasons a further response to a particular discovery request is deemed necessary are based on the response to some other discovery request, the other request and the response to it must be set forth [*Cal. Rules of Ct., Rule 3.1345(c)(5)*].

- If the pleadings, other documents in the file, or other items of discovery are relevant to the motion, a summary of each relevant document by the party relying on the document [*Cal. Rules of Ct., Rule 3.1345(c)(6)*].

The primary function of the separate statement appears to be that of providing a summary, in a single document, of all matters, taken from all pleadings and all other papers, that may be necessary to determine the motion. By including a statement of the factual and legal reasons for compelling further responses to each matter in dispute [*Cal. Rules of Ct., Rule 3.1345(c)(3)*], it appears that a separate statement, when required under *Cal. Rules of Ct., Rule 3.1345(c)*, also serves the same function as the supporting memorandum [*see Cal. Rules of Ct., Rule 3.1113(b)* (memorandum consists of statement of facts and statement of law, evidence and argument, discussing the statutes, cases, and textbooks cited as support)].

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16-193 California Forms of Pleading and Practice--Annotated § 193.243

§ 193.243 Proceedings to Compel Deponent to Answer Deposition Questions and to Produce Document or Thing [Code Civ. Proc. § 2025.480]--Order

[1] FORM Proceedings to Compel Deponent to Answer Deposition Questions and to Produce Document or Thing [Code Civ. Proc. § 2025.480]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.,* plaintiff] for an order to compel _____ [*name deponent*] to _____ [answer those questions, listed in the declaration attached to and in support of the motion, which he/she failed to answer at the taking of his/her deposition *and/or* produce for inspection those _____ (documents *and/or* tangible things) under his/her control, listed in the declaration attached to and in support of the motion, as described in the deposition _____ (notice *or* subpoena) served on _____, [*date*]], as well as for the imposition of a monetary sanction against _____ [*identify opposing party and/or his/her attorney, e.g.,* defendant _____ (*name*) and his/her counsel _____ (*name*)], came on regularly for hearing by the court on _____, [*date*].

Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*] [deponent appeared _____ (in person *and/or* by counsel)].

On proof made to the satisfaction of the court that the motion ought to be _____ [denied *or* granted],

[*EITHER*]

IT IS ORDERED that the motion be, and hereby is, denied.

[*OR*]

IT IS ORDERED that the motion be, and it hereby is, granted and that the deposition is to be resumed on _____, [*date*], at _____ [*time*], at _____ [*place*], at which _____ [*name deponent*] is hereby compelled to _____ [answer the questions listed in the declaration attached to and in support of the motion *and/or* produce for inspection the _____ (documents *and/or* tangible things) under his/her control listed in the declaration attached to and in support of the motion].

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*identify unsuccessful party, person, or attorney, e.g.*, defendant _____ (*name*) and his/her attorney _____ (*name*)] pay forthwith to _____ [*identify successful party, e.g.*, plaintiff] _____ [*name*] the sum of $_____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____ [*identify unsuccessful party, person, or attorney, e.g.*, defendant _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*identify unsuccessful party, person, or attorney, e.g.*, defendant _____ (*name*) and his/her attorney _____ (*name*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The proposed order set out in [1], *above*, is for use when the court has granted or denied a motion by the party seeking discovery to compel a deponent to answer questions at a deposition, to produce documents and other tangible things under the deponent's control as specified in the deposition notice or subpoena, or both, and has ordered that a monetary sanction be, or not be, imposed against the losing party [*Code Civ. Proc. § 2025.480*; *see § 193.241*].

In the event that the deponent fails to obey an order compelling responses under *Code Civ. Proc. § 2025.480*, the court may impose a contempt sanction. If the deponent is a party or party-affiliated, it may also make a further order imposing an issue, evidence, or terminating sanctions, or a monetary sanction in lieu of or in addition to these sanctions [*Code Civ. Proc. § 2025.480(g)*]. For further discussion of these sanctions and forms for use in seeking them following a failure to obey an order compelling discovery, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[3], [4], 192.15[3], [4], 192.50 et seq., and 192.60* et seq.

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16-193 California Forms of Pleading and Practice--Annotated § 193.244

§ 193.244 Proceedings to Impose Monetary Sanction Against Party Noticing Deposition for Failure to Attend [Code Civ. Proc. § 2025.430] or Failure to Subpoena Deponent [Code Civ. Proc. § 2025.440]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Impose Monetary Sanction Against Party Noticing Deposition for Failure to Attend [Code Civ. Proc. § 2025.430] or Failure to Subpoena Deponent [Code Civ. Proc. § 2025.440]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER IMPOSING MONETARY SANCTION AGAINST _____ [*identify party who served deposition notice and/or his/her attorney, e.g.,* PLAINTIFF _____ (*name*) AND HIS/HER ATTORNEY _____ (*name*)] FOR FAILURE TO _____ [ATTEND AND PROCEED WITH *or* SERVE DEPONENT WITH DEPOSITION SUBPOENA RESULTING IN DEPONENT'S FAILURE TO APPEAR FOR] SCHEDULED DEPOSITION, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	
	)	
	)	

Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____, [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify moving party, e.g.,* defendant] will, and hereby does, move for an order to impose a monetary sanction against_____ [*identify party who served deposition notice and/or his/her attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)], and in favor of _____ [*identify moving party, e.g.,* defendant] in the amount of $_____. The motion will be made on the grounds that _____ [*identify moving party and/or other persons attending, e.g.,* defendant and his/her attorney] attended the deposition at the time and place stated in the notice served by _____ [*identify party who served deposition notice, e.g.,* plaintiff], in the expectation that the testimony of the deponent, _____ [*name*], would be taken, but the deposition was not taken because _____ [*identify party who noticed deposition, e.g.,* plaintiff] _____ [failed to attend and proceed with the deposition *or* failed to serve the required deposition subpoena on the deponent, _____ (*name*), who therefore failed to attend], and as a result _____ [*identify moving party, e.g.,* defendant] incurred reasonable expenses in the amount specified *abve*.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name* (*s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*identify party, e.g.,* defendant) in the above-described action].

2. _____ [*Identify moving party, e.g.,* Defendant] _____ [*name*] is seeking an order of this court to impose a monetary sanction on _____ [*identify party who served deposition notice and/or his/her attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)], and in favor of _____ [*identify moving party, e.g.,* defendant], to pay to _____ [*identify moving party, e.g.,* defendant] the reasonable expenses, including reasonable attorney's fees, incurred by him/her in attending the scheduled deposition of _____ [*name*] at the time and place

stated in the notice of deposition.

3. On _____, [*date*], _____ [*identify party who served deposition notice, e.g.,* plaintiff] served _____ [*identify moving party, e.g.,* defendant] with a notice of the taking of the deposition of _____ [*name*] on _____, [*date*], at _____ [*time*], at _____ [*place*]. A true copy of this notice is attached hereto as Exhibit A and made a part hereof.

4. On _____, [*date*], at _____ [*time*], _____ [*identify moving party or other person attending deposition, e.g.,* I, as attorney for defendant _____ (*name*),] appeared at _____ [*place*] for the taking of the deposition of _____ [*name*], as specified in the deposition notice, in the expectation that the testimony of the deponent, _____ [*name*] would be taken.

[*EITHER, if party noticing deposition did not appear and proceed*]

5. The deposition did not proceed as specified in the deposition notice, because neither _____ [*identify party who served deposition notice, e.g.,* plaintiff] nor his/her attorney attended the deposition at the specified time and place.

[*OR, if party noticing deposition failed to serve deponent with deposition subpoena*]

5. The deposition did not proceed as specified in the deposition notice, because _____ [*name of deponent*], who is neither a party to the action nor affiliated with a party to the action, failed to appear at the specified time and place, never having been properly served by _____ [*identify party who served deposition notice, e.g.,* plaintiff] with a deposition subpoena as shown by _____ [*state facts showing that deponent was never properly served with deposition subpoena, such as, that a copy of deposition subpoena was not served to moving party with deposition notice, and any other facts known to declarant*].

[*CONTINUE*]

6. As a result of this failure by _____ [*identify party who served deposition notice, e.g.,* plaintiff] to _____ [attend and proceed with the deposition *or* serve _____ (*name of deponent*) with a deposition subpoena], _____ [*identify moving party, e.g.,* defendant] has incurred expenses as follows: _____ [*itemize reasonable expenses incurred, including attorney's fees, and explain basis of computing each*], for a total of $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name*]

[2] Use of Form

The form of notice of motion and motion set out in [1], *above*, is for use by a party to obtain an order imposing a monetary sanction against the party who served the deposition notice, or the attorney for that party, or both, for that party's failure to appear or proceed with the deposition, or for his or her failure to insure the appearance of a nonparty deponent by serving a deposition subpoena [*Code Civ. Proc. §§ 2025.430, 2025.440*]. For further discussion, see *§ 193.61[1]*.

This form may be used, with appropriate modifications, by a party other than the party who noticed the deposition notice, to impose a monetary sanction against a party deponent who failed to appear at, proceed with, or produce items at a deposition as required by the deposition notice, when the moving party attended in the expectation that the deponent's testimony would be taken [*Code Civ. Proc. §§ 2023.030(a), 2025.450*]. For further discussion, see *§ 193.60[1]*.

The motion is made before the court in which the action is pending [*see Code Civ. Proc. §§ 2016.020(b), 2025.430-2025.450*].

The imposition of a monetary sanction is designed to enable the moving party to recover reasonable expenses, including attorney's fees, incurred as a result of the opposing party's conduct [*Code Civ. Proc. § 2023.030(a)*; *see* discussion in *§ 193.230[4], see also Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*]. Therefore, the supporting declaration must state facts supporting the amount of the sanction sought [*Code Civ. Proc. § 2023.040*]; this amount should equal the expenses incurred by the moving party (Paragraph 6 of Supporting Declaration).

A supporting memorandum of is required to be served and filed with the foregoing notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; *see also* discussion and forms in Ch. 417, *Points and Authorities*]. For memoranda relating to a motion to compel under *Code Civ. Proc. § 2025.430* or *2025.440*, see California Points and Authorities , Ch. 83, *Discovery: Depositions* . (Matthew Bender).

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 193.220[4]*.

[3] Notice

Notice of a motion for the imposition of a monetary sanction under *Code Civ. Proc. § 2023.030(a)* and opportunity for hearing must be given to any affected party, person, or attorney [*see Code Civ. Proc. §§ 2023.030, 2023.040*].

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16-193 California Forms of Pleading and Practice--Annotated § 193.245

§ 193.245 Proceedings to Impose Monetary Sanction Against Party Noticing Deposition for Failure to Attend [Code Civ. Proc. § 2025.430] or Failure to Subpoena Deponent [Code Civ. Proc. § 2025.440]--Order

[1] FORM Proceedings to Impose Monetary Sanction Against Party Noticing Deposition for Failure to Attend [Code Civ. Proc. § 2025.430] or Failure to Subpoena Deponent [Code Civ. Proc. § 2025.440]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.,* defendant] for an order to impose a monetary sanction against _____ [*identify party who served deposition notice and/or his/her attorney, e.g.,* plaintiff _____ (*name*) and his/her counsel _____ (*name*)], to pay to _____ [*identify moving party, e.g.,* defendant] the reasonable expenses, including reasonable attorney's fees, incurred by him/her in attending the proposed deposition of _____ [*name*] at the time and place stated in the notice of deposition, came on regularly for hearing by the court on _____, [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

[*EITHER, if imposing sanctions*]

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that _____ [*identify party who served deposition notice and/or his/her attorney, e.g.,* plaintiff _____ (*name*) and his/her counsel _____ (*name*)] pay to _____ [*identify moving party, e.g.,* defendant] forthwith, the sum of $_____ as and for the reasonable expenses, including reasonable attorney's fees, incurred by _____ [*identify moving party, e.g.,* defendant] in attending _____ [in person *and/or* by counsel] the deposition of _____ [*name of deponent*] at the time and place specified in the deposition notice.

[*OR, if not ordering sanctions*]

On proof made to the satisfaction of the court that _____ [*identify party who served deposition notice and/or his/her attorney, e.g.,* plaintiff_____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS ORDERED that the motion be, and hereby is, denied.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use when the court grants or denies a motion for the imposition of a monetary sanction under *Code Civ. Proc. § 2025.430* or *2025.440* [*see § 193.244*].

With appropriate modifications, it may be used when the court grants a motion for the imposition of a monetary sanction against a party deponent, or the party with whom the deponent is affiliated, under *Code Civ. Proc. § 2025.450*.

The court is required to grant a motion for the imposition of a monetary sanction under *Code Civ. Proc. § 2023.030*, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust [*Code Civ. Proc. § 2025.440(a)*; *see Code Civ. Proc. § 2023.030(a)*].

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16-193 California Forms of Pleading and Practice--Annotated § 193.246

§ 193.246 Proceedings for Order Suppressing Deposition [Code Civ. Proc. § 2025.520(g) or 2025.530(e)]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Order Suppressing Deposition [Code Civ. Proc. § 2025.520(g) or 2025.530(e)]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER SUPPRESSING DEPOSITION OF _____ [*name*] AND IMPOSING A MONETARY SANCTION AGAINST _____ [*identify opposing party and/or his/her attorney, e.g.,* PLAINTIFF _____ (*name*) AND HIS/HER ATTORNEY _____ (*name*)], SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.*, plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.*, defendant] will, and hereby does, move for an order suppressing the deposition of _____ [*name*], taken by _____ [*identify party noticing deposition, e.g.*, plaintiff] in this action on _____ [*date*], and will further move for the imposition of a monetary sanction against _____ [*identify opposing party and/or his/her attorney, e.g*, plaintiff _____ (*name*) and his/her attorney _____(*name*)] in the amount of $_____. The motion for suppression of the deposition will be made on the grounds that _____ [*specify reasons of deponent for failing or refusing to approve transcript or refusing to sign paper identifying deposition as his/her own*].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name* (*s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*specify party, e.g.*, defendant) in the above-described action].

2. _____ [*Identify moving party, e.g.*, Defendant] _____ [*name*] is seeking an order of this court suppressing the deposition of _____ [*name*], taken by _____ [*identify party noticing deposition, e.g.*, plaintiff] in this action on _____ [*date*], and imposing a monetary sanction against _____ [*identify opposing party and/or his/her attorney, e.g.*, plaintiff _____ (*name*) and his/her attorney _____ (*name*)].

3. On _____ [*date*], _____ [*identify moving party, e.g.*, defendant] received written notice that the _____ [official transcript *or* recording] of the above-described deposition was available for _____ [reading, correcting, and signing *or* review].

[*EITHER, if moving party is deponent*]

4. Thereafter, _____ [*identify moving party, e.g.,* defendant], the deponent, _____ [failed or refused to approve the transcript *or* refused to sign a writing identifying the recording as his/her own deposition], for the following reasons: _____ [*specify reasons*].

[*OR, if person other than moving party is deponent*]

4. Thereafter, _____ [*name of deponent*] _____ [failed or refused to approve the transcript *or* refused to sign a writing identifying the recording as his/her own deposition], for the reasons described in his/her declaration, attached to the foregoing motion as Exhibit A.

[*CONTINUE*]

5. _____ [*Provide statement of facts showing reasonable and good faith attempt to resolve informally issues presented by motion, including description of conferring or attempting to confer with other parties in person, by telephone, or by letter*].

6. _____ [*Identify moving party, e.g.,* Defendant] has incurred expenses as follows in making this motion: _____ [*itemize reasonable expenses incurred, including attorney's fees, and explain basis of computing each expense*], for a total of $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name*]

[2] Use of Form

The form of notice of motion and motion set out in [1], *above*, is for use by a party to obtain an order suppressing a deposition, and an order imposing a monetary sanction against any party, person, or attorney opposing the motion, when the deponent has failed or refused to approve the transcript [*see Code Civ. Proc. § 2025.520*] or has refused to sign a paper identifying a recording of a deposition as his or her deposition [*see Code Civ. Proc. § 2025.530*]. The motion is made before the court in which the action is pending [*see Code Civ. Proc. §§ 2016.020(b), 2025.520, 2025.530*].

The supporting declaration must include facts showing that the moving party unsuccessfully attempted reasonably and in good faith, to resolve informally each issue presented by the motion (Paragraph 5 of Supporting Declaration) [*Code Civ. Proc. §§ 2025.520(g), 2025.530(e)*]. It must also be accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought (Paragraph 6 of Supporting Declaration) [*Code Civ. Proc. § 2023.040*].

For further discussion of a motion to suppress, see *§ 193.74*.

A memorandum of points and authorities is required to be served and filed with the foregoing notice of motion. For discussion and forms, see Ch. 417, *Points and Authorities* .

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 193.220[4]*.

[3] Notice

Although *Code Civ. Proc. §§ 2025.520* and *2025.530* do not specifically require notice to be given of this motion, notice of a motion for the imposition of a monetary sanction under *Code Civ. Proc. § 2023.030(a)* and opportunity for hearing must be given to any affected party, person, or attorney [*see Code Civ. Proc. §§ 2023.030, 2023.040*; *see* discussion in [4], *below*].

[4] Monetary Sanctions

The court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes the motion, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust [*Code Civ. Proc. §§ 2025.520(h), 2025.530(f)*]. For further discussion of monetary sanctions, see *§ 193.230[4]* [*see also Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*].

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16-193 California Forms of Pleading and Practice--Annotated § 193.247

§ 193.247 Proceedings for Order Suppressing Deposition [Code Civ. Proc. § 2025.520(g) or 2025.530(e)]--Order

[1] FORM Proceedings for Order Suppressing Deposition [Code Civ. Proc. § 2025.520(g) or 2025.530(e)]--Order
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*], Defendant	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	
_____		

The motion of _____ [*identify party, e.g.*, defendant] for an order suppressing the deposition of _____ [*name*], taken by _____ [*identify party noticing deposition, e.g.*, plaintiff] in this action on _____ [*date*], and imposing a monetary sanction against _____ [*identify opposing party and/or his/her attorney, e.g.*, plaintiff _____ (*name*) and his/her counsel _____ (*name*)], came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*] [; deponent appeared _____ (in person *and/or* by counsel)].

On proof made to the satisfaction of the court that the motion ought to be _____ [denied *or* granted],

[*EITHER, if motion is denied*]

IT IS ORDERED that the motion be, and hereby is, denied.

[*OR, if motion is granted and court is suppressing entire deposition*]

IT IS ORDERED that the motion be, and it hereby is, granted and that the deposition of _____ [*name*], taken by _____ [*identify party noticing deposition, e.g.,* plaintiff] in this action on _____ [*date*], is hereby suppressed.

[*OR, if motion is granted and court is suppressing only part of deposition*]

IT IS ORDERED that the motion be, and it hereby is, granted and that the deposition of _____ [*name*], taken by _____ [*identify party noticing deposition, e.g.,* plaintiff] in this action on _____ [*date*], is hereby suppressed in part, as follows: _____ [*specify*].

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] pay forthwith to _____ [*identify successful party, e.g.,* defendant] _____ [*name*] the sum of $_____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use when the court has granted or denied a motion to suppress a deposition, when the deponent has failed or refused to approve the transcript [*see Code Civ. Proc. § 2025.520*] or has refused to sign a paper identifying a recording of a deposition as his or her deposition [*see Code Civ. Proc. § 2025.530*; *see also § 193.246*].

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16-193 California Forms of Pleading and Practice--Annotated § 193.248

§ 193.248 Proceedings for Order Granting Leave to Take Subsequent Deposition of Natural Person [Code Civ. Proc. § 2025.610]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Order Granting Leave to Take Subsequent Deposition of Natural Person [Code Civ. Proc. § 2025.610]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER GRANTING LEAVE TO TAKE SUBSEQUENT DEPOSITION OF _____ [*name of deponent*], SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of

record:

NOTICE IS HEREBY GIVEN that on _____, [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify moving party, e.g.,* plaintiff] will, and hereby does, move for an order granting him/her leave to take a subsequent deposition of _____ [*name*]. The motion will be made on the grounds that good cause exists for this order in that _____ [*specify, e.g.,* a second deposition has become necessary because new factual issues have arisen that are relevant to the above-described action, and the previous deposition was taken prior to the existence of the facts which gave rise to these issues, which are _____ (*describe new facts and issues*)].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name* (*s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for plaintiff in the above-described action].

2. On _____, [*date*], at _____ [*place*], _____ [*identify party who took previous deposition, e.g.,* plaintiff] took the deposition of _____ [*name of deponent*].

3. Since the taking of that deposition, good cause has arisen for _____ [*identify moving party, e.g.,* plaintiff] to take a subsequent deposition of _____ [*name of deponent*], in that _____ [*state facts personally known to declarant showing good cause for taking subsequent deposition, e.g.,* plaintiff has recently uncovered that _____ (*state newly uncovered facts*), which has given rise to a new issue in this action concerning _____ (*state new issue*), and _____ (*state reasons for need for deponent to be re-examined, e.g.,* this deponent, as eyewitness to the accident, needs to be re-examined in light of this new evidence)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name*]

[2] Use of Form

The form of notice of motion and motion set out in [1], *above*, is for use by a party seeking to take a subsequent deposition of a natural person [*see Code Civ. Proc. § 2025.610*]. The motion is made before the court in which the action is pending [*see Code Civ. Proc. §§ 2016.020(b), 2025.610*]. Asan alternative to this motion, the parties and deponent may stipulate to taking a subsequent deposition [*Code Civ. Proc. § 2025.610(b)*]. For further discussion, see *§ 193.12*.

A supporting memorandum is required to be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; *see also* discussion and forms in Ch. 417, *Points and Authorities*].

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 193.220[4]*.

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16-193 California Forms of Pleading and Practice--Annotated § 193.249

§ 193.249 Proceedings for Order Granting Leave to Take Subsequent Deposition of Natural Person [Code Civ. Proc. § 2025.610]--Order

[1] FORM Proceedings for Order Granting Leave to Take Subsequent Deposition of Natural Person [Code Civ. Proc. § 2025.610]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.*, plaintiff] for an order granting him/her leave to take a subsequent deposition of _____ [*name of deponent*], came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*] [; deponent appeared _____ (in person *and/or* by counsel].

On proof made to the satisfaction of the court that the motion ought to be _____ [denied *or* granted],

IT IS ORDERED that the motion be, and hereby is, _____ [denied *or* granted and that

_____ (*identify moving party, e.g.*, plaintiff) is granted leave to take a subsequent deposition of _____ (*name*) (on _____ [*date*], at _____ (*place*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use in granting or denying a party leave to take a subsequent deposition of a natural person [*Code Civ. Proc. § 2025.610*; *see § 193.248*].

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16-193 California Forms of Pleading and Practice--Annotated § 193.250

§ 193.250 Proceedings for Order to Allow Nonparty Deponent to Appear by Telephone [Code Civ. Proc. § 2025.310]

[1] FORM Proceedings for Order to Allow Nonparty Deponent to Appear by Telephone [Code Civ. Proc. § 2025.310]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MOTION FOR ORDER TO ALLOW NONPARTY DEPONENT TO APPEAR BY BY TELEPHONE, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location:_____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g. defendant*] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in [_____ (*Department or Division*) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, deponent, person or organization*] will, and hereby does, move for an order allowing_____ [*nonparty deponent*] to appear at his/her deposition by telephone at the date and time required by the deposition subpoena. _____ [*nonparty deponent*] will be available at the following telephone number[s]: _____ [*include area code and telephone number(s)*].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*], and the memorandum served and filed herewith.
Dated: _____

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*name of party or nonparty*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*identify declarant, e.g., an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for* _____ *(identify party)*], declare:

1. _____ [*moving party, deponent*] seeks an order from this court allowing _____ [nonparty deponent], a nonparty deponent, to appear at his/her deposition by telephone at [*telephone number, including area code*] on the date and at the time stated in the deposition subpoena.

2. There is good cause for granting this motion in that [*specify facts constituting good cause*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion*.]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Use of Form

The form set out in [1], *above*, is for use when, for good cause, an order is sought to allow a nonparty deponent to appear by telephone under *Code Civ. Proc. § 2025.310*.

Under *Code Civ. Proc. § 2025.310*, a person may take, and any person other than the deponent may attend, a deposition by telephone or other remote electronic means. The court may expressly provide that a nonparty deponent may appear at his or her deposition by telephone if it finds there is good cause and no prejudice to any party.

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16-193 California Forms of Pleading and Practice--Annotated § 193.251

§ 193.251 Order Allowing Nonparty Deposition to Proceed by Telephone [Code Civ. Proc. § 2025.310]

[1] FORM Order Allowing Nonparty Deposition to Proceed by Telephone [Code Civ. Proc. § 2025.310]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER TO ALLOW NONPARTY
_____ [*name*],	)	DEPONENT TO APPEAR BY
Plaintiff,	)	BY TELEPHONE
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location:_____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

Proof having been made to the satisfaction of the court, and good cause appearing therefor,

IT IS HEREBY ORDERED that _____ [*nonparty deponent*] shall appear by telephone at a deposition set on notice to be taken on _____ [*date*], at _____ [*time*]. The attorney taking the deposition will arrange the following telecommunications: _____ [*e.g., conference call or speakerphone)*], as will enable the deponent to hear and be heard by others in attendance.
Dated:_____

_____ [signature]
Judge of the Superior Court

[2] Use of Form

The form set out in [1], *above*, is for use when the court has granted an order for a nonparty deponent to appear at a deposition by telephone under *Code Civ. Proc. § 2025.310*.

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16-193 California Forms of Pleading and Practice--Annotated §§ 193.252-193.259

[Reserved]

§§ 193.252[Reserved]

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B. Depositions on Written Questions

16-193 California Forms of Pleading and Practice--Annotated § 193.260

§ 193.260 Deposition by Written Questions [Code Civ. Proc. §§ 2028.010-2028.080]--Notice of Deposition [Code Civ. Proc. §§ 2025.220-2025.240, 2028.020]

[1] FORM Deposition by Written Questions [Code Civ. Proc. §§ 2028.010-2028.080]--Notice of Deposition [Code Civ. Proc. §§ 2025.220-2025.240, 2028.020]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF TAKING DEPOSITION OF
_____ [*name*],	)	_____ [*name*]
Defendant.	)	BY WRITTEN QUESTIONS
	)	
	)	

To _____ [*identify every other party who has appeared in action, and/or his/her/their attorney* (*s*)]:

NOTICE IS HEREBY GIVEN that _____ [*identify party, e.g.,* plaintiff] _____ [*name*] will take a deposition, by the attached written questions, of _____ [*name, if known, of prospective deponent, and address and telephone number, if known, if prospective deponent is not a party, including, if desired, his/her status, e.g.,* defendant *or if name not known, give general description sufficient to identify prospective deponent or class or group to which he/she belongs*]. The deposition will be taken before the following deposition officer: _____ [*name, descriptive title, and address of deposition officer*]. The deposition will commence _____ [at a date, time, and place to be determined by this deposition officer *or* on _____, [*date*], at _____ [*time*], at _____ (*place*)]. If the deposition is not completed on the date on which it is commenced, the taking of the deposition will be continued from

day to day thereafter, except for Sundays and holidays, at the same place, until completed.

[*If deponent is not a natural person, add*]

The matters on which examination is requested, described more fully in the attached written questions, are _____ [*specify with reasonable particularity*]. Pursuant to the provisions of Sections 2025.220-2025.240 and *2028.010 of the Code of Civil Procedure*, _____ [*name of deponent organization*] shall designate and produce at the deposition one or more of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to those matters to the extent of any information known or reasonably available to the deponent. [It ishereby requested that prompt notification in writing be given to the undersigned as to the name, address, telephone number, capacity, and job title of each person so designated to testify and the matters on which this person will testify.]

[*Add, if desired, statement of intent to record deposition by means of audio or video technology, and intent to reserve right to use video*
recording of deposition of treating or consulting physician or expert
witness at trial pursuant to Code Civ. Proc. § 2025.620(d). See § 193.225[1].]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*noticing party's status and name*]

[2] Use of Form

The form of notice set out in [1], *above*, is for use by a party in noticing a deposition to be taken on written questions [*see Code Civ. Proc. §§ 2025.220-2025.240*, *2028.020*]. This form includes (1) the name or descriptive title, as well as the address, of the deposition officer, and (2) the option of leaving the date, time, and place of deposition to the future determination of the deposition officer, as provided under *Code Civ. Proc. § 2028.020* [*see § 193.102*]. In other respects it complies with the general notice requirements of *Code Civ. Proc. §§ 2025.220-2025.240* [*Code Civ. Proc. § 2028.020*; see *§ 193.225[3] -[5]*].

A copy of the written questions to be propounded on direct examination must be attached to this form of notice [*Code Civ. Proc. § 2028.030*; *see § 193.261*]. If the deponent is a nonparty whose attendance must be required by service of a deposition subpoena, a copy of that subpoena must also accompany the notice [*Code Civ. Proc. §§ 2020.010-2020.030*, *2025.220-2025.240*, *2025.280*, *2025.310*, *2028.010*; *see* discussion in *§ 193.30* et seq. and the form of deposition subpoena in § 193.226].

For discussion of the service requirements for this form of notice, see *§ 193.225[5]*. For discussion concerning delivery of the notice to the deposition officer, see *§ 193.107*.

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16-193 California Forms of Pleading and Practice--Annotated § 193.261

§ 193.261 Deposition by Written Questions [Code Civ. Proc. § 2028.010-2028.080]--Written Questions to Be Propounded on Direct, Cross, Redirect, or Recross Examination [Code Civ. Proc. § 2028.030]

[1] FORM Deposition by Written Questions [Code Civ. Proc. § 2028.010-2028.080]--Written Questions to Be Propounded on Direct, Cross, Redirect, or Recross Examination [Code Civ. Proc. § 2028.030]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	_____ [DIRECT *or* CROSS *or* RE-
Defendant.	)	DIRECT *or* RECROSS] QUESTIONS TO BE PRO-
	)	POUNDED TO _____ [*name*] AT
	)	DEPOSITION BY WRITTEN QUESTIONS

_____

To _____ [*identify every other party who has appeared in action, and/or his/her/their attorney* (*s*)]:

The following are _____ [direct *or* cross *or* redirect *or* recross] questions to be propounded on behalf of _____ [*identify propounding party, e.g.*, plaintiff] _____ [*name*] to _____ [*name of deponent*], [_____ (*party status of deponent, if any, e.g.*, defendant),] the deponent, whose address is _____, at a deposition by written questions to be conducted by _____ [*name or descriptive title of deposition officer*], the deposition officer, whose address is _____, pursuant to the provisions of *Section 2028.010 et seq. of the Code of Civil Procedure.*

1. [*Set forth question to be answered.*]

2. [*Continue with any further questions.*]
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*propounding party's status and name*]

[2] Use of Form

This form of written questions is for use by a party serving direct, cross, redirect, or recross questions for a deposition by written questions [*see Code Civ. Proc. § 2028.030*].

For discussion of the requirements for serving direct, cross, redirect, or recross questions, see *§ 193.103*. For discussion of preview of the questions by the deponent and delivery of the questions to the deposition officer, see *§§ 193.106* and *193.107*.

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B. Depositions on Written Questions

16-193 California Forms of Pleading and Practice--Annotated § 193.262

§ 193.262 Deposition by Written Questions [Code Civ. Proc. §§ 2028.010-2028.080]--Objections to Written Questions [Code Civ. Proc. §§ 2028.040, 2028.050]

[1] FORM Deposition by Written Questions [Code Civ. Proc. § 2028.010-2028.080]--Objections to Written Questions [Code Civ. Proc. §§ 2028.040, 2028.050]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	OBJECTIONS TO _____
vs.	)	[DIRECT *or* CROSS *or* REDIRECT *or* RECROSS]
_____ [*name*],	)	QUESTIONS SERVED BY _____
Defendant.	)	[*identify party who*
	)	*served questions, e.g.,*
	)	PLAINTIFF] TO BE
	)	PROPOUNDED TO
	)	_____ [*name of deponent*] AT DE-
		POSITION BY
		WRITTEN QUESTIONS

_____

To _____ [*identify party/parties on whom deposition notice was served or* the parties herein] and to his/her/their attorney(s) of record:

[*EITHER, if objection is to form of question*]

NOTICE IS HEREBY GIVEN that _____ [*identify objecting party, e.g.,* defendant] _____ [*name*] objects to the form of the following _____ [direct *or* cross *or* redirect *or* recross] question(s) served by _____ [*identify party who served questions, e.g.,* plaintiff] on _____, [*date*], [and attached hereto,] on the grounds set forth below:

1. _____ [Question *or* Cross question *or* Redirect question *or* Recross question] No. _____ is objected to on the ground that _____ [*state ground for objection to form of question, e.g.,* it calls for a conclusion of the deponent].

2. [*Continue as necessary.*]

[*AND/OR, if objection is based on privilege or work product*]

NOTICE IS _____ [HEREBY *or* FURTHER] GIVEN that _____ [*identify objecting party, e.g.,* defendant] _____ [*name*] objects to the following _____ [direct *or* cross *or* redirect *or* recross] question(s) served by _____ [*identify party who served questions, e.g.,* plaintiff] on _____, [*date*], [and attached hereto,] on the ground(s) of _____ [privilege *and/or* work product], as set forth below:

1. _____ [Question *or* Cross question *or* Redirect question *or* Recross question] No. _____ is objected to on the ground that it calls for information that is _____ [privileged *or* subject to work product protection], in that _____ [*specify, e.g.,* it asks the deponent to disclose a confidential conversation that he/she had with his/her attorney].

2. [*Continue as necessary.*]
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*objecting party's status and name*]

[2] Use of Form

The form of objection set out in [1], *above*, is for use by a party in submitting specific objections to written questions pursuant, either to the form of the question [*Code Civ. Proc. § 2028.040*], or on the ground that it calls for privileged information or protected work product [*Code Civ. Proc. § 2028.050*].

An objection not timely served is waived [*Code Civ. Proc. §§ 2028.040(a), 2028.050(a)*]. For further discussion concerning service of an objection and the subsequent procedures for sustaining or overruling an objection, see *§ 193.104*. For a form of motion to sustain or to overrule an objection, see *§ 193.263*.

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 193 DISCOVERY: DEPOSITIONS
PART V. FORMS
B. Depositions on Written Questions

16-193 California Forms of Pleading and Practice--Annotated § 193.263

§ 193.263 Deposition by Written Questions [Code Civ. Proc. §§ 2028.010-2028.080]--Proceedings for Order Sustaining or Overruling Objections to Written Questions [Code Civ. Proc. §§ 2028.040, 2028.050]--Notice of Motion and Supporting Declaration

[1] FORM Deposition by Written Questions [Code Civ. Proc. §§ 2028.010-2028.080]--Proceedings for Order Sustaining or Overruling Objections to Written Questions [Code Civ. Proc. §§ 2028.040, 2028.050]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER _____ [SUSTAINING *or* OVERRULING] OBJECTION OF _____ [*identify objecting party, e.g.,* DEFENDANT] TO QUESTION SERVED BY _____ [*identify party who served questions, e.g.,* PLAINTIFF] TO BE PROPOUNDED AT WRITTEN DEPOSITION OF _____ [*name of deponent*] AND FOR ORDER IMPOSING A MONETARY SANCTION AGAINST _____ [*identify opposing party and/or his/her attorney, e.g.,* PLAINTIFF _____ (*name*) AND HIS/HER ATTORNEY _____ (*name*)], SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	

Date: _____
Time: _____
Location: _____
Judge: _____
Date Action Filed: _____
Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____, [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify moving party, e.g.,* defendant] will, and hereby does, move for an order _____ [sustaining *or* overruling] the objection made by _____ [*identify objecting party, e.g.,* defendant], attached hereto as Exhibit A, to the question attached hereto as Exhibit Bthat was/were served by _____ [*identify party who served questions, e.g.,* plaintiff] on _____, [*date*], to be propounded at the written deposition of _____ [*name of deponent*] on _____ [direct *or* cross *or* redirect *or* recross] examination. _____ [*Identify moving party, e.g.,* defendant] will further move for an order imposing monetary sanctions against _____ [*identify opposing party and/or his/her attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] and in favor of _____ [*identify moving party, e.g.,* defendant], in the amount of $_____. The motion will be made on the ground that _____ [*specify, e.g.,* the objection correctly specifies that the question improperly calls for hearsay].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name* (*s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*identify moving party, e.g.,* defendant) in the above-described action].

2. _____ [*Identify moving party, e.g.,* defendant] _____ [*name*] is seeking an order of this court _____ [sustaining *or* overruling] the objections made by _____ [*identify*

objecting party, e.g., defendant] to a certain question served by _____ [*identify party serving question, e.g.,* plaintiff], to be propounded in the written deposition of _____ [*name of deponent*] on _____ [direct *or* cross *or* redirect *or* recross] examination. The question, attached as Exhibit B, was served on _____, [*date*], and the objection, attached as Exhibit A, was [timely] served on _____, [*date*].

3. Pursuant to the deposition notice of _____ [*identify party serving deposition notice, e.g.,* plaintiff], the written deposition at which the question is to be propounded is scheduled to be taken [at a date, time, and place to be determined by _____ (*name of deposition officer*), the deposition officer *or* on _____, [*date*], at _____ (*place*), by _____ (*name of deposition officer*)].

4. The motion of _____ [*specify moving party, e.g.,* defendant] for an order _____ [sustaining *or* overruling] the objection should begranted, in that _____ [*set forth objections and any specific facts personally known to declarant showing reasons why motion should be granted*].

5. _____ [*Provide statement of facts showing reasonable and good faith attempt to resolve informally issues presented by motion, including description of conferring or attempting to confer with other parties in person, by telephone, or by letter*].

6. _____ [*Identify moving party, e.g.,* Defendant] has incurred expenses as follows in making this motion: _____ [*itemize reasonable expenses incurred, including attorney's fees, and explain basis of computing each expense*], for a total of $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name*]

[2] Use of Form

The form of notice of motion and motion set out in [1], *above,* is for use by a party in bringing a motion to sustain or overrule an objection to a question to be propounded at a written deposition on direct, cross, redirect, or recross examination. The form is also for use in requesting the imposition of a monetary sanction against any party, person, or attorney unsuccessfully opposing the motion [*see Code Civ. Proc. §§ 2028.040(c), 2028.050(c)*].

If the objection is to the form of the question, it is the responsibility of the objecting party to move promptly for the court to sustain it; unless sustained, the question is propounded subject to the objection [*Code Civ. Proc. § 2028.040(b)*]. On the other hand, if the objection is on the ground that the question calls for privileged information or protected work product, it is the responsibility of the party propounding the question to move for the court to overrule it; unless overruled, the question cannot be propounded [*Code Civ. Proc. § 2028.050(b)*]. For further discussion, see *§ 193.104*.

The supporting declaration must state facts showing that the moving party made a reasonable and good faith attempt at an informal resolution of any issue presented by the objection and motion (Paragraph 5 of Supporting Declaration). It must also be accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought (Paragraph 6 of Supporting Declaration) [*Code Civ. Proc. § 2023.040*].

A supporting memorandum is required to be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; *see also* discussion and forms in Ch. 417, *Points and Authorities*].

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 193.220[4]*.

[3] Notice

Although *Code Civ. Proc. §§ 2028.040* and *2028.050* do not specifically require notice to be given of the foregoing motion, notice of a motion for the imposition of a monetary sanction pursuant to *Code Civ. Proc. § 2023.030(a)* and opportunity for hearing must be given to any affected party, person, or attorney [*see Code Civ. Proc. § 2023.030*; *see* discussion in [4], *below*].

[4] Monetary Sanctions

The court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes the motion, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make imposition of the sanction unjust [*Code Civ. Proc. §§ 2028.040, 2028.050*]. For further discussion of monetary sanctions, see *§ 193.230[4]* [*see also Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*].

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B. Depositions on Written Questions

16-193 California Forms of Pleading and Practice--Annotated § 193.264

§ 193.264 Deposition by Written Questions [Code Civ. Proc. §§ 2028.010-2028.080]--Proceedings for Order Sustaining or Overruling Objections to Written Questions [Code Civ. Proc. §§ 2028.040, 2028.050]--Order

[1] FORM Deposition by Written Questions [Code Civ. Proc. §§ 2028.010-2028.080]--Proceedings for Order Sustaining or Overruling Objections to Written Questions [Code Civ. Proc. §§ 2028.040, 2028.050]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	AND AUTHORITIES
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	
_____		

The motion of _____ [*identify moving party, e.g.,* defendant] for an order _____ [sustaining *or* overruling] the objection made by _____ [*identify objecting party, e.g.,* defendant] to a certain question served by _____ [*identify party propounding question, e.g.,* plaintiff] and intended to be propounded to _____ [*name of deponent*] at a written deposition, and for an order imposing a monetary sanction against _____ [*identify opposing party, e.g.,* plaintiff], came on regularly for hearing by the court on _____, [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be _____ [denied *or* granted],

[*EITHER*]

IT IS ORDERED that the motion be, and hereby is, denied.

[*OR*]

IT IS ORDERED that the motion be, and it hereby is, granted and that the objections to _____ [Direct *or* Cross *or* Redirect *or* Recross] Questions Nos. _____ are hereby _____ [sustained *or* overruled], and _____ [*name of deposition officer*], the deposition officer, is directed _____[not to propound *or* to propound (, subject to objections as to form,)] these questions to _____ [*name of deponent*] at his/her written deposition.

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] pay forthwith to _____ [*identify successful party, e.g.,* defendant] _____ [*name*] the sum of $_____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)].
Dated: _____, [*date*].

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use when the court has granted or denied a motion for an order sustaining an objection to the form of a written question under *Code Civ. Proc. § 2028.040*, or when it has granted or denied a motion for an order overruling an objection to a written question based on privilege or work product protection under *Code Civ. Proc. § 2028.050*, and in connection with granting or denying the motion, has imposed or denied imposition of a monetary sanction against any party, person, or attorney unsuccessfully opposing the motion [*see § 193.263*].

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16-193 California Forms of Pleading and Practice--Annotated § 193.265

§ 193.265 Deposition by Written Questions [Code Civ. Proc. §§ 2028.010-2028.080]--Proceedings for Protective Order [Code Civ. Proc. §§ 2025.420, 2028.070]--Clauses to Be Used in Notice of Motion [Code Civ. Proc. § 2028.070]

[1] FORM Deposition by Written Questions [Code Civ. Proc. §§ 2028.010-2028.080]--Proceedings for Protective Order [Code Civ. Proc. §§ 2025.420, 2028.070]--Clauses to Be Used in Notice of Motion [Code Civ. Proc. § 2028.070]

[*Modify § 193.233[1] by inserting any of the following clauses, as appropriate, in accordance with the instruction to specify the order being requested, in line 8 of the first paragraph of the Motion of that form*]

be taken by oral, instead of written, examination.

[*OR*]

not be taken entirely by written examination, and that instead, _____ [*identify party or parties wishing to attend deposition, e.g.,* defendant] be permitted to attend the deposition in person or by attorney and to propound questions to the deponent by oral examination.

[*OR*]

be taken before _____ [a deposition officer other than *or* _____ (*name of proposed deposition officer*) instead of] the deposition officer specified in the deposition notice.

[2] Use of Form

The clauses set out in this form are designed to be inserted in the first paragraph of the notice of motion for a protective order re deposition *set out in § 193.233[1]*, to modify that form for use to obtain a protective order in the context of a written deposition, as expressly provided under *Code Civ. Proc. § 2028.070* [*see also* related forms at §§ 193.232, 193.234, 193.235 and the procedural checklist in § 193.182]. Note that, in addition to the orders enumerated in this form, the court may also make an order that objections under *Code Civ. Proc. §§ 2028.040* and *2028.050* be sustained or overruled. For a form of motion for an order sustaining or overruling an objection under *Code Civ. Proc. §§ 2028.040* and *2028.050*, see *§ 193.263*.

For further discussion concerning protective orders, see *§ 193.50* et seq.

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[Reserved]

§§ 193.266[Reserved]

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C. Taking Depositions Outside California

16-193 California Forms of Pleading and Practice--Annotated § 193.270

§ 193.270 Proceedings for Issuance of Commission, Letters Rogatory, or Letter of Request to Take Deposition Outside of California [Code Civ. Proc. §§ 2026.010(f), 2027.010(e)]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Issuance of Commission, Letters Rogatory, or Letter of Request to Take Deposition Outside of California [Code Civ. Proc. §§ 2026.010(f), 2027.010(e)]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ISSUANCE OF _____ [COMMISSION *or* LETTERS ROGATORY *or* LETTER OF REQUEST] TO TAKE DEPOSITION OF _____ [*name*] OUTSIDE CALIFORNIA, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify moving party, e.g.,* plaintiff] will, and hereby does, move the court for issuance, out of and under its seal, of _____ [a commission to take deposition appointing _____ (*name or descriptive title*) *or* _____ (letters rogatory *or* a letter of request) requesting the appropriate judicial authority in _____ (*name of foreign nation*) to appoint some competent person or officer] as the person before whom the deposition of _____ [*name*] is to be taken _____ [on oral examination *or* by (the attached) written questions] _____ [on _____[*date*], at _____ [*time*], at _____ (*place*) *or, if deposition on written questions and so desired,* at a date, time, and place to be determined by that deposition officer, within the foreign nation of _____ (*foreign nation*)]. The motion will be made on the grounds that _____ [*name of prospective deponent*] is outside California, that _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] is entitled to take his/her testimony by deposition, and that it is _____ [necessary *and/or* convenient] that the _____ [commission *or* letters rogatory *or* letter of request] issue.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name* (*s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*identify party, e.g.,* plaintiff) in the above-described action].

2. _____ [*Identify moving party, e.g.,* Plaintiff] _____ [*name*] is seeking an order of this court for issuance of _____ [a commission to take deposition appointing _____ (*name or descriptive title*) *or* _____ (letters rogatory *or* a letter of request) requesting the appropriate judicial authority in _____ (*name of foreign nation*) to appoint some competent person or officer] as the person before whom the deposition of _____ [*name*] is to be taken.

3. _____ [Summons was duly issued and served on defendant _____ (*name*) on _____ (*date* (*s*)) *or* Defendant _____ (*name*) appeared herein on

_____ (*date* (*s*))], and the [City and] County of _____, State of California is the proper place for the trial of this action.

4. The subject matter of this action is _____ [*set forth physical facts and circumstances out of which cause of action arose*].

5. _____ [*Name of prospective deponent*] is out of California and is [temporarily] residing at _____ [*address*] [as indicated by _____ (*identify, e.g.,* defendant _____'s (*name*) answer to plaintiff's first set of questions, Question No. _____, a copy of which is attached hereto as Exhibit A and made a part hereof)].

6. _____ [*Name of prospective deponent*] has knowledge of matters [and has in his/her possession or control _____ (*specify books, documents, and/or other things*)] which are relevant to the subject matter involved in this action in that _____ [*specify*] and he/she is a necessary [and material] witness. _____ [*Identify moving party, e.g.,* Plaintiff] _____ [*name*] cannot proceed properly to the trial of this action without the testimony of this witness on _____ [*set forth in general the subjects on which witness is expected to testify*].

[7. _____ (*Identify moving party, e.g.,* Plaintiff) _____ (*name*) served a notice of the deposition of _____ (*name*) on _____ (*identify opposing party, e.g.,* defendant) _____ (*name*) on _____, [*date*]. A copy of this notice is attached hereto as Exhibit _____ and made a part hereof.]

8. It is _____ [necessary *and/or* convenient] that this court issue _____ [a commission *or* letters rogatory *or* a letter of request] in that _____ [*specify facts, e.g.,* the attendance of _____ (*name*) at his/her deposition at _____ (*place*), on _____, [*date*], and his/her production of the books, documents, and other things described above in Paragraph _____ can be compelled, under the law of _____ (*specify jurisdiction in which deposition is to be taken*), only if the _____ (commission *or* letters rogatory *or* letter of request) issue out of and under the seal of this court, as is more fully explained in the memorandum of points and authorities served and filed herewith].

[9. *If the name or descriptive title of person to be appointed to take deposition is known, add*: _____ (*name and/or descriptive title of person to be appointed*), whose address is _____, is a _____ (person authorized to administer oaths by the laws of _____ (the United States *or name of foreign nation in which deposition is to be taken*) *or* person agreed to by all the parties to conduct the deposition), and thus is a competent and proper person to be appointed as the person before whom the deposition of _____ (*name*) is to be taken.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name*]

[2] Use of Form

The form of notice of motion and motion set out in [1], *above*, is for use by a party to obtain issuance of a commission, letters rogatory, or a letter of request for the purpose of taking a deposition outside of California for use in a California action [*see Code Civ. Proc. §§ 2026.010(f), 2027.010(e)*].

If the party seeks to take a deposition in another state, territory, or possession of the United States, he or she may obtain issuance of a commission only [*see Code Civ. Proc. § 2026.010(f)*]. If, however, the party seeks to take a deposition in a foreign nation, he or she may obtain issuance of a commission, letters rogatory, or letter of request [*see Code Civ. Proc. § 2027.010(e)*]. For further discussion, see *§ 193.123*.

There does not appear to be any statutory requirement that the deponent be a material witness. However, counsel may wish to include the bracketed language concerning materiality in Paragraph 6 in this form of declaration, as various court forms of commissions include that language [*see, e.g.*, court forms from Los Angeles County Superior Court and San Diego County Superior Court].

A supporting memorandum is required to be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; *see also* discussion and forms in Ch. 417, *Points and Authorities*].

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 193.220[4]*.

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16-193 California Forms of Pleading and Practice--Annotated § 193.271

§ 193.271 Proceedings for Issuance of Commission, Letters Rogatory, or Letter of Request to Take Deposition Outside of California [Code Civ. Proc. §§ 2026.010(f), 2027.010(e)]--Order

[1] FORM Proceedings for Issuance of Commission, Letters Rogatory, or Letter of Request to Take Deposition Outside of California [Code Civ. Proc. §§ 2026.010(f), 2027.010(e)]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
	)	ORDER THAT _____
Plaintiff,	)	[COMMISSION *or* LETTERS ROGATORY *or* LET-
vs.	)	TER OF REQUEST] ISSUE FOR TAKING DEPOS-
_____ [*name*],	)	ITION OF _____ [*name*] OUT-
	)	SIDE OF CALIFORNIA
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

The motion of _____ [*identify party, e.g.*, plaintiff] _____ [*name*] for an order that _____ [commission *or* letters rogatory *or* letter of request] issue for the taking of deposition of _____ [*name of deponent*] _____ [on oral examination *or* by written questions], came on regularly for hearing on _____, [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

[*EITHER*]

IT IS ORDERED that a commission issue out of and under the seal of this court directed to _____ [*name or descriptive title*], whose address is _____, to administer oaths and to take testimony at the deposition of _____ [*name*] _____ [on oral examination *or* by written questions] on _____ [*date*], at _____ [*specify place out of California*], commencing at _____ [*time*], local time.

[*OR*]

IT IS ORDERED that _____ [letters rogatory *or* a letter of request] issue out of and under the seal of this court addressed "To the Appropriate Judicial Authority in _____ [*name of foreign nation*]" to take the deposition of _____ [*name*] _____ [on oral examination *or* by written questions] on _____, [*date*], at _____ [*specify place out of California*], commencing at _____ [*time*], local time.

[*EITHER, for deposition in another state*]

[IT IS FURTHER ORDERED that the commission shall request that process issue in the place where the examination is to be held, requiring attendance and enforcing the obligations of the deponents to produce documents and answer questions, and _____ [set forth such terms as are required by the foreign jurisdiction to initiate process], and that these _____ [terms] are to be included in this commission.]

[*OR, for deposition in foreign nation*]

[IT IS FURTHER ORDERED that _____ (*set forth any terms and directions as are just and appropriate, e.g.,* the direct, cross, and redirect questions attached to this order are hereby settled and allowed as the questions to be propounded to this witness) and that these _____ (terms *and/or* directions) are to be included in _____ (this commission *or* these letters rogatory *or* this letter of request).]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use when the court has granted a motion by a party noticing a deposition, for issuance of a commission, letters rogatory, or a letter of request to take the deposition outside of California for use in an action in California [*see Code Civ. Proc. §§ 2026.010(f), 2027.010(e)* and § 193.270].

For depositions to be conducted in the United States or its territories, but outside California, a commission is issued by the clerk on the request of a party, without a court order; however, if a court order is required by a foreign jurisdiction, it may be obtained by ex parte application [*Code Civ. Proc. § 2026.010(f)*].

For depositions in foreign countries, the commission, letters rogatory, or letter of request may be issued on any terms and directions that are just and appropriate [*Code Civ. Proc. § 2027.010(e)*]. The last paragraph of this order may be used to specify these terms and/or conditions.

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16-193 California Forms of Pleading and Practice--Annotated § 193.272

§ 193.272 Commission to Take Deposition Outside California--Cal. Judicial Council Form DISC-030 [Code Civ. Proc. § 2026.010(f)]

[1] FORM Commission to Take Deposition Outside California--Cal. Judicial Council Form DISC-030 [Code Civ. Proc. § 2026.010(f)]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is is an illustration of California Judicial Council Form DISC-030, adopted by the Judicial Council for optional use when the court has granted a motion for issuance of a commission for taking a deposition outside California [*Code Civ. Proc. § 2026.010(f)*]. This form is available in electronic format in LexisNexis(R) Automated California Judicial Council Forms. The form may also be viewed, and an interactive version accessed (for an individual or monthly charge) at www.lexis.com or www.lexisone.com.

Prior to the creation of this form, a number of trial courts used their own printed forms for commissions; however, the Judicial Council form reproduced here is required to be accepted by all courts [*see* Cal. Rules of Court, § 1.35(a) (optional Judicial Council forms must be accepted for filing by all courts)].

[3] Issuance by Court

On request, the clerk of the court will issue a commission authorizing the deposition in another state or place, to any party in an action pending in the court's venue, without a noticed motion or court order. The commission will request that process issue in the place where the examination is to be held, requiring attendance and enforcing the obligations of the deponents to produce documents and answer questions. The commission may contain terms that are required by the foreign jurisdiction to initiate the process. If a court order is required by the foreign jurisdiction, an order for a commission may be obtained by ex parte application [Code Civ. Pro. § 2026.010(f)].

Counsel who obtained the commission should have the clerk of the court issue the commission and certify one copy of

the commission to take the deposition and stamp all other copies as endorsed filed [*see Gov. Code §§ 26833* (fee for certification), 26837 (fee for comparing copy with original for certification)]. Counsel then should forward the certified copy of the commission to the person named in the commission.

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16-193 California Forms of Pleading and Practice--Annotated § 193.273

§ 193.273 Proceedings for Issuance of Commission, Letters Rogatory, or Letter of Request to Take Deposition Outside of California [Code Civ. Proc. § 2027.010(e)]--Letters Rogatory

[1] FORM Proceedings for Issuance of Commission, Letters Rogatory, or Letter of Request to Take Deposition Outside of California [Code Civ. Proc. § 2027.010(e)]--Letters Rogatory

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	LETTERS ROGATORY RE DEPOSITION OF
	)	_____ [*name*]
Defendant.	)	
	)	
	)	

_____

THE PEOPLE OF THE STATE OF CALIFORNIA

To the Appropriate Judicial Authority in _____ [*name of foreign nation*]:

It has been determined by this court that the testimony of _____ [*name of prospective deponent*] who now _____ [resides *or* is temporarily] in your jurisdiction, is _____ [necessary *and/or* convenient] in the above-described action now pending in this court in which the above-described plaintiff and defendant(s) are parties. We therefore request that in the interest of justice you cause _____ [*name of deponent*], by the proper and usual process of your court, to appear before you or some competent person or officer

appointed by you and authorized for the purpose, at a time and place to be determined by you, then and there to make answer on his/her _____ [oath *or* solemn affirmation] to _____ [oral examination of the parties and their attorneys *or* the questions, cross questions, (and redirect and recross questions) annexed hereto]. We further request that you will cause his/her testimony in answer to _____ [this examination *or* these questions] to be reduced to writing [*if documents to be produced, add*:, and such books, papers or other articles that the witness may produce or identify to be marked as _____ (*identify party, e.g.,* plaintiff) _____'s (*name*) Exhibits]. We request that you then cause this testimony [with all exhibits so marked and attested] to be returned to us in an envelope endorsed with the title of this action and marked "Deposition of _____ [*name*]" addressed to the Clerk of this Court at _____ [*address*] and to cause the same to be forwarded to such clerk _____ [*if to be mailed directly state*: by mail or other usual channel of conveyance it;or, if rules of foreign nation require transmittal through diplomatic channels, state: through the nearest United States minister or consul].

We are ready and willing to do the same for you in a similar case when required.

Witness, Honorable _____ [*name*], Judge of the _____ [*name of court*] Court, on the _____ day of _____, [*date*].

_____
Clerk
By _____ [*signature*]
Deputy Clerk

[2] Use of Form

The form of proposed letters rogatory, set out in [1], *above*, is for use in taking a deposition outside the United States [*see Code Civ. Proc. § 2027.010(e)*]. It is issued by the trial court, and directed to the judicial authority in a jurisdiction which requires letters rogatory for taking a deposition in that jurisdiction for use in an action pending elsewhere [*see* discussion in *§ 193.123*].

Counsel who obtained the letters rogatory should have the judge sign and issue them, and have the clerk certify one copy and stamp the other copies as endorsed filed [*see Gov. Code §§ 26833, 26837* (certification)]. Counsel should forward the certified copy of the letters to the court named therein and have proceedings started for the appointment of a person to take the deposition or any proceedings for recognition of the letters. Once the person taking the deposition is appointed, arrangements can be made for the time and place of the deposition.

This form includes a request that the deposition be forwarded to the clerk of the court. Although *Code Civ. Proc. § 2025.550(a)* provides that a deposition is not filed with the court but instead is stored by the attorney for the party who noticed the deposition, it appears to be appropriate that a deposition taken under the auspices of a foreign tribunal should be first returned to the court that requested such exercise of judicial authority [*cf. 28 U.S.C. § 1781* (providing that Department of State has power to transmit letter rogatory or request to foreign tribunal and to receive it after execution, but that tribunal in United States is not precluded from transmitting letter rogatory or request to foreign tribunal and from return in same manner)].

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16-193 California Forms of Pleading and Practice--Annotated § 193.274

§ 193.274 Proceedings for Issuance of Commission, Letters Rogatory, or Letter of Request to Take Deposition Outside of California [Code Civ. Proc. § 2027.010(e)]--Letter of Request [Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 UST 2555, TIAS No. 7444]

[1] FORM Proceedings for Issuance of Commission, Letters Rogatory, or Letter of Request to Take Deposition Outside of California [Code Civ. Proc. § 2027.010(e)]--Letter of Request [Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 23 UST 2555, TIAS No. 7444]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	LETTER OF REQUEST RE DEPOSITION OF
	)	_____ [*name*]
Defendant.	)	
	)	
	)	

THE PEOPLE OF THE STATE OF CALIFORNIA

To _____ [*title and address of Central Authority of foreign nation*], the Central Authority of _____ [*name of foreign nation*]:

It has been determined by this court that the testimony of _____ [*name of prospective deponent*], who now _____ [resides *or* is temporarily] in your jurisdiction, is _____ [necessary *and/or* convenient] in the above-described action now pending in this court in which the above-described plaintiff and

defendant are parties. We therefore issue this letter of request for international judicial assistance, in accordance with the Hague Convention of March 18, 1970, on the taking of evidence in civil or commercial matters, as follows:

1. This letter of request, sent by the Superior Court of California for the County of _____ [*name of county*] to the Central Authority of _____ [*name of foreign nation*], is to be transmitted to _____ [*specify authority requested to execute letter*], the authority competent to execute it.

2. The names and addresses of the parties to the proceedings, and their representatives, are as follows: _____ [*identify*].

3. The nature of the proceedings for which the evidence is required and all necessary information in regard to the proceedings are as follows: _____ [*specify*].

[*EITHER*]

4. The following evidence is to be obtained: _____ [*specify*].

[*and/or*]

4. The following judicial act is to be performed: _____ [*specify*].

[*CONTINUE*]

5. The following person(s) is/are to be examined: _____ [*name* (*s*) *and address* (*es*)].

[*EITHER*]

6. The questions that are to be put to the person(s) to be examined are _____ [as follows: _____ (*specify*) *or* attached hereto as Exhibit A].

[*OR*]

6. The subject-matter about which the person(s) is/are to be examined is as follows: _____ [*specify*].

[*CONTINUE*]

[7. The following _____ (documents *and/or* real property *and/or* personal property) is/are to be inspected: _____ (*specify*).]

[8. The evidence is required to be given on oath or affirmation, as follows: _____ (*specify special form to be used*).]

[9. It is requested that the following special _____ (method *or* procedure) be followed, pursuant to Article 9 of the Hague Convention. _____ (*Identify party to reimburse costs*) will reimburse the fees

and costs occasioned by the use of this special _____ (method *or* procedure), pursuant to Article 14 of the Hague Convention.]

[10. The person(s) to be examined may claim privilege or duty to refuse to give the evidence under the *California Evidence Code, Sections 900-1070*, pursuant to Article 11 of the Hague Convention.]

[11. A translation into _____ (*specify language of foreign nation*) of this letter of request is attached hereto as Exhibit _____.]

[12. It is requested that _____ [*specify executing authority*] inform the Superior Court of the State of California for the County of _____ [*name of county*] of the time of and place at which the proceedings will take place, so that the parties concerned and their representatives may be present. It is also requested that this information be sent directly to the parties and their representatives, at the addresses stated above.]

[13. _____ (*Identify party to reimburse costs*) will reimburse the fees and costs incurred in executing this letter of request, in serving process to compel the appearance(s) of the person(s) to be examined and in his/her/their attendance, and in preparing a transcript of the proceedings, pursuant to Article 26 of the Hague Convention.]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court
By _____ [*signature*]
Deputy Clerk
[*Seal*]

[2] Use of Form

The proposed letter of request set out in [1], *above*, is for use as a letter of request issued by the trial court pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters [23 UST 2555, TIAS No. 7444; *see also* Note to *28 U.S.C.A. § 1781*]. It is issued by the trial court and directed to a foreign nation that is a signatory to the Convention [*see* discussion in *§ 193.123*].

This form may be set forth in English, unless the foreign nation to which the letter is directed has reserved otherwise pursuant to Article 33 of the Convention. Alternatively, the letter must be drafted in the language of the foreign nation or accompanied by a translation into that language [Convention, Article 4].

This form includes the following information, as required by Article 3 of the Convention:

- The authority requesting its execution and the authority requested to execute it, if known to the requesting authority.
- The names and addresses of the parties to the proceedings and their representatives, if any.
- The nature of the proceedings for which the evidence is required, including all necessary information in regard thereto.
- The evidence to be obtained or other judicial act to be performed.
- The names and addresses of the persons to be examined.

- The questions to be put to the persons to be examined or a statement of the subject matter about which they are to be examined.

- The documents or other property, real or personal, to be inspected.

- Any requirement that the evidence is to be given on oath or affirmation, and any special form to be used.

- Any special method or procedure to be followed under Article 9.

The letter is sent by the court in which the action is pending, directly to the Central Authority of the foreign nation, who will then forward it to the proper judicial authority [*see 28 U.S.C. § 1781*; Convention, Article 2].

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[Reserved]

§§ 193.275[Reserved]

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16-193 California Forms of Pleading and Practice--Annotated § 193.280

§ 193.280 Application for Discovery Subpoena in Action Pending Outside California [Code Civ. Proc. § 2029.100 et seq.; Cal. Judicial Council Form SUBP-030]

[1] FORM

Click here to view image.

[2] Use of Form

This form is an application for a discovery subpoena in an action pending outside California. It is a reproduction of Cal. Judicial Council Form SUBP-030, adopted by the Judicial Council for mandatory use [see Cal. Rules of Ct., Appendix, Div. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format is available at www.lexisone.com at no charge.

This form must be used to request issuance of a subpoena for discovery under the Interstate and International Depositions and Discovery Act [*Code Civ. Proc. § 2029.100 et seq.*].

For discussion and a form for a deposition subpoena for personal appearance only, see *§ 193.281*. For discussion and a form for a deposition subpoena for personal appearance and production of documents and things in an action pending outside California, see *§ 193.282*. For discussion and a form for a subpoena for inspection of premises in an action pending outside California, see *§ 195.70*. For discussion and a form for a subpoena for production of business records in an action pending outside California, see *§ 535.85*. For a discussion and forms for subpoenas to compel attendance at a deposition in an action pending in California, see *§§ 193.30 -193.35, 193.226 -193.228* (forms).

For general information on subpoenas and subpoenas duces tecum, see *Ch. 535, Subpoena, §§ 535.60, 535.61*.

[3] Procedure for Obtaining Subpoena

To request issuance of a subpoena under the Interstate and International Depositions and Discovery Act [*Code Civ.*

Proc. § 2029.100 et seq.], a party must submit the original, or a true and correct copy, of a foreign subpoena to the clerk of the superior court in the California county in which discovery is sought to be conducted [*Code Civ. Proc. § 2029.300(a)*]. A request for the issuance of a subpoena in these circumstances does not constitute making an appearance in the California courts [*Code Civ. Proc. § 2029.300(a)*].

In addition to submitting a subpoena, as described above, a party seeking discovery must do both of the following [*Code Civ. Proc. § 2029.300(b)*]:

- Submit an application requesting that the superior court issue a subpoena with the same terms as the foreign subpoena. The application must be on a form prescribed by the Judicial Council [*see § 193.180[1]* (Judicial Council Form SUBP-030)]. No civil coversheet is required.

- Pay the specified fee [*see Gov. Code § 70626*].

When these requirements are satisfied, the court clerk must promptly issue a subpoena for service on the person to which the foreign subpoena is directed [*Code Civ. Proc. § 2029.300(c)*].

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16-193 California Forms of Pleading and Practice--Annotated § 193.281

§ 193.281 Deposition Subpoena for Personal Appearance in Action Pending Outside California [Code Civ. Proc. § 2029.100 et seq.; Cal. Judicial Council Form SUBP-040]

[1] FORM

Click here to view image.

[2] Use of Form

This form is a deposition subpoena for a personal appearance in an action pending outside California. It is a reproduction of Cal. Judicial Council Form SUBP-040, adopted by the Judicial Council for mandatory use [*see* Cal. Rules of Ct., Appendix, Div. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format is available at www.lexisone.com at no charge.

The form is to used to require a nonparty witness to make a personal appearance and testify at a deposition in an action pending outside California, or if the nonparty witness is not a natural person, to designate one of more witnesses to appear and testify on behalf of the entity [*see Code Civ. Proc. §§ 2029.200(c), (e)*; *see Code Civ. Proc. § 2020.220(b)*; *see also Code Civ. Proc. § 2029.500* (making *Code Civ. Proc. § 2016.010 et seq.* applicable to discovery in actions pending outside California)].

For detailed discussion of the Interstate and International Depositions and Discovery Act [*Code Civ. Proc. § 2029.100 et seq.*], governing discovery in actions outside California, see *§ 193.30* et seq.

For a form for an application for a discovery subpoena in an action pending outside California, see *§ 193.280*. For a form for a deposition subpoena for personal appearance and production of documents and things in an action pending outside California, see *§ 193.282*. For a form for a subpoena for inspection of premises in an action pending outside California, see *§ 195.70*. For a form for a subpoena for production of business records in an action pending outside California, see *§ 535.85*. For discussion and forms for subpoenas generally, see Ch. 535, *Subpoena* .

[3] Procedure for Obtaining Subpoena

To request issuance of a subpoena under the Interstate and International Depositions and Discovery Act [*Code Civ. Proc. § 2029.100 et seq.*], a party must submit the original, or a true and correct copy, of a foreign subpoena to the clerk of the superior court in the California county in which discovery is sought to be conducted [*Code Civ. Proc. § 2029.300(a)*]. A request for the issuance of a subpoena in these circumstances does not constitute making an appearance in the California courts [*Code Civ. Proc. § 2029.300(a)*].

In addition to submitting a subpoena, as described above, a party seeking discovery must do both of the following [*Code Civ. Proc. § 2029.300(b)*]:

- Submit an application requesting that the superior court issue a subpoena with the same terms as the foreign subpoena. The application must be on a form prescribed by the Judicial Council [*see § 193.180[1]* (Judicial Council Form SUBP-030)]. No civil coversheet is required.

- Pay the specified fee [*see Gov. Code § 70626*].

When these requirements are satisfied, the court clerk must promptly issue a subpoena for service on the person to which the foreign subpoena is directed [*Code Civ. Proc. § 2029.300(c)*].

[4] Subpoena Form and Contents

A deposition subpoena issued under *Code Civ. Proc. § 2029.300* must do all of the following [*Code Civ. Proc. § 2029.300(d)*]:

- Incorporate the terms used in the foreign subpoena.

- Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

- Bear the caption and case number of the out-of-state case to which it relates.

- State the name of the court that issues it.

- Be on the official Judicial Council Form [*see Code Civ. Proc. § 2029.390*; § 193.181[1] (Judicial Council Form SUBP-040).

[5] Party Not Required to Retain Local Attorney

A party is not required to retain a local attorney to depose a witness in these circumstances. An active member of the California State Bar who is retained by a party to an out-of-state court proceeding may issue a deposition subpoena [*Code Civ. Proc. § 2029.350(a)*]. A deposition subpoena that issues under *Code Civ. Proc. § 2029.350(a)* must do all of the following [*Code Civ. Proc. § 2029.350(b)*]:

- Incorporate the terms used in the foreign subpoena.

- Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

- Bear the caption and case number of the out-of-state case to which it relates.

- State the name of the superior court of the county in which the discovery is to be conducted.

- Be on a form prescribed by the Judicial Council [*see Code Civ. Proc. § 2029.390*; § 193.181[1] (Judicial Council Form SUBP-040).

[6] Service of Subpoena

A discovery subpoena issued under the Act must be personally served in compliance with California law, including, without limitation, *Code Civ. Proc. § 1985* [*Code Civ. Proc. § 2029.400*].

The party noticing the deposition must effectuate service of the deposition subpoena on the nonparty deponent in advance of the deposition within a reasonable time to travel to the place of deposition [*Code Civ. Proc. § 2020.220(a)*].

Any person may serve the subpoena by personal delivery of a copy of it to the deponent if the deponent is a natural person. If the deponent is an organization, service may be by personal delivery of a copy of the subpoena to any officer, director, or custodian of records or to any agent or employee authorized by the organization to accept service of a subpoena [*Code Civ. Proc. § 2020.220(b)*]. Service may be accompanied by payment of witness fees [*see Code Civ. Proc. § 2020.230*].

Personal service of any deposition subpoena is effective to require the personal attendance and testimony of any deponent who is a resident of California at the time of service, if the subpoena so specifies, and any production, inspection, testing, and sampling. Personal service is also effective to require that deponent's attendance at a court session to consider any issue arising out of the deponent's refusal to be sworn, to answer any questions, to produce specified items, or to permit inspection or specified testing and sampling of the items produced [*Code Civ. Proc. § 2020.220(c)*].

For discussion of the service of subpoenas generally, see *Ch. 535, Subpoena, § 535.17*.

If the party giving notice of the deposition fails to serve a required subpoena on a nonparty or non-party-affiliated deponent and, as a result, the deponent fails to appear for the deposition, any party who, in person or by attorney, attended the deposition at the specified time and place in the expectation that the deponent's testimony would be taken should seek the imposition of a monetary sanction under *Code Civ. Proc. § 2023.030(a)* against the noticing party [*Code Civ. Proc. § 2025.440(a)*; *see § 193.244*].

[7] Witness Fees

If a deposition subpoena requires the personal attendance of the deponent, pursuant to *Code Civ. Proc. § 2020.310*, the party noticing the deposition is required to pay to the deponent in cash or by check the same witness fee and mileage required by *Gov. Code § 68070 et seq.*, for attendance and testimony before the court in which the action is pending. This payment, whether or not demanded by the deponent, must be made, at the option of the party noticing the deposition, either at the time of service of the deposition subpoena or at the time the deponent attends for the taking of testimony [*Code Civ. Proc. § 2020.230(a)*; *see Code Civ. Proc. § 2029.500* (making *Code Civ. Proc. § 2016.010 et seq.* applicable to discovery in actions pending outside California)].

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16-193 California Forms of Pleading and Practice--Annotated § 193.282

§ 193.282 Deposition Subpoena for Personal Appearance and Production of Documents and Things in Action Pending Outside California [Code Civ. Proc. § 2029.100 et seq.; Cal. Judicial Council Form SUBP-045]

[1] FORM

Click here to view image.

[2] Use of Form

This form is a deposition subpoena for personal appearance and production of documents and things in an action pending outside California. It is a reproduction of Cal. Judicial Council Form SUBP-045, adopted by the Judicial Council for mandatory use [see Cal. Rules of Ct., Appendix, Div. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form is used to require a nonparty witness to make a personal appearance and testify at a deposition in an action pending outside California and to produce documents and things, as specified in the deposition subpoena. If the nonparty witness is not a natural person, the subpoenaed entity must designate one of more witnesses to appear and testify on its behalf [*see Code Civ. Proc. §§ 2029.200(c), (e)*; *see Code Civ. Proc. § 2020.220(b)*; *see also Code Civ. Proc. § 2029.500* (making *Code Civ. Proc. § 2016.010 et seq.* applicable to discovery in actions pending outside California)].

For detailed discussion of the Interstate and International Depositions and Discovery Act [*Code Civ. Proc. § 2029.100 et seq.*], governing discovery in actions outside California, see *§ 193.30* et seq. For discussion of the procedure to obtain a subpoena, its required form and contents, service, and related issues, see *§ 193.281[2]* et seq.

For a form for an application for a discovery subpoena in an action pending outside California, see *§ 193.280*. For a form for a deposition subpoena for personal appearance only, see *§ 193.281*. For a form for a subpoena for inspection of premises in an action pending outside California, see *§ 195.70*. For a form for a subpoena for production of business

records in an action pending outside California, see *§ 535.85*. For discussion and forms for subpoenas generally, see Ch. 535, *Subpoena* .

[3] Affidavit Supporting Subpoena Duces Tecum

A discovery subpoena issued under the Act must be personally served in compliance with California law, including, without limitation, *Code Civ. Proc. § 1985* [*Code Civ. Proc. § 2029.400*]. Service of the deposition subpoena is discussed in *§ 193.281[6]*.

A copy of an affidavit must be served with a subpoena duces tecum issued before trial, showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality of those matters to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control [*Code Civ. Proc. § 1985(b)*; *see Code Civ. Proc. § 2029.500* (making *Code Civ Proc. § 1985 et seq.* applicable to discovery in actions pending outside California)].

For further discussion of the affidavit supporting the subpoena, see *Ch. 535, Subpoena, § 535.16*. For discussion of service of subpoenas generally, see *Ch. 535, Subpoena, § 535.17*.

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[Reserved]

§§ 193.283[Reserved]

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E. Depositions of Prisoners

16-193 California Forms of Pleading and Practice--Annotated § 193.290

§ 193.290 Proceedings for Order Authorizing Deposition of Prisoner [Code Civ. Proc. §§ 1995, 1996; Penal Code § 2623]--Notice of Motion

[1] FORM Proceedings for Order Authorizing Deposition of Prisoner [Code Civ. Proc. §§ 1995, 1996; Penal Code § 2623]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR OR-
vs.	)	DER AUTHORIZING DEPOSITION OF PRISON-
_____ [*name*],	)	ER
	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify moving party, e.g.,* plaintiff] will, and hereby does, move for an order that _____ [*name of*

prisoner], a prisoner in _____ [*specify name and location of jail or prison*], be produced for the taking of his/her deposition on _____ [oral examination *or* written questions], to be conducted at this _____ [jail *or* prison] at _____ [*place*] on _____, [*date*], commencing at _____ [*time*], or at such other time as the court may designate. The motion will be made on the grounds that _____ [*name of prisoner*] has knowledge of matters relevant and material to this action, and that his/her testimony as to such matters is necessary to _____ [*identify moving party, e.g.,* plaintiff] in preparing for and proceeding to the trial of this action.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name*]

[2] Use of Form

The notice of motion and motion set out in [1], *above*, are for use by a party who wishes to take the deposition of a prisoner who is confined in a state prison [*see Penal Code § 2623*] or county jail [*see Code Civ. Proc. §§ 1995-1997*].

The form must be supported by an affidavit or declaration showing the nature of the action, the testimony expected from the deponent, and its materiality [*Penal Code § 2623*; *Civ. Code § 1996*].

The motion is required to be served and filed with an accompanying memorandum [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; *see also* discussion and forms in Ch. 417, *Points and Authorities*].

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 193.220[4]*.

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[1] FORM

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[Code Civ. Proc. § 94(a)(1)]

[1] FORM

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§ 194.85 Proceedings for Order to Serve Interrogatories on a Member of a Class Who Is Not a Class Representative and Who Has Not Appeared [Cal. Rules of Ct., Rule 3.768(c)]

[1] FORM

[2] Use of Form

§ 194.86 Order Allowing Service of Interrogatories on a Member of Certified Class Who Is Not a Class Representative and Who Has Not Appeared [Cal. Rules of Ct., Rule 3.768(c)]

[1] FORM

[2] Use of Form

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§ 194.90 Proceedings for Order Extending Time for Service of Response to Interrogatories [Code Civ. Proc. § 2030.260]--Notice of Motion and Supporting Declaration

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[4] Previous Extensions

[5] Protective Order

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[1] FORM

[2] Use of Form

[3] Filing and Service of Order

§ 194.92 Proceedings for Order Relieving Responding Party From Waiver for Failure to Serve Timely Response [Code Civ. Proc. § 2030.290]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

§ 194.93 Proceedings for Order Relieving Responding Party From Waiver for Failure to Serve Timely Response [Code Civ. Proc. § 2030.290]--Order

[1] FORM

[2] Use of Form

§ 194.94 Response to Interrogatories [Code Civ. Proc. §§ 2030.210-2030.250]--Basic Format

[1] FORM

[2] Use of Form

[3] Format

[4] Content of Response

[5] Service of Response

[6] Verification

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[8] Cross References

§ 194.95 Proceedings for Protective Order Regarding Interrogatories [Code Civ. Proc. §§ 2017.020, 2019.030, 2030.090]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Sanctions

[4] Supporting Declaration

§ 194.96 Proceedings for Protective Order Regarding Interrogatories [Code Civ. Proc. §§ 2017.020, 2019.030, 2030.090]--Order

[1] FORM

[2] Use of Form

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§ 194.100 Proceedings for Order Compelling Response to Interrogatories [Code Civ. Proc. § 2030.290]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Time for Noticing Motion

[4] Sanctions

§ 194.101 Proceedings for Order Compelling Response to Interrogatories [Code Civ. Proc. § 2030.290]--Order

[1] FORM

[2] Use of Form

§ 194.102 Proceedings for Order Compelling Further Response to Interrogatories [Code Civ. Proc. § 2030.300]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Separate Statement

[4] Notice

[5] Burden of Proof

[6] Monetary Sanction

[7] Sanctions for Failure to Obey Order Compelling Further Response

§ 194.103 Proceedings for Order Compelling Further Response to Interrogatories [Code Civ. Proc. § 2030.300]--Separate Statement [Cal. Rules of Ct., Rule 3.1345]

[1] FORM

[2] Use of Form

[3] Contents of Separate Statement

§ 194.104 Proceedings for Order Compelling Further Response to Interrogatories [Code Civ. Proc. § 2030.300]--Order

[1] FORM

[2] Use of Form

§ 194.105 Proceedings for Order That Initial Answers to Interrogatories Be Deemed Binding [Code Civ. Proc. § 2030.310]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Sanctions

§ 194.106 Proceedings for Order That Initial Answers to Interrogatories Be Deemed Binding [Code Civ. Proc. § 2030.310]--Order

[1] FORM

[2] Use of Form

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§ 194.01 Scope of Chapter

This chapter covers discovery under the Civil Discovery Act using the discovery method of written interrogatories.

Part II (*see § 194.10* et seq.) has detailed discussion of the requirements and procedures relating to discovery by interrogatories.

Part IV provides procedural checklists in the following subparts:

- Subpart A (*see § 194.60* et seq.) provides checklists for use by a party propounding interrogatories or seeking discovery.

- Subpart B (*see § 194.70* et seq.) provides checklists for use by a party responding to interrogatories.

Part V provides forms relating to discovery by written interrogatories, including the following:

- Forms relating to early service of interrogatories and response, including relief from the requirement to serve interrogatories on all parties (*see §§ 194.80, 194.81*).

- Forms for interrogatories, including a form for specially drafted interrogatories (*see § 194.82*) as well as illustrative reproductions of form interrogatories approved by the Judicial Council (*see §§ 194.83, 194.84*).

- Forms for use in motion proceedings to extend the time for response to interrogatories (*see §§ 194.90, 194.91*).

- Forms for use in motion proceedings for relief from waiver of objections for failure to serve a timely response (*see §§ 194.92, 194.93*).

- A form for a response to interrogatories (*see § 194.94*).

- Forms for use in motion proceedings for a protective order in relation to discovery by interrogatories (*see §§ 194.95, 194.96*).

- Forms for use in motion proceedings to compel a response or further response to interrogatories, and related orders imposing sanctions (*see §§ 194.100 -194.104*).

- Forms for use in motion proceedings to obtain an order to deem initial answers to interrogatories binding (*see §§ 194.105, 194.106*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUse

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16-194 California Forms of Pleading and Practice--Annotated § 194.02

§ 194.02 Cross References

[1] Related Discovery Chapters

For discussion and forms relating to the general purpose, scope, regulation, and timing of civil discovery, see Ch. 190, *Discovery: Scope, Regulation, and Timing* .

For detailed discussion of evidentiary privileges and other statutory or constitutional protections against disclosure, see Ch. 191, *Discovery: Privileges and Other Discovery Limitations* .

For discussion and forms relating to discovery sanctions generally, see Ch. 192, *Discovery: Sanctions for Discovery Misuse* .

For detailed discussion of discovery of electronically stored evidence (e-discovery), see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*.

For discussion and forms relating to the use of other particular discovery methods authorized by the Civil Discovery Act, see the following chapters covering each method:

- Ch. 193, *Discovery: Depositions*.
- Ch. 195, *Discovery: Inspection of Tangible Evidence*.
- Ch. 196, *Discovery: Requests for Admissions*.
- Ch. 197, *Discovery: Physical and Mental Examinations*.
- Ch. 198, *Discovery: Exchange of Expert Witness Information*.

For discussion and forms relating to the use of specified discovery methods for the purpose of preserving testimony or

other evidence prior to the commencement of an action or pending an appeal, see Ch. 199, *Discovery: Preservation of Evidence* .

For discussion and forms relating to the review of interlocutory discovery orders in certain circumstances by petition for writ of mandate or prohibition, see Ch. 200, *Discovery: Review of Discovery Orders* .

[2] Other Related Chapters

For discussion and forms for interrogatories for use in various types of actions involving motor vehicles, see Ch. 85, *Automobiles: Discovery* .

For an illustrative example of Judicial Council form interrogatories approved for use in unlawful detainer proceedings, see *Ch. 333, Landlord and Tenant: Eviction Actions, § 333.120*.

For discussion of discovery in limited civil cases subject to the economic litigation provisions, including detailed discussion of the Judicial Council's form for interrogatories for economic litigation, see *Ch. 345A, Limited Civil Cases, §§ 345A.16, 345A.17*.

For discussion of and general forms relating to law and motion procedures generally, see Ch. 372, *Motions and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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16-194 California Forms of Pleading and Practice--Annotated §§ 194.03-194.09

[Reserved]

§§ 194.03[Reserved]

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16-194 California Forms of Pleading and Practice--Annotated § 194.10

§ 194.10 Governing Law

Discovery by interrogatories pursuant to the Civil Discovery Act (*Code Civ. Proc. § 2016.010 et seq.*) is governed generally by *Code Civ. Proc. §§ 2030.010-2030.410*. Related provisions of the Civil Discovery Act include the provision for form interrogatories, set out in *Code Civ. Proc. §§ 2033.710-2033.740* and the provisions governing discovery generally, set out in *Code Civ. Proc. §§ 2016.010-2019.030, 2023.010-2024.060*.

The extent of discovery permitted under the Civil Discovery Act is restricted in limited civil cases by the Economic Litigation provisions of *Code Civ. Proc. §§ 94* and *95*. The use of interrogatories in such cases is limited specifically by *Code Civ. Proc. § 94(a)*. For further discussion, see *§ 194.14[4]* [*see also Ch. 190, Discovery: Scope, Regulation, and Timing, §§ 190.11[2], 190.23[2][a]*; Ch. 345A, *Limited Civil Cases*, §§ 345A.16, 345A.17].

Statewide rule provisions relating to the format, content, and service of discovery papers and motions, and to discovery sanctions, are set out in *Cal. Rules of Ct., Rule 3.1000*, 3.1345, 3.1346, 3.1347, 3.1348, and 3.768.

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-194 California Forms of Pleading and Practice--Annotated § 194.11

§ 194.11 Purpose of Interrogatories

The general effect of an answer to an interrogatory is to bind immediately and conclusively the answering party to the facts set forth in the reply [*Coy v. Superior Court (1962) 58 Cal. 2d 210, 219, 23 Cal. Rptr. 393, 373 P.2d 457* (purpose of interrogatory different from deposition); *see Campain v. Safeway Stores, Inc. (1972) 29 Cal. App. 3d 362, 366, 104 Cal. Rptr. 752* ; *but see Weiss v. Baba (1963) 218 Cal. App. 2d 45, 50, 32 Cal. Rptr. 137* (party not precluded from presenting evidence at variance with answers to interrogatories)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUse

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16-194 California Forms of Pleading and Practice--Annotated § 194.12

§ 194.12 Matters Discoverable by Interrogatory

[1] In General

Any party may obtain discovery within the scope fixed by *Code Civ. Proc. § 2017.010 et seq.*, and subject to the restrictions set forth in *Code Civ. Proc. § 2019.010 et seq.*, by propounding to any other party to the action written interrogatories to be answered under oath [*Code Civ. Proc. § 2030.010(a)*].

The general scope of discovery permits the discovery of any matter that is not privileged so long as it is relevant to the subject matter [*Code Civ. Proc. § 2017.010*]. For detailed discussion of scope under *Code Civ. Proc. § 2017.010 et seq.*, and the general restrictions or regulatory provisions of *Code Civ. Proc. § 2019.010 et seq.*, see respectively Ch. 190, *Discovery: Scope, Regulation, and Timing* , § 190.20 et seq. and § 190.30 et seq. For detailed discussion of privileges and other protections against disclosure, such as the attorney work product protection of *Code Civ. Proc. § 2018.010 et seq.*, see Ch. 191, *Discovery: Privileges and Other Discovery Limitations* .

[2] Contentions and Facts

An interrogatory may relate to whether another party is making a certain contention, or to the facts, witnesses, and writings on which a contention is based. An interrogatory is not objectionable because an answer to it involves an opinion or contention that relates to fact or the application of law to fact, or would be based on information obtained or legal theories developed in anticipation of litigation or in preparation for trial [*Code Civ. Proc. § 2030.010(b)*, codifying holding in *Burke v. Superior Court (1969) 71 Cal. 2d 276, 284-285, 78 Cal. Rptr. 481, 455 P.2d 409]* .

However, interrogatories calling for a defendant to state legal arguments, conclusions, or opinions, such as an explanation of how a complaint failed to state facts sufficient to constitute a cause of action, how there was misjoinder of defendants, and how the complaint was ambiguous and unintelligible, are improper [*Flora Crane Serv., Inc. v. Superior Court (1965) 234 Cal. App. 2d 767, 781, 45 Cal. Rptr. 79]* .

[3] Witnesses

[a] Nonexpert Witnesses

Interrogatories requesting names and addresses of persons having knowledge of relevant facts or of percipient witnesses are proper. However, a complete list of nonexpert witnesses designated by the attorney to testify at trial is a derivative product developed as a result of the initiative of counsel in preparing for trial. Forced revelation of the list would violate the work product doctrine because counsel's decision in this respect is strategic and necessarily reflects counsel's evaluation of the strengths and weaknesses of the case [*City of Long Beach v. Superior Court (1976) 64 Cal. App. 3d 65, 72-73, 134 Cal. Rptr. 468]* . Moreover, requiring the attorney to describe the extent of the expected testimony of the witnesses clearly calls for production of a writing reflecting the attorney's impressions, conclusions, and opinions. The material therefore is protected absolutely from disclosure under the attorney work product doctrine [*City of Long Beach v. Superior Court (1976) 64 Cal. App. 3d 65, 80, 134 Cal. Rptr. 468* ; *see also* discussion of work product protection in Ch. 191, *Discovery: Privileges and Other Discovery Limitations*, § 191.100 et seq.].

[b] Expert Witnesses

Discovery concerning expert witnesses is available through a procedure for simultaneous exchange of expert witness information [*see Code Civ. Proc. § 2034.010 et seq.*]. For discussion and forms relating to this exchange procedure, see Ch. 198, *Discovery: Exchange of Expert Witness Information* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-194 California Forms of Pleading and Practice--Annotated § 194.13

§ 194.13 Time for Propounding Interrogatories

A defendant may propound interrogatories to a party to the action without leave of court at any time [*Code Civ. Proc. § 2030.020(a)*].

A plaintiff may propound interrogatories to a party without leave of court at any time that is 10 days (five days in unlawful detainer proceedings or other proceedings under *Code Civ. Proc. § 1159 et seq.*, governing forcible entry and detainer) after the service of the summons on, or appearance by, that party, whichever occurs first. However, on motion with or without notice, the court, for good cause shown, may grant leave to a plaintiff to propound interrogatories at an earlier time [*Code Civ. Proc. § 2030.020*]. For forms for use in obtaining an order authorizing early service of interrogatories, see *§§ 194.80, 194.81*. For a procedure checklist relating to this proceeding, see *§ 194.60[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUse

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§ 194.14 Number of Interrogatories

[1] General Restriction on Number

A party may propound to another party 35 specially prepared interrogatories, and any additional number of official form interrogatories, as described in *Code Civ. Proc. § 2033.710 et seq.*, that are relevant to the subject matter of the pending action [*Code Civ. Proc. § 2030.030(a)*]. Except as provided in *Code Civ. Proc. § 2030.070* (supplemental interrogatories), no party may, as a matter of right, propound to any other party more than 35 specially prepared interrogatories. If the initial set of interrogatories does not exhaust this limit, the balance may be propounded in subsequent sets. Unless a declaration as described in *Code Civ. Proc. § 2030.050* has been made, a party need only respond to the first 35 specially prepared interrogatories served, if that party states an objection to the balance, under *Code Civ. Proc. § 2030.240*, on the ground that the limit has been exceeded [*Code Civ. Proc. § 2030.030(b), (c)*].

[2] Greater Number When Warranted

Subject to the right of the responding party to seek a protective order under *Code Civ. Proc. § 2030.090*, any party who attaches a supporting declaration as described in *Code Civ. Proc. § 2030.050* may propound a greater number of specially prepared interrogatories to another party if this greater number is warranted because of any of the following [*Code Civ. Proc. § 2030.040(a)*]:

- The complexity or the quantity of the existing and potential issues in the particular case.
- The financial burden on a party entailed in conducting the discovery by oral deposition.
- The expedience of using this method of discovery to provide to the responding party the opportunity to conduct an inquiry, investigation, or search of files or records to supply the information sought.

Any party who is propounding, or has propounded, more than 35 specially prepared interrogatories to any other party must attach to each set of interrogatories a declaration for additional discovery [*Code Civ. Proc. § 2030.050*; *see § 194.82*].

[3] Supplemental Interrogatories

In addition to the number of interrogatories permitted by *Code Civ. Proc. §§ 2030.030* and *2030.040*, a party may propound a supplemental interrogatory to elicit any later-acquired information bearing on all answers previously made by any party in response to interrogatories [*Code Civ. Proc. § 2030.070(a)*]. The party may propound such supplemental interrogatories as follows [*Code Civ. Proc. § 2030.070(b)*]:

- Twice prior to the initial setting of a trial date.

- Once after the initial setting of a trial date, subject to the time limits on discovery proceedings and motions provided in *Code Civ. Proc. § 2024.010 et seq.*

On motion, for good cause shown, the court may grant leave to a party to propound an additional number of supplemental interrogatories [*Code Civ. Proc. § 2030.070(c)*].

For discussion and forms relating to the general time provisions of *Code Civ. Proc. § 2024.010 et seq.*, see *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.50 et seq. and § 190.90* et seq.

[4] Restriction on Number in Limited Civil Cases

The number of interrogatories or sets of interrogatories is further restricted in limited civil cases [*see Code Civ. Proc. § 91*]. In these cases, a party may use, as to any adverse party, a combination of 35 of the following forms of discovery [*Code Civ. Proc. § 94(a)*]:

- Interrogatories (with no subparts) under *Code Civ. Proc. § 2030.010 et seq.*

- Demands to produce documents, things, or electronically stored information under *Code Civ. Proc. § 2031.010 et seq.* [*see* generally Ch. 195, *Discovery: Inspection of Tangible Evidence*].

- Requests for admission (with no subparts) under *Code Civ. Proc. § 2033.010 et seq.* [*see* Ch. 196, *Discovery: Requests for Admission*].

For further discussion of discovery in limited civil cases, see *Ch. 190, Discovery: Scope, Regulation, and Timing, §§ 190.11[2], 190.23*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-194 California Forms of Pleading and Practice--Annotated § 194.14A

§ 194.14A Format of Interrogatories

Each interrogatory must be full and complete in and of itself [*Code Civ. Proc. § 2030.060(d)*; *see Clement v. Alegre (2009) 177 Cal. App. 4th 1277, 1287-1290, 99 Cal. Rptr. 3d 791* (because interrogatories arguably did not exceed *Code Civ. Proc. § 2030.030(b)* specified limit of 35, referring to another answer did not violate requirement of *Code Civ. Proc. § 2030.060(d)* that questions be full and complete)]. Reference to other materials or documents or incorporation by reference of those materials is prohibited if the effect is to undermine the rule of 35 [*Catanese v. Superior Court (1996) 46 Cal. App. 4th 1159, 1165, 54 Cal. Rptr. 2d 280 , disapproved on other grounds, Lewis v. Superior Court (1999) 19 Cal.4th 1232, 1243-1244, 82 Cal. Rptr. 2d 85, 970 P.2d 872*]. A preface or instruction may not be included with a set of interrogatories unless it has been approved under *Code Civ. Proc. § 2033.710 et seq.* [*Code Civ. Proc. § 2030.060(d)*; *see Code Civ. Proc. § 2033.710* (Judicial Council authorized to develop and approve official form interrogatories for optional use in any civil action in California state court)].

Any term specially defined in a set of interrogatories must be typed with all letters capitalized whenever that term appears [*Code Civ. Proc. § 2030.060(e)*]. No specially prepared interrogatory may contain subparts or a compound, conjunctive, or disjunctive question [*Code Civ. Proc. § 2030.060(e), (f)*; *see Clement v. Alegre (2009) 177 Cal. App. 4th 1277, 1291, 99 Cal. Rptr. 3d 791* (because interrogatories did not arguably exceed *Code Civ. Proc. § 2030.030(b)* specified limit of 35, referring to another answer did not violate prohibition of *Code Civ. Proc. § 2030.060(f)* against compound, conjunctive, or disjunctive questions].

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16-194 California Forms of Pleading and Practice--Annotated § 194.15

§ 194.15 Service of Interrogatories

The party propounding interrogatories must serve a copy of them on the party to whom they are directed [*Code Civ. Proc. § 2030.080(a)*].

The party propounding interrogatories must also serve copies on all other parties who have appeared in the action, unless the court on motion with or without notice has relieved that party from this requirement on its determination that service on all other parties would be unduly expensive or burdensome [*Code Civ. Proc. § 2030.080(b)*]. For a form for an application by a plaintiff for an order shortening the time within he or she may first serve interrogatories on another party, which includes a request to be relieved of the requirement of serving copies on all other parties, see *§ 194.80*.

In a class action, a party may not serve interrogatories on a member of a class who is not a party representative or who has not appeared without a court order [*Cal. Rules of Ct., Rule 3.768*].

Legal Topics:

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

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16-194 California Forms of Pleading and Practice--Annotated § 194.15A

§ 194.15A Retention of Interrogatories

Interrogatories may not be filed with the court, unless offered as relevant under a law and motion proceeding or other hearing or ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(8)*]. Instead, the serving party retains the original and the proof of service until six months after final disposition of the cause, unless otherwise ordered by the court for cause [*Code Civ. Proc. § 2030.280*; *Cal. Rules of Ct., Rule 3.250(b)*].

Legal Topics:

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

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16-194 California Forms of Pleading and Practice--Annotated § 194.16

§ 194.16 Response to Interrogatories

[1] Content of Response

The party to whom interrogatories have been propounded must respond in writing, under oath [*Code Civ. Proc. § 2030.210(a)*; for further discussion of oath requirement, *see* [5], *below*].

Code Civ. Proc. § 2030.210(a) requires a responding party to respond "separately to each interrogatory." Unlike *Code Civ. Proc. § 2031.210(a)(2)*, which permits a party to respond to a demand for inspection, copying, testing, or sampling with a representation that the party lacks the ability to comply with the demand, *Code Civ. Proc. § 2030.210(a)* requires a party responding to interrogatories to provide either an answer containing the information sought [*Code Civ. Proc. § 2030.210(a)(1)*; *see § 194.16[2]*], an exercise of the party's option to produce writings from which the answer can be ascertained [*Code Civ. Proc. § 2030.210(a)(2)*; *see § 194.16[3]*], or an objection to the particular interrogatory [*Code Civ. Proc., § 2030.210(a)(3)*; *see § 194.16[4]*]. Accordingly, a party generally may not respond to interrogatories simply by asserting its inability to respond [*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants (2007) 148 Cal. App. 4th 390, 406, 55 Cal. Rptr. 3d 751]* .

In the first paragraph of the response, immediately below the title of the case, there must appear the identity of the responding party, the set number, and the identity of the propounding party [*Code Civ. Proc. § 2030.210(b)*].

The responding party must respond separately to each interrogatory by providing one of the following [*Code Civ. Proc. § 2030.210(a)*]:

- An answer containing the information sought to be discovered [*see also* further discussion of answers in [2], *below*].

- An exercise of the party's option to produce writings [*see also* further discussion of this option in [3], *below*].

- An objection to the particular interrogatory [*see also* further discussion of objections in [4], *below*,

and in § 194.17].

Each answer, exercise of option, or objection in the response must bear the same number and be in the same sequence as the corresponding interrogatory, but the text of that interrogatory need not be repeated [*Code Civ. Proc. § 2030.210(c)*].

For a form for a response, see *§ 194.94*. For procedural checklists relating to the preparation and service of a response to interrogatories, see *§ 194.70* et seq.

[2] Response by Answer

Each answer in the response must be as complete and straightforward as the information reasonably available to the responding party permits. If an interrogatory cannot be answered completely, it must be answered to the extent possible. If the responding party does not have personal knowledge sufficient to respond fully to an interrogatory, that party must so state, but must make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, except when the information is equally available to the propounding party [*Code Civ. Proc. § 2030.220*; *see West v. Johnson & Johnson Products, Inc. (1985) 174 Cal. App. 3d 831, 874, 220 Cal. Rptr. 437* (decided under prior discovery act)].

A responding party has no duty to supplement his or her responses to interrogatories on the receipt of new information, absent an order compelling further answers, regardless of whether the party reserved the right to amend or supplement his or her earlier responses [*Biles v. Exxon Mobil Corp. (2004) 124 Cal. App. 4th 1315, 1328, 22 Cal. Rptr. 3d 282]* (failure to supplement interrogatory answer promptly did not constitute grounds for excluding evidence under former *Code Civ. Proc. § 2030(k), (l)* [*now see Code Civ. Proc. § 2030.290(c), 2030.300(e)*], when no order compelling further answers had been sought or entered, and trial court made no finding that initial responses were willfully false); *accord Browne v. Turner Constr. Co. (2005) 127 Cal. App. 4th 1334, 1349, 26 Cal. Rptr. 3d 433* ("There is no statutory duty in California to supplement interrogatory responses... . Even if plaintiff had violated a duty to supplement his responses it would not ordinarily justify the exclusion of evidence in the absence of a *willful* violation of an *order* for disclosure," citing *Biles*)].

[3] Response by Referral to Specific Writings

If the answer to an interrogatory would necessitate the preparation or the making of a compilation, abstract, audit, or summary of or from the documents of the party to whom the interrogatory is directed, and if the burden or expense of preparing or making it would be substantially the same for the party propounding the interrogatory as for the responding party, referring to *Code Civ. Proc. § 2030.230* and specifying the documents from which the answer may be derived or ascertained is a sufficient answer [*Code Civ. Proc. § 2030.230*].

This specification must be in sufficient detail to permit the propounding party to locate and to identify, as readily as the responding party can, the documents from which the answer may be ascertained. The responding party then must afford to the propounding party a reasonable opportunity to examine, audit, or inspect these documents and to make copies, compilations, abstracts, or summaries of them [*Code Civ. Proc. § 2030.230*].

By specifying the records from which an answer may be derived or ascertained, the answering party in essence declares that the information in the records is true, accurate, and complete and that no other information is available to the answering party [*Deyo v. Kilbourne (1978) 84 Cal. App. 3d 771, 784, 149 Cal. Rptr. 499* ; *Kaiser Foundation Hosp. v. Superior Court (1969) 275 Cal. App. 2d 801, 805, 80 Cal. Rptr. 263* (prior law)].

[4] Response by Objection

If only a part of an interrogatory is objectionable, the remainder of the interrogatory must be answered. If an objection is

made to an interrogatory or to a part of an interrogatory, the specific ground for the objection must be set forth clearly in the response [*Code Civ. Proc. § 2030.240*].

If an objection is based on a claim of privilege, the particular privilege invoked must be clearly stated. If an objection is based on a claim that the information sought is protected work product under *Code Civ. Proc. § 2018.010 et seq.*, that claim must be expressly asserted [*Code Civ. Proc. § 2030.240(b)*]. A responding party may object to an interrogatory that seeks privileged *information* by clearly stating the objection and the particular privilege invoked. However, the *existence* of a document containing privileged information is not privileged [*Hernandez v. Superior Court (2003) 112 Cal. App. 4th 285, 293, 4 Cal. Rptr. 3d 883* (plaintiffs had no right to refuse to identify documents in response to interrogatories, even though trial court's order to compel further responses incorrectly characterized required response as "privilege log," when court adequately explained its ruling in oral proceedings)].

Note that *Code Civ. Proc. § 2030.290* does not authorize a waiver of a claim of privilege or work product protection based on the use of boilerplate objections, provided the response to interrogatories is timely filed and complies with *Code Civ. Proc. § 2030.240* [*Best Products, Inc. v. Superior Court (2004) 119 Cal. App. 4th 1181, 1189, 15 Cal. Rptr. 3d 154* (defendant's failure to provide a privilege log did not constitute waiver of its right to assert attorney-client privilege and work product protection in regard to interrogatories propounded by plaintiff, when defendant provided timely, albeit boilerplate, response); *see Korea Data Systems v. Superior Court (1997) 51 Cal. App. 4th 1513, 1517, 59 Cal. Rptr. 2d 925* (construing pre-1986 *Code Civ. Proc. § 2031(k), now see Code Civ. Proc. § 2031.300*); *see, e.g., People ex rel. Lockyer v. Superior Court (2004) 122 Cal. App. 4th 1060, 1075, 19 Cal. Rptr. 3d 324* (relying on Best Product and Korea Data to hold that in discovery dispute, deficient objections or claims of privilege are not grounds for waiver, so long as party raised timely objections under former *Code Civ. Proc. § 2031(g)(3)* (*now see Code Civ. Proc. § 2031.240*) on grounds of privilege in its original response)].

If an objection is made to an interrogatory on the ground that it exceeds the limit on the number of specially prepared interrogatories specified in *Code Civ. Proc. § 2030.030*, the objection need only state that the propounding party has exceeded that limit [*see Code Civ. Proc. § 2030.030*].

For further discussion of specific objections, see *§ 194.17*.

[5] Signature Under Oath

The party to whom the interrogatories are directed must sign the response under oath, unless the response contains only objections. If that party is a public or private corporation, or a partnership, association, or governmental agency, one of its officers or agents must sign the response under oath on behalf of that party. If the officer or agent signing the response on behalf of that party is an attorney acting in that capacity for the party, that party waives any lawyer-client privilege and any protection for work product under *Code Civ. Proc. § 2018.010 et seq.* during any subsequent discovery from that attorney concerning the identity of the sources of the information contained in the response. The attorney for the responding party must sign any responses that contain an objection [*Code Civ. Proc. § 2030.250*]. For discussion of work product protection, see *Ch. 191, Discovery: Privileges and Other Discovery Limitations, § 191.100* et seq.

When the party to whom the interrogatories have been directed is incompetent and represented by a guardian ad litem, that guardian has the authority, subject to the court's ultimate supervision, to verify proper responses to those interrogatories on behalf of the ward [*Regency Health Services, Inc. v. Superior Court (1998) 64 Cal. App. 4th 1496, 1504-1505, 76 Cal. Rptr. 2d 95]* .

[6] Service of Response

[a] General Service Requirements

Within 30 days after service of interrogatories, the party to whom the interrogatories are propounded must serve the original of the response on the propounding party, unless on motion of the propounding party the court has shortened the time for response, or on motion of the responding party, the court has extended the time for response [*Code Civ. Proc. § 2030.260(a)*].

In unlawful detainer actions or other proceedings under *Code Civ. Proc. § 1159 et seq.* (governing forcible entry and detainer), the party to whom the interrogatories are propounded has five days from the date of service to respond, unless on motion of the propounding party the court has shortened the time for response, or unless on motion of the responding party the court has extended the time for response [*Code Civ. Proc. § 2030.260(b)*].

If the interrogatories were served by mail, the response period is extended by five calendar days if the place of address is within California, by 10 calendar days if the place of address is outside California but within the United States, or by 20 calendar days if the place of address is outside the United States [*see Code Civ. Proc. §§ 1013(a), 2016.050*]. The response period is extended two court days if service is by Express Mail or by fax [*see Code Civ. Proc. § 1013(c), (e)*].

The party to whom the interrogatories are propounded must also serve a copy of the response on all other parties who have appeared in the action, unless the court, on motion with or without notice, has relieved that party from this requirement on its determination that service on all other parties would be unduly expensive or burdensome [*Code Civ. Proc. § 2030.260(c)*].

For a form for a motion for use to extend the time for response, see *§ 194.90*. For a procedural checklist relating to this motion, see *§ 194.70[1]*. For a form for a request for relief from the requirement to serve all parties with a copy of interrogatories, which may be adapted for use in requesting similar relief from the requirement to serve all parties with a copy of the response, see *§ 194.80*.

[b] Agreement to Extend Time for Service of Response

In lieu of the motion proceeding for an extension of time in serving a response, discussed in [a], *above*, the party propounding interrogatories and the responding party may agree to extend the time for service of a response to a set of interrogatories, or to particular interrogatories in a set, to a date beyond that provided in *Code Civ. Proc. § 2030.260*. The agreement may be informal, but it must be confirmed in a writing that specifies the extended date for service of a response. Unless this agreement expressly states otherwise, it is effective to preserve to the responding party the right to respond to any interrogatory to which the agreement applies in any manner specified in *Code Civ. Proc. §§ 2030.210-2030.240* [*Code Civ. Proc. § 2030.270*].

An agreement to extend the time for response to interrogatories may not be filed unless it is offered as relevant to the determination of an issue in a law and motion proceeding or other hearing, or is ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(7)*]. The original of the agreement must be retained until six months after final disposition of the case, unless the court on motion of any party and for good cause shown orders the agreement preserved for a longer period [*Cal. Rules of Ct., Rule 3.250(b)*].

[7] Retention of Responses or Objections to Interrogatories

Responses or objections to interrogatories may not be filed with the court, unless offered as relevant under a law and motion proceeding orother hearing or ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(8)*]. Instead, the serving party retains the original and the proof of service until six months after final disposition of the cause, unless otherwise ordered by the court for cause [*Code Civ. Proc. § 2030.280*; *Cal. Rules of Ct., Rule 3.250(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewEvidenceProcedural ConsiderationsObjections & Offers of ProofObjections

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§ 194.17 Specific Proper or Improper Objections

[1] Interrogatory Onerous or Oppressive

Although it appears that the proper procedure to be followed to protect a party from annoyance, expense, embarrassment, or oppression in interrogatories is a motion for a protective order under *Code Civ. Proc. § 2030.090*, the courts will apparently consider objections to interrogatories on the grounds of oppression or burden in some situations. Objections that interrogatories are oppressive and burdensome are valid only if a burden results in injustice. The trial court does not have power to sustain the objection unless that is the only method of rendering substantial justice [*see West Pico Furniture Co. v. Superior Court (1961) 56 Cal. 2d 407, 417-418, 15 Cal. Rptr. 119, 364 P.2d 295* ; *Pantzalas v. Superior Court (1969) 272 Cal. App. 2d 499, 504, 77 Cal. Rptr. 354* (necessary to show work required to answer interrogatory)].

[2] Interrogatory Not Relevant

An objection that a question calls for information not relevant to the subject matter of an action and not likely to lead to the discovery of admissible evidence is proper [*Deaile v. General Telephone Co. of California (1974) 40 Cal. App. 3d 841, 851, 115 Cal. Rptr. 582* ; *see Code Civ. Proc. § 2017.010* (relevance requirement for discovery generally)]. However, irrelevance or immateriality to issues of a case are not proper objections [*Coy v. Superior Court (1962) 58 Cal. 2d 210, 217, 23 Cal. Rptr. 393, 373 P.2d 457]* . The test is relevance to the subject matter [*Darbee v. Superior Court (1962) 208 Cal. App. 2d 680, 685, 25 Cal. Rptr. 520]* .

For detailed discussion of relevance to the subject matter as it relates to the general scope of discovery, see *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.20* et seq.]. For discussion of evidentiary relevance generally, see California Trial Guide, Ch. 22 (Matthew Bender).

[3] Answer to Interrogatory Given Previously

A party may not refuse to answer interrogatories solely because the requested information was given in previous depositions or trials, unless requiring a reply would be unjust and inequitable [*Bunnell v. Superior Court (1967) 254 Cal. App. 2d 720, 723-724, 62 Cal. Rptr. 458]* .

[4] Interrogatory Calls for Hearsay

Discoverable evidence does not have to be admissible; hence an objection that an interrogatory calls for hearsay evidence is improper [*Smith v. Superior Court (1961) 189 Cal. App. 2d 6, 12, 11 Cal. Rptr. 165]* .

[5] Interrogatory Calls for Opinion or Conclusion

The fact that an interrogatory calls for an opinion or conclusion is not a proper objection if it prevents the propounding party from obtaining information leading to probative facts [*West Pico Furniture Co. v. Superior Court (1961) 56 Cal. 2d 407, 417, 15 Cal. Rptr. 119, 364 P.2d 295* ; *Sheets v. Superior Court (1967) 257 Cal. App. 2d 1, 13, 64 Cal. Rptr. 753]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 194.18 Effect of Failure to Serve Timely Response

[1] Waiver of Objections

If a party to whom interrogatories have been directed fails to serve a timely response, that party waives any right to exercise the option to produce writings under *Code Civ. Proc. § 2030.230*, as well as any objection to the interrogatories, including one based on privilege or on the protection for work product under *Code Civ. Proc. § 2018.010 et seq.* [*Code Civ. Proc. § 2030.290*; *see also* discussion in *Ch. 191, Discovery: Privileges and Other Discovery Limitations, § 191.15[1]*].

[2] Motion for Relief From Waiver

The court, on motion, may relieve a party from the waiver of an objection due to an untimely response, on its determination of the following [*Code Civ. Proc. § 2030.290(a)*]:

- That the party subsequently served a response to the interrogatories in substantial compliance with *Code Civ. Proc. §§ 2030.210-2030.240*.

- That the party's failure to serve a timely response to the interrogatories was the result of mistake, inadvertence, or excusable neglect.

For a form for a motion for use in obtaining an order for relief from waiver of an objection for untimely response, see *§ 194.92*. For a procedural checklist relating to this motion, see *§ 194.72*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductWaiversEvidencePrivilegesGeneral Overview

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§ 194.19 Motion to Compel Response

The party propounding the interrogatories may move for an order compelling response to the interrogatories. [*Code Civ. Proc. § 2030.290(b)*]. Unlike a motion to compel *further* responses (*see § 194.20*), a motion to compel responses is not subject to a 45-day time limit, and the propounding party does not have to demonstrate either good cause or that it satisfied a "meet-and-confer" requirement [*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants (2007) 148 Cal. App. 4th 390, 411, 55 Cal. Rptr. 3d 751* (monetary sanction under *Code Civ. Proc. §§ 2030.290(c), 2023.030* was proper for violation of order compelling responses; neither a 45-day limit nor meet-and-confer requirement applied); *cf. Code Civ. Proc. § 2030.290 with Code Civ. Proc. § 2030.300*].

Thus, once a party has failed to serve timely interrogatory responses, the trial court has the authority to hear a propounding party's motion to compel responses under *Code Civ. Proc. § 2030.290(b)*, regardless of whether a party serves an untimely response [*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants (2007) 148 Cal. App. 4th 390, 408, 55 Cal. Rptr. 3d 751* (trial court was not divested of authority to hear and grant motion to compel responses under *Code Civ. Proc. § 2030.290(b)* by untimely service of incomplete interrogatories)]. Moreover, a response to some interrogatories does not divest a trial court of authority under *Code Civ. Proc. § 2030.290* to compel answers to those interrogatories for which there was no appropriate response [*Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants (2007) 148 Cal. App. 4th 390, 406, 55 Cal. Rptr. 3d 751]* .

Any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response to interrogatories will be subject to a monetary sanction under *Code Civ. Proc. § 2023.030* unless the court finds that the one subject to the sanctionacted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2030.290*]. In addition, if that party subsequently disobeys the court's order compelling a response, the trial court may then "make those orders that are just," including the imposition of an issue sanction, an evidence sanction, or a terminating sanction. "In lieu or in addition" to any of those sanctions, the trial court "may impose a monetary sanction under" *Code Civ. Proc. § 2023.030* [*Code Civ. Proc. §§ 2030.290(c)* 2031.300(c); *see § 194.21*].

For a form for a motion to compel a response to interrogatories, see *§ 194.100*. For a procedural checklist for use in making the motion, see *§ 194.61[1]*. For further discussion of monetary sanctions under *Code Civ. Proc. § 2023.030*, to be imposed on a party who unsuccessfully makes or opposes a discovery motion such as a motion to compel responses

to interrogatories, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMotions to Compel

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§ 194.20 Motion to Compel Further Response

[1] Grounds

The propounding party, on receipt of a response to interrogatories, may move for an order compelling a further response when that party deems the response to include one or more of the following [*Code Civ. Proc. § 2030.300(a)*]:

- An answer to a particular interrogatory that is evasive or incomplete [for further discussion of response by answer, *see § 194.16[1], [2]*].

- An exercise of the option to produce documents under *Code Civ. Proc. § 2030.230* that is unwarranted or a required specification of documents that is inadequate [for further discussion of response by referral to documents, *see § 194.16[1], [3]*].

- An objection to an interrogatory that is without merit or too general [for further discussion of response by objection, *see §§ 194.16[1], [4], 194.17*].

The motion must be accompanied by a declaration stating facts that show a reasonable and good faith attempt at an informal resolution of any issue presented by it [*Code Civ. Proc. § 2030.300(b)*; for further discussion of this requirement, see generally *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*]. The motion must also be accompanied by a separate statement that provides all the information necessary to determine the issues presented, without reference to other documents [*see Cal. Rules of Ct., Rule 3.1345*; *see § 194.103*].

For a form for a motion to compel a further response to interrogatories, see *§ 194.102*. For a procedural checklist for use in making the motion, see *§ 194.61[3]*.

[2] Time Limit for Motion to Compel Further Response

Unless notice of motion is given within 45 days of the service of the response, or any supplemental response, or on or before any specific later date to which the propounding party and the responding party have agreed in writing, the propounding party waives any right to compel a further response to the interrogatories [*Code Civ. Proc. § 2030.300(c)*;

see, e.g., O'Brien v. Superior Court (1965) 233 Cal. App. 2d 388, 391, 43 Cal. Rptr. 815 (construing similar language under pre-1986 *Code Civ. Proc. § 2030* and holding that party making untimely service of motion to compel further response waived right to such order)].

If a response or any supplemental response was served by mail, this 45-day period is extended five calendar days if the place of address is within California, 10 calendar days if the place of address is outside California but within the United States, or 20 calendar days if the place of address is outside the United States [*see Code Civ. Proc. § 1013(a)*]. The period is extended two court days if service is by Express Mail or by fax [*see Code Civ. Proc. § 1013(c), (e)*; *see also Code Civ. Proc. § 2016.050* (*Code Civ. Proc. § 1013* applies to service of discovery motions)].

The 45-day time limit applies to the time for giving notice of a motion to compel a further response. Thus it imposes a deadline for serving notice of the motion, and not a deadline for filing the motion [*see Karz v. Karl (1982) 137 Cal. App. 3d 637, 646-647, 187 Cal. Rptr. 183* (construing similar language in pre-1986 *Code Civ. Proc. § 2030*)].

A party may not avoid the consequences of failing to meet the notice requirement of former *Code Civ. Proc. § 2030(1)* (*now see Code Civ. Proc. § 2030.300*) by propounding the same question again in a later set of interrogatories [*Professional Career Colleges, Magna Institute, Inc. v. Superior Court (1989) 207 Cal. App. 3d 490, 493-494, 255 Cal. Rptr. 5]* .

[3] Burden of Proof

On a motion to compel further response, the responding party has the burden of establishing a valid objection [*Coy v. Superior Court (1962) 58 Cal. 2d 210, 220, 23 Cal. Rptr. 393, 373 P.2d 457]* .

[4] Monetary Sanction Imposed by Order on Motion

The court must impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a further response to interrogatories, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2030.300(d)*; for further discussion of this general provision, *see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[2]*].

The court may award sanctions in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed [*Cal. Rules of Ct., Rule 3.1348*]. The court may not, however, deem the opposing party's failure to file written opposition, failure to appear at a hearing, or voluntary provision discovery to be an admission that the motion was proper or that sanctions should be awarded [*Cal. Rules of Ct., Rule 3.1348*].

For more detailed discussion of monetary sanctions generally, including requirements generally applicable in proceedings to impose such sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to CompelEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

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16-194 California Forms of Pleading and Practice--Annotated § 194.21

§ 194.21 Issue, Evidence, or Terminating Sanction on Failure to Comply With Order Compelling Response or Further Response

If a party fails to obey an order compelling response or further response to interrogatories, the court may make those orders that are just, including the imposition of an issue, evidence, or terminating sanction under *Code Civ. Proc. § 2023.010 et seq.* In lieu of, or in addition to, that sanction, the court may impose a monetary sanction pursuant to *Code Civ. Proc. § 2023.030* [*Code Civ. Proc. §§ 2030.290(c)* (failure to obey order compelling response), 2030.300(e) (failure to obey order compelling further response); *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants (2007) 148 Cal. App. 4th 390, 411-412* (violation of order compelling responses was proper basis for monetary sanction under *Code Civ. Proc. §§ 2030.290(c), 2023.030*, citing *Laguna Auto Body*); *Laguna Auto Body v. Farmers Ins. Exchange (1991) 231 Cal. App. 3d 481, 486-489, 282 Cal. Rptr. 530* , disapproved on other grounds in *Garcia v. McCutchen (1997) 16 Cal. 4th 469, 478, n.4, 66 Cal. Rptr. 2d 319, 940 P.2d 906* (no abuse of discretion in ordering dismissal as sanction when appellants willfully obstructed discovery, failed to honor their stipulation with opposing counsel that they would comply with discovery, and defied court order to answer all interrogatories and produce documents)].

However, the failure to supplement an interrogatory answer promptly did not constitute grounds for excluding evidence under former *Code Civ. Proc. § 2030(k), (l)* [*now see Code Civ. Proc. § 2030.290(c), 2030.300(e)*], when no order compelling further answers had been sought or entered, and trial court made no finding that the initial responses were willfully false [*Biles v. Exxon Mobil Corp. (2004) 124 Cal. App. 4th 1315, 1325, 1327, 22 Cal. Rptr. 3d 282* ; *accord Browne v. Turner Constr. Co. (2005) 127 Cal. App. 4th 1334, 1349, 26 Cal. Rptr. 3d 433* (citing *Biles* as debunking that "urban legend" that "a responding party has an affirmative duty to supplement responses to interrogatories if and when new information comes into that party's possession")].

For further discussion regarding issue, evidence, and terminating sanctions, and general forms for use in seeking such sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[3], 192.15[3]*, and *192.50* et seq. For further discussion regarding monetary sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*. For a procedural checklist for use in making a motion for sanctions on failure to obey an order compelling a response to interrogatories, see *§ 194.61[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMisconductEvidenceProcedural ConsiderationsObjections & Offers of ProofGeneral Overview

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[Reserved]

§ 194.22[Reserved]

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16-194 California Forms of Pleading and Practice--Annotated § 194.23

§ 194.23 Protective Orders

[1] Motion by Responding Party or Other Affected Person

When interrogatories have been propounded, the responding party and any other party or affected natural person or organization may promptly move for a protective order [*Code Civ. Proc. § 2030.090(a)*]. The types of protective orders that a court may issue in the context of interrogatories are discussed in [2], *below*.

The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by the motion [*Code Civ. Proc. § 2030.090(a)*; for further discussion of this requirement, *see generally Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*].

For a form for a motion for a protective order, see *§ 194.95*. For procedural checklists for use in connection with such motions, see *§ 194.71*.

[2] Types of Protective Orders

The court, for good cause shown, may make any order that justice requires to protect any party or other natural person or organization from unwarranted annoyance, embarrassment, or oppression, or from undue burden and expense. The protective order may include, but is not limited to, one or more of the following directions [*Code Civ. Proc. § 2030.090(b)*]:

- That the set of interrogatories, or particular interrogatories in the set, need not be answered [*Code Civ. Proc. § 2030.090(b)(1)*].

- That, contrary to the representations made in a declaration for additional discovery submitted under *Code Civ. Proc. § 2030.050*, the number of specially prepared interrogatories is unwarranted [*Code Civ. Proc. § 2030.090(b)(2)*; for discussion of burden in seeking such order, *see* [3], *below*; for discussion regarding declaration for additional discovery, *see § 194.14[2]*].

- That the time specified in *Code Civ. Proc. § 2030.260* to respond to the set of interrogatories, or to

particular interrogatories in the set, be extended [*Code Civ. Proc. § 2030.090(b)(3)*].

- That the response be made only on specified terms and conditions [*Code Civ. Proc. § 2030.090(b)(4)*].

- That the method of discovery be an oral deposition instead of interrogatories to a party [*Code Civ. Proc. § 2030.090(b)(5)*].

- That a trade secret or other confidential research development or commercial information not be disclosed or be disclosed only in a certain way [*Code Civ. Proc. § 2030.090(b)(6)*; *see, e.g., Fireman's Fund Insurance Co. v. Superior Court (1991) 233 Cal. App. 3d 1138, 1140-1141, 286 Cal. Rptr. 50* (issue raised in response to motion to compel rather than by motion seeking protective order)].

- That some or all of the answers to interrogatories be sealed and thereafter opened only on order of the court [*Code Civ. Proc. § 2030.090(b)(7)*].

[3] Burden of Justifying Number of Specially Prepared Interrogatories

If the responding party seeks a protective order on the ground that the number of specially prepared interrogatories is unwarranted, the propounding party shall have the burden of justifying the number of these interrogatories [*Code Civ. Proc. § 2030.040*].

[4] Terms of Discovery on Denial of Motion for Protective Order

If the motion for a protective order is denied in whole or in part, the court may order that the party provide or permit the discovery against which protection was sought on terms and conditions that are just [*Code Civ. Proc. § 2030.090(c)*].

[5] Monetary Sanction Imposed by Order on Motion

The court must impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances made the imposition of the sanction unjust [*Code Civ. Proc. § 2030.090(d)*].

For further discussion of monetary sanctions under *Code Civ. Proc. § 2023.030*, to be imposed on a party who unsuccessfully makes or opposes a discovery motion such as a motion for protective order, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryProtective OrdersEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

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16-194 California Forms of Pleading and Practice--Annotated § 194.24

§ 194.24 Amended Answers

[1] Grounds

Without leave of court, a party may serve an amended answer to any interrogatory that contains information discovered subsequent to, inadvertently omitted from, or mistakenly stated in the initial answer to the interrogatory [*Code Civ. Proc. § 2030.310(a)*].

[2] Use of Amended Answer at Trial

At the trial of the action, the propounding party or any other party may use the initial answer pursuant to *Code Civ. Proc. § 2030.410*, and the responding party may then use the amended answer [*Code Civ. Proc. § 2030.310(a)*]. For further discussion of the use of an initial answer at trial, see *§ 194.26*.

Legal Topics:

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

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§ 194.25 Motion to Deem Initial Answer Binding

[1] Grounds

The party who propounded an interrogatory to which an amended answer has been served may move for an order that the initial answer to that interrogatory be deemed binding on the responding party for the purpose of the pending action [*Code Civ. Proc. § 2030.310(b)*].

This motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [*Code Civ. Proc. § 2030.310(b)*; for further discussion of this requirement, see generally *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*].

The court must grant this motion if it determines all of the following [*Code Civ. Proc. § 2030.310(c)*]:

- The initial failure of the responding party to answer the interrogatory correctly has substantially prejudiced the party who propounded the interrogatory.

- The responding party has failed to show substantial justification for the initial answer to that interrogatory.

- The prejudice to the propounding party cannot be cured either by a continuance to permit further discovery or by the use of the initial answer pursuant to *Code Civ. Proc. § 2030.410* [*Code Civ. Proc. § 2030.310(c)*; *see* discussion in *§ 194.26*].

For a form for a motion that an initial answer be deemed binding, see *§ 194.105*. For a procedural checklist for use in making this motion, see *§ 194.62[2]*.

[2] Monetary Sanction Imposed by Order on Motion

The court may impose a monetary sanction pursuant to *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes a motion to deem binding an initial answer to an interrogatory, unless it

finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2030.310(d)*].

For further discussion of monetary sanctions under *Code Civ. Proc. § 2023.010 et seq.*, to be imposed on a party who unsuccessfully makes or opposes a discovery motion, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

Legal Topics:

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

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16-194 California Forms of Pleading and Practice--Annotated § 194.26

§ 194.26 Use of Answer at Trial or Hearing

At the trial or any other hearing in the action, so far as admissible under the rules of evidence, the propounding party or any party other than the responding party may use any answer or part of an answer to an interrogatory only against the responding party. It is not a ground for objection to the use of an answer to an interrogatory that the responding party is available to testify, has testified, or will testify at the trial or other hearing [*Code Civ. Proc. § 2030.410*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesFormEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral Overview

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16-194 California Forms of Pleading and Practice--Annotated §§ 194.27-194.39

[Reserved]

§§ 194.27[Reserved]

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PART III. RESEARCH GUIDE

16-194 California Forms of Pleading and Practice--Annotated § 194.40

§ 194.40 Matthew Bender Publications

For comprehensive discussion and forms relating to discovery by interrogatories under the California Civil Discovery Act and related California law, see DeMeo, California Deposition and Discovery Practice, Ch. 60, *Interrogatories* (Matthew Bender), and Hogan & Weber's, California Civil Discovery, Ch. 5, *Interrogatories to a Party* (Matthew Bender)

For memoranda relating to discovery by interrogatories under the California Civil Discovery Act and related California law, see California Points and Authorities , Ch. 84, *Discovery: Interrogatories* (Matthew Bender)

For discussion of and forms relating to interrogatories in various types of actions, see Bender's Forms of Discovery (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesForm

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§ 194.41 State Statutes

Restrictions on interrogatories in limited civil cases. *Code Civ. Proc. §§ 91, 94(a), 95*

Postjudgment interrogatories to judgment debtor. *Code Civ. Proc. §§ 708.010 et seq.*

Scope of discovery generally. *Code Civ. Proc. § 2017.010 et seq.*

Protective orders generally. *Code Civ. Proc. §§ 2017.020, 2019.030*

Extension of time when service by mail. *Code Civ. Proc. § 2016.050*

Sanctions generally. *Code Civ. Proc. § 2023.010 et seq.*

Time limits on discovery generally. *Code Civ. Proc. § 2024.010 et seq.*

Discovery by interrogatories. *Code Civ. Proc. § 2030.010 et seq.*

Official form interrogatories. *Code Civ. Proc. § 2033.710 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryProtective Orders

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16-194 California Forms of Pleading and Practice--Annotated § 194.42

§ 194.42 California Rules of Court

Format of supplemental and further interrogatories and responses. *Cal. Rules of Ct., Rule 3.1000*

Format of discovery motions; separate statement required to accompany motion to compel. *Cal. Rules of Ct., Rule 3.1345*

Service of motion papers on nonparty deponent. *Cal. Rules of Ct., Rule 3.1346*

Discovery motions in summary proceedings (unlawful detainer or other actions brought under *Code Civ. Proc. § 1159 et seq.*) involving possession of real property. *Cal. Rules of Court, Rule 3.1347*

Discovery sanctions; effect of lack of opposition to motion to compel. *Cal. Rules of Ct., Rule 3.1348*

Filing and retention of specified discovery papers relating to interrogatories. *Cal. Rules of Ct., Rule 3.250(a)(7), (8), (17), (18), (b)*

Discovery from unnamed class members in class action; interrogatories require court order. *Cal. Rules of Ct., Rule 3.768*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel

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16-194 California Forms of Pleading and Practice--Annotated § 194.43

§ 194.43 Local Court Rules

Use of interrogatories; responses; use of responses. Los Angeles Co. Super. Ct. Rules, Rules 7.12(g), 8.70

Legal Topics:

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

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16-194 California Forms of Pleading and Practice--Annotated § 194.44

§ 194.44 Decisions

[1] Class Actions

Defendant in class action has due process right to reasonable discovery, precluding blanket immunity to unnamed class members from obligation to respond to proper interrogatories. *Spoon v. Superior Court (1982) 130 Cal. App. 3d 735, 746, 182 Cal. Rptr. 44*

[2] Compelling Response to Interrogatories

Though nothing in discovery statutes requires trial court to make findings as basis of order granting or refusing right to have information disclosed, careful trial judge faced with questionable request for discovery should show basis of judge's determination. *Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 384, 15 Cal. Rptr. 90, 364 P.2d 266*

Trial court properly denied motion to compel further answers to interrogatories that sought information equally or more readily available to party seeking it than to party from whom it was sought. *Schaefer v. Manufacturers Bank (1980) 104 Cal. App. 3d 70, 75, 163 Cal. Rptr. 402*

Motion to compel further answers is properly denied if interrogatories stray too far and seek information that cannot reasonably serve acknowledged purpose of pretrial discovery. *Columbia Broadcasting Sys., Inc. v. Superior Court (1968) 263 Cal. App. 2d 12, 19, 69 Cal. Rptr. 348*

Order postponing party's answers relating to one issue until other party has first established another issue was improper. *Coffelt v. Superior Court (1967) 254 Cal. App. 2d 884, 887, 62 Cal. Rptr. 636*

[3] Protective Orders

Protective order granted in part when information requested in interrogatories would reveal details of licensing agreements and possibly cause competitive injury to answering party. *Maritime Cinema Serv. Corp. v. Movies en Route, Inc. (S.D. N.Y. 1973) 60 F.R.D. 587, 589-590*

To protect party from annoyance, expense, embarrassment, or oppression, court properly issued order that interrogatories be rephrased. *West Pico Furniture Co. v. Superior Court (1961) 56 Cal. 2d 407, 417-419, 15 Cal. Rptr. 119, 364 P.2d 295*

In making protective orders, trial court properly makes such order as justice requires, and does not necessarily deny disclosure in every case in which annoyance or oppression may be shown. *Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 380, 15 Cal. Rptr. 90, 364 P.2d 266*

Good faith actions of party against whom protective order made does not preventing award of expenses of motion. *Flynn v. Superior Court (1979) 89 Cal. App. 3d 491, 497, 152 Cal. Rptr. 796*

[4] Relief From Waiver of Objections

Attorney's unawareness of duty caused by employee's misplacement of papers constituted excusable neglect. *Elston v. City of Turlock (1985) 38 Cal. 3d 227, 234, 211 Cal. Rptr. 416, 695 P.2d 713*

Showing of excusable neglect after counsel has knowingly allowed time to respond to interrogatories to expire necessarily includes not only reasonable excuse for delay, but also reasonable explanation for failure to seek further extension from counsel or enlargement of time from court. *Mannino v. Superior Court (1983) 142 Cal. App. 3d 776, 779, 191 Cal. Rptr. 163*

[5] Response to Interrogatories

[a] Requirement That Response With Answers Be Signed Under Oath

When response to interrogatories directed to client is prepared by attorney who attaches verification form previously signed by client, and does not first consult client to ensure that any assertions of fact were true, requirement that interrogatories be signed under oath is violated. *Drociak v. State Bar (1991) 52 Cal. 3d 1085, 1090, 278 Cal. Rptr. 86, 804 P. 2d 711* (decided under prior law)

Trial court erred in finding incomplete answer to have been false, known to be false, and made in bad faith, when evidence was that answer to interrogatory was incomplete and defendant so informed plaintiff as soon as error was discovered. *Gaffney v. Downey Savings and Loan Assn. (1988) 200 Cal. App. 3d 1154, 1170-1171, 246 Cal. Rptr. 421*

[b] Objections

On objection to interrogatory on grounds of burden and oppression, trial court must properly balance equities, including costs, by balancing purposes and need for information against burden entailed in its production. *West Pico Furniture Co. v. Superior Court (1961) 56 Cal. 2d 407, 418, 15 Cal. Rptr. 119, 364 P.2d 295*

Because interrogatories did not arguably exceed limit of 35 specified in *Code Civ. Proc. § 2030.030(b)*, referring to another answer did not violate requirement of *Code Civ. Proc. § 2030.060(d)* that questions be full and complete, or prohibition of *Code Civ. Proc. § 2030.060(f)* against compound, conjunctive, or disjunctive questions. *Clement v. Alegre (2009) 177 Cal. App. 4th 1277, 1287-1291, 99 Cal. Rptr. 3d 791*

Responding party has no duty to supplement responses to interrogatories on receipt of new information, absent order compelling further answers, regardless of whether party reserved right to amend or supplement his or her earlier responses. Failure to supplement interrogatory answer promptly did not constitute grounds for excluding evidence under former *Code Civ. Proc. § 2030(k), (l)* [*now see Code Civ. Proc. § 2030.290(c), 2030.300(e)*], when no order compelling further answers had been sought or entered, and trial court made no finding that initial responses were willfully false. *Biles v. Exxon Mobil Corp. (2004) 124 Cal. App. 4th 1315, 1327-1328, 22 Cal. Rptr. 3d 282* ; *accord Browne v. Turner Constr. Co. (2005) 127 Cal. App. 4th 1334, 1349, 26 Cal. Rptr.3d 433*

In discovery dispute, deficient objections or claims of privilege are not grounds for waiver, so long as party raised timely objections under former *Code Civ. Proc. § 2031* (*now see Code Civ. Proc. § 2031.240*) on grounds of privilege in its original response. *People ex rel. Lockyer v. Superior Court (2004) 122 Cal. App. 4th 1060, 1075, 19 Cal. Rptr. 3d 324*

Defendant's failure to provide a privilege log did not constitute waiver of its right to assert attorney-client privilege and work product protection in regard to interrogatories propounded by plaintiff, when defendant providedtimely, albeit boilerplate, response. *Best Products, Inc. v. Superior Court (2004) 119 Cal. App. 4th 1181, 1189, 15 Cal. Rptr. 3d 154*

Plaintiffs had no right to refuse to identify documents in response to interrogatories; a responding party may object to an interrogatory that seeks privileged *information* by clearly stating the objection and the particular privilege invoked, but the *existence* of a document containing privileged information is not privileged. *Hernandez v. Superior Court (2003) 112 Cal. App. 4th 285, 293, 4 Cal. Rptr. 3d 883*

Interrogatories are objectionable if requesting disclosure of matters so remote from subject matter that disclosure would be of little or no practical benefit to propounding party; interrogatories as objectionable if framed to require disclosure of irrelevant as well as relevant matter. *Deaile v. General Telephone Co. of California (1974) 40 Cal. App. 3d 841, 850-851, 115 Cal. Rptr. 582* , citing *Columbia Broadcasting Sys., Inc. v. Superior Court (1968) 263 Cal. App. 2d 12, 19, 69 Cal. Rptr. 348*

Objection to interrogatory is not equivalent to motion for protective order. *Columbia Broadcasting Sys., Inc. v. Superior Court (1968) 263 Cal. App. 2d 12, 23, 69 Cal. Rptr. 348* ; *but see Ryan v. Superior Court (1960) 186 Cal. App. 2d 813, 817-820, 9 Cal. Rptr. 147* (relief granted from annoyance and expense by sustaining objections and refusing to order that interrogatories be answered)

Objection to interrogatory on ground that it calls for confidential information is not the equivalent to a motion for protective order, which is the proper procedure. *Columbia Broadcasting Sys., Inc. v. Superior Court (1968) 263 Cal. App. 2d 12, 23, 69 Cal. Rptr. 348* (interpreting pre-1986 *Code Civ. Proc. § 2030*)

Burden is on objecting party to show that interrogatories were interposed for improper purposes, directed to irrelevant subject matter, or, in spite of relevance, not reasonably calculated to lead to discovery of admissible evidence. *Darbee v. Superior Court (1962) 208 Cal. App. 2d 680, 686, 25 Cal. Rptr. 520*

[6] Scope of Discovery by Interrogatories

[a] Contentions and Facts

Party may properly use discovery to test pleadings by calling for facts on which adverse party is relying to support contentions. *Burke v. Superior Court (1969) 71 Cal. 2d 276, 281, 78 Cal. Rptr. 481, 455 P.2d 409* ; *Sheets v. Superior Court (1967) 257 Cal. App. 2d 1, 13* , 64 Cal. Rtpr. 753

Interrogatories calling for all facts that a party intends to produce at trial is possibly overbroad, but those limited to facts currently known are proper. *Singer v. Superior Court (1960) 54 Cal. 2d 318, 325-326* , 5 Cal. Rtpr. 697, *353 P.2d 305*

Plaintiff is required to attempt to obtain certain information from mother in order to respond to interrogatories when mother is cooperating closely in lawsuit, inquiry poses no discernible burden on plaintiff, and response might provide useful basis for more focused questioning. *Jones v. Superior Court (1981) 119 Cal. App. 3d 534, 552-553, 174 Cal. Rptr. 148*

Scope of interrogatories is permissible if relevant to subject matter, including questions that might lead to discovery of admissible evidence or information helpful in preparing for trial. *Deyo v. Kilbourne (1978) 84 Cal. App. 3d 771, 781, 149 Cal. Rptr. 499*

Interrogatory may properly ask whether party asserts certain contention, but may not compel disclosure of legal reasoning or theories. *Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal. 3d 1, 5, 123 Cal. Rptr. 283, 538 P.2d 739*

[b] Documents and Tangible Things

Overbroad request is properly restricted by trial court to allow requesting party reasonable opportunity to discover admissible evidence. *Borse v. Superior Court (1970) 7 Cal. App. 3d 286, 289, 86 Cal. Rptr. 559*

When interrogatory calls for information recorded in public documents that are as readily available to proponent of interrogatory as they are to party answering, court's order compelling answer was improper. *Alpine Mut. Water Co. v. Superior Court (1968) 259 Cal. App. 2d 45, 54, 66 Cal. Rptr. 250*

Party is entitled to information that will allow proper description of things in seeking their production and inspection. *Flora Crane Service, Inc. v. Superior Court (1965) 234 Cal. App. 2d 767, 777-778, 45 Cal. Rptr. 79*

Existence of document is discoverable when document itself is privileged. *Smith v. Superior Court (1961) 189 Cal. App. 2d 6, 12, 11 Cal. Rptr. 165*

[c] Relevance

Order requiring plaintiffs to disclose their entire medical histories was improper. *Britt v. Superior Court (1978) 20 Cal. 3d 844, 862-864, 143 Cal. Rptr. 695, 574 P.2d 766*

Trial court properly refused to compel response to interrogatories that would place undue burden and expense on responding party or require disclosure of relevant as well as irrelevant matter. *Columbia Broadcasting Sys., Inc. v. Superior Court (1968) 263 Cal. App. 2d 12, 19, 69 Cal. Rptr. 348*

Although purpose of discovery statutes is to permit party to prepare for trial and to discover relevant admissible evidence on matters reasonably calculated to lead to discovery of admissible evidence, Civil Discovery Act does not require one party to prepare opponent's case. *Ryan v. Superior Court (1960) 186 Cal. App. 2d 813, 819, 9 Cal. Rptr. 147* (prior law)

[7] Service of Interrogatories on Defendant After Appearance in Action

"Appearance" under pre-1986 *Code Civ. Proc. § 2030(a)* (*now see Code Civ. Proc. § 2030.020*) is not limited to general appearance, but party who appeared on motion to quash as not required to answer interrogatories that are not relevant to subject matter of motion. *1880 Corp. v. Superior Court (1962) 57 Cal. 2d 840, 842-843, 22 Cal. Rptr. 209, 371 P.2d 985*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryProtective OrdersCivil ProcedureDiscoveryRelevance

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16-194 California Forms of Pleading and Practice--Annotated § 194.45

§ 194.45 Law Reviews

Powers, "A Guide to Interrogatories in California Practice," *48 S. Cal. L. Rev. 1221 (1975)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsInterrogatoriesUse

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16-194 California Forms of Pleading and Practice--Annotated § 194.46

§ 194.46 Text References

Witkin, California Evidence, Ch. X, *Discovery*, § 87 et seq. (4th ed. 2000)

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-194 California Forms of Pleading and Practice--Annotated §§ 194.47-194.59

[Reserved]

§§ 194.47[Reserved]

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Chapter 194 DISCOVERY: INTERROGATORIES
PART IV. PROCEDURAL CHECKLISTS
A. Checklists for Party Seeking Discovery

16-194 California Forms of Pleading and Practice--Annotated § 194.60

§ 194.60 Preparing and Serving Interrogatories

NOTE:
The following checklists set out procedures commonly involved in obtaining discovery through the use of interrogatories to parties; they are not intended to be exhaustive.

[1] Preliminary Determinations

1. Whether the action or proceeding has been commenced [*see Code Civ. Proc. § 2030.020*].

2. If plaintiff is the party propounding the interrogatories, whether at least 10 days have elapsed since the party to be served with the interrogatories was served with the summons, or made an appearance--or, in an unlawful detainer action or other proceeding under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), whether five days has elapsed since the party to be served with the interrogatories was served with the summons, or made an appearance--whichever occurred first [*see Code Civ. Proc. § 2030.020(b), (c)*]. If not, see [2], *below*.

3. Whether party is an unnamed representative of a class or has not appeared [*see Cal. Rules of Ct., Rule 3.768*]. If so, see [3A], *below*.

[2] Motion for Order Authorizing Early Service

NOTE:
This order must be obtained by a plaintiff who wishes to serve interrogatories on a party within 10 days after service of summons on, or appearance by, that party, whichever occurs first, or in an unlawful detainer action or other proceeding under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), within five days after service of the summons on, or appearance by, that party, whichever occurs first [***see Code Civ. Proc. § 2030.020(b), (c)***]**. A motion for this order may be combined with a motion for an order shortening the time for the service of responses to interrogatories [*see* *§ 194.80* and *[3]*, *below*]**. It may also be combined with a motion for an order for

relief from the requirement to serve a copy of the interrogatories on all parties to the action [***see*** *Code Civ. Proc. § 2030.080* and § 194.80].

1. Without notice.

NOTE:
Counsel must attempt to give the opposing party notice of an ex parte application or give reasons why the opposing party should not be informed [*see* *Cal. Rules of Ct., Rule 3.1204*; ***see also*** *§ 194.80[3]*].

a. Prepare an application for ex parte order including supporting declarations, a supporting memorandum of points and authorities, and a proposed order granting the application [*see §§ 194.80*, *194.81*].

b. Present application and order to court in which action or proceeding is pending, for judge's signature.

NOTE:
In some trial courts the proper judge to sign the order will be the presiding judge of the court. In others, however, the proper judge to sign the order may, by local court rule, be the judge assigned to the Deposition and Discovery Department or the Law and Motion Department. If unfamiliar with local court practices, counsel should inquire of the court clerk as to the proper practice.

c. File originals, including signed order.

d. Serve copies of order with the interrogatories [*see* [5], *below*].

2. With notice.

a. Prepare documents.

Prepare notice of motion, supporting declarations, and supporting memorandum as required by *Cal. Rules of Ct., Rules 3.1113(a)*, and proof of service of these documents [*see Code Civ. Proc. § 1013a*; for a form of ex parte application that may be adapted for use, *see § 194.80*; *see also* Ch. 417, *Points and Authorities* , and Ch. 518, *Service of Summons and Papers*].

b. Serve documents.

If documents are to be served less than 16 court days before the date set for hearing of motion, or any longer period as required by *Code Civ. Proc. § 1005(b)* if service is by mail, fax, or overnight delivery, obtain an order shortening the time for notice of the motion, and then serve every party to the action or proceeding with copies of the documents listed in Paragraph a., *above* [*see Code Civ. Proc. §§ 1010-1020*; *see also* Ch. 524, *Shortening and Extension of Time* , and Ch. 518, *Service of Summons and Papers* .

c. File documents.

File the signed originals of the documents listed in Paragraph b., *above,* with the court.

d. Proceed as for usual noticed motion [*see* Ch. 372, *Motions and Orders*].

e. Order.

(1) Prepare order if court grants motion or as otherwise directed by the court. See *§ 194.81*, which may be adapted for use after a hearing on noticed motion.

(2) If required by local court rule or practice, have opposing party approve order as to form.

(3) Present order to judge for signature.

(4) File original signed order and keep copies of order stamped "endorsed filed" to be served with the interrogatories.

NOTE:
Under *Code Civ. Proc. § 1019.5(a),* when a motion is granted or denied, unless the court otherwise orders, notice of the court'sdecision or order must be given by the prevailing party to all other parties or their attorneys, in the manner provided in *Code Civ. Proc. §§ 1010-1020,* unless notice is waived by all parties in open court and is entered in the minutes (*see* Ch. 372, ***Motions and Orders* ,** and Ch. 518, ***Service of Summons and Papers***).

[3] Motion for Order Shortening Time for Response

Responding party must serve responses to the interrogatories within 30 days after service of the interrogatories, or in unlawful detainer proceedings within five days after service of interrogatories, unless on motion of the propounding party the court has shortened the time for response, or on motion of the responding party the court has extended the time for response [*see Code Civ. Proc. § 2030.260(a)*]. In an unlawful detainer action or other proceeding under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), the responding party has five days from the date of service to respond, unless on motion of the propounding party the court has shortened the time for response or unless on motion of the responding party the court has extended the time for response [*Code Civ. Proc. § 2030.260(b)*].

If the responses were served by mail, the response period is extended five calendar days if the place of address is within California, 10 calendar days if the place of address is outside California but within the United States, or 20 calendar days if the place of address is outside the United States [*Code Civ. Proc. §§ 1013(a), 2016.050*]. The period is extended two court days if service is by Express Mail, other overnight delivery, or by fax [*Code Civ. Proc. § 1013(c), (e)*]. A motion by the propounding party to shorten the time for response may be combined with a motion for an order shortening the time for service of the interrogatories [*see* [2], *above,* and § 194.80]. It may also be combined with a motion for an order for relief from the requirement to serve a copy of the interrogatories on all parties to the action [*see Code Civ. Proc. § 2030.080* and § 194.80]. In making this motion, counsel may adapt the procedures set out in [2], *above,* regarding early service of interrogatories by plaintiff.

[3A] Motion for Interrogatories From Unnamed Class Members in Class Action

In class action suits, a party may not serve interrogatories on a member of a class who is not a party representative or who has not appeared without a court order [*Cal. Rules of Ct., Rule 3.768(c)*]. In making it's decision whether to allow such discovery, the court must consider the timing of the request, the subject matter to be covered, the materiality of the

information being sought, the likelihood that class members have such information, the possibility of reaching factual stipulations that eliminate the need for such discovery, whether class representatives are seeking discovery on the subject to be covered, and whether discovery will result in annoyance, oppression, or undue burden or expense for the members of the class [*Cal. Rules of Ct., Rule 3.768(d)*].

[4] Preparation of Interrogatories and Proof of Service

1. Format of interrogatories.

The interrogatories must follow the format set out in *Code Civ. Proc. § 2030.060*. For a form setting out the general format to be followed, see *§ 194.82*. For an illustration of Judicial Council form interrogatories, see *§ 194.83* et seq.

2. Additional interrogatories.

NOTE:

A party may propound to another party 35 specially prepared interrogatories, and any additional number of official form interrogatories, as described in *Code Civ. Proc. § 2033.710 et seq.*, that are relevant to the subject matter of the pending action. With the exception of supplemental interrogatories under *Code Civ. Proc. § 2030.070*, no party may, as a matter of right, propound to any other party more than 35 specially prepared interrogatories. Unless a declaration for additional discovery, as described in *Code Civ. Proc. § 2030.050*, has been made, a party need only respond to the first 35 specially prepared interrogatories served, if that party states an objection to the balance, under *Code Civ. Proc. § 2030.240*, on the ground that the limit has been exceeded [*see* *Code Civ. Proc. § 2030.030*; *see* discussion in *§ 194.14*].

If more than 35 specially prepared interrogatories are desired, attach a declaration for additional discovery to each set containing more than 35 specially prepared interrogatories [*see* *§ 194.82*]. Any party may propound a greater number of interrogatories to another party if the greater number is warranted because of statutorily enumerated factors [***see*** *Code Civ. Proc. § 2030.050* and discussion in *§ 194.14[2]*].

3. To whom addressed.

The interrogatories should be addressed to the party who is to respond to them, and not to an officer, agent, or employee of the party [*see Mowry v. Superior Court (1962) 202 Cal. App. 2d 229, 233-235, 20 Cal. Rptr. 698* , disapproved on other grounds in *San Diego Professional Asso. v. Superior Court (1962) 58 Cal. 2d 194, 203-204, 23 Cal. Rptr. 384, 373 P.2d 448]* .

4. Proof of service

Prepare proof of service [*see Code Civ. Proc. § 1013a* and Ch. 518, *Service of Summons and Papers*].

[5] Service of Interrogatories

1. Serve the party to whom the interrogatories are directed [*see Code Civ. Proc. § 2030.080(a)*].

2. Serve all other parties who have appeared in the action.

a. Either serve all other parties who have appeared [*Code Civ. Proc. § 2030.080(b)*]; or

b. Obtain waiver of the requirement of service on all parties who have appeared [*Code Civ. Proc. § 2030.080(b)*; *see §§ 194.80, 194.81*].

The court on motion with or without notice may relieve the propounding party from this requirement on its determination that service on all other parties would be unduly expensive or burdensome [*Code Civ. Proc. § 2030.080(b)*].
(1) Proceed by motion without notice, adapting procedures set out in Paragraph (B)(1), *above*; or

(2) Proceed by motion with notice, adapting procedures set out in Paragraph (B)(2), *above.*

3. When serving interrogatories or copies of interrogatories, also serve endorsed-filed copies of any related orders, such as

a. Order shortening the time for service of interrogatories by plaintiff [*see* [2], *above*].

b. Order shortening time for service of responses [*see* [3], *above*].

[6] Preparation of Supplemental Interrogatories

If desired, propound supplementary interrogatories to elicit any later acquired information bearing on answers previously made by the responding party [*see Code Civ. Proc. § 2030.070*; *see also* discussion in *§ 194.14[3]*].

1. Supplemental interrogatories may be propounded twice prior to the initial setting of a trial date and subject to the time limits on discovery proceedings and motions provided in *Code Civ. Proc. § 2024.010 et seq.*, once after the initial setting of a trial date. On motion for good cause shown, the court may grant leave to propound an additional number of supplemental interrogatories [*Code Civ. Proc. § 2030.070*; for discussion of *Code Civ. Proc. § 2024.010 et seq.* time limits, *see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.50* et seq.].

2. Prepare and serve documents, following the procedures in [4], *above,* labeling the interrogatories as "supplemental."

[7] Disposition of Documents

Retain the original of the interrogatories, with the original proof of service affixed to them, and the original of the response until six months after final disposition of the action. Then, the documents may be destroyed unless the court, on motion of any party and for good cause shown, orders that they be preserved for a longer period [*see Code Civ. Proc. § 2030.280(b)*; *Cal. Rules of Ct., Rule 3.250(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureClass ActionsClass MembersNonnamed MembersCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesForm

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16-194 California Forms of Pleading and Practice--Annotated § 194.61

§ 194.61 Enforcement of Discovery by Interrogatories

[1] Motion to Compel Response and for Monetary Sanctions

1. Determine whether responding party has failed to submit a timely response.

The party to whom the interrogatories are propounded must serve a response within 30 days after service, except in an unlawful detainer action or other proceeding under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), in which case the responding party has five days from the date of service to respond, unless on the court has modified the time limitation or the parties have stipulated otherwise [*see Code Civ. Proc. § 2030.260(b)* and discussion in *§ 194.16[6]*]. If the interrogatories were served by mail, the response period is extended five calendar days if the place of address is within California, 10 calendar days if the place of address is outside California but within the United States, or 20 calendar days if the place of address is outside the United States [*Code Civ. Proc. §§ 1013(a), 2016.050*]. The period is extended two court days if service is by Express Mail, other overnight delivery, or by fax [*Code Civ. Proc. § 1013(c), (e)*].

2. Time for Noticing Motion.

Code Civ. Proc. § 2030.290 does not specify a time limit in which to bring a motion to compel response to interrogatories, although a reasonable time is probably 45 days after the last day that the response, or any supplemental response, could have been served, analogous to the requirement of *Code Civ. Proc. § 2030.300* for a motion to compel further answers to interrogatories [*see* discussion in *§ 194.20[2]*; *see also* [3], *below*].

3. Prepare documents.

a. Notice of motion and supporting declaration [§ 194.100].

b. Supporting memorandum as required by *Cal. Rules of Ct., Rule 3.1113(a)*. For discussion and forms, see Ch. 417, *Points and Authorities* .

c. Proof of service of documents listed in Paragraphs a. and b., *above* [*see Code Civ. Proc. § 1013a* and Ch. 518, *Service of Summons and Papers*].

4. Serve documents.

At least 16 court days before the date set for hearing of the motion or any longer period as required by *Code Civ. Proc. § 1005(b)* if service is by mail, overnight delivery, or fax, serve every party to the action or proceeding with copies of the documents listed in Paragraph 3, *above* [*see Code Civ. Proc. §§ 1010-1020* and Ch. 518, *Service of Summons and Papers*].

5. File documents.

File the signed originals of the notice of motion, supporting declaration, memorandum of points and authorities, and proof of service with the court.

6. Order.

a. Prepare order if court grants motion or as otherwise directed by the court [§ 194.101].

b. If required by local court rule or practice, have opposing party approve order as to form.

c. Present order to judge for signature.

d. File original signed order and serve copies of order stamped "endorsed filed" on the other parties.

NOTE:
Under *Code Civ. Proc. § 1019.5(a)*, when a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order must be given by the prevailing party to all other parties or their attorneys, in the manner provided in *Code Civ. Proc. §§ 1010-1020*, unless notice is waived by all parties in open court and is entered in the minutes [*see* Ch. 372, ***Motions and Orders* ,** and Ch. 518, ***Service of Summons and Papers***].

[2] Motion for Sanctions for Failure to Comply With Order Compelling Response

The procedures set out in [1], *above* may be adapted for use in obtaining an order for sanctions for failure to comply with an order compelling a response [*see Code Civ. Proc. § 2030.300*; *see also § 194.21* and *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[3], 192.15[3]*, and *192.50* et seq.].

[3] Motion to Compel Further Response

1. Preliminarily determine

a. Whether responding party has submitted an evasive or incomplete answer [*see Code Civ. Proc. § 2030.300(a)(1)*];

b. Whether responding party exercised an option to produce documents under *Code Civ. Proc. § 2030.230* that was unwarranted, or whether the required specification of those documents was inadequate [*see Code Civ. Proc. § 2030.300(a)(2)*];

c. Whether responding party made an objection that was without merit or too general [*see Code Civ. Proc. § 2030.300(a)(3)*];

d. Whether another procedure would be better for obtaining the information, such as deposing either the person who answered the interrogatories or some other person [*see Code Civ. Proc. § 2025.010 et seq.*].

2. Make a good faith attempt at informal resolution [*see Code Civ. Proc. § 2030.300(b)*].

3. Time for noticing motion.

A motion to compel further answers to interrogatories under *Code Civ. Proc. § 2030.300* must be noticed within 45 days from the date of service of the response, or any supplemental response, unless

a. The response was served by mail, which extends the time for filing the motion by five calendar days if the place of address is within California, 10 calendar days if the place of address is outside California but within the United States, or 20 calendar days if the place of address is outside the United States [*Code Civ. Proc. §§ 1013(a), 2016.050*]. The period is extended two court days if service is by Express Mail, other overnight delivery, or by fax [*Code Civ. Proc. § 1013(c), (e)*].

b. The propounding and responding parties have agreed in writing to a specific later date.

4. Prepare documents.

a. Notice of motion and supporting declaration, including declaration of good faith attempt at informal resolution [*see § 194.102*; for further discussion of this requirement, see generally *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*].

b. A separate document that sets forth each request, its response, the factual and legal reasons for compelling further response, and any other information that may be necessary to understand or determine the motion. Material is not to be incorporated by reference into the statement [*Cal. Rules of Ct., Rule 3.1345(a)(2), (c)*; *see § 194.103*].

c. Supporting memorandum as required by *Cal. Rules of Ct., Rule 3.1113(a)*. For discussion and forms, see Ch. 417, *Points and Authorities* .

d. Proof of service of documents listed in Paragraphs a.-c., *above* [*see Code Civ. Proc. § 1013a* and Ch. 518, *Service of Summons and Papers*].

5. Serve and file documents, and obtain order [§ 194.104].

The procedures for obtaining an order set out in [1], *above*, may be adapted for use in obtaining an order under *Code Civ. Proc. § 2030.300*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-194 California Forms of Pleading and Practice--Annotated § 194.62

§ 194.62 Use of Answers to Interrogatories

[1] Use Against Party Giving Answer

The propounding party may use any answer or part of an answer to an interrogatory at the trial or any other hearing in the action, pursuant to the rules of evidence, only against the responding party [*Code Civ. Proc. § 2030.410*; *see* discussion in *§ 194.26*].

[2] Motion for Order to Deem Initial Answer Binding

1. Grounds [*Code Civ. Proc. § 2030.310*; *see* discussion in *§ 194.25[1]*].

a. The initial failure of the responding party to answer the interrogatory correctly has substantially prejudiced the party who propounded the interrogatory.

b. The responding party has failed to show substantial justification for the initial answer to that interrogatory.

c. The prejudice to the propounding party cannot be cured either by a continuance to permit further discovery or by the use of the initial answer pursuant to *Code Civ. Proc. § 2030.410* [*Code Civ. Proc. § 2030.310(c)*].

2. Good faith attempt at informal resolution.

The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [*see Code Civ. Proc. § 2030.310(b)*; *see also* further discussion of this requirement in Ch. 190, *Discovery: Scope, Regulation, and Timing*, § 190.33[1]].

3. Procedure.

The procedure for obtaining an order *set out in § 194.61[1]* may be adapted for use for obtaining a order to deem an initial answer binding, using §§ 194.105, 194.106.

Legal Topics:

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

§§ 194.63[Reserved]

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B. Checklists for Responding Party

16-194 California Forms of Pleading and Practice--Annotated § 194.70

§ 194.70 Preparing and Serving Responses to Interrogatories

NOTE:

A party that determines that responding to any set of interrogatories, or particular interrogatories in a set, would cause unwarranted annoyance, embarrassment, oppression, or undue burden and expense may move for a protective order [*Code Civ. Proc. § 2030.090*; *see* *§ 194.71*].

[1] Extending Time for Response

1. By stipulation.

a. Obtain agreement of the propounding party to extend the time to respond to a set of interrogatories, or to particular interrogatories in a set, to a date beyond that provided in *Code Civ. Proc. § 2030.260* [*Code Civ. Proc. § 2030.270*; *see* discussion in *§ 194.16[6]*].

b. If the agreement is obtained orally, confirm it in a writing that specifies the extended date by either a letter or formal stipulation for signature of the propounding party. Counsel who obtain a stipulation by letter may also wish to obtain a signed formal stipulation.

c. The written agreement or stipulation may not be filed unless it is offered as relevant to the determination of an issue in a law and motion proceeding or other hearing, or is ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(7)*]. Counsel must retain the original of the agreement until six months after final disposition of the cause, unless the court on motion of any party and for good cause shown orders it preserved for a longer period [*Cal. Rules of Ct., Rule 3.250(b)*].

NOTE:

Unless the agreement expressly states otherwise, it preserves the responding party's right to respond to any interrogatory to which it applies [*Code Civ. Proc. §*

2030.270(c)*; *see discussion in *§ 194.16[6]*].

2. On motion.

a. Without notice.

NOTE:
There is no requirement under *Code Civ. Proc. § 2030.260* that the motion be noticed. However, counsel should consult local court rules to ascertain whether stricter requirements apply.

On motion of the responding party, the court may extend the time for response [*see Code Civ. Proc. § 2030.260*]. Adapt the procedures *set out in § 194.60[2]* [*see § 194.90* (form of noticed motion for use in obtaining this order)].

b. By noticed motion.

Follow the procedures for obtaining an order *set out in § 194.61[1]*, using § 194.90 (notice of motion and declaration) and § 194.91 (order).

c. Pursuant to motion for protective order.

A responding party may obtain a protective order that the time specified in *Code Civ. Proc. § 2030.260* to respond to the set of interrogatories, or to particular interrogatories in the set, be extended [*Code Civ. Proc. § 2030.090(b)(3)*]. This procedure may be used either just to extend the time to respond or in combination with other requests to limit or prevent the compelling of responses to the set of interrogatories or to particular interrogatories in the set [*see § 194.71*].

[2] Preparing Responses

1. Time for responding.

Unless there is a stipulation or order shortening or extending time [*see* [1], *above*, and § 194.60[3]], responses to interrogatories must be served within 30 days after service of the interrogatories, or, in an unlawful detainer action or other proceeding under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), within five days from the date of service [*see Code Civ. Proc. § 2030.260(b)*]. If the interrogatories were served by mail, the 30-day response period is extended five calendar days if the place of address is within California, 10 calendar days if the place of address is outside California but within the United States, or 20 calendar days if the place of address is outside the United States [*Code Civ. Proc. §§ 1013(a), 2016.050*]. The period is extended two court days if service is by Express Mail, other overnight delivery, or by fax [*Code Civ. Proc. § 1013(c), (e)*]. For discussion of relief from waivers resulting from failure to timely serve response, see *§ 194.72*.

2. Format [*see § 194.94*].

The party to whom interrogatories have been propounded must respond in writing under oath separately to each interrogatory. In the first paragraph of the response immediately below the title of the case, there must appear the identity of the responding party, the set number, and the identity of the propounding party. Each answer, exercise of option, or objection in the response must bear the same number and be in the same sequence as the corresponding interrogatory, but the text of the interrogatory need not be

repeated [*Code Civ. Proc. § 2030.210*; for discussion of content of response, *see § 194.16[1]*].

3. Types of responses [*Code Civ. Proc. § 2030.210(a)*; *see* discussion in *§ 194.16[1] -[4]*].

a. An answer containing the information sought.

b. An exercise of the party's option to produce writings.

c. An objection to the particular interrogatory.

4. Verification.

The party to whom the interrogatories are directed must sign the response under oath, unless the response contains only objections [*Code Civ. Proc. § 2030.250(a)*; for discussion of signatures of agents and officers, *see § 194.16[5]*; *see also* Ch. 572, *Verification*].

[3] Service of Response

1. Time.

See [1] and [2], *above*.

2. Procedure.

The responding party must serve the original of the response on the propounding party [*Code Civ. Proc. § 2030.260(a)*]. The procedure *set out in § 194.60[5]* for serving interrogatories may be adapted for service of the response.

[4] Amended Answers

After interrogatories have been answered, if information is subsequently discovered, was inadvertently omitted, or mistakenly stated, serve an amended answer [*Code Civ. Proc. § 2030.310*].

NOTE:
Leave of court is not required. The propounding party may still use the initial answer, and may move to make the initial answer binding [*see* *Code Civ. Proc. § 2030.310(b)*; *see also* *§ 194.62[2]*].

Legal Topics:

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

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16-194 California Forms of Pleading and Practice--Annotated § 194.71

§ 194.71 Motions for Protective Orders

[1] Preliminary Determinations

1. Determine if protective order is necessary to protect against annoyance, embarrassment, oppression, or undue burden and expense [*see Code Civ. Proc. § 2030.090*].

2. Determine if good cause exists for order [*see Code Civ. Proc. § 2030.090(b)* and § 194.23].

[2] Procedure

1. Make a reasonable and good faith attempt at informal resolution of the issue [*see Code Civ. Proc. § 2030.090(a)*; for further discussion of this requirement, see generally *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*].

NOTE:
The notice of motion must be accompanied by a declaration stating facts showing this attempt to resolve the issues [*Code Civ. Proc. § 2030.090(a)*].

2. Prepare, serve, and file documents [*see §§ 194.95, 194.96*].

Adapt the procedures for obtaining an order *set out in § 194.61[1]*. For forms and procedures for obtaining protective orders generally, see *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.30 et seq. and § 190.80* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryProtective Orders

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Chapter 194 DISCOVERY: INTERROGATORIES
PART IV. PROCEDURAL CHECKLISTS
B. Checklists for Responding Party

16-194 California Forms of Pleading and Practice--Annotated § 194.72

§ 194.72 Relief From Waiver After Failure to Serve Timely Response

NOTE:

If the propounding party has served a notice of motion to compel response, the responding party may wish to notice a motion for relief from waiver for hearing either prior to or concurrently with that motion [*see* *§ 194.73[1]*].

[1] Grounds for Motion

If a party to whom interrogatories have been directed fails to serve a timely response, that party waives any right to exercise the option to produce writings under *Code Civ. Proc. § 2030.230* as well as any objection to the interrogatories, including one based on privilege or on the protection for work product under *Code Civ. Proc. § 2018.010 et seq.*, unless the responding party is granted relief by motion on both the following grounds [*see Code Civ. Proc. § 2030.290*]:

1. The responding party subsequently served a response to the interrogatories that is in substantial compliance with *Code Civ. Proc. §§ 2030.210-2030.240* [*see § 194.70[2]*].

2. The responding party's failure to serve a timely response to the interrogatories was the result of mistake, inadvertence, or excusable neglect.

[2] Procedure

Follow the procedure for obtaining an order *set out in § 194.61[1]*, using the forms *set out in §§ 194.92* and *194.93*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMotions to Compel

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16-194 California Forms of Pleading and Practice--Annotated § 194.73

§ 194.73 Opposing Motions to Enforce Discovery by Interrogatories

[1] Opposing Motion to Compel Response

1. Service and filing of memorandum.

Serve and file a memorandum opposing the motion at least nine court days before the time appointed for the hearing, showing that the motion should be denied [*see Code Civ. Proc. § 1005(b), (c)* (time for serving opposing papers)].

a. Opposition to motion to compel response.

Although *Code Civ. Proc. § 2030.290* does not specify grounds on which the court should grant or deny a motion to compel response, if the responding party served a response subsequent to service of the motion, counsel should so state [*see § 194.72[1]*].

b. Opposition to motion for sanctions.

Counsel should oppose the imposition of sanctions by showing that the responding party acted with substantial justification or by describing other circumstances that make the sanction unjust [*see Code Civ. Proc. §§ 2023.030(a), 2030.290*].

2. Time for hearing motion for relief from waiver.

If counsel is also moving for relief from waiver to produce writings and to raise objections after failure to serve timely response, counsel may wish to have that motion heard prior to or concurrently with the motion to compel response, because the grounds for respondent's motion would support opposition to the propounding party's motion [*see § 194.72*].

[2] Opposing Motion to Compel Further Answers and for Monetary Sanctions

Serve and file a memorandum and declaration opposing the grounds for the motion at least nine court days before the time appointed for the hearing [*see Code Civ. Proc. § 1005(b), (c)*]. If appropriate, show that the moving party failed to make a reasonable and goodfaith attempt at an informal resolution of any issue presented in the motion [*see § 194.61[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMotions to Compel

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16-194 California Forms of Pleading and Practice--Annotated §§ 194.74-194.79

[Reserved]

§§ 194.74[Reserved]

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16-194 California Forms of Pleading and Practice--Annotated § 194.80

§ 194.80 Proceedings for Order Shortening Time for Plaintiff to Serve Interrogatories and Response [Code Civ. Proc. §§ 2030.020, 2030.260]--Including Request for Relief From Requirement to Serve All Other Parties [Code Civ. Proc. § 2030.080]--Ex Parte Application and Supporting Declaration

[1] FORM Proceedings for Order Shortening Time for Plaintiff to Serve Interrogatories and Response [Code Civ. Proc. §§ 2030.020, 2030.260]--Including Request for Relief From Requirement to Serve All Other Parties [Code Civ. Proc. § 2030.080]--Ex Parte Application and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
	)	
Plaintiff,	)	NO. _____
vs.	)	APPLICATION FOR EX PARTE ORDER SHORTENING TIME TO SERVE INTERROGATORIES AND RESPONSE AND FOR RELIEF FROM REQUIREMENT TO SERVE ALL PARTIES, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
_____ [*name*],	)	
Defendant.	)	
	)	
	)	

_____

APPLICATION

I, _____ [*name of attorney*], hereby apply on behalf of plaintiff _____ [*name*] for an order authorizing him/her/it to serve interrogatories on _____ [*specify party, e.g.,* defendant] _____ [*name*] within _____ [10 days *or, in unlawful detainer proceedings,* 5 days] after _____ [*specify party, e.g.,* defendant] _____ [*name*] _____

[was served with process *or* appeared] in this action [, and requiring response thereto to be served within _____ (*specify number less than normal time for response*) days after service of the interrogatories]. [I also apply on behalf of plaintiff _____ (*name*) for an order for relief from the requirement to serve all parties that have appeared in the action with copies of the interrogatories]. The motion will be made on the grounds that early service of the interrogatories [and response thereto] are necessary in that _____ [*specify ground(s), e.g.,* defendant is planning to leave the country on _____ (*date*), for an unspecified length of time, and plaintiff requires response to his/her interrogatories before that time in order properly to prepare his/her case]. [The motion will also be made on the ground that plaintiff should be relieved of the requirement to serve all parties that have appeared in the action with copies of the interrogatories in that _____ (*specify ground(s), e.g.,* he does not have adequate time to prepare the copies, and the expense would be unduly burdensome).]
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

SUPPORTING DECLARATION OF _____ [*name*]

In support of this application I declare that:

1. I am an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for plaintiff _____ [*name*].

[*EITHER*]

2. The summons in this action was served on defendant _____ [*name*] on _____ [*date*].

[*OR*]

2. _____ [*Specify party, e.g.,* Defendant] _____ [*name*] appeared in this action on _____ [*date*], by _____ [*specify, e.g.,* filing a motion to quash service of summons].

[*CONTINUE*]

3. It is necessary that plaintiff _____ [*name*] obtain an order permitting the service of interrogatories on _____ [*specify party, e.g.,* defendant] _____ [*name*] within _____ [10 days *or, in unlawful detainer proceedings,* 5 days] after _____ [service of summons on him/her *or* his/her appearance] in this action, and requiring response thereto within _____ [*specify number less than normal time for response*] days after service on him/her of those interrogatories. The shortened time limitations requested are necessary because _____ [*specify supporting facts, e.g.,* defendant's attorney Anthony Kruger told me that defendant is planning to leave the country on _____ (*date*), for an unspecified length of time, and plaintiff requires response to his/her interrogatories before that time to prepare his/her case properly].

4. It is necessary that plaintiff _____ [*name*] obtain an order for relief from the requirement to serve all parties that have appeared in the action in that _____ [*set forth facts, e.g.,* numerous other parties have appeared in the action, and effecting service on all of them would be unduly expensive. Plaintiff is under extreme time contraints to proceed with his/her discovery process, and the additional service requirement would be unduly burdensome].

5. On or about _____ [*date*], I _____ [informed defendant('s attorney) _____ (*name*) when and where the application would be made by _____ (*describe method, attaching any relevant documents as exhibits*) *or* attempted to inform defendant and his/her attorney when and where the application would be made but was unable to do so in that _____ (*describe attempt, attaching any relevant documents as exhibits*) *or specify reasons why plaintiff should not be required to inform the defendant or his/her attorney*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Set forth memorandum supporting application*]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The ex parte application and declaration set out in [1], *above*, is for use by plaintiff to seek an order allowing service of interrogatories within 10 days after service of summons, on that party, or appearance by that party, whichever occurs first; or, in an unlawful detainer action or other proceeding under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), within five days since service of the summons on, or appearance by, that party, whichever occurs first [*see Code Civ. Proc. § 2030.020(b), (c)*]. In addition, the form may be used to require service of response to the interrogatories within less than the 30-day, or in unlawful detainer proceedings or other proceedings under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), five-day limit after service of interrogatories [*see Code Civ. Proc. § 2030.260*; *see also Code Civ. Proc. §§ 1013(a), 2016.050* (extension of 30-day limit when service is by mail); *Code Civ. Proc. § 1013(c), (e)* (service by Express Mail or by fax)].

The form also may be used to obtain relief from the requirement to serve all parties that have appeared in the action with copies of the interrogatories [*see Code Civ. Proc. § 2030.080*].

Motions to obtain the relief sought by this form may made with or without notice [*see Code Civ. Proc. §§ 2030.020,* 2030.260, *2030.080*; for general forms for notices of motion, *see* Ch. 372, *Motions and Orders*].

[3] Ex Parte Application Requirements

Paragraph 4 of the Declaration is for use to set forth facts regarding notice procedures required by *Cal. Rules of Ct., Rules 3.1200-3.1207* [*see Cal. Rules of Ct., Rule 3.1204*].

A supporting memorandum is required to accompany the ex parte application [*see Cal. Rules of Ct., Rule 3.1201(4)*; for discussion and forms relating to supporting memoranda generally, *see* Ch. 417, *Points and Authorities*].

A proposed order must also accompany the application [*see Cal. Rules of Ct., Rule 3.1201(5)* and § 194.81].

For more detailed discussion of the general requirements for ex parte applications in pretrial proceedings, see *Ch. 193, Discovery: Depositions, § 193.221[3]* and *Ch. 372, Motions and Orders, § 372.19*.

[4] Cross References

- For discussion and forms concerning declarations in general, see Ch. 15, *Affidavits, Certificates, and Declarations*

- For discussion and forms relating to both ex parte applications and noticed motions and accompanying papers in general, see Ch. 372, *Motions and Orders*

- For discussion and forms concerning service of papers and proof of service, see Ch. 518, *Service of Summons and Papers*

- For further discussion and forms concerning shortening or extending time requirements in general, see Ch. 524, *Shortening and Extension of Time*

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16-194 California Forms of Pleading and Practice--Annotated § 194.81

§ 194.81 Proceedings for Order Shortening Time for Plaintiff to Serve Interrogatories and Response [Code Civ. Proc. §§ 2030.020, 2030.260]--Including Request for Relief From Requirement to Serve All Other Parties [Code Civ. Proc. § 2030.080]--Order

[1] FORM Proceedings for Order Shortening Time for Plaintiff to Serve Interrogatories and Response [Code Civ. Proc. §§ 2030.020, 2030.260]--Including Request for Relief From Requirement to Serve All Other Parties [Code Civ. Proc. § 2030.080]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

Application having been made on behalf of plaintiff, the court finds from proof made to the satisfaction of the court that there is good cause shown:

[*EITHER*]

1. To grant leave to plaintiff to propound interrogatories to _____ [*specify party, e.g.,* defendant] _____ [*name*] within _____ [10 days *or, in unlawful detainer proceedings,* 5 days] after _____ [service of summons *or* appearance] by _____ [*specify party, e.g.,* defendant].

[*AND/OR*]

2. To require that _____ [*specify party, e.g.*, defendant] _____ [*name*] respond to the interrogatories within _____ [*specify number less than normal time for response*] days from service of the interrogatories.

[*AND/OR*]

3. To relieve plaintiff from the requirement to serve all parties that have appeared in the action with copies of the interrogatories.

[*CONTINUE*]

IT IS THEREFORE ORDERED as follows:

[*EITHER*]

1. That plaintiff _____ [*name*] may serve [the attached] interrogatories on _____ [*specify party, e.g.*, defendant] _____ [*name*], forthwith, or as soon as such service can be made.

[*AND/OR*]

2. That _____ [*specify party, e.g.*, defendant] _____ [*name*] be required to respond to the interrogatories within _____ [*specify number lessthan normal time for response*] days from the date of service of the interrogatories.

[*AND/OR*]

3. That plaintiff be relieved from the requirement to serve all parties that have appeared in the action with copies of the interrogatories.
_____ [*date*]

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form for a proposed order set out in [1], *above*, is for use by a plaintiff to allow service of interrogatories within 10 days after service of summons on, or appearance by, that party, whichever occurs first; or, in an unlawful detainer action or other proceeding under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), within five days after service of the summons on, or appearance by, that party, whichever occurs first [*see Code Civ. Proc. § 2030.020(b), (c)*]. This form also is for use to require that service of the response occur within 30 days; or, in unlawful detainer proceedings or other proceedings under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), within five days from the date of

service [*see Code Civ. Proc. § 2030.260(a), (b)*; *see also Code Civ. Proc. §§ 1013(a), 2016.050* (extension of 30-day limit when service by mail); *Code Civ. Proc. § 1013(c), (e)* (service by express mail or by fax)]. It may be used, in addition, to obtain relief from the requirement to serve all parties that have appeared in the action with copies of the interrogatories [*see Code Civ. Proc. § 2030.080*; *see also* discussion in *§ 194.80[2], [3]* and cross references in § 194.80[4]].

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16-194 California Forms of Pleading and Practice--Annotated § 194.82

§ 194.82 Written Interrogatories [Code Civ. Proc. §§ 2030.010-2030.070]--Basic Format

[1] FORM Written Interrogatories [Code Civ. Proc. §§ 2030.010-2030.070]--Basic Format

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	_____ [*Identify propounding party, e.g.,* PLAINTIFF] _____'S [*name*]
_____ [*name*],	)	_____ [*specify number, e.g.,* FIRST]
Defendant.	)	SET OF [SUPPLEMENTAL] INTERROGATORIES
	)	TO
	)	_____ [*identify responding party, e.g.,* DEFENDANT] _____ [*name*]

_____

Propounding Party: _____ [*Identify, e.g.,* Plaintiff], _____ [*name*].

Set Number: _____ [of Supplemental Interrogatories].

Responding Party: _____ [*Identify, e.g.,* Defendant], _____ [*name*].

To _____ [*identify responding party, e.g.,* defendant] _____ [*name*] and to his/her attorneys:

_____ [*Identify propounding party, e.g.,* Plaintiff] _____ [*name*] requests that _____ [*identify responding party, e.g.,* defendant] _____ [*name*] respond to the following interrogatories separately and fully in writing and under oath, pursuant to *Section 2030.010 et seq. of the*

Code of Civil Procedure, and that the response be signed by the person making them and be served on _____ [*identify propounding party, e.g.,* plaintiff] _____ [*name*] within _____ [30 *or* 35 *or* 40 *or* 45 *or a lesser number*] days [, pursuant to the court's order shortening the time to respond,] after service of these interrogatories.

[In answering these interrogatories, furnish all information that is available to you. If you cannot answer an interrogatory completely, answer it to the extent possible. If you do not have personal knowledge sufficient to respond fully to an interrogatory, so state, but make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, unless the information is equally available to the propounding party, pursuant to Section of the Code of Civil Procedure.]

[*SET FORTH questions as follows, numbering each separately and consecutively. Do not include a preface, instructions, subparts, or a compound, conjunctive, or disjunctive question. Do not include any continuing interrogatories. Any term specially defined must be typed in all capital letters.*]

Interrogatory No. 1: _____ [*Set forth the first question*].

Interrogatory No. 2: _____ [*Set forth the second question*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*propounding party*]

[*CONTINUE if propounding more than 35 specially prepared interrogatories*]

DECLARATION FOR ADDITIONAL DISCOVERY

I, _____, declare:

1. I am _____ [a party to this action or proceeding appearing in propria persona *or* presently the attorney for _____, a party to this action or proceeding].

2. I am propounding to _____ [*identify party, e.g.,* the defendant _____ (name)] the attached set of interrogatories.

3. This set of interrogatories will cause the total number of specially prepared interrogatories propounded to the party to whom they are directed to exceed the number of specially prepared interrogatories permitted by *Section 2030.030 of the Code of Civil Procedure.*

4. I have previously propounded a total of _____ interrogatories to this party, of which _____ interrogatories were not official form interrogatories.

5. This set of interrogatories contains a total of _____ specially prepared interrogatories.

6. I am familiar with the issues and previous discovery conducted by all parties in this case.

7. I have personally examined each of the questions, including any subparts, in this set of interrogatories.

8. This number of questions is warranted under Section of the Code of Civil Procedure because _____ [*state each factor described in Code Civ. Proc. § 2030.040 that is relied on, as well as the reasons why any factor relied on is applicable to the instant lawsuit*].

9. None of the questions or subparts in this set of interrogatories is being propounded for any improper purpose, such as to harass the party, or the attorney for the party, to whom it is directed, or to cause unnecessary delay or needless increase in the cost of litigation.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*propounding party*]

[2] Use of Form

The specially prepared interrogatories set out in [1], *above*, is for use by any party for service on any other party [*see Code Civ. Proc. § 2030.010 et seq.*]. It may be used for initial interrogatories, or for supplemental interrogatories if the questions elicit any later-acquired information bearing on answers previously made [*see* discussion in *§ 194.14[3]*]. It contains a Declaration for Additional Discovery, for use if more than 35 specially prepared interrogatories are being propounded [*see* discussion in *§ 194.14[1]* and *[2]*]. For discussion of further limitations on the availability of interrogatories in limited civil cases, see *§ 194.14[4]*.

For additional interrogatories approved by the Judicial Council, see *§ 194.83* et seq. For forms of interrogatories for use in actions relating to motor vehicles, see Ch. 85, *Automobiles: Discovery* . For form interrogatories for use under particular fact situations in various kinds of cases, see Bender's Forms of Discovery, Vols. 1-10.

[3] Numbering Interrogatories

A party propounding interrogatories must number each set of interrogatories consecutively. The first paragraph immediately below the title of the case must set forth the identity of the propounding party, the set number, and the identity of the responding party. Each interrogatory in a set must be separately set forth and identified by number or letter [*Code Civ. Proc. § 2030.060*].

[4] Format of Interrogatories

Each interrogatory must be full and complete in and of itself. No preface or instruction must be included with a set of interrogatories unless it has been approved under *Code Civ. Proc. § 2033.710 et seq.* [*Code Civ. Proc. § 2030.060(d)*; *see Code Civ. Proc. § 2033.710* (Judicial Council authorized to develop and approve official form interrogatories for optional use in any civil action in a state court based on personal injury, property damage, wrongful death, unlawful detainer, breach of contract, family law, or fraud, and for any other civil actions the Council deems appropriate)].

Any term specially defined in a set of interrogatories shall be typed with all letters capitalized whenever that term appears. No specially prepared interrogatory shall contain subparts or a compound, conjunctive, or disjunctive question

[*Code Civ. Proc. § 2030.060(e), (f)*].

For a more detailed discussion of format requirements, see *§ 194.14A*.

[5] Service of Interrogatories

For discussion of when plaintiff and defendant may serve interrogatories, see *§ 194.13*. For a form of application for use in obtaining an order authorizing early service of interrogatories, see *§ 194.80*. For discussion of the parties on whom interrogatories must be served, see *§ 194.15*.

[6] Retention of Interrogatories

The interrogatories, and the responses and objections thereto, are not to be filed with the court, but must be retained by the propounding party [*Code Civ. Proc. § 2030.280*; *Cal. Rules of Ct., Rule 3.250(a)(8)*; for further discussion, *see § 194.16[7]*].

[7] Filing and Retention of Declaration for Additional Discovery

A declaration for additional discovery, whether offered separately or as an attachment to another document, may not be filed unless offered as relevant to the determination of an issue in a law and motion proceeding or other hearing or is ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(17)*]. The declaration must be retained until six months after final disposition of the cause, unless the court on motion of any party and for good cause shown orders the declaration preserved for a longer period [*Cal. Rules of Ct., Rule 3.250(b)*].

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16-194 California Forms of Pleading and Practice--Annotated § 194.83

§ 194.83 Written Interrogatories [Code Civ. Proc. §§ 2030.010-2030.070]--Judicial Council Form Interrogatories [Code Civ. Proc. § 2033.710 et seq.; Cal. Judicial Council Form DISC-001]--General

[1] FORM Written Interrogatories [Code Civ. Proc. §§ 2030.010-2030.070]--Judicial Council Form Interrogatories [Code Civ. Proc. § 2033.710 et seq.; Cal. Judicial Council Form DISC-001]--General

Click here to view image.

[2] Use of Form

The interrogatories set out in [1], *above*, is an illustrative reproduction of Cal. Judicial Council Form DISC-001, approved by the Judicial Council for optional use in any civil action in superior court based on personal injury, property damage, wrongful death, or fraud [*Code Civ. Proc. § 2033.710*; *see Cal. Rules of Ct., Rules 1.30(b), 1.35*; Cal. Rules of Ct., Appendix, Div. A]. The Judicial Council is authorized to develop and approve interrogatories for any other civil actions it deems appropriate [*Code Civ. Proc. § 2033.710*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge. The form also is available on the Internet at www.courtinfo.ca.gov/forms/.

Definitions and instructions are included in the form. The interrogatories do not change existing law relating to interrogatories, nor do they affect an answering party's right to assert any privilege [*see Code Civ. Proc. §§ 2017.010 et seq., 2018.010 et seq.*] or objection [*see Code Civ. Proc. § 2030.240*; *see also* Section 1(b) of the illustrative form].

[3] Other Judicial Council Form Interrogatories

There is a separate Judicial Council approved set of form interrogatories for use in under the economic litigation procedures in limited civil cases (Cal. Judicial Council Form DISC-004), *set out in § 194.84*.

There are also separate form interrogatories approved by the Judicial Council for use in unlawful detainer proceedings (Cal. Judicial Council Form DISC-003/UD-106), economic litigation (Cal. Judicial Council Form DISC-004), employment law (Cal. Judicial Council Form DISC-002), and family law proceedings (Cal. Judicial Council Form

FL-145). For illustrations of these forms, see Ch. 333, *Landlord and Tenant: Eviction Actions* , Ch. 194, *Discovery: Interrogatories* , Ch. 294, *Employment Law: Termination and Discipline* , in this publication and *California Family Law, Ch. 110, Trial Preparation and Discovery, § 110.33* (2d ed. Matthew Bender). These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge. The forms are also available at www.courtinfo.ca.gov/forms/.

[4] Filling in Form

[a] Caption

In the block at the top of the first page, fill in the name, address, and telephone number of the asking (propounding) party's attorney if that party is represented by counsel, and the name of that party. If the asking (propounding) party is not represented by counsel, then fill in the name, address, and telephone number of that party. Including fax numbers and e-mail addresses is optional. Fill in the name of the court in the second block. The short title of the case, which is entered in the third block, usually consists of the last name of the first plaintiff and the last name of the first defendant. In the bottom two blocks, fill in the names of the asking (propounding) and answering (responding) parties; the set number, which indicates the number of this set of interrogatories relative to the total number of sets of interrogatories that have been served in the proceeding; and the case number [*see Cal. Rules of Ct., Rule 3.1000(a)*].

[b] Choice of Interrogatories

The text of the interrogatories appears on the form, with each interrogatory preceded by a blank square box and a number. Counsel should determine which of the interrogatories he or she wishes to ask (propound) and check the box before the appropriate number on the form. The illustrative form in [1], *above*, has been filled out as it might be used by a defendant in a case arising out of a motor vehicle accident giving rise to alleged personal injury, property damage, and loss of income and earning capacity.

[5] Instructions for Answering or Responding Party

Whenever an interrogatory may be answered by referring to a document, the document may be attached as an exhibit to the response and referred to in the response. If the document has more than one page, refer to the page and section in which the answer to the interrogatory can be found [*see* Section 3(e) of the form].

Whenever an address and telephone number for the same person are requested in more than one interrogatory, the answering (responding) party must furnish them in answering only the first interrogatory asking for that information [*see* Section 3(f) of the form].

In answering these interrogatories, the answering (responding) party is not limited to his or her own personal knowledge, but must furnish all information available to him or her or to anyone acting on his or her behalf [*see Code Civ. Proc. § 2030.220*].

Answers to these interrogatories must be verified, dated, and signed [*Code Civ. Proc. § 2030.250*].

[6] Definitions

Section 4 of the form interrogatories sets out a number of definitions to words that appear throughout the interrogatories in boldface, all-capital type. In section 4(a), the attorney has the option of checking the Judicial Council's definition of "incident" for purposes of the interrogatories, or of providing a different definition drafted by the attorney.

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 194 DISCOVERY: INTERROGATORIES
PART V. FORMS

16-194 California Forms of Pleading and Practice--Annotated § 194.84

§ 194.84 Written Interrogatories [Code Civ. Proc. §§ 2030.010-2030.070]--Judicial Council Form Interrogatories [Code Civ. Proc. § 2033.710 et seq.; Cal. Judicial Council Form DISC-004] Limited Civil Cases (Economic Litigation) [Code Civ. Proc. § 94(a)(1)]

[1] FORM Written Interrogatories [Code Civ. Proc. §§ 2030.010-2030.070]--Judicial Council Form Interrogatories [Code Civ. Proc. § 2033.710 et seq.; Cal. Judicial Council Form DISC-004] Limited Civil Cases (Economic Litigation) [Code Civ. Proc. § 94(a)(1)]

Click here to view image.

[2] Use of Form

The form of interrogatories set out in [1], *above*, is an illustration of Cal. Judicial Council Form DISC-004, approved by the Judicial Council for optional use in a limited or unlimited civil case subject to the economic litigation provisions of *Code Civ. Proc. § 90 et seq.* [*Code Civ. Proc. § 2033.710 et seq.*; *see Cal. Rules of Ct., Rules 1.30(b), 1.35*; Cal. Rules of Ct., Appendix, Div. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge. The form is also available on the Internet at www.courtinfo.ca.gov/forms/.

When used in limited civil cases, these interrogatories are subject to the general restrictions on discovery in those cases set forth in *Code Civ. Proc. § 94*, including the limitation on the number of interrogatories that may be requested [*see Code Civ. Proc. § 94(a)(1)*]. Additionally, some of these interrogatories are similar to questions in the case questionnaire and may be omitted if the information sought has already been provided in a completed case questionnaire. For discussion of the procedures applicable to economic litigation in limited civil cases, including the restrictions on discovery, and an illustration of the Judicial Council's form of case questionnaire, see Ch. 345A, *Limited Civil Cases* .

For general instructions in completing the form, see *§ 194.83[4]*. See also discussion in *§ 194.83[2], [3], [5]*, and *[6]*.

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16-194 California Forms of Pleading and Practice--Annotated § 194.85

§ 194.85 Proceedings for Order to Serve Interrogatories on a Member of a Class Who Is Not a Class Representative and Who Has Not Appeared [Cal. Rules of Ct., Rule 3.768(c)]

[1] FORM Proceedings for Order to Serve Interrogatories on a Member of a Class Who Is Not a Class Representative and Who Has Not Appeared [Cal. Rules of Ct., Rule 3.768(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MOTION FOR ORDER TO SERVE INTERROG-
vs.	)	ATORIES ON A MEMBER OF A CLASS WHO IS
_____ [*name*],	)	NOT A CLASS REPRESENTATIVE AND WHO
Defendant.	)	HAS NOT APPEARED, PROPOSED INTERROG-
	)	ATORIES, AND MEMORANDUM
	)	Date: _____
	)	Time: _____
	)	Location:_____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g. plaintiff*] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (*Department or Division*) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [

identify party] will, and hereby does, move for an order allowing _____ [*identify party*] to serve interrogatories on _____ [*identify class member*], who is a member of the class certified by order of _____, but who is not a class representative and who has not appeared in this action.

The motion will be based on this notice of motion, on the proposed interrogatories (submitted with this notice of motion), and the memorandum of points and authorities served and filed herewith.
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
name of party or nonparty

PROPOSED INTERROGATORIES

[*Add memorandum supporting motion*.]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum of points and authorities supporting motion*.]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Use of Form

The form set out in [1], *above*, is for use when a party wishes to serve interrogatories on a member of a class who is not a party representative or who has not appeared under *Cal. Rules of Ct., Rule 3.768(c)*. Proposed interrogatories and a memorandum of supporting the factors listed in *Cal. Rules of Ct., Rule 3.768(d)* accompany the pleading.

In making its decision whether to allow such discovery, the court must consider the timing of the request, the subject matter to be covered, the materiality of the information being sought, the likelihood that class members have such information, the possibility of reaching factual stipulations that eliminate the need for such discovery, whether class representatives are seeking discovery on the subject to be covered, and whether discovery will result in annoyance, oppression, or undue burden or expense for the members of the class [*Cal. Rules of Ct., Rule 3.768(d)*].

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16-194 California Forms of Pleading and Practice--Annotated § 194.86

§ 194.86 Order Allowing Service of Interrogatories on a Member of Certified Class Who Is Not a Class Representative and Who Has Not Appeared [Cal. Rules of Ct., Rule 3.768(c)]

[1] FORM Order Allowing Service of Interrogatories on a Member of Certified Class Who Is Not a Class Representative and Who Has Not Appeared [Cal. Rules of Ct., Rule 3.768(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER TO SERVE INTERROGATORIES ON A MEMBER OF A CLASS WHO IS NOT A CLASS REPRESENTATIVE AND WHO HAS NOT APPEARED
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location:_____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

Upon the motion of the _____ [*identify moving party*] to allow service of interrogatories on _____, a member of the class certified in this action, who is not a class representative and who has not appeared, upon reviewing the proposed interrogatories submitted to the court, and upon consideration of the factors listed in *Cal. Rules of Ct., Rule 3.768(d)*, the court finds that the motion was made in a timely manner, that the subject matter to be covered by the interrogatories is relevant to the issues in the case, that the information sought is material to the issues in dispute, that the class members are likely to have the information requested, that an attempt to stipulate to the facts being sought was unsuccessful, that the information sought is not being obtained by class representatives, and

that the proposed interrogatories will not will result in annoyance, oppression, or undue burden or expense for the members of the class.

IT IS HEREBY ORDERED that the proposed interrogatories may be served on _____ [*members of class*].
Dated: _____

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form set out in [1], *above*, is for use when and order is granted for interrogatories to be served in a class action case from a class member whoneither has appeared in the case nor is a representative of the class [*Cal. Rules of Ct., Rule 3.768(c)*]. It should contain findings indicating that the court has considered the factors listed in *Cal. Rules of Ct., Rule 3.768(d)*.

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16-194 California Forms of Pleading and Practice--Annotated §§ 194.87-194.89

[Reserved]

§§ 194.87[Reserved]

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16-194 California Forms of Pleading and Practice--Annotated § 194.90

§ 194.90 Proceedings for Order Extending Time for Service of Response to Interrogatories [Code Civ. Proc. § 2030.260]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Order Extending Time for Service of Response to Interrogatories [Code Civ. Proc. § 2030.260]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER EXTENDING TIME FOR SERVICE OF RESPONSE TO INTERROGATORIES, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____

of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] will, and hereby does, move for an order extending until _____ [*date*] the time within which _____ [*identify moving party, e.g.,* defendant] _____ [*name*] may serve his/her response to the _____ [*number, e.g.,* first] set of interrogatories served on him/her by _____ [*specify party who served interrogatories, e.g.,* plaintiff] _____ [*name*] on _____ [*date*]. The motion will be made on the ground that _____ [*specify, e.g.,* the defendant does not have personal knowledge sufficient to respond fully to the interrogatories, and requires time to make a reasonable and good faith effort to obtain the information].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*identify moving party, e.g.,* defendant) _____ (*name*)].

2. On or about _____ [*date*], _____ [*identify party, e.g.,* defendant] was served with _____ [*describe interrogatories, e.g.,* plaintiff's first set of interrogatories to defendant].

3. _____ [*Describe nature of case, e.g.,* In the above-entitled action, the plaintiff is seeking damages for personal injuries and property damage allegedly sustained in a traffic accident involving a motor vehicle manufactured by defendant].

[4. There have been no previous extensions in this case granted by the court or agreed to by stipulation of the parties *or set forth facts regarding all previous extensions*.]

5. _____ [*Set forth facts underlying ground for motion, e.g.,* Defendant does not have personal knowledge sufficient to respond fully to interrogatories numbered 20-30, and believes that defendant's agents and employees are able to supply the necessary information therefor, but requires an additional 60 days in order to make a reasonable and good faith effort to obtain the information, as he is required to do pursuant to *Section 2030.220 of the Code of Civil Procedure*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The notice of motion and motion, with supporting declaration, set out in [1], *above*, is for use by a party who has been served with interrogatories to seek a court order extending the time to serve a response to the interrogatories beyond the 30-day limit allowed from the date of service of the interrogatories [*Code Civ. Proc. § 2030.260(a)*; *see also Code Civ. Proc. §§ 1013(a), 2016.050* (automatic extension of 30-day limit when service by mail); *see also Code Civ. Proc. § 1013(c), (e)* (service by Express Mail or by fax)]. This form may also be used by a party in an unlawful detainer action, or other proceeding under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), who has been served with interrogatories to seek a court order extending the time to serve a response beyond the five day period allowed from the date of service [*see Code Civ. Proc. § 2030.260(b)*].

The motion may be made with or without notice [*see Code Civ. Proc. § 2030.260*]. For a form of ex parte application and supporting declaration that may be adapted for use to extend time to serve a response to interrogatories, see *§ 194.80*.

A supporting memorandum must be served and filed with the form [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 194.80[4]*.

[3] Stipulation to Extend Time to Serve Response

Prior to preparing this notice of motion, counsel should attempt to obtain a stipulation between the propounding and responding parties to extend the time for service of a response [*see Code Civ. Proc. § 2030.270*].

[4] Previous Extensions

The applicant for an order extending time must disclose in writing the nature of the case and what, if any, previous extensions have been granted by court order or by stipulation [*Cal. Rules of Ct., Rule 2.20(b)*].

[5] Protective Order

If the responding party can establish that the extension of time is needed for protection from unwarranted annoyance, embarrassment, or oppression, or from undue burden and expense, he or she may move for a protective order, which may include an order extending time. In that event, a monetary sanction may be available to the prevailing party [*see Code Civ. Proc. § 2030.090*; *see § 194.95*].

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16-194 California Forms of Pleading and Practice--Annotated § 194.91

§ 194.91 Proceedings for Order Extending Time for Service of Response to Interrogatories [Code Civ. Proc. § 2030.260]--Order

[1] FORM Proceedings for Order Extending Time for Service of Response to Interrogatories [Code Civ. Proc. § 2030.260]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.*, defendant] _____ [*name*] for an order extending until _____ [*date*], the time within which he/she may serve his/her response to the _____ [*describe interrogatories, e.g.*, plaintiff's first set of interrogatories to defendant], came on regularly for hearing on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted and the time in which _____ [*identify*

party, e.g., defendant] _____ [*name*] may serve his/her response to the _____ [*describe interrogatories, e.g.,* plaintiff's first set of interrogatories to defendant] be, and hereby is, extended to _____ [*date*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This order is for use when the court grants a motion by a party who has been served with interrogatories to extend the time to serve a response [*see Code Civ. Proc. § 2030.260*]. See also *§ 194.90*.

[3] Filing and Service of Order

Orders extending time must be filed immediately and copies served within 24 hours after the making of the order, or within a time limit that may be fixed by the court [*Cal. Rules of Ct., Rule 2.20(c)*].

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16-194 California Forms of Pleading and Practice--Annotated § 194.92

§ 194.92 Proceedings for Order Relieving Responding Party From Waiver for Failure to Serve Timely Response [Code Civ. Proc. § 2030.290]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Order Relieving Responding Party From Waiver for Failure to Serve Timely Response [Code Civ. Proc. § 2030.290]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER RELIEVING RESPONDING PARTY FROM RELIEF FROM WAIVER, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____

[*identify party, e.g.,* defendant] will, and hereby does, move for an order relieving him/her from the waiver of his/her right[s] to _____ [exercise the option to produce writings under *Section 2030.230 of the Code of Civil Procedure* with respect to the interrogatories (numbered _____) *and/or* raise objections to the interrogatories (numbered _____)] in _____ [*describe interrogatories, e.g.,* plaintiff _____'s (*name*) first set of interrogatories to defendant _____ (*name*)] for failure to serve a timely response thereto. The motion will be made on the grounds that _____ [*identify moving party, e.g.,* defendant] has served a response to the interrogatories that is in substantial compliance with *Sections 2030.210-2030.240 of the Code of Civil Procedure*, and that his/her failure to serve a timely response thereto was the result of _____ [*specify reason, e.g.,* mistake, inadvertence, and/or excusable neglect].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name* (*s*)] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. [*Identity of declarant. See § 194.90[1], Declaration Paragraph 1.*]

2. On _____ [*date*], _____ [*describe service of interrogatories, e.g.,* plaintiff _____ (*name*) served his/her first set of interrogatories on defendant _____ (*name*) by mailing them to my office].

3. There is good cause for the order sought by _____ [*identify party, e.g.,* defendant] _____ [*name*] in that _____ [*set forth facts showing good cause, e.g.,* I was unaware of my duty to obtain a response to the above-described interrogatories because the secretary who received the interrogatories in the mail failed to notify me or any of my associates of their existence, and further concealed them by placing them in her desk drawer. That secretary was dismissed from my office on _____ [*date*]. On _____ [*date*], a subsequent secretary discovered the interrogatories when she cleaned out the desk in which they had been placed. She then brought them to my attention. I immediately contacted my client and obtained responses to the interrogatories, which were served forthwith on plaintiff _____ (*name*) on _____ [*date*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party's status and name*]

[2] Use of Form

The form of notice of motion and motion with supporting declaration set out in [1], *above*, is for use by a party who failed to serve a timely response to interrogatories to obtain an order for relief from the waivers imposed by *Code Civ. Proc. § 2030.290*, which prevent a responding party from exercising the option to produce writings under *Code Civ. Proc. § 2030.230* or objecting to the interrogatories.

The grounds for the motion are that the party subsequently served a response in substantial compliance with *Code Civ. Proc. §§ 2030.210-2030.240*, and that the failure to serve the response on time was the result of mistake, inadvertence, or excusable neglect [*Code Civ. Proc. § 2030.290(a)*]. These grounds are also available, among others, in support of a motion for relief from default under *Code Civ. Proc. § 473(b)*. Consequently, cases interpreting the sufficiency of a showing under *Code Civ. Proc. § 473(b)* may be useful with respect to obtaining an order of relief under *Code Civ. Proc. § 2030.290*. For further discussion of *Code Civ. Proc. § 473(b)*, see *Ch. 192, Discovery: Sanction for Discovery Misuse, § 192.13[3][c]*. For detailed discussion and forms relating to relief under *Code Civ. Proc. § 473(b)*, see Ch. 489, *Relief from Judgments and Orders* .

A supporting memorandum is required to be served and filed with the form [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*; *see also* discussion and forms in Ch. 417, *Points and Authorities*]. For forms of memoranda relating to a motion for relief from waiver under *Code Civ. Proc. § 2030.290*, see California Points and Authorities , Ch. 84, *Discovery: Interrogatories* (Matthew Bender).

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 194.80[4]*.

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16-194 California Forms of Pleading and Practice--Annotated § 194.93

§ 194.93 Proceedings for Order Relieving Responding Party From Waiver for Failure to Serve Timely Response [Code Civ. Proc. § 2030.290]--Order

[1] FORM Proceedings for Order Relieving Responding Party From Waiver for Failure to Serve Timely Response [Code Civ. Proc. § 2030.290]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.,* defendant] _____ [*name*] for an order relieving him/her from the waiver of the rights to exercise the option to produce writings under *Section 2030.230 of the Code of Civil Procedure*, and to raise objections with regard to _____ [Interrogatories No. _____ in] _____ [*describe interrogatories, e.g.,* plaintiff _____'s (*name*) first set of interrogatories to defendant _____ (*name*)], came on regularly for hearing on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

The Court, having considered the _____ [affidavit(s) *or* declaration(s)] and other documents in support

of and opposition to the motion, having heard the arguments of counsel, and being fully advised in the matter, determines that the plaintiff has served a response that is in substantial compliance with *Sections 2030.210-2030.240 of the Code of Civil Procedure*, and that the plaintiff's failure to serve it in a timely manner was the result of mistake, inadvertence, or excusable neglect, in that _____ [*specify reason for tardiness constituting mistake, inadvertence, or excusable neglect*].

IT IS ORDERED that the motion be, and hereby is, granted and _____ [*identify party, e.g.,* defendant] _____ [*name*] is relieved from the waiver of the right _____ [*specify relief sought, e.g.,* to exercise the option to produce writings under *Section 2030.230 of the Code of Civil Procedure*, and to raise objections in response to _____ (*describe interrogatories, e.g.,* plaintiff _____'s (*name*) first set of interrogatories to defendant _____ (*name*))].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use by a party who failed to serve timely a response to interrogatories for relief from the waivers imposed by *Code Civ. Proc. § 2030.290*, which prevent a responding party from exercising the option to produce writings under *Code Civ. Proc. § 2030.230* or to object to the interrogatories [*see Code Civ. Proc. § 2030.290*]. See also *§ 194.92*.

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16-194 California Forms of Pleading and Practice--Annotated § 194.94

§ 194.94 Response to Interrogatories [Code Civ. Proc. §§ 2030.210-2030.250]--Basic Format

[1] FORM Response to Interrogatories [Code Civ. Proc. §§ 2030.210-2030.250]--Basic Format

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	RESPONSE TO _____
_____ [*name*],	)	[*identify, e.g.,* PLAINTIFF]
Defendant.	)	_____'S [*name*]
	)	_____
	)	[*number, e.g.,* FIRST] SET OF INTERROGATORIES TO _____ [*identify, e.g.,* DEFENDANT] _____ [*name*]

_____

Responding Party: _____ [*Identify, e.g.,* Defendant], _____ [*name*].

Propounding Party: _____ [*Identify, e.g.,* Plaintiff], _____ [*name*].

Set Number: _____.

_____ [*Identify responding party, e.g.,* Defendant _____ (*name of individual*) *or* Defendant _____ (*name of public or private corporation, partnership, association, or governmental agency*) by _____ (*name*), its _____ (*specify capacity or title*),] responds to the interrogatories served on him/her/it by _____ [*identify party, e.g.,* plaintiff] _____ [*name*] as follows:

1. _____ [*If answering, state each answer by the same number and in the same sequence as the corresponding interrogatory, e.g.,* My name is John Doe; I reside at 1000 Main Street, Coast City, California].

2. _____ [*If stating an objection, clearly set forth the specific ground therefor; if invoking a privilege, clearly state which one, e.g.,* Objected to on the ground that the matters inquired into concern privileged lawyer-client communication in that they consist of information transmitted in confidence from plaintiff to his/her lawyer in the course of the lawyer-client relationship].

3. [*If exercising the option to refer to documents under Code Civ. Proc. § 2030.230, state:* Pursuant to Section of the Code of Civil Procedure, the writings from which the answer may be derived or ascertained are identified as _____ (*describe the writings in detail, e.g.,* investigation reports regarding traffic accidents involving Metro Transit System buses for theyears 1998-1999), and may be examined on or after _____ [*date*], between the hours of _____ [*time*] and _____ [*time*] at _____ (*place*), or at any other time and place as may be mutually agreed on.]

[*CONTINUE setting out appropriate responses*]

_____ [*date*]

[*EITHER, attorney signs if response contains one or more objections*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*responding party*]

[*AND/OR, party, its agent, or its officer signs and verifies, unless response contains only objections*]

_____ [*signature of responding party*
or agent or officer]
_____ [*typed name*]

VERIFICATION

[*EITHER*]

I, _____ [*name*], am the _____ [*identify, e.g.,* defendant] in the above-entitled action. I have read the foregoing Response to Interrogatories and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and concerning those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature of responding party*]
_____ [*typed name*]

[*OR*]

I, _____ [*name*], am _____ [the agent *or* an officer] of _____ [*name of responding party*], which is a _____ [*specify type of entity, e.g.*, corporation] and a/the _____ [*identify, e.g.*, defendant] in the above-entitled action. I have read the foregoing Response to Interrogatories and know the contents thereof.

Based on information available to _____[*name of responding party*], I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature of agent or officer*]
_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, sets out the basic format to be used in responding to written interrogatories served under *Code Civ. Proc. § 2030.010 et seq.* It includes examples of an answer, an objection, and an answer under referring the propounding party to specific documents of the answering party [*see Code Civ. Proc. § 2030.230*].

[3] Format

In each set of responses to interrogatories, the first paragraph immediately below the title of the case must show the identity of the responding party, the set number, and the identity of the propounding party [*Code Civ. Proc. § 2030.210(b)*]. If the response is a supplemental response, an amended answer, or a further response, the first paragraph must also include the nature of the paper [*Cal. Rules of Ct., Rule 3.1000(a)*]. Each answer, exercise of option, or objection in the response must bear the same identifying number or letter and be in the same sequence as the corresponding interrogatory, but the text of that interrogatory need not be repeated [*Code Civ. Proc. § 2030.210(c)*; *see also Cal. Rules of Ct., Rule 3.1000(b)* (format of supplemental responses, further responses, and amended answers)].

[4] Content of Response

Each answer in the response must be as complete and straightforward as the information reasonably available to the responding party permits [*Code Civ. Proc. § 2030.220(a)*; *see* discussion in *§ 194.14[2]*]. If only a part of an interrogatory is objectionable, the remainder of the interrogatory must be answered [*Code Civ. Proc. § 2030.240(a)*; *see* discussion in *§§ 194.16[4]* and *194.17*].

[5] Service of Response

Within 30 days after service of interrogatories, the party to whom the interrogatories are propounded must serve the original of the response on the propounding party, or in unlawful detainer actions or other proceedings under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), within five days from the date of service, unless on motion of the propounding party, the court has shortened the time for response, or on motion of the responding party, the court has

extended the time for response [*Code Civ. Proc. § 2030.260(a), (b)*]. If the interrogatories were served by mail, the 30-day response period is extended five calendar days if the place of address is within California, 10 calendar days if the place of address is outside California but within the United States, or 20 calendar days if the place of address is outside the United States [*Code Civ. Proc. §§ 1013(a), 2016.050*]. The period is extended two court days if service is by Express Mail or by fax [*Code Civ. Proc. § 1013(c), (e)*]. The parties may also agree to extend the time [*see Code Civ. Proc. § 2030.270*; *see §§ 194.16[6]* and *194.18*]. Absent a court order to the contrary, the responding party must also serve all other parties who have appeared [*Code Civ. Proc. § 2030.260(c)*]. The *form in § 194.80*, which includes a request for relief from the requirement to serve a copy of interrogatories on all parties, may be adapted to seek an order for relief from the requirement to serve a copy of the response on all parties.

[6] Verification

The party to whom the interrogatories are directed must sign the response under oath, unless the response contains only objections. If that party is a public or private corporation, or a partnership, association, or governmental agency, one of its officers or agents must sign the response under oath on behalf of that party. The attorney for the responding party must sign any responses that contain an objection [*Code Civ. Proc. § 2030.250*; for further discussion, *see § 194.16[5]*].

[7] Retention of Responses or Objections to Interrogatories

Responses or objections to interrogatories may not be filed with the court, unless offered as relevant under a law and motion proceeding or other hearing or ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(8)*]. Instead, the serving party retains the original and the proof of service until six months after final disposition of the cause, unless otherwise ordered by the court for cause [*Code Civ. Proc. § 2030.280*; *Cal. Rules of Ct., Rule 3.250(b)*].

[8] Cross References

For alternate verification forms, see Ch. 572, *Verification* .

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Chapter 194 DISCOVERY: INTERROGATORIES
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16-194 California Forms of Pleading and Practice--Annotated § 194.95

§ 194.95 Proceedings for Protective Order Regarding Interrogatories [Code Civ. Proc. §§ 2017.020, 2019.030, 2030.090]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Protective Order Regarding Interrogatories [Code Civ. Proc. §§ 2017.020, 2019.030, 2030.090]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER RESTRICTING DISCOVERY AND IMPOSING MONETARY SANCTIONS, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	(Interrogatories)
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] will, and hereby does, move for an order that _____ [*describe interrogatories, e.g.,* Interrogatories No. 10-25 of the first set of interrogatories served by plaintiff _____ (*name*) on defendant _____ (*name*) need not be answered], and will further move this court for an order requiring _____ [*identify party or attorney or both, e.g.,* plaintiff and/or his/her attorney _____ (*name*)] to pay a monetary sanction in the amount of $_____ to _____ [*identify moving party, e.g.,* defendant]. The motion will be made on the grounds that _____ [*specify, e.g.,* the interrogatories call for commercial information that could harm defendant's business if the information becomes public], and that _____ [*identify movingparty, e.g.,* defendant] made a reasonable and good faith attempt at an informal resolution of the issues presented by this motion.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name*(*s*)] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. [*Identity of declarant. See § 194.90[1], Supporting Declaration Paragraph 1.*]

2. On _____ [*date*], _____ [*identify party, e.g.,* plaintiff] _____ [*name*] served his/her _____ [*specify, e.g.,* first] set of interrogatories on _____ [*identify party, e.g.,* defendant] _____ [*name*]. A copy of _____ [that set of interrogatories *or* interrogatories No. _____ of that set] are attached hereto as Exhibit A and made a part hereof.

3. There is good cause for the order sought by _____ [*identify party, e.g.,* defendant] _____ [*name*] in that _____ [*set forth facts showing good cause, e.g.,* Interrogatories No. 10-25 refer to secret commercial information relating to licensing agreements entered into by defendant, including licensing fees. Defendant's business is highly competitive, and its competitors have systematically attempted to persuade defendant's customers to patronize them instead of defendant. Divulging the terms of defendant's licensing arrangements would enable defendant's competitors to offer better terms and thereby to take away these customers].

4. On _____ [*date*], _____ [*specify actions taken to confer with opposing party in a reasonable and good faith attempt to informally resolve the issues covered by the motion, including any narrowing of the areas of disagreement achieved by the negotiations, e.g.,* I sent a letter to plaintiff's attorney _____ (*name*) asking that plaintiff withdraw the interrogatories that are the subject of this motion. A copy of the letter is attached as Exhibit A and made a part hereof. To date, I have not received an answer to that letter, nor have my subsequent telephone calls to _____ (*name of opposing party's attorney*) been returned].

5. _____ [*Identify moving party, e.g.,* Defendant] bases his/her request for the imposition of a sanction

in the amount of $_____ on _____ [*itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party's status and name*]

[2] Use of Form

The notice of motion and motion with supporting declaration set out in [1], *above*, is for use by a party on whom interrogatories have been served, to seek an order preventing or limiting response to the interrogatories and to obtain monetary sanctions against the propounding party [*see Code Civ. Proc. § 2030.090*]. For discussion of protective orders relating to interrogatories, see *§ 194.23*.

A supporting memorandum must to be served and filed with the foregoing form [*Cal. Rules of Ct., Rule 3.1113(a)*; *see* Code C iv. Proc. §§ 1005(b), 1010, 2023.040; *see also* discussion and forms in Ch. 417, *Points and Authorities*]. For forms for memoranda relating to motions for protective orders regarding interrogatories, see California Points and Authorities , Ch. 84, *Discovery: Interrogatories* (Matthew Bender).

Any motion concerning interrogatories must identify the interrogatories or requests by set and number [*Cal. Rules of Ct., Rule 3.1345(d)*].

For discussion and forms relating to discovery of financial records in an action in which the plaintiff seeks punitive damages, see *Ch. 177, Damages, § 177.40* et seq.

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 194.80[4]*.

[3] Sanctions

The court must impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2030.090(d)*].

For further discussion of monetary sanctions under *Code Civ. Proc. § 2023.030*, to be imposed on a party who

unsuccessfully makes or opposes a discovery motion, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

[4] Supporting Declaration

Declaration Paragraph 4 of this form provides facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion as required by *Code Civ. Proc. § 2030.090(a)*. For further discussion of this requirement, see generally *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*.

Declaration Paragraph 5 sets forth facts supporting the amount of any monetary sanction sought [*see Code Civ. Proc. § 2023.040*; for discussion of this requirement, *see Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.19*].

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16-194 California Forms of Pleading and Practice--Annotated § 194.96

§ 194.96 Proceedings for Protective Order Regarding Interrogatories [Code Civ. Proc. §§ 2017.020, 2019.030, 2030.090]--Order

[1] FORM Proceedings for Protective Order Regarding Interrogatories [Code Civ. Proc. §§ 2017.020, 2019.030, 2030.090]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.*, defendant] _____ [*name*] for an order that _____ [*specify, e.g.*, the answers to Interrogatories No. 10-25 of plaintiff's _____ (*name*) first set of interrogatories served on defendant _____ (*name*) need not be answered] came on regularly for hearing on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

[*EITHER*]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[*OR*]

On good cause shown and proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted and that _____ [*specify order, e.g.,* defendant _____ (*name*) need not answer Interrogatories Numbers 10 through 25 of plaintiff _____'s (*name*) first set of interrogatories].

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] pay forthwith to _____ [*identify successful party, e.g.,* defendant] _____ [*name*] the sum of $_____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The proposed order set out in [1], *above*, is for use when the court grants or denies a motion by a party to whom interrogatories have been served to prevent or limit response to interrogatories and to obtain monetary sanctions against the propounding party [*see Code Civ. Proc. § 2030.090*].

Optional Paragraph 3 of the findings is for use when the party who did not prevail on the motion has failed to show that it acted with substantial justification or that other circumstances would make the imposition of the monetary sanction unjust. Paragraph 3 of the order provides language to award a monetary sanction against the responding attorney.

See also *§ 194.95*.

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16-194 California Forms of Pleading and Practice--Annotated §§ 194.97-194.99

[Reserved]

§§ 194.97[Reserved]

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16-194 California Forms of Pleading and Practice--Annotated § 194.100

§ 194.100 Proceedings for Order Compelling Response to Interrogatories [Code Civ. Proc. § 2030.290]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Order Compelling Response to Interrogatories [Code Civ. Proc. § 2030.290]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER COMPELLING RESPONSE TO INTERROGATORIES AND FOR MONETARY SANCTION, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____

of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.*, plaintiff] _____ [*name*] will, and hereby does, move for an order compelling _____ [*identify party, e.g.*, defendant] _____ [name] to serve on him/her a response to [Interrogatories No. _____ in] his/her _____ [*specify number, e.g.*, first] set of interrogatories, which he/she served on _____ [*identify party, e.g.*, defendant] _____ [name], on _____ [*date*], and will further move this court for an order requiring _____ [*identify party or attorney or both, e.g.*, defendant and/or his/her attorney, _____ (*name*),] to pay a monetary sanction to _____ [*identify party, e.g.*, plaintiff]. The motion will be made on the grounds that _____[*identify party, e.g.*, defendant] has failed to serve a timely response to the above-described interrogatories.

The motion will be based on this notice of motion, on the declaration(s)of _____ [*name*(*s*)] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*identify moving party, e.g.*, plaintiff) _____ (*name*)].

2. On _____ [*date*], _____ [*identify moving party, e.g.*, plaintiff] _____ [*name*] served his/her _____ [*specify number, e.g.*, first] set of interrogatories on _____ [*identify responding party, e.g.*, defendant] _____ [*name*]. A copy of those interrogatories with proof of service are attached to this declaration as Exhibit A and made a part hereof.

[*EITHER, if no response at all received*]

3. _____ [*Identify moving party, e.g.*, Plaintiff] _____ [*name*] has received no response to these interrogatories.

[*OR, if partial response received*]

3. On _____ [*date*], _____ [*identify responding party, e.g.*, defendant] _____ [*name*] served _____ [*identify propounding party, e.g.*, plaintiff] _____ [*name*] with his/her purported responses to the interrogatories, but did not respond at all to the Interrogatories No. _____. A copy of the response is attached hereto as Exhibit B and made a part hereof.

[*CONTINUE*]

4. _____ [*Identify moving party, e.g.,* Plaintiff] bases his/her request for the imposition of a sanction in the amount of $_____ on _____ [*itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

By: _____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The notice of motion and motion with supporting declaration set out in [1], *above*, is for use by a party who has propounded interrogatories to seek an order compelling response and imposing a monetary sanction when the party on whom they were served failed to serve a timely response to them [*see Code Civ. Proc. § 2030.290*]. If the responding party has served inadequate answers or improper objections, the party propounding the interrogatories should use § 194.102 instead of this form, to seek an order compelling a further response.

Any motion concerning interrogatories must identify the interrogatories by set and number [*Cal. Rules of Ct., Rule 3.1345(d)*].

A supporting memorandum is required to be served and filed with this form [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; *see also* discussion and forms in Ch. 417, *Points and Authorities*]. For forms for memoranda relating to motions to compel response to interrogatories, see California Points and Authorities , Ch. 84, *Discovery: Interrogatories* (Matthew Bender).

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 194.80[4]*.

[3] Time for Noticing Motion

Code Civ. Proc. § 2030.290 does not contain a provision requiring a motion to compel response to interrogatories to be filed and served within a particular time. Unless otherwise ordered or specifically provided by law, all moving and supporting papers must be served and filed at least 21 calendar days before the time appointed for the hearing [*Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(a)*]. The 21-day period may be extended depending on the method

of service used [*see Code Civ. Proc. § 1005(b)*]. For further discussion regarding the service and filing of motions and other papers, see Ch. 372, *Motions and Orders* , and Ch. 518, *Service of Summons and Papers* .

[4] Sanctions

The court must impose a monetary sanction under *Code Civ. Proc. § 2023.030*, against any party, person, or attorney who unsuccessfullymakes or opposes a motion to compel a response to interrogatories, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2030.290(d)*; for further discussion of this general provision, *see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[2]*].

The court may award sanctions in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed [*Cal. Rules of Ct., Rule 3.1348(a)*]. However, the court may not deem the opposing party's failure to file written opposition, failure to appear at a hearing, or voluntary provision discovery to be an admission that the motion was proper or that sanctions should be awarded [*Cal. Rules of Ct., Rule 3.1348(b)*].

For more detailed discussion of monetary sanctions generally, including requirements generally applicable in proceedings to impose such sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

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16-194 California Forms of Pleading and Practice--Annotated § 194.101

§ 194.101 Proceedings for Order Compelling Response to Interrogatories [Code Civ. Proc. § 2030.290]--Order

[1] FORM Proceedings for Order Compelling Response to Interrogatories [Code Civ. Proc. § 2030.290]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.,* plaintiff] _____ [*name*] for an order compelling _____ [*identify responding party, e.g.,* defendant] _____ [*name*] to serve on him/her response to [Interrogatories No. _____ in] his/her _____ [*specify number, e.g.,* first] set of interrogatories that he/she served on _____ [*identify responding party, e.g.,* defendant] _____ [*name*] on _____ [*date*], came on regularly for hearing on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be _____ [denied *or* granted],

IT IS ORDERED that the motion be, and hereby is, _____ [denied *or* granted and that

_____ (*specify each order, if more than one, in a separate paragraph, e.g.,* defendant _____ (*name*) serve response to (Interrogatories No. _____ in) plaintiff _____'s (*name*) first set of interrogatories on or before _____ (*date*)].

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] pay forthwith to _____ [*identify successful party, e.g.,* defendant] _____ [*name*] the sum of $_____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted withsubstantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form for a proposed order set out in [1], *above*, is for use when the court grants or denies a motion to compel response to interrogatories and to impose sanctions [*see Code Civ. Proc. § 2030.290*]. See also *§ 194.100*.

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16-194 California Forms of Pleading and Practice--Annotated § 194.102

§ 194.102 Proceedings for Order Compelling Further Response to Interrogatories [Code Civ. Proc. § 2030.300]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Order Compelling Further Response to Interrogatories [Code Civ. Proc. § 2030.300]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER COMPELLING FURTHER RESPONSE TO WRITTEN INTERROGATORIES AND FOR MONETARY SANCTION, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____

of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* plaintiff] will, and hereby does, move for an order compelling further responses to _____ [*describe interrogatories, e.g.,* Interrogatories No. 10-15 of the first set of interrogatories by plaintiff _____ (*name*) to defendant _____ (*name*)], and will further move this court for an order requiring _____ [*identify party or attorney or both, e.g.,* defendant and/or his/her attorney _____ (*name*)] to pay a monetary sanction in the amount of $_____ to _____ [*identify party, e.g.,* plaintiff]. The motion will be made on the ground[s] that _____ [the purported answers are evasive and incomplete *and/or* the exercise of the option to produce documents under *Section 2030.230 of the Code of Civil Procedure* is unwarranted) *and/or* the required specification of documents under *Section 2030.230 of the Code of Civil Procedure* is inadequate *and/or* the objection(s) to the interrogatories is/are _____ (without merit *and/or* too general)]. The motion will be made on the further ground that _____ [*moving party, e.g.,* plaintiff] made a reasonable and good faith attempt at informal resolution of the issues presented by this motion.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name*(*s*)], on the separate statement served and filed herewith pursuant to *Cal. Rules of Ct., Rule 3.1345*, on the memorandum set forth below, and on the records and file herein and such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. [*Identity of declarant. See § 194.100[1], Supporting Declaration Paragraph 1.*]

2. On _____ [*date*], _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] served his/her/its _____ [*number, e.g.,* first] set of interrogatories on _____ [*identify party, e.g.,* defendant] _____ [*name*].

3. On _____ [*date*], _____ [*identify responding party, e.g.,* defendant] _____ [*name*] served his/her/its purported responses on _____ [*identify moving party e.g.,* plaintiff] _____ [*name*].

4. [*Reasonable and good faith attempt to resolve informally. See § 194.95[1], Supporting Declaration Paragraph 4.*]

5. [*Itemization of expenses. See § 194.95[1], Supporting Declaration Paragraph 5.*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party's status and name*]

[2] Use of Form

The notice of motion and motion with supporting declaration set out in [1], *above*, is for use by a party who has propounded interrogatories after responses to them have been served to seek an order to compel further responses. A motion to compel further response may be based on any one, or a combination of, the following grounds [*see Code Civ. Proc. § 2030.300(a)*]:

- An answer to a particular interrogatory is evasive or incomplete.

- An exercise of the option to produce documents under *Code Civ. Proc. § 2030.230* is unwarranted or the required specification of those documents is inadequate.

- An objection to an interrogatory is without merit or too general.

Any motion concerning interrogatories must identify the interrogatories by set and number [*Cal. Rules of Ct., Rule 3.1345(d)*].

This motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by it [*Code Civ. Proc. § 2030.300(b)*]. For further discussion of this requirement, see generally *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*.

A supporting memorandum must be served and filed with this motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; *see also* discussion and forms in Ch. 417, *Points and Authorities*]. For memoranda relating to motions to compel further answers to interrogatories, see California Points and Authorities , Ch. 84, *Discovery: Interrogatories* (Matthew Bender).

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 194.80[4]*.

[3] Separate Statement

A motion to compel further responses to interrogatories must be accompanied by a separate statement [*Cal. Rules of Ct., Rule 3.1345(a)(2), (c)*]. This is a separate document filed and served with the motion that sets out all the information necessary to understand all the questions and responses that are in issue [*see Cal. Rules of Ct., Rule 3.1345(c)*]. For a form for this separate statement, together with further discussion of its requirements, see *§ 194.103*.

[4] Notice

Unless notice of motion is given within 45 days of the service of the response, or any supplemental response, or by any

specific later date towhich the propounding party and the responding party have agreed in writing, the propounding party waives any right to compel a further response to the interrogatories [*Code Civ. Proc. § 2030.300(c)*]. If the responses were served by mail, the 45-day period is extended five calendar days if the place of address is within California, 10 calendar days if the place of address is outside California but within the United States, or 20 calendar days if the place of address is outside the United States [*Code Civ. Proc. §§ 1013(a), 2016.050*]. The period is extended two court days if service is by Express Mail or by fax [*Code Civ. Proc. § 1013(c), (e)*]. For further discussion of notice requirements, see discussion in *§ 194.20[2]*.

[5] Burden of Proof

On the propounding party's motion to compel further response, the responding party has the burden of establishing a valid objection [*Coy v. Superior Court (1962) 58 Cal. 2d 210, 220, 23 Cal. Rptr. 393, 373 P.2d 457]* .

[6] Monetary Sanction

The court must impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a further response to interrogatories, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2030.300(d)*; for further discussion of this general provision, *see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[2]*].

The court may award sanctions in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed [*Cal. Rules of Ct., Rule 3.1348(a)*]. The court may not, however, deem the opposing party's failure to file written opposition, failure to appear at a hearing, or voluntary provision discovery to be an admission that the motion was proper or that sanctions should be awarded [*Cal. Rules of Ct., Rule 3.1348(b)*].

For more detailed discussion of monetary sanctions generally, including requirements generally applicable in proceedings to impose such sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

[7] Sanctions for Failure to Obey Order Compelling Further Response

If a party fails to obey an order compelling further response to interrogatories, the court may make those orders that are just, including the imposition of an issue, evidence, or terminating sanction under *Code Civ.Proc. § 2023.030*. In lieu of or in addition to that sanction, the court may impose a monetary sanction under *Code Civ. Proc. § 2023.030* [*Code Civ. Proc. § 2030.300(e)*]. For further discussion, see *§ 194.21*. For a form for a motion for an order imposing such sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, § 192.50*.

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 194 DISCOVERY: INTERROGATORIES
PART V. FORMS

16-194 California Forms of Pleading and Practice--Annotated § 194.103

§ 194.103 Proceedings for Order Compelling Further Response to Interrogatories [Code Civ. Proc. § 2030.300]--Separate Statement [Cal. Rules of Ct., Rule 3.1345]

[1] FORM Proceedings for Order Compelling Further Response to Interrogatories [Code Civ. Proc. § 2030.300]--Separate Statement [Cal. Rules of Ct., Rule 3.1020]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	SEPARATE STATEMENT IN SUPPORT OF MO-
vs.	)	TION FOR ORDER COMPELLING FURTHER RE-
_____ [*name*],	)	SPONSE TO INTERROGATORIES
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

This separate statement is submitted in support of the motion by _____ [*identify moving party, e.g.*, plaintiff] _____ [*name*] to compel _____ [*specify party from whom answers are sought, e.g.*, defendant] _____ [*name*] to serve an adequate response to the [supplemental] interrogatories propounded by _____ (*specify propounding party, e.g.*, plaintiff)]. As required under *Cal. Rules of Ct., Rule 3.1345*, this statement provides information relating to the interrogatories and responses at issue in the motion, as follows:

INTERROGATORY _____ [*identify specific interrogatory by set number and the number or letter*

of the individual interrogatory]

1. Text of Interrogatory: _____ [*specify*].

2. Text of Response(s): _____ [*specify text of response, and any further responses, to the specific interrogatory*].

[3. Related Definitions and Instructions: _____ (*specify, if necessary, the text of all definitions, instructions, and other matters required to understand the specific interrogatory and the responses to it.*)]

[4. Related Demands and Responses: _____ (*if the response to the specific interrogatory is dependent on the response given to another discovery request, or if the reasons a further response is deemed necessary are based on the response to some other discovery request, specify the text of the other request and the response to it.*)]

[5. Related Pleadings and Other Documents: _____ (*summarize any pleadings or other documents in the file, if any, that are relevant to the motion and are relied on by the moving party.*)]

6. Statement of Reasons for Compelling Further Response(s): _____ [*state factual and legal reasons for compelling further responses to the specific interrogatory*]. [*Set out separately, as above, any further specific interrogatories with related information, with respect to which the motion is seeking to compel further response.*]
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*propounding party's status and name*]

[2] Use of Form

The separate statement set out in [1], *above*, is required to accompany a motion, such as that *set out in § 194.102*, to compel further responses to interrogatories [*see Cal. Rules of Ct., Rule 3.1345(a)(2)*].

[3] Contents of Separate Statement

Any motion involving the content of a discovery request or the responses to such a request must be accompanied by a separate statement [*Cal. Rules of Ct., Rule 3.1345(a)*]. The motions that require a separate statement include a motion to compel further responses to interrogatories [*Cal. Rules of Ct., Rule 3.1345(a)(2)*]. A separate statement is not required when no response has been provided to the request for discovery [*Cal. Rules of Ct., Rule 3.1345(b)*].

This separate statement is a separate document filed and served with the motion. It must set forth all the information necessary to understand each discovery request (in this instance each inspection demand) and all the responses to it that are at issue [*Cal. Rules of Ct., Rule 3.1345(c)*]. It must be full and complete, so that no person is required to review any other document in order to determine the full request and the full response. Material may not be incorporated into the separate statement by reference [*Cal. Rules of Ct., Rule 3.1345(c)*].

The separate statement must include, for each discovery request (in this instance each inspection demand) to which a further response is requested, the following [*Cal. Rules of Ct., Rule 3.1345(c)*]:

- The text of the request, and the text of each response, answer, or objection, and any further responses or answers [*Cal. Rules of Ct., Rule 3.1345(c)(1), (2)*].

- A statement of the factual and legal reasons for compelling further responses, answers, or production as to each matter in dispute [*Cal. Rules of Ct., Rule 3.1345(c)(3)*].

- If necessary, the text of all definitions, instructions, and other matters required to understand each discovery request and the responses to it [*Cal. Rules of Ct., Rule 3.1345(c)(4)*].

- If the response to a particular discovery request is dependent on the response given to another discovery request, or if the reasons a further response to a particular discovery request is deemed necessary are based on the response to some other discovery request, the other request and the response to it must be set forth [*Cal. Rules of Ct., Rule 3.1345(c)(5)*].

- If the pleadings, other documents in the file, or other items of discovery are relevant to the motion, a summary of each relevant document by the party relying on the document [*Cal. Rules of Ct., Rule 3.1345(c)(6)*].

The primary function of the separate statement appears to be that of providing a summary, in a single document, of all matters, taken from all pleadings and all other papers, that may be necessary to determine the motion. By including a statement of the factual and legal reasons for compelling further responses to each matter in dispute [*Cal. Rules of Ct., Rule 3.1345(c)(3)*], it appears that a separate statement, when required under *Cal. Rules of Ct., Rule 3.1345(c)*, also serves the same function as the supporting memorandum [*see Cal. Rules of Ct., Rule 3.1113(b)* (memorandum consists of statement of facts and statement of law, evidence and argument, discussing the statutes, cases, and textbooks cited as support)].

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16-194 California Forms of Pleading and Practice--Annotated § 194.104

§ 194.104 Proceedings for Order Compelling Further Response to Interrogatories [Code Civ. Proc. § 2030.300]--Order

[1] FORM Proceedings for Order Compelling Further Response to Interrogatories [Code Civ. Proc. § 2030.300]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify moving party, e.g.* plaintiff] _____ [*name*] for an order requiring further response by _____ [*identify responding party, e.g.*, defendant] _____ [*name*] to _____ [*specify interrogatories, e.g.*, Interrogatories No. 10-15 of plaintiff _____'s (*name*) first set of interrogatories to defendant _____ (*name*)] and for monetary sanctions, came on regularly for hearing on _____, 20_____. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be _____ [denied *or* granted],

IT IS ORDERED that the motion be, and hereby is, _____ [denied *or* granted and that _____ (*specify each order in a separate paragraph, e.g.,* defendant answer Interrogatory No. 10 by stating the specific numbers of shares of stock as requested in the interrogatory)].

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] pay forthwith to _____ [*identify successful party, e.g.,* defendant] _____ [*name*] the sum of $_____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use when the court has granted or denied a motion by a party who has propounded interrogatories after responses to them have been served, to compel further responses [*see Code Civ. Proc. § 2030.300*]. See also *§§ 194.102* and *194.103*.

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16-194 California Forms of Pleading and Practice--Annotated § 194.105

§ 194.105 Proceedings for Order That Initial Answers to Interrogatories Be Deemed Binding [Code Civ. Proc. § 2030.310]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Order That Initial Answers to Interrogatories Be Deemed Binding [Code Civ. Proc. § 2030.310]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER THAT INITIAL ANSWERS TO INTERROGATORIES BE DEEMED BINDING AND FOR MONETARY SANCTION, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.*, plaintiff] will, and hereby does, move for an order that the initial answer of _____ [*identify party, e.g.*, defendant] _____ [*name*] to _____ [*describe interrogatory, e.g.*, Interrogatory No. _____ of the first set of plaintiff _____'s (*name*) interrogatories to defendant _____ (*name*)] be deemed binding on _____ [*identify party, e.g.*, defendant] _____ [*name*] for the purpose of the pending action. The motion will be made on the grounds that the initial failure of _____ [*identify party, e.g.*, defendant] _____ [name] to answer the interrogatory correctly has substantially prejudiced _____ [*identify party, e.g.*, plain tiff] _____ [*name*], that _____ [*identify party, e.g.*, defendant] _____ [*name*] has failed to show substantial justification for the initial answer to that interrogatory, andthat prejudice to _____ [*identify party, e.g.*, plaintiff] _____ [*name*] cannot be cured either by a continuance to permit further discovery or by the use ofthe initial answer pursuant to *Section 2030.410 of the Code of Civil Procedure.*

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name*(*s*)] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. [*Identity of declarant. See § 194.100[1], Supporting Declaration Paragraph 1.*

2. On _____ [*date*], _____ [*identify moving party, e.g.*, plaintiff] _____ [*name*] served his/her _____ [*specify number, e.g.*, first] set of interrogatories on _____ [*identify responding party, e.g.*, defendant].

3. On _____ [*date*], _____ [*identify responding party, e.g.*, defendant] _____ [*name*] served _____ [*identify propounding party, e.g.*, plaintiff] _____ [*name*] with his/her initial response to the interrogatories. A copy of the initial answer to Interrogatory No. _____ is attached hereto as Exhibit A and made a part hereof.

4. On _____ [*date*], _____ [*identify responding party, e.g.*, defendant] _____ [*name*] served _____ [*identify propounding party, e.g.*, plaintiff] _____ [*name*] with his/her amended answer to Interrogatory No. _____, a copy of which is attached hereto as Exhibit B and made a part hereof.

5. _____ [*Identify responding party, e.g.*, defendant] _____'s [*name*] initial failure to answer the interrogatory correctly has substantially prejudiced _____ [*identify propounding party, e.g.*, plaintiff] _____ [*name*] because _____ [*describe facts, e.g.*, defendant's initial

denial that similar claims have been made on similar accidents involving the vehicle described in Interrogatory No. _____ has caused plaintiff to hire, at great expense, several experts and investigators to research the matter. Plaintiff has already learned, by his/her own means, the facts provided in defendant's amended answer to Interrogatory No. _____. Plaintiff therefore spent resources that could have been used to better prepare his/her case as to matters legitimately not discoverable, and the prejudice to him/her cannot be cured by continuance for furtherdiscovery, or by the use of the initial answer pursuant to *Section 2030.410 of the Code of Civil Procedure*].

6. [*Reasonable and good faith attempt to resolve informally. See § 194.95[1], Supporting Declaration Paragraph 4.*]

7. [*Itemization of expenses. See § 194.95[1], Supporting Declaration Paragraph 5.*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party's status and name*]

[2] Use of Form

The form of notice of motion and motion with supporting declaration set out in [1], *above*, is for use by a party who propounded interrogatories, after the responding party has served an amended answer, to seek an order that the initial answer be deemed binding for the purpose of the pending action [*Code Civ. Proc. § 2030.310*]. The court shall grant this motion if it determines that (1) the initial failure of the responding party to answer the interrogatory correctly has substantially prejudiced the party who propounded the interrogatory; (2) the responding party has failed to show substantial justification for the initial answer to that interrogatory; and (3) the prejudice to the propounding party cannot be cured either by a continuance to permit further discovery or by the use of the initial answer pursuant to *Code Civ. Proc. § 2030.410* [*Code Civ. Proc. § 2030.310(c)*]. For further discussion, see *§ 194.25[1]*.

Paragraph 6 of the form provides facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion as required by *Code Civ. Proc. § 2030.310(b)*. For further discussion of this requirement, see generally *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*.

A supporting memorandum is also required to be served and filed with the form [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; *see also* discussion and forms in Ch. 417, *Points and Authorities*]. For forms of memoranda relating to a motion to obtain an order to deem an initial answer binding, see California Points and Authorities , Ch. 84, *Discovery: Interrogatories* (Matthew Bender).

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§*

194.80[4].

[3] Sanctions

The court must impose a monetary sanction under *Code Civ. Proc. § 2023.030*, against any party, person, or attorney who unsuccessfully makes or opposes a motion to deem binding an initial answer to an interrogatory, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2030.310(d)*].

For further discussion of monetary sanctions under *Code Civ. Proc. § 2023.030*, to be imposed on a party who unsuccessfully makes or opposes a discovery motion, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

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16-194 California Forms of Pleading and Practice--Annotated § 194.106

§ 194.106 Proceedings for Order That Initial Answers to Interrogatories Be Deemed Binding [Code Civ. Proc. § 2030.310]--Order

[1] FORM Proceedings for Order That Initial Answers to Interrogatories Be Deemed Binding [Code Civ. Proc. § 2030.310]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.,* plaintiff] _____ [*name*] for an order that the initial answer of _____ [*identify party, e.g.,* defendant] _____ [name] to _____ [*describe interrogatory, e.g.,* Interrogatory No. _____ of the first set of plaintiff _____'s (name) interrogatories to defendant _____ (name)] be deemed binding on _____ [*identify party, e.g.,* defendant] _____ [name] for the purpose of the pending action came on regularly for hearing on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

[*EITHER*]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[*OR*]

The Court, having considered the _____ [affidavit(s) *or* declaration(s)] and other documents in support of and in opposition to the motion, having heard the arguments of counsel, and being fully advised in the matter, determines as follows:

1. The initial failure of _____ [*identify party, e.g.,* defendant] _____ [*name*] to _____ [*describe interrogatory or interrogatories, e.g.,* Interrogatory No. _____ of the first set of plaintiff _____'s (*name*) interrogatories] has substantially prejudiced plaintiff _____ [*name*] in that _____ [*describe substantial prejudice to party who propounded the interrogatory*].

2. _____ [*Identify party, e.g.,* Defendant] _____ [*name*] has failed to show substantial justification for the initial answer to _____ [*describe interrogatory or interrogatories, e.g.,* Interrogatory No. _____ of the first set of plaintiff _____'s (*name*) interrogatories].

3. The prejudice to plaintiff _____ [*name*] cannot be cured either by a continuance to permit further discovery or by the use of the initial answer under *Section 2030.410 of the Code of Civil Procedure.*

IT IS, THEREFORE, ORDERED that the motion be, and hereby is, granted and that the initial answer of _____ [*identify party, e.g.,* defendant] _____ [*name*] to _____ [*describe interrogatory or interrogatories, e.g.,* Interrogatory No. _____ of the first set of plaintiff _____'s (*name*) interrogatories to defendant _____ (*name*)] be deemed binding on defendant _____ [*name*] for the purpose of the pending action.

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] pay forthwith to _____ [*identify successful party, e.g.,* defendant] _____ [*name*] the sum of $_____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)].

Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use when the court grants or denies a motion by a party who propounded interrogatories, after the responding party has served an amended answer, to seek an order that the initial answer be deemed binding for the purpose of the pending action [*Code Civ. Proc. § 2030.310*].

See also *§ 194.105*.

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Chapter 195 DISCOVERY: INSPECTION OF TANGIBLE EVIDENCE

16-195 California Forms of Pleading and Practice--Annotated 195.syn

§ 195.syn Synopsis to Chapter 195: DISCOVERY: INSPECTION OF TANGIBLE EVIDENCE

§ 195.01 Scope of Chapter

§ 195.02 Cross References

[1] Related Discovery Chapters

[2] Other Related Chapters

§§ 195.03-195.09 [Reserved]

§ 195.10 Governing Law

§ 195.11 Means by Which Inspection, Copying, Testing, or Sampling May Be Procured

§ 195.12 Discovery by Inspection, Copying, Testing, or Sampling of Item or Entry on Property

[1] Scope of Demand

[2] Property Subject to Production or Entry, and Inspection, Copying, Testing, or Sampling

[3] Inspection and Related Activities That May Be Conducted

§ 195.13 Demand for Inspection, Copying, Testing, or Sampling

§ 195.14 Supplemental Demand

§ 195.15 Restriction on Number in Limited Civil Cases

§ 195.16 Response to Demand

[1] Content of Response

[2] Verification of Response

[3] Service and Timing of Response

[4] Agreement to Extend Time for Response

§ 195.17 Protective Orders

[1] Motion for Protective Order

[2] Types of Protective Orders

§ 195.18 Effect of Failure to Respond

§ 195.19 Compelling Compliance With Demand

[1] On Failure to Respond

[2] On Service of Inadequate Response

[3] On Failure to Permit Inspection, Copying, Testing, or Sampling

§ 195.20 Sanction Provisions

[1] Monetary Sanction for Unsuccessfully Making or Opposing Motion

[2] Sanctions for Failure to Obey Order Compelling Response, Further Response, or Compliance

[3] Sanctions Following Completion of Discovery

[a] Monetary Sanctions Imposed Post Trial

[b] Monetary Sanctions Imposed by Reviewing Court

§ 195.21 Discovery Sanctions and Other Factors Preclude Tort Remedy for Spoliation of Tangible Evidence

§§ 195.22-195.29 [Reserved]

§ 195.30 Related Matthew Bender Publications

§ 195.31 State Statutes

§ 195.32 California Rules of Court

§ 195.33 Local Court Rules

§ 195.34 Decisions

[1] Description of Tangible Evidence

[2] Informal Inspection

[2A] Inspection and Related Activities

[3] Possession and Control of Tangible Evidence

[4] Protective Orders

[5] Response to Demand

[6] Sanctions

[7] Scope of Demand

[8] Tort Action for Spoliation of Tangible Evidence

§ 195.35 Text References

§§ 195.36-195.39 [Reserved]

§ 195.40 Demand for Production or Inspection, Copying, Testing, or Sampling

[1] Ascertain Whether Leave of Court Required

[2] Prepare Demand

[3] Prepare Proof of Service

[4] Serve Documents

[5] Supplemental Demands

[6] Disposition of Documents

§ 195.41 Motion for Order for Early Response

§ 195.42 Proceedings for Order Compelling Compliance and Sanctions

[1] Prepare Documents

[2] Serve Documents

[3] File Documents

[4] Order

§§ 195.43-195.49 [Reserved]

§ 195.50 Written Response

[1] Time for Response

[2] Prepare Response

[3] Proof of Service

[4] Serve Documents

§ 195.51 Motion for Protective Order

[1] Preliminary Determinations

[2] Prepare Documents

[3] Serve and File Documents

[4] Order

§ 195.52 Opposition to Motion for Order Compelling Response and Sanctions

[1] Prepare Documents

[2] Serve Documents

[3] File Documents

[4] Order

§§ 195.53-195.59 [Reserved]

§ 195.60 Demand--Production of Documents and Tangible Things for Inspection, Copying, Testing, or Sampling [Code Civ. Proc. § 2031.010 et seq.]

[1] FORM

[2] Use of Form

[3] Time for Serving Demand

[4] Content of Demand

[5] Format of Demand

[6] Supplemental Demand

[7] Filing and Retention of Demand

§ 195.61 Demand--Permission to Enter onto Land or Other Property for Inspection, Copying, Testing, or Sampling [Code Civ. Proc. § 2031.010 et seq.]

[1] FORM

[2] Use of Form

[3] Format, Contents, and Service of Demand

[4] Supplemental Demand

§ 195.62 Response to Demand for Inspection, Copying, Testing, or Sampling [Code Civ. Proc. § 2031.210 et seq.]

[1] FORM

[2] Use of Form

[3] Time for Response

[4] Contents of Response

[a] Types of Responses

[b] Statement of Compliance

[c] Representation of Inability to Comply

[d] Objection

[5] Format of Response

[6] Verification

§ 195.63 Proceedings to Obtain Protective Order [Code Civ. Proc. § 2031.060]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Time for Motion

[4] Monetary Sanctions

[5] Cross References

§ 195.64 Proceedings to Obtain Protective Order [Code Civ. Proc. § 2031.060]--Order

[1] FORM

[2] Use of Form

§ 195.65 Proceedings for Order to Compel--Compelling Response to Demand for Inspection, Copying, Testing, or Sampling [Code Civ. Proc. § 2031.300]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Time for Motion

[4] Identification of Demands

[5] Supporting Declaration

[6] Monetary Sanctions

[7] Additional Sanctions on Failure to Obey Order Granting Motion

§ 195.66 Proceedings for Order to Compel--Compelling Further Response to Demand for Inspection, Copying, Testing, or Sampling [Code Civ. Proc. § 2031.310]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Separate Statement

[4] Time for Motion

[5] Identification of Demands

[6] Opposing Production of Electronically Stored Evidence

[7] Monetary Sanctions

[8] Additional Sanctions on Failure to Obey Order Granting Motion

§ 195.67 Proceedings for Order to Compel--Compelling Further Response to Demand for Inspection, Copying, Testing, or Sampling [Code Civ. Proc. § 2031.310]--Separate Statement [Cal. Rules of Ct., Rule 3.1345]

[1] FORM

[2] Use of Form

[3] Contents of Separate Statement

§ 195.68 Proceedings for Order to Compel--Compelling Compliance With Response to Demand for Inspection, Copying, Testing, or Sampling [Code Civ. Proc. § 2031.320]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Time for Motion

[4] Identification of Demands

[5] Monetary Sanctions

[6] Additional Sanctions on Failure to Obey Order Granting Motion

§ 195.69 Proceedings for Order to Compel--Compelling Response, Further Response, or Compliance With Response to Demand for Inspection, Copying, Testing, or Sampling [Code Civ. Proc. §§ 2031.300, 2031.310, 2031.320]--Order

[1] FORM

[2] Use of Form

§ 195.70 Subpoena for Inspection of Premises in Action Pending Outside California [Code Civ. Proc. § 2029.100 et seq.; Cal. Judicial Council Form SUBP-050]

[1] FORM

[2] Use of Form

[3] Procedure for Obtaining Subpoena

[4] Subpoena Form and Contents

[5] Party Not Required to Retain Local Attorney

[6] Service of Subpoena

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Chapter 195 DISCOVERY: INSPECTION OF TANGIBLE EVIDENCE
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16-195 California Forms of Pleading and Practice--Annotated § 195.01

§ 195.01 Scope of Chapter

This chapter covers discovery under the Civil Discovery Act using the discovery method of demands for the production for inspection, copying, testing, or sampling of documents and other tangible evidence, and demands for entry onto real property for inspection.

Part II (*see § 195.10* et seq.) has detailed discussion of the requirements and procedures relating to discovery by inspection, copying, testing, or sampling of tangible evidence.

Part IV provides procedural checklists:

- Subpart A (*see § 195.40* et seq.) provides checklists for use by a party seeking discovery by demanding production or entry for inspection, copying, testing, or sampling.

- Subpart B (*see § 195.50* et seq.) provides checklists for use by a responding party.

Part V provides forms relating to discovery by demand for production or entry for inspection, copying, testing, or sampling including the following:

- Forms for demands for production for inspection, copying, testing, or sampling of documents or tangible things (*see § 195.60*) and for entry onto real property for inspection (*see § 195.61*).

- A form for a response to a demand for production or entry for inspection, copying, testing, or sampling (*see § 195.62*).

- Forms for use in motion proceedings for a protective order in relation to discovery by demand for inspection, copying, testing, or sampling of tangible evidence (*see §§ 195.63, 195.64*).

- Forms for use in motion proceedings to compel compliance with a demand for inspection, copying, testing, or sampling of tangible evidence (*see §§ 195.65 -195.69*).

- A form for a subpoena for inspection of premises in an action pending outside California, under the Interstate and International Depositions and Discovery Act [*Code Civ. Proc. § 2029.100 et seq.*] (*see § 195.70*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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16-195 California Forms of Pleading and Practice--Annotated § 195.02

§ 195.02 Cross References

[1] Related Discovery Chapters

For discussion and forms relating to the general purpose, scope, regulation, and timing of civil discovery, see Ch. 190, *Discovery: Scope, Regulation, and Timing* .

For detailed discussion of evidentiary privileges and other statutory or constitutional protections against disclosure, see Ch. 191, *Discovery: Privileges and Other Discovery Limitations* .

For discussion and forms relating to discovery sanctions generally, see Ch. 192, *Discovery: Sanctions for Discovery Misuse* .

For detailed discussion of discovery of electronically stored evidence (e-discovery), see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*; see also Matthew Bender(R) Practice Guide: California E-Discovery and Evidence.

For discussion and forms relating to the production of documents and things pursuant to deposition proceedings, see Ch. 193, *Discovery: Depositions* .

For discussion and forms relating to the use of other particular discovery methods authorized by the Civil Discovery Act, see the following chapters covering each method:

- Ch. 194, *Discovery: Interrogatories*.
- Ch. 196, *Discovery: Requests for Admissions*.
- Ch. 197, *Discovery: Physical and Mental Examinations*.
- Ch. 198, *Discovery: Exchange of Expert Witness Information*.

For discussion and forms relating to the use of specified discovery methods for the purpose of preserving testimony or other evidence prior to the commencement of an action or pending an appeal, see Ch. 199, *Discovery: Preservation of Evidence* .

For discussion and forms relating to the use of extraordinary writ proceedings to obtain interlocutory review of discovery orders, see Ch. 200, *Discovery: Review of Discovery Orders* .

For discussion and forms for subpoenas generally, see Ch. 535, *Subpoena* .

[2] Other Related Chapters

For discussion of and general forms relating to law and motion procedures generally, see Ch. 372, *Motions and Orders* .

For discussion and forms relating to use of subpoenas generally, see Ch. 535, *Subpoena* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureDiscoveryPrivileged MattersGeneral Overview

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16-195 California Forms of Pleading and Practice--Annotated §§ 195.03-195.09

[Reserved]

§§ 195.03[Reserved]

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16-195 California Forms of Pleading and Practice--Annotated § 195.10

§ 195.10 Governing Law

Discovery by demand for the production for inspection of documents, things, land, and electronically stored information pursuant to the Civil Discovery Act (*Code Civ. Proc. §§ 2016.010-2036.050*) is governed generally by *Code Civ. Proc. §§ 2031.010-2031.510*.

Discovery subpoenas for the inspection of premises, and for any testing, sampling, or other activity to take place during the inspection, in an action pending outside California are governed by the Interstate and International Depositions and Discovery Act [*Code Civ. Proc. § 2029.100 et seq.*; *see Code Civ. Proc. § 2029.500* (other applicable law)].

Related provisions of the Civil Discovery Act include the provisions governing discovery generally, set out in *Code Civ. Proc. §§ 2016.010-2019.030, 2023.010-2023.040*.

The extent of discovery permitted under the Civil Discovery Act is restricted in limited civil cases by the economic litigation provisions of *Code Civ. Proc. §§ 94* and *95*. The use of demands for the production or inspection, copying, testing, or sampling of tangible evidence is limited specifically by *Code Civ. Proc. § 94(a)*. For further discussion, see *§ 195.15* [*see also Ch. 190, Discovery: Scope, Regulation, and Timing, §§ 190.11[2], 190.23[2][a]*].

Statewide rule provisions relating to the format, content, and service of discovery papers and motions, and to discovery sanctions, are set out in *Cal. Rules of Ct., Rules 3.1000*, 3.1345, 3.1346, 3.1347, and 3.1348.

Case management requirements relating to discovery of electronically stored information are set out in *Cal. Rules of Ct., Rules 3.724*, *3.728(13)*. For detailed discussion of these requirements, see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*, § 195A.14.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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16-195 California Forms of Pleading and Practice--Annotated § 195.11

§ 195.11 Means by Which Inspection, Copying, Testing, or Sampling May Be Procured

The principal procedure by which production and inspection, copying, testing, or sampling may be obtained, discussed in this chapter, is set out in *Code Civ. Proc. §§ 2031.010-2031.510*. Under *Code Civ. Proc. § 2031.010*, a party may serve a demand, without a prior court order, on another party for the production of documents, tangible things, or electronically stored information, and to allow entry and inspection on land or other property [*see Code Civ. Proc. § 2031.010*]. In addition, under specified conditions a party may serve a supplemental demand to inspect any later acquired or discovered documents, tangible things, or electronically stored information or to permit entry and inspection, copying, testing, or sampling of any later acquired or discovered land or other property [*see Code Civ. Proc. § 2031.050(a)*].

A party also may be required to produce documents or other things at his or her deposition, if the notice of deposition provides for such production [*Code Civ. Proc. §§ 2025.220(a)(4), 2025.280(a)*]. A nonparty similarly may be required, by service of a deposition subpoena, to produce documents or other things at a deposition [*see Code Civ. Proc. § 2020.020(b)*]. For discussion of this method of inspecting or copying documents and inspecting other things, see Ch. 193, *Discovery: Depositions* .

Finally, the opportunity to inspect and copy writings may be given to a party propounding interrogatories. A party responding to interrogatories has the option of specifying writings from which an answer may be derived if the answer would require a compilation, abstract, audit, or summary of, or from the documents of the answering party, and if the burden or expense of preparing or making it would be substantially the same for either party [*see Code Civ. Proc. § 2030.230*]. For further discussion relating to this discovery method, see Ch. 194, *Discovery: Interrogatories* .

Note, too, that in some circumstances a party may conduct an inspection as a matter of informal investigation, outside the Discovery Act procedures entirely [*see, e.g., Pullin v. Superior Court (2000) 81 Cal. App. 4th 1161, 1164-1165, 97 Cal. Rptr. 2d 447* (upholding informal inspection by plainiff's expert of floor of defendant's store in slip-and-fall case, when inspection was carried out during time that store premises were open to the public)]. For further discussion, see *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.14*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedurePretrial MattersSubpoenas

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16-195 California Forms of Pleading and Practice--Annotated § 195.12

§ 195.12 Discovery by Inspection, Copying, Testing, or Sampling of Item or Entry on Property

[1] Scope of Demand

A party may demand that any other party produce documents, tangible things, or electronically stored information, or allow entry onto property for inspection or related activities, or both [*see Code Civ. Proc. § 2031.010*]. A party also may serve on another party a supplemental demand to inspect any later acquired or discovered documents, tangible things, land or other property, or electronically stored information [*see Code Civ. Proc. § 2031.050(a)*].

A party's demand for production and inspection of documents, tangible things, land, or other property, or electronically stored information is subject to both the scope of discovery generally delimited by *Code Civ. Proc. § 2017.010 et seq.* and also the restrictions set out in *Code Civ. Proc. § 2019.010 et seq.* [*Code Civ. Proc. § 2031.010(a)*]. For detailed discussion relating to the general scope of discovery under *Code Civ. Proc. § 2017.010 et seq.* and the general restrictions of *Code Civ. Proc. § 2019.010 et seq.*, see Ch. 190, *Discovery: Scope, Regulation, and Timing* .

[2] Property Subject to Production or Entry, and Inspection, Copying, Testing, or Sampling

A party may demand that any other party produce documents, tangible things, land, or other property, and electronically stored information in the possession, custody, or control of the party on whom the demand is made, or that any other party allow entry on land or other property in the possession, custody, or control of the party on whom the demand is made [*Code Civ. Proc. § 2031.010*].

As used in *Code Civ. Proc. § 2031.010 et seq.*, the term "document" includes handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored [*Code Civ. Proc. § 2016.020(c)*; *Evid. Code § 250*]. "Electronically stored information" is information that is stored in an electronic medium [*Code Civ. Proc. § 2016.020(e)*].

Production of electronic information presents thorny issues, often based on the shear volume of information or on the fact that the data is not readily accessible because of undue burden or cost [*see Playboy Enters. v. Welles (S.D. Cal*

1999) 60 F. Supp. 2d 1050, 1055 ; *Maldonado v. Superior Court (2002) 94 Cal. App. 4th 1390, 1396, 115 Cal. Rptr. 2d 137*]. For discussion of e-discovery, including the duty to preserve and produce electronic evidence, see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*.

[3] Inspection and Related Activities That May Be Conducted

A party may demand production or entry for the following purposes:

- To inspect, copy, test, or sample documents, tangible things, land or other property, and electronically stored information in the possession, custody, or control of any other party to the action [*Code Civ. Proc. § 2016.010(a)*].

- To inspect and copy a document that is in the possession, custody, or control of the party on whom the demand is made [*Code Civ. Proc. § 2016.010(b)*].

- To inspect and photograph, test, or sample any tangible things that are in the possession, custody, or control of the party on whom the demand is made [*Code Civ. Proc. § 2016.010(c)*].

- To enter on any land or other property that is in the possession, custody, or control of the party on whom the demand is made, inspect and measure, survey, photograph, test, or sample the land or other property, or any designated object or operation on it [*Code Civ. Proc. § 2016.010(d)*].

- To inspect, copy, test, or sample electronically stored information in the possession, custody, or control of the party on whom demand is made [*Code Civ. Proc. § 2016.010(e)*].

The photographing of tangible things may include even the face and body of a person [*Shepherd v. Superior Court (1976) 17 Cal. 3d 107, 118, 130 Cal. Rptr. 257, 550 P.2d 161* (construing pre-1986 *Code Civ. Proc. § 2031(a)*)]. It does not, however, include visually recording a reenactment of a particular event. Compliance with an order for inspection must be of a purely nontestimonial form because the deposition is the exclusive mechanism for testimonial forms of discovery [*Bailey v. Superior Court (1978) 79 Cal. App. 3d 444, 447, 144 Cal. Rptr. 875* (prior law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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§ 195.13 Demand for Inspection, Copying, Testing, or Sampling

Production and inspection, copying, testing, or sampling under *Code Civ. Proc. § 2031.010* is initiated by a demand served by any party on any other party [*see Code Civ. Proc. §§ 2031.010, 2031.040*]. The demand may be served on the plaintiff, without leave of court, at any time [*Code Civ. Proc. § 2031.020(a)*]. A plaintiff may make a demand without leave of court at any time that is at least 10 days after the service of the summons on, or appearance by, the party to whom the demand is directed, whichever occurs first [*Code Civ. Proc. § 2031.020(b)*]. In unlawful detainer actions or other proceedings under *Code Civ. Proc. § 1159 et seq.*, governing forcible entry and detainer, a plaintiff may make a demand for inspection, copying, testing, or sampling without leave of the court at any time that is five days after service of the summons on, or appearance by, the party to whom the demand is directed, whichever occurs first [*Code Civ. Proc. § 2031.020(c)*].

The formal demand procedure outlined in *Code Civ. Proc. § 2031.010 et seq.* is a mandatory prerequisite to seeking a court order compelling production and inspection, copying, testing, or sampling [*see People ex rel. Dept. of Transportation v. Superior Court (1976) 60 Cal. App. 3d 352, 358, 131 Cal. Rptr. 476* (prior law; *disapproved on other grounds, Davies v. Superior Court (1984) 36 Cal. 3d 291, 301, 204 Cal. Rptr. 154, 682 P.2d 349*); *see also Schaefer v. Manufacturers Bank (1980) 104 Cal. App. 3d 70, 74, 163 Cal. Rptr. 402* (prior law)].

For forms for demands and further discussion of requirements relating to the format, content, and service of a demand under *Code Civ. Proc. § 2031.010 et seq.*, see *§§ 195.60* and *195.61*. For the procedure to be used in making a demand, see *§ 195.40*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMotions to Compel

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16-195 California Forms of Pleading and Practice--Annotated § 195.14

§ 195.14 Supplemental Demand

Any party may propound a supplemental demand to inspect, copy, test, or sample any later acquired or discovered documents, tangible things, land or other property, or electronically stored information in the possession, custody, or control of the party on whom the demand is made [*Code Civ. Proc. § 2031.050(a)*].

Supplemental demands may be made as follows [*Code Civ. Proc. § 2031.050(b)*]:

- Twice before the initial setting of the trial date.

- Subject to the time limits on discovery proceedings and motions under *Code Civ. Proc. § 2024.010 et seq.*, once after the initial setting of the trial date [for discussion relating to the limits under *Code Civ. Proc. § 2024.010 et seq., see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.50* et seq.].

On motion for good cause shown, the court may allow a party to propound additional supplemental demands for inspection, copying, testing, or sampling [*Code Civ. Proc. § 2031.050(c)*].

For forms for demands that may be adapted for use in making a supplemental demand, see *§§ 195.60* and *195.61* [*see also § 195.40*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection

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16-195 California Forms of Pleading and Practice--Annotated § 195.15

§ 195.15 Restriction on Number in Limited Civil Cases

The number of demands for inspection, copying, testing, or sampling or sets of demands, is restricted in limited civil cases [*see Code Civ. Proc. § 91*]. In these cases, a party may use, as to any adverse party, a combination of no more than 35 of the following forms of discovery [*Code Civ. Proc. § 94(a)*]:

- Interrogatories (with no subparts) under *Code Civ. Proc. § 2030.010 et seq.* [*see* generally Ch. 194, *Discovery: Interrogatories*].

- Demands to produce documents or things or electronically stored information under *Code Civ. Proc. § 2031.010 et seq.*

- Requests for admission (with no subparts) under *Code Civ. Proc. § 2033.010 et seq.* [*see* generally Ch. 196, *Discovery: Requests for Admission*].

For further discussion of discovery in limited civil cases, see *Ch. 190, Discovery: Scope, Regulation, and Timing, §§ 190.11[2], 190.23*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsContent & FormCivil ProcedureDiscoveryMethodsInterrogatoriesFormCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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§ 195.16 Response to Demand

[1] Content of Response

The party to whom a demand for inspecting, copying, testing, or sampling, has been directed must respond separately to each item or category of item by any of the following [*Code Civ. Proc. § 2031.210(a)*]:

- A statement that the party will comply with the particular demand for inspection, copying, testing, or sampling, by the date set for inspection under *Code Civ. Proc. § 2031.030(c)* [*see § 195.60[4]*] and any related activities.

- A representation that the party lacks the ability to comply with the demand for inspection, copying, testing, or sampling, of a particular item or category of item.

- An objection to the demand.

For a form for a response, and more detailed discussion of the types of responses, *see § 195.62*. For a procedural checklist for providing a response, see *§ 195.50*.

Note that a waiver does not occur when the response is timely filed but inadequate. The use of boilerplate objections based on privilege or attorney work product protection may warrant other sanctions, but *Code Civ. Proc. § 2031.300* does not authorize a waiver of the objections for such insufficiency [*Korea Data Systems v. Superior Court (1997) 51 Cal. App. 4th 1513, 1517, 59 Cal. Rptr. 2d 925* (construing pre-1986 *Code Civ. Proc. § 2031(k), now see Code Civ. Proc. § 2031.300*); *see, e.g.,* *People ex rel. Lockyer v. Superior Court (2004) 122 Cal. App. 4th 1060, 1074-1075, 19 Cal. Rptr. 3d 324* (relying on *Best Product* and *Korea Data* to hold that in discovery disputes, deficient objections or claims of privilege are not grounds for waiver, so long as party raised timely objections under former *Code Civ. Proc. § 2031* on grounds of privilege in its original response); *Best Products, Inc. v. Superior Court (2004) 119 Cal. App. 4th 1181, 1189, 15 Cal. Rptr. 3d 154* (party that timely answered interrogatories and request for inspection and production of documents with repetitive, boilerplate attorney-client and work product privileges did not waive right to assert those privileges for failure to file privilege log as part of its opposition to plaintiff's motion to compel further discovery)].

[2] Verification of Response

The party must sign the response under oath unless the response only contains objections [*Code Civ. Proc. § 2031.250(a)*].

An objection in an unverified "hybrid" response, consisting of both objections and other statements, is effective [*Blue Ridge Ins. Co. v. Superior Court (1988) 202 Cal. App. 3d 339, 344, 248 Cal. Rptr. 346]* .

[3] Service and Timing of Response

Within 30 days after service of the demand, the party must serve the original of the response on the demanding party and a copy of the response on all other parties who have appeared in the action [*Code Civ. Proc. § 2031.260(a)*]. However, in unlawful detainer actions or other proceedings under *Code Civ. Proc. § 1159 et seq.*, governing forcible entry and detainer, the party has at least five days from the date of service of the demand to respond [*Code Civ. Proc. § 2031.260(b)*].

If demand was served by mail, this response period is extended five calendar days if the place of address is within California, 10 calendar days if the place of address is outside California but within the United States, or 20 calendar days if the place of address is outside the United States [*see Code Civ. Proc. §§ 1013(a), 2016.050*]. The period is extended two court days if service is by express mail or by fax [*see Code Civ. Proc. § 1013(c), (e)*].

On motion of the demanding party, the court may shorten the time for response, or on motion of the responding party, the court may extend the time for response [*Code Civ. Proc. § 2031.260(a)*; for forms for extending time to respond to interrogatories which may be adapted for this purpose, *see Ch. 194, Discovery: Interrogatories, § 194.90* et seq.].

In unlawful detainer proceedings, or other proceedings under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), on motion of the demanding party, the court may shorten the time for response, or, on motion of the responding party, the court may extend the time for response [*Code Civ. Proc. § 2031.260(b)*].

For discussion and a form for use in making an ex parte application, declaration in support of, and order extending time for response, see California Deposition and Discovery Practice, Ch. 8, *General Procedures for Discovery Motions and Shortening or Extending Time* (Matthew Bender). For additional discussion and forms that may be adapted for use in making an ex parte application or a motion to shorten the time for response, *see* Ch. 372, *Motions and Orders* , and Ch. 524, *Shortening and Extension of Time* .

[4] Agreement to Extend Time for Response

The demanding and responding parties may agree to extend the time for service of a response to a set of demands, or to particular items or categories of items in a set, to a date beyond that provided in *Code Civ. Proc. § 2031.260*. The agreement may be informal, but it must be confirmed in a writing that specifies the extended date for service of a response. Unless the agreement expressly states otherwise, it is effective to preserve to the responding party the right to respond to any item or category of item in the demand in any manner specified in *Code Civ. Proc. §§ 2031.030, 2031.210, 2031.260*, or *2031.280* [*Code Civ. Proc. § 2031.270*]. In other words, no waiver of the right to respond in the form of an objection is to be read into such an agreement [*see* Reporter's Notes to Proposed *Code Civ. Proc. § 2031(j)*; (*now Code Civ. Proc. § 2031.270*);*see also Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.13[2]*].

An agreement to extend time for response to a demand for inspection, copying, testing, or sampling, whether offered separately or as an attachment to another document, may not be filed unless offered as relevant to the determination of an issue in a law and motion proceeding or other hearing or is ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(7)*]. The original of the agreement must be retained until six months after final disposition of the cause, unless

the court on motion of any party and for good cause shown orders the original papers preserved for a longer period [*Cal. Rules of Ct., Rule 3.250(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsStipulations

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§ 195.17 Protective Orders

[1] Motion for Protective Order

When inspection, copying, testing, or sampling of documents, tangible things, places, or electronically stored information has been demanded, the party to whom the demand has been directed, and any other party or affected person or organization, may promptly move for a protective order [*Code Civ. Proc. § 2031.060(a)*]. A motion for protective order must be accompanied by a declaration stating facts showing a reasonable good faith attempt at an informal resolution of any issue presented by the motion [*Code Civ. Proc. § 2031.060(a)*; for further discussion of this general requirement, *see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*].

For a motion for protective order, see *§ 195.63*. For a procedural checklist for this motion proceeding, see *§ 195.51*. For discussion of monetary sanctions to be imposed in this motion proceeding on the party who unsuccessfully makes or opposes the motion, see *§ 195.20[1]*.

For discussion relating to protective orders restricting discovery under the general provisions of *Code Civ. Proc. § 2019.010 et seq.*, see *Ch. 190, Discovery: Purpose, Scope, and Timing, § 190.30* et seq.

[2] Types of Protective Orders

On a motion for protective order in inspection, copying, testing, or sampling demand proceedings, the court, for good cause shown, may make any order that justice requires to protect any party or other person from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense . A protective order may include but is not limited to the following directions [*Code Civ. Proc. § 2031.060(b)*]:

- That all or some of the items or categories of items in the demand need not be produced or made available at all [*Code Civ. Proc. § 2031.060(b)(1)*].

- That the time specified in *Code Civ. Proc. § 2031.260*, for serving a response to a set of demands, or to a particular item or category in a set of demands, be extended [*Code Civ. Proc. § 2031.060(b)(2)*].

- That the place of production be other than that specified in the demand [*Code Civ. Proc. § 2031.060(b)(3)*].

- That the inspection, copying, testing, or sampling be made only on specified terms and conditions [*Code Civ. Proc. § 2031.060(b)(4)*].

- That a trade secret or other confidential research, development, or commercial information not be disclosed, or be disclosed only to specified persons or only in a specified way [*Code Civ. Proc. § 2031.060(b)(5)*].

- That the items produced be sealed and thereafter opened only on court order [*Code Civ. Proc. § 2031.060(b)(6)*].

The party or affected person who seeks a protective order regarding the production, inspection, copying, testing, or sampling of electronically stored information on the basis that the information is from a source that is not reasonably accessible because of undue burden or expense bears the burden of demonstrating inaccessibility [*Code Civ. Proc. § 2031.060(c)*]. However, even if the party or affected person makes that showing, the court may still order discovery if the demanding party shows good cause [*Code Civ. Proc. § 2031.060(d)*; *see Code Civ. Proc. § 2031.060(e)* (allocation of discovery expense), (f) (limitations on frequency or extent of discovery of ESI)]. For a detailed discussion of protective orders in the context of e-discovery, see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*, § 195A.17.

If the motion for a protective order is denied in whole or in part, the court may order the responding party to provide or permit the discovery against which the protection was sought on terms and conditions that are just [*Code Civ. Proc. § 2031.060(g)*; *see Code Civ. Proc. § 2031.060(i)* (exception for electronically stored information)].

For a form for a proposed order granting or denying a motion for protective order, see *§ 195.64*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryProtective Orders

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§ 195.18 Effect of Failure to Respond

If a party to whom a demand for inspection, copying, testing, or sampling has been directed fails to serve a timely response to it, that party waives any objection to the demand, including one based on privilege or on the protection for work product under *Code Civ. Proc. § 2018.010 et seq.* [*Code Civ. Proc. § 2031.300(a)*; *see also Ruvalcaba v. Government Employees Ins. Co. (1990) 222 Cal. App. 3d 1579, 1580-1581, 272 Cal. Rptr. 541* (failure to respond does not waive party's ability to appeal subsequent imposition of sanctions for failure to respond)].

However, the court, on motion, may relieve that party from this waiver on the court's determination that (1) the party has subsequently served a response that is in substantial compliance with *Code Civ. Proc. §§ 2031.210-2031.260* and *2031.280*, and *(2)* the party's failure to serve a timely response was the result of mistake, inadvertance, or excusable neglect [*Code Civ. Proc. § 2031.300(a)*; for discussion of requirements for response under *Code Civ. Proc. § 2031.210 et seq., see § 195.16*].

In deciding whether or not the failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect, the court will apply the same standard as that used in *Code Civ. Proc. § 473(b)*. Counsel's mistake of law on a relatively simple and undebatable matter is not a valid ground for relief. Further, the press of an attorney's practice does not warrant relief [*City of Fresno v. Superior Court (1988) 205 Cal. App. 3d 1459, 1467, 253 Cal. Rptr. 296]* . Similarly, tactical choices by counsel do not warrant relief. For example, counsel's failure to assert the attorney-client privilege in reliance on the potential relief from an ultimately unsuccessful motion for a protective order was inexcusable neglect. Counsel's actions were based not on a mistake of law, but on the choice to pursue one course of action without complying with clear legal requirements [*Scottsdale Ins. Co. v. Superior Court (1997) 59 Cal. App. 4th 263, 274-276, 69 Cal. Rptr. 2d 112]* . Moreover, mandatory relief under *Code Civ. Proc. § 473(b)* is available only in those situations in which the attorney's mistake causes a total failure to oppose a dismissal motion or a failure to appear [*Gotschall v. Daley (2002) 96 Cal. App. 4th 479, 484, 116 Cal. Rptr. 2d 882]* . Thus, mandatory relief was not available when counsel mistakenly believed it was unnecessary, under *Code Civ. Proc. § 2034.010 et seq.*, to name treating physicians who would give opinion testimony as experts in the expert witness disclosure, and the trial court dismissed the case for lack of proof of causation [*Gotschall v. Daley (2002) 96 Cal. App. 4th 479, 484, 116 Cal. Rptr. 2d 882]* . For discussion and forms relating to relief from default under *Code Civ. Proc. § 473(b)*, see Ch. 489, *Relief From Judgments and Orders* .

Note that a waiver does not occur when the response filed is timely but inadequate. The use of boilerplate objections based on privilege or attorney work product protection may warrant other sanctions, but *Code Civ. Proc. § 2031.300* does not authorize a waiver of the objections for such insufficiency [*People ex rel. Lockyer v. Superior Court (2004) 122 Cal. App. 4th 1060, 1074-1075, 19 Cal. Rptr. 3d 324* (relying on *Best Product* and *Korea Data* to hold that in discovery disputes, deficient objections or claims of privilege are not grounds for waiver, so long as party raised timely objections on grounds of privilege in its original response); *Best Products, Inc. v. Superior Court (2004) 119 Cal. App. 4th 1181, 1189, 15 Cal. Rptr. 3d 154* (defendant's failure to provide a privilege log did not constitute waiver of its right to assert attorney-client privilege and work product protection in regard to interrogatories propounded by plaintiff, when defendant provided timely, albeit boilerplate, response); *Korea Data Systems Co. v. Superior Court (1997) 51 Cal. App. 4th 1513, 1517, 59 Cal. Rptr. 2d 925* (construing pre-1986 *Code Civ. Proc. § 2031(k), now see Code Civ. Proc. § 2031.300*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductWaivers

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§ 195.19 Compelling Compliance With Demand

[1] On Failure to Respond

If the responding party fails to serve a timely response to a demand for inspection, copying, testing, or sampling, the demanding party may move for an order compelling a response [*Code Civ. Proc. § 2031.300(b)*; for discussion of deadline for serving response, see *§ 195.16[3]*].

A party seeking an order requiring production or entry for inspection, copying, testing, or sampling must first have made a proper demand for production or entry [*see People ex rel. Dept. of Transportation v. Superior Court (1976) 60 Cal. App. 3d 352, 358, 131 Cal. Rptr. 476 , disapproved on other grounds, Davies v. Superior Court (1984) 36 Cal. 3d 291, 301, 204 Cal. Rptr. 154, 682 P.2d 349* (prior law); *see also § 195.13*].

For a form for a motion to compel a response, see *§ 195.65*. For a procedural checklist for this motion proceeding, see *§ 195.42*. For discussion of monetary sanctions to be imposed in this motion proceeding on the party who unsuccessfully makes or opposes the motion, see *§ 195.20[1]*. For discussion of sanctions to be imposed on the responding party for failure to obey an order compelling a response, see *§ 195.20[2]*.

[2] On Service of Inadequate Response

On receipt of a response to a demand for inspection, copying, testing, or sampling, if the demanding party deems that (1) a statement of compliance with the demand is incomplete, (2) a representation of inability to comply is inadequate, incomplete, or evasive, or (3) an objection in the response is without merit or too general, that party may move for an order compelling a further response to the demand [*Code Civ. Proc. § 2031.310(a)*; *see Standon Co. v. Superior Court (1990) 225 Cal. App. 3d 898, 902-903, 275 Cal. Rptr. 833* (distinguishing motion to compel further response under what is now *Code Civ. Proc. § 2031.310* from motion to compel compliance with response under what is now *Code Civ. Proc. § 2031.320*)].

A motion to compel a further response to a demand for inspection, copying, testing, or sampling must do the following [*Code Civ. Proc. § 2031.310(b)*]:

- Set forth specific facts showing good cause justifying the discovery sought by the demand.

- Include an accompanying declaration stating facts showing a reasonable good faith attempt at an informal resolution of any issue presented by the motion [for further discussion of this general requirement, *see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*].

For a form for a motion to compel a further response and further discussion of requirements relating to the motion, including time requirements, see *§ 195.66*. For a form for a separate statement setting out all information necessary to determine the motion, as required under *Cal. Rules of Ct., Rule 3.1345*, see *§ 195.67*. For a procedural checklist for this motion proceeding, see *§ 195.42*.

For discussion of monetary sanctions to be imposed in this motion proceeding on the party who unsuccessfully makes or opposes the motion, see *§ 195.20[1]*. For discussion of sanctions to be imposed on the responding party for failure to obey an order compelling a further response, see *§ 195.20[2]*.

[3] On Failure to Permit Inspection, Copying, Testing, or Sampling

If a party who has responded to a demand for inspection, copying, testing, or sampling under *Code Civ. Proc. § 2031.210 et seq.* afterwards fails to permit an inspection, copying, testing, or sampling in accordance with the statement of compliance in that party's response, the demanding party may move for an order compelling compliance [*Code Civ. Proc. § 2031.320(a)*].

For a form for a motion to compel a further response and further discussion of requirements relating to the motion, including time requirements, see *§ 195.67*. For a procedural checklist for this motion proceeding, see *§ 195.42*.

For discussion of monetary sanctions to be imposed in this motion proceeding on the party who unsuccessfully makes or opposes the motion, see *§ 195.20[1]*. For discussion of sanctions to be imposed on the responding party for failure to obey an order compelling compliance, see *§ 195.20[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMotions to Compel

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§ 195.20 Sanction Provisions

[1] Monetary Sanction for Unsuccessfully Making or Opposing Motion

In motion proceedings under *Code Civ. Proc. § 2031.010 et seq.*, either for a protective order or an order directing a response, further response, or compliance, the court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes the motion, unless the court finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. §§ 2031.060(h), (i), 2031.300(c), (d), 2031.310(h), (j), 2031.320(b), (d)*; for further discussion of this general provision, *see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[2]*].

The court may award sanctions in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed [*Cal. Rules of Ct., Rule 3.1348(a)*]. The court may not, however, deem the opposing party's failure to file written opposition, failure to appear at a hearing, or voluntary provision discovery to be an admission that the motion was proper or that sanctions should be awarded [*Cal. Rules of Ct., Rule 3.1348(b)*].

For more detailed discussion of monetary sanctions generally, including requirements generally applicable in proceedings to impose such sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

[2] Sanctions for Failure to Obey Order Compelling Response, Further Response, or Compliance

If a party fails to obey an order compelling a response, a further response, or compliance with a response, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *Code Civ. Proc. § 2023.030* against the disobedient party [*Code Civ. Proc. §§ 2031.300(c), (d), 2031.310(i), (j), 2031.320(c), (d)*]. In lieu of, or in addition to, those sanctions, the court may impose a monetary sanction under *Code Civ. Proc. § 2023.030* against the disobedient party [*Code Civ. Proc. §§ 2031.060(h), (i), 2031.300(c), (d), 2031.310(h), (j), 2031.320(b), (d)*; *see, e.g., Sauer v. Superior Court (1987) 195 Cal. App. 3d 213, 228-229, 240 Cal. Rptr. 489* (imposition of issue sanction for willful failure to obey order compelling production of financial records)].

Thus, for example, the terminating sanction of dismissal of the complaint may be imposed against a plaintiff after failure to comply with an order of production made under *Code Civ. Proc. § 2031.010 et seq.*, and the plaintiff may not avoid such involuntary and prejudicial dismissal by voluntarily dismissing the complaint prior to the hearing on the motion seeking dismissal as a sanction [*Hartbrodt v. Burke (1996) 42 Cal. App. 4th 168, 174, 49 Cal. Rptr. 2d 562]* .

For detailed discussion of evidence, issue, and terminating sanctions, and forms of motions seeking the imposition of such sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[3], 192.15[3]*, and *192.50* et seq.

[3] Sanctions Following Completion of Discovery

[a] Monetary Sanctions Imposed Post Trial

Under some circumstances, a monetary sanction under *Code Civ. Proc. § 2023.030* may be imposed post-trial. For example, a monetary sanction under *Code Civ. Proc. § 2023.030* may properly be imposed for failure to produce to evidence for inspection, even when the demanding party never made a motion to compel under *Code Civ. Proc. § 2031.010 et seq.*

In a products liability case, defendants, in response to a demand under *Code Civ. Proc. § 2031.010 et seq.* for the production of customer complaints relating to the product in issue, improperly withheld most of the complaints they had received. Thereafter, defendants lied at trial when questioned about the existence of any complaints other than those they had actually produced. Plaintiffs only learned of the existence of other complaints after trial, through a third party, and, because of defendant's deception, had had no way knowing during the discovery stage that there were grounds for seeking an order compelling a further response to their demand for production. In these circumstances, the court of appeal held that it was proper to award monetary sanctions under former *Code Civ. Proc. § 2023* (*now see Code Civ. Proc. § 2023.010 et seq.*), even though the plaintiffs as demanding parties had never moved to compel a further response. The court noted that, at this post trial stage, other discovery sanctions were no longer available, and monetary sanctions therefore were proper not only to punish the misconduct but also to reimburse the plaintiffs for their expenses incurred in prosecuting the first trial [*Sherman v. Kinetic Concepts, Inc. (1998) 67 Cal. App. 4th 1152, 1162-1163, 79 Cal. Rptr. 2d 641]* .

A separate motion for monetary sanctions under *Code Civ. Proc. § 2023.030* may be made *after* an underlying motion to compel further response to an inspection demand is litigated [*London v. Dri-Honing Corp. (2004) 117 Cal. App. 4th 999, 1001, 12 Cal. Rptr. 3d 240* (decided under the predecessor statute, former Code Civ. Proc. § 2023(b), repealed 2005)]. In one wrongful termination case, the trial court granted the former employee's motion for discovery monetary sanctions after he had successfully litigated the underlying motion to compel further response to his inspection demand. On appeal, the employer argued that the employee's motion was untimely because it was not set forth in the motion to compel further response [*see Code Civ. Proc. § 2031.310*]. The court of appeal disagreed, holding that the employee's separate motion was legally authorized, properly noticed, and timely made [*London v. Dri-Honing Corp. (2004) 117 Cal. App. 4th 999, 1009, 12 Cal. Rptr. 3d 240]* . The court found support for its decision in *Sherman v. Kinetic Concepts (1998) 67 Cal. App. 4th 1152, 79 Cal. Rptr. 2d 641* (discussed *above*), in which the court concluded that a motion for discovery monetary sanctions was appropriate even after the verdict. "[C]ommon sense dictates sanctions cannot be pursued before the affected party finds out about the alleged discovery dereliction of his or her opponent. The true facts may not emerge until the end of trial" [*London v. Dri-Honing Corp. (2004) 117 Cal. App. 4th 999, 1007, 12 Cal. Rptr. 3d 240]* . While the better practice may be to include the request for monetary sanctions in the motion to compel further response, there is no legal requirement to do so [*London v. Dri-Honing Corp. (2004) 117 Cal. App. 4th 999, 1008, 12 Cal. Rptr. 3d 240]* . Moreover, the timeliness of a separate motion for sanctions is subject to the trial court's discretion, rather than the 45-day limit from the time of the initial service of the response under *Code Civ. Proc. § 2031.310(c)* [*London v. Dri-Honing Corp. (2004) 117 Cal. App. 4th 999, 1009, 12 Cal. Rptr. 3d 240* (decided under former Code Civ. Proc. §§ 2023, 2031(m) repealed 2005)].

[b] Monetary Sanctions Imposed by Reviewing Court

Unmeritorious challenges to trial court rulings that direct compliance may result in the imposition of monetary sanctions by the reviewing court. For example, sanctions were imposed on a petitioner's attorney following two unmeritorious mandate petitions that objected to a legitimate demand for inspection of property and trial court rulings that correctly directed compliance with this demand [*Manzetti v. Superior Court (1993) 21 Cal. App. 4th 373, 378-381, 25 Cal. Rptr. 2d 857* (petitioner's reliance on former *Code Civ. Proc. § 2031(c)(4)* (*now see Code Civ. Proc. § 2031.030(c)(4)*), relating to specification in demand of activities in addition to inspection, was without merit and motivated solely for delay)]. For discussion of sanctions on appeal generally, see Ch. 49, *Appeal: Sanctions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMotions to CompelCivil ProcedureDiscoveryProtective Orders

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§ 195.21 Discovery Sanctions and Other Factors Preclude Tort Remedy for Spoliation of Tangible Evidence

In some instances, tangible evidence subject to discovery pursuant to a demand under *Code Civ. Proc. § 2031.010 et seq.* cannot be produced for inspection, copying, testing, or sampling because it has been lost or destroyed. In this situation, the Supreme Court has held that there is no tort cause of action in California for intentional spoliation of evidence.

The Court first came to this conclusion in the context of "first-party" spoliation, when both the injured party and the alleged "spoliator" were parties to the underlying litigation, and the injured party knew or reasonably should have known of the alleged loss or destruction of evidence before the trial or other decision on the merits of the underlying cause of action [*see Cedars-Sinai Medical Center v. Superior Court (1998) 18 Cal. 4th 1, 17-18, 74 Cal. Rptr. 2d 248, 954 P.2d 511]* .

One of the major reasons for the Court's decision was that, in these situations, there is a strong policy in favor of using nontort remedies for such "litigation misconduct." Such nontort remedies include discovery sanctions under former *Code Civ. Proc. § 2023* (*now see Code Civ. Proc. § 2023.010 et seq.*) when a party destroys evidence in response to a discovery request after litigation has commenced, or has destroyed evidence in anticipation of a discovery request [*Cedars-Sinai Medical Center v. Superior Court (1998) 18 Cal. 4th 1, 12, 74 Cal. Rptr. 2d 248, 954 P.2d 511* ; *see Hassoldt v. Patrick Media Group, Inc. (2000) 84 Cal. App. 4th 153, 167-169, 100 Cal. Rptr. 2d 662* (reversing award of damages for spoliation of evidence tort based on retroactive application of *Cedars-Sinai*); *cf.*; *Dale v. Dale (1998) 66 Cal. App. 4th 1172, 1185-1187, 78 Cal. Rptr. 2d 513* (holding that public policy reasons enumerated in *Cedars-Sinai* against creating tort remedies for litigation-related misconduct did not prohibit spouse from pursuing tort action against former spouse for concealment of community assets, absent pending dissolution proceeding; tort action based on several theories other than spoliation, including fraud and conversion)].

The Supreme Court later extended this rationale to "third-party" spoliation, holding there is likewise no tort remedy for intentional spoliation by one who was not a party to the underlying litigation to which the spoliated evidence related [*Temple Community Hospital v. Superior Court (1999) 20 Cal. 4th 464, 466, 84 Cal. Rptr. 2d 852, 976 P. 2d 223]* . The Court recognized that the salient distinction between first- and third-party spoliation of evidence is the disparity in sanctions available within the confines of the underlying litigation. The Court noted, however, that the victim of

third-party spoliation is not entirely helpless, in that some discovery sanctions are available against a nonparty who flouts the discovery process by suppressing or destroying evidence, and are also available against another party to the action in those instances in which it is possible to establish a connection between that party and the non-party spoliator. The Court concluded, in any event, that the distinction between the sanctions available to victims of first-party and third-party spoliation did not justify employing the burdensome and inaccurate instrument of derivative tort litigation in the case of third-party spoliation [*Temple Community Hospital v. Superior Court (1999) 20 Cal. 4th 464, 477, 84 Cal. Rptr. 2d 852, 976 P. 2d 223]* .

The decisions in *Cedars-Sinai* and *Temple* did not address the issue of whether tort liability may be available for *negligent* spoliation of evidence [*Temple Community Hospital v. Superior Court (1999) 20 Cal. 4th 464, 471 n.3, 84 Cal. Rptr. 2d 852, 976 P. 2d 223* ; *Cedars-Sinai Medical Center v. Superior Court (1998) 18 Cal. 4th 1, 18 n.4, 74 Cal. Rptr. 2d 248, 954 P. 2d 511]* . Subsequent court of appeal decisions have, however, concluded that there is no tort remedy for either first-party or third-party negligent spoliation of evidence [*Lueter v. State (2002) 94 Cal. App. 4th 1285, 1295, 115 Cal. Rptr. 2d 68* (third-party negligent spoliation of evidence); *Coprich v. Superior Court (2000) 80 Cal. App. 4th 1081, 1089-1090, 95 Cal. Rptr. 2d 884* (first- and third-party spoliation of evidence); *Farmers Ins. Exchange v. Superior Court (2000) 79 Cal. App. 4th 1400, 1407, 95 Cal. Rptr. 2d 51* (third-party negligent spoliation of evidence)].

The court of appeal panels in both *Coprich* and *Farmers Ins.* concluded that the policy considerations concerning tort actions for intentional spoliation, discussed by the Supreme Court in *Cedars-Sinai* and *Temple Community*, applied with equal force to negligent actions for spoliation. The burden to litigants, witnesses, and the judicial system outweighed the benefits of recognizing a tort cause of action to deter negligent spoliation of evidence and compensate spoliation victims [*Coprich v. Superior Court (2000) 80 Cal. App. 4th 1081, 1085, 95 Cal. Rptr. 2d 884* ; *Farmers Ins. Exchange v. Superior Court (2000) 79 Cal. App. 4th 1400, 1407-1408, 95 Cal. Rptr. 2d 51]* . These burdens included potentially endless litigation over speculative losses, significant potential for jury confusion and inconsistency when trying spoliation claims, either as a separate action or jointly with the underlying action, and the cost to society of promoting onerous record and evidence retention policies [*Coprich v. Superior Court (2000) 80 Cal. App. 4th 1081, 1085, 1088-1089, 95 Cal. Rptr. 2d 884* ; *Farmers Ins. Exchange v. Superior Court (2000) 79 Cal. App. 4th 1400, 1407-1408, 95 Cal. Rptr. 2d 51]* . These courts additionally noted the legal absurdity of holding a party liable for negligent conduct when the same party could not be held liable for similar conduct that was intentional [*Coprich v. Superior Court (2000) 80 Cal. App. 4th 1081, 1085, 1089, 95 Cal. Rptr. 2d 884* ; *Farmers Ins. Exchange v. Superior Court (2000) 79 Cal. App. 4th 1400, 1407, 95 Cal. Rptr. 2d 51]* .

The court of appeal in *Coprich* distinguished several earlier court of appeal decisions, most of which predated *Cedars-Sinai* and *Temple Community*, which had recognized a limited cause of action for negligent spoliation against a third party. Examples cited by the court in *Coprich* included the following: *Johnson v. United Services Automobile Assn. (1998) 67 Cal. App. 4th 626, 79 Cal. Rptr. 2d 234* (negligent spoliation not precluded by *Cedars-Sinai*), *overruled by Lueter v. State (2002) 94 Cal. App. 4th 1285, 115 Cal. Rptr. 2d 68* ; *Velasco v. Commercial Bldg. Maintenance Co. (1985) 169 Cal. App. 3d 874, 876-877, 215 Cal. Rptr. 504* (assuming, without deciding, that negligent spoliation survives as tort cause of action, holding that janitorial service had no duty to preserve evidence); *Hernandez v. Garcetti (1998) 68 Cal. App. 4th 675, 680, 80 Cal.Rptr. 2d 443* (assuming, without deciding, that negligent spoliation survives as tort cause of action, holding that government tort claim for negligent spoliation was untimely); *Galanek v. Wismar (1999) 68 Cal. App. 4th 1417, 1425, 81 Cal. Rptr. 2d 236* (legal malpractice claim based on negligent spoliation of evidence). The court in *Coprich* declined to follow *Velasco* and the cases it cited because they did not adequately address the compelling policy considerations discussed in *Cedars-Sinai* and *Temple Community* [*Coprich v. Superior Court (2000) 80 Cal. App. 4th 1081, 1085, 1090-1091, 95 Cal. Rptr. 2d 884]* . The *Coprich* court also found cases such as *Hernadez* and *Galanek* inapposite, in that the former assumed without deciding that a cause of action for negligent spoliation existed, and the latter was premised on a breach of a fiduciary duty [*Coprich v. Superior Court (2000) 80 Cal. App. 4th 1081, 1085, 1091, 95 Cal. Rptr. 2d 884]* . Finally, the court in *Coprich* rejected the conclusion of the court of appeal panel in *Johnson*, that is, its conclusion that the burdens and costs of a tort remedy for negligent third-party

spoliation did not justify precluding such a cause of action [*Johnson v. United Services Automobile Assn. (1998) 67 Cal. App. 4th 626, 631-632, 79 Cal. Rptr. 2d 234* , *overruled by* *Lueter v. State (2002) 94 Cal. App. 4th 1285, 115 Cal. Rptr. 2d 68]* . The *Coprich* court deemed this conclusion to be contrary to the Supreme Court's decision in *Temple Community*, which emphasized the need for "finality of adjudication" in the third-party context, the uncertainty of the fact of harm and causation, the potential for arbitrary and inconsistent results, and other costs and burdens [*Coprich v. Superior Court (2000) 80 Cal. App. 4th 1081, 1091, 95 Cal. Rptr. 2d 884]* .

In *Lueter v. State (2002) 94 Cal. App. 4th 1285, 115 Cal. Rptr. 2d 68* , the Third Appellate District panel agreed with the results in *Farmers Ins. Exchange* and *Coprich*, overruling *Johnson v. United Services Automobile Assn. (1998) 67 Cal. App. 4th 626, 79 Cal. Rptr. 2d 234* . The court of appeal panel found that the factors identified by the Supreme Court in *Temple Community*, in rejecting a tort of intentional third party spoliation, militated against the recognition of a tort of negligent spoliation of evidence [*Lueter v. State (2002) 94 Cal. App. 4th 1285, 1295, 115 Cal. Rptr. 2d 68]* . The court acknowledged that a limited cause of action for negligent spoliation of evidence by a third party spoliator, based on a special relationship rising out of an undertaking, agreement, or specific request to preserve evidence, or a relationship based on contract, statute, or regulation, as espoused in *Johnson v. United Services Automobile Assn.*, might tend to restrain the "endless spiral of lawsuits" that Temple feared. However, the appellate court found the amorphous requirement of a "special relationship" insufficient to overcome the concerns expressed in *Temple* [*Lueter v. State (2002) 94 Cal. App. 4th 1285,1296-1297, 115 Cal. Rptr. 2d 68]* . Because the *Lueter* court refused to recognize the tort of negligent spoliation of evidence against a private party, it rejected the argument that defendant state agency, which "prevented [plaintiffs] from taking [their] own tire tread from the accident scene" had a duty to preserve the evidence. Absent a statute specifically imposing liability, a public entity and its employees are not liable for causes of action in tort that cannot be pursued against a private party. Thus, any liability for spoliation against a public entity and its employees would have to be created by statute, not judicially [*Lueter v. State (2002) 94 Cal. App. 4th 1285, 1300, 115 Cal. Rptr. 2d 68]* .

Similarly, in *Forbes v. County of San (2002) 101 Cal. App. 4th 48, 123 Cal. Rptr. 2d 721* , the Fourth Appellate District panel held that plaintiffs, adversaries in a prior civil action, had no tort cause of action against the county or the state for intentional or negligent destruction of trial records from that action, after the judgment was vacated on appeal and a new trial ordered, in accordance with *Code Civ. Proc. § 914* [*Forbes v. County of San (2002) 101 Cal. App. 4th 48, 58-59, 123 Cal. Rptr. 2d 721]* . (*Code Civ. Proc. § 914* provides, in relevant part, that when it is impossible to obtain a reporter's transcript on appeal due to the loss or destruction of the reporter's notes, the court may vacate the judgment appealed and order a new trial.) The court of appeal panel concluded that the statutory duty to preserve evidence is not enough by itself to warrant tort liability [*Forbes v. County of San Bernardino (2002) 101 Cal. App. 4th 48, 57, 123 Cal. Rptr. 2d 721]* . In reaching its decision, the panel relied on the Supreme Court's decisions in *Cedars-Sinai* and *Temple Community*, as well as on *Coprich*, *Lueter*, and its own decision in *Farmers Ins.*, all of which establish "beyond reasonable dispute" that there is no tort cause of action against a litigant or third party for intentional or negligent destruction of evidence. The court rejected plaintiffs' argument that the spoliation cases were inapposite because they involved parties who, unlike defendants here, had no statutory duty to maintain records. Rather, under California law, the fact a public entity has a statutory duty to act or refrain from acting is not enough to create tort liability for a violation of that duty. Instead, the plaintiff also must show the resulting injury would be actionable against a private person. The spoliation cases established that the plaintiffs' alleged injuries for intentional destruction of court records and negligence did not meet that requirement [*Forbes v. County of San Bernardino (2002) 101 Cal. App. 4th 48, 57, 123 Cal. Rptr. 2d 721]* . The *Lueter* decision further supported the conclusion there should be no tort liability notwithstanding a public entity's duty to preserve evidence. This court of appeal panel agreed with the *Lueter* court that the existence of a statutory duty is an inadequate basis for tort liability in the absence of a statute expressly creating that liability, if the injury giving rise to the claim would not be actionable against a private party [*Forbes v. County of San Bernardino (2002) 101 Cal. App. 4th 48, 57-59, 123 Cal. Rptr. 2d 721]* . Finally, the court noted that it would have reached the same conclusion based on the public policy considerations that led the Supreme Court to reject tort liability in *Cedars-Sinai* and *Temple Community*. The concerns applicable here included potentially endless litigation, the existence of non-tort remedies to address the problem of destruction of records, and the impossibility of proving

causation and damages [*Forbes v. County of San Bernardino (2002) 101 Cal. App. 4th 48, 59, 123 Cal. Rptr. 2d 721]* .

At least one court, citing dictum in *Temple Community*, has held that the absence of a tort cause of action for spoliation does not preclude a possible action for contract damages, when there is a breach of a contract duty to preserve evidence and the underlying contract is not shown to be illegal, unconscionable, or otherwise unenforceable [*Coprich v. Superior Court (2000) 80 Cal. App. 4th 1081, 1085, 1091-1092, 95 Cal. Rptr. 2d 884* ; *see* *Lueter v. State (2002) 94 Cal. App. 4th 1285, 1299 n.3, 115 Cal. Rptr. 2d 68* (dictum that "the decisional authorities do not foreclose an action in contract where the defendant is under a contractual obligation to preserve evidence")].

Legal Topics:

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

§§ 195.22[Reserved]

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16-195 California Forms of Pleading and Practice--Annotated § 195.30

§ 195.30 Related Matthew Bender Publications

For comprehensive discussion and forms relating to discovery by demand for inspection, copying, testing, or sampling under the California Civil Discovery Act and related California law, see DeMeo, California Deposition and Discovery Practice, Ch. 61, *Demand for Inspection of Documents, Things, and Land* (Matthew Bender), and Hogan & Weber, California Civil Discovery, Ch. 6, *Inspection Demands* (Matthew Bender)

For memoranda relating to discovery by demand for inspection, copying, testing, or sampling under the California Civil Discovery Act and related California law, see California Points and Authorities, Ch. 85, *Discovery: Inspection of Tangible Evidence* (Matthew Bender)

For discussion of and forms relating to inspection demands in various types of actions, see Bender's Forms of Discovery (Matthew Bender)

For detailed coverage of the rules and procedures governing the inspection, copying, testing, or sampling of electronically stored information (ESI), see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection

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16-195 California Forms of Pleading and Practice--Annotated § 195.31

§ 195.31 State Statutes

Restrictions on inspection demands in limited civil cases. *Code Civ. Proc. §§ 91, 94(a), 95*

Scope and regulation of discovery in general. *Code Civ. Proc. §§ 2017.010 et seq., 2019.010 et seq.*

Sanctions in general. *Code Civ. Proc. § 2023.010 et seq.*

Production of writing or tangible things in context of deposition proceeding. *Code Civ. Proc. §§ 2025.220(a)(4), 2025.280(a)*; *see also Code Civ. Proc. § 2020.010 et seq.*

Discovery subpoenas for the inspection of premises in action pending outside California. *Code Civ. Proc. § 2029.100 et seq.*

Discovery by demand to another party for inspection of documents, tangible things, land, or electronically stored information. *Code Civ. Proc. § 2031.010 et seq.*

Claim of privilege or work product protection for electronically stored information produced in discovery. *Code Civ. Proc. § 2031.285*

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-195 California Forms of Pleading and Practice--Annotated § 195.32

§ 195.32 California Rules of Court

Format of supplemental and further discovery and responses. *Cal. Rules of Ct., Rule 3.1000*

Format of discovery motions; separate statement required to accompany motion to compel. *Cal. Rules of Ct., Rule 3.1345*

Service of motion papers on nonparty deponent. *Cal. Rules of Ct., Rule 3.1346*

Discovery motions in summary proceedings (unlawful detainer or other actions brought under *Code Civ. Proc. § 1159 et seq.*) involving possession of real property. *Cal. Rules of Court, Rule 3.1347*

Discovery sanctions; effect of lack of opposition to motion to compel. *Cal. Rules of Ct., Rule 3.1348*

Filing and retention of specified discovery papers relating to demand for inspection, copying, testing, or sampling. *Cal. Rules of Ct., Rule 3.250(a)(7), (9), (b)*

Case management requirements, including those relating to e-discovery. *Cal. Rules of Ct., Rules 3.724, 3.728*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions to Compel

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16-195 California Forms of Pleading and Practice--Annotated § 195.33

§ 195.33 Local Court Rules

Production of documents. Los Angeles Co. Super. Ct. Rules, Rule 7.12(f)

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-195 California Forms of Pleading and Practice--Annotated § 195.34

§ 195.34 Decisions

[1] Description of Tangible Evidence

Description is required such that would apprise person of ordinary intelligence of document desired. *Union Trust Co. v. Superior Court (1938) 11 Cal. 2d 449, 458, 81 P.2d 150* (prior law)

[2] Informal Inspection

Property open to the public may be examined without recourse to former *Code Civ. Proc. § 2031* (*now see Code Civ. Proc. § 2031.010 et seq.*) or Civil Discovery Act generally, so long as examination is lawful. *Pullin v. Superior Court (2000) 81 Cal. App. 4th 1161, 1164-1165, 97 Cal. Rptr. 2d 447*

[2A] Inspection and Related Activities

Former *Code Civ. Proc. § 2031(g)(1)* [*now see Code Civ. Proc. § 2031.280(c)*] automatically shifts to *demanding* party reasonable expense of translating data compilation into usable form, absent finding that translation is not necessary or that former *Code Civ. Proc. § 2031(g)(1)*) [*now see Code Civ. Proc. § 2031.280(c)*] does not apply for some other reason. *Toshiba Am. Electronics Components, Inc. v. Superior Court (2004) 124 Cal. App. 4th 762, 769, 21 Cal. Rptr. 3d 532*

Neither court's inherent power to exercise reasonable control over discovery matters nor any California statute authorized trial court to order litigants before trial to pay for destructive testing or any other discovery they did not wish to pursue; thus, trial court abused its discretion, in a construction defect case, by requiring defendants to share in cost of destructive testing that defendants did not want. *San Diego Unified Port Dist. v. Barnhart (2002) 95 Cal. App. 4th 1400, 1405, 116 Cal. Rptr. 2d 65*

[3] Possession and Control of Tangible Evidence

When liability insurer defending action under terms of policy, material that is under custody and control of insurance company or its general counsel is deemed in possession and control of defendant and obtainable under pre-1986 *Code Civ. Proc. § 2031*. *Clark v. Superior Court (1960) 177 Cal. App. 2d 577, 579, 2 Cal. Rptr. 375*

[4] Protective Orders

Request for production of documents is oppressive when the ultimate burden is incommensurate with result sought; it is oppressive to require an insurer to produce files of all claims made over a five-year period that were similar in nature to the claim in issue, when to do so would require individual evaluation of over 13,000 claims. *Mead Reinsurance Co. v. Superior Court (1986) 188 Cal. App. 3d 313, 320-321, 232 Cal. Rptr. 752* (prior law)

In granting discovery of names and addresses of particular claimants of insurer, trial court's denial of protective order that would prohibit insured's counsel from seeking employment from claimants or encouraging claimants to file suits is not abuse of court's discretion. *Colonial Life & Accident Ins. Co. v. Superior Court (1982) 31 Cal. 3d 785, 793-795, 183 Cal. Rptr. 810, 647 P.2d 86* (prior law)

Service on party's attorney of order for discovery of corporate records as proper under former *Code Civ. Proc. § 2031(b)* (*now see Code Civ. Proc. §§ 2031.300-2031.320*). *Thrasher v. Thrasher (1972) 27 Cal. App. 3d 23, 29, 103 Cal. Rptr. 618* (prior law)

[5] Response to Demand

Because petitioner raised timely objections under *Code Civ. Proc. § 2031.010 et seq.* on grounds of privilege to real party in interest's request for production of documents and served privilege log, petitioner preserved its objections, regardless of whether objections were sufficiently detailed in their response or privilege log; thus, trial court erred by finding waiver under *Code Civ. Proc. § 2031.300*. *People ex rel. Lockyer v. Superior Court (2004) 122 Cal. App. 4th 1060, 1074-1075, 19 Cal. Rptr. 3d 324*

Party that timely answered request for inspection and production of documents with repetitive, boilerplate attorney-client and work product privileges did not waive right to assert those privileges for failure to file privilege log as part of its opposition to plaintiff's request to inspect and product; *Code Civ. Proc. § 2031.300* does not include as authorized sanction a judicial order that privilege has been waived. *Best Products, Inc. v. Superior Court (2004) 119 Cal. App. 4th 1181, 1187-1188, 15 Cal. Rptr. 3d 154*

Provision in former *Code Civ. Proc. § 2031(g)* (*now see Code Civ. Proc. § 2031.250*), that response to request for production consisting solely of objections need not be verified, mandates that objection in unverified "hybrid" response, consisting of both objections and other statements, is effective. *Blue Ridge Ins. Co. v. Superior Court (1988) 202 Cal. App. 3d 339, 344, 248 Cal. Rptr. 346*

Objection to request for production not made within time for response set out in former *Code Civ. Proc. § 2031* (*now see Code Civ. Proc. § 2031.260*) is not permitted to be considered on motion for order to compel; informal letter stating that documents sought were privileged, which was mailed before formal request was made, is not proper response to request or basis for relief from default. *Schaff v. Superior Court (1983) 146 Cal. App. 3d 921, 923-924, 194 Cal. Rptr. 546*

[6] Sanctions

Separate motion for discovery monetary sanctions may be made after underlying motion to compel further response to an inspection demand is litigated, even though better practice may be to include request for monetary sanctions in motion to compel further response. *London v. Dri-Honing Corp. (2004) 117 Cal. App. 4th 999, 1001, 1008, 12 Cal. Rptr. 3d 240*

[7] Scope of Demand

Photographing of face and body of person is within terms "objects or tangible things" subject to production for photographing under former *Code Civ. Proc. § 2031* (*now see Code Civ. Proc. § 2031.010(c)*). *Shepherd v. Superior Court (1976) 17 Cal. 3d 107, 118, 130 Cal. Rptr. 257, 550 P.2d 161* (prior law)

Production and inspection of "objects or tangible things" does not encompass human remains. *Holm v. Superior Court (1986) 187 Cal. App. 3d 1241, 1247, 232 Cal. Rptr. 432* (prior law)

In mandate proceeding to compel payments pursuant to city ordinance, city attorney's tentative opinion draft concerning ordinance's legality is neither relevant admissible evidence nor reasonably calculated to lead to such evidence when ordinance's language is clear and individual legislator's intent is inadmissible. *City and County of San Francisco v. Superior Court (1982) 130 Cal. App. 3d 481, 484-486, 181 Cal. Rptr. 775* (prior law)

Discovery order authorizing claimant's representative to inspect and copy writings that plaintiffs designate as bearing on crashworthiness of vehicle is too broad by empowering claimants to resolve discovery disputes. *Volkswagenwerk Aktiengesellschaft v. Superior Court (1981) 123 Cal. App. 3d 840, 848-849, 176 Cal. Rptr. 874* (prior law)

Discovery order requiring defendant to permit claimants to conduct informal interviews of its employees is beyond scope of Discovery Act of 1957. *Volkswagenwerk Aktiengesellschaft v. Superior Court (1981) 123 Cal. App. 3d 840, 849, 176 Cal. Rptr. 874* (prior law)

Party is not required to first seek inspection of premises and documents by nonjudicial request when it is clear that party repeatedly but vainly sought production sufficient to persuade him or her and court that complete disclosure had been made, when motion for discovery not an unreasonable burden on court, and when opposing party had ample opportunity to interpose objections. *Volkswagenwerk Aktiengesellschaft v. Superior Court (1981) 123 Cal. App. 3d 840, 851, 176 Cal. Rptr. 874* (prior law)

Former *Code Civ. Proc. § 2031* (*now see Code Civ. Proc. § 2031.010 et seq.*) does not authorize compelled reenactment of event for any means of visual recordation, as such reenactment is of testimonial nature and outside scope of former *Code Civ. Proc. § 2031*. *Bailey v. Superior Court (1978) 79 Cal. App. 3d 444, 447, 144 Cal. Rptr. 875* (prior law); *but see Emerson Electric Co. v. Superior Court (1997) 16 Cal. 4th 1101, 1106-1113, 68 Cal. Rptr. 2d 883, 946 P. 2d 841* (deponent may be required to perform nonverbal reenactment during videotaped deposition)

Formal request procedure outlined in former *Code Civ. Proc. § 2031* is mandatory prerequisite to seeking court order for production of documents. *People ex rel. Dept. of Transportation v. Superior Court (1976) 60 Cal. App. 3d 352, 358, 131 Cal. Rptr. 476 , disapproved on other grounds, Davies v. Superior Court (1984) 36 Cal. 3d 291, 301, 204 Cal. Rptr. 154, 682 P.2d 349*

In absence of jurisdiction over foreign corporation, California courts are unable to compel officer over whom only personal and not representative jurisdiction has been acquired to produce corporate records. *Coopman v. Superior Court (1965) 237 Cal. App. 2d 656, 661, 47 Cal. Rptr. 131* (prior law)

[8] Tort Action for Spoliation of Tangible Evidence

There is no tort action in California for intentional spoliation of evidence by a third party, that is, by person not a party to underlying litigation to which spoliated evidence related. *Temple Community Hospital v. Superior Court (1999) 20 Cal. 4th 464, 466, 84 Cal. Rptr. 2d 852, 976 P.2d 223*

There is no tort action in California for intentional spoliation of evidence, when both injured party and alleged "spoliator" were parties to underlying litigation, and injured party knew or reasonably should have known of alleged loss or destruction of evidence before trial or other decision on the merits of underlying cause of action. *Cedar-Sinai Medical Center v. Superior Court (1998) 18 Cal. 4th 1, 17-18, 74 Cal. Rptr. 2d 248, 954 P.2d 511*

Plaintiffs, adversaries in prior civil action, had no tort cause of action against county or state for intentional or negligent destruction of trial records from that action, after judgment was vacated on appeal and new trial ordered; statutory duty to preserve evidence is not enough to warrant tort liability, absent statute expressly creating such liability when injury giving rise to claim would not be actionable against private party. *Forbes v. County of San Bernardino (2002) 101 Cal. App. 4th 48, 57-59, 123 Cal. Rptr. 2d 721*

There is no tort remedy for first-party or third-party negligent spoliation of evidence. *Lueter v. State (2002) 94 Cal. App. 4th 1285, 1295, 115 Cal. Rptr. 2d 68* (third-party negligent spoliation of evidence); *Coprich v. Superior Court (2000) 80 Cal. App. 4th 1081, 1089-1090, 95 Cal. Rptr. 2d 884* (first and third party spoliation of evidence); *Farmers Ins. Exchange v. Superior Court (2000) 79 Cal. App. 4th 1400, 1407, 95 Cal. Rptr. 2d 51* (third party negligent spoliation of evidence)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryProtective Orders

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16-195 California Forms of Pleading and Practice--Annotated § 195.35

§ 195.35 Text References

Witkin, California Evidence, Ch. X, *Discovery*, § 118 et seq. (4th ed. 2000)

Legal Topics:

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

§§ 195.36[Reserved]

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PART IV. PROCEDURAL CHECKLISTS
A. Checklists for Party Seeking Discovery

16-195 California Forms of Pleading and Practice--Annotated § 195.40

§ 195.40 Demand for Production or Inspection, Copying, Testing, or Sampling

[1] Ascertain Whether Leave of Court Required

1. Service by plaintiff.

a. If service is to be made on a party within 10 days after service of summons or appearance of that party, or is service is to be made within five days after service of summons in an unlawful detainer action or other proceeding under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), obtain leave of court either with or without notice [*Code Civ. Proc. § 2031.020(d)*; for forms to allow early service of interrogatories that may be adapted for use, *see Ch. 194, Discovery: Interrogatories, § 194.80* et seq.].

b. No leave of court is required if served on the other party more than 10 days after service of summons or appearance of that party [*Code Civ. Proc. § 2031.020(b)*].

2. Service by defendant may be made without leave of court at any time [*Code Civ. Proc. § 2031.020(a)*].

[2] Prepare Demand

1. Demand for production of documents or tangible things for inspection, copying, photographing, testing, and sampling [*see § 195.60*].

2. Demand for permission to enter on land or other property for inspection and related activities [*see § 195.61*].

[3] Prepare Proof of Service

Prepare proof of service of the demand [*see Code Civ. Proc. §§ 1013a, 2031.290*; *see also* Ch. 518, *Service of Summons*

and Papers].

[4] Serve Documents

Serve demand on party to whom it is directed, and copies of demand and proof of service on all parties who have appeared in the action [*Code Civ. Proc. § 2031.040*].

[5] Supplemental Demands

1. Prepare and serve supplemental demand in same manner as initial demand [*see* [2]-[4], *above* and §§ 195.60, 195.61], to inspect later acquired or later discovered documents, tangible things, land or other property, or electronically stored information in possession, control, or custody of party on whom demand is made. Supplemental demands may be made (1) twice before the initial setting of the trial date and (2) subject to time limits on discovery proceedings and motions under *Code Civ. Proc. § 2024.010 et seq.*, once after the initial setting of the trial date [*Code Civ. Proc. § 2031.050*; for discussion relating to time limits under *Code Civ. Proc. § 2024.010 et seq., see Ch. 190, Discovery: Scope, Regulation, and Timing § 190.50* et seq.].

2. On motion for good cause shown, the court may also allow the demanding party to propound an additional number of supplemental demands [*Code Civ. Proc. 2031.050(c)*].

[6] Disposition of Documents

Retain the original of the demand, with the original proof of service affixed, and the original of the response until six months after final disposition of the action. Then, the documents may be destroyed unless the court, on motion of any party and for good cause shown, orders that they be preserved for a longer period [*see Code Civ. Proc. § 2031.290(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection

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§ 195.41 Motion for Order for Early Response

If the requesting party wants a response to the request in less than the amount of time allowed under *Code Civ. Proc. § 2031.260* to reply, file a motion to shorten time with the court [*see Code Civ. Proc. § 2031.260* (30-day time limit for response, except in an unlawful detainer action or other proceeding under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), which has a five-day time limit); *see also Code Civ. Proc. §§ 1013(a), 2016.050* (extension of time limit when demand served by mail); *Code Civ. Proc. § 1013(c), (e)* (extension when service is by express mail or by fax)]. For a form for an ex parte application to shorten the time for responding to interrogatories (as well as the time for serving them), which may be adapted for this purpose, and a related procedural checklist, see *Ch. 194, Discovery: Interrogatories, §§ 194.60[3]* and *194.80* et seq. For discussion and forms relating to proceedings to shorten time requirements generally, see Ch. 524, *Shortening and Extension of Time* .

NOTE:

In unlawful detainer actions or other proceedings under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), unless the court has issued an order shortening the time for response, the responding party has at least five days from the date of service of the demand to respond [*Code Civ. Proc. § 2031.260*; for discussion, forms, and a procedural guide relating to unlawful detainer proceedings generally, *see* Ch. 333, *Landlord and Tenant: Eviction Actions*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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Chapter 195 DISCOVERY: INSPECTION OF TANGIBLE EVIDENCE
PART IV. PROCEDURAL CHECKLISTS
A. Checklists for Party Seeking Discovery

16-195 California Forms of Pleading and Practice--Annotated § 195.42

§ 195.42 Proceedings for Order Compelling Compliance and Sanctions

[1] Prepare Documents

1. Prepare notice of motion for order compelling response, further response, or compliance with response to demand [*Code Civ. Proc. §§ 2031.300, 2031.310*, or *2031.320*; *see* respectively forms of motion *set out in §§ 195.65, 195.66*, or *195.68*]. A motion to compel further response must (1) set out specific facts showing good cause for the discovery sought by the demand and (2) be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by the motion [*Code Civ. Proc. § 2031.310(b)*; *see* form for motion *set out in § 195.66*]. A motion to compel a further response must also be accompanied by a separate statement under *Cal. Rules of Ct., Rule 3.1345* [*see § 195.67*].

NOTE:
A separate motion for monetary sanctions may be made after an underlying motion to compel further response to an inspection demand is litigated, even though the better practice may be to place the request for monetary sanctions in its motion to compel further response [*see London v. Dri-Honing Corp. (2004) 117 Cal. App. 4th 999, 1001, 1008, 12 Cal. Rptr. 3d 240* ; § 195.20[3][a]].

2. Prepare memorandum supporting motion [*Cal. Rules of Ct., Rule 3.1113(a)*; for further discussion of memorandum requirements and a skeletal form for a memorandum, *see* Ch. 417, *Points and Authorities* ; for forms for memoranda supporting a motion to compel a response, further reponse, or compliance with a response to a demand for inspection, copying, testing, or sampling under *Code Civ. Proc. §§ 2031.300, 2031.310*, or *2031.320*, *see* California Points and Authorities, Ch. 85, *Discovery: Inspection of Tangible Evidence* (Matthew Bender)].

3. Prepare proof of service [*see Code Civ. Proc. § 1013a* and Ch. 518, *Service of Summons and Papers*].

[2] Serve Documents

At least 16 court days before the date set for hearing of the motion [*Code Civ. Proc. § 1005(b)*], or any longer time required by *Code Civ. Proc. § 1005(b)* if service of the notice of motion is to be by mail, overnight delivery, or fax, serve every party to the action or proceeding with a copy of the notice of motion, supporting declaration and memorandum, and proof of service.

[3] File Documents

File the signed original notice of motion, supporting papers, and proof of service.

[4] Order

1. If the court grants the motion, prepare an order granting motion [*see § 195.69*].

2. If required by local court rule or practice, have opposing party approve order as to form.

3. Present order to judge for signature.

4. File original.

5. Serve copies of order stamped "endorsed filed." Under *Code Civ. Proc. § 1019.5(a)*, when a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order [*see* Ch. 372, *Motions and Orders*] must be given by the prevailing party to all other parties or their attorneys in the manner provided in *Code Civ. Proc. §§ 1010-1020* [*see* Ch. 518, *Service of Summons and Papers*], unless notice is waived by all parties in open court and is entered in the minutes.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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16-195 California Forms of Pleading and Practice--Annotated §§ 195.43-195.49

[Reserved]

§§ 195.43[Reserved]

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16-195 California Forms of Pleading and Practice--Annotated § 195.50

§ 195.50 Written Response

[1] Time for Response

Respond within applicable time period:

1. Within 30 days from date of service of demand [*Code Civ. Proc. § 2031.260(a)*].

2. If service was made by mail, within 30 days plus 5 calendar days from date of service of demand if the place of address is within California, 30 days plus 10 calendar days if the place of address is outside California but within the United States, or 30 days plus 20 calendar days if the place of address is outside the United States [*see Code Civ. Proc. § 1013(a), 2016.050*]. The period is extended two court days if service is by express mail, other overnight delivery, or by fax [*see Code Civ. Proc. § 1013(c), (e)*].

3. Within the time as shortened or extended by court order under *Code Civ. Proc. § 2031.260* [for forms for extending time to respond to interrogatories which may be adapted for this purpose, *see Ch. 194, Discovery: Interrogatories, § 194.90* et seq.]. If the responding party can establish that an extension of time is needed for protection from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense, he or she may move for a protective order, which may include an order extending time. In that event, a monetary sanction may be available to the prevailing party [*see Code Civ. Proc. § 2031.060*; *see also* discussion in *§ 195.51* and form *set out in § 195.63*].

4. Within the time as extended (or shortened) by stipulation of counsel under *Code Civ. Proc. § 2031.270*. Counsel who obtain stipulations by telephone must confirm them in writing, either by letter or by written stipulation to be signed by the attorneys involved [*see Code Civ. Proc. § 2031.270(b)*]. The written stipulation, whether offered separately or as an attachment to another document, may not be filed unless it is offered as relevant to the determination of an issue in a law and motion proceeding or other hearing or is ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(7), (9)*]. The original written stipulation must be retained until six months after final disposition of the cause, unless the court on

motion of any party and for good cause shown orders the stipulation preserved for a longer period [*Cal. Rules of Ct., Rule 3.250(b)*].

NOTE:
In unlawful detainer actions or other proceedings under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), unless the court has issued an order shortening the time for response, the responding party has at least five days from the date of service of the demand to respond [*Code Civ. Proc. § 2031.260*; for discussion, forms, and a procedural guide relating to unlawful detainer proceedings generally, *see* Ch. 333, *Landlord and Tenant: Eviction Actions*].

[2] Prepare Response

Respond separately to each item or category of item in any of the following manners [*Code Civ. Proc. § 2031.210 et seq.*; for form of response, *see § 195.62*].

1. Object to the demand in whole or in part [*Code Civ. Proc. §§ 2031.210(a)(3), 2031.240*].

a. Specify the extent of, and specific grounds for, the objection.

b. If objecting in part, specify the objectionable part or parts of an item, or categories of items, and include a statement of compliance, or representation of inability to comply, with respect to remainder of the items or categories.

c. If objecting based on privilege, state the particular privilege invoked.

d. Expressly assert any claim that information sought is protected work product under *Code Civ. Proc. § 2018.010 et seq.*

2. Grant permission to inspect, copy, test, sampling, or enter [*Code Civ. Proc. §§ 2031.210(a)(1), 2031.220*].

a. State that inspection copying, testing, or sampling, will be allowed by date set under *Code Civ. Proc. § 2031.030(c)* [*see § 195.60[4]*], and that other related activities will be allowed in whole or in part; and

b. State that all documents or items in demanded category that are in possession, custody, or control of party, and to which no objection is being made, will be included in production.

NOTE:
Documents are to be produced as they are kept in the usual course of business, or organize and label them to correspond with the categories in the demand [*Code Civ. Proc. § 2031.280(a)*]. A party demanding inspection, copying, testing, or sampling of electronically stored information may specify the form or forms in which each type of electronically stored information is to be produced [*Code Civ. Proc. § 2031.030(a)(2)*].

The documents must be produced on the date specified in the demand, in accordance with *Code Civ. Proc. § 2031.030(c)(2)*, unless an objection has been made to that date. If the demand has been extended, in accordance with *Code Civ. Proc. § 2031.270*, the documents must be produced on the date agreed on [*Code Civ. Proc. § 2031.280(b)*].

If a party responding to a demand for production of electronically stored information objects to a specified form for producing the information, or if no form is specified in the demand, the responding party must state in its response the form in which it intends to produce each type of information [*Code Civ. Proc. § 2031.280(c)*]. Further, unless the parties otherwise agree or the court otherwise orders, if a demand for production does not specify a form or forms for producing a type of electronically stored information, the responding party must produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable [*Code Civ. Proc. § 2031.280(d)(1)*]. Unless the parties otherwise agree or the court otherwise orders, a party need not produce the same electronically stored information in more than one form [*Code Civ. Proc. § 2031.280(d)(1)*]. If necessary, the responding party must translate, through detection devices, any data compilations included in the demand into reasonably usable form.

The reasonable expense of such translation will be paid by the demanding party [see*Code Civ. Proc. § 2031.280(e)*]. Former Code Civ. Proc. § 2031(g)(1) [*now see Code Civ. Proc. § 2031.280(e)*] is a legislatively determined exception to the general rule that the responding party bear the cost of responding to discovery. When there is no dispute about the application of the statute, former Code Civ. Proc. § 2031(g)(1) [*now see Code Civ. Proc. § 2031.280(e)*] automatically shifts the expense of translating a data compilation into usable form to the demanding party [Toshiba Am. Electronics Components, Inc. v. Superior Court (2004) 124 Cal. App. 4th 762] (compelling production of all responsive documents contained in backup tapes without also requiring demanding party to pay any expenses involved in translating those tapes into usable form was abuse of discretion, absent finding that translation was not necessary or that former *Code Civ. Proc. § 2031(g)(1)* [*now see Code Civ. Proc. § 2031.280(e)*] otherwise did not apply)]. However, the demanding party is expected to pay only its reasonable expense for a necessary translation [*Toshiba Am. Electronics Components, Inc. v. Superior Court (2004) 124 Cal. App. 4th 762* ; *see Code Civ. Proc. § 2031.280(e)*]. Reasonableness and necessity are factual issues, that, if disputed, are to be determined by the trial court. When a demanding party is asked to pay for translations that the party does not believe are necessary, or when the party disputes the reasonableness of the expenses alleged, the party may seek a protective order or move to compel production, and the trial court then may make whatever orders justice requires [*see Toshiba Am. Electronics Components, Inc. v. Superior Court (2004) 124 Cal. App. 4th 762* ; *Code Civ. Proc. §§ 2031.060(a), 2031.300(b)*].

For further discussion of production of electronically stored information, see Ch. 195A, Discovery: Discovery of Electronically Stored Evidence (E-Discovery).

3. Make representation of inability to comply with the demand [*Code Civ. Proc. §§ 2031.210(a)(2), 2031.230*].

a. Affirm that a diligent search and a reasonable inquiry was made in an effort to comply with the demand [*Code Civ. Proc. § 2031.230*].

b. Specify whether the item has never existed; has been destroyed; has been lost, misplaced, or stolen; or has never been, or is no longer in, the responding party's possession, custody, or control.

c. Give the name and address of any person or organization known or believed to have possession,

custody, or control of the item or category of item.

d. If party objects to discovery of electronically stored information on grounds that it is from source that is not reasonably accessible because of undue burden or expense and that responding party will not search source absent agreement with demanding party or court order, identify types or categories of sources of electronically stored information that are not reasonably accessible [*see Code Civ. Proc. § 2031.210(d)*].

NOTE:
By objecting and identifying information of a type or category of source or sources that are not reasonably accessible, the responding party preserves any objections it may have relating to that electronically stored information [*Code Civ. Proc. § 2031.210(d)*].

[3] Proof of Service

Prepare proof of service of response [*see Code Civ. Proc. § 1013a, 2031.290*; *see also* Ch. 518, *Service of Summons and Papers*].

[4] Serve Documents

Serve original response on demanding party and copies of response on all other parties who have appeared in the action [*Code Civ. Proc. § 2031.260(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & Inspection

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B. Checklists for Responding Party

16-195 California Forms of Pleading and Practice--Annotated § 195.51

§ 195.51 Motion for Protective Order

[1] Preliminary Determinations

Determine if protective order is necessary to protect against annoyance, embarrassment, oppression, or undue burden and expense [*see Code Civ. Proc. § 2031.060*].

[2] Prepare Documents

1. Prepare notice of motion for protective order, together with a supporting declaration [*see § 195.63*].

NOTE:
The notice of motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt to resolve the issues informally [*Code Civ. Proc. § 2031.060(a)*; ***see*** generally *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*].

2. Prepare memorandum supporting motion [*Cal. Rules of Ct., Rule 3.1113(a)*; for further discussion of memorandum requirements and a skeletal form for a memorandum, *see* Ch. 417, *Points and Authorities* ; for forms for memoranda supporting a motion for protective order under *Code Civ. Proc. § 2031.060*, *see* California Points and Authorities, Ch. 85, *Discovery: Inspection of Tangible Evidence* (Mattew Bender)].

3. Prepare proof of service [*see Code Civ. Proc. §§ 1013a* and Ch. 518, *Service of Summons and Papers*].

[3] Serve and File Documents

See *§ 195.42[2], [3]*.

[4] Order

See *§ 195.42[4]* and form *set out in § 195.64*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryProtective Orders

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16-195 California Forms of Pleading and Practice--Annotated § 195.52

§ 195.52 Opposition to Motion for Order Compelling Response and Sanctions

[1] Prepare Documents

1. Any memorandum opposing the motion must be served and filed at least nine court days before the time appointed for the hearing [*see Code Civ. Proc. § 1005(b), (c)* (time for serving opposing papers)].

2. Prepare memorandum opposing motion for order compelling compliance with request for production or entry [*see* California Points and Authorities, Ch. 85, *Discovery: Inspection of Tangible Evidence* (Matthew Bender)].

3. Prepare proof of service of memorandum [*see Code Civ. Proc. § 1013a* and Ch. 518, *Service of Summons and Papers*].

[2] Serve Documents

Serve copies of the opposing memorandum and proof of service on the other parties to the action in the manner provided by *Code Civ. Proc. §§ 1010-1020*. For discussion relating to responses to motions generally, *see* Ch. 518, *Service of Summons and Papers* .

[3] File Documents

File opposing memorandum and proof of service within the time required and in the court required by local rules.

[4] Order

If the court denies the motion, prepare an order. [See *§ 195.42[4]* and *form in § 195.69*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMotions to Compel

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16-195 California Forms of Pleading and Practice--Annotated §§ 195.53-195.59

[Reserved]

§§ 195.53[Reserved]

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16-195 California Forms of Pleading and Practice--Annotated § 195.60

§ 195.60 Demand--Production of Documents and Tangible Things for Inspection, Copying, Testing, or Sampling [Code Civ. Proc. § 2031.010 et seq.]

[1] FORM Demand--Production of Documents and Tangible Things for Inspection [Code Civ. Proc. § 2031.010 et seq.]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DEMAND FOR PRODUCTION OF DOCUMENTS
Defendant.	)	AND TANGIBLE THINGS FOR INSPECTION
	)	[AND FOR _____ (COPYING *and/or*
	)	PHOTOGRAPHING *and/or* TESTING *and/or* SAMPLING)]

_____

Demanding Party: _____ [*Identify, e.g.*, Plaintiff],
_____ [*name*].

Set no. _____ [*specify*]

Responding party: _____ [*Identify, e.g.*, Defendant],
_____ [*name*].

To _____ [*identify party, e.g.*, defendant] _____ [*name*] and to
_____ [*name*], his/her attorney of record:

_____ [*Identify party serving demand, e.g.,* Plaintiff] _____ [*name*] demands that you produce and permit the inspection and _____ [*specify related activity, e.g.,* copying *and/or* photographing *and/or* testing *and/or* sampling] by or on behalf of himself/herself of the following _____ [*specify, e.g.,* documents *and/or* tangible things]:

1. [*Set forth separately the things to be produced by specifically describing each individual item, or specify each category with reasonable particularity*].

2. [*Continue setting forth, in separately numbered paragraphs, as many items or categories as desired*].

_____ [*Identify party serving request, e.g.,* Plaintiff] _____ [*name*] demands that the above-listed items be produced on _____ [*date*], at _____ [*time*], at _____ [*specify, e.g.,* the law offices of _____ (*name of law firm*)] located at _____ [*street address*], _____ [*city*], California, for the purpose of inspection [and copying] [and _____ (*specify related activity, such as testing or sampling, the manner in which the activity will be performed, and whether it will permanently alter or destroy the item or items*)].
Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*demanding party's status and name*]

[2] Use of Form

The demand set out in [1], *above*, is for use to demand the production of documents or tangible things for inspection and copying, photographing, testing, or sampling. The demand may be served by any party to an action or proceeding on any other party [*Code Civ. Proc. § 2031.010*]. The party making the demand must serve a copy of the demand on the party to whom it is directed and on all other parties who have appeared in the action [*Code Civ. Proc. § 2031.040*]. If the requesting party also wishes to request permission to enter upon land or other property for inspection, measuring, surveying, photographing, testing, or sampling, this demand may be combined with that set out in *§ 195.61*.

For a demand for production of electronically stored information under *Code Civ. Proc. § 2031.010*, see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)* , § 195A.62.

For further discussion of demands for inspection, copying, testing, or sampling, see *§§ 195.12 -195.14*. For discussion of restrictions on the number of individuals demands that may be made in a limited civil case, see *§ 195.15*.

For discussion and forms relating to an alternative procedure for commanding the production of documents and things in the context of an oral deposition, see Ch. 193, *Discovery: Depositions* .

[3] Time for Serving Demand

A defendant may make a demand for inspection, copying, testing, or sampling, without leave of court, at any time. If a plaintiff wishes to make a demand within 10 days after the service of the summons on, or appearance by, the party to

whom the demand is directed, whichever occurs first, or if the plaintiff wishes to make a demand within five days after the service of summons in an unlawful detainer action or other proceedings under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), the plaintiff must obtain leave of court to do so. However, at any later time, the plaintiff may make a demand without leave of court. Further, on a motion with or without notice, the court, for good cause shown, may grant leave to the plaintiff to make demand at an earlier time [*Code Civ. Proc. § 2031.020*]. For forms for early service of interrogatories that may be adapted for this purpose, *see Ch. 194, Discovery: Interrogatories, § 194.80* et seq.].

For discussion and forms relating to time requirements for completing discovery generally, *see Ch. 190, Discovery: Purpose, Scope, and Timing, § 190.50* et seq.

[4] Content of Demand

A demand for inspection, copying, testing, or sampling must be in writing, and must do all of the following [*Code Civ. Proc. § 2031.030*]:

- Designate the documents, tangible things, or land or other property, or electronically stored information to be inspected, copied, tested, or sampled, either by specifically describing each individual item, or by reasonably particularizing each category of item [*Code Civ. Proc. § 2031.030(c)(1)*].

- Specify a reasonable time for the inspection, copying, testing, or sampling that is at least 30 days after service of the demand, unless the court, for good cause shown, has granted leave to specify an earlier date [*Code Civ. Proc. § 2031.030(c)(2)*]. In an unlawful detainer action or other proceeding under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), specify a reasonable time for inspection, copying, testing, or sampling that is at least five days after service of the demand, unless the court, for good cause shown, has granted leave to specify an earlier date [*Code Civ. Proc. § 2031.030(c)(2)*].

- Specify a reasonable place for making the inspection, copying, testing, or sampling [*Code Civ. Proc. § 2031.030(c)(3)*].

- Specify any inspection, copying, testing, or sampling, or related activity, as well as the manner in which that related activity will be performed, and whether that activity will permanently alter or destroy the item involved [*Code Civ. Proc. § 2031.030(c)(4)*].

If the requests were served by mail, the 30-day period mentioned in *Code Civ. Proc. § 2031.030(c)(2)* is extended five calendar days if the place of address is within California, 10 calendar days if the place of address is outside California but within the United States, or 20 calendar days if the place of address is outside the United States [*see Code Civ. Proc. §§ 1013(a), 2016.050*]. The period is extended two court days if service is by express mail or by fax [*see Code Civ. Proc. § 1013(c), (e)*].

For a form for an ex parte application to shorten the time for responding to interrogatories (as well as the time for serving them), which may be adapted for this purpose, and a related procedural checklist, see *Ch. 194, Discovery: Interrogatories, §§ 194.60[3]* and *194.80* et seq. For discussion and forms relating to proceedings to shorten time requirements generally, see Ch. 524, *Shortening and Extension of Time* .

[5] Format of Demand

A party demanding an inspection, copying, testing, or sampling must number each set of demands consecutively [*Code Civ. Proc. § 2031.030(a)*]. The first paragraph immediately below the title of the case must state the identity of the demanding party, the set number, and the identity of the responding party. Each demand in a set must be separately set

forth, and identified by number or letter [*Code Civ. Proc. § 2031.030(b)*].

[6] Supplemental Demand

This form may be adapted for use in making a supplemental demand. Any party may propound a supplemental demand for inspection, copying, testing, or sampling of any later acquired or discovered documents, tangible things, land or other property, or electronically stored information that are in the possession, custody, or control of the person on whom the demand is made. Supplemental demands may be made (1) twice before the initial setting of the trial date, and (2) subject to the time limits of *Code Civ. Proc. § 2024.010 et seq.*, once after the initial setting of the trial date [*Code Civ. Proc. § 2031.050*; for discussion relating to limits under *Code Civ. Proc. § 2024.010 et seq., see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.50* et seq.]. On motion for good cause shown, the court may allow a party to propound an additional number of supplemental demands for inspection [*Code Civ. Proc. § 2031.050(c)*].

[7] Filing and Retention of Demand

A demand for production or inspection copying, testing, or sampling of tangible things, land or other property, or electronically stored information (and responses or objections to this demand) may not be filed with the court, unless offered as relevant under a law and motion proceeding or other hearing or ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(9)*]. Instead, the serving party retains the original and the proof of service until six months after final disposition of the cause, unless otherwise ordered by the court for cause [*Cal. Rules of Ct., Rule 3.250(b)*].

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16-195 California Forms of Pleading and Practice--Annotated § 195.61

§ 195.61 Demand--Permission to Enter onto Land or Other Property for Inspection, Copying, Testing, or Sampling [Code Civ. Proc. § 2031.010 et seq.]

[1] FORM Demand--Permission to Enter onto Land or Other Property for Inspection [Code Civ. Proc. § 2031.010 et seq.]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DEMAND FOR PERMISSION TO ENTER ON
Defendant.	)	PROPERTY FOR INSPECTION [AND FOR
	)	_____ (MEASURING *and/or* SUR-
	)	VEYING *and/or* PHOTOGRAPHING *and/or*
		SAMPLING)]

_____

Demanding Party: _____ [*Identify, e.g.*, Plaintiff],
_____ [*name*].

Set no. _____ [*specify*]

Responding party: _____ [*Identify, e.g.*, Defendant],
_____ [*name*].

To _____ [*identify party, e.g.*, defendant] _____ [*name*] and to
_____ [*name*], his/her attorney of record:

_____ [*Identify party serving request, e.g.,* Plaintiff] _____ [*name*] demands permission to enter on the _____ [*specify type of property, e.g.,* land described as _____ (*describe property, e.g., street address*)] for the purpose of _____ [inspecting *or* measuring *or* surveying *or* photographing *or* testing *or* sampling, *or combination of these as appropriate*] _____ [the property *or designate an object or operation on the property*].

_____ [*Identify party serving request, e.g.,* Plaintiff] _____ [*name*] requests that the entry on the above-mentioned property take place on _____ [*date*], at _____ [*time*], in the following manner _____ [*specify manner of entry and inspection, measurement, and/or related activity*].

Dated _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*demanding party's status and name*]

[2] Use of Form

The demand set out in [1], *above*, is for use to demand permission to enter upon land or other property, or any designated object or operation on it for the purpose of inspecting, measuring, surveying, photographing, testing, or sampling [*Code Civ. Proc. § 2031.010(d)*]. If the requesting party also wishes to request the production of documents or other tangible things, this demand may be combined with that *set out in § 195.60*. If the requesting party also wants to request the production of electronically stored information, this demand may be combined with the demand in Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*, § 195A.62.

[3] Format, Contents, and Service of Demand

The requirements for this type of demand are the same as those for a demand for production of documents or tangible things for inspection under *Code Civ. Proc. § 2031.010(b), (c)*. For discussion of these requirements, see *§ 195.60[3] -[5]*.

[4] Supplemental Demand

This form may be adapted for use in making a supplemental demand for permission to enter upon land or other property [*see Code Civ. Proc. § 2031.050* and discussion in *§ 195.60[6]*].

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 195 DISCOVERY: INSPECTION OF TANGIBLE EVIDENCE
PART V. FORMS

16-195 California Forms of Pleading and Practice--Annotated § 195.62

§ 195.62 Response to Demand for Inspection, Copying, Testing, or Sampling [Code Civ. Proc. § 2031.210 et seq.]

[1] FORM Response to Demand for Inspection [Code Civ. Proc. § 2031.210 et seq.]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*]	)	RESPONSE TO DEMAND FOR
Defendant.	)	_____ [PRODUCTION OF DOCU-
	)	MENTS OR TANGIBLE THINGS *or* ENTRY ON
	)	PROPERTY *or both*]]

_____

Demanding party: _____ [*Identify, e.g.,* Defendant], _____ [*name*].

Set no. _____ [*specify*]

Propounding Party: _____ [*Identify, e.g.,* Plaintiff], _____ [*name*].

To _____ [*identify party who served demand, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

_____ [*Identify responding party, e.g.,* Defendant] _____ [*name*] responds as follows to _____ [*identify demanding party, e.g.,* plaintiff] _____'s [*name*] [supplemental] demand for _____ [production, inspection, copying, photographing, testing, and sampling *or* entry and inspection *or other as appropriate*] served on _____ [*specify date served by mail as indicated on proof of service of demand or date personally served*]:

[*EITHER, for those things being produced, respond separately to each item, or category of item, with the following*]

1. The production, inspection, and related activity demanded in Item No. _____ will be allowed _____ [in whole *or specify to what extent production, inspection, and related activity will be allowed*]. The _____ [*specify document(s) or tangible thing(s) demanded, e.g.,* writings, charts, and photographs] are in the _____ [possession *or* custody *or* control] of _____ [*identify responding party, e.g.,* defendant] _____ [*name*], and will be included in this production.

[*OR, if unable to comply with demand for inspection of particular item or category of item*]

1. Is unable to comply with Item No. _____ because _____ [*specify, e.g.,* the writings, charts, and photographs requested have never existed]. A diligent search, and a reasonable inquiry has been made in an effort to comply with this demand.

[*OR, if objecting to entire item(s) or category(ies), state for each item or category*]

1. Objects to Item No. _____ in its entirety on the ground that _____ [*state ground for objection, e.g.,* the material demanded is privileged under the lawyer-client privilege].

[*OR, if objecting to part of item or category, state for each portion objected to*]

1. Objects to _____ [*specify, e.g.,* producing those writings, charts, and photographs demanded in Item No. _____, which are dated prior to _____ (*date*),] on the ground that _____ [*state ground, e.g.,* they are not relevant to the subject matter of the action]. _____ [The remainder of Item No. _____ will be produced for inspection and related activity as demanded *or* _____ (*identify responding party, e.g.,* Defendant _____ (*name*)) is unable to comply with the remainder of Item No. _____ because _____ (*specify, e.g.,* the writings, charts, and photographs demanded have never existed). A diligent search, and a reasonable inquiry has been made in an effort to comply with this demand.]

[*CONTINUE*]

2. [*Set forth, in successive paragraphs, similar responses bearing the same number, and in the same sequence, as each corresponding item or category in the demand.*]
Dated: _____.

[*EITHER, attorney signs if response contains one or more objections*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*responding party's status and name*]

[*AND/OR, party, its agent or officer signs and verifies, unless response contains only objections*]

VERIFICATION

I, _____ [*name*], _____ [certify *or* declare] under penalty of perjury under the laws of the State of California that the foregoing responses are true and correct [*if declarant answering on behalf of corporation or other entity, add:* based on such information as is available to _____ (*name of party*), a _____ (*specify type of entity, e.g.,* corporation), which designated me as its agent to respond to the foregoing request].

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The response set out in [1], *above*, is for use by a party who has been served with either a demand or a supplemental inspection demand [*Code Civ. Proc. § 2031.210 et seq.*]. For the procedure to be followed in responding to either type of demand, *see § 195.50*.

For a form for a response to a demand for production of electronically stored information (ESI) under *Code Civ. Proc. § 2031.210 et seq.*, see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*, § 195A.62. For detailed discussion of issues that arise in responding to a demand for ESI, see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*, § 195A.16.

[3] Time for Response

The response must be made within 30 days after service of the demand, or in unlawful detainer actions or other proceedings under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), within five days of demand [*Code Civ. Proc. § 2031.260*]. If the demand was served by mail, the response period is extended five days if the place of address is within California, 10 days if the place of address is outside California but within the United States, or 20 days if the place of address is outside the United States [*see Code Civ. Proc. §§ 1013(a), 2016.050*].

Note that the periods specified above govern the time for response, as distinguished from the time for compliance with the response, for example, by production of documents or other things for inspection, copying, testing, or sampling. The time for production or allowing entry for inspection, copying, testing, or sampling is a reasonable time specified in the demand, which must be at least 30 days, or in unlawful detainer actions or other proceedings under *Code Civ. Proc. §*

1159 et seq. (forcible entry and detainer), at least five days, after service of the demand [*Code Civ. Proc. § 2031.030(c)(2)*; *see § 195.60[4]*]. If the demand was served by mail, this minimum period is extended five days if the place of address is within California, 10 days if the place of address is outside California but within the United States, or 20 days if the place of address is outside the United States [*see Code Civ. Proc. §§ 1013(a), 2016.050*].

[4] Contents of Response

[a] Types of Responses

A separate response to each item or category of item is required. The response may be any of the following [*Code Civ. Proc. § 2031.210(a)*]:

- A statement that the party will comply with the particular demand for inspection, copying, testing, or sampling by the date set under *Code Civ. Proc. § 2031.030(c)* [*see § 195.60[4]*], and that other related activities will be allowed in whole or in part [*see* [b], *below*].

- A representation that the party lacks the ability to comply with the demand for inspection, copying, testing, or sampling of a particular item or category of item [*see* [c], *below*].

- An objection to the particular demand [*see* [d], *below*].

Each statement of compliance, each representation, and each objection in the response must bear the same number and be in the same sequence as the corresponding item or category in the demand. The text of each of item or category need not be repeated in the response, however [*Code Civ. Proc. § 2031.210(c)*; *Cal. Rules of Ct., Rule 3.1000(b)*].

[b] Statement of Compliance

A statement that the responding party will comply with a particular demand must state both of the following [*Code Civ. Proc. § 2031.220*]:

- That the production, inspection, copying, testing, sampling, and related activity demanded will be allowed either in whole or in part.

- That all documents or things in a demanded category that are in the possession, custody, or control of that party, and to which no objection is being made, will be included in the production.

Any documents demanded must either be produced as they are kept in the usual course of business, or be organized and labeled to correspond with the categories in the demand [*Code Civ. Proc. § 2031.280(a)*]. The documents must be produced on the date specified in the demand, in accordance with *Code Civ. Proc. § 2031.030(c)(2)*, unless an objection has been made to that date. If the demand has been extended, in accordance with *Code Civ. Proc. § 2031.270*, the documents must be produced on the date agreed on [*Code Civ. Proc. § 2031.280(b)*]. If necessary, the responding party, at the reasonable expense of the demanding party, must, through detection devices, translate any data compilations included in the demand into reasonably usable form [*Code Civ. Proc. § 2031.280(c)*].

If a party responding to a demand for production of electronically stored information objects to a specified form for producing the information, or if no form is specified in the demand, the responding party must state in its response the form in which it intends to produce each type of information [*Code Civ. Proc. § 2031.280(c)*]. Unless the parties otherwise agree or the court otherwise orders, if a demand for production does not specify a form or forms for producing a type of electronically stored information, the responding party must produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable [*Code Civ. Proc. § 2031.280(d)(1)*].

Further, unless the parties otherwise agree or the court otherwise orders, a party need not produce the same electronically stored information in more than one form [*Code Civ. Proc. § 2031.280(d)(1)*].

In a case of first impression, one court of appeal held that when there is no dispute about the application of former *Code Civ. Proc. § 2031(g)(1)* [*now see Code Civ. Proc. § 2031.280(e)*], the statute automatically shifts the expense of translating a data compilation into usable form to the demanding party [*Toshiba Am. Electronics Components, Inc. v. Superior Court (2004) 124 Cal. App. 4th 762, 772, 21 Cal. Rptr. 3d 532]* (former *Code Civ. Proc. § 2031(g)(1)* [*now see Code Civ. Proc. § 2031.280(e)*] is "a legislatively determined exception to the general rule that the responding party bear the cost of responding to discovery")]. However, the demanding party is expected to pay only its reasonable expense for a necessary translation [*Toshiba America Electronics Components, Inc. v. Superior Court (2004) 124 Cal. App. 4th 762, 773, 21 Cal. Rptr. 3d 532* ; *see Code Civ. Proc. § 2031.280(e)*]. Reasonableness and necessity are factual issues, that, if disputed, are left to the trial court's discretion. When a demanding party is asked to pay for translations that the party does not believe are necessary, or when the party disputes the reasonableness of the expenses alleged, the party may seek a protective order or move to compel production, and the trial court then may make whatever orders justice requires [*see Toshiba Am. Electronics Components, Inc. v. Superior Court (2004) 124 Cal. App. 4th 762, 772-773, 21 Cal. Rptr. 3d 532* ; *Code Civ. Proc. §§ 2031.060(a), 2031.300(b)*].

[c] Representation of Inability to Comply

A representation of inability to comply with a particular demand for inspection, copying, testing, or sampling must do the following [*Code Civ. Proc. § 2031.230*]:

- Affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with the demand.

- Specify whether the inability to comply is because the particular item or category of item has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party.

- Specify the name and address of any natural person or organization known or believed by the party to have possession, custody, or control of the item or category of item.

[d] Objection

An objection to an item, or category of item, in a demand for inspection, copying, testing, or sampling must do the following [*Code Civ. Proc. § 2031.240(b)*]:

- Identify with particularity any document, tangible thing, land, or electronically stored information falling within any category of item in the demand to which an objection is being made.

- Clearly set forth the extent of, and the specific ground for, the objection. Thus, if an objection is based on a claim of privilege, the objection must state the particular privilege invoked. Similarly, an objection based on a claim of the attorney work product protections of *Code Civ. Proc. § 2018.010 et seq.* must expressly assert that claim.

If only a part of an item, or category of item, in a demand is objectionable, the response must set out a statement of compliance, or a representation of inability to comply, with respect to the remainder of that item or category [*Code Civ. Proc. § 2031.240(a)*; *see* [b] and [c], *above*].

[5] Format of Response

A response to a demand for inspection, copying, testing, or sampling must include the following identifying data in the first paragraph immediately below the title of the case: (1) the identity of the responding party, (2) the set number, and (3) the identity of the demanding party [*Code Civ. Proc. § 2031.210(b)*]. If the response is a further response, the first paragraph must also include the nature of the paper [*Cal. Rules of Ct., Rule 3.1000(a)*].

[6] Verification

The responding party must sign the response under oath unless the response contains only objections. If that party is a public or private corporation or a partnership or association or governmental agency, one of its officers or agents must sign the response under oath on behalf of that party. If the officer or agent signing the response on behalf of that party is an attorney acting in that capacity for a party, that party waives any lawyer-client privilege and any protection for work product under *Code Civ. Proc. § 2018.010 et seq.* during any subsequent discovery from that attorney concerning the identity of the sources of information contained in the response. The attorney for the responding party must sign any responses that contain an objection [*Code Civ. Proc. § 2031.250(c)*].

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Chapter 195 DISCOVERY: INSPECTION OF TANGIBLE EVIDENCE
PART V. FORMS

16-195 California Forms of Pleading and Practice--Annotated § 195.63

§ 195.63 Proceedings to Obtain Protective Order [Code Civ. Proc. § 2031.060]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Obtain Protective Order [Code Civ. Proc. § 2031.060]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER RESTRICTING DISCOVERY AND IMPOSING MONETARY SANCTION, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as

the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify moving party, e.g.,* defendant] _____ [*name*] will, and hereby does, move for an order that _____ [*specify protection being sought, e.g.,* the correspondence demanded in Item No. _____ of the [supplemental] demand for _____[inspection *and/or* copying *and/or* testing *and/or* sampling] by _____ (*identify demanding party, e.g.,* plaintiff _____ (*name*)) need not be produced, and that only the correspondence relevant to the particular transaction at issue in the above-captioned action need be produced] and for an order imposing monetary sanctions against _____ [*identify demanding party and/or his/her attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] in the amount of $ _____. The motion will be made on the grounds that _____ [*specify, e.g.,* production and _____ [inspection *and/or* copying *and/or* testing *and/or* sampling] will subject defendant _____ (*name*) to oppression, undue burden, and expense] and that _____ [*identify moving party, e.g.,* defendant] _____ [*name*] made a reasonable and good faith attempt at informal resolution of the issues presented by this motion.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name* (*s*)] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*moving party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. On _____ [*date*], _____ [*identify demanding party, e.g.,* plaintiff] _____ [*name*] made a demand for the production and .....[inspection *and/or* copying *and/or* testing *and/or* sampling] of _____ [*specify, e.g.,* all correspondence relating to every business transaction engaged in by _____ (*identify party to whom demand directed, e.g.,* defendant) throughout the calendar year 1999].

3. _____ [*Set forth facts showing oppression, undue burden and expense, e.g.,* The correspondence demanded by plaintiff _____ (*name*) is voluminous, and is located in files in 500 offices in 26 major cities throughout the United States and Europe. It would take months, and considerable expense, to compile the demanded correspondence, and thereafter ship it to plaintiff].

4. _____ [*Set forth facts showing why scope of demand should be limited, e.g.,* All correspondence relating to the electric juicer allegedly ordered and never received by plaintiff _____ (*name*) is located in San Francisco, California, which is defendant's regional customer service department].

5. On _____ [*date*], _____ [*specify actions taken to confer with responding party in a reasonable and good faith attempt to informally resolve the issues covered by the motion, e.g.,* defendant _____ (*name*) sent a letter to plaintiff's attorney requesting that he/she narrow the scope of the demand, and suggesting that the correspondence relating to plaintiff's particular purchase order could be procured from defendant's San Francisco, California, office. A copy of the letter is attached. To date, plaintiff has not received an answer to his/her letter, nor has plaintiff's subsequent telephone calls to defendant's attorney been returned].

6. _____ [*Identify moving party, e.g.,* Defendant] bases his/her request for the imposition of a sanction in the amount of $_____ on _____ [*itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

The notice of motion and motion, with supporting declaration, set out in [1], *above*, is for use by a party to whom a demand or a supplemental demand for production and inspection, copying, testing, or sampling of documents, things, or places has been directed, and to move for a protective order against unwarranted annoyance, embarrassment, or oppression, or undue burden and expense [*see Code Civ. Proc. § 2031.060*].

The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [*Code Civ. Proc. § 2031.060(a)*; for further discussion of this general requirement, *see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*]. The declaration included with this form includes statements designed to satisfy this requirements, as well as factual statements supporting the grounds for the motion, and facts supporting the amount of monetary sanctions that might be awarded in favor of the moving party. For further discussion of the grounds for a protective order, including a list of orders expressly authorized under *Code Civ. Proc. § 2031.060*, see *§ 195.17*. For further discussion of monetary sanctions, see [4], *below*.

A supporting memorandum is required to be served and filed with this form [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; for further discussion of memorandum requirements and a skeletal memorandum, *see* Ch. 417, *Points and Authorities* ; for memoranda supporting a motion for a protective order under *Code Civ. Proc. § 2031.060, see* California Points and Authorities, Ch. 85, *Discovery: Inspection of Tangible Evidence* (Matthew Bender)].

For further discussion of protective orders, including protective orders for electronically stored information, see *§ 195.17[2]*. For a detailed discussion of protective orders in the context of e-discovery, see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*.

[3] Time for Motion

Although *Code Civ. Proc. § 2031.060* does not provide for any express time limit within which to make a motion for a protective order, it does provide that the motion must be made "promptly" [*Code Civ. Proc. § 2031.060(a)*]. Moreover, the party to whom a demand has been directed waives any objection to the demand if that party fails to serve a timely response to it [*Code Civ. Proc. § 2031.300(a)*; *see* discussion in *§ 195.18*].

Thus, it appears that a party to whom a demand is directed should move for a protective order as soon as possible, but in any event no later than the time for serving a response. For discussion of the time for response under *Code Civ. Proc. § 2031.260*, see *§ 195.62[3]*.

[4] Monetary Sanctions

The court must impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes this motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2031.060(h)*; *see also* discussion of this general provision in Ch. 190, *Discovery: Scope, Regulation, and Timing*, § 190.33[2]].

As discussed in [2], *above*, this motion must be accompanied by a declaration showing of a reasonable and good faith attempt at informal resolution of the issues raised by the motion. Under *Code Civ. Proc. §§ 2023.010(i)* and *2023.020*, the court is also required to impose a monetary sanction against any party or attorney who fails to confer in an attempt to resolve informally any dispute concerning discovery, in favor of anyone who incurs expenses, including attorney's fees, as a result of that conduct, when the section of the Civil Discovery Act governing a particular discovery motion requires a declaration showing that an attempt has been made. This sanction is to be imposed regardless of the outcome of the particular discovery motion [*Code Civ. Proc. §§ 2023.010(i), 2023.020*].

A monetary sanction under *Code Civ. Proc. § 2023.030* is an order that one who engaged in a misuse of the discovery process, his or her attorney if the attorney advised the conduct, or both, pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct [*Code Civ. Proc. § 2023.030(a)*].

A monetary sanction may only be imposed after notice to any affected party, person, or attorney, and after opportunity for hearing [*Code Civ. Proc. § 2023.030*].

A request for a sanction, in the notice of motion, must identify every party, person, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion must be supported by a memorandum, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought [*Code Civ. Proc. § 2023.040*]. The notice of motion and supporting declaration in this form include language designed to satisfy these requirements.

For further discussion of monetary sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

[5] Cross References

- For discussion and forms concerning declarations in general, see Ch. 15, *Affidavits, Certificates, and Declarations*

- For discussion and forms relating to both ex parte applications and noticed motions and accompanying papers in general, see Ch. 372, *Motions and Orders*

- For discussion and forms concerning service of papers and proof of service, see Ch. 518, *Service of Summons and Papers*

- For further discussion and forms concerning shortening or extending time requirements in general, see Ch. 524, *Shortening and Extension of Time*

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§ 195.64 Proceedings to Obtain Protective Order [Code Civ. Proc. § 2031.060]--Order

[1] FORM Proceedings to Obtain Protective Order [Code Civ. Proc. § 2031.060]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location:
Defendant.	)	_____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
_____		

The motion of _____ [*identify moving party, e.g.,* defendant] _____ [*name*] for an order directing that _____ [*specify protective order requested, e.g.,* the correspondence specified in Item No. _____ of the [supplemental] demand of _____ (*identify demanding party, e.g.,* plaintiff) need not be produced, and that only the correspondence relevant to the particular transaction at issue in the above-captioned action need be produced] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On good cause being shown and proof made to the satisfaction of the court that the motion ought to be _____ [denied *or* granted],

IT IS ORDERED that the motion be, and hereby is, _____ [denied *or* granted and that

_____ (*specify each order, if more than one, in a separate paragraph, e.g.,* the correspondence demanded by plaintiff _____ (*name*) in Item No. _____ of his/her demand for production Set No. _____ need not be produced)].

[_____ (*Set forth any additional orders, e.g.,* IT IS FURTHER ORDERED that only the correspondence between defendant and any other person that is located in defendant's San Francisco, California, customer service office, and that relates to the alleged transaction between plaintiff and defendant need be produced).]

[*EITHER, if imposing monetary sanctions*]

IT IS FURTHER ORDERED that _____ [*specify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] pay forthwith to _____ [*specify successful party, e.g.,* defendant] _____ [*name*] the sum of $ _____ as reasonable expenses and attorney's fees.

[*OR, if not ordering monetary sanctions*]

On further proof made to the satisfaction of the court that _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*specify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The proposed order set out in [1], *above*, is for use when the court has granted or denied a motion for a protective order in favor of a party to whom a demand or a supplemental demand for production and inspection , copying, testing, or sampling of documents, tangible things, places, or electronically stored information has been directed [*see Code Civ. Proc. § 2031.060*]. For further discussion of this motion proceeding, see *§ 195.63[2] -[4]*.

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16-195 California Forms of Pleading and Practice--Annotated § 195.65

§ 195.65 Proceedings for Order to Compel--Compelling Response to Demand for Inspection, Copying, Testing, or Sampling [Code Civ. Proc. § 2031.300]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Order to Compel--Compelling Response to Inspection Demand [Code Civ. Proc. § 2031.300]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER COMPELLING RESPONSE TO DEMAND FOR PRODUCTION AND _____ [INSPECTION *and/or* COPYING *and/or* TESTING *and/or* SAMPLING] AND IMPOSING MONETARY SANCTION, SUPPORTING DECLARATION OF _____[*name*], AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [*name of party, e.g.,* plaintiff] will, and hereby does, move the court for an order compelling _____ [*identify party from whom production and/or entry sought, e.g.,* defendant] _____ [*name*] to respond to the [supplemental] demand for _____ [inspection *and/or* copying *and/or* testing *and/or* sampling] by_____ [*identify demanding party, e.g.,* plaintiff]. _____ [*Identify moving party, e.g.,* Plaintiff] will also move this court for an order requiring _____ [*identify party or attorney or both, e.g.,* defendant and/or his/her attorney _____ (*name*)] to pay a monetary sanction in the amount of $_____ to _____ [*identify moving party, e.g.,* plaintiff]. The motion will be made on the grounds that _____ [*identify party from whom identification, production, and/or entry sought, e.g.,* defendant] _____ [*name*] has failed to timely respond to the inspection demand of _____ [*identify demanding party, e.g.,* plaintiff].

The motion will be based on this notice of motion, on the demand for _____ [production, inspection, and copying or photographing *or* entry and _____ (*specify, e.g.,* testing) *or both*] served on _____ [*date*], on the declaration(s) of _____ [*name(s)*] and the memorandum set forth below, on the papers and records on file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*moving party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. [*Identity of declarant. See § 195.63, Declaration Paragraph 1.*]

2. The subject matter of this action is _____ [*state nature of action showing why the documents, things, or land involved in the demand for production or entry are relevant to the action*].

3. On or about _____ [*date*], _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] served a demand for _____ [production and permission to inspect and _____ (copy *or* photograph *or* test *or* sample) certain designated categories of items *or* permission to enter on the _____ (*specify type of property, e.g.,* land) described as _____ (*give street address or other description of property*) for the purpose of _____ (*specify, e.g.,* inspecting) the _____ (*specify items or property, e.g.,* writings, charts, and photographs)] on _____ [*identify party from whom production or entry is being sought, e.g.,* defendant] _____ [*name*]. A true

and correct copy of this demand is attached as Exhibit A and incorporated by reference.

4. The foregoing _____ [*specify items or property for which production and inspection is being sought, e.g.,* writings, charts, and photographs] is/are, and at all times herein mentioned was/were, in the _____ [possession *or* custody *or* control] of _____ [*identify party from whom production and inspection is being sought, e.g.,* defendant].

5. To date, _____ [*identify responding party, e.g.,* defendant] _____ [*name*] has failed to respond to the demand.

6. [*Itemization of expenses. See § 195.63[1], Declaration Paragraph 6.*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

The notice of motion and motion, with supporting declaration, set out in [1], *above*, is for use to obtain an order compelling a response to a demand or a supplemental demand for production and permission to inspect and copy, photograph, test, or sample documents, tangible things, or electronically stored information. The form also may be used for an order compelling response to enter on property for inspection, measurement, or other activities relating to the property or an object or operation on the property [*Code Civ. Proc. § 2031.300*; *see* discussion in *§ 195.19[1]*].

A supporting memorandum is required to be served and filed with this form [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; for further discussion of memorandum requirements and a skeletal form for a memorandum, *see* Ch. 417, *Points and Authorities* ; for forms for memoranda supporting a motion to compel under *Code Civ. Proc. § 2031.300*, *see* California Points and Authorities, Ch. 85, *Discovery: Inspection of Tangible Evidence* (Matthew Bender)].

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 195.63[5]*.

For detailed discussion and forms relating to a response to a demand for inspection, copying, testing, or sampling electronically stored evidence, see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*.

[3] Time for Motion

No time is fixed for giving notice of a motion to compel an initial response to a demand under *Code Civ. Proc. § 2031.300*. Generally, however, the motion and supporting papers must be served and filed at least 16 court days before

the time appointed for the hearing unless otherwise ordered or specifically provided by law [*Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(a)*]. The 16-day period may be extended depending on the method of service used [*see Code Civ. Proc. § 1005(b)*]. For further discussion regarding the service and filing of motions and other papers, *see* Ch. 372, *Motions and Orders* , and Ch. 518, *Service of Summons and Papers* .

[4] Identification of Demands

A motion concerning demands for inspection, copying, testing, or sampling must identify the demands by set and number [*Cal. Rules of Ct., Rule 3.1345(d)*].

[5] Supporting Declaration

The supporting declaration in this form includes factual statements supporting the grounds for the motion. In this respect a supporting declaration should include facts showing the subject matter of the action, so that moving party can show that the material sought is relevant to the subject matter of the action, or will lead to admissible evidence and is therefore within the scope of discovery permitted by *Code Civ. Proc. § 2017.010*. The subject matter of the action has been defined as the circumstances and facts out of which the cause of action arises, that is, the property, contract, or other thing involved in the dispute; it is not the act or acts that constitute the cause of action but the physical facts in relation to which the suit is prosecuted [*Darbee v. Superior Court (1962) 208 Cal. App. 2d 680, 688, 25 Cal. Rptr. 520* (prior law)].

The supporting declaration should also contain facts showing that (1) a demand for production and inspection, copying, testing, sampling, or entry and inspection, was served on the party from whom production was sought; (2) a response to the demand was or was not received; and (3) the items are in the custody, possession, or control of the party from whom they are sought [*see Code Civ. Proc. § 2031.010*].

If the motion includes a requests for monetary sanctions, a supporting declaration must set out facts showing the amount sought [*see Code Civ. Proc. § 2023.040* and discussion in [6], *below*].

[6] Monetary Sanctions

The court must impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response to a demand for inspection, copying, testing, sampling, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2031.300(c)*; *see also* discussion of this general provision in Ch. 190, *Discovery: Scope, Regulation, and Timing*, § 190.33[2]].

The court may award sanctions in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed [*Cal. Rules of Ct., Rule 3.1348(a)*]. The court may not, however, deem the opposing party's failure to file written opposition, failure to appear at a hearing, or voluntary provision discovery to be an admission that the motion was proper or that sanctions should be awarded [*Cal. Rules of Ct., Rule 3.1348(b)*].

A request for a sanction must, in the notice of motion, identify every party, person, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion must be supported by a memorandum, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought [*Code Civ. Proc. § 2023.040*]. The notice of motion and supporting declaration in this form include language designed to satisfy these requirements.

For further discussion of monetary sanctions, see *§ 195.63[4]* and *Ch. 192, Discovery: Sanctions for Discovery Misuse,*

§§ 192.13[2], 192.15[2].

[7] Additional Sanctions on Failure to Obey Order Granting Motion

If the court grants this motion, the responding party will be subject to evidence, issue, or terminating sanctions, as well as additional monetary sanctions, if that party thereafter fails to obey the order compelling a response [*Code Civ. Proc. § 2031.300(c), (d)*]. For further discussion, see *§ 195.20[2]*.

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 195 DISCOVERY: INSPECTION OF TANGIBLE EVIDENCE
PART V. FORMS

16-195 California Forms of Pleading and Practice--Annotated § 195.66

§ 195.66 Proceedings for Order to Compel--Compelling Further Response to Demand for Inspection, Copying, Testing, or Sampling [Code Civ. Proc. § 2031.310]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Order to Compel--Compelling Further Response to Inspection Demand [Code Civ. Proc. § 2031.310]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR OR-
vs.	)	DER COMPELLING FURTHER RESPONSE TO
_____ [*name*],	)	DEMAND FOR PRODUCTION AND INSPECTION
Defendant.	)	[*and/or* COPYING *and/or* TESTING *and/or*
	)	SAMPLING] AND IMPOSING MONETARY
	)	SANCTION, SUPPORTING DECLARATION OF
	)	_____[*name*], AND MEMOR-
	)	ANDUM
		Date: _____
		Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		[Trial Date: _____]

_____

To _____ [*specify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [*identity of party, e.g.,* plaintiff _____ (*name*)] will, and hereby does, move the court for an order compelling _____ [*specify party from whom production and/or entry is sought, e.g.,* defendant] _____ [*name*] to serve an adequate response to the [supplemental] demand of _____ (*specify demanding party, e.g.,* plaintiff)]. _____ [*Specify moving party, e.g.,* Plaintiff] will also move this court for an order requiring _____ [*specify party or attorney or both, e.g.,* defendant and/or his/her attorney _____ (*name*)] to pay a monetary sanction in the amount of $_____ to _____[*specify moving party, e.g.,* plaintiff]. The motion will be made on the ground(s) that _____ [*specify party from whom identification, production, and/or entry sought, e.g.,* defendant] _____ [*name*] has _____ [*describe inadequacy of response, e.g.,* served an incomplete statement of compliance with the demand for _____ (inspection *and/or* copying *and/or* testing *and/or* sampling)]. There is good cause for the discovery sought by the inspection demand in that _____ [*set forth specific facts showing good cause justifying the discovery sought by the inspection demand*].

The motion will be based on this notice of motion, on the demand for _____ [production, inspection, testing, sampling, *and/or* copying or photographing *or* entry and _____ (*specify, e.g.,* testing) *or both*] served on _____ [*date*], on the declaration(s) of _____ [*name(s)*], on the separate statement served and filed herewith pursuant to *Cal. Rules of Ct., Rule 3.1345*, on the memorandum set forth below, on the papers and records on file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*moving party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. [*Identity of declarant. See § 195.63, Declaration Paragraph 1.*]

2. [*Subject matter of action showing relevance of discovery requested. See § 195.65[1],* Declaration Paragraph 2.]

3. [*Statement that demand was served. See § 195.65[1],* Declaration Paragraph 3.]

4. [*Statement that sought-after items or property are in opposing party's possession, custody or control. See § 195.65[1],* Declaration Paragraph 4.]

5. On _____ [*date*], _____ [*specify responding party, e.g.,* defendant]

_____ [*name*] served his/her response on _____ [*specify demanding party, e.g.,* plaintiff] _____ [*name*], and _____ [*specify type of response, e.g.,* represented that he/she was unable to comply with the demand]. _____ [*Set forth facts showing response was inadequate, e.g.,* The representation by _____ (*specify responding party, e.g.,* defendant) _____ (*name*), as set out in the Statement of Responses in Contention, is incomplete because he/she failed to specify whether the writings, charts, and photographs demanded (1) have ever existed, or (2) have been destroyed, or (3) have been lost, misplaced, or stolen, or (4) have never been, or are no longer, in his/her possession, custody, or control].

6. On _____ [*date*], _____ [*specify actions taken to confer with responding party in a reasonable and good faith attempt to informally resolve the issues covered by the motion, e.g.,* declarant sent a letter to defendant's attorney requesting that defendant _____ (*name*) respond to plaintiff's demand. A true and correct copy of the letter is attached as Exhibit C and incorprated by reference. To date, declarant has not received an answer to his/her letter, nor have declarant's subsequent telephone calls to defendant's attorney been returned].

7. [*Itemization of expenses. See § 195.63[1],* Declaration Paragraph 6.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

The notice of motion with supporting declaration set out in [1], *above*, is for use to obtain an order compelling a further response to a demand for inspection, copying, testing, or sampling demand when the demanding party deems the initial response to be inadequate [*Code Civ. Proc. § 2031.310*; *see* discussion in *§ 195.19[2]*].

This motion must set forth specific facts showing good cause justifying the discovery sought by the demand [*Code Civ. Proc. § 2031.310(b)(1)*]. It must also be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by the motion [*Code Civ. Proc. § 2031.310(b)(2)*; *see also* discussion in [6], *below*, and general discussion in *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*].

A supporting memorandum is required to be served and filed with this form [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; for further discussion of memorandum requirements and a skeletal form for a memorandum, *see* Ch. 417, *Points and Authorities* ; for forms for memoranda supporting a motion to compel under *Code Civ. Proc. § 2031.310*, *see* California Points and Authorities, Ch. 85, *Discovery: Inspection of Tangible Evidence* (Matthew Bender)].

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 195.63[5]*.

[3] Separate Statement

A motion to compel further responses to a demand for inspection, copying, testing, or sampling must be accompanied by a separate statement [*Cal. Rules of Ct., Rule 3.1345(a)(3), (c)*]. This is a separate document filed and served with the motion that sets out all the information necessary to understand all the questions and responses that are in issue [*see Cal. Rules of Ct., Rule 3.1345(c)*]. For a form for the separate statement, together with further discussion of its requirements, see *§ 195.67*.

[4] Time for Motion

A notice of motion to compel a further response to a demand must be made within 45 days of the service of the initial response, any supplemental response, or any specific later date to which the parties have agreed in writing. If the demand was served by mail, the 45-day period is extended 5 calendar days if the place of address is within California, 10 calendar days if the place of address is outside California but within the United States, or 20 calendar days if the place of address is outside the United States [*see Code Civ. Proc. §§ 1013(a), 2016.050*]. The 45-day period is extended two court days if service is by express mail or by fax [*see Code Civ. Proc. § 1013(c), (e)*].

If notice is not given within the appropriate period, the demanding party waives any right to compel a further response to the demand [*Code Civ. Proc. § 2031.310(c)*].

The 45-day limitation period is mandatory and jurisdictional in that it renders the court without authority to rule on an untimely motion other than to deny it [*Sexton v. Superior Court (1997) 58 Cal. App. 4th 1403, 1408-1410, 68 Cal. Rptr. 2d 708* (party did not raise untimeliness of motion in opposition papers, but raised it at commencement of hearing on motion)]. This 45-day period commences with the date of response, rather than the date set for actual production or inspection [*Standon Co. v. Superior Court (1990) 225 Cal. App. 3d 898, 902-903, 275 Cal. Rptr. 833* (also stating that, if responding party refuses to comply with promises made in response, demanding party should bring motion to compel compliance under former *Code Civ. Proc. § 2031(n)* (*now see Code Civ. Proc. § 2031.320*); *see § 195.68*].

[5] Identification of Demands

The motion must identify the demands by set and number [*Cal. Rules of Ct., Rule 3.1345(d)*]. For discussion of additional requirements applicable when requesting monetary sanctions, see [6], *below*.

[6] Opposing Production of Electronically Stored Evidence

The party or affected person opposing a motion to compel further response to a demand for inspection, copying, testing, or sampling electronically stored information (ESI) under *Code Civ. Proc. § 2031.310(a)*, on the basis that the information is from a source that is not reasonably accessible because of the undue burden or expense, bears the burden of demonstrating that the information is from a source that is not reasonably accessible [Code Civ. Proc. § 3021.310(d)]. However, even if the party or affected person makes such a showing, the court may still order discovery if the demanding party shows good cause [*Code Civ. Proc. § 2031.310(e)*; *see Code Civ. Proc. § 2031.310(f)* (allocation of discovery expense); *Code Civ. Proc. § 2031.310(g)* (limitations on frequency or extent of discovery of ESI)]. For a detailed discussion of motions for orders compelling further response in the context of e-discovery, see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*, § 195A.17.

[7] Monetary Sanctions

The court must impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel a response to a demand for inspection, copying, testing, or sampling, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2031.310(h)*; *see Standon Co. v. Superior*

Court (1990) 225 Cal. App. 3d 898, 904, 275 Cal. Rptr. 833 (court not required to award sanctions merely because motion was unsuccessful; may exercise its discretion by considering whether exceptions indicate no sanction is appropriate); *see also* discussion of this general provision in Ch. 190, *Discovery: Scope, Regulation, and Timing*, § 190.33[2]].

As discussed in [2], *above*, this motion must be accompanied by a declaration showing of a reasonable and good faith attempt at informal resolution of the issues raised by the motion. Under *Code Civ. Proc. §§ 2023.010(i)* and *2023.020*, the court is also required to impose a monetary sanction against any party or attorney who fails to confer in an attempt to resolve informally any dispute concerning discovery, in favor of anyone who incurs expenses, including attorney's fees, as a result of that conduct, when the section of the Civil Discovery Act governing a particular discovery motion requires a declaration showing that an attempt has been made. This sanction is to be imposed regardless of the outcome of the particular discovery motion [*Code Civ. Proc. § 2023.020*].

The court may award sanctions in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed [*Cal. Rules of Ct., Rule 3.1348(a)*]. The court may not, however, deem the opposing party's failure to file written opposition, failure to appear at a hearing, or voluntary provision discovery to be an admission that the motion was proper or that sanctions should be awarded [*Cal. Rules of Ct., Rule 3.1348(b)*].

A request for a sanction, in the notice of motion, must identify every party, person, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion must be supported by a memorandum, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought [*Code Civ. Proc. § 2023.040*]. The notice of motion and supporting declaration in this form include language designed to satisfy these requirements.

One court of appeal has held that a separate motion for monetary sanctions under *Code Civ. Proc. § 2023.030* may be made after an underlying motion to compel further response to an inspection demand is litigated [*London v. Dri-Honing Corp. (2004) 117 Cal. App. 4th 999, 1001, 12 Cal. Rptr. 3d 240]* . Even though the better practice may be to include the request for monetary sanctions in the motion to compel further response, there is no legal requirement to do so [*London v. Dri-Honing Corp. (2004) 117 Cal. App. 4th 999, 1008, 12 Cal. Rptr. 3d 240]* . The timeliness of a separate motion for sanctions is subject to the trial court's discretion, rather than the 45-day limit from the time of the initial service of the response under *Code Civ. Proc. § 2031.310(c)* [*London v. Dri-Honing Corp. (2004) 117 Cal. App. 4th 999, 1009, 12 Cal. Rptr. 3d 240]* .

For further discussion of monetary sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

[8] Additional Sanctions on Failure to Obey Order Granting Motion

If the court grants this motion, the responding party will be subject to evidence, issue, or terminating sanctions, as well as additional monetary sanctions, if that party thereafter fails to obey the order compelling a response [*Code Civ. Proc. § 2031.310(i)*]. For further discussion, see *§ 195.20[2]*.

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 195 DISCOVERY: INSPECTION OF TANGIBLE EVIDENCE
PART V. FORMS

16-195 California Forms of Pleading and Practice--Annotated § 195.67

§ 195.67 Proceedings for Order to Compel--Compelling Further Response to Demand for Inspection, Copying, Testing, or Sampling [Code Civ. Proc. § 2031.310]--Separate Statement [Cal. Rules of Ct., Rule 3.1345]

[1] FORM Proceedings for Order to Compel--Compelling Further Response to Inspection Demand [Code Civ. Proc. § 2031.310]--Separate Statement [Cal. Rules of Ct., Rule 3.1020]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	SEPARATE STATEMENT IN SUPPORT OF MO-
vs.	)	TION FOR ORDER COMPELLING FURTHER RE-
_____ [*name*],	)	SPONSE TO DEMAND FOR PRODUCTION AND
Defendant.	)	INSPECTION [*and/or* COPYING *and/or* TESTING
	)	*and/or* SAMPLING]
	)	Date: _____
	)	Time: _____
	)	Location:
		_____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

This separate statement is submitted in support of the motion by _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] to compel _____ [*specify party from whom production and/or entry is sought, e.g.,* defendant] _____ [*name*] to serve an adequate response to the [supplemental] demand for _____ [inspection *and/or* copying *and/or* testing *and/or* sampling] by_____ (*specify demanding party, e.g.,* plaintiff)]. As required under *Cal. Rules of Ct., Rule 3.1345,*

this statement provides information relating to the demands and responses at issue in the motion, as follows:

INSPECTION [*and/or* COPYING *and/or* TESTING, *and/or* SAMPLING] DEMAND _____
[*identify specific demand by set number and the number or letter of the individual demand*]

1. Text of Demand: _____ [*specify*].

2. Text of Response(s): _____ [*specify text of response, and any further responses, to the specific demand*].

[3. Related Definitions and Instructions: _____ (*specify, if necessary, the text of all definitions, instructions, and other matters required to understand the specific demand and the responses to it*).]

[4. Related Demands and Responses: _____ (*if the response to the specific demand is dependent on the response given to another discovery request, or if the reasons a further response is deemed necessary are based on the response to some other discovery request, specify the text of the other request and the reponse to it.*)]

[5. Related Pleadings and Other Documents: _____ (*summarize any pleadings or other documents in the file, if any, that are relevant to the motion and are relied on by the moving party.*)]

6. Statement of Reasons for Compelling Further Response(s): _____ [*state factual and legal reasons for compelling further responses to the specific demand*]. [*Set out separately, as above, any further specific demands with related information, with respect to which the motion is seeking to compel further response.*].
Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*demanding party's status and name*]

[2] Use of Form

The separate statement set out in [1], *above*, is required to accompany a motion, such as that *set out in § 195.66*, to compel further responses to a demand for inspection of documents or tangible things [*see Cal. Rules of Ct., Rule 3.1345(a)(3)*].

For detailed discussion and forms relating to a response to a demand for inspection, copying, testing, or sampling electronically stored evidence, see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*.

[3] Contents of Separate Statement

Any motion involving the content of a discovery request or the responses to such a request must be accompanied by a separate statement [*Cal. Rules of Ct., Rule 3.1345(a)*]. The motions that require a separate statement include a motion to compel further responses to a demand for inspection, copying, testing, or sampling of documents, tangible things, or

electronically stored information [*see Cal. Rules of Ct., Rule 3.1345(a)(3)*]. A separate statement is not required when no response has been provided to the request for discovery [*Cal. Rules of Ct., Rule 3.1345(b)*].

This separate statement is a separate document filed and served with the motion. It must set forth all the information necessary to understand each discovery request (in this instance each inspection demand) and all the responses to it that are at issue [*Cal. Rules of Ct., Rule 3.1345(c)*]. It must be full and complete, so that no person is required to review any other document in order to determine the full request and the full response. Material may not be incorporated into the separate statement by reference [*Cal. Rules of Ct., Rule 3.1345(c)*].

The separate statement must include, for each discovery request (in this instance each inspection demand) to which a further response is requested, the following [*Cal. Rules of Ct., Rule 3.1345(c)*]:

- The text of the request, and the text of each response, answer, or objection, and any further responses or answers [*Cal. Rules of Ct., Rule 3.1345(c)(1), (2)*].

- A statement of the factual and legal reasons for compelling further responses, answers, or production as to each matter in dispute [*Cal. Rules of Ct., Rule 3.1345(c)(3)*].

- If necessary, the text of all definitions, instructions, and other matters required to understand each discovery request and the responses to it [*Cal. Rules of Ct., Rule 3.1345(c)(4)*].

- If the response to a particular discovery request is dependent on the response given to another discovery request, or if the reasons a further response to a particular discovery request is deemed necessary are based on the response to some other discovery request, the other request and the response to it must be set forth [*Cal. Rules of Ct., Rule 3.1345(c)(5)*].

- If the pleadings, other documents in the file, or other items of discovery are relevant to the motion, a summary of each relevant document by the party relying on the document [*Cal. Rules of Ct., Rule 3.1345(c)(6)*].

The primary function of the separate statement appears to be that of providing a summary, in a single document, of all matters, taken from all pleadings and all other papers, that may be necessary to determine the motion. By including a statement of the factual and legal reasons for compelling further responses to each matter in dispute [*Cal. Rules of Ct., Rule 3.1345(c)(3)*], it appears that a separate statement, when required under *Cal. Rules of Ct., Rule 3.1345(c)*, also serves the same function as the supporting memorandum [*see Cal. Rules of Ct., Rule 3.1113(b)* (memorandum consists of statement of facts and statement of law, evidence and argument, discussing the statutes, cases, and textbooks cited as support)].

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16-195 California Forms of Pleading and Practice--Annotated § 195.68

§ 195.68 Proceedings for Order to Compel--Compelling Compliance With Response to Demand for Inspection, Copying, Testing, or Sampling [Code Civ. Proc. § 2031.320]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Order to Compel--Compelling Compliance With Response to Inspection Demand [Code Civ. Proc. § 2031.320]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER COMPELLING COMPLIANCE WITH RESPONSE AND IMPOSING MONETARY SANCTION, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*specify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [*name of party, e.g.,* plaintiff] will, and hereby does, move the court for an order compelling _____ [*specify party from whom production and/or entry sought, e.g.,* defendant] _____ [*name*] to _____ [produce and permit inspection (and _____ *specify any related activities, e.g.,* copying *or* photographing *or* testing *or* sampling) of certain _____ (*specify generally, e.g.,* writings, charts, and photographs) *or* permit entry on certain property for _____ (*specify, e.g.,* inspection)]. _____ [*Specify moving party, e.g.,* Plaintiff] will also move this court for an order requiring _____ [*specify party or attorney or both, e.g.,* defendant and/or his/her attorney _____ (*name*)] to pay a monetary sanction in the amount of $_____ to _____ [*specify moving party, e.g.,* plaintiff]. The motion will be made on the ground that _____ [*specify party from whom identification, production, and/or entry sought, e.g.,* defendant] _____ [*name*] has failed to permit inspection in accordance with the statement of compliance filed by him/her/it on _____ [*date*].

The motion will be based on this notice of motion, on the demand for _____ [production, inspection, and copying or photographing *or* entry and _____ (*specify, e.g.,* testing) *or both*] served on _____ [*date*], on the declaration(s) of _____ [*name(s)*] and the memorandum set forth below, on the papers and records on file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. [*Identity of declarant. See § 195.63[1]*, Declaration Paragraph 1.]

2. [*Subject matter of action showing relevance of discovery requested. See § 195.65[1]*, Declaration Paragraph 2.]

3. [*Statement that demand was served. See § 195.65[1]*, Declaration Paragraph 3.]

4. [*Statement that sought-after items or property are in opposing party's possession, custody or control. See § 195.65[1]*, Declaration Paragraph 4.]

5. On _____ [*date*], _____ [*specify responding party, e.g.,* defendant] _____ [*name*] served his/her response on _____ [*specify demanding party, e.g.,* plaintiff] stating that _____ [*specify responding party, e.g.,* defendant] _____ [*name*] would comply with the inspection demand.

6. To date, _____ [*specify responding party, e.g.,* defendant] _____ [*name*] has not produced the _____ [*specify, e.g.,* writings, charts, and photographs] designated in the demand.

7. [*Itemization of expenses. See § 195.63[1]*, Declaration Paragraph 6.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

The notice of motion and motion, with supporting declaration, set out in [1], *above*, is for use to obtain an order compelling a party to permit inspection, copying, testing, or sampling in accordance with that party's statement of compliance in his or her response to an inspection demand, when that party has refused to do so [*Code Civ. Proc. § 2031.320(a)*; *see* discussion in *§ 195.19[3]*].

A supporting memorandum is required to be served and filed with this form [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; for further discussion of memorandum requirements and a skeletal form of memorandum, *see* Ch. 417, *Points and Authorities* ; for forms for memoranda supporting a motion to compel under *Code Civ. Proc. § 2031.320*, *see* California Points and Authorities, Ch. 85, *Discovery: Inspection of Tangible Evidence* (Matthew Bender)].

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 195.63[5]*.

For detailed discussion and forms relating to a response to a demand for inspection, copying, testing, or sampling electronically stored evidence, see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*.

[3] Time for Motion

No time is fixed for giving notice of a motion to compel compliance with a statement in the response under *Code Civ. Proc. § 2031.320*. Unless otherwise ordered or specifically provided by law, all moving and supporting papers must be served and filed at least 16 court days before the time appointed for the hearing [*Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(a)*]. The 16-day period may be extended depending on the method of service used [*see Code Civ. Proc. § 1005(b)*]. For further discussion regarding the service and filing of motions and other papers, *see* Ch. 372, *Motions and Orders* , and Ch. 518, *Service of Summons and Papers* .

[4] Identification of Demands

A motion concerning demands for inspection, copying, testing, or sampling must identify the demands by set and

number [*Cal. Rules of Ct., Rule 3.1345(d)*].

[5] Monetary Sanctions

The court must impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel compliance with a response to a demand for inspection, copying, testing, or sampling, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2031.320(b)*; *see also* discussion of this general provision in Ch. 190, *Discovery: Scope, Regulation, and Timing*, § 190.33[2]].

The court may award sanctions in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed [*Cal. Rules of Ct., Rule 3.1348(a)*]. The court may not, however, deem the opposing party's failure to file written opposition, failure to appear at a hearing, or voluntary provision discovery to be an admission that the motion was proper or that sanctions should be awarded [*Cal. Rules of Ct., Rule 3.1348(b)*].

A request for a sanction must, in the notice of motion, identify every party, person, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion must be supported by a memorandum, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought [*Code Civ. Proc. § 2023.040*]. The notice of motion and supporting declaration in this form include language designed to satisfy these requirements.

For further discussion of monetary sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

[6] Additional Sanctions on Failure to Obey Order Granting Motion

If the court grants this motion, the responding party will be subject to evidence, issue, or terminating sanctions, as well as additional monetary sanctions, if that party thereafter fails to obey the order compelling compliance with a response [*Code Civ. Proc. § 2031.320(c)*]. For further discussion, see *§ 195.20[2]*.

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Chapter 195 DISCOVERY: INSPECTION OF TANGIBLE EVIDENCE
PART V. FORMS

16-195 California Forms of Pleading and Practice--Annotated § 195.69

§ 195.69 Proceedings for Order to Compel--Compelling Response, Further Response, or Compliance With Response to Demand for Inspection, Copying, Testing, or Sampling [Code Civ. Proc. §§ 2031.300, 2031.310, 2031.320]--Order

[1] FORM Proceedings for Order to Compel--Compelling Response, Further Response, or Compliance With Response to Inspection Demand [Code Civ. Proc. §§ 2031.300, 2031.310, 2031.320]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant(s).	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] to compel _____ [*identify party from whom production sought, e.g.,* defendant] _____ [*name*] to _____ [respond to the (supplemental) inspection demand of _____ (*identify demanding party, e.g.,* plaintiff) *or* serve an adequate response to the demand of _____ (*identify demanding party, e.g.,* plaintiff) *or* produce and permit inspection (and _____ *specify any related activities, e.g.,* copying *or* photographing *or* testing *or* sampling) of certain _____ (*specify generally, e.g.,* writings, charts, and photographs) *or* permit entry on certain property for _____ (*specify, e.g.,* inspection) *or both produce items and permit entry on property*] came on regularly for hearing on

_____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted and that _____ [*identify party from whom production or entry is sought, e.g.,* defendant] _____ [*name*] _____ shall [produce at _____ (*time*), on _____ (*date*), at _____ (*specify place, e.g.,* the law offices of _____ [*name*] located at _____ [*street address*], _____ [*city*], California) *or* permit _____ (*identify moving party, e.g.,* plaintiff) _____ (*name*) (and such _____ [*identify, e.g.,* surveyors and engineers as plaintiff chooses]) to enter on the _____ (*specify type of property, e.g.,* land) described as _____ (*give description of property, e.g.,* street address) for the purpose of _____ (*specify, e.g.,* inspecting and surveying) the _____ (property *or* designate object or operation on property) on _____ (*date*) *or both*], [or at such other time and place as may be agreed by the parties] the following:

1. _____ [*Designate each category for which production or entry is ordered, and set forth terms and conditions relating to the manner in which inspection or related activities, and copies, photographs, tests, or samples to be made, as well as any other terms and conditions prescribed by court*].

2. _____ [*Continue for each category as in 1., above*].

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*specify unsuccessful party, person, or attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] pay forthwith to _____ [*specify successful party, e.g.,* plaintiff] _____ [*name*] the sum of $_____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____ [*specify unsuccessful party, person, or attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*specify unsuccessful party, person, or attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The proposed order in [1], *above*, is for use when the court grants a motion to compel an initial response to a demand for inspection, copying, testing, or sampling, a further response to the demand, or compliance with a response to the demand under *Code Civ. Proc. §§ 2031.300*, *2031.310*, or *2031.320*, respectively. For further discussion of these proceedings, see *respectively §§ 195.65*, *195.66*, and *195.68*.

For detailed discussion and forms relating to a response to a demand for inspection, copying, testing, or sampling electronically stored evidence, see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*.

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16-195 California Forms of Pleading and Practice--Annotated § 195.70

§ 195.70 Subpoena for Inspection of Premises in Action Pending Outside California [Code Civ. Proc. § 2029.100 et seq.; Cal. Judicial Council Form SUBP-050]

[1] FORM

Click here to view image.

[2] Use of Form

This form is a subpoena for inspection of premises in an action pending outside California. It is a reproduction of Cal. Judicial Council Form SUBP-050, adopted by the Judicial Council for mandatory use [*see* Cal. Rules of Ct., Appendix, Div. A]. This form is available in an interactive, electronic format in *LexisNexis*(R) *Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format is available at www.lexisone.com at no charge.

The form is used to require a nonparty witness to permit an inspection of the premises specified in the subpoena, and to allow testing, sampling, or other activity as described in the subpoena, in an action pending outside California.

For detailed discussion of the Interstate and International Depositions and Discovery Act [*Code Civ. Proc. § 2029.100 et seq.*], governing discovery in actions outside California, see *Ch. 193, Discovery: Depositions, § 193.30* et seq.

For a form for an application for a discovery subpoena in an action pending outside California, see *Ch. 193, Discovery: Depositions, § 193.280*. For a form for a deposition subpoena for personal appearance only in an action pending outside California, see *Ch. 193, Discovery: Depositions, § 193.281*. For a form for a deposition subpoena for personal appearance and production of documents and things in an action pending outside California, see *Ch. 193, Discovery: Depositions, § 193.282*. For a form for a subpoena for production of business records in an action pending outside California, see *Ch., 535, Subpoena, § 535.85*.

For discussion and forms for subpoenas generally, see Ch. 535, *Subpoena* .

[3] Procedure for Obtaining Subpoena

To request issuance of a subpoena under the Interstate and International Depositions and Discovery Act [*Code Civ. Proc. § 2029.100 et seq.*], a party must submit the original, or a true and correct copy, of a foreign subpoena to the clerk of the superior court in the California county in which discovery is sought to be conducted [*Code Civ. Proc. § 2029.300(a)*]. A request for the issuance of a subpoena in these circumstances does not constitute making an appearance in the California courts [*Code Civ. Proc. § 2029.300(a)*].

In addition to submitting a subpoena, as described above, a party seeking discovery must do both of the following [*Code Civ. Proc. § 2029.300(b)*]:

- Submit an application requesting that the superior court issue a subpoena with the same terms as the foreign subpoena. The application must be on a form prescribed by the Judicial Council [*see Ch. 193, Discovery: Depositions, § 193.180[1]* (Judicial Council Form SUBP-030)]. No civil coversheet is required.

- Pay the specified fee [*see Gov. Code § 70626*].

When these requirements are satisfied, the court clerk must promptly issue a subpoena for service on the person to which the foreign subpoena is directed [*Code Civ. Proc. § 2029.300(c)*].

[4] Subpoena Form and Contents

A subpoena issued under *Code Civ. Proc. § 2029.300* must [*Code Civ. Proc. § 2029.300(d)*]:

- Incorporate the terms used in the foreign subpoena.

- Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

- Bear the caption and case number of the out-of-state case to which it relates.

- State the name of the court that issues it.

- Be on the prescribed Judicial Council form [*see Code Civ. Proc. § 2029.390*; *see* [1], *above*].

[5] Party Not Required to Retain Local Attorney

A party is not required to retain a local attorney to depose a witness in these circumstances. An active member of the California State Bar who is retained by a party to an out-of-state court proceeding may issue a subpoena under the Interstate and International Depositions and Discovery Act (*Code Civ. Proc. § 2029.100 et seq.*) [*Code Civ. Proc. § 2029.350(a)*].

A subpoena issued under *Code Civ. Proc. § 2029.350(a)* must [*Code Civ. Proc. § 2029.350(b)*]:

- Incorporate the terms used in the foreign subpoena.

- Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

- Bear the caption and case number of the out-of-state case to which it relates.

- State the name of the superior court of the county in which the discovery is to be conducted.
- Be on the prescribed Judicial Council form [*see Code Civ. Proc. § 2029.390*; *see* [1], *above*].

[6] Service of Subpoena

A discovery subpoena issued under the Interstate and International Depositions and Discovery Act must be personally served in compliance with California law, including, without limitation, *Code Civ. Proc. § 1985* [*Code Civ. Proc. § 2029.400*].

Any person may serve the subpoena by personal delivery of a copy of it to the deponent if the deponent is a natural person. If the deponent is an organization, service may be by personal delivery of a copy of the subpoena to any officer, director, or custodian of records or to any agent or employee authorized by the organization to accept service of a subpoena [*Code Civ. Proc. § 2020.220(b)*]. Service may be accompanied by payment of witness fees [*see Code Civ. Proc. § 2020.230*].

Personal service of any deposition subpoena is effective to require the personal attendance and testimony of any deponent who is a resident of California at the time of service, if the subpoena so specifies, and any production, inspection, testing, and sampling. Personal service is also effective to require that deponent's attendance at a court session to consider any issue arising out of the deponent's refusal to be sworn, to answer any questions, to produce specified items, or to permit inspection or specified testing and sampling of the items produced [*Code Civ. Proc. § 2020.220(c)*].

A copy of an affidavit must be served with a subpoena duces tecum issued before trial, showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality of those matters to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control [*Code Civ. Proc. § 1985(b)*; *see Code Civ. Proc. § 2029.500* (making *Code Civ. Proc. § 1985 et seq.* applicable to discovery in actions pending outside California)]. For further discussion of the affidavit supporting the subpoena, see *Ch. 535, Subpoena, § 535.16*.

For discussion of service of subpoenas generally, see *Ch. 535, Subpoena, § 535.17*.

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16-195A California Forms of Pleading and Practice--Annotated 195A.syn

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.syn Synopsis to Chapter 195A: DISCOVERY: DISCOVERY OF ELECTRONICALLY STORED EVIDENCE (E-DISCOVERY)

§ 195A.01 Scope of Chapter

§ 195A.02 Cross References

[1] Related Discovery Chapters

[2] Other Related Chapters

[3] Other Discovery Publications

§§ 195A.03-195A.09 [Reserved]

§ 195A.10 Governing Law

§ 195A.11 Overview of Electronic Discovery

§ 195A.12 Definition of "Electronically Stored Information" (ESI)

§ 195A.13 Document Preservation

§ 195A.14 Requirement to Meet and Confer

§ 195A.15 Demanding Electronically Stored Information

[1] Right to Demand Discovery of Electronically Stored Information

[2] Testing and Sampling

§ 195A.16 Responding to Demand for Electronically Stored Information

[1] Objection That Source Is Not Reasonably Accessible

[2] Objection to Specified Form for Production

[3] Translation of Data Compilations

§ 195A.17 Production of Electronically Stored Information That Is Not Reasonably Accessible

[1] Responding Party's Options

[2] Objection

[3] Protective Orders

[4] Motion to Compel

[5] Burden of Proof

[6] Discovery Allowed on Showing of Good Cause

[7] Allocation of Expense

§ 195A.18 Limits on Frequency and Extent of Discovery

§ 195A.19 Form of Production

[1] Specification of Form of Production

[2] Ordinarily Maintained or Reasonably Usable

§ 195A.20 Electronically Stored Information In Possession of Nonparties

[1] Subpoena for Electronically Stored Information

[2] Form of Production

[3] Opposing Production

[4] Good Cause for Production

[5] Limitations on Frequency and Extent of Discovery

[6] Protections Against Undue Burden and Expense

§ 195A.21 Inadvertent Production of Privileged Electronically Stored Information

[1] Retrieving Privileged Electronically Stored Information

[2] Duties of Counsel Who Receive Inadvertent Productions

§ 195A.22 Sanctions

[1] Sanctions for Losing on Motion to Compel or Protective Order

[2] Refusal to Comply With Order Compelling Further Response

[3] Sanctions for Spoliation of Evidence

[4] Safe Harbor from Sanctions

§§ 195A.23-195A.29 [Reserved]

§ 195A.30 Related Matthew Bender Publications

§ 195A.31 California Statutes

§ 195A.32 California Rules of Court

§ 195A.33 Decisions

[1] Allocation of Expense of Discovery

[2] Document Preservation

[3] Electronically Stored Information

[4] Form of Production

[5] Inadvertent Production of Privileged Material

[6] Limits on Frequency and Extent of Discovery

[7] Not Reasonably Accessible

[8] Sanctions

§§ 195A.34-195A.39 [Reserved]

Scope

§ 195A.40 Preservation of Electronically Stored Evidence

[1] Preserve Client's Evidence

[2] Seek Preservation of Evidence by Opponent

§ 195A.41 Meet and Confer

§ 195A.42 Demand for Inspection, Copying, Testing, or Sampling of Electronically Stored Information

[1] Prepare Demand

[2] Prepare Proof of Service

[3] Serve Documents

[4] Supplemental Demands

§ 195A.43 Receipt of Inadvertently Produced Privileged Information

[1] Before Notification

[2] After Notification

§§ 195A.44-195A.49 [Reserved]

Scope

§ 195A.50 Preservation of Electronically Stored Evidence

[1] Preserve Client's Evidence

[2] Seek Preservation of Evidence by Opponent

§ 195A.51 Meet and Confer

§ 195A.52 Response to Demand for Inspection, Copying, Testing, or Sampling of Electronically Stored Information

[1] Time for Response

[2] Prepare Response

[3] Proof of Service

[4] Serve Documents

§ 195A.53 Motion for Protective Order

[1] Not Reasonably Accessible

[2] Prepare Documents

[3] Serve Documents

[4] File Documents

[5] Order

§ 195A.54 Limits on Frequency and Extent, and Allocation of Expense

§ 195A.55 Producing Electronically Stored Information

§ 195A.56 Inadvertent Production of Privileged Information

§§ 195A.57-195A.59 [Reserved]

§ 195A.60 Sample Preservation Letter

[1] FORM

[2] Use of Form

§ 195A.61 Sample Electronically Stored Information Protocol

[1] FORM

[2] Use of Form

§ 195A.62 Demand--Production of Electronically Stored Information [Code Civ. Proc. § 2031.010 et seq.]

[1] FORM

[2] Use of Form

[3] Content of Demand

§ 195A.63 Response to Demand for Production of Electronically Stored Information [Code Civ. Proc. § 2031.010 et seq.]

[1] FORM

[2] Use of Form

[3] Content of Response

[a] Types of Responses

[b] Objections

Reviewed by Michael F. Kelleher n*

FOOTNOTES:
(n37)Footnote *. Michael Kelleher practices complex commercial litigation as a partner in the San Francisco office of Folger Levin & Kahn LLP, focusing on electronic discovery and intellectual property issues. Mr. Kelleher received his J.D. degree from the University of California at Berkeley, and a B.A. from the University of Utah with a major in Chemistry. Before law school, Mr. Kelleher served in the United States Navy as a nuclear submarine officer on USS Grayling (SSN 646).

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I. SCOPE

16-195A California Forms of Pleading and Practice--Annotated § 195A.01

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.01 Scope of Chapter

This chapter covers discovery of electronically stored information under the Civil Discovery Act, as amended in 2009 by the California Electronic Discovery Act [Stats. 2009, ch. 5], which provides specific rules and procedures governing electronic discovery ("e-discovery").

Part II [*see § 195A.10* et seq.] discusses the special issues, requirements and procedures relating to discovery of electronically stored information ("ESI").

Part IV provides procedural checklists:

- Subpart A [§ 195.40 et seq.] provides checklists for use by a party seeking discovery of electronically stored information.

- Subpart B [*see § 195.50* et seq.] provides checklists for use by a responding party.

Part V provides forms relating to discovery of electronically stored information, including the following:

- A form for a sample preservation letter instructing opposing parties to preserve electronic evidence [*see § 195.60*].

- A form for a sample electronically stored information protocol that can be negotiated between parties [*see § 195.61*].

- A form for a demand for production of electronically stored information [*see § 195.62*].

- A form for a response to a demand for production of electronically stored information [*see § 195.63*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryElectronic DiscoveryDiscoverabilityCivil ProcedureDiscoveryElectronic DiscoveryPreservationCivil ProcedureDiscoveryElectronic DiscoveryPrivileged Information

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I. SCOPE

16-195A California Forms of Pleading and Practice--Annotated § 195A.02

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.02 Cross References

[1] Related Discovery Chapters

For discussion and forms relating to the general purpose, scope, regulation, and timing of civil discovery, see Ch. 190, *Discovery: Scope, Regulation, and Timing* .

For detailed discussion of evidentiary privileges and other statutory or constitutional protections against disclosure, see Ch. 191, *Discovery: Privileges and Other Discovery Limitations* .

For discussion and forms relating to discovery sanctions generally, see Ch. 192, *Discovery: Sanctions for Discovery Misuse* .

For discussion and forms relating to the production of documents and things pursuant to deposition proceedings, see Ch. 193, *Discovery: Depositions* .

For discussion and forms relating to the use of particular discovery methods authorized by the Civil Discovery Act, see the following chapters covering each method:

- Ch. 194, *Discovery: Interrogatories*.
- Ch. 195, *Discovery: Inspection of Tangible Evidence*.
- Ch. 196, *Discovery: Requests for Admissions*.
- Ch. 197, *Discovery: Physical and Mental Examinations*.
- Ch. 198, *Discovery: Exchange of Expert Witness Information*.

For discussion and forms relating to the use of specified discovery methods for the purpose of preserving testimony or other evidence prior to the commencement of an action or pending an appeal, see Ch. 199, *Discovery: Preservation of Evidence* .

For discussion and forms relating to the use of extraordinary writ proceedings to obtain interlocutory review of discovery orders, see Ch. 200, *Discovery: Review of Discovery Orders* .

[2] Other Related Chapters

For discussion and forms relating to law and motion procedures generally, see Ch. 372, *Motions and Orders* .

For discussion and forms relating to use of subpoenas generally, see Ch. 535, *Subpoena* .

[3] Other Discovery Publications

For detailed coverage, forms, and checklists for conducting discovery of electronically stored evidence in California state court litigation, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence.

For detailed discussion of California discovery in general, see DeMeo, California Deposition and Discovery Practice, Ch. 2A, *California E-Discovery*.

For a basic procedural guide to California e-discovery, see Matthew Bender(R) Practice Guide: California Civil Discovery, Ch. 5, *Discovery of Electronic Information* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresCivil ProcedureDiscoveryMethodsCivil ProcedureDiscoveryRelevance

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AUTHOR: Reviewed by Michael F. Kelleher

[Reserved]

§§ 195A.03[Reserved]

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Chapter 195A DISCOVERY: DISCOVERY OF ELECTRONICALLY STORED EVIDENCE (E-DISCOVERY)
II. LEGAL BACKGROUND

16-195A California Forms of Pleading and Practice--Annotated § 195A.10

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.10 Governing Law

Discovery of electronically stored information pursuant to the Civil Discovery Act [*Code Civ. Proc. §§ 2016.010-2036.050*] is governed generally by the Electronic Discovery Act [*Code Civ. Proc. §§ 1985.8, 2031.010-2031.510*], which was enacted in 2009 and became effective as an urgency measure on June 29, 2009 [Stats. 2009 Ch. 5].

Related provisions of the Civil Discovery Act include the provisions governing discovery generally, set out in *Code Civ. Proc. §§ 2016.010-2019.030, 2023.010-2023.040*.

The extent of discovery permitted under the Civil Discovery Act is restricted in limited civil cases by the economic litigation provisions of *Code Civ. Proc. §§ 94* and *95*. The use of demands for the production or inspection of tangible evidence is limited specifically by *Code Civ. Proc. § 94(a)*. For further discussion, see *Ch. 190, Discovery: Scope, Regulation, and Timing, §§ 190.11[2], 190.23[2][a]*].

Case management requirements regarding discovery of electronically stored information are set out in *Cal. Rules of Ct., Rules 3.724, 3.728(13)*. Statewide rule provisions relating to the format, content, and service of discovery papers and motions, and to discovery sanctions, are set out in *Cal. Rules of Ct., Rules 3.1000, 3.1020, 3.1025*, and *3.1030*.

Because of the newness of the California electronic discovery statutes, and the infrequency with which e-discovery issues were considered in published California court opinions under the prior law, federal and out-of-state authority is more important in e-discovery cases than in other California cases dealing with general discovery issues. In particular, federal court decisions under the Federal Rules of Civil Procedure are important sources for guidance on the treatment of e-discovery issues. The Federal Rules of Civil Procedure were revised in 2006 to deal specifically with e-discovery issues [*see Fed. R. Civ. P., Rules 16(b)(3)(B)(iii), (iv), 26(b)(2)(B), (b)(5), (f), 34, 37*]. This was before most states (including California) had established their own rules governing e-discovery in state proceedings. As a result, state courts throughout the United States have often looked to federal judicial decisions--primarily in the federal district courts--for guidance on how to deal with similar e-discovery issues under state law [*see also § 195A.11*].

For further discussion of the governing law in e-discovery, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 2, *Governing Law in Electronic Discovery*.

Legal Topics:

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

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16-195A California Forms of Pleading and Practice--Annotated § 195A.11

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.11 Overview of Electronic Discovery

"[E]lectronic evidence is no less discoverable than paper evidence" [Advante Int'l Corp. v. Mintel Learning Tech. (N.D. Cal. 2006) 2006 U.S. Dist. LEXIS 45859, at *3 , *quoting Zubulake v. UBS Warburg LLC (S.D.N.Y. 2003) 217 F.R.D. 309, 317]* . However, the computer age has generated "new and challenging" issues for attorneys, clients, and courts during the civil discovery process [Advante Int'l Corp. v. Mintel Learning Tech. (N.D. Cal. 2006) 2006 U.S. Dist. LEXIS 45859, at *3] . "As individuals and corporations increasingly do business electronically--using computers to create and store documents, make deals, and exchange e-mails--the universe of discoverable material has expanded exponentially" [*Zubulake v. UBS Warburg LLC (S.D.N.Y. 2003) 217 F.R.D. 309, 311]* . Electronic data in discovery presents particular problems with respect to preservation and production or spoliation of evidence, privacy, and privilege.

For many years before the passage of the Electronic Discovery Act, California courts allowed discovery and often admission of electronically stored information into evidence under the prior discovery statutes [*see, e.g., People v. Lugashi (1988) 205 Cal. App. 3d 632, 640, 252 Cal. Rptr. 434* (allowing admission of bank computer records); *R.S. Creative v. Creative Cotton (1999) 75 Cal. App. 4th 486, 89 Cal. Rptr. 2d 353* (terminating sanctions for actions including spoliation of evidence on computers)].

In 2009, the California legislature passed the Electronic Discovery Act [Stats. 2009, ch. 5] to address the problems created by application of the general Discovery Act rules to the specific issues that typically arise in e-discovery. The Electronic Discovery Act took effect immediately on June 29, 2009, as an urgency measure.

The Electronic Discovery Act is modeled on federal rules governing e-discovery that took effect December 1, 2006 [*see Fed. R. Civ. P., Rules 16(b)(3)(B)(iii), (iv), 26(b)(2)(B), (b)(5), (f)(3)(c), 34(b)(1)(C), (b)(2)(D), (b)(2)(E), 37(e)*]. The federal rules were one of the first attempts nationally to address e-discovery in a comprehensive manner, and as a result state courts have often looked to these rules in attempting to resolve e-discovery issues in the absence of state law. As a result, California courts may be expected to look to federal decisions construing the federal rules for guidance at least until California courts have had a chance to interpret its Electronic Discovery Act.

The Judicial Council proposal that ultimately became the Electronic Discovery Act also contained conforming amendments to the California Rules of Court. These rules ultimately were adopted as a revision of *Cal. Rules of Ct., Rule 3.724*, and became effective August 14, 2009.

For a master checklist for an attorney conducting e-discovery in California, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, *Master Checklist for California E-Discovery*.

Legal Topics:

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

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AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.12 Definition of "Electronically Stored Information" (ESI)

The Electronic Discovery Act defines "electronically stored information" (commonly referred to as "ESI") as "information that is stored in an electronic medium" [*see Code Civ. Proc. § 2016.020(e)*]. "Electronic" is defined as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities" [*see Code Civ. Proc. § 2016.020(d)*]. Some common types of electronically stored information are e-mail, word processing documents or spreadsheets, instant messages, text messages, database information, digital photographs, digital video, electronic voice mail, temporary files, metadata, and even fragments of deleted files. ESI can be found in many locations, including computer hard drives, network servers, cell phones, personal digital assistants (PDAs), back-up tapes, CD-ROMs, DVD ROMs, and internet storage sites, among other areas.

Some discoverable ESI may not be apparent to the reader. For example, computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as "embedded data" or "embedded edits") in an electronic file but not make them apparent to the reader. The same is true of information describing the history, tracking, or management of an electronic file (sometimes called "metadata") [*see Fed. R. Civ. P. 26(f)*, advisory committee's note]. Federal courts generally have ordered the production of metadata when it is sought in an initial document request and the producing party has not yet produced the documents in any form [*see Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep't of Homeland Sec. (S.D.N.Y. 2008) 255 F.R.D. 350, 354, 357* (detailed discussion of production of metadata)]. Metadata was also used in California state courts before the Electronic Discovery Act [*People v. Hawkins (2002) 98 Cal. App. 4th 1428, 1450, 121 Cal. Rptr. 2d 627* (allowing use of computer clock access times)]. However, the production of metadata increases the scope and cost of review before production, and this increased burden may allow a producing party to object to a metadata request as unreasonable [*see, e.g.*, comments to Fed. R. *Civ. Proc. 26*, noting that metadata requires additional privilege review, and that the topics at the initial case management conference can include whether metadata should be produced].

For further assistance in understanding the technical aspects of electronic evidence, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 1, *Understanding Electronic Evidence*.

Legal Topics:

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

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AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.13 Document Preservation

A party's duty to preserve electronic evidence is triggered when the party has notice that the evidence is relevant to litigation or when the party should have known that the evidence might be relevant to litigation [*Zubulake v. UBS Warburg LLC (S.D.N.Y. 2003) 220 F.R.D. 212, 216* ; *see UMG Recordings, Inc. v. Hummer Winblad Venture Partners (In re Napster Copyright Litig.) (N.D. Cal. 2006) 462 F. Supp. 2d 1060, 1069* (defendant's duty to preserve evidence attached when defendant "should reasonably have believed that litigation against it was probable")]. This duty ensures that potentially relevant evidence is not lost or destroyed [*Cedars-Sinai Med. Ctr. v. Superior Court (1998) 18 Cal. 4th 1, 12, 74 Cal. Rptr. 2d 248, 954 P.2d 511]* .

Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put a "litigation hold" in place to ensure the preservation of relevant documents [*Cedars-Sinai Medical Center v. Superior Court (1998) 18 Cal. 4th 1, 74 Cal. Rptr. 2d 248, 954 P.2d 511* (court discusses litigation hold procedures in dicta in holding that a spoliation tort was unnecessary); *Zubulake v. UBS Warburg LLC (SDNY 2003) 220 FRD 212, 218* ; *see UMG Recordings, Inc. v. Hummer Winblad Venture Partners (In re Napster, Inc. Copyright Litig.) (N.D. Cal. 2006) 462 F. Supp. 2d 1060, 1070* (imposing sanctions against defendant for failing to stop its policy of deleting e-mails once the duty to preserve attached)]. The duty to preserve extends to those employees likely to have relevant information--the "key players" in the case [*Zubulake v. UBS Warburg LLC (S.D.N.Y. 2003) 220 F.R.D. 212, 218]* .

Destroying evidence in anticipation of a discovery request or in response to a discovery request constitutes a misuse of discovery in violation of *CCP §§ 2023.010* and *2023.030* [*Cedars-Sinai Med. Ctr. v. Superior Court (1998) 18 Cal. 4th 1, 12, 74 Cal. Rptr. 2d 248, 954 P.2d 511* ; *R.S. Creative, Inc. v. Creative Cotton, Ltd. (1999) 75 Cal. App. 4th 486, 495, 89 Cal. Rptr. 2d 353* (affirming order resulting in terminating sanctions for forging contract and destroying evidence by use of computers in violation of stipulation not to use the computers pending examination by expert)].

Under extraordinary circumstances such as evidence spoliation, the court may enter a preservation order and/or allow mirror imaging of computer disks by a forensics expert [*Dodge, Warren & Peters Ins. Services, Inc. v. Riley, 105 Cal. App. 4th 1414, 1417-1418, 130 Cal. Rptr. 2d 385]* .

For a procedural checklist for preserving ESI, see *§ 195A.40*. For a sample ESI protocol addressing issues related to the preservation of discoverable electronically stored information, see *§ 195A.61*.

For a sample preservation letter that may be sent to other parties instructing them to preserve evidence, see *§ 195A.60*. For assistance planning e-discovery, and further discussion of the initial procedures in e-discovery, including document preservation, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 4, *Planning E-Discovery*, and Ch. 5, *Initial Procedures in E-Discovery--Notice, Document Preservation, Meeting and Conferring, and Case Management*. For a step-by-step guide for obtaining an injunction to protect against the destruction of electronically stored information pending discovery, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 7, *Obtaining Injunction to Protect Against Destruction of Electronically Stored Evidence Pending Discovery*.

For memoranda in support of an application for a temporary restraining order and preliminary injunction to preserve evidence, see *California Points and Authorities, Ch. 116, Injunctions, § 116.31* (Matthew Bender). For further discussion of preservation of evidence generally, see Ch. 199, *Discovery: Preservation of Evidence* .

Legal Topics:

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

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§ 195A.14 Requirement to Meet and Confer

Under the Rules of Court implementing the Electronic Discovery Act, the parties must meet and confer, in person or by telephone, no later than 30 calendar days before the date set for the initial case management conference (unless the court orders another time period) to consider e-discovery issues, in addition to other general pre-trial civil procedure issues [*Cal Rules of Ct, Rule 3.724*]. The parties must consider the following specific issues related to e-discovery [*Cal Rules of Ct, Rule 3.724(8)*]:

- Any issues relating to the preservation of discoverable ESI.
- The form or forms in which information will be produced.
- The time within which the information will be produced.
- The scope of discovery of the information.
- The method for asserting or preserving claims of privilege or attorney work product, including whether such claims may be asserted after production.
- The method for asserting or preserving the confidentiality, privacy, trade secrets, or proprietary status of information relating to a party or person not a party to the civil proceedings.
- How the cost of production of ESI is to be allocated among the parties.
- Any other issues relating to the discovery of ESI, including developing a proposed plan relating to the discovery of the information.

The court's case management order may include appropriate orders relating to the discovery of ESI [*Cal. Rules of Ct.,*

Rule 3.728(13)].

PRACTICE TIP:

Counsel should consider whether ESI is likely to be relevant and used in the litigation as soon as possible. Cases without any use of ESI are already rare, and are likely to become more infrequent as the importance of ESI and the familiarity of courts and practitioners with ESI grows. If ESI will likely be sought by either side, the attorneys should attempt to agree upon reasonable limits on ESI that will provide the necessary information but limit the costs of the litigation. Such agreements may be easier to reach if the burdens of e-discovery will be approximately equally shared by the parties--e.g., in a dispute between two companies of equal size. If limits cannot be agreed upon, the attorney advocating these limits should document the efforts to seek agreement, and then seek to persuade the court to set the limits in a case management order or in rulings on discovery motions. *By Michael F. Kelleher.*

For a sample ESI protocol addressing issues related to the preservation of discoverable electronically stored information, see *§ 195A.61*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryCivil ProcedurePretrial MattersConferencesCase Management

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AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.15 Demanding Electronically Stored Information

[1] Right to Demand Discovery of Electronically Stored Information

Any party may demand that any other party produce ESI for inspecting, copying, testing, or sampling [*Code Civ. Proc. § 2031.010(a), (e)*]. A party demanding the production of ESI may specify the form or forms in which each type of ESI is to be produced [*Code Civ. Proc. § 2031.030(a)(2)*].

For a form for a demand for production of ESI, see *§ 195A.62*. For the procedure to be used in making a demand, see *§ 195A.42*.

For further guidance on preparing a demand for electronically stored evidence, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 6, *Demanding Production of Electronically Stored Evidence in California Court*.

[2] Testing and Sampling

The traditional means of obtaining information from documents under the Civil Discovery Act was through inspection and copying. The Electronic Discovery Act also allows a party to *test* and *sample* electronically stored information in addition to inspecting and copying it [*see Code Civ. Proc. § 2031.010(a), (e)*]. Under this provision, a party may review a small sample of electronically stored information for relevant information and based on the results, request broader access [*see, e.g., AAB Joint Venture v. United States (Fed. Cl. 2007) 75 Fed. Cl. 432, 444* (court ordered defendant to restore a portion of backup tapes from time periods specified by plaintiff, after which the parties would have an opportunity to argue whether or not additional restoration of back-up tapes was likely to lead to production of relevant evidence); *Toshiba America Electronics Components v. Superior Court (2004) 124 Cal. App. 4th 762, 21 Cal. Rptr. 3d 532* (court suggested sampling to determine if backup tapes contained relevant data)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.16 Responding to Demand for Electronically Stored Information

[1] Objection That Source Is Not Reasonably Accessible

In its response to a demand for discovery of electronically stored information, a party may object on the grounds that the ESI is from a source that is not reasonably accessible because of undue burden or expense. The responding party must identify in its response the types or categories of sources of ESI that it asserts are not reasonably accessible. By objecting and identifying the type or category of sources that are not reasonably accessible, the responding party preserves its objections relating to that ESI [*Code Civ. Proc. § 2031.210(d)*].

Whether a source is "reasonably accessible" is a factual question for the court that depends upon many factors, including the media on which the ESI is stored, the volume of the ESI, the time and cost required to restore, search and review the ESI, the amount at issue in the case, whether the ESI is cumulative and/or available from other sources, and the relevance of the ESI to key issues in the case [*Best Buy Stores, L.P. v. Developers Diversified Realty Corp. (D. Minn. 2007) 247 F.R.D. 567, 570* (database was not reasonably accessible because it would have to be restored from original sources at a cost of at least $124,000 plus a monthly storage cost of over $27,000); *see Parkdale Am., LLC v. Travelers Cas. & Sur. Co. of Am. (W.D.N.C. Nov. 2007) 2007 U.S. Dist. LEXIS 88820* (e-mails in LotusNotes format were reasonably accessible when cost of producing them was no more than $20,000)].

[2] Objection to Specified Form for Production

If the responding party objects to the specified form for producing ESI, it may state in its response the form in which it intends to produce each type of information [*Code Civ. Proc. § 2031.280(c)*]. ESI should be produced in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable. "Reasonably usable" likely requires that the ability to search and sort the ESI is maintained in the form in which it is produced [*see, e.g.,* L.H. v. Schwarznegger (C.D. Cal. 2008) 2008 U.S. Dist. LEXIS 86829 (sanctions for producing non-searchable PDF versions of electronic documents)].

[3] Translation of Data Compilations

If necessary, the responding party, at the reasonable expense of the demanding party, must use detection devices to translate any data compilations included in the demand into reasonably usable form [*Code Civ. Proc. § 2031.280(e)*; *Toshiba America Electronics Components v. Superior Court (2004) 124 Cal. App. 4th 762, 21 Cal. Rptr. 3d 532* (cost shifting for translation of backup tapes)].

For a form for a response to a demand for production of ESI, see *§ 195A.63*. For a procedural checklist, see *§ 195A.52*. For more detailed discussion of responding to demands for inspection of tangible evidence, see *Ch. 195, Discovery: Inspection of Tangible Evidence, § 195.16*.

For discussion of strategic considerations and a step-by-step guide to responding to electronic discovery demands, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 8, *Responding to Electronic Discovery Demands in California Court*. For guidance on gathering and producing ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 9, *Gathering and Producing Electronically Stored Information*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryElectronic DiscoveryDiscoverability

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§ 195A.17 Production of Electronically Stored Information That Is Not Reasonably Accessible

[1] Responding Party's Options

If electronically stored information is not reasonably accessible because of undue burden or expense, the respondent may either object [*see* [2], *below*] and force the requesting party to file a motion to compel [*see Code Civ. Proc. § 2031.210(a)(3)*; *see* [4], *below*], or, alternatively, seek a protective order on the basis that the information is from a source that is not reasonably accessible because of undue burden or expense [Code Civ. Proc. § 2031.60(a); *see* [3], *below*].

The provisions governing protective orders [*Code Civ. Proc. § 2031.060*; *see* [3], *below*] and motions to compel [*Code Civ. Proc. § 2031.310*; *see* [4], *below*] contain parallel provisions with respect to the court's powers to grant or limit discovery, as discussed in the remainder of this section and § 195A.18.

[2] Objection

A party to whom a demand for inspection, copying, testing, or sampling has been directed may respond by objecting to the particular demand for inspection, copying, testing, or sampling [*Code Civ. Proc. § 2031.210(a)*]. If a party objects to the discovery of electronically stored information on the grounds that it is from a source that is not reasonably accessible because of undue burden or expense and that the responding party will not search the source in the absence of an agreement with the demanding party or court order, the responding party must identify in its response the types or categories of sources of electronically stored information that it asserts are not reasonably accessible [*Code Civ. Proc. § 2031.210(d)*]. By objecting and identifying information of a type or category of source or sources that are not reasonably accessible, the responding party preserves any objections it may have relating to that electronically stored information [*Code Civ. Proc. § 2031.210(d)*]. As an alternative to objecting and waiting for a motion to compel, as discussed in [3], *below*, a party may seek a protective order.

For a discussion of strategy and a step-by-step guide to opposing demand for production of ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 10, *Opposing Demands for Electronic Evidence*

in California Court.

[3] Protective Orders

Instead of objecting and waiting for the requesting party to file a motion to compel discovery [*see* [2], *above*], a party from whom electronically stored information is sought may seek a protective order on the basis that the information is from a source that is not reasonably accessible because of undue burden or expense. The party seeking the protective order bears the burden of demonstrating that the information is from a source that is not reasonably accessible [*Code Civ. Proc. § 2031.060(c)*; *see also Fed. R. Civ. P. 26(b)(2)* (similar provision under federal rules regarding ESI that is not reasonably accessible)].

A responding party claiming that ESI is inaccessible must present the court with detailed information demonstrating undue burden or cost; a mere cost estimate and conclusory characterizations of their ESI as inaccessible will not suffice [*see Mikron Indus. v. Hurd Windows & Doors, Inc. (W.D. Wash. 2008) 2008 U.S. Dist. LEXIS 35166, *6]* ; *OpenTV v. Liberate Techs. (N.D. Cal. 2003) 219 F.R.D. 474* (in cost shifting analysis, criticizing conclusory statements without supporting evidence on cost of production)].

For a procedural checklist for seeking a protective order, see *§ 195A.53*. For more detailed discussion of protective orders, see *Ch. 195, Discovery: Inspection of Tangible Evidence, § 195.17*. For a step-by-step guide to seeking (or opposing) a protective order, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 11, *Seeking or Opposing Protective Order*.

[4] Motion to Compel

On receipt of a response to a demand for inspection, copying, testing, or sampling, the demanding party may move for an order compelling further response to the demand if the demanding party deems that any of the following apply [*Code Civ. Proc § 2031.310(a)*]:

- A statement of compliance with the demand is incomplete.
- A representation of inability to comply is inadequate, incomplete, or evasive.
- An objection in the response is without merit or too general.

A motion to compel must set forth specific facts showing good cause justifying the discovery sought by the demand. The motion must be accompanied by a meet and confer declaration [*Code Civ. Proc § 2031.310(b)*; *see Code Civ. Proc § 2016.040* (meet and confer declaration)]. Notice of this motion must be given within 45 days of the service of the response (or any supplemental response), unless the demanding party and the responding party have agreed in writing to a specific later date. Otherwise, the demanding party waives any right to compel a further response to the demand [*Code Civ. Proc § 2031.310(c)*].

For step-by-step guide to obtaining (or opposing) a motion to compel, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 12, *Obtaining or Opposing Motion to Compel*.

[5] Burden of Proof

The party or affected person objecting to or opposing the production, inspection, copying, testing, or sampling of electronically stored information on the basis that the information is from a source that is not reasonably accessible because of the undue burden or expense has the burden of demonstrating that the information is from a source that is not reasonably accessible because of undue burden or expense [Code Civ. Proc §§ 2031.60(c) (protective order),

2031.310(d) (motion to compel)].

[6] Discovery Allowed on Showing of Good Cause

Even if the responding party establishes that the information is from a source that is not reasonably accessible because of undue burden or expense, the court nevertheless may order discovery if the demanding party shows good cause, subject to limitations on frequency and extent [*Code Civ. Proc. §§ 2031.060(d)* (protective orders), 2031.310(e) (motions to compel)].

The court may set conditions for the discovery of the ESI, including allocation of the expense of discovery. [*Code Civ. Proc. § 2031.060(e)* (protective orders), 2031.310(f) (motions to compel)].

Although *Code Civ. Proc. §§ 2031.060(d)* and *2031.310* contain no definition of good cause, the 2006 advisory committee note to federal counterpart *Fed. R. Civ. P. 26(b)(2)* lists seven factors that may be appropriate in determining whether good cause exists:

- The specificity of the discovery request.
- The quantity of information available from other and more easily accessed sources.
- The failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources.
- The likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources.
- Predictions as to the importance and usefulness of the further information.
- The importance of the issues at stake in the litigation.
- The parties' resources.

In determining whether good cause exists, federal courts have considered these factors, along with the cost of the proposed discovery [*see Peskoff v. Faber (D.D.C. 2008) 251 F.R.D. 59, 60-61* (in $2.5 million case, good cause existed for $33,000 forensic examination because information sought was highly relevant, not duplicative, and could not be obtained from other sources); *Petcou v. C.H. Robinson Worldwide, Inc. (N.D. Ga. 2008) 2008 U.S. Dist. LEXIS 13723, at *2-5* (cost of retrieving e-mails from backup tapes outweighed its likely benefit when requests were overbroad and a response would cost hundreds of thousands of dollars)].

[7] Allocation of Expense

A court that orders discovery of electronically stored information from a source that is not reasonably accessible may allocate the expense of discovery. [*Code Civ. Proc. §§ 2031.060(e)* (protective orders), 2031.310(f) (motions to compel)].

Federal courts also have been unwilling to shift costs to the requesting party when the costs resulted from the responding party's inadequate efforts to search for and preserve ESI [*see, e.g., Peskoff v. Faber (D.D.C. 2008) 251 F.R.D. 59, 62* (refusing to shift cost of forensic examination when it was necessitated by responding party's inadequate search for ESI and failure to deactivate network maintenance tools that automatically delete ESI); *Henry v. Quicken Loans (E.D. Mich. 2008) 2008 U.S. Dist. LEXIS 11417, at *17* (refusing to shift costs to the requesting party when those

costs directly resulted from the responding party's under-inclusive search)].

For a procedural checklist for seeking allocation of the expense of discovery, see *§ 195A.54*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryElectronic DiscoveryDiscoverability

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16-195A California Forms of Pleading and Practice--Annotated § 195A.18

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.18 Limits on Frequency and Extent of Discovery

The court must limit the frequency or extent of discovery of ESI, even from a source that is reasonably accessible, if the court determines that any of the following conditions exists [*Code Civ. Proc. §§ 2031.060(f)* (protective orders), 2031.310(g) (motions to compel)]:

- It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive.
- The discovery sought is unreasonably cumulative or duplicative.
- The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.
- The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2)(C) contains a similar provision [*see Grand River Enters. Six Nations, Ltd. v. King (S.D.N.Y. 2009) 2009 U.S. Dist. LEXIS 12940, 33-34* (citing *Fed. R. Civ. P. 26(b)(2)(C)*, court declined to compel production of econometric data, in part because plaintiffs' expert had already calculated the same information, making it available from another source)].

For a procedural checklist for seeking limits on the frequency and extent of discovery, see *§ 195A.54*.

Legal Topics:

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

Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryElectronic DiscoveryDiscoverability

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16-195A California Forms of Pleading and Practice--Annotated § 195A.19

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.19 Form of Production

[1] Specification of Form of Production

The party demanding the production of ESI may specify the form of production for each type of ESI [*Code Civ. Proc. § 2031.030(a)(2)*]. The responding party may object to the specified form and may state in its response the form in which it intends to produce each type of information [*Code Civ. Proc. § 2031.280(c)*].

[2] Ordinarily Maintained or Reasonably Usable

Unless the parties otherwise agree or the court otherwise orders, if a demand for production does not specify a form or forms for producing a type of ESI, the responding party must produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable. A party need not produce the same ESI in more than one form [*Code Civ. Proc. § 2031.280(d)*].

If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature [*see L.H. v. Schwarzenegger (E.D. Cal. 2008) 2008 U.S. Dist. LEXIS 86829, *10-11* (quoting FRCP 34 Advisory Committee Notes to the 2006 amendment); defendants improperly converted documents from their original format which had been searchable and sortable, into PDF files that did not have these capabilities)].

For a procedural checklist for the form of production, see *§ 195A.55*.

For a sample ESI protocol containing detailed instructions regarding the format in which electronic evidence will be produced, see *§ 195A.61*.

For further discussion of the various forms of electronically stored information, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 1, *Understanding Electronic Evidence*. For discussion of the form in which electronically stored information will be produced, see Matthew Bender(R) Practice Guide: California E-Discovery and

Evidence, Ch. 9, *Gathering and Producing Electronically Stored Information*.

PRACTICE TIP:

Different types of ESI may be most convenient to review in varying formats. For example, e-mail is commonly exchanged and reviewed as images linked to a database containing searchable and/or sortable data from the e-mails such as from/to/cc/subject/date, etc. While such images are easy to use for e-mail, they are often difficult to review for an Excel spreadsheet because the images do not show the underlying calculations of the spreadsheet and often print out over many pages--for such a spreadsheet, production in the native Excel format can be more useful. Counsel should think carefully about what formats to request and what formats to provide. If possible, counsel should agree on formats for production in advance. One useful approach may be to agree to production in image format linked to a database, but with an agreement that the parties may request native file copies when necessary (such as with the spreadsheet example). *By Michael F. Kelleher*.

Legal Topics:

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

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16-195A California Forms of Pleading and Practice--Annotated § 195A.20

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.20 Electronically Stored Information In Possession of Nonparties

[1] Subpoena for Electronically Stored Information

The rules governing subpoenas of electronically stored information from nonparties are similar to those governing discovery of ESI from parties. A party may serve a subpoena on a nonparty allowing the party to inspect, copy, test or sample ESI [*Code Civ. Proc. § 1985.8(a)(1)*].

For more discussion of demanding ESI, see *§ 195A.15*.

For a checklist and further guidance on obtaining ESI from a nonparty, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 6, *Demanding Production of Electronically Stored Evidence in California Court*, § 6.14 et seq.

[2] Form of Production

A party serving a subpoena requiring production of electronically stored information may specify the form or forms in which each type of information is to be produced [*Code Civ. Proc. § 1985.8(b)*]. If a subpoena requiring production of electronically stored information does not specify a form or forms for producing a type of ESI, the person subpoenaed may produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable [*Code Civ. Proc. § 1985.8(c)(1)*]. A subpoenaed person need not produce the same ESI in more than one form [*Code Civ. Proc. § 1985.8(c)(2)*].

If necessary, the subpoenaed person, at the reasonable expense of the subpoenaing party, must use detection devices to translate any data compilations included in the subpoena into reasonably usable form [*Code Civ. Proc. § 1985.8(g)*].

For more discussion of the form of production of ESI, see *§ 195A.19*.

[3] Opposing Production

A subpoenaed person may oppose the production, inspection, copying, testing, or sampling of ESI on the basis that the information is from a source that is not reasonably accessible because of undue burden or expense. The subpoenaed person bears the burden of demonstrating that the information is from a source that is not reasonably accessible [*Code Civ. Proc. § 1985.8(d)*]. Carrying this burden requires an evidentiary showing; the statement of a lawyer in a memorandum that the electronic information is not readily accessible or that it would be unduly burdensome to comply with the request is not sufficient [*see Auto Club Family Ins. Co. v Ahner (E.D. La. 2007) 2007 U.S. Dist. LEXIS 63809, at *8-9* (under *Fed. R. Civ. P. 45(d)(1)(D)*)].

For more discussion of opposing production of ESI that is not reasonably accessible, see *§ 195A.16[1]*.

[4] Good Cause for Production

Even if the responding party establishes that the information is from a source that is not reasonably accessible because of undue burden or expense, the court may nonetheless order discovery if the demanding party shows good cause, subject to limitations on frequency and extent [*Code Civ. Proc. § 1985.8(e)*]. The court may set conditions for the discovery of the ESI, including allocation of the expense of discovery. [*Code Civ. Proc. § 1985.8(f)*].

For more discussion of showing good cause for production of ESI, see *§ 195A.17[2]*.

[5] Limitations on Frequency and Extent of Discovery

The court must limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that any of the following conditions exists [*Code Civ. Proc. § 1985.8(h)*]:

- It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive.

- The discovery sought is unreasonably cumulative or duplicative.

- The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.

- The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.

For more discussion of limiting the frequency or extent of discovery of ESI, see *§ 195A.18*.

[6] Protections Against Undue Burden and Expense

The Civil Discovery Act provides a nonparty served with a subpoena for electronically stored information additional protections against undue burden and expense not extended to parties from whom ESI is sought. First, a party serving a subpoena requiring the production of ESI must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena [*Code Civ. Proc. § 1985.8(j)*]. Second, a court order requiring compliance with a subpoena for ESI must protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance subpoena [*Code Civ. Proc. § 1985.8(k)*].

Legal Topics:

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

Civil ProcedureDiscoveryElectronic DiscoveryDiscoverability

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AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.21 Inadvertent Production of Privileged Electronically Stored Information

[1] Retrieving Privileged Electronically Stored Information

If a party discovers that privileged (or attorney work product protected) ESI was produced in discovery, the party making the claim may notify any party that received the information of the privilege claim and the basis for the claim [*Code Civ. Proc. § 2031.285(a), (d)(1)*]. After being notified, the receiving party must immediately sequester the information and either return it (and any copies) or within 30 days present the information to the court conditionally under seal for a determination of the claim [*Code Civ. Proc. § 2031.285(b)*]. Until resolution, the receiving party must preserve the information and keep it confidential and is precluded from using or disclosing the information [*Code Civ. Proc. § 2031.285(c), (d)(2)*]. If a party disclosed the information before being notified of the privilege claim, the party must immediately take reasonable steps to retrieve the information [*Code Civ. Proc. § 2031.285(c)(2)*]. These rules apply also to subpoenas [*Code Civ. Proc. § 1985.8(i)*].

For a procedural checklist for retrieving inadvertently disclosed information, see *§ 195A.56*.

[2] Duties of Counsel Who Receive Inadvertent Productions

Although *Code Civ. Proc. § 2031.285* does not impose any affirmative obligations on counsel who receive inadvertent productions of privileged information until notified by producing counsel, the California Supreme Court has spelled out such obligations. In *Rico v. Mitsubishi Motors Corp. (2007) 42 Cal. 4th 807, 68 Cal. Rptr. 3d 758, 171 P.3d 1092* , the Court held that when a lawyer receives materials subject to attorney-client privilege, and it is reasonably apparent that they were inadvertently disclosed by another attorney, the recipient attorney should refrain from examining them any more than is essential to ascertain whether they are privileged. The recipient should then immediately notify the sender. The parties should resolve the situation by agreement or with court assistance, if necessary. An attorney who violates this rule by using the privileged information faces possible disqualification.

For a procedural checklist for an attorney who receives inadvertent disclosure, see *§ 195A.43*. For further discussion of the ethical duty of an attorney who receives inadvertent disclosure, see *Ch. 191, Discovery: Privileges and Other*

Discovery Limitations, § 191.15[7][b]. For a more detailed discussion of counsel's duties in the context of production of ESI, including inadvertent production, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 3, *Ethical Issues for Attorneys in E-Discovery*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryDiscoverabilityCivil ProcedureDiscoveryElectronic DiscoveryPrivileged Information

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16-195A California Forms of Pleading and Practice--Annotated § 195A.22

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.22 Sanctions

[1] Sanctions for Losing on Motion to Compel or Protective Order

The court is *required*, subject to the safe harbor exception discussed in [4], *below*, to impose a monetary sanction against any party, person, or attorney who makes or opposes a motion to compel or a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. §§ 2031.010(h)* (protective orders), 2031.310(h) (motions to compel)].

[2] Refusal to Comply With Order Compelling Further Response

The court is authorized to impose a variety of sanctions on a party that fails to obey an order compelling further response, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *Code Civ. Proc. § 2023.010 et seq.* In lieu of or in addition to that sanction, the court may impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* [*Code Civ. Proc. § 2031.310[i]*]. For more detailed discussion of these various types of sanctions, see Ch. 510, *Sanctions* .

For a step-by-step guide, as well as forms to use to seek (or oppose) sanctions for noncompliance, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 13, *Seeking or Opposing Sanctions for Noncompliance*.

[3] Sanctions for Spoliation of Evidence

Sanctions are available for "misuses of discovery," including altering or destroying electronic evidence [*see Code Civ. Proc. §§ 2023.010, 2023.030*; *Cedars-Sinai Med. Ctr. v. Superior Court (1998) 18 Cal. 4th 1, 12, 74 Cal. Rptr. 2d 248, 954 P.2d 511* ; *R.S. Creative, Inc. v. Creative Cotton, Ltd. (1999) 75 Cal. App. 4th 486, 495, 89 Cal. Rptr. 2d 353* (affirming order resulting in terminating sanctions for forging contract and destroying evidence by use of computers in violation of stipulation not to use the computers pending examination by expert)]. Sanctions may include money, issue,

evidence, adverse inference, and terminating sanctions.

For example, in a case involving destruction of electronic data, the court of appeal found a terminating sanction was appropriate under former *Code Civ. Proc. § 2023(b)(4)(A)* (*now see Code Civ. Proc. § 2023.030(d)(1)*), after defendants repeatedly failed to comply with discovery orders and intentionally destroyed evidence requested by plaintiffs by running a program to erase e-mails from computer hard drives [*Electronic Funds Solutions, LLC v. Murphy (2005) 134 Cal. App. 4th 1161, 1183-1184, 36 Cal. Rptr. 3d 663]* .

An attorney may be subject to discipline, including suspension and disbarment, for participating in the suppression or destruction of evidence [*Bus. & Prof. Code § 6106* (act of moral turpitude, dishonesty or corruption is cause for disbarment or suspension); *Cal. Rules of Prof. Conduct, Rules 5-200* (lawyer may not seek to mislead court by false statement of fact or law), 5-220 (lawyer may not suppress evidence that the lawyer or the lawyer's client has legal obligation to reveal or to produce), 3-210 (lawyer may not advise violation of any law)]. For example, in a patent infringement case, plaintiff failed to produce more than 46,000 e-mails and documents that were requested in discovery. The court found that the plaintiff's outside attorneys had assisted their client in committing this incredible discovery violation by intentionally hiding or recklessly ignoring relevant documents, ignoring or rejecting numerous warning signs that the plaintiff's document search was inadequate, and blindly accepting the plaintiff's unsupported assurances that its document search was adequate. The attorneys then used the lack of evidence to repeatedly and forcefully make false statements and arguments to the court and jury. The court therefore referred the attorneys to the State Bar for potential discipline for violations of Rules 5-200 and 5-220 [*Qualcomm Inc. v. Broadcom Corp. (S.D. Cal. 2008) 2008 U.S. Dist. LEXIS 911, *64* , vacated in part, *Qualcomm Inc. v. Broadcom Corp. (S.D. Cal. 2008) 2008 U.S. Dist. LEXIS 16897]* .

For detailed discussion of monetary, issue, evidence, and terminating sanctions, see Ch. 192, *Discovery: Sanctions* . For further discussion of spoliation of evidence, including sanctions for spoliation and protective orders against spoliation, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 13, *Seeking or Opposing Sanctions for Noncompliance*.

[4] Safe Harbor from Sanctions

Absent exceptional circumstances, a court may not impose sanctions on a person or any attorney of a person for failure to provide ESI that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system [*Code Civ. Proc. §§ 2031.060(i)* (protective orders), 2031.310; *see also Code Civ. Proc. §§ 1985.8(l), 2031.300(d), 2031.310(j)* (motions to compel)].

A similar safe harbor exists under federal law [*see Fed. R. Civ. P. 37(e)*]. Under that rule, the good faith requirement has been interpreted to mean "that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve" [*Keithley v. Home Store.com, Inc. (N.D. Cal. 2008) 2008 U.S. Dist. LEXIS 61741* (quoting *Fed. R. Civ. P. 37* Advisory Committee Notes (2006 Amendment))].

Courts have found that parties who fail to impose a litigation hold and continue to destroy electronic documents after receiving notice of litigation are not acting in good faith and cannot take advantage of the safe harbor [*see, e.g.,* *Doe v. Norwalk Community College (D. Conn. 2007) 248 F.R.D. 372, 379* (defendants' failure to place a litigation hold and to preserve e-mails and hard drives relevant to litigation was at least grossly negligent, if not reckless)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryCivil ProcedureDiscoveryMisconductCivil ProcedureDiscoveryMotions

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[Reserved]

§§ 195A.23[Reserved]

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§ 195A.30 Related Matthew Bender Publications

For detailed discussion, procedural checklists, practice tips, and forms covering all aspects of e-discovery, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence.

For a step-by-step guide to requesting and responding to e-discovery, see Matthew Bender(R) Practice Guide: California Civil Discovery, Ch. 5, *Discovery of Electronic Information*

For comprehensive discussion and forms relating to discovery under the California Civil Discovery Act and related California law, see DeMeo, California Deposition and Discovery Practice (Matthew Bender), and Hogan & Weber, California Civil Discovery (Matthew Bender)

For comprehensive discussion and forms relating to discovery under the California Civil Discovery Act and related California law, see DeMeo, California Deposition and Discovery Practice (Matthew Bender), and Hogan & Weber, California Civil Discovery (Matthew Bender)

For memoranda relating to discovery by demand for inspection under the California Civil Discovery Act and related California law, see California Points and Authorities, Ch. 85, *Discovery: Inspection of Tangible Evidence* (Matthew Bender)

Legal Topics:

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

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AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.31 California Statutes

Subpoenas for electronically stored information. *Code Civ. Proc. § 1985.8*

Definition of "electronic" and "electronically stored information." *Code Civ. Proc. §§ 2016.020(d), (e)*

Scope and regulation of discovery in general. *Code Civ. Proc. §§ 2017.010 et seq., 2019.010 et seq.*

Sanctions in general. *Code Civ. Proc. § 2023.010 et seq.*

Discovery by demand to another party for inspection, copying, testing, or sampling of electronically stored information. *Code Civ. Proc. §§ 2031.010-2031.280, 2031.290-2031.320*

Inadvertent production of electronically stored information subject to claim of privilege or work product. *Code Civ. Proc. § 2031.285*

Presumptions that printouts of computer stored information and images are authentic. *Evid. Code § 1552, 1553*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryCivil ProcedureDiscoveryRelevanceCivil ProcedurePretrial MattersSubpoenas

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AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.32 California Rules of Court

Duty to meet and confer regarding preservation of discoverable electronically stored information, *Cal. Rules of Ct., Rule 3.724(8)*

Case management order may contain orders on discovery of electronically stored information, *Cal. Rules of Ct., Rule 3.728(13)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryElectronic DiscoveryDiscoverabilityCivil ProcedureDiscoveryElectronic DiscoveryPreservation

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§ 195A.33 Decisions

[1] Allocation of Expense of Discovery

Court-ordered cost-shifting is inappropriate when electronic data is accessible. *Cason-Merenda v. Detroit Med. Ctr. (E.D. Mich. 2008) 2008 U.S. Dist. LEXIS 51962, *11-12* (interpreting *Fed. R. Civ. P. 26(b)(2)(B)*)

Court refused to shift cost of forensic examination when it was necessitated by responding party's inadequate search for electronically stored information and failure to deactivate network maintenance tools that automatically delete electronically stored information. *Peskoff v. Faber (D.D.C. 2008) 251 F.R.D. 59, 62*

Court refuses to shift costs to requesting party when those costs directly resulted from responding party's under-inclusive search. *Henry v. Quicken Loans (E.D. Mich. 2008) 2008 U.S. Dist. LEXIS 11417, at *17*

Under former *Code Civ. Proc. 2031(g)(1)* (*now see Code Civ. Proc. 2031.280(b)*, when responding to an e-discovery request requires responding party to translate electronic data compilations in order to obtain usable information, expense of translation shifts to demanding party, but demanding party is expected to pay only its *reasonable* expense for a *necessary* translation; reasonableness and necessity are factual issues, that, if disputed, are left to trial court's discretion. *Toshiba America Electronics Components v. Superior Court (2004) 124 Cal. App. 4th 762, 771-773, 21 Cal. Rptr. 3d 532* (rejecting parties' reliance on cost-shifting analyses in cases from other jurisdictions, including *Zubulake v. UBS Warburg (S.D.N.Y. 2003) 217 F.R.D. 309* , on the ground that Code of Civil Procedure was controlling)

[2] Document Preservation

A party's duty to preserve electronic evidence is triggered when the party has notice that the evidence is relevant to litigation or when the party should have know that the evidence might be relevant to litigation. *Zubulake v. UBS Warburg LLC (S.D.N.Y. 2003) 220 F.R.D. 212, 216*

The duty to preserve evidence extends to those employees likely to have relevant information--the "key players" in the case. *Zubulake v. UBS Warburg LLC (S.D.N.Y. 2003) 220 F.R.D. 212, 218*

Destroying evidence in anticipation of a discovery request or in response to a discovery request constitutes a misuse of discovery in violation of *Code Civ. Proc. §§ 2023.010* and *2023.030*. *Cedars-Sinai Med. Ctr. v. Superior Court (1998) 18 Cal. 4th 1, 12, 74 Cal. Rptr. 2d 248, 954 P.2d 511*

Preliminary injunction prohibiting destruction of files in trade secret misappropriation case and appointing neutral forensics expert to copy files affirmed. *Dodge, Warren & Peters Ins. Services, Inc. v. Riley (2003) 105 Cal. App. 4th 1414, 1417-1418, 130 Cal. Rptr. 2d 385*

Court declined to disturb order for production of computer with accounting records when records had not been produced in compliance with ruling on motion to compel. *Oved & Assocs. Constr. Servs. v. Superior Court of Los Angeles County (2003) 2003 Cal. App. Unpub. LEXIS 12172*

Defendant sanctioned for destroying computer form of payroll evidence sought by plaintiff after plaintiff had sent letters demanding preservation of evidence. *Lombardo v. Broadway Stores (2002) 2002 Cal. App. Unpub. LEXIS 4700, 1-2*

[3] Electronically Stored Information

Federal courts generally have ordered the production of metadata when it is sought in an initial document request and the producing party has not yet produced the documents in any form. *Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep't of Homeland Sec. (S.D.N.Y. 2008) 255 F.R.D. 350, 357*

Information held in a computer's random access memory (RAM) is"electronically stored information" under Fed. R. *Civ. Proc. 34*. *Columbia Pictures, Inc. v. Bunnell (C.D. Cal. 2007) 245 F.R.D. 443*

Sanctions for failure to produce electronic copies of voicemails. In *Re Seroquel Products Liability Litigation (M.D. Fl. 2007) 244 F.R.D. 650*

Computer printouts of prior convictions were admissible as official records. *People v. Martinez (2000) 22 C4th 106, 126-134, 91 Cal. Rptr. 2d 687, 990 P. 2d 563*

Printouts from website and message board were not hearsay because they were not offered for the truth, and were self-authenticating as computer printouts. *Ampex Corp. v. Cargle (2005) 128 Cal. App. 4th 1569, 27 Cal. Rptr. 3d 863*

Computer clock access times in trade secret case were admissible non-hearsay. *People v. Hawkins (2002) 98 Cal. App. 4th 1428, 1450, 121 Cal. Rptr. 2d 627*

Trial court properly exercised discretion in refusing to admit instant message exchange when foundational evidence that the defendant used the particular screen name was indirect at best. People v. Von Gunten (2002) Cal. App. Unpub. LEXIS 2361

Computer printout of lottery winners was admissible in dispute about whether a missing lottery ticket was ever issued. Proper foundation as to computer records by lottery manager. *Aguimatang v. Cal. State Lottery (1991) 234 Cal. App. 3d 769, 805, 286 Cal. Rptr. 57*

Bank's computer records were properly admitted as business record despite asserted lack of foundational testimony as to how the computer system worked. *People v. Lugashi (1988) 205 CA3d 632, 640, 252 Cal. Rptr. 434*

Trial court properly excluded lengthy and complex computer printout of costs that would be incomprehensible to lay juror and would be unduly prejudicial and confusing because costs caused by wrongful acts were not segregated. *Huber, Hunt & Nichols, Inc. v. Moore (1977) 67 Cal. App. 3d 278, 296-297, 136 Cal. Rptr. 603*

[4] Form of Production

Sanctions for producing ESI in TIFF format when metadata was requested. *Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co. (M.D. Fla. 2009) 2009 U.S. Dist. LEXIS 21250*

If responding party ordinarily maintains information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature. *L.H. v. Schwarzenegger (E.D. Cal. 2008) 2008 U.S. Dist. LEXIS 86829, *10-11*

Party's print production of over 170 boxes of printed documents should be produced again in electronic format. 3M *Co. v. Kanbar (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 45232*

Production in TIFF form without metadata was insufficient. *In re Verisign Sec. Litig. (N.D. Cal. 2004) 2004 U.S. Dist. LEXIS 22467*

Party that destroyed electronic form of records and produced paper copies was sanctioned. *Lombardo v. Broadway Stores (2002) 2002 Cal. App. Unpub. LEXIS 4700, 1-2*

[5] Inadvertent Production of Privileged Material

When a lawyer receives materials subject to attorney-client privilege, and it is reasonably apparent that they were inadvertently disclosed by another attorney, recipient attorney should refrain from examining them any more than is essential to ascertain whether they are privileged, and must immediately notify the sender. *Rico v. Mitsubishi Motors Corp. (2007) 42 Cal. 4th 807, 68 Cal. Rptr. 3d 758, 171 P.3d 1092*

[6] Limits on Frequency and Extent of Discovery

Court declined to compel production of econometric data, in part because plaintiffs' expert had already calculated the same information, making it available from another source. *Grand River Enters. Six Nations, Ltd. v. King (S.D.N.Y. 2009) 2009 U.S. Dist. LEXIS 12940, 33-34* (*Fed. R. Civ. P. 26(b)(2)(C)*)

[7] Not Reasonably Accessible

In $2.5 million case, good cause exists for $33,000 forensic examination because information sought is highly relevant, not duplicative, and cannot be obtained from other sources. *Peskoff v. Faber (D.D.C. 2008) 251 F.R.D. 59, 60-61*

Responding party claiming that electronically stored information is inaccessible must present court with detailed information demonstrating undue burden or cost; mere cost estimate and conclusory characterizations of electronically stored information as inaccessible will not suffice. *Mikron Indus. v. Hurd Windows & Doors, Inc. (W.D. Wash. 2008) 2008 U.S. Dist. LEXIS 35166, *6*

Cost of retrieving e-mails from backup tapes outweighs its likely benefit when requests are overbroad and a response will cost hundreds of thousands of dollars. *Petcou v. C.H. Robinson Worldwide, Inc. (N.D. Ga. 2008) 2008 U.S. Dist. LEXIS 13723, at *2-5*

Meeting burden of showing that information is from a source that is not reasonably accessible requires an evidentiary showing; statement of a lawyer in a memorandum that the electronic information is not readily accessible or that it would be unduly burdensome to comply with request is not sufficient. *Auto Club Family Ins. Co. v Ahner (E.D. La., 2007) 2007 U.S. Dist. LEXIS 63809, at *8-9* (under *Fed. R. Civ. P. 45(d)(1)(D)*)

Database is not reasonably accessible when it would have to be restored from original sources at cost of at least $124,000, plus monthly storage cost of over *$27,000. Best Buy Stores, L.P. v. Developers Diversified Realty Corp. (D. Minn. 2007) 247 F.R.D. 567, 570*

E-mails in LotusNotes format are reasonably accessible when cost of producing them is no more than *$20,000. Parkdale Am., LLC v. Travelers Cas. & Sur. Co. of Am. (W.D.N.C. 2007) 2007 U.S. Dist. LEXIS 88820*

Court ordered parties to equally share cost of extracting requesting source code from defendant's database, and defendant was to solely bear cost of copying source code once it was extracted. *OpenTV v. Liberate Techs. (N.D. Cal. 2003) 219 F.R.D. 474*

[8] Sanctions

When plaintiff's outside attorneys assisted their client's discovery violations by intentionally hiding or recklessly ignoring relevant documents, ignoring or rejecting numerous warning signs that plaintiff's document search was inadequate, and blindly accepting plaintiff's unsupported assurances that its document search was adequate, court referred the attorneys to the State Bar for potential discipline for violations of Rules 5-200 and 5-220. *Qualcomm Inc. v. Broadcom Corp. (S.D. Cal. 2008) 2008 U.S. Dist. LEXIS 911, *64* , vacated in part, *Qualcomm Inc. v. Broadcom Corp. (S.D. Cal. 2008) 2008 U.S. Dist. LEXIS 16897*

Good faith requirement in *Fed. R. Civ. P. 37(e)* has been interpreted to mean "that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve." *Keithley v. Home Store.com, Inc. (N.D. Cal. 2008) 2008 U.S. Dist. LEXIS 61741*

Parties who fail to impose litigation hold and continue to destroy electronic documents after receiving notice of litigation are not acting in good faith and cannot take advantage of safe harbor from sanctions. *Doe v. Norwalk Community College (D. Conn. 2007) 248 F.R.D. 372, 379* (defendants' failure to place litigation hold and to preserve e-mails and hard drives relevant to litigation was at least grossly negligent, if not reckless; applying *Fed. R. Civ. P. 37(e)*)

No tort claim for third party spoliation of evidence. *Temple Cmty. Hosp. v. Superior Court (1999) 20 Cal. 4th 464, 476-478, 84 Cal. Rptr. 2d 852, 976 P. 2d 223*

No tort claim for spoliation of evidence. *Cedars-Sinai Medical Center v. Superior Court (1998) 18 Cal. 4th 1, 74 Cal. Rptr. 2d 248, 954 P.2d 511*

In a case involving destruction of electronic data, court found terminating sanction appropriate under former *Code Civ. Proc. § 2023(b)(4)(A)* (*now see Code Civ. Proc. § 2023.030(d)(1)*), after defendants repeatedly failed to comply with

discovery orders and intentionally destroyed evidence requested by plaintiffs by running a program to erase e-mails from computer hard drives. *Electronic Funds Solutions, LLC v. Murphy (2005) 134 Cal. App. 4th 1161, 1183-1184, 36 Cal. Rptr. 3d 663*

No tort claim for negligent spoliation of evidence, but claim for breach of contract for breach of agreement to preserve evidence can be pursued. *Coprich v. Superior Court (2000) 80 Cal. App. 4th 1081, 1089--1090, 95 Cal. Rptr. 2d 884*

Court imposed terminating sanctions for forging contract and destroying evidence by use of computers in violation of stipulation not to use computers pending examination by expert. *R.S. Creative, Inc. v. Creative Cotton, Ltd. (1999) 75 Cal. App. 4th 486, 495, 89 Cal. Rptr. 2d 353*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryBurden & Expense

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16-195A California Forms of Pleading and Practice--Annotated §§ 195A.34-195A.39

AUTHOR: Reviewed by Michael F. Kelleher

[Reserved]

§§ 195A.34[Reserved]

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A. Checklists for Party Seeking Discovery

16-A California Forms of Pleading and Practice--Annotated Scope

AUTHOR: Reviewed by Michael F. Kelleher

Scope

NOTE: For a step-by-step guide and forms for a party seeking preservation and production of ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 4, *Planning E-Discovery*, Ch. 5, *Initial Procedures in E-Discovery--Notice, Document Preservation, Meeting and Conferring, and Case Management*, and Ch. 6, *Demanding Production of Electronically Stored Evidence in California Court*.

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16-195A California Forms of Pleading and Practice--Annotated § 195A.40

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.40 Preservation of Electronically Stored Evidence

[1] Preserve Client's Evidence

1. When future litigation is probable, instruct client to suspend any document destruction policy and put in place litigation hold to ensure preservation of relevant documents.

a. Put litigation hold in writing and communicate it to all employees who might be considered "key players" in actual or anticipated litigation.

b. Periodically remind employees of need to continue to preserve relevant documents and electronically stored information.

[2] Seek Preservation of Evidence by Opponent

1. As soon as litigation is imminent, notify opposing party of its duty to preserve evidence [for sample preservation letter, *see § 195A.60*].

2. Consider whether extraordinary circumstances such as evidence spoliation provide grounds for a motion requesting that court enter a preservation order and/or allow mirror imaging of computer disks by forensics expert. *Dodge, Warren & Peters Ins. Services, Inc. v. Riley (2003) 105 Cal. App. 4th 1414, 1417-1418, 130 Cal. Rptr. 2d 385*

3. Consider requesting sanctions if opponent has altered or destroyed evidence in anticipation of a discovery request or in response to a discovery request [*CCP § 2023.030*].

Legal Topics:

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

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16-195A California Forms of Pleading and Practice--Annotated § 195A.41

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.41 Meet and Confer

1. Meet and confer with other party, in person or by telephone, no less than 30 calendar days before date set for initial case management conference (unless court orders another time period) to consider the following e-discovery issues [*Cal. Rules of Ct, Rule 3.724(8)*]:

a. Any issues relating to the preservation of discoverable ESI.

b. Form or forms in which information will be produced.

c. Time within which the information will be produced.

d. Scope of discovery of the information.

e. Method for asserting or preserving claims of privilege or attorney work product, including whether such claims may be asserted after production.

f. Method for asserting or preserving confidentiality, privacy, trade secrets, or proprietary status of information relating to a party or person not a party to the civil proceedings.

g. How cost of production of ESI is to be allocated among parties.

h. Any other issues relating to discovery of ESI, including developing a proposed plan relating to discovery of information.

2. Consider negotiating an ESI protocol regarding format in which different types of ESI are to be produced [*see 195A.61*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryCivil ProcedurePretrial MattersConferences

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16-195A California Forms of Pleading and Practice--Annotated § 195A.42

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.42 Demand for Inspection, Copying, Testing, or Sampling of Electronically Stored Information

[1] Prepare Demand

1. Prepare demand that a party produce ESI for inspecting, copying, testing, or sampling [*Code Civ. Proc. § 2031.010(a), (e)*; for form for demand, *see 195A.62*].

2. Specify the form or forms in which each type of ESI is to be produced [*Code Civ. Proc. § 2031.030(a)(2)*].

[2] Prepare Proof of Service

Prepare proof of service of the demand [*see Code Civ. Proc. §§ 1013a, 2031.290*; *see also* Ch. 518, *Service of Summons and Papers*].

[3] Serve Documents

Serve demand on party to whom it is directed, and copies of demand and proof of service on all parties who have appeared in the action [*Code Civ. Proc. § 2031.040*].

[4] Supplemental Demands

1. Prepare and serve supplemental demand in same manner as initial demand [*see* [1]-[3], *above*], to inspect, copy, test, or sample later acquired or later discovered ESI in possession, control, or custody of party on whom demand is made.

NOTE:
Supplemental demands may be made (1) twice before the initial setting of the trial

date, and (2) subject to time limits on discovery proceedings and motions under *Code Civ. Proc. § 2024.010 et seq.*, once after the initial setting of the trial date [*Code Civ. Proc. § 2031.050*; for discussion relating to time limits under *Code Civ. Proc. § 2024.010 et seq., see* *Ch. 190,* ***Discovery: Scope, Regulation, and Timing****, § 190.50* et seq.].

2. On motion for good cause shown, court may also allow demanding party to propound an additional number of supplemental demands for inspection, copying, testing or sampling [*Code Civ. Proc. § 2031.050(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryElectronic DiscoveryDiscoverability

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16-195A California Forms of Pleading and Practice--Annotated § 195A.43

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.43 Receipt of Inadvertently Produced Privileged Information

NOTE: For a more detailed discussion of counsel's duties in the context of production of ESI, including inadvertent production, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 3, *Ethical Issues for Attorneys in E-Discovery*.

[1] Before Notification

1. Upon receipt of any document in course of discovery that appears to be protected by the attorney-client privilege or is protected attorney work product, if it is apparent that the materials were provided or made available through inadvertence, take following steps [*Rico v. Mitsubishi Motors Corp. (2007) 42 Cal. 4th 807, 817, 68 Cal. Rptr. 3d 758, 171 P.3d 1092]* :

a. Refrain from examining materials any more than is essential to ascertain whether they are privileged.

b. Immediately notify sender.

c. Resolve situation by agreement or with court assistance, if necessary.

[2] After Notification

1. Upon receipt of any notification from another party that privileged (or attorney work product protected) ESI was inadvertently produced in discovery, take following steps [*Code Civ. Proc. § 2031.285*]:

a. Immediately sequester the information and either:
(1) Return the information (and any copies), or

(2) Within 30 days, present information to court conditionally under seal for

determination of claim.

b. Until resolution of claim, do not use or disclose the information.

c. If recipient of privileged information further disclosed the information before being notified of privilege claim, immediately take reasonable steps to retrieve the information.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryDiscoverabilityCivil ProcedureDiscoveryElectronic DiscoveryPrivileged Information

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16-195A California Forms of Pleading and Practice--Annotated §§ 195A.44-195A.49

AUTHOR: Reviewed by Michael F. Kelleher

[Reserved]

§§ 195A.44[Reserved]

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16-B California Forms of Pleading and Practice--Annotated Scope

AUTHOR: Reviewed by Michael F. Kelleher

Scope

NOTE: For a step-by-step guide and forms for a party responding to electronic discovery, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 4, *Planning E-Discovery*, Ch. 5, *Initial Procedures in E-Discovery--Notice, Document Preservation, Meeting and Conferring, and Case Management* and Ch. 8, *Responding to Electronic Discovery Demands in California Court*. For guidance on gathering and producing ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, see Ch. 9, *Gathering and Producing Electronically Stored Information* . For discussion of strategic considerations, as well as forms, for opposing demands for production of ESI, see Ch. 10, *Opposing Demands for Electronic Evidence in California Court* .

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16-195A California Forms of Pleading and Practice--Annotated § 195A.50

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.50 Preservation of Electronically Stored Evidence

[1] Preserve Client's Evidence

1. As soon as future litigation is probable, suspend any document destruction policy and put in place litigation hold to ensure preservation of relevant documents.

a. Put litigation hold in writing and communicate it to all employees who might be considered "key players" in actual or anticipated litigation.

b. Periodically remind employees of need to continue to preserve relevant documents and ESI.

2. If informed by any other party in writing that the discovery of ESI is reasonably likely to be sought, meet and confer at least 45 days before the date set for initial case management conference regarding any issues related to preservation of discoverable ESI [*Cal. Rules of Ct., Rule 3.724(b)(1)*; *see § 195A.51*].

[2] Seek Preservation of Evidence by Opponent

1. When litigation is imminent, notify opposing party of its duty to preserve evidence [for sample preservation letter, *see § 195A.60*].

2. Consider requesting a preservation order, forensic inspection of computer disks, and sanctions if opponent has altered or destroyed evidence in anticipation of a discovery request or in response to a discovery request [*Dodge, Warren & Peters Ins. Services, Inc. v. Riley (2003) 105 Cal. App. 4th 1414, 1417-418 130 Cal. Rptr. 2d 385* ; *CCP § 2023.030*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryDiscoverabilityCivil ProcedureDiscoveryElectronic DiscoveryPreservation

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16-195A California Forms of Pleading and Practice--Annotated § 195A.51

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.51 Meet and Confer

1. If informed by any other party in writing that discovery of ESI is reasonably likely to be sought, meet and confer, in person or by telephone, at least 45 calendar days before date set for initial case management conference, to consider the following [Cal. Rules of Ct., proposed Rule 3.724(b)]:

a. Any issues relating to the preservation of discoverable ESI.

b. Form or forms in which information will be produced.

c. Time within which the information will be produced.

d. Scope of discovery of the information.

e. Method for asserting or preserving claims of privilege or attorney work product, including whether such claims may be asserted after production.

f. Method for asserting or preserving confidentiality, privacy, trade secrets, or proprietary status of information relating to a party or person not a party to the civil proceedings.

g. How cost of production of ESI is to be allocated among the parties.

h. Any other issues relating to discovery of ESI, including developing a proposed plan relating to discovery of the information.

2. Consider negotiating ESI protocol regarding format in which different types of ESI are to be produced [for form for protocol, *see 195A.61*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryCivil ProcedurePretrial MattersConferences

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16-195A California Forms of Pleading and Practice--Annotated § 195A.52

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.52 Response to Demand for Inspection, Copying, Testing, or Sampling of Electronically Stored Information

[1] Time for Response

1. Respond within applicable time period:

a. Within 30 days from date of service of demand [*Code Civ. Proc. § 2031.260(a)*].

b. If service was made by mail, within 30 days plus five calendar days from date of service of demand if place of address is within California, 30 days plus 10 calendar days if place of address is outside California but within the United States, or 30 days plus 20 calendar days if place of address is outside United States [*see Code Civ. Proc. §§ 1013(a), 2016.050*].

NOTE:
The period is extended two court days if service is by express mail, other overnight delivery, or by fax [*see Code Civ. Proc. § 1013(c), (e)*].

c. Within time as shortened or extended by court order under *Code Civ. Proc. § 2031.260* [for forms for extending time to respond to interrogatories which may be adapted for this purpose, *see Ch. 194, Discovery: Interrogatories, § 194.90* et seq.].

NOTE:
If the responding party can establish that an extension of time is needed for protection from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense, he or she may move for a protective order, which may include an order extending time. In that event, a monetary sanction may be available to the prevailing party [*see* *Code Civ. Proc. § 2031.060*; *see also*

Ch. 195, ***Discovery: Inspection of Tangible Evidence,*** *§ 195.51*].

d. Within the time as extended (or shortened) by stipulation of counsel under *Code Civ. Proc. § 2031.270*.

NOTE:

Counsel who obtain stipulations by telephone must confirm them in writing, either by letter or by written stipulation to be signed by the attorneys involved [*see Code Civ. Proc. § 2031.270(b)*]. The written stipulation, whether offered separately or as an attachment to another document, may not be filed unless it is offered as relevant to the determination of an issue in a law and motion proceeding or other hearing or is ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(7), (9)*]. The original written stipulation must be retained until six months after final disposition of the cause, unless the court on motion of any party and for good cause shown orders the stipulation preserved for a longer period [*Cal. Rules of Ct., Rule 3.250(b)*].

[2] Prepare Response

1. Respond separately to *each item or category of item* in any of the manners listed in [2]-[4], *below* [*Code Civ. Proc. § 2031.210 et seq.*; for form for response, *see § 195A.52*].

2. Object to demand in whole or in part [*Code Civ. Proc. §§ 2031.210(a)(3), 2031.240*].

a. Specify extent of, and specific grounds for, objection.

b. If objecting in part, specify objectionable part or parts of item, or categories of items, and include a statement of compliance, or representation of inability to comply, with respect to remainder of items or categories.

c. If objecting based on privilege, state particular privilege invoked.

d. Expressly assert any claim that information sought is protected work product under *Code Civ. Proc. § 2018.010 et seq.*

e. If ESI is from a source that is not reasonably accessible because of undue burden or expense, identify types or categories of sources of ESI that are not reasonably accessible [*Code Civ. Proc. § 2031.210(d)*].

f. If objecting to specified form for producing ESI, state in response form in which respondent intends to produce each type of information [*Code Civ. Proc. § 2031.280(c)*].

3. Grant permission to inspect, copy, test, or sample [*Code Civ. Proc. §§ 2031.210(a)(1), 2031.220*].

a. State that inspection, copying, testing, or sampling will be allowed by date set for inspection under *Code Civ. Proc. § 2031.030(c)* and that other related activities will be allowed in whole or in part; and

b. State that all documents or things in demanded category that are in possession, custody, or control of party, and to which no objection is being made, will be included in production.

4. Make representation of inability to comply with demand [*Code Civ. Proc. §§ 2031.210(a)(2),*

2031.230].

a. Affirm that diligent search and reasonable inquiry was made in an effort to comply with demand [*Code Civ. Proc. § 2031.230*].

b. Specify whether item never existed; has been destroyed; has been lost, misplaced, or stolen; or has never been, or is no longer in, responding party's possession, custody, or control.

c. Give name and address of any person or organization known or believed to have possession, custody, or control of item or category of item.

[3] Proof of Service

1. Prepare proof of service of response [*see Code Civ. Proc. § 1013a, 2031.290*; *see also* Ch. 518, *Service of Summons and Papers*].

[4] Serve Documents

1. Serve original response on demanding party and copies of response on all other parties who have appeared in the action [*Code Civ. Proc. § 2031.260(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryElectronic DiscoveryDiscoverability

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16-195A California Forms of Pleading and Practice--Annotated § 195A.53

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.53 Motion for Protective Order

NOTE: For a step-by-step guide, as well as forms, for seeking a protective order in e-discovery, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 11, *Seeking or Opposing Protective Order*.

[1] Not Reasonably Accessible

1. Determine if ESI sought is from a source that is not reasonably accessible because of undue burden or expense [*Code Civ. Proc. § 2031.060(c)*].

[2] Prepare Documents

1. Prepare notice of motion for protective order, together with supporting declaration.

NOTE:
The notice of motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt to resolve the issues informally [*Code Civ. Proc. § 2031.060(a)*; *see generally* Ch. 190, *Discovery: Scope, Regulation, and Timing*, § 190.33[1]].

2. Prepare memorandum supporting motion [*Cal. Rules of Ct., Rule 3.1113(a)*].

NOTE:
For further discussion of memorandum requirements and a skeletal form for a memorandum, *see* Ch. 417, ***Points and Authorities*** ; for forms for memoranda supporting a motion for protective order under *Code Civ. Proc. § 2031.060*, ***see*** California Points and Authorities, Ch. 85, ***Discovery: Inspection of Tangible Evidence*** (Matthew Bender).

3. Prepare proof of service [*see Code Civ. Proc. §§ 1013a*; Ch. 518, *Service of Summons and Papers*].

[3] Serve Documents

1. At least 16 court days before date set for hearing on motion [*Code Civ. Proc. § 1005(b)*], or any longer time required by *Code Civ. Proc. § 1005(b)* if service of notice of motion is to be by mail, overnight delivery, or fax, serve every party to action or proceeding with copy of notice of motion, supporting declaration and memorandum of points and authorities, and proof of service.

[4] File Documents

1. File signed original notice of motion, supporting papers, and proof of service.

[5] Order

1. If the court grants motion, prepare order granting motion.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryProtective Orders

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16-195A California Forms of Pleading and Practice--Annotated § 195A.54

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.54 Limits on Frequency and Extent, and Allocation of Expense

1. If court find good cause for production of ESI from a source that is not reasonably accessible because of undue burden or expense:

a. Consider seeking limits on frequency and extent of discovery [*Code Civ. Proc. § 2031.060(f)*].

b. Consider seeking allocation of expense of discovery [*Code Civ. Proc. § 2031.060(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryBurden & Expense

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16-195A California Forms of Pleading and Practice--Annotated § 195A.55

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.55 Producing Electronically Stored Information

NOTE:
For further discussion of the translation of data compilations, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 10, *Opposing Demands for Production of Electronic Evidence in California Court*, § 10.07.

1. If necessary, at reasonable expense of demanding party, use detection devices to translate any data compilations included in demand into reasonably usable form [*Code Civ. Proc. § 2031.280(e)*].

PRACTICE TIP:
The respondent should not actually undertake the translation before there is either an agreement of a court order confirming that cost-shifting will occur. If translation will be required, it should be raised first with opposing counsel, and if necessary, the court, or alternatively in an objection. Thus, if translation may be required, it should be raised first with opposing counsel and, if necessary, the court, or, alternatively, in an objection [*see §§ 195A.51, 195A.52[2]. By Michael F. Kelleher.*

2. Produce electronically stored information in one of following forms [*Code Civ. Proc. § 2031.280(d)*]:

a. Form agreed upon by parties or ordered by court.

b. Form specified in demand.

c. Form in which it is ordinarily maintained.

d. Form that is reasonably usable.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryElectronic DiscoveryDiscoverability

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 195A DISCOVERY: DISCOVERY OF ELECTRONICALLY STORED EVIDENCE (E-DISCOVERY)
IV. PROCEDURAL CHECKLISTS
B. Checklists for Responding Party

16-195A California Forms of Pleading and Practice--Annotated § 195A.56

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.56 Inadvertent Production of Privileged Information

1. Upon discovery that any privileged (or attorney work product protected) ESI was produced in discovery, notify any party that received the information of the privilege claim and the basis for the claim [*Code Civ. Proc. § 2031.285(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryElectronic DiscoveryDiscoverabilityCivil ProcedureDiscoveryElectronic DiscoveryPrivileged Information

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B. Checklists for Responding Party

16-195A California Forms of Pleading and Practice--Annotated §§ 195A.57-195A.59

AUTHOR: Reviewed by Michael F. Kelleher

[Reserved]

§§ 195A.57[Reserved]

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16-195A California Forms of Pleading and Practice--Annotated § 195A.60

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.60 Sample Preservation Letter

[1] FORM 195A.60.1 Sample Preservation Letter

_____ [*date*]

TO: _____ [*name*]:

You are hereby given notice to immediately take all steps necessary to prevent the destruction, loss, concealment, or alteration of any paper, document, or electronically stored information ("ESI") and other data or information generated by and/or stored on your computers and storage media (e.g., hard disks, floppy disks, backup tapes, etc.), and e-mail related to (1) _____ [*subject matter of lawsuit*]; (2) the events and causes of action described in Plaintiffs' Complaint; and (3) ESI and documents you may use to support any defenses you may claim to have in this action.

You should anticipate that much of the information subject to disclosure and responsive to discovery in this action is stored on your current or former computer systems and other media and devices, including personal digital or data assistants, voice-messaging or voice-mail systems, online repositories, and cell phones.

ESI should be afforded the broadest possible definition and includes, but is not limited to, all digital communications (e.g., e-mail, voice mail, instant messaging), word processed documents (e.g., Word and WordPerfect documents and drafts), spreadsheets and tables (e.g., Excel and Lotus 123 worksheets), accounting application data (such as QuickBooks, Money, or Peachtree), image and facsimile files (including PDF, TIFF, JPG, and GIF images), sound recordings (including WAV and MP3 files), video recordings, all databases, all contact and relationship management data, calendar and diary application data, online access data (including temporary, Internet files, history, and cookies), all presentations (including PowerPoint and Corel), all network access and server activity logs, all data created with the use of any cell phone or Personal Data Assistant (PDA) devices, all CAD files, and all backup and archival files.

Adequate preservation of ESI requires more than simply refraining from efforts to destroy or dispose of such evidence. You must also intervene to prevent loss due to routine operations and employ proper techniques to safeguard all such evidence.

Because hard copies do not preserve electronic searchability or metadata, they are not an adequate substitute for ESI. If information exists in both electronic and paper form, you should preserve them both.

LITIGATION HOLD

You are requested to immediately initiate a litigation hold for potentially relevant ESI, documents, and tangible things, and to act diligently and in good faith to secure and audit compliance with that litigation hold. You are also requested to preserve and not destroy all passwords, decryption procedures (including, if necessary, the software to decrypt the files), network access codes, ID names, manuals, tutorials, written instructions, decompression or reconstruction software, and any and all other information and things necessary to access, view, and (if necessary) reconstruct any ESI. You should not pack, compress, purge, or dispose of any file or any part thereof.

You are further requested to immediately identify and modify or suspend features of your operations, information systems, and devices that, in routine operations, operate to cause the loss of documents, tangible items, or ESI. Examples of such features and operations include, but are not limited to, purging the contents of e-mail repositories by age, capacity, or other criteria; using data or media wiping, disposal, erasure, or encryption utilities or devices; overwriting, erasing, destroying, or discarding backup media; re-assigning, re-imaging or disposing of systems, servers, devices, or media; running antivirus or other programs that alter metadata; using metadata stripper utilities; and destroying documents or any ESI by age or other criteria.

SERVERS

With respect to servers like those used to manage electronic mail and network storage, the entire contents of each user's network share and e-mail account should be preserved and not modified.

STORAGE

With respect to on-line storage and/or direct access storage devices attached to your mainframe computers and/or minicomputers, in addition to the above, you are not to modify or delete any ESI, "deleted" files, and/or file fragments existing on the date of this letter's delivery that contain potentially relevant information.

With regard to all electronic media used for off-line storage, including magnetic tapes and cartridges, optical media, electronic media, and other media or combinations of media containing potentially relevant information, you are requested to stop any activity which may result in the loss of any ESI, including rotation, destruction, overwriting and erasure in whole or in part. This request is intended to cover all media used for data or information storage in connection with your computer systems, including magnetic tapes and cartridges, magneto-optical disks, floppy diskettes, and all other media, whether used with personal computers, minicomputers, mainframes or other computers, and whether containing backup and/or archival ESI.

PERSONAL COMPUTERS

You should take immediate steps to preserve all ESI on all personal computers used by your officers, directors and

employees, including all secretaries and assistants, that in any way relate to the [subject matter of action], and the events and causes of action described in the Complaint. As to fixed devices, (1) a true and correct copy is to be made of all such ESI, including all active files and completely restored versions of all deleted electronic files and file fragments; (2) full directory listings (including hidden files) for all directories and subdirectories (including hidden directories) on such fixed devices should be written; and (3) all such copies and listings are to be preserved until this litigation is ended. As to floppy diskettes, CDs, DVDs, tapes, and other non-fixed media relating to this matter, they are to be collected and stored pending resolution of this litigation.

PORTABLE SYSTEMS

In addition to your immediate preservation of ESI, documents and tangible items in your business, on servers and workstations, you should also determine if any home or portable systems may contain potentially relevant data or information. To the extent that officers, board members, or employees have sent or received potentially relevant e-mails or created or reviewed potentially relevant documents away from the office, you must preserve the contents of systems, devices, and media used for these purposes (including not only potentially relevant data from portable and home computers, but also from portable thumb drives, CD-R discs, PDAs, smart phones, voice mailboxes, or other forms of ESI storage). Additionally, if any employees, officers, or directors used online or browser-based e-mail accounts or services to send or receive potentially relevant messages and attachments, the contents of these account mailboxes should be preserved.

EVIDENCE CREATED OR ACQUIRED IN THE FUTURE

With regard to documents, tangible things, and ESI that are created or come into your custody, possession, or control subsequent to the date of delivery of this letter, potentially relevant evidence is to be preserved. You should take all appropriate action to avoid destruction of potentially relevant evidence.

Please forward a copy of this letter to all persons and entities possessing or controlling potentially relevant evidence. Your obligation to preserve potentially relevant evidence is required by law.

[2] Use of Form

The preservation letter set out in [1], *above*, directs an opposing party to preserve electronic evidence. For discussion of preservation of evidence, see *§ 195A.13*.

Form provided by Paul R. Kiesel and Steve Williams, reprinted from Kiesel & Williams, *California E-Discovery: Analysis of the 2009 Legislation and Rules* (LexisNexis 2009).

Legal Topics:

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

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16-195A California Forms of Pleading and Practice--Annotated § 195A.61

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.61 Sample Electronically Stored Information Protocol

[1] FORM 195A.61.1 Sample Electronically Stored Information Protocol

ESI PRODUCTION PROTOCOL

1. **Obligation to Produce Electronically Stored Information .** The parties acknowledge and agree that to the extent they possess electronically stored information ("ESI") responsive to a document request, that ESI is within the scope of matters subject to discovery in this case.

2. **Load Files.** Except for ESI described in sections 3(b) and (c) below, ESI will be produced in electronic format, with files suitable for loading into a litigation support database. The load files will define document breaks, attachments and other information identified below.

(a) **Document Cross-Reference File.** The producing party will provide a cross-reference file that identifies the start and end of the document, its attachments and its corresponding metadata.

(b) **Cross-Reference or Linking File.** The producing party will also provide a cross-reference file that facilitates the linking of the produced image or native file with the litigation database. This cross-reference file will contain fields such as the unique document ID (i.e., BegBates) and the file path of the corresponding image or native file. The producing party may provide this information either in a litigation database format or as a standard delimited ASCII text file.

3. **Categories of Production of ESI.** ESI will be produced as follows, depending on its classification.

(a) **Production of ESI as TIFF Images With Metadata and Extracted Text.** Documents created in standard office automation file formats (including but not limited to Microsoft Word or WordPerfect documents) and ESI that can practicably be converted into TIFF format will be produced as single-page TIFF Group IV images, with any available fielded metadata and text searchable information extracted from the native documents.

(i) **Bates Numbering.** The producing party will brand all TIFF images in the lower right-hand corner with its corresponding bates number, using a consistent font type and size. The Bates number must not obscure any part of the underlying image.

(ii) **File Names.** Image file names will be identical to the corresponding bates numbered images, with a ".tif" file extension.

(iii) **Confidentiality Endorsements.** The producing party will brand any confidentiality or similar endorsements in a corner of the TIFF image. Those endorsements must be in a consistent font type and size, and must not obscure any part of the underlying image or Bates number.

(iv) **Production of Extracted Full Text.** The producing party will provide extracted full text (i.e., text extracted from ESI) for all material originating as ESI in a text file corresponding to a single page of a document. The full text file name will be composed of the Bates number of the associated document, with a ".txt" file extension. When a party is unable to produce extracted full text, it will provide an explanation of that inability with its document production.

(v) **Production of Metadata.** The producing party will provide the following metadata, as applicable, for all ESI: start bates, end bates, start attachment, end attachment, custodian or source, original file path, original file name, file type/file extension, MD-5 hash value, title, creation date, creation time, page count, last modification date, last modification time, and last saved by name.

(vi) **Metadata for E-Mail.** In addition to the metadata to be produced for all ESI, for all e-mail, the producing party will also produce the following as fielded metadata: subject, author, recipients, from, to, copyees, blind copyees, date sent, time sent, date received, time received, MD-5 hash value, attachment file name, begin attachment, and end attachment. Family relationships among email and attachments will be maintained by ensuring that attachments immediately follow their parent e-mail, and setting the "begin attachment" and "end attachment" metadata fields appropriately.

(vii) **Explanation of Inability to Produce Metadata.** When a party is unable to produce metadata for a particular field, it will provide an explanation of that inability with its document production.

(viii) **Redaction.** If a file that originates in ESI needs to be redacted before production, the file will be rendered in TIFF, and the TIFF will be redacted and produced. However, to the extent that the text is searchable in the native format, the producing party will still provide searchable text for those portions of the document that have not been redacted.

(b) **Production of Native Format Documents That Are Impractical to Convert to TIFF.** ESI that is not practical to convert to TIFF may be produced using one of the two following methods, which method

will be subject to meet and confer between the parties.

(i) **Spreadsheets that are Impractical to Convert to TIFF.** ESI that is not practical to convert to TIFF (for example, spreadsheets) may be produced in electronic format suitable for loading to a litigation support database with links to the native files.

(A) **Identification.** ESI produced in native file format will be assigned a unique DocID number within the litigation database.

(B) **File Names.** File names will be identical to the DocID number, followed by the original file name and file extension.

(C) **Authentication.** The producing party will provide a litigation database load file with separately fielded data, which will contain, as one of the fields, the MD-5 hash value of each file produced in native format.

(ii) **ESI That Is Impractical to Produce with Links to a Database.** The parties understand and acknowledge that certain categories of ESI are structurally complex and do not lend themselves to production as native format documents with links to a litigation database. For example, in some instances renaming and/or linking a native document comprised of subparts will render the document unusable. After meet and confer, the parties may agree to produce these types of documents in native form, accompanied with a Bates number and MD-5 hash value, but separate from a litigation support database. In those instances, if a propounding party or its experts lack access to proprietary software needed to review the producing party's ESI in native format, the parties will meet and confer to obtain a resolution which allows that party to view the affected documents.

(iii) **Encrypted or Password-Protected ESI.** For any ESI that exists in encrypted format or is password-protected, the producing party will provide the propounding party a means to gain access to those native files (for example, by supplying passwords).

(c) **Reports in Lieu of Native Production.** If a party believes that it would be impractical to produce ESI in native format because of complexities associated with certain scheduling programs (such as Primavera), accounting systems, mapping systems, and/or other databases (such as MS Access, Oracle, and Microsoft SQL Server), it will so notify the propounding party and will inform the propounding party whether it has generated reports in the normal course of business using those programs or systems. In any such instance, the parties will meet and confer concerning the manner of production of those reports.

(d) **Production of Pictures/Images.** Any photographic images created and/or maintained in electronic format will be produced in that format.

4. **Production Media.** The producing party will use the appropriate electronic media (CD, DVD or hard drive) for its ESI production, and will cooperate in good faith to use the highest-capacity available media to minimize associated overhead. The producing party will label the physical media with the producing party, production date, media volume name, and document number range.

5. **Avoidance of Duplicate Production.** Each producing party will take all reasonable steps to reduce duplication of ESI. De-duplication will be performed within a custodian. The producing party will maintain references to all removed duplicate files.

Signed and agreed on _____ [*date*]
_____ [signature of party]

[typed name]

Signed and agreed on _____ [*date*]
_____ [signature of party]
[typed name]

[2] Use of Form

This form is a sample protocol (agreement of the parties) governing the production of electronically stored information in connection with discovery. When the parties to litigation recognize that issues concerning electronically stored information are present, it is often helpful to negotiate an ESI protocol such as the one set out in [1], *above.* Parties are required to meet and confer regarding such issues [*Cal. Rules of Ct., Rule 3.724(8)*]. The sample protocol here should be modified as appropriate for the kinds of ESI at issue in the particular case.

Form provided by Paul R. Kiesel and Steve Williams, reprinted from Kiesel & Williams, *California E-Discovery: Analysis of the 2009 Legislation and Rules* (LexisNexis 2009).

For discussion of preservation of ESI, see *§ 195A.13*. For a discussion of the format of production, see *§ 195A.19*.

For discussion of strategic considerations and a form for a preservation demand combined with a traditional demand letter, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 5, *Initial Procedures in E-Discovery--Notice, Document Preservation, Meeting and Conferring, and Case Management*, § 5.28.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryElectronic DiscoveryBurden & ExpenseCivil ProcedureDiscoveryElectronic DiscoveryDiscoverability

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16-195A California Forms of Pleading and Practice--Annotated § 195A.62

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.62 Demand--Production of Electronically Stored Information [Code Civ. Proc. § 2031.010 et seq.]

[1] FORM 195A.62.1 Demand--Production of Electronically Stored Information [Code Civ. Proc. § 2031.010 et seq.]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DEMAND FOR PRODUCTION OF DOCUMENTS
Defendant.	)	AND TANGIBLE THINGS FOR INSPECTION
	)	[AND FOR _____ (COPYING *and/or*
	)	TESTING *and/or* SAMPLING)]

_____

Demanding Party: _____ [*Identify, e.g.*, Plaintiff],

_____ [*name*].

Set no. _____ [*specify*]

Responding party: _____ [*Identify, e.g.*, Defendant],

_____ [*name*].

To _____ [*identify party, e.g.*, defendant] _____ [*name*] and to

_____ [*name*], his/her attorney of record:

_____ [*Identify party serving demand, e.g.,* Plaintiff] _____ [*name*] demands that you produce and permit the inspection and _____ [*specify related activity, e.g.,* copying *and/or* testing *and/or* sampling] by or on behalf of himself/herself of the items described below.

_____ [*Identify party serving request, e.g.,* Plaintiff] _____ [*name*] demands that the items described below be produced on _____ [*date*], at _____ [*time*], at _____ [*specify, e.g.,* the law offices of _____ (*name of law firm*)] located at _____ [*street address*], _____ [*city*], California, for the purpose of inspection [and _____ (*specify related activity, such as testing or sampling, the manner in which the activity will be performed, and whether it will permanently alter or destroy the item or items*)].

DEFINITIONS

1. "DOCUMENTS" means any and all writings as defined in *California Evidence Code § 250*. This includes without limitation all communications and writings of every kind, letters, telegrams, telexes, memoranda, reports, studies, calendar or diary entries, telephone logs, maps, pamphlets, drafts, notes, graphs, charts, tabulations, analyses, statistical or informational accumulations, accounting records of any kind, audio recordings, photographs, film impressions, videotapes, microfilm, microfiche, vu-graphs, computer disks, computer programs, software, magnetic tapes, or any medium containing computer programs, software, or data, and sounds or mechanical reproductions, and all compilations of the foregoing.

2. "ELECTRONIC" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

3. "ELECTRONICALLY STORED INFORMATION" means information that is stored in an ELECTRONIC medium, including without limitation disks, including hard disks and floppy disks, CD-ROMs, DVDs, network servers, shared servers, computers, magnetic tape, back-up tape, voicemail, and PDAs, whether currently on your premises or otherwise (e.g., at an employee's home or remote office).

INSTRUCTIONS

When a request specifically seeks DOCUMENTS in ELECTRONIC form, such DOCUMENTS shall be produced (i) with a load file suitable for loading the data into a litigation database that defines document breaks, attachments, metadata, and other information (identified below) and (ii) with a cross-reference file that facilitates the linking of the produced TIFF or native file with a litigation database; specifically, production to be as follows:

(a) Spreadsheets--To be produced (i) as a native file, and (ii) with a load file suitable for linking it to a litigation support database that (for authentication) identifies the MD-5 hash value of each file.

(b) Standard Office File Forms (e.g. E-mails, Word Processing Documents, Presentations)--To be produced (i) in TIFF format, and (ii) with metadata and text searchable information extracted from the native file and produced as fielded metadata. Family relationships among email and attachments are to be maintained.

When any such DOCUMENTS cannot be provided in one of the above manners, as in the case of certain scheduling, accounting, contact management, and database programs (e.g. Primavera, MS Access, Oracle, Microsoft SQL Server), or if Plaintiffs and each Defendant otherwise agree, Plaintiffs and each Defendant will determine another acceptable

electronic form for production.

DEMANDS FOR INSPECTION

1. All DOCUMENTS, including ELECTRONICALLY STORED INFORMATION, that relate or refer to _____ [*describe subject of dispute*].

Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*demanding party's status and name*]

[2] Use of Form

The demand set out in [1], *above*, is for use to demand the production of all electronically stored information relevant to the litigation for inspection, copying, testing or sampling [*Code Civ. Proc. § 2031.010(a), (e)*]. For further discussion of inspection demands for electronically stored information, see *§ 195A.15*. For discussion of strategic considerations and a step-by-step guide to demanding production of electronic evidence in California courts, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 6, *Demanding Production of Electronically Stored Evidence in California Court*.

[3] Content of Demand

A party demanding the production of electronically stored information may specify the form or forms in which each type of ESI is to be produced [*Code Civ. Proc. § 2031.030(a)(2)*].

Legal Topics:

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

California Forms of Pleading and Practice--Annotated

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16-195A California Forms of Pleading and Practice--Annotated § 195A.63

AUTHOR: Reviewed by Michael F. Kelleher

§ 195A.63 Response to Demand for Production of Electronically Stored Information [Code Civ. Proc. § 2031.010 et seq.]

[1] FORM 195A.63.1 Response to Demand for Production of Electronically Stored Information [Code Civ. Proc. § 2031.010 et seq.]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	RESPONSE TO DEMAND FOR PRODUCTION
Defendant.	)	OF DOCUMENTS
	)	
	)	

_____

Demanding Party: _____ [*Identify, e.g.,* Plaintiff],

_____ [*name*].

Set no. _____ [*specify*]

Responding party: _____ [*Identify, e.g.,* Defendant],

_____ [*name*].

To _____ [*identify party who served demand, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

_____ [*Identify responding party, e.g.,* Defendant] _____ [*name*] responds as follows to _____ [*identify demanding party, e.g.,* plaintiff] _____'s [*name*] [supplemental] demand for _____ [production, inspection, copying, testing, and sampling] served on _____ [*specify date served by mail as indicated on proof of service of demand or date personally served*]:

[*EITHER, for those things being produced, respond separately to each item, or category of item, with the following*]

1. The production, inspection, and related activity demanded in Item No. _____ will be allowed _____ [in whole *or specify to what extent production, inspection, and related activity will be allowed*]. The _____ [*specify electronically stored information demanded, e.g.,* hard drives, backup tapes] are in the _____ [possession *or* custody *or* control] of _____ [*identify responding party, e.g.,* defendant] _____ [*name*], and will be included in this production.

[*OR, if unable to comply with demand for inspection of particular item or category of item*]

1. Is unable to comply with Item No. _____ because _____ [*specify, e.g.,* the backup tapes no longer exist]. A diligent search and a reasonable inquiry has been made in an effort to comply with this demand.

[*OR, if objecting to entire item(s) or category(ies), state for each item or category*]

1. Objects to Item No. _____ in its entirety on the ground that _____ [*state ground for objection, e.g.,* it seeks electronically stored information from a source that is not reasonably accessible because of undue burden or expense].

[*OR, if objecting to part of item or category, state for each portion objected to*]

1. Objects to _____ [*specify, e.g.,* producing emails in native format. Pursuant to *Code Civ. Proc. § 2031.280(c),* Defendant will produce emails in PDF format]. [The remainder of Item No. _____ will be produced in native format.]

[*CONTINUE*]

2. [*Set forth, in successive paragraphs, similar responses bearing the same number, and in the same sequence, as each corresponding item or category in the demand.*]

Dated: _____.

[*EITHER, attorney signs if response contains one or more*

objections]

Dated: _____
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*demanding party's status and name*]

[*AND/OR, party, its agent or officer signs and verifies, unless response contains only objections*]

VERIFICATION

I, _____ [*name*], _____ [certify *or* declare] under penalty of perjury under the laws of the State of California that the foregoing responses are true and correct [*if declarant answering on behalf of corporation or other entity, add:* based on such information as is available to _____ (*name of party*), a _____ (*specify type of entity, e.g.,* corporation), which designated me as its agent to respond to the foregoing request].

_____ [*date*]
_____ [*signature*]

[2] Use of Form

The response set out in [1], *above*, is for use by a party who has been served with either a demand for production of ESI [*Code Civ. Proc. § 2031.210 et seq.*]. For the procedure to be followed in responding to a demand, *see § 195A.51*.

For discussion of strategic considerations and a step-by-step guide to responding to e-discovery demands, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 8, *Responding to Electronic Discovery Demands in California Court*. For guidance on gathering and producing ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 9, *Gathering and Producing Electronically Stored Information*.

[3] Content of Response

[a] Types of Responses

A separate response to each item or category of item is required. The response may be any of the following [*Code Civ. Proc. § 2031.210(a)*]:

- A statement that the party will comply with the particular demand for inspection by the date set for inspection under *Code Civ. Proc. § 2031.030(c)*.

- A representation that the party lacks the ability to comply with the demand for inspection of a particular item or category of item.

- An objection to the particular demand [*see* [b], *below*].

Each statement of compliance, each representation, and each objection in the response must bear the same number and be in the same sequence as the corresponding item or category in the inspection demand. The text of each of item or category need not be repeated in the response, however [*Code Civ. Proc. § 2031.210(c)*; *Cal. Rules of Ct., Rule 3.1000(b)*].

[b] Objections

An objection to an item, or category of items, in an inspection demand must do the following [*Code Civ. Proc. § 2031.240(b)*]:

- Identify with particularity any ESI falling within any category of item in the demand to which an objection is being made.

- Clearly set forth the extent of, and the specific ground for, the objection.

If only a part of an item, or category of item, in a demand is objectionable, the response must set out a statement of compliance, or a representation of inability to comply, with respect to the remainder of that item or category [*Code Civ. Proc. § 2031.240(a)*; *see* [a], *above*].

A party may object to a demand for discovery of ESI on the grounds that the ESI is from a source that is not reasonably accessible because of undue burden or expense. The responding party must identify in its response the types or categories of sources of ESI that it asserts are not reasonably accessible. By objecting and identifying the type or category of sources that are not reasonably accessible, the responding party preserves its objections relating to that ESI [*Code Civ. Proc. § 2031.210(d)*].

A responding party may object to the specified form for producing ESI and state the form in which it intends to produce each type of information [*Code Civ. Proc. § 2031.280(c)*].

Legal Topics:

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

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Chapter 196 DISCOVERY: REQUESTS FOR ADMISSIONS

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§ 196.31 State Statutes

§ 196.32 California Rules of Court

§ 196.33 Local Court Rules

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[5] Amendment or Withdrawal of Admission

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[5] Declaration for Additional Discovery

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§ 196.61 Request for Admissions [Code Civ. Proc. § 2033.010]--Judicial Council Form Requests [Code Civ. Proc. § 2033.710 et seq.; Cal. Judicial Council Form DISC-020]

[1] FORM

[2] Use of Form

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[3] Service of Requests and Statements

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§ 196.62 Response to Request for Admissions [Code Civ. Proc. §§ 2033.210-2033.250]

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[2] Use of Form

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[4] Types of Responses

[5] Signature

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§ 196.62A Proceedings for Order for Plaintiff to Make Early Requests for Admission and to Shorten Time for Response [Code Civ. Proc. §§ 2033.020, 2033.250]--Notice of Motion, Motion and Supporting Declaration

[1] FORM

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§ 196.62B Proceedings for Order for Plaintiff to Make Early Requests for Admission and to Shorten Time for Response [Code Civ. Proc. §§ 2033.020, 2033.250]--Order

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§ 196.63 Proceedings for Protective Order Concerning Request for Admissions [Code Civ. Proc. § 2033.080]--Notice of Motion and Supporting Declaration

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§ 196.64 Proceedings for Protective Order Concerning Request for Admissions [Code Civ. Proc. § 2033.080]--Order

[1] FORM

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§ 196.65 Proceedings for Order Requiring Further Response to Request for Admissions [Code Civ. Proc. § 2033.290]--Notice of Motion and Supporting Declaration

[1] FORM

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[2] Use of Form

[3] Contents of Separate Statement

§ 196.67 Proceedings for Order Requiring Further Response to Request for Admissions [Code Civ. Proc. § 2033.290]--Order

[1] FORM

[2] Use of Form

§ 196.68 Proceedings for Withdrawal of Admission [Code Civ. Proc. § 2033.300]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

§ 196.69 Proceedings for Withdrawal of Admission [Code Civ. Proc. § 2033.300]--Order

[1] FORM

[2] Use of Form

§ 196.70 Proceedings for Order That Matters Be Deemed Admitted [Code Civ. Proc. § 2033.280]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Monetary Sanction

§ 196.71 Proceedings for Order That Matters Be Deemed Admitted [Code Civ. Proc. § 2033.280]--Order

[1] FORM

[2] Use of Form

§ 196.72 Proceedings for Order That Matters Be Deemed Admitted Following Party's Failure to Obey Order to Make Further Response [Code Civ. Proc. § 2033.290]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

§ 196.73 Proceedings for Order That Matters Be Deemed Admitted Following Party's Failure to Obey Order to Make Further Response [Code Civ. Proc. § 2033.290]--Order

[1] FORM

[2] Use of Form

§ 196.74 Proceedings for Order Requiring Payment of Expenses of Proof [Code Civ. Proc. § 2033.420]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

§ 196.75 Proceedings for Order Requiring Payment of Expenses of Proof [Code Civ. Proc. § 2033.420]--Order

[1] FORM

[2] Use of Form

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PART I. SCOPE

16-196 California Forms of Pleading and Practice--Annotated § 196.01

§ 196.01 Scope of Chapter

This chapter covers discovery under the Civil Discovery Act using the discovery method of requests for admissions.

Part II [*see § 196.10* et seq.] has detailed discussion of the requirements and procedures relating to discovery by requests for admissions.

Part IV provides procedural checklists in the following subparts:

- Subpart A [*see § 196.40* et seq.] provides checklists for use by a party propounding requests for admissions.

- Subpart B [*see § 196.50*] provides checklists for use by a responding party.

Part V provides forms relating to discovery by requests for admissions, including the following:

- Forms for requests for admissions, including a form for specially drafted requests [*see § 196.60*], a reproduction of Judicial Council form requests [*see § 196.61*], and a reproduction of a Judicial Council form of request for statement of witnesses and evidence for limited civil cases [*see § 196.61A*].

- A form for a response to requests for admissions [*see § 196.62*].

- Forms for use in motion proceedings for a protective order in relation to discovery by requests for admissions [*see §§ 196.63, 196.64*].

- Forms for use in motion proceedings to compel a further response to requests for admissions [*see §§ 196.65 -196.67*].

- Forms for use in motion proceedings to withdraw or amend responses to a request for admissions [*see §§ 196.68, 196.69*].

- Forms for use in motion proceedings for an order directing that matters be deemed admitted following a party's failure to respond or provide further response to requests for admissions [*see §§ 196.70 -196.73*].

- Forms for use in motion proceedings for an order directing a party to pay the moving party's costs of proving an issue not properly admitted in response to requests for admission [*see §§ 196.74, 196.75*].

Legal Topics:

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

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16-196 California Forms of Pleading and Practice--Annotated § 196.02

§ 196.02 Cross References

[1] Related Discovery Chapters

For discussion and forms relating to the general purpose, scope, regulation, and timing of civil discovery, see Ch. 190, *Discovery: Scope, Regulation, and Timing* .

For detailed discussion of evidentiary privileges and other statutory or constitutional protections against disclosure, see Ch. 191, *Discovery: Privileges and Other Discovery Limitations* .

For discussion and forms relating to discovery sanctions generally, see Ch. 192, *Discovery: Sanctions for Discovery Misuse* .

For detailed discussion of discovery of electronically stored evidence (e-discovery), see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*.

For discussion and forms relating to the use of other particular discovery methods authorized by the Civil Discovery Act, see the following chapters covering each method:

- Ch. 193, *Discovery: Depositions*.
- Ch. 194, *Discovery: Interrogatories*.
- Ch. 195, *Discovery: Inspection of Tangible Evidence*.
- Ch. 197, *Discovery: Physical and Mental Examinations*.
- Ch. 198, *Discovery: Exchange of Expert Witness Information*.

For discussion and forms relating to the use of specified discovery methods for the purpose of preserving testimony or

other evidence prior to the commencement of an action or pending an appeal, see Ch. 199, *Discovery: Preservation of Evidence* .

For discussion and forms relating to the use of extraordinary writ proceedings to obtain interlocutory review of discovery orders, see Ch. 200, *Discovery: Review of Discovery Orders* .

For discussion of discovery in limited civil cases subject to the economic litigation provisions, including detailed discussion of the Judicial Council's form of interrogatories for economic litigation, see *Ch. 345A, Limited Civil Cases, §§ 345A.16, 345A.17*.

[2] Other Related Chapters

For discussion and a form for a request for admissions for use in various types of actions involving motor vehicles, see Ch. 85, *Automobiles: Discovery* .

For discussion of and general forms relating to law and motion procedures generally, see Ch. 372, *Motions and Orders*

These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsWritten Depositions

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16-196 California Forms of Pleading and Practice--Annotated §§ 196.03-196.09

[Reserved]

§§ 196.03[Reserved]

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16-196 California Forms of Pleading and Practice--Annotated § 196.10

§ 196.10 Governing Law

Discovery by requests for admissions pursuant to the Civil Discovery Act (*Code Civ. Proc. § 2016.010 et seq.*) is governed generally by *Code Civ. Proc. §§ 2033.010-2033.420*. Related provisions of the Civil Discovery Act include the provision for form requests, set out in *Code Civ. Proc. §§ 2033.710-2033.740* and the provisions governing discovery generally, set out in *Code Civ. Proc. §§ 2016.010-2019.030, 2023.010-2023.040*.

The extent of discovery permitted under the Civil Discovery Act is restricted in limited civil cases by the Economic Litigation provisions of *Code Civ. Proc. §§ 94* and *95*. The use of requests for admissions in such cases is limited specifically by *Code Civ. Proc. § 94(a)*. For further discussion, see *§ 196.13[2][b]* [*see also Ch. 190, Discovery: Scope, Regulation, and Timing, §§ 190.11[2], 190.23[2][a]*, Ch. 345A, *Limited Civil Cases*, §§ 345A.16, 345A.17].

Statewide rule provisions relating to the format, content, and service of discovery papers and motions, and to discovery sanctions, are set out in *Cal. Rules of Ct., Rules 3.1000*, 3.1345, 3.1346, 3.1347, and 3.1348.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsGeneral Overview

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16-196 California Forms of Pleading and Practice--Annotated § 196.11

§ 196.11 Nature and Purpose of Requests for Admissions

While most discovery procedures are aimed primarily at assisting counsel to prepare for trial, requests for admissions under former *Code Civ. Proc. § 2033* (*now see Code Civ. Proc. § 2033.010 et seq.*) are aimed primarily at setting a triable issue to rest so that it will not have to be litigated [*Cembrook v. Superior Court (1961) 56 Cal. 2d 423, 429, 15 Cal. Rptr. 127, 364 P.2d 303]* . Their fundamental purpose is to limit the triable issues and to spare the parties the burden and expense of litigating undisputed issues [*Brigante v. Huang (1993) 20 Cal. App. 4th 1569, 1576-1581, 25 Cal. Rptr. 2d 354 , disapproved on other grounds, Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 987 P.2d 727]* .

A request for admissions differs fundamentally from the other five discovery methods (depositions, interrogatories, inspection demands, medical examinations, and witness exchanges), which have as their main thrust the uncovering of factual data that may be used in proving things at trial. The request for admissions is a device that seeks to eliminate the need for proof in certain areas of the case [*Brigante v. Huang (1993) 20 Cal. App. 4th 1569, 1576-1581, 25 Cal. Rptr. 2d 354 , disapproved on other grounds, Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 987 P.2d 727]* .

Requests for admissions, however, should not be used as a substitute for the trial of genuinely disputed facts [*Hillman v. Stults (1968) 263 Cal. App. 2d 848, 885, 70 Cal. Rptr. 295]* , or as a substitute for discoveryprocedures to uncover evidence, such as an adversary's knowledge of the existence of certain facts [*International Harvester Co. v. Superior Court (1969) 273 Cal. App. 2d 652, 655, 78 Cal. Rptr. 515]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsContent & FormCivil ProcedureDiscoveryMethodsAdmissionsEffect

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16-196 California Forms of Pleading and Practice--Annotated § 196.12

§ 196.12 Matters Subject to Requests for Admission

Any party may serve a written request that any other party admit the genuineness of documents or the truth of any specified matters of fact, opinion relating to fact, or application of law to fact set forth in the request [*Code Civ. Proc. § 2033.010*]. A request for admission may relate to a matter that is in controversy between the parties [*Code Civ. Proc. § 2033.010*].

The requested matter must be within the general scope of discovery as provided by *Code Civ. Proc. § 2017.010 et seq.* and as limited by *Code Civ. Proc. § 2019.010 et seq.* [*Code Civ. Proc. § 2033.010*]. The general scope of discovery under *Code Civ. Proc. § 2017.010 et seq.* permits the discovery of any matter that is not privileged so long as it is relevant to the subject matter [*Code Civ. Proc. § 2017.010*]. Thus, requests for admission are generally authorized in regard to all matters relevant to the subject matter or reasonably calculated to lead to admissible evidence [*see Cembrook v. Superior Court (1961) 56 Cal. 2d 423, 429, 15 Cal. Rptr. 127, 364 P.2d 303* (prior law); *Cembrook v. Sterling Drug, Inc. (1964) 231 Cal. App. 2d 52, 62, 41 Cal. Rptr. 492* (prior law)]. For detailed discussion of scope under *Code Civ. Proc. § 2017.010 et seq.*, and the general restrictions or regulatory provisions of *Code Civ. Proc. § 2019.010 et seq.*, see *respectively Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.20 et seq. and § 190.30* et seq. For detailed discussion of privileges and other protections against disclosure, such as the attorney work product protection of *Code Civ. Proc. § 2018.010 et seq.*, see Ch. 191, *Discovery: Privileges and Other Discovery Limitations* .

Because requests are aimed at expediting trial, a request is not improper merely because it requests the admission of a controversial matter or one involving complex facts. If the litigant is able to make the admission, the time for making it is during discovery procedures and not at trial [*Cembrook v. Superior Court (1961) 56 Cal. 2d 423, 429, 15 Cal. Rptr. 127, 364 P.2d 303* (prior law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsContent & Form

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16-196 California Forms of Pleading and Practice--Annotated § 196.13

§ 196.13 Procedure for Requests

[1] Time for Making Requests

A defendant may make requests for admission by a party without leave of court at any time [*Code Civ. Proc. § 2033.020(a)*]. A plaintiff may make requests for admission by a party without leave of court at any time that is 10 days after the service of the summons on, or, in unlawful detainer actions or other proceedings under *Code Civ. Proc. § 1159 et seq.*, (forcible entry and detainer), five days after service of the summons on, or appearance by, that party, whichever occurs first [*Code Civ. Proc. § 2033.020(b), (c)*].

However, on motion with or without notice, the court, for good cause shown, may grant leave to a plaintiff to make requests for admission at an earlier time [*Code Civ. Proc. § 2033.020(d)*]. For a form for a notice of motion and motion to shorten the time for response, see *§ 196.62A*. For a form for an order, see *§ 196.62B*.

[2] Number of Requests

[a] Unlimited Civil Cases

No party is permitted to request, as a matter of right, any other party to admit more than 35 matters that do not relate to the genuineness of documents [*Code Civ. Proc. § 2033.030(a)*]. Unless a declaration for additional discovery as described in *Code Civ. Proc. § 2033.050* has been made, a party need only respond to the first 35 admission requests served that do not relate to the genuineness of documents, if that party states an objection to the balance under *Code Civ. Proc. § 2033.230* on the ground that the limit has been exceeded [*Code Civ. Proc. § 2033.030(b)*; *see Code Civ. Proc. § 2033.230*, discussed in *§ 196.16[4]*].

The number of requests for admission of the genuineness of documents is not limited, except as justice requires to protect the responding party from annoyance, embarrassment, oppression, or undue burden and expense [*Code Civ. Proc. § 2033.030(c)*; for discussion of protective orders, *see § 196.14*].

Subject to the right of the responding party to seek a protective order under *Code Civ. Proc. § 2033.080*, any party who attaches a declaration for additional discovery as described in *Code Civ. Proc. § 2033.050* may request a greater number

of admissions by another party if the greater number is warranted by the complexity or the quantity of the existing and potential issues in the particular case [*Code Civ. Proc. § 2033.040(a)*].

Any party who is requesting or who has already requested more than 35 admissions not relating to the genuineness of documents by any other party must attach to each set of requests for admissions a declaration for additional discovery as set forth in *Code Civ. Proc. § 2033.050*. For a form for a request for admissions that includes a declaration for additional discovery, see *§ 196.60*.

[b] Limited Civil Cases

The number of requests for admissions is further restricted in limited civil cases [*see Code Civ. Proc. § 91*]. In these cases, a party may use, as to any adverse party, a combination of 35 of the following forms of discovery [*Code Civ. Proc. § 94(a)*]:

- Interrogatories (with no subparts) under *Code Civ. Proc. § 2030.010 et seq.* [*see* generally Ch. 194, *Discovery: Interrogatories*].

- Demands to produce documents or things under *Code Civ. Proc. § 2031.010 et seq.* [*see* generally Ch. 195, *Discovery: Inspection of Tangible Evidence*].

- Demands to produce electronically stored information under *Code Civ. Proc. § 2031.010 et seq.* [*see generally* Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*].

- Requests for admission (with no subparts) under *Code Civ. Proc. § 2033.010 et seq.*

For further discussion of discovery in limited civil cases, see *Ch. 190, Discovery: Scope, Regulation, and Timing, §§ 190.11[2], 190.23*.

[3] Form of Requests

A request for admission must be written [*see Code Civ. Proc. § 2033.010*]. It should not contain questions to be answered, but should consist of statements of facts to be admitted [*Lieb v. Superior Court (1962) 199 Cal. App. 2d 364, 367, 18 Cal. Rptr. 705]* .

The request may not be combined in a single document with any other method of discovery [*Code Civ. Proc. § 2033.060(h)*].

For forms and further discussion of the format and contents of a request for admissions, see *§§ 196.60* and *196.61*.

[4] Attachment of Copies of Documents

A party requesting an admission of the genuineness of any documents must attach copies of those documents to the requests, and make the original of those documents available for inspection on demand by the party to whom the requests for admission are directed [*Code Civ. Proc. § 2033.060(g)*].

[5] Service of Requests

The party requesting admissions must serve a copy of them on the party to whom they are directed and on all other parties who have appeared in the action [*Code Civ. Proc. § 2033.070*].

[6] Retention of Requests

A request for admissions may not be filed with the court, unless offered as relevant under a law and motion proceeding or other hearing or ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(10)*]. Instead, the serving party retains the original and the proof of service until six months after final disposition of the cause, unless otherwise ordered by the court for cause [*Cal. Rules of Ct., Rule 3.250(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-196 California Forms of Pleading and Practice--Annotated § 196.14

§ 196.14 Protective Orders

[1] Motion for Protective Order

When requests for admission have been made, the responding party may promptly move for a protective order [*Code Civ. Proc. § 2033.080(a)*]. The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [*see Code Civ. Proc. § 2033.080(a)*; *see also* general discussion of good faith attempt requirements in Ch. 190, *Discovery: Scope, Regulation, and Timing*, § 190.33[1]]. For a form for a motion for a protective order in the context of requests for admissions, see *§ 196.63*.

[2] Types of Protective Order

The court, for good cause shown, may make any order that justice requires to protect any party from annoyance, embarrassment, oppression, or undue burden and expense [*Code Civ. Proc. § 2033.080(b)*]. This protective order may include, but is not limited to, one or more of the following directions [*Code Civ. Proc. § 2033.080(b)*]:

- That the set of admission requests, or particular requests in the set, need not be answered at all [*Code Civ. Proc. § 2033.080(b)(1)*].

- That, contrary to the representations made in a declaration for additional discovery, the number of admission requests is unwarranted [*Code Civ. Proc. § 2033.080(b)(2)*].

- That the time specified to respond to the set of admission requests, or to particular requests in the set, be extended [*Code Civ. Proc. § 2033.080(b)(3)*].

- That a trade secret or other confidential research, development, or commercial information not be admitted or be admitted only in a certain way [*Code Civ. Proc. § 2033.080(b)(4)*].

- That some or all of the answers to requests for admission be sealed and thereafter opened only on order of the court [*Code Civ. Proc. § 2033.080(b)(5)*].

[3] Determination of Motion

If the responding party seeks a protective order on the ground that the number of requests for admission is unwarranted [*see* [2], *above*], the propounding party has the burden of justifying the number of requests for admission [*Code Civ. Proc. § 2033.040(b)*].

The court must impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2033.080(d)*; *see Code Civ. Proc. § 2023.010 et seq.*]. For further discussion of this general provision for monetary sanctions, see *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[2]* and *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.12, 192.14*.

If the motion for a protective order is denied in whole or in part, the court may order that the responding party provide or permit the discovery against which protection was sought on terms and conditions that are just [*Code Civ. Proc. § 2033.080(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsAdmissionsContent & FormCivil ProcedureDiscoveryProtective Orders

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§ 196.15 Response to Request

The party to whom requests for admission have been directed must respond separately to each request. Each response must answer the substance of the requested admission, or set forth an objection to the particular request [*Code Civ. Proc. § 2033.210*]. For responses by answer or by objection, see *respectively § 196.16[1]* and *[2]*.

The response must be in writing [*Code Civ. Proc. § 2033.210(a)*]. It must be signed under oath by the responding party unless it consists entirely of objections [*Code Civ. Proc. §§ 2033.210(a), 2033.240*; for further discussion *see* [3], *below*].

For a form for a response, see *§ 196.62*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsResponses

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§ 196.16 Procedure for Responding to Request

[1] Response by Answer

[a] Types of Answers

Each answer in the response to a request for admissions must do all of the following [*Code Civ. Proc. § 2033.220(b)*]:

- Admit as much of the matter involved in the request as is true, either as expressed in the request itself or as reasonably and clearly qualified by the responding party [*see also* [b] and [d], *below*].

- Deny as much of the matter involved in the request as is untrue [*see also* [c] and [d], *below*].

- Specify as much of the matter involved in the request as to the truth of which the responding party lacks sufficient information or knowledge [*see also* [c], *below*].

[b] Content of Answer

Each answer in a response must be as complete and straightforward as the information reasonably available to the responding party permits [*Code Civ. Proc. § 2033.220(a)*].

[c] Answer by Denial or Statement of Inability to Admit or Deny

If a litigant has denied a particular matter, the court cannot force him or her to admit it even if the matter clearly appears to be true [*see Holguin v. Superior Court (1972) 22 Cal. App. 3d 812, 820, 99 Cal. Rptr. 653]* . However, by denying the facts for which admissions were requested and thereby putting the requesting party to its proof, the responding party risks being surcharged with costs pursuant to *Code Civ. Proc. § 2033.420* if the requesting party ultimately proves the fact involved [*see Chodos v. Superior Court (1963) 215 Cal. App. 2d 318, 324, 30 Cal. Rptr. 303* (prior law)]. For discussion concerning recovery of expenses of proof under *Code Civ. Proc. § 2033.420*, see *§ 196.21*.

If a responding party gives lack of information or knowledge as a reason for a failure to admit all or part of a request for

admission, that party must state in the answer that a reasonable inquiry concerning the matter in the particular request has been made and that the information known or readily obtainable is insufficient to enable that party to admit the matter [*Code Civ. Proc. § 2033.220(c)*; *see Lindgren v. Superior Court (1965) 237 Cal. App. 2d 743, 746-747, 47 Cal. Rptr. 298* (prior law); *Chodos v. Superior Court (1963) 215 Cal. App. 2d 318, 323, 30 Cal. Rptr. 303* (under prior law, responding party must make reasonable investigation to determine at time of responding whether it will dispute matters involved at trial)].

[d] Answer on Information and Belief

A party may answer a request for admission by stating that he or she has been informed and believes in either the truth or the falsity of the requested matters [*Chodos v. Superior Court (1963) 215 Cal. App. 2d 318, 322-323, 30 Cal. Rptr. 303* ; *Cohen v. Superior Court (1976) 63 Cal. App. 3d 184, 187, 133 Cal. Rptr. 575]* .

[2] Response by Objection

If an objection is made to a request or to a part of a request, the specific ground for the objection must be set forth clearly in the response [*Code Civ. Proc. § 2033.230(b)*].

If an objection is based on a claim of privilege, the particular privilege invoked must be clearly stated. If an objection is based on a claim that the matter as to which an admission is requested is protected work product under *Code Civ. Proc. § 2018.010 et seq.*, that claim must be expressly asserted [*Code Civ. Proc. § 2033.230(b)*]. For detailed discussion of privileges and attorney work product protection, see Ch. 191, *Discovery: Privileges and Other Discovery Limitations* .

If only a part of a request for admission is objectionable, the remainder of the request must be answered [*Code Civ. Proc. § 2033.230(a)*].

Courts have held that the following are not proper grounds for objecting to a request for admissions [*see Cembrook v. Superior Court (1961) 56 Cal. 2d 423, 429, 15 Cal. Rptr. 127, 364 P.2d 303* ; *Hillman v. Stults (1968) 263 Cal. App. 2d 848, 885, 70 Cal. Rptr. 295]* :

- The request calls for opinions, conclusions, and interpretations of the litigant.
- The request call for answers to intricate and controversial matters.
- The request relates to matters that cannot be clearly admitted or denied.
- The request calls for admissions of the truth of matters included in previously taken deposition testimony or of which the party already knows the truth.

For discussion of waiver for failure to make a timely objection, see *§ 196.17*.

[3] Signature Under Oath

The party to whom the requests for admission are directed must sign the response under oath, unless the response contains only objections [*Code Civ. Proc. § 2033.240(a)*; *see Code Civ. Proc. § 2015.5* (use of declaration under penalty of perjury)].

If the responding party is a public or private corporation, a partnership or association, or a governmental agency, one of its officers or agents must sign the response under oath on behalf of that party. If the officer or agent signing the response on behalf of that party is an attorney acting in that capacity for the party, that party waives any lawyer-client

privilege and any protection for work product under *Code Civ. Proc. § 2018.010 et seq.* during any subsequent discovery from that attorney concerning the identity of the sources of the information contained in the response [*Code Civ. Proc. § 2033.240(b)*].

The response of an individual party to the request for admissions must be personally verified by the party. Although *Code Civ. Proc. § 446* allows verification by the attorney when his or her client is out of the county, it applies only to pleadings and not to a request for admissions, because a central purpose of a sworn statement under former *Code Civ. Proc. § 2033* (*now see Code Civ. Proc. § 2033.010 et seq.*) is to establish unequivocally those matters admitted in the response [*Steele v. Totah (1986) 180 Cal. App. 3d 545, 550-551, 225 Cal. Rptr. 635* (prior law)].

If the responses are verified by defendant's counsel because the defendant cannot be located, a court should not automatically deem all of the request for admissions to be admitted without exercising its discretion to determine whether a less drastic remedy is appropriate. In such a case, the court has the power to fashion a remedy that will do justice, such as deeming only some requests admitted or relieving the defense from admitting or denying requests on a showing of efforts made to locate the defendant [*Brigante v. Huang (1993) 20 Cal. App. 4th 1569, 1582-1588, 25 Cal. Rptr. 2d 354* , *disapproved on other grounds,* *Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 987 P.2d 727* (defendant's counsel may raise issue of oppression by opposing motion to have requests deemed admitted, without filing separate motion for protective order)].

An unsworn statement may be considered as no response at all [*Zorro Inv. Co. v. Great Pac. Sec. Corp. (1977) 69 Cal. App. 3d 907, 914, 138 Cal. Rptr. 410]* . For example, in a case in which the plaintiffs made objections to a request for admissions but failed to provide any answers and did not verify their response, the unsworn response was held to be no response at all [*Appleton v. Superior Court (1988) 206 Cal. App. 3d 632, 634-636, 253 Cal. Rptr. 762]* .

[4] Time for Responding

The party to whom the requests are directed normally must serve the response within 30 days [*Code Civ. Proc. § 2033.250(a)*].

If the requests were served by mail, the 30-day response period is extended 5 calendar days if the place of address is within California, 10 calendar days if the place of address is outside California but within the United States, or 20 calendar days if the place of address is outside the United States [*see Code Civ. Proc. §§ 1013(a), 2016.050*]. The period is extended two court days if service is by express mail or fax [*see Code Civ. Proc. § 1013(c), (e)*].

On motion of the requesting party the court may shorten the time for response and, on motion of the responding party, the court may extend the time for response [*Code Civ. Proc. § 2033.250(a)*]. For a form for a notice of motion and motion for leave to shorten the time for response, see *§ 196.62A.*

In unlawful detainer actions or other proceedings under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), the party to whom the request is directed has at least five days from the date of service to respond, unless on motion of the requesting party, the court has shortened the time for response, or unless on motion of the responding party, the court has extended the time for response [*Code Civ. Proc. § 2033.250(b)*].

The party requesting admissions and the responding party may agree to extend the time for service of a response to a set of admission requests, or to particular requests. This agreement may be informal, but it must be confirmed in a writing that specifies the extended date for service of a response. Unless this agreement expressly states otherwise, it is effective to preserve to the responding party the right to respond to any request for admission to which the agreement applies in any authorized manner. Notice of this agreement must be given by the responding party to all other parties who were served with a copy of the request [*Code Civ. Proc. § 2033.260*]. An agreement to extend time for response may not be filed unless offered as relevant to the determination of an issue in a law and motion proceeding or other hearing, or is

ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(7)*]. The original of the agreement must be retained until six months after final disposition of the cause, unless the court on motion of any party and for good cause shown orders the original papers preserved for a longer period [*Cal. Rules of Ct., Rule 3.250(b)*].

[5] Service of Response

The party to whom the requests are directed must serve the original of the response to them on the requesting party and a copy of the response on all other parties who have appeared in the action [*Code Civ. Proc. § 2033.250(a)*].

[6] Amendment or Withdrawal of Responses

A party may amend or withdraw an admission made in response to a request for admission but only on leave of court granted after notice to all parties. The court may permit withdrawal or amendment of an admission only if it determines that the admission was the result of mistake, inadvertence, or excusable neglect and that the party who obtained the admission will not be substantially prejudiced in maintaining that party's action or defense on the merits [*Code Civ. Proc. § 2033.300*]. Any doubts in ruling on a motion to withdraw or amend an admission must be resolved in favor of the moving party [*New Albertsons, Inc. v. Superior Court (2008) 168 Cal. App. 4th 1403, 1408, 1420, 86 Cal. Rptr. 3d 457* (policy in favor of trial on merits required granting motion to withdraw admission, because defendant's mistake in admitting matter was not inexcusable, and withdrawal would not substantially prejudice plaintiffs)]. For a form for a motion to amend or withdraw an admission, see *§ 196.68*.

The court may impose conditions on the granting of the motion that are just, including, but not limited to, an order that (1) the party who obtained the admission be permitted to pursue additional discovery related to the matter involved in the withdrawn or amended admission, and (2) the costs of any additional discovery be borne in whole or in part by the party amending or withdrawing the admission [*Code Civ. Proc. § 2033.300(c)*].

Relief under former *Code Civ. Proc. § 2033(m)* (*now see Code Civ. Proc. § 2033.300*) is available for all admissions, and thus permits withdrawal or amendment not only of actual admissions included in a response, but also of those admissions that are "deemed" due to a failure to respond [*Wilcox v. Birtwhistle (1999), 21 Cal. 4th 973, 983, 90 Cal. Rptr. 2d 260, 263, 987 P.2d 727]* . The Supreme Court, in adopting this position, concluded that applying former *Code Civ. Proc. § 2033(m)* (*now see Code Civ. Proc. § 2033.300*) to all admissions, including deemed admissions, was more consistent with both the statutory language and legislative history of *Code Civ. Proc. § 2033.300* [*Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 978-983, 90 Cal. Rptr. 2d 260, 263-266, 987 P.2d 727]* , and in so holding rejected the majority view of prior court of appeal decisions, which had held that former *Code Civ. Proc. § 2033(n)* (*now see Code Civ. Proc. § 2033.300*) applies only to actual admissions included in a response and not to deemed admissions [*see, e.g., Courtesy Claims Service, Inc. v. Superior Court (1990) 219 Cal. App. 3d 52, 268 Cal. Rptr. 30 , disapproved, Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 987 P.2d 727]* .

Aside from the motion procedure of *Code Civ. Proc. § 2033.300*, under which an original admission may be corrected or withdrawn due to mistake, inadvertence, or excusable neglect, there is no other mechanism for updating responses to requests for admission, and no ongoing duty do so. Thus, the admitting party's "informal notification to the opposing party of a change in case theory does not obviate the conclusive effect of judicial admissions" [*Valerio v. Andrew Youngquist Constr. (2002) 103 Cal. App. 4th 1264, 1272-1274, 127 Cal. Rptr. 2d 436* (plaintiff was not entitled to recover in quantum meruit when he admitted existence of written contract in response to request for admissions, and failed to take necessary procedural steps under former *Code Civ. Proc. § 2033(m)* (*now see Code Civ. Proc. § 2033.300*) to remove these conclusive judicial admissions)]. Further, when an admission is based on present knowledge, and there is nothing mistaken, inadvertent, or neglectful about this admission, the admitting party has no duty to update the admission to reflect subsequently discovered evidence [*Burch v. Gombos (2000) 82 Cal. App. 4th 352, 356, 98 Cal. Rptr. 2d 119* ; *see also* discussion in *§ 196.19*].

[7] Retention of Responses or Objections

Responses or objections to a request for admissions may not be filed with the court, unless offered as relevant under a law and motion proceeding or other hearing or ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(10)*]. Instead, the serving party retains the original and the proof of service until six months after final disposition of the cause, unless otherwise ordered by the court for cause [*Cal. Rules of Ct., Rule 3.250(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsContent & FormCivil ProcedureDiscoveryMethodsAdmissionsObjectionsCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryMethodsAdmissionsWithdrawals

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§ 196.17 Consequences of Failure to Serve Timely Response

If a party to whom requests for admission have been directed fails to serve a timely response, that party thereby waives any objection to the requests, including one based on privilege or on the protection for work product under *Code Civ. Proc. § 2018.010 et seq.* [*Code Civ. Proc. § 2033.280*]. On motion by the responding party, however, the court may relieve that party from this waiver on its determination that (1) the party has subsequently served a response that is in substantial compliance with the requirements for a valid response, and (2) the party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect [*Code Civ. Proc. § 2033.280*].

The requesting party, after a responding party has failed to serve a timely response, may move for an order directing that the genuineness of any documents and the truth of any matters specified in the request be deemed admitted. The motion may also request a monetary sanction [*Code Civ. Proc. § 2033.280(b)*].

The court is required to grant this motion unless it finds that the party to whom the requests for admission have been directed has served, before the hearing on the motion, a proposed response to the requests for admission that is in substantial compliance with the requirements for a valid response. It is mandatory that the court impose a monetary sanction on the party whose failure to serve a timely response to requests for admission necessitated the motion [*Code Civ. Proc. § 2033.280(c)*; *see Allen-Pacific, Ltd. v. Superior Court (1997) 57 Cal. App. 4th 1546, 1550-1552, 67 Cal. Rptr. 2d 804 , disapproved on other grounds, Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 987 P.2d 727 ; Appleton v. Superior Court (1988) 206 Cal. App. 3d 632, 635, 253 Cal. Rptr. 762]* . For a form of motion that matters be deemed admitted under *Code Civ. Proc. § 2033.280*, see *§ 196.70*.

A court may not grant an order deeming the genuineness of any documents and the truth of any matters specified in the requests for admission if a proposed response is served before the hearing date and there has been no finding that the responses are not in substantial compliance with former *Code Civ. Proc. § 2033(f)(1)* (*now see Code Civ. Proc. § 2033.220*) [*Tobin v. Oris (1992) 3 Cal. App. 4th 814, 828, 4 Cal. Rptr. 2d 736 , disapproved on other grounds, Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 987 P.2d 727]* .

A proposed response that is in substantial compliance is the only reason for the court not to issue an order deeming the matters raised in the request admitted [*Allen-Pacific, Ltd. v. Superior Court (1997) 57 Cal. App. 4th 1546, 1550-1551,*

67 Cal. Rptr. 2d 804 , disapproved on other grounds, Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 267, 987 P.2d 727] . The court has no authority to make an exception on any other basis. Thus, an order that denied a request that matters be deemed admitted in "the interests of justice" and gave the responding party an additional 20 days to respond was improper [*Courtesy Claims Service, Inc. v. Superior Court (1990) 219 Cal. App. 3d 52, 55, 268 Cal. Rptr. 30 , disapproved on other grounds, Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 267, 987 P.2d 727]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryMethodsAdmissionsWithdrawalsCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersWork ProductWaivers

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§ 196.18 Compelling Further Response

[1] Motion to Compel

If the party requesting admissions, on receipt of the response, deems that (1) an answer to a particular request is evasive or incomplete or (2) an objection to a particular request is without merit or is too general, the requesting party may move for an order compelling a further response [*Code Civ. Proc. § 2033.290(a)*]. The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by it [*Code Civ. Proc. § 2033.290(b)*; *see* general discussion of good faith attempt requirements in Ch. 190, *Discovery: Scope, Regulation, and Timing*, § 190.33[1]].

For a form for a motion to compel a further response, see *§ 196.65*.

[2] Time for Making Motion; Waiver

Unless notice of the motion for an order compelling a further response is given within 45 days of the service of the response, or of any supplemental response, or by any specific later date to which the requesting party and the responding party have agreed in writing, the party requesting admissions waives any right to compel further response to the requests for admission [*Code Civ. Proc. § 2033.290(c)*].

If the response was served by mail, the 45-day deadline is extended 5 calendar days if the place of address is within California, 10 calendar days if the place of address is outside California but within the United States, or 20 calendar days if the place of address is outside the United States [*see Code Civ. Proc. §§ 1013(a), 2016.050*]. The period is extended two court days if service is by express mail or fax [*see Code Civ. Proc. § 1013(c),(e)*].

[3] Accompanying Separate Statement

A motion to compel further responses to requests for admission must be accompanied by a separate statement [*Cal. Rules of Ct., Rule 3.1345(a)(1)*]. This statement is to consist of a separate document that sets out all the information necessary to understand each discovery request and all the responses to it that are in issue. It must be full and complete so that no person is required to review any other document in order determine the full request and the full response.

Material may not be incorporated by reference [*Cal. Rules of Ct., Rule 3.1345(c)*]. For a form of separate statement and further discussion of the required contents as to each request in issue, see *§ 196.66*.

[4] Sanctions

The court must impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further response, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2033.290(d)*; for further discussion of this general provision, *see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[2]*].

The court may award sanctions in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed [*Cal. Rules of Ct., Rule 3.1348(a)*]. The court may not, however, deem the opposing party's failure to file written opposition, failure to appear at a hearing, or voluntary provision discovery to be an admission that the motion was proper or that sanctions should be awarded [*Cal. Rules of Ct., Rule 3.1348(b)*].

For further discussion of monetary sanctions generally, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.12, 192.14*.

If a party fails to obey an order compelling further response to requests for admission, the court may order that the matters involved in the requests be deemed admitted. In lieu of or in addition to this order, the court may impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* [*Code Civ. Proc. § 2033.290(e)*]. For a form of motion for an order directing that matters be deemed admitted, and sanctions imposed, for failure to obey an order requiring a further response, see *§ 196.72*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryPrivileged MattersGeneral Overview

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§ 196.19 Effect of Admissions

Any matter admitted in response to a request for admission is conclusively established against the party making the admission in the pending action, unless the court has permitted withdrawal or amendment of that admission [*Code Civ. Proc. § 2033.410(a)*; *see* discussion in *§ 196.16[6]*]. However, any admission made in the response is binding only on the responding party and only for the purposes of the pending action. It is not an admission by that party for any other purpose, and it may not be used in any manner against that party in any other proceeding [*Code Civ. Proc. § 2033.410(b)*].

Because the admission of a fact may be deceptive when the fact admitted may have different meanings, not all of which reflect the admitting party's reasonable understanding, the trial court has the discretion to admit evidence to elucidate and explain an admission. Through its discretion, the court may ensure that the request for admission is not misused as a device to hide or confuse issues [*Fredericks v. Kontos Industries, Inc. (1987) 189 Cal. App. 3d 272, 277-278, 234 Cal. Rptr. 395* (prior law)]. In *Fredericks*, for example, one party admitted to having agreed to make contract payments in a certain manner. The court of appeal in that case held that the trial court could properly admit evidence offered by the admitting party, to the effect that the agreement to pay in a certain manner was contingent on certain work taking place first [*Fredericks v. Kontos Industries, Inc. (1987) 189 Cal. App. 3d 272, 277, 234 Cal. Rptr. 395* (prior law); *cf. Valerio v. Andrew Youngquist Constr. (2002) 103 Cal. App. 4th 1264, 1273, 127 Cal. Rptr. 2d 436* (finding *Fredericks v. Kontos Industries, Inc.* inapplicable when there was no ambiguity in plaintiff's understanding at the time he responded to requests for admissions and plaintiff simply filed a mistaken response that he never later moved to amend or withdraw)].

In another case, one party made an admission, several months before trial, that it had no evidence of public recreational use prior to 1972 of a particular property. A few weeks after making this admission, however, the admitting party discovered new evidence of such recreational use, and successfully presented this evidence at trial. The trial court, relying on *Fredericks*, found that the party's admission was limited to its knowledge at the time the admission was made; it was not some sort of promise that the admitting party would not locate evidence in the future. The court of appeal held that the trial court properly limited the effect of the admission and properly admitted the subsequently discovered evidence [*Burch v. Gombos (2000) 82 Cal. App. 4th 352, 359-360, 98 Cal. Rptr. 2d 119]* . The court of appeal noted that the case should act as a "cautionary tale" to parties propounding requests for admission: they should

take care to seek admissions addressing matters of historical fact as distinguished from those regarding a matter of the party's present knowledge. Because an admitting party has no duty to update admissions to reflect newly discovered evidence [*see* discussion in *§ 196.16[6]*], a propounding party must in this way frame its requests so as to avoid being "sandbagged" by the admission at trial of evidence on an issue it had deemed to be eliminated by the admission [*Burch v. Gombos (2000) 82 Cal. App. 4th 352, 360, 98 Cal. Rptr. 2d 119]* .

Because an admission is for the purpose of the pending action only and a complaint and cross complaint have been held to be separate actions in other contexts, an admission made by a defendant to a plaintiff may not be binding on the defendant in a cross action against a third party. For example, in a personal injury action by a carpenter against a general contractor, the defendant's responses to the plaintiff's request for admissions regarding the cause of a construction accident were not binding on the defendant in its cross action against a subcontractor for indemnity [*Shepard & Morgan v. Lee & Daniel, Inc. (1982) 31 Cal. 3d 256, 259-262, 182 Cal. Rptr. 351, 643 P.2d 968]* . However, because one party in a case may enjoy the benefits of discovery obtained by other parties in that same case, admissions, whether express or by operation of law, may be used by all parties to a single action [*Swedberg v. Christiana Community Builders (1985) 175 Cal. App. 3d 138, 143-144, 220 Cal. Rptr. 544]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 196.20 Use of Admissions

A motion for summary judgment may be supported by an admission [*see Code Civ. Proc. § 437c(b)(1)*; *Gribin Von Dyl & Associates, Inc. v. Kovalsky (1986) 185 Cal. App. 3d 653, 662-663, 230 Cal. Rptr. 50]* .

The Discovery Act does not specify how the response may be used at trial [*see Code Civ. Proc. § 2033.410*]. If matters in an unlimited civil case have been admitted or deemed admitted, counsel for the propounding party may wish to request a case management conference if one has not been ordered,so that the judge may limit the issues to be tried [*see Cal. Rules of Ct., Rule 3.722*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 196.21 Sanctions for Unjustified Denial

[1] Motion for Expenses Incurred in Proving Matter Not Properly Admitted

If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under *Code Civ. Proc. § 2033.010 et seq.*, and if the party requesting that admission thereafter proves the genuineness of the document or the truth of the matter, the requesting party may move the court for an order requiring the responding party to pay reasonable expenses incurred in making that proof, including reasonable attorney's fees [*Code Civ. Proc. § 2033.420(a)*].

The requesting party need not be the prevailing party in the action to be entitled to this type of sanction [*see Smith v. Circle P Ranch Co. (1978) 87 Cal. App. 3d 267, 275, 150 Cal. Rptr. 828* (prior law)].

For a form for a motion for expenses of proof, see *§ 196.74*.

[2] Factors in Determining Motion

The court is required to make this order unless it finds that (1) an objection to the request was sustained or a response to it was waived, (2) the admission sought was of no substantial importance, (3) the party failing to make the admission had reasonable ground to believe that that party would prevail on the matter, or (4) there was other good reason for the failure to admit [*Code Civ. Proc. § 2033.420(b)*; *see also* further discussion in [3] and [4], *below*].

Thus, in determining whether sanctions are appropriate, the factors the court should consider include the following [*Brooks v. American Broadcasting Co. (1986) 179 Cal. App. 3d 500, 509-511, 224 Cal. Rptr. 838]* :

- Whether at the time the request was denied it was reasonably possible for the party making the denial to have appreciated that the requested admission involved a central issue in the case.

- The degree to which the party making the denial attempted in good faith to reach a reasonable resolution of the matters involved.

- Whether at the time the request was denied the party making the denial held a reasonably entertained good faith belief that the party would prevail on the issue at trial.

If a party justifiably denies a request for admission based on the information available at the time of the denial, but later acquires information indicating that the request should have been admitted, the court should consider whether that party later advised the proponent that the denial was in error or should be modified or whether that party let the initialdenial stand [*Brooks v. American Broadcasting Co. (1986) 179 Cal. App. 3d 500, 509-511, 224 Cal. Rptr. 838* ; *but see Burch v. Gombos (2000) 82 Cal. App. 4th 352, 356, 98 Cal. Rptr. 2d 119* and discussion in *§ 196.16[6]*].

Although expenses of proof may not be awarded merely because the response to a request for admissions was that the party could not truthfully admit or deny, the sanctions is proper if the party had access to the information at the time the request was propounded, because the responding party has a duty to investigate [*see Smith v. Circle P. Ranch Co. (1978) 87 Cal. App. 3d 267, 275, 276-277, 150 Cal. Rptr. 828* (prior law)]. The sanction also is proper if the evidence establishes that a statement of lack of information was false [*see, e.g., Allen v. Pitchess (1973) 36 Cal. App. 3d 321, 332, 111 Cal. Rptr. 658* (prior law)].

[3] Good Cause for Denial

For the court to properly award sanctions under *Code Civ. Proc. § 2033.420*, there must have been no good reason for the failure to admit [*Code Civ. Proc. § 2033.420(b)*; *see Hillman v. Stults (1968) 263 Cal. App. 2d 848, 886, 70 Cal. Rptr. 295* (prior law); *see also* [2], *above*].

A party has good cause for denying a matter within the meaning of *Code Civ. Proc. § 2033.420* if there is a serious and real contest as to the subject matter of the requested admission [*see Chodos v. Superior Court (1963) 215 Cal. App. 2d 318, 324, 30 Cal. Rptr. 303* (prior law)]. However, the fact that a party "hotly contests" an issue does not necessarily mean that the party had a good faith belief that he or she would prevail on the issue [*Brooks v. American Broadcasting Co. (1986) 179 Cal. App. 3d 500, 511, 224 Cal. Rptr. 838* (prior law)].

The fact that the matters that were denied were later proved by uncontradicted evidence does not mean that the denial was unreasonable per se. *Code Civ. Proc. § 2033.420* is calculated only to compel admissions as to all things that cannot reasonably be controverted [*see Haseltine v. Haseltine (1962) 203 Cal. App. 2d 48, 61, 21 Cal. Rptr. 238* (prior law)].

[4] Issue of Substantial Importance

For the court to award sanctions properly under *Code Civ. Proc. § 2033.420*, the admission sought must have been of substantial importance [*Code Civ. Proc. § 2033.420(b)(2)*; *see* [2], *above*].

A request for admission will be of substantial importance when the subject of the matter requested for admission has at least some direct relationship to one of the central issues in the case. A central issue in the case is one that, if not proven, would have altered the results in the case [*Wimberly v. Derby Cycle Corp. (1997) 56 Cal. App. 4th 618, 634-635, 65 Cal. Rptr. 2d 532* ; *see Brooks v. American Broadcasting Co. (1986) 179 Cal. App. 3d 500, 509, 224 Cal. Rptr. 838* (prior law)].

For example, in a strict product liability action, it was obvious that the plaintiff's requests for admissions that the product was defectively manufactured and that the defect was a proximate cause of the plaintiff's injuries involved issues of substantial importance. Thus, when the defendant denied those requests, but failed to produce any witness at trial regarding those issues, the plaintiff should be awarded the expenses in proving those issues [*Wimberly v. Derby Cycle Corp. (1997) 56 Cal. App. 4th 618, 638, 65 Cal. Rptr. 2d 532]* .

[5] Amount of Expense of Proof Award

Code Civ. Proc. § 2033.420 does not provide a penalty, but provides for reimbursement of the expenses of going to trial as a result of unfounded and unjustified denials [*see Hillman v. Stults (1968) 263 Cal. App. 2d 848, 884, 70 Cal. Rptr. 295* ; *Brooks v. American Broadcasting Co. (1986) 179 Cal. App. 3d 500, 509, 224 Cal. Rptr. 838* (prior law)].

The statute authorizes only expenses incurred in proving the matters denied by the opposing party, and not expenses incurred in trial preparation for areas not covered in the request for admissions [*Wimberly v. Derby Cycle Corp. (1997) 56 Cal. App. 4th 618, 638, 65 Cal. Rptr. 2d 532* (reversed order denying expenses); *Garcia v. Hyster Co. (1994) 28 Cal. App. 4th 724, 736-737, 34 Cal. Rptr. 2d 283* (award remanded to redetermine costs and fees); *see Smith v. Circle P Ranch Co. (1978) 87 Cal. App. 3d 267, 280, 150 Cal. Rptr. 828* ; *Hillman v. Stults (1968) 263 Cal. App. 2d 848, 889-890, 70 Cal. Rptr. 295]* .

Legal Topics:

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

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16-196 California Forms of Pleading and Practice--Annotated §§ 196.22-196.29

[Reserved]

§§ 196.22[Reserved]

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PART III. RESEARCH GUIDE

16-196 California Forms of Pleading and Practice--Annotated § 196.30

§ 196.30 Related Matthew Bender Publications

For comprehensive discussion and forms relating to discovery by requests for admissions under the California Civil Discovery Act and related California law, see DeMeo, California Deposition and Discovery Practice, Ch. 63, *Requests for Admissions* (Matthew Bender), and Hogan & Weber's California Civil Discovery, Ch. 9, *Admission Requests* (Matthew Bender)

For memoranda relating to discovery by requests for admissions under the California Civil Discovery Act and related California law, see California Points and Authorities , Ch. 86, *Discovery: Requests for Admissions* (Matthew Bender)

For discussion of and forms relating to requests for admissions in various types of actions, see Bender's Forms of Discovery (Matthew Bender)

Legal Topics:

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

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Chapter 196 DISCOVERY: REQUESTS FOR ADMISSIONS
PART III. RESEARCH GUIDE

16-196 California Forms of Pleading and Practice--Annotated § 196.31

§ 196.31 State Statutes

Restrictions on admission requests in limited civil cases. *Code Civ. Proc. §§ 91, 94(a), 95*

Scope and regulation of discovery in general. *Code Civ. Proc. §§ 2017.010 et seq., 2019.010 et seq.*

Sanctions in general. *Code Civ. Proc. § 2023.010 et seq.*

Requests for admission of facts or genuineness of documents. *Code Civ. Proc. § 2033.010 et seq.*

Development and approval of official form of requests for admissions by Judicial Council. *Code Civ. Proc. §§ 2033.710*-2033.740

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-196 California Forms of Pleading and Practice--Annotated § 196.32

§ 196.32 California Rules of Court

Format of supplemental and further discovery and responses. *Cal. Rules of Ct., Rule 3.1000*

Format of discovery motions; separate statement required to accompany motion to compel. *Cal. Rules of Ct., Rule 3.1345*

Service of motion papers on nonparty deponent. *Cal. Rules of Ct., Rule 3.1346*

Discovery motions in summary proceedings (unlawful detainer or other actions brought under *Code Civ. Proc. § 1159 et seq.*) involving possession of real property. *Cal. Rules of Court, Rule 3.1347*

Discovery sanctions; effect of lack of opposition to motion to compel. *Cal. Rules of Ct., Rule 3.1348*

Filing and retention of specified discovery papers relating to requests for admissions. *Cal. Rules of Ct., Rule 3.250(a)(7), (10), (17), (18), (b)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresMotions to CompelCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsResponses

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16-196 California Forms of Pleading and Practice--Annotated § 196.33

§ 196.33 Local Court Rules

Use of requests for admission. Los Angeles Co. Super. Ct. Rules, Rule 8.70

Legal Topics:

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

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16-196 California Forms of Pleading and Practice--Annotated § 196.34

§ 196.34 Decisions

[1] Purpose and Scope

While most discovery procedures are aimed primarily at assisting counsel to prepare for trial, requests for admissions are primarily aimed at setting at rest a triable issue so that it will not have to be tried. *Cembrook v. Superior Court (1961) 56 Cal. 2d 423, 429, 15 Cal. Rptr. 127, 364 P.2d 303*

[2] Deemed Admissions

Any doubts in ruling on motion to withdraw or amend an admission must be resolved in favor of the moving party. *New Albertsons, Inc. v. Superior Court (2008) 168 Cal. App. 4th 1403, 1408, 1420, 86 Cal. Rptr. 3d 457*

Relief under former *Code Civ. Proc. § 2033(m)* (*now see Code Civ. Proc. § 2033.300*) is available to amend or withdraw deemed admissions resulting from failure to respond as well as to amend or withdraw actual admissions included in a response. *Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983, 90 Cal. Rptr. 2d 260, 987 P.2d 727* (decided under prior law)

[3] Form of Request

Proper form of requests contemplated by former *Code Civ. Proc. § 2033* (*now see Code Civ. Proc. § 2033.010 et seq.*) are not questions to be answered, but statements of facts to be admitted. *Lieb v. Superior Court (1962) 199 Cal. App. 2d 364, 367, 18 Cal. Rptr. 705* (prior law)

[4] Response to Request

Relief under former *Code Civ. Proc. § 2033(m)* (*now see Code Civ. Proc. § 2033.300*) is available to amend or withdraw deemed admissions resulting from failure to respond as well as to amend or withdraw actual admissions

included in a response. *Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983, 90 Cal. Rptr. 2d 260, 987 P.2d 727*

Trial court which finds, in its discretion, that repetitious requests for admissions impose unfair burden on responding party has power to sustain objections to repetitive portions; court also has power to order ambiguous requests to be rephrased; "shotgun requests" criticized. *Cembrook v. Superior Court (1961) 56 Cal. 2d 423, 428, 430, 15 Cal. Rptr. 127, 364 P.2d 303*

When admission is merely based on admitting party's present knowledge and is not mistaken, inadvertent, or neglectful, the admitting party has no duty to update the admission to reflect knowledge based on evidence subsequently discovered by the admitting party. *Burch v. Gombos (2000) 82 Cal. App. 4th 352, 356, 98 Cal. Rptr. 2d 119*

When co-parties have been served with identical, but separate, sets of requests for admission, single joint document containing identical responses is proper, as long as it is verified under penalty of perjury by both co-parties. *Tobin v. Oris (1992) 3 Cal. App. 4th 814, 829, 4 Cal. Rptr. 2d 736 , disapproved on other grounds, Wilcox v. Birtwhistle (1999) 21 Cal. 4th 973, 983 n.12, 90 Cal. Rptr. 2d 260, 987 P.2d 727*

Blanket order sustaining objections to requests for admissions and barring disclosure *in toto*, under circumstances of case, is abuse of discretion. *Metalworking Machinery, Inc. v. Superior Court (1977) 69 Cal. App. 3d 791, 794, 138 Cal. Rptr. 369*

Unsworn statements in response are equivalent to no response at all. *Zorro Inv. Co. v. Great Pac. Sec. Corp. (1977) 69 Cal. App. 3d 907, 914, 138 Cal. Rptr. 410* (prior law)

Declaration in support of motion for protective order that contains no facts except for conclusion of necessity for order and other statements made on information and belief are not a sufficient basis for court to grant protective order on basis of annoyance, embarrassment, or oppression. *Goodman v. Citizens Life & Cas. Ins. Co. (1967) 253 Cal. App. 2d 807, 819-820, 61 Cal. Rptr. 682*

Absent contrary showing, trial court, under circumstances of case, should have accepted petitioners' sworn statement of reasons why he could not truthfully admit or deny; response to request for admissions is proper when it states an express and unequivocal disclaimer of any knowledge concerning facts or matters involved in all portions of the request for admissions and states that responding party has no means of ascertaining truth of matter. *Lindgren v. Superior Court (1965) 237 Cal. App. 2d 743, 747-748, 47 Cal. Rptr. 298* (prior law)

If there is legal question as to fact which party is being requested to admit, that party should set forth in detail reasons why party cannot truthfully admit or deny requests, but may not, by simply asserting that requests call for conclusions of law, successfully object to them. *Lieb v. Superior Court (1962) 199 Cal. App. 2d 364, 368, 18 Cal. Rptr. 705* (prior law)

[5] Sanctions

When plaintiff merely prepared to offer proof of liability, but defendants' concession immediately prior to trial made such proof unnecessary, plaintiff did not put on any evidence, and the question of whether she would have been able to prove the point at issue at trial could only be answered by resort to pure speculation; therefore, the trial court did not abuse its discretion in determining that plaintiff was not entitled to an order of costs and fees under former *Code Civ. Proc. § 2033(o)* (*now see Code Civ. Proc. § 2033.420*) on the ground that the issue had not been proved. *Stull v. Sparrow (2001) 92 Cal. App. 4th 860, 866, 112 Cal. Rptr. 2d 239*

Expenses are recoverable under former *Code Civ. Proc. § 2033(o)* (*now see Code Civ. Proc. § 2033.420*) only if party

requesting admission "proves" truth of matter, in this case, defendants' negligence. *Wagy v. Brown (1994) 24 Cal. App. 4th 1, 4-6, 29 Cal. Rptr. 2d 48*

In determining whether sanctions under former *Code Civ. Proc. § 2034(c)* (now see *Code Civ. Proc. § 2033.420*) are appropriate, trial court has discretion to decide whether there were no good reasons for denial, whether requested admission was of substantial importance, and amount of expenses to be awarded; once court determines statutory requirements for sanctions are met, reasonable expenses are required to be awarded. *Brooks v. American Broadcasting Co. (1986) 179 Cal. App. 3d 500, 508, 224 Cal. Rptr. 838*

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-196 California Forms of Pleading and Practice--Annotated § 196.35

§ 196.35 Text References

Witkin, California Evidence, Ch. X, *Discovery*, § 157 et seq. (4th ed. 2000)

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-196 California Forms of Pleading and Practice--Annotated §§ 196.36-196.39

[Reserved]

§§ 196.36[Reserved]

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A. Checklists for Party Propounding Requests

16-196 California Forms of Pleading and Practice--Annotated

NOTE:

The following checklists set out procedures commonly involved in obtaining discovery through the use of requests for admissions; they are not intended to be exhaustive.

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16-196 California Forms of Pleading and Practice--Annotated § 196.40

§ 196.40 Preparing and Serving Requests for Admissions

[1] Preliminary Determinations

1. Whether the party serving the request has appeared in the action or been served with summons [*see Code Civ. Proc. § 2033.010*].

2. If defendant is the party propounding the request for admissions, whether the party to be served with the request has been served with a summons or appeared in the action [*see Code Civ. Proc. § 2033.010*].

3. If plaintiff is the party serving the request, whether at least 10 days, or in an unlawful detainer action or other proceeding under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer) whether at least five days, have elapsed since the party to be served with the request was either served with summons or made an appearance [*see Code Civ. Proc. § 2033.020(b), (c)*]. If not, see [2], *below*.

[2] Motion for Order Authorizing Early Service

NOTE:
This order must be obtained if plaintiff seeks to serve a request for admissions on a party within 10 days, or in an unlawful detainer action or other proceeding under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer) within five days, after service of summons on, or appearance by, that party [*Code Civ. Proc. § 2033.020(b), (c)*]. It may be obtained with or without giving notice [*see* *Code Civ. Proc. § 2033.020(d)*]. When necessary, a motion for this order may be combined with a motion for an order shortening the time for the service of a response to the request [***see*** *§ 196.40[3]*, ***below***].

For a form for a notice of motion and motion to authorize early service of requests for admission, see *§ 196.62A*. For a form for an order, see *§ 196.62B*.

[3] Motion for Order Shortening Time for Response

On motion of a party requesting admissions, the court may shorten the time by which the responding party must serve the response [*Code Civ. Proc. § 2033.250(a)*]. This motion may be combined with a motion for an order authorizing early service of the request for admissions [*see* [2], *above*]. In making a motion shortening the time for response, counsel should follow the usual procedures for a noticed motion, such as those *set out in § 196.41[1]*. Counsel will most likely also need to obtain an order shortening the time for the notice of motion [*see Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(b)*; *see also* Ch. 524, *Shortening and Extension of Time*]. For a form for a notice of motion and motion to shorten the time for response, see *§ 196.62A*. For a form for an order, see *§ 196.62B*.

[4] Prepare Request for Admissions and Proof of Service

1. Format of request.

The request must follow the format set out in *Code Civ. Proc. § 2033.060* [*see §§ 196.60, 196.61*].

2. Attach copies of any documents which are the subject of the request.

If an admission of the genuineness of documents is being sought, copies of the documents must be attached to the request [*Code Civ. Proc. § 2033.060(g)*].

3. Prepare proof of service [*see Code Civ. Proc. § 1013a* and Ch. 518, *Service of Summons and Papers*].

[5] Serve Request for Admissions

1. Serve in the manner provided by *Code Civ. Proc. § 1010 et seq.* [*see Code Civ. Proc. § 2033.070*; *see also* Ch. 518, *Service of Summons and Papers*].

2. Serve on the party who is to respond [*see Code Civ. Proc. § 2033.070*].

3. Serve copies of request on all parties to the action who have appeared [*see Code Civ. Proc. § 2033.070*].

4. When serving requests for admissions or copies of the requests, also serve endorsed-filed copies of any related orders, such as:

a. Order authorizing early service of request by plaintiff [*see* § [2], *above*].

b. Order shortening time for service of response to request for admissions [*see* [3], *above*].

[6] Retain Original Request and Responses

The party responding to a request for admissions must serve the original responses made under oath on the party serving the request. The requesting party must retain the original request with the original proof of service attached to it and the original responses for at least six months after the judgment has become final. These documents are not to be filed with the court [*Code Civ. Proc. § 2033.270*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsAdmissionsContent

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16-196 California Forms of Pleading and Practice--Annotated § 196.41

§ 196.41 Enforcement of Requests for Admissions

[1] Motion That Matters Be Deemed Admitted

1. Time for noticing motion.

A motion that matters in the request for admissions be deemed admitted pursuant to *Code Civ. Proc. § 2033.280* may be brought after the time for response has lapsed [*Code Civ. Proc. § 2033.280*; for time deadlines for service of response, *see Code Civ. Proc. §§ 2033.250, 2033.260* and discussion in *§ 196.50[3]*].

2. Prepare documents.

a. Notice of motion and supporting declaration [§ 196.70].

b. Supporting memorandum [*Cal. Rules of Ct., Rule 3.1113(a)*; for general discussion and skeletal form, *see* Ch. 417, *Points and Authorities* ; for forms for supporting memoranda, *see also* California Points and Authorities, Ch. 86, *Discovery: Requests for Admissions* (Matthew Bender)].

c. Proof of service of the documents listed in Paragraphs a. and b., *above* [*see Code Civ. Proc. § 1013a*; *see also* Ch. 518, *Service of Summons and Papers*].

3. Serve documents.

At least 16 court days before the date set for hearing of the motion [*see Code Civ. Proc. § 1005(b)*], or any longer period as required by *Code Civ. Proc. § 1005(b)* if service of the notice motion was made by mail, Express Mail, other overnight delivery, or fax, serve every party to the action or proceeding with copies of the documents listed in Paragraphs 2(a)-(c), *above* [*see Code Civ. Proc. §§ 1010-1020*; *see also*

Ch. 518, *Service of Summons and Papers*].

4. File documents.

File the signed originals of the notice of motion, supporting declaration and memorandum of points and authorities, and proof of service, with the court.

5. Order.

a. Prepare order [§ 196.71] if court grants motion or as otherwise directed by court.

b. If required by local court rule or practice, have opposing party approve order as to form.

c. Present order to judge for signature.

d. File original signed order and serve copies of order stamped "endorsed-filed" on the other parties.

[2] Motion to Compel Further Responses

1. Attempt to resolve issue with responding party [*see Code Civ. Proc. § 2033.290(b)*].

2. Time for noticing motion.

A motion to compel further responses pursuant to *Code Civ. Proc. § 2033.290* must be noticed within 45 days from the date of service of the response or any supplemental response [*Code Civ. Proc. § 2033.290(c)*]. If service was by mail, this 45-day period is extended five calendar days if the place of address is within California, 10 calendar days if the place of address is outside California but within the United States, or 20 calendar days if the place of address is outside the United States [*see Code Civ. Proc. §§ 1013(a), 2016.050*]. The period is extended two court days if service is by Express Mail, other overnight delivery, or by fax [*see Code Civ. Proc. § 1013(c), (e)*].

3. Prepare documents: in addition to the notice of motion and supporting memorandum [*see* [1], *above* and form *set out in § 196.65*], a separate statement providing all information necessary to determine the motion is required [*see Cal. Rules of Ct., Rule 3.1345* and form *set out in § 196.66*].

4. Serve and file documents [*see* [1], *above*].

5. Order [*see* [1], *above*, and form *set out in § 196.67*].

[3] Motion That Matters Be Deemed Admitted on Failure to Comply With Order Compelling Further Response

1. A motion for deemed admissions may be filed if responding party fails to obey a court order requiring a further response within the time directed by the court in that order [*Code Civ. Proc. § 2033.290(e)*].

2. Prepare, serve, and file documents [*see* forms of motion and order *set out in §§ 196.72, 196.73*].

Follow motion procedures set out in [1], *above*.

[4] Motion to Recover Expenses of Proof

1. A motion to recover the expense incurred in proving a matter is proper when another party was requested to admit the matter, and thus eliminate the need for proving it, but unjustifiably failed to do so [*see Code Civ. Proc. § 2033.420* and discussion in *§ 196.21*]. Preliminarily determine the following:

a. That the matter requiring proof was one of substantial importance, and that, if denied, it was denied without good reason.

b. The amount of expense incurred in proving the matter.

2. Prepare, serve, and file documents [*see* form of motion *set out in § 196.74*].

Follow motion procedures set out in [1], *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-196 California Forms of Pleading and Practice--Annotated §§ 196.42-196.49

[Reserved]

§§ 196.42[Reserved]

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16-196 California Forms of Pleading and Practice--Annotated § 196.50

§ 196.50 Preparing and Serving Responses to Requests for Admissions

[1] Extending Time for Response

1. By stipulation.

NOTE:
For discussion of and procedures relating to stipulations generally, see Ch. 533, *Stipulations* .

a. Obtain agreement in writing to extend the time for you to respond to the request for admissions from the party who served request. The agreement must specify the extended date for service of the response [*Code Civ. Proc. § 2033.260*].

b. If the agreement is initially reached by telephone conversation, obtain written confirmation, preferably by sending a formal stipulation for signature of the party who served the request for admissions [*Code Civ. Proc. § 2033.260(b)*].

NOTE:
The written agreement may not be filed unless offered as relevant to the determination of an issue in a law and motion proceeding or other hearing, or is ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(7)*]. It must be retained until six months after final disposition of the cause, unless the court on motion of any party and for good cause shown orders the original papers preserved for a longer period [*Cal. Rules of Ct., Rule 3.250(b)*].

c. Give notice of agreement to all other parties who were served with copy of request [*Code Civ. Proc. § 2033.260(d)*].

2. By application or motion to extend time, with or without notice.

NOTE:

There is no requirement under *Code Civ. Proc. § 2033.250* that the motion be noticed. An application without notice, however, must comply with general requirements for ex parte applications [***see Cal. Rules of Ct., Rules 3.1200-3.1207*** ; **for general discussion and form of application, *see Ch. 193, Discovery: Depositions, § 193.221[3]* and Ch. 372, *Motions and Orders*].**

The court may allow, on motion of the responding party, a longer period of time to respond to the request for admissions [*see Code Civ. Proc. § 2033.250* ; for a form for a noticed motion to extend the time for response to interrogatories, which may be adapted for use in this situation, *see Ch. 194, Discovery: Interrogatories , § 194.90*].

3. By motion for protective order.

NOTE:

A responding party may obtain a protective order that the time specified in *Code Civ. Proc. § 2033.250* to respond to the set of interrogatories, or to particular interrogatories in the set, be extended [*Code Civ. Proc. § 2033.080(b)(3)*]. This motion procedure is useful when the responding party wishes to include other particular requests for limiting responses in combination with a request for an extension of time to respond. For this procedure see [2], *below*.

[2] Motion for Protective Order

1. Determine if protective order is necessary to protect against annoyance, embarrassment, oppression, or undue burden and expense [*see Code Civ. Proc. § 2033.080(b)*].

2. Determine if good cause exists for order [*see Code Civ. Proc. § 2033.080(b)*].

3. Make a reasonable and good faith attempt to resolve the issue [*see Code Civ. Proc. § 2033.080(a)*].

4. Prepare, serve, and file documents [*see* form set out in *§ 196.63*].

Follow motion procedures set out in *§ 196.41[1]*.

[3] Prepare Response to Request for Admissions

1. Time for responding.

NOTE:

Unless there is a stipulation or an order extending the time for response [*see § 196.50[1]* , *above*], a party must respond within 30 days, or in unlawful detainer actions or other proceedings under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), within five days, of the date of service of the request [*see Code Civ. Proc. § 2033.250*]. If the request was served by mail, the response period is extended five calendar days if the place of address is within California, 10 calendar days if the place of address is outside California but within the United States, or 20 calendar days if the place of address is outside the United States [*see Code Civ. Proc. §§ 1013(a) , 2016.050*]. The period is extended two court days if service is by Express Mail, other overnight delivery, or by fax [*see Code Civ. Proc. § 1013(c) , (e)*].

2. Request for original documents.

NOTE:
If a request for the admission of the genuineness of document has been made, responding party may request that the original documents be made available for inspection [*see Code Civ. Proc. § 2033.060(g)*].

3. Format of response.

NOTE:
The responses must follow the format set out in *Code Civ. Proc. §§ 2033.060* and *2033.210-2033.230* [*see* form set out in *§ 196.62* ; *see also Cal. Rules of Ct., Rule 3.1000* (concerning format of further responses)].

4. Type of responses:

NOTE:
The responding party must respond in writing under oath separately to each request [*Code Civ. Proc. § 2033.210(a)*].

a. Admitting the request in whole or in part, either as expressed in the request itself or as reasonably and clearly qualified by the responding party [*Code Civ. Proc. § 2033.220(b)(1)*].

b. Denying the request in whole or in part [*Code Civ. Proc. § 2033.220(b)(2)*].

c. Stating that the responding party lacks sufficient information or knowledge to admit or deny the request in whole or in part [*Code Civ. Proc. § 2033.220(b)(3)*].

NOTE:
To fail to admit for lack of knowledge, the responding must make a reasonable inquiry concerning the matter in a particular request [*see* *Code Civ. Proc. § 2033.220(c)*].

d. Written objections including the following:

(1) That the number of requests exceed the statutory limit [*Code Civ. Proc. §§ 2033.030, 2033.050*].

(2) That some or all of the requested admissions need not be answered due to a clearly identified privileged [*Code Civ. Proc. § 2033.230*].

(3) That a matter for which an admission is request is not within the scope of discovery or is otherwise improper in whole or in part [*see Code Civ. Proc. § 2033.230*].

5. Verification.

NOTE:
A party to whom the requests for admission are directed must sign the response under oath, unless the response contains only objections [*Code Civ. Proc. §§ 2033.210-2033.240* ; *Steele v.*

Totah (1986) 180 Cal. App. 3d 545, 550-551, 225 Cal. Rptr. 635 **(any sworn statement or verification must be made by the party himself or herself);** ***see also*** **general discussion and forms in Ch. 572,** ***Verification*** **].**

[4] Serve Responses

1. Time for service.

See [3], *above*.

2. Procedure.

NOTE:
The responding party must serve the original responses on the requesting party. In addition, all parties to the action must be served with a copy [***Code Civ. Proc. § 2033.250(a)*** **]. The procedure for serving responses to requests for admissions is the same as the procedure for serving the request for admissions, which is set out in** ***§ 196.40[5]*** **.**

[5] Amendment or Withdrawal of Admission

1. Determine if grounds for amendment or withdrawal exist consisting of mistake, inadvertence, or excusable neglect [*Code Civ. Proc. § 2033.300*].

2. Determine that no substantial prejudice to opposing party exists [*Code Civ. Proc. § 2033.300(b)*].

3. Prepare, serve, and file documents [for form for motion to amend or withdraw response to admission, *see § 196.68*]. Follow motion procedures set out in *§ 196.41[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsResponsesCivil ProcedureDiscoveryMethodsAdmissionsWithdrawalsCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDiscoveryProtective Orders

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PART IV. PROCEDURAL CHECKLISTS
B. Checklists for Responding Party

16-196 California Forms of Pleading and Practice--Annotated §§ 196.51-196.59

[Reserved]

§§ 196.51[Reserved]

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PART V. FORMS

16-196 California Forms of Pleading and Practice--Annotated § 196.60

§ 196.60 Request for Admissions [Code Civ. Proc. §§ 2033.010-2033.070]--Basic Format

[1] FORM Request for Admissions [Code Civ. Proc. §§ 2033.010-2033.070]--Basic Format

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Defendant.	)	
vs.	)	NO. _____
_____ [*name*],	)	REQUEST FOR ADMISSIONS [AND DECLARA-
Defendant.	)	TION FOR ADDITIONAL DISCOVERY]
	)	
	)	

_____

Requesting Party: _____ [*Identify, e.g.*, Plaintiff _____ (*name*)].

Set Number: _____ [*Specify*].

Responding Party: _____ [*Identify, e.g.*, Defendant _____ (*name*)].

To _____ [*identify party from whom admission is requested, e.g.*, defendant] _____ [*name*] and to his/her attorney of record:

_____ [*Requesting party, e.g.*, Plaintiff] _____ [*name*] requests you to admit the _____ [genuineness of the following documents *or* the truth of the following matters of fact *or both*].

[*If an admission of the genuineness of documents is being sought, list the documents, and state, when appropriate, the*

aspect of genuineness to be admitted, e.g.:]

DOCUMENTS

1. _____ [*Specify, e.g.,* That the original of the document, a copy of which is attached hereto as Exhibit A and incorporated by references, is a genuine undertaking executed by defendant _____ (*name*)].

2. _____ [*Specify, e.g.,* That the document attached hereto as Exhibit B and incorporated by references is a genuine one of a number of pamphlets printed by you or at your request in connection with the sale of _____ (*specify product*)].

3. _____ [*Specify any other documents*].

[*If an admission of the truth of a matter of fact is being sought, list the fact to be admitted.*]

MATTERS OF FACT

4. _____ [*Specify, e.g.,* That on _____, (*date*) defendant _____(*name*) was the registered owner of a _____ (*describe vehicle, e.g.,* 2001 Honda Accord sedan, bearing California license plate number _____)].

5. _____ [*Specify any other matters of fact*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*requesting party*]

[*If seeking more than 35 admissions (including prior sets) not related to the genuineness of documents, attach following declaration*].

DECLARATION FOR ADDITIONAL DISCOVERY

I, _____ [*name*], declare:

1. I am _____ [a party to this action or proceeding appearing in propria persona *or* presently the attorney for _____, a party to this action or proceeding].

2. I am propounding to _____ [*name of party to whom request is directed*], the attached set of requests for admission.

3. This set of requests for admission will cause the total number of requests propounded to the party to whom they are directed to exceed the number of requests permitted by the *Code of Civil Procedure Section 2033.030*.

4. I have previously propounded a total of _____ [*number*] requests for admission (including subparts) to this party.

5. This set of requests for admission contains a total of _____ requests.

6. I am familiar with the issues and the previous discovery conducted by all the parties in this case.

7. I have personally examined each of the requests, in this set of requests for admissions.

8. This number of requests for admission is warranted under Code of Civil Procedure Section 2033.040 because _____ [*state reasons why the complexity or the quantity of issues in the instant lawsuit warrant this number of requests for admission*].

9. None of the requests in this set of requests is being propounded for any improper purpose, such as to harass the party, or the attorney for the party, to whom it is directed, or to cause unnecessary delay or needless increase in the cost of litigation.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*requesting party*]

[2] Use of Form

The requests for admissions set out in [1], *above*, is for use by a party to obtain admissions from another party regarding the genuineness of documents or the truth of matters of fact or opinions relating to fact, or both [*Code Civ. Proc. § 2033.010*]. The form includes an optional declaration for additional discovery, to be used if the requesting party wishes to propound more than 35 admissions not relating to the genuineness of documents [*see Code Civ. Proc. § 2033.050*; for further discussion, *see* [5], *below*].

[3] Format of Requests

Each set of written requests for admissions served pursuant to *Code Civ. Proc. § 2033.010 et seq.* must be numbered consecutively by the propounding party. In the first paragraph immediately below the title of the case, the request must show (1) the identity of the requesting party, (2) the set number, and (3) the identity of each party who is directed to answer. Furthermore, each request in a set is to be separately set forth and identified by letter or number [*Code Civ. Proc. § 2033.060*].

Each request for admission must be full and complete in and of itself. No preface or instruction shall be included with a set of admission requests unless it has been approved by the Judicial Council under its mandate to develop an optional form for requests for admissions under *Code Civ. Proc. § 2033.710 et seq.* [*Code Civ. Proc. § 2033.060(d)*]. Any term specially defined in a request for admission must be typed with all letters capitalized whenever the term appears. No request for admission may contain subparts, or a compound, conjunctive, or disjunctive request unless it has been

approved by the Judicial Council [*Code Civ. Proc. § 2033.060(f)*].

The request for an admission of fact should be set out as a statement of fact, not as a question to be answered [*Lieb v. Superior Court (1962) 199 Cal. App. 2d 364, 367, 18 Cal. Rptr. 705]* .

For further discussion, see *§ 196.13[3]*.

[4] Service of Requests

A party preparing a set of requests for admissions must serve a copy on the party to whom the requests are directed, and must also serve copies on all other parties who have appeared in the action [*Code Civ. Proc. § 2033.070*]. The original, with the original proof of service affixed, must be kept by the requesting party until six months after final disposition of the action unless the court, on motion of any party and for good cause shown, orders that the originals be preserved for a longer period [*Code Civ. Proc. § 2033.270*]. For further discussion, see *§ 196.13[5]*.

[5] Declaration for Additional Discovery

If the requesting party is requesting, or has already requested, more than 35 admissions not relating to the genuineness of documents by any other party, the requesting party is required to attach to each set of requests for admissions a declaration in substantial compliance with the statutory language set out in *Code Civ. Proc. § 2033.050* [*Code Civ. Proc. § 2033.050*].

A declaration for additional discovery is not to be filed with the court unless it is offered as relevant to the determination of an issue in a law and motion proceeding or other hearing or is ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(17)*]. The original of the declaration must be retained until six months after final disposition of the cause, unless the court on motion of any party and for good cause shown orders the original papers preserved for a longer period [*Cal. Rules of Ct., Rule 3.250(b)*].

For further discussion of the limits on the number of requests as to matters not relating to the genuineness of documents, see *§ 196.13[2]*.

[6] Attachments for Requests Regarding Genuineness of Documents

If admission of the genuineness of any document is requested, a copy of that document must be attached to the request. In addition, the party requesting admission must make the original of the documents available for inspection on demand by the party to whom the requests for admission are directed [*Code Civ. Proc. § 2033.060(g)*].

For further discussion, see *§ 196.13[4]*.

[7] Retention of Requests

A request for admissions may not be filed with the court, unless offered as relevant under a law and motion proceeding or other hearing or ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(10)*]. Instead, the serving party retains the original and the proof of service until six months after final disposition of the cause, unless otherwise ordered by the court for cause [*Cal. Rules of Ct., Rule 3.250(b)*].

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16-196 California Forms of Pleading and Practice--Annotated § 196.61

§ 196.61 Request for Admissions [Code Civ. Proc. § 2033.010]--Judicial Council Form Requests [Code Civ. Proc. § 2033.710 et seq.; Cal. Judicial Council Form DISC-020]

[1] FORM Request for Admissions [Code Civ. Proc. § 2033.010]--Judicial Council Form Requests [Code Civ. Proc. § 2033.710 et seq.; Cal. Judicial Council Form DISC-020]

Click here to view image.

[2] Use of Form

The form for a request for admissions set out in [1], *above*, is an illustration of Cal. Judicial Council Form DISC-020, approved by the Judicial Council for optional use in any civil action in superior court based on personal injury, property damage, wrongful death, or fraud [*Code Civ. Proc. § 2033.710 et seq.*; *see Cal. Rules of Ct., Rules 1.30(b), 1.35*; Cal. Rules of Ct., Appendix, Div. A]. The Judicial Council is authorized to develop and approve requests for admission for any other civil actions it deems appropriate [*Code Civ. Proc. § 2033.710*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge. The form is also available on the Internet at www.courtinfo.ca.gov/forms/.

For further discussion of requirements relating to the format, content, attachments, and service of requests for admission, see *§§ 196.13* and *196.60[2] -[6]*.

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16-196 California Forms of Pleading and Practice--Annotated 196.61A

196.61A Request for Statement of Witnesses and Evidence [Code Civ. Proc. § 96]--Judicial Council Form DISC-015

[1] FORM

Click here to view image.

[2] Use of Form

The request for a statement of witnesses and evidence in [1], *above*, has been adopted by the Judicial Council for use by a party in a limited civil case subject to the economic litigation provisions of *Code Civ. Proc. §§ 90-100* [*see Cal. Rules of Ct., Rules 1.30(b), 1.31*; Cal. Rules of Ct., Appendix, Div. A; *see also Code Civ. Proc. § 91(a)* (actions coming under economic litigation procedure); Ch. 345A, *Limited Civil Cases*, § 345A.12]. Use of this form is mandatory [*Gov. Code § 68511*; *Cal. Rules of Ct., Rule 1.31*]. Although not entitled a request for admissions, this form is the economic litigation equivalent of a standard request for admission.

A request for an evidentiary statement may be served on any other party to the action [*Code Civ. Proc. § 96(a)*]. The form is self-explanatory.

Copies of this form must be furnished by the court clerk [*Code Civ. Proc. § 96(f)*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also available at www.lexisone.com at no charge. The form is also available on the Internet at http://www.courtinfo.ca.gov/forms/.

For detailed discussion of requests for evidentiary statements, including the consequences of failure to comply with a request, see *Ch. 345A, Limited Civil Cases, §§ 345A.16, 345A.17, 345A.101*.

[3] Service of Requests and Statements

A request for an evidentiary statement must be served no more than 45 days or less than 30 days before the date first set for trial, unless otherwise ordered [*Code Civ. Proc. § 96(b)*]. A statement responding to the request must be served

within 20 days from the service of the request [*Code Civ. Proc. § 96(c)*]. The time for serving and responding to requests is computed as provided by law, including extensions of time for service by mail under *Code Civ. Proc. § 1013* [*Code Civ. Proc. § 96(g)*].

No additional, amended, or late statement is permitted except by written stipulation or unless ordered for good cause on noticed motion [*Code Civ. Proc. § 96(d)*].

[4] No Filing Unless Ordered

Requests or statements served under *Code Civ. Proc. § 96* are not filed, unless otherwise ordered by the court [*Code Civ. Proc. § 96(e)*].

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16-196 California Forms of Pleading and Practice--Annotated § 196.62

§ 196.62 Response to Request for Admissions [Code Civ. Proc. §§ 2033.210-2033.250]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Defendant.	)	
vs.	)	NO. _____
_____ [*name*],	)	RESPONSE TO REQUEST FOR ADMISSIONS
Defendant.	)	
	)	
	)	

_____

Responding Party: _____ [*Identify, e.g.,* Defendant _____ (*name*)].

Requesting Party: _____ [*Identify, e.g.,* Plaintiff _____ (*name*)].

Set Number: _____ [*Specify*].

_____ [*Identify responding party, e.g.,* Defendant] _____ [*name*] responds to the request for admissions served on him/her by _____ [*identify requesting party, e.g.,* plaintiff] _____ [*name*] on _____ [*date*], as follows:

Request No. 1: _____ [*Specify response, e.g., if denying genuineness of document, state,* Denies the genuineness of the document, a copy of which is attached to the request for admissions as Exhibit _____].

Request No. 2: _____ [*Specify response, e.g., if denying matter of fact state,* Denies _____ (the truth of the matters set forth in this request *or* _____ (*specify, e.g.,* that he/she was the registered owner of the vehicle described in this request on _____ [*date*], or at any other time))].

Request No. 3: _____ [*Specify response, e.g., if admitting in part and denying in part, state,* Admits that _____ (*specify*), but denies that _____ (*specify*)].

Request No. 4: _____ [*State response, e.g., if cannot admit or deny, state,* Cannot truthfully admit or deny the matters set forth in this request because _____ (*specify reasons, e.g.,* neither he/she nor his/her employees, agents, attorneys, nor his/her attorney's agents and employees have any knowledge of these matters, nor have they been able, despite making a reasonable inquiry into the matter by _____ (*specify efforts made*), to obtain information from which the truth or falsity of the matter might be learned)].

Request No. 5: _____ [*State response, e.g., if objecting to request, state,* Objects to this request on the ground that _____ (*specify, e.g.,* it is not relevant to the subject matter of the action or reasonably calculated to lead to admissible evidence) in that _____ (*specify*)].

_____ [*date*]

[*EITHER, attorney signs if response contains one or more objections*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*responding party*]

[*AND/OR, party, its agent, or officer signs and verifies, unless response contains only objections*]

VERIFICATION

I _____ [*name*], am _____ [*identify party, or if response made on behalf of corporation or other party, specify status e.g.,* the president of defendant _____ (*name of corporation*)] in the above-entitled action. I have read the foregoing responses which are true of my own knowledge, except as to those matters which are stated on information and belief, and as to those matters, I believe them to be true].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form set out in [1], *above*, provides the general format for responding to a set of requests for admissions and includes examples of various types of responses.

For the procedures to be followed in preparing and serving the response, see *§§ 196.16* and *196.50*.

[3] Format of Response

The first paragraph of the response immediately below the title of the case must include the identity of the responding party, the set number, and the identity of the requesting party. If the response is a further response, this paragraph must also include the nature of the paper [*Code Civ. Proc. § 2033.210(c)*; *see also Cal. Rules of Ct., Rule 3.1000(a)* (similar requirements for further responses)].

Each answer or objection must bear the same number and be in the same sequence as the corresponding request, but the text of the particularrequest need not be repeated [*Code Civ. Proc. § 2033.210(d)*; *see also Cal. Rules of Ct., Rule 3.1000(b)* (similar requirements for further responses, but providing that text of request "need not" be repeated)].

See also discussion in *§ 196.15*.

[4] Types of Responses

A response may be in the form of an answer. An answer must be as straightforward as the information available to the responding party permits. It must admit so much of the matter in the request as is true, deny so much as is untrue, and specify so much as to the truth of which the responding party lacks sufficient knowledge [*Code Civ. Proc. § 2033.220*]. For further discussion of response by answer, see *§ 196.16[1]*.

Alternatively, a response may be in the form of an objection to so much of the matter in the request as is objectionable. If only a part of a request is objectionable, the remainder must be answered. The ground for any objection must be clearly set forth. If it is based on a claim of privilege, the particular privilege invoked must be clearly stated. If it is based on a claim of attorney work product protection of *Code Civ. Proc. § 2018.010 et seq.*, that claim must be expressly asserted [*Code Civ. Proc. § 2033.230*]. For further discussion of response by objection, see *§ 196.16[2]*.

[5] Signature

The party to whom the requests for admissions are directed must sign the response under oath, unless the response contains only objections. If that party is a public or private corporation, or a partnership or association or governmental agency, one of its officers or agents must sign the response on behalf of that party. If the officer or agent signing the response on behalf of a party is an attorney acting in that capacity for the party, that party waives any lawyer-client privilege and any protection for work product under *Code Civ. Proc. § 2018.010 et seq.* during any subsequent discovery from that attorney concerning the identity of the sources of the information contained in the response. The attorney for the responding party must sign any response that contains an objection [*Code Civ. Proc. § 2033.240(c)*]. For further discussion, see *§ 196.16[3]*.

[6] Service of Response

In the absence of a stipulation or court order shortening or extending the time for serving the response on the requesting party, it must be served within 30 days, or in unlawful detainer actions or other proceedings under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), within five days, after the service of the request [*Code Civ. Proc. § 2033.250*]. If the request was served by mail, the response period is extended five calendar days if the place of address is within California, 10 calendar days if the place of address is outside California but within the United States, or 20 calendar days if the place of address is outside the United States [*see Code Civ. Proc. §§ 1013(a), 2016.050*]. The period is extended two court days if service is by Express Mail, other overnight delivery, or by fax [*see Code Civ. Proc. §*

1013(c), (e)].

The responding party must serve the original response on the requesting party, and copies on all other parties who have appeared in the action [*Code Civ. Proc. § 2033.250*].

For further discussion, see *§ 196.16[4]* and *[5]*.

[7] Retention of Responses or Objections

Responses or objections to a request for admissions may not be filed with the court, unless offered as relevant under a law and motion proceeding or other hearing or ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(10)*]. Instead, the serving party retains the original and the proof of service until six months after final disposition of the cause, unless otherwise ordered by the court for cause [*Cal. Rules of Ct., Rule 3.250(b)*].

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16-196 California Forms of Pleading and Practice--Annotated § 196.62A

§ 196.62A Proceedings for Order for Plaintiff to Make Early Requests for Admission and to Shorten Time for Response [Code Civ. Proc. §§ 2033.020, 2033.250]--Notice of Motion, Motion and Supporting Declaration

[1] FORM Proceedings for Order for Plaintiff to Make Early Requests for Admission and to Shorten Time for Response [Code Civ. Proc. §§ 2033.020, 2033.250]--Notice of Motion, Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	NOTICE OF MOTION AND MOTION FOR OR-
_____ [*name*],	)	DER TO MAKE EARLY REQUESTS FOR ADMIS-
Defendant. vs.	)	SION AND TO SHORTEN TIME FOR RESPONSE
_____ [*name*],	)	[, SUPPORTING DECLARATION OF
Defendant.	)	_____ (*name*)]
	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To each party herein and to the attorney of record for each such party:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*],_____ [*city*], _____ [

identify party, e.g., defendant] _____ [*name*] will, and hereby does, move for an order to serve early Requests for Admission, _____ Set, on _____ [*name*], within _____ [10 days *or, in unlawful detainer actions or other proceedings under Code Civ. Proc. § 1159 et seq. (forcible entry and detainer),* 5 days] after defendant [was served with process *or* appeared] in this action [, and requiring that party to serve his/her/its response to those Requests for Admission, _____ Set, within _____ (specify number of days less than 30, *or in unlawful detainer actions or other proceedings under Code Civ. Proc. § 1159 et seq. (forcible entry and detainer),* less than 5) after service of the requests for admission]. The motion is made on the grounds that early service of the Requests for Admission, _____ Set, [and responses thereto] are necessary in that _____ [*specify*].

The motion will be based on this notice of motion, on the attached _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s*)] and the memorandum served and filed with this motion,on the papers, records, and file in this action [, in particular, the documents described in Attachment 1, which are made a part hereof by reference] [and such oral and documentary evidence as may be presented at the hearing of the motion].
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff_____ [*name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

SUPPORTING DECLARATION OF _____ [*name*]

In support of this application, I declare that:

1. I am an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for plaintiff _____ [*name*].

2. The nature of this _____ [action *or* proceeding] is _____ [*specify*].

[*EITHER*]

3. The summons in this action was served on defendant _____ [*name*] on _____ [*date*].

[*OR*]

3. _____ [*Specify party, e.g.,* Defendant] _____ [*name*] appeared in this action on _____ [*date*], by _____ [*specify, e.g.,* filing a motion to quash service of summons].

[*CONTINUE*]

4. This declaration is made in support of _____ [*specify, e.g.,* plaintiff's] motion for orders to serve early Requests for Admission, _____ Set, on _____ [*name*] and to shorten the time for response.

5. There is good cause for plaintiff _____ [*name*] to obtain an order permitting him/her/it to serve requests for admission on _____ [*specify party,* e.g., defendant] before [10 days *or, in unlawful detainer proceedings,* 5 days] after service of the summons or appearance by defendant in this action, and for requiring response thereto within _____ [*specify number less than normal time for response*] days after service on him/her/it of the requests for admission. The shortened time limitations are necessary because _____ [*specify supporting facts*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

This form for a notice of motion, motion, supporting memorandum, and supporting declaration is for use by a plaintiff to seek an order authorizing early service of requests for admission, that is, within 10 days after service of summons, or in an unlawful detainer action or other proceeding under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), within five days after service of summons, or the appearance of another party, whichever occurs first [*see Code Civ. Proc. § 2033.020(b), (c)*; § 193.13[1] (time for making requests)]. In addition, the form may be used to shorten the statutory time within which a response is due, by requiring service of response to the requests for admission within less than the 30-day, or in unlawful detainer action or other proceeding under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), five-day limit after service of the requests for admission [*see Code Civ. Proc. § 2033.250* (time for responding)].

Any motion concerning admissions must identify the requests by set and number [*Cal. Rules of Ct., Rule 3.1345(d)*].

A supporting memorandum is required to be served and filed with this motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*]. For general discussion of memoranda requirements and a skeletal form of memorandum, see Ch. 417, *Points and Authorities* .

This notice of motion and declaration usually will be combined with an application for an order under *Code Civ. Proc. § 1005(b),* shortening the time required for giving notice of the motion, since this form will be used when there is a need to proceed quickly. For a sample application and a form for an order shortening time, see *Ch. 524, Shortening and Extension of Time, § 524.54* (Application and Declaration for Ex Parte Order Shortening Time for Service of Notice of Motion and Accompanying Papers [*Code Civ. Proc. § 1005*] and § 524.55 [Ex Parte Order Shortening Time for Service of Notice of Motion and Accompanying Papers [*Code Civ. Proc. § 1005(b)*].

For a form for an order for use if this motion is granted, see *§ 196.62B.*

Motions to obtain relief sought by this form may be made with or without notice [*see Code Civ. Proc. §§ 2033.020(d), 2033.250*].] for general forms for notices of motion, *see* Ch. 372, *Motions and Orders* . For procedures to be followed

in preparing and serving this motion, see *§ 196.41[1]*.

For cross-references to additional forms relating to law and motion proceedings generally, see § 193.63[4].

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16-196 California Forms of Pleading and Practice--Annotated § 196.62B

§ 196.62B Proceedings for Order for Plaintiff to Make Early Requests for Admission and to Shorten Time for Response [Code Civ. Proc. §§ 2033.020, 2033.250]--Order

[1] FORM Proceedings for Order for Plaintiff to Make Early Requests for Admission and to Shorten Time for Response [Code Civ. Proc. §§ 2033.020, 2033.250]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER SHORTENING TIME FOR PLAINTIFF
Defendant. vs.	)	TO SERVE REQUESTS FOR ADMISSION AND
_____ [*name*],	)	RESPONSE
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

Application having been made on behalf of plaintiff, the court finds from proof made to the satisfaction of the court that there is good cause shown:

[*EITHER*]

1. To grant leave for plaintiff to serve Requests for Admission, _____ Set, on _____ [*specify party, e.g.,* defendant] _____ [*name*] within _____ [10 days *or, in unlawful*

detainer actions or other proceedings under Code Civ. Proc. § 1159 et seq. (forcible entry and detainer), five days] after _____ [service of summons *or* appearance] by _____ [*specify party, e.g.,* defendant].

[*AND/OR*]

2. To require that _____ [*specify party, e.g.,* defendant] _____ [*name*] respond to the Requests for Admission, _____ Set, within _____ [*specify number less than normal time for response*] days from service of the requests for admission.

[*CONTINUE*]

IT IS THEREFORE ORDERED as follows:

[*EITHER*]

1. That plaintiff _____ [*name*] may serve [the attached] Requests for Admission, Set _____ [*specify number*] on _____ [*specify party, e.g.,* defendant] _____ [*name*], forthwith, or as soon as such service can be made.

[*AND/OR*]

2. That _____ [*specify party, e.g.,* defendant] _____ [*name*] be required to respond to the Requests for Admission, Set _____ [*specify number*] within _____ [*specify number less than normal time for response*] days from the date of service of the requests for admission.

_____ [*date*]
_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The proposed order set out in [1], *above*, is for use by a plaintiff to allow service of requests for admission within 10 days after service of summons, or in unlawful detainer actions or other proceeding under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer), within five days after service of the summons, or after the appearance by another party, whichever occurs first. It is also for use to require that service of the response occur prior to the expiration of 30 days, or in unlawful detainer actions or other proceeding under *Code Civ. Proc. § 1159 et seq.* (forcible entry and detainer) prior to the expiration of five days, after service of the requests for admission [*see Code Civ. Proc. §§ 2033.020(b), (c), 2033.250*; *see also Code Civ. Proc. §§ 1013(a), 2016.050* (extension of 30-day limit when service by mail); *see also Code Civ. Proc. § 1013(c), (e)* (service by express mail or by fax)].

For further discussion of this proceeding, see *§§ 196.13[1], 196.16[4],* and 193.62A. For cross-references, see § 193.63[4].

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16-196 California Forms of Pleading and Practice--Annotated § 196.63

§ 196.63 Proceedings for Protective Order Concerning Request for Admissions [Code Civ. Proc. § 2033.080]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Protective Order Concerning Request for Admissions [Code Civ. Proc. § 2033.080]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Defendant.	)	NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER RESTRICTING DISCOVERY AND IMPOSING MONETARY SANCTION, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	
	)	(Request for Admissions)
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify moving party, e.g.,* defendant] will, and hereby does, move for a protective order _____ [*specify type of order sought, e.g.,* that Request Number 1 in Request For Admissions, Set _____ (*specify number, e.g.,* One), propounded by _____ (*identify requesting party, e.g.,* plaintiff) _____ (*name*) and served on _____ (*identify moving party, e.g.,* defendant) _____ (*name*) on _____ [*date*], need not be answered], and an order imposing a monetary sanction against _____ [*identify responding party and/or his/her attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] in the amount of $_____. The motion will be made on the ground that _____ [*specify grounds for protective order, e.g.,* the request relates to confidential research that _____ (*identify moving party, e.g.,* defendant) has been conducting], and that _____ [*identify moving party, e.g.,* defendant] made a reasonable and good faith attempt to resolve informally the issues presented by this motion.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name* (*s*)] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*identify party, e.g.,* defendant) in the above-described action].

2. _____ [*Identify moving party, e.g.,* Defendant] _____ [*name*] is seeking a protective order from this court directing that _____ [*specify order sought, e.g.,* the defendant not be required to answer Request Number 1 in Request For Admissions, Set _____ (*specify number, e.g.,* One), which is attached to this declaration as Exhibit A].

3. Good cause exists for the protective order sought by _____ [*identify moving party, e.g.,* defendant] in that _____ [*set forth facts showing good cause for particular order sought, e.g.,* the above-specified Request Number 1 relates to highly confidential research which defendant has been conducting and is of marginal relevance to the issues involved in this litigation].

4. On _____ [*date*], _____ [*specify actions taken to confer with opposing party in a reasonable and good faith attempt to informally resolve the issues covered by the motion, e.g.,* I sent a letter to plaintiff's attorney asking that plaintiff withdraw Request Number 1. A copy of the letter is attached as Exhibit A and made a part hereof. To date, I have not received an answer to his/her letter, nor have my subsequent telephone calls to plaintiff's attorney been returned].

5. _____ [*Identify moving party, e.g.*, Defendant] bases his/her request for the imposition of a sanction in the amount of $_____ on _____ [*itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

The notice of motion with supporting declaration set out in [1], *above*, is for use by a party, on whom a request for admissions was served, to obtain a protective order concerning the response pursuant to *Code Civ. Proc. § 2033.080*; for discussion of the various types of protective orders available under *Code Civ. Proc. § 2033.080, see § 196.14[2]*]. The motion also seeks a monetary sanction in the amount of costs and attorney's fees incurred in bringing the motion [*see* [3], *below*].

The motion must be made in the court in which the action is pending [*see Code Civ. Proc. § 2016.020(b)*], and should be made promptly after the request for admissions has been served [*Code Civ. Proc. § 2033.080(a)*].

Any motion concerning admission requests must identify the requests by set and number [*Cal. Rules of Ct., Rule 3.1345(d)*].

The motion must be accompanied by a supporting declaration that makes a factual showing of a reasonable and good faith attempt to resolve informally the issues presented by the motion [*Code Civ. Proc. § 2033.080(a)*; *see* discussion in *§ 196.14[1], above*].

A memorandum is required to be served and filed with this motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*]. For general discussion of memoranda requirements and a skeletal form of memorandum, see Ch. 417, *Points and Authorities* . For memoranda supporting a motion for protective order under *Code Civ. Proc. § 2033.080*, see California Points and Authorities, Ch. 86, *Discovery: Requests for Admissions* (Matthew Bender).

For the procedures to be followed in preparing and serving this motion, see *§ 196.50[2]*.

[3] Monetary Sanctions

The court must impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2033.080(d)*; for further discussion of monetary sanctions in this context, *see § 196.14[3]*].

[4] Cross References

- For discussion and forms concerning declarations in general, see Ch. 15, *Affidavits, Certificates, and Declarations*

- For discussion and forms relating to noticed motions and accompanying papers generally, see Ch. 372, *Motions and Orders*

- For discussion and forms concerning service of papers and proof of service, see Ch. 518, *Service of Summons and Papers*

- For further discussion and forms concerning shortening or extending time requirements in general, see Ch. 524, *Shortening and Extension of Time*

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16-196 California Forms of Pleading and Practice--Annotated § 196.64

§ 196.64 Proceedings for Protective Order Concerning Request for Admissions [Code Civ. Proc. § 2033.080]--Order

[1] FORM Proceedings for Protective Order Concerning Request for Admissions [Code Civ. Proc. § 2033.080]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify moving party, e.g.,* defendant] for a protective order directing that _____ [*describe motion, e.g.,* Request Number 1 in Request For Admissions, Set _____ (*specify number, e.g.,* One), propounded by _____ (*identify requesting party, e.g.,* plaintiff) _____ (*name*) and served on _____ (*identify moving party, e.g.,* defendant) _____ (*name*) on _____ [*date*], need not be answered] and for monetary sanctions came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

[*EITHER*]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[*OR*]

On good cause being shown and on proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and _____ [*describe order, e.g.,* Request Number 1 in Request For Admissions, Set _____ (*specify number, e.g.,* One), propounded by _____ (*identify requesting party, e.g.,* plaintiff) _____ (*name*) and served on _____ (*identify moving party, e.g.,* defendant) _____(*name*) on _____ (*date*), need not be answered].

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*specify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney_____ (*name*)] pay forthwith to _____ [*specify successful party, e.g.,* defendant] _____ [*name*] the sum of $_____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____ [*specify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*specify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The proposed order set out in [1], *above*, is for use when the court has granted or denied a motion by a party for a protective order under *Code Civ. Proc. § 2033.080*. For further discussion of this proceeding, see *§§ 196.14* and *196.63[2] -[4]*.

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16-196 California Forms of Pleading and Practice--Annotated § 196.65

§ 196.65 Proceedings for Order Requiring Further Response to Request for Admissions [Code Civ. Proc. § 2033.290]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Order Requiring Further Response to Request for Admissions [Code Civ. Proc. § 2033.290]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	NOTICE OF MOTION AND MOTION FOR OR-
	)	DER REQUIRING FURTHER RESPONSE TO
_____ [*name*]	)	REQUEST FOR ADMISSIONS AND IMPOSING
Defendant.	)	MONETARY SANCTIONS, SUPPORTING DE-
vs.	)	CLARATION OF
_____ [*name*],	)	_____ [*name*],
Defendant.	)	STATEMENT OF REQUESTS
	)	AND RESPONSES IN CONTENTION, AND
	)	MEMORANDUM
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] will, and hereby does, move the court for an order pursuant to Sections 2023.010 et seq. *and 2033.290 of the Code of Civil Procedure* that _____ [*identify responding party, e.g.,* defendant] _____[*name*] serve further responses to Request(s) No. _____ [*specify*] of _____ [*identify party, e.g.,* plaintiff] _____'s [*name*] _____ [*specify number, e.g.,* first] set of requests for admissions served on _____ [*identify party, e.g.,* defendant] _____ [*name*] on_____ [*date*], and for an order imposing monetary sanctions against _____ [*identify responding party and/or his/her attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] in the amount of $_____. The motion will be made on the grounds that the _____ [documents *and/or* matters of fact] which are the subject of the requests for admission specified above are relevant to the subject matter of this action and are not privileged, and that _____ [*specify type of response to each request in question and specify reasons response is improper, e.g.,* the objection to Request No. 2 is improper in that the matter in question is not privileged under the attorney-client privilege, and the response to Request No. 4 does not comply with *Section 2033.220 of the Code of Civil Procedure* and is improper in that the _____ (*identify responding party, e.g.,* defendant) _____ (*name*) refused to admit or deny the genuineness of the document in question but gave no reason whatsoever for his/her purported inability to admit or deny the genuineness of the documents in question].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name* (*s*)], and the copies of the requests for admissions and responses [and correspondence] attached to that/those declaration(s) as Exhibit(s), on the separate statement served and filed herewith pursuant to *Cal. Rules of Ct., Rule 3.1345*, on the memorandum set forth below; and on the records and file herein and such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

1. [*Identity of declarant. See § 196.63[1], Declaration, Paragraph 1.*]

2. This is an action _____ [*specify the subject matter and issues of the action, specifically referring to pleadings or other documents on file, summarizing or attaching portions of those pleadings or documents as exhibits when appropriate*].

3. On _____ [*date*], _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] served his/her _____ [*specify number, e.g.,* first] set of requests for admissions on _____ [*identify party, e.g.,* defendant] _____ [*name*]. A copy of those requests for admissions is attached hereto as Exhibit A and made a part hereof.

4. On _____ [*date*], _____ [*identify party, e.g.,* defendant] _____ [*name*] served his/her purported responses to those requests for admissions on _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*]. A copy of those purported responses is attached as Exhibit B and incorporated by reference.

5. The _____ [objection(s) *or* failure of the response(s) to comply with *Sections 2033.210 et seq. of the Code of Civil Procedure or both*] was/were without substantial justification in that _____ [*specify, e.g.,* the objections raised were patently not in point in that _____ (*specify*)].

6. [*Reasonable and good faith attempt to resolve informally issues presented by motion. See § 196.63[1], Declaration, Paragraph 4.*]

7. [*Itemization of expenses. See § 196.63[1], Declaration, Paragraph 5.*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

The notice of motion with supporting declaration set out in [1], *above*, is for use by a party who served requests for admissions and wishes to compel a further response to those requests because the responding party's initial response was evasive, incomplete, or contained an objection to a particular request that was meritless or too general [*see Code Civ. Proc. § 2033.290*, discussed in the *§ 196.18, above*].

Any motion concerning admission requests must identify the requests by set and number [*Cal. Rules of Ct., Rule 3.1345(d)*].

The motion must be accompanied by a supporting declaration that makes a factual showing of a reasonable and good faith attempt to resolve informally the issues presented by the motion [*Code Civ. Proc. § 2033.290(b)*; *see* further discussion in *§ 196.18[1]*].

A memorandum is required to be served and filed with this motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*]. For general discussion of memoranda requirements and a skeletal form of memorandum, see Ch. 417, *Points and Authorities* . For forms of memoranda supporting a motion to compel responses under *Code Civ. Proc. § 2033.290*, see California Points and Authorities, Ch. 86, *Discovery: Requests for Admissions* (Matthew Bender).

For the procedures to be followed in preparing and serving this motion, see *§ 196.41[2]*.

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 196.63[4]*.

[3] Separate Statement

A motion to compel further responses to requests for admissions must be accompanied by a separate statement [*Cal. Rules of Ct., Rule 3.1345(a)(1), (c)*]. This is a separate document filed and served with the motion that sets out all the information necessary to understand all the questions and responses that are in issue [*see Cal. Rules of Ct., Rule 3.1345(c)*]. For a form for this separate statement, together with further discussion of its requirements, see *§ 196.66*.

[4] Notice Requirements

The notice of the motion for an order compelling a further response must be given within 45 days of the service of the response, or of any supplemental response, or by any specific later date to which the requesting party and the responding party have agreed in writing. If the party requesting admissions fails to make the motion within the appropriate time, he or she waives any right to compel further response to the requests for admission [*Code Civ. Proc. § 2033.290(c)*].

If the response was served by mail, the 45-day deadline is extended five calendar days if the place of address is within California, 10 calendar days if the place of address is outside California but within the United States, or 20 calendar days if the place of address is outside the United States [*see Code Civ. Proc. §§ 1013(a), 2016.050*]. The period is extended two court days if service is by Express Mail, other overnight delivery, or by fax [*see Code Civ. Proc. § 1013(c), (e)*].

[5] Monetary Sanctions

The court must impose a monetary sanction under *Code Civ. Proc. § 2023.030* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel further responses, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2033.290(d)*; for further discussion, *see § 196.18[4]*].

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16-196 California Forms of Pleading and Practice--Annotated § 196.66

§ 196.66 Proceedings for Order Requiring Further Response to Request for Admissions [Code Civ. Proc. § 2033.290]--Separate Statement [Cal. Rules of Ct., Rule 3.1345]

[1] FORM Proceedings for Order Requiring Further Response to Request for Admissions [Code Civ. Proc. § 2033.290]--Separate Statement [Cal. Rules of Ct., Rule 3.1020]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	SEPARATE STATEMENT IN SUPPORT OF MO-
Defendant.	)	TION
vs.	)	FOR ORDER COMPELLING FURTHER RE-
_____ [*name*],	)	SPONSE TO REQUEST FOR ADMISSIONS
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

This separate statement is submitted in support of the motion by _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] to compel _____ [*specify party from whom admissions are sought, e.g.,* defendant] _____ [*name*] to serve a further response to the [supplemental] request for admissions of _____ (*specify requesting party, e.g.,* plaintiff)]. As required under *Cal. Rules of Ct., Rule 3.1345*, this statement provides information relating to the requests for admissions and the responses thereto that are at issue in the motion, as follows:

REQUEST FOR ADMISSION _____ [*identify request by set number and the number or letter of the individual request*]

1. Text of Request: _____ [*specify*].

2. Text of Response(s): _____ [*specify text of response, and any further responses, to the specific request*].

[3. Related Definitions and Instructions: _____ (*specify, if necessary, the text of all definitions, instructions, and other matters required to understand the specific request and the responses to it.*)]

[4. Related Requests and Responses: _____ (*if the response to the specific request is dependent on the response given to another discovery request, or if the reasons a further response is deemed necessary are based on the response to some other discovery request, specify the text of the other request and the response to it.*)]

[5. Related Pleadings and Other Documents: _____ (*summarize any pleadings or other documents in the file, if any, that are relevant to the motion and are relied on by the moving party.*)]

6. Statement of Reasons for Compelling Further Response(s): _____ [*state factual and legal reasons for compelling further responses to the specific request*]. [*Set out separately, as above, any further specific requests with related information, with respect to which the motion is seeking to compel further response.*]
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*requesting party's status and name*]

[2] Use of Form

The separate statement set out in [1], *above*, must to accompany a motion, such as that *set out in § 196.65*, to compel further responses to requests for admissions [*see Cal. Rules of Ct., Rule 3.1345(a)(1)*].

[3] Contents of Separate Statement

Any motion involving the content of a discovery request or the responses to such a request must be accompanied by a separate statement [*Cal. Rules of Ct., Rule 3.1345(a)*]. The motions that require a separate statement include a motion to compel further responses to requests for admissions [*Cal. Rules of Ct., Rule 3.1345(a)(1)*]. A separate statement is not required when no response has been provided to the request for discovery [*Cal. Rules of Ct., Rule 3.1345(b)*].

This separate statement is a separate document filed and served with the motion. It must set forth all the information necessary to understand each discovery request (in this instance each request for admission) and all the responses to it that are at issue [*Cal. Rules of Ct., Rule 3.1345(c)*]. It must be full and complete, so that no person is required to review any other document in order to determine the full request and the full response. Material may not be incorporated into the separate statement by reference [*Cal. Rules of Ct., Rule 3.1345(c)*].

The separate statement must include, for each discovery request (in this instance each request for admission) to which a further response is requested, the following [*Cal. Rules of Ct., Rule 3.1345(c)*]:

- The text of the request, and the text of each response, answer, or objection, and any further responses or answers [*Cal. Rules of Ct., Rule 3.1345(c)(1), (2)*].

- A statement of the factual and legal reasons for compelling further responses, answers, or production as to each matter in dispute [*Cal. Rules of Ct., Rule 3.1345(c)(3)*].

- If necessary, the text of all definitions, instructions, and other matters required to understand each discovery request and the responses to it [*Cal. Rules of Ct., Rule 3.1345(c)(4)*].

- If the response to a particular discovery request is dependent on the response given to another discovery request, or if the reasons a further response to a particular discovery request is deemed necessary are based on the response to some other discovery request, the other request and the response to it must be set forth [*Cal. Rules of Ct., Rule 3.1345(c)(5)*].

- If the pleadings, other documents in the file, or other items of discovery are relevant to the motion, a summary of each relevant document by the party relying on the document [*Cal. Rules of Ct., Rule 3.1345(c)(6)*].

The primary function of the separate statement appears to be that of providing a summary, in a single document, of all matters, taken from all pleadings and all other papers, that may be necessary to determine the motion. By including a statement of the factual and legal reasons for compelling further responses to each matter in dispute [*Cal. Rules of Ct., Rule 3.1345(c)(3)*], it appears that a separate statement, when required under *Cal. Rules of Ct., Rule 3.1345(c)*, also serves the same function as the supporting memorandum [*see Cal. Rules of Ct., Rule 3.1113(b)* (memorandum consists of statement of facts and statement of law, evidence and argument, discussing the statutes, cases, and textbooks cited as support)].

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PART V. FORMS

16-196 California Forms of Pleading and Practice--Annotated § 196.67

§ 196.67 Proceedings for Order Requiring Further Response to Request for Admissions [Code Civ. Proc. § 2033.290]--Order

[1] FORM Proceedings for Order Requiring Further Response to Request for Admissions [Code Civ. Proc. § 2033.290]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	Date: _____
vs.	)	Time: _____
_____ [*name*(*s*)],	)	Location: _____
Defendant(s).	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] for an order that _____ [*identify party, e.g.,* defendant] _____ [*name*] serve further answers to Request(s) No. _____ [*specify*] of _____ [*identify party, e.g.,* plaintiff's] _____ [*specify number, e.g.,* first] set of requests for admissions which were served on _____ [*identify responding party, e.g.,* defendant] _____ [*name*] on _____ [*date*], and that _____ [*identify responding party and/or his/her attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] pay to _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] the amount of his/her reasonable expenses, including attorney's fees, incurred in obtaining this order, came on regularly for hearing on

_____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be _____ [denied *or* granted],

IT IS ORDERED that the motion be, and hereby is, _____ [denied *or* granted and that _____ (*specify responding party, e.g.,* defendant) _____ (*name*) serve _____ (*specify, e.g.,* further answers to Requests Nos. _____ and _____) of _____ (*specify moving party, e.g.,* plaintiff) _____'s (*name*) _____ (*specify number, e.g.,* first) set of requests for admissions on _____ (*specify moving party, e.g.,* plaintiff) on or before _____ (*date*).

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*specify unsuccessful party, person, or attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] pay forthwith to _____ [*specify successful party, e.g.,* plaintiff] _____ [*name*] the sum of $_____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____ [*specify unsuccessful party, person, or attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*specify unsuccessful party, person, or attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The proposed order set out in [1], *above*, is for use if the court has granted or denied a motion to compel further answers pursuant to *Code Civ. Proc. § 2033.290* and granted expenses under *Code Civ. Proc. §§ 2023.030* and *2033.290*. For further discussion, see *§§ 196.18* and *196.65[2] -[5]*.

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Chapter 196 DISCOVERY: REQUESTS FOR ADMISSIONS
PART V. FORMS

16-196 California Forms of Pleading and Practice--Annotated § 196.68

§ 196.68 Proceedings for Withdrawal of Admission [Code Civ. Proc. § 2033.300]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Withdrawal of Admission [Code Civ. Proc. § 2033.300]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Defendant. vs. _____ [*name*], Defendant.	)))))))))))	NO. _____ NOTICE OF MOTION AND MOTION FOR WITHDRAWAL OF ADMISSION, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

_____

To _____ [*identify party, e.g.*, plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____

[*identify moving party, e.g.,* defendant] will, and hereby does, move for the court for permission to withdraw _____ [*specify admission that moving party seeks to withdraw, e.g.,* Response Number 1 to Request Number 1 in Request For Admissions, Set _____ (*specify number, e.g.,* One), propounded by _____ (*identify requesting party, e.g.,* plaintiff) _____ (*name*)]. The motion will be made on the grounds of _____ [*specify grounds, e.g.,* mistake].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name*(*s*)] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. [*Identity of declarant. See § 196.63[1], Declaration, Paragraph 1.*]

2. _____ [*Identify moving party, e.g.,* Defendant] _____ [*name*] is seeking to withdraw his/her response(s) to Requests for Admissions, Set _____ (*specify number, e.g.,* One), as set forth below.

REQUEST NO. _____ [*Specify number as it appears in the original request for admissions, e.g.,* 1]: _____ [*Set forth the request verbatim*].

RESPONSE: _____ [*Set forth the response or objection served by responding party verbatim*].

3. The above-specified response(s) was/were incorrect because _____ [*set forth facts showing that the response was incorrect due to mistake, inadvertence, or excusable neglect.*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

The notice of motion with supporting declaration set out in [1], *above*, is for use by a party who wishes to withdraw an

admission under *Code Civ. Proc. § 2033.300*. With minor alterations it may also be used for amending an admission under *Code Civ. Proc. § 2033.300*. For discussion of the grounds on which amendment and withdrawal of responses are permitted, see *§ 196.16[6]*.

Any motion concerning admission requests must identify the requests by set and number [*Cal. Rules of Ct., Rule 3.1345(d)*].

A supporting memorandum is required to be served and filed with this motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*]. For general discussion of memoranda requirements and a skeletal form of memorandum, see Ch. 417, *Points and Authorities* . For memoranda supporting a motion to withdraw or amend a response under *Code Civ. Proc. § 2033.300*, see California Points and Authorities, Ch. 86, *Discovery: Requests for Admissions* (Matthew Bender).

For the procedures to be followed in preparing and serving this motion, see *§ 196.50[5]*.

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 196.63[4]*.

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16-196 California Forms of Pleading and Practice--Annotated § 196.69

§ 196.69 Proceedings for Withdrawal of Admission [Code Civ. Proc. § 2033.300]--Order

[1] FORM Proceedings for Withdrawal of Admission [Code Civ. Proc. § 2033.300]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify moving party, e.g.,* defendant] for an order directing that _____ [*identify moving party, e.g.,* defendant] _____ [*describe motion, e.g.,* be entitled to withdraw its Response Number 1 to Request Number 1 in Request For Admissions, Set _____ (*specify number, e.g.,* One), propounded by _____ (*identify requesting party, e.g.,* plaintiff) _____ (*name*) and served on _____ (*identify responding party, e.g.,* defendant) _____ (*name*) on _____ [*date*]] came on regularly for hearing on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that good cause exists for granting the motion on the grounds of _____ [*specify grounds, e.g.,* mistake *or* inadvertence *or* excusable neglect], and that the

_____ (*identify requesting party, e.g.,* plaintiff) will not be substantially prejudiced in maintaining that party's action or defense on the merits,

IT IS ORDERED that the motion be, and it hereby is, granted and that _____ [*describe order, e.g.,* Response Number 1 to Request Number 1 in Request For Admissions, Set _____ (*specify number, e.g.,* One), propounded by _____ (*identify requesting party, e.g.,* plaintiff) _____ (*name*) be withdrawn].

[IT IS FURTHER ORDERED that _____ (*set forth any conditions the court imposes on the granting of the motion, e.g.,* (*identify requesting party, e.g.,* plaintiff) will be permitted to pursue additional discovery related to _____(*specify issue involved in the withdrawn admission*), the costs of all additional discovery on such issue to be borne by _____ (*identify moving party, e.g.,* defendant)).]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The proposed order set out in [1], *above*, is for use when the court has granted a motion directing that a party be entitled to withdraw or amend an admission under *Code Civ. Proc. § 2033.300*. See also *§ 196.68*.

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16-196 California Forms of Pleading and Practice--Annotated § 196.70

§ 196.70 Proceedings for Order That Matters Be Deemed Admitted [Code Civ. Proc. § 2033.280]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Order That Matters Be Deemed Admitted [Code Civ. Proc. § 2033.280]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Defendant. vs. _____ [*name*], Defendant.	))))))))))	NO. _____ NOTICE OF MOTION AND MOTION FOR ORDER THAT MATTERS IN REQUEST FOR ADMISSIONS BE DEEMED ADMITTED AND IMPOSING MONETARY SANCTIONS, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ (*specify number*) of] this court, located at _____ [*address*], _____ [*city*], _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] will, and hereby does, move the court for an order pursuant to Sections 2023.010 et seq. *and 2033.280 of the Code of Civil Procedure* that the truth of all specified matters, and the genuineness of all specified documents, in the Request For Admissions, Set _____ [*specify number, e.g.,* One], propounded by _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] and served on _____ [*identify responding party, e.g.,* defendant] _____ [*name*] on _____ [*date*], be deemed admitted, and for monetary sanctions against _____ [*identify responding party and/or his/her attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] in the amount of $_____. The motion will be made on the grounds that _____ [*identify respondingparty, e.g.,* defendant] _____ [*name*] failed to serve a timely response to _____'s [*identify moving party, e.g.,* plaintiff] above-described Request For Admissions.

The motion will be based on this notice of motion; on the declaration(s) of _____ [*name*(*s*)] and the copies of the requests for admissions and responses attached to his/her declaration as Exhibits, and the memorandum, set forth below; on the records and file herein; and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I _____ [*name*], declare:

1. [*Identity of declarant. See § 196.63[1], Declaration, Paragraph 1.*]

2. On _____ [*date*], _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] served his/her _____ [*specify number, e.g.,* first] set of requests for admissions on _____ [*identify responding party, e.g.,* defendant] _____ [*name*] _____ [personally *or* by mail]. A copy of those requests for admissions is attached as Exhibit A and incorporated by reference.

3. Under Code of Civil Procedure Section_____ 2033.250 [*identify party to whom request was made, e.g.,* defendant] was required to respond by _____ [*specify date by which response was due*].

4. The time for _____ [*identify party to whom request was made, e.g.,* defendant] to serve a response on _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] in a timely manner expired on _____ [*specify date by which response is due under Code Civ. Proc. § 2033.250*], and _____ [*identify party to whom request was made, e.g.,* defendant] has not at this time served any response on _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*].

5. As a result of the failure of _____ [*specify party to whom request was made, e.g.,* defendant] _____ [*name*] to respond to the request for admissions described above, _____ [

identify moving party, e.g., plaintiff] _____ [*name*] has necessarily incurred the following reasonable expenses: _____ [*itemize expenses, including attorney's fees, and give amounts, explaining basis of computation*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

This notice of motion and supporting declaration is for use by a party, who served a request for admissions on another party and did not receive a response, to bring a motion that the matters in the request be deemed admitted [*Code Civ. Proc. § 2033.280*; *see* discussion in *§ 196.17*]. It may be brought after the party to whom the request was directed failed to respond within the time limits specified in *Code Civ. Proc. § 2033.250* [*Code Civ. Proc. § 2033.280*; for discussion of this time requirement, *see § 196.16[4]*].

Any motion concerning admission requests must identify the requests by set and number [*Cal. Rules of Ct., Rule 3.1345(d)*].

A supporting memorandum is required to be served and filed with this motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*]. For general discussion of memoranda requirements and a skeletal form of memorandum, see Ch. 417, *Points and Authorities* . For forms of memoranda supporting a motion under *Code Civ. Proc. § 2033.280*, see California Points and Authorities, Ch. 86, *Discovery: Requests for Admissions* (Matthew Bender).

For the procedures to be followed in preparing and serving this motion, see *§ 196.41[1]*.

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 196.63[4]*.

[3] Monetary Sanction

It is *mandatory* that the court impose a monetary sanction under *Code Civ. Proc. § 2023.030* against the party or attorney, or both, whose failure to serve a timely response to requests for admission necessitates a motion to deem admitted the genuineness of any documents and the truth of any matters specified in the requests [*Code Civ. Proc. § 2033.280(b), (c)*; *Appleton v. Superior Court (1988) 206 Cal. App. 3d 632, 635, 253 Cal. Rptr. 762* (decided under prior law)]. Thus, the supporting declaration includes facts showing the actual amount of expenses and fees incurred as a result of the necessity that requesting party bring the motion. For further discussion, see *§ 196.17* and general discussion of monetary sanctions in Ch. 192, *Discovery: Sanctions for Discovery Misuse*, §§ 192.12, 192.14.

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16-196 California Forms of Pleading and Practice--Annotated § 196.71

§ 196.71 Proceedings for Order That Matters Be Deemed Admitted [Code Civ. Proc. § 2033.280]--Order

[1] FORM Proceedings for Order That Matters Be Deemed Admitted [Code Civ. Proc. § 2033.280]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] for an order that all the truth of all specified matters, and the genuineness of all specified documents, in the Request For Admissions, Set _____ [*specify number, e.g.,* One], propounded by _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] and served on _____ [*identify responding party, e.g.,* defendant] _____ [*name*] on _____ [*date*], be deemed admitted, and that _____ [*identify responding party and/or his/her attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] pay to _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] the amount of his/her reasonable expenses, including attorney's fees, incurred in obtaining this order, came on regularly for hearing on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted and that the truth of all specified matters, and the genuineness of all specified documents, in the Request For Admissions, Set _____ [*specify number, e.g.,* One], propounded by _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] and served on _____ [*identify responding party, e.g.,* defendant] _____ [*name*] on _____ [*date*], be deemed admitted.

IT IS FURTHER ORDERED that _____ [*identify responding party, or his/her attorney, or both, e.g.,* defendant _____ (*name*) and his/her attorney, _____ (*name*)] pay forthwith to _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] $_____ on or before _____ [*date*], for his/her reasonable expenses in making this motion, including attorney's fees.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The proposed order set out in [1], *above*, is for use if the court has granted a motion for deemed admissions and for payment of expenses under *Code Civ. Proc. §§ 2023.030(a)* and *2033.280*. See also *§ 196.70*.

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16-196 California Forms of Pleading and Practice--Annotated § 196.72

§ 196.72 Proceedings for Order That Matters Be Deemed Admitted Following Party's Failure to Obey Order to Make Further Response [Code Civ. Proc. § 2033.290]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Order That Matters Be Deemed Admitted Following Party's Failure to Obey Order to Make Further Response [Code Civ. Proc. § 2033.290]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Defendant. vs. _____ [*name*], Defendant.	NO. _____ NOTICE OF MOTION AND MOTION FOR ORDER REQUIRING MATTERS IN REQUEST FOR FURTHER RESPONSES BE DEEMED ADMITTED AND IMPOSING MONETARY SANCTIONS, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the

matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] will, and hereby does, move the court for an order pursuant to Sections 2023.010 et seq. *and 2033.290 of the Code of Civil Procedure* that _____ [the truth of the matters *and/or* the genuineness of the documents] specified in the Request For Admissions, Set _____ [*specify number, e.g.,* One], Request(s) _____ [*specify number of request(s) as to which the court made an order compelling further response, e.g.,* 4] propounded by _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*], which matter(s) was/were the subject of a court order requiringa further response be deemed admitted, and for an order imposing a monetary sanction against _____ [*identify responding party and/or his/her attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] in the amount of $_____. The motion will be made on the grounds that _____ [*identify responding party, e.g.,* defendant] _____ [*name*] failed to make a further response to _____'s [*identify moving party, e.g.,* plaintiff] above-described Request For Admissions as ordered by the court on _____ [*date*], and that _____ [*identify moving party, e.g.,* plaintiff] made a reasonable and good faith attempt to resolve informally the issues presented by this motion.

The motion will be based on this notice of motion; on the declaration(s) of _____ [*name*(*s*)], and the copies of the requests for admissions, responses, and order of the court requiring further responses attached to his/her declaration as exhibits; on the memorandum, all of which are served and filed herewith; on the records and file herein; and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

SUPPORTING DECLARATION OF _____ [*name*]

I _____ [*name*], declare:

1. [*Identity of declarant. See § 196.63[1], Declaration, Paragraph 1.*]

2. On _____ [*date*], _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] obtained an order of the court, attached as Exhibit A, requiring _____ [*identify party who failed to make further response, e.g.,* defendant] _____ [*name*] to make a further response to the following request(s) for admission. A copy of the order is attached as Exhibit A.

REQUEST NO. _____ [*specify number of request subject to court's order as it appears in the original request for admissions, e.g.,* 2]: _____ [*Set forth the request verbatim*].

3. _____ [*Identify party to whom request was made, e.g.,* Defendant] failed to submit a further response as required by the court.

4. [*Reasonable and good faith attempt to resolve informally issues presented by motion. See § 196.63[1], Declaration, Paragraph 4.*]

5. The following expenses have been incurred as a result of _____ [*identify party to whom request was made, e.g.,* defendant _____'s (*name*)] failure to obey this court's order to make further response: _____ [*itemize expenses, including attorney's fees, and give amounts, explaining basis of computation*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

The notice of motion with supporting declaration set out in [1], *above*, is for use by a party who obtained an order requiring another party to make further responses to a request for admissions when the party who was ordered to make the further responses failed to do so. The motion requests that matters contained in the order requiring further response be deemed admitted under *Code Civ. Proc. §§ 2033.290*, and requests an award of the expenses of making the motion as a monetary sanction under *Code Civ. Proc. §§ 2023.030* and *2033.290* [*see also* discussion in *§ 196.18[4]*].

Any motion concerning admission requests must identify the requests by set and number [*Cal. Rules of Ct., Rule 3.1345(d)*].

A memorandum is required to be served and filed with this motion [*Cal. Rules of Ct., Rule 3.1113*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*]. For general discussion of memoranda requirements and a skeletal form for a of memorandum, see Ch. 417, *Points and Authorities* . For forms of memoranda supporting a motion under *Code Civ. Proc. § 2033.290*, see California Points and Authorities, Ch. 86, *Discovery: Requests for Admissions* (Matthew Bender).

For the procedures to be followed in preparing and serving this motion, see *§ 196.41[3]*.

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 196.63[4]*.

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16-196 California Forms of Pleading and Practice--Annotated § 196.73

§ 196.73 Proceedings for Order That Matters Be Deemed Admitted Following Party's Failure to Obey Order to Make Further Response [Code Civ. Proc. § 2033.290]--Order

[1] FORM Proceedings for Order That Matters Be Deemed Admitted Following Party's Failure to Obey Order to Make Further Response [Code Civ. Proc. § 2033.290]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] for an order that the _____ [truth of the matters *and/or* genuineness of the documents] specified in the Request for Admissions, Set _____ [*specify number, e.g.,* One], Request(s) _____ [*specify number of request(s) as to which order is granted, e.g.,* 4], propounded by _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] and served on _____ [*identify responding party, e.g.,* defendant] _____ [*name*] on _____ [*date*], be deemed admitted, and that monetary sanctions be imposed against _____ [*identify responding party and/or his/her attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] in the amount of $_____, came on regularly for hearing on _____ [*date*]. Plaintiff appeared by

counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted and the _____ [truth of all matters *and/or* genuineness of the documents] specified in Request Number(s) _____ [*specify number of request(s) as to which order is granted, e.g.*, 4] in the Request For Admissions, Set _____ [*specify number, e.g.*, One], propounded by _____ [*identify moving party, e.g.*, plaintiff] _____ [*name*] and served on _____ [*identify responding party, e.g.*, defendant] _____ [*name*] on _____ [*date*], as set forth below, be deemed admitted.

REQUEST NO. _____ [*specify number of request subject to court's order as it appears in the original request for admissions, e.g.*, 4]: _____ [*Set forth the request verbatim*].

IT IS FURTHER ORDERED that _____ [*identify responding party, or his/her attorney, or both, e.g.*, defendant _____ (*name*) and his/her attorney, _____ (*name*)] pay forthwith to _____ [*identify moving party, e.g.*, plaintiff] _____ [*name*] his/her reasonable expenses in making this motion, including attorney's fees, in the amount of $_____, on or before _____ [*date*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The proposed order set out in [1], *above*, is for use when the court has granted a motion to compel further answers under *Code Civ. Proc. § 2033.290*, and the party who was ordered to make the further responses failed to do so. The order directs that the matters that were the subject of the order compelling further response be deemed admitted pursuant to *Code Civ. Proc. § 2033.290*. The order also directs the payment to the moving party of expenses incurred in bringing the motion, pursuant to *Code Civ. Proc. §§ 2023.010 et seq.* and *2033.290(d)*. See also *§§ 196.18[4]* and *196.72*.

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 196 DISCOVERY: REQUESTS FOR ADMISSIONS
PART V. FORMS

16-196 California Forms of Pleading and Practice--Annotated § 196.74

§ 196.74 Proceedings for Order Requiring Payment of Expenses of Proof [Code Civ. Proc. § 2033.420]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Order Requiring Payment of Expenses of Proof [Code Civ. Proc. § 2033.420]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	NOTICE OF MOTION AND MOTION FOR OR-
	)	DER REQUIRING _____
_____ [*name*],	)	[*identify party, e.g.,*
Defendant. vs.	)	DEFENDANT] _____ [*name*]
_____ [*name*],	)	TO PAY EXPENSES OF PROOF, SUPPORTING
Defendant.	)	DECLARATION OF
	)	_____ [*name*], AND MEMOR-
	)	ANDUM
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [*party, e.g.,* plaintiff] _____ [*name*] will, and hereby does, move the court for an order that _____ [*identify party, e.g.,* defendant _____ [*name*] pay to _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] the sum of $_____, as his/her reasonable expenses, including reasonable attorney's fees, incurred in proving the _____ [truth of facts *or* genuineness of documents] denied by defendant _____ (*name*) in his/her response to a request for admissions. The motion will be made on the grounds that _____ [*identify party, e.g.,* defendant] _____ [*name*] served denials to certain requests for admissions which were served on him/her by _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] pursuant to *Section 2033.010 et seq. of the Code of Civil Procedure* and that _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] thereafter proved the _____ [genuineness of those document(s) *or* the truth of those matter(s) of fact *or both*].

The motion will be based on this notice of motion; on the declaration(s) of _____ [*name*(*s*)], including the copies of the requests for admissions and responses attached to his/her declaration as Exhibits and on the memorandum, all of which are served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

SUPPORTING DECLARATION OF _____ [*name*]

I _____ [*name*], declare:

1. [*Identity of declarant. See § 196.63[1], Declaration, Paragraph 1.*]

2. On _____ [*date*], _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] served his/her _____ [*specify number, e.g.,* first] set of requests for admissions on _____ [*identify party, e.g.,* defendant] _____ [*name*], a copy of which is attached as Exhibit A and incorporated by reference.

3. On _____ [*date*], _____ [*identify party, e.g.,* defendant] _____ [*name*] served his/her responses to those requests for admission on _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*], a copy of which is attached as Exhibit B and incorporated by reference.

4. Among the matters which _____ [*identify party, e.g.,* defendant] _____ [*name*] was requested to admit was/were the following;

REQUEST NO. _____ [*specify number of request as it appears in the original request for admissions, e.g.,* 2]: _____ [*Set forth the request verbatim*].

5. _____ [*Identify party, e.g.,* defendant] _____ [*name*] served [a] sworn denial(s) to

Request(s) No. _____ [*specify request number*(*s*)].

6. This/These matter(s) is/are of substantial importance in this action in that _____ [*specify, e.g.,* defendant's liability is based on his/her ownership of the vehicle in question].

7. It appears that there were no good reasons for the denial(s) in that _____ [*specify, e.g.,* evidence that _____ (*specify facts*), introduced at trial as shown in the partial transcript attached as Exhibit C, shows that defendant _____ (*name*) made his/her sworn denial with full knowledge that _____ (*specify matter, e.g.,* he/she was the registered owner of the vehicle involved in the accident which caused plaintiff's injuries) was not in fact true].

8. As a result of _____ [*identify party, e.g.,* defendant] _____'s [*name*] denial of this/these matter(s), _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] was required to prove the matter(s) at the trial of this action by _____ [*specify, e.g.,* the testimony of _____ (*name of witness*), concerning _____ (*specify subject of testimony, e.g.,* defendant's ownership of the vehicle involved in the accident which caused plaintiff's injuries)].

9. The reasonable expenses of such proof amounted to $_____, and were: _____ [*itemize expenses of proof, including attorney's fees, attaching supporting documents, such as bills from experts, as exhibits, if available*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

The notice of motion with supporting declaration set out in [1], *above*, is for use by a party to obtain the expenses, including reasonable attorney's fees, incurred in proving the genuineness of documents or matters of fact, or both, when the opposing party has unjustifiably failed to admit to such matters in response to a request for admission [*see Code Civ. Proc. § 2033.420*]. It is not necessary for the moving party to have prevailed in the action for him or her to recover these expenses [*see Smith v. Circle P Ranch Co. (1978) 87 Cal. App. 3d 267, 275, 150 Cal. Rptr. 828* (prior law)]. For further discussion, see *§ 196.21*.

Any motion concerning admission requests must identify the requests by set and number [*Cal. Rules of Ct., Rule 3.1345(d)*].

A suppoting memorandum is required to be served and filed with this motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*]. For general discussion of memoranda requirements and a skeletal form of memorandum, see Ch. 417, *Points and Authorities* . For forms of memoranda supporting a motion under *Code Civ. Proc. § 2033.420*, see California Points and Authorities, Ch. 86, *Discovery: Requests for Admissions* (Matthew

Bender).

For the procedures to be followed in preparing and serving this motion, see *§ 196.41[4]*.

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 196.63[4]*.

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Chapter 196 DISCOVERY: REQUESTS FOR ADMISSIONS
PART V. FORMS

16-196 California Forms of Pleading and Practice--Annotated § 196.75

§ 196.75 Proceedings for Order Requiring Payment of Expenses of Proof [Code Civ. Proc. § 2033.420]--Order

[1] FORM Proceedings for Order Requiring Payment of Expenses of Proof [Code Civ. Proc. § 2033.420]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] for an order that _____ [*identify party, e.g.,* defendant] pay him/her the sum of $_____, as his/her reasonable expenses in proving _____ [*specify matters which were proven*] came on regularly for hearing on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

[*EITHER*]

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that _____ [*identify party, e.g.,* defendant] _____ [*name*] pay forthwith to _____ [*identify party, e.g.,* plaintiff] _____ [*name*] the sum of $_____ as reasonable expenses, including reasonable attorney's fees, of making the proof described above.

[*OR*]

The court finds that _____ [*specify ground for denying order under Code Civ. Proc. § 2033.420, e.g.,* the admission sought was of no substantial importance].

IT IS THEREFORE ORDERED that the motion be, and hereby is, denied.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use when the court grants or denies a motion for an award of the expenses, including reasonable attorney's fees, incurred in proving the genuineness of documents or matters of fact or both, following another party's sworn denials served in response to moving party's requests for admissions. Although *Code Civ. Proc. § 2033.420* does not require the court to make written findings disclosing its reasons for granting the order, it appears to be the better practice to include those reasons, thereby making meaningful appellate review possible [*see Smith v. Circle P Ranch Co. (1978) 87 Cal. App. 3d 267, 278-279, 150 Cal. Rptr. 828* (prior law)].

See also *§§ 196.21* and *196.74[2]*.

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 197 DISCOVERY: PHYSICAL AND MENTAL EXAMINATIONS

16-197 California Forms of Pleading and Practice--Annotated 197.syn

§ 197.syn Synopsis to Chapter 197: DISCOVERY: PHYSICAL AND MENTAL EXAMINATIONS

§ 197.01 Scope of Chapter

§ 197.02 Cross References

[1] Related Discovery Chapters

[2] Other Related Chapters

§§ 197.03-197.09 [Reserved]

§ 197.10 Governing Law

§ 197.11 Discovery by Physical or Mental Examination

[1] Scope of Discovery by Examination

[2] Discovery by Examination More Limited Than Other Discovery Methods

[3] Genetic Paternity Testing Not Affected

§ 197.12 Persons Who May Be Examined

§ 197.13 Who May Perform Examination

[1] Physical Examination

[2] Mental Examination

§ 197.14 Physical or Mental Condition in Controversy

§ 197.15 Examination on Stipulation

§ 197.16 Initial Physical Examination of Personal Injury Plaintiff

[1] Demand for Examination

[a] Defendant May Demand One Physical Examination

[b] Contents of Demand

[c] Service of Copies and Disposition of Original Demand

[2] Response to Demand

[a] Statement of Compliance, Modified Compliance, or Refusal

[b] Service of Response

[c] Effect of Untimely Response: Waiver of Objections

[3] Motion to Compel Response and Compliance

[a] After Failure to Serve Timely Response

[b] Monetary Sanctions for Unsuccessfully Making or Opposing Motion

[c] Sanction Proceedings Following Failure to Obey Order Compelling Response

[4] Motion to Compel Compliance With Demand

[a] After Response With Unwarranted Refusal or Modification

[b] Monetary Sanction for Unsuccessfully Making or Opposing Motion

§ 197.17 Court Ordered Examination

[1] Court Order Required for All Examinations Other Than Initial Physical Examination of Personal Injury Plaintiff

[2] Motion for Court Ordered Examination

[3] Court May Grant Motion Only on Good Cause Shown

[4] Multiple Court Ordered Examinations

[5] Restrictions on Court Ordered Examinations

[a] Stipulation Precluding Mental Examination of Personal Injury Plaintiff

[b] Radiological Tests (X-Rays)

[c] Other Restrictions Based on Opposition to Motion

[6] Order Granting Motion for Examination

§ 197.18 Conduct of Examination

[1] Physical Examinations

[a] Presence of Examinee's Attorney or Representative

[i] For Observation and Recording

[ii] Suspension of Examination Pending Motion for Protective Order

[b] Presence of Examinee's Physician

[c] Presence of Interpreter

[2] Mental Examinations

§ 197.19 Examination Reports

[1] Option to Demand Report of Examination

[2] Right of Party Providing Report to Receive Reciprocal Reports

[3] Motions to Compel Delivery of Reports

§ 197.20 Sanctions for Failure to Submit to or Produce Another for Examination

§ 197.21 Examination Before Commencement of Action or Pending Appeal

§§ 197.22-197.29 [Reserved]

§ 197.30 Related Matthew Bender Publications

§ 197.31 Federal Rules

§ 197.32 State Statutes

§ 197.33 California Rules of Court

§ 197.34 Decisions

[1] Condition Must Be in Controversy

[2] Court Ordered Examination

[3] Examination by Stipulation

[4] Examination of Living Persons Only

[5] Examination Proper

[6] Examiner

[7] Stipulation of Personal Injury Plaintiff Precluding Mental Examination

§ 197.35 Text References

§§ 197.36-197.39 [Reserved]

§ 197.40 Examination Prior to Commencement of Action or Pending Appeal

§ 197.41 Examination By Stipulation

§ 197.42 Examination by Demand

[1] Preliminary Determinations

[2] Arrange With Physician for Examination

[3] Prepare Documents

[4] Serve Demand

[5] Negotiate any Differences Arising From Plaintiff's Response

[6] Seek Court Order to Compel Response or Compliance

§ 197.43 Court Ordered Examination

[1] Preliminary Determinations

[2] Prepare, Serve, and File Documents

[3] Proceed as for Usual Noticed Motion

[4] Prepare and File Order

§ 197.44 Procedure Following Request for Examination Reports

[1] Obtain Reports

[2] Deliver Reports

[3] Request Reports of Past and Future Examinations

[4] Compel Delivery by Motion

§ 197.45 Sanctions

[1] Sanction for Failure by Physician or Party to Deliver Reports

[2] Sanctions for Failure to Respond to Demand for Examination

[3] Sanctions for Failure to Appear at Examination

[4] Other Sanctions

§§ 197.46-197.49 [Reserved]

§ 197.50 Personal Injury Plaintiff's Response to Demand for Initial Physical Examination

[1] Extending Time for Response

[2] Preliminary Determinations

[3] Prepare Written Response

[4] Serve Response

§ 197.51 Relief From Waiver of Objections

[1] File Response

[2] Move for Relief From Waiver of Objections to Demand

§ 197.52 Opposition to Motion for Examination

[1] Prepare Stipulation Regarding Limited Recovery for Emotional Distress

[2] Prepare Opposing Declaration

[3] Prepare Memorandum Opposing Motion

[4] Serve Documents

[5] File Documents

§ 197.53 Copies of Reports

[1] Request Copies of Reports

[2] Compel Delivery by Motion

§ 197.54 Sanctions

[1] Sanctions With Order Compelling Delivery of Reports

[2] Other Sanctions

§§ 197.55-197.59 [Reserved]

§ 197.60 Stipulation for Physical or Mental Examination [Code Civ. Proc. § 2016.030]

[1] FORM

[2] Use of Form

[3] Exchange of Reports and Waiver of Privilege

[4] Service of Stipulation

[5] Sanctions

[6] Cross References

§ 197.61 Initial Physical Examination of Personal Injury Plaintiff--Demand for Examination [Code Civ. Proc. § 2032.220]

[1] FORM

[2] Use of Form

§ 197.62 Initial Physical Examination of Personal Injury Plaintiff--Response to Demand for Examination [Code Civ. Proc. § 2032.230]

[1] FORM

[2] Use of Form

§ 197.63 Initial Physical Examination of Personal Injury Plaintiff--Proceedings to Compel Response to and Compliance With Demand [Code Civ. Proc. § 2032.240]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Monetary Sanctions

[4] Cross References

§ 197.64 Initial Physical Examination of Personal Injury Plaintiff--Proceedings to Compel Compliance With Demand [Code Civ. Proc. § 2032.250]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Separate Statement

[4] Monetary Sanctions

§ 197.65 Initial Physical Examination of Personal Injury Plaintiff--Proceedings to Compel Compliance With Demand [Code Civ. Proc. § 2032.250]--Separate Statement [Cal. Rules of Ct., Rule 3.1345]

[1] FORM

[2] Use of Form

[3] Contents of Separate Statement

§ 197.66 Initial Physical Examination of Personal Injury Plaintiff--Proceedings to Compel Response to and/or Compliance With Demand [Code Civ. Proc. §§ 2032.240, 2032.250]--Order

[1] FORM

[2] Use of Form

§ 197.67 Initial Physical Examination of Personal Injury Plaintiff--Proceedings for Relief From Waiver of Objections to Demand [Code Civ. Proc. § 2032.240(a)]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

§ 197.68 Initial Physical Examination of Personal Injury Plaintiff--Proceedings for Relief From Waiver of Objections to Demand [Code Civ. Proc. § 2032.240(a)]--Order

[1] FORM

[2] Use of Form

§ 197.69 Court Ordered Examination [Code Civ. Proc. § 2032.310]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Contents of Notice of Motion and Accompanying Papers

§ 197.70 Court Ordered Examination [Code Civ. Proc. § 2032.320(b)]--Stipulation by Personal Injury Plaintiff in Lieu of Mental Examination

[1] FORM

[2] Use of Form

[3] Filing and Retention

§ 197.71 Court Ordered Examination [Code Civ. Proc. § 2032.320]--Order

[1] FORM

[2] Use of Form

[3] Contents of Order

§ 197.72 Delivery of Copies of Examination Reports [Code Civ. Proc. § 2032.610]--Demand

[1] FORM

[2] Use of Form

[3] Copies of Reports of Earlier Examinations

[4] Time for Production of Reports

[5] Demand Waives Privilege Not to Disclose Reciprocal Reports

§ 197.73 Delivery of Copies of Examination Reports [Code Civ. Proc. § 2032.620]--Proceedings for Order Compelling Delivery--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Monetary Sanctions

§ 197.74 Delivery of Copies of Examination Reports [Code Civ. Proc. § 2032.620]--Proceedings for Order Compelling Delivery--Order

[1] FORM

[2] Use of Form

§ 197.75 Reciprocal Delivery of Copies of Examination Reports [Code Civ. Proc. § 2032.650]--Proceedings for Order Directing Reciprocal Delivery--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Monetary Sanctions

§ 197.76 Reciprocal Delivery of Copies of Examination Reports [Code Civ. Proc. § 2032.650]--Proceedings for Order Directing Reciprocal Delivery--Order

[1] FORM

[2] Use of Form

§ 197.77 Proceedings for Sanctions on Failure to Submit to or Produce Another for Examination Pursuant to Demand or Stipulation [Code Civ. Proc. §§ 2032.220, 2016.030, 2032.410, 2032.420]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Contents of Declaration

§ 197.78 Proceedings for Sanctions on Failure to Submit to or Produce Another for Examination Pursuant to Demand or Stipulation [Code Civ. Proc. §§ 2032.030, 2016.220, 2032.410, 2032.420]--Clause Requesting Various Orders

[1] FORM

[2] Use of Form

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Chapter 197 DISCOVERY: PHYSICAL AND MENTAL EXAMINATIONS
PART I. SCOPE

16-197 California Forms of Pleading and Practice--Annotated § 197.01

§ 197.01 Scope of Chapter

This chapter covers discovery under the Civil Discovery Act using the discovery method of demand or motion for the physical or mental examination of a party or party affiliated person whose physical or mental condition is in issue in the action.

Part II (*see § 197.10* et seq.) has detailed discussion of the requirements and procedures relating to discovery by physical or mental examination.

Part IV provides procedural checklists in the following subparts:

- Subpart A (*see § 197.40* et seq.) provides checklists for use by a party seeking an examination.

- Subpart B (*see § 197.50* et seq.) provides checklists for use by a responding party.

Part V provides forms relating to discovery by demand for physical or mental examination, including the following:

- A form for a stipulation for a physical or mental examination (*see § 197.60*).

- A form for a demand that a personal injury plaintiff submit to an initial physical examination (§ 197.61), and a response to that demand (*see § 197.62*).

- Forms for use in motion proceedings to compel and response to, or compliance with, or both, a demand that a personal injury plaintiff submit to an initial physical examination (*see §§ 197.63 -197.66*).

- Forms for use in motion proceedings for relief from waiver of objections by a personal injury plaintiff, following failure to file a timely response to a demand for initial physical examination (*see §§ 197.67, 197.68*).

- Forms for use in motion proceedings for an order directing a physical or mental examination other

than the initial physical examination of a personal injury plaintiff (*see §§ 197.69 -197.71*).

- Forms for use in demanding the delivery of copies of examination reports (*see § 197.72*), obtaining an order requiring delivery of copies of examination reports (*see §§ 197.73, 197.74*), and obtaining an order requiring a reciprocal delivery of copies of examination reports (*see §§ 197.75, 197.76*).

- Forms for use in motion proceedings for sanctions following a failure to submit to, or produce another for, an examination in compliance with a demand for the initial physical examination of a personal injury plaintiff, or in complaince with a stipulation (*see §§ 197.77, 197.78*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations

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16-197 California Forms of Pleading and Practice--Annotated § 197.02

§ 197.02 Cross References

[1] Related Discovery Chapters

For discussion and forms relating to the general purpose, scope, regulation, and timing of civil discovery, see Ch. 190, *Discovery: Scope, Regulation, and Timing* .

For detailed discussion of evidentiary privileges and other statutory or constitutional protections against disclosure, see Ch. 191, *Discovery: Privileges and Other Discovery Limitations* .

For discussion and forms relating to discovery sanctions generally, see Ch. 192, *Discovery: Sanctions for Discovery Misuse* .

For detailed discussion of discovery of electronically stored evidence (e-discovery), see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*.

For discussion and forms relating to the use of other particular discovery methods authorized by the Civil Discovery Act, see the following chapters covering each method:

- Ch. 193, *Discovery: Depositions*.
- Ch. 194, *Discovery: Interrogatories*.
- Ch. 195, *Discovery: Inspection of Tangible Evidence*.
- Ch. 196, *Discovery: Requests for Admissions*.
- Ch. 198, *Discovery: Exchange of Expert Witness Information*.

For discussion and forms relating to the use of specified discovery methods for the purpose of preserving testimony or

other evidence prior to the commencement of an action or pending an appeal, see Ch. 199, *Discovery: Preservation of Evidence* .

For discussion and forms relating to the use of extraordinary writ proceedings to obtain interlocutory review of discovery orders, see Ch. 200, *Discovery: Review of Discovery Orders* .

[2] Other Related Chapters

For a discussion of and forms for use in obtaining blood tests in actions for paternity under the Uniform Act on Blood Tests to Determine Paternity (*Fam. Code § 7550 et seq.*) see Ch. 412, *Paternity* .

For a discussion of and forms for appointment of a physician or other expert by the court under *Evid. Code § 730*, see Ch. 551, *Trial* .

For discussion of and general forms relating to law and motion procedures generally, see Ch. 372, *Motions and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsWritten DepositionsCivil ProcedureDiscoveryMisconduct

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16-197 California Forms of Pleading and Practice--Annotated §§ 197.03-197.09

[Reserved]

§§ 197.03[Reserved]

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Chapter 197 DISCOVERY: PHYSICAL AND MENTAL EXAMINATIONS
PART II. LEGAL BACKGROUND

16-197 California Forms of Pleading and Practice--Annotated § 197.10

§ 197.10 Governing Law

Discovery by demand or motion for a physical or mental examination of a party or party affiliated person, pursuant to the Civil Discovery Act (*Code Civ. Proc. § 2016.010 et seq.*) is governed generally by *Code Civ. Proc. § 2032.010 et seq.*

Related provisions of the Civil Discovery Act include the provisions governing discovery generally, set out in *Code Civ. Proc. §§ 2016.010 et seq.*-2019.010 et seq., 2023.010 et seq.

The extent of discovery permitted under the Civil Discovery Act is restricted in limited civil cases by the economic litigation provisions of *Code Civ. Proc. §§ 94* and *95*. The use of discovery under *Code Civ. Proc. § 2032.010 et seq.*, however, is authorized without restriction by *Code Civ. Proc. § 94(d)*. For further discussion of discovery in limited civil cases generally, see *Ch. 190, Discovery: Scope, Regulation, and Timing, §§ 190.11[2], 190.23[2][a]*.

Statewide rule provisions relating to the format, content, and service of discovery papers and motions, and to discovery sanctions, are set out in *Cal. Rules of Ct., Rules 3.1000*, 3.1345, 3.1346, 3.1347, and 3.1348.

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-197 California Forms of Pleading and Practice--Annotated § 197.11

§ 197.11 Discovery by Physical or Mental Examination

[1] Scope of Discovery by Examination

Any party may obtain discovery, subject to the restrictions set forth in *Code Civ. Proc. § 2019.010 et seq.*, by means of a physical or mental examination of a party or party affiliated person [*see* [2], *below*], in any action in which the mental or physical condition (including the blood group) of that party or party affiliated person is in controversy [*Code Civ. Proc. § 2032.020(a)*]. For further discussion of who may be examined, see *§ 197.12*. For discussion of what constitutes a condition in controversy, see *§ 197.14*.

The restrictions of *Code Civ. Proc. § 2019.010 et seq.* are those applicable to discovery generally, and permit a party or other affected person to seek a protective order limiting the frequency or extent of use of any of the discovery methods, including discovery by examination, when th discovery sought is unduly burdensome or expensive, when it is cumulative or duplicative, or when it is obtainable from another source that is more convenient, less burdensome, or less expensive [*see Code Civ. Proc. § 2019.030*; *see also Code Civ. Proc. § 2019.020* (general regulation of sequence and timing of discovery)]. For more detailed discussion and forms relating to *Code Civ. Proc. § 2019.010 et seq.*, see *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.30* et seq.

[2] Discovery by Examination More Limited Than Other Discovery Methods

The Discovery Act (*Code Civ. Proc. § 2016.010 et seq.*) generally permits discovery to proceed on the service of a demand, request, or notice seeking discovery by means of a particular method. Under this overall design, the trial court intervenes only when there is some dispute that the parties cannot resolve informally [*see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33*]. Given, however, the peculiar intrusiveness of physical and mental examinations, discovery by examination is not generally available on demand. A party may make a demand for an examination only in the case of an initial physical examination of a plaintiff seeking damages for personal injuries [*see Code Civ. Proc. § 2032.220*]. In all other situations, absent a stipulation of the parties, a party seeking a physical or mental examination must apply for a court order, which may only be granted for good cause [*see Code Civ. Proc. §§ 2032.310, 2032.320*]. For discussion of a demand for an initial physical examination of a personal injury plaintiff, *see § 197.16*. For discussion of examination by court order on showing of good cause, *see § 197.17*. For discussion of examination on stipulation of the parties, *see § 197.15*.

Similarly, the Discovery Act generally permits discovery of any matter not privileged so long as it is relevant to the subject matter involved in the action or proceedings, not only as admissible evidence but also if it appears reasonably calculated to lead to the discovery of admissible evidence [*see Code Civ. Proc. § 2017.010* and discussion in *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.20*]. A party is entitled to discovery by examination, however, only when the physical or mental condition of the party or party affiliated person is in controversy in the action [*Code Civ. Proc. § 2032.020(a)*]. The application of this narrower standard is in keeping with the view that discovery by examination is a "drastic and intrusive" form of discovery in comparison with the other methods, which generally apply the more liberal standard of *Code Civ. Proc. § 2017.010* [*see* Reporter's Notes to Proposed *Code Civ. Proc. § 2032(a)*; *see also Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.13[2]*]. For further discussion of the requirement that physical or mental condition be in controversy, *see § 197.14*.

[3] Genetic Paternity Testing Not Affected

The provisions for discovery by examination under *Code Civ. Proc. § 2032.010 et seq.* do not affect genetic testing conducted under the Uniform Act on Blood Tests to Determine Paternity (*Fam. Code § 7550 et seq.*) [*see Code Civ. Proc. § 2032.010(a)*]. For discussion and forms relating to genetic testing in an action or proceeding in which paternity is a relevant fact, see Ch. 412, *Paternity* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsStipulationsFamily LawPaternity & SurrogacyProof of PaternityEvidenceGenetic Tests

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16-197 California Forms of Pleading and Practice--Annotated § 197.12

§ 197.12 Persons Who May Be Examined

The following persons may be subjected to an examination for discovery purposes, when the mental or physical condition of the person is a matter of controversy in the action [*Code Civ. Proc. § 2032.020(a)*]:

- A party to the action.
- An agent of any party.
- A natural person in the custody or under the legal control of a party.

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-197 California Forms of Pleading and Practice--Annotated § 197.13

§ 197.13 Who May Perform Examination

[1] Physical Examination

A physical examination conducted under *Code Civ. Proc. § 2032.010 et seq.* may be performed only by a licensed physician or other appropriate licensed health care practitioner [*Code Civ. Proc. § 2032.020(b)*; *see Bus. & Prof. Code § 2000 et seq.* (Medical Practice Act)].

The meaning of the term "other appropriate licensed health care practitioner" is unclear. This language was not part of the original language of the proposed Discovery Act of 1986, but was added by the Legislature in the process of enactment. Other appropriate licensed health care practitioners might include chiropractors [*see Bus. & Prof. Code § 1000-5* et seq.], physical therapists [*see Bus. & Prof. Code § 2600 et seq.*], speech pathologists and audiologists [*see Bus. & Prof. Code § 2530 et seq.*], optometrists [*see Bus. & Prof. Code § 3000 et seq.*], and respiratory therapists [*see Bus. & Prof. Code § 3700 et seq.*].

[2] Mental Examination

A mental examination conducted under *Code Civ. Proc. § 2032.010 et seq.* can only be performed by a licensed physician or by a licensed clinical psychologist with a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis of emotional and mental disorders [*Code Civ. Proc. § 2032.020(c)*]. A psychologist who is not authorized to perform the examination by *Code Civ. Proc. § 2032.020(c)* may do work under the general direction of a licensed physician (or by analogy, under the direction of a psychologist) who is authorized to conduct the examination under *Code Civ. Proc. § 2032.020(c)* [*see Reuter v. Superior Court (1979) 93 Cal. App. 3d 332, 338, 155 Cal. Rptr. 525]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-197 California Forms of Pleading and Practice--Annotated § 197.14

§ 197.14 Physical or Mental Condition in Controversy

A party may obtain discovery by the physical or mental examination of another party or party affiliated person only when the physical or mental condition of that person is in controversy in the action [*Code Civ. Proc. § 2032.020(a)*].

The United States Supreme Court has stated some general rules in considering the "in controversy" requirement of *Fed. R. Civ. P., Rule 35*, on which former *Code Civ. Proc. § 2032* (*now see Code Civ. Proc. § 2032.010 et seq.* was originally based. It has distinguished between those situations in which a party places his or her own physical or mental condition in controversy in the pleadings, and situations in which one party seeks to show that another's condition is in controversy. Thus, for example, the pleadings are sufficient to show that a particular condition is in controversy when a plaintiff in a personal injury action alleges mental or physical injury involving that condition, or when a defendant asserts his or her own mental or physical condition as a defense [*Schlagenhauf v. Holder (1964) 379 U.S. 104, 119, 85 S. Ct. 234, 13 L. Ed. 2d 152* ; *Vinson v. Superior Court (1987) 43 Cal. 3d 833, 839-840, 239 Cal. Rptr. 292, 740 P.2d 404* ; *see also Reuter v. Superior Court (1979) 93 Cal. App. 3d 332, 341, 155 Cal. Rptr. 525]* .

On the other hand, when one party attempts to place another's physical or mental condition in controversy when the pleadings have not done so, the party seeking the examination must make an affirmative showing that the mental or physical condition is in controversy [*Schlagenhauf v. Holder (1964) 379 U.S. 104, 119-120, 85 S. Ct. 234, 13 L. Ed. 2d 152]* . Such an affirmative showing has been established, for example, in a statutory proceeding to terminate employment, when the petitioner employer alleged that its dismissal of respondent employee was due to the respondent's mental condition, and petitioner sought authorization for a mental examination of the respondent [*see Board of Trustees v. Superior Court (1969) 274 Cal. App. 2d 377, 379-380, 79 Cal. Rptr. 58]* . Similarly, a plaintiff showed that defendant's physical condition was in controversy, in an action based on defendant's willful misconduct as a driver, after eliciting from defendant an admission that he had an eye defect and blurred vision [*Harabedian v. Superior Court (1961) 195 Cal. App. 2d 26, 31, 15 Cal. Rptr. 420* (proper order for opthalmological examination could have been made)].

Legal Topics:

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

Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsTortsProcedureDiscovery

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§ 197.15 Examination on Stipulation

In lieu of the procedures and restrictions specified in *Code Civ. Proc. § 2032.010 et seq.* for obtaining an examination, the parties may arrange and carry out any physical or mental examination by written agreement or stipulation [*Code Civ. Proc. § 2016.030*].

The stipulation should cover all the terms and conditions that would be required in a demand for examination under *Code Civ. Proc. § 2032.220* [*see § 197.16*] or a motion for a court-ordered examination under *Code Civ. Proc. § 2032.310* [*see § 197.17*]. Specifically, it should cover the time, place, manner, conditions, scope, and nature of the examination, as well as the identity and specialty, if any, of the person who is to conduct the examination [*see Code Civ. Proc. §§ 2032.220(c), 2032.310(b)*]. For a form of stipulation, *see § 197.60*].

A party who enters into a stipulation for examination but thereafter fails to comply with the stipulation may be compelled to do so and is also subject to sanctions [*Code Civ. Proc. §§ 2032.410, 2032.420*].

Parties are encouraged to enter a stipulation for examination, particularly with respect to any examination that would otherwise require a court order under *Code Civ. Proc. § 2032.310*. A motion for a court-ordered examination must be accompanied by a declaration showing a reasonable and good faith attempt to arrange for the examination by agreement [*see Code Civ. Proc. § 2032.310(b)*]. Thus, even if the parties cannot agree on a complete stipulation pertaining to all aspects of the examination, every effort should be made to negotiate as many terms of examination as possible, in order satisfy the requirements of this declaration when seeking a order requiring the examination.

The provisions of *Code Civ. Proc. §§ 2032.610-2032.650*, relating to the exchange of medical reports and waiver of privilege [*see § 197.19*], apply if the examination is pursuant to stipulation [*Code Civ. Proc. §§ 2032.610-2032.650*; *see also Grover v. Superior Court (1958) 161 Cal. App. 2d 644, 648-649, 327 P.2d 212]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 197.16 Initial Physical Examination of Personal Injury Plaintiff

[1] Demand for Examination

[a] Defendant May Demand One Physical Examination

In any case in which a plaintiff is seeking recovery for personal injuries, any defendant may demand one physical examination of the plaintiff, provided that the examination does not include any diagnostic test or procedure that is painful, protracted, or intrusive, and is conducted at a location within 75 miles of the residence of the examinee. A defendant may make this demand without leave of court after that defendant has been served or has appeared in the action, whichever occurs first [*Code Civ. Proc. § 2032.220*; *see also Code Civ. Proc. § 2032.210* ("plaintiff" includes a cross complainant, and "defendant" includes a cross defendant)]. For a form of demand, see *§ 197.61*.

It is not clear whether each defendant or only one of several defendants may demand a physical examination under *Code Civ. Proc. § 2032.220*. Proposed language describing the examination as "an initial routine physical examination," was changed on enactment to "one physical examination" [*see* Reporter's Notes to Proposed *Code Civ. Proc. § 2032(c)(1)* (*now see Code Civ. Proc. § 2032.220(a)*); *see also Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.13[2]*]. Arguably the change of this term, together with use of the term "any defendant" rather than "each defendant," together imply that, while "any" defendant may make a demand under *Code Civ. Proc. § 2032.220(a)*, the demand may only be made once as to a particular plaintiff. For discussion of subsequent examinations of a personal injury plaintiff pursuant to court order on a showing of good cause, see *§ 197.17[4]*.

[b] Contents of Demand

The demand shall specify the time, place, manner, conditions, scope, and nature of the examination, as well as the identity and the specialty, if any, of the physician who will perform it [*Code Civ. Proc. § 2032.220(c)*]. The physical examination must be scheduled for a date at least 30 days after service of the demand for it, unless on motion of the party demanding the examination the court has shortened this time [*Code Civ. Proc. § 2032.220(d)*].

If the demand was served by mail, the 30-day minimum period for scheduling the examination is extended 5 calendar days after service if the place of address is within California, 10 calendar days if the place of address is outside

California but within the United States, or 20 calendar days if the place of address is outside the United States [*see Code Civ. Proc. §§ 1013(a), 2016.050*]. The 30-day period is extended by two court days if service is by Express Mail, other overnight delivery, or by Fax [*see Code Civ. Proc. § 1013(c), (e)*].

[c] Service of Copies and Disposition of Original Demand

Copies of the demand for this physical examination must be served on the plaintiff and on all other parties who have appeared in the action [*Code Civ. Proc. § 2032.220(e)*]. The original of the demand is not filed with the court, but is to be preserved by the defendant, together with the original proof of service and the original response, until six months after final disposition of the action. At that time, the original may be destroyed, unless the court, on motion of any party and for good cause shown, orders that the original be preserved for a longer period [*Code Civ. Proc. § 2032.260*].

[2] Response to Demand

[a] Statement of Compliance, Modified Compliance, or Refusal

The plaintiff to whom this demand for initial physical examination has been directed must respond to the demand by a written statement that the examinee will comply with the demand as stated, will comply with the demand as specifically modified by the plaintiff, or will refuse, for reasons specified in the response, to submit to the demanded physical examination [*Code Civ. Proc. § 2032.230(a)*].

For a form of response, see *§ 197.62*.

[b] Service of Response

Plaintiff's response to the demand must be served within 20 days after service of the demand [*Code Civ. Proc. § 2032.230(b)*]. If the demand was served by mail, this 20-day deadline is extended by five calendar days if the place of address is within California, by 10 calendar days if the place of address is outside California but within the United States, or by 20 calendar days if the place of address is outside the United States [*see Code Civ. Proc. §§ 1013(a), 2016.050*]. The response period is extended two court days if service of the demand was by Express Mail, other overnight delivery, or by Fax [*Code Civ. Proc. § 1013(a), (c), (e)*].

On motion by the demanding defendant, the court may order the time for response to be shortened. Conversely, on motion by the responding plaintiff, the court may extend the time for response [*Code Civ. Proc. § 2032.230(b)*]. The original of the response must be served on the defendant making the demand, and a copy of the response must be served on all other parties who have appeared in the action [*Code Civ. Proc. § 2032.230(b)*].

[c] Effect of Untimely Response: Waiver of Objections

If a plaintiff to whom a demand for a physical examination has been directed fails to serve a timely response to it, that plaintiff waives any objection to the demand [*Code Civ. Proc. § 2032.240(a)*]. On motion, however, the court may relieve that plaintiff from this waiver if it determines that the plaintiff has subsequently served a response that is in substantial compliance with *Code Civ. Proc. § 2032.240(a)(1)* [*see* [a], *above*], and that the plaintiff's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect [*Code Civ. Proc. § 2032.240(a)(2)*]. For a motion for relief from waiver of objections, see *§ 197.67*.

[3] Motion to Compel Response and Compliance

[a] After Failure to Serve Timely Response

If a plaintiff fails to serve a timely response to a demand for a physical examination, the demanding defendant may

move for an order compelling a response and compliance with the demand [*Code Civ. Proc. § 2032.240(b)*]. The motion may seek an order directing not only a response, but also compliance with the demand, because the plaintiff, by failing to serve a timely response in the first place, waived all objections on which he or she might have based a response other than one consisting of a statement of compliance [*see* [2][c], *above* (waiver and relief from waiver)].

For a form of motion seeking response to and compliance with a demand, see *§ 197.63*.

[b] Monetary Sanctions for Unsuccessfully Making or Opposing Motion

The court must impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel compliance with a demand for a physical examination, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2032.240(c)*; for further discussion of this general provision, *see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[2]*].

The court may award sanctions in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed [*Cal. Rules of Ct., Rule 3.1348(a)*]. The court may not, however, deem the opposing party's failure to file written opposition, failure to appear at a hearing, or voluntary provision discovery to be an admission that the motion was proper or that sanctions should be awarded [*Cal. Rules of Ct., Rule 3.1348(b)*].

For more detailed discussion of monetary sanctions generally, including requirements generally applicable in proceedings to impose such sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

[c] Sanction Proceedings Following Failure to Obey Order Compelling Response

If a demanding defendant succeeds in obtaining an order directing a plaintiff to respond and comply with the demand, and the plaintiff thereafter fails to obey that order, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *Code Civ. Proc. § 2023.010 et seq.* In lieu of or in addition to that sanction, the court may impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* [*Code Civ. Proc. § 2032.240(d)*]. For detailed discussion of evidence, issue, and terminating sanctions, and forms for motions seeking the imposition of such sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[3], 192.15[3],* and *192.50* et seq.

[4] Motion to Compel Compliance With Demand

[a] After Response With Unwarranted Refusal or Modification

If a defendant who has demanded a physical examination pursuant to *Code Civ. Proc. § 2032.220* deems that plaintiff's modification of the demand or refusal to submit to the physical examination is unwarranted, that defendant may move for an order compelling compliance with the demand [*Code Civ. Proc. § 2032.250(a)*].

A motion to compel compliance under *Code Civ. Proc. § 2032.250(a)* must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of any issue presented by the motion [*Code Civ. Proc. § 2032.250(a)*; for further discussion of this general requirement, *see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*].

For a form for a motion seeking compliance with a demand following an unwarranted response, see *§ 197.64*. For a form for the separate statement required to accompany this motion under *Cal. Rules of Ct., Rule 3.1345(a)(6)*, see *§ 197.65*.

Monetary sanctions normally imposed in connection with this motion proceeding are discussed in [b], *below*. For discussion of further sanctions following a plaintiff's subsequent failure to obey an order compelling compliance with a demand, see *§ 197.20*.

[b] Monetary Sanction for Unsuccessfully Making or Opposing Motion

The court must impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel compliance under *Code Civ. Proc. § 2032.250(a)*, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2032.250(b)*].

For further discussion of this general provision, see *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[2]*. For more detailed discussion of monetary sanctions generally, including requirements generally applicable in proceedings to impose such sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 197.17 Court Ordered Examination

[1] Court Order Required for All Examinations Other Than Initial Physical Examination of Personal Injury Plaintiff

If any party desires to obtain discovery by a physical examination other than pursuant to *Code Civ. Proc. § 2032.220* [*see § 197.16* (initial physical examination of personal injury plaintiff)], or by a mental examination, that party must obtain leave of court [*Code Civ. Proc. § 2032.310(a)*].

[2] Motion for Court Ordered Examination

A motion for court ordered examination under *Code Civ. Proc. § 2032.310* must be accompanied by declaration stating facts that show that the moving party first made a reasonable a good faith attempt to arrange for the examination by stipulation under *Code Civ. Proc. § 2016.030* [*Code Civ. Proc. § 2032.310(b)*]. For discussion of examinations on stipulation, see *§ 197.15*. For further discussion of the general requirement of a reasonable good faith attempt at informal resolution prior to bringing a discovery motion, see *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*.

The motion must specify the time, place, manner, conditions, scope, and nature of the examination, as well as the identity and the specialty, if any, of the person or persons who will perform the examination. Generally, the place of examination must be within 75 miles of the residence of the person to be examined. If the place specified is more distant, the court will grant the order only after determining that there is good cause for the travel involved, and will condition the order on the advancement by the moving party of reasonable expenses and costs for the examinee to travel to the place of examination [*Code Civ. Proc. §§ 2032.310(b), 2032.320(e)*]. For discussion of good cause required to be shown for examination generally, see [3], *below*.

Notice of the motion must be served on the person to be examined and on all parties who have appeared in the action [*Code Civ. Proc. § 2032.310(c)*].

For a form for a notice of motion and motion for a court ordered examination, see *§ 197.69*.

[3] Court May Grant Motion Only on Good Cause Shown

The court may a grant a motion for a court ordered examination only for good cause shown [*Code Civ. Proc. § 2032.320(a)*; *see, e.g., Vinson v. Superior Court (1987) 43 Cal. 3d 833, 840-844, 239 Cal. Rptr. 292, 740 P.2d 404* (good cause shown for physical examination but not for mental examination; decided under prior law)].

The requirement of good cause may be satisfied by the very nature of the claim or proceeding involved. For example, in a statutory proceeding to dismiss a teacher on the grounds that she was mentally unfit, the court found that there was good cause shown by the very nature of the proceedings because they could not be determined without the aid of an expert in the mental health field [*Board of Trustees v. Superior Court (1969) 274 Cal. App. 2d 377, 380, 79 Cal. Rptr. 58]* . Usually, however, specific facts must be shown, such as the moving party's inability to obtain the information by other means [*see Schlagenhauf v. Holder (1964) 379 U.S. 104, 118, 85 S. Ct. 234, 13 L. Ed. 2d 152* (interpretation of *Fed. R. Civ. P., Rule 35*, on which former *Code Civ. Proc. § 2032* was originally based)].

[4] Multiple Court Ordered Examinations

There is nothing in the language of *Code Civ. Proc. § 2032.010 et seq.* that expressly limits the number of mental or physical examinations. Thus, for example, defendants, on a showing of good cause, may obtain multiple examinations of a personal injury plaintiff in addition to the initial physical examination that may be demanded without court order in such cases [*see Shapira v. Superior Court (1990) 224 Cal. App. 3d 1249, 1256, 274 Cal. Rptr. 516]* . Depending on the injury alleged by the plaintiff, multiple examinations by medical specialists in different fields pertinent to a plaintiff's injury may be very appropriate [*Shapira v. Superior Court (1990) 224 Cal. App. 3d 1249, 1256, 274 Cal. Rptr. 516* (dictum)].

Although permissible, multiple examinations are not to be ordered routinely. The potential for harassment of plaintiffs by repetitive examinations should be eliminated by the good cause requirement [*Shapira v. Superior Court (1990) 224 Cal. App. 3d 1249, 1255, 274 Cal. Rptr. 516* (citing federal case suggesting court should require stronger showing of good cause for a second examination than for the first)]. Moreover, *Code Civ. Proc. § 2032.020* specifically subjects examinations to the provisions of *Code Civ. Proc. § 2019.030*, which provide for protective orders to limit discovery that is unreasonably cumulative or duplicative or otherwise unduly burdensome [*Code Civ. Proc. § 2032.020(a)*; *see § 197.11[1]*].

When the issue of multiple examinations is raised, the trial court is required to exercise its discretion when determining whether good cause exists for the requested examination [*see Shapira v. Superior Court (1990) 224 Cal. App. 3d 1249, 1254-1256, 274 Cal. Rptr. 516* (mental examination)].

[5] Restrictions on Court Ordered Examinations

[a] Stipulation Precluding Mental Examination of Personal Injury Plaintiff

If a party seeking recovery for personal injuries stipulates that (1) no claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed, and (2) no expert testimony regarding this usual mental and emotional distress will be presented at trial in support of the claim for damages, the court will not order a mental examination of the person for whose personal injuries the recovery is being sought absent a showing of exceptional circumstances [*Code Civ. Proc. § 2032.320(b), (c)*]. For a form of stipulation to preclude a court ordered mental examination under *Code Civ. Proc. § 2032.310*, see *§ 197.70*. For discussion and forms relating to proof of mental and emotional suffering as a component of general damages for personal injury, see *Ch. 177, Damages, § 177.40* et seq., and Ch. 362, *Mental Suffering and Emotional Distress* .

[b] Radiological Tests (X-Rays)

If the examinee submits or authorizes access to X-rays of any area of his or her body for inspection by the examining physician, no additional X-rays of that area may be taken by the examining physician except with consent of the examinee or on order of the court for good cause shown [*Code Civ. Proc. § 2032.520*; *see Ghanooni v. Super Shuttle (1993) 20 Cal.App. 4th 256, 260-261, 24 Cal. Rptr. 2d 501* (trial court properly imposed monetary sanctions against plaintiff when she failed to provide substantial justification for her refusal to submit to defendants' demand for X-rays, and when her attorney's argument that the X-rays were unnecessary because only soft tissue injuries were involved was not supported by any expert medical opinion and was, in fact, contradicted by plaintiff's treating physician)].

[c] Other Restrictions Based on Opposition to Motion

Discovery under *Code Civ. Proc. § 2032.010 et seq.* is subject to the restrictions of *Code Civ. Proc. § 2019.010 et seq.* [*Code Civ. Proc. § 2032.020(a)*]. A party or person opposing a court ordered examination may therefore seek to have the examination limited to the extent it is unduly burdensome or cumulative within the meaning of *Code Civ. Proc. § 2019.030* [*see* further discussion in *§ 197.11[1]* and in Ch. 190, *Discovery: Scope, Regulation, and Timing*, § 190.30 et seq.].

Moreover, the general provisions of *Code Civ. Proc. § 2017.020* provide that a party or other affected person may seek to limit discovery when its intrusiveness or burdensomeness outweighs the likelihood of obtaining admissible evidence [*see* further discussion in *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.30*]. *Code Civ. Proc. § 2032.010 et seq.* do not incorporate the general provisions of *Code Civ. Proc. § 2017.010 et seq.* and § 2017.710 et seq. by reference, as do most other discovery methods. It appears, however, that this omission was not intended to exclude the protections of *Code Civ. Proc. § 2017.020*. Rather, this omission was designed to exclude consideration of the broader scope of discovery under *Code Civ. Proc. § 2017.010* in favor of a scope more narrowly and more specifically based on a person's physical or mental condition being an issue in controversy [*see* further discussion in *§§ 197.11[2], 197.14*].

In any event, an order granting an examination under *Code Civ. Proc. § 2032.320* must specify the terms and conditions of the examination [*see* [6], *below*]. It is therefore recommended that a party or person seeking to limit an examination provide, in the opposition to the motion, such evidence and argument as will enable to the court to determine and articulate any desired conditions deemed necessary to protect the examinee.

The party requesting or objecting to a specific condition for the examination generally has the burden of establishing that it is or is not necessary [*see Edmiston v. Superior Court (1978) 22 Cal. 3d 699, 703-704, 150 Cal. Rptr. 276, 586 P.2d 590* (videotaping not permitted when examinee failed to show why less intrusive audio recording would not sufficiently protect integrity of examination); *Edwards v. Superior Court (1976) 16 Cal. 3d 905, 913, 130 Cal. Rptr. 14, 549 P.2d 846* (unsupported objections which do not question qualification of examiner given little weight; length of proposed examination not shortened when examinee failed to show complete examination could be conducted in less time)].

[6] Order Granting Motion for Examination

An order granting a physical or mental examination is made only on a determination of good cause [*Code Civ. Proc. § 2032.320(a)*; for further discussion, *see* [3], *above*]. It must, in addition, specify the person or persons who may perform the examination, the time and place of the examination, and the manner, scope, and nature of the examination, including the diagnostic tests and procedures authorized [*Code Civ. Proc. § 2032.320(d)*. Under *Code Civ. Proc. § 2032.320*, the court must "describe *in detail* who will conduct the examination, where and when it will be conducted, the conditions, scope and nature of the examination, *and* the diagnostic tests and procedures to be employed" [*Carpenter v. Superior Court (2006) 141 Cal. App. 4th 249, 260, 45 Cal. Rptr. 3d 821* (italics in original); *cf. Bittle v. Superior Court (1961) 55 Cal. App. 3d 489, 494-495, 127 Cal. Rptr. 574* (under former *Code Civ. Proc. § 2032(a)*, governing physical examinations, trial court's order was not fatally defective when missing information was supplied in notice of motion)]. In addition, the requirement that the court specify the "diagnostic tests and procedures" imposes something more than

identification of the general "types" or categories of tests. Rather, "the way to describe these 'diagnostic tests and procedures'--*fully* and *in detail*-- is to list them by name" (italics in original) [*Carpenter v. Superior Court (2006) 141 Cal. App. 4th 249, 260-262, 45 Cal. Rptr. 3d 821* (trial court failed to comply with requirement of *Code Civ. Proc. § 2032.320* by ordering "standardized written psychological tests" of "emotional and cognitive functioning")].

For discussion of additional determinations and conditions required when the place of examination is more distant that 75 miles from the examinee's residence, see [2], *above*. For discussion of other possible restrictions, see [5], *above*. For discussion of conduct of the examination and requirements relating to observation or recordation of an examination, see *§ 197.18*.

For an order granting a court ordered examination, see *§ 197.71*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations

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§ 197.18 Conduct of Examination

[1] Physical Examinations

[a] Presence of Examinee's Attorney or Representative

[i] For Observation and Recording

The attorney for the examinee or for a party producing the examinee, or that attorney's representative, is permitted to attend and observe any physical examination conducted for discovery purposes [*Code Civ. Proc. § 2032.510(a)*; *see, e.g., Mercury Casualty Co. v. Superior Court (1986) 179 Cal. App. 3d 1027, 1034, 225 Cal. Rptr. 100* (decided under former *Code Civ. Proc. § 2032(a)*) (*now see Code Civ. Proc. § 2032.020(a)*)]. If an attorney's representative is to serve as the observer, the representative must be authorized to so act by a writing subscribed by the attorney that identifies the representative [*Code Civ. Proc. § 2032.510(c)*].

That attorney or representative may also record, stenographically or by audio technology, any words spoken to or by the examinee during any phase of the examination [*Code Civ. Proc. § 2032.510(a)*]. Videotaping is not authorized because it is too intrusive and because the need for a record of the examination can be met by audio recording or transcription [*see Edmiston v. Superior Court (1978) 22 Cal. 3d 699, 702-704, 150 Cal. Rptr. 276, 586 P.2d 590* (decided under prior law); *accord Ramirez v. MacAdam (1993) 13 Cal. App. 4th 1638, 1640-1641, 16 Cal. Rptr. 2d 911]* .

It is not clear whether *Code Civ. Proc. § 2032.510(a)* allows the presence of both an attorney and a reporter. Although *Code Civ. Proc. § 2032.510(a)* is worded in the disjunctive, cases decided under the 1956 Discovery Act held that the court should grant permission at the request of either party for the presence of a reporter [*Gonzi v. Superior Court of San Francisco (1959) 51 Cal. 2d 586, 589, 335 P.2d 97]* , but that the presence of a reporter was not a substitute for the presence of the attorney for the party to be examined [*Munoz v. Superior Court (1972) 26 Cal. App. 3d 643, 645, 102 Cal. Rptr. 686]* .

The observer may monitor the examination, but must not participate in or disrupt it [*Code Civ. Proc. § 2032.510(b)*].

[ii] Suspension of Examination Pending Motion for Protective Order

If, in the judgment of the observer [*see* [i], *above*], the examiner becomes abusive to the examinee or undertakes to engage in unauthorized diagnostic tests and procedures, the observer may suspend the examination to enable the party being examined or producing the examinee to make a motion for a protective order. Conversely, if the observer begins to participate in or disrupt the examination, the person conducting the physical examination may suspend the examination to enable the party at whose instance it is being conducted to move for a protective order [*Code Civ. Proc. § 2032.510(d), (e)*].

The court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion for a protective order, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2032.510(f)*]. For further discussion of this general provision, see *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[2]*. For more detailed discussion of monetary sanctions generally, including requirements generally applicable in proceedings to impose such sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

[b] Presence of Examinee's Physician

California cases have not established the right of an examinee to have his or her own physician present at a physical examination conducted on behalf of the opposition [*Long v. Hauser (1975) 52 Cal. App. 3d 490, 493, 125 Cal. Rptr. 125* (decision of arbitrator to that effect upheld)]. If, however, the examinee's physician were there as the attorney's representative of the examinee's attorney, referred to in *Code Civ. Proc. § 2032.510(a)*, it does not seem that there could be any objection [*see Code Civ. Proc. § 2032.510(a)*].

[c] Presence of Interpreter

When an insurer or the defendant requests the medical examination of a person who is a party to a civil action for the purpose of determining damages and the person to be examined does not proficiently speak or understand English, an interpreter must be present to interpret the examination in a language that the person understands [*Evid. Code § 755.5(a)*]. The interpreter's fees must be paid by the insurer or defendant requesting the medical examination [*Evid. Code § 755.5(b)*].

The record of, or testimony concerning, any examination conducted in violation of *Evid. Code § 755.5(a)* is inadmissible in any civil action [*Evid. Code § 755.5(c)*]. *Evid. Code § 755.5* does not prohibit the presence of any other person to assist a party [*Evid. Code § 755.5(d)*].

[2] Mental Examinations

The examiner and examinee both have the right to record a mental examination on audio tape [*Code Civ. Proc. § 2032.530(a)*]. The entire examination, not simply the examinee's responses, must be recorded, because recording only the examinee's responses would defeat main purposes of audio recording, which are to ensure that the examiner does not overstep the bounds set by court for the mental examination, that the context of the responses can be judged for purposes of trial, that the examinee's interests are protected, especially since the examinee's counsel ordinarily will not be present and that any evidence of abuse can be presented to the court [*Golfland Entertainment Ctrs., Inc. v. Superior Court (2003) 108 Cal App. 4th 739, 750-751, 133 Cal. Rptr. 2d 828]* . Videotaping is not authorized [*Baqleh v. Superior Court (People)(2002) 100 Cal. App. 4th 478, 492, 122 Cal Rptr. 2d 673* ; *see* *Edmiston v. Superior Court (1978) 22 Cal. 3d 699, 702-704, 150 Cal. Rptr. 276, 586 P.2d 590* (physical examination, decided under prior law); *Ramirez v. MacAdam (1993) 13 Cal. App. 4th 1638, 1640-1641, 16 Cal. Rptr. 2d 911* (physical examination)]. Nor is the presence of a court reporter permitted [*Golfland Entertainment Ctrs., Inc. v. Superior Court (2003) 108 Cal App. 4th 739, 750-751, 133 Cal. Rptr. 2d 828* (reasoning that differences between physical examination statute, allowing

presence of counsel or counsel's representative to record exam by audio technology or stenography as matter of right, *Code Civ. Proc. § 2032.510(a)*, and mental examination statute, permitting presence of counsel or counsel's representative only by agreement or court order, and providing only for right of examiner or examinee to record exam by means of audio technology, *Code Civ. Proc. § 2032.530*, indicate legislature's intent that court reporters should not attend mental examinations and that those examinations should be audio recorded; decided under former *Code Civ. Proc. § 2032(g)(1)-(2)*)]. The provisions of the Discovery Act are not, however, to be construed to alter, amend, or affect existing case law with respect to the presence of theattorney for the examinee or other persons during a mental examination by agreement or by court order [*Code Civ. Proc. § 2032.530(b)*].

Under prior case law that remains unaltered by the provisions of the current Discovery Act, persons other than the examiner and examinee are not permitted in a mental examination, at least absent agreement of the parties. The absence of people other than the examiner and examinee is considered essential to the special and private rapport necessary between the examiner and examinee. The purposes of a mental examination are best served by not permitting plaintiff's counsel to be present at the examination, since the examination will only be effective and lead to a fair and objective evaluation of the examinee's mental and emotional condition if conducted on a one-to-one basis [*Vinson v. Superior Court (1987) 43 Cal. 3d 833, 844-846, 239 Cal. Rptr. 292, 740 P.2d 404* ; *Edwards v. Superior Court (1976) 16 Cal. 3d 905, 909-912, 130 Cal. Rptr. 14, 549 P.2d 846* ; *see, e.g., Golfland Entertainment Ctrs., Inc. v. Superior Court (2003) 108 Cal App. 4th 739, 748, 133 Cal. Rptr. 2d 828* (reaffirming *Edwards* and *Vinson* holdings that attorney's presence is not required during mental examination, although "trial courts retain the power to permit the presence of counsel or to take other prophylactic measures when needed," but finding no evidence in this case to justify exception to standard rule barring counsel)].

Legal Topics:

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§ 197.19 Examination Reports

[1] Option to Demand Report of Examination

A party who submits to, or produces another for, a physical or mental examination in compliance with a demand under *Code Civ. Proc. § 2032.220*, an order of court under *Code Civ. Proc. § 2032.320*, or an agreement under *Code Civ. Proc. § 2016.030* has the option of making a written demand that the party at whose instance the examination was made deliver to the demanding party (1) a copy of a detailed written report setting out the history, examinations, findings, including the results of all tests made and the diagnoses, prognoses, and conclusions of the examiner; and (2) a copy of reports of all earlier examinations of the same condition of the examinee made by that or any other examiner [*Code Civ. Proc. § 2032.610(a)*].

If this option is exercised, a copy of these reports must be delivered within 30 days after service of the demand, or within 15 days of trial, whichever is earlier [*Code Civ. Proc. § 2032.610(b)*]. If the demand is served by mail, the 30-day period is extended by five calendar days if the place of address is within California, 10 calendar days if the place of address is outside California but within the United States, or 20 calendar days if the place of address is outside the United States [*see Code Civ. Proc. §§ 1013(a), 2016.050*]. The 30-day period is extended by two court days if the demandis Express Mail, other overnight delivery, or by Fax [*see Code Civ. Proc. § 1013(c), (e)*].

A party who has submitted to a physical examination under *Code Civ. Proc. § 2032.220* is entitled to a report of that examination on demand, even if the examining physician has not prepared one [*Kennedy v. Superior Court (1998) 64 Cal. App. 4th 674, 678, 75 Cal. Rptr. 2d 373]* . The report may be seen as a trade off: if one party to a personal injury litigation is required by his or her opponent to submit to a medical examination, at the very least that party is entitled to a report of the information obtained by his or her adversary in litigation [*Kennedy v. Superior Court (1998) 64 Cal. App. 4th 674, 678, 75 Cal. Rptr. 2d 373* (court contrasted Legislature's use of term "existing" written report in former *Code Civ. Proc. § 2032(j)* (*now see Code Civ. Proc. § 2032.640*)) as additional support for holding that existence of report is not determinative of *Code Civ. Proc. § 2032(h)* requirement (*now see Code Civ. Proc. § 2032.610*))].

The protection for work product under *Code Civ. Proc. § 2018.010 et seq.* is waived, both for the examiner's writings and reports and to the taking of the examiner's testimony [*Code Civ. Proc. § 2032.610(c)*]. Thus a party submitting to an

examination may not only demand a report but also depose the examining physician with regard to the examination, whether or not the party requesting the examination has withdrawn the physician as an expert witness [*Kennedy v. Superior Court (1998) 64 Cal. App. 4th 674, 678-679, 75 Cal. Rptr. 2d 373]* . A party may generally "hide" an expert from deposition by withdrawing that expert and designating him or her as "consultant," and thereby reinstate the work product protection. When, however, an expert is also the examining physician under *Code Civ. Proc. § 2032.010 et seq.*, the specific terms of that section control, and *Code Civ. Proc. § 2032.610(c)* explicitly waives the work product protection with regard to an examination [*Kennedy v. Superior Court (1998) 64 Cal. App. 4th 674, 679, 75 Cal. Rptr. 2d 373* (interpreting former *Code Civ. Proc. § 2032(h)*)].

One significant consequence of exercising the option to demand examination reports under *Code Civ. Proc. § 2032.610*, is that the demanding party must provide reciprocal copies of reports of any examination of the same condition, and waives any privilege or work product protection with respect to such reports [*see Code Civ. Proc. §§ 2032.630, 2032.640, 2032.650* and discussion in [2], *below*].

For a form of demand requesting delivery of an examination reports, see *§ 197.72*.

[2] Right of Party Providing Report to Receive Reciprocal Reports

A party receiving a demand for a report under *Code Civ. Proc. § 2032.610* is entitled, at the time of compliance with that demand, to receive in exchange a copy of any existing written report of any examination of thesame condition by any other physician, psychologist, or licensed health care practitioner. In addition, that party is entitled to receive, promptly after it has been prepared, any later report of any previous or subsequent examination of the same condition by any other physician, psychologist, or licensed health care practitioner [*Code Civ. Proc. § 2032.640*].

By demanding and obtaining a report of a physical or mental examination under *Code Civ. Proc. § 2032.610* or *2032.620*, or by taking the deposition of the examiner, other than under *Code Civ. Proc. § 2034.410 et seq.*, the party who submitted to, or produced another for a physical or mental examination waives in the pending action, and in any other action involving the same controversy, any privilege, as well as any protection for work product under *Code Civ. Proc. § 2018.010 et seq.*, that that party or other examinee may have regarding reports and writings as well as the testimony of every other physician, psychology, or licensed health care practitioner who has examined or may thereafter examine the party or other examinee in respect of the same physical or mental condition [*Code Civ. Proc. § 2032.630*]. Nothing in *Code Civ. Proc. § 2032.010 et seq.*, however, requires the disclosure of the identity of an expert consulted in actions for professional negligence in order to make the certification required in such actions under *Code Civ. Proc. § 411.30* or *411.35* [*Code Civ. Proc. § 2032.010(b)*].

[3] Motions to Compel Delivery of Reports

If the party at whose instance the examination was made fails to make a timely delivery of examination reports when these are demanded under *Code Civ. Proc. § 2032.610*, the demanding party may move for an order compelling their delivery [*Code Civ. Proc. § 2032.620*]. Similarly, if a party demands and receives reports under *Code Civ. Proc. § 2032.610*, but fails to deliver existing or later reciprocal reports of previous or subsequent examinations under *Code Civ. Proc. § 2032.640*, the party who is entitled to receive reciprocal reports may move for an order compelling their delivery [*Code Civ. Proc. § 2032.650*].

For a form of motion to compel delivery of examination reports under *Code Civ. Proc. § 2032.620*, see *§ 197.73*. For a form of motion to compel delivery of reciprocal reports under *Code Civ. Proc. § 2032.640*, see *§ 197.75*.

Both motions must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [*Code Civ. Proc. §§ 2032.620(a), 2032.650(a)*; for further discussion of this general requirement, *see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*].

The court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes either of these motions, unless it findsthat the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. §§ 2032.620(b), 2032.650(b)*; for further discussion of this general provision, *see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[2]*].

The court may award sanctions in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed [*Cal. Rules of Ct., Rule 3.1348(a)*]. The court may not, however, deem the opposing party's failure to file written opposition, failure to appear at a hearing, or voluntary provision discovery to be an admission that the motion was proper or that sanctions should be awarded [*Cal. Rules of Ct., Rule 3.1348(b)*].

For more detailed discussion of monetary sanctions generally, including requirements generally applicable in proceedings to impose such sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

If a party fails to obey an order compelling delivery of medical reports under either *Code Civ. Proc. § 2032.620* or *2032.650*, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *Code Civ. Proc. § 2023.010 et seq.* In lieu of or in addition to those sanctions, the court may impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* [*Code Civ. Proc. §§ 2032.620(c), 2032.650(c)*; for detailed discussion and forms relating to evidence, issue, and terminating sanctions, *see Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[3], 192.15[3], 192.50* et seq.]. In addition, the court must exclude at trial the testimony of any examiner or health care practitioner whose report has not been provided by a party when ordered to do so under either *Code Civ. Proc. § 2032.620* or *2032.650* [*Code Civ. Proc. §§ 2032.620(c), 2032.650(c)*].

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§ 197.20 Sanctions for Failure to Submit to or Produce Another for Examination

If a party is required by *Code Civ. Proc. § 2032.220, 2032.310,* or *2016.030* to submit to a physical or mental examination or to produce another for a physical or mental examination but fails to do so, the court, on motion of the party entitled to the examination, may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under *Code Civ. Proc. § 2023.010 et seq.* [*Code Civ. Proc. §§ 2032.410, 2032.420*]. In lieu of or in addition to that sanction, the court may, on motion of the party, impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* [*Code Civ. Proc. §§ 2032.410, 2032.420*].

In the case of a party required to produce another for a physical or mental examination, sanctions may not be imposed if the party failing to comply demonstrates an inability to produce the person for examination [*Code Civ. Proc. § 2032.420*].

For a form for a motion for sanctions based on for failure to submit to a demand or stipulation for a physical and mental examination, see *§ 197.77*. For detailed discussion of evidence, issue, and terminating sanctions, and additional forms for motions seeking the imposition of such sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[3], 192.15[3],* and *192.50* et seq.

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§ 197.21 Examination Before Commencement of Action or Pending Appeal

A party wishing to have a physical examination taken before the commencement of an action, or pending appeal, in order to preserve evidence that may otherwise be lost, may proceed under *Code Civ. Proc. §§ 2035.010 et seq.* and *2036.010 et seq.* [*see Block v. Superior Court (1963) 219 Cal. App. 2d 469, 473-474, 477-478, 33 Cal. Rptr. 205* (prior law)]. For detailed discussion and forms relating to the preservation of evidence under *Code Civ. Proc. §§ 2035.010 et seq.* and *2036.010 et seq.*, see Ch. 199, *Discovery: Preservation of Evidence* .

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[Reserved]

§§ 197.22[Reserved]

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§ 197.30 Related Matthew Bender Publications

For comprehensive discussion and forms relating to discovery by examination under the California Civil Discovery Act and related California law, see DeMeo, California Deposition and Discovery Practice, Ch. 62, *Physical and Mental Examinations* (Matthew Bender), and Hogan & Weber's California Civil Discovery, Ch. 8, *Medical Examinations: Physical and Mental* (Matthew Bender)

For memoranda relating to discovery by examination under the California Civil Discovery Act and related California law, see California Points and Authorities, Ch. 87, *Discovery: Physical and Mental Examinations* (Matthew Bender)

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§ 197.31 Federal Rules

Physical, mental, and blood examinations. *Fed. R. Civ. P., Rule 35*

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§ 197.32 State Statutes

Examinations in limited civil cases. *Code Civ. Proc. §§ 91, 94(d), 95*

Scope and regulation of discovery in general. *Code Civ. Proc. §§ 2017.010 et seq., 2019.010 et seq.*

Sanctions in general. *Code Civ. Proc. § 2023.010 et seq.*

Discovery by physical or mental examination of party or party affiliated person. *Code Civ. Proc. § 2032.010 et seq.*

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§ 197.33 California Rules of Court

Format of supplemental and further discovery and responses. *Cal. Rules of Ct., Rule 3.1000*

Format of discovery motions; separate statement required to accompany motion to compel. *Cal. Rules of Ct., Rule 3.1345*

Service of motion papers on nonparty deponent. *Cal. Rules of Ct., Rule 3.1346*

Discovery motions in summary proceedings (unlawful detainer or other actions brought under *Code Civ. Proc. § 1159 et seq.*) involving possession of real property. *Cal. Rules of Court, Rule 3.1347*

Discovery sanctions; effect of lack of opposition to motion to compel. *Cal. Rules of Ct., Rule 3.1348*

Filing and retention of specified discovery papers relating to discovery by examination. *Cal. Rules of Ct., Rule 3.250(a)(11), (12), (b)*

Legal Topics:

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§ 197.34 Decisions

[1] Condition Must Be in Controversy

Moving party is required to make affirmative showing that each condition to be examined is genuinely in controversy and that good cause exists; ability to obtain information sought by other means is relevant. *Schlagenhauf v. Holder (1964) 379 U.S. 104, 118, 85 S. Ct. 234, 13 L. Ed. 2d 152* (former *Fed. R. Civ. P., Rule 35*, on which former *Code Civ. Proc. § 2032* is based)

Allegation of past emotional distress does not put plaintiff's mental condition "in controversy" for purposes of former *Code Civ. Proc. § 2032(a)* (*now see Code Civ. Proc. § 2032.020(a)*); plaintiff in sexual harassment suit who amended complaint to allege that she ceased to suffer emotional distress several months after harassment ended was not required to submit to mental examination. *Doyle v. Superior Court (1996) 50 Cal. App. 4th 1878, 1886, 58 Cal. Rptr. 2d 476*

In dissolution proceeding, trial court's denial of psychiatric examination of mother and child was proper when mother's mental condition was not in issue and when trial court exercised its discretion in considering burden and inconvenience of examination on child, probable irrelevance since husband was not natural father, and doubtful benefit of examining child under two years of age. *In re Marriage of Halpern (1982) 133 Cal. App. 3d 297, 315-316, 184 Cal. Rptr. 740*

Under conditions of case, mental condition of guardian ad litem was not in controversy under *Code Civ. Proc. § 2032* (*now see Code Civ. Proc. § 2032.020(a)*). *Reuter v. Superior Court (1979) 93 Cal. App. 3d 332, 340-345, 155 Cal. Rptr. 525*

Even though pleadings fail to disclose that plaintiff's mental condition is in controversy, if parties allege in course of proceedings that one major issue presented is emotional damage to plaintiff who has been under care of psychiatrist for trauma occasioned by accident, plaintiff's mental condition then appears to be in controversy within meaning of former *Code Civ. Proc. § 2032*. *Whitfield v. Superior Court of Los Angeles County (1966) 246 Cal. App. 2d 81, 83, 54 Cal. Rptr. 505*

[2] Court Ordered Examination

Under *Code Civ. Proc. § 2032.320*, trial court must "specify the ... diagnostic tests and procedures" of mental examination by naming the tests and procedures to be performed; ordering "standardized written psychological tests" of "emotional and cognitive functioning" failed to meet statutory requirements. *Carpenter v. Superior Court (2006) 141 Cal. App. 4th 249, 260-262, 45 Cal. Rptr. 3d 821*

Trial court may order criminal defendant to submit to mental examination by expert designated by prosecution in order to evaluate mental competence under *Pen. Code § 1369*, but order must comply with Civil Discovery Act, specifying time, place, manner, conditions, scope and nature of examination, and identity and specialty of persons performing examination, in accordance with former *Code Civ. Proc. § 2032(d)* (*now see Code Civ. Proc. § 2032.320(d)*). *Baqleh v. Superior Court (People) (2002) 100 Cal. App. 4th 478, 122 Cal Rptr. 2d 673*

Order under former *Code Civ. Proc. § 2032(a)* not stating specific time or place for examination or name of doctor as not defective per se when written notice of motion set forth particulars required by former *Code Civ. Proc. § 2032(a)* (now see *Code Civ. Proc. § 2032.320(d)*). *Bittle v. Superior Court (1976) 55 Cal. App. 3d 489, 494-495, 127 Cal. Rptr. 574* (lack of specificity in order resulted from request by party opposing motion who had not objected to order until filing of writ)

Order which did not specify time, place, manner, conditions, and scope of examination and person making examination as failing to comply with former *Code Civ. Proc. § 2032(a)* (now see *Code Civ. Proc. § 2032.320(d)*) and as defective. *Harabedian v. Superior Court (1961) 195 Cal. App. 2d 26, 33-34, 15 Cal. Rptr. 420*

[3] Examination by Stipulation

Unless otherwise expressly provided, stipulation for medical examination incorporates all provisions of former *Code Civ. Proc. § 2032 et seq.* (*now see Code Civ. Proc. § 2032.010 et seq.*), including those for exchange of medical reports and waiver of privilege. *Grover v. Superior Court (1958) 161 Cal. App. 2d 644, 649, 327 P.2d 212* (prior law)

[4] Examination of Living Persons Only

Former *Code Civ. Proc. § 2032* does not authorize exhumation and examination of corpse, but only allows physical examination of living persons. *Holm v. Superior Court (1986) 187 Cal. App. 3d 1241, 1248, 232 Cal. Rptr. 432*

[5] Examination Proper

Procedure held not painful, protracted, or intrusive when uncontradicted medical evidence indicated that procedure was necessary to determine etiology of growth, and that there would be little cosmetic damage, and minimal pain and risks, and examination was properly ordered. *Abex Corp. v. Superior Court (1989) 209 Cal. App. 3d 755, 758, 257 Cal. Rptr. 498*

[6] Examiner

Code Civ. Proc. § 2032 (*now see Code Civ. Proc. § 2032.210 et seq.*), allowing defendant in personal injury action to have plaintiff examined by physician of defendant's choosing, as adversarial and physician need not be independent and disinterested expert as required by *Evid. Code § 730*, which allows court appointment of expert. *Mercury Casualty Co. v. Superior Court (1986) 179 Cal. App. 3d 1027, 1032-1033, 225 Cal. Rptr. 100*

Because vocational rehabilitation counselor is not licensed physician, no affirmative authority existed under former *Code Civ. Proc. § 2032*, or otherwise, for such person to conduct physical examination. *Browne v. Superior Court (1979) 98 Cal. App. 3d 610, 615, 159 Cal. Rptr. 669*

[7] Stipulation of Personal Injury Plaintiff Precluding Mental Examination

The "pain and suffering" usually associated with physical injury is a convenient label for pain, fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror, or ordeal; pain and suffering need not be established by expert medical testimony; it is usually established by plaintiff's testimony, but may be established by lay witness observing suffering; even in the absence of explicit testimony showing pain, an inference of pain is proper if the injury is one normally accompanied by pain. *Capelouto v. Kaiser Foundation Hospitals (1972) 7 Cal. 3d 889, 892, 895-897, 103 Cal. Rptr. 856, 500 P.2d 880*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsStipulations

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§ 197.35 Text References

Cal. Civil Discovery Practice, Ch. 1, *Planning Discovery*, Ch. 10, *Physical and Mental Examinations* (3d ed. Cal. CEB 2000)

Witkin, California Evidence, Ch. X, *Discovery*, § 140 et seq. (4th ed. 2000)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical Examinations

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[Reserved]

§§ 197.36[Reserved]

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16-197 California Forms of Pleading and Practice--Annotated § 197.40

§ 197.40 Examination Prior to Commencement of Action or Pending Appeal

Proceed under *Code Civ. Proc. § 2035.010 et seq.* (perpetuation of testimony or preservation of evidence prior to commencement of action) or 2036.010 et seq. (perpetuation of testimony or preservation of evidence pending appeal) [*see Block v. Superior Court (1963) 219 Cal. App. 2d 469, 473-474, 477-478, 33 Cal. Rptr. 205]* . For a discussion of and forms and procedures for use under *Code Civ. Proc. § 2035.010 et seq.* or *2036.010 et seq.*, see Ch. 199, *Discovery: Preservation of Evidence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsPerpetuation of Testimony

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16-197 California Forms of Pleading and Practice--Annotated § 197.41

§ 197.41 Examination By Stipulation

NOTE:

An examination under *Code Civ. Proc. § 2032.010 et seq.* can and ordinarily should be obtained pursuant to stipulation [*see Code Civ. Proc. §§ 2032.250(b)* (prevailing party on motion to enforce demand for examination as entitled to monetary sanctions unless one subject to sanctions acted with substantial justification, or other circumstances make imposition of sanctions unjust), 2032.310(b) (motion for order for examination as required to show reasonable and good faith attempt to arrange for examination by agreement)]. If the examination is taken on stipulation, the provisions on exchanging reports [*Code Civ. Proc. §§ 2032.610, 2032.640*] and waiver of privilege [*Code Civ. Proc. § 2032.630*] are applicable unless the parties agree otherwise [*Code Civ. Proc. §§ 2032.610-2032.650*].

1. Arrange with physician for examination.

2. Prepare Stipulation, setting forth all terms to which counsel have agreed [§ 197.60].

NOTE:

The power of an attorney to enter into a stipulation is governed by *Code Civ. Proc. § 283*. For a general discussion of and forms for stipulation, see Ch. 533, *Stipulations* .

3. Have stipulation executed.

4. Prepare proof of service [*see Code Civ. Proc. § 1013a* and Ch. 518, *Service of Summons and Papers*].

5. Serve copies of the stipulation and proof of service on all the parties and on the person to be examined [*see Code Civ. Proc. §§ 1010-1020* and Ch. 518, *Service of Summons and Papers*].

6. Keep original of stipulation until six months after final disposition of the cause; do not file it with

court unless offered as relevant to a law and motion proceeding or other hearing or ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(11), (b)*].

7. For motion for sanctions under *Code Civ. Proc. §§ 2032.410, 2032.420* based on failure to submit to examination or produce another for examination pursuant to stipulation, see form *set out in § 197.77*, procedure in § 197.45[3], and general motion procedures *set out in § 197.43[2] -[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsStipulations

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16-197 California Forms of Pleading and Practice--Annotated § 197.42

§ 197.42 Examination by Demand

[1] Preliminary Determinations

1. Whether examination sought is one which can be made on demand [*see Code Civ. Proc. § 2032.220(a)* and discussion in *§ 197.16*]:

a. Is it the initial physical examination of a personal injury plaintiff?

b. Will it be conducted at a location within 75 miles of the residence of the examinee?

c. Will any painful, protracted, or intrusive diagnostic test or procedure be necessary as part of the examination?

2. Whether the condition you are seeking to have examined is in controversy in the action [*see Code Civ. Proc. § 2032.020(a)* and discussion in *§ 197.14*].

3. Whether the person to be examined proficiently speaks or understands the English language. If not, arrange for an interpreter to be present [*see Evid. Code § 755.5(a)* and discussion in *§ 197.18[1][c]*].

[2] Arrange With Physician for Examination

The date of examination must be at least 30 days after service of demand [*Code Civ. Proc. § 2032.220(d)*]. If the demand was served by mail, the 30-day period is extended 5 calendar days if the place of address is within California, 10 calendar days if the place of address is outside California but within the United States, or 20 calendar days if the place of address is outside the United States [*Code Civ. Proc. §§ 1013(a), 2016.050*].

[3] Prepare Documents

1. *See § 197.61* for form of demand for initial physical examination of personal injury plaintiff.

2. Set forth time, place, manner, conditions, scope and nature of examination, as well as identity and specialty, if any, of the physician or other appropriate health professional who will perform the examination.

[4] Serve Demand

NOTE:
The demanding party must retain the original of the demand for six months after final disposition of the action [*Code Civ. Proc. § 2032* .260(b)].

1. Prepare proof of service [*see Code Civ. Proc. § 1013a* and Ch. 518, *Service of Summons and Papers*].

2. Serve copies of the demand and proof of service on plaintiff and on all the parties who have appeared in the action [*Code Civ. Proc. § 2032.220(e)*; *see Code Civ. Proc. §§ 1010-1020* and Ch. 518, *Service of Summons and Papers*].

3. Keep the original demand, together with the original proof of service and the original response, until six months after final disposition of the cause; do not file it with court [*Code Civ. Proc. § 2032.260*].

[5] Negotiate any Differences Arising From Plaintiff's Response

NOTE:
If a motion under *Code Civ. Proc. § 2032* .250(a) to compel compliance with the demand is necessary, it will have to be supported by a declaration stating facts showing a reasonable and good faith attempt to informally resolve the issues presented by the motion [*Code Civ. Proc. § 2032* **.250(a)**].

[6] Seek Court Order to Compel Response or Compliance

If a plaintiff fails to respond to a demand in a timely manner, or if a defendant deems that a plaintiff's response to or modification of a demand is unwarranted, that defendant may move for an order compelling compliance with the demand [*Code Civ. Proc. §§ 2032.240(b)*, *2032.250(a)*; *see* discussion in *§ 197.16[3], [4]*]. Follow the motion and order procedure as described in § 197.43[2]-[4]. See forms of motion *set out in §§ 197.63* and *197.64*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMotions to Compel

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§ 197.43 Court Ordered Examination

[1] Preliminary Determinations

1. Whether the person sought to be examined is a party, an agent of a party, or a person in the custody or under the legal control of a party [*Code Civ. Proc. § 2032.020(a)*].

2. Whether you are seeking an initial physical examination of a personal injury plaintiff which can be made by demand under *Code Civ. Proc. § 2032.220* or some other physical examination or a mental examination.

NOTE:
In paternity cases, certain genetic tests may be sought under *Fam. Code § 7550 et seq.*, the Uniform Act on Blood Tests to Determine Paternity. *Code Civ. Proc. § 2032* .010 et seq. does not affect these tests [*Code Civ. Proc. § 2032* **.010(a)**; ***see*** *§ 197.11[3]* and Ch. 412, ***Paternity***].

3. Whether the condition you are seeking to have examined is in controversy in the action [*see Code Civ. Proc. § 2032.020(a)* and discussion in *§ 197.14*].

4. Whether there is good cause for the examination [*see Code Civ. Proc. §§ 2032.320(a), 2036.020*].

5. If you are representing a defendant and there are multiple defendants, whether you have contacted them concerning the examination.

6. Whether the examination can be made pursuant to stipulation.

NOTE:
A motion under *Code Civ. Proc. § 2032* .310 to require a physical or mental examination must be accompanied by a declaration stating facts showing a reasonable and

good faith attempt to arrange for the examination by stipulation [*Code Civ. Proc. § 2032* **.310(b)**].

7. Whether the person to be examined proficiently speaks or understands the English language. If not, arrange for an interpreter to be present [*see Evid. Code § 755.5(a)* and discussion in *§ 197.18[1][c]*].

8. Arrange with physician or other practitioner for examination.

[2] Prepare, Serve, and File Documents

1. Prepare notice of motion for order for examination, with a supporting declaration [*Code Civ. Proc. § 2032.310*; *see § 197.69*].

2. Prepare supporting memorandum [*see Cal. Rules of Ct., Rules 3.1113(a)*; for discussion and forms, *see* Ch. 417, *Points and Authorities* ; *see also* California Points and Authorities , Ch. 87, *Discovery: Physical and Mental Examinations* (Matthew Bender)].

3. Prepare proof of service of documents listed *above* [*see Code Civ. Proc. § 1013a*; *see also* Ch. 518, *Service of Summons and Papers*].

4. Serve documents.

NOTE:
Notice of the motion must be given to the person to be examined and to all parties who have appeared in the action [*Code Civ. Proc. § 2032* **.310(c)**].

a. Service on parties of notices, motions, and orders made under *Code Civ. Proc. § 2032.310* may be made on any party or his or her attorney in the manner provided in *Code Civ. Proc. §§ 1010-1020* [*Code Civ. Proc. §§ 1010-1020*].

b. At least 16 court days before date set for hearing [*Code Civ. Proc. § 1005(b)*], or within any longer period as required by *Code Civ. Proc. § 1005* if notice of motion is to be served by mail, Express Mail, other overnight delivery, or by fax serve documents listed *above*, on every party who has appeared and on the person to be examined [*see Code Civ. Proc. §§ 1010-1020, 2032.310(c)*; *see also* Ch. 518, *Service of Summons and Papers*].

5. File signed originals of documents listed *above*, with the court.

[3] Proceed as for Usual Noticed Motion

See Ch. 372, *Motions and Orders* .

[4] Prepare and File Order

1. Prepare order if court grants motion or as directed by court [*see § 197.71*].

2. If required by local court rule or practice, have opposing party approve order as to form.

3. Present order to judge for signature.

4. File original signed order and serve endorsed-filed copies of order on other parties.

NOTE:

Under *Code Civ. Proc. § 1019.5(a)*, when a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order (*see* Ch. 372, ***Motions and Orders***) must be given by the prevailing party to all other parties or their attorneys in the manner provided in *Code Civ. Proc. §§ 1010-1020* (***see*** Ch. 518, ***Service of Summons and Papers***), unless notice is waived by all parties in open court and is entered in the minutes.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsStipulationsFamily LawPaternity & SurrogacyProof of PaternityEvidenceGenetic Tests

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§ 197.44 Procedure Following Request for Examination Reports

NOTE:

The following procedures are designed to be used by the party who originally requested the examination after he or she receives a demand under *Code Civ. Proc. § 2032* .610 for copies of reports from the party who was examined or who produced another for examination [*Code Civ. Proc. § 2032* **.020**(a)]. If the examination was taken pursuant to a court order or a stipulation which did not waive the parties' rights under *Code Civ. Proc. § 2032* **.610**, the party examined may demand and receive a report of the examination together with reports of all earlier examinations of the same condition [*Code Civ. Proc. § 2032* **.610(a)**)].

[1] Obtain Reports

1. Request the physician(s), psychologist(s), or other licensed health care professional(s) who conducted the examination to prepare detailed written report(s) setting out their findings and conclusions [*see Code Civ. Proc. § 2032.610(a)(1)*].

2. When such report(s) have been requested, have the examiner(s) who performed earlier examinations of the same condition prepare detailed written report(s) setting out their findings and conclusions [*see Code Civ. Proc. § 2032.610(a)(2)*].

[2] Deliver Reports

Deliver the reports to the party who demanded them.

[3] Request Reports of Past and Future Examinations

NOTE:

After a demand for a report or reports of the examination is made by the party examined, and after comply ing with that request, the party who sought the examination is entitled to copies of

any existing written report of any examination of the same condition as well as any later report of any previous or subsequent examination of the same condition [*see Code Civ. Proc. § 2032.640* and discussion in *§ 197.19[2]*]. Although *Code Civ. Proc. § 2032.640* does not specify that a request is necessary, the better practice seems to be to use a written request which can then be used as the basis for a motion to compel delivery (*see* [4], *below*) if the request is not honored.

1. Prepare a request that the party who was examined or who produced another for examination deliver to you (the party who sought the examination) reports of previous or subsequent examinations of the same condition as well as any later report of any previous or subsequent examination of the same condition [*see Code Civ. Proc. § 2032.640*].

2. Serve copies of the request described *above* [*Code Civ. Proc. §§ 1010-1020, 2032.640*; *see also* Ch. 518, *Service of Summons and Papers*].

3. Keep the original request and proof of service until six months after final disposition of the cause; do not file it or the response to request with court unless offered as relevant to a law and motion proceeding or other hearing or ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(12), (b)*].

4. Negotiate for delivery of reports from party who was examined.

NOTE:

If a motion under *Code Civ. Proc. § 2032* .650 to compel delivery of reports or disclosure of examiners is necessary, it will have to be supported by a declaration stating facts showing a reasonable and good faith attempt to informally resolve the issues presented by the motion [*Code Civ. Proc. § 2032* **.650(a)**].

[4] Compel Delivery by Motion

NOTE:

If the party who was examined or who produced another for examination refuses to deliver the reports or to disclose the identities of examiners as requested [*see* [3], *above*], the examining party may move for an order requiring delivery [*see* *Code Civ. Proc. § 2032* .650].

1. Prepare notice of motion and supporting declaration [§ 197.75], supporting memorandum [*see Cal. Rules of Ct., Rule 3.1113(a)*; for discussion and forms, *see* Ch. 417, *Points and Authorities* ; *see also* California Points and Authorities, Ch. 87, *Discovery: Physical and Mental Examinations* (Matthew Bender)], and proof of service of these documents [*see Code Civ. Proc. §§ 1013a, 2032.650(a)*; *see also* Ch. 518, *Service of Summons and Papers*].

2. Serve documents.

> At least 16 court days before date set for the hearing [*Code Civ. Proc. § 1005(b)*], or within any longer period as required by *Code Civ. Proc. § 1005* if service of the notice of motion is to be made by mail, Express Mail, other overnight delivery, or by fax serve documents listed *above* on every party who has appeared and on the person from whom the documents are requested if he or she is not a party [*see Code Civ. Proc. §§ 1010-1020, 2032.220(e)*; *see also* Ch. 518, *Service of Summons and Papers*].

3. File documents.

File signed originals of the documents listed *above* with the court.

4. Proceed as for the usual noticed motion [*see* Ch. 372, *Motions and Orders*].

5. Order [*see § 197.76*].

Proceed as in § 197.43[4].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMotions to Compel

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§ 197.45 Sanctions

[1] Sanction for Failure by Physician or Party to Deliver Reports

If a party who has demanded and received delivery of medical reports under *Code Civ. Proc. § 2032.610* fails to deliver existing or later reports of previous or subsequent examinations, the party who has complied with *Code Civ. Proc. § 2032.610* may notice a motion for an order compelling delivery. The court must impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes the motion, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2032.650(a), (b)*]. Follow the procedures for a noticed motion as *set forth in § 197.43[2] -[4]*. For a form of notice of motion to compel delivery and for a monetary sanction, *see § 197.75*.

If a physician or party then fails or refuses to deliver a report after being ordered to do so, the party who sought the original examination may [*Code Civ. Proc. § 2032.650(c)*]:

1. Seek any order that is just including the imposition of an issue sanction, an evidence sanction, a terminating sanction, and/or a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* Follow the procedures for a noticed motion as *set forth in § 197.43[2] -[4]*. For a form that may be used to obtain an order imposing an issue, evidence, or terminating sanction under *Code Civ. Proc. § 2032.650(c)*, see *§ 197.77*.

2. Give notice of a motion for an order excluding that health care practitioner's (i.e., one who made previous or later examinations) testimony at trial, adapting procedures on noticed motion in § 197.43.

3. Make a motion in limine, immediately prior to trial, requesting that the health care practitioner's testimony be excluded [*see* Ch. 373, *Motions in Limine*].

4. Orally move the court at the time of trial to exclude the testimony of the health care practitioner.

[2] Sanctions for Failure to Respond to Demand for Examination

If a plaintiff to whom a demand for a physical examination has been directed fails to serve a timely response to it, the defendant may notice a motion for an order compelling response and compliance with the demand. The court must impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel compliance with a demand for a physical examination, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2032.240(c)*; *see § 197.63*]. Follow the procedures for a noticed motion as *set forth in § 197.43[2] -[4]*.

[3] Sanctions for Failure to Appear at Examination

If a party required by demand, stipulation, or order to submit to a physical or mental examination or to produce another for examination fails to do so, the party entitled to the examination may notice a motion for those orders that are just, including the imposition of an issue sanction, an evidence sanction, a terminating sanction, and/or a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* [*see Code Civ. Proc. §§ 2032.410, 2032.420*]. Follow the procedures for a noticed motion as *set forth in § 197.43[2] -[4]*. For general forms that may be used to obtain an order imposing an issue, evidence, or terminating sanction under *Code Civ. Proc. § 2032.410* and § 2032.420, *see §§ 197.77, 197.78*.

[4] Other Sanctions

The various sanctions available for disobedience of orders made under *Code Civ. Proc. § 2032.010 et seq.* are discussed in *§ 197.20*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMotions to Compel

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[Reserved]

§§ 197.46[Reserved]

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B. Checklists for Responding Party

16-197 California Forms of Pleading and Practice--Annotated § 197.50

§ 197.50 Personal Injury Plaintiff's Response to Demand for Initial Physical Examination

[1] Extending Time for Response

Plaintiff must respond to the demand within 20 days after it was served on him or her, or within 25 days if it was served by mail. However, plaintiff may move to extend the time for response [*Code Civ. Proc. § 2032.230(b)*; for a form of notice of motion to extend time to respond to interrogatories that may be adapted for use, *see Ch. 194, Discovery: Interrogatories, § 194.90*].

[2] Preliminary Determinations

1. Whether examination sought is one which can be made on demand [*see Code Civ. Proc. § 2032.220(a)* and discussion in *§ 197.16*]:

a. Will it be conducted at a location within 75 miles of the residence of the examinee?

b. Will any painful, protracted, or intrusive diagnostic test or procedure be necessary as part of the examination?

c. Does the entire examination relate to the condition in controversy, or is the scope of the examination too broad?

2. Whether examination should be taken in the manner requested; whether scope and manner of examination are reasonable considering condition in controversy.

3. Is examiner qualified physician or other appropriate health care practitioner [*see Code Civ. Proc. § 2032.020(b)*]?

4. Consider requests for, and facts supporting, imposition of certain conditions at the examination, such as the presence of examinee's attorney or a court reporter at a physical examination, a tape recording of

the examination, etc. [*see Code Civ. Proc. §§ 2032.510, 2032.530*].

[3] Prepare Written Response

1. Prepare written response to defendant's demand for initial physical examination [*Code Civ. Proc. § 2032.230*; *see § 197.62*].

[4] Serve Response

1. Prepare proof of service [*see Code Civ. Proc. § 1013a* and Ch. 518, *Service of Summons and Papers*].

2. Serve original of response on defendant making demand. Serve copies on all parties who have appeared in the action [*Code Civ. Proc. § 2032.230(b)*; *see Code Civ. Proc. §§ 1010-1020* and Ch. 518, *Service of Summons and Papers*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations

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PART IV. PROCEDURAL CHECKLISTS
B. Checklists for Responding Party

16-197 California Forms of Pleading and Practice--Annotated § 197.51

§ 197.51 Relief From Waiver of Objections

If a plaintiff fails to file a timely response to a demand for a physical examination, that plaintiff is deemed to have waived any objection to it. However, on motion, the court may relieve the plaintiff from waiver on a determination that the plaintiff has subsequently served a response in substantial compliance with *Code Civ. Proc. § 2032.230*, and that the failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect [*Code Civ. Proc. § 2032.240(a)*].

[1] File Response

Follow the procedure *set forth in § 197.50[3], [4]*.

[2] Move for Relief From Waiver of Objections to Demand

Follow the procedures for a noticed motion as *set forth in § 197.43[2] -[4]*, using *form in § 197.67*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical Examinations

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16-197 California Forms of Pleading and Practice--Annotated § 197.52

§ 197.52 Opposition to Motion for Examination

[1] Prepare Stipulation Regarding Limited Recovery for Emotional Distress

1. If a mental examination is being sought of a personal injury plaintiff who is not seeking recovery for mental and emotional distress over and above that usually associated with the physical injuries claimed and who will not present expert testimony regarding this usual mental and emotional distress at trial, prepare stipulation to that effect [*see Code Civ. Proc. § 2032.320* and discussion in *§ 197.17[5][a]*; *see § 197.70*].

NOTE:
It is unclear whether or not the stipulation may be filed with the court [*see Cal. Rules of Ct., Rule 3.250(a)(11)* (providing that an "agreement for physical and mental examinations" may not be filed unless offered as relevant to the determination of an issue in a law and motion proceeding or other hearing or ordered filed for good cause)]. A stipulation under *Code Civ. Proc. § 2032* .320 might or might not be considered an "agreement for physical and mental examinations." Thus, counsel should consult local practice to determine whether to file or to retain the original stipulation until six months after final disposition of the cause [***see*** *Cal. Rules of Ct., Rule 3.250(b)*].

2. If stipulation will require execution by counsel for the party seeking mental examination, obtain execution.

[2] Prepare Opposing Declaration

1. Include any facts showing that the condition is not in controversy.

2. If applicable, show how good cause for the examination has not been shown [*see Code Civ. Proc. § 2032.320(a)*].

NOTE:

A motion for a physical or mental examination may only be granted for good cause and requires a showing that a reasonable and good faith attempt has been made to arrange for the examination by agreement. If a mental examination is being sought of a personal injury plaintiff who has made the stipulation referred to in [1], *above*, the mental examination can only be ordered on a showing of exceptional circumstances [***see Code Civ. Proc. § 2032.320(b)***].

3. Include any facts showing that the person to be examined is not a party, an agent of a party, or in the legal custody or control of a party [*see Code Civ. Proc. § 2032.020(a)*].

4. Include facts showing that the examination should not be taken in the manner requested, such as that the examiner is not qualified or that the procedures requested are extraordinary, unnecessary, and/or unduly painful [*see Code Civ. Proc. §§ 2032.020(b), 2032.220(a)*].

5. Include requests for, and facts supporting, a limitation of the scope of the examination or the imposition of certain conditions at the examination, such as the presence of examinee's attorney or a court reporter at a physical examination, a tape recording of examination, etc. [*see Code Civ. Proc. §§ 2032.310, 2032.530*].

[3] Prepare Memorandum Opposing Motion

Opposing party should include in this memorandum any requests for conditions to be put on the examination or limitations or changes in the scope and manner in which it is to be taken.

[4] Serve Documents

Serve copies of any stipulation regarding limited recovery for emotional suffering, opposing declaration, and memorandum as well as proof of service of those documents on all parties [*see Code Civ. Proc. §§ 1010-1020, 2032.220(e)*; *see also* Ch. 518, *Service of Summons and Papers*].

[5] File Documents

File original signed stipulation, opposing declaration, memorandum, and proof of service with the court within the time required by local rule.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsStipulationsTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral Overview

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B. Checklists for Responding Party

16-197 California Forms of Pleading and Practice--Annotated § 197.53

§ 197.53 Copies of Reports

[1] Request Copies of Reports

A party who was examined or who produced another for examination has the option of making a written demand that the party who requested the examination deliver the report written by the examiner, as well as copies of reports of all earlier examinations of the same condition of the examinee made by that or any other examiner, to the party who was examined or who produced another for examination, or to such party's attorney [*see Code Civ. Proc. § 2032.610(a)*].

NOTE:
This right to obtain a copy of the report and consequent waiver of privileges applies when one has been examined pursuant to stipulation unless the stipulation expressly waives the provisions of *Code Civ. Proc. §§ 2032.610-2032.650* [*see Code Civ. Proc. §§ 2032.610-2032.650*].

1. Prepare demand [§ 197.72].

2. Serve a copy of the request on the party who caused the examination to be taken [*see Code Civ. Proc. §§ 1010-1020, 2032.610(a)*].

3. Keep the original request and proof of service until six months after final disposition of the cause; do not file the request or the response to it with the court unless offered as relevant to a law and motion proceeding or other hearing or ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(12), (b)*].

[2] Compel Delivery by Motion

1. Negotiate for delivery of reports by the party who caused the examination.

NOTE:
If a motion under *Code Civ. Proc. § 2032* .620 to compel delivery of reports is

necessary, it will have to be supported by a declaration stating facts showing a reasonable and good faith attempt to informally resolve the issues presented by the motion [*Code Civ. Proc. § 2032* **.620(a)**].

2. Follow the motion and order procedure as described in § 197.43[2]-[4], and use the *form in § 197.73*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMotions to Compel

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16-197 California Forms of Pleading and Practice--Annotated § 197.54

§ 197.54 Sanctions

[1] Sanctions With Order Compelling Delivery of Reports

Follow procedure *set out in § 197.45[1]*. The court must exclude the testimony of any examiner whose report has not been provided by a party [*see Code Civ. Proc. § 2032.620(c)*].

[2] Other Sanctions

See § 197.45[4].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMotions to Compel

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16-197 California Forms of Pleading and Practice--Annotated §§ 197.55-197.59

[Reserved]

§§ 197.55[Reserved]

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16-197 California Forms of Pleading and Practice--Annotated § 197.60

§ 197.60 Stipulation for Physical or Mental Examination [Code Civ. Proc. § 2016.030]

[1] FORM Stipulation for Physical or Mental Examination [Code Civ. Proc. § 2016.030]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	STIPULATION FOR _____
_____ [*name*],	)	[PHYSICAL *or* MENTAL *or* BLOOD] EXAMINA-
Defendant.	)	TION OF
	)	_____ [*name*]
	)	

_____

It is hereby stipulated between the parties through their respective counsel that _____ [*specify name and status of person to be examined e.g.*, plaintiff], _____ [*name*], _____ [submit to *or* produce _____ (*name*) for] a _____ [physical *or* mental] examination to be conducted by Dr. _____ [*name*] on _____ [*date*], at _____ [*time*] at _____ [*place*] to determine _____ [*specify condition in question, e.g.*, the extent and nature of any skeletal, muscular, soft tissue, or nerve damage or injury to, or abnormality of, plaintiff's neck, arms, shoulders, and back, including, in particular, any evidence of loss of normal range of motion].

It is further stipulated that the nature, scope, conditions, and manner of the examination are to be as follows:

[*Specify, in as many separately numbered subparagraphs as necessary, the nature, manner, scope, and conditions of the examination demanded. See examples in form of order for examination set out in § 197.71[1].*]

It is further stipulated that _____ [*set forth other items to which counsel have stipulated, such as agreement for payment of costs of the examination, e.g.,* _____ (*specify party, e.g.,* defendant) _____ (*name*) shall pay _____'s [*specify examinee's name*] fees and all related costs of the examination, including all diagnostic procedures utilized].

It is further stipulated that _____ [*set forth other items to which counsel have stipulated, such as agreement for exchange of reports, e.g.,* the examining physician shall deliver on the same date to each of the attorneys signing this stipulation copies of all reports of the examination, including a history, examinations, findings, results of all tests or procedures done by him/her or at his/her instance, diagnoses, prognoses, and conclusions. There shall be no further exchange or delivery of reports of examinations by reason of, or based on, the provisions of *Section 2032.610* or *2032.640 of the Code of Civil Procedure*, and this stipulation is not a demand pursuant to *Section 2032.610 of the Code of Civil Procedure.* This agreement, however, is not intended to be construed to preclude the disclosure of such reports pursuant to other provisions of Sections 2016.010 et seq.--2036.010 et seq. of the Code of Civil Procedure].

It is further stipulated that _____ [*set forth any further agreement, such as one relating to existence of good cause for the examination and issuance of an order for the examination, e.g.,* good cause exists for this examination and that an order may be entered in accordance with the terms of this stipulation on the presentation thereof to the court].
Dated: _____.

_____ [*signature*]
Attorney for _____ [*identify party*]
_____ [*signature*]
Attorney for _____ [*identify party*]

[2] Use of Form

The form of stipulation set out in [1], *above*, is for use by parties to stipulate to an examination under *Code Civ. Proc. § 2016.030* and may be adapted to reflect the particular agreement of the parties. Courts prefer that such examinations be taken on stipulation [*see* discussion in *§ 197.15*]. If the parties cannot agree, a defendant seeking the initial physical examination of a personal injury plaintiff must proceed by demand [*Code Civ. Proc. § 2032.220*; *see § 197.61*], and all others must proceed on motion for a court ordered examination [*Code Civ. Proc. § 2032.310*; *see § 197.69*].

[3] Exchange of Reports and Waiver of Privilege

A party who submits to or produces another for an examination pursuant to stipulation has the election to demand delivery of the report of the examination and all attendant test results as well as copies of reports of all earlier examinations of the same condition of the examinee made by the same or any other examiner [*Code Civ. Proc. § 2032.610*; *see § 197.19[1]*]. A party who complies with a demand for examination reports under *Code Civ. Proc. § 2032.610* is, in turn, entitled to receive reciprocal reports [*Code Civ. Proc. § 2032.640*; *see § 197.19[1]*].

By demanding and obtaining a report pursuant to *Code Civ. Proc. § 2032.610* or by deposing the examiner, the party who submitted to, or produced another for, examination waives all privileges, as discussed in the Introduction under--Waiver of Privilege [*Code Civ. Proc. § 2032.630*]. Thus, counsel should specify whether the stipulation incorporates a demand under *Code Civ. Proc. § 2032.610* or is intended as a substitute for or waiver of those rights [*see Code Civ. Proc. § 2016.030* (parties may modify procedures by stipulation)].

[4] Service of Stipulation

It is recommended that a copy of the final stipulation be served on the party to be examined and a declaration of proof of service be made and retained.

The original stipulation is retained by the parties until six months after final disposition of the cause, and may not be filed with the court unless it is offered as relevant to a law and motion proceeding or other hearing, or it is ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(11), (b)*].

[5] Sanctions

If a party required by stipulation to submit to an examination or produce another for an examination fails to do so, an opposing party may seek an order imposing an issue, evidence, or terminating sanction. The court in granting such a motion may also impose a monetary sanction in lieu of or in addition to these sanctions [*Code Civ. Proc. §§ 2032.410, 2032.420*; *see* discussion in *§ 197.20*].

[6] Cross References

For discussion relating to discovery stipulations generally, see *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.35*

For discussion and forms relating to stipulations generally, see Ch. 533, *Stipulations*

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16-197 California Forms of Pleading and Practice--Annotated § 197.61

§ 197.61 Initial Physical Examination of Personal Injury Plaintiff--Demand for Examination [Code Civ. Proc. § 2032.220]

[1] FORM Initial Physical Examination of Personal Injury Plaintiff--Demand for Examination [Code Civ. Proc. § 2032.220]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DEMAND FOR INITIAL PHYSICAL EXAMINA-
Defendant.	)	TION OF PLAINTIFF SEEKING DAMAGES FOR
	)	PERSONAL INJURIES
	)	

_____

Defendant _____ [*name*] hereby demands, pursuant to *Section 2032.220 of the Code of Civil Procedure*, that plaintiff _____ [*name*] present himself/herself on _____ [*date*], at _____ [*time*], at the offices of Dr. _____ [*name, and specialty, if any, of examiner*] at _____ [*address*] and then and there submit to a physical examination to be conducted by Dr. _____ [*name*] to determine _____ [*specify condition in question, e.g.*, the extent and nature of any skeletal, muscular, soft tissue, or nerve damage or injury to, or abnormality of, plaintiff's neck, arms, shoulders, and back, including, in particular, any loss of normal range of motion].

The nature, scope, conditions, and manner of the examination are to be as follows:

[*Specify, in as many separately numbered subparagraphs as necessary, the nature, manner, scope, and conditions of the examination demanded. See examples in form of order for examination set out in § 197.71[1].*]

Dated: _____.

_____ [*signature*]
Attorney for Defendant

[2] Use of Form

The form of demand set out in [1], *above*, is for use by a defendant in a personal injury action to request a physical examination of the plaintiff. One such examination may be demanded without first obtaining a court order. The demand may be made at any time after the defendant has been served or has appeared in the action [*see Code Civ. Proc. § 2032.220(b)*].

The examination must be conducted at a place within 75 miles of the residence of the examinee and it cannot include any diagnostic test or procedure that is painful, protracted, or intrusive. Unless the party demanding the examination has obtained an order shortening time, the physical examination must be scheduled for a date at least 30 days after the service of the demand [*see Code Civ. Proc. § 2032.220*; *see also Code Civ. Proc. §§ 1013(a), 2016.050* (extension of minimum period when service is by mail, etc.)].

For further discussion, including discussion of service of copies and retention of the original demand, see *§ 197.16*.

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16-197 California Forms of Pleading and Practice--Annotated § 197.62

§ 197.62 Initial Physical Examination of Personal Injury Plaintiff--Response to Demand for Examination [Code Civ. Proc. § 2032.230]

[1] FORM Initial Physical Examination of Personal Injury Plaintiff--Response to Demand for Examination [Code Civ. Proc. § 2032.230]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	PLAINTIFF'S RESPONSE TO DEMAND FOR INI-
Defendant.	)	TIAL PHYSICAL EXAMINATION
	)	
	)	

_____

To defendant _____ [*name*]:

[*EITHER*]

In response to the demand of _____ [*date*] by defendant _____ [*name of defendant*], requesting that plaintiff _____ [*name*] submit to a physical examination, plaintiff states that he/she will comply with the demand _____ [as stated *or* with the following modifications: _____ (*specify*, *e.g.*, he/she will not submit to the X rays because they are duplicative of the one's taken on _____ (*date*) by _____ (*name*) and made available to defendant (for duplication) on _____ (*date*). For plaintiff to submit to additional X rays at this time would subject plaintiff to unnecessary risk)].

[*OR*]

In response to the demand of _____ [*date*] by defendant _____ [*name of defendant*], requesting that plaintiff _____ [*name*] submit to a physical examination, plaintiff states that he/she refuses to comply with the demand because _____ [*specify reasons for refusal, e.g.,* he/she has already been examined at the demand of defendant _____ (*name*)].
Dated: _____.

_____ [*signature*]
Attorney for Plaintiff

[2] Use of Form

The form of response set out in [1], *above*, is for use by a plaintiff in a personal injury action to reply to a defendant's demand for initial physical examination [*see Code Civ. Proc. § 2032.230*; for form of demand, see *§ 197.61*]. The plaintiff may respond that he or she will comply with the demand as stated, or will comply with the demand as modified, or to specify reasons for refusing to comply [*Code Civ. Proc. § 2032.230(a)*]. If the defendant believes the modification or refusal to comply is unwarranted, he or she may move for an order compelling compliance after he or she has first made a reasonable and good faith attempt to informally resolve the matter [*Code Civ. Proc. § 2032.250(a)*].

For further discussion, including discussion of service deadlines and requirements and the effect of untimely service of the response, see *§ 197.16*.

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16-197 California Forms of Pleading and Practice--Annotated § 197.63

§ 197.63 Initial Physical Examination of Personal Injury Plaintiff--Proceedings to Compel Response to and Compliance With Demand [Code Civ. Proc. § 2032.240]--Notice of Motion and Supporting Declaration

[1] FORM Initial Physical Examination of Personal Injury Plaintiff--Proceedings to Compel Response to and Compliance With Demand [Code Civ. Proc. § 2032.240]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO COM-
vs.	)	PEL RESPONSE TO AND COMPLIANCE WITH
_____ [*name*],	)	DEMAND FOR INITIAL PHYSICAL EXAMINA-
Defendant.	)	TION OF PERSONAL INJURY PLAINTIFF AND
	)	IMPOSE MONETARY SANCTIONS, SUPPORT-
	)	ING DECLARATION OF _____
	)	[*name*], AND MEMORANDUM
	)	Date: _____
		Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To plaintiff _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____

of] this court, located at _____ [*street address*], _____ [*city*], defendant will, and hereby does, move for an order compelling a response to and compliance with the demand for physical examination served on plaintiff on _____ [*date*], and will further move this court for an order requiring _____ [*identify party or attorney or both, e.g.,* plaintiff and/or his/her attorney _____ [*name*] to pay a monetary sanction in the amount of $_____ to defendant. The motion will be made on the grounds that plaintiff was served with the demand for physical examination on _____ [*specify date after time for response under Code Civ. Proc. § 2032.230 expired*], and that he/she has failed to serve a timely response to it, as required by *Section 2032.230 of the Code of Civil Procedure.* The motion for monetary sanctions will be made on the grounds that the failure to respond to and comply with the demand is without substantial justification and that there are no circumstances that make the imposition of the requested sanction unjust.

The motion will be based on this notice of motion, on the memorandum and declaration(s) of _____ [*name(s*)] set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for defendant *or other statement as appropriate*].

2. Defendant _____ [*name*] is seeking an order from this court compelling plaintiff to respond to and comply with its demand for an initial physical examination of plaintiff _____ [*name*] at the time and place and in the manner set forth in his/her/its demand of _____ [*date*]. A copy of that demand was served on plaintiff on _____ [*date*], by _____ [*specify how service was effected, e.g.,* personal delivery to plaintiff's attorney's office]. A true and correct copy of the demand and proof of service thereof are attached hereto as Exhibit A and made a part hereof.

3. [*Nature of action. See § 197.64[1], Declaration Paragraph 3.*]

4. [*Physical condition in controversy. See § 197.64[1], Declaration Paragraph 4.*]

5. Plaintiff has failed to serve a response to the demand for an initial physical examination, although more than _____ [20 *or other number of days within which plaintiff was required to respond to demand*] days have elapsed since he/she/it was served with it. As a result of plaintiff's failure to make a timely response to the demand, plaintiff has waived any objections he/she/it may have to it, pursuant to *Section 2032.240(a) of the Code of Civil Procedure.*

6. [*Good cause for physical examination. See § 197.64[1], Declaration Paragraph 6.*]

7. On _____ [*date*], _____ [*specify efforts made to compel plaintiff to respond to*

demand, e.g., I sent a letter to plaintiff's attorney, with a copy of the demand for physical examination, and asked him/her to respond to the demand. A copy of this letter is attached as Exhibit B. After five days had elapsed and I still had not received a response from plaintiff's attorney, I telephoned his/her office on _____ [*date*], and left a message with the secretary to have him/her return my call to discuss his/her failure to respond to the demand. I did not receive a call back and still have not received a response to the demand.]

8. Defendant bases his/her request for the imposition of a sanction in the amount of $_____ on _____ [*itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion*]

[2] Use of Form

The form of notice of motion and motion with supporting declaration set out in [1], *above*, is for use by a defendant in a personal injury action to compel a response to and compliance with a demand for an initial physical examination of a personal injury plaintiff, after the plaintiff has failed to make a timely response to the demand [*see Code Civ. Proc. § 2032.240*]. The time and manner of service should be set forth in the declaration, and a copy of the proof of service should be attached as an exhibit.

A supporting memorandum is required to be served and filed with this form [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; for further discussion of memorandum requirements and a skeletal form of memorandum, *see* Ch. 417, *Points and Authorities* ; for forms of memoranda for use in proceedings under *Code Civ. Proc. § 2032.010 et seq., see* California Points and Authorities , Ch. 87, *Discovery: Physical and Mental Examinations* (Matthew Bender)].

For further discussion, see *§ 197.16[3]*. For procedural checklists, see *§§ 197.42[6], 197.45*.[2].

[3] Monetary Sanctions

The court must impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes this motion, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2032.240(c)*; *see also* discussion of this general provision in Ch. 190, *Discovery: Scope, Regulation, and Timing*, § 190.33[2]].

A monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* is an order that one who engaged in a misuse of the discovery process, his or her attorney if the attorney advised the conduct, or both, pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct [*Code Civ. Proc. § 2023.030(a)*].

A monetary sanction may only be imposed after notice to any affected party, person, or attorney, and after opportunity

for hearing [*Code Civ. Proc. § 2023.030*].

A request for a sanction must, in the notice of motion, identify every party, person, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion must be supported by a memorandum of points and authorities, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought [*Code Civ. Proc. § 2023.040*]. The notice of motion and supporting declaration in this form include language designed to satisfy these requirements.

For further discussion of monetary sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

[4] Cross References

- For discussion and forms concerning declarations in general, see Ch. 15, *Affidavits, Certificates, and Declarations*

- For discussion and forms relating to both ex parte applications and noticed motions and accompanying papers in general, see Ch. 372, *Motions and Orders*

- For discussion and forms concerning service of papers and proof of service, see Ch. 518, *Service of Summons and Papers*

- For further discussion and forms concerning shortening or extending time requirements in general, see Ch. 524, *Shortening and Extension of Time*

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 197 DISCOVERY: PHYSICAL AND MENTAL EXAMINATIONS
PART V. FORMS

16-197 California Forms of Pleading and Practice--Annotated § 197.64

§ 197.64 Initial Physical Examination of Personal Injury Plaintiff--Proceedings to Compel Compliance With Demand [Code Civ. Proc. § 2032.250]--Notice of Motion and Supporting Declaration

[1] FORM Initial Physical Examination of Personal Injury Plaintiff--Proceedings to Compel Compliance With Demand [Code Civ. Proc. § 2032.250]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO COM-
vs.	)	PEL COMPLIANCE WITH DEMAND FOR INI-
_____ [*name*],	)	TIAL PHYSICAL EXAMINATION OF PERSONAL
Defendant.	)	INJURY PLAINTIFF AND IMPOSE MONETARY
	)	SANCTIONS, SUPPORTING DECLARATION OF
	)	_____ [*name*], AND MEMOR-
	)	ANDUM
	)	Date: _____
	)	Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To plaintiff _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located

at _____ [*street address*], _____ [*city*], defendant will, and hereby does, move for an order compelling compliance with its demand of _____ [*date*], that plaintiff submit to a physical examination. Defendant will, and hereby does, further move this court for an order requiring _____ [*identify party or attorney or both, e.g.*, plaintiff and/or his/her attorney _____ (*name*)] to pay a monetary sanction in the amount of $_____ to defendant. The motion will be made on the grounds that the nature, scope, conditions, and manner of the examination set forth in defendant's demand are reasonable and appropriate given the nature and extent of the injuries claimed by plaintiff, that _____ [plaintiff's refusal is *or* the modifications demanded by plaintiff are] unwarranted, and that despite defendant's reasonable and good faith attempt to informally resolve the areas of disagreement, plaintiff continues his/her unwarranted _____ [refusal *or* demands for modification].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*], on the separate statement served and filed herewith pursuant to *Cal. Rules of Ct., Rule 3.1345*, on the memorandum served and filed herewith, and on the records and file herein and on such evidence as may be presented at the hearing of the motion. Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for defendant in the above-described action].

2. Defendant _____ [*name*] is seeking an order from this court compelling its initial physical examination of plaintiff _____ [*name*] at the time and place and in the manner set forth in his/her/its demand of _____ [*date*]. A copy of that demand was served on plaintiff on _____ [*date*]. A true and correct copy of the demand (and proof of service thereof) is/are attached as Exhibit A and incorporated by reference.

3. This is an action brought by plaintiff _____ [*name*] for personal injuries which he/she allegedly sustained in _____ [*specify, e.g.*, an automobile accident which allegedly occurred on _____ (*date*)].

4. The particular physical condition of the plaintiff which is in controversy is _____ [*specify, e.g.*, the extent, if any, to which his/her eyesight was impaired as a result of the automobile accident(, as alleged in the complaint)].

[*EITHER*]

5. Plaintiff refused to comply with the defendant's demand for an initial physical examination on the grounds that _____ [*specify, e.g.*, sufficient records of examinations by plaintiff's physicians have been made available to this defendant]. A true and correct copy of plaintiff's response to the demand is attached as Exhibit B and

incorporated by reference.

[*OR*]

5. Plaintiff's response to defendant's demand for initial physical examination modified the demand by _____ [*specify, e.g.,* limiting the time allowed for the examination to one hour]. A true and correct copy of plaintiff's response to the demand is attached as Exhibit B and incorporated by reference.

6. Good cause exists to compel the physical examination of plaintiff of the nature and scope, in the manner, and under the conditions set forth in defendant's demand in that _____ [*set forth facts showing good cause, e.g.,* although defendant has obtained medical records showing examinations made by plaintiff's treating physician two weeks after the accident, those records are inconclusive. Over time, different indications would ordinarily develop which would clarify the cause, if any, of plaintiff's complaint. Defendant is entitled to have plaintiff examined by a physician of defendant's choice and the records of previous examinations do not reflect the effect, if any, of healing and therapy occurring after the date of those early examinations. As more fully described in the accompanying declaration of Dr. _____, all component procedures enumerated in defendant's demand are standard and necessary to determine the extent of an injury of the type alleged by plaintiff; none of them are painful, protracted, or intrusive. Two to three hours is not an uncommon or taxing length of time for an examination of this sort].

7. On _____ [*date*], _____ [*specify actions taken to confer with responding party in a reasonable and good faith attempt to informally resolve the issues covered by the motion, including any narrowing of the areas of disagreement achieved by the negotiations, e.g.,* I sent a letter to plaintiff's attorney asking that plaintiff submit to this examination to provide a basis for determining the extent of the permanent injuries allegedly sustained by the plaintiff, who has never been examined at the instance of any defendant is this action. A copy of the letter is attached as Exhibit C. Plaintiff's attorney contends that I should be satisfied with receiving a copy of the evaluation made two months ago by Dr. _____, who has been treating plaintiff for the injuries allegedly sustained].

8. Plaintiff bases his/her request for the imposition of a sanction in the amount of $_____ on _____ [*itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

The notice of motion and motion with supporting declaration set out in [1], *above*, is for use by a defendant in a personal injury action to compel an initial physical examination of the plaintiff when the plaintiff has responded to defendant's demand for a physical examination, either by refusing to comply, or by agreeing to comply subject to

unwarranted modifications [*see Code Civ. Proc. § 2032.250(a)*]. Any modifications of the original demand that the parties have agreed to should be set forth in the declaration [*Code Civ. Proc. § 2032.250(a)*].

The form may be modified for use by a cross defendant to compel a cross plaintiff to comply with a demand for an examination by changing the designation of the parties [*see Code Civ. Proc. § 2032.210*].

The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [*Code Civ. Proc. § 2032.250(a)*; for further discussion of this general requirement, *see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*]. The declaration included with this form includes statements designed to satisfy this requirements, as well as factual statements supporting the grounds for the motion, and facts supporting the amount of monetary sanctions that might be awarded in favor of the moving party. For further discussion of monetary sanctions, see [4], *below*.

A supporting memorandum is required to be served and filed with this form [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; for further discussion of memorandum requirements and a skeletal form of memorandum, *see* Ch. 417, *Points and Authorities* ; for forms for memoranda for use in proceedings under *Code Civ. Proc. § 2032.010 et seq., see* California Points and Authorities , Ch. 87, *Discovery: Physical and Mental Examinations* (Matthew Bender)].

For further discussion, see *§ 197.16[4]*. For a procedural checklist, see *§ 197.42[6]*. For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 197.63[4]*.

[3] Separate Statement

A motion to compel compliance after a plaintiff has responded to a demand with objections must be accompanied by a separate statement [*Cal. Rules of Ct., Rule 3.1345(a)(6), (c)*]. This is a separate document filed and served with the motion that sets out all the information necessary to understand all the questions and responses that are in issue [*see Cal. Rules of Ct., Rule 3.1345(c)*]. For a form for the separate statement, together with further discussion of its requirements, see *§ 197.65*.

[4] Monetary Sanctions

The court must impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes this motion, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2032.250(b)*; *see also* discussion of this general provision in Ch. 190, *Discovery: Scope, Regulation, and Timing*, § 190.33[2]].

The court may award sanctions in favor of a party who files a motion to compel discovery, even though no opposition to the motion was filed, or opposition to the motion was withdrawn, or the requested discovery was provided to the moving party after the motion was filed [*Cal. Rules of Ct., Rule 3.1348(a)*]. The court may not, however, deem the opposing party's failure to file written opposition, failure to appear at a hearing, or voluntary provision discovery to be an admission that the motion was proper or that sanctions should be awarded [*Cal. Rules of Ct., Rule 3.1348(b)*].

As discussed in [2], *above*, this motion must be accompanied by a declaration showing of a reasonable and good faith attempt at informal resolution of the issues raised by the motion. Under *Code Civ. Proc. § 2023.010(i)*, the court is also required to impose a monetary sanction against any party or attorney who fails to confer in an attempt to resolve informally any dispute concerning discovery, in favor of anyone who incurs expenses, including attorney's fees, as a result of that conduct, when the section of the Civil Discovery Act governing a particular discovery motion requires a declaration showing that an attempt has been made. This sanction is to be imposed regardless of the outcome of the

particular discovery motion [*Code Civ. Proc. § 2023.020*].

A monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* is an order that one who engaged in a misuse of the discovery process, his or her attorney if the attorney advised the conduct, or both, pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct [*Code Civ. Proc. § 2023.030(a)*].

A monetary sanction may only be imposed after notice to any affected party, person, or attorney, and after opportunity for hearing [*Code Civ. Proc. § 2023.030*].

A request for a sanction, in the notice of motion, must identify every party, person, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion must be supported by a memorandum, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought [*Code Civ. Proc. § 2023.040*]. The notice of motion and supporting declaration in this form include language designed to satisfy these requirements.

For further discussion of monetary sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

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Chapter 197 DISCOVERY: PHYSICAL AND MENTAL EXAMINATIONS
PART V. FORMS

16-197 California Forms of Pleading and Practice--Annotated § 197.65

§ 197.65 Initial Physical Examination of Personal Injury Plaintiff--Proceedings to Compel Compliance With Demand [Code Civ. Proc. § 2032.250]--Separate Statement [Cal. Rules of Ct., Rule 3.1345]

[1] FORM Initial Physical Examination of Personal Injury Plaintiff--Proceedings to Compel Compliance With Demand [Code Civ. Proc. § 2032.250]--Separate Statement [Cal. Rules of Ct., Rule 3.1020]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	SEPARATE STATEMENT IN SUPPORT OF MO-
vs.	)	TION FOR ORDER COMPELLING COMPLIANCE
_____ [*name*],	)	WITH DEMAND FOR INITIAL PHYSICAL EX-
Defendant.	)	AMINATION OF PERSONAL INJURY PLAINTIFF
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

This separate statement is submitted in support of the motion by _____ [*identify moving party, e.g.,* defendant] _____ [*name*] to compel _____ [*specify party from whom examination is sought, e.g.,* plaintiff] _____ [*name*] to comply with the demand _____ [*specify demanding party, e.g.,* defendant] to submit to a physical examination. As required under *Cal. Rules of Ct., Rule 3.1345*, it provides information relating to the demand and response(s) at issue in the motion, as follows:

1. Text of Demand: _____ [*specify*].

2. Text of Response(s): _____ [*specify text of response, and any further responses, to the demand*].

[3. Related Definitions and Instructions: _____ [*specify, if necessary, the text of all definitions, instructions, and other matters required to understand the demand and the responses to it.*]

[4. Related Discovery Requests and Responses: _____ [*if the response to the demand is dependent on the response given to another discovery request, or if the reasons a further response is deemed necessary are based on the response to some other discovery request, specify the text of the other request and the reponse to it.*]

[5. Related Pleadings and Other Documents: _____ [*summarize any pleadings or other documents in the file, if any, that are relevant to the motion and are relied on by the moving party.*]

6. Statement of Reasons for Compelling Further Response(s): _____ [*state factual and legal reasons for compelling compliance with the demand*].
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*demanding party's status and name*]

[2] Use of Form

The separate statement set out in [1], *above*, is required to accompany a motion, such as that *set out in § 197.64*, to compel compliance with a demand for physical examination of a personal injury plaintiff [*see Cal. Rules of Ct., Rule 3.1345(a)(6)*].

[3] Contents of Separate Statement

Any motion involving the content of a discovery request or the responses to such a request must be accompanied by a separate statement [*Cal. Rules of Ct., Rule 3.1345(a)*]. The motions that require a separate statement include a motion to compel further responses to a demand for inspection of documents or tangible things [*Cal. Rules of Ct., Rule 3.1345(a)(3)*]. A separate statement is not required when no response has been provided to the request for discovery [*Cal. Rules of Ct., Rule 3.1345(b)*].

This separate statement is a separate document filed and served with the motion. It must set forth all the information necessary to understand each discovery request (in this instance each inspection demand) and all the responses to it that are at issue [*Cal. Rules of Ct., Rule 3.1345(c)*]. It must be full and complete, so that no person is required to review any other document in order to determine the full request and the full response. Material may not be incorporated into the separate statement by reference [*Cal. Rules of Ct., Rule 3.1345(c)*].

The separate statement must include, for each discovery request to which a further response is requested, the following [*Cal. Rules of Ct., Rule 3.1345(c)*]:

- The text of the request, and the text of each response, answer, or objection, and any further responses or answers [*Cal. Rules of Ct., Rule 3.1345(c)(1), (2)*].

- A statement of the factual and legal reasons for compelling further responses, answers, or production

as to each matter in dispute [*Cal. Rules of Ct., Rule 3.1345(c)(3)*].

- If necessary, the text of all definitions, instructions, and other matters required to understand each discovery request and the responses to it [*Cal. Rules of Ct., Rule 3.1345(c)(4)*].

- If the response to a particular discovery request is dependent on the response given to another discovery request, or if the reasons a further response to a particular discovery request is deemed necessary are based on the response to some other discovery request, the other request and the response to it must be set forth [*Cal. Rules of Ct., Rule 3.1345(c)(5)*].

- If the pleadings, other documents in the file, or other items of discovery are relevant to the motion, a summary of each relevant document by the party relying on the document [*Cal. Rules of Ct., Rule 3.1345(c)(6)*].

The primary function of the separate statement appears to be that of providing a summary, in a single document, of all matters, taken from all pleadings and all other papers, that may be necessary to determine the motion. By including a statement of the factual and legal reasons for compelling further responses to each matter in dispute [*Cal. Rules of Ct., Rule 3.1345(c)(3)*], it appears that a separate statement, when required under *Cal. Rules of Ct., Rule 3.1345(c)*, also serves the same function as the supporting memorandum [*see Cal. Rules of Ct., Rule 3.1113(b)* (memorandum consists of statement of facts and statement of law, evidence and argument, discussing the statutes, cases, and textbooks cited as support)].

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16-197 California Forms of Pleading and Practice--Annotated § 197.66

§ 197.66 Initial Physical Examination of Personal Injury Plaintiff--Proceedings to Compel Response to and/or Compliance With Demand [Code Civ. Proc. §§ 2032.240, 2032.250]--Order

[1] FORM Initial Physical Examination of Personal Injury Plaintiff--Proceedings to Compel Response to and/or Compliance With Demand [Code Civ. Proc. §§ 2032.240, 2032.250]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of defendant _____ [*name*] for an order compelling [response to and] compliance with his/her demand of _____ [*date*], for plaintiff _____'s [*name*] initial physical examination under *Section 2032.220 of the Code of Civil Procedure*, came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted [in part], and that _____ [*name*] submit

to a physical examination by Dr. _____ [*name*], at _____ [*time*], in his/her offices at _____ [*address*].

[*EITHER*]

IT IS FURTHER ORDERED that the nature, scope, conditions, and manner of the examination be those set forth in defendant's demand.

[*OR*]

IT IS FURTHER ORDERED that the nature, scope, conditions, and manner of the examination be as follows:

[*Specify, in as many separately numbered subparagraphs as necessary, the nature, manner, scope, and conditions of the examination demanded. See examples in form of order for examination set out in § 197.71[1].*]

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*identify persons against whom sanction is to be imposed, e.g.*, plaintiff _____ (*name*) and his/her attorney _____ (*name*)] pay forthwith to defendant _____ [*name*] the sum of $_____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that plaintiff _____ [*name*] and his/her attorney _____ [*name*] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on plaintiff _____ [*name*] and his/her attorney _____ [*name*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use when the court has granted a defendant's motion to compel a response to and compliance with, or compliance with a demand for the initial physical examination of a personal injury plaintiff under *Code Civ. Proc. § 2032.240* or *2032.250* [*see §§ 197.63, 197.64*].

A plaintiff who fails to submit a timely response to the demand waives any objections to it [*see Code Civ. Proc. § 2032.240(a)*]. Therefore an order granting a motion under *Code Civ. Proc. § 2032.240* will direct both response and compliance because plaintiff's only possible response will be a statement of compliance, unless plaintiff has sought and obtained relief from the waiver of objections [*see* further discussion in *§ 197.16[2][c], [3][a]*; *see also* form of motion for relief from waiver *set out in § 197.67*].

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16-197 California Forms of Pleading and Practice--Annotated § 197.67

§ 197.67 Initial Physical Examination of Personal Injury Plaintiff--Proceedings for Relief From Waiver of Objections to Demand [Code Civ. Proc. § 2032.240(a)]--Notice of Motion and Supporting Declaration

[1] FORM Initial Physical Examination of Personal Injury Plaintiff--Proceedings for Relief From Waiver of Objections to Demand [Code Civ. Proc. § 2032.240(a)]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR OR-
vs.	)	DER RELIEVING PLAINTIFF FROM WAIVER OF
_____ [*name*],	)	OBJECTIONS TO DEMAND FOR PHYSICAL EX-
Defendant.	)	AMINATION, SUPPORTING DECLARATION OF
	)	_____ [*name*], AND MEMOR-
	)	ANDUM
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To defendant _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], plaintiff will, and hereby does, move for an

order relieving him/her from his/her waiver of objections to the demand for an initial physical examination. Plaintiff will also move for an order requiring _____ [*identify party or attorney or both, e.g.,* defendant and/or his/her attorney] to pay a monetary sanction in the amount of $_____ to plaintiff. The motion will be made on the grounds that plaintiff has served a response that is in substantial compliance with *Section 2032.230 of the Code of Civil Procedure* and that plaintiff's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.

The motion will be based on this notice of motion, the memorandum and declaration(s) of _____ [*name*(*s*)] set forth below, on the papers and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for plaintiff *or other statement as appropriate*].

2. Plaintiff's failure to respond to the demand for an initial physical examination served on him/her was the result of _____ [mistake *or* inadvertence *or* excusable neglect *or any combination thereof*] in that _____ [*state facts showing mistake, inadvertence, or excusable neglect that led to the failure to file a timely response*].

3. Plaintiff served a response on _____ [*date*], that is in compliance with the provisions of *Section 2032.230 of the Code of Civil Procedure.* A copy of the response is attached as Exhibit A and made a part hereof.

4. Plaintiff bases his/her request for the imposition of a sanction in the amount of $_____ on _____ [*itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion*]

[2] Use of Form

The form of notice of motion and motion with supporting declaration set out in [1], *above*, is for use by a plaintiff to obtain relief from his or her waiver of objections to a demand for an initial physical examination. A plaintiff who fails to file a timely response to such a demand is deemed to have waived any objection to it; however, on motion, the court may grant relief from waiver on a determination that (A) the plaintiff has subsequently served a response in substantial compliance with *Code Civ. Proc. § 2032.230*; and *(B)* the failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect [*Code Civ. Proc. § 2032.240(a)*; for a form of response, *see § 197.62*].

A plaintiff may also use this form in combination with his or her responsive papers to a motion by defendant for an order compelling response to and compliance with a demand for an initial physical examination under *Code Civ. Proc. § 2032.240(b)* [*see § 197.63*].

The form may be modified for use by a cross plaintiff to seek relief from a waiver with respect to a demand made by a cross defendant by changing the designation of the parties [*see Code Civ. Proc. § 2032.210*].

A supporting memorandum is required to be served and filed with this form [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; for further discussion of memorandum requirements and a skeletal form of memorandum, *see* Ch. 417, *Points and Authorities* ; for forms of memoranda for use in proceedings under *Code Civ. Proc. § 2032.010 et seq., see* California Points and Authorities , Ch. 87, *Discovery: Physical and Mental Examinations* (Matthew Bender)].

For further discussion, see *§ 197.16[2][c]*. For a procedural checklist, see *§ 197.51*. For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 197.63[4]*.

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16-197 California Forms of Pleading and Practice--Annotated § 197.68

§ 197.68 Initial Physical Examination of Personal Injury Plaintiff--Proceedings for Relief From Waiver of Objections to Demand [Code Civ. Proc. § 2032.240(a)]--Order

[1] FORM Initial Physical Examination of Personal Injury Plaintiff--Proceedings for Relief From Waiver of Objections to Demand [Code Civ. Proc. § 2032.240(a)]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of plaintiff _____ [*name*] for an order relieving him/her from his/her waiver of objections to the demand for an initial physical examination under *Section 2032.240(a) of the Code of Civil Procedure* and for monetary sanctions, came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

The Court, having considered the _____ [affidavit(s) *or* declaration(s)] and other documents in support of and opposition to the motion, having heard the arguments of counsel, and being fully advised in the matter, determines that the plaintiff has served a response that is in substantial compliance with *Section 2032.230 of the Code of Civil Procedure*, and that the plaintiff's failure to serve it in a timely manner was the result of mistake, inadvertence, or

excusable neglect, in that _____ [*specify reason for tardiness constituting mistake, inadvertence, or excusable neglect*].

IT IS, THEREFORE, ORDERED that the motion be, and hereby is, granted and that plaintiff is relieved from his/her waiver of any objections to the demand.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use when the court has granted the plaintiff's motion for relief from his or her waiver of any objections to a demand for an initial physical examination of a personal injury plaintiff [*Code Civ. Proc. § 2032.240(a)*; *see § 197.67*].

The form may be modified for use by a cross plaintiff to seek waiver with respect to a demand made by a cross defendant by changing the designation of the parties [*see Code Civ. Proc. § 2032.210*].

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16-197 California Forms of Pleading and Practice--Annotated § 197.69

§ 197.69 Court Ordered Examination [Code Civ. Proc. § 2032.310]--Notice of Motion and Supporting Declaration

[1] FORM Court Ordered Examination [Code Civ. Proc. § 2032.310]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER FOR REQUIRING
vs.	)	_____ [*specify party, e.g.,* PLAINTIFF] _____ [*name*] TO
_____ [*name*],	)	_____ [SUBMIT TO *or* PRODUCE _____
Defendant.	)	(*name*) FOR] A _____
	)	[PHYSICAL *or* MENTAL] EXAMINATION, SUPPORTING DECLARATION OF
	)	_____ [*name*], AND MEMORANDUM
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant] _____ [*name*] will, and hereby does, move for an order requiring _____ [*specify party, e.g.,* plaintiff] _____ [*name*] _____ [to submit to *or* to produce _____ (*name*), _____ (an agent *or* a person in the custody *or* a person under the legal control) of _____(*identify party, e.g.,* plaintiff) _____ (*name*) for] a _____ [physical *or* mental] examination to be taken by Dr. _____ [*name*][, _____ (*give examiner's specialty, if any, e.g.,* an ophthalmologist,] [and his/her assistants,] or a physician to be appointed by the court, on _____ [*date*], at _____ [*time*], at _____ [*place*], or at such time and place as the court may direct. This examination is to include _____ [*specify nature, manner, scope, and conditions of examination, as well as any extraordinary tests or procedures which are to be employed, e.g., encephalogram, myelogram, or extensive X rays*] to determine _____ [*designate particular physical or mental codition, e.g.,* the existence and extent of any permanent optical nerve damage sustained by plaintiff], as more particularly set out in the declaration[s] of _____ [*name(s)*] attached hereto. The motion will be made on the grounds that _____ [*specify condition of party or other person to be examined, e.g.,* the alleged damage to plaintiff _____'s (*name*) eyesight] is in controversy in this action, that there is good cause for the requested examination in that _____ [*identify, e.g.,* defendant _____ (*name*) cannot adequately and safely prepare for and proceed to trialof the issues, particularly _____ (*specify issues, e.g.,* the extent of any injuries suffered by plaintiff), in this action without medical information relating to the nature and extent of plaintiff _____'s (*name*) alleged injuries], and that despite _____ [*identify moving party, e.g.,* defendant]'s reasonable and good faith attempt to arrange for this examination by agreement under *Section 2016.030 of the Code of Civil Procedure,* _____ [*identify party sought to be examined, e.g.* plaintiff] refused and continues to refuse to enter into any such agreement.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*Identify moving party, e.g.,* Defendant] _____ [*name*] is seeking an order

from this court requiring _____ [*identify party, e.g.,* plaintiff] _____ [*name*] to _____ [submit to *or* produce _____ (*name*), _____ (his/her agent *or* a person in his/her custody *or* a person under his/her legal control) for] a _____ [physical *or* mental] examination by Dr. _____ [*name*] on _____ [*date*], at _____ [*time*], pursuant to the provisions of *Section 2032.310 of the Code of Civil Procedure.*

3. This is an action brought by the plaintiff sought to be examined for personal injuries which he/she allegedly sustained in _____ [*specify, e.g.,* an automobile accident which allegedly occurred on _____ (*date*)].

[4. _____ (*Name of person to be examined*) is _____ (*set forth facts showing that person to be examined is an agent, under the legal control, or in the custody of the party against whom the order is being requested*).]

5. _____ [*Set forth facts showing that the condition to be examined is in controversy, e.g.,* Plaintiff _____ (*name*) alleged in the complaint that his/her eyesight was impaired as a result of the automobile accident].

6. Good cause exists to compel the physical examination of plaintiff of the nature and scope, in the manner, and under the conditions set forth in the notice of motion in that _____ [*set forth facts showing good cause, e.g.,* although a previous examination has been made by a general practitioner, that examination is obsolete and does not reflect the effect, if any, of healing and therapy occurring after the date of the initial examination. As more fully described in the accompanying declaration of Dr. _____, all component procedures enumerated in the notice of motion are standard and necessary to determine the extent of an injury of the type alleged by plaintiff; none of them are painful, protracted, or intrusive. Two to three hours is not an uncommon or taxing length of time for an examination of this sort. Defendant is unable to adequately or safely prepare for or proceed to trial in this action without current information ascertained and evaluated by a physician of his/her choice, respecting plaintiff's current manifestations of injury, the nature and extent thereof, and the prognosis therefor].

7. Dr. _____ [*name of physician whom moving party has chosen to perform the examination*] is a duly licensed and practicing physician in the State of California with offices at _____ [*place*], and is fully qualified to conduct the examination requested by _____ [*identify party, e.g.,* defendant] _____ [*name*]. His/Her examination of _____ [*identify, e.g.,* plaintiff _____ (*name*)] will consist of the following: _____ [*statements as to manner, scope, and conditions of the examination*].

[8. The party sought to be examined has not stipulated, as provided in *Section 2032.320(c) of the Code of Civil Procedure*, that (1) no claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed, and (2) no expert testimony regarding this usual mental and emotional distress will be presented at trial in support of the claim for damages.]

9. [*Reasonable and good faith attempt to resolve issues presented by motion. See § 197.64[1], Declaration Paragraph 7.*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

The form of notice of motion and motion with supporting declaration set out in [1], *above*, is for use by a party to obtain a court order either to require a party to submit to a physical or mental examination, other than the initial physical examination of a personal injury plaintiff, or to produce the party's agent or a person in the party's custody or legal control to submit to such an examination [*see Code Civ. Proc. § 2032.310*].

For detailed discussion of proceedings for an order directing a physical or mental examination, see *§ 197.17*.

For a form of stipulation that may be used in lieu an order pursuant to noticed motion, see *§ 197.60* [*see also* discussion in *§ 197.15*]. Before making this motion, the moving party must at least have tried to arrange for the examination by stipulation. The motion is required to be supported by a declaration which states facts showing a reasonable and good faith attempt to arrange for the examination by stipulation [*Code Civ. Proc. § 2032.310(b)*; for further discussion of this requirement, *see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*].

A supporting memorandum is required to be served and filed with this form [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; for further discussion of memorandum requirements and a skeletal form of memorandum, *see* Ch. 417, *Points and Authorities* ; for forms of memoranda for use in proceedings under *Code Civ. Proc. § 2032.010 et seq.*, *see* California Points and Authorities , Ch. 87, *Discovery: Physical and Mental Examinations* (Matthew Bender)].

For further discussion, see *§ 197.15*. For a procedural checklist, see *§ 197.43*. For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 197.63[4]*.

[3] Contents of Notice of Motion and Accompanying Papers

The notice of motion should state the name of the person to be examined. The time, place, manner, conditions, scope, and nature of the examination, and the identity and the specialty, if any, of person or persons whom will perform the examination must be specified in the notice of motion [*see Code Civ. Proc. § 2032.310(b)*].

If the motion seeks performance of unusual, painful, protracted, dangerous, or intrusive diagnostic procedures, it is good practice to include a declaration of a physician explaining the necessity for those procedures and the degree of pain or danger involved. If no extraordinary procedures are involved, the declaration in support of the motion should probably so state (Paragraph 6 of Declaration).

The declaration in support of the motion will usually be completed by the attorney for the moving party. If the person to be examined is an agent or in the custody under the legal control of a party, optional Paragraph 4 should be included. Paragraphs 2 and 7 of the declaration restate the identity of the person to be examined, the identity and qualifications of the examiner, and the time, place, nature, manner, conditions, and scope of the examination [*Code Civ. Proc. § 2032.310(b)*; *see Code Civ. Proc. § 2032.020* (who is qualified to make examination)].

The declaration must state facts showing that the condition to be examined is in controversy (Paragraph 5) [*see Code Civ. Proc. § 2032.020(a)*] and must also contain facts showing that good cause exists for taking the examination (Paragraph 6).

If a mental examination is being sought of a party seeking recovery for personal injuries, the declaration should also include a statement that the party sought to be examined has not stipulated as provided under *Code Civ. Proc. § 2032.320(c)* (Paragraph 8) [*Code Civ. Proc. § 2032.320(b)*; *see* discussion in *§ 197.17[5][a], see also § 197.70*].

If the place of the examination is more than 75 miles from the residence of the person to be examined, the court cannot order the examination unless it makes a determination that there is good cause for the travel involved and conditions the examination on the advancement by the moving party of the reasonable expenses and costs to the examinee for travel to the place of examination [*Code Civ. Proc. § 2032.320(e)*]. Thus, if travel beyond 75 miles is being sought, the declaration should establish good cause for the travel and should give an estimate of reasonable travel expenses and costs.

Lastly, as discussed in [2], *above*, the declaration must state facts showing that a reasonable and good faith attempt has been made to arrange for the examination by stipulation [*Code Civ. Proc. § 2032.310(b)*].

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16-197 California Forms of Pleading and Practice--Annotated § 197.70

§ 197.70 Court Ordered Examination [Code Civ. Proc. § 2032.320(b)]--Stipulation by Personal Injury Plaintiff in Lieu of Mental Examination

[1] FORM Court Ordered Examination [Code Civ. Proc. § 2032.320(b)]--Stipulation by Personal Injury Plaintiff in Lieu of Mental Examination

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	STIPULATION TO PREVENT MENTAL EXAM-
Defendant.	)	INATION OF PLAINTIFF _____
	)	[*name*]
	)	

_____

It is hereby stipulated by plaintiff _____ [*name*], by and through his/her counsel and in order to demonstrate that there is no need or good cause for the mental examination of plaintiff requested by defendant _____ [*name*], that (1) plaintiff makes no claim for mental and emotional distress over and above that usually associated with the physical injuries claimed, and (2) no expert testimony regarding this usual mental and emotional distress will be presented at trial in support of the claim for damages.

[It is further stipulated that if a mental examination of plaintiff is ordered by the court, plaintiff will not be bound by the foregoing stipulation and may increase his/her claim to include a claim for mental and emotional distress over and above that usually associated with the physical injuries that he/she has claimed and may present expert testimony at trial regarding any claim for damages over and above the usual mental and emotional distress.]
Dated: _____

_____ [*signature*]
Attorney for Plaintiff

[2] Use of Form

The form of stipulation set out in [1], *above*, is for use by a personal injury plaintiff who is not seeking recovery for mental or emotional distress over and above that usually associated with the physical injuries he or she claims. If a party seeking recovery for personal injuries stipulates that (1) no claim is being made for mental and emotional distress over and above that usually associated with such physical injuries; and (2) no expert testimony regarding this usual mental and emotional distress will be presented at trial in support of the claim for damages, a mental examination of a person for whose personal injuries a recovery is being sought shall not be ordered except on a showing of exceptional circumstances [*Code Civ. Proc. § 2032.320(b)*].

It is not clear what constitutes exceptional circumstances. As originally proposed, the draft legislation allowed the court to order a mental examination after such a stipulation only if its purpose was vocational rehabilitation testing [*see* Reporter's Notes to Proposed *Code Civ. Proc. § 2032(d)*; *see also Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.13[2]*].

Plaintiff may want to include the second paragraph in hopes of not being bound by the stipulations if the court finds exceptional circumstances and orders the mental examination. Alternatively, if the party seeking the mental examination is willing to stipulate to drop its request and not to renew it, the stipulation could be made and signed by both parties.

For further discussion, see *§ 197.17[5][a]*. For cross references to additional discussion and forms relating to stipulations generally, see *§ 197.60[6]*.

[3] Filing and Retention

It is unnecessary to file the stipulation with the court, except in accompanying papers opposing a motion for mental examination despite the stipulation [*cf. Cal. Rules of Ct., Rule 3.250(a)(11)*]. It should be retained until six months after final disposition of the cause [*see Cal. Rules of Ct., Rule 3.250(b)*].

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16-197 California Forms of Pleading and Practice--Annotated § 197.71

§ 197.71 Court Ordered Examination [Code Civ. Proc. § 2032.320]--Order

[1] FORM Court Ordered Examination [Code Civ. Proc. § 2032.320]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify moving party, e.g.,* defendant] _____ [*name*] for an order that _____ [*identify party, e.g.,* plaintiff] _____ [*name*] _____ [submit to *or* produce _____ (*name*) for] a _____ [physical *or* mental] examination came on regularly for hearing on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

Proof having been made to the satisfaction of the court, and good cause appearing therefor,

IT IS ORDERED that the motion be, and hereby is, granted [in part], and that _____ [*identify party, e.g.,* plaintiff] _____ [*name*] _____ [submit to *or* produce _____ (*name*) for] a _____ [physical *or* mental *or* blood] examination by Dr. _____ [*name*]

on _____ [*date*], at _____ [*time*], in his/her offices at _____ [*address*].

IT IS FURTHER ORDERED that this examination shall be conducted as in the following manner:

[*Specify, in as many separately numbered subparagraphs as necessary, the nature, manner, scope, and conditions of the examination demanded.*]

1. The examining _____ [*specialty of examiner, e.g.*, physician] may ask, and _____ [*name of person to be examined*] shall answer, questions relating to the nature and extent of the injuries alleged to have been sustained in the accident that is the subject matter of this action; present symptoms and conditions; medical history, including the manner in which the injuries were incurred; prior injuries and diseases; and _____'s [*name of person to be examined*] occupational history. There shall be no inquiry, other than is necessary for purposes of diagnosis and evaluation of the injuries, symptoms, and conditions, into the conduct, events, or circumstances alleged to have produced or contributed to the happening of the accident.

2. The examining _____ [*specialty of examiner, e.g.*, physician] may use, and _____ [*name of person to be examined*] shall cooperate in the use of, accepted diagnostic instruments, tests, manipulations, and techniques, including the making of X-ray pictures of _____'s [*name of person to be examined*] _____ [*specify limited area of body to be x-rayed, e.g.*, left shoulder, arm, and hand] and _____ [*specify other procedures such as electroencephalography, myography, electrocardiography, etc., if appropriate*], but no procedure causing pain or undue discomfort or endangering _____'s [*name of person to be examined*] life or health shall be used except by order of this court, granted with notice, on a further showing of good cause therefor.

[3. *If a mental examination is requested, specify diagnostic tests and procedures by listing them by name.*

[4. *Continue, if necessary, with other conditions, such as the manner and extent to which bodily fluids, products, and tissues may be taken for laboratory analysis; arrangements for calling in specialists and consultants; arrangements for the presence of counsel for the person to be examined; arrangements for the presence of a court reporter, or for a tape recording of the examination, etc.*.

[5. *Continue, if examination will be made more than 75 miles from examinee's residence, with provision for advancement by moving party of reasonable expenses and costs to the examinee for travel to the place of examination.*.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use when the court has granted a motion under *Code Civ. Proc. § 2032.320* for a physical or mental examination. See discussion in *§ 197.69* and *§ 197.70*.

[3] Contents of Order

The order must specify the person or persons who may perform the examination and the time, place, manner, diagnostic tests and procedures, conditions, scope, and nature of the examination [*Code Civ. Proc. § 2032.320(d)*]. If the place of the examination is more than 75 miles from the residence of the person to be examined, the order to submit to it shall be

made only on the court's determination that there is good cause for the travel involved, and conditioned on the advancement by the moving party of the reasonable expenses and costs to the examinee for travel to the place of examination [*Code Civ. Proc. § 2032.320(e)*]. See also discussion in *§ 197.17[6]*.

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16-197 California Forms of Pleading and Practice--Annotated § 197.72

§ 197.72 Delivery of Copies of Examination Reports [Code Civ. Proc. § 2032.610]--Demand

[1] FORM Delivery of Copies of Examination Reports [Code Civ. Proc. § 2032.610]--Demand

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	REQUEST FOR COPIES OF REPORTS OF EX-
Defendant.	)	AMINATION
	)	
	)	

_____

To _____ [*identify party who caused examination to be made, e.g.,* defendant] _____ [*name*] and to his/her attorney:

Demand is hereby made, pursuant to *Section 2032.610 of the Code of Civil Procedure*, that you deliver to _____ [*identify party who was examined or who produced examinee, e.g.,* plaintiff _____ (*name*)], through his/her attorney, on or before _____ [*date*], the following:

1. A copy of a detailed written report by Dr. _____ [*name of examiner*] setting out the history, examinations, findings, including results of all tests made, diagnoses, prognoses, and conclusions of Dr. _____ [*name of examiner*] based on his/her examination of _____ [*name of person examined*] on _____ [*date*].

2. Copies of reports of all earlier examinations of the condition for which _____ [*identify party or person examined, e.g.,* plaintiff _____ (*name*)] was examined by Dr. _____ [*name of*

examiner] on _____ [*date of examination referred to in item 1*] made by _____ [*name of examiner*] or by any other examiner.
Dated: _____

_____ [*signature*]
Attorney for _____ [*requesting party*]

[2] Use of Form

The form of demand set out in [1], *above*, is for use by a party who was examined, or who produced another for examination, to require the party who caused the examination to deliver a copy of a medical report by the examiner, together with copies of reports of all earlier examinations of the same condition, by the same or any other examiner. The form may be used regardless of whether the examination was performed in accordance with a stipulation, a demand, or a court order, unless, of course, it was pursuant to a stipulation which specifically provided that *Code Civ. Proc. § 2032.610* would not apply [*see Code Civ. Proc. § 2032.610* and discussion in *§ 197.19[1]*].

Although *Code Civ. Proc. § 2032.610* does not specify a particular form of request or that the request be in writing, this form, together with a proof of service of the request, is recommended in the event it is later necessary to establish a basis for an order requiring delivery [*see §§ 197.73, 197.74*].

The demand is not to be filed unless offered as relevant to a law and motion proceeding or other hearing or ordered filed for good cause. The original is to be retained by the demanding party [*see Cal. Rules of Ct., Rule 3.250(a)(12), (b)*].

[3] Copies of Reports of Earlier Examinations

It is not clear whether reports of earlier examinations of the same condition may be requested in the general statutory language. A party who wishes to describe them specifically in the request may obtain the details through other discovery methods such as interrogatories, prior to serving the request under *Code Civ. Proc. § 2032.610*.

[4] Time for Production of Reports

The copies of the reports must be delivered within 30 days after service of the demand or within 15 days of trial, whichever is earlier [*Code Civ. Proc. § 2032.610(b)*; *see Code Civ. Proc. §§ 1013(a), 2016.050* (extending 30-day period when demand is served by mail, etc.)].

[5] Demand Waives Privilege Not to Disclose Reciprocal Reports

By demanding and obtaining a report of an examination under *Code Civ. Proc. § 2032.610*, or by taking the deposition of the examiner, the party who submitted to, or produced another for a physical or mental examination waives in the pending action, and in any other action involving the same controversy, any privilege, as well as any protection for work product under *Code Civ. Proc. § 2018.010 et seq.*, that the examinee may have regarding the testimony of every other physician, psychologist, or other health care practitioner who has examined or may thereafter examine the party, in respect of the same physical or mental condition [*Code Civ. Proc. § 2032.630*]. See further discussion in *§ 197.19*].

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16-197 California Forms of Pleading and Practice--Annotated § 197.73

§ 197.73 Delivery of Copies of Examination Reports [Code Civ. Proc. § 2032.620]--Proceedings for Order Compelling Delivery--Notice of Motion and Supporting Declaration

[1] FORM Delivery of Copies of Examination Reports [Code Civ. Proc. § 2032.620]--Proceedings for Order Compelling Delivery--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER REQUIRING DELIVERY OF COPIES OF REPORTS OF EXAMINATION AND IMPOSING MONETARY SANCTION, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon as

thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [*identify party who was examined or who produced another for examination, e.g.,* plaintiff _____ (*name*)] will, and hereby does, move for an order requiring _____ [*identify party at whose request examination was made, e.g.,* defendant] _____ [*name*] to deliver to _____ [*identify moving party, e.g.,* plaintiff _____ (*name*)] copies of detailed written reports of Dr. _____ [*name of examiner*] regarding his/her examination of _____ [*identify party or other person examined, e.g.,* plaintiff _____ (*name*)] conducted on _____ [*date*], and copies of reports of all earlier examinations of the same condition, and for an order imposing monetary sanctions against _____ [*identify responding party and/or his/her attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] in the amount of $_____. The motion will be made on the grounds that _____ [*identify moving party, e.g.,* plaintiff _____ (*name*)] has duly requested delivery to him/her of copies of such reports from _____ [*identify party who caused examination to be made, e.g.,* defendant] _____ [*name*]; that the time for delivery of those reports as provided by *Section 2032.610(b) of the Code of Civil Procedure* has expired; that despite _____'s [*identify moving party, e.g.,* plaintiff] reasonable and good faith attempt to informally resolve the areas of disagreement, _____ [*identify, e.g.,* defendant] has failed and refused to deliver the copies of the reports; and that _____ [*identify moving party, e.g.,* plaintiff _____ (*name*)] is entitled to copies of the reports pursuant to *Section 2032.620(a) of the Code of Civil Procedure.*

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum set forth below, on the request for copies of reports of examinations and proof of service thereof, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

DECLARATION OF _____ [*name*]

I _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record for _____ (*identify party, e.g.,* plaintiff) in this action].

2. On _____ [*date*], pursuant to the _____ [demand of _____ (name of party demanding initial physical examination of personal injury plaintiff) *or* stipulation of the parties *or* order of this Court issued on the motion of _____ (*name of party requiring examination*)] dated _____, a copy of which is attached hereto as Exhibit A and made a part hereof, _____ [*name of examinee,* e.g., plaintiff] was examined for _____ [*name of party requiring examination*] by Dr. _____ [*name of examiner*].

[3. Earlier examinations of the same condition were made as follows: _____ (*list names of examiners and dates of earlier examinations of the same conditions if known by declarant and for which copies of reports are being sought*).]

4. On _____ [*date*], _____ [*identify party who was examined or who produced another for examination, e.g.,* plaintiff _____ (*name*)] served his/her written demand for delivery of a detailed written report of the examiner relating to the examination on _____ [*date of examination taken on court order, demand, or stipulation*], together with like reports of all earlier examinations of the same condition. A copy of this demand is attached hereto as Exhibit B and made a part hereof.

5. _____ [*Identify party who caused examination to be made, e.g.,* Defendant] _____ [*name*] refused, and continues to refuse, to deliver copies of said reports or of any like reports as requested.

6. [*Reasonable and good faith attempt to resolve issues presented by motion. See § 197.64[1], Declaration Paragraph 7.*]

7. _____ [*Identify moving party, e.g.,* Plaintiff] bases his/her request for the imposition of a sanction in the amount of $_____ on _____ [*itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

The form of notice of motion and motion with supporting declaration set out in [1], *above*, is for use by a party who has been examined or who produced another for an examination, to obtain copies of the report of the examination and of any like reports of earlier examinations of the same condition [*see Code Civ. Proc. § 2032.610*]. The right to copies of these reports under *Code Civ. Proc. § 2032.610* applies regardless of whether the examination was pursuant to stipulation, demand, or court order unless it was pursuant to a stipulation which specifically provided that *Code Civ. Proc. § 2032.610* would not apply [*Code Civ. Proc. § 2032.610*].

The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [*Code Civ. Proc. § 2032.620(a)*; for further discussion of this general requirement, *see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*]. The declaration included with this form includes statements designed to satisfy this requirements, as well as factual statements supporting the grounds for the motion, and facts supporting the amount of monetary sanctions that might be awarded in favor of the moving party. For further discussion of monetary sanctions, see [3], *below*.

A supporting memorandum is required to be served and filed with this form [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; for further discussion of memorandum requirements and a skeletal form of memorandum, *see* Ch. 417, *Points and Authorities*; for forms of memoranda for use in proceedings under *Code Civ. Proc. § 2032.010 et seq., see* California Points and Authorities, Ch. 87, *Discovery: Physical and Mental Examinations* (Matthew Bender)].

For further discussion, see *§ 197.19[3]*. For a procedural checklists, see *§§ 197.44*, *197.53*. For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 197.63[4]*.

[3] Monetary Sanctions

The court must impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes this motion, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2032.620(b)*; *see also* discussion of this general provision in Ch. 190, *Discovery: Scope, Regulation, and Timing*, § 190.33[2]].

As discussed in [2], *above*, this motion must be accompanied by a declaration showing of a reasonable and good faith attempt at informal resolution of the issues raised by the motion. Under *Code Civ. Proc. § 2023.010(i)*, the court is also required to impose a monetary sanction against any party or attorney who fails to confer in an attempt to resolve informally any dispute concerning discovery, in favor of anyone who incurs expenses, including attorney's fees, as a result of that conduct, when the section of the Civil Discovery Act governing a particular discovery motion requires a declaration showing that an attempt has been made. This sanction is to be imposed regardless of the outcome of the particular discovery motion [*Code Civ. Proc. § 2023.020*].

A monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* is an order that one who engaged in a misuse of the discovery process, his or her attorney if the attorney advised the conduct, or both, pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct [*Code Civ. Proc. § 2023.030(a)*].

A monetary sanction may only be imposed after notice to any affected party, person, or attorney, and after opportunity for hearing [*Code Civ. Proc. § 2023.030*].

A request for a sanction must, in the notice of motion, identify every party, person, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion must be supported by a memorandum, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought [*Code Civ. Proc. § 2023.040*]. The notice of motion and supporting declaration in this form include language designed to satisfy these requirements.

For further discussion of monetary sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

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Chapter 197 DISCOVERY: PHYSICAL AND MENTAL EXAMINATIONS
PART V. FORMS

16-197 California Forms of Pleading and Practice--Annotated § 197.74

§ 197.74 Delivery of Copies of Examination Reports [Code Civ. Proc. § 2032.620]--Proceedings for Order Compelling Delivery--Order

[1] FORM Delivery of Copies of Examination Reports [Code Civ. Proc. § 2032.620]--Proceedings for Order Compelling Delivery--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party who was examined or who produced another for examination, e.g.,* plaintiff] _____ [*name*] for an order requiring _____ [*identify party who caused examination to be made, e.g.,* defendant] _____ [*name*] to deliver to _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] copies of detailed written reports of Dr. _____ [*name of examiner*] regarding his/her examination of _____ [*identify party or other person examined, e.g.,* plaintiff] _____ [*name*] conducted on _____ [*date*], together with all like reports of all earlier examinations of the same condition, came on regularly for hearing on _____ [*date*]. _____ [*name*] appeared as counsel for plaintiff; _____ [*name*] appeared as counsel for defendant.

On proof made to the satisfaction of the court that the motion ought to be _____ [denied *or* granted],

IT IS ORDERED that the motion be, and hereby is, _____ [denied *or* granted and that _____ (*identify party who caused examination to be made, e.g.,* defendant) _____ (*name*) deliver to _____ (*identify moving party, e.g.,* plaintiff) _____ (*name*) a copy of a detailed written report by the examiner, setting out the history, examinations, findings, including results of all tests made, diagnoses, prognoses, and his/her conclusions based on his/her examination of _____ (*identify party or other person examined, e.g.,* plaintiff) _____ (*name*), conducted on _____ (*date*)(, as well as a copy of _____ (*if desired, describe or specify reports sought of earlier examinations*)), within _____ (*number*) days after service on _____ (*identify party who caused examination to be made, e.g.,* defendant) _____ (*name*), of a copy of this order].

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*identify unsuccessful party, person, or attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] pay forthwith to _____ [*identify successful party, e.g.,* plaintiff] _____ [*name*] the sum of $_____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____ [*identify unsuccessful party, person, or attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*identify unsuccessful party, person, or attorney, e.g.,* defendant _____ (*name*) and his/her attorney _____ (*name*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use when the court has granted or denied a motion for an order requiring the party who caused a physical or mental examination to be made to deliver to the party who was examined or who produced another for examination, a copy of a detailed written report of the examiner [*see Code Civ. Proc. § 2032.620* and discussion in *§ 197.19[3]*].

If the moving party has requested copies of reports of earlier examinations, the order should include those as well. Although the order could refer to all earlier examinations of the same condition, it would seem better practice to specify the earlier examinations and examiners if they are known.

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16-197 California Forms of Pleading and Practice--Annotated § 197.75

§ 197.75 Reciprocal Delivery of Copies of Examination Reports [Code Civ. Proc. § 2032.650]--Proceedings for Order Directing Reciprocal Delivery--Notice of Motion and Supporting Declaration

[1] FORM Reciprocal Delivery of Copies of Examination Reports [Code Civ. Proc. § 2032.650]--Proceedings for Order Directing Reciprocal Delivery--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER REQUIRING RECIPROCAL DELIVERY OF REPORTS OF EXAMINATIONS AND IMPOSING MONETARY SANCTIONS, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [*identify party who caused examination to be made, e.g.,* defendant] _____ [*name*] will, and hereby does, move the court for an order requiring _____ [*identify party who was examined or who produced another for examination, e.g.,* plaintiff] _____ [*name*] to deliver to _____ [*identify moving party, e.g.,* defendant] _____ [*name*] copies of detailed written reports of any examination of _____ [*identify party or other person examined, e.g.,* plaintiff] _____ [*name*] made prior to or after the examination by Dr. _____ [*name of examiner*] on _____ [*date*], of the same condition examined on _____ [*date*]. _____ [*Identify party who caused examination to be made, e.g.,* Defendant] _____ [*name*] will further move this court for an order requiring _____ [*identify party who was examined or who produced another for examination, e.g.,* plaintiff] _____ [*name*] to provide _____ [*identify moving party, e.g.,* defendant] _____ [*name*], through his/her attorney, promptly after it has been prepared, any later report of any previous or subsequent examination of that condition. Plaintiff will further move this court for an order requiring _____ [*identify party or attorney or both, e.g.,* defendant and/or his/her attorney _____ (*name*)] to pay a monetary sanction in the amount of $_____ to _____ [*identify moving party, e.g,* plaintiff]. The motion will be made on the grounds that _____ [*identify moving party, e.g.,* defendant] _____ [*name*], after request by _____ [*identify party who was examinedor who produced another for examination, e.g.,* plaintiff] _____ [*name*], delivered copies of all reports as required by *Section 2032.610 of the Code of Civil Procedure*; that [*identify moving party, e.g.,* defendant] _____ [*name*] then requested from _____ [*identify party who was examined or who produced another for examination, e.g.,* plaintiff] _____ [*name*] copies of all existing reports of all examinations of the same condition and the identity of any other physician or psychologist who has examined the same condition but who has not submitted a report; that despite _____ [*identify moving party, e.g.,* defendant]'s reasonable and good faith attempt to informally resolve the areas of disagreement, _____ [*identify opposing party, e.g.,* plaintiff] has failed and refused to deliver the copies of existing reports of examinations of _____ [*identify person examined, e.g.,* plaintiff] _____ [*name*] relating to thesame condition; and that _____ [*identify moving party, e.g.,* defendant] _____ [*name*] is entitled to copies of such reports and to receive, promptly after it has been prepared, any later report of any previous or subsequent examination of that condition, all pursuant to *Section 2032.640 of the Code of Civil Procedure.*

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name*]

DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. [*Identity of declarant. See § 197.73[1], Declaration, Paragraph 1.*]

2. [*Date and description of examination. See § 197.73[1], Declaration, Paragraph 2.*]

3. [*If known, dates and descriptions of earlier examinations of same condition. See § 197.73[1], Declaration, Paragraph 3.*].

4. [*Date and service of examinee's demand for reports. See § 197.73[1], Declaration, Paragraph 4.*].

[5. Examinations of the same condition were made thereafter as follows: _____ (*list subsequent examinations of the same condition of which declarant has personal knowledge and for which copies of reports are being sought*).]

6. On _____ [*date*], in response to the request of _____ [*identify party who was examined or who produced another for examination, e.g.,* plaintiff] _____ [*name*], dated _____ [*date*], _____ [*identify party who caused examination to be made, e.g.,* defendant] _____ [*name*] delivered to _____ [*identify person who made request, e.g.,* plaintiff] _____ [*name*] the report of Dr. _____ [*name of examiner*] of his/her examination made on _____ [*date*][, and _____ (*specify any reports of earlier examinations of the same condition which were also delivered as required by Code Civ. Proc. § 2032.610*)].

7. Thereafter, on _____ [*date*], _____ [*identify party who caused examination to be made, e.g.,* defendant] _____ [*name*] made a [written] request of _____ [*identify party who was examined or who produced another for examination, e.g.,* plaintiff] _____ [*name*] for the delivery of copies of all existing reports of any examinations, previously or thereafter made, of the same condition. [A copy of that request (and proof of service thereof) is/are attached hereto as Exhibit C and made a part hereof)].

8. _____ [*Specify party who was examined or who produced another for examination, e.g.,* Plaintiff] _____ [*name*] failed and refused and continues to fail and refuse to deliver copies of such reports.

9. [*Reasonable and good faith attempt to resolve issues presented by motion. See § 197.64[1], Declaration Paragraph 7.*].

10. Because _____ [*identify party who was examined or who produced another for examination, e.g.,* plaintiff] _____ [*name*] has unreasonably refused to deliver copies of existing reports, I do not believe that _____[*identify party who was examined or who produced another for examination, e.g.,* plaintiff] _____ [*name*] will provide reports of future examinations as required by *Section 2032.640 of the Code of Civil Procedure* unless this court orders him/her to do so.

11. _____ [*Identify moving party, e.g.,* Defendant] bases his/her request for the imposition of a sanction in the amount of $_____ on _____ [*itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

The form of notice of motion and motion with supporting declaration set out in [1], *above*, is for use by a party who caused a physical or mental examination to be made and who has complied with a demand under *Code Civ. Proc. § 2032.610* by the party examined, to obtain copies of reports of examinations of the same condition [*see Code Civ. Proc. § 2032.650(a)*]. If the examination was taken pursuant to a stipulation, the provisions of *Code Civ. Proc. §§ 2032.610-2032.650* are applicable unless the parties have agreed otherwise [*Code Civ. Proc. §§ 2032.610-2032.650*].

The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [*Code Civ. Proc. § 2032.650(a)*; for further discussion of this general requirement, *see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*]. The declaration included with this form includes statements designed to satisfy this requirements, as well as factual statements supporting the grounds for the motion, and facts supporting the amount of monetary sanctions that might be awarded in favor of the moving party. For further discussion of monetary sanctions, see [3], *below*.

A supporting memorandum is required to be served and filed with this form [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; for further discussion of memorandum requirements and a skeletal form of memorandum, *see* Ch. 417, *Points and Authorities* ; for forms of memoranda for use in proceedings under *Code Civ. Proc. § 2032.010 et seq., see* California Points and Authorities, Ch. 87, *Discovery: Physical and Mental Examinations* (Matthew Bender)].

For further discussion, see *§ 197.19[3]*. For a procedural checklists, see *§§ 197.44, 197.53*. For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 197.63[4]*.

[3] Monetary Sanctions

The court must impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes this motion, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2032.650(b)*; *see also* discussion of this general provision in Ch. 190, *Discovery: Scope, Regulation, and Timing*, § 190.33[2]].

As discussed in [2], *above*, this motion must be accompanied by a declaration showing of a reasonable and good faith attempt at informal resolution of the issues raised by the motion. Under *Code Civ. Proc. § 2023.010(i)*, the court is also required to impose a monetary sanction against any party or attorney who fails to confer in an attempt to resolve informally any dispute concerning discovery, in favor of anyone who incurs expenses, including attorney's fees, as a result of that conduct, when the section of the Civil Discovery Act governing a particular discovery motion requires a declaration showing that an attempt has been made. This sanction is to be imposed regardless of the outcome of the particular discovery motion [*Code Civ. Proc. § 2023.020*].

A monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* is an order that one who engaged in a misuse of the discovery process, his or her attorney if the attorney advised the conduct, or both, pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct [*Code Civ. Proc. § 2023.030(a)*].

A monetary sanction may only be imposed after notice to any affected party, person, or attorney, and after opportunity for hearing [*Code Civ. Proc. § 2023.030*].

A request for a sanction must, in the notice of motion, identify every party, person, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion must be supported by a memorandum, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought [*Code Civ. Proc. § 2023.040*]. The notice of motion and supporting declaration in this form include language designed to satisfy these requirements.

For further discussion of monetary sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

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16-197 California Forms of Pleading and Practice--Annotated § 197.76

§ 197.76 Reciprocal Delivery of Copies of Examination Reports [Code Civ. Proc. § 2032.650]--Proceedings for Order Directing Reciprocal Delivery--Order

[1] FORM Reciprocal Delivery of Copies of Examination Reports [Code Civ. Proc. § 2032.650]--Proceedings for Order Directing Reciprocal Delivery--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party who caused examination to be made, e.g.,* defendant] _____ [*name*] for an order requiring _____ [*identify party who was examined or who produced another for examination, e.g.,* plaintiff] _____ [*name*] (1) to deliver to _____ [*identify party who caused examination to be made, e.g.,* defendant] _____ [*name*] copies of existing written reports by the examining _____ [physicians *and/or* psychologists *and/or* health care practitioners] of any examination of _____ [*identify party or other person examined, e.g.,* plaintiff] _____ [*name*] made prior to or after the examination of _____ [*identify party or other person examined, e.g.,* plaintiff] _____ [*name*] on _____, [*date*], by Dr. _____ [*name of examiner*]; (2) to deliver to

_____ [*identify party who caused examination to be made, e.g.,* defendant] _____ [*name*], promptly after it has been prepared, any later report of any previous or subsequent examination; and (3) for monetary sanctions came on regularly for hearing on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant(s) appeared by counsel _____ [*name(s)*].

[*EITHER*]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[*OR*]

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS HEREBY ORDERED that _____ [*identify party who was examined or who produced another for examination, e.g.,* plaintiff] _____ [*name*] deliver to _____ [*moving party, e.g.,* defendant] _____ [*name*] a copy of each existing written report of any other physician, psychologist, or health care practitioner who has examined _____ [*identify party or other person examined, e.g.,* plaintiff] _____ [*name*] regarding the same condition which was the subject of the examination made on _____ [*date*], by _____ [*name of examiner*] within _____ days after service on _____ [*identify party who was examined or who produced another for examination, e.g.,* plaintiff] _____ [*name*], of a copy of this order.

IT IS FURTHER ORDERED that _____ [*identify party who was examined or who produced another for examination, e.g.,* plaintiff] _____ [*name*] deliver to _____ [*identify party who caused examination to be made, e.g.,* defendant] _____ [*name*], within _____ days after it has been prepared, any later report of any previous or subsequent examination.

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] pay forthwith to _____ [*identify successful party, e.g.,* defendant] _____ [*name*] the sum of $_____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*identify unsuccessful party, person, or attorney; e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)].

Dated: _____

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use when the court has granted or denied a motion by a party who caused a physical or mental examination to be taken and who has complied with the examined party's demand under *Code Civ. Proc. § 2032.610* for a written report, to require the party who was examined or who produced the examinee to deliver copies of all existing reports of examinations of the same condition. The order also requires delivery of any subsequent reports. It also provides for imposing, or not imposing, monetary sanctions against the unsuccessful party and his/her attorney [*see Code Civ. Proc. § 2032.650(b)*]. See discussion in *§ 197.19*.

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16-197 California Forms of Pleading and Practice--Annotated § 197.77

§ 197.77 Proceedings for Sanctions on Failure to Submit to or Produce Another for Examination Pursuant to Demand or Stipulation [Code Civ. Proc. §§ 2032.220, 2016.030, 2032.410, 2032.420]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Sanctions on Failure to Submit to or Produce Another for Examination Pursuant to Demand or Stipulation [Code Civ. Proc. §§ 2032.220, 2016.303, 2032.410, 2032.420]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER _____ [*specify particular relief sought, e.g.,* STRIKING PLAINTIFF _____'S (*name*) COMPLAINT, ENTERING JUDGMENT AGAINST HIM/HER,] AND IMPOSING MONETARY SANCTIONS; SUPPORTING DECLARATION OF _____ [*name*]; AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.*, plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.*, defendant] will, and hereby does, move the court for an order _____ [*specify order sought, using clauses from § 197.78[1]*] under Section [2032.*410* or *2032.420 of the Code of Civil Procedure*], and for an order under *Section 2023.030(a) of the Code of Civil Procedure* that _____ [*name of party who failed to submit to examination or produce another for examination*] and/or _____ [*name*], the attorney advising _____ [*name of party who failed to submit to examination or produce another for examination*], pay to _____ [*identify moving party, e.g.*, defendant] a monetary sanction in the sum of $_____. The motion will be made on the grounds that _____ [*specify status of person or party, e.g.*, plaintiff] _____ [*name*], although required by _____ [stipulation of the parties *or* demand of _____ (*identify moving party, e.g.*, this defendant)] dated _____ [*date*], to _____ [submit to *or* produce another for] a _____ [mental *or* physical] examination on _____ [*date*], [and although he/he was able to produce _____ (*name of other person required to be produced for examination*)] has failed [and refused] to do so.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. [*Identity of declarant. See § 197.73[1], Declaration Paragraph 1.*]

2. This is an action for _____ [*specify, e.g.*, damages for injuries received by plaintiff when the automobile in which he/she was riding was hit by an automobile being driven by defendant _____ (*name*)].

3. The particular physical condition of _____ [*specify party or other person who was to be examined, e.g.*, plaintiff] that is in controversy is _____ [*specify, e.g.*, the extent, if any, to which his/her eyesight was impaired as a result of the automobile accident].

[*EITHER*]

4. On _____ [*date*], _____ [*specify parties to stipulation, e.g*, plaintiff and this

defendant] stipulated that _____ [*specify party, e.g,* plaintiff] would _____ [submit to *or* produce (his/her agent) _____ (*name of person to be produced*) (, a person in his/her custody or under his/her legal control) for] a _____ [physical *or* mental] examination by Dr. _____ (*name of examiner*) on _____ [*date*], at _____[*place of examination*]. A copy of the stipulation and proof of service of that stipulation is attached hereto marked Exhibit A and made a part hereof.

[*OR*]

4. On _____ [*date*], this defendant, over ten days after _____ [being served with summons *or* appearing] in this action, served on plaintiff _____ [*name*] a demand for an initial physical examination of plaintiff _____ [*name*] at the time and place and in the manner set forth in the demand. A true and correct copy of the demand and proof of service thereof are attached hereto as Exhibit A and made a part hereof.

[*CONTINUE*]

5. _____ [*Identify disobedient party, e.g.,* Plaintiff] _____ [*name*] failed to _____ [appear and submit to *or* produce _____ (*name of person to be produced*) for] the _____ [mental *or* physical] examination as required by the _____ [demand *or* stipulation]. _____ [*Identify disobedient party, e.g.,* Plaintiff _____ (*name*)] has refused and continues to refuse to comply with this _____ [demand *or* stipulation].

[6. _____ (*Identify disobedient party, e.g.,* Plaintiff) _____ (*name*) was and is able to easily produce _____ (*name of person to be produced*) because _____ (*name of person to be produced*) _____ (*set forth facts establishing ability to comply, e.g.,* is his/her three-year-old daughter and is in his/her care and custody.]

7. _____ [*State the effects of the noncompliance, e.g., if dismissal is being sought,* As a result of plaintiff _____'s (*name*) refusal to submit to the physical examination _____ (as ordered by the court *or* in accordance with the stipulation), this defendant is unable to adequately or safely prepare for or proceed to trial in this action in that he/she is without current information ascertained and evaluated by a physician of his/her choice, respecting plaintiff's current manifestations of injury, the nature and extent thereof, and the prognosis therefor and has been unable to ascertain the facts on which plaintiff is basing his/her claims for damages in this action].

[8. *Reasonable and good faith attempt at informal resolution. See § 197.64[1], Declaration Paragraph 7.*]

[9. *Set forth facts, if any, showing previous sanctions awarded against refusing party or person.*]

[10. The following expenses have been incurred by _____ [*identify moving party, e.g.,* this defendant] as a result of _____ [*identify disobedient party, e.g.,* plaintiff's] refusal to comply with the _____ [stipulation *or* order] and subsequent failure to resolve this issue informally: _____ [*itemize expenses, including attorney's fees, and showing basis of calculation*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

The form of notice of motion and motion with supporting declaration set out in [1], *above*, is for use by a party in obtaining the sanctions available under *Code Civ. Proc. § 2032.410* and § 2032.420 for the failure of a party to submit to or to produce another for a physical or mental examination as required by *Code Civ. Proc. § 2032.220* (demand for initial physical examination of personal injury plaintiff) or *Code Civ. Proc. § 2016.030* (stipulation of parties) [*see Code Civ. Proc. §§ 2032.410, 2032.420*].

The particular types of sanctions available are described in § 197.78 and discussed in *§ 197.20*. Since *Code Civ. Proc. §§ 2032.410-2032.420* provide that the court may make any order which is just, counsel may wish to specify an order which is not set out in *Code Civ. Proc. § 2023.030*.

For a form of order that may be modified for use as an order imposing the sanctions sought by this form, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, § 192.53*.

A supporting memorandum is required to be served and filed with this form [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*; for further discussion of memorandum requirements and a skeletal form of memorandum, *see* Ch. 417, *Points and Authorities* ; for forms of memoranda for use in proceedings under *Code Civ. Proc. § 2032.010 et seq., see* California Points and Authorities , Ch. 87, *Discovery: Physical and Mental Examinations* (Matthew Bender)].

For further discussion, see *§ 197.20*. For a procedural checklists, see *§ 197.45, 197.53*. For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 197.63[4]*.

[3] Contents of Declaration

Sanctions cannot be ordered against a party who was required to produce another for physical or mental examination if the party failing to comply demonstrates that he or she was unable to produce the other person for the examination [*Code Civ. Proc. § 2032.420*]. Paragraph 6 of the declaration should be used whenever the noncomplying party was required to produce another.

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Chapter 197 DISCOVERY: PHYSICAL AND MENTAL EXAMINATIONS
PART V. FORMS

16-197 California Forms of Pleading and Practice--Annotated § 197.78

§ 197.78 Proceedings for Sanctions on Failure to Submit to or Produce Another for Examination Pursuant to Demand or Stipulation [Code Civ. Proc. §§ 2032.030, 2016.220, 2032.410, 2032.420]--Clause Requesting Various Orders

[1] FORM Proceedings for Sanctions on Failure to Submit to or Produce Another for Examination Pursuant to Demand or Stipulation [Code Civ. Proc. §§ 2032.030, 2016.220, 2032.410, 2032.420]--Clause Requesting Various Orders

[*Insert any of the following, or combination of the following, in the first paragraph of the notice of motion set out in § 197.77, following the words* "for an order"]

[*EITHER*]

that the following facts, matters, and conditions be taken to be established as stated for the purposes of this action: _____ [*set forth particular facts sought to be taken as established which physical or mental examination would have shown*].

[*OR*]

prohibiting _____ [*identify disobedient party, e.g.,* plaintiff] _____ [*name*] from offering evidence at the trial of this case _____ [*specify particular claim, defense, document, thing, item of testimony, physical or mental condition, or blood group, e.g.,* supporting his/her claim that the his/her eyesight remains impaired due to the injuries allegedly sustained in the accident in question].

[*OR*]

[striking this action from the trial calendar and] staying all further proceedings on behalf of or taken by _____ [*identify disobedient party, e.g.*, plaintiff] _____ [*name*] until he/she complies with the order of this court dated _____ requiring him/her to _____ [submit to *or* produce (his/her agent) _____ (*name of person to be produced*) (, a person in his/her custody or under his/her legal control) for] a _____ [physical *or* mental] examination by Dr. _____ [*name of examiner*].

[*OR*]

_____ [*specify order striking all or part of pleading, dismissing action, or entering default judgment, e.g.*, striking plaintiff _____'s (*name*) complaint and dismissing the action with prejudice as to plaintiff _____ (*name*) *or* striking defendant _____'s (*name*) answer and entering default judgment against him/her in favor of plaintiff _____ (*name*) for the relief demanded in the complaint *or other as appropriate*].

[2] Use of Form

The form of clauses set out in [1], *above*, is for use by a party seeking an order for the sanctions available under *Code Civ. Proc. §§ 2023.030(b)-(e), 2032.410-2032.420*. Appropriate clauses should be inserted in the first paragraph of the notice of motion *set out in § 197.77*.

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 198 DISCOVERY: EXCHANGE OF EXPERT WITNESS INFORMATION

16-198 California Forms of Pleading and Practice--Annotated 198.syn

§ 198.syn Synopsis to Chapter 198: DISCOVERY: EXCHANGE OF EXPERT WITNESS INFORMATION

§ 198.01 Scope of Chapter

§ 198.02 Cross References

[1] Related Discovery Chapters

[2] Other Related Chapters

§§ 198.03-198.09 [Reserved]

§ 198.10 Governing Law

§ 198.11 Demand for Exchange of Expert Witness Information

[1] Demand for Mutual and Simultaneous Exchange

[2] Procedure for Making Demand

[3] When Demand Must Be Made

[a] General Rule

[b] Relief From Untimely Demand

[c] Demand and Related Proceedings on Retrial

[4] Retention of Demand or List

§ 198.12 Exchange of Information

[1] Procedure and Date of Exchange

[2] Contents of Exchange

[a] List Designating Experts or Statement of Intent Not to Use Experts

[b] Expert Witness Declaration for Party-Affiliated Expert

[i] Declaration Generally Required for Expert Retained by Party

[ii] Contents of Declaration

[iii] Purpose of Declaration and Harmless Noncompliance

[iv] Declaration Is Required When Designating an Expert Retained by Another Party

[v] Declaration Is Not Required When Designating Treating Physician or Other "Percipient" Expert

§ 198.13 Exchange of Discoverable Reports and Writings

§ 198.14 Motion for Protective Order

§ 198.15 Supplemental Witness List

§ 198.16 Amending or Augmenting Expert Witness Information

[1] Motion for Leave to Amend or Augment

[2] Timing of Motion

[3] Grounds for Granting Leave

[4] Conditions for Granting Leave

§ 198.17 Motion to Submit Tardy Expert Witness Information

[1] On Failure to Submit Timely Information

[2] Grounds and Conditions for Granting Leave

§ 198.18 Deposition of Expert Witness

[1] Right to Depose Expert Designated by Another Party

[2] Procedures for Taking Depositions Generally Apply

[3] Exceptions to General Deposition Procedures

[a] Location of Deposition

[b] Use of Deposition Notice Rather Than Subpoena

[c] Payment of Expert Witness Fee

[i] Summary of Exception

[ii] "Expert Witness" Subject to Exception

[iii] Calculation of Fee Payable by Deposing Party

[iv] Tender of Anticipated Fee by Deposing Party

[v] Fees Payable by Designating Party or Tardy Counsel

[vi] Motion to Set Reasonable Fee

[vii] Expert's Standing to Appeal Order Setting Fee

§ 198.19 Effect of Unreasonable Failure to Exchange Expert Witness Information

[1] Exclusion From Evidence of Expert Testimony

[2] Determining "Unreasonable" Failure

§ 198.20 When Nonlisted Expert May Testify at Trial

§§ 198.21-198.29 [Reserved]

§ 198.30 Related Matthew Bender Publications

§ 198.31 State Statutes

§ 198.31A California Rules of Court

§ 198.32 Decisions

[1] Exchange of Expert Witness Information

[2] Exclusion of Expert Testimony at Trial

[3] Expert Witness Costs

[4] Expert Witness Declaration

[5] Proceeding to Augment or Amend Expert Witness Information

[6] Withdrawal of Designated Expert Witness

§ 198.33 Text References

§§ 198.34-198.39 [Reserved]

§ 198.40 Demand Exchange of Expert Witness Information

[1] Service of Demand

[2] Date of Exchange

[3] Disposition of Original Demand

§ 198.41 Exchange of Expert Witness Information

[1] Motion for Protective Order

[2] Initial Exchange

[3] Supplemental Expert List

§ 198.42 Augmenting, Amending, and Submitting Tardy Expert Witness Information

[1] Motion to Augment Expert Witness List

[2] Motion to Amend Expert Witness Declaration

[3] Motion to Submit Tardy Expert Witness Information

§ 198.43 Examining Designated Expert Witnesses

[1] Prepare Notice of Taking Deposition

[2] Tender Expert Witness Fees

§§ 198.44-198.49 [Reserved]

§ 198.50 Demand for Exchange of Information Relating to Expert Witnesses [Code Civ. Proc. § 2034.210]

[1] FORM

[2] Use of Form

[3] Time Limit for Demand

[4] Time for Exchange

[5] Contents of Demand

§ 198.51 Expert Witness Declaration [Code Civ. Proc. § 2034.260(c)] for Retained Expert or Expert Who Is Party or Employed by Party [Code Civ. Proc. § 2034.210(b)]

[1] FORM

[2] Use of Form

§ 198.52 Proceedings for Order Setting Different Date of Exchange [Code Civ. Proc. § 2034.230]--Notice of

Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Cross References

§ 198.53 Proceedings for Order Setting Different Date of Exchange [Code Civ. Proc. § 2034.230]--Order

[1] FORM

[2] Use of Form

§ 198.54 Proceedings to Augment or Amend Expert Witness Information or to Submit Tardy Expert Witness Information [Code Civ. Proc. §§ 2034.610, 2034.710]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Timing of Motion

[4] Accompanying Papers

[5] Declaration of Good Faith Attempt at Informal Resolution

[6] Monetary Sanctions

§ 198.55 Proceedings to Augment or Amend Expert Witness Information or to Submit Tardy Expert Witness Information [Code Civ. Proc. §§ 2034.610, 2034.710]--Order

[1] FORM

[2] Use of Form

§ 198.56 Proceedings to Obtain Protective Order Prior to Exchange of Expert Witness Information [Code Civ. Proc. § 2034.250]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Declaration of Good Faith Attempt at Informal Resolution

[4] Monetary Sanctions

§ 198.57 Proceedings to Obtain Protective Order Prior to Exchange of Expert Witness Information [Code Civ. Proc. § 2034.250]--Order

[1] FORM

[2] Use of Form

§ 198.58 Proceedings for Order Setting Compensation of Expert [Code Civ. Proc. § 2034.470]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Declaration of Good Faith Attempt at Informal Resolution

[4] Monetary Sanctions

§ 198.59 Proceedings for Order Setting Compensation of Expert [Code Civ. Proc. § 2034.470]--Order

[1] FORM

[2] Use of Form

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Chapter 198 DISCOVERY: EXCHANGE OF EXPERT WITNESS INFORMATION
PART I. SCOPE

16-198 California Forms of Pleading and Practice--Annotated § 198.01

§ 198.01 Scope of Chapter

This chapter covers discovery under the Civil Discovery Act by exchange of expert witness information.

Part II (§ 198.10 et seq.) has detailed discussion of the requirements and procedures relating to discovery by exchange of expert witness information.

Part IV provides the following procedural checklists:

- Procedures for demanding (§ 198.40) and conducting (§ 198.41) an exchange.
- Procedures for augmenting, amending, or submitting tardy expert witness information (§ 198.42).
- Procedures for examining a designated expert (§ 198.43).

Part V provides forms relating to discovery by exchange of expert witness information, including the following:

- A demand for exchange of expert witness information (§ 198.50) as well as an expert witness declaration for use in responding to a demand for exchange of information (§ 198.51).
- Forms for use in motion proceedings to set a different date for the exchange of information (§§ 198.52, 198.53).
- Forms for use in motion proceedings to augment, amend, or submit tardy expert witness information (§§ 198.54, 198.55).
- Forms for use in motion proceedings to obtain a protective order prior to an exchange of expert witness information (§§ 198.56, 198.57).
- Forms for use in motion proceedings for an order setting compensation for an expert witness (§§

198.58, 198.59).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery

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16-198 California Forms of Pleading and Practice--Annotated § 198.02

§ 198.02 Cross References

[1] Related Discovery Chapters

- For discussion and forms relating to the general purpose, scope, regulation, and timing of civil discovery, see Ch. 190, *Discovery: Scope, Regulation, and Timing* .

- For detailed discussion of evidentiary privileges and other statutory or constitutional protections against disclosure, see Ch. 191, *Discovery: Privileges and Other Discovery Limitations* . For discussion specifically relating to expert consultant information protected from disclosure under the attorney work product provisions of *Code Civ. Proc. § 2018.010 et seq.*, see *§ 191.103[2]*.

- For discussion and forms relating to discovery sanctions generally, see Ch. 192, *Discovery: Sanctions for Discovery Misuse* .

- For detailed discussion of discovery of electronically stored evidence (e-discovery), see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*.

- For discussion and forms relating to the use of other particular discovery methods authorized by the Civil Discovery Act, see the following chapters covering each method:

  - Ch. 193, *Discovery: Depositions*.

  - Ch. 194, *Discovery: Interrogatories*.

  - Ch. 195, *Discovery: Inspection of Tangible Evidence*.

  - Ch. 196, *Discovery: Requests for Admissions*.

  - Ch. 197, *Discovery: Physical and Mental Examinations*.

- For discussion and forms relating to the use of specified discovery methods for the purpose of preserving testimony or other evidence prior to the commencement of an action or pending an appeal, see Ch. 199, *Discovery: Preservation of Evidence* .

- For discussion and forms relating to the use of extraordinary writ proceedings to obtain interlocutory review of discovery orders, see Ch. 200, *Discovery: Review of Discovery Orders* .

[2] Other Related Chapters

- For a discussion of the exchange of lists of expert witnesses in eminent domain proceedings, see Ch. 247, *Eminent Domain* .

- For discussion relating to the examination and testimony of expert witnesses at trial, and discussion and forms relating to proceeding by the court to appoint an expert witness under *Evid. Code § 730*, see Ch. 551, *Trial* .

- For discussion of and general forms relating to law and motion procedures generally, see Ch. 372, *Motions and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsWritten Depositions

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16-198 California Forms of Pleading and Practice--Annotated §§ 198.03-198.09

[Reserved]

§§ 198.03[Reserved]

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16-198 California Forms of Pleading and Practice--Annotated § 198.10

§ 198.10 Governing Law

Discovery by exchange of expert witness information pursuant to the Civil Discovery Act (*Code Civ. Proc. § 2016.010 et seq.*) is governed generally by *Code Civ. Proc. § 2034.010 et seq.* Related provisions of the Civil Discovery Act include the provisions governing discovery generally, set out in *Code Civ. Proc. §§ 2016.010 et seq.*-2019.010 et seq., 2023.010 et seq.

The extent of discovery permitted under the Civil Discovery Act is restricted in limited civil cases by the Economic Litigation provisions of *Code Civ. Proc. §§ 94* and *95*. The use of discovery under *Code Civ. Proc. § 2034.010 et seq.* is, however, authorized without restriction by *Code Civ. Proc. § 94(e)*. For further discussion of discovery in limited civil cases generally, see *Ch. 190, Discovery: Scope, Regulation, and Timing, §§ 190.11[2], 190.23[2][a]*.

Statewide rule provisions relating to the format, content, and service of discovery papers and motions, and to discovery sanctions, are set out in *Cal. Rules of Ct., Rules 3.1000*, 3.1345, 3.1346, 3.1347, and 3.1348.

Code Civ. Proc. § 2034.010 et seq. does not apply to the exchange of lists of expert witnesses in eminent domain proceedings. These are instead governed by *Code Civ. Proc. § 1258.010 et seq.* [*see Code Civ. Proc. § 2034.010*]. For discussion of these proceedings, see Ch. 247, *Eminent Domain* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsExpert Witness Discovery

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16-198 California Forms of Pleading and Practice--Annotated § 198.11

§ 198.11 Demand for Exchange of Expert Witness Information

[1] Demand for Mutual and Simultaneous Exchange

After the trial date is set, any party may obtain discovery by demanding that all parties simultaneously exchange information concerning each other's expert witnesses to the following extent [*Code Civ. Proc. § 2034.210*]:

- A mutual and simultaneous exchange of a list containing the name and address of any natural person, including one who is a party, whose oral or deposition testimony in the form of an expert opinion any party expects to offer in evidence at the trial [*Code Civ. Proc. § 2034.210(a)*]. The statute does not permit a unilateral exchange [*see Code Civ. Proc. §§ 2034.230, 2034.250, 2019.010(f)*; *Fairfax v. Lords (2006) 138 Cal. App. 4th 1019, 1026-1027, 41 Cal. Rptr. 3d 850* (trial court committed prejudicial error by allowing medical malpractice defendant to delay his designation of retained expert witnesses until 20 days after plaintiff had designated his own expert, instead of enforcing simultaneous exchange of information as required by former *Code Civ. Proc. § 2034* (*now see Code Civ. Proc. §§ 2034.210(a), 2034.260(a), (b)*); *Hernandez v. Superior Court (2003) 112 Cal. App. 4th 285, 297, 4 Cal. Rptr. 3d 883* (case management order requiring unilateral disclosure of identity, curriculum vitae, and opinion concerning causation of each medical expert who would support plaintiffs' wrongful death claims was not proper exercise of trial court's power to manage complex litigation)].

- If any expert designated in the expert witness list is a party or an employee of a party, or has been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action, the designation of the witness must include or be accompanied by an expert witness declaration under *Code Civ. Proc. § 2034.260(c)* [*Code Civ. Proc. § 2034.210(b)*; for detailed discussion relating to expert witness declarations, *see §§ 198.12[2][b]* and *198.51*].

- A mutual and simultaneous production, for inspection and copying, of all discoverable reports and writings, if any, made by any expert described in *Code Civ. Proc. § 2034.210(b)* (*see above*; that is, a designated expert for whom an expert witness declaration must be provided) in the course of preparing

the expert's opinion [*Code Civ. Proc. § 2034.210(c)*; for further discussion *see § 198.13*].

A party may withdraw a designated expert from the list of trial witnesses at any time before that expert is deposed [*County of Los Angeles v. Superior Court (1990) 222 Cal. App. 3d 647, 656, 271 Cal. Rptr. 698* (work-product protection accorded that expert's knowledge is thereby revived)].

For a form for a demand for an exchange of expert witness information, see *§ 198.50*. For discussion of when a party waives the attorney-client privilege and work product protection by designating himself as an expert witness, see *Ch. 191, Discovery: Privileges and Other Discovery Limitations, § 191.103[2]*.

[2] Procedure for Making Demand

The party demanding an exchange of information may do so without leave of court by serving the demand on all parties who have appeared in the action [*Code Civ. Proc. §§ 2034.220, 2034.240*].

Neither the demand nor any expert witness lists and declarations exchanged are filed with the court. The party demanding the exchange, however, must retain the original of the demand with the original proof of service attached and the original of the lists and declarations exchanged until six months after final disposition of the action. The originals may then be destroyed unless the court, on the motion of any party for good cause shown, orders them preserved for a longer period [*Code Civ. Proc. § 2034.290(a), (b)*].

However, the demand and all expert witness lists and declarations exchanged in response to it must be lodged with the court when their contents become relevant to an issue in any pending matter in the action. For example, it appears that the demand and information must be lodged when a party files a motion to augment an expert witness list or to amend an expert witness declaration [*see Code Civ. Proc. § 2034.290(c)* and discussion in *§ 198.16*].

For a procedural checklist for use in making a demand, see *§ 198.40*.

[3] When Demand Must Be Made

[a] General Rule

The demand for an exchange of information must be made no later than the tenth day after the initial trial date has been set or 70 days before that trial date, whichever is closer to the trial date [*Code Civ. Proc. § 2034.220*].

[b] Relief From Untimely Demand

Although *Code Civ. Proc. § 2034.010 et seq.* contains no provision for relief from an untimely demand for exchange of expert witness information, relief from a prematurely made demand has been granted under *Code Civ. Proc. § 473* [*Zellerino v. Brown (1991) 235 Cal. App. 3d 1097, 1104-1107, 1 Cal. Rptr. 2d 222* ; for discussion of *Code Civ. Proc. § 473* (relief based on mistake, inadvertence, surprise or excusable neglect), *see* Ch. 489, *Relief From Judgments and Orders*]. For example, when the defendants in a medical malpractice action mistakenly believed the case was governed by the rules of a local Accelerated Civil Trial project and sent the demand for exchange in accordance with those rules, *before* the trial date was set, relief was available to the defendants under *Code Civ. Proc. § 473* in the form of a later date for exchange [*Zellerino v. Brown (1991) 235 Cal. App. 3d 1097, 1104-1107, 1 Cal. Rptr. 2d 222]* . The court adopted the very broad definition accorded the term "proceeding" in *Code Civ. Proc. § 473*, concluded that it included any step or measure taken in the prosecution or defense of a civil action, including a demand for discovery [*Zellerino v. Brown (1991) 235 Cal. App. 3d 1097, 1105-1106, 1 Cal. Rptr. 2d 222]* .

Relief under *Code Civ. Proc. § 473* is unavailable in discovery proceedings when the Discovery Act provides analogous, if more limited, relief. Nevertheless, nothing in *Code Civ. Proc. § 2034.010 et seq.* provides for relief from

failure to file a timely demand for exchange of expert trial witness information [*Zellerino v. Brown (1991) 235 Cal. App. 3d 1097, 1106-1107, 1 Cal. Rptr. 2d 222* (construing former *Code Civ. Proc. § 2034*)].

Any relief granted under Section 473 must satisfy the grounds for relief stated in the Discovery Act. Former *Code Civ. Proc. § 2034(c)* (*now see Code Civ. Proc. § 2034(c)*), which allows a court to order an earlier or later date of exchange on a showing of good cause [*see § 198.12[1]*], permits a court to change the date of exchange in granting relief under Section 473 [*Zellerino v. Brown (1991) 235 Cal. App. 3d 1097, 1108, 1 Cal. Rptr. 2d 222]* .

[c] Demand and Related Proceedings on Retrial

If an action is reset for trial, for example, following a mistrial, grant of new trial, or appellate reversal and remittitur, discovery is reopened, and the general time requirements for completing discovery are recalculated based on the new trial date [*see Fairmont Ins. Co. v. Stendell (2000) 22 Cal. 4th 245, 247, 92 Cal. Rptr. 2d 70, 991 P.2d 156* ; *see also Guzman v. Superior Court (1993) 19 Cal. App. 4th 705, 708, 23 Cal. Rptr. 2d 585* (on grant of one party's motion for new trial, another party may utilize exchange procedures to designate new expert witnesses before the new trial)]. Thus, a party's second demand for exchange of expert witness information, served more than 70 days before the second trial date, is timely [*Beverly Hospital v. Superior Court (1993) 19 Cal. App. 4th 1289, 1292-1296, 24 Cal. Rptr. 2d 238]* .

Requirements for the exchange the expert witness information otherwise continue to apply on retrial. For example, if a party improperly elicits expert testimony from a non-designated expert witness in the initial trial, that does not absolve the party from requirements to designate and make disclosure concerning that witness on retrial [*see Province v. Center for Women's Health & Family Birth (1993) 20 Cal. App. 4th 1673, 1683-1684, 25 Cal. Rptr. 2d 667* , disapproved on other grounds in *Heller v. Norcal Mutual Insurance Co. (1994) 8 Cal. 4th 30, 41, 32 Cal. Rptr. 2d 200, 876 P.2d 999]* .

[4] Retention of Demand or List

Demands for exchange of expert witnesses, demands for production of discoverable reports and writings of expert witnesses, and lists of expert witnesses whose opinion a party intends to offer into evidence [*see* [1], *above*] may not be filed with the court, unless offered as relevant under a law and motion proceeding or other hearing or ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)(13), (14), (15)*; *see Cal. Rules of Ct., Rule 3.250(a)(16)* (statement that party does not presently intend to offer expert witness testimony similarly is not filed)]. Instead, the serving party retains the original and the proof of service until six months after final disposition of the cause, unless otherwise ordered by the court for cause [*Cal. Rules of Ct., Rule 3.250(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery

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16-198 California Forms of Pleading and Practice--Annotated § 198.12

§ 198.12 Exchange of Information

[1] Procedure and Date of Exchange

All parties who have appeared in the action must exchange information concerning expert witnesses in writing on or before the date of exchange specified in the demand. The exchange of information may occur at a meeting of the attorneys for the parties involved or by mailing the information on or before the date of exchange [*Code Civ. Proc. § 2034.260(a)*].

The specified date of exchange must be 50 days before the initial trial date or 20 days after service of the demand, whichever is closer to the trial date. However, on motion and a showing of good cause, the court may order an earlier or later date of exchange [*Code Civ. Proc. § 2034.230*].

For a form of motion to set an earlier or later date for exchange, see *§ 198.52*. For procedural checklists relating to the exchange, see *§§ 198.40, 198.41*.

[2] Contents of Exchange

[a] List Designating Experts or Statement of Intent Not to Use Experts

The information provided by a party in a simultaneous exchange of expert witness information must include either of the following:

- A list setting forth the name and address of any person whose expert opinion the party expects to offer in evidence at the trial [*Code Civ. Proc. § 2034.260(b)(1)*].

- Alternately, a statement that the party does not presently intend to offer the testimony of any expert witness [*Code Civ. Proc. § 2034.260(b)(2)*].

[b] Expert Witness Declaration for Party-Affiliated Expert

[i] Declaration Generally Required for Expert Retained by Party

If a party provides a list [*see* [a], *above*], that includes an expert described under *Code Civ. Proc. § 2034.210(b)* (that is, an expert who is a party, an employee of a party, or was retained by a party to form and express an opinion in anticipation of the litigation or in preparation for the trial of the action) [*see § 198.11[1]*], the list must be accompanied by an expert witness declaration as to that witness [*Code Civ. Proc. § 2034.260(c)*]. For a form of expert witness declaration, see *§ 198.51*.

[ii] Contents of Declaration

The expert witness declaration must contain the following:

- A brief narrative statement of the qualifications of the expert [*Code Civ. Proc. § 2034.260(c)(1)*].

- A brief narrative statement of the general substance of the testimony the expert is expected to give [*Code Civ. Proc. § 2034.260(c)(2)*].

- A representation that the expert has agreed to testify at trial [*Code Civ. Proc. § 2034.260(c)(3)*].

- A representation that the expert will be sufficiently familiar with the pending action to submit a meaningful oral deposition concerning the specific testimony that he or she is expected to give, including any opinion and the basis for that opinion [*Code Civ. Proc. § 2034.260(c)(4)*].

- A statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney [*Code Civ. Proc. § 2034.260(c)(5)*].

The expert witness declaration must be signed under penalty of perjury, only by the attorney for the party, or by the party if he or she has no attorney [*see Code Civ. Proc. § 2034.260(c)*].

[iii] Purpose of Declaration and Harmless Noncompliance

The requirement that a party disclose the general substance of an expert witness's expected testimony means the party must disclose the substance of the facts and the opinions to which the expert will testify at trial, thereby giving the opposing party the opportunity to prepare for cross examination and rebuttal of the testimony [*Kennemur v. State of California (1982) 133 Cal. App. 3d 907, 919, 184 Cal. Rptr. 393* (prior law)].

A failure to include the general substance of an expert witness's proposed testimony is harmless error, however, if the opposing party nevertheless obtains such information through a deposition of the expert [*Kennemur v. State of California (1982) 133 Cal. App. 3d 907, 918 n.5, 184 Cal. Rptr. 393* (prior law)]. Further, even if testimony is offered without prior disclosure, there is no prejudice if the court offers to recess the trial in order for counsel to depose the witness to obtain rebuttal evidence, but counsel refuses to accept the offer [*Whitehall v. United States Lines, Inc. (1986) 177 Cal. App. 3d 1201, 1210, 223 Cal. Rptr. 452* (prior law)].

[iv] Declaration Is Required When Designating an Expert Retained by Another Party

The necessity for an expert witness declaration is based on the "designation" of a witness, as well that witness' status as a party-affiliated expert. An expert witness declaration is required for each expert retained by *a* party, who is not necessarily the same as the designating party. Thus, if one party designates an expert witness who was retained by *another* party, the party who designates that witness, and who therefore expects to offer the expert's testimony at trial, must furnish an expert witness declaration [*Zellerino v. Brown (1991) 235 Cal. App. 3d 1097, 1116, 1 Cal. Rptr. 2d*

222] .

[v] Declaration Is Not Required When Designating Treating Physician or Other "Percipient" Expert

The Supreme Court has held that an expert witness declaration, disclosing the anticipated testimony of a party-affiliated expert, need not be provided with respect to a *percipient* expert. A percipient expert is distinguished from one who is employed by a party and provided with information by that party in order to render an expert opinion in anticipation of or preparation for litigation [*see* discussion in *§ 198.11[1]*]. This is because a percipient expert provides expert opinion that is based, not on information provided by an employing party witness, but rather on information acquired from personal observation. Requiring the designating party to analyze such a witness's anticipated testimony and to submit that analysis to the opponent would invade the absolute protection given by the work-product doctrine to the thought processes of an attorney in preparation for trial [*Schreiber v. Estate of Kiser (1999) 22 Cal. 4th 31, 34-35, 91 Cal. Rptr. 2d 293, 989 P.2d 720* ; *Hurtado v. Western Medical Center (1990) 222 Cal. App. 3d 1198, 1203, 272 Cal. Rptr. 324]* .

Thus, for example, an expert witness declaration need not be submitted for a treating physician who has been designated as an expert witness. A treating physician is not the type of "retained" expert described by *Code Civ. Proc. § 2034.210(b)* for whom such a declaration is required under *Code Civ. Proc. § 2034.260(c).* A treating physician is not consulted for litigation purposes, but is rather a percipient witness who acquires facts independently through the underlying physician-patient relationship. As a percipient witness, a treating physician may nevertheless testify as an expert witness to any opinions formed on the basis of facts independently acquired and informed by the physician's training, skill, and experience [*Schreiber v. Estate of Kiser (1999) 22 Cal. 4th 31, 34-36, 91 Cal. Rptr. 2d 293, 989 P.2d 720* ; *see, e.g, Fatica v. Superior Court (2002) 99 Cal. App. 4th 350, 353, 120 Cal. Rptr. 2d 904* (petitioners' expert, a treating physician, should have been permitted to testify concerning his opinions; under *Schreiber,* testimony of treating physician who is a percipient expert is not limited to personal observations, rather, he or she may provide both fact and opinion testimony and may testify as to opinions formed on basis of facts independently acquired and informed by his or her training, skill, and experience)]. This includes opinions regarding causation and standard of care, because those issues are inherent in a physician's work [*Schreiber v. Estate of Kiser (1999) 22 Cal. 4th 31, 39, 91 Cal. Rptr. 2d 293, 989 P.2d 720* (disapproving *Plunkett v. Spaulding (1997) 52 Cal. App. 4th 114, 60 Cal. Rptr. 2d 377*)].

Compliance with *Code Civ. Proc. § 2034.010 et seq.*, however, is required if the treating physicians will be called to testify as a retained expert [*see Kalaba v. Gray (2002) 95 Cal. App. 4th 1416, 1423-1424, 116 Cal. Rptr. 2d 570* (treating physicians, who were not listed or identified by name, but simply referred to in expert witness designation as "all past or present examining and/or treating physicians," could not testify as experts; construing former *Code Civ. Proc. § 2034*); *see § 198.19[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery

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16-198 California Forms of Pleading and Practice--Annotated § 198.13

§ 198.13 Exchange of Discoverable Reports and Writings

If a demand for an exchange of information concerning expert trial witnesses includes a demand for production of reports and writings as described in *Code Civ. Proc. § 2034.210(c)* [*see § 198.11[1]*], all parties must produce and exchange, at the place and on the date specified in the demand, all discoverable reports and writings, if any, made by any designated expert described in *Code Civ. Proc. § 2034.210(b)* (that is, a designated expert who is a party, an employee of a party, or was retained by a party to form and express an opinion in anticipation of the litigation or in preparation for the trial of the action) [*Code Civ. Proc. § 2034.270*; for further discussion of experts described under *Code Civ. Proc. § 2034.210(b), see §§ 198.11[1]*] and 198.12[2][b]]. Retention requirements are discussed in *§ 198.11[4]*.

A party who does not file a discoverable report of an expert witness until the date of trial unreasonably fails to fulfill this obligation. Even if the report is not received until the date of trial, the party should file the report as part of a motion for leave to submit tardy information [*see Zellerino v. Brown (1991) 235 Cal. App. 3d 1097, 1116-1117, 1 Cal. Rptr. 2d 222]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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16-198 California Forms of Pleading and Practice--Annotated § 198.14

§ 198.14 Motion for Protective Order

A party who has been served with a demand may promptly move for a protective order [*Code Civ. Proc. § 2034.250*].

On a showing of good cause, the court may make any order that justice requires to protect any party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense [*Code Civ. Proc. § 2034.250(b)*]. The order may include, but is not limited to, one or more of the following directions:

- That the demand be quashed because it was not timely served [*Code Civ. Proc. § 2034.250(b)(1)*; *see also* discussion in *§ 198.11[3][b]*].

- That the date of exchange be earlier or later than that specified in the demand [*Code Civ. Proc. § 2034.250(b)(2)*].

- That the exchange be made only on specified terms and conditions [*Code Civ. Proc. § 2034.250(b)(3)*].

- That the production and exchange of any reports and writings of experts be made at a different place, or at a different time than that specified in the demand [*Code Civ. Proc. § 2034.250(b)(4)*].

- That some or all of the parties be divided into sides on the basis of their identity of interest in the issues in the action, and that the designation of retained experts or experts otherwise described under *Code Civ. Proc. § 2034.210(b)* [*see § 198.11[1]*] be made by any side so created [*Code Civ. Proc. § 2034.250(b)(5)*].

- That a party or a side reduce the list of employed or retained experts designated by that party or side under *Code Civ. Proc. § 2034.210(b)* [*Code Civ. Proc. § 2034.250(b)(6)*; *see also § 198.11[1]*].

If the motion for a protective order is denied in whole or in part, the court may order that the parties against whom the motion is brought provide or permit the discovery against which the protection was sought on those terms and

conditions that are just [*Code Civ. Proc. § 2034.250(c)*].

A motion for a protective order is the only method of properly challenging a demand for exchange of expert trial witness information [*see Zellerino v. Brown (1991) 235 Cal. App. 3d 1097, 1109-1112, 1 Cal. Rptr. 2d 222* (objection is improper challenge)]. A protective order may also be sought in post-demand proceedings, such as proceedings to depose a expert designated in the exchange [*see Code Civ. Proc. § 2034.420*, discussed in *§ 198.18[3][a]*].

For a form of motion for protective order, with discussion of requirements relating to monetary sanctions and a good faith attempt at informal resolution of issues presented by the motion, see *§ 198.56*. For a procedural checklist relating to this motion proceeding, see *§ 198.41[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryProtective Orders

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§ 198.15 Supplemental Witness List

Within 20 days after the exchange described in *Code Civ. Proc. § 2034.260* [*see § 198.12*], any party who engaged in the exchange may submit a supplemental expert list containing the name and address of any experts who will express an opinion on a subject to be covered by an expert designated by an adverse party to the exchange, if the party supplementing an expert witness list has not previously retained an expert to testify on that subject [*Code Civ. Proc. § 2034.280(a)*].

This supplemental list must be accompanied by an expert witness declaration under *Code Civ. Proc. § 2034.260(c)* concerning the additional experts [*Code Civ. Proc. § 2034.280(b)*; for discussion of declarations under *Code Civ. Proc. § 2034.260(c), see § 198.12[2][b]*]. It must also be accompanied by all discoverable reports and writings, if any, made by those additional experts [*Code Civ. Proc. § 2034.280(b)*; *see also* discussion in *§ 198.13*].

A party submitting supplemental information regarding additional experts must also make those experts available immediately for a deposition under *Code Civ. Proc. §§ 2034.410-2034.470* [*Code Civ. Proc. § 2034.280(c)*; *see* discussion in *§ 198.18*]. Such a deposition may be taken even though the time limit for discovery under *Code Civ. Proc. § 2024.010 et seq.* has expired [*Code Civ. Proc. § 2034.280(c)*; for general discussion relating to time limits under *Code Civ. Proc. § 2024.010 et seq., see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.50* et seq.].

The procedural for supplemental expert witness information allows a party to reconsider which experts he or she should call. For example, if a party decides not to call an expert on an issue on the assumption that another party will not call one on that issue, but the initial exchange reveals that the assumption was incorrect, the first party may submit a supplemental list under *Code Civ. Proc. § 2034.280* [*see* Reporter's Notes to Proposed *Code Civ. Proc. § 2034(h)*; *see also Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.13[2]*].

Conversely, a party who has already designated an expert to testify on a particular subject may not replace that expert with one stated on a supplemental list [*Basham v. Babcock (1996) 44 Cal. App. 4th 1717, 1718, 52 Cal. Rptr. 2d 456]*
.

For a procedural checklist in submitting supplemental expert witness information, see *§ 198.41[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery

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16-198 California Forms of Pleading and Practice--Annotated § 198.16

§ 198.16 Amending or Augmenting Expert Witness Information

[1] Motion for Leave to Amend or Augment

On the motion of any party who has engaged in a timely exchange of expert witness information, the court may grant leave to do either of the following [*Code Civ. Proc. § 2034.610(a)*]:

- Augment that party's expert witness list and declaration by adding the name and address of any expert witness whom the party has subsequently retained.

- Amend the party's expert witness declaration with respect to the general substance of the testimony that a previously designated expert is expected to give.

A party who wishes to substitute an expert for one already designated must make a motion to augment that party's list of experts as required by *Code Civ. Proc. § 2034.610*. A court's order that discovery is closed except for experts who are allowed to be designated late does not constitute permission for a party to augment that party's list of experts without bringing the statutory motion [*Richaud v. Jennings (1993) 16 Cal. App. 4th 81, 87-91, 19 Cal. Rptr. 2d 790* (construing former *Code Civ. Proc. § 2034*)].

For a form of motion for leave to augment or amend, with discussion of requirements relating to monetary sanctions and a good faith attempt at informal resolution of issues presented by the motion, see *§ 198.54*. For procedural checklists relating to this motion proceeding, see *§ 198.42[1]* and *[2]*.

[2] Timing of Motion

The motion must be made a sufficient time in advance of the time limit for the completion of discovery under *Code Civ. Proc. § 2024.010 et seq.* to permit the deposition, within that time limit, of any expert to whom the motion [*Code Civ. Proc. § 2034.610(b)*; *see Bonds v. Roy (1999) 20 Cal. 4th 140, 149, 83 Cal. Rptr. 2d 289, 973 P.2d 66* (trial court was within discretion to deny motion made near close of trial)].

Under exceptional circumstances, the court may permit the motion to be made at a later time [*Code Civ. Proc. §*

2034.610(b)]. For discussion of general time requirements under *Code Civ. Proc. § 2024.010 et seq.*, see *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.50* et seq. For discussion relating to the reopening of discovery when a trial date is reset following mistrial or pursuant to a new trial, see *§ 198.11[3][c]*.

[3] Grounds for Granting Leave

The court may grant leave to augment or amend an expert witness list or declaration only after taking into account the extent to which the opposing party has relied on the list of expert witnesses, and after determining that any party opposing the motion will not be prejudiced in maintaining the party's action or defense on the merits [*Code Civ. Proc. § 2034.620(a), (b)*; *see Dickison v. Howen (1990) 220 Cal. App. 3d 1471, 1478-1479, 270 Cal. Rptr. 188* (party will be prejudiced by augmentation when, due to its reliance on previous list of experts, it is not prepared for new testimony, and cannot be prepared to respond to new testimony in time for trial)].

The court must also determine the following [*Code Civ. Proc. § 2034.620(c)*]:

- The moving party sought leave promptly after deciding to call the additional expert witness or offer the different or additional testimony.

- The moving party, in seeking leave, has also promptly served a copy of the proposed expert witness information on all other parties who have appeared in the action.

- Before seeking leave, the moving party either (1) would not in the exercise of reasonable diligence have determined to call that expert witness or have decided to offer the different or additional testimony of that expert witness, or (2) failed to determine to call that expert witness, or to offer the different or additional testimony of that expert witness as a result of mistake, inadvertence, surprise, or excusable neglect.

For purposes of showing mistake, inadvertence, surprise, or excusable neglect, when a party's attorney previously interviewed an expert witness and determined the expected testimony of that witness, a change of testimony by that expert witness constituted "surprise" sufficient to support leave for augmentation [*Dickison v. Howen (1990) 220 Cal. App. 3d 1471, 1478, 270 Cal. Rptr. 188]* .

[4] Conditions for Granting Leave

Leave to amend or augment expert witness information is required to be conditioned on the moving party making the expert available immediately for a deposition under *Code Civ. Proc. §§ 2034.410-2034.470* [*see* discussion in *§ 198.18*]. Leave is also to be conditioned on such other terms as may be just. These may include, but are not limited to, the following [*Code Civ. Proc. § 2034.620(d)*]:

- Granting leave to any party opposing the motion to designate additional expert witnesses or to elicit additional opinions from those previously designated.

- Granting a continuance of the trial for a reasonable period of time.

- Awarding costs and litigation expenses to any party opposing the motion.

Additional conditions may be appropriate depending on the circumstances of the case. For example, in a medical malpractice action, the trial court, in granting the defendant leave to augment, also granted certain conditions requested by plaintiff in the event the court granted the motion to augment. These conditions limited defendant's augmentation to one new expert, to be made available under terms convenient to the plaintiff and at the defendant's expense, and

required the defendant to provide plaintiff with an itemization of consultation fees paid to the new expert by the defendant's malpractice insurer within the last three years, together with the names of counsel for the plaintiffs in those cases in which the new expert had been paid for such consultation [*Dickison v. Howen (1990) 220 Cal. App. 3d 1471, 1479-1480, 270 Cal. Rptr. 188]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureDiscoveryMethodsExpert Witness Discovery

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16-198 California Forms of Pleading and Practice--Annotated § 198.17

§ 198.17 Motion to Submit Tardy Expert Witness Information

[1] On Failure to Submit Timely Information

On the motion of any party who has failed to submit expert witness information on the date specified in a demand for that exchange, the court may grant leave to submit that information on a later date [*Code Civ. Proc. § 2034.710*].

The motion to submit tardy information must be made a sufficient time in advance of the time limit for the completion of discovery under *Code Civ. Proc. § 2024.010 et seq.* to permit the deposition, within that time limit, of any expert to whom the motion [*Code Civ. Proc. § 2034.710(b)*]. Under exceptional circumstances, however, the court may permit the motion to be made at a later time [*Code Civ. Proc. § 2034.710(b)*; for discussion of time requirements under *Code Civ. Proc. § 2024.010 et seq., see Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.50* et seq.].

For a form of motion for leave to submit tardy information, with discussion of requirements relating to monetary sanctions and a good faith attempt at informal resolution of issues presented by the motion, see *§ 198.54*. For a procedural checklist relating to this motion proceeding, see *§ 198.42[3]*.

[2] Grounds and Conditions for Granting Leave

The court may grant leave to submit tardy information only after taking into account the extent to which the opposing party has relied on the absence of a list of expert witnesses, and after determining that any party opposing the motion will not be prejudiced in maintaining the party's action or defense on the merits [*Code Civ. Proc. § 2034.720(a), (b)*].

The court must also determine the following [*Code Civ. Proc. § 2034.720(c)*]:

- The moving party failed to submit the information for which leave to submit is being sought, as a result of mistake, inadvertence, surprise, or excusable neglect.

- The moving party sought leave promptly after learning of the mistake, inadvertence, surprise, or excusable neglect.

- The moving party, in seeking leave, has also promptly served a copy of the proposed expert witness information described in *Code Civ. Proc. § 2034.260* [*see* discussion in *§ 198.12[2]*] on all other parties who have appeared in the action.

Leave to submit tardy information is required to be conditioned on the moving party making the expert available immediately for a deposition under *Code Civ. Proc. §§ 2034.410-2034.470* [*see* discussion in *§ 198.18*]. Leave is also to be conditioned on such other terms as may be just. These may include, but are not limited to, the following [*Code Civ. Proc. § 2034.720(d)*]:

- Granting leave to any party opposing the motion to designate additional expert witnesses or to elicit additional opinions from those previously designated.

- Granting a continuance of the trial for a reasonable period of time.

- Awarding costs and litigation expenses to any party opposing the motion.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 198.18 Deposition of Expert Witness

[1] Right to Depose Expert Designated by Another Party

When any party receives an expert witness list from another party, he or she may take the deposition of any person on the list [*Code Civ. Proc. § 2034.410*]. This right was one that formerly distinguished California discovery practice from that under the federal rules [*see* Reporter's Notes to Proposed *Code Civ. Proc. § 2034(k)*]. Since the 1986 enactment of former *Code Civ. Proc. § 2034*, however, *Fed. R. Civ. P., Rule 26(b)(4)(A)* has been revised to afford this right as well.

In exceptional circumstances, a party may depose another party's expert witness even before receipt of the other party's expert witness list. For example, when one party submitted a declaration by an expert witness in support of a motion for summary judgment, and the opposing party presented a counter affidavit by another expert, the moving party sought to depose the opposing party's expert on the basis of that expert's foundational facts. The opposing party resisted the deposition on the ground that it was premature under former *Code Civ. Proc. § 2034(i)* (*now see Code Civ. Proc. § 2034.410*). The moving party argued that an expert's affidavit expressing a completely untenable opinion based on inaccurate foundational facts should not alone be permitted to raise a triable issue so as to defeat summary judgment. The court of appeal agreed, on these unusual facts, and permitted the deposition to proceed on that limited issue [*St. Mary Medical Center v. Superior Court (1996) 50 Cal. App. 4th 1531, 1534, 1538-1541, 58 Cal. Rptr. 2d 182]* .

[2] Procedures for Taking Depositions Generally Apply

Generally, the procedures for taking oral and written depositions set forth in *Code Civ. Proc. §§ 2025.010 et seq., 2026.010, 2027.010,* and *2028.010 et seq.* apply to the deposition of the expert [*see Code Civ. Proc. § 2034.410*]. For detailed discussion and forms relating to these procedures, see Ch. 193, *Discovery: Depositions* . Exceptions to the general procedures that otherwise apply, set out in *Code Civ. Proc. §§ 2034.410-2034.470,* are discussed in [3], *below*.

[3] Exceptions to General Deposition Procedures

[a] Location of Deposition

A deposition under *Code Civ. Proc. §§ 2034.410-2034.470,* of an expert of the type described in *Code Civ. Proc. §*

2034.210(b) (that is, one who has been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action, or who is an employee of a party or party himself or herself) [*see § 198.11[1]*], must be taken within 75 miles of the courthouse where the action is pending [*Code Civ. Proc. § 2034.420*]. This codifies prior case law holding that retained experts, unlike nonparty witnesses or experts with independently acquired knowledge, may be compelled to travel to the area where the trial will be held [*see* Reporter's Notes to Proposed *Code Civ. Proc. § 2034(k)(1)* (subsequently enacted as *Code Civ. Proc. § 2034(i)(1)*; *now see Code Civ. Proc. § 2034.420*); *see also Tahoe Forest Inn v. Superior Court (1979) 99 Cal. App. 3d 509, 512, 160 Cal. Rptr. 314]* . As such, it is an exception to the location requirements that apply to oral depositions generally [*Code Civ. Proc. § 2034.420*; *see* discussion in [2], *above*; for discussion of the general location requirements, *see also Ch. 193, Discovery: Depositions, § 193.22*].

The court may order the deposition to be taken at a more distant place from the courthouse, but only on a motion for a protective order by the party designating the expert and on a showing of exceptional hardship [*Code Civ. Proc. § 2034.420*]. For a form of motion for protective order that may be used for this purpose, see *§ 198.56*. For a procedural checklists relating to this proceeding, see *§ 198.41[1]* and *198.43[1]*.

[b] Use of Deposition Notice Rather Than Subpoena

The service of a proper deposition notice, accompanied by a tender of the expert's fee described in *Code Civ. Proc. § 2034.430* [*see* discussion in [3], *below*], is effective to require a party employing or retaining an expert to produce that expert for a deposition under *Code Civ. Proc. §§ 2034.410-2034.470*) [*Code Civ. Proc. § 2034.460(a)*].

This codifies prior case regarding the deposition of retained experts [*see Tahoe Forest Inn v. Superior Court (1979) 99 Cal. App. 3d 509, 512, 160 Cal. Rptr. 314]* . It makes it clear that a deposition notice is sufficient to compel the attendance of a designated expert at a discovery deposition, and that in this situation no deposition subpoena is required [*see* Reporter's Notes to Proposed *Code Civ. Proc. § 2034(k)(3)* (subsequently enacted as *Code Civ. Proc. § 2034(i)(3), now see Code Civ. Proc. § 2034.460*); *see also Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.13[2]*]. As such, it is an exception to the general deposition provisions that otherwise apply [*Code Civ. Proc. § 2034.420*; *see* discussion in [2], *above*; for discussion of the deposition notice and deposition subpoena provisions that otherwise apply to compel attendance at a deposition, *see also Ch. 193, Discovery: Depositions, § 193.21[3]* and *193.30* et seq.].

The obligation to attend based on a deposition notice alone is, however, effectively limited to experts who are employed or retained by the designating party, since it is only these experts who are under the effective control of the party who is required to produce them on receipt of a deposition notice under *Code Civ. Proc. § 2034.460* [*see* Reporter's Notes to Proposed *Code Civ. Proc. § 2034(k)(3)* (subsequently enacted as *Code Civ. Proc. § 2034(i)(3), now see Code Civ. Proc. § 2034.460*))]. In other words, even if the party serving the deposition notice properly tenders the expert witness fees, a designating party receiving the deposition notice has the burden of producing the expert witness only if that party employed or retained the expert for the purpose of preparation for trial. A designating party need not produce an expert who is a percipient witness and was not designated because he or she was retained, but only because the designating party intends to ask questions of the witness that may require an expert opinion [*Hurtado v. Western Medical Center (1990) 222 Cal. App. 3d 1198, 1203, 272 Cal. Rptr. 324]* .

[c] Payment of Expert Witness Fee

[i] Summary of Exception

A party desiring to depose an expert witness designated by another party under *Code Civ. Proc. § 2034.430(a)*, must pay compensation to that witness as provided in *Code Civ. Proc. § 2034.430*, provided that the expert is not a party or an employee of a party, and provided that the expert falls within one of the definitions discussed in [ii], *below* [*Code Civ. Proc. § 2034.430(a)*]. For discussion of the determination of the amount of the fee, and proceedings to have the

court reset an unreasonable fee, see respectively [iii] and [vi], *below*.

This compensation requirement is one of the exceptions to the general deposition procedures that otherwise apply to expert witness depositions under *Code Civ. Proc. §§ 2034.410-2034.470* [*see* discussion in [2], *above*].

[ii] "Expert Witness" Subject to Exception

For the purpose of the compensation requirement of *Code Civ. Proc. § 2034.430* [*see* [i], *above*], an "expert witness" who must be compensated for time spent at a deposition under *Code Civ. Proc. §§ 2034.410-2034.470* is one who is not a party or an employee of a party, and who falls within one of the following categories [*Code Civ. Proc. § 2034.430(a)*]:

- An expert, other than a party or employee of a party, described in *Code Civ. Proc. § 2034.210(b)* (that is, an expert who has been retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation for the trial of the action) [*Code Civ. Proc. § 2034.430(a)*; *see also § 198.11[1]*].

- A treating physician and surgeon or other treating health care practitioner who is to be asked during the deposition to express opinion testimony [*Code Civ. Proc. § 2034.430(a)(2)*]. This includes opinion or factual testimony regarding the past or present diagnosis or prognosis made by the practitioner or the reasons for a particular treatment decision made by the practitioner, but does not include testimony requiring only the reading of words and symbols contained in the relevant medical record, or, if those words and symbols are not legible to the deponent, the approximation by the deponent of what those words and symbols are [*Code Civ. Proc. § 2034.430(a)(2)*].

- An architect, professional engineer, or licensed land surveyor who was involved with the original project design or survey for which he or she is asked to express an opinion both within his or her expertise and relevant to the action or proceeding [*Code Civ. Proc. § 2034.430(a)(3)*].

- A designated expert in a workers' compensation case arising under *Lab. Code § 3201 et seq.* or *6100 et seq.* [*Code Civ. Proc. § 2034.430(f)*].

[iii] Calculation of Fee Payable by Deposing Party

An expert who is deposed under *Code Civ. Proc. §§ 2034.410-2034.470* and who falls within one of the categories described in *Code Civ. Proc. § 2034.430(a)* [*see* [ii], *above*], must be paid his or her reasonable and customary hourly or daily fee for any time spent at the deposition [*Code Civ. Proc. § 2034.430(b)*].

The time spent at the deposition commences at the time noticed in the deposition subpoena (or deposition notice) [*see* [2], *above*], or, alternately, at the time of arrival if the expert witness arrives at a later time. The time spent at the deposition terminates when the expert witness is dismissed from the deposition, whether or not he or she is actually deposed by any party attending the deposition [*Code Civ. Proc. § 2034.430(b)*]. For discussion of charges for preparation and travel, see [v], *below*.

A daily fee may only be charged for a full day of attendance at a deposition, or when the expert was required by the deposing party to be available for a full day and the expert necessarily had to forego all business he or she would have otherwise conducted that day but for the request that he or she be available all day for the scheduled deposition [*Code Civ. Proc. § 2034.430(e)*].

The hourly or daily fee to be charged by the expert witness must not exceed the fee charged to the party who retained the expert, except when the expert has donated his or her services to a charitable or other nonprofit organization [*Code*

Civ. Proc. § 2034.430(d)]. This provision does not prohibit a variable fee schedule based on the type of services rendered. It requires an expert to charge for deposition testimony the same fee that would be charged to the retaining party for *testimonial*, as opposed to non-testimonial, services, such as consultative or investigative work [*Rancho Bernardo Development Co. v. Superior Court (1992) 2 Cal. App. 4th 358, 361-363, 2 Cal. Rptr. 2d 878* (construing former *Code Civ. Proc. § 2034*)]. Experts generally charge more for testimony at depositions or court proceedings than they do for non-testimonial services. This is rationalized by the fact that it is a more stressful, and a more valuable, type of service than non-testimonial services. *Code Civ. Proc. § 2034.430* does not limit the fee for deposition services to whatever lower fee may be charged for non-testimonial services. Because most experts are retained by a party for consultative or investigative purposes only, there being little cause for a party to depose its own expert, this means that another party who subsequently deposes that expert will typically be charged a higher fee than that charged to the party who designated the expert, at least for those rendered to the designating party before testifying at trial [*see* *Rancho Bernardo Development Co. v. Superior Court (1992) 2 Cal. App. 4th 358, 362, 2 Cal. Rptr. 2d 878* (court specifically did not address reasonableness of fee)].

An expert witness's "customary" fee is not necessarily the "reasonable" fee a deposing party must pay for deposing another party's expert witness. When the deposing party believes the expert's fee is unreasonable, *Code Civ. Proc. § 2034.470* provides a mechanism for the court to resolve the dispute and set the fee [*see* discussion of this proceeding in [vi], *below*].

Witness fees incurred in deposing an opponent's treating physicians are not costs recoverable under *Code Civ. Proc. § 1033.5(a)(7)* by the prevailing party [*Baker-Hoey v. Lockheed Martin Corp. (2003) 111 Cal. App. 4th 592, 597-600, 3 Cal. Rptr. 3d 593* ; *see Code Civ. Proc. § 1033.5(a)(7)* (prevailing party in tort case may recover as costs ordinary witness fees incurred in deposing witness)]. Deposition fees paid to an opponent's treating physician are recoverable as costs only if the expert was ordered by the court [*Baker-Hoey v. Lockheed Martin Corp. (2003) 111 Cal. App. 4th 592, 595-596, 3 Cal. Rptr. 3d 593* (treating physicians are experts and recovery of their fees as costs are accordingly governed by *Code Civ. Proc. § 1033.5*'s provisions governing expert witness fees, not provisions applicable to ordinary witnesses); *see Code Civ. Proc. § 1033.5(a)(8)* (fees or expert witness fees ordered by court are recoverable); *see also Code Civ. Proc. § 1033.5(b)(1)* (specifically disallowing expert fees as costs unless court has ordered fees to be incurred, absent specific authorizing statute)]. Otherwise, a treating physician's reasonable and customary hourly or daily fees must be paid under *Code Civ. Proc. § 2034.430* to take his or her deposition [*Baker-Hoey v. Lockheed Martin Corp. (2003) 111 Cal. App. 4th 592, 600, 3 Cal. Rptr. 3d 593* (construing former *Code Civ. Proc. § 2034*)].

Gov. Code § 68092.5 sets out provisions substantially similar to *Code Civ. Proc. §§ 2034.430-2034.470* (discussed *above* and in [iv]-[vi], *below*). *Gov. Code § 68092.5* applies to the compensation of an expert for testimony at trial, as distinguished from compensation for time spent at deposition for discovery purposes. For further discussion of *Gov. Code § 68092.5*, see Ch. 535, *Subpoena* .

[iv] Tender of Anticipated Fee by Deposing Party

The deposing party must either accompany the service of the deposition notice with a tender of the expert's fee based on the anticipated length of the deposition, or tender that fee at the commencement of the deposition [*Code Civ. Proc. § 2034.450(a)*; *True v. Shank (2000) 81 Cal. App. 4th 1250, 1257, 97 Cal. Rptr. 2d 462* (per statutory provision, expert witness fees may be tendered at commencement of deposition as alternative to tender with deposition notice)]. In either event, the deposing party is required to deliver the expert's fee to the designating party's attorney [*Code Civ. Proc. § 2034.450(b)*;].

If the deposing party fails to tender the fee either with the deposition notice or at the commencement of the deposition, the expert need not be deposed at the time specified in the notice, unless the parties stipulate otherwise [*Code Civ. Proc. § 2034.460(b)*; for further discussion of *Code Civ. Proc. § 2034.460*, *see* [b], *above*].

If the deposition takes longer than anticipated, the party noticing the deposition must pay the balance of the fee within five days of receipt of an itemized statement from the expert [*Code Civ. Proc. § 2034.450(c)*].

[v] Fees Payable by Designating Party or Tardy Counsel

The party designating the expert is responsible for any fee charged by the expert for preparing for the deposition and for traveling to the place of the deposition, as well as for any travel expenses of the expert [*Code Civ. Proc. § 2034.440*].

The provision for setting the amount of fees to be paid to an expert under *Code Civ. Proc. § 2034.430* renders the deposing party liable only for those fees of the expert that are "reasonable." An expert is not precluded from charging or receiving an additional amount from his or her client, the designating party. Thus, for example, an expert may bill his or her client for any amounts that have been disallowed by the court in a proceeding to set the fees payable by the deposing party [for discussion of this proceeding, *see* [vi], *below*]. These excess or "unreasonable" fees remain a matter of negotiation and agreement between the expert and the designating party [*Marsh v. Mountain Zephyr, Inc. (1996) 43 Cal. App. 4th 289, 304, 50 Cal. Rptr. 2d 493]* .

If any counsel for the expert, the designating party, or any other party other than the deposing party is late arriving at the deposition, the expert's reasonable and customary hourly or daily fee for the time period determined from the time noticed in the deposition subpoena (or deposition notice) until the time of that counsel's late arrival is chargeable to that tardy counsel [*Code Civ. Proc. § 2034.430(c)*].

[vi] Motion to Set Reasonable Fee

If a party desiring to take the deposition of an expert witness under *Code Civ. Proc. §§ 2034.410-2034.470* deems that the expert's hourly or daily fee for providing deposition testimony is unreasonable, that party may move for an order setting the expert's compensation. Notice of the motion must be given to the expert [*Code Civ. Proc. § 2034.470(a)*].

This motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. Notice of this motion must be given to the expert [*Code Civ. Proc. § 2034.470(b)*; for further discussion of this requirement, see generally *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*].

In any such attempt at an informal resolution, either the party or the expert must provide the other with the following [*Code Civ. Proc. § 2034.470(b)*]:

- Proof of the ordinary and customary fee actually charged and received by that expert for similar services provided outside the subject litigation [*Code Civ. Proc. § 2034.470(b)(1)*].

- The total number of times the presently demanded fee has ever been charged and received by that expert [*Code Civ. Proc. § 2034.470(b)(2)*].

- The frequency and regularity with which the presently demanded fee has been charged and received by that expert within the two-year period preceding the hearing on the motion [*Code Civ. Proc. § 2034.470(b)(3)*].

In the motion proceeding, in addition to any other facts or evidence offered in support of or in opposition to the motion, either the expert or the designating must provide proof of these same three items [*Code Civ. Proc. § 2034.470(c)* (also providing that the items described in *Code Civ. Proc. § 2034.470(b)(2)* and *(3)* apply only in actions filed after 1993)].

The court's determination as to the reasonableness of the fee is also required to be based on these same three items [

Code Civ. Proc. § 2034.470(c), (d)]. The court may also consider, however, evidence of the ordinary and customary fees charged by similar experts for similar services within the relevant community, as well as any other factors that the court deems necessary or appropriate to make its determination [*Code Civ. Proc. § 2034.470(e)*]. If the court determines that the expert's fee is unreasonable, it must set that fee based on the evidence and factors considered [*Code Civ. Proc. § 2034.470(f)*].

For a form of motion to set fees, with discussion of additional requirements relating to monetary sanctions for unsuccessfully making or opposing the motion, see *§ 198.58*.

[vii] Expert's Standing to Appeal Order Setting Fee

An expert witness has standing to appeal the order setting his or her deposition testimony fee [*Marsh v. Mountain Zephyr, Inc. (1996) 43 Cal. App. 4th 289, 297, 50 Cal. Rptr. 2d 493]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsOral Depositions

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16-198 California Forms of Pleading and Practice--Annotated § 198.19

§ 198.19 Effect of Unreasonable Failure to Exchange Expert Witness Information

[1] Exclusion From Evidence of Expert Testimony

On the objection of any party who has made a complete and timely compliance with the exchange requirements of *Code Civ. Proc. § 2034.260* [*see* discussion in *198.12*], the trial court is required to exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following:

- List that witness as an expert under *Code Civ. Proc. § 2034.260* [*Code Civ. Proc. § 2034.300(a)*; *see* discussion in *198.12[2][a]*].

- Submit an expert witness declaration [*Code Civ. Proc. § 2034.300(b)*; *see* discussion in *198.12[2][b]*].

- Produce reports and writings of expert witnesses under *Code Civ. Proc. § 2034.270* [*Code Civ. Proc. § 2034.300(c)*; *see* discussion in *198.13*].

- Make that expert witness available for a deposition under *Code Civ. Proc. §§ 2034.410-2034.470* [*Code Civ. Proc. § 2034.300(d)*; *see* discussion in *198.18*].

These exclusion provisions apply except as provided in *Code Civ. Proc. §§ 2034.610-2034.630* (proceeding to augment or amend expert witness information, discussed in *§ 198.16*), *Code Civ. Proc. §§ 2034.710-2034.730* (proceeding to submit tardy expert witness information, discussed in *§ 198.17*), and *Code Civ. Proc. § 2034.310* (nonlisted expert may be called to testify if listed by another party or for impeachment purposes, discussed in *§ 198.20*) [*Code Civ. Proc. § 2034.300*].

These exclusion provisions do not apply to pretrial proceedings. For example, a declaration under penalty of perjury by an expert who was not listed pursuant to *Code Civ. Proc. § 2034.010 et seq.* may properly be offered as support for a party's position on a pretrial motion [*Kennedy v. Modesto City Hospital (1990) 221 Cal. App. 3d 575, 580-582, 270 Cal. Rptr. 544* (summary judgment motion; construing former *Code Civ. Proc. § 2034*)].

[2] Determining "Unreasonable" Failure

Interpretation of the phrase "unreasonably failed" has been the key in applying the expert testimony exclusion provisions of *Code Civ. Proc. § 2034.300*, discussed in [1], *above*.

In the malpractice case of *Bonds v. Roy (1999) 20 Cal. 4th 140, 83 Cal. Rptr. 2d 289, 973 P.2d 66* , the trial court excluded a defense expert witness's testimony on a particular issue pursuant to former *Code Civ. Proc. § 2034(j)(2)* (*now see Code Civ. Proc. § 2034.300(b)*) (failure to submit expert witness declaration) [*see* discussion in *§ 198.12[2][b]*]. The defendant had in fact submitted an expert witness declaration, but that declaration did not mention that the expert was expected to testify on the particular issue on which the court excluded testimony.

The Supreme Court, in affirming the trial court's ruling, interpreted a "failure" to submit a declaration under former *Code Civ. Proc. § 2034(j)(2)* to include not only a failure to submit a declaration altogether, but also a failure to submit an expert witness declaration that complies fully with the *content requirements* of former *Code Civ. Proc. § 2034(f)(2)* (*now see Code Civ. Proc. § 2034.260(c)*) [*see* discussion in *§ 198.12[2][b][ii]*]. In this case, the defendant "failed" to submit a declaration in that the declaration did not provide the general substance of *all* the testimony that the expert was expected to give. Although the defendant made a motion to amend the declaration under former *Code Civ. Proc. § 2034(k)* (*now see Code Civ. Proc. § 2034.610*) in order to correct this failure, this motion was not made until moments before the expert was to be sworn as a witness, near the close of the trial, and the trial court was within its discretion denying that motion as untimely [*Bonds v. Roy (1999) 20 Cal. 4th 140, 142-143, 145-146, 149, 83 Cal. Rptr. 2d 289, 973 P.2d 66* (disapproving contrary rulings in *Castaneda v. Bornstein (1995) 36 Cal. App. 4th 1818, 1828-1830, 43 Cal. Rptr. 2d 10* and *Martinez v. City of Poway (1993) 12 Cal. App. 4th 425, 429-430, 15 Cal. Rptr. 2d 644*); *see also* discussion of timeliness of motion to augment or amend in § 198.16].

However, *Code Civ. Proc. § 2034.300(b)*, providing for the exclusion of testimony as a sanction for the failure to submit a witness declaration, which under *Bonds v. Roy* (discussed *above*) includes an inaccurate declaration, did not provide the statutory authority to impose monetary sanctions for disclosing for the first time during the trial a theory that the expert did not disclose in the expert witness declaration [*Muller v. Fresno Community Hospital & Medical Ct. (2009) 172 Cal. App. 4th 887, 905-906, 91 Cal. Rptr. 3d 617]* .

A California court of appeal excluded expert testimony under *Code Civ. Proc. § 2034(j)(4)* (*now see Code Civ. Proc. § 2034.300(d)*) (failure to make expert available for deposition) [*see* discussion in *§ 198.18[3][b]*], to the extent that the testimony went beyond opinions the expert had expressed during his deposition [*Jones v. Moore (2000) 80 Cal. App. 4th 557, 564-565, 95 Cal. Rptr. 2d 216* (legal malpractice case)]. In his deposition, the expert testified as to specific opinions, and *affirmatively stated* that these were the only opinions he intended to offer at trial, and promised to notify defendant if he later formulated others. This the expert did not do. Nor did plaintiff make a timely motion to amend the expert's declaration under former *Code of Civ. Proc. § 2034(k)* (*now see Code Civ. Proc. § 2034.610*), although that declaration regarding this expert arguably was broad enough to encompass the additional testimony [*Jones v. Moore (2000) 80 Cal. App. 4th 557, 564-565, 95 Cal. Rptr. 2d 216]* . The court reasoned that the case did not turn on the adequacy of the expert witness declaration. It turned, rather, on a party's right to rely on the other party's expert's express representation that the opinions expressed during an expert deposition were the only ones that needed be met at trial. Although this case did not present precisely the situation described in former *Code of Civ. Proc. § 2034(j)(4)*, it was sufficiently similar in that the expert was, in effect, not made available for deposition as to the further opinions he offered at trial, opinions which, in his deposition testimony, he had assured defense counsel he did not have. The court concluded that it would be grossly unfair and prejudicial to hold otherwise [*Jones v. Moore (2000) 80 Cal. App. 4th 557, 565, 95 Cal. Rptr. 2d 216]* .

Another court of appeal has held that expert testimony is not to be excluded under former *Code Civ. Proc. § 2034(j)(4)* (*now see Code Civ. Proc. § 2034.300(d)*) unless the party offering the testimony "unreasonably" failed to make that expert witness available for deposition under former *Code Civ. Proc. § 2034(i)* (*now see Code Civ. Proc. §§*

2034.410-2034.470). In *Stanchfield v. Hamer Toyota, Inc. (1995) 37 Cal. App. 4th 1495, 44 Cal. Rptr. 2d 565* , the party seeking to present the testimony did make the expert available for a deposition, although the deposition was never completed because the expert needed more time to develop his opinions. The court concluded that this was not an unreasonable failure to make the witness available for deposition, especially since the opposing party did nothing at the time and waited until two weeks before the trial date before making an objection [*Stanchfield v. Hamer Toyota, Inc. (1995) 37 Cal. App. 4th 1495, 1503-1504, 44 Cal. Rptr. 2d 565]* .

One court of appeal refused to allow plaintiff's treating physicians to testify as experts because the treating physicians were not listed or identified by name, as required by former *Code Civ. Proc. § 2034(j)(1)* (*now see Code Civ. Proc. § 2034.300(a)*) (failure to list witness as an expert) [*see* discussion in *§ 198.12[2][a]*], but simply referred to in the expert witness designation as "all past or present examining and/or treating physicians" [*Kalaba v. Gray (2002) 95 Cal. App. 4th 1416, 1423-1424, 116 Cal. Rptr. 2d 570]* . Although no expert declaration is required for a treating physician who will be called to testify at trial as an expert witness [*see* *Schreiber v. Estate of Kiser (1999) 22 Cal. 4th 31, 34-35, 91 Cal. Rptr. 2d 293, 989 P.2d 720* (discussed in *§ 198.12[2][b][v]*)], retained experts must be designated, and the designation must be accompanied by the expert witness declaration described in *Code Civ. Proc. § 2034.260(c)* [*Kalaba v. Gray (2002) 95 Cal. App. 4th 1416, 1422-1423, 116 Cal. Rptr. 2d 570* (construing former *Code Civ. Proc. § 2034(f)*)]. The court of appeal explained that "the transformation from treating physician to expert" does not occur unless the treating physician is identified by name and address in the proponent's designation [*Kalaba v. Gray (2002) 95 Cal. App. 4th 1416, 1418, 116 Cal. Rptr. 2d 570]* . The court found no authority to support plaintiff's contention that her discovery responses should be viewed as "substantial compliance" with the specific requirements of former *Code Civ. Proc. § 2034*. Although the Supreme Court suggested in *Schreiber* that an opposing party would be prudent to ask a treating physician at his or her deposition whether the physician holds any opinions on the matters about which expert testimony will be required at trial, and if so, the manner in which he or she obtained the factual underpinning of those opinions, the Supreme Court did not suggest that, to be prudent, defense counsel should depose every treating physician without regard to whether the treating physician had been designated as an expert [*Kalaba v. Gray (2002) 95 Cal. App. 4th 1416, 1423, 116 Cal. Rptr. 2d 570]* . Expressing concern that medical malpractice cases are already particularly complex and expensive to prosecute and to defend, the court found nothing in *Schreiber* to suggestthat the Supreme Court intended to impose further unnecessary economic burdens on either side by encouraging more depositions than reasonably necessary in any particular case [*Kalaba v. Gray (2002) 95 Cal. App. 4th 1416, 1423-1424, 116 Cal. Rptr. 2d 570,1423-1424]* . Accordingly, the court concluded that plaintiff had complied with neither the letter nor the spirit of former *Civ. Proc. Code § 2034* [*Kalaba v. Gray (2002) 95 Cal. App. 4th 1416, 1423, 116 Cal. Rptr. 2d 570]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryEvidenceTestimonyExpertsAdmissibility

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§ 198.20 When Nonlisted Expert May Testify at Trial

A party who has not previously designated an expert witness may nevertheless call that expert witness to testify at trial in either of the following situations [*Code Civ. Proc. § 2034.310*]:

- The expert was designated by another party, and was thereafter deposed under *Code Civ. Proc. §§ 2034.410-2034.470* [*Code Civ. Proc. § 2034.310(a)*].

- The expert is called as a witness to impeach the testimony of an expert witness offered by any other party at the trial. This impeachment may include testimony as to the falsity or nonexistence of any fact used as the foundation for any opinion by any other party's expert witness, but may not include testimony that contradicts the opinion [*Code Civ. Proc. § 2034.310(b)*; *see, e.g., Mizel v. City of Santa Monica (2001) 93 Cal. App. 4th 1059, 1067-1068, 113 Cal. Rptr. 2d 649* (no error in excluding expert testimony of defendants' rebuttal witness, because proposed testimony expressed contrary opinion, and thus did not qualify under exception of former *Code Civ. Proc. § 2034(m), now see Code Civ. Proc. § 2034.310(b)*)].

Calling a witness pursuant to *Code Civ. Proc. § 2034.310(a)* is not restricted to situations in which the designating party does not call the expert to testify, or in which coparties agree to share an expert and the designating coparty leaves the case [*Powell v. Superior Court (1989) 211 Cal. App. 3d 441, 445, 259 Cal. Rptr. 390* (construing former *Code Civ. Proc. § 2034(m)(1)*)]. Thus, a nondesignating party may call an expert even though the expert was designated by an opposing party, so long as the nondesignating party deposed that expert after his or her designation [*Powell v. Superior Court (1989) 211 Cal. App. 3d 441, 444-445, 259 Cal. Rptr. 390* (plaintiff was allowed to call as expert physician previously designated by defendant hospital)].

Legal Topics:

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

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[Reserved]

§§ 198.21[Reserved]

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§ 198.30 Related Matthew Bender Publications

For comprehensive discussion and forms relating to discovery by interrogatories under the California Civil Discovery Act and related California law, see DeMeo, California Deposition and Discovery Practice, Ch. 64, *Exchange of Expert Trial Witness Information* (Matthew Bender), and Hogan & Weber, California Civil Discovery, Ch. 10, *Expert Witness Disclosure*

For memoranda relating to discovery by interrogatories under the California Civil Discovery Act and related California law, see California Points and Authorities, Ch. 88, *Discovery: Exchange of Expert Witness Information* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 198.31 State Statutes

Exchange of expert witness information in limited civil cases. *Code Civ. Proc. §§ 91, 94(e), 95*

Scope and regulation of discovery in general. *Code Civ. Proc. §§ 2017.010 et seq., 2019.010 et seq.*

Sanctions in general. *Code Civ. Proc. § 2023.010 et seq.*

Discovery by simultaneous exchange of expert trial witness information. *Code Civ. Proc. § 2034.010 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 198.31A California Rules of Court

Format of supplemental and further discovery and responses. *Cal. Rules of Ct., Rule 3.1000*

Format of discovery motions; separate statement required to accompany motion to compel. *Cal. Rules of Ct., Rule 3.1345*

Service of motion papers on nonparty deponent. *Cal. Rules of Ct., Rule 3.1346*

Discovery motions in summary proceedings (unlawful detainer or other actions brought under *Code Civ. Proc. § 1159 et seq.*) involving possession of real property. *Cal. Rules of Court, Rule 3.1347*

Discovery sanctions; effect of lack of opposition to motion to compel. *Cal. Rules of Ct., Rule 3.1348*

Filing and retention of specified discovery papers relating to exchange of expert witness information. *Cal. Rules of Ct., Rule 3.250(a)(13), (15), (16), (b)*

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§ 198.32 Decisions

[1] Exchange of Expert Witness Information

Trial court committed prejudicial error by allowing medical malpractice defendant to delay his designation of retained expert witnesses until 20 days after the patient had designated his own expert, instead of enforcing simultaneous exchange of information as required by former *Code Civ. Proc. § 2034* (*now see Code Civ. Proc. §§ 2034.210(a), 2034.260(a), (b)*). *Fairfax v. Lords (2006) 138 Cal. App. 4th 1019, 1026-1027, 41 Cal. Rptr. 3d 850*

Former *Code Civ. Proc. § 2034* (*now see Code Civ. Proc. § 2034.010 et seq.*) specifically provides for a simultaneous, mutual exchange of expert witness information, not a unilateral exchange; thus, case management order requiring unilateral disclosure of identity, curriculum vitae, and opinion concerning causation of each medical expert who would support plaintiffs' wrongful death claims was not proper exercise of trial court's power to manage complex litigation. *Hernandez v. Superior Court (2003) 112 Cal. App. 4th 285, 297, 4 Cal. Rptr. 3d 883*

As matter of first impression, concluding that Civil Discovery Act applies to Sexually Violent Predators Act (*Welf. & Inst. Code § 6600 et seq.*); thus, trial court erred in denying petitioner's motion to compel exchange of expert witness information. *Leake v. Superior Court (2001) 87 Cal. App. 4th 675, 682, 104 Cal. Rptr. 2d 767 , overruled on other grounds, People v. Yartz (2005) 37 Cal. 4th 529, 537, 36 Cal. Rptr. 3d 328, 123 P.3d 604*

Well-defined procedures for exchange of expert witness information such as experts' identities and testimony are necessary to ensure fairness to parties and efficient resolution of disputes. *Province v. Center for Women's Health & Family Birth (1993) 20 Cal. App. 4th 1673, 1683, 25 Cal. Rptr. 2d 667 , disapproved on other grounds in Heller v. Norcal Mutual Insurance Co. (1994) 8 Cal. 4th 30, 41, 32 Cal. Rptr. 2d 200, 876 P.2d 999*

Former *Code Civ. Proc. § 2034* (*now see Code Civ. Proc. § 2034.010 et seq.*) requires litigating party to reveal expert witness information to other parties sufficiently early in pretrial stage so that expert witness discovery does not interfere with other trial preparation. *Richaud v. Jennings (1993) 16 Cal. App. 4th 81, 90, 19 Cal. Rptr. 2d 790*

Party is required to disclose, either in expert witness exchange list or at expert's deposition, substance of facts and

opinions to which expert will testify at trial; impeaching expert is permitted to give reasons why opposing expert's foundational facts were false or nonexistent, but not to generally rebut opinion of expert being impeached. *Kennemur v. State of California (1982) 133 Cal. App. 3d 907, 919, 924-925, 184 Cal. Rptr. 393* (prior law)

[2] Exclusion of Expert Testimony at Trial

Treating physicians, who were not listed or identified by name, but simply referred to in expert witness designation as "all past or present examining and/or treating physicians" could not testify as experts; "the transformation from treating physician to expert" does not occur unless treating physician is identified by name and address in proponent's designation, and designation is accompanied by expert witness declaration described in former *Code Civ. Proc. § 2034(f)* (*now see Code Civ. Proc. § 2034.260(c)*). *Kalaba v. Gray (2002) 95 Cal. App. 4th 1416, 116 Cal. Rptr. 2d 570, 575-577*

Former *Code Civ. Proc. § 2034(m)* (*now see Code Civ. Proc. § 2034.310(b)*) required exclusion of expert testimony of defendants' rebuttal witness, because proposed testimony would not have challenged foundational facts of plaintiff's expert's testimony; "calling an expert witness to express an opinion contrary to that expressed by another expert witness is not the 'impeachment' contemplated by section [2034, subdivision (m)]." *Mizel v. City of Santa Monica (2001) 93 Cal. App. 4th 1059, 1067-1068, 113 Cal. Rptr. 2d 649*

Former *Code of Civ. Proc. § 2034(j)(4)* (*now see Code Civ. Proc. § 2034.300(d)*) required exclusion of expert testimony going beyond opinions expert expressed during his deposition, even though expert witness declaration arguably was broad enough to encompass additional testimony, because expert failed to fulfill his promise to notify defendant that he later formulated other opinions, and plaintiff did not make timely motion to amend declaration under former *Code of Civ. Proc. § 2034(k)* (*now see Code Civ. Proc. § 2034.610*). *Jones v. Moore (2000) 80 Cal. App. 4th 557, 564-565, 95 Cal. Rptr. 2d 216*

Trial court must exclude expert opinion of witness only if party offering witness has unreasonably failed to fulfill statutory requirements. *Stanchfield v. Hamer Toyota, Inc. (1995) 37 Cal. App. 4th 1495, 1503-1504, 44 Cal. Rptr. 2d 565*

Pursuant to former Code Civ. Proc. § 2037.5 (*now see Code Civ. Proc. § 2034.310(b)*), party is not entitled to call undisclosed expert witness merely to give opinion testimony contrary to that of opposing party. *Sprague v. Equifax, Inc. (1985) 166 Cal. App. 3d 1012, 1040, 213 Cal. Rptr. 69* (prior law); *Gallo v. Peninsula Hospital (1985) 164 Cal. App. 3d 899, 903-905, 211 Cal. Rptr. 27* (prior law); *Ellenberger v. Karr (1982) 127 Cal. App. 3d 423, 427, 179 Cal. Rptr. 583* (prior law)

[3] Expert Witness Costs

Treating physicians' fees that defendant corporation had to pay under former *Code Civ. Proc. § 2034(i)(2)* (*now see Code Civ. Proc. § 2034.430*) when deposing physicians in connection with residents' claims against corporation for groundwater contamination were not recoverable as costs, although corporation was prevailing party at trial; recovery was unavailable under *Code Civ. Proc. § 1033.5(a)(8)* because physicians were not court-ordered experts, and unavailable under *Code Civ. Proc. § 1033.5(a)(7)*, because fees paid to physicians were not ordinary witness fees. *Baker-Hoey v. Lockheed Martin Corp. (2003) 111 Cal. App. 4th 592, 597-600, 3 Cal. Rptr. 3d 593*

[4] Expert Witness Declaration

Neither *Code Civ. Proc. § 2034.300(b)*, nor any other statute, authorized imposing monetary sanctions for disclosing

for first time during trial a theory that the expert did not disclose in the expert witness declaration. *Muller v. Fresno Community Hospital & Medical Ct. (2009) 172 Cal. App. 4th 887, 905-906, 91 Cal. Rptr. 3d 617*

Treating physicians, who were not listed or identified by name, but simply referred to in expert witness designation as "all past or present examining and/or treating physicians," could not testify as experts; retained experts must be designated, and designation must be accompanied by expert witness declaration described in former *Code Civ. Proc. § 2034(f)* (*now see Code Civ. Proc. § 2034.260(c)*). *Kalaba v. Gray (2002) 95 Cal. App. 4th 1416, 116 Cal. Rptr. 2d 570, 575-577*

No expert witness declaration is required for treating physician, in that a treating physician is neither a "retained" expert nor otherwise a witness described under *Code Civ. Proc. § 2034.210(b)* to whom the declaration requirement of *Code Civ. Proc. § 2034.260(c)* applies; treating physician is rather a percipient fact witness who, as physician, may be designated as an expert and give expert opinion testimony as to any opinions formed on basis of facts independently acquired and informed by physician's training, skill, and experience, including opinions regarding causation and standard of care. *Schreiber v. Estate of Kiser (1999) 22 Cal. 4th 31, 34-36, 39, 91 Cal. Rptr. 2d 293, 989 P.2d 720* (disapproving *Plunkett v. Spaulding (1997) 52 Cal. App. 4th 114, 60 Cal. Rptr. 2d 377* to the extent contrary; construing former *Code Civ. Proc. § 2034(a)(2), (f)*)

Under *Code Civ. Proc. § 2034.260(c)*, a party must include in expert witness declaration a brief narrative statement of the general substance of the testimony that each expert is expected to give; when a party has failed to provide a declaration providing the general substance of all testimony that an expert is expected to give, and has not moved to amend the declaration under *Code Civ. Proc. 2034.610*, it is proper for the trial court, on objection by another party under *Code Civ. Proc. 2034.300(b)*, to exclude testimony by that expert on matters not described in the declaration. *Bonds v. Roy (1999) 20 Cal. 4th 140, 142-143, 145-146, 149, 83 Cal. Rptr. 2d 289, 973 P.2d 66* (disapproving *Castaneda v. Bornstein (1995) 36 Cal. App. 4th 1818, 1828-1830, 43 Cal. Rptr. 2d 10* and *Martinez v. City of Poway (1993) 12 Cal. App. 4th 425, 429-430, 15 Cal. Rptr. 2d 644* to the extent contrary; construing former *Code Civ. Proc. § 2034(f)(2), (j)(2), (k)*)

Petitioners' expert, a treating physician, should have been permitted to testify concerning his opinions; under *Schreiber v. Estate of Kiser*, testimony of treating physician who is a percipient expert is not limited to personal observations, rather, he or she may provide both fact and opinion testimonyand may testify as to opinions formed on the basis of facts independently acquired and informed by his or her training, skill, and experience. *Fatica v. Superior Court (2002) 99 Cal. App. 4th 350, 353, 120 Cal. Rptr. 2d 904*

[5] Proceeding to Augment or Amend Expert Witness Information

Code Civ. Proc. § 2034.610 provides procedure for augmentation of party's expert witness list when for good reason expert was not listed on original expert witness list. *Richaud v. Jennings (1993) 16 Cal. App. 4th 81, 90, 19 Cal. Rptr. 2d 790* (construing former *Code Civ. Proc. § 2034(k)*)

[6] Withdrawal of Designated Expert Witness

Party did not waive his attorney-client privilege by designating himself as expert witness, because designation was withdrawn before he disclosed significant part of privileged communication. *Shooker v. Superior Court (2003) 111 Cal. App. 4th 923, 930, 4 Cal. Rptr. 3d 334*

Party is entitled to withdraw designated expert witness at any time before expert's deposition, thereby reviving work product protection for reports prepared by expert in consultant's capacity. *County of Los Angeles v. Superior Court (1990) 222 Cal. App. 3d 647, 656, 271 Cal. Rptr. 698*

Withdrawal of designated expert does not require noticed motion procedure. *County of Los Angeles v. Superior Court (1990) 222 Cal. App. 3d 647, 656, 271 Cal. Rptr. 698*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureRemediesCosts & Attorney FeesCostsWitnessesEvidenceTestimonyExpertsAdmissibility

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16-198 California Forms of Pleading and Practice--Annotated § 198.33

§ 198.33 Text References

Witkin, California Evidence, ch. X, *Discovery*, § 178 et seq. (4th ed. 2000)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery

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[Reserved]

§§ 198.34[Reserved]

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16-198 California Forms of Pleading and Practice--Annotated § 198.40

§ 198.40 Demand Exchange of Expert Witness Information

[1] Service of Demand

1. Determine that it is not later than 10 days after initial trial date has been set, or 70 days before that trial date, whichever is closer to trial date [*Code Civ. Proc. § 2034.220*].

2. Prepare demand [*Code Civ. Proc. § 2034.210*; *see § 198.50* (form of demand)].

3. Prepare proof of service, and attach to demand [*see Code Civ. Proc. § 1013a* and Ch. 518, *Service of Summons and Papers*].

4. Serve the demand on all parties who have appeared in the action. Leave of court is not required [*Code Civ. Proc. § 2034.220, 2034.240*].

[2] Date of Exchange

1. Specify the date of exchange in the demand [*see Code Civ. Proc. § 2034.230(b)*].

NOTE:
The date of exchange must be 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date, unless the court on motion and a showing of good cause orders an earlier or later date [*see* *Code Civ. Proc. § 2034* .230(b)].

2. To have the date of exchange set within 50 days of the initial trial date, or within 20 days after service of the demand, do the following [*Code Civ. Proc. § 2034.230*]:

a. Prepare a notice of motion to set a different date for the exchange of expert witness information, a supporting declaration [*Code Civ. Proc. § 2034.230(b)*; *see § 198.52* (form of motion)], a memorandum of points and authorities, and proof of service of these

documents [*see Code Civ. Proc. § 1013a*, and Ch. 518, *Service of Summons and Papers*].

b. At least 16 court days before the date set for the hearing [*see Code Civ. Proc. § 1005(b)* (period extended if service made by mail, Express Mail, other overnight delivery, or fax)], serve every party to the action or proceeding with a copy of the foregoing documents [*see Code Civ. Proc. §§ 1010-1020* and Ch. 518, *Service of Summons and Papers*].

[3] Disposition of Original Demand

1. Do not file the demand with the court. Retain the original, with original proof of service attached, until six months after final disposition of the action [*Code Civ. Proc. § 2034.290(a), (b)*; *Cal. Rules of Ct., Rule 3.250(a)(13), (b)*]. Should any discovery motions relating to expert witnesses become necessary during the action, these documents will have to be lodged with the court [*see e.g., § 198.42[1]*].

2. When six months after final disposition have passed, destroy original demand and proof of service unless the court, on the motion of any party, orders them preserved for a longer period [*Code Civ. Proc. § 2034.290(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness Discovery

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16-198 California Forms of Pleading and Practice--Annotated § 198.41

§ 198.41 Exchange of Expert Witness Information

NOTE:

Once the demand has been made, all parties who have appeared in the action, including the demanding party, must simultaneously exchange expert witness information. Thus, most of the following steps must or may be taken by the demanding party as well as by all parties served with the demand [*see Code Civ. Proc. § 2034* .260]. The only exception is a motion for a protective order relating to the exchange, which may only be made by a party served with a demand [***see Code Civ. Proc. § 2034* .250].**

[1] Motion for Protective Order

1. If the demand causes unwarranted annoyance, embarrassment, oppression, or undue burden and expense, promptly prepare a notice of motion for a protective order, a supporting declaration [*Code Civ. Proc. § 2034.250*; *see § 198.56* (form of motion)], a memorandum [for supporting forms of points and authorities, *see* California Points and Authorities, Ch. 88, *Discovery: Exchange of Expert Witness Information* (Matthew Bender)], and proof of service of these documents [*see Code Civ. Proc. § 1013a* and Ch. 518, *Service of Summons and Papers*].

2. Serve a copy of the documents on each party in same manner as noticed motion proceeding described in § 198.40[2]

[2] Initial Exchange

1. If any expert whose testimony will be used at trial is a party, an employee of a party, or retained in connection with the litigation [*see Code Civ. Proc. § 2034.210(b)*], prepare an expert witness declaration [*Code Civ. Proc. § 2034.260(c)*; *see § 198.51* (form of declaration)].

2. On or before the date specified in the demand, which must be 50 days before the trial date, or 20 days after service of the demand, whichever is closer to the trial date, unless court has ordered a different date [*Code Civ. Proc. § 2034.230(b)*; for court-ordered date change, *see § 198.40[2]*], exchange any expert

witness information, including any expert witness declarations [*see Code Civ. Proc. § 2034.260(c)*], with all parties who have appeared in the action [*Code Civ. Proc. § 2034.260(a)*]. This may occur at a meeting of the attorneys for the parties involved, or by mail [*Code Civ. Proc. § 2034.260(a)*].

[3] Supplemental Expert List

NOTE:
Any supplemental expert list must be submitted within 20 days of the initial exchange [*Code Civ. Proc. § 2034* .280(a)].

1. After the exchange, determine whether any other party has designated an expert to express an opinion on a subject for which you have not retained an expert.

2. Prepare and submit a supplemental expert witness list containing the name and address of any experts who will be called to testify on that subject [*Code Civ. Proc. § 2034.280(a)*].

a. Include an expert witness declaration concerning the additional experts [*Code Civ. Proc. § 2034.280(b)*; *see § 198.51* (form of declaration)].

b. Include all discoverable reports and writings, if any, made by the additional experts [*Code Civ. Proc. § 2034.280(b)*].

c. Ensure that those experts are available immediately for a deposition under *Code Civ. Proc. §§ 2034.410-2034.470*, even if the time limit for discovery under *Code Civ. Proc. § 2024.010 et seq.* has expired [*Code Civ. Proc. § 2034.280(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryProtective Orders

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16-198 California Forms of Pleading and Practice--Annotated § 198.42

§ 198.42 Augmenting, Amending, and Submitting Tardy Expert Witness Information

[1] Motion to Augment Expert Witness List

1. Determine that your original exchange of expert witness information was timely [*Code Civ. Proc. § 2034.610(a)(1)*].

2. Determine that there is sufficient time to permit the deposition of any expert who may be added to the expert witness list to be taken within the time limit for completing discovery under *Code Civ. Proc. § 2024.010 et seq.* [*see Code Civ. Proc. § 2034.610(b)*].

NOTE:
Under exceptional circumstances, the court may permit a motion to submit tardy expert witness information to be made at a later time [*Code Civ. Proc. § 2034 .610(b)*].

3. If because of mistake, inadvertence, surprise, or excusable neglect, an expert was not designated in the exchange, do the following [*Code Civ. Proc. § 2034.620*]:

a. Prepare and promptly serve on all other parties who have appeared in the action a copy of an augmented expert witness list containing the name and address of the new expert [*see Code Civ. Proc. § 2034.620(c)(2)(B)*].

NOTE:
As a prerequisite to making the motion, counsel must make a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [*see Code Civ. Proc. § 2034* .610(c)].

b. Prepare a notice of motion to augment the expert witness list, a supporting declaration stating facts showing the attempt at an informal resolution of the dispute [*see Code Civ. Proc. § 2034.610(c)*; § 198.54 (form of motion)], a supporting memorandum [for supporting memoranda, *see* California Points

and Authorities, Ch. 88, *Discovery: Exchange of Expert Witness Information* (Matthew Bender)], and proof of service of these documents [*see Code Civ. Proc. § 1013a* and Ch. 518, *Service of Summons and Papers*].

c. Promptly file the notice of motion and supporting documents with the court [*Code Civ. Proc. §§ 1005.5, 1010*; *see Code Civ. Proc. § 2034.620(c)(2)(A)*].

d. Serve copies of the documents on each party in same manner as noticed motion proceeding described in § 198.40[2].

e. Lodge the demand, and all expert witness lists and declarations exchanged in response to it, with the court [*see Code Civ. Proc. § 2034.290(c)*].

[2] Motion to Amend Expert Witness Declaration

1. Determine that your original exchange of expert witness information was timely [*Code Civ. Proc. § 2034.610(a)(2)*].

2. Determine whether additional testimony or different testimony than that summarized in the expert witness declaration is required [*Code Civ. Proc. § 2034.610(a)(2)*].

3. Determine that there is sufficient time within the time limit for completing discovery under *Code Civ. Proc. § 2024.010 et seq.* to permit the taking of the deposition of any expert with respect to whom the expert witness declaration may be amended [*see Code Civ. Proc. § 2034.610(b)*].

NOTE:
Under exceptional circumstances, the court may permit a motion to augment to be made at a later time [*Code Civ. Proc. § 2034* .610(b)].

4. If because of mistake, inadvertence, surprise, or excusable neglect, the testimony was not included in the exchange, do the following [*Code Civ. Proc. § 2034.620*]:

a. Prepare and promptly serve on all other parties who have appeared in the action a copy of the different or additional testimony [*see Code Civ. Proc. § 2034.620(c)(2)(B)*].

NOTE:
As a prerequisite to making the motion, counsel must make a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [*see Code Civ. Proc. § 2034* .610(c)].

b. Prepare a notice of motion to amend the expert witness declaration, a supporting declaration stating facts showing the attempt at an informal resolution of the dispute [*see Code Civ. Proc. § 2034.610(c)*; for a form, *see § 198.54*], a supporting memorandum [for supporting memoranda, *see* California Points and Authorities, Ch. 88, *Discovery: Exchange of Expert Witness Information* (Matthew Bender)], and proof of service of these documents [*see Code Civ. Proc. § 1013a* and Ch. 518, *Service of Summons and Papers*].

c. Promptly file the notice of motion and supporting documents, serve the appropriate copies, and lodge the appropriate documents with the court as described in [1], *above*.

[3] Motion to Submit Tardy Expert Witness Information

1. Determine that there is sufficient time within the time limit for completing discovery under *Code Civ. Proc. § 2024.010 et seq.* to permit the taking of the deposition of any expert who will be included in the tardy expert witness information [*see Code Civ. Proc. § 2034.710(b)*].

NOTE:
Under exceptional circumstances, the court may permit a motion to augment to be made at a later time [*Code Civ. Proc. § 2034* .710(b)].

2. If as the result of mistake, inadvertence, surprise, or excusable neglect, expert witness information was not timely submitted, promptly serve a copy of any proposed expert witness information on all other parties who have appeared in the action [*Code Civ. Proc. § 2034.720(c)*].

NOTE:
As a prerequisite to making the motion, counsel must make a reasonable and good faith attempt at an informal resolution of each issue presented by the motion [*see Code Civ. Proc. § 2034* .710(c)].

3. Prepare a notice of motion to submit tardy information, a supporting declaration stating facts showing the attempt at an informal resolution of the dispute [*see Code Civ. Proc. § 2034.710(c)*; § 198.54 (form of motion)], a supporting memorandum [for supporting memoranda, *see* California Points and Authorities, Ch. 88, *Discovery: Exchange of Expert Witness Information* (Matthew Bender)], and proof of service of these documents [*see Code Civ. Proc. § 1013a* and Ch. 518, *Service of Summons and Papers*].

4. Promptly file the notice of motion and supporting documents, serve the appropriate copies, and lodge the appropriate documents with the court as described in [1], *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureDiscoveryMethodsExpert Witness Discovery

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16-198 California Forms of Pleading and Practice--Annotated § 198.43

§ 198.43 Examining Designated Expert Witnesses

[1] Prepare Notice of Taking Deposition

Follow procedures for taking oral and written depositions set forth in *Code Civ. Proc. §§ 2025.010 et seq.*-2028.010 et seq. [*see* Ch. 193, *Discovery: Depositions*], with the following exceptions:

1. If any expert to be deposed is retained by a party or is otherwise an expert described under *Code Civ. Proc. § 2034.210(b)*, notice the deposition at a place within 75 miles of the courthouse where the action is pending [*see Code Civ. Proc. § 2034.420*].

2. Service of the deposition notice, accompanied by the tender of the expert witness fee as provided under *Code Civ. Proc. § 2034.430* [*see* [2], *below*], is effective to require the party retaining the expert to produce the retained expert for deposition [*Code Civ. Proc. § 2034.460(a)*].

[2] Tender Expert Witness Fees

1. Either accompany the service of the deposition notice with a tender of the expert's fee based on the anticipated length of the deposition or tender that fee at the commencement of the deposition. If the fee is not tendered, the expert will not be deposed at that time unless the parties stipulate otherwise. Ensure that the fee is delivered to the attorney for the party designating the expert [*Code Civ. Proc. §§ 2034.450-2034.460*; *see § 198.18[3][c]*].

2. Motion to Set Expert's Compensation.

a. If the expert's hourly or daily fee for providing deposition testimony is deemed unreasonable, prepare a notice of motion for an order setting the expert's compensation, a supporting declaration stating facts showing the attempt at informal resolution of the dispute [*Code Civ. Proc. § 2034.470*; *see § 198.58* (form of motion)], a memorandum of points and authorities [for supporting forms of points and authorities, *see* California Points and Authorities, Ch. 88, *Discovery: Exchange of Expert Witness Information*

(Matthew Bender)], and proof of service of these documents [*see Code Civ. Proc. § 1013a* and Ch. 518, *Service of Summons and Papers*].

NOTE:
As a prerequisite to making the motion, counsel must make a reasonable and good faith attempt at an informal resolution of any issue presented by the motion [*see Code Civ. Proc. § 2034* .470(b)].

b. Serve copies of the foregoing documents on each party in same manner as noticed motion proceeding described in § 198.40[2].

NOTE:
Notice must be given to the expert as well as to the parties [*see Code Civ. Proc. § 2034* .470(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureDiscoveryMethodsOral Depositions

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[Reserved]

§§ 198.44[Reserved]

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PART V. FORMS

16-198 California Forms of Pleading and Practice--Annotated § 198.50

§ 198.50 Demand for Exchange of Information Relating to Expert Witnesses [Code Civ. Proc. § 2034.210]

[1] FORM Demand for Exchange of Information Relating to Expert Witnesses [Code Civ. Proc. § 2034.210]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	DEMAND FOR EXCHANGE
_____ [*name*],	)	OF INFORMATION RELATING TO EXPERT
Defendant.	)	WITNESSES
	)	
	)	

_____

To _____ [*name of party to whom demand is being made*], from _____ [*name of demanding party*]:

You are requested to serve, not later than _____ [*specify date 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date, unless the court orders otherwise*], in compliance with *Section 2034.210 of the Code of Civil Procedure*, a list of expert witnesses together with expert witness declarations[, and any and all reports and writings made by each expert in the course of preparing his or her opinion]. You are requested to produce the reports and writings at _____ (*address*), _____ (*city*).]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Use of Form

The demand set out in [1], *above*, is for use by any party to obtain simultaneous production of information relating to the expert witnesses that all other parties to the action expect to call. The optional language may be used when a party also wants production of all discoverable reports and writings made by expert witnesses in the course of preparing their opinions. Any party may include a demand for production of discoverable reports and writings when the expert witness is a party, an employee of a party, or has been retained by a party in anticipation of litigation [Code *Civ. Proc. § 2034.210*]. The demand may be made without leave of court [*Code Civ. Proc. § 2034.220*]. A copy of the demand must be served on all parties who have appeared in the action [*Code Civ. Proc. § 2034.240*].

[3] Time Limit for Demand

The demand must be made no later than the tenth day after the initial trial date has been set, or 70 days before that trial date, whichever is closer to the trial date [*Code Civ. Proc. § 2034.220*].

[4] Time for Exchange

The date for the exchange must be 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date. However, on motion and a showing of good cause, the court may order an earlier or later date of exchange [*Code Civ. Proc. § 2034.230(b)*; *see § 198.52*].

The demand, and any expert witness lists and declarations exchanged, are not filed with the court. The demanding party must retain both the original of the demand with the original proof of service affixed, and the original of all expert witness lists and declarations exchanged, until six months after final disposition of the action. At that time, all originals may be destroyed, unless the court, on motion of any party, and for good cause shown, orders that they be preserved for a longer period [*Code Civ. Proc. § 2034.290(a), (b)*; *Cal. Rules of Ct., Rule 3.250(a)(13), (b)*].

[5] Contents of Demand

There is no requisite statutory language, but the demand must be in writing, and must identify, below the title of the case, the party making the demand. The demand must state that it is being made under *Code Civ. Proc. § 2034.010 et seq.* and must also specify the date for the exchange [*Code Civ. Proc. § 2034.230*]. When the demand requests production of reports and writings, it must apparently also specify a place for the exchange [*see Code Civ. Proc. § 2034.270*].

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16-198 California Forms of Pleading and Practice--Annotated § 198.51

§ 198.51 Expert Witness Declaration [Code Civ. Proc. § 2034.260(c)] for Retained Expert or Expert Who Is Party or Employed by Party [Code Civ. Proc. § 2034.210(b)]

[1] FORM Expert Witness Declaration [Code Civ. Proc. § 2034.260(c)] for Retained Expert or Expert Who Is Party or Employed by Party [Code Civ. Proc. § 2034.210(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	EXPERT WITNESS DECLARATION
Defendant.	)	
	)	
	)	

_____

I, _____ [*name of demanding party's attorney*], declare:

1. _____ [*Name of expert*] [*if expert is a party, specify status, e.g.:*, defendant in the above-entitled action,] is qualified to testify as an expert in the field of _____ [*specify area of expertise*] on the basis of his/her _____ [*list degrees, experience, and any other basis for qualification as an expert*].

2. The general substance of the testimony that _____ [*name of expert*] is expected to give is that _____ [*set forth brief narrative statement of general substance of testimony*].

[*REPEAT, in successively numbered paragraphs, setting forth the qualifications and general substance of the expected testimony for each expert witness, then CONTINUE*]

3. _____ [*Name*(*s*) *of expert*(*s*)] has/have agreed to testify at the trial.

4. _____ [*Name*(*s*) *of expert*(*s*)] will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning any opinion and its basis.

5. The hourly fee(s) of _____ [*name of expert or* each expert] for providing deposition testimony and for consulting with the retaining attorney is/are as follows:

Name	Fee
_____	_____
_____	_____
_____	_____

6. The daily fee(s) of _____ [*name of expert or* each expert] for providing deposition testimony and for consulting with the retaining attorney is/are as follows:

Name	Fee
_____	_____
_____	_____
_____	_____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The declaration set out in [1], *above*, is for use by any party to respond to a demand for the exchange of information concerning expert witnesses. It is used by a responding party to provide information required under *Code Civ. Proc. § 2034.260(c)*, relating to any expert designated by that party who is an expert described under *Code Civ. Proc. § 2034.210(b)* (that is, an expert who is retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation, or in preparation for the trial of the action, is an employee of a party, or is a party). For further discussion, including discussion of the required contents of this declaration, see *§ 198.12[2][b]* [*see also § 198.11[1]* (discussing experts described under *Code Civ. Proc. § 2034.210(b)*)]. For discussion of the exclusion of expert testimony for failure to include complete information in an expert witness declaration, see *§ 198.19*.

The declaration must be made under penalty of perjury. It must be signed only by the attorney for the party designating the expert, or by that party if that party has no attorney [*Code Civ. Proc. § 2034.260(c)*].

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 198 DISCOVERY: EXCHANGE OF EXPERT WITNESS INFORMATION
PART V. FORMS

16-198 California Forms of Pleading and Practice--Annotated § 198.52

§ 198.52 Proceedings for Order Setting Different Date of Exchange [Code Civ. Proc. § 2034.230]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Order Setting Different Date of Exchange [Code Civ. Proc. § 2034.230]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER SETTING
vs.	)	DIFFERENT DATE OF EXCHANGE, SUPPORTING DECLARATION OF _____
_____ [*name*],	)	[*name*], AND
Defendant.	)	MEMORANDUM
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____

of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] will, and hereby does, move for an order setting _____ [an earlier *or* a later] date for the exchange of expert witness information than _____ [within 50 days of the initial trial date *or* within 20 days after service of the demand]. The motion will be made on the grounds that _____ [*allege specific facts showing good cause for setting the date of exchange of expert witness information within 50 days of trial or within 20 days after service of demand*].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s*)] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. I would like to schedule the exchange of expert witness information for _____ [*date*]. This date will be _____ [within 50 days of the initial trial date of _____ (*date*) *or* within 20 days after service of the demand].

3. _____ [*State facts showing good cause why the date of exchange of expert witness information should be permitted within 50 days of initial trial or sooner than 20 days after service of demand*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].
By: _____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

The form of notice of motion and motion, with supporting declaration, set out in [1], *above*, is for use by a party to move for an order to set a date for the exchange of expert witness information different from that specified by statute [*see Code Civ. Proc. § 2034.230*].

Generally, the date for the exchange of expert witness information must be 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date. However, the court, on motion and a showing of good cause, may order an earlier or later date of exchange [*Code Civ. Proc. § 2034.230(b)*]. If this day falls on a Saturday, Sunday, or holiday, the last day becomes the next court day closer to the trial date [*Code Civ. Proc. § 2016.060*; *see Code Civ. Proc. § 10* (designated holidays)].

A supporting memorandum is required to be served and filed with this motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*]. For general discussion of memoranda requirements and a skeletal form of memorandum, see Ch. 417, *Points and Authorities* . For forms of memoranda relating to proceedings to exchange expert witness information under *Code Civ. Proc. § 2034.010 et seq.*, see California Points and Authorities, Ch. 88, *Discovery: Exchange of Expert Witness Information* (Matthew Bender).

[3] Cross References

For discussion and forms concerning declarations in general, see Ch. 15, *Affidavits, Certificates, and Declarations*

For discussion and forms relating to noticed motions and accompanying papers generally, see Ch. 372, *Motions and Orders*

For discussion and forms concerning service of papers and proof of service, see Ch. 518, *Service of Summons and Papers*

For further discussion and forms concerning shortening or extending time requirements in general, see Ch. 524, *Shortening and Extension of Time*

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16-198 California Forms of Pleading and Practice--Annotated § 198.53

§ 198.53 Proceedings for Order Setting Different Date of Exchange [Code Civ. Proc. § 2034.230]--Order

[1] FORM Proceedings for Order Setting Different Date of Exchange [Code Civ. Proc. § 2034.230]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

_____

The motion of _____ [*identify party, e.g.,* defendant] _____ [for an order setting _____ (an earlier *or* a later) date for the exchange of expert witness information than _____ (within 50 days of the initial trial date *or* within 20 days after service of the demand)], came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that the date of exhange will be _____ [*date*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use when the court has granted an order setting the date for the exchange of expert witness information to a date within 50 days of the initial trial date, or within 20 days after service of the demand [*see Code Civ. Proc. § 2034.230(b)* and § 198.52].

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16-198 California Forms of Pleading and Practice--Annotated § 198.54

§ 198.54 Proceedings to Augment or Amend Expert Witness Information or to Submit Tardy Expert Witness Information [Code Civ. Proc. §§ 2034.610, 2034.710]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Augment or Amend Expert Witness Information or to Submit Tardy Expert Witness Information [Code Civ. Proc. §§ 2034.610, 2034.710]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO
vs.	)	_____ [AUGMENT *or* AMEND *or*
_____ [*name*],	)	SUBMIT TARDY] EXPERT WITNESS INFORMA-
Defendant.	)	TION AND TO IMPOSE SANCTIONS, SUPPORT-
	)	ING DECLARATION OF _____
	)	[*name*], AND MEMORANDUM
	)	Date: _____
	)	Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____

of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* plaintiff] will, and hereby does, move for an order to _____ [augment the expert witness list *or* amend the declaration he/she submitted in response to the demand for exchange of expert witness information *or* submit expert witness informa tion even though the time specified in the demand for the exchange has lapsed]. The motion will be made on the ground(s) that _____ [*identify moving party, e.g.,* plaintiff] has subsequently _____ [retained an (additional) expert *or* decided to offer _____ (different *or* additional) testimony of an expert] and failed to _____ [include the name and address of the expert *or* include the general substance of the different or additional testimony *or* submit the expert information on or before the date of exchange specified in the demand] as a result of _____ [mistake *or* inadvertence *or* surprise *or* excusable neglect]. _____ [*Identify moving party, e.g.,* Plaintiff] _____ [*name*] will further move the court for an order requiring _____ [*identify party or attorney or both, e.g.,* defendant and/or his/her attorney _____ (*name*)] to pay a monetary sanction in the amount of $_____ to _____ [*identify moving party, e.g,* plaintiff].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s*)] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. On _____ [*date*], _____ [*identify demanding party, e.g.,* defendant] _____ [*name*] made a demand for the simultaneous exchange of information relating to all parties' expert witnesses. The date of exchange specified in the demand is _____ [*date*].

[*EITHER, if motion to augment or amend information*]

3. On _____ [*date*], _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] timely submitted _____ [a list setting forth the name(s) and address(es) of the person(s) whose expert opinion he/she expected to offer in evidence at trial, together with a declaration stating the general substance of the testimony each expert is expected to give *or* a statement that he/she did not presently intend to offer the testimony of any expert witness].

[*OR, if motion for leave to submit tardy information*]

3. _____ [*Identify moving party, e.g.,* Plaintiff] _____ [*name*] has not yet submitted a list setting forth the name(s) and address(es) of the person(s) whose expert opinion he/she expects to offer in evidence at trial.

[*CONTINUE*]

4. _____ [*Set forth facts supporting motion for leave to augment or amend expert witness information or to submit tardy information, e.g,* Since submitting his/her expert witness list, plaintiff has retained _____ (*name of expert*) to give his/her expert opinion at trial].

5. _____ [*Set forth facts showing that failure to include name of expert witness or substance of testimony, or to timely provide expert witness information, was due to mistake, inadvertence, surprise, or excusable neglect*].

6. On _____ [*date*], _____ [*specify actions taken to confer with responding party in a reasonable and good faith attempt to informally resolve the issues covered by the motion, e.g.,* plaintiff sent a letter to defendant's attorney asking that plaintiff be allowed to augment his/her expert witness list by adding the name of the newly retained expert, and stating that a copy of the revised list, together with the expert witness' declaration made pursuant to *Section 2034.260(c) of the Code of Civil Procedure,* had been sent to all parties to the litigation. A copy of the letter is attached as Exhibit A and made a part hereof. To date, plaintiff has not received an answer to his/her letter, nor have plaintiff's subsequent telephone calls to defendant's attorney been returned].

7. _____ [*Identify moving party, e.g.,* Plaintiff] bases his/her request for the imposition of a sanction in the amount of $_____ on _____ [*itemize and explain, in as many paragraphs as necessary, the basis of the computation of the monetary amount of sanction requested*].

[8. (*If the motion is not timely under Code Civ. Proc. § 2034 .610(b) or § 2034.710(b) , state facts establishing exceptional circumstances why the court should permit the motion to be made at a time that is not sufficiently in advance of the time limit for discovery under Code Civ. Proc. § 2024 .010 et seq. to permit the deposition of the expert to whom the motion relates to be taken within that time limit*).]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

The form of notice of motion and motion, with supporting declaration, set out in [1], *above,* is for use by a party to move for leave either to augment or amend expert witness information already submitted in response to a demand for the exchange of such information, or to submit expert witness information after the time specified in the demand has lapsed [*Code Civ. Proc. §§ 2034.610(a), 2034.710(a)*]. For discussion of these proceedings, see *§§ 198.16* and *198.17*.

For procedural checklists relating to this motion proceeding, see *§ 198.42[1]* and *[2]*.

A supporting memorandum is required to be served and filed with this motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*]. For general discussion of memoranda requirements and a skeletal form of memorandum, see Ch. 417, *Points and Authorities* . For forms of memoranda relating to proceedings to exchange expert witness information under *Code Civ. Proc. § 2034.010 et seq.*, see California Points and Authorities, Ch. 88, *Discovery: Exchange of Expert Witness Information* (Matthew Bender).

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 198.52[3]*.

[3] Timing of Motion

Motions to augment, amend, or submit tardy expert witness information must be made a sufficient time in advance of the time limit for the completion of discovery under *Code Civ. Proc. § 2024.010 et seq.* to permit the deposition of any expert to whom the motion relates to be taken within that time limit. However, under exceptional circumstances, the court may permit the motion to be made at a later time [*Code Civ. Proc. §§ 2034.610(b), 2034.710(b)*].

[4] Accompanying Papers

The demand, and all expert witness lists and declarations exchanged in response to it, must be lodged with the court when their contents become relevant to an issue in any pending matter in the action [*see Code Civ. Proc. § 2034.290(c)*]. If relevant, the demand should also be lodged with the court in a proceeding to submit tardy expert witness information under *Code Civ. Proc. § 2034.710*.

[5] Declaration of Good Faith Attempt at Informal Resolution

The form of declaration in [1], *above*, includes a statement of facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. This statement must accompany both a notice of motion to augment expert witness information, and a notice of motion to submit tardy information [*see Code Civ. Proc. §§ 2034.610(c), 2034.710(c)*; *see also* discussion in [6], *below*, and general discussion in *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*]. The form of declaration also includes factual statements supporting the grounds for the motion.

[6] Monetary Sanctions

Whether the motion is to augment, amend, or submit tardy witness information, the court must impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes the motion, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. §§ 2034.630, 2034.730*; *see also* discussion of this general provision in Ch. 190, *Discovery: Scope, Regulation, and Timing*, § 190.33[2]].

As discussed in [5], *above*, a motion under either *Code Civ. Proc. § 2034.610* or § 2034.710 must be accompanied by a declaration showing of a reasonable and good faith attempt at informal resolution of the issues raised by the motion. Under *Code Civ. Proc. § 2023.010(i)*, the court is also required to impose a monetary sanction against any party or attorney who fails to confer in an attempt to resolve informally any dispute concerning discovery, in favor of anyone who incurs expenses, including attorney's fees, as a result of that conduct, when the section of the Civil Discovery Act governing a particular discovery motion requires a declaration showing that an attempt has been made. This sanction is to be imposed regardless of the outcome of the particular discovery motion [*Code Civ. Proc. § 2023.020*].

A monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* is an order that one who engaged in a misuse of the

discovery process, his or her attorney if the attorney advised the conduct, or both, pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct [*Code Civ. Proc. § 2023.030(a)*].

A monetary sanction may only be imposed after notice to any affected party, person, or attorney, and after opportunity for hearing [*Code Civ. Proc. § 2023.030*].

A request for a sanction must, in the notice of motion, identify every party, person, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion must be supported by a memorandum, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought [*Code Civ. Proc. § 2023.040*]. The notice of motion and supporting declaration in this form include language designed to satisfy these requirements.

For further discussion of monetary sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

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16-198 California Forms of Pleading and Practice--Annotated § 198.55

§ 198.55 Proceedings to Augment or Amend Expert Witness Information or to Submit Tardy Expert Witness Information [Code Civ. Proc. §§ 2034.610, 2034.710]--Order

[1] FORM Proceedings to Augment or Amend Expert Witness Information or to Submit Tardy Expert Witness Information [Code Civ. Proc. §§ 2034.610, 2034.710]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.,* plaintiff] for an order for leave to _____ [augment *or* amend *or* submit tardy] expert witness information came on regularly for hearing by the court on _____ [*date*]. _____ [*Identify attending parties, e.g.,* Plaintiff appeared by counsel _____ (*name*); defendant appeared by counsel _____ (*name*)].

On proof made to the satisfaction of the court that _____ [*identify party opposing the motion, e.g.,* defendant] _____ [*name*] will not be prejudiced in maintaining his/her _____ [action *or* defense] on the merits and that _____ [*identify moving party, e.g.,* plaintiff]:

[*EITHER, if moving to augment information by adding subsequently retained expert*(*s*)]

1. Decided to call and retained _____ [*name*(*s*)], as [an] expert witness[es] on _____ [*date*], and sought leave to augment expert witness information promptly thereafter.

2. _____ [Would not in the exercise of reasonable diligence have determined to call that expert witness *or* failed to include the name(s) and address(es) of the expert(s) as a result of _____ (mistake *or* inadvertence *or* surprise *or* excusable neglect)], and

[*OR, if moving to amend information by changing the general substance of testimony*]

1. Decided to offer the _____ [different *or* additional] testimony of _____ [*name*(*s*)] as [an] expert witness[es] on _____ [*date*], and sought leave to amend the expert witness information promptly thereafter,

2. _____ [Would not in the exercise of reasonable diligence have determined to offer the _____ (different *or* additional) testimony of that expert witness *or* failed to include the general substance of the _____ (different *or* additional) testimony as a result of _____ (mistake *or* inadvertence *or* surprise *or* excusable neglect)], and

[*OR, if moving to submit tardy information*]

1. Failed to submit the information as a result of _____ [mistake *or* inadvertence *or* surprise *or* excusable neglect],

2. Sought leave to submit the information promptly after learning of the _____ [mistake *or* inadvertence *or* surprise *or* excusable neglect], and

[*CONTINUE*]

3. Promptly thereafter served a copy of the proposed expert witness information on all other parties who have appeared in the action.

IT IS ORDERED that the motion be, and it hereby is, granted and that the _____ [*identify moving party, e.g.,* plaintiff] may _____ [augment *or* amend his/her expert witness information *or* submit tardy expert witness information] on the condition that _____ [*identify moving party, e.g.,* plaintiff] make the expert available immediately for a deposition pursuant to *Code of Civil Procedure Sections 2034.410-2034.470* [*state any further conditions imposed on the order, e.g,* and on the further condition that _____ (*identify nonmoving party, e.g.,* defendant) has leave to designate an additional expert witness to address the issue or _____ (*specify relevant issue*)].

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] pay forthwith to [*identify*

successful party, e.g., defendant] _____ [*name*] the sum of $_____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____ [*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____[*identify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)].

IT IS FURTHER ORDERED that _____ (*name of party*) pay to _____ (*identify moving party, e.g.,* plaintiff) _____ (*name*), the sum of $_____ as reasonable costs, expenses and attorney's fees.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use when the court has granted a motion for leave either to augment or amend expert witness information already submitted in response to a demand for the exchange of such information, or to submit expert witness information after the time specified in the demand has lapsed [*Code Civ. Proc. §§ 2034.610, 2034.710*]. For discussion of the determinations required to be made by the court, and the conditions that are required or permitted, in an order granting leave to augment or amend expert witness information, see *§ 198.16[3], [4]*. For discussion of such determinations and conditions in granting leave to submit tardy expert witness information, see *§ 198.17[2]*. See also discussion in *§ 198.54[2] -[6]*.

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16-198 California Forms of Pleading and Practice--Annotated § 198.56

§ 198.56 Proceedings to Obtain Protective Order Prior to Exchange of Expert Witness Information [Code Civ. Proc. § 2034.250]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Obtain Protective Order Prior to Exchange of Expert Witness Information [Code Civ. Proc. § 2034.250]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER RESTRICTING DISCOVERY AND IMPOSING MONETARY SANCTIONS, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____

of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* plaintiff] _____ [*name*] will, and hereby does, move for an order that the demand for an exchange of expert witness information submitted by _____ [*identify party, e.g.* defendant] on _____ [*date*] be quashed and will further move this court for an order requiring _____ [*identify party or attorney or both, e.g.,* defendant and/or his/her attorney _____ (*name*)] to pay a monetary sanction in the amount of $_____ to _____ [*identify moving party, e.g,* plaintiff]. The motion will be made on the ground(s) that _____ [*specify, e.g.,* the demand was not timely served] and that _____ [*identify moving party, e.g,* plaintiff] made a reasonable and good faith attempt at an informal resolution of the issues presented by this motion.

The motion will be based on this notice of motion, on the declaration(s)of _____ [*name*(*s*)] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party's status and name*]

SUPPORTING DECLARATION OF _____ (*name*)

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. On _____ [*date*], _____ [*identify responding party, e.g.,* defendant] _____ [*name*] made a demand for the simultaneous exchange of information relating to all parties' expert witnesses. The date of exchange specified in the demand is _____ [*date*].

3. _____ [*Set forth facts showing unwarranted annoyance, embarrassment, oppression, or undue burden and expense, e.g.,* This action is set for trial on _____ (*date*). Thus, defendant's demand was submitted within 70 days from the trial date].

4. On _____ [*date*] _____ [*specify actions taken to confer with responding party in a reasonable and good faith attempt to informally resolve the issues covered by the motion, e.g.,* I _____ (*name*) sent a letter to defendant's attorney requesting that defendant withdraw his/her demand in that it was not timely submitted. A copy of the letter is attached as Exhibit A and made a part hereof. To date, I have not received an answer to that letter, nor have my subsequent telephone calls to defendant's attorney been returned].

5. [*Itemization of expenses. See § 198.54[1], Declaration Paragraph 7.*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

The notice of motion and motion, with supporting declaration, set out in [1], *above*, is for use by a party who seeks a protective order relating to the demand for, and exchange of, expert witness information. The motion is sought to protect the moving party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense, and must be brought promptly after the demand has been served [*see Code Civ. Proc. § 2034.250*]. For discussion of this proceeding, including discussion of the types of directions that the court may give in granting the motion, see *§ 198.14*. For a procedural checklist relating to this motion proceeding, see *§ 198.41[1]*.

A supporting memorandum is required to be served and filed with this motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*]. For general discussion of memoranda requirements and a skeletal form of memorandum, see Ch. 417, *Points and Authorities* . For forms of memoranda relating to proceedings to exchange expert witness information under *Code Civ. Proc. § 2034.010 et seq.*, see California Points and Authorities, Ch. 88, *Discovery: Exchange of Expert Witness Information* (Matthew Bender).

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 198.52[3]*.

[3] Declaration of Good Faith Attempt at Informal Resolution

The form of declaration in [1], *above*, includes a statement of facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. This statement must accompany the motion [*see Code Civ. Proc. § 2034.250(a)*; *see also* discussion in [4], *below*, and general discussion in *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*]. The form of declaration also includes factual statements supporting the grounds for the motion.

[4] Monetary Sanctions

In a motion proceeding for a protective order under *Code Civ. Proc. § 2034.250*, the court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes the motion, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2034.250(d)*; *see also* discussion of this general provision in Ch. 190, *Discovery: Scope, Regulation, and Timing*, § 190.33[2]].

As discussed in [3], *above*, the motion must be accompanied by a declaration showing of a reasonable and good faith attempt at informal resolution of the issues raised by the motion. Under *Code Civ. Proc. § 2023.010(i)*, the court is also required to impose a monetary sanction against any party or attorney who fails to confer in an attempt to resolve informally any dispute concerning discovery, in favor of anyone who incurs expenses, including attorney's fees, as a result of that conduct, when the section of the Civil Discovery Act governing a particular discovery motion requires a declaration showing that an attempt has been made. This sanction is to be imposed regardless of the outcome of the particular discovery motion [*Code Civ. Proc. § 2023.020*].

A monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* is an order that one who engaged in a misuse of the discovery process, his or her attorney if the attorney advised the conduct, or both, pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct [*Code Civ. Proc. § 2023.030(a)*].

A monetary sanction may only be imposed after notice to any affected party, person, or attorney, and after opportunity for hearing [*Code Civ. Proc. § 2023.030*].

A request for a sanction must, in the notice of motion, identify every party, person, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion must be supported by a memorandum, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought [*Code Civ. Proc. § 2023.040*]. The notice of motion and supporting declaration in this form include language designed to satisfy these requirements.

For further discussion of monetary sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 198 DISCOVERY: EXCHANGE OF EXPERT WITNESS INFORMATION
PART V. FORMS

16-198 California Forms of Pleading and Practice--Annotated § 198.57

§ 198.57 Proceedings to Obtain Protective Order Prior to Exchange of Expert Witness Information [Code Civ. Proc. § 2034.250]--Order

[1] FORM Proceedings to Obtain Protective Order Prior to Exchange of Expert Witness Information [Code Civ. Proc. § 2034.250]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.,* plaintiff] _____ [*name*] _____ [*specify, e.g.,* directing that the demand for an exchange of expert witness information submitted by _____ (*identify party, e.g.* defendant) on _____ (*date*), be quashed] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

[*EITHER*]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[*OR*]

On good cause being shown and proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted and that _____ [*specify, e.g.*, the demand for an exchange of expert witness information submitted by _____ (*specify party, e.g.*, defendant) on _____ (*date*), shall be, and is, quashed].

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*identify unsuccessful party, person, or attorney, e.g.*, plaintiff _____ (*name*) and his/her attorney _____ (*name*)] pay forthwith to _____ [*specify successful party, e.g.*, defendant] _____ [*name*] the sum of $_____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____ [*specify unsuccessful party, person, or attorney, e.g.*, plaintiff _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*specify unsuccessful party, person, or attorney, e.g.*, plaintiff _____ (*name*) and his/her attorney _____ (*name*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use when the court has granted or denied a motion for a protective order relating to the demand for, and exchange of, expert witness information [*see Code Civ. Proc. § 2034.250*]. For discussion of the types of directions or conditions that the court may include in such an order, see *§ 198.14* [*see also* discussion in *§ 198.56[2] -[4]*].

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Chapter 198 DISCOVERY: EXCHANGE OF EXPERT WITNESS INFORMATION
PART V. FORMS

16-198 California Forms of Pleading and Practice--Annotated § 198.58

§ 198.58 Proceedings for Order Setting Compensation of Expert [Code Civ. Proc. § 2034.470]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Order Setting Compensation of Expert [Code Civ. Proc. § 2034.470]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER SETTING COMPENSATION OF EXPERT AND IMPOSING MONETARY SANCTIONS, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____

of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* plaintiff] will, and hereby does, move for an order setting the compensation of your expert _____ [*name*] to be deposed by _____ [*identify party, e.g.,* plaintiff] on _____ [*date*] and will further move this court for an order requiring _____ [*identify party or attorney or both, e.g.,* defendant and/or his/her attorney _____ (*name*)] to pay a monetary sanction in the amount of $_____ to _____ [*identify moving party, e.g,* plaintiff]. The motion will be made on the grounds that the _____ [hourly *or* daily] fee demanded by that expert is unreasonable and that _____ [*identify moving party, e.g,* plaintiff] made a reasonable and good faith attempt at an informal resolution of the issues presented by this motion.

The motion will be based on this notice of motion, on the declaration(s) of _____[*name*(*s*)] and the memorandum set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party's status and name*]

SUPPORTING DECLARATION OF _____ (*name*)

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. On _____ [*date*], _____ [*identify moving party, e.g.,* plaintiff] _____ [*name*] received an expert witness list from _____ [*identify party, e.g.,* defendant] _____ [*name*] in response to a demand made by _____ [*identify demanding party*] for the simultaneous exchange of information relating to all parties' expert witnesses.

3. The expert witness declaration of _____ [*name*], which was attached to the aforementioned list, contains a statement that the expert's _____ [hourly *or* daily] fee for providing deposition testimony is $_____. _____ [*Identify moving party, e.g.,* Plaintiff] wishes to take the deposition of that expert, but deems his/her fee to be unreasonable.

4. _____ [*Set forth facts showing that the fee requested by the expert is unreasonable, e.g.,* I have retained seven experts with knowledge, skill, experience, training, and education similar to that of _____ (*name of expert whose fee is disputed*) over the past one-year period. The highest fee charged by any of them was 25 percent lower, and their average fee was 32 per cent lower, than the fee requested by _____ (*name of expert whose fee is disputed*).]

5. On _____ [*date*], _____ [*specify actions taken to confer with responding party in a reasonable and good faith attempt to informally resolve the issues covered by the motion, e.g.,* plaintiff _____ (*name*) sent a letter to defendant's attorney requesting that the expert's fee be adjusted to a more reasonable rate. A copy of the letter is attached as Exhibit A and made a part hereof. To date, plaintiff has not received

an answer to his/her letter, nor have plaintiff's subsequent telephone calls to defendant's attorney been returned].

6. [*Itemization of expenses. See § 198.54[1], Declaration Paragraph 7.*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

The form of notice of motion and motion, with supporting declaration, set out in [1], *above*, is for use by a party who wants to depose another party's expert witness to make a motion to have the court set the witness' deposition fee. Such a motion may be made if the deposing party deems that the expert's hourly or daily fee for providing deposition testimony is unreasonable [*Code Civ. Proc. § 2034.470*].

For discussion of this proceeding, see *§ 198.18[3][c][vi]*.

A supporting memorandum is required to be served and filed with this motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010, 2023.040*]. For general discussion of memoranda requirements and a skeletal form of memorandum, see Ch. 417, *Points and Authorities* . For forms of memoranda relating to proceedings to exchange expert witness information under *Code Civ. Proc. § 2034.010 et seq.*, see California Points and Authorities, Ch. 88, *Discovery: Exchange of Expert Witness Information* (Matthew Bender).

For cross references to additional discussion and forms relating to law and motion proceedings generally, see *§ 198.52[3]*.

[3] Declaration of Good Faith Attempt at Informal Resolution

The form of declaration in [1], *above*, includes a statement of facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. This statement must accompany the motion [*see Code Civ. Proc. § 2034.470(b)*; *see also* discussion in [4], *below*, and general discussion in *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.33[1]*]. The form of declaration also includes factual statements supporting the grounds for the motion.

[4] Monetary Sanctions

In a motion proceeding to set fees under *Code Civ. Proc. § 2034.470*, the court is required to impose a monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* against any party, person, or attorney who unsuccessfully makes or opposes the motion, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Code Civ. Proc. § 2034.470(g)*; *see also* discussion of this general provision in Ch. 190, *Discovery: Scope, Regulation, and Timing*, § 190.33[2]].

As discussed in [3], *above*, the motion must be accompanied by a declaration showing of a reasonable and good faith

attempt at informal resolution of the issues raised by the motion. Under *Code Civ. Proc. § 2023.010(i)*, the court is also required to impose a monetary sanction against any party or attorney who fails to confer in an attempt to resolve informally any dispute concerning discovery, in favor of anyone who incurs expenses, including attorney's fees, as a result of that conduct, when the section of the Civil Discovery Act governing a particular discovery motion requires a declaration showing that an attempt has been made. This sanction is to be imposed regardless of the outcome of the particular discovery motion [*Code Civ. Proc. § 2023.020*].

A monetary sanction under *Code Civ. Proc. § 2023.010 et seq.* is an order that one who engaged in a misuse of the discovery process, his or her attorney if the attorney advised the conduct, or both, pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct [*Code Civ. Proc. § 2023.030(a)*].

A monetary sanction may only be imposed after notice to any affected party, person, or attorney, and after opportunity for hearing [*Code Civ. Proc. § 2023.030*].

A request for a sanction must, in the notice of motion, identify every party, person, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion must be supported by a memorandum, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought [*Code Civ. Proc. § 2023.040*]. The notice of motion and supporting declaration in this form include language designed to satisfy these requirements.

For further discussion of monetary sanctions, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[2], 192.15[2]*.

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 198 DISCOVERY: EXCHANGE OF EXPERT WITNESS INFORMATION
PART V. FORMS

16-198 California Forms of Pleading and Practice--Annotated § 198.59

§ 198.59 Proceedings for Order Setting Compensation of Expert [Code Civ. Proc. § 2034.470]--Order

[1] FORM Proceedings for Order Setting Compensation of Expert [Code Civ. Proc. § 2034.470]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.,* plaintiff] for an order setting the compensation of _____ [*name*], the expert of _____ [*identify party, e.g.,* defendant], came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

[*EITHER*]

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion be, and hereby is, denied.

[*OR*]

The court, having considered the _____ [affidavit(s) *or* declaration(s)] and other documents in support of and in opposition to the motion, having heard the arguments of counsel, and being fully advised in the matter, determines that the fee demanded by _____ [*name of expert*] for providing deposition testimony as an expert witness is unreasonable.

IT IS THEREFORE ORDERED that the motion be, and hereby is, granted and that the sum of $_____ is a reasonable _____ [hourly *or* daily] rate of compensation for _____ [*name of expert whose fee is disputed*], and is the rate at which _____ [*specify moving party, e.g.,* plaintiff] shall pay for the taking of the deposition.

[*EITHER, if imposing sanctions*]

IT IS FURTHER ORDERED that _____ [*specify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] pay forthwith to _____ [*specify successful party, e.g.,* defendant] _____ [*name*] the sum of $_____ as reasonable expenses and attorney's fees.

[*OR, if not ordering sanctions*]

On further proof made to the satisfaction of the court that _____ [*specify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)] _____ [acted with substantial justification *or specify other circumstances making imposition of a sanction unjust*],

IT IS FURTHER ORDERED that no monetary sanction be imposed on _____ [*specify unsuccessful party, person, or attorney, e.g.,* plaintiff _____ (*name*) and his/her attorney _____ (*name*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use when the court has granted a motion to set expert witness compensation for deposition testimony. The court must set the expert's fee if it determines that the fee demanded by the expert is unreasonable [*Code Civ. Proc. § 2034.470(f)*]. For further discussion, see *§ 198.18[3][c][vi]* [*see also* discussion in *§ 198.58[2] -[4]*].

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapter 199 DISCOVERY: PRESERVATION OF EVIDENCE

16-199 California Forms of Pleading and Practice--Annotated 199.syn

§ 199.syn Synopsis to Chapter 199: DISCOVERY: PRESERVATION OF EVIDENCE

§ 199.01 Scope of Chapter

§ 199.02 Cross References

[1] Related Discovery Chapters

[2] Other Related Chapters

§§ 199.03-199.09 [Reserved]

§ 199.10 Governing Law

§ 199.11 When Discovery Is Available Before Action Is Commenced

[1] To Prevent Failure or Delay of Justice

[2] Not for Investigative Purposes

[3] Not When Declaratory Relief Is Available

§ 199.12 Discovery Methods Available for Perpetuation or Preservation

§ 199.13 Petition for Leave to Conduct Discovery

[1] Contents of Petition

[2] Court in Which Petition Must Be Filed

[3] Notice of Petition

[4] Service of Notice and Petition

[5] Appointment of Attorney When Service Is by Publication

§ 199.14 Order

[1] Showing Required

[2] Contents of Order

§ 199.15 Use of Deposition to Perpetuate Testimony

§§ 199.16-199.19 [Reserved]

§ 199.20 Governing Law

§ 199.21 When Discovery Pending Appeal Is Allowed

§ 199.22 Discovery Methods Available for Perpetuation or Preservation

§ 199.23 Notice of Motion

§ 199.24 Order

§ 199.25 Use of Deposition to Perpetuate Testimony

§§ 199.26-199.29 [Reserved]

§ 199.30 Matthew Bender Publications

§ 199.31 State Statutes

§ 199.32 Decisions

§ 199.33 Text References

§§ 199.34-199.39 [Reserved]

§ 199.40 Petitioner's Checklists

[1] Prepare Petition and Notice of Petition

[2] Serve Notice

[3] File Papers

[4] Hearing and Post Hearing Matters

[5] Conduct Discovery Authorized by Court

§ 199.41 Checklist for Expected Adverse Party

§§ 199.42-199.49 [Reserved]

§ 199.50 Moving Party's Checklist

§ 199.51 Opposing Party's Checklist

§§ 199.52-199.59 [Reserved]

§ 199.60 Proceedings to Perpetuate Testimony or to Preserve Evidence Before Action Is Commenced [Code Civ. Proc. § 2035.010 et seq.]--Petition [Code Civ. Proc. § 2035.030]

[1] FORM

[2] Use of Form

[3] Cross References

§ 199.61 Proceedings to Perpetuate Testimony or to Preserve Evidence Before Action Is Commenced--Notice of Petition [Code Civ. Proc. § 2035.040]

[1] FORM

[2] Use of Form

§ 199.62 Proceedings to Perpetuate Testimony or to Preserve Evidence Before Action Is Commenced--Order [Code Civ. Proc. § 2035.050]

[1] FORM

[2] Use of Form

§§ 199.63-199.69 [Reserved]

§ 199.70 Proceedings for Order Authorizing Perpetuation of Testimony or Preservation of Evidence Pending Appeal [Code Civ. Proc. § 2036.010 et seq.]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Cross References

§ 199.71 Proceedings for Order Authorizing Perpetuation of Testimony or Preservation of Evidence Pending Appeal--Order [Code Civ. Proc. § 2036.040]

[1] FORM

[2] Use of Form

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Chapter 199 DISCOVERY: PRESERVATION OF EVIDENCE
PART I. SCOPE

16-199 California Forms of Pleading and Practice--Annotated § 199.01

§ 199.01 Scope of Chapter

This chapter covers procedures under the Civil Discovery Act whereby a party or potential party may utilize specified discovery methods for the purpose of perpetuating testimony or preserving evidence, when there is some appreciable danger that the testimony or evidence will be lost before an action can be been commenced, or a retrial begun after a pending appeal.

Part II provides discussion in the following subparts:

- Subpart A (§ 199.10 et seq.) discusses the procedures to be followed for preserving evidence before an action has been commenced.

- Subpart B (§ 199.20 et seq.) discusses the procedures to be followed for preserving evidence while an appeal is pending and a new trial or retrial is anticipated.

Part IV provides procedural checklists in the following subparts:

- Subpart A (§ 199.40 et seq.) provides checklists for use in proceedings to preserve evidence prior to commencement of an action.

- Subpart B (§ 199.50 et seq.) provides checklists for use in proceedings to preserve evidence when an appeal is pending.

Part V includes the following forms:

- Subpart A (§ 199.60 et seq.) includes forms of petition, notice of petition, and order for use in seeking an order allowing discovery to preserve evidence before the commencement of an action.

- Subpart B (§ 199.70 et seq.) includes forms of motion and order for use in seeking an order allowing discovery to preserve evidence when an appeal is pending.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of Testimony

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Chapter 199 DISCOVERY: PRESERVATION OF EVIDENCE
PART I. SCOPE

16-199 California Forms of Pleading and Practice--Annotated § 199.02

§ 199.02 Cross References

[1] Related Discovery Chapters

- For discussion and forms relating to the general purpose, scope, regulation, and timing of civil discovery, see Ch. 190, *Discovery: Scope, Regulation, and Timing* .

- For detailed discussion of evidentiary privileges and other statutory or constitutional protections against disclosure, see Ch. 191, *Discovery: Privileges and Other Discovery Limitations* .

- For discussion and forms relating to discovery sanctions generally, see Ch. 192, *Discovery: Sanctions for Discovery Misuse* .

- For detailed discussion of discovery of preservation of evidence in the context of e-discovery, see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*.

- For discussion and forms relating to the use of other particular discovery methods authorized by the Civil Discovery Act of 1986, see the following chapters covering each method:

  - Ch. 193, *Discovery: Depositions*.

  - Ch. 194, *Discovery: Interrogatories*.

  - Ch. 195, *Discovery: Inspection of Tangible Evidence*.

  - Ch. 196, *Discovery: Requests for Admissions*.

  - Ch. 197, *Discovery: Physical and Mental Examinations*.

  - Ch. 198, *Discovery: Exchange of Expert Witness Information*.

- For discussion and forms relating to the use of extraordinary writ proceedings to obtain interlocutory review of discovery orders, see Ch. 200, *Discovery: Review of Discovery Orders* .

[2] Other Related Chapters

- For discussion and forms relating to noticed motions and accompanying papers in general, see Ch. 372, *Motions and Orders* .

- For discussion and forms concerning service of papers and proof of service, see Ch. 518, *Service of Summons and Papers* .

- For discussion and forms for use in shortening or extending time requirements, see Ch. 524, *Shortening and Extension of Time* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsWritten Depositions

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PART I. SCOPE

16-199 California Forms of Pleading and Practice--Annotated §§ 199.03-199.09

[Reserved]

§§ 199.03[Reserved]

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Chapter 199 DISCOVERY: PRESERVATION OF EVIDENCE
PART II. LEGAL BACKGROUND
A. Preservation of Evidence Before Action Is Commenced

16-199 California Forms of Pleading and Practice--Annotated § 199.10

§ 199.10 Governing Law

Proceedings to perpetuate testimony or preserve evidence prior to the commencement of an action are governed by *Code Civ. Proc. § 2035.010 et seq.*

In addition, the trial court has the inherent power to issue an injunction to prevent the potential destruction of evidence pending discovery, based on the trial court's inherent power to make orders facilitating discovery and the presentation of evidence, when the Civil Discovery Act does not provide an adequate remedy at law [*Dodge, Warren & Peters Ins. Serv., Inc. v. Riley (2003) 105 Cal. App. 4th 1414, 1419-1420, 130 Cal. Rptr. 2d 385* (in action by employer against terminated employees for misappropriation of trade secrets, unfair business practices, breach of fiduciary duty and breach of contract, trial court properly issued preliminary injunction against defendants, requiring preservation of electronic evidence by prohibiting defendants from destroying, deleting, or secreting from discovery any of their electronic storage media)].

For discussion of the duty to preserve electronic evidence and sanctions for e-discovery abuses, as well as other issues arising in e-discovery, see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*, §§ 195A.16, 195A.22, 195A.60. For points and authorities in support of an application for a temporary restraining order and preliminary injunction to preserve evidence pending a discovery order, see *California Points and Authorities, Ch. 116, Injunctions, § 116.31* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureRemediesInjunctionsGeneral Overview

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Chapter 199 DISCOVERY: PRESERVATION OF EVIDENCE
PART II. LEGAL BACKGROUND
A. Preservation of Evidence Before Action Is Commenced

16-199 California Forms of Pleading and Practice--Annotated § 199.11

§ 199.11 When Discovery Is Available Before Action Is Commenced

[1] To Prevent Failure or Delay of Justice

A person may file a verified petition under *Code Civ. Proc. § 2035.030* if he or she desires to perpetuate his or her own testimony, or that of another person, or preserve evidence for use in any action that may be cognizable in any court of California [*Code Civ. Proc. § 2035.030*].

An order authorizing all or part of the discovery is proper if the court determines that the discovery requested may prevent a failure or delay of justice [*Code Civ. Proc. § 2035.050(a)*]. In determining whether to authorize discovery by a petitioner who expects a successor in interest to be a party to the action, the court must consider, in addition to other appropriate factors, whether the requested discovery could be conducted by the petitioner's successor in interest, instead of by the petitioner [*Code Civ. Proc. § 2035.050(a)*].

[2] Not for Investigative Purposes

Code Civ. Proc. § 2035.010 et seq. is designed for the perpetuation of testimony or the preservation of evidence for use in the event that an action is subsequently brought [*Code Civ. Proc. § 2035.010(a)*; *see Campbell Chain Co. v. Alameda County (1970) 12 Cal. App. 3d 248, 257, 90 Cal.Rptr. 501* (former *Code Civ. Proc. § 2017* intended to permit perpetuation of testimony for use in actual legal action that cannot be presently brought)]. *Code Civ. Proc. § 2035.010 et seq.* may not be used for the purpose either of ascertaining the possible existence of a cause of action or a defense to it, or of identifying those who might be made parties to an action not yet filed [*Code Civ. Proc. § 2035.010(b)*].

In other words, the procedure is not designed for purely investigative or discovery purposes but for the preservation of evidence for introduction in a probable future court case [*see Hunt-Wesson Foods, Inc. v. County of Stanislaus (1969) 273 Cal. App. 2d 92, 98, 77 Cal. Rptr. 832* ; *see also* Reporter's Notes to Proposed *Code Civ. Proc. § 2035(a)*; *see also Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.13[2]*]. If testimony or evidence sought to be preserved cannot be used in an actual legal action, *Code Civ. Proc. § 2035.010 et seq.* may not be used simply as a means to obtain that information [*see Hunt-Wesson Foods, Inc. v. Stanislaus County (1969) 273 Cal. App. 2d 92, 98, 77 Cal. Rptr. 832* (depositions that could not be used in anticipated board of equalization hearing not authorized to be taken

under former *Code Civ. Proc. § 2017*)].

[3] Not When Declaratory Relief Is Available

The petitioner seeking an order under *Code Civ. Proc. § 2035.010 et seq.* must show that he or she is unable to bring the expected action or to cause it to be brought [*see Code Civ. Proc. § 2035.030(b)(2)*]. If petitioner may bring an action for relief by declaratory judgment [*see Code Civ. Proc. §§ 1060-1062.5* and Ch. 182, *Declaratory Relief*], then it would appear that his or her petition could not properly contain the necessary allegation that an action could not be brought [*see* DeMeo, California Deposition and Discovery Practice , Ch. 65, *Perpetuation of Testimony and Preservation of Evidence* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsPerpetuation of Testimony

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PART II. LEGAL BACKGROUND
A. Preservation of Evidence Before Action Is Commenced

16-199 California Forms of Pleading and Practice--Annotated § 199.12

§ 199.12 Discovery Methods Available for Perpetuation or Preservation

Where a proper showing is made [*see* discussion in *§ 199.14[1]*], the court may make an order authorizing any or all of the following discovery methods [*Code Civ. Proc. § 2035.020*]:

- Oral and written depositions.
- Inspections of documents, things, and places.
- Physical and mental examinations.

If the court authorizes the use of one or more of these methods, discovery must then be conducted in accordance with the provisions of *Code Civ. Proc. §§ 2016.010-2036.050* that govern the particular discovery method to be used [*Code Civ. Proc. § 2035.050(c)*]. For detailed discussion and forms relating to the provisions that generally govern these particular discovery methods, see respectively Ch. 193, *Discovery: Depositions* , Ch. 195, *Discovery: Inspection of Tangible Evidence*, and Ch. 197, *Physical and Mental Examinations*.

There is no requirement that discovery be conducted in a particular sequence, such as by taking a deposition before ordering an inspection or an examination [*see Block v. Superior Court (1963) 219 Cal. App. 2d 469, 477, 33 Cal. Rptr. 205* (decided under prior discovery act)]. Use of the discovery methods authorized under *Code Civ. Proc. § 2035.010 et seq.* is, however, subject to the general scope of discovery delimited by *Code Civ. Proc. § 2017.010 et seq.* and the general restrictions of *Code Civ. Proc. § 2019.010 et seq.* [*Code Civ. Proc. § 2035.010(a)*]. Under *Code Civ. Proc. § 2019.010 et seq.*, for example, a court may in fact issue an order regulating the manner, timing, and sequence of discovery. For detailed discussion and forms relating to the general scope and regulation of discovery under *Code Civ. Proc. §§ 2017.010 et seq.* and *2019.010 et seq.*, see Ch. 190, *Discovery: Scope, Regulation and Timing* .

Legal Topics:

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

Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsWritten Depositions

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16-199 California Forms of Pleading and Practice--Annotated § 199.13

§ 199.13 Petition for Leave to Conduct Discovery

[1] Contents of Petition

The person who wants to perpetuate the testimony or to preserve evidence must file a verified petition [*Code Civ. Proc. § 2035.030(a)*].

The petition must be titled in the name of the petitioner and show all of the following [*Code Civ. Proc. § 2035.030(b)*]:

- That the petitioner, or the petitioner's successor in interest, expects to be a party to an action cognizable in a court in California.

- The present inability of the petitioner, and, if applicable, the petitioner's successor in interest, to bring the action or cause it to be brought.

- The subject matter of the expected action and petitioner's involvement. If the validity or construction of a written instrument may be called into question or is connected to the subject matter of the proposed discovery, a copy of that written instrument must be attached to the petition.

- The particular discovery methods that the petitioner desires to employ.

- The facts that petitioner desires to establish by the proposed discovery.

- The petitioner's reasons for desiring to perpetuate or preserve these facts before the action is brought.

- The names or descriptions of the persons petitioner expects will be adverse parties so far as known.

- The names and addresses of those from whom the discovery is to be sought.

- The substance of the information expected to be elicited from each of those from whom discovery is being sought.

- A request for an order authorizing the petitioner to engage in discovery by the described methods for the purpose of perpetuating the described testimony or preserving the described evidence.

For a form of petition under *Code Civ. Proc. § 2035.030(a)*, see *§ 199.60*. For procedural checklists relating to this motion, see *§ 199.40* et seq.

[2] Court in Which Petition Must Be Filed

The petition must be filed in the superior court in the county of the residence of at least one expected adverse party, or if no expected adverse party is a resident of California, in the superior court of a county where the action or proceeding may be filed [*Code Civ. Proc. § 2035.030(a)*].

[3] Notice of Petition

Petitioner must give notice to each natural person or organization named in the petition as an expected adverse party, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition [*Code Civ. Proc. § 2035.040(a), (b)*]. A copy of the petition must be served with the notice [*Code Civ. Proc. § 2035.040(b)*].

For a form for a notice of petition under *Code Civ. Proc. § 2035.040*, see *§ 199.61*. For procedural checklists relating to this notice, see *§ 199.40*.

[4] Service of Notice and Petition

The notice and a copy of the petition must be served at least 20 days before the date of the hearing [*Code Civ. Proc. § 2035.040(c)*]. Service is to be made in the manner provided for service of summons [*Code Civ. Proc. § 2035.040(a)*; for the manner of service of summons, *see Code Civ. Proc. §§ 413.10-417.40* and Ch. 518, *Service of Summons and Papers*].

If service cannot be made with due diligence on any expected adverse party named in the petition, the court shall make an order for service by publication [*Code Civ. Proc. § 2035.040(d)*; *see also Code Civ. Proc. § 415.50* (service of summons by publication)].

If there is any doubt concerning the adequacy of notice to a particular expected adverse party, a petitioner should seek an order of service by publication on that party. This will ensure that the party is properly represented at the deposition [*see* discussion in [5], *below*]. For discussion of the potential exclusion of deposition testimony as to any expected adverse party who does not receive adequate notice and is not represented at the deposition, *see § 199.15*.

[5] Appointment of Attorney When Service Is by Publication

If any expected adverse party served by publication does not appear at the hearing, the court must appoint an attorney to represent that party for all purposes, including the cross examination of any person whose testimony is taken by deposition. The court must order that the petitioner pay the reasonable fees and expenses of any attorney so appointed [*Code Civ. Proc. § 2035.040(e)*].

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedureCounselAppointmentsCivil ProcedureDiscoveryMethodsPerpetuation of Testimony

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16-199 California Forms of Pleading and Practice--Annotated § 199.14

§ 199.14 Order

[1] Showing Required

The court may make its order authorizing all or a part of the discovery requested if the court determines that the discovery may prevent a failure or delay of justice [*See Code Civ. Proc. § 2035.050*].

For a form for a proposed order under *Code Civ. Proc. § 2035.050*, see *§ 199.62*.

[2] Contents of Order

An order made under *Code Civ. Proc. § 2035.050* must identify any witness whose deposition may be taken, and any documents, things, or places that may be inspected, and any person whose physical or mental condition may be examined [*Code Civ. Proc. § 2035.050(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of Testimony

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16-199 California Forms of Pleading and Practice--Annotated § 199.15

§ 199.15 Use of Deposition to Perpetuate Testimony

A deposition to perpetuate testimony taken under *Code Civ. Proc. § 2035.010 et seq.* or under comparable provisions of the laws of the state, the federal courts, or a foreign nation, in which it was taken, may be used in any action involving the same subject matter brought in a court of California. The deposition may be used in accordance with the provisions of *Code Civ. Proc. § 2025.620* (use of oral depositions) [*Code Civ. Proc. § 2035.060*].

Under *Code Civ. Proc. § 2025.620*, deposition testimony may be used at trial subject only when it is otherwise admissible under the rules of evidence and only against parties who had proper notice of the deposition. Thus, a petitioner who perpetuates a deponent's testimony under *Code Civ. Proc. § 2035.010 et seq.* may ultimately be unable to use that testimony in a later action against an expected adverse party who did not receive proper notice and was not present or properly represented at the deposition. For example, one court concluded that notice under former *Code Civ. Proc. § 2035(e)* (*now see Code Civ. Proc. § 2035*..040) was inadequate as to a defendant nurse, when the notice was given to the nurse in care of the attorneys for two defendant hospitals, neither of which were the nurse's employer. As a result, the nurse did not appear either personally or through representation at the hearing on the petition or at the deposition. The court held that testimony perpetuated at the deposition was properly excluded as to the nurse [*N.N.V. v. American Assn. of Blood Banks (1999) 75 Cal.App. 4th 1358, 1395-1396, 89 Cal. Rptr. 2d 885* (noting also that even if notice were adequate, the testimony at issue was inadmissible under the rules of evidence)].

For further discussion of *Code Civ. Proc. § 2025.620*, see *Ch. 193, Discovery: Depositions, § 193.90* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureTrialsDepositionsEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral Overview

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16-199 California Forms of Pleading and Practice--Annotated §§ 199.16-199.19

[Reserved]

§§ 199.16[Reserved]

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16-199 California Forms of Pleading and Practice--Annotated § 199.20

§ 199.20 Governing Law

Proceedings to perpetuate testimony or to preserve evidence pending an appeal from a judgment of any California court, or before taking an appeal if the time for appeal has not expired, are governed by *Code Civ. Proc. § 2036.010 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureAppealsGeneral Overview

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16-199 California Forms of Pleading and Practice--Annotated § 199.21

§ 199.21 When Discovery Pending Appeal Is Allowed

If an appeal has been taken from a judgment of any California court, or if the time for taking an appeal has not expired, a party may obtain discovery to perpetuate testimony or to preserve evidence for use in the event of further proceedings in that court [*Code Civ. Proc. § 2036.010*; *see also § 199.11[1]*]. This situation may arise when a complaint is dismissed after a demurrer to the complaint has been sustained without leave to amend, and the plaintiff has appealed. Since so much time will elapse before the appeal is decided, it may be necessary to perpetuate testimony or to preserve evidence to be used at trial [*see* DeMeo, California Deposition and Discovery Practice , Ch. 65, *Perpetuation of Testimony and Preservation of Evidence* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureAppealsGeneral Overview

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16-199 California Forms of Pleading and Practice--Annotated § 199.22

§ 199.22 Discovery Methods Available for Perpetuation or Preservation

The discovery methods available to preserve evidence pending an appeal are the following [*Code Civ. Proc. § 2036.020*]:

- Oral and written depositions.
- Inspections of documents, things, and places.
- Physical and mental examinations.

If the court authorizes the use of one or more of these methods, discovery is then required to be conducted in accordance with the provisions of *Code Civ. Proc. §§ 2016.010-2036.050* that govern the particular discovery method authorized [*Code Civ. Proc. § 2036.040(c)*]. Use of these discovery methods is also subject to the general scope of discovery delimited by *Code Civ. Proc. § 2017.010 et seq.* and the general restrictions of *Code Civ. Proc. § 2019.010 et seq.* [*Code Civ. Proc. § 2036.010*].

For detailed discussion and forms relating to provisions that generally govern the particular discovery methods that may be used under *Code Civ. Proc. § 2036.010 et seq.*, see respectively Ch. 193, *Discovery: Depositions* , Ch. 195, *Discovery: Inspection of Tangible Evidence* , and Ch. 197, *Physical and Mental Examinations* . For detailed discussion and forms relating to the general scope and regulation of discovery under *Code Civ. Proc. §§ 2017.010 et seq.* and *2019.010 et seq.*, see Ch. 190, *Discovery: Scope, Regulation and Timing* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsWritten Depositions

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16-199 California Forms of Pleading and Practice--Annotated § 199.23

§ 199.23 Notice of Motion

A party may request leave to obtain discovery must bring a motion in the trial court that entered the judgment subject to the pending appeal, on the same notice and service as required for discovery sought in an action pending in that court [*Code Civ. Proc. § 2036.030(a)*; *see Code Civ. Proc. §§ 2025.010 et seq.* (depositions), 2031.010 et seq. (inspection of documents, tangible things, or electronically stored information), 2032.010 et seq. (physical and mental examinations)].

The party must show the names or addresses of the natural persons or organizations from whom the discovery is sought, the methods of discovery for which authorization is sought, and the reasons for perpetuating testimony or preserving evidence [*Code Civ. Proc. § 2036.030(b)*].

For a form for a notice of motion under *Code Civ. Proc. § 2036.030*, see *§ 199.70*. For procedural checklists relating to this motion, see *§ 199.50*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureAppealsGeneral Overview

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16-199 California Forms of Pleading and Practice--Annotated § 199.24

§ 199.24 Order

The court may make an order authorizing discovery if it finds that all or part of the discovery requested in the motion may prevent a failure or delay of justice in the event of further proceedings in the trial court following the appeal [*Code Civ. Proc. § 2036.040*].

The order must identify any witness whose deposition may be taken, any documents, things, or places that may be inspected, and any person whose physical or mental condition may be examined [*Code Civ. Proc. § 2036.040(b)*].

For a form for a proposed order under *Code Civ. Proc. § 2036.040*, see *§ 199.71*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureAppealsGeneral Overview

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16-199 California Forms of Pleading and Practice--Annotated § 199.25

§ 199.25 Use of Deposition to Perpetuate Testimony

A deposition to perpetuate testimony taken under *Code Civ. Proc. § 2036.010 et seq.* may be used in any later proceeding in accordance with the provisions of *Code Civ. Proc. § 2025.620* (use of oral depositions) [*Code Civ. Proc. § 2036.050*]. For discussion of use at trial of a deposition under *Code Civ. Proc. § 2025.620*, see *§ 199.15* and *Ch. 193, Discovery: Depositions, § 193.90* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureTrialsDepositionsCivil ProcedureAppealsGeneral Overview

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16-199 California Forms of Pleading and Practice--Annotated §§ 199.26-199.29

[Reserved]

§§ 199.26[Reserved]

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16-199 California Forms of Pleading and Practice--Annotated § 199.30

§ 199.30 Matthew Bender Publications

For comprehensive discussion and forms relating to procedures to perpetuate testimony or preserve evidence, see DeMeo, California Deposition and Discovery Practice , Ch. 65, *Perpetuation of Testimony and Preservation of Evidence* (Matthew Bender), and Hogan & Weber's, California Civil Discovery, Ch. 14, *Pre-Suit and Post-Suit Discovery* (Matthew Bender)

For memoranda of points and authorities relating to discovery before an action commences or pending appeal, see California Points and Authorities , Ch. 89, *Discovery: Preservation of Evidence* (Matthew Bender)

For discussion of analogous discovery under the federal rules, see Moore's Federal Practice, Ch. 27, *Depositions or Other Discovery Before Action or Pending Appeal* (3d ed. Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureAppealsGeneral Overview

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16-199 California Forms of Pleading and Practice--Annotated § 199.31

§ 199.31 State Statutes

Discovery to preserve evidence before action is commenced. *Code Civ. Proc. § 2035.010 et seq.*

Discovery to preserve evidence pending appeal. *Code Civ. Proc. § 2036.010 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureAppealsGeneral Overview

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16-199 California Forms of Pleading and Practice--Annotated § 199.32

§ 199.32 Decisions

Provisions regarding scope of examination and various limitations and protections against abuse which control other discovery procedures are applicable in proceeding to perpetuate testimony under former *Code Civ. Proc. § 2017. Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 372, 15 Cal. Rptr. 90, 364 P.2d 266*

Petition to preserve evidence under *Code Civ. Proc. § 2035.010 et seq.* did not constitute "an action" for purposes of statute of limitations in *Gov. Code § 945.6(a)(1)*; procedure to perpetuate testimony or to preserve evidence "does not provide the petitioner with any further relief beyond obtaining discovery materials." *Orr v. City of Stockton (2007) 150 Cal. App. 4th 622, 630-631, 58 Cal. Rptr. 3d 662*

In action by employer against terminated employees for misappropriation of trade secrets, unfair business practices, breach of fiduciary duty and breach of contract, trial court properly issued preliminary injunction against defendants, requiring preservation of electronic evidence by prohibiting defendants from destroying, deleting, or secreting from discovery any of their electronic storage media, based on trial court's inherent power to make orders facilitating discovery and presentation of evidence, when Discovery Act does not provide an adequate remedy at law. *Dodge, Warren & Peters Ins. Serv., Inc. v. Riley (2003) 105 Cal. App. 4th 1414, 1419-1420, 130 Cal. Rptr. 2d 385*

Notice under former *Code Civ. Proc. § 2035(e)* (*now see Code Civ. Proc. § 2035.040*) was inadequate, and deposition testimony was properly excluded, as to defendant nurse, when plaintiffs gave notice to nurse only in care of counsel for two defendant hospitals that did not employ defendant nurse, and nurse consequently was not properly represented at deposition. *N.N.V. v. American Assn. of Blood Banks (1999) 75 Cal. App. 4th 1358, 1395-1396, 89 Cal. Rptr. 2d 885*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureTrialsDepositionsEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral Overview

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16-199 California Forms of Pleading and Practice--Annotated § 199.33

§ 199.33 Text References

California Civil Discovery Practice, Ch. 4, *Scheduling and Preparing for Oral Depositions*, § 4.128 et seq, § 4.137 et seq. (Cal. CEB 3d ed. 2000)

Witkin, California Evidence, ch. X, *Discovery*, § 210 et seq. (4th ed. 2000)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsOral Depositions

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16-199 California Forms of Pleading and Practice--Annotated §§ 199.34-199.39

[Reserved]

§§ 199.34[Reserved]

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PART IV. PROCEDURAL CHECKLISTS
A. Preservation of Evidence Before Action Is Commenced

16-199 California Forms of Pleading and Practice--Annotated § 199.40

§ 199.40 Petitioner's Checklists

[1] Prepare Petition and Notice of Petition

1. Prepare verified petition [*Code Civ. Proc. § 2035.030*; *see § 199.60*].

2. Prepare notice stating that petitioner will apply to the court for order or orders prayed for in petition [*Code Civ. Proc. § 2035.040*; *see § 199.61*].

3. Prepare supporting memorandum. The memorandum is required [*see Cal. Rules of Ct., Rules 3.1130(a), 3.1113(a)*] in that the notice of petition is equivalent to a notice of motion [*see Code Civ. Proc. § 1064* (definitions of motions and orders in civil actions apply to similar acts in special proceedings)]. For general discussion and forms, see Ch. 417, *Points and Authorities* . For memoranda supporting a petition to perpetuate testimony or preserve evidence before an action is commenced, see California Points and Authorities, Ch. 89, *Discovery: Preservation of Evidence* (Matthew Bender).

4. Prepare proposed order [*Code Civ. Proc. § 2035.050*; *see § 199.62*].

[2] Serve Notice

1. The notice of petition must be served, together with a copy of the petition and accompanying papers, on each natural person or organization named in the petition as an expected adverse party [*Code Civ. Proc. § 2035.040*].

2. Service must be effected at least 20 days before the date set in the notice for the hearing [*Code Civ. Proc. § 2035.040(c)*].

3. Service is required to be in the same manner as service of summons [*Code Civ. Proc. § 2035.040(a)*; *see Code Civ. Proc. §§ 415.10-415.47*; for methods of service of summons, see Ch. 518, *Service of Summons and Papers*].

4. If after due diligence the petitioner is unable to cause service on any expected adverse party, petitioner must apply for an order of service of publication. In this situation the court in which the petition is filed may make such an order [*see Code Civ. Proc. § 2035.040(d)*; *see also Code Civ. Proc. § 415.50* (service by publication), and Ch. 518, *Service of Summons and Papers*; for discussion and forms relating to ex parte applications generally, *see* Ch. 372, *Motions and Orders*].

NOTE:

If service by publication must be requested for one or more of the anticipated adverse parties, counsel will probably need to prepare a new notice of petition, to ensure that the hearing date is at least 20 days after the completion of service by publication. Such service is deemed complete when the notice is published the requisite number of times over the specified period of time as provided in *Gov. Code § 6064* [*see* *Code Civ. Proc. § 415.50*]. It may thus be necessary to serve the papers again, with the new date of hearing, on any other expected adverse party who was already served with the original notice.

[3] File Papers

1. File original copy of verified petition and accompanying papers with the clerk of the superior court in a county in which any of the persons named in the petition as expected adverse parties to the anticipated action reside, or, if none of the parties resides in California, in the county in which the action may be filed [*see Code Civ. Proc. § 2035.030(a)*].

2. Pay filing fee for first paper filed in a special proceeding [*see Gov. Code §§ 26820, 70611*].

3. Prepare and file signed original proof of service of copies of petition, notice of petition, and supporting memorandum of points and authorities on expected adverse parties [*see Code Civ. Proc. §§ 417.10-417.40* and Ch. 518, *Service of Summons and Papers*].

[4] Hearing and Post Hearing Matters

1. Appear at hearing and present argument if necessary.

2. If any expected adverse party who has been served with notice by publication does not appear at the hearing, the court appoints an attorney to represent that person [*Code Civ. Proc. § 2035.040(e)*; *see* [2], *above*].

3. If the court grants the petition, prepare proposed order if not previously prepared [*see 199.62*], submit for judge's signature, and file original signed order.

NOTE:

Under *Code Civ. Proc. § 1019.5(a)*, when a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order [*see* Ch. 372, ***Motions and Orders***] must be given by the prevailing party to all other parties or to their attorneys, in the manner provided in *Code Civ. Proc. §§ 1010-1020* [***see*** Ch. 518, ***Service of Summons and Papers***], unless notice is waived by all parties in open court and is entered in the minutes.

[5] Conduct Discovery Authorized by Court

Conduct discovery authorized by the order in accordance with provisions governing the method or methods of discovery authorized [*see Code Civ. Proc. §§ 2035.020, 2035.050(c)*; *see also* Ch. 193, *Discovery: Depositions* , Ch.

195, *Discovery: Inspection of Tangible Evidence* , and Ch. 197, *Physical and Mental Examinations*]. A copy of the order of authorization should be attached to any deposition notice, demand for production, etc.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsWritten Depositions

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A. Preservation of Evidence Before Action Is Commenced

16-199 California Forms of Pleading and Practice--Annotated § 199.41

§ 199.41 Checklist for Expected Adverse Party

1. Prepare memorandum opposing petition, any opposing declarations or affidavits, and proof of service of opposing papers.

2. If desired, prepare counterpetition for protective order, patterned after the noticed motions for protective orders authorized under the Discovery Act in relation to the discovery sought in the petition [*see, e.g., Code Civ. Proc. §§ 2025.420, 2031.060, 2032.510(d), (e)* and discussion of protective orders in Ch. 193, *Discovery: Depositions*, Ch. 195, *Discovery: Inspection of Tangible Evidence*, and Ch. 197, *Physical and Mental Examinations*].

2. Serve opposing papers, and counterpetition, if any, and file with proof of service.

3. Appear at hearing and present opposing argument if necessary.

4. Prepare, serve and file order denying petition if so directed by court [*see* discussion of this procedure in § 199.40[4].

5. If discovery is granted, consider procedures available under the general provisions governing the discovery method authorized by the order, *e.g.*, protective orders under *Code Civ. Proc. §§ 2025.420, 2031.060*, or *2032.510(d), (e)* [*see* discussion and forms in Ch. 193, *Discovery: Depositions* , Ch. 195, *Discovery: Inspection of Tangible Evidence* , and Ch. 197, *Physical and Mental Examinations*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryMethodsWritten Depositions

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16-199 California Forms of Pleading and Practice--Annotated §§ 199.42-199.49

[Reserved]

§§ 199.42[Reserved]

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16-199 California Forms of Pleading and Practice--Annotated § 199.50

§ 199.50 Moving Party's Checklist

1. Prepare notice of motion, supporting declaration, and supporting memorandum of points and authorities [*Code Civ. Proc. § 2036.030*; *see* checklist of analogous procedures under *Code Civ. Proc. § 2035.010 et seq.* in § 199.40[1]]. For form of motion, see *§ 199.70*. For detailed discussion of motion procedure generally, see Ch. 372, *Motions and Orders* . For memoranda of points and authorities supporting a petition to perpetuate testimony or preserve evidence before an action is commenced, see California Points and Authorities, Ch. 89, *Discovery: Preservation of Evidence* (Matthew Bender).

2. Prepare proof of service [*see* Ch. 518, *Service of Summons and Papers*].

3. Serve papers and file in court that entered judgment from which appeal was taken [*Code Civ. Proc. § 2036.030(a)*; *see Code Civ. Proc. §§ 1010-1020* and Ch. 518, *Service of Summons and Papers*].

4. Appear at hearing on motion and present argument if necessary.

5. If the court grants the motion, prepare proposed order if not previously prepared [*see § 199.71*], submit for judge's signature, and file original signed order.

6. Conduct discovery authorized by the order in accordance with provisions governing the method or methods of discovery authorized [*see Code Civ. Proc. §§ 2036.010, 2036.020, 2035.040(c)*; *see also* Ch. 193, *Discovery: Depositions* , Ch. 195, *Discovery: Inspection of Tangible Evidence* , and Ch. 197, *Physical and Mental Examinations*]. A copy of the order of authorization should be attached to any deposition notice, demand for production, etc.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureAppealsGeneral Overview

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16-199 California Forms of Pleading and Practice--Annotated § 199.51

§ 199.51 Opposing Party's Checklist

Adapt procedures *set out in § 199.41*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of TestimonyCivil ProcedureAppealsGeneral Overview

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16-199 California Forms of Pleading and Practice--Annotated §§ 199.52-199.59

[Reserved]

§§ 199.52[Reserved]

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16-199 California Forms of Pleading and Practice--Annotated § 199.60

§ 199.60 Proceedings to Perpetuate Testimony or to Preserve Evidence Before Action Is Commenced [Code Civ. Proc. § 2035.010 et seq.]--Petition [Code Civ. Proc. § 2035.030]

[1] FORM Proceedings to Perpetuate Testimony or to Preserve Evidence Before Action Is Commenced [Code Civ. Proc. § 2035.010 et seq.]--Petition [Code Civ. Proc. § 2035.030]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Petition of _____ [*name*], Petitioner, to _____ [Perpetuate the Testimony of _____ (*name*(*s*)) *and/or* Preserve Evidence].	))))))	NO. _____ PETITION TO _____ [PERPETUATE TESTIMONY *and/or* PRESERVE EVIDENCE]

_____

Petitioner, _____ [*name*], alleges:

1. Petitioner expects to be a _____ [plaintiff *or* defendant *or* party litigant] in an action cognizable in a court in the State of California, namely an action _____ [*state nature and character of action sufficiently to show that it is capable of being heard and determined in a California court*]. Petitioner's expectation is based on _____ [*set forth facts showing why petitioner expects the action to be brought*].

2. Petitioner is presently unable to _____ [bring the action *or* cause the action to be brought] because _____ [*specify*].

3. The subject matter of the expected action is _____ [*specify*].

4. Petitioner's interest in the expected action is _____ [*specify*].

5. Petitioner expects the following _____ [persons *and/or* entities] to be adverse parties in the anticipated action: _____ [*give names or descriptions and addresses of adverse parties so far as known*].

6. Petitioner desires to employ the following discovery methods to preserve evidence in the event that an action is subsequently filed: _____ [*specify one or more methods authorized by Code Civ. Proc. § 2035.020*].

7. Petitioner's seeks leave to preserve evidence by means of the proposed discovery because _____ [*state reason or reasons why the perpetuation of testimony or preservation of evidence may prevent a failure or delay of justice*].

[*Use the following paragraphs, as appropriate, to state the name and address of each person or entity from whom discovery is sought, the discovery method to be used for each, and the substance of the information expected to be elicited from each.*]

[*EITHER*]

8. Petitioner desires to examine _____ [*name and address of deponent*] by _____ [oral *or* written] deposition. Petitioner expects to elicit from _____ [*name of deponent*] the following information: _____ [*give substance of information*].

[*AND/OR*]

9. Petitioner desires to subject _____ [*name and address of party to be examined*] to a _____ [physical *and/or* mental examination conducted by _____ [*name and profession of examiner*]. Petitioner expects to discover the following information as a result of the examination: _____ [*give substance of information*].

[*AND/OR*]

10. Petitioner desires to inspect _____ [*identify documents or things or places to be inspected*], which _____ [is *or* are] in the possession, custody, or control of _____ [*name and address of person from whom discovery sought*]. Petitioner expects to discover the following information as a result of the inspection: _____ [*give substance of information*].

[*CONTINUE*]

WHEREFORE, petitioner prays for an order authorizing the petitioner to _____ [*specify, e.g.,* take the oral deposition of _____ (*name*) for the purpose of perpetuating his/her testimony, as described in Paragraph 9], pursuant to *Code of Civil Procedure Section 2035.010 et seq.*

_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

The form of petition set out in [1], *above*, is for use by a person wishing to perpetuate testimony or preserve evidence, prior to the commencement of an action. It may be used to seek discovery by oral and written depositions, inspections of documents, things and places, and physical and mental examinations [*Code Civ. Proc. § 2035.020*]. It may not be used to ascertain the possible existence of a cause of action or defense or to identify those who might be made parties to an action not yet filed [*Code Civ. Proc. § 2035.010(b)*].

This petition must be verified and filed in the superior court of any county where an expected adverse party to the anticipated action resides, or if no expected adverse party resides in California, in the county where the action may be filed [*Code Civ. Proc. § 2035.030(a)*].

The petition is required to accompanied by a supporting memorandum [*see Cal. Rules of Ct., Rules 3.1103(a)* 3.1113(a)] in that the required notice of petition [§ 199.61] makes the petition the functional equivalent of a noticed motion [*see Code Civ. Proc. § 1064* (definitions of motions and orders in civil actions apply to similar acts in special proceedings)]. For general discussion and forms relating to memoranda see Ch. 417, *Points and Authorities* . For memoranda supporting a petition to perpetuate testimony or preserve evidence before an action is commenced, see California Points and Authorities, Ch. 89, *Discovery: Preservation of Evidence* (Matthew Bender).

For discussion of the contents of the petition, see *§ 199.13[1]*. For discussion and checklists relating to the procedures relating to the petition, see *§§ 199.13* and *199.40*.

[3] Cross References

For alternative forms of verification, see Ch. 572, *Verification*

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16-199 California Forms of Pleading and Practice--Annotated § 199.61

§ 199.61 Proceedings to Perpetuate Testimony or to Preserve Evidence Before Action Is Commenced--Notice of Petition [Code Civ. Proc. § 2035.040]

[1] FORM Proceedings to Perpetuate Testimony or to Preserve Evidence Before Action Is Commenced--Notice of Petition [Code Civ. Proc. § 2035.040]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	NOTICE OF PETITION FOR
	)	ORDER AUTHORIZING _____
Petition of _____ [*name*],	)	[PERPETUATION OF TESTIMONY *and/or* PRE-
Petitioner,	)	SERVATION OF
to _____ [Perpetuate the	)	EVIDENCE]
Testimony of _____	)	Date: _____
(*name*(*s*)) *and/or* Preserve Evidence.]	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*persons named in petition as expected adverse parties*]:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], petitioner will, and hereby

does, apply to the court for an order authorizing him/her to _____ [*specify order sought, e.g.,* take the deposition(s) of _____ (*designate or describe person(s) to be examined*) on _____ (oral examination *or* written interrogatories) for the purpose of _____ (perpetuating his/her/their testimony *and/or* preserving evidence)], and for all other proper orders, as requested in the attached petition to _____ [perpetuate testimony *and/or* preserve evidence]. Petitioner will apply for this order on the ground that the requested _____ [perpetuation of testimony *and/or* preservation of evidence] may prevent a failure or delay of justice, as more fully appears in the attached petition to _____ [perpetuate testimony *and/or* preserve evidence].

This application will be based on this notice, and on the attached petition to _____ [perpetuate testimony *and/or* preserve evidence] and memorandum of points and authorities.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[2] Use of Form

The form of notice of petition set out in [1], *above*, is for use by a petitioner in providing the required notice of a petition under *Code Civ. Proc. § 2035.040*, such as the form of petition *set out in § 199.60*.

A copy of this form of notice, with a copy of the petition and accompanying papers attached, must be served in the same manner as a summons in a civil action is served [*see Code Civ. Proc. §§ 415.10-415.50*], on every natural person or organization named as an expected adverse party in the petition to perpetuate testimony or to preserve evidence [*Code Civ. Proc. § 2035.040*]. For further discussion and procedural checklist, see *§§ 199.13[3] -[5]* and *199.40[2]*.

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16-199 California Forms of Pleading and Practice--Annotated § 199.62

§ 199.62 Proceedings to Perpetuate Testimony or to Preserve Evidence Before Action Is Commenced--Order [Code Civ. Proc. § 2035.050]

[1] FORM Proceedings to Perpetuate Testimony or to Preserve Evidence Before Action Is Commenced--Order [Code Civ. Proc. § 2035.050]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Petition of _____ [*name*],	)	ORDER AUTHORIZING
Petitioner,	)	_____ [*specify discovery author-*
to _____ [Perpetuate the	)	*ized, e.g.,*
Testimony of _____	)	DEPOSITIONS TO PERPETUATE TESTIMONY]
(*name*(*s*)) *and/or* Preserve	)	Date: _____
Evidence].	)	Time: _____
	)	Location: _____

_____

The petition of _____ [*name*] for an order authorizing him/her to _____ [*specify order(s) sought, e.g.,* take the depositions of _____ (*designate or describe person(s) to be examined*)] came on regularly for hearing on _____ [*date*]. Petitioner appeared by counsel _____ [*name*]; _____ [*name(s) of each expected adverse parties*] appeared by his/her/their counsel, _____ [*name*(*s*)] [, respectively]. [_____ (*Name of any expected adverse party who was served by publication*) appeared by _____ (*name*), counsel appointed for him/her by this court.]

Proof having been made to the satisfaction of the court that the _____ [perpetuation of the testimony

of _____ (*name*(*s*) *and*/*or* preservation of evidence] may prevent a failure or delay of justice:

IT IS HEREBY ORDERED:

1. That petitioner is authorized and granted leave to _____ [*specify discovery authorized, e.g.,* take the deposition(s) of _____ (*designate or describe person*) on _____ (oral examination *or* written interrogatories) concerning _____ (*specify subject matter of the examination*)].
[_____ (*Repeat for each additional discovery authorized*)].

[2. _____ (*Specify such order as may be just concerning furnishing copies of transcripts or other documents, e.g.,* That petitioner furnish, at his/her expense, copies of the transcript(s) of deposition(s) to each of the expected adverse parties named above).]

[3. *Specify such order as may be just concerning payment of the taxable costs relating to the discovery method authorized that would be allowable to the prevailing party after the trial of an action.*]

[4. *Specify such order as may be just requiring petitioner to pay reasonable fees and expenses to court-appointed attorney representing expected adverse party who was served with the petition by publication and failed to appear.*]

[5. *Specify any other orders made by the court, e.g.,* protective orders.]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use where the court has granted a petition under *Code Civ. Proc. § 2035.010 et seq.* for authorization to conduct discovery to perpetuate testimony or to preserve evidence before an action is commenced [*see § 199.60* (form of petition)]. Paragraphs 2-5 include other orders which the court may make under *Code Civ. Proc. § 2035.050*, and counsel should include the particular orders made by the court.

For further discussion, see *§§ 99.11[1], 199.14, 199.40[4]*.

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16-199 California Forms of Pleading and Practice--Annotated §§ 199.63-199.69

[Reserved]

§§ 199.63[Reserved]

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16-199 California Forms of Pleading and Practice--Annotated § 199.70

§ 199.70 Proceedings for Order Authorizing Perpetuation of Testimony or Preservation of Evidence Pending Appeal [Code Civ. Proc. § 2036.010 et seq.]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Order Authorizing Perpetuation of Testimony or Preservation of Evidence Pending Appeal [Code Civ. Proc. § 2036.010 et seq.]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER AUTHORIZING _____
vs.	)	[PERPETUATION OF TESTIMONY *and/or* PRESERVATION OF EVIDENCE] PENDING APPEAL, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [*identify party, e.g.*, plaintiff] _____ [*name*] will, and hereby does, move the court for an order granting him/her leave to _____ [*specify discovery requested, e.g.*, take the depositions of _____ (*name*(*s*) *of person*(*s*) *to be examined*) on _____ (oral examination *or* written interrogatories)] for the purpose, in the event of further proceedings in this county, of _____ [*specify, e.g.*, perpetuating his/her/their testimony] pending the appeal that _____ [has been *or* may be] taken from the judgment in the above-entitled action and for all other proper orders. The motion will be made on the ground that the _____ [perpetuation of the requested testimony *and/or* preservation of the evidence] is proper to avoid a failure or delay of justice.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name*(*s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*identify moving party, e.g.*, plaintiff)].

2. On _____ [*date*], a judgment was rendered in the above-entitled court _____ [*specify, e.g.*, dismissing plaintiff _____'s (*name*) complaint after the court sustained defendant _____'s (*name*) demurrer without leave to amend].

3. _____ [An appeal has been taken by _____ (*identify party, e.g.*, plaintiff) _____ (*name*) from the judgment rendered by this court in the above-entitled action *or* The time for taking an appeal from the judgment rendered by this court in the above-entitled action has not expired, and it is anticipated that _____ (*identify party, e.g.*, plaintiff) _____ (*name*) will appeal from the judgment].

[*EITHER*]

4. _____ [*Identify moving party, e.g.*, Plaintiff] _____ [*name*] wishes to examine _____ [*name*], whose address is _____ [*specify*], and expects to elicit from his/her testimony _____ [*specify substance of expected testimony*].

[*AND/OR*]

5. _____ [*Identify moving party, e.g.,* Plaintiff] _____ [*name*] wishes to preserve evidence by _____ [*specify discovery method requested, e.g.,* having _____ (*name*) whose address is _____ (*specify*) and who is _____ (*identify, e.g.,* the defendant and cross complainant), physically examined by a physician specialized in _____ (*specify area of medical specialty*)]. _____ [*Identify moving party, e.g.,* Plaintiff] expects to establish from this _____ [*specify discovery method requested, e.g.,* examination] the following facts: _____ [*specify facts expected to be established*].

[*CONTINUE*]

[6. *Repeat preceding paragraph for each witness moving party desires to examine or each piece of evidence moving party desires to preserve.*]

7. _____ [*Identify moving party, e.g.,* Plaintiff] _____ [*name*] desires to _____ [perpetuate the testimony of _____ (*name*(*s*) *of witness*(*es*)) *and/or* preserve the evidence specified] because _____ [*set forth facts showing reasons for perpetuation of the testimony or preservation of the evidence establishing that the perpetuation or preservation is proper to avoid a failure or delay of justice*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM IN SUPPORT OF MOTION

[*Add memorandum supporting motion.*]

[2] Use of Form

The form of notice of motion and motion with supporting declaration set out in [1], *above*, is for use by a party seeking to obtain discovery by either taking depositions, inspecting documents, things, or places, or obtaining the physical or mental examination of a person for use in the event of further proceedings in the court in which judgment in an action has been rendered [*Code Civ. Proc. §§ 2036.020, 2036.030*]. It must be filed in the court in which judgment was rendered after an appeal has been taken or before the time for taking an appeal has expired [*see Code Civ. Proc. § 2036.010*].

The supporting declaration portion of the form is designed to comply with the provisions of *Code Civ. Proc. § 2036.030(b)* that the motion must show (1) the names and addresses of the natural persons or organizations from whom the discovery is being sought, (2) the methods of discovery for which authorization is being sought, and (3) the reasons for perpetuating testimony or preserving evidence. The declaration should also state sufficient facts to show that the perpetuation of testimony or preservation of evidence is proper to avoid a failure or delay of justice if there are further proceedings in the action in that court [*see Code Civ. Proc. § 2036.040(a)*].

A supporting memorandum must be served and filed with the form [*Cal. Rules of Ct., Rule 3.1113(a)*]. For general discussion and forms relating to memoranda, see Ch. 417, *Points and Authorities* . For memoranda supporting a petition to perpetuate testimony or preserve evidence before an action is commenced, see California Points and Authorities, Ch. 89, *Discovery: Preservation of Evidence* (Matthew Bender).

[3] Cross References

For discussion and forms relating to noticed motions and accompanying papers in general, see Ch. 372, *Motions and Orders*

For discussion and forms concerning service of papers and proof of service, see Ch. 518, *Service of Summons and Papers*

For discussion and forms for use in shortening or extending time requirements, see Ch. 524, *Shortening and Extension of Time*

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16-199 California Forms of Pleading and Practice--Annotated § 199.71

§ 199.71 Proceedings for Order Authorizing Perpetuation of Testimony or Preservation of Evidence Pending Appeal--Order [Code Civ. Proc. § 2036.040]

[1] FORM Proceedings for Order Authorizing Perpetuation of Testimony or Preservation of Evidence Pending Appeal--Order [Code Civ. Proc. § 2036.040]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER AUTHORIZING _____
vs.	)	[PERPETUATION OF TESTIMONY *or*
_____ [*name*],	)	PRESERVATION OF EVIDENCE] PENDING AP-
Defendant.	)	PEAL
	)	Date: _____
	)	Time: _____
	)	Location: _____

_____

The motion of _____ [*identify moving party, e.g.*, plaintiff] _____ [*name*] for an order _____ [*specify, e.g.*, authorizing him/her to take the deposition(s) of _____ (*person(s) to be examined*) on _____ (oral examination *or* written interrogatories)] for the purpose of _____ [perpetuating testimony *and/or* preserving evidence] for use in the event of further proceedings in this court, came on regularly for hearing on _____ [*date*]. Plaintiff _____ [*name*] appeared by counsel _____ [*name*]; defendant _____ appeared by counsel _____[*name*].

On proof being made to the satisfaction of the court that the _____ [*specify, e.g.*, perpetuation of the

testimony of _____ (*person*(*s*) *to be examined*] is proper to avoid a failure or delay of justice,

IT IS HEREBY ORDERED that the motion be and hereby is granted and that _____ [*identify moving party, e.g.*, plaintiff] _____ [*name*] is authorized to _____ [*specify, e.g.*, take the deposition(s) of _____ (*person*(*s*) *to be examined*) on _____ (oral examination *or* written interrogatories) concerning _____ (*specify subject matter of the examination*)].

[IT IS FURTHER ORDERED that _____ (*specify any further order of the court issued in accordance with the provisions governing the discovery method*(*s*) *authorized*).]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use where the court has granted a motion to perpetuate testimony or preserve evidence under *Code Civ. Proc. § 2036.040* [*see § 199.70* (form of motion)]. The last paragraph is to be included when the court has made further orders in accordance with the provisions governing the particular discovery method authorized [*see Code Civ. Proc. § 2036.040*].

For further discussion and checklist, see *§§ 199.24* and *199.50*.

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Chapter 200 DISCOVERY: REVIEW OF DISCOVERY ORDERS

16-200 California Forms of Pleading and Practice--Annotated 200.syn

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§ 200.25 Text References

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§ 200.40 Caption and Introduction for Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103] or for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]

[1] FORM

[2] Use of Form

§ 200.41 Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103] to Restrain Enforcement of Discovery Order

[1] FORM

[2] Use of Form

[3] Allegations

[4] Memorandum

[5] Adequate Record

[6] Certificate of Interested Persons or Entities

[7] Verification

[8] Timely Filing of Petition

[9] Number of Copies

[10] Praying for Relief in the Alternative

§ 200.42 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Issuance of Discovery Order

[1] FORM

[2] Use of Form

[3] Allegations

[4] Memorandum

[5] Adequate Record

[6] Verification

[7] Certificate of Interested Persons or Entities

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PART I. SCOPE

16-200 California Forms of Pleading and Practice--Annotated § 200.01

§ 200.01 Scope of Chapter

This chapter contains a discussion of and forms for use in obtaining appellate review of trial court orders in proceedings involving civil discovery.

The forms in include:

- A form for caption and introduction for a petition for writ of mandate or prohibition seeking review of a discovery order (§ 200.40).

- Forms for petition for writ of prohibition (§ 200.41) and mandate (§ 200.42) seeking, respectively, to restrain enforcement of a discovery order granted by the trial court or to compel issuance of a discovery order denied by the trial court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition

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16-200 California Forms of Pleading and Practice--Annotated § 200.02

§ 200.02 Cross References

[1] Related Discovery Chapters

- For discussion and forms relating to the general purpose, scope, regulation, and timing of civil discovery, see Ch. 190, *Discovery: Scope, Regulation, and Timing* .

- For detailed discussion of evidentiary privileges and other statutory or constitutional protections against disclosure, see Ch. 191, *Discovery: Privileges and Other Discovery Limitations* .

- For discussion and forms relating to discovery sanctions generally, see Ch. 192, *Discovery: Sanctions for Discovery Misuse* .

- For detailed discussion of discovery of electronically stored evidence (e-discovery), see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*.

- For discussion and forms relating to the use of other particular discovery methods authorized by the Civil Discovery Act, see the following chapters covering each method:

  - Ch. 193, *Discovery: Depositions*.

  - Ch. 194, *Discovery: Interrogatories*.

  - Ch. 195, *Discovery: Production or Inspection of Tangible Evidence*.

  - Ch. 196, *Discovery: Requests for Admissions*.

  - Ch. 197, *Discovery: Physical and Mental Examinations*.

  - Ch. 198, *Discovery: Exchange of Expert Witness Information*.

- For discussion and forms relating to the use of specified discovery methods for the purpose of preserving testimony or other evidence prior to the commencement of an action or pending an appeal, see Ch. 199, *Discovery: Preservation of Evidence* .

[2] Other Related Chapters

- For detailed discussion and forms relating to review proceedings by extraordinary writ of mandate and prohibition generally, see Ch. 358, *Mandate and Prohibition* .

- For discussion and forms relating to review of contempt proceedings by writ of review or habeas corpus generally, see Ch. 135, *Contempt* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsMental & Physical ExaminationsCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsWritten Depositions

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16-200 California Forms of Pleading and Practice--Annotated §§ 200.03-200.09

[Reserved]

§§ 200.03[Reserved]

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PART II. LEGAL BACKGROUND

16-200 California Forms of Pleading and Practice--Annotated § 200.10

§ 200.10 Governing Law

The review of a trial court discovery order by mandate is governed by *Code Civ. Proc. § 1084 et seq.* Writs of prohibition are governed by *Code Civ. Proc. § 1102 et seq.* General rules concerning writs of prohibition and mandate are contained in *Code Civ. Proc. § 1107 et seq.* Rules on original proceedings of mandate and prohibition in reviewing courts are contained in *Cal. Rules of Ct., Rule 8.490.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition

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PART II. LEGAL BACKGROUND

16-200 California Forms of Pleading and Practice--Annotated § 200.11

§ 200.11 Appeal of Discovery Orders

[1] Generally Not Separately Appealable

Orders relating to discovery generally are not separately appealable, but, instead, are reviewable on appeal from the judgment finally entered in the action [*Southern Pacific Co. v. Oppenheimer (1960) 54 Cal. 2d 784, 786, 8 Cal. Rptr. 657, 356 P.2d 441* ; *Peterson v. General Motors Corp. (1993) 19 Cal. App. 4th 1330, 1332-1333, 23 Cal. Rptr. 2d 768* ; *Clausing v. San Francisco Unified School Dist. (1990) 221 Cal. App. 3d 1224, 1241, 271 Cal. Rptr. 72]* .

The merits of a discovery order may not always be subjected to a thorough review since appellate courts are much more reluctant to overturn the judgment of a trial court after a full trial because of a procedural error, unless the error is so prejudicial that it constitutes a miscarriage of justice [*Wooldridge v. Mounts (1962) 199 Cal. App. 2d 620, 629, 18 Cal. Rptr. 806]* . Moreover, by the time a final judgment is entered, the harm presented by the discovery has already occurred, and a decision on appeal of the final judgment may not remedy the situation.

[2] Exception When Discovery Unrelated to Merits of Case

When the discovery sought does not relate to the merits of the underlying case, however, a discovery order may be appealed prior to a final judgment [*Gregori v. Bank of America (1989) 207 Cal. App. 3d 291, 310, 254 Cal. Rptr. 853]* . Thus, in a lender liability action brought by a growers' cooperative against its bank, when the plaintiff's attorney initiated and maintained an undisclosed social relationship with the defense counsel's secretary, who was familiar with all aspects of the litigation, the trial court's order on a motion to compel further discovery regarding the nature of that relationship and the matters that may have been discussed was immediately appealable. The court of appeal reasoned that the discovery sought did not relate to the merits of the lender liability case and that, considering the substance of the defendant's claim, resolution of the discovery issue could not be deferred until final judgment was rendered [*Gregori v. Bank of America (1989) 207 Cal. App. 3d 291, 310, 254 Cal. Rptr. 853]* .

[3] Postjudgment Order That Affects Judgment or Relates to Its Enforcement

To be appealable, a postjudgment order must raise issues different from those arising from an appeal from the judgment, and must affect the judgment or relate to its enforcement. For example, an appeal from an order denying attorney's fees

pursuant to former *Code Civ. Proc. § 2033(o)* (*now see Code Civ. Proc. § 2033.420*) (sanction for unwarranted failure to admit discovery request) raises issues different from those arising from the judgment itself. Secondly, the order affects the judgment or relates to its enforcement because it determines the rights and liabilities of the parties arising from the judgment, is not preliminary to later proceedings, and will not become subject to appeal after some future judgment. Therefore, the order is appealable [*Lakin v. Watkins Associated Industries (1993) 6 Cal. 4th 644, 651-656, 25 Cal. Rptr. 2d 109, 863 P.2d 179]* .

[4] Sanction Orders

Whether denial of a motion for sanctions is appealable "is far from settled" [*Muller v. Fresno Community Hospital & Medical Ct. (2009) 172 Cal. App. 4th 887, 897-898, 91 Cal. Rptr. 3d 617* (reviewing conflicting decisions)]. In the frequently cited opinion in *Sjoberg v. Hastorf (1948) 33 Cal. 2d 116, 119, 199 P.2d 668* , the California Supreme Court held that orders levying sanctions for failure to make discovery may be appealed if they are a final judgment on a collateral proceeding growing out of the action. It is not sufficient, though, that the order determine finally, for the purpose of further proceedings in the trial court, some distinct issue in the case. The order must direct the payment of money by appellant or the performance of an act by or against him or her [*Sjoberg v. Hastorf (1948) 33 Cal. 2d 116, 119, 199 P.2d 668* ; *see Lund v. Superior Court (1964) 61 Cal. 2d 698, 709, 39 Cal. Rptr. 891, 394 P.2d 707]* .

However, in *Meehan v. Hopps (1955) 45 Cal. 2d 213, 288 P.2d 267* , the California Supreme Court disregarded the limitations on the collateral order doctrine that the order require the payment of money or the performance of an act [*Meehan v. Hopps (1955) 45 Cal. 2d 213, 217, 288 P.2d 267* (order disqualifying an attorney)]. In *Muller v. Fresno Community Hospital & Medical Ct. (2009) 172 Cal. App. 4th 887, 901-902, 91 Cal. Rptr. 3d 617* , a California court of appeal has reconciled these apparent inconsistencies in the Supreme Court's opinions by focusing on the nature of the order; that is, on whether the order itself does or does not require a payment of money or the performance of an act. That court proffered that when the order does not require a payment of money or the performance of an act, the Supreme Court will find the order appealable without reference to these limitations, as long as the court is satisfied that the order is truly collateral [*Muller v. Fresno Community Hospital & Medical Ct. (2009) 172 Cal. App. 4th 887, 901-902, 91 Cal. Rptr. 3d 617 , citing Meehan v. Hopps (1955) 45 Cal. 2d 213, 217, 288 P.2d 267* ; *Takehara v. H. C. Muddox Co. (1972) 8 Cal. 3d 168, 171, 104 Cal. Rptr. 345, 501 P.2d 913* ; *McClearen v. Superior Court (1955) 45 Cal. 2d 852, 855, 291 P.2d 449]* . The court explained that the limitations of a payment of money and the performance of an act are actually indications that the order in question is collateral to the main action. In other words, when the order directs the payment of money or the performance of an act, it is likely that the matter addressed in the order is collateral to the main action. Viewed from this perspective, the court found it logical that orders awarding pendente lite attorney fees [*In re Marriage of Skelley (1976) 18 Cal. 3d 365, 368-369, 134 Cal. Rptr. 197, 556 P.2d 297]* , orders directing the parties to share in the payment of discovery costs [*San Diego Unified Port Dist. v. Douglas E. Barnhart, Inc. (2002) 95 Cal. App. 4th 1400, 1402, 116 Cal. Rptr. 2d 65]* , and an order unsealing court records (the performance of an act) [*In re Providian Credit Card Cases (2002) 96 Cal. App. 4th 292, 297, 116 Cal. Rptr. 2d 833]* were orders that were collateral to the main action [*Muller v. Fresno Community Hospital & Medical Ct. (2009) 172 Cal. App. 4th 887, 902, 91 Cal. Rptr. 3d 617]* .

The *Muller* court concluded that in the case before it, the order denying the motion for sanctions was appealable as a collateral order. The sanctions were too independent of the cause itself to require that appellate consideration be deferred until the whole case was adjudicated. The issue of sanctions to be awarded for defendants' alleged misconduct during and prior to the second trial of this case was not relevant to the proceedings on the remand of this case. If the order denying sanctions were to be reviewed on appeal, there was no reason to defer that review to the appeal from the eventual judgment. There was also the "very real question" whether the order denying sanctions would be reviewable from a judgment following a third trial in this case, assuming that there is a third trial. The court, however, did not hold that generally all orders denying motions for sanctions are appealable as collateral orders [*Muller v. Fresno Community Hospital & Medical Ct. (2009) 172 Cal. App. 4th 887, 904-905, 91 Cal. Rptr. 3d 617]* . In this case, there is no judgment and there might never be a judgment. Under these circumstances, the order denying the motion for

sanctions was appealable as a collateral order [*Muller v. Fresno Community Hospital & Medical Ct. (2009) 172 Cal. App. 4th 887, 904-905, 91 Cal. Rptr. 3d 617]* .

Other than final judgments on collateral proceedings, discovery orders, including orders imposing sanctions, were traditionally classified as interim, nonappealable orders [*Ballard v. Taylor (1993) 20 Cal. App. 4th 1736, 1738-1739, 25 Cal. Rptr. 2d 384* (sanction orders nonappealable regardless of amount of sanction; construing former *Code Civ. Proc. § 904.1(k)*); *Hanna v. BankAmerica Business Credit, Inc. (1993) 16 Cal. App. 4th 913, 915-918, 20 Cal. Rptr. 2d 430* (construing former *Code Civ. Proc. § 904.1(k)*)]. For example, an order imposing sanctions for failure to make discovery on an attorney representing a party in a pending matter is not a separately appealable final order [*Slemaker v. Woolley (1989) 207 Cal. App. 3d 1377, 1382, 255 Cal. Rptr. 532* (former *Code Civ. Proc. § 2025* order, *now see* Code Civ. Proc. § 2025.101 et seq.); *see In re Marriage of Niklas (1989) 211 Cal. App. 3d 28, 34, 258 Cal. Rptr. 921* (court of appeal granted review by treating appeal as application for extraordinary relief, in part because sanctions were imposed in response to earlier order from it)]. Former *Code Civ. Proc. § 904.1(k)* was added operative in 1990, authorizing an appeal from a superior court judgment directing payment of monetary sanctions by a party or an attorney in excess of $750. Even after the addition of this provision, the majority view apparently was that orders imposing monetary discovery sanctions were nonappealable [*Ballard v. Taylor (1993) 20 Cal. App. 4th 1736, 1738-1739, 25 Cal. Rptr. 2d 384* (and cases cited therein); *Peterson v. General Motors Corp. (1993) 19 Cal. App. 4th 1330, 1332-1333, 23 Cal. Rptr. 2d 768* ; *Hanna v. BankAmerica Business Credit, Inc. (1993) 16 Cal. App. 4th 913, 915-918, 20 Cal. Rptr. 2d 430]* .

Code Civ. Proc. § 904.1 as amended operative January 1, 1994, provides that when a superior court enters an interlocutory judgment or order directing payment of monetary sanctions by a party or an attorney for a party in an amount exceeding $5,000, an appeal is expressly authorized [*see Code Civ. Proc. § 904.1(a)(11), (12)*; *see also Mattco Forge, Inc. v. Arthur Young & Co. (1990) 223 Cal. App. 3d 1429, 1442 n.10, 273 Cal. Rptr. 262* (construing sanction order to be judgment under former *Code Civ. Proc. § 904.1(k)*)]. Aggregation of separate sanction awards to exceed the $5,000 threshhold under *Code Civ. Proc. § 904.1(a)(11)* or *(12)* is appropriate only when the same conduct is being sanctioned [*see Champion/L.B.S. Associates Development Co. v. E-Z Serve Petroleum Marketing, Inc. (1993) 15 Cal. App. 4th 56, 59-60, 18 Cal. Rptr. 2d 726* (dictum; construing former *Code Civ. Proc. § 904.1(k)*].

An order or judgment directing payment of monetary sanctions of $5,000 or less by a party or an attorney for a party may be reviewed on an appeal by that party after entry of a final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed on a petition for an extraordinary writ [*Code Civ. Proc. § 904.1(b)*; *see also Guillemin v. Stein (2002) 104 Cal. App. 4th 156, 161, 128 Cal. Rptr. 2d 65* (after appeal from discovery sanctions award of $1,643 was dismissed as untimely, it was immaterial that court later "confirmed" its sanctions award in postjudgment order from which there was a timely appeal; to be appealable, postjudgment order must also raise issue different from issues embraced in judgment, otherwise it would give party two chances to appeal same ruling and thus circumvent time limit on appealing from judgment)]. Limited civil cases are specifically excluded from the sanction provisions of *Code Civ. Proc. § 904.1(a)* [*Code Civ. Proc. § 904.1(a)*; *see Code Civ. Proc. § 85 et seq.*; *see also Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.23*].

[5] Order in Foreign Action

Whether monetary discovery sanctions exceeding $5,000 are made appealable by the 1994 amendment to *Code Civ. Proc. § 904.1* expanding the right of appeal to encompass an "order" as well as an interlocutory judgment has not yet been expressly decided by a reviewing court [*see Ballard v. Taylor (1993) 20 Cal. App. 4th 1736, 1739 n.1, 25 Cal. Rptr. 2d 384]* .

A discovery order issued in a proceeding pending in another jurisdiction constitutes an exception to the general rule that discovery orders are not appealable. In these cases, the order will be deemed a final, appealable judgment because it is the sole matter before the trial court and no final review of the underlying action will take place in California [

Warford v. Medeiros (1984) 160 Cal. App. 3d 1035, 1039-1041, 207 Cal. Rptr. 94 (immediate appeal allowed of order denying application to compel discovery under former *Code Civ. Proc. § 2034* in out-of-state action)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedureAppealsAppellate JurisdictionCollateral Order Doctrine

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§ 200.12 Review of Discovery Orders by Writ

[1] Availability

In an appropriate situation, a prerogative writ of mandate or prohibition may be used to review interim orders in discovery cases, although they will not be issued routinely or as a matter of course even when the trial court's order is erroneous [*Mobil Oil Corp. v. Superior Court (1976) 59 Cal. App. 3d 293, 303, 130 Cal. Rptr. 814* ; *O'Brien v. Superior Court (1965) 233 Cal. App. 2d 388, 391, 43 Cal. Rptr. 815* ; *see Palay v. Superior Court (1993) 18 Cal. App. 4th 919, 925, 22 Cal. Rptr. 2d 839]* . Their use is not favored because the delay caused by interim review of discovery orders is likely to result in greater harm to the judicial process than would the enforcement of a possibly improper discovery order [*Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal. 3d 1, 5, 123 Cal. Rptr. 283, 538 P.2d 739* ; *Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 169-170, 84 Cal. Rptr. 718, 465 P.2d 854]* .

Generally the prerogative writs should be used in discovery matters only to review questions of first impression that are of general importance to the trial courts and to the profession, and when general guidelines can be laid down for future cases [*Vinson v. Superior Court (1987) 43 Cal. 3d 833, 838, 239 Cal. Rptr. 292, 740 P.2d 404* ; *Oceanside Union School Dist. v. Superior Court (1962) 58 Cal. 2d 180, 185-186 n.4, 23 Cal. Rptr. 375, 373 P.2d 439* ; *Stermer v. Superior Court (1993) 20 Cal. App. 4th 777, 779-780 n.1, 24 Cal. Rptr. 2d 577* (disapproved on other grounds in *Emerson Electric Co. v. Superior Court (1997) 16 Cal. 4th 1101, 1106, 1113, 68 Cal. Rptr. 2d 883, 946 P.2d 841* ; court of appeal ruled mandate appropriate to review order requiring deponent to physically reenact event during videotaped deposition because it was an important issue of first impression; the Supreme Court disapproved the court of appeal's conclusion that such reenactment could not be required)]. However, as an exception to this general rule, courts permit review by extraordinary writ if an order allegedly violates a party's privilege or other protection against disclosure [*see Roberts v. Superior Court (1973) 9 Cal. 3d 330, 336, 107 Cal. Rptr. 309, 508 P.2d 309* ; *Hiott v. Superior Court (1993) 16 Cal. App. 4th 712, 716, 20 Cal. Rptr. 2d 157* (order compelled disclosure of allegedly privileged videotape); *Thomas B. v. Superior Court (1985) 175 Cal. App. 3d 255, 260, 220 Cal. Rptr. 577* (order compelling putative father to produce privileged income tax returns before parentage was conclusively established); *Hofmann Corp. v. Superior Court (1985) 172 Cal. App. 3d 357, 362-363 n.2, 218 Cal. Rptr. 355* (order compelling discovery of confidential customer list)].

Review by extraordinary writ has also been granted when the case involved a significant issue. Thus, it was an appropriate method of review of a court order for exhumation and autopsy of a deceased testator due to the sensitive nature of the issues [*Holm v. Superior Court (1986) 187 Cal. App. 3d 1241, 1244, 232 Cal. Rptr. 432]* . Review by extraordinary writ may also be warranted by the procedural history of a particular case. For example, an order imposing monetary sanctions was reviewed by the court of appeal prior to a final judgment when the trial court had granted the monetary sanctions in response to a notice that the court of appeal was considering issuing a peremptory writ directing the trial court to modify its order imposing issue sanctions and to impose only severe monetary sanctions [*In re Marriage of Niklas (1989) 211 Cal. App. 3d 28, 34, 258 Cal. Rptr. 921]* .

Additionally, an appellate court may, in its discretion, review a judgment or order for the payment of monetary sanctions of $5,000 or less on petition for an extraordinary writ [*Code Civ. Proc. § 904.1(b)*].

[2] Choice of Writ

Under *Code Civ. Proc. § 1085*, mandate may issue to compel the performance of an act by an inferior court, corporation, board, or person that the law specially commands as a duty arising from an office, trust, or station. The writ of prohibition is the counterpart of mandate. Its function, as expressed in *Code Civ. Proc. § 1102*, is to arrest proceedings of an inferior court, corporation, board, or person that has exceeded its jurisdiction [*American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 588, 113 Cal. Rptr. 561]* . Consequently, mandate is ordinarily the appropriate remedy sought when attacking an improper denial of discovery, and prohibition is the remedy sought to overturn an improper grant of discovery [*Burke v. Superior Court (1969) 71 Cal. 2d 276, 277-278 n.1, 78 Cal. Rptr. 481, 455 P.2d 409* ; *Petterson v. Superior Court (1974) 39 Cal. App. 3d 267, 269, 114 Cal. Rptr. 20]* .

Despite the different purposes of the two writs, the courts have often used mandate to prohibit actions of trial courts [*Morris Stulsaft Foundation v. Superior Court (1966) 245 Cal. App. 2d 409, 415, 54 Cal. Rptr. 12]* . This use has had the effect of changing the test for exercise of the writ of prohibition, which is in theory a jurisdictional writ, from excess of jurisdiction to abuse of discretion. Hence a discovery order may be prohibited not only when it is wholly invalid, but also when, under the circumstances, it constitutes an abuse of the lower court's discretion [*see American Mut.Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 589, 113 Cal. Rptr. 561]* .

Although counsel should attempt to choose the appropriate remedy, a mistake in the choice is not fatal to the request for relief. When the allegations and prayers of the petition are broad enough to encompass the appropriate remedy, the petition may be treated as one for such relief, and the proper order may be granted. Moreover, if a single writ will not grant all the relief required, the court may grant both writs of prohibition to prevent the lower court from acting in excess of its jurisdiction and mandate to compel a mandatory act [*O'Brien v. Superior Court (1965) 233 Cal. App. 2d 388, 392, 43 Cal. Rptr. 815]* .

[3] Grounds for Writ

[a] Denial of Discovery

For a prerogative writ to be issued when discovery is denied, a clear abuse of discretion by the trial court should be demonstrated [*West Pico Furniture Co. v. Superior Court (1961) 56 Cal. 2d 407, 415, 15 Cal. Rptr. 119, 364 P.2d 295* (quoting earlier case); *Lehman v. Superior Court (1986) 179 Cal. App. 3d 558, 562, 224 Cal. Rptr. 572]* . Such abuse is shown if there is no substantial basis for the manner in which the trial court discretion was exercised, or if the trial court applied a patently improper standard of decision [*Coriell v. Superior Court (1974) 39 Cal. App. 3d 487, 491 n.1, 114 Cal. Rptr. 310]* .

[b] Grant of Discovery

The liberal policies of the discovery statutes generally counsel against overturning a trial court's decision granting

discovery unless a substantial interest of the petitioner will be impaired by the discovery [*Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 171, 84 Cal. Rptr. 718, 465 P.2d 854* ; *see Avant! Corp. v. Superior Court (2000) 79 Cal. App. 4th 876, 881-882, 94 Cal. Rptr. 2d 505* (reviewing court is not free to substitute its discretion for that of trial court if trial court's conclusion was reasonable exercise of its discretion, even though court of appeal may disagree with trial court's conclusion)]. Consequently, when discovery is granted, petitioner should show a violation of privilege or of the provisions of *Cal. Const., art. I, § 13* (unreasonable searches and seizures) [*West Pico Furniture Co. v. Superior Court (1961) 56 Cal. 2d 407, 415, 15 Cal. Rptr. 119, 364 P.2d 295* (quoting earlier case); *see Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal. 3d 1, 5, 123 Cal. Rptr. 283, 538 P.2d 739]* . The general rule, however, that a reviewing court should rarely interfere with pretrial discovery orders, particularly when the orders grant discovery, is not applicable in a case involving an order pertaining to requests for admissions under former *Code Civ. Proc. § 2033* (*now see Code Civ. Proc. § 2033.010 et seq.*) because requests for admissions are more closely akin to summary adjudication procedures than to orthodox discovery, designed less to discover the facts than to render it unnecessary to try otherwise triable issues [*Hansen v. Superior Court (1983) 149 Cal. App. 3d 823, 827, 197 Cal. Rptr. 175* (decided under former *Code Civ. Proc. § 2033*)].

Perrogative writs are especially needed if the trial court order allegedly violates a privilege of the party against whom discovery is granted. That party must either disclose the privileged information or subject himself or herself to a charge of contempt for refusal to obey the court's order pending appeal. The first alternative could lead to disruption of a confidential relationship, while the second would involve the possibility of a jail sentence and additional delay of the litigation during review of the contempt order [*Roberts v. Superior Court (1973) 9 Cal. 3d 330, 336, 107 Cal. Rptr. 309, 508 P.2d 309* ; *see Davis v. Superior Court (1992) 7 Cal. App. 4th 1008, 1012-1013, 9 Cal. Rptr. 2d 331* (mandate is proper method to seek review of order denying motion to quash subpoena duces tecum for psychotherapy records)].

A court generally will not issue an extraordinary writ if the objection to the trial court's grant of discovery is on relevancy grounds, unless the court concludes that the answers sought by a given line of questioning cannot, as a reasonable possibility, lead to the discovery of admissible evidence or be helpful in preparing for trial. Even though this rule requires disclosing irrelevant matter, the burden of disclosing such matter will generally not be too onerous, and the purposes of the discovery process of improving the efficiency and integrity of the judicial process will be preserved [*Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 170 n.11, 173, 84 Cal. Rptr. 718, 465 P.2d 854* ; *see Colonial Life & Accident Ins. Co. v. Superior Court (1982) 31 Cal. 3d 785, 790, 183 Cal. Rptr. 810, 647 P.2d 86* ; *Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal. 3d 1, 7, 123 Cal. Rptr. 283, 538 P.2d 739]* .

[3A] Standard of Review

A discovery order normally is reviewed under the deferential abuse of discretion standard [*John B. v. Superior Court (2006) 38 Cal. 4th 1177, 1186, 45 Cal. Rptr. 3d 316, 137 P.3d 153* ; *Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 380, 15 Cal. Rptr. 90, 364 P.2d 266* (decided under prior law)]. Accordingly, a reviewing court generally will not substitute its opinion for that of the trial court unless the trial court's decision "falls outside the bounds of reason" [*People v. DeSantis (1992) 2 Cal. 4th 1198, 1226, 9 Cal. Rptr. 628, 831 P. 2d 1210* ; *Lipton v. Superior Court (1996) 48 Cal. App. 4th 1599, 1612, 56 Cal. Rptr. 2d 341* (trial court's ruling will be sustained unless "there was 'no legal justification' for the order granting or denying the discovery in question")].

Although the trial court has wide discretion in managing discovery issues, "there can be no room for the exercise of such discretion if no ground exists upon which it might operate" [*Toshiba America Electronic Components v. Superior Court (2004) 124 Cal. App. 4th 762, 768, 21 Cal. Rptr. 3d 532*]. Thus, when the relevant facts are undisputed, a trial court's exercise of discretion is reviewed as a question of law [*Toshiba America Electronic Components v. Superior Court (2004) 124 Cal. App. 4th 762, 768, 21 Cal. Rptr. 3d 532*]. An appellate court may reverse a trial court's decision for abuse of discretion when the exercise of that discretion is not based on the applicable law. "Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of

discretion" [*Toshiba America Electronic Components v. Superior Court (2004) 124 Cal. App. 4th 762, 768, 21 Cal. Rptr. 3d 532*]. When the issue on appeal is whether a particular communication falls outside the protection of the *First Amendment*, independent review is called for, both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited [*Krinsky v. Doe 6 (2008) 159 Cal. App. 4th 1154, 1161, 72 Cal. Rptr. 3d 231*]. This independent review function, however, is not equivalent to a *de novo* review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff [*Krinsky v. Doe 6 (2008) 159 Cal. App. 4th 1154, 1161, 72 Cal. Rptr. 3d 231*].

In all other cases, abuse of discretion is the appropriate standard [*Krinsky v. Doe 6 (2008) 159 Cal. App. 4th 1154, 1161, 72 Cal. Rptr. 3d 231* (independent review of plausible *First Amendment* defense in determining whether communications constituted libel in appeal arising from denial of anonymous Internet poster's motion to quash plaintiff's subpoena seeking his or her identity)].

For discussion of the appellate court's deference to the trial court's findings of fact, see [4], *below*.

[4] Trial Court's Factual Determinations

Each exercise of discretion by a trial court will occur under a differing set of facts, and each case, of necessity, must be decided in light of those particular facts. Nevertheless, the Supreme Court has stated that, to constitute a proper exercise of discretion, the factual determination of the trial court should clearly and unequivocally be based on the following legal concepts [*Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 382-384, 15 Cal. Rptr. 90, 364 P.2d 266* (decided under prior law)]:

- The legislative purposes of the Discovery Act are not to be subverted under the guise of the exercise of discretion [*see* discussion in *Ch. 190, Discovery: Scope, Regulation, and Timing, § 190.12*].

- Those purposes are to be given effect rather than thwarted so that discovery is encouraged.

- When disputed facts provide a basis for the exercise of discretion, those facts should be liberally construed in favor of discovery, rather than in the most limited and restrictive manner possible.

- Although the statutory limitations on discovery must be applied when the facts so warrant, exercise of discretion does not authorize extension beyond these limits.

- There is no room for judicial discretion in those situations not included in the statutes but asserted as general limitations on the privileges conferred. These situations, however, may be subject to judicial discretion under the statutory power to prevent abuse and advance the ends of justice.

- The power to prevent abuse by granting protective orders is the power to exercise discretion based on the factual showing made. When the record indicates facts on which the court exercised its discretion, that exercise will not be disturbed on appeal. When the facts are undisputed, or there is but one reasonable interpretation of them, the question is not one of fact but of law.

- The trial courts in exercising their discretion should keep in mind that the Legislature has suggested that, when possible, the courts should impose partial limitations rather than outright denial of discovery.

- In the exercise of its discretion, the court should weigh the relative importance of the information sought against the hardship that its production might entail; and it must weigh the relative ability of the

parties to obtain the information before requiring the adversary to bear the burden or cost of production, keeping in mind the statutory admonition of entering an order consistent with justice.

Any record that indicates a failure to give adequate consideration to these concepts is subject to the attack of abuse of discretion, regardless of the fact that the order shows no such abuse on its face [*Greyhound Corp. v. Superior Court (1961) 56 Cal. 2d 355, 384, 15 Cal. Rptr. 90, 364 P.2d 266* (decided under prior law)].

[5] Furnishing Trial Court Record

A petitioner for an extraordinary writ to a trial court must furnish a record sufficient to enable the reviewing court to evaluate the lower court's exercise of discretion [*Lemelle v. Superior Court (1978) 77 Cal. App. 3d 148, 156, 143 Cal. Rptr. 450]* . The record must include the ruling of the trial court on petitioner's motion concerning discovery, or else the petitioner cannot contend that it was erroneous [*Hamwi v. Citinational-Buckeye Inv. Co. (1977) 72 Cal. App. 3d 462, 474, 140 Cal. Rptr. 215]* . The record also should include a copy of all declarations filed in the lower court and, in most instances, a transcript of any hearing. In the absence of a transcript the reviewing court will have no way of knowing, in many cases, what grounds were advanced, mutually assumed, or judicially noticed at the hearing [*Lemelle v. Superior Court (1978) 77 Cal. App. 3d 148, 156-157, 143 Cal. Rptr. 450]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition

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16-200 California Forms of Pleading and Practice--Annotated § 200.13

§ 200.13 New Objections Not Considered on Appeal

Generally an order or judgment of a trial court will be sustained, without regard to the reasons given by that court, if adequate grounds existed for the making of the order or judgment at the time the order was made. Consequently, an objecting party may not urge new and additional objections raised for the first time on appeal [*West Pico Furniture Co. v. Superior Court (1961) 56 Cal. 2d 407, 413-414, 15 Cal. Rptr. 119, 364 P.2d 295]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureAppealsReviewabilityPreservation for Review

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16-200 California Forms of Pleading and Practice--Annotated § 200.14

§ 200.14 Review of Contempt Order

Contempt is one sanction available under discovery proceedings [*see* former *Code Civ. Proc. § 2023(b)* (*now see Code Civ. Proc. § 2023.030*), discussed in *Ch. 192, Discovery: Sanctions for Discovery Misuse, §§ 192.13[4], 192.15[4]*].

The judgment and orders of the court or judge in contempt cases are final, conclusive [*Code Civ. Proc. § 1222*], and not appealable [*In re Buckley (1973) 10 Cal. 3d 237, 259, 110 Cal. Rptr. 121, 514 P.2d 1201]* . Although a contempt order is nonappealable, it may be reviewed by a petition for a writ of review [*Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 764, 104 Cal. Rptr. 921]* , habeas corpus [*see In re Carvallo (1973) 29 Cal. App. 3d 983, 986, 105 Cal. Rptr. 925]* , or prohibition [*see Safer v. Superior Court (1975) 15 Cal. 3d 230, 235, 124 Cal. Rptr. 174, 540 P.2d 14]* . For discussion and forms for use in seeking review of contempt proceedings, see Ch. 135, *Contempt* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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16-200 California Forms of Pleading and Practice--Annotated § 200.15

§ 200.15 Relief From Discovery Order by Nonparty Witness

Because only a party has a right to appeal or seek review by prerogative writ, the only procedure by which a nonparty witness may secure relief from a discovery order is to subject himself or herself to a contempt order for noncompliance, which is reviewable in an appellate court by habeas corpus or by writ of review [*La Bella v. Kaiser Foundation Health Plan, Inc. (1977) 72 Cal. App. 3d 499, 500-501, 138 Cal. Rptr. 212]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsGeneral OverviewCivil ProcedureSanctionsContemptCivil ContemptCriminal Law & ProcedureHabeas CorpusGeneral Overview

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[Reserved]

§§ 200.16[Reserved]

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16-200 California Forms of Pleading and Practice--Annotated § 200.20

§ 200.20 Matthew Bender Publications

For comprehensive discussion and forms relating to review of discovery orders, see DeMeo, California Deposition and Discovery Practice, Ch. 9, *Review of Discovery Orders* (Matthew Bender); *see also* Hogan & Weber's California Civil Discovery, Ch. 1, *Introduction*, § 1.8 (Matthew Bender)

For memoranda relating to writ proceedings to review discovery orders, see California Points and Authorities, Ch. 89A, *Discovery: Review of Discovery Orders* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionCivil ProcedureAppealsAppellate JurisdictionCollateral Order Doctrine

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16-200 California Forms of Pleading and Practice--Annotated § 200.21

§ 200.21 California Constitution

Supreme Court, courts of appeal, and superior courts have original jurisdiction to issue writs of mandate and prohibition. *Cal. Const., art. VI, § 10*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition

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§ 200.22 State Statutes

Appeals in civil actions. *Code Civ. Proc. § 901 et seq.*

Mandamus. *Code Civ. Proc. §§ 1084-1097*

Writ of prohibition. *Code Civ. Proc. §§ 1102-1105*

Issuance, return, and hearing of writs. *Code Civ. Proc. §§ 1107, 1108*

Law governing writ proceedings. *Code Civ. Proc. § 1109*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 200.23 California Rules of Court

Original writ proceedings in reviewing courts. *Cal. Rules of Ct., Rule 8.490*

Legal Topics:

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

[1] Appeal of Discovery Orders

All discovery disputes involving arbitration proceedings must be submitted first to arbitrator, not to court; although *parties* are entitled to only limited judicial review of arbitrator discovery orders, nonparties are entitled to full judicial review of arbitrators' adverse discovery orders. *Berglund v. Arthroscopic & Laser Surgery Ct. of San Diego (2008) 44 Cal. 4th 528, 532, 535-536, 79 Cal. Rptr. 3d 370, 187 P.3d 86*

After appeal from discovery sanctions award of $1,643 was dismissed as untimely, it was immaterial that court later "confirmed" its sanctions award in postjudgment order from which there was a timely appeal; to be appealable, postjudgment order must also raise issue different from those embraced in judgment, otherwise it would give party two chances to appeal same ruling and thus circumvent time limit on appealing from judgment. *Guillemin v. Stein (2002) 104 Cal. App. 4th 156, 161, 128 Cal. Rptr. 2d 65*

Trial court rulings concerning discovery sanctions are generally not subject to review by extraordinary writ, but are reviewable on appeal after judgment; exception exists when compelled disclosure of claimed privilege is threatened. *Hiott v. Superior Court (1993) 16 Cal. App. 4th 712, 716, 20 Cal. Rptr. 2d 157*

Discovery orders are not directly appealable; trial court order denying motion for discovery is proper when discovery sought was relevant only to plaintiffs' class action allegations, to which defendants' demurrer was properly sustained without leave to amend prior to issuance of discovery order. *Clausing v. San Francisco Unified School Dist. (1990) 221 Cal. App. 3d 1224, 1241, 271 Cal. Rptr. 72*

Order striking defendant's answer and entering default as sanction for failure to participate in discovery is not appealable, but is reviewable on appeal from subsequent default judgment against him. *Thomas v. Luong (1986) 187 Cal. App. 3d 76, 78, 231 Cal. Rptr. 631*

Plaintiff who elects to present issue of alleged untimeliness of motion to compel further answers by disobeying court order compelling further answers, and then raising untimeliness issue on appeal, is not entitled to escape sanction

dismissing case when untimeliness argument and plaintiff's good faith is not sustained by court of appeal. *Karz v. Karl (1982) 137 Cal. App. 3d 637, 650, 187 Cal. Rptr. 183*

Grant of protective order precluding further discovery until conclusion of all administrative proceedings or until further order of court is not appealable. *Bartschi v. Chico Community Memorial Hospital (1982) 137 Cal. App. 3d 502, 507-508, 187 Cal. Rptr. 61*

Discovery matters in municipal court actions (now limited civil cases) may be reviewed by petition for extraordinary writ in superior court (now superior court appellate division). *Webb v. Municipal Court (1981) 118 Cal. App. 3d 881, 885-886, 173 Cal. Rptr. 636*

Appeal is not adequate remedy when party is left with choice of supplying information to which other party is clearly not entitled or of suffering risk of default judgment on debatable point of law. *Board of Administration v. Superior Court (1975) 50 Cal. App. 3d 314, 324, 123 Cal. Rptr. 530*

Although order to compel answers on deposition is generally not appealable, order based on motion to compel answers, which was, in effect, motion to enjoin attorney from representing plaintiffs due to conflict of interest, is appealable. *Kraus v. Davis (1970) 6 Cal. App. 3d 484, 486-487, 85 Cal. Rptr. 846*

[2] Burden of Proof

Party seeking to overturn trial court ruling on discovery showed abuse of discretion by court; court erred as matter of law in upholding relevancy objection in motion to compel further answers to interrogatories. *Fisher v. Superior Court (1986) 177 Cal. App. 3d 779, 784, 223 Cal. Rptr. 203*

On appeal from order imposing sanctions in discovery proceedings, appellant has burden of showing abuse of trial court's discretion. *Petersen v. Vallejo (1968) 259 Cal. App. 2d 757, 781, 66 Cal. Rptr. 776*

[3] Mandate

[a] Generally

Mandate is appropriate remedy for improper denial of discovery. *Burke v. Superior Court (1969) 71 Cal. 2d 276, 277-278 n. 1, 78 Cal. Rptr. 481, 455 P.2d 409*

Although petitioner mistook remedy and sought prohibition, appellate court is able to grant writ of mandamus since petitioner made out case entitling him to mandamus. *Powell v. Superior Court (1957) 48 Cal. 2d 704, 705, 312 P.2d 698*

Liberal policy of relevancy in justifying discovery counsels against overturning trial court's decision granting discovery, but appellate court should not use rule giving trial court wide discretion to defeat liberal policies of statutes with respect to orders limiting or denying discovery. *Mobil Oil Corp. v. Superior Court (1976) 59 Cal. App. 3d 293, 303-304, 130 Cal. Rptr. 814*

[b] Examples of Mandate Proceedings

Whether trial court had power to grant prospective witness use and derivative use immunity to facilitate discovery by private party is question meeting criteria for use of mandate in discovery matters. *Daly v. Superior Court (1977) 19*

Cal. 3d 132, 140, 137 Cal. Rptr. 14, 560 P.2d 1193

Writ of mandate is proper to require trial court to set aside order denying production and inspection of documents requested and reconsider defendant's objections to specific documents. *Associated Brewers Distrib. Co. v. Superior Court (1967) 65 Cal. 2d 583, 589, 55 Cal. Rptr. 772, 422 P.2d 332*

Writ of mandate is proper to require that trial court order real parties in interest to produce documents in question for purpose of refreshing witness's recollection during his deposition. *Filipoff v. Superior Court (1961) 56 Cal. 2d 443, 453, 15 Cal. Rptr. 139, 364 P.2d 315*

Writ of mandate is proper to compel trial court to set aside order sustaining objections to requests for admissions and to require trial court to reconsider objections. *Cembrook v. Superior Court (1961) 56 Cal. 2d 423, 430, 15 Cal. Rptr. 127, 364 P.2d 303*

Writ of mandate is proper method to seek review of trial court order compelling putative father to produce state income tax returns and other privileged financial records before his parentage was conclusively established. *Thomas B. v. Superior Court (1985) 175 Cal. App. 3d 255, 260, 220 Cal. Rptr. 577*

Relief by writ of mandate is available when trial court abused its discretion by ordering discovery of a confidential customer list; use of the writ to protect confidential information as justified by same reasoning that allows use of writ to protect privileged information. *Hofmann Corp. v. Superior Court (1985) 172 Cal. App. 3d 357, 362-363 n.2, 218 Cal. Rptr. 355*

Writ of mandate is proper method to seek review of protective order preventing depositions based on single fact that proposed deponents are lawyers. *Meritplan Insurance Co. v. Superior Court (1981) 124 Cal. App. 3d 237, 242, 177 Cal. Rptr. 236*

Peremptory writ of mandate to compel production of things is proper when full briefing by parties and issuance of alternative writ would only cause further delay. *Watt Indus., Inc. v. Superior Court (1981) 115 Cal. App. 3d 802, 806, 171 Cal. Rptr. 503*

Writ of mandate is proper to compel trial court to vacate order compelling production of documents and enter new order denying production on ground that order violates attorney-client privilege and attorney's work-product privilege. *Schlumberger Ltd. v. Superior Court (1981) 115 Cal. App. 3d 386, 391, 171 Cal. Rptr. 413*

Exception to general rule that disfavors pretrial review of discovery orders by extraordinary writ exists when information sought is protected by statutory psychotherapist-patient privilege, since redress after disclosure would be impossible. *City of Alhambra v. Superior Court (1980) 110 Cal. App. 3d 513, 517-518, 168 Cal. Rptr. 49*

Writ of mandate is proper to compel trial court to set aside order granting motion to compel further answers to interrogatories on ground that order violated privilege against disclosure of income tax returns. *Coate v. Superior Court (1978) 81 Cal. App. 3d 113, 114-115, 144 Cal. Rptr. 350*

Writ of mandate is proper to require trial court to quash order that plaintiff reenact circumstances of accident for photographic recording by defendant. *Bailey v. Superior Court (1978) 79 Cal. App. 3d 444, 447, 144 Cal. Rptr. 875*

Writ of mandate is proper to direct trial court to vacate its conditional order, and issue unconditional order, quashing subpoenas duces tecum re depositions served on custodians of records of doctors hired by plaintiff's attorney to examine plaintiff and to inform attorney as to plaintiff's medical condition. *Sanders v. Superior Court (1973) 34 Cal. App. 3d 270, 278-280, 109 Cal. Rptr. 770*

Writ of mandate is proper to direct trial court to vacate order requiring defendant to answer certain interrogatories. *City of Los Angeles v. Superior Court (1973) 33 Cal. App. 3d 778, 786, 109 Cal. Rptr. 365*

Writ of mandate is proper method to review discovery order appointing commission to take depositions of officials or employees of defendant in another country. Volkswagenwerk Aktienge sellschaft v. *Superior Court (1973) 33 Cal. App. 3d 503, 508-509, 109 Cal. Rptr. 219*

[4] Prohibition

Writ of prohibition is proper remedy to restrain trial court's order requiring videotaping of deposition. *Bailey v. Superior Court (1977) 19 Cal. 3d 970, 978, 140 Cal. Rptr. 669, 568 P.2d 394*

Writ of prohibition is proper to restrain superior court from compelling petitioner to answer interrogatory seeking disclosure of information concerning petitioner's state sales tax returns. *Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal. 3d 1, 7, 123 Cal. Rptr. 283, 538 P.2d 739*

Writ of prohibition, barring production and inspection of psychotherapist's records concerning plaintiff when no specific mental condition of plaintiff was at issue, is proper because psychotherapist-patient privilege applied. *Roberts v. Superior Court (1973) 9 Cal. 3d 330, 336-337, 107 Cal. Rptr. 309, 508 P.2d 309*

Writ of prohibition is proper when discovery improperly ordered. *Burke v. Superior Court (1969) 71 Cal. 2d 276, 277-278 n.1, 78 Cal. Rptr. 481, 455 P.2d 409* ; *Petterson v. Superior Court (1974) 39 Cal. App. 3d 267, 269, 114 Cal. Rptr. 20*

Writ of prohibition is properly used to review trial court order overruling petitioner's objections to interrogatories on grounds that they were calculated to annoy, embarrass, and oppress plaintiff and that the information was protected by attorney-client privilege and privilege accorded communications made in confidence to public officer when public interest would suffer by disclosure. *Oceanside Union School Dist. v. Superior Court (1962) 58 Cal. 2d 180, 185-187, 23 Cal. Rptr. 375, 373 P.2d 439*

Writ review is appropriate to resolve tension between right of defendant in sexual harassment case to conduct discovery and plaintiff's countervailing constitutional right to privacy. *Doyle v. Superior Court (1996) 50 Cal. App. 4th 1878, 1883-1884, 58 Cal. Rptr. 2d 476*

Prerogative writ is appropriate to review discovery order when based on violation of right of privacy, such as that involved in compelled production of personnel file. *El Dorado Savings & Loan Assn. v. Superior Court (1987) 190 Cal. App. 3d 342, 344-345, 235 Cal. Rptr. 303*

Application by prerogative writ is appropriate in discovery cases when order of the trial court granting discovery purportedly violates a privilege involving attorney-client relationship or constitutes an invasion of the constitutional right of privacy. *Willis v. Superior Court (1980) 112 Cal. App. 3d 277, 289, 169 Cal. Rptr. 301*

[5] Questions of First Impression

Question of whether third-party recipient of confidential information from physician may assert physician-patient privilege is question of first impression for which writ of mandate is proper method to review trial court's action. *Rudnick v. Superior Court (1974) 11 Cal. 3d 924, 928, 114 Cal. Rptr. 603, 523 P.2d 643*

Reviewing courts may entertain applications for prerogative writs to control discovery, but only sparingly and only to review questions of first impression and general importance. *Oceanside Union School Dist. v. Superior Court (1962) 58 Cal. 2d 180, 185-186 n. 4, 23 Cal. Rptr. 375, 373 P.2d 439* ; *Matchett v. Superior Court (1974) 40 Cal. App. 3d 623, 626, 115 Cal. Rptr. 317*

Review by extraordinary writ is appropriate in case of first impression involving interpretation of provision of new Discovery Act and justification of trial court's exercise of discretion. *Appleton v. Superior Court (1988) 206 Cal. App. 3d 632, 634, 253 Cal. Rptr. 762*

Prerogative writ is not favored method to review discovery orders; however, use of prerogative writ instead of direct appeal is justified when question of first impression is presented that affects large number of litigants and attorneys. *St. Vincent Medical Center v. Superior Court (1984) 160 Cal. App. 3d 1030, 1032, 206 Cal. Rptr. 840*

Question of whether motion to compel answers to interrogatories must comply with former Cal. Rules of Ct, Rule 222.1 when there has been total failure to respond within time prescribed by statute is question of first impression likely to repeatedly arise until resolved; thus review of discovery order by prerogative writ is appropriate. *Leach v. Superior Court (1980) 111 Cal. App. 3d 902, 906, 169 Cal. Rptr. 42*

[6] Record on Appeal

Although often desirable to aid appellate review, no statement of reasons by trial court for denying motion to quash subpoena is required; trial court's order is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness. *Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 718, 21 Cal. Rptr. 2d 200, 854 P.2d 1117*

When record contains no explanation of grounds for trial court's order sustaining objections to request for admission, appellate court presumes that order was based on objections set forth by real party in interest and that trial court found objections meritorious. *Cembrook v. Superior Court (1961) 56 Cal. 2d 423, 426, 15 Cal. Rptr. 127, 364 P.2d 303*

When motion for pretrial inspection of material is made, showing as to why material was needed is required before appellate court will find that denial of motion was abuse of discretion. *Brenard v. Superior Court (1959) 172 Cal. App. 2d 314, 318, 341 P.2d 743*

[7] Standard of Review

In appeal arising from denial of anonymous Internet poster's motion to quash plaintiff's subpoena served on California message-board host, seeking poster's identity, appellate court conducted independent review of plausible *First Amendment* defense in determining whether communications constituted libel; because plaintiff could not make required prima facie showing of elements of libel necessary to overcome defendant's *First Amendment* right to speak anonymously, court quashed subpoena. *Krinsky v. Doe 6 (2008) 159 Cal. App. 4th 1154, 72 Cal. Rptr. 3d 231*

Appellate court reviews trial court's discovery order to determine if trial court's factual determinations are based on substantial evidence; trial court is able to assess credibility and resolve any conflicts in evidence; trial court's findings are thus entitled to great weight; even though contrary findings could have been made, appellate court should defer to trial court's factual determinations if evidence is in conflict, whether trial court's ruling is based on oral testimony or declarations. *Hiott v. Superior Court (1993) 16 Cal. App. 4th 712, 716-717, 20 Cal. Rptr. 2d 157*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionCivil ProcedureAppealsRecords on AppealCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

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Chapter 200 DISCOVERY: REVIEW OF DISCOVERY ORDERS
PART III. RESEARCH GUIDE

16-200 California Forms of Pleading and Practice--Annotated § 200.25

§ 200.25 Text References

Witkin, California Procedure, vol. 8, *Extraordinary Writs*, §§ 70, 108, 156, 157, 245, 253, 254, vol. 9, *Appeal* §§ 63, 117 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition

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[Reserved]

§§ 200.26[Reserved]

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PART IV. FORMS

16-200 California Forms of Pleading and Practice--Annotated § 200.40

§ 200.40 Caption and Introduction for Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103] or for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]

[1] FORM Caption and Introduction for Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103] or for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]

[*or*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	[CIVIL] NO. _____
vs.	)	PETITION FOR WRIT OF
THE SUPERIOR COURT OF THE STATE OF	)	_____ [PROHIBITION
CALIFORNIA, COUNTY OF	)	*or* MANDATE]
_____,	)	[Related Appeal Pending]
Respondent,	)	
_____ [*name*],	)	
Real Party in Interest.	)	

_____

[TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE _____ (*number*) APPELLATE DISTRICT, DIVISION _____ (*number*) OF THE STATE OF CALIFORNIA:]

Petitioner alleges:

[2] Use of Form

This form is a caption and introduction for use when filing a petition for a writ of prohibition or mandate [*see §§ 200.41*, *200.42* (forms for petitions)].

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PART IV. FORMS

16-200 California Forms of Pleading and Practice--Annotated § 200.41

§ 200.41 Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103] to Restrain Enforcement of Discovery Order

[1] FORM Petition for Writ of Prohibition [Code Civ. Proc. §§ 1102, 1103] to Restrain Enforcement of Discovery Order

[*Caption, introduction. See § 200.40[1]*]

[1. *If related appeal is pending, allege:* A related appeal is pending in the case entitled _____ (*title of case*), No. _____ in the Superior Court of _____ County and No. _____ in the _____ (*specify appellate court and appellate court docket number, if any*).]

2. Petitioner is _____ [*identify petitioner and describe the proceeding, e.g.,* the _____ (plaintiff *or* defendant) in the action entitled _____ (*name*), Plaintiff, vs. _____ (*name*), Defendant, Civil Action No. _____, now pending before respondent court].

[*EITHER*]

3. Respondent is the Superior Court of the State of California, County of _____, in which the above-entitled action is pending.

4. Real party in interest is _____ [*name*] and has an interest that is directly affected by this proceeding in that _____ [*specify reasons that make person the real party in interest, e.g.,* he/she/it is the _____ (plaintiff *or* defendant) in the above-entitled action].

5. On _____ [*date*], _____ [petitioner *or* real party in interest] filed the action

described in Paragraph 2 of this petition. A copy of that complaint is attached hereto as Exhibit A and made a part hereof. That complaint seeks _____ [*specify, e.g.,* to recover damages for personal injuries suffered when the car belonging to the real party in interest struck the car in which petitioner was riding].

6. On _____ [*date*], _____ [*describe discovery proceeding leading to objection to respondent's exercise of jurisdiction, e.g.,* real party in interest served on petitioner written interrogatories, a copy of which is attached hereto as Exhibit B and made a part hereof. Interrogatories No. 25-30 inquired whether petitioner had undergone previous illness and institutional confinements during his/her lifetime and requested a description of the injuries he/she claims to have suffered in the collision with defendant's vehicle. On _____ [*date*], petitioner served on the real party in interest written answers under oath to the written interrogatories in which petitioner answered Interrogatories No. 25-30 by indicating he/she had been hospitalized for a prior automobile accident and for an overdose of pills. Petitioner further stated that he/she had received psychiatric treatment from a psychotherapist for a few months].

7. _____ [*Allege further facts of discovery proceeding, if necessary, e.g.,* On receipt of petitioner's answers, real party in interest subpoenaed all of petitioner's medical records in the custody of the various doctors who had treated him/her, including those of petitioner's psychotherapist. The psychotherapist refused to surrender his/her records unless ordered to do so by the court, on the ground that they were privileged].

8. _____ [*Describe judicial action exercised by respondent court in response to the motions of real party in interest that is in excess of respondent court's jurisdiction, e.g.,* On _____ [*date*], respondent, on motion made and noticed by real party in interest, made and signed an order requiring production of the psychotherapist's records. A copy of the order is attached hereto as Exhibit C and made a part hereof].

9. _____ [*Allege that respondent's action granting discovery was in excess of the court's jurisdiction or an abuse of discretion in that it was a violation of privilege or of the provisions of Cal. Const., Art I, § 13 (unreasonable searches and seizures) or that the material was not relevant for discovery purposes, including, as well, objections made by petitioner to action in trial court, e.g.,* Respondent's action requiring production of petitioner's psychotherapists' records was in excess of its jurisdiction in that it was a violation of the psychotherapist-patient privilege as raised by petitioner in his/her papers opposing real party in interest's motion in the trial court. A copy of petitioner's papers is attached hereto as Exhibit D and made a part hereof. No specific mental condition of petitioner was at issue in the action and consequently, bringing the action did not deprive him/her of the privilege. Additionally, he/she did not waive the privilege by disclosing that he/she had received psychiatric treatment since he/she disclosed no more than was necessary to avoid application of the patient-litigant exception set forth in *Section 1016 of the Evidence Code*].

[10. *If ground for petition is lack of relevancy of information sought, allege that the answers sought by the line of questioning cannot as a reasonable possibility lead to the discovery of admissible evidence or be helpful in preparation for trial; allege any other facts, if applicable, showing burden or other injustice caused by complying with discovery.*]

11. _____ [*If real party in interest has taken steps to obtain sanctions, allege what steps he/she has taken and what sanctions he/she is seeking, e.g.,* On _____ [*date*], real party in interest served on petitioner a notice of motion notifying petitioner that on _____ [*date*], he/she will move respondent for an order striking petitioner's complaint in the action described in Paragraph 2 of this petition for petitioner's failure to obey the order requiring production of the psychotherapist's records and ordering petitioner to pay to real party in interest all reasonable expenses, including reasonable attorney's fees, incurred by real party in interest in obtaining such an order. A copy of the notice of motion is attached hereto as Exhibit E and made a party hereof].

12. Petitioner is a person beneficially interested in the issuance of a writ of prohibition by virtue of the fact that he/she is the _____ [*identify party, e.g.,* plaintiff *or* defendant] in the above-described action and _____ [*specify any further interest, e.g.,* that production of the above-described records would violate

the confidentiality of the relationship required between petitioner and his/her psychiatrist].

13. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law in that an order issued by a court in enforcement or in aid of the discovery procedure is not an appealable order and prohibition is an appropriate remedy to attack the improper enforcement of a discovery order.

[14. The issues presented in this petition are questions of first impression that are of general importance to the trial courts and to the legal profession, and general guidelines may be laid down for future cases by resolving the questions in that _____ (*specify what issues will be resolved by the court's decision*).]

[15. *If petition is an original proceeding in a court of appeal, add:* This petition is made to this court in the first instance rather than to the Superior Court of the State of California, County of _____, for the following reason(s): _____ (*specify circumstances, as required by Rule 8.490(b)(1) of California Rules of Court, that render it proper and necessary that the writ issue from an appellate court*).]

WHEREFORE, petitioner prays:

1. That the court issue an alternative writ of prohibition commanding respondent to _____ [desist *or* refrain] from further proceeding in the matter specified in the petition, and to show cause before this court at a time specified by court order why it should not be absolutely restrained from any further proceedings in such matter;

2. That on the return of the alternative writ and the hearing of this petition, this court issue its peremptory writ of prohibition absolutely restraining respondent from any further proceedings in this matter;

3. For costs of this proceeding; and

4. For such other and further relief as the court deems just and proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form of petition set out in [1], *above*, is for use in seeking a writ of prohibition in a superior court or a court of appeal to restrain the enforcement of a discovery order granted by a trial court. Although the form is designed to be adapted to meet the facts peculiar to any situation, a petition may be denied summarily, and care must be taken in adapting the form to make certain that no essential allegations are omitted.

Original writ proceedings should be initiated in the Supreme Court only in cases of overwhelming public importance. The Supreme Court rarely accepts such proceedings, but instead transfers the case to the appropriate court of appeal. For further discussion and forms relating to writs of prohibition generally, see Ch. 358, *Mandate and Prohibition* .

[3] Allegations

The petition alleges the following:

- The identity of respondent as an inferior tribunal (Paragraph 3) [*Code Civ. Proc. § 1103*].
- The identity of real party in interest (Paragraph 4) [*see Cal. Rules of Ct., Rule 8.490(b)(2)*].
- The discovery proceeding involved in the dispute (Paragraphs 6 and 7).
- The judicial action being exercised by respondent (Paragraph 8).
- The reason or reasons why the court's action was in excess of its jurisdiction or an abuse of its discretion (Paragraph 9) [*Code Civ. Proc. § 1102*].
- The petitioner's objection to underlying motion by real party in interest's, which was the basis for the trial court's order (Paragraph 9).
- The beneficial interest of petitioner (Paragraph 12).
- The fact that petitioner has no adequate legal remedy (Paragraph 13).
- The reason or reasons why it is proper for the writ to issue from an appellate court, to be included if the petition is filed in the court of appeal and could otherwise be filed in superior court (Paragraph 15).

The petition also contains an allegation that the questions presented are of first impression and of general importance to the trial courts and the legal profession (Paragraph 14). Whether this allegation is part of a petitioner's initial burden in seeking an extraordinary writ, and therefore whether it should be alleged, is unclear. The Supreme Court has long noted a tendency of some courts of appeal to regard prerogative writs as the normal instruments for reviewing discovery orders, noting further that this tendency is likely to result in more harm to the judicial process than the denial of immediate relief from less significant errors. The Court has repeated its standard, previously set out in *Oceanside Union School Dist. v. Superior Court (1962) 58 Cal. 2d 180, 185-186 n. 4, 23 Cal. Rptr. 375, 373 P.2d 439* , that writs should be used in discovery matters only to review questions of first impression that are of general importance to the trial courts and the legal profession in which general guidelines can be laid down for future cases [*Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 169-170, 84 Cal. Rptr. 718, 465 P.2d 854]* .

[4] Memorandum

A writ petition filed in the court of appeal must be accompanied by points and authorities [*Cal. Rules of Ct., Rules 8.490(b)(5)*].

If the respondent is the superior court or a judge of that court (as is commonly the case), the petition and one set of supporting documents (including a memorandum) must be served on any named real party in interest, but only the petition must be served on the respondent [*see Cal. Rules of Ct., Rule 8.490(f)(1)*]. However, if the respondent is not the superior court or a judge of that court, both the petition and one set of supporting documents must be served on the respondent and on any named real party in interest [*Cal. Rules of Ct., Rule 8.490(f)(2)*].

The petition must also be accompanied by proof of service of copies of the petition and accompanying memorandum on the respondent and any real party in interest named in the petition [*Code Civ. Proc. § 1107*; *see Cal. Rules of Ct., Rule 8.490(b)(5), (f)*]. The proof of service must give the telephone number of each attorney served and name each party represented by each attorney [*Cal. Rules of Ct., Rule 8.490(f)(3)*].

The clerk must file the petition even if its proof of service is defective. However, if the petitioner fails to file a corrected proof of service within five days after the clerk gives notice of the defect, the court may strike the petition or impose a lesser sanction [*Cal. Rules of Ct., Rule 8.490(f)(5)*]. A court may, however, in its discretion and for good cause, grant the petition ex parte without notice or service of the petition on the respondent and any real party in interest [*Code Civ. Proc. § 1107*; *see Cal. Rules of Ct., Rule 8.490(f)(6)* (court may allow petition to be filed without proof of service); *see also* Ch. 358, *Mandate and Prohibition* for detailed discussion of service].

In a trial court proceeding, a memorandum is not expressly required, but are nevertheless strongly recommended [*see Cal. Rules of Ct., Rules 3.1103(a)(2), 3.1113* (law and motion requirements, applicable to writ petitions, require a memorandum to accompany noticed motion)]. For further discussion of this point, see Ch. 358, *Mandate and Prohibition* .

For memoranda in support of writ petitions for review of discovery orders, see California Points and Authorities, Ch. 89A, *Discovery: Review of Discovery Orders* (Matthew Bender)

[5] Adequate Record

When a writ petition is filed in an appellate court to seek review of a trial court ruling, it must be accompanied by a record adequate to permit the review, including (1) copies of the order or judgment, (2) all documents and exhibits, and (3) a transcript, or a declaration that a transcript has been ordered and is expected to be filed on a certain date, or if no transcript is available, an explanation of its unavailability and a summary of the proceedings. In exigent circumstances, the petition may be filed without copies of the ruling from which the petition seeks relief or the required documents or exhibits [*see Cal. Rules of Ct., Rule 8.490(c)(1)(A)-(C)*], if counsel files a declaration that explains the urgency and the circumstances making the documents unavailable and fairly summarizes their substance. Failure to meet these requirements may result in a summary denial of the petition, stay request, or both [*Cal. Rules of Ct., Rule 8.490(c)(5)*].

All supporting documents must (1) be bound together at the end of the petition or in separate volumes not to exceed 300 pages each, with consecutive pagination throughout, (2) be index-tabbed by number or letter, and (3) begin with a table of contents listing each document by title and index-tab number or letter. If the document has attachments, the table of contents must give the title of each attachment and a brief description of its contents [*Cal. Rules of Ct., Rule 8.490(d)(1)*]. *Cal. Rules of Ct., Rule 8.44(a)* governs the number of copies of supporting documents to be filed [*Cal. Rules of Ct., Rule 8.490(d)(3)*; *see* [8], *below*].

Additionally, the petition must be served on a nonparty public officer or agency when required by statute or by *Cal. Rules of Ct., Rule 8.29* [*Cal. Rules of Ct., Rule 8.490(f)(4)*]. *Cal. Rules of Ct., Rule 8.29* requires service of certain briefs or petitions on the state attorney general, as well as on public officers and agencies, as required by statute.

[6] Certificate of Interested Persons or Entities

When a writ petition is filed in an appellate court to seek review of a trial court ruling in civil cases other than family, juvenile, guardianship, and conservator cases, each party must also file and serve a Certificate of Interested Persons or Entities, as required by *Cal. Rules of Ct., Rule 8.208* [*Cal. Rules of Ct., Rule 8.490(i)(1), (2)*].

The petitioner's certificate must be included in the petition [*Cal. Rules of Ct., Rule 8.490(i)(3)*]. The certificates of the respondent and the real party of interest must be included in their preliminary opposition, or if no opposition is filed, in any return [*Cal. Rules of Ct., Rule 8.490(i)(3)*]. The certificate must appear after the cover and before the tables [*Cal. Rules of Ct., Rule 8.490(i)(3)*]. If the identity of any party has not been publicly disclosed in the proceedings, the party may file an application for permission to file its certificate under seal, separately from the petition, preliminary opposition, or return [*Cal. Rules of Ct., Rule 8.490(i)(3)*].

Sanctions for failure to comply with court's notice to file the certificate are discretionary. If the petitioner fails to file a certificate within 10 days after the clerk of court mails a notice to file, the court may strike the petition. If the respondent fails to comply, the court may strike the document [*Cal. Rules of Ct., Rule 8.490(i)(4), (5)*].

The certificate is designed to provide Court of Appeal justices with additional information identifying persons with "hidden" interests in a proceeding, to help the justices determine whether to disqualify themselves [*Cal. Rules of Ct., Rule 8.208(a)*; *see* Appellate Advisory Committee Report dated March 10, 2006, http://www.courtinfo.ca.gov/rules/amendments.htm].

Thus, if a party is an entity, the certificate must list any other "entity or person that the party knows has an ownership interest of 10 percent or more in the party" [*Cal. Rules of Ct., Rule 8.208(e)(1)*]. All parties must also list "any other person or entity that has a financial or other interest in the outcome of the proceeding that the party reasonably believes the justices should consider in determining whether to disqualify themselves" [*Cal. Rules of Ct., Rule 8.208(e)(2)*]. If the party knows of no entity or person required to be disclosed under the rule, the party must so state in the certificate [*Cal. Rules of Ct., Rule 8.208(e)(3)*]. Further, a party who learns of changed or additional information required to be disclosed under Rule 8.208 "must promptly serve and file a supplemental certificate" [*Cal. Rules of Ct., 8.208(f)*].

[7] Verification

A petition for writ of prohibition must be verified [*Code Civ. Proc. § 1103*; *Cal. Rules of Ct., Rule 8.490(b)(4)*]. This requirement may be met by affidavit or by declaration under penalty of perjury [*Code Civ. Proc. §§ 446, 1109, 2015.5*].

[8] Timely Filing of Petition

A petition for a writ of mandate or prohibition is filed timely unless there is an unreasonable delay in filing the petition and prejudice to the real party. What is reasonable is determined by the facts. For example, a writ filed almost six months after a discovery order had been issued, well after the 60-day period applicable to appeals, was not untimely when the petitioners had made a motion for summary judgment, which, if granted, would have mooted the discovery order, and when the respondent had retained new counsel who was not immediately substituted into the case [*Rosso & Ebersold v. Superior Court (1987) 191 Cal. App. 3d 1514, 1517, 237 Cal. Rptr. 242]* .

[9] Number of Copies

When filing the petition in superior court, the attorney should prepare the following number of copies:

- Original for filing.
- Copy for service on respondent.

- Copy for service on real party in interest (if there are two or more respondents or real parties in interest, a copy for service on each party should be prepared).
- Office copy.
- Copy for petitioner, if desired.
- Additional copies as desired.

When filing the petition in a court of appeal, the attorney should prepare the following number of copies

- Original and four copies for filing [*Cal. Rules of Ct., Rule 8.44(b)(3)*].
- Copy for service on respondent.
- Copy for service on real party in interest (if there are two or more respondents or two or more real parties in interest, a copy for service on each party should be prepared).
- Office copy.
- Copy for petitioner, if desired.
- Additional copies as desired.

Unless the court orders otherwise by local rule or in the specific case, the attorney also must file one set of separately bound supporting documents accompanying the petition [*Cal. Rules Ct., Rule 8.44(b)(5)*].

[10] Praying for Relief in the Alternative

When counsel is in doubt as to the type of writ to seek, it is proper to pray in the alternative for a writ of prohibition or mandate. The cases uniformly follow the modern pleading principle that neither mislabeling nor a defective prayer will bar relief justified by proper allegations and proof [*Peck's Liquors, Inc. v. Superior Court (1963) 221 Cal. App. 2d 772, 775, 34 Cal. Rptr. 735]* .

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16-200 California Forms of Pleading and Practice--Annotated § 200.42

§ 200.42 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Issuance of Discovery Order

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Issuance of Discovery Order

[*Caption, introduction. See § 200.40[1].*]

1. [*Related appeal pending. See § 200.41[1], Paragraph 1.*]

2-4. [*Identity of parties involved. See § 200.41[1], Paragraphs 2-4.*]

5. _____ [*Allege statutory authority for discovery procedure sought by petitioner, e.g., Code of Civil Procedure Section 2030.020(b), (c)* provides that a plaintiff may propound interrogatories to a party without leave of court at any time that is 10 days after the service of the summons on, or appearance by, that party, whichever occurs first, or in an unlawful detainer action or other proceeding under *Code of Civil Procedure Section 1159 et seq.* (forcible entry and detainer), whether five days have elapsed since service of the summons on, or appearance by, that party, whichever occurs first. *Code of Civil Procedure Section 2030.210(a)* provides that the interrogatories must be responded to separately and fully in writing under oath by either an answer, an exercise of the party's option to produce writings, or by an objection].

6. _____ [*Allege facts of discovery proceeding sought by petitioner, e.g.,* On _____ (*date*), real party in interest was duly and properly served with summons in the action described in Paragraph 2 of this petition, and on _____ (*specify date more than 10 days after service of summons*), petitioner duly and properly served written interrogatories relevant to the subject matter of the action on the real party in interest. A copy of these written interrogatories is attached as Exhibit A and incorporated by reference].

7. _____ [*Allege facts showing that real party in interest refused to comply with discovery request and lacked reasons to do so, e.g.,* More than 30 days have elapsed since the service of written interrogatories on the real party in interest. The real party in interest obtained no order extending his/her time to answer such written interrogatories. He/She failed to serve responses to the interrogatories served on him/her as described in Paragraphs 5

and 6 of this petition although the information sought by the interrogatories is relevant to the subject matter of the action and is not privileged matter. Real party in interest offered no sufficient reasons for failing to comply with petitioner's request for answers to the written interrogatories].

8. _____ [*Allege facts showing petitioner obtained an order to compel real party in interest to answer the interrogatories, e.g., Code of Civil Procedure Sections 2030.290(b)* and *(c)* provide in part that when a responding party has failed to serve a timely response to interrogatories, the propounding party may bring a motion to compel a response and a motion for monetary sanctions. On _____ (*date*), petitioner, on motion duly made and noticed, moved the respondent for such an order. On _____ (*date*), respondent made its order compelling real party in interest to answer the interrogatories within 30 days of the date of the order, and assessing monetary sanctions against real party in interest in the amount of $_____ (*specify*)].

9. _____ [*Allege facts showing that real party in interest failed to comply with the order made, e.g.,* Thereafter, real party in interest failed to serve answers to the interrogatories on petitioner within 30 days after respondent made its order compelling real party in interest to do so].

10. _____ [*Allege facts showing that petitioner made a motion to impose sanctions, e.g.,* On _____ (*date*), petitioner, on motion duly made and noticed, moved the respondent, under *Code of Civil Procedure Section 2030.290(b)*, for an order _____ (*specify sanction sought, e.g.,* striking out the answer of real party in interest, and imposing monetary sanctions, including reasonable attorney's fees) under Code of Civil Procedure Section 2023.290(c)].

11. _____ [*Allege respondent's improper action constituting an abuse of discretion, e.g.,* On _____ (*date*), after hearing the motion described in Paragraph 10 of this petition, respondent made a finding that the real party in interest had engaged in conduct that constitutes an abuse of the discovery process, but respondent abused its discretion by refusing to enter an order imposing any of the sanctions available pursuant to *Code of Civil Procedure Sections 2023.020* and *2030.290(c)*].

12. Petitioner is entitled to an order of respondent _____ [*allege type of order petitioner is entitled to, e.g.,* imposing sanctions on the real party in interest for his/her willfully engaging in conduct constituting an abuse of the discovery process] for the reason that _____ [*specify reasons, e.g.,* such an order is expressly prescribed by statute as alleged in Paragraph 10 of this petition].

13. Petitioner is a person beneficially interested in the issuance of a writ by virtue of the fact that he/she is the _____ [*describe party, e.g.,* plaintiff] in the action described in Paragraph 2 of the petition and _____ [*allege any other interest, e.g.,* is entitled to the benefit of the sanctions set out in *Code of Civil Procedure Section 2023.020*].

14. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition, because the order denying discovery is not appealable and mandate is an appropriate remedy to attack the improper denial of discovery. _____ [*Allege further reasons, if any, why petitioner has no adequate legal remedy, e.g.,* If sanctions are not imposed on the real party in interest, petitioner will have to proceed to trial of the action described in Paragraph 2 of this petition without information that is in the exclusive knowledge of the real party in interest and essential to the proper prosecution of the action.]

15. [*Question of first impression. See § 200.41[1], Paragraph 14.*]

16. [*Original proceeding in court of appeal. See § 200.41[1], Paragraph 15.*]

WHEREFORE, petitioner prays:

1. That the court issue an alternative writ of mandate commanding respondent to _____ [*describe duty to be performed*] or to show cause before this court at a time specified by court order why it has not done so and why a peremptory writ should not issue;

2. That, on the return of the alterative writ and the hearing of this petition, this court issue its peremptory writ of mandate commanding respondent to _____ [*describe duty to be performed*];

3. For costs of this proceeding; and

4. For such other and further relief as the court deems just and proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[*Verification. See § 200.41[1].*]

[2] Use of Form

The petition set out in [1], *above*, is a general form for use in filing a petition for a writ of mandate in a superior court or a court of appeal. The examples used throughout the form illustrate one of the many factual situations in which mandate might be an appropriate remedy in a discovery proceeding. Counsel may adapt the form to meet the facts peculiar to his or her situation. However, because a petition may be denied summarily, care must be taken to make certain that no essential allegations are omitted.

For discussion regarding the initiation of original writ proceedings in the Supreme Court, as distinguished from the court of appeal, see *§ 200.41[2]*.

[3] Allegations

The petition alleges the following:

- The identity of respondent as an inferior tribunal (Paragraph 3) [*Code Civ. Proc. § 1085*].
- Identity of real party in interest (Paragraph 4) [*Cal. Rules of Ct., Rule 8.490(b)(2)*].
- The statutory authority for the discovery procedure sought by petitioner (Paragraph 5).
- Facts showing the type of discovery sought by petitioner (Paragraph 6).
- The refusal of the real party in interest to comply with the discovery request (Paragraph 7).
- Facts showing that petitioner obtained an order compelling discovery (Paragraph 8) and that real party in interest failed to comply with the order (Paragraph 9).
- Motion by petitioner under *Code Civ. Proc. §§ 2030.290(b), (c)* to impose sanctions (Paragraph 10).

- Improper action by respondent constituting an abuse of discretion (Paragraph 11). Note that the petitioner does not need to allege specifically that the trial court committed an abuse of discretion if he or she alleges the facts that show such abuse [*West Pico Furniture Co. v. Superior Court (1961) 56 Cal. 2d 407, 415, 15 Cal. Rptr. 119, 364 P.2d 295]* .

- Petitioner's entitlement to the order for sanctions (Paragraph 12).

- Petitioner's beneficial interest (Paragraph 13) [*see Code Civ. Proc. § 1086*].

- The lack of an adequate legal remedy (Paragraph 14) [*see Code Civ. Proc. § 1086*].

- The reason or reasons why it is proper for the writ to issue from an appellate court, to be included if the petition is filed in the court of appeal (Paragraph 16).

For a discussion of the allegation of a question of first impression (Paragraph 15) *see § 200.41[3]*.

[4] Memorandum

For discussion of the requirements that a writ petition be accompanied by a supporting memorandum, see *§ 200.41[4]*.

For memoranda in support of writ petitions for review of discovery orders, see California Points and Authorities, Ch. 89A, *Discovery: Review of Discovery Orders* (Matthew Bender).

[5] Adequate Record

For discussion of the requirements that a writ petition filed in the court of appeal be accompanied by a record adequate to permit review, see *§ 200.41[5]*.

[6] Verification

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*]. This requirement may be met by affidavit or by declaration under penalty of perjury [*Code Civ. Proc. §§ 446, 1109, 2015.5*].

[7] Certificate of Interested Persons or Entities

For discussion of the requirement that a certificate of interested persons or entities be filed in the court of appeal, see *§ 200.41[6]*.

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Volume 16: Depositions and Discovery-Chs. 190-204
Chapters 201-204 [RESERVED]

16-201 California Forms of Pleading and Practice--Annotated Chapters 201-204

[RESERVED]

Chapters 201[RESERVED]

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Volume 17: Defaults and Default Judgements thru Duress, Menace, Fraud, Undue Influence, and Mistake-Chs. 205-219
Chapter 205 DEFAULTS AND DEFAULT JUDGMENTS

17-205 California Forms of Pleading and Practice--Annotated 205.syn

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[ii] Required When Answer Stricken

[iii] Requirements When Multiple Causes of Action Alleged

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[6] Declaration of Mailing (Paragraph 6)

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[3] Cross References

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[1] FORM

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§ 205.95 Default Judgment by Clerk [Code Civ. Proc. § 585(a)]--Basic Form

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[2] Use of Form

[3] Contents of Form

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[5] Text References

§ 205.96 [Reserved]

§ 205.97 Default Judgment by Court [Code Civ. Proc. § 585(a), (b)]--Basic Form

[1] FORM

[2] Use of Form

[3] Cross References

[4] Text References

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[1] FORM

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[3] Cross References

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[1] FORM

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[3] Contents of Form

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[1] FORM

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FOOTNOTES:
(n39)Footnote *.
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Chapter 205 DEFAULTS AND DEFAULT JUDGMENTS
PART I. SCOPE

17-205 California Forms of Pleading and Practice--Annotated § 205.01

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§ 205.01 Scope of Chapter

This chapter discusses the pretrial disposition of an action by entry of a default and default judgment. The chapter focuses on when a default may be entered and the procedures for obtaining entry of a default and default judgment. The introduction discusses:

- An overview of procedures [*see § 205.10* et seq.].
- Entry of default [*see § 205.20* et seq.].
- Entry of default judgment [*see § 205.40* et seq.].

This chapter includes the following forms:

- An illustration of the Judicial Council form of Request for Entry of Default [*see § 205.90*].
- A request to fix attorney's fees [*see § 205.91*].
- A declaration, application, and order required to take a default against a person in the military [*see*

§§ 205.92 -205.94].

- Default judgments by the clerk [*see § 205.95*] and by the court [*see §§ 205.97 -205.98*].

- A notice to shorten the time to seek relief from default in actions involving real property [*see § 205.100*].

- A stipulation to set aside a default [*see § 205.101*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPretrial JudgmentsDefaultGeneral OverviewCivil ProceduresPretrial JudgmentsDefaultDefault JudgmentsCivil ProceduresPretrial JudgmentsDefaultEntry of Default Judgments

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17-205 California Forms of Pleading and Practice--Annotated § 205.02

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§ 205.02 Cross References

For discussion and forms related to setting aside a default or default judgment, see Ch. 371, *Motions After Trial* , and Ch. 489, *Relief From Judgments and Orders* . For other chapters relating to default in the context of specific causes of action, see Ch. 221, *Dissolution of Marriage: Procedure* , Ch. 333, Landlord and Tenant: Eviction Actions, and Ch. 482, *Quieting Title* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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17-205 California Forms of Pleading and Practice--Annotated §§ 205.03-205.09

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[Reserved]

§§ 205.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Overview of Procedures

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§ 205.10 Governing Law

The entry of defaults and default judgments is governed by *Code Civ. Proc. §§ 585-587.5* and *Cal. Rules of Court, Rules 3.1800* and *3.1700(a)(2)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultEntry of Default Judgments

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17-205 California Forms of Pleading and Practice--Annotated § 205.11

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§ 205.11 Default and Default Judgment Distinguished

A default proceeding is a device designed to enable the courts to clear their calendars of cases lacking adversarial quality [*see Jones v. Interstate Recovery Service (1984) 160 Cal. App. 3d 925, 928, 206 Cal. Rptr. 924]* . The two key procedural events in a default proceeding are the entry of default and the entry of the default judgment. These events may be distinguished as follows:

- Entry of default cuts off a defendant's right to answer or otherwise respond to the complaint. Once the default is entered, the defendant is "out of court" and cannot take further steps in the cause affecting plaintiff's right of action, until the default is set aside in a proper proceeding [*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc. (1984) 155 Cal. App. 3d 381, 385-386, 202 Cal. Rptr. 204]* . For discussion of the procedures for setting aside a default or default judgment, see Ch. 371, *Motions After Trial* , and Ch. 489, *Relief From Judgments and Orders* .

- Default judgment actually awards the plaintiff the relief sought in the plaintiff's complaint. It also conclusively establishes between the parties, so far as subsequent proceedings on a different cause of action are concerned, the truth of all material allegations in the complaint in the default action and every fact necessary to uphold the default judgment [*see Collin v. American Empire Ins. Co. (1994) 21 Cal.*

App. 4th 787, 805, 26 Cal. Rptr. 2d 391 ; *Mitchell v. Jones (1959) 172 Cal. App. 2d 580, 586-587, 342 P.2d 503* and discussion in *§ 205.44*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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17-205 California Forms of Pleading and Practice--Annotated § 205.12

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§ 205.12 Availability of Default and Default Judgment

[1] Defendant Fails to Make Timely Response

A plaintiff may request the entry of default against a defendant who fails to do one of the following:

- File a response to a complaint within the time specified in the summons [*Code Civ. Proc. § 585*; *see* discussion in *§ 205.20*].

- Answer within the proper time after a complaint is amended or the court rules on a demurrer or certain motions in the action [*Code Civ. Proc. § 586*; *see* discussion in *§ 205.20[2]*, et seq.].

If a defendant is technically in default, default will not be entered unless the plaintiff affirmatively takes action to obtain the entry of the defendant's default [*see Code Civ. Proc. § 585*]. This is accomplished by filing a formal request with the clerk of the court on the form prescribed by the Judicial Council for such applications, along with proper documentation [*see § 205.25[1]*]. If the case is an appropriate one for the entry of default, the clerk must enter default, thereby cutting off the defendant's right to appear [*see* discussion in *§ 205.27*]. For an illustration of the form of request for entry of default, see *§ 205.90*.

[2] Entry of Default Judgment by Clerk and Court Distinguished

At the time of entry of default, the court clerk may also enter a default judgment if the following requirements are met [*Code Civ. Proc. § 585(a)*; *see* discussion in *§ 205.45*]:

- The defendant was not served by publication.
- The action arises on contract or judgment.
- The action only seeks recovery of a fixed or determinable amount of money or damages.

In all other cases, the plaintiff must obtain a court judgment of default [*see Code Civ. Proc. § 585(b), (c)*]. A plaintiff seeking a court judgment of default must present sufficient evidence to a court to support his or her claim for relief [*see Code Civ. Proc. § 585(b)-(d)*]. This process is often referred to as "prove-up" [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rules 9.11(b), 9.18].

[3] Application to Cross Complaint

Default may be taken on a cross complaint filed by a defendant against another defendant or the plaintiff as well as on a complaint [*see Code Civ. Proc. § 585(e)*]. As used in the default statutes "complaint" includes a cross complaint, "defendant" include a cross defendant, and "plaintiff" includes a cross complainant [*Code Civ. Proc. § 587.5*].

[4] Default Limited to "Actions"

Code Civ. Proc. §§ 585-587.5 apply specifically to "actions." They do not apply to special proceedings unless they are expressly made applicable by the statutes governing a particular special proceeding [*see In re Christopher A. (1991) 226 Cal. App. 3d 1154, 1162, 277 Cal. Rptr. 302* (default statutes inapplicable to proceeding for freedom from parental control and custody under former *Civ. Code § 232 et seq.*; *now see Fam. Code § 7800 et seq.*)].

Civil actions are generally those actions governed by Part Two of the Code of Civil Procedure (*Code Civ. Proc. § 307 et seq.*). Special proceedings are generally those governed by Part Three of the Code of Civil Procedure (Code *Civ. Proc. § 1063 et seq.*), although there are other scattered statutes providing for special proceedings [*see, e.g., Pub. Res. Code § 3314* (special proceeding to enjoin waste of gas)].

[5] Imposition of Default as Sanction

[a] For Delay in "Fast Track" Program

Local rules adopted pursuant to the Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*) provide strict guidelines for pretrial procedures. A number of courts authorize default as a potential sanction for noncompliance with their trial court delay reduction rules [*see, e.g.,* Orange Co. Super. Ct. Rules, Rule 454; Sacramento Co. Super. Ct. Rules, Rule 11.12].

For discussion and forms relating to sanctions under local court rules, see Ch. 510, *Sanctions* .

[b] For Misuse of Discovery Provisions

Under certain circumstances, a trial court may order that a default judgment be rendered as a "terminating sanction," for a party's misuse of the discovery process [*see Code Civ. Proc. § 2023.030*]. For further discussion of this sanction, see Ch. 190, *Depositions and Discovery*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral OverviewCivil ProcedureDiscoveryDisclosuresSanctionsCivil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedurePretrial JudgmentsDefaultFailure to Pursue the Cause

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PART II. LEGAL BACKGROUND
A. Overview of Procedures

17-205 California Forms of Pleading and Practice--Annotated §§ 205.13-205.19

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[Reserved]

§§ 205.13[Reserved]

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Volume 17: Defaults and Default Judgements thru Duress, Menace, Fraud, Undue Influence, and Mistake-Chs. 205-219
Chapter 205 DEFAULTS AND DEFAULT JUDGMENTS
PART II. LEGAL BACKGROUND
B. Entry of Default

17-205 California Forms of Pleading and Practice--Annotated § 205.20

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§ 205.20 Grounds for Entry of Default

[1] No Answer or Response to Complaint

When the defendant has been served other than by publication, the clerk, on plaintiff's application, must enter the default of the defendant or defendants so served if, within the time specified in the summons, none of the following has been filed [*Code Civ. Proc. § 585(a), (b)*]:

- Answer.
- Demurrer.
- Notice of motion to strike (of the type described, *below*).
- Notice of motion to transfer under *Code Civ. Proc. § 396b*.
- Notice of motion to dismiss pursuant to *Code Civ. Proc. § 583.210* for failure to timely serve the summons.

- Notice of motion to quash service or to stay or dismiss pursuant to *Code Civ. Proc. § 418.10*.
- Notice of filing petition for writ of mandate pursuant to *Code Civ. Proc. § 418.10*.

The time permitted for a responsive pleading generally is 30 days [*Code Civ. Proc. § 412.20(a)(3)*], although specific statutes may dictate a shorter time period for the filing of a response [*see, e.g., Code Civ. Proc. § 1167* (five-day limitation for response in forcible and unlawful entry and detainer actions)].

A notice of motion to strike in this context is a notice of motion to strike the whole or any part of a pleading filed within the time that the moving party is required otherwise to plead to that pleading. The notice of motion must specify a hearing date set in accordance with *Code Civ. Proc. § 1005(b)* (general requirements for notice of motions; *see* Ch. 372, *Motions and Orders*) The filing of the notice of motion does not extend the time within which to demur [*Code Civ. Proc. § 585(f)*].

[2] No Answer or Response to Amended Complaint

On proper application, the clerk must enter the defendant's default if the defendant, within 30 days after service of the amended complaint or within the time allowed by the court, fails to file any of the following [*Code Civ. Proc. § 586(a)(1)*; *see Code Civ. Proc. §§ 471.5(a), 585*]:

- Answer.
- Demurrer.
- Notice of motion to strike under *Code Civ. Proc. § 585(f)* (*see § 205.20[1]*).

When, however, an amendment relates merely to formal or immaterial matters and does not change the cause of action, the defendant does not have to answer. A default entered under those circumstances should be set aside [*Gray v. Hall (1928) 203 Cal. 306, 310-311, 265 P. 246* ; *Carrasco v. Craft (1985) 164 Cal. App. 3d 796, 808-811, 210 Cal. Rptr. 599]* .

ILLUSTRATION:

Amendment Relating to Immaterial Matter. Plaintiff files a complaint alleging eight causes of action against several defendants. Two of the defendants file an answer to the complaint specifically denying relevant portions of the complaint and setting forth seven separate affirmative defenses. Plaintiff later files a motion to amend the complaint, which is granted. The complaint, as amended, does not change the causes of action alleged against the two defendants, but changes the paragraphing in which the causes of action are alleged. Defendants fail to file an answer to the amended complaint and default is entered. Has the court committed error by entering the default? Yes. While the specific denials and admissions made in the answer filed by defendants could not be applied directly to the amended complaint insofar as the amended complaint had changed the paragraphs and the way that it was written, the answer did set forth a sufficient defense to the complaint as amended. Therefore, it was error to enter the default and default judgment on the basis that the defendants failed to file an answer to the amended complaint [*Carrasco v. Craft (1985) 164 Cal. App. 3d 796, 808-811, 210 Cal. Rptr. 599* (setting aside default)].

[3] No Answer After Overruling of Demurrer or Denial of Motion to Strike

On proper application, the clerk must enter the defendant's default if the defendant fails to answer a complaint within the time allowed by the court after a demurrer is overruled and/or a motion to strike pursuant to *Code Civ. Proc. § 585(f)* is denied [*Code Civ. Proc. § 586(a)(2)*; *see Code Civ. Proc. § 585*].

[4] No Answer After Portion of Complaint Stricken

On proper application, the clerk must enter the defendant's default if the defendant fails to answer, within the time allowed by the court, the unstricken portion of a complaint after a motion to strike as defined in *Code Civ. Proc. § 585(f)* is granted, if no demurrer has been sustained or is then pending [*see Code Civ. Proc. §§ 585, 586(a)(3)*].

[5] No Response After Motion to Quash or Stay Denied

On proper application, the clerk must enter the defendant's default if the defendant fails to plead to the complaint within 15 days after service of written notice of entry of an order denying defendant's motion to quash service or to stay or dismiss the action. For good cause shown, however, the trial court may extend the time to plead for an additional period not exceeding 20 days [*see Code Civ. Proc. §§ 418.10(b), 585, 586(a)(4)*].

If a defendant seeks a writ of mandate to require the trial court to quash service or to stay or dismiss the action, the defendant's default may be taken if he or she fails to file a responsive pleading within 10 days after service of written notice of denial of the writ. For good cause shown, however, the trial court may extend the time to plead for an additional period not exceeding 20 days [*see Code Civ. Proc. §§ 418.10(c), 585, 586(a)(4)*].

PRACTICE TIP:

Notice of Ruling to Defendant. To control the commencement of the period in which the defendant must file a responsive pleading, plaintiff's counsel may wish to provide a Notice of Ruling to the defendant.

PRACTICE TIP: Note Effect of *Code Civ. Proc. § 1005(b)*. Be mindful of whether or not extensions of time for service by mail or FAX [*see Code Civ. Proc. § 1005(b)*] apply to the time within which defendant must respond.

[6] No Amendment After Demurrer to Answer Sustained

On proper application, the clerk must enter the defendant's default if the defendant fails to amend an answer within the time permitted by the court after a demurrer to the answer is sustained [*Code Civ. Proc. § 586(a)(5)*; *see Code Civ. Proc. § 585*].

[7] No Response After Action on Motion to Transfer

[a] Motion Denied

On proper application, the clerk must enter the defendant's default if a motion to transfer under *Code Civ. Proc. § 396b* is denied and the defendant fails to respond to the complaint within the time allowed by the court or within the time provided in *Code Civ. Proc. § 586(a)(6)(C)* (*discussed under § 205.20[7][c]*) [*Code Civ. Proc. § 586(a)(6)(A)*; *see Code Civ. Proc. § 585*].

[b] Motion Granted

On proper application, the clerk must enter the defendant's default if a motion to transfer under *Code Civ. Proc. § 396b*

is granted and the defendant fails to respond to the complaint within 30 days of the mailing of the notice of the filing and case number by the clerk of the court to which the action or proceeding is transferred or within the time provided in *Code Civ. Proc. § 586(a)(6)(C)* (discussed in *§ 205.70[7][c]*) [*Code Civ. Proc. § 586(a)(6)(B)*; *see Code Civ. Proc. § 585*].

[c] Time to Respond If Order Is Appealed, Stayed, or Subject of Writ

Code Civ. Proc. § 586(a)(6)(C) provides that if the order granting or denying the motion to transfer under *Code Civ. Proc. § 396a* or *396b* is appealed under *Code Civ. Proc. § 904.2* and a stay is granted or if a writ of mandate is sought following the grant or denial of the motion to transfer, the court, on application or on its own motion, must allow the defendant a reasonable time to answer the complaint after the appeal or mandate proceeding becomes final or on earlier termination of the stay. Notice of the order allowing defendant further time to answer the complaint must be promptly served by the party who obtained the order or by the clerk if the order is made on the court's own motion [*Code Civ. Proc. § 586(a)(6)(C)*].

[8] No Amendment After Answer Stricken With Leave to Amend

On proper application, the clerk must enter the defendant's default when a defendant fails to amend the answer within the time allowed by the court after a motion to strike all or part of the answer is granted with leave to amend [*Code Civ. Proc. § 586(a)(7)*; *see Code Civ. Proc. § 585(f)*].

[9] Answer Stricken Without Leave to Amend

On proper application, the clerk must enter the defendant's default when a motion to strike the entire answer, as defined in *Code Civ. Proc. § 585(f)* (*see § 205.20[2]*), is granted without leave to amend [*Code Civ. Proc. § 586(a)(7)*; *see Code Civ. Proc. § 585*].

[10] No Response After Code Civ. Proc. § 583.250 Motion to Dismiss

On proper application, the clerk must enter the defendant's default if the defendant fails to respond within the time allowed by the court after a motion to dismiss pursuant to *Code Civ. Proc. § 583.250* (failure to timely serve summons) is denied [*Code Civ. Proc. § 586(a)(8)*; *see also Code Civ. Proc. § 418.10* (motion to dismiss as response to action)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedurePretrial JudgmentsDefaultFailure to Pursue the CauseCivil ProcedurePretrial JudgmentsDefaultRelief From Default

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§ 205.21 Belated Responsive Pleading Precludes Entry of Default

If the defendant belatedly files a pleading at a time when his or her default has not yet been taken, the plaintiff is considered to have granted, in effect, additional time to the defendant to plead; the defendant is not strictly in default in such case [*Goddard v. Pollock (1974) 37 Cal. App. 3d 137, 141, 112 Cal. Rptr. 215]* .

PRACTICE TIP:

Striking Defendant's Untimely Pleading. Should the defendant belatedly file a pleading at a time when his or her default has not yet been taken, the plaintiff should promptly move to strike the defendant's untimely pleading. If the court in its discretion grants the motion, the plaintiff should then request entry of the defendant's default [*Goddard v. Pollock (1974) 37 Cal. App. 3d 137, 141, 112 Cal. Rptr. 215]* . For more detailed discussion of motions to strike, see Ch. 375, *Motions to Strike: Pleadings* , Ch. 376, *Motions to Strike: Anti-SLAPP* , and Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultEntry of Default Judgments

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17-205 California Forms of Pleading and Practice--Annotated § 205.22

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§ 205.22 Responsive Pleading by Corporation Precludes Entry of Default Against Fictitious Business Name It Uses

Use of a fictitious business name does not create a legal entity separate from its owner. There is no legal distinction between a corporation and its fictitious business name. Thus, when a corporation is sued in its corporate name as well as under a fictitious business name that it uses, and the corporation appears in its corporate name, entry of default against the fictitious business name thereafter is improper [*Pinkerton's, Inc. v. Superior Court (1996) 49 Cal. App. 4th 1342, 1344, 1347-1349, 57 Cal. Rptr. 2d 356* (trial court wrong when it found that action could proceed against a fictitious business name after the legal entity had been dismissed)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporate NamesFictitious NamesGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultEntry of Default Judgments

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17-205 California Forms of Pleading and Practice--Annotated § 205.23

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§ 205.23 Notice of Damages Required Before Taking Default

[1] Due Process Limitation

It is a fundamental concept of due process that a judgment cannot be entered against a defendant unless he or she has been given proper notice and an opportunity to defend. California satisfies these requirements in default cases through *Code Civ. Proc. § 580*, the primary purpose of which is to guarantee defaulting parties adequate notice of the maximum judgment that may be assessed against them [*Sole Energy Company v. Hodges (2005) 128 Cal. App. 4th 199, 208* , 26 Cal. Rtpr. 3d 823; *In re Marriage of Lippel (1990) 51 Cal. 3d 1160, 1166, 276 Cal. Rptr. 290, 801 P.2d 1041*]. Section 580 limits the relief granted to the plaintiff, if there is no answer, to no more than that which the plaintiff demanded in the complaint, in the statement of damages required by *Code Civ. Proc. § 425.11*, or in the statement provided for in *Code Civ. Proc. § 425.115*. It constitutes a statutory expression of the mandates of due process, which require formal notice of potential liability [*see Parish v. Peters (1991) 1 Cal. App. 4th 202, 207, 1 Cal. Rptr. 2d 836* ; *see also Code Civ. Proc. § 585(a)-(c)* (limiting default judgment to amount in complaint or Section 425.11 or 425.115 statement)].

These principles apply whether the default occurs before or after an answer is filed [*see Greenup v. Rodman (1986) 42 Cal. 3d 822, 826-829, 231 Cal. Rptr. 220, 726 P.2d 1295* (answer stricken for refusal to comply with discovery orders,

and matter continued as default proceeding); *see also Morton Regent Enterprises, Inc. v. Leadtec California, Inc. (1977) 74 Cal. App. 3d 842, 847-848, 141 Cal. Rptr. 706* (involving motion by plaintiff's and cross defendant's surety to intervene after judgment to vacate judgment when plaintiff failed to appear at trial and judgment was entered against it on complaint and cross complaint)].

Code Civ. Proc. § 580 applies to limited civil cases to limit default judgments to the amount specified in the complaint [*see Janssen v. Luu (1997) 57 Cal. App. 4th 272, 278, 66 Cal. Rptr. 2d 838* (applying law with respect to municipal court jurisdiction)]. Both Section 580 and due process require that defendants be told exactly what their exposure is [*see Karton v. Dougherty (2009) 171 Cal. App. 4th 133, 151, 89 Cal. Rptr. 3d 506* (default judgment void where it is mathematically impossible for the unpaid fees and costs awarded to plaintiff, plus interest awarded thereon, to be within the amount demanded in the complaint); *Janssen v. Luu (1997) 57 Cal. App. 4th 272, 277-278, 66 Cal. Rptr. 2d 838* (directing judgment to be modified to reduce total award from $24,825.04 to $3,000 when complaint had sought damages "in excess of $3,000.00 and according to proof"); *Pino v. Campo (1993) 15 Cal. App. 4th Supp. 1,3-6 , 19 Cal. Rptr. 2d 483* (reversing judgment for $20,867.84 and directing default to be set aside)]. It is not enough that the defendant may know the court's jurisdictional limits. If no specific amount of damages is demanded, there is no adequate notice to the defendant, and a default judgment entered under those conditions is void [*Falahati v. Kondo (2005) 127 Cal. App. 4th 823, 830, 26 Cal. Rptr. 3d 104* ; *Janssen v. Luu (1997) 57 Cal. App. 4th 272, 278-279, 66 Cal. Rptr. 2d 838* (rejecting the Los Angeles Superior Court appellate department view expressed in *Brown v. McAdoo (1987) 196 Cal. App. 3d Supp. 20 , 242 Cal. Rptr. 473* , that a complaint is sufficient if it seeks general damages according to proof, expressly remitting all amounts in excess of the court's jurisdictional maximum, but without specifying in the complaint what that maximum is, and similar view expressed by the Los Angeles Superior Court appellate department in *Wisdom v. Ramirez (1985) 177 Cal. App. 3d Supp. 1 , 222 Cal. Rptr. 923*)]. If no amount were stated in a complaint in a limited civil case, the resulting judgment would be void in its entirety [*Janssen v. Luu (1997) 57 Cal. App. 4th 272, 279, 66 Cal. Rptr. 2d 838* (under circumstances of case, however, municipal court judgment was void only to extent it exceeded amount claimed in complaint)].

Under *Code Civ. Proc. § 580*, actual notice of the damages sought is not sufficient. Due process requires formal notice; and constructive notice of potential liability does not satisfy section 580 [*Stein v. York (2010) 181 Cal. App. 4th 320, 325, 105 Cal. Rptr. 3d 1* (Defendant's active participation in discovery and other pretrial procedures was not a waiver of his right to object to the amount of damages awarded. Nor was defendant on notice of the damages because he attended the default hearing. Although defendant was physically present at the hearing, he was in default, and therefore "out of court." He did not participate in his capacity as a defendant but only as a witness who had been subpoenaed by plaintiff to testify. Because the complaint did not specify the amount of damages sought, it could not support a default judgment in any amount. Thus, the judgment was void and had to be vacated. On remand, plaintiff could move to amend the complaint to state the full amount of damages sought. If plaintiff was permitted to do so, defendant would have the opportunity to attack the amended pleading, answer it, or default once more, if he so chose.)].

[2] When Amount Claimed Is Not Alleged

[a] Generally

The rule requiring that defaulting parties receive adequate notice applies to cases in which an amount claimed is not usually, by the nature of the action, specified in the complaint. For example, in an action for dissolution of partnerships and an accounting in which the amount due is unliquidated and unascertained, it has been held that a default judgment awarding a sum of money of which no prior notice as to the amount was given to the defendant was in excess of the trial court's jurisdiction [*Ely v. Gray (1990) 224 Cal. App. 3d 1257, 1260-1261, 274 Cal. Rptr. 536 (Third District)]* . By analogizing this case to one for personal injury or wrongful death in which the amount claimed cannot be stated in the complaint but must be stated in a statement of damages served on the defendant before his or her her default can be entered (*see discussion under § 205.23[2][c][i], below*), *Ely v. Gray* held that the plaintiff who seeks an accounting has the solution of a postcomplaint and predefault notice to the defendant of the amount plaintiff will seek to prove due if

the defendant defaults and that, as with the statement of damages required by *Code Civ. Proc. § 425.11*, the notice must be given with adequate time for the defendant to respond before a default is entered [*Ely v. Gray (1990) 224 Cal. App. 3d 1257, 1263-1264, 274 Cal. Rptr. 536* (affirming portion of judgment dissolving partnerships and reversing that portion awarding a specified sum on the accounting)].

Another case, however, has held that there is no need to serve a statement of damages on the defaulting defendant in an action for an accounting, valuation and payment of plaintiff's interest in a partnership from which plaintiff withdrew when the defandant partnership has a partnership agreement setting out a specific method for calculating a withdrawing partner's interest and the financial information from which it can precisely calculate the amount for which it could be liable if it defaulted [*Cassel v. Sullivan, Roche & Johnson (1999) 76 Cal. App. 4th 1157, 1163-1164, 90 Cal. Rptr. 2d 899* (concluding that under the circumstance before it, *Ely v. Gray* was not analytically sound in light of later cases)]. The *Cassel* court held that in this situation, the complaint need only specify the type of relief requested, and not the specific dollar amount sought [*Cassel v. Sullivan, Roche & Johnson (1999) 76 Cal. App. 4th 1157, 1162-1164, 90 Cal. Rptr. 2d 899* (relying on *In re Marriage of Andresen (1994) 28 Cal. App. 4th 873, 877, 879, 34 Cal. Rptr. 2d 147* , which held that when wife had adequately given notice that she was requesting the parties' property rights to be determined, there was no need to include the amount of relief requested, as contrasted with the type of relief requested)].

[b] Punitive Damages Claim

[i] No Amount to Be Alleged

No claim for punitive damages may specify the amount or amounts of punitive damages sought [*Civ. Code § 3295(e)*]. Conversely, punitive damages may not be recovered from a defaulting defendant on the basis of a general allegation in the complaint of entitlement to such damages. Due process requires that notice be given in some form of the amount of punitive damages sought [*Wiley v. Rhodes (1990) 223 Cal. App. 3d 1470, 1472-1474, 273 Cal. Rptr. 279]* .

If a complaint, in violation of *Civ. Code § 3295(e)*, specifies the amount of punitive damages sought, the trial court may however award punitive damages because the statement of the amount meets the notice requirement of *Code Civ. Proc. § 580* [*Cummings Medical Corp. v. Occupational Medical Corp. (1992) 10 Cal. App. 4th 1291, 1296-1298, 13 Cal. Rptr. 2d 585* (cross complaint; cross defendant admitted actual notice of amount sought)].

[ii] Statement Preserving Right to Punitive Damages

A plaintiff may preserve the right to seek punitive damages pursuant to *Civ. Code § 3294* on a default judgment by serving a statutory statement on the defendant [*see Code Civ. Proc. § 425.115(b)*]. The plaintiff must serve the statement before a default may be taken if the motion for default judgment includes a request for punitive damages [*Code Civ. Proc. § 425.115(f)*]. The plaintiff may serve the statement pursuant to *Code Civ. Proc. § 425.115*, and may serve it as part of the statement of damages required by *Code Civ. Proc. § 425.11, discussed under § 205.23[2][c][i]* [*Code Civ. Proc. §§ 425.11(e), 425.115(e)*; for forms of both types of statements, *see* Ch. 177, *Damages*].

If the defendant appears in the action, the plaintiff will not be limited to the amount set forth in the statement [*Code Civ. Proc. § 425.115(c)*].

The procedures provided for in *Code Civ. Proc. § 425.115* also apply to cross complaints [*Code Civ. Proc. § 425.115(a)*].

[iii] Manner of Service of Statement Preserving Right to Punitive Damages

If the party against whom default is to be taken has not appeared in the action, the statement preserving the right to punitive damages must be in the same manner as a summons [*Code Civ. Proc. § 425.115(g)(1)*; *see Code Civ. Proc. §*

415.10 et seq. (service of summons)].

If the party against whom default is to be taken has appeared in the action, the statement preserving the right to punitive damages must be served on the party's attorney, or on the party if he or she has appeared without an attorney, either in the same manner as a summons or in the manner provided for service of other papers [*Code Civ. Proc. § 425.115(g)(2)*; *see Code Civ. Proc. § 415.10 et seq.* (service of summons); *Code Civ. Proc. § 1010 et seq.* (service of papers)].

For discussion of these manners of service, see Ch. 518, *Service of Summons and Papers* .

[c] Personal Injury or Wrongful Death Actions

[i] Service of Statement of Damages

Normally, a complaint sets forth the relief to which the plaintiff claims to be entitled, and, if money or damages is sought, the amount claimed [*see Code Civ. Proc. § 425.10(a)(2)*]. In actions to recover actual or punitive damages for personal injury or wrongful death, however, the amount claimed must not be stated in the complaint, but the complaint must comply with *Code Civ. Proc. § 422.30* (caption requirements), and in limited civil cases alleging these causes of action the complaint must comply with *Gov. Code § 70613(b)* (first page of complaint to state whether amount demanded exceeds or does not exceed $10,000) [*Code Civ. Proc. § 425.10(b)*].

Before a default can be taken in cases in which the amount of damages is not stated in the complaint, the plaintiff must give the defendant notice of the amount of special and general damages sought to be recovered [*Code Civ. Proc. § 425.11*; *see Hamm v. Elkin (1987) 196 Cal. App. 3d 1343, 1346, 242 Cal. Rptr. 545]* . This provision is referred to as the "statement of damages" requirement [*see, e.g., Plotitsa v. Superior Court (1983) 140 Cal. App. 3d 755, 759, 189 Cal. Rptr. 769]* , which replaces the specification of damages generally required to be made in the complaint [*Damele v. Mack Trucks, Inc. (1990) 219 Cal. App. 3d 29, 38, 267 Cal. Rptr. 197]* .

The Section 425.11 statement of damages may be combined with the statement provided for in *Code Civ. Proc. § 425.115, discussed under § 205.23[2][b][ii]* [*Code Civ. Proc. §§ 425.11(e), 425.115(e)*].

Any default or subsequent default judgment entered without the statement of damages having been given is in excess of the court's jurisdiction [*see Petty v. Manpower, Inc. (1979) 94 Cal. App. 3d 794, 797-798, 156 Cal. Rptr. 622* ; *see also Jones v. Interstate Recovery Service (1984) 160 Cal. App. 3d 925, 929-930, 206 Cal. Rptr. 924]* and void [*Barragan v. Banco BCH (1986) 188 Cal. App. 3d 283, 303, 232 Cal. Rptr. 758* ; *see also Stevenson v. Turner (1979) 94 Cal. App. 3d 315, 318-320, 156 Cal. Rptr. 499]* .

ILLUSTRATION:

Default May Be Set Aside If Statement Not Served. In a personal injury action, the defendant has neither retained counsel, filed an answer, nor otherwise appeared. Plaintiff obtains an entry of default without serving a statement of damages. May defendant have the default set aside? Yes. A default entered against a nonappearing defendant is void if a statement of damages has not been served on the defendant [*see Plotitsa v. Superior Court (1983) 140 Cal. App. 3d 755, 758-761, 189 Cal. Rptr. 769]* .

[ii] Required When Answer Stricken

Code Civ. Proc. § 425.11 also applies when a defendant's answer is stricken and default entered as a discovery sanction [*Morgan v. Southern Cal. Rapid Transit Dist. (1987) 192 Cal. App. 3d 976, 984-986, 237 Cal. Rptr. 756* (disapproved on another ground in *Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 434, 280 Cal. Rptr. 83, 808 P.2d 226* ; *see also discussion under § 205.23[1]*)].

[iii] Requirements When Multiple Causes of Action Alleged

If the complaint alleges multiple causes of action, some based on personal injury and the others not, the statement must be given as to all causes of action if the two kinds of claims are closely tied [*see Jones v. Interstate Recovery Service (1984) 160 Cal. App. 3d 925, 929-930, 206 Cal. Rptr. 924]* .

Otherwise, the statement may be limited to the damages claimed for personal injury [*see Barragan v. Banco BCH (1986) 188 Cal. App. 3d 283, 303-304, 232 Cal. Rptr. 758]* . The damages claimed on the nonpersonal injury claims should normally be set forth in the complaint [*see Code Civ. Proc. § 425.10(a)(2)*].

[iv] Manner of Service

If the party against whom default is to be taken has not appeared in the action, the statement of damages must be served in the same manner as a summons [*Code Civ. Proc. § 425.11(d)(1)*].

If the party against whom default is to be taken has appeared in the action [*see § 205.12[5][a]* et seq.], the statement of damages must be served either on the party's attorney or, if the party appears without an attorney, on the party. Service must be either in the manner provided for the service of summons or in the manner provided for *Code Civ. Proc. § 1010 et seq.* [*Code Civ. Proc. § 425.11(d)(2)*]. For discussion these manners of service, see Ch. 518, *Service of Summons and Papers* .

ILLUSTRATION:

Service of Statement on Appearing Party's Attorney. In a superior court personal injury action in which the defendant has made a general appearance, the plaintiff mails a notice of damages to the defendant's attorney. No answer is timely filed, and default is entered. May the defendant have the default set aside on the ground that service of the notice of damages on the attorney was improper? No. When a defendant is represented by counsel and has appeared in an action, service of the statement of damages on the defendant's attorney is permissible [*Beeman v. Burling (1990) 216 Cal. App. 3d 1586, 1593-1594, 265 Cal. Rptr. 719]* .

[v] When Original Service Was by Publication

Under *Code Civ. Proc. §§ 425.11* and *585(c)*, as amended by Stats. 1993, ch. 456, the defendant is entitled to be served with a statement of damages. Presumably, if service was originally by publication, the defendant has not appeared, and the defendant still cannot be served otherwise, the statement would be served by publication [*see Code Civ. Proc. § 425.11(d)(1)*; *see also Code Civ. Proc. § 415.50* (service by publication)]. The 1993 amendments resolved a conflict in the courts of appeal [*compare Candelaria v. Avitia (1990) 219 Cal. App. 3d 1436, 1441, 269 Cal. Rptr. 32* (Sixth Appellate Dist., relying on *Code Civ. Proc. § 585(c)* and excusing service of statement of damages as futile) *with Parish v. Peters (1991) 1 Cal. App. 4th 202, 210-211, 1 Cal. Rptr. 2d 836* (Third Appellate Dist., service by publication constitutionally mandated)].

Once a party obtains a court order allowing service of the summons and complaint by publication, a separate order is not necessary to also simultaneously serve the statement of damages by publication [*Anastos v. Lee (2004) 118 Cal. App. 4th 1314, 1318, 13 Cal. Rptr. 3d 716]* .

[vi] Time for Service

The phrase "before a default may be taken" has been construed to require that the notice be given before the default is entered by the clerk [*Hamm v. Elkin (1987) 196 Cal. App. 3d 1343, 1345-1346, 242 Cal. Rptr. 545]* .

Prudent counsel should allow 30 days to elapse after service of the statement of damages before taking the defendant's default [*but see* Code *Civ. Proc. § 1005(a)(13), (b)* (21-day notice for proceedings that require notice but do not specify

time)]. *Code Civ. Proc. § 425.11* prior to its amendment by 1993 Stats., Ch. 456, contained no language stating or suggesting the amount of notice that a plaintiff must give a defendant concerning the amount of damages sought before seeking default [*Connelly v. Castillo (1987) 190 Cal. App. 3d 1583, 1588, 236 Cal. Rptr. 112]* . The Supreme Court, construing *Code Civ. Proc. § 425.11* held that a defendant is entitled to actual notice of the liability to which he or she may be subjected, a reasonable period of time before default may be entered [*Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 435, 280 Cal. Rptr. 83, 808 P.2d 226]* .

Prior to the *Schwab* decision, some courts, analogizing the situation to the time permitted to answer an amended complaint increasing the amount of damages sought, had held that the plaintiff must defer the entry of default until 30 days from the date the statement of damages was served [*Twine v. Compton Supermarket (1986) 179 Cal. App. 3d 514, 517, 224 Cal. Rptr. 562* ; *Plotitsa v. Superior Court (1983) 140 Cal. App. 3d 755, 761, 189 Cal. Rptr. 769]* . At least one court had rejected the 30-day rule, and held that a reasonable time was adequate [*Connelly v. Castillo (1987) 190 Cal. App. 3d 1583, 1589-1590, 236 Cal. Rptr. 112* (27 days)]. When *Schwab* held that a reasonable period of time was required, it cited the cases that required 30 days [*see Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 434-435, 280 Cal. Rptr. 83, 808 P.2d 226]* . The amendment of *Code Civ. Proc. § 425.11* by 1993 Stats., Ch. 456, to specify the manner of service, seems to strengthen the service of summons analogy [*see § 205.23[2][c][iv]*].

[vii] Failure to Serve

Liability imposed on a defaulting defendant without notice of the amount of damages violates both *Code Civ. Proc. §§ 425.11* and *580* [*Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 433, 280 Cal. Rptr. 83, 808 P.2d 226* ; *see discussion under § 205.23[2][c][i]*].

A specific notice of damages is required. Statements the plaintiff may make relating to damages in settlement demands or in the at-issue memorandum do not satisfy the *Code Civ. Proc. § 425.11* notice requirement [*Debbie S. v. Ray (1993) 16 Cal. App. 4th 193, 198-199, 19 Cal. Rptr. 2d 814* (trial court properly vacated judgment in favor of plaintiff for failure to file statement at least 60 days before trial)]. Service of the statement on some other interested party, such as defendant's insurance carrier, is insufficient [*Lopez v. Fancelli (1990) 221 Cal. App. 3d 1305, 1309, 1312, 271 Cal. Rptr. 87]* .

A default and default judgment entered in a superior court personal injury or wrongful death action are "void on the face of the record" and may be challenged at any time if it appears from papers filed with the court or it is admitted that no statement of damages was personally served on the defendant [*see Lopez v. Fancelli (1990) 221 Cal. App. 3d 1305, 1310-1311, 271 Cal. Rptr. 87* (plaintiff admittedly did not serve statement on defendants); *Twine v. Compton Supermarket (1986) 179 Cal. App. 3d 514, 516 n.1, 517-518, 224 Cal. Rptr. 562* (documents plaintiffs filed with court showed statement was served by mail); *Plotitsa v. Superior Court (1983) 140 Cal. App. 3d 755, 760, 189 Cal. Rptr. 769* (request to enter default stated that statement was served by mail)].

[3] Filing

Code Civ. Proc. § 425.11, on its face, does not require that the statement of damages or proof of its service be filed. However, the better (if not required) practice may be to file a proof of service [*see, e.g., Connelly v. Castillo (1987) 190 Cal. App. 3d 1583, 1586, 236 Cal. Rptr. 112* (plaintiff personally served defendant with a statement of special and general damages, but "curiously ... did not file proof of this service in superior court")]. Although the proof of service would not appear in the judgment roll [*see Code Civ. Proc. § 670*], the fact of service would appear from the court's records and file. On the other hand, the same court held that the fact, and not the proof, of service renders the subsequent default judgment valid and that failure to file proof of service of the statement of damages constitutes a mere irregularity that does not void the judgment [*Connelly v. Castillo (1987) 190 Cal. App. 3d 1583, 1589, 236 Cal. Rptr. 112]* .

Filing the statement of damages, however, may defeat the purpose of *Code Civ. Proc. § 425.10(b)* to protect the defendants from adverse publicity resulting from inflated demands [*Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 431, 280 Cal. Rptr. 83, 808 P.2d 226* ; *Parish v. Peters (1991) 1 Cal. App. 4th 202, 208, 1 Cal. Rptr. 2d 836]* , because the statement would be open to public inspection. Nevertheless, the better practice may be to file both the statement of damages and the proof of its service [*see* *Parish v. Peters (1991) 1 Cal. App. 4th 202, 211, 1 Cal. Rptr. 2d 836* (stating that absent defendants bring about the publication of the statement of damages by their own actions)].

Language in some court opinions seems to require that the statement of damages be filed whether or not an answer to the complaint is filed [*see, e.g.,* *Damele v. Mack Trucks, Inc. (1990) 219 Cal. App. 3d 29, 42, 267 Cal. Rptr. 197* (statute requires that, after answer is filed, plaintiff must "file a statement of damages" at least 60 days before date set for trial); *Connelly v. Castillo (1987) 190 Cal. App. 3d 1583, 1586, 236 Cal. Rptr. 112* (plaintiff "filed the damages statement with the trial court together with proof of service"); *Petty v. Manpower, Inc. (1979) 94 Cal. App. 3d 794, 799, 156 Cal. Rptr. 622* ("[t]he record discloses that no notice [*sic*, statement] of damages sought was ever filed or served below")].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedureRemediesDamagesPunitive DamagesConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewTortsNegligenceGeneral OverviewTortsWrongful Death & Survival ActionsGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 17: Defaults and Default Judgements thru Duress, Menace, Fraud, Undue Influence, and Mistake-Chs. 205-219
Chapter 205 DEFAULTS AND DEFAULT JUDGMENTS
PART II. LEGAL BACKGROUND
B. Entry of Default

17-205 California Forms of Pleading and Practice--Annotated § 205.24

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§ 205.24 Plaintiff Required to Take Default Promptly

Local court rules may require the plaintiff to move promptly to take a defendant's default. For example, San Diego County requires that if a defendant does not make a general appearance within the time provided by statute, the plaintiff must request entry of default forthwith [San Diego Co. Super. Ct. Rules, Div. II, Rule 2.1.7]. San Diego County local rules also require the plaintiff to obtain the default judgment within 45 days of taking the default if no active defendants remain in the case, or at the time of trial if other defendants are present [San Diego Co. Super. Ct. Rules, Div. II, Appendix A].

Plaintiff also should be aware of time requirements for obtaining a default judgment after entry of default. In collection cases, as defined in *Cal. Rules of Ct., Rule 3.740(a)*, which are actions for recovery of not more than $25,000, exclusive of interest and attorney fees, arising from a credit transaction for property, services, or money, if proofs of service of the complaint are filed or service by publication is made and defendants do not file responsive pleadings, the plaintiff must obtain a default judgment within 360 days after the filing of the complaint [*Cal Rules of Ct., Rule 3.740(f)*]. If the plaintiff has not obtained a default judgment by that time, the court must issue an order to show cause why reasonable monetary sanctions should not be imposed. The order to show cause must be vacated if the plaintiff obtains a default judgment at least 10 court days before the order to show cause hearing [*Cal Rules of Ct., Rule 3.740(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedureSanctionsGeneral OverviewGovernmentsCourtsRule Application & Interpretation

California Forms of Pleading and Practice--Annotated

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PART II. LEGAL BACKGROUND
B. Entry of Default

17-205 California Forms of Pleading and Practice--Annotated § 205.25

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§ 205.25 Preparing Request for Entry of Default

[1] Mandatory Judicial Council Form

A plaintiff or cross complainant seeking entry of a default, default judgment, or both, must use the Judicial Council form entitled Request for Entry of Default [*see Gov. Code 68511*; *Cal. Rules of Ct., Rules 3.1800, 1.30*; Judicial Council Form CIV-100]. The form includes:

- A declaration under *Code Civ. Proc. § 585.5* (*discussed under § 205.25[2]*).
- A declaration of mailing (*discussed under § 205.25[3]*).
- A memorandum of costs (*discussed under § 205.25[4]*).
- A declaration of nonmilitary status (*discussed under § 205.25[5][a]* et seq.

For a checklist of steps for requesting entry of default and default judgment, see the Procedural Checklist. For an illustration of the Judicial Council form, see *§ 205.90*.

[2] Declaration of Proper Venue

Code Civ. Proc. § 585.5 requires a declaration of venue when the requesting party is seeking a clerk's judgment for damages under *Code Civ. Proc. § 585(a)* (discussed in *§ 205.45*). The declaration under *Code Civ. Proc. § 585.5* is intended to insure proper venue of actions under the Unruh Retail Installment Sales Act (*Civ. Code § 1801 et seq.*), the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*), or *Code Civ. Proc. § 395(b)* [*see Code Civ. Proc. § 585.5(a)*].

The statute requires that every application to enter default under *Code Civ. Proc. § 585.5(a)* include or be accompanied by this declaration. Thus, a clerk is justified in refusing to enter the default as requested when a plaintiff fails to complete the declaration [*Code Civ. Proc. § 585(a)*]. Entry of a default or default judgment without full compliance with the venue provisions of *Civ. Code § 1812.10* or *Civ. Code § 2984.4* or *Code Civ. Proc. § 395(b)* subjects the default to attack by defendant on noticed motion [*Code Civ. Proc. § 585.5(b)-(d)*; *see* Ch. 371, *Motions After Trial* , and Ch. 489, *Relief From Judgments and Orders*]. The Judicial Council form of Request for Entry of Default includes this declaration [*see § 205.90*].

[3] Declaration of Mailing

The requesting party or his or her attorney must complete a declaration of mailing when requesting a default under *Code Civ. Proc. § 585(a), (b),* or *(c),* or *Code Civ. Proc. § 586*; otherwise the default cannot be entered nor the request for judgment heard [*Code Civ. Proc. § 587*]. The declaration must show either of the following [*see Code Civ. Proc. § 587*]:

- The requesting party mailed a copy of the request to the defendant's attorney of record, or, if none, to the defendant at his or her last known address, specifying the date of mailing.

- The requesting party did not mail a copy of the request because the defendant had no attorney of record and address known to the requesting party or his or her attorney.

To satisfy the minimum requirement of *Code Civ. Proc. § 587* for notifying defendant of plaintiff's application for default, plaintiff must check all available sources, such as city and county directories, utility companies, friends, acquaintances or relatives of defendant, or licensing offices to ascertain the defendant's mailing address [*Slusher v. Durrer (1977) 69 Cal. App. 3d 747, 756, 138 Cal. Rptr. 265]* . The fact that the defendant or defendant's attorney did not receive the notice does not, however, invalidate the default or constitute a ground for setting aside a judgment based on the default [*Code Civ. Proc. § 587*].

Although *Code Civ. Proc. § 587* specifically states that no default will be entered without the filing of an affidavit of mailing, the failure to comply with the requirement neither deprives the court of jurisdiction to render judgment nor requires the judgment to be set aside if defendant received actual notice of the request to enter default [*see In re Marriage of Harris (1977) 74 Cal. App. 3d 98, 102, 141 Cal. Rptr. 333]* .

The Judicial Council form of Request for Entry of Default includes this declaration [*see § 205.90*].

[4] Memorandum of Costs

The requesting party must provide a memorandum of costs when seeking a judgment by the clerk or court that includes an award of costs recoverable under *Code Civ. Proc. §§ 1032, 1033.5*. A party seeking a default judgment who claims costs must request them on the Request for Entry of Default form (Application to Enter Default) (Judicial Council Form CIV-100) when applying for the judgment [*Cal. Rules of Court, Rule 3.1700(a)(2)*; *see § 205.90*]. The memorandum must be certified by the oath of the party or his or her attorney or agent, or by the clerk of the attorney, stating that to the

best of the declarant's knowledge and belief the items are correct, and that the items of cost have been necessarily incurred in the action or proceeding [Cal. Rules of Court, Rule supporting 3.1700(a)(1)].

PRACTICE TIP:

Special Requirements Under Local Rules. If a default judgment is to be entered by the court, the memorandum of costs may be incomplete since it would not include costs and disbursements incurred in preparation for the court hearing. However, some court clerks require that the memorandum be completed at the time the request for the entry of a default judgment by the court is filed with the clerk. If recoverable costs and disbursements have been incurred between the date of filing the official form and applying to the court for judgment, local court practice should be determined as to the appropriate procedure by which these expenses are to be recovered. Ordinarily, a second memorandum itemizing total costs and disbursements is filed, although some courts permit the filing of a supplemental memorandum, itemizing costs and disbursements incurred between the filing of the Request for Entry of Default and the application for judgment.

[5] Declaration of Nonmilitary Status

[a] Defendant's Nonmilitary Status Known

The requesting party or his or her attorney must provide a declaration of nonmilitary status if he or she knows that the defendant is not in military service, or in the case of multiple defendants, that none of them is in military service [*see 50 U.S.C. App. § 521(b)*; *Mil. & Vet. Code § 402(a)*]. The Judicial Council form of Request for Default includes this declaration; however, this form has not yet been revised to reflect the 2003 revisions to the Servicemembers Civil Relief Act, and a separate declaration addressing the federal requirements should be filed [*see § 205.90*].

The filing of this declaration, or one in lieu of it (discussed in § 205. 25[5][b], *below*), is required by the Servicemembers Relief Act before entry of a default judgment against a defendant [*see 50 U.S.C. App. § 520*]. The filing of this declaration is also required by *Mil. & Vet. Code § 402(a)*. Under the state statute, service member means both [*see Mil. & Vet. Code § 401(a)*]:

- Officers and enlisted members of the National Guard called or ordered into active state service by the Governor or President.

- Reservists of the United States Military Reserve who have been called to full-time active duty.

Military service under that state statute means full-time active state service or full-time active federal service for a period in excess of seven days in any 14-day period; and any service member who has been called to active service or duty since September 11, 2001, to engage in homeland defense against terrorism, his or her days of service prior to June 21, 2002 are credited toward this seven-day period [*Mil. & Vet. Code § 401(b)*].

Section 201(c) [*50 U.S.C. App. § 521(c)*] of the Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*] provides that any person who makes or uses an affidavit required under the section, or a statement, declaration, verification, or certificate that is certified or declared to be true under penalty of perjury permitted under *50 U.S.C. App. § 521(b)(4)*, knowing it to be false, will be guilty of a misdemeanor punishable by imprisonment not to exceed one year or by fine not to exceed $1,000, or both. Under the state statute, any person who, for purposes under the section, makes or uses a declaration declared to be true under penalty of perjury, knowing it to be false, is guilty of a misdemeanor and is punishable by imprisonment not to exceed one year or by a fine not to exceed $1,000, or both [*Mil. & Vet. Code § 402(b)*].

WARNING:

The declaration of nonmilitary status on the official form fails to meet the requirements of federal law in

two respects: (1) it does not set forth facts showing that the defendant is not in the military service; and (2) it is usually dated and filed at the time of requesting entry of default rather than at the time of the actual entry of the default judgment. The Judicial Council form has not yet been revised to reflect the 2003 revisions to the Servicemembers Civil Relief Act, and the better practice is to include a second declaration addressing these facts and the federal requirements. This second declaration will often contain more specific statements of facts showing that the defendant is not in military service than does the declaration on the Judicial Council form. Such facts might include statements of defendant's age, physical disability, residence, and occupation [*see § 205.92*].

A party's military status can have far reaching effects on an action, from continuances and staying actions to restrictions on collecting debts and relief from judgments and orders. For a listing of cross references to multiple discussion on the effect of military status, see *§ 205.92[4]*.

[b] Procedure When Defendant Is in Military or Military Status Unknown

If the plaintiff knows that a defaulting defendant is in military service, or if plaintiff is unable to determine whether or not a defendant is in military service, plaintiff must file a declaration so stating [*50 U.S.C. App. § 521(b)(1)*; *Mil. & Vet. Code § 402(a)*]. For a form of declaration, see *§ 205.92*.

In this situation, under the Servicemembers Civil Relief Act, no judgment may be entered if the defendant is in military service until after the court has appointed an attorney to represent the defendant and protect his or her interest. The court is to make such an appointment on application [*50 U.S.C. App. § 521(b)(2)*]. The same protections apply under the state statute, including that a bond may be required and an order made to protect the rights of the service member; however, no attorney appointed to protect a service member may have the power to waive any right of the person for whom he or she is appointed or bind him or her by his or her acts [*50 U.S.C. App. § 521(b)(2)*; *Mil. & Vet. Code § 402(c)*].

Under the state statute, if the declaration is not filed showing that the defendant is not in the military service, no judgment may be entered without first securing an order of court directing that entry, and no order may be made if the defendant is in the military service until after the court appoints an attorney to represent the defendant and protect his or her interest, and the court may, on application, make that appointment [*Mil. & Vet. Code § 402(a)*]. Unless it appears that the defendant is not in the military service the court may require, as a condition before judgment is entered, that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in the military service, against any loss or damage that he or she may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part [*Mil. & Vet. Code § 402(a)*]. The court may make such other and further order or enter that judgment as in its opinion may be necessary to protect the rights of the defendant [*Mil. & Vet. Code § 402(a)*].

For a form of ex parte application and an order directing entry of default, see *§§ 205.93* and *205.94*.

[c] Relief for Servicemember Defendant

Under the Servicemembers Civil Relief Act a judgment rendered against a person in military service during the period of service or within 60 days thereafter may be opened on the application of that person or his or her personal representative if it appears that military service prejudiced him or her in making a defense. The state statute only applies to judgments rendered during the period of service or within 30 days thereafter.

The application must be made within 90 days after the military service terminates, and it must be shown that there is a meritorious or legal defense to the action or part of it [*50 U.S.C. App. § 521(g)*; *Mil. & Vet. Code § 402(d)*]. Thus, although a default judgment entered without appointment of an attorney for a defendant in military service may be set aside, it is not void, but only voidable [*Allen v. Allen (1947) 30 Cal. 2d 433, 436, 182 P.2d 551* ; *see Radlinski v. Superior Court (1960) 186 Cal. App. 2d 821, 822-823, 9 Cal. Rptr. 73]* .

To establish the necessary prejudice under state law to open up a default judgment entered without appointment of an attorney, the defendant must show that by reason of military service, he or she could not have been present if he or she had desired to be present [*Kromm v. Kromm (1948) 84 Cal. App. 2d 523, 530, 191 P.2d 115]* . Generally, no presumption of prejudice arises if it is shown only that a false affidavit of nonmilitary service was filed, that no affidavit was filed at all, or that no attorney was appointed [*see Wilterdink v. Wilterdink (1947) 81 Cal. App. 2d 526, 534, 184 P.2d 527]* . Prejudice is presumed, however, if no attorney was appointed for a defendant who was stationed outside the United States [*In re Marriage of Lopez (1981) 115 Cal. App. 3d 776, 783, 173 Cal. Rptr. 718]* . However, appointment of attorney is not required prior to entry of default judgment when the defendant in military service has appeared by his or her own attorney, even though limited to special appearance [*Reynolds v. Reynolds (1943) 21 Cal. 2d 580, 585-586, 134 P.2d 251]* .

For further discussion of relief from default under the Servicemembers Civil Relief Act and the state statute, see Ch. 489, *Relief From Judgments and Orders* .

[d] Timing of Declaration

The declaration regarding nonmilitary or military status must be filed before the default judgment is entered [*50 U.S.C. App. § 521(b)(1)*; *Mil. & Vet. Code § 402(a)*]. A declaration is not, however, required to obtain a default. Thus, a court clerk may not refuse to enter a default because the plaintiff has not yet signed the declaration [*Interinsurance Exchange v. Collins (1994) 30 Cal. App. 4th 1445, 1447, 37 Cal. Rptr. 2d 126]* .

WARNING:

For discussion of filing a separate declaration in addition to declaration on Judicial Council Form CIV-100 to satisfy requirements of federal Servicemembers Civil Relief Act, see *§§ 205.49[5] [b], 205.90 [8]*, and for form of separate declaration, see *§ 205.92*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueIndividual DefendantsCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act

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PART II. LEGAL BACKGROUND
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17-205 California Forms of Pleading and Practice--Annotated § 205.26

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§ 205.26 Accompanying Papers

If attorney fees are to be fixed by the court under *Code Civ. Proc. § 585(a)*, the Judicial Council form of Request for Entry of Default should be accompanied by a written request for court determination of the amount of attorney fees and for a court judgment [*see also* discussion in *§ 205.49[3]*]. For a form of request to fix attorney fees and enter judgment; see *§ 205.91*.

If declarations will be used in lieu of testimony to obtain a court judgment [*see Code Civ. Proc. § 585(d)*], the declarations and other required information and documents specified in *Cal. Rules of Ct., Rule 3.1800* must also accompany the official form [*see Cal. Rules of Ct., Rule 3.1800* and § 205.49[5]].

If applicable, the official form should be accompanied by the original of the contract or a certified copy of the judgment sued on [*see Cal. Rules of Court, Rule 3.1806* (requiring the clerk to note across the face of the writing the fact of rendition of judgment with the date and title of the court and case); *see also* Los Angeles Co. Super. Ct. Rules, Rule 9.13 (application for default judgment on written obligation to pay money should be accompanied by original writing for cancellation pursuant to *Cal. Rules of Court, Rule 3.1806*)].

If the requesting party is seeking a clerk's judgment or is seeking a default judgment on declarations, a proposed

judgment should be lodged and served with the Request for Entry of Default but not attached to it [*see Cal. Rules of Ct., Rules 3.1113(j), see also Cal. Rules of Ct., Rule 3.1590(h)*]. For forms of clerk's default judgment, see *§ 205.95*.

If the proof of service of summons has not already been filed, it must be filed with the request for entry of default. For a default under *Code Civ. Proc. § 585(c)*, the official form should be accompanied by proof of publication of summons if such proof has not previously been filed with the court clerk.

If punitive damages are sought from a defaulting party, or if any damages are sought in a superior court personal injury or wrongful death action, the plaintiff must provide separate notice of the damages requested before a default may be taken [*see Civ. Code § 3295(e)*; *Code Civ. Proc. §§ 425.11(e), 425.115(e)*]. For further discussion, see *§ 205.23[2][a]* et seq.

PRACTICE TIP:

Contact Court Clerk Re Other Papers. The clerk of the court should be contacted to determine if other documents are required under local practice.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesDamagesSpecial Damages

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Chapter 205 DEFAULTS AND DEFAULT JUDGMENTS
PART II. LEGAL BACKGROUND
B. Entry of Default

17-205 California Forms of Pleading and Practice--Annotated § 205.27

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§ 205.27 Clerk's Duty to Enter Default Is Ministerial

The clerk's duty to enter a default in an appropriate case (*discussed under § 205.20[2]* et seq.) is ministerial. If the clerk fails or refuses to enter a default, the plaintiff may petition a higher court for a writ of mandate to compel entry [*see Todd v. Everett (1966) 247 Cal. App. 2d 209, 211-212, 55 Cal. Rptr. 382]* .

Conversely, the ministerial nature of the clerk's duty means that he or she has no authority, for example, to determine the sufficiency of either the substance or form of a pleading. Thus, if a defendant has sent letters to the court that contained in substance an answer, the clerk has no power to enter a default [*Baske v. Burke (1981) 125 Cal. App. 3d 38, 45, 177 Cal. Rptr. 794]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsCourtsClerks of Court

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17-205 California Forms of Pleading and Practice--Annotated § 205.28

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§ 205.28 Clerk's Duty When Service Was by Publication

If service on the defendant was made by publication, the clerk must enter the defendant's default on plaintiff's application on the expiration of the time for answering and on proof of publication and that none of the responses under § 205.20[2] has been filed within the time specified in the summons [*Code Civ. Proc. § 585(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsGovernmentsCourtsClerks of Court

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17-205 California Forms of Pleading and Practice--Annotated § 205.29

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§ 205.29 Effect of Entry of Default

Once a default has been regularly entered and becomes effective, the defendant against whom it was entered is out of court and, in the absence of fraud by the plaintiff, that defendant's right to participate in the litigation is terminated. Pleadings filed by the defendant after his or her default becomes effective are void, unless the default is first set aside [*Forbes v. Cameron Petroleums, Inc. (1978) 83 Cal. App. 3d 257, 262-263, 147 Cal. Rptr. 766* ; *but see Jensen v. Allstate Ins. Co. (1973) 32 Cal. App. 3d 789, 791, 108 Cal. Rptr. 498* (permitting motion to strike plaintiff's request for entry of default and enlargement of time to respond)]. For discussion of proceedings to set aside a default and default judgment, see Ch. 371, *Motions After Trial* , and Ch. 489, *Relief From Judgments and Orders* .

The default generally admits, so far as the defaulting party is concerned, the absolute truth of all aptly pleaded allegations of the complaint giving rise to liability [*Bristol Convalescent Hosp. v. Stone (1968) 258 Cal. App. 2d 848, 859, 66 Cal. Rptr. 404]* .

Except for the mailing requirements relating to the request to enter default itself [*see Code Civ. Proc. § 587* (*discussed under § 205.25[3]*)], once the default has been duly entered, the defendant is not entitled to service of any bill of exceptions, notice of appeal, or other notices or papers filed thereafter, other than amendments to the pleadings or an amended pleading [*Code Civ. Proc. § 1010*]. The defaulting defendant has no right to notice of any default hearing [

Weiss v. Blumencranc (1976) 61 Cal. App. 3d 536, 540, 131 Cal. Rptr. 298] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultEntry of Default Judgments

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17-205 California Forms of Pleading and Practice--Annotated § 205.30

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§ 205.30 Waiver of Default

[1] By Stipulation

The entry of a defendant's default for failure to answer or otherwise appear in an action is a privilege which may or may not be exercised by the plaintiff [*see Code Civ. Proc. §§ 585, 586*]. Accordingly, the parties may agree by stipulation to waive or set aside a default. For form of stipulation to waive or set aside default, see § 205.191.

[2] By Filing Amended Complaint After Taking Default

If the plaintiff, after taking the defendant's default, amends the complaint in a matter of substance as distinguished from a matter of mere form, the amendment opens the default and eliminates the original complaint as a basis for judgment [*Jackson v. Bank of America (1986) 188 Cal. App. 3d 375, 387-389, 233 Cal. Rptr. 162]* .

Examples of amendments of substance opening a default include:

- Amending the complaint to increase defendant's exposure to liability [*see Leo v. Dunlap (1968) 260 Cal. App. 2d 24, 27-28, 66 Cal. Rptr. 888]* .

- Bringing a new party into the action, if defaulting parties are affected [*see Stack v. Welder (1935) 3 Cal. 2d 71, 75, 43 P.2d 270]* .

An amended pleading that includes simply a change in form does not open a default and give a defendant a new right to answer [People v. Parcel No. 0560500-09 *(1997) 58 Cal. App. 4th 120, 126* , 68 Rptr. 2d 51 (failure to serve amended complaint did not render default judgment void when amendment did not constitute change in substance)]. The fact that the amended complaint was different from the original complaint in form only is not a determination that the clerk can make, since the clerk's function is only to determine if there is proof of service and if an answer to the amended complaint has been filed within the time allowed by law or order of the court [*Bristol Convalescent Hosp. v. Stone (1968) 258 Cal. App. 2d 848, 862, 66 Cal. Rptr. 404]* . Further, the determination of whether the amendment was one of substance or form is within the court's discretion. Its determination of the question, even if erroneous, does not render a subsequent default judgment void [*Butler v. Roma-Lind, Inc. (1961) 190 Cal. App. 2d 861, 864-865, 12 Cal. Rptr. 371]* . For discussion related to the distinction between void and voidable judgments, see Ch. 489, *Relief From Judgments and Orders* .

When an amended complaint is served on a defendant in default, it must be served personally in the same manner as an original complaint. Service by mail is insufficient, and a default judgment taken after service by mail is void if the default was taken in an amount greater than set forth in the original complaint [*Engebretson & Co. v. Harrison (1981) 125 Cal. App. 3d 436, 440-444, 178 Cal. Rptr. 77]* .

Once the plaintiff amends the complaint, the defendant then has the right to answer or demur to the amendment, regardless of whether it is accomplished by a new amended complaint or an amendment to the original complaint [*Ford v. Superior Court of Orange County (1973) 34 Cal. App. 3d 338, 342-343, 109 Cal. Rptr. 844* ; *see Code Civ. Proc. § 471.5*].

If the defendant fails to plead to the amended complaint within 30 days after it is served, or such other time as the court may direct, plaintiff may again take defendant's default on the plaintiff's application [*Code Civ. Proc. §§ 471.5(a), 586(a)(1)*; for analysis when there is no answer or response to an amended complaint, *see § 205.20[2]*].

[3] No Automatic Waiver From Failure to Obtain Judgment on Default

Under former *Code Civ. Proc. § 581a(c)*, the court was required to dismiss an action if the plaintiff failed to have judgment entered after the defendant had filed no answer within three years after service was made or the defendant had made a general appearance, unless the parties filed a written stipulation extending the time [*see Brown v. Ridgeway (1984) 149 Cal. App. 3d 732, 737, 197 Cal. Rptr. 327* (entry of a default judgment more than three years after the service of summons constituted reversible error under former statute)]. The 1984 amendments to the dismissal statutes eliminated this provision for mandatory dismissal [*see Code Civ. Proc. § 583.210 et seq.*; *see also* discussion in Ch. 212, *Dismissal*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsContracts LawContract Conditions & ProvisionsWaiversGeneral Overview

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17-205 California Forms of Pleading and Practice--Annotated §§ 205.31-205.39

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[Reserved]

§§ 205.31[Reserved]

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17-205 California Forms of Pleading and Practice--Annotated § 205.40

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§ 205.40 Entry of Default Judgment as Matter of Right

Plaintiff may obtain entry of a default judgment either on application to the court [*see Code Civ. Proc. § 585(b)* and discussion in *§ 205.49*] or, in certain contract actions or actions involving California judgments for the recovery of money or damages, on application to the clerk [*see Code Civ. Proc. § 585(a)* and discussion in *§ 205.45*].

If the clerk or the court fails or refuses to enter a default judgment when the judgment is authorized and plaintiff has properly applied for its entry, plaintiff may seek a writ of mandate to compel entry of the judgment [*see W.A. Rose Co. v. Municipal Court (1959) 176 Cal. App. 2d 67, 74, 1 Cal. Rptr. 49* ; *Colthurst v. Fitzgerald (1922) 56 Cal. App. 740, 741, 206 P. 471]* . For discussion relating to mandate generally, see Ch. 358, *Mandate and Prohibition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsCourtsClerks of Court

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17-205 California Forms of Pleading and Practice--Annotated § 205.41

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§ 205.41 Restrictions on Entry of Default Judgment

[1] Taking of Evidence Required in Certain Actions

A default judgment may not be rendered in the following types of actions without the taking of evidence by the court:

- Marital dissolution actions [*Fam. Code § 2336*].
- Actions in small claims court [*Code Civ. Proc. § 116.520(b)*].
- Actions to quiet title [*Code Civ. Proc. § 764.010*; *see also discussion under § 205.49[2][b][ii]*].
- Actions to reestablish destroyed land records [*Code Civ. Proc. § 751.14*].
- Actions to reestablish boundaries of land disturbed by earth movements [*Code Civ. Proc. § 751.59*].
- Mandamus proceedings [*Code Civ. Proc. § 1088*].

- Prohibition proceedings [*Code Civ. Proc. §§ 1088, 1105*].

- Proceedings for involuntary dissolution of corporations [*see Corp. Code § 1804*].

- Actions to determine title to real property under tax sales or tax deeds [*Rev. & Tax. Code § 3962*].

[2] Default Judgment Unavailable Against Certain Types of Defendants

Entry of default judgment is prohibited or restricted by decisional or statutory law when the judgment is taken against the following persons:

- A defendant in military service, unless the court first appoints an attorney to represent the interests and issues an order directing entry of the default judgment [*50 U.S.C. App. § 521*; *see* discussion in *§ 205.25[5][b]*].

- A defendant designated by a fictitious name, unless the copy of the summons or other process or, if no summons or process, the first pleading or notice served on defendant bore on its face a notice that the defendant was served as the person sued on the specified fictitious name [*Code Civ. Proc. § 474*; *see Nissan v. Barton (1970) 4 Cal. App. 3d 76, 80-81, 84 Cal. Rptr. 36* (default judgment void when plaintiff failed to comply with *Code Civ. Proc. § 474*)].

- A nominal defendant who is in reality a plaintiff in the case [*see Watkins v. Nutting (1941) 17 Cal. 2d 490, 498-499, 110 P.2d 384]* .

- One of several defendants, when that defendant's liability is dependent on liability of answering defendant or defendants [*Plott v. York (1939) 33 Cal. App. 2d 460, 464, 91 P.2d 924* ; *see also Adams Mfg. & Engineering Co. v. Coast Centerless Grinding Co. (1960) 184 Cal. App. 2d 649, 655, 7 Cal. Rptr. 761]* .

- A person or entity sued in a fictitious business name, when the person or entity using that name appears in the action in its legal name [*see Pinkerton's, Inc. v. Superior Court (1996) 49 Cal. App. 4th 1342, 1344, 1347-1348, 57 Cal. Rptr. 2d 356* (improper to enter default of "Pinkerton's, Inc., DBA Pinkerton Security & Investigation Services" after Pinkerton's, Inc. appeared in and was dismissed from action); *see also § 205.22*].

- An indigent prisoner who has not been permitted counsel and the opportunity to avoid default [*Payne v. Superior Court (1976) 17 Cal. 3d 908, 927, 132 Cal. Rptr. 405, 553 P.2d 565* (couching its decision in terms of due process and equal protection)].

[3] Additional Requirements for Default Judgment on Cross Complaint

Default judgment on a cross complaint may not be entered unless the following two requirements are met [*Code Civ. Proc. § 585(e)*]:

- A separate judgment may be properly awarded on the cross complaint.

- The court finds that a separate judgment on the cross complaint would not substantially delay the final disposition of the action between the parties.

Given that *Code Civ. Proc. § 585(e)* expressly requires a finding by the court concerning prospective delay, it appears

that default judgment on a cross complaint must always be obtained through the court [*see discussion under § 205.49[4]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporate NamesFictitious NamesGeneral OverviewCivil ProcedurePartiesFictitious NamesCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act

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§ 205.42 Relief Awarded to Plaintiff Limited to Demand

If no answer is filed, the relief awarded to the plaintiff on entry of a default judgment cannot exceed that which the plaintiff has demanded in the complaint or stated in the *Code Civ. Proc. § 425.11* statement of damages, and if any, stated in the *Code Civ. Proc. § 425.115* statement preserving the right to punitive damages [*Code Civ. Proc. §§ 580, 585*; *In re Marriage of Lippel (1990) 51 Cal. 3d 1160, 1166, 276 Cal. Rptr. 290, 801 P.2d 1041* ; *see Code Civ. Proc. § 425.10(b)*; for discussion of the statements, *see § 205.23[2][c][i]*, and *§ 205.23[2][b][ii]*].

A default judgment purporting to award more relief than is demanded in the prayer in the complaint is void because it denies the defaulting defendant notice and a fair hearing. This is so even though the allegations of the complaint would support a judgment for additional relief and general or further relief is prayed for [*Burtnett v. King (1949) 33 Cal. 2d 805, 806-807, 205 P.2d 657* ; *see also In re Marriage of Wells (1988) 206 Cal. App. 3d 1434, 1437, 254 Cal. Rptr. 185*]. Thus, when damages according to proof are prayed for, it is improper to grant a money judgment [*Ludka v. Memory Magnetics International (1972) 25 Cal. App. 3d 316, 322, 101 Cal. Rptr. 615*].

Moreover, the damages awarded on default must be of the same character as those pleaded. For example, a complaint seeking damages "in excess of $20,000," punitive damages of $100,000, and costs cannot support a default judgment for $26,457.50 compensatory damages, $2,500 in attorney's fees, and costs [*Becker v. S.P.V. Construction Co. (1980) 27*

Cal. 3d 489, 494-495, 165 Cal. Rptr. 825, 612 P.2d 915 ; *Electronic Funds Solutions, LLC v. Murphy (2006) 134 Cal. App. 4th 1161, 1173, 36 Cal. Rptr. 3d 663* (compensatory damages on default cannot exceed the $50,000 amount prayed for in the complaint; phrase "in an amount in excess of $50,000" does not provide notice of unlimited damages and the recoverable damages on default are limited to $50,000); *see also Ostling v. Loring (1994) 27 Cal. App. 4th 1731, 1737, 1742, 33 Cal. Rptr. 2d 391* (prayer for damages in amount shown at trial, but not less than $50,000, and treble those damages pursuant to statute did not support default judgment for $150,000 actual damages)]. A default judgment in excess of the amount stated in the prayer of the complaint is void only to the extent of the excess and may be modified by the trial court to save that portion which is not void [*Becker v. S.P.V. Construction Co. (1980) 27 Cal. 3d 489, 495, 165 Cal. Rptr. 825, 612 P.2d 915]* .

For purposes of default, a failure to answer includes the case in which an answer is filed but later stricken by the court [*Brown v. Ridgeway (1983)149 Cal. App. 3d 732, 736, 197 Cal. Rptr. 327]* . Consequently, when a default judgment is entered as a discovery sanction and the defendant's answer is stricken, the award is limited to the amount prayed for by the plaintiff in the complaint [*Greenup v. Rodman (1986) 42 Cal. 3d 822, 824, 231 Cal. Rptr. 220, 726 P.2d 1295]* .

For further discussion, see *§ 205.23[1]* et seq., *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 205.43 Procedure for Obtaining Entry of Default Judgment

A default judgment may be requested at the same time as the entry of the default itself or at a later time. The judgment may be entered by either the clerk or the court by completing the appropriate sections of the Judicial Council form of Request for Entry of Default [*see § 205.90*].

Other papers may need to be filed with the request. For example, counsel should submit a completed form of proposed default judgment along with a request to enter a default and clerk's judgment. For further discussion of this and other additional papers that may be required, see *§ 205.26*, and under § 205.49[5][a][ii].

For a checklist of the steps for obtaining a default judgment, see the Procedural Checklist. For forms of request to enter default judgment and proposed default judgments, see Forms § 205.90, and §§ 205.94-205.99.

Although entry of default prior to entry of a default judgment is provided for by statute [*see Code Civ. Proc. § 585(a)-(c)*] and often required by local court rule [*see, e.g.* , San Francisco Uniform Local Ct. Rules, Rule 8.13, a default judgment is not rendered invalid by failure to have entered default [*Crouch v. H.L. Miller & Co. (1915) 169 Cal. 341, 345-346, 146 P. 880* ; *Norman v. Berney (1965) 235 Cal. App. 2d 424, 429-430, 45 Cal. Rptr. 467]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedureRemediesDamagesGeneral OverviewGovernmentsCourtsClerks of Court

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Chapter 205 DEFAULTS AND DEFAULT JUDGMENTS
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17-205 California Forms of Pleading and Practice--Annotated § 205.44

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§ 205.44 Res Judicata Effect of Default Judgment

A default judgment conclusively establishes between the parties, so far as subsequent proceedings on a different cause of action are concerned, the truth of all material allegations in the complaint in the default action and every fact necessary to uphold the default judgment. However, a default judgment is not conclusive as to any defense or issue that was not raised and is not necessary to uphold the judgment [*Four Star Electric, Inc. v. F & H Construction (1992) 7 Cal. App. 4th 1375, 1380, 10 Cal. Rptr. 2d 1* (reversing dismissal when default judgments not entitled to collateral estoppel effect)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

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17-205 California Forms of Pleading and Practice--Annotated § 205.45

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§ 205.45 When Judgment by Clerk Permitted

Although the clerk usually enters a default, the clerk's power to render judgment on the default is limited to cases "arising upon contract or judgment of a court for the recovery of money or damages only" [*Code Civ. Proc. § 585(a)*]. This provision is intended to enable the clerk to enter judgment only if no evidence is necessary to disclose the correct amount. If evidence or the exercise of discretion is required, then entry is made under *Code Civ. Proc. § 585(b)* by the court [*see Lynch v. Bencini (1941) 17 Cal. 2d 521, 526, 110 P.2d 662* (clerk is unauthorized to enter judgment on contract with no provision for damages)].

Because the clerk's authority is strictly construed, he or she has the power to enter a default judgment in a contract action only if the terms of the contract provide for some definite fixed amount of damages or such sum can be ascertained from the terms of the contract by mathematical computation [*Liberty Loan Corp. of North Park v. Petersen (1972) 24 Cal. App. 3d 915, 918, 101 Cal. Rptr. 395* (clerk not authorized to enter judgment where note sued on showed on its face that it was secured)]. In determining whether the action is one coming within the provisions of *Code Civ. Proc. § 585(a)*, the allegations of the complaint and the terms of the contract must be examined. If the amount to be awarded as damages is not ascertainable from either document, the clerk cannot enter judgment [*see Lynch v. Bencini (1941) 17 Cal. 2d 521, 528, 110 P.2d 662]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsContracts LawGeneral OverviewGovernmentsCourtsClerks of Court

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17-205 California Forms of Pleading and Practice--Annotated § 205.46

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§ 205.46 Clerk's Authority When There Are Multiple Causes of Action

When a complaint states several causes of action and one of them is of the type on which the clerk may enter judgment, the clerk has the authority to enter judgment on that cause of action even though he or she has no authority to do so on the other causes [*Norman v. Berney (1965) 235 Cal. App. 2d 424, 430, 45 Cal. Rptr. 467]* . However, it must be clear that the allegation is in fact a separate cause of action and not just a separate theory of recovery [*Brown v. Superior Court (1966) 242 Cal. App. 2d 519, 525, 51 Cal. Rptr. 633]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsGovernmentsCourtsClerks of Court

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17-205 California Forms of Pleading and Practice--Annotated § 205.47

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§ 205.47 Limitation on Clerk's Authority When There Are Several Defendants

When there are several defendants, and one or more, but not all, of the defendants have defaulted, only the court has discretion whether to enter a judgment against the defaulting defendants. The clerk may not enter a default judgment against the defaulting defendants; any default judgment taken by a clerk in violation of this rule is void [*Kooper v. King (1961) 195 Cal. App. 2d 621, 628-629, 15 Cal. Rptr. 848* ; *see Code Civ. Proc. § 579*; *see also Diamond National Corp. v. Golden Empire Builders, Inc. (1963) 213 Cal. App. 2d 283, 288, 28 Cal. Rptr. 616* (default judgment by clerk permissible if all defendants are in default)]. The rationale underlying this rule is that if an answering codefendant raises defenses that bear upon the plaintiff's right to recover at all (as distinguished from the right to recover against any particular defendant), the court must have the opportunity to determine whether the defenses also inure to the defaulting defendants' benefit [*see Kooper v. King (1961) 195 Cal. App. 2d 621, 629, 15 Cal. Rptr. 848* ; *Plott v. York (1939) 33 Cal. App. 2d 460, 463, 91 P.2d 924]* .

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsGovernmentsCourtsClerks of Court

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17-205 California Forms of Pleading and Practice--Annotated § 205.48

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§ 205.48 Contents of Clerk's Judgment

The clerk is empowered to enter judgment for the following [*Code Civ. Proc. § 585(a)*]:

- The principal amount demanded in the complaint, the *Code Civ. Proc. § 425.11* statement of damages, or the *Code Civ. Proc. § 425.115* statement preserving the right to punitive damages, or a lesser amount if credit has been acknowledged by plaintiff.
- Interest allowed by law or in accordance with the terms of the contract.
- Costs against defendant or defendants, or against one or more of the defendants.

In addition, if a schedule of attorney fees has been adopted by rule of court, the clerk may include in the judgment attorney fees in accordance with the schedule if at least one of the following is true [*Code Civ. Proc. § 585(a)*]:

- The contract involved in the action provides for attorney fees.
- The action is one in which the plaintiff is statutorily entitled to attorney fees.

For a form of proposed default judgments by clerk, see *§ 205.95*.

Although the clerk may be authorized to enter judgment and award attorney fees under the statute, plaintiff has a right to request that attorney fees be fixed by the court if he or she is dissatisfied with the attorney fees permitted by the schedule of fees or if no schedule of fees has been adopted by the court [*Code Civ. Proc. § 585(a)*; *see also* Los Angeles Co. Super. Ct. Rules, Rules 3.2(a) (fee schedule) 9.15 (fee requirements and variations from schedule)]. For a form of request that attorney's fees be fixed by court, see *§ 205.91*.

The clerk is also authorized to enter judgment for restitution of premises in an unlawful detainer action. If the complaint sought other relief, such as damages, the plaintiff may then apply for a court judgment for the remainder of the relief demanded [*see Code Civ. Proc. § 1169*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesDamagesPunitive DamagesGovernmentsCourtsClerks of Court

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17-205 California Forms of Pleading and Practice--Annotated § 205.49

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§ 205.49 Entry of Judgment by Court

[1] Actions Involving Personal Service

The plaintiff may apply to the court under *Code Civ. Proc. § 585(b)* for the relief demanded in the complaint when a default is entered in:

- An action involving a contract from which the amount of damages cannot be ascertained.
- An action on a judgment in which the recovery is not limited to money or damages.
- Any other action in which the defendant is served other than by publication.

After the default is entered by the clerk, the court will hear evidence offered by the plaintiff and will render judgment in his or her favor for such sum, not to exceed the amount stated in the complaint, the *Code Civ. Proc. § 425.11* statement of damages, or the *Code Civ. Proc. § 425.115* statement preserving the right to punitive damages, as appears by the evidence to be just. If the taking of an account or the proof of any fact is necessary to enable the court to give judgment or to carry the judgment into effect, the court may take the account or hear the proof or may in its discretion order a

reference for that purpose [*Code Civ. Proc. § 585(b)*].

Similarly, if the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury or by a reference [*Code Civ. Proc. § 585(b)*]. However, the court is not bound by such an assessment and may award damages in whatever sum appears to the court to be just, not exceeding the demand of the complaint [*Cyrus v. Haveson (1976) 65 Cal. App. 3d 306, 318, 135 Cal. Rptr. 246]* .

When the default judgment has been returned after appeal, unless the appellate court directs otherwise, a defaulting defendant cannot participate in a second judgment hearing any more than he or she can in the first hearing between default and appeal [*Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc. (1984) 155 Cal. App. 3d 381, 387, 202 Cal. Rptr. 204* (defendant not allowed to submit evidence in proceedings following reversal of default judgment due to excessive damages)].

For forms of proposed default judgments by the court, see *§§ 205.97-205.98*.

[2] Actions With Service by Publication

[a] Court Renders Judgment on Plaintiff's Evidence

After a default has been entered in an action in which the service of the summons was by publication, the plaintiff may apply to the court for the relief demanded in the complaint. The court will hear the evidence offered by the plaintiff, and render judgment in plaintiff's favor for such sum (not exceeding the amount stated in the complaint, the *Code Civ. Proc. § 425.11* statement of damages, or the *Code Civ. Proc. § 425.115* statement preserving the right to punitive damages), as appears by that evidence to be just [*Code Civ. Proc. § 585(c)*; *see § 205.42*].

[b] Requirements in Specific Situations

[i] Nonresident Defendant

If the defendant is not a California resident, the court will require the plaintiff, or his or her agent, to be examined, on oath, respecting any payments that have been made to the plaintiff, or to anyone for his or her use, on account of any demand mentioned in the complaint, the *Code Civ. Proc. § 425.11* statement of damages, or the *Code Civ. Proc. § 425.115* statement preserving the right to punitive damages, and may render judgment for the amount which he or she is entitled to recover [*Code Civ. Proc. § 585(c)*].

[ii] Action Involving Real Property

In all cases affecting the title to or possession of real property, where the service of the summons was by publication and the defendant has failed to answer, no judgment is to be rendered on proof of mere occupancy, unless that occupancy has continued for the time and has been of the character necessary to confer title by prescription. In all cases in which the plaintiff bases his or her claim on a paper title, the court shall require evidence establishing plaintiff's equitable right to judgment before rendering judgment [*Code Civ. Proc. § 585(c)*; for discussion of title by prescription, see Ch. 13, *Adverse Possession*].

On the other hand, in actions involving only the possession of real property, the court may render judgment on proof of occupancy by plaintiff and ouster by defendant if the complaint is verified [*see Code Civ. Proc. § 446*] and shows by proper allegations that no party to the action claims title to the real property involved, either by prescription, accession, transfer, will, or succession, but only possession of it [*Code Civ. Proc. § 585(c)*].

[3] Determination of Attorney's Fees

In actions in which the clerk is generally authorized to enter judgment, a plaintiff who seeks to have attorney's fees fixed by the court when no schedule of fees has been adopted or when he or she is dissatisfied with the fee schedule, must file a written request at the time of application for entry of default [*Code Civ. Proc. § 585(a)*; *see also* Los Angeles Co. Super. Ct. Rules, Rules 3.2(a) (fee schedule), 9.15 (calculation of fees on default)].

PRACTICE TIP:

Requesting Attorney's Fees in Separate Document. A separate document requesting the court to fix attorney's fees and enter judgment may be used when the plaintiff wishes the court to set the recoverable attorney's fees. The application should be filed with the Request for Entry of Default if counsel desires immediate entry of judgment. A hearing date should be obtained from the clerk [*see Code Civ. Proc. § 585(a)*].

In such cases, after entry of the default, the court will hear the application for determination of the attorney's fees and render judgment for the fees, for the other relief demanded in the complaint, the *Code Civ. Proc. § 425.11* statement of damages, or the *Code Civ. Proc. § 425.115* statement preserving the right to punitive damages, or a lesser amount if credit has been acknowledged, and for costs against the defendant or defendants, or against one or more of the defendants [*Code Civ. Proc. § 585(a)*]. The matter may be determined on affidavits or declarations in lieu of testimony [*see Code Civ. Proc. § 585(d)*; for discussion, *see § 205.49[5]*].

For a form of request to fix attorney's fees and enter judgment, see *§ 205.91*.

[4] When Default on Cross Complaint Is Sought

Before ordering entry of a default judgment on a cross complaint, the court must determine whether a separate judgment may be properly awarded on the cross complaint and must find that a separate judgment on the cross complaint would not substantially delay the final disposition of the action between the parties [*Code Civ. Proc. § 585(e)*]. Therefore, it appears that entry of default judgment on a cross complaint must always be by court order. Presumably the provisions of *Code Civ. Proc. § 585(d)*, which give the court discretionary power in certain cases to permit the use of affidavits or declarations in lieu of personal testimony when a court judgment of default on a complaint is sought, will be applicable to defaults on cross complaints under *Code Civ. Proc. § 585(e)*; *see Code Civ. Proc. § 587.5* (as used in default statutes, "complaint" includes cross complaint, "defendant" includes cross defendant, and "plaintiff" includes cross complainant)].

For a form of default judgment on a cross complaint, see *§ 205.98*.

[5] Use of Declarations in Lieu of Testimony

[a] In Court's Discretion

The court has discretion to permit a plaintiff applying for a court judgment on default under *Code Civ. Proc. § 585(b), (c)* [*see § 205.49[2][a]*] to use affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in lieu of personal testimony, as to all or any part of the evidence or proof required or permitted to be offered, received, or heard in such cases. This power also applies to applications to the court to fix attorney's fees under *Code Civ. Proc. § 585(a)* [*Code Civ. Proc. § 585(d)*; *see § 205.49[3]*].

In Los Angeles County Superior Court, determination of applications for default judgment on declarations pursuant to *Code Civ. Proc. § 585(d)* is the preferred procedure.

[b] Requirements

A party who seeks a default judgment on declarations must use Cal. Judicial Council Form CIV-100 and must include in the documents filed with the clerk the following [*Cal. Rules of Ct., Rule 3.1800*]:

- Except in unlawful detainer cases, a brief summary of the case identifying the parties and the nature of plaintiff's claim;
- Declarations or other admissible evidence in support of the judgment requested;
- Interest computations as necessary;
- A memorandum of costs and disbursements;
- A declaration of nonmilitary status for each defendant against whom judgment is sought;
- A proposed form of judgment;
- A dismissal of all parties against whom judgment is not sought or an application for separate judgment against specified parties under *Code Civ. Proc. § 579*, supported by a showing of grounds for each judgment;
- Exhibits as necessary; and
- A request for attorney fees if allowed by statute or by the agreement of the parties.

The facts stated in the affidavits or declarations must be within the personal knowledge of the affiant or declarant and must be set forth with particularity. Each affidavit or declaration must show affirmatively that the affiant or declarant, if sworn as a witness, can testify competently to the facts contained therein [*Code Civ. Proc. § 585(d)*].

WARNING:

The declaration of military status in Judicial Council Form CIV-100 may not satisfy federal statutory requirements as amended by the 2003 Servicemembers Civil Relief Act (formerly the Soldiers' and Sailors' Civil Relief Act). The federal statute requires the filing of a declaration as to military status of the defendant before a default judgment can be entered. The declaration must state whether or not the defendant is in military service, but the declaration must be more than the mere statement in the Judicial Council Form because it must contain facts necessary to support the declaration [*50 U.S.C. App. § 521(b)(1)*]. If the plaintiff is unable to determine whether the defendant is in military service under the Act, the plaintiff must file a declaration so stating. Thus, a declaration should be filed in addition to Paragraph 8 of this Judicial Council Form [*see § 205.92* (form of declaration); *see also Mil. & Vet. Code § 402(a)*].

[6] Costs, Interest, and Attorney's Fees Included in Judgment

When the default judgment is entered by the court, costs, interest, and attorney fees may be included in the judgment as provided by law [*Civ. Code § 3287 et seq.* (interest); *Code Civ. Proc. § 1021* (attorney fees); *see also Code Civ. Proc. §§ 1032-1034* (costs)].

For discussion and forms relating to recovery of costs and attorney's fees, see Ch. 174, *Costs and Attorney's Fees* .

For discussion and forms relating to recovery of interest, see Ch. 177, *Damages* , and Ch. 318, *Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessMethodsPublicationCivil ProceduresPretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProceduresRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProceduresRemediesDamagesCompensatory DamagesCivil ProceduresRemediesDamagesPunitive Damages

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17-205 California Forms of Pleading and Practice--Annotated § 205.50

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§ 205.50 Notice of Entry of Judgment

[1] In General

A defaulting party must be notified when the plaintiff applies for entry of default [*see Code Civ. Proc. 587*, discussed in *§ 205.25[3]*]. Once the default is duly entered, however, no further notices are required to be given to a defaulting party who has not appeared in the action [*Code Civ. Proc. § 1010*].

In contested actions or special proceedings, the party submitting a judgment for entry must prepare and mail a copy of the notice of entry of judgment to all parties who have appeared in the action or proceeding and must file with the court the original notice of entry of judgment together with the proof of service by mail [*Code Civ. Proc. § 664.5(a)*]. This requirement does not apply unless the prevailing party is represented by counsel. Nor does it apply to proceedings for dissolution of marriage, nullity of marriage, or legal separation or to small claims actions [*Code Civ. Proc. § 664.5(a)*]. Thus, notice must be given to a defaulting party who appeared in the action, to other defendants who have appeared in the action, or both.

Even when notice is not required, it may nonetheless be desirable in order to shorten the defendant's time for seeking relief from the judgment. For example, a defaulting defendant has up to two years after entry of a default judgment

against him or her to move to set aside the default for lack of actual notice under *Code Civ. Proc. § 473.5*. If he or she is served with written notice that the default or default judgment has been entered, however, the motion must be filed within 180 days after service of the notice [*Code Civ. Proc. § 473.5*; for further discussion of procedure for relief from default under *Code Civ. Proc. § 473.5, see* Ch. 489, *Relief From Judgments and Orders* ; *see also discussion under § 205.50[2]*].

For purposes of the mandatory relief provision of *Code Civ. Proc., § 473(b)*, "default" means only a defendant's failure to answer a complaint, and a "default judgment" means only a judgment entered after the defendant has failed to answer and the defendant's default has been entered [*Vandermoon v. Sanwong (2006) 142 Cal. App. 4th 315, 321, 47 Cal. Rptr. 3d 772]* .

For a general form of notice of entry of judgment, see *Ch. 318, Judgments, § 318.40* et seq. For an optional California Judicial Council Form CIV-130, Notice of Entry of Judgment or Order, see *Ch. 318, Judgments § 318.336*.

[2] In Property Actions

If a default judgment determines the ownership or right to possession of real or personal property and the plaintiff has personally served both the defaulting defendant and his or her attorney of record within the state of California a written notice that the judgment was taken and that any rights defendant has to relief from the judgment under *Code Civ. Proc. § 473(b)* for mistake, inadvertence, surprise, or excusable neglect will expire 90 days after service of the notice, any *Code Civ. Proc. § 473(b)* motion must be made within 90 days after service of the notice on the defaulting party or on the attorney, whichever service is later [*Code Civ. Proc. § 473(b)*]. Absent this notice, the defendant may move to set aside the default under *Code Civ. Proc. § 473* up to six months after the date of entry of default [*see In re Marriage of Jacobs (1982) 128 Cal. App. 3d 273, 281-282, 180 Cal. Rptr. 234* ; for further discussion of procedure for relief from default under *Code Civ. Proc. § 473(b), see* Ch. 489, *Relief From Judgments and Orders*].

Thus, in property actions, it is advisable for a plaintiff to give a defaulting defendant and his or her attorney the special notice entry of judgment authorized under *Code Civ. Proc. § 473(b)*, especially when the default judgment is entered soon after the entry of default, because the notice will shorten the defendant's time for filing a motion to set aside the default.

For a form of notice of default judgment and shortening time for relief from default in property actions, see *§ 205.100*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 205 DEFAULTS AND DEFAULT JUDGMENTS
PART II. LEGAL BACKGROUND
C. Entry of Default Judgment

17-205 California Forms of Pleading and Practice--Annotated §§ 205.51-205.59

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§§ 205.51[Reserved]

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17-205 California Forms of Pleading and Practice--Annotated § 205.60

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§ 205.60 Federal Statutes

Defaults involving persons in military service. *50 U.S.C. App. § 520*

Legal Topics:

For related research and practice materials, see the following legal topics:
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17-205 California Forms of Pleading and Practice--Annotated § 205.61

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§ 205.61 State Statutes

Requirements to enter default against defendant designated by fictitious name. *Code Civ. Proc. § 474*

Judgment for or against one or more of several parties. *Code Civ. Proc. § 578*

Judgment against one or more defendants, action proceeding against others. *Code Civ. Proc. § 579*

Entry of default and default judgment. *Code Civ. Proc. §§ 585-587*

Judgment roll in case of default. *Code Civ. Proc. § 670(a)*

Default in unlawful detainer cases. *Code Civ. Proc. § 1169*

Default as waiver of notice of deposition proceedings. *Code Civ. Proc. § 2004*

Default judgment as sanction for abuse of discovery process. *Code Civ. Proc. § 2023(b)(4)(D)* [*Code Civ. Proc. § 2023.030(d)* operative July 1, 2005]

Application of *Code Civ. Proc. § 585* to family law proceedings involving costs and attorney's fees pendente lite. *Fam. Code § 2031*

Defaults involving persons in military service. *Mil. & Vet. Code § 402*

Legal Topics:

For related research and practice materials, see the following legal topics:
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17-205 California Forms of Pleading and Practice--Annotated § 205.62

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§ 205.62 California Rules of Court

Documents and information to be filed with clerk when seeking default judgment on declarations. *Cal. Rules of Ct., Rule 3.1800*

Claiming costs. Cal. Rules of Ct., Rule supporting 3.1700(a)(2)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 205.63 Local Court Rules

[1] Los Angeles County

Procedures for obtaining default judgment. Los Angeles Co. Super. Ct. Rules, Rule 9.10 et seq.

[2] San Francisco County

Procedure for seeking default judgment. San Francisco Uniform Local Ct. Rules, Rule 6.6

Legal Topics:

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17-205 California Forms of Pleading and Practice--Annotated § 205.64

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§ 205.64 Decisions

[1] Effect of Default Judgment

Judgment by default as said to "confess" material facts alleged by plaintiff, that is, defendant's failure to answer has same effect as express admission of matters well pleaded in complaint. *Beeman v. Burling (1990) 216 Cal. App. 3d 1586, 1597, 265 Cal. Rptr. 719*

[2] Entry of Default and Default Judgment

[a] Entry Improper

Under the "well pleaded" complaint rule, it is error to enter a default judgment on a complaint that fails to state a cause of action against the defaulting defendant. *Ferraro v. Camarlinghi (2008) 161 Cal. App. 4th 509, 539, 75 Cal. Rptr. 3d 19*

Default and default judgment is void if the complaint fails to apprise the defendant of the nature of the plaintiff's demand or if the court granted relief which it had no power to grant including a default judgment that exceeds the

amount demanded in the complaint. When the complaint contained no specific factual allegations with respect to the particular defendant seeking relief from the default judgment and did not specify the amount of damages plaintiff sought from the particular defendant, the default judgement against that defendant was void. *Falahati v. Kondo (2005) 127 Cal. App. 4th 823, 830, 26 Cal. Rptr. 3d 104*

Default and default judgment as void when entered only 16 days after earliest date on which service by publication could have been deemed completed under former *Code Civ. Proc. § 413* [*now Code Civ. Proc. § 415.50*] because defendant served by publication had 30 days after completion of service to appear and answer under former *Code Civ. Proc. § 407* [*now Code Civ. Proc. § 412.20*]. *Whealton v. Whealton (1967) 67 Cal. 2d 656, 659, 63 Cal. Rptr. 291, 432 P.2d 979*

Failure to properly serve and give formal statutory notice to defendant of the amount of money damages the plaintiff was seeking is basis to set aside default, even if defendant had actual notice. *Schwab v. Southern California Gas Co. (2004) 114 Cal. App. 4th 1308, 1320-1322, 8 Cal. Rptr. 3d 627*

Plaintiff as required to name business entity in its right capacity in his or her complaint in order to obtain enforceable judgment by default. *Earl W. Schott, Inc. v. Kalar (1993) 20 Cal. App. 4th 943, 946, 24 Cal. Rptr. 2d 580*

Failure to serve husband with amended petition and summons for dissolution after service of action for legal separation as improper service as basis to set aside default. *In re Marriage of Rhoades (1984) 157 Cal. App. 3d 169, 172, 211 Cal. Rptr. 531*

When elderly defendant wrote letters to court clerk requesting that clerk do "what was needed" to answer complaint and stating that defendant would pay any necessary fees, clerk as having no authority to determine that such letters did not constitute sufficient pleading and to enter default judgment. *Baske v. Burke (1981) 125 Cal. App. 3d 38, 45, 177 Cal. Rptr. 794*

If defendants' notice of motion to quash service was on file when clerk received plaintiff's request for entry of default, clerk as having no authority to enter defendants' default despite fact that notice was technically defective when filed. *Goddard v. Pollock (1974) 37 Cal. App. 3d 137, 143, 112 Cal. Rptr. 215*

When creditor pursuant to former *Com. Code § 9504* (*now see Com. Code § 9601 et seq.*) dealt with and sold property that was security for debt sued on, clerk was not authorized by former *Code Civ. Proc. § 585*(*l*) (*now see Code Civ. Proc. § 585(a)*) to enter default judgment against debtor for deficiency since such judgment requires judicial determination that sale was conducted in commercially reasonable manner and that claimed expenses connected with repossession and sale were reasonable. *Liberty Loan Corp. of North Park v. Petersen (1972) 24 Cal. App. 3d 915, 919, 101 Cal. Rptr. 395*

When only plaintiff's attorney was served with cross complaint, clerk had no power to enter default under former *Code Civ. Proc. § 585(1)* (*now see Code Civ. Proc. § 585(a)*), which required personal service on party, and entry of default and default judgment was void; superior court's power to set aside void judgment not affected by six-month limitation of *Code Civ. Proc. § 473*. *Westport Oil Co. v. Garrison (1971) 19 Cal. App. 3d 974, 978, 97 Cal. Rptr. 287*

[b] Entry Proper

Motion to dismiss filed in federal court after removal is sufficiently similar to demurrer to constitute responsive pleading for purpose of avoiding entry of default when case is transferred back to state court by federal court. *Laguna Village, Inc. v. Laborers' Internat. Union of North America (1983) 35 Cal. 3d 174, 182, 197 Cal. Rptr. 99, 672 P.2d 882*

Trial court properly granted landlords' motion for summary adjudication following the tenants' failure to appear at trial, resulting in a default judgment, in the landlords' action for breach of contract, declaratory relief, ejectment, and quiet title. Tenants failed to file the separate statement of facts in opposition required pursuant to *Code Civ. Proc. § 437c(b)(3)*, and the tenants' attempt to shift the blame for their failure to comply to the trial court, without any case authority demonstrating that the trial court abused its discretion, was incorrect and misplaced. The tenants had taken the time to file a sur-reply to the landlords' reply brief, and could have used that opportunity to remedy their deficiency, but did not do so. *Whitehead v. Habig (2008) 163 Cal. App. 4th 896, 902, 77 Cal. Rptr. 3d 679*

Entry of default is proper when defendant fails to file answer within 10 days of entry of court order denying defendant's motion to dismiss complaint; denied motion to dismiss is treated as demurrer overruled without leave to amend. *Barragan v. Banco BCH (1986) 188 Cal. App. 3d 283, 299-300, 232 Cal. Rptr. 758*

Defaulting party's motion for summary judgment does not preclude entry of default judgment. *Barragan v. Banco BCH (1986) 188 Cal. App. 3d 283, 299, 232 Cal. Rptr. 758*

Defendant's demurrer asserting pendency of another action involving substantially same causes of action and issues does not preclude entry of default against defendant because operative effect of demurrer ceased after conclusion of first action. *Barragan v. Banco BCH (1986) 188 Cal. App. 3d 283, 298-299, 232 Cal. Rptr. 758*

Clerk is entitled to rely on document's label in determining whether defendant has filed answer; default was properly entered by clerk when only document defendant filed was labeled as declaration in opposition to preliminary injunction. *Wisdom v. Ramirez (1986) 177 Cal. App. 3d Supp. 1, 7-8 , 222 Cal. Rptr. 923*

If affidavit showed fact of service of summons, court was empowered to render default judgment, although affidavit erroneous as to place of service. *Wheat v. McNeill (1931) 111 Cal. App. 72, 78, 295 P. 102*

[3] Filing of Amended Complaint

Amended pleading that includes simply change in form does not open default and give defendant new right to answer; when amended complaint merely corrected two typographical errors pertaining to assessor's parcel number, but original complaint contained correct parcel number in grant deed incorporated as exhibit and thereby gave notice of real property at issue, amendment did not constitute change in substance; failure to serve amended complaint did not render default judgment void. People v. Parcel No. 0560500-09 *(1997) 58 Cal. App. 4th 120, 126* , 68 Rptr. 2d 51

Substantive amendment to complaint superseded original complaint, thereby opening default, and permitting defaulting defendant to answer. *Beeman v. Burling (1990) 216 Cal. App. 3d 1586, 1597, 265 Cal. Rptr. 719*

In action against bank for rescission, fraud, and negligent misrepresentation, plaintiff's argument and proof at default hearing regarding bank's conduct after complaint had been filed constituted de facto amendment of complaint relieving bank of default and entitling it to be served anew and then to answer. *Jackson v. Bank of America (1986) 188 Cal. App. 3d 375, 387-389, 233 Cal. Rptr. 162*

[4] Prerequisites to Default

Although a plaintiff's attorney is not legally required to warn a defendant's attorney before taking a default, if plaintiff's counsel knows the identity of the lawyer representing a defendant, such warning is at the least an ethical obligation of counsel. *Fasuyi v. Permatex, Inc. (2008) 167 Cal. App. 4th 681, 701, 84 Cal. Rptr. 3d 351*

Party is required to provide notice and an opportunity to be heard before defaults can be entered as a discovery

sanction. Failure to provide defendants notice and an opportunity for a hearing is a denial of due process and renders the default and subsequent default judgment void. *Sole Energy Company v. Hodges (2005) 128 Cal. App. 4th 199, 208* , 26 Cal. Rtpr. 3d 823

Although law generally favors hearing on merits, plaintiff is entitled to default judgment when defendant fails to answer, demur, or give notice of certain other motions. *Ely v. Gray (1990) 224 Cal. App. 3d 1257, 1260, 274 Cal. Rptr. 536*

To reach default stage, party is required to follow well-defined rules that ensure that defendant has sufficient knowledge of pending action to make fair and informed choice regarding whether or not to defend; if plaintiff fails to adhere to those rules, defendant is not required to suffer consequences default judgment brings. *Lopez v. Fancelli (1990) 221 Cal. App. 3d 1305, 1309-1310, 271 Cal. Rptr. 87*

[5] Relief Awarded to Plaintiff

[a] Limitation to Amount Demanded in Complaint

Default judgment entered as discovery sanction cannot include award in excess of that prayed for in complaint. *Greenup v. Rodman (1986) 42 Cal. 3d 822, 826-829, 231 Cal. Rptr. 220, 726 P.2d 1295*

Default judgment in excess of amount stated in prayer of complaint is void only to extent of excess, and may be modified by court to save valid portion. *Becker v. S.P.V. Construction Co. (1980) 27 Cal. 3d 489, 495, 165 Cal. Rptr. 825, 612 P.2d 915*

Where the dollar amount demanded on plaintiff's request for entry of default was "0.00," appellate court found that it could not support a default judgment in any amount. Where no specific amount of damages is demanded, there is no adequate notice to the defendant--and the default judgment of $2.65 million entered under those conditions is void. Constructive notice of potential liability does not satisfy *Code Civ. Proc. § 580*. *Stein v. York (2010) 181 Cal. App. 4th 320, 325, 105 Cal. Rptr. 3d 1*

Compensatory damages on default cannot exceed the $50,000 amount prayed for in the complaint. The phrase "in an amount in excess of $50,000" does not provide notice of unlimited damages and the recoverable damages on default are limited to *$50,000. Electronic Funds Solutions, LLC v. Murphy (2006) 134 Cal. App. 4th 1161, 1173, 36 Cal. Rptr. 3d 663*

Prayer in complaint alone governs amount of relief available in default judgment. *Gudarov v. Hadjieff (1952) 38 Cal. 2d 412, 416-417, 240 P.2d 621*

When the complaint did not specify the amount of damages plaintiff sought from the defendant, the default judgement against that defendant was void. Where no amount of damages is demanded, any amount awarded is by definition greater than the amount demanded. *Falahati v. Kondo (2005) 127 Cal. App. 4th 823, 830-831, 26 Cal. Rptr. 3d 104*

Intent of *Code Civ. Proc. § 580*, limiting relief to that demanded in complaint, is to ensure that defendant who declines to contest action does not thereby subject him or herself to open-ended liability; default judgment greater than amount specifically demanded is beyond court's jurisdiction and void. *In re Marriage of Wells (1988) 206 Cal. App. 3d 1434, 1437, 254 Cal. Rptr. 185*

Defendant in municipal court action had sufficient notice to satisfy *Code Civ. Proc. § 580* and uphold default judgment for $11,479.95 plus $1,250 in attorney's fees, even though complaint did not demand any specific amount of

compensatory damages, when complaint did demand $15,000 in punitive damages and referred to statute that established liability for actual damages, penalty not to exceed stated amount, and minimum award. *Wisdom v. Ramirez (1986) 177 Cal. App. 3d Supp. 1, 7-8 , 222 Cal. Rptr. 923*

When no amount of damages is alleged and prayer merely asks for damages according to proof, pleading is insufficient to permit award on default judgment. *Ludka v. Memory Magnetics International (1972) 25 Cal. App. 3d 316, 322-323, 101 Cal. Rptr. 615*

Allegation in complaint that plaintiff had been damaged in sum of $10,000, combined with prayer for damages according to proof, gives sufficient notice to defendant that plaintiff sought damages in addition to restitutional relief to sustain award of damages. *Thorson v. Western Development Corp. (1967) 251 Cal. App. 2d 206, 213, 59 Cal. Rptr. 299*

Default judgment fatally deficient for award of excess relief may be set aside without vitiating defendant's default. *Jonson v. Weinstein (1967) 249 Cal. App. 2d 954, 958, 58 Cal. Rptr. 32*

[b] Limitation in Personal Injury and Wrongful Death Actions

Default judgment in personal injury or wrongful death case as not to be entered absent notice in complaint or "statement of damages" of special and general damages sought. *Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 434, 280 Cal. Rptr. 83, 808 P.2d 226* (disapproving *Morgan v. Southern Cal. Rapid Transit Dist. (1987) 192 Cal. App. 3d 976, 237 Cal. Rptr. 756*)

Statement of damages under *Code Civ. Proc. § 425.11* as required to be served before entry of default by clerk; statement served after entry of default but before entry of default judgment as untimely. *Hamm v. Elkin (1987) 196 Cal. App. 3d 1343, 1346, 242 Cal. Rptr. 545*

Amount of damages sought in personal injury or wrongful death action as required to be communicated by plaintiff through notice under *Code Civ. Proc. § 425.11* before defendant's answer may be stricken and default entered as discovery sanction. *Morgan v. Southern Cal. Rapid Transit Dist. (1987) 192 Cal. App. 3d 976, 986, 237 Cal. Rptr. 756* (disapproved on other grounds in *Schwab v. Rondel Homes, Inc. (1991) 53 Cal. 3d 428, 434, 280 Cal. Rptr. 83, 808 P.2d 226*)

In action by former depositors against bank for conversion, accounting, fraud and deceit, negligence, breach of contract, and false imprisonment, failure of depositors to comply with *Code Civ. Proc. § 425.11* as not rendering default judgment void because nonpersonal injury damages were clearly isolated from personal injury damages and amply supported amount set forth in prayer for relief. *Barragan v. Banco BCH (1986) 188 Cal. App. 3d 283, 303-304, 232 Cal. Rptr. 758*

Default judgment for trespass, assault, conversion, intentional infliction of emotional distress, and wrongful repossession as properly set aside when plaintiff had failed to inform defendant of amount of damages sought as required by *Code Civ. Proc. § 425.11* disclosure for all causes of action. *Jones v. Interstate Recovery Service (1984) 160 Cal. App. 3d 925, 929-930, 206 Cal. Rptr. 924*

In personal injury action, plaintiff's request to enter default, specifying only total amount of damages sought, as not complying with *Code Civ. Proc. § 425.11* requirement that notice be given to defendant of amount of special and general damages sought. *Plotitsa v. Superior Court (1983) 140 Cal. App. 3d 755, 761-762, 189 Cal. Rptr. 769*

In personal injury or wrongful death action, default as void on face and subject to challenge beyond *Code Civ. Proc. §*

473 six-month limitation period if it was entered without statement of amount of damages sought as required under *Code Civ. Proc. § 425.11*. *Plotitsa v. Superior Court (1983) 140 Cal. App. 3d 755, 760, 189 Cal. Rptr. 769*

Plaintiff in personal injury action as required to personally serve defendant with request to enter default if defendant has not been given prior notice that complies with *Code Civ. Proc. § 425.11* statement-of-damages requirement. *Plotitsa v. Superior Court (1983) 140 Cal. App. 3d 755, 759, 189 Cal. Rptr. 769* ; *see also* *Twine v. Compton Supermarket (1986) 179 Cal. App. 3d 514, 517-518, 224 Cal. Rptr. 562* (*Plotitsa* applies retroactively)

Entry of default judgment as improper in personal injury action when complaint did not state amount demanded and defendant was given no notice of amount sought by plaintiff, either by way of statement of damages pursuant to *Code Civ. Proc. § 425.11* or request to enter default. *Petty v. Manpower, Inc. (1979) 94 Cal. App. 3d 794, 798, 156 Cal. Rptr. 622*

[c] Amount of Damages as Stated in Body of Complaint

Where complaint adequately notified defendant that the amount of damages sought was $245,000--the amount of an uncollected judgment--plaintiffs were not required to reiterate that sum in the prayer in order to comply with *Code of Civ. Proc. § 580*. However, because neither the body of the complaint nor the prayer for relief identified the amount of attorney's fees being sought as $15,000, that amount must be stricken from the judgment. *Hearn v. Howard (2009) 177 Cal. App. 4th 1193, 1209, 99 Cal. Rptr. 3d 642*

[6] Purpose of Default Judgment

Default judgment as procedural device designed to clear court's calendar and files of those cases that have no adversarial quality. *Lopez v. Fancelli (1990) 221 Cal. App. 3d 1305, 1309, 271 Cal. Rptr. 87*

[7] Standard of Proof

When defendant has defaulted, standard of proof requires that plaintiff merely establish a prima facie case; trial court erroneously applied preponderance of evidence standard in determining whether plaintiff entitled to an award of damages. *Johnson v. Stanhiser (1999) 72 Cal. App. 4th 357, 361, 85 Cal. Rptr. 2d 82*

[8] Standard of Review on Appeal

On plaintiff's appeal from award of damages after defendant defaulted, in which trial court failed to award plaintiff any damages other than costs and fees, case presented set of circumstances where award, or lack of it, was totally unconscionable and without justification, thus calling for review. *Johnson v. Stanhiser (1999) 72 Cal. App. 4th 357, 361, 85 Cal. Rptr. 2d 82*

[9] Waiver of Constitutional Rights

Defendant in any civil action as having right to notice of relief sought in complaint and to opportunity for hearing on matter to be adjudicated, but defendant who has received requisite notice and defaults deliberately as waiving his or her constitutional right to that hearing; hence, if proper notice is given, there is no constitutional impediment to entry of default judgment, notwithstanding general principle that waiver of constitutional rights is not presumed. *County of Mendocino v. Ted S. (1990) 217 Cal. App. 3d 1202, 1206-1207, 266 Cal. Rptr. 452*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 205.65 Text References

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, § 109 et seq. (4th ed. 1997)

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PART III. RESEARCH GUIDE

17-205 California Forms of Pleading and Practice--Annotated §§ 205.66-205.69

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[Reserved]

§§ 205.66[Reserved]

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Volume 17: Defaults and Default Judgements thru Duress, Menace, Fraud, Undue Influence, and Mistake-Chs. 205-219
Chapter 205 DEFAULTS AND DEFAULT JUDGMENTS
PART IV. PROCEDURAL CHECKLIST

17-205 California Forms of Pleading and Practice--Annotated § 205.70

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§ 205.70 Preliminary Steps and Planning

☐ Consult local practice as to other required documentation or additional requirements to obtain entry of a default and default judgment.

☐ File and serve statement of damages on defendant if complaint does not state amount [*see Code Civ. Proc. §§ 425.11, 580*; for form, *see Ch. 177, Damages, § 177.40* et seq.].

☐ File and serve statement preserving the right to punitive damages, if claiming such damages [*see Code Civ. Proc. §§ 425.115, 580*; for form, *see Ch. 177, Damages, § 177.40* et seq.].

☐ Determine whether defendant is in military service [*see 50 U.S.C. App. § 521(1)*].

☐ Determine whether clerk or court will enter the default judgment.

☐ Clerk may enter judgment if [*see Code Civ. Proc. § 585(a)*]:

- ☐ Service was not by publication, and
- ☐ Case arises in contract or on judgment for recovery of money or damages only.

☐ Court enters judgment in all other cases [*see Code Civ. Proc. § 585(b), (c)*].

☐ Determine whether attorney fees are available by contract or law. If so:

☐ If judgment may be entered by clerk, determine whether court has adopted a schedule of attorney's fees, so that clerk may include fees in the judgment [*Code Civ. Proc. § 585(a)*].

☐ If the court has a schedule of attorney's fees but counsel is dissatisfied with the fees it would provide, consider whether to request a court determination of attorney's fees, as authorized by *Code Civ. Proc. § 585(a)*.

☐ If there is no schedule, be prepared to have court enter judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesDamagesPunitive DamagesMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act

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17-205 California Forms of Pleading and Practice--Annotated § 205.71

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§ 205.71 Entry of Default [and Default Judgment by Clerk or Court]

☐ Prepare mandatory Judicial Council form of Request for Entry of Default [for form, *see § 205.90*], filling in:

☐ Request to enter default and if sought at same time, request to enter clerk's judgment or court judgment.

☐ Declaration under *Code Civ. Proc. § 585.5(a)* if application to enter default is made under *Code Civ. Proc. § 585(a)* [*Code Civ. Proc. § 585.5(a)*].

☐ Declaration of military status, when appropriate [*see 50 U.S.C. App. § 520(1)*; *see Cal. Rules of Ct., Rule 3.1800(a)*].

NOTE:
Timing of Declaration. The declaration of military status must be filed before entry of a default judgment, but need not be filed before entry of default [***Interinsurance***

***Exchange v. Collins (1994) 30 Cal. App. 4th 1445, 1447, 37 Cal. Rptr. 2d 126]* .**

☐ Memorandum of costs [*Code Civ. Proc. § 1033.5*; *Cal. Rules of Ct., Rules 3.1800*, 3.1750; for discussion, *see § 205.25[4], above*].

☐ Declaration of mailing [*Code Civ. Proc. § 587*].

☐ Make copies of mandatory Judicial Council form:

☐ Original for filing.

☐ One copy for defendant, or if defendant is represented by counsel, his or her attorney of record.

☐ One copy for client, if desired.

☐ One office copy.

☐ Additional copies as desired.

☐ Prepare accompanying papers:

☐ Proposed judgment [for form, *see § 205.95*], if party seeks a clerk's judgment on the default or seeks a default judgment on declarations [*see Code Civ. Proc. §§ 585(a), 586*; *Cal. Rules of Ct., Rule 3.1800*].

☐ Request to fix attorney's fees [for form, *see § 205.91*], if counsel wishes to have the court fix attorney's fees authorized by the contract or by statute and render judgment under *Code Civ. Proc. § 585(a)*, with copies as for mandatory Judicial Council form, *above* [*see Cal. Rules of Ct., Rule 3.1800*].

☐ Declaration of military status [*see § 205.92*], if defendant is in military service or if plaintiff does not know defendant's military status [*see 50 U.S.C. App. § 521*]. Also:

☐ Secure court appointment of an attorney to represent the absent defendant [for form, *see § 205.93*].

☐ Furnish a bond if one is required as a condition to entry of judgment.

☐ Declarations or other admissible evidence in support of the judgment requested, if seeking a default judgment on declarations and if the court permits use of declarations in a case requiring a court hearing for judgment [*see Code Civ. Proc. § 585(b), (c), (e)*; *Cal. Rules of Ct., Rule 3.1800(a)*], or on an application to have the court fix attorney's fees [*see Code Civ. Proc. § 585(a)*], for use in lieu of personal

testimony at the hearing [*Code Civ. Proc. § 585(d)*]. Ensure that declarations:

☐ Set out particular facts within the declarant's personal knowledge, and

☐ State facts showing that declarant is competent to testify as witness [*Code Civ. Proc. § 585(d)*].

☐ If party seeks default judgment on declarations, prepare additional documents to be included with documents filed with the clerk [*Cal Rules of Ct., Rule 3.1800(a)*]:

☐ Brief summary of the case identifying the parties and the nature of plaintiff's claim (not required in unlawful detainer cases).

☐ Interest computations as necessary.

☐ A dismissal of all parties against whom judgment is not sought or an application for separate judgment against specified parties under *Code Civ. Proc. § 579*, supported by a showing of grounds for each judgment.

☐ Exhibits as necessary.

☐ If judgment is to be rendered on written obligation to pay money, obtain original of contract or certified copy of judgment so clerk can annotate it when judgment is entered [*see Cal. Rules of Ct., Rule 3.1806*].

☐ Mail copies of papers:

☐ Mail one copy of the application and of each of the accompanying papers to defendant's attorney of record, or if none, to defendant at his or her last known address [*Code Civ. Proc. § 587*].

☐ Deliver originals of papers:

☐ Deliver the original of the official form and the originals of each of the accompanying papers to the court clerk for filing.

☐ If proof of service of summons has not been previously filed, such proof should accompany the Request for Entry of Default [*see Code Civ. Proc. § 585(a), (b)*].

☐ If a required *Code Civ. Proc. § 425.11* statement of damages was served and proof of service of the statement has not been previously filed, such proof should accompany the Request for Entry of Default.

☐ If a statement to preserve punitive damages under *Code Civ. Proc. § 425.115* has been served and

proof of service of the statement has not been previously filed, such proof should accompany the Request for Entry of Default.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral Overview

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PART IV. PROCEDURAL CHECKLIST

17-205 California Forms of Pleading and Practice--Annotated § 205.72

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§ 205.72 Entry of Default Judgment by Court After Hearing

☐ Consult local court procedures to determine whether the complaint is a type for which the court requires a hearing or a type for which the court prefers to issue a judgment on the basis of declarations in lieu of personal testimony.

☐ If court requires oral prove-up hearing rather than determining case on basis of declarations, obtain hearing date:

☐ If a court judgment on the default is sought [*see Code Civ. Proc. § 585(b), (c), (e)*], obtain a hearing date from the clerk at the time the request for entry of default form is filed, or from the department or courtroom where the case is assigned, according to local practice.

☐ If not already filed with the clerk [*Cal. Rules of Ct., Rule 3.1800*], prepare proposed judgment [for forms, *see §§ 205.97 -205.99*]:

☐ Prepare a proposed judgment for submission to the court at the hearing for the judge's signature.

☐ Attend hearing:

☐ Instruct persons who will be offering personal testimony to attend the hearing on the default.

☐ Attend the hearing and submit the proposed judgment to the court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultEntry of Default Judgments

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17-205 California Forms of Pleading and Practice--Annotated § 205.73

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§ 205.73 Notice of Entry of Default Judgment

☐ Prepare and serve notice of entry of default judgment, if required or desired:

☐ In a contested superior court action, serve a copy of notice of entry of the default judgment on all parties who have appeared in the action and file the original notice, with proof of service by mail, with the court [*Code Civ. Proc. § 664.5(a)*; for form, *see Ch. 318, Judgments, § 318.40* et seq.].

☐ In an action involving ownership or right to possession of real or personal property, personally serve a copy of the notice of entry of judgment and shortening of time for relief on the defendant and his or her attorney of record and file the original notice and proof of service with the court, if desired to shorten defendant's time for seeking relief under *Code Civ. Proc. § 473* [for form, *see § 205.100*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultEntry of Default Judgments

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17-205 California Forms of Pleading and Practice--Annotated §§ 205.74-205.89

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[Reserved]

§§ 205.74[Reserved]

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PART V. FORMS

17-205 California Forms of Pleading and Practice--Annotated § 205.90

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§ 205.90 Request for Entry of Default and/or Default Judgment [Code Civ. Proc. § 585]--Judicial Council Form CIV-100

[1] FORM Request for Entry of Default [Code Civ. Proc. § 585]--Judicial Council Form CIV-100

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustration of Cal. Judicial Council Form CIV-100, which must be used by a plaintiff or cross complainant to seek entry of a default and/or default judgment. Use of the form is mandatory; no court may use a different form [*Gov. Code § 68511*; *Cal. Rules of Ct., Rule 1.31*].

The form has been filled in to illustrate how it might be used to request entry of default and entry of a default judgment by the court clerk. The boxes in the heading that request Entry of Default and Clerk's Judgment, therefore, are checked. For discussion of when the box entitled Court Judgment should be checked, see *§ 205.90[3][c]*, Request for Court Judgment (Paragraph 1(b)), *below*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in

PDF format also is available at *www.lexisone.com* at no charge.

CAUTION:

If attorney's fees are to be fixed by the court under *Code Civ. Proc. § 585(a)*, this form should be accompanied by a written request for court determination of the amount of attorney's fees and for a court judgment [*see Code Civ. Proc. § 585(a)*; § 205.91]. The request should also be accompanied by proof of service [*Code Civ. Proc. § 585(a), (b)*], or by proof of publication [*Code Civ. Proc. § 585(c)*], of the summons, as the case may be, if that proof has not previously been filed with the court clerk [*see Code Civ. Proc. § 417.30(a)*]. If the entry of default is requested under *Code Civ. Proc. § 585(b), (c)*, or *(e)* and the court permits the use of affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in lieu of personal testimony pursuant to *Code Civ. Proc. § 585(d)*, the request should be accompanied by the appropriate affidavits or declarations and additional documents as required by *Cal. Rules of Ct., Rule 3.1800*.

[3] Request for Entry of Default and Default Judgment

[a] Date and Plaintiff's Name (Paragraph 1)

The date on which the complaint or cross complaint was filed should be entered at Paragraph 1(a). The blank at the end of Paragraph 1(b) should be filled in with the typed name of the plaintiff or cross claimant exactly as it appears on the complaint or cross complaint.

[b] Request That Clerk Enter Default (Paragraph 1(a))

The requesting party cannot obtain a court judgment or clerk's judgment until a default has been entered [*see Code Civ. Proc. § 585(a), (b), (e)*]. Therefore, unless a default has been entered pursuant to a previous request, Paragraph 1(c) must be checked and filled in with the typed name of the defendant or other defaulting party as it appears on the complaint or cross complaint. If only entry of the default is desired at this time, nothing further need be filled out [*see Code Civ. Proc. § 585(a), (b), (e)*]. If a default has been entered previously and a judgment is requested, Paragraph 1(c) may be left blank.

[c] Request for Court Judgment (Paragraph 1(b))

In certain cases, discussed in *§ 205.49[2], above*, a default judgment must be entered by the court, as distinguished from a clerk's judgment (*discussed under § 205.45*). If a court judgment is sought, Paragraph 1(b) should be checked. The Judicial Council form does not provide an option for a court judgment for default on a cross complaint pursuant to *Code Civ. Proc. § 585(e)*. When judgment is sought in this situation, the requesting party should manually insert subdivision "(e)" after " *Code Civ. Proc. § 585(b), (c)*," in line one of Paragraph 1(b).

If the complaint is a type for which local court practice requires a hearing, or if a hearing is desired, a hearing date should be obtained from the clerk. Otherwise, the necessary affidavits or declarations allowed by *Code Civ. Proc. § 585(d)* in lieu of testimony must be prepared for filing with the Request for Entry of Default.

A party who seeks a default judgment on declarations must include in the documents filed with the clerk the following [*Cal Rules of Ct., Rule 3.1800*]:

- Except in unlawful detainer cases, a brief summary of the case identifying the parties and the nature of plaintiff's claim;

- Declarations or other admissible evidence in support of the judgment requested;

- Interest computations as necessary;

- A memorandum of costs and disbursements (Paragraph 7 of Judicial Council Form);

- A declaration of nonmilitary status for each defendant against whom judgment is sought (Paragraph 8 of Judicial Council Form);

- A proposed form of judgment [*see §§ 205.95 -205.99*];

- A dismissal of all parties against whom judgment is not sought or an application for separate judgment against specified parties under *Code Civ. Proc. § 579*, supported by a showing of grounds for each judgment;

- Exhibits as necessary; and

- A request for attorney fees if allowed by statute or by the agreement of the parties (Paragraph 2 of Judicial Council Form and § 205.91).

For further discussion see *§ 205.49[5]*.

[d] Request for Clerk's Judgment for Restitution of Real Property (Paragraph 1(c)(1))

If the action is one for unlawful detainer, forcible detainer, or forcible entry, and the plaintiff seeks immediate restitution of the premises and a writ of execution on the judgment under *Code Civ. Proc. § 1169*, he or she should check Paragraph 1(c)(1) of the Judicial Council form of Request for Entry of Default.

If, however, the action is for unlawful detainer after nonpayment of rent and the lease has not expired, the requesting party should not check Paragraph 1(c)(1) if *Code Civ. Proc. § 1174(c)* applies. Section 1174(c) provides for a five-day stay of judgment for restitution, during which time the tenant can pay back rent together with any damages, interest, and costs, unless the notice to pay or quit stated the landlord's election to declare the lease forfeited [*Code Civ. Proc. § 1174(c)*]. If the five-day stay provision applies, it appears that the plaintiff should request a court judgment for restitution, as well as any damages, interest, and costs, rather than proceed under the expedited default procedure provided by *Code Civ. Proc. § 1169*.

The requesting party should check the box under Paragraph 1(c)(1) of the form if the default judgment is to include not only the defendants named in the complaint but also all other occupants of the premises [*see Code Civ. Proc. § 1169*]. The judgment will include and be enforceable against those unnamed persons if, at the time the defendants were served with process, a summons, complaint, and prejudgment claim of right to possession were also served on all other persons who might claim to have occupied the premises at the time the action was filed [*see Code Civ. Proc. §§ 415.46(a), (b), (e), 715.020(d)*].

If a judgment for costs and damages, such as back rent, is desired in addition to restitution of the premises, the requesting party should also request a court judgment under Paragraph 1(b) of the form (*discussed under § 205.90[3][c]*). After the clerk enters an immediate judgment for restitution and issues the writ, the court will consider the request for a court judgment granting such additional relief [*see Code Civ. Proc. § 1169*].

[e] Request for Clerk's Judgment for Damages (Paragraph 1(c)(2))

If the action is one for damages in which the clerk may enter judgment under *Code Civ. Proc. § 585(a)* (discussed in *§ 205.45* et seq., *below*), the requesting party should check Paragraph 1(c)(2) of the Judicial Council form of Request for

Entry of Default. In this situation the requesting party must also complete a declaration under *Code Civ. Proc. § 585.5* (*discussed under § 205.90[5]* (Paragraph 5), *below*).

If, however, the requesting party claims reasonable attorney fees in the absence of a court-approved fee schedule, or in excess of such a schedule, he or she should request a court judgment under Paragraph 1(b) of the form (*discussed under § 205.90[3][c], above*), rather than a clerk's judgment under Paragraph 1(c)(2) [*see Code Civ. Proc. § 585(a)*]. For further discussion regarding the recovery of attorney's fees in a judgment by the court, see *§ 205.49[3]*.

For a form of request to fix attorney's fees and enter judgment, see *§ 205.91*.

[f] Request for Clerk's Judgment on Previously Entered Default (Paragraph 1(c)(3))

If a clerk's judgment is sought (*see discussion under § 205.90[3][d]*, and *§ 205.90[3][e]*), and a default has already been entered pursuant to a previous request, the requesting party should so indicate by checking Paragraph 1(c)(3) of the Judicial Council form of Request for Entry of Default and by filling in the prior date on which the clerk entered the default [*see also discussion under § 205.90[3][b]*].

[g] Itemizing the Monetary Request (Paragraph 2)

[i] List and Total Amounts

The requesting party must complete Paragraph 2 of the Judicial Council form of Request for Entry of Default when seeking a judgment by the clerk or court that includes any monetary award. In this paragraph the requesting party itemizes the the following amounts:

- The demand of the complaint or cross complaint, or, in the case of a complaint or cross complaint for personal injury or wrongful death in an unlimited civil case, the amount of special and general damages stated in the plaintiff's or cross complainant's *Code Civ. Proc. § 425.11* statement of damages [*see also* discussion in the § 205.23[2][c]].

- Prejudgment interest as allowed by law or in accordance with the terms of the contract [*see, e.g., Civ. Code § 3287*; *see also* Los Angeles Co. Super. Ct. Rules, Rule 9.14 (if interest is requested in excess of the usury limitations of *Cal. Const., art. XV, § 1*, proof must be presented of plaintiff's exemption from the usury limitations unless an exemption has been pleaded in the complaint and admitted by the entry of default)].

- Costs [*see Code Civ. Proc. §§ 1032, 1033.5* and discussion in *§ 205.25[4]*].

- Attorney's fees, when recovery from the defaulting party is authorized by contract or statute [*see Code Civ. Proc. § 1033.5(a)(10), (c)(5)*; *see also discussion under § 205.90[3][e]*, and in § 205.25[4], and § 205.49[3]].

[ii] Punitive Damage Claims

Counsel will need to modify the form if punitive damages are to be claimed on default. In that event, the plaintiff will have had to have prepared and served a statement preserving the right to punitive damages on the defendant. Although this statement may be combined with the *Code Civ. Proc. § 425.11* statement, its use is not limited to personal injury or wrongful death actions in superior courts [*see Code Civ. Proc. § 425.115*; for discussion, *see* the introduction to § 205.23[2][b][ii]]. The Judicial Council has not revised the form of default to account for this additional potential source of an item of the monetary award.

[iii] Deductions for Any Credits Acknowledged

The requesting party must deduct from the foregoing amounts any "credits acknowledged," that is, any amounts previously paid by the defaulting party to the requesting party. The requesting party should then determine the balance and totals. If, however, the requesting party is seeking a court determination of attorney's fees under *Code Civ. Proc. § 585(a)* (*see § 205.90[3][e]*, and in § 205.49[3]), he or she should not total the items in Paragraph 2 pending the setting of those fees.

[iv] Daily Damages

If daily damages have been demanded in the complaint, such as in an action for unlawful detainer or breach of contract, the amount demanded should be entered at Paragraph 2(g) of the form. The blank at the end of Paragraph 2(g) should be filled in with the date on which the complaint alleges that damages began to accrue.

[h] Signing and Dating the Request

The requesting party or his or her attorney must sign and date the form in the space immediately following Paragraph 2(g) of the form.

[4] Unlawful Detainer Cases (Paragraphs 3 and 4)

If a "legal document assistant" or "unlawful detainer assistant," was compensated for giving advice or assistance with the form [*see Bus. & Prof. Code §§ 6400, 6408*], Paragraphs 3 and 4 must be completed.

[5] Declaration Under Code Civ. Proc. § 585.5 (Paragraph 5)

The appropriate boxes of Paragraph 5 must be checked if entry of a default is requested under *Code Civ. Proc. § 585(a)* in an action arising on a contract or on a judgment for recovery of money or damages [*see Code Civ. Proc. § 585.5(a)*]. This declaration is intended to ensure proper venue of actions under the Unruh Retail Installment Sales Act [*Civ. Code § 1801 et seq.*] (Paragraph 3(a)), the Rees-Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 2981 et seq.*] (Paragraph 3(b)), or *Code Civ. Proc. § 395(b)* (Paragraph 3(c)) [*see Code Civ. Proc. § 585.5(a)*; *see also* discussion in *§ 205.25[2]*].

[6] Declaration of Mailing (Paragraph 6)

The person mailing the request to enter default must complete the Declaration of Mailing, by checking Paragraph 6(a) and giving the name or names of defendants who cannot be located or by checking Paragraph 6(b) and filling in the date of mailing and the names and addresses of the attorney or party to whom the request was mailed [*see Code Civ. Proc. § 587*].

The declaration of mailing must be signed under penalty of perjury by the person mailing the copy of the request to enter default or by someone with knowledge of such mailing [*see Code Civ. Proc. § 587*]. For further discussion, *see § 205.25[3]*.

[7] Memorandum of Costs (Paragraph 7)

[a] In General

The memorandum of costs should be completed by itemizing costs and necessary disbursements in the action or proceeding. The term "costs" refers to recoverable expenses fixed in amount, by statute or otherwise, whereas the term "disbursements" refers to recoverable expenses not fixed in amount [*see Code Civ. Proc. § 1033.5* (costs allowed); *see*

also Ch. 174, Costs and Attorney's Fees, § 174.10 et seq.].

A party seeking a default judgment who claims costs must request them on the Request for Entry of Default form (Application to Enter Default) (Judicial Council Form CIV-100) at the time of applying for the judgment [*Cal. Rules of Ct., Rule 3.1700(a)(2)*]. The memorandum must be certified by the oath of the party or his or her attorney or agent, or by the clerk of the attorney, stating that to the best of the declarant's knowledge and belief the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding [*Cal. Rules of Ct., Rule 3.1700(a)(1)*].

For further discussion, see *§ 205.25[4]*.

[8] Declaration of Nonmilitary Status (Paragraph 8)

If it is known that defendant is not in military service or, in the case of multiple defendants, that none of them is in military service, the declaration at Paragraph 8 should be completed [*see 50 U.S.C. App. § 521*; *Mil. & Vet. Code § 402(a)*]. The filing of this declaration, or one in lieu of it, is required by the state statutory protections for members of National Guard and reservists called to active duty before entry of a default judgment against a defendant [*see Mil. & Vet. Code § 402(a)*]. A declaration of nonmilitary service is also required under the Servicemembers Civil Relief Act for active members of the military as defined under the act [*50 U.S.C. App. § 521*]. For further discussion, see *§ 205.25[5][a]*.

WARNING:

The declaration of military status in Judicial Council Form CIV-100 may not satisfy federal statutory requirements as amended by the 2003 Servicemembers Civil Relief Act (formerly the Soldiers' and Sailors' Civil Relief Act). The federal statute requires the filing of a declaration as to military status of the defendant before a default judgment can be entered. The declaration must state whether or not the defendant is in military service, but the declaration must be more than the mere statement in the Judicial Council Form because it must contain facts necessary to support the declaration [*50 U.S.C. App. § 521(b)(1)*]. If the plaintiff is unable to determine whether the defendant is in military service under the Act, the plaintiff must file a declaration so stating. Thus, a declaration should be filed in addition to Paragraph 8 of this Judicial Council Form [*see § 205.92* (form of declaration); *see also Mil. & Vet. Code § 402(a)*].

[9] Cross References

For discussion relating to recovery of interest, *see* Ch. 177, *Damages* , and Ch. 318, *Judgment*

For discussion relating to recovery of costs, *see* Ch. 174, *Costs and Attorney's Fees*

For discussion of entering default in an unlawful detainer action, *see* Ch. 333, *Landlord and Tenant: Eviction Actions*

[10] Text References

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, § 109 et seq. (4th ed. 1997)

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17-205 California Forms of Pleading and Practice--Annotated § 205.91

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§ 205.91 Request to Fix Attorney's Fees and Enter Judgment [Code Civ. Proc. § 585(a)]

[1] FORM Request to Fix Attorney's Fees and Enter Judgment [Code Civ. Proc. § 585(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	REQUEST TO FIX ATTORNEY'S FEES AND
Defendant.	)	ENTER JUDGMENT
	)	
	)	

_____

I request the fixing of attorney fees by the court and entry of judgment by the court in the above-entitled action under *Code of Civil Procedure Section 585(a)*.

Plaintiff prays judgment as set out below.

	Amount	Credits Acknowledged	Balance
[*EITHER*]			
Demand of Complaint	$_____	$_____	$_____
[*OR*]			
Demand of Statement of Damages	$_____	$_____	$_____
[*CONTINUE*]			
Punitive Damages	$_____	$_____	$_____
Attorney Fees	$_____	$_____	$_____
Interest	$_____	$_____	$_____
Costs	$_____	$_____	$_____

Plaintiff will offer evidence on the issue of attorney fees at the hearing on this application.
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The form of request to fix attorney's fees and enter judgment in [1], *above*, may be used by a plaintiff to obtain a default judgment under *Code Civ. Proc. § 585(a)* when plaintiff wishes the court to set the recoverable attorney's fees because a schedule of attorney's fees has not been adopted by the court or the plaintiff is dissatisfied with the fee permitted by the schedule. This application should be filed with the Request for Entry of Default if counsel desires immediate entry of a judgment. A hearing date should be obtained from the clerk [*see Code Civ. Proc. § 585(a)*; *see also* discussion in *§ 205.49[3] above*].

[3] Cross References

For an illustration and discussion of Cal. Judicial Council Form CIV-100 Request for Default, see *§ 205.90*

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§ 205.92 Declaration [Code Civ. Proc. § 2015.5] Regarding Military Status [50 U.S.C. App. § 521(b); Mil. & Vet. Code § 402(a)]

[1] FORM Declaration [Code Civ. Proc. § 2015.5] Regarding Military Status [50 U.S.C. App. § 521(b); Mil. & Vet. Code § 402(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DECLARATION OF _____
Defendant.	)	[*name*] REGARDING DEFENDANT'S MILITARY
	)	STATUS
	)	

_____

I, _____ [*name*], declare:

I am the _____ [plaintiff *or* attorney for plaintiff] in the above-entitled action.

This declaration is in support of plaintiff's application for default judgment against _____ [*name*], the/a defendant in the above-entitled action. The declaration is made to comply with the provisions of the Act of Congress cited as the Servicemembers Civil Relief Act and the state protections for servicemembers and reservists as provided in *Military and Veterans Code section 400 et seq.*

[*EITHER to declare nonmilitary status*]

_____ [*Name*], _____ [the *or* a] defendant in the above-entitled action, is not presently in the military service within the meaning of that Act.

_____ [*Specify facts within declarant's personal knowledge tending to show that defendant is a civilian, such as residence, full time occupation, results of inquiry of armed services, etc.*]

[*OR to declare status as member of military*]

_____ [*Name*], the/a defendant in the above-entitled action, is, at the date hereof, a person in the military service of the United States, within the meaning of the Act [Servicemembers Civil Relief Act *and/or* the state protections for servicemembers and reservists as provided in *Military and Veterans Code section 400 et seq.*], in that he/she is _____ [a member of the Army of the United States *or* a member of the United States Marine Corps *or* a member of the United States Coast Guard *or* a member of the United States Air Force *or* an officer of the Public Health Service detailed by proper authority for duty with the _____ (Army *or* Navy) or a person being trained or educated under the supervision of the United States preliminary to induction into military service *or* an officer or enlisted member of the National Guard called or ordered into active state service by the Governor or President for a period in excess of seven days in any 14-day period *or* a reservists of the United States Military Reserve who haw been called to full-time active duty for a period in excess of seven days in any 14-day period].

_____ [*Set forth other facts tending to show that defendant is in the military service, such as location where defendant is stationed, date of induction, rank, etc.*].

[*OR to declare military status unknown*]

I have been unable to determine whether or not the defendant is in the military service of the United States, within the meaning of the federal act or state statutes, despite the following attempts to discover defendant's status _____ [*state facts showing efforts made to ascertain defendant's military status*].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____[*typed name*]

[2] Use of Form

The form of declaration in [1], *above*, should be used by a plaintiff seeking a default judgment to make the required declaration regarding the defendant's military status. The form should be submitted in lieu of or in addition to the declaration printed on the Judicial Council form of request for entry of default [*see § 205.90*; 50 U.S.C. App. § 521(b); *Mil. & Vet. Code § 402(a)*, and discussion in *§ 205.25[5][a]* et seq.]. Judicial Council Form CIV-100, Request for Entry of Default, has not yet been revised to reflect the requirements of the 2003 changes made by the Servicemembers Civil Relief Act, and providing the form, *above*, in addition to the Judicial Council form is the better practice. Counsel may then file an application for the appointment of an attorney to represent defendant [Form § 205.93], and obtain a court order for entry of the default judgment [Form § 205.94].

For the definition of "persons in military service," see *50 U.S.C. App. § 511(1)*; *Mil. & Vet. Code § 400*. For the applicability of the Soldiers' and Sailors' Civil Relief Act of 1940 [*50 U.S.C. App. §§ 501-591*] to state courts, see *50 U.S.C. App. § 512*. For filing an "in lieu" declaration of military status, see *50 U.S.C. App. § 520(1)*.

[3] Declaration Under Penalty of Perjury

Code Civ. Proc. § 2015.5, *50* U.S.C. App. § 521; *Mil. & Vet. Code § 402(a)* authorize use of a declaration under penalty of perjury, as in the foregoing form, in lieu of an affidavit. For a form of an affidavit see Ch. 15, *Affidavits, Certificates, and Declarations* .

[4] Cross References

For discussion of how a party's military service may affect family law proceedings and declaration requirements, see Ch. 12A, *Adoptions: Termination of Parent* ; Ch. 220, *Dissolution of Marriage: Master Procedural Guide* ; and Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies*

For an application for a stay of attachment involving a person in military service, see Ch. 62, *Attachment*

For an declaration for a stay of attachment involving a person in military service, see Ch. 62, *Attachment* , Form 19

For a complaint for unlawful retaliation by a lender, creditor, or other person against a person who received a stay or postponement because of military service, see *Ch. 129, Consumer Credit Reporting, § 129.150*

For discussion and an application for a stay of a pending action or proceeding based on military service, see *Ch. 136, Continuances, §§ 136.20[2], 136.78A*

For an application for a stay of execution of a judgment or order involving a person in military service, see Ch. 254, *Executions and Enforcement of Judgments*

For an application for a stay of garnishment involving a person in military service, see Ch. 276, *Garnishment*

For a defendant's notice of admitting service of summons and complaint, waiving further notice, and waiving rights under the Servicemembers Civil Relief Act and similar state statutes, see *Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances, § 323.173*

For a lessee's notice of termination of a lease due to the lessee's military service, see *Ch. 332, Landlord and Tenant: The Tenancy, § 332.71A*

For a stay of eviction in an unlawful detainer proceeding during a period of military service, see *Ch. 333, Landlord and Tenant: Eviction Actions, § 333.111*

For an application for relief against the enforcement of a fine or penalty against a person in military service when the penalty was incurred, see Ch. 489, *Relief From Judgment or Order*

For a service member's application for relief from judgment, supporting declaration and order, see *Ch. 489, Relief From Judgments and Orders, § 489.411*

For detailed discussion of relief under the Servicemembers Civil Relief Act and related California legislation, see *Ch. 501, Sales: Retail Installment Contracts; §§ 501.60* et seq

For an application for stay of enforcement of pre-existing obligation during the period of the applicant's military service, see *Ch. 501, Sales: Retail Installment Contracts, § 501.300*

For an application (motion) for temporary relief from an obligation on the ground that the person is or was in active military service after entering into the obligation, see *Ch. 501, Sales: Retail Installment Contracts, § 501.301*

For an affirmative defense to an action on an interest-bearing obligation on the ground that the annual rate of interest may not exceed 6 percent per year during the period of the defendant's military service, see *Ch. 501, Sales: Retail Installment Contracts, § 501.302*

For an application (motion) in an action on a contract for the purchase of personal property for a stay of proceedings on the ground that the defendant is on active military service see *Ch. 501, Sales: Retail Installment Contracts, § 501.303*

For an application for a stay during military service in an action to enforce a security interest in real or personal property, see *Ch. 503, Sales: Secured Transactions, § 503.113*

For discussion of ascertaining a defendant's military status at the time of service of summons and its benefits and effect on subsequent proceedings, see *Ch. 518, Service of Summons and Papers, § 518.19*

For a petition for a stay of foreclosure proceedings and relief from an installment contract, mortgage, or trust deed for the purchase of real property by an active member of the military service, see *Ch 555, Trust Deeds and Real Property Mortgages, § 555.139A*

For an application for a stay of proceedings to collect real property taxes or assessments by an active member of the military service, see Ch 555, *Trust Deeds and Real Property Mortgages*, § 555.139B

For an order staying foreclosure proceedings in relation to an obligation secured by a mortgage or trust deed on real property for an active member of the military service, see Ch 555, *Trust Deeds and Real Property Mortgages*, § 555.139C

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§ 205.93 Ex Parte Application for Order, and Order Appointing Attorney for Defendant Under Servicemembers Civil Relief Act [50 U.S.C. App. § 521(b); Mil. & Vet. Code § 402(a)]

[1] FORM Ex Parte Application for Order, and Order Appointing Attorney for Defendant Under Servicemembers Civil Relief Act [50 U.S.C. App. § 521(b); Mil. & Vet. Code § 402(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	EX PARTE APPLICATION FOR ORDER, DE-
Defendant.	)	CLARATION OF _____ [*name*],
	)	AND ORDER APPOINTING ATTORNEY FOR
	)	DEFAULTING DEFENDANT IN MILITARY SER-
		VICE APPLICATION

_____

I, _____ [*name*], attorney for plaintiff, hereby apply for appointment of _____ [*name*] as attorney for the defendant in the above-entitled matter pursuant to _____ [Title 50 of the United States Code, Appendix Section 521 *and/or Military and Veterans Code section 402(a)*].
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am the [attorney for the] plaintiff in the above-entitled action.

2. Defendant in this action is a member of the United States _____ [*specify branch of service, e.g.,* Army]. His/Her service mailing address is _____ [*address*]. Defendant was served with the summons and complaint in the above-entitled action by _____ [*specify method of service*] on _____ [*date*]. The time for defendant to plead expired on _____ [*date*], and defendant has not made any appearance, nor has any pleading been filed on his/her behalf.

[3. _____ (*Name of attorney to be appointed*) is an attorney at law, duly licensed to practice in California, who, if appointed, will adequately represent the interests of defendant in this matter.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

ORDER APPOINTING ATTORNEY FOR DEFAULTING DEFENDANT IN MILITARY SERVICE

Good cause appearing for granting the foregoing application,

IT IS HEREBY ORDERED that _____ [*name*], Attorney at Law, with offices at _____ [*address*], _____[*city*], California, be and is hereby appointed to act as counsel for defendant in the above-entitled action.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of ex parte application for order in [1], *above*, is for use by a plaintiff seeking to have a default judgment entered against a defendant who is in military service. An attorney must be appointed prior to entry of any judgment to

represent the interests of a defendant who is in military service if the defendant does not appear [*50 U.S.C. App. § 521(b)(2)*; *Mil. & Vet. Code § 402(a)*]. Since the attorney is to be appointed for a defendant who by reason of military service does not appear in the action, the application would logically be an ex parte matter.

For the appointment of an attorney to represent a defendant in military service as required before entry of default judgment, see *50 U.S.C. App. § 521(b)(2)*; *Mil. & Vet. Code § 402(a)*. For discussion on the acts of appointed attorney as not binding on a defendant, see *50 U.S.C. App. § 521(b)(2)*; *Mil. & Vet. Code § 402(c)*.

[3] Contents of Application

The contents of this form are based in part on former Los Angeles Co. Super. Ct. Rules, Rule 400, § 8, which required that the application state (1) the branch of military service that the defendant is in; (2) his or her service mailing address; (3) when the time to plead expired; (4) whether any pleading has been filed on his or her behalf; and (5) any other pertinent fact. Although no longer specifically required by the Los Angeles rules, this information appears to be appropriate to give the court adequate background for the proceeding. Optional Paragraph 3 may be used if appropriate, pursuant to local court rule or practice, to identify an attorney to represent the defendant's interests.

The form of verification shown here complies with the requirements of *Code Civ. Proc. § 2015.5*.

[4] Cross References

For an illustration and discussion of Cal. Judicial Council Form CIV-100 Request for Default, see *§ 205.90*

For a form of declaration regarding defendant's military status, see *§ 205.92*

For a form of orderdirecting entry of a default judgment without a declaration regarding defendant's nonmilitary status, see *§ 205.94*

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§ 205.94 Order Directing Entry of Default Judgment Without Proof of Defendant's Nonmilitary Status [Mil. & Vet. Code § 402(a)]

[1] FORM Order Directing Entry of Default Judgment Without Proof of Defendant's Nonmilitary Status [Mil. & Vet. Code § 402(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

_____

On reading the _____ [affidavit *or* declaration] of _____ [*name of affiant or*

declarant] and good cause appearing therefor,

IT IS HEREBY ORDERED that judgment be entered for plaintiff on the default of defendant _____ [*name*] in the above-entitled action without proof of defendant's nonmilitary status.

[*If the court requires that plaintiff file a bond, add:*]

IT IS FURTHER ORDERED that, prior to entry of judgment and as a condition thereto, plaintiff file in the office of the Clerk of _____ County a bond in the amount of $_____, approved by this court, conditioned to indemnify this defendant, if in military service, against any loss or damage that defendant may suffer by reason of the judgment, should such judgment be hereafter set aside in whole or in part.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of order in [1], *above*, may be used to obtain a default judgment from the clerk by a plaintiff who has filed an affidavit or declaration stating his or her inability to determine the defaulting defendant's military status [*see § 205.92*]. Under state law [*Mil. & Vet. Code § 400 et seq.*], if plaintiff does not know whether defendant is in military service, no judgment can be entered on the defendant's default unless plaintiff first obtains a court order directing such entry [*Mil. & Vet. Code § 402(a)*].

[3] Cross References

For an illustration and discussion of Cal. Judicial Council Form CIV-100 Request for Default, see *§ 205.90*

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§ 205.95 Default Judgment by Clerk [Code Civ. Proc. § 585(a)]--Basic Form

[1] FORM Default Judgment by Clerk [Code Civ. Proc. § 585(a)]--Basic Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DEFAULT JUDGMENT BY CLERK
Defendant.	)	
	)	
	)	

In this action defendant _____ [*name*], having been regularly served with summons and copy of the complaint and having failed to file an answer or other responsive pleading within the time prescribed by law, and the default of the defendant having been duly entered on _____ [*date*], on application of the plaintiff to

the Clerk for judgment,

[*EITHER*]

JUDGMENT IS ENTERED for plaintiff against defendant in the sum of $_____, principal, with interest thereon at the rate of _____ percent to the date hereof [, attorney fees in the sum of _____], and the costs and disbursements of plaintiff in the sum of $_____, for an amount totalling $_____; together with interest on the judgment as provided by law.

[*OR*]

JUDGMENT IS ENTERED for plaintiff, and plaintiff shall recover from defendant [and any and all tenants, subtenants, named claimants, and other occupants] the restitution and possession of those premises situated in the County of _____, State of California, and more particularly described as _____ [*specify*].

[*CONTINUE*]

Judgment entered, _____ [*date*].

_____ [*signature*]
Clerk
By: _____ [*signature*]
Deputy Clerk

[2] Use of Form

The form of judgment in [1], *above*, may be used to obtain entry of a default judgment by the clerk pursuant to *Code Civ. Proc. § 585(a)*. Local court practice may require use of a preprinted form, however, and counsel should check with the clerk of the court to determine whether such a form is available.

An alternative paragraph is provided for use when the default judgment is obtained in an unlawful detainer case seeking restitution of the premises [*see Code Civ. Proc. § 1169*].

[3] Contents of Form

The clerk is authorized to enter judgment in an action arising on a contract or a judgment for recovery of money or damages only [for discussion, *see* the Introduction, *§ 205.45, above*]. The clerk's judgment will award plaintiff the principal amount demanded in the complaint or a lesser amount if defendant has made payments to plaintiff, interest allowed by law or in accordance with the terms of the contract, and costs. If by rule of court a schedule of attorney's fees has been adopted, the judgment may also include such fees if the contract or statute involved provides for recovery of attorney's fees [*Code Civ. Proc. § 585(a)*].

The clerk is also authorized to enter judgment for restitution of premises in an unlawful detainer action. If the complaint sought other relief, such as damages, the plaintiff may then apply for a court judgment for the remainder of the relief demanded [*see Code Civ. Proc. § 1169*]. For discussion of the circumstances in which the judgment for restitution of the premises includes all the occupants, whether they were named in the complaint or not, see the Comments to § 205.90.

[4] Cross References

For a form of default judgment by the court, § 205.97

[5] Text References

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, §§ 141-144 (4th ed. 1997)

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17-205 California Forms of Pleading and Practice--Annotated § 205.96

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[Reserved]

§ 205.96[Reserved]

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Volume 17: Defaults and Default Judgements thru Duress, Menace, Fraud, Undue Influence, and Mistake-Chs. 205-219
Chapter 205 DEFAULTS AND DEFAULT JUDGMENTS
PART V. FORMS

17-205 California Forms of Pleading and Practice--Annotated § 205.97

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§ 205.97 Default Judgment by Court [Code Civ. Proc. § 585(a), (b)]--Basic Form

[1] FORM Default Judgment by Court [Code Civ. Proc. § 585(a), (b)]--Basic Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DEFAULT JUDGMENT BY COURT
Defendant.	)	
	)	
	)	

This cause came on for hearing on _____ [*date*], before the Honorable _____, Judge presiding in _____ [_____ (Department *or* Division) _____ of] the above-entitled court, _____ [*name of attorney*] appearing for plaintiff.

[*EITHER, if service is other than by publication*]

It appearing that defendant, _____ [*name*], having been regularly served with process, having failed to appear and answer plaintiff's complaint filed herein, and the default of this defendant having been duly entered; on application of plaintiff to the court, and after having heard and considered the evidence,

[*OR, if service is by publication*]

The defendant, _____ [*name*], having been regularly served with summons by publication, having failed to appear and answer plaintiff's complaint within the time allowed by law, and the default of this defendant having been entered; on application of plaintiff to the court and proof of publication and of the allegations of plaintiff's complaint having been made to the satisfaction of the court,

[*CONTINUE*]

IT IS ORDERED that plaintiff have and recover judgment from defendant, _____ [*name*], in the sum of $_____, _____ [principal *or* damages]; interest thereon at the rate of _____ percent per annum to the date hereof; [attorney fees in the sum of $_____;] and plaintiff's costs and disbursements in the sum of $_____; together with interest on the judgment as provided by law.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of judgment in [1], *above*, may be used by plaintiff in obtaining the entry of a default judgment by the court in actions in which the clerk is not authorized to enter judgment [*Code Civ. Proc. § 585(a), (b)*]. Local court practice may require use of a preprinted form, however, and counsel should check with the clerk of the court to determine whether such a form is available.

For discussion of the procedure for obtaining the judgment, including proof requirements, see *§ 205.49[1]* et seq. For entry of default judgment by court when defendant was served other than by publication, see *Code Civ. Proc. § 585(b)*. For entry of default judgment by court when defendant was served by publication, see *Code Civ. Proc. § 585(c)*.

[3] Cross References

For an illustration and discussion of Cal. Judicial Council Form CIV-100 Request for Default, see *§ 205.90*

For a form of request to fix attorney's fees and enter judgment, see *§ 205.91*

For a discussion relating to the recovery of costs and attorney's fees, see Ch. 174, *Costs and Attorney's Fees* .

[4] Text References

Witkin, California Procedure, Vol. 6, *Proceedings Without Trial*, §§ 145-148 (4th ed. 1997)

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17-205 California Forms of Pleading and Practice--Annotated § 205.98

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§ 205.98 Default Judgment by Court [Code Civ. Proc. § 585(e)]--On Cross Complaint

[1] FORM Default Judgment by Court [Code Civ. Proc. § 585(e)]--On Cross Complaint

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DEFAULT JUDGMENT BY COURT
Defendant.	)	
	)	
	)	

This cause came on for hearing on _____ [*date*], before the Honorable _____, Judge presiding in _____ [_____ (Department *or* Division) _____ of] the above-entitled court, _____ [*name of attorney*] appearing for cross complainant.

The cross defendant, _____ [*name*], has been served with the cross complaint filed herein and has failed to answer or respond to it, and the default of the cross defendant has been duly entered. This court having found that a separate judgment on the cross complaint may be properly awarded in this action and that a separate judgment on the cross complaint would not substantially delay the final disposition of the action between the parties.

IT IS ORDERED that cross complainant have and recover judgment from the cross defendant in the sum of $_____ [principal *or* damages]; interest thereon at the rate of _____ percent per annum to the date hereof; [attorney's fees in the sum of $_____;] and cross complainant's costs and disbursements in the sum of $_____; together with interest on such judgment as provided by law.
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The form of judgment in [1], *above*, may be used by a cross complainant in obtaining the entry of a default judgment by the court [*Code Civ. Proc. § 585(e)*]. Because a default judgment on a cross complaint may not be entered unless a separate judgment may be properly awarded on it and the court finds that a separate judgment on the cross complaint would not substantially delay the final disposition of the action between the parties [*Code Civ. Proc. § 585(e)*], a default judgment on a cross complaint must always be obtained through the court.

The form may be modified for use when the cross complaint has been filed by a defendant against another defendant [for alternative captions for cross complaints, *see* Ch. 123, *Complaints and Cross Complaints*].

For a court determination of attorney's fees, see *Code Civ. Proc. § 585(a)*. For use of affidavits in lieu of personal testimony in hearing on application for default judgment by court, see *Code Civ. Proc. § 585(d)*. For entry of default judgment by court on a cross complaint, see *Code Civ. Proc. § 585(e)*.

[3] Cross References

For discussion relating to the recovery of costs and attorney's fees, see Ch. 174, *Costs and Attorney's Fees* .

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PART V. FORMS

17-205 California Forms of Pleading and Practice--Annotated § 205.99

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[Reserved]

§ 205.99[Reserved]

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17-205 California Forms of Pleading and Practice--Annotated § 205.100

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§ 205.100 Notice Shortening Time for Relief From Default and Default Judgment in Property Action [Code Civ. Proc. § 473(b)]

[1] FORM Notice Shortening Time for Relief From Default and Default Judgment in Property Action [Code Civ. Proc. § 473(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF DEFAULT
_____ [*name*],	)	JUDGMENT AND SHORTENING
Defendant.	)	TIME FOR RELIEF
	)	
	)	

_____

TO _____ [*name and designation of party, e.g.*, Jane Doe, Defendant], AND TO _____[*name*], HIS/HER ATTORNEY OF RECORD:

NOTICE IS HEREBY GIVEN that a default judgment was entered against you in the above-entitled action on _____ [*date*], and that such judgment determined the _____ [ownership *or* right to possession] of the _____ [real *or* personal] property described as follows: _____ [*set out description of property affected*]. _____ [A copy of the judgment is attached *or set out provisions of judgment*.]

YOU ARE FURTHER NOTIFIED that any rights you may have to apply for relief from the judgment under the provisions of *Code of Civil Procedure Section 473* shall expire 90 days after service of this notice.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

The form of notice in [1], *above*, may be used by a plaintiff after entry of default and default judgment to shorten the time for defendant to seek relief from the default and default judgment in an action involving ownership or right to possession of real or personal property. The notice must be personally served within the state both on the defendant and on the defendant's attorney of record [*see Code Civ. Proc. § 473(b)*].

[3] Contents of Form

The form of notice, *above*, must notify defendant and his or her attorney that the judgment was taken against the defendant and that any rights defendant has to apply for relief from the judgment under *Code Civ. Proc. § 473* will expire 90 days after service of the notice [*Code Civ. Proc. § 473(b)*].

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Chapter 205 DEFAULTS AND DEFAULT JUDGMENTS
PART V. FORMS

17-205 California Forms of Pleading and Practice--Annotated § 205.101

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§ 205.101 Stipulation [Code Civ. Proc. § 283] and Order Setting Aside Default

[1] FORM Stipulation [Code Civ. Proc. § 283] and Order Setting Aside Default

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	STIPULATION AND ORDER
_____ [*name*],	)	SETTING ASIDE DEFAULT
Defendant.	)	
	)	
	)	

_____

IT IS HEREBY STIPULATED by and between _____, [*name of attorney*], attorney for plaintiff, and _____ [*name of attorney*], attorney for defendant, that any default entered herein against defendant pursuant to the request to enter default filed herein on _____ [*date*], may be set aside.

Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]
_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Defendant_____ [*name*]

ORDER

On reading and filing the stipulation of the parties hereto that the default entered herein against defendant be set aside and good cause appearing therefor,

IT IS HEREBY ORDERED that the default heretofore entered against defendant, _____ [*name*], be set aside [and that defendant have _____ days from notice of this order within which to answer or otherwise plead to the complaint on file herein].
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The form of stipulation and order setting aside default in [1], *above*, may be used by plaintiff and defendant to set aside a default when the parties have so agreed. For the authority of an attorney to bind a client by stipulation, see *Code Civ. Proc. § 283(1)*.

[3] Cross References

For discussion and forms for setting aside a stipulation, see Ch. 533, *Stipulations*

For discussion and forms relating to relief from default and default judgments, which were previously covered in this chapter, see Ch. 489, *Relief From Judgments and Orders* .

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Chapter 206 DEMURRERS AND MOTIONS FOR JUDGMENT ON THE PLEADINGS

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[e] Action Is Premature

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Specification of Ground

[4] Cross References

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Cross References

§ 206.128 Special Demurrer to Complaint or Cross Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--Pleading Is Uncertain [Code Civ. Proc. § 430.10(f)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 206.129 Special Demurrer to Complaint or Cross Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--Cannot Be Ascertained Whether Contract on Which Action Is Founded Is Written or Oral or Implied by Conduct [Code Civ. Proc. § 430.10(g)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 206.130 Special Demurrer to Complaint or Cross Complaint [Code Civ. Proc. § 411.35(g)]--No Certificate Filed in Action Based on Professional Negligence [Code Civ. Proc. § 430.10(h)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 206.131 Demurrer to Answer [Code Civ. Proc. § 430.30(a)]--Skeletal Form

[1] FORM

[2] Use of Form

§ 206.132 General Demurrer to Answer [Code Civ. Proc. § 430.30(a)]--No Defense Stated [Code Civ. Proc. §

430.20(a)]

[1] FORM

[2] Use of Form

§ 206.133 Special Demurrer to Answer [Code Civ. Proc. § 430.30(a)]--Pleading Is Uncertain [Code Civ. Proc. § 430.20(b)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 206.134 Special Demurrer to Answer [Code Civ. Proc. § 430.30(a)]--Cannot Be Ascertained Whether Contract Pleaded Is Written or Oral [Code Civ. Proc. § 430.20(c)]

[1] FORM

[2] Use of Form

§ 206.135 Notice of Hearing on Demurrer [Cal. Rules of Ct., Rule 3.1320(c)]

[1] FORM

[2] Use of Form

§ 206.136 Stipulation [Code Civ. Proc. § 283(1)] Postponing Hearing on Demurrer and Order [Code Civ. Proc. § 595.2]

[1] FORM

[2] Use of Form

[3] Stipulations

[4] Postponement of Hearing on Stipulation

§ 206.137 Stipulation [Code Civ. Proc. § 283(1)] That Demurrer Be Dropped Off Calendar

[1] FORM

[2] Use of Form

[3] Other Stipulations

§ 206.138 Stipulation [Code Civ. Proc. § 283(1)] That Demurrer Be Restored to Calendar

[1] FORM

[2] Use of Form

§ 206.139 Order on Demurrer [Code Civ. Proc. §§ 472a, 472b, 472d]

[1] FORM

[2] Use of Form

[3] Cross References

§ 206.140 Notice of Court's Ruling on Demurrer [Cal. Rules of Ct., Rules 3.1100, 3.1109]

[1] FORM

[2] Use of Form

[3] Commencement of Time to Answer or Amend

§ 206.141 Notice of Motion for Reconsideration of Ruling on Demurrer [Code Civ. Proc. § 1008(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 206.142 Notice of Motion for Order Striking Untimely Amended Complaint and Dismissing Action for Failure to Amend Complaint After Demurrer Was Sustained With Leave to Amend [Code Civ. Proc. § 581(f)(2); Cal. Rules of Ct., Rule 3.1320(i)]

[1] FORM

[2] Use of Form

§ 206.143 Ex Parte Application for Order Dismissing Action for Failure to Amend Complaint After Demurrer Was Sustained With Leave to Amend [Code Civ. Proc. § 581(f)(2); California Rules of Court, Rule 3.1320(h)]

[1] FORM

[2] Use of Form

[3] Procedure on Ex Parte Motion

[4] Local Court Rules

[5] Cross References

§ 206.144 Order Dismissing Action [Code Civ. Proc. § 581d] on Plaintiff's Failure to File Amended Pleading [Code Civ. Proc. § 581(f)(2)]

[1] FORM

[2] Use of Form

[3] Order of Dismissal

[4] Cross References

§§ 206.145-206.149 [Reserved]

§ 206.150 Notice of Motion for Judgment [Code Civ. Proc. § 577] on the Pleadings [Code Civ. Proc. § 438]--Failure to State Cause of Action or Defense

[1] FORM

[2] Use of Form

[3] Accompanying Papers

[4] Cross References

§ 206.151 Order Granting or Denying Motion for Judgment on the Pleadings [Code Civ. Proc. § 438]

[1] FORM

[2] Use of Form

[3] Amendment of Pleading

[4] Judgment

§ 206.152 Notice of Motion to Strike and to Enter Judgment [Code Civ. Proc. § 438]--Amended Pleading After Motion for Judgment on the Pleadings Not Timely Filed or in Violation of Prior Ruling

[1] FORM

[2] Use of Form

[3] Accompanying Papers

§ 206.153 Notice of Motion to Enter Judgment [Code Civ. Proc. § 438]--Failure to File Amended Pleading After Motion for Judgment on the Pleadings Was Granted With Leave to Amend

[1] FORM

[2] Use of Form

[3] Accompanying Papers

§ 206.154 Judgment [Code Civ. Proc. § 577] on the Pleadings [Code Civ. Proc. § 438]--After Motion Was Granted With Leave to Amend and Party Failed to Amend

[1] FORM

[2] Use of Form

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17-206 California Forms of Pleading and Practice--Annotated § 206.01

§ 206.01 Scope of Chapter

This chapter covers proceedings on demurrer to test the sufficiency of pleadings contained in a complaint, cross complaint, or answer. The Legal Background defines demurrers and discusses the grounds for demurrers [*see §§ 206.11 -206.14*], and the requirements for drafting, serving, and filing demurrers and related papers, and the responses available to an opposing party [*see §§ 206.15 -206.24*], as well as the requirements and considerations relating to the hearing and ruling on the demurrer and postruling matters [*see §§ 206.25 -206.37*]. A Research Guide [*see § 206.80* et seq.] and Procedural Checklists [*see § 206.100* et seq.] are also provided. This chapter also includes the following forms relating to demurrers:

- Skeletal forms of demurrers to complaints [*see § 206.120*] and answers [*see § 206.131*].
- Forms that state the various grounds for objection and that may be incorporated in the body of the skeletal forms of demurrers including:
    - Objections to a complaint or cross complaint [*see §§ 206.121 -206.130*].
    - Objections to an answer [*see §§ 206.132 -206.134*].
- Notice of hearing on demurrer [*see § 206.135*].
- Stipulations for postponing the hearing on a demurrer [*see §§ 206.136*- 138].
- Order on a demurrer [*see § 206.139*].
- Notice of the court's ruling [*see § 206.140*].
- Notice of motion for reconsideration of the ruling [*see § 206.141*].
- Ex parte application and order [*see §§ 206.142 -206.143*] for use in dismissing a complaint when a

plaintiff has failed to amend his or her complaint after a demurrer was sustained with leave to amend.

This chapter also discusses the procedure for obtaining, on motion, a judgment on the pleadings by reason of defects appearing on the face of the pleading or from matter of which the court must [*Evid. Code § 451*] or may [*Evid. Code §§ 452, 453*] take judicial notice [*see §§ 206.50* et seq.]. A Research Guide [*see § 206.90* et seq.] and Procedural Checklists [*see § 206.110* et seq.] are also provided. This chapter includes the following forms relating to motions for judgment on the pleadings:

- Notice of motion for judgment on the pleadings [§ 206.150] and an order on the motion [*see § 206.151*].

- Notice of motion to strike an amended pleading filed after a motion for judgment on the pleadings has been granted with leave to amend when the amended pleading is untimely or violates the prior ruling [*see § 206.152*].

- Notice of motion to enter judgment when no amended pleading is filed after a motion for judgment on the pleadings has been granted with leave to amend [*see § 206.153*].

- Judgment [*see § 206.154*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrers

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§ 206.02 Cross References

For alternative forms of demurrers in particular actions or proceedings, see the following chapters:

- Ch. 3, *Abatement of Actions*
- Ch. 13, *Adverse Possession*
- Ch. 61, *Associations and Clubs*
- Ch. 104, *Building Contracts*
- Ch. 119, *Claim and Delivery*
- Ch. 140, *Contracts*
- Ch. 334, *Landlord and Tenant: Claims for Damages*
- Ch. 340, *Libel and Slander*
- Ch. 345, *Limitation of Actions*
- Ch. 358, *Mandate and Prohibition*
- Ch. 361, *Mechanics' Liens*
- Ch. 362, *Mental Suffering and Emotional Distress*
- Ch. 390, *Notaries Public*

- Ch. 444, *Probate: Will Contests*
- Ch. 454, *Probate: Claims Against the Estate*
- Ch. 491, *Res Judicata*
- Ch. 492, *Review (Certiorari), Writ of*

For discussion and forms relating to motions to strike, see Ch. 375, *Motions to Strike: Pleadings* , and Ch. 376, *Motions to Strike: Anti-SLAPP* .

For discussion of motion practice generally, see Ch. 372, *Motions and Orders* .

For a discussion of the use of motions for judgment on the pleadings in declaratory relief actions, see Ch. 182, *Declaratory Relief* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionReal Property LawAdverse PossessionGeneral OverviewTortsIntentional TortsDefamationGeneral Overview

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[Reserved]

§§ 206.03[Reserved]

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§ 206.10 Governing Law

Demurrers are governed generally by *Code Civ. Proc. §§ 422.10, 430.10-430.80, 472a-472d, 589, 591, 1014* and by *Cal. Rules of Ct., Rules 1.6, 2.100-2.119, 3.1100, 3.1103(b), (c), 3.1109, 3.1112, 3.1113(a), 3.1320, 3.1326*. Their service and filing are governed by *Code Civ. Proc. §§ 465, 1011-1013, 1015, 1017, 1020* and by *Cal. Rules of Ct., Rule 1.6(15), (19), 1.20*. Proof of service is governed by *Code Civ. Proc. §§ 1013a, 2009, 2015.5*. The amendment of pleadings, which includes demurrers (*see Code Civ. Proc. § 422.10*), is governed by *Code Civ. Proc. §§ 471.5, 472, 473*.

The dismissal of an action after a demurrer to the complaint or cross complaint is sustained without leave to amend, or with leave to amend and no amendment is filed, is governed by *Code Civ. Proc. §§ 581(f)(1), (2), 581d* and by *Cal. Rules of Ct., Rule 3.1320(h)*. The entry of a default judgment against a defendant who fails to plead to an amended complaint or to answer a complaint after his, her, or its demurrer to it has been overruled is governed by *Code Civ. Proc. § 586(a)(1), (2)*.

Other statutory provisions authorize the use of a demurrer pursuant to *Code Civ. Proc. § 430.10* in specific actions [*see, e.g., Code Civ. Proc. § 340.1(j)* (failure to file certificates in accordance with *Code Civ. Proc. § 340.1* in action by plaintiff 26 years of age or older to recover damages suffered as a result of childhood sexual abuse)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProceduresDismissalsInvoluntary DismissalsFailures to State ClaimsCivil ProceduresPretrial JudgmentsDefaultEntry of Default Judgments

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§ 206.11 Demurrer Defined

[1] Responsive Pleading That Objects to Facially Defective Accusatory Pleading

A demurrer is a essentially a pleading filed in response to one of the other types of pleadings [*see Code Civ. Proc. §§ 422.10, 430.10, 430.20*]. The other types of pleadings are a complaint and cross complaint, which are accusatory pleadings, and an answer, which, like a demurrer, is also a responsive pleading [*see Code Civ. Proc. §§ 412.20(a)(3), (4), 422.10, 425.10, 430.10, 430.20, 431.20, 431.30, 432.10, 585(a)*].

Unlike these other pleadings, a demurrer cannot allege facts, deny facts, or otherwise allude to extrinsic evidence not subject to judicial notice [*see, e.g.,* Cook v. de la *Guerra (1864) 24 Cal. 237, 239* ; *Hayward v. Henderson (1979) 88 Cal. App. 3d 64, 71, 151 Cal. Rptr. 505* ; *see also Gould v. Maryland Sound Industries, Inc. (1995) 31 Cal. App. 4th 1137, 1144* (defendants cannot state facts in their demurrers that, if true, would defeat plaintiff's complaint)].

A demurrer simply objects to the pleading in question on the ground that the pleading contains a defect that appears from examination of the pleading itself or from examination of the pleading together with judicially noticed facts [*see Code Civ. Proc. § 430.30*; for discussion of the specific defects that constitute grounds for objection by demurrer, *see § 206.13, below*].

Thus, a demurrer only raises issues of law to be tried by the court [*see Code Civ. Proc. §§ 589, 591*; *Pescosolido v. Maddock (1985) 172 Cal. App. 3d 230, 232, 218 Cal. Rptr. 165]* , and its primary function is to test the sufficiency of the pleading it challenges by raising these questions of law [*see E-Fab, Inc. v. Accountants, Inc. Services (2007) 153 Cal. App. 4th 1308, 1315-1316, 64 Cal. Rptr. 3d 9* (complaint must show on its face that action is barred by statute of limitations; it is not enough for the complaint to show merely that the action may be barred); *see also Salimi v. State Comp. Ins. Fund (1997) 54 Cal. App. 4th 216, 219, 62 Cal. Rptr. 2d 640* ; *Nordlinger v. Lynch (1990) 225 Cal. App. 3d 1259, 1271, 275 Cal. Rptr. 684* ; *see also Boyle v. City of Redondo Beach (1999) 70 Cal. App. 4th 1109, 1114 n.2, 83 Cal. Rptr. 2d 164* (demurrer tests legal sufficiency of factual allegations in complaint); *accord Stevens v. Superior Court (1999) 75 Cal. App. 4th 594, 608-609, 89 Cal. Rptr. 2d 370]* . A demurrer is not the appropriate procedure for determining the truth of disputed facts or what inferences should be drawn when competing inferences are possible [

CrossTalk Productions, Inc. v. Jacobson (1998) 65 Cal. App. 4th 631, 635, 76 Cal. Rptr. 2d 615 ; *see also Ball v. GTE Mobilnet of California (2000) 81 Cal. App. 4th 529, 534-535, 96 Cal. Rptr. 2d 801* (general demurrer challenges only legal sufficiency of complaint, not truth or accuracy of its factual allegations or plaintiff's ability to prove those allegations)].

[2] "General" vs. "Special" Demurrers

The terms "general demurrer" and "special demurrer" do not generally appear in statutory language (*but see Code Civ. Proc. § 92(a), (c)* and *discussion under § 206.12[2], below*). They are, however, distinctions commonly used by courts and counsel.

A "general demurrer" is a demurrer to a complaint or cross complaint on the ground the challenged pleading fails to state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*] or, alternatively, a demurrer to an answer on the ground it does not state facts sufficient to constitute a defense [*Code Civ. Proc. § 430.20(a)*; for further discussion, *see § 206.13[1], [2], below*].

A "special demurrer" is one that is based on any of the other grounds for objection set out in *Code Civ. Proc. §§ 430.10* and *430.20* (*discussed under § 206.13[1]* and *§ 206.13[2], below*) [*see Timberidge Enterprises, Inc. v. City of Santa Rosa (1978) 86 Cal. App. 3d 873, 879-880, 150 Cal. Rptr. 606* (demurrer to answer); *Buss v. J.O. Martin Co. (1966) 241 Cal. App. 2d 123, 133, 50 Cal. Rptr. 206* (demurrer to complaint or cross complaint)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrers

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§ 206.12 Proceedings in Which Demurrers May Be Used

[1] In Civil Actions

A demurrer may be filed generally in any civil action [*Code Civ. Proc. § 422.10*; *see also Code Civ. Proc. §§ 21-32* (distinguishing civil actions, special proceedings, and criminal actions)].

[2] Special Demurrers Prohibited in Most Limited Civil Cases

Special demurrers, as distinguished from general demurrers, are not allowed in limited civil cases [*see Code Civ. Proc. §§ 91(a), 92(c)*; *see also Code Civ. Proc. § 91(b)* (restriction not applicable in small claims, unlawful detainer, forcible entry, and forcible detainer actions)].

[3] Use of Demurrers Limited in Special Proceedings

A demurrer may be filed in a special proceeding of a civil nature if the statutes governing the particular special proceeding expressly so provide. Examples of such statutes are *Code Civ. Proc. §§ 1069.1* (certiorari), 1089 (mandate), 1105 (prohibition), 1170 (unlawful or forcible detainer or forcible entry), and 1250.350 (eminent domain).

Absent express statutory authority, a demurrer may nevertheless be filed in a special proceeding if the statutes governing the special proceeding incorporate the provisions of Part 2 of the Code of Civil Procedure (which governs civil actions and includes the demurrer statutes, that is, *Code Civ. Proc. §§ 422.10, 430.10-430.80, 472a-472d, 581, 591*), provided a demurrer would not be inconsistent with the legislative purpose intended to be accomplished by the special proceeding.

A demurrer may not be used in certain special proceedings in which courts have held its use to be inappropriate or unauthorized [*see, e.g., In re Fred J. (1979) 89 Cal. App. 3d 168, 176, 152 Cal. Rptr. 327* (demurrer held unauthorized in proceeding under *Welf. & Inst. Code § 300* to declare minor a dependent child of juvenile court, although procedure "akin" to demurrer might be used to question sufficiency of notice)] or in which demurrers are expressly prohibited by the statutes or rules that govern the particular special proceeding [*see, e.g., Cal. Rules of Ct., Rule 5.108* (forbidding

demurrers in proceedings under the Family Law Act unless otherwise specifically permitted under the rules)].

[4] Class Actions

For discussion of the use of demurrers in class actions, see Ch. 120, *Class Actions* .

[5] Limitation on Use of Demurrers Against Common Counts

Generally, claims alleged by common counts are not subject to demurrer [*see Farmers Ins. Exchange v. Zerin (1997) 53 Cal. App. 4th 445, 460* (allegation of claim using common counts sufficient against general or special demurrers)]. When a complaint pleads a single cause of action in different counts (that is, separately stated theories of relief for the same cause of action or injury), however, there may be instances when a joined common count is subject to a demurrer [*see, e.g., Farmers Ins. Exchange v. Zerin (1997) 53 Cal. App. 4th 445, 460, 61 Cal. Rptr. 2d 707* (common count was subject to demurrer when it incorporated allegations of all preceding claims including allegation of equitable lien and court concluded under other alleged theories of relief that plaintiff had no such equitable lien thereby so that plaintiff had no claim for money had and received); *see also discussion under § 206.16[3], below*, and Ch. 121, *Common Counts*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusReal Property LawEminent Domain ProceedingsProcedureReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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§ 206.13 Grounds for Demurrer

[1] Objections to Complaint or Cross Complaint

The party against whom a complaint or cross complaint has been filed may object, by demurrer or answer as provided in *Code Civ. Proc. § 430.30*, to the pleading on any one or more of the following grounds:

- The court has no jurisdiction of the subject of the cause of action alleged in the pleading [*Code Civ. Proc. § 430.10(a)*; for further discussion, *see § 206.14[3], below*; for a form, *see § 206.123, below*].

- The person who filed the pleading does not have the legal capacity to sue [*Code Civ. Proc. § 430.10(b)*; for further discussion, *see § 206.14[2], below*; for a form, *see § 206.124, below*].

- There is another action pending between the same parties on the same cause of action [*Code Civ. Proc. § 430.10(c)*; for further discussion, *see § 206.14[4], below*; for a form, *see § 206.125, below*].

- There is a defect or misjoinder of parties [*Code Civ. Proc. § 430.10(d)*; for further discussion, *see § 206.14[5], [6] below*; for forms, *see §§ 206.126* and *206.127, below*].

- The pleading does not state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*; for further discussion, *see § 206.14[1], below*; for a form, *see § 206.122, below*].

- The pleading is uncertain (the term "uncertain" including any pleading that is ambiguous or unintelligible, or both) [*Code Civ. Proc. § 430.10(f)*; for further discussion, *see § 206.14[7], below*; for a form, *see § 206.128, below*].

- In an action founded on a contract, it cannot be ascertained from the pleading whether the contract is written or oral or implied by conduct [*Code Civ. Proc. § 430.10(g)*; for further discussion, *see § 206.14[8], below*; for a form, *see § 206.129, below*].

- In an action for damages or indemnity for professional negligence of a certified architect, registered professional engineer, or a licensed land surveyor, the certificate required by *Code Civ. Proc. § 411.35* has not been filed [*Code Civ. Proc. §§ 411.35(g), 430.10(h)*; for further discussion, *see § 206.14[9], below*; for a form, *see § 206.130, below*].

For discussion regarding when these objections may be raised by demurrer, see *§ 206.15[1], below*.

Code Civ. Proc. § 430.10(i) also lists the failure to file a certificate required by former *Code Civ. Proc. § 411.36* as a ground for demurrer, but Section 411.36 was repealed by its own terms effective January 1, 1997.

[2] Objections to Answer

A party against whom an answer has been filed may object by demurrer to the answer on any of the following grounds [*Code Civ. Proc. § 430.20*]:

- The answer does not state facts sufficient to constitute a defense [*Code Civ. Proc. § 430.20(a)*; for further discussion, *see § 206.14[1], below*; for a form, *see § 206.132, below*].

- The answer is uncertain, which includes ambiguity and unintelligibility [*Code Civ. Proc. § 430.20(b)*; for further discussion, *see § 206.14[7], below*; for a form, *see § 206.133, below*].

- When the answer pleads a contract, it cannot be ascertained from the answer whether the contract is written or oral [*Code Civ. Proc. § 430.20(c)*; for further discussion, *see § 206.14[8], below*; for a form, *see § 206.134, below*].

For discussion regarding when these objections may be raised by demurrer, see *§ 206.15[2], below*.

[3] Objections to Complaint in Intervention

Whether an objection to a complaint in intervention [*see Code Civ. Proc. § 387*] may be made on the grounds specified in *Code Civ. Proc. § 430.10* (*discussed under § 206.13[1], above*) or *Code Civ. Proc. § 430.20* (*discussed under § 206.13[2], above*) depends on whether the intervening party is to be regarded as a plaintiff or as a defendant in the action. If the intervenor joins with plaintiff or otherwise assumes the role of a plaintiff, an objection to the complaint in intervention may be on any of the grounds enumerated in *Code Civ. Proc. § 430.10*. If the intervenor unites with a defendant, an objection to the complaint in intervention has the legal effect of an objection to the answer and may be made on any of the grounds enumerated in *Code Civ. Proc. § 430.20* [*see Timberidge Enterprises, Inc. v. City of Santa Rosa (1978) 86 Cal. App. 3d 873, 879-880, 150 Cal. Rptr. 606* ; for discussion of intervention generally, *see* Ch. 395, *Parties*].

[4] Objections to Pleadings Filed in Special Proceeding

Additional or alternative grounds of demurrer to a pleading filed in a special proceeding may be found in the particular statutes governing the special proceeding [*see, e.g., Code Civ. Proc. §§ 1250.350-1250.370* (proceeding in eminent domain)].

[5] Statutory Grounds for Objections Are Exclusive

The statutory grounds for demurrer are exclusive [*Kyle v. Craig (1899) 125 Cal. 107, 111, 57 P. 791* (involving predecessor statutes)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedurePartiesJoinderMisjoinder

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§ 206.14 Analysis of Particular Objections

[1] Failure to State Cause of Action

[a] General Demurrer

A party may demur to a complaint or cross complaint if the pleading appears not to state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*].

Under *Code Civ. Proc. § 430.80(a)*, the objection that the complaint or cross complaint does not state facts sufficient to constitute a cause of action is not waived by failure to raise it by demurrer or answer. The objection may normally be raised at any point in the proceeding [*see Wilson v. Sharp (1954) 42 Cal. 2d 675, 677, 268 P.2d 1062* ; *Fried v. Municipal Court (1949) 94 Cal. App. 2d 376, 378, 210 P.2d 883* ; *see also Wilson v. Houston Funeral Home (1996) 42 Cal. App. 4th 1124, 1132, 50 Cal. Rptr. 2d 161]* , for example, by a motion for judgment on the pleadings [*see § 206.50* et seq., *below*], by an objection at trial to the introduction of evidence [*see, e.g., Parker v. Bowron (1953) 40 Cal. 2d 344, 349-350, 254 P.2d 6* (affirming judgment where issue was raised in that manner, without directly holding it to be appropriate)], or on appeal [*Greene v. Municipal Court (1975) 51 Cal. App. 3d 446, 450, 124 Cal. Rptr. 139* ; *Halbert v. Berlinger (1954) 127 Cal. App. 2d 6, 15, 273 P.2d 274]* .

The objection may be made the basis of a motion for summary judgment [*Bowden v. Robinson (1977) 67 Cal. App. 3d 705, 710, 136 Cal. Rptr. 871]* , in which event the motion for summary judgment, in effect, operates as a motion for judgment on the pleadings [*C. L. Smith Co. v. Roger Ducharme, Inc. (1977) 65 Cal. App. 3d 735, 744-745, 135 Cal. Rptr. 483]* .

Notwithstanding the provisions of *Code Civ. Proc. § 430.80(a)*, the objection that the pleading fails to state facts sufficient to constitute a cause of action may be waived in certain cases when it is not raised by demurrer or answer. Examples are as follows:

- The failure of the pleading to state a cause of action results from the fact that the action appears on the face of the pleading or from judicially noticed matter to be barred by the statute of limitations [*see*

Hall v. Chamberlin (1948) 31 Cal. 2d 673, 679-680, 192 P.2d 759 ; *Burke v. Maguire (1908) 154 Cal. 456, 462-463, 98 P. 21* ; for discussion, *see Ch. 345, Limitation of Actions, § 345.28*].

- The failure to state a cause of action results from the pleading of an essential allegation as a legal conclusion rather than as an ultimate fact [*see* *Penrose v. Winter (1901) 135 Cal. 289, 290-291, 67 P. 772* (action to foreclose mortgage; court held that material fact of nonpayment is implied in averment that specified sum "is now due and owing," a legal conclusion rather than an ultimate fact, and is sufficient to sustain judgment by default; court overruled *Ryan v. Holliday (1895) 110 Cal. 335, 337, 42 P. 891* , on this point)].

- Proof admitted at trial without objection establishes the existence of a cause of action defectively pleaded and the pleading is amended pursuant to *Code Civ. Proc. § 469* to conform to proof.

- The action is tried on the theory that the defective pleading in fact states a cause of action and raises material issues that are decided by the verdict or judgment and the defect is nonprejudicial to the other party [*see* *Steffen v. Refrigeration Discount Corp. (1949) 91 Cal. App. 2d 494, 500, 205 P.2d 727* ; *Flennaugh v. Heinrich (1948) 89 Cal. App. 2d 214, 219-220, 200 P.2d 580* ; *Drullinger v. Erskine (1945) 71 Cal. App. 2d 492, 496-497, 163 P.2d 48]* . In this case, a new trial or reversal of the judgment for error as to pleading is prohibited by the provision of *Cal. Const., art VI, § 13*.

[b] Choice of Substantive Law

Whether the complaint states facts sufficient to constitute a cause of action will depend on the substantive law to be followed, which is not necessarily the law of the forum. For example, an action properly commenced in a California court may be based on the substantive law of another state because the events in question occurred there [*see, e.g., Pacific Diamond Co. v. Superior Court (1978) 85 Cal. App. 3d 871, 875-878, 149 Cal. Rptr. 813* (Colorado law as governing issue whether innkeeper is liable on account of theft of diamonds from guest in guest's room at innkeeper's Denver hotel)].

[c] Essential Element Omitted

A complaint or cross complaint fails to state a cause of action if it omits an essential element of the cause of action sought to be stated. Examples are as follows:

- Failure to allege facts showing existence of legal duty [*see, e.g.,* *Beauchene v. Synanon Foundation, Inc. (1979) 88 Cal. App. 3d 342, 348, 151 Cal. Rptr. 796* ; *see* Ch. 380, *Negligence*].

- Failure to allege breach of duty or proximate cause [*see, e.g.,* *Marsiglia v. Dozier (1911) 161 Cal. 403, 405, 119 P. 505* ; *Potter v. Richards (1955) 132 Cal. App. 2d 380, 384-385, 282 P.2d 113* ; *see* Ch. 380, *Negligence*].

- Failure to allege exhaustion of administrative or contract remedies if that is a condition precedent to maintenance of the action [*see, e.g.,* *State of California v. Superior Court (2004) 32 Cal. 4th 1234, 13 Cal. Rptr. 3d 534, 90 P.3d 116* (failure to allege facts demonstrating or excusing compliance with claim presentation requirement of *Tort Claims Act); Hood v. Hacienda La Puente Unified School Dist. (1998) 65 Cal. App. 4th 435, 439-441, 76 Cal. Rptr. 2d 448* (administrative remedies); *Hayward v. Henderson (1979) 88 Cal. App. 3d 64, 70, 151 Cal. Rptr. 505* (administrative remedies); *A. Teichert & Son, Inc. v. State of Cal. (1965) 238 Cal. App. 2d 736, 746, 48 Cal. Rptr. 225* (contract remedies; disapproved on other grounds in *E. H. Morrill Co. v. State of California (1967) 65 Cal. 2d 787, 792, 56 Cal. Rptr. 479, 423 P.2d 551*); *see also* *Dalton v. East Bay Mun. Utility Dist. (1993) 18 Cal. App. 4th 1566,*

1573-1574, 23 Cal. Rptr. 2d 230 (failure to file claim under California Tort Claims Act)].

The fact that a trial court is acting in excess of its jurisdiction if it improperly overrules the demurrer and proceeds to hear the case without requiring exhaustion of administrative remedies does not convert the ground of demurrer from failure to state a cause of action to lack of subject matter jurisdiction, since the failure to have alleged exhaustion of administrative remedies may simply have been an oversight and the complaint can properly be amended to include such allegation. Should the trial court overrule the demurrer, it would appear that the defendant should petition a higher court for a writ of mandate compelling the lower court to set aside its order and to make an order sustaining the demurrer [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 287-296, 109 P.2d 942]* .

If an amended complaint is filed that alleges exhaustion of the administrative remedies, defendant may respond appropriately to the allegation in his, her, or its answer. If the amended complaint alleges exhaustion of part but not all of the administrative remedies and fails to allege sufficient excuse for the nonexhaustion or if it alleges simply that plaintiff did not exhaust his, her, or its administrative remedies and shows no legal excuse therefor, it appears the amended complaint would be subject to demurrer on the ground the court lacks jurisdiction of the subject matter, since exhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 293, 109 P.2d 942* (petition for writ of mandate affirmatively alleged administrative remedies had not been exhausted)].

[d] No Cause of Action on Any Theory Stated

A complaint or cross complaint fails to state a cause of action if the cause of action alleged does not lie and no cause of action on any theory is stated [*see, e.g.,* *Otworth v. Southern Pac. Transportation Co. (1985) 166 Cal. App. 3d 452, 461, 212 Cal. Rptr. 743* (no abuse of discretion in sustaining demurrer since complaint for conversion, breach of contract, unjust enrichment, and violation of due process failed to allege essential facts and elements of causes of action); *City Products Corp. v. Globe Indemnity Co. (1979) 88 Cal. App. 3d 31, 35-42, 151 Cal. Rptr. 494* (demurrer by insurance company to insured's complaint for breach of contract to recover punitive damages assessed against insured in prior action for malicious prosecution held properly sustained without leave to amend since recovery is barred by *Ins. Code § 533* and public policy requires that burden of such damages be borne by party against whom they were assessed and not passed on to party's insurer)].

[e] Action Is Premature

A complaint or cross complaint fails to state a cause of action if it shows on its face that the action is premature [*see, e.g.,* *Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, 892, 153 Cal. Rptr. 842, 592 P.2d 329* (overruled on other grounds in *Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal. 3d 287, 292, 250 Cal. Rptr. 116, 758 P.2d 58*); *see also* *Breneric Associates v. City of Del Mar (1998) 69 Cal. App. 4th 166, 188, 81 Cal. Rptr. 2d 324* (demurrer may be sustained when complaint shows on face claim not ripe for adjudication)].

[f] Lack of Standing to Sue

A complaint or cross complaint fails to state a cause of action if it shows on its face that the cause of action alleged is in someone other than the plaintiff or cross complainant and, therefore, the pleader lacks standing to sue [*see Code Civ. Proc. § 367* (requiring with specified exceptions that action be prosecuted in name of real party in interest); *Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6* (distinguishing this ground from lack of legal capacity to sue, a ground of special demurrer [*see § 206.124*]); *Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 19, 108 P.2d 906* ; *Charpentier v. Los Angeles Rams Football Co. (1999) 75 Cal. App. 4th 301, 307, 89 Cal. Rptr. 2d 115* ; *see also* *Gulf Ins. Co. v. TIG Ins. Co. (2001) 86 Cal. App. 4th 422, 428-433, 103 Cal. Rptr. 2d 305* (surety could not bring bad faith action against general liability insurer); *Sacramento County Fire Protection Dist. v. Sacramento County Assessment Appeals Bd. (1999) 75 Cal. App. 4th 327, 331, 89 Cal. Rptr. 2d 215* (standing to sue goes to existence of cause of

action, *i.e.*, whether plaintiff has right to relief in court; demurrer can be used to challenge standing)]. For further discussion, see Ch. 123, *Complaints and Cross Complaints* .

[g] Affirmative Defense Appears on Face of Pleading

A complaint or cross complaint fails to state facts sufficient to constitute a cause of action if it shows on its face or it appears from judicially noticed matter that the action is barred by an affirmative defense [*see, e.g.,* *Halvorsen v. Aramark Uniform Services, Inc. (1998) 65 Cal. App. 4th 1383, 1391, 77 Cal. Rptr. 2d 383* (when complaint affirmatively alleges facts amounting to an affirmative defense, it is subject to demurrer); *Sissle v. Stefenoni (1979) 88 Cal. App. 3d 633, 635-636, 152 Cal. Rptr. 56* (judgment of dismissal following sustaining of general demurrer to complaint for wrongful death affirmed when complaint on its face showed action was barred by decedent's willful misconduct)]. The affirmative defense must clearly appear on the face of the complaint to support a demurrer [*CrossTalk Productions, Inc. v. Jacobson (1998) 65 Cal. App. 4th 631, 635, 76 Cal. Rptr. 2d 615]* .

A demurrer based on an affirmative defense cannot be granted when the action might be barred by the defense, but is not necessarily barred [*CrossTalk Productions, Inc. v. Jacobson (1998) 65 Cal. App. 4th 631, 635, 76 Cal. Rptr. 2d 615]* .

Other examples of affirmative defenses that may appear on the face of the pleading or from judicially noticed matter include the following:

- Action is time-barred [*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort (2001) 91 Cal. App. 4th 875, 881, 110 Cal. Rptr. 2d 877* (demurrer on the ground of bar of the statute of limitations must appear clearly and affirmatively that, upon the face of the complaint, the right of action is necessarily barred; however, not applicable unless the complaint alleges every fact which the defendant would be required to prove if he or she were to plead the bar of the applicable statute of limitation as an affirmative defense; *see* Ch. 345, *Limitation of Actions*].

- Laches [*Kleinclaus v. Dutard (1905) 147 Cal. 245, 248, 250, 81 P. 516* ; *Warren v. Atchison, T. & S.F. Ry. Co. (1971) 19 Cal. App. 3d 24, 36, 96 Cal. Rptr. 317* (general demurrer to complaint on basis of laches as not subject to being sustained, absent showing on face of complaint of unexplained, unreasonable delay and some prejudicial effect].

- Statute of frauds [*Gressley v. Williams (1961) 193 Cal. App. 2d 636, 640-641, 14 Cal. Rptr. 496* ; *see* Ch. 530 *Statute of Frauds*].

- Res judicata [*Weil v. Barthel (1955) 45 Cal. 2d 835, 837, 291 P.2d 30* ; *see* Ch. 491, *Res Judicata*].

- Absolute privilege [*Easton v. Sutter Coast Hospital (2000) 80 Cal. App. 4th 485, 490, 95 Cal. Rptr. 2d 316* (tort actions based on events following health practitioner's report of suspected elder abuse, subject of absolute privilege under *Welf. & Inst. Code § 15634*); *Goodley v. Sullivant (1973) 32 Cal. App. 3d 619, 625-626, 108 Cal. Rptr. 451* (defamation action based on statements made in relation to proceedings of hospital's liaison, executive, and grievance committees, disapproved on other grounds in *Hackethal v. Weissbein (1979) 24 Cal. 3d 55, 61 n.5, 154 Cal. Rptr. 423, 592 P.2d 1175*); *Donnell v. Linforth (1935) 11 Cal. App. 2d 25, 29, 52 P.2d 937* (defamation action based on statement made in affidavit filed in judicial proceeding)].

- Governmental immunity [*see, e.g.,* *Universal By-Products, Inc. v. City of Modesto (1974) 43 Cal. App. 3d 145, 154, 117 Cal. Rptr. 525* ; *see* Ch. 464, *Public Entities and Officers: California Tort Claims*

Act].

- Failure to exhaust arbitration if the only issue litigated is covered by the arbitration clause [Charles J. Rounds Co. v. Joint Council of Teamsters No. 42 *(1971) 4 Cal. 3d 888, 899, 95 Cal. Rptr. 53, 484 P.2d 1397]* . If, however, the complaint raises issues not susceptible to arbitration, the defendant may not merely assert failure to arbitrate an issue as an affirmative defense but must demand arbitration and seek a stay of the litigation [*see* Charles J. Rounds Co. v. Joint Council of Teamsters No. 42 *(1971) 4 Cal. 3d 888, 899, 95 Cal. Rptr. 53, 484 P.2d 1397* ; *but see Badgley v. Van Upp (1993) 20 Cal. App. 4th 218, 221-222, 24 Cal. Rptr. 2d 406* (demurrer properly overruled when relief sought was beyond arbitrator's authority to award)].

A defense that would render the complaint susceptible to a general demurrer if it appeared on the face of the pleading but does not so appear may be pleaded in the answer [*Code Civ. Proc. § 430.30(b)*] as an affirmative defense [*Code Civ. Proc. § 431.30(b)(2)*]. If it is so pleaded and it does not go to the merits of the action, but constitutes a bar (or ground of abatement), it may on motion of either party be tried before trial of any other issues in the case [*Code Civ. Proc. § 597*; *see also* Ch. 3, *Abatement of Actions*] or be made the basis of a motion for summary judgment [*see Code Civ. Proc. § 437c*; for discussion and forms, *see* Ch. 537, *Summary Judgment*].

[h] Complaint Raises Claim Required to Have Been Raised in Previous Compulsory Cross-Complaint

If a party against whom a complaint or cross-complaint has been filed and served fails to allege in a cross-complaint any related cause of action which (at the time of serving the answer to the complaint) the party has against the plaintiff, the party may not thereafter in any other action assert against the plaintiff the related cause of action not pleaded [*Code Civ. Proc. § 426.30(a)*; for discussion of compulsory cross-complaints in general, *see* Ch. 123, *Complaints and Cross Complaints*]. "Related cause of action" is a cause of action arising out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action the plaintiff alleges in the complaint [*Code Civ. Proc. § 426.10(c)*]. For the compulsory cross-complaint statute to apply, the related cause of action must be in existence at the time of service of the answer [*Code Civ. Proc. § 426.30(a)*]; otherwise, failure to assert it in prior litigation is not a bar under the statute [*Align Technology, Inc. v. Tran (2009) 179 Cal. App. 4th 949, 960, 102 Cal. Rptr. 3d 343* ; *Crocker Nat. Bank v. Emerald (1990) 221 Cal. App. 3d 852, 864, 270 Cal. Rptr. 699]* . The relatedness standard does not require an absolute identity of factual backgrounds for the two claims, only a logical relationship between them [*Align Technology, Inc. v. Tran (2009) 179 Cal. App. 4th 949, 960, 102 Cal. Rptr. 3d 343* ; *Currie Medical Specialties, Inc. v. Bowen (1982) 136 Cal.App.3d 774, 777, 186 Cal. Rptr. 543]* .

A court may properly sustain a demurrer for failure to state a claim on which relief can be granted if the claims alleged in the challenged complaint are barred under the compulsory cross-complaint statute. The analysis includes a review of whether the current claims are logically related to those asserted in the prior suit, and if so, whether the current claims are nonetheless maintainable because they were not in existence at the time of the service of the answer to the original complaint or cross-complaint. If the current claims are logically related to those asserted in the prior suit and therefore barred under the compulsory cross-complaint statute, but there is a question as to whether they were in existence at the time of the original suit, the demurrer should be granted with leave to amend [*Align Technology, Inc. v. Tran (2009) 179 Cal. App. 4th 949, 958-972, 102 Cal. Rptr. 3d 343]* .

[2] Lack of Capacity

Unless a governing statute states otherwise, a complaint need not allege the plaintiff's capacity to sue. If lack of capacity does not appear on the face of the complaint, it cannot be raised by demurrer, but is a special plea in abatement [*Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 994 n.4, 277 Cal. Rptr. 517, 803 P.2d 370* ; for further discussion and forms, *see Ch. 3, Abatement of Actions, § 3.30* et seq.].

If the objection that the person who filed the pleading does not have legal capacity to sue [*Code Civ. Proc. § 430.10(b)*] is not taken by demurrer or answer, it is deemed waived [*Code Civ. Proc. § 430.80(a)*; *Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6* ; *Tinsley v. Palo Alto Unified School Dist. (1979) 91 Cal. App. 3d 871, 883, 154 Cal. Rptr. 591]* . For a form of demurrer based on lack of capacity, see *§ 206.124*.

The question of incapacity to sue is different from that of standing to sue [*see* discussion under [1][f], *above*]. Incapacity [*Code Civ. Proc. § 430.10(b)*] is merely a legal disability, which deprives a party of the right to come into court to assert a cause of action that he, she, or it has. It is a ground of special demurrer and is waived if not raised by demurrer or answer [*Code Civ. Proc. § 430.80*]. A person who lacks standing to sue to assert the cause of action alleged is one who has no right to the relief sought. This latter objection goes to the existence of a cause of action and is not a plea in abatement as is lack of capacity to sue. A complaint or cross complaint that states a cause of action in someone but not in the plaintiff is subject to a general demurrer for failure to state a cause of action [*see Code Civ. Proc. § 430.10(e)*] and, under *Code Civ. Proc. § 430.80*, is not waived by failure to raise it by demurrer or answer [*see Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6* ; *Tinsley v. Palo Alto Unified School Dist. (1979) 91 Cal. App. 3d 871, 883, 154 Cal. Rptr. 591]* .

[3] Lack of Subject Matter Jurisdiction

The only jurisdictional objection that may be raised by demurrer to a complaint or cross complaint is lack of subject matter jurisdiction [*Code Civ. Proc. §§ 430.10(a), 430.30(a)*]. Lack of jurisdiction over the person of the defendant is made by motion to quash service of the summons [*see Code Civ. Proc. § 418.10(a)*], and an act in excess of the court's jurisdiction is attacked, not by demurrer, which lies only to challenge a pleading, but, for example, by petitioning a higher court for a writ of prohibition or certiorari, as the case may be [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 291, 109 P.2d 942* ; *see also* Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*].

If the trial court sustains a demurrer based on the objection that the court has no jurisdiction of the subject of the cause of action alleged in the pleading [*Code Civ. Proc. § 430.10(a)*], it may dismiss the action only if there is no state court in California having such jurisdiction. If there is a California state court having subject matter jurisdiction, the court, on sustaining the demurrer, must order the case transferred to such court [*see Code Civ. Proc. §§ 396a, 399*; and Ch. 324, *Jurisdiction: Subject Matter*].

The objection that the court lacks jurisdiction of the subject of the cause of action alleged in the challenged pleading [*Code Civ. Proc. § 430.10(a)*] is not waived by the failure to raise it by demurrer or answer [*Code Civ. Proc. § 430.80(a)*] and, hence, may be raised at any time [*People v. Coit Ranch, Inc. (1962) 204 Cal. App. 2d 52, 57, 21 Cal. Rptr. 875]* . In this respect, this type of "special demurrer" is similar to a "general demurrer" for insufficiency of facts [*see Certified Grocers of California, Ltd. v. San Gabriel Valley Bank (1983) 150 Cal. App. 3d 281, 285-286 n.1, 197 Cal. Rptr. 710* ; *Buss v. J.O. Martin Co. (1966) 241 Cal. App. 2d 123, 133, 50 Cal. Rptr. 206* ; discussion under [1][a], *above*].

[4] Another Action Pending

A demurrer may be taken to a complaint or cross complaint on the ground that another action is pending between the same parties [*Code Civ. Proc. § 430.10(c)*; for a form, *see § 206.125*]. An action is pending from the time it is commenced until its final determination on appeal, or until the time for appeal has passed, unless the judgment is satisfied sooner [*Code Civ. Proc. § 1049*]. The objection that another action is pending between the same parties on the same cause does not normally appear on the face of the complaint or cross complaint but is based on matters of which the court may take judicial notice [*Code Civ. Proc. §§ 430.30(a), 430.70*; *Evid. Code § 452(d)*]. If the objection that there is another action pending between the same parties on the same cause of action is not taken by demurrer or answer, it is deemed waived [*Code Civ. Proc. § 430.80(a)*].

The pendency of a prior action in a California state court predicated on the same cause of action and between the same parties constitutes a ground of abatement of the second action [*see Code Civ. Proc. § 597*] filed either in the same court or in another court of competent jurisdiction [*Simmons v. Superior Court (1950) 96 Cal. App. 2d 119, 122-123, 214 P.2d 844]* . Should the court in the second action overrule the demurrer and proceed or threaten to proceed with the case after the court in the first action has assumed and exercised jurisdiction, it may be restrained from doing so by issuance of a writ of prohibition [*see Code Civ. Proc. §§ 1102-1105*; *see Browne v. Superior Court (1940) 16 Cal. 2d 593, 597, 107 P.2d 1* ; *Kresteller v. Superior Court (1967) 248 Cal. App. 2d 545, 549, 56 Cal. Rptr. 771]* . For further discussion, see *Ch. 3, Abatement of Actions, § 3.50* et seq. For discussion and a form of demurrer based on the rule of exclusive concurrent jurisdiction and a comparison to another action pending, see *Ch. 324, Jurisdiction: Subject Matter, §§ 324.25[2], 324.106.*

If a demurrer based on *Code Civ. Proc. § 430.10(c)* is sustained and no other special defense is sustained, the court enters an interlocutory judgment to the effect that no trial of other issues shall be had until final determination of the other action. The plaintiff may appeal from this interlocutory judgment [*see Code Civ. Proc. § 597*].

[5] Defect of Parties

If the objection that there is a defect of parties [*Code Civ. Proc. § 430.10(d)*] is not taken by demurrer or answer, it is deemed waived [*Code Civ. Proc. § 430.80(a)*; for a form of demurrer, *see § 206.126, below*], unless the defect in parties results from the nonjoinder of an indispensable party. The nonjoinder of an indispensable party is a jurisdictional defect that can be raised at any stage of the proceedings [*Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 522-523, 106 P.2d 879* ; *Vanoni v. County of Sonoma (1974) 40 Cal. App. 3d 743, 746, 115 Cal. Rptr. 485]* . For discussion and forms relating to the compulsory joinder of parties, see *Code Civ. Proc. § 389* and Ch. 395, *Parties.*

A court of appeal has stated that, although many cases have held that the failure to join an indispensable party is a jurisdictional defect, the failure is not a jurisdictional defect in the fundamental sense because, even in the absence of an indispensable party, the court still has power to render a decision as to the parties before it that will stand. For reasons of equity and convenience, not because it is without power to proceed, a court should not proceed with a case when it determines that an indispensable party is absent and cannot be joined. The court acknowledged, however, that the courts of appeal continue to state in dicta that the absence of an indispensable party deprives the court of jurisdiction over the subject matter, but that this is not the correct rule under former *Code Civ. Proc. § 389, Fed. R. Civ. P., Rule 19,* or *Code Civ. Proc. § 389,* as amended in 1971. The question of whether a nonjoined person is not only a necessary but an indispensable party apparently will arise only when the person cannot be joined. In that event, the court should focus first on what relief, if any, can be granted to the parties in the case before it and not on the character of the nonjoined person [*Kraus v. Willow Park Public Golf Course (1977) 73 Cal. App. 3d 354, 364-365, 140 Cal. Rptr. 744]* .

Rather than demurring based on nonjoinder of a party, counsel may wish to consider compelling joinder by pleading the defect of the parties in the answer and moving by noticed motion for an order compelling joinder [*see Code Civ. Proc. § 389* and Ch. 395, *Parties*].

In any event, a defendant may not raise a defect or misjoinder of parties by demurrer if the pleadings do not disclose the existence of the matter relied on [*Harboring Villas Homeowners Assn. v. Superior Court (1998) 63 Cal. App. 4th 426, 429, 73 Cal. Rptr. 2d 646]* .

[6] Misjoinder of Parties

A demurrer on the ground of misjoinder of parties defendant or parties cross defendant is generally available only to a defendant or cross defendant who is misjoined, since one defendant's or cross defendant's interests are not normally prejudiced by the misjoinder of another defendant or cross defendant [*see Wuest v. Wuest (1942) 53 Cal. App. 2d 339,*

344, 127 P.2d 934 (misjoinder of parties defendant); *Division of Labor Law Enforcement v. Barnes (1962) 205 Cal. App. 2d 337, 345, 23 Cal. Rptr. 55* (misjoinder of parties cross defendant; disapproved on another ground in *White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 351 n.9, 66 Cal. Rptr. 697, 438 P.2d 345*)].

Although it is not necessary that the demurrer state the reasons the misjoinder is improper, it must nevertheless designate the party who is improperly joined [*Gardner v. Samuels (1897) 116 Cal. 84, 88, 47 P. 935]* .

If the objection that there is a misjoinder of parties [*Code Civ. Proc. § 430.10(d)*] is not taken by demurrer or answer, it is deemed waived [*Code Civ. Proc. § 430.80(a)*]. For a form of demurrer, see *§ 206.127, below*.

[7] Pleading Is Uncertain

A demurrer for uncertainty (including ambiguity and unintelligibility) is directed at the allegations actually made in the challenged pleading and not to matters not alleged. A demurrer for uncertainty does not lie as to immaterial matter or if the facts are presumptively within the knowledge of the demurring party [*Dumm v. Pacific Valves (1956) 146 Cal. App. 2d 792, 799, 304 P.2d 738]* . Moreover, such a demurrer should not be sustained if the allegations are sufficiently clear to apprise the defendant of the issues that must be met, even if the allegations of the complaint may not be as clear and as detailed as might be desired [*Gonzales v. State of California (1977) 68 Cal. App. 3d 621, 631, 137 Cal. Rptr. 681]* .

If the objection that the pleading is uncertain, which includes ambiguity and intelligibility [*Code Civ. Proc. § 430.10(f)*], is not taken by demurrer or answer, it is waived [*Code Civ. Proc. § 430.80(a)*]. For a form of demurrer, see *§ 206.128, below*.

[8] Ambiguous Pleading of Contract

A party may demur if the action or cross action is founded on a contract and it cannot be ascertained from the pleading whether the contract is written or oral or implied by conduct [*Code Civ. Proc. §§ 430.10(g), 430.30(a)*].

A defendant or cross defendant will normally want to demur on this ground if the contract was not in writing and is either unenforceable under the statute of frauds or the action on it is barred by the statute of limitations. On the filing of the amended complaint alleging that the contract was oral or implied by conduct, defendant will then be in a position to demur generally to the complaint or cross complaint.

The objection in an action or cross action founded on a contract that it cannot be ascertained from the pleading whether the contract is written or oral or implied by conduct may be taken by demurrer or answer [*Code Civ. Proc. §§ 430.10(g), 430.30(a), (b)*] and, if not so taken, is deemed waived [*Code Civ. Proc. § 430.80(a)*]. For a form of demurrer, see *§ 206.129, below*.

[9] Absence of Certificate

[a] Professional Negligence Action

A party may demur in an action or cross action for damages or indemnity arising out of the professional negligence of a certificated architect, registered professional engineer, or licensed land surveyor if the certificate required under *Code Civ. Proc. § 411.35(a), (b)* has not been filed [*Code Civ. Proc. §§ 411.35(g), 430.10(h)*]. Actions covered by this requirement include any complaint or cross complaint for equitable indemnity arising out of the rendition of professional services, whether or not the complaint or cross complaint specifically asserts or uses the terms "professional negligence" or "negligence" [*Code Civ. Proc. § 411.35(i)*].

In an action based on professional negligence, as that term is used in *Code Civ. Proc. § 411.35*, an objection that the

certificate required under *Code Civ. Proc. § 411.35(a), (b)* has not been filed may be taken by demurrer [*Code Civ. Proc. §§ 411.35(g), 430.10(h)*]. For a form of demurrer, see *§ 206.130*.

It is error for a court to grant a defendant's demurrer without leave to amend where it is "reasonably possible" for the plaintiff to cure the defect of failing to properly file a certificate required by *Code Civ. Proc. § 411.35(a), (b)* [*Price v. Dames & Moore (2001) 92 Cal. App. 4th 355, 359, 112 Cal. Rptr. 2d 65* (plaintiff in pro per filed certificate of merit after the filing of original complaint and prior to the filing of the amended complaint; since her attorney had not filed a substitution of attorney, substituting out of the case, this certificate of merit was not properly signed; however certificate statute does not require dismissal for improper certificate)].

[b] Limitation on Procedure

Code Civ. Proc. § 430.10 provides that the objections it enumerates, including the lack of a *Code Civ. Proc. § 411.35* certificate may be taken by either demurrer or answer as provided in *Code Civ. Proc. § 430.30*. Nevertheless, *Code Civ. Proc. § 411.35* provides that the objections regarding lack of the certficates may be raised by demurrer or motion to strike, but makes no mention of raising the objection by answer [*see Code Civ. Proc. § 411.35(g)*; *see also Code Civ. Proc. § 430.10(h)* (expressly referring to *Code Civ. Proc. § 411.35*) and *Code Civ. Proc. § 340.1(j)* (authorizing demurrer or motion to strike, without mentioning answer, if certificates not filed in accordance with *Code Civ. Proc. § 340.1* in action by plaintiff 26 years of age or older to recover damages suffered as a result of childhood sexual abuse)]. Assuming that *Code Civ. Proc. § 411.35*, as the more specific provision, controls, the objections apparently may not be raised by answer. A party may nevertheless raise the objection by demurrer even in those situations in which raising the objection by answer would otherwise be appropriate (that is, in which the defect is not apparent on the face of the challenged pleading), simply by requesting that the court take judicial notice of the fact that the certificate had not been filed [*see Code Civ. Proc. §§ 430.30(a), 430.70*; *Evid. Code §§ 452(d), 453*; for further discussion, *see also* Ch. 321, *Judicial Notice*].

If the objection is not taken by demurrer or other authorized means, it is deemed waived [*see Code Civ. Proc. § 430.80(a)*].

[c] Procedure in Limited Civil Cases

In addition to the issues *discussed under § 206.14[9][b], above*, the manner of raising this objection is further limited in limited civil cases. In these cases, special demurrers are generally prohibited [*Code Civ. Proc. § 92(c)*; *see also* discussion in *§ 206.12[2], above*]. One likely argument to reconcile the statutes would be that *Code Civ. Proc. § 92(c)* controls the earlier-enacted, contrary language of *Code Civ. Proc. § 411.35(g)*. That argument might be countered on the basis that Section 411.35 should prevail as a more specific provision.

Motions to strike are also prohibited in limited civil cases, except when made because the damages or relief sought are not supported by the allegations of the complaint [*Code Civ. Proc. § 92(d)*]. Arguably, *Code Civ. Proc. § 411.35(g)* nevertheless permits motions to strike to be made, because the language in the provisions authorizing the motion was enacted later than the contrary language in *Code Civ. Proc. § 92(d)* [for discussion of general rules of statutory construction, *see* Ch. 531, *Statutes and Ordinances*].

[d] Failure to Comply as Basis for Sanctions

An attorney's failure to comply with the provisions of *Code Civ. Proc. § 411.35* may constitute grounds for professional discipline [*Code Civ. Proc. § 411.35(f)*].

[10] Federal Preemption

A purely legal issue of federal preemption is properly addressed by demurrer [*Washington Mutual Bank v. Superior*

Court (2002) 95 Cal. App. 4th 606, 612, 115 Cal. Rptr. 2d 765 (Home Owners' Loan Act, *42 U.S.C. § 1461 et seq.*, preempted state claims under California's *Civ. Code § 2948.5* alleging unlawful charging of interest on home loans); *Ball v. GTE Mobilnet of California (2000) 81 Cal. App. 4th 529, 535, 96 Cal. Rptr. 2d 801]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedureParties JoinderMisjoinderCivil ProcedureParties JoinderNecessary Parties

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17-206 California Forms of Pleading and Practice--Annotated § 206.15

§ 206.15 When Objections May Be Raised by Demurrer

[1] Defective Complaint or Cross Complaint

An objection to a complaint or cross complaint on any of the grounds enumerated in *Code Civ. Proc. § 430.10* (discussed in Subpart A under Grounds for Demurrer, *above*) must be made as provided in *Code Civ. Proc. § 430.30* [*Code Civ. Proc. § 430.10*].

Code Civ. Proc. § 430.30 provides, in turn, that, if any ground for objection appears on the face of the complaint or cross complaint or from any matter of which the court must or may take judicial notice, the objection on that ground may be taken by demurrer to the pleading [*Code Civ. Proc. § 430.30(a)*]. Alternatively, if the ground for objection does not appear on the face of the pleading, the objection may be taken by answer [*Code Civ. Proc. § 430.30(b)*]. For related discussion of alternative means for raising the objection set out in *Code Civ. Proc. § 430.10(h), (i),* see *§ 206.14[9][b], above.*

The objections set out in *Code Civ. Proc. § 430.10* are deemed waived if they are not raised by either demurrer or answer, except that the following two objections are not deemed waived [*Code Civ. Proc. § 430.80(a)*; for further discussion, *see § 206.14, above*]:

- The objection that the court has no jurisdiction of the subject matter of the cause of action alleged in the pleading.

- The objection that the pleading does not state facts sufficient to constitute a cause of action.

[2] Defective Answer

An objection to an answer on any of the grounds enumerated in *Code Civ. Proc. § 430.20* (discussed in Subpart A under *§ 206.13[2], above*) may be made by demurrer whenever the objection appears on the face of the answer or from any matter of which the court must or may take judicial notice [*Code Civ. Proc. § 430.30(a)*].

A demurrer is the only pleading that may be filed in response to an answer. California law does not authorize the filing of a "replication" or other form of reply in civil actions. Instead, any new matters alleged in the answer, either in avoidance or constituting a defense, are automatically deemed to be controverted by the opposing party [*Code Civ. Proc. § 431.20(b)*].

An objection to an answer on the ground that it does not state facts sufficient to constitute a defense is not waived by a failure to raise it by demurrer [*Code Civ. Proc. § 430.80(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsAnswersCivil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticePleadingsComplaintsCross-ComplaintsEvidenceJudicial NoticeGeneral Overview

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17-206 California Forms of Pleading and Practice--Annotated § 206.16

§ 206.16 Specification of Pleading or Portion of Pleading Subject to Demurrer

[1] General Rule

A demurrer to a complaint or cross complaint may be taken to the whole pleading or to any of the causes of action (or counts) stated in it [*Code Civ. Proc. § 430.50(a)*]. Thus, a demurrer to a cause of action may be filed without answering other causes of action [*Cal. Rules of Ct., Rule 3.1320(j)*].

A demurrer cannot, however, be taken to only a part of a cause of action or count [*Campbell v. Genshlea (1919) 180 Cal. 213, 217, 180 P. 336* (general demurrer); *Chazen v. Centennial Bank (1998) 61 Cal. App. 4th 532, 542, 71 Cal. Rptr. 2d 462* ; *see PH II, Inc. v. Superior Court (1995) 33 Cal. App. 4th 1680, 1681, 1683, 40 Cal. Rptr. 2d 169* (although party may not demur to a portion of a cause of action, when a substantive defect is clear from the face of a complaint involving only a portion of a cause of action, that portion may be attacked by filing a motion to strike)].

For purposes of this rule, a "cause of action" is a set of facts giving rise to a basis for relief. The facts may constitute grounds for various remedies, such as damages or injunctive relief, but the availability of alternative remedies does not mean there is more than one cause of action [*California Assn. of Psychology Providers v. Rank (1990) 51 Cal. 3d 1, 7 n.3, 270 Cal. Rptr. 796, 793 P.2d 2]* . Stated in another way, a "cause of action" consists of [*Skrbina v. Fleming Companies (1996) 45 Cal. App. 4th 1353, 1364, 53 Cal. Rptr. 2d 481* ; *Miranda v. Shell Oil Co. (1993) 17 Cal. App. 4th 1651, 1658* ; *see Crowley v. Katleman (1994) 8 Cal. 4th 666, 681-683, 34 Cal. Rptr. 2d 386, 881 P.2d 1083* (discussing primary right theory in holding that it did not apply to preclude malicious prosecution action when at least one theory of liability was based on probable cause)]:

- A primary right of the plaintiff,
- A corresponding primary duty imposed on the defendant, and
- The defendant's delict or wrongful act that constitutes a breach of that primary right and duty.

A cause of action is not based on the characterization of the legal theory or theories to advance it. Rather, it is based on plaintiff's injuries [*Skrbina v. Fleming Companies (1996) 45 Cal. App. 4th 1353, 1364, 53 Cal. Rptr. 2d 481]* . A violation of one primary right gives rise to one cause of action [*Crowley v. Katleman (1994) 8 Cal. 4th 666, 681, 34 Cal. Rptr. 2d 386, 881 P.2d 1083]* .

"Counts" are, in turn, separate theories of entitlement to a remedy based on the same cause of action [*Eichler Homes of San Mateo, Inc. v. Superior Court (1961) 55 Cal. 2d 845, 847-848, 13 Cal. Rptr. 194, 361 P.2d 914]* , even if each count alleges different facts to establish that entitlement under its particular theory [*see Zumbrun v. University of Southern California(1972) 25 Cal. App. 3d 1, 9, 101 Cal. Rptr. 499]* . Each count must state facts sufficient to constitute a cause of action if it is to withstand a general demurrer [*see Code Civ. Proc. § 430.10(e)*; *Warren v. Atchison, T. & S.F. Ry. Co. (1971) 19 Cal. App. 3d 24, 40-41, 96 Cal. Rptr. 317]* .

Thus, when several purported causes of action allege invasion of the same primary right in actuality only one cause of action has been stated. On the other hand, if a plaintiff alleges that the defendant's single wrongful act invaded two different primary rights, the plaintiff has stated two causes of action, even though both invasions are pleaded in a single "count" of the complaint [*Skrbina v. Fleming Companies (1996) 45 Cal. App. 4th 1353, 1364, 53 Cal. Rptr. 2d 481* (defendant's second demurrer to complaint, timely filed under *Cal. Rules of Ct., Rule 3.1320(g)* after first demurrer was overruled without an order that defendant answer the complaint, was procedurally proper when first demurrer, nominally taken to the whole complaint actually addressed only one of three inartfully pleaded causes of action)].

For further discussion of what constitutes a "cause of action" and a "count," see Ch. 123, *Complaints and Cross Complaints* .

The prayer is not part of a cause of action and is not subject to demurrer even if plaintiff has prayed for relief to which he or she is not entitled [*see Moropoulos v. C.H. & O.B. Fuller Co. (1921) 186 Cal. 679, 688, 200 P. 601* ; *Grisingher v. Shaeffer (1938) 25 Cal. App. 2d 5, 9, 76 P.2d 149]* .

[2] Single Cause of Action

If the complaint or cross complaint states only a single cause of action or count, any demurrer to it would go to the whole pleading since the demurrer cannot go to part of the cause of action [*see Campbell v. Genshlea (1919) 180 Cal. 213, 217, 180 P. 336* ; *Financial Corp. of America v. Wilburn (1987) 189 Cal. App. 3d 764, 778, 234 Cal. Rptr. 653* ; *see also PH II, Inc. v. Superior Court (1995) 33 Cal. App. 4th 1680, 1681, 1683, 40 Cal. Rptr. 2d 169* (although party may not demur to a portion of a cause of action, when a substantive defect is clear from the face of a complaint involving only a portion of a cause of action, that portion may be attacked by filing a motion to strike)]. In the case of a special demurrer for uncertainty, the objection should identify those specific portions of the pleading that are uncertain [*see Jones v. Iverson (1900) 131 Cal. 101, 103-104, 63 P. 135* ; for a form, *see § 206.128*].

[3] Multiple Causes of Action or Counts in Complaint

A demurrer to a part of a complaint or cross complaint setting forth multiple causes of action or counts must identify the particular cause or count that is being challenged [*Cal. Rules of Ct., Rule 3.1112(d)*]. If a general demurrer to a pleading containing multiple causes of action or counts fails to do so, the court will normally overrule that demurrer so long as any one of the causes of action or counts are sufficient to withstand the demurrer [*see, e.g., Jones v. Iverson (1900) 131 Cal. 101, 104, 63 P. 135* (special demurrer); *Warren v. Atchison, T. & S.F. Ry. Co. (1971) 19 Cal. App. 3d 24, 29, 96 Cal. Rptr. 317* (general demurrer); *Western Title Ins. etc. Co. v. Bartolacelli (1954) 124 Cal. App. 2d 690, 694, 269 P.2d 165* (general demurrer)].

Separately stated causes of action and counts are severable for the purposes of objecting to them by demurrer and each must normally stand or fall on its own allegations [*Western Title Ins. etc. Co. v. Bartolacelli (1954) 124 Cal. App. 2d*

690, 694, 269 P.2d 165] . Hence, the averments of one count cannot be amplified by the allegations of another separately stated count or cause of action in the same pleading unless the latter are included by special reference or otherwise in the portion of the complaint under attack. Similarly, unless the alternate pleadings contain antagonistic statements, the statement of facts sufficient to constitute a cause of action in one count is not a bar to the maintenance of a separately stated count in the same pleading based on inconsistent allegations [*Steiner v. Rowley (1950) 35 Cal. 2d 713, 719, 221 P.2d 9]* .

Nevertheless, in a complaint pleading a single cause of action in different counts (that is, separately stated theories of relief for the same cause of action or injury), a count premised on detailed factual allegations made in another count must stand or fall with the other count [*Lambert v. Southern Counties Gas Co. (1959) 52 Cal. 2d 347, 353, 340 P.2d 608]* . This rule clearly applies if a generally pleaded common count is clearly based on a specifically pleaded count for breach of contract. If plaintiff is not entitled to recover under the count for damages for breach of contract wherein all the facts on which plaintiff's demand is based are specifically pleaded, it is proper to sustain a demurrer to the whole pleading, including a common count set forth in the complaint the recovery under which is obviously based on the set of facts specifically pleaded in the other count [*Zumbrun v. University of Southern California (1972) 25 Cal. App. 3d 1, 14, 101 Cal. Rptr. 499* ; *see* *Farmers Ins. Exchange v. Zerin (1997) 53 Cal. App. 4th 445, 460, 61 Cal. Rptr. 2d 707* (common count was subject to demurrer when it incorporated allegations of all preceding claims including existence of an equitable lien and court concluded under other alleged theories of relief that plaintiff had no such equitable lien so that plaintiff had no claim for money had and received); for further discussion of this rule and exceptions to it, *see* Ch. 121, *Common Counts*].

Similarly, in a complaint that consists of two counts, one to quiet title to real property and the other, as incidental to the first count, to have declared void an instrument under which particular defendants assert title, if the count to quiet title in regard to particularly named defendants clearly shows that it is based on the same facts that are pleaded in the cause to remove a cloud, a general demurrer of those defendants should be sustained if the second count reveals a defect in plaintiff's title or does not state a cause of action to remove a cloud [*Ephraim v. Metropolitan Trust Co. (1946) 28 Cal. 2d 824, 833, 172 P.2d 501* ; *but see* *Western Title Ins. etc. Co. v. Bartolacelli (1954) 124 Cal. App. 2d 690, 694, 269 P.2d 165* , in which the court of appeal, without discussing or citing *Ephraim*, stated that the "rule is limited to pleadings involving a common count"].

If separate counts are in reality separate causes of action against different defendants, a properly stated cause of action against one defendant cannot be defeated by incorporating allegations from the other cause of action against another defendant that plaintiff did not specifically incorporate by reference in the complaint [*Lambert v. Southern Counties Gas Co. (1959) 52 Cal. 2d 347, 353-354, 340 P.2d 608]* .

[4] Multiple Defenses in Answer

The demurrer may be taken to the whole answer or to any one or more of the several defenses set up in it [*Code Civ. Proc. § 430.50(b)*].

Separate defenses, like separately stated causes of action and counts, must be separately numbered [*Cal. Rules of Ct., Rules 2.112, 1.5(b)*], and, hence, any demurrer to an answer alleging multiple affirmative defenses should identify the particular defense being challenged.

[5] Joint Demurrers by Multiple Defendants

In a case involving multiple defendants or cross defendants, two or more of them may demur jointly to the complaint or cross complaint. If this is done, the joint demurrer must be overruled if the complaint is good as against any of the defendants jointly demurring [*Wise v. Southern Pacific Co. (1963) 223 Cal. App. 2d 50, 76, 35 Cal. Rptr. 652* (*overruled on other grounds in* *Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 510, 521,*

28 Cal. Rptr. 2d 475, 869 P.2d 454)]. This rule is limited to special demurrers. It does not apply to a general demurrer since a defendant may raise at any time in any appropriate way the defect that a plaintiff has not stated in his or her complaint facts sufficient to constitute a cause of action against that defendant [*Majestic Realty Co. v. Pacific Lighting Corp. (1974) 37 Cal. App. 3d 641, 642-643, 112 Cal. Rptr. 423]* .

[6] Demurrer to Judicial Council Form Complaint

Adoption of Judicial Council official forms for the most common civil actions has not changed the statutory requirement that the complaint contain whatever ultimate facts are essential to state a cause of action. Thus, in cases in which specific allegations need to be alleged, such as a claim for a dangerous condition of public property, the pleader must add the details. The form complaint, standing alone, is no more immune to demurrer than any other complaint that fails to meet essential pleading requirements to state a cause of action [*People ex rel. Dept. of Transportation v. Superior Court (1992) 5 Cal. App. 4th 1480, 1486, 7 Cal. Rptr. 2d 498* ; *see Setliff v. E.I. Du Pont De Nemours & Co. (1995) 32 Cal. App. 4th 1525, 1529-1538, 38 Cal. Rptr. 2d 763* (sustaining of defendants' demurrers to Judicial Council form complaint affirmed)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedureJoinder of Claims & RemediesGeneral Overview

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§ 206.17 Specification of Objections or Grounds for Demurrer

A demurrer must distinctly specify the grounds on which any of the objections to the complaint, cross complaint, or answer are taken and, if it fails to do so, it may be disregarded [*Code Civ. Proc. § 430.60*; *see e.g., Johnson v. Clark (1936) 7 Cal. 2d 529, 536, 61 P.2d 767]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrers

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17-206 California Forms of Pleading and Practice--Annotated § 206.18

§ 206.18 Other Format Requirements

The form and format requirements of all papers, including demurrers, presented to the court for filing are set forth in *Cal. Rules of Ct., Rules 2.100-2.119*, with additional requirements for law and motion papers set forth in *Cal. Rules of Ct., Rules 3.1110* and *3.1112*. The size of papers and type, pagination, and so forth, are governed by *Cal. Rules of Ct., Rules 2.101-2.109*, and the format of the first page by *Cal. Rules of Ct., Rules 2.111* and *3.1110(b)*. Footers are governed by *Cal. Rules of Ct., Rule 2.110*.

Any additions, deletions, or interlineations on the face of the pleading must be initialed by the clerk or judge at the time of filing, and all copies served must conform to the filed original, including the numbering of lines, pagination, additions, deletions, and interlineations [*Cal. Rules of Ct., Rule 2.117*]. The clerk is forbidden to file papers that do not comply with these requirements, but the court, for good cause shown, may permit the filing of papers that do not comply [*Cal. Rules of Ct., Rules 2.118, 1.5(b)*].

A demurrer must state on the first page immediately below the number of the case, the names of the party filing the demurrer and of the party whose pleading is the subject of the demurrer [*Cal. Rules of Ct., Rule 3.1320(e)*].

Local court rules should be checked if counsel is unfamiliar with them. However, local rules concerning demurrers or the form and format of papers are preempted by the California Rules of Court. The exception to the rule of preemption most likely to be relevant to a demurrer is the exception for local rules adopted under the Trial Court Delay Reduction Act [*Cal. Rules of Ct., Rule 3.20*].

For a form of demurrer and further discussion of format, see *§ 206.120*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeMotion PracticeContent & Form

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§ 206.19 Accompanying Papers

[1] Notice of Hearing

A party filing a demurrer must serve and file with it a notice of hearing [*see § 206.135* (form)] that specifies a hearing date in accordance with *Code Civ. Proc. § 1005(b)* [*Cal. Rules of Ct., Rules 1.5(b), 3.1110, 3.1103(b)*, 3.1112(a), *3.1320(c)*]. *Code Civ. Proc. § 1005(b)* provides generally that unless otherwise ordered or specifically provided by law a written notice of motion must be given at least 16 court days before the hearing. If, however, the notice is served by mail, this period is increased by 5 calendar days if the place of mailing and of address are within California, by 10 calendar days if either the place of mailing or of address is outside California but within the United States, or by 20 calendar days if either the place of mailing or of address is outside the United States [*Code Civ. Proc. § 1005(b)*]. If the notice is served by fax, express mail, or another method of overnight delivery, the 16-day notice period is increased by two calendar days [*Code Civ. Proc. § 1005(b)*]. A two court day extension may apply in the case of electronic service [*see Code Civ. Proc. § 1010.6(a)(6)*; for discussion, *see Ch. 518, Service of Summons and Papers, § 518.41[8]*].

A demurrer must be set for hearing not more than 35 days following the filing of the demurrer or on the first date available to the court thereafter [*Cal. Rules of Ct., Rules 1.5(b), 3.1110, 3.1103(b), 3.1320(c)*].

For good cause shown, the court may order the hearing held on an earlier or later day on notice prescribed by the court [*Cal. Rules of Ct., Rules 1.5(b), 3.1110, 3.1103(b), 3.1320(c)*].

[2] Points and Authorities

A party filing a demurrer must serve and file with it a memorandum in support of each of its grounds. The absence of the memorandum may be construed by the court as an admission that a special demurrer is not meritorious and as a waiver of all grounds thereof not so supported [*Cal. Rules of Ct., Rules 1.5(b), 3.1110, 3.1103(b)* 3.1113(a); for discussion and forms, *see* Ch. 417, *Points and Authorities*].

The objections that the court has no jurisdiction of the subject of the cause of action alleged in the pleading attacked [*Code Civ. Proc. § 430.10(a)*] and that the pleading does not state facts sufficient to constitute a cause of action [*Code*

Civ. Proc. § 430.10(e) (ground of general demurrer)] are not waived by failure to take the objection by demurrer or answer [*Code Civ. Proc. § 430.80*] and would, therefore, not be waived by failure to submit a memorandum in support of a demurrer on either ground. Nevertheless, to avoid the possibility of an erroneous ruling on the demurrer that can prove costly to counsel or to his or her client to correct, the better practice is to submit points and authorities in support of each of these grounds of demurrer.

If the party is relying on matters subject to judicial notice, the supporting points and authorities should include not only the authorities supporting the ground of the demurrer, but also the applicable authorities showing (1) that the court is authorized to take judicial of the particular matter, and (2) the propriety of granting judicial notice under the circumstances of the case [*see Evid. Code §§ 453, 454*; *see also § 206.19[3], below*].

Points and authorities in support of and in opposition to demurrers may be found in California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[3] Request for Judicial Notice

A demurrer may be made whenever the objection appears on the face of the pleading or appears from both that pleading and any matter of which the court is required to or may take judicial notice [*Code Civ. Proc. § 430.30(a)*; *Rodas v. Spiegel (2001) 87 Cal. App. 4th 513, 517, 104 Cal. Rptr. 2d 439* (judicial notice)]. When a demurring party is relying on matters subject to mandatory judicial notice, no request need be made for the court to take such judicial notice. On the other hand, if the demurring party is relying on matters subject to permissive judicial notice, he or she must request that the court take notice of such matters, subject to the requirements of *Evid. Code § 453* [*see also Cal. Rules Ct., Rules 3.1113(l), 3.1306(b)*].

Under *Code Civ. Proc. § 430.70*, when the ground for demurrer is based on matter of which the court may take judicial notice under *Evid. Code § 452* or *453*, such matter must be specified in the demurrer, or in the supporting points and authorities, except as the court may otherwise permit [*Code Civ. Proc. § 430.70*; *see StorMedia Inc. v. Superior Court (1999) 20 Cal. 4th 449, 456 n.9, 84 Cal. Rptr. 2d 843, 976 P.2d 214]* . The California Rules of Court provide that any request for judicial notice must be made in a separate document listing the specific items for which notice is requested, must provide the court and each party with a copy of the material; and if the material is part of a court file, the party must specify in writing the part of the court file sought to be judicially noticed and the party must make arrangements with the clerk to have the file in the courtroom at the time of the hearing [*Cal. Rules of Ct., Rule 3.1306(a), (c)*]. Local court rule requirements, if any, should also be ascertained.

For detailed discussion of judicial notice, including the matters subject to mandatory and permissive judicial notice, the requirements for making a request that judicial notice be taken of specified matters, and a form of request for judicial notice for inclusion in a demurrer, see Ch. 321, *Judicial Notice* .

[4] Proof of Service

A demurrer must be both served and filed [*Cal. Rules of Ct., Rules 1.5(b), 3.1110, 3.1103(b), 3.1113(a), 3.1320(c)*]. That is, a copy of the demurrer with its supporting papers and of the notice of hearing must be served on the adverse party's attorney of record or on the adverse party if he or she has no attorney of record [*see Code Civ. Proc. §§ 465, 1015*; *Cal. Rules of Ct., Rules 1.5(15), (19), 3.1110, 3.1103(b)*], and then the originals of these papers, with proof of prior service attached, are presented to the court clerk or deputy clerk for filing [*Cal. Rules of Ct., Rules 1.21(b), 3.1100, 3.1103*]. Service is normally made by mail [*see Code Civ. Proc. §§ 1012, 1013*], although other manners of service are provided for [*see Code Civ. Proc. § 1011*]. For further discussion and forms of proof of service, see the Procedural Guide, *§ 206.100[3]*, [4], *below*, and Ch. 518, *Service of Summons and Papers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsEvidenceJudicial NoticeGeneral Overview

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§ 206.20 Time Requirements

[1] Demurrer to Complaint or Cross Complaint

Any demurrer to a complaint or cross complaint in a civil action must be served [*Code Civ. Proc. §§ 422.10, 465*; *Cal. Rules of Ct., Rules 1.5(b), 3.1110, 3.1103(b)*, 3.1113(a), 3.1320(c)] and filed with the court in which the action is pending within 30 days after the complaint or cross complaint was served on the party demurring [*Code Civ. Proc. §§ 430.40(a), 432.10*] or within any extension of that period [*see Code Civ. Proc. §§ 1054, 1054.1*].

One court opinion holds the 30-day language of *Code Civ. Proc. § 430.40(a)* is permissive, not mandatory, and the 30-day time requirement "applies only to a first round of demurrers" and not to amended complaints [*McAllister v. County of Monterey (2007) 147 Cal. App. 4th 253, 280, 54 Cal. Rptr. 3d 116* (court aware of no statute or rule that specifically governs time limit for amended complaint or where no amended pleading is filed after dissolution of a stay)].

When a demurrer was directed to fewer than all the causes of action in the complaint, the defendant, unless otherwise ordered, has 10 days to move to strike, to demur, or otherwise to plead to the complaint or the remaining causes of action following [*Cal. Rules of Ct., Rule 3.1320(j)*]:

(1) The overruling of the demurrer;

(2) Amendment of the complaint or the expiration of the time to amend if the demurrer was sustained with leave to amend; or

(3) The sustaining of the demurrer if the demurrer was sustained without leave to amend.

Thus, for example, when a demurrer that has been directed to fewer than all the causes of action in the complaint has been overruled by the trial court without the court ordering the defendant to answer the complaint, under appropriate circumstances a successive demurrer directed to other causes of action may be appropriate [*see, e.g., Skrbina v.*

Fleming Companies (1996) 45 Cal. App. 4th 1353, 1363-1365, 53 Cal. Rptr. 2d 481 (when defendant's wrongful act alleged to have invaded two different primary rights, two causes of action stated even though both are pleaded in single count; second demurrer to same complaint was not procedurally improper when (a) plaintiff's first cause of action actually, though inartfully, pleaded three causes of action, (b) defendants' first demurrer, though nominally taken to whole complaint, addressed only one of those causes of action, (c) demurrer was overruled without the trial court ordering defendants to answer the complaint, and (d) defendants' second demurrer filed timely under *Cal. Rules of Ct., Rule 3.1320(j)*)].

[2] Demurrer to Answer

Any demurrer to an answer to a complaint or cross complaint in a civil action must be served [*Code Civ. Proc. §§ 422.10, 465*; *Cal. Rules of Ct., Rules 1.5(b), 3.1110, 3.1103(b), 3.1113(a), 3.1320(c)*] and filed with the court in which the action is pending within 10 days after service of the answer on the party demurring [*Code Civ. Proc. § 430.40(b)*] or within any extension of that period [*see Code Civ. Proc. §§ 1054, 1054.1*].

[3] Other Circumstances

Following denial of a motion to transfer a case from an improper to a proper court under *Code Civ. Proc. § 396b*, relating to change of venue, 30 calendar days are deemed granted to defendant, unless otherwise ordered, to move to strike, to demur, or otherwise to plead if the defendant has not previously filed a response [*Cal. Rules of Ct., Rule 3.1326*]. If a motion to transfer is granted, 30 calendar days are deemed granted from the date the receiving court mails notice of receipt of the case and its new case number [*Cal. Rules of Ct., Rule 3.1326*; *see Code Civ. Proc. § 586(a)(1)* (authorizing entry of default if defendant fails to respond to complaint within 30 days)].

With respect to special proceedings of a civil nature in which demurrers are authorized, special provisions may limit the time within which to demur to a shorter period [*see, e.g., Code Civ. Proc. §§ 1167, 1167.3, 1170* (relating to forcible or unlawful detainer and forcible entry, and limiting the time within which to demur to five days)].

For forms of stipulations postponing the hearing on a demurrer and dropping the demurrer off calender, see *§§ 206.136* and *206.137*. For forms of stipulation and order extending time within which to demur, see Ch. 26, *Answers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeMotion PracticeTime Limitations

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17-206 California Forms of Pleading and Practice--Annotated § 206.21

§ 206.21 Demurrer as Appearance by Defendant; Filing Fee

As a responsive pleading, the filing of a demurrer by a defendant constitutes an appearance in the case by that defendant [*Code Civ. Proc. § 1014*]. As such, its filing, when it is the first paper filed by the party, requires payment of the filing fee [*see Gov. Code §§ 70611, 70614*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrers

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17-206 California Forms of Pleading and Practice--Annotated § 206.22

§ 206.22 Making Concurrent Pleadings or Motions

[1] Answer

A party objecting to a complaint or cross complaint may both demur and answer at the same time (in separate pleadings, of course) [*Code Civ. Proc. § 430.30(c)*], and the demurrer is not waived by the concurrent filing of the answer [*Code Civ. Proc. § 472a*]. For discussion and forms relating to answers generally, see Ch. 26, *Answers* .

[2] Motion to Strike

If a notice of motion to strike the whole or any part of a pleading [*see Code Civ. Proc. § 435*; *see also* Ch. 375, *Motions to Strike: Pleadings* , and *§ 206.120[3][v], below*] is interposed with a demurrer, it must be noticed for hearing and heard at the same time as the demurrer [*Cal. Rules of Ct., Rules 1.5(b), 3.1110, 3.1103(b)* 3.1322].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProceduresPleading & PracticePleadingsAnswers

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§ 206.23 Amendment of Demurrer

As a pleading, a demurrer is subject to amendment under *Code Civ. Proc. §§ 472* and *473* [*see Baxter v. Boston-Pacific Oil Co. (1927) 81 Cal. App. 187, 189, 253 P. 185* (trial court properly allowed amendment to demurrer)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral Overview

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17-206 California Forms of Pleading and Practice--Annotated § 206.24

§ 206.24 Response to Demurrer

[1] Amendment of Pleading

Before the hearing on the demurrer, a party whose pleading is challenged by demurrer may elect to amend the pleading to correct the alleged defects by filing the amended pleading and serving it on the other party [*see Code Civ. Proc. § 472*]. In such a case, the demurrer hearing is usually taken off calendar.

[2] Continuance of Hearing

A party whose pleading is challenged by demurrer may also consider seeking a stipulation to continue the demurrer hearing in order to allow for filing of an amended pleading. For a form of stipulation, see *§ 206.136*. However, counsel should consult local court rules for any limitations on continuances [*see* Ch. 136, *Continuances* , and Ch. 552, *Trial Court Delay Reduction*].

[3] Opposition to Demurrer

The party opposing the demurrer may respond by filing and serving a memorandum in opposition to the demurrer at least 9 court days before the hearing. All papers opposing a motion must be served by personal delivery, facsimile transmission, express mail, or other means consistent with the provisions of *Code Civ. Proc. §§ 1010, 1011, 1012*, and *1013*, and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers are filed. The time extensions provided in *Code Civ. Proc. § 1013* do not apply to these time periods [*Code Civ. Proc. § 1005(c)*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to section 1010.6); *see also* Ch. 372, *Motions and Orders* ; Ch. 417, *Points and Authorities*]. For discussion and forms of points and authorities in opposition to a demurrer of a particular issue, see the appropriate chapter in California Points and Authorities (Matthew Bender).

As a pleading, an improperly filed demurrer may also be subject to a motion to strike [*see Code Civ. Proc. § 422.10*; *Baxter v. Boston-Pacific Oil Co. (1927) 81 Cal. App. 187, 189, 253 P. 185* (demurrer is pleading and can be amended)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProceduresPretrial MattersContinuances

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17-206 California Forms of Pleading and Practice--Annotated § 206.25

§ 206.25 Effect of Failure to Prosecute Demurrer

Failure of the person filing a demurrer to prosecute it may be construed as a waiver of the demurrer, except as otherwise provided in *Code Civ. Proc. § 430.80* [*Code Civ. Proc. § 591*]. The exceptions referred to are failure to state a cause of action and lack of subject matter jurisdiction [*Code Civ. Proc. § 430.80*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & Preservation

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17-206 California Forms of Pleading and Practice--Annotated § 206.26

§ 206.26 Tentative Rulings in Law and Motion Matters

A trial court that offers a tentative ruling procedure in civil law and motion matters must follow one of the following procedures [*Cal. Rules of Ct., Rule 3.1308(a)*]:

- The court must make its tentative ruling available by telephone and also, at the option of the court, by any other method designated by the court, by no later than 3:00 p.m. the court day before the hearing. If the court desires oral argument, the tentative ruling must so direct. The tentative ruling may also note any issues on which the court wishes the parties to provide further argument. If the court has not directed argument, oral argument must be permitted only if a party notifies all other parties and the court by 4:00 p.m. on the court day before the hearing of the party's intention to appear. A party must notify all other parties by telephone or in person. The court must accept notice by telephone and, at its discretion, may also designate alternative methods by which a party may notify the court of the party's intention to appear. The tentative ruling will become the ruling of the court if the court has not directed oral argument by its tentative ruling and notice of intent to appear has not been given.

- The court must make its tentative ruling available by telephone and also, at the option of the court, by any other method designated by the court, by a specified time before the hearing. The tentative ruling may note any issues on which the court wishes the parties to provide further argument at the hearing. This procedure must not require the parties to give notice of intent to appear, and the tentative ruling will not automatically become the ruling of the court if such notice is not given. The tentative ruling, or such other ruling as the court may render, will not become the final ruling of the court until the hearing.

Other than following one of the two tentative ruling procedures above, courts must not issue tentative rulings except by posting a calendar note containing tentative rulings on the day of the hearing or by announcing the tentative ruling at the time of oral argument [*Cal. Rules of Ct., Rule 3.1308(b)*]. A judge is not required to issue tentative rulings [*Cal. Rules of Ct., Rule 3.1308(e)*]. If a court or a branch of a court adopts a tentative ruling procedure, that procedure must be used by all judges in the court or branch who issue tentative rulings [*Cal. Rules of Ct., Rule 3.1308(d)*].

Counsel should consult local rules and practice regarding tentative rulings.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPretrial MattersGeneral Overview

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17-206 California Forms of Pleading and Practice--Annotated § 206.27

§ 206.27 Hearing on Demurrer

[1] By Court

A demurrer raises only issues of law [*see Code Civ. Proc. § 589*; *Wylie v. Gresch (1987) 191 Cal. App. 3d 412, 414, 236 Cal. Rptr. 552]* . Thus, a hearing on demurrer is necessarily determined by the court, as distinguished from a jury [*see Code Civ. Proc. § 591*; *Evid. Code § 310*].

[2] Failure of Party to Appear

If a party fails to appear at the hearing, the demurrer must be disposed of on the merits at the request of the party appearing unless, for good cause, the hearing is continued. The failure to appear in support of a special demurrer may be construed by the court as an admission that the demurrer is not meritorious and as a waiver of all its grounds [*Cal. Rules of Ct., Rules 1.5(b), 3.1110, 3.1103(b)* 3.1320(f); *see Code Civ. Proc. § 591*].

If neither party appears, the demurrer may be disposed of on its merits or dropped from the calendar (to be restored on notice or on such terms as the court may deem proper), or the hearing may be continued to such time as the court shall order [*Cal. Rules of Ct., Rules 1.5(b), 3.1110, 3.1103(b)* 3.1320(f)].

[3] Placing Off Calendar

The parties may wish to stipulate to placing the matter off calendar [*see § 206.137*]. Counsel should consult local court rules for any restrictions on stipulations [*see* Ch. 552, *Trial Court Delay Reduction*].

[4] Telephone Appearance by Counsel

Counsel may appear by telephone in many law and motion hearings at which witnesses are not called to testify (other than those arising under the Welfare and Institutions Code, the Family Code, or *Code Civ. Proc. §§ 527.6, 527.7, 527.8* (injunctive relief regarding harassment, gang violence, or violence or threats toward employees)), although the court has discretion to require personal appearance on a case by case basis [*Cal. Rules of Ct., Rule 3.670(a)-(e)*; *see also Code*

Civ. Proc. § 367.5].

Counsel choosing to appear by telephone must place the phrase "Telephone Appearance" below the title of the moving or opposing papers or at least five court days before the appearance, notify the court and all other parties of the party's intent to appear by telephone. If the notice is oral, it must be given either in person or by telephone. If the notice is in writing, it must be given by filing a "Notice of Intent to Appear by Telephone" with the court at least five court days before the hearing and by serving the notice at the same time on all other parties by personal delivery, facsimile transmission, express mail, or other means reasonably calculated to ensure delivery to the parties no later than the close of the next business day [*Cal. Rules of Ct., Rule 3.670(g)(1)*].

If a party that has given notice that it intends to appear by telephone subsequently chooses to appear in person, the party must so notify the court and all other parties that have appeared in the action, by telephone, at least two court days before the hearing [*Cal. Rules of Ct., Rule 3.670(g)(3)*].

For further discussion of the statutes, rules, and judicial standards governing telephone appearances, see *Ch. 372, Motions and Orders, § 372.21[16]*.

[5] Opportunity for Hearing and Oral Argument Required

The court may not deprive the parties of oral argument at the hearing on a demurrer. The hearing on a demurrer is a "critical pretrial matter" where there is a "real and genuine dispute" and the opportunity for oral argument must be provided. Statutes and Rules governing demurrers all contemplate the physical presence of the lawyers in the courtroom unless arrangements have been made for telephonic appearances. Thus, a local court procedure in which the court's ruling was disseminated to counsel via the Internet the day prior to the hearing, and in which there was no procedure for oral argument, was improper [*Medix Ambulance Service, Inc. v. Superior Court (2002) 97 Cal. App. 4th 109, 117, 118 Cal. Rptr. 2d 249]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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17-206 California Forms of Pleading and Practice--Annotated § 206.28

§ 206.28 Ruling on Demurrer

[1] Matters Considered by Court

In ruling on a demurrer the court is usually limited to a consideration of the pleading attacked and to matters of which it must or may take judicial notice under *Evid. Code §§ 451, 452* [*see Code Civ. Proc. §§ 430.30(a), 430.70*; *see also Gould v. Maryland Sound Industries, Inc. (1995) 31 Cal. App. 4th 1137, 1144, 37 Cal. Rptr. 2d 718* (defendants cannot state facts in their demurrers that, if true, would defeat plaintiff's complaint)].

In an appropriate case, the court may also consider judicial admissions contained in the plaintiff's complaint and apparently admissions contained in the plaintiff's opposition papers to a defendant's demurrer to negate the plaintiff's ability to state a cause of action [*see Casterson v. Superior Court (2002) 101 Cal. App. 4th 177, 181, 123 Cal. Rptr. 2d 637* (face of the complaint showed that the claim was barred by a statutory affirmative defense); *Rodas v. Spiegel (2001) 87 Cal. App. 4th 513, 517, 104 Cal. Rptr. 2d 439* (taking judicial notice of admissions in plaintiff's opposition to demurrer); *Setliff v. E.I. Du Pont De Nemours & Co. (1995) 32 Cal. App. 4th 1525, 1534, 1536-1537, 38 Cal. Rptr. 2d 763* ; *see also Knoell v. Petrovich (1999) 76 Cal. App. 4th 164, 168-169, 90 Cal. Rptr. 2d 162* (admission in plaintiff's first amended complaint)]. Moreover, the court does not error by considering other matters not objected to by the party whose pleading is attacked.

A demurrer may be sustained only if the complaint lacks any sufficient allegations to entitle the plaintiff to relief [*Chazen v. Centennial Bank (1998) 61 Cal. App. 4th 532, 542, 71 Cal. Rptr. 2d 462]* . If on consideration of all the facts stated it appears that the plaintiff is entitled to any relief, the complaint will be held good [*Salimi v. State Comp. Ins. Fund (1997) 54 Cal. App. 4th 216, 219, 62 Cal. Rptr. 2d 640]* . A complaint withstands a general demurrer, if, on consideration of all the facts stated, it appears that the plaintiff is entitled to some relief, even if the facts are inartfully stated or intermingled with irrelevant facts or the complaint demands relief to which plaintiff is not entitled under the facts alleged [*Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 123, 109 Cal. Rptr. 799, 514 P.2d 111* (trial court erred in sustaining general demurrer to cause of action that incorrectly sought traditional rather than administrative mandamus); *White v. State of California (1987) 195 Cal. App. 3d 452,471, 240 Cal. Rptr. 732* (trial court erred in sustaining general demurrer to cause of action that sought unavailable money damages rather than

compensatory educational services available under Education of the Handicapped Act); *see Schnall v. Hertz Corp. (2000) 78 Cal. App. 4th 1144, 1152, 93 Cal. Rptr. 2d 439]* .

[2] Allegations Admitted by General Demurrer

[a] Facts Admitted

A general demurrer admits the truth of all factual material allegations properly pleaded in the challenged pleading, regardless of possible difficulties of proof [*Blank v. Kirwan (1985) 39 Cal. 3d 311, 318, 216 Cal. Rptr. 718, 703 P.2d 58* ; *Martinez v. Socoma Companies, Inc. (1974) 11 Cal. 3d 394, 399, 113 Cal. Rptr. 585, 521 P.2d 841* ; *see Stop Loss Ins. Brokers, Inc. v. Brown & Toland Medical Group (2006) 143 Cal. App. 4th 1036, 1040, 49 Cal. Rptr. 3d 609* (court treats demurrer as admitting all facts properly pleaded, but not contentions, deductions, or conclusions of fact or law); *StorMedia Inc. v. Superior Court (1999) 20 Cal. 4th 449, 453 n.3, 84 Cal. Rptr. 2d 843, 976 P.2d 214* (court assumes truth of all well-pleaded allegations of complaint); *Roskind v. Morgan, Stanley Dean Witter & Co. (2000) 80 Cal. App. 4th 345, 349, 95 Cal. Rptr. 2d 258* (court assumes truth of well-pleaded allegations of complaint; ability of plaintiff to prove them not in issue); *Gervase v. Superior Court (1995) 31 Cal. App. 4th 1218, 1224, 37 Cal. Rptr. 2d 875* (demurrer admits, provisionally for purposes of testing pleading, all material facts properly pleaded, however improbable they may be)]. Thus, material facts alleged in the complaint, as well as facts that may be implied or inferred from those expressly alleged, are treated generally as true for the purpose of ruling on the demurrer [*Marshall v. Gibson, Dunn & Crutcher (1995) 37 Cal. App. 4th 1397, 1403, 44 Cal. Rptr. 2d 501* ; *see Rodas v. Spiegel (2001) 87 Cal. App. 4th 513, 517, 104 Cal. Rptr. 2d 439* (all material facts pleaded in complaint and all those that arise by reasonable implication are deemed admitted by demurring party); *Wilner v. Sunset Life Ins. Co. (2000) 78 Cal. App. 4th 952, 958, 93 Cal. Rptr. 2d 413* (same)]. A general demurrer to a complaint based on a written contract set out in full in the pleading admits not only the contents of the instrument but also any pleaded meaning to which the instrument is reasonably susceptible [*Martinez v. Socoma Companies, Inc. (1974) 11 Cal. 3d 394, 400, 113 Cal. Rptr. 585, 521 P.2d 841]* .

The court accepts as true facts appearing in exhibits attached to the complaint, as well as facts alleged in the text of the complaint. If the facts appearing in the attached exhibit contradict those expressly pleaded, those in the exhibit are given precedence [*Mead v. Sanwa Bank California (1998) 61 Cal. App. 4th 561, 567-568, 71 Cal. Rptr. 2d 625* ; *see Breneric Associates v. City of Del Mar (1998) 69 Cal. App. 4th 166, 180, 81 Cal. Rptr. 2d 324]* . There may be instances, however, when the rule giving precedence to allegations in exhibits does not apply [*see, e.g., Mead v. Sanwa Bank California (1998) 61 Cal. App. 4th 561, 568, 71 Cal. Rptr. 2d 625* (in context of *Civ. Code § 2832,* if written instruments attached to pleading were always given precedence, then a supposed principal would be foreclosed from exercising the statutory right to prove he or she was actually a surety)].

[b] Contentions and Conclusions Not Admitted

A general demurrer does not admit contentions, deductions, or conclusions of fact or law alleged in the complaint; facts impossible in law; or allegations contrary to facts of which a court may take judicial notice [*Blank v. Kirwan (1985) 39 Cal. 3d 311, 318, 216 Cal. Rptr. 718, 703 P.2d 58* ; *Martinez v. Socoma Companies, Inc. (1974) 11 Cal. 3d 394, 399, 113 Cal. Rptr. 585, 521 P.2d 841* ; *William S. Hart Union High School Dist. v. Regional Planning Com. (1991) 226 Cal. App. 3d 1612, 1616 n.2, 277 Cal.Rptr. 645]* . Thus, if the facts alleged are inconsistent with and do not support the conclusion drawn from them, the facts control, and the sufficiency of the complaint is to be determined from the facts pleaded [*Iverson, Yoakum, Papiano & Hatch v. Berwald (1999) 76 Cal. App. 4th 990, 995, 90 Cal. Rptr. 2d 665]* .

[c] Distinction Between Admitted Ultimate Facts and Unadmitted Conclusions

The distinction between conclusions that are not admitted and ultimate facts that are deemed admitted is not always clear. In difficult cases, the particularity of pleading required depends on the extent to which the defendant in fairness

needs detailed information that can be conveniently provided by the plaintiff. Less particularity is required if the defendant may be assumed to possess knowledge of the facts at least equal, if not superior, to that possessed by the plaintiff [*Burks v. Poppy Construction Co. (1962) 57 Cal. 2d 463, 473-474, 20 Cal. Rptr. 609, 370 P.2d 313]* . Thus, the "conclusion of law--ultimate fact" dichotomy is not absolute. Rather, in any case, the fair import of language used in the pleading must be received to determine whether the adversary has been fairly apprised of the factual basis of the claim against him or her [*Jones v. Oxnard School Dist. (1969) 270 Cal. App. 2d 587, 593, 75 Cal. Rptr. 836* ; *see also Semole v. Sansoucie (1972) 28 Cal. App. 3d 714, 721, 104 Cal. Rptr. 897]* .

[3] Construction of the Challenged Pleading

The court is required in the construction of a pleading, for the purpose of determining its effect, to construe its allegations liberally with a view to substantial justice between the parties [*Code Civ. Proc. § 452*; *Chazen v. Centennial Bank (1998) 61 Cal. App. 4th 532, 542, 71 Cal. Rptr. 2d 462* ; *C & H Foods Co. v. Hartford Ins. Co. (1984) 163 Cal. App. 3d 1055, 1062, 211 Cal. Rptr. 765* ; *see also Wilner v. Sunset Life Ins. Co. (2000) 78 Cal. App. 4th 952, 958, 93 Cal. Rptr. 2d 413* (complaint must be construed liberally by drawing reasonable inferences from facts pleaded)]. It must disregard any error or defect in the pleading which in the opinion of the court does not affect the substantial rights of the parties [*Code Civ. Proc. § 475*; *see also Steiner v. Rowley (1950) 35 Cal. 2d 713, 719, 221 P.2d 9]* .

The court must look through the form of the pleading to its substance in ruling on the demurrer. Labels that are attached that are erroneous or confusing must be ignored if the complaint pleads facts that would entitle the plaintiff to relief. What a paper is, rather than how it is named, fixes its character [*LiMandri v. Judkins (1997) 52 Cal. App. 4th 326, 339, 60 Cal. Rptr. 2d 539]* . If, however, there is any inconsistency between the specific allegations of a complaint on which a conclusion must be based and the conclusion alleged, the specific allegations control [*Wood v. EllingCorp. (1977) 20 Cal. 3d 353, 364 n.8, 142 Cal. Rptr. 696, 572 P.2d 755* ; *Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 422, 282 P.2d 890* ; *see also Henderson v. Superior Court (1978) 77 Cal. App. 3d 583, 590, 142 Cal. Rptr. 478]* . Moreover, allegations in a complaint must yield to contrary facts found in exhibits to the complaint [*Software Design & Application, Ltd. v. Hoefer & Arnett, Inc. (1996) 49 Cal. App. 4th 472, 484, 56 Cal. Rptr. 2d 756* ; *see Mead v. Sanwa Bank California (1998) 61 Cal. App. 4th 561, 567-568, 71 Cal. Rptr. 2d 625* (stating rule, but also noting that there are instances in which the rule giving precedence to allegations in exhibits does not apply)].

A plaintiff's complaint need not be liberally construed if (1) the plaintiff has filed a defective complaint, (2) the defect is pointed out by demurrer, (3) the demurrer is sustained with leave to amend, and (4) the plaintiff is unwilling or unable to remove the defect. In such a case, the court may resolve all ambiguities within the pleading against the plaintiff [*see Truta v. Avis Rent A Car System, Inc. (1987) 193 Cal. App. 3d 802, 816, 238 Cal. Rptr. 806]* .

[4] Inconsistency in Pleadings

A party may not avoid objections to a pleading raised by demurrer merely by amending the pleading to omit the objectionable matters. If a complaint contains allegations destructive of a cause of action, the defect is not curable in subsequently filed pleadings by simply omitting the allegations without explanation. The original defect infects the subsequent pleading so as to render it vulnerable to demurrer [*Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 836, 69 Cal. Rptr. 321, 442 P.2d 377* ; *see also Freeman v. San Diego Assn. of Realtors (1999) 77 Cal. App. 4th 171, 178 n.3, 91 Cal. Rptr. 2d 534* (plaintiff may not avoid defects of earlier pleadings by omitting facts or alleging new facts inconsistent with allegations of earlier pleadings); *Continental Ins. Co. v. Lexington Ins. Co. (1997) 55 Cal. App. 4th 637, 646, 64 Cal. Rptr. 2d 116* (even if plaintiff given leave to amend, plaintiff would not be allowed to amend complaint to state a fact directly contradictory to one previously stated)]. This rule applies to both verified and unverified complaints [*Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 836, 442 P.2d 377* ; *Zappas v. King Williams Press, Inc. (1970) 10 Cal. App. 3d 768, 775, 89 Cal. Rptr. 307* ; *see Hills Trans. Co. v. Southwest Forest Industries, Inc. (1968) 266 Cal. App. 2d 702, 710-711, 72 Cal. Rptr. 441* ; *see also Hendy v. Losse (1991) 54 Cal. 3d*

723, 742-743, 1 Cal. Rptr. 2d 543, 819 P.2d 1] .

Similarly, a party cannot retreat from allegations and supporting exhibits concerning actual documentation and supplant them in amended pleadings with conclusory allegations characterizing the documentation in general terms, and with an entirely different twist [*Software Design & Application, Ltd. v. Hoefer & Arnett, Inc. (1996) 49 Cal. App. 4th 472, 484, 56 Cal. Rptr. 2d 756* (plaintiff in initial complaint attached copies of a letter and a transfer request form both signed by plaintiff which were not at all questionable or irregular on their face, but in amended complaint failed to include description of this documentation or to append copies of it); *see also Freeman v. San Diego Assn. of Realtors (1999) 77 Cal. App. 4th 171, 178 n.3, 91 Cal. Rptr. 2d 534* (when affidavits or exhibits filed by plaintiff may be judicially noticed, court may consider those facts to assess whether complaint survives a general demurrer)]. If the facts alleged in the complaint are contradicted by the supporting exhibits, the facts in the exhibits will take precedence [*Holland Holland v. Morse Diesel Internat., Inc. (2001) 86 Cal. App. 4th 1443, 1447, 104 Cal. Rptr. 2d 239]* .

The judicial policy against sham pleading permits the appellate court to take judicial notice of the prior pleading and require the pleader to explain the inconsistency. If the party fails to do so, the appellate court is permitted to disregard inconsistent allegations and to read into the amended complaint allegations of the superseded complaint [*Owens v. Kings Supermarket (1988) 198 Cal. App. 3d 379, 384, 243 Cal. Rptr. 627* ; *see Freeman v. San Diego Assn. of Realtors (1999) 77 Cal. App. 4th 171, 178 n.3, 91 Cal. Rptr. 2d 534* (if plaintiff in amended complaint pleads facts inconsistent with prior complaint without explaining inconsistency, court will read into amended complaint facts alleged in superseded complaint)].

On the other hand, the fact that prior pleadings may have contained true, but irrelevant, matters does not render the proposed amended complaint a sham. The sham pleading rule should not be applied when the plaintiff seeks to change the legal theory of recovery and the legal conclusions he or she seeks to draw from the underlying factual events, and also seeks to omit factual allegations that are irrelevant and immaterial to the new legal theories asserted [*Berman v. Bromberg (1997) 56 Cal. App. 4th 936, 948-949, 65 Cal. Rptr. 2d 777]* . Under such circumstances, there is no need for the plaintiff to explain the reasons for the amended pleading because there are no inconsistencies in the underlying material or relevant factual allegations [*Berman v. Bromberg (1997) 56 Cal. App. 4th 936, 949, 65 Cal. Rptr. 2d 777]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrers

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§ 206.29 Order Overruling Demurrer

If a demurrer to a complaint or cross complaint is overruled and no answer has been filed, the court, except as otherwise provided by rule adopted by the Judicial Council, is required to allow the filing of an answer on such terms as may be just [*Code Civ. Proc. § 472a*]. The Judicial Council has provided in this case that, unless otherwise ordered or provided by law, leave to answer within 10 days shall be deemed granted, except for actions in forcible entry, forcible detainer, or unlawful detainer, in which case 5 calendar days shall be deemed granted [*Cal. Rules of Ct., Rule 3.1320(g)*]. An example of a time period otherwise provided by law is *Code Civ. Proc. § 1167.3*, relating to proceedings in unlawful or forcible detainer or forcible entry (not to exceed five days). The time given to answer runs from service of the notice of the order [for a form of order, *see § 206.140, below*], unless the notice is waived in open court and the waiver entered in the minutes [*Code Civ. Proc. § 472b*].

If a demurrer to an answer is overruled, the action must proceed as if no demurrer had been interposed, and any new matter alleged in the answer must be considered as denied [*see Code Civ. Proc. §§ 431.20(b), 472a(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsAnswers

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§ 206.30 Order Sustaining Demurrer

[1] Specification of Ground

When a demurrer is sustained, the court is required to include in its decision or order a statement of the specific ground or grounds on which the decision or order is based. The specification may be by reference to appropriate pages and paragraphs of the demurrer. The party against whom the demurrer has been sustained may, however, waive these requirements [*Code Civ. Proc. § 472d*]. For example, he or she waives the requirement by failing to notify the court of its failure to specify the grounds [*Krawitz v. Rusch (1989) 209 Cal. App. 3d 957, 962, 257 Cal. Rptr. 610]* .

A court satisfies the requirement of *Code Civ. Proc. § 472d* by referencing the appropriate paragraphs of the demurrer or supporting points and authorities, but an order made "per points and authorities in moving papers" does not suffice. However, if the sole ground of the demurrer is the complaint's failure to state facts sufficient to constitute a cause of action, an order sustaining a demurrer without leave to amend satisfies the requirement of Section 472d if the court rules that it appears from the points and authorities that the complaint does not state facts sufficient to constitute a cause of action against defendant. Section 472d does not mandate a detailed statement explaining the court's reasons for sustaining the demurrer on the ground specified [*Mautner v. Peralta (1989) 215 Cal. App. 3d 796, 801-802, 263 Cal. Rptr. 535]* .

Specification by reference to appropriate pages and paragraphs of the demurrer, as opposed to specifying the ground, would normally be done if the demurrer to the pleading was on multiple grounds.

[2] With Leave to Amend

When a demurrer is sustained, the court may grant leave to amend the challenged pleading [*Code Civ. Proc. § 472a(c)*], but is not required by the cited statute to do so; hence, it may sustain a demurrer without leave to amend [*Baldwin v. Daniels (1955) 132 Cal. App. 2d 560, 563, 282 P.2d 522]* . Liberality in permitting amendment, however, is the rule when a fair opportunity to correct any defect has not been given [*Angie M. v. Superior Court (1995) 37 Cal. App. 4th 1217, 1227, 44 Cal. Rptr. 2d 197]* .

Unless it is clear that the pleading is not susceptible of amendment to correct the defect, it is an abuse of discretion to sustain a demurrer without leave to amend [*see, e.g., Richelle L. v. Roman Catholic Archbishop of San Francisco (2003) 106 Cal. App. 4th 257, 282, 130 Cal. Rptr. 2d 601* ; *Cundiff v. Bell Atlantic Corporation (2002) 101 Cal. App. 4th 1395, 1405, 125 Cal. Rptr. 2d 445* ; *Schwarz v. Regents of University of California (1990) 226 Cal. App. 3d 149, 153, 276 Cal. Rptr. 470* ; *Murray v. Wright (1958) 166 Cal. App. 2d 589, 591, 333 P.2d 111* ; *Kadota Fig Assn. v. Case-Swayne Co. (1946) 73 Cal. App. 2d 796, 804, 167 P.2d 518* ; *see also Angie M. v. Superior Court (1995) 37 Cal. App. 4th 1217, 1227, 44 Cal. Rptr. 2d 197* (denial of leave to amend abuse of discretion unless complaint shows on face that it is incapable of amendment)]. Conversely stated, if the complaint, liberally construed, can state a cause of action, or if it is reasonably possible that plaintiffs can cure the complaint by amendment, the trial court should not sustain the demurrer without leave to amend [*Citizens for Open Access, Etc. Tide, Inc. v. Seadrift Assn. (1998) 60 Cal. App. 4th 1053, 1063, 71 Cal. Rptr. 2d 77* ; *accord Schnall v. Hertz Corp. (2000) 78 Cal. App. 4th 1144, 1151, 93 Cal. Rptr. 2d 439]* .

Although it is an abuse of discretion to sustain a demurrer without leave to amend when there is a reasonable possibility that the plaintiff can amend its complaint to cure the defect, the burden is on the plaintiff to show how the complaint can be amended and how the amendment will change the legal effect of its pleading *Holcomb v. Wells Fargo Bank, N.A. (2007) 155 Cal. App. 4th 490, 495, 66 Cal. Rptr. 3d 142* ; [*McKelvey v. Boeing North American, Inc. (1999) 74 Cal. App. 4th 151, 163, 86 Cal. Rptr. 2d 645]* . The assertion of an abstract right to amend does not satisfy this burden [*Rakestraw v. California Physicians' Service (2000) 81 Cal. App. 4th 39, 43, 96 Cal. Rptr. 2d 354* (for further discussion of plaintiff's burden, *see § 206.36[3][d], below*)].

If a demurrer is sustained without leave to amend, the question as to whether the court abused its discretion in making the order is open on appeal even though no request to amend the pleading was made [*Code Civ. Proc. § 472c(a)*]. Thus, a trial court may be required to grant leave to amend when it knows of potentially viable claims at the time it sustains a demurrer, even though plaintiff does not request leave to amend [*Kolani v. Gluska (1998) 64 Cal. App. 4th 402, 405, 411-412, 75 Cal. Rptr. 2d 257* (absent statute of limitations concern or prejudice to opposing party such as delay in trial, loss of critical evidence, or added cost of preparation, trial court should have granted leave to amend, rather than sustaining demurrer without leave to amend, when it knew of potentially viable claim at time of sustaining of demurrer, even though plaintiff did not request leave to amend); *cf. Rakestraw v. California Physicians' Service (2000) 81 Cal. App. 4th 39, 44, 96 Cal. Rptr. 2d 354* (burden of showing reasonable possibility exists that amendment can cure defects remains with plaintiff; neither the trial court nor the appellate court will rewrite complaint; when appellant offers no allegations to support possibility of amendment and no legal authority showing viability of new causes of action, there is no basis for finding trial court abused its discretion when it sustained demurrer without leave to amend)].

For further discussion of when there is an abuse of discretion when a demurrer is sustained without leave to amend, see *§ 206.36[3][d], below*.

If a demurrer to any pleading is sustained with leave to amend, the court is required to fix the time within which the amendment or amended pleading must be filed [*Code Civ. Proc. § 472a(c)*]. (Simple amendments may, however, be permitted by interlineation or alteration on the face of the pleading [*see Cal. Rules of Ct., Rules 3.1110, 3.1324*].) Should the court, in sustaining the demurrer, either fail to indicate whether the demurrer is sustained with or without leave to amend or, if leave to amend is granted, fail to specify the time within which the amendment or amended pleading must be filed, leave to amend within 10 days, unless otherwise provided by law, is deemed granted, except for actions in forcible entry, forcible detainer, or unlawful detainer, in which case 5 calendar days shall be deemed granted [*Cal. Rules of Ct., Rule 3.1320(g)*]. In a proceeding in unlawful or forcible detainer or forcible entry, the time to file an amended answer may not exceed five days [*Code Civ. Proc. § 1167.3*]. The time for filing the amendment or amended pleading runs from the service of the notice [*see § 206.140, below* (form of notice)] of the order, unless the notice is waived in open court and the waiver entered in the minutes [*Code Civ. Proc. § 472b*].

If a demurrer is sustained with leave to amend, the party whose pleading was challenged has two options:

- Stand on the pleading by refusing to amend, suffer a dismissal or default, as the case may be, to be entered, and appeal from the subsequent judgment [*see, e.g., Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 420, 282 P.2d 890]* (but, if the judgment is affirmed, the case is adjudicated); or

- Accept the court's determination that the pleading was defective and amend it. In this case, if the court's order sustaining a demurrer to a cause of action in a complaint or cross-complaint, or to an affirmative defense in an answer, does not sustain the demurrer as to the entire pleading, the order remains open on appeal after the filing of an amended pleading [*Code Civ. Proc. § 472c(b)(1), (2)*]. "Open on appeal" in this context means that the party aggrieved by the order may claim the order as error in an appeal from the final judgment in the action [*Code Civ. Proc. § 472c(c)*].

When leave to amend is granted, a plaintiff is not precluded from adding a new cause of action that supports recovery on the original obligation sued on under a different legal theory [*Datig v. Dove Books, Inc. (1999) 73 Cal. App. 4th 964, 983 n.19, 87 Cal. Rptr. 2d 719* (party may plead cause of action for recision of contract after having pleaded cause of action for breach of contract; under election of remedies doctrine, it is acceptance of an actual benefit from one theory that renders continued pursuit of alternative unfair and constitutes election); *see also Patrick v. Alacer Corp. (2008) 167 Cal. App. 4th 995, 84 Cal. Rptr. 3d 642* (party permitted to add declaratory relief cause of action to establish standing after demurrer sustained with leave to amend because addition of that cause of action directly responded to the court's reason for sustaining the earlier demurrer)].

[3] Without Leave to Amend

If a demurrer to a pleading is sustained without leave to amend, the aggreived party may do either of the following:

- Seek reconsideration of the order sustaining the demurrer [for discussion, *see § 206.31*]; or

- Seek appellate review of the judgment of dismissal or default judgment resulting from the order sustaining the demurrer [for discussion, *see § 206.36*].

[4] Statement of Decision

Since factual questions are not involved in ruling on a demurrer, the trial court is not required at the request of a party to prepare a statement of decision under *Code Civ. Proc. § 632* [*see Hayward v. Henderson (1979) 88 Cal. App. 3d 64, 70-71, 151 Cal. Rptr. 505* (decided prior to 1981 amendment of *Code Civ. Proc. § 632* substituting statement of decision for findings of fact and conclusions of law)].

[5] Notice of Court's Ruling

If the demurrer is submitted and taken under advisement, the clerk must forthwith notify the parties of the ruling when it is made. The notification must specifically identify the matter ruled on and may be given by mailing the parties a copy of the ruling. In a case having multiple parties, the notification (or any notice of the ruling [*see § 206.140, below* (form)] served by a party) must name the moving party and the party against whom relief was requested and specifically identify the particular demurrer ruled on. The failure of the clerk to give such notification does not extend the time provided by law for performing any act, except as provided in *Cal. Rules of Ct., Rule 8.104(a)* or *8.751(a)* (relating to notice of appeal from superior court and from municipal courts, respectively, in civil cases) [*Cal. Rules of Ct., Rules 3.1110, 3.1109*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 206.31 Motion for Reconsideration

A demurrer is an "application for an order" for purposes of *Code Civ. Proc. § 1008(a)* (reconsideration of application for order), and a motion to reconsider may be made when a demurrer is sustained without leave to amend. Thus, a party against whom a demurrer has been sustained may file an application to reconsider the matter supported by a proposed pleading containing new allegations not previously included by the pleader [*Rains v. Superior Court (1984) 150 Cal. App. 3d 933, 943, 198 Cal. Rptr. 249]* .

Prior to the 1992 amendment of *Code Civ. Proc. § 1008*, cases had held that the new allegations in the proposed pleading may state facts previously known to the moving party [*Rains v. Superior Court (1984) 150 Cal. App. 3d 933, 943, 198 Cal. Rptr. 249* ; *see Careau v. Security Pacific Business Credit, Inc. (1990) 222 Cal. App. 3d 1371, 1386 n.9, 272 Cal. Rptr. 387* (*Code Civ. Proc. § 1008(a)* does not require that support for motion for reconsideration be based on "new facts"; only necessary that motion be based an "alleged different state of facts" than the original motion); *see also Mogilefsky v. Superior Court (1993) 20 Cal. App. 4th 1409, 1418, 26 Cal. Rptr. 2d 116* (plaintiff entitled to submit amended complaint by way of motion for reconsideration; if amended complaint states any cause of action, trial court obligated to vacate order sustaining demurrers without leave to amend and make different order granting leave to file amended complaint)]. However, even though a motion to reconsider may be based on either new or different facts, the moving party must provide the trial court with a satisfactory explanation as to why he or she failed to produce the evidence at any earlier time. Failure to do so may expose the party to sanctions [*see Code Civ. Proc. § 1008(a), (d)*; *Lucas v. Santa Maria Public Airport Dist. (1995) 39 Cal. App. 4th 1017, 1027-1028, 46 Cal. Rptr. 2d 177* (trial court held not to have abused discretion in denying motion when moving party failed to bring matter to trial court's attention earlier and proposed third amended complaint stated no cause of action)].

For a form of motion for reconsideration, see *§ 206.141, below*. For further discussion and forms relating to motions for reconsideration generally, see Ch. 374, *Motions to Reconsider and Renewed Motions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 206.32 Obtaining Judgment of Dismissal After Order Sustaining Demurrer Without Leave to Amend

Unless *Code Civ. Proc. § 597* (relating to separate trial of affirmative defenses) applies, the court may dismiss the complaint as to a defendant after a demurrer to that complaint is sustained without leave to amend and either party moves for dismissal [*see Code Civ. Proc. § 581(f)(1)*].

In the absence of a request for reconsideration (*see discussion under § 206.31, above*) a formal motion to dismiss the action is not necessary; an informal request by either party is sufficient [*Berri v. Superior Court (1955) 43 Cal. 2d 856, 860, 279 P.2d 8* ; *see also Rudolph v. Fulton (1960) 178 Cal. App. 2d 339, 343, 2 Cal. Rptr. 807* ; *cf. discussion under § 206.33[1], below*].

The entry of judgment follows the order of dismissal as a matter of course. Specifically, a dismissal ordered by the court must be in the form of a written order signed by the court and filed in the action, and, when so filed, the order constitutes the judgment and is effective for all purposes. The clerk must note the judgment in the register of actions in the case [*Code Civ. Proc. § 581d*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 206.33 Obtaining Judgment of Dismissal After Opposing Party's Failure to Amend Pleading

[1] On Motion by Demurring Party

Unless *Code Civ. Proc. § 597* (relating to separate trial of affirmative defenses) applies, *Code Civ. Proc. § 581* provides that the court may dismiss the complaint as to that defendant if, after a demurrer to the complaint is sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court and either party moves for dismissal [*Code Civ. Proc. § 581(f)(2)*]. Under this section, either plaintiff or defendant may move for dismissal. Defendant cannot, therefore, forestall an appeal by failing to move for dismissal [*see California Ammonia Co. v. Macco Corp. (1969) 270 Cal. App. 2d 429, 433, 75 Cal. Rptr. 753]* .

A motion to dismiss the entire action and for entry of judgment after expiration of the time to amend following the sustaining of a demurrer may be made ex parte [*Cal. Rules of Ct., Rule 3.1320(h)*]. For a combined form of ex parte motion and order granting the motion, see *§ 206.143, below*.

If an untimely amendment is filed following the court's order sustaining the demurrer with leave to amend, the defendant should bring a motion to strike the amendment before moving to dismiss the action pursuant to *Code Civ. Proc. § 581(f)(2)* [*Gitmed v. General Motors Corp. (1994) 26 Cal. App. 4th 824, 827-828, 31 Cal. Rptr. 2d 625]* . The motion to strike the untimely amended pleading must be obtained by noticed motion pursuant to *Code Civ. Proc. § 1010* [*Cal. Rules of Ct., Rule 3.1320(h)*; *see Gitmed v. General Motors Corp. (1994) 26 Cal. App. 4th 824, 828-829, 31 Cal. Rptr. 2d 625* (party should give notice of motion to strike and motion to dismiss)]. For a form of notice of motion to strike an amended complaint as untimely and to dismiss the action, see *§ 206.142, below*.

[2] On Court's Own Motion

Code Civ. Proc. § 581(f)(2) does not provide the exclusive method for securing dismissal of an action on plaintiff's failure to serve and file an amended complaint after a demurrer to the complaint has been sustained with leave to amend. Rather, the court has inherent power to enforce its order sustaining a demurrer with leave to amend by dismissing the action on its own motion without notice to plaintiff when plaintiff fails to comply with the terms on which the court granted permission to amend [*Sousa v. Capital Co. (1963) 220 Cal. App. 2d 744, 755, 34 Cal. Rptr.*

71 (involving a predecessor statute)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 206.34 Voluntary Dismissal After Demurrer Sustained

A plaintiff may obtain voluntary dismissal without prejudice before a demurrer is heard and submitted for decision, even if the trial court has already made a tentative ruling sustaining the demurrer [*Datner v. Mann Theatres Corp. (1983) 145 Cal. App. 3d 768, 770-771, 193 Cal. Rptr. 676]* . It may even be possible to obtain a voluntary dismissal without prejudice after the demurrer has been submitted for decision but before the final decision is made [*see Wells v. Marina City Properties, Inc. (1981) 29 Cal. 3d 781, 789-790, 176 Cal. Rptr. 104, 632 P.2d 217* (dictum); *Kyle v. Carmon (1999) 71 Cal. App. 4th 901, 84 Cal. Rptr. 2d 303, 309-310* (applying *Wells* dictum to allow voluntary dismissal witouth prejudice after hearing but before decision on *Code Civ. Proc. § 425.16* motion)].

When a demurrer is sustained with leave to amend, a plaintiff may still obtain a voluntary dismissal without prejudice before the time to amend expires [*Christensen v. Dewor Developments (1983) 33 Cal. 3d 778, 785, 191 Cal. Rptr. 8, 661 P.2d 1088* ; *see also Parsons v. Umansky (1994) 28 Cal. App. 4th 867, 870-871, 34 Cal. Rptr. 2d 144]* .

Once a general demurrer is sustained, either without leave to amend or with leave to amend and plaintiff thereafter fails to amend within the time permitted, there has been a "trial" for the purposes of *Code Civ. Proc. § 581*. Thus, the plaintiff can no longer voluntarily dismiss the action without prejudice under *Code Civ. Proc. § 581(b)(1), (c),* even if the trial court has yet to enter a judgment of dismissal on the sustained demurrer [*see Wells v. Marina City Properties, Inc. (1981) 29 Cal. 3d 781, 789, 176 Cal. Rptr. 104, 632 P.2d 217* (decided under former *Code Civ. Proc. § 581(1)*); *Berri v. Superior Court (1955) 43 Cal. 2d 856, 859, 279 P.2d 8* ; *Tokerud v. CapitalBank Sacramento (1995) 38 Cal. App. 4th 775, 781, 45 Cal. Rptr. 2d 345]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedureDismissalsVoluntary

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§ 206.35 Obtaining Default Judgment Following Order on Demurrer

[1] Demurrer to Complaint Sustained With Leave to Amend

If defendant's demurrer to the complaint was sustained with leave to amend, an amended complaint was served and filed, and the defendant failed to answer it as amended or to demur to it, or to file a notice of motion to strike of the character specified in *Code Civ. Proc. § 585* within 30 days after it was served on defendant or within the time allowed by the court, a default judgment may be entered against the defendant [*see Code Civ. Proc. § 586(a)(1)*].

[2] Demurrer to Complaint Overruled

If defendant, without answering, demurred to the complaint with or without filing a notice of motion to strike of the character specified in *Code Civ. Proc. § 585*, the demurrer was overruled and, if a notice of motion to strike was filed, the motion was denied, and defendant failed to answer the complaint within the time allowed by the court, a default judgment may be entered against the defendant [*Code Civ. Proc. § 586(a)(2)*].

[3] Demurrer to Answer Sustained With Leave to Amend

If plaintiff's demurrer to the answer was sustained and defendant failed to amend the answer within the time allowed by the court, a default judgment may be entered against the defendant [*Code Civ. Proc. § 586(a)(5)*].

[4] In Unlawful Detainer, Forcible Detainer, or Forcible Entry Proceedings

A special provision governs proceedings in unlawful or forcible detainer and forcible entry and limits the time to answer the complaint to five days unless the court orders otherwise for good cause shown. This provision applies after a demurrer to a complaint is overruled or a demurrer to an answer is sustained [*Code Civ. Proc. § 1167.3* (referring to time to answer under *Code Civ. Proc. § 586(a)(2)* and *(5)*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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Volume 17: Defaults and Default Judgements thru Duress, Menace, Fraud, Undue Influence, and Mistake-Chs. 205-219
Chapter 206 DEMURRERS AND MOTIONS FOR JUDGMENT ON THE PLEADINGS
PART II. LEGAL BACKGROUND
A. Demurrers

17-206 California Forms of Pleading and Practice--Annotated § 206.35A

§ 206.35A Subsequent Demurrers

When a prior demurrer was sustained as to some causes of action but overruled as to others, a defendant may not demur again on the same grounds to those portions of an amended pleading as to which the prior demurrer was overruled [*Bennett v. Suncloud (1997) 56 Cal. App. 4th 91, 96-97, 65 Cal. Rptr. 2d 80]* . However, a party is within its rights to successively demurrer to a cause of action in an amended pleading notwithstanding a prior unsuccessful demurrer to that same cause of action [*Pavicich v. Santucci (2000) 85 Cal. App. 4th 382, 389, 102 Cal. Rptr. 2d 125]* . The interests of all parties are advanced by avoiding a trial and reversal for a defect in pleadings. The objecting party is acting properly in raising the point at the first opportunity, by general demurrer. If the demurrer is erroneously overruled, the objecting party is acting properly in raising the point again, at the next opportunity. If the trial judge made the former ruling himself or herself, he or she is not bound by it. If the demurrer was overruled by a different judge, the trial judge is equally free to reexamine the sufficiency of the pleading [*Pacific States Enterprises, Inc. v. City of Coachella (1993) 13 Cal. App. 4th 1414, 1420, n.3, 17 Cal. Rptr. 2d 68]* .

When there was only one cause of action and the prior demurrers to that cause of action were sustained, a defendant may demur again on the grounds that the prior demurrer was sustained [*Berg & Berg Enterprises, LLC v. Boyle (2009) 178 Cal. App. 4th 1020, 1035-1036, 100 Cal. Rptr. 3d 875* (because defendants demurred to single cause of action of new third amended complaint as to which no prior demurrer had been overruled, restrictive provisions of *Code Civ. Proc. § 1008* were inapplicable)]. When a plaintiff files an amended pleading in response to an order sustaining a prior demurrer to a cause of action with leave to amend, the amended cause of action is treated as a new pleading and a defendant is free to respond to it by demurrer on any ground [*Bennett v. Suncloud (1997) 56 Cal. App. 4th 91, 96-97, 65 Cal. Rptr. 2d 80* ; *Clausing v. San Francisco Unified School Dist. (1990) 221 Cal. App. 3d 1224, 1232, 271 Cal. Rptr. 72]* .

The role of an appellate court entails review of the trial court's ruling, not its rationale. Even if the trial court is constrained by its prior rulings in its consideration of the grounds raised on demurrers to an amended pleading, on review of the judgment, the appellate court is not so constrained and is free to render an opinion based on the correct rule of law [*Berg & Berg Enterprises, LLC v. Boyle (2009) 178 Cal. App. 4th 1020, 1036, 100 Cal. Rptr. 3d 875* ; *Bennett v. Suncloud (1997) 56 Cal. App. 4th 91, 97, 65 Cal. Rptr. 2d 80]* .

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§ 206.36 Appellate Review

[1] Of Order

[a] Order Not Appealable

Neither an order overruling a demurrer nor one sustaining a demurrer, whether with or without leave to amend, is appealable [*see San Diego Gas & Electric Co. v. Superior Court (1996) 13 Cal. 4th 893, 912-913, 55 Cal. Rptr. 2d 724, 920 P.2d 669* (overruling demurrer); *Youngblood v. Board of Supervisors (1978) 22 Cal. 3d 644, 651, 150 Cal. Rptr. 242, 586 P.2d 556* (sustaining demurrer without leave to amend); *Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 119, 81 Cal. Rptr. 592, 460 P.2d 464* (overruling demurrer); *see also People ex rel. Lungren v. Superior Court (1996) 14 Cal. 4th 294, 299-300, 58 Cal. Rptr. 2d 855, 926 P.2d 1042* (review of demurrer sustained with leave to amend by writ of mandate)]. But, the ruling may be reviewed on appeal from a subsequent judgment or order of dismissal [*Code Civ. Proc. § 472c*; *Timberidge Enterprises, Inc. v. City of Santa Rosa (1978) 86 Cal. App. 3d 873, 878, 150 Cal. Rptr. 606* ; *see McKelvey v. Boeing North American, Inc. (1999) 74 Cal. App. 4th 151, 157 n.8, 86 Cal. Rptr. 2d 645]* . For further discussion and forms, see Ch. 374, *Motions to Reconsider and Renewed Motions* .

An exception to this rule may apply in class actions. An order sustaining a demurrer without leave to amend that prevents any further proceedings as a class action has been held to be in legal effect a final judgment from which an appeal lies because the order has the "death knell" effect of making further proceeding in the action impractical [*Kennedy v. Baxter Healthcare Corp. (1995) 43 Cal. App. 4th 799, 807, 50 Cal. Rptr. 2d 736* ; for further discussion, *see* Ch 120, *Class Actions*].

[b] Construction of Order as Judgment

Although an order sustaining or overruling a demurrer is not appealable (*see discussion under § 206.36[1][a], above*), an appellate court may elect to treat an appeal from an order sustaining a demurrer as an appeal from the judgment of dismissal subsequently entered and to review the order on that appeal. In doing so the court may deem the order sustaining the demurrer to contain a judgment of dismissal [*see Los Altos Golf and Country Club v. County of Santa Clara (2008) 165 Cal. App. 4th 198, 202, 80 Cal. Rptr. 3d 340* ; *Beazell v. Schrader (1963) 59 Cal. 2d 577, 579-580,*

30 Cal. Rptr. 534, 381 P.2d 390 ; *Conley v. Roman Catholic Archbishop (2000) 85 Cal. App. 4th 1126, 1130, 102 Cal. Rptr. 679* ; *Thaler v. Household Finance Corp. (2000) 80 Cal. App. 4th 1093, 1098, 95 Cal. Rptr. 2d 779* ; *Lumpkin v. Jordon (1996) 49 Cal. App. 4th 1223, 1226 n.1, 57 Cal. Rptr. 2d 303* ; *see also Cal. Rules of Ct., Rule 8.104(d)*]. An appellate court can also amend an order sustaining a demurrer to make it an appealable judgment of dismissal [*see Hardman v. Feinstein (1987) 195 Cal. App. 3d 157, 159 n.1, 240 Cal. Rptr. 483* (construing notice of appeal as applying to amended judgment)].

Some courts have been reluctant, however, to treat a nonappealable order as appealable or to amend a nonappealable order to make it an appealable judgment of dismissal [*see, e.g., Jordan v. Malone (1992) 5 Cal. App. 4th 18, 22-23, 6 Cal. Rptr. 2d 454 (Fifth District panel dismissed purported appeal from tentative written decision)* ; *Munoz v. Florentine Gardens (1991) 235 Cal. App. 3d 1730, 1731, 1 Cal. Rptr. 2d 609 (Second District panel dismissed appeal from minute order granting motion to dismiss for failure to prosecute)* ; *Modica v. Merin (1991) 234 Cal. App. 3d 1072, 1074, 285 Cal. Rptr. 673* (Third District panel dismissed appeal from order granting summary judgment after plaintiff failed to take opportunity to have judgment entered); *Cohen v. Equitable Life Assurance Society (1987) 196 Cal. App. 3d 669, 671, 242 Cal. Rptr. 84* (Second District panel as "saving" unperfected appeal from order sustaining demurrer, but serving notice that it would not "bail out" careless attorneys in the future)]. The ultimate responsibility for perfecting the appeal rests with the appealing party [*Jordan v. Malone (1992) 5 Cal. App. 4th 18, 21, 6 Cal. Rptr. 2d 454]* .

Despite some courts' reluctance to save appeals, other courts may still interpret a notice of appeal from an unappealable order sustaining a demurrer as applying to the judgment rather than the nonappealable order [*see Thaler v. Household Finance Corp. (2000) 80 Cal. App. 4th 1093, 1098, 95 Cal. Rptr. 2d 779 (First Dist., Div. Five)* ; *LiMandri v. Judkins (1997) 52 Cal. App. 4th 326, 333 n.1, 60 Cal. Rptr. 2d 539 (Fourth Dist., Div. One)]* .

[c] Review by Extraordinary Writ

[i] Order Sustaining Demurrer

An erroneous order sustaining a demurrer may, in an appropriate case, be reviewed in a higher court by mandate. For example, if a demurrer is granted as to a substantial part of a case, but does not dispose of the entire case, review by mandate may be appropriate [*Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 806-807, 94 Cal. Rptr. 796, 484 P.2d 964* ; *see North American Chemical Co. v. Superior Court (1997) 59 Cal. App. 4th 764, 773, 69 Cal. Rptr. 2d 466* (when court has sustained demurrer to only one of several causes of action, its order is not appealable and review by mandate is appropriate way to control abuse of judicial discretion)].

For discussion and forms relating to review by writ of mandate, see Ch. 358, *Mandate and Prohibition* .

[ii] Order Overruling Demurrer

An erroneous order overruling a demurrer ordinarily would not be considered on extraordinary writ, but may be in an appropriate case [*see Babb v. Superior Court (1971) 3 Cal. 3d 841, 851-852, 92 Cal. Rptr. 179, 479 P.2d 379* ; *City of Huntington Park v. Superior Court (1995) 34 Cal. App. 4th 1293, 1297, 41 Cal. Rptr. 2d 68]* . Appropriate cases include the following:

- When the issue is tendered on undisputed facts and is purely legal in nature, it calls for the court's independent appellate review, and if the issue is of significant legal import, relief by extraordinary writ is appropriate [*see City of Huntington Park v. Superior Court (1995) 34 Cal. App. 4th 1293, 1297, 41 Cal. Rptr. 2d 68* (mandate)].

- When a significant issue of law is raised and when resolution of the issue in petitioner's favor would

result in final disposition as to that party, relief by extraordinary writ is appropriate [*Curry v. Superior Court (1993) 20 Cal. App. 4th 180, 183, 24 Cal. Rptr. 2d 495* (mandate)].

- When the issue raised is considered jurisdictional, relief by extraordinary writ is appropriate [*County of Santa Barbara v. Superior Court (1971) 15 Cal. App. 3d 751, 754-755, 93 Cal. Rptr. 406* (prohibition)].

- When, under the facts, the court's discretion can only be exercised in one way and the issue is of grave nature or significant legal impact, relief by extraordinary writ is appropriate [*Babb v. Superior Court (1971) 3 Cal. 3d 841, 851-852, 92 Cal. Rptr. 179, 479 P.2d 379* (court treated petition for writ of prohibition as one for mandate)].

For discussion and forms relating to review by writ of mandate, see Ch. 358, *Mandate and Prohibition* .

[2] Of Subsequent Judgment

Judgments are, with specified exceptions, made appealable by *Code Civ. Proc. §§ 904.1(a)(1)* (judgments in unlimited civil cases) and 904.2(a) (judgments in limited civil cases). Hence, judgments of dismissal entered after a demurrer to the complaint has been sustained, either without leave to amend or with leave to amend and plaintiff has failed to amend, are appealable [*see, e.g.,* *Irwin v. City of Manhattan Beach (1966) 65 Cal. 2d 13, 16, 51 Cal. Rptr. 881, 415 P.2d 769* (demurrer sustained without leave to amend); *Battle v. Kessler (1983) 149 Cal. App. 3d 853, 855, 197 Cal.Rptr. 170* (appeal from nonappealable order sustaining demurrer treated as having been taken from appealable order of dismissal)].

Either party may appeal a several judgment [*see Code Civ. Proc. § 579*] resolving all issues between a plaintiff and, for example, one of two or more defendants, although the action remains pending in the trial court between the plaintiff and the other defendant or defendants. Thus, a judgment dismissing the complaint as to some but not all defendants after their demurrer to a complaint that has been sustained without leave to amend is appealable [*Tinsley v. Palo Alto Unified School Dist. (1979) 91 Cal. App. 3d 871, 880, 154 Cal. Rptr. 591]* . Moreover, although an order sustaining a demurrer without leave to amend is not an appealable order, the appellate court may amend a judgment to include a dismissal of the action as to a defendant whose demurrer has been sustained without leave to amend [*Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal. App. 3d 590, 599 n.1, 262 Cal. Rptr. 842]* .

[3] Standard of Review

[a] In General

A demurrer tests the legal sufficiency of a complaint, and the granting of leave to amend involves the trial court's discretion. Thus, an appellate court employs two separate standards of review [*McClain v. Octagon Plaza, LLC (2008) 159 Cal. App. 4th 784, 791* , 71 Cal. Rtpr. 3d 885; *Filet Menu, Inc. v Cheng (1999) 71 Cal. App. 4th 1276, 1279-1280, 84 Cal. Rptr. 2d 384* ; *Hernandez v. City of Pomona (1996) 49 Cal. App. 4th 1492, 1497-1498, 57 Cal. Rptr. 2d 406* ; *see* *G. L. Mezzetta, Inc. v. City of American Canyon (2000) 78 Cal. App. 4th 1087, 1091-1092, 93 Cal. Rptr. 2d 292* ; *Lazar v. Hertz Corp. (1999) 69 Cal. App. 4th 1494, 1501, 82 Cal. Rptr. 2d 368*]:

- First, there is a de novo review of the complaint to determine if it contains facts sufficient to state a cause of action, or in other words, to determine whether or not the trial court erroneously sustained the demurrer as a matter of law.

- Second, where the complaint is sustained without leave to amend, reviewing courts determine whether the trial court abused its discretion in doing so.

Absent a clear error or abuse of discretion by the trial court, the judgment or order of dismissal following the sustaining of a demurrer will be affirmed [*Pena v. Sita World Travel, Inc. (1978) 88 Cal. App. 3d 642, 644, 152 Cal. Rptr. 17* ; *Banerian v. O'Malley (1974) 42 Cal. App. 3d 604, 610-611, 116 Cal. Rptr. 919* ; *see Farmers Ins. Exchange v. Zerin (1997) 53 Cal. App. 4th 445, 459, 61 Cal. Rptr. 2d 707* (judgment must be affirmed if supported on any ground stated in demurrers, whether or not relied on by trial court); *Stanton Road Associates v. Pacific Employers Ins. Co. (1995) 36 Cal. App. 4th 333, 341, 43 Cal. Rptr. 2d 1* (unless failure to grant leave to amend is an abuse of discretion, appellate court must affirm the trial court's judgment if it is correct on any theory); *see also Trinkle v. California State Lottery (1999) 71 Cal. App. 4th 1198, 1201, 84 Cal. Rptr. 2d 496* (although appellate court exercises independent judgment in reviewing demurrer to determine if complaint's factual allegations state cause of action, appellate court must affirm if trial court's decision correct on any theory); *Hernandez v. City of Pomona (1996) 49 Cal. App. 4th 1492, 1497, 57 Cal. Rptr. 2d 406* (reversible error exists only if facts were alleged showing entitlement to relief under any possible legal theory)].

The appellant has the burden of demonstrating that either (1) the demurrer was sustained erroneously as matter of law on the facts pleaded, or (2) the court abused its discretion by failing to grant leave to amend [*Kroll & Tract v. Paris & Paris (1999) 72 Cal. App. 4th 1537, 1541, 86 Cal. Rptr. 2d 78]* . A trial court's ruling sustaining a demurrer is deemed erroneous when a plaintiff has stated a cause of action under any possible legal theory. In assessing the sufficiency of a demurrer, all material facts pleaded in the complaint, and those that arise by reasonable implication, are deemed true [*Las Lomas Land Co., LLC v. City of Los Angeles (2009) 177 Cal. App. 4th 837, 847-848, 99 Cal. Rptr. 3d 503* ; *Tafoya v. Hastings College (1987) 191 Cal. App. 3d 437, 440, 236 Cal. Rptr. 395* ; *Terhell v. American Commonwealth Associates (1985) 172 Cal. App. 3d 434, 438, 218 Cal. Rptr. 256* ; *see also Thaler v. Household Finance Corp. (2000) 80 Cal. App. 4th 1093, 1098, 95 Cal. Rptr. 2d 779* (court accepts as true all facts that may be implied or inferred from those alleged)]. If the demurrer is based on an affirmative defense, it cannot be granted if the action might be barred by the defense, but is not necessarily barred [*CrossTalk Productions, Inc. v. Jacobson (1998) 65 Cal. App. 4th 631, 635, 76 Cal. Rptr. 2d 615]* .

It is an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that defect can be cured by amendment [*Las Lomas Land Co., LLC v. City of Los Angeles (2009) 177 Cal. App. 4th 837, 847-848, 99 Cal. Rptr. 3d 503* ; *Minsky v. City of Los Angeles (1974) 11 Cal. 3d 113, 118, 113 Cal. Rptr. 102, 520 P.2d 726* ; *Wilner v. Sunset Life Ins. Co. (2000) 78 Cal. App. 4th 952, 958-959, 93 Cal. Rptr. 2d 413* ; *Vanzant v. DaimlerChrysler Corp. (2002) 96 Cal. App. 4th 1283, 1288, 118 Cal. Rptr. 2d 48* ; *Gilmer v. Ellington (2008) 159 Cal. App. 4th 190, 202* , 70 Cal. Rtpr. 3d 893]. It is, however, proper to sustain a demurrer without leave to amend when it is improbable that plaintiff can state a cause of action in light of earlier failed attempts by plaintiff to do so and the nature of the defects involved [*Wilner v. Sunset Life Ins. Co. (2000) 78 Cal. App. 4th 952, 958-959, 93 Cal. Rptr. 2d 413* ; *Lee v. Interinsurance Exchange (1996) 50 Cal. App. 4th 694, 724, 57 Cal. Rptr. 2d 798* ; *see Alexandria S. v. Pacific Fertility Medical Center, Inc. (1997) 55 Cal. App. 4th 110, 115, 64 Cal. Rptr. 2d 23* (demurrers sustained without leave to amend after plaintiff had twice failed to adequately amend the complaint)].

The showing as to how a complaint can be amended to state a cause of action need not be made to the trial court and can be made for the first time to the reviewing court [*see Burchett v. City of Newport Beach (1995) 33 Cal. App. 4th 1472, 1483, 40 Cal. Rptr. 2d 1* ; *Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal. App. 3d 1371, 1386, 272 Cal. Rptr. 387* ; *see also Rakestraw v. California Physicians' Service (2000) 81 Cal. App. 4th 39, 43, 96 Cal. Rptr. 2d 354]* . However, while a plaintiff need not request leave to amend in order to preserve on appeal the issue of whether the court abused discretion in a sustaining demurrer without leave to amend, on appeal the plaintiff bears the burden of proving there is reasonable possibility the defect in the pleading can be cured by amendment. The plaintiff must show how plaintiff can amend its complaint and how that amendment will change the legal effect of the complaint [*Palm Springs Tennis Club v. Rangel (1999) 73 Cal. App. 4th 1, 7-8, 86 Cal. Rptr. 2d 73* ; *see McKelvey v. Boeing North American, Inc. (1999) 74 Cal. App. 4th 151, 163, 86 Cal. Rptr. 2d 645* ; for further discussion, *see § 206.36[3][d], below*)]. A new legal theory can be advanced for the first time on appeal why the allegations state a cause of action

[20th *Century Ins. Co. v. Quackenbush (1998) 64 Cal. App. 4th 135, 139 n.3, 75 Cal. Rptr. 2d 113]* . New issues, however, cannot generally be raised for the first time in oral argument [*see Burchett v. City of Newport Beach (1995) 33 Cal. App. 4th 1472, 1483, 40 Cal. Rptr. 2d 1* (demurrer was properly sustained without leave to amend when no suggestion of the potential viability of any new cause of action was made in trial or appellate court)]. At least one court has held that the general rule allowing plaintiff to request leave to amend for the first time on appeal does not apply if the trial court sustains defendant's demurrer with leave to amend and plaintiff elects not to amend the pleading [*Las Lomas Land Co., LLC v. City of Los Angeles (2009) 177 Cal. App. 4th 837, 861, 99 Cal. Rptr. 3d 503*].

[b] Statement of Grounds in Order

Code Civ. Proc. § 472d provides that, when a demurrer is sustained, the trial court "shall" include in its decision or order a statement of the specific ground or grounds on which the decision or order is based. If the court enters a specific ground for sustaining the demurrer in the court minutes, the minutes constitute an order for this purpose [*Stevenson v. San Francisco Housing Authority (1994) 24 Cal. App. 4th 269, 275, 29 Cal. Rptr. 2d 398]* . Trial courts do not, however, always comply with this requirement. In any case, *Code Civ. Proc. § 472d* prescribes no rule regulating the reviewing process, that is, it does not provide that the order must be tested only according to the reasons given by the trial court [*Weinstock v. Eissler (1964) 224 Cal. App. 2d 212, 224-225, 36 Cal. Rptr. 537]* . Consequently, the trial court's order sustaining a demurrer, urging several grounds of objection, may be upheld on appeal from the judgment if any of the grounds urged are correct even though the trial court specified the wrong ground or did not specify any ground [*see Zappas v. King Williams Press, Inc. (1970) 10 Cal. App. 3d 768, 771, 89 Cal. Rptr. 307* (demurrer erroneously sustained on ground action was barred by statute of frauds, but judgment of dismissal affirmed on ground action was barred by *Bus. & Prof. Code § 10136*, requiring that it be alleged and proved that plaintiff was a licensed broker at time of transaction and plaintiff could not amend to so allege); *California State Employees' Assn. v. Williams (1970) 7 Cal. App. 3d 390, 395, 86 Cal. Rptr. 305* (trial court erroneously sustained demurrer on jurisdictional grounds, but judgment for defendants affirmed on ground demurrer should have been sustained for failure to state cause of action, a ground urged by defendants in trial court); *see also CAMSI IV v. Hunter Technology Corp. (1991) 230 Cal. App. 3d 1525, 1533, 282 Cal. Rptr. 80* (defendant demurred on grounds that complaint failed to plead sufficiently theories of recovery and action was barred by statute of limitations; trial court sustained demurrer on ground that complaint did not sufficiently plead theories of recovery, and appellate court affirmed judgment on ground that claims were barred by statute of limitations].

[c] Court's Action, Not Reasons, Reviewed

It is the validity of the court's action in sustaining the demurrer that is reviewable, not the court's opinion or statement of reasons for its actions [*Gonzales v. State of California (1977) 68 Cal. App. 3d 621, 627, 137 Cal. Rptr. 681* ; *Sackett v. Wyatt (1973) 32 Cal. App. 3d 592, 598 n.2, 108 Cal. Rptr. 219* ; *see Wilner v. Sunset Life Ins. Co. (2000) 78 Cal. App. 4th 952, 958, 93 Cal. Rptr. 2d 413* ; *Orange Unified School Dist. v. Rancho Santiago Community College Dist. (1997) 54 Cal. App. 4th 750, 757, 62 Cal. Rptr. 2d 778]* . If the allegations adequately state a cause of action under any legal theory, it is error to sustain a demurrer [*Cellular Plus, Inc. v. Superior Court (1993) 14 Cal. App. 4th 1224, 1231, 18 Cal. Rptr. 2d 308]* .

Nor is the demurring party limited on appeal to the reasons and arguments advanced in the trial court in support of a general demurrer; rather, the party may present to the appellate court any and all reasons supporting the trial court's order sustaining it [*Sanchez v. Truck Ins. Exchange (1994) 21 Cal. App. 4th 1778, 1787, 26 Cal. Rptr. 2d 812* ; *Zumbrun v. University of Southern California (1972) 25 Cal. App. 3d 1, 8-9, 101 Cal. Rptr. 499* ; *see also Zappas v. King Williams Press, Inc. (1970) 10 Cal. App. 3d 768, 771, 89 Cal. Rptr. 307]* .

If an order sustaining a demurrer to a complaint with leave to amend is general in its terms and does not specify the particular ground of the court's ruling and the pleader elects not to amend, the subsequent order of dismissal will not be disturbed on appeal if the complaint is objectionable on any ground raised by the demurrer [*Shapiro v. Wells Fargo*

Realty Advisors (1984) 152 Cal. App. 3d 467, 474, 199 Cal. Rptr. 613 ; *Weinstock v. Eissler (1964) 224 Cal. App. 2d 212, 223, 36 Cal. Rptr. 537* ; *see also Rader v. Apple Valley Bldg. & Dev. Co. (1968) 261 Cal. App. 2d 308, 314, 68 Cal. Rptr. 108]* .

If the demurrer is based on both general and special grounds and the trial court sustains it with respect to the general ground, the ruling impliedly was made either without considering the special grounds or on determining that they were not well taken. Thus, if the trial court sustains a demurrer without leave to amend in general terms, the court of appeal must assume that the trial court only ruled on the general demurrer and not on the special demurrer [*Rogoff v. Grabowski (1988) 200 Cal. App. 3d 624, 628, 246 Cal. Rptr. 185]* .

If the appellate court concludes that the general demurrer was erroneously sustained (that is, that the complaint states a cause of action), the trial judge should, on remand, be directed to consider the special grounds [*Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 425-426, 282 P.2d 890* ; *Weinstock v. Eissler (1964) 224 Cal. App. 2d 212, 223-224, 36 Cal. Rptr. 537]* .

[d] Sufficiency of Complaint After Demurrer Sustained

A reviewing court is not bound by the trial court's construction of the pleadings, but rather will make its own independent judgment of the sufficiency of the complaint [*Parsons v. Tickner (1995) 31 Cal. App. 4th 1513, 1521, 37 Cal. Rptr. 2d 810* ; *see Hernandez v. City of Pomona (1996) 49 Cal. App. 4th 1492, 1497, 57 Cal. Rptr. 2d 406]* , even as to matters not expressly ruled on by the trial court [*Herman v. Los Angeles County Metropolitan Transportation Authority (1999) 71 Cal. App. 4th 819, 824, 84 Cal. Rptr. 2d 144]* .

The court takes the facts from the plaintiff's complaint, the allegations of which are deemed true for the limited purpose of determining whether the plaintiff has stated a viable cause of action [*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 885, 66 Cal. Rptr. 2d 888, 941 P.2d 1157]* . The court's only task is to determine whether the complaint states a cause of action [*Snyder v. Michael's Stores, Inc. (1997) 16 Cal. 4th 991, 995, 68 Cal. Rptr. 2d 476, 945 P.2d 781]* .

When a demurrer is sustained, the appellate court must determine whether the complaint states facts sufficient to constitute a cause of action. In reviewing the sufficiency of a complaint against a general demurrer, the appellate court treats the demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law, and it considers matters that may be judicially noticed. It also gives the complaint a reasonable interpretation, reading it as a whole and its parts in their context. Moreover, the allegations of the complaint must be liberally construed with a view to attaining substantial justice among the parties [*Biles v. Richter (1988) 206 Cal. App. 3d 325, 328-329, 253 Cal. Rptr. 414* ; *see Herman v. Los Angeles County Metropolitan Transportation Authority (1999) 71 Cal. App. 4th 819, 824, 84 Cal. Rptr. 2d 144* ; *Levin v. Gulf Ins. Group (1999) 69 Cal. App. 4th 1282, 1284, 82 Cal. Rptr. 2d 228* ; *Santa Monica Rent Control Bd. v. Bluvstein (1991) 230 Cal. App. 3d 308, 313-314, 281 Cal. Rptr. 298* ; *see also 20th Century Ins. Co. v. Quackenbush (1998) 64 Cal. App. 4th 135, 138 n.1, 75 Cal. Rptr. 2d 113* (argumentative allegations and conclusions of law not presumed to be true)]. Allegations in a complaint, however, must yield to contrary facts found in exhibits to the complaint [*Software Design & Application, Ltd. v. Hoefer & Arnett, Inc. (1996) 49 Cal. App. 4th 472, 484, 56 Cal. Rptr. 2d 756* ; *see Breneric Associates v. City of Del Mar (1998) 69 Cal. App. 4th 166, 180, 81 Cal. Rptr. 2d 324* ; *Mission Oaks Ranch, Ltd. v. County of Santa Barbara (1998) 65 Cal. App. 4th 713, 720, 77 Cal. Rptr. 2d 1]* . There may be some instances, however, when the rule giving precedence to allegations in exhibits does not apply [*see, e.g., Mead v. Sanwa Bank California (1998) 61 Cal. App. 4th 561, 567-568, 71 Cal. Rptr. 2d 625* (stating rule, but also noting that there are instances in which the rule giving precedence to allegations in exhibits does not apply)].

The appellate court must examine the complaint's factual allegations to determine if they state a cause of action under any available legal theory irrespective of the labels attached to any alleged cause of action. Reversible error has been committed if the facts alleged show entitlement to relief under any possible legal theory [*Daly v. Exxon Corp (1997)*

55 Cal App. 4th 39, 43, 63 Cal. Rptr. 2d 727 ; *Sindell v. Gibson, Dunn & Crutcher (1997) 54 Cal. App. 4th 1457, 1465, 63 Cal. Rptr. 2d 594* ; *accord Rosales v. City of Los Angeles (2000) 82 Cal. App. 4th 419, 423, 98 Cal. Rptr. 2d 144* ; *see also Franklin v. Monadnock Co. (2007) 151 Cal. App. 4th 252, 257, 59 Cal. Rptr. 3d 692* ; *G. L. Mezzetta, Inc. v. City of American Canyon (2000) 78 Cal. App. 4th 1087, 1091, 93 Cal. Rptr. 2d 292* (reversible error exists only if facts alleged show entitlement to relief under any possible legal theory); *Mead v. Sanwa Bank California (1998) 61 Cal. App. 4th 561, 564, 71 Cal. Rptr. 2d 625* (court disregards any erroneous or confusing labels employed by plaintiff when considering legal effect of facts)].

The court considers neither the truth nor accuracy of the material factual allegations [*Campbell v. Superior Court (1996) 44 Cal. App. 4th 1308, 1311, 52 Cal. Rptr. 2d 385]* . The court is not concerned with the plaintiff's possible inability or difficulty in proving the allegations of the complaint [*Parada v. City of Colton (1994) 24 Cal. App. 4th 356, 362, 29 Cal. Rptr. 2d 309* ; *see also Gordon v. Law Offices of Aguirre & Meyer (1999) 70 Cal. App. 4th 972, 975 n.2, 83 Cal. Rptr. 2d 119* (reviewing court accepts as true all properly pleaded allegations without concern for proof problems); *Gervase v. Superior Court (1995) 31 Cal. App. 4th 1218, 1224, 37 Cal. Rptr. 2d 875* (demurrer neither concerned with likelihood that plaintiffs will prevail nor with whether they have evidence to support their allegations)]. Rather, the appellate court is required to construe the complaint liberally to determine if a cause of action has been stated, given the assumed truth of the facts pleaded [*Picton v. Anderson Union High School Dist. (1996) 50 Cal. App. 4th 726, 730, 733, 57 Cal. Rptr. 2d 829]* .

But, an allegation that is contrary to law or to a fact of which the court may take judicial notice [*see Evid. Code §§ 452, 459*] is to be treated as a nullity [*Rauber v. Herman (1991) 229 Cal. App. 3d 942, 946, 280 Cal. Rptr. 785* ; *see Cochran v. Cochran (1998) 65 Cal. App. 4th 488, 493, 76 Cal. Rptr. 2d 540* (court may disregard such allegations); *accord Duggal v. G.E. Capital Communications Services, Inc. (2000) 81 Cal. App. 4th 81, 86, 96 Cal. Rptr. 2d 383* ; *City of Chula Vista v. County of San Diego (1994) 23 Cal. App. 4th 1713, 1719, 29 Cal. Rptr. 2d 89* (judicially noticeable facts may supersede allegations)]. Moreover, in an appropriate case, the court may consider judicial admissions contained in the plaintiff's complaint and apparently admissions contained in the plaintiff's opposition papers to a defendant's demurrer to negate the plaintiff's ability to state a cause of action [*see Setliff v. E.I. Du Pont De Nemours & Co. (1995) 32 Cal. App. 4th 1525, 1534, 1536-1537, 38 Cal. Rptr. 2d 763* ; *see also Knoell v. Petrovich (1999) 76 Cal. App. 4th 164, 168-169, 90 Cal. Rptr. 2d 162* (admission in plaintiff's first amended complaint); *Gordon v. Law Offices of Aguirre & Meyer (1999) 70 Cal. App. 4th 972, 980 n.10, 83 Cal. Rptr. 2d 119* (admission in plaintiff's complaint and reply brief)].

Also, if the trial court sustains a demurrer with leave to amend but the plaintiff elects not to amend, there is a presumption that the plaintiff has stated as strong a case as he or she can. In those instances, in determining whether the trial court has abused its discretion, the appellate court must resolve all ambiguities and uncertainties raised by the demurrer against the plaintiff; if the complaint is objectionable on any ground raised by the demurrer, the judgment of dismissal must be affirmed [*Casella v. City of Morgan Hill (1991) 230 Cal. App. 3d 43, 48, 280 Cal. Rptr. 876 , cert. denied, 118 L. Ed. 2d 387 (1992)* ; *see also Freeman v. San Diego Assn. of Realtors (1999) 77 Cal. App. 4th 171, 197, 91 Cal. Rptr. 2d 534* ; *Tudor Ranches, Inc. v. State Comp. Ins. Fund (1998) 65 Cal. App. 4th 1422, 1434, 77 Cal. Rptr. 2d 574]* .

Conversely, if the trial court fails to grant leave to amend when it knows of potentially viable claims at the time it sustains a demurrer, even though plaintiff does not request leave to amend reversal may be required [*see Kolani v. Gluska (1998) 64 Cal. App. 4th 402, 405, 411-412, 75 Cal. Rptr. 2d 257* (absent statute of limitations concern or prejudice to opposing party such as delay in trial, loss of critical evidence, or added cost of preparation, trial court should have granted leave to amend, rather than sustaining demurrer without leave to amend, when it knew of potentially viable claim at time of sustaining of demurrer, even though plaintiff did not request leave to amend)].

There is a strong policy in favor of a hearing on the merits [*Vaillette v. Fireman's Fund Ins. Co. (1993) 18 Cal. App. 4th 680, 685, 22 Cal. Rptr. 2d 807]* and in reviewing an order sustaining a demurrer without leave to amend, the

appellate court accepts as true all properly pleaded facts and determines whether the plaintiff pleaded facts showing that he or she is entitled to some relief under any legal theory [*Rauber v. Herman (1991) 229 Cal. App. 3d 942, 946, 280 Cal. Rptr. 785]* . Moreover, the appellate court accepts as true not only the facts alleged in the complaint but also facts that may be implied or inferred from those expressly alleged [*Mead v. Sanwa Bank California (1998) 61 Cal. App. 4th 561, 564, 71 Cal. Rptr. 2d 625* ; *Marshall v. Gibson, Dunn & Crutcher (1995) 37 Cal. App. 4th 1397, 1403, 44 Cal. Rptr. 2d 339* ; *see Gordon v. Law Offices of Aguirre & Meyer (1999) 70 Cal. App. 4th 972, 976, 83 Cal. Rptr. 2d 119]* .

The appellate court when reviewing the sufficiency of a complaint against a demurrer will not ordinarily consider the allegations of a superseded complaint [*see Baltins v. James (1995) 36 Cal. App. 4th 1193, 1205, 42 Cal. Rptr. 2d 896* (disapproved on other grounds in *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal. 4th 739, 761, 76 Cal.Rptr. 2d 749, 958 P.2d 1026*)]. For discussion of exceptions to this rule, see *§ 206.28[4], above*.

If the pleading is defective, the court must further decide whether there is a reasonable possibility that the defect can be cured by amendment. If it can be, the trial court has abused its discretion, and the judgment will be reversed. If not, there has been no abuse of discretion, and the judgment will be affirmed. The burden is on the plaintiff to prove the reasonable possibility of amendment [*Blank v. Kirwan (1985) 39 Cal. 3d 311, 318, 216 Cal. Rptr. 718, 703 P.2d 58* ; *KFC Western, Inc. v. Meghrig (1994) 23 Cal. App. 4th 1167, 1173, 28 Cal. Rptr. 2d 676* ; *Vaillette v. Fireman's Fund Ins. Co. (1993) 18 Cal. App. 4th 680, 685, 22 Cal. Rptr. 2d 807* ; *see Assurance Co. of America v. Haven (1995) 32 Cal. App. 4th 78, 81-82, 38 Cal. Rptr. 2d 25* (trial court's judgment of dismissal based on demurrer sustained without leave to amend reversed when there was reasonable possibility that insurer could amend its complaint to allege cause of action)].

The plaintiff must show in what manner plaintiff can amend the complaint and how that amendment will change the legal effect of the pleading [*Redmond v. Secure Horizons, Pacificare, Inc. (1997) 60 Cal. App. 4th 96, 105, 70 Cal. Rptr. 2d 174* ; *accord Rakestraw v. California Physicians' Service (2000) 81 Cal. App. 4th 39, 43, 96 Cal. Rptr. 2d 354* ; *McKelvey v. Boeing North American, Inc. (1999) 74 Cal. App. 4th 151, 163, 86 Cal. Rptr. 2d 645* ; *Palm Springs Tennis Club v. Rangel (1999) 73 Cal. App. 4th 1, 5, 86 Cal. Rptr. 2d 73* ; *see Downs v. Department of Water & Power (1997) 58 Cal. App. 4th 1093, 1099, 68 Cal. Rptr. 2d 590* (to meet burden of showing abuse of discretion plaintiff must show how complaint can be amended to state cause of action)]. The assertion of an abstract right to amend does not satisfy this burden. The plaintiff must clearly and specifically set forth the applicable substantive law and the legal basis for amendment, i.e., the elements of the cause of action and authority for it. Further, the plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action. Allegations must be factual and specific, not vague or conclusory [*Rakestraw v. California Physicians' Service (2000) 81 Cal. App. 4th 39, 43-44, 96 Cal. Rptr. 2d 354]* . Plaintiff's showing need not be made in the trial court, however, as long as it made to the reviewing court [*Downs v. Department of Water & Power (1997) 58 Cal. App. 4th 1093, 1099, 68 Cal. Rptr. 2d 590* ; *see discussion under § 206.36[3][a], above*].

The burden of showing a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor the appellate court will rewrite a complaint [*Rakestraw v. California Physicians' Service (2000) 81 Cal. App. 4th 39, 44, 96 Cal. Rptr. 2d 354]* . If the plaintiff cannot show an abuse of discretion, the trial court's order sustaining the demurrer without leave to amend must be affirmed [*Lazar v. Hertz Corp. (1999) 69 Cal. App. 4th 1494, 1501, 82 Cal. Rptr. 2d 368]* . If there is no factual dispute in the case, the nature of the claim is obvious, and no liability exists under the applicable substantive law, there is no abuse of discretion, because the defect could not be cured by amendment [*Harshbarger v. City of Colton (1988) 197 Cal. App. 3d 1335, 1349, 243 Cal. Rptr. 463* ; *see Redmond v. Secure Horizons, Pacificare, Inc. (1997) 60 Cal. App. 4th 96, 105, 70 Cal. Rptr. 2d 174* (defendant's demurrer properly sustained without leave to amend when no reasonable possibility that plaintiff could amend complaint to bring it within jurisdiction of trial court); *see also Biles v. Richter (1988) 206 Cal. App. 3d 325, 332, 253 Cal. Rptr. 414* (demurrer to complaint for negligence properly sustained without leave to amend when lack of negligence is determined as matter of law)]. Similarly, when the plaintiff offers no allegations to support the possibility

of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend [*Rakestraw v. California Physicians' Service (2000) 81 Cal. App. 4th 39, 44, 96 Cal. Rptr. 2d 354]* .

It has been stated that when a demurrer to an original complaint has been sustained, denial of leave to amend constitutes an abuse of discretion if the pleading on its face does not show that it is incapable of amendment [*Association of Community Organizations for Reform Now v. Department of Industrial Relations (1995) 41 Cal. App. 4th 298, 302 n.2, 48 Cal Rptr. 2d 486* , citing *California Federal Bank v. Matreyek (1992) 8 Cal. App. 4th 125, 130-131, 10 Cal. Rptr. 2d 58]* . This rule, however, is peculiar to cases in which a complaint is good as against a general demurrer for failure to state a cause of action but is subject to a special demurrer for uncertainty or ambiguity in the pleading. In those cases the plaintiff must be given the opportunity to clarify the uncertainty or ambiguity unless the pleading on its face shows that the defect cannot be cured. When a complaint is subject to a general demurrer, however, this special rule is inapplicable and the burden remains on the appellant to demonstrate how the complaint might be amended [*Association of Community Organizations For Reform Now v. Department of Industrial Relations (1995) 41 Cal. App. 4th 298, 302 n.2, 48 Cal Rptr. 2d 486* (no error in trial court sustaining general demurrer without leave to amend; plaintiff did not meet burden to demonstrate manner in which complaint might be amended)].

[e] Consideration of Matters Subject to Judicial Notice

A reviewing court may consider facts judicially noticed by the trial court or those which the trial court properly could have noticed [*StorMedia Inc. v. Superior Court (1999) 20 Cal. 4th 449, 456 n.9, 84 Cal. Rptr. 2d 843, 976 P.2d 214]* .

When reviewing a demurrer on appeal, in the interests of justice, a court will consider judicially noticeable facts, even if these facts are not set forth in the complaint [*Cantu v. Resolution Trust Corp. (1992) 4 Cal. App. 4th 857, 877, 6 Cal. Rptr. 2d 151* ; *see City of Chula Vista v. County of SanDiego (1994) 23 Cal. App. 4th 1713, 1719, 29 Cal. Rptr. 2d 89]* . In particular, appellate courts should judicially notice any fact of which the trial court took proper judicial notice [*Evid. Code § 459(a)*; *Cantu v. Resolution Trust Corp. (1992) 4 Cal. App. 4th 857, 877, 6 Cal. Rptr. 2d 151* ; *see also Freeman v. San Diego Assn. of Realtors (1999) 77 Cal. App. 4th 171, 178 n.3, 91 Cal. Rptr. 2d 534* (when affidavits or exhibits filed by plaintiff may be judicially noticed, court may consider those facts)].

A reviewing court will ordinarily, however, look to the record made in the trial court. Although the court may take judicial notice of matters not before the trial court, it need not do so. An appellate court may properly decline to take judicial notice under *Evid. Code §§ 452* and *459* of a matter that should have been presented in the first instance to the trial court for its consideration [*Brosterhous v. State Bar (1996) 12 Cal. 4th 315, 325-326, 48 Cal. Rptr. 2d 87, 906 P.2d 1242* (judicial notice of administrative record not taken; no request made in trial court and Court of Appeal)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionCivil ProcedureAppealsStandards of ReviewDe Novo Review

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§ 206.37 Time to Amend After Remand

When an order sustaining a demurrer without leave to amend is reversed or otherwise remanded by any order issued by a reviewing court, any amended complaint must be filed within 30 days after the clerk of the reviewing court mails notice of the issuance of the remittitur [*Code Civ. Proc. § 472b*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentAdditurs & RemittitursRemittitursCivil ProcedureAppealsRemands

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[Reserved]

§§ 206.38[Reserved]

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17-206 California Forms of Pleading and Practice--Annotated § 206.50

§ 206.50 Governing Law

The motion for judgment on the pleadings, long recognized by case law [*see Hibernia S. & L. Soc. v. Thornton (1897) 117 Cal. 481, 482, 49 P. 573* ; *see also Coyne v. Krempels (1950) 36 Cal. 2d 257, 262, 223 P.2d 244]* , was established as a statutory motion by 1993 Stats., ch. 456, which, among other changes, enacted *Code Civ. Proc. § 438*. Section 438 now governs a motion for judgment on the pleadings.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsJudgment on the Pleadings

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§ 206.51 Other Motions Treated as Motions for Judgment on the Pleadings

When a motion for summary judgment challenges the sufficiency of the pleadings rather than the evidence supporting the allegations contained in the pleadings, it is tantamount to a motion for judgment on the pleadings and may be treated as such by the trial court. The practical effect of this procedure is that in granting judgment on the pleadings, the trial court may give the plaintiff the opportunity to amend the complaint even when no motion to amend has been filed [*Taylor v. Lockheed Martin Corp. (2000) 78 Cal. App. 4th 472, 479, 92 Cal. Rptr. 2d 873* ; *see also American Airlines, Inc. v. County of San Mateo (1996) 12 Cal. 4th 1110, 1117-1118, 51 Cal. Rptr. 2d 251, 912 P.2d 1198* (defendants' summary judgment motion used to test whether complaint stated cause of action treated as motion for judgment on pleadings when time for demurrer had passed)]. Court has treated an improperly brought motion to dismiss as a nonstatutory motion for judgment on the pleadings [*see Saltarelli & Steronovich v. Douglas (1995) 40 Cal. App. 4th 1, 4-5, 46 Cal. Rptr. 2d 683]* .

Similarly, a court may properly treat motions in limine as a motion for judgment on the pleading where the cumulative effect of the motions in limine is to challenge all of the evidence submitted by a party on the ground that it fails to state any cause of action and entitles the other party to judgment as a matter of law [*Coshow v. City of Escondido (2005) 132 Cal. App. 4th 687, 701, 34 Cal. Rptr. 3d 19]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedurePretrial MattersMotions in LimineGeneral Overview

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17-206 California Forms of Pleading and Practice--Annotated § 206.52

§ 206.52 Limitations on Motion

The *Code Civ. Proc. § 438* motion for judgment on the pleadings is comparable to a general demurrer, and may also be based on the special demurrer ground of lack of jurisdiction [*compare Code Civ. Proc. § 438(c) with Code Civ. Proc. § 430.10(a), (e)*; *see § 206.54[1], below*]. However, the Section 438 motion cannot be brought until the time for a demurrer to the challenged pleading has expired [*Code Civ. Proc. § 438(f)*]. A party may make a Section 438 motion for judgment on the pleadings if he or she did not demur to the complaint or answer on the same grounds as those asserted in the motion [*Code Civ. Proc. § 438(g)(2)*]. If a party demurred and the demurrer was overruled, the party may make a Section 438 motion on the same grounds, but only if there has been a material change in applicable case law or statutes since the ruling on the demurrer [*Code Civ. Proc. § 438(g)(1)*]. The Section 438 motion is not available after entry of the pretrial conference order or within 30 days of the date initially set for trial, whichever is later, unless the court allows otherwise [*Code Civ. Proc. § 438(e)*]. Thus, parties are pressed to make any challenges to the pleadings at the earliest possible time.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeMotion PracticeTime LimitationsCivil ProceduresPretrial JudgmentsJudgment on the Pleadings

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§ 206.53 Motion by Any Party or the Court

A motion for judgment on the pleadings may be brought by a party or by the court on its own motion [*Code Civ. Proc. § 438(b)*].

As used in Section 438, "complaint" includes a cross complaint, "plaintiff" includes a cross complainant, and "defendant" includes a cross defendant [*Code Civ. Proc. § 438(a)*].

Legal Topics:

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§ 206.54 Grounds

[1] Enumerated in Code Civ. Proc. § 438

The grounds for a *Code Civ. Proc. § 438* motion for judgment on the pleadings are limited to those specifically listed [*Code Civ. Proc. § 438(c)(1)*].

If the moving party is a plaintiff, the grounds are that the complaint states facts sufficient to constitute a cause or causes of action against the defendant and that the answer does not state facts sufficient to constitute a defense [*Code Civ. Proc. § 438(c)(1)(A)*].

If the moving party is a defendant, the grounds are that the court lacks subject matter jurisdiction, or that the complaint does not state facts sufficient to constitute a cause of action against that defendant [*Code Civ. Proc. § 438(c)(1)(B)*].

The same limitations as to grounds apply to a motion brought by the court [*Code Civ. Proc. § 438(c)(3)*].

The motion may be as to either the entire pleading attacked or as to separate causes of action or separate defenses [*Code Civ. Proc. § 438(c)(2)*].

[2] Compared to Demurrer

The statutory grounds under *Code Civ. Proc. § 438* are similar to those recognized by case law prior to the enactment of Section 438. The case law established that the grounds for a motion for judgment on the pleadings are the same as those for a general demurrer [*see Carlson v. Lindauer (1953) 119 Cal. App. 2d 292, 301, 259 P.2d 925]* . The motion is analagous to a general demurrer. In other words, it admits the truth of all material facts pleaded [*Kempton v. City of Los Angeles (2008) 165 Cal. App. 4th 1344, 1347, 81 Cal. Rptr. 3d 852* ; *CD Investment Co. v. California Ins. Guarantee Assn. (2000) 84 Cal. App. 4th 1410, 1417, 101 Cal. Rptr. 2d 806* ; *see Consolidated Fire Protection Dist. v. Howard Jarvis Taxpayers' Assn. (1998) 63 Cal. App. 4th 211, 219, 73 Cal. Rptr. 2d 586]* , unless contrary to law or fact of which the court may take judicial notice [*Mechanical Contractors Assn. v. Greater Bay Area Assn. (1998) 66 Cal. App. 4th 672, 677, 78 Cal. Rptr. 2d 225]* . Hence, it attacks only defects appearing from the face of the pleadings, or by

matters that can be judicially noticed [*Howard Jarvis Taxpayers Assn. v. City of Riverside (1999) 73 Cal. App. 4th 679, 685, 86 Cal. Rptr. 2d 592* ; *Cloud v. Northrop Grumman Corp. (1998) 67 Cal. App. 4th 995, 999, 79 Cal. Rptr. 2d 544]* .

A motion for judgment on the pleadings, like a general demurrer, tests whether, as a matter of law, a pleading states facts sufficient to constitute a cause of action [*Thornburg v. El Centro Regional Medical Center (2006) 143 Cal. App. 4th 198, 201, 48 Cal. Rptr. 3d 840* ; *Ponderosa Homes, Inc. v. City of San Ramon (1994) 23 Cal. App. 4th 1761, 1767-1768, 29 Cal. Rptr. 2d 26* (statute of limitations barred action); *Fraker v. Sentry Life Ins. Co. (1993) 19 Cal. App. 4th 276, 285, 23 Cal. Rptr. 2d 372* ; *La Jolla Village Homeowners' Assn. v. Superior Court (1989) 212 Cal. App. 3d 1131, 1141, 261 Cal. Rptr. 146]* or a defense [*see MacIsaac v. Pozzo (1945) 26 Cal. 2d 809, 812-813, 161 P.2d 449]* . A complaint is subject to the motion only when the facts alleged are not sufficient to state a cause of action and do not entitle plaintiff to any part of the relief sought [*Rannard v. Lockheed Aircraft Corp. (1945) 26 Cal. 2d 149, 151, 157 P.2d 1]* . The complaint cannot be attacked by reference to matters set forth in the answer [*Hughes v. Western MacArthur Co. (1987) 192 Cal. App. 3d 951, 957, 237 Cal. Rptr. 738]* . An answer is subject to the motion only when the complaint states a cause of action and theanswer raises no material issue and states no defense [*see MacIsaac v. Pozzo (1945) 26 Cal. 2d 809, 812-813, 161 P.2d 449]* .

[3] Lack of Subject Matter Jurisdiction

The granting of a motion for judgment on the pleadings made by one defendant and dismissing the action as to all defendants on the ground the court lacked subject matter jurisdiction in that the alleged cause of action was preempted by federal law has been held to be proper as a prudent and economical use of judicial resources [*see Gene R. Smith Corp. v. Terry's Tractor, Inc. (1989) 209 Cal. App. 3d 951, 952-953, 956 n.1, 257 Cal. Rptr. 598* , *cert. denied, 494 U.S. 1016* ; *see also Saks v. Parilla, Hubard & Militzok (1998) 67 Cal. App. 4th 565, 567, 574, 79 Cal. Rptr. 2d 120* (court properly granted defendants' motion for judgment on the pleadings based on lack of subject matter jurisdiction over action for malicious prosecution and abuse of process that was completely preempted by Bankruptcy Code)].

[4] Limited to Matter on Face of Pleading and Judicial Notice

The grounds for the motion must appear on the face of the challenged pleading or from any matter of which the court is may take judicial notice [*Code Civ. Proc. § 438(d)*]. In ruling on a motion for judgment on the pleadings, the trial court must accept as true all material facts properly pleaded, but does not consider conclusions of law or fact, opinions, speculation, or allegations contrary to law or facts that are judicially noticed [*Stevenson Real Estate Services, Inc. v. CB Richard Ellis Real Estate Services, Inc. (2006) 138 Cal. App. 4th 1215, 1219-1220, 42 Cal. Rptr. 3d 235]* .

Thus, matters of which the court must [*Evid. Code § 451*] or may [*Evid. Code § 452*; *see Evid. Code § 453* (procedure for making permissive judicial notice mandatory)] take judicial notice, including competent evidence of record in the trial court, may be considered by the court in ruling on the motion for judgment on the pleadings [*see Code Civ. Proc. § 438(d)*; *Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 714 n.3, 117 Cal. Rptr. 241, 527 P.2d 865* ; *Tiffany v. Sierra Sands Unified School Dist. (1980) 103 Cal. App. 3d 218, 225, 162 Cal. Rptr. 669]* . Competent evidence means extrinsic evidence that is properly authenticated and included in the record, such as written responses to requests for admissions and written interrogatories [*see Stencel Aero Engineering Corp. v. Superior Court (1976) 56 Cal. App. 3d 978, 986-987 n.6, 128 Cal. Rptr. 691* ; *see also Tiffany v. Sierra Sands Unified School Dist. (1980) 103 Cal. App. 3d 218, 230-231, 162 Cal. Rptr. 669* (although trial court may, but is not compelled to, take judicial notice of competent evidence adduced at trial proceedings on motion for judgment on pleadings); *compare Stencel* and *Tiffany with Hong Soo Shin v. Oyoung Kong (2000) 80 Cal. App. 4th 498, 505, 95 Cal. Rptr. 304* (expert declarations that were part of summary judgment motion could not be used to attack judgment on pleadings)].

The court may not, however, consider evidence outside of the pleadings or its judicial notice, nor may it interpret the matters before it if the interpretations involve resolving factual questions that cannot be resolved without resort to

extrinsic evidence [*Trewin v. State of California (1984)150 Cal. App. 3d 975, 981, 198 Cal. Rptr. 263* ; *see Cloud v. Northrop Grumman Corp. (1998) 67 Cal. App. 4th 995, 999-1000, 79 Cal. Rptr. 2d 544* (if factual issues could not be decided solely by reviewing complaint and matters that could be judicially noticed, issues could not be decided on motion for judgment on the pleadings); *see also Hong Soo Shin v. Oyoung Kong (2000) 80 Cal. App. 4th 498, 502-503, 505, 95 Cal. Rptr. 304* (expert declarations that were part of summary judgment motion could not be used to attack judgment on pleadings); *cf. Howard Jarvis Taxpayers Assn v. City of Riverside (1999) 73 Cal. App. 4th 679, 688-689, 86 Cal. Rptr. 2d 592* (statements by various city officials could not be considered by court as evidence, but could be considered to extent they show plaintiffs should have been given leave to amend)].

A court may, however, consider evidence outside the pleading when the parties enter into a written stipulation concerning facts and authorize the court on the record to consider the stipulation for purposes of the motion [*see North Side etc. Assn. v. Hillside etc. Park (1945) 70 Cal. App. 2d 609, 613-614, 161 P.2d 618* ; *cf. Agnew v. City of Los Angeles (1950) 99 Cal. App. 2d 105, 107-108, 221 P.2d 340* (record did not show that parties had consented to court's consideration of stipulation)].

The court may also properly consider the parties' statements of undisputed facts, as to which they waived their rights to have a determination at trial [*Ponderosa Homes, Inc. v. City of San Ramon (1994) 23 Cal. App. 4th 1761, 1768, 29 Cal. Rptr. 2d 26* (defendant's motion for judgment on the pleadings based on bar of statute of limitations followed its successful opposition to plaintiff's motion for summary adjudication on the same grounds)].

In addition, in an appropriate case, the court may consider judicial admissions contained in a party's pleadings and apparently admissions contained in that party's opposition papers [*see Setliff v. E.I. Du Pont De Nemours & Co. (1995) 32 Cal. App. 4th 1525, 1534, 1536-1537, 38 Cal. Rptr. 2d 763* (demurrers granted as to some defendants and judgment on the pleadings granted as to other defendants; on appeal court held that judicial admissions contained in plaintiff's amended complaint negated plaintiff's ability to state causes of action for negligence and products liability under traditional theories and that admissions contained in plaintiff's opposition papers to demurrers also negated plaintiff's ability to state cause of action for products liability under alternative liability and market share theories)].

When a written instrument is attached to the pleading and properly incorporated by reference, the court may examine the exhibit and treat the pleader's allegations of its legal effect as surplusage [*Lumbermens Mut. Cas. Co. v. Vaughn (1988) 199 Cal. App. 3d 171, 178, 244 Cal. Rptr. 567* (insurance coverage case); *cf. Columbia Casualty Co. v. Northwestern Nat. Ins. Co. (1991) 231 Cal. App. 3d 457, 468-470, 282 Cal. Rptr. 389* (when written instruments incorporated by reference are basis of claim or defense, recitals in instruments take precedence over allegations in pleadings unless incorporated instruments susceptible to more than one interpretation; given liberality of California's parol evidence rule, judgment on pleadings granted in reliance on terminology of incorporated complex contract to negate express allegation of its meaning is highly suspect)].

If there are material factual issues that require evidentiary resolution, judgment on the pleading must be denied [*Schabarum v. California Legislature (1998) 60 Cal. App. 4th 1205, 1216, 70 Cal. Rptr. 2d 745]* .

When judicial notice is sought, the matter to be noticed must be specified in the notice of motion, or in the supporting points and authorities, unless the court permits otherwise [*Code Civ. Proc. § 438(d)*]. For further discussion of matters subject to judicial notice and of the procedure for taking judicial notice, see Ch. 321, *Judicial Notice* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil

ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPretrial JudgmentsJudgment on the Pleadings

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§ 206.55 Availability of Motion in Special Proceedings

The motion is most frequently made in civil actions, but it is equally available in special proceedings of a civil nature in which demurrers may properly be filed [*see, e.g., Knoff v. City and County of San Francisco (1969) 1 Cal. App. 3d 184, 200, 81 Cal. Rptr. 683* (mandate proceeding); *Estate of Marler (1957) 148 Cal. App. 2d 30, 33, 306 P.2d 105* (will contest); *see also Prob. Code § 8251(b)* (demurrers in will contests)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersEstate, Gift & Trust LawWill ContestsGeneral Overview

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§ 206.56 Time of Motion

A plaintiff may make a *Code Civ. Proc. § 438* motion for judgment on the pleadings only after the defendant has filed an answer and the time to demur to the answer has expired [*Code Civ. Proc. § 438(f)(1)*].

A defendant may make a *Code Civ. Proc. § 438* motion for judgment on the pleadings only after he or she has filed an answer and the time to demur to the complaint has expired [*Code Civ. Proc. § 438(f)(2)*].

The motion may not be brought after a pretrial conference order has been entered pursuant to *Code Civ. Proc. § 575*, or within 30 days of the date the action is initially set for trial, whichever is later, unless the court otherwise permits [*Code Civ. Proc. § 438(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeMotion PracticeTime LimitationsCivil ProceduresPleading & PracticePleadingsAnswersCivil ProceduresPretrial JudgmentsJudgment on the Pleadings

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§ 206.57 Form of Motion

Except for motions under *Code Civ. Proc. § 438(i), discussed under § 206.59[2], below,* Section 438 does not expressly require a noticed motion. The section appears to contemplate that the motion usually will be noticed, because Section 438(d) requires that matter to be judicially noticed must be specified in the notice of motion or the supporting points and authorities, unless the court otherwise permits. Thus, counsel should generally give notice under *Code Civ. Proc. § 1005(b)* unless local practice is otherwise [*see Code Civ. Proc. § 1005(a)(13)* (Section 1005(b) notice to be given when notice is required and no other time or method is prescribed by law or by court or judge); *see also Code Civ. Proc. §§ 1010, 1011*]. For a form of notice of motion, see *§ 206.150, below*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeContent & FormCivil ProceduresPretrial JudgmentsJudgment on the Pleadings

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§ 206.58 Hearing on Motion

[1] Right to and Scope of Hearing

The party whose pleading is attacked by this motion is entitled to a hearing [*see Code Civ. Proc. § 1005.5*; *see McDonald v. Severy (1936) 6 Cal. 2d 629, 631, 59 P.2d 98]* , at which only matters appearing on the face of the pleading (and judicially noticed matters [*see Code Civ. Proc. §§ 430.30(a), 430.70*; *Evid. Code §§ 452, 453*]) will be considered [*De Gonia v. Building Material etc. Union (1957) 155 Cal. App. 2d 573, 577-578, 318 P.2d 486]* .

Because of the essential similarity between a general demurrer and a motion for judgment on the pleadings, the rules governing the construction of pleadings in ruling on a general demurrer govern in the ruling on a judgment on the pleadings [*see Hardy v. Admiral Oil Co. (1961) 56 Cal. 2d 836, 840, 16 Cal. Rptr. 894, 366 P.2d 310]* . Thus, the general rule that, in construing a pleading for the purpose of determining its effect, its allegations must be liberally construed with the view to substantial justice [*Code Civ. Proc. § 452*] applies to motions for judgment on the pleadings [*Gill v. Curtis Publishing Co. (1952) 38 Cal. 2d 273, 275, 239 P.2d 630* ; *Gabaldon v. United Farm Workers Organizing Committee (1973) 35 Cal. App. 3d 757, 759, 111 Cal. Rptr. 203]* .

Similarly, because the motion admits all material and issuable facts pleaded [*Colberg, Inc. v. State of California ex rel. Dept. Pub. Wks. (1967) 67 Cal. 2d 408, 412, 62 Cal. Rptr. 401, 432 P.2d 3* ; *see Howard Jarvis Taxpayers Assn v. City of Riverside (1999) 73 Cal. App. 4th 679, 685, 86 Cal. Rptr. 2d 592]* , the trial court is required to treat all of plaintiff's, or defendant's, allegations as true [*Sullivan v. County Los Angeles (1974) 12 Cal. 3d 710, 714-715 n.3, 117 Cal. Rptr. 241, 527 P.2d 865* ; *IMO Development Corp. v. Dow Corning Corp. (1982) 135 Cal. App. 3d 451, 457, 185 Cal. Rptr. 341]* , unless contrary to law or fact of which the court may take judicial notice [*Mechanical Contractors Assn. v. Greater Bay Area Assn. (1998) 66 Cal. App. 4th 672, 677, 78 Cal. Rptr. 2d 225]* .

The facts alleged being deemed true, the only question for determination is one of law, and the trial court has no discretion in granting or denying the motion, but must apply the law correctly [*Ludgate Ins. Co. v. Lockheed Martin Corp. (2000) 82 Cal. App. 4th 592, 603, 98 Cal. Rptr. 2d 277]* . The court is not concerned with a plaintiff's possible inability to prove the claims made in the complaint [*Inter-Modal Rail Employees Assn. v. Burlington Northern &*

Santa Fe Ry. Co. (1999) 73 Cal. App. 4th 918, 924, 87 Cal. Rptr. 2d 60] .

[2] Considerations on Motion by Plaintiff

In ruling on a plaintiff's motion for a judgment on the pleadings, the trial court must consider (1) whether or not the complaint states a cause of action and, if it does, (2) whether or not the answer states facts sufficient to constitute a defense. If the answer does not, a judgment on the pleadings for plaintiff is proper [*Code Civ. Proc. § 438(c)(1)(A)*; *see MacIsaac v. Pozzo (1945) 26 Cal. 2d 809, 812-813, 161 P.2d 449* ; *Adjustment Corp. v. Hollywood etc. Co. (1939) 35 Cal. App. 2d 566, 569, 96 P.2d 161]* .

[3] Considerations on Motion by Defendant

The trial court may grant a defendant's motion for judgment on the pleading only if there is an entire absence in the complaint of some fact or facts essential to state a cause of action [*Code Civ. Proc. § 438(c)(1)(B)(ii)*; *see Hibernia S. & L. Soc. v. Thornton (1897) 117 Cal. 481, 482-483, 49 P. 573* ; *Trewin v. State of California (1984) 150 Cal. App. 3d 975, 981, 198 Cal. Rptr. 263]* or if there is a lack of subject matter jurisdiction [*Code Civ. Proc. § 438(c)(1)(B)(i)*].

In ruling on a defendant's motion, it has been stated that the trial court determines what has been called a pure question of law, "but what is in fact a mixed question of law and fact that is predominantly legal: does the plaintiff's complaint state facts sufficient to constitute a cause of action against the defendant?" [*Smiley v. Citibank (1995) 11 Cal. 4th 138, 145, 44 Cal. Rptr. 2d 441, 900 P.2d 690]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the Pleadings

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§ 206.59 Granting Order

[1] With or Without Leave to Amend

A *Code Civ. Proc. § 438* motion for judgment on the pleadings may be granted with or without leave to file an amended complaint or answer, as the case may be [*Code Civ. Proc. § 438(h)(1)*]. The standard for granting the motion is essentially the same as that applicable to a general demurrer, that is, under the state of the pleadings, together with matters that may be judicially noticed, it appears that a party is entitled to judgment as a matter of law [*Schabarum v. California Legislature (1998) 60 Cal. App. 4th 1205, 1216, 70 Cal. Rptr. 2d 745]* .

The same standards regarding leave to amend apply to a general demurrer and motion for judgment on the pleadings [*Kempton v. City of Los Angeles (2008) 165 Cal. App. 4th 1344, 1348, 81 Cal. Rptr. 3d 852* ; *Cloud v. Northrop Grumman Corp. (1998) 67 Cal. App. 4th 995, 1006, 79 Cal. Rptr. 2d 544]* . An order granting a motion for judgment on the pleadings will normally grant leave to amend, if an amendment curing the defect is possible [*see Beverage v. Canton Placer Mining Co. (1955) 43 Cal. 2d 769, 778, 278 P.2d 694* ; *see also Smiley v. Citibank (1995) 11 Cal. 4th 138, 164 n.18, 44 Cal. Rptr. 2d 441, 900 P.2d 690* (leave to amend should generally be granted if reasonable possibility that defect can be cured); *Cloud v. Northrop Grumman Corp. (1998) 67 Cal. App. 4th 995, 1011, 79 Cal. Rptr. 2d 544* (if pleading defective, but amendable, judgment on pleadings should be granted with leave to amend)]. Indeed, it has been held that if a motion for judgment on the pleadings is granted as to the original complaint, denial of leave to amend constitutes an abuse of discretion if the pleading does not show on its face that it is incapable of amendment [*Consolidated Fire Protection Dist. v. Howard Jarvis Taxpayers' Assn. (1998) 63 Cal. App. 4th 211, 219, 73 Cal. Rptr. 2d 586* ; *Virginia G. v. ABC Unified School Dist. (1993) 15 Cal. App. 4th 1848, 1852, 19 Cal. Rptr. 2d 671* ; *see Schonfeldt v. State of California (1998) 61 Cal. App. 4th 1462, 1465, 72 Cal. Rptr. 2d 464* (reversible error if defect can reasonable be cured by amendment)].

Thus, a judgment on the pleadings without leave to amend should not be granted if there is a reasonable possibility that the defect in the pleading can be cured by amendment. The burden of proving that there is a reasonable possibility that the defect can be cured by amendment is on the party whose pleading is attacked [*see La Jolla Village Homeowners' Assn. v. Superior Court (1989) 212 Cal. App. 3d 1131, 1141, 261 Cal. Rptr. 146* ; *see also Smiley v. Citibank (1995)*

11 Cal. 4th 138, 164 n.18, 44 Cal. Rptr. 2d 441, 900 P.2d 690 (Court of Appeal properly upheld trial court's order granting motion without leave to amend when no reasonably possibility to cure defect in complaint appeared)]. A trial court does not abuse its discretion in sustaining a motion for judgment on the pleadings without leave to amend if the plaintiff fails to indicate the nature of the proposed amendment or the manner in which he or she would amend the complaint [*Tiffany v. Sierra Sands Unified School Dist. (1980) 103 Cal. App. 3d 218, 226, 162 Cal. Rptr. 669]* .

If the defect cannot be corrected by amendment, for example, when a defendant moves for judgment on the pleadings and no liability exists under substantive law, leave to amend the complaint should be denied [*La Jolla Village Homeowners' Assn. v. Superior Court (1989) 212 Cal. App. 3d 1131, 1141, 261 Cal. Rptr. 146* ; *see Schonfeldt v. State of California (1998) 61 Cal. App. 4th 1462, 1465, 72 Cal. Rptr. 2d 464* (if there is no liability as a matter of law, leave to amend should not be granted)].

For a form of order on a motion for judgment on the pleadings, see *§ 206.151, below*; for a form of judgment, see *§ 206.154, below*.

[2] Procedure if Granted With Leave to Amend

If leave to amend is granted, the court is required to grant 30 days to the party against whom the motion was granted to file an amended pleading [*Code Civ. Proc. § 438(h)(2)*].

If the amended pleading is filed after the time specified in the court's order, the moving party may move the court to strike the amended pleading and for entry of judgment in moving party's favor [*Code Civ. Proc §§ 438(h)(4)(A), (B), (i)(1)(A), 435(b)(1), (e)*; for a form, *see § 206.152, below*]. The moving party may also move to have the amended pleading striken and for entry judgment in its favor if the amended pleading violates the the court's prior ruling on the motion [*Code Civ. Proc §§ 438(i)(1)(A), 435(b)(1), (e)*; for a form, *see § 206.152, below*]. If no amended pleading is filed, after the time to file an amended complaint or answer has expired, the moving party must move for entry of judgment in its favor and judgment will be entered forthwith [*Code Civ. Proc. § 438(h)(4)(C), (i)(1)(B)*; for a form, *see § 206.153, below*].

All motions under *Code Civ. Proc. § 438(i)* must be made pursuant to *Code Civ. Proc. § 1010* [*Code Civ. Proc. § 438(i)(2)*; for discussion of Section 1010, *see* Ch. 372, *Motions and Orders*]. At the hearing on the motion, the court is required to determine whether to enter judgment in favor of a particular party [*Code Civ. Proc. § 438(i)(3)*; *see also Code Civ. Proc. § 438(h)(4)*].

[3] Procedure if Granted Without Leave to Amend

If the motion for judgment on the pleadings is granted with respect to the entire complaint or answer without leave to amend, judgment shall be entered forthwith in accordance with the motion [*Code Civ. Proc. § 438(h)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProceduresPretrial JudgmentsGeneral OverviewCivil ProceduresPretrial JudgmentsJudgment on the PleadingsCivil ProceduresJudgmentsEntry of JudgmentsGeneral Overview

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§ 206.60 Appeal

[1] When Available

As in the case of a demurrer, only the judgment, not the order granting the motion, is appealable [*Cream v. Wheatcraft (1953) 115 Cal. App. 2d 517, 522, 252 P.2d 637* ; *Budrow v. Wheatcraft (1953) 115 Cal. App. 2d 517, 522, 252 P.2d 637* (disapproved on other grounds in *Carney v. Simmonds (1957) 49 Cal. 2d 84, 315 P.2d 305*)].

This general rule is based on the theory that the interlocutory order can be reviewed on appeal from the final judgment. Nevertheless, when a superior court order granted a partial judgment on the pleadings as to only one cause of action and then transfered the action to the municipal court on the ground that it lacked subject matter jurisdiction of the other cause of action by itself, the order granting the partial judgment on the pleadings was treated as tantamount to a dismissal from which an appeal may be taken. Otherwise, any appeal from the subsequent municipal court judgment after trial on the remaining cause of action would have been to the appellate department of the superior court, which would not have had jurisdiction to pass on the propriety of the superior court's order granting a partial judgment on the pleadings [*Uptain v. Duarte (1988) 206 Cal. App. 3d 1258, 1261-1262, 254 Cal. Rptr. 150]* .

[2] Standard of Review

[a] Same as on Demurrer

Because a judgment on the pleadings is equivalent to a judgment entered after a demurrer has been sustained, the standard of appellate review is the same [*see, e.g.,* *Everett v. State Farm General Ins. Co. (2008) 162 Cal. App. 4th 649, 75 Cal. Rtpr. 3d 812* ; *Pardee Construction Co. v. Insurance Co. of the West (2000) 77 Cal. App. 4th 1340, 1361 n.25, 92 Cal. Rptr. 2d 443* ; *Hu v. Silgan Containers Corp. (1999) 70 Cal. App. 4th 1261, 1265, 83 Cal. Rptr. 2d 333]* . Similarly, the appellate court reviews a trial court's decision to deny a motion for judgment on the pleadings under the same standard of review as the decision to overrule a demurrer [*McCutchen v. City of Montclair (1999) 73 Cal. App. 4th 1138, 1144, 87 Cal. Rptr. 2d 95]* . For discussion of review concerning demurrers, *see § 206.36[3][a], above*.

An appellate court independently reviews a trial court's order on a motion for judgment on the pleadings [*Smiley v.*

Citibank (1995) 11 Cal. 4th 138, 146, 44 Cal. Rptr. 2d 441, 900 P.2d 690 (discussing common law motion for judgment on the pleadings); *McCutchen v. City of Montclair (1999) 73 Cal. App. 4th 1138, 1144, 87 Cal. Rptr. 2d 95* ; *Howard Jarvis Taxpayers Assn. v. City of Riverside (1999) 73 Cal. App. 4th 679, 685, 86 Cal. Rptr. 2d 592* ; *see Ludgate Ins. Co. v. Lockheed Martin Corp. (2000) 82 Cal. App. 4th 592, 602-603, 98 Cal. Rptr. 2d 277* (de novo standard of review)].

[b] Assumption of Truth of Facts Alleged

On appeal from a judgment on the pleadings for defendant, the court accepts as true all well pleaded allegations in the complaint [*Aron v. U-Haul Co. of California (2006) 143 Cal. App. 4th 796, 802, 49 Cal. Rptr. 3d 555* ; *Hong Soo Shin v. Oyoung Kong (2000) 80 Cal. App. 4th 498, 502, 95 Cal. Rptr. 304* ; *Pang v. Beverly Hospital, Inc. (2000) 79 Cal. App. 4th 986, 989, 94 Cal. Rptr. 2d 643* (material facts properly pleaded are deemed true, but not contentions, deductions, or conclusions of fact or law)].

On appeal from a judgment on the pleadings for plaintiff, the appellate court will assume the truth of all facts properly pleaded in the answer and will disregard the controverted allegations of the complaint [*Sebago, Inc. v. City of Alameda (1989) 211 Cal. App. 3d 1372, 1379-1380, 259 Cal. Rptr. 918* ; *see also Lumbermens Mut. Cas. Co. v. Vaughn (1988) 199 Cal. App. 3d 171, 178, 244 Cal. Rptr. 567* (facts alleged in attacked pleading accepted as true)].

On appeal from a judgment for the plaintiff on both the complaint and the defendant's cross complaint, both standards of review apply; the appellate court must assume the truth of all facts properly pleaded in the cross complaint and in the answer to the complaint and must disregard the controverted allegations of the complaint [*Sebago, Inc. v. City of Alameda (1989) 211 Cal. App. 3d 1372, 1379-1380, 259 Cal. Rptr. 918]* .

[c] Consideration of Facts Subject to Judicial Notice

An appellate court may take judicial notice of any matter of which a trial court may take judicial notice, and the trial court's refusal to take judicial notice does not preclude the appellate court from doing so in reviewing a judgment on the pleadings [*see Evid. Code § 459*; *Sebago, Inc. v. City of Alameda (1989) 211 Cal. App. 3d 1372, 1380, 259 Cal. Rptr. 918* ; *compare Tiffany v. Sierra Sands Unified School Dist. (1980) 103 Cal. App. 3d 218, 225, 162 Cal. Rptr. 669* (court may consider matters subject to judicial notice, including competent evidence of record in lower court) *with Hong Soo Shin v. Oyoung Kong (2000) 80 Cal. App. 4th 498, 503, 505, 95 Cal. Rptr. 304* (court does not consider factual information outside complaint and judicially noticed matters; declarations that were part of summary judgment motion could not be used to attack judgment on pleadings); *see also Pang v. Beverly Hospital, Inc. (2000) 79 Cal. App. 4th 986, 989-990, 94 Cal. Rptr. 2d 643* (taking notice of declarations that were part of summary judgment motion when both parties requested consideration)].

[d] Consideration of Admissions

The appellate court may consider matters that may be judicially noticed, including a party's admissions or concessions which cannot reasonably be controverted [*Pang v. Beverly Hospital, Inc. (2000) 79 Cal. App. 4th 986, 989-990, 94 Cal. Rptr. 2d 643* (when trial court treated motion for summary adjudication as motion for judgment on the pleadings, appellate court judicially noticed declarations, excerpts from deposition testimony and separate statement of undisputed facts placed before trial court by summary adjudication motion which contained admissions and concessions fatal to plaintiff's claim)].

The appellate court may also consider judicial admissions contained in a plaintiff's pleading and apparently admissions contained in plaintiff's opposition papers to negate plaintiff's ability to state a cause of action [*see Setliff v. E. I. Du Pont De Nemours & Co. (1995) 32 Cal. App. 4th 1525, 1534, 1536-1537, 38 Cal. Rptr. 2d 763]* .

[e] Motion Granted Without Leave to Amend

If leave to amend was not granted, the appellate court determines whether the complaint states a cause of action and whether the defect can reasonably by cured by amendment. If the pleading defect can be cured, the trial court committed reversible error. If not, the appellate court affirms. Plaintiff bears the burden of proof on this issue [*Pang v. Beverly Hospital, Inc. (2000) 79 Cal. App. 4th 986, 989, 94 Cal. Rptr. 2d 643]* . When a motion for judgment on the pleadings is granted as to the original complaint, denial of leave to amend constitutes an abuse of discretion if the pleading on its face does not show that it is incapable of amendment [*Consolidated Fire Protection Dist. v. Howard Jarvis Taxpayers' Assn. (1998) 63 Cal. App. 4th 211, 219, 73 Cal. Rptr. 2d 586* ; *Gami v. Mullikin Medical Center (1993) 18 Cal. App. 4th 870, 876-877, 22 Cal. Rptr. 2d 819]* .

Although normally an appellant may not assert on appeal a legal theory not asserted below, this principal does not apply where the case was resolved at the pleading stage without leave to amend being granted. In that situation, the appellate court must consider whether the plaintiff's allegations state a cause of action under any legal theory, whether or not asserted in the trial court [*Barthelemy v. Orange County Flood Control Dist. (1998) 65 Cal. App. 4th 558, 566, 76 Cal. Rptr. 2d 575]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsEffectCivil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionCivil ProcedureAppealsStandards of ReviewDe Novo Review

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§ 206.61 Review by Mandate

An order granting a motion for judgment on the pleadings that does not dispose of the entire case but terminates the case as to one or more of several causes of action, parties, or defenses, but less than all of them, may be reviewable before trial by mandate [*see, e.g., La Jolla Village Homeowners' Assn. v. Superior Court (1989) 212 Cal. App. 3d 1131, 1140-1141, 261 Cal. Rptr. 146* (review of motion for judgment on pleadings on one cause of action in favor of certain defendants)]. Relief by extraordinary writ is also appropriate to review denial of a motion for judgment on the pleadings if the issue raised is purely legal in nature and is one of significant legal import [*American Internat. Group, Inc. v. Superior Court (1991) 234 Cal. App. 3d 749, 755, 285 Cal. Rptr. 765* (issue of first impression regarding availability of civil RICO claim between insurer and insured)].

Generally, the same matters considered by the appellate court on appeal from a judgment on the pleadings are considered by the reviewing court on a review by mandate. Thus, for purposes of mandate review of an order for judgment on the pleadings such as the kind mentioned above, the material facts alleged in the complaint and facts that may be implied or inferred from those expressly alleged are usually treated as true, and the reviewing court determines whether the trial court erred when it ruled that the plaintiff had failed to state a cause of action as a matter of law [*La Jolla Village Homeowners' Assn v. Superior Court (1989) 212 Cal. App. 3d 1131, 1141, 261 Cal. Rptr. 146]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedureRemediesWritsCommon Law WritsMandamus

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[Reserved]

§§ 206.62[Reserved]

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17-206 California Forms of Pleading and Practice--Annotated § 206.80

§ 206.80 Related Publications from Matthew Bender

For memoranda of points and authorities relating to forms in this part, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender)

For memoranda of points and authorities supporting or opposing demurrers in particular actions and fact situations, see the General Index to California Points and Authorities (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 206.81 State Statutes

[1] Amendment of Pleadings

Time to answer or demur to amended pleading. *Code Civ. Proc. § 471.5*

When amendment is permitted. *Code Civ. Proc. §§ 472, 472a, 473*

[2] Appeal

Issue as to whether trial court abused its discretion in sustaining demurrer without leave to amend is open on appeal from subsequent judgment. *Code Civ. Proc. § 472c*

Appealable judgments and orders. *Code Civ. Proc. §§ 904.1, 904.2*

[3] Concurrent Demurrer and Answer

Party objecting to complaint or cross complaint may demur and answer at same time. *Code Civ. Proc. § 430.30(c)*

Demurrer not waived by concurrent filing of answer. *Code Civ. Proc. § 472a*.

[4] Demurrers in Specific Cases

Demurrer available to enforce *Civ. Code § 48.7(a)* ban on complaints for damages for libel or slander based on certain statements relating to child abuse while criminal prosecution is pending; award of attorney's fees and costs on sustaining of demurrer. *Civ. Code § 48.7(c), (d)*

Special demurrers prohibited in limited civil cases. *Code Civ. Proc. §§ 91(a), 92(c)*

Action for infringement of literary, artistic, or intellectual production not attached to complaint. *Code Civ. Proc. § 429.30*

Civil actions generally. *Code Civ. Proc. §§ 430.10, 430.30*

Proceeding in certiorari, mandate, or prohibition. *Code Civ. Proc. §§ 1069.1, 1089, 1105*

Proceeding in forcible entry or detainer and unlawful detainer. *Code Civ. Proc. § 1170*; *see also Code Civ. Proc. § 1167.3*

Proceeding in eminent domain. *Code Civ. Proc. §§ 1250.350-1250.370*

[5] Dismissal and Default

Dismissal of action after demurrer to complaint is sustained. *Code Civ. Proc. § 581(f)(1), (2)*

Conditions for default judgment after order on demurrer. *Code Civ. Proc. §§ 585, 586*

[6] Grounds for Demurrer

Grounds of objection to complaint or cross complaint. *Code Civ. Proc. § 430.10*

Grounds of objection to answer. *Code Civ. Proc. §§ 430.20*

When objection may be taken by demurrer. *Code Civ. Proc. § 430.30(a)*

Specification of ground of objection in demurrer. *Code Civ. Proc. § 430.60*

Invoking judicial notice. *Code Civ. Proc. § 430.70*; *Evid. Code § 453*

Waiver of ground of objection by failure to raise it by demurrer or answer. *Code Civ. Proc. § 430.80*

Matters of which court must or may take judicial notice. *Evid. Code §§ 451, 452*

[7] Nature of Demurrer

Demurrer is pleading. *Code Civ. Proc. § 422.10*

Demurrer raises issues of law only tried by court. *Code Civ. Proc. §§ 589, 591*

Demurrer constitutes appearance in case. *Code Civ. Proc. § 1014*

[8] Postponement of Hearing

Postponement of hearing on demurrer on written agreement of attorneys of record of parties who have appeared. *Code*

Civ. Proc. § 595.2

[9] Ruling on Demurrer

Power of court to hear and determine uncontested demurrers at chambers. *Code Civ. Proc. § 166(a)(3)*

Demurrer to part of pleading. *Code Civ. Proc. § 430.50*

Effect of overruling or sustaining demurrer. *Code Civ. Proc. § 472a*

When time to amend or answer after ruling on demurrer starts to run. *Code Civ. Proc. § 472b*

Specification in order sustaining demurrer of ground on which order is based. *Code Civ. Proc. § 472d*

Extensions of time. *Code Civ. Proc. §§ 1054, 1054.1*

[10] Time for Demurrer

Time to demur to complaint or cross complaint in civil action. *Code Civ. Proc. § 430.40(a)*

Time to demur to answer in civil action. *Code Civ. Proc. § 430.40(b)*

Time to demur to amended pleading in civil action. *Code Civ. Proc. §§ 471.5, 472*

Time to demur to complaint in special proceeding in unlawful or forcible detainer or forcible entry. *Code Civ. Proc. §§ 1167.3, 1170*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 206.82 California Rules of Court

Demurrer to petition within original jurisdiction or reviewing court. *Cal. Rules of Ct., Rule 8.487(b)*

Format of papers offered for filing. *Cal. Rules of Ct., Rules 2.100-2.119, 3.1110, 3.1112*

Applications for orders extending time. *Cal. Rules of Ct., Rules 2.20, 3,* 1100, *3.1103(b)*

"Shall" as used in rules is mandatory. *Cal. Rules of Ct., Rules 1.5(b), 3.1110, 3.1103(b)*

Application of civil law and motion rules (*Cal. Rules of Ct., Rule 3.1100 et seq.*). *Cal. Rules of Ct., Rule 3.1100*

Notice of hearing. *Cal. Rules of Ct., Rules 3.1100, 3.1320(c)*

Effect of failure to appear at hearing. *Cal. Rules of Ct., Rules 3.1100, 3.1320(c)*

Amendment of pleadings. *Cal. Rules of Ct., Rules 3.1100, 3.1324*

Notice and hearing on concurrent motion to strike. *Cal. Rules of Ct., Rules 3.1100, 3.1322*

Civil law and motion rules (*Cal. Rules of Ct., Rule 3.1100 et seq.*) apply to demurrers unless context or subject matter otherwise requires. *Cal. Rules of Ct., Rule 3.1103(c)*

Memoranda. *Cal. Rules of Ct., Rule 3.1113*

Providing of copies of material to be judicially noticed. *Cal. Rules of Ct., Rule 3.1306(c)*

Specification of grounds. *Cal. Rules of Ct., Rule 3.1320(a)*

Notice of hearing. *Cal. Rules of Ct., Rule 3.1320(c)*

Caption of demurrer. *Cal. Rules of Ct., Rule 3.1320(e)*

Extension of time to move to strike, to demur, or otherwise to plead to complaint when demurrer is filed that is not directed to all causes of action. *Cal. Rules of Ct., Rule 3.1320(j)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 206.83 Local Court Rules

NOTE:
Local Rules Preempted. Demurrers and the form and format of papers are now governed exclusively by the California Rules of Court and local rules concerning those subjects are preempted and should be considered null and void [*Cal. Rules of Ct., Rule 3.20* (with exception for rules adopted under Trial Court Delay Reduction Act)].

[1] Del Norte County

Points and authorities supporting demurrer. Del Norte Co. Super. Ct. Rules, Rule III, § 4

[2] Los Angeles County

Assignment of judge for law and motion matters. Los Angeles Co. Super. Ct. Rules, Rules 7.3(i), 7.4

Time; trial court delay reduction standards. Los Angeles Co. Super. Ct. Rules, Rule 7.7(a)(3)

Judicial notice. Los Angeles Co. Super. Ct. Rules, Rule 9.2

[3] Monterey County

Law and motion. Monterey Co. Super. Ct. Rules, Rule 7 et seq.

[4] Sacramento County

Civil law and motion. Sacramento Co. Super. Ct. Rules, Rule 3.00 et seq.

[5] San Bernardino County

Civil law and motion. San Bernardino Co. Super. Ct. Rules, Rule 510 et seq.

[6] San Diego County

General policies and procedures. San Diego Co. Super. Ct. Rules, Div. II, Rule 2 et seq.

[7] San Francisco City and County

Civil Law and motion matters. San Francisco Uniform Local Ct. Rules, Rule 8.0 et seq.

Demurrers and Other Motions. San Francisco Uniform Local Ct. Rules, Rule 8.7

Evidence at Hearing and Judicial Notice. San Francisco Uniform Local Ct. Rules, Rule 8.9

[8] San Luis Obispo County

Civil law and motion procedures; demurrers. San Luis Obispo Co. Super. Ct. Rules, Rule 7.00 et seq.

Legal Topics:

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

[1] Amendment

[a] In General

Demurrer is pleading subject to amendment under *Code Civ. Proc. §§ 472, 473*. *Baxter v. Boston-Pacific Oil Co. (1927) 81 Cal. App. 187, 189, 253 P. 185*

[b] Failure to Amend Within Time Allowed

On plaintiff's failure to amend complaint in timely manner after demurrer was sustained with leave to amend, trial court has discretion to grant or deny defendant's motion to dismiss under former *Code Civ. Proc. § 581(c)* (*now see Code Civ. Proc. § 581(f)(2)*) on plaintiff's opposition to motion and prompt submission of amended complaint; court is not required to dismiss action subject to subsequent motion by plaintiff under *Code Civ. Proc. § 473* (excusable neglect) to set aside and vacate order of dismissal. *Contreras v. Blue Cross of California (1988) 199 Cal. App. 3d 945, 948, 245 Cal. Rptr. 258*

[2] Appeal of Judgment of Dismissal

[a] Appealability of Order on Demurrer

Notice of appeal from nonappealable order sustaining demurrer treated as premature, but valid, notice of appeal from subsequently entered judgment of dismissal under Cal. Rules of Ct., Rule 2(c) [*see now Cal. Rules of Ct., Rule 8.104(d)*]. *Turpin v. Sortini (1982) 31 Cal. 3d 220, 224 n.2, 182 Cal. Rptr. 337, 643 P.2d 954*

Order sustaining demurrer is usually not immediately appealable, because it is not on its face a final judgment; however, it may be treated as judgment for purposes of appeals when, like a formal judgment, it disposes of action and

precludes further proceedings; when demurrer is sustained as to all causes of action, without leave to amend, only step left to finally dispose of action is formality of an order or judgment of dismissal; in those situations, appellate court may deem order sustaining demurrer to incorporate a judgment of dismissal, and review the order. *Thaler v. Household Finance Corp. (2000) 80 Cal. App. 4th 1093, 1098, 95 Cal. Rptr. 2d 779 (First Dist., Div. Five)*

Order sustaining demurrer without leave to amend is not appealable; appeal treated as being from amended notice of appeal from subsequent judgment of dismissal. *Hood v. Hacienda La Puente Unified School Dist. (1998) 65 Cal. App. 4th 435, 437 n.1, 76 Cal. Rptr. 2d 448*

Order sustaining demurrer is not appealable; it may be reviewed only on appeal from subsequent order of dismissal; although appellate court may save premature appeal by deeming order sustaining demurrer to incorporate judgment of dismissal, appellate court will not use this device to defeat appeal; appeal held timely as to sustaining of demurrers when court sustained demurrers of some of defendants without leave to amend but did not dismiss action as to them at that time and thereafter granted other defendants' motion for judgment on the pleadings and at same time dismissed all remaining defendants from the action; there was only one order dismissing the parties from the action, that is, the order granting motion for judgment on the pleadings and dismissing action as to all remaining defendants, and thus defendants that demurred were still defendants at this point, order applied to them, and their appeal from that order was timely. *Orange Unified School Dist. v. Rancho Santiago Community College Dist. (1997) 54 Cal. App. 4th 750, 756, 62 Cal. Rptr. 2d 778*

Although notice of appeal stated that appeal was from order sustaining demurrer and order denying motion for reconsideration of ruling on demurrer, both being nonappealable orders, in interest of orderly administration of justice court construed notice of appeal liberally in favor of its sufficiency interpreting it to apply to the judgment rather than the nonappealable orders. *LiMandri v. Judkins (1997) 52 Cal. App. 4th 326, 333 n.1, 60 Cal. Rptr. 2d 539 (Fourth Dist., Div. One)*

Order sustaining demurrer without leave to amend which prevents any further proceedings as a class action is in legal effect a final judgment from which an appeal lies. *Kennedy v. Baxter Healthcare Corp. (1996) 43 Cal. App. 4th 799, 807, 50 Cal. Rptr. 2d 736* (distinguishing *Vasquez v. Superior Court of San Joaquin County (1971) 4 Cal. 3d 800, 794 Cal. Rptr. 796* , in which court concluded appeal not permitted when demurrers sustained to class action allegations contained in one cause of action but overruled as to second cause of action)

When nonappealable order granting motion to strike and sustaining demurrer without leave to amend included complete opinion in support of order and constituted final judicial determination of the merits, order treated as appealable judgment. *Luna Records Corp., Inc. v. Alvarado (1991) 232 Cal. App. 3d 1023, 1025 n.1, 283 Cal. Rptr. 865*

Order sustaining demurrer without leave to amend is not appealable; any appeal must be taken from subsequent dismissal of action. *Yancey v. Fink (1991) 226 Cal. App. 3d 1334, 1342-1343, 277 Cal. Rptr. 415*

Judgment dismissing complaint after demurrer was sustained without leave to amend and complaint was severed from cross complaint for express purpose of enabling plaintiffs to appeal was nonappealable as to plaintiff who was a party to still-pending cross action; but appeal by plaintiffs who were not parties to cross complaint was proper. *California Dental Assn. v. California Dental Hygienists' Assn. (1990) 222 Cal. App. 3d 49, 58-60, 271 Cal. Rptr. 410* (nevertheless, treating cross defendant plaintiff's appeal as petition for writ of mandate to avoid fragmentation and multiplicity of appeals)

Appeal from order sustaining demurrer without leave to amend construed to be appeal from order of dismissal. *Holland v. Thacher (1988) 199 Cal. App. 3d 924, 927 n.1, 245 Cal. Rptr. 247* ; *Cohen v. Equitable Life Assurance Society (1987) 196 Cal. App. 3d 669, 671, 242 Cal. Rptr. 84* (expressing refusal to "bail out" careless attorneys in

future)

Order sustaining demurrer without leave to amend is nonappealable, but appellate court is empowered to amend order to make it appealable judgment of dismissal and to construe notice of appeal as applying to that judgment. *Hardman v. Feinstein (1987) 195 Cal. App. 3d 157, 159 n.1, 240 Cal. Rptr. 483*

[b] Burden on Appeal

If demurrer to complaint is sustained without leave to amend, burden on appeal of proving that there is reasonable possibility that defect can be cured by amendment is squarely on plaintiff. *Blank v. Kirwan (1985) 39 Cal. 3d 311, 318, 216 Cal. Rptr. 718, 703 P.2d 58* ; *Stansfield v. Starkey (1990) 220 Cal. App. 3d 59, 71-72, 269 Cal. Rptr. 337* ; *Hall v. Nomura Securities International (1990) 219 Cal. App. 3d 43, 46, 268 Cal. Rptr. 45*

Plaintiff bears burden of showing how complaint might be amended to state viable cause of action. *Duggal v. G.E. Capital Communications Services, Inc. (2000) 81 Cal. App. 4th 81, 86, 96 Cal. Rptr. 2d 383*

On appeal, plaintiff bears burden of demonstrating that trial court erroneously sustained demurrer as matter of law; because demurrer tests legal sufficiency of complaint, plaintiff must show complaint alleges facts sufficient to establish every element of each cause of action; if complaint fails to plead, or if defendant negates, any essential element of particular cause of action, appellate court should affirm sustaining of demurrer; when demurrer has been sustained without leave to amend, appellate court decides whether reasonable possibility exists that amendment may cure defect; plaintiff bears burden of proving there is reasonable possibility of amendment; plaintiff may make this showing for first time on appeal; to satisfy burden on appeal, plaintiff must show in what manner plaintiff can amend complaint and how that amendment will change legal effect of plaintiff's pleading; assertion of an abstract right to amend does not satisfy burden; plaintiff must clearly and specifically set forth applicable substantive law and legal basis for amendment, i.e., elements of cause of action and authority for it; further, plaintiff must set forth factual allegations that sufficiently state all required elements of that cause of action; allegations must be factual and specific, not vague or conclusory; burden of showing reasonable possibility exists that amendment can cure defects remains with plaintiff; neither trial court nor appellate court will rewrite complaint; when plaintiff offers no allegations to support possibility of amendment and no legal authority showing viability of new causes of action, there is no basis for finding trial court abused its discretion when it sustained demurrer without leave to amend. *Rakestraw v. California Physicians' Service (2000) 81 Cal. App. 4th 39, 43-44, 96 Cal. Rptr. 2d 354*

While appellate court must consider whether complaint might state cause of action if a defect could reasonably be cured by amendment, and reverse the judgment of dismissal if defect can be cured, plaintiff bears burden of demonstrating a reasonable possibility to cure any defect by amendment; trial court abuses discretion if it sustains demurrer without leave to amend when plaintiff shows a reasonable possibility to cure any defect by amendment; if plaintiff cannot show an abuse of discretion, trial court's order sustaining demurrer without leave to amend must be affirmed. *Schnall v. Hertz Corp. (2000) 78 Cal. App. 4th 1144, 1152, 93 Cal. Rptr. 2d 439*

If demurrer was sustained without leave to amend, appellate court decides whether there is a reasonable possibility that the defect can be cured by amendment; if it can be, trial court has abused its discretion and appellate court will reverse; burden of proving such reasonable possibility is squarely on plaintiff. *Hart v. County of Alameda (1999) 76 Cal. App. 4th 766, 775, 90 Cal. Rptr. 2d 386*

When demurrer has been sustained, appellate court determines whether complaint states facts sufficient to constitute cause of action; when demurrer sustained without leave to amend, appellate court decides whether there is reasonable possibility that defect can be cured by amendment; if it can be, trial court has abused discretion and appellate court reverses; if not there has been no abuse of discretion, and appellate court affirms; burden of proving such reasonable

possibility is squarely on plaintiff. *Lagatree v. Luce, Forward, Hamilton & Scripps (1999) 74 Cal. App. 4th 1105, 1111, 88 Cal. Rptr. 2d 664*

Although it is abuse of discretion to sustain demurrer without leave to amend when there is reasonable possibility that plaintiff can amend complaint to cure defect, burden on plaintiff to show how complaint can be amended and how amendment will change legal effect of pleading; showing may be made for first time on appeal. *McKelvey v. Boeing North American, Inc. (1999) 74 Cal. App. 4th 151, 163, 86 Cal. Rptr. 2d 645*

While plaintiff need not request leave to amend to preserve on appeal issue of whether court abused discretion in sustaining demurrer without leave to amend, on appeal plaintiff bears burden of proving there is reasonable possibility defect in pleading can be cured by amendment; plaintiff must show how plaintiff can amend its complaint and how that amendment will change legal effect of complaint. *Palm Springs Tennis Club v. Rangel (1999) 73 Cal. App. 4th 1, 7-8, 86 Cal. Rptr. 2d 73*

On appeal following sustaining demurrer without leave to amend, appellant has burden of demonstrating either (1) demurrer sustained erroneously as matter of law on facts pleaded, or (2) court abused discretion by failing to grant leave to amend. *Kroll & Tract v. Paris & Paris (1999) 72 Cal. App. 4th 1537, 1541, 86 Cal. Rptr. 2d 78*

When demurrer sustained, appellate court determines if complaint states facts sufficient to constitute cause of action; when complaint sustained without leave to amend, appellate court determines if there is reasonable possibility that defect can be cured by amendment; if it can be, trial court has abused discretion and appellate court reverses; if not, there has been no abuse of discretion and appellate court affirms; burden of proving such reasonable possibility is squarely on plaintiff. *Herman v. Los Angeles County Metropolitan Transportation Authority (1999) 71 Cal. App. 4th 819, 824, 84 Cal. Rptr. 2d 144*

When trial court sustains demurrer without leave to amend, appellate court must consider if complaint might state cause of action if defect could reasonably be cured by amendment; if defect can be cured, judgment of dismissal must be reversed to allow plaintiff opportunity to do so; plaintiff bears burden of demonstrating reasonable possibility to cure any defect by amendment; trial court abuses discretion if it sustains demurrer without leave to amend when plaintiff shows reasonable possibility to cure any defect by amendment; trial court's order sustaining demurrer without leave to amend must be affirmed if plaintiff cannot show abuse of discretion. *Lazar v. Hertz Corp. (1999) 69 Cal. App. 4th 1494, 1501, 82 Cal. Rptr. 2d 368*

Burden on plaintiff to demonstrate that the trial court abused its discretion; plaintiff must show in what manner plaintiff can amend plaintiff's complaint and how that amendment will change the legal effect of plaintiff's pleading. *Redmond v. Secure Horizons, Pacificare, Inc. (1997) 60 Cal. App. 4th 96, 105, 70 Cal. Rptr. 2d 174*

Plaintiff bears burden of proving reasonable possibility that defect can be cured by amendment when demurrer to complaint sustained without leave to amend. *Silva v. Block (1996) 49 Cal. App. 4th 345, 349, 56 Cal. Rptr. 2d 613* ; *Cross v. Bonded Adjustment Bureau (1996) 48 Cal. App. 4th 266, 275, 55 Cal. Rptr. 2d 801*

On appeal, burden on plaintiff to demonstrate either that demurrer was erroneously sustained or that sustaining demurrer without leave to amend was abuse of discretion. *Zuniga v. Housing Authority (1995) 41 Cal. App. 4th 82, 92, 48 Cal. Rptr. 2d 353*

Plaintiff bears burden on appeal of demonstrating that trial court abused its discretion in sustaining demurrer without leave to amend by showing in what manner it can amend its complaint and how that amendment will change legal effect of its pleading. *Trustees of Capital Wholesale Electric etc. Fund v. Shearson Lehman Brothers, Inc. (1990) 221 Cal. App. 3d 617, 622, 270 Cal. Rptr. 566*

[c] Considerations on Appeal

On appeal from dismissal following sustained demurrer, reviewing court takes as true all well-pleaded factual allegations of complaint. *Haggis v. City of Los Angeles (2000) 22 Cal. 4th 490, 495, 93 Cal. Rptr. 2d 327, 993 P.2d 983*

Supreme Court will assume truth of all properly pleaded material allegations when appeal is from judgment of dismissal entered after trial court sustained demurrer without leave to amend. *Preferred Risk Mutual Ins. Co. v. Reiswig (1999) 21 Cal. 4th 208, 212, 87 Cal. Rptr. 2d 187, 980 P.2d 895*

Reviewing court may consider facts judicially noticed by the trial court or those which the trial court properly could have noticed. *StorMedia Inc. v. Superior Court (1999) 20 Cal. 4th 449, 456 n.9, 84 Cal. Rptr. 2d 843, 976 P.2d 214*

Because matter comes to reviewing court after trial court sustained defendant's demurrer, reviewing court must, under established principles, assume truth of all properly pleaded material allegations of complaint in evaluating validity of decision below; only sufficiency of plaintiff's complaint, not seemliness of its litigation strategy, or its counsel's motives, are properly before court on review at this time. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc. (1998) 17 Cal. 4th 553, 558-559, 71 Cal. Rptr. 2d 731, 950 P.2d 1086*

In reviewing dismissal following trial court's sustaining of demurrer, reviewing court takes properly pleaded material allegations of complaint as true; court's only task is to determine whether complaint states cause of action. *Snyder v. Michael's Stores, Inc. (1997) 16 Cal. 4th 991, 995, 68 Cal. Rptr. 2d 476, 945 P.2d 781*

When matter comes to appellate court on demurrer, court takes facts from plaintiff's complaint, allegations of which are deemed true for limited purpose of determining whether plaintiff has stated viable cause of action. *Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 885, 66 Cal. Rptr. 2d 888, 941 P.2d 1157*

For purpose of appeal following dismissal of action after court has sustained demurrer without leave to amend, reviewing court takes properly pleaded material allegations of complaint as true; appellate court's only task on review is to determine if complaint states a cause of action. *ABC Internat. Traders, Inc. v. Matsushita Electric Corp. (1997) 14 Cal. 4th 1247, 1253, 61 Cal. Rptr. 2d 112, 931 P.2d 290*

On appeal from judgment of dismissal following sustaining of general demurrer, all material allegations of complaint as being accepted as true. *Shoemaker v. Myers (1990) 52 Cal. 3d 1, 7, 276 Cal. Rptr. 303, 801 P.2d 1054*

Only task of appellate court in ruling on demurrer as being to determine whether complaint states cause of action; accordingly, court assumes that complainant's properly pleaded material allegations are true and gives complaint a reasonable interpretation by reading it as a whole and all its parts in their context; court does not, however, assume truth of contentions, deductions, or conclusions of fact or law. *Moore v. Regents of University of California (1990) 51 Cal. 3d 120, 125, 271 Cal. Rptr. 146, 793 P.2d 479* ; *Gulf Ins. Co. v. TIG Ins. Co. (2001) 86 Cal. App. 4th 422, 429, 103 Cal. Rptr. 2d 305*

General demurrer admits proof of all material allegations in complaint and on appeal; appellate court is not concerned with plaintiff's ability to prove allegations. *Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 151 n.1, 162, 233 Cal. Rptr. 308, 729 P.2d 743*

On appeal from judgment of dismissal following sustaining of general demurrer, plaintiff's ability to prove allegations of complaint or possibile difficulty in making such proof as not concerning reviewing court; plaintiff as needing only to plead facts showing that he or she may be entitled to some relief. *Ochoa v. Superior Court (1985) 39 Cal. 3d 159,*

162 n.2, 216 Cal. Rptr. 661, 703 P.2d 1 ; *Conklin v. Sloss (1978) 86 Cal. App. 3d 241, 248, 150 Cal. Rptr. 121* ; *see also Worldwide Commerce, Inc. v. Fruehauf Corp. (1978) 84 Cal. App. 3d 803, 807, 149 Cal. Rptr. 42*

Judgment of dismissal after demurrer sustained without leave to amend is to be affirmed if proper on any grounds stated in demurrer, whether or not trial court acted on that ground. *Carman v. Alvord (1982) 31 Cal. 3d 318, 324, 182 Cal. Rptr. 506, 644 P.2d 192*

On appeal from judgment entered pursuant to order sustaining demurrer, appellate court is to assume truth of factual allegations of complaint. *Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 517, 150 Cal. Rptr. 1, 585 P.2d 851* ; *Jones v. Grewe (1987) 189 Cal. App. 3d 950, 954, 234 Cal. Rptr. 717*

Review of order sustaining demurrer on appeal is not limited to ground on which demurrer was sustained by trial court. *Burke v. Maguire (1908) 154 Cal. 456, 461, 98 P. 21*

An appellate court's only task in reviewing a ruling on a demurrer is to determine whether the complaint states a cause of action; the reviewing court assumes the truth of allegations in the complaint which have been properly pleaded and gives it a reasonable interpretation by reading it as a whole and with all its parts in their context; however, the assumption of truth does not apply to contentions, deductions, or conclusions of law and fact. *Gulf Ins. Co. v. TIG Ins. Company (2001) 86 Cal. App. 4th 422, 429, 103 Cal. Rptr. 2d 305*

In reviewing judgment of dismissal after demurrer is sustained without leave to amend, appellate court must assume truth of all facts properly pleaded by plaintiff; regardless of label attached to cause of action, appellate court must examine complaint's factual allegations to determine whether they state cause of action on any available legal theory; reversible error is committed if facts alleged show entitlement to relief under any possible legal theory; appellate court, however, will not assume truth of contentions, deductions or conclusions of fact or law, and may disregard allegations that are contrary to law or to fact of which judicial notice may be taken. *Rosales v. City of Los Angeles (2000) 82 Cal. App. 4th 419, 423-424, 98 Cal. Rptr. 2d 144*

In reviewing order sustaining demurrer, appellate court considers prior complaint and judgment, which was judicially noticed in trial court and is part of record on appeal; to determine whether to sustain demurrer on res judicata grounds, judicial notice may be taken of prior judgment and other court records. *Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 180 n.4, 98 Cal. Rptr. 2d 44*

In determining whether complaint alleges facts sufficient to state cause of action, appellate court treats demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of law; court also considers matter that court may or must take judicial notice. *Freis v. Soboroff (2000) 81 Cal. App. 4th 1102, 1104, 97 Cal. Rptr. 2d 429*

In reviewing sufficiency of complaint against general demurrer, appellate court treats demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law; court also considers matters that may be judicially noticed; when demurrer was sustained, appellate court determines whether complaint states facts sufficient to constitute cause of action. *Rakestraw v. California Physicians' Service (2000) 81 Cal. App. 4th 39, 43, 96 Cal. Rptr. 2d 354*

For purposes of assessing sufficiency of demurrer, appellate court assumes truth of all well-pleaded facts; appellate court accepts as true all facts that may be implied or inferred from those alleged; in addition, relevant matters that are properly subject of judicial notice may be treated as having been pled. *Thaler v. Household Finance Corp. (2000) 80 Cal. App. 4th 1093, 1098, 95 Cal. Rptr. 2d 779*

Appellate court treats demurrer as admitting all material facts when properly pleaded; court, however, will not assume

truth of contentions, deductions, or conclusions of fact or law and court may disregard any allegations that are contrary to law or to fact of which judicial notice may be taken. *Crystaplex Plastics, Ltd. v. Redevelopment Agency (2000) 77 Cal. App. 4th 990, 993, 92 Cal. Rptr. 2d 197*

Demurrer admits truth of all material factual allegations, and appellate court is required to accept them as such, together with those matters subject to judicial notice. *Wise v. Pacific Gas & Electric Co. (1999) 77 Cal. App. 4th 287, 291, 91 Cal. Rptr. 2d 479*

When examining sufficiency of complaint against general demurrer, appellate court treats as true all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law; court, however disregards allegations that are contrary to law or to facts that may be judicially noticed, or are contradicted by express terms of an exhibit incorporated into the complaint; when plaintiff pleads inconsistent facts without explaining inconsistency, court will read into amended complaint facts alleged in superseded complaint; moreover, when affidavits or exhibits filed by plaintiff may be judicially noticed, court may consider those facts to assess whether complaint survives general demurrer; because plaintiff was given leave to amend complaint but elected to stand on allegations as pleaded, appellate court construes any ambiguity against plaintiff. *Freeman v. San Diego Assn. of Realtors (1999) 77 Cal. App. 4th 171, 178 n.3, 197, 91 Cal. Rptr. 2d 534*

Demurrer admits all material facts properly pleaded, and because review on demurrer is pure legal question, trial court's determination entitled to no deference from appellate court; one area when court's discretion comes into play is when plaintiff complains trial court abused discretion in refusing leave to amend in which case appellate court considers each issue, accordingly, in light of possibility that the complaint could be improved enough to survive demurrer; appellate court must afford reasonable interpretation of complaint read as a whole with its parts in context. *Charpentier v. Los Angeles Rams Football Co. (1999) 75 Cal. App. 4th 301, 306-307, 307 n.4, 89 Cal. Rptr. 2d 115*

Appellate court treats demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law; court also considers matters that may be judicially noticed; further, court gives complaint reasonable interpretation, reading it as whole, and its parts in their context. *Lagatree v. Luce, Forward, Hamilton & Scripps (1999) 74 Cal. App. 4th 1105, 1110-1111, 88 Cal. Rptr. 2d 664*

In reviewing sufficiency of complaint against general demurrer, appellate court treats demurrer as admitting all material facts properly pleaded. *Britz, Inc. v. Dow Chemical Co. (1999) 73 Cal. App. 4th 177, 180, 86 Cal. Rptr. 2d 188*

On appeal from judgment dismissing action after sustaining demurrer without leave to amend, appellate court gives complaint reasonable interpretation, and treats demurrer as admitting all material facts properly pleaded, but does not assume truth of contentions, deductions or conclusions of law. *Palm Springs Tennis Club v. Rangel (1999) 73 Cal. App. 4th 1, 4-5, 86 Cal. Rptr. 2d 73*

Appellate court treats demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law; appellate court also considers matters judicially noticed; general demurrer admits truth of all material factual allegations of complaint and plaintiff's ability to prove allegations, or possible difficulty in making such proof, does not concern reviewing court; appellate court not bound by construction placed by trial court on pleadings and must make independent judgment thereon, even as to matters not expressly ruled on by trial court; complaint must be given reasonable interpretation and read as whole with its parts considered in their context. *Herman v. Los Angeles County Metropolitan Transportation Authority (1999) 71 Cal. App. 4th 819, 824, 84 Cal. Rptr. 2d 144*

In reviewing sufficiency of complaint against general demurrer, court treats demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law; court also considers matters that may be judicially noticed. *Boyle v. City of Redondo Beach (1999) 70 Cal. App. 4th 1109, 1114 n.2, 83 Cal. Rptr. 2d 164*

Because appeal arises from dismissal following demurrer, appellate court relies on plaintiffs' complaint and documents court judicially noticed for summary of factual background; court accepts as true all properly pleaded allegations without concern for proof problems; court must accept as true not only facts alleged in complaint but also facts that may be implied or inferred from those expressly alleged. *Gordon v. Law Offices of Aguirre & Meyer (1999) 70 Cal. App. 4th 972, 975 n.2, 976, 83 Cal. Rptr. 2d 119*

Appellate court gives complaint reasonable interpretation, reading it as whole and reviewing its parts in context; court deems true all material facts properly pled; court also accepts as true those facts that may be implied or inferred from those expressly alleged. *Lazar v. Hertz Corp. (1999) 69 Cal. App. 4th 1494, 1501, 82 Cal. Rptr. 2d 368*

In reviewing sufficiency of complaint, appellate court treats demurrer as admitting all material facts properly pleaded; in construing pleading for purpose of determining its effect, its allegations must be liberally construed with view toward substantial justice between parties. *Levin v. Gulf Ins. Group (1999) 69 Cal. App. 4th 1282, 1284, 82 Cal. Rptr. 2d 228* ; *Chazen v. Centennial Bank (1998) 61 Cal. App. 4th 532, 542, 71 Cal. Rptr. 2d 462*

In reviewing ruling on demurrer, court treats demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law; court also considers matters that may be judicially noticed; further, court gives complaint reasonable interpretation, reading it as whole and its parts in their context. *Countrywide Home Loans, Inc. v. Superior Court (1999) 69 Cal. App. 4th 785, 791, 82 Cal. Rptr. 2d 63*

Appellate court treats demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of law; court also disregards allegations that are contrary to law or facts that may be judicially noticed or that are contradicted by express terms of exhibit incorporated into complaint; court gives complaint reasonable interpretation, reading it as whole and its parts in their context, to determine if complaint states facts sufficient to constitute cause of action. *Breneric Associates v. City of Del Mar (1998) 69 Cal. App. 4th 166, 180, 81 Cal. Rptr. 2d 324*

Demurrer treated as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law; appellate court gives complaint reasonable interpretation, reading it as whole and its parts in context; when demurrer is based on affirmative defense, defense must clearly appear on face of complaint to support demurrer; demurrer based on affirmative defense cannot properly be granted when action might be barred by defense, but is not necessarily barred. *CrossTalk Productions, Inc. v. Jacobson (1998) 65 Cal. App. 4th 631, 635, 76 Cal. Rptr. 2d 615*

In reviewing judgment of dismissal after demurrer is sustained without leave to amend, appellate court assumes truth of all facts properly pleaded by plaintiff; regardless of label attached to cause of action, court must examine complaint's factual allegations to determine whether they state cause of action on any available legal theory; reversible error committed if facts alleged show entitlement to relief under any legal theory; court, however, will not assume truth of contentions, deductions, or conclusions and may disregard allegations that are contrary to the law or to a fact which judicial notice may be taken; court may take judicial notice of records of California court and must take judicial notice of state's decisional and statutory law. *Cochran v. Cochran (1998) 65 Cal. App. 4th 488, 493, 76 Cal. Rptr. 2d 540*

In reviewing sufficiency of complaint against general demurrer, appellate court treats demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of law; court also considers matters which may be judicially noticed; court gives complaint reasonable interpretation, reading it as a whole and its parts in their context. *Hood v. Hacienda La Puente Unified School Dist. (1998) 65 Cal. App. 4th 435, 438, 76 Cal. Rptr. 2d 448*

When reviewing order sustaining demurrer, appellate court must presume truth of all material facts alleged in complaint; argumentative allegations and conclusions of law are not presumed true. 20th *Century Ins. Co. v. Quackenbush (1998) 64 Cal. App. 4th 135, 138 n.1, 75 Cal. Rptr. 2d 113*

On appeal from judgment of dismissal after demurrer has been sustained without leave to amend, appellate court assumes truth of all properly pleaded facts in complaint; appellate court examines these facts to determine whether complaint successfully states cause of action on any available legal theory; if it does, sustaining demurrer constitutes abuse of discretion and appellate court must reverse. *Day v. AT & T Corp. (1998) 63 Cal. App. 4th 325, 331, 74 Cal. Rptr. 2d 55*

Because it is not reviewing court's role to construct theories or arguments that would undermine the judgment, appellate court considers only those theories advanced in appellant's briefs. *Mead v. Sanwa Bank California (1998) 61 Cal. App. 4th 561, 564, 71 Cal. Rptr. 2d 625*

In reviewing judgment of dismissal after demurrer sustained without leave to amend, court must assume truth of all facts properly pleaded by plaintiff; regardless of label attached, court must examine complaint's factual allegations to determine whether they state cause of action on any available legal theory; reversible error committed if facts alleged show entitlement to relief under any possible legal theory; court, however, will not assume truth of contentions, deductions or conclusions of fact or law and may disregard allegations that are contrary law or fact of which judicial notice may be taken. *Cochran v. Cochran (1997) 56 Cal. App. 4th 1115, 1119-1120, 66 Cal. Rptr. 2d 337*

On review, demurrer admits all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law; appellate court must examine complaint's factual allegations to determine if they state cause of action under any legal theory regardless of label given to the cause of action; reversible error committed if facts alleged show entitlement to relief under any possible legal theory. *Daly v. Exxon Corp (1997) 55 Cal App. 4th 39, 43, 63 Cal. Rptr. 2d 727*

In determining merits of demurrer, all material facts pleaded in complaint and those that arise by reasonable implication, but not conclusions of fact or law, are deemed admitted by demurring party; on appeal, reviewing court does not review validity of trial court's reasoning, but only propriety of the ruling itself. *Orange Unified School Dist. v. Rancho Santiago Community College Dist. (1997) 54 Cal. App. 4th 750, 757, 62 Cal. Rptr. 2d 778*

Reviewing court's task in reviewing a judgment following the sustaining of a general demurrer without leave to amend is to determine if complaint states, or can be amended to state, a cause of action; for that purpose reviewing court accepts as true complaint's properly pleaded material factual allegations together with facts that may properly be judicially noticed. *LiMandri v. Judkins (1997) 52 Cal. App. 4th 326, 335, 60 Cal. Rptr. 2d 539*

In reviewing demurrer, appellate court limited to facts alleged in complaint and appearing in exhibits attached to complaint; demurrer challenges only legal sufficiency of complaint, not truth of its factual allegations or plaintiff's ability to prove those allegations; thus, appellate court treats as true all of complaint's material factual allegations, but not contentions, deductions, or conclusions of fact or law and can also consider facts appearing in exhibits attached to complaint; appellate court required to construe complaint liberally to determine if cause of action has been stated, given assumed truth of facts pleaded. *Picton v. Anderson Union High School Dist. (1996) 50 Cal. App. 4th 726, 730, 732-733, 57 Cal. Rptr. 2d 829*

A party cannot retreat from allegations and supporting exhibits concerning actual documentation and supplant them in amended pleadings with conclusory allegations characterizing documentation in general terms, and with an entirely different twist; moreover, allegations in complaint must yield to contrary facts found in exhibits to complaint. *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc. (1996) 49 Cal. App. 4th 472, 484, 56 Cal. Rptr. 2d 756*

When reviewing sufficiency of complaint against demurrer, court must accept as true factual allegations of complaint, but not contentions, deductions or conclusions of law; allegations of complaint superseded by amended complaint ordinarily not considered, but are considered when amended complaint tries to avoid earlier complaint's defects by pleading inconsistent facts or omitting facts that rendered prior complaint defective. *Baltins v. James (1995) 36 Cal. App. 4th 1193, 1196-1197, 1205, 42 Cal. Rptr. 2d 896* (disapproved on other grounds in *Jordache Enterprises, Inc. v.*

Brobeck, Phleger & Harrison (1998) 18 Cal. 4th 739, 761, 76 Cal. Rptr. 2d 749, 958 P.2d 1026)

Court may consider judicial admissions contained in plaintiff's complaint and apparently admissions contained in plaintiff's opposition papers to defendant's demurrer to negate plaintiff's ability to state cause of action. See *Setliff v. E.I. Du Pont De Nemours & Co. (1995) 32 Cal. App. 4th 1525, 1534, 1536, 38 Cal. Rptr. 2d 763*

Determination of sufficiency of complaint against demurrer is limited to whether plaintiff alleged essential facts to support claim for relief; court as not concerned with plaintiff's possible inability or difficulty in proving allegations of complaint. *Parada v. City of Colton (1994) 24 Cal. App. 4th 356, 362, 29 Cal. Rptr. 2d 309*

On appeal, party may change his or her theory so long as it presents only questions of law based on undisputed facts. *Sanchez v. Truck Ins. Exchange (1994) 21 Cal. App. 4th 1778, 1787, 26 Cal. Rptr. 2d 812*

In evaluating whether appellant may be able to state cause of action, all allegations are taken as true even though their proof appears unlikely, as well as all facts that may be implied or inferred from those expressly alleged. *Smith v. County of Kern (1993) 20 Cal. App. 4th 1826, 1830, 25 Cal. Rptr. 2d 716*

In reviewing order sustaining demurrer without leave to amend, appellate court accepts as true all properly pleaded facts since strong policy favors hearing on the merits. *Vaillette v. Fireman's Fund Ins. Co. (1993) 18 Cal. App. 4th 680, 685, 22 Cal. Rptr. 2d 807*

Correctness of trial court's action in sustaining demurrer, not its reasons, as reviewable. *Tarmann v. State Farm Mut. Auto. Ins. Co. (1991) 2 Cal. App. 4th 153, 159, 2 Cal. Rptr. 2d 861*

On appeal from judgment entered after sustaining demurrer to complaint without leave to amend, appellate court as construing allegations of complaint liberally to attain substantial justice among parties, as deeming true all material and properly pleaded facts, as considering all documents that have been determined by trial court as appropriate for judicial notice, and as not considering conclusions of fact or law, opinions, speculation, or allegations that are contrary either to law or to judicially noticed facts. *Long Beach Equities, Inc. v. County of Ventura (1991) 231 Cal. App. 3d 1016, 1024, 282 Cal. Rptr. 877*

In reviewing demurrer to complaint, appellate court as assuming that plaintiff can prove all facts that he or she has alleged. *William S. Hart Union High School Dist. v. Regional Planning Com. (1991) 226 Cal. App. 3d 1612, 1616 n.2, 277 Cal. Rptr. 645*

If demurrer is sustained, appellate court as determining whether complaint states facts sufficient to constitute cause of action, allegations as regarded as true and as liberally construed with view to attaining substantial justice, and relevant matters that are properly the subject of judicial notice as permitted to be treated as having been pleaded; if demurrer is sustained without leave to amend, appellate court as deciding whether there is a reasonable possibility defect can be cured by amendment; if not, trial court as not having abused its discretion, and appellate court as affirming. *Nordlinger v. Lynch (1990) 225 Cal. App. 3d 1259, 1271, 275 Cal. Rptr. 684*

When reviewing order sustaining demurrer without leave to amend, appellate court as required to treat demurrer as admitting all properly pleaded facts, but not contentions, deductions, or conclusions of law, and as required to read complaint as a whole and to give it reasonable interpretation; appellant as permitted to raise arguments for first time on appeal when facts are not disputed and issue merely raises new question of law. *Koch v. Rodlin Enterprises (1990) 223 Cal. App. 3d 1591, 1595, 273 Cal. Rptr. 438*

On review of judgment of dismissal following sustaining of demurrer to complaint with leave to amend and plaintiff elected not to amend, appellate court as reviewing facts alleged in complaint in light of well-established principle that

allegations of complaint that are not contrary to law or to fact of which court may take judicial notice must be deemed to be true. *Terminals Equipment Co. v. City and County of San Francisco (1990) 221 Cal. App. 3d 234, 238, 241, 270 Cal. Rptr. 329*

Reviewing court is concerned not with party's possible difficulty or inability in proving allegations of complaint, but rather with party's possible entitlement to relief. *Rader Co. v. Stone (1986) 178 Cal. App. 3d 10, 20, 223 Cal. Rptr. 806*

[d] Standard of Review

In reviewing sufficiency of complaint against general demurrer, appellate court (1) treats demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law; (2) considers matters that may be judicially noticed; (3) gives complaint reasonable interpretation, reading it as a whole and its parts in their context; (4) determines, when demurrer is sustained, whether complaint states facts sufficient to constitute cause of action; and (5) decides, when demurrer is sustained without leave to amend, whether there is a reasonable possibility that defect can be cured by amendment; if it can, trial court has abused its discretion and appellate court reverses; if not, there has been no abuse of discretion and appellate court affirms. *Blank v. Kirwan (1985) 39 Cal. 3d 311, 318, 216 Cal. Rptr. 718, 703 P.2d 58* ; *Marsha V. v. Gardner (1991) 231 Cal. App. 3d 265, 269, 281 Cal. Rptr. 473* ; *Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal. App. 3d 1371, 1381, 272 Cal. Rptr. 387* ; *Stansfield v. Starkey (1990) 220 Cal. App. 3d 59, 71-72, 269 Cal. Rptr. 337*

If general demurrer is to original complaint and is sustained without leave to amend, issues presented on appeal is whether complaint states cause of action and, if not, whether there is reasonable possibility that it could be amended to do so. *Martinez v. Socoma Companies, Inc. (1974) 11 Cal. 3d 394, 400, 113 Cal. Rptr. 585, 521 P.2d 841*

Trial court's decision to dismiss case after sustaining general demurrer is based predominantly on question of law; trial court's ruling is, therefore, subject to de novo review, meaning that appellate court independently exercises its judgment about whether complaint properly states cause of action. *Kendrick v. City of Eureka (2000) 82 Cal. App. 4th 364, 368, 98 Cal. Rptr. 2d 153*

When reviewing order sustaining demurrer without leave to amend, appellate court must treat demurrer as admitting all properly pleaded facts, but not contentions, deductions or conclusions of law; court must read complaint as whole and give it reasonable interpretation; regardless of labels attached to cause of action, court must examine complaint's factual allegations to determine whether they state cause of action on any available theory; reversible error is committed if facts alleged show entitlement to relief under any possible legal theory. *Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 180, 98 Cal. Rptr. 2d 44*

On appeal from judgment dismissing action after sustaining demurrer without leave to amend, standard of review is well settled; reviewing court gives complaint reasonable interpretation, and treats demurrer as admitting all material facts properly pleaded; court does not, however, assume truth of contentions, deductions or conclusions of law; judgment must be affirmed if any of several grounds of demurrer is well taken; however, it is error for trial court to sustain demurrer when plaintiff has stated cause of action under any possible legal theory; and it is abuse of discretion to sustain demurrer without leave to amend if plaintiff shows there is reasonable possibility any defect identified by defendant can be cured by amendment. *Shvarts v. Budget Group, Inc. (2000) 81 Cal. App. 4th 1153, 1157, 97 Cal. Rptr. 2d 722*

When demurrer sustained without leave to amend, appellate court determines whether there is reasonable possibility that cause of action can be stated; if it can, appellate court reverses; if not, appellate court affirms. *Ball v. GTE Mobilnet of California (2000) 81 Cal. App. 4th 529, 535, 96 Cal. Rptr. 2d 801*

In reviewing judgment of dismissal after demurrer sustained without leave to amend, appellate court must assume truth of all facts properly pleaded by plaintiff; appellate court, however, does not assume truth of contentions, deductions or conclusions of fact or law and may disregard allegations that are contrary to law or fact of which judicial notice may be taken; regardless of labels attached to cause of action, appellate court must examine complaint's factual allegations to determine if they state cause of action on any available legal theory; reversible error is committed if facts alleged show entitlement to relief under any possible legal theory; appellate court will affirm order sustaining demurrer which is correct on any legal theory. *Duggal v. G.E. Capital Communications Services, Inc. (2000) 81 Cal. App. 4th 81, 86, 96 Cal. Rptr. 2d 383*

On appeal, plaintiff bears burden of demonstrating that trial court erroneously sustained demurrer as matter of law; appellate court thus reviews complaint de novo to determine whether it alleges facts stating cause of action under any legal theory; because demurrer tests legal sufficiency of complaint, plaintiff must show complaint alleges facts sufficient to establish every element of each cause of action; if complaint fails to plead, or if defendant negates, any essential element of particular cause of action, appellate court should affirm sustaining of demurrer; when demurrer sustained without leave to amend, appellate court decides whether reasonable possibility exists that amendment may cure defect; if it can appellate court reverses, but if not appellate court affirms. *Rakestraw v. California Physicians' Service (2000) 81 Cal. App. 4th 39, 43, 96 Cal. Rptr. 2d 354*

Although appellate court exercises its independent judgment in reviewing demurrer to determine if complaint's factual allegations state cause of action, appellate court must affirm if trial court's decision to sustain demurrer was correct on any theory; because case comes to appellate court on sustaining of demurrer, court accepts as true facts alleged in complaint. *Boon v. Rivera (2000) 80 Cal. App. 4th 1322, 1325-1327, 96 Cal. Rptr. 2d 276*

Order sustaining demurrer is erroneous if allegations of complaint state cause of action under any legal theory; on appeal from demurrer/dismissal of declaratory relief action, appellate court may apply abuse of discretion standard to determine whether declaratory relief is proper remedy unless facts not in dispute and issue may be determined as matter of law. *Thaler v. Household Finance Corp. (2000) 80 Cal. App. 4th 1093, 1098, 1099 n.5, 95 Cal. Rptr. 2d 779*

On appeal from a dismissal after an order sustaining a demurrer, appellate court reviews order de novo, exercising independent judgment about whether complaint states cause of action as matter of law; appellate court gives complaint reasonable interpretation, reading it as whole and viewing its parts in context; appellate court deems to be true all material facts properly pled and must also accept as true those facts that may be implied or inferred from those expressly alleged; if no liability exists as matter of law, appellate court must affirm that part of judgment sustaining demurrer; trial court abuses its discretion if it sustains demurrer without leave to amend when plaintiff shows reasonable possibility to cure any defect by amendment; complaint's allegations must be liberally construed with view to substantial justice between parties. *Mack v. Soung (2000) 80 Cal. App. 4th 966, 971-972, 95 Cal. Rptr. 2d 830*

In reviewing dismissal entered after trial court sustained demurrer, appellate court takes properly pleaded material allegations of complaint to be true; appellate court's task is to determine if complaint states cause of action; demurrer to it is properly sustained if complaint on its face alleges facts amounting to an affirmative defense of absolute privilege. *Easton v. Sutter Coast Hospital (2000) 80 Cal. App. 4th 485, 490, 95 Cal. Rptr. 2d 316*

Appellate court reviews de novo to determine whether facts as pleaded could entitle plaintiff to any legal remedy as matter of law; appellate court gives complaint reasonable interpretation, reading it as whole and viewing its parts in context; court deems to be true all material facts properly plead; in other words, plaintiff need only plead facts showing that plaintiff may be entitled to some relief; court construes complaint's allegations liberally with view to substantial justice between parties. *Roskind v. Morgan, Stanley Dean Witter & Co. (2000) 80 Cal. App. 4th 345, 349-350, 95 Cal. Rptr. 2d 258*

Review of judgment entered after sustaining demurrer without leave to amend presents question whether it appears plaintiff is entitled to any relief at court's hands against defendants, which is pure question of law. *Roskind v. Morgan, Stanley Dean Witter & Co. (2000) 80 Cal. App. 4th 345, 349, 95 Cal. Rptr. 2d 258* ; *Schnall v. Hertz Corp. (2000) 78 Cal. App. 4th 1144, 1152, 93 Cal. Rptr. 2d 439*

Demurrer tests legal sufficiency of complaint, and granting leave to amend involves trial court's discretion; therefore, appellate court employs two separate standards of review on appeal; first, complaint is reviewed de novo to determine if it contains sufficient facts to state cause of action; in doing so, appellate court accepts as true complaint's properly pleaded material factual allegations, together with facts that may be properly judicially noticed; reversible error exists only if facts were alleged showing entitlement to relief under any possible legal theory; second, when demurrer is sustained without leave to amend, reviewing courts determine if trial court abused its discretion in doing so; appellate court will only reverse for abuse of discretion if appellate court determines there is reasonable possibility the pleading can be cured by amendment; otherwise, trial court's decision will be affirmed for lack of abuse. *G. L. Mezzetta, Inc. v. City of American Canyon (2000) 78 Cal. App. 4th 1087, 1091-1092, 93 Cal. Rptr. 2d 292*

On appeal, appellate court does not review validity of trial court's reasoning but only propriety of ruling itself; appellate court is not bound by trial court's construction of complaint, but must make its own independent interpretation. *Rodas v. Spiegel (2001) 87 Cal. App. 4th 513, 517, 104 Cal. Rptr. 2d 439* ; *Wilner v. Sunset Life Ins. Co. (2000) 78 Cal. App. 4th 952, 958, 93 Cal. Rptr. 2d 413*

When trial court sustains demurrer without leave to amend, appellate court reviews action under abuse of discretion standard; if there is reasonable possibility that pleading can be cured by amendment, trial court's ruling will be reversed; on review, appellate court examines complaint's factual allegations to determine if they state cause of action on any available legal theory; court treats demurrer as admitting all material facts when properly pleaded; court, however, will not assume truth of contentions, deductions, or conclusions of fact or law and court may disregard any allegations that are contrary to law or to fact of which judicial notice may be taken. *Crystaplex Plastics, Ltd. v. Redevelopment Agency (2000) 77 Cal. App. 4th 990, 993, 92 Cal. Rptr. 2d 197*

Reviewing court gives complaint reasonable interpretation, and treats demurrer as admitting all material facts properly pleaded; court does not, however, assume truth of contentions, deductions or conclusions of law; judgment must be affirmed if any one of several grounds of demurrer is well taken; however, it is error of law for a trial court to sustain demurrer when plaintiff has stated cause of action under any legal theory; questions of law are independently reviewed. *Walker v. Allstate Indemnity Co. (2000) 77 Cal. App. 4th 750, 754, 92 Cal. Rptr. 2d 132*

In reviewing sufficiency of complaint against a general demurrer that was sustained, appellate court treats demurrer as admitting all material facts that are properly pleaded and determines whether the complaint states facts sufficient to constitute a cause of action. *Writers Guild of America, West, Inc. v. City of Los Angeles (2000) 77 Cal. App. 4th 475, 477, 91 Cal. Rptr. 2d 603*

Court's task in reviewing ruling on demurrer is to determine whether complaint states cause of action; accordingly, court assumes that complaint's properly pleaded material allegations are true and gives complaint reasonable interpretation by reading it as a whole and all its parts in context; when trial court sustains demurrer, reversible error exists if those facts show entitlement under any possible legal theory; further, when demurrer is sustained without leave to amend, appellate court decides whether there is a reasonable possibility that defect can be cured by amendment; if it can be, trial court has abused its discretion and appellate court will reverse. *Hart v. County of Alameda (1999) 76 Cal. App. 4th 766, 775, 90 Cal. Rptr. 2d 386*

When trial court sustained demurrers without leave to amend, appellate court reviews trial court's ruling for abuse of discretion, treating demurrers as admitting all material facts properly pleaded in complaint; if those facts sufficient to support a cause of action under any valid theory, complaint is good against demurrers. *Mac v. Bank of America (1999)*

76 Cal. App. 4th 562, 564, 90 Cal. Rptr. 2d 496

Because appellate court assumes truth of all properly pleaded material allegations of complaint with respect to appeal from judgment based on sustaining of demurrer, interpretation of *Code Civ. Proc. § 47(b)* is question of law and subject to appellate court's independent review. *Sacramento Brewing Co. v. Desmond, Miller & Desmond (1999) 75 Cal. App. 4th 1082, 1085, 89 Cal. Rptr. 2d 760*

On review of judgment sustaining demurrers without leave to amend, appellate court accepts as true factual allegations in complaint; for purpose of determining effect of complaint, its allegations are liberally construed, with a view toward substantial justice; in reviewing sufficiency of complaint against general demurrer, appellate court must determine whether complaint states facts sufficient to constitute cause of action; and when it is sustained without leave to amend, appellate court decides whether there is reasonable possibility that the defect can be cured by amendment; if it can be, trial court abused its discretion and appellate court reverses; if not, there has been no abuse of discretion and appellate court affirms; if appellate court concludes complaint does not state a claim, but there is reasonable possibility that defects can be cured by amendment, leave to amend must be granted. *Stevens v. Superior Court (1999) 75 Cal. App. 4th 594, 599, 601, 89 Cal. Rptr. 2d 370*

Demurrer admits all material facts properly pleaded, and because review on demurrer is pure legal question, trial court's determination is entitled to no deference from appellate court; one area when court's discretion comes into play is when plaintiff complains trial court abused discretion in refusing leave to amend in which case appellate court considers each issue, accordingly, in light of possibility that the complaint could be improved enough to survive demurrer; appellate court must afford reasonable interpretation of complaint read as a whole with its parts in context; if factual allegations of complaint are adequate to state cause of action under any legal theory, demurrer must be overruled; appellate court can only uphold general demurrer sustained without leave to amend if it appears there is no cause of action stated under applicable substantive law. *Charpentier v. Los Angeles Rams Football Co. (1999) 75 Cal. App. 4th 301, 306-307, 307 n.4, 89 Cal. Rptr. 2d 115*

Appellate court treats demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law; court also considers matters that may be judicially noticed; further, court gives complaint a reasonable interpretation, reading it as whole, and its parts in their context; when demurrer sustained, appellate court determines whether complaint states facts sufficient to constitute cause of action; when demurrer sustained without leave to amend, appellate court decides whether there is reasonable possibility that defect can be cured by amendment; if it can be, trial court has abused discretion and appellate court reverses; if not, there has been no abuse of discretion, and appellate court affirms; burden of proving such reasonable possibility is squarely on plaintiff. *Lagatree v. Luce, Forward, Hamilton & Scripps (1999) 74 Cal. App. 4th 1105, 1110-1111, 88 Cal. Rptr. 2d 664*

In evaluating whether court erred in sustaining demurrer, appellate court must assume truth of all facts properly pleaded and decide whether, on de novo review of complaint, plaintiff has pleaded sufficient facts to constitute cause of action; when trial court sustains demurrer without leave to amend, appellate court must decide whether complaint alleges facts showing entitlement to relief under any possible legal theory; if so, court abuses its discretion in denying leave to amend. *Harris v. Rudin, Richman & Appel (1999) 74 Cal. App. 4th 299, 306-307, 87 Cal. Rptr. 2d 822*

On appeal from judgment dismissing action after sustaining demurrer without leave to amend, appellate court gives complaint reasonable interpretation, and treats demurrer as admitting all material facts properly pleaded, but does not assume truth of contentions, deductions or conclusions of law; trial court errs in sustaining demurrer when plaintiff has stated cause of action under any possible legal theory, and abuses discretion in sustaining demurrer without leave to amend if plaintiff shows there is reasonable possibility any defect identified by defendant can be cured by amendment. *Palm Springs Tennis Club v. Rangel (1999) 73 Cal. App. 4th 1, 4-5, 86 Cal. Rptr. 2d 73*

Because demurrer both tests legal sufficiency of complaint and involves trial court's discretion, appellate court employs

two separate standards of review; first court reviews complaint de novo to determine whether complaint alleges facts sufficient to state cause of action under any legal theory, or in other words, to determine whether or not trial court erroneously sustained demurrer as matter of law; second, if trial court sustains demurrer without leave to amend, appellate court determines whether plaintiff could amend complaint to state cause of action. *Filet Menu, Inc. v Cheng (1999) 71 Cal. App. 4th 1276, 1279, 84 Cal. Rptr. 2d 384*

Because appeal follows order sustaining demurrer, appellate court accepts as true all well-pleaded material allegations of complaint; although appellate court exercises independent judgment in reviewing demurrer to determine if complaint's factual allegations state cause of action, appellate court must affirm if trial court's decision is correct on any theory. *Trinkle v. California State Lottery (1999) 71 Cal. App. 4th 1198, 1200-1201, 84 Cal. Rptr. 2d 496*

Appellate court treats demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law; appellate court also considers matters judicially noticed; general demurrer admits truth of all material factual allegations of complaint and plaintiff's ability to prove allegations, or possible difficulty in making such proof, does not concern reviewing court; appellate court not bound by construction placed by trial court on pleadings and must make independent judgment thereon, even as to matters not expressly ruled on by trial court; complaint must be given reasonable interpretation and read as whole with its parts considered in context; when demurrer sustained, appellate court determines if complaint states facts sufficient to constitute cause of action; when complaint sustained without leave to amend, appellate court determines if there is reasonable possibility that defect can be cured by amendment; if it can be, trial court has abused discretion and appellate court reverses; if not, there has been no abuse of discretion and appellate court affirms. *Herman v. Los Angeles County Metropolitan Transportation Authority (1999) 71 Cal. App. 4th 819, 824, 84 Cal. Rptr. 2d 144*

In reviewing judgment of dismissal after demurrer sustained without leave to amend, appellate court assumes truth of all facts properly pleaded by plaintiff; regardless of label attached to cause of action, appellate court must examine complaint's factual allegations to determine whether they state cause of action on any legal theory; reversible error is committed if facts alleged show entitlement to relief under any possible legal theory; appellate court, however, will not assume truth of contentions, deductions, or conclusions of fact or law and may disregard allegations that are contrary to law or to a fact of which judicial notice may be taken; when ground for objection to complaint, such as statute of limitations, appears on its face or from matters of which court may take judicial notice, demurrer on that ground is proper. *Shaolian v. Safeco Ins. Co. (1999) 71 Cal. App. 4th 268, 271, 83 Cal. Rptr. 2d 702*

When demurrer sustained, appellate court determines whether complaint states facts sufficient to constitute cause of action; when demurrer sustained without leave to amend, appellate court decides whether a reasonable possibility exists that amendment may cure defect; if it can, appellate court reverses, but if not appellate court affirms. *Boyle v. City of Redondo Beach (1999) 70 Cal. App. 4th 1109, 1114 n.2, 83 Cal. Rptr. 2d 164*

On appeal from judgment of dismissal following sustaining of demurrer without leave to amend, appellate court must accept as true not only facts alleged in complaint but also facts that may be implied or inferred from those expressly alleged; demurrer based on statute of limitations will not lie where action may be, but is not necessarily, barred; for bar of statute of limitations to be raised by demurrer, defect must clearly and affirmatively appear on face of complaint; it is not enough that complaint shows that action may be barred. *Gordon v. Law Offices of Aguirre & Meyer (1999) 70 Cal. App. 4th 972, 976, 83 Cal. Rptr. 2d 119*

On appeal from dismissal after order sustaining demurrer, appellate court reviews order de novo exercising independent judgment whether complaint states cause of action as matter of law; court gives complaint reasonable interpretation, reading it as whole and reviewing its parts in context; court deems true all material facts properly pled; court also accepts as true those facts that may be implied or inferred from those expressly alleged; appellate court must affirm that part of judgment sustaining demurrer if no liability exists as matter of law. *Lazar v. Hertz Corp. (1999) 69 Cal. App. 4th 1494, 1501, 82 Cal. Rptr. 2d 368*

Although decision to sustain or overrule demurrer is legal ruling subject to de novo review on appeal, granting of leave to amend involves exercise of trial court's discretion; when trial court sustains demurrer without leave to amend, appellate court must consider if complaint might state cause of action if defect could reasonably be cured by amendment; if defect can be cured, judgment of dismissal must be reversed to allow plaintiff opportunity to do so; plaintiff bears burden of demonstrating reasonable possibility to cure any defect by amendment; trial court abuses discretion if it sustains demurrer without leave to amend when plaintiff shows reasonable possibility to cure any defect by amendment; trial court's order sustaining demurrer without leave to amend must be affirmed if plaintiff cannot show abuse of discretion. *Lazar v. Hertz Corp. (1999) 69 Cal. App. 4th 1494, 1501, 82 Cal. Rptr. 2d 368*

In reviewing sufficiency of complaint against general demurrer that was sustained, appellate court treats demurrer as admitting all material facts properly pleaded and determines whether complaint states facts sufficient to constitute cause of action; in construing pleading for purpose of determining its effect, its allegations must be liberally construed with view toward substantial justice between parties. *Levin v. Gulf Ins. Group (1999) 69 Cal. App. 4th 1282, 1284, 82 Cal. Rptr. 2d 228*

When reviewing judgment based on order sustaining demurrer without leave to amend, appellate court accepts as accurate factual allegations of complaint; if complaint states cause of action, judgment must be reversed; appellate court decides whether there is reasonable possibility that defect can be cured by amendment; if it can be, trial court has abused its discretion and appellate court reverses; if not, there has been no abuse of discretion, and appellate court affirms; burden of proving reasonable possibility is squarely on plaintiff. *Morrison v. Viacom, Inc. (1998) 66 Cal. App. 4th 534, 540, 545, 78 Cal. Rptr. 2d 133*

When demurrer is based on affirmative defense, affirmative defense must clearly appear on face of complaint to support demurrer; demurrer based on affirmative defense cannot properly be granted when action might be barred by defense, but is not necessarily barred. *CrossTalk Productions, Inc. v. Jacobson (1998) 65 Cal. App. 4th 631, 635, 76 Cal. Rptr. 2d 615*

Demurrer treated as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law; appellate court gives complaint reasonable interpretation, reading it as whole and its parts in context; when demurrer is sustained, appellate court determines whether complaint states facts sufficient to constitute cause of action; when it is sustained without leave to amend, appellate court decides whether there is reasonable possibility that defect can be cured by amendment; if it can be, trial court abused discretion and appellate court reverses; if not, no abuse of discretion and appellate court affirms; complaint must be liberally construed with view towards substantial justice between parties. *CrossTalk Productions, Inc. v. Jacobson (1998) 65 Cal. App. 4th 631, 635, 76 Cal. Rptr. 2d 615*

In reviewing judgment of dismissal after demurrer is sustained without leave to amend, appellate court assumes truth of all facts properly pleaded by plaintiff; regardless of label attached to cause of action, court must examine complaint's factual allegations to determine whether they state cause of action on any available legal theory; reversible error committed if facts alleged show entitlement to relief under any legal theory; court, however, will not assume truth of contentions, deductions, or conclusions and may disregard allegations that are contrary to the law or to a fact which judicial notice may be taken; when ground for objection to complaint, such as statute of limitations, appears on its face or from matters that may be judicially noticed, demurrer on that ground is proper; if plaintiff shows complaint can be amended to state a cause of action, it is abuse of discretion to sustain demurrer without leave to amend. *Cochran v. Cochran (1998) 65 Cal. App. 4th 488, 493, 494 n.3, 76 Cal. Rptr. 2d 540*

In reviewing sufficiency of complaint against general demurrer, appellate court treats demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of law; court also considers matters that may be judicially noticed; court gives complaint reasonable interpretation, reading it as whole and its parts in context; when demurrer is sustained, court determines whether complaint states facts sufficient to constitute cause of action and if

complaint is sustained without leave to amend, court decides whether there is reasonable possibility that defect can be cured by amendment; if it can be, trial court abused its discretion and appellate court reverses; if not, there was no abuse of discretion and appellate court affirms; burden of proving reasonably possibility is squarely on plaintiff; because under California Tort Claims Act all governmental tort liability is based on statute, general rule that statutory causes of action must be pleaded with particularity is applicable; every fact material to the existence of its statutory liability must be pleaded with particularity. *Hood v. Hacienda La Puente Unified School Dist. (1998) 65 Cal. App. 4th 435, 438-439, 76 Cal. Rptr. 2d 448*

When reviewing order sustaining demurrer, appellate court must presume truth of all material facts alleged in complaint; argumentative allegations and conclusions of law are not, however, presumed true; new legal theory can be advanced for first time on appeal why allegations state cause of action. 20th *Century Ins. Co. v. Quackenbush (1998) 64 Cal. App. 4th 135, 138 n.1, 139 n.3, 75 Cal. Rptr. 2d 113*

When considering appeal from judgment of dismissal following sustaining of demurrer, appellate court accepts facts pleaded as true; trial erred if pleading states cause of action under any possible legal theory; it abused its discretion if face of pleading s shows reasonable probability defects could be cured by properly amended pleading. *Merlet v. Rizzo (1998) 64 Cal. App. 4th 53, 58, 75 Cal. Rptr. 2d 83*

When demurrer is sustained, appellate court determines whether complaint states facts sufficient to constitute cause of action; and when it is sustained without leave to amend, appellate court decides whether there is reasonable possibility that defect can be cured by amendment; if it can be, trial court has abused its discretion and appellate court reverses; if not, there has been no abuse of discretion and appellate court affirms; burden of proving reasonable possibility is squarely on plaintiff. *Axline v. Saint John's Hospital & Health Center (1998) 63 Cal. App. 4th 907, 912, 74 Cal. Rptr. 2d 385*

On appeal from judgment of dismissal after demurrer has been sustained without leave to amend, appellate court assumes truth of all properly pleaded facts in complaint; appellate court examines these facts to determine whether complaint successfully states cause of action on any available legal theory; if it does, sustaining demurrer constitutes abuse of discretion and appellate court must reverse. *Day v. AT & T Corp. (1998) 63 Cal. App. 4th 325, 331, 74 Cal. Rptr. 2d 55*

In evaluating order sustaining demurrer, appellate court gives pleading reasonable interpretation by reading it as whole and all of its parts in context; court assumes truth of all properly pleaded material facts, facts that may be inferred from those expressly pleaded, and any material facts of which judicial notice has been requested and may be taken; court accepts as true both facts alleged in text of complaint and facts appearing in attached exhibits; if facts appearing in attached exhibit contradict those expressly pleaded, those in exhibit are given precedence; rule giving precedence to allegations in exhibits, however, not applicable under facts in context of applicability of *Civ. Code § 2832*; when considering legal effect of facts, court disregards any erroneous or confusing labels employed by plaintiff; complaint sufficient if it alleges facts that state cause of under any possible legal theory. *Mead v. Sanwa Bank California (1998) 61 Cal. App. 4th 561, 564, 567-568 ; 71 Cal. Rptr. 2d 625*

In reviewing sufficiency of complaint, appellate court treats demurrer as admitting all material facts properly pleaded; demurrer does not lie to portion of cause of action; demurrer may be sustained only if complaint lacks any sufficient allegations to entitle plaintiff to relief; in construction of pleading, for purpose of determining its effect, its allegations must be liberally construed, with view to substantial justice between parties. *Chazen v. Centennial Bank (1998) 61 Cal. App. 4th 532, 542, 71 Cal. Rptr. 2d 462*

When reviewing order sustaining general demurrer without leave to amend, appellate court must treat demurrer as admitting all properly pleaded facts, but not contentions, deductions or conclusions of fact or law; appellate court must read complaint as whole and give it reasonable interpretation; if complaint, liberally construed, can state cause of action,

or if it is reasonably possible that plaintiffs can cure complaint by amendment, trial court should not sustain demurrer without leave to amend. *Citizens for Open Access, Etc. Tide, Inc. v. Seadrift Assn. (1998) 60 Cal. App. 4th 1053, 1063, 71 Cal. Rptr. 2d 77*

In reviewing sufficiency of complaint against general demurrer, court treats demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of law; court may also consider matters which may be judicially noticed; further, court gives complaint reasonable interpretation, reading it as a whole and its parts in their context; when demurrer sustained, court determines whether complaint states facts sufficient to constitute cause of action; irrespective of labels attached by pleader to any alleged cause of action, court examines factual allegations of complaint to determine whether they state (or can state) cause of action on any available legal theory; if they do trial court's order of dismissal must be reversed. *North American Chemical Co. v. Superior Court (1997) 59 Cal. App. 4th 764, 773, 786, 69 Cal. Rptr. 2d 466* ; *Sindell v. Gibson, Dunn & Crutcher (1997) 54 Cal. App. 4th 1457, 1465, 63 Cal. Rptr. 2d 594*

In reviewing sufficiency of complaint against general demurrer, court treats demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of law; court may also consider matters which may be judicially noticed; further, court gives complaint reasonable interpretation, reading it as whole and its parts in their context; when demurrer sustained without leave to amend, appellate court decides whether there is reasonable possibility that defect can be cured by amendment; if it can be, trial court has abused discretion and appellate court reverses; if not, there has been no abuse of discretion and appellate court affirms. *Downs v. Department of Water & Power (1997) 58 Cal. App. 4th 1093, 1099, 68 Cal. Rptr. 2d 590*

On appeal from judgment dismissing action after sustaining demurrer without leave to amend, reviewing court gives complaint reasonable interpretation and treats demurrer as admitting all material facts properly pleaded, but does not assume the truth of contentions, deductions, or conclusions of law; judgment must be affirmed if any one of several grounds of demurrer is well taken; it is error, however, for trial court to sustain demurrer when plaintiff has stated cause of action under any possible legal theory; and it is abuse of discretion to sustain demurrer without leave to amend if plaintiff shows there is reasonable possibility any defect identified by the defendant can be cured by amendment. *Weikel v. TCW Realty Fund II Holding Co. (1997) 55 Cal. App. 4th 1234, 1243-1244, 65 Cal. Rptr. 2d 25*

Appellate court accepts facts pleaded as true when considering appeal from demurrer; trial court erred if pleading states cause of action under any possible legal theory; it abused its discretion if face of pleadings shows a reasonable probability the defects could be cured by a properly amended pleading. *Alexandria S. v. Pacific Fertility Medical Center, Inc. (1997) 55 Cal. App. 4th 110, 115, 64 Cal. Rptr. 2d 23*

When reviewing merits of general demurrer, court must, at every stage of action, disregard any defect in pleadings that does not affect substantial right of parties; pleadings must be reasonably interpreted, being read as a whole and each part must be given meaning from context where it appears; all that is necessary as against general demurrer is to plead facts showing that plaintiff may be entitled to some relief; in passing on sufficiency of pleadings, allegations must be liberally construed with view toward substantial justice between parties. *Michaelian v. State Comp. Ins. Fund (1996) 50 Cal. App. 4th 1093, 1104-1105, 58 Cal. Rptr. 2d 133*

When matter comes to appellate court on judgment of dismissal following trial court's order sustaining defendants' demurrer without leave to amend, appellate court assumes truth of all properly pleaded facts, but not contentions, deductions, or conclusions of fact or law; assuming truth of plaintiffs' factual allegations, appellate court then independently determines whether they have alleged cognizable claims; an order sustaining demurrer without leave to amend is unwarranted and constitutes abuse of discretion if there is reasonable possibility that defect can be cured by amendment, but it is proper to sustain demurrer without leave to amend when it is improbable that plaintiffs can state a cause of action in light of earlier failed attempts by plaintiff to do so and nature of defects involved. *Lee v. Interinsurance Exchange (1996) 50 Cal. App. 4th 694, 709, 724, 57 Cal. Rptr. 2d 798*

Appellate court employs two separate standards of review; first, there is de novo review of complaint to determine if it contains facts sufficient to state a cause of action; in doing so, appellate court accepts as true properly pleaded material factual allegations of complaint, together with facts that may be properly judicially noticed; reversible error exists only if facts were alleged showing entitlement to relief under any possible legal theory; second, when complaint sustained without leave to amend, reviewing courts determine whether trial court abused its discretion in doing so. *Hernandez v. City of Pomona (1996) 49 Cal. App. 4th 1492, 1497, 57 Cal. Rptr. 2d 406*

On review of the trial court's refusal to grant leave to amend, appellate court will reverse for abuse of discretion if appellate court determines there is reasonable possibility pleading can be cured by amendment; otherwise, trial court's decision will be affirmed for lack of abuse. *Hernandez v. City of Pomona (1996) 49 Cal. App. 4th 1492, 1498, 57 Cal. Rptr. 2d 406*

When demurrer sustained, appellate court determines whether complaint states facts sufficient to constitute cause of action; if demurrer sustained without leave to amend court decides whether there is reasonable possibility that defect can be cured by amendment; if it can be so cured, trial court abused its discretion and appellate court will reverse; if it cannot be so cured, there has been no abuse of discretion and appellate court will affirm. *Engstrom v. Kallins (1996) 49 Cal. App. 4th 773, 778, 56 Cal. Rptr. 2d 842* ; *Cross v. Bonded Adjustment Bureau (1996) 48 Cal. App. 4th 266, 275, 55 Cal. Rptr. 2d 801*

Appellate court must affirm if trial court's decision to sustain demurrer was correct on any theory. *Silva v. Block (1996) 49 Cal. App. 4th 345, 350, 56 Cal. Rptr. 2d 613*

Trial court's judgment must be affirmed if any one of several grounds of demurrer is well taken; however, error for trial court to sustain demurrer when plaintiff has stated cause of action under any possible theory; also abuse of discretion to sustain demurrer without leave to amend if plaintiff shows reasonable possibility any defect identified by defendant can be cured by amendment. *Winding Creek v. McGlashan (1996) 44 Cal. App. 4th 933, 939, 52 Cal. Rptr. 2d 236*

Court gives reasonable interpretation to complaint, reading it as a whole and its parts in their context; if demurrer sustained without leave to amend, appellate court decides if there is reasonable possibility that defect can be cured by amendment and if so reverses and if not affirms. *Campanelli v. Regents of University of California (1996) 44 Cal. App. 4th 572, 575-576, 51 Cal. Rptr. 2d 891*

In reviewing ruling on demurrer to determine if complaint states cause of action, court (1) treats demurrer as admitting all material facts properly pleaded but not contentions, deductions or conclusions of law or fact, (2) considers matters that may be judicially noticed, and (3) gives complaint reasonable interpretation reading it as whole and its parts in their context; when demurrer is sustained, court determines whether complaint states facts sufficient to constitute a cause of action; when demurrer is sustained without leave to amend, court decides whether there is a reasonable possibility that defect can be cured by amendment, and if so, trial court abused discretion and court will reverse, and if not, no abuse of discretion and court will affirm; if trial court's decision to sustain demurrer is correct on any theory appellate court must affirm. *Kennedy v. Baxter Healthcare Corp. (1996) 43 Cal. App. 4th 799, 807-808, 50 Cal. Rptr. 2d 736*

Allegations in complaint must be read in light most favorable to plaintiff and liberally construed with view to attaining substantial justice among parties. *Wilson v. Houston Funeral Home (1996) 42 Cal. App. 4th 1124, 1131, 50 Cal. Rptr. 2d 169*

On appeal from judgment dismissing action after demurrer sustained without leave to amend, standard of review is as follows: (1) reviewing court gives complaint reasonable interpretation; (2) court treats complaint as admitting all material facts well pleaded; (3) court, however, does not assume truth of contentions, deductions or conclusions of law; (4) if any one of several grounds for demurrer is well taken judgment must be affirmed; (5) however, error for trial court

to sustain demurrer when plaintiff has stated cause of action under any legal theory; (6) moreover, abuse of discretion to sustain demurrer without leave to amend if plaintiff shows there is reasonable possibility any defect identified by defendant can be cured by amendment; and (7) court also considers matters that may be judicially noticed. *Howard Jarvis Taxpayers' Assn. v. Board of Supervisors (1996) 41 Cal. App. 4th 1363, 1372, 49 Cal. Rptr. 2d 157*

Court may consider judicial admissions contained in plaintiff's complaint and apparently admissions contained in plaintiff's opposition papers to defendant's demurrer to negate plaintiff's ability to state cause of action. See *Setliff v. E.I. Du Pont De Nemours & Co. (1995) 32 Cal. App. 4th 1525, 1534, 1536-1537, 38 Cal. Rptr. 2d 763*

In evaluating whether appellant may be able to state cause of action, all allegations are taken as true even though their proof appears unlikely, as well as all facts that may be implied or inferred from those expressly alleged. *Smith v. County of Kern (1993) 20 Cal. App. 4th 1826, 1830, 25 Cal. Rptr. 2d 716*

Trial court may consider demurrer filed later that local rules require; contention that complaint fails to state cause of action is never waived and can be raised at later state of proceeding, such as motion for judgment on pleadings or summary judgment; therefore plaintiff suferred not prejudice by court considering demurrer that was filed outside time required by local rule. *Wilson v. Houston Funeral Home (1996) 42 Cal. App. 4th 1124, 1132, 50 Cal. Rptr. 2d 169*

Sustaining demurrer without leave to amend as abuse of discretion if there is reasonable possibility that plaintiff can amend complaint to cure defects, but such showing as not required to be made in trial court so long as it is made to reviewing court; rule as liberally applied to permit further amendment not only if defect is one of form but also if it is one of substance, provided pleader did not have fair, prior opportunity to correct substantive defect. *Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal. App. 3d 1371, 1386-1387, 272 Cal. Rptr. 387*

In reviewing propriety of order sustaining demurrer to cross complaint for failure to state facts sufficient to constitute cause of action, appellate court independently determines whether cross complaint shows some relief can properly be given and as not concerning itself with cross complainant's difficulty or inability to prove various allegations; appellate court as concerned only with whether such allegations show entitlement to relief or prospect for such entitlement, if properly amended; because review encompasses solely questions of law, appellate court as able to entertain legal arguments not presented in court below. *Selma Pressure Treating Co. v. Osmose Wood Preserving Co. (1990) 221 Cal. App. 3d 1601, 1611, 1614, 271 Cal. Rptr. 596* ; *overruled in part by Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56*

On appeal, all intendments weigh in favor of regularity of trial court proceedings and correctness of judgment; unless clear error or abuse of discretion is demonstrated, trial court's judgment of dismissal following sustaining of demurrer to complaint as affirmed on appeal. *Krawitz v. Rusch (1989) 209 Cal. App. 3d 957, 962-963, 257 Cal. Rptr. 610*

General demurrer presents same question to appellate court as to trial court, that is, whether plaintiff has alleged sufficient facts to justify any relief. *B & P Development Corp. v. City of Saratoga (1986) 185 Cal. App. 3d 949, 952, 230 Cal. Rptr. 192*

Sustaining general demurrer without leave to amend is not abuse of discretion if it appears from complaint that, under applicable substantive law, there is no reasonable probability that defect can be cured by amendment. *C & H Foods Co. v. Hartford Ins. Co. (1984) 163 Cal. App. 3d 1055, 1062, 211 Cal. Rptr. 765*

If party elects to stand on complaint after demurrer to it has been sustained with leave to amend, judgment is affirmed if complaint is objectionable on any ground. *Shapiro v. Wells Fargo Realty Advisors (1984) 152 Cal. App. 3d 467, 474, 199 Cal. Rptr. 613* ; *Vaughn v. Certified Life Ins. Co. (1965) 238 Cal. App. 2d 177, 180, 47 Cal. Rptr. 619*

Strict construction of demurrer and assumption that plaintiff has pleaded strongest possible case are required in

determining on appeal whether trial court has abused its discretion in sustaining demurrer and plaintiff has elected not to amend complaint. *Flynn v. Higham (1983) 149 Cal. App. 3d 677, 679, 197 Cal. Rptr. 145*

[3] Continuance

Plaintiff's contention that the hearing on defendant's demurrer should have been continued to permit plaintiff to examine some documents rejected and trial court held not to have abused discretion in denying continuance when (1) there had been a previous continuance for that purpose, (2) only five pages remained to be produced none of which could possibly be relevant to the legal issues raised by plaintiff's complaint, and (3) plaintiff failed to explain how the five pages could possibly affect outcome of demurrer. *Mitchell, Silberberg & Knupp v. Yosemite Ins. Co. (1997) 58 Cal. App. 4th 389, 395, 67 Cal. Rptr. 2d 906*

[3A] Failure to State Cause of Action as Grounds

Trial court properly sustained demurrer to complaint by former employer against former employee alleging breach of contract and conversion of patents belonging to employer, on grounds that under *Code Civ. Proc. § 426.30*, compulsory cross-complaint statute, employer was required to raise claims in response to former employee's prior cross-complaint filed in prior action by employer against employee, where claims alleged by employer in complaint were logically related to claims asserted in Tran cross-complaint in the prior suit, and where allegations of complaint did not clearly show that any claims arose after employer answered cross-complaint in prior action. However, trial court abused its discretion in denying employer leave to amend for employer to provide additional allegations as to when it discovered misconduct at issue, where employer met its burden of showing there was reasonable possibility it could have amended complaint to allege claim against former employee that would not be barred by compulsory cross-complaint statute. *Align Technology, Inc. v. Tran (2009) 179 Cal. App. 4th 949, 958-972, 102 Cal. Rptr. 3d 343*

[4] Waiver of Defenses

Objection based on plaintiff's lack of standing to sue is not subject to waiver under *Code Civ. Proc. § 430.80* because person lacking standing cannot state valid cause of action. *McKinny v. Board of Trustees (1982) 31 Cal. 3d 79, 90, 181 Cal. Rptr. 549, 642 P.2d 460*

Failure to object to defect in pleadings, such as misjoinder of parties, by demurrer or answer waives objection. *Jordan v. Department of Motor Vehicles (1999) 75 Cal. App. 4th 449, 469, 89 Cal. Rptr. 2d 333*

On appeal from judgment dismissing complaint after trial court sustained general demurrer without leave to amend, plaintiff who fails to challenge on appeal denial of leave to amend normally waives issue. *Rose v. County of Plumas (1984) 152 Cal. App. 3d 999, 1008, 199 Cal. Rptr. 842*

[5] Function of Demurrer

Demurrer merely tests legal sufficiency of complaint, not its factual truth. *Roskind v. Morgan, Stanley Dean Witter & Co. (2000) 80 Cal. App. 4th 345, 349, 95 Cal. Rptr. 2d 258*

Demurrer tests legal sufficiency of complaint. *Kendrick v. City of Eureka (2000) 82 Cal. App. 4th 364, 367, 98 Cal. Rptr. 2d 153* ; *G. L. Mezzetta, Inc. v. City of American Canyon (2000) 78 Cal. App. 4th 1087, 1091, 93 Cal. Rptr. 2d 292*

General demurrer challenges only legal sufficiency of complaint, not truth or accuracy of its factual allegations or plaintiff's ability to prove those allegations. *Ball v. GTE Mobilnet of California (2000) 81 Cal. App. 4th 529, 534-535, 96 Cal. Rptr. 2d 801* ; *Granquist v. Sandberg (1990) 219 Cal. App. 3d 181, 183, 268 Cal. Rptr. 109*

Demurrer tests legal sufficiency of factual allegations in complaint. *Rakestraw v. California Physicians' Service (2000) 81 Cal. App. 4th 39, 42, 96 Cal. Rptr. 2d 354* ; *Boyle v. City of Redondo Beach (1999) 70 Cal. App. 4th 1109, 1114 n.2, 83 Cal. Rptr. 2d 164*

Demurrer tests sufficiency of a complaint by raising questions of law. *Wilner v. Sunset Life Ins. Co. (2000) 78 Cal. App. 4th 952, 958, 93 Cal. Rptr. 2d 413*

Demurrer tests sufficiency of complaint's factual allegations rather than relief suggested in prayer of complaint. *Stevens v. Superior Court (1999) 75 Cal. App. 4th 594, 609, 89 Cal. Rptr. 2d 370*

Function of demurrer is to test sufficiency of complaint by raising questions of law. *Herman v. Los Angeles County Metropolitan Transportation Authority (1999) 71 Cal. App. 4th 819, 824, 84 Cal. Rptr. 2d 144*

Demurrer tests only sufficiency of pleading and as lying only when defect appears on face of pleading or from matters judicially noticed by court; demurrer as not proper vehicle for determining truth of disputed facts. *Fiorito v. Superior Court (1990) 226 Cal. App. 3d 433, 437, 438, 277 Cal. Rptr. 27*

Question of proof as not subject to being resolved on demurrer because all properly pleaded allegations are taken as true even though their proof appears unlikely. *Bach v. McNelis (1989) 207 Cal. App. 3d 852, 866, 255 Cal. Rptr. 232*

[6] General and Special Demurrers

Rule is being that, if special demurrer is well taken on any ground, it is sustained with leave to amend and court does not specify ground of its ruling, and plaintiff fails to amend, judgment of dismissal should be affirmed on appeal. *Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 424, 282 P.2d 890*

When general and special demurrers were made and trial court sustained demurrer without leave to amend in general terms, court of appeal is required to assume that trial court only ruled on general demurrer and not on special demurrer. *Rogoff v. Grabowski (1988) 200 Cal. App. 3d 624, 628, 246 Cal. Rptr. 185*

Objections that complaint is ambiguous or uncertain or that essential facts appear only inferentially, as conclusions of law or by way of recitals, must be raised by special demurrer and is not reachable on general demurrer. *Johnson v. Mead (1987) 191 Cal. App. 3d 156, 160, 236 Cal. Rptr. 277*

Demurrer on ground that complaint does not state facts sufficient to constitute cause of action is general demurrer and demurrers on other grounds including lack of jurisdiction are special demurrers. *Certified Grocers of California, Ltd. v. San Gabriel Valley Bank (1983) 150 Cal. App. 3d 281, 285 n.1, 197 Cal. Rptr. 710* ; *Buss v. J.O. Martin Co. (1966) 241 Cal. App. 2d 123, 133, 50 Cal. Rptr. 206*

[7] Judicial Notice

[a] Effect of Judicial Notice

In ruling on demurrer, court may consider facts of which it has taken judicial notice; this includes existence of document; when judicial notice is taken of document, however, truthfulness and proper interpretation of document is

subject to dispute; reviewing court may consider facts judicially noticed by trial court or those which trial court properly could have noticed. *StorMedia Inc. v. Superior Court (1999) 20 Cal. 4th 449, 456 n.9, 84 Cal. Rptr. 2d 843, 976 P.2d 214*

Demurrer reaches not only contents of challenged pleading but also matters that may be considered under judicial notice, including orders, regulations, decisions, and records of state administrative agencies. *El Rancho Unified School Dist. v. National Education Assn. (1983) 33 Cal. 3d 946, 950 n.6, 192 Cal. Rptr. 123, 663 P.2d 893*

All facts well pleaded and facts that may be judicially noticed are considered in ruling on demurrer. *Talley v. Northern San Diego Hosp. Dist. (1953) 41 Cal. 2d 33, 36, 257 P.2d 22* ; *see also* *Serrano v. Priest (1971) 5 Cal. 3d 584, 591, 96 Cal. Rptr. 601, 487 P.2d 1241*

Appellate court may disregard allegations that are contrary to law or fact of which judicial notice may be taken. *Duggal v. G.E. Capital Communications Services, Inc. (2000) 81 Cal. App. 4th 81, 86, 96 Cal. Rptr. 2d 383*

When affidavits or exhibits filed by plaintiff may be judicially noticed, court may consider those facts to assess whether complaint survives a general demurrer. *Freeman v. San Diego Assn. of Realtors (1999) 77 Cal. App. 4th 171, 178 n.3, 91 Cal. Rptr. 2d 534*

In reviewing sufficiency of complaint against general demurrer, appellate court considers matters that may be judicially noticed. *Boyle v. City of Redondo Beach (1999) 70 Cal. App. 4th 1109, 1114 n.2, 83 Cal. Rptr. 2d 164*

In reviewing judgment of dismissal after demurrer is sustained without leave to amend, appellate court assumes truth of all facts properly pleaded by plaintiff; court, however, will not assume truth of contentions, deductions, or conclusions and may disregard allegations that are contrary to the law or to a fact of which judicial notice may be taken. *Cochran v. Cochran (1998) 65 Cal. App. 4th 488, 493, 76 Cal. Rptr. 2d 540*

In determining sufficiency of complaint against demurrer, judicially noticeable facts supersede inconsistent factual allegations contained in complaint. *City of Chula Vista v. County of San Diego (1994) 23 Cal. App. 4th 1713, 1719, 29 Cal. Rptr. 2d 89*

In determining sufficiency of complaint against demurrer, court as considering not only contents of complaint, but also matters of which judicial notice may be taken. *Pitman v. City of Oakland (1988) 197 Cal. App. 3d 1037, 1041, 243 Cal. Rptr. 306*

All material facts properly pleaded in complaint are assumed to be true unless they are contradicted by facts judicially noticed. *Financial Corp. of America v. Wilburn (1987) 189 Cal. App. 3d 764, 768-769, 234 Cal. Rptr. 653*

Tests or rules applied in determining whether court that has taken judicial notice of document may take judicial notice of truth of contents. *Joslin v. H.A.S. Ins. Brokerage (1986) 184 Cal. App. 3d 369, 374-375, 228 Cal. Rptr. 878*

[b] Improper

At demurrer stage, existence of contract between private parties cannot be established by judicial notice under *Evid. Code § 452(h)* to contradict allegations in complaint; sufficiency of plaintiff's complaint must be tested without reference to purported contract. *Gould v. Maryland Sound Industries, Inc. (1995) 31 Cal. App. 4th 1137, 1144-1446, 37 Cal. Rptr. 2d 718*

Although *Evid. Code § 452(d)* permits court to take judicial notice of court records, court as not allowed to take judicial

notice of truth of hearsay statements simply because statements are part of court record; although court may take judicial notice of existence of each document in court file, court as allowed only to take judicial notice of truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments. *Magnolia Square Homeowners Assn. v. Safeco Ins. Co. (1990) 221 Cal. App. 3d 1049, 1056, 271 Cal. Rptr. 1*

In action based on sexual discrimination in country club membership, court as not permitted in hearing on demurrer to complaint to take judicial notice of "admission" by plaintiff's counsel that club was "truly a private membership club in the view that people cannot walk in and use the club"; unlike answer to request for admission relied on by defendant, counsel's statement in another context during hearing in trial court as not constituting judicially noticeable fact. *Warfield v. Peninsula Golf & Country Club (1989) 214 Cal. App. 3d 646, 653 n.4, 262 Cal. Rptr. 890*

Although, in ruling on demurrer, court may take judicial notice of files in other judicial proceedings, court as not allowed to take judicial notice of truth of factual matters asserted in them; court as not permitted to take judicial notice of truth of assertions in declarations or affidavits filed in court proceedings or of hearsay allegations as being true just because they are part of court record or file; court as permitted to take judicial notice of existence of each document in court file, but only of truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments. *Bach v. McNelis (1989) 207 Cal. App. 3d 852, 865, 255 Cal. Rptr. 232*

Judicial notice of county's practice of preparing and mailing rejections as not dispositive of whether county actually mailed rejection to plaintiff because that fact may not be deduced from mailing practice at demurrer stage. *Cruz v. County of Los Angeles (1985) 173 Cal. App. 3d 1131, 1134, 219 Cal. Rptr. 661*

Judicial notice as proper only with respect to plaintiff's recorded statements inconsistent with pleadings, not to inconsistencies in materials filed on behalf of adverse party. *Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal. App. 3d 593, 605, 176 Cal. Rptr. 824*

Court as not permitted to take judicial notice of truth of allegations made in documents such as pleadings, affidavits, and allegations in bankruptcy proceedings. *Tarr v. Merco Constr. Engineers, Inc. (1978) 84 Cal. App. 3d 707, 715, 148 Cal. Rptr. 813*

[c] Proper

The court may take judicial notice of the decisions of other state and federal courts, particularly "several federal and state court decisions that have extensively discussed the factual and legal background relating to the present dispute." *U.S. Ecology, Inc. v. State of California (2001) 92 Cal. App. 4th 113, 120, 111 Cal. Rptr. 2d 689*

To determine whether to sustain demurrer on res judicata grounds, judicial notice may be taken of prior judgment and other court records. *Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 180 n.4, 98 Cal. Rptr. 2d 44*

When ground for objection to complaint, such as statute of limitations, appears on its face or from matters of which court may or must take judicial notice, demurrer on that ground is proper; appellate court may take judicial notice of records of a California court and must take judicial notice of decisional and statutory law of *California and United States. Duggal v. G.E. Capital Communications Services, Inc. (2000) 81 Cal. App. 4th 81, 86, 96 Cal. Rptr. 2d 383* ; *Shaolian v. Safeco Ins. Co. (1999) 71 Cal. App. 4th 268, 271, 83 Cal. Rptr. 2d 702*

Custom of sending monthly bank statements is sufficiently established to support judicial notice; date check paid can support inference that it was the subject of a monthly statement over a year before suit filed or an unauthorized signature reported. *Mac v. Bank of America (1999) 76 Cal. App. 4th 562, 565-566, 90 Cal. Rptr. 2d 496*

Proper for trial court in ruling on demurrer to consider facts of which it has taken judicial notice which include the existence of a document, though not the truthfulness or proper interpretation of the document's contents. *AL Holding Co. v. O'Brien & Hicks, Inc. (1999) 75 Cal. App. 4th 1310, 1313, 89 Cal. Rptr. 2d 918*

Appellate court took judicial notice of amended notice of motion in bankruptcy proceeding that corrected error in caption as authorized under *Evid. Code §§ 452, 459*; under *Evid. Code § 452(d)*, records of any court of the United States are subject to judicial notice and defendants made request for judicial notice in trial court; in appeal from ruling on demurrer, appellate court may take judicial notice of such matters. *Sacramento Brewing Co. v. Desmond, Miller & Desmond (1999) 75 Cal. App. 4th 1082, 1085 n.3, 89 Cal. Rptr. 2d 760*

When court records subject to judicial notice provide ground for objection to complaint, demurrer on that ground is proper. *Britz, Inc. v. Dow Chemical Co. (1999) 73 Cal. App. 4th 177, 180, 86 Cal. Rptr. 2d 188*

When ground for objection to complaint, such as statute of limitations, appears on its face or from matters of which court may or must take judicial notice, demurrer on that ground is proper. *Cochran v. Cochran (1997) 56 Cal. App. 4th 1115, 1120, 66 Cal. Rptr. 2d 337*

Judicial notice of party's earlier pleadings and positions, as well as of established facts from both same case and other cases, is proper; plaintiff cannot avoid demurrer by pleading facts that contradict facts or positions pleaded in earlier actions or by suppressing facts that prove the pleaded facts false. *Cantu v. Resolution Trust Corp. (1992) 4 Cal. App. 4th 857, 877, 6 Cal. Rptr. 2d 151*

Judicial notice of content of court records is appropriate only when existence of record itself precludes contravention of that which is recited in it, for example, if findings of fact, conclusions of law, or judgments bind party for purposes of res judicata or collateral estoppel; otherwise, judicial notice for truth of content of court records is not appropriate either because truth of content is reasonably subject to dispute or because content is hearsay. *Columbia Casualty Co. v. Northwestern Nat. Ins. Co. (1991) 231 Cal. App. 3d 457, 473, 282 Cal. Rptr. 389*

Court may take judicial notice of truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments. *Cote v. Henderson (1990) 218 Cal. App. 3d 796, 802, 267 Cal. Rptr. 274*

Judicial notice may ordinarily be taken of court's own records, including prior pleadings in case. *People v. Cavanna (1989) 214 Cal. App. 3d 1054, 1058, 263 Cal. Rptr. 177*

In ruling on demurrer, trial court properly considers judicially noticeable matters, and allegations of complaint that are inconsistent with, or contradicted by, judicially noticed facts must be rejected. *Rossco Holdings Inc. v. State of California (1989) 212 Cal. App. 3d 642, 646-647, 260 Cal. Rptr. 736*

Agency memorandum is proper subject of judicial notice. *Truta v. Avis Rent A Car System, Inc. (1987) 193 Cal. App. 3d 802, 809 n.6, 238 Cal. Rptr. 806*

Trial court in civil action properly took judicial notice that, prior to action, plaintiff had filed petition for relief under former *Bankruptcy Act. Tarr v. Merco Constr. Engineers, Inc. (1978) 84 Cal. App. 3d 707, 712, 148 Cal. Rptr. 813*

[8] Motions for Reconsideration

If demurrer is sustained without leave to amend, plaintiff is entitled to submit proposed amended complaint by way of motion for reconsideration; if amended complaint states any cause of action, trial court is obligated (1) to vacate order sustaining demurrer without leave to amend and (2) to make different order granting plaintiff leave to file amended

complaint that may include cause of action that trial court, in deciding merits of motion for reconsideration, determined was valid. *Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal. App. 3d 1371, 1386, 272 Cal. Rptr. 387*

[9] New Trial After Appeal

If judgment of dismissal entered on order sustaining demurrer without leave to amend is reversed on appeal, under former *Code Civ. Proc. § 583(c)* (*now see Code Civ. Proc. § 583.320(a)*), action must be brought to trial within three years from filing of remittitur in trial court. *McDonough Power Equipment Co. v. Superior Court (1972) 8 Cal. 3d 527, 532, 105 Cal. Rptr. 330, 503 P.2d 1338*

[10] Propriety of Demurrer

Right to demur is limited to parties to action. *Artana v. San Jose Scavenger Co. (1919) 181 Cal. 627, 629, 185 P. 850*

The issue of class certification may appropriately be decided on demurrer. *Alvarez v. May Department Stores Co. (2006) 143 Cal. App. 4th 1223, 1231, 49 Cal. Rptr. 3d 892*

When complaint shows on its face that action is barred by statute of limitations, general demurrer for failure to state cause of action will lie. *Kendrick v. City of Eureka (2000) 82 Cal. App. 4th 364, 367, 98 Cal. Rptr. 2d 153*

Purely legal issue of federal preemption is properly addressed by demurrer. *Washington Mutual Bank v. Superior Court (2002) 95 Cal. App. 4th 606, 612, 115 Cal. Rptr. 2d 765*

Demurrer is appropriate vehicle to secure dismissal of state law action based on federal law preemption. *Ball v. GTE Mobilnet of California (2000) 81 Cal. App. 4th 529, 535, 96 Cal. Rptr. 2d 801*

When complaint affirmatively alleges facts amounting to an affirmative defense, it is subject to demurrer. *Halvorsen v. Aramark Uniform Services, Inc. (1998) 65 Cal. App. 4th 1383, 1391, 77 Cal. Rptr. 2d 383*

Demurrer is not appropriate procedure for determining truth of disputed facts or what inferences should be drawn when competing inferences are possible. *CrossTalk Productions, Inc. v. Jacobson (1998) 65 Cal. App. 4th 631, 635, 76 Cal. Rptr. 2d 615*

Demurrer does not lie to portion of cause of action. *Chazen v. Centennial Bank (1998) 61 Cal. App. 4th 532, 542, 71 Cal. Rptr. 2d 462*

Demurrer sustained without leave to amend was appropriate as to complaint against public entity in which plaintiffs failed to first file a claim pursuant to the California Tort Claims Act and failed to prove exemption from filing claim under *Gov. Code § 905(f)*. *Dalton v. East Bay Mun. Utility Dist. (1993) 18 Cal. App. 4th 1566, 1573-1574, 23 Cal. Rptr. 2d 230*

Complaint against public entity is subject to demurrer or to judgment on pleadings if facts or theory of complaint are different from those alleged in original claim filed with public entity. *Colapinto v. County of Riverside (1991) 230 Cal. App. 3d 147, 152 n.1, 281 Cal. Rptr. 171*

Complaint against public entity is vulnerable to demurrer or motion for judgment on pleadings if it alleges factual basis for recovery that is not fairly reflected in written claim filed with public entity. *Crow v. State of California (1990) 222 Cal. App. 3d 192, 199-200, 271 Cal. Rptr. 349*

Demurrer is ordinarily inappropriate when plaintiff pleads contract and controversy concerning effect of terms of contract, because cause of action for declaratory relief has been stated; demurrer is proper, however, when allegations do not support declaratory relief in plaintiff's favor as matter of law. *State Farm Fire & Cas. Co. v. Superior Court (1987) 191 Cal. App. 3d 74, 76, 236 Cal. Rptr. 216*

General demurrer to part of cause of action is improper. *Financial Corp. of America v. Wilburn (1987) 189 Cal. App. 3d 764, 778, 234 Cal. Rptr. 653*

Objections to prayer are not properly taken by demurrer. *Grisingher v. Shaeffer (1938) 25 Cal. App. 2d 5, 9, 76 P.2d 149*

[11] Review by Extraordinary Writ

Mandate is appropriate remedy to compel trial court to vacate order sustaining demurrer in class action in which plaintiffs could not appeal from order that barred substantial portion of cause of action from being heard on merits. *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 807, 94 Cal. Rptr. 796, 484 P.2d 964*

When court has sustained demurrer to only one of several causes of action, its order is not appealable and review by mandamus is appropriate way to control judicial discretion where that discretion has been abused; abuse of discretion exists when trial court has committed substantial error which is clearly prejudicial; such error is present when court improperly prevents party from pleading substantial part of its case; under such circumstances relief by mandamus is appropriate to prevent needless and expensive trial and reversal. *North American Chemical Co. v. Superior Court (1997) 59 Cal. App. 4th 764, 773, 69 Cal. Rptr. 2d 466*

When demurrer sustained without leave to amend with respect to less than all causes of action, mandate is appropriate remedy to review trial court's ruling sustaining demurrer when it appears trial court deprived party of opportunity to plead cause of action and extraordinary relief may prevent needless and expensive trial and reversal. *Campbell v. Superior Court (1996) 44 Cal. App. 4th 1308, 1314-1315, 52 Cal. Rptr. 2d 385*

Mandate is appropriate remedy to review trial court's ruling sustaining demurrer without leave to amend to less than all causes of action pled when trial court has deprived party opportunity to plead substantial portion of case and extraordinary relief may prevent needless trial and reversal. *Angie M. v. Superior Court (1995) 37 Cal. App. 4th 1217, 1223, 44 Cal. Rptr. 2d 197*

Mandate is appropriate remedy to review order overruling demurrer if significant issue of law is raised and resolution of that issue in petitioner's favor would result in final disposition as to that party. *Curry v. Superior Court (1993) 20 Cal. App. 4th 180, 183, 24 Cal. Rptr. 2d 495*

On petition for writ of mandate to compel trial court to vacate order overruling demurrer, petitioner has burden to show that trial court's order is erroneous as matter of law and that petitioner will suffer harm that cannot be corrected on further appeal. *Long Beach Equities, Inc. v. County of Ventura (1991) 231 Cal. App. 3d 1016, 1024, 282 Cal. Rptr. 877*

In mandate proceeding to review trial court's overruling of insurer's demurrer to complaint, reviewing court as assuming truth of all properly pleaded material allegations of complaint and as giving complaint a reasonable interpretation by reading it as a whole and its parts in their context. *Doctors' Co. Ins. Services v. Superior Court (1990) 225 Cal. App. 3d 1284, 1288-1289, 275 Cal. Rptr. 674*

Although reviewing court will not ordinarily intervene to review rulings on pleadings, mandate as appropriate remedy to review order overruling demurrer when significant questions are presented. *Coopers & Lybrand v. Superior Court (1989) 212 Cal. App. 3d 524, 529, 539, 260 Cal. Rptr. 713* (significant questions involved were definition of arbitration and applicability of arbitral immunity to facts of case)

Writ of mandate as properly issued, in discretion of appellate court, when trial court, by sustaining demurrer without leave to amend complaint, appears to have deprived party of opportunity to plead cause of action. *Pfleger v. Superior Court (1985) 172 Cal. App. 3d 421, 425, 218 Cal. Rptr. 371*

Writ of mandate as proper to direct trial court to overrule defendant's demurrer to complaint when plaintiff unable to appeal because of one final judgment rule and when refusal to consider petition will result in piecemeal disposition of case. *Wallis v. Superior Court (1984) 160 Cal. App. 3d 1109, 1114 n.1, 207 Cal. Rptr. 123*

Writ of mandate as issuing to compel trial court to sustain demurrer to complaint without leave to amend. *Miner v. Superior Court (1973) 30 Cal. App. 3d 597, 600, 602, 106 Cal. Rptr. 416*

Order overruling demurrer as reviewable by prohibition if jurisdictional question is presented. *County of Santa Barbara v. Superior Court (1971) 15 Cal. App. 3d 751, 754-755, 93 Cal. Rptr. 406*

[12] Ruling on Demurrer

[a] In General

On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions or conclusions of law. The judgment must be affirmed if any one of the several grounds of demurrer is well taken. However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer. The court is not limited to plaintiffs' theory of recovery in testing the sufficiency of their complaint against a demurrer, but instead must determine if the factual allegations of the complaint are adequate to state a cause of action under any legal theory. California courts have long since departed from holding a plaintiff strictly to the "form of action" he has pleaded and instead have adopted the more flexible approach of examining the facts alleged to determine if a demurrer should be sustained. *Bagatti v. Department of Rehabilitation (2002) 97 Cal. App. 4th 344, 353, 118 Cal. Rptr. 2d 443*

If complaint, liberally construed, can state cause of action, or if it is reasonably possible that plaintiffs can cure complaint by amendment, trial court should not sustain demurrer without leave to amend. *Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 180, 98 Cal. Rptr. 2d 44*

For purposes of ruling on demurrer, court assumes truth of all well-pleaded allegations of complaint; ability of plaintiff to prove them not in issue. *Roskind v. Morgan, Stanley Dean Witter & Co. (2000) 80 Cal. App. 4th 345, 349, 95 Cal. Rptr. 2d 258*

In determining if complaint is sufficient to constitute a cause of action, rule is, that if on consideration of all facts stated it appears plaintiffs entitled to any relief at hands of court against defendants, complaint will be held good, although facts may not be clearly stated, or may be intermingled with statement of other facts irrelevant to the cause of action shown, or although plaintiff may demand relief to which he or she is not entitled on facts alleged; in other words, plaintiff need only plead facts showing that he or she may be entitled to some relief. *Schnall v. Hertz Corp. (2000) 78*

Cal. App. 4th 1144, 1152, 93 Cal. Rptr. 2d 439

When conclusion is alleged and also special facts from which conclusion is drawn, if special facts are inconsistent with and do not support conclusion, the former control, and sufficiency of complaint is to be determined from special facts pleaded. *Iverson, Yoakum, Papiano & Hatch v. Berwald (1999) 76 Cal. App. 4th 990, 995, 90 Cal. Rptr. 2d 665*

If factual allegations of complaint are adequate to state cause of action under any legal theory, demurrer must be overruled. *Charpentier v. Los Angeles Rams Football Co. (1999) 75 Cal. App. 4th 301, 307, 89 Cal. Rptr. 2d 115*

When demurrer is based on affirmative defense, affirmative defense must clearly appear on face of complaint to support demurrer; demurrer based on affirmative defense cannot properly be granted when action might be barred by defense, but is not necessarily barred. *CrossTalk Productions, Inc. v. Jacobson (1998) 65 Cal. App. 4th 631, 635, 76 Cal. Rptr. 2d 615*

Regardless of label attached to cause of action, court must examine complaint's factual allegations to determine whether they state cause of action on any available legal theory; reversible error committed if facts alleged show entitlement to relief under any legal theory. *Cochran v. Cochran (1998) 65 Cal. App. 4th 488, 493, 76 Cal. Rptr. 2d 540*

Trial court may be required to grant leave to amend when it knows of potentially viable claims at time it sustains demurrer, even though plaintiff does not request leave to amend. *Kolani v. Gluska (1998) 64 Cal. App. 4th 402, 405, 75 Cal. Rptr. 2d 257*

Irrespective of labels attached by pleader to any alleged cause of action, court examines factual allegations of complaint to determine whether they state cause of action on any legal theory; if they do the trial court's order of dismissal must be reversed. *North American Chemical Co. v. Superior Court (1997) 59 Cal. App. 4th 764, 773, 69 Cal. Rptr. 2d 466*

Trial court must look through form of pleading to its substance in ruling on demurrer; labels that are attached that are erroneous or confusing must be ignored if complaint pleads facts that would entitle plaintiff to relief; what paper is, rather than how it is named, fixes its character. *LiMandri v. Judkins (1997) 52 Cal. App. 4th 326, 339, 60 Cal. Rptr. 2d 539*

Because demurrer to complaint tests only sufficiency of complaint, court does not consider facts that have not been alleged in complaint unless they may be reasonably inferred from matters that have been pleaded or are proper subjects of judicial notice. *Hall v. Great Western Bank (1991) 231 Cal. App. 3d 713, 719 n.7, 282 Cal. Rptr. 640*

Demurrer to complaint by improperly joined parties defendant against whom no cause of action was or could be stated is to be sustained without leave to amend. *William M. v. Superior Court (1990) 225 Cal. App. 3d 447, 451-452, 275 Cal. Rptr. 103*

In ruling on demurrer, trial court is obligated to look past form of pleading to its substance; erroneous or confusing labels attached by inept pleader are to be ignored if complaint pleads facts that would entitle plaintiff to relief. *Saunders v. Cariss (1990) 224 Cal. App. 3d 905, 908, 274 Cal. Rptr. 186*

Trial court is not to sustain demurrer without leave to amend when plaintiff has alleged facts showing entitlement to relief under any possible legal theory. *Savage v. Trammell Crow Co. (1990) 223 Cal. App. 3d 1562, 1576, 273 Cal. Rptr. 302*

Trial court properly entered judgment of dismissal after sustaining demurrer to plaintiffs' fourth amended complaint when plaintiffs not only failed to state cause of action after five attempts but also elected not to amend again. *Golden*

Feather Community Assn. v. Thermalito Irrigation Dist. (1989) 209 Cal. App. 3d 1276, 1288, 257 Cal. Rptr. 836

Only requirement to withstand general demurrer to complaint as that, on consideration of all facts stated, plaintiff must appear to be entitled to some relief, notwithstanding plaintiff may demand relief to which he or she is not entitled under facts alleged. *White v. State of California (1987) 195 Cal. App. 3d 452, 471, 240 Cal. Rptr. 732*

[b] Ambiguous Instrument

General rule is that, when written instrument that is foundation of cause of action or defense is attached to pleading as exhibit and incorporated in it by proper reference, court may, on demurrer, examine exhibit and treat pleader's allegations of its legal effect as surplusage. *Washer v. Bank of America (1943) 21 Cal. 2d 822, 829-830, 136 P.2d 297* , overruled on another ground in *MacLeod v. Tribune Publishing Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36*

In ruling on general demurrer to complaint for alleged breach of contract, trial court properly construed alleged employment contract against assertion that judicial interpretation of written instrument is proper only after parties have had opportunity to present extrinsic evidence as to intent and meaning of writing, if complaint did not allege that writing was ambiguous or place any definite construction on it by averment, and plaintiff attached copy of alleged contract to complaint and incorporated it by reference, leaving it to speak for itself. *Beck v. American Health Group Internat., Inc. (1989) 211 Cal. App. 3d 1555, 1560-1562, 260 Cal. Rptr. 237*

Plaintiff's failure to plead what extrinsic evidence will be offered to prove meaning of ambiguous instrument did not prevent plaintiff from contending on appeal that demurrer should not have been sustained because extrinsic evidence would have been admissible to assist in interpretation of contract; when ambiguous contract is attached and incorporated into complaint, party pleading ambiguous contract is only required to allege in complaint the meaning that party ascribes to contract. *Southern Pacific Land Co. v. Westlake Farms, Inc. (1987) 188 Cal. App. 3d 807, 816-817, 233 Cal. Rptr. 794*

General rule is that, if instrument sued on is ambiguous, party pleading it must set forth its meaning and that meaning attributed to it must be one to which it is reasonably susceptible; if pleaded instrument is susceptible to more than one construction as to its nature or purpose intended by parties, construction of party pleading as to be accepted, if reasonable, in considering sufficiency of pleading attacked by general demurrer. *Connell v. Zaid (1969) 268 Cal. App. 2d 788, 794-795, 74 Cal. Rptr. 371*

[c] Attached Exhibits

Appellate court disregards allegations that are contrary to law or facts that may be judicially noticed or that are contradicted by express terms of exhibit incorporated into complaint. *Freeman v. San Diego Assn. of Realtors (1999) 77 Cal. App. 4th 171, 178 n.3, 91 Cal. Rptr. 2d 534* ; *Breneric Associates v. City of Del Mar (1998) 69 Cal. App. 4th 166, 180, 81 Cal. Rptr. 2d 324*

Written instruments that are foundation of causes of action and attached to complaint are presumed to be valid for purposes of demurrer and reviewable by court. *SCEcorp v. Superior Court (1992) 3 Cal. App. 4th 673, 677, 4 Cal. Rptr. 2d 372*

Although allegations in complaint must be accepted as true for purposes of demurrer, facts appearing in exhibits attached to complaint as also accepted as true and, if contrary to allegations of pleading, as given precedence. *Dodd v. Citizens Bank of Costa Mesa (1990) 222 Cal. App. 3d 1624, 1626-1627, 272 Cal. Rptr. 623*

Demurrer tests pleading alone and not evidence or other extrinsic matters that do not appear on face of pleading or

cannot be properly inferred from factual allegations of complaint; this principle means that, if pleading sufficiently states cause of action, demurrer cannot be granted on basis of showing of extrinsic matters by inference from attached exhibits, affidavits, or otherwise, except those matters that are subject to judicial notice; court cannot give judicial notice to truth of assertions in declarations or affidavits filed in court proceedings. *Bach v. McNelis (1989) 207 Cal. App. 3d 852, 864-865, 255 Cal. Rptr. 232*

[d] Grant or Denial of Leave to Amend

Although trial court properly sustained demurrer to complaint by former employer against former employee alleging breach of contract and conversion of patents belonging to employer, on grounds that under *Code Civ. Proc. § 426.30*, compulsory cross-complaint statute, employer was required to raise claims in response to former employee's prior cross-complaint filed in prior action by employer against employee, trial court abused its discretion in denying employer leave to amend for employer to provide additional allegations as to when it discovered misconduct at issue, where employer met its burden of showing there was reasonable possibility it could have amended complaint to allege claim against former employee that would not be barred by compulsory cross-complaint statute. *Align Technology, Inc. v. Tran (2009) 179 Cal. App. 4th 949, 971-972, 102 Cal. Rptr. 3d 343*

If the complaint, on its face, alleges facts constituting an affirmative defense barring the claim, a demurrer without leave to amend should be sustained. *Casterson v. Superior Court (2002) 101 Cal. App. 4th 177, 181, 123 Cal. Rptr. 2d 637*

If there is any reasonable possibility that plaintiff can state a good cause of action, it is error to sustain demurrer without leave to amend. *Ludgate Ins. Co. v. Lockheed Martin Corp. (2000) 82 Cal. App. 4th 592, 608, 98 Cal. Rptr. 2d 277*

If complaint, liberally construed, can state cause of action, or if it is reasonably possible that plaintiffs can cure complaint by amendment, trial court should not sustain demurrer without leave to amend. *Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 180, 98 Cal. Rptr. 2d 44*

It is abuse of discretion to sustain demurrer without leave to amend if plaintiff shows there is reasonable possibility any defect identified by defendant can be cured by amendment. *Shvarts v. Budget Group, Inc. (2000) 81 Cal. App. 4th 1153, 1157, 97 Cal. Rptr. 2d 722*

Neither trial court nor appellate court will rewrite complaint; when plaintiff offers no allegations to support possibility of amendment and no legal authority showing viability of new causes of action, there is no basis for finding trial court abused its discretion when it sustained demurrer without leave to amend. *Rakestraw v. California Physicians' Service (2000) 81 Cal. App. 4th 39, 44, 96 Cal. Rptr. 2d 354*

Trial court abuses its discretion if it sustains demurrer without leave to amend when plaintiff shows reasonable possibility to cure any defect by amendment. *Mack v. Soung (2000) 80 Cal. App. 4th 966, 971, 95 Cal. Rptr. 2d 830*

If there is reasonable possibility that defect in complaint can be cured by amendment or that pleading liberally construed can state cause of action, demurrer should not be sustained without leave to amend. *Schnall v. Hertz Corp. (2000) 78 Cal. App. 4th 1144, 1151, 93 Cal. Rptr. 2d 439*

It is abuse of discretion to sustain demurrer without leave to amend if there is reasonable possibility any defect can be cured by amendment; demurrer may be sustained without leave to amend when nature of defects and previous unsuccessful attempts to plead render it probable plaintiff cannot state cause of action; to avoid this result, plaintiff must demonstrate how he or she can amend complaint to change legal effect of the pleading. *Wilner v. Sunset Life Ins. Co.*

(2000) 78 Cal. App. 4th 952, 958-959, 93 Cal. Rptr. 2d 413

Although it is abuse of discretion to sustain demurrer without leave to amend when there is reasonable possibility that plaintiff can amend complaint to cure defect, burden is on plaintiff to show how complaint can be amended and how amendment will change legal effect of pleading. *McKelvey v. Boeing North American, Inc. (1999) 74 Cal. App. 4th 151, 163, 86 Cal. Rptr. 2d 645*

Trial court errs in sustaining demurrer when plaintiff has stated cause of action under any possible legal theory, and abuses discretion in sustaining demurrer without leave to amend if plaintiff shows there is reasonable possibility any defect identified by defendant can be cured by amendment. *Palm Springs Tennis Club v. Rangel (1999) 73 Cal. App. 4th 1, 5, 86 Cal. Rptr. 2d 73*

When complaint contained factual ambiguity which if construed one way supported trial court's ruling sustaining demurrer without leave to amend, but construed another way showed trial court was incorrect in its ruling, and complaint otherwise contained no fatal defects and could easily been amended to cure ambiguity and state claim on which relief could be granted, trial court committed reversible error in sustaining demurrer without leave to amend. *CrossTalk Productions, Inc. v. Jacobson (1998) 65 Cal. App. 4th 631, 635, 649, 76 Cal. Rptr. 2d 615*

Denial of leave to amend constitutes abuse of discretion if pleading does not show on its face that it is incapable of amendment; generally it is abuse of discretion to sustain demurrer without leave to amend if there is any reasonable possibility that defect can be cured by amendment. *Redmond v. Secure Horizons, Pacificare, Inc. (1997) 60 Cal. App. 4th 96, 105, 70 Cal. Rptr. 2d 174*

Even if plaintiff were given leave to amend, plaintiff would not be allowed to amend complaint to state fact directly contradictory to one previously stated. *Continental Ins. Co. v. Lexington Ins. Co. (1997) 55 Cal. App. 4th 637, 646, 64 Cal. Rptr. 2d 116*

Allegations in complaint must yield to contrary facts found in exhibits to complaint. *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc. (1996) 49 Cal. App. 4th 472, 484, 56 Cal. Rptr. 2d 756*

Demurrer properly sustained without leave to amend if it appears that under applicable substantive law there is no reasonable possibility that amendment could remedy defects. *Dalton v. East Bay Mun. Utility Dist. (1993) 18 Cal. App. 4th 1566, 1570-1571, 23 Cal. Rptr. 2d 230* ; *Vaillette v. Fireman's Fund Ins. Co. (1993) 18 Cal. App. 4th 680, 685, 22 Cal. Rptr. 2d 807*

Denial of leave to amend complaint was proper where plaintiff's proposed amended complaint added allegations regarding events subsequent to filing action. *Hebert v. Los Angeles Raiders, Ltd. (1991) 23 Cal. App. 4th 414, 426, 29 Cal. Rptr. 2d 540*

Demurrer is not to be sustained without leave to amend if complaint, liberally construed, can state cause of action under any theory or if there is reasonable possibility defect in complaint can be cured by amendment; demurrer as to be sustained and leave to amend denied only when facts are not in dispute and nature of plaintiff's claim is clear but, under substantive law, no liability exists. *Schwarz v. Regents of University of California (1990) 226 Cal. App. 3d 149, 153, 276 Cal. Rptr. 470*

Although general rule is that it is abuse of discretion to sustain demurrer without leave to amend unless complaint shows that it is incapable of amendment, leave to amend as properly denied when nature of plaintiff's claim is clear but, under substantive law, no liability exists, for no amendment could change result. *Clausing v. San Francisco Unified School Dist. (1990) 221 Cal. App. 3d 1224, 1233, 271 Cal. Rptr. 72* ; *McDonald v. John P. Scripps Newspaper (1989) 210 Cal. App. 3d 100, 105, 257 Cal. Rptr. 473*

Although it would be error to deny leave to amend cross complaint on sustaining of general demurrer if there were any reasonable possibility that cross complainant could state cause of action, such as by supplying additional allegations, sustaining demurrer without leave to amend as proper when undisputed facts give rise to no liability as matter of law; complainant as having burden of showing how pleading can be amended and how amendment will change legal effect of pleading. *Cooper v. Equity Gen. Insurance (1990) 219 Cal. App. 3d 1252, 1263, 268 Cal. Rptr. 693*

Declarations of fact filed after demurrer considered by trial court in determining amendability of complaint to state cause of action. *Mobaldi v. Regents of University of California (1976) 55 Cal. App. 3d 573, 577, 127 Cal. Rptr. 720* (disapproved on other grounds in *Baxter v. Superior Court (1977) 19 Cal. 3d 461, 466 n.4, 138 Cal. Rptr. 315, 563 P.2d 871* , and *Elden v. Sheldon (1988) 46 Cal. 3d 267, 277, 250 Cal. Rptr. 254, 758 P.2d 582*)

[e] Inconsistency in Pleadings

Plaintiff may not avoid defects of plaintiff's earlier pleadings by omitting facts that made earlier pleadings defective or alleging new facts inconsistent with the allegations of the earlier pleading; when plaintiff pleads inconsistent facts without explaining inconsistency, court will read into amended complaint facts alleged in superseded complaint. *Freeman v. San Diego Assn. of Realtors (1999) 77 Cal. App. 4th 171, 178 n.3, 91 Cal. Rptr. 2d 534*

Because of judicial admission in plaintiff's first amended complaint plaintiff could not plead contradictory facts in third amended complaint to toll statute of limitations, and demurrer to third amended complaint sustained without leave to amend. *Knoell v. Petrovich (1999) 76 Cal. App. 4th 164, 168-169, 90 Cal. Rptr. 2d 162*

Sham pleading rule should not be applied in case where plaintiff seeks to change legal theory of recovery and legal conclusions he or she seeks to draw from underlying factual events, and also seeks to omit factual allegations that are irrelevant and immaterial to new legal theories asserted; third amended complaint alleged different legal theories based on same set of general facts as set out in superseded pleadings and prior omitted allegations, even if true and even if read into third amended complaint, were immaterial to the legal theories set out in third amended complaint and thus prior allegations did not undermine or destroy causes of action in that complaint; under such circumstances, sham pleading rule inapplicable and no need for plaintiff to explain reasons for amended pleading because there were no inconsistencies in underlying material or relevant factual allegations. *Berman v. Bromberg (1997) 56 Cal. App. 4th 936, 946-949, 65 Cal. Rptr. 2d 777*

Material factual allegations in verified pleading that are omitted in subsequent amended pleading without adequate explanation are considered by court in ruling on demurrer to later pleading. *Shoemaker v. Myers (1990) 52 Cal. 3d 1, 12, 276 Cal. Rptr. 303, 801 P.2d 1054*

If verified complaint contains allegations destructive of cause of action, defect is not curable in subsequently filed pleadings by simply omitting such allegations without explanation; original defect infects subsequent pleading so as to render it vulnerable to demurrer; party may correct pleading by omitting allegation that apparently was made as result of mistake or inadvertence. *Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 836, 69 Cal. Rptr. 321, 442 P.2d 377*

Even if plaintiff were given leave to amend, plaintiff would not be allowed to amend complaint to state a fact directly contradictory to one previously stated. *Continental Ins. Co. v. Lexington Ins. Co. (1997) 55 Cal. App. 4th 637, 646, 64 Cal. Rptr. 2d 116*

Plaintiff is not allowed to avoid demurrer by discarding factual allegations of its prior complaint or by avoiding factual allegations by contradictory averments in superseding amended pleading. *California Dental Assn. v. California Dental Hygienists' Assn. (1990) 222 Cal. App. 3d 49, 53 n.1, 271 Cal. Rptr. 410*

In considering demurrer, court of appeal is not to consider sufficiency of superseded complaint unless it appears that allegations in prior complaint that were destructive of cause of action were omitted in subsequent complaint without valid explanation. *Amarel v. Connell (1988) 202 Cal. App. 3d 137, 144, 248 Cal. Rptr. 276*

Rule that all allegations of fact in verified complaint that are subsequently omitted or contradicted in amended complaint are still binding on plaintiff is valid and useful to defeat abuses of privilege to amend and to discourage sham and untruthful pleadings, but is not intended to prevent honest plaintiffs from correcting erroneous allegations of generic terms or to prevent correction of ambiguous statements of fact. *Contreras v. Blue Cross of California (1988) 199 Cal. App. 3d 945, 950, 245 Cal. Rptr. 258*

When party files amended complaint and seeks to avoid defects of prior complaint, either by omitting facts that rendered complaint defective or by pleading facts inconsistent with allegations of prior pleading, policy against sham pleading permits appellate court to take judicial notice of prior pleading and requires pleader to explain inconsistency; on failure of party to do so, appellate court may disregard inconsistent allegations and read into amended complaint allegations of superseded complaint. *Owens v. Kings Supermarket (1988) 198 Cal. App. 3d 379, 384, 243 Cal. Rptr. 627* ; *see also Baltins v. James (1995) 36 Cal. App. 4th 1193, 1205, 42 Cal. Rptr. 2d 896* (disapproved on other grounds in *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal. 4th 739, 761, 76 Cal. Rptr. 2d 749, 958 P.2d 1026*)

[f] Consideration of Other Pleadings

Allegations of answer filed contemporaneously with demurrer do not cure defects in complaint. *Metropolitan Life Ins. Co. v. Rolph (1920) 184 Cal. 557, 564, 194 P. 1005*

Matters alleged in complaint are not considered in ruling on demurrer to cross complaint. *Fresno Canal & Irr. Co. v. Perrin (1915) 170 Cal. 411, 414, 149 P. 805*

[g] Matters Admitted by Demurrer

For purpose of ruling on demurrer, court assumes truth of all well-pleaded allegations of complaint. *StorMedia Inc. v. Superior Court (1999) 20 Cal. 4th 449, 453 n.3, 84 Cal. Rptr. 2d 843, 976 P.2d 214*

Only task of appellate court in ruling on demurrer is to determine whether complaint states cause of action; accordingly, appellate court assumes that complaint's properly pleaded material allegations are true and gives complaint reasonable interpretation by reading it as a whole and all its parts in context; appellate court, however, does not assume truth of contentions, deductions, or conclusions of fact or law. *People ex rel. Lungren v. Superior Court (1996) 14 Cal. 4th 294, 300-301, 58 Cal. Rptr. 2d 855, 926 P.2d 1042*

Demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. *Serrano v. Priest (1971) 5 Cal. 3d 584, 591, 96 Cal. Rptr. 601, 487 P.2d 1241* ; *William S. Hart Union High School Dist. v. Regional Planning Com. (1991) 226 Cal. App. 3d 1612, 1616 n.2, 277 Cal. Rptr. 645*

Demurrer as not admitting truth of impermissible conclusions of law alleged in pleading attacked. *Faulkner v. California Toll Bridge Auth. (1953) 40 Cal. 2d 317, 329, 253 P.2d 659* (allegations that acts were arbitrary, capricious, fraudulent, wrongful, and unlawful); *see also Callahan v. Broderick (1899) 124 Cal. 80, 82-84, 56 P. 782* ; *Beresford Neighborhood Assn. v. City of San Mateo (1989) 207 Cal. App. 3d 1180, 1190, 255 Cal. Rptr. 434* (demurrer does not admit conclusions of law)

All material facts pleaded in complaint and all those that arise by reasonable implication are deemed admitted by demurring party. *Rodas v. Spiegel (2001) 87 Cal. App. 4th 513, 517, 104 Cal. Rptr. 2d 439* ; *Wilner v. Sunset Life Ins. Co. (2000) 78 Cal. App. 4th 952, 958, 93 Cal. Rptr. 2d 413*

When reviewing order sustaining demurrer without leave to amend, appellate court must treat demurrer as admitting all properly pleaded facts, but not contentions, deductions or conclusions of law. *Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 180, 98 Cal. Rptr. 2d 44*

On appeal from judgment dismissing action after sustaining demurrer without leave to amend, reviewing court treats demurrer as admitting all material facts properly pleaded but court does not assume truth of contentions, deductions or conclusions of law. *Shvarts v. Budget Group, Inc. (2000) 81 Cal. App. 4th 1153, 1157, 97 Cal. Rptr. 2d 722*

In determining whether complaint alleges facts sufficient to state cause of action, appellate court treats demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of law. *Freis v. Soboroff (2000) 81 Cal. App. 4th 1102, 1104, 97 Cal. Rptr. 2d 429*

In reviewing judgment of dismissal after demurrer sustained without leave to amend, appellate court must assume truth of all facts properly pleaded by plaintiff; appellate court, however, does not assume truth of contentions, deductions or conclusions of fact or law and may disregard allegations that are contrary to law or fact of which judicial notice may be taken. *Duggal v. G.E. Capital Communications Services, Inc. (2000) 81 Cal. App. 4th 81, 86, 96 Cal. Rptr. 2d 383*

In reviewing sufficiency of complaint against general demurrer, appellate court treats demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. *Rakestraw v. California Physicians' Service (2000) 81 Cal. App. 4th 39, 43, 96 Cal. Rptr. 2d 354*

For purposes of assessing sufficiency of demurrer, appellate court assumes truth of all well-pleaded facts; appellate court accepts as true all facts that may be implied or inferred from those alleged. *Thaler v. Household Finance Corp. (2000) 80 Cal. App. 4th 1093, 1098, 95 Cal. Rptr. 2d 779*

Appellate court deems to be true all material facts properly pled and must also accept as true those facts that may be implied or inferred from those expressly alleged. *Mack v. Soung (2000) 80 Cal. App. 4th 966, 971, 95 Cal. Rptr. 2d 830*

For purposes of ruling on demurrer, court assumes truth of all well-pleaded allegations of complaint; ability of plaintiff to prove them is not in issue; instead facts alleged must be treated as having been admitted; appellate court deems to be true all material facts properly pled. *Roskind v. Morgan, Stanley Dean Witter & Co. (2000) 80 Cal. App. 4th 345, 349, 95 Cal. Rptr. 2d 258*

For purposes of ruling on demurrer allegations of complaint must be treated as having been admitted; while, however, demurrer admits all material and issuable facts properly pleaded, it does not admit contentions, deductions or conclusions of fact or law alleged therein. *Schnall v. Hertz Corp. (2000) 78 Cal. App. 4th 1144, 1151-1152, 93 Cal. Rptr. 2d 439*

In reviewing complaint de novo to determine if it contains sufficient facts to state cause of action, appellate court accepts as true complaint's properly pleaded material factual allegations, together with facts that may be properly judicially noticed. *G. L. Mezzetta, Inc. v. City of American Canyon (2000) 78 Cal. App. 4th 1087, 1091, 93 Cal. Rptr. 2d 292*

Appellate court treats demurrer as admitting all material facts when properly pleaded; court, however, will not assume truth of contentions, deductions, or conclusions of fact or law and court may disregard any allegations that are contrary

to law or to fact of which judicial notice may be taken. *Crystaplex Plastics, Ltd. v. Redevelopment Agency (2000) 77 Cal. App. 4th 990, 993, 92 Cal. Rptr. 2d 197*

Reviewing court treats demurrer as admitting all material facts properly pleaded; court does not, however, assume truth of contentions, deductions or conclusions of law. *Walker v. Allstate Indemnity Co. (2000) 77 Cal. App. 4th 750, 754, 92 Cal. Rptr. 2d 132*

For purpose of reviewing judgment of dismissal following sustaining of demurrer, appellate court accepts as true properly pleaded material factual allegations of the complaint, together with facts that may be judicially noticed. *Sacramento Brewing Co. v. Desmond, Miller & Desmond (1999) 75 Cal. App. 4th 1082, 1084, 89 Cal. Rptr. 2d 760*

Demurrer admits all material facts properly pleaded. *Charpentier v. Los Angeles Rams Football Co. (1999) 75 Cal. App. 4th 301, 306, 89 Cal. Rptr. 2d 115*

In reviewing sufficiency of complaint against general demurrer, court treats demurrer as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. *Boyle v. City of Redondo Beach (1999) 70 Cal. App. 4th 1109, 1114 n.2, 83 Cal. Rptr. 2d 164*

Demurrer treated as admitting all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law. *CrossTalk Productions, Inc. v. Jacobson (1998) 65 Cal. App. 4th 631, 635, 76 Cal. Rptr. 2d 615*

In determining merits of demurrer, all material facts pleaded in the complaint and those that arise by reasonable implication, but not conclusions of fact or law, are deemed admitted by the demurring party. *Orange Unified School Dist. v. Rancho Santiago Community College Dist. (1997) 54 Cal. App. 4th 750, 757, 62 Cal. Rptr. 2d 778*

For purposes of testing questions of law raised, demurrer admits all material and issuable facts properly pleaded. *Fiorito v. Superior Court (1990) 226 Cal. App. 3d 433, 437, 277 Cal. Rptr. 27*

Demurrer admits all material and issuable facts properly pleaded, but as not admitting contentions, deductions, or conclusions of fact or law alleged in pleading; thus, although allegations of complaint are deemed to be true in ruling on demurrer, allegation contrary to law or to fact of which court may take judicial notice is to be treated as nullity. *Terminals Equipment Co. v. City and County of San Francisco (1990) 221 Cal. App. 3d 234, 241, 270 Cal. Rptr. 329*

For purpose of testing question of law raised, demurrer admits all material and issuable facts that are properly pleaded, however improbable they may be. *Byrne v. Harvey (1962) 211 Cal. App. 2d 92, 103, 27 Cal. Rptr. 110*

[h] Notice of Court's Ruling

Service of file-stamped copy of formal order sustaining demurrer with leave to amend constitutes lawful service of notice of order pursuant to Code Civ. Proc. § 472b. *Parris v. Cave (1985) 174 Cal. App. 3d 292, 293, 219 Cal. Rptr. 871*

[13] Subsequent Demurrers

In action by largest creditor of failed company against individual members of company's board of directors resulting from assignment for benefit of creditors, which plaintiff alleged breached fiduciary duty, because of prior rulings on demurrers to plaintiff's superseded pleadings, trial court did not lack jurisdiction to consider whether third amended complaint alleged viable cause of action for breach of fiduciary duty, where there was only one cause of action and prior demurrers to that cause of action were sustained; where plaintiff filed third amended complaint in response to order

sustaining prior demurrers with leave to amend, so that amended cause of action was treated as new pleading and defendants were free to respond to it by demurrer on any ground; and where, even if trial court had been constrained by its prior rulings in its consideration of grounds raised on demurrers to third amended complaint, on review of the judgment, appellate court was not so constrained and was free to render opinion based on correct rule of law. *Berg & Berg Enterprises, LLC v. Boyle (2009) 178 Cal. App. 4th 1020, 1035-1036, 100 Cal. Rptr. 3d 875*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 206.85 Law Reviews

Comment, *Not Looking the Complaint in the Face: Judicial Notice on Demurrer, 4 U.S.F. L. Rev. 433 (1970)*

Chance, *Some Practical Suggestions on Defense Motions and Other Procedures Before Trial, 40 Cal. L. Rev. 192 (1952)*

Legal Topics:

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§ 206.86 Text References

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§§ 206.87[Reserved]

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B. Motions for Judgment on the Pleadings

17-206 California Forms of Pleading and Practice--Annotated § 206.90

§ 206.90 Related Publications From Matthew Bender

For memoranda of points and authorities supporting and opposing a motion for judgment on the pleadings, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender)

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§ 206.91 California Rules of Court

Points and authorities in support of notices of motions. *Cal. Rules of Ct., Rules 3.1110, 3.1112(a), 3.1113(a)*

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17-206 California Forms of Pleading and Practice--Annotated § 206.92

§ 206.92 Decisions

[1] Amended Complaint

Trial court abused discretion in granting defendants' motion for judgment on pleadings and in denying plaintiffs' motion under *Code Civ. Proc. § 473(a)* to amend complaint to name bankruptcy trustee as party plaintiff; regarding motion to amend, although substitution would occur after state statute of limitations expired, amendment related back to original complaint and doctrine of judicial estoppel did not apply. *Haley v. Dow Lewis Motors, Inc. (1999) 72 Cal. App. 4th 497, 507-511, 85 Cal. Rptr. 2d 352*

Leave to amend complaint as proper when circumstances surrounding motion for judgment on pleadings show that plaintiff's complaint excusably confused similar names of seller and manufacturer of automobile. *Prince v. Jensen Motors, Inc. (1983) 139 Cal. App. 3d 653, 655-656, 188 Cal. Rptr. 911*

Granting of motion for judgment on pleadings without leave to amend as not abuse of discretion when, even if leave granted, complaint cannot be made to state cause of action by amendment. *IMO Development Corp. v. Dow Corning Corp. (1982) 135 Cal. App. 3d 451, 461, 185 Cal. Rptr. 341*

[2] Appeal

[a] In General

A motion for judgment on the pleadings, like a demurrer, raises only questions of law. Therefore, the appellate court can consider new theories on appeal to challenge or justify the trial court's ruling. *Burnett v. Chimney Sweep (2004) 123 Cal. App. 4th 1057, 1065, 20 Cal. Rptr. 3d 562*

Review of judgment on pleadings requires appellate court to determine, de novo and as matter of law, whether complaint states cause of action; for purposes of review, appellate court accepts as true all material facts alleged in

complaint; denial of leave to amend after granting judgment on pleadings is reviewed for abuse of discretion; court gives complaint reasonable interpretation by reading it as whole and all its parts in their context. *Ludgate Ins. Co. v. Lockheed Martin Corp. (2000) 82 Cal. App. 4th 592, 602, 609, 98 Cal. Rptr. 2d 277*

Motion for judgment on pleadings is equivalent to demurrer and is governed by same standard of review; all material facts that are properly pleaded are deemed true, but not contentions, deductions, or conclusions of fact or law; if leave to amend was not granted, appellate court determines whether complaint states cause of action and whether defect can reasonably by cured by amendment; if pleading defect can be cured, trial court committed reversible error; if not, appellate court affirms; plaintiff bears burden of proof on this issue; finally, judgment will be affirmed if it is proper on any grounds raised in motion even if court did not rely on those grounds. *Pang v. Beverly Hospital, Inc. (2000) 79 Cal. App. 4th 986, 989, 94 Cal. Rptr. 2d 643*

On appeal from granting of a motion for judgment on the pleadings, standard of review is same as for judgment of dismissal following sustaining of general demurrer; thus, appellate court applies de novo standard of review, exercising its independent judgment in determining whether pleadings, together with matters that may be judicially noticed, entitle defendants to judgment. *Pardee Construction Co. v. Insurance Co. of the West (2000) 77 Cal. App. 4th 1340, 1361 n.25, 92 Cal. Rptr. 2d 443*

On appeal, appellate court reviews trial court's decision to grant or deny motion for judgment on pleadings under same standard of review as decision to sustain or overrule demurrer; standard of review de novo, i.e., appellate court exercises independent judgment about whether, assuming truth of pleadings, complaint states cause of action. *McCutchen v. City of Montclair (1999) 73 Cal. App. 4th 1138, 1144, 87 Cal. Rptr. 2d 95*

Appellate court reviews order granting judgment on pleadings independently. *Howard Jarvis Taxpayers Assn. v. City of Riverside (1999) 73 Cal. App. 4th 679, 685, 86 Cal. Rptr. 2d 592*

Judgment on pleadings equates to judgment entered after sustaining of demurrer, and standard of review is identical; thus, when motion for judgment on pleadings granted, appellate court determines whether complaint states facts sufficient to constitute cause of action; appellate court is confined to facts alleged in pleadings attacked. *Hu v. Silgan Containers Corp. (1999) 70 Cal. App. 4th 1261, 1265, 83 Cal. Rptr. 2d 333*

Standard of appellate review of judgment on the pleadings is identical to that of review of judgment following sustaining of demurrer; in either case, leave to amend should be granted if there is any reasonable possibility that plaintiff can state good cause of action; when demurrer is sustained or motion for judgment on the pleadings is granted as to original complaint, denial of leave to amend constitutes abuse of discretion if pleading does not show on its face that it is incapable of amendment. *Consolidated Fire Protection Dist. v. Howard Jarvis Taxpayers' Assn. (1998) 63 Cal. App. 4th 211, 219, 73 Cal. Rptr. 2d 586*

Defendant may move for judgment on the pleadings on same basis as general demurrer; standard of appellate review corresponds to that applied to judgment following sustaining of demurrer. *Ruttenberg v. Ruttenberg (1997) 53 Cal. App. 4th 801, 804, 62 Cal. Rptr. 2d 78*

Standards that govern judgment after successful demurrer also govern judgment on the pleadings. *Williams v. Wells & Bennett Realtors (1997) 52 Cal. App. 4th 857, 861, 61 Cal. Rptr. 2d 34*

Court review of judgment on the pleadings is guided by same rules governing review of sustaining of general demurrer. *Fiol v. Doellstedt (1996) 50 Cal. App. 4th 1318, 1323, 58 Cal. Rptr. 2d 308*

Because judgment on pleadings is equivalent to judgment entered after sustaining of demurrer, standard of appellate review as same. *Orange Unified School Dist. v. Rancho Santiago Community College Dist. (1997) 54 Cal. App. 4th*

750, 764, 62 Cal. Rptr. 2d 778 ; *Setliff v. E.I. Du Pont De Nemours & Co. (1995) 32 Cal. App. 4th 1525, 1534, 1536-1537, 38 Cal. Rptr. 2d 763* ; *Gami v. Mullikin Medical Center (1993) 18 Cal. App. 4th 870, 876, 22 Cal. Rptr. 2d 819* ; *Briggs v. Lawrence (1991) 230 Cal. App. 3d 605, 610, 281 Cal. Rptr. 578* ; *Heredia v. Farmers Ins. Exchange (1991) 228 Cal. App. 3d 1345, 1358-1359, 279 Cal. Rptr. 511* ; *Rodriguez v. Superior Court (1990) 221 Cal. App. 3d 1371, 1374, 271 Cal. Rptr. 114* ; *Tokeshi v. State of California (1990) 217 Cal. App. 3d 999, 1002, 266 Cal. Rptr. 255*

Review on appeal from order granting motion for judgment on pleadings as same as if general demurrer had been sustained, since motion has purpose and effect of general demurrer. *Yanase v. Automobile Club of So. Cal. (1989) 212 Cal. App. 3d 468, 470, 260 Cal. Rptr. 513*

On appeal from judgment on pleadings, case as reviewed in same way as judgment of dismissal entered following sustaining of general demurrer. *Lumbermens Mut. Cas. Co. v. Vaughn (1988) 199 Cal. App. 3d 171, 178, 244 Cal. Rptr. 567*

[b] Considerations on Appeal

In reviewing order granting motion for judgment on pleadings, reviewing court as accepting as true all material allegations of complaint. *Kimmel v. Goland (1990) 51 Cal. 3d 202, 205, 271 Cal. Rptr. 191, 793 P.2d 524* ; *Vehicular Residents Assn. v. Agnos (1990) 222 Cal. App. 3d 996, 998, 272 Cal. Rptr. 216* ; *Yanase v. Automobile Club of So. Cal. (1989) 212 Cal. App. 3d 468, 470, 260 Cal. Rptr. 513*

Task of appellate court is to determine whether complaint states cause of action; all facts alleged in complaint are deemed admitted, and appellate court gives complaint reasonable interpretation by reading it as whole and all its parts in their context; court is not concerned with plaintiff's possible inability to prove claims made in complaint, the allegations of which are accepted as true and liberally construed with view toward attaining substantial justice. *Ludgate Ins. Co. v. Lockheed Martin Corp. (2000) 82 Cal. App. 4th 592, 602, 98 Cal. Rptr. 2d 277*

On appeal from judgment on pleadings, appellate court accepts as true all well pleaded allegations in complaint and matters properly subject to judicial notice; motion should only be granted when complaint fails to state cause of action; because purpose of motion for judgment on pleadings is to test sufficiency of pleadings, court does not consider factual information outside complaint and judicially noticed matters; declarations that were part of summary judgment motion could not be used to attack judgment on pleadings. *Hong Soo Shin v. Oyoung Kong (2000) 80 Cal. App. 4th 498, 502-503, 505, 95 Cal. Rptr. 304*

In addition to facts pleaded, appellate court may consider matters that may be judicially noticed, including party's admissions or concessions which can not reasonably be controverted. *Pang v. Beverly Hospital, Inc. (2000) 79 Cal. App. 4th 986, 989-990, 94 Cal. Rptr. 2d 643*

In considering whether defendant is entitled to judgment on pleadings, appellate court looks to face of pleading under attack; all facts alleged in complaint are admitted for purposes of motion and court determines if those facts constitute cause of action; court also may consider matters subject to judicial notice. *Howard Jarvis Taxpayers Assn v. City of Riverside (1999) 73 Cal. App. 4th 679, 685, 86 Cal. Rptr. 2d 592*

Appellate court determines whether complaint states cause of action; all facts alleged in complaint are deemed admitted and appellate court gives complaint reasonable interpretation by reading it as whole and all parts in their context; appellate court not concerned with a plaintiff's possible inability to prove the claims made in complaint, the allegations of which are accepted as true and liberally construed with view toward attaining substantial justice. *Inter-Modal Rail Employees Assn. v. Burlington Northern & Santa Fe Ry. Co. (1999) 73 Cal. App. 4th 918, 924, 87 Cal. Rptr. 2d 60*

Defendant is entitled to judgment on pleadings if plaintiff's complaint does not state facts sufficient to constitute cause of action; in considering whether defendant entitled to judgment on pleadings, appellate court looks only to face of pleading under attack; all facts alleged in complaint are admitted for purpose of motion and court determines if those facts constitute cause of action; court also may consider matters subject to judicial notice. *Howard Jarvis Taxpayers Assn. v. City of Riverside (1999) 73 Cal. App. 4th 679, 684-685, 86 Cal. Rptr. 2d 592*

Appellate court decides propriety of judgment on pleadings by examining pleadings and judicially noticed matters to see if facts are sufficient to state cause of action. *Saks v. Parilla, Hubard & Militzok (1998) 67 Cal. App. 4th 565, 567, 79 Cal. Rptr. 2d 120*

Because appeal emanated from granting motion for judgment on the pleadings, appellate court assumes truth of material factual allegations of complaint; although normally appellant may not assert on appeal a legal theory not asserted below, this principal does not apply when case resolved at pleading stage without leave to amend being granted; in that situation, appellate court must consider whether plaintiff's allegations state cause of action under any legal theory, whether or not asserted in trial court. *Barthelemy v. Orange County Flood Control Dist. (1998) 65 Cal. App. 4th 558, 561, 566, 76 Cal. Rptr. 2d 575*

In reviewing judgment on the pleadings, appellate court determines whether complaint states cause of action and whether defect can be reasonably cured by amendment; if so, trial court committed reversible error; otherwise, appellate court affirms; appellate court treats pleadings as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of law; appellate court independently construes statutes as matter of law; if there is no liability as a matter of law, leave to amend should not be granted. *Schonfeldt v. State of California (1998) 61 Cal. App. 4th 1462, 1465, 72 Cal. Rptr. 2d 464*

In determining whether pleadings, together with matters that may be judicially noticed, entitle party to judgment, reviewing court can itself conduct appropriate analysis and need not defer to trial court. *Schabarum v. California Legislature (1998) 60 Cal. App. 4th 1205, 1216, 70 Cal. Rptr. 2d 745*

Defendant may move for judgment on the pleadings on same basis as general demurrer; standard of appellate review corresponds to that applied to judgment following sustaining of demurrer; thus, motion confined to face of pleading under attack; court's task in reviewing judgment of dismissal following sustaining of such a demurrer is to determine if complaint states, or can be amended to state, cause of action; for that purpose, court accepts as true properly pleaded material factual allegations of complaint, together with facts that may be judicially noticed. *Ruttenberg v. Ruttenberg (1997) 53 Cal. App. 4th 801, 804, 62 Cal. Rptr. 2d 78*

On appeal from a judgment on the pleadings, appellate court assumes truth of complaint's allegations. *Williams v. Wells & Bennett Realtors (1997) 52 Cal. App. 4th 857, 861, 61 Cal. Rptr. 2d 34*

In reviewing order granting motion for judgment on the pleadings, court may consider judicial admissions contained in plaintiff's pleadings and apparently admissions contained in plaintiff's opposition papers to negate plaintiff's ability to state cause of action. See *Setliff v. E.I. Du Pont De Nemours & Co. (1995) 32 Cal. App. 4th 1525, 1534, 1536-1537, 38 Cal. Rptr. 2d 763*

In reviewing dismissal following judgment on pleadings, facts as alleged as taken as true and judgment as looked on in light most favorable to party opposing motion. *Settimo Associates v. Environ Systems, Inc. (1993) 14 Cal. App. 4th 842, 845 n.3, 17 Cal. Rptr. 2d 757*

In reviewing order granting defendant's motion for judgment on pleadings and dismissing action, appellate court as accepting as true facts alleged in complaint and as considering face of complaint to determine whether facts alleged entitle plaintiff to any relief. *MacDonald v. State of California (1991) 230 Cal. App. 3d 319, 326, 281 Cal. Rptr. 317*

If defendant's motion for judgment on pleadings is granted, appellate court as determining whether complaint states facts sufficient to constitute cause of action. *Heredia v. Farmers Ins. Exchange (1991) 228 Cal. App. 3d 1345, 1358-1359, 279 Cal. Rptr. 511*

On review of judgment on pleadings, appellate court as looking only to face of pleading under attack; complaint as not subject to attack by reference to matters set forth in answer; all facts alleged in complaint as admitted for purposes of motion and court as also permitted to consider matters subject to judicial notice. *Rodriguez v. Superior Court (1990) 221 Cal. App. 3d 1371, 1374, 271 Cal. Rptr. 114*

In reviewing order granting motion for judgment on pleadings, appellate court as accepting as true all material allegations in plaintiff's complaint; underlying merit of allegations as ultimately subject to proof by competent and convincing evidence. *Quesada v. Oak Hill Improvement Co. (1989) 213 Cal. App. 3d 596, 601, 261 Cal. Rptr. 769*

On appeal from judgment on pleadings, appellate court as required to accept allegations of parties opposing judgment as true and to determine whether their allegations state, or can be amended to state, cause of action. *GEM Developers v. Hallcraft Homes of San Diego, Inc. (1989) 213 Cal. App. 3d 419, 423, 261 Cal. Rptr. 626*

Although it is reviewing court's duty in most cases to indulge in every reasonable presumption in favor of sustaining trial court, substantially opposite as true when plaintiff appeals from judgment on pleadings. *Lumbermens Mut. Cas. Co. v. Vaughn (1988) 199 Cal. App. 3d 171, 178-179, 244 Cal. Rptr. 567*

[3] Concurrent Motions

Motion for judgment on pleadings as made concurrently with other motions. *Dragna v. White (1955) 45 Cal. 2d 469, 470, 289 P.2d 428* ; *Allen v. California Mut. B. & L. Assn. (1940) 40 Cal. App. 2d 374, 377, 104 P.2d 851* (objection to taking of testimony)

[4] Demurrer Compared

Because motion for judgment on pleadings performs same function as general demurrer, truth of facts alleged in complaint as required to be accepted in review of ruling on motion. *Nunn v. State of California (1984) 35 Cal. 3d 616, 620-621, 200 Cal. Rptr. 440, 677 P.2d 846*

Motion for judgment pleadings is analogous to general demurrer. *Ludgate Ins. Co. v. Lockheed Martin Corp. (2000) 82 Cal. App. 4th 592, 602, 98 Cal. Rptr. 2d 277*

Motion for judgment on pleadings equivalent to demurrer and is governed by same standard of review. *Pang v. Beverly Hospital, Inc. (2000) 79 Cal. App. 4th 986, 989, 94 Cal. Rptr. 2d 643*

Motion for judgment on the pleadings is tantamount to a general demurrer. *Pardee Construction Co. v. Insurance Co. of the West (2000) 77 Cal. App. 4th 1340, 1361 n.25, 92 Cal. Rptr. 2d 443* ; *Orange Unified School Dist. v. Rancho Santiago Community College Dist. (1997) 54 Cal. App. 4th 750, 764, 62 Cal. Rptr. 2d 778*

On appeal, appellate court reviews trial court's decision to grant or deny motion for judgment on pleadings under same standard of review as decision to sustain or overrule demurrer; standard of review de novo, i.e., appellate court exercises independent judgment about whether, assuming truth of pleadings, complaint states cause of action. *McCutchen v. City of Montclair (1999) 73 Cal. App. 4th 1138, 1144, 87 Cal. Rptr. 2d 95*

Motion for judgment on pleading is analogous to general demurrer; task of appellate court is to determine whether complaint states a cause of action; appellate court determines whether complaint states cause of action; all facts alleged in complaint are deemed admitted and appellate court gives complaint reasonable interpretation by reading it as whole and all parts in their context; appellate court not concerned with a plaintiff's possible inability to prove the claims made in complaint, the allegations of which are accepted as true and liberally construed with view toward attaining substantial justice. *Inter-Modal Rail Employees Assn. v. Burlington Northern & Santa Fe Ry. Co. (1999) 73 Cal. App. 4th 918, 924, 87 Cal. Rptr. 2d 60*

Motion for judgment on pleadings and general demurrer perform same functions and thus motion for judgment on pleadings attacks only defects appearing from face of pleadings, or by matters that can be judicially noticed; therefore, presentation of extrinsic evidence not proper on motion for judgment on pleadings; same standards regarding leave to amend apply to general demurrer and motion for judgment on pleadings; if pleading defective, but amendable, judgment on pleadings should be granted, but with leave to amend. *Cloud v. Northrop Grumman Corp. (1998) 67 Cal. App. 4th 995, 999, 1006, 1011, 79 Cal. Rptr. 2d 544*

Both demurrer and motion for judgment on pleadings accept as true all material factual allegations of challenged pleading, unless contrary to law or facts of which court may take judicial notice; sole issue is whether complaint, as it stands, states cause of action as matter of law. *Mechanical Contractors Assn. v. Greater Bay Area Assn. (1998) 66 Cal. App. 4th 672, 677, 78 Cal. Rptr. 2d 225*

Motion for judgment on the pleadings performs function of general demurrer, admitting truth of all material facts pleaded; in addition to facts alleged in complaint, court may consider matters which may be judicially noticed, including court records; standard of appellate review of judgment on the pleadings is identical to that of review of judgment following sustaining of demurrer. *Consolidated Fire Protection Dist. v. Howard Jarvis Taxpayers' Assn. (1998) 63 Cal. App. 4th 211, 219, 73 Cal. Rptr. 2d 586*

Standard for granting motion for judgment on the pleadings is essentially same as that applicable to general demurrer, that is, under state of pleadings, together with matters that may be judicially noticed, it appears that a party is entitled to judgment as a matter of law. *Schabarum v. California Legislature (1998) 60 Cal. App. 4th 1205, 1216, 70 Cal. Rptr. 2d 745*

Defendant may move for judgment on the pleadings on same basis as a general demurrer; standard of appellate review corresponds to that applied to judgment following sustaining of demurrer; thus, motion confined to face of pleading under attack; court's task in reviewing judgment of dismissal following sustaining of such a demurrer is to determine if complaint states, or can be amended to state, cause of action; for that purpose, court accepts as true properly pleaded material factual allegations of complaint, together with facts that may be judicially noticed. *Ruttenberg v. Ruttenberg (1997) 53 Cal. App. 4th 801, 804, 62 Cal. Rptr. 2d 78*

Motion for judgment on the pleadings may be made on ground that pleading at issue fails to state facts sufficient to constitute legally cognizable claim or defense; appellate review is guided by same rules governing review of sustaining of general demurrer. *Fiol v. Doellstedt (1996) 50 Cal. App. 4th 1318, 1323, 58 Cal. Rptr. 2d 308*

Motion for judgment on pleadings as well-established procedure for testing sufficiency of pleading, having purpose and effect of general demurrer. *Kortmeyer v. California Ins. Guarantee Assn. (1992) 9 Cal. App. 4th 1285, 1293, 12 Cal. Rptr. 2d 71*

Motion for judgment on pleadings as equivalent of general demurrer made after pleadings are in. *Columbia Casualty Co. v. Northwestern Nat. Ins. Co. (1991) 231 Cal. App. 3d 457, 463, 282 Cal. Rptr. 389*

Demurrer and motion for judgment on pleadings as functionally equivalent; each as testing allegations of complaint,

supplemented by any relevant matter of which trial court can take judicial notice, to determine whether plaintiff has stated any legally cognizable claim for relief against defendant. *Briggs v. Lawrence (1991) 230 Cal. App. 3d 605, 610, 281 Cal. Rptr. 578*

Motion by defendant for judgment on pleadings as operating as general demurrer to complaint; motion as available when complaint shows on its face that action is barred by statute of limitations. *Hunt v. County of Shasta (1990) 225 Cal. App. 3d 432, 440 n.5, 275 Cal. Rptr. 113*

Like demurrer, motion for judgment on pleadings as confined to face of pleading under attack, which means two things: (1) if pleading, though uncertain or otherwise defective in form, sufficiently states cause of action or defense, motion cannot be granted on basis of showing of extrinsic matters by inference from attached exhibits, by affidavits, or otherwise; (2) sufficient complaint cannot be thus attacked by reference to matters set forth in answer; however, various outside matters may be looked to under doctrine of judicial notice; finally, since motion performs function of general demurrer, it admits as true material facts pleaded. *Tokeshi v. State of California (1990) 217 Cal. App. 3d 999, 1002, 266 Cal. Rptr. 255*

Motion for judgment on pleadings as made on same grounds and decided on same basis as general demurrer; judgment on pleadings for defendant as granted if complaint on its face fails to state cause of action. *Pierson v. Sharp Memorial Hospital, Inc. (1989) 216 Cal. App. 3d 340, 342, 264 Cal. Rptr. 673* ; *Quesada v. Oak Hill Improvement Co. (1989) 213 Cal. App. 3d 596, 600-601, 261 Cal. Rptr. 769*

Motion for judgment on pleadings by defendant as equivalent of general demurrer and, on appeal from judgment, appellate court as assuming truth of all facts properly pleaded in complaint; motion for judgment on pleadings by plaintiff as equivalent of demurrer to answer, and appellate court as assuming truth of all facts properly pleaded in answer and disregarding controverted allegations of complaint; both standards of review as applying to judgment on pleadings for plaintiff on both complaint and cross complaint, in that appellate court must assume truth of all facts properly pleaded in cross complaint and in answer to complaint and must disregard controverted allegations of complaint. *Sebago, Inc. v. City of Alameda (1989) 211 Cal. App. 3d 1372, 1379-1380, 259 Cal. Rptr. 918*

When motion for judgment on pleadings has purpose and effect of general demurrer, facts alleged in pleading attacked as required to be accepted as true. *Lumbermens Mut. Cas. Co. v. Vaughn (1988) 199 Cal. App. 3d 171, 178, 244 Cal. Rptr. 567*

Motion for judgment on pleadings performs function of general demurrer, admitting all material and issuable facts pleaded; court as permitted to consider matters that may be judicially noticed in addition to facts alleged; review of judgment on pleadings as identical to that on judgment following sustaining of general demurrer. *Barker v. Hull (1987) 191 Cal. App. 3d 221, 224, 236 Cal. Rptr. 285*

Motion for judgment on pleadings operates like general demurrer with review restricted to facts alleged in complaint, and judgment as to be upheld only when complaint fails to state cause of action. *Barney v. Aetna Casualty & Surety Co. (1986) 185 Cal. App. 3d 966, 974, 230 Cal. Rptr. 215* ; *Wolfrich Corp. v. United Services Automobile Assn. (1983) 149 Cal. App. 3d 1206, 1209, 197 Cal. Rptr. 446* (disapproved on other grounds in *Doctors' Co. v. Superior Court (1989) 49 Cal. 3d 39, 49, 260 Cal. Rptr. 183, 775 P.2d 508*)

Like demurrer, motion for judgment on pleadings as confined to face of pleading under attack, and properly pleaded operative facts as accepted as true. *Lehto v. City of Oxnard (1985) 171 Cal. App. 3d 285, 287, 217 Cal. Rptr. 450*

Motion for judgment on pleadings as analogous to plaintiff's demurrer to answer and as evaluated by same standards; denial of motion as proper when defendant's pleadings raise material issue or set up affirmative matter constituting defense. *Allstate Ins. Co. v. Kim W. (1984) 160 Cal. App. 3d 326, 330-331, 206 Cal. Rptr. 609*

Standard of review of judgment on pleadings as same as that used to review judgment following sustaining of demurrer; ultimate issue as being whether, disregarding formal defects curable by amendment, pleading party is entitled to any relief based on facts pleaded and judicially noticed. *Kayfetz v. State of California (1984) 156 Cal. App. 3d 491, 496, 203 Cal. Rptr. 33*

Motion for judgment on pleadings as, in effect, general demurrer; thus, defendant as able to move for judgment on pleadings on ground that complaint fails to state legally cognizable cause of action. *IMO Development Corp. v. Dow Corning Corp. (1982) 135 Cal. App. 3d 451, 457, 185 Cal. Rptr. 341*

Motion for judgment on pleadings as treated as demurrer on appeal. *Galligan v. City of San Bruno (1982) 132 Cal. App. 3d 869, 876, 183 Cal. Rptr. 466*

Motion for judgment on the pleadings as receiving same treatment from legal standpoint as general demurrer; facts alleged in complaint as assumed to be true and as liberally construed in favor of party against whom motion is made. *Higgins v. Del Faro (1981) 123 Cal. App. 3d 558, 565, 176 Cal. Rptr. 704*

[5] Evidence Considered

Because purpose of motion for judgment on pleadings is to test sufficiency of pleadings, court does not consider factual information outside complaint and judicially noticed matters; declarations that were part of summary judgment motion could not be used to attack judgment on pleadings. *Hong Soo Shin v. Oyoung Kong (2000) 80 Cal. App. 4th 498, 502-503, 505, 95 Cal. Rptr. 304*

When summary adjudication motion denied and trial court on own motion deemed matter motion for judgment on pleadings, appellate court judicially noticed declarations, excerpts from deposition testimony and separate statement of undisputed facts placed before trial court by summary adjudication motion which contained admissions and concessions fatal to plaintiff's claim. *Pang v. Beverly Hospital, Inc. (2000) 79 Cal. App. 4th 986, 990, 94 Cal. Rptr. 2d 643*

Statements made by city officials admitting that Proposition 218 could or would abrogate assessment (which was subject of suit) could not be considered by court as evidence, but could be considered to extent they showed that plaintiffs should have been given leave to amend. *Howard Jarvis Taxpayers Assn v. City of Riverside (1999) 73 Cal. App. 4th 679, 688-689, 86 Cal. Rptr. 2d 592*

Motion for judgment on pleadings attacks only defects disclosed appearing from face of pleadings, or by matters that can be judicially noticed; presentation of extrinsic evidence is not proper on motion for judgment on pleadings; thus, if factual issues could not be decided solely by reviewing complaint and matters that could be judicially noticed, issues could not be decided on motion for judgment on pleadings. *Cloud v. Northrop Grumman Corp. (1998) 67 Cal. App. 4th 995, 999-1000, 79 Cal. Rptr. 2d 544*

Trial court properly denied plaintiff's motion for judgment on pleading concerning plaintiff's complaint after defendant dismissed its cross complaint with prejudice; party who dismisses cross complaint with prejudice is not precluded from contesting allegations in plaintiff's complaint; that party, however, may not assert affirmative defenses in nature of new matter where those affirmative defenses concern same nucleus of operative facts as were alleged in dismissed action. *Walsh v. West Valley Mission Community College Dist. (1998) 66 Cal. App. 4th 1532, 1545-1547, 78 Cal. Rptr. 2d 725*

Judgment on the pleadings does not depend on resolution of questions of witness credibility or evidentiary conflicts; in fact, judgment on the pleading must be denied when there are material factual issues that require evidentiary resolution. *Schabarum v. California Legislature (1998) 60 Cal. App. 4th 1205, 1216, 70 Cal. Rptr. 2d 745*

Appellate court in reviewing granting of motion for judgment on the pleadings may consider judicial admissions contained in plaintiff's pleadings and apparently admissions contained in plaintiff's opposition papers to negate plaintiff's ability to state cause of action. See *Setliff v. E.I. Du Pont De Nemours & Co. (1995) 32 Cal. App. 4th 1525, 1534, 1536-1537, 38 Cal. Rptr. 2d 763*

Statements of undisputed facts submitted by parties, as to which they waived their rights to determination at trial, as properly considered in determination of motion for judgment on the pleadings. *Ponderosa Homes, Inc. v. City of San Ramon (1994) 23 Cal. App. 4th 1761, 1768, 29 Cal. Rptr. 2d 26*

Motion for judgment on pleadings as to cross complaint as tested by sufficiency of allegations included in cross complaint, amplified only by matter subject to judicial notice and concessions made by pleader; if written instruments incorporated in pleading are foundation of claim or defense, recitals of instruments as taking precedence over allegations in pleading itself unless incorporated instruments are susceptible to more than one interpretation; for judicial notice to support motion by negating express allegation of pleading, notice as required to be of something that cannot reasonably be controverted; judgment on pleadings granted in reliance on terminology of incorporated complex contract to negate express allegation of its meaning as highly suspect; motion as granted only if instrument incorporated by reference conclusively negates express allegation in pleading, and, except in extraordinary case, conclusive negation as unlikely because parol evidence may lead to interpretation of contract consistent with pleading's express allegation. *Columbia Casualty Co. v. Northwestern Nat. Ins. Co. (1991) 231 Cal. App. 3d 457, 463, 468, 470, 282 Cal. Rptr. 389*

Written instrument attached to pleading and properly incorporated by reference as properly considered in determination of motion for judgment on pleadings, although, ordinarily, motion is confined to face of challenged pleading. *Lumbermens Mut. Cas. Co. v. Vaughn (1988) 199 Cal. App. 3d 171, 178, 244 Cal. Rptr. 567*

[6] Grounds of Motion for Judgment on Pleadings

Ground of motion by defendant or cross defendant as being failure of complaint or cross complaint to state facts sufficient to constitute cause of action. *Gill v. Curtis Publishing Co. (1952) 38 Cal. 2d 273, 275, 239 P.2d 630* ; *Hibernia S. & L. Soc. v. Thornton (1897) 117 Cal. 481, 482, 49 P. 573* ; *McCarthy v. Frost (1973) 33 Cal. App. 3d 872, 874, 109 Cal. Rptr. 470*

Ground of motion by plaintiff as being that answer fails to state facts sufficient to constitute defense. *MacIsaac v. Pozzo (1945) 26 Cal. 2d 809, 812-813, 161 P.2d 449* ; *City of Los Angeles v. California Towel & Linen Supply Co. (1963) 217 Cal. App. 2d 410, 416, 31 Cal. Rptr. 832*

Motion for judgment on pleadings by plaintiff on ground answer is evasive or sham. *Gay v. Winter (1867) 34 Cal. 153, 161*

A motion for judgment on the pleadings may be made on ground that pleading at issue fails to state facts sufficient to constitute a legally cognizable claim or defense. *Fiol v. Doellstedt (1996) 50 Cal. App. 4th 1318, 1323, 58 Cal. Rptr. 2d 308*

Motion for judgment on pleadings as proper if plaintiff failed to allege intent to hold defendant corporation liable for acts committed by predecessor corporation. *Hughes v. Western MacArthur Co. (1987) 192 Cal. App. 3d 951, 957, 237 Cal. Rptr. 738*

[7] Judgment on Court's Motion

Court's granting of judgment on pleadings during hearing on demurrer as proper, in light of fact that motions are substantially similar, same rules apply to each, and appeal is reviewed in same manner. *Peters v. State of California (1987) 188 Cal. App. 3d 1421, 1424, 234 Cal. Rptr. 117*

Court as having power to give judgment on pleadings on its own motion, although, if made without warning and without affording opportunity for argument or amendment, order may constitute serious abuse of discretion. *Jayasinghe v. Lee (1993) 13 Cal. App. 4th Supp. 33, 36 , 17 Cal. Rptr. 2d 117*

[8] Judicial Notice

In addition to facts pleaded, appellate court may consider matters that may be judicially noticed, including party's admissions or concessions which can not reasonably be controverted. *Pang v. Beverly Hospital, Inc. (2000) 79 Cal. App. 4th 986, 989-990, 94 Cal. Rptr. 2d 643*

In considering whether defendant entitled to judgment on pleadings, appellate court may consider matters subject to judicial notice. *Howard Jarvis Taxpayers Assn. v. City of Riverside (1999) 73 Cal. App. 4th 679, 685, 86 Cal. Rptr. 2d 592*

In deciding motion for judgment on pleadings, court as permitted to consider, in addition to facts pleaded, any matters subject to judicial notice. *Sebago, Inc. v. City of Alameda (1989) 211 Cal. App. 3d 1372, 1380-1381, 259 Cal. Rptr. 918*

[9] New Trial Motion

Motion for new trial after judgment on pleadings. *Carney v. Simmonds (1957) 49 Cal. 2d 84, 91, 315 P.2d 305*

[10] Res Judicata

Judgment on pleadings as res judicata. *Takekawa v. Hole (1911) 17 Cal. App. 653, 656, 121 P. 296* ; *see also Keidatz v. Albany (1952) 39 Cal. 2d 826, 828, 249 P.2d 264*

[11] Review by Mandate

Because orders dealing with pleadings are largely discretionary and interlocutory in nature and are seldom appealable until final judgment in case, mandamus review as normally lying to control judicial discretion if that discretion has been abused. *La Jolla Village Homeowners' Assn. v. Superior Court (1989) 212 Cal. App. 3d 1131, 1140, 261 Cal. Rptr. 146*

In mandate proceeding reviewing trial court's order striking causes of action and granting motions for judgment on pleadings, without leave to amend, reviewing court as considering de novo whether trial court has made ruling that deprives party of opportunity to plead cause of action, which, if it did, is abuse of discretion. *La Jolla Village Homeowners' Assn. v. Superior Court (1989) 212 Cal. App. 3d 1131, 1140, 261 Cal. Rptr. 146*

[12] Ruling on Motion

Trial court has no discretion in granting or denying motion for judgment on pleadings; facts alleged being deemed true, only question for determination is one of law; on pure questions of law, trial courts have no choice; they must, without

choice, apply law correctly. *Ludgate Ins. Co. v. Lockheed Martin Corp. (2000) 82 Cal. App. 4th 592, 603, 98 Cal. Rptr. 2d 277*

When ruling on a motion for judgment on the pleadings, court may consider only face of pleadings and matters that are a proper subject of judicial notice. *Taylor v. Lockheed Martin Corp. (2000) 78 Cal. App. 4th 472, 479, 92 Cal. Rptr. 2d 873*

In considering whether defendant entitled to judgment on pleadings, appellate court looks only to face of pleading under attack; all facts alleged in complaint are admitted for purpose of motion and court determines if those facts constitute cause of action; court also may consider matters subject to judicial notice. *Howard Jarvis Taxpayers Assn. v. City of Riverside (1999) 73 Cal. App. 4th 679, 685, 86 Cal. Rptr. 2d 592*

Both demurrer and motion for judgment on pleadings accept as true all material factual allegations of challenged pleading, unless contrary to law or facts of which court may take judicial notice; sole issue is whether complaint, as it stands, states cause of action as matter of law. *Mechanical Contractors Assn. v. Greater Bay Area Assn. (1998) 66 Cal. App. 4th 672, 677, 78 Cal. Rptr. 2d 225*

Motion for judgment on the pleadings performs function of general demurrer, admitting truth of all material facts pleaded; in addition to facts alleged in complaint, court may consider matters which may be judicially noticed, including court records. Consolidated Fire Protection Dist. v. Howard Jarvis Taxpaye rs' *Assn. (1998) 63 Cal. App. 4th 211, 219, 73 Cal. Rptr. 2d 586*

Standard for granting motion for judgment on the pleadings is essentially same as that applicable to general demurrer, that is, under state of pleadings, together with matters that may be judicially noticed, it appears that party is entitled to judgment as a matter of law; judgment on the pleadings does not depend on resolution of questions of witness credibility or evidentiary conflicts; in fact, judgment on the pleading must be denied if there are material factual issues that require evidentiary resolution. *Schabarum v. California Legislature (1998) 60 Cal. App. 4th 1205, 1216, 70 Cal. Rptr. 2d 745*

In ruling on motion for judgment on pleadings, allegations in pleading attacked as required to be accepted as true and liberally construed in pleader's favor; if addressed to pleading as a whole, motion as required to be denied if even one count is good; if addressed to separate counts, motion as permitted to be granted as to some counts and denied as to others. *Heredia v. Farmers Ins. Exchange (1991) 228 Cal. App. 3d 1345, 1358, 279 Cal. Rptr. 511*

In considering whether defendant is entitled to judgment on pleadings, court as looking only to face of pleading under attack and as not considering matters raised in answer; all facts alleged in complaint as admitted for purposes of motion, and court as determining whether those facts constitute cause of action; court as also permitted to consider matters subject to judicial notice. *Hunt v. County of Shasta (1990) 225 Cal. App. 3d 432, 440, 275 Cal. Rptr. 113*

Court as required to assume that facts alleged in complaint are true when ruling on motion for judgment on pleadings and to construe them liberally in favor of party against whom motion is made. *Higgins v. Del Faro (1981) 123 Cal. App. 3d 558, 565, 176 Cal. Rptr. 704*

[13] Summary Judgment Distinguished

Defendants' motion for summary judgment treated as motion for judgment on pleadings to test constitutionality under federal Constitution of state constitutional initiative measure relating to housing. *Mulkey v. Reitman (1966) 64 Cal. 2d 529, 532, 50 Cal. Rptr. 881, 413 P.2d 825*

When motion for summary judgment challenges sufficiency of the pleadings rather than evidence supporting allegations contained therein, it is tantamount to motion for judgment on the pleadings and may be treated as such by trial court; practical effect of this procedure is that in granting judgment on the pleadings, trial court may give plaintiff the opportunity to amend the complaint even when no motion to amend has been filed. *Taylor v. Lockheed Martin Corp. (2000) 78 Cal. App. 4th 472, 479, 92 Cal. Rptr. 2d 873*

Motion for judgment on pleadings and motion for summary judgment distinguished. *Columbia Casualty Co. v. Northwestern Nat. Ins. Co. (1991) 231 Cal. App. 3d 457, 463, 467-470, 282 Cal. Rptr. 389*

[14] Timeliness of Motion

Judgment on the pleadings as properly granted after denial of two prior motions and overruling of general demurrer if party made motion at first opportunity; judge as always free to reexamine sufficiency of pleading. *Donohue v. State of California (1986) 178 Cal. App. 3d 795, 801, 224 Cal. Rptr. 57*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionCivil ProcedureAppealsStandards of ReviewDe Novo Review

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B. Motions for Judgment on the Pleadings

17-206 California Forms of Pleading and Practice--Annotated § 206.93

§ 206.93 Text References

Witkin, California Procedure, vol. 5, *Pleading*, § 954; vol. 6, *Proceedings Without Trial*, §§ 162-172 (4th ed. 1997)

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[Reserved]

§§ 206.94[Reserved]

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A. Demurrers

17-206 California Forms of Pleading and Practice--Annotated § 206.100

§ 206.100 Demurring Party's Checklist

[1] Preliminary Determinations

1. If demurring party is a defendant who has not yet appeared in the action, consider that general demurrer constitutes general appearance; thus, after filing demurrer defendant may no longer make a special appearance to contest lack of personal jurisdiction.

2. Determine whether the opposing party's pleading is timely.

a. A complaint or cross complaint is subject to general demurrer if the lapse of the applicable statute of limitations appears from the pleading or from judicially noticed matters.

b. An untimely answer (not filed within 30 days after service of the summons or of the cross complaint [*Code Civ. Proc. §§ 430.40(a), 432.10*] or within any stipulated or court-ordered extension [*Code Civ. Proc. §§ 1054, 1054.1*; *Cal. Rules of Ct., Rule 2.20*]) may be subject to a motion to strike.

3. Determine whether one or more of the statutory grounds for objection to the opposing party's pleading may be established, either from the face of the opposing party's pleading, or from that pleading and matters subject to judicial notice [*see Code Civ. Proc. §§ 430.10, 430.20*].

a. Grounds for objection to complaint or cross complaint [*see Code Civ. Proc. § 430.10*]:

☐ The court lacks subject matter jurisdiction over the cause of action alleged in the pleading.

☐ The opposing party lacks legal capacity to sue.

☐ Another action is pending between the same parties on the same cause of action.

☐ There is a defect or misjoinder of the parties.

☐ The pleading does not state facts sufficient to constitute a cause of action. Included are situations in which the allegations or judicially noticed matters disclose an affirmative defense that disposes of the cause of action.

☐ The pleading is uncertain, ambiguous, or unintelligible.

☐ In an action founded on a contract, it cannot be ascertained from the pleading whether the contract is written, oral, or implied by conduct.

☐ In an action for professional negligence against an architect, professional engineer, or land surveyor, a certificate of merit has not been filed as required under *Code Civ. Proc. § 411.35*.

b. Grounds for objection to answer [*see Code Civ. Proc. § 430.20*]:

☐ The answer does not state facts sufficient to constitute a defense.

☐ The answer is uncertain, ambiguous, or unintelligible.

☐ The answer pleads a contract, but it cannot be ascertained from the answer whether the contract is written or oral.

4. Consider whether a demurrer is the most appropriate method for raising the objection or objections against the opposing party's pleading.

a. Special demurrers (that is, demurrers on grounds other than the failure to state a cause of action or defense) are generally not allowed in limited civil cases [*see Code Civ. Proc. §§ 91(a),(d), 92(c)*].

b. The objection may be raised by answer if it is not disclosed on the face of the pleading or from judicially noticed matters [*Code Civ. Proc. § 430.30*].

c. An objection for failure to file the certificate required under *Code Civ. Proc. § 411.35* may generally be raised by motion to strike as well as demurrer.

5. Consider any strategic reasons for demurrer.

a. Certain statutory objections are waived if not timely raised by demurrer or answer [*Code Civ. Proc. § 430.80*].

b. Depending on the circumstances, it may be strategically advantageous or disadvantageous to demur

(for example, the demurrer may narrow the issues on which the opposing party may proceed or, conversely, may aid the opposing party in focusing on his or her stronger issues).

c. In some situations, for example, when it likely that the opposing party's defect can be cured by amendment, it may be less expensive and more expedient to approach opposing counsel about stipulating to a voluntary amendment of the pleading.

6. Consider whether it is appropriate to file an answer or motion to strike concurrently with demurrer.

7. Make sure the demurrer is made within applicable time requirements.

a. A demurrer to a complaint or cross complaint must be filed within 30 days after service of the summons or of the cross complaint [*Code Civ. Proc. §§ 430.40(a), 432.10*].

b. A demurrer to an answer must be filed within 10 days after service of the answer [*Code Civ. Proc. § 430.40(b)*].

c. It may be possible to extend the applicable time limit by stipulation or by court order on application [*Code Civ. Proc. §§ 1054, 1054.1*; *Cal. Rules of Ct., Rule 2.20*].

[2] Documents to Be Obtained

If the demurring party is relying on matters subject to judicial notice, he or she must in some situations (for example, with regard to records of another court) obtain properly authenticated copies of the matters to be noticed, and attach these to the demurrer or supporting memorandum [*see Code Civ. Proc. § 430.70*].

[3] Preparation of Papers

1. Draft the Demurrer [FORMS: *see §§ 206.120 -206.134*].

a. State separately each ground for objection and specify the pleading or portion of the pleading against which each objection is made.

b. Sign the demurrer. Because a demurrer is a pleading [*Code Civ. Proc. § 422.10*], it must be signed by the attorney of record, or if none, by the party [*see Code Civ. Proc. § 128.7(a)*].

2. Draft the notice of hearing [FORM: *see § 206.135*]. In some courts it may be necessary to reserve a hearing date in advance with the clerk. The selected hearing date must allow sufficient time for advance service on the other parties [*see § 206.100[4], below*], but must be not more than 35 days following filing of the demurrer (or the first date available to the court thereafter) [*Cal. Rules of Ct., Rule 3.1320(c)*].

3. Draft the supporting memorandum [*see Cal. Rules of Ct., Rule 3.1113*; for general discussion and forms, *see* Ch. 417, *Points and Authorities*]. For forms of memoranda, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender), and the General Index to that publication.

4. If a ground for demurrer is based on matters of which the court may take judicial notice under *Evid. Code §§ 452* and *453*, specify these matters for the purpose of invoking such notice, in a separate

document listing the specific items for which notice is requested [*Cal. Rules of Ct., Rule 3.1113(l)*; *see Code Civ. Proc. § 430.70*; for a discussion and forms, *see* Ch. 321, *Judical Notice*].

5. Prepare any additional papers that are to be filed concurrently with the demurrer (for example, motion to strike and supporting papers).

6. Prepare declaration or certificate regarding proof of service [*see Code Civ. Proc. § 1013a*; *see also* Ch. 518, *Service of Summons and Papers*].

[4] Service and Filing

1. Serve copies of the demurrer and accompanying papers on the opposing party and other parties who have appeared [*see Code Civ. Proc. §§ 465, 1005, 1011, 1012, 1015*; *Cal. Rules of Ct., Rules 1.6(15), (19), 3.1110*, 3.1103(b), 3.1320(c)].

a. Service is normally made in person or by mail [*Code Civ. Proc. §§ 1011, 1012*]; for alternative methods (for example, by fax), see *Code Civ. Proc. §§ 1010.5, 1011* [*see also Cal. Rules of Ct., Rules 2.300, 2.306*].

b. Service in person must be completed at least 16 court days before the selected hearing date [*see Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1320(c)*].

☐ When service is by mail, this 16-day period for completing service before the hearing date is extended by 5 calendar days if the place of mailing and the place of address are within California, by 10 calendar days if either of these places is outside California but within the United States, or by 20 calendar days if either of these places is outside the United States [*see Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1320(c)*].

☐ When service is by fax transmission, express mail, or another form of overnight delivery, this 16-day period is extended by 2 calendar days [*see Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1320(c)*]. An extension period of two court days, as opposed to calendar days, may apply in the case of electronic service made pursuant to a local rule adopted under *Code Civ. Proc. § 1010.6* [*see Code Civ. Proc. § 1010.6(a)(6)*; for discussion, *see Ch. 518, Service of Summons and Papers, § 518.41[8]*].

2. File the originals of the demurrer and accompanying papers with the clerk of the court in which the action is pending at least 16 court days, plus any applicable additional period, before the selected hearing date [*Code Civ. Proc. §§ 465, 1005(b)*; *Cal. Rules of Ct., Rule 3.1320(c)*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (noted *above*)].

a. Pay filing fee.

b. Generally, it is good practice to submit the office copy to the clerk to be stamped together with the original, to serve as a check on the contents of the original.

c. Proof of service must be filed no later than five calendar days before the hearing date [*see Cal. Rules of Ct., Rule 3.1300(c)*].

3. If necessary (for example, to file a timely demurrer), apply for an order shortening the time requirements for service and filing requirements [*see Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1320(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsAnswers

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§ 206.101 Responding Party's Checklist

[1] Preliminary Determinations

1. Examine the demurrer and notice of hearing for timeliness and other potential defects; an untimely or otherwise improper demurrer is subject to a motion to strike.

2. Examine the demurrer, supporting memorandum of points and authorities, and any matters specified for judicial notice, and determine whether the challenged pleading actually contains the defects objected to in the demurrer.

a. Although a general demurrer does not specify the precise defect in the sufficiency of the allegations, the responding party may usually determine the purported defects by referring to the memorandum submitted in support of the demurrer.

b. Check the authorities cited in the supporting memorandum to verify that they actually support the points stated.

c. Check the accuracy and relevancy of the matters specified for judicial notice, if any.

[2] Preparation of Papers

1. Determine the most appropriate response and draft the papers, if any, required to make that response.

a. If the demurrer is untimely or otherwise improper, draft a motion to strike the demurrer in whole or part, together with supporting papers [*see* Ch. 375, *Motions to Strike: Pleadings*].

b. If the demurrer is well taken, in whole or part, consider, for example, whether it might be most expedient to seek to remedy the defect by stipulating to the filing of an amended

pleading before the hearing or by stipulating that the demurrer be sustained with leave to amend.

c. If the pleading is sufficient or not subject to the objections raised by the demurrer, prepare an opposing memorandum establishing the sufficiency of the pleading.

d. Consider seeking a stipulated continuation of the hearing date if necessary to prepare the response [Form: *see § 206.136*].

e. If no opposition is desirable, some local courts may require filing a notice of nonopposition.

2. Prepare declaration or certificate regarding proof of service of the response [*see Code Civ. Proc. § 1013a*; *see also* Ch. 518, *Service of Summons and Papers*].

[3] Service and Filing

1. Serve copies of the opposing memorandum or other response on the demurring party and other parties who have appeared [*see Code Civ. Proc. §§ 465, 1005, 1011, 1012, 1015*; Cal. Rules of Ct., Rules *1.6(15), (19), 3.1110, 3.1103(b), 3.1320(c)*].

a. Service must be completed at least 9 court days before the scheduled hearing date, and the opposition papers must be served by personal delivery, facsimile transmission, express mail, or other means consistent with the provisions of *Code Civ. Proc. §§ 1010, 1011, 1012*, and *1013*, and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers are filed [*see Code Civ. Proc. § 1005(c)*; *Cal. Rules of Ct., Rule 3.1320(c)*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to section 1010.6)].

b. Some courts require service to ensure that other parties receive papers in time to submit a reply or to prepare for the hearing, for example, by personal service. Consider sending papers by messen ger service (or sending a courtesy copy by fax transmission).

2. File the original responding papers directly with the court clerk within 9 court days of the scheduled hearing date [*see Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rules 3.1302(a)*, 3.1320(c); *cf. Code Civ. Proc. § 1010.6(a)(6)* (noted *above*)]. Generally it is good practice to submit the office copy to the clerk to be stamped together with the original, to serve as a check on the contents of the original.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeMotion PracticeTime LimitationsEvidenceJudicial NoticeGeneral Overview

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17-206 California Forms of Pleading and Practice--Annotated § 206.102

§ 206.102 Hearing and Postruling Checklist

[1] Hearing on Demurrer

1. If possible, obtain any tentative ruling and consult local rules for procedure, if any, for appearing at hearing and stipulating to or contesting the tentative ruling.

2. If a party desires to appear by telephone and telephone appearances are permissible under the Rules of Court [*see Cal. Rules of Ct., Rule 3.670(a)-(d)*] and available under local rule, arrange for telephone appearance [*see Code Civ. Proc. § 367.5*; Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.1].

3. Attend hearing.

a. The court may determine a demurrer on its merits despite the failure of one party to attend the hearing. If the demurring party fails to attend the hearing on a special demurrer, this demurrer may be deemed not meritorious and its grounds waived [*Cal. Rules of Ct., Rule 3.1320(f)*; *see also Cal. Rules of Ct., Rule 3.1304(c)* (notice of nonappearance; court must rule as if party had appeared when that party gives proper notice of nonappearance)].

b. If court usually requires prevailing party to prepare order, prepare and bring proposed order (if not already submitted). Make sure an order sustaining a demurrer specifies the grounds for the ruling, whether the order is submitted by the prevailing party or is prepared by the clerk as a minute order [*see Code Civ. Proc. § 472d*].

[2] Postruling Matters

1. If court so requests, the prevailing party prepares the court's order, in the same number of copies as the demurrer, and presents it to judge for signature.

2. Unless the court orders otherwise, the prevailing party requests conformed copies of the original order

and serves these copies, with proof of service, on all parties or their attorneys, unless each party has waived such notice of the order and the waiver was noted in the court's minutes [*see Code Civ. Proc. § 1019.5*]. The prevailing party then files the proof of service.

3. A nonprevailing party should consider the following:

a. Whether to seek reconsideration of the ruling [*see Code Civ. Proc. § 1008*; *see also* Ch. 374, *Motions to Reconsider and Renewed Motions*].

b. Whether to amend the defective pleading when the demurrer was sustained with leave to amend, or whether to answer when the demurrer has been overruled. Unless otherwise ordered, the amendment or answer must be served and filed within 10 days after service of the notice of the ruling [*see Cal. Rules of Ct., Rule 3.1320(g)* (or within five calendar in unlawful detainer proceeding)].

4. The prevailing party should consider serving and filing a motion to dismiss when the demurrer was sustained with leave to amend but the nonprevailing party fails to amend within the time required.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

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[Reserved]

§§ 206.103[Reserved]

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17-206 California Forms of Pleading and Practice--Annotated § 206.110

§ 206.110 Moving Party's Checklist

[1] Preliminary Determinations

1. Sufficiency of pleading.

Determine whether the opposing pleading (complaint, cross complaint, answer) states a cause of action or defense or whether the court lacks subject matter jurisdiction.

a. Judicial notice.

☐ Determine whether there are any facts of which the court must [*Evid. Code § 451*] or may [*Evid. Code §§ 452, 453*] take judicial notice, including competent evidence of record that, when read with the challenged pleading, will render it deficient [*see, e.g., Tiffany v. Sierra Sands Unified School Dist. (1980) 103 Cal. App. 3d 218, 162 Cal. Rptr. 669]* .

☐ Determine whether there are any facts of which the court must [*Evid. Code § 451*] or may [*Evid. Code §§ 452, 453*] take judicial notice that will supplement the challenged pleading so as to render it sufficient.

b. Stipulation.

Determine whether there are any matters to which the parties will stipulate that will form the basis of a motion for judgment on the pleadings [*see* discussion in *§ 206.54[4], above*].

2. Change in law.

If the moving party's earlier demurrer on the same grounds to be raised in the motion was overruled, determine whether

there has been a material change in the applicable case law or statutes [*Code Civ. Proc. § 438(g)(1)*].

3. Time Limitations.

Determine whether the motion is timely.

NOTE:
The defendant must have filed an answer, and the moving party's time to demur to the opposing party's pleading must have expired before the motion can be made [*Code Civ. Proc. § 438(f)*]. The motion cannot be made after a pretrial conference order has been entered pursuant to *Code Civ. Proc. § 575*, or within 30 days of the date the action is initially set for trial, whichever is later, unless the court otherwise permits [*Code Civ. Proc. § 438(e)*].

[2] Preparation of Stipulation

1. Consultation with adverse parties.

If there are matters to which the parties can stipulate that will form the basis of a motion for judgment on the pleadings, consult with the adverse parties, or with their attorneys if they are represented by counsel, to determine the precise matters to be agreed on and whether the parties or their attorneys will in fact stipulate in writing to the court's considering them on the motion.

2. Drafting the stipulation.

a. Form.

Set forth on pleading paper, in the style of the pleadings of the case [*Cal. Rules of Ct., Rules 2.100-2.119*], the circumstances that the parties stipulate to facts, the facts as agreed on, and a place for the signatures of all stipulating parties. For a general form of stipulation, see Ch. 533, *Stipulations* .

[3] Preparation of Papers

1. Draft notice of motion for judgment on the pleadings [FORM: *see § 206.150, below*].

2. Draft supporting memorandum [*see Cal. Rules of Ct., Rule 3.1113*].

For points and authorities in support of motions for judgment on the pleadings, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender). See also Ch. 417, *Points and Authorities* .

NOTE:
If the motion is based on matters of which the court may take judicial notice [*Evid. Code § 452*], include the matters to be so noticed in the notice of motion or memorandum [*Code Civ. Proc. § 438(d)*; *see* *Code Civ. Proc. § 430.70*; *Evid. Code § 453*]. For discussion and forms relating to judicial notice, see Ch. 321, ***Judicial Notice* .**

If the motion is based on matters as to which a stipulation is filed, bring that fact to the attention of the court in the memorandum [*see § 206.54[4], above*].

3. Collect or draft any additional supporting papers.

Identify the papers on which the motion will be based [*Code Civ. Proc. § 1010*].

NOTE:
Additional papers may include any matter of which the court is requested to take judicial notice or stipulations as to matters, other than the pleadings, that may be considered by the court, but will not include any declaration in support of the motion.

4. Draft proof of service [*see Code Civ. Proc. § 1013a*]. For discussion and forms of proof of service, see Ch. 518, *Service of Summons and Papers* .

5. Draft proposed order [Form: *see § 206.151, below*].

[4] Service and Filing

1. Serve copies of the notice of motion and accompanying papers on the attorney for the party whose pleading is challenged or, if the party has no attorney, on the other party [*Code Civ. Proc. §§ 1005, 1011, 1012, 1015*; 303(b), *Cal. Rules of Ct., Rules 1.6(15), (19), 3.1110, 3.1103(b)*].

Service in person must be completed at least 16 court days before the selected hearing date [*see Code Civ. Proc. § 1005(b)*].

If service is by mail, the 16-day period for completing service before the hearing date is extended by 5 calendar days if the place of mailing and of address are within California, by 10 calendar days if either of these places is outside California but within the United States, or by 20 calendar days if either of these places is outside the United States [*see Code Civ. Proc. § 1005(b)*].

If service is by fax transmission or overnight delivery, this 21-day period is extended by 2 calendar days [*see Code Civ. Proc. § 1005(b)*]. An extension period of two court days may apply in the case of electronic service [*see Code Civ. Proc. § 1010.6(a)(6)*; for discussion, *see Ch. 518, Service of Summons and Papers, § 518.41[8]*].

2. File the originals of the notice of motion and accompanying papers at least 16 court days, plus any appropriate additional period, with the clerk of the court in which the action is pending [*Cal. Rules of Ct., Rules 3.1300, 3.1302(a)*; *Code Civ. Proc. §§ 1005(b), 1013a*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (noted *above*)].

NOTE:
Generally, it is good practice to submit the office copy to the clerk to be stamped together with the original, to serve as a check on the contents of the original.

3. File proof of service no later than five calendar days before the hearing date [*see Cal. Rules of Ct., Rule 3.1300(c)*].

[5] Response to Opposing Party's Memorandum

1. File response if appropriate.

a. Examine the memorandum, if any, filed in response to the motion for judgment on the pleadings.

b. If time permits, counsel may wish to file a supplemental memorandum, with proof of service, in opposition to the opposing party's memorandum. Local practice may vary, but usually this supplemental memorandum should be filed directly with the clerk of the law and motion department or division, rather than in the office of the court clerk, so that the court will have sufficient time to consider the memorandum prior to the hearing on the motion.

2. Serve and file any response papers.

All reply papers must be filed and a copy served at least five court days before the time appointed for the hearing. All reply papers must be served by personal delivery, facsimile transmission, express mail, or other means consistent with the provisions of *Code Civ. Proc. §§ 1010, 1011, 1012,* and *1013,* and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the reply papers are filed [*Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(a)*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to section 1010.6)]. Unless otherwise provided by local court rule, all papers relating to a law and motion proceeding must be filed in the clerk's office [*Cal. Rules of Ct., Rule 3.1302(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeContent & FormCivil ProceduresPretrial JudgmentsJudgment on the PleadingsEvidenceJudicial NoticeGeneral Overview

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PART IV. PROCEDURAL CHECKLISTS
B. Motions for Judgment on the Pleadings

17-206 California Forms of Pleading and Practice--Annotated § 206.111

§ 206.111 Opposing Party's Guide

[1] Preliminary Determinations

1. On receipt of the notice of motion and supporting memorandum, ascertain if it was timely served. Read the notice of motion to ascertain the alleged defects in the pleading.

2. Read the supporting memorandum and verify the citations to determine whether they support the points or statements for which they are cited.

NOTE:
Points may be inaccurately stated or not supported by the authorities cited. Moreover, a case cited may superficially support the point in that it makes an identical or similar statement, but may actually hold that the statement is not applicable to the facts of that case or that the case presents an exception to the rule. In that situation, the case is usually not authority for the statement made but, rather, an authority in opposition to it.

3. If the motion is well taken, determine the advisability of not opposing it or of stipulating that the motion be granted with leave to amend the pleading.

[2] Preparation of Papers

1. If counsel intends to oppose the motion, prepare an opposing memorandum. For forms of memoranda, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender), and the General Index to that publication. See also Ch. 417, *Points and Authorities* , in this publication.

2. Prepare the certificate, affidavit, or declaration, as the case may be, of service [*Code Civ. Proc. §§ 1013(b), 1013a, 2009, 2015.5*].

[3] Service and Filing

1. Serve copies of the opposing memorandum on the moving party's attorney or, if none, on the moving party [*Code Civ. Proc. §§ 1005(b), 1011, 1012, 1015*; *Cal. Rules of Ct., Rules 1.6(15), (19)*. 3.1110, 3.1103].

NOTE:

Unless otherwise ordered or specifically provided by law, all papers opposing a motion must be served at least 9 court days before the hearing. All papers opposing a motion must be served by personal delivery, facsimile transmission, express mail, or other means consistent with the provisions of *Code Civ. Proc. §§ 1010, 1011, 1012,* and *1013*, and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers are filed [*Code Civ. Proc. § 1005(c)*; *Cal. Rules of Ct., Rule 3.1300*; *cf.* *Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to *Code Civ. Proc. § 1010.6*)].

2. File the original opposing papers with the clerk of the court in which the action is pending. The papers may be delivered in person or by mail.

a. Unless otherwise ordered or specifically provided by law, all papers opposing a motion must be filed at least 9 court days before the hearing [*Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to *Code Civ. Proc. § 1010.6*)].

b. Unless otherwise provided by local rule, all papers relating to a law and motion proceeding must be filed in the clerk's office [*Cal. Rules of Ct., Rule 3.1302(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeContent & FormCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresPleading & PracticeMotion PracticeTime LimitationsCivil ProceduresPretrial JudgmentsJudgment on the Pleadings

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17-206 California Forms of Pleading and Practice--Annotated §§ 206.112-206.119

[Reserved]

§§ 206.112[Reserved]

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17-206 California Forms of Pleading and Practice--Annotated § 206.120

§ 206.120 Demurrer to Complaint [Code Civ. Proc. §§ 430.10, 430.30(a)]--Skeletal Form

[1] FORM Demurrer to Complaint [Code Civ. Proc. §§ 430.10, 430.30(a)]--Skeletal Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DEMURRER OF _____ [*name*] TO
vs.	)	COMPLAINT OF _____ [*name*],
_____ [*name*],	)	MEMORANDUM, AND NOTICE OF HEARING
Defendant.	)	[This demurrer is accompanied by a Notice of Motion to Strike]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____
		[LIMITED CIVIL CASE]

_____

[*Body of demurrer. See forms §§ 206.121-206.130.*]

[WHEREFORE, defendant prays that this/these demurrer(s) be sustained (without leave to amend), that plaintiff take nothing by his/her/its complaint, that defendant have judgment for his/her/its costs, and for all other proper relief.]

[Dated: _____.]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

MEMORANDUM
[*Add required memorandum of supporting the demurrer*]

NOTICE OF HEARING
[*Attach required notice of hearing; see § 206.135, below*.]

[2] Use of Form

The form in [1], *above*, illustrates the various parts of the demurrer and is for use by a defendant to demur to a complaint. With appropriate modifications, it may also be used by a cross defendant to demur to a cross complaint, in which case, the nature of the papers set forth in the caption would read "DEMURRER OF CROSS DEFENDANT _____ [*name*] TO CROSS COMPLAINT OF _____ [*name of cross complainant*]," etc. [*see Cal. Rules of Ct., Rules 2.111(6), 3.1112(a), (b), (e), 3.1320(c)*]. For the format of a demurrer to an answer, see *§ 206.131, below*.

[3] Format

[a] Caption

[i] General Rules

The demurrer is a pleading [*Code Civ. Proc. § 422.10*] that must contain a caption setting forth the name of the court and county in which the action is brought and the title of the action [*Code Civ. Proc. § 422.30*].

The title of the action is required to include the names of the parties unless otherwise provided by statute or Judicial Council rule. It is sufficient to state the name of the first party on each side with an appropriate indication of other parties [*Code Civ. Proc. § 422.40*; *Cal. Rules of Ct., Rule 2.111(4)*], such as, the phrase "et al." following the first named party [for example, John Smith et al., Plaintiffs, vs. Peter Brown et al., Defendants].

If the demurrer is filed in a limited civil case, the caption must also include the phrase "Limited Civil Case" [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*].

The format requirements of the first page are set forth in *Cal. Rules of Ct., Rules 2.111, 3.1110(b)*. For a listing and discussion of these requirements, see Ch. 108, *Captions and Introductions* .

Additional requirements are imposed by Cal. Rules of Ct., Rules 3.111(b) and *3.1320(e)*, which require the following information to be included immediately below the case number:

1. The date, time, and location, if ascertainable, of any scheduled hearing and the name of the hearing judge, if ascertainable;

2. The nature or title of any attached document other than an exhibit;

3. The date of filing of the action;

4. The trial date, if set; and

5. The name of the party filing the demurrer and the name of the party whose pleading is the subject of the demurrer.

[ii] Supporting Memorandum

A memorandum must accompany the demurrer [*Cal. Rules of Ct., Rules 3.1110, 3.1112(a)*, 3.1113(a)]. The usual procedure is to append the memorandum to the end of the demurrer immediately after the signature line with a heading, "MEMORANDUM," centered on the page. When this is done, the memorandum will not have a separate caption, but, instead, is noted in the caption of the demurrer, as in the form in [1], *above*.

For additional discussion of memoranda, see Ch. 417, *Points and Authorities* . For complete memoranda supporting and opposing demurrers and requirements imposed by the California Rules of Court and local court rules, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender).

[iii] Notice of Hearing

The notice of hearing required to accompany a demurrer under *Cal. Rules of Ct., Rules 3.1112(a), 3.1320(c),* is usually a separate document, but may be physically attached to the demurrer. If it is physically attached, it need not, unless required by local court rule, have a separate caption, but, instead, is noted in the caption to the demurrer, as indicated in the foregoing form. For a form of notice of hearing, see *§ 206.135, below*.

[iv] Request for Judicial Notice

Any request for judicial notice must be in a separate document listing the specific items for which notice is requested [*Cal. Rules of Ct., Rule 3.1113(l)*; *see Code Civ. Proc. § 430.70* (request to take judicial notice to be in demurrer or memorandum except as court may otherwise permit)].

For discussion and a form of request for judicial notice that may be used with a demurrer, see Ch. 321, *Judicial Notice* .

[v] Notice of Motion to Strike

A notice of motion to strike must be given within the time allowed to plead. If a demurrer is interposed, the notice must be given concurrently with the demurrer and heard at the same time as the demurrer [*Cal. Rules of Ct., Rules 1.5(b), 3.1100, 3.1103(b)*, 3.1332]. If a motion to strike is noticed concurrently with a demurrer, the better practice, if not required by local rule, is to so indicate in the caption of the demurrer under the statement of the nature of the papers, as illustrated in the foregoing form [*see* discussion and forms in Ch. 375, *Motions to Strike: Pleadings*].

[b] Body of Demurrer

For discussion of the body of a demurrer, see *§ 206.121[3], below*.

[c] Prayer

A prayer to a demurrer is not required but is frequently included.

[d] Date

A demurrer, like other pleadings, need not be dated, since the operative dates are the dates of service and filing, but counsel frequently date pleadings to have a record of when they were prepared and executed.

[e] Signature and Sanctions

In cases commenced on or after January 1, 1995, if there is an attorney of record in an action, he or she must sign the demurrer [*see Code Civ. Proc. § 128.7(a), (i), (j)*]. If there is no attorney of record, the party must sign [*see Code Civ. Proc. § 128.7(a)*].

By presenting the demurrer to the court, the signer certifies that the paper is not being presented primarily for an improper purpose, such as harassment, delay, or needless increase in the cost of litigation [*see Code Civ. Proc. § 128.7(b)(1)*]. The signer also certifies that the demurrer is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law [*see Code Civ. Proc. § 128.7(b)(2)*].

If the court finds that this certification is false, sanctions may be imposed [*Code Civ. Proc. § 128.7(c)*].

In actions or proceedings pending as of December 31, 1994, sanctions for frivolous or delaying tactics under *Code Civ. Proc. § 128.5* apply.

For discussion of these sanction provisions, see Ch. 510, *Sanctions* .

[4] Requirements Under Local Rules

Local court rules may contain additional requirements and should be checked if counsel is unfamiliar with them. However, any local rules concerning demurrers or the form and format of papers are preempted by the California Rules of Court, and should be considered null and void. The exception to the rule of preemption most likely to be relevant to a demurrer is the exception for local rules adopted under the Trial Court Delay Reduction Act [*Cal. Rules of Ct., Rule 3.20*].

[5] Cross References

Witkin, California Procedure, vol. 5, *Pleading*, §§ 899-971 (4th ed. 1997)

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17-206 California Forms of Pleading and Practice--Annotated § 206.121

§ 206.121 Demurrer to Complaint [Code Civ. Proc. §§ 430.10, 430.30(a)]--Body of Demurrer--Illustrative Combinations

[1] FORM Demurrer to Complaint [Code Civ. Proc. §§ 430.10, 430.30(a)]--Body of Demurrer--Illustrative Combinations

[*EITHER, demurrer on single ground*]

Defendant demurs to [_____ (Count I *or* the First Cause of Action *or other*) of] the complaint herein on the ground that _____ [*specify; see forms of body of demurrer in §§ 206.122- 206.130, below*].

[*OR, demurrer on multiple grounds to single cause of action or count*]

Defendant demurs to [_____ (Count I *or* the First Cause of Action *or other*) of] the complaint herein separately and severally on each of the following grounds: _____ [*specify, e.g.,*

1. It fails to state facts sufficient to constitute a cause of action.

2. It is uncertain in that, in Paragraph 3 on page 2, lines 5-6, it is alleged that the contract sued on is written and was executed on January 31, 1997, whereas, in Paragraph 7 on page 4, lines 9-10, it is alleged that the contract was oral and was entered into on April 1, 1996.

3. _____ (*Continue, setting forth each ground of demurrer in a separately numbered paragraph*).]

[*OR, demurrers on multiple grounds to multiple causes of action or counts*]

Defendant demurs to the complaint herein separately and severally on each of the following grounds:

1. _____ [Count I *or* The First Cause of Action *or other*] _____ [*specify, e.g.,* fails to state facts sufficient to constitute a cause of action].

2. _____ [Count II *or* The Second Cause of Action *or other*] _____[*specify, e.g.,* fails to state facts sufficient to constitute a cause of action in that it shows on its face that the cause of action alleged is barred by the statute of limitations].

3. _____ [Count III *or* The Third Cause of Action *or other*] is uncertain in that, in Paragraph 4 on page 2, lines 4-7, it alleges that the contract sued on was entered into on March 1, 1997, whereas, in Paragraph 8 on page 4, lines 26-28, it alleges that the contract sued on was entered into on March 1, 1994.

4. Further, with respect to _____ [Count III *or* the Third Cause of Action *or other*], it cannot be ascertained from the allegations thereof whether the contract on which the action is founded is written or oral.

[*OR, demurrers on multiple grounds to multiple causes of action or counts; another form*]

DEMURRER TO _____ [COUNT I *or* FIRST CAUSE OF ACTION *or other*]

Defendant demurs to _____ [Count I *or* the First Cause of Action *or other*] of the complaint herein on the ground _____ [*specify, e.g.,* that it fails to state facts sufficient to constitute a cause of action].

DEMURRER TO _____ [COUNT II *or* SECOND CAUSE OF ACTION *or other*]

Defendant demurs to _____ [Count II *or* the Second Cause of Action *or other*] of the complaint herein on the ground _____ [*specify, e.g.,* that it fails to state facts sufficient to constitute a cause of action in that it shows on its face that the cause of action alleged is barred by the statute of limitations].

DEMURRERS TO _____ [COUNT III *or* THIRD CAUSE OF ACTION *or other*]

Defendant demurs to _____ [Count III *or* the Third Cause of Action *or other*] of the complaint herein separately and severally on each of the following grounds: _____[*specify, e.g.,*

1. It is uncertain in that, in Paragraph 4 on page 2, lines 4-7, it alleges that the contract sued on was entered into on March 1, 1997, whereas, in Paragraph 8 on page 4, lines 26-28, it alleges that the contract sued on was entered into on March 1, 1994.

2. It cannot be ascertained from the pleading whether the contract on which the action is founded is written or oral.]

[2] Use of Form

The form in [1], *above*, illustrates the manner of demurring on a single ground, on multiple grounds, and to multiple causes of action or counts in a complaint [*see Code Civ. Proc. §§ 430.10* (grounds of objection to complaint or cross complaint), 430.20 (grounds of objection to answer)]. The examples may be inserted as appropriate as the body of the demurrer in the form *set out in § 206.120[1], above*.

For further discussion, see *§ 206.16, above.*

[3] Format of Body of Demurrer

The demurrer must distinctly specify the grounds on which any objections to the complaint, cross complaint, or answer are taken. If it does not, it may be disregarded [*Code Civ. Proc. § 430.60*]. *Cal. Rules of Ct., Rule 3.1112* governs the format of motions generally. *Cal. Rules of Ct., Rule 3.1320(a)*, requires that each ground of demurrer be set forth in a separate paragraph and state whether it applies to the entire complaint, cross complaint, or answer or to specified causes of action or defenses.

Each of several grounds of demurrer should be stated separately, since a demurrer stating several grounds conjunctively may be overruled unless all grounds are good [*see Jones v. Iverson (1900) 131 Cal. 101, 104, 63 P. 135* ; *Kraner v. Halsey (1889) 82 Cal. 209, 212, 22 P. 1137]* . Moreover a separate demurrer should be made against each count or cause of action, since a demurrer attacking an entire complaint that contains several counts or causes of action will be overruled if any count or cause of action is good against the demurrer [*Skipper v. Gilbert J. Martin Constr. Co. (1957) 156 Cal. App. 2d 82, 86-87, 318 P.2d 732]* .

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17-206 California Forms of Pleading and Practice--Annotated § 206.122

§ 206.122 General Demurrer to Complaint or Cross Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--No Cause of Action Stated [Code Civ. Proc. § 430.10(e)]

[1] FORM General Demurrer to Complaint or Cross Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--No Cause of Action Stated [Code Civ. Proc. § 430.10(e)]

_____ [Defendant *or* Cross defendant _____ (*name*)] demurs to [_____ (Count I *or* the First Cause of Action *or other*) of] the _____ [complaint *or* cross complaint of _____ (*name*), cross complainant,] herein on the ground that it does not state facts sufficient to constitute a cause of action.

[2] Use of Form

The form in [1], *above*, is for insertion in *§ 206.120[1]* as the body of the demurrer when the complaint or cross complaint, or a cause of action or count in it, does not state facts sufficient to constitute a cause of action [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*; for discussion see, *see also § 206.14[1], above*]. For a form for use when the objection is that it appears on the face of the pleading or from judicially noticed matter that the action is barred by the statute of limitations, see Ch. 345, *Limitation of Actions* .

[3] Specification in Demurrer of Ground of Objection

Code Civ. Proc. § 430.60 requires that the demurrer distinctly specify the grounds on which any of the objections to the complaint or cross complaint are taken and that, unless it does so, it may be disregarded. Nevertheless, the ground of a general demurrer, except when it is based on the bar of the statute of limitations [*see § 206.123*], may be stated in the words of the statute [*Burke v. Maguire (1908) 154 Cal. 456, 462, 98 P. 21*], that is, in the words of *Code Civ. Proc. § 430.10(e)*. This results from the fact that the failure to state facts sufficient to constitute a cause of action is usually not waived by failure to take the objection by demurrer or answer [*see Code Civ. Proc. § 430.80(a)*]. The supporting points and authorities required to accompany the demurrer [*see Cal. Rules of Ct., Rules 1.5(b), 3.1100, 3.1103(b)*, 3.1113(a)] will, however, normally specify the particular defect constituting the ground of objection.

[4] Cross References

For memoranda supporting and opposing a general demurrer on the ground the action is premature, see California Points and Authorities, Ch. 10, *Abatement and Survival of Actions* (Matthew Bender)

For memoranda supporting and opposing a general demurrer to a complaint, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender)

For additional commentary relating to the form of a demurrer, see *§§ 206.120[2] et seq., 206.121[2]* et seq.

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17-206 California Forms of Pleading and Practice--Annotated § 206.123

§ 206.123 Special Demurrer to Complaint or Cross Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--No Subject Matter Jurisdiction [Code Civ. Proc. § 430.10(a)]

[1] FORM Special Demurrer to Complaint or Cross Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--No Subject Matter Jurisdiction [Code Civ. Proc. § 430.10(a)]

_____ [Defendant *or* Cross Defendant _____ (*name*)] demurs to [_____ (Count I *or* the First Cause of Action *or other*) of] the _____ [complaint *or* cross complaint of _____ (*name*), cross complainant,] herein on the ground that the court has no jurisdiction of the subject of the cause of action therein alleged [for the following reasons: _____ (*specify*)].

[2] Use of Form

The form in [1], *above*, is for insertion in § 206.120[1] as the body of the demurrer when it appears on the face of the challenged pleading or from judicially noticed matter [*Code Civ. Proc. § 430.30(a)*] that the court has no jurisdiction of the subject of the cause of action alleged [*Code Civ. Proc. § 430.10(a)*]. For further discussion, see *§ 206.14[3], above.*

Special demurrers are generally not allowed in limited civil cases [*see Code Civ. Proc. §§ 91(a), (d), 92(c)*].

[3] Cross References

For memoranda supporting and opposing a demurrer to a complaint on the ground of lack of subject matter jurisdiction, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender)

For a memorandum in support of a petition for writ of prohibition to restrain trial court from acting without or in excess of its jurisdiction, see California Points and Authorities, Ch. 150, *Mandate and Prohibition*

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17-206 California Forms of Pleading and Practice--Annotated § 206.124

§ 206.124 Special Demurrer to Complaint or Cross Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--No Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]

[1] FORM Special Demurrer to Complaint or Cross Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--No Legal Capacity to Sue [Code Civ. Proc. § 430.10(b)]

_____ [Defendant *or* Cross defendant _____ (*name*)] demurs to the _____ [complaint *or* cross complaint of _____ (*name*), cross complainant,] herein on the ground _____ [plaintiff *or* cross complainant] does not have legal capacity to sue [for the reason that it appears _____ (on the face of the _____ (complaint *or* cross complaint) *or* from _____ (*specify matter*) of which this court is requested to take judicial notice) that _____ (plaintiff *or* cross complainant) _____ (*specify, e.g.,* is a 16-year old minor appearing by a foreign guardian who has not been appointed by a California court as plaintiff's guardian ad litem or as the guardian or conservator of his/her estate)].

[2] Use of Form

The form in [1], *above*, is for insertion in § 206.120[1] as the body of the demurrer when it appears from the challenged pleading or from judicially noticed matter [*Code Civ. Proc. § 430.30(a)*] that the plaintiff or cross complainant has no legal capacity to sue [*Code Civ. Proc. § 430.10(b)*].

The demurrer assumes that the lack of capacity to sue appears on the face of the complaint. In this regard, it should be noted that, unless a governing statute states otherwise, a complaint need not allege the plaintiff's capacity to sue. If lack of capacity does not appear on the face of the complaint, it cannot be raised by demurrer, but is a special plea in abatement [*Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 994 n.4, 277 Cal. Rptr. 517, 803 P.2d 370]* .

For further discussion, see *§ 206.14[2], above*.

Special demurrers are generally not allowed in limited civil cases [*see Code Civ. Proc. §§ 91(a), (d), 92(c)*].

[3] Specification of Ground

The demurrer must distinctly specify the ground on which the objection is taken or it may be disregarded [*Code Civ. Proc. § 430.60*]. The bare statement that plaintiff does not have legal capacity to sue, however, constitutes a distinct specification of the ground and is sufficient [*Ginsberg Tile Co. v. Faraone (1929) 99 Cal. App. 381, 385, 278 P. 866* (decided under predecessor statute)], since a demurrer raises issues of law [*Code Civ. Proc. § 589*], whereas answers raise factual issues [*Code Civ. Proc. § 590*; *see also, e.g.,* *Ontario State Bank v. Tibbits (1889) 80 Cal. 68, 69-70, 22 P. 66* (statement in answer that plaintiff had no legal capacity to sue was conclusion of law and tendered no issue of fact)]. The reason the plaintiff or cross complainant lacks legal capacity to sue will, if not obvious on the face of the pleading or specified in the demurrer, be made clear from the memorandum that must accompany the demurrer [*Cal. Rules of Ct., Rules 1.5(b), 3.1110, 3.1103(b)*, 3.1112(a), 3.1113(a); *see also* Ch. 417, *Points and Authorities*].

[4] Cross References

For alternative forms of demurrers on the ground plaintiff lacks legal capacity to sue and forms of affirmative defenses on this ground, see Ch. 3, *Abatement of Actions*

For memoranda supporting and opposing a special demurrer to a complaint on the ground plaintiff lacks legal capacity to sue, see California Points and Authorities, Ch. 10, *Abatement and Survival of Actions* , and Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender)

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17-206 California Forms of Pleading and Practice--Annotated § 206.125

§ 206.125 Special Demurrer to Complaint or Cross Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--Another Action Pending [Code Civ. Proc. § 430.10(c)]

[1] FORM Special Demurrer to Complaint or Cross Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--Another Action Pending [Code Civ. Proc. § 430.10(c)]

_____ [Defendant *or* Cross defendant _____ (*name*)] demurs to the [_____ (First *or other*) Cause of Action set forth in the] _____ [complaint *or* cross complaint of _____ (*name*), cross complainant,] herein on the ground that there is another action pending between the same parties on the same cause of action, to wit, an action entitled _____, Plaintiff, vs. _____, Defendant, No. _____, now pending in the _____ Court of _____, and in which summons was served on _____ [*date*]. [This court is hereby requested to take judicial notice of this other pending action, and, for that purpose, certified copies of the (records and) files in that action are attached to the separate Request for Judicial Notice that is filed with this demurrer.]

[2] Use of Form

The form in [1], *above*, is for insertion in § 206.120[1] as the body of the demurrer when it appears on the face of the challenged pleading or from judicially noticed matter [*Code Civ. Proc. § 430.30(a)*] that there is another action pending between the same parties on the same cause of action [*Code Civ. Proc. § 430.10(c)*]. For further discussion, see *§ 206.14[4], above.*

Any request for judicial notice must be made in a separate document listing the specific items for which notice is requested and must comply with *Cal. Rules of Ct., Rule 3.1306(c)* [*Cal. Rules of Ct., Rule 3.1113(j)*]. *Cal. Rules of Ct., Rule 3.1306(c)* requires a party requesting judicial notice of material under *Evid. Code §§ 452* or *453* to provide the court and each party with copy of the material; and if the material is part of a file in the court in which the matter is being heard, the party must specify in writing the part of the court file sought to be judicially noticed, and the party must make arrangements with the clerk to have the file in the courtroom at the time of the hearing. For analysis and forms of judicial notice, see Ch. 321, *Judicial Notice* .

Special demurrers are generally not allowed in limited civil cases [*see Code Civ. Proc. §§ 91(a), (d), 92(c)*].

[3] Cross References

For an alternative form of demurrer on the ground of another action pending, a form of affirmative defense on this ground, and a form of interlocutory judgment staying action, see Ch. 3, *Abatement of Actions*

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17-206 California Forms of Pleading and Practice--Annotated § 206.126

§ 206.126 Special Demurrer to Complaint or Cross Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--Defect of Parties [Code Civ. Proc. § 430.10(d)]

[1] FORM Special Demurrer to Complaint or Cross Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--Defect of Parties [Code Civ. Proc. § 430.10(d)]

_____ [Defendant *or* Cross defendant _____ (*name*)] demurs to the [_____ (First *or other*) Cause of Action set forth in the] _____ [complaint *or* cross complaint of _____ (*name*), cross complainant,] herein on the ground that there is a defect or nonjoinder of parties _____ [plaintiff *or* defendant *or* cross complainant *or* cross defendant] in that _____ [*specify party who should have been joined, or explain basis of nonjoinder*].

[2] Use of Form

The form in [1], *above*, is for insertion in § 206.120[1] as the body of the demurrer when it appears on the face of the challenged pleading or from judicially noticed matter [*Code Civ. Proc. § 430.30(a)*] that there is a defect of parties [*Code Civ. Proc. § 430.10(d)*].

The demurrer must specify who should have joined and in what the nonjoinder consists [*Kreling v. Kreling (1897) 118 Cal. 413, 420, 50 P. 546]* .

Special demurrers are generally not allowed in limited civil cases [*see Code Civ. Proc. §§ 91(a), (d), 92(c)*].

For further discussion, see *§ 206.14[5], above.*

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17-206 California Forms of Pleading and Practice--Annotated § 206.127

§ 206.127 Special Demurrer to Complaint or Cross Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--Misjoinder of Parties [Code Civ. Proc. § 430.10(d)]

[1] FORM Special Demurrer to Complaint or Cross Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--Misjoinder of Parties [Code Civ. Proc. § 430.10(d)]

_____ [Defendant *or* Cross defendant _____ (*name*)] demurs to the [_____ (First *or other*) Cause of Action set forth in the] _____ [complaint *or* cross complaint of _____ (*name*), cross complainant,] herein on the ground that there is a misjoinder of parties _____ [plaintiff *or* defendant *or* cross complainant *or* cross defendant] in that _____ [*name*] has been improperly joined as a party _____ [plaintiff *or* defendant *or* cross complainant *or* cross defendant].

[2] Use of Form

The form in [1], *above*, is for insertion in § 206.120[1] as the body of the demurrer when it appears from the face of the challenged pleading or from judicially noticed matter [*Code Civ. Proc. § 430.30(a)*] that there is a misjoinder of parties [*Code Civ. Proc. § 430.10(d)*]. For further discussion, see *§ 206.14[6], above.*

Although it is not necessary that the demurrer state the reasons the misjoinder is improper, it must nevertheless designate the party who is improperly joined [*Gardner v. Samuels (1897) 116 Cal. 84, 88, 47 P. 935]* .

Special demurrers are generally not allowed in limited civil cases [*see Code Civ. Proc. §§ 91(a), (d), 92(c)*].

[3] Cross References

For alternative forms of demurrers on the ground of misjoinder and forms of affirmative defenses on this ground, see Ch. 3, *Abatement of Actions*

For memoranda supporting and opposing a special demurrer to a complaint on the ground of misjoinder of parties, see California Points and Authorities, Ch. 10, *Abatement and Survival of Actions* , and Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender)

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17-206 California Forms of Pleading and Practice--Annotated § 206.128

§ 206.128 Special Demurrer to Complaint or Cross Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--Pleading Is Uncertain [Code Civ. Proc. § 430.10(f)]

[1] FORM Special Demurrer to Complaint or Cross Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--Pleading Is Uncertain [Code Civ. Proc. § 430.10(f)]

_____ [Defendant *or* Cross defendant _____ (*name*)] demurs to [_____ (Count I *or* the First Cause of Action *or other*) of] the _____ [complaint *or* cross complaint of _____ (*name*), cross complainant,] herein on the ground that it is uncertain in that _____ [*specify, e.g.,* in Paragraph _____ (*specify number*), on page _____ (*specify number*), lines _____ (*specify numbers*), it is alleged that the contract sued on is written, and, in Paragraphs _____ (*specify number*), on page _____ (*specify number*), lines _____ (*specify numbers*), it is alleged that the contract sued on is oral].

[2] Use of Form

The form in [1], *above*, is for insertion in § 206.120[1] as the body of the demurrer when the pleading is uncertain [*Code Civ. Proc. §§ 430.10(f), 430.30(a)*]. For further discussion, see *§ 206.14[7], above.*

Special demurrers are generally not allowed in limited civil cases [*see Code Civ. Proc. §§ 91(a), (d), 92(c)*].

[3] Cross References

For memoranda supporting and opposing a special demurrer to a complaint on the ground of uncertainty, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender)

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17-206 California Forms of Pleading and Practice--Annotated § 206.129

§ 206.129 Special Demurrer to Complaint or Cross Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--Cannot Be Ascertained Whether Contract on Which Action Is Founded Is Written or Oral or Implied by Conduct [Code Civ. Proc. § 430.10(g)]

[1] FORM Special Demurrer to Complaint or Cross Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--Cannot Be Ascertained Whether Contract on Which Action Is Founded Is Written or Oral or Implied by Conduct [Code Civ. Proc. § 430.10(g)]

_____ [Defendant *or* Cross defendant _____ (*name*)] demurs to the [_____ (First *or other*) Cause of Action set forth in the] _____ [complaint *or* cross complaint of _____ (*name*), cross complainant,] herein on the ground that it cannot be ascertained from the pleading whether the contract on which the action is founded is written or oral or implied by conduct.

[2] Use of Form

The form in [1], *above*, is for insertion in § 206.120[1] as the body of the demurrer when the action or cross action is founded on a contract and it cannot be ascertained from the pleading whether the contract is written or oral or implied by conduct [*Code Civ. Proc. §§ 430.10(g), 430.30(a)*]. For further discussion, see *§ 206.14[8], above.*

Special demurrers are generally not allowed in limited civil cases [*see Code Civ. Proc. §§ 91(a), (d), 92(c)*].

[3] Cross References

See generally Ch. 140, *Contracts*

For memoranda supporting and opposing a special demurrer to a complaint in an action founded on contract in which it cannot be ascertained whether the contract is written or oral or implied by conduct, see California Points and Authorities, Ch. 50, *Contracts* , and Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender)

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17-206 California Forms of Pleading and Practice--Annotated § 206.130

§ 206.130 Special Demurrer to Complaint or Cross Complaint [Code Civ. Proc. § 411.35(g)]--No Certificate Filed in Action Based on Professional Negligence [Code Civ. Proc. § 430.10(h)]

[1] FORM Special Demurrer to Complaint or Cross Complaint [Code Civ. Proc. § 411.35(g)]--No Certificate Filed in Action Based on Professional Negligence [Code Civ. Proc. § 430.10(h)]

_____ [Defendant *or* Cross defendant _____ (*name*)] demurs to the [_____ (First *or other*) Cause of Action set forth in the] _____ [complaint *or* cross complaint of _____ (*name*), cross complainant,] herein on the ground that the certificate required by *Code of Civil Procedure Section 411.35* has not been filed.

[2] Use of Form

The form in [1], *above*, is for insertion in § 206.120[1] as the body of the demurrer when the action or cross action is for damages or indemnity arising out of the professional negligence of a certificated architect, registered professional engineer, or licensed land surveyor and the certificate required under *Code Civ. Proc. § 411.35(a),(b)* has not been filed [*Code Civ. Proc. §§ 411.35(g), 430.10(h)*]. For further discussion, see *§ 206.14[9], above.*

Special demurrers are generally not allowed in limited civil cases [*see Code Civ. Proc. §§ 91(a), (d), 92(c)*; for discussion, *see § 206.14[9][c], above*].

[3] Cross References

For further discussion and forms of certificates of merit for use in actions against licensed professionals specified in *Code Civ. Proc. § 411.35*, see Ch. 56, *Architects*

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17-206 California Forms of Pleading and Practice--Annotated § 206.131

§ 206.131 Demurrer to Answer [Code Civ. Proc. § 430.30(a)]--Skeletal Form

[1] FORM Demurrer to Answer [Code Civ. Proc. § 430.30(a)]--Skeletal Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	DEMURRER OF
	)	_____ [*name*]
_____ [*name*],	)	TO ANSWER OF
Plaintiff,	)	_____ [*name*],
vs.	)	MEMORANDUM, AND NOTICE OF HEARING
_____ [*name*],	)	[This demurrer is accompanied by a Notice of Motion
Defendant.	)	to Strike]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

[*Body of demurrer. See §§ 206.132 -206.134.*]

[WHEREFORE, plaintiff prays that this/these demurrer(s) be sustained (without leave to amend), and that plaintiff take judgment as prayed for in his/her/its complaint on file herein.]

[Dated: _____.]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form in [1], *above*, illustrates the various parts of the demurrer and is for use by a plaintiff to demur to an answer. With appropriate modifications, it may also be used by a cross complainant to demur to an answer to the cross complaint, in which case the nature of the papers set forth in the caption would read "DEMURRER TO ANSWER TO CROSS COMPLAINT OF _____ [*name*], CROSS DEFENDANT," etc. [*see Cal. Rules of Ct., Rule 2.111(6)*, 3.112(a), (b), (e)].

For further discussion of the requirements of a demurrer and its accompanying papers, see *§ 206.120[2]* et seq., *above*.

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17-206 California Forms of Pleading and Practice--Annotated § 206.132

§ 206.132 General Demurrer to Answer [Code Civ. Proc. § 430.30(a)]--No Defense Stated [Code Civ. Proc. § 430.20(a)]

[1] FORM General Demurrer to Answer [Code Civ. Proc. § 430.30(a)]--No Defense Stated [Code Civ. Proc. § 430.20(a)]

_____ [Plaintiff *or* Cross complainant _____ (*name*)] demurs to the [_____ (First *or other*) Affirmative Defense of the] answer of _____ [defendant *or* cross defendant] _____ [*name*] to the _____ [complaint *o* r cross complaint] herein on the ground that it does not state facts sufficient to constitute a defense.

[2] Use of Form

The form in [1], *above*, is for insertion in § 206.131[1] as the body of the demurrer when it appears from the face of the answer or from judicially noticed matter [*Code Civ. Proc. § 430.30(a)*] that the answer, or any one or more of the several defenses set up in the answer [*Code Civ. Proc. § 430.50(b)*] and to which the demurrer is directed, does not state facts sufficient to constitute a defense [*Code Civ. Proc. § 430.20(a)*]. The objection that the answer does not state facts sufficient to constitute a defense is not waived by failure to raise it by demurrer [*Code Civ. Proc. § 430.80(b)*].

For further discussion, *see § 206.13[2], above.*

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17-206 California Forms of Pleading and Practice--Annotated § 206.133

§ 206.133 Special Demurrer to Answer [Code Civ. Proc. § 430.30(a)]--Pleading Is Uncertain [Code Civ. Proc. § 430.20(b)]

[1] FORM Special Demurrer to Answer [Code Civ. Proc. § 430.30(a)]--Pleading Is Uncertain [Code Civ. Proc. § 430.20(b)]

_____ [Plaintiff *or* Cross complainant] _____ [*name*] demurs to the [_____ (First *or other*) Affirmative Defense set forth in the] answer of _____ [defendant *o* r cross defendant] _____ [*name*] to the _____ [complaint *or* cross complaint] herein on the ground it is uncertain in that _____ [*specify, e.g.,* in Paragraph _____ (*specify number*), on page _____ (*specify number*), lines _____ (*specify number*), of the answer, defendant denies that plaintiff and defendant entered into an oral contract on or about March 1, 1979, as alleged in the complaint, or into any contract at all, oral or written, on this or any other date, and, in Paragraph _____ (*specify number*) on page _____ (*specify number*), lines _____ (*specify numbers*), of the answer, defendant expressly admits the truth of the allegations contained in Paragraph _____ (*specify number*) of the complaint herein, which paragraph realleges the parties' making of an oral contract on or about March 1, 1997, and specifically alleges the terms, conditions, and agreements of the parties under that contract; it therefore cannot be ascertained from the answer whether defendant is admitting or denying that the parties entered into an oral contract as described in the complaint on or about March 1, 1997].

[2] Use of Form

The form in [1], *above*, is for insertion in § 206.131 as the body of the demurrer when the answer or the particular defense demurred to [*see Code Civ. Proc. § 430.50(b)*] is uncertain [*Code Civ. Proc. §§ 430.20(b), 430.30(a)*; for discussion, *see § 206.14[7], above*]. The objection is deemed waived if it is not raised by demurrer [*Code Civ. Proc. § 430.80(b)*].

Special demurrers are generally not allowed in limited civil cases [*see Code Civ. Proc. §§ 91(a), (d), 92(c)*].

[3] Cross References

For a memorandum supporting a demurrer to the answer on the ground of uncertainty, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender)

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17-206 California Forms of Pleading and Practice--Annotated § 206.134

§ 206.134 Special Demurrer to Answer [Code Civ. Proc. § 430.30(a)]--Cannot Be Ascertained Whether Contract Pleaded Is Written or Oral [Code Civ. Proc. § 430.20(c)]

[1] FORM Special Demurrer to Answer [Code Civ. Proc. § 430.30(a)]--Cannot Be Ascertained Whether Contract Pleaded Is Written or Oral [Code Civ. Proc. § 430.20(c)]

_____ [Plaintiff *or* Cross complainant _____ (*name*)] demurs to the [_____ (First *or other*) Affirmative Defense of the] answer of _____ [defendant *or* cross defendant] _____ [*name*] to the _____ [complaint *or* cross complaint] herein on the ground that it cannot be ascertained therefrom whether the contract pleaded therein is written or oral.

[2] Use of Form

The form in [1], *above*, is for insertion in § 206.131[1] as the body of the demurrer when it cannot be ascertained from the answer or from the particular defense demurred to [*see Code Civ. Proc. § 430.50(b)*] whether the contract pleaded there is written or oral [*Code Civ. Proc. §§ 430.20(c), 430.30(a)*; for discussion, *see § 206.14[8], above*]. The objection is deemed waived if it is not raised by demurrer [*Code Civ. Proc. § 430.80(b)*].

Special demurrers are generally not allowed in limited civil cases [*see Code Civ. Proc. §§ 91(a), (d), 92(c)*].

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17-206 California Forms of Pleading and Practice--Annotated § 206.135

§ 206.135 Notice of Hearing on Demurrer [Cal. Rules of Ct., Rule 3.1320(c)]

[1] FORM Notice of Hearing on Demurrer [Cal. Rules of Ct., Rule 3.1320(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF HEARING ON DEMURRER OF
vs.	)	_____ [*name*] TO
_____ [*name*],	)	_____[*specify pleading, e.g.,* COM-
Defendant.	)	PLAINT] OF _____ [*name*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To the above-named _____ [*specify, e.g.,* plaintiff] and to _____ [*name*], his/her/its attorney:

NOTICE IS HEREBY GIVEN that _____ [*specify party, e.g.,* defendant's] demurrer to the _____ [*specify pleading, e.g.,* complaint], a copy of which is served herewith, has been set for hearing on _____ [*date not later than 35 days following filing of demurrer or first date available thereafter*], at _____ [*time*], or as soon thereafter as the matter may be heard, in the courtroom of [_____ (Department *or* Division) _____ of] the above-entitled court, located [in the

_____ (*name of building*)] at _____ [*street address and city*], California.
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form of notice of hearing on the demurrer in [1], *above*, must be served and filed with the demurrer [*Cal. Rules of Ct., Rules 3.1112(a), 3.1320(c)*; for discussion, *see §§ 206.19* and *206.20, above*].

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§ 206.136 Stipulation [Code Civ. Proc. § 283(1)] Postponing Hearing on Demurrer and Order [Code Civ. Proc. § 595.2]

[*Caption. See §§ 206.120, 206.135.*]

[1] FORM Stipulation [Code Civ. Proc. § 283(1)] Postponing Hearing on Demurrer and Order [Code Civ. Proc. § 595.2]

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto through their respective counsel that the hearing on the demurrer of _____ [*specify party, e.g.,* defendant] to the _____ [*specify pleading, e.g.,* complaint] herein, filed on _____ [*date*], and noticed for hearing on _____ [*date*], at _____[*time*], be postponed to _____[*date*], at _____[*time*], or as soon thereafter as the matter can be heard, for the following reason(s): _____ [*specify*].
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]
_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

ORDER

It is so ordered.

Dated: _____.

_____ [*signature*]
Judge of the SuperiorCourt

[2] Use of Form

The form in [1], *above*, may be used to secure an order postponing the hearing on the demurrer for a period not to exceed 30 days [*see Code Civ. Proc. § 595.2*]. For forms of stipulation and order extending time within which to demur, see Ch. 26, *Answers* .

[3] Stipulations

An attorney has authority to bind his or her client in any of the steps of an action or proceeding by his or her agreement filed with the clerk or entered on the minutes of the court, and not otherwise [*Code Civ. Proc. § 283(1)*].

[4] Postponement of Hearing on Stipulation

Although the demurrer must be noticed for hearing within the time limits specified in *Cal. Rules of Ct., Rule 3.1320(c)* [*see § 206.135[2], above*], the court is authorized to postpone the hearing for a period not to exceed 30 days if all attorneys of record of parties who have appeared in action agree in writing to the postponement [*Code Civ. Proc. § 595.2* (applying also to hearings of motion and to trial)]. *Code Civ. Proc. § 595.2* provides in such case that "the court shall postpone." Despite its mandatory language, the section is directory only since otherwise the section would constitute an unconstitutional interference with the inherent power of the courts to control the order of business before them [*Lorraine v. McComb (1934) 220 Cal. 753, 757, 32 P.2d 960* (involving postponement of trial); *see County of San Bernardino v. Doria Mining & Engineering Corp. (1977) 72 Cal. App. 3d 776, 784, 140 Cal. Rptr. 383* (same)].

Since the court may deny the postponement absent a showing of good cause, it is suggested that the stipulation set forth the reason for the postponement, although this is not required by the statute.

Because local trial delay reduction rules may restrict stipulations and continuances, counsel should be sure to check local court rules [*see* Ch. 136, *Continuances*].

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Volume 17: Defaults and Default Judgements thru Duress, Menace, Fraud, Undue Influence, and Mistake-Chs. 205-219
Chapter 206 DEMURRERS AND MOTIONS FOR JUDGMENT ON THE PLEADINGS
PART V. FORMS
A. Demurrers

17-206 California Forms of Pleading and Practice--Annotated § 206.137

§ 206.137 Stipulation [Code Civ. Proc. § 283(1)] That Demurrer Be Dropped Off Calendar

[*Caption. See §§ 206.120[1], 206.131[1].*]

[1] FORM Stipulation [Code Civ. Proc. § 283(1)] That Demurrer Be Dropped Off Calendar

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto through their respective counsel that _____ [*specify party, e.g.,* defendant's] demurrer to the _____ [*specify pleading, e.g.,* complaint] herein, filed on _____ [*date*], and noticed for hearing on _____ [*date*], at _____ [*time*], be dropped form the calendar [and reset for hearing by mutual agreement of the parties *or* on _____ days' notice *or other*].
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]
_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

The form in [1], *above*, is for use when the parties agree that the hearing on the demurrer be dropped from the calendar. Counsel should check local court rules for restrictions on dropping matters from the calendar without leave of court [*see* Ch. 552, *Trial Court Delay Reduction*].

[3] Other Stipulations

Stipulations that the demurrer will not be argued and will be sustained or overruled and that plaintiff be given a certain number of days to amend or defendant be given a certain number of days to answer may also be utilized. For forms of stipulation and order extending time to demur, see Ch. 26, *Answers* . For a stipulation postponing the hearing, see *§ 206.136, above*.

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17-206 California Forms of Pleading and Practice--Annotated § 206.138

§ 206.138 Stipulation [Code Civ. Proc. § 283(1)] That Demurrer Be Restored to Calendar

[*Caption. See §§ 206.120[1], 206.131[1], 206.135[1].*]

[1] FORM Stipulation [Code Civ. Proc. § 283(1)] That Demurrer Be Restored to Calendar

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto through their respective counsel that the demurrer of _____ [*specify party, e.g.,* defendant] to the _____ [*specify pleading, e.g.,* complaint] herein, filed on _____ [*date*], originally noticed for hearing on _____ [*date*], at _____ [*time*], and thereafter dropped from the calendar on stipulation of the parties filed on _____ [*date*], be restored to the Law and Motion Calendar and heard on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in the courtroom of [_____ (Department *or* Division) _____ of] the above-entitled court, located [in the _____ (*name of building*)] at _____ [*street address and city*], California.
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]
_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

The form in [1], *above*, is for use when the parties agree that a demurrer that was dropped from the calendar on stipulation of the parties [*see § 206.137, above*] be restored to the calendar. For the procedure to follow when the

demurrer was dropped from the calendar by the court on the failure of the parties to appear at the hearing, see *Cal. Rules of Ct., Rule 3.1320(f)*.

If opposing counsel refuses to stipulate to restoration of the demurrer to calendar and the ground of the demurrer has not been waived [*see Code Civ. Proc. § 430.80*], counsel may wish to consider a noticed motion [*see Code Civ. Proc. §§ 1003, 1010*] restoring the demurrer to the calendar.

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17-206 California Forms of Pleading and Practice--Annotated § 206.139

§ 206.139 Order on Demurrer [Code Civ. Proc. §§ 472a, 472b, 472d]

[1] FORM Order on Demurrer [Code Civ. Proc. §§ 472a, 472b, 472d]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff [*and* Cross Defendant],	)	NO. _____
vs.	)	ORDER _____ [*describe ruling, e.g.,* OVERRULING DEMURRER]
_____ [*name*],	)	
Defendant [and Cross Complainant].	)	Date: _____
[vs.	)	Time: _____
_____ (*name*),	)	Location: _____
Cross Defendant.]	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

The demurrer of _____ [defendant *or* cross defendant *or* plaintiff *or* cross complainant] _____ [*name*] to the _____ [*designate pleading, e.g.,* first amended]_____ [complaint *or* cross complaint of cross complainant _____ (*name*) *or* answer of defendant _____ (*name*) to the complaint *or* answer of cross defendant _____ (*name*) to the cross complaint of cross complainant _____ (*name*)] herein came on regularly _____ [for hearing *or* to be heard] by the court on _____ [*date*]. _____ [*Name*] appeared as counsel for _____ [*specify party, e.g.,* plaintiff], and _____ [*name*] appeared as counsel for _____ [*specify party, e.g.,* defendant]. After hearing, the matter was submitted to the court for a ruling [and by the court taken under advisement]. The court, having read [and considered] the supporting and opposing points and authorities and having heard [and considered] the

arguments of counsel, and good cause appearing therefor,

[*EITHER, if overruled*]

IT IS ORDERED that the demurrer be, and hereby is, overruled[, and _____ (defendant *or* cross defendant) is hereby granted _____ days, after notice, in which to serve and file his/her/its answer to the _____ (*designate pleading, e.g.,* first amended) _____ (complaint *or* cross complaint) (, subject to the following terms: _____ (*specify*)].

[*OR, if sustained with leave to amend*]

IT IS ORDERED that the demurrer be, and hereby is, sustained on the ground _____ [*specify, e.g.,* that the _____ (*designate pleading, e.g.,* first amended) complaint does not state facts sufficient to constitute a cause of action in that it shows on its face that the action is barred by the statute of limitations], and plaintiff is hereby granted _____ days, after notice, in which to serve and file _____ (*designate pleading, e.g.,* a first *or other number*) amended complaint].

[*OR, if sustained without leave to amend*]

IT IS ORDERED that the demurrer be, and hereby is, sustained without leave to amend on the ground _____ [*specify, e.g.,* that the _____ (*designate pleading, e.g.,* first amended) complaint does not state facts sufficient to constitute a cause of action in that it shows on its face that the action is barred by the statute of limitations].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above,* is for use when a formal order on the demurrer is desired or is required by the court. This might occur when the demurrer is not taken under advisement, but is ruled on at the hearing. Although the court's ruling will appear in the minutes as a minute order, the court may direct the prevailing or other party, particularly if the demurrer is sustained, to prepare a formal order.

If the courts sustains the demurrer, the order must specify the ground or grounds on which the order it based. This may be done by reference to appropriate pages and paragraphs of the demurrer. The party against whom the demurrer was sustained may waive this requirement [*Code Civ. Proc. § 472d*].

When a demurrer is sustained, the order may grant leave to amend the pleading [*see Code Civ. Proc. § 472a(c)*]. Unless the court orders otherwise, leave to amend within 10 days following the ruling on demurrer is deemed to be granted (five calendar days in forcible entry, forcible detainer, or unlawful detainer actions) [*Cal. Rules of Ct., Rule 3.1320(g)*; *see Code Civ. Proc. § 472b* (when time begins to run)].

When a demurrer to a complaint is overruled, the court must allow an answer to be filed on such terms as may be just [*see Code Civ. Proc. § 472a(b)*]. Unless the court orders otherwise, leave to answer within 10 days following the ruling on demurrer is deemed to be granted (five calendar days in forcible entry, forcible detainer, or unlawful detainer

actions) [*Cal. Rules of Ct., Rule 3.1320(g)*; *see Code Civ. Proc. § 472b* (when time begins to run)].

If the demurrer is sustained on the ground that there is another action pending between the parties on the same cause of action, and no other special defense is sustained, an interlocutory judgment will be entered in favor of the defendant so pleading to the effect that no trial of other issues may be had until the final determination of the other action [*Code Civ. Proc. § 597*]. Otherwise, either party may move for dismissal after a demurrer has been sustained without leave to amend, or if sustained with leave to amend, after plaintiff fails to amend within the time allowed [*Code Civ. Proc. § 581(f)*]. The order dismissing the action must be in writing [*Code Civ. Proc. § 581d*].

For further discussion of orders overruling and sustaining demurrers, see *§ 206.29* and *206.30* respectively, *above.*

[3] Cross References

For forms of request for dismissal, see Ch. 212, *Dismissal*

For forms of request for entry of default, see Ch. 205, *Defaults and Default Judgments*

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17-206 California Forms of Pleading and Practice--Annotated § 206.140

§ 206.140 Notice of Court's Ruling on Demurrer [Cal. Rules of Ct., Rules 3.1100, 3.1109]

[1] FORM Notice of Court's Ruling on Demurrer [Cal. Rules of Ct., Rules 3.1100, 3.1109]

[*Caption. See § 206.136.*]

To the above-named _____ [*party against whom ruling was made*] and to _____ [*name*], his/her/its attorney:

[*EITHER*]

NOTICE IS HEREBY GIVEN that, on _____ [*date*], the court overruled your demurrer to the _____ [*designate pleading, e.g.,* first amended] _____ [complaint *or* cross complaint *or* answer to the complaint *or* answer to the cross complaint] herein [and granted you _____ days in which to serve and file your answer to the _____ (*designate pleading, e.g.,* first amended) _____ (complaint *or* cross complaint)] [on the following terms _____ (*specify*)].

[*OR*]

NOTICE IS HEREBY GIVEN that, on _____ [*date*], the court sustained _____ [defendant's *or* cross defendant's *or* plaintiff's *or* cross complainant's] demurrer to the _____ [*designate pleading, e.g.,* first amended] _____ [complaint *or* cross complaint *or* answer to the complaint *or* answer to the cross complaint] herein[, without leave to amend,] on the ground _____ [*specify, e.g.,* that the _____ (*designate pleading, e.g.,* first amended) complaint does not state facts sufficient to constitute a cause of action] [and granted you _____ days in which to serve and file a _____ (*designate pleading, e.g.,* first amended _____ (complaint *or* cross complaint

or cross complaint *or* answer to the complaint *or* answer to the cross complaint))].
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form in [1], *above*, is for use by the prevailing party to notify the nonprevailing party of the court's ruling on the demurrer. In a case having multiple parties, the notice must name the moving party and the party against whom relief was requested and must specifically identify the particular demurrer ruled on [*Cal. Rules of Ct., Rule 3.1109*].

[3] Commencement of Time to Answer or Amend

Following a ruling on a demurrer, unless otherwise ordered, leave to answer or amend within 10 days is deemed granted, except for actions in forcible entry, forcible detainer, or unlawful detainer, in which case five calendar days are deemed granted [*Cal. Rules of Ct., Rule 3.1320(g)*].

A demurrer to a cause of action may be filed without answering other causes of action. Unless otherwise ordered, defendant shall have 10 days to move to strike, to demur, or otherwise to plead to the complaint or the remaining causes of action following [*Cal. Rules of Ct., Rule 3.1320(j)*]:

- The overruling of the demurrer;
- Amendment of the complaint or the expiration of the time to amend if the demurrer was sustained with leave to amend; or
- The sustaining of the demurrer if the demurrer was sustained without leave to amend.

The time given to amend a pleading if the demurrer to it is sustained, or to answer if a demurrer to a complaint or cross complaint is overruled and no answer was filed, runs from the service of the notice of the decision or order, unless notice is waived in open court and the waiver entered in the minutes [*Code Civ. Proc. § 472b*].

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17-206 California Forms of Pleading and Practice--Annotated § 206.141

§ 206.141 Notice of Motion for Reconsideration of Ruling on Demurrer [Code Civ. Proc. § 1008(a)]

[1] FORM Notice of Motion for Reconsideration of Ruling on Demurrer [Code Civ. Proc. § 1008(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR RE-
vs.	)	CONSIDERATION OF RULING ON DEMURRER
_____ [*name*],	)	OF _____ [*name*] TO
Defendant.	)	_____ [*specify paper, e.g.,* COM-
	)	PLAINT] OF _____ [*name*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To the above-named _____ [*specify, e.g.,* defendant] and to _____ [*name*], his/her/its attorney:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* plaintiff] will, and hereby does, move for an order for reconsideration of, and an order setting aside,

the order of this court, the Honorable _____ [*name of judge*] presiding, _____ [*specify, e.g.*, sustaining defendant's demurrer to plaintiff's complaint without leave to amend] made on _____ [*date*], and for an order _____[*specify, e.g.*, overruling the demurrer *or* granting plaintiff leave to amend]. The motion is made on the ground _____ [*specify, e.g.*, that the case on which the court relied in ruling on the demurrer has been overruled].

The motion is based on this notice of motion, on the supporting memorandum [and the proposed amended _____ (*specify, e.g.*, complaint)] served and filed herewith, and on the records and file herein.
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form in [1], *above*, is for use by a party to seek reconsideration of the court's ruling on a demurrer. The motion must be made within 10 days after the moving party was served with a written notice of the ruling on demurrer [*see Code Civ. Proc. § 1008(a)*].

A supporting affidavit or declaration is required [*see Code Civ. Proc. § 1008(a)*]. For further discussion regarding the matters required to be shown in the supporting declaration, together with a form of supporting declaration, and of other requirements that restrict motions for reconsideration, see Ch. 374, *Motions to Reconsider and Renewed Motions* .

A supporting memorandum must be filed and a copy served with this notice of motion [*Cal. Rules of Ct., Rules 3.1112(a), 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[3] Cross References

For memoranda supporting a motion for reconsideration generally, see California Points and Authorities, Ch. 158, *Motions to Reconsider and Renewed Motions* (Matthew Bender)

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17-206 California Forms of Pleading and Practice--Annotated § 206.142

§ 206.142 Notice of Motion for Order Striking Untimely Amended Complaint and Dismissing Action for Failure to Amend Complaint After Demurrer Was Sustained With Leave to Amend [Code Civ. Proc. § 581(f)(2); Cal. Rules of Ct., Rule 3.1320(i)]

[1] FORM Notice of Motion for Order Striking Untimely Amended Complaint and Dismissing Action for Failure to Amend Complaint After Demurrer Was Sustained With Leave to Amend [Code Civ. Proc. § 581(f)(2); Cal. Rules of Ct., Rule 3.1320(i)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER STRIKING UNTIMELY AMENDED COMPLAINT AND DISMISSING ACTION FOR FAILURE TO AMEND COMPLAINT AFTER DEMURRER SUSTAINED WITH LEAVE TO AMEND
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To plaintiff _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], defendant will, and hereby does, move pursuant to *Code of Civil Procedure Section 581(f)(2)* and *California Rules of Court, Rule 3.1320(i)*, for an order striking the _____ [*specify, e.g.,* first amended complaint] and dismissing this action on the ground that plaintiff failed to file an amended complaint within the time required by _____ [law *or* this court's order made and entered on _____ (*date*), sustaining defendant's demurrer to the complaint herein and granting plaintiff _____ days in which to serve and file an amended complaint].

The motion will be based on this notice of motion[, on the declaration(s) of _____ (*name(s)*)] and the supporting memorandum served and filed herewith, on the papers, records, and file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

The form in [1], *above*, is for use by a defendant to move the court by noticed motion for an order striking an amended complaint that was filed after a demurrer was sustained with leave to amend, and the amended complaint was not filed until after the time to amend had expired. The motion also seeks dismissal of the action for failure to file an amended pleading within the time allowed after the court sustained the demurrer with leave to amend, which will be the status of the case if the motion to strike is granted [*see Gitmed v. General Motors Corp. (1994) 26 Cal. App. 4th 824, 827-829, 31 Cal. Rptr. 2d 625]* . The time prescribed by law is set forth in *Cal. Rules of Ct., Rule 3.1320(g)*, which provides that, following a ruling on a demurrer, unless otherwise ordered, leave to amend within 10 days is deemed granted, except for actions in forcible entry, forcible detainer, or unlawful detainer, in which case 5 calendar days are deemed granted.

The motion to strike must be made as a noticed motion [*Cal. Rules of Ct., Rule 3.1320(i)* (motion to be noticed pursuant to *Code Civ. Proc. § 1010*)], although the motion to dismiss may be ex parte. For discussion, see *§ 206.33, above*.

With appropriate modifications, the form may also be used to seek dismissal of a single cause of action to which the demurrer was sustained. *Cal. Rules of Ct., Rule 3.1320(j)*, provides that a demurrer to a cause of action may be filed without answering other causes of action and that, unless otherwise ordered, defendant shall have 10 days to move to strike, to demur, or otherwise to plead to the complaint or the remaining causes of action following

- The overruling of the demurrer;

- Amendment of the complaint or the expiration of the time to amend if the demurrer was sustained with leave to amend; or

- The sustaining of the demurrer if the demurrer was sustained without leave to amend.

For a form of order granting the motion that may be used in conjunction with this form, see *§ 206.143*.

A supporting memorandum must be filed and a copy served with this notice of motion [*Cal. Rules of Ct., Rules 3.1112(a)*, 3.1113(a); *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

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17-206 California Forms of Pleading and Practice--Annotated § 206.143

§ 206.143 Ex Parte Application for Order Dismissing Action for Failure to Amend Complaint After Demurrer Was Sustained With Leave to Amend [Code Civ. Proc. § 581(f)(2); California Rules of Court, Rule 3.1320(h)]

[1] FORM Ex Parte Application for Order Dismissing Action for Failure to Amend Complaint After Demurrer Was Sustained With Leave to Amend [Code Civ. Proc. § 581(f)(2); California Rules of Court, Rule 3.1320(h)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	EX PARTE APPLICATION FOR ORDER DIS-
Defendant.	)	MISSING ACTION FOR FAILURE TO AMEND
	)	COMPLAINT AFTER DEMURRER WAS SUS-
	)	TAINED WITH LEAVE TO AMEND [AND OR-
		DER]

_____

[*EITHER*]

Defendant _____ [*name*] hereby moves for an order dismissing the above-entitled action [as to this defendant] pursuant to *Code of Civil Procedure section 581(f)(2)* and *California Rules of Court, Rule 3.1320(h)* on the ground that, on _____ [*date*], this court sustained [this] defendant's demurrer to the complaint with _____ days leave to amend, that, as shown by the records and file herein of which the court is requested to take judicial notice, plaintiff, at th e hearing on the demurrer, in open court, orally waived service of notice of the court's ruling on the demurrer, and the waiver was entered in the court's minutes, that plaintiff has failed to [serve or] file an amended complaint, and that the time for doing so has expired.

[*OR*]

Defendant _____ [*name*] hereby moves for an order dismissing the above-entitled action [as to this defendant] pursuant to *Code of Civil Procedure section 581(f)(2)* and *California Rules of Court, Rule 3.1320(h)* on the ground that, on _____ [*date*], this court sustained [this] defendant's demurrer to the complaint with _____ days leave to amend, that, as shown by the records and file herein of which the court is requested to take judicial notice, notice of the court's ruling was served on plaintiff on _____ [*date*], that plaintiff has failed to [serve or] file an amended complaint, and that the time for doing so has expired.

[*CONTINUE*]

[Defendant _____ (*name*) further represents that, at no time, by stipulation or otherwise, has he/she granted plaintiff an extension of time within which to file an amended complaint.]

[I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.]
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

ORDER

It appearing from the records of this court that defendant's demurrer to the plaintiff's complaint in the above-entitled action was sustained on _____[*date*], with _____ days leave to amend, that plaintiff _____ [waived service of notice of the ruling *or* was properly served with notice of the court's ruling], that no extension of this time was granted by the court, that plaintiff has failed to file an amended complaint within the time allowed or at all, and that the time for doing so has expired, and, on the further representation to this court, that defendant _____[*name*] has at no time, by stipulation or otherwise, granted plaintiff an extension of time within which to file the amended complaint,

IT IS ORDERED THAT the above-entitled action [*or* complaint as to defendant _____ (*name*)] be, and hereby is, dismissed [without prejudice] and that defendant recover costs in the sum of $_____.
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The combined form of application and order in [1], *above*, is for use by a defendant whose demurrer to a complaint was sustained with leave to amend to move for an order dismissing the action or, if the defendant is only one of two or more defendants and the demurrer was sustained only as to him or her, dismissing the complaint as to the moving defendant, when the plaintiff has failed to file an amended pleading within the time required [*Code Civ. Proc. § 581(f)(2)*; *Cal. Rules Ct., Rule 3.1320(h)*]. An application for an order is, of course, a motion [*see Code Civ. Proc. § 1003*].

The matters set forth in the first paragraph of the application are all matters that will have appeared in the court's records and file. A request for judicial notice in a separate document listing the specific items for which notice is requested should also be included in the moving papers and counsel must arrange with the clerk to have the file in the courtroom at the time of the hearing [*Cal. Rules of Ct., Rules 3.1113(l), 3.1306(c)*; for discussion and forms, *see* Ch. 321, *Judical Notice*]. If the optional second paragraph is included, representing that there was no agreement to extend time, the optional declaration under penalty of perjury should also be included [*see Code Civ. Proc. §§ 2009* (use of affidavit on motion authorized), 2015.5 (use of declaration under penalty of perjury in lieu of affidavit)].

Because a written order of dismissal when filed constitutes a judgment, the court may require preparation of a separate formal order instead of the abbreviated order appended to the motion [for a separate form of order, *see § 206.144, below*].

With appropriate modifications, this form may also be used by a defendant to seek dismissal of a single cause of action when a demurrer to it was sustained with leave to amend and plaintiff has failed to amend [*see Cal. Rules of Ct., Rule 3.1320(j)*], or by a cross defendant to move for an order dismissing a cross complaint or cause of action in a cross complaint on the same ground.

[3] Procedure on Ex Parte Motion

A party seeking an ex parte order is generally required to give or attempt to give notice of the application to opposing counsel or unrepresented party. An affidavit or declaration regarding the giving of this notice must accompany the application [*see Cal. Rules Ct., Rule 3.1204*]. For discussion of this requirement and related forms, see Ch. 372, *Motions and Orders* .

[4] Local Court Rules

Local court rules may contain additional requirements regarding ex parte motions and should be checked if counsel is unfamiliar with them. However, any local rules concerning ex parte applications or the form and format of papers are preempted by the California Rules of Court, and should be considered null and void [*Cal. Rules of Ct., Rule 3.20*].

[5] Cross References

For further discussion of ex parte motions, see Ch. 372, *Motions and Orders*

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§ 206.144 Order Dismissing Action [Code Civ. Proc. § 581d] on Plaintiff's Failure to File Amended Pleading [Code Civ. Proc. § 581(f)(2)]

[1] FORM Order Dismissing Action [Code Civ. Proc. § 581(d)] on Plaintiff's Failure to File Amended Pleading [Code Civ. Proc. § 581(f)(2)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER DISMISSING ACTION
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

Defendant's motion for an order dismissing this action came on regularly for hearing by the court on _____ [*date*]. Defendant appeared by counsel _____ [*name*]; plaintiff appeared by counsel _____ [*name*].

It appearing from the records and file herein that the demurrer of defendant _____ [*name*] to the complaint of plaintiff _____ [*name*] was sustained on _____ [*date*], [with _____ days leave to amend], that _____ [plaintiff, at the hearing on the demurrer, in open court, orally waived service of notice of the court's ruling on the demurrer and the waiver was entered in the

minutes of the court *or* notice of the court's ruling on the demurrer was served (by mail) on plaintiff on _____ (*date*)], that the time so limited by the court in which to file an amended pleading _____ [was not extended by stipulation of the parties or order of the court *or* was extended _____ days by _____ (stipulation of the parties *or* order of the court) dated _____ (*date*)], that _____ [the period has *or* both the original and extended periods have] expired, and that no amended complaint has been filed with the court, now, therefore,

IT IS ORDERED that the above-entitled action be, and it hereby is, dismissed [without prejudice] and that defendant recover costs herein incurred in the sum of $_____.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of order in [1], *above*, is for use to dismiss the action if the plaintiff has failed to file an amended complaint within the time allowed by the court on sustaining defendant's demurrer to the complaint and the defendant has moved for the dismissal [*see Code Civ. Proc. § 581(f)(2)*].

[3] Order of Dismissal

All dismissals ordered by the court are required to be in the form of a written order signed by the court and filed in the action, and these orders when so filed constitute judgments and are effective for all purposes. Such judgments are required to be noted in the clerk's register of actions in the case [*Code Civ. Proc. § 581d*].

The order includes an award of costs to the defendant [*see Code Civ. Proc. § 1032(a)(4), (b)* (defendant in whose favor dismissal is entered as prevailing party entitled to costs)].

[4] Cross References

For an alternative form of order dismissing an action, see Ch. 212, *Dismissal*

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PART V. FORMS
A. Demurrers

17-206 California Forms of Pleading and Practice--Annotated §§ 206.145-206.149

[Reserved]

§§ 206.145[Reserved]

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B. Motions for Judgment on the Pleadings

17-206 California Forms of Pleading and Practice--Annotated § 206.150

§ 206.150 Notice of Motion for Judgment [Code Civ. Proc. § 577] on the Pleadings [Code Civ. Proc. § 438]--Failure to State Cause of Action or Defense

[1] FORM Notice of Motion for Judgment [Code Civ. Proc. § 577] on the Pleadings [Code Civ. Proc. § 438]--Failure to State Cause of Action or Defense

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MOTION AND NOTICE OF MOTION FOR JUDG-
Plaintiff,	)	MENT ON THE PLEADINGS
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant _____ (*name*)], will, and hereby does, move pursuant to *Code of Civil Procedure Section 438* for entry of judgment on the pleadings in favor of _____ [*specify moving party,*

e.g., defendant _____ (*name*)] and against _____ [*specify party against whom motion is directed, e.g.*, plaintiff _____ (*name*)]. The motion will be made on the ground that the _____ [complaint states facts sufficient to constitute a cause of action and the answer does not state facts sufficient to constitute a defense *or* court lacks subject matter jurisdiction of the cause of action alleged in the complaint *or* complaint does not state facts sufficient to constitute a cause of action].

The motion will be based on this notice of motion, on the supporting memorandum served and filed herewith, [on the stipulation of the parties attached hereto,] and on the records and file herein.
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The notice of motion in [1], *above*, is for use by a plaintiff or defendant to move for a judgment on the pleadings prior to trial [*see Code Civ. Proc. § 438(c)*]. With appropriate modifications, it may also be used by a cross complainant or cross defendant to move for judgment on the complaint and cross complaint [*see Code Civ. Proc. § 438(a)*].

[3] Accompanying Papers

A supporting memorandum must be filed and a copy served with this notice of motion [*Cal. Rules of Ct., Rules 3.1112(a)*]. The absence of the memorandum may be construed by the court as an admission that the motion is not meritorious and as cause for its denial [*Cal. Rules of Ct., Rules 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*].

Declarations or affidavits are not permitted. If the parties wish facts outside the pleadings to be considered at the hearing of the motion, there must be a formal stipulation specifically for that purpose, and the stipulation must be mentioned as a basis for the motion, order, and judgment [*see Agnew v. City of Los Angeles (1950) 99 Cal. App. 2d 105, 107-108, 221 P.2d 340* ; *North Side etc. Assn. v. Hillside etc. Park (1945) 70 Cal. App. 2d 609, 613-614, 161 P.2d 618* (in dictum, noting, however, that stipulation is not proper basis for motion)].

If the party bases the motion on a matter of which the court may take judicial notice [*see Code Civ. Proc. § 438(d)*; *Clark v. City of Pasadena (1951) 102 Cal. App. 2d 198, 200, 227 P.2d 306]* pursuant to *Evid. Code § 452*, the request for judicial notice must be made in a separate document listing the specific items for which notice is requested [*see Cal. Rules of Ct., Rule 2.111*; *Evid. Code § 452*; for discussion and forms, *see* Ch. 321, *Judicial Notice*].

Any paper referred to that has been previously filed must be referred to by date of execution and title [*Cal. Rules of Ct., Rule 3.1110(d)*].

[4] Cross References

See, generally, Ch. 372, *Motions and Orders*

For memoranda supporting and opposing a motion for judgment on the pleadings, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender)

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17-206 California Forms of Pleading and Practice--Annotated § 206.151

§ 206.151 Order Granting or Denying Motion for Judgment on the Pleadings [Code Civ. Proc. § 438]

[1] FORM Order Granting or Denying Motion for Judgment on the Pleadings [Code Civ. Proc. § 438]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER _____
Plaintiff,	)	[GRANTING *or* DENYING] MOTION FOR JUDG-
vs.	)	MENT ON THE PLEADINGS
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

The motion of _____ [*identify moving party*] for judgment on the pleadings came on regularly for hearing by the court on _____ [*date*], on notice duly and regularly given. _____ [*Name*] appeared as counsel for plaintiff, and _____ [*name*] appeared as counsel for defendant. The matter having been argued and submitted and it appearing [from the _____ (*specify pleadings*) filed herein and the stipulation that the parties entered into and consented to be considered by this court] that the _____ [complaint states facts sufficient to constitute a cause of action and the answer does not state facts sufficient to constitute a defense *or* court lacks subject matter jurisdiction of the cause of action alleged in the complaint *or* complaint does not state facts sufficient to constitute a cause of action].

IT IS ORDERED that the motion be, and hereby is, _____ [denied *or* granted (and _____ (*specify party*) is given 30 days in which to serve and file an amended _____ (*specify pleading*))].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use when a formal order denying or granting the motion is required by the court. The general rule is that an order is ineffective unless it is filed with the clerk or entered in the minutes [*Jablon v. Henneberger (1949) 33 Cal. 2d 773, 775, 205 P.2d 1]* . Under this rule, the order granting the motion must be entered in the official minutes and not merely in the rough minutes of the department clerk, in order that it be effective [*Jablon v. Henneberger (1949) 33 Cal. 2d 773, 774-775, 205 P.2d 1]* .

[3] Amendment of Pleading

A *Code Civ. Proc. § 438* motion for judgment on the pleadings may be granted with or without leave to file an amended complaint or answer, as the case may be [*Code Civ. Proc. § 438(h)(1)*]. However, an order granting a motion for judgment on the pleadings will normally grant leave to amend, if an amendment curing the defect is possible [*see Beverage v. Canton Placer Mining Co. (1955) 43 Cal. 2d 769, 778, 278 P.2d 694]* . If the court grants leave to amend, it is required to grant 30 days to file the amended pleading [*Code Civ. Proc. § 438(h)(2)*]. For discussion, see *§ 206.59, above.*

[4] Judgment

If the motion is granted as to the entire pleading without leave to amend, judgment is to be entered forthwith [*Code Civ. Proc. § 438(h)(3)*].

If the motion is granted with leave to amend, judgment may be entered after further proceedings as required by Section 438(i) if no amended pleading is filed or if it is filed late or otherwise in violation of the court's prior ruling on the motion [*see Code Civ. Proc. § 438(h)(4), (i)*; for discussion, *see § 206.59[3], above*].

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17-206 California Forms of Pleading and Practice--Annotated § 206.152

§ 206.152 Notice of Motion to Strike and to Enter Judgment [Code Civ. Proc. § 438]--Amended Pleading After Motion for Judgment on the Pleadings Not Timely Filed or in Violation of Prior Ruling

[1] FORM Notice of Motion to Strike and to Enter Judgment [Code Civ. Proc. § 438]--Amended Pleading After Motion for Judgment on the Pleadings Not Timely Filed or in Violation of Prior Ruling

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MOTION AND NOTICE OF MOTION TO STRIKE AMENDED PLEADING AND TO ENTER JUDGMENT
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant _____ (*name*)], will, and hereby does, move pursuant to *Code of Civil*

Procedure sections 435(e), 436, 438(h)(4), and *438(i)(1)(a)* for an order to strike _____ [*specify pleading, e.g.,* first amended complaint] and to enter judgment. The motion will be made on the ground that the _____ [*specify pleading, e.g.,* first amended complaint] _____ [was not filed within the time allowed in *and/or* violates] this Court's order of _____ [*date*] granting _____ [*specify moving party, e.g.,* defendant's] motion for judgment on the pleadings.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The notice of motion in [1], *above,* is for use to move to strike an amended pleading filed after a motion for judgment on the pleadings was granted with leave to amend. The form may be used when the amended pleading is not timely filed or otherwise violates the court's prior ruling on the motion [*see Code Civ. Proc. §§ 435(b)(1), (e), 438(i)(1)(A)*; *see also Code Civ. Proc. § 438(h)(4)(A), (B)*].

For discussion, see *§ 206.59[2], above.*

[3] Accompanying Papers

A supporting memorandum must be filed and a copy served with this notice of motion [*see Code Civ. Proc. §§ 1005(b), 1010*; *Cal. Rules of Ct., Rules 3.1112(a), 3.1113(a)*].

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17-206 California Forms of Pleading and Practice--Annotated § 206.153

§ 206.153 Notice of Motion to Enter Judgment [Code Civ. Proc. § 438]--Failure to File Amended Pleading After Motion for Judgment on the Pleadings Was Granted With Leave to Amend

[1] FORM Notice of Motion to Enter Judgment [Code Civ. Proc. § 438]--Failure to File Amended Pleading After Motion for Judgment on the Pleadings Was Granted With Leave to Amend

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MOTION AND NOTICE OF MOTION TO ENTER
Plaintiff,	)	JUDGMENT
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant _____ (*name*)], will, and hereby does, move pursuant to *Code of Civil Procedure Sections 438(h)(4)(C)* for an order to enter judgment. The motion will be made on the ground that the

_____ [*specify party against whom motion is directed, e.g.*, plaintiff _____ (*name*)] failed to file an amended _____ [*specify pleading, e.g.*, complaint] within the time allowed in this Court's order of _____[*date*] granting _____ [*specify moving party, e.g.*, defendant's] motion for judgment on the pleadings.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The notice of motion in [1], *above*, is for use to move to enter judgment after a motion for judgment on the pleadings was granted with leave to amend, but no amended pleading was filed [*see Code Civ. Proc. § 438(i)(B)*; *see also Code Civ. Proc. § 438(h)(4)(C)*].

For discussion, see *§ 206.59[2], above.*

[3] Accompanying Papers

A supporting memorandum must be filed and a copy served with this notice of motion [*see Code Civ. Proc. §§ 1005(b), 1010*; *Cal. Rules of Ct., Rules 3.1112(a), 3.1113(a)*].

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17-206 California Forms of Pleading and Practice--Annotated § 206.154

§ 206.154 Judgment [Code Civ. Proc. § 577] on the Pleadings [Code Civ. Proc. § 438]--After Motion Was Granted With Leave to Amend and Party Failed to Amend

[1] FORM Judgment [Code Civ. Proc. § 577] on the Pleadings [Code Civ. Proc. § 438]--After Motion Was Granted With Leave to Amend and Party Failed to Amend

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	JUDGMENT
Defendant.	)	
	)	
	)	

The motion of _____ [*specify party*] for judgment on the pleadings came on regularly for hearing by the court on _____ [*date*]. _____ [*Name*] appeared as counsel for plaintiff, and _____ [*name*] appeared as counsel for defendant. After hearing, the motion was granted [and _____ (*specify party*) was granted 30 days within which to serve and file an amended _____ (*specify pleading*)].

[*EITHER, if moving party is plaintiff*]

It appearing that:

[1. Defendant has failed to file an amended answer _____ (within the time allowed by *or* conforming to) the court's order of _____ (*date*), sustaining plaintiff's motion for judgment on the pleadings with leave to amend), and]

2. The complaint herein states a cause of action entitling plaintiff to the relief prayed for and the answer fails to state any facts sufficient to constitute a defense to the complaint or to any portion of it,

IT IS ORDERED AND ADJUDGED that plaintiff _____ [*specify relief, e.g.,* have and recover from defendant the sum of $_____ as prayed for in the complaint herein], together with his/her/its costs herein incurred in the sum of $_____.

[*OR, if moving party is defendant*]

It appearing that:

[1. Plaintiff has failed to file an amended complaint _____ (within the time allowed by *or* conforming to) the court's order of _____ (*date*), sustaining defendant's motion for judgment on the pleadings with leave to amend), and]

2. The complaint herein [and each _____ (count *or* cause of action) therein stated] fails to state facts sufficient to constitute a cause of action,

IT IS ORDERED AND ADJUDGED that plaintiff take nothing by his/her complaint and that defendant recover his/her costs herein incurred in the sum of $_____.

[*CONTINUE*]

Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use as a judgment on the pleadings when the order granting the motion was either without leave to amend or with leave to amend and the party whose pleading was challenged failed to amend [*see Code Civ. Proc. § 438(h), (i)*]. For discussion and forms relating to judgments generally, see Ch. 318, *Judgments* .

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Chapters 207-208 [RESERVED]

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[RESERVED]

Chapters 207[RESERVED]

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Chapter 209 DENTISTS

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§ 209.syn Synopsis to Chapter 209: DENTISTS

§ 209.01 Scope of Chapter

§ 209.02 Dentistry Defined

§ 209.03 Cross References

[1] Malpractice

[2] Licensing

§§ 209.04-209.09 [Reserved]

§ 209.10 Governing Statutes

§ 209.11 Liability for Negligence

[1] Generally

[2] Standard of Care

[3] General Practitioner and Specialist

§ 209.12 Informed Consent

[1] Lack of Informed Consent; Negligence or Battery

[2] Importance of Distinction Between Battery and Negligence

[a] Different Elements to Be Proved

[b] Insurance Coverage and Damages

[c] Statute of Limitations

§ 209.13 Damages Recoverable in Negligence Action

§ 209.14 Punitive Damages

§ 209.15 Statute of Limitations

[1] Negligence

[2] Battery

[3] Notice of Intention to Commence Action

[a] Requirement

[b] Extension of Period of Limitation

[c] Effect of Failure to Give Notice

§ 209.16 Security for Costs in Professional Negligence Actions

[1] On Defendant's Motion

[2] Security in Form of Undertaking

§ 209.17 Limitations on Contingent Fees

§ 209.18 Malpractice Reporting Requirements

[1] Settlement, Judgment, or Arbitration Award

[2] Judgment or Criminal Conviction

§§ 209.19-209.29 [Reserved]

§ 209.30 Governing Statutes

§ 209.31 Issuance and Suspension of Licenses

§ 209.32 Judicial Review

§ 209.33 Proof of License Required in Action for Compensation

§§ 209.34-209.39 [Reserved]

§ 209.40 State Statutes

[1] Dentists Generally

[2] Malpractice

[a] Generally

[b] Commencing Action

[c] Statute of Limitations

[d] Arbitration

[e] Damages

[f] Limitations on Liability

[g] Attorney's Fees

[h] Evidence

[3] Proceedings Involving Licenses

[a] Licensing

[b] Writ of Mandate to Review Administrative Decision

§ 209.41 California Rules of Court

§ 209.42 Decisions

[1] Malpractice

[a] Standard of Care

[b] Informed Consent

[c] Negligence

[d] Pleading Professional Negligence

[e] Battery

[f] Evidence

[g] Implied Contract

[h] Liability for Other Acts

[i] Statute of Limitations

[j] Continuance

[2] Proceedings Involving Licenses

[a] Membership in Professional Organizations

[b] Suspension, Revocation, and Reinstatement of Dental Licenses

[c] Review of Administrative Law Decisions

[3] Antitrust

§ 209.43 Attorney General Opinions

§ 209.44 Law Reviews

§§ 209.45-209.59 [Reserved]

§ 209.60 Complaint for Damages by Patient Against Dentist for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 3333]--General Form

[1] FORM

[2] Use of Form

[3] Notice of Intention to Commence Action Required

[4] No Statement of Amount of Damages

[5] Allegations

[6] Verification

[7] Statute of Limitations

[8] Security for Costs

[9] Cross References

§ 209.61 Allegation of Improper Administration of Anesthetic

[1] FORM

[2] Use of Form

§ 209.62 Allegation of Failure to Remove All of Roots of Extracted Tooth

[1] FORM

[2] Use of Form

§ 209.63 Allegation of Dropping Extracted Tooth Down Patient's Throat

[1] FORM

[2] Use of Form

§ 209.64 Complaint for Damages by Patient Against Dentist for Personal Injuries Based on Negligence and Lack of Informed Consent [Civ. Code §§ 1714(a), 3333]

[1] FORM

[2] Use of Form

[3] Notice of Intention to Commence Action Required

[4] No Statement of Amount of Damages

§ 209.65 Complaint for Damages by Patient Against Dentist for Personal Injuries Based on Battery [Civ. Code § 3333]

[1] FORM

[2] Use of Form

[3] No Statement of Amount of Damages

[4] Allegations

[5] Notice of Intention to Commence Action Not Required

§ 209.66 Allegation of Severance or Traumatization of Nerve During Dental Procedure

[1] FORM

[2] Use of Form

§§ 209.67-209.79 [Reserved]

§ 209.80 Petition for Writ of Mandate to Review Administrative Decision of Board of Dental Examiners to Suspend, Revoke, or Deny License [Code Civ. Proc. §§ 1085, 1086, 1094.5]

[1] FORM

[2] Use of Form

[a] In General

[b] Alternative Writ Procedure

[c] Noticed Application Procedure

[3] Proof of Service Required

[4] Points and Authorities

[5] Allegations

[6] Verification

[7] Time for Filing

[8] Attorney's Fees

[9] Cross References

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Chapter 209 DENTISTS
PART I. SCOPE

17-209 California Forms of Pleading and Practice--Annotated § 209.01

§ 209.01 Scope of Chapter

This chapter discusses and contains forms relating to the liability of dentists for malpractice and proceedings involving dental licenses.

Malpractice actions against dentists are discussed in *§ 209.10* et seq. Forms relating to dental malpractice include:

- General forms of complaint against a dentist based on negligence[*see § 209.60*], lack of informed consent[*see § 209.64*], and battery[*see § 209.65*].

- Specific allegations[*see §§ 209.61 -209.63*] for use in a complaint against a dentist for negligence.

- Specific allegation of nerve damage[*see § 209.66*] that may be used in any of the three complaints.

For discussion and forms regarding general principles of negligence, contributory negligence, and res ipsa loquitur, see Ch. 295, *Hospitals* , Ch. 380, *Negligence* , and Ch. 415, *Physicians: Medical Malpractice* .

Proceedings involving licenses to practice dentistry are discussed in *§ 209.30* et seq. Forms relating to proceedings involving licenses include:

- Petition for a writ of mandate to obtain judicial review of disciplinary proceedings affecting a dentist's license to practice[*see § 209.80*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare Providers

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PART I. SCOPE

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§ 209.02 Dentistry Defined

Dentistry is the diagnosis or treatment, by surgery or other method, of diseases and lesions and the correction of malpositions of the human teeth alveolar process, gums, jaws, or associated structures. Such diagnosis or treatment may include all necessary related procedures as well as the use of drugs, anesthetic agents, and physical evaluation[*Bus. & Prof. Code § 1625*]. Additionally, a person practices dentistry within the meaning of the Dental Practice Act[*Bus. & Prof. Code §§ 1600-1808*] if the person does any one or more of the following[*Bus. & Prof. Code § 1625(a)-(e)*]:

- Advertises or represents himself or herself to be a dentist by card, circular, pamphlet, newspaper, or by any other means.

- Performs, or offers to perform, an operation or diagnosis of any kind, or treats diseases or lesions of the human teeth, alveolar process, gums, jaws, or associated structures, or corrects malposed positions thereof.

- In any way indicates that he or she will perform by himself or herself or his or her agents or servants any operation on the human teeth, alveolar process, gums, jaws, or associated structures, or in any way indicates that he or she will construct, alter, repair, or sell any bridge, crown, denture, orother prosthetic appliance or orthodontic appliance.

- Makes, or offers to make, an examination of, with the intent to perform or cause to be performed any operation on the human teeth, alveolar process, gums, jaws, or associated structures.

- Manages or conducts as manager, proprietor, conductor, lessor, or otherwise, a place where dental operations are performed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawBusiness Administration &

OrganizationLicensesGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceActionsGeneral Overview

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17-209 California Forms of Pleading and Practice--Annotated § 209.03

§ 209.03 Cross References

[1] Malpractice

For discussion of general principles relating to malpractice actions, including the Medical Injury Compensation Reform Act, see Ch. 295, *Hospitals* . For discussion of and forms for use in negligence actions generally, see Ch. 380, *Negligence* , and Ch. 415, *Physicians: Medical Malpractice* .

[2] Licensing

For general discussion of administrative adjudication and judicial review, see Ch. 473, *Public Agency Adjudication* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* .

For discussion and forms relating to hospital privileges and professional society memeberships, see Ch. 416, *Physicians: Membership on Hospital Staffs or in Professional Organizations* .

For a discussion of expert and opinion evidence, see *California Trial Guide, § 60.01 et seq.* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewHealthcare LawActions Against Healthcare WorkersGeneral OverviewHealthcare LawBusiness Administration & OrganizationHospital PrivilegesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare Providers

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17-209 California Forms of Pleading and Practice--Annotated §§ 209.04-209.09

[Reserved]

§§ 209.04[Reserved]

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17-209 California Forms of Pleading and Practice--Annotated § 209.10

§ 209.10 Governing Statutes

Dental malpractice, like other types of negligence, is governed by *Civ. Code § 1714(a)*. In addition, the Medical Injury Compensation Reform Act of 1975 (MICRA), which allows evidence of collateral sources[*see Civ. Code § 3333.1*], limits the amount of noneconomic damages recoverable[*see Civ. Code § 3333.2*], and provides for periodic payment of a judgment for future damages[*see Code Civ. Proc. § 667.7(a)*], also applies to dental malpractice. Additional statutes governing dental malpractice actions are listed in § 209.40[2].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersGeneral OverviewTortsDamagesCompensatory DamagesGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare Providers

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§ 209.11 Liability for Negligence

[1] Generally

A dentist is responsible for injuries caused to a patient by lack of ordinary skill in the practice of his or her profession[*see Civ. Code § 1714(a)*; *Roberts v. Parker (1932) 121 Cal. App. 264, 267, 8 P.2d 908]* .

[2] Standard of Care

A dentist is required to have and to use only that degree of learning and skill ordinarily possessed by dentists of good professional reputation practicing in the vicinity[*Barham v. Widing (1930) 210 Cal. 206, 213, 291 P. 173]* . Failure to usesuch ordinary skill and care in the application of such knowledge renders a dentist liable for any injuries suffered by his or her patients as a result[*Roberts v. Parker (1932) 121 Cal. App. 264, 267, 8 P.2d 908]* . The question as to whether or not there was proper care in the treatment of a plaintiff is one to be determined by the opinions of experts. In the absence of expert evidence, a dentist is presumed to exercise the ordinary care and skill required in treating a patient[*Simone v. Sabo (1951) 37 Cal. 2d 253, 257-258, 231 P.2d 19]* .

[3] General Practitioner and Specialist

A general practitioner has a duty to refer a patient to a specialist if, under the same circumstances, a reasonably careful and skillful general practitioner would have done so. The general practitioner's duty is measured in relation to the facts of the particular case, taking into consideration such elements as the patient's mental and emotional condition, his or her known financial situation, and the many other variables which a physician meets in treating human ailments[*Simone v. Sabo (1951) 37 Cal. 2d 253, 257, 231 P.2d 19]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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17-209 California Forms of Pleading and Practice--Annotated § 209.12

§ 209.12 Informed Consent

[1] Lack of Informed Consent; Negligence or Battery

A patient's failure to give his or her informed consent to a particular medical procedure or operation may be the basis of a professional malpractice action against a doctor. Depending on the facts, the theory of such an action may be either negligenceor battery (or both). If the doctor obtains the consent of the patient to perform one type of treatment and subsequently performs a substantially different treatment for which no consent was obtained, the doctor commits a technical battery since the requisite element of deliberate intent to deviate from the consent given is present. Liability for a battery may arise because the doctor either failed to properly explain the contemplated procedure or failed to determine if the patient reasonably comprehended the explanation[*Cobbs v. Grant (1972) 8 Cal. 3d 229, 239-241, 104 Cal. Rptr. 505, 502 P.2d 1* ; *Berkey v. Anderson (1969) 1 Cal. App. 3d 790, 803, 82 Cal. Rptr. 67]* .

Cases often categorize the failure to obtain an informed consent as negligence because the issue more often involves a matter of the standard of professional care. Thus, when the patient consents to a certain treatment and the doctor performs that treatment, but an undisclosed complication occurs, even though no intentional deviation from the consent appears, the doctor, in obtaining the consent, may have failed to meet his or her duty to use due care in disclosing pertinent information. In this situation, the action should be pleaded in negligence[*Cobbs v. Grant (1972) 8 Cal. 3d 229, 240-241, 104 Cal. Rptr. 505, 502 P.2d 1]* . The duty to reveal is measured by the patient's right of self-decision. The right is effectively exercised only if the patient possesses adequate information to make an intelligent choice, thus, the physician is required to communicate whatever information would be material to thedecision[*Cobbs v. Grant (1972) 8 Cal. 3d 229, 245, 104 Cal. Rptr. 505, 502 P.2d 1]* .

For further discussion of informed consent, see Ch. 415, *Physicians: Medical Malpractice* .

[2] Importance of Distinction Between Battery and Negligence

[a] Different Elements to Be Proved

When the performance of a particular procedure or operation constitutes a technical battery, the defendant is liable for

all damages proximately resulting, regardless of whether or not the procedure or operation was skillfully performed or whether or not the damages could have been anticipated[*Berkey v. Anderson (1969) 1 Cal. App. 3d 790, 803, 82 Cal. Rptr. 67]* .

In a negligence action, there must be a causal relationship between the failure to inform and the injury to the plaintiff. This is established only if the evidence shows that, had the revelation been made, consent to treatment would not have been given. This in turn requires the jury to apply an objective test: that is, what would a prudent person in the patient's position have decided if the person had been adequately informed of all significant perils[*Cobbs v. Grant (1972) 8 Cal. 3d 229, 245, 104 Cal. Rptr. 505, 502 P.2d 1]* .

Expert opinion as to community standards is not required under a cause of action for battery. The patient must prove only the failure to give an informed consent and a mere touching, absent consent *[Cobbs v. Grant (1972) 8 Cal. 3d 229, 240, 104 Cal. Rptr. 505, 502 P.2d 1].*

[b] Insurance Coverage and Damages

A doctor liable for a battery might not be covered by malpractice insurance[*see Ins. Code § 533* (precluding insurance coverage for willful acts of insured)], and may be liable for punitive damages[*Cobbs v. Grant (1972) 8 Cal. 3d 229, 240, 104 Cal. Rptr. 505, 502 P.2d 1]* .

[c] Statute of Limitations

In some jurisdictions (including, apparently, California, as discussed in *§ 209.15*), the patient has a longer statute of limitations if he or she sues in negligence[*Cobbs v. Grant (1972) 8 Cal. 3d 229, 240, 104 Cal. Rptr. 505, 502 P.2d 1]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsHealthcare LawActions Against Healthcare WorkersGeneral OverviewHealthcare LawTreatmentPatient ConsentInformed ConsentTortsIntentional TortsAssault & BatteryGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare Providers

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§ 209.13 Damages Recoverable in Negligence Action

The general measure of damages in an action against a dentist based on negligence is the amount which will compensate the plaintiff for all the detriment proximately caused by the defendant's breach of duty, whether or not such detriment could have been anticipated[*Civ. Code § 3333*; *see also discussion under § 209.12[2]*].

A plaintiff who sues a health care provider for professional negligence, however, is subject to the Medical Injury Compensation Reform Act of 1975 (MICRA), which allows evidence of collateral sources[*see Civ. Code § 3333.1*], limits the amount of noneconomic damages recoverable[*see Civ. Code § 3333.2*], and provides for periodic payment of a judgment for future damages [*see Code Civ. Proc. § 667.7(a)*; *Fein v. Permanente Medical Group (1985) 38 Cal. 3d 137, 155-178, 211 Cal. Rptr. 368, 695 P.2d 665* (upholding constitutionality of *Civ. Code §§ 3333.1, 3333.2*; periodic payments as mandatory under *Code Civ. Proc. § 667.7*)]. For the purposes of these rules, the term "professional negligence" means negligent conduct by a health care provider in rendering professional services which proximately causes a personal injury or wrongful death, provided that such services are within the scope of service for which the provider is licensed and are not within any restriction imposed by the licensing authority or a licensed hospital[*Civ. Code §§ 3333.1(c)(2), 3333.2(c)(2)*; *Code Civ. Proc. § 667.7(e)(4)*].

For discussion of these rules, see Ch. 415, *Physicians: Medical Malpractice* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersGeneral OverviewTortsDamagesCollateral Source RuleGeneral OverviewTortsDamagesCompensatory DamagesGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare Providers

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§ 209.14 Punitive Damages

No claim for punitive damages against a health care provider may be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed. The court may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading, when, on the basis of the supporting and opposing affidavits presented, that party has established that there is a substantial probability that he or she will prevail on the claim under *Civ. Code § 3294*[*Code Civ. Proc. § 425.13(a)*]. For discussion ofthe availability of punitive damages, see *Ch. 177, Damages, § 177.40* et seq.

The motion for such an order must be filed within two years after the complaint or initial pleading is filed or not less than nine months before the date the matter is first set for trial, whichever is earlier[*Code Civ. Proc. § 425.13(a)*].

For further discussion and forms for obtaining an order under *Code Civ. Proc. § 425.13*, see Ch. 415, *Physicians: Medical Malpractice* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsHealthcare LawActions Against Healthcare WorkersGeneral OverviewTortsDamagesPunitive DamagesGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare Providers

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17-209 California Forms of Pleading and Practice--Annotated § 209.15

§ 209.15 Statute of Limitations

[1] Negligence

An action against a dentist for injury or death based on professional negligence must be commenced within three years after the date of injury or one year after the plaintiff discovers or should have discovered the injury through the use of reasonable diligence. The statute of limitations may be tolled, however, on proof of fraud, intentional concealment, or the presence of a foreign body in the plaintiff which has no therapeutic or diagnostic purpose or effect[*see Code Civ. Proc. § 340.5*].

An action for malpractice brought by a minor must also be commenced within three years from the date of the wrongful act, except that a minor under the full age of six must commence any action within three years or prior to his or her eighth birthday, whichever provides a longer period. The statute of limitationsfor minors is tolled for any period during which the parent or guardian engages in fraud or collusion with the defendant's insurer or health care provider in the failure to bring an action for alleged professional negligence on behalf of the minor[*see Code Civ. Proc. § 340.5*; *see generally* Ch. 367A, *Minors: Tort Actions*].

If the action is against a dentist who is a public employee, both Gov. Code § 954.6 (the statute of limitations for actions against public entities under the Tort Claims Act) and *Code Civ. Proc. § 340.5* (the statute of limitations for medical malpractice actions) apply with equal force. Thus, for example, if the plaintiff files a claim under the Torts Act against the dentist, and the plaintiff receives notice of rejection of that claim pursuant to *Gov. Code § 913*, a court action must be filed within six months or the action will be barred under *Gov. Code § 945.6*, even though the action is filed within the one-year limitation period of *Code Civ. Proc. § 340.5*[*Anson v. County of Merced (1988) 202 Cal. App. 3d 1195, 1199, 1202, 249 Cal. Rptr. 457]* .

[2] Battery

Formerly, the same statute of limitations, former Code Civ. Proc. § 340.5, applied to causes of action for both negligence and battery since the statute applied to actions for injury or death resulting from professional services rendered without consent or for error or omission in practice. *Code Civ. Proc. § 340.5* was amended and now applies

only to actions for injury or death based on professional negligence. Since professional negligence is defined elsewhere in the codes as a negligent act or omission to act[*see Civ. Code §§ 3333.1(c)(2), 3333.2(c)(2)*; *Code Civ. Proc. § 364(f)(2)*], *Code Civ. Proc. § 340.5* may no longer apply to an action against a dentist for battery. If this is the case, the statute of limitations in a battery action would be two years (one year, prior to January 1, 2003)[*Code Civ. Proc. § 335.1*; *see* former Code Civ. Proc. § 340(3); Ch. 345, *Limitation of Actions,* § 345.14] and would commence running immediately on the commission of the battery[*Sonbergh v. MacQuarrie (1952) 112 Cal. App. 2d 771, 773-774, 247 P.2d 133]* .

[3] Notice of Intention to Commence Action

[a] Requirement

An action based on a dentist's professional negligence cannot be commenced unless the defendant has been given at least 90 days prior notice of the intention to commence the action[*see Code Civ. Proc. § 364(a)*]. Although no particular form of notice is necessary, the notice must inform the defendant of the legal basis of the claim and the type of loss sustained, specifying the nature of the injuries suffered[*Code Civ. Proc. § 364(b)*]. Service of the notice may be effected as prescribed in *Code Civ. Proc. §§ 1010-1020*[*Code Civ. Proc. § 364(c)*].

This notice requirement, however, does not apply to any defendant whose name is unknown to the plaintiff at the time of filing the complaint and who is identified in the complaint by afictitious name pursuant to *Code Civ. Proc. § 474*[*Code Civ. Proc. § 364(e)*].

The notice is not required in battery actions. Thus, a plaintiff may not extend the one-year statute of limitations for battery by filing a notice within 90 days before the statute's expiration[*see Noble v. Superior Court (1987) 191 Cal. App. 3d 1189, 1192-1194, 237 Cal. Rptr. 38* (action against physician)].

For a form of notice, see Ch. 415, *Physicians: Medical Malpractice* .

[b] Extension of Period of Limitation

If the notice is served within 90 days of the expiration of the statute of limitations, the time for commencement of the action is extended 90 days from the service of the notice[*Code Civ. Proc. § 364(d)*; *see also Code Civ. Proc. § 340.5* and the discussion under [1] *above*].

[c] Effect of Failure to Give Notice

Failure to comply with the notice provision of *Code Civ. Proc. § 364* neither invalidates any court proceedings nor affects the jurisdiction of the court to render judgment. Failure to comply by any attorney at law, however, does render such person subject to professional discipline and the State Bar of California must investigate and take appropriate action in any such case brought to its attention[*Code Civ. Proc. § 365*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLegislationStatutes of LimitationsTollingHealthcare LawActions Against Healthcare WorkersGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare Providers

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§ 209.16 Security for Costs in Professional Negligence Actions

[1] On Defendant's Motion

In an action for damages for personal injuries against a dentist or his or her employer hospital for error, omission, or negligence in the performance of professional services, or performance of professional services without consent, the defendant may move the court, within six months after service of summons, for an order requiring the plaintiff to furnish an undertaking in a sum not to exceed $500 as security for costs of defense as provided in *Code Civ. Proc. § 1029.6(d)*, which may be awarded against the plaintiff [*Code Civ. Proc. § 1029.6(a)*].

The defendant's motion for an order requiring security must be supported by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) showing that the claim against the defendant is frivolous. Notice must be given to the plaintiff and to all defendants who appeared in the action [*Code Civ. Proc. § 1029.6(a)*].

Within 30 days of receipt of the notice, any other defendant who appeared in the action may join with the moving party to request such an order. A defendant who fails to join with the moving party may not subsequently move for an order requiring security [*Code Civ. Proc. § 1029.6(a)*].

The motion is not available in actions filed in small claims court [*Code Civ. Proc. § 1029.6(b)*].

For discussion of the hearing on a motion for security, the awarding of costs to the prevailing party, and defendant's preclusion from making a motion for summary judgment, see Ch. 295, *Hospitals* .

[2] Security in Form of Undertaking

The undertaking must be executed by two or more sufficient personal sureties, by one sufficient admitted surety insurer, or by any combination of sufficient personal sureties and admitted surety insurers [*Code Civ. Proc. § 995.310*]. It must be in writing and signed by the sureties under oath [*see Code Civ. Proc. § 995.320(a)*]. It appears that the undertaking is no longer required to be approved by the court [*see Code Civ. Proc. §§ 995.410, 1029.6*].

For further discussion of undertakings and related forms, see *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.40* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewHealthcare LawActions Against Healthcare WorkersGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare Providers

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17-209 California Forms of Pleading and Practice--Annotated § 209.17

§ 209.17 Limitations on Contingent Fees

In addition to the other limitations the Legislature has imposed in an action against a dentist based on his or her professional negligence, *Bus. & Prof. Code § 6146* sets forth rules governing the percentage of the recovery an attorney may contract for or collect as his or her fee in the action, whether recovery is by settlement, arbitration, or judgment. For discussion of these limitations, see Ch. 415, *Physicians: Medical Malpractice* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersGeneral OverviewLegal EthicsClient RelationsAttorney FeesGeneral OverviewTortsDamagesCosts & Attorney FeesGeneral OverviewTortsDamagesCosts & Attorney FeesContingent FeesTortsMalpractice & Professional LiabilityHealthcare Providers

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17-209 California Forms of Pleading and Practice--Annotated § 209.18

§ 209.18 Malpractice Reporting Requirements

[1] Settlement, Judgment, or Arbitration Award

Every insurer providing professional liability insurance to a licensed dentist is required to send a complete report to the Dental Board of California for any settlement or arbitration award over $10,000 of or for a claim or action for damages for death or personal injury caused by the dentist's negligence, error, or omission in practice, or by the dentist's rendering of unauthorized professional services. The report must be sent within 30 days after the written settlement agreement has been reduced to writing and signed by all parties, or within 30 days after service of the arbitration award on the parties [*Bus. & Prof. Code § 801(c)*].

Every settlement, judgment, or arbitration award over $30,000 of a claim or action for damages for death or personal injury caused by a dentist's negligence, error or omission in practice, or by the unauthorized rendering of professional services, by a dentist who does not possess professional liability insurance, must be reported to the Dental Board of California within 30 days after the written settlement agreement is reduced to writing and signed by all the parties or 30 days after service of the judgment or arbitration award on the parties. A complete report must be made by the dentist or his or her counsel, with a copy sent to the claimant through his or her counsel if the person is represented, or directly if he or she is not. If, within 45 days of the conclusion of the written settlement agreement or service of the judgment or arbitration award on the parties, counsel for the claimant, or, if the claimant is not represented by counsel, the claimant himself or herself, has not received a copy of the report, the claimant must make the report himself or herself. Failure of the licensee or claimant, or, if represented by counsel, their counsel, to comply, as well as knowing and intentional failure to comply or conspiracy or collusion not to comply, or to hinder or impede any other person in the compliance, are each punishable by a fine [*Bus. & Prof. Code § 802(a)*].

The required content of the reports is set out in *Bus. & Prof. Code § 804*.

[2] Judgment or Criminal Conviction

Within 10 days after a criminal conviction, or a malpractice judgment in excess of $30,000, the court clerk of the court rendering the judgment is required to report that fact to the Dental Board of California [*Bus. & Prof. Code § 803(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsClerks of CourtHealthcare LawActions Against Healthcare WorkersGeneral OverviewInsurance LawMalpractice InsuranceDentistsInsurance LawMalpractice InsuranceSettlementsTortsMalpractice & Professional LiabilityHealthcare Providers

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[Reserved]

§§ 209.19[Reserved]

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17-209 California Forms of Pleading and Practice--Annotated § 209.30

§ 209.30 Governing Statutes

Dentists and dentistry are governed by the Dental Practice Act [Bus. & Prof.Code § 1600 et seq.]. The act regulates administration, examining, admission and practice, special permits, registration, additional offices, suspension and revocation of licenses, mental illness, violations of the act, fees, dental hygienists, and corporations.

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRevocation & Suspension

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§ 209.31 Issuance and Suspension of Licenses

The Dental Board of California has the power to revoke or suspend a dentist's license after a hearing conducted in accordance with the provisions of the Administrative Procedure Act, *Gov. Code § 11500 et seq.*[*Bus. & Prof. Code § 1670*]. Protection of the public is the Board's highest priority in exercising its licensing, regulatory and disciplinary functions. Whenprotecting the public is inconsistent with other interests sought to be promoted, protecting the public is paramount[*Bus. & Prof. Code § 1601.2*].

For general discussion of licensing, see Ch. 471B, *Licensing by Public Agencies* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRevocation & Suspension

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17-209 California Forms of Pleading and Practice--Annotated § 209.32

§ 209.32 Judicial Review

Mandate [*Code Civ. Proc. § 1094.5*] is the proper remedy to review orders suspending or revoking a license [*Gov. Code § 11523*]. Neither a writ of prohibition nor certiorari will lie to review orders suspending or revoking a license [Whitten v. California State Board, etc. *(1937) 8 Cal. 2d 444, 446-447, 65 P.2d 1296]* . Further, thepetitioner is not entitled to a trial de novo unless it is apparent from the record that the proceedings before the board were capricious. However, the court may allow further evidence to be submitted, if it appears that the interest of justice will best be served by so doing [*see Dare v. Bd. of Medical Examiners (1943) 21 Cal. 2d 790, 800-801, 136 P.2d 304]* .

For general discussion of administrative adjudication and judicial review, see Ch. 473, *Public Agency Adjudication* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRevocation & Suspension

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17-209 California Forms of Pleading and Practice--Annotated § 209.33

§ 209.33 Proof of License Required in Action for Compensation

To bring or maintain an action, or to recover in law or equity in any action for the collection of compensation, a dentist must allege and prove that he or she was duly licensed at all times during the performance of the act of dentistry for which compensation is sought, regardless of the merits of the action [*see Bus. & Prof. Code §§ 143, 1626*].

The following acts and operations do not require a license from the Board of Dentistry [*Bus. & Prof. Code § 1626*]:

- The practice of oral surgery by a physician or surgeon licensed under the Medical Practice Act [*Bus. & Prof. Code § 1626(a)*].

- Specified practices in approved dental colleges and licensing examinations [*Bus. & Prof. Code § 1626(b)-(d),(g)*].

- The construction, alteration, and repair of specified dental prostheses and orthodontic appliances [*Bus. & Prof. Code § 1626(e)*].

- The manufacture and sale of wholesale dental supplies [*Bus. & Prof. Code § 1626(f)*].

- The practice of dentistry by specified federal personnel when engaged in the discharge of official duties [*Bus. & Prof. Code § 1626*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawGeneral OverviewHealthcare LawBusiness Administration & OrganizationGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

California Forms of Pleading and Practice--Annotated

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Chapter 209 DENTISTS
PART II. LEGAL BACKGROUND
B. Proceedings Involving Licenses

17-209 California Forms of Pleading and Practice--Annotated §§ 209.34-209.39

[Reserved]

§§ 209.34[Reserved]

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PART III. RESEARCH GUIDE

17-209 California Forms of Pleading and Practice--Annotated § 209.40

§ 209.40 State Statutes

[1] Dentists Generally

Potential conflict of interest arising from referral to provider of health care services in which dentist has investment interest. *Bus. & Prof. Code § 650.01 et seq.*

Group advertising and referral services for dentists. *Bus. & Prof. Code § 650.2*

Recission by patient of contract or plan for dental services. *Civ. Code § 1689.3*

Implied warranty of fitness for particular purpose written warranty requirement contained in Song-Beverly Consumer Warranty Act (*Civ. Code § 1790 et seq.*) not applicable to dentist providing restoration or dental prosthesis. *Civ. Code § 1793.02(e)(3)*

Liability for failure to report suspected child abuse or neglect. *Penal Code § 11166(c)*

[2] Malpractice

[a] Generally

Dental Practice Act. *Bus. & Prof. Code § 1600 et seq.*

Liability for negligence. *Civ. Code § 1714(a)*

Res ipsa loquitur. *Evid. Code § 646*

Duty to report settlement, judgment, or arbitration award of over $10,000 involving dentist's professional negligence to licensing board. *Bus. & Prof. Code §§ 801(c), 802*

Reporting criminal conviction or malpractice judgment in excess of $30,000 to licensing board. *Bus. & Prof. Code § 803*

[b] Commencing Action

Notice of intention to commence actions based on professional negligence. *Code Civ. Proc. § 364*

Security for costs in action against dentist for negligence. *Code Civ. Proc. § 1029.6*

[c] Statute of Limitations

Statute of limitations in actions against health care providers. *Code Civ. Proc. § 340.5*

Separate trial of statute of limitations defense prior to other issues required in professional negligence actions. *Code Civ. Proc. § 597.5*

[d] Arbitration

Arbitration of medical malpractice cases. *Code Civ. Proc. § 1295*

[e] Damages

In action against health care provider for professional negligence, plaintiff's noneconomic losses for pain, suffering, inconvenience, physical impairment,disfigurement, and other nonpecuniary damage, limited to $250,000. *Civ. Code § 3333.2*

Judgment against health care provider for future damages may be paid in one lump sum or periodically. *Code Civ. Proc. § 667.7*

[f] Limitations on Liability

Emergency care. *Bus. & Prof. Code §§ 900, 1627.5*; *Gov. Code § 8659*

[g] Attorney's Fees

Limitations on attorney's contingency fees for representing person seeking damages in connection with negligence action against health care provider. *Bus. & Prof. Code § 6146*

[h] Evidence

In action against health care provider for professional negligence, right of defendant to introduce into evidence any benefits payable to plaintiff from governmental disability or private insurance plans. *Civ. Code § 3333.1*

[3] Proceedings Involving Licenses

[a] Licensing

Noncompliance with child or family support order is ground for nonissuance or nonrenewal of professional license. *Bus. & Prof. Code §§ 31, 6143.5*

Licensure must be alleged and proved in action to recover compensation for professional services when plaintiff required to be licensed under Business and Professions Code. *Bus. & Prof. Code § 143*

False advertising is good cause for revocation or suspension of license or other disciplinary action. *Bus. & Prof. Code § 651*

Valid, unexpired license or special permit required to lawfully practice dentistry in California; limited exceptions. *Bus. & Prof. Code § 1626*

Time periods for Dental Board to initiate proceeding against licensee for specified violations of Dental Practice Act. *Bus. & Prof. Code § 1670.2*

[b] Writ of Mandate to Review Administrative Decision

Caption of pleading. *Code Civ. Proc. §§ 422.30, 1109*

All parties required to be identified in caption. *Code Civ. Proc. §§ 422.40, 1109*

Allegation of facts. *Code Civ. Proc. §§ 425.10, 1109*

Parties as plaintiff and defendant. *Code Civ. Proc. § 1063*

Requirement that petitioner be beneficially interested in issuance of writ and have no plain and speedy remedy at law. *Code Civ. Proc. § 1086*

Procedure for review of administrative decision by mandate proceeding. *Code Civ. Proc. § 1094.5*

Limitation period for filing petition seeking review of local agency decision. *Code Civ. Proc. § 1094.6*

Facts provable by judicial notice. *Evid. Code § 450 et seq.*

Writ of mandate. *Code Civ. Proc. § 1094.5*

Procedure to obtain review of administrative decision. *Gov. Code § 11523*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsHealthcare LawActions Against Healthcare WorkersGeneral OverviewInsurance LawMalpractice InsuranceDentistsTortsDamagesCompensatory DamagesPain & SufferingGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare Providers

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17-209 California Forms of Pleading and Practice--Annotated § 209.41

§ 209.41 California Rules of Court

Rules of procedure for writs of mandate in superior court. *Cal. Rules of Ct., Rule 2.100 et seq.*

Law and motion rules for writs of mandate in superior courts. *Cal. Rules of Ct., Rule 3.1100 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamus

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17-209 California Forms of Pleading and Practice--Annotated § 209.42

§ 209.42 Decisions

[1] Malpractice

[a] Standard of Care

Dentist has duty to refer patient to specialist only if, under same circumstances, reasonably careful and skillful practitioner would have done so. *Simone v. Sabo (1951) 37 Cal. 2d 253, 257, 231 P.2d 19*

General practitioner not negligent absent proof that he or she did something that reasonably prudent and skillful dental specialist would not have done. *Simone v. Sabo (1951) 37 Cal. 2d 253, 258, 231 P.2d 19*

Dentist's extraction of impacted left lower second bicuspid did not fall below standard of care of reasonably prudent oral surgeon despite plaintiff's claim of severance of nerve and resulting numbness. *Simone v. Sabo (1951) 37 Cal. 2d 253, 258, 231 P.2d 19*

Dentist required to have and use only degree of learning and skill ordinarily possessed by dentists of good professionalreputation in same locality. *Barham v. Widing (1930) 210 Cal. 206, 213, 291 P. 173*

When expert testimony showed that dentists' diagnosis and treatment were within standard of care of community, and patient countered this evidence with only her personal declaration of negligence, court properly granted summary judgment in dentists' favor. *Willard v. Hagemeister (1981) 121 Cal. App. 3d 406, 175 Cal. Rptr. 365*

[b] Informed Consent

Dentists' representation of periodontal condition and salvageability of patient's tooth raised triable issue of fact in case concerning alleged misrepresentation of severity of patient's condition and dentist's alleged failure to disclose material facts necessary for informed consent. *Willard v. Hagemeister (1981) 121 Cal. App. 3d 406, 416-419, 175 Cal. Rptr. 365*

Failure to obtain informed consent constitutes battery when patient gave permission for physician to perform electromyograms and physician instead performed myelogram. *Berkey v. Anderson (1969) 1 Cal. App. 3d 790, 803, 82 Cal. Rptr. 67*

Matter of informed consent is not determined by whether or not physician's failure to disclose risks to patient was in conformity with recognizedpractices in community. *Berkey v. Anderson (1969) 1 Cal. App. 3d 790, 805, 82 Cal. Rptr. 67*

Informed consent involves duty of doctor to properly explain contemplated procedure and question of whether patient comprehended explanation. *Berkey v. Anderson (1969) 1 Cal. App. 3d 790, 803, 82 Cal. Rptr. 67*

When patient consents to certain treatment which doctor performs but undisclosed inherent complication with low probability occurs, action must be pleaded in negligence. *Cobbs v. Grant (1972) 8 Cal. 3d 229, 240-241, 104 Cal. Rptr. 505, 502 P.2d 1*

[c] Negligence

Actionable negligence consists of either practitioner doing something which should not have been done or omitting to do something which should have been done. *Roberts v. Parker (1932) 121 Cal. App. 264, 268, 8 P.2d 908*

Dentist was negligent in failing to use reasonable precautions and ordinary care in extracting tooth and treating wound following extraction; jury justified in finding that negligence was origin of plaintiff's osteomyelitis. *Roberts v. Parker (1932) 121 Cal. App. 264, 268-270, 8 P.2d 908*

[d] Pleading Professional Negligence

Malpractice action against several dentists and physician as sufficiently pleaded when plaintiff alleged defendants' agreement to treat plaintiff with professional skill, negligent acts by defendants, and injury to plaintiff asproximate result of same acts. *Smith v. Beauchamp (1945) 71 Cal. App. 2d 250, 254-256, 162 P.2d 662*

Joinder of cause of action for assault based on theory of unauthorized operation with cause of action based on theory that same operation was negligently performed was proper. *Estrada v. Orwitz (1946) 75 Cal. App. 2d 54, 57, 170 P.2d 43*

[e] Battery

Failure to obtain informed consent in California is battery if patient did not consent to procedure at all. *Cobbs v. Grant (1972) 8 Cal. 3d 229, 239-240, 104 Cal. Rptr. 505, 502 P.2d 1*

Plaintiff's consent to removal of tooth as complete legal defense in action against dentist for assault and battery based on alleged extraction by dentist of tooth other than one causing plaintiff pain. *Carr v. Dickey (1958) 163 Cal. App. 2d 416, 423, 329 P.2d 539*

Unauthorized surgical operation constitutes technical assault and battery. *Estrada v. Orwitz (1946) 75 Cal. App. 2d 54, 57, 170 P.2d 43*

Failure to obtain informed consent constitutes battery when patient gave permission for one procedure and physician

instead performed another for which no permission was given. *Berkey v. Anderson (1969) 1 Cal. App. 3d 790, 803, 82 Cal. Rptr. 67*

[f] Evidence

In action for damages for malpractice against dentist, jury was justified in inferring negligence from dentist's admission of having made mistake. *Walter v. England (1933) 133 Cal. App. 676, 686-687, 24 P.2d 930*

Admission of evidence of dentist's insurance coverage as not prejudicial error when conversation disclosing insurance involved admission of responsibility and mistake on part of dentist. *Walter v. England (1933) 133 Cal. App. 676, 688-689, 24 P.2d 930*

Failure to use proper professional care in treatment of patient is established only by expert testimony. *Simone v. Sabo (1933) 37 Cal. 2d 253, 257-258, 231 P.2d 19*

Expert testimony unnecessary when cases do not depend on facts peculiarly within knowledge of professional experts but rather depend on facts ascertainable through ordinary senses of nonexpert. *Barham v. Widing (1930) 210 Cal. 206, 214, 291 P. 173*

Testimony of plaintiff's husband that he was awakened night after night by wife's cries due to pain in her jaw subsequent to defendant dentist's needle breaking off during surgery and that wife had been in good health previously was admissible evidence constituting common knowledge and not necessitating expert testimony. *Walter v. England (1933) 133 Cal. App. 676, 689-690, 24 P.2d 930*

Arbitrarily excluding expert witness from testifying in dental malpractice case on geographical grounds held improper. *Evans v. Ohanesian (1974) 39 Cal. App. 3d 121, 128, 112 Cal. Rptr. 236*

Excluding expert witness from testifying in dental malpractice action on ground that witness is specialist and would hold defendant to higher standard of care than is required of general practitioner held improper. *Evans v. Ohanesian (1974) 39 Cal. App. 3d 121, 128, 112 Cal. Rptr. 236*

[g] Implied Contract

Although dentist cannot be held to guarantee results of services, in undertaking treatment of patient, practitioner impliedly contracts and represents that he or she possesses reasonable skill and learning and that he or she will use due care in application of such skill. *Roberts v. Parker (1932) 121 Cal. App. 264, 267, 8 P.2d 908*

[h] Liability for Other Acts

In action to recover for injuries sustained as result of X-ray burns, defendant dentist held liable under doctrine of respondeat superior for negligence of employee who operated X-ray machine. *Ragin v. Zimmerman (1929) 206 Cal. 723, 730, 276 P. 107*

Jury properly instructed jury that defendant dentist would be bound by message given nurse who had actual or ostensible authority. *Rising v. Veatch (1931) 117 Cal. App. 404, 407, 3 P.2d 1023*

When individual dentist guilty of negligence was employee of defendant corporation but corporation was alter ego of individual dentist, judgment as properly rendered against dentist and corporation. *Nelson v. Painless Parker (1930)*

104 Cal. App. 770, 778, 286 P. 1078

[i] Statute of Limitations

One-year statute of limitations of *Code Civ. Proc. § 340.5* did not begin to run merely because plaintiff sought second opinion based on suspicions that plaintiff's treating dentist may have been doing something wrong; after second opinion dentist allayed plaintiff's concerns by indicating that medical treatment she had been receiving was fine, plaintiff then continued to be treated by original dentist. *Kitzig v. Nordquist (2000) 81 Cal. App. 4th 1384, 1392-1396, 97 Cal. Rptr. 2d 762*

Medical malpractice action against public entity brought after claim rejected under *Gov. Code § 913* as required to be filed within six-month limitation period of *Gov. Code § 945.6*, even though action is filed within one-year limitation period of *Code Civ. Proc. § 340.5* for medical malpractice actions. *Anson v. County of Merced (1988) 202 Cal. App. 3d 1195, 1199, 1202, 249 Cal. Rptr. 457*

One-year statute of limitations applicable to health care providers under *Code Civ. Proc. § 340.5* as tolled and extended for 90 days by timely notice of intention to commence action under *Code Civ. Proc. § 364*. *Gomez v. Valley View Sanitorium (1978) 87 Cal. App. 3d 507, 510, 151 Cal. Rptr. 97*

Failure to remove pieces of roots of extracted teeth from plaintiff's jaw and gum was subject to statute of limitations, which began running on date plaintiff discovered or should have discovered presence of root pieces. *Ehlen v. Burrows (1942) 51 Cal. App. 2d 141, 145-146, 124 P.2d 82*

[j] Continuance

When party being sued by dentist in small claims court has malpractice claim against dentist exceeding jurisdictional amount in small claims court, party has right to continuance of small claims trial to comply with *Code Civ. Proc. § 364* and former Code Civ. Proc. § 116.8(b) (*now see Code Civ. Proc. § 116.390*). *Clark v. Superior Court (1980) 113 Cal. App. 3d 865, 869, 169 Cal. Rptr. 898*

[2] Proceedings Involving Licenses

[a] Membership in Professional Organizations

Writ of mandate requiring American Dental Association (ADA) to vacate decision reducing penalty imposed by California Dental Association (CDA) against dentist from expulsion to suspension properly granted when ADA failed to consider CDA code of ethics as ADA was required to do under its own bylaws. *California Dental Assn. v. American Dental Assn. (1979) 23 Cal. 3d 346, 354-355, 152 Cal. Rptr. 546, 590 P.2d 401*

Power of dental and medical associations to exclude persons from membership not unbridled but viewed judicially as fiduciary power to be exercised in reasonable and lawful manner for advancement of interests of medicalprofession and public generally. *Pinsker v. Pacific Coast Soc. of Orthodontists (1969) 1 Cal. 3d 160, 165, 81 Cal. Rptr. 623, 460 P.2d 495* P.2d 495

Plaintiff dentist, by showing that exclusion from membership in defendant orthodontal associations deprives him of substantial economic advantages, establishes right to judicial intervention with respect to denial of application for membership. *Pinsker v. Pacific Coast Society of Orthodontists (1969) 1 Cal. 3d 160, 164-165, 81 Cal. Rptr. 623, 460 P.2d 495*

[b] Suspension, Revocation, and Reinstatement of Dental Licenses

Advertising to guarantee any dental service constitutes unprofessional conduct for which dentist is subject to license suspension or revocation. *Webster v. Board of Dental Examiners (1941) 17 Cal. 2d 534, 540-541, 110 P.2d 992*

In proceeding for reinstatement of license, Board of Dental Examiners may consider former licensee's business practices after revocation of license. *Flanzer v. Board of Dental Examiners (1990) 220 Cal. App. 3d 1392, 1397-1398, 271 Cal. Rptr. 583*

Proper conditions for reinstatement of license include: (1) requiring former licensee to take and pass California State Dental Board Examination, (2) requiring former licensee to limit practice to a solo practice or practice with one other dentist, and (3) requiring former licensee to submit to Board of Dental Examiners a detailed plan for practice. *Flanzer v. Board of Dental Examiners (1990) 220 Cal. App. 3d 1392, 1398-1399, 271 Cal. Rptr. 583*

Imposition of community service as condition of reinstatement of license is prohibited by *Bus. & Prof. Code § 1671(e)* if original discipline resulted from violations relating to quality of care. *Flanzer v. Board of Dental Examiners (1990) 220 Cal. App. 3d 1392, 1400, 271 Cal. Rptr. 583*

Reversal of dental license revocation requires redetermination of appropriate penalty by board when, at most, dentist had committed one act of unprofessional conduct, two acts of incompetence, and two acts of negligence, and board had improperly held dentist accountable for acts of other dentists under respondeat superior theory. *James v. Board of Dental Examiners (1985) 172 Cal. App. 3d 1096, 1110, 1112, 218 Cal. Rptr. 710*

Board of Medical Examiners' decision to adopt hearing officer's proposed order to dismiss proceedings for license suspension or revocation against dentist leaves licensee as though no accusation had been filed against him and thus with no right to protect and no entitlement to issuance of writ of mandate. *Grant v. Board of Medical Examiners (1965) 232 Cal. App. 2d 820, 827-828, 43 Cal. Rptr. 270*

Advertisement by dentist of professional superiority constituted unprofessional conduct subject to licensesuspension or revocation. *Barron v. Board of Dental Examiners (1941) 44 Cal. App. 2d 790, 793, 113 P.2d 247*

Aiding and abetting unlicensed person in practice of dentistry as constituting grounds for suspension of license to practice dentistry even if unlicensed person performed no surgical operation but merely took molds or casts. *Jacobs v. Board of Dental Examiners (1922) 189 Cal. 709, 714, 209 P. 1006*

Aiding and abetting corporation in practice of dentistry constitutes grounds for suspension of license to practice dentistry. *Painless Parker v. Board of Dental Examiners (1932) 216 Cal. 285, 298-299, 14 P.2d 67*

Bartering by dentist for use of license of other qualified practitioner so as to employ unqualified person to practice dentistry under license of another constitutes unprofessional conduct for which license suspension or revocation is appropriate. *Homan v. Board of Dental Examiners (1927) 202 Cal. 593, 596-598, 262 P. 324*

[c] Review of Administrative Law Decisions

Code Civ. Proc. § 1094.5(administrative mandamus) applies to all cases in which agency decision being reviewed by court is product of proceeding in which hearing and related procedural protections are required by law. *Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 817, 140 Cal. Rptr. 442, 567 P.2d 1162*

In mandamus proceeding to review action of administrativelaw board, trial de novo is not unqualified or unlimited right and defendant not entitled to remain silent during hearing before administrative body and subsequently secure trial de novo in unlimited sense. *Dare v. Bd. of Medical Examiners (1943) 21 Cal. 2d 790, 795, 799, 136 P.2d 304*

Writ of prohibition is available to restrain threatened exercise of judicial power in excess of jurisdiction but inappropriate to restrain officer or board exercising purely ministerial functions. Whitten v. California State Board, etc. *(1937) 8 Cal. 2d 444, 445, 65 P.2d 1296*

State agencies engaged in making administrative decisions are subject to review by writ of mandate. Whitten v. California State Board, etc. *(1937) 8 Cal. 2d 444, 446-447, 65 P.2d 1296*

Independent judgment test applies in first judicial review of administrative proceeding in which license to practice dentistry is revoked; substantial evidence test applies to appellate review of first judicial review. *James v. Board of Dental Examiners (1985) 172 Cal. App. 3d 1096, 1105-1106, 218 Cal. Rptr. 710*

[3] Antitrust

Labor exemption to California's Cartwright Antitrust Act (*Bus. & Prof. Code § 16703*) extends to concerted effort by voluntary dental hygienists' association to increase and fix members' compensation paid by dentists,under whose supervision they are legally required to work. *California Dental Assn. v. California Dental Hygienists' Assn. (1990) 222 Cal. App. 3d 49, 63-71, 271 Cal. Rptr. 410*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsHealthcare LawActions Against Healthcare WorkersGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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17-209 California Forms of Pleading and Practice--Annotated § 209.43

§ 209.43 Attorney General Opinions

Dentist permitted to use urinalysis, blood and hair analysis, transcutaneous nerve stimulation, and electrogalvanic stimulation, to offer dietary recommendations, to use oral drops to determine vitamin assimilation, and to prescribe Elavil to relax muscles, if such practices have been accepted by dental community; dentist not permitted to palpate liver, thyroid, or adrenal glands. *69 Ops. Cal. Atty. Gen. 29 (1986)*

Alien permitted to serve on State Board of Dental Examiners. 61 Ops. Cal. Atty. Gen. 528 (1978)

In nonemergency situation, authorization for medical treatment of adult person by court is improper despite person's inability to give consent, unless patient has been declared incompetent. *60 Ops. Cal. Atty. Gen. 382 (1977)*

Use of acupuncture in dentistry authorized if it relates to normal practice of dentistry. *57 Ops. Cal. Atty. Gen. 341 (1974)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewImmigration LawDuties & Rights of AliensEmployment

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17-209 California Forms of Pleading and Practice--Annotated § 209.44

§ 209.44 Law Reviews

Comment, *Professional-Client Sex: Is Criminal Liability an Appropriate Means of Enforcing Professional Responsibility, 40 UCLA L. Rev. 1275 (1993)*

Frankford, *Privatizing Health Care: Economic Magic to Cure Legal Medicine, 66 S. Cal. L. Rev. 1 (1992)*

Comment, *Torts; Medical Malpractice, 7 Pacific L.J. 544 (1976)*

Note, *Restrictive Licensing of Dental Paraprofessionals, 83 Yale L.J. 806 (1974)*

Note, *Informed Consent and the Patient's Right to "No": Cobbs v. Grant, 6 Loyola L. Rev. 384 (1973)*

Symposium: Medical Malpractice in California, 8 USF L. Rev. 227 (1973)

Hagman, *The Medical Patient's Right to Know, 17 UCLA L. Rev. 758 (1970)*

Comment, *Informed Consent in Medical Malpractice, 55 Cal. L. Rev. 1396 (1967)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesSex CrimesGeneral OverviewHealthcare LawActions Against Healthcare WorkersGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawTreatmentPatient ConsentInformed ConsentTortsMalpractice & Professional LiabilityHealthcare Providers

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[Reserved]

§§ 209.45[Reserved]

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PART IV. FORMS
A. Malpractice

17-209 California Forms of Pleading and Practice--Annotated § 209.60

§ 209.60 Complaint for Damages by Patient Against Dentist for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 3333]--General Form

[1] FORM Complaint for Damages by Patient Against Dentist for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 3333]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Dental Malpractice)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, a dentist duly licensed to practice his/her profession and is practicing his/her profession in _____ County, California.

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, andtherefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that

plaintiff's injuries as herein alleged were proximately caused by such negligence.)]

3. On _____ [*date*], in _____ [*city*], _____ County, California, defendant maintained dental offices and held himself/herself out to the public as a competent and skilled dentist. Relying on defendant's skill and competency in dentistry, plaintiff employed him/her to _____ [*specify dental service, e.g.,* examine and treat plaintiff's teeth to alleviate pain from toothache].

4. At this time and place, defendant negligently examined, diagnosed, and treated plaintiff's _____ [*specify area treated*] [in that _____ (*if appropriate, generally state acts and omissions wherein defendant failed to conform to standard of care required*)].

5. As a proximate result of the defendant's negligence, plaintiff _____ [*specify result of defendant's negligence, e.g.,* suffered osteomyelitis of the jaw] and suffered the injuries alleged below.

6. As a further proximate result of the defendant's negligence, plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervous system and person, all of which injuries have caused, andcontinue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.]. As a result of these injuries, plaintiff has suffered general damages.

7. As a further proximate result of defendant's negligence, plaintiff has been damaged in that he/she has been required to expend money and incur obligations for medical services, X-rays, drugs, and sundries reasonably required in the treatment and relief of his/her injuries.

8. As a further proximate result of defendant's negligence, plaintiff's earning capacity has been greatly impaired, both in the past and present.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature*]

_____ [*typed name*]

[2] Use of Form

The form of complaint in [1], *above* may be used by a patient in an action to recover damages for personal injuries resulting from a dentist's professional negligence. In appropriate case, this form may be combined with a complaint alleging battery [for a form, *see § 209.65*], lack of informed consent [for a form, see *§ 209.64*], or both. For discussion, see *§ 209.12*.

[3] Notice of Intention to Commence Action Required

An action based on a health care provider's professional negligence may not be commenced unless the defendant has been given at least 90 days prior notice of the intention to commence the action[*Code Civ. Proc. § 364(a)*]. For discussion, see *§ 209.15[3]*, and for a form of notice, see Ch. 415, *Physicians: Medical Malpractice* .

[4] No Statement of Amount of Damages

A complaint for personal injuries or wrongful death may not state the amount of damages sought to be recovered[*Code Civ. Proc. § 425.10(b)*]. Therefore, no reference to specific dollar amounts of damages should be used. For forms and procedures for use to ascertain the specific damages sought in such personal injury or wrongful death actions, see Ch. 177, *Damages* .

[5] Allegations

Negligence, including malpractice, may be pleaded in general terms[*Landeros v. Flood (1976) 17 Cal. 3d 399, 408, 131 Cal. Rptr. 69, 551 P.2d 389* ; *Stafford v. Shultz (1954) 42 Cal. 2d 767, 774, 270 P.2d 1]* . It is thus sufficient, at least as far as a general demurrer is concerned, to allege that certain treatment was negligently administered by the defendant to the plaintiff's damage without alleging in what respect the treatment may have been deficient[*Stafford v. Shultz (1954) 42 Cal. 2d 767, 774, 270 P.2d 1* ; *Greninger v. Fischer (1947) 81 Cal. App. 2d 549, 552, 184 P.2d 694]* .

Therefore, the complaint alleges:

- The existence of a dentist-patient relationship, express or implied (Paragraph 3), thereby establishing plaintiff's right to expect defendant will care for and treat plaintiff with proper professional skills and will exercise reasonable and ordinary care and diligence[*see Keene v. Wiggins (1977) 69 Cal. App. 3d 308, 313, 138 Cal. Rptr. 3* (stating that essential element of malpractice suit is establishment of duty owed to plaintiff by physician and adding that the duty owed varies with the relationship of parties, the foreseeability of injury or harm, and plaintiff's reasonable reliance on opinion received from defendant); *see also Stafford v. Shultz (1954) 42 Cal. 2d 767, 775, 270 P.2d 1* ; *Felton v. Schaeffer (1991) 229*

Cal. App. 3d 229, 234-235, 279 Cal. Rptr. 713] .

- Negligence on defendant's part in rendering professional services (Paragraph 4)[*Greninger v. Fischer (1947) 81 Cal. App. 2d 549, 552, 184 P.2d 694* ; *Smith v. Beauchamp (1945) 71 Cal. App. 2d 250, 254-256, 162 P.2d 662]* .

- Plaintiff's injuries, pleaded both generally and specifically (Paragraphs 4-8)[*see Civ. Code § 3333*; *Myers v. Stephens (1965) 233 Cal. App. 2d 104, 120, 43 Cal. Rptr. 420* (noting the general rules that general damages need not be specially pleaded, but special damages do); for a discussion of general and special damages in tort actions, see *Ch. 177, Damages, § 177.140* et seq.].

- Defendant's negligence as a proximate cause of plaintiff's injuries (Paragraphs 4-8)[*Keen v. Prisinzano (1972) 23 Cal. App. 3d 275, 279, 100 Cal. Rptr. 82* ; *Marvin v. Talbott (1963) 216 Cal. App. 2d 383, 385, 30 Cal. Rptr. 893]* .

[6] Verification

Although verification of this complaint is not required[*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case[*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection[*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[7] Statute of Limitations

An action for personal injury or death against a dentist based on professional negligence must be commenced within three years after the date of injury or one year after the plaintiff discovers or should have discovered the injury by use of reasonable diligence[*Code Civ. Proc. § 340.5*]. For discussion of tolling the statute of limitations and actions by minors, see *§ 209.14*.

[8] Security for Costs

In an action for damages for personal injuries against a dentist for professional negligence, the defendant may, within six months after service of summons, move the court for an order requiring the plaintiff to furnish an undertaking in a sum not to exceed $500 as security for costs of defense as provided in *Code Civ. Proc. § 1029.6(d)*, which may be awarded against the plaintiff[*Code Civ. Proc. § 1029.6(a)*; for discussion, *see § 209.16*].

[9] Cross References

For alternative allegations as to capacity and residence of parties and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introduction*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, § 177.40* et seq.

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue* , Pt. I

For alternative forms of verifications, see Ch. 572, *Verification*

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17-209 California Forms of Pleading and Practice--Annotated § 209.61

§ 209.61 Allegation of Improper Administration of Anesthetic

[1] FORM Allegation of Improper Administration of Anesthetic

At this time and place, defendant negligently and unskillfully administered anesthetic to plaintiff in that _____ [*specify generally acts and/or omissions of defendant*].

[2] Use of Form

The allegation in [1], *above,* is for use in a complaint based on negligence to recover damages for personal injuries resulting from the negligent administration of anesthetic[*Newman v. Campbell (1937) 23 Cal. App. 2d 639, 640, 73 P.2d 1265* (dentist liable for plaintiff's personal injuries suffered as result of negligent administration of anesthetic by defendant's employee)]. This allegation may be inserted in the complaint against a dentist based on negligence at § 209.60[1] in place of Paragraph 4.

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17-209 California Forms of Pleading and Practice--Annotated § 209.62

§ 209.62 Allegation of Failure to Remove All of Roots of Extracted Tooth

[1] FORM Allegation of Failure to Remove All of Roots of Extracted Tooth

At this time and place, defendant negligently and unskillfully left one of the roots of the extracted tooth in plaintiff's gum, proximately causing a chronic inflammation and infection of the jaw which caused other ailments and painful symptoms throughout plaintiff's body, such as _____ [*specify, e.g.*, rheumatism and neuralgia].

[2] Use of Form

The allegation in [1], *above*, is for use in a complaint based on negligence to recover damages for personal injuries resulting from the failure of a dentist to remove all roots of an extracted tooth[*see George v. Matthews (1959) 175 Cal. App. 2d 680, 684, 346 P.2d 863* ; *see also Ehlen v. Burrows (1942) 51 Cal. App. 2d 141, 145-146, 124 P.2d 82]* . This allegation may be inserted in the complaint against a dentist based on negligence at § 209.60[1] in place of Paragraphs 4 and 5.

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17-209 California Forms of Pleading and Practice--Annotated § 209.63

§ 209.63 Allegation of Dropping Extracted Tooth Down Patient's Throat

[1] FORM Allegation of Dropping Extracted Tooth Down Patient's Throat

At this time and place, defendant negligently and carelessly extracted plaintiff's _____ [*specify tooth, e.g.*, left lower second bicuspid] and allowed the extracted tooth to drop down plaintiff's throat as a result of which the tooth lodged in plaintiff's _____ [esophagus *or* bronchial tubes *or specify other place*] causing plaintiff severe pain and suffering including _____ [*specify, e.g., one of the following* : loss of breath *or* pneumonia attacks *or* coughing spells].

[2] Use of Form

The allegation in [1], *above*, is for use in a complaint based on negligence to recover damages for injuries resulting from dropping an extracted tooth down a patient's throat[*see Nelson v. Painless Parker (1930) 104 Cal. App. 770, 773-774, 286 P. 1078]* . This allegation may be inserted in the complaint against a dentist based on negligence at § 209.60[1] in place of Paragraphs 4 and 5.

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17-209 California Forms of Pleading and Practice--Annotated § 209.64

§ 209.64 Complaint for Damages by Patient Against Dentist for Personal Injuries Based on Negligence and Lack of Informed Consent [Civ. Code §§ 1714(a), 3333]

[1] FORM Complaint for Damages by Patient Against Dentist for Personal Injuries Based on Negligence and Lack of Informed Consent [Civ. Code §§ 1714(a), 3333]

[*Caption. See Form 1.*]

1. [*Capacity of defendant. See § 209.60[1], Paragraph 1*].

[*2. Fictitious name allegation, if appropriate. See § 209.60[1], Paragraph 2.*]

3. On _____ [*date*], in _____ [*city*], _____ County, California, defendant maintained dental offices andheld himself/herself out to the public as a competent and skilled dentist. Relying on defendant's skill and competency in dentistry, plaintiff employed him/her to _____ [*specify dental service performed*].

4. At this time and place, defendant negligently failed to disclose the inherent risks of the dental services to be rendered, including _____ [*specify risks involved, e.g.,* the cutting of the trigeminal nerve resulting in permanent numbness in jaw], and negligently failed to obtain plaintiff's informed consent in light of the undisclosed risks.

5. If plaintiff had been adequately informed of the inherent risk of _____ [*specify risk*] in performing the procedure described above, he/she would not have consented to the operation.

6. [*Allegation of injuries proximately resulting from failure to disclose inherent risk. See § 209.60[1], Paragraphs 4-7.*]

[*Prayer. See § 209.60[1].*]

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 209.60[1].*]

[2] Use of Form

The complaint in [1], *above*, may be used by a dental patient in an action based on negligence to recover damages for personal injuries if the patient consented to certain treatment which the doctor performed, but an undisclosed inherent complication with low probability occurred[*see Cobbs v. Grant (1972) 8 Cal. 3d 229, 240-241, 104 Cal. Rptr. 505, 502 P.2d 1* ; for discussion, *see § 209.12*].

In appropriate case, this form may be combined with a complaint alleging general negligence [for a form, *see § 209.60*], battery [for a form, *see § 209.65*], or both.

[3] Notice of Intention to Commence Action Required

An action based on a health care provider's professional negligence may not be commenced unless the defendant has been given at least 90 days prior notice of the intention to commence the action[*Code Civ. Proc. § 364(a)*]. For discussion, see *§ 209.15[3]*, and for a form of notice, see Ch. 415, *Physicians: Medical Malpractice* .

[4] No Statement of Amount of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action[*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages must be alleged[*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained[*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see *Ch. 177, Damages, § 177.40* et seq., and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

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17-209 California Forms of Pleading and Practice--Annotated § 209.65

§ 209.65 Complaint for Damages by Patient Against Dentist for Personal Injuries Based on Battery [Civ. Code § 3333]

[1] FORM Complaint for Damages by Patient Against Dentist for Personal Injuries Based on Battery [Civ. Code § 3333]

[*Caption. See § 209.60[1].*]

1. [*Capacity of defendant. See § 209.60[1], Paragraph 1*].

[2. *Fictitious name allegation, if appropriate. See § 209.60[1], Paragraph 2.*]

3. [*Employment of defendant to perform dental services. See § 209.64[1]. Paragraph 3*].

[4. Plaintiff, on or about _____[*date*], informed defendant that he/she consented to defendant's performing _____ (*specify proposed treatment, e.g.*, the extraction of plaintiff's lower left wisdom tooth) as suggested and recommended by defendant.]

[*EITHER*]

5. On _____ [*date*], after plaintiff arrived in defendant's office, an anesthetic was administered by defendant which rendered plaintiff unconscious. While plaintiff was unconscious, defendant _____[*specify treatment performed, e.g.*, extracted all four of plaintiff's wisdom teeth], a procedure to which plaintiff had not consented [except _____ (*specify procedure to which plaintiff had consented*)].

[*OR*]

5. Defendant did not inform plaintiff that a risk integral to the procedure [and highly probable to occur] was _____ [*specify risk, e.g.*, the severing of the mandibular nerve]. In performing the procedure, _____ [*describe occurrence of risk*].

6. _____ [*Allege injuries proximately resulting from failure to disclose integral risk*].

[*Prayer. See § 209.60[1].*]

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 209.60[1].*]

[2] Use of Form

The complaint in [1], *above,* may be used by a dental patient in an action based on battery to recover damages for personal injuries when plaintiff did not consent either to the entire procedure or some part of the procedure performed by defendant dentist or when plaintiff consented to the procedure but defendant did not inform him or her of a risk integral to the procedure[*see Cobbs v. Grant (1972) 8 Cal. 3d 229, 239, 104 Cal. Rptr. 505, 502 P.2d 1]* .

In appropriate case, this form may be combined with a complaint alleging general negligence [for a form, *see § 209.60*], negligent failure to obtain informed consent [for a form, *see § 209.64*], or both. For discussion, see *§ 209.12*.

[3] No Statement of Amount of Damages

A complaint for personal injuries or wrongful death may not state the amount of damages sought to be recovered[*Code Civ. Proc. § 425.10(b)*]. Therefore, no reference to specific dollar amounts of damages should be used. For forms and procedures for use in ascertaining the specific damages sought in such personal injury or wrongful death actions, see Ch. 177, *Damages* .

[4] Allegations

The complaint alleges in part:

- Plaintiff's consent to the procedure performed by defendant (Paragraph 4).

- Defendant's performance of a procedure different from the one consented to by plaintiff or the failure of defendant to inform plaintiff of a risk integral to the procedure and the occurrence of that risk (Paragraph 5).

- Damages suffered by plaintiff (Paragraph 6)[*see Cobbs v. Grant (1972) 8 Cal. 3d 229, 239, 104 Cal. Rptr. 505, 502 P.2d 1]* .

[5] Notice of Intention to Commence Action Not Required

No notice of intention to commence an action for battery against a dentist need be filed prior to the filing of this complaint because the notice is required only in actions based on a health care provider's professional negligence, which is defined as anegligent act or omission[*Code Civ. Proc. § 364(f)(2)*]. It may be advisable to file such notice since a trial court may consider that the facts pleaded in support of a battery theory should be interpreted as a matter of law to state a cause of action for negligence. Nevertheless, the failure to comply with the notice requirements does not invalidate the court's proceedings, nor does it affect the court's jurisdictionto render a judgment. Failure to comply is, however, ground for professional discipline[*Code Civ. Proc. § 365*].

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17-209 California Forms of Pleading and Practice--Annotated § 209.66

§ 209.66 Allegation of Severance or Traumatization of Nerve During Dental Procedure

[1] FORM Allegation of Severance or Traumatization of Nerve During Dental Procedure

At this time and place, defendant [negligently and unskillfully] _____ [severed *or* traumatized] plaintiff's _____[*specify nerve, e.g.*, mandibular] nerve during the _____[*specify procedure performed, e.g.*, extraction by defendant of plaintiff's left lower second bicuspid] which caused plaintiff numbness in the _____ [*specify affected area, e.g.*, lower lip and jaw].

[2] Use of Form

The allegation in [1], *above*, is for use in a complaint to recover damages for the severance or traumatization of a nerve and resulting numbness[*see Myers v. Ross (1963) 216 Cal. App. 2d 645, 649, 31 Cal. Rptr. 110* (dentist was negligent in severing nerve while fitting patient for dentures)].

If the plaintiff was not informed of the risk of a severed nerve, but the probability of the nerve being severed was low, the cause of action would appear to be for negligence based on lack of informed consent, and the allegation should be insertedin the form of complaint in § 209.64[1].

If the risk was integral to the procedure being performed, the cause of action is probably for battery, and the allegation should be inserted in the form of complaint in § 209.65[1].

If plaintiff was informed of the risks involved and consented to the procedures used but the nerve was severed as a result of the negligence of the dentist, the cause of action is for negligence and, and the allegation should be inserted in the form of complaint in § 209.60[1].

For discussion of the different possible actions, see the *discussion under § 209.12*.

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[Reserved]

§§ 209.67[Reserved]

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17-209 California Forms of Pleading and Practice--Annotated § 209.80

§ 209.80 Petition for Writ of Mandate to Review Administrative Decision of Board of Dental Examiners to Suspend, Revoke, or Deny License [Code Civ. Proc. §§ 1085, 1086, 1094.5]

[1] FORM Petition for Writ of Mandate to Review Administrative Decision of Board of Dental Examiners to Suspend, Revoke, or Deny License [Code Civ. Proc. §§ 1085, 1086, 1094.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
Board of Dental Examiners,	)	PETITION FOR WRIT OF MANDATE TO RE-
Respondent.	)	VIEW DECISION OF BOARD OF DENTAL EX-
	)	AMINERS
	)	

_____

Petitioner alleges:

[*EITHER*]

1. Petitioner is now [, and for many years has been,] regularly and duly licensed by the Board of Dental Examiners of the State of California to practice dentistry in California, and holds a license to do so; the license number is _____ and it was issued to him/her on _____ [*date*].

[*OR*]

1. Petitioner meets all of the qualifications for a dentist's license established by law. Petitioner duly applied for a dentist's license on _____[*date*] in compliance with all statutes and administrative regulations governing such an application.

[*CONTINUE*]

2. Respondent Board of Dental Examiners is a statewide administrative agency charged by law with administration of the Dental Practice Act, *Business and Professions Code, Section 1600 et seq.*.

3. _____ [*State authority of respondent to exercise discretion in determining relevant facts and requirement that hearing be held, e.g.*, Under *Sections 1670-1680 of the Business and Professions Code*, the Board has discretion todetermine whether or not a ground exists either for suspension or for revocation of a dentist's license, and particularly whether _____ (*specify facts constituting ground for action*). Pursuant to *Business and Professions Code Section 1670* and *Government Code Sections 11500-11528*, the Board is required to hold a hearing and take evidence in its proceedings for the determination of those facts].

4. _____ [*Specify facts regarding holding of hearing, e.g.*, On _____ [*date*], at _____ (*specify meeting place*) a hearing was held to receive evidence on the issue of whether or not a ground exists either for suspension or for revocation of the dentist's license which petitioner then held and which was then in full force and effect. Petitioner attended the hearing. On _____ [*date*], petitioner received the Board's decision and order _____(*specify effect of decision and order, e.g.*, revoking petitioner's dentist's license) on the ground that _____ (*specify, if possible*). _____ (*State fact of application for reconsideration, if appropriate, and adverse result*)].

5. The Board's decision and order are invalid for the following reasons:

[*STATE reasons that decision is invalid, e.g.,* :]

a. The administrative law judge found that _____ [*state all findings*]. The Board does not have authority to _____ [suspend *or* revoke *or* deny] a dentist's license on any of those grounds.

b. At the hearing, petitioner tried to offer evidence toshow that _____ [*specify facts provable by evidence in question*]. This evidence was in the form of _____[*specify, e.g.*, the testimony of _____(*name*)]. The hearing officer ruled that this evidence was not admissible and it was not received. The evidence was admissible and should have been received.

c. The hearing administrative law judge found that _____ [*state specific findings*]. [*The evidence received at the hearing does not support these findings, as petitioner alleges more particularly below.*]

[*CONTINUE*]

6. _____ [A verbatim transcript of the record of the hearing, containing the evidence received, is attached as Exhibit A and made a part hereof *or* The substance of the evidence received at the hearing is as follows: _____ (*state substance of evidence*).] [*If petitioner claims that evidence does not support findings, add:* The evidence does not support the findings for thefollowing reasons: _____ (*specify*).] [*If petitioner claims that incompetent evidence was received, add:* Petitioner objected at the hearing to the following

evidence, on the grounds indicated, but in each instance petitioner's objection was not sustained and the evidence was received: _____ (*identify evidence, e.g.,* the testimony of _____(*name*), which was offered to show _____(*specify, e.g.,* petitioner's former affiliation with particular political parties in violation of petitioner's constitutional rights) _____ (*state ground for objection, e.g.,* which was objected to on the ground that _____ (*specify*)).]

[7. *Add, if appropriate* : Petitioner has the following relevant evidence that was not presented at the hearing: _____ (*describe completely*). This evidence could not be produced at the hearing because _____ (*specify why, in the exercise of reasonable diligence, petitioner could not produce evidence and, if appropriate, why evidence could not be produced on reconsideration*). This evidence tends to show that _____ (*state what evidence will prove*).]

[8. *If attorney's fees are claimed under Gov. Code § 800, add* : As an incident of bringing and maintaining this proceeding, petitioner has become, and is, obligated personally to pay to his/her counsel _____ (*name*), attorney's fees _____ (exceeding $7,500 *or* in the sum of $_____).]

WHEREFORE, petitioner prays judgment as follows:

[1. *If alternative writ procedure is used:* For an alternative writ of mandate directing respondent to set aside its order of _____[*date*], _____ (*specify effect of order, e.g.,* revoking petitioner's dentist's license), _____ (*if application for license was denied, add:* and to reconsider whether petitioner is entitled to receive a dentist's license as applied for*; or if license was suspended, revoked, or otherwise restricted, add:* and to reinstate petitioner's dentist's license as it existed before that order was issued or in the alternative to show cause why a peremptory writ of mandate to the same effect should not be issued);]

[2. *If petitioner will seek stay of operation of administrative order or decision pending judgment, add* : For an order restraining respondent from giving effect to its order of _____ (*date*), _____ (*specify effect of order*), until further order of the court and to show cause why operation of that order should not be stayed pending the judgment in this proceeding;]

3. For a peremptory writ of mandate _____ [to the same effect as the alternative writ except for the order to show cause *or set out terms at length as in Paragraph 1 of this prayer, omitting words relating to order to show cause*];

[4. For reasonable attorney's fees, in addition to any other relief granted or other costs awarded;]

5. For costs of suit herein incurred [*add, if appropriate:* including $_____ for preparation of the administrative record]; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature*]

[2] Use of Form

[a] In General

The form of petition for a writ of mandate in [1], *above*, is for use by an aggrieved dentist to obtain judicial review of an administrative decision (and resulting order, if any) that the petitioner's license be suspended or revoked or that the petitioner's application for a license be denied. For discussion of petitions for writs of mandate to review administrative decisions, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , through Ch. 474C, *Proceudres in Reviewing Agency Decisions* .

[b] Alternative Writ Procedure

If petitioner proceeds by the alternative writ procedure, he or she should prepare a petition, an order for issuance of the alternative writ, if local court rules or practice require, and an alternative writ of mandate. He or she must serve a copy of the petition on the respondent and file the petition along with proof of service[*Code Civ. Proc. § 1107*]. At the time, the alternative writ is deposited, but not filed, with the clerk of the court. Five days after the filing of the petition, the court must examine thepapers on file and issue or decline toissue the alternative writ. Within the five-day period, the respondent may file points and authorities in opposition to the alternative writ. If the respondent files a memorandum, he or she must serve a copy on the petitioner, but the petitioner has no right to respond[*see Code Civ. Proc. § 1107*]. If the court issues the alternative writ, the judge signs either the order for issuance or the writ itself. When the writ had been duly issued, the petitioner is informed and he or she may then have a copy served on the respondent[*see Code Civ. Proc. § 1096*]. The alternative writ includes an order to show cause why a peremptory writ should not be issued at a time and place specified in the writ[*see Code Civ. Proc. § 1087*].

For a form of an alternative writ of mandate, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[c] Noticed Application Procedure

Pursuant to the noticed application procedure, the petitioner prepares his or her petition and a notice fixing a time (at least 10 days in advance) and place for hearing the petition[*see Code Civ. Proc. § 1088*]. Copies of these papers may be filed and served in the same manner as in an ordinary civil action[*Code Civ. Proc. § 1107*; *see Code Civ. Proc. § 1088.5*]. If the petition is filed in the trial court without proof of service pursuant to *Code Civ. Proc. § 1088.5*, the respondent has 30 days to answer or otherwise respond after service of the petition when a record ofthe proceeding to be reviewed has been filed with the petition or when no record is required, or has 30 days to answer or otherwise respond following receipt of a copy of the record if a record has been requested pursuant to *Gov. Code § 11523* or otherwise, and the record has not been filed with the petition[*Code Civ. Proc. § 1089.5*]. If proof of service is filed with the petition, the respondent may serve and file points and authorities in opposition to the petition within five days after the

filing of the petition[*see Code Civ. Proc. § 1107*]. However, no alternative writ is issued[*see Code Civ. Proc. § 1108*]. Instead, the court hears the petition and the respondent's answer, if any, on the date fixed by the notice for hearing. If the petitioner makes a persuasive case, the court issues or orders issued the peremptory writ[*see Code Civ. Proc. §§ 1088, 1089, 1094*].

[3] Proof of Service Required

Proof of service of a copy of the petition on each respondent and real party in interest must accompany the petition when it is offered for filing (except when, in its discretion and for good cause, the court has granted the application for the writ ex parte)[*Code Civ. Proc. § 1107*]. In a trial court, if no alternative writ is sought, proof of service of a copy of the petition need not accompany the application for the writ at the time of filing, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court[*Code Civ. Proc. § 1088.5*].

[4] Points and Authorities

Points and authorities customarily accompany a petition filed in a superior court, although they do not appear to be expressly required by statute.

[5] Allegations

The petition in [1], *above*, alleges in part[*see Code Civ. Proc. § 1094.5*]:

- That petitioner is beneficially interested in the issuance of the writ (Paragraph 1).
- The Board of Dental Examiner's authority to exercise discretion in determining relevant facts (Paragraph 3).
- The requirement that a hearing be held at which evidence is required to be taken (Paragraph 3).
- Facts regarding the holding of the hearing (Paragraph 4).
- The decision of the board (Paragraph 4).
- The reasons for the invalidity of the decision (Paragraph 5).

For discussion of the essential and optional allegations in a petition for administrative mandate, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[6] Verification

Verification of this complaint is not required, but verification of the complaint requires the defendant to file a verified answer[*Code Civ. Proc. § 446*] and precludes a general denial[*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[7] Time for Filing

The petition for writ of mandate must be filed within 30 days after the last day on which reconsideration can be ordered[*Gov. Code § 11523*].

[8] Attorney's Fees

In a civil action to appeal or review the award, finding, or other determination of any administrative proceeding under the Government Code or any other provision of state law, except actions of the State Board of Control, the complainant, if he or she prevails in the civil action, may collect reasonable attorney's fees, computed at $100 per hour, not to exceed $7,500, if the complainant is personally obligated to pay such fees and if it was determined that the administrative decision or award was the result of arbitrary or capricious action or conduct by a public entity or an official thereof acting in an official capacity[*Gov. Code § 800*].

[9] Cross References

For discussion and forms relating to administrative mandate proceedings, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* .

For forms of allegations of petitioner's capacity to sue, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions and discussions of the subject, see Ch. 108, *Captions and Introductions*

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17-211 California Forms of Pleading and Practice--Annotated 211.syn

§ 211.syn Synopsis to Chapter 211: DEPOSIT IN COURT

§ 211.01 Scope of Chapter

§ 211.02 Cross References

§§ 211.03through 211.09 [Reserved]

§ 211.10 Provisions for Deposit of Money in Court

§ 211.11 Deposit in Court Under Code Civ. Proc. § 572

[1] Provisional Remedy Available When Funds Are Held in Trust

[2] Entitlement to Funds Must Be at Issue

[3] Requirement That Funds Be Held in Trust for Another

§ 211.12 Procedure for Requiring Deposit or Delivery

[1] Application and Order

[2] Enforcement of Order

§ 211.13 Calculating Deposit When Foreign Money Is at Issue

§§ 211.14through 211.29 [Reserved]

§ 211.30 Related Matthew Bender Publications

§ 211.31 State Constitution

§ 211.32 State Statutes

[1] Specific Provisions for Deposit in Court

[2] Treatment of Deposits

[3] Uniform Foreign-Money Claims Act

§ 211.33 Local Court Rules

§ 211.34 Decisions

[1] Court Authority

[2] Deposit Requirements

[3] Money Requirement

[4] Notice Requirements

§ 211.35 Text References

§§ 211.36through 211.49 [Reserved]

§ 211.50 Proceedings for Order Requiring Deposit in Court [Code Civ. Proc. §§ 572-574]--Notice of Motion, Motion, and Supporting Papers

[1] FORM

[2] Use of Form

[3] Cross References

§ 211.51 Proceedings for Order Requiring Deposit in Court [Code Civ. Proc. §§ 572-574]--Order

[1] FORM

[2] Use of Form

[3] Authorization to Receive Money Deposited in Court

[4] Cross References

§ 211.52 Application, Declaration, and Order Directing Sheriff, Constable, or Marshal to Enforce Order for Deposit or Delivery [Code Civ. Proc. § 574]

[1] FORM

[2] Use of Form

[3] Cross References

§ 211.53 Application for Order Directing Auditor or Controller to Issue Warrant and for County Treasurer to Pay Money on Deposit in Court [Gov. Code § 68084]

[1] FORM

[2] Use of Form

[3] Money Deposited

[a] With Treasurer

[b] In Interest-Bearing Bank Account

§ 211.54 Order Directing Auditor or Controller to Issue Warrant and County Treasurer to Pay Money on Deposit [Gov. Code § 68084]

[1] FORM

[2] Use of Form

[3] Cross References

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17-211 California Forms of Pleading and Practice--Annotated § 211.01

§ 211.01 Scope of Chapter

This chapter discusses proceedings involving the provisional remedy of deposit in court as provided in *Code Civ. Proc. §§ 572-574* [*see § 211.10* et seq.]. It includes forms for requiring a deposit to be made [*see §§ 211.50 -211.52*] and for applying to a court for an order to pay the applicant money on deposit with the court [*see §§ 211.53, 211.54*]. These forms may be used under *Code Civ. Proc. §§ 572-574*, or any other statutory procedure whenever funds to which the applicant is entitled have been deposited with the court. A Research Guide is also provided [*see § 211.30* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDeposits in Court

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17-211 California Forms of Pleading and Practice--Annotated § 211.02

§ 211.02 Cross References

- For discussion and forms relating to deposit in court in lieu of an undertaking, see Ch. 43, *Appeal: Stay of Proceedings* , Ch. 303, *Injunctions* , and Ch. 538, *Suretyship, Bonds, and Undertakings*

- For discussion and forms for use in withdrawing money deposited in court in an eminent domain proceeding, see Ch. 247, *Eminent Domain*

- For a discussion of the distribution of the proceeds of a partition sale, see Ch. 397, *Partition*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsFiling FeesCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureRemediesBondsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawEstatesConcurrent OwnershipPartition Actions

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§§ 211.03[Reserved]

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17-211 California Forms of Pleading and Practice--Annotated § 211.10

§ 211.10 Provisions for Deposit of Money in Court

This chapter discusses the procedure set out in *Code Civ. Proc. §§ 572-574* for requiring a party to a controversy to deposit funds or property in court when that party has no right to the assets but is merely holding them in trust for another.

Additional proceedings, discussed elsewhere, which permit or require a party to deposit money in court include the following:

- Proceedings by which a defendant may deposit in court a sum that defendant alleges was tendered to plaintiff before the action commenced and is the full amount due to plaintiff, for the purpose of shifting costs if the allegation is found to be true [*see Code Civ. Proc. § 1025*; *see also Code Civ. Proc. § 998* (analogous cost-shifting provision when settlement offer, rather than tender, is made); for further discussion, *see Ch. 174, Costs and Attorney's Fees, § 174.10* et seq.].

- Proceedings by which a party may deposit a sum admitted to be owing and interplead other parties who conflicting claims to that sum [*Code Civ. Proc. § 386*; for further discussion, *see* Ch. 314, *Interpleader*].

- Proceedings by which a party may deposit a sum equal to the amount of a required undertaking, in lieu of that undertaking [*see Code Civ. Proc. § 995.710 et seq.*; for further discussion, *see* Ch. 538, *Suretyship, Bonds, and Undertakings*].

- Proceedings by which a court may order a party to a maritial dissolution to deposit funds that it has found belong to the party's former spouse, as a means of enforcing its judgment under *Fam. Code § 290* [*see Ch. 258, Family Law Enforcement: General Enforcement Principles and Remedies, § 258.60 et seq., and Ch. 259, Family Law Enforcement: Special Remedies for Support Enforcement, § 259.80* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDeposits in Court

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17-211 California Forms of Pleading and Practice--Annotated § 211.11

§ 211.11 Deposit in Court Under Code Civ. Proc. § 572

[1] Provisional Remedy Available When Funds Are Held in Trust

A party to a controversy involving a right to a certain sum of money or any other thing capable of delivery may be required to deposit that money or property in court if it is clearly admitted by the pleadings or shown on examination of a party to an action that he or she has no right to retain the money or property but is holding it as trustee for the other party, to whom it belongs or is due or that the property should, under the circumstances of the case, be held by the court pending final disposition of the action [*Code Civ. Proc. § 572*].

Code Civ. Proc. § 572 is a prejudgment remedy only and may not be used to enforce a judgment [*In re Marriage of Fithian (1977) 74 Cal. App. 3d 397, 401, 141 Cal. Rptr. 506* (holding that *Code Civ. Proc. § 572* was notavailable to wife to enforce husband's obligation to apply her portion of pension but concluding that trial court had power under *Fam. Code § 290* to enforce marital decree by order directing deposit of funds in court)].

[2] Entitlement to Funds Must Be at Issue

Funds or property can be required to be deposited with the court only if the funds or property are the subject of the litigation [*see Code Civ. Proc. § 572*]. For example, if the money the party possesses is an incident of the litigation, that is, if it is dependent on the judgment to be rendered in the action, such as in the case of an action for accounting, redemption, specific performance, or rescission, the party cannot be compelled to deliver the money as provided in *Code Civ. Proc. § 572* [*Green v. Duvergey (1905) 146 Cal. 379, 386, 80 P. 234* ; *see Burke v. Superior Court (1907) 7 Cal. App. 178, 181, 93 P. 1058]* .

[3] Requirement That Funds Be Held in Trust for Another

It must be shown by the pleadings or an examination of the party who holds the funds or property that the party admits he or she has no right to retain the money or property but is holding it as trustee for the other party [*Code Civ. Proc. § 572*]. The admission must be free from any condition, and the party who is proceeding under *Code Civ. Proc. § 572* must claim an immediate right to the money. If the admission makes the right of the other party dependent on his or her performance of some condition, or if the other party does not claim any right to the money, or disputes the existence of

the condition, a trial court may not order the funds deposited before a hearing in the cause and a judicial determination of the respective rights of the parties [*Green v. Duvergey (1905) 146 Cal. 379, 385, 80 P. 234* ; *see* *In re Elias (1962) 209 Cal. App. 2d 262, 271, 275, 25 Cal. Rptr. 739* (alleged agreement that party holding funds in trust for other party for purpose of discharging other party's obligation on bonds, until such time as bonds were completely exonerated, as not admission that other party was entitled to funds where party had made no admission that bonds were not exonerated and thus held in trust)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDeposits in CourtEstate, Gift & Trust LawTrustsGeneral Overview

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17-211 California Forms of Pleading and Practice--Annotated § 211.12

§ 211.12 Procedure for Requiring Deposit or Delivery

[1] Application and Order

When the provisional remedy under *Code Civ. Proc. § 572* is available, a party may move the court for an order that the money or property be deposited in court or delivered to the party to whom it belongs or is due. If the requisite showing is made, the court may make this order on such occasions as may be just and subject to the further direction of the court [*Code Civ. Proc. § 572*].

[2] Enforcement of Order

Whenever a court has ordered the deposit or delivery of money or property and the order is disobeyed, the court, besides punishing the disobedience, may make an order requiring the sheriff, or marshal to take the money or property and deposit or deliver it in conformity with its directions [*Code Civ. Proc. § 574*; *see § 211.53*].

If punishment is sought for disobedience of the order, proceedings in contempt under *Code Civ. Proc. §§ 1209-1222* should be commenced by a declaration of contempt conforming to the requirements of *Code Civ. Proc. § 1211* [*see Frey v. Superior Court (1913) 22 Cal. App. 421, 425-426, 134 P. 733* (obedience to *Code Civ. Proc. § 572* order as permitted to be enforced by proceedings in contempt)]. For discussion and forms for use in contempt proceedings, see Ch. 135, *Contempt* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDeposits in CourtCivil ProcedureSanctionsContemptCivil ContemptEstate, Gift & Trust LawTrustsGeneral Overview

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§ 211.13 Calculating Deposit When Foreign Money Is at Issue

Code Civ. Proc. § 676.11 sets out the the rules for computing foreign money in United States dollars in an action on a foreign-money claim (defined in *Code Civ. Proc. § 676.1(6)*). It applies in the following situations only [*Code Civ. Proc. § 676.11(b)*]:

- To determine the value of assets to be seized or restrained pursuant to a writ of attachment, garnishment, execution, or other legal process.
- To determine the amount at issue for assessing costs.
- To determine the amount involved for a surety bond or other court-required undertaking.

For more detailed discussion of calculations under *Code Civ. Proc. § 676.11*, see Ch. 62, *Attachment* . For further discussion of the Uniform Foreign-Money Claims Act (*Code Civ. Proc. § 676 et seq.*), see *Ch. 318, Judgments, § 318.40* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDeposits in CourtInternational LawDispute ResolutionRemediesGeneral Overview

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[Reserved]

§§ 211.14[Reserved]

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§ 211.30 Related Matthew Bender Publications

For a discussion of deposit of cash in court in lieu of a bail bond in a criminal action, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, ch. 12 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureBailGeneral Overview

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17-211 California Forms of Pleading and Practice--Annotated § 211.31

§ 211.31 State Constitution

Power of Legislature to provide for deposit of public moneys in specified institutions. *Cal. Const., art. XI, § 11(b)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDeposits in CourtGovernmentsState & Territorial GovernmentsLegislatures

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17-211 California Forms of Pleading and Practice--Annotated § 211.32

§ 211.32 State Statutes

[1] Specific Provisions for Deposit in Court

Allegation of tender in answer to contract complaint and deposit in court of amount to which plaintiff entitled; order that deposit be invested in insured, interest-bearing account. *Civ. Code § 1717(b)(2)*

Deposit in court of damages in action to enjoin diversion of water. *Code Civ. Proc. § 532(b)*

Deposit in court of money or property admitted to be held in trust for another. *Code Civ. Proc. §§ 572-574*

Deposit in court of surplus proceeds after judicial foreclosure. *Code Civ. Proc. § 727*

Deposit in court of proceeds of partition sale and procedures for disposition of such proceeds. *Code Civ. Proc. §§ 873.810-873.850*

Deposit in court in lieu of undertaking. *Code Civ. Proc. §§ 995.710-995.770*

Deposit in court by defendant of amount previously tendered, in order to shift costs if plaintiff fails to recover amount exceeding deposit. *Code Civ. Proc. § 1025*; *see also Civ. Code § 2983.4* (tender and deposit in action under Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*); *Code Civ. Proc. § 998* (analagous cost-shifting when plaintiff fails to recover amount greater than defendant's settlement offer)

Deposit in court in unlawful detainer proceeding of amount of rent to forestall execution on judgment. *Code Civ. Proc. § 1174(c)*

Deposit in court of money paid in eminent domain judgment and procedures for withdrawal of such money. *Code Civ. Proc. § 1268.010, 1268.110 et seq.*

[2] Treatment of Deposits

Deposit by local agencies in state or national banks, savings associations or federal associations, credit unions, or federally insured industrial loan companies in California; payment of interest. *Gov. Code §§ 53630-53681*

Deposit of money with court. *Gov. Code § 53679*

Order directing payment or withdrawal of deposit as requiring auditor to draw warrant and treasurer to pay deposit. *Gov. Code § 68084*

Withdrawal procedure pursuant to charter in cities governed by charter. *Gov. Code § 68084*

[3] Uniform Foreign-Money Claims Act

Procedure for establishing value, in United States dollars, of foreign money at issue, for limited purpose of enforcing provisional remedies (such as deposit in court). *Code Civ. Proc. § 676.11*

Legal Topics:

For related research and practice materials, see the following legal topics:
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17-211 California Forms of Pleading and Practice--Annotated § 211.33

§ 211.33 Local Court Rules

Application of order for payment of money on deposit with court to be made on form provided by court. Alameda Co. Super. Ct. Rules, Rule 5.4

Required contents of application of order for payment of money on deposit with court. Los Angeles Co. Super. Ct. Rules, Rule 3.1

Required contents of application of order for payment of money on deposit with court. San Bernardino Co. Super. Ct. Rules, Rule 740.8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDeposits in CourtGovernmentsCourtsRule Application & Interpretation

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17-211 California Forms of Pleading and Practice--Annotated § 211.34

§ 211.34 Decisions

[1] Court Authority

Court does not necessarily lose authority and responsibility over fund deposited in court when judgment entered or action dismissed. *Vallelunga v. Gomes (1951) 102 Cal. App. 2d 374, 379, 227 P.2d 550*

[2] Deposit Requirements

Court deposits transferred to the county treasurer are required by *Code Civ. Proc. 573* to be placed in special interest-bearing account for benefit of owner. *Fresno Fire Fighters v. Jernagan (1986) 177 Cal. App. 3d 403, 407-408, 222 Cal. Rptr. 886*

Order that money be deposited in court under *Code Civ. Proc. § 572* is proper when party holds money as trustee, or when money belongs or is due to another party and party from whom money is asked has no right or title to hold money. *Green v. Duvergey (1905) 146 Cal. 379, 386, 80 P. 234*

Court is without jurisdiction to order deposit with clerk under *Code Civ. Proc. § 572*, and all subsequent proceedings on contempt charge based on defendant's refusal to so deposit money are void, when there was no admission in the pleadings that any sum was owed, there was no proof that defendant owed any money to plaintiff or a third party, and there was no proof that a trust existed. *In re Elias (1962) 209 Cal. App. 2d 262, 270-275, 25 Cal. Rptr. 739*

Right of court to order deposit under *Code Civ. Proc. § 572* depends on facts shown to court, and it must be shown that party from whom payment is asked has no right or title to hold money in question, and that it belongs to or is due another. *Frey v. Superior Court (1913) 22 Cal. App. 421, 425, 134 P. 733*

Court has jurisdiction to make order requiring party to deposit sum in court under *Code Civ. Proc. § 572* where party's pleadings admitted possessingmoney belonging to another party. *Burke v. Superior Court (1907) 7 Cal. App. 178, 180, 93 P. 1058*

Court is not entitled to adjudicate title to property by ordering its deposit under *Code Civ. Proc. § 572* when party holding property claimed title to it in his own right and disputed other's interest in property. *Ex parte Casey (1886) 71 Cal. 269, 271-272, 12 P. 118*

Order that money be deposited in court under *Code Civ. Proc. § 572* is improper when money was consideration plaintiff had received for conveyance of property and plaintiff sought to have conveyance declared void on ground that it resulted from defendants' fraudulent representations and undue influence at a time when plaintiff was mentally incompetent to transact business, and defendants sought to defeat right of action. *Green v. Duvergey (1905) 146 Cal. 379, 386, 80 P. 234*

[3] Money Requirement

Code Civ. Proc. § 573 requires deposit of money; certificate of deposit drawn in name of county clerk and given to county clerk pursuant to written stipulation of attorneys to court suit is not payment or deposit of money into court under *Code Civ. Proc. § 573*. *Armstrong v. Brown (1936) 12 Cal. App. 2d 22, 26, 54 P.2d 1118*

[4] Notice Requirements

Court order directing court clerk to apportion money in court's possession according to judgment is valid despite lack of notice of a motion, when the real controversy was decided and there was no reason to prolong litigation. *Shepherd v. Perea (1950) 98 Cal. App. 2d 837, 837, 220 P.2d 777*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureRemediesDeposits in CourtCivil ProcedureSanctionsContemptCivil Contempt

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§ 211.35 Text References

California Civil Procedure Before Trial, Ch. 41, *Deposit in Court* (Cal. CEB 3rd ed. 2000)

Witkin, California Procedure, Vol. 6, *Provisional Remedies*, §§ 457-459 (4th ed. 1997)

Legal Topics:

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

§§ 211.36[Reserved]

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17-211 California Forms of Pleading and Practice--Annotated § 211.50

§ 211.50 Proceedings for Order Requiring Deposit in Court [Code Civ. Proc. §§ 572-574]--Notice of Motion, Motion, and Supporting Papers

[1] FORM Proceedings for Order Requiring Deposit in Court [Code Civ. Proc. §§ 572-574]--Notice of Motion, Motion, and Supporting Papers

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER REQUIRING DEPOSIT IN COURT, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM OF POINTS AND AUTHORITIES
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [plaintiff *or* defendant] _____ [*name*] and to his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*]_____, or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [plaintiff *or* defendant] _____ [*name*] will, and hereby does, move for an

order requiring _____ [plaintiff *or* defendant] _____ [*name*] to _____ [deposit in this court *or* deliver to _____ (*party to whom property belongs or to whom money is due*)] _____ [*description of property or, if money, a statement of amount*], which _____ [property *or* sum] is the subject of litigation in the above-entitled cause. The motion will be made pursuant to *Section 572 of the Code of Civil Procedure* and will be based on the grounds that _____ [*name of party against whom motion is made*] is in _____ [possession *or* control] of _____ [*description of property*

or, if money, a statement of amount], the subject of litigation in the above-entitled cause, and he/she/it has no right to retain the_____ [property *or* money] but is holding it as _____ [*state capacity of party holding property or money, e.g.*, trustee *or* bailee], as _____ [is *or* will be] shown by an _____ [admission in the pleadings *or* examination of the party].

The motion will be made and based on this notice of motion, on the declaration(s) of _____ [*name*(*s*)] and the memorandum of points and authorities served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am a _____ [plaintiff *or* defendant] in this action. _____ [*Name of party against whom motion is made*] is in _____ [possession *or* control] of _____ [*description of property or, if money, a statement of amount*], the subject of litigation in the above-entitled action.

2. He/She/It came into such _____ [possession *or* control] by _____ [*relate facts showing how party came into possession or control*].

3. _____ [*Name of party against whom motion is made*] has no right to retain the _____ [property *or* money]. Rather, he/she/it is holding it as _____ [*state capacity of party holding property or money, e.g.*, trustee *or* bailee], as _____ [is *or* will be] shown by _____ [*specify admission in the pleadings or* an examination of the party which will demonstrate that _____ (*specify facts sought to be produced on examination*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES
[*Add memorandum of points and authorities supporting motion*]

[2] Use of Form

The form of notice of motion in [1], *above*, is for use in a proceeding involving a right to a certain sum of money or any other thing capable of delivery, when it is admitted by the pleadings or shown on an examinationof a party to the action that the party has no right to retain the money or property but is holding it as trustee for another party to whom it belongs or is due. This motion seeks an order requiring the party in possession or control of the money or property to deposit the same in court or deliver it to the party to whom it belongs or is due or that the property should, under the circumstances of the case, be held by the court pending final disposition of the action.

A supporting memorandum must be filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; for discussion and a general form of memorandum, *see* Ch. 417, *Points and Authorities*].

This notice of motion should also be accompanied by an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]).

[3] Cross References

See generally Ch. 372, *Motions and Orders* , and Ch. 15, *Affidavits, Certificates, and Declarations*

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17-211 California Forms of Pleading and Practice--Annotated § 211.51

§ 211.51 Proceedings for Order Requiring Deposit in Court [Code Civ. Proc. §§ 572-574]--Order

[1] FORM Proceedings for Order Requiring Deposit in Court [Code Civ. Proc. §§ 572-574]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*]	)	ORDER REQUIRING DEPOSIT IN COURT
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*name of moving party*] for an order to deposit in court came on regularly for hearing by the court this date. _____ [Plaintiff *or* Defendant] _____ [*name of party against whom order is sought*] appeared by counsel _____ [*name*].

Upon proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and _____ [*name of party against whom motion made*] is ordered, on or before _____ [*date*] to _____ [deposit in court *or* deliver to _____ (*name*)] the following _____ [property *or* money] held by him/her/it: _____ [*specify property or sum of money*].

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, is for use if the court grants a motion for deposit in the court under *Code Civ. Proc. § 572*. A copy of the order should be served on the party against whom it is issued and the party's attorney so that the party will have such notice as will support an order for contempt in the event he or she fails to comply [*see People v. Superior Court (1965) 239 Cal. App. 2d 99, 104, 48 Cal. Rptr. 445* ; *In re Mancini (1963) 215 Cal. App. 2d 54, 56, 29 Cal. Rptr. 796* ; *see also Cox v. Tyrone Power Enterprises (1942) 49 Cal. App. 2d 383, 389, 121 P.2d 829* (order as no more inclusive than motion) and *Badella v. Miller (1955) 44 Cal. 2d 81, 85, 279 P.2d 729* (order effective when signed and filed)].

[3] Authorization to Receive Money Deposited in Court

Whenever money is paid into or deposited in the court, it shall be deposited with the court's treasury as provided in *Gov. C. § 68084* [*Code Civ. Proc. § 573*].

[4] Cross References

See generally Ch. 254, *Executions and Enforcement of Judgments* , and Ch. 318, *Judgments*

For additional comments and cross references, see *§ 211.50*

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17-211 California Forms of Pleading and Practice--Annotated § 211.52

§ 211.52 Application, Declaration, and Order Directing Sheriff, Constable, or Marshal to Enforce Order for Deposit or Delivery [Code Civ. Proc. § 574]

[1] FORM Application, Declaration, and Order Directing Sheriff, Constable, or Marshal to Enforce Order for Deposit or Delivery [Code Civ. Proc. § 574]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	APPLICATION FOR ORDER DIRECTING
Defendant.	)	_____ [SHERIFF *or* CONSTABLE
	)	*or* MARSHAL] TO ENFORCE ORDER FOR
	)	_____ [DEPOSIT *or* DELIVERY],
		SUPPORTING DECLARATION OF
		_____ [*name*], SUPPORTING
		MEMORANDUM OF POINTS AND AUTHORIT-
		IES, AND ORDER

_____

APPLICATION

_____ [*Name of party*] hereby applies for an order pursuant to the provisions of *Section 574 of the Code of Civil Procedure* directing the _____ [sheriff *or* constable *or* marshal] to _____ [deposit in court *or* deliver to _____ (*name of moving party*)] the property described in the order of this court on _____ [*date*].

SUPPORTING DECLARATION OF _____ [*name*]

In support of this application, I, _____ [*name of attorney*], declare:

1. I am an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record for _____ [*specify moving party*].

2. On _____ [*date*], this court issued an order that _____ [*name of party*] _____ [deposit in court *or* deliver to _____ (*name*)] on or before _____ [*date*], the following _____ [property *or* money] held by him/her/it: _____ [*describe property*]. The court found that he/she/it did not have any right to retain the property but was holding it in trust for _____ [*name of moving party*].

3. _____ [*Name of party*] failed to comply with this order on or before _____ [*date*], and continues to fail to comply with this order.

[4. _____ (*State any other facts showing that party against whom order directed has present ability to comply with order*).]

5. [_____ (*If required by local rule or practice or if otherwise appropriate, state any facts showing informal attempts to obtain compliance with order*).]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*signature*]

_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*State points and authorities under Code Civ. Proc. § 574 in support of application*]

ORDER

It appearing that on _____ [*date*], the court ordered _____ [*name of party holding property or money and ordered to deposit or deliver it*] to _____ [deposit in court *or* deliver] _____ [*describe property or state amount of money*]; and it further appearing that _____ [*name of party ordered to deposit or deliver*] has failed to comply with the order [although he/she/it has the present ability to comply with the order],

IT IS ORDERED that the _____ [sheriff *or* constable *or* marshal] take the property from _____ [*name of person in possession or control of property and ordered to deposit or deliver it*] and _____ [deposit *or* deliver] the same in accordance with the order of this court dated _____ [*date*].

[_____ (*Specify any further conditions of order*).]

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

Judge of the _____ Court

[2] Use of Form

The form of application, supporting declaration and memorandum of points and authorities, and order set out in [1], *above,* is for use in enforcing an order requiring deposit under *Code Civ. Proc. § 572*, when a party disobeys that order.

Code Civ. Proc. § 574 provides simply that a court may make an order directing an officer to take the money or property and deposit or deliver it in accordance with the prior order under *Code Civ. Proc. § 572*. Thus, there is no express requirement that the order be made on motion or application. Any application for an order under *Code Civ. Proc. § 572* should at least, however, conform to the requirments applicable to ex parte applications generally [*see Cal. Rules of Ct., Rule 3.1200-3.1207*; for detaileddiscussion of these requirements and a skeletal form of ex parte application, *see* Ch. 372, *Motions and Orders*].

Because the court may make this order "beside punishing the disobediance" [*Code Civ. Proc. § 574*], this order is sometimes sought together with a judgment of contempt. Sometimes contempt proceedings alone are pursued [*see Frey v. Superior Court (1913) 22 Cal. App. 421, 425-426, 134 P. 733* (order under *Code Civ. Proc. § 572* may be enforced by proceedings in contempt); *see also In re Elias (1962) 209 Cal. App. 2d 262, 268, 269, 25 Cal. Rptr. 739]* .

[3] Cross References

For discussion and forms relating to contempt proceedings generally, see Ch. 135, *Contempt*

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17-211 California Forms of Pleading and Practice--Annotated § 211.53

§ 211.53 Application for Order Directing Auditor or Controller to Issue Warrant and for County Treasurer to Pay Money on Deposit in Court [Gov. Code § 68084]

[1] FORM Application for Order Directing Auditor or Controller to Issue Warrant and for County Treasurer to Pay Money on Deposit in Court [Gov. Code § 68084]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	APPLICATION FOR ORDER DIRECTING
Defendant.	)	_____ [AUDITOR *or* CONTROL-
	)	LER] TO DRAW WARRANT AND TREASURER
	)	TO PAY MONEY ON DEPOSIT

_____ [Plaintiff *or* Defendant] _____ [*name*] hereby applies for an order directing the _____ [auditor *or* controller] of _____ County, California, to draw his/her warrant for the sum of $_____ in favor of _____ [*name of party entitled to money*], and the treasurer of this county to pay said warrant with money heretofore deposited by _____ [*name of depositing party*].

The sum of $_____ was deposited by _____ [*name of depositing party*] on _____, [*date*], as and for _____ [*state reason for deposit*], and subject to the following terms and conditions: _____ [*state any terms and conditions of deposit*].

_____ [*Name of person claiming an interest in the deposited money*], residing at _____ [*address, including city and state*], and _____ [*name of person claiming an*

interest in the deposited money], residing at _____ [*address, including city and state*], also claim an interest in the deposited money on the basis of _____ [*state basis for claims of other persons*].

_____ [Plaintiff *or* Defendant] is entitled to receive the sum of $_____ and any interest earned therein for the reason(s) that _____ [*state reason(s) claimant is entitled to receive deposited funds*].

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*name*]

[Plaintiff *or* Defendant]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing application and know the contents thereof. The sameis true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], *above,* is for use in applying for an order directing the county treasurer to pay money or deliver property on deposit with the court as provided in *Code Civ. Proc. § 573* or in any action or proceeding when money has been deposited with the clerk or judge [*see Gov. Code § 68084*]. This form is based on the requirements for such an application specified in Los Angeles Co. Super. Ct. Rules, Rule 3.1(b), when the money or property is deposited with the court other than pursuant to *Code Civ. Proc. § 708.710 et seq.* (deposit of money owed by public agency to a judgment debtor) [*see also* San Bernardino Super. Ct. Rules, Rule 740.8 (imposing similar requirements)].

Both Los Angeles Co. Super. Ct. Rules, Rule 3.1(b) and San Bernardino Super. Ct. Rules, Rule 740.8 also state that the judge or commissioner may require the applicant to proceed by motion on notice to all interested persons. The rules do not otherwise provide guidelines for when notice may be required. Commonly, however, local court rules have no specific requirements for applying for money or property on deposit with the court. Local court practice should be consulted to determine if there is any general procedure to follow [*see* Santa Clara Co. Super. Ct. Rules, Rule 1.10(A) (order for payment of money required to be supported by affidavit setting forth right to specific amount shown and stating that amount is on deposit in treasurer's office)].

[3] Money Deposited

[a] With Treasurer

If any money is deposited with the clerk or judge of any superior court pursuant to any action or proceeding in the court, or pursuant to any order, decree, or judgment of the court, or when any money is to be paid to the court to be held in trust pursuant to any provision of Title 8 of the Government Code or the Code of Civil Procedure, that money must be deposited as soon as practicable after the receipt thereof with the treasurer and a duplicate receipt of the treasurer, for it must be filed with the auditor. The certificate of the auditor that a duplicate receipt has been filed is necessary before the clerk, judge, or party required to deposit the money is entitled to a discharge of the obligation imposed upon the clerk, judge, or party to make the deposit [*Gov. Code § 68084(a)*].

If any money deposited or paid is to be withdrawn or paid out, the order directing the payment or withdrawal must require the auditor to draw a warrant for it and the treasurer to pay it [*Gov. Code § 68084(b)*].

[b] In Interest-Bearing Bank Account

Money deposited into court and transferred to the custody of the county treasurer is deemed to be in the court's treasury, and interest earned thereon belongs to the court as trustee for the party ultimately entitled to receive it [*Ostly v. Saper (1957) 147 Cal. App. 2d 671, 675, 305 P.2d 946]* . Since a county treasurer receives money under *Code Civ. Proc. § 573* or *Gov. Code § 68084* subject to court order, he or she gets mere custody of such money, and any interest earned on the money belongs to the party ultimately entitled to receive it [*Metropolitan Water Dist. v. Adams (1948) 32 Cal. 2d 620, 627-628, 197 P.2d 543]* . *Gov. Code § 53844*, providing that all interest earned on funds in the county treasury shall be credited to the county general fund, is not applicable to court deposits. Absent a statutory directive that court deposits transferred to the county treasurer are to be placed in the county treasury, they must be placed in a special interest-bearing account for the benefit of the owner as required by *Code Civ. Proc. § 573*. [*Fresno Fire Fighters v. Jernagan (1986) 177 Cal. App. 3d 403, 407-408, 222 Cal. Rptr. 886]* .

No statute requires money deposited in a superior court to be deposited in an interest-bearing account, except for *Civ. Code § 1717(b)(2)* (tender and deposit in contract action), which requires that when any deposit is made pursuant to that section, the court shall, on the application of any party to the action, order the deposit to be invested in an insured, interest-bearing account, and that the interest on the amount is to be allocated to the parties in the same proportion as the original funds are allocated. However, superior courts are considered on a parity with other depositing local agencies within the meaning of *Gov. Code § 53630(a)* [*Ostly v. Saper (1957) 147 Cal. App. 2d 671, 675, 305 P.2d 946]* . So far as possible, money in the custody of such court and delivered to a county treasurer must be deposited in state or national banks, savings associations or federal associations, credit unions, or federally insured industrial loan companies in California, or must be invested as specified in *Gov. Code § 53635* [*see Gov. Code §§ 53630, 53635, 53637*]. Money deposited in a bank, savings association or federal association, state or federal credit union, or federally insured industrial loan company must be invested with the objective of realizing maximum return, consistent with prudent financial management [*Gov. Code § 53637*]. Municipal courts are exempted from this requirement, and money in the possession of a municipal court may, but need not, be deposited in a bank, savings and loan association, or credit union in an interest-bearing account [*Gov. Code § 53679*].

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17-211 California Forms of Pleading and Practice--Annotated § 211.54

§ 211.54 Order Directing Auditor or Controller to Issue Warrant and County Treasurer to Pay Money on Deposit [Gov. Code § 68084]

[1] FORM Order Directing Auditor or Controller to Issue Warrant and County Treasurer to Pay Money on Deposit [Gov. Code § 68084]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER DIRECTING _____
Defendant.	)	[AUDITOR *or* CONTROLLER] TO DRAW WAR-
	)	RANT AND TREASURER TO PAY MONEY ON
	)	DEPOSIT

_____

It appearing that there is on deposit with the county treasurer of _____ County, California, the sum of $_____ deposited by _____ [*name of depositing party*] as and for _____ [*state reason for deposit*], and it further appearing that _____ [*name of party entitled to money*] is entitled to the money so deposited,

IT IS ORDERED that the _____ [auditor *or* controller] of said county draw his/her warrant for the sum of $_____ in favor of _____ [*name of party entitled to money*], and that the treasurer of said county pay said warrant with money heretofore deposited by _____ [*name of depositing party*]. _____ [*date*]

_____ [*signature*]

_____ [*typed name*]

Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, is for use after money has been deposited with the county treasurer pursuant to *Code Civ. Proc. § 573*, a party has been found entitled to receive it, and an application for a payment order has been made.

[3] Cross References

For additional comments and cross references, see *§ 211.53*

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Chapter 212 DISMISSAL

17-212 California Forms of Pleading and Practice--Annotated 212.syn

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§ 212.syn Synopsis to Chapter 212: DISMISSAL

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§ 212.02 Cross References

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§ 212.10 Dismissal Defined

§ 212.11 Types of Dismissal

§ 212.12 Dismissal With and Without Prejudice

[1] Distinguished

[2] Voluntary Dismissals May Be Either

[3] Involuntary Dismissals Are Without Prejudice

§ 212.13 Effect of Cross Complaint on Dismissal Without Prejudice

§ 212.14 Effect of Trial Delay Reduction Programs

[1] Local Rules Govern

[2] Dismissal of DOE Defendants

§§ 212.15-212.29 [Reserved]

§ 212.30 Governing Law

§ 212.31 Voluntary Dismissal Defined

§ 212.32 Statutory Definitions

§ 212.33 Purpose of Voluntary Dismissal

§ 212.34 Types of Voluntary Dismissal

§ 212.35 Requesting Voluntary Dismissal

§ 212.36 Voluntary Dismissal Before Trial

[1] Plaintiff's Right to Request Voluntary Dismissal

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[a] Defendant Seeks Affirmative Relief or Transfer

[b] Improper Under Trial Court Delay Reduction Rules to Dismiss for Purpose of "Judge Shopping"

[c] Demurrer Has Been Sustained

[d] In Lieu of Opposition to a Defendant's Summary Judgment Motion

[e] When Evidence Presented Before Referee in Partition Proceeding

[f] Avoidance of Discovery Sanctions

[g] Plaintiff Is Not Real Party in Interest

[h] Effect Is to Dismiss an Indispensable Party

[i] After Adverse Arbitration Award

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[1] By Request

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§ 212.39 Dismissal in Trial Court Delay Reduction Action

§ 212.40 Effects of Voluntary Dismissal

[1] Effect on Rights of Other Parties

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§ 212.41 Appeal After Voluntary Dismissal

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§ 212.60 Involuntary Dismissal Defined

§ 212.61 Principal Governing Law

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[2] Statutory Definitions

[3] Statutory Policy and Construction

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§ 212.62 Other Authority for Involuntary Dismissal

[1] Not Limited by Code Civ. Proc. § 583.110 et seq.

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[a] Neither Party Appears

[b] Either Party Fails to Appear

[4] As Sanction Under Statute

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[6] Court's Inherent Power

§ 212.63 Recovery of Costs and Attorney's Fees Following Involuntary Dismissal

§ 212.64 Relief From Dismissal Under Code Civ. Proc. § 473

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§ 212.80 Motion to Dismiss as Response to Complaint

§ 212.81 Not a General Appearance

§ 212.82 Notice of Motion

[1] Time for Motion

[2] Notice Extends Time to Respond

§ 212.83 Review of Denial of Motion

[1] Writ of Mandate

[2] Notice Extends Time to Respond Pending Review

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§ 212.100 Mandatory Dismissal for Delay in Serving Summons and Complaint

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[1] Basic Time Period: Three Years Plus 60 Days

[2] Commencement of Time Period for Service

[3] When Service Is Complete

[a] Service of Summons on Defendant

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[1] Effect of Stipulation or General Appearance

[2] Acts Constituting General Appearance

[a] By Statutory Definition

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[4] In Case Involving Cross Complaint

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§ 212.104 Time Excluded From Computation of Period

[1] Time During Which Defendant Not Amenable to Process

[2] Stay Affecting Service

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§ 212.105 Additional Requirements Under Trial Court Delay Reduction Act

§ 212.106 Nonapplicability of Statutes Tolling Statutes of Limitation

§ 212.107 Defenses to Motion for Dismissal for Delay in Service

[1] Defenses Limited by Statute

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§§ 212.108-212.119 [Reserved]

§ 212.120 Mandatory Dismissal for Delay in Bringing Action to Trial or Retrial

[1] Failure to Bring Case to Trial Within Statutory Period

[2] Special Rule Re Dismissal of Petition for Dissolution of Marriage

[3] Dismissal Order Possible Before Expiration Date

§ 212.121 Period for Bringing Action to Trial

[1] Five-Year Period

[2] Commencement of Period

[a] To Bring to Trial

[b] To Bring to Arbitration

§ 212.122 Period for Bringing Action to New Trial

[1] Three-Year Period Generally

[2] After Mistrial

[3] After Order Granting New Trial

[4] After Remittitur for New Trial

§ 212.123 When Action Is Brought to Trial or New Trial

[1] Commencement of Trial

[a] In Jury Case

[b] In Nonjury Case

[c] In Judicially Arbitrated Case

[2] Pretrial Disposition on Merits

[3] Effect of Bringing Action to Trial

[4] Partial Trial

§ 212.124 Extension of Time for Trial by Stipulation

[1] Stipulation by Parties

[2] Construction of Stipulation

§ 212.125 Exclusions From Computation of Time Period

[1] All Exclusions Statutory

[2] Suspension of Court's Jurisdiction

[3] Stay or Injunction of Prosecution of Action

[4] Impossibility, Impracticability, or Futility

[a] When Tolling Applicable

[b] Reasonable Diligence Required

[c] Situations in Which Exclusion May Be Applicable

[i] Court Congestion

[ii] Court Fails to Perform Duty

[iii] Disability of Counsel

[iv] Multiple Defendants

[v] Separate Action Pending

[vi] Default Entered

[d] Situations in Which Exclusion Is Inapplicable

[i] Delay Due to Ordinary, Usual, Proceedings in Course of Prosecution of Action

[ii] Inexcusable Error of Plaintiff's Counsel

[iii] Incapacity of Plaintiff That Does Not Prevent Bringing Action to Trial

[5] Other Statutory Time Extensions

[a] Submission of Action to Judicial Arbitration

[b] Submission of Action to Mediation

[c] Party in Military Service

[d] Review of Determination of Good Faith Settlement

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§ 212.292 Proceedings for Writ of Mandate [Code Civ. Proc. § 1086] to Compel Lower Court to Enter Order Dismissing Action for Delay in Prosecution [Code Civ. Proc. § 418.10(c)]--Notice of Filing of Petition

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[10] Text References

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[1] FORM

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[1] FORM

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[1] FORM

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[1] FORM

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[1] FORM

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[3] Cross References

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[1] FORM

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[1] FORM

[2] Use of Form

[3] Cross References

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FOOTNOTES:
(n41)Footnote *.
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Chapter 212 DISMISSAL

PART I. SCOPE

17-212 California Forms of Pleading and Practice--Annotated § 212.01

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§ 212.01 Scope of Chapter

This chapter covers the grounds, conditions, and procedures for obtaining a voluntary dismissal of an action [*see § 212.30* et seq.]. This chapter also includes a checklist for voluntary dismissal [*see § 212.210* et seq.] and relevant forms [*see § 212.270* et seq.].

This chapter also covers involuntary dismissal for delay in prosecution with the following topics:

- An overview of involuntary dismissal [*see § 212.60* et seq.].
- Motion to dismiss as a response to the complaint [*see § 212.80* et seq.].
- Mandatory dismissal for delay in serving the summons and complaint [*see § 212.100* et seq.].
- Mandatory dismissal for delay in bringing an action to trial or new trial [*see § 212.120* et seq.].
- Discretionary dismissal for delay in service or bringing an action to trial [*see § 212.150* et seq.].

This chapter also provides procedural checklists [*see § 212.230* et seq. and the following forms:

- A notice of motion for dismissal if the motion is to be made within time to answer without making a general appearance [*see § 212.290*] and a petition of writ of mandate [*see § 212.291*] and of notice of petition [*see § 212.292*] to seek review if the motion is denied.

- A stipulation extending the time within which to bring an action to trial [*see § 212.298*].

- Notices of motion for mandatory [*see §§ 212.293 -212.294*] and discretionary [*see §§ 212.296* and *212.297*] dismissal.

- Written statement [*see § 212.299*] and declaration [*see § 212.300*] to oppose dismissal.

- Orders of dismissal [*see §§ 212.301 -212.306*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotionsCivil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsStipulationsCivil ProcedureRemediesWritsCommon Law WritsMandamus

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PART I. SCOPE

17-212 California Forms of Pleading and Practice--Annotated § 212.02

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§ 212.02 Cross References

For forms involving dismissal in specific substantive actions or proceedings, see the specific article relating to that action or proceeding and the General Index

For forms involving dismissal in specific substantive actions or proceedings, see the specific article relating to that action or proceeding and the General Index

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Chapter 212 DISMISSAL
PART I. SCOPE

17-212 California Forms of Pleading and Practice--Annotated §§ 212.03-212.09

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[Reserved]

§§ 212.03[Reserved]

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Chapter 212 DISMISSAL
PART II. LEGAL BACKGROUND
A. In General

17-212 California Forms of Pleading and Practice--Annotated § 212.10

AUTHOR: HON. PATTI S. KITCHING BARBARA A. REEVES CHARLES PEREYRA-SUAREZ EDITORIAL CONSULTANTS Justice Kitching, an Associate Justice of the California Court of Appeal, Second Appellate District, Division Three, was formerly a Judge of the Los Angeles Superior Court, where her assignments included the law and motion department. Barbara A. Reeves is a partner with Fried, Frank, Harris, Shriver & Jacobson, Los Angeles, California. Her areas of litigation expertise include intellectual property, securities, fraud, contract, international trade, antitrust, environmental coverage, and white-collar criminal defense. Charles Pereyra-Suarez is a partner in McKenna & Cuneo and heads the Litigation Department in the Los Angeles office. He also has served as a judge pro tem of the Los Angeles County Municipal and Superior Courts since 1986. This article was adapted from California Practice Handbook: Pretrial Disposition (Matthew Bender), Litigation Section, Los Angeles County Bar Associate, Handbook Editor; Hon. Patti S. Kitching, Barbara A. Reeves, Charles Pereyra-Suarez, Contributing Editors.

§ 212.10 Dismissal Defined

Dismissal of an action is a termination of the court's consideration of a case prior to completion of a full trial of the issues of fact [*Schisler v. Mitchell (1959) 174 Cal. App. 2d 27, 29, 344 P.2d 61]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsGeneral Overview

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Chapter 212 DISMISSAL
PART II. LEGAL BACKGROUND
A. In General

17-212 California Forms of Pleading and Practice--Annotated § 212.11

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§ 212.11 Types of Dismissal

A dismissal may be voluntary, by the party filing the action [*see Code Civ. Proc. § 581(b)(1), (2), (e)*; *see* Part I, *below*], or involuntary, by the court [*see Code Civ. Proc. §§ 581(b)(3)-(5), (d), (f)-(i), (l), 583.110 et seq.*; *see* Part II, *below*].

Involuntary dismissals by the court are either discretionary [*see, e.g., Code Civ. Proc. § 583.410-583.430*; *see* Part II, Introduction, Subpart E, *below*] or mandatory, in the sense it is required under certain circumstances unless some express statutory exception or excuse applies [*see Code Civ. Proc. §§ 583.250, 583.360*; *see* Part II, Introduction, Subparts C and D, *below*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsGeneral Overview

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PART II. LEGAL BACKGROUND
A. In General

17-212 California Forms of Pleading and Practice--Annotated § 212.12

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§ 212.12 Dismissal With and Without Prejudice

[1] Distinguished

A judgment of dismissal that is not rendered on the merits does not bar the filing of a subsequent action based on the same facts [*Stephan v. American Home Builders (1971) 21 Cal. App. 3d 402, 406, 98 Cal. Rptr. 354* ; *see Hill v. City of Clovis (1998) 63 Cal. App. 4th 434, 445, 73 Cal. Rptr. 2d 638* (dismissal risks applicable statute of limitations will run before party in position to renew dismissed action); *Troche v. Daley (1990) 217 Cal. App. 3d 403, 412, 266 Cal.Rptr. 34* (subsequent action is subject to applicable statute of limitations)]. Such a dismissal is said to be without prejudice [*see Kinley v. Alexander (1955) 137 Cal. App. 2d 382, 387, 290 P.2d 287]* .

A dismissal with prejudice, on the other hand, is a final judgment on the merits and bars a subsequent action on the same cause [*Gagnon Co., Inc. v. Nevada Desert Inn (1955) 45 Cal. 2d 448, 455, 289 P.2d 466]* . A dismissal with prejudice may occur because there was actually a determination on the merits; the parties reached a settlement and the dismissal was intended to act as a retraxit, that is, a final disposition on the merits; or because of a statutory requirement for dismissal with prejudice [*see Code Civ. Proc. § 581(d), (e)*; *Goddard v. Security Title Ins. & Guar. Co.(1939) 14 Cal. 2d 47, 55, 92 P.2d 804* ; *Stephan v. American Home Builders (1971) 21 Cal. App. 3d 402, 407, 98 Cal. Rptr. 354* ; *see also Torrey Pines Bank v. Superior Court (1989) 216 Cal. App. 3d 813, 819-820, 265 Cal. Rptr. 217]* .

A dismissal that does not specify whether it was with or without prejudice should be deemed to be with prejudice absent a contrary contention by the plaintiff [*Tudor Ranches, Inc. v. State Comp. Ins. Fund (1998) 65 Cal. App. 4th 1422, 1430, 77 Cal. Rptr. 2d 574]* .

[2] Voluntary Dismissals May Be Either

With respect to voluntary dismissals under *Code Civ. Proc. § 581* (*see* Part I, Introduction, *below*), if the dismissal is made by the clerk's entry, it is presumed to be without prejudice, but if the dismissal is entered in open court pursuant to a stipulation or motion addressed to the court, it is ordinarily effective as a retraxit [*Lewis v. Johnson (1939) 12 Cal. 2d 558, 563, 86 P.2d 99]* .

[3] Involuntary Dismissals Are Without Prejudice

Involuntary dismissals under *Code Civ. Proc. §§ 583.110-583.430* for delay in prosecution (*see* Part II, *below*), are always without prejudice because they are not considered to be on the merits [*Code Civ. Proc. § 581(b)(4)* and *(g)*; *Watson v. Superior Court (1972) 24 Cal. App. 3d 53, 60, 100 Cal. Rptr. 684* (prior law), disapproved on another ground in *Hocharian v. Superior Court (1981) 28 Cal. 3d 714, 722 n. 5, 170 Cal. Rptr. 790, 621 P.2d 829* ; *see also Ashworth v. Memorial Hospital (1988) 206 Cal. App. 3d 1046, 1063, 1063 ns.2, 3, 254 Cal. Rptr. 104]* .

As a practical matter, however, a new action is often barred by the statute of limitations, even though the dismissal was without prejudice [*Stephan v. American Home Builders (1971) 21 Cal. App. 3d 402, 407, 98 Cal. Rptr. 354]* . Even though the filing of the complaint may have tolled the statute, once the action is dismissed the limitation period is restored as if no action had been brought [*Wood v. Elling Corp. (1977) 20 Cal. 3d 353, 359, 142 Cal. Rptr. 696, 572 P.2d 755]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals With PrejudiceCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals Without Prejudice

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Chapter 212 DISMISSAL
PART II. LEGAL BACKGROUND
A. In General

17-212 California Forms of Pleading and Practice--Annotated § 212.13

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§ 212.13 Effect of Cross Complaint on Dismissal Without Prejudice

The right to bring a new action within the limitations period following voluntary dismissal of a first complaint without prejudice pursuant to *Code Civ. Proc. § 581(c)* is not absolute when there is a related cross-complaint pending in the original action. The compulsory cross complaint statute, *Code Civ. Proc. § 426.30*, precludes the plaintiff from bringing a new action based on claims arising from the same transaction that was the basis of a cross complaint in the first action [*Carroll v. Import Motors, Inc. (1995) 33 Cal. App. 4th 1429, 1435-1436, 39 Cal. Rptr. 2d 791* ; *see also* *Hill v. City of Clovis (1998) 63 Cal. App. 4th 434, 445, 73 Cal. Rptr. 2d 638* (voluntary dismissal does not protect cross-complainant from later contention that dismissed cause of action in cross-complaint was compulsory and therefore required to be brought and adjudicated in action initiated by plaintiff)].

Rather than filing a second action, the proper course in this situation is for the plaintiff to request leave of court to file a late compulsory cross complaint in the first action [*Carroll v. Import Motors, Inc. (1995) 33 Cal. App. 4th 1429, 1436, 39 Cal. Rptr. 2d 791* ; *see Code Civ. Proc. § 426.50*; for discussion of Section 426.50, *see* Ch. 123, *Complaints and Cross Complaints*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersConditionsCivil ProcedureDismissalsVoluntary DismissalsNoticesDismissals Without PrejudiceGovernmentsLegislationStatutes of LimitationsTime Limitations

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17-212 California Forms of Pleading and Practice--Annotated § 212.14

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§ 212.14 Effect of Trial Delay Reduction Programs

[1] Local Rules Govern

Superior Courts in all California counties are required to implement delay reduction programs [*Gov. Code §§ 68605.5, 68620(a)*]. Local court rules implementing the Trial Court Delay Reduction Act govern much of the procedure, particularly impacting on time requirements [*see Gov. Code §§ 68607, 68612, 68616*].

The local rules are restricted by *Gov. Code § 68616*, which provides some minimum time standards. Local rules cannot impose shorter time limits than authorized by Section 68616. Issues that may arise under trial court delay reduction rules and affect voluntary or involuntary dismissal are discussed in Parts I and II, respectively.

For further discussion, see Ch. 552, *Trial Court Delay Reduction* .

[2] Dismissal of DOE Defendants

One restriction precludes local delay reduction rules from requiring the dismissal or severance of unnamed (DOE) defendants prior to the conclusion of the introduction of evidence at trial, except on stipulation or on motion of the parties [*Gov. Code § 68616(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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17-212 California Forms of Pleading and Practice--Annotated §§ 212.15-212.29

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[Reserved]

§§ 212.15[Reserved]

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17-212 California Forms of Pleading and Practice--Annotated § 212.30

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§ 212.30 Governing Law

The principal statute governing dismissal of actions is *Code Civ. Proc. § 581*. The statutory grounds for obtaining a voluntary dismissal are contained in *Code Civ. Proc. § 581(b)(1)* (prior to trial), (2) (written consent of parties), and (e) (after commencement of trial). Section 581 is not to bedeemed an exclusive enumeration of the court's power to dismiss an action or a complaint as to a defendant [*Code Civ. Proc. § 581(m)*].

Legal Topics:

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

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17-212 California Forms of Pleading and Practice--Annotated § 212.31

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§ 212.31 Voluntary Dismissal Defined

Dismissal of an action is a termination of the court's consideration of a case prior to completion of a full trial of the issues of fact [*Schisler v. Mitchell (1959) 174 Cal. App. 2d 27, 29, 344 P.2d 61]* .

"Voluntary dismissal" refers to a dismissal that is requested by the plaintiff or taken with the plaintiff's express consent [*see Code Civ. Proc. § 581(b)(1), (2), (e)*; *Datner v. Mann Theatres Corp. (1983) 145 Cal. App. 3d 768, 770, 193 Cal. Rptr. 676* (using term "voluntary dismissal" to refer to dismissal requested by plaintiff before trial); *cf.* discussion of involuntary dismissal in Part II, *below*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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17-212 California Forms of Pleading and Practice--Annotated § 212.32

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§ 212.32 Statutory Definitions

The following definitions apply with respect to voluntary dismissals under *Code Civ. Proc. § 581*:

- "Action" means any civil action or special proceeding [*Code Civ. Proc. § 581(a)(1)*].
- "Complaint" means a complaint and a cross complaint [*Code Civ. Proc. § 581(a)(2)*].
- "Court" means the court in which the action is pending [*Code Civ. Proc. § 581(a)(3)*].
- "Defendant" includes a cross defendant [*Code Civ. Proc. § 581(a)(4)*].
- "Plaintiff" includes a cross complainant [*Code Civ. Proc. § 581(a)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 212.33 Purpose of Voluntary Dismissal

The purpose of the voluntary dismissal provisions is to afford a plaintiff a limited degree of freedom in controlling the course of litigation that he or she has initiated [*see Wilson v. L.A. County Civil Service Com. (1954) 126 Cal. App. 2d 679, 684, 273 P.2d 34]* .

Legal Topics:

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17-212 California Forms of Pleading and Practice--Annotated § 212.34

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§ 212.34 Types of Voluntary Dismissal

Code Civ. Proc. § 581 provides for three basic categories of voluntary dismissal:

- An action may be dismissed by the plaintiff, for any reason, at any time before the actual commencement of trial, by filing or making a request as provided in *Code Civ. Proc. § 581(b)(1)* [*Code Civ. Proc. § 581(b)(1)*; *see § 212.36*].

- Any party may dismiss an action with the written consent of all other parties [*Code Civ. Proc. § 581(b)(2)*; *see § 212.37*].

- A plaintiff may request the dismissal (with prejudice) of a complaint, or any of the causes of action asserted in it, after commencement of trial [*Code Civ. Proc. § 581(e)*; *see § 212.38*].

In addition, a voluntary dismissal will be implied if plaintiff abandons the case after commencement of trial [*see Code Civ. Proc. § 581(d)*; *see also § 212.37[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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17-212 California Forms of Pleading and Practice--Annotated § 212.35

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§ 212.35 Requesting Voluntary Dismissal

A request for voluntary dismissal must be made on the mandatory Judicial Council Form CIV-110 "Request for Dismissal" [*see Cal. Rules of Ct., Rule 1.31*; *see also § 212.270*].

A party requesting dismissal under *Code Civ. Proc. § 581(b)(1), (2)*, or *(e)* must file a notice of entry of the dismissal on mandatory Judicial Council Form CIV-120 "Notice of Entry of Dismissal and Proof of Service" [*Cal. Rules of Ct., Rule 3.1390*; *see § 212.271*].

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17-212 California Forms of Pleading and Practice--Annotated § 212.36

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§ 212.36 Voluntary Dismissal Before Trial

[1] Plaintiff's Right to Request Voluntary Dismissal

An action may be dismissed with or without prejudice by the plaintiff, for any reason, at any time before the actual commencement of trial, by filing or making a request as provided in *Code Civ. Proc. § 581(b)(1)* [*Code Civ. Proc. § 581(b)(1)*; *see Kyle v. Carmon (1999) 71 Cal. App. 4th 901, 908-909, 84 Cal. Rptr. 2d 303]* . For purposes of Section 581, a "trial" is deemed to commence at the beginning of the opening statement or argument of any party or his or her counsel, or if there is no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence [*Code Civ. Proc. § 581(a)(6)*; *see Kyle v. Carmon (1999) 71 Cal. App. 4th 901, 908-909, 84 Cal. Rptr. 2d 303]* . This language, however, has been held to be illustrative rather than exclusive of the circumstances under which a trial has begun [*Gray v. Superior Court (1997) 52 Cal. App. 4th 165, 171, 60 Cal. Rptr. 2d 428]* .

With some exceptions (*see, e.g., discussion under § 212.36[2]*), voluntary dismissal before trial is a matter of right and may be exercised by plaintiff without the knowledge of other parties or the consent of the court [*Roski v. Superior Court (1971) 17 Cal. App. 3d 841, 845, 95 Cal. Rptr. 312]* . When plaintiff files a voluntary dismissal within the time provided by statute, the court is stripped of jurisdiction to dismiss a case for failure to prosecute [*Franklin Capital*

Corp. v. Wilson (2007) 148 Cal. App. 4th 187, 192 n.6, 55 Cal. Rptr. 3d 424] .

Plaintiff's voluntary dismissal of the complaint leaves undisturbed pending cross-complaints involving other cross-complainants and cross-defendants [*Sanabria v. Embrey (2001) 92 Cal. App. 4th 422, 425, 111 Cal. Rptr. 2d 837]* .

The entry of a properly filed request for dismissal is not a judicial act but a ministerial one [*Parenti v. Lifeline Blood Bank (1975) 49 Cal. App. 3d 331, 335, 122 Cal. Rptr. 709* , disapproved on another ground in *Wells v. Marina City Properties, Inc., (1981) 29 Cal. 3d 781, 789, 176 Cal. Rptr. 104, 632 P.2d 217]* . When a plaintiff has an absolute right to dismiss an action and does everything within his or her power to comply with the applicable statute, a trial court is without power to prevent the filing of the request for dismissal, and a court clerk is without power to prevent entry of dismissal [*see* *Aetna Casualty & Surety Co. v. Humboldt Loaders, Inc. (1988) 202 Cal. App. 3d 921, 931, 249 Cal. Rptr. 175* (decided under former *Code Civ. Proc. § 581(1)*)].

For further discussion, see *§ 212.270*. For a checklist of the procedure for making a request for voluntary dismissal, see *§ 212.210*.

[2] Limits on Availability of Voluntary Dismissal

[a] Defendant Seeks Affirmative Relief or Transfer

Voluntary dismissal without prejudice before trial is not available in either of the following situations [*Code Civ. Proc. § 581(i)*]:

- If the defendant or an intervenor seeks affirmative relief in a cross complaint or complaint in intervention.

- If there is a motion pending for an order transferring the action to another court under *Code Civ. Proc. § 396b* (for discussion, *see* Ch. 571, *Venue*).

A pleading is not considered to seek affirmative relief unless it contains, plainly on its face, affirmative allegations or introduces new affirmative matter entitling the pleader to relief [*In re Mercantile Guaranty Co. (1968) 263 Cal. App. 2d 346, 351, 69 Cal. Rptr. 361]* .

ILLUSTRATION:

Right to Dismiss Unaffected by Answer in Declaratory Relief Action. In a declaratory relief action brought by an insurance company against its insureds and others claiming coverage under a liability policy, the persons claiming coverage interpose an answer requesting a judicial declaration in favor of policy coverage, and make allegations in the answer that denial of coverage was the product of bad faith. Have the persons claiming coverage defeated the insurer's right to voluntarily dismiss the declaratory relief action? No. Neither the answer nor the allegations in the answer qualify as a cross complaint or as a request for affirmative relief to defeat the insurer's absolute right to dismiss [*Aetna Casualty & Surety Co. v. Humboldt Loaders, Inc. (1988) 202 Cal. App. 3d 921, 927-929, 249 Cal. Rptr. 175* (decided under former *Code Civ. Proc. § 581(1)*; *now see Code Civ. Proc. § 581(b)(1), (i)*)].

In a partition action, however, contrary to normal pleading procedure, a defendant may seek affirmative relief in his or her answer which avoids the need for the defendant to file a cross-complaint seeking such relief [*Code Civ. Proc. § 872.430*;Gray v. Superior Court (1997) 52 Cal. App. 4th165, 168 n.2, *60 Cal. Rptr. 2d 428]* . Thus, a defendant who requests affirmative relief in his or her answer in a partition action may invoke *Code Civ. Proc. § 581(i)* as a bar to a voluntary dismissal [*Gray v. Superior Court (1997) 52 Cal. App. 4th 165, 174, 60 Cal. Rptr. 2d 428* (dismissal

inappropriate in partition action when defendant requested affirmative relief in answer)].

A voluntary dismissal without prejudice erroneously obtained in violation of the limitations imposed under *Code Civ. Proc. § 581(i)* will be treated as a dismissal with prejudice [*see Hehr v. Swendseid (1966) 243 Cal. App. 2d 142, 150-151, 52 Cal. Rptr. 107* (decided under former *Code Civ. Proc. § 581(a)*)].

[b] Improper Under Trial Court Delay Reduction Rules to Dismiss for Purpose of "Judge Shopping"

Local rule may state a policy against dismissing and refiling to obtain a different judge. For example, Los Angeles Superior Court rules provide that if a case is dismissed by the party (or by the judge) prior to judgment and the same or essentially the same claims, involving the same or essentially the same parties are alleged in another action, the later filed action is to be assigned to the judge to whom the first case was assigned. As an exception, the presiding judge may, for good cause, order that the case be assigned to a different judge [Los Angeles Co. Super. Ct. Rules, Rule 7.3(d); *see also § 212.14[1]*].

[c] Demurrer Has Been Sustained

A plaintiff's right to a voluntary dismissal without prejudice under *Code Civ. Proc. § 581(b)(1)* is terminated by a decision sustaining a demurrer to his or her complaint without leave to amend [*see Goldtree v. Spreckels (1902) 135 Cal. 666, 673, 67 P. 1091* (decided under former *Code Civ. Proc. § 581*); *Bell v. Hummel (1982) 136 Cal. App. 3d 1009, 1015, 186 Cal. Rptr. 688* (decided under former *Code Civ. Proc. § 581*; overruled on other grounds in *Laird v. Blacker (1992) 2 Cal. 4th 606, 617, 7 Cal. Rptr. 2d 550, 828 P.2d 691 , cert. denied, 506 U.S. 1021*)].

The right to voluntary dismissal without prejudice is also terminated if a demurrer to the plaintiff's complaint is sustained with leave to amend and the plaintiff fails to amend within the time authorized by the court, as extended by stipulation or order, even if the trial court has not yet entered a judgment of dismissal on the sustained demurrer [*Wells v. Marina City Properties, Inc. (1981) 29 Cal. 3d 781, 789, 176 Cal. Rptr. 104, 632 P.2d 217]* . In these cases the court may dismiss the complaint as to the defendant [*Code Civ. Proc. § 581(f)(2)*].

On the other hand, when a demurrer is sustained with leave to amend, a plaintiff may obtain a voluntary dismissal without prejudice before the expiration of the time to amend [*Parsons v. Umansky (1994) 28 Cal. App.4th 867, 870-871, 34 Cal. Rptr. 2d 144]* . Similarly, after a demurrer has been sustained with leave to amend, a plaintiff may dismiss without prejudice while a demurrer to an amended complaint is pending decision [*Christensen v. Dewor Developments (1983) 33 Cal. 3d 778, 785, 191 Cal. Rptr. 8, 661 P.2d 1088]* . A plaintiff may also obtain voluntary dismissal without prejudice before the demurrer is heard and submitted for decision, even if the trial court has already made a tentative ruling sustaining the demurrer [*Datner v. Mann Theatres Corp. (1983) 145 Cal. App. 3d 768, 770-771, 193 Cal. Rptr. 676]* . It may even be possible to obtain a voluntary dismissal without prejudice after the demurrer has been submitted for decision but before the final decision is made [*see Wells v. Marina City Properties, Inc. (1981) 29 Cal. 3d 781, 789-790, 176 Cal. Rptr. 104, 632 P.2d 217* (dictum); *see also Kyle v. Carmon (1999) 71 Cal. App. 4th 901, 908-912, 84 Cal. Rptr. 2d 303* (voluntary dismissal with prejudice valid when entered after *Code Civ. Proc. § 425.16* motion to strike was taken under submission, but before court ruled on motion)].

[d] In Lieu of Opposition to a Defendant's Summary Judgment Motion

If the request for dismissal is filed prior to the time to file an opposition to a motion for summary judgment, then the dismissal is valid [*Zapanta v. Universal Care, Inc. (2003) 107 Cal. App. 4th 1167, 1172-1173, 132 Cal. Rptr. 2d 842]* . However, a plaintiff who attempts to dismiss the complaint after a motion for summary judgment has been filed, and the time for opposition has passed, is subject to the trial court's continuing jurisdiction to hear and rule on the pending motion. A plaintiff may not frustrate the summary judgment statute by interposing a voluntary dismissal without prejudice in lieu of opposition to a defendant's motion [*Cravens v. State Bd. of Equalization (1997) 52 Cal. App. 4th*

253, 255, 60 Cal. Rptr. 2d 436] . Thus, a trial court has the power to grant an unopposed defense motion for summary judgment when the defendants' moving papers have met their burden of negating the plaintiff's claims, entitling them to judgment as a matter of law if no issues of disputed fact are raised, and plaintiff, rather than filing opposition papers within the requisite time, files a request for dismissal without prejudice one day before the scheduled hearing date [*Cravens v. State Bd. of Equalization (1997) 52 Cal. App. 4th 253, 255, 257, 60 Cal. Rptr. 2d 436]* . The basis of *Cravens* is that a plaintiff who fails to oppose a summary judgment motion cannot evade the consequences of that failure by an adroit dismissal of the lawuit [*Mossanen v. Monfared (2000) 77 Cal. App. 4th 1402, 1409, 92 Cal. Rptr. 2d 459]* . Under other circumstances, dismissal may be proper [*see Mossanen v. Monfared (2000) 77 Cal. App. 4th 1402, 1409, 92 Cal. Rptr. 2d 459* (trial court erred in vacating dismissal and entering summary judgment when court had erroneously allowed counsel to withdraw leaving guardian ad litem powerless to oppose motion)].

Moreover, a plaintiff may not voluntarily dismiss an action without prejudice after an adverse tentative summary judgment ruling has been announced and a hearing has commenced which is thereafter continued under *Code Civ. Proc. § 437c(h)* for the express and exclusive purpose of permitting the plaintiff the opportunity to present opposition evidence that plaintiff claims was previously unavailable [*Mary Morgan, Inc. v. Melzark (1996) 49 Cal. App. 4th 765, 767, 57 Cal. Rptr. 2d 4]* . Furthermore, a summary judgment order bars voluntary dismissal [*Sweat v. Hollister (1995) 37 Cal. App. 4th 603, 614-615, 43 Cal. Rptr. 2d 399* ; *see Mary Morgan, Inc. v. Melzark (1996) 49 Cal. App. 4th 765, 769, 57 Cal. Rptr. 2d 4]* .

[e] When Evidence Presented Before Referee in Partition Proceeding

A plaintiff's right to dismiss his or her complaint at any time before the actual commencement of trial (*see Code Civ. Proc. § 581(b)(1)*) is cut off by the commencement of evidentiary proceedings before a referee appointed in a partition action. A trial has actually commenced when the parties appear and present evidence before the referee in the partition proceeding [*Gray v. Superior Court (1997) 52 Cal. App. 4th 165, 167, 173, 60 Cal. Rptr. 2d 428]* .

[f] Avoidance of Discovery Sanctions

A plaintiff may not defeat a defendant's motion for a terminating discovery sanction by filing a voluntary dismissal just before the sanction hearing. That tactic would simply defeat the trial court's power to enforce its discovery orders [*Hartbrodt v. Burke (1996) 42 Cal. App. 4th 168, 175-176, 49 Cal. Rptr. 2d 562]* .

[g] Plaintiff Is Not Real Party in Interest

If the plaintiff or petitioner is not the real party in interest, and the plaintiff or petitioner has a fiduciary duty to the real party in interest, dismissal may be granted only with court approval on a showing that the party or parties in whose name or names the lawsuit is instituted have been adequately protected [*see Marcarelli v. Cabell (1976) 58 Cal. App. 3d 51, 55, 129 Cal. Rptr. 509]* . The rule applies in the following proceedings:

- Probate proceedings [*see Malibu Outrigger Bd. of Governors v. Superior Court (1980) 103 Cal. App. 3d 573, 579, 165 Cal. Rptr. 1]* .

- Child custody matters [*Ford v. Superior Court (1959) 171 Cal. App. 2d 228, 230, 340 P.2d 296]* .

- Guardianship matters [*see Malibu Outrigger Bd. of Governors v. Superior Court (1980) 103 Cal. App. 3d 573, 579, 165 Cal. Rptr. 1]* .

- Shareholder derivative suits [*Marcarelli v. Cabell (1976) 58 Cal. App. 3d 51, 55, 129 Cal. Rptr. 509]* .

- Class actions [*see Cal. Rules of Ct., Rule 3.770* and discussion in *§ 212.36[2][k]*].

[h] Effect Is to Dismiss an Indispensable Party

When the dismissal affects one of two or more codefendants, the dismissal may be denied if the codefendant to be dismissed is an indispensable party to the action [*see Wilson v. Frakes (1960) 178 Cal. App. 2d 580, 582-584, 3 Cal. Rptr. 434]* .

[i] After Adverse Arbitration Award

Dismissal may be denied if the plaintiff requests it after demanding a trial de novo following a judicial arbitration award in defendant's favor. Dismissal under these circumstances would defeat the legislative policy of judicial arbitration. In such a case, the request for dismissal is deemed to repudiate the demand for a trial de novo and reinstate the arbitration award [*Herbert Hawkins Realtors, Inc. v. Milheiser (1983) 140 Cal. App. 3d 334, 337-340, 189 Cal. Rptr. 450]* .

[j] After Mandatory Dismissal Ruling but Before Order

The plaintiff has no right to voluntary dismissal of an action after the defendant has obtained a ruling dismissing the same action involuntarily, but before the order for involuntary dismissal has been filed [*M & R Properties v. Thomson (1992) 11 Cal. App. 4th 899, 900-901, 14 Cal. Rptr. 2d 579]* . When there is a conflict between a plaintiff's right to voluntary dismissal and a defendant's right to a mandatory dismissal, the defendant's right prevails [*M & R Properties v. Thomson (1992) 11 Cal. App. 4th 899, 905, 14 Cal. Rptr. 2d 579]* .

[k] Restrictions in Class Actions

No action may be dismissed that has been determined to be a class action under the provisions of the Code of Civil Procedure unless and until notice that the court deems adequate has been given, and the court orders dismissal [*Code Civ. Proc. § 581(k)*; *Cal. Rules of Ct., Rule 3.770*; *see Code Civ. Proc. § 382* (statutory authority for class action); *La Sala v. American Sav. & Loan Assn. (1971) 5 Cal. 3d 864, 868, 871, 97 Cal. Rptr. 849, 489 P.2d 1113* ; *see also Malibu Outrigger Bd. of Governors v. Superior Court (1980) 103 Cal. App. 3d 573, 579, 165 Cal. Rptr. 1* (holding that dismissal should have been granted in class action as matter of class protection)]. For discussion of the procedure for obtaining dismissal in class actions, see Ch. 120, *Class Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProceduresDismissalsVoluntary DismissalsGeneral OverviewCivil ProceduresSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProceduresSanctionsGeneral Overview

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17-212 California Forms of Pleading and Practice--Annotated § 212.37

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§ 212.37 Voluntary Dismissal After Commencement of Trial

[1] By Request

A plaintiff may request the dismissal of a complaint, or any of the causes of action asserted in it, in its entirety or as to any defendants, after commencement of trial [*Code Civ. Proc. § 581(e)*; *see also Code Civ. Proc. § 581(a)(6)* (defining "commencement of trial"; *discussed under § 212.36[1]*].

After commencement of trial dismissal is with prejudice, unless all affected parties consent that it be without prejudice or the court orders that the dismissal be without prejudice on a showing of good cause [*Code Civ. Proc. § 581(e)*; *see Davis v. Pine Mountain Lbr. Co. (1969) 273 Cal. App. 2d 218, 226-227, 77 Cal. Rptr. 825* ; *see also §§ 212.12, 212.38*].

A dismissal with prejudice before the court renders its decision will not have the effect of dismissing a cross complaint filed in the same action [*see Code Civ. Proc. § 581(e)*].

Code Civ. Proc. § 581(e) does not affect a plaintiff's right, prior to the entry of judgment, to abandon or dismiss one or more counts of the complaint that set forth alternative remedies to the counts on which plaintiff elected to stand [*Steele v. Litton Industries, Inc. (1968) 260 Cal. App. 2d 157, 171-172, 68 Cal. Rptr. 680* (holding that dismissal with

prejudice was not required when plaintiff dismissed alternative counts requesting equitable relief)].

[2] By Abandonment

During the period extending from the beginning of the trial to submission of the case, the court must dismiss a complaint with prejudice if the plaintiff abandons it [*see Code Civ. Proc. § 581(d)*].

Although by its terms *Code Civ. Proc. § 581(d)* grants the trial court independent authority to dismiss an action, the provision has been used solely as a mechanism by which a plaintiff, and not the court, voluntarily dismisses an action which has been abandoned [*Kaufman & Broad Bldg. Co. v. City & Suburban Mortg. Co. (1970) 10 Cal. App. 3d 206, 212-213, 88 Cal. Rptr. 858]* .

A voluntary dismissal under *Code Civ. Proc. § 581(d)* must be predicated on a clear, unequivocal, and express intent to abandon an action. That intent may be shown by a motion to dismiss, stipulation of the parties, or some other form of express intent on the record [*Kaufman & Broad Bldg. Co. v. City & Suburban Mortg. Co. (1970) 10 Cal. App. 3d 206, 212-213, 88 Cal. Rptr. 858]* .

ILLUSTRATION:

Abandonment Arising From Plaintiff's Motion to Dismiss: A plaintiff makes an insufficient showing of just cause on a motion fordismissal after commencement of trial under *Code Civ. Proc. § 581(e)*. May the court treat plaintiff's dismissal attempt as an abandonment if defendant insists on proceeding with trial? Yes [*see Burnett v. Burnett (1948) 88 Cal. App. 2d 805, 807, 199 P.2d 685]* .

As is true with voluntary dismissals under *Code Civ. Proc. § 581(b)* or *(e)*, the abandonment of the action under *Code Civ. Proc. § 581(d)* does not have the effect of dismissing a cross complaint filed in the action [*see Kershaw v. Hogan (1932) 127 Cal. App. 89, 90, 15 P.2d 535* (decided under former *Code Civ. Proc. § 581*].

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17-212 California Forms of Pleading and Practice--Annotated § 212.38

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§ 212.38 Voluntary Dismissal on Consent of Parties

Any party may dismiss an action with or without prejudice with the written consent of all other parties [*Code Civ. Proc. § 581(b)(2)*].

In addition, the parties may agree to limit the legal effect of the dismissal to the plaintiff dismissing the action [*see Manning v. Wymer (1969) 273 Cal. App. 2d 519, 523-527, 78 Cal. Rptr. 600]* .

ILLUSTRATION:

Limiting Effect to Dismissing Plaintiff. Parties who file separate complaints involving the same transaction enter into an agreement that dismissal with prejudice by one party of his or her action would not preclude other party from proceeding with the remaining action. Is such an agreement permissible? Yes. Parties may agree to limit the legal effect of a dismissal to the dismissing plaintiff [*see Manning v. Wymer (1969) 273 Cal. App. 2d 519, 523-527, 78 Cal. Rptr. 600]* .

Code Civ. Proc. § 581(e) also provides that all parties to the action may consent to a dismissal without prejudice after actual commencement of the trial. A defendant's failure to object to dismissal without prejudice is sufficient to establish consent under *Code Civ. Proc. § 581(e)* [*Davis v. Pine Mountain Lbr. Co. (1969) 273 Cal. App. 2d 218, 227, 77 Cal.*

Rptr. 825] .

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17-212 California Forms of Pleading and Practice--Annotated § 212.39

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§ 212.39 Dismissal in Trial Court Delay Reduction Action

The right of a plaintiff to exercise the statutory right to voluntarily dismiss an action under *Code Civ. Proc. § 581(b)* is consistent with the mission of and unimpaired by the trial court delay reduction program [*Harris v. Billings (1993) 16 Cal. App. 4th 1396, 1404-1405, 20 Cal. Rptr. 2d 718]* . Therefore, the court should allow dismissal without prejudice even if the parties have an underlying agreement to facilitate settlement, under which statutes of limitations and laches claims will be tolled for a particular period of time. The dismissal is nonetheless a final disposition that removesthe case from the court's inventory and allows later-filed cases to move ahead in line [*Harris v. Billings (1993) 16 Cal. App. 4th 1396, 1400, 1404, 20 Cal. Rptr. 2d 718]* .

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§ 212.40 Effects of Voluntary Dismissal

[1] Effect on Rights of Other Parties

The entry of a request for dismissal generally cuts off any rights the defendant may have had, except a defendant's right to affirmative relief or a motion to transfer. Plaintiff's voluntary dismissal of the complaint leaves undisturbed pending cross-complaints involving other cross-complainants and cross-defendants [*Sanabria v. Embrey (2001) 92 Cal. App. 4th 422, 425, 111 Cal. Rptr. 2d 837]* . Any pending motion, such as a motion to intervene or a motion to dismiss under the five-year provision of *Code Civ. Proc. §§ 583.310, 583.360(a)*, may not be heard, and the moving party's rights are entirely cut off [*see* *Egly v. Superior Court (1970) 6 Cal. App. 3d 476, 479, 482 n.4, 86 Cal. Rptr. 18* (judgment creditor's motion to impose lien on plaintiff's cause of action); *see also* *Kyle v. Carmon (1999) 71 Cal. App. 4th 901, 909, 84 Cal. Rptr. 2d 303* (after plaintiff properly exercises right to voluntary dismissal before commencement of trial under *Code Civ. Proc. § 581*, trial court lacks jurisdiction to enter further orders in dismissed action except for matters such as attorney fees)]. Any right that may have accrued because leave to intervene has been given does not affect the plaintiff's right to dismiss if no complaint in intervention requesting affirmative relief has yet been filed [*Klinghoffer v. Barasch (1970) 4 Cal. App. 3d 258, 261-262, 84 Cal. Rptr. 350]* . For discussion of the effect of dismissal on a demurrer proceeding, see *§ 212.36[2][c]*.

Once a plaintiff has voluntarily dismissed without prejudice, the court is without jurisdiction to vacate the dismissal or to enter a new order dismissing the action with prejudice [*Harris v. Billings (1993) 16 Cal. App. 4th 1396, 1400, 1404, 20 Cal. Rptr. 2d 718]* .

[2] Effect on Recovery of Costs

A trial court is without power either to impose any conditions on the dismissal, such as requiring plaintiff to prepay defendant the costs of the action [*see Hopkins v. Superior Court (1902) 136 Cal. 552, 553-554, 69 P. 299]* , or to stay the entry of the dismissal before or after the request was filed [*Egly v. Superior Court (1970) 6 Cal. App. 3d 476, 479, 482-483, 86 Cal. Rptr. 18]* .

The court does, however, have jurisdiction to award costs and statutory attorney's fees incurred up to the date of dismissal [*Bell v. Hummel (1982) 136 Cal. App. 3d 1009, 1015, 186 Cal. Rptr. 688* (overruled on other grounds in *Laird v. Blacker (1992) 2 Cal. 4th 606, 617, 7 Cal. Rptr. 2d 550, 828 P.2d 691*); *Associated Convalescent Enterprises v. Carl Marks& Co., Inc. (1973) 33 Cal. App. 3d 116, 120, 108 Cal. Rptr. 782* ; *see Townzen v. County of El Dorado (1998) 64 Cal. App. 4th 1350, 1358, 76 Cal. Rptr. 2d 281* (defendants entitled to recover initial filing fee as litigation costs)]. For example, when the plaintiff voluntarily dismisses an alleged SLAPP (strategic litigation against public participation) suit while a special motion to strike is pending, the court has discretion to determine whether the defendant is the prevailing party for purposes of attorney's fees under Code Civ. Proc § 426.16(c) [*Coltrain v. Shewalter (1998) 66 Cal. App. 4th 94, 107, 77 Cal. Rptr. 2d 600* ; *see also Kyle v. Carmon (1999) 71 Cal. App. 4th 901, 917-918, 84 Cal. Rptr. 2d 303* (recovery of prevailing defendant's attorney fees and costs under *Code Civ. Proc. § 425.16*)].

PRACTICE TIP:

Judgment Should Provide For Costs. A defendant seeking recovery of costs should have a formal judgment of dismissal entered ordering payment of court costs [*see Code Civ. Proc. § 1032(b)*].

Contractually authorized attorney's fees are not recoverable following voluntary dismissal. There is no "prevailing party" for the purpose of a fee award if the action has been voluntarily dismissed [*Civ. Code § 1717(b)(2)*]. Although *Civ. Code § 1717* bars recovery of attorney fees incurred in defending contract claims when the case is voluntarily dismissed before trial, Section 1717 does not bar recovery of attorney fees incurred in defending tort or other noncontract claims arising from a contract with a broadly worded attorney's fee provision. Whether attorney fees incurred in defending tort or other noncontract claims are recoverable after a pretrial dismissal depends on the terms of the contractual attorney fee provision [*Santisas v. Goodin (1998) 17 Cal. 4th 599, 602, 617, 71 Cal. Rptr. 2d 830, 951 P.2d 399* (also holding that *International Industries, Inc. v. Olen (1978) 21 Cal. 3d 218, 577 P.2d 1031* , does not bar recovery)].

[3] Effect on Settlements

A voluntary dismissal deprives the court of jurisdiction to enforce the terms of a settlement under *Code Civ. Proc. § 664.6*; however, the parties may agree to the court retaining jurisdiction to enforce the terms of the settlement [*Wackeen v. Malis (2002) 97 Cal. App. 4th 429, 433, 118 Cal. Rptr. 2d 502* (where plaintiff dismissed complaint pursuant to a good faith settlement and thereafter defendant breached agreement, plaintiff could not move for an order entering judgment on the settlement agreement under *Code Civ. Proc. § 664.6* because the parties did not make a specific agreement prior to dismissal of the case, either in writing or on the record, that the court was to retain jurisdiction after dismissal, and the plaintiff's only remedy was a separate action for enforcement)].

[4] Effect on Sanctions Motion

A voluntary dismissal made while a motion for sanctions pursuant to *CCP § 128.7* is pending may not avoid a court's consideration of an award of sanctions [*Eichenbaum v. Alon (2003) 106 Cal. App. 4th 967, 976, 131 Cal. Rptr. 2d 296*

(where plaintiff's voluntary dismissal of his action with prejudice, after defendant's motion for sanctions had been filed and taken under submission, did not deprive the trial court of authority to grant the motion and impose sanctions on plaintiff and his attorneys for presenting an improper amended complaint)].

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§ 212.41 Appeal After Voluntary Dismissal

The entry of a properly filed request for dismissal is a ministerial act from which there is no right to appeal [*Parenti v. Lifeline Blood Bank (1975) 49 Cal. App. 3d 331, 335, 122 Cal. Rptr. 709* (disapproved on another ground in *Wells v. Marina City Properties, Inc. (1981) 29 Cal. 3d 781, 789, 176 Cal. Rptr. 104, 632 P.2d 217*)]. Thus, a plaintiff may not appeal after taking a voluntary dismissal [*Yancey v. Fink (1991) 226 Cal. App. 3d 1334, 1342-1343, 277 Cal. Rptr. 415]* , nor may a defendant appeal the plaintiff's dismissal [*Gray v. Superior Court (1997) 52 Cal. App. 4th 165, 170-171, 60 Cal. Rptr. 2d 428]* . A defendant, however, may file a motion to vacate the dismissal which motion if denied is nonappealable, but may be reviewed by extraordinary writ [*Gray v. Superior Court (1997) 52 Cal. App. 4th 165, 171-172, 60 Cal. Rptr. 2d 428]* .

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§ 212.42 Appeal After Stipulated Dismissal

Generally, there is no right to appeal after a voluntary dismissal [*Denney v. Lawrence (1994) 22 Cal. App. 4th 927, 930 n.1, 27 Cal. Rptr. 2d 556]* . However, when a dismissal was requested after an adverse trial court ruling so that an appeal could be taken promptly, and operates as a request for an entry of judgment based on the adverse ruling, an appeal will lie [*Denney v. Lawrence (1994) 22 Cal. App. 4th 927, 930 n.1, 27 Cal. Rptr. 2d 556* ; *see Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 400-402, 87 Cal. Rptr. 2d 453, 981 P. 2d 79* (appealability of consent judgments); *Casey v. Overhead Door Corp. (1999) 74 Cal. App. 4th 112, 116 n.2, 87 Cal. Rptr. 2d 603* (appeal available if dismissal is intended to expedite appeal and is not truly a voluntary relinquishment of the action)]. A written order of dismissal entered in the clerk's register as required by *Code Civ. Proc. § 581d*, constitutes a judgment [*see APRI Ins. Co. v. Superior Court (1999) 76 Cal. App. 4th 176, 181, 90 Cal. Rptr. 2d 171]* .

The parties may agree to a dismissal with a stipulation that a sanctions order may be appealed [*Stewart v. Colonial Western Agency, Inc. (2001) 87 Cal. App. 4th 1006, 1012, 105 Cal. Rptr. 2d 115]* .

If the parties stipulate to judgment on less than all causes of action and the plaintiff voluntarily dismisses the remainder with prejudice, thejudgment may be appealable [*Tudor Ranches, Inc. v. State Comp. Ins. Fund (1998) 65 Cal. App. 4th 1422, 1429-1431, 77 Cal. Rptr. 2d 574]* . However, if the remaining causes of action are dismissed without

prejudice, the judgment does not disposes of all the causes of action and there is no appealable judgment [*Hill v. City of Clovis (1998) 63 Cal. App. 4th 434, 442-446, 73 Cal. Rptr. 2d 638* ; *see Tudor Ranches, Inc. v. State Comp. Ins. Fund (1998) 65 Cal. App. 4th 1422, 1429-1431, 77 Cal. Rptr. 2d 574]* .

For discussion of judgments on stipulations, see Ch. 318, *Judgments* .

Legal Topics:

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17-212 California Forms of Pleading and Practice--Annotated §§ 212.43-212.59

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§§ 212.43[Reserved]

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PART II. LEGAL BACKGROUND
C. Involuntary Dismissal For Delay In Prosecution
1. Overview Of Involuntary Dismissal

17-212 California Forms of Pleading and Practice--Annotated § 212.60

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§ 212.60 Involuntary Dismissal Defined

A dismissal of an action is a termination of the court's consideration of a case prior to completion of a full trial of the issues of fact [*Schisler v. Mitchell (1959) 174 Cal. App. 2d 27, 29, 344 P.2d 61]* . A voluntary dismissal is one entered at the request of the party filing the action [*see Code Civ. Proc. § 581(b)(1), (2), (e)* and discussion in Part I,]; an involuntary dismissal is a dismissal by the court [*see Code Civ. Proc. §§ 581(b)(3)-(5), (d), (f), (g), (l), 583.110 et seq.*].

There are two categories of involuntary dismissal:

- Mandatory involuntary dismissals, that is, dismissals that are required under certain circumstances unless some express statutory exception or excuse applies [*see Code Civ. Proc. §§ 583.250, 583.360* and discussion in Subpts. B, C, and D,].

- Discretionary involuntary dismissals, that is, dismissals that are entered by the court when dismissal appears to be appropriate under the circumstances [*see Code Civ. Proc. §§ 583.410-583.430* and discussion in Subpt. E,].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral Overview

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§ 212.61 Principal Governing Law

[1] Applicable Statutes and Rules

Code Civ. Proc. § 583.110 et seq., sets out the principal provisions governing involuntary dismissals for delay in prosecution. Other applicable provisions and rules include the following:

- *Code Civ. Proc. § 581* (grounds for dismissal).
- *Code Civ. Proc. § 581d* (requirements for dismissal orders).
- *Cal. Rules of Ct., Rule 3.770* (dismissal of class actions).
- *Cal. Rules of Ct., Rule 3.1340* (discretionary dismissal for failure to bring action to trial within two years).
- *Cal. Rules of Ct., Rule 3.1342* (procedure for discretionary dismissal for delay in prosecution).

- *Cal. Rules of Ct., Rule 3.1390* (notice of entry of dismissal).

NOTE:

Case Authority Decided Under Former Statutes. *Code Civ. Proc. § 583.110 et seq.* replaced former *Code Civ. Proc. §§ 581a* and *583* in 1985. The current statutes codify and clarify preexisting case law and make certain substantive changes [*see* 17 Cal. L. Revision Comm'n Reports 905 (1984); *see also Code Civ. Proc. § 583.160* (when prior law applies)]. Cases decided under former *Code Civ. Proc. §§ 581a* and *583* are cited and discussed as persuasive, rather than controlling, authority to the extent that the current law codifies former case law or continues former substantive principles.

For involuntary dismissal under other provisions, *see § 212.62[1]*.

[2] Statutory Definitions

The following definitions apply under *Code Civ. Proc. § 583.110 et seq.*, unless a particular provision or context requires otherwise:

- "Action" includes an action commenced by a cross complaint or other pleading that asserts a cause of action or claim for relief [*Code Civ. Proc. § 583.110(a)*].

- "Complaint" includes a cross complaint or other initial pleading [*Code Civ. Proc. § 583.110(b)*].

- "Court" means the court in which the action is pending [*Code Civ. Proc. § 583.110(c)*].

- "Defendant" includes a cross defendant or other person against whom an action is commenced [*Code Civ. Proc. § 583.110(d)*].

- "Plaintiff" includes a cross complainant or other person by whom an action is commenced [*Code Civ. Proc. § 583.110(e)*].

- "Service" includes return of summons [*Code Civ. Proc. § 583.110(f)*].

[3] Statutory Policy and Construction

The statutory scheme for involuntary dismissals under *Code Civ. Proc. § 583.110 et seq.* expressly states the policy that every plaintiff shall proceed with reasonable diligence in the prosecution of an action or cross complaint, but that all parties shall cooperate in bringing the action to trial or other disposition [*Code Civ. Proc. § 583.130*].

Additionally, in construing *Code Civ. Proc. § 583.110 et seq.*, the policy favoring the parties' right to stipulate in their own interests and the policy favoring a disposition on the merits are generally to be preferred over the policy requiring dismissal for failure to proceed with reasonable diligence, except as otherwise expressly provided by statute or court rule adoptedpursuant to statute [*Code Civ. Proc. § 583.130*; *see also Denham v. Superior Court (1970) 2 Cal. 3d 557, 566, 86 Cal. Rptr. 65, 468 P.2d 193* (decided under prior law); *Weeks v. Roberts (1968) 68 Cal. 2d 802, 806, 69 Cal. Rptr. 305, 442 P.2d 361* (decided under prior law)].

[4] Application in Special Proceedings

*Code Civ. Proc. § 583.110 et seq.*apply to civil actions but not to special proceedings except to the extent that these statutes are incorporated by reference in the special proceeding [*Code Civ. Proc. § 583.120(a)*; *see, e.g., Dresser v. Superior Court (1964) 231 Cal. App. 2d 68, 78, 41 Cal. Rptr. 473* (former *Code Civ. Proc. § 581a* applicable in eminent

domain proceedings under *Code Civ. Proc. § 1230.040*, incorporating by reference provisions applicable to civil actions)].

Despite the general rule, a court may, by rule or otherwise under its inherent authority, apply *Code Civ. Proc. § 583.110 et seq.* to all or part of a special proceeding, unless to do so would be inconsistent with the character of the special proceeding or the statute governing the proceeding [*Code Civ. Proc. § 583.120(b)*; *Oskooi v. Fountain Valley Regional Hospital (1996) 42 Cal. App. 4th 233, 238-239, 49 Cal. Rptr. 2d 769* (*Code Civ. Proc. § 583.110 et seq.* applies to mandamus proceedings; lead opinion by Sonenshine, J.; concurring and dissenting opinions did not address issue); *cf. Civ. Code § 3147* (special rule for discretionary dismissal of action to foreclose mechanic's lien); *Horney v. Superior Court (1948) 83 Cal. App. 2d 262, 270-271, 188 P.2d 552* (holding former *Code Civ. Proc. § 581a* inconsistent with and not applicable to will contests)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to Prosecute

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§ 212.62 Other Authority for Involuntary Dismissal

[1] Not Limited by Code Civ. Proc. § 583.110 et seq.

The provisions of *Code Civ. Proc. § 583.110 et seq.* do not limit or otherwise affect the authority of a court to dismiss an action or impose other sanctions pursuant to any of the following [*Code Civ. Proc. § 583.150*]:

- A rule adopted under *Code Civ. Proc. § 575.1* (authorizing superior courts to adopt local rules to expedite and facilitate business of court).
- A rule adopted by the Judicial Council pursuant to some other statute.
- The inherent authority of the court.

[2] After Demurrer or Motion to Strike Without Leave to Amend or on Failure to Amend

Under another statute, involuntary dismissal is proper when a party moves for dismissal after a demurrer or a motion to strike the whole complaint is sustained or granted either without leave to amend or with leave to amend and the plaintiff

fails to make timely amendment [*Code Civ.Proc. § 581(f)* (also providing that dismissal is not permitted if *Code Civ. Proc. § 597*, relating to separate trial of special defense or defenses, applies); *see Cano v. Glover (2006) 143 Cal. App. 4th 326, 330, 48 Cal. Rptr. 3d 871* (dismissal under *Code Civ. Proc. § 581(f)(2)*, after demurrer is sustained with leave to amend but plaintiff fails to amend, should be with prejudice); *Leader v. Health Indus. of Am. (2001) 89 Cal. App. 4th 603, 614, 107 Cal. Rptr. 2d 489* (dismissal proper following failure to amend within allotted time; plaintiff tried to file belated and unexcused fourth amended complaint); *Harding v. Collazo (1986) 177 Cal. App. 3d 1044, 1053-1054, 223 Cal. Rptr. 329* (dismissal also proper following failure to amend pursuant to stipulation)].

[3] In Case of Failure to Appear

[a] Neither Party Appears

Involuntary dismissal is allowed when neither party appears for trial following 30 days notice of time and place [*Code Civ. Proc. § 581(b)(3)* (dismissal without prejudice)].

[b] Either Party Fails to Appear

Involuntary dismissal is also statutorily authorized if either party fails to appear at trial and the other party appears and requests dismissal [*Code Civ. Proc. § 581(b)(5)* (dismissal of action without prejudice), (*l*) (dismissal of complaint in whole or as to that defendant without prejudice)].

If the issue to be tried is one of fact, proof must first be made that the absent party had 15 days' notice of the trial; if proof is available or if the issue to be tried is one of law, the appearing party has the option to proceed with the case to obtain a verdict or judgment [*Code Civ. Proc. § 594(a)*; *see Clune v. Quitzow (1899) 125 Cal. 213, 214, 57 P. 886]* .

Dismissal under *Code Civ. Proc. § 581(b)(5)*, (*l*) is discretionary [*Schlothan v. Rusalem (1953) 41 Cal. 2d 414, 415, 417-418, 260 P.2d 68* (decided under former *Code Civ. Proc. § 581(3)*, now *Code Civ. Proc. § 581 (b)(5)*); *Link v. Cater (1998) 60 Cal. App. 4th 1315, 1320-1321, 71 Cal. Rptr. 2d 130* (decided under *Code Civ. Proc. § 581*(*l*)].

A trial court's discretion to dismiss under *Code Civ. Proc. § 581*(*l*) will be overturned only on a showing of manifest abuse of discretion. Discretion is abused when the trial court's ruling is arbitrary, capricious, exceeds the bounds of reason or prevents a fair hearing from being held [*Link v. Cater (1998) 60 Cal. App. 4th 1315, 1320-1321, 71 Cal. Rptr. 2d 130]* . Examples of cases in which dismissal has been held to be an abuse of discretion include:

- When plaintiff's counsel failed to appear after being misled by the court concerning the date that a trailed case would be called for trial [*see Schlothan v. Rusalem (1953) 41 Cal. 2d 414, 415, 417-418, 260 P.2d 68]* .

- When plaintiff diligently prosecuted a case for over four years and the trial court invited dismissal under *Code Civ. Proc. § 581*(*l*) and refused to grant a continuance when imposition of a lesser sanction, such as monetary sanctions, would suffice [*Link v. Cater (1998) 60 Cal. App. 4th 1315, 1325-1326, 71 Cal. Rptr. 2d 130* ; for discussion of the use of terminating sanctions, *see* Ch. 510, *Sanctions*].

In the case of an indigent, pro se prisoner who is the plaintiff, the trial court will abuse its discretion by dismissing the prisoner's action if, prior to dismissing a case based on the prisoner's failure to appear at a proceeding, the trial court does not make findings that the failure to appear is willful. For example, after allowing an indigent prisoner appearing pro se to appear telephonically, the trial court abused its discretion by dismissing the case for the prisoner's failure to appear telephonically at the case management conference without making any finding that the failure to telephonically appear was willful. By doing so, the trial court failed to ensure that the prisoner was able to exercise his right of meaningful access to the courts [*Jameson v. Desta (2009) 179 Cal. App. 4th 672, 683-684, 101 Cal. Rptr. 3d 345]* .

[4] As Sanction Under Statute

Additional statutes authorize involuntary dismissal in certain circumstances as a sanction for disobedience of a court order [*see, e.g., Code Civ. Proc. §§ 2023(b)(4), 2025(o)* (dismissal for disobedience of order compelling answers to deposition) (*Code Civ. Proc. §§ 2023.030(d), 2025.480(a)* operative July 1, 2005)]. For discussion of dismissal as a discovery sanction, see Ch. 192, *Discovery: Sanctions for Discovery Misuse* .

Dismissal as a sanction has been upheld even when not expressly authorized by statute, but imposed as a sanction for plaintiff's deliberate refusal to comply with an order referring a case to judicial arbitration [*see Genovia v. Cassidy (1983) 145 Cal. App. 3d 452, 458-459, 193 Cal. Rptr. 454]* . *Code Civ. Proc. § 128.5* was subsequently amended to make clear that the sanctions authorized by it for frivolous or delaying tactics applied to judicial arbitration proceedings [*see Lyons v. Wickhorst (1986) 42 Cal. 3d 911, 918, 231 Cal. Rptr. 738, 727 P.2d 1019]* .

For discussion of other grounds for dismissal as a sanction, see Ch. 510, *Sanctions* .

[5] As Sanction Under Trial Court Delay Reduction Rule

Several counties have rules authorizing dismissal as a potential sanction for any failure to comply with the rules [*see, e.g.,* Alameda Co. Super. Ct. Rules, Rule 4.4(2)(R); Orange Co. Super. Ct. Rules, Rule 454; Sacramento Co. Super. Ct. Rules, Rule 11.12; *see also Gov. Code § 68608(b)* (authorization for sanctions)]. For discussion of dismissal as a sanction under local court rule, see Ch. 510, *Sanctions* .

[6] Court's Inherent Power

Trial courts retain an inherent discretionary power to dismiss for lack of prosecution as a means of controlling their calendars [*Overaa v. Keeney (1915) 169 Cal. 628, 630-631, 147 P. 466* ; *Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn. (1977) 71 Cal. App. 3d 706, 712-713, 139 Cal. Rptr. 651]* . However, it appears unlikely that a court may properly exercise this inherent power in any situation covered by statute [*see General Motors Corp. v. Superior Court (1966) 65 Cal. 2d 88, 98, 52 Cal. Rptr. 460, 416 P.2d 492* (no discretion to dismiss for delay in bringing action to trial which was less than minimum period of delay allowed by former *Code Civ. Proc. § 583(a)*); *Roman v. Usary Tire & Service Center (1994) 29 Cal. App. 4th 1422, 1430-1431, 35 Cal. Rptr. 2d 329* (dismissal reversed when court's order stated dismissal was under Section 583.410,but two years had not elapsed)]. Thus, the exercise of power appears to be limited to situations not covered by *Code Civ. Proc. § 583.110 et seq.*, such as delays in prosecution after trial has commenced [*see Karras v. Western Title Ins. Co. (1969) 270 Cal. App. 2d 753, 757, 76 Cal. Rptr. 141* (dismissal upheld after seven-year delay following continuance to allow plaintiffs to prepare authorities in support of evidentiary objection); *see also § 212.37[2]*].

Moreover, in light of *Code Civ. Proc. § 583.150*, a trial court retains inherent discretionary power to dismiss an action when the complaint has been shown to be fictitious or sham such that plaintiff has no valid cause of action [Pearlson v. Does 1 to 646 *(1999) 76 Cal. App. 4th 1005, 1010, 90 Cal. Rptr. 2d 787* (dismissal upheld)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 212.63 Recovery of Costs and Attorney's Fees Following Involuntary Dismissal

A defendant in whose favor a dismissal is entered is a "prevailing party" [*Code Civ. Proc. § 1032(a)(4)*]. Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding [*Code Civ. Proc. § 1032(b)*]. Items allowed and not allowed as costs are listed in *Code Civ. Proc. § 1033.5*.

Allowable costs include attorney's fees authorized by statute or law and may be assessed on a noticed motion or on submission of a costs bill [*Code Civ. Proc. § 1033.5(a)(10)(B), (C)*; *see Code Civ. Proc. § 1033.5(c)(5)*]. When any California statute refers to the award of "costs and attorney's fees," attorney's fees are an item of costs to be awarded [*Code Civ. Proc. § 1033.5(c)(5)*].

Attorney's fees authorized by contract are also allowable costs and must be assessed on noticed motion, unless otherwise provided by the parties' stipulation [*Civ. Code § 1717*; *Code Civ. Proc. § 1033.5(a)(10)(A), 1033.5(c)(5)*]. Because *Code Civ. Proc. § 1032(a)(4), (b)* provides that a defendant in whose favor a dismissal is entered is a "prevailing party" entitled to costs, the defendant is entitled to attorney's fees under *Code Civ. Proc. § 1033.5(a)(10)(A)* if the contract authorizes payment of attorney's fees incurred in enforcing the contract. Under *Civ. Code § 1717*, a "party

prevailing on the contract" is the party who recovered a greater relief in the action on the contract, although the court may also determine that there is no party prevailing on the contract [*Civ. Code § 1717(b)(1)*].

By its terms, *Civ. Code § 1717(b)(1)* does not require a final judgment. Thus, because *Civ. Code § 1717(b)(2)* expressly excludes from the definition of prevailing party only those defendants as to whom an action has been voluntarily dismissed, it appears that a court may determine that a defendant as to whom an action has been involuntarily dismissed may be a party prevailing on the contract for purposes of *Civ. Code § 1717*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

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§ 212.64 Relief From Dismissal Under Code Civ. Proc. § 473

A plaintiff may obtain mandatory relief from involuntary dismissal under *Code Civ. Proc. § 473(b)* only if the dismissal occurred because the plaintiff's attorney failed to oppose the defendant's motion for dismissal [*Leader v. Health Indus. of Am. (2001) 89 Cal. App. 4th 603, 620, 107 Cal. Rptr. 2d 489]* . A plaintiff may not obtain mandatory relief merely by filing an affidavit in which plaintiff's counsel avows that the dismissal came about through counsel's fault. A literal reading of Section 473 would abrogate the dismissal statutes by implication, as few, if any, dismissals under those statutes would ever be final [*Bernasconi Commercial Real Estate v. St. Joseph's Regional Healthcare System (1997) 57 Cal. App. 4th 1078, 1080, 182, 67 Cal. Rptr. 2d 475* (affirming denial of relief from mandatory dismissal for failure to serve complaint within three years under *Code Civ. Proc. § 583.210*); *Peltier v. McCloud River R.R. Co. (1995) 34 Cal. App. 4th 1809, 1817-1825, 41 Cal. Rptr. 2d 182* (affirming denial of relief from discretionary dismissal under *Code Civ. Proc. § 583.410* for failure to bring case to trial within three years); *Leader v. Health Indus. of Am. (2001) 89 Cal. App. 4th 603, 620, 107 Cal. Rptr. 2d 489* (affirming denial of relief from discretionary dismissal based on the failure to file an amended complaint after demurrer was sustained with leave to amend)].

For further discussion, see *Ch. 489, Relief From Judgments and Orders, § 489.41*.

Legal Topics:

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2. Motion to Dismiss Prior to Answering

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§ 212.80 Motion to Dismiss as Response to Complaint

A defendant, on or before the last day of defendant's time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion to dismiss the action pursuant to the applicable provisions of *Code Civ. Proc. § 583.110 et seq.* [*Code Civ. Proc. § 418.10(a)(3)*]. Dismissals under *Code Civ. Proc. § 583.110 et seq.* are discussed in *§ 212.100 et seq., § 212.120 et seq., and § 212.150* et seq.

When dismissing the complaint in whole, or as to a defendant, under *Code Civ. Proc. § 418.10*, the court may dismiss without prejudice [*Code Civ. Proc. § 581(h)*].

Other motions that may be brought at the same time are motions to quash service of summons on the ground the court lacks jurisdiction over the defendant and to stay or dismiss the action on the ground of inconvenient forum [*Code Civ. Proc. § 418.10(a)(1), (2)*; for discussion of these motions, see Ch. 323, *Jurisdiction: Personal*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsMotions

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2. Motion to Dismiss Prior to Answering

17-212 California Forms of Pleading and Practice--Annotated § 212.81

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§ 212.81 Not a General Appearance

Neither a *Code Civ. Proc. § 418.10* motion, a *Code Civ. Proc. § 473* or *473.5* motion joined with it, nor an application to the court or stipulation of the parties for an extension of the time to plead, constitutes a general appearance by the defendant [*Code Civ. Proc. § 418.10(d)*; *see also Code Civ. Proc. § 583.220(b)* (motion to dismiss for failure to serve summons does not constitute general appearance waiving the failure to serve); *but see discussion under § 212.84*, on the variance between *Code Civ. Proc. § 418.10(d)* and *Code Civ. Proc. § 585(a)-(c)* regarding when a motion to dismiss protects against a default]. For discussion of *Code Civ. Proc. § 473* and *473.5* motions, see Ch. 489, *Relief From Judgments and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil ProcedureDismissalsInvoluntary DismissalsMotions

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17-212 California Forms of Pleading and Practice--Annotated § 212.82

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§ 212.82 Notice of Motion

[1] Time for Motion

The notice must designate, as the time for making the motion, a date not more than 30 days after filing of the notice. The notice must be served in the manner and times prescribed by *Code Civ. Proc. § 1005(b)* [*Code Civ. Proc. § 418.10(b)*; for discussion of Section 1005(b), *see* Ch. 372, *Motions and Orders*].

For a form of notice of motion to dismiss under *Code Civ. Proc. §§ 418.10(a)(3), 583.110 et seq.* for delay in serving the summons, *see § 212.290*.

[2] Notice Extends Time to Respond

The service and filing of the notice extends the defendant's time to plead until 15 days after service on the defendant of a written notice of entry of an order denying the motion. However, if the defendant shows good cause, the court may extend the defendant's time to plead for an additional period not exceeding 20 days [*Code Civ. Proc. § 418.10(b)*; *see also Code Civ. Proc. § 472a(e)* (court to allow pleading to be filed when motion to dismiss under *Code Civ. Proc. § 583.210 et seq.* for failure to timely serve summons is denied); for a general form of application to extend time, *see* Ch.

524, *Shortening and Extension of Time*]. The defendant must file or enter a responsive pleading in the trial court within this time unless, on or before the last day of the defendant's time to plead, the defendant serves on the adverse party and files with the trial court a notice that the defendant has petitioned for a writ of mandate [*Code Civ. Proc. § 418.10(c)*; *see § 212.83[1]*; for a form of notice of the petition, *see § 212.292*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProceduresPleading & PracticePleadingsTime LimitationsExtensionsCivil ProceduresDismissalsInvoluntary DismissalsMotions

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17-212 California Forms of Pleading and Practice--Annotated § 212.83

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§ 212.83 Review of Denial of Motion

[1] Writ of Mandate

If the trial court denies the motion, the defendant, within 10 days after service on the defendant of a written notice of entry of the court's order, or within any further time not exceeding 20 days that the trial court may for good cause allow, and before pleading, may petition an appropriate reviewing court for a writ of mandate to require the trial court to enter its order dismissing the action [*Code Civ. Proc. § 418.10(c)*; *see § 212.291*].

[2] Notice Extends Time to Respond Pending Review

The service and filing of a notice that the defendant has petitioned for a writ of mandate extends the defendant's time to plead until 10 days after service on the defendant of a written notice of the final judgment in the mandate proceeding [*Code Civ. Proc. § 418.10(c)*; *see Cal. Rules of Ct., Rule 8.491* (extension of time to plead until 10 days after Supreme Court files order denying petition for review of court of appeal's denial of writ of madate); for a form of notice of the petition, *see § 212.292*]. The trial court may extend the time to plead for an additional period not exceeding 20 days for good cause shown [*Code Civ. Proc. § 418.10(c)*; for a general form of application to extend time, see Ch. 524, *Shortening and Extension of Time*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureDismissalsInvoluntary DismissalsMotionsCivil ProcedureRemediesWritsCommon Law WritsMandamus

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17-212 California Forms of Pleading and Practice--Annotated § 212.84

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§ 212.84 No Default During Extension of Time to Respond

No default may be entered against the defendant before expiration of the time to plead [*Code Civ. Proc. § 418.10(d)*; *see also Code Civ. Proc. § 585(a)-(c)*]. There appears, however, to be an inconsistency in the statutes in this respect.

On the one hand, *Code Civ. Proc. § 418.10(a)(3)* allows any motion to dismiss under *Code Civ. Proc. §§ 583.110-583.430* to be made within in the time for responding to the complaint to avoid default [*see Code Civ. Proc. § 418.10(a)(3), (d)*]. This would include, for example, motions for either discretionary or mandatory dismissal for failure to serve summons or for failure to bring to trial. *Code Civ. Proc. § 585(a)-(c)*, however, only refers to motions for mandatory dismissal for failure to serve summons (*Code Civ. Proc. §§ 583.210-583.250*) as forestalling default. Thus, Section 418.10(a)(3) appears to allow a motion to dismiss under Section 583.410 for failure to serve the complaint [*Code Civ. Proc. §§ 583.410, 583.420(a)(1)*] and to bring to trial within two years of filing the action [*Code Civ. Proc. §§ 583.410, 583.420(a)(2)(B)*; *Cal. Rules of Ct., Rule 3.1340*], and to provide that neither motion constitutes a general appearance and that no default may be taken pending their resolution.

On the other hand, *Code Civ. Proc. § 585(a)-(c)* refers only to Section 583.210 motions as precluding default. This is of particular concernbecause Section 585(a)-(c) was amended to include Section 583.210 motions as precluding default in

the same legislation that added Section 583.110 motions to Section 418.10 [*see* 1993 Stats., ch. 456, §§ 1, 10]. The Legislature's intent as to which motions to dismiss forestall default and do not constitute a general appearance, therefore, is not entirely clear. As a practical matter, of course, the motion for failure to have served summons is the most relevant motion.

If a motion to dismiss pursuant to *Code Civ. Proc. § 583.250* is denied, and the defendant fails to respond within the time allowed by the court, the plaintiff may take the defendant's default and obtain a default judgment [*Code Civ. Proc. § 586(a)(8)*; *see Code Civ. Proc. § 585*; for discussion and forms, *see* Ch. 205, *Defaults and Default Judgments*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotionsCivil ProcedurePretrial JudgmentsDefaultDefault Judgments

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17-212 California Forms of Pleading and Practice--Annotated §§ 212.85-212.99

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[Reserved]

§§ 212.85[Reserved]

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17-212 California Forms of Pleading and Practice--Annotated § 212.100

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§ 212.100 Mandatory Dismissal for Delay in Serving Summons and Complaint

Code Civ. Proc. §§ 583.210-583.250 set forth periods in which the plaintiff must serve a summons and complaint on a defendant [*see § 212.101*]. If service is not completed within the mandatory time periods, the court must dismiss the action [*Code Civ. Proc. § 583.250(a)*].

Proceedings to dismiss a case for delay in service may be initiated on [*Code Civ. Proc. § 583.250(a)*]:

- A motion by any person interested in the action, whether named as a party or not.
- A motion by the court.

PRACTICE TIP:

Mandatory Dismissal of Co-Defendant. A defendant may be dismissed under *Code Civ. Proc. § 583.250(a)* even though he or she may be jointly liable with the defendants who were served or who did appear [*Andre v. General Dynamics, Inc. (1974) 43 Cal. App. 3d 839, 842-843, 118 Cal. Rptr. 95* (decided under prior law)].

For a form of motion to dismiss for delay in service, *see § 212.293*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessSummonsGeneral OverviewCivil ProceduresPleading & PracticeService of ProcessTime LimitationsDismissalsCivil ProceduresDismissalsInvoluntary DismissalsFailures to Prosecute

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§ 212.101 Time for Service

[1] Basic Time Period: Three Years Plus 60 Days

A summons and complaint must generally be served on a defendant no later than three years after the action is commenced against that defendant [*Code Civ. Proc. § 583.210(a)*]. If the last day of the three-year period is a holiday, the period is extended to and includes the next day that is not a holiday [*see Code Civ. Proc. § 12a*; *Ystrom v. Handel (1988) 205 Cal. App. 3d 144, 147-149, 252 Cal. Rptr. 110* ("holiday" includes Saturday)].

Proof of service of the summons must be filed within 60 days after the time the summons and complaint must be served upon a defendant [*Code Civ. Proc. § 583.210(b)*]. For discussion of filing proof of service of summons, see *Ch. 518, Service of Summons and Papers, § 518.21*.

PRACTICE TIP:

Ascertain Trial Court Delay Reduction Status. As soon as possible after filing a case, counsel must ascertain whether the case is going to be assigned to the court's delay reduction program. If the case is so assigned, counsel may be required to complete service of the summons and complaint within a much shorter period, usually 60 days, or face sanctions [*see Gov. Code § 68616(a)* (60 days is least a court may

require); for discussion, *see § 212.105*].

[2] Commencement of Time Period for Service

Under *Code Civ. Proc. § 583.210(a)*, an action is commenced at the time the complaint is filed [*Code Civ. Proc. § 583.210(a)*]. It commences at this time against a defendant named in the caption of the complaint, even though no attempt is made to state a cause of action against that defendant until a subsequent amendment based on the same general set of facts [*Elling Corp. v. Superior Court (1975) 48 Cal. App. 3d 89, 94-95, 123 Cal. Rptr. 734* (decided under prior law)].

When an original complaint alleges causes of action against a fictitiously named defendant, the action commences against that defendant when the original complaint was filed, not when an amendment is filed substituting the defendant's true name for the fictitious one. If a new party is added to the action, however, the action commences as to that party on the date of filing of the pleading naming him or her as a new party [*Barrington v. A.H. Robins Co. (1985) 39 Cal. 3d 146, 150, 216 Cal. Rptr. 405, 702 P.2d 563* ; *Nelson v. A.H. Robins Co. (1983) 149 Cal. App. 3d 862, 866-868, 197 Cal. Rptr. 179]* . The rules that determine whether there is a relation-back to the filing of the original complaint for purposes of the delay-in-prosecution statutes applies to amendments adding plaintiffs as well as defendants [*American Western Banker v. Price Waterhouse (1993) 12 Cal. App. 4th 39, 48-49, 14 Cal. Rptr. 2d 916* (no relation back for new plaintiff for new plaintiffs on new cause of actions)].

If a cause of action in an amended complaint does not relate back to the original complaint for purposes of determining the statute of limitations, that is, if it does not rest on the same general set of facts as the original complaint and does not refer to the same accident or injury, the three-year period commences as to that cause of action at the time it is first alleged in an amended complaint [*Barrington v. A.H. Robins Co. (1985) 39 Cal. 3d 146, 150, 151-158, 216 Cal. Rptr. 405, 702 P.2d 563* (decided under prior law, but stating its applicability to current law in dicta)]. This rule applies as to both:

- Defendants named by a fictitious name in the original complaint [*see* *Barrington v. A.H. Robins Co. (1985) 39 Cal. 3d 146, 150, 151-158, 216 Cal. Rptr. 405, 702 P.2d 563]* .

- Defendants added by the amended complaint [*see* *Hennessey's Tavern, Inc. v. American Air Filter Co. (1988) 204 Cal. App. 3d 1351, 1354, 1360-1361, 251 Cal. Rptr. 859]* .

For discussion of relation-back, see Ch. 21, *Amended and Supplemental Pleadings* .

[3] When Service Is Complete

[a] Service of Summons on Defendant

In determining whether service was made within the mandatory period prescribed by *Code Civ. Proc. § 583.210*, it is deemed effective on completion of the last necessary act [*see* *Billings v. Edwards (1979) 91 Cal. App. 3d 826, 830, 154 Cal. Rptr. 453]* .

ILLUSTRATION:

Mailing Copy of Summons Within Mandatory Period. Plaintiff files a complaint on October 8, 1974. He makes substituted service pursuant to *Code Civ. Proc. § 415.20*, mailing a copy of the summons and complaint on October 5, 1977. Under *Code Civ. Proc. § 415.20*, service of summons is deemed "complete on the 10th day after the mailing." The applicable mandatory dismissal statute requires service to be made within a three-year period. Is service timely for purposes of the statute? Yes. If service is made by mail, it is timely if mailed within the required time period despite the provision of *Code Civ. Proc. § 415.20(a)* that service by mail is not "complete" until 10 days after the mailing [*Billings v.*

Edwards (1979) 91 Cal. App. 3d 826, 830, 154 Cal. Rptr. 453 (decided under prior law)].

[b] Return of Summons

"Service" includes return of summons [*Code Civ. Proc. § 583.110(f)*; *see § 212.101*]. Therefore, even if a defendant is timely served within a three-year period, the action must be dismissed as to that defendant if the return is not timely made thereafter [*Kaiser Foundation Hospitals v. Superior Court (1975) 49 Cal. App. 3d 523, 527, 122 Cal. Rptr. 432* (decided under prior law; disapproved to extent inconsistent with *Johnson v. Superior Court(1985) 38 Cal. 3d 243, 255 n.7, 211 Cal. Rptr. 517, 695 P.2d 1058* , discussed)].

Formal defects in the return of service do not invalidate a timely return, since the defects may be cured by amendment nunc pro tunc after expiration of the statutory period [*Botsford v. Pascoe (1979) 94 Cal. App. 3d 62, 70, 156 Cal. Rptr. 177* (decided under prior law)].

When substituted service is made by mail under *Code Civ. Proc. § 415.40* (service on person outside California), the return need not include every item necessary for proof of service, at least for the purpose of dismissal for delay in service. The return is effective when it provides the court with notice that plaintiff has completed all acts necessary to effect service [*see* *Johnson & Johnson v. Superior Court (1985) 38 Cal. 3d 243, 252-256, 211 Cal. Rptr. 517, 695 P.2d 1058* (decided under prior law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessSummonsGeneral OverviewCivil ProceduresPleading & PracticeService of ProcessTime LimitationsGeneral OverviewCivil ProceduresPartiesFictitious Names

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§ 212.102 Statute Satisfied if Defendant Makes General Appearance

[1] Effect of Stipulation or General Appearance

The defendant's general appearance in the action has the same effect as valid service and return of summons [*see Code Civ. Proc. §§ 583.210, 583.220*].

A general appearance, however, does not excuse the time period prescribed for service if the appearance is made after the period has lapsed [*see Blank v. Kirwan (1985) 39 Cal. 3d 311, 333, 216 Cal. Rptr. 718, 703 P.2d 58* (prior law); *see also Biss v. Bohr (1995) 40 Cal. App. 4th 1246, 1251, 47 Cal. Rptr. 2d 692* (because summons and complaint must be served within three years, answer will excuse failure to do so only if filed within that period)]. That is, a general appearance after the period for service has run does not give the court jurisdiction over the defendant [*Dale v. ITT Life Ins. Corp. (1989) 207 Cal. App. 3d 495, 499 n.4, 255 Cal. Rptr. 8]* .

If the defendant is timely served with a summons and complaint within the three year period for service, but generally appears thereafter during the 60-day period for return of summons, there appears to be a split of authority as to whether the time limitation within which return of summons must be made still applies.

Division Three of the Fourth District Court of Appeal has held that when a summons must be returned within three years, sixty days, an answer during that period excuses compliance [*Biss v. Bohr (1995) 40 Cal. App. 4th 1246, 1249-1251, 47 Cal. Rptr. 2d 692* (answer constitutes general appearance; order of dismissal reversed against two defendants when summons and complaint timely served, defendants filed answers within 60-day period for return of summons and plaintiff filed proof of service after 60-day period had elapsed)]. Similarly, Division Three of the First District Court of Appeal has held that the limitation for return of summons becomes inapplicable in this circumstance, the court reasoning that a general appearance during the period for return of summons eliminates the provision for mandatory dismissal because the filing of an answer serves the same purpose as the return of summons of informing the court that the defendant has received jurisdictional notice [*Wong v. Armstrong World Industries, Inc. (1991) 232 Cal. App. 3d 1032, 1034-1035, 283 Cal. Rptr. 870* (defendant filed answer three years and 24 days after issuance of summons; judgment of dismissal reversed when defendant returned summons three years and ten months after issuance of summons)].

Division Four of the Second District, however, has ruled that a defendant's general appearance within the additional 60-day period does not relieve plaintiff of the requirement to complete service within three years and return the summons 60 days thereafter [*Weatherby v. Van Diest (1991) 233 Cal. App. 3d 506, 508-511, 284 Cal. Rptr. 622* (defendant filed answer three years and 46 days after issuance of summons; order of dismissal upheld when defendant returned summons three years and ten months after issuance of summons)]. The court in *Biss v. Bohr (1995) 40 Cal. App. 4th 1246, 1250-1251, 47 Cal. Rptr. 2d 692* , discussed *above*, refused to follow and pointed out what it considered to be the mistaken reasoning in *Weatherby*.

[2] Acts Constituting General Appearance

[a] By Statutory Definition

By statute, a defendant is considered to have made a general appearance if he or she [*Code Civ. Proc. § 1014*]:

- Answers.
- Demurs.
- Files a notice of motion to strike.
- Files a notice of motion to transfer under *Code Civ. Proc. § 396b*.
- Moves for reclassification under *Code Civ. Proc. § 403.040*.
- Gives the plaintiff written notice of appearance, or defendant's attorney gives notice of appearance for the defendant.

[b] By Intent to Appear Generally

In the absence of a controlling statute, an act will be considered a general appearance if, under all the circumstances, it reflects a defendant's intent to submit to the court's jurisdiction [*General Ins. Co. v. Superior Court (1975) 15 Cal. 3d 449, 453, 124 Cal. Rptr. 745, 541 P.2d 289* (decided under prior law); *see* *Goodwine v. Superior Court (1965) 63 Cal. 2d 481, 484, 47 Cal. Rptr. 201, 407 P.2d 1* (decided under prior law)].

As a general rule, a defendant makes a general appearance if he or she does any of the following [*see* Botsford v. Pascoe (1979) 94 Cal. App. 3d62, 67, *156 Cal. Rptr. 177* (prior law); *Slaybaugh v. Superior Court (1977) 70 Cal. App. 3d*

216, 222-224, 138 Cal. Rptr. 628 (prior law)]:

- Requests relief that could only be given to a party.

- Makes an appearance and request for relief that itself would be a regular proceeding.

- Seeks, takes, or agrees to some beneficial step or proceeding in the cause other than one only contesting jurisdiction.

ILLUSTRATION:

Filing of Answers to Interrogatories. A defendant files and serves interrogatories in a case, assuming that the court has jurisdiction over him. Has the defendant generally appeared in the action? Yes. The filing of answers to interrogatories is a regular proceeding in a case [*see Chitwood v. County of Los Angeles (1971) 14 Cal. App. 3d 522, 527-528, 92 Cal. Rptr. 441* (decided under prior law)].

[3] Acts Not Constituting General Appearance

For the purpose of determining whether the time period for service applies under *Code Civ. Proc. § 583.220*, none of the following acts constitute a general appearance in an action:

- A stipulation under *Code Civ. Proc. § 583.230* extending the time within which service must be made [*Code Civ. Proc. § 583.220(a)*].

- A motion to dismiss made under *Code Civ. Proc. § 583.110 et seq.*, whether joined with a motion to quash service or a motion to set aside a default judgment, or otherwise [*Code Civ. Proc. § 583.220(b)*].

- An extension of time to plead after a motion to dismiss made under *Code Civ. Proc. § 583.110 et seq.* [*Code Civ. Proc. § 583.220(c)*].

- A motion under *Code Civ. Proc. § 418.10* to quash service of summons or to stay or dismiss the action on the ground of inconvenient forum (a defendant or cross defendant who makes such a motion may simultaneously answer, demur, or move to strike the complaint or cross-complaint; no general appearance is deemed to have been made until the motion made under *Code Civ. Proc. § 418.10* is denied) [see *Code Civ. Proc. § 418.10(a), (e)*].

[4] In Case Involving Cross Complaint

Because a complaint and a cross complaint are generally treated as independent actions, an appearance in one does not preclude obtaining a dismissal in regard to the other [*Botsford v. Pascoe (1979) 94 Cal. App. 3d 62, 67, 156 Cal. Rptr. 177* (decided under prior law)].

[5] In Case Involving Complaint in Intervention

An appearance in an action will prevent dismissal of a complaint in intervention because a complaint in intervention is not treated as a separate action but as part of the original, main action. Thus, if a defendant appears in the original action, he or she cannot obtain dismissal of a complaint in intervention for failure to serve it within three years [*Rhode v. National Medical Hosp. (1979) 93 Cal. App. 3d 528, 537-538, 155 Cal. Rptr. 797* (decided under prior law)].

On the other hand, the filing of an answer to a complaint in intervention does not constitute a general appearance in the underlying action so as to prevent dismissal of the underlying action for failure to serve summons [*Kuchins v. Hawes (1990) 226 Cal. App. 3d 535, 538-541, 276 Cal. Rptr. 281* (involving discretionary dismissal under *Code Civ. Proc. §§*

583.410(a), 583.420(a)(1) for failure to serve summons within two years after action commenced)].

[6] In Cases Consolidated for Trial

When two separate actions against the same defendant, arising from the same incident, have been consolidated for trial but not merged, a general appearance in one of the actions does not constitute an appearance in the other [*Sanchez v. Superior Court (1988) 203 Cal. App. 3d 1391, 1396, 250 Cal. Rptr. 787]* .

ILLUSTRATION:

Appearance in One of Two Consolidated Actions. A defendant complies with a subpoena for a deposition noticed by the plaintiff in one of the actions for which the defendant has been served with process. The defendant participates and defends his interest with regard to that action action at the deposition. Has he made a general appearance with regard to the second action for which has has not received service? No [*Sanchez v. Superior Court (1988) 203 Cal. App. 3d 1391, 1396, 1399, 250 Cal. Rptr. 787]* .

[7] Determining if Time Extension Is General Appearance

By statute, an extension of time to plead made either after a motion to dismiss under *Code Civ. Proc. § 583.110 et seq.* or in connection with a motion to quash service does not constitute a general appearance [*Code Civ. Proc. §§ 418.10(d), 583.220(c)*; *see § 212.194[8][b]*].

In other situations, a defendant who seeks an extension of time to plead is not usually deemed to have made a general appearance, since the purpose may be to obtain adequate time to determine whether or not to object to the court's jurisdiction [*Busching v. Superior Court (1974) 12 Cal. 3d 44, 50-51, 115 Cal. Rptr. 241, 524 P.2d 369* (decided under prior law)]. If, however, the resulting written agreement extending time discloses an intent to submit to the court's jurisdiction, it constitutes a general appearance [*General Ins. Co. v. Superior Court (1975) 15 Cal. 3d 449, 452-454, 124 Cal. Rptr. 745, 541 P.2d 289]* . That intent may be shown by:

- An agreement to accept service [*General Ins. Co. v. Superior Court (1975) 15 Cal. 3d 449, 452-453, 124 Cal. Rptr. 745, 541 P.2d 289* (decided under prior law)].

- An agreement extending time in which to appear [*RCA Corp. v. Superior Court (1975) 47 Cal. App. 3d 1007, 1009-1010, 121 Cal. Rptr. 441* (decided under prior law)].

- An open extension of time in which to plead that neither challenges nor questions personal service [*Knapp v. Superior Court (1978) 79 Cal. App. 3d 799, 802, 804-805 n.2, 145 Cal. Rptr. 154* (decided under prior law)].

The authorities are split on whether, in any event, an agreement to extend time made by someone other than the defendant or his or her attorney constitutes a general appearance [*see* *Knapp v. Superior Court (1978) 79 Cal. App. 3d 799, 803-804, 145 Cal. Rptr. 154* (agreement between claims adjuster and plaintiff's counsel as sufficient under prior law); *Woodruff v. McDonald's Restaurants (1977) 75 Cal. App. 3d 655, 657-658, 142 Cal. Rptr. 367* (stipulation between plaintiff's attorney and representative of defendant's insurance carrier as insufficient under prior law)].

Even when a request for an extension of time does not constitute a general appearance, it may nonetheless give rise to a defense of estoppel if the plaintiff's failure to complete timely service was caused by his or her reasonable reliance on that request [*see § 212.129[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsConsentCivil ProceduresPleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProceduresPleading & PracticeService of ProcessGeneral OverviewCivil ProceduresPleading & PracticeService of ProcessTime LimitationsExtensions

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17-212 California Forms of Pleading and Practice--Annotated § 212.103

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§ 212.103 Extension of Time for Service by Stipulation

The parties may extend the time within which service must be made under *Code Civ. Proc. § 583.210* by written stipulation, which need not be filed, but if not, must be brought to the court's attention if it becomes relevant to a motion for dismissal [*Code Civ. Proc. § 583.230(a)*].

The parties may also extend the time period for service by oral agreement made in open court, if entered in the minutes of the court or a transcript is made [*Code Civ. Proc. § 583.230(b)*; *see also Code Civ. Proc. § 583.130* (policy favoring right of parties to stipulate as generally to be preferred)].

A stipulation to extend time for service is effective even if it is made after the time period has lapsed and a motion to dismiss has been made, so long as it is executed before the court orders dismissal [*see General Ins. Co. v. Superior Court (1975) 15 Cal. 3d 449, 454-455, 124 Cal. Rptr. 745, 541 P.2d 289* ; *Big Bear Mun. Water Dist. v. Superior Court (1969) 269 Cal. App. 2d 919, 923-924, 75 Cal. Rptr. 580* (decided under prior law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessTime LimitationsExtensions

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17-212 California Forms of Pleading and Practice--Annotated § 212.104

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§ 212.104 Time Excluded From Computation of Period

[1] Time During Which Defendant Not Amenable to Process

The period of time during which the defendant was not amenable to process must be excluded in computing the time within which service must be made under *Code Civ. Proc. § 583.210* [*Code Civ. Proc. § 583.240(a)*].

The plaintiff has the burden of showing that the defendant is not amenable to process [*Perez v. Smith (1993) 19 Cal. App. 4th 1595, 1597, 24 Cal. Rptr. 2d 186* ; *Evartt v. Superior Court (1979) 89 Cal. App. 3d 795, 802, 152 Cal. Rptr. 836* (decided under prior law)].

The general test is whether any statutory procedure exists under which service of process could be made on the defendant through the exercise of reasonable diligence [*see, e.g., Adelson v. Hertz Rent-A-Car (1982) 133 Cal. App. 3d 221, 226-227, 183 Cal. Rptr. 779]* .

ILLUSTRATION:

Amenability to Process. Plaintiff files her complaint against defendant on August 16, 1977. On April 28, 1979, defendant marries and changes her surname; thereafter she moves to an address in Canada. On

> September 9, 1980, 24 days after the lapse of the then-applicable 3-year statute for service, plaintiff serves defendant in Canada. Before this time, plaintiff's counsel made no attempts to serve defendant at her Canadian address. May plaintiff claim that the case falls under the exception for defendants not amenable to the process of the court? No. When there are procedures by which a defendant may be served, and through the exercise of reasonable diligence, the possibility of effecting that service exists, the defendant cannot be considered "not amenable to process." In this case, *Code Civ. Proc. § 413.30* sets out a procedure for serving a foreign defendant, and plaintiff in fact effected such service on defendant with little difficulty, despite defendant's name change and move. Additionally, plaintiff made no showing of any attempt to serve defendant until after the lapse of the applicable three-year limitation period [*see Adelson v. Hertz Rent-A-Car (1982) 133 Cal. App. 3d 221, 224-227, 183 Cal. Rptr. 779]* .

If a person can be served by publication under *Code Civ. Proc. § 415.50*, he or she is amenable to process. A finding under Section 415.50 that a defendant was not reasonably available for service of process other than by publication is not the equivalent of a finding that a defendant was not amenable to process within the meaning of Section 583.240(a) [*Watts v. Crawford (1995) 10 Cal. 4th 743, 761, 42 Cal. Rptr. 2d 81, 896 P.2d 807* (*disapproving Quaranta v. Merlini (1987) 192 Cal. App. 3d 22, 237 Cal. Rptr. 179*); *Perez v. Smith (1993) 19 Cal. App. 4th 1595, 1599-1600, 24 Cal. Rptr. 2d 186]* . Thus, if service is to be by publication, the publication must be completed before the *Code Civ. Proc. §§ 583.410, 583.250* period expires [*see Watts v. Crawford (1995) 10 Cal. 4th 743, 761, 42 Cal. Rptr. 2d 81, 896 P.2d 807]* .

[2] Stay Affecting Service

In computing the time within which service must be made under *Code Civ. Proc. § 583.210*, one must exclude any time during which the prosecution of the action or proceedings in the action was stayed and the stay affected service [*Code Civ. Proc. § 583.240(b)*].

[3] Litigation Concerning Validity of Service

Any time during which the parties litigated the validity of service must be excluded from the computation of time within which service must be made under *Code Civ. Proc. § 583.210* [*Code Civ. Proc. § 583.240(c)*].

[4] Service Impossible, Impracticable, or Futile

[a] Nature of Exclusion

The time within which service must be made under *Code Civ. Proc. § 583.210* does not include any time during which service, for any reason, was impossible, impracticable, or futile due to causes beyond the plaintiff's control [*Code Civ. Proc. § 583.240(d)*]. This exclusion is to be strictly construed due to the potential prejudice to the defendant occasioned by any delay in service and in recognition of the fact that service is ordinarily within the plaintiff's control when exercising reasonable diligence [*see* Law Revision Commission Comment to *Code Civ. Proc. § 583.240*; *see also Shipley v. Sugita (1996) 50 Cal. App. 4th 320, 326, 57 Cal. Rptr. 2d 750]* . Thus, for example, false statements by plaintiff's counsel to plaintiff that a defendant had been properly served, when in fact no service had occurred, were held not to have made proper service within the statutory period impossible or impracticable under *Code Civ. Proc. § 583.240(d)* so as to toll the period during the time plaintiff erroneously believed the defendant had been served. Plaintiff is not entitled to relief from the mandatory dismissal requirement of *Code Civ. Proc. § 583.210* because of attorney misconduct [*Shipley v. Sugita (1996) 50 Cal. App. 4th 320, 324-327, 57 Cal. Rptr. 2d 750* (declining to judicially engraft into *Code Civ. Proc. § 583.240(d)* another exception to the rule of mandatory dismissal for those cases in which attorney misconduct frustrates the plaintiff's ability to perfect service)].

Examples of situations involving impossibility or impracticability include:

- Defendant has intentionally concealed himself or herself to avoid service, and plaintiff has failed to locate defendant in spite of an exercise of reasonable diligence [*see Wyoming Pacific Oil Co. v. Preston (1958) 50 Cal. 2d 736, 740-741, 329 P.2d 489* (dismissal based on plaintiff's failure to timely serve concealed defendant reversed as abuse of discretion); *see also Adelson v. Hertz Rent-A-Car (1982) 133 Cal. App. 3d 221, 228, 183 Cal. Rptr. 779* (reasonable diligence to find and serve defendant required)].

- Defendant has initiated an appeal in a collateral action that involves a point essential to the action sought to be dismissed [*Deas v. Knapp (1982) 129 Cal. App. 3d 443, 449-451, 181 Cal. Rptr. 76* (decided under prior law)].

[b] Failure to Discover Relevant Facts Not Cause Beyond Plaintiff's Control

For purposes of the exclusion under *Code Civ. Proc. § 583.240(d)*, plaintiff's failure to discover relevant facts or evidence is not a cause beyond the plaintiff's control [*Code Civ. Proc. § 583.240(d)*].

ILLUSTRATIONS:

Causes Not Beyond Plaintiff's Control. Plaintiff, despite the exercise of reasonable diligence, fails to obtain evidence leading to the discovery of a "Doe" defendant's identity in time to serve that defendant within the prescribed period. Does *Code Civ. Proc. § 583.240(d)* exclude the time within which plaintiff attempts to learn the defendant's identity? No [*see Republic Corp. v. Superior Court (1984) 160 Cal. App. 3d 1253, 1254-1255, 1258, 207 Cal. Rptr. 241* (decided under prior law)].

Plaintiff's action is filed on November 4, 1977. Counsel does not attempt to serve process on defendant until September, 1980, and fails to serve process within the three-year period. Counsel explains that he delayed because he did not determine until September, 1980, that the suit had a reasonable probability of success. Does counsel's argument excuse his failure to effect service within the three years required under applicable law?. No. Counsel's showing may explain or excuse a failure to bring the matter to trial in a timely fashion, but it does not excuse a failure to effect service and return of service within three years [*see Tandy Corp. v. Superior Court (1982) 129 Cal. App. 3d 734, 742-743, 181 Cal. Rptr. 319* (decided under prior law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsTime LimitationsComputationCivil ProceduresPleading & PracticePleadingsTime LimitationsExtensionsCivil ProceduresPleading & PracticeService of ProcessTime LimitationsExtensions

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17-212 California Forms of Pleading and Practice--Annotated § 212.105

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§ 212.105 Additional Requirements Under Trial Court Delay Reduction Act

Under the Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*), all superior courts in California must maintain delay reduction programs to facilitate timely disposition of civil actions [*see Gov. Code §§ 68605.5, 68608(a), 68620*]. Local rules governing delay reduction programs may and commonly do require service of the complaint within as short a time as 60 days after filing [*Gov. Code § 68616(a)*].

Los Angeles County's delay reduction rules provide a useful illustration. Los Angeles Co. Super. Ct. Rules, Rule 7.7(a)(1), provides that all complaints "shall be served within 60 days of the filing date and a proof of service thereof shall be filed within 90 days of the filing date, unless an appearance is made within said 90 days" [Los Angeles Co. Super. Ct. Rules, Rule 7.7(a)(1); *see* Los Angeles Co. Super. Ct. Rules, Rule 7.7(b) (extension by court for good cause)]. The rule further provides that cross complaints must be served within 30 days of the filing date and a proof of service filed within 60 days of the filing date [Los Angeles Co. Super. Ct. Rules, Rule 7.7(a)(2)].

The "three-years plus 60 days" time requirements under *Code Civ. Proc. § 583.210* [*see § 212.101*] and the more stringent time requirements under local delay reduction rules are distinguishable in that violation of the former results in mandatory dismissal, while violation of the latter does not [*see Code Civ. Proc. § 583.250*; *Gov. Code § 68608(b)*].

Dismissal is *discretionary* if a plaintiff fails to serve a complaint within the expedited time frame called for under a local delay reduction rule [*see Gov. Code § 68608(b)*].

A judge in a delay reduction case has the power to dismiss an action "if it appears that less severe sanctions would not be effective, after taking into account the effect of previous sanctions or previous lack of compliance in the case" [*Gov. Code § 68608(b)*]. Thus, if a plaintiff fails to serve the defendant within the shortened period mandated under a local delay reduction rule, it appears that the court should, at the very least, notify the plaintiff of the noncompliance and provide the plaintiff with an opportunity for compliance before the court can dismiss the case. Of course, even if the court does not dismiss a plaintiff's case, it may still impose other sanctions on the plaintiff or the plaintiff's attorney for noncompliance, including monetary sanctions [*see Code Civ. Proc. § 575.2(a)*].

For discussion of the Trial Court Delay Reduction Act, including what actions are and are not subject to it, see Ch. 552, *Trial Court Delay Reduction* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsFailures to ComplyCivil ProcedureDismissalsInvoluntary DismissalsFailures to Prosecute

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§ 212.106 Nonapplicability of Statutes Tolling Statutes of Limitation

The time within which service must be made once an action is commenced is not tolled by the statutory provisions tolling the running of the statute of limitations [*Tzolov v. International Jet Leasing (1989) 214 Cal. App. 3d 325, 327, 262 Cal. Rptr. 606* (rejecting application of *Code Civ. Proc. § 352*, which tolls statutes of limitations based on plaintiff's minority or insanity)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 212.107 Defenses to Motion for Dismissal for Delay in Service

[1] Defenses Limited by Statute

The requirements of *Code Civ. Proc. § 583.210 et seq.* are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute [*Code Civ. Proc. § 583.250(b)*]. Thus, aside from the exceptions under *Code Civ. Proc. § 583.220* [*see § 212.102*], extensions under *Code Civ. Proc. § 583.230* [*see § 212.103*, and exclusions under *Code Civ. Proc. § 583.240* [*see § 212.104*, there is generally no defense to a motion for mandatory dismissal under *Code Civ. Proc. § 583.250(a)(2)* other than that of waiver or estoppel [*Code Civ. Proc. § 583.140*; *see § 212.129[2]*].

[2] Estoppel

Estoppel may be raised as a defense if the defendant's conduct reasonably misled the plaintiff into believing that the time requirements for service had been satisfied or waived [*see Tresway Aero, Inc. v. Superior Court (1971) 5 Cal. 3d 431, 437-442, 96 Cal. Rptr. 571, 487 P.2d 1211]* .

ILLUSTRATION:

Defendant Estopped From Seeking Dismissal. Plaintiff brings an action against a state agency for damages. Almost three years after the filing of the complaint, plaintiff asks the general counsel of the agency to accept service on behalf of the agency. Before the applicable three-year period for service runs out, the general counsel executes an acknowledgment of service provided by plaintiff's counsel. Approximately 17 months later, the Attorney General files a motion to dismiss for failure to timely serve summons and complaint, claiming that the plaintiff's service on agency counsel was legally ineffective. The Attorney General asserts that plaintiff was required by statute to make service on the Attorney General and that the agency counsel had no legal right to accept service on the agency's behalf. May the defendant be estopped from claiming that service was improper? Yes. Regardless of whether the agency counsel had the right to accept service, he thought he did, and so there is a possible factual predicate for estoppel [*see State Air Resources Bd. v. Superior Court (1979) 93 Cal. App. 3d 803, 807, 808-809, 155 Cal. Rptr. 726]* .

ILLUSTRATION: Defendant Not Estopped From Seeking Dismissal. On October 5, 1981, plaintiffs file a complaint to recover damages caused by construction defects. The complaint, as originally filed, erroneously names "Heltzer Building Company" as defendant. The project's true owner and developer, Heltzer Enterprises, is not named as defendant until June 6, 1985, when plaintiff files an amendment to the complaint naming Heltzer Enterprises as Doe 1. On October 21, 1985, Heltzer Enterprises and Heltzer Building Company file a joint answer to the first amended complaint; the answer denies either defendant was the project's developer or general contractor, and alleges improper use of the Doe statute as an affirmative defense. Thereafter, Heltzer Enterprises actively participates in pretrial discovery, as well as in a mandatory settlement conference. After plaintiff voluntarily dismisses Heltzer Building Company from the action on June 9, 1986, Heltzer Enterprises files its own motion for dismissal, based on plaintiff's failure to serve the complaint within three years. Is defendant barred from seeking dismissal under the doctrine of equitable estoppel? No. Defendant did not lull plaintiff into a false sense of security resulting in inaction prior to the running of the applicable three-year date [*see Brookview Condominium Owners' Assn. v. Heltzer Enterprises-Brookview (1990) 218 Cal. App. 3d 502, 510-512, 267 Cal. Rptr. 76]* .

The authorities are split on whether or not a request by defendant's counsel for an extension of time in which to plead past the date of expiration of the statutory time period gives rise to an estoppel defense.

One case held, under prior law, that estoppel is present unless the defendant questions the adequacy of service of process or otherwise indicates lack of intention to submit to the jurisdiction of the court [*see Knapp v. Superior Court (1978) 79 Cal. App. 3d 799, 804, 145 Cal. Rptr. 154* (decided by First Dist., Div. Four)].

Another court, however, held under prior law that estoppel was not established by a request for extension of time to plead, as opposed to an extension of time to appear [*see Owen v. Niagara Machine & Tool (1977) 68 Cal. App. 3d 566, 569, 137 Cal. Rptr. 378* (decided by Second Dist., Div. Four)]. Similarly, a later case has held that estoppel was not established by a request for an extension for 15 days which was granted and which fell within 3 years, 60 days after the complaint was filed, when nothing on the last day of the extension was forthcoming and plaintiff on that date still had time to file a timely return [*Biss v. Bohr (1995) 40 Cal. App. 4th 1246, 1251-1253, 47 Cal. Rptr. 2d 692* (decided by Fourth Dist., Div. Three; although extension not expressly stated to be to answer complaint, court indicated its analysis would not be altered if it were)].

[3] Waiver

Waiver can also be a defense to the three-year rule. In contrast to the doctrine of estoppel, which applies when the conduct of one side has induced the other to take a position that it would be injured if the first should be permitted to repudiate its acts [*see § 212.129[3]*], waiver refers to the act, or the consequences of the act, of one side only [

Brookview Condominium Owners' Assn. v. Heltzer Enterprises-Brookview (1990) 218 Cal. App. 3d 502, 512, 267 Cal. Rptr. 76 (no waiver found)].

To support a finding of waiver, there must be [*Brookview Condominium Owners' Assn. v. Heltzer Enterprises-Brookview (1990) 218 Cal. App. 3d 502, 513, 267 Cal. Rptr. 76]* :

- An existing, right, benefit, or advantage.
- Actual or constructive knowledge of the right's existence.
- Either an actual intention to relinquish the right or conduct so inconsistent with any intent to enforce the right as to induce a reasonable belief that it has been relinquished.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessWaiversGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteGovernmentsLegislationStatutes of LimitationsEquitable Estoppel

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Chapter 212 DISMISSAL
PART II. LEGAL BACKGROUND
C. Involuntary Dismissal For Delay In Prosecution
3. Mandatory Dismissal for Delay in Service

17-212 California Forms of Pleading and Practice--Annotated §§ 212.108-212.119

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[Reserved]

§§ 212.108[Reserved]

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17-212 California Forms of Pleading and Practice--Annotated § 212.120

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§ 212.120 Mandatory Dismissal for Delay in Bringing Action to Trial or Retrial

[1] Failure to Bring Case to Trial Within Statutory Period

Code Civ. Proc. §§ 583.310-583.360 set forth periods in which the plaintiff must bring an action to trial [*see § 212.121*].

If an action is not brought to trial within the mandatory time periods, the court must dismiss the action [*Code Civ. Proc. § 583.360(a)*].

Proceedings to dismiss a case for delay in bringing it to trial may be initiated by [*Code Civ. Proc. § 583.360(a)*]:

- A motion by the defendant.
- A motion by the court.

The aim of the requirement is to promote the trial of actions before evidence is lost or destroyed, or the memory of

witnesses becomes dimmed, and also to protect defendants from being subjected to the annoyance of unmeritorious actions remaining undecided for an indefinite period of time [*Moran v. Superior Court (1983) 35 Cal. 3d 229, 237, 197 Cal. Rptr. 546, 673 P.2d 216]* .

For a form of notice of motion for dismissal based on failure to bring action to trial, *see § 212.294*.

[2] Special Rule Re Dismissal of Petition for Dissolution of Marriage

A petition for dissolution of marriage or legal separation is not subject to dismissal for delay in prosecution if any of the following conditions are present [*Code Civ. Proc. § 583.161*]:

- An order for child support has been issued in connection with the proceeding and has not been terminated by the court or by operation of law under *Fam. Code §§ 3900, 3901, 4007,* and *4013*.

- An order for spousal support has been issued in connection with the proceeding and has not been terminated by the court.

- The petition is for dissolution of marriage and a separate trial on the issue of status of the marriage has been conducted under *Fam. Code § 2337*.

For discussion of dismissal of these petitions, see Ch. 221, *Dissolution of Marriage: Procedure* .

[3] Dismissal Order Possible Before Expiration Date

Although mandatory dismissal is normally appropriate only after the applicable time period has expired, an order of dismissal has been upheld even though it was made before the mandatory expiration date, on the ground that the time remaining to bring the action to trial was grossly inadequate under the circumstances [*Massey v. Bank of America (1976) 56 Cal. App. 3d 29, 33, 128 Cal. Rptr. 144* (decided under prior law); *see also § 212.150* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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17-212 California Forms of Pleading and Practice--Annotated § 212.121

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§ 212.121 Period for Bringing Action to Trial

[1] Five-Year Period

An action must be brought to trial within five years after the action is commenced against the defendant [*Code Civ. Proc. § 583.310*].

The five-year period of *Code Civ. Proc. § 583.310* does not apply to family law proceedings in which a pendente lite child support order is obtained, or other family law actions in which a pendente lite child support order may be obtained such as petitions to establish parental relationship, petitions for custody and support of minor children, and proceedings under the Domestic Violence Prevention Act [*County of Orange v. Quinn (2002) 97 Cal. App. 4th 956, 960, 118 Cal. Rptr. 2d 833* (interpreting *Fam. Code § 3601*)].

NOTE:

Effect of "Fast Track" Programs. The stricter requirements of trial court delay reduction programs has lessened the impact of the mandatory five-year period of *Code Civ. Proc. § 583.310*. Case disposition time standards promulgated by the Judicial Council direct municipal and superior courts to dispose of 90 percent of general civil cases within 12 months, 98 percent of general civil cases within 18

months, and 100 percent of general civil cases within 24 months [*see* Cal. Rules of Ct. Appen. Div. I, §§ 2.1(c), (h), 2.3(b); *but see* Cal. Rules of Ct. Appen. Div. I, § 2.1(g) (superior court case involving "exceptional circumstances" or requiring "continuing review" is exempt from time standards); *see generally Gov. Code § 68600 et seq.* (Trial Court Delay Reduction Act)]. Many courts have adopted the Judicial Council time standards [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 7.6; Riverside County Super. Ct. Rules, Rule 11.0050 (adopting Judicial Council Standards)].

[2] Commencement of Period

[a] To Bring to Trial

An action commences on the date the original complaint is filed, as to any defendant named in that complaint either expressly or by a fictitious name. But when a new party defendant is added to the action, the action commences as to that defendant on the date of the order adding him or her as a party or on the date the pleading naming him or her as a new party is filed [*Gray v. Firthe (1987) 194 Cal. App. 3d 202, 209, 239 Cal. Rptr. 389* ; *see also Code Civ. Proc. §§ 350* (action commences when complaint is filed), 583.310 (five-year period begins when action commences against defendant)].

[b] To Bring to Arbitration

Several courts interpreting prior law have stated that, when an action is subject to contractual arbitration, the five-year period for bringing the action to an arbitration hearing commences at the time the court files the order compelling arbitration, not at the time the plaintiff files the complaint [*see Gainey v. Occidental Land Research (1986) 186 Cal. App. 3d 1051, 1054, 231 Cal. Rptr. 249* ; *Preston v. Kaiser Foundation Hospitals (1981) 126 Cal. App. 3d 402, 408-410, 178 Cal. Rptr. 882* ; *but see Lockhart-Mummery v. Kaiser Foundation Hospitals (1980) 103 Cal. App. 3d 891, 896, 163 Cal. Rptr. 325* (five-year period is measured from date of filing the complaint)]. It is uncertain whether courts will follow this approach under *Code Civ. Proc. § 583.310*, which requires the five-year period to be calculated from the date the "action is commenced against the defendant."

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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17-212 California Forms of Pleading and Practice--Annotated § 212.122

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§ 212.122 Period for Bringing Action to New Trial

[1] Three-Year Period Generally

In cases in which a new trial is granted in an action, the action must be brought again within certain three-year trial periods [*see § 212.122[2]*]. If, however, the applicable three-year period expires before the end of the initial five-year period prescribed by *Code Civ. Proc. § 583.310* [*see discussion under § 212.121*], the action need not be brought to trial again before the expiration of the latter period [*Code Civ. Proc. § 583.320(b)*].

The time requirements for bringing an action again to trial do not apply to ancillary or collateral proceedings subsequent to the original trial, such as a motion for attorney's fees under *Code Civ. Proc. § 1021.5* (private attorney general theory) [*No Oil, Inc. v. City of Los Angeles (1984) 153 Cal. App. 3d 998, 1003-1006, 200 Cal. Rptr. 768]* .

For a form of notice of motion for dismissal for failure to bring an action to a new trial, *see § 212.295*.

[2] After Mistrial

If a trial is commenced but no judgment is entered because of a mistrial or because a jury is unable to reach a decision,

and a new trial is granted in the action, the action must again be brought to trial within three years after the order of the court declaring the mistrial or the disagreement of the jury is entered [*Code Civ. Proc. § 583.320(a)(1)*].

When the parties stipulate to binding arbitration without a right to a trial de novo, the binding arbitration is equivalent to a trial. In such a case, when the arbitration hearing is abruptly terminated and arbitrator's appointment vacated, the order vacating the appointment is equivalent to an order declaring a mistrial within the meaning of former *Code Civ. Proc. § 583* (now see *Code Civ. Proc. § 583.320(a)(1)*) [*Dodd v. Ford (1984) 153 Cal. App. 3d 426, 429-431, 200 Cal. Rptr. 256]* .

[3] After Order Granting New Trial

If after judgment a new trial is granted and no appeal is taken, the action must again be brought to trial within three years after the order granting the new trial is entered [*Code Civ. Proc. § 583.320(a)(2)*].

If a default judgment has been obtained under *Code Civ. Proc. § 585*, an order setting aside the default judgment does not qualify as a new trial order for the purposes of *Code Civ. Proc. § 583.320* [*Misic v. Segars (1995) 37 Cal. App. 4th 1149, 44 Cal. Rptr. 2d 100* (setting aside judgment after default proveup hearing did not extend 5-year period for trial for three additional years provided for in *Code Civ. Proc. § 583.320(a)(3)*]. An order vacating a default judgment for the defendant's failure to answer is not equivalent to an order for a new trial for the purpose of this requirement, since a default judgment results from a non-adversarial hearing rather than a trial [*Tiholiz v. Superior Court (1980) 104 Cal. App. 3d 201, 205, 163 Cal. Rptr. 452* (decided under prior law); *see Misic v. Segars (1995) 37 Cal. App. 4th 1149, 44 Cal. Rptr. 2d 100]* . It has been suggested, however, that rather than asking to have a default judgment set aside, under certain circumstances a defaulting defendant may ask the trial court for a new trial. If granted, under *Code Civ. Proc. § 583.320(a)(e)* plaintiff arguably would have three years from the date of the order to bring the matter to trial [*Misic v. Segars (1995) 37 Cal. App. 4th 1149, 1154-1156, 44 Cal. Rptr. 2d 100* (issue raised but not decided); *see In re Marriage of Dunmore (1996) 45 Cal. App. 4th 1372, 1377, 53 Cal. Rptr. 2d 450* (uncontested hearing to prove damages for default judgment while subject to new trial motion is not "trial" for purposes of dismissal statute)].

By contrast, it has been held that an action is "brought to trial" when a plaintiff proceeds to try the action under *Code Civ. Proc. § 594* (proceeding with case when other party fails to appear at trial or hearing) in the defendant's absence, so that an order setting aside the judgment in the plaintiff's favor is equivalent to an order granting a new trial for purposes of this requirement [*Briley v. Sukoff (1979) 98 Cal. App. 3d 405, 408-410, 159 Cal. Rptr. 452* (decided under prior law)].

For discussion of the exclusion of time in computing when action must be brought to trial generally when a default judgment is vacated, see *§ 212.125[4][c][vi] below.*

[4] After Remittitur for New Trial

If on appeal an order granting a new trial is affirmed or a judgment is reversed and the action remanded for a new trial, the action must again be brought to trial within three years after the remittitur is filed by the clerk of the trial court [*Code Civ. Proc. § 583.320(a)(3)*].

On the going down of the remittitur, the action is remanded for a new trial whether the decision so provides expressly, is an unqualified reversal, or contains a direction only as to the overruling of court's discretion. The fact that an appellate court did not expressly remand for a new trial is immaterial if the appeal followed from a final determination of the parties' rights on the merits [*see McDonough Power Equipment Co. v. Superior Court (1972) 8 Cal. 3d 527, 532-533, 105 Cal. Rptr. 330, 503 P.2d 1338]* .

On the other hand, an action is not deemed to be remanded for a new trial within the meaning of *Code Civ. Proc. §*

583.320(a)(3) if the appellate opinion is but a qualified reversal of a judgment after a dismissal without prejudice rather than a "trial" on the merits [*Fannin Corp. v. Superior Court (1974) 36 Cal. App. 3d 745, 753-755, 111 Cal. Rptr. 920* (decided under prior law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureTrialsMotions for MistrialCivil ProcedureJudgmentsRelief From JudgmentAdditurs & RemittitursRemittitursCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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17-212 California Forms of Pleading and Practice--Annotated § 212.123

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§ 212.123 When Action Is Brought to Trial or New Trial

[1] Commencement of Trial

[a] In Jury Case

For the purpose of the time requirements of *Code Civ. Proc. §§ 583.310* and *583.320*, an action is "brought to trial" if, in a jury case, the jury has been impanelled [*Hartman v. Santamarina (1982) 30 Cal. 3d 762, 765-767, 765 n.3, 180 Cal. Rptr. 337, 639 P.2d 979* (decided under prior law)].

One court of appeal has held that a party can put a jury trial beyond the bar of the dismissal statute by merely commencing the jury selection process, the rationale being that a contrary rule would invite an unscrupulous party to delay or prolong voir dire examination of prospective jurors until the expiration of the five-year period [*Hilliard v. A.H. Robins Co. (1983) 148 Cal. App. 3d 374, 389-390, 196 Cal. Rptr. 117]* .

[b] In Nonjury Case

An action is "brought to trial" in a nonjury case if one witness has been sworn and gives some testimony relevant to the

issues [*Weeks v. Roberts (1968) 68 Cal. 2d 802, 805, 69 Cal. Rptr. 305, 442 P.2d 361* (decided under prior law); *Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn. (1977) 71 Cal. App. 3d 706, 711-712, 139 Cal. Rptr. 651* (decided under prior law)].

Alternatively, an action may be brought to trial if the plaintiff requests leave to present his or her first witness, but is denied [*Clements v. Ragghianti (1957) 155 Cal. App. 2d 188, 191, 317 P.2d 706* (decided under prior law)].

[c] In Judicially Arbitrated Case

Usually, submission of an action to judicial arbitration [*see Code Civ. Proc. § 1141.10 et seq.*] is not considered bringing the action to trial, since a trial de novo may be subsequently demanded. However, commencement of a judicial arbitration hearing was held to be equivalent to the commencement of a trial when the parties had stipulated to binding arbitration without a right to trial de novo [*Dodd v. Ford (1984) 153 Cal. App. 3d 426, 429-431, 200 Cal. Rptr. 256* (decided under prior law)].

[2] Pretrial Disposition on Merits

An action may be "brought to trial" when a judgment is rendered pursuant to a pretrial order which determines an issue of law or fact [*McDonough Power Equipment Co. v. Superior Court (1972) 8 Cal. 3d 527, 532, 105 Cal. Rptr. 330, 503 P.2d 1338* (decided under prior law)]. In other words, an action is "brought to trial" in any situation in which the rights of the parties have been finally determined on the merits of the case, either factually or legally [*Fannin Corp. v. Superior Court (1974) 36 Cal. App. 3d 745, 751, 111 Cal. Rptr. 920* (decided under prior law)].

Examples of situations in which an action is "brought to trial" include the following:

- When the court dismisses an action with prejudice following the sustaining of a demurrer [*see Berri v. Superior Court (1955) 43 Cal. 2d 856, 858-860, 279 P.2d 8* (decided under prior law)].

- When the court enters a judgment following a motion for summary judgment [*Southern Pacific Co. v. Seaboard Mills (1962) 207 Cal. App. 2d 97, 104, 24 Cal. Rptr. 236* (decided under prior law)].

- When a case is submitted on stipulated facts for final determination of legal questions [*Ryerson v. Riverside Cement Co. (1968) 266 Cal. App. 2d 789, 795, 72 Cal. Rptr. 595* (decided under prior law)].

Examples of situations in which an action is not "brought to trial" include the following:

- When a court grants discretionary dismissal of an action for delay in prosecution [*see Fannin Corp. v. Superior Court (1974) 36 Cal. App. 3d 745, 751, 111 Cal. Rptr. 920* (decided under prior law)].

- When a court grants a motion for partial summary judgment or summary adjudication of issues [*see King v. California (1970) 11 Cal. App. 3d 307, 310-312, 89 Cal. Rptr. 715* (decided under prior law)].

- When a court sets a trial date for a date after the expiration of the applicable period [*see Tunis v. Superior Court (1963) 59 Cal. 2d 465, 467, 30 Cal. Rptr. 135, 380 P.2d 823* (decided under prior law)].

[3] Effect of Bringing Action to Trial

If an action is "brought to trial" within the applicable time period for doing so, the mandatory requirement measured by that particular period is satisfied even if the trial is not completed [*see Hartman v. Gordon H. Ball, Inc. (1969) 269 Cal. App. 2d 779, 780-781, 75 Cal. Rptr. 618* (decided under prior law)].

ILLUSTRATION:

Trial Ending in Mistrial. The trial of an action ends in a mistrial. Is the action "brought to trial" for purposes of the dismissal statute? Yes [*see Hartman v. Gordon H. Ball, Inc. (1969) 269 Cal. App. 2d 779, 780-781, 75 Cal. Rptr. 618* (decided under prior law)].

[4] Partial Trial

Partial trial of an action will take the case out of the operation of the five-year statute [*Berri v. Superior Court (1955) 43 Cal. 2d 856, 861, 279 P.2d 8* (prior law); *In re Marriage of MacFarlane & Lang (1992) 8 Cal. App. 4th 247, 255, 10 Cal. Rptr. 2d 157* (partial trial found in evidentiary hearing granting judgment of dissolution and subsequent hearings on issues relating to property over which it had reserved jurisdiction)].

However, if none of the issues determined in the earlier trial are related to the issues to be tried on the remaining causes of action, the earlier trial will not be considered a partial trial and will not take the case out of the operation of the five year statute [*Sagi Plumbing v. Chartered Constr. Corp. (2004) 123 Cal. App. 4th 443, 449, 19 Cal. Rptr. 3d 835* (earlier trial of issues unrelated and irrelevant to remaining two causes of action did not constitute commencement of trial on the remaining two causes of action; plaintiff's failure to bring the remaining two causes of action to trial within five years resulted in their involuntary dismissal)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureTrialsBench TrialsCivil ProcedureTrialsMotions for Mistrial

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§ 212.124 Extension of Time for Trial by Stipulation

[1] Stipulation by Parties

The parties may extend the time within which an action must be brought to trial under *Code Civ. Proc. §§ 583.310* and *583.320* by the following:

- A written stipulation, which need not be filed, but if not filed, must be brought to the court's attention if relevant to a motion for dismissal [*Code Civ. Proc. § 583.330(a)*].

- An oral agreement made in open court, if entered in the minutes of the court or if a transcript is made [*Code Civ. Proc. § 583.330(b)*; *see also Code Civ. Proc. § 583.130* (policy favoring right of parties to stipulate is generally to be preferred)].

A stipulation may be made after the expiration of the applicable time period, so long as dismissal of the action has not yet been ordered [*see General Ins. Co. v. Superior Court (1975) 15 Cal. 3d 449, 454-455, 124 Cal. Rptr. 745, 541 P.2d 289]* . However, a stipulation entered into after the five-year period has expired will extend the five-year term only

if it expressly waives the right to dismissal or extends the time of trial to a date beyond the five-year period [*see Miles v. Speidel (1989) 211 Cal. App. 3d 879, 883, 259 Cal. Rptr. 582]* .

For a form of stipulation extending time within which an action must be brought to trial, *see § 212.298*.

[2] Construction of Stipulation

A stipulation is effective under *Code Civ. Proc. § 583.330* if it expressly waives the right to mandatory dismissal for failure to satisfy the requirements of *Code Civ. Proc. § 583.310* or *583.320*, or if it expressly permits the plaintiff to bring the action to trial or retrial at some date beyond the applicable time period [*see General Ins. Co. v. Superior Court (1975) 15 Cal. 3d 449, 455, 124 Cal. Rptr. 745, 541 P.2d 289* (decided under prior law); *J.C. Penney Co. v. Superior Court (1959) 52 Cal. 2d 666, 669, 343 P.2d 919* (decided under prior law)].

A stipulation may also be effective if it shows intent to extend the applicable time period by indefinitely extending the time for performance of some other act that is a necessary prerequisite to bringing the action to trial [*see Health Industries of America v. Los Angeles County Metropolitan Transportation Authority (2002) 102 Cal. App. 4th 1372, 1378, 126 Cal. Rptr. 2d 294* ; *Regan Distributors, Inc. v. Yurosek & Son, Inc. (1979) 88 Cal. App. 3d 924, 928-929, 152 Cal. Rptr. 127* (decided under prior law; appellate court, based on stipulation, reversed discretionary dismissal for failure to timely bring action to trial)]. However, the mere granting of an open extension of time to answer, which is exercised within the statutory period, may not extend the period under circumstances that do not preclude the plaintiff from bringing the case to trial within the prescribed time [*see Gentry v. Nielsen (1981) 123 Cal. App. 3d 27, 33, 176 Cal. Rptr. 385* (decided under prior law)].

ILLUSTRATION:

Indefinite Extension Does Not Excuse Delay in Bringing to Trial. Parties stipulate in writing to an open extension of time within which defendant may respond to the complaint. Defendants file answers two years before the expiration of the five-year dismissal period. Plaintiff does not bring the action to trial within five years from the date the action was filed. Does the stipulation automatically operate to toll or waive the five-year period for bringing the action to trial? No. The mere granting of an open extension of time to answer, which is exercised within the statutory period, does not extend the period under circumstances which do not preclude the plaintiff from bringing the case to trial within the prescribed time [*see Gentry v. Nielsen (1981) 123 Cal. App. 3d 27, 33, 176 Cal. Rptr. 385* (decided under prior law)].

If the stipulation extends the applicable period for an indefinite period of time, a court may construe it to include an implied condition that the extension be for a reasonable period of time [*see Chapin v. Superior Court (1965) 234 Cal. App. 2d 571, 576, 44 Cal. Rptr. 496* (decided under prior law; court opined that additional five years was maximum boundary for "reasonable time")].

In construing a stipulation extending the five-year period, the ordinary rules of interpretation of contracts apply. Under those rules, the paramount consideration is the intention of the parties as it existed at the time of contracting. The court must examine the instrument in the light of the circumstances surrounding its execution so as to ascertain what the parties meant by the words they used [*Miles v. Speidel (1989) 211 Cal. App. 3d 879, 883-884, 259 Cal. Rptr. 582]* . The objective intent as evidenced by the words of the contract governs the court's interpretation [*Miles v. Speidel (1989) 211 Cal. App. 3d 879, 884, 259 Cal. Rptr. 582]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureDismissalsInvoluntary DismissalsFailures to Prosecute

California Forms of Pleading and Practice--Annotated

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Chapter 212 DISMISSAL
PART II. LEGAL BACKGROUND
C. Involuntary Dismissal For Delay In Prosecution
4. Mandatory Dismissal For Delay In Bringing Action To Trial

17-212 California Forms of Pleading and Practice--Annotated § 212.125

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§ 212.125 Exclusions From Computation of Time Period

[1] All Exclusions Statutory

Under *Code Civ. Proc. § 583.360*, the five-year period is not subject to extension, excuse, or exception except as expressly provided by statute [*Code Civ. Proc. § 583.360(b)*]. The statutory exceptions (other than by stipulation, discussed in *§ 212.194[7][h]*), are discussed in the remainder of this section and in § 212.126.

[2] Suspension of Court's Jurisdiction

Any time during which the court's jurisdiction to try the action was suspended is excluded in computing the time within which an action must be brought to trial or retrial under *Code Civ. Proc. §§ 583.310-583.360* [*Code Civ. Proc. § 583.340(a)*]. For discussion of appellate courts' divergent views on how to determine impossibility, impracticability, and futility, *see § 212.154[4]*..

Suspension of jurisdiction under *Code Civ. Proc. § 583.340(a)* refers to a lack of jurisdiction in the strict sense, that is, an entire absence of power to hear or to determine the case [*White v. Renck (1980) 108 Cal. App. 3d 835, 840-841, 166 Cal. Rptr. 701* (decided under prior law)].

ILLUSTRATIONS:

Jurisdiction Suspended. Plaintiff brings an action against defendant, filing the complaint on July 21, 1976. The trial court enters summary judgment in plaintiff's favor on February 7, 1977. Defendant successfully appeals the judgment and a remittitur is filed on May 12, 1978. On August 3, 1981, defendant moves to dismiss the action on the ground that plaintiffs have failed to bring the action to trial within five years from the filing of the complaint. In computing the date by which plaintiff's action must be brought to trial in order to avoid dismissal, must the court exclude the one-year and sixteen-day period of the time that its jurisdiction to try the action was suspended due to defendant's appeal? Yes. The time during which the court's jurisdiction to try the action was suspended because of defendant's appeal from the summary judgment must be excluded from the overall five-year period commencing with the filing of the complaint. Plaintiffs have until August 6, 1982 to bring their action to trial [*Bergin v. Portman (1983) 141 Cal. App. 3d 23, 26, 190 Cal. Rptr. 81]* .

Jurisdiction Not Suspended. Plaintiff, a minor, files a complaint in a tort action against defendant on February 5, 1973. On that same day, the court appoints plaintiff's father as her guardian ad litem. The father dies on January 18, 1976 and a second guardian ad litem, plaintiff's mother, is not appointed until August 4, 1976, approximately 200 days later. On March 20, 1978, defendants move to dismiss the action, based on plaintiff's failure to bring the case to trial within five years after the filing of the complaint. In computing the date by which plaintiff's action must be brought to trial in order to avoid dismissal, may the court exclude the 200-day hiatus when plaintiff was unrepresented by a guardian ad litem? No. The absence of a guardian ad litem is not a jurisdictional defect. The court does not lose jurisdiction of the subject matter and the parties by this defect; the defect could be waived and the judgment would not be subject to collateral attack as a void judgment. The dismissal statute refers to "lack of jurisdiction" only in the fundamental sense of an entire absence of power to hear or determine the case [*White v. Renck (1980) 108 Cal. App. 3d 835, 838-841, 166 Cal. Rptr. 701* (decided under prior law)].

[3] Stay or Injunction of Prosecution of Action

Any time during which the prosecution of the trial of the action is stayed or enjoined is excluded in computing the time within which an action must be brought to trial or retrial under *Code Civ. Proc. §§ 583.310-583.360* [*Code Civ. Proc. § 583.340(b)*; *see also Cal. Rules of Ct., Rule 3.515* (stay pending coordination of actions as excluded from calculation of time periods under *Code Civ. Proc. § 583.110 et seq.*)].

For purposes of *Code Civ. Proc. § 583.340(b)*, a "stay" is a temporary suspension of a case, or some proceeding in it, until the happening of a defined contingency [*Holland v. Dave Altman's R.V. Center (1990) 222 Cal. App. 3d 477, 482, 271 Cal. Rptr. 706]* .

Examples of stays that would result in a exclusion of time include the following:

- The stay under federal bankruptcy law, which operates as a stay on the commencement or continuation of any action against a bankrupt when bankruptcy proceedings are pending against the bankrupt [*Hughes v. Portsmouth Square, Inc. (1982) 135 Cal. App. 3d 170, 172-173, 184 Cal. Rptr. 926* (decided under prior law)].

- The stay pending contractual arbitration ordered under *Code Civ. Proc. §§ 1281.2, 1281.4* [*see Byerly v. Sale (1988) 204 Cal. App. 3d 1312, 1314-1316* ; for discussion of the relationship between the dismissal statutes and contractual arbitration, *see § 212.128*].

- A stay for an indefinite time until an appeal on an order quashing service of summons is concluded [

see Holland v. Dave Altman's R.V. Center (1990) 222 Cal. App. 3d 477, 482, 271 Cal. Rptr. 706] .

[4] Impossibility, Impracticability, or Futility

[a] When Tolling Applicable

Any time during which it was impossible, impracticable, or futile to bring an action to trial is excluded in computing the time within which an action must be brought to trial or retrial under *Code Civ. Proc. §§ 583.310-583.360* [*Code Civ. Proc. § 583.340(c)*; *see, e.g., Hattersley v. American Nucleonics Corp. (1992) 3 Cal. App. 4th 397, 401, 4 Cal. Rptr. 2d 331* (tolling principle of *Code Civ. Proc. § 583.340(c)* applies to three-year nondiscretionary dismissal statute *Code Civ. Proc. § 583.320(a)(3)*)].

The plaintiff has the burden of proving impossibility, impracticability, or futility [*see Lauriton v. Carnation Co. (1989) 215 Cal. App. 3d 161, 165, 263 Cal. Rptr. 476]* . The plaintiff must show a causal connection between the circumstances on which plaintiff relies and the failure to satisfy the five-year requirement; bringing the action to trial must be impossible, impracticable, or futile for the reason proffered [*see Wilshire Bundy Corp. v. Auerbach (1991) 228 Cal. App. 3d 1280, 1289, 279 Cal. Rptr. 488* ; *Sierra Nevada Memorial-Miners Hospital, Inc. v. Superior Court (1990) 217 Cal. App. 3d 464, 473, 266 Cal. Rptr. 50]* . For discussion of appellate courts' divergent views on how to determine impossibility, impracticability, and futility, *see § 212.154[4]*.

The excuse of impossibility or impracticability may apply as follows:

- When, as a matter of law or fact, it would not be possible to commence trial [*see Christin v. Superior Court of Los Angeles County (1937) 9 Cal. 2d 526, 71 P.2d 205]* .

- When, although proceeding to trial is neither legally nor factually impossible, it would involve excessive and unreasonable difficulty in light of the circumstances of the individual case, including the acts and conduct of the parties and the nature of the proceedings [*Brunzell Constr. Co. (1970) 2 Cal. 3d 545, 554, 86 Cal. Rptr. 297, 468 P.2d 553* (decided under prior law)].

If the trial court concludes that there was a period of impossibility, impracticability, or futility over which plaintiff had no control, it must toll the running of the five-year period for that period, even if there is ample time after that period for the plaintiff to bring the case to trial [*Brown & Bryant, Inc. v. Hartford Accident & Indemnity Co. (1994) 24 Cal. App. 4th 247, 257, 29 Cal. Rptr. 2d 144]* . The plaintiff need not show that he or she would have brought the case to trial within the five-year period but for theperiod of impracticability [*New West Fed. Savings & Loan Assn. v. Superior Court (1990) 223 Cal. App. 3d 1145, 1155, 273 Cal. Rptr. 37]* .

[b] Reasonable Diligence Required

The plaintiff has a duty to use reasonable diligence in prosecuting his or her action [*Lauriton v. Carnation Co. (1989) 215 Cal. App. 3d 161, 164, 263 Cal. Rptr. 476* ; *see Code Civ. Proc. § 583.130*]. The exclusion of *Code Civ. Proc. § 583.340(c)* does not apply when a plaintiff fails to take reasonable steps to expedite the proceedings [*see Schwenke v. J & P Scott, Inc. (1988) 205 Cal. App. 3d 71, 79-80, 252 Cal. Rptr. 91]* . To establish reasonable diligence, the plaintiff must be able to demonstrate diligence in pursuit of his or her duty to expedite the resolution of the case at all stages of the proceedings, including the specific duty to use every reasonable effort to bring the matter to trial within the five-year period [*Lauriton v. Carnation Co. (1989) 215 Cal. App. 3d 161, 164, 263 Cal. Rptr. 476]* . For discussion of appellate courts' divergent views on how to determine impossibility, impracticability, and futility, *see § 212.154[4]*.

ILLUSTRATION:

Failure to Exercise Due Diligence. On December 31, 1981, plaintiff files a complaint in municipal court to foreclose on a mechanic's lien. On June 29, 1982, defendants file a verified answer and

unverified cross complaint seeking damages for breach of contract in the amount of $35,000. On December 8, 1982, defendant successfully moves to have the action transferred to the superior court; the case is docketed in that court on March 14, 1983. The matter is sent to arbitration. On March 12, 1984, plaintiff requests a trial de novo. The case is restored to the trial calendar. At a status conference held on August 30, 1984, plaintiff requests that the case be ordered off the active calendar. For the next two and one-half years, there is no activity on the case. On March 5, 1987, defendant moves to restore the case to the trial calendar. On May 15, 1987, defendant moves to dismiss the case on the ground that more than five years have elapsed since the filing of the complaint. Is *Code Civ. Proc. § 583.340(c)* applicable? No. Plaintiff could easily have moved to transfer the action at the time he was served with the cross complaint. Instead, he did nothing, waiting until defendant brought the motion nearly five months later. Moreover, the case was taken off calendar for approximately two and one-half years at plaintiff's request [*see Schwenke v. J & P. Scott, Inc. (1988) 205 Cal. App. 3d 71, 79-80, 252 Cal. Rptr. 91]* .

[c] Situations in Which Exclusion May Be Applicable

[i] Court Congestion

A period of court congestion may be a sufficient basis for exclusion under *Code Civ. Proc. § 583.340(c)* when the congestion causes unusual or abnormal delays beyond the plaintiff's control [*see Lazelle v. Lovelady (1985) 171 Cal. App. 3d 34, 38-42, 217 Cal. Rptr. 145* (decided under prior law); *Bennett v. Bennett Cement Contractors, Inc. (1981) 125 Cal. App. 3d 673,677-678, 125 Cal. App. 3d 673, 678, 178 Cal. Rptr. 633* (decided under prior law); *see also Chin v. Meier (1991) 235 Cal. App. 3d 1473, 1477-1478, 1 Cal. Rptr. 2d 499* (aggregate time of continuances due to court unavailability as tolling limitation period of *Code Civ. Proc. § 583.340(c)* even if reasonable time remains to bring action to trial)].

ILLUSTRATION:

Five-Year Period Tolled While Case on Civil Active List. On November 27, 1978, plaintiffs file a complaint against defendants. Pursuant to an "Order to Specially Set Case for Trial," trial is set for September 14, 1983. On that date, no courts are available and the case begins trailing on a day-to-day basis. On November 22, 1983, five days before the running of the five-year limitation period, plaintiffs file an Election of Arbitration, pursuant to *Cal. Rules of Ct., Rule 1600 et seq [now see Rule 3.810*]. The case is taken off the civil active list and placed on the arbitration list. The five-year period expires. On December 29, 1983, defendants file a motion to dismiss for failure to prosecute within five years. Plaintiff argues that the five- year period should be tolled under *Code Civ. Proc. § 583.340(c)*, because it was impossible for him to prosecute his action during the 69-day period from September 14, 1983 to November 22, 1983, due to the unavailability of a judge and court room. Is *Code Civ. Proc. § 583.340(c)*applicable? Yes. An exception to mandatory dismissal for failure to prosecute is recognized when the delay in bringing a case to trial is due, at least partially, to court congestion. When a plaintiff has waited the normal time for a place on the calendar and has been assigned such a place well within the five-year period, his or her inability thereafter to proceed to trial because of continued court congestion should not be chargeable to the five-year period [*Lazelle v Lovelady (1985) 171 Cal. App. 3d 34, 41-42, 217 Cal. Rptr. 145* (decided under former law)].

The court congestion or unavailability of a courtroom to try the case must prevent or interfere with plaintiff's prosecution of the case. If plaintiff is not ready for trial, a court-declared moratorium on civil trials, for example, will not be sufficient to make it impossible, impracticable, or futile to bring the action to trial [*see Jordan v. Superstar Sandcars (2010) 182 Cal. App. 4th 1416, 1420-1422* (while two court-declared moratoria on civil trials prevented civil cases from being tried, moratoria did not prevent or interfere with plaintiffs prosecuting their case, where plaintiffs were not ready for trial at time of moratoria)].

The tolling principle of *Code Civ. Proc. § 583.340(c)* applies to *Code Civ. Proc. § 583.320(a)(3)* (three-year nondiscretionary retrial dismissal statute) [*Hattersley v. American Nucleonics Corp. (1992) 3 Cal. App. 4th 397, 401, 4 Cal. Rptr. 2d 331]* .

[ii] Court Fails to Perform Duty

In calculating the applicable time periods for bringing an action to trial, the period during which the trial is held in abeyance pending official court action that is necessary to proceed may be excludable under *Code Civ. Proc. § 583.340(c)*, on the ground that it is impossible for the plaintiff to prosecute the action during this time because of a delay caused solely by the court.

Examples of this excludable time include:

- The period between a plaintiff's successful peremptory challenge of the judge presiding over the trial under *Code Civ. Proc. § 170.6* and the time a new judge is assigned [Hartman v. Santamarina (1982) 30Cal. 3d 762, 768, *180 Cal. Rptr. 337, 639 P.2d 979* (decided under prior law); *Nail v. Osterholm (1970) 13 Cal. App. 3d 682, 686, 91 Cal. Rptr. 908* (decided under prior law)].

- The time between the filing of a judicial arbitration award and the setting of a trial date, when a party has made a request for trial de novo following judicial arbitration [*Moran v. Superior Court (1983) 35 Cal. 3d 229, 240-242, 197 Cal. Rptr. 546, 673 P.2d 216* (decided under prior law); *Paul E. Iacono Structural Engineer, Inc. v. Rizzo (1984) 162 Cal. App. 3d 803, 807-808, 208 Cal. Rptr. 787* (decided under prior law); for further discussion, *see § 212.125[5][a]*].

[iii] Disability of Counsel

Delay in bringing a case to trial attributable to the sickness or death of counsel is not necessarily excusable so as to toll the running of the five-year statutory period under *Code Civ. Proc. § 583.310*. Rather, whether the period will be tolled depends on the facts of the case and whether the illness renders it impractical to bring the case to trial within the statutory period. The existence of impracticability is determined in light of all the circumstances of the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves. The critical factor in applying the exception to a given factual situation is whether the plaintiff exercised reasonable diligence in prosecuting his or her case [*Him v. Superior Court (1986) 184 Cal. App. 3d 35, 39, 228 Cal. Rptr. 839]* .

ILLUSTRATIONS:

Attorney's Illness As Tolling Period. On April 7, 1981, plaintiff files a personal injury complaint against defendant. Plaintiff's at-issue memorandum is filed in November 1982. In October 1984, plaintiff serves interrogatories on defendant. Settlement negotiations take place during 1985. On February 18, 1986, seven weeks prior to the deadline for bringing the case to trial, plaintiff's sole counsel is hospitalized after suffering severe chest pains. By late March 1986, the attorney is able to work in his office two hours per day, and by May, he is able to spend four hours per day at the office. In late April 1986, the attorney realizes that the five-year period has expired, and he immediately telephones the office of defendant's attorney to obtain a written stipulation to extend time. Defense counsel declines to so stipulate, and files a motion to dismiss on May 8, 1986. Should the five-year period be tolled due to the disability of plaintiff's counsel? Yes. Under all of the circumstances, plaintiff's conduct was sufficiently diligent to warrant the applicability of the impracticability exception to excuse his failure to bring the case to trial within the five-year limit [*see* *Him v. Superior Court (1986) 184 Cal. App. 3d 35, 39, 228 Cal. Rptr. 839]* .

Attorney's Illness As Not Tolling Period. Plaintiff brings a medical malpractice action against

defendant. As of December 1987, the law firm representing plaintiff consists of one partner and two contract attorneys; one of these contract attorneys works on the discovery and preparation of plaintiff's case. The partner undergoes three surgeries between August 5, 1987 and November8, 1988, requiring 77 days of recuperation. The contract attorney mistakenly refers to the service date posted on the file label (December 9, 1986) as the date the complaint was filed; consequently, she does not obtain a trial date within the five-year period. On February 6, 1989, defendant files a motion to dismiss for failure to to bring the action to trial within five years. Should the five-year period be tolled due to the partner's disability? No. The illness of the attorney for a total of 77 days during the five-year period is not a sufficient period alone to warrant an inference that an appreciable delay in the prosecution of plaintiff's case occurred because of that incapacity [*see Sierra Nevada Memorial-Miners Hospital, Inc. v. Superior Court (Hudson) (1990) 217 Cal. App. 3d 464, 471, 473-474, 266 Cal. Rptr. 50]* .

[iv] Multiple Defendants

An unavoidable delay in proceeding to trial against one defendant (caused, for example, by intervening injunctions and appeals) that results in plaintiff delaying proceedings against the other defendants in the action is not an excusable delay as to the other defendants if it would not have been impracticable and futile for plaintiff to sever the causes of action and proceed separately against the codefendants [*Brunzell Constr. Co. v. Wagner (1970) 2 Cal. 3d 545, 554-556, 86 Cal. Rptr. 297, 468 P.2d 553* (decided under prior law)].

The trial court is in the most advantageous situation to evaluate the question of whether or not the action could be severed, and the factors it may consider include [*Brunzell Constr. Co. v. Wagner (1970) 2 Cal. 3d 545, 554-556, 86 Cal. Rptr. 297, 468 P.2d 553* (decided under prior law); *see Westinghouse Electric Corp. v. Superior Court (1983) 143 Cal. App. 3d 95, 107-108, 191 Cal. Rptr. 549* (decided under prior law)]:

- The relationship between the causes of action.
- The expense and difficulty likely to be engendered by separate trials.
- The diligence and good faith efforts of the plaintiff.
- The prejudice or hardship to defendants.
- The expense, complexity, and quantity of evidentiary duplication.
- The potential problems of inconsistent judicial determinations.
- Any other relevant facts the court deems important.

Since impracticability may vary not only as to different proceedings but as to different parties within the same proceeding, each defendant is entitled to an individual evaluation of the right to dismissal with respect to the defendant's particular role in the litigation [*Brunzell Constr. Co. v. Wagner (1970) 2 Cal. 3d 545, 555, 86 Cal. Rptr. 297, 468 P.2d 553* (decided under prior law)].

[v] Separate Action Pending

The plaintiff may be able to establish that proceeding to trial would be impracticable and futile because another action is pending that arose outof the same incident or involves some of the same issues. Examples of situations in which impracticability or futility may be found to exist include the following:

- The outcome in the pending case would resolve a legal issue that is unsettled or essential to plaintiff's case and the interests of judicial economy would be promoted by delaying proceeding to trial [*see Rose v. Knapp (1951) 38 Cal. 2d 114, 118, 237 P.2d 981* (decided under prior law); *Stella v. Great Western Sav. & Loan Assn. (1970) 13 Cal. App. 3d 732, 737-739, 91 Cal. Rptr. 771* (decided under prior law)].

- The pending action, brought by plaintiff in federal court, cannot be consolidated with plaintiff's state court action and determination of the federal action would be beneficial to all the parties to the state action [*see McRoberts v. Gorham (1971) 18 Cal. App. 3d 1040, 1045, 96 Cal. Rptr. 427* (decided under prior law)].

Conversely to the two examples above, the existence of a pending action will not justify delay in prosecuting the plaintiff's action if there are no disputed or complex facts or legal issues to be tried in plaintiff's action that would be obviated by a final determination in the pending action [*see Reserve Ins. Co. v. Universal Underwriters Ins. Co. (1975) 51 Cal. App. 3d 57, 62-63, 123 Cal. Rptr. 763* (prior law)]. Also, existence of a pending action brought by the plaintiff in federal court may not justify delay in prosecuting plaintiff's state court action if there was no necessity for bringing the actions in different forums and no particular benefit to be gained by awaiting the outcome of the pending action [*see Mitchell v. Frank R. Howard Memorial Hospital (1992) 6 Cal. App. 4th 1396, 1404, 8 Cal. Rptr. 2d 521* ; *Manor Drug Stores v. Blue Chip Stamps (1977) 71 Cal. App. 3d 423, 426-427, 139 Cal. Rptr. 483* (decided under prior law)].

The fact that an action was consolidated with a second action may excuse delay in bringing the consolidated action against a defendant named in the first action if substantial benefits were gained by consolidation, such as preventing the duplication of complex mechanical and technical factual evidence [*see General Motors Corp. v. Superior Court (1966) 65 Cal. 2d 88, 96, 52 Cal. Rptr. 460, 416 P.2d 492* (consolidated personal injury and wrongful death cases based on design defects in automobile; decided under prior law)].

[vi] Default Entered

Some courts of appeal have adopted a rule of mandatory exclusion in cases of default, holding that the period between the time that defendant defaulted and the time the default judgment was ultimately set aside is excluded from computation of the time within which the action must thereafter be brought to trial, because there is no adversary against whom the plaintiff may reasonably prosecute the action during this time [*Maguire v. Collier (1975) 49 Cal. App. 3d 309, 312-313, 122 Cal. Rptr. 510* (decidedunder prior law); *see Misic v. Segars (1995) 37 Cal. App. 4th 1149, 1156, 44 Cal. Rptr. 2d 100* ; *see, e.g., Dale v. ITT Life Ins. Corp. (1989) 207 Cal. App. 3d 495, 498-499, 255 Cal. Rptr. 8]* .

However, at least one court of appeal has rejected the rule of mandatory exclusion, taking the position that the time between entry of a default and entry of a default judgment is excludable if and only if the court finds that, despite the plaintiff's use of due diligence to obtain entry of the judgment, it was impossible, impracticable, or futile to obtain the judgment. Taking this approach, the court determined that the period of a defendant's default did not constitute a mandatory exclusion sufficient to toll the mandatory dismissal period when the plaintiff failed to obtain a default judgment for over three years after the clerk's entry of default, until the court on its own motion acted to dismiss the case [*Hughes v. Kimble (1992) 5 Cal. App. 4th 59, 68-70, 6 Cal. Rptr. 2d 616]* .

[d] Situations in Which Exclusion Is Inapplicable

[i] Delay Due to Ordinary, Usual, Proceedings in Course of Prosecution of Action

The impossibility exclusion does not apply to those ordinary and usual proceedings in the course of the prosecution of an action that necessarily entail periods in which the plaintiff cannot bring the matter to trial, such as:

- The period during which the defendant has the right to answer [*New West Fed. Savings & Loan Assn. v. Superior Court (1990) 223 Cal. App. 3d 1145, 1155, 273 Cal. Rptr. 37* ; *Sierra Nevada Memorial-Miners Hospital, Inc. v. Superior Court (1990) 217 Cal. App. 3d 464, 472, 266 Cal. Rptr. 50]* .

- Delays related to [*Crown Coach Corp. v. Superior Court (1972) 8 Cal. 3d 540, 548, 105 Cal. Rptr. 339, 503 P.2d 1347* (decided under prior law); *Sierra Nevada Memorial-Miners Hospital, Inc. v. Superior Court (1990) 217 Cal. App. 3d 464, 472, 266 Cal. Rptr. 50]* :

  - The disposition of a demurrer.

  - Amendment of pleadings.

  - The normal time of waiting for a place on the court's calendar.

  - The normal time for securing the attendance of a jury.

- Normal delays in discovery proceedings [*see* *Gentry v. Nielsen (1981) 123 Cal. App. 3d 27, 35-36* . *176 Cal. Rptr. 385* (decided under prior law)].

- The normal time required for change of venue [*see* *Moore v. Powell (1977) 70 Cal. App. 3d 583, 589, 138 Cal. Rptr. 914]* .

[ii] Inexcusable Error of Plaintiff's Counsel

Delays in prosecuting an action are not excludable from the five-year period if they result from an inexcusable error of plaintiff's counsel, such as:

- Failure due to a computational error in calendaring a case for timely action by mistakenly referring to the date posted on the office file label as the date the complaint was filed [*see* *Sierra Nevada Memorial-Miners Hospital, Inc. v. Superior Court (Hudson) (1990) 217 Cal. App. 3d 464, 469, 266 Cal. Rptr. 50]* .

- Failure to note that a stipulation mistakenly did not waive dismissal [*Martin v. Cook (1977) 68 Cal. App. 3d 799, 807-809, 137 Cal. Rptr. 434* (decided under prior law)].

- Allowing the court inadvertently to set trial beyond expiration of the five-year period [*Singelyn v. Superior Court (1976) 62 Cal. App. 3d 972, 975, 133 Cal. Rptr. 486]* .

[iii] Incapacity of Plaintiff That Does Not Prevent Bringing Action to Trial

A delay resulting from an incapacity of the plaintiff that does not prevent bringing the action to trial is not excludable [*see* *Singelyn v. Superior Court (1976) 62 Cal. App. 3d 972, 974-975, 133 Cal. Rptr. 486* (decided under prior law)].

[5] Other Statutory Time Extensions

[a] Submission of Action to Judicial Arbitration

Submission of an action to judicial arbitration under *Code Civ. Proc. § 1141.10 et seq.* suspends the running of the time periods specified in *Code Civ. Proc. § 583.110 et seq.* [*see Code Civ. Proc. § 1141.17(a)*; *see also § 212.126*] if an action is or remains submitted to arbitration more than four years and six months after the plaintiff has filed the action.

In that case, the time beginning on the date four years and six months after the plaintiff has filed the action and ending on the date on which a request for a de novo trial is filed under *Code Civ. Proc. § 1141.20* is not included in computing the five-year period specified in *Code Civ. Proc. § 583.310* [*Code Civ. Proc. § 1141.17(b)*].

Section 1141.17 is the exclusive ground for tolling based on the submission of a case to judicial arbitration [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 434, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* . Thus, there is no further tolling to prevent dismissal under *Code Civ. Proc. § 583.310* when a request for trial de novo is filed, the court selects a trial date beyond the five year statutory period taking into account the tolling under *Code Civ. Proc. § 1141.17(b)*, and plaintiff fails to object to the trial date and to inform the court as to the last day of trial within the statutory period. It is plaintiff's obligation to exercise reasonable diligence in calculating the mandatory dismissal date under *Code Civ. Proc. § 583.310* and to request a trial date within the statutory period [*Lee v. Park (1996) 43 Cal. App. 4th 305, 308-309, 50 Cal. Rptr. 2d 511]* . Nonetheless, after a trial de novo request, tolling may be based on *Code Civ. Proc. § 1141.20*, based on the trial court's failure to calendar or recalendar the case after the trial de novo request. For Section 1141.20 tolling to apply, the plaintiff must inform the court of the impending five-year deadline at the time of or shortly after the request for trial de novo [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 434-435, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* . For discussion of tolling after judicial arbitration, see *Ch. 36, Judicial Arbitration, § 36.37*.

[b] Submission of Action to Mediation

Submission of an action to mediation tolls the running of the five-year time period if the action is submitted to mediation more than four years and six months after the plaintiff has filed the action [*Code. Civ. Proc. § 1775.7*]. In that case, the time beginning on the date four years and six months after the plaintiff has filed the action and ending on the date on which a statement of nonagreement (indicating that the mediation did not resolve the matter) is filed shall not be included in computing the five year period [*Code. Civ. Proc. § 1775.7*]. The tolling commences on the four-year six-month date after the action was filed by plaintiff, not on the date the trial court orders the case to mediation [*Code. Civ. Proc. § 1775.7*; *Gonzalez v. County of Los Angeles (2004) 122 Cal. App. 4th 1124, 1130, 19 Cal. Rptr. 3d 381]* .

[c] Party in Military Service

Federal law suspending statutory limitation periods during the time that a party is in active military service (for example, *50 U.S.C. App. § 526*) tolls the time period for bringing an action to trial or retrial [*Buttler v. City of Los Angeles (1984) 153 Cal. App. 3d 520, 524-525, 200 Cal. Rptr. 372 , cert. denied, 469 U.S. 883* (decided under prior law)].

[d] Review of Determination of Good Faith Settlement

When a trial court has made a determination that a plaintiff's settlement with a joint tortfeasor or coobligor on a contract debt was made in good faith, this determination is subject to review by petition for writ of mandate, and the periods for bringing an action to trial are tolled during the period of such review [*Code Civ. Proc. § 877.6(e)(3)*].

[e] Stay Order in Coordination Proceeding

The time during which any stay of proceeding is in effect under *Cal. Rules of Ct., Rule 3.510 et seq.*, relating to coordination proceedings, is notincluded in determining whether the action stayed should be dismissed for lack of prosecution under *Code Civ. Proc. § 583.110 et seq.* [*Cal. Rules of Ct., Rule 3.515(j)*]. Only that time when a stay has been actually granted under the rules is excluded from the time in which a case must be brought to trial [*Gordon's Cabinet Shop v. State Comp. Ins. Fund (1999) 74 Cal. App. 4th 33, 40-41, 87 Cal. Rptr. 2d 541* (five-year dismissal statute not tolled)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act

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4. Mandatory Dismissal For Delay In Bringing Action To Trial

17-212 California Forms of Pleading and Practice--Annotated § 212.126

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§ 212.126 Special Extension After Statutory Tolling or Extension

Under *Code Civ. Proc. § 583.350*, if the time within which an action must be brought to trial or retrial under *Code Civ. Proc. § 583.310 et seq.* is tolled or extended by statute and at the end of the tolling or extension period less than six months remain in the applicable time period, the action is not subject to mandatory dismissal under *Code Civ. Proc. § 583.310 et seq.* if it is brought to trial or retrial within six months after the end of the tolling or extension period [*Code Civ. Proc. § 583.350*; *see Him v. Superior Court (1986) 184 Cal. App. 3d 35, 38, 228 Cal. Rptr. 839]* .

Conversely, if no trial setting was obtained in an action within six months after expiration of the tolling period, the action must be dismissed [*Greene v. Howmedica, Inc. (1993) 13 Cal. App. 4th 912, 915, 16 Cal. Rptr. 2d 777]* .

One court of appeal has held that *Code Civ. Proc. § 583.350* does not apply to cases submitted to judicial arbitration, that cases in arbitration four years and six months after the action was filed are governed by *Code Civ. Proc. § 1141.17(b)* (*discussed under § 212.125[5][a]*), and that under *Code Civ. Proc. § 1141.17(b)*, the plaintiff has six months from the date the request for trial de novo is filed within which to bring the action to trial [*Drummond v. Murata (1991) 227 Cal. App. 3d 44, 48-49, 277 Cal. Rptr. 727 (Second District, Division Three)]* .

Another court of appeal, however, has cited *Code Civ. Proc. § 583.350* as the authority in reaching the same conclusion as to the time within which the plaintiff must bring the action to trial after the request for trial de novo is filed [*Marchuk v. Ralphs Grocery Co. (1990) 226 Cal. App. 3d 1273, 1276 n.1, 276 Cal. Rptr. 627 (Fourth District, Division Three)]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureDismissalsInvoluntary DismissalsFailures to Prosecute

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§ 212.127 Motions by Plaintiff to Avoid Mandatory Dismissal

[1] Consideration of Discretionary Dismissal Factors

Whenever a plaintiff makes any motion seeking to avoid the mandatory five-year statute, the trial court, before entering any order on the merits of the motion, should consider the factors relevant to a motion to dismiss under the discretionary dismissal provisions of *Code Civ. Proc. § 583.420* (discussed in Subpt. E, *below*) [*see Sisler v. Superior Court (1988) 205 Cal. App. 3d 864, 868, 252 Cal. Rptr. 665* (*discussed under § 212.127[3]*)].

[2] Motion for Trial Preference

As a means of expediting the trial when the time limit for bringing an action to trial is approaching, a plaintiff may move for trial preference [*see Code Civ. Proc. § 36*].

A court may grant a motion for trial preference in a civil case, on a showing of cause by the movant that satisfies the court that the interests of justice will be served by granting the preference [*Code Civ. Proc. § 36(e)*]. The court, however, has discretion to grant or deny such a motion, even when it is made to avoid dismissal under *Code Civ. Proc. § 583.310 et seq.*, on an evaluation of the totality of the circumstances [*Salas v. Sears, Roebuck & Co. (1986) 42 Cal.*

3d 342, 344-349, 228 Cal. Rptr. 504, 721 P.2d 590] .

A motion to specially set to avoid the bar of the five-year statute raises the same issues as a motion for discretionary dismissal based on delay in prosecution (discussed in *§ 212.150* et seq.) [*Salas v. Sears, Roebuck & Co. (1986) 42 Cal. 3d 342, 346, 228 Cal. Rptr. 504, 721 P.2d 590]* . The court should consider the criteria for discretionary dismissal listed in *Cal. Rules of Ct., Rule 3.1342(e)* (discussed in *§§ 212.152- 212.153 below*) when deciding a motion to specially set under *Code Civ. Proc. § 36(e)* [*Biondi, Flemming & Gonzales v. Braham (1990) 218 Cal. App. 3d 842, 847, 267 Cal. Rptr. 365]* .

Relevant factors include [*Salas v. Sears, Roebuck & Co. (1986) 42 Cal. 3d 342, 349, 228 Cal. Rptr. 504, 721 P.2d 590* ; *Parlen v. Golden State Sanwa Bank (1987) 194 Cal. App. 3d 906, 912, 240 Cal. Rptr. 73]* :

- The condition of the court calendar.
- Dilatory conduct by plaintiff.
- Prejudice to the defendant of an accelerated trial date.
- The likelihood of eventual mandatory dismissal if the early trial date is denied.

[3] Motion to Refer Case to Arbitration

When a plaintiff seeks to avoid mandatory dismissal by moving to refer the case to arbitration, the trial court, before entering any order on the merits of the motion, should consider the factors relevant to a motion to dismiss under the discretionary dismissal provisions of *Code Civ. Proc. § 583.420* (discussed under Criteria Used by Court in Exercising Discretion, *below*) [*Sisler v. Superior Court (1988) 205 Cal. App. 3d 864, 868, 252 Cal. Rptr. 665]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureAlternative Dispute ResolutionGeneral Overview

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§ 212.128 Application of Mandatory Dismissal Statutes in Contractual Arbitration Proceedings

The mandatory dismissal provisions of *Code Civ. Proc. § 583.310 et seq.* apply to lawsuits subject to contractual arbitration, even if the case is inarbitration [*see Kuzmanoff v. Kron (1988) 207 Cal. App. 3d Supp. 1, 3 , 255 Cal. Rptr. 168* (citing cases)]. The dismissal statutes apply only to court actions [*see Code Civ. Proc. § 583.120(a)*] and hence cannot be applied *directly* to arbitration proceedings. Nevertheless, their concepts and limitation periods provide the guideline for determining whether a matter submitted to contractual arbitration should be dismissed for unreasonable delay in bringing the matter to a conclusion [*see Byerly v. Sale (1988) 204 Cal. App. 3d 1312, 1315, 251 Cal. Rptr. 749* ; *Young v. Ross-Loos Medical Group, Inc. (1982) 135 Cal. App. 3d 669, 673, 185 Cal. Rptr. 536]* .

For discussion of the relationship of the dismissal statutes to contractual arbitration, see *Ch. 32, Contractual Arbitration: Agreement and Compelling Arbitration, §§ 32.33* and *32.50* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteContracts LawContract Conditions & ProvisionsArbitration Clauses

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§ 212.129 Defenses to Motion for Dismissal for Delay in Bringing Action to Trial

[1] Limited Availability of Defenses

The requirements of *Code Civ. Proc. §§ 583.310-583.360* are mandatory and are not subject to extension, excuse, or exception except as expressly provided by statute [*Code Civ. Proc. § 583.360(b)*]. Thus, aside from the extensions under *Code Civ. Proc. §§ 583.330* and *583.350* [*see § 212.194[7][h]*] and exclusions under *Code Civ. Proc. § 583.340* or other statutes [*see § 212.125*], there is generally no defense to a motion for mandatory dismissal under *Code Civ. Proc. § 583.360(a)* other than that of waiver or estoppel [*Code Civ. Proc. § 583.140*].

[2] Waiver

[a] Applicability

Nothing in *Code Civ. Proc. § 583.110 et seq.* affects the principles of waiver [*Code Civ. Proc. § 583.140*].

ILLUSTRATION:

Failure to Seek Dismissal Until After Trial. Plaintiff files a complaint for dissolution of partnership on

May 30, 1974. After court trial on January 12, 1983, judgment is entered in her favor. Defendant appeals from the judgment entered, contending that the trial court erred in failing to dismiss the action pursuant to the five-year dismissal provision. Has the defendant waived the right to have the action dismissed? Yes. If an action is subject to dismissal under the five-year rule, but is nonetheless brought to trial without any objection from the defendant, his or her conduct indicates intent to submit the issues for a determination on the merits and constitutes a waiver of the right to seek dismissal [*see Butler v. Hathcoat (1983) 146 Cal. App. 3d 834, 838-840, 194 Cal. Rptr. 352]* .

[b] Conduct Not Constituting Waiver

[i] Presence at Trial-Setting Conference When Date is Set After Five-Year Period

A defendant's mere presence at a trial setting conference at which the trial date is set beyond the time required for bringing an an action to trial is not sufficient to constitute a waiver [*Central Mutual Ins. Co. v. Executive Motor Home Sales, Inc. (1983) 143 Cal. App. 3d 791, 796, 192 Cal. Rptr. 169* (decided under prior law); *Singelyn v. Superior Court (1976) 62 Cal. App. 3d 972, 974, 133 Cal. Rptr. 486* (decided under prior law)].

[ii] Request for Continuance

A request for a continuance made by the defendant after the expiration of the applicable time period does not constitute a waiver [*Balboa Ins. Co. v. Aguirre (1983) 149 Cal. App. 3d 1002, 1008, 197 Cal. Rptr. 250* (decided under prior law)].

[3] Estoppel

[a] Applicability

Nothing in *Code Civ. Proc. § 583.110 et seq.* affects the principles of estoppel [*Code Civ. Proc. § 583.140*]. Thus, the equitable doctrine of estoppel applies fully to motions to dismiss on account of failure to bring an action to trial within five years of its filing [*Greene v. State Farm Fire & Casualty Co. (1990) 224 Cal. App. 3d 1583, 1590, 274 Cal. Rptr. 736]* .

[b] Nature and Elements

The doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he or she intentionally led another to believe a particular circumstance to be true and to rely on such belief to his or her detriment. The elements of the doctrine are as follows [*Greene v. State Farm Fire & Casualty Co. (1990) 224 Cal. App. 3d 1583, 1590, 274 Cal. Rptr. 736* (quoting *Strong v. County of Santa Cruz (1975) 15 Cal. 3d 720, 725, 125 Cal. Rptr. 896, 543 P.2d 264*)]:

- The party to be estopped must be apprised of the facts and must intend that his or her conduct shall be acted on, or must so act that the party asserting the estoppel has a right to believe it was so intended.

- The other party must be ignorant of the true state of facts and must rely on the conduct to his or her injury.

For a form of declaration in opposition to a motion to dismiss under *Code Civ. Proc. § 583.360(a)* on the ground of estoppel, *see § 212.300*.

[c] Conduct of Party Giving Rise to Estoppel

Conduct of the defendant that reasonably induces the plaintiff to take no action to bring the action to trial within the time required may give rise to the defense of estoppel [*Borglund v. Bombardier, Ltd. (1981) 121 Cal. App. 3d 276, 280-281, 175 Cal. Rptr. 150* (decided under prior law)].

Conduct by the defendant that may give rise to estoppel include the following:

- Submitting documents that indicate a willingness to proceed to a disposition on the merits [*see City of Los Angeles v. Gleneagle Dev. Co. (1976) 62 Cal. App. 3d 543, 562-564, 133 Cal. Rptr. 212* (defendant submitted at-issue memorandum; decided under prior law); *Mustalo v. Mustalo (1974) 37 Cal. App. 3d 580, 584-585, 112 Cal. Rptr. 594* (defendant submitted written response under Family Law Act and memorandum setting case for trial; decided under prior law)].

- Actively seeking a postponement [*see Woley v. Turkus (1958) 51 Cal. 2d 402, 408-409, 334 P.2d 12* (decided under prior law); *Breacher v. Breacher (1983) 141 Cal. App. 3d 89, 92-93, 190 Cal. Rptr. 112* (decided under prior law)].

Facts that might otherwise give rise to a defense of estoppel may not prevent dismissal if there is additional delay after the period of postponement that can be attributed to plaintiff [*see Andre v. General Dynamics, Inc. (1974) 43 Cal. App. 3d 839* (decided under prior law, construing discretionary dismissal statute); *Smith v. El Centro Lodge No. 1325 (1969) 271 Cal. App. 2d 713* (decided under prior law)].

ILLUSTRATION:

Plaintiff's Delay Makes Estoppel Inapplicable. On July 6, 1962, plaintiff files an action on a contract, seeking damages. Trial is set for February 1, 1967. On February 1, 1967, the court places the trial off calendar because the attorney for one of the defendants is ill and unable to appear for trial, and trial is reset for October 18, 1967. On September 19, the defendant files a motion to dismiss for failure to prosecute. Is defendant estopped from asserting the five-year dismissal rule because defendant requested a continuance based on the attorney's illness? No. While trial of the action was continued due to the attorney's illness, this occurred five months before the five-year period expired. Plaintiff had ample time to request a trial setting within the time limitation. The court notified plaintiff of the October 18, 1967, trial setting on February 19, 1967, almost five months before the time expired, yet he made no attempt to advance the trial to a date within the five-year period or secure written agreement to a trial after that time [Smith v. El Centro Lodge No. 1325 *(1969) 271 Cal. App. 2d 713, 717, 76 Cal. Rptr. 629* (decided under prior law)].

[d] Conduct of Party Not Giving Rise to Estoppel

Examples of conduct not giving rise to estoppel include the following:

- A defendant's mere presence at a trial-setting conference at which the trial date is set beyond the time required for bringing an action to trial [*Central Mutual Ins. Co. v. Executive Motor Home Sales, Inc. (1983) 143 Cal. App. 3d 791, 796, 192 Cal. Rptr. 169* (decided under prior law); *Singelyn v. Superior Court (1976) 62 Cal. App. 3d 972, 974, 133 Cal. Rptr. 486* (decided under prior law)].

- A defendant's request for a continuance made after the expiration of the applicable time period [*Balboa Ins. Co. v. Aguirre (1983) 149 Cal. App. 3d 1002, 1008, 197 Cal. Rptr. 250* (decided under prior law)].

- A defendant's agreement to trail a matter until after the expiration of the applicable time period, when plaintiff should have used due diligence in preventing the matter from being off calendar when the

date expired [*Hoffman v. State of California (1985) 171 Cal. App. 3d 1100, 1107-1108, 217 Cal. Rptr. 867* (decided under prior law)].

- A defendant's failure to appear voluntarily for a deposition, combined with efforts to seek a continuance of an arbitration hearing and assurances by defendant that defendant will be available for such a hearing before the statutory period expires [*Tejada v. Blas (1987) 196 Cal. App. 3d 1335, 1341-1342, 242 Cal. Rptr. 538]* .

- Defense counsel submitting a declaration stating he was not available for trial until after the expiration of the statutory period, since plaintiffs were aware when the five-year trial period ran, and it was not reasonable to assume defendants were willing to waive the deadline. Further, defense counsel was obligated to tell the court when he was unavailable for trial, and the fact that defense counsel's notice of unavailability extended beyond the five-year cutoff date did not constitute any misrepresentation or waiver of the five-year period. Any ambiguity or confusion created by defense counsel mentioning his unavailability beyond the cutoff date could have been clarified by plaintiffs' counsel, who was responsible for insuring the case was tried before the five-year period expired [*Jordan v. Superstar Sandcars (2010) 182 Cal. App. 4th 1416, 1422-1423]* .

[e] Conduct of Branches of Government

Estoppel may be asserted against the government when justice requires. Moreover, estoppel may arise as a result of conduct by the judicial branch as well as the executive branch of government. Thus, the conflicting interests of a trial court in expeditiously clearing its calendar of old cases and a plaintiff in having a full trial on the merits may set up a situation in which equitable estoppel may be applied against the court to prevent it from pursuing its interest to the detriment of the plaintiff [*Greene v. State Farm Fire & Casualty Co. (1990) 224 Cal. App. 3d 1583, 1590, 274 Cal. Rptr. 736]* .

ILLUSTRATION:

Estoppel Against Court. On April 12, 1982, plaintiff files an action for damages against defendant. The Superior Court, on its own motion, adopts a general order that establishes a civil jury trial calendar disposition program to which the court assigns 500 cases, including plaintiff's case, and extends the five-year period in such cases to March 18, 1988. On March 15, 1988, the defendant moves for dismissal for failure to bring the case to trial within five years. Should the court be estopped from dismissing the action? Yes. Plaintiff should be able to rely on the statements of the court [*see* *Greene v. State Farm Fire & Casualty Co. (1990) 224 Cal. App. 3d 1583, 1590-1592, 274 Cal. Rptr. 736]* .

[4] Effect of Settlement Agreement

The courts of appeal are in conflict as to whether another exception to mandatory dismissal exists when the parties have entered into a settlement agreement.

Under one view, set forth by *Division Two of the Second District in Gorman v. Holte (1985) 164 Cal. App. 3d 984, 211 Cal. Rptr. 34* , the settlement agreement renders the five-year statutory limitation legally irrelevant, since an action that is settled by agreement will not proceed to trial [*Gorman v. Holte (1985) 164 Cal. App. 3d 984, 987-988, 211 Cal. Rptr. 34 (Second Dist., Div. Two, decided under prior law)]* . Both the Sixth District and Division Five of the Second District have endorsed the *Gorman* view [*see* *Malouf Bros. v. Dixon (1991) 230 Cal. App. 3d 280, 285, 281 Cal. Rptr. 235 (Second Dist., Div. Five)* ; *Schiro v. Curci (1990) 220 Cal. App. 3d 840, 844-845, 269 Cal. Rptr. 639 (Sixth Dist.)]* .

ILLUSTRATION:

Application of Gorman View. Parties reach a settlement agreement at the mandatory settlement

conference. The agreement is stated in open court before the *Code Civ. Proc. § 583.310* five-year limitation period had passed. Judgment is not entered until after expiration of the five-year period, when plaintiffs move for judgment under *Code Civ. Proc. § 664.6* after plaintiffs had performed their part of the agreement and defendant had refused to perform his. Does *Code Civ. Proc. § 583.310*, requiring an action to be brought to trial within five years, apply to a judgment entered pursuant to a motion to enforce a settlement agreement entered into within the five-year period? No. The five-year dismissal statute (*Code Civ. Proc. § 583.310*) applies only to disputes that can and will be resolved by trial. The statute's purpose is to prevent avoidable delay in bringing an action to trial. Once the parties have stated a complete settlement in open court, the court may assume that the matter has been finally disposed of. Although details of execution may remain, it is reasonable to assume the matter will not go to trial. If a dispute about the settlement develops, it can be resolved through the procedure set forth in *Code Civ. Proc. § 664.6* [*Malouf Bros. v. Dixon (1991) 230 Cal. App. 3d 280, 284-285, 281 Cal. Rptr. 235]* .

Under the second view, espoused by the *First District, Division Two, in Varwig v. Leider (1985) 171 Cal. App. 3d 312, 217 Cal. Rptr. 208* , an action must be dismissed under the five-year rule, regardless of whether or not the parties had entered in to a settlement agreement [*Varwig v. Leider (1985) 171 Cal. App. 3d 312, 315-316, 217 Cal. Rptr. 208* (decided under prior law)]. The *Varwig* view has been criticized as having the potential to prevent settlements on the eve of trial shortly before the five-year deadline or settlements that enable the defendant to avoid a court judgment [*Malouf Bros. v. Dixon (1991) 230 Cal. App. 3d 280, 285, 281 Cal. Rptr. 235]* . Moreover, the First District, Division Five, has declined to follow Varwig,and followed the Gorman view [*see Canal Street, Ltd. v. Sorich (2000) 77 Cal. App. 4th 602, 608, 91 Cal. Rptr. 2d 811]* . The court in Canal Street, Ltd. noted that since Varwig the five-year statute has been amended to particularly incorporate what had been simply a judicially created exception to the mandatory five-year dismissal. The computation of the five-year period now specifically excludes (*Code Civ. Proc. § 583.340(c)*) the time during which bring the action to trial was impossible, impracticable, or futile. Thus, the time during which a settlement agreement is in effect tolls the five-year period, because attempting to bring an action to trial when all issues have been resolved through settlement would be futile [*Canal Street, Ltd. v. Sorich (2000) 77 Cal. App. 4th 602, 608-609, 91 Cal. Rptr. 2d 811]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureSettlementsGeneral OverviewGovernmentsLegislationStatutes of LimitationsEquitable EstoppelGovernmentsLegislationStatutes of LimitationsWaivers

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Volume 17: Defaults and Default Judgements thru Duress, Menace, Fraud, Undue Influence, and Mistake-Chs. 205-219
Chapter 212 DISMISSAL
PART II. LEGAL BACKGROUND
C. Involuntary Dismissal For Delay In Prosecution
4. Mandatory Dismissal For Delay In Bringing Action To Trial

17-212 California Forms of Pleading and Practice--Annotated §§ 212.130-212.149

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[Reserved]

§§ 212.130[Reserved]

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17-212 California Forms of Pleading and Practice--Annotated § 212.150

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§ 212.150 Discretionary Dismissal for Delay in Prosecution

A trial court may, in its discretion, dismiss an action for delay in prosecution under the provisions of *Code Civ. Proc. §§ 583.410-583.430*, either on its own motion or on the defendant's motion, if to do so appears to the court to be appropriate under the circumstances of the case [*Code Civ. Proc. § 583.410(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to Prosecute

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17-212 California Forms of Pleading and Practice--Annotated § 212.151

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§ 212.151 Time Periods Limiting Exercise of Discretion

[1] Two-Year Delay in Completing Service

Under *Code Civ. Proc. § 583.420*, the court has discretion to dismiss an action if service has not been made within two years after the action is commenced against the defendant [*Code Civ. Proc. § 583.420(a)(1)*]. "Service" in this context includes return of summons [*Code Civ. Proc. § 583.110(f)*; *see, e.g., Ladd v. Dart Equipment Corp. (1991) 230 Cal. App. 3d 1088, 1099, 281 Cal. Rptr. 813]* .

The time period for the purpose of discretionary dismissal is calculated in the same manner as it is for mandatory dismissal [*see Code Civ. Proc. § 583.420(b)* and § 212.100 et seq.].

The factors to be considered by the court in determining whether an action should be dismissed for failure to serve within two years are set forth in *Cal. Rules of Ct., Rule 3.1342*. For discussion of these factors, see *§ 212.153*.

The court has no discretion to dismiss for a delay in effecting service if the complaint is served in less than two years [*see Code Civ. Proc. § 583.420(a)(1)*].

[2] Two-Year Delay in Bringing Action to Trial

The court may use its discretion to dismiss an action if it has not been brought to trial, or "conditionally settled," within two years after it was commenced against the defendant [*Code Civ. Proc. § 583.420(a)(2)*; *Cal. Rules of Ct., Rule 3.1340*]. A case is "conditionally settled" if and only if both of the following are true [*Cal. Rules of Ct., Rule 3.1340(a)*]:

- A settlement agreement conditions dismissal on the satisfactory completion of specified terms that are not to be fully performed within two years after the filing of the case.

- Notice of the settlement is filed with the court under *Cal. Rules of Ct., Rule 3.1385*.

The time period for the purpose of discretionary dismissal is calculated in the same manner as it is for mandatory dismissal for failure to bring to trial within five years [*see Code Civ. Proc. § 583.420(b)* and Subpt. D, *above*].

If a new trial has been granted, the court has discretion to dismiss the action if it is not brought again to trial within two years after one of the following [*Code Civ. Proc. § 583.420(a)(3)*]:

- The entry of an order of the court declaring a mistrial or the disagreement of the jury if a trial is commenced but no judgment is entered because of a mistrial or because a jury is unable to to reach a decision.

- The entry of an order granting a new trial if after judgment a new trial is granted and no appeal is taken.

- The filing of the remittitur by the clerk of the trial court if on appeal an order granting a new trial is affirmed or a judgment is reversed and the action is remanded for a new trial.

Cal. Rules of Ct., Rule 3.1342 sets forth the criteria which the court must consider in determining whether to dismiss an action for failure to bring to trial or conditionally settle an action within two years. For detailed discussion of these factors, see *§ 212.153*.

The court has no discretion to dismiss under *Code Civ. Proc. §§ 583.410-583.430* for failure to bring to trial if the delay in question has been for a period shorter than two years [*General Motors Corp. v. Superior Court (1966) 65 Cal. 2d 88, 98, 52 Cal. Rptr. 460, 416 P.2d 492* (decided under prior law); *see Roman v. Usary Tire & Service Center (1994) 29 Cal. App. 4th 1422, 1430-1431, 35 Cal. Rptr. 2d 329* ; *but see Vernon v. Great Western Bank (1996) 51 Cal. App. 4th 1007, 1011-1013, 59 Cal. Rptr. 2d 350* (order of dismissal with prejudice five months after mistrial held proper, whether viewed as dismissal for failure to diligently prosecute, or as dismissal for failure to appear on day of trial under *Code Civ. Proc. § 581(b)(5)*, when there was a pattern of conduct showing a failure to prosecute diligently and a total disregard of the court's orders, including failing to appear on the date ordered for the retrial knowing continuancehad already been denied, but instead sending another attorney to make a special appearance to report that plaintiff's counsel was at that moment ready for another trial in another court)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureSettlementsGeneral Overview

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§ 212.152 General Criteria to Be Considered by Court

[1] All Relevant Matters

The court must consider all matters relevant to a proper determination of the motion, including the court's file in the case, the affidavits, and supporting data submitted by the parties [*Cal. Rules of Ct., Rule 3.1342(e)*].

The discretion of the trial court is broad and will not be disturbed unless there has been a miscarriage of justice or the trial court exceeded the bounds of reason [*Luti v. Graco, Inc. (1985) 170 Cal. App. 3d 228, 232, 215 Cal. Rptr. 902* (decided under prior law); *see Landry v. Berryessa Union School Dist. (1995) 39 Cal. App. 4th 691, 698, 46 Cal. Rptr. 2d 119]* . The court's order will be deemed, however, to have been made in abuse of the court's discretion if the record affirmatively shows that the court failed to consider all relevant factors of which it could take cognizance as required by *Cal. Rules of Ct., Rule 3.1342(e)* [*Visco v. Abatti (1983) 144 Cal. App. 3d 904, 907, 192 Cal. Rptr. 833* (decided under prior law); *Tannatt v. Joblin (1982) 130 Cal. App. 3d 1063, 1066-1070, 182 Cal. Rptr. 112* (decided under prior law)].

For discussion of a plaintiff's reasonable excuse for delay in prosecuting the action, and of prejudice to a defendant as factors for the court's consideration, see *§§ 212.154* and *212.155*.

[2] Policies Preferring Disposition on Merits

When ruling on a motion for discretionary dismissal, a court shall generally be guided by the policies set forth in *Code Civ. Proc. § 583.130* [*Cal. Rules of Ct., Rule 3.1342(e)*; *see Code Civ. Proc. § 583.130*]:

- The plaintiff must proceed with reasonable diligence in the prosecution of the action, but all parties must cooperate in bringing the action to trial or disposition.

- Except as otherwise provided by statute or by rule of court adopted pursuant to statute, the policy favoring the right of parties to make stipulations in their own interests and the policy favoring trial or other disposition of an action on the merits are generally to be preferred over the policy requiring dismissal for failure to proceed with reasonable diligence in the prosecution of an action.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 212.153 Criteria Enumerated by Rule

[1] Presumption of Court Consideration

The court is presumed to have considered all relevant factors enumerated in *Cal. Rules of Ct., Rule 3.1342(e)* (discussed under headings *below*) when ruling on a motion for discretionary dismissal, and it need not recite the fact that it complied with this rule or enumerate the specific basis for its ruling in its order [*Wilson v. Sunshine Meat & Liquor Co. (1983) 34 Cal. 3d 554, 562-563, 194 Cal. Rptr. 773, 669 P.2d 9* (decided under prior law)].

[2] Diligence in Effecting Service of Process

When considering a discretionary dismissal for failure to effect service, the court shall consider the diligence with which the opposing party sought to effect service of process, and the extent to which the moving party and other essential parties were available for service [*Cal. Rules of Ct., Rule 3.1342(e)*].

A discretionary dismissal for failure to complete service within two years was upheld, for example, when the plaintiff admitted that documents leading to the identity of the defendant originally named fictitiously could have been obtained before action was filed [*Clark v. Stabond (1987) 197 Cal. App. 3d 50, 55, 242 Cal. Rptr. 676]* .

[3] Extent of Settlement Negotiations

When applicable, a court considering a discretionary dismissal shall take into account the extent to which the parties engaged in any settlement negotiations or discussions [*Cal. Rules of Ct., Rule 3.1342(e)*].

[4] Diligence in Pretrial Proceedings

In ruling on a motion for discretionary dismissal, the court shall, when applicable, consider the extent to which the parties were diligent in pursuing discovery or other pretrial proceedings, including whether either party sought any extraordinary relief [*Cal. Rules of Ct., Rule 3.1342(e)*].

This is probably one of the most important factors, in view of the plaintiff's primary duty to use reasonable diligence in prosecuting the action at all stages, as well as the duty of other parties to cooperate in efforts to bring the action to trial or other disposition [*see Code Civ. Proc. § 583.130*].

For example, discretionary dismissal has been upheld under the following circumstances:

- When a plaintiff fails to explain delay in obtaining new counsel [*Dubois v. Corroon & Black Corp. (1993) 12 Cal. App. 4th 1689, 1697, 16 Cal. Rptr. 2d 719* (no diligence demonstrated during 31-month delay); *Andre v. General Dynamics, Inc. (1974) 43 Cal. App. 3d 839, 843-844, 118 Cal. Rptr. 95* (decided under prior law)].

- When most of plaintiff's pretrial activity has been initiated solely by defendant's various attempts to dispose of the action, including a motion to dismiss for lack of prosecution [*see Farrant v. Casas de la Senda Homeowners Assn. (1985) 170 Cal. App. 3d 221, 226, 216 Cal. Rptr. 27* (decided under prior law)].

The likelihood of discretionary dismissal due to the plaintiff's failure to exercise reasonable diligence increases when the five-year period for mandatory dismissal has almost expired and the plaintiff fails to offer any satisfactory explanation for the lengthy delay [*see Farrar v. McCormick (1972) 25 Cal. App. 3d 701, 704, 102 Cal. Rptr. 190* (decided under prior law)].

[5] Complexity or Nature of Case

When applicable, a court considering a discretionary dismissal shall take into account the extent to which delay may be attributable to the complexity or nature of the case [*Cal. Rules of Ct., Rule 3.1342(e)*].

ILLUSTRATIONS:

Complexity of Case as Factor Weighing Against Discretionary Dismissal. Plaintiffs file an action against defendant in June 1964. The parties file extensive pleadings. During the course of the action, there are frequent personnel changes in the plaintiffs' law firm. In April 1969, defendant moves for discretionary dismissal for failure to prosecute. In ruling on the motion, may the court consider the fact that numerous pleadings were filed? Yes. The fact that extensive pleadings were filed is a factor, which, together with the frequent changes of counsel within plaintiffs' law firm and the resultant pressure on the attorneys remaining with the firm, may be considered in determining whether plaintiffs have shown that their delay was excusable [*Denham v. Superior Court (1970) 2 Cal. 3d 557, 565, 86 Cal. Rptr. 65, 468 P.2d 193* (decided under prior law)].

Multiple plaintiffs file actions for personal injury, property damage, and deprivation of constitutional assembly and speech rights; the actions arise out of violence that occurred while plaintiffs were picketing

in support of union recognition. The complaints allege that those responsible for the violence were agents of another labor union, acting under the direction of a specific individual. Two years after the complaints are filed, defendants move for discretionary dismissal for failure to bring the actions to trial. Should the court consider the nature and complexity of the actions in ruling on the motion? Yes. The factual and legal complexity of the cases militate against an early dismissal for want of prosecution [*United Farm Workers National Union v. International Brotherhood of Teamsters (1978) 87 Cal. App. 3d 225, 237, 150 Cal. Rptr. 761* (decided under prior law)].

[6] Delay Caused by Applicable Law

The extent to which delay may be attributable to the law applicable to the case, including the pendency of other litigation under a common set of facts or determinative of the legal or factual issues in the case is a factor for judicial consideration on a motion for discretionary dismissal [*Cal. Rules of Ct., Rule 3.1342(e)*].

ILLUSTRATION:

Pendency of Litigation Against Codefendant. In April 1977, plaintiff files a complaint against 10 specific defendants, alleging that the first named defendant, with the assistance of the other nine named defendants, wrongfully obtained and received for his own use monies plaintiff had posted as collateral for a bail bond. Plaintiff determines that only the first named defendant was primarily liable, and decides to proceed against that defendant first. Plaintiff serves the first named defendant, and the defendant answers the complaint in May 1977. In January 1979, plaintiff obtains a summary judgment against the defendant, but plaintiff is unable to successfully execute or otherwise collect. In March 1980, plaintiff serves the remaining nine defendants. These defendants file a motion for discretionary dismissal in September 1980. In assessing the reasonableness of plaintiff's delay against the nine other defendants, must the court consider the plaintiff's decision to save the other defendants the burden of litigation while actively pursuing the action against another defendant? Yes. Under *Cal. Rules of Ct., Rule 203.5 [now see 3.1342(e)*], the court must consider the law applicable to the case, including the pending of other litigation under a common set of facts. Under the facts pleaded in plaintiff's complaint, she could have brought one lawsuit against the first named defendant and another against the other defendants, making the consideration specifically applicable. The principle, nevertheless is the same; plaintiff should not be penalized for bringing one action rather than two [*see Tannatt v. Joblin (1982) 130 Cal. App. 3d 1063, 1068, 182 Cal. Rptr. 112* (decided under prior law)].

[7] Delay Attributable to Conduct of Party

The court ruling on a motion for discretionary dismissal must, when applicable, consider the extent to which delay was attributable to any extensions of time or other conduct of either party [*Cal. Rules of Ct., Rule 3.1342(e)*]. For example, discretionary dismissal may be improper in light of this factor when plaintiff delayed prosecution for three years to allow defendants, cross complainants, and cross defendants to complete discovery amongst each other [*Pomona Federal Plaza, Ltd. v. Investment Concepts, Inc. (1988) 203 Cal. App. 3d 217, 222-224, 249 Cal. Rptr. 757]* .

However, a plaintiff is not excused from his or her obligation to prosecute when a defendant agrees to several continuances, and finally agrees to take the matter off calendar indefinitely for the benefit of the plaintiff and at the plaintiff's request [Blank v. Kirwan (1985) 39 Cal. 3d 311 (decided under prior law); *Kidd v. Kopald (1994) 31 Cal. App. 4th 132, 36 Cal. Rptr. 2d 875* (dismissal upheld despite parties' stipulation to open extension of time for defendant to respond to complaint)].

[8] Condition of Court Calendar

The condition of the court's calendar and the availability of an earlier trial date, if the matter was ready for trial, are factors for consideration for a court ruling on a motion for discretionary dismissal [*Cal. Rules of Ct., Rule 3.1342(e)*].

For example, this factor was deemed to be significant to assess the reasonableness of a delay of three years in bringing a jury case to trial in a court in which such actions routinely took five years to get to trial [*Tannatt v. Joblin (1982) 130 Cal. App. 3d 1063, 1069, 182 Cal. Rptr. 112* (decided under prior law)].

[9] Interests of Justice

When ruling on a motion for discretionary dismissal, the court must consider whether the interests of justice are best served by dismissal or trial of the case [*Cal. Rules of Ct., Rule 3.1342(e)*].

For example, when a delay is due to the negligence of plaintiff's counsel, and there is no indication that the plaintiff's case otherwise lacks merit, it may best serve the interests of justice to allow the case to go to trial, particularly when the plaintiff has no alternative remedy [*City of Los Angeles v. Gleneagle Dev. Co. (1976) 62 Cal. App. 3d 543, 559-560, 133 Cal. Rptr. 212* (decided under prior law)].

[10] Other Facts and Circumstances

In addition to those factors specifically enumerated under the headings *above*, the court must consider any other fact or circumstance that is relevant to a fair determination of the motion [*Cal. Rules of Ct., Rule 3.1342(e)*; *see also § 212.152[1]*].

Examples of possible additional factors include:

- The degree to which the opposing party had an unusual caseload and staff problems [*see Woolfson v. Personal Travel Service, Inc. (1971) 3 Cal. 3d 909, 912 n.2, 912-913, 92 Cal. Rptr. 286, 479 P.2d 646* (decided under prior law)].

- The degree to which plaintiff's pattern of conduct was "so severe and deliberate" as to constitute extreme circumstances [*see Lyons v. Wickhorst (1986) 42 Cal. 3d 911, 917, 231 Cal. Rptr. 738, 727 P.2d 1019]* .

- The availability of alternatives less severe than dismissal [*see Lyons v. Wickhorst (1986) 42 Cal. 3d 911, 917, 231 Cal. Rptr. 738, 727 P.2d 1019]* .

Legal Topics:

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§ 212.154 Reasonable Excuse for Plaintiff's Delay

[1] As Criteria for Consideration

The role that excuse plays in discretionary dismissal is somewhat unclear. The prevailing view in the California appellate courts appears to be that a plaintiff's failure to show diligence or excuse for delay does not necessarily require dismissal [*see Denham v. Superior Court (1970) 2 Cal. 3d 557, 563, 86 Cal. Rptr. 65, 468 P.2d 193* ; *Ladd v. Dart Equipment Corp. (1991) 230 Cal. App. 3d 1088, 1105, 281 Cal. Rptr. 813]* . However, there is authority to the contrary, holding that dismissal is required when no justification is provided for delay [*see Trailmobile, Inc. v. Superior Court (1989) 210 Cal. App. 3d 1451, 1455-1456 . 259 Cal. Rptr. 100* ; *see also Oskooi v. Fountain Valley Regional Hospital (1996) 42 Cal. App. 4th 233, 241, 49 Cal. Rptr. 2d 769* (lead opinion by Sonenshine, J.; concurring and dissenting opinions did not address issue)].

In any event, reasonable diligence is one of the more important criteria to be considered by the court [*see Code Civ. Proc. § 583.130* (plaintiff must proceed with reasonable diligence); *Cal. Rules of Ct., Rule 3.1342(e)* (enumerating diligence of the parties as one criterion to be considered); *see also § 212.153[4]*]. If the plaintiff fails to show reasonable or excusable delay, the court may dismiss the action in its discretion even if the defendant fails to establish

actual prejudice [*Putnam v. Clague (1992) 3 Cal. App. 4th 542, 549, 5 Cal. Rptr. 2d 25* ; *see Lopez v. State of California (1996) 49 Cal. App. 4th 1292, 1295, 57 Cal. Rptr. 2d 266* ; *see also § 212.194[9]*].

[2] Sufficient Showing

Court of appeal decisions are at best inconsistent in their analysis as to what showing is necessary to constitute a viable "excuse." After setting out the various lines of cases and attempting to reconcile the decisions from its Fifth District decisions, one court of appeal suggests the trial court is called upon to make two determinations in deciding whether the delay is excusable [*see Putnam v. Clague (1992) 3 Cal. App. 4th 542, 557-558, 5 Cal. Rptr. 2d 25* ; *see also Yao v. Anaheim Eye Medical Group, Inc. (1992) 10 Cal. App. 4th 1024, 1030-1031, 12 Cal. Rptr. 2d 856* (Fourth Dist., Div. Three following *Putnam*)]:

- Is the explanation credible under all the circumstances?

- If so, could a reasonably competent attorney conclude that delay was justified under the circumstances?

This test was endorsed and utilized in *Yao v. Anaheim Eye Medical Group, Inc. (1992) 10 Cal. App. 4th 1024, 1029-1030, 12 Cal. Rptr. 2d 856 (Fourth Dist.)* , but was criticized in *Roach v. Lewis (1993) 14 Cal. App. 4th 1179, 1184, 18 Cal. Rptr. 2d 281 (Second Dist.)* . The court in *Roach*, in determining that the trial court had not abused its discretion in dismissing the case, simply relied on the factors set forth in former Cal. Rules of Ct., Rule 373(e) [*now see Cal. Rules of Ct., Rule 3.1342(e)*], discussed in *§§ 212.152, 212.153 above* [*Roach v. Lewis (1993) 14 Cal. App. 4th 1179, 1184, 18 Cal. Rptr. 2d 281* (attorney's strategy not a relevant matter)].

ILLUSTRATION:

Excusable Delay for Staggered Service Against Single Defendant. Two married couples represented by one attorney respectively file similar medical malpractice complaints against a single physician on May 29, 1987, and December 1, 1987. Summons in the actions is served on defense counsel on or about January 26, 1990, and defense counsel accepts service on defendant's behalf on February 11, 1990. On March 22, 1990, defendant files a motion seeking discretionary dismissal of the actions, based on the plaintiffs' failure to serve defendant within two years after the commencement of the actions. Plaintiffs file opposition to the dismissal motion, stating that their case was one of numerous cases handled by their attorney against the defendant arising from the defendant's performance of surgeries using a procedure allegedly falling below the applicable standard of care. The plaintiff's attorney's declaration discloses that he elected to pursue a case filed by another plaintiff, Thompson, as a "lead case" on the issue of negligence/standard of care, with the understanding that evidence developed in the Thompson case would be applicable to the other cases against the defendant. (The Thompson case settled in June 1989, after a number of trial date continuances, some of which were requested by defendant rather than due to court congestion.) Service of process and the conduct of discovery in the cases against defendant was deliberately staggered by plaintiff's counsel so as to avoid creating unmanageable demands on both parties and their counsel. Have the plaintiffs made an credible, reasonable excuse for their delay in serving the complaints? Yes. Reasonably competent attorneys in the position of plaintiff's counsel could conclude that staggering service in the numerous pending cases would accommodate the parties and the two attorneys involved in all of the cases by smoothing out the scheduling of discovery, trial, and other litigation events. Thus, the plaintiffs have met their initial burden of proof in opposing the motions to dismiss [*see Putnam v. Clague (1992) 3 Cal. App. 4th 542, 558-563, 5 Cal. Rptr. 2d 25]* .

[3] Insufficient Showing

Dismissal is clearly warranted when the plaintiff offers no explanation for delays in service or other prosecution of the

action or otherwise fails to show excusable delay [*see, e.g.,* *Kuchins v. Hawes (1990) 226 Cal. App. 3d 535, 541, 276 Cal. Rptr. 281* ; *Hilliard v. Lobley (1989) 216 Cal. App. 3d 638, 641-642, 265 Cal. Rptr. 5]* .

ILLUSTRATION:

Failure to Show Excusable Delay. On August 22, 1985, plaintiff files an action for medical malpractice against defendant surgeon. Sometime thereafter, plaintiff substitutes attorneys and the second attorneyfiles an amended complaint on March 18, 1986. On May 14, 1987, plaintiff retains her present attorney, who obtains a medical consultation and thereafter serves the amended complaint on defendant on October 8, 1987. On May 19, 1988 defendant files an answer to the complaint and a motion to dismiss on the ground that plaintiff failed to serve the complaint within two years from the filing of the action. In opposing the motion, plaintiff does not explain why service was not or could not be effected prior to August 1987. Plaintiff does offer some explanation for the delay from May 1987, when her present attorney was hired until October 1987, when service was effectuated. However, with respect to the delay prior to May of 1987, plaintiff's declaration simply states that at some time after the complaint was filed, her first attorney referred her to a second attorney. There is no information as to when this occurred and no explanation as to why service was not or could not have been made by the first attorney. Similarly, there is no explanation as to why the second attorney did not serve defendant or when he advised plaintiff that he was no longer willing to represent plaintiff. Has the plaintiff showed justifiable delay or diligence in prosecution? No [*see* *Hilliard v. Lobley (1989) 216 Cal. App. 3d 638, 640-642, 265 Cal. Rptr. 5* (affirming dismissal by trial court when plaintiff failed to explain delay in service from August 1986 to May 1987)].

As the mandatory dismissal deadline approaches, the showing required to justify delay grows increasingly [*see* *United Farm Workers National Union v. International Brotherhood of Teamsters (1978) 87 Cal. App. 3d 225, 237, 150 Cal. Rptr. 761* (decided under prior law); *Andre v. General Dynamics, Inc. (1974) 43 Cal. App. 3d 839, 843, 118 Cal. Rptr. 95* (decided under prior law)].

[4] Impossibility, Impracticability, or Futility

Prior to the 1984 amendment to *Code Civ. Proc. § 583.340,* the law held that regardless of whether there was a period of impossibility, impracticability, or futility that occurred during the statutory period, if there was a reasonable time within which the plaintiff could have exercised reasonable diligence to bring the matter to trial thereafter, the period of impossibility did not toll the five years limit. This rule was "overruled" by the 1984 amendment. The amendment inserted language making the tolling of the five years mandatory [*Chin v. Meier (1991) 235 Cal. App. 3d 1473, 1477, 1 Cal. Rptr. 2d 499* ; *Rose v. Scott (1991) 233 Cal. App. 3d 537, 542, 284 Cal. Rptr. 487* ; Sierra Nevada Memorial-Miners Hospital, Inc. v. Superior Court (Hudson) (1990) Cal. App. 3d, *217 Cal. App. 3d 464, 266 Cal. Rptr. 50* (*citing* 17 Cal. L. Revision Comm'n Report at 936)]. The Cal. Law Revision Commission's Comment to that amendment states the following [17 Cal. L. Revision Comm'n Rep at 936)]:

> Under Section 583.340 the time within which an action must be brought to trial is tolled for the period of the excuse, regardless whether a reasonable time remained at the end of the period of the excuse to bring the action to trial. This overrules cases such as *State of California v. Superior Court, 98 Cal. App.3d 643, 159 Cal. Rptr. 650 (1979)* , and *Brown v. Superior Court, 62 Cal. App.3d 197, 132 Cal. Rptr. 916 (1976)* .

The courts of appeal in California have three divergent views on the effect of the 1984 amendment in light of the aforementioned Comment [s *ee* *De Santiago v. D & G Plumbing, Inc. (2007) 155 Cal. App. 4th 365, 376, 65 Cal. Rptr. 3d 882*].

Under one view, if the trial court concludes there was a period of impossibility, impracticability, or futility over which

plaintiff had no control, it must toll the running of the five-year period for that amount of time, even if there is ample time after the tolling period for the plaintiff to bring the case to trial [*Chin v. Meier (1991) 235 Cal. App. 3d 1473, 1477, 1 Cal. Rptr. 2d 499* ; *Brown & Bryant, Inc. v. Hartford Accident & Indemnity Co. (1994) 24 Cal. App. 4th 247, 257, 29 Cal. Rptr. 2d 144* ; *Rose v. Scott (1991) 233 Cal. App. 3d 537, 542, 284 Cal. Rptr. 487*]. Under this view, the plaintiff need not show that he or she would have brought the case to trial within the five-year period but for the period of impracticability [*New West Fed. Savings & Loan Assn. v. Superior Court (1990) 223 Cal. App. 3d 1145, 1155, 273 Cal. Rptr. 37*]. In *Chin v. Meier*, the court concluded that when there is a court-ordered continuance, the trial court must merely subtract the aggregate periods of time attributable to each court-ordered continuance because of courtroom unavailability [*see* *Chin v. Meier (1991) 235 Cal. App. 3d 1473, 1478, 1 Cal. Rptr. 2d 499*]. The court in *Chin* rejected any consideration of reasonable diligence in determining whether the impracticability exception applied.

The requirement of the aforementioned first view requires that the event causing the period of impossibility, impracticability, or futility must have been beyond the control of the plaintiff, which may have a similar function as a requirement of reasonable diligence. However, it applies only to the event causing the period of impossibility, impracticability, or futility, and does not apply to the time after the end of that period. The remaining two views, in contrast, apply diligence to the period after the end of the period of impossibility, impracticability, or futility that remains in the original five-year period in which to bring the case to trial.

Other cases advocate a second view that the plaintiff has a duty to use reasonable diligence in prosecuting his or her case in order to be entitled to the tolling for an event creating an impossibility, impracticability, or futility [*see, e.g.,* *De Santiago v. D & G Plumbing, Inc. (2007) 155 Cal. App. 4th 365, 65 Cal. Rptr. 3d 882* ; *Tamburina v. Combined Ins. Co. of America (2007) 147 Cal. App. 4th 323, 336, 54 Cal. Rptr. 3d 175* (diligence is critical factor in applying exception); *Moss v. Stockdale, Peckham & Werner (1996) 47 Cal. App. 4th 494, 502, 54 Cal. Rptr. 2d 805* (legal malpractice action); *Lauriton v. Carnation Co. (1989) 215 Cal. App. 3d 161, 164, 263 Cal. Rptr. 476*]. Under this view, the exclusion of *Code Civ. Proc. § 583.340(c)* does not apply when a plaintiff fails to take reasonable steps to expedite the proceedings in the remaining time in the original five-year period after the disability from the event ceases [*see* *Schwenke v. J & P Scott, Inc. (1988) 205 Cal. App. 3d 71, 79-80, 252 Cal. Rptr. 91*]. In determining whether the impracticability exception applies under this view, the court must find the following three factors [*Tamburina v. Combined Ins. Co. of America (Third Dist. 2007) 147 Cal. App. 4th 323, 328, 54 Cal. Rptr. 3d 175*]:

- The plaintiff has demonstrated a circumstance of impracticability.

- There is a "causal connection" between that circumstance and plaintiff's failure to move the case to trial.

- The plaintiff was reasonably diligent in moving the case to trial.

The Third District held that five stipulated continuances, totaling 424 days, attributable to the plaintiff's and his attorney's serious health problems, qualified as a circumstance of impracticability [*Tamburina v. Combined Ins. Co. of America (2007) 147 Cal. App. 4th 323, 331-332, 54 Cal. Rptr. 3d 175*]. The *Tamburina* court further concluded there was a causal connection between the stipulated continuances and the plaintiff's failure to bring the case to trial within five years, because the continuance period of 424 days deprived the plaintiff of a substantial portion of the five-year period for prosecuting the lawsuit [*Tamburina v. Combined Ins. Co. of America (2007) 147 Cal. App. 4th 323, 335, 54 Cal. Rptr. 3d 175*]. Because the trial court concluded in *Tamburina* that there was no causal connection, and thus dismissed the action for failure to bring the action within five years, the trial court did not consider the third factor, reasonable diligence, in determining whether the five-year period was tolled based on impracticability. As a consequence, the Third District reversed and remanded the case to the trial court for a determination of whether the plaintiff exercised reasonable diligence in prosecuting the case [*Tamburina v. Combined Ins. Co. of America (2007) 147 Cal. App. 4th 323, 336, 54 Cal. Rptr. 3d 175*].

Under a third view [*see* *De Santiago v. D & G Plumbing, Inc. (2007) 155 Cal. App. 4th 365, 375, 65 Cal. Rptr. 3d 882*], the plaintiff must show a causal connection between the circumstances on which plaintiff relies and the failure to satisfy the five-year requirement [*Sanchez v. City of Los Angeles (2003) 109 Cal. App. 4th 1262, 1271, 135 Cal. Rptr. 2d 869* ; *Sierra Nevada Memorial-Miners Hospital, Inc. v. Superior Court (1990) 217 Cal. App. 3d 464, 473, 266 Cal. Rptr. 50*]. Upon becoming aware of the impending expiration of the five-year period after the period, the trial court in all likelihood would have given the case priority for the purpose of trying the case before the five-year period expired. Because there was a possibility the insurer could have brought the case to trial before expiration of the five-year period, despite trial continuances, the continuances did not result in impracticability [*De Santiago v. D & G Plumbing, Inc. (2007) 155 Cal. App. 4th 365, 65 Cal. Rptr. 3d 882*].

The courts have found that the plaintiff also had a duty to take whatever other measures were available to attempt to accelerate trial of the case before expiration of the five-year period, including bringing a motion to advance the trial, pursuant to *California Rules of Court, Rule 3.1335* [*De Santiago v. D & G Plumbing, Inc. (2007) 155 Cal. App. 4th 365, 374, 65 Cal. Rptr. 3d 882* (*citing Cal. Rules of Ct., Rule 3.1335*); *Wale v. Rodriguez (1988) 206 Cal. App. 3d 129, 253 Cal. Rptr. 382*]. Similarly, plaintiffs in a personal injury action were not entitled to a tolling of the five years on the asserted ground that the court assigned a trial date beyond the expiration of the period, as the plaintiffs never alerted the court to the fact that the date was set beyond the five-year deadline, and further manifested a lack of diligence by acquiescing in that trial date for over a year [*Baccus v. Superior Court (1989) 207 Cal. App. 3d 1526, 255 Cal. Rptr. 781*]. Moreover, courts have held that a plaintiff's filing of a bankruptcy petition does not invoke the tolling of the five years, as a plaintiff can seek relief from the bankruptcy court [*see* *Lauriton v. Carnation Co. (1989) 215 Cal. App. 3d 161, 165, 263 Cal. Rptr. 476*]. Further, even after plaintiff was discharged from bankruptcy and filed an at-issue memorandum before the five-year period expired, he made no motion to have the case specially set for trial [*Lauriton v. Carnation Co. (1989) 215 Cal. App. 3d 161, 165, 263 Cal. Rptr. 476*].

Further, there have been cases in which courts pursuing the causal connection also considered the notion of the plaintiff's control of the cause, but unlike the first view above, applied it to the period after the end of the event causing the impossibility, impracticability, or futility [*see* *Sanchez v. City of Los Angeles (2003) 109 Cal. App. 4th 1262, 1273, 135 Cal. Rptr. 2d 869*]. In *Sanchez v. City of Los Angeles (2003) 109 Cal. App. 4th 1262, 135 Cal. Rptr. 2d 869* , despite plaintiff's argument that the five-year period should be tolled from the date of defendant's attorney's suicide until the date replacement counsel was retained and was ready for trial, the court found that expiration of the five-year period was actually due to the plaintiffs' attorney's miscalculation of the five-year period, and thus there was no causal connection between defendant's attorney's death and expiration of the five-year period [*Sanchez v. City of Los Angeles (2003) 109 Cal. App. 4th 1262, 1274, 135 Cal. Rptr. 2d 869*]. The causal connection operates like the reasonable diligence requirement noted in the second view discussed above [*see* *De Santiago v. D & G Plumbing, Inc. (2007) 155 Cal. App. 4th 365, 375, 65 Cal. Rptr. 3d 882*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessTime LimitationsDismissalsCivil ProcedureDismissalsInvoluntary DismissalsFailures to Prosecute

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Chapter 212 DISMISSAL
PART II. LEGAL BACKGROUND
C. Involuntary Dismissal For Delay In Prosecution
5. Discretionary Dismissal

17-212 California Forms of Pleading and Practice--Annotated § 212.155

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§ 212.155 Prejudice to Defendant

A defendant is not expressly required by statute or rule to show prejudice in order for a court to grant a motion for discretionary dismissal [*see Code Civ. Proc. §§ 583.410-583.430*; *Cal. Rules of Ct., Rule 3.1342(e)*].

The Supreme Court has concluded that prejudice to the defendant is not required to support a discretionary dismissal, reasoning that discretionary dismissal is designed not only to remedy prejudice to the defendant, but also to expedite the administration of justice by compelling every person who files an action to prosecute it with promptness and diligence [*see Blank v. Kirwan (1985) 39 Cal. 3d 311, 332, 216 Cal. Rptr. 718, 703 P.2d 58* ; *Freedman v. Pacific Gas & Electric Co. (1987) 196 Cal. App. 3d 696, 711, 242 Cal. Rptr. 8* (recognizing that *Blank* impliedly disapproves the line of cases beginning with *Hurtado v. Statewide Home Loan Co. (1985) 167 Cal. App. 3d 1019, 1028-1032, 213 Cal. Rptr. 712* to the extent that they require a showing of actual prejudice to defendant to justify discretionary dismissal)].

Once plaintiff has made a showing of reasonable excuse for delay (*discussed under § 212.154*), the trial court must consider all pertinent factors, including prejudice to defendant from the delay in ruling on dismissal [*Putnam v. Clague (1992) 3 Cal. App. 4th 542, 563, 5 Cal. Rptr. 2d 25* ; *Cordova v. Vons Grocery Co. (1987) 196 Cal. App. 3d 1526, 1535, 242 Cal. Rptr. 605]* . In particular, several appellate decisions have reversed a discretionary grant of

dismissal when the plaintiff made a showing of reasonable diligence and the defendant did not show any actual prejudice [*see Putnam v. Clague (1992) 3 Cal. App. 4th 542, 563, 5 Cal. Rptr. 2d 25* ; *Cubit v. Ridgecrest Community Hospital (1987) 194 Cal. App. 3d 1552, 1569-1573, 240 Cal. Rptr. 346]* . A mere inference of prejudice alone may not defeat the showing [*Fleming v. Gallegos (1994) 23 Cal. App. 4th 68, 74-75, 28 Cal. Rptr. 2d 350* (in action to recover title to real property in which plaintiff showed attorney abandonment, inference of prejudice to defendant by existence of lis pendens was insufficient to override showing of reasonable diligence without evidence inability to refinance or sell)].

Other decisions, conversely, have affirmed a discretionary grant of dismissal when defendant did show actual prejudice and plaintiff failed to justify his or her delay [*see Adams v. Roses (1986) 183 Cal. App. 3d 498, 505-506, 228 Cal. Rptr. 339* (decided under prior law)]. For further discussion of plaintiff's showing of excusable delay, see *§ 212.154*.

Some courts have ruled that prejudice is inherent in any protracted delay and may be presumed as a factor justifying dismissal when the delay is unjustified [*see Farrant v. Casas de la Senda Homeowners Assn. (1985) 170 Cal. App. 3d 221, 226-227, 216 Cal. Rptr. 27* (decided under prior law); *Lopez v. Larson (1979) 91 Cal. App. 3d 383, 401-402, 153 Cal. Rptr. 912* (decided under prior law); *see also Lopez v. State of California (1996) 49 Cal. App. 4th 1292, 1295, 57 Cal. Rptr. 2d 266]* . That presumption is particularly appropriate when an unusual potential for prejudice exists under the circumstances of the case [*see, e.g., Schumpert v. Tishman Co. (1988) 198 Cal. App. 3d 598, 606, 243 Cal. Rptr. 810* (presumed prejudice as factor justifying dismissal of personal injury case in which delay in service prevented defendants from gathering relevant physical evidence and conducting meaningful discovery)].

PRACTICE TIP:

Distinction Between Late Service and Late Trial. Counsel should note that there may well be a distinction between late service of process and a later trial. At least one court, discussing prior law, noted that courts have historically been more willing to infer prejudice in cases involving late service of process [*see Luti v. Graco, Inc. (1985) 170 Cal. App. 3d 228, 233-238, 215 Cal. Rptr. 902]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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17-212 California Forms of Pleading and Practice--Annotated § 212.156

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§ 212.156 Effect of Matter Having Been Set for Trial

When a trial court routinely sets a matter for trial it does so without regard to a motion to dismiss for failure to prosecute. The issue of whether the criteria for dismissal is present is not before the court at that time unless it is expressly brought to the court's and counsel's attention. Although a trial court has power under *Code Civ. Proc. § 583.410* to dismiss on its own motion the court need not exercise it at any particular time, nor is the court forced to address the issue at routine case management conferences. Thus, a trial court does not pass on those issues in a routine trial setting context, and when a trial date has been routinely set, the court is not prevented from subsequently ruling on a motion to dismiss and granting discretionary dismissal [*Lopez v. State of California (1996) 49 Cal. App. 4th 1292, 1296-1297, 57 Cal. Rptr. 2d 266* (setting of trial date did not establish that trial court was satisfied with plaintiff's due diligence so as to preclude trial court from granting discretionary dismissal)].

Legal Topics:

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

Civil ProcedurePleading & PracticeService of ProcessTime LimitationsDismissalsCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedureTrialsGeneral Overview

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§ 212.157 Effect of Motion for Trial Preference

A trial court has discretion whether to grant a motion to specially set a case for trial pursuant to *Code Civ. Proc. § 36(e)*. Under appropriate circumstances, a court may deny such a motion and in its discretion, based on its own motion or on motion of the defendant, dismiss an action pursuant to *Code Civ. Proc. § 583.410* [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 439-444, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* . Moreover, although *Code Civ. Proc. § 36(b)* (which grants a trial preference for a party under the age of 14 in a wrongful death or personal injury action) is mandatory, it has been held not to divest the court of its discretion to dismiss a case under *Code Civ. Proc. § 583.410* and *Code Civ. Proc. § 583.420(a)(2)* [*Landry v. Berryessa Union School Dist. (1995) 39 Cal. App. 4th 691, 695-697, 46 Cal. Rptr. 2d 119* (no abuse of discretion in denying minor plaintiffs' request for a trial preference pursuant to *Code Civ. Proc. § 36(b)* and granting defendant's motion for discretionary dismissal pursuant to *Code Civ. Proc. §§ 583.410* and *583.420(a)(2)*]. For further discussion on the effect of a motion for a trial preference under *Code Civ. Proc. § 36(e)*, see Ch. 425, *Pretrial Proceedings*, § 425.64[5][b].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 212.158 Motion for Discretionary Dismissal

[1] When Required

A party seeking discretionary dismissal must generally serve and file a notice of motion at least 45 days before the date set for hearing of the motion, and the party may serve and file an affidavit or declaration stating facts in support of the motion together with the supporting memorandum [*Cal. Rules of Ct., Rule 3.1342(a)*]. A court may reduce the 45-day notice period, however, under *Code Civ. Proc. § 1005(b)*, which permits a court to prescribe a shortened notice period with respect to motions [*see Kunzler v. Karde (1980) 109 Cal. App. 3d 683, 688, 167 Cal. Rptr. 425* (decided under prior law)].

If the court seeks to dismiss an action sua sponte under Code Civ. Proc. § 584.420(a)(2)(B), for failure to bring the action to trial or conditionally settle it within two years after it was commenced, the clerk must set a hearing on the dismissal and mail notice to all parties at least 20 days before the hearing date [*Cal. Rules of Ct., Rule 3.1340(b)*; *see Sakhai v. Zipora (2009) 180 Cal. App. 4th 593, 598-600, 102 Cal. Rptr. 3d 691* (trial court was not required to give parties 45 days' notice before hearing on discretionary dismissal under *Code Civ. Proc. § 583.410*, and *28* days' notice trial court gave parties of order to show cause why action should not be dismissed for delay in prosecution before

hearing was more than enough notice under *Cal. Rules of Ct., Rule 3.1340(b)*)].

The notice provision of *Cal. Rules of Ct., Rule 3.1340(a)* does not appear to apply to court-originated discretionary dismissal motions other than those under *Code Civ. Proc. § 583.420(a)(2)(B)*. Thus, there is no express notice requirement for court-originated motions for discretionary dismissal under either *Code Civ. Proc. § 583.420(a)(1)* (delay in completing service) or *Code Civ. Proc. § 583.420(a)(3)* (delay in bringing action to retrial).

One court of appeal has held that the 45-day notice requirement of *Cal. Rules of Ct., Rule 3.1342(a)* applies when the parties have been specially brought into court for a hearing on a court-initiated motion [*Tate v. Superior Court (1975) 45 Cal. App. 3d 925, 930, 119 Cal. Rptr. 835* (decided under prior law)]. The California Supreme Court, however, in *Wilson v. Sunshine Meat & Liquor Co.* has noted that former Cal. Rules of Ct., Rule 373(a) [*now see Cal. Rules of Ct., Rule 3.1342(a)*], by its terms, does not apply to the court but to a "party" seeking dismissal [*Wilson v. Sunshine Meat & Liquor Co. (1983) 34 Cal. 3d 554, 560, 194 Cal. Rptr. 773, 669 P.2d 9* (decided under prior law); *see also Sakhai v. Zipora (2009) 180 Cal. App. 4th 593, 598, 102 Cal. Rptr. 3d 691* (*Cal. Rules of Ct., Rule 3.1342* explicitly applies to party in action, whereas *Cal. Rules of Ct., Rule 3.1340(b)* explicitly applies to court's own motion to dismiss case; since dismissal occurred on court's own motion, *Cal. Rules of Ct., Rule 3.1340(b)* applied)]. The Court in *Wilson* held that, whatever the notice requirement might be with respect to a "true court-originated motion," the 45-day notice requirement does not apply when the court's motion for discretionary dismissal is made at a hearing on plaintiff's motion to set the case specially for trial. In the latter situation, a plaintiff is not prejudiced by a short notice period because the purpose of the 45-day period is satisfied. Moreover, the plaintiff waives any objection by arguing on its merits the motion to set the case specially for trial, since that motion traditionally invites inquiry into the same factors relevant to a motion for discretionary dismissal [*Wilson v. Sunshine Meat & Liquor Co. (1983) 34 Cal. 3d 554, 560-562, 194 Cal. Rptr. 773, 669 P.2d 9* (decided under prior law)].

For a form of motion for discretionary dismissal and supporting papers, *see § 212.296*.

[2] Prosecution of Action Not Precluded by Notice of Motion

The filing of the notice of motion does not preclude the opposing party from further prosecution of the case to bring it to trial [*Cal. Rules of Ct., Rule 3.1342(a)*]. In fact, the lengthy 45-day notice period of *Cal. Rules of Ct., Rule 3.1342(a)*, is intended to provide the plaintiff with ample time withinwhich to complete any necessary preparation and move to set his or her case for trial, if so inclined. Thus, if the plaintiff moves to set the case specially for trial and the defendant then files a motion for discretionary dismissal, the plaintiff cannot complain that he or she was prejudiced by the fact that the court shortened the notice period for the dismissal motion in order to hear the motions together [*Farrar v. McCormick (1972) 25 Cal. App. 3d 701, 705, 102 Cal. Rptr. 190* (decided under prior law)].

Similarly, the plaintiff waives any objection to an inadequate notice period by appearing at the hearing and challenging the motion on the merits rather than specially objecting to lack of compliance with the notice requirement [*Clark v. Stabond Corp. (1987) 197 Cal. App. 3d 50, 59, 242 Cal. Rptr. 676]* .

[3] Opposition

Within 15 days after service of the notice of motion, the opposing party may serve and file a written opposition, a memorandum of points and authorities, and a supporting affidavit or declaration stating facts showing why the motion should be denied. The court may grant the motion without a hearing on the merits if no opposition is filed [*Cal. Rules of Ct., Rule 3.1342(b)*].

[4] Response and Reply

Within 15 days after service of the written opposition, if any, the moving party may serve and file a response, including

a supplemental memorandum of points and authorities and additional supporting affidavits or declarations [*Cal. Rules of Ct., Rule 3.1342(c)*]. The opposing party may then serve and file a reply within five days after service of the response [*Cal. Rules of Ct., Rule 3.1342(d)*].

[5] Burden of Proof

[a] Defendant's Initial Burden

On a motion for discretionary dismissal, at least one made by the defendant, the defendant has the initial burden of showing that the dismissal is warranted [*Marra v. Mission Foods Corp. (1993) 19 Cal. App. 4th 724, 727, 23 Cal. Rptr. 2d 741* ; *Visco v. Abatti (1983) 144 Cal. App. 3d 904, 908, 192 Cal. Rptr. 833* (decided under prior law)].

[b] Plaintiff's Burden to Show Excuse for Delay

Once the party moving for dismissal has shown that the dismissal is warranted, the burden shifts to the plaintiff opposing the motion to show some excuse for the delay [*Lopez v. State of California (1996) 49 Cal. App. 4th 1292, 1295, 57 Cal. Rptr. 2d 266* ; *Marra v. Mission Foods Corp. (1993) 19 Cal. App. 4th 724, 727, 23 Cal. Rptr. 2d 741* ; *see also § 212.154*].

If a plaintiff fails to file any written opposition to a motion for discretionary dismissal, the court may deem this to be an admission that the motion is meritorious and the court may grant the motion without a hearing on the merits [*Cal. Rules of Ct., Rule 3.1342(b)*].

In *Denham v. Superior Court*, the California Supreme Court held that if a plaintiff files written opposition to the motion for dismissal, the court is not required to grant the motion for discretionary dismissal unless there is an entire absence of any showing constituting good cause for any demonstrated delay [*see Denham v. Superior Court (1970) 2 Cal. 3d 557, 564, 86 Cal. Rptr. 65, 468 P.2d 193* (decided under prior law)].

Some courts of appeal have interpreted *Denham* to mean that, although the plaintiff is excused from presenting *adequate* evidence of good cause for the delay, the plaintiff is still required to present some evidence of good cause, and it would be an abuse of discretion for the court to refuse to grant the motion when the plaintiff's opposition failed to present any relevant evidence of good cause [*Moore v. El Camino Hosp. Dist. (1978) 78 Cal. App. 3d 661, 664, 144 Cal. Rptr. 314* (decided under prior law); *Dunsmuir Masonic Temple v. Superior Court (1970) 12 Cal. App. 3d 17, 21-23, 90 Cal. Rptr. 405* (decided under prior law)].

Other courts have taken a contrary view. In ruling on the motion, the court is required to consider not only evidence submitted by the parties, but also its own file or any other matters relevant to a property determination of which it may take cognizance by judicial notice, such as the condition of its calendar [*Cal. Rules of Ct., Rule 3.1342(e)*]. Consequently, some courts have taken the position that the plaintiff is not necessarily required to present relevant evidence opposing the motion on penalty of having the motion automatically granted, so long as he or she submits written opposition that calls the court's attention to matters of which it may take cognizance and that tend to explain or justify the demonstrated delay. The court, in turn, would abuse its discretion in denying the motion only if there is a complete absence of any evidence or other data tending to explain or justify the delay [*Kunzler v. Karde (1980) 109 Cal. App. 3d 683, 688-690, 167 Cal. Rptr. 425* (decided under prior law); *Lopez v. Larson (1979) 91 Cal. App. 3d 383, 397 n.9, 397-398, 153 Cal. Rptr. 912* (decided under prior law); *see also Oskooi v. Fountain Valley Regional Hospital (1996) 42 Cal. App. 4th 233, 241, 49 Cal. Rptr. 2d 769* (*Lopez* cited with approval; trial court must grant motion to dismiss when no showing of excusable delay; lead opinion by Sonenshine, J.; concurring and dissenting opinions did not address issue)].

[6] Conditional Grant or Denial of Motion

The court may not only grant or deny a motion under *Code Civ. Proc. §§ 583.410-583.430*, it may, when the facts warrant, continue or defer its ruling pending the performance of any conditions to a grant or denial thatit may impose to effectuate substantial justice [*Code Civ. Proc. § 583.430(a)*; *Cal. Rules of Ct., Rule 3.1342(f)*]. The court may make any necessary order to effectuate its authority under *Code Civ. Proc. § 583.430(a)*, including, but not limited to, provisional and conditional orders [*Code Civ. Proc. § 583.430(b)*].

For example, when damage caused by delay in prosecution is compensable in money, the court may offer the plaintiff an opportunity to make economic redress as a condition to denying a motion to dismiss under *Code Civ. Proc. §§ 583.410-583.430* [*Hansen v. Snap-Tite, Inc. (1972) 23 Cal. App. 3d 208, 213, 100 Cal. Rptr. 51* (decided under prior law)]. Similarly, an order granting a motion to dismiss may be conditioned on the defendant either waiving a statute of limitations or voluntarily dismissing a cross complaint, whereas an order denying a motion to dismiss may be conditioned on the plaintiff's taking timely steps to complete discovery, to obtain a certificate of readiness for trial, or to obtain an order advancing the trial date [*see* Law Revision Commission Comment to *Code Civ. Proc. § 583.430*].

[7] Review

[a] Order Dismissing Action

A dismissal order is appealable [*Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 993 n.3, 277 Cal. Rptr. 517, 803 P.2d 370]* . Counsel intending to seek review by appeal of the dismissal of an action should take care to perfect the appeal by obtaining an order of dismissal and judgment. A mere "notice of ruling" of dismissal is not appealable, and courts of appeal are increasingly reluctant to save erroneous appeals by permitting appellant to obtain an appealable order or judgment after the fact [*Shpiller v. Harry C's Redlands (1993) 13 Cal. App. 4th 1177, 1180, 16 Cal. Rptr. 2d 814]* .

On appeal from an order dismissing a case for a failure to diligently prosecute, there can be no review of earlier, non-appealable summary adjudication orders that would otherwise be reviewed on appeal from a final judgment on the merits [*Vernon v. Great Western Bank (1996) 51 Cal. App. 4th 1007, 1009, 1014-1015, 59 Cal. Rptr. 2d 350]* .

[b] Order Denying Motion for Dismissal

A denial of a dismissal motion is not directly appealable. It may, however, be challenged either by a petition for a writ of mandate or on appeal from a final judgment [*Oskooi v. Fountain Valley Regional Hospital (1996) 42 Cal. App. 4th 233, 237, 49 Cal. Rptr. 2d 769* (lead opinion by Sonenshine, J.; concurring and dissenting opinion did not address rule)]. If the defendant does not exercise the option of seeking pretrial review by a writ of mandate, however, and waits to raise the issue on appeal after trial, thecourt may be not be inclined to disturb plaintiff's victory on the merits after the judicial resources have already be expended on trial [*see* *Reid v. Balter (1993) 14 Cal. App. 4th 1186, 1195-1196, 18 Cal. Rptr. 2d 287* ; *see also* *Oskooi v. Fountain Valley Regional Hosp. & Medical Ctr. (1996) 42 Cal. App. 4th 251-253, 42 Cal. App. 4th 233, 253, 49 Cal. Rptr. 2d 769* (dissenting opinion)].

[c] Standard of Review

When the court exercises its discretionary powers under *Code Civ. Proc. §§ 583.410-583.430* and dismisses a case, the reviewing court will not substitute its opinion for that of the trial court unless a clear case of abuse is shown and there has been a miscarriage of justice [*Blank v. Kirwan (1985) 39 Cal. 3d 311, 331, 216 Cal. Rptr. 718, 703 P.2d 58, 703 P.2d 58]* . The trial court is able to assess credibility and resolve any conflicts in the evidence, and its factual findings are entitled to great weight [*see* *Shamblin v. Brattain (1988) 44 Cal. 3d 474, 479, 243 Cal. Rptr. 902, 749 P.2d 339* (proceeding to set aside default)].

In reviewing a trial court's ruling under *Code Civ. Proc. §§ 583.410-583.430*, the appellate court will generally uphold a denial of a motion to dismiss if there is any showing of good cause for the delay and no miscarriage of justice would

result [*Denham v. Superior Court (1970) 2 Cal. 3d 557, 564, 566, 86 Cal. Rptr. 65, 468 P.2d 193* (decided under prior law)]. On the other hand, a grant of dismissal is subject to closer appellate scrutiny, with doubts resolved in favor of the plaintiff, so that a grant of dismissal will generally be reversed if the circumstances indicate a reasonable excuse for the delay and an absence of actual prejudice to the defendants [*City of Los Angeles v. Gleneagle Dev. Co. (1976) 62 Cal. App. 3d 543, 561-563, 133 Cal. Rptr. 212* (decided under prior law)]. The underlying policy for each rule is the same; a disposition on the merits is generally to be preferred over a dismissal for delay [*Code Civ. Proc. § 583.130*; *see Denham v. Superior Court (1970) 2 Cal. 3d 557, 566, 86 Cal. Rptr. 65, 468 P.2d 193* (decided under prior law); *City of Los Angeles v. Gleneagle Dev. Co. (1976) 62 Cal. App. 3d 543, 563, 133 Cal. Rptr. 212* (decided under prior law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotionsCivil ProcedureTrialsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionEvidenceProcedural ConsiderationsBurdens of ProofBurden Shifting

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PART II. LEGAL BACKGROUND
C. Involuntary Dismissal For Delay In Prosecution
5. Discretionary Dismissal

17-212 California Forms of Pleading and Practice--Annotated §§ 212.159-212.169

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[Reserved]

§§ 212.159[Reserved]

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17-212 California Forms of Pleading and Practice--Annotated § 212.170

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§ 212.170 California Points and Authorities

For memoranda of points and authorities supporting and opposing motions for dismissal, see California Points and Authorities , Ch. 90, *Dismissal* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions

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17-212 California Forms of Pleading and Practice--Annotated § 212.171

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§ 212.171 State Statutes

Dismissal of action by either party on written consent of other. *Code Civ. Proc. § 581(b)*

Requirement of consent of attorney of record of party or parties applying for dismissal under *Code Civ. Proc. § 581(b)(1)* or *(2)*, or order of court after notice to attorney. *Code Civ. Proc. § 581(b)*

Dismissal by plaintiff by written request to clerk before commencement of trial. *Code Civ. Proc. § 581(b)(1)*

Dismissal with prejudice by plaintiff after commencement of trial. *Code Civ. Proc. § 581(e)*

Dismissal without prejudice after commencement of trial by parties' consent or by court order on good cause showing. *Code Civ. Proc. § 581(e)*

Legal Topics:

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

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17-212 California Forms of Pleading and Practice--Annotated § 212.172

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§ 212.172 California Rules of Court

Dismissal of class action permitted only after court approval. *Cal. Rules of Ct., Rule 3.770*

Service and filing of notice of entry of dismissal. *Cal. Rules of Ct., Rule 3.1390*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureDismissalsGeneral Overview

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17-212 California Forms of Pleading and Practice--Annotated § 212.173

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§ 212.173 Decisions

[1] Voluntary Dismissal

[a] Generally

Court of appeal held plaintiff could dismiss action under *Code Civ. Proc. § 581* after a motion to compel arbitration had been granted, but before the arbitration had commenced; precluding plaintiff from doing so would be at odds with provision permitting plaintiff to voluntarily dismiss his or her complaint at any time before the actual commencement of trial. *Cardiff Equities, Inc. v. Superior Court (2008) 166 Cal. App. 4th 1541, 1549, 83 Cal. Rptr. 3d 699*

Code Civ. Proc. § 581 allows plaintiff voluntarily to dismiss case before commencement of trial; purpose behind this right is to allow plaintiff certain amount of freedom of action within limits prescribed by code; statute treats equally dismissals with or without prejudice, with respect to right to dismiss before commencement of trial; apart from certain statutory exceptions, plaintiff's right to voluntary dismissal before commencement of trial under *Code Civ Proc. § 581* appears absolute. *Kyle v. Carmon (1999) 71 Cal. App. 4th 901, 908-909, 84 Cal. Rptr. 2d 303*

When action is voluntarily dismissed by plaintiff as to some but not all of parties, court retains subject matter

jurisdiction over action. *Basinger v. Rogers & Wells (1990) 220 Cal. App. 3d 16, 22-23, 269 Cal. Rptr. 332*

Plaintiff insurer had absolute right to dismiss declaratory relief action against its insured and others claiming coverage under liability insurance contract prior to trial when no cross complaint filed; neither answer requesting judicial declaration in favor of policy coverage nor allegations in answer that denial of coverage was product of bad faith qualified as cross complaint or affirmative relief, and therefore did not defeat plaintiff's absolute right to dismiss under former *Code Civ. Proc. § 581(1)* (*now see Code Civ. Proc. § 581(b)(1), (h)*). *Aetna Casualty & Surety Co. v. Humboldt Loaders, Inc. (1988) 202 Cal. App. 3d 921, 927-929, 249 Cal. Rptr. 175*

Dismissal ordered by court considered to be involuntary, while one entered at request of party is voluntary. *D & J, Inc. v. Ferro Corp. (1986) 176 Cal. App. 3d 1191, 1194, 222 Cal. Rptr. 656*

Voluntary dismissal entered by plaintiff's attorney without plaintiff's knowledge and consent is voidable within reasonable time after plaintiff learns of it. *Whittier Union High Sch. Dist. v. Superior Court (1977) 66 Cal. App. 3d 504, 507-509, 136 Cal. Rptr. 86*

Voluntary dismissal before trial is generally matter of right and exercisable by plaintiff without knowledge of other parties or consent of court. *Roski v. Superior Court (1971) 17 Cal. App. 3d 841, 845, 95 Cal. Rptr. 312*

[b] Appeal

Party may not obtain immediate review of adverse ruling on some of its claims by dismissing remaining claims without prejudice; however, party may stipulate to adverse judgment with prejudice on all its claims in order to appeal from that judgment. *Tudor Ranches, Inc. v. State Comp. Ins. Fund (1998) 65 Cal. App. 4th 1422, 1429-1431, 77 Cal. Rptr. 2d 574*

Defendant cannot appeal plaintiff's dismissal; defendant, however, may file motion to vacate dismissal, which if denied may be reviewed by extraordinary writ. *Gray v. Superior Court (1997) 52 Cal. App. 4th 165, 171-172, 60 Cal. Rptr. 2d 428*

While compulsory dismissal by order of court is judicial act from which plaintiff may appeal, voluntary dismissal by plaintiff is accomplished by ministerial act of clerk, from which no appeal lies. *Yancey v. Fink (1991) 226 Cal. App. 3d 1334, 1342-1343, 277 Cal. Rptr. 415*

[2] Availability

Voluntary dismissal without prejudice was available after demurrer was sustained with leave to amend but before decision on demurrer to amended complaint. *Christensen v. Dewor Developments (1983) 33 Cal. 3d 778, 785, 191 Cal. Rptr. 8, 661 P.2d 1088*

Plaintiff may no longer voluntary dismiss a case when either (a) there had been a public and formal indication by the trial court of the legal merits of the case, or (b) there was some procedural dereliction by the plaintiff making dismissal inevitable; when plaintiff dismissed case prior to order to show cause hearing contemplating dismissal or sanctions, dismissal had not yet become inevitable and therefore plaintiff's voluntary dismissal was effective. *Franklin Capital Corp. v. Wilson (2007) 148 Cal. App. 4th 187, 210, 55 Cal. Rptr. 3d 424*

Apart from certain statutory exceptions, plaintiff's right to voluntary dismissal before commencement of trial under *Code Civ Proc. § 581* appears absolute; plaintiff's voluntary dismissal with prejudice was valid when entered after *Code Civ. Proc. § 425.16* motion to strike filed, hearing held, motion taken under submission, but before court ruled on

motion. *Kyle v. Carmon (1999) 71 Cal. App. 4th 901, 908-912, 84 Cal. Rptr. 2d 303*

Plaintiff's right to dismiss complaint at any time before actual commencement of trial (*see Code Civ. Proc. § 581(b)(1)*) is cut off by commencement of evidentiary proceedings before referee appointed in a partition action; moreover, voluntary dismissal in action for partition improper when defendant's answer requests affirmative relief. *Gray v. Superior Court (1997) 52 Cal. App. 4th 165, 167, 173-174, 60 Cal. Rptr. 2d 428*

Plaintiff who waits until motion for summary judgment has been filed and time for opposition has passed, to attempt to dismiss his or her complaint, is subject to trial court's continuing jurisdiction to hear and rule on pending motion; plaintiff may not frustrate summary judgment statute by interposing voluntary dismissal without prejudice in lieu of opposition to defendant's motion. *Cravens v. State Bd. of Equalization (1997) 52 Cal. App. 4th 253, 255, 257, 60 Cal. Rptr. 2d 436*

Plaintiff may not voluntarily dismiss action without prejudice after adverse tentative summary judgment ruling announced and hearing commenced which is thereafter continued for express and exclusive purpose of permitting plaintiff opportunity to present opposition evidence that plaintiff claims was previously unavailable. *Mary Morgan, Inc. v. Melzark (1996) 49 Cal. App. 4th 765, 767, 57 Cal. Rptr. 2d 4*

Voluntary dismissal of action after filing petition for trial de novo subsequent to judicial arbitration is not available to avoid unfavorable arbitration ruling. *Herbert Hawkins Realtors, Inc. v. Milheiser (1983) 140 Cal. App. 3d 334, 339-340, 189 Cal. Rptr. 450*

Voluntary dismissal is not available after trial court sustains general demurrer without leave to amend. *Bell v. Hummel (1982) 136 Cal. App. 3d 1009, 1015, 186 Cal. Rptr. 688* (overruled on other grounds in *Laird v. Blacker (1992) 2 Cal. 4th 606, 617, 7 Cal. Rptr. 2d 550, 828 P.2d 691 , cert. denied, 506 U.S. 1021*)

Voluntary dismissal is not sufficient to make defendant "prevailing party" entitled to attorney's fees under *Civ. Code § 1717*. *D & J, Inc. v. Ferro Corp. (1986) 176 Cal. App. 3d 1191, 1193, 222 Cal. Rptr. 656* ; *Associated Convalescent Enterprises v. Carl Marks & Co., Inc. (1973) 33 Cal. App. 3d 116, 120-121, 108 Cal. Rptr. 782*

Voluntary dismissal without prejudice available after demurrer sustained with leave to amend and plaintiff files request for dismissal within time required to amend. *Malick v. American Sav. & Loan Assn. (1969) 273 Cal. App. 2d 171, 174, 79 Cal. Rptr. 499*

Payment of costs or attorney's fees not proper condition to obtaining voluntary dismissal. *Eddings v. White (1964) 229 Cal. App. 2d 579, 585, 40 Cal. Rptr. 453*

[3] Effect

In voluntary pretrial dismissal cases, *Civ. Code § 1717* bars recovery of attorney fees incurred in defending contract claims, but neither Section 1717 nor *International Industries, Inc. v. Olen (1978) 21 Cal. 3d 218, 577 P.2d 1031* , bar recovery of attorney fees incurred in defending tort or other noncontract claims arising from contract with broad attorney's fee provision; whether attorney's fees incurred in defending tort or other noncontract claims are recoverable after pretrial dismissal depends on terms of contractual attorney fee provision. *Santisas v. Goodin (1998) 17 Cal. 4th 599, 602, 617, 71 Cal. Rptr. 2d 830, 951 P.2d 399*

On proper exercise of plaintiff's right to voluntary dismissal before commencement of trial under *Code Civ. Proc. § 581*, trial court thereafter lacks jurisdiction to enter further orders in dismissed action except for matters such as attorney fees; order of court lacking subject matter jurisdiction is void. *Kyle v. Carmon (1999) 71 Cal. App. 4th 901, 909, 84*

Cal. Rptr. 2d 303

Defendant who prevails on motion for judgment on the pleadings as to contractual causes of action, but remains as defendant on tort counts, is not entitled to attorney's fees pursuant to *Civ. Code § 1717* when plaintiff subsequently voluntarily dismisses defendant as to "entire action." *Rosen v. Robert P. Warmington Co. (1988) 201 Cal. App. 3d 939, 942-944, 247 Cal. Rptr. 635*

Voluntary dismissal is simply withdrawal of plaintiff's complaint which leaves defendant as though never a party. *Skelly v. Richman (1970) 10 Cal. App. 3d 844, 858, 89 Cal. Rptr. 556*

Voluntary dismissal without prejudice before trial is not judgment on merits. *Crosswhite v. American Ins. Co. (1964) 61 Cal. 2d 300, 302, 38 Cal. Rptr. 412, 392 P.2d 5*

[4] Relief From Voluntary Dismissal

Defendant may file motion to vacate dismissal, which if denied may be reviewed by extraordinary writ. *Gray v. Superior Court (1997) 52 Cal. App. 4th 165, 172, 60 Cal. Rptr. 2d 428*

Plaintiffs' attorney's lack of authority invalidated dismissal with prejudice; trial court abused its discretion in denying motion to vacate dismissal since court had attorney's declaration that she acted without authority and by mistake, and there was no conceivable reason to dismiss action with prejudice rather than without prejudice. *Romadka v. Hoge (1991) 232 Cal. App. 3d 1231, 1237, 283 Cal. Rptr. 878*

Even after voluntary dismissal with prejudice has been filed, trial court has jurisdiction to vacate judgment of dismissal under *Code Civ. Proc. § 473* if it was entered as result of plaintiff's mistake, inadvertence, surprise, or excusable neglect. *Basinger v. Rogers & Wells (1990) 220 Cal. App. 3d 16, 21-22, 269 Cal. Rptr. 332*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral Overview

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17-212 California Forms of Pleading and Practice--Annotated § 212.174

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§ 212.174 Text References

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, §§ 253-278 (4th ed. 1997)

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Chapter 212 DISMISSAL
PART III. RESEARCH GUIDE
B. Involuntary Dismissal For Delay In Prosecution

17-212 California Forms of Pleading and Practice--Annotated § 212.190

AUTHOR: HON. PATTI S. KITCHING BARBARA A. REEVES CHARLES PEREYRA-SUAREZ EDITORIAL CONSULTANTS Justice Kitching, an Associate Justice of the California Court of Appeal, Second Appellate District, Division Three, was formerly a Judge of the Los Angeles Superior Court, where her assignments included the law and motion department. Barbara A. Reeves is a partner with Fried, Frank, Harris, Shriver & Jacobson, Los Angeles, California. Her areas of litigation expertise include intellectual property, securities, fraud, contract, international trade, antitrust, environmental coverage, and white-collar criminal defense. Charles Pereyra-Suarez is a partner in McKenna & Cuneo and heads the Litigation Department in the Los Angeles office. He also has served as a judge pro tem of the Los Angeles County Municipal and Superior Courts since 1986. This article was adapted from California Practice Handbook: Pretrial Disposition (Matthew Bender), Litigation Section, Los Angeles County Bar Associate, Handbook Editor; Hon. Patti S. Kitching, Barbara A. Reeves, Charles Pereyra-Suarez, Contributing Editors.

§ 212.190 California Points and Authorities

For memoranda of points and authorities supporting and opposing motions for dismissal, see California Points and Authorities , Ch. 90, *Dismissal*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions

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§ 212.191 State Statutes

[1] Dismissal for Delay in Prosecution

[a] General Provisions

Dismissal for delay in prosecution under *Code Civ. Proc. §§ 583.110-583.430* as without prejudice. *Code Civ. Proc. § 581(b)(4), (g)*

Definitions. *Code Civ. Proc. § 583.110*

Application to special proceedings. *Code Civ. Proc. § 583.120*

Statement of policy. *Code Civ. Proc. § 583.130*

Principles of waiver and estoppel as not affected by *Code Civ. Proc. §§ 583.110-583.430*. *Code Civ. Proc. § 583.140*

Other authority to dismiss or impose sanctions as not affected by *Code Civ. Proc. §§ 583.110-583.430*. *Code Civ. Proc.*

§ 583.150

[b] Discretionary Dismissal

Court's discretionary power to dismiss action for delay in prosecution. *Code Civ. Proc. § 583.410*

Limitations on time period when court may exercise discretion to dismiss action under *Code Civ. Proc. § 583.410*. *Code Civ. Proc. § 583.420(a)*

Time periods under *Code Civ. Proc. § 583.420(a)* as computed in same manner as comparable periods under *Code Civ. Proc. §§ 583.210-583.360*. *Code Civ. Proc. § 583.420(b)*

Conditional grant or denial of discretionary dismissal under *Code Civ. Proc. § 583.410*. *Code Civ. Proc. § 583.430*.

[c] Mandatory Dismissal for Delay in Bringing Action to Trial or New Trial

Action as required to be brought to trial within five years. *Code Civ. Proc. § 583.310*

Action as required to be brought again to trial within three years after mistrial, grant of new trial, or remand for new trial. *Code Civ. Proc. § 583.320*

Time requirements of *Code Civ. Proc. §§ 583.310, 583.320* as subject to extension by written stipulation or oral agreement entered in minutes of court or transcript. *Code Civ. Proc. § 583.330*

Time requirements of *Code Civ. Proc. §§ 583.310, 583.320* as suspended when court lacks jurisdiction, action is stayed or enjoined, or bringing action to trial or new trial is impossible, impracticable, futile. *Code Civ. Proc. § 583.340*

Time for bringing to trial under *Code Civ. Proc. §§ 583.310, 583.320* extended by six months if less than six months remain after time period is tolled or extended by statute. *Code Civ. Proc. § 583.350*

Dismissal required on court's or defendant's motion when time requirements of *Code Civ. Proc. §§ 583.310* or *583.320* are not met. *Code Civ. Proc. § 583.360(a)*

Requirements of *Code Civ. Proc. §§ 583.310-583.360* are mandatory and not subject to extension, excuse, or exception except by statute. *Code Civ. Proc. § 583.360(b)*

Periods for bringing action to trial in *Code Civ. Proc. §§ 583.310-583.430* tolled during time that determination of good faith settlement with joint tortfeasor coobligor is reviewed. *Code Civ. Proc. § 877.6(e)(3)*

Code Civ. Proc. § 583.310 period tolled if action is in judicial arbitration more than four years and six months after plaintiff filed action. *Code Civ. Proc. § 1141.17*

[d] Mandatory Dismissal for Delay in Service

Defendant required to be served within three years. *Code Civ. Proc. § 583.210(a)*

Proof of service of summons required to be filed within 60 days after the time the summons and complaint must be served upon a defendant. *Code Civ. Proc. § 583.210(b)*

Time requirements of *Code Civ. Proc. § 583.210* are not applicable if defendant so stipulates or makes general appearance. *Code Civ. Proc. § 583.220*

Time requirements of *Code Civ. Proc. § 583.210* are subject to extension by written stipulation or oral agreement entered in minutes of court or transcript. *Code Civ. Proc. § 583.230*

Further proceedings in action prohibited and dismissal required on motion of court, defendant, or other interested person when time requirements of *Code Civ. Proc. § 583.210* are not met. *Code Civ. Proc. § 583.250(a)*

Requirements of *Code Civ. Proc. §§ 583.210-583.250* are mandatory and not subject to extension, excuse, or exception except as provided by statute. *Code Civ. Proc. § 583.250(b)*

Time requirements of *Code Civ. Proc. § 583.210* suspended when defendant is not amenable to process, action is stayed and stay affects service, validity of service is litigated, or service is impossible, impracticable, futile for reasons beyond plaintiff's control. *Code Civ. Proc. § 583.340*

[2] Dismissal on Other Grounds

Dismissal by court when either party fails to appear at trial, and other party appears and requests dismissal. *Code Civ. Proc. § 581(b)(5)*

Dismissal by court without prejudice when no party appears for trial following 30 days notice of time and place for trial. *Code Civ. Proc. § 581(b)(3)*

Dismissal by plaintiff with or without prejudice in whole or in part prior to actual commencement of trial. *Code Civ. Proc. § 581(c)*

Dismissal by court with prejudice when plaintiff abandons cause on trial and before final submission. *Code Civ. Proc. § 581(d)*

Dismissal by court on either party's motion after demurrer is sustained or motion to strike is granted. *Code Civ. Proc. § 581(f)*

[3] Order of Dismissal

Written order signed by court and filed required for all dismissals ordered by court. *Code Civ. Proc. § 581d*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedurePleading & PracticeService of ProcessTime LimitationsDismissalsCivil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions

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§ 212.192 California Rules of Court

Dismissal of class action permitted only after court approval. *Cal. Rules of Ct., Rule 3.770*

Discretionary dismissal for failure to bring action to trial or to conditional settlement within two years. *Cal. Rules of Ct., Rule 3.1342(a)*

Procedure and criteria for motion for discretionary dismissal under *Code Civ. Proc. §§ 583.410-583.430*. *Cal. Rules of Ct., Rules 3.1340*

Service and filing of notice of entry of dismissal. *Cal. Rules of Ct., Rule 3.1390*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureDismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsMotionsCivil ProcedureSettlementsGeneral OverviewCivil

ProcedureJudgmentsEntry of JudgmentsGeneral Overview

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§ 212.193 Local Court Rules

Motion to dismiss. San Francisco Co. Super. Ct. Rules, Rules 8.7(B)

Legal Topics:

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

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§ 212.194 Decisions

[1] Appeal of Order Dismissing Action

Order dismissing fewer than all defendants from action is final judgment as to those dismissed and appealable. *Hydrotech Systems, Ltd. v. Oasis Waterpark (1991) 52 Cal. 3d 988, 993 n.3, 277 Cal. Rptr. 517, 803 P.2d 370*

On appeal from order dismissing case for failure to prosecute diligently, there can be no review of earlier, nonappealable summary adjudication orders that would otherwise be reviewed on appeal from final judgment on merits. *Vernon v. Great Western Bank (1996) 51 Cal. App. 4th 1007, 1009, 1013-1015, 59 Cal. Rptr. 2d 350*

As general rule involuntary dismissal effected by written court order is appealable. *Topa Ins. Co. v. Fireman's Fund Ins. Companies (1995) 39 Cal. App. 4th 1331, 1336, 46 Cal. Rptr. 2d 516*

Appeal from minute order granting motion to dismiss for failure to prosecute dismissed is not taken from appealable order; plaintiffs refused opportunity to secure order of dismissal and to request judicial notice of after-filed judgment. *Munoz v. Florentine Gardens (1991) 235 Cal. App. 3d 1730, 1731-1732, 1 Cal. Rptr. 2d 609*

Order of dismissal for failure to prosecute is appealable. Nye v. 20th *Century Ins. Co. (1990) 225 Cal. App. 3d 1041, 1043 n.1, 275 Cal. Rptr. 319*

Order of dismissal is appealable under *Code Civ. Proc. § 904.1* when it finally disposes of action. *Southern Cal. White Trucks v. Teresinski (1987) 190 Cal. App. 3d 1393, 1398 n.1, 236 Cal. Rptr. 159*

[2] Considerations on Appeal

[a] Discretionary Dismissal

Dismissal under *Code Civ. Proc. § 581*(*l*) is discretionary; trial court's discretion will be overturned only on showing of manifest abuse of discretion; discretion abused when trial court's ruling is arbitrary, capricious, exceeds the bounds of reason or prevents fair hearing from being held; terminatingsanctions should only be ordered when there has been previous noncompliance with rule or order and it appears less severe sanction would be effective; terminating sanctions should not be ordered as first response when noncompliance is through no fault of party. *Link v. Cater (1998) 60 Cal. App. 4th 1315, 1320-1321, 1325-1326, 71 Cal. Rptr. 2d 130*

Reviewing court will not substitute its opinion for that of trial court unless there is clear abuse of discretion and miscarriage of justice. *Lopez v. State of California (1996) 49 Cal. App. 4th 1292, 1295, 57 Cal. Rptr. 2d 266*

Assuming trial court abused discretion in not granting motion for discretionary dismissal, defense attorney's declaration that because of passage of time witnesses had moved away and would not be available for trial is insufficient to show prejudice needed for reversal when declaration does not identify witnesses and what relevant facts their testimony would have shown. *Reid v. Balter (1993) 14 Cal. App. 4th 1186, 1195, 18 Cal. Rptr. 2d 287*

Objection that trial court, in granting motion to dismiss action for failure to serve and return summons within two years, failed to apply standards set forth in *Cal. Rules of Ct., Rule 3.1342(e)* was not subject to being raised for first time on appeal; on appeal of trial court's ruling on discretionary dismissal motion, reviewing court will not substitute its opinion for that of trial court unless clear case of abuse is shown and there has been miscarriage of justice; burden of showing abuse is on complaining party. *Ladd v. Dart Equipment Corp. (1991) 230 Cal. App. 3d 1088, 1092 n.2, 1100, 281 Cal. Rptr. 813*

Trial court has wide discretion in ruling on motion to dismiss for lack of diligent prosecution and its decision will not be reversed on appeal absent abuse of discretion; appropriate test for abuse of discretion is whether trial court exceeded bounds of reason; when two or more inferences can reasonably be deduced from facts, reviewing court has no authority to substitute its decision for that of trial court; trial court's decision to deny motion to dismiss is not as closely scrutinized on appeal as decision to dismiss because law favors decisions on the merits. *Maggio, Inc. v. United Farm Workers (1991) 227 Cal. App. 3d 847, 884, 278 Cal. Rptr. 250 , cert. denied, 502 U.S. 863*

Discretionary dismissal of action for failure to serve summons within two years (*Code Civ. Proc. §§ 583.410(a), 583.420(a)(1)*) reversed on appeal only when manifest abuse of discretion has been shown; burden of demonstrating abuse of discretion is on appellant; trial court's decision reversed only if, based on evidence viewed most favorably in support of trial court's decision, appellate court finds that no reasonable judge could have reached same result. *Kuchins v. Hawes (1990) 226 Cal. App. 3d 535, 538, 541, 276 Cal. Rptr. 281*

When trial court has ruled on discretionary motion to dismiss, unless clear case of abuse is shown, and unless there has been miscarriage of justice, reviewing court will not substitute its opinion and thereby divest trial court of its discretionary power; burden is on complaining party to establish abuse of discretion. *State Compensation Ins. Fund v. Selma Trailer & Manufacturing Co. (1989) 210 Cal. App. 3d 740, 747-748, 258 Cal. Rptr. 545*

In reviewing ruling on motion to dismiss under *Code Civ. Proc. § 583.420(a)(2)(A)*, reviewing court does not substitute its opinion and thereby divest trial court of its discretionary power unless clear case of abuse is shown and unlessthere has been miscarriage of justice; burden is on complaining party to establish abuse of discretion; ultimate question on review is whether under all circumstances plaintiff has shown a clear or manifest abuse of discretion. *Freedman v. Pacific Gas & Electric Co. (1987) 196 Cal. App. 3d 696, 703-704, 242 Cal. Rptr. 8*

Appellate court gives substantial deference to trial court's ruling on discretionary dismissal and will not reverse decision unless manifest abuse of discretion existed. *San Ramon Valley Unified School Dist. v. Wheatley-Jacobsen, Inc. (1985) 175 Cal. App. 3d 1050, 1054, 221 Cal. Rptr. 342* (prior law)

[b] Mandatory Dismissal

Trial court's ruling on motion to dismiss under *Code Civ. Proc. § 583.310* (requiring action to be brought to trial within five years), disturbed on appeal only on showing of manifest abuse of discretion; judgment or order of lower court presumed correct; all intendments and presumptions indulged to support it on matters as to which record is silent, and error required to be affirmatively shown. *Monzon v. Schaefer Ambulance Service, Inc. (1990) 224 Cal. App. 3d 16, 26, 28, 273 Cal. Rptr. 615*

[3] Discretionary Dismissal for Delay in Prosecution

[a] Generally

Municipal court lacks authority to dismiss plaintiff's case on ground that plaintiff failed to comply with local rules regarding Delay Reduction Standards when court had not adopted any trial delay reduction rules in compliance with California Rules of Court and statute governing adoption of those rules; *Code Civ. Proc. §§ 583.410, 583.420* authorize dismissal only after two years have passed from date action commenced. *Simmons v. City of Pasadena (1995) 40 Cal. App. 4th Supp. 1, 5, 47 Cal. Rptr. 2d 102*

Although *Code Civ. Proc. § 36(b)* (which grants trial preference for party under age of 14 in wrongful death or personal injury action) is mandatory, it does not divest court of its discretion to dismiss case under *Code Civ. Proc. §§ 583.410* and *583.420(a)(2)* [*Landry v. Berryessa Union School Dist. (1995) 39 Cal. App. 4th 691, 695-697, 46 Cal. Rptr. 2d 119]* .

Trial court's dismissal of legal malpractice action on its own motion under *Code Civ. Proc. § 583.410* for failure to bring to trial was not abuse of discretion even though plaintiff effected service of process within two years of filing complaint and parties agreed to open extension of time for defendant to respond, when extension was also for plaintiff's benefit (to conduct further investigation), plaintiff failed to serve complaint until end of two-year period during which defendant attorney continued to represent plaintiff without knowledge of existence of complaint, and plaintiff failed to conduct relevant discovery. *Kidd v. Kopald (1994) 31 Cal. App. 4th 132, 36 Cal. Rptr. 2d 875*

Trial court's discretionary dismissal of complaint in intervention upheld when intervening insurer consented to dropping case from civil active list, little discovery occurred in four years between complaint's filing and dismissal, insurer did not pursue arbitration of complaint in intervention, and insurerfailed to file at-issue memorandum. *Wagner v. Rios (1992) 4 Cal. App. 4th 608, 612, 5 Cal. Rptr. 2d 731*

Motion for discretionary dismissal of action for failure to serve summons within two years was properly granted when summons was not served until two and one half years after action was commenced, after which plaintiff conducted discovery, when her only attempt at prosecution of action or discovery in two-and-one-half-year period was filing

complaint and writing one letter confirming a phone conversation; belated manifestation of diligence did not operate to justify earlier unjustified protracted delay; policy that interests of justice weigh against disposing of litigation on procedural grounds prevails only when plaintiff makes some showing of excusable delay in failing to prosecute, and no such showing was made. *Kuchins v. Hawes (1990) 226 Cal. App. 3d 535, 541, 276 Cal. Rptr. 281*

Motion for discretionary dismissal for failure to serve summons within two years after action was commenced against defendant properly denied when plaintiff acted diligently to serve summons and no prejudice from delay to defendant is shown. *Highland Stucco & Lime, Inc. v. Superior Court (Los Angeles Unified School District) (1990) 222 Cal. App. 3d 637, 645, 272 Cal. Rptr. 60*

Trial court did not err in dismissing cross complaint for delay in prosecution under three-year discretionary dismissal statute (*Code Civ. Proc. § 583.420(a)(2)(A)*), when it would have been justified in dismissing it under five-year mandatory dismissal statute (*Code Civ. Proc. § 583.310 et seq.*). *Waxman v. Boren, Elperin, Howard & Sloan (1990) 221 Cal. App. 3d 519, 526, 270 Cal. Rptr. 540*

As delay between filing of complaint and motion to dismiss increases from two years to five, showing required to excuse failure to bring case to trial grows greater and greater. *State Compensation Ins. Fund v. Selma Trailer & Manufacturing Co. (1989) 210 Cal. App. 3d 740, 748, 258 Cal. Rptr. 545*

Determination of whether case should be dismissed for failure to prosecute diligently requires assessment of credibility, resolution of conflicts in evidence, and balancing of competing judicial policies, all of which are uniquely within province of trial court; discretion of trial court must be upheld unless there is showing of clear abuse, and there has been miscarriage of justice. *Ystrom v. Handel (1988) 205 Cal. App. 3d 144, 151, 252 Cal. Rptr. 110*

Dismissal four and one half years after commencement of action was error when plaintiff had diligently conducted discovery, on learning of additional ground of malpractice three years after commencement of case had immediately joined additional defendants, and had vigorously responded to several demurrers and defendants showed no prejudice from delay. *Cubit v. Ridgecrest Community Hospital (1987) 194 Cal. App. 3d 1552, 1565-1573, 240 Cal. Rptr. 346* (prior law)

Court did not abuse its discretion in denying motion to set case specially for trial and then dismissing case for lack of prosecution when deadline for mandatory dismissal was approaching. *Parlen v. Golden State Sanwa Bank (1987) 194 Cal. App. 3d 906, 910-915, 240 Cal. Rptr. 73*

Specific information regarding delay was required to enable court to find that plaintiff's conduct causing delay was reasonable. *Longshore v. Pine (1986) 176 Cal. App. 3d 731, 737, 222 Cal. Rptr. 364* (prior law)

Defendant has burden to show discretionary dismissal is warranted through showing of some prejudice or presence of factors under *Cal. Rules of Ct., Rule 3.1342(e)*, which when viewed together militate in favor of dismissal, and when showing is made, burden shifts to plaintiff to show excusable delay. *San Ramon Valley Unified School Dist. v. Wheatley-Jacobsen, Inc. (1985) 175 Cal. App. 3d 1050, 1057, 221 Cal. Rptr. 342* (prior law)

On motion for discretionary dismissal, defendant has burden of showing that dismissal is warranted. *Campanella v. Takaoka (1984) 160 Cal. App. 3d 504, 513, 206 Cal. Rptr. 745* (prior law)

Sanction is appropriate alternative to dismissal when delay in prosecution is compensable. *Hansen v. Snap-Tite, Inc. (1972) 23 Cal. App. 3d 208, 213, 100 Cal. Rptr. 51* (prior law)

[b] Applicability of Rulings in Default Cases

Because relief from default under *Code Civ. Proc. § 473* depends on party's being able to show excusable neglect and implicates same opposing policies of encouraging diligence yet having cases resolved on their merits, reasoning of those cases is generally applicable in dismissal-for-delay cases. *Freedman v. Pacific Gas & Electric Co. (1987) 196 Cal. App. 3d 696, 705, 242 Cal. Rptr. 8*

[c] Attorney's Negligence

Plaintiff not entitled to relief from mandatory dismissal requirement of *Code Civ. Proc. 583.210* due to attorney misconduct; on other hand, when dismissal is discretionary, misconduct of plaintiff's attorney must be considered by court. *Shipley v. Sugita (1996) 50 Cal. App. 4th 320, 324-327, 57 Cal. Rptr. 2d 750*

When attorney's neglect amounts to abandonment, neglect not imputed to client for purposes of discretionary dismissal statute, if client is relatively free of negligence. *Fleming v. Gallegos (1994) 23 Cal. App. 4th 68, 71-73, 28 Cal. Rptr. 2d 350*

Negligence of plaintiff's attorney in failing to prosecute case, when attorney did not totally fail to represent plaintiff, imputed to plaintiff. *Freedman v. Pacific Gas & Electric Co. (1987) 196 Cal. App. 3d 696, 704-707, 242 Cal. Rptr. 8* .

[d] Computation of Statutory Periods

Time from filing of first amended complaint in municipal court to filing of transferred action in superior court not excluded in computing time for purposes of discretionary dismissal, when almost all of that time was within plaintiff's control. *Williams v. Los Angeles Unified School Dist. (1994) 23 Cal. App. 4th 84, 104, 28 Cal. Rptr. 2d 219*

Defendant not estopped to assert its right to move to dismiss action when plaintiff's grant of open extension of time in which defendant may respond was for plaintiff's benefit. *Marra v. Mission Foods Corp. (1993) 19 Cal. App. 4th 724, 728-729, 23 Cal. Rptr. 2d 741*

Delay attributed to awaiting outcome of related proceedings with direct bearing on action in which summons is not timely filed not excusable per se. *Scarzella v. DeMers (1993) 17 Cal. App. 4th 1762, 1769, 22 Cal. Rptr. 2d 329*

Two-year period under former *Code Civ. Proc. § 583(a)*, after which action may be dismissed in discretion of court, not tolled while plaintiff obtains certificate of merit required by former *Code Civ. Proc. § 411.30* in medical malpractice actions. *Adams v. Roses (1986) 183 Cal. App. 3d 498, 504, 228 Cal. Rptr. 339*

[e] Criteria to Be Considered

Discretionary dismissal of action under former *Code Civ. Proc. § 583(a)* (*now see Code Civ. Proc. § 583.420(a)*) for failure to prosecute not abuse of discretion even though defendant was not prejudiced by delay because legislative policy underlying former *Code Civ. Proc. § 583* not only grounded on prejudice caused by delay to defendant, but also on effective administration of justice. *Blank v. Kirwan (1985) 39 Cal. 3d 311, 332, 216 Cal. Rptr. 718, 703 P.2d 58*

Trial court abused discretion under *Code Civ. Proc. § 581*(*l*) in inviting dismissal of case and in refusing to grant continuance when imposition of lesser sanction would suffice; when plaintiff diligently prosecuted case for over four years, even assuming some penalty was warranted, clearly dismissal was too severe; terminating sanctions should only be ordered when there has been previous noncompliance with rule or order and it appears less severe sanction would be effective; terminating sanctions should not be ordered as first response when noncompliance is through no fault of

party. *Link v. Cater (1998) 60 Cal. App. 4th 1315, 1325-1326, 71 Cal. Rptr. 2d 130*

In action to recover title to real property in which plaintiff showed attorney abandonment, inference of prejudice to defendant by existence of lis pendens insufficient to override showing of reasonable diligence without evidence inability to refinance or sell. *Fleming v. Gallegos (1994) 23 Cal. App. 4th 68, 74, 28 Cal. Rptr. 2d 350*

Discretionary dismissal statute places no restrictions on trial court's exercise of discretion on motion to dismiss for failure to serve summons within two years; there is no requirement that motion to dismiss must be granted unless opposed by adequate showing of diligence or excuse for delay. *Ladd v. Dart Equipment Corp. (1991) 230 Cal. App. 3d 1088, 1105, 281 Cal. Rptr. 813* (Second Appellate District, Division Five; declining to follow *Trailmobile, Inc. v. Superior Court (1989) 210 Cal. App. 3d 1451, 259 Cal. Rptr. 100*)

In ruling on motion to dismiss because plaintiff has not brought case to trial within two years, trial court to be guided by policy favoring trial on merits over dismissal for failure to prosecute with reasonable diligence (*Cal. Rules of Ct., Rule 3.1342*); although interests of justice weigh heavily against disposition of litigation on procedural grounds, that policy necessarily prevails only if plaintiff makes some showing of excusable delay; trial court also to consider prejudice suffered by defendant. *Maggio, Inc. v. United Farm Workers (1991) 227 Cal. App. 3d 847, 883, 278 Cal. Rptr. 250*

To avoid dismissal for failure to serve process within two years after action was commenced against defendant, plaintiff who has delayed prosecutionbeyond discretionary deadlines set forth in *Code Civ. Proc. §§ 583.410, 583.420(a)(1)* is required to make some showing that lack of activity was excusable. *Trailmobile, Inc. v. Superior Court (1989) 210 Cal. App. 3d 1451, 1455-1456, 259 Cal. Rptr. 100* (Third Appellate District, criticized in *Ladd v. Dart Equipment Corp. (1991) 230 Cal. App. 3d 1088, 1105, 281 Cal. Rptr. 813*)

Code Civ. Proc. § 474 (fictitious name statute) does not limit applicability of *Code Civ. Proc. § 583.420* in actions against fictitiously named defendants whose identities are discerned more than two years after complaint is filed (but less than three-year period after which dismissal for delay in service is mandatory under *Code Civ. Proc. § 583.210*). *Clark v. Stabond (1987) 197 Cal. App. 3d 50, 57, 242 Cal. Rptr. 676*

Discretionary dismissal improper abuse of trial court's discretion when plaintiff was diligent in preparing for trial and delay resulted only from defendant's request for continuance and plaintiff's reliance on defendant's promise to arrange for continuance, so that no prejudice to defendant was shown. *Cordova v. Vons Grocery Co. (1987) 196 Cal. App. 3d 1526, 1535-1536, 242 Cal. Rptr. 605*

Decision in *Blank v. Kirwan (1985) 39 Cal. 3d 311, 332, 216 Cal. Rptr. 718, 703 P.2d 58* , disapproved by implication rule in *Hurtado v. Statewide Home Loan Co. (1985) 167 Cal. App. 3d 1019, 1028-1032, 213 Cal. Rptr. 712* , *Luti v. Graco, Inc. (1985) 170 Cal. App. 3d 228, 235-236, 215 Cal. Rptr. 902* , *Troupe v. Courtney (1985) 169 Cal. App. 3d 930, 934-935, 215 Cal. Rptr. 703* , and other cases, that actual prejudice must always be shown to justify discretionary dismissal under former *Code Civ. Proc. § 583(a)* (*now see Code Civ. Proc. § 583.420(a)*. *Freedman v. Pacific Gas & Electric Co. (1987) 196 Cal. App. 3d 696, 711, 242 Cal. Rptr. 8*

Although actual prejudice need not always be shown to justify discretionary dismissal, actual prejudice is factor to be considered if it exists. *Freedman v. Pacific Gas & Electric Co. (1987) 196 Cal. App. 3d 696, 711, 242 Cal. Rptr. 8*

Prejudice inhers in cases in which long delays inevitably result in dimmed memories and lost witnesses. *Freedman v. Pacific Gas & Electric Co. (1987) 196 Cal. App. 3d 696, 712, 242 Cal. Rptr. 8*

Court required to consider totality of circumstances of case, including prejudice to defendant, before granting discretionary dismissal. *Cubit v. Ridgecrest Community Hospital (1987) 194 Cal. App. 3d 1552, 1569, 240 Cal. Rptr.*

346 (prior law)

Inexcusable delay by plaintiff coupled with some prejudice to defendant as able to outweigh other factors considered by trial court, even if dismissal inevitably results; completion of formal discovery as not determinative of plaintiff's diligence. *Parlen v. Golden State Sanwa Bank (1987) 194 Cal. App. 3d 906, 913-915, 240 Cal. Rptr. 73*

Discretionary dismissal of cross complaint as proper when appellant failed to serve respondent until nearly three years after filing cross complaint and conducted no discovery until four years after filing, and when open extension to respond expressly precluded extension of trial date beyond statutory time. *Martin v. K & K Properties Inc. (1987) 188 Cal. App. 3d 1559, 1566, 234 Cal. Rptr. 161* (prior law)

Absent some showing of prejudice to defendants, trial court as abusing discretion in granting motion for discretionary dismissal and denying request to specially set case for trial. *Troupe v. Courtney (1985) 169 Cal. App. 3d 930, 934-935, 215 Cal. Rptr. 703* (prior law)

Discretionary dismissal as erroneous abuse of discretion when record indicated that trial court failed to consider all relevant factors under former Cal. Rules of Ct., Rule 203.5(e), (*now see Cal. Rules of Ct., Rule 3.1342(e)*), particularly plaintiff's overall diligence in prosecuting action, and dismissed action solely due to plaintiff's failure to appear for trial-setting conference. *Dockery v. Hyatt (1985) 169 Cal. App. 3d 830, 832-834, 215 Cal. Rptr. 488* (prior law)

On grant of discretionary dismissal, court as not required to specify rule or factors considered under former Cal. Rules of Ct, Rule § 203.5(e) (*now see* Cal. Rules of Ct., Rule § 3.1342(e)). *Wilson v. Sunshine Meat & Liquor Co. (1983) 34 Cal. 3d 554, 562-563, 194 Cal. Rptr. 773, 669 P.2d 9*

In exercising discretionary power to dismiss for delay in prosecution, court as able to consider plaintiff's lack of diligence during period that case was submitted to arbitration. *D'Hondt v. Regents of University of California (1984) 153 Cal. App. 3d 723, 730, 200 Cal. Rptr. 628* (prior law)

Grant of motion for discretionary dismissal as abuse of discretion if record shows that court failed to carefully consider each relevant factor as required by former Cal. Rules of Ct, Rule 203.5 (*now see Cal. Rules of Ct., Rule 3.1342(e)*). *Visco v. Abatti (1983) 144 Cal. App. 3d 904, 907, 192 Cal. Rptr. 833* (prior law); *United Farm Workers National Union v. International Brotherhood of Teamsters (1978) 87 Cal. App. 3d 225, 236, 150 Cal. Rptr. 761* (prior law)

[f] Justification for Delay in Prosecution

On motion for discretionary dismissal for delay in prosecuting action, showing that is required to justify delay as becoming greater as time passes three years and approaches time when dismissal is mandatory. *Freedman v. Pacific Gas & Electric Co. (1987) 196 Cal. App. 3d 696, 703, 242 Cal. Rptr. 8*

[g] Procedure

Notice requirement of former Cal. Rules of Ct, Rule § 203.5(a) (*now see* Cal. Rules of Ct., Rule § 3.1342) as not applying to discretionary dismissal when dismissal was ordered on court's own motion during review of plaintiff's motion to specially set case for trial to avoid mandatory dismissal. *Wilson v. Sunshine Meat & Liquor Co. (1983) 34 Cal. 3d 554, 559-560, 194 Cal. Rptr. 773, 669 P.2d 9*

Trial court was not required to give parties 45 days' notice before hearing on discretionary dismissal for delay in prosecution under *Code Civ. Proc. § 583.410(b)* and *Cal. Rules of Ct., Rule 3.1342*, where, under *Cal. Rules of Ct., Rule 3.1340(b)*, requiring clerk to set hearing and mail notice to all parties at least 20 days before hearing date if the court

intends to dismiss an action on its own motion, trial court gave parties notice of order to show cause why action should not be dismissed for delay in prosecution 28 days before hearing, which was more than enough notice under Rule 3.1340(b); and where *Cal. Rules of Ct., Rule 3.1342*, which requires party seeking dismissal of case for delay in prosecution to serve and file notice of motion at least 45 days before date set for hearing on motion, explicitly applies to party in action, whereas Rule 3.1340(b) explicitly applies to court's own motion to dismiss case, and since dismissal occurred on court's own motion, Rule 3.1340(b) applied. *Sakhai v. Zipora (2009) 180 Cal. App. 4th 593, 598-600, 102 Cal. Rptr. 3d 691*

Plaintiff's due process rights as not violated when court failed to give notice of its intention to dismiss action under *Code Civ. Proc. § 583.410*, because plaintiff was afforded those rights in subsequent hearing on reconsideration. *Cordova v. Vons Grocery Co. (1987) 196 Cal. App. 3d 1526, 1531-1532, 242 Cal. Rptr. 605*

[4] Dismissal for Avoidance of Court Ordered Arbitration

Dismissal with prejudice as proper when plaintiff circumvented mandatory arbitration by requesting arbitrator to enter judgment for defendant in order to preserve right to jury trial to which plaintiff was not otherwise entitled, to defendant's disadvantage, and in defiance of court's order to arbitrate. *Genovia v. Cassidy (1983) 145 Cal. App. 3d 452, 457-458, 193 Cal. Rptr. 454* (prior law)

[5] Inherent Power of Court to Dismiss

Inherent power without aid of legislation to dismiss action for lack of prosecution. *Overaa v. Keeney (1915) 169 Cal. 628, 630-631, 147 P. 466* ; *Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn. (1977) 71 Cal. App. 3d 706, 712-713, 139 Cal. Rptr. 651*

Trial court's dismissal under inherent discretionary power of fictitious or sham complaint upheld when no defendants were named in complaint, only fictitious defendants under *Code Civ. Proc. § 474*; while pleading was legally permissible, inability of plaintiff to identify even one potential defendant raised significant questions regarding viability of the alleged claims and plaintiff, by giving court no specific information to demonstrate that plaintiff's requested discovery to learn identity of unnamed defendants was anything other than a fishing expedition, failed to demonstrate good cause to support issuance of a discovery order under *Code Civ. Proc. § 2025(b)(2)* [*now see Code Civ. Proc. § 2025.210* operative July 1, 2005]. Pearlson v. Does 1 to 646 *(1999) 76 Cal. App. 4th 1005, 1010-1012, 90 Cal. Rptr. 2d 787*

Discretionary dismissal after trial commences. *Karras v. Western Title Ins. Co. (1969) 270 Cal. App. 2d 753, 757, 76 Cal. Rptr. 141*

[6] Involuntary Dismissal for Reasons Other Than Delay in Prosecution

Trial court abused its discretion by choosing "drastic measure" of dismissal of indigent prisoner's pro se action against prison doctor for failure to appear telephonically at case management conference and subsequent order to show cause hearing, without first determining that prisoner had been afforded meaningful access to the courts and that his failure to appear at required hearings was willful. *Jameson v. Desta (2009) 179 Cal. App. 4th 672, 683-684, 101 Cal. Rptr. 3d 345*

Court did not have authority to involuntarily dismiss plaintiff's action when parties were unable to finalize settlement agreement after plaintiff's counsel had notified the court of a tentative settlement and asked the court to set an order to show cause hearing in 45 days; court was required to set the case for trial as requested by the parties once it was clear

that settlement negotiations had failed. *Levitz v. TheWarlocks (2007) 148 Cal. App.4th 531, 535-536, 55 Cal. Rptr. 3d 800*

Trial court, after quashing service and vacating order for publication of summons because complaint failed to state cause of action as required by *Code Civ. Proc. § 415.50(a)(1)*, as not empowered to dismiss action. *Islamic Republic of Iran v. Pahlavi (1984) 160 Cal. App. 3d 620, 629, 206 Cal. Rptr. 752*

[7] Mandatory Dismissal for Delay in Bringing Action to Trial

[a] Generally

After one judge had granted plaintiff's motion to advance and had set case for trial within five-year period, order by second judge dismissing action and vacating trial date as error; although trial court has jurisdiction to reconsider prior ruling or to entertain renewal of previous motion, one judge is not permitted to reconsider and overrule ruling of another absent showing that first judge is unavailable; considerations on motion for preferential trial setting as same as on motion to dismiss; both as addressed to discretion of trial court; both as governed by factors set forth in former *Cal. Rules of Ct., Rule 3.1342(e)*; *Curtin v. Koskey (1991) 231 Cal. App. 3d 873, 874, 876-878, 282 Cal. Rptr. 706*

Code Civ. Proc. § 583.310, requiring that action be dismissed if not brought to trial within five years after action is commenced, as not applying to judgment entered on motion to enforce settlement agreement (*Code Civ. Proc. § 664.6*). *Malouf Bros. v. Dixon (1991) 230 Cal. App. 3d 280, 284-285, 281 Cal. Rptr. 235* (following *Schiro v. Curci (1990) 220 Cal. App. 3d 840, 844, 269 Cal. Rptr. 639* , and *Gorman v. Holte (1985) 164 Cal. App. 3d 984, 987-988, 211 Cal. Rptr. 34* , and rejecting contrary holding in *Varwig v. Leider (1985) 171 Cal. App. 3d 312, 315-316, 217 Cal. Rptr. 208*)

Trial court as having some discretion to grant or deny request to dismiss for delay in bringing action to trial, and reviewing court as not inclined to intervene unless there is a manifest abuse of that discretion. *Wheeler v. City of Santa Monica (1990) 219 Cal. App. 3d 1554, 1560, 269 Cal. Rptr 175*

Motion for leave to file cross complaint to defendant's cross complaint to allege causes of action set forth in original complaint that had been dismissed for failure to bring action to trial within five years (*see Code Civ. Proc. §§ 583.310, 583.360*) on ground they were related causes of action (*see Code Civ. Proc. §§ 426.30, 426.50*), and amended answer to allege same claims as offset, as properly denied. *Flynn v. Page (1990) 218 Cal. App. 3d 342, 347, 266 Cal. Rptr. 830*

Five-year time limit for bringing action to trial as no longer applicable when parties stipulated to complete settlement of their dispute before lapse of period, even though they did not formally execute their agreement before lapse of period. *Gorman v. Holte (1985) 164 Cal. App. 3d 984, 987-989, 211 Cal. Rptr. 34* (prior law)

Federal provision tolling statutory limitation periods during party's period of military service (former *50 U.S.C. App. § 525*; *now see 50 U.S.C. App. § 526*) also tolled five-year period for bringing case to trial under former *Code Civ. Proc. § 583* (*now see Code Civ. Proc. § 583.310*). *Buttler v. City of Los Angeles (1984) 153 Cal. App. 3d 520, 523-526, 200 Cal. Rptr. 372*

[b] Commencement of Trial

For purposes of determining whether action was "brought to trial," "trial" as examination before competent tribunal, according to law of land, of questions of fact or of law put in issue by pleadings, for purpose of determining rights of parties; hearing on motion in limine as not trial because it did not involve question of law or fact raised by pleadings. *Hendrix v. Hendrix (1985) 171 Cal. App. 3d 859, 862, 217 Cal. Rptr. 609* (prior law)

[c] Computation of Statutory Periods

Plaintiff as bringing action to trial so as to avoid dismissal when jury was impanelled within five-year period, even though jury was subsequently discharged and case was continued beyond five-year period for bringing action to trial. *Hartman v. Santamarina (1982) 30 Cal. 3d 762, 765-767, 180 Cal. Rptr. 337, 639 P.2d 979* (prior law)

Test for determining whether subsequently filed claim has life independent of original complaint for purposes of five-year mandatory dismissal rule (*Code Civ. Proc. §§ 583.310, 583.360*) is whether claim asserts separate cause of action; in context of cross complaints and separate lawsuits subsequently consolidated, time for bringing claim to trial runs from filing of cross complaint or separate but consolidated lawsuit, rationale being that each claim states separate cause of action that could have been separately brought and tried and they were thus distinct though simultaneous actions with their own independent time frames for purposes of mandatory dismissal statute. *Bright v. American Termite Control Co. (1990) 220 Cal. App. 3d 1464, 269 Cal. Rptr. 793*

When complaint in intervention by insurer claiming property subrogation rights states essentially same causes of action against defendant as are stated in plaintiff's original complaint, five-year dismissal period for failure to bring action to trial (*Code Civ. Proc. §§ 583.310, 583.360*) as running from date original action was commenced and not from date complaint in intervention is filed; although both plaintiff and intervener each possess separate right of action, in contrast to separate causes of action involved in cross complaint or separate but consolidated lawsuit, bringing separate actions is proscribed by rule against splitting a cause of action unless objection is waived by defendant. *Bright v. American Termite Control Co. (1990) 220 Cal. App. 3d 1464, 1468-1470, 269 Cal. Rptr. 793*

Action as "commenced" for purposes of *Code Civ. Proc. §§ 583.310* and *583.360(a)* on plaintiff's filing original complaint against defendant. *Bank of America v. Superior Court (1988) 200 Cal. App. 3d 1000, 1010-1011, 246 Cal. Rptr. 521*

Date original complaint filed as commencement of five-year period for bringing action to trial as to intervenor in workers' compensation action even though complaint in intervention was filed later. Johnson v. Santos (l983) *148 Cal. App. 3d 566, 571, 196 Cal. Rptr. 145* (prior law)

Plaintiff as bringing action to trial so as to avoid dismissal when jury venire panel was sworn and voir dire examination begun within five-year period for bringing action to trial. *Hilliard v. A.H. Robins Co. (1983) 148 Cal. App. 3d 374, 389-390, 196 Cal. Rptr. 117* (prior law)

Taking of testimony and resultant judgment under *Code Civ. Proc. § 594* prior to end of five-year period for bringing action to trial as constituting bringing matter to trial so as to avoid dismissal. *Briley v. Sukoff (1979) 98 Cal. App. 3d 405, 410, 159 Cal. Rptr. 452* (prior law)

[d] Effect of Dismissal

Dismissal for failure to bring action to trial within five-year period as not divesting trial court of jurisdiction to consider matters ancillary to underlying action, such as application for attorney fees under *Code Civ. Proc. § 1021.5*. *Maria P. v. Riles (1987) 43 Cal. 3d 1281, 1290, 240 Cal. Rptr. 872, 743 P.2d 932*

[e] Effect of Settlement on Mandatory Dismissal

Five-year dismissal period of *Code Civ. Proc. § 583.310* tolled following recitation of settlement on record before expiration of five-year period even though settlement was not reduced to judgment within that period. *Canal Street,*

Ltd. v. Sorich (2000) 77 Cal. App. 4th 602, 608-609, 91 Cal. Rptr. 2d 811 (First Dist., Div. Five (following *Brown & Bryant, Inc. v. Hartford Accident & Indemnity Co. (1994) 24 Cal. App. 4th 247, 255, 29 Cal. Rptr. 2d 144* , *Malouf Bros. v. Dixon (1991) 230 Cal. App. 3d 280, 285, 281 Cal. Rptr. 235* , *Schiro v. Curci (1990) 220 Cal. App. 3d 840, 844-845, 269 Cal. Rptr. 639* , and *Gorman v. Holte (1985) 164 Cal. App. 3d 984, 988* and rejecting contrary holding of *First District, Division Two, in Varwig v. Leider (1985) 171 Cal. App. 3d 312, 217 Cal. Rptr. 208*)

Settlement agreement, entered into before expiration of five-year period for mandatory dismissal for failure to prosecute (*Code Civ. Proc. § 583.310 et seq.*) but not executed until after expiration of that period, providing that superior court would retain jurisdiction over enforcement of its terms as either coming within exception specified in *Code Civ. Proc. § 583.340(c)* in that, during time between agreement to settle and final execution of settlement agreement by all interested parties, it would have been "futile" to bring action to trial because all issues had been resolved through settlement, or as constituting implied waiver or extension of five-year dismissal rule because settlement agreement vested continued jurisdiction in trial court to supervise compliance with its terms. *Schiro v. Curci (1990) 220 Cal. App. 3d 840, 844-845, 269 Cal. Rptr. 639* (following *Gorman v. Holte (1985) 164 Cal. App. 3d 984, 986, 211 Cal. Rptr. 34* , and rejecting contrary holding in *Varwig v. Leider (1985) 171 Cal. App. 3d 312, 314-316, 217 Cal. Rptr. 208*)

[f] Effect of Swearing in Jury After Period Has Expired

Impanelment of jury after five-year period for bringing action to trial has run (*Code Civ. Proc. §§ 583.310, 583.360(a)*) as not preventing court from dismissing action for failure to prosecute; only circumstance that will revive action after five-year period has expired as stipulation between parties. *Estate of Anastasio (1989) 215 Cal. App. 3d 486, 488-489, 263 Cal. Rptr. 622*

[g] Estoppel or Waiver as Defense

Despite submission by counsel for defendants of declaration stating he was not available for trial until after five-year period expired, trial court appropriately rejected doctrine of equitable estoppel, where plaintiffs were aware when five-year trial period ran, and it was not reasonable to assume defendants were willing to waive deadline; where defense counsel was obligated to tell the court when he was unavailable for trial, and fact that defense counsel's notice of unavailability extended beyond five-year cutoff date did not constitute any misrepresentation or waiver of five-year period; and where any ambiguity or confusion created by defense counsel mentioning his unavailability beyond cutoff date could have been clarified by plaintiffs' counsel, who was responsible for insuring case was tried before five-year period expired. *Jordan v. Superstar Sandcars (2010) 182 Cal. App. 4th 1416, 1422-1423*

Dismissal of action for failure to bring to trial within five years improper since statute tolled during periods of delay caused by defendant's motions to continue trial. *Rose v. Scott (1991) 233 Cal. App. 3d 537, 541, 284 Cal. Rptr. 487*

Defendant as estopped from moving for mandatory dismissal for failure to bring action to trial during time that trial was continued at defendant's oral request in court, but not thereafter. *Ward v. Levin (1984) 161 Cal. App. 3d 1026, 1034, 208 Cal. Rptr. 312* (prior law)

Defendant as estopped from invoking mandatory dismissal when defendants' counsel made misrepresentations to court concerning calculation of period for bringing action to trial, on which plaintiff's attorney justifiably relied. *Griffis v. S.S. Kresge Co. (1984) 150 Cal. App. 3d 491, 499, 197 Cal. Rptr. 771* (prior law)

Defendant's request for continuance at trial setting conference and delayed filing of defendants' form substituting attorneys as not estopping defendants from invoking dismissal when those acts occurred after expiration of mandatory period for bringing action to new trial. *Balboa Ins. Co. v. Aguirre (1983) 149 Cal. App. 3d 1002, 1008-1009, 197 Cal.*

Rptr. 250 (prior law)

Right to pursue mandatory dismissal for delay in bringing action to trial as waived when no motion is made until after trial. *Butler v. Hathcoat (1983) 146 Cal. App. 3d 834, 840, 194 Cal. Rptr. 352* (prior law)

Defendant as not estopped from moving for dismissal for failure to bring action to trial within five years on basis of conduct unrelated to plaintiff's delay in prosecution. *Evans v. City of Los Angeles (1983) 145 Cal. App. 3d 142, 150, 193 Cal. Rptr. 282* (prior law)

Estoppel as applicable to prevent dismissal, even though case was not brought to new trial within three years as required, on ground that defendant's attorney moved for continuance of trial to date past three-year period and prosecuting attorney did not object. *Holder v. Sheet Metal Worker's Internat. Assn. (1981) 121 Cal. App. 3d 321, 325-327, 175 Cal. Rptr. 313* (prior law)

Stipulation extending time to plead for indefinite period as not effective to extend statutory period by stipulation, but as nonetheless constituting waiver of diligence otherwise required in bringing action to trial, which in effect tolled running of statutory period until parties agreed to reinstate requirement of diligence. *Farrar, Herrick & Associates v. Safecare Co. (1981) 115 Cal. App. 3d 123, 131, 171 Cal. Rptr. 191* (prior law)

[h] Extension of Time for Trial by Stipulation

Stipulation to extend five-year period which also gave specific judge authority to set case for trial "subject to the schedule of the judge" was a proper stipulation and prevented another judicial officer from granting a motion to dismiss. *Health Industries of America v. Los Angeles County Metropolitan Transportation Authority (2002) 102 Cal. App. 4th 1372, 1378, 126 Cal. Rptr. 2d 294*

Reason behind requirement for written stipulation extending time within which action must be brought to trial set forth in *Code Civ. Proc. § 583.330(a)* as to preclude all disputes, with their attendant charges and countercharges of overreaching and unethical conduct, by requiring that clear and uncontrovertible evidence be presented to court that statutory time was deliberatedly intended to be extended by both parties. *Miles v. Speidel (1989) 211 Cal. App. 3d 879, 883, 259 Cal. Rptr. 582*

Letter from defendant's counsel confirming indefinite extension of time to answer complaint, subject to termination by notice, as constituting written stipulation within meaning of *Code Civ. Proc. § 583.330*, thereby precluding defendant, who never filed answer, from obtaining dismissal for lack of prosecution. *Wheeler v. Payless Super Drug Stores (1987) 193 Cal. App. 3d 1292, 1294, 1302-1303, 238 Cal. Rptr. 885*

When parties stipulate to postpone trial indefinitely, subject to being reset on motion to advance by any party, dismissal as inappropriate before motion to advance has been made. *Imperial Ins. Co. v. California Casualty Indem. Exchange (1984) 158 Cal. App. 3d 540, 548-549, 204 Cal. Rptr. 819* (prior law)

[i] Minority of Plaintiff

Fact that plaintiff is minor, so that time for commencing action is tolled under *Code Civ. Proc. § 352(a)*, as not precluding dismissal under *Code Civ. Proc. §§ 583.310, 583.360* for failure to bring timely commenced action to trial within five years. *Baccus v. Superior Court (1989) 207 Cal. App. 3d 1526, 1536-1537, 255 Cal. Rptr. 781*

[j] Periods Excluded From Statutory Period

[i] Action Stayed or Enjoined

Time during which the action at law is stayed during pendency of contractual arbitration proceedings as to be excluded in computing five-year period. *Brock v. Kaiser Foundation Hospitals (1992) 10 Cal. App. 4th 1790, 1794, 13 Cal. Rptr. 2d 678*

Period that plaintiff is in bankruptcy as not excluded from five-year period that action must be brought to trial under *Code Civ. Proc. §§ 583.310* and *583.340* to avoid mandatory dismissal. *Lauriton v. Carnation Co. (1989) 215 Cal. App. 3d 161, 163-164, 263 Cal. Rptr. 476*

When action is ordered stayed pending resolution of appeal in related action, stay is continuing, for purposes of computing time excluded under *Code Civ. Proc. § 583.340(b),* until all avenues of judicial review of related case have been exhausted; stay is therefore continuing after remittitur by court of appeal when petition for writ of certiorari is pending in United States Supreme Court and as terminating only after grant or denial of that writ. *Rosenthal v. Wilner (1988) 197 Cal. App. 3d 1327, 1333-1334, 243 Cal. Rptr. 472*

Dismissal of action for failure to bring it to trial within five years as improper when action was stayed by bankruptcy proceeding. *Hughes v. Portsmouth Square, Inc. (1982) 135 Cal. App. 3d 170, 172-173, 184 Cal. Rptr. 926* (prior law)

[ii] Jurisdiction Suspended

Trial court as properly dismissing action for failure to bring it to trial within five years, notwithstanding plaintiff's contention that five-year period was tolled on ground municipal court's jurisdiction was suspended between time plaintiff filed verified amended complaint, attached to motion to file amended complaint and to transfer case to superior court, to date superior court assumed jurisdiction (117 days) because plaintiff failed for more than two months to pay transfer fees required by *Code Civ. Proc. § 399* and transfer was not timely accomplished; municipal court as not divested of jurisdiction until transfer fees were paid. *Wheeler v. City of Santa Monica (1990) 219 Cal. App. 3d 1554, 1560-1562, 269 Cal. Rptr. 175* (distinguishing *Schwenke v. J & P Scott, Inc. (1988) 205 Cal. App. 3d 71, 252 Cal. Rptr. 91*)

Jurisdiction of superior court over action as not suspended by plaintiff's subsequent bankruptcy; although generally all causes of action possessed by bankrupt vest in trustee in bankruptcy, trustee as able to intervene in action or be substituted as party plaintiff; too, although plaintiff is not authorized to personally prosecute action without authorization from bankruptcy court, plaintiff may seek relief from that court, such as (1) an order permitting trustee to prosecute lawsuit in plaintiff's name; (2) an order compelling trustee to maintain action; (3) an order authorizing plaintiff to prosecute action in his or her own behalf; or (4) a formal order of abandonment. *Lauriton v. Carnation Co. (1989) 215 Cal. App. 3d 161, 164-165, 263 Cal. Rptr. 476*

Jurisdiction as not suspended by death of plaintiff joint tenant because title to property passed to surviving joint tenant. *Ferk v. County of Lake (1988) 205 Cal. App. 3d 268, 274-276, 252 Cal. Rptr. 196*

In action originally filed in municipal court, in which defendant filed unverfied cross complaint seeking damages in amount in excess of court's jurisdictional limit, period when court's jurisdiction was suspended as being between time that lack of jurisdiction under *Code Civ. Proc. § 396* appeared to court, that is, at hearing on motion to transfer, and time case was refiled in superior court. *Schwenke v. J & P Scott, Inc. (1988) 205 Cal. App. 3d 71, 75-79, 252 Cal. Rptr. 91*

Period during appeal, excluded from time for bringing action to trial, as running from filing of notice of appeal to

issuance of remittitur or denial of hearing. *Standard Oil Co. v. Superior Court (1976) 61 Cal. App. 3d 852, 855 n. 1, 132 Cal. Rptr. 761* (prior law); *Fannin Corp. v. Superior Court (1974) 36 Cal. App. 3d 745, 750, 111 Cal. Rptr. 920* (prior law)

Period of appeal as excluded from statutory period for bringing action to trial, even though appeal premature. *Guy F. Atkinson Co. v. State of California (1971) 17 Cal. App. 3d 1065, 1068, 95 Cal. Rptr. 543* (prior law)

Period within which action must be brought to trial as tolled during time of appeal from pretrial order of dismissal. *Diverco Constructors, Inc. v. Wilstein (1970) 4 Cal. App. 3d 6, 13-14, 85 Cal. Rptr. 851* (prior law)

[iii] Prosecution Impossible, Impracticable, or Futile

[A] Generally

Critical factor in applying impossibility, impracticability, or futility exclusion as being whether plaintiff exercised reasonable diligence in bringing action to trial throughout statutory period. *Moran v. Superior Court (1983) 35 Cal. 3d 229, 238-240, 197 Cal. Rptr. 546, 673 P.2d 216* (prior law); *Martin v. K & K Properties Inc. (1987) 188 Cal. App. 3d 1559, 1568, 234 Cal. Rptr. 161* (prior law)

Statutes providing for mandatory time for bringing action to trial or new trial as rendered "legally irrelevant" by timely and enforceable settlement agreement which finally disposes of all issues in underlying lawsuit *Brown & Bryant, Inc. v. Hartford Accident & Indemnity Co. (1994) 24 Cal. App. 4th 247, 254, 29 Cal. Rptr. 2d 144*

Code Civ. Proc. § 583.340(c), which tolls five-year period within which action must be brought to trial when it is impossible, impracticable, or futile to do so, as effectively recognizing tolling period from time notice of appeal from order dismissing action for failure to prosecute was filed until filing of remittitur, as it would obviously be impossible to bring case to trial during that period. *Wilshire Bundy Corp. v. Auerbach (1991) 228 Cal. App. 3d 1280, 1286 n.10, 279 Cal. Rptr. 488*

Code Civ. Proc. § 583.340 as impelling view that there must be a causal connection between circumstance on which plaintiff relies and failure to satisfy five-year requirement, that bringing action to trial must be impossible, impracticable, or futile for reason proffered, and that this is consistent with earlier case law requirement that party is unable, from causes beyond his or her control, to bring case to trial. *Wilshire Bundy Corp. v. Auerbach (1991) 228 Cal. App. 3d 1280, 1289, 279 Cal. Rptr. 488*

Appellate court as deferring to trial court's finding of excuse of impossibility or impracticability absent abuse of discretion; trial court as determining whether it is impossible, impracticable, or futile to bring case to trial in light of all circumstances in individual case, including acts and conduct of parties and nature of proceedings themselves; critical factor in applying exceptions to given factual situation as being whether plaintiff exercised reasonable diligence in prosecuting case; Law Revision Commission as having instructed that in construing *Code Civ. Proc. § 583.340*, excuse must be liberally construed as applied to bringing to trial requirement in recognition of fact that bringing case to trial frequently may be hindered by causes beyond plaintiff's control. *Pat Rose Associates v. Coombe (1990) 225 Cal. App. 3d 9, 16-17, 275 Cal. Rptr. 1* (disapproved on other grounds in *Adams v. Murakami (1991) 54 Cal. 3d 105, 116, 284 Cal. Rptr. 318, 813 P.2d 1348*)

What is impossible, impractical, or futile within meaning of *Code Civ. Proc. § 583.340(c)* as required (1) to be interpreted liberally, consistent with policy favoring trial on merits; and (2) to be determined in light of all circumstances in individual case, including acts and conduct of parties and nature of proceedings themselves; critical factor in applying these exceptions to given factual situation as being whether plaintiff exercised reasonable diligence in

prosecuting his or her case; thus, whether exception is applicable as generally a question of fact to be determined by trial court under totality-of-circumstances test. *Monzon v. Schaefer Ambulance Service, Inc. (1990) 224 Cal. App. 3d 16, 26, 28, 273 Cal. Rptr. 615*

Denial of motion to dismiss for failure to bring action to trial within statutory period as proper when trial court properly concluded it was impracticable for trial to proceed during pendency of defendant's writ petition seeking to overturn denial of its summary judgment motion, although appellate court had denied motion to stay trial court proceedings and even though four months remained in which to bring action to trial after writ was denied. *New West Fed. Savings & Loan Assn. v. Superior Court (Weber) (1990) 223 Cal. App. 3d 1145, 1151-1156, 273 Cal. Rptr. 37*

What is impossible as required to be determined in light of all circumstances in individual case, including acts and conduct of parties and nature of proceedings themselves; critical factor in applying this exception to given fact situation is whether plaintiff exercised reasonable diligence in prosecuting case; to establish reasonable diligence, plaintiff as required to be able to demonstrate diligence in pursuit of duty to expedite resolution of case at all stages of proceedings, including specific duty to use every reasonable effort to bring matter to trial within five-year period; burden of proving that it was impossible to bring action to trial within five years as on plaintiff. *Lauriton v. Carnation Co. (1989) 215 Cal. App. 3d 161, 164-165, 263 Cal. Rptr. 476*

What is impossible, impracticable, or futile as determined in light of all circumstances of individual case, including acts and conduct of parties and nature of proceedings themselves; critical factor as being whether plaintiff exercised reasonable diligence, although reasonable diligence alone as not sufficient to protect plaintiff from involuntary dismissal but as constituting guideline by which to assess existing exceptions of impossibility, impracticability, or futility. *Baccus v. Superior Court (1989) 207 Cal. App. 3d 1526, 1532-1533, 255 Cal. Rptr. 781*

When plaintiff could have brought matter to trial before expiration of statutory period by moving to set matter specially for trial, but did not do so, he or she as precluded from making later claim of impossibility or impracticability based on defendant's dilatory conduct. *Tejada v. Blas (1987) 196 Cal. App. 3d 1335, 1340, 242 Cal. Rptr. 538*

Impracticability and impossibility as operating to toll statutory period in action that was stayed by bankruptcy proceedings as to some, but not all, defendants, when court denied motion to sever action and proceed only against nonbankruptcy defendants, and when bankruptcy defendants were indispensible parties. *Rim Forest Lumber Co. v. Woodside Construction Co. (1987) 190 Cal. App. 3d 454, 467-470, 235 Cal. Rptr. 443*

Impossibility as not applicable to toll statutory period while plaintiff obtains certificate of merit required by former *Code Civ. Proc. § 411.30* in medical malpractice actions. *Adams v. Roses (1986) 183 Cal. App. 3d 498, 504, 228 Cal. Rptr. 339* (discretionary dismissal under prior law)

Burden as on plaintiffs to establish in trial court, by clear and convincing proof, existence of either impossibility, impracticability or futility of bringing matter to trial within five years. *Lane v. Newport Bldg. Corp. (1986) 176 Cal. App. 3d 870, 874, 222 Cal. Rptr. 443* (prior law)

What is impossible, impracticable, or futile as required to be determined in light of all circumstances in individual case, and critical factor as being whether plaintiff exercised reasonable diligence in prosecuting his or her case. *Alvarado Community Hospital v. Superior Court (1985) 173 Cal. App. 3d 476, 484, 219 Cal. Rptr. 52* (prior law)

Trial court as having discretion to determine applicability of exception for impossibility, impracticability, or futility, and its decision as disturbed only in cases of manifest abuse. *Alvarado Community Hospital v. Superior Court (1985) 173 Cal. App. 3d 476, 484-485, 219 Cal. Rptr. 52* (prior law)

Prosecution of action by plaintiff as clearly impossible, impracticable, or futile between date that plaintiff's attorney

fraudulently dismissed action and date that plaintiff learned of dismissal. *Alvarado Community Hospital v. Superior Court (1985) 173 Cal. App. 3d 476, 485, 219 Cal. Rptr. 52* (prior law)

Plaintiffs' inadvertence in selecting trial date beyond mandatory period as not constituting impossibility or impracticability because plaintiffs had duty to keep track of such crucial dates. *Cannon v. City of Novato (1985) 167 Cal. App. 3d 216, 222, 213 Cal. Rptr. 132* (prior law)

[B] Court Congestion

Trial court did not abuse its discretion in dismissing plaintiffs' action based on finding that plaintiffs failed to establish that bringing action to trial was impossible, impracticable, or futile, where, while two court-declared moratoria on civil trials prevented civil cases from being tried, moratoria did not prevent or interfere with plaintiffs prosecuting their case, because plaintiffs were not ready for trial at time of moratoria; with regard to alleged de facto moratorium during final year within which plaintiffs were required to bring their case to trial, while few civil cases were being tried due to backlog in cases, cases approaching five-year cutoff were being tried, and three additional courtrooms were added for trying civil cases. Furthermore, record showed that plaintiffs were not reasonably diligent in bringing case to trial within five years, where plaintiffs took no steps to set case for trial before expiration of five-year period. *Jordan v. Superstar Sandcars (2010) 182 Cal. App. 4th 1416, 1420-1422*

Period that action was trailed by court until courtroom became available as excluded on ground that it was impossible, impracticable, or futile to bring action to trial during that time. *Ward v. Levin (1984) 161 Cal. App. 3d 1026, 1034-1035, 208 Cal. Rptr. 312* (prior law)

Delay caused by unusual court congestion, during which time no judge or court was available although trial date set, as excluded from calculation of time within which action must be brought to trial. *Breacher v. Breacher (1983) 141 Cal. App. 3d 89, 91, 190 Cal. Rptr. 112* (prior law); *Goers v. Superior Court (1976) 57 Cal. App. 3d 72, 74-75, 129 Cal. Rptr. 29* (prior law)

Unexpectedly slow-moving judicial arbitration outside plaintiff's control as cause of impossibility. *Brown v. Engstrom (1979) 89 Cal. App. 3d 513, 523-524, 152 Cal. Rptr. 628* (prior law)

[C] Court's Failure to Perform Duty

Period that trial is held in abeyance pending assignment of another judge under *Code Civ. Proc. § 170.6* (peremptory challenge of judge) excluded from calculation of time within which action must be brought to trial. *Hartman v. Santamarina (1982) 30 Cal. 3d 762, 768, 180 Cal. Rptr. 337, 639 P.2d 979* (prior law); *Breacher v. Breacher (1983) 141 Cal. App. 3d 89, 91, 190 Cal. Rptr. 112* (prior law)

[D] Death of Party

Period after plaintiff died and before estate was opened or personal representative was appointed to prosecute decedent's claims excluded from calculation of time within which action must be brought to trial. *Pham v. Wagner Litho Machinery Co. (1985) 172 Cal. App. 3d 966, 973, 218 Cal. Rptr. 476* (prior law)

[E] Default Entered

Period that erroneous default judgment was in effect excluded from statutory periods for bringing action to trial.

Maguire v. Collier (1975) 49 Cal. App. 3d 309, 312-313, 122 Cal. Rptr. 510 (prior law); *Ford v. Superior Court (1973) 34 Cal. App. 3d 338, 343, 109 Cal. Rptr. 844* (prior law)

[F] Multiple Defendants

Assumption by plaintiffs' counsel in state action that bankruptcy of one of several defendants stayed entire state action did not support plaintiffs' assertion that they were reasonably diligent in prosecuting action, particularly when plaintiffs did not cite any relevant authority supporting reasonableness of their counsel's assumption, or any steps taken by their counsel to preserve plaintiffs' right to trial and avoid dismissal. *Lane v. Newport Bldg. Corp. (1986) 176 Cal. App. 3d 870, 874, 222 Cal. Rptr. 443* (prior law)

Plaintiff's duty to join necessary party, described in *Code Civ. Proc. § 389*, or to show the impossibility or impracticality of joinder to trial court and bring action to trial without necessary party is part of diligence that, if absent, supports dismissal for failure to bring action to trial. *Sanders v. Fuller (1975) 45 Cal. App. 3d 994, 1002, 119 Cal. Rptr. 902* (prior law)

[G] When Exclusion Based on Impossibility, Impracticability, or Futility Not Available

False statement by plaintiff's attorney to plaintiff that defendant, a citizen and resident of a foreign country, had been properly served, when in fact no service had been made, did not make proper service within the statutory period impossible or impracticable under *Code Civ. Proc. § 583.240(d)*; plaintiff not entitled to relief from mandatory dismissal requirement of *Code Civ. Proc. § 583.210* due to attorney misconduct; Legislature intended that attorney misconduct could not excuse failure to complete service within mandatory statutory period; on other hand, when dismissal is discretionary, misconduct of plaintiff's attorney must be considered by the court. *Shipley v. Sugita (1996) 50 Cal. App. 4th 320, 324-327, 57 Cal. Rptr. 2d 750*

Prosecution of action within five-year limitation period did not render impossible, impracticable, or futile by appeal from trial court's orders allowing plaintiff's attorney to withdraw as counsel, since orders were nonappealable and appeal from nonappealable orders does not toll limitations statute; even if they were appealable, trial court retained general jurisdiction over action under *Code Civ. Proc. § 916*, and prosecution was not impossible, impracticable, or futile; prosecution was not stayed by denial of discovery motions or by plaintiff's appeal from order compelling him to attend deposition, continuing arbitration date until after that deposition, and granting defendants fees and costs; except for narrow subject matter of orders appealed from, trial court retained full jurisdiction to proceed with action; limitation period was not tolled by one peremptory challenge and one challenge for actual bias to trial judge when each was without merit, filed after five-year period had expired, and denied as untimely same day they were filed. *Messih v. Levine (1991) 228 Cal. App. 3d 454, 459-460, 278 Cal. Rptr. 825 , cert. denied, 112 S. Ct. 387, 116 L. Ed. 2d 337*

Court clerk's failure to perform duty to notify counsel of eligibility to file certificate of readiness did not excuse failure to bring action to trial resulting from failure to file certificate when counsel could easily have discovered clerk's failure and filed certificate in time to set trial within statutory period. *Karubian v. Security Pacific Nat. Bank (1984) 152 Cal. App. 3d 134, 140, 199 Cal. Rptr. 295* (prior law)

Impossibility, impracticability, or futility in bringing action to trial within time required not shown by fact that court clerk set date for trial beyond required time, since plaintiff failed to exercise reasonable diligence in requesting advancement of trial date. *Central Mutual Ins. Co. v. Executive Motor Home Sales, Inc. (1983) 143 Cal. App. 3d 791, 795, 192 Cal. Rptr. 169* (prior law)

Time spent complying with administrative claims procedure or relief from those proceedings does not affect time period for bringing action to trial. *Davalos v. County of Los Angeles (1983) 142 Cal. App. 3d 57, 62-63, 190 Cal.*

Rptr. 711 (prior law)

Delay caused by numerous failures of defendant to appear for scheduled depositions was not excludable when facts did not show that that delayaffected bringing case to trial. *Gentry v. Nielsen (1981) 123 Cal. App. 3d 27, 35, 176 Cal. Rptr. 385* (prior law)

Ordinary incidents of class action proceedings, including certification and notice to class, were not basis for exclusion under prior law. *Standard Oil Co. v. Superior Court (1976) 61 Cal. App. 3d 852, 857, 132 Cal. Rptr. 761* ; *Massey v. Bank of America (1976) 56 Cal. App. 3d 29, 32-33, 128 Cal. Rptr. 144*

Time consumed by plaintiff in attempting to serve foreign corporation not excluded from computation of statutory period for bringing action to trial when alternative means of service was available. *Hughes & Ladd, Inc. v. Rogue River Paving Co. (1975) 46 Cal. App. 3d 311, 313, 119 Cal. Rptr. 925* (prior law)

[iv] When Plaintiff Makes Motion to Avoid Mandatory Dismissal

When plaintiff makes motion to set case specially for trial to avoid mandatory dismissal, court has discretion to deny motion after considering factors including plaintiff's dilatory conduct, prejudice to defendant of accelerated trial date, and likelihood of eventual mandatory dismissal if early trial date is denied. *Salas v. Sears, Roebuck & Co. (1986) 42 Cal. 3d 342, 349, 228 Cal. Rptr. 504, 721 P.2d 590* ; *Parlen v. Golden State Sanwa Bank (1987) 194 Cal. App. 3d 906, 912, 240 Cal. Rptr. 73*

Motion to specially set case for trial to avoid mandatory dismissal for delay in prosecution requires showing of good cause under former Cal. Rules of Ct., Rule 375(b) [*now see Cal. Rules of Ct., Rule 3.1335*]; mere showing that statutory period would run unless case were specially set not enough to compel trial court to grant motion; absence of prejudice by delay to adverse party neither compels trial court to grant motion to specially set nor prevents it from granting motion to dismiss. Nye v. 20th *Century Ins. Co. (1990) 225 Cal. App. 3d 1041, 1045-1046, 275 Cal. Rptr. 319*

When plaintiff makes any motion to avoid five-year statute, trial court required to consider factors relevant to motion to dismiss under discretionary dismissal provisions of *Code Civ. Proc. § 583.420* prior to entry of any order on merits of motion; motion to refer case to judicial arbitration brought close to expiration of five-year statute required to be determined after consideration of factors relevant to court's discretionary power to dismiss for failure to prosecute action diligently. *Sisler v. Superior Court (1988) 205 Cal. App. 3d 864, 868-869, 252 Cal. Rptr. 665*

[8] Mandatory Dismissal for Delay in Service

[a] Generally

Service by mail on person outside state under *Code Civ. Proc. § 415.40* complete on date mailed, for purpose of mandatory dismissal for delay in service. *Johnson & Johnson v. Superior Court (1985) 38 Cal. 3d 243, 252, 211 Cal. Rptr. 517, 695 P.2d 1058* (prior law)

Return need not include every item necessary for proof of service, at least for purpose of dismissal for delay in service; return of service under *Code Civ. Proc. § 415.40* effective when it provides court with notice that plaintiff hascompleted all acts necessary to effect service, i.e., when it includes original summons and affidavit of service by mail, but does not include return receipt. *Johnson & Johnson v. Superior Court (1985) 38 Cal. 3d 243, 252-256, 211 Cal. Rptr. 517, 695 P.2d 1058* (prior law)

Gov. Code § 945.3 (tolling of period for criminal defendant to file civil action against peace officer) not applicable to

toll period of time for service of summons, and as not applicable to causes of action against civilian defendants or by plaintiffs other than criminal defendant. *Damjanovic v. Ambrose (1992) 3 Cal. App. 4th 503, 510, 4 Cal. Rptr. 2d 560*

In action for flood losses against insurers by property owners, one of whom alleged that his residence was insured by named insurer, trial court erred in quashing service of summons on named insurer because of plaintiff's failure to serve summons and complaint on it within three years as required by *Code Civ. Proc. § 583.210* and dismissing plaintiff's complaint when plaintiff inadvertently served superseded second amended complaint within three-year period but served third amended operative complaint after limitation period had expired, inasmuch as service that was made constituted substantial compliance with *Code Civ. Proc. § 583.210*; when reasonable attempt was made to comply with statute in good faith, and there was no attempt to mislead or conceal, doctrine of substantial compliance holds that statute may be deemed satisfied. *Davis v. Allstate Ins. Co. (1989) 217 Cal. App. 3d 1229, 1231-1232, 266 Cal. Rptr. 668*

Motion to dismiss action for failure to serve summons within two years addressed to trial court's discretion, and its decision not disturbed on appeal absent clear showing of manifest abuse of that discretion. *Hilliard v. Lobley (1989) 216 Cal. App. 3d 638, 640-641, 265 Cal. Rptr. 5*

In action for personal injuries timely filed by plaintiff's guardian ad litem, plaintiff's incompetency, which would have tolled running of statute of limitations under *Code Civ. Proc. § 352*, did not toll three-year period within which summons must be served to avoid mandatory dismissal. *Tzolov v. International Jet Leasing, Inc. (1989) 214 Cal. App. 3d 325, 327-328, 262 Cal. Rptr. 606*

Trial court erred in denying defendant's motion to dismiss action for failure to serve summons and complaint within three years on ground that defendant had filed answer to complaint in intervention by employer to recover workers' compensation benefits paid to plaintiffs; filing of answer to complaint in intervention that had been later dismissed with prejudice at intervenor's request did not constitute general appearance in main action so as to relieve plaintiffs of duty to serve summons and complaint. *Duckett v. Superior Court (1989) 207 Cal. App. 3d 1419, 1422-1425, 255 Cal. Rptr. 733*

Workers' compensation insurer's complaint in intervention properly dismissed on ground that plaintiffs in underlying third-party tort action had failed to serve and return summons within statutory three-year period under former *Code Civ. Proc. § 581*. *Chambers v. Santa Cruz City School Dist. (1987) 193 Cal. App. 3d 518, 522-524, 238 Cal. Rptr. 356*

Desire to await outcome of underlying case no excuse for long and otherwise unexplained period of neglect in serving summons in legal malpracticeaction. *Paul v. Drost (1986) 186 Cal. App. 3d 1407, 1411-1412, 231 Cal. Rptr. 361* (prior law)

Stipulation between parties extending time to answer complaint does not constitute general appearance precluding dismissal if it occurs after expiration of three-year period for service and return of summons. *Tires Unlimited v. Superior Court (1986) 180 Cal. App. 3d 974, 982, 226 Cal. Rptr. 25* (prior law)

Notwithstanding mandatory language of former *Code Civ. Proc. § 581*, trial court vested with discretion to apply exceptions in accordance with spirit of law and with view toward serving ends of justice. *Serrano v. Safeway Stores, Inc. (1986) 179 Cal. App. 3d 131, 135, 224 Cal. Rptr. 420* (prior law)

Code Civ. Proc. § 417.30, requiring return of summons together with proof of service, and former *Code Civ. Proc. § 581a* do not require return of original summons to establish proof of service; if service on defendant is properly made, any defect in return is immaterial as it is fact of service that gives court jurisdiction. *Courtney v. Abex Corp. (1986) 176 Cal. App. 3d 343, 346-347, 221 Cal. Rptr. 770*

Defendant in complaint in intervention not entitled to dismissal for failure to serve summons when defendant has made general appearance in main action in which intervention is sought. *Rhode v. National Medical Hosp. (1979) 93 Cal. App. 3d 528, 537-538, 155 Cal. Rptr. 797* (prior law)

Three-year period for completing service not tolled by continuous cause of action. *Los Angeles County v. Security Ins. Co. (1975) 52 Cal. App. 3d 808, 816, 125 Cal. Rptr. 701* (prior law)

Relief from judgment under *Code Civ. Proc. § 473* for mistake, inadvertence, surprise, or excusable neglect not available to relieve plaintiff of dismissal for failure to complete service on ground of counsel's ignorance of law as to correct means of making return of summons. *Kaiser Foundation Hospitals v. Superior Court (1975) 49 Cal. App. 3d 523, 527, 122 Cal. Rptr. 432* (prior law) (overruled on other grounds in *Johnson & Johnson v. Superior Court (1985) 38 Cal. 3d 243, 254, 211 Cal. Rptr. 517, 695 P.2d 1058*)

[b] Acts Constituting General Appearance

Defendant who was served in only one of two separate actions, brought against him by different plaintiffs concerning same incident and later consolidated but not merged, did not make general appearance in unserved action by appearing and otherwise defending interests at deposition noticed by plaintiff in served action. *Sanchez v. Superior Court (1988) 203 Cal. App. 3d 1391, 1396, 1399, 250 Cal. Rptr. 787*

[c] Computation of Statutory Period

Three-year period for completing service starts to run from filing of amended complaint substituting defendant's true name for fictitious name when cause of action in amended complaint is based on different operational facts. *Barrington v. A.H. Robins Co. (1985) 39 Cal. 3d 146, 151-154, 216 Cal. Rptr. 405, 702 P.2d 563* (prior law)

Three-year period for completing service started from time of filing original complaint and not from time of filing amended complaint substitutingdefendant's true name for fictitious name. *Nelson v. State of California (1982) 139 Cal. App. 3d 72, 76, 188 Cal. Rptr. 479* (prior law)

[d] Estoppel or Waiver as Defense

Doctrine of equitable estoppel applicable to motions to dismiss for failure to effectuate service within three years as required by *Code Civ. Proc. § 583.210*; if trial court finds statements or conduct by a defendant which lulls plaintiff into false sense of security resulting in inaction, and there is reasonable reliance, estoppel must be available to prevent defendant from profiting from his or her deception; estoppel and waiver distinguished. *Brookview Condominium Owners' Assn. v. Heltzer Enterprises-Brookview (1990) 218 Cal. App. 3d 502, 510, 512-513, 267 Cal. Rptr. 76*

Defendant under no duty to inform plaintiff of intent not to waive right to dismissal under three-year statute; thus defendant's silence at deposition about not yet being served in one of two consolidated actions for which deposition was being taken did not create estoppel to dismissal. *Sanchez v. Superior Court (1988) 203 Cal. App. 3d 1391, 1400, 250 Cal. Rptr. 787*

Participation in settlement negotiations does not estop defendant from seeking mandatory dismissal for delay in service. *Lesko v. Superior Court (1982) 127 Cal. App. 3d 476, 485-487, 179 Cal. Rptr. 595* (prior law)

[e] Periods Excluded from Statutory Period

[i] Defendant Not Amenable to Process

Order for service by publication was not binding adjudication that defendant was not amenable to process, and constituted no impediment to defendant's motion to dismiss for untimely service. *Watts v. Crawford (1995) 10 Cal. 4th 743, 761, 42 Cal. Rptr. 2d 81, 896 P.2d 807* ; *Perez v. Smith (1993) 19 Cal. App. 4th 1595, 1600, 24 Cal. Rptr. 2d 186*

Marriage and subsequent change of name and address do not make defendant not amenable to service so as to toll statutory time for completing service. *Adelson v. Hertz Rent-A-Car (1982) 133 Cal. App. 3d 221, 226, 183 Cal. Rptr. 779* (prior law)

Defendant's absence from state does not make him or her not amenable to process so as to toll statutory time for completing service. *Buchanan v. Buchanan (1979) 99 Cal. App. 3d 587, 592-593, 160 Cal. Rptr. 577* (prior law)

[ii] Service Affected by Stay

Time prosecution of action or proceedings in action was stayed, when stay precluded service on additional defendants in complex litigation case, properly excluded under *Code Civ. Proc. § 583.240(b)* in computing time within which service must be made to avoid dismissal. *Highland Stucco & Lime, Inc. v. Superior Court (Los Angeles Unified School District) (1990) 222 Cal. App. 3d 637, 643-644, 272 Cal. Rptr. 60*

[iii] Service Impossible, Impracticable, or Futile

False statement by plaintiff's attorney to plaintiff that defendant, a citizen and resident of a foreign country, had been properly served, when in fact no service had been made, did not make proper service within the statutory period impossible or impracticable under *Code Civ. Proc. 583.240(d)*; Legislature intended that attorney misconduct could not excuse failure to complete service within mandatory statutory period; on other hand, when dismissal is discretionary, misconduct of plaintiff's attorney must be considered by the court. *Shipley v. Sugita (1996) 50 Cal. App. 4th 320, 324-327, 57 Cal. Rptr. 2d 750*

Even if invalid, legal effect of court order staying all proceedings in complex litigation case except for abatement and statute of limitations, thereby staying further service of summonses until after mandatory three-year period for service had passed, renders service during stay impossible, impracticable, or futile within meaning of *Code Civ. Proc. § 583.240(d)*, as compliance with facially valid court order is mandatory and thus a cause beyond plaintiff's control. *Highland Stucco & Lime, Inc. v. Superior Court (Los Angeles Unified School District) (1990) 222 Cal. App. 3d 637, 644, 272 Cal. Rptr. 60*

Failure to discover facts or evidence do not excuse plaintiff from duty to serve and return summons within three years. *Dillashaw v. Ayerst Laboratories, Inc. (1983) 141 Cal. App. 3d 35, 40, 190 Cal. Rptr. 68* (prior law)

[9] Prejudice to Defendant

Actual prejudice to defendant not required to be established before court may dismiss action; legislative policy underlying dismissal statutes not solely to avoid prejudice to defendant but rather also to expedite administration of justice by requiring every person to prosecute action promptly and diligently; moreover, prejudice presumed from protracted and unexplained delay, particularly when delay has been in serving complaint; when faced with motion to dismiss it is incumbent on plaintiff to establish reasonable or excusable delay in service; if such showing is not made,

court permitted to dismiss action in its discretion even if defendant fails to establish actual prejudice. *Hilliard v. Lobley (1989) 216 Cal. App. 3d 638, 641-642, 265 Cal. Rptr. 5*

[10] Public Policies

Public policy favoring disposition of cases on their merits coexists with policy that plaintiff must proceed with reasonable diligence in prosecution of action. Nye v. 20th *Century Ins. Co. (1990) 225 Cal. App. 3d 1041, 1045, 275 Cal. Rptr. 319*

[11] Purpose of Involuntary Dismissal Statutes

Purpose of *Code Civ. Proc. § 583.310 et seq.* is to implement the Legislature's policy to discourage stale claims. *Santangelo v. Allstate Ins. Co. (1998) 65 Cal. App. 4th 804, 814, 76 Cal. Rptr. 2d 735*

Purpose of involuntary dismissal statute for failure to bring action to trial within two years is to compel reasonable diligence in prosecution of lawsuits, and is designed to promote trial of cases before evidence is lost or destroyed, or memory of witnesses become dimmed. *Maggio, Inc. v. United Farm Workers (1991) 227 Cal. App. 3d 847, 883, 278 Cal. Rptr. 250*

One purpose of statutes relating to involuntary dismissal for delay in prosecution is to expedite administration of justice to benefit litigant as well as general public, specifically protecting from annoyance of unmeritorious action remaining undecided for indefinite period of time; purposes served by statutes is somewhat analogous to those underlying statutes of limitation, that is, both types of statutes as promoting trial of cases before evidence is lost, destroyed, or memory of witnesses become dimmed. *State Compensation Ins. Fund v. Selma Trailer & Manufacturing Co. (1989) 210 Cal. App. 3d 740, 754, 258 Cal. Rptr 545*

[12] Relationship to Arbitration

Court retains jurisdiction to dismiss for lack of diligent prosecution while case ordered to judicial arbitration. *Nanfito v. Superior Court (1991) 2 Cal. App. 4th 315, 319-320, 2 Cal. Rptr. 2d 876*

[13] Review by Mandate of Order Denying Motion to Dismiss

In mandate proceeding to review trial court's ruling denying motion to dismiss complaint for failure to serve process within time prescribed by *Code Civ. Proc. §§ 583.410, 583.420(a)(1)*, reviewing court generally will not substitute its judgment for that of trial court absent clear abuse of discretion; burden is on defendant to establish abuse. *Trailmobile, Inc. v. Superior Court (1989) 210 Cal. App. 3d 1451, 1455, 259 Cal. Rptr. 100*

Mandate is appropriate remedy to obtain review of order denying motion to dismiss for delay in prosecution. *Big Bear Mun. Water Dist. v. Superior Court (1969) 269 Cal. App. 2d 919, 922, 75 Cal. Rptr. 580*

Vacation of dismissal order by trial court was possible at any time when court lacked jurisdiction to make order. *Harris v. Board of Education (1957) 152 Cal. App. 2d 677, 680, 313 P.2d 212*

Legal Topics:

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California Forms of Pleading and Practice--Annotated

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PART III. RESEARCH GUIDE
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17-212 California Forms of Pleading and Practice--Annotated § 212.195

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§ 212.195 Law Reviews

Review of Selected l984 California Legislation, "Civil Procedure; Dismissal for Lack of Prosecution," *16 Pacific L.J. 543 (1985)*

Gardner, "Summary Judgment and Dismissal Motions in Dissolution of Marriage Proceedings," 15 Bev. Hills B.J. 373 (1980)

Note, "Dismissal and Nonsuit: Right to Voluntary Dismissal After Commencement of Trial," *30 Cal. L. Rev. 76 (1941)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotionsCivil ProcedureDismissalsVoluntary DismissalsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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Volume 17: Defaults and Default Judgements thru Duress, Menace, Fraud, Undue Influence, and Mistake-Chs. 205-219
Chapter 212 DISMISSAL
PART III. RESEARCH GUIDE
B. Involuntary Dismissal For Delay In Prosecution

17-212 California Forms of Pleading and Practice--Annotated § 212.196

AUTHOR: HON. PATTI S. KITCHING BARBARA A. REEVES CHARLES PEREYRA-SUAREZ EDITORIAL CONSULTANTS Justice Kitching, an Associate Justice of the California Court of Appeal, Second Appellate District, Division Three, was formerly a Judge of the Los Angeles Superior Court, where her assignments included the law and motion department. Barbara A. Reeves is a partner with Fried, Frank, Harris, Shriver & Jacobson, Los Angeles, California. Her areas of litigation expertise include intellectual property, securities, fraud, contract, international trade, antitrust, environmental coverage, and white-collar criminal defense. Charles Pereyra-Suarez is a partner in McKenna & Cuneo and heads the Litigation Department in the Los Angeles office. He also has served as a judge pro tem of the Los Angeles County Municipal and Superior Courts since 1986. This article was adapted from California Practice Handbook: Pretrial Disposition (Matthew Bender), Litigation Section, Los Angeles County Bar Associate, Handbook Editor; Hon. Patti S. Kitching, Barbara A. Reeves, Charles Pereyra-Suarez, Contributing Editors.

§ 212.196 Text References

Witkin, California Procedure, Vol. 6, *Proceedings Without Trial*, § 250 et seq. (4th ed. 1997)

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§§ 212.197[Reserved]

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17-212 California Forms of Pleading and Practice--Annotated § 212.210

AUTHOR: HON. PATTI S. KITCHING BARBARA A. REEVES CHARLES PEREYRA-SUAREZ EDITORIAL CONSULTANTS Justice Kitching, an Associate Justice of the California Court of Appeal, Second Appellate District, Division Three, was formerly a Judge of the Los Angeles Superior Court, where her assignments included the law and motion department. Barbara A. Reeves is a partner with Fried, Frank, Harris, Shriver & Jacobson, Los Angeles, California. Her areas of litigation expertise include intellectual property, securities, fraud, contract, international trade, antitrust, environmental coverage, and white-collar criminal defense. Charles Pereyra-Suarez is a partner in McKenna & Cuneo and heads the Litigation Department in the Los Angeles office. He also has served as a judge pro tem of the Los Angeles County Municipal and Superior Courts since 1986. This article was adapted from California Practice Handbook: Pretrial Disposition (Matthew Bender), Litigation Section, Los Angeles County Bar Associate, Handbook Editor; Hon. Patti S. Kitching, Barbara A. Reeves, Charles Pereyra-Suarez, Contributing Editors.

§ 212.210 Trial Not Commenced

☐ Determine if there is a clerk with whom the request must be filed. If no clerk, the request may be made to the judge orally, or in writing as outlined below [*Code Civ. Proc. § 581(b)(1)*].

☐ Fill out mandatory Judicial Council Form CIV-110 "Request for Dismissal" [for form, *see § 212.270*] in the following numbers of copies:

- ☐ Original for filing.
- ☐ Office copy.
- ☐ Copy for opposing counsel.
- ☐ Any additional copies as may be desired.

☐ Sign form:

☐ If dismissing party's attorney of record will not give written consent to dismissal, dismissal will require court order after notice to attorney [*Code Civ. Proc. § 581(j)*].

☐ File form with court clerk or if no clerk, with judge.

☐ Submit, at same time, costs of clerk or judge [*Code Civ. Proc. § 581(b)(1)*].

☐ Costs involved are nominal costs for entering the order, but do not include defendant's costs in the action, which are recoverable in the usual manner by a cost bill [*Hopkins v. Superior Court (1902) 136 Cal. 552, 553-554, 69 P. 299]* .

☐ Prepare, serve on all parties, and file notice of entry of dismissal on mandatory Judicial Council Form CIV-120 "Notice of Entry of Dismissal and Proof of Service" [*Cal. Rules of Ct., Rule 3.1390*; for form, *see § 212.271*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotionsCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

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§ 212.211 Consent to Dismissal Without Prejudice

- ☐ Fill out mandatory Judicial Council Form CIV-110 "Request for Dismissal" [for form, *see § 212.270*] in the following numbers of copies:
  - ☐ Original for filing.
  - ☐ Office copy.
  - ☐ Copy for opposing counsel.
  - ☐ Any additional copies as may be desired.
- ☐ Obtain necessary signatures on the form.

☐ A *Code Civ. Proc. § 581(e)* dismissal requires the consent of all affected parties to the trial.

☐ A *Code Civ. Proc. § 581(b)(2)* dismissal additionally requires consent of requesting party's attorney of record.

☐ File request with court clerk or, if there is no clerk, with judge.

☐ Prepare, serve on all parties, and file notice of entry of dismissal on mandatory Judicial Council Form CIV-120 "Notice of Entry of Dismissal and Proof of Service" [*Cal. Rules of Ct., Rule 3.1390*; for form, *see § 212.271*].

Legal Topics:

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

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17-212 California Forms of Pleading and Practice--Annotated § 212.212

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§ 212.212 Dismissal Without Prejudice For Just Cause After Trial Commences.

☐ *Code Civ. Proc. § 581(e)* provides for dismissal without prejudice based on just cause by an order of the court. Presumably, this order may be obtained by written motion or oral motion made in open court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals Without Prejudice

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§ 212.213 Dismissal With Prejudice After Trial Commences

- ☐ Fill out mandatory Judicial Council Form CIV-110 "Request for Dismissal" [for form, *see § 212.270*] in the following numbers of copies:
  - ☐ Original for filing.
  - ☐ Office copy.
  - ☐ Copy for opposing counsel.
  - ☐ Any additional copies as may be desired.
- ☐ Sign the form.

☐ File the request with the court clerk or if no clerk, the judge.

☐ Prepare, serve on all parties, and file notice of entry of the dismissal on mandatory Judicial Council Form CIV-120 "Notice of Entry of Dismissal and Proof of Service" [*Cal. Rules of Ct., Rule 3.1390*; for form, *see § 212.271*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals With Prejudice

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17-212 California Forms of Pleading and Practice--Annotated §§ 212.214-212.229

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§§ 212.214[Reserved]

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1. Dismissal For Delay In Serving Summons And Complaint

17-212 California Forms of Pleading and Practice--Annotated § 212.230

AUTHOR: HON. PATTI S. KITCHING BARBARA A. REEVES CHARLES PEREYRA-SUAREZ EDITORIAL CONSULTANTS Justice Kitching, an Associate Justice of the California Court of Appeal, Second Appellate District, Division Three, was formerly a Judge of the Los Angeles Superior Court, where her assignments included the law and motion department. Barbara A. Reeves is a partner with Fried, Frank, Harris, Shriver & Jacobson, Los Angeles, California. Her areas of litigation expertise include intellectual property, securities, fraud, contract, international trade, antitrust, environmental coverage, and white-collar criminal defense. Charles Pereyra-Suarez is a partner in McKenna & Cuneo and heads the Litigation Department in the Los Angeles office. He also has served as a judge pro tem of the Los Angeles County Municipal and Superior Courts since 1986. This article was adapted from California Practice Handbook: Pretrial Disposition (Matthew Bender), Litigation Section, Los Angeles County Bar Associate, Handbook Editor; Hon. Patti S. Kitching, Barbara A. Reeves, Charles Pereyra-Suarez, Contributing Editors.

§ 212.230 Preliminary Determinations

☐ Review basic timeframes for dismissal based on delay in service:

☐ *Mandatory* three years after commencement of action against that person, and/or return not made within 60 days thereafter [*Code Civ. Proc. §§ 583.210, 583.250(a)(2)*].

☐ *Discretionary* two years after commencement of action against that defendant, including return of summons [*Code Civ. Proc. § 583.410(a), 583.420(a)(1)*; *see Code Civ. Proc. § 583.110(f)*].

☐ Determine whether dismissal is available:

☐ Ascertain date time period commenced.

☐ Determine date, if any, service and return made:

☐ Date summons or complaint or cross complaint served.

☐ Date summons or other proof of service returned to court.

☐ Determine time, if any, excluded from computation of applicable time period [*Code Civ. Proc. §§ 583.240, 583.420(b)*]:

☐ Time while defendant was not amenable to process.

☐ Time while action was stayed and stay affects service.

☐ Time while validity of service was subject of litigation by parties.

☐ Time while service was otherwise impossible, impracticable, or futile, for reasons beyond plaintiff's control.

☐ Determine whether applicable time period has been extended by written stipulation or by recorded oral agreement in open court [*Code Civ. Proc. §§ 583.230(b), 583.420(b)*].

☐ Determine if moving party may seek dismissal:

☐ Person interested in the action (or court itself) may move for *mandatory* dismissal under *Code Civ. Proc. § 583.250*.

☐ Defendant or cross defendant (or court itself) may move for *discretionary* dismissal [*Code Civ. Proc. § 583.410(a)*].

☐ Person may not move for dismissal if he or she has waived that right by stipulation or has made a general appearance in the action [*Code Civ. Proc. § 583.220*].

☐ Person otherwise entitled to move for dismissal may be estopped by his or her conduct from making motion [*Code Civ. Proc. § 583.140*].

☐ Consider combining motions for mandatory and discretionary dismissal.

PRACTICE TIP:

Provide Court With Alternative Basis to Grant Relief. Motion for mandatory dismissal should be combined with motion for discretionary dismissal under *Code Civ. Proc. § 583.410(a)* if grounds for exercise of trial court's discretion exist, because if motion for mandatory dismissal is denied because of exclusion of period of time or some other reason, motion for discretionary dismissal

may nonetheless be granted if minimum period of delay has elapsed and it appears to be otherwise proper under circumstances.

☐ Determine whether motion for dismissal may be made as a response to the complaint [*Code Civ. Proc. § 418.10(a)(3)*].

☐ Determine last day of defendant's time to respond to complaint.

☐ Consider combining motion with other motions that may be made in response to complaint without making a general appearance [*Code Civ. Proc. § 418.10(a)(1), (2), (d)*]:

☐ Motion to quash service of summons for lack of jurisdiction over defendant

☐ Motion to stay or dismiss the action for inconvenient forum.

☐ *Code Civ. Proc. § 473* or *473.5* motion.

☐ Consider filing an answer, demurrer, or motion to strike, since to do so will not compromise a special appearance until the motions under *Code Civ. Proc. § 418.10* are denied [*see Code Civ. Proc. § 418.10(e)*].

☐ Move for dismissal [*see* (B), *below*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessTime LimitationsDismissalsCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions

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17-212 California Forms of Pleading and Practice--Annotated § 212.231

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§ 212.231 Procedure for Bringing the Motion

☐ Papers to be prepared:

☐ *Mandatory* dismissal [*see §§ 212.290, 212.293*].

☐ *Discretionary* dismissal [*see §§ 212.290, 212.296*].

☐ Supporting affidavits or declarations [*see §§ 212.293, 212.296*].

☐ Request for judicial notice [*see Cal. Rules of Ct., Rule 3.1113(l)*; for form, *see* Ch. 321, *Judicial Notice*].

☐ If requesting judicial notice under *Evid. Code § 452* or *453*, include a copy of that

matter to be noticed; if it is part of the court's file, include a statement specifying the part of the file to be judicially noticed, and arrange with the clerk to have the file in the courtroom at the hearing [*Cal. Rules of Ct., Rule 3.1306(c)*].

☐ Supporting memorandum of points and authorities.

☐ Proposed order, if required by local rule [for form, *see §§ 212.302, 212.303*].

☐ Declaration or certificate re proof of service of moving papers [*see Code Civ. Proc. § 1013a*; for forms, see Ch. 518, *Service of Summons and Papers*].

☐ Copies of papers to be prepared:

☐ Original to be filed with court.

☐ One office copy.

☐ One copy for service on each party who has appeared in case.

☐ Additional copies as required by local court rule.

☐ Service:

☐ Select hearing date for motion, allowing sufficient time for service. Clear hearing date with clerk, if required by local practice.

☐ Attach declaration or certificate re proof of service to each copy of papers served.

☐ Time for serving notice:

☐ Serve copy of notice of motion for *mandatory* dismissal and supporting papers at least 16 court days before hearing, plus any extensions based on manner of service, unless otherwise ordered [*Code Civ. Proc. § 1005(b)*; *see* § *Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to Section 1010.6)].

☐ Serve copy of notice of motion for *discretionary* dismissal and supporting papers at least 45 calendar days before hearing, plus any extensions based on manner of service, unless otherwise ordered [*Cal. Rules of Ct., Rule 3.1342(a)*; *Code Civ. Proc. § 1010.6(a)(6), 1013*].

☐ If necessary, seek an order shortening the time requirements for service and filing [*see Code Civ.*

Proc. § 1005(b); *Cal. Rules of Ct., Rule 3.1300(b)*].

☐ Filing:

☐ Submit original of notice of motion and supporting papers to court clerk for filing within the same time period as that applicable to service (discussed *above*).

☐ Submit office copy to clerk to be stamped together with the original.

PRACTICE TIP:
Avoid Later Disputes. The stamped office copy may then serve as a check on the contents of the papers, if any filed originals are lost; it may also provide ready resolution of any dispute over the file date.

☐ File proof of service of moving papers no later than five calendar days before the hearing date [*see Cal. Rules of Ct., Rule 3.1300(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 212.232 Procedure for Opposing Motion

☐ Determine whether it is desirable to submit opposing papers, e.g., opposing declarations or memoranda:

☐ Determine whether one or more exceptions to time requirement can be established.

☐ If opposition is not desirable, consider serving and filing a Notice of Nonopposition. This may be required in some courts.

☐ Prepare any opposing papers in as many copies as original papers.

☐ File original papers directly with clerk of appropriate department:

☐ At least 9 court days before hearing date on motion for *mandatory* dismissal [*Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(a)*; *see also Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to section 1010.6)].

☐ Within 15 days of service of notice of motion for *discretionary* dismissal [*Cal. Rules of Ct., Rule 3.1342(a)*; *see also Code Civ. Proc. §§ 1010.6(a)(6), 1013* (extensions of time)].

☐ Have office copy stamped together with original to serve as check of contents and file date.

☐ Serve copies:

☐ At least 9 court days before hearing date on motion for *mandatory* dismissal [*Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(a)*; *Code Civ. Proc. § 1010.6(a)(6)* (noted *above*)].

☐ Within 15 days of service of notice of motion for *discretionary* dismissal [*Cal. Rules of Ct., Rule 3.1342(b)*; *see also Code Civ. Proc. §§ 1010.6(a)(6), 1013* (extensions of time)].

PRACTICE TIP:

Avoid Continuance. Some local rules require service to ensure that other parties receive papers in time to submit a reply or prepare for the hearing. Consider sending papers by messenger service (or sendingcourtesy copy by Fax transmission) to avoid continuance on the ground that opposing papers were not received before hearing [*see, e.g.*, Los Angeles Co. Super. Ct. Rules, Rules 7.12(b) (policy against using timing and manner of service to disadvantage opposing party; if it is likely service by mail, even if allowed will prejudice opposing party, service should be by personal delivery)].

NOTE:

Five Year Period May Govern Bringing to New Trial. If the mandatory three-year period for bringing to new trial would expire earlier than five years after the action was commenced against the defendant, the five-year period governs [*Code Civ. Proc. § 583.320(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessTime LimitationsDismissalsCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions

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§ 212.233 Procedure for Moving Party's Reply

- ☐ Examine any affidavit, declaration, or memorandum filed by the opposing party.
- ☐ If desired and time permits, prepare a supplemental affidavit or declaration and memorandum].
- ☐ Serve copies and file original reply papers:
  - ☐ At least five court days before the hearing on motion for *mandatory* dismissal [*Code Civ. Proc. §§ 1005(b), 1010.6(a)(6)*; *Cal. Rules of Ct., Rule 3.1300(a)*].
  - ☐ Within 15 days after service of written objection to motion for *discretionary* dismissal [*Cal. Rules of Ct., Rule 3.1342(c)*; *see also Code Civ. Proc. §§ 1010.6(a)(6), 1013* (extensions of time)].

☐ Select method of service that will not prejudice opposing party [*see* C., *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessTime LimitationsDismissalsCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions

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B. Involuntary Dismissal for Delay in Prosecution
1. Dismissal For Delay In Serving Summons And Complaint

17-212 California Forms of Pleading and Practice--Annotated § 212.234

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§ 212.234 Additional Reply of Opposing Party

☐ If the moving party files a reply to any written opposition, the opposing party may, if time permits, prepare serve and file a supplemental affidavit or declaration and memorandum in opposition.

☐ Serve and file this reply relating to a *discretionary* motion within five days after service of moving party's reply [*Cal. Rules of Ct., Rule 3.1342(d)*].

☐ Serve and file this reply relating to a *mandatory* promptly; no statute or rule provides a specific deadline.

☐ Select method of service that will not prejudice moving party [*see* (C), *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessTime LimitationsDismissalsCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions

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§ 212.235 Hearing on Motion

☐ Determine whether to appear at hearing.

☐ If submitting motion without an appearance, prepare, serve, and file a notice of nonappearance in same number of copies as notice of motion [*see Cal. Rules of Ct., Rule 3.1304(c)*].

☐ If possible, obtain any tentative ruling as authorized by local rule [*see Cal. Rules of Ct., Rule 3.1308*].

☐ If telephone appearance is available and desired, arrange for telephone appearance [*see Code Civ. Proc. § 367.5*; Cal. Rules of Ct., App., Div. I, § 21; *see also Cal. Rules of Ct., Rule 3.670*].

☐ If appropriate, attend hearing.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsHearingsCivil ProcedureDismissalsInvoluntary DismissalsMotions

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17-212 California Forms of Pleading and Practice--Annotated § 212.236

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§ 212.236 Post-Ruling Procedures

☐ The prevailing party must mail or deliver the proposed order to the other party for approval as conforming to the court's order [*Cal. Rules of Ct., Rule 3.1312(a)*; for form, *see §§ 212.301 -212.303*]. Exceptions:

☐ Parties waive notice [*Cal. Rules of Ct., Rule 3.1312(a)*].

☐ Court orders otherwise [*Cal. Rules of Ct., Rule 3.1312(a)*].

☐ Motion unopposed and proposed order was submitted with the moving papers (unless court orders otherwise) [*Cal. Rules of Ct., Rule 3.1312(d)*].

☐ Within five days (*Code Civ. Proc. § 1013*, extending time for service by mail does not apply) after

the mailing or delivery of proposed order, the other party must notify prevailing party as to whether the proposed order is approved, stating any reasons for disapproval. Failure to provide timely notification to the prevailing party is deemed an approval [*Cal. Rules of Ct., Rule 3.1312(a)*].

☐ The prevailing party must, on expiration of the five-day period provided for approval, promptly transmit the proposed order to the court, together with a summary of any responses of other parties or a statement that no responses were received [*Cal. Rules of Ct., Rule 3.1312(b)*]. Any other party may prepare and submit a proposed order if the prevailing party fails to do so [*Cal. Rules of Ct., Rule 3.1312(c)*].

☐ After the order is signed, unless court orders otherwise, request conformed copies of original order, and serve them, with proof of service, on all parties or their attorneys, unless each party has wa ived such notice of order and waiver was noted in court's minutes [*see Code Civ. Proc. § 1019.5(a)*].

☐ File proof of service of notice.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessTime LimitationsDismissalsCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions

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17-212 California Forms of Pleading and Practice--Annotated §§ 212.237-212.249

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[Reserved]

§§ 212.237[Reserved]

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2. Dismissal For Delay In Bringing Action To Trial

17-212 California Forms of Pleading and Practice--Annotated § 212.250

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§ 212.250 Preliminary Determinations

☐ Review basic timeframes for dismissal based on delay in bringing action to trial or new trial:

☐ *Mandatory* to trial within five years after action was commenced against defendant [*Code Civ. Proc. § 583.310*].

☐ *Discretionary* to trial or conditionally settled within two years after action was commenced against defendant [*Code Civ. Proc. § 583.420(a)(2)(B)*; *Cal. Rules of Ct., Rule 3.1340(a)*].

☐ *Mandatory* to new trial within three years or *discretionary* to new trial within two years after one of the following [*Code Civ. Proc. §§ 583.320, 583.420(a)(3)*]:

☐ Entry of order declaring mistrial or disagreement of jury, if no appeal.

- ☐ Entry of order granting new trial, if appeal.
- ☐ Filing of the remittitur by clerk of trial court following appeal.

☐ Determine date action was commenced against defendant or cross defendant, that is, when complaint or cross complaint was filed [*see Code Civ. Proc. §§ 411.10, 583.110(b), 583.310*].

☐ In case of new trial, determine date relevant order was entered or remittitur filed [*Code Civ. Proc. § 583.320(a)*].

☐ Determine date, if any, that action is set for trial or new trial.

☐ Determine whether trial has commenced, i.e., whether any of the following have occurred:

- ☐ Jury is impanelled.
- ☐ Witness is called and testifies.
- ☐ Issue of law or fact is determined, bringing action to stage of final disposition.

☐ Determine time, if any, excluded from computation of time period [*Code Civ. Proc. § 583.340*]:

- ☐ Time while court's jurisdiction is stayed or enjoined.
- ☐ Time while prosecution of action is stayed or enjoined.
- ☐ Time while bringing action to trial is impossible, impracticable, or futile.
- ☐ Time party is on active military service [*50 U.S.C. App. § 526*].
- ☐ If action is in judicial arbitration in last six months of *Code Civ. Proc. § 583.310* five-year period, time from four years and six months after plaintiff filed action until request for trial de novo is filed [*Code Civ. Proc. § 1141.17(b)*].

☐ Determine whether time period has been extended by written stipulation or by recorded oral agreement in open court [*Code Civ. Proc. §§ 583.330, 583.420(b)*].

☐ Determine whether actual time remaining after any statutory tolling or exclusionary period is less than six months, in which case time period is extended so that six months will remain after end of excluded period [*Code Civ. Proc. § 583.350*].

☐ Determine if moving party may seek dismissal:

☐ Defendant or cross defendant (or court itself) may move for dismissal under *Code Civ. Proc. § 583.360(a)*.

☐ Person may not move for dismissal if he or she has waived that right or is estopped by his or her conduct [*Code Civ. Proc. § 583.140*].

☐ Consider combining motion for mandatory dismissal with motion for discretionary dismissal [for checklist, *see § 212.230*].

☐ Move for dismissal [for checklist, *see § 212.251*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsComputationCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions

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17-212 California Forms of Pleading and Practice--Annotated § 212.251

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§ 212.251 Procedure for Bringing Motion

- ☐ Papers to be prepared:
  - ☐ Notice of motion:
    - ☐ *Mandatory* dismissal [for forms, *see §§ 212.294, 212.295*].
    - ☐ *Discretionary* dismissal [for forms, *see § 212.296*].
  - ☐ Supporting affidavits or declarations [*see §§ 212.294, 212.295,* 212.296].
  - ☐ Material to be judicially noticed [for checklist, *see § 212.251*].
  - ☐ Supporting memorandum.

☐ Proposed order, if required by local rule [for forms, *see §§ 212.302*-212.306 212.306].

☐ Declaration or certificate re proof of service of moving papers [*see Code Civ. Proc. § 1013a*; for forms, see Ch. 518, *Service of Summons and Papers*].

☐ Copies of papers to be prepared [for checklist, *see § 212.231*].

☐ Service [for checklist, *see § 212.231*].

☐ Filing [for checklist, *see § 212.231*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsComputationCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions

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17-212 California Forms of Pleading and Practice--Annotated § 212.252

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§ 212.252 Procedure for Opposing Motion

☐ For checklist, *see § 212.232*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsComputationCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions

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17-212 California Forms of Pleading and Practice--Annotated § 212.253

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§ 212.253 Procedure for Moving Party's Reply

☐ For checklist, *see § 212.233*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsTime LimitationsComputationCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions

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17-212 California Forms of Pleading and Practice--Annotated § 212.254

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§ 212.254 Additional Reply of Opposing Party

☐ For checklist, *see § 212.234*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsComputationCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions

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17-212 California Forms of Pleading and Practice--Annotated § 212.255

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§ 212.255 Hearing on Motion

☐ For checklist, *see § 212.235*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsHearingsCivil ProcedureDismissalsInvoluntary DismissalsMotions

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17-212 California Forms of Pleading and Practice--Annotated § 212.256

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§ 212.256 Post-Ruling Procedures

☐ For checklist, *see § 212.236*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsComputationCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotions

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17-212 California Forms of Pleading and Practice--Annotated §§ 212.257-212.269

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§§ 212.257[Reserved]

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17-212 California Forms of Pleading and Practice--Annotated § 212.270

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§ 212.270 Request for Voluntary Dismissal of Action [Code Civ. Proc. § 581]--Judicial Council Form CIV-110

[1] FORM Request for Voluntary Dismissal of Action [Code Civ. Proc. § 581]--Judicial Council Form CIV-110

Click here to view image.

[2] Use of Form

This form is a filled-in illustrative reproduction of Judicial Council Form CIV-110, adopted by the Judicial Council for use to request voluntary dismissal in any of the following situations:

- Before commencement of trial purusant to *Code Civ. Proc. § 581(b)(1)*.
- With the consent of all parties purusant to *Code Civ. Proc. § 581(b)(2)*.
- After commencement of trial purusant to *Code Civ. Proc. § 581(e)*.

Use of the form is mandatory [*Cal. Rules of Ct., Rule 1.31*; *see Gov. Code § 68511*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Filling Out Form

Fill in, in the spaces provided, the requested information concerning the requesting party's attorney, the court in which the action is filed, and the parties, title, and number of the action. Then check the appropriate boxes to describe the type of action, whether dismissal is with or without predjudice (Paragraph 1), and whether dismissal is of the entire action or only of the complaint, petition, or cross complaint (Paragraph 2). Dismissal under *Code Civ. Proc. § 581(b)(1)* or *(2)* may be with or without prejudice, while dismissal under *Code Civ. Proc. § 581(e)* is generally with prejudice [*see* General Introduction, under Dismissal With or Without Prejudice, *above*].

If dismissal relates only to specified parties, causes of action, or cross complaints, check the "Other" box and identify the parties, causes of action, and cross complaints (Paragraph 2).

The form should be signed by the requesting party's attorney of record in the space provided, to indicate consent to the dismissal [*Code Civ. Proc. § 581(j)*; *see* Procedural Checklist]. If dismissal is based, in addition, on the opposing party's consent [*see Code Civ. Proc. § 581(b)(2), (e)*], the opposing party's attorney must sign in the space established for that purpose.

The authority for, limitations on, and effect of dismissal under *Code Civ. Proc. § 581(b)(1), (2),* or *(e)* are discussed in *§ 212.36*.

[4] Notice of Entry of Dismissal

A party requesting dismissal under *Code Civ. Proc. § 581(b)(1), (2),* or *(e)* must serve on all parties and file a notice of entry of the dismissal [*Cal. Rules of Ct., Rule 3.1390*]. For a form of notice, see *§ 212.271*.

[5] Text References

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, §§ 250-274, 278 (4th ed. 1997)

[6] Cross References

For a related form of notice of voluntary dismissal, see *§ 212.271*.

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Chapter 212 DISMISSAL
PART V. FORMS
A. Voluntary Dismissal

17-212 California Forms of Pleading and Practice--Annotated § 212.271

AUTHOR: HON. PATTI S. KITCHING BARBARA A. REEVES CHARLES PEREYRA-SUAREZ EDITORIAL CONSULTANTS Justice Kitching, an Associate Justice of the California Court of Appeal, Second Appellate District, Division Three, was formerly a Judge of the Los Angeles Superior Court, where her assignments included the law and motion department. Barbara A. Reeves is a partner with Fried, Frank, Harris, Shriver & Jacobson, Los Angeles, California. Her areas of litigation expertise include intellectual property, securities, fraud, contract, international trade, antitrust, environmental coverage, and white-collar criminal defense. Charles Pereyra-Suarez is a partner in McKenna & Cuneo and heads the Litigation Department in the Los Angeles office. He also has served as a judge pro tem of the Los Angeles County Municipal and Superior Courts since 1986. This article was adapted from California Practice Handbook: Pretrial Disposition (Matthew Bender), Litigation Section, Los Angeles County Bar Associate, Handbook Editor; Hon. Patti S. Kitching, Barbara A. Reeves, Charles Pereyra-Suarez, Contributing Editors.

§ 212.271 Notice of Entry of Voluntary Dismissal [Cal. Rules of Ct., Rule 3.1390]--Judicial Council Form CIV-120

[1] FORM Notice of Entry of Voluntary Dismissal [Cal. Rules of Ct., Rule 3.1390]--Judicial Council Form CIV-120

Click here to view image.

[2] Use of Form

This form is a reproduction of the form adopted by the Judicial Council for use a party who requested dismissal to serve and file notice of entry of the dismissal [*Cal. Rules of Ct., Rule 3.1390*; *see also Code Civ. Proc. §§ 581d* (order of dismissal constitutes judgment), 664.5 (notice of entry of judgment)]. Rule 3.1390 requires the party who requested dismissal to serve on all parties and file notice of entry of the dismissal. The notice must be given on the mandatory Judicial Council form.

The effect of the notice, like the notice of entry of a judgment, is to commence the time within which a memorandum of costs must be served [*Cal. Rules of Ct., Rule 3.1700(a)(1)*; for discussion, see *Ch. 174, Costs and Attorney's Fees, § 174.10* et seq.].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Cross References

For a related form of request for voluntary dismissal, see *§ 212.270*.

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Chapter 212 DISMISSAL
PART V. FORMS
A. Voluntary Dismissal

17-212 California Forms of Pleading and Practice--Annotated §§ 212.272-212.289

AUTHOR: HON. PATTI S. KITCHING BARBARA A. REEVES CHARLES PEREYRA-SUAREZ EDITORIAL CONSULTANTS Justice Kitching, an Associate Justice of the California Court of Appeal, Second Appellate District, Division Three, was formerly a Judge of the Los Angeles Superior Court, where her assignments included the law and motion department. Barbara A. Reeves is a partner with Fried, Frank, Harris, Shriver & Jacobson, Los Angeles, California. Her areas of litigation expertise include intellectual property, securities, fraud, contract, international trade, antitrust, environmental coverage, and white-collar criminal defense. Charles Pereyra-Suarez is a partner in McKenna & Cuneo and heads the Litigation Department in the Los Angeles office. He also has served as a judge pro tem of the Los Angeles County Municipal and Superior Courts since 1986. This article was adapted from California Practice Handbook: Pretrial Disposition (Matthew Bender), Litigation Section, Los Angeles County Bar Associate, Handbook Editor; Hon. Patti S. Kitching, Barbara A. Reeves, Charles Pereyra-Suarez, Contributing Editors.

[Reserved]

§§ 212.272[Reserved]

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B. Involuntary Dismissal For Delay In Prosecution

17-212 California Forms of Pleading and Practice--Annotated § 212.290

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§ 212.290 Proceedings to Dismiss for Delay in Prosecution Before Time to Plead Expires [Code Civ. Proc. § 418.10(a)(3)]--Notice of Motion [Code Civ. Proc. § 418.10(b)]

[1] FORM Proceedings to Dismiss for Delay in Prosecution Before Time to Plead Expires [Code Civ. Proc. § 418.10(a)(3)]--Notice of Motion [Code Civ. Proc. § 418.10(b)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MOTION AND NOTICE OF MOTION TO DIS-
vs.	)	MISS ACTION, SUPPORTING DECLARATION
_____[*name*],	)	OF _____ [*name*], AND MEMOR-
Defendant.	)	ANDUM OF POINTS AND AUTHORITIES
	)	Date: _____
	)	Time: _____
	)	Location: _____

) Judge: _____
Date Action Filed: _____
Trial Date: None Set

_____

To _____ [*name*],
plaintiff, and to _____ [*name*],
his/her attorney of record:

NOTICE IS HEREBY GIVEN that defendant _____ [*name*] appears specially to make this motion only, and so specially appearing, hereby moves and will, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], move, for an order to dismiss the action against this defendant under *Code of Civil Procedure Sections 418.10(a)(3),* _____ [*specify relevant sections of Code Civ. Proc. § 583.110 et seq., e.g.,* §§ 583.210, and 583.250(a)(2)]. The motion will be made on the ground(s) that _____ [*specify delay constituting grounds for dismissal, e.g.,* summons and complaint were not served on this defendant within three years after the complaint was filed].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

MEMORANDUM OF POINTS AND AUTHORITIES
[*Add memorandum of points and authorities here*]

CAUTION:
Points And Authorities Required. A memorandum of points and authorities must be filed and a copy served with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorites* .

[2] Use of Form

This notice of motion is for use by a defendant who has not appeared generally in an action or proceeding to apply for an order dismissing the action for delay in prosecution without making a general appearance [*see Code Civ. Proc. § 418.10(a)(3), (d)*; for discussion of what constitutes a general appearance, *see* Ch. 323, *Jurisdiction: Personal*]. The form may be modified for use by a cross defendant to move to dismiss an action on a cross complaint.

The example used in the form is failure to serve the summons within three years [*see Code Civ. Proc. § 583.210 et seq.*]. For discussion of the motion, including other grounds under *Code Civ. Proc. § 583.110 et seq.*, see *§ 212.80* et seq.

For a form of proposed order granting the motion, *see § 212.301*. For a form of petition for a writ of mandate to review denial of the motion, *see § 212.291*.

[3] Related Motions

Other motions that may be brought at the same time without constituting a general appearance are a motion for an order quashing the service of summons for lack of personal jurisdiction and a motion to stay or dismiss the action on the ground that California is an inconvenient forum [*see Code Civ. Proc. § 418.10(a), (d)*]. For discussion of these motions, see Ch. 323, *Jurisdiction: Personal* .

Any of these motions may also be combined with a *Code Civ. Proc. § 473* or *473.5* motion to set aside an order or judgment, which may be necessary if the plaintiff has taken a default judgment before the defendant brings this motions.

For discussion of Section 473 and 473.5 motions, see Ch. 489, *Relief From Judgments and Orders* .

[4] Supporting Declaration

For forms of declaration supporting this motion, see *§§ 212.293*, *212.294*, and 22.

[5] Service and Filing

[a] Within Time to Plead

A defendant must serve and file the notice of motion no later than the last day of his or her time to plead, unless the court for good cause allows further time [*see Code Civ. Proc. § 418.10(a)*].

[b] Time for Making Motion

The notice of motion under *Code Civ. Proc. § 418.10(a)* must designate, as the time for making the motion, a date not more than 30 days after the filing of the notice [*Code Civ. Proc. § 418.10(b)*; *see also Code Civ. Proc. § 1167.4(a)* (in proceeding for unlawful or forcible detainer or forcible entry, time for making motion is not less than three or more than seven days after the filing of the notice)].

The notice and supporting papers must be filed and copies served at least 16 court days before the hearing, subject to the following extensions. If the notice is served by mail, the required 16-day period is increased by five calendar days if the place of mailing and of address are in California, by 10 calendar days if either the place of mailing or of address is outside California but in the United States, and by 20 calendar days if either the place of mailing or of address is outside the United States. If service is by fax or by Express Mail or other method of overnight delivery, the 16-day period is increased by two calendar days. The court, or judge of the court, may prescribe a shorter time [*Code Civ. Proc. §§ 418.10(b), 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(b)*]. An extension period of two court days may apply in the case of electronic service [*see Code Civ. Proc. § 1010.6(a)(6)*; for discussion, *see Ch. 518, Service of Summons and Papers, § 518.41[8]*].

[6] California Points and Authorities

For memoranda of points and authorities supporting and opposing a motion to dismiss for delay in prosecution, see California Points and Authorities , Ch. 90, *Dismissal*

[7] State Statutes

Time for making motion; filing and service requirements. *Code Civ. Proc. § 418.10(a), (b)*

[8] Cross References

See also *§§ 212.270, 212.295, 212.300*, and *212.301*.

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Chapter 212 DISMISSAL
PART V. FORMS
B. Involuntary Dismissal For Delay In Prosecution

17-212 California Forms of Pleading and Practice--Annotated § 212.291

AUTHOR: HON. PATTI S. KITCHING BARBARA A. REEVES CHARLES PEREYRA-SUAREZ EDITORIAL CONSULTANTS Justice Kitching, an Associate Justice of the California Court of Appeal, Second Appellate District, Division Three, was formerly a Judge of the Los Angeles Superior Court, where her assignments included the law and motion department. Barbara A. Reeves is a partner with Fried, Frank, Harris, Shriver & Jacobson, Los Angeles, California. Her areas of litigation expertise include intellectual property, securities, fraud, contract, international trade, antitrust, environmental coverage, and white-collar criminal defense. Charles Pereyra-Suarez is a partner in McKenna & Cuneo and heads the Litigation Department in the Los Angeles office. He also has served as a judge pro tem of the Los Angeles County Municipal and Superior Courts since 1986. This article was adapted from California Practice Handbook: Pretrial Disposition (Matthew Bender), Litigation Section, Los Angeles County Bar Associate, Handbook Editor; Hon. Patti S. Kitching, Barbara A. Reeves, Charles Pereyra-Suarez, Contributing Editors.

§ 212.291 Proceedings for Writ of Mandate [Code Civ. Proc. § 1086] to Compel Lower Court to Enter Order Dismissing Action for Delay in Prosecution [Code Civ. Proc. § 418.10(c)]--Petition

[1] FORM Proceedings for Writ of Mandate [Code Civ. Proc. § 1086] to Compel Lower Court to Enter Order Dismissing Action for Delay in Prosecution [Code Civ. Proc. § 418.10(c)]--Petition

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
_____ APPELLATE DISTRICT

_____ [*name*],	)	
Petitioner,	)	CIVIL NO. _____
vs.	)	PETITION FOR WRIT OF MANDATE TO COM-
SUPERIOR COURT OF CALIFORNIA, COUNTY	)	PEL TRIAL COURT TO DISMISS ACTION FOR
OF _____ [*name*],	)	DELAY IN PROSECUTION

_____ [*name*], Real Party in In-)
terest.
_____

Petitioner alleges:

1. Petitioner is the defendant in the action described below [, is _____ (*describe capacity, if other than an individual prosecuting this proceeding in his or her own behalf*),] and is a party beneficially interested herein.

2. Respondent is the _____ Court of _____.

3. Real party in interest is the plaintiff in the action described below and is a party beneficially interested in this proceeding.

4. On _____ [*date*], real party in interest filed in respondent court against this petitioner, as defendant, a complaint, numbered _____ in the file and records of the respondent court, for _____ [*specify relief sought and basis of action as alleged in complaint, e.g.*, damages for personal injuries allegedly sustained in an automobile collision]. A copy of this complaint is attached as Exhibit A and made a part hereof. On _____ [*date*], petitioner, as defendant, was [purportedly] served with summons in the action described above in _____ [*city and state*] pursuant to the provisions of Section _____ of the Code of Civil Procedure. The summons was returned to respondent court with proof of service, a copy of which is attached as Exhibit B and made a part hereof.

5. Petitioner made no general appearance in respondent court. Rather, on _____ [*date*], petitioner appeared specially in respondent court and, pursuant to *Code of Civil Procedure Sections 418.10(a)(3)* and _____ [*specify relevant section or sections of Code Civ. Proc. § 583.110 et seq., e.g.,* 583.210 et seq.], moved for an order dismissing the action for delay in prosecution on the ground(s) that _____ [*specify, e.g.,* summons and complaint were not served on this defendant within three years after the complaint was filed]. A copy of petitioner's notice of motion and supporting papers is attached as Exhibit C and made a part hereof. A copy of real party in interest's opposing papers is attached as Exhibit D and made a part hereof. Respondent court denied the motion on _____ [*date*]. A certified copy of the court's order is attached as Exhibit E and made a part hereof.

[*ADD, if petition is to be filed in court of appeal EITHER*]

6. A copy of the transcript of the proceedings at the hearing on the motion Attached as Exhibit F and made a part hereof.

[*OR*]

6. A transcript of the proceedings at the hearing of the motion was ordered on _____ [*date*] and will be transmitted to this court for filing as soon as it is available. It is expected that it will be filed on or before _____ [*date*].

[*OR*]

6. No transcript of the oral proceedings at the hearing on the motion is available for the reason that the proceedings were not reported. However, a fair summary of the proceedings is set forth in the declaration of _____ [*name of counsel*] appended hereto and made a part hereof].

[*CONTINUE*]

7. Respondent court improperly denied the motion to dismiss for delay in prosecution because _____ [*specify reasons as set forth in attached exhibits which were before respondent court*].

8. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law to compel respondent court to dismiss the action for delay in prosecution in that this is the only proceeding authorized by statute to obtain the relief sought.

WHEREFORE, petitioner prays:

1. That this court issue an alternative writ of mandate directing respondent court to make and enter its order dismissing the action or to show cause before this court at a specified time and place why it has not done so;

2. That, on the hearing of this petition and the return to it, if any, this court issue a peremptory writ of mandate directing respondent court to so order;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____ [*name*], am the [attorney for] petitioner in the above-entitled proceeding. I have read the foregoing petition for writ of mandate and know the contents thereof. The same is true of my own knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[*ADD if petition is to be filed in a court of appeal and no transcript of the proceedings at the hearing on the motion in respondent court is available*]

DECLARATION OF COUNSEL

I, _____ [*name*], declare:

I am the attorney for petitioner in this proceeding and represented the petitioner on the motion to dismiss for delay in prosecution] in respondent court. No transcript of those proceedings is available for the reason that _____ [*specify, e.g.*, the proceedings were not reported]. Nevertheless, a fair summary of those proceedings is as follows:

_____ [*Fairly summarize proceedings, including arguments of counsel and the basis of the trial court's decision, if it was stated*].
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

CAUTION:

Petition Must Be Verified. A petition for writ of mandate must be verified [*Code Civ. Proc. § 1086*] on the personal knowledge of the affiant or declarant and not on information and belief [*Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 204, 151 Cal. Rptr. 721* ; *see* also *City of Santa Cruz v. Municipal Court (1989) 49 Cal. 3d 74, 87, 260 Cal. Rptr. 520, 776 P.2d 222]* . It must also, when presented for filing, be accompanied by proof of service of a copy of the petition on the respondent and real party in interest (except when the court, in its discretion and for good cause, grants the application for thewrit ex parte) [*Code Civ. Proc. § 1107*]. For the method of serving the petition, see *Code Civ. Proc. §§ 1010-1020, 1107*.

The petition must be accompanied by a memorandum [*Cal. Rules of Ct., Rule 8.486(a)(5)*]. The form, content, page limitations, and other requirements of *Cal. Rules of Ct., Rule 8.204* apply to petitions writ of mandate or prohibition [*Cal. Rules of Ct., Rule 8.486(a)(6)*]. If the petition seeks review of trial court proceedings that are also the subject of a pending appeal, the notice "Related Appeal Pending" must appear on the cover of the petition and the first paragraph of the petition must state the appeal's title, trial court docket number, and any reviewing court docket number [*Cal. Rules of Ct., Rule 8.486(a)(3)*].

[2] Use of Form

This form is for use to petition a reviewing court for a writ of mandate to compel the trial court to enter an order dismissing the action for delay in prosecution, after the trial court has denied petitioner's motion to do so [*Code Civ. Proc. § 418.10(c)*; *see § 212.83[1]*]. For a form of petition for a writ of mandate to review denial of a motion to quash service of summons, a motion to stay or dismiss based on inconvenient forum, or both, which may be combined with this petition, see Ch. 323, *Jurisdiction: Personal* .

[3] Transcript

Cal. Rules of Ct., Rule 8.486(b) requires one of the alternative Paragraphs 6 and the appended declaration of counsel to be included when the petition is to be filed in a court of appeal or the Supreme Court. If the petition is to be filed in a superior court, counsel should check the local rules to determine whether similar or other requirements are imposed on

the writ petition. Even absent such rules, however, counsel may wish to follow the requirements of a petition filed in an appellate court to show that the petition is meritorious, because, without such a showing, the petition may be denied out of hand without a hearing. For further discussion, see § 212.29[4].

[4] Requirements When Petition Is Filed in Appellate Court

Whenever a writ petition filed in a court of appeal or the Supreme Court seeks review of a trial court ruling, it must be accompanied by a record adequate to permit the review, including the following [*Cal. Rules of Ct., Rule 8.486(b)*; *see also Cal. Rules of Ct., Rule 8.486(c)* (format for documents and exhibits)]:

- A copy of the order from which relief is sought.
- Copies of all documents and exhibits.
- Copies of all other documents submitted to the trial court that are necessary for a complete understanding of the case and the ruling.
- A transcript of the proceedings leading to the order below or a declaration by counsel that a transcript has been ordered and is expected to be filed on a certain date, or, if no transcript is available, a declaration by counsel explaining why it is unavailable and fairly summarizing the proceedings, including counsels' arguments and the basis of the trial court's decision, if stated.

[5] Notice of Filing Petition

The defendant must serve notice of this petition on the opposing parties and file it with the trial court [*see Code Civ. Proc. § 418.10(c)*; *see § 212.292*].

[6] California Points and Authorities

For memoranda of points and authorities supporting and opposing a petition for writ of mandate generally, see California Points and Authorities , Ch. 150, *Mandate and Prohibition*

[7] State Statutes

Mandate as remedy to review trial court order denying motion to dismiss action for delay in prosecution when defendant has not made general appearance in action. 418.10(a)(3), (c)

Mandate generally. *Code Civ. Proc. §§ 1084 et seq., 1107 et seq.*

[8] Cross References

For related forms, *see §§ 212.291* and *212.292*.

For further discussion of mandate proceedings generally, including procedure, format requirements, and essential allegations, see Ch. 358, *Mandate and Prohibition*

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§ 212.292 Proceedings for Writ of Mandate [Code Civ. Proc. § 1086] to Compel Lower Court to Enter Order Dismissing Action for Delay in Prosecution [Code Civ. Proc. § 418.10(c)]--Notice of Filing of Petition

[1] FORM Proceedings for Writ of Mandate [Code Civ. Proc. § 1086] to Compel Lower Court to Enter Order Dismissing Action for Delay in Prosecution [Code Civ. Proc. § 418.10(c)]--Notice of Filing of Petition
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF FILING OF PETITION FOR WRIT OF
Defendant.	)	MANDATE
	)	
	)	

To _____ [*name*], plaintiff, and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that defendant has filed a petition in the _____ [*title of court*] for a writ of mandate to compel the above-named court to enter its order dismissing the above-entitled action for delay in prosecution pursuant to *Code of Civil Procedure Sections 418.10(a)(3)* and _____ [*specify relevant section or sections of Code Civ. Proc. § 583.110 et seq., e.g.,* 583.210 et seq.] on the ground(s) that _____ [summons and complaint were not served on this defendant within three years after the complaint was filed]. The petition was filed on _____ [*date*].
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

This form is for use to give plaintiff notice of the filing of the petition for writ of mandate set out in *see § 212.291* [*see Code Civ. Proc. § 418.10(c)*; *see* discussion in Introduction, Subpart B, Motion to Dismiss Prior Prior to Answering, under--Notice Extends Time to Respond,].

[3] Cross References

For a related form, *see § 212.291*.

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§ 212.293 Proceedings for Mandatory Dismissal of Action by Defendant or Interested Party for Failure to Complete Service Three Years and/or File Proof of Service Within 60 Days Thereafter [Code Civ. Proc. §§ 583.210, 583.250(a)(2)]--Notice of Motion and Declaration

[1] FORM Proceedings for Mandatory Dismissal of Action by Defendant or Interested Party for Failure to Complete Service Three Years and/or File Proof of Service Within 60 Days Thereafter [Code Civ. Proc. §§ 583.210, 583.250(a)(2)]--Notice of Motion and Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION TO DIS-
Plaintiff,	)	MISS ACTION, SUPPORTING DECLARATION
vs.	)	OF _____ [*name*], AND SUP-
_____ [*name*],	)	PORTING MEMORANDUM
Defendant.	)	Date: _____

) Time: _____
) Location: _____
) Judge: _____
Date Action Filed: _____
Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff or (defendant and) cross complainant] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant or (plaintiff and) cross defendant] _____ [*name*] will, and hereby does, move for an order to dismiss the above-entitled action pursuant to *Code of Civil Procedure Sections 583.210* and *583.250(a)(2)*. The motion is made on the ground that service of the _____ [summons and complaint *or* (summons and) cross complaint] in the above-entitled action was not made within three years after the filing of the _____ [complaint *or* cross complaint] and the proof of service of the summons was not filed within 60 days after the time that the _____ [summons and complaint *or* (summons and) cross complaint] was required to be served.

The motion is based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed with it, on the records and file in this action, and on any evidence that may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* the moving party and defendant in the above-entitled action *or other statement as appropriate*].

[*SET FORTH, in successively numbered paragraphs, facts showing that the mandatory period for completing service has elapsed, even when taking into account any known stipulated extensions of time or time excluded from calculation, and that this delay is unexcused or unreasonable under the circumstances (e.g., because the defendant or cross defendant was amenable to process throughout the statutory period), e.g.:*]

2. I was served with summons and a copy of the complaint in the above-entitled action on _____ [*date*], after a period of more than three years from the commencement of this action on _____ [*date*

].

3. I was amenable to process throughout the period between commencement of the above-entitled action and service of the summons and complaint, as follows:

a. I was regularly employed as a _____ [*specify occupation*] at _____ [*specify place of employment*] prior to _____ [*date of filing*], and until _____ [*date*].

b. From _____ [*date*], until _____ [*date*], I resided with my family continually and uninterruptedly at _____ [*address or other location*], California, having left my forwarding address with _____ [*name of employer*] on terminating my employment.

c. I have owned several automobiles since _____ [*date*], all of which were registered in my name in the records of the Department of Motor Vehicles showing my residence as set forth above.

d. I have had a telephone at this address which is listed in my name in the telephone book.

e. At that address I have continually received the service provided by _____Gas Company, _____ Water Company, and _____ Electric Company and I am the named subscriber.

f. I have been a regularly licensed _____ [*specify occupation*] since prior to _____ [*date*], and have yearly renewed my license asrequired by the state, which license is and always has been a matter of record with the State of California.

g. Since _____ [*date*], I have not been out of the state and have never secreted myself in any manner to avoid identification, location, or process of the court.

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion*]

CAUTION:

Points and Authorities Required. A memorandum must be filed and a copy served with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005, 1010*].

[2] Use of Form

This form is for use to give notice of a motion for mandatory dismissal of an action under *Code Civ. Proc. §§*

583.210-583.250 on the grounds that the defendant or cross defendant was not served within three years after the filing of the complaint or cross complaint and that the proof of service of the summons was not filed within 60 days thereafter [*Code Civ. Proc. §§ 583.210, 583.250(a)(2)*; *see Code Civ. Proc. § 583.110(a)* (action includes cross complaint)].

The attached form of declaration is for use to support a motion to dismiss an action as provided in the notice of motion. It may also be used to support a motion to dismiss under *Code Civ. Proc. §§ 583.410(a), 583.420(a)(1)* and *Cal. Rules of Ct., Rule 3.1342* (discretionary dismissal for delay in prosecution, which cannot be granted until one of several enumerated conditions has occurred, one of which is failure to serve process and file the return within two years after the action was commenced against the defendant or cross defendant) [*see § 212.296*]. The form may also be used to support defendant's response to plaintiff's opposition to the motion [*see Cal. Rules of Ct., Rules 3.1300(a), 3.1342(c)*].

A declaration may be used to support a motion in lieu of an affidavit [*see Code Civ. Proc. § 2015.5*].

For a description of the steps to be followed in undertaking this motion, see the Procedural Checklist, *above*. For a form of proposed order for use with the foregoing form, *see § 212.303*.

[3] Contents of Form

[a] Notice of Motion

The form of notice of motion is based on the grounds that the defendant or cross defendant was not served within three years after the filing of the complaint or cross complaint and that the proof of service of the summons was not filed within 60 days thereafter [*Code Civ. Proc. §§ 583.210, 583.250(a)(2)*]. Because mandatory dismissal may be premised on either of these grounds, the form may be modified, for example, to seek dismissal of an action on the sole ground that the proof of service of the summons was not filed within 60 days after the mandatory three-year period for service of the summons and complaint [*Code Civ. Proc. §§ 583.210(b), 583.250(a)(2)*]. Dismissal under *Code Civ. Proc. §§ 583.210-583.250* is discussed in *§ 212.100* et seq.

[b] Supporting Declaration

The attached declaration establishes that no time should be excluded in computing the applicable time period for service on the ground that the defendant or cross defendant was not amenable to process [*see Code Civ. Proc. §§ 583.240(a), 583.420(b)*; see also *§ 212.104[1]*].

If the declaration is made in support of a motion for discretionary dismissal under *Code Civ. Proc. §§ 583.410(a), 583.420(a)(1)*, additional facts should be provided, in this or in additional declarations, to show that the delay was unreasonable and justifies dismissal under all the circumstances of the case [*see Cal. Rules of Ct., Rule 3.1342(e)*; for further discussion see *§§ 212.152 -212.153*].

[c] Format of Supporting Papers

The form illustrates supporting papers attached to the notice of motion. If the supporting papers not attached to notice of motion, they must have conforming captions [*see Cal. Rules of Ct., Rule 3.1110(b), 3.1115*].

[4] Alternative Notice of Motion for Discretionary Dismissal

This form may be coupled with a notice of motion for discretionary dismissal under *Code Civ. Proc. §§ 583.410-583.430* [*see § 212.150 et seq. and § 212.296*], thus giving the trial court the option to grant a discretionary dismissal if it finds that dismissal is not yet mandatory.

[5] Motion by Nonparty

A motion for dismissal of an action under *Code Civ. Proc. §§ 583.210-583.250* may be made by any party interested in the action whether named as a party or not [*Code Civ. Proc. § 583.250(a)(2)*]. Thus, this form may be modified for use by an interested person other than a defendant or crossdefendant, such as, for example, a person who is potentially subject to being named in an action by the substitution of his or her true name in place of a fictitiously named defendant, but who was never actually named or served before the expiration of the mandatory period for service [*see § 212.194[8][e][iii] above*].

[6] Service and Filing

The notice and supporting papers must be filed and copies served at least 16 court days before the hearing, subject to the following extensions. If service is by mail, the required 16-day period is increased by five calendar days if the place of mailing and of address are in California, by 10 calendar days if either the place of mailing or of address is outside California but in the United States, and by 20 calendar days if either the place of mailing or of address is outside the United States. If service is by fax or by Express Mail or other method of overnight delivery, the 16-day period is increased by two calendar days. The court, or judge of the court, may prescribe a shorter time [*Code Civ. Proc. §§ 583.250(a)(2), 1005(a)(13), (b)*; *Cal. Rules of Ct., Rule 3.1300(b)*]. An extension period of two court days may apply in the case of electronic service [*see Code Civ. Proc. § 1010.6(a)(6)*; for discussion, *see Ch. 518, Service of Summons and Papers, § 518.41[8]*].

[7] Cross References

For additional forms of notice of motion, see Ch. 372, *Motions and Orders*

[8] California Points and Authorities

For memoranda of points and authorities in support of a motion to dismiss, see California Points and Authorities , Ch. 90, *Dismissal*

[9] State Statutes

Defendant as required to be served within three years. *Code Civ. Proc. § 583.210(a)*

Proof of service of the summons must be filed within 60 days after the time the summons and complaint must be served upon a defendant. *Code Civ. Proc. § 583.210(b)*

Time requirements of *Code Civ. Proc. § 583.210* as not applicable if defendant so stipulates or makes general appearance. *Code Civ. Proc. § 583.220*

Extension of *Code Civ. Proc. § 583.210* time requirements by written stipulation or oral agreement entered in minutes of court or transcript. *Code Civ. Proc. § 583.230*

Suspension of *Code Civ. Proc. § 583.210* time requirements. *Code Civ. Proc. § 583.240*

Mandatory dismissal when *Code Civ. Proc. § 583.210* time requirements are not met. *Code Civ. Proc. § 583.250(a)*

Requirements of *Code Civ. Proc. §§ 583.210-583.250* as mandatory and as not subject to extension, excuse, or exception except as provided by statute. *Code Civ. Proc. § 583.250(b)*

[10] Text References

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, § 309 (4th ed. 1997)

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Volume 17: Defaults and Default Judgements thru Duress, Menace, Fraud, Undue Influence, and Mistake-Chs. 205-219
Chapter 212 DISMISSAL
PART V. FORMS
B. Involuntary Dismissal For Delay In Prosecution

17-212 California Forms of Pleading and Practice--Annotated § 212.294

AUTHOR: HON. PATTI S. KITCHING BARBARA A. REEVES CHARLES PEREYRA-SUAREZ EDITORIAL CONSULTANTS Justice Kitching, an Associate Justice of the California Court of Appeal, Second Appellate District, Division Three, was formerly a Judge of the Los Angeles Superior Court, where her assignments included the law and motion department. Barbara A. Reeves is a partner with Fried, Frank, Harris, Shriver & Jacobson, Los Angeles, California. Her areas of litigation expertise include intellectual property, securities, fraud, contract, international trade, antitrust, environmental coverage, and white-collar criminal defense. Charles Pereyra-Suarez is a partner in McKenna & Cuneo and heads the Litigation Department in the Los Angeles office. He also has served as a judge pro tem of the Los Angeles County Municipal and Superior Courts since 1986. This article was adapted from California Practice Handbook: Pretrial Disposition (Matthew Bender), Litigation Section, Los Angeles County Bar Associate, Handbook Editor; Hon. Patti S. Kitching, Barbara A. Reeves, Charles Pereyra-Suarez, Contributing Editors.

§ 212.294 Proceedings for Mandatory Dismissal of Action by Defendant [Code Civ. Proc. § 583.360(a)]--Failure to Bring Action to Trial Within Five Years [Code Civ. Proc. § 583.310]--Notice of Motion and Declaration

[1] FORM Proceedings for Mandatory Dismissal of Action by Defendant [Code Civ. Proc. § 583.360(a)]--Failure to Bring Action to Trial Within Five Years [Code Civ. Proc. § 583.310]--Notice of Motion and Declaration
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO DISMISS ACTION, SUPPORTING DECLARATION OF _____ [*name*], AND SUPPORTING MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____

) Judge: _____
Date Action Filed: _____
Trial Date: _____

_____

To _____ [plaintiff *or* (defendant and) cross complaint] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [defendant *or* (plaintiff and) cross defendant] _____ [*name*] will, and hereby does, move for an order to dismiss the above-entitled action pursuant to *Code of Civil Procedure Sections 583.310* and *583.360(a)*. The motion is made on the ground that _____ [plaintiff *or* cross complainant] has failed to prosecute the above-entitled action and to bring it to trial within five years after it was commenced against the _____ [defendant *or* cross defendant].

The motion is based on this notice of motion, on the declaration(s) of _____ [*name(s*)] and the supporting memorandum served and filed with it, on the records and file in this action, and on any evidence that may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*State facts showing that the applicable mandatory period for bringing the action to trial has elapsed, even when taking into account any known stipulated extensions of time or time excluded from calculation, e.g.,* This action was commenced against defendant in the above-entitled court on _____ (*date*). This court lacked jurisdiction to proceed with this action from _____ (*date*) until _____ (*date*), pending plaintiff's appeal from the order of _____ (*date*), sustaining defendant's demurrer without leave to amend. The action was not brought to trial on or before _____ (*date*), a period of more than five years from the date that the action was commenced, excluding the period of time during which the court lacked jurisdiction over the action. No stipulation to continue this action beyond that time has been filed].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion*]

CAUTION:
Points and Authorities Required. A memorandum of points and authorities must be filed and a copy served with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005, 1010*].

[2] Use of Form

This form is for use to give notice of a motion by a defendant or cross defendant for mandatory dismissal for failure to bring an action to trial within five years [*Code Civ. Proc. §§ 583.310, 583.360(a)*; *see Code Civ. Proc. § 583.110(a)* (action includes cross complaint)]. *Code Civ. Proc. § 583.360(a)* requires notice to be given to the parties on a motion by defendant to dismiss under *Code Civ. Proc. §§ 583.310-583.360*. Dismissal under *Code Civ. Proc. §§ 583.310-583.360* is discussed in *§ 212.120* et seq.].

The attached form of declaration is for use to support a motion to dismiss an action as provided in the notice of motion. The declaration shows thatthe applicable time period, after which dismissal is required, has elapsed, even after accounting for any statutory period of extension or exclusion which may have applied under the particular circumstances of the case [*Code Civ. Proc. § 583.360(b)*; *see* discussion in Introduction, Subpart D, particularly under Extension of Time for Trial by Stipulation and Exclusions From Computation of Time Period,]. A declaration may be used to support the motion in lieu of an affidavit [*see Code Civ. Proc. § 2015.5*].

For a description of the steps to be followed in undertaking this motion, see the Procedural Checklist, *above*. The form may be coupled with a notice of motion for discretionary dismissal under *Code Civ. Proc. §§ 583.410-583.430* [*see* Introduction, Subpart D, *above*, and *see § 212.296*], thus giving the trial court the option to grant a discretionary dismissal if it finds that dismissal is not yet mandatory.

For a form of proposed order for use with the foregoing form, *see § 212.304*.

[3] Service and Filing

The notice and supporting papers must be filed and copies served at least 16 court days before the hearing, subject to the following extensions. If service is by mail, the required 16-day period is increased by five calendar days if the place of mailing and of address are in California, by 10 calendar days if either the place of mailing or of address is outside California but in the United States, and by 20 calendar days if either the place of mailing or of address is outside the United States. If service is by fax or by Express Mail or other method of overnight delivery, the 16-day period is increased by two calendar days. The court, or judge of the court, may prescribe a shorter time [*Code Civ. Proc. §§ 583.360(a), 1005(a)(13), (b)*; *Cal. Rules of Ct., Rule 3.1300(b)*]. An extension period of two court days may apply in the case of electronic service [*see Code Civ. Proc. § 1010.6(a)(6)*; for discussion, *see Ch. 518, Service of Summons and Papers, § 518.41[8]*].

[4] State Statutes

Action as required to be brought to trial within five years. *Code Civ. Proc. § 583.310*

Extension of *Code Civ. Proc. §§ 583.310-583.360* time requirements as subject to extension by written stipulation or oral agreement entered in minutes of court or transcript. *Code Civ. Proc. § 583.330*

Suspension of *Code Civ. Proc. §§ 583.310-583.360* time requirements. *Code Civ. Proc. §§ 583.340, 583.350*

Dismissal as required on court's or defendant's motion when time requirements of *Code Civ. Proc. § 583.310* are not met. *Code Civ. Proc. § 583.360(a)*

Requirements of *Code Civ. Proc. §§ 583.310-583.360* as mandatory and as not subject to extension, excuse, or exception except by statute. *Code Civ. Proc. § 583.360(b)*

Limited tolling of *Code Civ. Proc. § 583.310* period by judicial arbitration. *Code Civ. Proc. § 1141.17*

[5] Text References

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, § 330 et seq. (4th ed. 1997)

[6] Cross References

For a related form, *see § 212.293*.

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Chapter 212 DISMISSAL
PART V. FORMS
B. Involuntary Dismissal For Delay In Prosecution

17-212 California Forms of Pleading and Practice--Annotated § 212.295

AUTHOR: HON. PATTI S. KITCHING BARBARA A. REEVES CHARLES PEREYRA-SUAREZ EDITORIAL CONSULTANTS Justice Kitching, an Associate Justice of the California Court of Appeal, Second Appellate District, Division Three, was formerly a Judge of the Los Angeles Superior Court, where her assignments included the law and motion department. Barbara A. Reeves is a partner with Fried, Frank, Harris, Shriver & Jacobson, Los Angeles, California. Her areas of litigation expertise include intellectual property, securities, fraud, contract, international trade, antitrust, environmental coverage, and white-collar criminal defense. Charles Pereyra-Suarez is a partner in McKenna & Cuneo and heads the Litigation Department in the Los Angeles office. He also has served as a judge pro tem of the Los Angeles County Municipal and Superior Courts since 1986. This article was adapted from California Practice Handbook: Pretrial Disposition (Matthew Bender), Litigation Section, Los Angeles County Bar Associate, Handbook Editor; Hon. Patti S. Kitching, Barbara A. Reeves, Charles Pereyra-Suarez, Contributing Editors.

§ 212.295 Proceedings for Mandatory Dismissal of Action by Defendant [Code Civ. Proc. § 583.360(a)]--Failure to Bring Action to New Trial Within Three Years [Code Civ. Proc. § 583.320(a)]--Notice of Motion and Declaration

[1] FORM Proceedings for Mandatory Dismissal of Action by Defendant [Code Civ. Proc. § 583.360(a)]--Failure to Bring Action to New Trial Within Three Years [Code Civ. Proc. § 583.320(a)]--Notice of Motion and Declaration
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION TO DIS-
Plaintiff,	)	MISS ACTION, SUPPORTING DECLARATION
vs.	)	OF _____ [*name*], AND SUP-
_____ [*name*],	)	PORTING MEMORANDUM
Defendant.	)	Date: _____
	)	Time: _____

) Location: _____
) Judge: _____
Date Action Filed: _____
Trial Date: _____

_____

To _____ [plaintiff *or* (defendant and) cross complainant] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [defendant *or* (plaintiff and) cross defendant] _____ [*name*] will, and hereby does, move for an order to dismiss the above-entitled action pursuant to *Code of Civil Procedure Sections 583.320(a)* and *583.360(a)*. The motion is made on the ground that _____ [plaintiff *or* cross complainant] has failed to prosecute the above-entitled action and to bring it again to trial within three years after the date _____ [of entry herein of the _____ (disagreement of the jury *or* order declaring mistrial *or* order granting new trial) *or* on which remittitur was filed by the clerk of the trial court after an appeal in which _____ (the judgment was reversed and the cause remanded for a new trial *or* an order granting a new trial was affirmed)].

The motion is based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed with it, on the records and file in this action, and on any evidence that may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*State facts showing that the applicable mandatory period for bringing the action to trial has elapsed, even when taking into account any known stipulated extensions of time or time excluded from calculation, e.g.,* This action was commenced against defendant in the above-entitled court on _____ (*date*). This court lacked jurisdiction to proceed with this action from _____ (*date*) until _____ (*date*), pending plaintiff's appeal from the order of _____ (*date*), sustaining defendant's demurrer without leave to amend. The action was not brought to trial on or before _____ (*date*), a period of more than three years from the date that the action was commenced, excluding the period of time during which the court lacked jurisdiction over the action. No stipulation to continue this

action beyond that time has been filed].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion*]

CAUTION:
Points and Authorities Required. A memorandum be filed and a copy served with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005, 1010*].

[2] Use of Form

This form is for use to give notice of a motion by a defendant or cross defendant for mandatory dismissal for failure to bring an action again to trial within three years [*Code Civ. Proc. §§ 583.320(a), 583.360(a)*; *see Code Civ. Proc. § 583.110(a)* (action includes cross complaint)]. *Code Civ. Proc. § 583.360(a)* requires notice to be given to the parties on a motion by defendant to dismiss under *Code Civ. Proc. §§ 583.310-583.360*.Dismissal under *Code Civ. Proc. §§ 583.310-583.360* is discussed in *§ 212.120* et seq.

The attached form of declaration is for use to support a motion to dismiss an action as provided in the notice of motion. The declaration shows that the applicable time period, after which dismissal is required, has elapsed, even after accounting for any statutory period of extension or exclusion which may have applied under the particular circumstances of the case [*Code Civ. Proc. § 583.360(b)*; *see § 212.120* et seq., particularly §§ 212.123 and 212.125]. A declaration may be used to support the motion in lieu of an affidavit [*see Code Civ. Proc. § 2015.5*].

For a description of the steps to be followed in undertaking this motion, see the Procedural Checklist, *above*. For a form of proposed order for use with the form, *see § 212.305*.

The form may be coupled with a notice of motion for discretionary dismissal under *Code Civ. Proc. §§ 583.410-583.430* [*see § 212.150 et seq. and § 212.296*], thus giving the trial court the option to grant a discretionary dismissal if it finds that dismissal is not yet mandatory.

[3] Service and Filing

The notice and supporting papers must be filed and copies served at least 16 court days before the hearing, subject to the following extensions. If service is by mail, the required 16-day period is increased by five calendar days if the place of mailing and of address are in California, by 10 calendar days if either the place of mailing or of address is outside California but in the United States, and by 20 calendar days if either the place of mailing or of address is outside the United States. If service is by fax or by Express Mail or other method of overnight delivery, the 16-day period is increased by two calendar days. The court, or judge of the court, may prescribe a shorter time [*Code Civ. Proc. §§ 583.360(a), 1005(a)(13), (b)*; *Cal. Rules of Ct., Rule 3.1300(b)*]. An extension period of two court days may apply in the case of electronic service [*see Code Civ. Proc. § 1010.6(a)(6)*; for discussion, *see Ch. 518, Service of Summons and Papers, § 518.41[8]*].

[4] State Statutes

Action as required to be brought again to trial within three years after mistrial, grant of new trial, or remand for new trial. *Code Civ. Proc. § 583.320*

[5] Cross References

For related forms, *see §§ 212.293* and *212.294*.

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Chapter 212 DISMISSAL
PART V. FORMS
B. Involuntary Dismissal For Delay In Prosecution

17-212 California Forms of Pleading and Practice--Annotated § 212.296

AUTHOR: HON. PATTI S. KITCHING BARBARA A. REEVES CHARLES PEREYRA-SUAREZ EDITORIAL CONSULTANTS Justice Kitching, an Associate Justice of the California Court of Appeal, Second Appellate District, Division Three, was formerly a Judge of the Los Angeles Superior Court, where her assignments included the law and motion department. Barbara A. Reeves is a partner with Fried, Frank, Harris, Shriver & Jacobson, Los Angeles, California. Her areas of litigation expertise include intellectual property, securities, fraud, contract, international trade, antitrust, environmental coverage, and white-collar criminal defense. Charles Pereyra-Suarez is a partner in McKenna & Cuneo and heads the Litigation Department in the Los Angeles office. He also has served as a judge pro tem of the Los Angeles County Municipal and Superior Courts since 1986. This article was adapted from California Practice Handbook: Pretrial Disposition (Matthew Bender), Litigation Section, Los Angeles County Bar Associate, Handbook Editor; Hon. Patti S. Kitching, Barbara A. Reeves, Charles Pereyra-Suarez, Contributing Editors.

§ 212.296 Proceedings for Discretionary Dismissal of Action by Defendant [Code Civ. Proc. §§ 583.410(a), 583.420(a); Cal. Rules of Ct., Rules 3.1340, 3.1342]--Notice of Motion and Declaration

[1] FORM Proceedings for Discretionary Dismissal of Action by Defendant [Code Civ. Proc. §§ 583.410(a), 583.420(a); Cal. Rules of Ct., Rules 3.1340, 3.1342]--Notice of Motion and Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO DISMISS ACTION, SUPPORTING DECLARATION OF _____ [*name*], AND SUPPORTING MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept: _____

) Judge: _____
Date Action Filed: _____
Trial Date: _____

_____

To _____ [*identify party, e.g.,*] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [defendant *or* (plaintiff and) cross defendant] _____ [*name*] will, and hereby does, move for an order to dismiss the above-entitled action pursuant to *Code of Civil Procedure Sections 583.410(a)* and *583.420(a)* _____ [(1) *or* (2) *or* (3)]. The motion is made on the ground that _____ [plaintiff *or* cross complainant] has failed to exercise reasonable diligence in prosecuting the above-entitled action and _____ [*specify elapse of minimum period of delay, as applicable, under Code Civ. Proc. § 583.420(a)(1), (2), or (3), e.g.,* has failed to make service within two years after the action was commenced against the _____ (defendant *or* cross defendant)].

The motion is based on this notice of motion, on the declaration(s) of _____ [*name(s*)] and the supporting memorandum served and filed with it, on the records and file in this action, and on any evidence that may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for the _____ [defendant *or* cross defendant] _____ [*name, if more than one defendant or cross defendant*] in the above-entitled action.

2. The _____ [*specify subject matter of action, e.g.,* accident] that is the subject matter of the [cross] complaint occurred on _____ [*date*]; the [cross] complaint in this matter was filed on _____ [*date*]; summons and [cross] complaint were served on [this] _____ [defendant *or* cross defendant] on _____ [*date*]; at all times during the years _____ through _____, [this] _____ [defendant *or* cross defendant] was present, residing, and maintaining his/her usual place of business in _____ [*city*], _____ County, California, and was at all times open and accessible to service of process.

[*SET FORTH facts showing prejudice such as those in Paragraphs 3-6*]

3. Following the advice received from _____ [plaintiff's *or* cross complainant's] counsel on _____ [*date*], I assigned an investigator to locate two witnesses and certain documentary evidence, indicating that the sole and proximate cause of the injuries and resultant damage to _____ [plaintiff *or* cross complainant] was his/her own negligence. I have a statement from one of the witnesses concerning the complained of repairs to the vehicle owned by _____ [plaintiff *or* cross complainant] which indicates that this _____ [defendant *or* cross defendant] could not be responsible for injury, if any, or damage, if any, suffered. [A copy of this statement is attached as Exhibit A and made a part hereof.]

4. I am informed and believe and, therefore, declare that the second witness was the sole eyewitness to the occurrence out of which the alleged injuries and damage, if any, were occasioned.

5. The documentary evidence referred to is the accident investigation report made out by the California Highway Patrol, which report has been destroyed as a matter of regular producer by the California Highway Patrol as more than _____ years have passed since the accident occurred.

6. Because of the destruction of this evidence, the investigator I assigned has informed me that he/she is now unable to locate [either of] the witness(es) referred to above or the documentary evidence.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion*]

CAUTION:
Points and Authorities Required. A memorandum must be filed and a copy served with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005, 1010*].

[2] Use of Form

This form is for use to give notice of a motion by a defendant or cross defendant for discretionary dismissal of an action under *Code Civ. Proc. §§ 583.410-583.430* on the ground that the opposing party has failed to use reasonable diligence, resulting in a delay in prosecution which justifies dismissal under the circumstances [*Code Civ. Proc. § 583.410(a)*; *see Code Civ. Proc. § 583.110(a)* (action includes cross complaint)].

The attached form of declaration is for use to support a motion to dismiss an action as provided in the notice of motion. The declaration establishes the loss of evidence, prejudicing the defendant's or cross defendant's defense of the action, as a factor supporting a grant of discretionary dismissal [*see Cal. Rules of Ct., Rule 3.1342(e)*; for further discussion see Introduction, Subpart E, under §§ 212.152, and 212.153]. A declaration may be used to support the motion in lieu of an affidavit [*see Code Civ. Proc. § 2015.5*].

The criteria and procedure for discretionary dismissal under *Code Civ. Proc. §§ 583.410-583.430* is further discussed in

the Introduction, Subpart E, *above*. For an outline of the steps to be followed in undertaking this motion, see the Procedural Checklist, *above*.

For a form of proposed order for use with the foregoing form, *see § 212.306*.

[3] When Motion May Be Made

The motion may be made only after one of the following periods of minimum delay has elapsed:

- Service has not been completed within two years after the action was filed against the defendant or cross defendant [*Code Civ. Proc. § 583.420(a)(1)*].

- The action has not been brought to trial or conditionally settled within two years after the action was commenced [*Code Civ. Proc. § 583.420(a)(2)(B)*; *Cal. Rules of Ct., Rule 3.1340(a)*].

- The action has not been brought to new trial within two years [*Code Civ. Proc. § 583.420(a)(3)*].

[4] Service and Filing

The notice must be served and filed at least 45 days before the date set for hearing [*Cal. Rules of Ct., Rule 3.1342(a)*].

[5] State Statutes

Court's discretionary power to dismiss action for delay in prosecution. *Code Civ. Proc. § 583.410*

Time before which court cannot dismiss action under *Code Civ. Proc. § 583.410*. *Code Civ. Proc. § 583.420(a)*

Time periods under *Code Civ. Proc. § 583.420(a)* as computed in same manner as comparable periods under *Code Civ. Proc. §§ 583.210-583.360*. *Code Civ. Proc. § 583.420(b)*

Conditional grant or denial of discretionary dismissal under *Code Civ. Proc. § 583.410*. *Code Civ. Proc. § 583.430*.

[6] California Rules of Court

Discretionary dismissal by court on its own motion or on motion of defendant for failure to bring action to trial or to conditional settlement within two years after action was commenced against defendant; notice required for dismissal by court on its own motion. *Cal. Rules of Ct., Rule 3.1340(a)*

Procedures and criteria governing discretionary dismissal. *Cal. Rules of Ct., Rule 3.1342*

[7] Text References

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, § 425 et seq. (4th ed. 1997)

[8] Cross References

For related forms, *see §§ 212.293 -212.295*.

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Chapter 212 DISMISSAL
PART V. FORMS
B. Involuntary Dismissal For Delay In Prosecution

17-212 California Forms of Pleading and Practice--Annotated § 212.297

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§ 212.297 Proceedings for Discretionary Dismissal of Action by Plaintiff or Defendant Under Nonstatutory Inherent Power to Dismiss for Delay in Prosecution at Trial Under Nonstatutory Inherent Power to Dismiss--Notice of Motion

[1] FORM Proceedings for Discretionary Dismissal of Action by Plaintiff or Defendant Under Nonstatutory Inherent Power to Dismiss for Delay in Prosecution at Trial Under Nonstatutory Inherent Power to Dismiss--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO DIS-
vs.	)	MISS ACTION, SUPPORTING DECLARATION
_____ [*name*],	)	OF _____ [*name*], AND SUP-
Defendant.	)	PORTING MEMORANDUM
	)	Date: _____

) Time: _____
) Location:
) Judge: _____
Date Action Filed: _____
Trial Date: _____

_____

To plaintiff _____ [*name*]
and to plaintiff's attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter can be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], defendant _____ [*name*] will, and hereby does, move for an order to dismiss the above-entitled action. The motion will be made on the ground that _____ [*specify ground showing that there is an absence of diligent prosecution and that no applicable dismissal statute exists or that the period for compliance specified in the applicable mandatory dismissal statute has not yet expired, e.g.,* plaintiff has failed to prosecute diligently the above-entitled action during trial].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name*(*s*)] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

CAUTION:

A supporting memorandum must be filed and a copy served with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005, 1010*].

[2] Use of Form

This form is for use to give notice of a motion for dismissal based on the inherent discretionary power of the trial court to dismiss an action for lack of prosecution. The authority for dismissal on this basis is discussed in the Introduction, Subpart A, under § 212.62.

[3] Decisions

Inherent power without aid of legislation to dismiss action for lack of prosecution. *Overaa v. Keeney (1915) 169 Cal. 628, 630-631, 147 P. 466* ; *Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn. (1977) 71 Cal. App. 3d 706, 712-713, 139 Cal. Rptr. 651*

Discretionary dismissal after trial commences. *Karras v. Western Title Ins. Co. (1969) 270 Cal. App. 2d 753, 757, 76*

Cal. Rptr. 141

[4] Text References

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, § 429 et seq. (4th ed. 1997)

[5] Cross References

For a related form, *see § 212.293*.

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B. Involuntary Dismissal For Delay In Prosecution

17-212 California Forms of Pleading and Practice--Annotated § 212.298

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§ 212.298 Stipulation Extending Time Within Which Action Must Be Brought to Trial [Code Civ. Proc. § 583.330]

[1] FORM Stipulation Extending Time Within Which Action Must Be Brought to Trial [Code Civ. Proc. § 583.330]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	STIPULATION EXTENDING TIME WITHIN
Defendant.	)	WHICH ACTION MUST BE BROUGHT TO TRI-
	)	AL
	)	

It is hereby agreed and stipulated to by all of the parties to this action as follows:

1. This action shall be brought to trial on or before _____ [*date*].

2. The date specified above constitutes an extension of time within which this action must be brought to trial beyond that otherwise provided for under _____ [*Code of Civil Procedure Section 583.310 or Code of Civil Procedure Section 583.320*].

3. This action may not be dismissed under the provisions of _____ [*Code of Civil Procedure Section 583.310 or Code of Civil Procedure Section 583.320*] prior to the date specified in Paragraph 1.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[*CONTINUE with signature line for attorney for each defendant who has appeared in action*]

[2] Use of Form

This form is for use as a stipulation extending the time within which an action must be brought to trial beyond the five-year limitation of *Code Civ. Proc. § 583.310* or the three-year limitation of *Code Civ. Proc. § 583.320(a)* [*see Code Civ. Proc. § 583.330*].

The form is set up with a caption for filing. Filing is not required, but if the stipulation is not filed, it must be brought to the court's attention when it is relevant to a motion for dismissal [*Code Civ. Proc. § 583.330(a)*].

A stipulation may also be made by oral agreement in open court, if entered in the minutes of the court or a transcript is made [*Code Civ. Proc. § 583.330(b)*].

[3] Cross References

For related forms, *see §§ 212.294* and *212.295*.

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17-212 California Forms of Pleading and Practice--Annotated § 212.299

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§ 212.299 Opposition [Cal. Rules of Ct., Rule 3.1342(b)] to Motion for Discretionary Dismissal of Action by Defendant [Code Civ. Proc. § 583.410] for Failure to Complete Service, Bring Action to Trial, or Bring Action to New Trial Within Two Years [Code Civ. Proc. § 583.420(a); Cal. Rules of Ct., Rule 3.1340]--Written Statement

[1] FORM Opposition [Cal. Rules of Ct., Rule 3.1342(b)] to Motion for Discretionary Dismissal of Action by Defendant [Code Civ. Proc. § 583.410] for Failure to Complete Service, Bring Action to Trial, or Bring Action to New Trial Within Two Years [Code Civ. Proc. § 583.420(a); Cal. Rules of Ct., Rule 3.1340]--Written Statement
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	OPPOSITION TO MOTION FOR DISMISSAL
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____

) Date Action Filed: _____
) Trial Date: _____
)
_____

_____ [Plaintiff *or* Cross Complainant] hereby opposes _____ [defendant's *or* cross defendant's] motion to dismiss the above-entitled action on the ground that _____ [plaintiff *or* cross complainant] failed to _____ [*specify, e.g.,* bring the case to trial or to conditional settlement within two years after it was commenced], and requests that the motion be denied, on the following ground(s):

[*SET FORTH, in successively numbered paragraphs, each ground of opposition, e.g.* :]

1. The two-year period has not expired for the following reasons:

a. The period from _____ [*date*] to _____ [*date*] must be excluded from calculation of the period because it was impossible to bring the action to trial during that period because there was no judge available to rule on _____ [plaintiff's *or* cross complainant's] necessary discovery motions in that the only judge of this court had died, the Governor did not appoint a successor until _____ [*date*], and the Chief Justice of California did not assign a judge from another court until _____ [*date*].

b. The period from _____ [*date*] to _____ [*date*] must be excluded from the period because it represents the period of the continuance granted to the _____ [defendant *or* cross defendant], despite the objection of _____ [plaintiff *or* cross complainant], who was then, andnow is, ready to proceed to trial, that the continuance would extend commencement of the trial until after expiration of the two-year period.

2. Any other delay by _____ [plaintiff *or* cross complainant] in bringing this action to trial is justified by the extensive periods of time consumed in responding to _____ [defendant's *or* cross defendant's] numerous unsuccessful pretrial motions, by extensive discovery proceedings, and by subsequent lengthy settlement negotiations.

[*CONTINUE*]

This statement of opposition is based on the declaration(s) of _____ [*name(s*)] and the memorandum served and filed herewith and on the court's records and file herein.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This form of written opposition is for use to oppose a motion for discretionary dismissal under *Code Civ. Proc. §*

583.410(a) for delay in prosecution made after the lapse of one of the time periods specified in *Code Civ. Proc. § 583.420(a)* [*Code Civ. Proc. § 583.410(b)*; *Cal. Rules of Ct., Rule 3.1342(b)*; *see § 212.194[3]*]. The factors which may be significant in opposing a motion for discretionary dismissal are discussed in *§§ 212.152, 212.153 above*].

In addition, the applicable time period under *Code Civ. Proc. § 583.420(a)* may be extended by the same means as is the comparable mandatory time period, discussed in the Introduction, under Subparts C and D, *above* [*Code Civ. Proc. § 583.420(b)*; *see, e.g., § 212.125[4]*].

[3] Service and Filing

This statement of opposition must be filed and a copy served within 15 days after service of the notice of motion to dismiss and should be accompanied by a memorandum and a supporting affidavit or declaration [*Cal. Rules of Ct., Rule 3.1342(b)*; *see Code Civ. Proc. §§ 1010.6(a)(6), 1013* (extensions of time)].

Failure to serve and file written opposition may be construed by the court as an admission that the motion is meritorious and permits the court to grant the motion without a hearing [*Cal. Rules of Ct., Rule 3.1342(b)*; *see* Introduction, Subpart E, under--Burden of Proof, *above*]. For a description of the steps to be taken in making and opposing a motion on these grounds, see the Procedural Checklist, *above*.

[4] California Points and Authorities

For memoranda of points and authorities in opposition to a motion for dismissal for failure to bring an action to trial, see California Points and Authorities , Ch. 90, *Dismissal*

[5] California Rules of Court

Opposition to motion for discretionary dismissal. *Cal. Rules of Ct., Rule 3.1342(b)*

[6] Cross References

For discussion and forms relating to the format of law and motion papers, see Ch. 372, *Motions and Orders* , and Ch. 417, *Points and Authorities*

For a related form, *see § 212.296*

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17-212 California Forms of Pleading and Practice--Annotated § 212.300

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§ 212.300 Opposition to Motion for Dismissal of Action by Defendant [Code Civ. Proc. §§ 583.360(a), 583.410(a)] for Failure to Bring Action to Trial Within Five Years [Code Civ. Proc. § 583.310] or New Trial Within Three Years [Code Civ. Proc. § 583.320(a)], or for Discretionary Dismissal for Delay in Prosecution [Code Civ. Proc. §§ 583.410(a), 583.420] Based on Estoppel and/or Extraordinary Court Congestion--Declaration

[1] FORM Opposition to Motion for Dismissal of Action by Defendant [Code Civ. Proc. §§ 583.360(a), 583.410(a)] for Failure to Bring Action to Trial Within Five Years [Code Civ. Proc. § 583.310] or New Trial Within Three Years [Code Civ. Proc. § 583.320(a)], or for Discretionary Dismissal for Delay in Prosecution [Code Civ. Proc. §§ 583.410(a), 583.420] Based on Estoppel and/or Extraordinary Court Congestion--Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____	)	
	)	NO. _____
_____ [*name*],	)	DECLARATION OF _____
Plaintiff,	)	[*name*] IN OPPOSITION TO MOTION FOR DIS-
vs.	)	MISSAL

_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am an attorney at law duly licensed to practice in California and the attorney of record for _____ [*name of opposing party*] in the above-entitled action.

2. _____ [*Specify background facts concerning the initial setting of the trial date and the deadline for bringing the case to trial, e.g.,* On March 12, 1995, I participated in a trial setting conference at which the case was set for trial on May 6, 1995, a date which was _____ (*specify, e.g.,* three) days before expiration of the period within which the case was required to be brought to trial pursuant to *Code of Civil Procedure Section 583.310*].

[*EITHER*]

3. _____ [*Establish basis for estoppel by describing facts which show (1) conduct by defendant (or cross defendant) including action which is comparable to a written stipulation (2) on which plaintiff (or cross complainant) reasonably relied and which (3) reasonably induced the plaintiff (or cross complainant) to believe that the defendant (or cross defendant) would not attempt to dismiss the action for lack of prosecution, e.g.,* On May 6, 1995, _____ (*name*), attorney of record for (defendant *or* cross defendant) _____ (*name*) appeared and requested a continuance of 10 days until May 16, 1995. Although I was prepared to go to trial, I acquiesced in the request of _____ (defendant's *or* cross defendant's) counsel. The minute order of the court for that date establishes the request of _____ (defendant's *or* cross defendant's) counsel and the new trial date of May 16, 1995].

[*OR*]

3. _____ [*Specify facts which establish exceptional court congestion, e.g.,* On May 6, 1995, when defendant's counsel and I appeared for trial, we were informed that no trial courts were available. Again, on May 7, the case was trailed for lack of a judge or court room. On May 8, we were informed that no courtroom would be available until May 10 and defendant filed a notice of motion for dismissal. This delay in bringing the action to trial from May 6 to May 10 was exceptional in that in my seven years of practice in this court, I have never experienced the trailing of a case for more than one day].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of declaration may be used in opposition to a motion to dismiss an action under *Code Civ. Proc. § 583.360(a)* or *583.410(a)* for failure to bring the action to trial or new trial as required under *Code Civ. Proc. §§ 583.310-583.430*. A declaration may be used to oppose the motion in lieu of an affidavit [*see Code Civ. Proc. § 2015.5*].

The theory of estoppel used as an example in the form is that plaintiff acted with diligence in attempting to bring the action to trial and succeeded in setting the case for trial before expiration of the statutory period. The continuance requested by the defendant and entered in the minute order estopped the defendant from requesting dismissal during that 10-day period [*see Woley v. Turkus (1958) 51 Cal. 2d 402, 408-409, 334 P.2d 12* (prior law); for further discussion *see § 212.129 above*].

The example of court congestion used in the declaration is that exceptional, unanticipated court congestion tolls the running of the statutory period because it makes it impossible to go to trial [*see Bennett v. Bennett Cement Contractors, Inc. (1981) 125 Cal. App. 3d 673, 677-678, 178 Cal. Rptr. 633* (prior law); for further discussion *see § 212.125[4][c][i] above*].

[3] State Statutes

Principles of waiver and estoppel as not abrogated or affected by *Code Civ. Proc. §§ 583.110-583.430*. *Code Civ. Proc. § 583.140*

Time during which it is impossible, impracticable, or futile to bring action to trial as excluded from computation of periods for bringing action to trial. *Code Civ. Proc. § 583.340(c)*

[4] Cross References

For related forms, *see §§ 212.294*, *212.295*, 30, and 50.

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17-212 California Forms of Pleading and Practice--Annotated § 212.301

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§ 212.301 Order of Dismissal [Code Civ. Proc. § 581d]--General Form

[1] FORM Order of Dismissal [Code Civ. Proc. § 581d]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [defendant *or* (plaintiff and) cross defendant] _____ [*name*] to dismiss the above-entitled cause pursuant to Code of Civil Procedure Section(s) _____ [*state statutory authority*], on the ground that _____ [*state ground, e.g.,* (plaintiff *or* cross complainant) failed to bring the action to trial within three years of its commencement against _____ (defendant *or* cross defendant)], came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

Good cause for such dismissal having been shown,

IT IS ORDERED that this cause be, and hereby is, dismissed [with prejudice] and that defendant have and recover costs in the sum of $_____.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This order is for use to dismiss an action and may be used when there has been a motion by a defendant or cross defendant for dismissal pursuant to some statutory authority. The form may be modified for use when the motion for dismissal was made by the plaintiff under *Code Civ. Proc. § 581(d)* or *(e)*, by an interested party other than a defendant under *Code Civ. Proc. § 583.250(a)(2)*, by the court under *Code Civ. Proc. § 581(f), 583.250(a)(2), 583.360(a)*, or *583.410(a)*, or by the defendant on the basis of the court's inherent nonstatutory power to dismiss.

For forms of orders granting a motion for dismissal under particular statutes, see the following forms:

see § 212.303 (dismissal under *Code Civ. Proc. §§ 583.210-583.250* for plaintiff's delay in service).

see § 212.304 (dismissal under *Code Civ. Proc. §§ 583.310, 583.360* for plaintiff's delay in bringing action to trial).

see § 212.305 (dismissal under *Code Civ. Proc. §§ 583.320, 583.360* for plaintiff's delay in bringing action to new trial).

see § 212.306 (discretionary dismissal under *Code Civ. Proc. §§ 583.410(a), 583.420(a)* for plaintiff's delay in prosecution).

The submission and content of proposed orders such as that set forth in this form are often subject to local court rules, which should therefore be consulted [*see, e.g.,* Orange Co. Super. Ct. Rules, Rule 400]. Local courts may also provide a form of dismissal order itself [*see § 212.302*].

[3] Written Order as Judgment

Dismissals ordered by the court must be in the form of a written order signed by the court, which, when filed, constitutes a judgment effective for all purposes. The clerk of the trial court is required to note these judgments in the register of actions in the case [*Code Civ. Proc. § 581d*].

[4] Notice of Order

The prevailing party is generally required to serve notice of the order on all parties and file the original of the notice with proof of service [*Code Civ. Proc. § 664.5*; see also *Code Civ. Proc. § 1019.5*]. For further discussion and forms of such notice and proof of service, see Ch. 372, *Motions and Orders* , and Ch. 518, *Service of Summons and Papers* .

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Chapter 212 DISMISSAL
PART V. FORMS
B. Involuntary Dismissal For Delay In Prosecution

17-212 California Forms of Pleading and Practice--Annotated § 212.302

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§ 212.302 Order of Dismissal [Code Civ. Proc. § 581d]--Los Angeles County Superior Court Form

[1] FORM Order of Dismissal [Code Civ. Proc. § 581d]--Los Angeles County Superior Court Form

Click here to view image.

[2] Source of Form

This form is a reproduction of Form CIV 123 04-02 available at the office of the clerk of Los Angeles County Superior Court, or on the court's website at www.lasuperiorcourt.org.

[3] Cross References

For a related form, see *§ 212.301*.

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17-212 California Forms of Pleading and Practice--Annotated § 212.303

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§ 212.303 Order of Dismissal [Code Civ. Proc. § 581d]--Mandatory Dismissal for Failure to Complete Service of Complaint or Cross Complaint Within Three Years and 60 Days [Code Civ. Proc. §§ 583.210, 583.250(a)(2)]

[1] FORM Order of Dismissal [Code Civ. Proc. § 581d]--Mandatory Dismissal for Failure to Complete Service of Complaint or Cross Complaint Within Three Years and 60 Days [Code Civ. Proc. §§ 583.210, 583.250(a)(2)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [defendant *or* cross defendant] _____ [*name*] to dismiss the above-entitled action pursuant to *Sections 583.210, 583.250(a)(2) of the Code of Civil Procedure* on the ground that _____ [*specify ground stated in motion, e.g.,* the summons and complaint were not served within three years after the commencement of the action] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

Good cause for such dismissal having been shown,

IT IS ORDERED that this cause be, and hereby is, dismissed [with prejudice] and that defendant have and recover costs in the sum of $_____.
Dated: _____

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The foregoing order is for use to dismiss an action commenced by complaint or cross complaint on the ground that the summons and complaint was not served within three years after commencement of the action [*Code Civ. Proc. §§ 583.210(a), 583.250(a)(2)*].

The form may be modified for use to dismiss an action on the alternative or additional ground that proof of service of the summons was not filed within 60 days after the three-year period for serving the summons and complaint [*Code Civ. Proc. §§ 583.210(b), 583.250(a)(2)*]. It may also be modified for use when the motion for dismissal was made by an interested party other than a defendant or cross defendant [*see Code Civ. Proc. §§ 583.250(a)(2)*]. For a form of order dismissing an action under the court's discretionary power to dismiss for unreasonable delay in prosecution under the circumstances, as reflected, in part, by a failure to complete service within two years [*Code Civ. Proc. §§ 583.410(a), 583.420(a)(1)*], *see § 212.306*.

[3] Cross References

For related forms, *see §§ 212.293* and *212.301*.

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B. Involuntary Dismissal For Delay In Prosecution

17-212 California Forms of Pleading and Practice--Annotated § 212.304

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§ 212.304 Order of Dismissal [Code Civ. Proc. § 581d]--Failure to Bring Action to Trial Within Five Years [Code Civ. Proc. §§ 583.310, 583.360(a)]

[1] FORM Order of Dismissal [Code Civ. Proc. § 581d]--Failure to Bring Action to Trial Within Five Years [Code Civ. Proc. §§ 583.310, 583.360(a)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [defendant *or* cross defendant] _____ [*name*] for an order dismissing the above-entitled action for failure to bring it to trial within five years after it was commenced came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ADJUDGED, ORDERED, AND DECREED that the motion be, and hereby is, granted and that the action be, and hereby is, dismissed and that defendant recover from plaintiff costs in the sum of $_____.
Dated: _____

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use to dismiss an action commenced by complaint or cross complaint on the ground of a delay in bringing the action to trial which required dismissal under *Code Civ. Proc. §§ 583.310, 583.360(a)*. For a form of order dismissing an action under the court's discretionary power to dismiss for unreasonable delay in prosecution under the circumstances, as reflected, in part, by a failure to bring the action to trial within three years [*Code Civ. Proc. §§ 583.410(a), 583.420(a)(2)*], *see § 212.305*.

[3] Cross References

For related forms, *see §§ 212.294, 212.295*, and 60.

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PART V. FORMS
B. Involuntary Dismissal For Delay In Prosecution

17-212 California Forms of Pleading and Practice--Annotated § 212.305

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§ 212.305 Order of Dismissal [Code Civ. Proc. § 581d]--Failure to Bring Action Again to Trial Within Three Years [Code Civ. Proc. §§ 583.320(a), 583.360(a)]

[1] FORM Order of Dismissal [Code Civ. Proc. § 581d]--Failure to Bring Action Again to Trial Within Three Years [Code Civ. Proc. §§ 583.320(a), 583.360(a)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [defendant *or* cross defendant] _____ [*name*] for an order dismissing the above-entitled action for failure to bring it again to trial within three years after the _____ [filing of the remittitur by the clerk of the trial court *or* entry of _____ (the order declaring a mistrial *or* the disagreement of the jury *or* the order granting a new trial)] came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ADJUDGED, ORDERED, AND DECREED that the motion be, and hereby is, granted and that the action be, and hereby is, dismissed and that defendant recover from plaintiff costs in the sum of $_____.
Dated: _____

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use to dismiss an action commenced by complaint or cross complaint on the ground of a delay in bringing the action again to trial which required dismissal under *Code Civ. Proc. §§ 583.320(a), 583.360(a)*. For a form of order dismissing an action under the court's discretionary power to dismiss for unreasonable delay in prosecution under the circumstances, as reflected, in part, by a failure to bring the action again to trial within two years [*Code Civ. Proc. §§ 583.410(a), 583.420(a)(3)*], *see § 212.306*.

[3] Cross References

For related forms, *see §§ 212.294, 212.295*, and 60.

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17-212 California Forms of Pleading and Practice--Annotated § 212.306

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§ 212.306 Order of Dismissal [Code Civ. Proc. § 581d]--For Unreasonable Delay in Prosecution [Code Civ. Proc. §§ 583.410(a), 583.420(a)]

[1] FORM Order of Dismissal [Code Civ. Proc. § 581d]--For Unreasonable Delay in Prosecution [Code Civ. Proc. §§ 583.410(a), 583.420(a)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [defendant *or* cross defendant] _____ [*name*] for an order dismissing the above-entitled action for failure to exercise reasonable diligence in prosecuting the above-entitled action and _____ [*specify elapse of minimum period of delay, as applicable, under Code Civ. Proc. § 583.420(a)(1), (2), or (3), e.g.*, for failure to make service within two years after the action was commenced against the _____ (defendant *or* cross defendant)] came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted and that the action be, and hereby is, dismissed and that defendant recover from plaintiff costs in the sum of $_____.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use to dismiss an action commenced by complaint or cross complaint under the court's discretionary power to dismiss for unreasonable delay in prosecution under the circumstances [*Code Civ. Proc. § 583.410(a)*]. The court's discretionary power to dismiss arises only after a two-year delay in completing service, a two-year delay in bringing the action to trial, or a two-year delay in bringing the action again to trial [*Code Civ. Proc. § 583.420(a)*].

[3] Cross References

For related forms, *see §§ 212.296* and *212.301*.

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Chapter 213 DOCUMENTS OF TITLE

17-213 California Forms of Pleading and Practice--Annotated 213.syn

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[1] Defined

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[3] Dock Warrants and Receipts

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[5] Warehouse Receipts

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§ 213.31 Electronic and Tangible Documents

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[2] Electronic Document Superseded by Tangible Document

[3] Control of Electronic Document

§ 213.32 Negotiation

[1] Indorsement and Delivery

[a] Tangible Document

[b] Electronic Document

[c] Indorsement of Nonnegotiable Document

[2] When Document Is "Duly Negotiated"

[3] Effect of Due Negotiation

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§ 213.34 Document of Title Defeated by Person With Prior Interest in Goods

§ 213.35 Transfer Without Due Negotiation

[1] Effect

[2] Transfer of Nonnegotiable Documents of Title

§ 213.36 Nonnegotiable Document of Title Defeated by Diversion

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[2] Good Faith Delivery

[3] Excuses for Nondelivery

[4] Excuse Because of Conflicting Claims

§§ 213.38-213.49 [Reserved]

§ 213.50 Form of Warehouse Receipt

[1] Essential Terms

[2] Terms Limiting Liability for Loss or Damage

[3] Terms Specifying Claims Procedures

[4] Liability for Nonreceipt or Misdescription

§ 213.51 Duty of Care

213.52 Warehouse's Lien

[1] Defined

[2] Security Interest

[3] Person Against Whom Lien Is Effective

[4] Loss of Lien

§ 213.53 Enforcement of Lien

[1] Against Merchants

[2] Against Persons Other Than Merchants

[3] Satisfaction of Lien Prior to Sale

§ 213.54 Failure to Comply With Enforcement Provisions

§§ 213.55-213.69 [Reserved]

§ 213.70 Carriers as "Public Utilities"

§ 213.71 Form of Bills of Lading

[1] Essential Terms

[2] Terms Specifying Claims Procedures

[3] Terms Limiting Liability for Loss and Damage

[4] Liability for Misdating, Nonreceipt, or Misdescription

[5] Immunity From Liability for Nondelivery in Case of Diversion or Change of Instructions

§ 213.72 Duty of Care

§ 213.73 Carrier's Lien

[1] Defined

[2] Persons Against Whom the Lien Is Effective

[3] Loss of the Lien

§ 213.74 Enforcement of Lien

§ 213.75 Failure to Comply With Enforcement Provisions

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[1] Duty to Deliver

[2] Liability for Nondelivery

[3] Negotiable Documents of Title

[4] Negotiation and Delivery

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[1] Duty to Deliver

[2] Negotiation and Delivery

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§ 213.110 State Statutes

[1] Duty of Care

[2] Liability for Omission of Essential Terms

[3] Warehouse's Lien

[4] Warehouse Receipts

§ 213.111 Decisions

[1] Warehouse and Warehouse Receipts

[2] Duty of Care

[3] Terms of Warehouse Receipts

[4] Warehouse's Lien

§§ 213.112-213.129 [Reserved]

§ 213.130 Related Matthew Bender Publications

§ 213.131 State Constitution

§ 213.132 State Statutes

§ 213.133 Decisions

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§ 213.150 Complaint for Damages [Civ. Code § 3300] for Failure to Deliver Goods Covered by Document of Title [Com. Code § 7403]--By Person Entitled Under Document

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction

[6] Venue

[7] State Statutes

[8] Decisions

[9] Cross References

§ 213.151 Affirmative Defense--Statutory Excuse for Nondelivery [Com. Code § 7403(a)]--Goods Damaged or Destroyed by Fire Not Caused by Negligence of Carrier or Warehouse [Com. Code § 7403(a)(2)]--By Carrier or Warehouse

[1] FORM

[2] Use of Form

[3] Alternative Procedures

[4] State Statutes

[5] Cross References

§ 213.152 Complaint in Interpleader [Code Civ. Proc. § 386]--Conflicting Claims to Goods in Possession of Carrier or Warehouse [Com. Code § 7603]--By Carrier or Warehouse

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutues

[5] Cross References

§§ 213.153-213.169 [Reserved]

§ 213.170 Complaint for Damages [Civ. Code § 3300]--For Omission of Essential Term From Warehouse Receipt

[Com. Code § 7202]--By Person Entitled to Goods Under Warehouse Receipt

[1] FORM

[2] Use of Form

[3] Allegations

[4] Essential Terms

[5] Optional Terms

[6] State Statutes

[7] Cross References

§ 213.171 Complaint for Damages [Civ. Code § 3300]--For Damages Caused by Misdescription of Goods [Com. Code § 7203]--By Person Entitled to Goods Under Warehouse Receipt

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Cross References

§ 213.172 Proceedings to Enforce Warehouse's or Carrier's Lien--Notice to Persons Known to Claim Interest in Goods of Proposed Sale of Goods--Lien on Goods Stored by Merchant or Other Person [Com. Code §§ 7210(a), (b), 7308(a), (g)]

[1] FORM

[2] Use of Form

[3] Contents of Notice

[a] Warehouse's Lien on Goods Stored by Merchant

[b] Warehouse's Lien on Goods Other Than Goods Stored by Merchant

[c] Carrier's Lien

[4] State Statutes

[5] Decisions

[6] Cross References

§ 213.173 Proceedings to Enforce Warehouse's Lien--Advertisement of Sale for Publication or Posting--Lien on Goods Not Stored by Merchant [Com. Code §§ 7210(b)(5), 7308(g)]

[1] FORM

[2] Use of Form

[3] Publication Requirement

[4] Contents of Advertisement

[5] Cross References

§ 213.174 Complaint for Damages [Civ. Code §§ 3333, 3336]--For Willful or Negligent Failure to Comply With Requirements of Notice and Sale [Com. Code §§ 7210(i), 7308(h)]--By Owner of Goods Against Carrier or Warehouse

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Decisions

[6] Cross References

§§ 213.175-213.189 [Reserved]

§ 213.190 Complaint for Damages [Civ. Code § 3333]--Breach of Duty by Carrier or Warehouse Resulting in Loss or Damage to Goods [Com. Code §§ 7204, 7309]--By Person Entitled to Goods Under Bill of Lading or Warehouse Receipt

[1] FORM

[2] Use of Form

[3] Allegations

[4] Duty of Care

[5] State Statutes

[6] Decisions

[7] Cross References

§ 213.191 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Failure to Follow Claims Procedures [Com. Code §§ 7204(c), 7309(c)]--By Carrier or Warehouse

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

§ 213.192 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Limitation of Liability [Com. Code §§ 7204(b), 7309(b)]--By Carrier or Warehouse

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

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Chapter 213 DOCUMENTS OF TITLE
PART I. SCOPE

17-213 California Forms of Pleading and Practice--Annotated § 213.01

§ 213.01 Scope of Chapter

This chapter discusses the parties' rights and liabilities under negotiable and nonnegotiable documents of title. It includes forms for a complaint [*see § 213.150*] and an affirmative defense [*see § 213.151*] for use in an action for failure to deliver goods. This chapter also includes a complaint [*see § 213.152*] for an action in interpleader when there are conflicting claims to goods in a carrier's or warehouse's possession.

This chapter discusses terms in warehouse receipts, the warehouse's duty of care for the goods in its possession, and liens of warehouses. It includes forms for complaints [*see §§ 213.170, 213.171*] for use when a warehouse fails to include essential terms in the warehouse receipt. It also includes forms for notice [*see § 213.172*] and advertisement [*see § 213.173*] of sale to satisfy the warehouse's lien. In addition, there is a form for a complaint [*see § 213.174*] for use in an action for damages when the warehouse has not complied with the statutory requirements for enforcing its lien.

This chapter also discusses bills of lading, the carrier's duty of care with respect to the goods covered by them, and the carrier's lien on the goods for charges based on transportation and storage. It includes forms for a complaint [*see § 213.190*] and an affirmative defenses [*see §§ 213.191, 213.192*] for use in an action for breach of the duty of care.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)General Provisions (Article 1)Definitions & InterpretationDocument of TitleCommercial Law (UCC)Documents of Title (Article 7)Bills of LadingCommercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsLiens

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§ 213.02 Cross References

For a discussion and forms for use in actions and cross actions in interpleader generally, see Ch. 314, *Interpleader* .

For discussion and forms for use in bailment of personal property, see Ch. 93, *Bailments* .

For discussion and forms for use in actions for conversion of personal property, see Ch. 150, *Conversion* .

For discussion of general provisions of the Civil Code which regulate liens, and for forms for use in enforcing miscellaneous liens, see Ch. 342, *Liens and Wage Preferences* .

For discussion and forms for damages for personal injury based on negligence on business premises generally, see Ch. 421, *Premises Liability* .

For discussion of litigation arising out of transactions secured by personal property, see Ch. 503, *Sales: Secured Transactions* .

For discussion and forms relating to agreements for rental or lease of space in self-service storage facilities, and attachment and enforcement ofliens on personal property stored at self-service storage facilities, see Ch. 517, *Self-Service Storage Facilities* .

For discussion and forms for use in bailment of personal property, see Ch. 93, *Bailments* .

For discussion of intrastate inland carriage of freight, and forms for use against carriers for nondelivery, delayed delivery, and loss or injury to freight, see Ch. 109, *Carriers* .

For discussion and forms for use in action for conversion of personal property, see Ch. 150, *Conversion* .

For discussion of general provisions of the Civil Code which regulate liens, and for forms for use in enforcing various

miscellaneous liens, see Ch. 342, *Liens and Wage Preferences* .

For discussion of litigation arising out of transactions secured by personal property, see Ch. 503, *Sales: Secured Transactions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCommercial Law (UCC)Documents of Title (Article 7)General OverviewContracts LawTypes of ContractsBailmentsTortsIntentional TortsConversionGeneral OverviewTransportation LawCarrier Duties & LiabilitiesBills of Lading

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17-213 California Forms of Pleading and Practice--Annotated §§ 213.03-213.09

[Reserved]

§§ 213.03[Reserved]

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17-213 California Forms of Pleading and Practice--Annotated § 213.10

§ 213.10 Governing Statutes

Documents of title are governed by Division 7 of the Uniform Commercial Code, as enacted in the California Commercial Code [*see Com. Code § 7101 et seq.*]. Division 7 is subject to any treaty or statute of the United States or any California regulatory statute to the extent that the treaty, federal statute, or regulatory statute is applicable [*Com. Code § 7103(a)*].

Division 7 does not modify or repeal any law prescribing the form or content of a document of title or the services or facilities to be afforded by a bailee, or otherwise regulating a bailee's business in respects not specifically treated in Division 7. However, violation of such a law does not affect the status of a document of title that otherwise is within the definition of a document of title [*Com. Code § 7103(b)*].

Division 7 modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act [*15 U.S.C. § 7001 et seq.*] (the E-SIGN Commerce Act) but does not modify, limit, or supersede *15 U.S.C. § 7001(c)* or authorize electronic delivery of any of the notices described in *15 U.S.C. § 7003(b)* [*Com. Code § 7103(c)*].

Division 7 governs to the extent that there is a conflict between the Uniform Electronic Transactions Act [*Civ. Code § 1633.1 et seq.*] and Division 7 [*Com. Code § 7103(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)General OverviewCommercial Law (UCC)Documents of Title (Article 7)Application & ConstructionComputer & Internet LawInternet BusinessContractsDigital Signatures

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§ 213.11 Definitions

A "bailee" under Division 7 is a person who, by a document of title, acknowledges possession of goods and contracts to deliver them [*Com. Code § 7102(a)(1)*]. However, actual possession of the goods is not required. If a bailee acknowledges possession when he or she does not have it, the bailee is bound by the obligations of Division 7 [UCC Comment 1 to *Com. Code § 7102*].

A "bearer" is the person in possession of a document of title [*Com. Code § 1201(b)(5)*].

A "carrier" is a person that issues a bill of lading [*Com. Code § 7102(a)(2)*].

A "consignee" is the person named in a bill of lading to whom or to whose order the document promises delivery [*Com. Code § 7102(a)(3)*].

A "consignor" is the person named in a bill of lading as the person from whom goods have been received for shipment [*Com. Code § 7102(a)(4)*].

A "delivery order" is a record that contains an order to deliver goods directed to a warehouse, carrier, or other person that in the ordinary course of business issues warehouse receipts or bills of lading [*Com. Code § 7102(a)(5)*]. "Delivery" with respect to documents of title means voluntary transfer of possession of the document [*Com. Code § 1201(b)(15)*].

"Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing [*Com. Code § 7102(a)(6)*].

The "holder" with respect to a document of title means the person in possession if the goods are deliverable to bearer or to the order of the person in possession [*Com. Code § 1201(b)(21)*]. The "holder" with respect to a negotiable instrument means the person in possession if the instrument is payable to bearer, or, in the case of an instrument payable to an identified person, if the identified person is in possession [*Com. Code § 1201(b)(21)*].

An "issuer" is a bailee that issues a document of title or, in the case of an unaccepted delivery order, the person that orders the possessor of goods to deliver. The term includes a person for whom an agent or employee purports to act in issuing a document if the agent or employee has real or apparent authority to issue documents, even if the issuer did not receive any goods, the goods were misdescribed, or in any other respect the agent or employee violated the issuer's instructions [*Com. Code § 7102(a)(8)*].

A "person entitled under the document" is the holder, in the case of a negotiable document of title, or the person to whom delivery of the goods is to be made by the terms of, or pursuant to instructions in a record under, a nonnegotiable document of title [*Com. Code § 7102(a)(9)*].

"Receipt" of goods means taking physical possession of them [*Com. Code §§ 2103(1)(c), 7102(b)(3)*].

A "record" is information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form [*Com. Code § 7102(a)(10)*].

To "sign" means to do one of the following, with present intent to authenticate or adopt a record [*Com. Code § 7102(a)(11)*]:

- Execute or adopt a tangible symbol.
- Attach to or logically associate with the record an electronic sound, symbol, or process.

A "shipper" is a person that enters into a contract of transportation with a carrier [*Com. Code § 7102(a)(12)*].

A "warehouse" is a person engaged in the business of storing goods for hire [*Com. Code § 7102(a)(13)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Definitions

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§ 213.12 Documents of Title

[1] Defined

Documents of title include bills of lading, dock warrants, dock receipts, warehouse receipts, gin tickets, compress receipts, and any other document which in the regular course of business or financing is treated as adequately evidencing that the person entitled under the document has the right to receive, hold and dispose of the document and the goods it covers. Documents of title must purport to be issued by a bailee and to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass [*Com. Code § 1201(b)(16)*; *Chartered Bank of London v. Chrysler Corp. (1981) 115 Cal. App. 3d 755, 761, 171 Cal. Rptr. 748]* .

[2] Bills of Lading

A bill of lading is a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods and which, by its terms, evidences the intention of the issuer that the person entitled under the document has the right to receive, hold, and dispose of the document and the goods it covers. Designation of the document by the issuer as a "bill of lading" is conclusive evidence of that intention. "Bill of lading" includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or rail transportation; the term includes an air consignment note or air waybill [*Com. Code § 1201(b)(6)*].

[3] Dock Warrants and Receipts

A dock warrant or receipt is a kind of interim certificate issued by steamship companies on delivery of the goods at the dock, entitling a designated person to have a bill of lading issued to him or her at the company's office [UCC Comment 15 to *Com. Code § 1201*].

[4] Gin Tickets and Compress Receipts

A gin ticket and compress receipt are issued by a bailee (the cotton gin or compress, as the case may be) and purport to cover cotton in the bailee's possession. The person in possession of such documents is entitled to receive, hold and

dispose of the documents and the goods represented [UCC Comment 15 to *Com. Code § 1201*].

[5] Warehouse Receipts

A "warehouse receipt" is a document evidencing the receipt of goods for storage issued by a warehouse [*Com. Code § 7102*], which by its terms evidences the intention of the issuer that the person entitled under the document [*Com. Code § 7102(a)(9)*] has the right to receive, hold, and dispose of the document and the goods it covers. Designation of a document by the issuer as a "warehouse receipt" is conclusive evidence of such an intention [*Com. Code § 1201(b)(42)*; *Chartered Bank of London v. Chrysler Corp. (1981) 115 Cal. App. 3d 755, 761, 171 Cal. Rptr. 748]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)General Provisions (Article 1)Definitions & InterpretationDocument of TitleCommercial Law (UCC)Documents of Title (Article 7)General OverviewCommercial Law (UCC)Documents of Title (Article 7)Bills of LadingCommercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsGeneral OverviewContracts LawTypes of ContractsBailments

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[Reserved]

§§ 213.13[Reserved]

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17-213 California Forms of Pleading and Practice--Annotated § 213.30

§ 213.30 Negotiable and Nonnegotiable Documents of Title

A document of title is negotiable if:

- By its terms, the goods covered by it are to be delivered to the bearer or to the order of a named person [*Com. Code § 7104(a)*]; and

- When it was issued, it did not have a conspicuous legend, however expressed, that it is nonnegotiable [*Com. Code § 7104(c)*].

Any other document is nonnegotiable [*Com. Code § 7104(b)*].

A document of title is negotiable only if it satisfies the requirements of *Com. Code § 7104* as stated above. Even the endorsement and return of a nonnegotiable document will not render it negotiable. A document is nonnegotiable only if written instructions providing for delivery to order or bearer are given by a named person [*Com. Code § 7104*, Official UCC Comment].

A negotiable document more nearly represents the goods, and a bailee may not deliver the goods without receiving the document [*Com. Code § 7104*, Cal. Code Comment 1; *see Com. Code § 7403(c)*; § 213.37].

Further, the holder of a negotiable document may acquire more rights than the transferor had [*Com. Code § 7104*, Official UCC Comment]. For a discussion of the rights acquired by the holder of a negotiable document, see *§ 213.32[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Negotiation & Transfer

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17-213 California Forms of Pleading and Practice--Annotated § 213.31

§ 213.31 Electronic and Tangible Documents

[1] Tangible Document Superseded by Electronic Document

On request of a person entitled under a tangible document of title, the issuer of the tangible document may issue an electronic document of title as a substitute for the tangible document if [*Com. Code § 7105(c)*]:

- The person entitled under the tangible document surrenders possession of the document to the issuer; and

- The electronic document when issued contains a statement that it is issued in substitution for the tangible document.

On issuance of an electronic document of title in substitution for a tangible document of title as described above, the following occur [*Com. Code § 7105(d)*]:

- The tangible document ceases to have any effect or validity; and

- The person that procured issuance of the electronic document warrants to all subsequent persons entitled under the electronic document that the warrantor was a person entitled under the tangible document when the warrantor surrendered possession of the tangible document to the issuer.

[2] Electronic Document Superseded by Tangible Document

On request of a person entitled under an electronic document of title, the issuer of the electronic document may issue a tangible document of title as a substitute for the electronic document if [*Com. Code § 7105(a)*]:

- The person entitled under the electronic document surrenders control of the document to the issuer; and

- The tangible document when issued contains a statement that it is issued in substitution for the electronic document.

On issuance of a tangible document of title in substitution for an electronic document of title as described above, the following occur [*Com. Code § 7105(b)*]:

- The electronic document ceases to have any effect or validity; and

- The person that procured issuance of the tangible document warrants to all subsequent persons entitled under the tangible document that the warrantor was a person entitled under the electronic document when the warrantor surrendered control of the electronic document to the issuer.

[3] Control of Electronic Document

A person has control of an electronic document of title if a system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to whom the electronic document was issued or transferred [*Com. Code § 7106(a)*]. A system meets that requirement, and a person is deemed to have control of an electronic document of title, if the document is created, stored, and assigned in such a manner that all of the following conditions are satisfied [*Com. Code § 7106(b)*]:

- A single authoritative copy of the document exists which is unique and identifiable.

- The authoritative copy identifies the person asserting control as either the person to whom the document was issued or, if the authoritative copy indicates that the document has been transferred, the person to whom the document was most recently transferred.

- The authoritative copy is communicated to and maintained by the person asserting control or that person's designated custodian.

- The authoritative copy is unalterable, except as otherwise allowed by the conditions stated below.

- Copies or amendments that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control.

- Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy.

- Any amendment of the authoritative copy is readily identifiable as authorized or unauthorized.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Application & ConstructionComputer & Internet LawInternet BusinessContractsGeneral Overview

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§ 213.32 Negotiation

[1] Indorsement and Delivery

[a] Tangible Document

A negotiable tangible document of title running to the order of a named person is negotiated by that person's indorsement and delivery. If the document is indorsed in blank or to the bearer, any person can negotiate it by delivery alone [*Com. Code § 7501(a)(1)*]. The indorsed document can be negotiated by any holder no matter how he or she acquired possession of it [*Com. Code § 7501*, Official UCC Comment 2].

If, by its original terms, a document of title runs to its bearer, it is negotiated by delivery alone [*Com. Code § 7501(a)(2)*]. If the document is delivered to the named person to whom it runs, the effect is the same as if it had been negotiated. [*Com. Code § 7501(a)(3)*]. For example, a negotiation results if the bailor delivers the document to a banker or buyer to whose order the document has been taken [*Com. Code § 7501*, Official UCC Comment 3]. When a document has been indorsed to a specified person, negotiation requires both the indorsement of the special indorsee and delivery [*Com. Code § 7501(a)(4)*].

[b] Electronic Document

In the case of an electronic document of title, if the document's original terms run to the order of a named person or to bearer, the document is negotiated by delivery of the document to another person. Indorsement by the named person is not required to negotiate the document. If the document's original terms run to the order of a named person and the named person has control of the document [*see Com. Code § 7106*], the effect is the same as if the document had been negotiated [*Com. Code § 7501(b)*].

[c] Indorsement of Nonnegotiable Document

Indorsement of a nonnegotiable document has no effect [*Com. Code § 7501(c)*]. A nonnegotiable document of title cannot be negotiated, and its indorsement gives the transferee no additional rights [*Com. Code § 7501*, Cal. Code

Comment 5]. For discussion of the transfer of nonnegotiable documents, see *§ 213.35[2]*.

[2] When Document Is "Duly Negotiated"

A negotiable document of title is "duly negotiated" when it is negotiated in the manner stated in *Com. Code § 7501* [*see* [1], *above*] to a holder who purchases it in good faith, without notice of any defense against or claim to it on the part of any person, and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a monetary obligation [*Com. Code § 7501(a)(5),(b)(3)*].

[3] Effect of Due Negotiation

Subject to *Com. Code § 7503* [*see § 213.34*] and to the provisions of *Com. Code § 7205* dealing with fungible goods, when a negotiable document of title has been duly negotiated to the holder, he or she acquires title to the document, title to the goods, and all rights accruing under the law of agency or estoppel, including rights to goods delivered to the bailee after the document was issued [*Com. Code § 7502(a)(1)-(3)*]. This means that the holder to whom a document has been negotiated acquires such title to the goods covered as the person negotiating the document had or had the ability to convey, and also such title to the goods as the person to whose order the goods were to be delivered had or had the ability to convey [*Com. Code § 7502*, Cal. Code Comment 1].

The holder also acquires the direct obligation of the issuer to hold or deliver the goods according to the terms of the document free of any defense or claim except those arising under the terms of the document or under Division 7, but in the case of a delivery order [*see Com. Code § 7102(a)(5)* (definition); § 213.11)], the bailee's obligation accrues only on the bailee's acceptance of the delivery order, and the obligation acquired by the holder is that the issuer and any indorser will procure the acceptance of the bailee [*Com. Code § 7502(a)(4)*]. In other words, the bailee is obliged to hold possession of the goods for the person to whom the document was negotiated as fully as if the bailee had contracted directly with him or her [*Com. Code § 7502*, Cal. Code Comment 1]. For discussion of the bailee's obligation to deliver under documents of title, see *§ 213.37*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Application & ConstructionCommercial Law (UCC)Documents of Title (Article 7)Negotiation & TransferComputer & Internet LawInternet BusinessContractsGeneral Overview

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§ 213.33 Duly Negotiated Document of Title Not Defeated by Stoppage, Breach of Duty, or Tortious Deprivation of Possession

Subject to *Com. Code § 7503* [*see § 213.34*], title and rights acquired by due negotiation are not defeated by any stoppage of the goods represented by the document, or by surrender of the goods by the bailee. They also are not impaired even if [*Com. Code § 7502(b)*; *see § 213.34*]:

- The negotiation or any prior negotiation constituted a breach of duty;

- Any person has been deprived of possession of a negotiable tangible document or control of a negotiable electronic document by misrepresentation, fraud, accident, mistake, duress, loss, theft or conversion; or

- A previous sale or other transfer of the goods or document has been made to a third person.

In other words, negotiation is not impaired by a breach of duty by the person negotiating the document or by the fact that the true owner of the document was wrongfully deprived of its possession, as long as the person to whom the document is negotiated is a good faith purchaser for value [*Com. Code § 7502*, Cal. Code Comment 2].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Title, Creditors & Good Faith PurchasersGood Faith Purchases & TitleCommercial Law (UCC)Documents of Title (Article 7)Negotiation & TransferContracts LawTypes of ContractsBona Fide Purchasers

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17-213 California Forms of Pleading and Practice--Annotated § 213.34

§ 213.34 Document of Title Defeated by Person With Prior Interest in Goods

A document of title confers no right in goods against a person who, before issuance of the document, had a legal interest or a perfected security interest in the goods, if that person did not acquiesce in the procurement of any document by the bailor or the bailor's nominee [*Com. Code § 7503(a)(2)*], or if that person did not deliver or entrust the goods or any document of title covering the goods to the bailor or the bailor's nominee with actual or apparent authority to ship, store, or sell, or with power to obtain delivery under *Com. Code § 7403* [*see § 213.37*], or with power of disposition under any statute or rule of law [*Com. Code § 7503(a)(1)*; *see generally Com. Code § 7503(a)(1)(c)* (selected list of such statutes in Commercial Code)].

In other words, a good faith purchaser of the document for value acquires only such title as the true owner, by entrusting the goods or the document to the transferor, has actually or apparently given the transferor the authority to convey [*Com. Code § 7503*, Cal. Code Comment 1]. For example, a thief cannot acquire the power to transfer the goods to a good faith purchaser, but a factor or an agent may have the apparent authority to confer a right in the goods to the purchaser [*Com. Code § 7503*, Cal. Code Comment 1].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Title, Creditors & Good Faith PurchasersGood Faith Purchases & TitleCommercial Law (UCC)Sales (Article 2)Title, Creditors & Good Faith PurchasersReservation for SecurityCommercial Law (UCC)Documents of Title (Article 7)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)Security AgreementsEffectivenessContracts LawTypes of ContractsBona Fide Purchasers

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17-213 California Forms of Pleading and Practice--Annotated § 213.35

§ 213.35 Transfer Without Due Negotiation

[1] Effect

When a negotiable or nonnegotiable document of title is delivered but not duly negotiated to a transferee, the transferee acquires the title and rights that the transferor possessed or had actual authority to convey [*Com. Code § 7504(a)*]. Although the transferee's rights are not subject to defeat by attachment of the goods covered by the document or surrender of them to the transferor, the transferee cannot acquire enforceable rights to control or receive the goods over the bailee's objection merely by giving notice to the bailee [*Com. Code § 7504*, Official UCC Comment 1; *see § 213.35[2]*].

[2] Transfer of Nonnegotiable Documents of Title

The transferee of a nonnegotiable document of title acquires the rights that the transferor possessed or had actual authority to convey [*Com. Code § 7504(a)*]. However, until the bailee receives notice of the transfer, the transferee's rights may be defeated in several ways:

- The transferor's creditors could treat the sale of the goods covered by the document as void if retention of the goods by the transferor was fraudulent (*see Com. Code § 2402(2)*) [*Com. Code § 7504(b)(1)*].

- A buyer from the transferor in the ordinary course of business may defeat the transferee's rights if the bailee has delivered the goods to the buyer or received notification of the buyer's rights [*Com. Code § 7504(b)(2)*].

- A lessee from the transferor in the ordinary course of business may defeat the transferee's rights if the bailee has delivered the goods to the lessee or received notification of the lessee's rights [*Com. Code § 7504(b)(3)*].

- The transferee's rights as against the bailee may be defeated by good faith dealings of the bailee with

the transferor [*Com. Code § 7504(b)(4)*].

Once the bailee receives notice of the transfer of a nonnegotiable document of title, the transferee's rights can no longer be defeated [*Com. Code § 7504(b)*]. Thus, the transferee of a nonnegotiable document may acquire rights greater in some respects than those of the transferor by giving notice of the transfer to the bailee [*Com. Code § 7504*, Official UCC Comment 2].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)General OverviewCommercial Law (UCC)Documents of Title (Article 7)Negotiation & TransferCommercial Law (UCC)Documents of Title (Article 7)ObligationsContracts LawSales of GoodsTitle, Creditors & Good Faith PurchasersPassing of Title

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17-213 California Forms of Pleading and Practice--Annotated § 213.36

§ 213.36 Nonnegotiable Document of Title Defeated by Diversion

When the consignor diverts goods covered by a nonnegotiable bill of lading or changes the shipping instructions so that the goods are not delivered to the consignee, the consignee's title to the goods is defeated if they are delivered to a buyer or lessee in the ordinary course of business, and in any event the consignee's rights against the bailee are defeated [*Com. Code § 7504(c)*]. This protects both the carrier and the new buyer. The carrier is immune from liability for nondelivery if it honors the consignor's instructions to divert, and the title of the substituted consignee is protected if he or she is a buyer in the ordinary course of business [*Com. Code § 7504*, Official UCC Comment 3].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Bills of LadingCommercial Law (UCC)Documents of Title (Article 7)ObligationsContracts LawSales of GoodsPerformanceBuyer's Rights

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17-213 California Forms of Pleading and Practice--Annotated § 213.37

§ 213.37 Delivery Under Documents of Title

[1] General Obligation

Unless the bailee establishes a lawful excuse or defense for not making delivery, he or she must deliver the goods to the person entitled under the document [*Com. Code § 7403(a)*; for a form for a complaint for failure to deliver, *see § 213.150*]. However, before the carrier is required to make delivery, the person entitled must satisfy the bailee's lien either if requested to do so or if the goods cannot lawfully be delivered until the lien is paid [*Com. Code § 7403(b)*]. Unless the person claiming is one against whom the document confers no right under *Com. Code § 7503(a)*, concerning a person with a prior legal interest or perfected security interest in goods [*see § 213.34*], he or she also must surrender to the bailee possession or control of any outstanding negotiable document either for cancellation or for notation that only partial delivery has been made [*Com. Code § 7403(c)*; *see, e.g., BII Finance Co. v. U-States Forwarding Services Corp. (2002) 95 Cal. App. 4th 111, 123-125, 115 Cal. Rptr. 2d 312* (carrier found liable to shipper's assignee for delivering goods to purchaser, who had not paid for goods, without requiring surrender of original negotiable bills of lading)].

For a discussion of the carrier's and warehouse's lien, see *§§ 213.52* and *213.73*. For a discussion of negotiable and nonnegotiable documents of title, see *§ 213.30*.

[2] Good Faith Delivery

A bailee who in good faith, including observance of reasonable commercial standards, has received goods and delivered them according to the terms of the document of title, or pursuant to Division 7, will not be liable for misdelivery. This rule applies even though the person from whom the bailee received the goods had no authority to procure the document or to dispose of the goods. It also applies even though the person to whom the bailee delivered the goods had no authority to receive them [*Com. Code § 7404*]. *Com. Code § 7404* applies to delivery to a fraudulent holder of a valid document as well as to delivery to the holder of an invalid document [*Com. Code § 7404*, Official UCC Comment].

[3] Excuses for Nondelivery

The bailee must deliver the goods to a person entitled under the document who complies with *Com. Code § 7403(b)* and *(c)* [*see § 213.37[1]*], unless and to the extent that the bailee establishes any of the following [*Com. Code § 7403(a)*]:

- Delivery of the goods to a person whose receipt was rightful as against the claimant;

- Damage to or delay, loss, or destruction of the goods for which the bailee is not liable [*see § 213.151*];

- Previous sale or other disposition of the goods in lawful enforcement of a lien or on warehouse's lawful termination of storage;

- The seller's exercise of the right to stop delivery pursuant to *Com. Code § 2705* when the buyer is insolvent, or repudiates, or fails to make a payment due before delivery [*see* Ch. 500, *Sales: Sales Under the Commercial Code*], or a lessor's exercise of the same right under *Com. Code § 10526*;

- A diversion, re-consignment, or other disposition pursuant to *Com. Code § 7303* [*see § 213.71[5]*] or tariff regulating that right;

- Release, satisfaction, or any other fact affording a personal defense against the claimant; or

- Any other lawful excuse.

Com. Code § 7403(a)(1) covers delivery to a person whose title is paramount to the rights represented by the document. For example, a bailee is not liable on a negotiable document if he or she delivers stolen goods to the rightful owner which were deposited by a thief even if the document is held by a good faith purchaser. On the other hand, the bailee would not have a defense against a good faith purchaser if the rightful owner had entrusted the goods to a person with the power of disposition and the document was duly negotiated to the good faith purchaser [*Com. Code § 7403*; *see § 213.34*, Official UCC Comment 2].

Com. Code § 7403(a)(1) is also the one exception to the requirement of *Com. Code § 7403(c)* that possession or control of the document be surrendered or a notation of partial delivery be made on the document [*Com. Code § 7403*, Official UCC Comment 5; *see § 213.37*].

[4] Excuse Because of Conflicting Claims

If there is more than one claim to title or possession of the goods covered by a document, the bailee may postpone delivery for a reasonable time to ascertain the validity of the adverse claims or bring an action in interpleader [*Com. Code § 7603*; *see § 213.152*]. This enables a bailee faced with conflicting claims to the goods to compel the claimants to litigate their claims with each other rather than with the bailee [*Com. Code § 7603*, Official UCC Comment]. For discussion of interpleader actions, see Ch. 314, *Interpleader* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Bills of LadingCommercial Law (UCC)Documents of Title (Article 7)ObligationsContracts LawTypes of ContractsBailmentsTransportation LawCarrier Duties & LiabilitiesBills of Lading

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[Reserved]

§§ 213.38[Reserved]

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17-213 California Forms of Pleading and Practice--Annotated § 213.50

§ 213.50 Form of Warehouse Receipt

[1] Essential Terms

A "warehouse" is a person engaged in the business of storing goods for hire [*Com. Code § 7102(a)(13)*]. Any warehouse may issue a warehouse receipt [*Com. Code § 7201(a)*]. A receipt issued for goods, including distilled spirits and agricultural commodities, stored under a statute requiring a bond against withdrawal or a license for the issuance of receipts in the nature of warehouse receipts, has the same effect as a warehouse receipt, even if the receipt is issued by a person who is the owner of the goods, but who is not a warehouse [*Com. Code § 7201(b)*].

A warehouse receipt does not have to be in any particular form [*Com. Code § 7202(a)*]. However, the warehouse is liable for damages for omission unless a receipt provides for each of the following [*Com. Code § 7202(b)*; *see § 213.170*]:

- A statement of the location of the warehouse facility where the goods are stored.
- The date of issue of the receipt.
- The unique identification code of the receipt.
- A statement whether the goods received will be delivered to the bearer, to a named person, or to a named person or the person's order.
- The rate of storage and handling charges (but if goods are stored under a field warehousing arrangement, a statement of that fact is sufficient on a nonnegotiable receipt).
- A description of the goods or the packages containing them;
- The signature of the warehouse or its agent.

- If the receipt is issued for goods that the warehouse owns, either solely, jointly, or in common with others, a statement of the fact of that ownership.

- A statement of the amount of advances made and of liabilities incurred for which the warehouse claims a lien or security interest (but if the precise amount of advances made or liabilities incurred, at the time of the issue of the receipt, is unknown to the warehouse or to its agent that issued the receipt, then a statement of the fact that advances have been made or liabilities incurred and the purpose of the advances or liabilities is sufficient).

Com. Code § 7202 does not require that a warehouse receipt be issued, but states formal requirements for those that are issued [*Com. Code § 7202*, Official UCC Comment]. It covers both negotiable and nonnegotiable receipts [*Com. Code § 7202*, Cal. Code Comment 4]. Further, if the receipt does not comply with the provisions of *Com. Code § 7202*, the issuer is nevertheless subject to the same obligations as if it were in the correct form [*Com. Code § 7202*, Cal. Code Comment 3; *see Com. Code § 7401(1)* (Division 7 applies even though document of title does not conform to requirements of division)]. For forms for warehouse receipts, see *California Legal Forms, Ch. 54A, Storage of Goods, § 54A.200* (Matthew Bender).

A warehouse may insert any other provisions in the receipt that are not contrary to the Commercial Code and do not impair the obligation of delivery under *Com. Code § 7403* or the duty of care under *Com. Code § 7204*. Any contrary provisions are ineffective [*Com. Code § 7202(c)*; *Page v. Ace Van & Storage Co. (1948) 87 Cal. App. 2d 294, 297-298, 196 P.2d 816]* . For a discussion of warehouse receipt clauses limiting liability, see *§ 213.50[2]*. For a discussion of the obligation to deliver, see *§ 213.37*.

[2] Terms Limiting Liability for Loss or Damage

Liability for loss or damage may be limited by terms in the warehouse receipt. Liability may be increased by a written request from the bailor at the time he or she signs the receipt, or within a reasonable time after its receipt, and the bailee may charge increased rates for the increase in liability. However, no increase is permitted if it is contrary to a lawful limitation of liability contained in the warehouse's tariff, if any, nor permit recovery in excess of the actual value of the goods. The damages limitation does not apply to a warehouse's liability for conversion [*Com. Code § 7204(b)*]. *Com. Code § 7204(b)* is in accord with prior California case law [*Com. Code § 7204*, Cal. Code Comment 2; *see George v. Bekins Van & Storage Co. (1949) 33 Cal. 2d 834, 845-848, 205 P.2d 1037* (clause in warehouse receipt limiting warehouse's liability to declared value of goods was valid)]. For an affirmative defense allegation based on limited liability for use by a warehouse or carrier, see *§ 213.192*.

Terms of limitation are binding on a bailor who is an experienced businessperson, whether or not he or she had actual knowledge of those terms, absent any evidence of unfair dealing or any departure from the ordinary course of business. Therefore, for example, a bailor who accepts a warehouse receipt that limits the liability of the warehouse pursuant to public utility tariffs, without declaring an increased value in order to obtain a higher liability, cannot assert that he or she did not have full knowledge and understanding of the terms of liability in seeking to avoid the stated limitation if the goods become damaged [*see Hischemoeller v. Nat. Ice etc. Storage Co. (1956) 46 Cal. 2d 318, 320-329, 294 P.2d 433]* .

[3] Terms Specifying Claims Procedures

The warehouse receipt may include reasonable provisions as to the time and manner of presenting claims or instituting actions based on bailment [*Com. Code § 7204(c)*; *Home Ins. Co. v. L.A. Warehouse Co. (1936) 16 Cal. App. 2d 737, 740, 61 P.2d 510]* . For an affirmative defense allegation based on failure to follow claims procedures for use by a warehouse or carrier, see *§ 213.191*.

[4] Liability for Nonreceipt or Misdescription

A party to, or purchaser for value in good faith of, a document of title other than a bill of lading, who relies on the description of the goods in the document, may recover from the issuer damages caused by the nonreceipt or misdescription of the goods. The party or purchaser may not recover damages, however, to the extent that either [*Com. Code § 7203*; *see § 213.171*]:

- The document conspicuously indicates that the issuer does not know whether any part or all of the goods in fact were received, or whether they conform to the description; or

- The party or purchaser otherwise has notice of the nonreceipt or misdescription.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsGeneral OverviewCommercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsLiabilityContracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsBona Fide PurchasersTortsNegligenceDefensesExculpatory ClausesGeneral Overview

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17-213 California Forms of Pleading and Practice--Annotated § 213.51

§ 213.51 Duty of Care

A warehouse must exercise such care for goods under a warehouse receipt as a reasonably careful person would exercise under like circumstances [*Com. Code § 7204(a)*; *Runkle v. Southern Pacific Milling Co. (1921) 184 Cal. 714, 717, 195 P. 398]* . However, *Com. Code § 7204*, which sets forth this requirement, does not impair or repeal *Civ. Code § 1630*, which requires that a limitation of liability must be conspicuously printed on a contract of bailment for parking or storage of a motor vehicle, or any of the provisions of the Public Utilities Code or the Food and Agricultural Code or any lawful regulations issued thereunder [*Com. Code § 7204(d)*]. *Com. Code § 7204(d)* permits the imposition of a higher standard of care by statute [*Com. Code § 7204*, Cal. Code Comment 4]. For a more detailed discussion of limitation of liability by motor vehicle bailees, see Ch. 274, *Garages and Gas Stations* .

Prior to enactment of the Commercial Code, proof of deposit and of failure of a bailee to redeliver goods in accordance with a warehouse receipt was a prima facie case, and the burden was on the warehouse to excuse the failure [*Taussig v. Bode & Haslett (1901) 134 Cal. 260, 263, 66 P. 259* ; *First Nat. Bank v. Crown T. & S. Co. (1928) 89 Cal. App. 243, 246, 264 P. 534* ; *see Com. Code § 7403*]. However, when a bailee showed a return of the goods stored and a loss had been caused by damage, the burden was on the plaintiff to prove affirmatively that the damage was caused by the fault of the bailee [*see Taussig v. Bode & Haslett (1901) 134 Cal. 260, 263, 66 P. 259* (contents of barrels placed in storage lost due to leakage)].

To a large extent, the rules established by the case law discussed above have not been changed by Division 7. A bailee must deliver goods to a person entitled under a document of title unless the bailee establishes a lawful excuse for not doing so [*Com. Code § 7403(a)*; *see § 213.37[1]*]. Thus, the burden is on the bailee to prove that failure to deliver is the result of damage to or delay, loss, or destruction of the goods for which the bailee is not liable. However, if the goods are damaged or destroyed by fire and as a result, cannot be delivered, the burden of establishing negligence is on the person entitled under the document [*Com. Code § 7403(a)(2)*].

Generally, Division 7 does not attempt to define the tort liability of bailees, except to hold certain classes of bailees to a minimum standard of care [*Com. Code § 7101*, Official UCC Comment]. In fact, the first clause of *Com. Code § 7403(a)(2)* amounts to a cross reference to all the tort law that determines the varying responsibilities and standards of

care applicable to commercial bailees [*Com. Code § 7403*, Official UCC Comment 3]. It also is probably in basic accord with prior California law (that is, the Uniform Warehouse Receipts Act and the Uniform Bill of Lading Act) and the cases construing that law [*Com. Code § 7403*, Cal Code Comment 2]. Accordingly, the burden of establishing that the bailee was negligent if goods are delivered damaged apparently is still on the person entitled under the warehouse receipt [*see Taussig v. Bode & Haslett (1901) 134 Cal. 260, 263, 66 P. 259]* . For a complaint for use by a person entitled to goods against a warehouse or carrier who delivers the goods damaged, *see § 213.190*. For a detailed discussion of the plaintiff's burden of establishing negligence, see Ch. 380, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsGeneral OverviewCommercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsLiabilityContracts LawTypes of ContractsBailmentsEvidenceProcedural ConsiderationsBurdens of Proof

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17-213 California Forms of Pleading and Practice--Annotated 213.52

213.52 Warehouse's Lien

[1] Defined

A warehouse has a lien against the bailor on the goods covered by a warehouse receipt or storage agreement, or on the proceeds of the goods if in its possession, for charges for storage, processing incidental to storage, or transportation, including demurrage and terminal charges, insurance, labor, or other charges present or future in relation to the goods, and for expenses necessary for preservation of the goods or reasonably incurred in their sale pursuant to law. Further, if the person on whose account the goods are held is liable for like charges or expenses in relation to other goods whenever deposited, and it is stated in the warehouse receipt or storage agreement that a lien is claimed for charges and expenses in relation to other goods, then the warehouse also has a lien against the goods covered by the warehouse receipt or storage agreement or on the proceeds thereof in its possession for those charges whether or not the other goods have been delivered by the warehouse. However, against a person to whom a negotiable receipt was duly negotiated, the warehouse's lien is limited to the charges in an amount or at a rate specified on the receipt or, if no charges are specified, to a reasonable charge for storage of the specific goods covered by the receipt after the date of the receipt [*Com. Code § 7209(a)*; *American D. Co. v. Hollywood S. Co. (1938) 28 Cal. App. 2d 439, 441-442, 82 P.2d 711* ; *San Angelo, Etc. v. S. End W. Co. (1936) 19 Cal. App. 2d Supp. 749, 754, 61 P.2d 1235]* .

Com. Code § 7209 describes a specific lien that attaches automatically to goods stored under a nonnegotiable warehouse receipt. It also provides for a general lien extending to like charges in relation to other goods [*Com. Code § 7209*, Official UCC Comment 1; *see* *Boas v. De Pue Warehouse Co. (1924) 69 Cal. App. 246, 250, 230 P. 980* (warehouse issuing nonnegotiable receipt was entitled to specific lien for charges as against stored goods)]. Further, the warehouse's lien applies whether or not the warehouse issues a receipt. If a receipt is issued, it extends to all enumerated charges [*Com. Code § 7209*, Cal. Code Comment 10]. For a discussion of liens in general, see Ch. 342, *Liens and Wage Preferences* .

[2] Security Interest

A warehouse also may reserve a security interest against the bailor for the maximum amount specified on the receipt for charges other than those specified in *Com. Code § 7209(b)*, such as for money advanced and interest. If a receipt is

issued for the goods, such a security interest is not valid as against third persons without notice unless the maximum amount of the interest is conspicuously specified on the receipt. This security interest is governed by the provisions of Division 9 of the Commercial Code [*Com. Code § 7209(b)*; *see Com. Code § 1201(b)(10)* (defining "conspicuous")]. It arises out of relations between the parties other than bailment for storage or transportation, as when the bailee assumes the role of financer or performs a manufacturing operation, and extends credit in reliance on the goods covered by the warehouse receipt [*Com. Code § 7209*, Official UCC Comment 2]. For a detailed discussion of transactions secured by personal property or fixtures, see Ch. 503, *Sales: Secured Transactions* .

[3] Person Against Whom Lien Is Effective

Com. Code § 7209(a) and *(b)* validate a warehouse's lien and security interest as against the bailor [UCC Comment 3 to *Com. Code § 7209*].

A warehouse's lien for charges and expenses under *Com. Code § 7209(a)* or a security interest under *Com. Code § 7209(b)* also is effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by the bailor to a good-faith purchaser for value would have been valid. However, the lien or security interest is not effective against a person who, before issuance of a document of title, had a legal interest or a perfected security interest in the goods, if that person did not acquiesce in the procurement of any document by the bailor or the bailor's nominee [*Com. Code § 7209(c)(2)*], or if that person did not deliver or entrust the goods or any document of title covering the goods to the bailor or the bailor's nominee with actual or apparent authority to ship, store, or sell, or with power to obtain delivery under *Com. Code § 7403* [*see § 213.37*], or with power of disposition under any statute or rule of law [*Com. Code § 7209(c)(1)*; *see generally Com. Code § 7209(c)(1)(c)* (selected list of such statutes in Commercial Code)].

If the goods are household goods, the lien under *Com. Code § 7209(a)* is effective against all persons if the depositor was the legal possessor of the goods at the time of deposit. "Household goods" are defined as furniture, furnishings, and personal effects used by the depositor in a dwelling [*Com. Code § 7209(d)*].

To validate a warehouse's lien as against third parties, the owner must have entrusted the goods to the depositor. Thus, the owner's interest will not be subjected to a lien or security interest arising out of a deposit of the owner's goods by a thief [UCC Comment 3 to *Com. Code § 7209*; *see Young v. Colyear (1921) 54 Cal. App. 232, 235, 201 P. 623]* .

[4] Loss of Lien

When a warehouse voluntarily delivers the goods or unjustifiably refuses to deliver them, it loses the warehouse's lien [*Com. Code § 7209(e)*; *see American Distilling Co. v. Hollywood Storage Co. (1938) 28 Cal. App. 2d 439, 442, 82 P.2d 711* (warehouse's lien may be implicitly waived by acts or conduct inconsistent with it); *see also Boas v. De Pue Warehouse Co. (1924) 69 Cal. App. 246, 250, 230 P. 980* (warehouse may deliver part of goods stored and retain lien for whole amount of charges)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsLiensContracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsBona Fide Purchasers

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17-213 California Forms of Pleading and Practice--Annotated § 213.53

§ 213.53 Enforcement of Lien

[1] Against Merchants

A warehouse's lien may be enforced by private or public sale of the goods in bloc or in parcels. All persons known to claim an interest in the goods must be notified of the sale. The notice must include a statement of the amount due, the nature of the proposed sale, and the time and place of any public sale. The sale can be at any time or place, and on any terms that are commercially reasonable. A warehouse sells in a "commercially reasonable" manner if it does any of the following [*Com. Code § 7210(a)*]:

- Sells the goods in the usual manner in any recognized market for them.
- Sells the goods at the price current in any recognized market at the time of the sale.
- Otherwise sells the goods in conformity with commercially reasonable practices among dealers in the type of goods sold.

Excepting the preceding three cases, a sale of more goods than apparently necessary to be offered to ensure satisfaction of the obligation is not commercially reasonable. That a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouse is not in itself sufficient to establish that the sale was not made in a commercially reasonable manner [*Com. Code § 7210(a)*].

Com. Code § 7210(a), as discussed above, applies to commercial storage, that is, goods stored by a merchant [*Com. Code § 7210*, Cal. Code Comment]. However, a lien on goods stored by a merchant may be enforced in accordance with either *Com. Code § 7210(a)* or *(b)* [*Com. Code § 7210(h)*; § 213.53[2]].

[2] Against Persons Other Than Merchants

If the goods are not stored by a merchant in the course of business, a warehouse's lien may only be enforced by the method provided in *Com. Code § 7210(b)* [*see Com. Code § 7210(b)*]. All persons known to claim an interest in the

goods must be notified in person or by registered or certified letter to their last known address. The notice must include an itemized statement of the claim, a description of the goods, a demand for payment within a specified time, which cannot be less than 10 days after receipt of the notice, and a conspicuous statement that if the claim is not paid within that time, the goods will be advertised for sale and sold by auction at a specified time and place. The sale must conform to the terms of the notification, and must be held at the nearest suitable place to where the goods are located [*Com. Code § 7210(b)(1)-(4)*].

After the time given in the notice has expired, the sale must be advertised once a week for two consecutive weeks in a newspaper of general circulation published in the judicial district where the sale is to be held. The advertisement must include all of the following [*Com. Code § 7210(b)(5)*]:

- A description of the goods.
- The name of the person on whose account the goods are being held.
- The time and place of the sale.

The sale must take place at least 15 days after the date of the first publication of the advertisement. If there is no newspaper of general circulation, the advertisement must be posted at least 10 days before the sale in at least six conspicuous places in the neighborhood of the proposed sale [*Com. Code § 7210(b)(5)*]. For forms for the notice and advertisement of sale, see *§§ 213.172* and *213.173*.

[3] Satisfaction of Lien Prior to Sale

Before a sale under *Com. Code § 7210*, any person claiming a right in the goods may pay the amount necessary to satisfy the warehouse's lien and reasonable expenses incurred under *Com. Code § 7210*. In that event, the warehouse must not sell the goods, but must retain them pursuant to the terms of the warehouse receipt and Division 7 [*Com. Code § 7210(c)*].

The warehouse may satisfy the lien from the proceeds of the sale, but any balance must be held for delivery to the bailor on demand [*Com. Code § 7210(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsLiens

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17-213 California Forms of Pleading and Practice--Annotated § 213.54

§ 213.54 Failure to Comply With Enforcement Provisions

If the warehouse fails to comply with the requirements for sale under *Com. Code § 7210*, it is liable for damages caused by the failure. If the violation is willful, the warehouse is liable for conversion [*Com. Code § 7210(i)*; *see George v. Bekins Van & Storage Co. (1949) 33 Cal. 2d 834, 837, 205 P.2d 1037* (tort of conversion committed when bailee having the power to do so refuses to redeliver goods to which bailor entitled); *see also Fitch v. Bekins Van & Storage Co. (1937) 22 Cal. App. 2d 101, 102, 70 P.2d 670* (conversion action based on alleged failure to notify plaintiff of sale to satisfy warehouse's lien); § 213.174].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsLiensTortsIntentional TortsConversionGeneral Overview

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[Reserved]

§§ 213.55[Reserved]

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17-213 California Forms of Pleading and Practice--Annotated § 213.70

§ 213.70 Carriers as "Public Utilities"

In California, a common carrier is a "public utility" [*Cal. Const., art. XII, § 3*] and is subject to the regulation of the Public Utilities Commission and the provisions of the Public Utilities Code [*Pub. Util. Code § 216*]. A "common carrier" is every person and corporation providing transportation for compensation to or for all or any portion of the public [*Pub. Util. Code § 211*]. A motor carrier of property [*see Pub. Util. Code § 224.6*; *Veh. Code § 34601* (definition)], however, is not a "public utility" [*Pub. Util. Code § 216.5*]. For a detailed discussion of regulation of carriers and rate setting by the Public Utilities Commission, see Ch. 109, *Carriers* .

To the extent that any treaty, or federal or California statute, tariff, classification, or regulation is applicable, the provisions of Division 7 are subject to that authority [*Com. Code § 7103(a)*]. For example, statutes authorizing a commission to fix rates and prescribe services are not affected by Division 7, and are controlling on the matters that they cover [*Com. Code § 7103*, Official UCC Comment 2].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesState & Local Regulation

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17-213 California Forms of Pleading and Practice--Annotated § 213.71

§ 213.71 Form of Bills of Lading

[1] Essential Terms

Division 7 makes no provision for formal requirements in the form of or terms of bills of lading, as it does for warehouse receipts [*see Com. Code §§ 7201, 7202* (warehouse receipt need not be in any particular form, but must contain essential terms); *see also § 213.50*].

[2] Terms Specifying Claims Procedures

A carrier may include reasonable provisions in the bill of lading as to the time and manner of presenting claims and instituting actions based on the shipment [*Com. Code § 7309(c)*; *see Pioneer Fruit Co. v. Southern Pacific Co. (1920) 47 Cal. App. 44, 46, 190 P. 50* (written notice of claim given to general freight agent of delivering carrier at time of arrival of shipment at its destination sufficient)]. For a form for an affirmative defense allegation based on failure to follow claims procedures for use by a warehouse or carrier, see *§ 213.191*.

[3] Terms Limiting Liability for Loss and Damage

If the carrier's rates are based on value, its liability may be limited by a term in the bill of lading or in a transportation agreement that states that liability will not exceed the value stated in the document. However, the consignor, by the carrier's tariff, must be afforded and advised of the opportunity to declare a higher value, or a value as lawfully provided in the tariff. When no tariff is filed, the consignor must be otherwise advised of that opportunity. This liability limitation does not apply to a carrier's liability for conversion to its own use [*Com. Code § 7309(b)*]. For a form for an affirmative defense based on limited liability for use by a warehouse or carrier, see *§ 213.192*. *Com. Code § 7309(b)* applies to the carrier's liability as an insurer as well as to liability based on negligence [*Com. Code § 7309*, Official UCC Comment; *see Civ. Code § 2194* (strict liability for loss or damage to freight); *see also Civ. Code §§ 2174-2178* (limitation of liability by special contract)]. For a discussion of the Civil Code provisions regarding limitations on liability by common carriers, see Ch. 109, *Carriers* .

[4] Liability for Misdating, Nonreceipt, or Misdescription

Besides being a receipt for goods, a bill of lading is a contract for carriage of goods, and evidence of title to the goods. The latter is true only as to negotiable bills of lading [*Com. Code § 7301*, Cal. Code Comment 1]. For discussion of bills of lading as receipt for goods, see *§ 213.12[2]*. For forms of bills of lading, see California Legal Forms, Ch. 54, *Storage of Property* (Matthew Bender).

When a consignee of a nonnegotiable bill of lading gives value in good faith, or when a holder to whom a negotiable bill of lading has been duly negotiated relies on the description of the goods or the date on the bill of lading, the consignee or holder may recover damages from the issuer caused by the misdating of the bill of lading or the nonreceipt or misdescription of the goods. However, the consignee or holder may not recover damages to the extent that the document indicates that the issuer does not know whether any part or all of the goods in fact were received or conform to the description. For example, the description may be in terms of marks or labels of kind, quantity, or condition, or the receipt or description may be qualified by "contents or condition of contents of packages unknown," "said to contain," "shippers weight, load and count," or words of similar import, if that indication is true [*Com. Code § 7301(a)*; *see § 213.171*].

If the issuer of the bill of lading is a common carrier, and the carrier is the one who loads the goods, the carrier must count individual packages, or ascertain the kind and quality of bulk freight [*Com. Code § 7301(b), (c)*]. However, the carrier will not be liable for damages caused by improper loading if the goods were loaded by the shipper. The carrier may insert the words "shipper's weight, load and count" or similar words on the bill of lading to indicate that this is the case [*Com. Code § 7301(d)*]. If the shipper loads the goods, he or she is deemed to have guaranteed the accuracy of the information he or she supplies to the carrier with respect to the goods, and the shipper indemnifies the carrier against damage caused by inaccuracies [*Com. Code § 7301(e)*].

[5] Immunity From Liability for Nondelivery in Case of Diversion or Change of Instructions

Unless the bill of lading otherwise provides, a carrier may deliver the goods to a person or destination other than that stated in the bill of lading or may otherwise dispose of the goods on instructions from [*Com. Code § 7303(a)*]:

- The holder of a negotiable bill of lading;

- The consignor on a nonnegotiable bill of lading notwithstanding contrary instructions from the consignee;

- The consignee on a nonnegotiable bill of lading in the absence of contrary instructions by the consignor, if the goods have arrived at the billed destination or if the consignee is in possession of the tangible bill of lading or in control of the electronic bill of lading; or

- The consignee on a nonnegotiable bill of lading if the consignee is entitled as against the consignor to dispose of the goods.

Unless instructions from such a person are noted on a negotiable bill of lading, a person to whom the bill of lading is duly negotiated can hold the bailee according to the original terms [*Com. Code § 7303(b)*].

Com. Code § 7303 provides only an immunity for carriers against liability for misdelivery. It does not, for example, defeat the title to the goods which the consignee-buyer may have acquired from the consignor-seller on delivery of the goods to the carrier under a nonnegotiable bill of lading [UCC Comment 2 to *Com. Code § 7303*]. For a discussion of delivery of goods, and the effect of transfer of nonnegotiable documents of title covering them, see *§ 213.35*.

Subject to *Com. Code § 7303*, the carrier must comply with the directions of the consignor or consignee [*Civ. Code §*

2115]. The carrier must deliver the goods to the consignee at the place to which they are addressed, in the manner usual at that place [*Civ. Code § 2118*]. The goods must be personally delivered to the consignee or the consignee's agent if either can be found with reasonable diligence [*Civ. Code § 2119*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Bills of LadingCommercial Law (UCC)Documents of Title (Article 7)ObligationsTortsNegligenceDefensesExculpatory ClausesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesBills of Lading

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17-213 California Forms of Pleading and Practice--Annotated § 213.72

§ 213.72 Duty of Care

A carrier who issues a negotiable or nonnegotiable bill of lading must exercise such care for the goods as a reasonable person would exercise under like circumstances [*Com. Code § 7309(a)*]. For a complaint for use by a person entitled to goods against a warehouse or carrier who delivers the goods damaged, see *§ 213.190*. *Com. Code § 7309(a)* does not impair any rule of law imposing the liability of an insurer on a common carrier in intrastate commerce [*Com. Code § 7309*, Official UCC Comment; *see Civ. Code § 2194* (common carrier strictly liable, subject to certain limited exceptions, for loss or injury to freight from the time he or she accepts the freight until delivery)]. For a discussion of the Civil Code provisions establishing strict liability on the part of common carriers for loss or injury to freight, see Ch. 109, *Carriers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Bills of LadingTortsNegligenceStandards of CareGeneral OverviewTortsTransportation TortsGeneral OverviewTransportation LawCarrier Duties & LiabilitiesBills of Lading

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17-213 California Forms of Pleading and Practice--Annotated § 213.73

§ 213.73 Carrier's Lien

[1] Defined

A carrier has a lien on the goods covered by a bill of lading, or on the proceeds of those goods in its possession, for charges after the date of the carrier's receipt of the goods for storage or transportation (including demurrage and terminal charges) and for expenses necessary for preservation of the goods incident to the transportation or reasonably incurred in their sale pursuant to law. However, if a negotiable bill of lading has been purchased for value, the carrier's lien against the purchaser is limited to the charges stated in the bill of lading or applicable tariffs, or if no charges are stated then to a reasonable charge [*Com. Code § 7307(a)*].

Civ. Code § 2144 also provides for a carrier's lien for the following [*Civ. Code § 2144*]:

- Freightage and services rendered at the request of the shipper or consignee in and about the transportation of the property;

- Care and preservation of the property;

- Money advanced at the request of the shipper or consignee to discharge a prior lien; and

- Subject to the limitations specified in *Civ. Code § 3051.6*, any fines, penalties, costs, expenses, and interest arising from the provision of false or erroneous certifications of gross cargo weight [*see 49 U.S.C. § 5902(b)* (requirements governing certifications of gross cargo weight)].

Civ. Code § 2144 was not repealed as a result of the adoption of the Commercial Code. However, it would be subordinate to the specific provisions of the Commercial Code [*Com. Code § 7307*, Cal. Code Comment 1].

[2] Persons Against Whom the Lien Is Effective

When a carrier is required by law to receive goods for transportation, a lien for charges and expenses under *Com. Code*

§ 7307(a) is effective against the consignor or any person entitled to the goods unless the carrier had notice that the consignor lacked authority to subject the goods to those charges and expenses. Any other lien under *Com. Code § 7307(a)* is effective against the consignor and any person who permitted the bailor to have control or possession of the goods unless the carrier had notice that the bailor lacked that authority [*Com. Code § 7307(b)*].

[3] Loss of the Lien

When the carrier voluntarily delivers the goods or unjustifiably refuses to deliver them, the carrier loses the lien [*Com. Code § 7307(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Bills of LadingContracts LawSecured TransactionsPerfection & PriorityPriorityLiensTransportation LawCarrier Duties & LiabilitiesBills of Lading

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17-213 California Forms of Pleading and Practice--Annotated § 213.74

§ 213.74 Enforcement of Lien

A carrier's lien may be enforced by public or private sale of the goods, in bloc or in parcels, at any time or place and on any terms that are commercially reasonable, after notifying all persons known to claim an interest in the goods. The notification must include a statement of the amount due, the nature of the proposed sale, and the time and place of any public sale.

The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the carrier is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the carrier either sells the goods in the usual manner in any recognized market for those goods, or if the carrier sells at the price current in the market at the time of the sale or if the carrier has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, the carrier has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to ensure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence [*Com. Code § 7308(a)*]. The lien may be enforced in accordance with either *Com. Code § 7308(a)* or the procedure set forth in *Com. Code § 7210(b)*, pertaining to goods other than those stored with a warehouse by a merchant [*Com. Code § 7308(g)*]. For a notice of sale, *see § 213.172*.

The scope of *Com. Code § 7308(a)* is difficult to determine. Although *Com. Code § 7308(a)* is substantially the same as *Com. Code § 7210(a)* (relating to goods stored with a warehouse by a merchant), it contains no phrase limiting its application to goods given to the carrier by a merchant as does *Com. Code § 7210(a)* [*see Com. Code § 7308*, Cal. Code Comments 1 and 2; *see also Com. Code § 7210(a)* (enforcement procedure for warehouse's lien except as provided by *Com. Code § 7210(b)* which governs noncommercial storage); for discussion of enforcement procedures for warehouse's liens, *see § 213.52*]. Thus, it may be that *Com. Code § 7308(a)* governs enforcement procedures for carrier's liens with respect to both commercial and noncommercial transportation of goods [*see Com. Code § 7308*, Official UCC Comment (procedure coextensive with that given warehouse in cases other than those covering noncommercial storage by warehouse)].

The carrier's rights to a lien under *Civ. Code § 2144* are regulated by the title on liens in *Civ. Code § 2872 et seq.* [*Civ.*

Code § 2144; *see Civ. Code § 3052* (enforcement procedure); *see also Civ. Code §§ 3051, 3051.5* (special lien for compensation for services on personal property in carrier's possession; carrier's lien for charges owed by shipper on freight previously delivered); for a form and discussion of notice of sale of personal property in person's possession to satisfy lien, *see* Ch. 342, *Liens and Wage Preferences*]. However, in light of the possible application of *Com. Code § 7308(a)* to both commercial and noncommercial transportation, it is not clear when the carrier's lien in *Civ. Code § 2144*, or its enforcement provision in *Civ. Code § 3052*, actually apply. Although *Civ. Code § 2144* has not been repealed, both *Civ. Code §§ 2144* and *3052* (incorporated by reference in *Civ. Code § 2144*) are arguably subordinate to the specific provisions of *Com. Code §§ 7307* and *7308(a)* [*see* Cal. Code Comment 1 to *Com. Code § 7307*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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17-213 California Forms of Pleading and Practice--Annotated § 213.75

§ 213.75 Failure to Comply With Enforcement Provisions

If the carrier fails to comply with the requirements for sale under *Com. Code § 7308*, it is liable for damages caused by the failure, and if the violation is willful, the carrier is liable for conversion [*Com. Code § 7308(h)*; *see § 213.174*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Bills of LadingCommercial Law (UCC)Documents of Title (Article 7)ObligationsTortsIntentional TortsConversionGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesBills of Lading

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17-213 California Forms of Pleading and Practice--Annotated §§ 213.76-213.89

[Reserved]

§§ 213.76[Reserved]

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17-213 California Forms of Pleading and Practice--Annotated § 213.90

§ 213.90 State Statutes

[1] Duty to Deliver

Carrier is required to comply with directions of consignor or consignee. *Civ. Code § 2115*

Delivery to consignee. *Civ. Code § 2118*

Delivery to consignee or agent. *Civ. Code § 2119*

Seller is able to stop delivery of goods in transit if buyer insolvent or repudiates or fails to make payment due before delivery or for any other rightful reason. *Com. Code § 2705(2)*

Obligation of warehouse and carrier to deliver. *Com. Code § 7403*

Good faith delivery. *Com. Code § 7404*

[2] Liability for Nondelivery

General provisions for carrier limitation of liability. *Civ. Code §§ 2174-2178*

Carrier strict liability for failure to deliver. *Civ. Code § 2194*

Conflicting claims and interpleader. *Com. Code § 7603*

[3] Negotiable Documents of Title

"Conspicuous" defined. *Com. Code § 1201(b)(10)*

Negotiable document of title defined. *Com. Code § 7104(a)*

Nonnegotiable document of title defined. *Com. Code § 7104(b)*

Conspicuous marking of nonnegotiable document of title is required. *Com. Code § 7104(c)*

[4] Negotiation and Delivery

Form of negotiation and "due negotiation." *Com. Code § 7501*

Rights acquired by due negotiation. *Com. Code § 7502*

Documents of title defeated. *Com. Code § 7503*

Rights acquired in absence of due negotiation. *Com. Code § 7504*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCommercial Law (UCC)Documents of Title (Article 7)DefinitionsCommercial Law (UCC)Documents of Title (Article 7)Negotiation & TransferCommercial Law (UCC)Documents of Title (Article 7)ObligationsTransportation LawCarrier Duties & LiabilitiesGeneral Overview

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§ 213.91 Decisions

[1] Duty to Deliver

Carrier that delivered goods to purchaser who had not paid for goods, without requiring surrender of original negotiable bills of lading, was liable to shipper's assignee who was holder by due negotiation of bills of lading. *BII Finance Co. v. U-States Forwarding Services Corp. (2002) 95 Cal. App. 4th 111, 123-125, 115 Cal. Rptr. 2d 312*

Unauthorized delivery of goods covered by warehouse receipts to one other than person entitled to goods is conversion. *Friednash v. Lawrence Warehouse Co (1953) 121 Cal. App. 2d 202, 204, 205, 263 P.2d 45*

Warehouse is not liable for refusal to deliver goods covered by nonnegotiable warehouse receipt to party named therein when warehouse was justified in concluding that there was absolute sale of goods by named party to person to whom goods were delivered. *Otis v. Overland Terminal Warehouse Co. (1936) 18 Cal. App. 2d 157, 161, 63 P.2d 831* ; *see Com. Code § 7403*

Warehouse acts at its peril in purporting to deliver goods to true owner if person is not in fact entitled to possession. *Smith v. Miller (1935) 5 Cal. App. 2d 564, 572, 43 P.2d 347* ; *see Com. Code § 7403*

[2] Negotiation and Delivery

Transfer of negotiable warehouse receipts without due negotiation does not transfer title to covered goods to transferee as against transferor when parties expressly agreed that it would not. *Mount Tivy Winery v. Lewis (9th Cir. 1943) 134 F.2d 120, 123-124* ; *see Com. Code § 7504*

Transfer of negotiable warehouse receipts is transfer of title to goods covered by them. *Bishop v. Fulkerth (1886) 68 Cal. 607, 610, 10 P. 122*

Indorsement of nonnegotiable bill of lading gives transferee no additional right. *Ward- Lewis Lumber Co. v. Mahony (1925) 70 Cal. App. 708, 713, 234 P. 417* ; *see Com. Code § 7501(c)*

Transferee of nonnegotiable warehouse receipt acquires title to the covered goods as against transferor subject to any agreement with transferor. *Boas v. De Pue Warehouse Co. (1924) 69 Cal. App. 246, 249, 230 P. 980* ; *see Com. Code § 7504*

Transfer of various bills of lading and nonnegotiable warehouse receipts to creditor as security for loans was sufficient delivery to constitute valid pledge, and was symbolic delivery of covered goods. *Yokohama S. Bk. v. Trans-Oceanic Co. (1921) 54 Cal. App. 533, 535, 202 P. 346*

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Bills of LadingCommercial Law (UCC)Documents of Title (Article 7)Negotiation & TransferCommercial Law (UCC)Documents of Title (Article 7)ObligationsCommercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsLiabilityTortsIntentional TortsConversionGeneral Overview

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[Reserved]

§§ 213.92[Reserved]

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17-213 California Forms of Pleading and Practice--Annotated § 213.110

§ 213.110 State Statutes

[1] Duty of Care

Warehouse's duty of care. *Com. Code § 7204(a)*

Contractual limitations on warehouse's liability. *Com. Code § 7204(b)*

Reasonable provisions as to the time and manner of presenting claims are valid. *Com. Code § 7204(c)*

[2] Liability for Omission of Essential Terms

Essential and optional terms in warehouse receipt. *Com. Code § 7202*

Liability for nonreceipt and misdescription under a warehouse receipt. *Com. Code § 7203*

Termination of storage at warehouse's option. *Com. Code § 7206*

Goods covered by warehouse receipt, except fungible goods, must be kept separate. *Com. Code § 7207*

Effect of altered warehouse receipts. *Com. Code § 7208*

[3] Warehouse's Lien

Warehouse's lien. *Com. Code § 7209*

Security interest for money advanced and interest. *Com. Code § 7209(b)*

Enforcement of warehouse's lien. *Com. Code § 7210*

[4] Warehouse Receipts

Negotiable and nonnegotiable warehouse receipts. *Com. Code § 7104*

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsGeneral OverviewCommercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsLiabilityCommercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsLiens

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17-213 California Forms of Pleading and Practice--Annotated § 213.111

§ 213.111 Decisions

[1] Warehouse and Warehouse Receipts

Distillery was warehouse when it charged a monthly fee for storage plus separate fee for unloading delivery trucks. *In re Hedgeside Distillery Corp. (N.D. Cal. 1952) 123 F. Supp. 933, 953* ; *see Com. Code § 7102(a)(13)*

Warehouse receipt is written contract between warehouse to store goods and owner to pay for that service. *Sinsheimer v. Whitely (1896) 111 Cal. 378, 380, 43 P. 1109*

[2] Duty of Care

Reasonable care under circumstances is required of warehouse. *Grace & Co. v. City of Los Angeles (9th Cir. 1960) 278 F.2d 771, 775*

Warehouse's duty of care was duty to exercise such care in safeguarding bailor's property as reasonably careful owner of similar goods would exercise. *Runkle v. Southern Pacific Milling Co. (1921) 184 Cal. 714, 717, 195 P. 398* ; *see Com. Code § 7204(a)*

Proof of deposit and of failure of bailee to redeliver in accordance with warehouse receipt stated prima facie case, and burden was on warehouse to excuse failure to redeliver. *Taussig v. Bode & Haslett (1901) 134 Cal. 260, 263, 66 P. 259* ; *First Nat. Bank v. Crown T. & S. Co. (1928) 89 Cal. App. 243, 246, 264 P. 534* ; *see Com. Code § 7403*

[3] Terms of Warehouse Receipts

Declared valuation clause was valid term in warehouse receipt. *George v. Bekins Van & Storage Co. (1949) 33 Cal. 2d 834, 845-848, 205 P.2d 1037* ; *Rosenberg v. San Francisco Storage Co. (1927) 81 Cal. App. 715, 717, 254 P. 909* ;

McMullin v. Lyon Fireproof Storage Co. (1925) 74 Cal. App. 87, 95-100, 239 P. 422 ; *see Com. Code § 7204(b)*

Warehouse may insert any terms in receipt, not contrary to law, that do not impair obligation to exercise reasonable care. *Page v. Ace Van & Storage Co. (1948) 87 Cal. App. 2d 294, 297-298, 196 P.2d 816* ; *see Com. Code § 7202(c)*

Requirement for prompt presentation of written claim is reasonable as designed to give warehouse timely opportunity to ascertain facts concerning asserted loss. *Home Ins. Co. v. L.A. Warehouse Co. (1936) 16 Cal. App. 2d 737, 740, 61 P.2d 510* ; *see Com. Code § 7204(c)*

[4] Warehouse's Lien

Excise tax, bond premium, and attorney's fees advanced were proper basis for lawful claims on which warehouse's lien might be based. *L.A. Warehouse Co. v. American Etc. Co. (1943) 22 Cal. 2d 402, 407, 139 P.2d 641* ; *see Com. Code § 7209(a)*

Nonnegotiable warehouse receipt containing recital that goods stored were subject to lien for charges was sufficient to support lien to extent of such charges even though amount was not stated in receipt. *Sampsell v. Security-First Nat. Bank (1949) 92 Cal. App. 2d 648, 652, 207 P.2d 1088* ; *Boas v. De Pue Warehouse Co. (1924) 69 Cal. App. 246, 250, 230 P. 980* ; *see Com. Code § 7209(a)*

Warehouse had lien on goods warehoused. *American D. Co. v. Hollywood S. Co. (1938) 28 Cal. App. 2d 439, 441-442, 82 P.2d 711* ; *San Angelo, Etc. v. S. End W. Co. (1936) 19 Cal. App. 2d Supp. 749, 754, 61 P.2d 1235* ; *see Com. Code § 7209(a)*

Sale of stored property to satisfy lien for storage charges was proper when notice was given of contemplated sale pursuant to law. *Norton v. Lyon Van & Storage Co. (1935) 9 Cal. App. 2d 199, 203, 49 P.2d 311* ; *see Com. Code § 7210*

Fruit packer was entitled to warehouse's lien for services rendered in receiving, storing, processing, and packing. *Golden State Orchards v. Harter (1928) 93 Cal. App. 390, 400, 269 P. 735* ; *see Com. Code § 7209(a)*

Warehouse was entitled to lien for charges made for and on account of resacking and reconditioning goods when warehouse receipts provided that such charges must be paid before delivery. *Browning v. River Farms Co. (1927) 82 Cal. App. 361, 364-366, 255 P. 548* ; *see Com. Code § 7209(a)*

Warehouse's lien was inapplicable to property of which depositor had neither title nor right of possession. *Young v. Colyear (1921) 54 Cal. App. 232, 235, 201 P. 623* ; *see Com. Code § 7209(a)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsGeneral OverviewCommercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsLiabilityCommercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsLiens

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[Reserved]

§§ 213.112[Reserved]

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C. Carriers and Bills of Lading

17-213 California Forms of Pleading and Practice--Annotated § 213.130

§ 213.130 Related Matthew Bender Publications

For discussion of licensing of and rate setting by carriers, see California Legal Forms, Ch. 54, *Shipment of Property* (Matthew Bender)

For discussion and forms relating to the storage of commercial, noncommercial, and household goods, see California Legal Forms, Ch. 54A, *Storage of Goods* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsGeneral OverviewTransportation LawCarrier Duties & LiabilitiesRates & TariffsTransportation LawCarrier Duties & LiabilitiesState & Local Regulation

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C. Carriers and Bills of Lading

17-213 California Forms of Pleading and Practice--Annotated § 213.131

§ 213.131 State Constitution

Common carriers as public utilities. *Cal. Const., art. XII, § 3*

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17-213 California Forms of Pleading and Practice--Annotated § 213.132

§ 213.132 State Statutes

Carrier's liability for nonreceipt or misdescription. *Com. Code § 7301*

Delivery of goods to person or destination other than that stated in bill of lading. *Com. Code § 7303*

Effect of altered bills of lading. *Com. Code § 7306*

Carrier's lien. *Com. Code § 7307*

Enforcement of carrier's lien. *Com. Code § 7308*

Carrier's duty of care and contractual limitation of liability. *Com. Code § 7309*

Reasonable provisions in bill of lading as to time and manner of presenting claims. *Com. Code § 7309(c)*

Security interest in negotiable documents. *Com. Code § 9304(2)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Bills of LadingCommercial Law (UCC)Documents of Title (Article 7)ObligationsCommercial Law (UCC)Secured Transactions (Article 9)Attachment of Security InterestsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)Security AgreementsGeneral OverviewTransportation LawCarrier Duties & LiabilitiesBills of Lading

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17-213 California Forms of Pleading and Practice--Annotated § 213.133

§ 213.133 Decisions

Value of goods is fixed by shipper, and shipper has privilege of securing full coverage by paying stipulated charge for protection. *Franklin v. Southern Pacific Co. (1928) 203 Cal. 680, 687, 265 P. 936*

When goods are consigned by vendor to vendee on negotiable bill of lading, attempt by vendor to stop goods in transit is unavailing against bona fide purchaser of bill of lading for value in usual course of business. *Newhall v. Central Pac. R.R. Co. (1876) 51 Cal. 345, 349*

In case arising out of interstate shipment of computer equipment by common carrier, plaintiff's conversion claim seeking monetary damages beyond limitation on liability in bill of lading was preempted under federal law [*49 U.S.C. § 14706*]. *Dictor v. David & Simon, Inc. (2003) 106 Cal. App. 4th 238, 249-250, 130 Cal. Rptr. 2d 588*

Bill of lading is contract of carriage between the parties. *Kentner Truck Line v. Maier Brewing Co. (1960) 183 Cal. App. 2d 89, 93, 6 Cal. Rptr. 572* ; *Pioneer Fruit Co. v. Southern Pacific Co. (1920) 47 Cal. App. 44, 46, 190 P. 50*

Delivery to situs that is usual place for delivery is sufficient to support finding that goods were duly delivered. *Southern Cal. Com. Co. v. Alberti (1922) 58 Cal. App. 84, 207 P. 1023*

Fact of shipment makes prima facie case, and burden is on carrier to prove facts excusing nondelivery. *American Fruit Distributors v. Hines (1921) 55 Cal. App. 377, 388-390, 203 P. 821*

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Bills of LadingContracts LawSales of GoodsDamages & RemediesBuyer's Damages & RemediesLimitation & ModificationGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewTransportation LawCarrier Duties & LiabilitiesBills of

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17-213 California Forms of Pleading and Practice--Annotated §§ 213.134-213.149

[Reserved]

§§ 213.134[Reserved]

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17-213 California Forms of Pleading and Practice--Annotated § 213.150

§ 213.150 Complaint for Damages [Civ. Code § 3300] for Failure to Deliver Goods Covered by Document of Title [Com. Code § 7403]--By Person Entitled Under Document

[1] FORM Complaint for Damages [Civ. Code § 3300] for Failure to Deliver Goods Covered by Document of Title [Com. Code § 7403]--By Person Entitled Under Document

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

1. Defendant _____[*name*] is, and at all times herein mentioned was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a corporation existing under the laws of the State of California with its principal place of business in _____[*city*], _____ County, California. Defendant is, and at all times herein mentioned was, doing business as a _____[common carrier of freight *or* warehouse] for hire.

[2. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintff will amend this

complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.)]

[3. (Plaintiff is informed and believes and thereon alleges that) (A)t all time herein mentioned each of the defendants sued herein as DOES I- _____ (*number less than all the Does*) inclusive, was the agent and employee of each of the remaining defendants and was at all times acting within the course and scope of such agency and employment.]

4. On or about _____[*date*], bailor delivered to defendant[s, and each of them,] at _____[*specify address*] for _____[transportation *or* storage] by defendant[s, and each of them,] the goods described as follows: _____[*specify goods*]. On the same day, defendant[s, and each of them,] issued to bailor its/their _____[negotiable *or* nonnegotiable] _____[warehouse receipt *or* bill of lading]. Plaintiff _____ [*specify plaintiff's interest, e.g.,* is the owner of the aforementioned goods, and is the holder of the aforementioned _____ (bill of lading *or* warehouse receipt) endorsed to him/her]. A copy of the _____[bill *or* receipt] is attached as Exhibit "_____" and incorporated by reference.

5. Thereafter, defendant[s, and each of them,] _____ [*specify, e.g.,* transported the aforementioned goods to *or* stored the aforementioned goods at _____ (*name of storage facility*)]. On or about _____[*date*], plaintiff demanded that defendant[s, and each of them,] deliver the goods and tendered defendant's charges in the amount of $_____ and _____[the bill of lading *or* the warehouse receipt], properly endorsed, and offered to acknowledge delivery when it was made. Defendant[s, and each of them,] failed and refused, and continue(s) to fail and refuse, to deliver the goods.

6. The value of the goods at _____[*specify destination*] on or about _____[*date*], the time and place when the goods should have been delivered to plaintiff, was $_____.

7. As a proximate result of the failure of defendant[s, and each of them,] to deliver the goods, plaintiff suffered damages in the amount of $_____.

[8. In compliance with the claims procedure specified in Paragraph _____ of the _____ (bill of lading *or* warehouse receipt), plaintiff _____ (*allege acts taken by plaintiff to comply with claims procedure, e.g.,* presented a written claim at defendant's main office at _____ (*address, including city and state*) stating that plaintiff did not receive the goods and specifying the damages plaintiff claims for nondelivery of them. (A copy of plaintiff's claim is attached as Exhibit _____ and incorporated by reference.)]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For general damages in the amount of $_____;

2. For costs of suit incurred herein; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____[*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same istrue of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

This complaint is for use by a person entitled to delivery under a document of title to bring an action against a warehouse or carrier for damages for failure or refusal to deliver the goods covered by the document [*Com. Code § 7403(a)*].

[3] Allegations

This complaint alleges:

- The defendant's capacity, if defendant is not an individual, and defendant's residence or other basis of venue (Paragraph 1) [*see, e.g., Code Civ. Proc. §§ 395(a), 395.5*].

- Fictitious defendants (Paragraph 2) [*see Code Civ. Proc. § 474*].

- That one or more of the fictitious defendants is the agent or agents of the remaining defendants (Paragraph 3).

- That the carrier or warehouse received the goods from the bailor for storage or delivery [*see Com. Code § 7102(a)(1)*], and that the plaintiff had an interest in the goods, either because of holding the negotiable bill of lading or warehouse receipt or because the goods were to be delivered to the plaintiff pursuant to a nonnegotiable document (Paragraph 4) [*Com. Code §§ 1201(b)(6),(42), 7102(a)(9), 7201, 7202*].

- That the goods were in the possession of the carrier or warehouse [*Com. Code § 7102(a)(1)*], which failed or refused to fulfill the duty to deliver the goods after the plaintiff demanded that they be delivered, surrendered the negotiable document of title, if any, and tendered the freight charges due, thereby satisfying the carrier's or warehouse's lien (Paragraph 5) [*Com. Code § 7403(a)-(c)*].

- The value of the goods at the time of delivery, or when delivery was to be made, and the detriment caused by the warehouse's or carrier's breach of duty (Paragraphs 6 and 7) [*Civ. Code § 3316*].

- That the plaintiff satisfied any obligation in the warehouse receipt or bill of lading requiring a written claim to be filed with the carrier or warehouse (Paragraph 8) [*Com. Code §§ 7204(c), 7309(c)*].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified if the action an unlimited civil case in the superior court [*Code Civ. Proc. §§ 92(b), 446*].

Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[6] Venue

In a breach of contract action, the proper venue is either in the county where the defendant resides, where the contract was to be performed, or where the contract was entered into [*Code Civ. Proc. § 395(a)*]. When the defendant is a corporation, the county where the breach arises, or the corporation's principal place of business is located are also proper places to institute the action [*Code Civ. Proc. § 395.5*]. Similarly, an unincorporated association may be sued in the county in which the breach arises or the association's principal office is located [*Code Civ. Proc. § 395.2*]. When the basis for venue is other than the residence of the defendant, the fact relied on to establish venue, such as the place that the contract was entered into, should be alleged because the county in which defendant resides is the proper county for trial except as otherwise provided by law [*see Code Civ. Proc. § 395(a)*].

[7] State Statutes

Carrier must comply with directions of consignor or consignee. *Civ. Code § 2115*

Delivery to consignee. *Civ. Code § 2118*

Delivery to consignee or agent. *Civ. Code § 2119*

Obligation of warehouse and carrier to deliver, and excuses for nondelivery. *Com. Code § 7403*

Good faith delivery. *Com. Code § 7404*

Conflicting claims and interpleader. *Com. Code § 7603*

[8] Decisions

Proof of deposit and of failure of bailee to redeliver in accordance with warehouse receipt makes prima facie case, and burden is on warehouse to excuse failure to redeliver. *Taussig v. Bode & Haslett (1901) 134 Cal. 260, 263, 66 P. 259* ; *First Nat. Bank v. Crown T. & S. Co. (1928) 89 Cal. App. 243, 246, 264 P. 534* ; *see Com. Code § 7403*

Warehouse is not liable for refusal to deliver goods covered by nonnegotiable warehouse receipt to party named in it when warehouse is justified in concluding that there was absolute sale of goods by named party to person to whom goods were delivered. *Otis v. Overland Terminal Warehouse Co. (1936) 18 Cal. App. 2d 157, 161, 63 P.2d 831* ; *see*

Com. Code § 7403

Warehouse acts at its peril in purporting to deliver goods to true owner and person in fact not entitled to possession. *Smith v. Miller (1935) 5 Cal. App. 2d 564, 572, 43 P.2d 347* ; *see Com. Code § 7403*

[9] Cross References

For alternative allegations as to capacity and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used* .

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions* .

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints* .

For a discussion and forms for use in actions and cross actions in interpleader generally, see Ch. 314, *Interpleader* .

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter* .

For alternative forms for prayers, see Ch. 420, *Prayers* .

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers* .

For forms for allegations showing proper venue, see Ch. 571, *Venue* .

For alternative forms for verification, see Ch. 572, *Verification* .

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17-213 California Forms of Pleading and Practice--Annotated § 213.151

§ 213.151 Affirmative Defense--Statutory Excuse for Nondelivery [Com. Code § 7403(a)]--Goods Damaged or Destroyed by Fire Not Caused by Negligence of Carrier or Warehouse [Com. Code § 7403(a)(2)]--By Carrier or Warehouse

[1] FORM Affirmative Defense--Statutory Excuse for Nondelivery [Com. Code § 7403(1)]--Goods Damaged or Destroyed by Fire Not Caused by Negligence of Carrier or Warehouseman [Com. Code § 7403(1)(b)]--By Carrier or Warehouseman

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that on or about _____[*date*], the goods described in the complaint on file herein were _____[destroyed *or* damaged] in a fire [of unknown origin] that burned defendant's warehouse.

[2] Use of Form

This affirmative defense is for use by a carrier or warehouse to answer a complaint alleging a breach of its duty to deliver goods covered by a bill of lading or warehouse receipt. A carrier or warehouse has a duty to deliver goods in its possession to a person who is entitled to them under a bill of lading or warehouse receipt, unless and to the extent that the carrier or warehouse can establish that it has a specifically enumerated statutory excuse for not doing so [*Com. Code § 7403(a)*]. For example, a carrier or warehouse will not be liable for nondelivery if it can establish that the goods were destroyed by some cause for which it was not liable. However, if the goods were destroyed by fire, the burden is on the person entitled to the goods under the document of title to establish that the fire was caused by the negligence of the carrier or warehouse [*Com. Code § 7403(a)(2)*].

If more than one affirmative defense is set forth in the answer, each defense must be separately stated [*Code Civ. Proc. § 431.30(g)*] and numbered [*Cal. Rule of Ct., Rule 2.112*]. If the complaint sets forth more than one cause of action, the affirmative defense must refer to the cause of action it is intended to answer [*Code Civ. Proc. § 431.30(g)*].

[3] Alternative Procedures

If the fact that a carrier or warehouse has a statutory excuse for its failure to deliver goods covered by a document of title appears on the face of the complaint or from matter of which the court must or may take judicial notice [*see Evid. Code §§ 451, 452*], the objection may be raised by demurrer [*Code Civ. Proc. § 430.30(a)*; *see generally* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*]. Whether or not the fact so appears, if the defense can be indisputably established by affidavits, declarations, admissions, answers to interrogatories, or depositions, defendant may move for summary judgment on that ground [*see Code Civ. Proc. § 437c*; *see also* Ch. 537, *Summary Judgment*].

[4] State Statutes

Burden of establishing negligence in case of damage or destruction by fire is on person entitled under the document. *Com. Code § 7403(a)(2)*

[5] Cross References

See also *§ 213.190*.

For discussion of plaintiff's burden of establishing negligence, see Ch. 380, *Negligence* .

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17-213 California Forms of Pleading and Practice--Annotated § 213.152

§ 213.152 Complaint in Interpleader [Code Civ. Proc. § 386]--Conflicting Claims to Goods in Possession of Carrier or Warehouse [Com. Code § 7603]--By Carrier or Warehouse

[1] FORM Complaint in Interpleader [Code Civ. Proc. § 386]--Conflicting Claims to Goods in Possession of Carrier or Warehouseman [Com. Code § 7603]--By Carrier or Warehouseman

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT IN INTERPLEADER
_____ [*name*],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

1. Plaintiff _____[*name*] is, and at all times herein mentioned was, _____ [*state capacity of plaintiff which allows it to bring action, e.g.*, a corporation duly organized and existing under the laws of the state of _____ (*specify state*), and is authorized to do and is doing business in the State of California and engaged in the business of _____ (warehouse *or* intrastate transportation)].

2. Defendant _____[*bailor's name*] is, and at all times mentioned herein was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.*, a resident of _____ County, California].

3. Defendant _____[*claimant's name*] is, and at all times mentioned herein was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a resident of _____ County, California].

[4. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is making or has a claim to the goods herein described which is conflicting with the claims of the defendants herein and which may subject plaintiff to vexatious litigation with respect to such goods)].

5. On or about _____[*date*], defendant _____[*bailor's name*] delivered to plaintiff the following goods for _____[storage *or* transportation]: _____[*description of goods*]. These goods are in the approximate value of $_____. Plaintiff issued its _____[warehousereceipt *or* bill of lading] No. _____ to defendant _____[*bailor's name*] as a receipt for the goods. A copy of this receipt is attached as Exhibit "_____" and incorporated by reference.

6. Defendant _____[*claimant's name*] claims the goods delivered to plaintiff on the ground that _____[*specify basis of claim, e.g.*, he/she is a good faith purchaser for value of the goods from the bailor].

7. Plaintiff is indifferent with respect to which of the defendants plaintiff should deliver the above-described goods, and plaintiff has no claim on or interest in the goods other than for the proper charges for _____[storage *or* transportation] thereof and is ready and willing to deliver the goods to the court or to such person as the court shall direct.

8. The respective claims made by defendants _____[*names*] are adverse and conflicting and are made without plaintiff's collusion. Plaintiff is unable to safely determine which of the claims is valid.

9. Plaintiff has incurred attorney fees and costs as a result of these proceedings in the amount of $_____.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. That defendants be ordered to interplead and litigate their respective rights to the above-described goods;

2. That plaintiff be discharged from any and all liability on account of the claims of each of the defendants;

3. That plaintiff be awarded costs and reasonable attorney fees to be determined by the court; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 213.150[1].*]

[2] Use of Form

This complaint is for use by a carrier or warehouse to bring an action in interpleader when there is more than one claim to title or possession of goods covered by a bill of lading or warehouse receipt, and which were delivered to the carrier or warehouse. The carrier or warehouse is excused from its duty to deliver the goods to the person entitled to them under the document of title until it has had a reasonable time to ascertain the validity of the adverse claims or bring the interpleader action [*Com. Code § 7603*].

[3] Allegations

The form alleges:

- Plaintiff's capacity to bring suit (Paragraph 1) [*see Corp. Code §§ 167, 207*].
- Defendant's residence (Paragraphs 3 and 4) [*see, e.g., Code Civ. Proc. §§ 395(a), 395.5*].
- Fictitious defendants (Paragraph 4) [*see Code Civ. Proc. § 474*; *see generally* Ch. 20, *Allegations Commonly Used*].
- That the carrier or warehouse received goods for storage for or delivery to the person entitled to them under a bill of lading or warehouse receipt, thereby incurring a duty to deliver the goods (Paragraph 5) [see *Com. Code §§ 7102(a)(1), 7403(a)*].
- That conflicting claims have been made to the goods (Paragraphs 6 and 8) [*Code Civ. Proc. § 386*; *Com. Code § 7603*].
- That plaintiff has no interest in the goods (Paragraph 7) [*see Code Civ. Proc. § 386*].
- That attorney's fees and costs were incurred (Paragraph 9) [*Code Civ. Proc. § 386.6*].

[4] State Statutues

Conflicting claims and interpleader. *Com. Code § 7603*

[5] Cross References

See also *§ 213.150*.

For discussion of interpleader generally, see Ch. 314, *Interpleader* .

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[Reserved]

§§ 213.153[Reserved]

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B. Warehouses and Warehouse Receipts

17-213 California Forms of Pleading and Practice--Annotated § 213.170

§ 213.170 Complaint for Damages [Civ. Code § 3300]--For Omission of Essential Term From Warehouse Receipt [Com. Code § 7202]--By Person Entitled to Goods Under Warehouse Receipt

[1] FORM Complaint for Damages [Civ. Code § 3300]--For Omission of Essential Term From Warehouse Receipt [Com. Code § 7202]--By Person Entitled to Goods Under Warehouse Receipt

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

1. Defendant _____[*name*] is, and at all times herein mentioned was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a corporation existing under the laws of the State of California with its principal place of business in _____[*city*], _____ County, California]. Defendant is, and at all times herein mentioned was, doing business as a warehouse for hire.

[2. *Fictitious name allegation, if appropriate. See § 213.150[1], Paragraph 2.*]

[3. *Agency allegation if appropriate. See § 213.150[1], Paragraph 3.*]

4. On or about _____[*date*], _____ [*specify person from whom warehouse received goods for storage and/or delivery, e.g.,* bailor _____ (*name*)] deposited with defendant[s, and each of them,] the goods described as follows: _____[*specify goods*]. On the same day, defendant[s, and each of them,] issued to _____ [*specify person from whom warehouse received goods for storage and/or delivery, e.g.,* bailor _____ (*name*)] its/their warehouse receipt No. _____ as a receipt for the goods. A copy of this warehouse receipt is attached as Exhibit "_____," and incorporated by reference.

5. The warehouse receipt issued by defendant[s, and each of them,] failed to include within its terms _____[*specify omitted term e.g.,* a statement of advances made by defendant(s, and each of them,) against the goods described in the warehouse receipt].

6. Plaintiff _____ [*specify plaintiff's interest, e.g.,* purchased the receipt as issued from _____ (*name of selle* r) for $_____, the price determined by the charges specified in the warehouse receipt].

7. Plaintiff suffered damages as a result of the aforementioned omission _____[*specify how damage occurred, e.g*. in that defendant(s, and each of them,) refused to deliver the goods without payment of the advances made on the goods. Plaintiff paid the advances under protest].

8. As a proximate result of the omission of the term, plaintiff suffered damage in the amount of $_____.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For general damages in the amount of $_____;

2. For costs of suit incurred herein; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 213.150[1].*]

[2] Use of Form

This complaint is for use by a person entitled to goods covered by a warehouse receipt when he or she suffers damages as a result of the failure of a warehouse to include essential terms in the warehouse receipt [*see Com. Code § 7202(b)*].

[3] Allegations

The form alleges:

- That the warehouse received goods for storage and/or delivery to the person entitled to them under the warehouse receipt (Paragraph 4) [*see Com. Code §§ 7102(a)(1), 7403(a)*].

- The omission of an essential term in the warehouse receipt (Paragraph 5) [*Com. Code § 7202(b)*].

- Plaintiff's interest in the goods, that is, as the person entitled to them (Paragraph 6) [*see Com. Code §§ 1201(b)(16),(21), 7102(a)(9)*].

- The damages suffered by plaintiff because of the omission (Paragraphs 7 and 8) [*Com. Code § 7202(b)*].

[4] Essential Terms

Although a warehouse receipt does not have to be in any particular form, it must embody specified statutory terms, or the warehouse is liable for damages caused by their omission [*Com. Code § 7202(a),(b)(1)-(9)*]. These terms are listed in § 213.50[1].

[5] Optional Terms

A warehouse may insert any other terms in the warehouse receipt that are not contrary to the provisions of the Commercial Code and do not impair the warehouse's obligation of delivery under *Com. Code § 7403* or its duty of care under *Com. Code § 7204*. Any contrary provisions will be ineffective [*Com. Code § 7202(c)*].

[6] State Statutes

Essential and optional terms in warehouse receipt. *Com. Code § 7202*

[7] Cross References

See also *§ 213.150*.

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17-213 California Forms of Pleading and Practice--Annotated § 213.171

§ 213.171 Complaint for Damages [Civ. Code § 3300]--For Damages Caused by Misdescription of Goods [Com. Code § 7203]--By Person Entitled to Goods Under Warehouse Receipt

[1] FORM Complaint for Damages [Civ. Code § 3300]--For Damages Caused by Misdescription of Goods [Com. Code § 7203]--By Person Entitled to Goods Under Warehouse Receipt

SUPERIOR COURT OF

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant(s). See § 213.150[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 213.150[1], Paragraph 2.*]

[3. *Agency allegation if appropriate. See § 213.150[1], Paragraph 3.*]

4. On or about _____[*date*], _____ [*specify person from whom warehouse received*

goods for storage and/or delivery, e.g., bailor _____ (*name*)] deposited with defendant[s, and each of them,] the goods described as follows: _____[*specify goods*]. On the same day, defendant[s, and each of them,] issued to _____ [*specify person from whom warehouse received goods for storage and/or delivery, e.g.,* bailor _____ (*name*)] its/their warehouse receipt No. _____ as a receipt for the goods. The aforementioned warehouse receipt described the goods as follows: _____[*specify*]. A copy of this warehouse receipt is attached as Exhibit "_____" and incorporated by reference.

5. On or about _____[*date*], the aforementioned warehouse receipt was _____[duly negotiated *or* transferred] to plaintiff for value in the sum of $_____. Plaintiff accepted the warehouse receipt in good faith and, without any notice or knowledge to the contrary, reasonably relied on the description of the goods on the receipt. Plaintiff is now the owner and holder of the warehouse receipt, and is entitled to the goods covered by it.

6. On or about _____[*date*], plaintiff demanded that defendant[s, and each of them,] deliver the goods and tendered to defendant(s) the charges itemized by defendant(s) together with the warehouse receipt, properlyendorsed, and offered to acknowledge delivery when it was made. Defendant[s, and each of them,] failed and refused, and continue(s) to fail and refuse, to deliver the goods. Instead, defendant[s, and each of them] offered the following described goods in satisfaction of the obligation contained in the warehouse receipt on the ground that the offered goods were, and are, in fact those deposited under the terms of the warehouse receipt: _____[*describe goods offered*]. Plaintiff refused to accept this offer, and defendant[s, and each of them,] has continued to fail and refuse to deliver the goods as described in the warehouse receipt.

7. The value of the goods described in the warehouse receipt was, and is, $_____, and as a proximate result of the failure of defendant[s, and each of them,] to deliver the goods, plaintiff has been damaged in that sum.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For general damages in the amount of $_____;

2. For costs of suit incurred herein; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 213.150[1].*]

[2] Use of Form

This complaint is for use by a person who is entitled to goods covered by a warehouse receipt because he or she is either a party to the receipt or a bona fide purchaser of the receipt, to bring an action against a warehouse for damages suffered as the result of a misdescription on the receipt of the goods covered by the receipt [*see Com. Code § 7203*].

[3] Allegations

The form alleges that:

- The warehouse received goods for storage and/or delivery to the person entitled to them under the warehouse receipt (Paragraph 4) [see *Com. Code § 7102(a)(1)*].

- The plaintiff is the person entitled to receive the goods covered by the receipt, and that he or she relied in good faith on the description of the goods in the receipt (Paragraph 5) [*Com. Code §§ 7102(a)(9), 7203*].

- The warehouse has failed or refused to fulfill its obligation to deliver the goods described in the receipt (Paragraph 6) [*Com. Code §§ 7203, 7403(a)*].

- Plaintiff suffered damages as a result of the misdescription of the goods (Paragraph 7) [*Com. Code § 7203*].

[4] State Statutes

Liability for nonreceipt and misdescription under a warehouse receipt. *Com. Code § 7203*

[5] Cross References

See also *§§ 213.150* and *213.170*.

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17-213 California Forms of Pleading and Practice--Annotated § 213.172

§ 213.172 Proceedings to Enforce Warehouse's or Carrier's Lien--Notice to Persons Known to Claim Interest in Goods of Proposed Sale of Goods--Lien on Goods Stored by Merchant or Other Person [Com. Code §§ 7210(a), (b), 7308(a), (g)]

[1] FORM Proceedings to Enforce Warehouseman's or Carrier's Lien--Notice to Persons Known to Claim Interest in Goods of Proposed Sale of Goods--Lien on Goods Stored by Merchant or Other Person [Com. Code §§ 7210(1), (2), 7308(1), (7)]

TO: _____[*name of bailor or third party known to claim interest in the goods*].

Notice is hereby given that _____[you *or specify name of owner or lawful possessor if notice is being sent to other interested person*] are in default of payment of the following itemized charges and expenses, for _____ [*specify, e.g.,* (transportation and) storage of the goods described below, in the undersigned's _____ (warehouse *or* terminal)] located at _____[*address*] from _____[*date*], to _____[*specify date, e.g.,* the present].

[This notice constitutes a demand for payment of all charges, expenses, and costs listed below. PAYMENT MUST BE MADE WITHIN 10 DAYS FROM THE TIME YOU RECEIVE THIS NOTICE, AND UNLESS PAYMENT IS RECEIVED BY THE UNDERSIGNED, THE LISTED GOODS WILL BE ADVERTISED FOR SALE AND SOLD BY AUCTION, PURSUANT TO COMMERCIAL CODE SECTION 7210(b), AT _____ [*specify nearest suitable place to that where the goods are held or stored, e.g.,* THE _____ (WAREHOUSE *or* TERMINAL) LOCATED AT THE ADDRESS SPECIFIED ABOVE.]

The goods are described as follows: _____[*specify in detail the goods that are subject to the lien and are to be sold*].

The amounts now due and payable for storage of the goods are as follows: _____[*specify in detail the amount due and the date when it became due, including the applicable rate*].

In addition, the undersigned claims the amount of $_____, for _____[*specify any additional charges claimed, e.g.,* processing incidental to storage, transportation, and insurance]; the amount of $_____, for storage of the goods, at the rate of $_____ per _____[*specify unit, e.g.,* pound], from the date of this notice to the date of the aforementioned sale; and for the reasonable expenses of this proceeding to enforce the lien.
Dated: _____.

_____
[*signature of warehouse or carrier*]

[2] Use of Form

This forms is a notice of sale for use by a warehouse or carrier to enforce a lien on goods covered by a warehouse receipt or bill of lading [see *Com Code §§ 7210(a), (b), 7308(a), (g)*].

A warehouse has a lien on the goods, against the bailor or a third party who entrusted the goods to the bailor, for charges accrued in relation to the goods [*Com. Code § 7209(a), (c)*]. For further discussion of warehouse liens, see *§ 213.52*.

A carrier has a similar lien, but the lien may be effective against the consignor or any person entitled to the goods only as long as the carrier did not have notice that the consignor lacked authority to subject the goods to the charges [*Com. Code § 7307(a), (b)*]. For further discussion of carriers' liens, see *§ 213.73*.

[3] Contents of Notice

[a] Warehouse's Lien on Goods Stored by Merchant

If the goods were stored by a merchant, a warehouse's lien may be enforced by private or public sale of the goods after notifying all persons known to claim an interest in the goods. The sale must take place at a time or place, and on terms, that are commercially reasonable. The notice of sale must include a statement of the amount due, the nature of the proposed sale, and the time and place of any public sale [*Com. Code § 7210(a)*].

[b] Warehouse's Lien on Goods Other Than Goods Stored by Merchant

If the goods were stored by other than a merchant, stricter requirements govern the sale of the goods in satisfaction of a warehouse's lien [*see Com. Code § 7210(b)*; *see also § 213.53[2]*]. All persons known to claim an interest in the goods must be notified of a sale. Notification may be made by mail, personal service, or verifiable electronic mail. The notice must be given to those persons either in person or by registered or certified mail at their last known address, and must include all of the following [*Com. Code § 7210(b)*]:

- An itemized statement of the claim.
- A description of the goods.
- A demand for payment within a specified time that cannot be less than 10 days after receipt of the notice.
- A conspicuous statement that if the claim is not paid within that time, the goods will be advertised for sale and sold by auction at a specified time and place.

The sale must conform to the terms of the notification, and must be held at the nearest suitable place to where the goods

are located [*Com. Code § 7210(b)*].

[c] Carrier's Lien

Under *Com. Code § 7308(g)*, a carrier's lien may be enforced pursuant to the methods set out in *Com. Code § 7308(a)* or *7210(b)*. The procedure set forth in *Com. Code § 7308(a)* is substantially similar to the method for enforcing a warehouse's lien under *Com. Code § 7210(a)*, except that the procedure provided in *Com. Code § 7308(a)* is not restricted to liens on goods given to the carrier by merchants in the course of their business, as is *Com. Code § 7210(a)* [*see Com. Code § 7308*, Cal. Code Comments 1 and 2; *see also Com. Code § 7210(a)* (enforcement procedure for warehouse's lien except as provided by *Com. Code § 7210(b)* which governs noncommercial storage)]. In other words, the stricter regulation of enforcement of warehouse's liens on goods stored by nonmerchants, governed by *Com. Code § 7210(b)*, apparently is not imposed on carriers, although a carrier may elect to proceed under that section [*see Com. Code § 7308(a), (g)*; *see also Com. Code § 7308*, Official UCC Comment (section intended to give carrier enforcement procedure coextensive with that given warehouse in cases other than those covering noncommercial storage); *see also Com. Code § 7210(a)*].

It is not clear under what circumstances *Civ. Code § 2144* (a carrier's lien for services rendered at the shipper's or consignee's request is regulated by *Civ. Code § 2872 et seq.*), and its corresponding enforcement procedure in *Civ. Code § 3052*, would apply. *Civ. Code § 2144* has not been repealed by the Commercial Code, although it would be subordinate to the specific provisions in Division 7. Thus, *Com. Code §§ 7307* and *7308* may prevail over *Civ. Code §§ 2144* and *3205* [*see Com. Code § 7307*, Cal. Code Comment 1]. For discussion of the enforcement of a carrier's lien on goods covered by a bill of lading, see *§ 213.74*.

[4] State Statutes

Warehouse's lien. *Com. Code § 7209*

Security interest for money advanced and interest. *Com. Code § 7209(b)*

Enforcement of warehouse's lien. *Com. Code § 7210*

Carrier's lien. *Com. Code § 7307*

Enforcement of carrier's lien. *Com. Code § 7308*

[5] Decisions

Warehouse had lien on goods warehoused. *American D. Co. v. Hollywood S. Co. (1938) 28 Cal. App. 2d 439, 441-442, 82 P.2d 711* ; *San Angelo, Etc. v. S. End W. Co. (1936) 19 Cal. App. 2d Supp. 749, 754, 61 P.2d 1235* ; *see Com. Code § 7209(a)*

Sale of stored property to satisfy lien for storage charges was proper when notice of contemplated sale was given. *Norton v. Lyon Van & Storage Co. (1935) 9 Cal. App. 2d 199, 202-203, 49 P.2d 311* ; *see Com. Code § 7210*

Fruit packer was entitled to warehouse's lien for services rendered in receiving, storing, processing, and packing. *Golden State Orchards v. Harter (1928) 93 Cal. App. 390, 400, 269 P. 735* ; *see Com. Code § 7209(a)*

Warehouse was entitled to lien for charges made for and on account of resacking and reconditioning goods when warehouse receipts provided that such charges must be paid before delivery. *Browning v. River Farms Co. (1927) 82*

Cal. App. 361, 364-366, 255 P. 548 ; *see Com. Code § 7209(a)*

Warehouse's lien was inapplicable to property of which the depositor had neither title nor right of possession. *Young v. Colyear (1921) 54 Cal. App. 232, 235, 201 P. 623* ; *see Com. Code § 7209(a)*

[6] Cross References

See *§ 213.173*.

For discussion of general provisions of the Civil Code which regulate liens, and for forms for use in enforcing various miscellaneous liens, see Ch. 342, *Liens and Wage Preferences* .

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17-213 California Forms of Pleading and Practice--Annotated § 213.173

§ 213.173 Proceedings to Enforce Warehouse's Lien--Advertisement of Sale for Publication or Posting--Lien on Goods Not Stored by Merchant [Com. Code §§ 7210(b)(5), 7308(g)]

[1] FORM Proceedings to Enforce Warehouseman's Lien--Advertisement of Sale for Publication or Posting--Lien on Goods Not Stored by a Merchant [Com. Code §§ 7210(2)(f), 7308(7)]

To whom it may concern:

Notice is hereby given that on _____[*date*], at _____[*time*], at _____[*address*], _____ County, California, the undersigned will sell at public auction for cash, in lawful money of the United States, to satisfy the lien thereon for _____[storage *and/or* hauling], the goods described below that were deposited by _____[*name*] with the undersigned at _____[*specify or warehouse address*].

The goods to be sold are: _____[*itemize the goods*].

The amount due on these goods is $_____. The auction will be made for the purpose of satisfying the lien on the goods to the extent of that amount, together with the cost of the sale.
Dated: _____.

_____ [*signature of warehouse*]

[2] Use of Form

This form is the text of an advertisement for use by a warehouse to advertise the sale of goods to satisfy a warehouse's lien on goods not stored by a merchant in the ordinary course of business [*see Com. Code § 7210(b)(5)*].

[3] Publication Requirement

A warehouse's lien on goods other than goods stored by a merchant in the course of business may be only enforced by

public sale of the goods [*Com. Code § 7210(b)(5)*; *see Com. Code § 7308(g)* (carrier's lien also may be enforced by method set forth in *Com. Code § 7210(b)*)].

The warehouse must give notice of sale to all persons known to claim an interest in the goods. The notice must specify a time after which the goods will be advertised for sale and sold if payment has not been made [*Com. Code § 7210(b)(1), (3)*; *see § 213.172*]. After the time given in the notice of sale has expired, the sale to enforce the lien must be advertised once a week for two consecutive weeks in a newspaper of general circulation published in the judicial district where the sale is to be held. The sale must take place at least 15 days after the date of the first publication of the advertisement.

If there is no newspaper of general circulation, the advertisement must be posted at least 10 days before the sale in at least six conspicuous places in the neighborhood of the proposed sale [*Com. Code § 7210(b)(5)*].

[4] Contents of Advertisement

The advertisement must include all of the following [*Com. Code § 7210(b)(5)*; *see Com. Code § 7308(g)* (application to sales to enforce carrier's lien)]:

- A description of the goods.
- The name of the person on whose account the goods are being held.
- The time and place of the sale.

[5] Cross References

See *§ 213.172*.

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17-213 California Forms of Pleading and Practice--Annotated § 213.174

§ 213.174 Complaint for Damages [Civ. Code §§ 3333, 3336]--For Willful or Negligent Failure to Comply With Requirements of Notice and Sale [Com. Code §§ 7210(i), 7308(h)]--By Owner of Goods Against Carrier or Warehouse

[1] FORM Complaint for Damages [Civ. Code §§ 3333, 3336]--For Willful or Negligent Failure to Comply With Requirements of Notice and Sale [Com. Code §§ 7210(9), 7308(8)]--By Owner of Goods Against Carrier or Warehouseman

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Conversion)
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 213.171[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 213.150[1], Paragraph 2.*]

[3. *Agency allegation if appropriate. See § 213.150[1], Paragraph 3.*]

4. At all times herein mentioned, and in particular on or about _____[*date of conversion*], plaintiff was, and still is, the _____[*describe plaintiff's interest in the goods, e.g.,* bailor] and was, and still is entitled to possession of the goods described as follows: _____[*specify goods*]. Plaintiff is entitled to possession of these goods by virtue of the fact that _____[*specify reason e.g.,* he/she holds a negotiable warehouse receipt covering them].

5. On _____[*date*], _____ [plaintiff *or, if the plaintiff is the consignor or some other interested party who did not deposit the goods, specify, e.g.,* the bailor _____ (*name*)] deposited the goods described above with defendant[s, and each of them,] at its/their _____[terminal *or* warehouse] located at _____[*specify address*]. On the same day, defendant[s, and each of them], for valuable consideration received and accepted the goods, and agreed to both store and safely keep the goods in its/their _____[terminal *or* warehouse] until they should be called for by plaintiff and delivered to plaintiff on demand. Defendant[s, and each of them], issued to _____[plaintiff *or* the bailor] its/their _____[bill oflading *or* warehouse receipt] No. _____ as a receipt for the goods. A copy of the document is attached as Exhibit "_____" and incorporated by reference.

6. On or about _____[*date of failure to comply with notice requirements*], at _____ County, California, the goods described above had a value of $_____.

7. On _____[*date*], defendant[s, and each of them] issued a notice or notices of its/their intent to sell the goods to satisfy its/their lien for _____[*specify charges and/or expenses covered by lien, e.g.,* storage charges]. A copy of this notice is attached as Exhibit "_____" and incorporated by reference.

8. Plaintiff did not receive a notice of sale from [any of] the defendant(s).

[9. The failure of defendant(s, and each of them,) to send a notice to plaintiff was a willful violation of Section(s) _____ (7210(1) *or* 7210(2) *or* 7210(2) and 7308(7) *or* 7308(1)) of the California Uniform Commercial Code because defendant(s, and each of them,) had knowledge of plaintiff's claim of an interest in the goods in that _____ (*allege facts showing knowledge, e.g.,* it/they were notified by the bailor of a sale of the goods and negotiation of the _____[bill of lading *or* warehouse receipt] to plaintiff. A copy of the letter from the bailor to defendant(s, and each of them,) notifying it/them of the sale is attached as Exhibit "_____" and incorporated by reference.)]

10. On _____[*date*], defendant[s, and each of them] sold the goods pursuant to the notice _____[*specify method of sale, e.g.,* by public auction].

[11. *If plaintiff is seeking damages under the alternative damage provision of Civ. Code § 3336, include the following allegation*: As a proximate re sult of the conversion of the goods by the defendant(s, and each of them), plaintiff _____ (*allege injuries suffered which are the natural, reasonable, and proximate results of the conversion*), all to plaintiff's damage in the sum of $_____.]

[12. Between the time of the conversion of the goods described above and their proceeds by defendant(s, and each of them,) to its/their own use and the filing of this action, plaintiff _____ (*set forth facts showing time and money properly expended in pursuit of the converted goods*), all to plaintiff's further damage in the sum of $_____.]

[13. The aforementioned acts of defendant justify the awarding of punitive and exemplary damages in that they constitute _____ (*specify conduct justifying award of punitive damages under Civ. Code § 3294, e.g.,* despicable conduct carried on in willful and conscious disregard of plaintiff's rights).]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For the value of the goods converted in the sum of $_____;

2. For interest at the legal rate on the foregoing sum pursuant to *Civil Code Section 3336*, from and after _____[*date*];

[3. For damages for the proximate and foreseeable loss resulting from defendant's conversion in the sum of $_____;]

[4. For damages for time and money properly expended in pursuit of the converted property in the sum of $_____;]

[5. For punitive and exemplary damages;]

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.

[*Verification if desired*]

Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Use of Form

This form is a complaint for use by a person entitled to goods under a document of title to bring an action for damages based on a warehouse's or carrier's willful or negligent failure to notify the plaintiff of a sale to enforce its lien for storage and other charges. If the carrier or warehouse fails to comply with the notice provisions of *Com. Code §§ 7210* and *7308*, it will be liable for damages caused by the failure. If the violation is willful, the carrier or warehouse is liable for conversion [*Com. Code §§ 7210(i), 7308(h)*].

This form may be modified for use against a carrier or warehouse who fails to comply with any of the other requirements of *Com. Code §§ 7210* and *7308* [*see Com. Code §§ 7210(i), 7308(h)*].

[3] Allegations

The form alleges the following:

- That the carrier or warehouse received goods for storage and/or delivery to the person entitled to them under the bill of lading or warehouse receipt (Paragraph 5) [*see Com. Code § 7102(a)(1)*].

- The value of the goods at the time of willful or negligent failure to comply with the notice provisions (Paragraph 6) [*Civ. Code §§ 3333, 3336*].

- That the carrier or warehouse sent notices of sale to satisfy a carrier's or warehouse's lien, but breached its duty to send a notice to plaintiff (Paragraph 7 and 8) [*Com. Code §§ 7209, 7210, 7307, 7308*

].

- That the goods were sold at public or private auction (Paragraph 10) [*Com. Code §§ 7210, 7308*].

Optional paragraphs are included for use if the defendant's failure to comply with *Com. Code §§ 7210* and *7308* was willful. These paragraphs allege the following:

- The defendant's willful failure or refusal to send a notice to the plaintiff (Paragraph 9) [*see Com. Code §§ 7210(i), 7308(h)*].

- The measure of damages for conversion (Paragraphs 11 and 12) [*Civ. Code § 3336*].

- The basis for punitive damages (Paragraphs 9 and 13) [*Civ. Code § 3294*; *see* Ch. 177, *Damages*].

[4] State Statutes

Enforcement of warehouse's lien. *Com. Code § 7210*

Enforcement of carrier's lien. *Com. Code § 7308*

[5] Decisions

Conversion is committed when bailee having power to do so refuses to redeliver goods to which bailor is entitled. *George v. Bekins Van & Storage Co. (1949) 33 Cal. 2d 834, 837, 205 P.2d 1037*

Failure to notify plaintiff of sale to satisfy warehouse's is cause for conversion action. *Fitch v. Bekins Van & Storage Co. (1937) 22 Cal. App. 2d 101, 104, 70 P.2d 670*

Sale of stored property to satisfy lien for storage charges was proper when notice of contemplated sale was given pursuant to law. *Norton v. Lyon Van & Storage Co. (1935) 9 Cal. App. 2d 199, 202-203, 49 P.2d 311*

[6] Cross References

See also *§§ 213.150, 213.172,* and *213.173*.

For discussion and forms for use in action for conversion of personal property, see Ch. 150, *Conversion* .

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[Reserved]

§§ 213.175[Reserved]

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C. Carriers and Bills of Lading

17-213 California Forms of Pleading and Practice--Annotated § 213.190

§ 213.190 Complaint for Damages [Civ. Code § 3333]--Breach of Duty by Carrier or Warehouse Resulting in Loss or Damage to Goods [Com. Code §§ 7204, 7309]--By Person Entitled to Goods Under Bill of Lading or Warehouse Receipt

[1] FORM Complaint for Damages [Civ. Code § 3333]--Breach of Duty by Carrier or Warehouseman Resulting in Loss or Damage to Goods [Com. Code §§ 7204, 7309]--By Person Entitled to Goods Under Bill of Lading or Warehouse Receipt

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Negligence)
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant(s). See § 213.171[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 213.150[1], Paragraph 2.*]

[3. [*Agency allegation if appropriate. See § 213.150[1], Paragraph 3.*]

4. On or about _____[*date*], _____ [*specify person from whom carrier or warehouse received goods for storage and/or delivery, e.g.,* bailor _____ (*name*)] delivered to defendant[s, and each of them,] at _____[*specify address*] the goods described as follows: _____[*specify goods*]. On the same day, defendant[s, and each of them,] issued to _____ [*specify person from whom carrier or warehouse received goods for storage and/or delivery, e.g.,* bailor _____ (*name*)] its/their _____[bill of lading *or* warehouse receipt] No. _____ as a receipt for the goods. Plaintiff _____ [*specify plaintiff's interest, e.g.* became the owner of the _____ (bill of lading *or* warehouse receipt) when it was negotiated to him/her by _____ (*specify negotiator, e.g.,* bailor _____ [*name*]) for value on or about _____ (*date*)]. A copy of this _____[bill of lading *or* warehouse receipt] is attached hereto, marked as Exhibit "_____," and incorporated herein by reference.

5. On or about _____[*date*], defendant[s, and each of them,] _____ [*specify disposition, e.g.,* stored the goods in a warehouseoperated by it/them at _____ (*specify address*)]. At the time the goods were delivered to defendant[s, and each of them], they were in good and proper condition, and were of a value of $_____.

6. While the goods were in their possession, defendant[s, and each of them,] negligently _____[*allege acts or omissions by defendant(s) establishing negligence*].

7. On or about _____[*date*], plaintiff demanded that defendant[s, and each of them,] deliver the goods to _____[*specify address*]. Delivery was made on _____[*date*], but the goods were in a damaged and injured condition in that they were _____[*specify nature of damage*].

8. As a proximate result of the negligence of defendant[s, and each of them,] plaintiff's goods were _____ [*describe damage, e.g.* destroyed beyond repair, all to plaintiff's damage in the sum of $_____ *or* damaged]. [*If property was not completely destroyed, add*: Plaintiff _____ (has expended *or* must expend) $_____ for repair of the (damaged) goods, which is a reasonable sum for such repair].

[9. In compliance with the claims procedure specified in Paragraph _____ of the _____ (bill of lading *or* warehouse receipt), plaintiff _____ (*allege acts taken by plaintiff to comply with claims procedure, e.g.,* presented a written claim at defendant's main office at _____ (*address, including city and state*) stating that plaintiff received the goods in a damaged condition and specifying the damages plaintiff claims for injury to the goods. (A copy of plaintiff's claim is attached as Exhibit "_____," and incorporated herein by reference.)]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For general damages [in the sum of $_____];

2. For costs of suit incurred herein; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 213.150[1].*]

[2] Use of Form

This for is a complaint for use by a person entitled to goods under a bill of lading or warehouse receipt to bring an action for damages against a carrier or warehouse that breached its duty of care by delivering goods in a damaged condition [*Com. Code §§ 7204(a), 7309(a)*].

[3] Allegations

This form alleges that:

- The carrier or warehouse received goods for storage and/or delivery to the person entitled to them under the bill of lading or warehouse receipt (Paragraph 4) [*see Com. Code § 7102(a)(1)*].

- The goods were in good condition when received by the carrier or warehouse (Paragraph 5).

- While the goods were in the carrier's or warehouse's possession, they were damaged due to its negligence (Paragraph 6) [*Com. Code §§ 7204(a), 7309(a)*; *see* Ch. 380, *Negligence*].

- The goods were delivered to plaintiff (Paragraph 7) [*Com. Code § 7403(a)*].

- As a result of the negligence of the carrier or warehouse, plaintiff suffered damages (Paragraph 8) [*Civ. Code §§ 3316, 3333*].

- The plaintiff complied with the carrier's or warehouse's claims procedure, if any (Paragraph 9) [*Com. Code §§ 7204(c), 7309(c)*].

[4] Duty of Care

A carrier or warehouse must exercise such care for goods under a bill of lading or warehouse receipt as a reasonably careful person would exercise under like circumstances [*Com. Code §§ 7204(a), 7309(a)*]. Once goods are deposited with a carrier or warehouse, they must be delivered to the person entitled to them under the bill of lading or warehouse receipt, unless the carrier or warehouse can establish a lawful excuse for not doing so [*Com. Code § 7403(a)*]. For example, the carrier or warehouse may be excused if it can establish that failure to deliver is the result of damage to or delay, loss, or destruction of the goods for which it is not liable [*Com. Code § 7403(a)(2)*]. However, ordinary tort principles apply to liability for goods that are delivered damaged, and the burden of establishing that the carrier or warehouse was negligent is on the plaintiff [*Com. Code §§ 7101*; *Taussig v. Bode & Haslett (1901) 134 Cal. 260, 263, 66 P. 259* ; *see Com. Code § 7403(a)(2)* (burden of establishing negligence in case of damage or destruction by fire is on person entitled to receive goods)].

[5] State Statutes

Warehouse's duty of care. *Com. Code § 7204(a)*

Carrier's duty of care. *Com. Code § 7309*

Obligation of warehouse and carrier to deliver, and excuses for nondelivery. *Com. Code § 7403*

[6] Decisions

Reasonable care under circumstances is required of warehouse. *Grace & Co. v. City of Los Angeles (9th Cir. 1960) 278 F.2d 771, 775*

Warehouse's duty of care is duty to exercise such care in safeguarding bailor's property as reasonably careful owner of similar goods would exercise. *Runkle v. Southern Pacific Milling Co. (1921) 184 Cal. 714, 717, 195 P. 398* ; *see Com. Code § 7204(a)*

Requirement for prompt presentation of written claim is reasonable as designed to give warehouse timely opportunity to ascertain facts concerning asserted loss. *Home Ins. Co. v. L.A. Warehouse Co. (1936) 16 Cal. App. 2d 737, 740, 61 P.2d 510* ; *see Com. Code § 7204(c)*

[7] Cross References

See also *§ 213.150*.

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Chapter 213 DOCUMENTS OF TITLE
PART IV. FORMS
C. Carriers and Bills of Lading

17-213 California Forms of Pleading and Practice--Annotated § 213.191

§ 213.191 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Failure to Follow Claims Procedures [Com. Code §§ 7204(c), 7309(c)]--By Carrier or Warehouse

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Failure to Follow Claims Procedures [Com. Code §§ 7204(3), 7309(3)]--By Carrier or Warehouseman

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

1. The _____[warehouse receipt *or* bill of lading] provides in part _____[*specify provision of warehouse receipt or bill of lading that requires filing of a claim with the carrier or warehouse for loss or damage within a specified time*].

2. Defendant, after delivery of the goods to plaintiff, delivered a claim form to plaintiff that he/she was to complete as proof of loss or damage. Defendant has not received the aforementioned proof of loss, nor has defendant received any other statement of plaintiff's claim.

[2] Use of Form

This form is an affirmative defense is for use by a warehouse or carrier to include in an answer to a complaint seeking damages based on injury to or destruction of goods when the plaintiff failed to file a claim for loss or damage as required by the warehouse receipt or bill of lading covering the goods. Reasonable provisions in a bill of lading or warehouse receipt as to the time and manner of presenting claims or instituting actions based on bailment are valid [*Com. Code §§ 7204(c), 7309(c)*].

[3] State Statutes

Validity of reasonable provisions in warehouse receipt as to the time and manner of presenting claims. *Com. Code §*

7204(c)

Validity of reasonable provisions in bill of lading as to the time and manner of presenting claims. *Com. Code § 7309(c)*

[4] Decisions

Provision requiring prompt presentation of written claim is reasonable because it is designed to give warehouse timely opportunity to ascertain facts concerning asserted loss. *Home Ins. Co. v. L. A. Warehouse Co. (1936) 16 Cal. App. 2d 737, 740, 61 P.2d 510*

[5] Cross References

See also *§ 213.151*.

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17-213 California Forms of Pleading and Practice--Annotated § 213.192

§ 213.192 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Limitation of Liability [Com. Code §§ 7204(b), 7309(b)]--By Carrier or Warehouse

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Limitation of Liability [Com. Code §§ 7204(2), 7309(2)]--By Carrier or Warehouseman

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that plaintiff agreed to accept the valuation in the _____[warehouse receipt *or* bill of lading] covering the goods to be _____[stored *or* transported], which provides _____[*specify provision in warehouse receipt or bill of lading limiting liability to fixed value*].

[2] Use of Form

This affirmative defense is for use by a carrier or warehouse to include in an answer to a complaint seeking damages based on injury to or destruction of goods when the plaintiff claims damages in excess of a limited value stated in the warehouse receipt or bill of lading covering the goods. Damages for loss or damage to goods covered may be limited by a term in the warehouse receipt setting forth a specific liability per article or item, or value per unit of weight. However, the limitation on damages does not apply to a warehouse's liability for conversion [*Com. Code §§ 7204(b), 7309(b)*].

[3] State Statutes

General provisions for carrier limitation of liability. *Civ. Code §§ 2174-2178*

Contractual limitations on warehouse's liability. *Com. Code § 7204(b)*

Carrier's contractual limitation of liability. *Com. Code § 7309(b)*

[4] Decisions

Declared valuation clause is valid term in warehouse receipt. *George v. Bekins Van & Storage Co. (1949) 33 Cal. 2d 834, 845-848, 205 P.2d 1037* ; *Rosenberg v. San Francisco Storage Co. (1927) 81 Cal. App. 715, 717, 254 P. 909* ; *McMullin v. Lyon Fireproof Storage Co. (1925) 74 Cal. App. 87, 95-100, 239 P. 422* ; *see Com. Code § 7204(b)*

Warehouse may insert any terms in receipt that are not contrary to law and that do not impair obligation to exercise reasonable care. *Page v. Ace Van & Storage Co. (1948) 87 Cal. App. 2d 294, 297-298, 196 P.2d 816* ; *see Com. Code § 7202(c)*

[5] Cross References

See also *§ 213.151*.

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[2] Device

[3] Drug

[4] Manufacture

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[6] Prescription

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[4] Gross Immorality, Incompetence, or Gross Negligence

[5] Fraud and Moral Turpitude

[6] False Representations in Writing

[7] Dangerous Use of Drugs or Alcohol

[8] Providing Controlled Substance to Addict

[9] Conduct That Would Have Warranted Denial of License

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[b] Substance Dispensed for Addict or Habitual User

[c] Penalty for Knowing Violation

[5] Selling, Dispensing, or Compounding Drug While Under the Influence

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§ 214.60 Strict Liability in Tort Generally

§ 214.61 Strict Liability for Distribution of Defective Drug Product

§ 214.62 Strict Liability for Defective Warning of Dangerous Drug

[1] Doctrine Applies to Defective Warning

[2] Duty to Warn

[a] Manufacturer's Duty to Warn

[b] Pharmacist's Duty to Warn

[i] Harmful Effects or Impairment of Ability to Drive

[ii] Adequacy of Warning

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§ 214.80 "Prescription Drug Claims Processor" Defined

§ 214.81 Duty to Prepare Pharmaceutical Fee Studies

[1] Studies Must Have Been Conducted on or Before January 1, 1984

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§ 214.110 Petition to State Board of Pharmacy for Reinstatement of License to Practice Pharmacy [Bus. & Prof. Code § 4309]

[1] FORM

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[3] Cross References

§§ 214.111-214.114 [Reserved]

§ 214.115 Complaint for Damages for Personal Injuries Based on Negligence--By Purchaser-User of Prescription Drug Against Pharmacist--General Form

[1] FORM

[2] Use of Form

[3] Contents of Form

[4] Specifying Amount of Damages

[5] Verification

[6] Notice Prior to Commencing Action

[7] Cross References

§§ 214.116-214.119 [Reserved]

§ 214.120 Complaint for Declaratory Relief, Permanent Injunction, and Damages for Violation in Preparing of Pharmaceutical Fee Study--Against Prescription Drug Claims Processor by Pharmacy Owner [Civ. Code § 2528]

[1] FORM

[2] Use of Form

[3] Contents of Form

[4] Verification

[5] Notice Prior to Commencing Action

[6] Jurisdiction

[7] Costs and Attorney's Fees

[8] Cross References

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17-214 California Forms of Pleading and Practice--Annotated § 214.01

§ 214.01 Scope of Chapter

This chapter discusses and contains forms for use in proceedings related to the manufacture and sale of drugs, including the registration of pharmacists and requirements relating to pharmaceutical fee studies by prescription drug claims processors. It also discusses the liability of manufacturers and pharmacists for injuries resulting from defects in drugs and drug prescriptions.

The chapter contains the following forms:

- Form of petition to the Board of Pharmacy for reinstatement of a suspended or revoked certificate to practice pharmacy [*see § 214.110*].

- Form of complaint by a purchaser-user of drugs for damages for personal injury based on the negligence of the pharmacist [*see § 214.115*].

- Form of complaint by a pharmacy owner against a prescription drug claims processor for failure to prepare and transmit pharmaceutical fee studies [*see § 214.120*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesControlled SubstancesGeneral OverviewHealthcare LawActions Against Healthcare WorkersGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRevocation & SuspensionTortsProducts LiabilityStrict Liability

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§ 214.02 Cross References

- For a form of complaint against a drug manufacturer for compensatory and punitive damages based on false advertising, see Ch. 14, *Advertising* .

- For forms alleging entitlement to treble damages when defendant is not licensed, see *Ch. 177, Damages, § 177.40* et seq.

- For forms of complaint and allegations that may be used in an action brought by a plaintiff who purchased and used a defective drug against the manufacturer and distributor of the drug for damages based on strict liability, see Ch. 460, *Products Liability* .

- For forms of petitions of writs of mandate that may be used in proceedings to compel the issuance of a pharmacist's license, see Ch. 471B, *Licensing by Public Agencies* .

- For a form of petition of a writ of mandate to review an administrative decision that may be used in proceedings to review an order of the State Board of Pharmacy revoking, suspending, or modifying a pharmacist's license, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

- For a form of notice required by *Code Civ. Proc. § 364* of intention to commence action against health care provider, see Ch. 415, *Physicians: Medical Malpractice* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewTortsDamagesGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsProducts LiabilityGeneral Overview

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§ 214.03 Governing Law

The principle statutes that regulate the profession of pharmacy are *Bus. & Prof. Code § 4000 et seq.* (known as the Pharmacy Law) [*Bus. & Prof. Code § 4000*]. These statutes are supplemented by *16 Cal. Code Reg §§ 1700-1794*.

The provisions of *Bus. & Prof. Code § 4000 et seq.* generally do not apply to:

- The retail sale of drugs packaged or bottled in the manufacturer's or distributor's containers and labeled in accordance with federal and state drug labeling requirements;

- The sale of dangerous devices, hypodermic needles and syringes, and other specified solutions under specified conditions, to a licensed home health agency or hospice;

- The storage of devices in secure supply areas of licensed hospitals and clinics; or

- The retail sale of vitamins, mineral products, foods, supplements, or nutrients [*see Bus. & Prof. Code § 4057* (exception does not apply to drugs or devices subject to *Bus. & Prof. Code § 4022*)].

Regardless of whether the ingredient of a prescription is trademarked or not, a registered pharmacist must compound or dispense a prescription of a medical practitioner [*see Bus. & Prof. Code § 4051*; *see also § 214.10*].

The duty of prescription drug claims processors to prepare and transmit pharmaceutical fee studies and pharmacy owners' right to enforce that duty are governed by *Civ. Code §§ 2527* and *2528*.

The Uniform Controlled Substances Act [*Health & Safety Code § 11000 et seq.*], and those provisions contained in the Sherman Food, Drug, and Cosmetic Law [*Health & Safety Code § 109875 et seq.*] may also affect the manufacture and sale of prescription and other drugs. Liability of manufacturers and pharmacists for damages resulting from personal injuries caused by defects in drugs and prescriptions is governed by case law.

The Pharmacy Law was reorganized in 1996. *Bus. & Prof. Code § 4000 et seq.*, enacted at that time, are to be construed

as a continuation of the previous version of the law [1996 Stats, ch. 890, § 4].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesControlled SubstancesManufactureGeneral OverviewGovernmentsState & Territorial GovernmentsPolice PowerHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawTreatmentGeneral Overview

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17-214 California Forms of Pleading and Practice--Annotated § 214.04

§ 214.04 Definitions

[1] Dangerous Drug

The term "dangerous drug" as used in this article means any drug unsafe for self-use in humans or animals, and includes the following [*see Bus. & Prof. Code § 4022*]:

- Any drug bearing the legend: "Caution: federal law prohibits dispensing without prescription," "Rx only," or words of similar import.

- Any other drug that by federal or state law can be lawfully dispensed only on prescription or furnished pursuant to *Bus. & Prof. Code § 4006*.

[2] Device

The term "device" means any instrument, apparatus, machine, implant, in vitro reagent, or contrivance, including any component, part, product or byproduct of a device, and accessory, that is, any of the following [*Bus. & Prof. Code § 4023*; *Health & Safety Code § 109920(b), (c)*]:

- Intended for use in the diagnosis of disease or other condition, or in the cure, mitigation, treatment, or prevention of disease in humans or any other animal.

- Intended to affect the structure or any function of the body of humans or any other animal.

It does not include contact lenses, or any prosthetic or orthopedic device that does not require a prescription [*Bus. & Prof. Code § 4023*].

[3] Drug

The term "drug" means [*Bus. & Prof. Code § 4025*; *Health & Safety Code § 109925*]:

- Articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them.

- Articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans or other animals.

- Articles (other than food) intended to affect the structure or any function of the body of humans or other animals.

- Articles intended for use as a component of any of the foregoing articles.

[4] Manufacture

The term "manufacture" means the preparation, compounding, propagation, processing, or fabrication of any drug or device including repackaging or otherwise changing the container, wrapper, or labeling of any drug or device in furtherance of its distribution, but excluding repackaging from a bulk container by a retailer at the time of sale to its ultimate consumer [*Health & Safety Code § 109970*].

"Manufacturer" means and includes everyone who prepares, derives, produces, compounds, or repackages any drug or device except a pharmacy that manufactures on the immediate premises where the drug or device is sold to the ultimate consumer [*Bus. & Prof. Code § 4033(a)(1)*]. It does not mean a pharmacy compounding a drug for parenteral therapy, pursuant to a prescription, for delivery to another pharmacy for the purpose of delivering or administering the drug to the patient(s) named in the prescription, provided that neither the components for the drug nor the drug are compounded, fabricated, packaged, or otherwise prepared prior to receipt of the prescription [*Bus. & Prof. Code § 4033(a)(2)*]. It also does not mean a pharmacy that, at a patient's request, repackages a drug previously dispensed to the patient or to the patient's agent pursuant to a prescription [*Bus. & Prof. Code § 4033(a)(3)*].

"Manufacturer" also means a person who prepares, derives, manufactures, produces, or repackages a dangerous drug [*see Bus. & Prof. Code § 4022*], device, or cosmetic. It includes the holders of a new drug application, an abbreviated new drug application, or a biologics license application, provided that the application has been approved; a manufacturer's third party logistics provider; a private label distributor (including colicensed partners) for whom the private label distributor's prescription drugs are originally manufactured and labeled for the distributor and have not been repackaged; or the distributor agent for the manufacturer, contract manufacturer, or private label distributor, whether the establishment is a member of the manufacturer's affiliated group (regardless of whether the member takes title to the drug) or is a contract distributor site [*Bus. & Prof. Code § 4033(b)*].

[5] Pharmacy

The term "pharmacy" as used in the Pharmacy Law means an area, place, or premises licensed by the board in which the profession of pharmacy is practiced and where prescriptions are compounded. It includes, but is not limited to, any area, place, or premises described in a license issued by the board where controlled substances, dangerous drugs, or dangerous devices are stored, possessed, prepared, manufactured, derived, compounded, or repackaged and from which the controlled substances, dangerous drugs, or dangerous devices are furnished, sold, or dispensed at retail [*Bus. & Prof. Code § 4037(a)*; *see Bus. & Prof. Code § 4112(a)* (nonresident pharmacy that delivers dangerous drugs or dangerous devices to California)].

"Pharmacy" does not include any area in a facility licensed by the State Department of Health Services where floor supplies, ward supplies, operating room supplies, or emergency room supplies of dangerous drugs or dangerous devices are stored or possessed solely for treatment of patients registered for treatment in the facility or for treatment of patients receiving emergency care in the facility [*Bus. & Prof. Code § 4037(b)*].

[6] Prescription

"Prescription" means an oral, written, or electronic transmission order given individually for the person or persons for whom ordered and issued by a physician, dentist, optometrist, podiatrist, veterinarian, or naturopathic doctor pursuant to *Bus. & Prof. Code § 3640.7* [*Bus. & Prof. Code § 3640.7* is operative only until January 1, 2013, and repealed on January 1, 2014, unless Legislature changes those dates], or, if a drug order is issued pursuant to *Bus. & Prof. Code § 2746.51*, *2836.1*, *3502.1*, or 3460.5, by a certified nurse-midwife, nurse practitioner, physician assistant, or naturopathic doctor licensed in California, or pursuant to either *Bus. & Prof. Code § 4052(a)(4)(D)* or *(5)(A)(iv)* by a pharmacist licensed in California [*Bus. & Prof. Code § 4040(a)*; *Bus. & Prof. Code § 4052(a)(4)*, *(5)* were amended to refer to permitted functions of a pharmacist in performing procedures or functions in a licensed health care facility as authorized by *Bus. & Prof. Code § 4052.1*, and in performing procedures or functions as part of the care provided by a health care facility, a licensed home health agency, a licensed clinic in which there is a physician oversight, a provider who contracts with a licensed health care service plan with regard to the care or services provided to the enrollees of that health care service plan, or a physician, as authorized by *Bus. & Prof. § 4052.2*, respectively, but *Bus. & Prof. Code § 4040(a)* was not amended, so it continues to refer to outdated provisions in § 4052(a)]. The prescription must include the information specified in *Bus. & Prof. Code § 4040(a)(1)*.

Notwithstanding *Bus. & Prof. Code § 4040(a)*, a written order of the prescriber of a dangerous drug, except for a Schedule II controlled substance, containing at least the information specified in *Bus. & Prof. Code § 4040(b)* may be treated as a prescription by the dispensing pharmacist as long as any additional information required by § 4040(a) is readily retrievable in the pharmacy [*Bus. & Prof. Code § 4040(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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17-214 California Forms of Pleading and Practice--Annotated § 214.05

§ 214.05 Agencies Regulating Pharmacists and Drugs

[1] State Board of Pharmacy

The Board of Pharmacy of the State of California in the Department of Consumer Affairs has responsibility for administering and enforcing the Pharmacy Law [*Bus. & Prof. Code § 4001(a)* (§ 4001(a) is operative only until July 1, 2010, and repealed on January 1, 2011, unless the Legislature changes those dates); *see Bus. & Prof. Code § 4018* ("Board" defined)]. Among its responsibilities are the following:

- Licensing pharmacists [*Bus. & Prof. Code § 4200 et seq.*].
- Disciplining pharmacists [*Bus. & Prof. Code § 4300 et seq.*].
- Operation of pharmacies [*Bus. & Prof. Code § 4110 et seq.*; *see Bus. & Prof. Code § 4112* (nonresident pharmacies that deliver controlled substances, dangerous drugs, or dangerous devices to California)].
- Sale of dangerous drugs or devices [*see Bus. & Prof. Code § 4080 et seq.*].

It also oversees wholesalers and manufacturers [*Bus. & Prof. Code § 4160 et seq.*] and veterinary food-animal drug retailers [*Bus. & Prof. Code § 4196 et seq.*]. The Board is composed of registered pharmacists and public members [*Bus. & Prof. Code § 4001(b), (c)* (operative only until July 1, 2010, and repealed on January 1, 2011, unless Legislature changes those dates)].

The Board has authority to make rules and regulations as necessary for the protection of the public [*Bus. & Prof. Code § 4005(a), (c)*; *see 16 Cal. Code Reg § 1761 et seq.* (rules of professional conduct)].

[2] Department of Health Services

The Department of Health Services licenses the manufacturer of a drug or device [*Health & Safety Code § 111615*]. This licensing requirement does not apply to a pharmacy that does not manufacture drugs or devices for sale other than

in the regular course of conducting a retail business [*Health & Safety Code § 111655(a)*].

[3] Medical Board

The Medical Board of California, the State Board of Optometry, the Bureau of Naturopathic Medicine, the Dental Board of California, the Osteopathic Medical Board of California, the Board of Registered Nursing, the Veterinary Medical Board, and the Physician Assistant Committee have authority, with the Board of Pharmacy, to assure compliance with *Bus. & Prof. Code § 4170(a)* (dispensing of prescription drugs or dangerous devices by prescriber in office or place of practice). Additionally, these boards arespecifically charged with the enforcement of the Pharmacy Law, relative to their respective licensees [*Bus. & Prof. Code § 4170(b)*].

Legal Topics:

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

§§ 214.06[Reserved]

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17-214 California Forms of Pleading and Practice--Annotated § 214.10

§ 214.10 Certificate Required for Pharmacy Practice

No person may manufacture, compound, furnish, sell, or dispense any dangerous drug or device, or dispense or compound any prescription pursuant to *Bus. & Prof. Code § 4040* unless he or she is a pharmacist [*Bus. & Prof. Code § 4051*; *see Bus. & Prof. Code § 4036* ("pharmacist" defined); *see also Bus. & Prof. Code § 4110* (pharmacy license)]. This requirement does not apply to a person who is qualified for an exemption or otherwise specifically excepted [*see Bus. & Prof. Code §§ 4053-4057*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 214.11 Application Requirements

An applicant for a pharmacist's license must establish on a prescribed form [*see Bus. & Prof. Code § 4201*] that he or she meets all of the following requirements [*Bus. & Prof. Code § 4200(a)*]:

- Is at least 18 years old.

- Has graduated from a college of pharmacy or department of pharmacy of a university recognized by the Board, or, if the applicant graduated from a foreign pharmacy school, the foreign-educated applicant has been certified by the Foreign Pharmacy Graduate Examination Committee.

- Has completed at least 150 semester units of collegiate study in the United States, or the equivalent in a foreign country, with no less than 90 of those semester units completed while in resident attendance at a school or college of pharmacy.

- Has earned at least a baccalaureate degree in a course of study devoted to the practice of pharmacy.

- Has completed 1,500 hours of pharmacy practice experience or the equivalent in accordance with *Bus. & Prof. Code § 4209*.

- Has passed a written and practical examination given by the board prior to December 31, 2003, or has passed the North American Pharmacist Licensure Examination and the California Practice Standards and Jurisprudence Examination for Pharmacists on or after January 1, 2004.

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§ 214.12 Refusal of Application for Unprofessional Conduct

The Board may refuse a license to any applicant guilty of unprofessional conduct. It may, in its sole discretion, issue a probationary license, subjectto any terms or conditions not contrary to public policy, to any applicant who is guilty of unprofessional conduct and who has met all other requirements for licensure [*Bus. & Prof. Code § 4300(c)*; *see* discussion regarding unprofessional conduct in § 214.21[1]].

In addition, under the general provisions regulating licensed professions under the Business and Professions Code [*see Bus. & Prof. Code § 475 et seq.*], an applicant for certification may be denied a license if he or she has committed any of the fraudulent or criminal acts listed in *Bus. & Prof. Code § 480* [*see Bus. & Prof. Code §§ 475, 4202(c)*].

For a detailed discussion of these acts and forms of petitions for writs of mandate that may be used in proceedings to compel the issuance of a pharmacist's certificate, see Ch. 471B, *Licensing by Public Agencies* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusHealthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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17-214 California Forms of Pleading and Practice--Annotated § 214.13

§ 214.13 Scope of Pharmacist's Practice

By statute, the Legislature has declared the practice of pharmacy to be a profession [*Bus. & Prof. Code § 4050(a)*]. It has also defined the scope of a pharmacist's practice to include:

- Furnishing to a prescriber a reasonable quantity of compounded drug product for prescriber office use [*Bus. & Prof. Code § 4052(a)(1)*].

- Transmitting a valid prescription to another registered pharmacist [*Bus. & Prof. Code § 4052(a)(2)*].

- Administering, orally or topically, drugs and biologicals pursuant to a prescriber's order [*Bus. & Prof. Code § 4052(a)(3)*].

- Performing procedures or functions in a licensed health care facility as authorized by *Bus. & Prof. Code § 4052.1* [*Bus. & Prof. Code § 4052(a)(4)*], which requires that those procedures or functions be performed in accordance with policies, procedures, or protocols developed by health professionals, including physicians, pharmacists, and registered nurses, with the concurrence of the facility administrator [*Bus. & Prof. Code § 4052.1(a)*], and requires that the pharmacist has received appropriate training as prescribed in the policies and procedures of the facility prior to performing any procedure authorized by § 4052.1 [*Bus. & Prof. Code § 4052.1(b)*].

- Performing procedures or functions as part of the care provided by a health care facility, a licensed home health agency, a licensed clinic in which there is a physician oversight, a provider who contracts with a licensed health care service plan with regard to the care or services provided to the enrollees of that health care service plan, or a physician, as authorized by *Bus. & Prof. Code § 4052.2* [*Bus. & Prof. Code § 4052(a)(5)*], which requires that the procedures or functions be performed in accordance with the policies, procedures, or protocols of the facility, agency, clinic, plan, or physician, and in accordance with *Bus. & Prof. Code § 4052.2(c)* [*Bus. & Prof. Code § 4052.2(a)*; *see Bus. & Prof. Code § 4052.2(c)*

(requiring that policies, procedures, or protocols referred to in § 4052.2(c) be developed by health care professionals, including physicians, pharmacists, and registered nurses and meet specific requirements)], and that before performing any procedure authorized by § 4052.2, a pharmacist has either successfully completed clinical residency training or demonstrated clinical experience in direct patient care delivery [*Bus. & Prof. Code § 4052.2(d)*].

- Manufacturing, measuring, fitting to the patient, or selling and repairing, dangerous devices or furnishing instructions to the patient or the patient's representative concerning the use of those devices [*Bus. & Prof. Code § 4052(a)(6)*].

- Providing consultation to patients and professional information, including clinical or pharmacological information, advice, or consultation to other health care professionals [*Bus. & Prof. Code § 4052(a)(7)*].

- Furnishing emergency contraception drug therapy as authorized by *Bus. & Prof. Code § 4052.3* [*Bus. & Prof. Code § 4052(a)(8)*], which requires that a pharmacist furnish emergency contraception drug therapy in accordance with either standardized procedures or protocols developed by the pharmacist and an authorized prescriber acting within his or her scope of practice or standardized procedures or protocols developed and approved by both the Board and the Medical Board of California in consultation with the American College of Obstetricians and Gynecologists, the California Pharmacist Association, and other appropriate entities [*Bus. & Prof. Code § 4052.3(a)*], and that before furnishing emergency contraception drug therapy, a pharmacist complete a specified training program on emergency contraception [*Bus. & Prof. Code § 4052.3(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 214.14 Related Licenses and Applications

"License" means and includes any license, permit, registration, certificate or exemption issued by the board. It also includes the process or applying for and renewing any such document [*Bus. & Prof. Code § 4032*].

All applications under the Pharmacy Law are subject to general rules [*see, e.g., Bus. & Prof. Code §§ 4207* (investigation of applicant), 4300 (grounds for denial of application or revocation of license)]. Applications for specific types of licenses are also subject to some specific rules [*see, e.g.,* pharmacists, discussed in *§ 214.11*; conduct of pharmacy, wholesaler, medical device retailer, or veterinary food-animal drug retailer (*see Bus. & Prof. Code § 4201*); nonprofit community clinic or free clinic (*see Bus. & Prof. Code §§ 4180, 4203*); and surgical clinic (*see Bus. & Prof. Code §§ 4190, 4204*)].

Legal Topics:

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

§§ 214.15[Reserved]

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§ 214.20 License or Other Permit Subject to Suspension or Revocation

Every license issued may be suspended or revoked [*see Bus. & Prof. Code § 4300(a)*]. For discussion of the various modes of discipline that may be imposed by the Board, see *§ 214.29*.

The proceedings under the Pharmacy Law are conducted in accordance with the Administrative Procedure Act (*Gov. Code § 11500 et seq.*) [*see Bus. & Prof. Code § 4300(e)*].

Legal Topics:

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§ 214.21 Initiation of Disciplinary Conduct by Board

[1] Mandatory Action by Board for Fraudulent Procurement of License or Unprofessional Conduct

The Board must take take action against any holder of a license [*Bus. & Prof. Code § 4301*]:

- Who is guilty of unprofessional conduct.
- Whose license has been procured by fraud or misrepresentation or issued by mistake.

The Board's duty to take action is mandatory. What may be considered "unprofessional conduct" is discussed in *§§ 214.22, 214.23*.

[2] Discretionary Action Against Holder of Probationary Certificate

The Board may initiate disciplinary proceedings, conducted in accordance with the Administrative Procedure Act (*Gov. Code § 11500 et seq.*), to revoke or suspend any probationary certificate of licensure for any violation of the terms or conditions of probation [*Bus. & Prof. Code § 4300(d), (e)*; for discussion of procedures under the Administrative Procedure Act, *see* Ch. 473, *Public Agency Adjudication* , et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
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17-214 California Forms of Pleading and Practice--Annotated § 214.22

§ 214.22 Unprofessional Conduct Generally

Unprofessional conduct is described in many sections of the Business and Professions Code. Section 4301 provides a partial list of what may be considered unprofessional conduct [*see Bus. & Prof. Code § 4301*].

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17-214 California Forms of Pleading and Practice--Annotated § 214.23

§ 214.23 Acts Considered Unprofessional Conduct

[1] Violation of the Pharmacy Law or Other Federal and State Law

Unprofessional conduct includes, but is not limited to, the violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of or conspiring to violate any provision or term of the Pharmacy Law (*Bus. & Prof. Code § 4000 et seq.*) or of the applicable federal and state laws and regulations governing pharmacy, including regulations established by the Board or by any other state or federal regulatory agency [*Bus. & Prof. Code § 4301(o)*].

Unprofessional conduct also includes engaging in any conduct that subverts or attempts to subvert an investigation of the Board [*Bus. & Prof. § 4301(q)*].

[2] Conviction of Crime Related to Pharmacy Practice

Conviction of a crime substantially related to the qualifications, functions, and duties of a licensee constitutes unprofessional conduct under the Pharmacy Law. The record of conviction of a violation of *21 U.S.C. § 801 et seq.*, regulating controlled substances, or of a violation of California statutes regulating controlled substances or dangerous drugs is conclusive evidence of unprofessional conduct. In all other cases, the record of conviction is conclusive evidence only of the fact that the conviction occurred. The Board may inquire into the circumstances surrounding the commission of the crime to fix the degree of discipline or, in the case of a conviction not involving controlled substances or dangerous drugs, to determine if the conviction is of an offense substantially related to the qualifications, functions, and duties of a licensee. A plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction [*see Bus. & Prof. Code § 4301(l)*].

[3] Conviction for Violations Regarding Controlled Substance, Dangerous Drugs or Alcohol

The violation of any California statutes, of any other state, or of the United States regulating controlled substances and dangerous drugs constitutes unprofessional conduct under the Pharmacy Law [*Bus. & Prof. Code § 4301(j)*]. The conviction of more than one misdemeanor or any felony involving the use, consumption, or self-administration of any

dangerous drug or alcoholic beverage, or any combination of those substances, also constitutes unprofessional conduct under the Pharmacy Law [*Bus. & Prof. Code § 4301(k)*].

Unprofessional conduct also includes the cash compromise of a charge of violation of *21 U.S.C. § 801 et seq.* (drug abuse and prevention control) regarding controlled substances or of *Welf. & Inst. Code § 14000 et seq.* relating to the Medi-Cal program. The record of the compromise is conclusive evidence of unprofessional conduct [*Bus. & Prof. § 4301(m)*].

[4] Gross Immorality, Incompetence, or Gross Negligence

Unprofessional conduct includes gross immorality, incompetence, or gross negligence [*Bus. & Prof. Code § 4301(a)-(c)*].

[5] Fraud and Moral Turpitude

Unprofessional conduct includes the commission of any act involving moral turpitude, dishonesty, fraud, deceit, or corruption, whether the act is committed in the course of relations as a licensee or otherwise, and whether the act is a felony or misdemeanor or not [*Bus. & Prof. Code § 4301(f)*].

[6] False Representations in Writing

Knowingly making or signing any certificate or other document that falsely represents the existence or nonexistence of a state of facts constitutes unprofessional conduct within the meaning of the Pharmacy Law [*see Bus. & Prof. Code § 4301(g)*].

[7] Dangerous Use of Drugs or Alcohol

The administering to oneself of a controlled substance, or the use of a dangerous drug or of alcoholic beverages to the extent or in a manner as to be dangerous or injurious to oneself, to a person holding a pharmacist's license, or to any other person or to the public, or to the extent that the use impairs the ability of the person to conduct with safety to the public the practice authorized by the license constitutes unprofessional conduct under the Pharmacy Law [*Bus. & Prof. Code § 4301(h)*]. Selling, trading, transferring or furnishing drugs obtained pursuant to *42 U.S.C. § 256b* to a person the licensee knows or reasonably should have known is not a patient of a covered entity is unprofessional conduct under the Pharmacy Law [*Bus. & Prof. Code § 4301(r)*].

[8] Providing Controlled Substance to Addict

Except as otherwise authorized by law, knowingly selling, furnishing, giving away, or administering, or offering to sell, furnish, give away, or administer, any controlled substances to an addict constitutes unprofessional conduct under the Pharmacy Law [*see Bus. & Prof. Code § 4301(i)*].

[9] Conduct That Would Have Warranted Denial of License

Actions or conduct that would have warranted denial of a license constitutes unprofessional conduct under the Pharmacy Law [*see Bus. & Prof. Code § 4301(p)*].

[10] Excessive Furnishing of Controlled Substances

The clearly excessive furnishing of dangerous drugs by a wholesaler to a pharmacy that primarily or solely dispenses prescription drugs to patients of long-term care facilities constitutes unprofessional conduct under the Pharmacy Law [*Bus. & Prof. Code § 4301(s)* (further enumerating factors for determining whether furnishing of controlled substances

is clearly excessive)].

[11] Cash Compromise of Controlled Substances Charge

The cash compromise of a charge of violation of *21 U.S.C. § 801 et seq.*, regulating controlled substances, constitutes unprofessional conduct under the Pharmacy Law. The record of the compromise is conclusive evidence of unprofessional conduct [*Bus. & Prof. Code § 4301(m)*].

[12] Failure to Comply with Order to Cease and Desist Compounding Injectable Sterile Drug Products

The failure to comply with an order to cease and desist from compounding injectable sterile drug products issued by the Board will be deemed unprofessional conduct [*Bus. & Prof. Code § 4127.3(d)*; for discussion of the compounding of injectable sterile drug products generally, *see § 214.45[6]*].

[13] Other Acts

Unprofessional conduct for a pharmacist may also include any of the following [*Bus. & Prof. Code § 4306.5*]:

- Acts or omissions that involve, in whole or in part, the inappropriate exercise of the pharmacist's education, training, or experience as a pharmacist, whether or not the act or omission arises in the course of the practice of pharmacy or the ownership, management, administration, or operation of a pharmacy or other entity licensed by the Board.

- Acts or omissions that involve, in whole or in part, the failure to exercise or implement the pharmacist's best professional judgment or corresponding responsibility with regard to the dispensing or furnishing of controlled substances, dangerous drugs, or dangerous devices, or with regard to the provision of services.

- Acts or omissions that involve, in whole or in part, the failure to consult appropriate patient, prescription, and other records pertaining to the performance of any pharmacy function.

- Acts or omissions that involve, in whole or in part, the failure to fully maintain and retain appropriate patient-specific information pertaining to the performance of any pharmacy function.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 214.24 Activity on Premises Is Not Ordinary Activity

The Board may cancel the license of a wholesaler, pharmacy, or veterinary food-animal drug retailer if the activity on the licensed premises is not the ordinary activity for which the license has been issued for at least one day each calendar week during any 120-day period (other than by order of the board), or for a shorter period if good cause is shown [*Bus. & Prof. Code § 4312(a), (e)*].

To cancel a license for violation of *Bus. & Prof. Code § 4312*, the Board must first make a diligent, good faith effort to give notice to the licensee by personal service. If no written objection is received within 10 days after personal service is made or a diligent, good faith effort to give notice by personal service has failed, the Board may cancel the certificate, license, permit or registration without a hearing [*Bus. & Prof. Code § 4312(a)*].

If the licensee files a written objection, the Board must file an accusation based on the business remaining closed, and proceedings must beconducted in accordance with the Administrative Procedure Act (*Gov. Code § 11500 et seq.*) [*Bus. & Prof. Code § 4312(a)*].

Legal Topics:

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§ 214.25 Unfair Competition

Resale of drugs acquired at preferentially low prices pursuant to the federal Nonprofit Institutions Act (*15 U.S.C. § 13c*), with certain limited exceptions, is prohibited and constitutes unfair competition within the meaning of *Bus. & Prof. Code § 17200 et seq.* [*Bus. & Prof. Code §§ 4380, 4381*]. This behavior subjects one to injunction and to liability for treble damages [*Bus. & Prof. Code § 4470*; *see also Ch. 565, Unfair Competition, § 565.10* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawTrade Practices & Unfair CompetitionGeneral OverviewAntitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRevocation & Suspension

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17-214 California Forms of Pleading and Practice--Annotated § 214.26

§ 214.26 Discipline by Another State

Disciplinary action by another state concerning a license to practice pharmacy, to operate a pharmacy, or to do any other act for which a license is required under California law regulating and licensing pharmacists, constitutes unprofessional conduct, and is grounds for disciplinary action against a licensee or grounds for the denial of licensure of an applicant [*Bus. & Prof. Code § 4301(n)*].

If a pharmacist is licensed or otherwise authorized to practice pharmacy in another state or by a federal agency, and that license or authority is suspended or revoked, the pharmacist's license will be suspended automatically for the duration of the suspension or revocation [*Bus. & Prof. § 4301.5(a)*]. If an accusation for permanent discipline is not filed within 90 days of the suspension, it is automatically terminated [*Bus. & Prof. § 4301.5(c)*]. The Board must notify the pharmacist of this suspension and of the right to have the issue of penalty heard in an administrative proceeding [*Bus. & Prof. § 4301.5(a), see Bus. & Prof. § 4301.5(c)* (administrative procedure)].

Upon its own motion or for good cause shown, the Board may decline to impose or may set aside the suspension when it appears to be in the interest of justice to do so, with due regard to maintaining the integrity of and confidence in the pharmacy profession [*Bus. & Prof. § 4301.5(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationLicensesRevocation & Suspension

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17-214 California Forms of Pleading and Practice--Annotated § 214.27

§ 214.27 Misconduct Need Not Be Intentional

In disciplining an individual for violation of a law regulating pharmacy, the Board has authority to penalize a licensee for an employee's unlawful acts although unauthorized by and unknown to the licensee [*Arenstein v. California State Bd. of Pharmacy (1968) 265 Cal. App. 2d 179, 192-193, 71 Cal. Rptr. 357* ; *Randle v. Cal. State Bd. of Pharmacy (1966) 240 Cal. App. 2d 254, 261, 49 Cal. Rptr. 485]* . Even under *Bus. & Prof. Code § 4328*, which prohibits permitting a person other than a registered pharmacist to dispense drugs, the permission need not be given knowingly [*Brodskyv. Cal. State Bd. of Pharmacy (1959) 173 Cal. App. 2d 680, 688-689, 344 P.2d 68* (decided under former statute)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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17-214 California Forms of Pleading and Practice--Annotated § 214.28

§ 214.28 Responsibility for Acts of Employees

A person who maintains and conducts a pharmacy may be disciplined by the Board for the unlawful acts of his or her employees while engaged in the conduct and operation of the pharmacy. This rule applies even though the permittee does not authorize the unlawful acts and did not have actual knowledge of the activities [*Arenstein v. California State Bd. of Pharmacy (1968) 265 Cal. App. 2d 179, 192-193, 71 Cal. Rptr. 357]* .

A pharmacist-in-charge, although himself or herself an employee of the pharmacy owner, may have responsibilities similar to those of an owner for the unknown acts of the owner's employees [*see Bus. & Prof. Code § 4113(b)*; *Smith v. State Bd. of Pharmacy (1995) 37 Cal. App. 4th 229, 243, 43 Cal. Rptr. 2d 532]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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17-214 California Forms of Pleading and Practice--Annotated § 214.29

§ 214.29 Actions Board May Take

[1] Imposing Discipline

The Board must discipline a holder of any license whose default has been entered or who has been heard by the Board and found guilty, by any of the following methods [*Bus. & Prof. Code § 4300(b)*]:

- Suspending judgment.
- Placing the holder on probation.
- Suspending the holder from practice for not more than one year.
- Revoking the license.
- Taking such other disciplinary action that in its discretion it deems proper.

On satisfactory completion of probation, the board must convert the probationary certificate to a regular certificate, free of conditions [*Bus. & Prof. Code § 4300(d)*].

[2] Awarding Costs, Including Attorney's Fees

The administrative law judge conducting the disciplinary hearing may order a disciplined pharmacist to pay the Board's investigation and enforcement costs, including its legal fees [*Angelier v. State Board of Pharmacy (1997) 58 Cal. App. 4th 592, 599-602, 68 Cal. Rptr. 2d 213* (construing *Bus. & Prof. Code § 125.3(c)* and *(j)* so as to produce harmony among various statutory provisions for recovery of costs incurred in disciplinary proceedings)]. However, the Medical Board may not request nor obtain investigation and prosecution costs for a disciplinary proceeding against a licensed pharmacist [*Bus. & Prof. Code § 125.3(k)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRevocation & Suspension

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17-214 California Forms of Pleading and Practice--Annotated § 214.30

§ 214.30 Modification of Board Decision

The choice of penalty by the Board is within its discretion and not modifiable on review unless the Board clearly abused its discretion by imposing an unreasonable hardship on the licensee [*West Romaine Corp. v. Cal. State Bd. of Pharmacy (1968) 266 Cal. App. 2d 901, 905-906, 72 Cal. Rptr. 569* ; *O'Mara v. State Bd. of Pharmacy (1966) 246 Cal. App. 2d 8, 12, 54 Cal. Rptr. 862* ; *see Bus. & Prof. Code § 4300(e)* (action of Board final subject to review by superior court)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewStandards of ReviewAbuse of DiscretionHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRevocation & Suspension

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17-214 California Forms of Pleading and Practice--Annotated § 214.31

§ 214.31 Reinstatement of License

[1] May File Petition for Reinstatement After One Year

Any person whose license has been revoked or suspended by the Board may petition for reinstatement or modification of the penalty. A petition must state such facts as are required by the Board and be supported by two or more verified recommendations from two Board licensees as well as recommendations from two or more citizens who have personal knowledge of the penalty and the activities of the petitioner since the disciplinary penalty was imposed [*Bus. & Prof. Code § 4309(a), (b)*]. When a petition is filed less than 24 months after a previous petition has been denied, the Board may deny the second petition summarily [*Bus. & Prof. Code § 4309(g)*; *see Bus. & Prof. Code § 4309(a)* (setting out requirements for times when petition may be filed)].

For a form of petition for reinstatement, see *§ 214.110*.

[2] Facts to Be Considered by Board

In making its decision on the petition, the Board may consider factors including, but not limited to, all of the following [*Bus. & Prof. Code § 4309(d)*]:

- All the petitioner's activities since the disciplinary action was taken.
- The offense for which the petitioner was disciplined.
- The petitioner's activities during the time the license was in good standing.
- The petitioner's documented rehabilitative efforts.
- The petitioner's general reputation for truth and professional ability.

The Board is required by law to take into account all competent evidence of rehabilitation that is provided to it [*Bus. & Prof. Code § 482*; *see 16 Cal. Code Reg § 1769* (criteria for determining rehabilitation)].

The board may investigate any and all matters pertaining to the petition and documents submitted with or in connection with the application [*Bus. & Prof. Code § 4309(i)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsHealthcare LawBusiness Administration & OrganizationLicensesRequirementsHealthcare LawBusiness Administration & OrganizationLicensesRevocation & Suspension

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17-214 California Forms of Pleading and Practice--Annotated § 214.32

§ 214.32 Judicial Review

[1] Review by Writ of Mandate Filed in Superior Court

The action taken by the Board of Pharmacy is final except that the propriety of such action is subject to review by petition for a writ of mandate filed in the superior court under *Code Civ. Proc. § 1094.5* [*see Bus. & Prof. Code § 4300(e)*; *Grant v. Board of Medical Examiners (1965) 232 Cal. App. 2d 820, 826-827, 43 Cal. Rptr. 270]* .

For forms of a petition for writ of mandate and an alternative writ of mandate for use in seeking review of a decision by the Board of Pharmacy to revoke, suspend, or otherwise modify a license, see Ch. 474C, *Procedures in Reviewing of Agency Decisions* .

[2] Standard of Review

[a] Independent Judgment by Superior Court

In reviewing the decision of the Board, the superior court may exercise its independent judgment on the evidence [*Angelier v. State Board of Pharmacy (1997) 58 Cal. App. 4th 592, 599, 68 Cal. Rptr. 2d 213* ; *Arenstein v. California State Bd. of Pharmacy (1968) 265 Cal. App. 2d 179, 184-186, 71 Cal. Rptr. 357]* .

[b] Credible, Competent Evidence Standard in Appellate Court

The role of the appellate court is solely to decide whether credible, competent evidence supports the trial court's judgment [*Arenstein v. California State Bd. of Pharmacy (1968) 265 Cal. App. 2d 179, 184-186, 71 Cal. Rptr. 357* ; *Randle v. Cal. State Bd. of Pharmacy (1966) 240 Cal. App. 2d 254, 256-257, 49 Cal. Rptr. 485]* .

Legal Topics:

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

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17-214 California Forms of Pleading and Practice--Annotated § 214.33

§ 214.33 Disposition of Drugs After License Voided or Revoked or Business Discontinued

When the license of a wholesaler, pharmacist, or veterinary food-animal drug retailer is cancelled pursuant to *Bus. & Prof. Code § 4312(a)* (temporary closure of business), or revoked pursuant to *Bus. & Prof. Code § 4300 et seq.* (disciplinary proceedings), or a wholesaler, pharmacy, or veterinary food-animal drug retailer notifies the board of its intent to remain closed or to discontinue business, the licensee must, within 10 days, arrange for the transfer of all dangerous drugs and controlled substances or dangerous devices to another licensee authorized to possess such drugs and substances or dangerous devices. The licensee performing this transfer must immediately confirm in writing to the Board that the transfer has taken place [*Bus. & Prof. Code § 4312(b)*].

If a pharmacy, wholesaler, or veterinary food-animal drug retailer fails to comply with *Bus. & Prof. Code § 4312(b)*, the Board may obtain an order from the superior court authorizing it to enter the pharmacy, wholesaler, or veterinary food-animal drug retailer and inventory and store, transfer, sell, or arrange for the sale of the drugs and substances or dangerous devices [*Bus. & Prof. Code § 4312(c)*].

When the Board sells or arranges for the sale of any dangerous drugs or controlled substances or dangerous devices pursuant to *Bus. & Prof. Code § 4312(c)*, it may retain from the proceeds of the sale an amount sufficient to cover its costs, including the costs of disposing of the drugs, substances, or devices, and return the remaining proceeds to the licensee or, if the licensee cannot be found, to the Pharmacy Board Contingent Fund [*Bus. & Prof. Code § 4312(d)*].

It is a misdemeanor for anyone to knowingly fail to comply with *Bus. & Prof. Code § 4312(b)* [*Bus. & Prof. Code § 4335*].

Legal Topics:

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

§§ 214.34[Reserved]

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17-214 California Forms of Pleading and Practice--Annotated § 214.40

§ 214.40 Persons Qualified to Dispense Prescriptions

[1] Registered Pharmacist

In general, it is unlawful for any person to manufacture, compound, sell, or dispense any dangerous drug or devices, or compound any prescription of a medical practitioner, unless that person is a registered pharmacist [*Bus. & Prof. Code § 4051*]. It is a misdemeanor for anyone who has a pharmacy to permit the compounding or dispensing of prescriptions or the furnishing of dangerous drugs by anyone other than a registered pharmacist or to fail to place a registered pharmacist in charge of the pharmacy [*Bus. & Prof. Code §§ 4328, 4330(a)*].

In addition, any nonpharmacist owner who commits any act that would tend to subvert the efforts of the pharmacist-in-charge to comply with the laws governing the operation of the pharmacy is guilty of a misdemeanor [*Bus. & Prof. Code § 4330(b)*].

A prescription for controlled substances is only to be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is on the prescribing practitioner, but a corresponding responsibility rests on the pharmacist who fills the prescription [*Health & Safety Code § 11153(a)*]. For discussion of what is not considered a legitimate medical purpose, see *§ 214.45[4]*.

[2] Exempted Manufacturers, Wholesalers, and Other Medical Providers

The code grants exemptions to the rule discussed in [1], *above*, for manufacturers, wholesalers, medical licensees [*see* [3], *below*], sellers of certain trademark drugs and others [*see Bus. & Prof. Code §§ 4053, 4054, 4057*].

Wholesalers and manufacturers, including their agents and employees, are prohibited from furnishing controlled substances for other than legitimate medical purposes [*Health & Safety Code § 11153.5(a)*]. The violation of this provision by anyone knowing, or having a conscious disregard for the fact, that the controlled substances are for other than a legitimate medical purpose is a crime [*Health & Safety Code § 11153.5(b)*].

[3] Exempted Medical Licensees

Even though licensed physicians, surgeons, optometrists, dentists, and podiatrists who are not registered pharmacists may dispense drugs or dangerous devices, they may do so only under the conditions specified in *Bus. & Prof. Code § 4170(a)*. These conditions include the requirement that the physician, surgeon, optometrist, dentist, or podiatrist fulfill all labeling and recordkeeping requirements imposed on pharmacists by *Bus. & Prof. Code § 4076 et seq.* [*Bus. & Prof. Code § 4170(a)*; *see* discussion in *§§ 214.44* and *214.46*].

Registered nurses functioning within certain licensed clinics may also dispense drugs [*see Bus. & Prof. Code § 4173*; *see also Bus. & Prof. Code §§ 2725.1*, *2836.1-2836.3*].

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17-214 California Forms of Pleading and Practice--Annotated § 214.41

§ 214.41 Drugs That Require Prescription

Certain drugs and devices, when intended for use by humans, may be sold only with a written prescription or an oral prescription that is promptly reduced to writing [*Bus. & Prof. Code § 4059*; Health & Safety Code § 1150]. Generally, these are drugs and devices that are habit forming or involve sufficient danger to require that their use be under the supervision of a practitioner licensed to administer those drugs or devices [*Health & Safety Code §§ 111225, 111350*].

Under the California Uniform Controlled Substances Act [*Health & Safety Code §§ 11000-11651*], a controlled substance generally may not be dispensed without a prescription that meets the requirements of *Health & Safety Code §§ 11150-11180* [*Health & Safety Code § 11027*; *see Health & Safety Code §§ 11150-11207*].

During a federal, state, or local emergency, a pharmacist may, in good faith, furnish a dangerous drug or a dangerous device in reasonable quantities without a prescription [*Bus. & Prof. Code § 4062*].

Under the Compassionate Use Act of 1996, seriously ill persons may obtain and use marijuana for medical purposes when that use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana [*Health & Safety Code § 11362.5*]. Patients, primary caregivers, and physicians will not be subject to criminal prosecution or sanction for this activity. However, the Act specifically provides that it does not supersede laws prohibiting persons from engaging in conduct that endangers others or condone the use diversion of marijuana for nonmedical purposes [*Health & Safety Code § 11362.5*].

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17-214 California Forms of Pleading and Practice--Annotated § 214.42

§ 214.42 Contents of Prescriptions

Generally, prescriptions must contain the following [*Bus. & Prof. Code § 4040(a)*]:

- The name(s) and address(es) of the patient(s).
- The name and quantity of the drug or device prescribed and the directions for use.
- The date of issue.
- The name, address, and telephone number of the prescriber, his or her license classification, and his or her federal registry number, if a controlled substance is prescribed (this information may be rubber stamped, typed, printed by hand, or typeset).
- A legible, clear notice of the condition for which the drug is being prescribed, if requested by the patient(s).
- If the prescription is in writing, the signature of the prescriber issuing the order of the certified nurse-midwife, physician assistant, nurse practitioner, or naturopathic doctor who issues a drug order pursuant to *Bus. & Prof. Code § 2746.51*, *2836.1*, *3502.1*, or *3640.5* [*Bus. & Prof. Code § 3640.7* is operative only until January 1, 2013, and repealed on January 1, 2014, unless Legislature changes those dates], respectively, or the pharmacist who issues a drug order pursuant to either *Bus. & Prof. Code § 4052(a)(4)(D)* or *(5)(A)(iv)* [*Bus. & Prof. Code § 4052(a)(4), (5)* were amended to refer to permitted functions of a pharmacist in performing procedures or functions in a licensed health care facility as authorized by *Bus. & Prof. Code § 4052.1*, and in performing procedures or functions as part of the care provided by a health care facility, a licensed home health agency, a licensed clinic in which there is a physician oversight, a provider who contracts with a licensed health care service plan with regard to the care or services provided to the enrollees of that health care service plan, or a physician, as authorized by

Bus. & Prof. § 4052.2, respectively, but *Bus. & Prof. Code § 4040(a)* was not amended, so it continues to refer to outdated provisions in § 4052(a)].

Variations on these requirements are described in *Bus. & Prof. Code § 4040(b), (c)*]. In addition, there are separate and more stringent requirements for the contents of prescriptions for controlled substances [*see Health & Safety Code §§ 11164, 11167*].

Legal Topics:

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17-214 California Forms of Pleading and Practice--Annotated § 214.43

§ 214.43 Falsification of Prescriptions for Controlled Substance

The Uniform Controlled Substances Act prohibits the falsification of prescriptions for controlled substances [*see Health & Safety Code § 11157*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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17-214 California Forms of Pleading and Practice--Annotated § 214.44

§ 214.44 Proper Records for Prescriptions and Drug Sales

When called on, the owner or manager of a pharmacy or other specified store must furnish the names of the owner, manager, and employees together with a brief statement of the capacity of these persons [*Bus. & Prof. Code § 4082*].

All prescriptions filled by a pharmacy and all other records required by *Bus. & Prof. Code § 4081* must be maintained on the premises and available for inspection for at least three years. If the pharmacy discontinues business, the records must be maintained in a board-licensed facility for at least three years [*Bus. & Prof. Code § 4333(a)*]. Willful failure to comply is a misdemeanor punishable by a fine [*Bus. & Prof. Code § 4333(b)*]. The board may, on written request, waive the requirement that the records be maintained on the premises or, for a pharmacy that discontinues business, at a board-licensed facility [*Bus. & Prof. Code § 4333(c)*]. The pharmacist must also keep prescriptions of controlled substances on file for a period of three years from the date of filling [*Health & Safety Code §§ 11158, 11179, 11205*].

Any person who fails to maintain or produce required records relating to the sale and inventory of dangerous drugs or devices is guilty of amisdemeanor [*Bus. & Prof. Code § 4332*; *see Bus. & Prof. Code § 4081* (records requirements)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesControlled SubstancesDelivery, Distribution & SaleReportingGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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17-214 California Forms of Pleading and Practice--Annotated § 214.45

§ 214.45 Dispensing of Prescriptions

[1] Dispensing Without License

It is unlawful for any person to manufacture, compound, furnish, sell, or dispense any dangerous drug or devices, or to dispense or compound any prescription pursuant to *Bus. & Prof. Code § 4040* unless he or she is a registered pharmacist under the provisions of the Pharmacy Law, unless the Pharmacy Law provides otherwise [*Bus. & Prof. Code § 4051*].

[2] Use of Generic Drugs for Prescriptions

Unless the prescriber indicates otherwise, a pharmacist filling a prescription order for a drug product prescribed by its trade or brand name may select another drug product with the same active chemical ingredients of the same strength, quantity, and dosage form, and of the same generic drug type [*Bus. & Prof. Code § 4073(a), (b)*]. The pharmacist, in this instance, assumes the same responsibility for selecting the dispensed drug as would be incurred in filling a prescription for a drug product prescribed by generic name. The prescriber assumes no liability for an act or omission by the pharmacist in selecting, preparing, or dispensing the drug product [*see Bus. & Prof. Code § 4073(c)*; *see also Bus. & Prof. Code § 4122(a)* (requiring posted notice of possiblity of generic drug product selection)]. When such a substitution is made, the use of the cost-saving drug product dispensed must be communicated to the patient and the name of the dispensed drug indicated on the prescription label, except when the prescriber orders otherwise [*Bus. & Prof. Code § 4073(e)*].

In addition to the authority to select another product under *Bus. & Prof. Code § 4073*, a pharmacist may select a different form of medication with the same active chemical ingredients of equivalent strength and duration of therapy as the prescribed drug product when the change will improve the patient's ability to comply with the prescribed drug therapy, unless the prescriber indicates not to substitute for the prescribed drug [*Bus. & Prof. Code § 4052.5(a), (b), (c)*]. However, substitution between long-acting and short-acting forms of a medication with the same chemical ingredients or between one drug product and two or more drug products with the same chemical ingredients is not permitted [*Bus. & Prof. Code § 4052.5(f)*]. A pharmacist selecting a different form of medication assumes the same responsibility for the dispensed product as he or she would for filing a prescription using the prescribed form of

medication, and the prescriber incurs no liability for an act by the pharmacist in so selecting, preparing or dispensing a product [*Bus. & Prof. Code § 4052.5(c)*]. A pharmacist substituting a different form of medication must communicate that to thepatient and indicate the name of the dispensed drug on the prescription label unless the prescriber orders otherwise [*Bus. & Prof. Code § 4052.5(e)*].

[3] Adulteration of Drug or Device Prohibited

It is unlawful for any person to adulterate a drug or device or to manufacture, receive in commerce, sell, deliver, hold, or offer for sale any drug or device that is adulterated [*Health & Safety Code §§ 111295-111305*]. The statute defines several forms of adulteration including the existence of any filthy, putrid, or decomposed substance in a drug or device [*Health & Safety Code § 111250*; *see Health & Safety Code §§ 111255-111290*].

[4] Controlled Substance Not Dispensed for Legitimate Purpose

[a] Substance Not Issued in Usual Course of Treatment or Legitimate Research

An order purporting to be a prescription that is not issued in the usual course of professional treatment or of legitimate and authorized research, is not a legal prescription, unless otherwise authorized by the California Uniform Controlled Substances Act [*Health & Safety Code § 11153(a)*].

[b] Substance Dispensed for Addict or Habitual User

An order for an addict or habitual user of controlled substances that is not issued in the course of professional treatment or as part of an authorized narcotic treatment program for the purpose of providing the user with controlled substances sufficient to keep him or her comfortable by maintaining customary use, is not a legal prescription, unless otherwise authorized by the California Uniform Controlled Substances Act [*Health & Safety Code § 11153(a)*].

[c] Penalty for Knowing Violation

A pharmacist who knowingly fills an order in violation of *Health & Safety Code § 11153(a)* is subject to imprisonment, a fine, or both [*Health & Safety Code § 11153(b)*; *see Health & Safety Code § 11156*].

[5] Selling, Dispensing, or Compounding Drug While Under the Influence

It is a misdemeanor to sell, dispense, or compound any drug while under the influence of any dangerous drug or alcoholic beverage [*Bus. & Prof. Code § 4327*]. Forgery of a prescription is a crime [*Bus. & Prof. Code § 4324(a)*].

[6] Compounding of Injectable Sterile Drug Products

Contingent on the allocation of positions to the Board for the implementation of the provisions of *Bus. & Prof. Code § 4127 et seq.* governing the compounding of injectable sterile drug products [*Bus. & Prof. Code § 4127.6*], effective January 1, 2003 or the effective date or regulations adopted by the board for the compounding of injectable sterile drug products pursuant to *Bus. & Prof. Code § 4127* [*Bus. & Prof. Code § 4127.1(f)*], a pharmacy may not compound injectable sterile drug products in California unless it has obtained a renewable, nontransferable license pursuant to *Bus. & Prof. Code § 4127.1* [*Bus. & Prof. Code § 4127.1(a)*]. However, reconstitution of a sterile powder does not require a license if the powder was obtained from a manufacturer and the drug is reconstituted for administration to patients by a health care professional licensed to administer drugs by injection [*Bus. & Prof. Code § 4127.1(e)*]. A nonresident pharmacy may not compound injectable sterile drug products for shipment into California without a license [*Bus. & Prof. § 4127.2(a)*]. Violation of the statutory or regulatory provisions regarding injectable sterile drug products may subject the violator to a fine [*Bus. & Prof. Code § 4127.4*].

When the board has a reasonable belief that a pharmacy compounding injectable sterile drug products poses an immediate threat to the public health or safety, the board may issue a cease and desist order, which must provide that the owner may request a hearing, and a notice to the owner setting forth the acts or omissions with which the owner is charged [*Bus. & Prof. Code § 4127.3*]. Review of the decision of the Board's decision after the hearing may be sought to a writ of mandamus pursuant to *Code Civ. Proc. § 1094.5* [*Bus. & Prof. Code § 4127.3(c)*]. Failure to comply with a cease and desist order is unprofessional conduct [*Bus. & Prof. Code § 4127.3(d)*; *see § 214.23[11]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesControlled SubstancesDelivery, Distribution & SaleGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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§ 214.46 Labeling and Packaging of Prescriptions

[1] Labeling Defined

Labeling means any label or other written, printed, or graphic matter on or accompanying a drug or device or its wrapper or container [*Health & Safety Code §§ 109955-109960*].

[2] Prescription Must Be Dispensed With Correct Label in Correct Container

A pharmacist, physician, surgeon, or podiatrist may not dispense any prescription except in a container correctly labeled with the manufacturer's trade name of the drug or the generic name and the name of the manufacturer, unless the prescriber or nurse practitioner who functions pursuant to a standardized procedure *Bus. & Prof. Code § 2836.1*, or protocol, the physician assistant who functions pursuant to *Bus. & Prof. Code § 3502.1*, the naturopathic doctor who functions pursuant to a standardized procedure or protocol described in *Bus. & Prof. Code § 3640.5*, [*Bus. & Prof. Code § 3640.7* is operative only until January 1, 2013, and repealed on January 1, 2014, unless Legislature changes those dates], or the pharmacist who functions pursuant to a policy, procedure, or protocol pursuant to either *Bus. & Prof. Code § 4052(a)(4)(D)* or *(5)(A)(iv)* orders otherwise. Commonly used abbreviations may be used. Preparations containing two or more active ingredients may be identified by the manufacturer's trade name or the commonly used name or the principal active ingredients [*Bus. & Prof. Code § 4076*].

In addition, the container must correctly label all of the following [*Bus. & Prof. Code § 4076*; *Health & Safety Code § 111480*]:

- The directions for the use of the drug.
- The name(s) of the patient(s).
- The name of the prescriber or, if applicable, the name of the certified nurse-midwife who functions pursuant to a standardized procedure or protocol described in *Bus. & Prof. Code § 2746.51*, the nurse

practitioner who functions pursuant to a standardized procedure described in *Bus. & Prof. Code § 2836.1*, or protocol, the physician assistant who functions pursuant to *Bus. & Prof. Code § 3502.1*, the naturopathic doctor who functions pursuant to a standardized procedure or protocol described in *Bus. & Prof. Code § 3640.5* [*Bus. & Prof. Code § 3640.7* is operative only until January 1, 2013, and repealed on January 1, 2014, unless Legislature changes those dates], or the pharmacist who functions pursuant to a policy, procedure, or protocol pursuant to either *Bus. & Prof. Code § 4052(a)(4)(D)* or *(5)(A)(iv)*.

- The date of issue.

- The name and address of the pharmacy, and prescription number or other means of identifying the prescription.

- The strength of the drug or drugs dispensed.

- The quantity of the drug or drugs dispensed.

- The expiration date of the effectiveness of the drug dispensed.

- The condition for which the drug was prescribed, if requested by the patient and the condition is indicated on the prescription.

- For outpatient pharmacies, commencing January 1, 2006, the physical description of the dispensed medication, including its color, shape, and any identification code that appears on the tablets or capsules, which may be printed on an auxiliary label affixed to the prescription container, except as follows [Note that the statute provides that this requirement would not become operative if the Board, prior to January 1, 2006, adopted regulations mandating the same labeling requirements (*Bus & Prof. Code § 4076(a)(11)(D)*); for current regulations, *see 16 Cal. Code Reg. §§ 1707.4(a)(2)(A)* (refill pharmacies), 1710(b)(3) (hospital pharmacies)]:

  (i) Prescriptions dispensed by a veterinarian.

  (ii) A new drug for the first 120 days the drug is on the market and for the 90 days during which the national reference file has no description on file.

  (iii) Dispensed medications for which no physical description exists in any commercially available database.

A pharmacist may not dispense a prescription except in a container that meets the requirements of state and federal law [*Bus. & Prof. Code § 4076(a)*]. Further, it is unlawful for any person to distribute in commerce any drug or device if its packaging or labeling does not conform to the requirements of *Health & Safety Code §§ 110340-110385*, that pertain to quantity and ingredients [*Health & Safety Code § 110385*]. The Uniform Controlled Substances Act also prohibits the falsification of labels affixed to a package that contains controlled substances [*see Health & Safety Code § 11173*].

[3] Repackaging of Drugs Previously Dispensed

At a patient's request, a pharmacy may repackage a drug previously dispensed to the patient or the patient's agent pursuant to a prescription [*Bus. & Prof. Code § 4052.7(a)*]. A pharmacy providing repackaging services must have in place policies and procedures for repackaging the drugs and must label the repackaged prescription container as specified in *Bus. & Prof. Code § 4052.7(b)* [*Bus. & Prof. Code § 4052.7(b)*]. The repackaging pharmacy and the pharmacy that initially dispensed the drug are only liable for its own actions in providing the drug to the patient or the

patient's agent [*Bus. & Prof. Code § 4052.7(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Labeling & PackagingState RegulationHealthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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§ 214.47 Misbranding of Prescriptions

A drug or device is misbranded if its labeling is false or misleading in any particular or fails to contain adequate directions and warnings [*Health & Safety Code §§ 111330, 111375*; *see also Health & Safety Code §§ 111335-111365, 111380-111435, 111490* (descriptions of misbranding)].

A habit forming drug that may not be sold without a prescription is misbranded if its label fails to contain a warning that it is habit forming [*Health & Safety Code § 111350*].

It is unlawful for any person to misbrand a drug or device or to manufacture, receive in commerce, sell, deliver, hold, or offer for sale a drug or device that is misbranded [*Health & Safety Code §§ 111440-111450*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Labeling & PackagingState RegulationHealthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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17-214 California Forms of Pleading and Practice--Annotated § 214.48

§ 214.48 Delivery of Controlled Substance to Pharmacy

No person may deliver Schedule II, III, or IV controlled substances [*see Health & Safety Code §§ 11054-11056*] to a pharmacy or pharmacy receiving area, nor may any person receive controlled substances on behalf of a pharmacy unless, at the time of delivery, a pharmacist or authorized receiving personnel signs a receipt showing the type and quantity of the controlled substances received. Any discrepancy between the receipt and the type or quantity of controlled substances actually received must be reported to the delivering wholesaler or manufacturer by the next business day after delivery to the pharmacy [*Health & Safety Code § 11209(a)*].

The delivery receipt and any record of discrepancy must be maintained by the wholesaler or manufacturer for a period of three years [*Health & Safety Code § 11209(b)*]. A violation of the provisions of *Health & Safety Code § 11209* is a misdemeanor [*Health & Safety Code § 11209(c)*].

Nothing in *Health & Safety Code § 11209* requires a common carrier to label a package containing controlled sustances in a manner contrary to federal law or regulation [*Health & Safety Code § 11209(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Labeling & PackagingState RegulationCriminal Law & ProcedureCriminal OffensesControlled SubstancesDelivery, Distribution & SaleGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral Overview

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17-214 California Forms of Pleading and Practice--Annotated § 214.49

§ 214.49 Advertising Prescription Drugs

Prescription drugs or devices may be advertised [*see Bus. & Prof. Code § 4341*]. Advertisements are subject to the general prohibitions against false and misleading advertising contained in *Bus. & Prof. Code § 17500* [*see* Ch. 14, *Advertising*], as well as the specific prohibitions contained in *Bus. & Prof. Code § 4121(a)*. This latter section provides that an advertisement of the retail price for a drug that requires a prescription must be limited to quantities of the drug that are consistent with good medical practice and must include the strength, dosage form, and the exact dates during which the advertised price will be in effect [*Bus. & Prof. Code § 4121(a)*; *see also Bus. & Prof. Code § 4122(a)* requiring posted notice of price information].

The Sherman Food, Drug, and Cosmetic Law [*Health & Safety Code § 109875 et seq.*] also prohibits certain advertisements for drugs or devices. An advertisement is any representation, under the act including but not limited to statements, on a product and its container that is disseminated for the purpose of inducing or which is likely to induce the purchase or use of a drug or device [*Health & Safety Code § 109885*]. The prohibition contained in the act is in addition to that contained in *Bus. & Prof. Code § 651* governing false and deceptive advertising by any licensed professional, including pharmacists.

Under the Sherman Food, Drug, and Cosmetic Law, it is unlawful to manufacture, receive in commerce, sell, or offer to sell any drug or device which is falsely advertised or to disseminate any false advertisement of a drug or device [*Health & Safety Code §§ 110390, 110395, 110400*]. An advertisement is false if it is false or misleading in any particular [*Health & Safety Code § 110390*]. It is also unlawful to advertise any drug or device that is adulterated, misbranded, or represented to have an effect on a condition, disorder, or disease for which advertising is prohibited by *Health & Safety Code § 110403* [*see Health & Safety Code § 110398*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Labeling & PackagingState RegulationHealthcare LawBusiness

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17-214 California Forms of Pleading and Practice--Annotated § 214.50

§ 214.50 Penalties and Sanctions

Both the Pharmacy Law (*Bus. & Prof. Code § 4000 et seq.*) and the Sherman Food, Drug, and Cosmetic Law (*Health & Safety Code § 109875 et seq.*), provide criminal penalties of fine, imprisonment, or both, for violation of provisions under those acts [*see Bus. & Prof. Code § 4320 et seq.* (prohibitions and offenses); *Health & Safety Code § 111825*].

The Sherman Food, Drug, and Cosmetic Law also provides procedures to embargo suspected drugs or devices [*Health & Safety Code § 111860*] and authorizes proceedings leading to a temporary or permanent injunction against violations of the act or the condemnation and destruction of a drug or device that is adulterated, misbranded, falsely advertised, or otherwise prohibited from sale, as well as punitive fines [*Health & Safety Code §§ 111860, 111880, 111885, 111900, 111915*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Labeling & PackagingState RegulationCriminal Law & ProcedureCriminal OffensesControlled SubstancesDelivery, Distribution & SalePenaltiesHealthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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17-214 California Forms of Pleading and Practice--Annotated § 214.51

§ 214.51 Quality Assurance Program

Effective January 1, 2002 [*see Bus. & Prof. Code § 4125(c)*], every pharmacy must establish a quality assurance program that, at a minimum, documents medication errors attributable, in whole or in part, to the pharmacy or its personnel. The purpose of the program is to assess errors occurring in the pharmacy in dispensing or furnishing prescription medications so that the pharmacy can take appropriate action to prevent a recurrence [*Bus. & Prof. Code § 4125(a)*].

Records generated for and maintained as a component of a pharmacy's ongoing quality assurance program are peer review documents and not subject to discovery in an arbitration, civil proceeding or other proceeding, except that the board may review the quality assurance program and records as necessary to protect the public health and safety or if fraud is alleged by a government agency with jurisdiction over the pharmacy, and nothing in *Bus. & Prof. Code § 4125* prevents a patient from accessing his or her own prescription records or affects the discoverability of records not solely generated for and maintained as a component of a pharmacy's ongoing quality assurance program [*Bus. & Prof. Code § 4125(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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[Reserved]

§§ 214.52[Reserved]

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17-214 California Forms of Pleading and Practice--Annotated § 214.60

§ 214.60 Strict Liability in Tort Generally

A manufacturer, or retailer who is an integral part of the overall producing and marketing enterprise is strictly liable in tort if it places an article on the market, with the knowledge that it is to be used without inspection for defects, and if it proves to have a defect that causes an injury to the plaintiff [*Greenman v. Yuba Power Products, Inc. (1963) 59 Cal. 2d 57, 62-63, 27 Cal. Rptr. 697, 377 P.2d 897* ; *see Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 261, 37 Cal. Rptr. 896, 391 P.2d 168]* .

This doctrine applies to drug manufacturers [*see Grinnell v. Charles Pfizer & Co. (1969) 274 Cal. App. 2d 424, 433-434, 79 Cal. Rptr. 369]* , and would appear to apply to retailers of drug products, as well, although no case has clearly stated the proposition [*see Christofferson v. Kaiser Foundation Hospitals (1971) 15 Cal. App. 3d 75, 80, 92 Cal. Rptr. 825* (holding that when manufacturer was not strictly liable for drug that caused harmful side effects to plaintiff, failure to show that retailer had knowledge of side effects or means of knowledge beyond that of manufacturer as removing all basis for retailer's liability); *see also People v. Stuart (1956) 47 Cal. 2d 167, 172, 302 P.2d 5* (applying strict criminal liability in cases involving violations of predecessors of *Health & Safety Code §§ 111295-111305, 111440-111450*, prohibiting sale of adulterated or misbranded drugs, since such violations entail great danger to public health and safety)].

The doctrine applies only to the sale of products and not to the rendition of services. If, by statute or decision, the administration of a particular drug is deemed a service, the principles of strict liability do not apply [*see Fogo v. Cutter Laboratories, Inc. (1977) 68 Cal. App. 3d 744, 751-754, 137 Cal. Rptr. 417* (strict liability doctrine as not applying to blood transfusions since under *Health & Safety Code § 1606* blood transfusions are deemed a service for all purposes)].

For further discussion of products liability actions based on strict liability in tort, see Ch. 460, *Products Liability* .

Legal Topics:

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

TortsProducts LiabilityStrict Liability

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§ 214.61 Strict Liability for Distribution of Defective Drug Product

The strict liability doctrine applies when the product was manufactured with a defect [*see Grinnell v. Charles Pfizer & Co. (1969) 274 Cal. App. 2d 424, 436-438, 79 Cal. Rptr. 369* (polio vaccine that contained virulent particles as defective)].

For further discussion of products liability actions based on defect in the design or manufacture under the theory of strict liability in tort, see Ch. 460, *Products Liability* .

Legal Topics:

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

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17-214 California Forms of Pleading and Practice--Annotated § 214.62

§ 214.62 Strict Liability for Defective Warning of Dangerous Drug

[1] Doctrine Applies to Defective Warning

A product may be deemed defective for the purposes of the doctrine of strict liability, although faultlessly made, if it would be unreasonably dangerous to place the product in the hands of the user without a suitable warning, and the product is actually supplied without such warning [*see Grinnell v. Charles Pfizer & Co. (1969) 274 Cal. App. 2d 424, 435 n.7, 79 Cal. Rptr. 369* ; *Toole v. Richardson-Merrell, Inc. (1967) 251 Cal. App. 2d 689, 710-711, 60 Cal. Rptr. 398]* .

[2] Duty to Warn

[a] Manufacturer's Duty to Warn

A manufacturer who knows or has reason to know that a product is dangerous for the use for which it is supplied and has no reason to believe that those who will consume the product will realize its dangerous condition has a duty to warn of the possible risks of using the product [*Stevens v. Parke, Davis & Co. (1973) 9 Cal. 3d 51, 64, 107 Cal. Rptr. 45, 507 P.2d 653* ; *Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 987 n.32, 95 Cal. Rptr. 381]* . This duty particularly applies to drugs that are unavoidably unsafe because, in the present state of human knowledge, it is not possible to make them safe for their intended use [*Grinnell v. Charles Pfizer & Co. (1969) 274 Cal. App. 2d 424, 435-436 n.7, 79 Cal. Rptr. 369* ; *see Fogo v. Cutter Laboratories, Inc. (1977) 68 Cal. App. 3d 744, 754, 137 Cal. Rptr. 417* (liability for hepatitus virus in blood plasma product as resolved by adequacy of warning)], or drugs that have known or documented dangerous effects on parts of the body that are not the object of treatment [*see, e.g., Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 984, 989-991, 95 Cal. Rptr. 381* (warning to doctor as adequate in case of drug Enovid that caused embolisms); *Toole v. Richardson-Merrell, Inc. (1967) 251 Cal. App. 2d 689, 709-710* , *60 Cal. Rptr. 398* (warning as required in case of drug for treating arteriosclerosis known to damage eyes)].

The duty to warn does not apply to side effects that include the following [*see Christofferson v. Kaiser Foundation Hospitals (1971) 15 Cal. App. 3d 75, 78-80, 92 Cal. Rptr. 825* ; *Magee v. Wyeth Laboratories, Inc. (1963) 214 Cal.*

App. 2d 340, 352-354, 29 Cal. Rptr. 322] :

- Long delayed.
- Unforeseeable.
- Unrelated to the ailment for which the drug is designed to treat.
- Not suggested by careful laboratory procedures.
- The partial result of the consumer's unknown and unknowable allergies, sensitivities, and idiosyncrasies.

Nevertheless, when a danger is known or should be known to exist for some identifiable group of users, a warning must be given even though those endangered are few in number when compared with the total number of users of the drug [*Love v. Wolf (1967) 249 Cal. App. 2d 822, 833, 58 Cal. Rptr. 42]* .

Manufacturers of prescription drugs that fail to warn about known or reasonably scientifically knowable risks are subject to a strict liability standard. This standard requires a plaintiff to prove that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. In appropriate cases, Food and Drug Administration action or inaction regarding a particular drug, though not dispositive, may be admissible to show whether a risk was known or reasonably scientifically knowable. However, a pharmaceutical manufacturer may not be held liable for failing to give a warning it has been expressly precluded by the FDA from giving [*Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1108-1115, 56 Cal. Rptr. 162]* . A failure-to-warn strict liability claim is not necessarily preempted if the FDA did not expressly preclude the warning requested by the plaintiff, even if the defendant utilized the label approved by the FDA [*McKenney v. Purepac Pharmaceutical Co. (2008) 167 Cal. App. 4th 72, 85, 83 Cal. Rptr. 3d 810*].

In the case of prescription drugs, the manufacturer's duty to warn runs to the physician, not to the patient. If the warning to doctors is adequate, absent special circumstances known or foreseeable in the exercise of due care by the manufacturer, there is no duty to warn the patient [*Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1116, 56 Cal. Rptr. 162* ; *Stevens v. Parke, Davis & Co. (1973) 9 Cal. 3d 51, 65, 107 Cal. Rptr. 45, 507 P.2d 653* ; *Fogo v. Cutter Laboratories, Inc. (1977) 68 Cal. App. 3d 744, 754-755, 137 Cal. Rptr. 417]* .

[b] Pharmacist's Duty to Warn

[i] Harmful Effects or Impairment of Ability to Drive

Under *Bus. & Prof. Code § 4074(a)*, a pharmacist has a duty to inform a patient orally or in writing of the harmful effects of a drug dispensed by prescription if the drug poses substantial risk to the person consuming it when taken in combination with alcohol or if the drug may impair a person's ability to drive a motor vehicle. The disclosure requirement only applies to those drugs listed by the State Board of Pharmacy as the type of drug for which such warning is required [*Bus. & Prof. Code § 4074(a)*]. However, no case has considered the liability of a pharmacist for injury resulting from a failure to comply with this requirement. The board may by regulation require additional information or labeling [*Bus. & Prof. Code § 4074(b)*].

In any case, it would appear that a pharmacist is strictly liable for injuries that result from the pharmacist's failure to warn a buyer of defects in a manufactured drug when the pharmacist knew or had the means of knowing that the manufacturer's warning was inadequate [*Christofferson v. Kaiser Foundation Hospitals (1971) 15 Cal. App. 3d 75,*

80, 92 Cal. Rptr. 825] .

[ii] Adequacy of Warning

Whether a warning is adequate is a question of fact. Adequacy does not equal mere compliance with regulations or directives, such as those issued by the federal food and drug administration, since they may be only minimal in nature and the manufacturer may know of, or have reason to know of, greater dangers. Moreover, an adequate warning may be eroded or even nullified by over-promotion of the drug through a vigorous sales campaign that may have the effect of persuading doctors to disregard the warnings that are given [*Stevens v. Parke, Davis & Co. (1973) 9 Cal. 3d 51, 65, 107 Cal. Rptr. 45, 507 P.2d 653* ; *see* *Fogo v. Cutter Laboratories, Inc. (1977) 68 Cal. App. 3d 744, 755, 137 Cal. Rptr. 417]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProducts LiabilityDuty to WarnTortsProducts LiabilityStrict Liability

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§ 214.63 Negligence

A pharmacist may be liable for injuries resulting from a breach of the pharmacist's duty of ordinary care or skill in the performance of pharmaceutical services [*Civ. Code § 1714(a)*]. Thus, for example, a pharmacist may be liable for negligence for excessive furnishing of controlled substances [*see Smith v. State Bd. of Pharmacy (1995) 37 Cal. App. 4th 229, 232, 243, 247, 43 Cal. Rptr. 2d 532]* , and other lack of care in dispensing drugs [*see Murphy v. Boericke and Runyon Co. (1925) 72 Cal. App. 132, 134, 236 P. 966]* .

In addition, negligence per se principles apply to create a presumption of negligence for violation of statutes regulating pharmaceutical practice [*Toole v. Richardson-Merrell Inc. (1967) 251 Cal. App. 2d 689, 703, 60 Cal. Rptr. 398]* .

Pharmacists are "health care providers" under Civ. Code Proc. § 364(f)(1), which defines a "health care provider" as including any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code. Pharmacists are licensed under *Bus. & Prof. Code, § 4000 et seq.*, which is Chapter 9 of Division 2. Therefore, the provisions governing the commencement of actions based on a health care provider's professional negligence apply to actions against pharmacists [*see* Civ. Code Proc. §§ 364, 365]. For discussion of notice requirements for bringing a professional negligence action, see *§ 214.115[6], below*.

For a form of complaint for damages for personal injuries based on negligence, by a purchaser-user of a prescription drug against a pharmacist, see *§ 214.115*. For further discussion of and forms for use in negligence actions, see Ch. 380, *Negligence* . Forms of notice as a prerequisite to an action against a health care provider for professional negligence are provided in Ch. 415, *Physicians: Medical Malpractice*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare Providers

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17-214 California Forms of Pleading and Practice--Annotated § 214.64

§ 214.64 Causation

The plaintiff must show that his or her injuries arising from the use of a defective product were caused by an act of the defendant or by an instrumentality under the defendant's control [*Sindell v. Abbott Laboratories (1980) 26 Cal. 3d 588, 597-598, 163 Cal. Rptr. 132, 607 P.2d 924]* .

In proving that the defective drug caused plaintiff's injuries, plaintiff may rely on circumstantial evidence. If the injuries could have been caused by the drug in question or by other drugs or separate diseases, the plaintiff is not required to negate the possibility that other drugs or separate diseases caused his or her injuries [*Grinnell v. Charles Pfizer & Co. (1969) 274 Cal. App. 2d 424, 436, 79 Cal. Rptr. 369* (substantial circumstantial evidence of causation when some witnesses inferred a causal relationship while others testified that cause could not be determined); *Thomsen v. Rexall Drug & Chemical Co. (1965) 235 Cal. App. 2d 775, 783, 45 Cal. Rptr. 642* (jury finding of causation supported when injury could have been caused by erroneously provided drug or by another drug that plaintiff was using)].

The plaintiff may also be relieved of the requirement of proving that a particular defendant was responsible for the defective drug if he or she joins in his or her action the manufacturers of a substantial share of the drug. In such a case, if the plaintiff cannot identify the particular defendant who was responsible for his or her injuries, the burden of proof shifts to such manufacturers. Each manufacturer will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product that caused plaintiff's injuries [*Sindell v. Abbott Laboratories (1980) 26 Cal. 3d 588, 612, 163 Cal. Rptr. 132, 607 P.2d 924]* .

The negligence of a physician in prescribing a drug or failing to be properly informed is not an intervening cause of injury that will exonerate a manufacturer from liability when the manufacturer's negligence in promotion and failing to provide adequate warnings made the physician's act foreseeable [*Stevens v. Parke, Davis & Co. (1973) 9 Cal. 3d 51, 69, 107 Cal. Rptr. 45, 507 P.2d 653* ; *Love v. Wolf (1967) 249 Cal. App. 2d 822, 837-838, 58 Cal. Rptr. 42]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceCausationProximate CauseGeneral Overview

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§ 214.65 Assumption of Risk

A defense to a claim based on strict liability applies when a user of a drug assumes the risk of the defect by discovering a defect and becoming aware of the danger of the defect but nevertheless proceeding to unreasonably use the drug to his or her injury [*Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 991, 95 Cal. Rptr. 381]* .

The doctrine of assumption of risk has merged into comparative fault analysis to the extent that one form of assumption of risk is no more than a variant of contributory negligence, a form that is usually referred to as implied unreasonable assumption of risk [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 119 Cal. Rptr. 858, 532 P.2d 1226* ; *see also Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 730, 144 Cal. Rptr. 380, 575 P.2d 1162* (comparative fault applies in strict liability actions)]. The doctrine remains a separate and complete defense when the plaintiff has expressly agreed to relieve the defendant of the obligation of reasonable conduct towards him or her [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

Secondary assumption of the risk, rather than a complete bar of primary, or express, assumption of risk, applies to a strict products liability claim [*Milwaukee Electric Tool Corp. v. Superior Court (1993) 15 Cal. App. 4th 547, 562, 19 Cal. Rptr. 2d 24* ; *see Knight v. Jewett (1992) 3 Cal. 4th 296, 309, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (lead opinion concluded that terminology distinguishing between reasonable and unreasonable implied assumption by prior opinions in the courts of appeal was more misleading than helpful)]. Thus, the plaintiff's conduct in encountering a known risk imposed by a defendant's breach of its duty to produce a defect-free product can be the basis for reducing any award to plaintiff by the plaintiff's proportionate amount of fault [*see Milwaukee Electric Tool Corp. v. Superior Court (1993) 15 Cal. App. 4th 547, 565-566, 19 Cal. Rptr. 2d 24]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersGeneral OverviewTortsNegligenceDefensesAssumption of RiskGeneral OverviewTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsProducts

LiabilityStrict Liability

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§ 214.66 Punitive Damages for Intentional, Malicious, and Reckless Conduct

Punitive damages based on actual malice under *Civ. Code § 3294* may be recovered in an action for damages for injuries arising from the use of a defective drug when the manufacturer knew that the product was dangerous and that its explicit or implicit representations of safety were false and acted either with intention to injure the users of the drug or in willful and conscious disregard of their safety [*see G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 26-33, 122 Cal. Rptr. 218]* .

ILLUSTRATION:

Falsifying Data and Instructing Sales Staff to Not Admit Danger. When there is evidence that the manufacturer falsified test data, omitted data from reports presented to the government, instructed its salesman to avoid admission of danger, and conducted a vigorous sales campaign despite the manufacturer's knowledge of the drug's danger, would these facts justify an award of punitive or exemplary damages? Yes--a court of appeal held that these facts were sufficient to support a finding of malice in fact by the jury as a foundation for an award of punitive damages [*Toole v. Richardson-Merrell, Inc. (1967) 251 Cal. App. 2d 689, 714-715, 60 Cal. Rptr. 398]* .

For a form of allegation for use by a purchaser-user of a product in a complaint against the product's manufacturer to recover punitive damages when the complaint is based on strict liability in tort, see Ch. 460, *Products Liability* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesPunitive DamagesGeneral OverviewTortsProducts LiabilityStrict Liability

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17-214 California Forms of Pleading and Practice--Annotated §§ 214.67-214.79

[Reserved]

§§ 214.67[Reserved]

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17-214 California Forms of Pleading and Practice--Annotated § 214.80

§ 214.80 "Prescription Drug Claims Processor" Defined

The term "prescription drug claims processor" means any nongovernmental entity that has a contractual relationship with purchasers of prepaid or insured prescription drug benefits, and that processes, consults, advises on, or otherwise assists in the processing of prepaid or insured prescription drug benefit claims submitted by a licensed California pharmacy or its patrons. The term does not include insurers [*see Ins. Code § 23*], health care service plans [*see Health & Safety Code § 1345(f)*], pharmacy permit holders [*see Bus. & Prof. Code § 4110*], employers, trusts, and other entities that assume the risks of pharmaceutical services for designated beneficiaries. The term also excludes insurers, health care service plans, and nonprofit hospital service plans that process claims on a nonrisk basis for self-insured clients [*Civ. Code § 2527(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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17-214 California Forms of Pleading and Practice--Annotated § 214.81

§ 214.81 Duty to Prepare Pharmaceutical Fee Studies

[1] Studies Must Have Been Conducted on or Before January 1, 1984

On or before January 1, 1984, every prescription drug claims processor must have conducted or obtained the results of a study or studies that identifies the fees, separate from ingredient costs, of all, or of a statistically significant sample, of California pharmacies, for pharmaceutical dispensing services to private consumers. The study or studies must meet reasonable professional standards of the statistical profession [*Civ. Code § 2527(c)*].

The determination of the pharmacy's fees made for purposes of the study or studies must be computed by reviewing a sample of the pharmacy's usual charges for a random or other representative sample of commonly prescribed drug products, subtracting the average wholesale price of drug ingredients, and averaging the resulting fees by dividing the aggregate of the fees by the number of prescriptions reviewed [*Civ. Code § 2527(c)*].

A study report must include a preface, an explanatory summary of the results and findings including a comparison of the fees of California pharmacies by setting forth the mean fee and standard deviation, the range of fees, and fee percentiles (10th, 20th, 30th, 40th, 50th, 60th, 70th, 80th, 90th) [*Civ. Code § 2527(c)*].

This study or these studies must be conducted or obtained no less often than every 24 months [*Civ. Code § 2527(c)*].

The reporting requirement in *Civ. Code § 2527* and the related penalty and enforcement provisions in *Civ. Code § 2528* violate the free speech provision of the California Constitution because they violate the free speech rights guaranteed to prescription drug claims processors by compelling speech, and regulation is not narrowly tailored to achieve a governmental interest to encourage insurers to pay pharmacists fair rate for drug dispensing services [*ARP Pharmacy Svcs., Inc. v. Gallagher Bassett Svcs., Inc. (2006) 138 Cal. App. 4th 1307, 1314-1322, 42 Cal. Rptr. 3d 256* ; *see Cal. Const. art. I, § 2*].

[2] Compliance Required to Continue Processing

On or after January 1, 1984, no prescription drug claims processor is to enter into or perform any provision of any new

contract, or perform any provision of any existing contract, with a licensed California pharmacy, or process or assist in the processing of any prescription drug claim submitted by or otherwise involving a service of a licensed California pharmacy unless the processor is in compliance with the requirements for the preparation and transmittal of pharmaceutical studies as set forth in *Civ. Code § 2527(c)*, discussed under [1], *above*, and (d), discussed in *§ 214.82* [*Civ. Code § 2527(a)*].

Effective January 1, 1986, a claims processor may comply with *Civ. Code § 2527(c)*, discussed under [1], *above*, and (d), discussed in *§ 214.82*, in the event no new study or studies meeting the criteria of *Civ. Code § 2527(c)* have been conducted or obtained subsequent to January 1, 1984, by transmitting the same study or studies previously transmitted, with notice of cost-of-living changes as measured by the Consumer Price Index of the United States Department of Labor [*Civ. Code § 2527(d)*].

The reporting requirement in *Civ. Code § 2527* and the related penalty and enforcement provisions in *Civ. Code § 2528* violate the free speech provision of the California Constitution because they violate the free speech rights guaranteed to prescription drug claims processors by compelling speech, and regulation is not narrowly tailored to achieve a governmental interest to encourage insurers to pay pharmacists fair rate for drug dispensing services [*ARP Pharmacy Svcs., Inc. v. Gallagher Bassett Svcs., Inc. (2006) 138 Cal. App. 4th 1307, 1314-1322, 42 Cal. Rptr. 3d 256* ; *see Cal. Const. art. I, § 2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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17-214 California Forms of Pleading and Practice--Annotated § 214.82

§ 214.82 Duty to Transmit Studies to Clients

The study or reports must be transmitted by certified mail by each prescription drug claims processor to the chief executive officer or designee of each client for whom it performs claims processing services. The processor must transmit the study or studies to clients no less often than every 24 months. Nothing in *Civ. Code § 2527* is to be construed, however, to require a processor to transmit to its clients more than two studies during any 24-month period [*Civ. Code § 2527(d)*].

The reporting requirement in *Civ. Code § 2527* and the related penalty and enforcement provisions in *Civ. Code § 2528* violate the free speech provision of the California Constitution because they violate the free speech rights guaranteed to prescription drug claims processors by compelling speech, and regulation is not narrowly tailored to achieve a governmental interest to encourage insurers to pay pharmacists fair rate for drug dispensing services [*ARP Pharmacy Svcs., Inc. v. Gallagher Bassett Svcs., Inc. (2006) 138 Cal. App. 4th 1307, 1314-1322, 42 Cal. Rptr. 3d 256* ; *see Cal. Const. art. I, § 2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of FreedomHealthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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17-214 California Forms of Pleading and Practice--Annotated § 214.83

§ 214.83 Action by Pharmacy Owner for Failure to Prepare Studies

[1] Statutory Damages

A violation of *Civ. Code § 2527* by a prescription drug claims processor may result only in imposition of a civil remedy. The remedy includes, but is not limited to, imposition of statutory damages of not less than $1000 or more than $10,000 depending on the severity or gravity of the violation, plus reasonable attorney's fees, and costs, declaratory and injunctive relief, and any other relief that the court deems proper [*Civ. Code § 2528*].

The reporting requirement in *Civ. Code § 2527* and the related penalty and enforcement provisions in *Civ. Code § 2528* violate the free speech provision of the California Constitution because they violate the free speech rights guaranteed to prescription drug claims processors by compelling speech, and regulation is not narrowly tailored to achieve a governmental interest to encourage insurers to pay pharmacists fair rate for drug dispensing services [*ARP Pharmacy Svcs., Inc. v. Gallagher Bassett Svcs., Inc. (2006) 138 Cal. App. 4th 1307, 1314-1322, 42 Cal. Rptr. 3d 256* ; *see Cal. Const. art. I, § 2*].

For a form of complaint for declaratory relief, permanent injunction, and damages, for violations in the preparing of a pharmaceutical fee study, see *§ 214.120*.

[2] Standing to Bring Suit

Any owner of a licensed California pharmacy has standing to bring an action seeking a civil remedy if his or her pharmacy has a contractual relationship with, or renders pharmaceutical services to, a beneficiary of a client of the claims processor, against whom the action is brought [*Civ. Code § 2528*].

[3] Notice of Violation With Opportunity to Comply

The owner may not, however, commence such an action unless he or she has notified the processor in writing as to the nature of the alleged violation and the processor fails to remedy the violation within 30 days from the receipt of the notice or fails to undertake steps to remedy the violation within that period and complete the steps promptly thereafter [

Civ. Code § 2528].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of FreedomConstitutional LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsStandingHealthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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17-214 California Forms of Pleading and Practice--Annotated §§ 214.84-214.89

[Reserved]

§§ 214.84[Reserved]

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17-214 California Forms of Pleading and Practice--Annotated § 214.90

§ 214.90 Related Matthew Bender Publications

For memoranda of points and authorities related to forms in this chapter, see California Points and Authorities, Ch. 165, *Negligence* , Ch. 190, *Products Liability* , and Ch. 195, *Public Administrative Law* (Matthew Bender)

For discussion relating personal injury actions generally, see Personal Injury: Actions, Defenses, Damages, *Drugs and Druggists*, §§ 1-6 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGeneral OverviewTortsNegligenceGeneral OverviewTortsProducts LiabilityStrict Liability

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§ 214.91 State Statutes

[1] Controlled Substances

DMSO. *Bus. & Prof. Code §§ 2078, 4077(d)*

Controlled substances defined. *Bus. & Prof. Code § 4021*; *Health & Safety Code § 11007*

Hypodermic needles and syringes. *Bus. & Prof. Code § 4140 et seq.*

Poisons. *Bus. & Prof. Code § 4240*

Required warnings regarding anabolic steroids in athletic facilities and contracts. *Civ. Code § 1812.97*

Report of sales and transfers of controlled substances. *Health & Safety Code §§ 11100, 11100.1, 11105*

Penalties for sale, receipt, or possession of specified substances, apparatus, or chemicals for use in unlawful manufacture of controlled substance. *Health & Safety Code §§ 11104, 11104.5, 11366.7*

Manufacture of drug or device licensed by Department of Health Services. *Health & Safety Code § 111615 et seq.*

[2] Definitions

Controlled substance. *Bus. & Prof. Code § 4021*; *Health & Safety Code § 11007*

Dangerous device. *Bus. & Prof. Code § 4022*

Dangerous drug. *Bus. & Prof. Code § 4022*

Device. *Bus. & Prof. Code § 4023*; *Health & Safety Code § 109920*

Direct supervision and control. *Bus. & Prof. Code § 4023.5*

Drug. *Bus. & Prof. Code § 4022*; *Health & Safety Code § 109925*

Manufacturer. *Bus. & Prof. Code § 4033*; *Health & Safety Code § 109970*

New drug. *Health & Safety Code § 109980*

Pharmacist. *Bus. & Prof. Code § 4036*

Pharmacy. *Bus. & Prof. Code § 4037*

Prescriptions. *Bus. & Prof. Code § 4040*; *Health & Safety Code § 110010*

[3] Licenses and Applications

License defined. *Bus. & Prof. Code § 4032*

Application for pharmacist's license. *Bus. & Prof. Code §§ 4200, 4201*

Application for registration as pharmacy technician. *Bus. & Prof. Code § 4202*

Application for license as nonprofit or free clinic. *Bus. & Prof. Code § 4203*

Application for license as surgical clinic. *Bus. & Prof. Code § 4204*

License to sell hypodermic needles and syringes. *Bus. & Prof. Code § 4205*

Investigation of applicants. *Bus. & Prof. Code § 4207*

[4] Offenses and Disciplinary Proceedings

Disciplinary proceedings. *Bus. & Prof. Code § 4300 et seq.*

Every license as subject to revocation. *Bus. & Prof. Code § 4300*

Unprofessional conduct mandating discipline. *Bus. & Prof. Code §§ 4301, 4306*

Petition for reinstatement or modification of penalty. *Bus. & Prof. Code § 4309*

Suspension of license upon incarceration for felony. *Bus. & Prof. Code § 4311*

Cancelling of license for temporary closure of business. *Bus. & Prof. Code § 4312*

Prohibitions and offenses. *Bus. & Prof. Code § 4320 et seq.*

Permissible advertising of prescription drugs and devices. *Bus. & Prof. Code § 4341*; *Health & Safety Code §§ 110390,*

110395, 110400

Unfair trade practices. *Bus. & Prof. Code § 4380 et seq.*

Penalties for sale, receipt, or possession of specified substances, apparatus, or chemicals for use in unlawful manufacture of controlled substance. *Health & Safety Code §§ 11104, 11104.5, 11366.7*

Penalties and sanctions. *Health & Safety Code § 111825 et seq.*

[5] Pharmacists and Pharmacies

License required for pharmacists. *Bus. & Prof. Code § 4051*

Acts pharmacist may perform. *Bus. & Prof. Code §§ 4052, 4052.1*, 4052.2, 4052.3, 4052.4, *4103*

Exceptions to license requirement. *Bus. & Prof. Code §§ 4053-4057*

Record keeping requirements. *Bus. & Prof. Code §§ 4081, 4082*; *Health & Safety Code §§ 11205, 11206*

License required for pharmacies. *Bus. & Prof. Code § 4110*

Nonresident pharmacies. *Bus. & Prof. Code § 4112*

Operation of pharmacy. *Bus. & Prof. Code §§ 4113-4120*

Prescription price information. *Bus. & Prof. Code §§ 4121, 4122*

Dispensing of replacement contact lenses. *Bus. & Prof. Code § 4124*

Pharmacy corporations. *Bus. & Prof. Code § 4150 et seq.*

Application for license as pharmacist. *Bus. & Prof. Code §§ 4200, 4201*

Continuing education for pharmacists. *Bus. & Prof. Code § 4231 et seq.*

Pharmacists Recovery Program. *Bus. & Prof. Code § 4360 et seq.*

Sign requirements. *Bus. & Prof. Code § 4343*

[6] Prescriptions

Substitution of different form of medication to improve patient's ability to comply with drug therapy. *Bus. & Prof. Code § 4052.5*

Repackaging of drugs previously dispensed pursuant to prescription. *Bus. & Prof. Code § 4052.7*

Dangerous drug or dangerous device requires prescription. *Bus. & Prof. Code § 4059*; *Health & Safety Code §§ 11027, 111225, 111350*

Prescription not required during emergency. *Bus. & Prof. Code § 4062*

Prescription refills. *Bus. & Prof. Code §§ 4063, 4064*

Prescription requirements. *Bus. & Prof. Code §§ 4070, 4072*

Substitution of generic drug. *Bus. & Prof. Code § 4073*

Warning with prescription drug. *Bus. & Prof. Code § 4074*

Prescription container. *Bus. & Prof. Code §§ 4076, 4077*

Compounding injectable sterile drug products by pharmacy. *Bus. & Prof. Code § 4127 et seq.*

Contents, labeling and misbranding of prescription drugs. *Health & Safety Code §§ 11164, 111350, 111480*

Tamper-proof packaging. *Health & Safety Code § 111465*

Mislabeling, misbranding, and adulteration as prohibited. *Health & Safety Code §§ 111295 et seq., 111330 et seq.*

[7] Regulatory Scheme

Pharmacy Law. *Bus. & Prof. Code § 4400 et seq.*

Pharmacy Law administered and enforced by Board of Pharmacy. *Bus. & Prof. Code § 4001* (operative only until July 1, 2010, and repealed on January 1, 2011, unless Legislature changes those dates)

Uniform Controlled Substances Act administered and enforced by Board of Pharmacy. *Bus. & Prof. Code § 4011*

Required quality assurance program to document medication errors at pharmacy. *Bus. & Prof. Code § 4125*

Fees and fines under Pharmacy Law. *Bus. & Prof. Code § 4400 et seq.*

Action for failure to comply with distribution of pharmaceutical fee studies requirement. *Civ. Code §§ 2527, 2528*

Treble damages as available against unlicensed person who causes injury while providing goods for which license is required. *Code Civ. Proc. § 1029.8*

Sherman Food, Drug and Cosmetic Law. *Health & Safety Code § 109875 et seq.*

Uniform Controlled Substances Act. *Health & Safety Code § 11000 et seq.*

County voluntary drug repository and distribution programs to distribute surplus medications to persons in need of financial assistance. *Health & Safety Code § 150200 et seq.*

[8] Special Entities

Wholesalers and manufacturers. *Bus. & Prof. Code § 4160 et seq.*

Prescriber dispensing. *Bus. & Prof. Code § 4170 et seq.*

Nonprofit or free clinics. *Bus. & Prof. Code § 4180 et seq.*

Surgical clinics. *Bus. & Prof. Code § 4190 et seq.*

Veterinary food-animal drug retailers. *Bus. & Prof. Code § 4196 et seq.*

Pharmacy technician. *Bus. & Prof. Code § 4202*

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Labeling & PackagingState RegulationCriminal Law & ProcedureCriminal OffensesControlled SubstancesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRevocation & SuspensionTortsProducts LiabilityDuty to Warn

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§ 214.92 Administrative Regulations

Regulations of Board of Pharmacy. *16 Cal. Code Reg § 1700 et seq.*

Regulations applicable to pharmacies. *16 Cal. Code Reg § 1707 et seq.*

Regulations applicable to pharmacist candidates. *16 Cal. Code Reg § 1719 et seq.*

Regulations applicable to dangerous drugs. *16 Cal. Code Reg § 1744 et seq.*

Prohibitions and discipline. *16 Cal. Code Reg § 1760 et seq.*

Regulations applicable to manufacturers and wholesalers. *16 Cal. Code Reg §§ 1780-1784*

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Labeling & PackagingState RegulationHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRevocation & Suspension

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§ 214.93 Decisions

[1] Issuance, Suspension, and Revocation of Pharmacy License

Pharmacist-in-charge, although employee of pharmacy owner, may have responsibilities similar to those of owner for unknown acts of owner's employees. *See Bus. & Prof. Code § 4054*; *Smith v. State Bd. of Pharmacy (1995) 37 Cal. App. 4th 229, 243, 43 Cal. Rptr. 2d 532* (decided under former *Bus. & Prof. Code § 4054*; *now see Bus. & Prof. Code § 4113(b)*)

In disciplining individual for violation of law regulating pharmacy, Board has authority to penalize licensee for employee's unlawful acts although unauthorized by and unknown to licensee. *Arenstein v. California State Bd. of Pharmacy (1968) 265 Cal. App. 2d 179, 192-193, 71 Cal. Rptr. 357*

[2] Selling, Dispensing, and Compounding Prescription Drugs or Devices

Virginia statute making advertisement of prices of prescription drugs by pharmacists unprofessional conduct is violative of United States Constitution. *Va. Pharmacy Bd. v. Va. Consumer Council (1976) 425 U.S. 748, 773, 96 S. Ct. 1817, 48 L. Ed. 2d 346, 365*

On appeal of sentence after conviction on drug charges, Ninth Circuit reversed decision of district court and remanded for resentencing, concluding that district court erred in determining that sentencing guidelines amendment that interpreted "mixture or substance" did not apply to defendant; court held guideline amendment to be retroactive and therefore applicable to defendant's case. *United States v. Innie (9th Cir. 1996) 77 F.3d 1207, 1209*

California-based veterinarian challenged Food and Drug Administration Compliance Policy Guides (CPGs) as exceeding the agency's statutory mandate by regulating veterinarians's extra-label drug use, alleging injury from fear of prosecution from prior conviction, lack of notice of, and opportunity to comment on, CPGs; challenge could not withstand motion to dismiss because veterinarian was unable to establish invasion of legally protected interest. *Takhar v. Kessler (9th Cir. 1996) 76 F.3d 995, 1000*

In federal prosecution for improper drug prescription practices involving anabolic steroids, physician was properly found in contempt of court for failure to produce records required to be maintained by former *Bus. & Prof.Code §§ 4232* (records concerning dangerous drugs) and 4331 (records of prescriptions filled), despite physician's challenges to order based on privilege, privacy, and *U.S. Const., amend. X*. *In re Grand Jury Proceedings (9th Cir. 1986) 801 F.2d 1164, 1168* (*now see Bus. & Prof. Code §§ 4081, 4333*, respectively)

Pharmacy's Medi-Cal provisional provider license terminated when pharmacy allowed pharmacy technician to dispense medication without direct supervision and control of a pharmacist. *Golden Drugs Co., Inc. v. Maxwell-Jolly (2009) 179 Cal. App. 4th 1455, 1465-1467, 102 Cal. Rptr. 3d 446*

Trial court properly granted summary judgment to medical group whose physicians individually dispense drugs on for-profit basis to workers' compensation patients, on complaint by pharmacy that group was dispensing drugs in violation of *Bus. & Prof. Code § 4170(a)(3)*, which prohibits physicians, as prescribers, from keeping a retail pharmacy, when legislature's intent was to prohibit physicians from dispensing drugs to general public. *Park Medical Pharmacy v. San Diego Orthopedic Associates Medical Group, Inc. (2002) 99 Cal. App. 4th 247, 120 Cal. Rptr. 2d 858*

When board accusation charged excessive furnishing of controlled substances and certain records violations, pharmacist was deprived of his right to procedural due process when board failed to inform him that it was charging or going to rely on negligence theory. *Smith v. State Bd. of Pharmacy (1995) 37 Cal. App. 4th 229, 232, 243, 247, 43 Cal. Rptr. 2d 532*

1982 amendment of *Bus. & Prof. Code § 4350.5* (violation of federal law regulating pharmacy as unprofessional conduct) merely clarified existing law and made no substantive change. *Banks v. Board of Pharmacy (1984) 161 Cal. App. 3d 708, 715, 207 Cal. Rptr. 835* (*now see Bus. & Prof. Code § 4301*)

Limitations on compounding of prescriptions to registered pharmacists are constitutional. *In re Gray (1926) 206 Cal. 497, 502, 274 P. 974*

Pharmacist suspended from participation in Medi-Cal program for charging Medi-Cal customers greater price than other customers. *Zimmerman v. Brian (1974) 41 Cal. App. 3d 563, 569-570, 116 Cal. Rptr. 211*

Guilty plea to violation of federal dangerous drug statute is admission of violation of state statute. *Arenstein v. California State Bd. of Pharmacy (1968) 265 Cal. App. 2d 179, 189-190, 71 Cal. Rptr. 357*

Finding of trial court in proceeding for writ of mandamus that board's finding of violation was not supported by weight of evidence was upheld on appeal when record showed that 38,441 ampules of a dangerous drug were missing and unaccounted for but pharmacist testified unequivocally that he never sold the drug without prescription. *Randle v. Cal. State Bd. of Pharmacy (1966) 240 Cal. App. 2d 254, 256-257, 49 Cal. Rptr. 485*

Continuing jurisdiction to revoke license is retained when Board of Pharmacy grants probation. *Goldsmith v. Cal. State Bd. of Pharmacy (1961) 191 Cal. App. 2d 866, 873, 13 Cal. Rptr. 139*

[3] Civil Liability for Distribution of Defective Drugs or Devices

[a] Strict Liability in Tort

Statutory scheme requiring immunization for all school-age children against communicable childhood diseases (*Health & Safety Code § 3380 et seq.*) does not extend to vaccine manufacturers grant of immunity from negligence or strict

liability in tort. *Flood v. Wyeth Laboratories, Inc. (1986) 183 Cal. App. 3d 1272, 1275-1277, 228 Cal. Rptr. 700*

Under *Health & Safety Code § 1606*, private manufacturer of pharmaceuticals that distributes blood product is engaged in service rather than sale and is exempt from strict liability even though it obviously puts the product on the market in order to make a profit. *Fogo v. Cutter Laboratories, Inc. (1977) 68 Cal. App. 3d 744, 753, 137 Cal. Rptr. 417*

Physician is not liable as seller under strict liability doctrine. *Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 977, 95 Cal. Rptr. 381*

Hospital is not liable for use of defective product under strict liability doctrine. *Silverhart v. Mount Zion Hospital (1971) 20 Cal. App. 3d 1022, 1028, 98 Cal. Rptr. 187*

[b] Negligence

Statutory scheme requiring immunization for all school-age children against communicable childhood diseases (*Health & Safety Code § 3380 et seq.*) does not extend to vaccine manufacturers grant of immunity from negligence or strict liability in tort. *Flood v. Wyeth Laboratories, Inc. (1986) 183 Cal. App. 3d 1272, 1275-1277, 228 Cal. Rptr. 700*

Presumption of negligence is created by violation of *Federal Food, Drug, and Cosmetic Law. Toole v. Richardson-Merrell Inc. (1967) 251 Cal. App. 2d 689, 703, 60 Cal. Rptr. 398*

Liability for negligence in erroneously filling prescription. *Thomsen v. Rexall Drug & Chemical Co. (1965) 235 Cal. App. 2d 775, 777, 45 Cal. Rptr. 642*

Damages for negligently dispensing drugs. *Murphy v. Boericke and Runyon Co. (1925) 72 Cal. App. 132, 134, 236 P. 966*

[c] Fraud

Cause of action for fraud is sufficient against manufacturers, distributors, sellers, and dispensers of drugs. *Wennerholm v. Stanford Univ. Sch. of Med. (1942) 20 Cal. 2d 713, 716, 128 P.2d 522*

[4] Civil Actions

Repeated self-justification by manufacturer of defibrillator equipment for use with cardiac arrest victims was sufficient to show likelihood of further violation, and thus justified issuance of order permanently restraining manufacturer from directly or indirectly failing or refusing to furnish information required by medical device reporting regulations. *U.S. v. Laerdal Mfg. Corp. (9th Cir. 1995) 73 F.3d 852, 856*

Plaintiffs are entitled to learn identity of doctors preparing "drug reaction reports" for defendant drug manfacturer in action based on injuries sustained from ingestion of oral contraceptive. *Henard v. Superior Court (1972) 26 Cal. App. 3d 129, 132-133, 102 Cal. Rptr. 721*

In cases involving injury from drug ingestion, one-year period of limitation is not initiated until plaintiff discovers, or in the exercise of reasonable care should have discovered, that he or she was damaged. *Warrington v. Charles Pfizer & Co. (1969) 274 Cal. App. 2d 564, 569-570, 80 Cal. Rptr. 130*

Injured person's reliance on drug manufacturer's failure to give notice of dangerous effects of drug that were known to

the manufacturer is reasonable explanation for person's failure to discover cause of injury within one year. *Warrington v. Charles Pfizer & Co. (1969) 274 Cal. App. 2d 564, 572-573, 80 Cal. Rptr. 130*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesControlled SubstancesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRevocation & SuspensionTortsNegligenceGeneral OverviewTortsProducts LiabilityStrict Liability

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§ 214.94 Attorney General Opinions

Physician generally may prescribe for patient medical device distributed by company in which physician has ownership interest, provided that any return on investment is based on physician's proportional ownership share and requisite disclosures are made; when physician may prescribe device for patient, company generally may solicit physicians as investors in the company. *89 Op. Atty Gen. 25 (2006)*

Regulation of out-of-state mail order pharmacies under California law. *75 Ops. Cal. Atty. Gen. 41 (1992)*

Defining (1) "reasonable quantity," (2) "compound medication," and (3) "prescriber office use," as used in former *Bus. & Prof. Code § 4046(c)(1)* (concerning scope of pharmacist's practice). *73 Ops. Cal. Atty. Gen. 103 (1990)* (*now see Bus. & Prof. Code § 4052(a)(1)*)

Pharmacy operated by University of California is subject to licensure, inspection, and disciplinary provisions of Pharmacy Law. 72 Ops. Cal. Atty. Gen. 119 (1989)

Pharmacist is permitted to dispense new drugs pursuant to physician's prescription as long as component elements of such drugs have not been banned. *61 Ops. Cal. Atty. Gen. 192, 192-193 (1978)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawTreatmentMedical DevicesGeneral Overview

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§ 214.95 Law Reviews

Comment, *Professional-Client Sex: Is Criminal Liability an Appropriate Means of Enforcing Professional Responsibility, 40 UCLA L. Rev. 1275 (1993)*

Frankford, *Privatizing Health Care: Economic Magic to Cure Legal Medicine, 66 S. Cal. L. Rev. 1 (1992)*

Moore, *Comment k: A Prescription for the Over-the-Counter Drug Industry, 22 Pac. L.J. 43 (1990)*

Comment, *Prescription Drugs and Strict Liability: The Flaw in the Ointment, 19 Pac. L.J. 193 (1987)*

Comment, *Strict Liability for Prescription Drugs: Which Shall Govern--Comment K or Strict Liability Applicable to Ordinary Products? 16 Golden Gate U.L. Rev. 309 (1986)*

Comment, *The Application of Trade Secret Protection to Safety and Effectiveness Data of Patented Drugs, 16 U.C. Davis L. Rev. 463 (1983)*

Comment, *Prenatal Fraud: Untruth and the Consequences for the Drug Manufacturer, 13 Pac. L.J. 147 (1981)*

Comment, *Picking Your Poison: The Drug Efficacy Requirements and the Right of Privacy, 25 UCLA L. Rev. 577 (1978)*

Rosoff and Dunfee, *A "Fix" for the Retail Pharmacy: The Supreme Court Redefines Application of the Robinson-Patman Act to Drug Sales by Nonprofit Hospitals, 13 Cal. West L. Rev. 195 (1977)*

Comment, *Government Regulation of Health-Care Drugs of Questional Efficacy, 14 San Diego L. Rev. 388 (1977)*

Article, *Strict Liability in Tort: Its Applicability to Manufacturer of Prescription Drugs, 7 U.C. Davis L. Rev. 487 (1974)*

Dolan, *The Impact of Methadone Maintenance on Civil and Criminal Liability, 46 S. Cal. L. Rev. 713 (1973)*

Note, *Misfeasance in the Pharmacy: A Bundle of "Fun, Joy and Affection"?, 8 Cal. W. L. Rev. 341 (1972)*

Note, *Liability of Birth Control Pill Manufacturers, 23 Hastings L.J. 1526 (1972)*

Keeton, *Some Observations About the Strict Liability of the Maker of Prescription Drugs: The Aftermath of MER/29, 56 Cal. L. Rev. 149 (1968)*

James, *The Untoward Effects of Cigarettes and Drugs: Some Reflections on Enterprise Liability, 54 Cal. L. Rev. 1550 (1966)*

Note, *Manufacturer's Warranties and the Sales Act, 15 Stan. L. Rev. 381 (1963)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesSex CrimesSexual AssaultAbuse of AdultsGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewTortsBusiness TortsUnfair Business PracticesGeneral OverviewTortsIntentional TortsInvasion of PrivacyGeneral OverviewTortsProducts LiabilityStrict Liability

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§ 214.96 Text References

Witkin, Summary of California Law, Vol. 3 *Sales,* §§ 102, 103, 320; Vols. 5 and 6 *Torts,* §§ 358, 957, 1335, 1340; Vol. 8 *Constitutional Law,* § 880 (9th ed 1990)

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[Reserved]

§§ 214.97[Reserved]

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17-214 California Forms of Pleading and Practice--Annotated § 214.110

§ 214.110 Petition to State Board of Pharmacy for Reinstatement of License to Practice Pharmacy [Bus. & Prof. Code § 4309]

[1] FORM Petition to State Board of Pharmacy for Reinstatement of License to Practice Pharmacy [Bus. & Prof. Code § 4309]

In the Matter of the Petition for Reinstatement of the Certificate of _____ [*name*], Petitioner.	)))))	NO. _____ BEFORE THE BOARD OF PHARMACY, DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS, STATE OF CALIFORNIA

1. The undersigned petitioner respectfully requests the reinstatement of his/her license that was _____ [revoked *or* suspended and petitioner placed on probation], by the Board of Pharmacy ("Board"), decision No. _____. The decision became effective on _____ [*date*].

2. The verified recommendations of registered pharmacists _____ [*name*] and _____ [*name*] are attached to this petition as Exhibits _____ and _____, respectively, and made a part hereof.

3. Also attached to this petition are the recommendations _____ [*name*] and _____ [*name*], citizens of the United States and of the State of California, each having personal knowledge of the activities of petitioner since the disciplinary action was taken. These recommendations are marked Exhibits _____ and _____, respectively, and are made a part of this petition.

4. The petitioner is not now under sentence or on probation or parole for any criminal offense and has not been afforded a hearing on any petition filed pursuant to *Section 4309 of the Business and Professions Code* within a period of one year immediately preceding the filing of this petition.

5. Petitioner requests reinstatement of his/her license without conditions or restrictions, and an opportunity to present evidence before the Board in support of this petition. Petitioner further requests reasonable notice of the time and place at which that evidence may be presented.
Dated: _____ [*date*].

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Use of Form

The form in [1], *above*, is a petition for reinstatement of a license to practice pharmacy is for use by a respondent when the cause for discipline has been removed or the respondent has become rehabilitated [*see Bus. & Prof. Code § 4309*].

For discussion of reinstatment of a certificate generally, see *§ 214.31*.

[3] Cross References

For a form of general petition pursuant to *Gov. Code § 11522* for restoration of rights of revoked or suspended license, see *Ch. 473G, Agency Adjudication Decisions, § 473G.71*

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[Reserved]

§§ 214.111[Reserved]

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17-214 California Forms of Pleading and Practice--Annotated § 214.115

§ 214.115 Complaint for Damages for Personal Injuries Based on Negligence--By Purchaser-User of Prescription Drug Against Pharmacist--General Form

[1] FORM Complaint for Damages for Personal Injuries Based on Negligence--By Purchaser-User of Prescription Drug Against Pharmacist--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DAMAGES
[and DOES I through _____,]	)	(Negligence)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. Plaintiff is, and at all times herein mentioned was, a resident of _____ (*specify county and stats or allege capacity of plaintiff if a legal entity or suing in a representative capacity*).]

2. Defendant _____ [*name of seller*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ [*city*], _____ County, California *or allege other capacity of defendant and basis of venue as appropriate*].

3. Defendant _____ [*name of seller*] is, and at all times herein mentioned was, in the business of compounding prescriptions and dispensing at retail such prescriptions and other medical drugs.

4. Defendant _____ [*name of pharmacist*] is, and at all times herein mentioned was, a pharmacist duly licensed to practice his/her profession in the State of California.

[5. Plaintiff is ignorant of the true names and capacities of defendants sued herein as Does I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by that negligence.)]

[6. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned defendant _____ (*name of pharmacist*) was the agent of the defendant _____ (*name of seller*) and (in doing the things hereinafter alleged) was acting within the course and scope of such agency and with the permission and consent of his/her codefendant.]

7. On or about _____ [*date*], plaintiff was under the care of Dr. _____ [*name*], who is, and at all times mentioned herein was, a medical doctor duly licensed to practice his/her profession in California.

8. On or about _____ [*date*], Dr. _____ [*name*] prescribed certain medical drugs for plaintiff. _____ [*Allege description of prescription, e.g.,* The prescription called for 30 tablets, each tablet containing two grams of Valium and directing that one tablet be taken three times a day].

9. Because defendant _____ [*name of seller*] was engaged in the sale of prescription drugs to the general public, and defendant _____ [*name of pharmacist*] was engaged in the filling of prescriptions for drugs for the general public, they owed a duty to the general public and to plaintiff in particular to use reasonable care to see that the prescriptions for drugs were filled so as to be fit for human use.

10. _____ [*Allege act of negligence, e.g.,* On or about _____, (*date*), defendant _____ (*name of pharmacist*) prepared the prescription for plaintiff. Defendant placed a label on the container for the drug intended for plaintiff. The label said that one tablet should be taken every two hours. This label did not correctly state the directions that had been given by Dr. _____ (*name*). The error in preparing the label was due to the negligence of defendant _____ (*name of seller*) and the defendant's agent _____ (*name of pharmacist*)].

11. _____ [*Allege plaintiff's reasonable reliance, e.g.,* Reasonably relying on the label and pursuant to the directions stated on the label, plaintiff consumed 8 tablets a day until the tablets were fully consumed].

12. As a proximate result of the negligence of defendants, and each of them, plaintiff was hurt and injured in his/her health, strength, and activity sustaining injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has suffered general damages according to proof.

13. As a further proximate result of defendants' negligence herein alleged, plaintiff has been damaged in that he/she has been required to expend money and incur obligations, for medical services, X-rays, drugs, and sundries reasonably required in the treatment and relief of the injuries herein alleged.

14. As a further proximate result of the negligence of defendants and each of them, plaintiff was prevented from attending to his/her usual occupation as a _____ [*state occupation*] _____ [for a period of _____ (*specify*) *or* to the date of the filing of this complaint] and thereby lost earnings [to

his/her damage according to proof].

WHEREFORE, plaintiff prays judgment against defendants, and each of them as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action or proceeding. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form is a general form for use by a plaintiff to recover damages sustained as the result of using drugs improperly because of a negligently filled prescription. The fact situation described in the form illustrates allegations for use when the negligence consists in providing erroneous directions for using the drug.

For discussion of negligence as a basis for liability by a pharmacist, see *§ 214.63*.

[3] Contents of Form

The complaint alleges:

- Plaintiff's capacity or residence (Paragraph 1).
- Defendant's capacity and basis for venue (Paragraph 2).
- Defendant's activities that are the basis for defendant's duty to use reasonable care (Paragraphs 3, 4, 9).
- Fictitious name (Paragraph 5).
- Agency (Paragraph 6).
- Facts establishing plaintiff's use of due care (Paragraphs 7, 8, 11).
- Defendant's act of negligence (Paragraph 10) [*see Civ. Code § 1714*].
- Any actual damages that plaintiff has incurred (Paragraphs 12-14) [*see Civ. Code § 3333*].

The allegation of plaintiff's capacity and residence is not required and is normally omitted unless plaintiff is a legal entity, doing business under a fictitious business name, or is suing in a representative capacity.

[4] Specifying Amount of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see *Ch. 177, Damages, § 174.10* et seq., and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[6] Notice Prior to Commencing Action

Code Civ. Proc. § 364(a) requires 90 days prior notice as a prerequisite to an action against a health care provider, including pharmacists, for professional negligence [*see* Civ. Code Proc. § 364(f)(1) ("health care provider" defined)].

[7] Cross References

For alternative allegations as to capacity and residence of parties, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative allegations as to damages, see Ch. 177, *Damages*

For forms of complaints alleging fraud and deceit, see Ch. 269, *Fraud and Deceit*

For discussion of and forms for use in negligence actions, see Ch. 380, *Negligence*

For a form of notice as a prerequisite to an action against a health care provider for professional negligence, see Ch. 415, *Physicians: Medical Malpractice*

For alternative forms of prayers and verifications, see Chs. 420, *Prayers* , and 572, *Verification* , respectively

For forms of complaints for use in actions for breach of warranty, see Ch. 500, *Sales and Secured Transactions*

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[Reserved]

§§ 214.116[Reserved]

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17-214 California Forms of Pleading and Practice--Annotated § 214.120

§ 214.120 Complaint for Declaratory Relief, Permanent Injunction, and Damages for Violation in Preparing of Pharmaceutical Fee Study--Against Prescription Drug Claims Processor by Pharmacy Owner [Civ. Code § 2528]

[1] FORM Complaint for Declaratory Relief, Permanent Injunction, and Damages for Violation in Preparing of Pharmaceutical Fee Study--Against Prescription Drug Claims Processor by Pharmacy Owner [Civ. Code § 2528]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*], Plaintiff,	)	
vs.	)	
_____ [*name*],	)	NO. _____
[and DOES I through _____,]	)	COMPLAINT FOR DECLARATORY RELIEF,
Defendant(s).	)	PERMANENT INJUNCTION, AND DAMAGES
	)	
	)	

Plaintiff alleges:

1. [*Plaintiff's capacity and residence, when appropriate. See § 214.115[1], Paragraph 1.*]

2. [*Defendant's capacity and residence, when appropriate. See § 214.115[1], Paragraph 2.*]

3. Plaintiff is the owner of _____ [*name*], a pharmacy duly licensed under the laws of the State of California and located in _____ County, California.

4. Defendant is a prescription drug claims processor as defined in *Section 2527(b) of the Civil Code*.

5. Plaintiff's pharmacy _____ [has a contractual relationship with *or* renders pharmaceutical services

to] _____ [a beneficiary *or* beneficiaries] of _____ [*name(s) of defendant's clients*], who _____ [is *or* are] client(s) of defendant.

6. _____ [*Describe defendant's alleged violation of Civ. Code § 2527,e.g.,* The study _____ (conducted *or* obtained) by defendant of fees of California pharmacies of dispensing services to private consumers does not comply with the requirements of *Section 2527(c) of the Civil Code* in that it did not cover a statistically significant sample of California pharmacies].

7. On _____ [*date*], plaintiff notified defendant in writing as to the nature of the alleged violation of *Section 2527 of the Civil Code*. Defendant _____ [did not *or* refused to] remedy the violation within 30 days fromreceipt of the notice, _____ [did not *or* refused to] undertake steps to remedy the violation within that period and complete the steps promptly thereafter [, and continues to refuse to remedy the violation].

8. An actual controversy now exists betweeen plaintiff and defendant concerning their respective rights and duties. Plaintiff contends that _____ [*specify contentions, e.g.,* defendant's fee study was not based on a statistically significant sample of California pharmacies]. Defendant disputes these contentions and contends that _____ [*specify contentions, e.g.,* the study he/she/it _____ (made *or* obtained) was based on a statistically significant sample of California pharmacies].

9. Plaintiff desires a judicial determination of his/her/its rights, and a declaration as to whether or not _____ [*specify issue to be determined, e.g.,* defendant's study was based on a statistically significant sample of California pharmacies]. A judicial declaration is necessary and appropriate at this time under the circumstances in order that plaintiff may ascertain his/her its rights and duties under *Section 2528 of the Civil Code*.

10. Defendant's wrongful conduct, unless and until enjoined and restrained by order of this court, will cause great and irreparable injury to plaintiff in that _____ [*specify particular facts that will constitute great and irreparable harm to plaintiff's business resulting from defendant's failure or refusal to comply with Civ. Code § 2527*].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a declaration that _____ [*state determination, requested e.g.,* the fee study _____ (made *or* obtained) by defendant is not sufficient to satisfy the requirements of *Section 2527 of the Civil Code* because it was not based on a statistically significant sample of California pharmacies];

2. For a permanent injunction directing defendant to complete and transmit a fee study in compliance with *Section 2527 of the Civil Code*;

3. For damages in the sum of $_____;

4. For reasonable attorney's fees incurred herein;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 214.105.*]

[2] Use of Form

The form in [1], *above,* is for use by a pharmacy owner who is seeking declaratory and injunctive relief against a prescription drug claims processor for an alleged violation in preparing a fee study of pharmaceutical dispensing services to private consumers [*see Civ. Code § 2528*].

Although *Civ. Code § 2258* specifically authorizes declaratory and injunctive relief in the action, counsel should determine whether or not such relief is appropriate under the circumstances.

The reporting requirement in *Civ. Code § 2527* and the related penalty and enforcement provisions in *Civ. Code § 2528* violate the free speech provision of the California Constitution because they violate the free speech rights guaranteed to prescription drug claims processors by compelling speech, and regulation is not narrowly tailored to achieve a governmental interest to encourage insurers to pay pharmacists fair rate for drug dispensing services [*ARP Pharmacy Svcs., Inc. v. Gallagher Bassett Svcs., Inc. (2006) 138 Cal. App. 4th 1307, 1314-1322, 42 Cal. Rptr. 3d 256* ; *see Cal. Const. art. I, § 2*].

For a discussion of the requirement of a fee study and of requirements relating to its contents, see § 214.70 et seq.

[3] Contents of Form

The form in [1], *above,* alleges:

- The plaintiff's capacity and residence (Paragraph 1).

- The defendant's capacity and residence (Paragraph 2).

- The plaintiff's standing as an owner of a licensed California pharmacy that has a contractual relationship with or renders pharmaceutical services to a beneficiary of a client of defendant (Paragraphs 3, 5) [*see Civ. Code § 2528*].

- The defendant's capacity as a prescription drug claims processor (Paragraph 4) [*see Civ. Code §§ 2527(b), 2528*].

- That defendant violated *Civ. Code § 2527* (Paragraph 6) [*see Civ. Code §§ 2527(c),(d), 2528*].

- That the plaintiff gave the defendant written notice to remedy the violation (Paragraph 7) [*see Civ. Code § 2528*].

In relation to the request for declaratory relief, the form alleges:

- The existence of an actual controversy and the parties conflicting contentions (Paragraph 8).

- That the plaintiff desires a declaration of his or her rights that is necessary and appropriate under the circumstances (Paragraph 9) [*see Code Civ. Proc. §§ 1060, 1061*; *Alturas v. City of Gloster (1940) 16*

Cal. 2d 46, 48, 104 P.2d 810] .

In relation to the request for a permanent mandatory injunction, the form additionally alleges facts showing why the defendant's conduct will constitute great and irreparable injury (Paragraph 10) and the inadequacy of any legal remedies (Paragraph 11) [*see Civ. Code § 3422*; *Code Civ. Proc. § 526*; *E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Helms Bakeries v. St. Bd. Equalization (1942) 53 Cal. App. 2d 417, 425, 128 P.2d 167]* .

[4] Verification

Verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. § 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Notice Prior to Commencing Action

Before commencing an action against a prescription drug claims processor, a pharmacy owner must give the processor written notice as to the nature of the alleged violation of *Civ. Code § 2527*, and the processor must fail to remedy the violation within 30 days from receipt of the notice or fail to undertake steps to remedy the violation within that period and to complete the steps promptly thereafter [*Civ. Code § 2528*].

[6] Jurisdiction

An action seeking permanent injunctive relief or declaratory relief is in the jurisdiction of the superior court and is not a limited civil case [*see Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(7), (8), 580(b)(2), (5), 1060*].

If, however, only the statutory damages of not less than $1000 nor more than $10,000 provided for in *Civ. Code § 2528*, are sought, the superior court has jurisdiction of the action as a limited civil case (amount in controversy, exclusive of interest, is $25,000 or less) [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[7] Costs and Attorney's Fees

Recovery of costs and attorney's fees are authorized in an action against a prescription drug claims processor for violation of *Civ. Code § 2527* [*Civ. Code § 2528*].

[8] Cross References

For discussion and forms relating to the remedy of declaratory relief, see Ch. 182, *Declaratory Relief*

For discussion and forms relating to permanent injunctive relief, see Ch. 303, *Injunctions*

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17-215 California Forms of Pleading and Practice--Annotated 215.syn

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[5] Mistake of Fact

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[1] FORM

[2] Use of Form

§ 215.121 Allegation of Deprivation of Exercise of Free Will Without Confinement of Person or Detention of Property [Civ. Code § 1569]

[1] FORM

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§ 215.122 Allegation of Economic or Business Duress [Civ. Code § 1569]

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§ 215.130 Allegation of Confidential Relationship Raising Presumption of Undue Influence or Constructive Fraud [Civ. Code §§ 1573(1), 1575(1)]

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[b] Reliance

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Cross References

§ 215.141 Allegation of Unilateral Mistake of Fact--Other Party Aware of Mistake [Civ. Code § 1577]

[1] FORM

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§ 215.141A Allegation of Unilateral Mistake of Fact--Other Party Unaware of Mistake

[1] FORM

[2] Use of Form

§ 215.142 Allegation of Mistake of Law [Civ. Code § 1578]

[1] FORM

[2] Use of Form

[3] Cross References

§ 215.143 Allegation of Innocent Misrepresentation

[1] FORM

[2] Use of Form

§ 215.144 Allegation of Intentional Misrepresentation of Fact [Civ. Code § 1572]

[1] FORM

[2] Use of Form

[3] Cross References

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PART I. SCOPE

17-215 California Forms of Pleading and Practice--Annotated § 215.01

§ 215.01 Scope of Chapter

This chapter discusses the defenses of duress, menace, fraud, undue influence, and mistake as each negates the apparent consent to a contract. The chapter contains forms of allegations for use in complaints for rescission or reformation and for use as affirmative defenses to actions based on contract on the following grounds:

- Duress and menace [*see § 215.120* et seq.].
- Undue influence [*see § 215.130* et seq.].
- Mistake, misrepresentation and fraud [*see § 215.140* et seq.].

The terms duress, menace, fraud, undue influence, and mistake are used, individually and in varying combinations, in numerous sections of the California codes other than in relation to the issue of contractual consent. However, the forms in this chapter may be adapted for use in cases arising under those other sections that involve invalidating some type of agreement [*see, e.g., Civ. Code §§ 1788.10* (debt collection by using duress and menace), 3261 (mistake made with intent to defraud as invalidating lien); *Prob. Code § 6104* (will made under duress, menace, fraud, or undue influence may be denied probate)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral Overview

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17-215 California Forms of Pleading and Practice--Annotated § 215.02

§ 215.02 Cross References

[1] Contract Made by Minor

For discussion and forms to disaffirm under *Fam. Code § 6710* a contract made by a minor, see Ch. 365, *Minors: Contract Actions* ,.

[2] Related Discussion and Forms

For discussion of contracts and rescission in general, see Ch. 140, *Contracts* , and Ch. 490, *Rescission and Restitution* , respectively.

For forms to use in conjunction with the forms in this chapter, see the following chapters:

- For forms for use to seek cancellation of a deed obtained by fraud, undue influence, or mistake, see Ch. 107, *Cancellation of Instruments* , and Ch. 184, *Deeds* .

- For forms relating to the cause of action of fraud and deceit, see Ch. 269, *Fraud and Deceit* .

- For discussion and forms relating to mistake and fraud as grounds for reformation, see Ch. 488, *Reformation of Instruments* .

Many other chapters include related discussion and forms:

- For discussion of duress and other defenses relating to accord and satisfaction, see Ch. 6, *Accord and Satisfaction* .

- For forms of defense relating to fraud and mistake for use in actions based on accounts stated, see Ch. 8, *Accounts Stated and Open Accounts* .

- For a form for use in actions involving fraud in auctions, see Ch. 77, *Auctions and Auctioneers* .

- For discussion and forms relating to actions involving fraud by and against brokers, see Ch. 103, *Brokers* .

- For discussion and forms for use in actions involving fraud in building contracts, see Ch. 104, *Building Contracts* .

- For a form for use in recovering an overpayment made under mistake of fact, see Ch. 121, *Common Counts* .

- For discussion and forms involving actions to set aside fraudulent conveyances, see Ch. 270, *Fraudulent Conveyances* .

- For discussion and forms involving gifts induced by fraud, mistake, or undue influence, see Ch. 278, *Gifts* .

- For discussion and forms involving fraud in actions against insurance companies and brokers, see Ch. 308, *Insurance* .

- For discussion and forms involving the attacking of judgments on the basis of fraud or mistake, see Ch. 318, *Judgments* .

- For a form for use in an action for damages for fraud in transfer of oil and gas interests, see Ch. 393, *Oil and Gas* .

- For a form for use in an action for rescission of a partnership contract based on misrepresentations made in connection with entering into the partnership, see Ch. 401, *Partnerships: Actions Between General Partners and Partnership* .

- For a form for use in an action for damages for fraud in the sale of land, see Ch. 427, *Principal and Agent* .

- For forms for use in actions to set aside a will procured by fraud or undue influence, see Ch. 444, *Probate: Will Contests* .

- For discussion and forms relating to erroneous bids involving public work contracts, see Ch. 481, *Public Works* .

- For discussion and forms involving fraud in sale of securities and investments, see Ch. 515, *Securities and Franchise Regulation* .

- For discussion and forms relating to the statute of frauds, see Ch. 530, *Statute of Frauds* .

- For a form for use in actions by a surety against persons fraudulently obtaining execution of contractors labor and materials bonds, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

- For forms for use in rescission of irrevocable trusts on grounds of duress, etc., and in impressing constructive trusts on property obtained through fraud or mistake, see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

- For forms for use in actions for rescission of contract for sale of property due to fraud, see Ch. 569, *Vendor and Purchaser* .

[3] Setting Aside Judgments and Orders

For discussion and forms to set aside a judgment of marital dissolution obtained by fraud, duress, mistake, or other grounds under *Fam. Code § 2120 et. seq.*, see Ch. 221, *Dissolution of Marriage: Procedure* .

- For general discussion and forms for use to set aside a stipulation, judgment, or stipulated judgment induced by duress, fraud, or mistake, see Ch. 489, *Relief From Judgments and Orders* , and Ch. 533, *Stipulations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAgeContracts LawPerformanceAccord & SatisfactionContracts LawRemediesReformationContracts LawRemediesRescission & RedhibitionGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGeneral Overview

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17-215 California Forms of Pleading and Practice--Annotated § 215.03

§ 215.03 Governing Statutes

Consent to a contract is governed generally by *Civ. Code §§ 1565-1590*. Acts and omissions constituting duress, fraud, undue influence, and mistake and which invalidate consent are set forth in *Civ. Code §§ 1569-1579*.

Relief from marital dissolution judgments obtained by duress is governed by *Fam. Code § 2120 et. seq.*, discussed in Ch. 221, *Dissolution of Marriage: Procedure* . Void and invalid attempted transfers to fiduciaries, including attorneys, and conservators, are governed by *Prob. Code § 21350 et seq.*, discussed in Ch. 444, *Probate: Will Contests* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewEstate, Gift & Trust LawWill ContestsFraudEstate, Gift & Trust LawWill ContestsMistake

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[Reserved]

§§ 215.04[Reserved]

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PART II. LEGAL BACKGROUND
A. Background Principles

17-215 California Forms of Pleading and Practice--Annotated § 215.10

§ 215.10 Consent as Essential Element of Contract

Consent is an essential element to the formation of a contract [*Civ. Code § 1550*]. Consent is composed of an offer and an acceptance [*American B. M. Co. v. Indemnity Ins. Co. (1932) 214 Cal. 608, 615, 7 P.2d 305]* . To be valid, consent must be free, mutual, and communicated by each party to the other [*Civ. Code § 1565*]. An apparent consent is not real or free when obtained through duress, menace, fraud, undue influence, or mistake [*Civ. Code § 1567*; *see, e.g.,* *Jones v. Adams Financial Services (1999) 71 Cal. App. 4th 831, 840, 84 Cal. Rptr. 2d 151* (loan documents signed by elderly woman who was blind and suffered from dementia were obtained through fraud in the execution without negligence on plaintiff's part and contract therefore was void)]. Consent is deemed to have been obtained through one of these causes only when it would not have been given had that cause not existed [*Civ. Code § 1568*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesDuress & Undue InfluenceThreats of Arrest & ImprisonmentContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawFormationMeeting of Minds

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17-215 California Forms of Pleading and Practice--Annotated § 215.11

§ 215.11 Confusion and Overlap of Terms

The terms duress, menace, fraud, and undue influence are often confused, used interchangeably, or deemed to include each other [*see In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 83, 85 n.9, 260 Cal. Rptr. 403* (duress as fraud; finding of duress, that wife was very emotional, upset, and distraught to the point that she was acting under her husband's will as demonstrating undue influence); *Leeper v. Beltrami (1959) 53 Cal. 2d 195, 205, 1 Cal. Rptr. 12, 347 P.2d 12* (duress as species of fraud); *O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 158, 119 Cal. Rptr. 245* (undue influence as species of constructive fraud); *Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 128, 54 Cal. Rptr. 533* (duress and menace used interchangeably)].

Duress, menace, fraud, and undue influence are often all alleged in the same action [*see Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 128-129, 131-132, 54 Cal. Rptr. 533* (finding undue influence but no duress, menace, or constructive fraud)]. Counsel may wish to allege more than one ground for invalidating apparent consent and leave it to the trier of fact to determine which actions actually did overpower the party's ability to give actual consent.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesDuress & Undue InfluenceThreats of Arrest & ImprisonmentContracts LawDefensesFraud & MisrepresentationGeneral Overview

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[Reserved]

§§ 215.12[Reserved]

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B. Duress and Menace

17-215 California Forms of Pleading and Practice--Annotated § 215.20

§ 215.20 Statutory Definition of Duress and Menace

Duress is defined by *Civ. Code § 1569* as:

- The unlawful confinement of the person of a party, or of a party's husband, wife, ancestor, descendant, or adopted child, or of the ancestor, descendant, or adopted child of the party's husband or wife [*Civ. Code § 1569(1)*];

- The unlawful detention of the property of the party or of the relatives of the party listed in item 1, *above* [*Civ. Code § 1569(2)*]; or

- The confinement of one of the persons listed in item 1, *above*, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive [*Civ. Code § 1569(3)*].

Although menace is often used interchangeably with duress in California [*see Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 128, 54 Cal. Rptr. 533]* , it is technically different from duress, in that it is a threat of duress as specified in *Civ. Code § 1569(1)* or *(3)*. It is also a threat of unlawful and violent injury to the person or property of any person specified in *Civ. Code § 1569(1)*, or of injury to the character of that person [*Civ. Code § 1570*]. Thus, threats of bodily harm are sufficient to uphold a finding of duress [*Alderson v. Alderson (1986) 180 Cal. App. 3d 450, 464-465, 225 Cal. Rptr. 610* (voiding quitclaim deeds signed under threats of violence coupled with evidence of actual violence before and after signing)]. Because courts frequently fail to distinguish between duress and menace [*see §§ 215.11, 215.21[1]*], the term duress is also used to mean menace in this chapter unless otherwise indicated.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesDuress & Undue InfluenceThreats of Arrest & Imprisonment

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B. Duress and Menace

17-215 California Forms of Pleading and Practice--Annotated § 215.21

§ 215.21 Expanded Definition

[1] In General

Case law has expanded the definition of duress beyond the limited wording of the statute [*see § 215.11*]. The expanded definition of duress includes whatever destroys a person's free agency and constrains that person to do something against his or her will [*In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 84, 260 Cal. Rptr. 403* ; *Lewis v. Fahn (1952) 113 Cal. App. 2d 95, 98, 247 P.2d 831* (quoting 17 Am. Jur., p. 873)]. Duress may be exercised by threats, importunity, or any species of mental coercion [*In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 84, 260 Cal. Rptr. 403* ; *In re Marriage of Gonzalez (1976) 57 Cal. App. 3d 736, 744, 129 Cal. Rptr. 566* ; *Gross v. Needham (1960) 184 Cal. App. 2d 446, 461, 7 Cal Rptr 664]* . Duress exists if one party intentionally used threats or pressure to induce action or nonaction to the other party's detriment and the coerced party was thereby induced to assent and had no reasonable alternative [In reMarriage of *Baltins (1989) 212 Cal. App. 3d 66, 84, 85 n.9, 260 Cal. Rptr. 403* (series of misrepresentations, threats, and refusal to deal with counsel resulting in finding of duress that also amounted to undue influence); *Rich & Whillock, Inc. v. Ashton Development, Inc. (1984) 157 Cal. App. 3d 1154, 1158-1159, 204 Cal. Rptr. 86]* .

[2] Landlord-Tenant

Lessees were held to be acting under duress when they paid full rental, despite contrary agreements, because the lessors had made written and oral threats to declare the lease cancelled and bring an action for eviction if the lessees did not pay the increased amount [*Lewis v. Fahn (1952) 113 Cal. App. 2d 95, 97, 100, 247 P.2d 831]* . In addition, a stepsister was held to have executed a deed transferring a joint tenancy interest to her stepbrother under duress. The deed was executed after an argument with the stepbrother who claimed that the time to act was short, and that the grantor would lose the property altogether if the joint tenancy deed was not signed [*Gross v. Needham (1960) 184 Cal. App. 2d 446, 461, 7 Cal Rptr 664]* .

[3] Domestic Relations

In the context of marital settlement agreements, duress may consist of threats and intimidation regarding financial

stability and the right to see the children [*see* *In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 86, 260 Cal. Rptr. 403* (husband threatened involuntary bankruptcy filing and not to see children); *In re Marriage of Gonzalez (1976) 57 Cal. App. 3d 736, 743, 129 Cal. Rptr. 566* (rescission of marital property settlement agreement, threats that unless wife signed agreement, she would lose her children and become destitute)].

[4] Statute of Limitations

Duress in the form of threats to have a person deported if he contested an accounting have been held sufficient to estop the party making the threats from raising the defense of the statute of limitations when the threatened party finally did bring suit [*Ateeq v. Najor (1993) 15 Cal. App. 4th 1351, 1356, 19 Cal. Rptr. 2d 320]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsEquitable Estoppel

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§ 215.22 Business or Economic Duress

In addition to the expansion of the definition of duress discussed above, duress is not limited to threats against the person or acts of mental coercion. It may also consist of threats to business or property interests [*Leeper v. Beltrami (1959) 53 Cal. 2d 195, 203, 1 Cal. Rptr. 12, 347 P.2d 12* ; *Louisville Title Ins. Co. v. Surety Title & Guar. Co. (1976) 60 Cal. App. 3d 781, 801, 132 Cal. Rptr. 63]* . The economic duress doctrine is similar to the general doctrine of duress and menace. However, as it has evolved, it is not limited to the early statutory and judicial interpretation requiring the commission of an unlawful act in the nature of a tort or crime [*Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian (1990) 218 Cal. App. 3d 1058, 1077, 267 Cal. Rptr. 457* (threat to expose former Philippine President Marcos's investments in U.S. corporations); *Rich & Whillock, Inc. v. Ashton Development, Inc. (1984) 157 Cal. App. 3d 1154, 1158-1159, 204 Cal. Rptr. 86* ; *see § 215.23*]. Instead, economic duress may consist of a wrongful act that is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure [*Crosstalk Productions Inc. v. Jacobson (1998) 65 Cal. App. 4th 631, 644, 76 Cal. Rptr. 2d 615* ; *Rich & Whillock, Inc. v. Ashton Development, Inc. (1984) 157 Cal. App. 3d 1154, 1158, 204 Cal. Rptr. 86]* . It may take the form of a bad faith threat to institute civil process, blackmail, an assertion of a claim known to be false, or a bad faith threat to breach a contract or to withhold payment [*Crosstalk Productions Inc. v. Jacobson (1998) 65 Cal. App. 4th 631, 644-645, 76 Cal. Rptr. 2d 615* ; *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian (1990) 218 Cal. App. 3d 1058, 1077, 267 Cal. Rptr. 457* (no finding of coercion); *Rich & Whillock, Inc. v. Ashton Development, Inc. (1984) 157 Cal. App. 3d 1154, 1158-1159, 204 Cal. Rptr. 86* ; *see Leeper v. Beltrami (1959) 53 Cal. 2d 195, 204, 1 Cal. Rptr. 12, 347 P.2d 12* (claim known to be false; *see § 215.121*, form of allegation of deprivation of exercise of free will without confinement of person or detention of property); *see also § 215.26*].

A reasonably prudent person who finds that, to protect his or her property or business interests, it is necessary to make a payment of money that he or she does not owe and that in equity and good conscience the receiver should not retain, may recover it [*Young v. Hoagland (1931) 212 Cal. 426, 431, 298 P. 996* (action by stockholders to recover assessment illegally levied by board of directors and paid under threat of sale of stock); *Rich & Whillock, Inc. v. Ashton Development, Inc. (1984) 157 Cal. App. 3d 1154, 1160-1161, 204 Cal. Rptr. 86* (contractor's releases settling billing for less than actual costs as unenforceable due to economic duress when contractor signed releases only because creditors and subcontractors threatened involuntary bankruptcy filing if not paid); *Chrysler Credit Corp. v. Ostly*

(1974) 42 Cal. App. 3d 663, 675-676, 117 Cal. Rptr. 167] .

A determination that a payment was made under compulsion requires proof that (1) the payment was made under circumstances sufficient to control the action of a reasonable person, and (2) the person in fact considered that it was necessary to make such a payment to protect his or her business interests [*Chrysler Credit Corp. v. Ostly (1974) 42 Cal. App. 3d 663, 678, 117 Cal. Rptr. 167* ; *see Flynn v. San Francisco (1941) 18 Cal. 2d 210, 216-218, 115 P.2d 3* ; *cf. London Homes, Inc. v. Korn (1965) 234 Cal. App. 2d 233, 239-240, 44 Cal. Rptr. 262* (no economic duress when plaintiff agreed for good business reasons to pay more than originally required)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesDuress & Undue InfluenceEconomic Duress

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§ 215.23 Unlawful Act No Longer Required

The older cases required an act or threat to be unlawful for the act or threat to constitute duress or menace. The unlawful act or threat had to be either a tort or a crime [*see, e.g., In re Marriage of Gonzalez (1976) 57 Cal. App. 3d 736, 743, 747, 129 Cal. Rptr. 566* (threats to unlawfully take children out of country so wife could not see them unless she signed agreement); *see Goldstein v. Enoch (1967) 248 Cal. App. 2d 891, 894-895, 57 Cal. Rptr. 19* (party held not to have acted under coercion, but rather voluntarily)].

As discussed above [*see § 215.22*], recent cases have applied a more relaxed definition of duress and menace. Under the modern rule, duress, which includes whatever destroys a person's free agency and constrains him or her to act against his or her will, may be exercised by threats, importunity, or any species of mental coercion [*In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 84, 260 Cal. Rptr. 403]* . There is no longer a requirement that there be an unlawful act. Nevertheless, the older cases are discussed here to interpret acts of duress and menace where such acts or omissions propagate a tort or crime.

The Restatement (Second) of Contracts lists the following as improper threats [Restatement (Second) of Contracts (1981) § 176]:

- A crime or tort, or what would be a crime or tort if it resulted in obtaining property.
- A criminal prosecution.
- The use of civil process, when the threat is made in bad faith.
- A breach of the duty of good faith and fair dealing under a contract.
- A threat that results in an exchange that is not on fair terms if (1) the threatened act would harm the recipient but would not significantly benefit the party making the threat, (2) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the

party making the threat, or (3) what is threatened is otherwise a use of power for illegitimate ends.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 215.24 Assertion of Future Lawful Act

To determine whether a threat is wrongful depends on what is threatened. Generally, it is not unlawful to threaten to commit a lawful future act. If it is lawful to commit a certain act, then it is also lawful to threaten to commit that act [McKay v. Retail Auto. S. L. Union No. 1067 *(1940) 16 Cal. 2d 311, 321, 106 P.2d 373 , cert. denied, 313 U.S. 566]* . In doing so, a person merely gives warning of his or her lawful intentions and gives the other person the chance to either avoid or accept the consequences [McKay v. Retail Auto. S. L. Union No. 1067 *(1940) 16 Cal. 2d 311, 321, 106 P.2d 373 , cert. denied, 313 U.S. 566* ; *but see Balling v. Finch (1962) 203 Cal. App. 2d 413, 420, 21 Cal. Rptr. 490* (note voided on basis of duress in form of threats to inform Commissioner of violations of securities laws)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 215.25 Assertion of Legal Right

It is not duress or menace to do what one has a legal right to do [*U.S. Hertz, Inc. v. Niobrara Farms (1974) 41 Cal. App. 3d 68, 81, 116 Cal. Rptr. 44]* , unless the claims asserted are known to be false [*Leeper v. Beltrami (1959) 53 Cal. 2d 195, 204, 1 Cal. Rptr. 12, 347 P.2d 12* ; *Louisville Title Ins. Co. v. Surety Title & Guar. Co. (1976) 60 Cal. App. 3d 781, 801, 132 Cal. Rptr. 63]* . Consequently, none of the following constitutes duress: (1) taking a different, but mistaken, view of one's contractual rights; (2) a good faith refusal to proceed with a contract, even though the refusal might later be found wrong; or (3) threatening to take or actually taking legal action (such as threatening to foreclose an overdue mortgage or to levy execution on nonexempt property even if the supporting judgment is avoidable) [*London Homes, Inc. v. Korn (1965) 234 Cal. App. 2d 233, 240, 44 Cal. Rptr. 262* (voluntarily contracting to pay more for land than originally agreed is not duress when plaintiff could have sued for damages but elected not to for good business reasons)].

However, the assertion of a legal right is wrongful if it is made in bad faith, unless the right asserted is specifically given in a contract (such as the right to cancel a franchise or terminate an indemnity agreement) [*see* *Louisville Title Ins. Co. v. Surety Title & Guar. Co. (1976) 60 Cal. App. 3d 781, 799-801, 805, 132 Cal. Rptr. 63]* .

In any case, a threat not to perform a contract is not sufficient for a finding of duress unless the threat was made with the intent to force another to do something he or she would otherwise not have been willing to do. If a reasonable alternative exists to making payment, duress is not present [*Louisville Title Ins. Co. v. Surety Title & Guar. Co. (1976) 60 Cal. App. 3d 781, 799-800 n.6, 801, 132 Cal. Rptr. 63]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 215.26 Threat of Criminal Prosecution

An agreement is obtained under duress if it was obtained under threat of criminal prosecution. As a matter of public policy, such threats constitute sufficient menace to obviate the free consent required by *Civ. Code § 1565* [*Bayscene Resident Negotiators v. Bayscene Mobilehome Park (1993) 15 Cal. App. 4th 119, 127-129, 18 Cal. Rptr. 2d 626* (city attorney threatened prosecution if owner did not agree to arbitrate as required by municipal ordinance; arbitration agreement as unenforceable); *Helmick v. Thomas (1960) 187 Cal. App. 2d 395, 397, 9 Cal. Rptr. 512]* . This public policy prevails even if the agreement obtained by threat of criminal prosecution was one to collect an amount that was due [*Balling v. Finch (1962) 203 Cal. App. 2d 413, 420, 21 Cal. Rptr. 490]* . However, the threat must be more than some statement or act from which a guilty party becomes apprehensive of prosecution [*Miller v. Walden (1942) 53 Cal. App. 2d 353, 361, 127 P.2d 952* (promissory note executed by embezzler's relatives as not obtained by menace where victim merely consulted district attorney concerning embezzlement and demanded return of embezzled money but made no threats to have embezzler arrested)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 215.27 Acts by Third Person

Duress may consist of the wrongful acts of a third party if the party claiming duress was induced thereby to enter into a contract and the other party to the contract had reason to know of the duress of the third party [*Leeper v. Beltrami (1959) 53 Cal. 2d 195, 206, 1 Cal. Rptr. 12, 347 P.2d 12* ; *cf. Hall v. Department of Adoptions (1975) 47 Cal. App. 3d 898, 903, 121 Cal. Rptr. 223* (inference that husband threatened wife into signing relinquishment of child for adoption as not attributable to county for purposes of voiding relinquishment)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 215.28 Proof of Duress

In proving duress, there is no objective legal standard of resistance with which the person acted on must comply. Rather, the test for proving duress is subjective [*see Lewis v. Fahn (1952) 113 Cal. App. 2d 95, 99-100, 247 P.2d 831]* . The determination in each case is whether or not the threatened person was bereft of the free exercise of his or her will. This determination is not measured by the nature of the threats but by the state of mind induced in the victim. The means used to produce that condition and the person's age, sex, state of health, and mental characteristics are thus all evidence of his or her state of mind [*Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian (1990) 218 Cal. App. 3d 1058, 1078, 267 Cal. Rptr. 457* ; *Balling v. Finch (1962) 203 Cal. App. 2d 413, 419, 21 Cal. Rptr. 490* ; *see McIntosh v. McIntosh (1962) 209 Cal. App. 2d 371, 373, 26 Cal. Rptr. 26* (applying subjective standards, adding that whether victim acted as reasonably prudent person was question for trier of fact)].

This subjective standard for measuring duress has been stated to be particularly applicable to the form of duress termed "illegal business compulsion" [*Lewis v. Fahn (1952) 113 Cal. App. 2d 95, 100, 247 P.2d 831* (payments made by lessees under threat that unless made the lessors would declare lease cancelled and bring action in eviction)]. However, business compulsion does not exist if the threatened party had a reasonable alternative to part with the consideration. The determination of whether there is a reasonable alternative is made by ascertaining as a question of fact whether a reasonably prudent person would follow the alternative course [*Leeper v. Beltrami (1959) 53 Cal. 2d 195, 204-205, 1 Cal. Rptr. 12, 347 P.2d 12* (holding that allowing one's property to be sold in foreclosure as not reasonable alternative to payment of money demanded in suit wrongfully filed); *London Homes, Inc. v. Korn (1965) 234 Cal. App. 2d 233, 239-240* , *44 Cal. Rptr. 262* (no duress or business compulsion when plaintiff could have sued for damages instead of entering into contract); *Louisville Title Ins. Co. v. Surety Title & Guar. Co. (1976) 60 Cal. App. 3d 781, 801-802, 132 Cal. Rptr. 63]* .

Legal Topics:

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

§§ 215.29[Reserved]

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§ 215.40 Undue Influence Defined

As set forth in *Civil Code Section 1575*, undue influence consists of the following:

- The use, by one in whom confidence is reposed by another or who holds a real or apparent authority over another, of such confidence or authority for the purpose of obtaining an unfair advantage or the person [*Civ. Code § 1575(1)*];

- Taking an unfair advantage of another's weakness of mind [*Civ. Code § 1575(2)*]; or

- Taking a grossly oppressive and unfair advantage of another's necessities or distress [*Civ. Code § 1575(3)*].

Whether or not undue influence has been exerted is a question of fact [*In re Marriage of Dawley (1976) 17 Cal. 3d 342, 354, 131 Cal. Rptr. 3, 551 P.2d 323* ; *Stewart v. Marvin (1956) 139 Cal. App. 2d 769, 775, 294 P.2d 114]* . The statutory definition is not dispositive. There are no fixed definitions or inflexible formulas. Instead, the trier of fact must decide from the entire context if a person's will was overborne and if he or she was induced to do or forbear from doing an act that he or she would not do, or would do, if left to act freely [*Keithley v. Civil Service Bd. (1970) 11 Cal. App. 3d 443, 451, 89 Cal. Rptr. 809]* .

As mentioned above, undue influence also consists of the use, by one in whom a confidence is reposed by another or who holds a real or apparent authority over another, of that confidence or authority in order to obtain an unfair advantage [*Civ. Code § 1575(1)*]. This type of undue influence is discussed separately in §§ 215.80-215.83, because allegations and proof of actual undue influence are unnecessary if it is shown that the parties had a confidential relationship and an advantage was taken by the party in whom the confidence was reposed [*see Buchmayer v. Buchmayer (1945) 68 Cal. App. 2d 462, 467, 157 P.2d 9* ; *see also Wells Fargo Bank v. Brady (1953) 116 Cal. App. 2d 381, 398, 254 P.2d 71* (evidence supporting finding of confidential relationship not examined)].

Legal Topics:

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§ 215.41 Forms of Undue Influence

[1] In General

As discussed under [2] and [3], *below*, undue influence may consist of either (1) the undue susceptibility to influence of the person claiming relief [*see Civ. Code § 1575(2), (3)*], or (2) the use of excessive pressure by the person against whom relief is sought, resulting in overpersuasion [*see Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 130, 54 Cal. Rptr. 533]* , or both.

[2] Undue Susceptibility

Undue susceptibility [*see Civ. Code § 1575(2), (3)*] may consist of (1) total weakness of mind that leaves a person entirely without understanding, (2) a lesser weakness that destroys the capacity of a person to make a contract even though he or she is not totally incapacitated, or (3) a still lesser weakness that provides sufficient grounds to rescind a contract for undue influence. This lesser weakness need not be long lasting or wholly incapacitating but may be merely a lack of full vigor due to age, physical condition, emotional anguish, or a combination of these factors [*Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 131, 54 Cal. Rptr. 533]* . Many cases have involved elderly, sick, or senile persons alleged to have executed wills or deeds under pressure [*see, e.g., O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 153-156, 119 Cal. Rptr. 245]* . Other cases concern persons with mental illnesses that amount to the weakness of mind contemplated by *Civ. Code § 1575(2)* [*see, e.g., Smalley v. Baker (1968) 262 Cal. App. 2d 824, 835, 69 Cal. Rptr. 521* ; *see Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 131, 54 Cal. Rptr. 533]* .

A large number of other cases have involved distraught, confused, and exhausted employees who were pressured by their employers to resign from their jobs [*see, e.g., Keithley v. Civil Service Bd. (1970) 11 Cal. App. 3d 443, 447-448, 89 Cal. Rptr. 809* (police officer encouraged to resign over period of days while facing felony rape charges and hysterical wife); *Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 127, 54 Cal. Rptr. 533* (distraught, tired homosexual school teacher, after release from jail, encouraged by his boss at his home to resign immediately)]. Finally, a line of cases relates to the execution of releases by hospitalized persons in pain and suffering mental anguish [*Weger v. Rocha (1934) 138 Cal. App. 109, 113, 32 P.2d 417]* .

[3] Use of Excessive Pressure

Undue influence can consist of the use of excessive pressure by a dominant person over a servient person, resulting in the apparent will of the servient person being in fact the will of the dominant person [*Keithley v. Civil Service Bd. (1970) 11 Cal. App. 3d 443, 451, 89 Cal. Rptr. 809* ; *Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 131, 54 Cal. Rptr. 533]* .

The use of excessive pressure, resulting in overpersuasion, is generally accompanied by certain characteristic elements which, when simultaneously present in a significant number, characterize persuasion as excessive. These elements are [*Keithley v. Civil Service Bd. (1970) 11 Cal. App. 3d 443, 452, 89 Cal. Rptr. 809* ; *Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 133, 54 Cal. Rptr. 533* ; *see Channell v. Anthony (1976) 58 Cal. App. 3d 290, 306 n.1, 129 Cal. Rptr. 704* ; *see also Robison v. City of Manteca (2000) 78 Cal. App. 4th 452, 457-458, 92 Cal. Rptr. 2d 748* (no allegations coming within *Keithley* criteria)]:

- Discussion of the transaction at an unusual or inappropriate time.
- Consummation of the transaction in an unusual place.
- Insistent demand that the business be finished at once.
- Extreme emphasis on untoward consequences of delay.
- The use of multiple persuaders by the dominant side against a single servient party.
- Absence of third-party advisers to the servient party.
- Statements that there is no time to consult financial advisers or attorneys.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 215.42 Undue Influence and Fraud Distinguished

Undue influence differs from fraud in that undue influence refers to the subjugation of the will of a party, while fraud refers to deception of a party. However, undue influence is in a sense a species of fraud, though it may be exercised without any actual fraud or false representations being made [*In re Estate of Ricks (1911) 160 Cal. 467, 480, 117 P. 539* ; *see* *Estate of Newhall (1923) 190 Cal. 709, 718, 214 P. 231* ; *O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 158, 119 Cal. Rptr. 245* (undue influence as species of constructive fraud); *Stewart v. Marvin (1956) 139 Cal. App. 2d 769, 775, 294 P.2d 114* (undue influence as species of constructive fraud)].

Undue influence may at times be exerted and applied by the use of fraud. When fraudulent representations are relied on as an element of undue influence, the complaining party must show that they were made the basis of importunity and mental pressure and that the victim's will was overcome [*Estate of Newhall (1923) 190 Cal. 709, 718, 214 P. 231* ; *In re Estate of Ricks (1911) 160 Cal. 467, 480-481, 117 P. 539* ; *see* *Estate of Garibaldi (1961)57 Cal. 2d 108, 114, 17 Cal. Rptr. 623, 367 P.2d 39* (stating that fraud and undue influence as closely related and fraud as may be considered in determining whether undue influence existed)]. If such a showing is made, however, the fact that the party fails to show the presence of an element essential to state a cause of action for fraud is immaterial. Thus, even though the representations may prove to be true or the plaintiff's reliance may prove to have been unreasonable, relief may still be granted if the elements of undue influence are otherwise present [*Rottman v. Rottman (1921) 55 Cal. App. 624, 633-634, 204 P. 46]* .

Legal Topics:

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

§§ 215.43[Reserved]

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§ 215.50 Mistake Preventing Formation of Contract

The consent of the parties to a contract must be free, mutual, and communicated by each to the other [*Civ. Code § 1565*]. Apparent consent is not free when obtained by mistake [*Civ. Code § 1567(5)*]. Consent is not mutual unless the parties all agree on the same thing in the same sense [*Civ. Code § 1580*]. In certain cases, by application of *Civ. Code §§ 1635-1662* (governing interpretation of contracts), the parties may be deemed to have agreed to the same thing without regard to the fact [*Civ. Code § 1580*]. Consent can be communicated with effect, only by some act or omission of the party contracting, by which he or she intends to communicate it, or which necessarily tends to such communication [*Civ. Code § 1581*].

Legal Topics:

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California Forms of Pleading and Practice--Annotated

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17-215 California Forms of Pleading and Practice--Annotated § 215.51

§ 215.51 Mistake of Fact

[1] In General

Mistake may be either of fact or of law [*Civ. Code § 1576*]. Mistake of law is *discussed under § 215.55*.

Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake, and must consist of either [*Civ. Code § 1577*; *see Donovan v. RRL Corp. (2001) 26 Cal. 4th 261, 278-279, 109 Cal. Rptr. 2d 807, 27 P.3d 702* (auto dealership's lack of knowledge regarding typographical error in newspaper's advertised price of car constituted mistake of fact); *see also § 215.56[1]*]:

- An unconscious ignorance or forgetfulness of a past or present fact that is material to the contract; or

- A belief in the present existence of a thing material to the contract that does not in fact exist, or a belief in the past existence of a thing material to the contract that did not in fact exist.

A mistake of foreign laws is a mistake of fact [*Civ. Code § 1579*].

A mistake of fact within the meaning of *Civ. Code § 1577* must concern a present or past fact, not something that occurs after execution of the contract [*Mosher v. Mayacamas Corp. (1989) 215 Cal. App. 3d 1, 4-5, 263 Cal. Rptr. 373* ; *see § 215.53*]. Applying this distinction can require careful analysis. For example, in one case, achieving the purpose of a contract depended on one party obtaining city approval of the party's status as a qualified conservation entity. The party in question failed to obtain that approval because that party was not in fact eligible to be approved for the necessary status. A trial court concluded, and an appellate court concurred, that both parties had been mistaken as to a material fact, since both parties assumed, at the time the contract was made, that the unapproved party was eligible. That party had contended, incorrectly as it turned out, that the only mistake involved the parties' assumption as to the occurrence of a future event, which was that the necessary approval would be obtained [*Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga (2009) 175 Cal. App. 4th 1306, 1343, 96 Cal. Rptr. 3d 813*].

A contract is void, or may be avoided [*see Civ. Code § 1689(b)(1)*], on the ground of a mutual mistake or unilateral mistake that was induced by or known to the nonmistaken party [*see Harris v. Rudin, Richman & Appel (2002) 95 Cal. App. 4th 1332, 1339, 116 Cal. Rptr. 2d 552* (reversing summary judgment for plaintiff because defendants raised triable issues of fact as to whether they were entitled to rescind settlement agreement based on mutual mistake of fact or law); *Balistreri v. Nevada Livestock Production Credit Assn. (1989) 214 Cal. App. 3d 635, 640-644, 262 Cal. Rptr. 862* (reversing judgment denying cancellation of deed of trust on grounds of both unilateral and mutual mistake)].

[2] Mutual Mistake

Mutual mistake prevents the formation of a contract [*Balistreri v. Nevada Livestock Production Credit Assn. (1989) 214 Cal. App. 3d 635, 642, 262 Cal. Rptr. 862]* . A mutual mistake of fact occurs when each party has a different intention regarding some material aspect of the subject matter and (1) neither party knows or has reason to know the meaning attached by the other party, or (2) each party knows or has reason to know the meaning attached by the other party. No contract is formed because there is no meeting of the minds [*Balistreri v. Nevada Livestock Production Credit Assn. (1989) 214 Cal. App. 3d 635, 640-642, 262 Cal. Rptr. 862* (lender intended one property be pledged as collateral, trustors intended to pledge another); *Merced County Sheriff's Employees' Assn. v. County of Merced (1987) 188 Cal. App. 3d 662, 675-677, 233 Cal. Rptr. 519* (no agreement found between firefighters' association and county); *Merced County Mut. Fire Ins. Co. v. State of California (1991) 233 Cal. App. 3d 765, 771-772, 284 Cal. Rptr. 680* (mutual mistake as to extent of insurance coverage)]. In *Merced County Sheriff's Employees' Assn. v. County of Merced*, no contract was formed because each party to a firefighters' association agreement was at fault: one party for misstating the reason for its proffered language, which created irreconcilable ambiguity, and the other for failing to appreciate the import of the proffered language [*Merced County Sheriff's Employees' Assn. v. County of Merced (1987) 188 Cal. App. 3d 662, 675-676, 233 Cal. Rptr. 519]* .

In determining what the parties intended and whether those intentions were properly communicated, certain rules apply. When contract language is ambiguous and susceptible of two different meanings, one understood by each party, the contract will be upheld in accordance with the meaning attached to it by the party who manifested that meaning if that party had no reason to know of a different meaning attached by the other party [*Merced County Sheriff's Employees' Assn. v. County of Merced (1987) 188 Cal. App. 3d 662, 672-674, 233 Cal. Rptr. 519* (agreement with sheriffs' association upheld on basis of meaning attached by association because county failed to make its meaning known)].

[3] Reliance on Innocent Misrepresentation

A contract may be rescinded when one party relied in good faith on an innocent misrepresentation of a material fact made by the other party [*Crocker-Anglo Nat. Bank v. Kuchman (1964) 224 Cal. App. 2d 490, 495-497, 36 Cal. Rptr. 806* (misrepresentation of value of stock); *see Van Meter v. Bent Constr. Co. (1956) 46 Cal. 2d 588, 594-596, 297 P.2d 644]* . The result of one party's reliance on an innocent misrepresentation made by the other is that both parties understand the facts to be other than as they really are. Thus, there is mutual mistake, which is the basis for rescission [*Crocker-Anglo Nat. Bank v. Kuchman (1964) 224 Cal. App. 2d 490, 496, 36 Cal. Rptr. 806* ; *see § 215.51[2]*]. Based on equitable principles, the negligent reliance of the party seeking to avoid or reform the contract will not bar relief unless that party's negligence, in light of his or her intelligence and information, is so preposterous or irrational that it amounts to gross negligence or neglect of a legal duty [*Van Meter v. Bent Constr. Co. (1956) 46 Cal. 2d 588, 595, 297 P.2d 644* (reliance on markers placed by other party to determine area to be cleared; judgment denying relief reversed, remanded for further findings)].

Analyzing the situation in *Balistreri v. Nevada Livestock Production Credit Assn.* [*see § 215.51[2]*] as one of unilateral mistake induced by the other party, the court reversed a judgment denying cancellation of a deed of trust executed in reliance on a cover letter, that misrepresented the property to be encumbered. The court implied that trustors' failure to read the deed of trust before signing it amounted only to ordinary negligence [*Balistreri v. Nevada Livestock Production Credit Assn. (1989) 214 Cal. App. 3d 635, 642-644, 262 Cal. Rptr. 862* ; *see §§ 215.141, 215.143*

(allegations of unilateral mistake of fact and innocent misrepresentation)].

[4] Unilateral Mistake

A mistake is unilateral if only one party understands the facts to be other than as they really are. Relief may be granted for a unilateral mistake of fact if the nonmistaken party knew or had reason to know of the mistake and obtained an advantage from it [*M. F. Kemper Constr. Co. v. City of Los Angeles (1951) 37 Cal. 2d 696, 701, 235 P.2d 7* (relief granted to mistaken party); *see also Bldg. Serv. Emp. Pension Tr. v. Amer. Bldg. Maint. (9th Cir. 1987) 828 F.2d 576, 578* (applying California law; unilateral mistake in demand letter should have been known to other party) *Reid v. Landon (1958) 166 Cal. App. 2d 476, 484, 333 P.2d 432* ; *see § 215.52*].

In *Donovan v. RRL Corp.* [*Donovan v. RRL Corp. (2001) 26 Cal. 4th 261, 109 Cal. Rptr. 2d 807, 27 P.3d 702]* the California Supreme Court stated that California law does not adhere to the original Restatement of Contract's requirements for rescission based on unilateral mistake of fact, *i.e.*, only in circumstances in which the other party know of the mistake or caused the mistake. The court adopted as California law the rule set forth in the Restatement Second of Contracts, § 153(a), authorizing rescission for unilateral mistake of fact when enforcement would be unconscionable. The court stated that when a plaintiff has no reason to know of and does not cause the defendant's unilateral mistake of fact, the defendant must establish the following facts to obtain rescission of the contract [*Donovan v. RRL Corp. (2001) 26 Cal. 4th 261, 281-282, 109 Cal. Rptr. 2d 807, 27 P.3d 702* (auto dealership's lack of knowledge regarding typographical error in advertised price of car constituted mistake of fact; rescission was warranted because evidence established that unilateral mistake of fact was made in good faith, defendant did not bear risk of mistake, and enforcement of contract with erroneous price would be unconscionable)]:

- The defendant made a mistake regarding a basic assumption upon which the defendant made the contract;

- The mistake has a material effect upon the agreed exchange of performances that is adverse to the defendant;

- The defendant does not bear the risk of the mistake; and

- The effect of the mistake is such that the enforcement of the contract would be unconscionable.

Relief will not be granted for unilateral mistakes that result from one party's misunderstanding of or dissatisfaction with a provision of the contract [*Lawrence v. Shutt (1969) 269 Cal. App. 2d 749, 764-766, 75 Cal. Rptr. 533]* , or that arise when a party is aware, at the time the contract is made, that he or she has only limited knowledge with respect to the fact to which the mistake relates but treats that knowledge as sufficient. In the last situation, the party with limited knowledge assumes any risk relating to that fact and will not be granted relief [*In re Marriage of Hahn (1990) 224 Cal. App. 3d 1236, 1241, 273 Cal. Rptr. 516* ; *see* Restatement (Second) of Contracts § 154(b)]. For example, when an individual buys a life annuity contract and then dies soon thereafter from a pre-existing medical condition of which the individual was ignorant at the time of making the contract, the contract is not subject to rescission on the ground of mistake of fact, because the parties to a life annuity contract are presumed to assume the risk of the uncertainty of life expectancy. Neither party can know how long the annuitant will live, and each party must necessarily regard that limited knowledge as sufficient for purposes of making the contract, since otherwise no life annuity contract could ever be made [*Grenall v. United of Omaha Life Ins. Co. (2008) 165 Cal. App. 4th 188, 193-196, 80 Cal. Rptr. 3d 609*].

Failure to make reasonable inquiry to ascertain the meaning and content of a contract is generally considered a neglect of legal duty that precludes relief for unilateral mistake of fact [*Lawrence v. Shutt (1969) 269 Cal. App. 2d 749, 765-766, 75 Cal. Rptr. 533* ; *Wal-Noon Corp. v. Hill (1975) 45 Cal. App. 3d 605, 615, 119 Cal. Rptr. 646* ; *cf. Balistreri v. Nevada Livestock Production Credit Assn. (1989) 214 Cal. App. 3d 635, 642-644, 262 Cal. Rptr. 862* ;

Reid v. Landon (1958) 166 Cal. App. 2d 476, 482, 333 P.2d 432 (*see § 215.54*)].

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§ 215.52 Contractor's Bids

Most examples of unilateral mistakes of fact involve contractor's bids. *Pub. Contract Code § 5100 et seq.* set forth an exclusive statutory procedure for seeking relief from a mistaken bid submitted to a public entity. Consequently, rescission is no longer a remedy in cases involving public entities [*see* Ch. 481, *Public Works*]. Discussion regarding mistake in cases of bids to public entities should also apply to bids made to other than public entities, in cases between general contractors and subcontractors [*see Brunzell Constr. Co. v. G.J. Weisbrod, Inc. (1955) 134 Cal. App. 2d 278, 283, 285 P.2d 989* (applying law set forth in case involving bid to public entity to case involving bid between general contractor and subcontractor)].

Relief from mistaken bids is consistently allowed if one party knows or has reason to know of the other's error and the requirements for rescission are fulfilled [*M. F. Kemper Constr. Co. v. City of Los Angeles (1951) 37 Cal. 2d 696, 701, 235 P.2d 7* ; *Brunzell Constr. Co. v. G.J. Weisbrod, Inc. (1955) 134 Cal. App. 2d 278, 284, 285 P.2d 989]* . Rescission is available for a unilateral mistake in the preparation of a bid if the mistake is remediable, if no hardship would result to the offeree because of a change of position, and if the offeror timely notified the offeree either before acceptance or after acceptance but before the time the contract is executed. A mistake is "remediable" if it is material and perceptible so that performance would work a hardship, it relates to the substance of the consideration, and it is the result of inadvertence rather than gross negligence amounting to a breach of duty [*White v. Berrenda Mesa Water Dist. (1970) 7 Cal. App. 3d 894, 904, 87 Cal. Rptr. 338* (quoting 52 A.L.R.2d 792, 795)]. Thus, timely communication of knowledge of a remediable mistake to the offeree eliminates the obstacles to relief traditionally associated with unilateral mistake [*White v. Berrenda Mesa Water Dist. (1970) 7 Cal. App. 3d 894, 904, 87 Cal. Rptr. 338]* . Relief will not be allowed in a situation of promissory estoppel in which the offeror should reasonably expect his or her bid to induce action or forbearance of a definite and substantial character on the part of the offeree when such action is induced, and when injustice can be avoided only be enforcing the promise [*Drennan v. Star Paving Co. (1958) 51 Cal. 2d 409, 413, 333 P.2d 757]* . Similarly, although the court's decision was based in part on the ground that parties to a contract are presumed to know all applicable laws in existence at the time their contract is made, a contractor's mistaken assumption that all government agencies participating in a public utility project would forebear collection of fees usually imposed by them did not prohibit collection of fees from the contractor pursuant to the city's ordinance requiring permits for using hauling equipment exceeding a specified tonnage within its boundaries [*City of Redwood City v. Dalton*

Construction Co. (1990) 266 Cal. Rptr. 198] .

The parties must be in contractual privity with each other to obtain relief from a mistake in a bid. Consequently, a third party who has no contract or other relation with the party who made the mistake cannot obtain relief due to the mistake [*see Neptune Gunite Co. v. Monroe Enterprises Inc. (1964) 229 Cal. App. 2d 439, 444, 40 Cal. Rptr. 367* (subcontractor not entitled to relief from owner for mistake in subcontractor's bid)].

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§ 215.53 Mistake of Judgment

The term "mistake of judgment" refers to a party's mistaken notion about the effect of uncertain future events regarding the subject matter of a contract, rather than a mistaken notion regarding a current or past fact [*see Mosher v. Mayacamas Corp. (1989) 215 Cal. App. 3d 1, 5, 263 Cal. Rptr. 373]* . The cases distinguish between a mistake of judgment and a mistake of fact such as a mechanical or clerical error in tabulating or transcribing figures. Generally, relief is refused for a mistake of judgment. If a party is denied relief because of a mistake of judgment, that party is merely forced to perform the contract as made. On the other hand, if a party is denied relief from a clerical error, that party is forced to perform a contract he or she had no intention of making [*M. F. Kemper Constr. Co. v. City of Los Angeles (1951) 37 Cal. 2d 696, 703, 235 P.2d 7* ; *see White v. Berrenda Mesa Water Dist. (1970) 7 Cal. App. 3d 894, 907, 87 Cal. Rptr. 338* (contractor entitled to withdraw mistaken bid based on failure to correlate information in soil report with specifications although contractor characterized mistake as one of judgment)].

Typically, a mistake of judgment refers merely to some risk inherent in the transaction of business. For example, a purchaser of vacation property knew that tax treatment of secondary residences was a major aspect of the value of the property, and that if pending tax law revisions were enacted, the property value would decrease. After enactment of the Tax Reform Act of 1986, and the resulting decrease in the value of the property, the purchaser was denied rescission. The court said that as a matter of law, the purchaser's predicament did not constitute a mistake of fact or a failure of consideration, but an error of judgment about market conditions [*Mosher v. Mayacamas Corp. (1989) 215 Cal. App. 3d 1, 5-6, 263 Cal. Rptr. 373* ; *see § 215.57*].

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§ 215.54 Relief Denied if Mistake Due to Neglect of Duty

Relief is denied if a mistake of fact is caused by the neglect of a legal duty on the part of the claimant [*Civ. Code § 1577*]. Carelessness is not in itself a neglect of duty, because courts recognize that carelessness is present in nearly every case of mistake [*Donovan v. RRL Corp. (2001) 26 Cal. 4th 261, 283, 291, 109 Cal. Rptr. 2d 807, 27 P.3d 702* (auto dealership's failure to review proof sheet for newspaper advertisement listing price of particular vehicle was not neglect of legal duty that would preclude rescission for unilateral mistake of fact regarding price); *Reid v. Landon (1958) 166 Cal. App. 2d 476, 482, 333 P.2d 432* (reliance on other party's representations that agreement as written conformed to mistaken party's instructions); *see M. F. Kemper Constr. Co. v. City of Los Angeles (1951) 37 Cal. 2d 696, 702, 235 P.2d 7* (carelessness in preparation of cost estimate); *Schultz v. County of Contra Costa (1984) 157 Cal. App. 3d 242, 248, 203 Cal. Rptr. 760* (no neglect of duty in reasonably diligent examination of property)]. Ordinary negligence does not constitute neglect of legal duty. Rather, for equitable reasons, the breach of duty must amount to gross negligence, which is defined as the want of even scant care or an extreme departure from the ordinary standard of conduct [*see Sun'N Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 701, 148 Cal. Rptr. 329, 582 P.2d 920* (failure to examine bank statement); *Van Meter v. Bent Constr. Co. (1956) 46 Cal. 2d 588, 594-595, 297 P.2d 644* (reliance on other party's markers to estimate area to be cleared); *White v. Berrenda Mesa Water Dist. (1970) 7 Cal. App. 3d 894, 901, 87 Cal. Rptr. 338]* .

Failure to read a document before signing it is not neglect of legal duty that bars relief if the mistaken party relied on a representation by the other party concerning the matter about which he or she was mistaken, even if there is a unilateral mistake that the mistaken party would have discovered by reading the document [*Balistreri v. Nevada Livestock Production Credit Assn. (1989) 214 Cal. App. 3d 635, 642-644, 262 Cal. Rptr. 862* (failure to read deed of trust; reliance on cover letter referring to different property of plaintiffs than was encumbered by enclosed deed of trust)].

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§ 215.55 Mistake of Law

A mistake of law constitutes a mistake justifying relief only when it arises from the following:

- A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law [*Civ. Code § 1578(1)*]; or

- A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify [*Civ. Code § 1578(2)*].

Generally, a mistake of law occurs when a person knows the specific facts on which his or her rights depend but is ignorant of the rules of law which the courts will apply to those facts [*Guthrie v. Times-Mirror Co. (1975) 51 Cal. App. 3d 879, 884-885, 124 Cal. Rptr. 577* (quoting Corbin on Contracts, Vol. 3, § 616)].

Following from the dictates of *Civ. Code § 1578*, relief may be granted either when (1) the mistake is mutual, for example as when all parties to a contract believed that the contract did not violate antitrust laws when it was subsequently held to be in violation of those laws [*see Guthrie v. Times-Mirror Co. (1975) 51 Cal. App. 3d 879, 882-883, 886, 124 Cal. Rptr.577* (denying rescission on ground that plaintiffs showed no injury); *see also Civ. Code § 1578(1)*], or as when all parties to an agreement settling a legal malpractice action for preparation of a trust exposing the trustees to tax liability were unaware of a Probate Code amendment that eliminated the tax problem [*see Harris v. Rudin, Richman & Appel (2002) 95 Cal. App. 4th 1332, 1339-1341, 116 Cal. Rptr. 2d 552]* , or (2) when the mistake arises from a misrepresentation of law by one person, of which the other party was aware but did not rectify [*see Los Angeles City School Dist. v. Landier Inv. Co. (1960) 177 Cal. App. 2d 744, 751, 2 Cal. Rptr. 662* (stating that court requires stronger showing to justify relief from mistake of law than from mistake of fact); *see also Gardner v. Watson (1915) 170 Cal. 570, 577, 150 P. 994* (unilateral mistake not amounting to fraud is not ground to avoid contract); *Civ. Code § 1578(2)*]. One reason for refusing to grant relief for unilateral mistakes of law is that all parties to a contract are presumed to know all applicable laws in existence at the time their contract is made [*see City of Redwood City v. Dalton Construction Co. (1990) 266 Cal. Rptr. 198]* .

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§ 215.56 Mistake Must Be Material

[1] In General

To void a contract or justify rescission, a mistake, whether of law or of fact, must materially affect an essential element of the contract and not merely a collateral matter [*Bellwood Discount Corp. v. Empire Steel Buildings Co. (1959) 175 Cal. App. 2d 432, 435, 346 P.2d 467* (denying rescission); *Edwards v. Lang (1961) 198 Cal. App. 2d 5, 12, 18 Cal. Rptr. 60* (denying rescission); *see Guthrie v. Times-Mirror Co. (1975) 51 Cal. App. 3d 879, 886, 124 Cal. Rptr. 577* (denying rescission); *see also § 215.56[2]*]. Generally, material mistakes concern the nature of transaction, the identity of the parties, the identity of things to which the contract relates, or the occurrence of collateral events [*Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 130, 54 Cal. Rptr. 533* (resignation voided on ground of undue influence, not mistake)].

For relief to be granted, the mistake must be one that controls the conduct of the party, and must be essential to the object of the contract, not merely incidental. The court must be satisfied that but for the mistake, the complainant would not have assumed the obligation from which he or she seeks to be relieved [*Reid v. Landon (1958) 166 Cal. App. 2d 476, 483, 333 P.2d 432* (allowing rescission); *Roller v. California Pac. Title Ins. Co. (1949) 92 Cal. App. 2d 149, 157, 206 P.2d 694* (denying rescission)].

However, the fact that the plaintiff would not have made the contract but for the mistake is not enough to obtain relief. The mistake must affect the execution of an essential element of the contract. That is, the mistake must concern the parties, the subject matter, the consideration, or the offer and acceptance of the contract [*see Odorizzi v. Bloomfield School Dist.(1966) 246 Cal. App. 2d 123, 130, 54 Cal. Rptr. 533]* . For example, relief is allowed if the parties enter into a contract under the mistaken belief that the subject matter or consideration is in existence, and condition their contract on that belief. If the parties are aware that the existence of the subject matter is doubtful and still make a contract concerning that subject matter, they are deemed to have assumed the risk, and relief is not available [*Hannah v. Steinman (1911) 159 Cal. 142, 147, 112 P. 1094]* . An example of a mistake regarding a collateral matter that is not essential enough to allow relief is a mistake concerning the feasibility of changing the basement of a duplex apartment building into living quarters [*Vickerson v. Frey (1950) 100 Cal. App. 2d 621, 628, 224 P.2d 126* (ceiling was too low

to meet building regulation)].

Any mistake of fact made by the parties becomes immaterial when, before executing the contract, the parties learn the true facts [*Coleman v. Edgar (1927) 83 Cal. App. 720, 724, 257 P. 452* (boundary dispute)].

[2] Requirement of Injury

A necessary corollary of the principle that the mistake, whether of law or of fact, must be material, is that a contract is voidable for mistake only if enforcement of the terms drafted would be materially harmful or more onerous to the party seeking avoidance. That is, the party seeking relief must suffer an injury [*Guthrie v. Times-Mirror Co. (1975) 51 Cal. App. 3d 879, 886, 124 Cal. Rptr. 577]* . The mistake in *Guthrie* for which plaintiffs, shareholders who sold their stock to defendant, sought rescission was that defendant's control of the company was held to violate antitrust laws. Defendant was required to divest itself of the company, which it did at a profit. Although the court said that pecuniary loss is not necessary to warrant relief, plaintiffs here could show no injury. Had the law been as the parties supposed, the consideration received by plaintiffs would have been the same [*Guthrie v. Times-Mirror Co. (1975) 51 Cal. App. 3d 879, 885-887, 124 Cal. Rptr. 577* (before execution of contract, parties knew of and assumed risk that defendant's ownership would violate antitrust laws)].

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§ 215.57 Mistakes Parties Had in Mind

A contract is not voidable on the ground of mistake if the mistake relates to an uncertain matter the parties contemplated at the outset, the existence about which they assumed the risk. When parties are aware at the time a contract is entered that a doubt exists as to a particular matter, and the parties nonetheless make the contract on that assumption, the risk of the existence of the doubtful matter is assumed as an element of the bargain [*Mosher v. Mayacamas Corp. (1989) 215 Cal. App. 3d 1, 5-6, 263 Cal. Rptr. 373* ; *Guthrie v. Times-Mirror Co. (1975) 51 Cal. App. 3d 879, 885, 124 Cal. Rptr. 577* ; *see §§ 215.51[4], 215.53*].

Conversely, relief is not available for mutual mistake about an issue that the parties did not consider [*see* *Spurgeon v. Drumheller (1985) 174 Cal. App. 3d 659, 663-664, 220 Cal. Rptr. 195* (lender's demand for financial information from buyer who was taking property subject to existing loan does not warrant relief when there was no showing that parties contemplated that no financial information would be requested)].

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17-215 California Forms of Pleading and Practice--Annotated §§ 215.58through 215.69

[Reserved]

§§ 215.58[Reserved]

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§ 215.70 Fraud

[1] In General

Fraud may be either actual fraud or constructive fraud [*Civ. Code § 1571*]. For coverage of these two types of fraud, see *§§ 215.70[2], [5]*.

[2] Actual Fraud Defined

Actual fraud, within the meaning of *Civ. Code §§ 1565-1590*, consists of any of the following acts, committed by a party to a contract, or with his or her connivance, with the intent to deceive another party to the contract, or to induce that party to enter into the contract [*Civ. Code § 1572*]:

- The suggestion, as a fact, of that which is not true, by one who does not believe it to be true (known as intentional fraud) [*Civ. Code § 1572(1)*];

- The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, although he or she believes it to be true (known as negligent fraud) [*Civ. Code § 1572(2)*];

- The suppression of that which is true, by one having knowledge or belief of the fact (known as concealment) [*Civ. Code § 1572(3)*];

- A promise made without any intention of performing it (known as promissory fraud) [*Civ. Code § 1572(4)*]; or

- Any other act fitted to deceive [*Civ. Code § 1572(5)*].

In its broad general sense, the concept of fraud embraces anything that is intended to deceive, including any statement, act, concealment, and omission involving a breach of legal or equitable duty, trust, or confidence that results in injury to

one who justifiably relies on it [*Ach v. Finkelstein (1968) 264 Cal. App. 2d 667, 674, 70 Cal. Rptr. 472]* .

[3] Elements of Actual Fraud

The necessary elements of actual fraud are (1) misrepresentation (a false representation, concealment, or nondisclosure), (2) knowledge of falsity of the misrepresentation (scienter), (3) the intent to defraud (to induce reliance), (4) justifiable reliance, and (5) resulting damage [*Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1108, 252 Cal. Rptr. 122, 762 P.2d 46* ; *Seeger v. Odell (1941) 18 Cal. 2d 409, 414, 115 P.2d 977* ; *Hohe v. San Diego Unified Sch. Dist. (1990) 224 Cal. App. 3d 1559, 1565, 274 Cal. Rptr. 647* ; *South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 Cal. App. 3d 750, 765, 102 Cal. Rptr. 286]* . All of these elements must be present for actionable fraud; the absence of any one element will prevent recovery [*Ach v. Finkelstein (1968) 264 Cal. App. 2d 667, 674, 70 Cal. Rptr. 472]* . For further discussion of actual fraud, see Ch. 269, *Fraud and Deceit* .

[4] Question of Fact

Whether actual fraud exists is a question of fact [*Civ. Code § 1574*; *Ach v. Finkelstein (1968) 264 Cal. App. 2d 667, 675, 70 Cal. Rptr. 472]* . There is no absolute or fixed rule for determining what facts constitute fraud, as long as all of the required elements are present [*see § 215.70[3]*]. Whether fraud is found depends on the particular facts of the case. Fraud may be proved by direct evidence or it may be inferred from all of the circumstances in the case [*Ach v. Finkelstein (1968) 264 Cal. App. 2d 667, 674-675, 70 Cal. Rptr. 472]* .

[5] Constructive Fraud

There are two types of constructive fraud. In the first type, constructive fraud consists of any act or omission that the law specially declares to be fraudulent, without respect to actual fraud [*Civ. Code § 1573(2)*].

In its second form, constructive fraud consists of any breach of duty without an actual fraudulent intent whereby the person at fault or anyone claiming under him or her gains an advantage by misleading another person to that person's prejudice or the prejudice of any one claiming under that person [*Civ. Code § 1573(1)*]. This type of constructive fraud arises from breach of duty by one in a confidential or fiduciary relationship to another that induces justifiable reliance by the other person to his or her prejudice [*Byrum v. Brand (1990) 219 Cal. App. 3d 926, 937, 268 Cal. Rptr. 609* (parties stipulated that investment advisor was fiduciary); *Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 129, 54 Cal. Rptr. 533* (no confidential relationship found between parties); *see also* Ch. 269, *Fraud and Deceit* , for additional cases holding various relationships to be confidential)].

Constructive fraud as defined in *Civ. Code § 1573(1)* applies primarily to advantages taken of confidential relationships and is discussed in *§ 215.80* et seq.

If a confidential or fiduciary relationship exists, the fiduciary or the one in whom confidence is reposed must make full and complete disclosure of all material facts within his or her knowledge relating to the transaction in question. Any concealment of material facts is fraud [*Byrum v. Brand (1990) 219 Cal. App. 3d 926, 937-938, 268 Cal. Rptr. 609* ; *Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1977) 67 Cal. App. 3d 19, 32, 136 Cal. Rptr. 378]* . Thus, unlike actual fraud, constructive fraud does not require an intentional deception [*Mary Pickford Co. v. Bayly Bros., Inc. (1939) 12 Cal. 2d 501, 525, 86 P.2d 102* ; *Byrum v. Brand (1990) 219 Cal. App. 3d 926, 937-938, 268 Cal. Rptr. 609* ; *see also* discussion following the form of allegation of confidential relationship raising presumption of undue influence or constructive fraud, § 215.130[2], [3]]. Similarly, when constructive fraud is based on nondisclosure, the elements of representation and falsity are absent. The relationship and breach of the duty of disclosure required by it are the elements that must be alleged [*Byrum v. Brand (1990) 219 Cal. App. 3d 926, 937, 268 Cal. Rptr. 609]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesFraud & MisrepresentationConstructive FraudContracts LawDefensesFraud & MisrepresentationIntentional Fraud

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§ 215.71 Innocent Misrepresentation

An innocent misrepresentation, if not made in the context of a confidential relationship or some other duty, is not constructive fraud under *Civ. Code § 1573(1)*, and therefore provides no basis for relief. Although an innocent misrepresentation is not enumerated as a ground for rescission under *Civ. Code § 1689*, it has been held to be a type of mistake under *Civ. Code § 1689(b)(1)*, warranting rescission of a contract in an appropriate case [*Crocker-Anglo Nat. Bank v. Kuchman (1964) 224 Cal. App. 2d 490, 494-496, 36 Cal. Rptr. 806* ; *see also Guthrie v. Times-Mirror Co. (1975) 51 Cal. App. 3d 879, 890, 124 Cal. Rptr. 577* (no misrepresentation alleged, only statement of opinion, which, even if it had been representation, was not material); *see § 215.51[3]*]. Thus, a party may rescind a contract if his or her consent was induced by a material misrepresentation, albeit made innocently [*Wood v. Kalbaugh (1974) 39 Cal. App. 3d 926, 929-930, 114 Cal. Rptr. 673* (representation held to be mere puffing and not material; judgment for restitution of downpayment made under foreclosed contract reversed)].

The courts have treated innocent misrepresentation as a type of mistake. This is based on the reasoning that, if the mistake were material and relied on by the party seeking relief, the mistake would be mutual and a ground for rescission [*see Crocker-Anglo Nat. Bank v. Kuchman (1964) 224 Cal. App. 2d 490, 495-496, 36 Cal. Rptr. 806* ; *Guthrie v. Times-Mirror Co. (1975) 51 Cal. App. 3d 879, 890, 124 Cal. Rptr. 577* ; *see also § 215.143*, form of allegation of innocent misrepresentation]. Concealment concerning insurance, whether intentional or unintentional, entitles the injured party to rescind the insurance contract [*Ins. Code § 331*].

In determining the character of the misrepresentation, courts will apply an objective test. The question is how the misrepresentation is likely to affect the conduct of a reasonable person with reference to the transaction in question [*Wood v. Kalbaugh (1974) 39 Cal. App. 3d 926, 930, 114 Cal. Rptr. 673* (quoting Restatement of Contracts, § 476, comment b)]. Materiality of a representation is a question of law [*Merced County Mut. Fire Ins. Co. v. State of California (1991) 233 Cal. App. 3d 765, 772, 284 Cal. Rptr. 680* (rescission sought on grounds of mistake and misrepresentation); *see § 215.143*, for a form of allegation of innocent misrepresentation].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesFraud & MisrepresentationConstructive FraudContracts LawFormationAmbiguity & MistakeGeneral Overview

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17-215 California Forms of Pleading and Practice--Annotated § 215.72

§ 215.72 Fraud and Deceit Distinguished

Under the Civil Code, "fraud" and "deceit" are technically two distinct concepts. "Fraud" refers to one of the bases for rescission of a contract based on lack of valid consent [*see Civ. Code §§ 1566, 1567(3), 1689(b)(1)*]. "Deceit" refers to the basis for the tort cause of action for damages [*see Civ. Code §§ 1709, 1710*]. Nevertheless, the courts frequently use the terms interchangeably. For discussion of the tort of "fraud and deceit," see Ch. 269, *Fraud and Deceit* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesFraud & MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationGeneral Overview

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17-215 California Forms of Pleading and Practice--Annotated §§ 215.73through 215.79

[Reserved]

§§ 215.73[Reserved]

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§ 215.80 Presumption That Advantage Taken Is Unfair

The principles governing confidential relationships are often discussed in terms of a presumption of undue influence or fraud. These principles should not be confused with the substantive provisions governing undue influence or fraud discussed in parts B and D, respectively. This part addresses the presumption of unfair advantage that arises from the existence of a confidential relationship. If a confidential relationship exists and someone in whom confidence has been reposed obtains an advantage because of that confidence and relationship, that advantage is presumed to be taken unfairly. It is immaterial (and no proof need be shown by the complainant) that the violating party may have obtained the advantage by the exercise of undue influence or through fraudulent misrepresentations. Once advantage is alleged in the course of a confidential relationship, the defendant has the burden of proving the fairness of the transaction and his or her good faith in all respects [*see Boyd v. Bevilacqua (1966) 247 Cal. App. 2d 272, 290-291, 55 Cal. Rptr. 610* (joint venture partners as in fiduciary relationship; advantage taken of confidential relationship as presumptively fraudulent); *Platt v. Wells Fargo Bank (1963) 222 Cal. App. 2d 658, 667, 35 Cal. Rptr. 377 , cert. denied, (1964) 377 U.S. 965* (advantage taken of confidential relationship as raising presumption of undue influence)].

Many cases addressing the presumption of undue influence that arises when one gains advantage from another with respect to whom he or she holds a position of trust held that the standard applicable to trustees [former *Civ. Code §§ 2219, 2235*; *see now Prob. Code § 16004(c)*] applied to other relationships. However, it remains unclear whether, and to what extent, courts will adopt the principles and presumption of *Prob. Code § 16004(c)* as applicable to relationships other than trustee-beneficiary. This is especially true in light of the fact that the provisions of former *Civ. Code § 2219* (which specified that one who voluntarily assumed a relation of personal confidence with another was deemed a trustee) was repealed as of July 1, 1987 and has not been restated in a comparable statute. This part of this chapter is based in part on cases decided under the repealed statutes, primarily former *Civ. Code §§ 2219, 2235*.

The 1986 repeals and enactments of the Trust Law (*Prob. Code § 15000 et seq.*) were not intended to alter rules applied by courts to fiduciary and confidential relationships, except with regard to express trusts governed by the new Trust Law [*Prob. Code § 15003(b)*]. In addition, the 1986 revision was not intended to prevent application of all or part of the principles or procedures of the new Trust Law to an entity or relationship that is excluded from the definition of "trust" in *Prob. Code § 82* if the Trust Law principles or procedures are applied pursuant to statutory or common law principles

by court order or rule or by contract [*Prob. Code § 15003(c)*].

Cases decided before 1987 should be reviewed and used with caution until the effect of the presumption of *Prob. Code § 16004(c)* on relationships other than trustee-beneficiary is fully clarified [*see 215.81[2]*].

Former *Civ. Code § 2235* provided that all transactions between a trustee and his or her beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which the trustee obtains any advantage from the beneficiary, are presumed to be entered into by the beneficiary without sufficient consideration and under undue influence [*cf.* presumption of *Prob. Code § 16004(c)*; *see § 215.81[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationConstructive FraudEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of CareEvidenceInferences & PresumptionsGeneral Overview

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§ 215.81 Confidential Relationships

[1] Defined

Generally, a confidential relationship exists when a person reposes a trust and confidence in another party or that person holds a real or apparent authority over the other person [*Civ. Code § 1575(1)*; *see Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1977) 67 Cal. App. 3d 19, 31, 136 Cal. Rptr. 378* ; *see also Davies v. Krasna (1975) 14 Cal. 3d 502, 510, 121 Cal. Rptr. 705, 535 P.2d 1161* (submission of creative concept to another in trust; acceptance of trust as essence of confidential relationship)].

When a person in whom confidence is reposed obtains control over the affairs of the other party due to the confidence, such as, in the relationship of a principal and agent, attorney and client, and business partners, a trust or fiduciary relationship is created [*Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1977) 67 Cal. App. 3d 19, 31, 136 Cal. Rptr. 378* ; *see Vai v. Bank of America (1961) 56 Cal. 2d 329, 338, 15 Cal. Rptr. 71, 364 P.2d 247* (husband and wife, relationship now governed by *Fam. Code §§ 721, 1100(e)*); *see* former *Civ. Code § 2219* (under § 215.81[2])]. Regardless of whether a relationship is termed confidential or fiduciary, the presumption arises in either case that an advantage is taken, because the transaction is deemed unfair [*see Estate of Cover (1922) 188 Cal. 133, 143, 204 P. 583* (spousal relationship, now governed by *Fam. Code §§ 721, 1100(e)*)].

[2] Trustee-Beneficiary

The relationship between a trustee and a beneficiary is a fiduciary relationship. A transaction between trustee and beneficiary that occurs during the existence of the trust or while the trustee's influence with the beneficiary remains and by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee's fiduciary duties, unless the transaction relates to the hiring or compensation of the trustee [*Prob. Code § 16004(c)*; *but see Prob. Code § 16015* (compensated services provided by regulated financial institution or its affiliates not violation)]. The presumption affects the burden of proof [*Prob. Code § 16004(c)*].

Decisional law interpreting former *Civ. Code § 2235* (superseded by *Prob. Code § 16004*) applied the former statute to relationships other than that of trustee-beneficiary. It is unclear whether cases interpreting former *Civ. Code § 2235* are

relevant to *Prob. Code § 16004* [*see § 215.80*]. For discussion of and forms relating to trusts, see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

[3] Attorney-Client Relationship

The attorney-client relationship was held to be a specific application of the trustee-beneficiary relationship under former *Civ. Code § 2235* (*see now Prob. Code § 16004*) [*see Bradner v. Vasquez (1954) 43 Cal. 2d 147, 151, 272 P.2d 11]* . Consequently, if there was a preexisting attorney-client relationship at the time of a transaction, there was a rebuttable presumption of undue influence if the attorney benefited from the transaction [*see Hicks v. Clayton (1977) 67 Cal. App. 3d 251, 262, 136 Cal. Rptr. 512* ; *Walton v. Broglio (1975) 52 Cal. App. 3d 400, 403-404, 125 Cal. Rptr. 123]* . For example, in one case in which an attorney sued a client for breach of an alleged oral joint venture agreement between the attorney and client, the court held that the attorney's conduct violated *Cal. Rules Prof. Conduct, Rule 3-300* and also amounted to undue influence under *Prob. Code § 16004(c)*. For that reason, the alleged agreement was held voidable, and once the client acted to void it, the court properly refused to enforce the agreement or to grant any other requested relief arising from the voided agreement [*BGJ Associates v. Wilson (2003) 113 Cal. App. 4th 1217, 1221, 1226-1230, 7 Cal. Rptr. 3d 140]* .

The presumption arising out of the attorney-client relationship does not to apply to agreements regarding fees [*Walton v. Broglio (1975) 52 Cal. App. 3d 400, 403-404, 125 Cal. Rptr. 123]* .

[4] Husband-Wife Relationship

The husband-wife relationship was held to be a specific application of the trustee-beneficiary relationship under former *Civ. Code § 2235* (*see now Prob. Code § 16004*) [*see Vai v. Bank of America (1961) 56 Cal. 2d 329, 337, 15 Cal. Rptr. 71, 364 P.2d 247]* . Cases applying the former statute held that the advantage gained by one spouse need not have been an unfair one for the presumption of undue influence to arise, even in a situation in which adequacy of consideration would generally be presumed [*see Rader v. Thrasher (1962) 57 Cal. 2d 244, 252, 18 Cal. Rptr. 736, 368 P.2d 360* ; *see also Bradner v. Vasquez (1954) 43 Cal. 2d 147, 151-152, 272 P.2d 11]* .

Each spouse is required to act, with respect to the other spouse in the management and control of the community assets and liabilities, in accordance with the general rules governing fiduciary relationships, which control the actions of persons having relationships of personal confidence as specified in *Fam. Code § 721*, until the assets and liabilities have been divided by the parties or by a court. This duty includes the obligation to make full disclosure to the other spouse of all material facts and information regarding the existence, characterization, and valuation of all assets in which the community has or may have an interest and debts for which the community is or may be liable, and to provide on request equal access to all information, records, and books that pertain to the value and character of those assets and debts [*Fam. Code § 1100(e)*]. A breach of this fiduciary duty that results in impairment of a spouse's one-half interest in community property may be remedied by an accounting and by reforming title to the asset to place title in the name of the injured spouse [*see Fam. Code § 1101(a)-(c)*].

Generally in transactions between themselves, a husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither may take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners, as provided in *Corp. Code §§ 16403*, *16404*, and *16503*, including, but not limited to, the following [*Fam. Code § 721(b)*]:

- Providing each spouse access at all times to any books kept regarding a transaction for the purposes of inspection and copying [*see Corp. Code § 16403(b)*];

- Rendering upon request, true and full information of all things affecting any transaction which concerns the community property (except that nothing in *Fam. Code § 721* is intended to impose a duty for either spouse to keep detailed books and records of community property transactions); and

- Accounting to the spouse, and holding as a trustee, any benefit or profit derived from any transaction by one spouse without the consent of the other spouse which concerns the community property [*see Corp. Code § 16404(b)(1)*].

The foregoing fiduciary relationship rule is expressly subject to exceptions in the following provisions of the Probate Code [*Fam. Code § 721(b)*]:

- *Prob. Code §§ 143, 144,* and *146,* concerning waivers of rights of inheritance.

- *Prob. Code § 16040,* concerning the trustee's standard of care in administering a trust.

- *Prob. Code § 16047,* concerning a trustee's duties under the Uniform Prudent Investor Act.

It is the intent of the legislature that *Fam. Code § 721* provides that the fiduciary relationship between spouses includes all of the same rights and duties in the management of community property as the rights and duties of unmarried business partners managing partnership property, as provided in *Corp. Code §§ 16403, 16404,* and *16503,* and to abrogate the ruling in *In re Marriage of Duffy (2001) 91 Cal. App. 4th 923, 111 Cal. Rptr. 2d 160* , to the extent that it is in conflict with that intent [Stats. 2002, ch. 310, § 2].

For further discussion of the confidential relationship of spouses and obligations arising from it, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure 2d ed., Ch. 10, *Validity and Effects of Marriage* (Matthew Bender).

[5] Agents

The relationship of agent and principal is another relationship to which cases applied the former presumptions regarding trustees. An agent must act in good faith in form as well as substance, regardless of whether the agent receives compensation. When an agent receives no compensation, the burden is on the agent to show that a transaction in which he or she obtained an advantage was entered into by the principal freely and voluntarily with full knowledge of all the facts and with perfect understanding of the effect of the transaction [*Wilbur v. Wilbur (1925) 197 Cal. 1, 15, 239 P. 332* ; *Webb v. Saunders (1949) 89 Cal. App. 2d 732, 735-736, 201 P.2d 816* ; *see Civ. Code § 2322(c)*].

Civ. Code § 2322(c), which was amended at the same time as the trustee-beneficiary presumption of the Probate Code, provides that an agent's authority expressed in general terms, however broad, does not authorize an agent to violate a duty to which a trustee is subject pursuant to *Prob. Code §§ 16002, 16004, 16005,* and 16109. However, whether the presumption under *Prob. Code § 16004* will be extended to other agency relationships remains to be determined.

[6] Effect of Family Relationship

Except as between a husband and wife, the mere fact of a family relationship between parties does not of itself establish the existence of a fiduciary or confidential relation raising a presumption of undue influence. Whether such a relationship exists between members of the same family depends on all the facts and circumstances of the case. Unless one party actually dominates the other so that the other depends on the first for advice and guidance, a confidential relationship does not exist, even though the parties are closely related by family ties [*Peters v. Papoulacos (1963) 218 Cal. App. 2d 791, 794, 32 Cal. Rptr. 689* (cousin's son)].

Although the courts have stated that the relationship between parent and child is presumed to be confidential [*Johnson v. Clark (1936) 7 Cal. 2d 529, 534, 61 P.2d 767* ; *Sparks v. Sparks (1950) 101 Cal. App. 2d 129, 135, 225 P.2d 238]* , when considering whether a transaction between a parent and child should be invalidated on the ground of undue influence or fraud, the courts require more than the mere relationship [*see* *Wilbur v. Wilbur (1925) 197 Cal. 1, 14, 239 P. 332* ; *Williams v. Williams (1958) 163 Cal. App. 2d 144, 148-149, 329 P.2d 70]* . For example, if an aged parent is not incompetent, of weak mentality, or subject to influence, a transfer to a child who never attended to the parent's business affairs, never advised or counseled the parent, and who did not occupy any superior position, handle any transactions, or in any way conduct himself or herself so as to occupy a confidential relationship, would not be presumed to have been procured by undue influence [*Spaulding v. Jones (1953) 117 Cal. App. 2d 541, 553-554, 256 P.2d 637]* . To establish undue influence, other facts must be shown such as old age, infirmity, dependency on a child who exercises authority over the parent, or an exclusive opportunity purposefully created to influence the parent [*see* *Nessen v. Nessen (1933) 218 Cal. 59, 61, 21 P.2d 415* (exclusive opportunity to influence parent grantor in favor of one child to exclusion of others); *Beckmann v. Beckmann (1959) 174 Cal. App. 2d 717, 721, 345 P.2d 121* (undue influence by daughter of 80 year old mother in weak mental condition when deed was executed and in custody of daughter who had mother's trust and confidence immediately before making deed)].

[7] No Confidential Relationship Between Employer and Employee

No presumption of a confidential relationship arises from the fact that parties to a contract are employer and employee, especially when the parties are negotiating to bring about a termination of their relationship. In that situation, each party is expected to look after his or her own interests, and a lack of confidentiality is implicit in the subject matter of their dealings [*Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 129, 54 Cal. Rptr. 533]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsCauses of Action & RemediesBreach of Fiduciary DutyGeneral OverviewContracts LawContract InterpretationFiduciary ResponsibilitiesEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of CareFamily LawMarital Duties & RightsProperty RightsGeneral OverviewLegal EthicsClient RelationsGeneral Overview

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§ 215.82 Advantage Defined

A fiduciary or person in a confidential relationship obtains an advantage when the fiduciary enters into a transaction with a beneficiary or other party in which the fiduciary's position is improved, the fiduciary obtains a favorable opportunity, or the fiduciary otherwise gains, benefits, or profits [*Main v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1977) 67 Cal. App. 3d 19, 31, 136 Cal. Rptr. 378* ; *see* *Rader v. Thrasher (1962) 57 Cal. 2d 244, 250, 18 Cal. Rptr. 736, 368 P.2d 360* (contract for contingent fee obtained during time attorney-client relationship existed and after attorney had brought action on behalf of client as advantage)]. Another example of advantage is a new agreement between an attorney and a client to replace an earlier agreement less advantageous to the attorney. In this particular case, the initial agreement provided for a minimum fee, and provided that the attorney could be dismissed without cause. The replacement agreement evidencing advantage gave the attorney 10 percent of all money received by the clients from oil property for the remainder of attorney's life and provided that the attorney could be dismissed only for legal cause [*Bradner v. Vasquez (1954) 43 Cal. 2d 147, 152-153, 272 P.2d 11]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationConstructive FraudEvidenceInferences & PresumptionsGeneral OverviewLegal EthicsClient RelationsGeneral Overview

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§ 215.83 Rebuttal of Presumption

To rebut the presumption of constructive fraud or undue influence arising from the existence of a fiduciary or confidential relationship between two parties, the benefited party must show that the contract was made freely, voluntarily, with full knowledge of all facts, and with perfect understanding of the effect of the contract [*Wilbur v. Wilbur (1925) 197 Cal. 1, 15, 239 P. 332* ; *Sparks v. Sparks (1950) 101 Cal. App. 2d 129, 135-136, 225 P.2d 238* ; *Szekeres v. Reed (1950) 96 Cal. App. 2d 348, 357, 215 P.2d 522* ; *Webb v. Saunders (1949) 89 Cal. App. 2d 732, 735-736, 201 P.2d 816]* . Although some cases state that the donor or grantor must have had independent advice for the presumption to be rebutted [*see, e.g., Sparks v. Sparks (1950) 101 Cal. App. 2d 129, 135-136, 225 P.2d 238]* , most courts have held that proof of independent advice is not required if there is other evidence sufficient to rebut the presumption. However, the presence or lack of independent advice is a circumstance to be considered [*Bradner v. Vasquez (1954) 43 Cal. 2d 147, 153, 272 P.2d 11* ; *Brown v. Canadian Indus. Alcohol Co. (1930) 209 Cal. 596, 599, 289 P. 613* (rebuttal of presumption without proof of independent advice); *Nagle v. Valadez(1962) 202 Cal. App. 2d 51, 55, 20 Cal. Rptr. 548* ; *Helbing v. Helbing (1948) 89 Cal. App. 2d 224, 229, 200 P.2d 560]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawDefensesDuress & Undue InfluenceGeneral OverviewEvidenceInferences & PresumptionsGeneral OverviewEvidenceInferences & PresumptionsRebuttal of PresumptionsTortsBusiness TortsFraud & MisrepresentationConstructive FraudGeneral Overview

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[Reserved]

§§ 215.84[Reserved]

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§ 215.90 Variety of Remedies

A party who entered a contract under mistake or due to fraud, undue influence, duress, or menace has a variety of remedies. He or she may rescind or reform the contract, obtain relief based on common counts, bring an action for deceit, or defend an action on the contract. While it may not make a difference from a practical standpoint, theoretically, there is a difference between a void contract and a voidable contract [*see C.I.T. Corp. v. Panac (1944) 25 Cal. 2d 547, 548, 154 P.2d 710]* . A void contract is of no effect from the outset, and can be disregarded by the parties. On the other hand, a voidable contract is valid until disaffirmed by the party with the power to disaffirm [*Bonacci v. Mass. Bonding & Ins. Co. (1943) 58 Cal. App. 2d 657, 664, 137 P.2d 487* ; *see Hakes Investment Co. v. Lyons (1913) 166 Cal. 557, 561, 137 P. 911* (void and voidable contracts concerning minors)]. Because of this difference, rescission is unnecessary when a contract is void, rather than voidable [*Bonacci v. Mass. Bonding & Ins. Co. (1943) 58 Cal. App. 2d 657, 664, 137 P.2d 487]* .

For example, when a promisor knows what he or she is signing, but his or her signature is induced by fraud, a voidable contract is formed and notice of rescission and an offer to restore any consideration received are necessary. However, when fraud goes to the inception or execution so that the promisor is deceived as to the nature of the act and does not know what he or she is signing or did not intend to enter the contract, mutual assent is lacking, the contract is void, and rescission is not necessary, as a contract was never made to rescind [*Ford v. Shearson Lehman American Express, Inc. (1986) 180 Cal. App. 3d 1011, 1028-1029, 225 Cal. Rptr. 895* (plaintiff initiated action; brokerage agreement under which defendants sought to compel arbitration held invalidated by fraud in inception and undue influence)].

Legal Topics:

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

Consent that is not free is not absolutely void, but may be rescinded by the parties [*Civ. Code § 1566*; *see Chakmak v. H.J. Lucas Masonry, Inc. (1976) 55 Cal. App. 3d 124, 129, 127 Cal. Rptr. 404]* . Consequently, a party to a contract may rescind the contract if the consent of that party or of any party jointly contracting with him or her was given by mistake, or obtained through duress, menace, fraud, or undue influence [*Civ. Code § 1689(b)(1)*; *see, e.g., Donovan v. RRL Corp. (2001) 26 Cal. 4th 261, 283, 294, 109 Cal. Rptr. 2d 807, 27 P.3d 702* (defendant satisfied requirements for rescission of contract on ground of unilateral mistake of fact); *Harris v. Rudin, Richman & Appel (2002) 95 Cal. App. 4th 1332, 1339, 116 Cal. Rptr. 2d 552* (reversing summary judgment for plaintiff because defendants raised triable issues of fact as to whether they were entitled to rescind settlement agreement based on mutual mistake of fact or law)]. For a discussion of and forms relating to rescission, see Ch. 490, *Rescission and Restitution* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawFormationAmbiguity & MistakeGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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§ 215.92 Remedy for Undue Influence

Rescission is available to a party who enters a contract due to undue influence [*Civ. Code § 1689(b)(1)*; *see Bancroft v. Bancroft (1895) 110 Cal. 374, 379, 42 P. 896]* . That party may also challenge enforcement of the contract [*see Ford v. Shearson Lehman American Express, Inc. (1986) 180 Cal. App. 3d 1011, 1020, 225 Cal. Rptr. 895* (contract held void for lack of voluntary consent due to dominance, control, and advantage gained by virtue of fiduciary relationship of former psychotherapist and stock broker in context of resisting order to arbitrate under contract)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 215.93 Fraud Without Damage or Injury

To obtain rescission of a contract for fraud, it is not necessary to plead or prove pecuniary damages as a result of the fraud [*Hefferan v. Freebairn (1950) 34 Cal. 2d 715, 721, 214 P.2d 386]* . Although some courts formerly stated that substantial injury or prejudice must be shown to have resulted from the fraud [*Hefferan v. Freebairn (1950) 34 Cal. 2d 715, 721, 214 P.2d 386* ; *Dunn v. Stringer (1940) 41 Cal. App. 2d 638, 644, 107 P.2d 411]* , the California Supreme Court has stated that anyone who is fraudulently induced to enter into a contract is injured by that fraudulent inducement. This is because interference with a person's interest in making a free choice and in exercising his or her judgment in making decisions with respect to economic transactions and enterprises constitutes an injury. Under this view, a plaintiff does not need to show pecuniary injury in order to obtain rescission because the law assumes that injury necessarily follows from the fraud [*Earl v. Saks & Co. (1951) 36 Cal.2d 602, 611, 226 P.2d 340* ; *Wood v. Jotham Bixby Co. (1938) 29 Cal. App. 2d 294, 298, 84 P.2d 204]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 215.94 Common Counts

Relief based on common counts is available when money was paid due to mistake, fraud, undue advantage, or undue influence [*see Leeper v. Beltrami (1959) 53 Cal. 2d 195, 204-205, 1 Cal. Rptr. 12, 347 P.2d 12* ; *City Bank of San Diego v. Ramage (1968) 266 Cal. App. 2d 570, 585, 72 Cal. Rptr. 273* (money had and received)]. To achieve an equitable result, the court will infer that the defendant promised to repay the plaintiff [*see Philpott v. Superior Court (1934) 1 Cal. 2d 512, 518-523, 36 P.2d 635* ; *see Lawn v. Camino Heights, Inc. (1971) 15 Cal. App. 3d 973, 982, 93 Cal. Rptr. 621]* . For a discussion of and forms relating to common counts, see Ch. 121, *Common Counts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 215.95 Cancellation of Instrument

A contract may be cancelled if there is a reasonable apprehension that, if it is left outstanding, it may cause serious injury to a person against whom it is void or voidable [*Civ. Code § 3412*]. For discussion of and forms relating to cancellation of contracts, see Ch. 107, *Cancellation of Instruments* .

Legal Topics:

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

A party who enters into a contract through fraud or mistake may seek reformation of the contract so that it expresses the intention of the parties [*Civ. Code § 3399*]. However, a party to a contract cannot seek reformation if the contract is void from the outset. This is because equity cannot make a contract when no contract exists, and a void contract is no contract at all [*see McClure v. Cerati (1948) 86 Cal. App. 2d 74, 85, 194 P.2d 46]* . For discussion of and forms relating to reformation, see Ch. 488, *Reformation of Instruments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 215.97 Action for Damages for Deceit

As an alternative to rescinding a contract or setting up the fraud as a defense or counterclaim in an action on the contract, a person who has been fraudulently induced to enter into a contract has the option of affirming the contract, retaining what he or she has received, and suing for damages in a tort action for deceit [*Persson v. Smart Inventions, Inc. (2005) 125 Cal. App. 4th 1141, 1152-1156, 23 Cal. Rptr. 3d 335* (when stock redemption agreement was induced by fraud, trial court had equitable power to set aside provision for release of unknown claims; aggrieved party not required to rescind contract and return consideration to sue for fraud); *McCauley v. Dennis (1963) 220 Cal. App. 2d 627, 632, 34 Cal. Rptr. 90]* .

A party does not lose his or her right to damages if he or she is unsuccessful in disaffirming a contract by rescission [*De Campos v. State Compensation Ins. Fund (1954) 122 Cal. App. 2d 519, 526, 265 P.2d 617]* . However, when a party chooses to affirm a contract and sue for damages for deceit, he or she waives any right to subsequently rescind the contract [*Gutterman v. Gally (1933) 131 Cal. App. 647, 653, 21 P.2d 1000]* . A party may plead inconsistent remedies [*Walters v. Marler (1978) 83 Cal. App. 3d 1, 16, 147 Cal. Rptr. 655]* , and generally does not have to choose a remedy until the court or jury has made its determination [*Jahn v. Brickey (1985) 168 Cal. App. 3d 399, 406, 214 Cal. Rptr. 119* ; *Walters v. Marler (1978) 83 Cal. App. 3d 1, 16, 147 Cal. Rptr. 655]* . For a more detailed discussion of election of remedies and a form of affirmative defense based on an election having been made, see Ch. 490, *Rescission and Restitution* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 215.98 Affirmative Defense or Counterclaim

Duress, menace, undue influence, fraud, and mistake may each be used as an affirmative defense in an answer to a complaint. They also may be used in a complaint or counterclaim in which the aggrieved party may recover damages [*McCauley v. Dennis (1963) 220 Cal. App. 2d 627, 632, 34 Cal. Rptr. 90]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticePleadingsCounterclaimsGeneral OverviewContracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral Overview

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§ 215.99 Pleading

A complaint or defense alleging undue influence, fraud, duress, menace, or mistake must be pleaded in specific language describing the acts relied on to constitute the defense, not general allegations or legal conclusions [*Maxwell v. Santa Rosa (1959) 53 Cal. 2d 274, 279-280, 1 Cal. Rptr. 334, 347 P.2d 678* (fraud); *Metropolis etc. Sav. Bank v. Monnier (1915) 169 Cal. 592, 596, 147 P. 265* (menace, duress, fraud); *Krug v. Meeham (1952) 109 Cal. App. 2d 274, 276-277, 240 P.2d 732* (undue influence); *see Stock v. Meek (1950) 35 Cal. 2d 809, 815, 221 P.2d 15* (mistake)].

General allegations are merely conclusions of the pleader and are insufficient without a further statement of particular facts [*Marshall v. Packard-Bell Co. (1951) 106 Cal. App. 2d 770, 774, 236 P.2d 201]* . The pleading should be sufficient to inform one's adversaries of the nature of the cause of action stated against them with sufficient particularity to advise them of the issues they will be required to meet at the trial of the action [*see Lewis v. Fahn (1952) 113 Cal. App. 2d 95, 100, 247 P.2d 831]* .

The pleading party should name the particular defense on which he or she relies, such as undue influence, to aid those reading the pleading. However, if the essential facts constituting that defense have been alleged, one should be able to recover, even if the defense is not specifically named, or even if the factual situation combines the elements of more than one defense [*see Harman v. City & County of San Francisco (1972) 7 Cal. 3d 150, 157, 101 Cal. Rptr. 880, 496 P.2d 1248* (complaint sufficient although facts were not clearly stated, and although plaintiff demanded relief to which he or she is not entitled under facts alleged, if plaintiff is entitled to any relief under facts stated); *Hick v. Thomas (1891) 90 Cal. 289, 294, 27 P. 208* ; *Santa Cruz County v. McLeod (1961) 189 Cal. App. 2d 222, 235, 11 Cal. Rptr. 249]* .

If a complaint alleging economic duress is ambiguous but could be amended to cure the ambiguity, the defendant is not entitled to a demurrer without leave to amend [*Crosstalk Productions Inc. v. Jacobson (1998) 65 Cal. App. 4th 631, 644-645, 76 Cal. Rptr. 2d 615* (complaint alleging extortion in "securing" contract from broadcasting network was ambiguous as to whether plaintiffs were admitting to paying commercial bribes to obtain contract in violation of *Penal Code § 641.3*, and thus establishing unclean hands defense, but could be amended to cure ambiguity to clarify that "secure" meant simply safeguarding finalization of contract)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 215.100 Statute of Limitations

The three-year limitation period set forth in *Code Civ. Proc. § 338(d)* governs actions for relief on the ground of fraud or mistake. The cause of action does not accrue until the the aggrieved party discovers the facts constituting the fraud or mistake. For a further discussion of the provisions of *Code Civ. Proc. § 338(d)*, see Ch. 269, *Fraud and Deceit* .

Code Civ. Proc. § 338(d) also applies to actions based on duress or menace [*Leeper v. Beltrami (1959) 53 Cal. 2d 195, 207, 1 Cal. Rptr. 12, 347 P.2d 12]* . However, actions for relief on the ground of undue influence are governed by the four-year period prescribed by *Code Civ. Proc. § 343* [*Wade v. Busby (1944) 66 Cal. App. 2d 700, 702, 152 P.2d 754]* .

Actions for rescission of a written contract, including actions on the ground of fraud or mistake, are subject to the four-year limitation period of *Code Civ. Proc. § 337(3)* [*cf. Leeper v. Beltrami (1959) 53 Cal. 2d 195, 212, 1 Cal. Rptr. 12, 347 P.2d 12* (three-year limitation of *Code Civ. Proc. § 338(d)* as applicable when basis of action is duress, a type of fraud)].

Legal Topics:

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

§§ 215.101[Reserved]

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§ 215.110 State Statutes

[1] Definitions

Acts constituting duress. *Civ. Code § 1569*

Threats constituting menace. *Civ. Code § 1570*

Types of fraud. *Civ. Code §§ 1571-1573*

Undue influence defined. *Civ. Code § 1575*

Types of mistake. *Civ. Code §§ 1576-1579*

[2] Duress

Relief from marital dissolution judgments obtained by duress after time has expired for relief under *Code Civ. Proc. § 473. Fam. Code § 2120 et seq.*

[3] Fraud

Conveyances made to defraud creditors are void. *Civ. Code § 1227*

Breach of duty, which without actual fraudulent intent results in advantage to person at fault, is constructive fraud. *Civ. Code § 1573(1)*; *cf. Civ. Code §§ 1709, 1710(3)* (intent as element of tort cause of action)

Actual fraud is question of fact. *Civ. Code § 1574*

When contract prevented from being put into writing by fraud enforceable against fraudulent party. *Civ. Code § 1623*

Common carrier not permitted to be exonerated by agreement from liability for fraud. *Civ. Code § 2175*

Agent never has authority to do act that is fraud on principal. *Civ. Code § 2306*

Mistakes and errors do not invalidate lien except when made with intent to defraud or as to bona fide purchaser. *Civ. Code § 3261*

Validity of debtor's contracts in absence of fraud. *Civ. Code § 3431*

Damages for fraud in purchase, sale, or exchange of property. *Civ. Code § 3343*

[4] Mistake

Mistake of fact defined. *Civ. Code § 1577*

Mistake of foreign law is mistake of fact. *Civ. Code § 1579*

Property obtained without consent due to mutual mistake is required to be returned by party obtaining thing when he or she has notice of mistake. *Civ. Code § 1713*

Parol evidence is permitted when mistake or imperfection of writing is put in issue by pleadings. *Code Civ. Proc. § 1856(e)*

[5] Consent

Consent is essential element of contract. *Civ. Code § 1550*

Essential elements of consent. *Civ. Code § 1565*

Requirement that consent be free. *Civ. Code § 1566*

Apparent consent is not free when obtained through duress, menace, fraud, undue influence, or mistake. *Civ. Code §§ 1567, 1568*

Intention of parties to be regarded when written contract fails to express real intention of parties due to fraud, mistake, or accident. *Civ. Code § 1640*

[6] Trusts

Trust created by acquiring thing by fraud, accident, mistake, undue influence, violation of trust, or other wrongful act. *Civ. Code § 2224*

Transaction between trustee and beneficiary; presumption of violation of fiduciary duties. *Prob. Code § 16004(c)*; *but see Prob. Code § 16015* (compensated services provided by regulated financial institution or its affiliates not violation)

[7] Damages

Interest is permitted to be awarded as damages in every case of fraud, oppression, or malice. *Civ. Code § 3288*

[8] Remedies

Party is permitted to rescind contract when consent given by mistake or obtained through duress, menace, fraud, or undue influence. *Civ. Code § 1689(b)(1)*

Stipulation that errors of description will not avoid contract does not remove right of rescission for fraud or mistake when mistake was in matter essential to inducement of contract and is not capable of exact and entire compensation. *Civ. Code § 1690*

Tort action for damages for deceit. *Civ. Code § 1709*

Property obtained without consent is required to be returned. *Civ. Code § 1712*

Specific performance is not enforceable against party to contract when assent was obtained by misrepresentation, concealment, circumvention, or unfair practices or if assent was given under influence of mistake, misapprehension, or surprise. *Civ. Code § 3391*

Reformation of contract for mistake or fraud. *Civ. Code § 3399*

Cancellation of void or voidable instrument if reasonable apprehension of injury would result if left outstanding. *Civ. Code § 3412*

[9] Statute of Limitations

Statute of limitations for action based on fraud or mistake is three years. *Code Civ. Proc. § 338(d)*

Statute of limitations for rescission of written contract, including on ground of fraud or mistake, is four years. *Code Civ. Proc. § 337(3)*; *cf. Leeper v. Beltrami (1959) 53 Cal. 2d 195, 212, 1 Cal. Rptr. 12, 347 P.2d 12* (three-year limitation of *Code Civ. Proc. § 338(d)* is applicable when basis of action is duress, a type of fraud)

Statute of limitations for rescission of oral contract is two years. *Code Civ. Proc. § 339*

Statute of limitations for action for relief on ground of undue influence is four years. *Code Civ. Proc. § 343*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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§ 215.111 Decisions

[1] Duress

[a] Generally

One who falsely clouds title to real property and then seeks consideration to remove cloud is guilty of wrongful act and as permitted to be compelled to restore consideration recovered. *Leeper v. Beltrami (1959) 53 Cal. 2d 195, 203, 1 Cal. Rptr. 12, 347 P.2d 12*

[b] Business Compulsion

Party pleading economic duress must have had no "reasonable alternative" to action it seeks to avoid, such as agreeing to contract; inquiry of whether party had reasonable alternative is determined by examining whether reasonably prudent person would follow alternative course or might submit, and is factual inquiry not susceptible to determination on demurrer. *Crosstalk Productions Inc. v. Jacobson (1998) 65 Cal. App. 4th 631, 644-645, 76 Cal. Rptr. 2d 615*

Economic duress involves wrongful act that is sufficiently coercive to cause reasonably prudent person faced with no reasonable alternative to succumb to perpetrator's pressure; assertion of claim known to be false or bad faith threat to breach contract or to withhold payment may constitute wrongful act for purposes of economic duress doctrine. *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian (1990) 218 Cal. App. 3d 1058, 1077, 267 Cal. Rptr. 457*

Existence of duress dependent on circumstances and thus not tested by objective nature of threats, but by state of mind induced in victim; evidentiary questions such as victim's condition, age, sex, state of health, and mental characteristic are relevant. *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian (1990) 218 Cal. App. 3d 1058, 1078-1079, 267 Cal. Rptr. 457*

Contractor's endorsement of releases settling billing for lesser value than actual costs was unenforceable and amounted

to economic duress when contractor signed releases only because he was overextended to creditors and subcontractors and faced with imminent bankruptcy if not paid its final billing. *Rich & Whillock, Inc. v. Ashton Development, Inc. (1984) 157 Cal. App. 3d 1154, 1160-1161, 204 Cal. Rptr. 86*

Plaintiffs deprived of right to construct building unless they purchased easement for light, air, and access, entered into contract for easement under economic duress and permitted to rescind contract. *Short Line Associates v. City & County of San Francisco (1978) 78 Cal. App. 3d 50, 59, 143 Cal. Rptr. 921*

[c] Examples Not Constituting Duress

Dog owner failed to raise triable issue of fact as to whether county's retention of his dog at animal shelter was unlawful so as to establish statutory duress; signed release for neutering, which resulted in dog's death and subsequent lawsuit, was therefore valid and enforceable. *Tarpy v. County of San Diego (2003) 110 Cal. App. 4th 267, 276-279, 1 Cal. Rptr. 3d 607*

Grief arising from death of close relative not sufficient duress to invalidate contract between cemetery and family of decedent. *Sinai Memorial Chapel v. Dudler (1991) 231 Cal. App. 3d 190, 199, 282 Cal. Rptr. 263* ; *In re Terra (1952) 111 Cal. App. 2d 452, 462, 244 P.2d 921*

[2] Fraud

[a] Generally

Fraud is never presumed. *Cooper v. Leslie Salt Co. (1969) 70 Cal. 2d 627, 636, 75 Cal. Rptr. 766, 451 P.2d 406 , cert. denied, 396 U.S. 821*

[b] Elements of Fraud

Reliance on misrepresentation not reasonable when complaining party could have ascertained truth through exercise of reasonably diligence, such as reading contract. *Rowland v. PaineWebber Inc. (1992) 4 Cal. App. 4th 279, 286, 6 Cal. Rptr. 2d 20*

Findings of intentional fraud and justifiable reliance is supported by evidence of defendant's signed escrow instructions guaranteeing accuracy of sales brochure, admission by defendant that brochure represented profits to be more than they actually were, expert testimony that defendant's records were misleading, plaintiff's assertion of reliance, and plaintiff's lack of experience in similar business. *Campbell v. McClure (1986) 182 Cal. App. 3d 806, 811, 227 Cal. Rptr. 450*

[c] Constructive Fraud

Person may be found to have reasonably relied on legal opinion of nonlawyer when recipient of opinion is in relationship of trust with, or believes that, maker of opinion has special knowledge on subject. *Lynch v. Cruttenden & Co. (1993) 18 Cal. App. 4th 802, 808, 22 Cal. Rptr. 2d 636* .

When constructive fraud is based on nondisclosure, elements of representation and falsity are absent. *Byrum v. Brand (1990) 219 Cal. App. 3d 926, 938, 268 Cal. Rptr. 609*

Constructive fraud exists when conduct, although not actually fraudulent, ought to be treated as fraudulent because it has consequences and legal effects of actual fraud. *Byrum v. Brand (1990) 219 Cal. App. 3d 926, 938, 268 Cal. Rptr.*

609 ; *Efron v. Kalmanovitz (1964) 226 Cal. App. 2d 546, 560, 38 Cal. Rptr. 148*

Investment management contacts invalid when plaintiff never voluntarily assented to agreements but was victim of scheme of domination, control, concealment, misrepresentation, and advantage gained by virtue of fiduciary relationship, which scheme was perpetrated by plaintiff's former psychotherapist and broker, who was also psychotherapist's former patient. *Ford v. Shearson Lehman American Express, Inc. (1986) 180 Cal. App. 3d 1011, 1026-1029, 225 Cal. Rptr. 895*

Constructive fraud presumed from relation of parties to transaction or circumstances under which it takes place; constructive fraud often exists when parties to contract have special confidential or fiduciary relationship that affords power of party to take undue advantage of other party. *Ford v. Shearson Lehman American Express, Inc. (1986) 180 Cal. App. 3d 1011, 1020, 225 Cal. Rptr. 895*

[d] Promissory Fraud

When execution of contract was induced by promise made without intention to perform [*see Civ. Code § 1572(4)*], contract was obtained by fraud and permitted to be declared null and void. *Simmons v. Cal. Institute of Technology (1949) 34 Cal. 2d 264, 274, 209 P.2d 581* ; *Coast Bank v. Holmes (1971) 19 Cal. App. 3d 581, 591, 97 Cal. Rptr. 30*

Complaint alleging cause of action for promissory fraud must contain facts showing: (1) promise made regarding material fact; (2) absence of intent on part of defendant at time promise was made to perform it; (3) intent on part of defendant to induce action by plaintiff; (4) justifiable reliance on promise by plaintiff; (5) nonperformance of promise by defendant; and (6) injury and damage proximately resulting to plaintiff. *Bondi v. Jewels by Edwar, Ltd. (1968) 267 Cal. App. 2d 672, 677, 73 Cal. Rptr. 494, 1968 Trade Cas. (CCH) P72655*

[e] Statute of Limitations

Limitation period on former partners' cause of action against other former partners for fraud based on concealment of profits derived from sale and rental of property to dissolved partnership was postponed by fraudulent concealment and as not commencing until plaintiffs had actual or inquiry notice. *Rosenfeld, Meyer & Susman v. Cohen (1987) 191 Cal. App. 3d 1035, 1059-1060, 237 Cal. Rptr. 14*

Between fiduciaries, actual notice is question of fact; distribution of report, which contained footnote disclosing separate interest of some partners in assets leased to partnership, at partnership meeting was not sufficient to charge other partners with notice of separate interests or profit on lease. *Rosenfeld, Meyer & Susman v. Cohen (1987) 191 Cal. App. 3d 1035, 1059, 237 Cal. Rptr. 14*

[f] As Defense

Plaintiff's fraud is alternative ground for relieving defendant from liability for failure to perform contract that defendant entered into under unilateral mistake of fact because plaintiff's knowledge that contract was unprofitable and suppression of that fact were "fitted to deceive" and amounted to fraud. *Architects & Contractors Estimating Service, Inc. v. Smith (1985) 164 Cal. App. 3d 1001, 1008, 211 Cal. Rptr. 45*

Fraud without damages is no defense. *South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 Cal. App. 3d 750, 765, 102 Cal. Rptr. 286*

When contract has been obtained by fraud, defendant is permitted to wait and excuse himself or herself from

performance by proof of fraud when enforcement is sought against him or her. *Friedberg v. Weissbuch (1955) 135 Cal. App. 2d 750, 756, 287 P.2d 785*

[3] Undue Influence

[a] Presumption

Presumption that advantage obtained by grantee was from undue influence exerted on grantor arises when record showed that deed in dispute was prepared, executed, and recorded due to defendant's activity, plaintiff was thereby deprived of her primary asset, and defendants were benefited. *O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 153-154, 119 Cal. Rptr. 245*

[b] Evidence

To set aside gift on basis of undue influence, some act or conduct by donee is required; finding of undue influence cannot be based on donor's belief alone, unless donor was mentally infirm. *Estate of Truckenmiller (1979) 97 Cal. App. 3d 326, 334-335, 158 Cal. Rptr. 699* (inter vivos gift, not set aside)

Distinction between proof of undue influence necessary to set aside will and that necessary to set aside inter vivos gift or deed; to set aside will, no presumption of undue influence arises until confidential relationship is established, but for inter vivos gift, extreme age and infirmity of grantor and slight evidence of coercion will shift burden to require beneficiary to establish that transaction was free and fair from influence. *O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 153, 155-156, 119 Cal. Rptr. 245* ; *Faulkner v. Beatty (1958) 161 Cal. App. 2d 547, 550-552, 327 P.2d 41* (deed set aside); *Stewart v. Marvin (1956) 139 Cal. App. 2d 769, 775, 294 P.2d 114* ; *Longmire v. Kruger (1926) 80 Cal. App. 230, 240-241, 251 P. 692* (grandson; in loco parentis, but no specific finding of confidential relationship; deed set aside)

Direct evidence of undue influence is rarely obtainable and court normally relegated to determine by inference from totality of facts and circumstances. *Keithley v. Civil Service Bd. (1970) 11 Cal. App. 3d 443, 451, 89 Cal. Rptr. 809*

What constitutes undue influence and sufficient proof thereof depends on facts and circumstances of each case. *Stewart v. Marvin (1956) 139 Cal. App. 2d 769, 775, 294 P.2d 114*

Evidence of undue influence was insufficient to set aside deed allegedly executed because of threats of criminal prosecution coupled with mental weakness. *Buchmayer v. Buchmayer (1945) 68 Cal. App. 2d 462, 467-469, 157 P.2d 9*

[c] Transaction Upheld

Probate court's finding of no undue influence was supported by sufficient evidence showing heir/assignor of real property that was part of probate estate had understood nature and consequences of transaction. *Estate of Boyd (1979) 98 Cal. App. 3d 125, 139, 159 Cal. Rptr. 298*

[d] Transaction Voided

Acts committed under undue influence did not constitute valid waiver because waiver requires voluntary act. *Channell v. Anthony (1976) 58 Cal. App. 3d 290, 305, 129 Cal. Rptr. 704*

Elderly woman was entitled to reconveyance of deed to couple she considered family when plaintiff's age and infirmity, solitariness, loss of mental vigor, susceptibility to influence, and other evidence, though conflicting, gave rise to inference that transaction was not product of plaintiff's free volition. *O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 154-156, 119 Cal. Rptr. 245* (finding of confidential relationship)

Transfer of bank accounts to daughter set aside on findings of mother's weakness of mind when mother was old, mentally and physically infirm, and feared being sent to nursing home, which daughter fraudulently promised mother she would not do if mother transferred accounts. *Wells Fargo Bank v. Brady (1953) 116 Cal. App. 2d 381, 398-399, 254 P.2d 71* (court did not consider sufficiency of evidence supporting finding of confidential relationship as judgment was supported on grounds of fraud and undue influence taken of aunt's weakness of mind)

[e] Weakness of Mind

Manic-depressive psychosis is weakness of mind in context of *Civ. Code § 1575* because it is mental illness, but manic-depressive person not incompetent to enter contract under *Civ. Code § 38* as one entirely without understanding or under *Civ. Code § 39* as one not entirely without understanding. *Smalley v. Baker (1968) 262 Cal. App. 2d 824, 835, 69 Cal. Rptr. 521*

[f] Unfair Advantage Taken of Weakness or Distress

Resignation of police officer after being charged with rape was coercion under circumstances of case and product of undue influence. *Keithley v. Civil Service Bd. (1970) 11 Cal. App. 3d 443, 452, 89 Cal. Rptr. 809*

Resignation of teacher after being arrested on charges of homosexual activity was obtained by undue influence. *Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 135, 54 Cal. Rptr. 533*

[4] Confidential Relationship

Oral joint venture agreement between attorney and client which was result of undue influence and violation of attorney's fiduciary duties [*Prob. Code § 16004*; *Cal. Rules Prof. Conduct, Rule 3-300*] was voidable; client did not ratify it by conduct; once client acted to void agreement, trial court properly refused to enforce it. *BGJ Associates v. Wilson (2003) 113 Cal. App. 4th 1217, 1226-1230, 7 Cal. Rptr. 3d 140*

At time marital settlement agreement was executed husband procured interlocutory decree; husband was under fiduciary duty to disclose existence of all community assets and failure to disclose existence of retirement benefits as constituting constructive fraud on wife. *In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 154-155, 133 Cal. Rptr. 583*

Mere fact that relationship is friendly and intimate does not establish that it is confidential; confidential relationship also requires servient party to repose trust and confidence in integrity and fidelity of other party. *O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 153, 119 Cal. Rptr. 245*

No confidential relationship exists between spouses when cross complaint and husband's testimony showed history of wife's broken promises from time of marriage and continuous course of cruel and abusive conduct toward husband. *Buchmayer v. Buchmayer (1945) 68 Cal. App. 2d 462, 470, 157 P.2d 9*

[5] Mistake of Fact

[a] Mutual Mistake of Fact

When each party has different intention regarding some primary aspect of subject matter, mutual mistake prevents formation of contract because there is no meeting of minds. *Balistreri v. Nevada Livestock Production Credit Assn. (1989) 214 Cal. App. 3d 635, 640-642, 262 Cal. Rptr. 862* (lender intended one property be pledged as collateral, trustors intended to pledge another); *Merced County Sheriff's Employees' Assn. v. County of Merced (1987) 188 Cal. App. 3d 662, 675-677, 233 Cal. Rptr. 519*

When contract provided that purchaser would take property subject to existing loan, lender's demand for purchaser's financial statement did not provide ground for rescission on basis of mutual mistake because there was no showing that seller contemplated that no financial information would be requested. *Spurgeon v. Drumheller (1985) 174 Cal. App. 3d 659, 663-664, 220 Cal. Rptr. 195*

Mistake of fact was material, and thus sufficient for relief when both parties at time of execution of contract for removal of sand, gravel, and aggregates mistakenly believed that deposits of clay, which were on top of aggregates, were to be removed by third party in accordance with contract for sale of clay that was later canceled. *Sand v. Concrete Serv. Co. (1959) 176 Cal. App. 2d 169, 171, 174-175, 1 Cal. Rptr. 257*

[b] Unilateral Mistake of Fact

Failure to read document before signing it did not bar relief for unilateral mistake that would have been discovered by reading document if mistaken party relied on representation by other party. *Balistreri v. Nevada Livestock Production Credit Assn. (1989) 214 Cal. App. 3d 635, 642-644, 262 Cal. Rptr. 862* (cover letter referred to different property of plaintiffs than was encumbered by enclosed deed of trust)

Summary judgment based on accord and satisfaction was error if one party's unilateral mistake in demand letter should have been known to other party; triable question of fact existed regarding whether attorney for nonmistaken party should have known that amount of interest claimed in demand letter was based on miscalculation. *Bldg. Serv. Emp. Pension Tr. v. Amer. Bldg. Maint. (9th Cir. 1987) 828 F.2d 576, 578* (applying California law)

Ordinary negligence was not neglect of legal duty; defendant was not liable for failure to perform under contract entered into under unilateral mistake of fact when plaintiff knew that contract as bid was unprofitable; plaintiff's suppression of fact that contract was underbid amounted to fraud. *Architects & Contractors Estimating Service, Inc. v. Smith (1985) 164 Cal. App. 3d 1001, 1007-1008, 211 Cal. Rptr. 45*

Contract was rescindable for mistake of fact when plaintiffs knew agreement signed by defendant was not same as latter had instructed lawyer to prepare, defendant relied on plaintiffs' representations that agreement complied with defendant's instructions, and plaintiffs benefited by change in agreement. *Reid v. Landon (1958) 166 Cal. App. 2d 476, 484, 333 P.2d 432*

[6] Mistake of Law

[a] Allowing Relief

Court was equitably empowered to treat stipulated dismissal as rescinded and rule on substance of dispute when dismissal was entered into under both parties' mistaken belief that law did not permit them to proceed with suit until administrative remedies had been exhausted. *Gayle Mfg. Co. v. Federal Sav. & Loan Ins. Corp. (9th Cir. 1990) 910 F.2d 574, 582 n.6* (applying California law)

Summary judgment for plaintiff reversed because defendants raised triable issues of fact as to whether they were entitled to rescind settlement agreement based on mutual mistake of fact or law; parties' mutual mistake regarding amendment to Probate Code, which would diminish plaintiff's damages from trust which exposed trustees to tax liability, went to heart of agreement settling action for legal malpractice in drafting trust. *Harris v. Rudin, Richman & Appel (2002) 95 Cal. App. 4th 1332, 1339-1341, 116 Cal. Rptr. 2d 552*

Relief for mistake of law was permitted when plaintiff alleged (1) defendant made representations about use of space, (2) plaintiff relied on representations in buying share, (3) plaintiff learned that she could not use space as planned, and (4) plaintiff gave prompt notice of rescission, offering to restore things of value received. *Stock v. Meek (1950) 35 Cal. 2d 809, 815, 221 P.2d 15*

When mistake of law deprives one party of valuable right and gives other party material advantage not contemplated by either party, court of equity properly adjusts parties' rights as though law was what parties supposed it to be if that is necessary for justice to be done. *Benson v. Bunting (1900) 127 Cal. 532, 537, 59 P. 991* ; *Brown v. Volz (1949) 90 Cal. App. 2d 793, 800, 204 P.2d 110*

Contract was able to be rescinded on ground of mistake of law or fact when plaintiff leased property thinking it could be rented for larger sum than allowed under federal rent control regulations. *Adams v. Heinsch (1948) 89 Cal. App. 2d 300, 303-305, 200 P.2d 796*

Evidence in case showed contract entered into by each party under mistake of law when plaintiff told bank she wanted her husband to be able to draw on bank account in case of her death, plaintiff and husband signed new deposit agreement, and plaintiff believed bank account was still her sole property. *Spear v. Farwell (1935) 5 Cal. App. 2d 111, 112-113, 42 P.2d 391*

[b] Relief Not Available

Employee who filed retirement application in mistaken belief that retirement could be rescinded was not entitled to rescind retirement on ground of unilateral mistake of law [*see* Civ. Code § 1578(2)] when there was no showing that employer induced or knowingly took advantage of mistake. *Williams v. City of Los Angeles (1991) 229 Cal. App. 3d 1627, 1636, 281 Cal. Rptr. 21*

Cross-complaint did not state cause of action for rescission on ground of mutual mistake when allegation did not state actual mistake on cross complainant's part but only stated that mutual mistake occurred "if" cross defendants' claim that cross complainants acted as their agents was well founded. *Wood v. Metzenbaum (1951) 107 Cal. App. 2d 727, 730-731, 237 P.2d 703*

[7] Innocent Misrepresentation

Innocent misrepresentation not enumerated as ground for rescission, but as type of mistake within meaning of *Civ. Code § 1689(b)(1)* that entitles one to rescission. *Guthrie v. Times-Mirror Co. (1975) 51 Cal. App. 3d 879, 890, 124 Cal. Rptr. 577* ; *Crocker-Anglo Nat. Bank v. Kuchman (1964) 224 Cal. App. 2d 490, 495-496, 36 Cal. Rptr. 806*

Rule allowing rescission for innocent misrepresentation is based on equitable principle that it would be unjust to allow one who has made false representation, however innocently, to retain fruits of bargain. *Crocker-Anglo Nat. Bank v. Kuchman (1964) 224 Cal. App. 2d 490, 497, 36 Cal. Rptr. 806*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 215.112 Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 256-321; vol. 2, *Insurance*, §§ 68, 216, 217, 224, 225, 231, 232 (10th ed. 2005)

Witkin, California Procedure, vol. 4, *Pleading*, §§ 505-511 (defense), vol. 5, *Pleading*, § 1016 (rescission) (4th ed. 1997)

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[Reserved]

§§ 215.114[Reserved]

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17-215 California Forms of Pleading and Practice--Annotated § 215.120

§ 215.120 Allegation of Threats of and Actual Confinement of Person or Property and Threats of Injury to Person or Property [Civ. Code §§ 1569, 1570]

[1] FORM Allegation of Threats of and Actual Confinement of Person or Property and Threats of Injury to Person or Property [Civ. Code §§ 1569, 1570]

1. The apparent consent of _____ [plaintiff *or* defendant] to the contract referred to _____ [above *or* in the complaint] was not real, mutual, or free, in that it was obtained through duress and menace as herein alleged.

2. _____ [*Allege relationship of pleading party to confined party or ownership of property by relative of party or by party, e.g.,* At all times herein mentioned, _____ (plaintiff *or* defendant) was the owner and entitled to immediate possession of _____ (*describe property*)].

3. _____ [*Allege threats of unlawful or violent injury to person or property, e.g.,* On numerous occasions on and about _____ (*date*), defendant threatened and told plaintiff that unless he/she agreed to (and signed) the contract, unlawful and violent injury would be done to his/her property, namely that _____ (*set forth threats, describing property threatened, e.g.,* his/her property would be defaced, damaged, wrecked, and diminished in value)].

[4. *If appropriate, allege unlawful threats to and actual confinement of relative or detention of property, e.g.,* On or about _____ (*date*), _____ (plaintiff *or* defendant) threatened to and did seize and take possession of the property described above, and then and there detained and refused to release it until and unless _____ (plaintiff *or* defendant) manifested consent to the terms of (and signed) the contract.]

5. _____ [Plaintiff *or* Defendant] greatly feared for the safety of _____ [*specify, e.g.,* his/her property]. Any and all apparent consent of _____ [plaintiff *or* defendant] to the contract was obtained from him/her solely through the duress and menace consisting in the threat of and unlawful detention of and threat of injury to _____ [plaintiff's *or* defendant's] _____ [*specify, e.g.,* property].

_____ [Plaintiff *or* Defendant] would not have consented to the contract had it not been for the duress and menace.

6. _____ [Plaintiff *or* Defendant] seeks rescission of the contract because _____ [plaintiff *or* defendant] has no other adequate remedy at law. If the contract is not rescinded, _____ [plantiff *or* defendant] will suffer irreparable harm and injury because _____ [plaintiff *or* defendant] _____ [*e.g.*, will be deprived of his/her bargain by having been forced to sell property he/she did not want to].

[2] Use of Form

The form of allegation of duress and menace in [1], *above*, may be used in a complaint for rescission of a contract, or in an affirmative defense in an answer to a complaint for damages for breach of contract when a party was forced to consent to the contract by duress and menace as defined in *Civ. Code §§ 1569* and *1570* [*see § 215.99*].

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17-215 California Forms of Pleading and Practice--Annotated § 215.121

§ 215.121 Allegation of Deprivation of Exercise of Free Will Without Confinement of Person or Detention of Property [Civ. Code § 1569]

[1] FORM Allegation of Deprivation of Exercise of Free Will Without Confinement of Person or Detention of Property [Civ. Code § 1569]

1. The apparent consent of _____ [*name of party*] to the contract referred to _____ [above *or* in the complaint] was not real, mutual, or free in that it was obtained through duress as herein alleged.

2. _____ [*Allege facts showing the unlawful act performed by the party who obtained the pleading party's consent to the contract, e.g.,* On or about _____ (*date*), defendant wrongfully and unlawfully filed an action in the _____ Court of _____ County to foreclose a certain mortgage on the property which is the subject of the contract, and in connection with that action caused a notice of lis pendens to be filed against the property. At that time, defendant knew that nothing was due on that mortgage or on the obligation it secured].

3. _____ [*Allege facts showing that the pleading party was deprived of the exercise of his/her free will, e.g.,* The notice of lis pendens created and constituted a cloud on plaintiff's title to the property, by reason of which plaintiff was unable to find a buyer willing to pay the otherwise reasonable market value of the property. Plaintiff had no reasonable alternative and was forced to (agree to) sell (and convey) the property to defendant for $_____, which amounted to a fraction of its market value of $_____].

4. _____'s [*Name of pleading party*] consent was obtained solely through duress [and menace] consisting of _____[*specify, e.g.,* the unlawful use of civil process to cloud title to his/her property], and he/she would not have given the consent had it not been for the duress.

5. Plaintiff seeks rescission of the contract because plaintiff has no other adequate remedy at law. If the contract is not rescinded, plantiff will suffer irreparable harm and injury because plaintiff _____ [*e.g.,* will be deprived of his/her bargain by having been forced to sell property at an unfairly low price].

[2] Use of Form

The allegation of duress in [1], *above*, may be used by a plaintiff in an action for rescission of a contract, or by a defendant as an affirmative defense in an action on a contract that the consenting party was induced to enter into by the unlawful act of another under circumstances that deprived him or her of the exercise of free will but when there were no threats of or actual confinement of a person or detention of property. For coverage of this type of duress, see the discussion in *§ 215.21*. The allegations may also be used in a complaint based on a common count to recover the money paid under duress [*see Leeper v. Beltrami (1959) 53 Cal. 2d 195, 203, 1 Cal. Rptr. 12, 347 P.2d 12* ; *see also 215.99*].

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17-215 California Forms of Pleading and Practice--Annotated § 215.122

§ 215.122 Allegation of Economic or Business Duress [Civ. Code § 1569]

[1] FORM Allegation of Economic or Business Duress [Civ. Code § 1569]

1. _____ [The apparent consent of _____ (*name of pleading party*) to the contract referred to _____ (above *or* in the complaint) was not real, mutual, or free in that it was obtained through duress and menace as herein alleged *or* The payments made by _____ (*name of pleading party*) to _____ (*name of party exacting consent*) were involuntary and _____'s (*name of pleading party*) apparent consent was not real, mutual, or free in that it was obtained through duress and menace as herein alleged].

2. _____ [*Allege facts showing business or property interests of pleading party, e.g.,* On _____ (*date*), plaintiff and defendant entered into an agreement by which defendant agreed to lease to plaintiff certain real property consisting of _____ (*give address and description of property*). The lease provided that the rental would be $_____ per month until certain remodeling was finished and then the rent would increase to $_____ per month]. [A copy of that lease is attached marked Exhibit "A" and made a part hereof.]

3. _____ [*Allege facts showing threats of unlawful action by other party concerning the pleading party's business or property interest, e.g.,* On or about _____ (*date*), defendant threatened plaintiff that if plaintiff did not pay the higher rental fee before the remodeling of the premises was completed, the defendant would cancel the lease and institute legal proceedings to evict plaintiff from the leased premises].

4. In order to protect his/her/its _____ [business *or* property] interests, _____ [*name of pleading party*] considered that he/she/it had no reasonable alternative and that it was necessary to _____ [enter into the contract *or* make the payments]. Any and all apparent consent of _____ [*name of pleading party*] to the contract was obtained from him/her/it solely through the economic duress and the menace of _____ [*name of party exacting consent*]. [_____ (*Name of pleading party*) would not have consented to the contract had it not been for the duress and menace.]

5. _____ [*Name of pleading party*] seeks rescission of the contract because _____ [*name of pleading party*] has no other adequate remedy at law. If the contract is not rescinded, _____ [*name of pleading party*] will suffer irreparable harm and injury because _____ [*name of pleading party*] _____ [*e.g.*, will be deprived of his/her bargain by having to pay more rent than was originally agreed].

[2] Use of Form

The form of allegation of duress and menace in [1], *above*, may be used in a complaint for rescission of a contract, or in an answer to a complaint for damages for breach of contract as an affirmative defense when the consent to the contract or the payments was obtained by threats to business or property interests. For a discussion of economic duress, see the discussion in *§ 215.22* [*see also § 215.99*]. The sample facts used in this form are based on the facts of *Lewis v. Fahn (1952) 113 Cal. App. 2d 95, 247 P.2d 831* .

This form of allegation of duress and of menace may also be used in a common count for recovery of money paid under duress [*City Bank of San Diego v. Ramage (1968) 266 Cal. App. 2d 570, 585, 72 Cal. Rptr. 273* (common law action for money had and received as lying to recover money obtained by fraud, misrepresentation, duress, undue influence, and mistake of fact); *see* Ch. 121, *Common Counts*].

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[Reserved]

§§ 215.123[Reserved]

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17-215 California Forms of Pleading and Practice--Annotated § 215.130

§ 215.130 Allegation of Confidential Relationship Raising Presumption of Undue Influence or Constructive Fraud [Civ. Code §§ 1573(1), 1575(1)]

[1] FORM Allegation of Confidential Relationship Raising Presumption of Undue Influence or Constructive Fraud [Civ. Code §§ 1573(1), 1575(1)]

1. _____ [*Allege confidential relationship between plaintiff and defendant, e.g.,* On or about _____ (*date*), plaintiff engaged defendant as plaintiff's attorney for the purpose of handling plaintiff's affairs and at all times herein mentioned defendant acted as attorney for plaintiff].

2. _____ [*Allege benefit or advantage obtained by party in whom confidence was reposed, or breach of duty resulting in advantage to person in whom confidence was reposed, e.g.,* At a time when plaintiff was in need of capital to carry on operations of a corporation in which plaintiff owned a majority of the stock, defendant induced plaintiff to sell the assets to defendant by signing an agreement which is attached as Exhibit A and made a part hereof. Plaintiff executed the agreement on the recommendation of defendant and because of plaintiff's trust and confidence in defendant as his/her attorney. Defendant induced plaintiff to enter into the agreement for the purpose of enabling defendant to secure for his/her own personal benefit certain profits and advantages and he/she did secure these advantages. Defendant failed to fully disclose all the facts of the transaction to plaintiff and represented to plaintiff that he/she would have only a nominal interest in the new corporation. Plaintiff would not have entered into the transaction if he/she had known that the facts were not as they were represented to him/her].

3. Plaintiff seeks rescission of the contract because plaintiff has no other adequate remedy at law. If the contract is not rescinded, plaintiff will suffer irreparable harm and injury because plaintiff _____ [*e.g.,* will be deprived of a share of profits in and control of his/her company].

[2] Use of Form

The allegation in [1], *above,* may be used by a plaintiff in a complaint for rescission of a contract, or by a defendant as an affirmative defense in an action on a contract [*see, e.g., BGJ Associates v. Wilson (2003) 113 Cal. App. 4th 1217, 1226-1230, 7 Cal. Rptr. 3d 140* , discussed in *§ 215.81[3]*] when a confidential relationship existed between the

plaintiff and defendant (Paragraph 1) and the party in whom confidence was reposed obtained an advantage from the relationship (Paragraph 2). These allegations are enough to raise the presumption of undue influence, discussed in *§§ 215.40 -215.42*, and shift the burden of proof to the party in whom confidence was reposed [*Civ. Code § 1575(1)*; *Boyd v. Bevilacqua (1966) 247 Cal. App. 2d 272, 290-291, 55 Cal. Rptr. 610* ; *Platt v. Wells Fargo Bank (1963) 222 Cal. App. 2d 658, 667, 35 Cal. Rptr. 377 , cert. denied, (1964) 377 U.S. 965* ; for a form alleging undue influence when no confidential relation existed or no presumption of undue influence arises from the relationship, *see § 215.131[2]*].

[3] Allegations for Constructive Fraud

[a] Intent

In general, intent to deceive or other fraudulent intent is not required to establish constructive fraud as a defense to enforcement of a contract. Rather, fraud is presumed from the parties' confidential relationship [*Civ. Code § 1573(1)*; *Byrum v. Brand (1990) 219 Cal. App. 3d 926, 936-938, 268 Cal. Rptr. 609* ; *see* discussion in *§ 215.70[5]*]. *Byrum* did not to address the issue in the pleading context, but reversed a defense verdict in favor of an investment advisor who failed to disclose material adverse facts regarding a venture in which he induced plaintiff to invest on the ground that the special verdict form asking whether defendant intentionally failed to disclose facts that should have been disclosed because of the parties' confidential relationship was an incorrect statement of the law and served to confuse and mislead the jury [*Byrum v. Brand (1990) 219 Cal. App. 3d 926, 936-938, 268 Cal. Rptr. 609* (noting that Witkin, California Procedure, Vol. 5, *Pleading*, § 666 (3d ed. 1985) recommends intent to deceive be alleged, while 34 Cal. Jur. 3d *Fraud and Deceit*, § 72 states that it is not necessary to allege intent to deceive)].

For discussion of various relationships held to be confidential for purposes of constructive fraud, and a form for a complaint for tort damages based on constructive fraud, see Ch. 269, *Fraud and Deceit* .

[b] Reliance

The pleading and proof of the reliance element is relaxed in constructive fraud to the extent that reliance on the misrepresentation or nondisclosure of a fiduciary may be presumed unless there is direct evidence of lack of reliance [*Estate of Gump (1991) 1 Cal. App. 4th 582, 601, 603, 2 Cal. Rptr. 2d 269* (trustee's fee claim; absent reliance by beneficiaries, no constructive fraud found); *Toedter v. Bradshaw (1958) 164 Cal. App. 2d 200, 208, 330 P.2d 688]* .

A person may be found to have reasonably relied on the legal opinion of a nonlawyer when the recipient of the opinion is in a relationship of trust with, or reasonably believes that, the maker of the opinion has special knowledge or skill on a particular matter [*Lynch v. Cruttenden & Co. (1993) 18 Cal. App. 4th 802, 808]* . As in the example used in this form, it may be useful to allege in general terms the pleading party's reliance by following the advise or recommendation of the fiduciary or party in whom confidence was reposed because of his or her trust and confidence in that party.

In addition, even in the absence of a fiduciary relationship, failure to read a contract is considered excusable when reliance is placed on the misrepresentation of the party with superior knowledge or skill [*Lynch v. Cruttenden & Co. (1993) 18 Cal. App. 4th 802, 807]* .

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17-215 California Forms of Pleading and Practice--Annotated § 215.131

§ 215.131 Allegation of Unfair Advantage Taken of Confidence and Weakness Though No Confidential Relationship Presumed From Parties' Relationship [Civ. Code § 1575(2), (3)]

[1] FORM Allegation of Unfair Advantage Taken of Confidence and Weakness Though No Confidential Relationship Presumed From Parties' Relationship [Civ. Code § 1575(2), (3)]

1. _____ [*Allege, with particularity, facts showing that parties had a confidential relationship, e.g.,* On or about _____ (*date*), plaintiff was 84 years old and was bereaved and distressed by the death of her husband on _____ (*date*). At that time plaintiff reposed confidence in defendant, a nurse who had assisted in the care of plaintiff's husband for four years, until his death, and who continued to care for plaintiff in the role of nurse, adviser, and confidante].

2. _____ [*Name of party in whom confidence was reposed*] used the confidence reposed in her/him by _____ [*name of pleading party*] to gain an unfair advantage of _____'s [*name of pleading party*] weakness of mind and distress in that _____ [*specify, including facts showing benefit or advantage obtained by party in whom confidence was reposed, e.g.,* defendant induced and caused plaintiff to sign the deed giving defendant plaintiff's lifetime home without receiving any consideration from defendant for it].

3. The apparent consent of _____ [*name of pleading party*] to the _____ [*specify, e.g.,* deed] was not real, mutual, or free in that it was obtained through this undue influence, and _____ [*name of pleading party*] would not have given his/her consent but for the undue influence.

4. _____ [*Name of pleading party*] seeks rescission of the contract because _____ [*name of pleading party*] has no other adequate remedy at law. If the contract is not rescinded, _____ [*name of pleading party*] will suffer irreparable harm and injury because _____ [*name of pleading party*] _____ [*e.g.,* will be deprived of the use of his/her property by having given it to _____ (*name of party in whom confidence was reposed*)].

[2] Use of Form

The allegation in [1], *above,* may be used by a plaintiff in a complaint for rescission of a contract, or by a defendant as an affirmative defense in an action on a contract when the party's consent was obtained by the use of undue influence in that the other party took advantage of the confidence reposed in him or her and of the party's weakness of mind, necessities, or desires [*see Civ. Code § 1575(2), (3)*]. It is for use when no confidential relationship existed between plaintiff and defendant or when a confidential relationship existed between the parties from which the presumption of undue influence did not arise automatically. For example, this might arise in a parent-child relationship [*see, e.g., Williams v. Williams (1958) 163 Cal. App. 2d 144, 148-149, 329 P.2d 70* ; *Longmire v. Kruger, (1926) 80 Cal. App. 230, 240-241, 251 P. 692* (grandson; donee in loco parentis)].

Except those relationships that statutes hold to be fiduciary or confidential [*see § 215.70[5]*; *see also §§ 215.80 -215.83*], the existence of a confidential relationship is a question of fact and can be determined only on a case-by-case basis [*O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 153, 119 Cal. Rptr. 245* ; *Kloehn v. Prendiville (1957) 154 Cal. App. 2d 156, 160, 316 P.2d 17]* . A finding of a confidential relationship is not necessary to establish undue influence under *Civ. Code § 1575(2)* or *(3)* [*Buchmayer v. Buchmayer (1945) 68 Cal. App. 2d 462, 467, 157 P.2d 9* ; *Wells Fargo Bank v. Brady (1953) 116 Cal. App. 2d 381, 398-399, 254 P.2d 71* (weakness of mind)]. However, a confidential relationship is alleged in this form (Paragraph 1) [*see Faulkner v. Beatty (1958) 161 Cal. App. 2d 547, 550-552, 327 P.2d 41* (case on which allegations in this form are based and which found confidential relationship to exist)] because, if a confidential relationship is established, the burden of proof will shift to the benefited party, who will then be required to prove that no unfair advantage was taken or that the transaction was fair [*O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 153, 155-156, 119 Cal. Rptr. 245* (finding of confidential relationship); *Faulkner v. Beatty (1958) 161 Cal. App. 2d 547, 550-552, 327 P.2d 41* ; *Stewart v. Marvin (1956) 139 Cal. App. 2d 769, 775, 294 P.2d 114* (husband and wife, reconciled after interlocutory decree of dissolution); *Longmire v. Kruger (1926) 80 Cal. App. 230, 240-241, 251 P. 692* (grandson; donee in loco parentis, but no specific finding of confidential relationship)]. Most of these cited cases find a confidential relationship between the parties, but also hold that, to shift the burden of proof to the beneficiary/grantee of an inter vivos gift or deed to establish that the transaction was fair and not obtained by taking advantage of the grantor/donee's weakness of mind, all that is necessary is evidence of the grantor/donee's age, susceptibility to imposition, and infirmity and slight evidence of circumstances from which it may be inferred that the instrument was the product of coercion [*O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 153, 155-156, 119 Cal. Rptr. 245* ; *Faulkner v. Beatty (1958) 161 Cal. App. 2d 547, 550-552, 327 P.2d 41* ; *Stewart v. Marvin (1956) 139 Cal. App. 2d 769, 775, 294 P.2d 114* ; *Longmire v. Kruger (1926) 80 Cal. App. 230, 240-241, 251 P. 692]* .

For a form to use to allege undue influence when the parties were in a confidential relationship from which a presumption of undue influence arises, see *§ 215.130*.

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17-215 California Forms of Pleading and Practice--Annotated § 215.132

§ 215.132 Allegation of Unfair Advantage Taken of Weakness or Distress [Civ. Code § 1575(2), (3)]

[1] FORM Allegation of Unfair Advantage Taken of Weakness or Distress [Civ. Code § 1575(2), (3)]

1. The consent of _____ [*name of pleading party*] to the alleged herein _____ [*specify, e.g.,* resignation] was not real, mutual, or free in that it was obtained through undue influence as herein alleged.

2. _____ [*Allege relationship between plaintiff and defendant, e.g.,* Plaintiff was the superintendent of the school district in which defendant was employed as a teacher].

3. At the time that _____ [*name of pleading party*] signed the _____ [*specify, e.g.,* resignation] he/she was under such severe mental and emotional strain due to _____ [*specify reasons such as lack of sleep, arrest by police, and pressure by these factors, e.g.,* having just completed the process of arrest, questioning by the police, booking, release on bail and having gone for 40 hours without sleep, causing him to be completely exhausted and in an emotional turmoil] that he/she was incapable of rational thought or action.

4. While _____ [*name of pleading party*] was in this condition and unable to think clearly the following events occurred:

[*EITHER*]

a. _____ [*Name of party using undue influence*] discussed the transaction at an unusual or inappropriate time in that _____ [*specify, e.g.,* he came to plaintiff's home at 2:00 a.m.];

[*AND/OR*]

b. The transaction was consummated in an unusual place in that _____ [*specify, e.g.,* defendant came

to plaintiff's house to discuss a business matter];

[*AND/OR*]

c. _____ [*Name of party using undue influence*] insisted that the business be finished at once;

[*AND/OR*]

d. _____ [*Name of party using undue influence*] placed an extreme emphasis on the untoward consequences of delay in that _____ [*specify, e.g.,* defendant stated that if plaintiff did not resign his position immediately the school district would suspend and dismiss him from his position and publicize the proceedings and his arrest];

[*AND/OR*]

e. _____ [*Name of pleading party*] was by himself/herself but _____ [*name of party using undue influence*] brought several other people with him/her to talk to _____ [*name of pleading party*];

[*AND/OR*]

f. _____ [*Name of pleading party*] consented to the agreement without receiving advice from any other person as to what action to take;

[*AND/OR*]

g. _____ [*Name of party using undue influence*] told _____ [*name of pleading party*] that there was no time to consult _____ [an attorney *or* a financial advisor].

[*CONTINUE*]

5. Because of _____'s [*name of pleading party*] belief in _____'s [*name of party using undue influence*] representations, _____ [*name of party using undue influence*] was able to substitute his/her will and judgment in place of _____'s [*name of pleading party*] and thus obtain _____'s [*name of pleading party*] signature to the _____ [*specify, e.g.,* resignation]. _____'s [*Name of pleading party*] consent would not have been given but for this undue influence.

6. _____ [*Name of pleading party*] seeks rescission of the contract because _____ [*name of pleading party*] has no other adequate remedy at law. If the contract is not rescinded, _____ [*name of pleading party*] will suffer irreparable harm and injury because _____ [*name of pleading party*] _____ [*e.g.,* will be unfairly deprived of his/her job].

[2] Use of Form

The allegation in [1], *above*, is for use by a plaintiff in a complaint to rescind a contract, or by a defendant as an affirmative defense to an action on a contract when no confidential relationship existed between plaintiff and defendant and the other party took unfair advantage of the alleging party's weakness or distress so that the latter's consent to the contract was obtained through undue influence [*Civ. Code § 1575(2), (3)*]. The allegations in paragraphs 4a through 4g contain each of the elements discussed in *§ 215.41[3]* [*see Keithley v. Civil Service Bd. (1970) 11 Cal. App. 3d 443, 452, 89 Cal. Rptr. 809* ; *Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 133, 54 Cal. Rptr. 533]* .

For forms alleging undue influence when the parties were in a confidential relationship, see *§§ 215.130, 215.131*.

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[Reserved]

§§ 215.133[Reserved]

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17-215 California Forms of Pleading and Practice--Annotated § 215.140

§ 215.140 Allegation of Mutual Mistake of Fact [Civ. Code § 1577]

[1] FORM Allegation of Mutual Mistake of Fact [Civ. Code § 1577]

1. The consent of _____ [*name of pleading party*] to the _____ [above-referenced contract *or* contract referred to in the complaint] was not real, mutual, or free in that it was obtained solely through mistake as herein alleged.

2. Plaintiff and defendant entered into the contract under a material, mutual mistake of fact in that _____ [*specify facts showing mutual mistake as to basic or material fact, e.g.,* the parties to the lease believed that the second floor of the building could be used as a restaurant and bar without any structural changes to the brick building. The parties did not contemplate at the time the lease was executed that costly structural changes to the building itself would have to be made; however, unknown to both parties, substantial alterations to the building, including portions not leased by plaintiff, were required by law to use the second floor as planned].

3. _____ [*Name of pleading party*] was induced to enter the contract because of his/her mistaken belief that _____ [*specify, e.g.,* no major structural changes would need to be made to the building to use the second floor as a restaurant and bar].

4. As a result of the mutual mistake of fact of the parties, _____ [*name of pleading party*] was injured in that _____ [*specify harm or injury to party seeking to avoid enforcement of contract, e.g.,* the lease specifies that plaintiff must pay for any alterations to be made to the building to use the second floor as a restaurant and bar and the cost of these alterations was substantially more than the parties contemplated when entering in the contract because of the necessity of making the building comply with legal requirements].

5. _____ [*Name of pleading party*] would not have given his/her apparent consent to the contract except for his/her mistaken belief.

6. _____ [*Name of pleading party*] seeks rescission of the contract because _____ [

name of pleading party] has no other adequate remedy at law. If the contract is not rescinded, _____ [*name of pleading party*] will suffer irreparable harm and injury because _____ [*name of pleading party*] _____ [*e.g.*, will be deprived of his/her bargain by having to perform more structural repairs than the parties contemplated].

[2] Use of Form

The allegation in [1], *above*, is for use by a plaintiff in a complaint for rescission of a contract, or by a defendant as an affirmative defense in an action on a contract when the contract was entered into under a mutual mistake of fact material to the contract. The factual allegations used as examples in this form are derived from *Williams v. Puccinelli (1965) 236 Cal. App. 2d 512, 46 Cal. Rptr. 285* , in which the court of appeal affirmed the judgment for rescission despite the defendant's contention that the plaintiff was negligent in not discovering the structural defects before entering into the lease. The court relied on testimony that a nonexpert could not have determined from physical observation that the structural work would have to be done and on the fact that not all carelessness amounts to neglect of legal duty that would bar relief [*Williams v. Puccinelli (1965) 236 Cal. App. 2d 512, 518-519, 46 Cal. Rptr. 285]* .

[3] Cross References

For discussion and forms relating to cancellation of instruments, see Ch. 107, *Cancellation of Instruments*

For forms of complaint for reformation based on mistake, see Ch. 488, *Reformation of Instruments*

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17-215 California Forms of Pleading and Practice--Annotated § 215.141

§ 215.141 Allegation of Unilateral Mistake of Fact--Other Party Aware of Mistake [Civ. Code § 1577]

[1] FORM Allegation of Unilateral Mistake of Fact--Other Party Aware of Mistake [Civ. Code § 1577]

1. The consent of _____ [*name of pleading party*] to the contract referred to _____ [above *or* in the complaint] was not real, mutual, or free in that it was obtained solely through mistake as herein alleged.

2. _____ [*Name of pleading party*] entered into the above-described contract under a mistake of fact material to the contract in that _____ [*specify facts showing mistake of fact material to the contract, e.g.,* he thought he could complete the work for a cost of $70,000 but the work sheet used to determine the fee contained an error in addition resulting in the fee being substantially lower than it should have been].

[*EITHER*]

3. _____ [*Name of party wanting contract enforced*] was aware of the mistake of _____ [*name of pleading party*] and unfairly used that mistake to take advantage of _____ [*name of pleading party*] in that _____ [*specify, e.g.,* plaintiff notified defendant of the mistake in addition on the work sheet as soon as he/she became aware of it but after the contract had been executed, but defendant refused to agree to pay the proper fee and insisted on paying the lower fee stated on the work sheet].

[*OR*]

3. _____ [*Name of party wanting contract enforced*] was, or should have been, aware of the mistake of _____ [*name of pleading party*] *in that* _____ [*specify, e.g.,* plaintiff's bid was half the amount of any other bid submitted to defendant].

[*CONTINUE*]

4. As a result of the mistake of fact _____ [*name of pleading party*] was injured in that _____ [*specify harm or injury to party seeking to avoid enforcement of the contract, e.g.,* if plaintiff is required to perform the contract he will lose a substantial sum of money in the amount of $_____ since he cannot perform the work required for the fee stated in the work sheet].

5. _____ [*Name of pleading party*] would not have given his/her apparent consent to the contract if the mistake had not existed.

6. _____ [*Name of pleading party*] seeks rescission of the contract because _____ [*name of pleading party*] has no other adequate remedy at law. If the contract is not rescinded, _____ [*name of pleading party*] will suffer irreparable harm and injury because _____ [*name of pleading party*] _____ [*e.g.,* will be deprived of his/her bargain by having to perform for substantially less money than the parties contemplated].

[2] Use of Form

The allegation in [1], *above,* is for use by a plaintiff in a complaint for rescission of a contract, or by a defendant as an affirmative defense in an action on a contract when the party seeking to avoid the contract entered into it under a unilateral mistake of fact of which the other party was aware and which the other party took advantage of to the complaining party's detriment [*see §§ 215.51[4], 215.52*; *compare* § 215.140 (form of allegation of mutual mistake of fact) *with* § 215.143 (form of allegation of innocent misrepresentation)].

For further discussion and references on mistake of fact see *§ 215.140*.

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17-215 California Forms of Pleading and Practice--Annotated § 215.141A

§ 215.141A Allegation of Unilateral Mistake of Fact--Other Party Unaware of Mistake

[1] FORM Allegation of Unilateral Mistake of Fact--Other Party Unaware of Mistake

1. The consent of _____ [*name of pleading party*] to the contract was not real, mutual, or free in that it was obtained solely through mistake as herein alleged.

2. _____ [*Name of pleading party*] entered into the contract under a mistake of fact regarding _____ [*specify facts showing basic assumption upon which defendant made contract*].

3. The mistake of fact has a material effect upon the agreed-upon exchange of performance that is adverse to _____ [*name of pleading party*], in that _____ [*describe effect of mistake upon performance*].

4. _____ [*Name of pleading party*] does not bear the risk of that mistake because _____ [*describe*].

5. The effect of the above-described mistake is such that enforcement of the contract would be unconscionable, in that _____ [*specify harm or injury to party seeking to avoid enforcement of the contract*].

6. _____ [*Name of pleading party*] seeks rescission of the contract because _____ [*name of pleading party*] has no other adequate remedy at law.

[2] Use of Form

The allegation in [1], *above*, is for use in a complaint for rescission of a contract, or as an affirmative defense in an action on a contract when the party seeking to avoid the contract entered into it under a unilateral mistake of fact, of which the other party was unaware [*compare* § 215.141]. The California Supreme Court has stated that when a plaintiff has no reason to know of and does not cause the defendant's unilateral mistake of fact, the defendant must establish the facts listed in [1], *above*, to obtain rescission of the contract [*Donovan v. RRL Corp. (2001) 26 Cal. 4th 261, 281-282,*

294, 109 Cal. Rptr. 2d 807, 27 P.3d 702 (auto dealership's lack of knowledge regarding typographical error in advertised price of car constituted mistake of fact; rescission was warranted because evidence established that unilateral mistake of fact was made in good faith, defendant did not bear risk of mistake, and enforcement of contract with erroneous price would be unconscionable); *see § 215.52[4]*].

For further discussion and references on mistake of fact, see *§ 215.140*.

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17-215 California Forms of Pleading and Practice--Annotated § 215.142

§ 215.142 Allegation of Mistake of Law [Civ. Code § 1578]

[1] FORM Allegation of Mistake of Law [Civ. Code § 1578]

1. The consent of _____ [*name of pleading party*] to the contract referred to _____ [above *or* in the complaint] was not real, mutual, or free in that it was obtained solely through mistake as herein alleged.

2. Due to a _____ [mutual mistake of law by plaintiff and defendant *or* mistake of law by plaintiff which was known to defendant, but which defendant never rectified or mentioned to plaintiff], the contract states _____ [*specify wording of contract that gave rise to mistake, e.g.,* that plaintiff and her husband are joint tenants of the bank account].

3. At all relevant times _____ [plaintiff and defendant believed *or* plaintiff believed, and communicated this belief to defendant,] that _____ [*specify what parties believed law to be, e.g.,* the wording of the contract merely meant that plaintiff's husband could draw on the account after plaintiff's death but that plaintiff was the sole owner of the account during her lifetime].

4. As a result of the mistake of law, _____ [*name of pleading party*] was injured in that _____ [*specify harm or injury to party seeking to avoid contract, e.g.,* plaintiff's husband has withdrawn money from plaintiff's account].

5. _____ [*Name of pleading party*] would not have given his/her consent to the contract had he/she not believed and understood the law and its effect on the contract to be as stated above, and had he/she not believed and understood that defendant also had the same understanding of the law and its effect on the contract.

6. _____ [*Name of pleading party*] seeks rescission of the contract because _____ [*name of pleading party*] has no other adequate remedy at law. If the contract is not rescinded, _____ [*name of pleading party*] will suffer irreparable harm and injury because _____ [*name of pleading party*] _____ [*e.g.,* will be deprived of his/her bargain because of the parties' mutual mistake

regarding the bank account].

[2] Use of Form

The allegation in [1], *above*, is for use in a complaint for rescission of a contract or as an affirmative defense in an action on a contract when the contract was based on a mutual mistake of law [*Civ. Code § 1578(1)*; *see, e.g.*, *Harris v. Rudin, Richman & Appel (2002) 95 Cal. App. 4th 1332, 1339-1341, 116 Cal. Rptr. 2d 552* (reversing summary judgment for plaintiff because defendants raised triable issues of fact as to whether they were entitled to rescind settlement agreement based on mutual mistake of fact or law; all parties to agreement settling legal malpractice action for preparation of trust exposing trustees to tax liability were unaware of Probate Code amendment that eliminated tax problem)] or a mistake of law by plaintiff of which defendant was aware and did not rectify [*Civ. Code § 1578(2)*; *see § 215.55*].

[3] Cross References

For a complaint for reformation of contract based on mistake of law, see Ch. 488, *Reformation of Instruments*

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Chapter 215 DURESS, MENACE, FRAUD, UNDUE INFLUENCE, AND MISTAKE
PART IV. FORMS
Subpart C Allegations of Mistake, Misrepresentation, and Fraud

17-215 California Forms of Pleading and Practice--Annotated § 215.143

§ 215.143 Allegation of Innocent Misrepresentation

[1] FORM Allegation of Innocent Misrepresentation

1. The consent of _____ [*name of pleading party*] to the contract referred to _____ [above *or* in the complaint] was not real, mutual, or free in that it was obtained solely through innocent misrepresentation and mistake as herein alleged.

2. During the contract negotiations between plaintiff and defendant to induce _____ [*name of pleading party*] to enter the contract, _____ [*name of party making misrepresentation*] mistakenly represented _____ [*allege representations made by party in good faith relating to existence of fact or thing material to contract, e.g.,* that the total liabilities of the company amounted to only $210,000. This figure was contained in a balance sheet produced by internal audit purporting to show the company's financial position as of _____ (*date*). The balance sheet was furnished by _____ (*name of party making misrepresentation*) to _____ (*name of pleading party*)].

3. _____ [*Allege pleading party's reliance on the other party's representations and discovery of mistake, e.g.,* Plaintiff, at the time of entering into the contract, at the time he/she paid defendant the downpayment and executed the note for the balance of the purchase price, and at the time he/she executed the contract, believed that the company's total liabilities amounted to only $120,000 on _____ (*date*), which resulted in a net worth of approximately $200,000. After the execution of the documents of sale and transfer of control and possession were completed, and plaintiff's staff began audits and implementation of new financial and accounting procedures, they discovered that total liabilities on _____ (*date*), actually amounted to $210,000, which resulted in a net worth of only $90,000. Plaintiff is informed and believes and on that information and belief alleges that the error was inadvertently made in computation, tabulation, or printing and was not the result of any attempt to deceive].

4. _____ [*Allege both defendant's and plaintiff's belief or reliance in truth of representation, e.g.,* Both plaintiff and defendant, at the time they entered into the contract believed that as of _____ (*date*), the company's total liabilities amounted to $120,000 and its net worth was approximately $200,000].

5. _____ [*Name of pleading party*] would not have entered into the contract if the innocent misrepresentation or mistake had not existed.

6. _____ [*Name of pleading party*] seeks rescission of the contract because _____ [*name of pleading party*] has no other adequate remedy at law. If the contract is not rescinded, _____ [*name of pleading party*] will suffer irreparable harm and injury because _____ [*name of pleading party*] _____ [*e.g.*, will be deprived of his/her bargain because of the innocent misrepresentation of accounts].

[2] Use of Form

The allegation in [1], *above*, is for use by a plaintiff in an action to rescind a contract, or by a defendant as an affirmative defense in an action on a contract when one party innocently made false representations to induce the other party to enter the contract and the latter relied on the representations to his or her detriment [*see Crocker-Anglo Nat. Bank v. Kuchman (1964) 224 Cal. App. 2d 490, 496-497, 36 Cal. Rptr. 806* (reversing judgment denying rescission, mistake regarding value of stock); *Brown v. Klein (1928) 89 Cal. App. 153, 155-157, 264 P. 496* (affirming rescission of sale of one-third interest in partnership based on computation error in totalling liabilities)]. Some cases characterize this situation as a species of fraud, while others characterize it as a type of mistake [*see §§ 215.51[3], 215.71*].

In either case, the mistake or innocent misrepresentation must relate to a material aspect of the contract so that the party who relied on the misrepresentation would suffer material injury if the contract were upheld [*Guthrie v. Times-Mirror Co. (1975) 51 Cal. App. 3d 879, 890, 124 Cal. Rptr. 577* ; *Wood v. Kalbaugh (1974) 39 Cal. App. 3d 926, 930, 114 Cal. Rptr. 673]* . Reliance arising from neglect of a legal duty will bar relief [*see Van Meter v. Bent Constr. Co. (1956) 46 Cal. 2d 588, 595, 297 P.2d 644* ; *Balistreri v. Nevada Livestock Production Credit Assn. (1989) 214 Cal. App. 3d 635, 642-644, 262 Cal. Rptr. 862* (in neither case did reliance amount to neglect of legal duty)]. Although relief will be denied for a mistake of fact caused by the neglect of a legal duty, it does not appear to be the affirmative burden of the pleading party to allege that he or she did not neglect a legal duty. Instead, neglect of legal duty can be raised as a defense to avoidance of the contract on the basis of mistake of fact [*see Sun'N Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 700, 148 Cal. Rptr. 329, 582 P.2d 920]* . Nevertheless, the pleading party may want to insert additional allegations to anticipate any claim of neglect of legal duty [*see, e.g., Brown v. Klein (1928) 89 Cal. App. 153, 155, 264 P. 496* (negligence issue disposed of by finding that plaintiff did not make independent examination of business and did not have opportunity to do so); *see also Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 408-410, 11 Cal. Rptr. 2d 51, 834 P.2d 745* (auditors have no duty to unintended recipients of information they supply)].

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17-215 California Forms of Pleading and Practice--Annotated § 215.144

§ 215.144 Allegation of Intentional Misrepresentation of Fact [Civ. Code § 1572]

[1] FORM Allegation of Intentional Misrepresentation of Fact [Civ. Code § 1572]

1. The apparent consent of _____ [*name of pleading party*] to the contract referred to _____ [above *or* in the complaint] was not real, mutual, or free in that it was obtained through fraud, as herein alleged.

2. On or about _____ [*date*], _____ [*name of party making fraudulent representations*] falsely and fraudulently represented to _____ [*name of pleading party*] that _____ [*specify with particularity the statements of material fact claimed by the pleading party to be false, e.g.,* the premises owned by defendant had sufficient water supply for the entire acreage that was ample for irrigation and for domestic purposes on an annual basis].

3. _____'s [*Name of party making fraudulent representations*] representations were false. The true facts were as follows: _____ [*specify, e.g.,* the land did not contain an ample supply of water and the water well on the property did not supply water to the property year-round or for any period of time at all].

4. When _____ [*name of party making fraudulent representations*] made these representations he/she knew them to be false, and made these representations with the intent to defraud and deceive _____ [*name of pleading party*] and with intent to induce _____ [*name of pleading party*] to enter into the above-described contract for _____ [*specify, e.g.,* the purchase and sale of the property].

5. _____ [*Name of pleading party*] believed the representations and relied on the truth of them in entering into the contract. _____ [*Name of pleading party*] would not have given his/her apparent consent to the contract had it not been for the fraud. The reliance by _____ [*name of pleading party*] was justified because _____ [*specify, e.g.,* at the time the representations were made, defendant had lived on the property for five years and was in a position of advantage with respect to knowledge of facts concerning the transaction].

6. As a proximate result of _____'s [*name of party making fraudulent representations*] fraud and the facts herein alleged, _____ [*name of pleading party*] was _____ [*allege facts showing allowable damages, e.g.,* induced to buy the property at a higher price than its actual value], by reason of which plaintiff has been damaged in the sum of $_____.

7. Plaintiff seeks rescission of the contract because Plaintiff has no other adequate remedy at law. If the contract is not rescinded, plantiff will suffer irreparable harm and injury because plaintiff _____ [*e.g.,* will be deprived of his/her bargain by having been induced to buy the property at higher than its actual value].

[2] Use of Form

The allegation in [1], *above,* may be used by a plaintiff in a complaint for rescission of a contract, or by a defendant as an affirmative defense in an action on a contract when he or she was induced to enter the contract due to the other party's intentional fraud [*Civ. Code § 1572(1)*]. For further discussion of fraud, see the discussion in *§ 215.70* et seq.

For other forms involving fraud that may be adapted for use in a complaint for rescission of a contract, or as an affirmative defense in an action on a contract, see Ch. 269, *Fraud and Deceit* .

The general rule with respect to pleading a cause of action in fraud is that fraud must be specifically pleaded and the complaint should state specific facts of how and where the fraud occurred. A vague but artful pleading of fraud should not be used simply to get a foot in the courtroom door. The effect of this general rule is twofold: (1) the facts constituting fraud must be alleged (that is, general pleading of the legal conclusion of fraud is insufficient); and (2) every element of the cause of action for fraud must be alleged in the proper manner (that is, factually and specifically). The policy of liberal construction of the pleadings will not ordinarily be invoked to sustain a pleading defective in any material respect [*Hall v. Department of Adoptions (1975) 47 Cal. App. 3d 898, 904, 121 Cal. Rptr. 223* (quoting a legal commentator); *Bank of America v. Vannini (1956) 140 Cal. App. 2d 120, 130, 295 P.2d 102* (party pleading defense based on fraud required to set forth all elements of fraud)].

[3] Cross References

For discussion and forms generally involving fraud, as well as a specific form involving intentional misrepresentations concerning land, see Ch. 269, *Fraud and Deceit*

For a form of complaint by a lessee of mining property against lessor for fraudulent representation of ownership of property, see Ch. 363, *Mining*

For a form of complaint by transferee of oil and gas interest for fraud by transferor who failed to obtain security transfer permit from corporations commissioner, see Ch. 393, *Oil and Gas*

For a form of complaint for reformation of contract based on fraud, see Ch. 488, *Reformation of Instruments*

For a form of complaint for restitution based on rescission of contract for fraudulent misrepresentation, see Ch. 490, *Rescission and Restitution*

For forms for use by purchaser for damages resulting from fraudulent exchange of land or for rescission due to fraudulent misrepresentations or fraudulent concealment, and for form of defense for vendee's complaint of fraud based on inspection by vendee, see Ch. 569, *Vendor and Purchaser*

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Chapter 220 DISSOLUTION OF MARRIAGE: MASTER PROCEDURAL GUIDE

18-220 California Forms of Pleading and Practice--Annotated 220.syn

§ 220.syn Synopsis to Chapter 220: DISSOLUTION OF MARRIAGE: MASTER PROCEDURAL GUIDE

§ 220.01 Scope of Chapter

§ 220.02 Governing Law

[1] Statutes

[2] Statewide Family Law Rules and Forms

[3] Local Court Rules in General

[4] Uniform Domestic Relations Rules for Bay Area Superior Court

§ 220.03 Civil Remedies Concerning Break-Up of Marital Relationship

§ 220.04 Purpose of Proceeding for Dissolution or Separation

§ 220.05 Cross References

§§ 220.06-220.09 [Reserved]

§ 220.10 Determine Scope of Legal Action Required

§ 220.11 Make Fee Arrangements

§ 220.12 Prepare Any Special Notices

§ 220.13 Assess Need to Sever Joint Tenancies

§§ 220.14-220.19 [Reserved]

§ 220.20 Determine Jurisdiction and Venue

§ 220.21 Initial Pleadings and Papers

§ 220.22 Join Parties to Proceeding

§§ 220.23-220.29 [Reserved]

§ 220.30 Evaluate Need for Responsive Pleadings

§ 220.31 Prepare, Serve, and File Responsive Pleadings

§ 220.32 Join Parties to Proceeding

§ 220.33 Challenge Improper Pleadings or Proceedings, or Entry of Default

§§ 220.34-220.39 [Reserved]

§ 220.40 Preliminary Discovery and Fact Gathering

§ 220.41 Mediation of Custody and Visitation Issues

§ 220.42 Appearance of Counsel and Client

§ 220.43 Conduct of Hearing and Rendition of Order

§ 220.44 Special Considerations in Bringing Certain Pretrial Motions

§§ 220.45-220.49 [Reserved]

§ 220.50 Formal Discovery.

§ 220.51 Evaluate Need for Contested Trial

§ 220.52 [Reserved]

§ 220.53 Complete Pretrial, Settlement Conference, or Similar Statement, and Final Declaration of Disclosure

§ 220.54 Attend Mandatory Conferences Before Trial

§ 220.55 Specially Set Trial of Child Custody and Child Support Issues

§ 220.56 Adjust Trial Date for Good Cause

§ 220.57 Prepare Trial Brief

§ 220.58 Marshal Evidence and Line Up Witnesses

§ 220.59 Submit Final Financial and Disclosure Declarations

§§ 220.60-220.69 [Reserved]

§ 220.70 Challenge Trial Judge if Necessary

§ 220.71 Complete the Trial Appearance

§ 220.72 Request Statement of Decision

§ 220.73 Prepare Formal Judgment as Directed

§ 220.74 Posttrial Matters

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Chapter 220 DISSOLUTION OF MARRIAGE: MASTER PROCEDURAL GUIDE

PART I. SCOPE

18-220 California Forms of Pleading and Practice--Annotated § 220.01

§ 220.01 Scope of Chapter

This chapter sets forth a master procedural guide for actions involving marital dissolution or legal separation. This guide provides the framework and instructions for navigating the individual chapters that analyze marital dissolution and legal separation, which include:

- Procedure and illustrative, filled-in forms, including all mandatory Judicial Council forms, for commencing and pursuing through judgment a proceeding for marital dissolution or legal separation, as well as postjudgment and modification procedures [*see* Ch. 221, *Dissolution of Marriage: Procedure*].

- Division and valuation of the community estate [*see* Ch. 222, *Dissolution of Marriage: Property Division and Valuation*].

- Child custody [*see* Ch. 223, *Dissolution of Marriage: Child Custody*].

- Child support [*see* Ch. 224, *Dissolution of Marriage: Child Support*].

- Spousal support [*see* Ch. 225, *Dissolution of Marriage: Spousal Support*].

- Attorney's fees [*see* Ch. 226, *Dissolution of Marriage: Attorney's Fees*].

- Major tax consequences of a dissolution [*see* Ch. 226, *Dissolution of Marriage: Tax Effects of Dissolution*].

For related forms and proceedings, see Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights* ; Ch. 122, *Community Property* ; Ch. 245, *Emancipation of Minors* ; Ch. 258, *Fam. Law Enforcement: General Enforcement Principles and Remedies* ; Ch. 259, *Fam. Law Enforcement: Special Remedies for Support Enforcement* ; Ch. 260, *Fam. Law Enforcement: Foreign Judgments* ; Ch. 359, *Marriage* ; Ch. 364, *Minors: Claims and Property of Minors* ; Ch. 394, *Parent and Child* ; and Ch. 412, *Paternity* .

For discussion and forms relating to the property rights of the parties to a nonmarital relationship, or domestic partners, see Ch. 387, *Nonmarital Cohabitation* .

For procedure and forms relating to adoption, see Ch. 12, *Adoptions: Nature and Effect* ; Ch. 12A, *Adoptions: Termination of Parental Rights* ; Ch. 12B, *Adoptions: Unmarried Minors* ; Ch. 12C, *Adoptions: Adults and Married Minors* ; Ch. 12D, *Adoptions: Amendment and Inspection of Records* ; and Ch. 12E, *Adoptions: Attack on Decree* .

For a discussion and forms relating to protective orders against domestic violence and other harassment, see Ch. 293, *Harassment and Domestic Violence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawMarital Termination & Spousal SupportLegal Separation

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§ 220.02 Governing Law

[1] Statutes

The law pertaining to marriage and the family is set forth in the Family Code. The Family Code supersedes the former Family Law Act (former *Civ. Code § 4000 et seq.*) and redesignates within one code the former statutory provisions that comprise the Uniform Premarital Agreement Act (*Fam. Code § 1600 et seq.*), the Family Conciliation Court Law (*Fam. Code § 1800 et seq.*), the Uniform Divorce Recognition Act (*Fam. Code § 2090 et seq.*), the Uniform Child Custody Jurisdiction and Enforcement Act (*Fam. Code § 3400 et seq.*), the Uniform Interstate Family Support Act (*Fam. Code § 4900 et seq.*), the Domestic Violence Prevention Act (*Fam. Code § 6200 et seq.*), the Uniform Act on Blood Tests to Determine Paternity (*Fam. Code § 7550 et seq.*), and the Uniform Parentage Act (*Fam. Code § 7600 et seq.*).

Dissolution of marriage and legal separation are governed by *Fam. Code § 2000 et seq.* Property rights of the parties on dissolution are governed by *Fam. Code § 2500 et seq.*; child custody is governed by *Fam. Code § 3000 et seq.*; and child and spousal support by *Fam. Code § 3500 et seq.*

The means by which a marriage may be terminated are set forth in *Fam. Code § 310*, and the general jurisdiction of the superior court is set forth in *Fam. Code §§ 200, 2010*, and *3101*. Pendente lite spousal and child support is authorized by *Fam. Code § 3600 et seq.*, and protective orders in the family law summons and on ex parte application by Fam. Code *§ 2040 et seq. Fam. Code § 2023* authorizes the court to order payment of certain obligations directly to creditors. *Fam. Code § 2020* specifies the time within which a responsive pleading must be filed and *Fam. Code §§ 231, 2022* relate to trial. Attorney's fees and costs are governed by *Fam. Code § 270 et seq.*, and general enforcement of judgments, orders, and decrees by *Fam. Code § 290 et seq. Fam. Code § 2080 et seq.* authorizes a court in a dissolution of marriage proceeding to restore a wife's birth name or other former name.

[2] Statewide Family Law Rules and Forms

The California Judicial Council is authorized by statute to promulgate rules of practice and procedure that govern proceedings under the Family Code, notwithstanding any other provision of law [*Fam. Code § 211*; *see Cal. Const., art. VI, § 6* (Judicial Council's general powers to promulgate rules of procedure)]. Accordingly, the Council has adopted the

Family Law Rules and related Judicial Council forms, and adopts specific forms and procedures as required by individual statutes [*see Cal. Rules of Ct., Rules 5.10 et seq.*; *In re Marriage of McKim (1972) 6 Cal. 3d 673, 678 n.4, 100 Cal. Rptr. 140, 493 P.2d 868* ; *In re Marriage of Dover (1971) 15 Cal. App. 3d 675, 678, 93 Cal. Rptr. 384* ; *see, e.g., Fam. Code § 2105* (requiring declaration of disclosure, including specified information, on form prescribed by Judicial Council)].

The Family Law Rules apply to all proceedings for marital dissolution, nullity of marriage, or legal separation; the authorizing rule states that they apply to every action and proceeding to which the Family Code applies [*Cal. Rules of Ct., Rule 5.20*]. In general, the procedure to be followed to obtain a judgment of dissolution of marriage or legal separation is set forth in *Cal. Rules of Ct., Rules 5.10 et seq.* and the forms provided for use in these proceedings are designated as Cal. Judicial Council Forms FL-100 et seq. [*see Fam. Code § 211*; *Gov. Code § 68511*; *see also Cal. Rules of Ct., Rules 1.30, 1.31, 1.35, 2.150*].

Cal. Rules of Ct., Rule 5.21 clarifies that, except as provided by the Family Law Rules, all provisions of law applicable to civil actions generally apply to a proceeding under the Family Code, if they would otherwise apply without reference to that rule. However, to the extent that the Rules conflict provisions in other statutes or rules, the Family Law Rules prevail [*see Cal. Rules of Ct., Rule 5.21*; *see also Cal. Rules of Ct., Rule 5.22* (relating to family law proceedings other than for dissolution or nullity of marriage or legal separation)].

Furthermore, in the exercise of the family law court's jurisdiction, if the course of proceeding is not specifically indicated by statute or by the Family Law Rules, the court may adopt any suitable process or mode of proceeding that is consistent with the spirit of the Family Code and the Family Law Rules [*Cal. Rules of Ct., Rule 5.140*; *see In re Marriage of McKim (1972) 6 Cal. 3d 673, 678, 100 Cal. Rptr. 140, 493 P.2d 868]* .

[3] Local Court Rules in General

Many, if not most, superior courts throughout California have promulgated specialized rules of practice and procedure for their respective family law departments [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, ch.14]. These local rules are permitted to the extent that they do not conflict with state statutes or the California Rules of Court (including the statewide Family Law Rules) [*see Gov. Code § 68070(a)*; *Cal. Rules of Ct., Rules 2.30, 3.20, 10.613*; *Shipp v. Superior Court (1992) 5 Cal. App. 4th 147, 151, 6 Cal. Rptr. 2d 685]* . Counsel must be aware of the rules applicable in his or her county of practice and be sure to follow them.

[4] Uniform Domestic Relations Rules for Bay Area Superior Court

To assist counsel in domestic relations cases by providing a uniformity of the local rules governing these cases, several counties in the San Francisco Bay region have adopted the Uniform Domestic Relations Local Rules for Bay Area Superior Courts (hereinafter cited as Bay Area Super. Ct. Dom. Rel. Rules). The rules, were initially adopted by the Superior Courts of Alameda, Contra Costa, Marin, San Francisco, San Mateo, Solano, and Sonoma Counties, but have not been adopted by the Superior Courts of either Napa or Santa Clara County. However, in certain of these counties, some of the uniform rules have been superseded by more particularized local rules, making it necessary for counsel to verify the extent to which each of the foregoing counties currently adheres to the uniform rules [*cf., e.g.,* San Francisco Uniform Local Ct. Rules, Rule 11; Alameda Co. Coordinated Local Ct. Rules, Rule 11; Contra Costa Co. Super. Ct. Rules, Rule 12]. Thus, a knowledge of each county's local rules is essential.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportCosts & Attorney FeesFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionGeneral OverviewFamily

LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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§ 220.03 Civil Remedies Concerning Break-Up of Marital Relationship

Although spouses are permitted by statute, on prescribed grounds, to seek a judgment of marital dissolution, legal separation, or nullity of marriage [*see Fam. Code §§ 2210* (nullity), *2310* (separation or dissolution)], no civil cause of action currently exists to remedy the personal anger, disappointment, or frustration that may have been occasioned by a spouse's infidelity or break-up of the parties' personal relationship. By statute, no cause of action arises for: (a) alienation of affection; (b) criminal conversation; (c) seduction of a person over the age of legal consent; or (d) breach of promise of marriage [*Civ. Code § 43.5*]. Furthermore, a fraudulent promise to marry or to cohabit after marriage does not give rise to a cause of action for damages [*Civ. Code § 43.4*; *see In re Marriage of Buckley (1982) 133 Cal. App. 3d 927, 931-934, 184 Cal. Rptr. 290]* . However, spouses are otherwise generally free to assert tort causes of action against one another [*see Klein v. Klein (1962) 58 Cal. 2d 692, 693, 26 Cal. Rptr. 102, 376 P.2d 70* ; *Self v. Self (1962) 58 Cal. 2d 683, 689-691, 26 Cal. Rptr. 97, 376 P.2d 65* ; *Dale v. Dale (1998) 66 Cal. App. 4th 1172, 1175, 1187, 78 Cal. Rptr. 2d 513]* .

For discussion of fraud in connection with obtaining consent to marry or regarding cohabitation after marriage as a ground for annulment, see Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights* . For discussion of remedies for a spouse's breach of fiduciary responsibilities in connection with the management and control of community property, see Ch. 122, *Community Property* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsCauses of ActionAlienation of AffectionFamily LawMarital Duties & RightsCauses of ActionBreach of Promise to MarryFamily LawMarital Duties & RightsCauses of ActionCriminal ConversationsTortsIntentional TortsInterference With Personal RelationshipsGeneral Overview

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§ 220.04 Purpose of Proceeding for Dissolution or Separation

The purpose of a proceeding for marital dissolution is to dissolve the marriage and restore the parties to the status of single persons, divide the community estate, determine the custody of children, and, if the respondent is subject to the court's personal jurisdiction, settle the parties' financial responsibilities regarding spousal and child support.

A proceeding for legal separation has the same general purposes as that for marital dissolution, except that a judgment of legal separation does not terminate the parties' marital status. Thus, legal separation is essentially a device to determine and settle the spouses' financial responsibilities to one another and to their minor children, as well as to determine child custody. A judgment of legal separation might be sought for religious or other personal reasons, such as the ability to retain certain spousal health or survivor benefits. A party might also initially petition for legal separation when the state or county residency requirements for a dissolution proceeding have not yet been met, and then amend the petition to seek dissolution when residency is established [*see Fam. Code §§ 2320, 2321*].

For discussion of the grounds for marital dissolution and legal separation, and of the procedure involved in dissolution and separation proceedings, see Ch. 221, *Dissolution of Marriage: Procedure* . For discussion of the purpose of and procedure involved in a proceeding for nullity of marriage, see Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawMarital Termination & Spousal SupportLegal Separation

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§ 220.05 Cross References

For discussion of adoption and related forms, see Chs. 12, *Adoptions: Nature and Effect* , 12A, *Adoptions: Termination of Parental Rights* , 12B, *Adoptions: Unmarried Minors* , 12C, *Adoptions: Adults and Married Minors* , 12D, *Adoptions: Amendment and Inspection of Records* , and 12E, *Adoptions: Attack on Decree*

For discussion of the grounds for annulling a marriage and forms for use in a nullity proceeding, see Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights*

For discussion of multiple-party accounts in banks, savings and loans, and other financial institutions, including accounts of married persons, see Ch. 95, *Banks, Deposits, and Checks*

For discussion of the characterization of community property, spousal rights of management and control of community property, and forms for use in a proceeding to remedy a breach of related interspousal duties, see Ch. 122, *Community Property*

For discussion and related forms for the emancipation of minors, see Ch. 245, *Emancipation of Minors*

For discussion and related forms for use in the enforcement of California and out-of-state family law judgments and orders, see Chs. 258, *Fam . Law Enforcement: General Enforcement Principles and Remedies*, 259, *Fam. Law Enforcement: Special Remedies for Support Enforcement*, and 260, *Fam. Law Enforcement: Foreign Judgments*

For discussion of guardianship and conservatorship and related forms, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , through Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships*

For discussion of obtaining restraining orders against domestic violence without filing a family law petition, and of restraints against general harassment and related forms, see Ch. 293, *Harassment and Domestic Violence*

For discussion of the rights of parties in proceedings to adjudge a minor a dependent of the court, see Ch. 328: *Juvenile Courts: Dependency Proceedings*

For discussion of the validity and legal effects of marriage and related forms, see Ch. 359, *Marriage*

For discussion of tort actions involving parent and child, see Ch. 367A, *Minors: Tort Actions*

For discussion of contract matters involving minors and related forms, see Ch. 365, *Minors: Contract Actions*

For discussion of child custody and support proceedings not involving marital dissolution proceedings, and related forms, see Ch. 394, *Parent and Child*

For discussion of grounds for establishing parentage of a child and related forms, see Ch. 412, *Paternity*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionGeneral OverviewFamily LawDelinquency & DependencyDependency ProceedingsFamily LawGuardiansGeneral OverviewFamily LawMarital Termination & Spousal SupportAnnulmentGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity Property

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Chapter 220 DISSOLUTION OF MARRIAGE: MASTER PROCEDURAL GUIDE
PART I. SCOPE

18-220 California Forms of Pleading and Practice--Annotated §§ 220.06-220.09

[Reserved]

§§ 220.06[Reserved]

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Chapter 220 DISSOLUTION OF MARRIAGE: MASTER PROCEDURAL GUIDE
PART II. MASTER PROCEDURAL GUIDE
A. Preliminary Considerations

18-220 California Forms of Pleading and Practice--Annotated § 220.10

§ 220.10 Determine Scope of Legal Action Required

1. Choose the proceeding that affords the client the most expeditious and complete relief.

a. Determine whether the client has an immediate need for relief, particularly if domestic violence or a threatened removal of a child is involved.

(1) If a married client wishes to remain married, but is experiencing domestic violence, consider an application under *Fam. Code § 6200 et seq.* to obtain a restraining order, along with any related custody, or dwelling exclusion order. Advise the client about the availability of emergency protective orders [*see Fam. Code § 6250 et seq.*]. For a discussion of ex parte and related relief, see Ch. 221, *Dissolution of Marriage: Procedure* , and Ch. 293, *Harassment and Domestic Violence* .

(2) If the client is unmarried, the same general type of relief from domestic violence is available [*see Fam. Code § 6221*; *see also Fam. Code § 6211* (defining "domestic violence" broadly, to include nonmarital situations)].

b. If a married client wishes to remain married but desires exclusive custody of a child, or seeks an accounting of the use or disposition of community property, counsel can bring an appropriate alternative proceeding instead of a dissolution [*see Fam. Code §§ 1101, 3120*].

c. If residency requirements for a dissolution cannot presently be met, consider petitioning initially for legal separation and then converting the proceeding to one for dissolution when the residency requirements are met [*see Fam. Code §§ 2320, 2321*; *see also* Ch. 221, *Dissolution of Marriage: Procedure*].

(1) Legal separation also may be desired by a client on religious grounds; or by a client who fears the eventual loss of some benefit that is contingent on remaining married, as

discussed in Item 2, *below*.

(2) If the client's sole objective is to obtain a legal separation, point out that if the other party objects, that party can respond by requesting dissolution [*see Fam. Code §§ 2345, 2347*].

d. If annulment is desired, ascertain if the proper grounds exist, and if the time limits within which to file a nullity petition can be met [*see Fam. Code § 2200 et seq.*], as discussed in Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights* . In some cases, nullity may be requested in a petition as an alternative to dissolution [*see Cal. Rules of Ct., Rule 5.114*].

e. If an action for dissolution, legal separation, or for the support of children has already been filed and the parties had another child before or after final judgment, consider filing a supplemental complaint seeking an order of paternity or support for that child. The court may consolidate support orders, arrearages of support and wage assignments [*see Fam. Code §§ 2330.1, 3651(b)*].

2. Ascertain whether the client will be adversely affected by bringing a family law proceeding.

a. Find out, for example, if the client faces a possible loss of health care or similar benefits after a dissolution, and if the client has special health problems that necessitate regular care.

b. Find out whether the client, if divorced, will still be entitled to any "derivative" Social Security benefits [*see 42 U.S.C. §§ 402(b), 416(d)*].

c. Find out if the client has an immigration status that depends on being married for a certain period. Some clients may have only a type of provisional residence visa that is related to the duration of the marriage [*see generally 8 U.S.C. § 1186a*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportAnnulmentGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawMarital Termination & Spousal SupportLegal Separation

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18-220 California Forms of Pleading and Practice--Annotated § 220.11

§ 220.11 Make Fee Arrangements

1. Reduce all fee agreements to writing, even if complex litigation is not anticipated. For a form of attorney's fees agreement, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, Ch. 216 (Matthew Bender 2d ed.).

a. A writing is required by statute with respect to agreements in which it is reasonably foreseeable that the total expense to the client, including attorney's fees, will exceed $1,000 [*Bus. & Prof. Code § 6148(a), (e)*].

b. As a matter of suggested practice, clarify that execution and return of the agreement must take place before counsel's services will commence.

c. At the time the contract is entered into, provide a duplicate copy of the contract signed by both the attorney and the client, or the client's guardian or representative, to the client or to the client's guardian or representative [*Bus. & Prof. Code § 6148(a)*].

2. Collect from the client fees and costs that are reasonably necessary to commence and prosecute the litigation; deposit these in a segregated client trust account that complies with state law [*see Bus. & Prof. Code § 6211 et seq.*].

a. If counsel has agreed to take the case on the basis that fees and costs will be paid if and when they are recovered from the opposing party, ensure that this is clearly expressed in the fee agreement, as well as whether counsel will advance costs [*see Fam. Code § 270 et seq.*; *Cal. Rules Prof. Conduct, Rule 4-210*].

b. Consider whether an indigent client may proceed in forma pauperis [*see Gov. Code §§ 68630-68641*; *Cal. Rules of Ct., Rules 3.50*-3.58; *Cruz v. Superior Court (2004) 120 Cal.*

App. 4th 175, 187-191, 14 Cal. Rptr. 3d 917 (hearing on applicant's eligibility for fee waiver)].

c. If a client owns an interest in community real property and is unable to pay attorney's fees, the client may wish to consider the possibility of securing payment by granting a lien on the property in favor of counsel. This is known as a "family law attorney's real property lien" and attaches only to the encumbering party's interest in the community real property [*see Fam. Code §§ 1102(e), 2033*].

(1) Before entering into an arrangement for a family law attorney's real property lien, counsel must follow *Cal. Rules Prof. Conduct, Rule 3-300*, setting forth conditions for entering into a business transaction with, or of knowingly acquiring an ownership, possessory, security, or other pecuniary interest adverse to, a client [*see Fam. Code § 2033(e)*].

(2) Before recording the lien, counsel must also follow the statutory requirements for notice of the lien to the opposing party or counsel, who is permitted by statute to object to the lien's imposition, as discussed in Ch. 226, *Dissolution of Marriage: Attorney's Fees* [*see Fam. Code § 2033(b), (c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportCosts & Attorney FeesFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawMarital Termination & Spousal SupportLegal SeparationLegal EthicsClient RelationsAttorney FeesFee Agreements

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18-220 California Forms of Pleading and Practice--Annotated § 220.12

§ 220.12 Prepare Any Special Notices

1. If a family law proceeding is being filed, prepare and send a notice of the client's adverse interest in any retirement or pension benefits being acquired by the opposing party through employment, as discussed in Ch. 221, *Dissolution of Marriage: Procedure* [*see Fam. Code § 755(c)*].

2. Prepare and send a statutory notice to insurers directing them to maintain the current beneficiaries under health, life, or disability insurance policies of one or both parties [*see Fam. Code § 2050*].

3. Evaluate the need to record a notice of pending litigation (lis pendens) with respect to any parcel of real property held in the name of one or both spouses [*see Code Civ. Proc. § 405.20*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensNoticesFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawMarital Termination & Spousal SupportLegal SeparationHealthcare LawInsuranceGeneral OverviewInsurance LawLife InsuranceGeneral Overview

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18-220 California Forms of Pleading and Practice--Annotated § 220.13

§ 220.13 Assess Need to Sever Joint Tenancies

1. Consider severing any joint tenancies of the spouses, particularly in real property, pending the outcome of the litigation, to avoid the possible transfer on death of the client's interest to the other spouse by operation of law [*see In re Marriage of Hilke (1992) 4 Cal. 4th 215, 222-224, 14 Cal. Rptr. 2d 371, 841 P.2d 891* ; *see Fam. Code § 2040(e)* (summons must contain warning regarding effect of jointly held real property ownership if either party dies before that property is divided)].

2. Follow the statutory provisions to sever the joint tenancy, if the other party does not consent to severance [*see, e.g., Civ. Code § 683.2* (real property)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationMarital PropertyFamily LawMarital Termination & Spousal SupportLegal SeparationReal Property LawEstatesConcurrent OwnershipJoint Tenancies

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18-220 California Forms of Pleading and Practice--Annotated §§ 220.14-220.19

[Reserved]

§§ 220.14[Reserved]

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18-220 California Forms of Pleading and Practice--Annotated § 220.20

§ 220.20 Determine Jurisdiction and Venue

1. Ascertain if state and county residency requirements have been met by one or both spouses in order to meet jurisdictional requirements for bringing a dissolution proceeding [*see Fam. Code § 2320*].

a. If residency requirements for marital dissolution have not been met, consider petitioning for legal separation and then amending the petition to one for dissolution [*see Fam. Code § 2321*].

b. Alternatively, consider deferring the filing of the petition until the residency requirements are met, keeping in mind the client's need to obtain immediate relief in certain cases.

2. Be alert to different venue requirements depending on the nature of the proceeding.

a. In a dissolution or legal separation proceeding, venue is proper in the county in which either the petitioner or respondent resides at the commencement of the proceeding [*Code Civ. Proc. § 395(a)*; *see also Code Civ. Proc. § 397* (grounds for change of venue)].

b. The proper venue for trial of a nullity action is the county in which either the petitioner or respondent resides when the petition is filed [*Code Civ. Proc. § 395(a)*].

c. Other venue provisions may apply if the respondent resides outside California, resides in a California county that is unknown to the petitioner, or is about to depart from the state [*see Code Civ. Proc. § 395(a)*].

3. Determine if the court has jurisdiction to hear child custody matters, particularly if the children have been only recently brought into California, or if they currently reside outside of California. Advise the

client that custody jurisdiction cannot be conferred on the court merely by the parties' consent. It must be established as required by the governing statutes [*see Fam. Code §§ 2010, 3022, 3400 et seq.*; *28 U.S.C. § 1738A*]. For discussion of jurisdictional standards, see Ch. 394, *Parent and Child* .

4. Ascertain if personal jurisdiction can be obtained over the other party:

a. In order to impose a personal obligation, such as an order to pay child or spousal support, or attorney's fees and costs [*see generally Burnham v. Superior Court of Cal. (1990) 495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631, 638-639* ; *Kulko v. Superior Court (1978) 436 U.S. 84, 91, 98 S. Ct. 1690, 56 L. Ed. 2d 132, 140]* . However, personal jurisdiction over a parent who resides out of state is not necessary to make a binding custody determination, if the court has subject matter jurisdiction over the custody dispute pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act and the Parental Kidnapping Prevention Act [*Fam. Code § 3421 et seq.*; *28 U.S.C. § 1738A*; *cf. In re Marriage of Torres (1998) 62 Cal. App. 4th 1367, 1378, 73 Cal. Rptr. 2d 344* (under former UCCJA, out-of-state parent must receive notice and opportunity to be heard, but personal jurisdiction unnecessary)].

b. In order to divide the community interest in a military service member's longevity retirement or pension benefits, as discussed in Ch. 222, *Dissolution of Marriage: Property Division and Valuation* [*see 10 U.S.C. § 1408*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueIndividual DefendantsFamily LawChild CustodyJurisdictionSubject Matter JurisdictionFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationRetirement BenefitsPensionsFamily LawMarital Termination & Spousal SupportLegal Separation

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18-220 California Forms of Pleading and Practice--Annotated § 220.21

§ 220.21 Initial Pleadings and Papers

1. Prepare pleadings to initiate the proceeding. Typically, these will at least include:

☐ Family law petition [Cal. Judicial Council Form FL-100].

☐ Family law summons [Cal. Judicial Council Form FL-110].

a. The initial pleadings might also include an expanded Declaration Under the Uniform Child Custody Jurisdiction Act (Form FL-105), as well as a Property Declaration, and Income and Expense Declaration [Cal. Judicial Council Forms FL-150, FL-155, FL-160].

b. Some type of immediate relief may be needed that is not provided for by orders that are set forth on the back of the family law summons [*see Fam. Code § 2040*; Cal. Judicial Council Form FL-110]. In urgent cases, seek ex parte relief.
(1) Ex parte relief requires the filing of additional forms [*see*, e.g., Cal. Judicial Council Form FL-300 (Order to Show Cause), FL-305 (Temporary Orders), FL-310 (Application for Order and Supporting Declaration)].

(2) Follow any special procedure prescribed by local court rules regarding the filing of the moving papers for ex parte relief [*see, e.g.*, Los Angeles Co. Super. Ct. Rules, Rule 14.2]. Check any local court rules pertaining to notice requirements to the opposing side with respect to ex parte matters.

(3) If child custody or visitation is expected to be contested, ascertain whether local practice requires the inclusion, along with other papers to be served on the opposing party, of a standardized notice form (provided by the court) regarding mandatory mediation [*see*

generally Fam. Code § 3170].

c. Determine the need for joinder of a third party, as discussed in [*see § 220.32, see also* Ch. 221, *Dissolution of Marriage: Procedure* .

d. If the proceeding was initiated after December 31, 1994, counsel must sign all papers presented to the court. By so signing, counsel certifies that the papers are not frivolous, designed to delay or harass, or unwarranted by the facts, and subjects himself or herself to statutory provisions for sanctions [*see Code Civ. Proc. § 128.7(a), (b)*; for discussion of sanctions, *see* Ch. 226, *Dissolution of Marriage: Attorney's Fees*].

2. File the pleadings and papers:

☐ Pay the filing fees, unless the client has applied for and been granted permission to proceed in forma pauperis [*see Cal. Rules of Ct., Rules 3.50*-3.58], or the application is for certain relief against domestic violence [*see Fam. Code § 6222*].

☐ File the original petition, along with any related custody declaration, applicable property and financial declarations, and any original confidential counseling statement required.

☐ Present to the court clerk the summons that will be "issued" by the clerk.

☐ Obtain from the court clerk at least three or four "endorsed-filed" copies of all documents filed, along with the original and several copies of the summons that have the case number stamped on them.

3. Consider the need for making an immediate challenge to the judge after the filing of the petition, if an ex parte order may be contested or in courts in which a judge is assigned "for all purposes" at the commencement of the case. In certain courts, letting the judge adjudicate an issue will preclude a later challenge; thus, counsel must follow the procedure set forth by statute and local rules in this regard [*see Code Civ. Proc. § 170.6*].

4. Arrange for service of a copy of the summons, petition, and related moving papers (and corresponding blank responsive forms) on the opposing party. For discussion of the requirements for service, see Ch. 221, *Dissolution of Marriage: Procedure* [*see Code Civ. Proc. § 413.10 et seq.*].

5. On completion of proper service, file the original summons and a proof of service with the court clerk. Obtain "endorsed-filed" copies of the summons and proof of service for counsel's file.

6. Prepare and serve a preliminary declaration of disclosure of assets and liabilities [*see* Ch. 221, *Dissolution of Marriage: Procedure*].

a. Except by court order for good cause, after or concurrently with service of the family law petition, each party must serve on the other a preliminary declaration of disclosure. The declaration must be executed under penalty of perjury on the mandatory Judicial Council form. It must not be filed with the court, except on court order [*see Fam. Code § 2104(a)-(c)*; *see also* Cal. Judicial Council Form FL-140 (form)].

b. Each party must also provide the other with a completed income and expense declaration [*see* Cal. Judicial Council Form FL-150], unless an income and expense declaration has already been provided and

is current and valid [*see Fam. Code § 2104(e)*].

c. File proof of service of the preliminary declaration of disclosure and income and expense declaration with the court [*Fam. Code §§ 2103, 2104(b)*]. For an illustrative, filled-in version of the mandatory proof of service form, see Cal. Judicial Council Form FL-141 (declaration of service form).

d. Note that if written disclosure of an *investment, business, or other income-producing opportunity* will be made pursuant to statute, the disclosure may need to be made in a particular case at an earlier time than that generally required for the preliminary declaration of disclosure [*see Fam. Code § 2102(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsFiling FeesFamily LawChild CustodyEnforcementUniform Child Custody Jurisdiction & Enforcement ActFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationGeneral OverviewFamily LawMarital Termination & Spousal SupportLegal Separation

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18-220 California Forms of Pleading and Practice--Annotated § 220.22

§ 220.22 Join Parties to Proceeding

1. Consider the need for joining as a party any of the following persons, using the procedure outlined in Ch. 221, *Dissolution of Marriage: Procedure* [*see Fam. Code § 2021*; *Cal. Rules of Ct., Rule 5.154*; *see also Fam. Code § 3425(c)*; *Cal. Rules of Ct., Rule 5.158(a)*]:

a. Any person who has in his or her possession or control, or who claims to own, any property subject to the court's jurisdiction in the proceeding.

b. Any person who has or claims custody or physical control of, or visitation rights with, any minor child of the marriage.

2. Consider joining any employee benefit plan that administers pension, retirement, or other employee benefits to which a party may be entitled [*see Fam. Code §§ 2021, 2060 et seq.*; *Cal. Rules of Ct., Rule 5.162*]. As a matter of routine practice, joinder is strongly recommended [*see* Ch. 222, *Dissolution of Marriage: Property Division and Valuation*].

3. Note that a court must order joined as a party any person it discovers has physical custody or claims custody or visitation rights regarding any minor child of the marriage [*see Cal. Rules of Ct., Rule 5.158*; *see also Fam. Code § 3410*]. Additional rules authorize third parties to seek joinder to the proceeding, based on their claim to an interest in property or in child custody or visitation [*see generally Cal. Rules of Ct., Rules 5.150-5.152, 5.154(b), (c), 5.158*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionGeneral OverviewFamily LawChild CustodyJurisdictionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawMarital Termination

& Spousal SupportDissolution & DivorceProperty DistributionClassificationRetirement BenefitsPensionsFamily LawMarital Termination & Spousal SupportLegal Separation

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18-220 California Forms of Pleading and Practice--Annotated §§ 220.23-220.29

[Reserved]

§§ 220.23[Reserved]

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C. Responding to the Proceedings (Respondent's Checklist)

18-220 California Forms of Pleading and Practice--Annotated § 220.30

§ 220.30 Evaluate Need for Responsive Pleadings

1. Examine the petition and related pleadings that have been served on the client. In general, a response [*see* Cal. Judicial Council Form FL-120] should be served and filed to prevent entry of a default against the client and to secure the relief that he or she needs.

a. A respondent who seeks no relief other than to have his or her former name restored could file a response seeking that relief only, but this is not necessary or recommended, given the ex parte application procedure available for that purpose [*see Fam. Code § 2080 et seq.*; Cal. Judicial Council Form FL-395].

b. File a response simultaneously with a motion to quash service of summons if the client wishes to challenge the court's exercise of personal jurisdiction over him or her [*Code Civ. Proc. § 418.10(e)*]. Filing the motion and response simultaneously does not constitute a general appearance unless and until the court denies the motion and enters an order denying the motion [*Code Civ. Proc. § 418.10(e)(1)*; *cf. In re Marriage of Torres (1998) 62 Cal. App. 4th 1367, 1380-1381, 73 Cal. Rptr. 2d 344* (nonresident parent who contests only pendente lite custody and visitation orders is not subject to court's general jurisdiction)]. For discussion of challenging jurisdiction, see Ch. 221, *Dissolution of Marriage: Procedure* .

2. Determine whether pleadings should be filed in response to an order to show cause or notice of motion brought by the petitioner. In general, counsel should prepare, serve, and file responsive pleadings, even if he or she is in agreement with some or all of the orders the petitioner has sought.

3. Discuss with the client and opposing counsel the desirability of stipulating to case management [*see Fam. Code § 2450, 2451*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionGeneral OverviewFamily LawMarital Termination & Spousal SupportLegal Separation

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18-220 California Forms of Pleading and Practice--Annotated § 220.31

§ 220.31 Prepare, Serve, and File Responsive Pleadings

1. Prepare at a minimum the following pleadings and papers, unless the client wishes to challenge the court's exercise of personal jurisdiction over him or her:

☐ Response [Cal. Judicial Council Form FL-120].

☐ Related financial and property declarations, if relevant to the relief requested in the response and the client has sufficient information to present them [*see Cal. Rules of Ct., Rules 5.128*; *see also* Cal. Judicial Council Forms FL-150 (Income and Expense Declaration), FL-155 (Financial Statement (Simplified)), FL-160 (Property Declaration)].

a. Note that in the Response, the client may agree with the petitioner's choice of overall relief with respect to the status of marriage (namely, dissolution, separation, or nullity), or may wish to request other relief. For example, if the petitioner sought a legal separation, the client may respond by requesting a marital dissolution [*see Fam. Code §§ 2345, 2347*].

b. In the response, the client also may seek all other affirmative relief appropriate to his or her situation, such as child custody, child or spousal support, attorney's fees and costs, and a division of marital property. For a complete explanation of completing the response, see Ch. 221, *Dissolution of Marriage: Procedure* .

2. Prepare a responsive declaration to any order to show cause or notice of motion initiated by the petitioner [*see* Cal. Judicial Council Form FL-320].

a. This declaration should be used to indicate the respondent's assent to, or disagreement

with, any of the orders proposed, and to request the respondent's own orders if these pertain to the same issues as those raised by the petitioner [*see Fam. Code § 213*].

b. File a separate order to show cause or notice of motion if the client wishes to obtain court orders on issues that are different from those raised by the petitioner, or if the client is seeking immediate ex parte relief.

3. If child or spousal support, or attorney's fees and costs are at issue, prepare income and expense and property declarations [Cal. Judicial Council Forms FL-150, FL-155, FL-160], unless they were already prepared in connection with the response.

4. Serve a copy of all responsive pleadings [*see generally Code Civ. Proc. §§ 1012, 1013, 1013a*; *Cal. Rules of Ct., Rule 5.10*].

5. File the original versions of the response, the declaration of mailing (or other proof of service), and all other responsive pleadings and declarations within the time provisions set forth by statute, or court rule [*see Fam. Code § 2020*; *see also* Ch. 221, *Dissolution of Marriage: Procedure*].

a. Filing a response to the petition will entail paying a required court filing fee, as this is generally the respondent's "first paper" in the proceeding.

b. If the client is indigent, file an application to proceed *in forma pauperis* [*see Cal. Rules of Ct., Rules 3.50*-3.63].

6. Prepare and serve a preliminary declaration of disclosure of assets and liabilities. The declaration must be executed under penalty of perjury on the mandatory Judicial Council form [*see Fam. Code § 2104*; Cal. Judicial Council Form FL-140].

a. It must not be filed with the court, except on court order, but proof of service of the preliminary declaration of disclosure must be filed with the court [*see Fam. Code § 2104*]. For an illustrative, filled-in version of the required declaration of service form, see Cal. Judicial Council Form FL-141.

b. Along with the preliminary declaration of disclosure, each party must provide the other with a completed income and expense declaration [*see* Cal. Judicial Council Form FL-150], unless an income and expense declaration has already been provided and is current and valid [*Fam. Code § 2104(e)*].

c. If written disclosure of an investment, business, or other income-producing opportunity will be made, that disclosure may need to be made in a particular case at an earlier time than that required for the preliminary declaration [*see Fam. Code § 2102*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral Overview

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18-220 California Forms of Pleading and Practice--Annotated § 220.32

§ 220.32 Join Parties to Proceeding

1. Consider joining as a party any person who has in his or her possession or control, or who claims to own, any property subject to the court's jurisdiction in the proceeding, or who has or claims custody or physical control of, or visitation rights with, any minor child of the marriage [*see Fam. Code §§ 2021, 3425(c)*; *Cal. Rules of Ct., Rules 5.154, 5.158(a), (b)*; *see also* Ch. 221, *Dissolution of Marriage: Procedure*].

2. Consider joining any employee benefit plan that administers pension, retirement, or other employee benefits to which a party may be entitled [*see Fam. Code §§ 2021, 2060 et seq.*; *Cal. Rules of Ct., Rule 5.162*]. In general, joinder is strongly recommended.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureParties Joinder Permissive JoinderFamily LawChild CustodyGeneral OverviewFamily LawChild CustodyProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationRetirement BenefitsPensions

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18-220 California Forms of Pleading and Practice--Annotated § 220.33

§ 220.33 Challenge Improper Pleadings or Proceedings, or Entry of Default

1. Move to strike matter in the petition if it was improperly included, such as an issue or a cause of action that is not authorized in the Family Code [*see Code Civ. Proc. § 435*].

2. Move to quash the proceeding if, for example, the residency requirements set forth by statute [*see Fam. Code § 2320*] for bringing the petition have not been met, or there is already a pending action between the parties regarding the termination of their marriage [*see Cal. Rules of Ct., Rule 5.121*].

3. Move to quash service of summons if, for example, the court lacks personal jurisdiction over the respondent [*see Code Civ. Proc. § 418.10(a)*]. A motion to quash service of summons is not deemed to be a general appearance by the respondent [*see Code Civ. Proc. § 418.10(d)*; *Cal. Rules of Ct., Rule 5.120(a)* (respondent appears by filing response, notice of motion to strike, notice of motion to quash proceeding, notice of motion to transfer proceeding, or written notice of appearance). A respondent may move to quash service of summons and simultaneously respond [*Code Civ. Proc. § 418.10(e)*]. Filing neither the motion nor the response under this procedure constitutes a general appearance unless and until the court denies the motion and enters an order denying the motion [*Code Civ. Proc. § 418.10(e)(1)*].

4. Move to transfer (change venue) if, for example, the court in which the proceeding has been filed is not the proper court, or the change is needed to promote the convenience of witnesses and the ends of justice [*see Code Civ. Proc. § 397*].

5. Move to set aside the entry of a default and/or default judgment that has been entered against the client in order to file a response, as discussed in Ch. 221, *Dissolution of Marriage: Procedure* and Ch. 489, *Relief From Judgments and Orders* [*see Code Civ. Proc. § 473*; *see also Fam. Code § 2120 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-220 California Forms of Pleading and Practice--Annotated §§ 220.34-220.39

[Reserved]

§§ 220.34[Reserved]

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18-220 California Forms of Pleading and Practice--Annotated § 220.40

§ 220.40 Preliminary Discovery and Fact Gathering

1. Obtain all documentation that the client is not otherwise able to furnish relevant to the subject of the hearing. If feasible, contact opposing counsel to informally obtain documents from the opposing party. Obtain the documentation illustrated for the following specific issues.

a. For temporary child or spousal support, or attorney's fees and costs, obtain items such as:

☐ Recent payroll vouchers ("pay stubs") for both parties (if both are employed).

☐ Income tax returns (state and federal) for the past year or other relevant period [*see Fam. Code § 3552*].

☐ Latest account check registers and statements for all bank, savings, and similar accounts.

☐ Recent loan applications.

☐ Documents establishing or reflecting each party's common monthly expenses, such as credit card bills, mortgage statements, medical bills, and the like, and canceled checks showing the payment of bills.

☐ Any other documents required to be furnished by local court rule [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 14.6].

b. For temporary child custody, obtain items such as:

☐ Documentation relating to the child's health and well-being. If physical abuse is at issue, obtain copies of any related police reports, medical records and related treatment bills, and written declarations of any witnesses.

☐ Birth certificates, if needed to apply for public assistance.

☐ School attendance records, if needed to establish a pattern of absences due, for example, to physical abuse.

☐ School counseling records, if needed to establish a report of abuse or other conflict affecting the child.

c. For temporary control of an asset, obtain items such as:

☐ Documentation showing ownership of the asset and payments that are still owed.

☐ For a vehicle, also obtain documentation of its registration and the existence of liability insurance.

d. For a restraining order on personal conduct (not provided for in the summons), obtain items such as the following:

☐ Police reports concerning domestic violence.

☐ Related medical treatment reports and bills, if the client or a child was abused.

☐ Residential telephone bills, to the extent they help document the making of annoying calls made from the parties' residence, or billed to the residential telephone number.

2. Interview the client and any other persons who can offer testimony helpful to the client in establishing the basis for the relief sought.

3. If the opposing party has not voluntarily provided needed information, serve a formal discovery request, provided there is sufficient time before the hearing. Discovery for the purpose of preparing for trial in the underlying proceeding is discussed in *§ 220.50*. For a complete overview of discovery in family law matters, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, ch. 110 (Matthew Bender 2d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyGeneral OverviewFamily LawChild SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportCosts & Attorney FeesFamily LawMarital Termination & Spousal SupportDissolution

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18-220 California Forms of Pleading and Practice--Annotated § 220.41

§ 220.41 Mediation of Custody and Visitation Issues

1. Confirm with the client that he or she has made contact with mediation personnel designated by the court, such as Family Court Services, and is otherwise complying with the mandatory mediation requirements before the hearing [*see Fam. Code § 3170 et seq.*].

2. Obtain the mediator's report and recommendation, in counties that provide for them [*see Fam. Code § 3183*; *see also Fam. Code § 3111* (custody investigation report)]. These may not be available until shortly before the hearing, and counsel should ascertain the local practice in this regard.

3. Find out if the mediator will testify, although this will not be the usual case at a hearing on temporary orders. More frequently, in so-called "nonconfidential counties," if a recommendation is to be made by the mediator, he or she may confer in chambers with both counsel and the judge prior to the hearing. In so-called "confidential counties," the mediator does not confer with the judge. For discussion of mandatory mediation, see Ch. 223, *Dissolution of Marriage: Child Custody* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediationsFamily LawAlternative Dispute ResolutionMediationFamily LawChild CustodyGeneral OverviewFamily LawChild CustodyGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-220 California Forms of Pleading and Practice--Annotated § 220.42

§ 220.42 Appearance of Counsel and Client

1. Ascertain prior to the hearing date, if possible, the identity of the judge before whom the hearing will be held. Be prepared to bring a motion to disqualify the judge if the appropriate statutory grounds are met [*see Code Civ. Proc. § 170.1 et seq.*].

NOTE:
If a motion will be made pursuant to *Code Civ. Proc. § 170.6*, counsel should strictly follow the times set forth in the statute and local rules for bringing the motion. The date on which the case is been assigned to a judge "for all purposes" under the local court rules is particularly important, because the period within which the motion may be brought may be measured from the time of the assignment. This may be early in the case [*see Code Civ. Proc. § 170.6(2)*; *Shipp v. Superior Court (1992) 5 Cal. App. 4th 147, 151-152, 6 Cal. Rptr. 2d 685]* .

2. Be prepared to raise any jurisdictional defect or defense at the hearing that pertains to the need for the client to appear for the hearing. This should already have been set forth in the client's responsive pleadings or papers to the court [*see § 220.31*].

3. Both the client and counsel generally should attend the hearing, if an appearance is otherwise proper. The client should be prepared to testify and explain any of the declarations he or she has presented to the court.

4. Be prepared to confer with the opposing counsel or unrepresented party before the commencement of the hearing in order to arrive at a time estimate and to attempt to reach a stipulation on as many outstanding issues as possible. Such a "meet and confer" requirement may also be set forth by local court rules.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionGeneral Overview

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18-220 California Forms of Pleading and Practice--Annotated § 220.43

§ 220.43 Conduct of Hearing and Rendition of Order

1. Present any partial stipulation on the issues. Local practice may vary, but the judge may wish to have the stipulation stated for the record or presented in writing prior to hearing evidence on any remaining contested matters.

2. Be ready to stipulate to the admission of the parties' declarations, subject to cross-examination of the party if the court will permit it. Local court rules may even deem the declarations admitted subject to legal objection, amendment, or cross-examination.

3. Prepare, as a time-saving device, to make "offers of proof" concerning matters to which, if the client were sworn as a witness, he or she would testify. This is the practice in some courts.

4. At the hearing's conclusion, and pursuant to the court's direction, prepare a written version of the court's order.

a. In general, the order should be prepared using the Judicial Council form of Findings and Order After Hearing and its appropriate attachments [*see* Cal. Judicial Council Forms FL-340-FL-344], as discussed in Ch. 221, *Dissolution of Marriage: Procedure* .

b. The order prepared by counsel should be sent to the opposing attorney for approval concerning its form and content, and signature; it then would be returned to counsel for submission to the judge for signature and filing.

c. Serve a conformed, "endorsed-filed" copy of the signed order by mail on the opposing attorney (or unrepresented party), as discussed in Ch. 221, *Dissolution of Marriage: Procedure* . Personal service of the order on the opposing party may be advisable in some cases.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsStipulationsFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral Overview

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18-220 California Forms of Pleading and Practice--Annotated § 220.44

§ 220.44 Special Considerations in Bringing Certain Pretrial Motions

1. Motion for Bifurcation

a. Move to bifurcate issues for trial when an early termination of marital status is needed, or when the trial of a particular issue is more effectively decided separately from the trial of other issues [*see Fam. Code § 2337*; *Cal. Rules of Ct., Rule 5.175*]. Issues that might be bifurcated include [*Cal. Rules of Ct., Rule 5.175(c)*]:

(1) Validity of a premarital or postmarital agreement.

(2) Date of parties' separation.

(3) Date for valuation of assets.

(4) Characterization of particular property as separate or community.

(5) Apportionment of increases in business value.

(6) Existence or value of business or professional goodwill.

b. Use the mandatory Judicial Council form of Request for Separate Trial [Cal. Judicial Council Form FL-315 (Form 21)] and the standard noticed motion procedure described in Ch. 221, *Dissolution of Marriage: Procedure* to bring the motion, unless there is a stipulation to bifurcate. The motion must be heard no later than the trial-setting conference [*Cal. Rules of Ct., Rule 5.175(a)*]. A preliminary declaration of disclosure with a completed schedule of assets and debts must also be served with the noticed motion, unless it has been served previously, or the parties stipulate in writing to defer its service until a later time [*Fam. Code § 2337(b)*].

c. Opposing counsel may wish to contest the bifurcation motion, or request that conditions be imposed in granting bifurcation [*see Fam. Code § 2337(b)*].

2. Motion for Alternate Valuation Date

a. Move for a date of valuation of property other than the date of trial when good cause can be shown for the alternate date [*see Fam. Code § 2552*].

(1) Some pension or retirement benefits are more properly valued on the date of separation, rather than trial, even though the date of trial is the usual time for valuing such benefits [*see Bowman v. Bowman (1985) 171 Cal. App. 3d 148, 158, 217 Cal. Rptr. 174* ; *In re Marriage of Behrens (1982) 137 Cal. App. 3d 562, 577, 187 Cal. Rptr. 200]* .

(2) Consider whether a law or similar professional practice, particularly one having a single practitioner or small number of partners, should be valued as of the date of separation [*see In re Marriage of Green (1989) 213 Cal. App. 3d 14, 20-21, 261 Cal. Rptr. 294]* .

b. Use the mandatory Judicial Council form of Request for Separate Trial [Cal. Judicial Council Form FL-315 (Form 21)] and the general noticed motion procedure described in Ch. 221, *Dissolution of Marriage: Procedure* to bring the motion, giving at least 30 days' notice [*see Fam. Code § 2552(b)*].

c. Opposing counsel may wish to contest the motion if, for example, it appears that good cause cannot, in fact, be established for a valuation date other than trial, or if an asset should otherwise clearly be valued on the date of trial [*see Fam. Code § 2552*].

3. Motion for Party's Vocational Examination

a. Consider moving to have a party examined by a vocational training counselor when his or her ability to obtain employment is at issue in connection with the determination of spousal support [*see Fam. Code § 4331*], as discussed in Ch. 225, *Dissolution of Marriage: Spousal Support* .

b. The examination may be made only for good cause shown, on notice to the party to be examined and all parties, and must specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons by whom it is to be made [*Fam. Code § 4331(b)*].

c. Opposing counsel may wish to contest the motion, or seek to limit the scope of the order in order to prevent possible harassment of the client.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSeparate TrialsFamily LawMarital Duties & RightsProperty RightsPostnuptial & Separation AgreementsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPremarital AgreementsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral Overview

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18-220 California Forms of Pleading and Practice--Annotated §§ 220.45-220.49

[Reserved]

§§ 220.45[Reserved]

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E. Preparing for Contested Trial

18-220 California Forms of Pleading and Practice--Annotated § 220.50

§ 220.50 Formal Discovery.

1. Evaluate Need for Discovery

a. Use formal discovery if counsel is unable to obtain documents or information voluntarily from the opposing counsel or unrepresented party.
(1) Contact the opposing counsel and ask if needed documents or information may be voluntarily provided.

(2) Keep a record of all efforts that have been made to obtain voluntary compliance from the opposition with requests for discovery.

b. Note that certain financial information is required by statute or court rule to be furnished by the parties in many instances.

(1) Documents such as income and expense and property declarations [Cal. Judicial Council Forms FL-150, FL-160] that are required to be filed when appropriate to the relief requested, or in connection with disclosure declarations, often serve as a basis for seeking further information through discovery [*see Cal. Rules of Ct., Rule 5.128*].

(2) Tax returns must be furnished by the parties in proceedings concerning child or spousal support [*Fam. Code § 3552*].

(3) Moreover, local court rules often require the parties to exchange payroll vouchers ("wage stubs") and other related information, particularly if child or spousal support, or attorney's fees and costs are at issue [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 14.6 (order to show cause matters)].

(4) Each party is also required to serve on the other party "preliminary" and "final" declarations of disclosure relating to assets and liabilities, accompanied by a current income and expense declaration [*see Fam. Code §§ 2100-2113*]. For

discussion of disclosure declarations, see Ch. 221, *Dissolution of Marriage: Procedure* .

c. Perform a search of public records as an alternative, or in addition, to formal discovery of documents relating to such matters as:

- ☐ Real property transactions and county taxes.
- ☐ Birth and death certificates, and marriage licenses.
- ☐ Business and professional licenses.
- ☐ Fictitious business statements.
- ☐ Transfers of businesses ("bulk sales").
- ☐ Issuance of corporate names.
- ☐ Registration and transfer of vehicles and vessels.
- ☐ Records of other court proceedings.
- ☐ Income taxes the client paid.

d. Obtain a standard credit report concerning one or both parties from one of the national credit reporting services.

e. In addition to any formal discovery needed [*see* Items 2-13, *below*], consider having the client employ:

(1) A forensic accountant to examine and summarize the parties' business records.

(2) An actuary to appraise pension or retirement plan benefits.

(3) A real property appraiser to value the family home and any other realty owned by the parties.

(4) A private investigator to help document conduct of a party to the extent relevant to child custody or visitation, or to a party's physical ability to work [*see Fam. Code §§ 2022, 2335, 4330, 4331*].

(5) A personal property appraiser to value any jewelry, art, collectibles, or furnishings.

f. If formal discovery is needed, develop a discovery plan early in the case and tailor all discovery requests to the needs of the case, rather than engaging in broad "boilerplate" requests that may be overinclusive or irrelevant. For a complete discussion of discovery in general, see Ch. 190, *Discovery:*

Scope, Regulation, and Timing et seq., and DeMeo, California Deposition and Discovery Practice (Matthew Bender). For a general discussion of discovery in family law cases and illustrative forms, including Judicial Council form interrogatories, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, Ch. 111 (Matthew Bender 2d ed.).

2. Discovery Related to Property, Support, Attorney's Fees, and Costs

a. For ownership or characterization of real property, obtain all documents pertaining to its acquisition, sale, lease, or encumbrance by one or both parties (before and after marriage). Also obtain any written agreements between the parties concerning the realty.

(1) Such documents may include:

- ☐ Deeds (including deeds of trust).
- ☐ Title insurance policies.
- ☐ Promissory notes.
- ☐ Sales agreements.
- ☐ Contracts of sale.
- ☐ Leases.
- ☐ Homeowner association agreements.
- ☐ County property tax statements.
- ☐ Annual account statement from secured lenders.
- ☐ Property insurance policies.
- ☐ Loan applications pertaining to the property.
- ☐ Written agreements for major property repairs.
- ☐ Income tax returns.

(2) Also obtain documents evidencing expenditures to purchase, lease, renovate, or repair property, or to pay property taxes and insurance:

- ☐ Canceled checks.

☐ Bank statements.

☐ Savings or related account passbooks.

☐ Copies of money orders or cashier's checks.

(3) Use the following common discovery devices:

☐ Written interrogatories and requests for admissions, to find out about interests the opposing party claims to have, or acknowledges having, in real property [*see* Code Civ. Proc. §§ 2030.030, 2033.030, 2033.710; Cal. Judicial Council Forms FL-145, FL-142 (optional form interrogatories and schedule of assets and debts)].

☐ Demand for production of documents, to obtain actual copies of documents in the possession of the opposing party [*see* Code Civ. Proc. § 2031.010].

☐ Demand to inspect or enter on land, to physically view the land or a building structure [*see* Code Civ. Proc. § 2031.010(d)].

☐ Deposition subpoena, to obtain records of the opposing party held by a bank or savings, or similar institution [*see* Code Civ. Proc. § 2020.410].

☐ Oral deposition of the opposing party, to clarify the opposing party's allegations concerning the property [*see* Code Civ. Proc. § 2025.010 et seq.].

b. For ownership and characterization of personal property, obtain all documents pertaining to the acquisition, sale, lease, or encumbrance of the property by one or both parties (before and after marriage). Also obtain any written agreements between the parties concerning the property.

(1) For each motor vehicle, find out the information noted below:

☐ Manufacturer's name and year of production.

☐ Model and color.

☐ License and identification (V.I.N.) numbers.

☐ Sales or lease agreements.

☐ Financing agreements.

☐ Current registration certificate.

☐ Insurance policy.

☐ Canceled checks showing vehicle payments.

☐ Bank or other statements showing payments.

☐ Ownership certificate ("pink slip").

☐ Whether the vehicle has been involved in any recent collisions. If so, obtain copies of any related traffic collision reports from the police agency that made the report.

☐ Whether any claims are pending for property damage or personal injury as a result of a collision involving the vehicle. If so, obtain copies of all correspondence (or, if a court action is pending, all pleadings), involving any such claims.

(2) For each vessel obtain:

☐ Manufacturer's name and year of production.

☐ Model and color.

☐ Vessel registration number.

☐ Vessel serial number.

☐ Other information set out in Item (1), *above*.

(3) For each mobile home designed for semipermanent installation on land, obtain:

☐ Manufacturer's name and year of production.

☐ Model and color.

☐ Serial and registration numbers.

☐ Space number in mobile home park.

☐ Mobile home park space leasing agreement.

☐ Other information set out in Item (1), *above*.

(4) For each business, ascertain or obtain:

☐ Business name (including any fictitious name).

☐ Location or locations of the business.

☐ Form of ownership.

☐ When it was acquired or commenced.

☐ Source of funds by which it was acquired.

☐ Source of funds by which it is operated.

☐ Identities and addresses of operators.

☐ Fictitious business statement (if any).

☐ Assets of business.

☐ Liabilities of business.

☐ Existence of professional or business licenses.

☐ Financial statements issued during marriage.

☐ Transfer agreements (bulk sales).

☐ Leases involving the business.

☐ Loans involving the business during marriage.

☐ Current bank statements.

☐ Records of business inventories.

☐ Records of cash receipts and disbursements.

- ☐ Invoices for goods received or shipped.
- ☐ Bills of lading for goods transported.
- ☐ Records of insurance issued for the business.
- ☐ Records of any liability claims.
- ☐ Tax records (income, real/personal property).

(a) If the business operates as a corporation, also ascertain whether it is publicly or privately held and the number of shares of stock issued, and obtain:

- ☐ Stockholders' names and addresses.
- ☐ Officers' names and addresses.
- ☐ Directors' names and addresses.
- ☐ Certificate of incorporation.
- ☐ Articles of incorporation and bylaws.
- ☐ Stock option holders' names and addresses.
- ☐ Stock option agreements.
- ☐ Amounts owed to Department of Corporations.
- ☐ Licensing/certification of operator(s).

(b) If the business is a partnership, also obtain or ascertain:

- ☐ Partners' names and addresses.
- ☐ Partners' participation (general/limited).
- ☐ Written partnership agreement.
- ☐ Type of license needed to operate business.

☐ Name of partner holding operating license.

☐ List of any pending license suspension actions or professional disciplinary actions.

(c) If the business is some type of national franchise, such as a "fast-food" restaurant, ascertain whether the spouse-operator has an actual ownership interest as a franchisee, is earning a salary or wage, and has employee benefits. In addition, obtain:

☐ Any written franchise agreement.

☐ Description of employee/operator benefits:

☐ Stock, stock options, profit-sharing.

☐ Pension or retirement benefits.

☐ Loan agreements by franchise to operator.

(5) For each party who has acquired, or is acquiring, benefits as an employee, or as an owner or operator of a business, obtain:

☐ Pension/retirement plan summary; that is, the periodic statement of the employee's accrued stock, savings, or retirement accounts, including amounts invested on the employee's behalf in mutual funds or other funds, that employers may furnish. Some employees work out of union hiring halls and are paid essentially as independent contractors. Their pension plans may be through a union only; thus, any plan statement or summary must be obtained from the particular union.

☐ Annual summary of employee benefit accounts.

☐ Name and address of any pension plan administrator.

☐ Name and address of any stock purchase plan administrator.

☐ A description of all other employee benefits, including health insurance, life insurance, and disability insurance; obtain summaries explaining these benefits.

(6) For each party who is employed and earns a salary or wage, obtain the following information and items:

☐ The gross pay rate per month, week, or hour (from payroll vouchers--"wage stubs"--or the like).

☐ The frequency of payment.

☐ Deductions from gross income that are made.

☐ Any written contract of employment or independent contractor agreement.

☐ Any formal agreement for payment of commissions or tips.

☐ State and federal income tax returns for the past five years.

(7) When funds are held by one or both parties in bank, savings, credit union, or similar financial institutions, obtain:

☐ Names and addresses of all institutions.

☐ Statements showing current account balances.

☐ Statements showing balance on a date at issue.

☐ Account number for each account.

☐ Names and addresses of all account holders.

☐ Manner of holding each account.

☐ Location, assigned number, and contents of any safe deposit box located in the institution.

☐ Existence of any funds of the parties that are held in the personal (or business) account or safe deposit box of someone other than the parties or their children.

(8) When the parties hold bonds, certificates of deposit, shares of stock, or other similar instruments, ascertain or obtain, as appropriate:

☐ Number and denomination of each kind or class of instrument.

☐ Manner of holding title to each.

☐ Identifying serial number of any contested instrument.

☐ Means of acquiring each.

☐ All canceled checks or bank statements showing the expenditure made to acquire the instrument.

(9) When individual policies of life insurance have been purchased, obtain a copy of each and ascertain:

☐ Face amount of the policy.

☐ Name of the insured and policy owner.

☐ Policy number.

☐ Name and address of insurer.

☐ Name and address of each beneficiary.

☐ Type of insurance (term, whole life, etc.).

☐ Date of issuance and policy period.

☐ Premium amount and frequency of payment.

☐ Whether current premiums have been paid.

(10) When individual policies of medical, hospital, dental, disability, or related insurance are being maintained for the parties or their children, obtain a copy of each (or other evidence of coverage) and ascertain or otherwise obtain:

☐ Name and address of insurer.

☐ Name(s) of the insured.

☐ Policy number (including any group number).

☐ Type of insurance.

☐ Existence of outstanding claims under policy.

☐ All outstanding medical bills with pending insurance claims. If the medical condition of the opposing party is at issue and a physical examination of that party has been ordered, obtain copies of the examination reports [*see* Code Civ. Proc. § 2032.610].

☐ Any written treatment plan, such as for orthodontic work or psychiatric counseling, that has been

devised by the service provider.

(11) When ownership or characterization is at issue of individual items of personal property, such as jewelry, collections, furniture, or other household furnishings, ascertain:

☐ When the item was acquired.

☐ The means by which it was acquired.

☐ If a gift, the name and address of the donor.

☐ If purchased, its cost and place of purchase.

☐ Canceled checks for the purchase.

☐ Bank statements reflecting the purchase.

☐ Savings passbooks reflecting the purchase.

☐ Any purchase or financing agreement.

☐ Bills, credit receipts or statements for the purchase.

☐ The funds or other property used to acquire it.

☐ Date of manufacture and all identifying information.

☐ Any written appraisals that may have been made for insurance or other purposes of jewelry, antiques, or other collectibles.

☐ Any special insurance policy "riders" to insure such jewelry, antiques, or other collectibles.

☐ Location of the item.

(12) For debts of the parties that are not reflected in the documentation of assets discussed above, obtain copies of:

☐ All bills, credit card statements, and the like for debts that are claimed to be outstanding, as well as for debts paid before the parties separated and for which some type of reimbursement is claimed.

☐ Copies of any outstanding judgment and any related documentation showing payments made on each judgment. Ascertain whether there are judgment liens filed against the parties' real property, liens

filed by homeowner associations for unpaid association dues, mechanics' liens, or any other types of lien.

☐ Records of any federal bankruptcy filings of the parties during marriage (or during the current family law proceeding).

(13) Use the following common discovery devices:

☐ Written interrogatories and requests for admissions, to find out interests the opposing party claims to have, or acknowledges having, in personal property, or concerning any debt claimed to be outstanding, or for which reimbursement is claimed [*see* Code Civ. Proc. §§ 2030.030, 2033.030, 2033.710; Cal. Judicial Council Forms FL-145, FL-142 (optional form interrogatories and schedule of assets and debts)].

☐ Demand for production of documents, to obtain actual copies of documents in the possession of the opposing party [*see* Code Civ. Proc. § 2031.010].

☐ Demand to inspect property, to physically view personal property, such as an antique or collectible [*see* Code Civ. Proc. § 2031.010(c)].

☐ Deposition subpoena, to obtain records of the opposing party held by a bank or savings, or similar institution [*see* Code Civ. Proc. § 2020.410].

☐ Oral deposition of the opposing party, to clarify the opposing party's allegations concerning the property [*see* Code Civ. Proc. § 2025.010 et seq.].

3. Discovery Related to Child Custody and Visitation

a. Tailor the discovery plan to the underlying grounds for requesting custody or visitation.

(1) This may encompass a broad range of areas concerning both the parent and child that deal with physical and mental health, child abuse, related domestic violence, and other issues.

(2) Consider the child's total living situation, including the presence of any unrelated third parties who may be dating a parent, sharing the same living quarters as the child and a parent, or providing child care.

(3) Custody and visitation are the major areas in which evidence concerning the conduct of the parties can be relevant to the proceeding, both generally insofar as the conduct is relevant to the best interests of the child, and specifically to the extent that the conduct supports a "history of abuse" by one parent against the child or against the other parent [*see Fam. Code § 3011* (factors determining best interests of child)]. Therefore, counsel may seek to gather documentary and testimonial evidence relating to party conduct in addition to other relevant matter.

b. If abusive conduct towards a child is an issue, obtain:

☐ Police reports (including photographs of injuries).

☐ Medical treatment records for the child.

☐ Court records (criminal and juvenile dependency).

☐ Reports of a county probation officer or child protective services agency.

☐ School or day care records, if these establish a pattern of absences due to a child's injuries. Also, there may be records of the child's physical condition from examinations by a school nurse, or records of emotional problems from a school counselor.

c. The same general documentation as that set forth in Item b., *above*, can and should be obtained if abuse has been directed by one party against the other when a child has been present, such as in the home [*see Fam. Code § 3011(b)*].

d. If a parent's mental or physical health is at issue with respect to custody or visitation, counsel may move to compel the examination of the parent by a physician and obtain related medical or psychiatric reports [*see* Code Civ. Proc. § 2032.610].

(1) A party's physical or mental condition may sometimes also be reflected in related police reports.

(2) A party or child also may have been previously committed for psychiatric evaluation, and a report may be on file with the treatment facility as well as with any public agency assisting in the process of taking the person into physical custody.

e. If a child's mental health is at issue, his or her records of medical or psychiatric treatment may be discoverable by either parent on providing a release by the parent to the health care provider.

(1) School records may also be a source of mental health information, to the extent that these records reflect school attendance and the reports of teachers or counselors.

(2) School grades may also be an issue if it is claimed, for example, that a particular custody arrangement is having a negative impact on the child, as reflected in his or her school grades.

f. If a comprehensive custody investigation has been ordered by the court [*see Fam. Code § 3111*], the investigative report that is issued may contain information that leads counsel to further matters meriting discovery.

g. Use the following common discovery devices:

(1) Written interrogatories and requests for admissions, to find out about the grounds on which a claim of custody or visitation is based, or facts pertaining to these issues that the party claims or acknowledges [*see* Code Civ. Proc. §§ 2030.030, 2033.030, 2033.710;

Cal. Judicial Council Forms FL-145, FL-142 (optional form interrogatories and schedule of assets and debts)].

(2) Demand for production of documents, to obtain actual copies of relevant documents in the possession of the opposing party, such as school records, birth certificates, medical bills for emergency treatment, and the like [*see* Code Civ. Proc. § 2031.010(b)].

(3) Deposition subpoena, to obtain records of the opposing party held by a medical provider [*see Code Civ. Proc. §§ 1985.3*, 2020.410]; alternatively, use a written demand to a party to produce such records when his or her physical or mental examination has been ordered [*see* Code Civ. Proc. § 2032.610].

(4) Oral deposition of the opposing party or of a third party, to clarify the factual basis for the opposing party's allegations or conduct concerning custody or visitation [*see* Code Civ. Proc. §§ 2020.010(a)(1), 2025.010 et seq.].

4. Compel Discovery That Was Improperly Withheld

a. If the opposition has been properly served with a discovery request and has improperly failed or refused to comply, counsel for the proponent may move, using the standard noticed motion procedure [*see* Ch. 221, *Dissolution of Marriage: Procedure*], to compel discovery.

(1) The procedure is contained in each separate section of the Code of Civil Procedure that concerns a particular discovery method, but these sections generally incorporate Code Civ. Proc. § 2023.010 by reference. It sets forth several types of discovery misuses and the types of sanctions that may be imposed for misuse [*see, e.g.,* Code Civ. Proc. § 2023.010(d)-(h) (failing to respond to discovery request; making unmeritorious objection or an evasive response; disobeying a court order to provide discovery, opposing unsuccessfully and without substantial justification a motion to compel discovery).

(2) The goal of the motion is to obtain a court order that requires the opponent to comply with the discovery request. In an appropriate case, counsel should seek monetary sanctions for the noncompliance, and should have available all documentation of attempts to obtain discovery [*see generally Code Civ. Proc. § 2023.030*].

b. Counsel for the party on whom the discovery request has been served may feel that it was improper or overbroad, and seek to resist the request entirely, or to limit the scope of discovery by obtaining a protective order, or sanctions [*see Code Civ. Proc. §§ 2019.030, 2023.010, 2025.420, 2030.090, 2031.060, 2033.080, 2034.250*].

c. If the disclosure declarations required by *Fam. Code §§ 2103-2105* have not been served by the opposition or the information provided in the declarations is insufficient, follow the procedure outlined by *Fam. Code § 2107* to compel compliance as discussed in Ch. 221, *Dissolution of Marriage: Procedure* . If a party fails to comply with any provision of *Fam. Code §§ 2103-2105*, the court must, in addition to any other remedy provided by law, impose money sanctions against the noncomplying party in an amount sufficient to deter repetition of the conduct or comparable conduct, which must include attorney's fees, costs incurred, or both, unless the court finds that the noncomplying party acted with substantial justification or that other circumstances make the imposition of the sanction unjust [*Fam. Code § 2107(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewFamily LawChild CustodyGeneral OverviewFamily LawChild SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportCosts & Attorney FeesFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral Overview

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18-220 California Forms of Pleading and Practice--Annotated § 220.51

§ 220.51 Evaluate Need for Contested Trial

1. Review the case after discovery is completed with the goal of attempting to resolve as many outstanding issues as possible.

a. Review the pleadings, motions, orders, and material obtained through discovery and any disclosure declarations. Research substantive and procedural legal issues.

b. Contact opposing counsel and determine his or her willingness to stipulate to facts, allegations, or elements that do not appear to be disputed. Document settlement attempts for the purpose of establishing possible bad faith by the opponent in refusing to settle [*see Fam. Code § 271*].

c. Some local court rules provide procedures for voluntary settlement conferences, as well as a "meet and confer" requirement prior to any mandatory settlement conference.

d. Before making any settlement offers or stipulations (which, of course, should be signed by the client as well as counsel), go over them with the client and explain the merits of the stipulation versus going to trial on the issues involved [*see Bus. & Prof. Code § 6103.5*; *Cal. Rules Prof. Conduct, Rule 3-510*; *In re Marriage of Helsel (1988) 198 Cal. App. 3d 332, 339-340, 243 Cal. Rptr. 657]* .

2. Review all appraisals or other reports concerning property that have been prepared by experts retained in the case. Plan to exchange appraisals and other reports that will be the basis of trial testimony in accordance with any local rule. Use the appraisals in settlement discussions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureSettlementsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral Overview

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[Reserved]

§ 220.52[Reserved]

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18-220 California Forms of Pleading and Practice--Annotated § 220.53

§ 220.53 Complete Pretrial, Settlement Conference, or Similar Statement, and Final Declaration of Disclosure

1. Prepare, serve, and file, in accordance with local court rule, the pretrial statement, combined pretrial statement and request for admissions, settlement conference statement or similar document in order to apprise the court and the opposing party of counsel's contentions.

a. Some courts require that a pretrial statement or combined pretrial statement/request for admissions be filed before holding any pretrial conferences in "long cause" matters. In some cases, usually involving "short cause" matters, this would be filed before or with an at-issue memorandum [*see, e.g.,* San Francisco City & County Uniform Local Rules of Court, Rule 11.36(A)(1)].

b. Other courts require the filing of a settlement conference statement a prescribed number of days before a mandatory settlement conference is scheduled. Local rules may require the parties to meet and confer in good faith before the statement is prepared and to issue a joint statement, absent leave of court to file a separate statement.

2. Unless a joint statement of the parties will be issued, a party wishing to oppose the statement filed should follow the local rule applicable to contest this pleading. This may take the form of a "reply" pretrial statement or document of a similar kind. Some courts also require the filing of a settlement proposal in a document separate from the pretrial or related statement.

3. Prepare, and service, a final declaration of disclosure concerning assets and liabilities, along with a current income and expense declaration, unless the parties have stipulated to waive service of the final declaration, or there is a court order excusing it for good cause [*see Fam. Code §§ 2105, 2106*; Cal. Judicial Council Forms FL-140, FL-144; *see* Ch. 221, *Dissolution of Marriage: Procedure*].

a. Except by court order for good cause, or the parties' stipulated waiver of the final

declaration of disclosure, prior to or at the time the parties enter into an agreement for the resolution of property or support issues other than pendente lite support or, in the event the case goes to trial, no later than 45 days before the first trial date is assigned, each party must serve on the other a final declaration of disclosure and an updated income and expense declaration, unless a current income and expense declaration is on file [*see Fam. Code § 2105*; *In re Marriage of Steiner (2004) 117 Cal. App. 4th 519, 522, 528, 11 Cal. Rptr. 3d 671* (parties are not entitled to reversal of judgment or new trial based on their failure to exchange final declarations of disclosure absent showing of miscarriage of justice)].

b. Unless the parties have stipulated under penalty of perjury to waive the final declaration of disclosure requirements, or those requirements have been dispensed with by the court for good cause, no judgment will be entered regarding the parties' property rights without each party, or that party's attorney, having executed and served a copy of the final declaration of disclosure and current income and expense declaration. In addition, each party must execute and file with the court a declaration signed under penalty of perjury stating that service of the final declaration of disclosure and current income and expense declaration was made on the other party, or that service of these items has been waived pursuant to statute [*see Fam. Code §§ 2105, 2106*; Cal. Judicial Council Form FL-141].

c. Notwithstanding the foregoing service requirements for the final declaration, if written disclosure of an investment, business, or other income-producing opportunity is to be made, such a disclosure may need to be made at an earlier time than that required for the final declaration [*see, e.g., Fam. Code § 2102(a)(2)*]. For discussion of the consequences of failing to comply with the disclosure requirements, see Ch. 221, *Dissolution of Marriage: Procedure* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial ConferencesFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionProperty Settlements

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18-220 California Forms of Pleading and Practice--Annotated § 220.54

§ 220.54 Attend Mandatory Conferences Before Trial

1. Counsel should anticipate attending a mandatory settlement conference.

a. On a party's request or on the court's own motion, a case may be set for a mandatory settlement conference [*Cal. Rules of Ct., Rule 3.1380(a)*].

b. Unless excused by the court for good cause, trial counsel and parties must personally attend the conference [*Cal. Rules of Ct., Rule 3.1380(b)*; *see Cal. Rules of Ct., Rule 3.670(c)(1)* (telephone appearance allowed only on court's order)]. When any consent to settle is required for any reason, the party with that consensual authority must be present personally at the conference [*Cal. Rules of Ct., Rule 3.1380(b)*].

c. No later than five court days before the settlement conference, each party must submit to the court and serve on the other party a mandatory settlement conference statement [*Cal. Rules of Ct., Rule 3.1380(c)*].

2. Consider related pretrial orders that may result from the conference.

a. The court has authority to order certain matters, such as the examination of a long account, heard by a referee [*see Code Civ. Proc. § 638 et seq.*].

b. It also may order the parties into arbitration when the value of disputed community property does not exceed $50,000, and the parties do not voluntarily agree in writing to a division of that property [*see Fam. Code § 2554*].

c. A stipulated order to bifurcate certain issues may result from the conference [*see Fam. Code § 2337*; *Cal. Rules of Ct., Rule 5.175*]. A *motion* to bifurcate must be heard not later

than the trial-setting conference [*Cal. Rules of Ct., Rule 5.175(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedurePretrial MattersSeparate TrialsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral Overview

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18-220 California Forms of Pleading and Practice--Annotated § 220.55

§ 220.55 Specially Set Trial of Child Custody and Child Support Issues

1. Move, as prescribed by local rules of court, for a special trial setting if the case involves child custody.

a. If child custody is the only contested issue, the case will be given a preference over other civil cases, except matters to which a special precedence is given by law, for assigning a trial date, and will be given an early hearing [*Fam. Code § 3023(a)*].

b. If custody is one of several contested issues, the court ordinarily must order a separate trial on custody and then give a preference to trial of the custody issue, as described above [*Fam. Code § 3023(b)*].

2. Move, as prescribed by local rules of court, for a special trial setting if the case involves child support.

a. Whenever child support is at issue, the court may on a showing of good cause order a separate trial on that issue, which will be given preference over other civil matters, except those to which a special preference is given by law, for assigning a trial date [*Fam. Code § 4003*].

b. If a separate trial has been ordered on child custody, the issues of custody and child support must be tried together [*Fam. Code § 4003*].

3. The court may have indicated, at a settlement or other conference that it will try either custody or support (or both) separately from other issues in the case.

a. If this is not the case, and no stipulation on a separate trial has been reached, counsel should make a noticed motion to that effect in order to resolve those issues in the child's interest.

b. Counsel should keep in mind, with respect to child custody, that the parties may still be in the process of participating in mandatory mediation with court personnel, or a court-ordered investigation may not yet be completed [*see Fam. Code §§ 3111, 3170 et seq.*]. Therefore, any trial date on custody should attempt to accommodate those events.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSeparate TrialsFamily LawAlternative Dispute ResolutionMediationFamily LawChild CustodyGeneral OverviewFamily LawChild SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-220 California Forms of Pleading and Practice--Annotated § 220.56

§ 220.56 Adjust Trial Date for Good Cause

1. Avoid changing the trial date, unless the change is necessary to accommodate an essential witness or to otherwise present essential evidence.

2. Absent a stipulation between the parties on changing the date, use the noticed motion procedure before trial to move to reset the trial date, or for a continuance of trial [*see, e.g.*, Los Angeles Co. Super. Ct. Rules, Rule 9.12 (motion to continue)].

3. An agreement to bifurcate the trial may obviate the need for adjustment of the trial date; thus, bifurcation should be kept in mind as an alternative if the issues involved are amenable to bifurcation [*see* Ch. 221, *Dissolution of Marriage: Procedure*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersContinuancesCivil ProcedurePretrial MattersSeparate TrialsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-220 California Forms of Pleading and Practice--Annotated § 220.57

§ 220.57 Prepare Trial Brief

1. Counsel will be required in many counties to prepare, file, and serve a trial brief.

a. A trial brief should concisely set forth a party's statement of the factual and legal issues to be tried, including specific contentions, and applicable points and authorities.

b. It should set out both parties' contentions, a proposed division of property, proposed awards of child custody and visitation, child and spousal support, and attorney's fees and costs, along with supporting authorities.

c. Local court rules may specify the form and contents of the brief, as well as the time for filing and service.

d. Local rules also may require the filing of a settlement proposal with the brief.

2. A trial brief is recommended, even if not required, as an aid to the court and an organizational tool for counsel.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyGeneral OverviewFamily LawChild SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportCosts & Attorney FeesFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral Overview

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18-220 California Forms of Pleading and Practice--Annotated § 220.58

§ 220.58 Marshal Evidence and Line Up Witnesses

1. Finalize the trial preparation by a complete review of the case.

a. Gather together all tangible physical evidence, such as documents that will be marked as exhibits.

b. Review depositions, interrogatories, and other products of discovery, along with any records of prior court testimony, and the like for possible use as sources of impeachment evidence at trial.
(1) Note that simply because a document was discoverable does not necessarily mean that it will be admissible at trial.

(2) If the opposing counsel will not stipulate to admissibility, consideration should be given on how to make the document admissible. In some instances, it may be necessary to resubpoena the document for use at trial.

c. Use the checklist below as an aid in completing this preparation. Assemble, review, and place originals or copies of the following in appropriate witness and exhibit files:

☐ Contracts, deeds, insurance policies, and financial records that are the basis for property or support claims.

☐ Declarations, letters, and other written statements made, written, prepared, or executed by potential witnesses, especially with regard to expert witnesses.

☐ All other potential exhibits and items of evidence that may support your claims or

defenses.

☐ Depositions of parties and witnesses.

☐ Interrogatories and responses.

☐ Demands for production of documents and documents produced in response to each request.

☐ Documents and items of evidence likely to be offered in evidence by opposing parties.

2. Contact the client and verify that he or she will be available to appear at trial.

a. Meet with the client before trial to review the scope of possible courtroom testimony, including a review of any documents the client may be expected to authenticate at trial.

b. If it appears that the client cannot attend, counsel may need to move to reset the trial date or otherwise continue trial.

3. Contact each third-party witness that counsel intends to call to testify at trial.

a. Confirm the date of the appearance and the arrangement for payment of any fees, such as expert witness fees.

b. Meet with each third-party witness and review with him or her the scope of possible trial testimony, especially with respect to any appraisals of property or reports he or she may have prepared in anticipation of trial.

c. If it appears that the witness cannot attend, counsel may need to move to reset the trial date or otherwise continue trial, depending on the importance of the witness to the case.

d. Use the checklist below as an aid in completing this preparation:

☐ Discuss with the witness general matters such as the nature of the proceeding, trial testimony, and procedures, and appropriate dress and courtroom behavior.

☐ Review with the witness major areas to be covered on direct examination.

☐ In the case of an expert witness, review qualifications and wording of hypothetical questions or other questions to be used to elicit opinions.

☐ Review with the witness each exhibit that will be shown to him or her on direct examination; if appropriate, discuss the manner in which he or she will be asked to authenticate or lay a foundation for the exhibit.

☐ Have the witness review his or her deposition, answers to interrogatories, declarations, and other statements in the possession of opposing counsel.

☐ Discuss with the witness the general approach to answering questions on cross-examination.

☐ Review with the witness anticipated areas and lines of cross-examination.

☐ Review with the witness each statement or exhibit that may be used during cross-examination.

e. If a witness has problems communicating in or understanding English, consider whether an interpreter should be used, and if so, make necessary arrangements.

f. Subpoena third-party witnesses who might otherwise be unwilling to voluntarily appear at trial.

(1) The testimony of a police officer, county social worker, or other third party may be needed with respect to a child custody matter, keeping in mind that the client may be responsible for any fees imposed by law for bringing certain public officers into court, or for any ordinary witness fees.

(2) Alternatively, attempt to reach a stipulation with the opposing party on admission of the contents of any report made by the prospective witness, rather than compelling him or her to testify.

4. Prepare a witness file for each witness. Use the checklist below in completing the file, so that it ultimately includes:

☐ Cover sheet.

☐ Subpoena requiring attendance and proof of service on witness, using the mandatory Judicial Council form [*see* Cal. Judicial Council Form 982(a)(16)].

☐ Transcript of the witness' deposition, if any.

☐ The witness' answers to interrogatories.

☐ All declarations and pleadings the witness has executed or verified in the action.

☐ All other relevant written statements made, executed, or prepared by the witness.

☐ Copies of all documentary exhibits to be used in direct or cross-examination of the witness.

☐ Outline of questions to be asked of witness on direct or cross-examination.

☐ Materials and legal memoranda on critical evidentiary issues likely to arise during witness' testimony. For source material in this area, see California Family Law Trial Guide (Matthew Bender).

5. Complete any exchange of witness lists, exhibits, expert reports, or the like as required by local court rule. Some courts require advance marking of exhibits before trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-220 California Forms of Pleading and Practice--Annotated § 220.59

§ 220.59 Submit Final Financial and Disclosure Declarations

1. Serve and file any final Income and Expense [Cal. Judicial Council Forms FL-150] and Property [Cal. Judicial Council Form FL-160] declarations before trial that reflect the client's most recent financial situation, in any case in which the client's request for relief from the court calls for them [*Cal. Rules of Ct., Rule 5.128(a)*].

2. If not already done, serve and file the "final declaration of disclosure" within the statutory time limit [*see Fam. Code § 2105*; *see also § 220.53*].

3. Be certain to observe all local rules of practice, particularly with respect to any special time limitations within which all declarations must be filed before trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral Overview

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18-220 California Forms of Pleading and Practice--Annotated §§ 220.60-220.69

[Reserved]

§§ 220.60[Reserved]

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18-220 California Forms of Pleading and Practice--Annotated § 220.70

§ 220.70 Challenge Trial Judge if Necessary

1. Find out which judge has been assigned to try the case or, if the case has not yet been assigned, find out how cases are assigned, and determine which judges may be assigned to try the case.

2. Research the judge or judges to whom the case has been, or may be, assigned.

3. Move to disqualify the judge if counsel believes that he or she is prejudiced against the client. Counsel may make a peremptory challenge or a challenge for cause, as discussed in Item IV-C, above [*see Code Civ. Proc. §§ 170.1 et seq.*, 170.6(a)(2); *Shipp v. Superior Court (1992) 5 Cal. App. 4th 147, 152, 6 Cal. Rptr. 2d 685]* . If a peremptory challenge is properly made, the disqualification takes effect immediately and requires the court to transfer the case for reassignment [*Hemingway v. Superior Court (2004) 122 Cal. App. 4th 1148, 1157, 19 Cal. Rptr. 3d 363]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-220 California Forms of Pleading and Practice--Annotated § 220.71

§ 220.71 Complete the Trial Appearance

Appear and present matter before court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-220 California Forms of Pleading and Practice--Annotated § 220.72

§ 220.72 Request Statement of Decision

1. At the conclusion of trial, counsel for either party should routinely request a statement of decision to preserve the party's rights on appeal [*see In re Marriage of Arceneaux (1990) 51 Cal. 3d 1130, 1133-1138, 275 Cal. Rptr. 797, 800 P.2d 1227]* .

a. Make the request in writing, or orally in open court, and specify the controverted issues for which the party is requesting a statement of decision [*see Code Civ. Proc. § 632*; *Cal. Rules of Ct., Rule 3.1590*].

b. Make the request within 10 days after the court announces a tentative decision. However, if trial is concluded within one calendar day, or in less than eight hours over more than one day, the request must be made prior to the submission of the matter for decision [*see Code Civ. Proc. § 632*; *Cal. Rules of Ct., Rule 3.1590*].

c. The court's tentative decision may state whether a requested statement of decision will be prepared by the court or by a designated party; and direct that the tentative decision will be the statement of decision unless within 10 days either party specifies controverted issues or makes proposals not covered in the tentative decision [*Cal. Rules of Ct., Rule 3.1590(a)*].

2. After a party has requested a statement of decision, any party may make proposals on its content, although any proposal must be made within 10 days of the date of the request [*see Code Civ. Proc. § 632*; *Cal. Rules of Ct., Rule 3.1590*].

Legal Topics:

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

Civil ProcedureTrialsBench TrialsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-220 California Forms of Pleading and Practice--Annotated § 220.73

§ 220.73 Prepare Formal Judgment as Directed

1. If so directed by the court, prepare a written judgment in the matter. The judge may have a practice of asking the "prevailing" party to prepare the judgment, but this will not always be the case. Forms of judgment on particular issues are set forth in Ch. 221, *Dissolution of Marriage: Procedure* .

a. If the parties' marital status has not already been terminated (such as in an earlier bifurcated proceeding), counsel would use the Judicial Council form of judgment, plus any attachments [Cal. Judicial Council Form FL-180].

b. Draft the judgment in a form that meets special statutory requirements for enforcement, such as the "qualified domestic relations order" (QDRO) requirements provided for ERISA pension/retirement benefits.

2. When directed to prepare the judgment, counsel will normally send the proposed judgment to the opposing attorney for approval concerning its form and content, and on its return, submit it to the court for signature by the trial judge. Special time limits apply, particularly when a statement of decision has been requested [*see Cal. Rules of Ct., Rule 3.1590(c)-(g)*].

a. Local practice and rules should also be consulted in this regard.

b. Be sure to include with the judgment completed Judicial Council forms of notice of entry of judgment [Cal. Judicial Council Form FL-190], along with postage-paid envelopes addressed to the parties (usually in care of their respective counsel), as required by local practice.

3. Serve a conformed, "endorsed-filed" copy of the signed judgment by mail on the opposing attorney. In certain instances, it may be prudent to also personally serve the opposing party with a copy of the

judgment, particularly if his or her personal knowledge of a court order may be at issue thereafter.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-220 California Forms of Pleading and Practice--Annotated § 220.74

§ 220.74 Posttrial Matters

1. File Appeal or Seek Other Appropriate Relief

a. Bring an appeal on behalf of the client when the issue at stake is significant enough to the client to justify the time and expense, and the appeal has merit [*see generally Code Civ. Proc. § 904.1*; *see also Cal. Rules of Ct., Rule 5.180* (appeals in bifurcated matters)].

b. The appeal may also necessitate the filing of an undertaking by the client, often in the context of a stay of enforcement of the judgment [*see Code Civ. Proc. § 916 et seq.*].

c. File a notice of appeal within the time limits prescribed by the California Rules of Court and comply with all other statutory requirements and rules of court to perfect the appeal [*see Code Civ. Proc. §§ 901-904.1, 906 et seq.*; *Cal. Rules of Ct., Rules 8.100-8.552*]. For discussion of the procedures involved, see Ch. 40, *Appeal* .

2. Seek Writ Relief if Appropriate

a. In some cases, it is more appropriate to seek relief from the court's judgment by extraordinary writ than by filing an appeal, or by petitioning for writ relief pending the outcome of the appeal [*see, e.g., Code Civ. Proc. §§ 917.7, 923*; *Cal. Rules of Ct., Rule 8.112* (writ of supersedeas pending appeal)].

b. In other cases, such as those involving a contempt judgment, the court's ruling is not appealable, and may be reviewed only by writ relief [*see, e.g., Code Civ. Proc. §§ 904.1(a), 1068, 1222* (writ of review for contempt matters)].

c. Bring a petition for the writ being sought. The petition must ordinarily be filed in the

court of appeal for the appellate district in which the involved superior court is located [*see generally Cal. Rules of Ct., Rules 8.112, 8.490*]. For discussion of the procedures involved in seeking writ relief, see Ch. 358, *Mandate and Prohibition* , and Ch. 492, *Review (Certiorari), Writ of.*

3. Concluding Services and Withdrawal From Case

a. Send to insurance carriers a statutory notice that the judgment requires one of the parties to maintain or purchase health, life, or disability insurance. Use the notice form and procedure set forth in *Fam. Code § 2051*.

b. Advise the client to immediately review (and usually, to revoke and rewrite) any last will and testament made during the marriage; and to review any beneficiary designations under life insurance policies and similar instruments, but not to change these if the judgment requires the maintenance of the current designations.

c. Advise the client that if any property still remains held in joint tenancy title between the parties, which might occur in bifurcated proceedings in which marital status has not yet been terminated, the client should consider severing the joint tenancy titles in order to avoid the possible passage of title by operation of law on the client's death [*see In re Marriage of Hilke (1992) 4 Cal. 4th 215, 222-224, 14 Cal. Rptr. 2d 371, 841 P.2d 891]* .

d. Unless counsel has been replaced by another attorney during the litigation and is therefore no longer the attorney of record, counsel may wish to formally withdraw at the conclusion of the litigation, even without the formal consent of the client or the court.
(1) Counsel may file a notice of withdrawal at any time subsequent to the time when any judgment becomes final and prior to service on the attorney of pleadings or motion papers in any proceeding then pending in the cause [*Code Civ. Proc. § 285.1*].

(2) The notice under *Code Civ. Proc. § 285.1* must state (a) the date of entry of the final decree or judgment, (b) the last known address of the party, (which should be verified in some manner by counsel or his or her staff), and (c) that the attorney withdraws as attorney for such party.

(3) A copy of the notice must be mailed to the party at his or her last known address and must be served on the adverse party [*Code Civ. Proc. § 285.1*]. For an illustrative, filled-in version of the Judicial Council form of withdrawal, see Form 53 [Cal. Judicial Council Form FL-960].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureRemediesWritsGeneral OverviewCivil ProcedureAppealsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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Chapter 221 DISSOLUTION OF MARRIAGE: PROCEDURE

18-221 California Forms of Pleading and Practice--Annotated 221.syn

§ 221.syn Synopsis to Chapter 221: DISSOLUTION OF MARRIAGE: PROCEDURE

§ 221.01 Scope of Chapter

§ 221.02 Cross References

§§ 221.03-221.09 [Reserved]

§ 221.10 Grounds for Dissolution and Legal Separation

[1] Necessity of Marriage

[2] Irreconcilable Differences

[3] Incurable Insanity

[4] Legal Separation

[5] Choice Between Dissolution and Legal Separation

§ 221.11 Jurisdiction in Proceeding for Dissolution or Legal Separation

[1] Jurisdiction in Proceeding for Dissolution

[a] Domicile as Basis

[b] Statutory Residence Requirement

[2] Jurisdiction in Proceeding for Legal Separation

[a] Domicile

[b] No Residence Requirement for Legal Separation

[3] Support, Custody, and Property in Proceeding for Dissolution or Legal Separation

[a] In General

[b] Marital Property

[c] Child Custody Matters

[d] Constitutional Considerations ("Minimum Contacts")

[4] Proper Court

[5] Proceedings Involving Native Americans

§ 221.12 Venue

[1] In Proceeding for Dissolution

[2] In Proceeding for Legal Separation

§ 221.13 Initial Client Interview

[1] Objectives

[2] Interview Technique

[3] Use of Checklist

[4] Providing Limited Attorney Assistance in Preparation of Court Documents

§ 221.14 Preliminary Advice

[1] General Topics To Be Covered

[2] Alternatives to Termination of Marriage

[3] Initial Self-Help Measures

[a] Physical Separation and Protection From Violence

[b] Protection of Children

[c] Possession and Protection of Property

[d] Raising Cash

[e] Protection From Other Spouse's Debts

[f] Assistance From Family Law Information Centers

[4] Filing Considerations

[a] No Proceeding Pending

[b] Proceeding Pending

§ 221.15 Petitioning for Dissolution or Legal Separation

[1] General Procedural Rules

[2] Judicial Council Forms

[3] Petition and Related Papers

[a] Petition for Dissolution or Legal Separation

[b] Mandatory Declaration of Disclosure

[c] Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act

[d] Lis Pendens

[e] In Forma Pauperis

[4] Summons

[a] Issuance

[b] Joinder Summons

[c] Papers to Be Served With Summons

[5] Service of Summons

[a] Requirement

[b] Strategy in Serving Summons

[c] Persons Who May Serve Summons

[d] Service by Personal Delivery

[e] Substituted Service

[f] Service by Mail

[g] Service by Publication

[h] Service on Persons in Other States

[i] Service on Persons in Foreign Countries

[j] Notice When Custody Is at Issue

[6] Postpetition Procedures

[a] Amended and Supplemental Pleadings

[b] Supplemental Complaint for Child Support of Unborn Child

[c] Motion to Quash Responsive Relief

[d] Motion to Strike

[e] Redacting Social Security Numbers and Sealing Financial Pleadings

[i] Redacting Social Security Numbers

[ii] Sealing Financial Pleadings

§ 221.16 Responding to the Petition

[1] Respondent's Options

[2] Response

[a] In General

[b] Accompanying Papers

[c] Service

[d] Filing

[3] Mandatory Declaration of Disclosure

[4] Appearance

[a] What Constitutes Appearance

[b] Notice of Appearance

[5] Motion to Strike

[a] Basis for Motion

[b] Filing and Service

[c] No Extension of Time

[6] Motion to Quash Proceeding

[a] Bases for Motion

[b] Waiver by Failure to File Timely Motion

[c] Time for Hearing

[d] Extension of Time to Respond

[e] Ruling on Motion

[f] Order

[7] Motion to Quash Service of Summons

[a] Basis for Motion

[b] Effect of Motion on Time to Plead

[c] Motion as Special Appearance

[d] Order

[8] Motion for Change of Venue

[a] Basis for Motion

[b] Temporary Orders Before Transfer

[c] Order Transferring Proceeding

[9] Motion to Stay or Dismiss Proceeding on Ground of Inconvenient Forum

[a] Basis for Motion

[b] Procedure

[c] Stay or Dismissal

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§ 221.17 Joinder of Parties and Causes of Action

[1] In General

[a] Parties

[i] Authority for Joinder and Definitions

[ii] Personal Jurisdiction Required

[iii] Mandatory Versus Permissive Joinder

[iv] Opposition to Joinder

[v] Binding Nature of Judgment on Party Joined

[b] Claims or Causes of Action

[c] Attorney's Fees

[2] Joinder of Persons in General

[a] Claiming Right to Custody or Visitation

[b] Claiming Ownership of Community Property

[c] Served With Restraining Order

[d] Indispensable or Necessary Party

[3] Joinder of Employee Benefit Plan

[a] In General

[b] Joinder on Default

[c] Stipulation

[d] Effect of Appearance or Nonappearance at Hearing

[e] Hearing on Motion to Modify or Set Aside

[f] Availability and Duration of Stay of Orders Affecting Plan

[4] Joinder of Causes of Action

§ 221.18 Pendente Lite Orders, Ex Parte Relief, and Selected Pretrial Motions

[1] Nature of Preliminary Relief

[a] Function of Preliminary Orders in Family Law Proceeding

[b] Spousal Support

[c] Custody

[d] Child Support

[e] Attorney's Fees and Costs

[f] Disposition of Property

[g] Implementation of Case Management Plan

[h] Mandatory Disclosure of Property, Income, and Expenses

[i] Injunctive Relief

[j] Maintenance of Health, Life, Disability, or Other Insurance Coverage

[2] Application for Preliminary Orders

[a] Decision to Seek Preliminary Orders

[b] Methods of Applying for Preliminary Orders

[c] Stipulation and Order

[d] Notice of Motion

[e] Order to Show Cause

[f] Informal Notice of Ex Parte Application

[g] Memorandum of Points and Authorities

[h] Other Papers to Be Served by Party Seeking Relief

[i] Determining Time of Hearing in Relation to Service Requirements

[j] Obtaining Order Shortening Time

[k] Service of Papers

[l] Child Custody Award Pursuant to Agreement or on Ex Parte Application

[m] Mediation

[3] Responding Party's Papers

[a] Responsive Declaration

[b] Responding Party's Other Papers

[c] Service and Filing

[4] Bifurcation and Consolidation

[a] Bifurcation

[b] Consolidation

[i] In General

[ii] Cases Involving Child Support Agencies

[5] Hearing and Orders

[a] Continuance

[b] Hearing

[c] Attack on Order in Trial Court

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§ 221.19 Reconciliation Proceedings

§ 221.20 Uncontested Proceedings

[1] In General

[2] Representing Petitioner

[3] Representing Respondent

[4] Representing Both Parties

[5] Entry of Default and Setting for Hearing

[6] The Uncontested Hearing

[a] Establishing Grounds

[b] Evidence Regarding Property, Custody, and Support

[c] The Proposed Judgment of Dissolution

§ 221.21 Summary Dissolution

[1] In General

[2] Role of Attorney

[3] When Summary Procedure Is Available

[4] Procedure

[5] Revocation of Petition

[6] Entry of Final Judgment

[a] When Judgment May Be Entered

[b] Effect of Entry of Final Judgment

[c] Availability of Set Aside

§§ 221.22-221.39 [Reserved]

§ 221.40 Applicability of Civil Trial Rules and Procedures

§ 221.41 Avoiding Trial and Limiting Issues by Settlement

§ 221.42 Mediation of Child Custody and Visitation Issues Before Trial

§ 221.43 Pretrial Procedures Affecting Conduct of Trial

[1] Bifurcation

[2] Case Management

[3] Reference of Case or Factual Issues to Referee

[a] In General

[b] On Consent of Parties

[c] By Court Order

[d] Referee's Findings

[4] Submission to Arbitration

[5] Joinder

[6] Consolidation

[7] Closed Hearing

[8] Request for Jury

§ 221.44 Pretrial Statement

§ 221.45 Settlement Conferences

§ 221.46 Preference Given Contested Custody and Child Support Issues

§ 221.47 Adjusting Trial Date

[1] Continuances

[2] Advancing, Resetting, or Specially Setting Trial

§ 221.48 Mandatory Declaration of Disclosure

[1] When Declaration Required

[2] Stipulation to Waive Final Declaration

[3] Form and Service of Declaration

[4] Contents of Declaration

[5] Remedies for Noncompliance With Disclosure Requirements

§§ 221.49-221.59 [Reserved]

§ 221.60 Disqualification of Judge

[1] By Peremptory Challenge

[2] For Cause

§ 221.61 Notice of Trial

§ 221.62 Private Trial and Sealing of Court Files

§ 221.63 Trial Brief

[1] In General

[2] Other Papers

§ 221.64 General Considerations in Presenting Case

§ 221.65 Use of Opening and Closing Statements

[1] Opening Statement

[2] Final Argument

§ 221.66 Anticipating Evidentiary Problems

[1] Review of Evidence Before Trial

[2] Prohibited Evidence

§ 221.67 Use of Expert's Reports

§ 221.68 Use of and Preparation of Exhibits

§ 221.69 Discovery Evidence at Trial

[1] In General

[2] Electronic Recordings

§ 221.70 Stipulations at Trial

§ 221.71 Witnesses

[1] In General

[2] Restoration of Birth Name or Former Name

[3] Qualification of Experts

§ 221.72 Request for Statement of Decision

§ 221.73 Preparation, Rendition, and Entry of Judgment

§ 221.74 Attorney's Withdrawal After Entry of Final Judgment

§§ 221.75-221.89 [Reserved]

§ 221.90 Grounds for Dismissal

§ 221.91 Types of Dismissals

[1] With or Without Prejudice

[2] Discretionary or Mandatory

[a] Discretionary Dismissals

[b] Mandatory Dismissals

§ 221.92 Dismissal by Petitioner Before Trial

[1] When Available

[2] When Prohibited

§ 221.93 Voluntary Dismissal by Either Party Before Judgment

§ 221.94 No Dismissal When Child or Spousal Support Order in Force

§ 221.95 No Dismissal After Separate Trial on Marital Status

§ 221.96 Effect of Dismissal on Pendente Lite Orders

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§ 221.110 Necessity for Statement of Decision in Family Law Proceedings

[1] General Nature and Purpose of Statement

[2] When Statement Not Required

[3] When Statement Must Be Issued Without Request

[4] Effect of Statement on Appeal

§ 221.111 Procedures Applicable to Statements of Decision

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[2] Party Designated to Prepare Statement or Use of Tentative Decision

[3] When Request Must Be Made

[4] Contents and Format of Statement of Decision

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[6] Failure to Make Requested Statement of Decision

§ 221.112 Required Findings on Particular Issues

[1] Spousal Support

[2] Child Support

[3] Child Custody

[4] Property Division

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§ 221.130 Single Final Judgment of Dissolution

§ 221.131 Refusal to Enter Judgment

[1] In General

[2] Reconciliation of Parties

§ 221.132 Finality of Judgment for Purposes of Terminating Marital Status

[1] Six-Month Waiting Period

[2] Specification of Date of Finality in Judgment

[3] Retention of Jurisdiction Over Date of Termination of Marital Status

[4] Effect of Death of Party

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§ 221.133 Res Judicata

[1] Application to Judgment of Dissolution

[2] Not Applicable to Child Support and Custody Orders

[3] Not Applicable to Spousal Support Orders

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§ 221.134 Community Property Division in Judgment

[1] Propriety of Immediate Division

[2] Unadjudicated Community Property

[3] Qualified Domestic Relations Orders (QDROs)

§ 221.135 Spousal Support in Judgment

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[2] Permanent Support

§ 221.136 Marital Settlement Agreements and Judgment

§ 221.137 Stipulated Judgment

§ 221.138 Procedure for Obtaining Judgment

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[2] Submission and Signing of Proposed Judgment

[3] Objections to Proposed Judgment; Signing and Filing

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[5] Entry of Judgment

[6] Notice of Entry of Judgment

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[b] Notice to Insurer

[7] Judgment of Legal Separation

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§ 221.150 Motion for New Trial

[1] Availability in Family Code Proceeding

[2] Grounds for New Trial Motion

§ 221.151 Motion to Vacate Judgment and Enter Different Judgment

[1] Grounds for Motion

[2] Ruling on Motion to Vacate

§ 221.152 Motion to Set Aside Default and Default Judgment

[1] Improper Service of Summons

[2] Violation of Servicemembers Civil Relief Act and Related California Law

[3] Mistake, Inadvertence, Surprise, or Excusable Neglect

§ 221.153 Family Code Motion to Set Aside Judgment

[1] Availability

[2] Preliminary Finding of Materiality

[3] Grounds and Time Limits for Set-Aside Motion

[4] Ruling on Set-Aside Motion

[5] Property Division After Set-Aside

[6] Other Rights and Remedies Unaffected

[7] Appeal Period Not Extended

§ 221.154 Postjudgment Tort Action for Concealment of Community Assets

§ 221.155 Motion for Relief From Void Judgment or Order

[1] Availability

[2] Grounds for Relief From Void Judgment or Order

[3] Time Limits When Judgment or Order Void on Face or Void in Fact

[4] Nonstatutory Motion to Vacate Void Judgment

[5] Collateral Attack on Void Judgment

§ 221.156 Postjudgment Motion or Order to Show Cause to Divide Unadjudicated Property

[1] Availability

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§ 221.157 Motion for Correction of Clerical Error

§ 221.158 Motion to Reconsider and Renewed Motions

§ 221.159 Relief From Support Orders

[1] Fraud, Perjury, or Lack of Notice

[2] Proceedings Brought by Child Support Agencies

[a] Default Judgments Based on Presumed Income

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§ 221.180 Orders Subject to Modification

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[4] Child Custody and Visitation

[5] Attorney's Fees and Costs

§ 221.181 Discovery of Other Party's Income and Expense Information Before Support Modification Proceeding

[1] Information From Party

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[a] Request for Production of Income and Benefits Information

[b] Required Notice to Employee

[c] Employee's Motion to Quash or Modify Request

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§ 221.182 Application for Modification

[1] Papers and Format

[2] Use of Order to Show Cause or Notice of Motion

[3] Local Court Rules

[4] Service of Application Papers

[a] General Rules

[b] Service Before or After Judgment

§ 221.183 Response to Application

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[2] Countermotion

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§ 221.184 Change of Venue

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[c] Nonresidents

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[1] FORM

[2] Use of Form

[3] Completing the Form

[a] Caption

[b] Residence

[c] Statistical Facts

[d] Minor Children

[e] Separate Property

[f] Community and Quasi-Community Property

[g] Type of Relief Sought

[h] Request for Relief

[i] Notice of Child Support

[j] Declaration Regarding Orders in Summons

[k] Social Security Numbers

[4] State Statutes

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[6] Text References

§ 221.311 Preliminary Declaration of Disclosure--Judicial Council Form [Fam. Code §§ 2103-2113; Cal. Judicial Council Form FL-140]

[1] FORM

[2] Use of Form

[3] Completing the Form

[4] State Statutes

[5] Cross References

§ 221.312 Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act--Cal. Judicial Council Form FL-105 [Fam. Code § 3429]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 221.313 Summons--Family Law--Judicial Council Form [Cal. Judicial Council Form FL-110]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 221.314 Proof of Service of Summons--Judicial Council Form (Family Law) [Cal. Judicial Council Form FL-115]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 221.315 Notice and Acknowledgment of Receipt--Family Law--Judicial Council Form [Judicial Council Form

FL-117]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 221.316 Response [Cal. Judicial Council Form FL-120]

[1] FORM

[2] Use of Form

[3] Completing the Form

[a] Residence

[b] Statistical Facts

[c] Minor Children

[d] Separate Property and Obligations

[e] Community Property Declaration

[f] Reconciliation

[g] Denial of Grounds for Proceeding

[h] Marital Status; Dissolution, Separation, or Nullity

[i] Request for Relief

[j] Notice of Child Support

[k] Social Security Numbers

[4] State Statutes

[5] Text References

[6] Cross References

§ 221.317 Notice of Motion and Declaration for Joinder--Judicial Council Form [Cal. Judicial Council Form FL-371]

[1] FORM

[2] Use of Form

[3] Notice of Motion

[4] Declaration for Joinder

[5] Pleading to Accompany Notice of Motion and Declaration for Joinder

[6] Filing and Service

[7] State Statutes

[8] California Rules of Court

[9] Text References

§ 221.318 Responsive Declaration to Motion for Joinder, Consent Order of Joinder--Judicial Council Form [Cal. Judicial Council Form FL-373]

[1] FORM

[2] Use of Form

[3] Order of Joinder

[4] Cross References

§ 221.319 Summons (Joinder)--Judicial Council Form [Cal. Judicial Council Form FL-375]

[1] FORM

[2] Use of Form

[3] Cross References

§ 221.320 Request for Joinder of Employee Pension Benefit Plan and Order (Family Law)--Judicial Council Form [Fam. Code §§ 2060-2062; Cal. Judicial Council Form FL-372]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] California Rules of Court

[5] Decisions

[6] Cross References

§ 221.321 Pleading on Joinder--Employee Pension Benefit Plan (Family Law)--Judicial Council Form [Fam. Code §§ 2060-2062; Cal. Judicial Council Form FL-370]

[1] FORM

[2] Use of Form

[3] Cross References

§ 221.322 Notice of Appearance and Response of Employee Benefit Plan (Family Law)--Judicial Council Form [Fam. Code §§ 2060-2062; Cal. Judicial Council Form FL-374]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 221.323 Notice to Maintain Insurance During Pendency of Proceeding

[1] FORM

[2] Use of Form

[3] State Statutes

§ 221.324 Stipulation for Custody

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Text References

§ 221.325 Stipulation for Temporary Orders

[1] FORM

[2] Use of Form

[3] Cross References

§ 221.326 Notice of Motion (General)--Cal. Judicial Council Form FL-301

[1] FORM

[2] Notice of Motion

[3] California Rules of Court

[4] Text References

§ 221.327 Application for Order and Supporting Declaration--Cal. Judicial Council Form FL-310

[1] FORM

[2] Use of Form

[3] Contents of Supporting Declaration

§ 221.328 Application or Response to Application for Separate Trial--Cal. Judicial Council Form FL-315

[1] FORM

[2] Use of Form

[3] Supporting Declaration

[4] Joinder of Pension Plans

[5] Requested Orders

[6] Time for Hearing and Clerk's Mailing

§§ 221.329-221.330 [Reserved]

§ 221.331 Order to Show Cause and Temporary Orders--Cal. Judicial Council Forms FL-300, FL-305

[1] FORM

[2] Use of Form

[3] Completing the Form

[4] Temporary Orders

[5] State Statutes

[6] California Rules of Court

[7] Decisions

[8] Text References

§ 221.332 Income and Expense Declaration [Cal. Judicial Council Form FL-150] With Income Information, Expense Information, and Child Support Information--Judicial Council Form

[1] FORM

[2] Use of Form

[3] Completion of Forms

[4] Income Averaging

[5] Children of Other Relationships (Child Support and Hardship Deductions)

[6] Attachments

§ 221.333 Financial Statement (Simplified)--Judicial Council Form [Cal. Judicial Council Form FL-155]

[1] FORM

[2] Use of Form

§ 221.334 Property Declaration--Judicial Council Form [Cal. Judicial Council Form FL-160]

[1] FORM

[2] Use of Form

§ 221.335 Continuation of Property Declaration--Judicial Council Form [Cal. Judicial Council Form FL-161]

[1] FORM

[2] Use of Form

[3] Cross References

§ 221.336 Ex Parte Application and Order to Seal Financial Forms--Judicial Council Form [Cal. Judicial Council Form FL-316]

[1] FORM

[2] Use of Form

§ 221.337 Responsive Declaration to Order to Show Cause or Notice of Motion--Judicial Council Form [Cal. Judicial Council Form FL-320]

[1] FORM

[2] Use of Form

[3] Cross References

§ 221.338 Findings and Order After Hearing and Attachments--Judicial Council Form [Cal. Judicial Council Forms FL-340-FL-344, FL-347]

[1] FORM

[2] Use of Form

§ 221.339 Appearance, Stipulation, and Waivers--Judicial Council Form [Cal. Judicial Council Forms FL-130]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] California Rules of Court

[5] Text References

§ 221.340 Request to Enter Default--Judicial Council Form [Cal. Judicial Council Forms FL-165]

[1] FORM

[2] Use of Form

[3] Cross References

§ 221.341 Declaration for Default or Uncontested Dissolution or Legal Separation [Fam. Code § 2336; Cal. Judicial Council Form FL-170]

[1] FORM

[2] Use of Form

[3] Cross References

§ 221.342 Joint Petition for Summary Dissolution of Marriage--Judicial Council Form [Fam. Code §§ 200, 2401, 2406; Cal. Judicial Council Form FL-800]

[1] FORM

[2] Use of Form

§ 221.343 Request for Final Judgment, Final Judgment of Dissolution of Marriage, and Notice of Entry of Judgment--Judicial Council Form [Fam. Code § 2403; Cal. Judicial Council Form FL-820]

[1] FORM

[2] Use of Form

[3] Cross References

§ 221.344 Notice of Revocation of Petition for Summary Dissolution--Judicial Council Form [Fam. Code § 2402; Cal. Judicial Council Form FL-830]

[1] FORM

[2] Use of Form

[3] Cross References

§ 221.345 Proof of Personal Service--Judicial Council Form [Code Civ. Proc. § 1011; Cal. Judicial Council Form FL-330]

[1] FORM

[2] Use of Form

§ 221.346 Proof of Service by Mail--Judicial Council Form [Code Civ. Proc. §§ 1013, 1013a; Cal. Judicial Council Form FL-335]

[1] FORM

[2] Use of Form

§ 221.347 Notice of Consolidation--Cal. Judicial Council Form FL-920

[1] FORM

[2] Use of Form

§ 221.348 Notice of Limited Scope Representation--Cal. Judicial Council Form FL-950

[1] FORM

[2] Use of Form

§ 221.349 Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation--Cal. Judicial Council Form FL-955

[1] FORM

[2] Use of Form

§ 221.350 Objection to Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation--Cal. Judicial Council Form FL-956

[1] FORM

[2] Use of Form

§ 221.351 Order on Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation--Cal. Judicial Council Form FL-958

[1] FORM

[2] Use of Form

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§ 221.370 Stipulation and Waiver of Final Declaration of Disclosure--Judicial Council Form [Fam. Code § 2105(d); Cal. Judicial Council Form FL-144]

[1] FORM

[2] Use of Form

[3] Cross References

§ 221.371 Final Declaration of Disclosure--Judicial Council Form [Fam. Code § 2105; Cal. Judicial Council Form FL-140]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 221.372 Declaration Regarding Service of Declaration of Disclosure and Income and Expense Declaration--Judicial Council Form [Fam. Code § 2106; Cal. Judicial Council Form FL-141]

[1] FORM

[2] Use of Form

[3] Cross References

§ 221.373 Notice of Withdrawal of Attorney of Record [Code Civ. Proc. § 285.1; Cal. Judicial Council Form FL-960]

[1] FORM

[2] Use of Form

[3] State Statutes

§§ 221.374-221.389 [Reserved]

§ 221.390 Request for Statement of Decision [Code Civ. Proc. § 632; Fam. Code § 2338(a)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] California Rules of Court

§ 221.391 Proposed Statement of Decision [Code Civ. Proc. § 632; Fam. Code § 2338(a); Cal. Rules of Ct., Rule 232(c)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 221.392 Judgment of Dissolution [Cal. Judicial Council Form FL-180]

[1] FORM

[2] Use of Form

[3] Completing Form

[a] Caption

[b] Restraining or Protective Orders

[c] Hearing Information (Paragraph 2)

[d] Jurisdiction Over Respondent (Paragraph 3)

[e] Orders of the Court (Paragraph 4)

[f] Continuation Pages; Signature of Judge

[4] Number of Copies to Prepare

§ 221.393 Notice of Entry of Judgment--Judicial Council Form [Cal. Judicial Council Form FL-190]

[1] FORM

[2] Use of Form

[3] Completing Form

[4] Copies

[5] Cross References

§ 221.394 Notice to Health, Life, or Disability Insurer After Order or Judgment [Fam. Code § 2051]

[1] FORM

[2] Use of Form

§ 221.395 Request for Dismissal--Judicial Council Form [Cal. Judicial Council Form FL-618]

[1] FORM

[2] Use of Form

§§ 221.396-221.409 [Reserved]

§ 221.410 Declaration in Support of Motion to Set Aside Judgment [Fam. Code § 2122]

[1] FORM

[2] Use of Form

[3] Completing Declaration and Accompanying Papers

[4] Cross References

§ 221.411 Declaration [Code Civ. Proc. § 2015.5] in Support of Motion to Divide Unadjudicated Community Estate Assets and Liabilities [Fam. Code § 2556]

[1] FORM

[2] Use of Form

[3] Completing Declaration and Accompanying Papers

[4] Cross References

§ 221.412 Request for Hearing and Application to Set Aside Support Order Under Family Code Section 3691--Cal. Judicial Council Form FL-360

[1] FORM

[2] Use of Form

§ 221.413 Responsive Declaration to Application to Set Aside Support Order--Cal. Judicial Council Form FL-365

[1] FORM

[2] Use of Form

§ 221.414 Order After Hearing to Set Aside Support Order--Cal. Judicial Council Form FL-367

[1] FORM

[2] Use of Form

§§ 221.415-221.429 [Reserved]

§ 221.430 Request for Production of Income and Expense Declaration After Judgment [Fam. Code § 3664]--Judicial Council Form [Cal. Judicial Council Form FL-396]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 221.431 Order to Show Cause for Modification of Order--Judicial Council Form [Cal. Judicial Council Form FL-300]

[1] FORM

[2] Use of Form

[3] Completing the Form

[4] Presentment to Judge

§ 221.432 Application for Modification of Order and Supporting Declaration--Judicial Council Form [Cal. Judicial Council Form FL-310]

[1] FORM

[2] Use of Form

[3] Completing the Form

§ 221.433 Notice of Motion and Motion for Simplified Modification of Order for Child, Spousal, or Family Support and Information Sheet--Judicial Council Forms [Cal. Judicial Council Forms FL-390, FL-391]

[1] FORM

[2] Use of Form

§ 221.434 Responsive Declaration to Motion for Simplified Modification of Order for Child, Spousal, or Family Support and Information Sheet--Judicial Council Forms [Cal. Judicial Council Forms FL-392, FL-393]

[1] FORM

[2] Use of Form

§ 221.435 Request for Income and Benefit Information From Employer--Cal. Judicial Council Form FL-397

[1] FORM

[2] Use of Form

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Volume 18: Dissolution of Marriage: Master Procedural Guide thru Dissolution of Marriage: Property Division and Valuation-Chs. 220-222

Chapter 221 DISSOLUTION OF MARRIAGE: PROCEDURE

PART I. SCOPE

18-221 California Forms of Pleading and Practice--Annotated § 221.01

§ 221.01 Scope of Chapter

This chapter discusses and contains forms relevant to the grounds for obtaining a judgment of dissolution or legal separation in California; the practical aspects of the attorney's initial contact with the client in marital termination cases; the law applicable to, and the procedures for, initiating a proceeding for dissolution or legal separation (*see §§ 221.310 -221.315*); the various pleadings and other papers that may be filed in response to a petition in a family law proceeding (*see § 221.316*); joinder of those claiming or controlling interests that are subject to disposition in family law proceedings, including joinder of pension benefit plans (*see §§ 221.317 -221.322*); the procedure for obtaining preliminary orders for spousal support, child custody, support, and visitation, and attorney's fees and costs in proceedings for dissolution of marriage or legal separation (*see §§ 221.323 -221.325, 221.331 -221.338*); the procedure required to bifurcate the issue of dissolution or legal separation from related issues of custody, support, and property rights, together with those necessary to consolidate a dissolution proceeding with a civil action (*see §§ 221.326* -221.330); proceedings for reconciliation; and the procedures involved in a default or uncontested dissolution or legal separation, as well as those involved in obtaining a summary dissolution of marriage (*see §§ 221.339 -221.344*).

Injunctive relief related to family violence is discussed in Ch. 293, *Harassment and Domestic Violence* . Actions to nullify marriages are discussed in Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights* .

This chapter also discusses and contains forms relevant to pretrial considerations such as the applicability of civil trial rules and procedures, settlement, mediation of child custody and visitation issues, and pretrial procedures affecting conduct of the trial. It addresses topics involved in bringing a case to trial such as placing the case on the civil active list [*see § 221.370*], pretrial statements, conferences before trial, setting for trial, and compliance with mandatory disclosure requirements [*see §§ 221.371* and *221.372*].

This chapter also discusses trial considerations such as disqualification of judges, courtroom assignments, trial briefs, opening and closing statements, and general considerations involved in presenting a case at trial. It discusses evidentiary considerations at trial and covers concluding matters such as requests for statements of decision; preparing, rendering, and entering judgments; and the withdrawal of attorneys after a judgment is final [*see § 221.373*].

Continuances are discussed in Ch. 136, *Continuances* ; pretrial proceedings in Ch. 425 *Pretrial Proceedings* .

This chapter also discusses and contains forms relevant to the grounds and procedure to be used for the dismissal of family law proceedings; the use of and procedures regarding statements of decisions in family law proceedings *[§§ 221.390, 221.391*]; and judgments of dissolution and legal separation [*§§ 221.392, 221.393*].

Judgments of nullity of marriage are discussed in Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights* .

General forms pertaining to dismissals of civil actions and proceedings, which may be adapted for use in family law proceedings, are contained in Ch. 212, *Dismissal;* those concerning appeals in Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal;* those concerning statements of decision in Ch. 529, *Statement of Decision;* those concerning judgments in Ch. 318, *Judgments;* and those concerning motions for new trial in Ch. 371, *Motions After Trial,* § 371.60 et seq.

This chapter also discusses and contains forms pertinent to the methods for obtaining relief from judgments and orders in Family Code proceedings at the trial court level. It includes discussion of motions for new trial, motions to vacate judgment, motions to set aside default or void judgments [*see § 221.410*], motions for equitable set-aside relief, and motions to divide previously unadjudicated community estate assets or liabilities [*see § 221.411*].

General civil forms pertaining to motions for new trial and to set aside and vacate a judgment and enter a new judgment are contained in *Ch. 371, Motions After Trial, §§ 371.60 et seq.* and *371.90 et seq.*, respectively; those concerning motions for relief from defaults and default judgments, from void judgments, and for equitable relief are contained in Ch. 489, *Relief From Judgments and Orders;* those concerning motions to correct a judgment are contained in Ch. 318, *Judgments* ; and those concerning motions for reconsideration or renewed motions are contained in Ch. 374, *Motions to Reconsider and Renewed Motions* . General forms pertaining to appeals, which may be adapted for use in family law proceedings, are contained in Ch. 40, *Appeal: An Overview,* through Ch. 54, *Appeal: California Supreme Court Review* .

Standards and special procedures applicable to modification of child custody, child support, and spousal support orders are discussed in Ch. 223, *Dissolution of Marriage: Child Custody* , Ch.224, *Dissolution of Marriage: Child Support* and Ch. 225, *Dissolution of Marriage: Spousal Support* .

This chapter also discusses procedures and contains forms for the modification of judgments and orders in family law proceedings [*see § 221.430-* 84]. It also discusses the types of orders that are subject to modification.

For discussion of substantive rules governing modification of child custody and visitation orders, see Ch. 223, *Dissolution of Marriage: Child Custody* . Fordiscussion of the substantive standards for modification of child support orders, see Ch. 224, *Dissolution of Marriage: Child Support* . For discussion of the substantive standards for modification of spousal support orders, see Ch. 225, *Dissolution of marriage: Spousal Support*. Rules governing attorney's fee awards and modification of those awards are covered in Ch. 225, *Dissolution of Marriage: Attorney's Fees* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsTypesTemporary SupportFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportLegal SeparationFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsTemporary Support

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Chapter 221 DISSOLUTION OF MARRIAGE: PROCEDURE
PART I. SCOPE

18-221 California Forms of Pleading and Practice--Annotated § 221.02

§ 221.02 Cross References

See generally Ch. 40, *Appeal: An Overview* , through Ch. 54, *Appeal: California Supreme Court Review* , Ch. 318, *Judgments* , Ch. 371, *Motions After Trial* , Ch. 372, *Motions and Orders* , and Ch. 489, *Relief From Judgments and Orders*

For discussion of general enforcement proceedings, see Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureAppealsGeneral Overview

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PART I. SCOPE

18-221 California Forms of Pleading and Practice--Annotated §§ 221.03-221.09

[Reserved]

§§ 221.03[Reserved]

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Chapter 221 DISSOLUTION OF MARRIAGE: PROCEDURE
PART II. LEGAL BACKGROUND
A. Initiating The Proceeding And Preliminary Relief

18-221 California Forms of Pleading and Practice--Annotated § 221.10

§ 221.10 Grounds for Dissolution and Legal Separation

[1] Necessity of Marriage

The existence of a valid marriage is a prerequisite to obtaining a dissolution [*see Borg v. Borg (1938) 25 Cal. App. 2d 25, 29, 76 P.2d 218]* . Therefore, if the marriage never took place or is void, a proceeding for dissolution is improper, and such facts can be raised as a defense. If the marriage is voidable, it is valid until annulled [*Estate of LeMont (1970) 7 Cal. App. 3d 437, 439-440, 86 Cal. Rptr. 810]* , and a proceeding for dissolution is proper unless the party who is entitled to have the marriage annulled raises the issue that the marriage is voidable.

[2] Irreconcilable Differences

A court may enter a judgment of dissolution of marriage on the ground that irreconcilable differences exist that have caused the irremediable breakdown of the marriage [*Fam. Code § 2310(a)*; *see In re Marriage of Mehren & Dargan (2004) 118 Cal. App. 4th 1167, 1171, 13 Cal. Rptr. 3d 522* (husband's agreement to grant to wife all of his interest in their community property should he use illicit drugs was unenforceable because it violated public policy favoring no-fault divorce); *Diosdado v. Diosdado (2002) 97 Cal. App. 4th 470, 118 Cal. Rptr. 2d 494* (contract between spouses creating right to liquidated damages for infidelity was against public policy and contravened statute limiting recovery in dissolution proceedings to statutory property division)]. "Irreconcilable differences" are defined by statute as those grounds determined by the court to be substantial reasons for not continuing the marriage and that make it appear that the marriage should be dissolved [*Fam. Code § 2311*; *see In re Marriage of Walton (1972) 28 Cal. App. 3d 108, 118-119, 104 Cal. Rptr. 472]* . If the court finds that these differences exist, it must order the dissolution of the marriage [*Fam. Code § 2333*]. If a reasonable possibility of reconciliation appears to exist, the court must continue the proceeding for dissolution or legal separation for a period of no more than 30 days [*Fam. Code § 2334(a)*].

[3] Incurable Insanity

A court may enter a judgment of dissolution of marriage on the ground of incurable insanity [*Fam. Code § 2310(b)*] on proof that the insane spouse was incurably insane at the time the petition was filed and remains incurably insane [*Fam.*

Code § 2312]. The term "incurably" as it relates to dissolution of marriage on insanity grounds cannot be taken in a literal sense, since it is impossible to establish that a mental disease can never be cured. It means, instead, that it isreasonably probable that the mental disease cannot be cured. Proof of incurable insanity, which cannot be rejected by the court in the absence of conflicting evidence, must include competent medical or psychiatric testimony [*Wirz v. Wirz (1950) 96 Cal. App. 2d 171, 175-176, 214 P.2d 839* ; *see Fam. Code § 2312*].

[4] Legal Separation

The grounds for legal separation are the same as those for dissolution: irreconcilable differences and incurable insanity [*Fam. Code § 2310*]. A court may not render a judgment of the legal separation of the parties without the consent of both parties, however, unless one party has not made a general appearance and the petition requests legal separation rather than dissolution or a judgment of nullity [*Fam. Code § 2345*]. A judgment of legal separation does not bar a subsequent judgment decreeing the dissolution of the marriage rendered pursuant to a petition for dissolution filed by either party [*Fam. Code § 2347*]. A judgment of legal separation is not an interim order, however; it is a final adjudication of the parties' property rights, and is conclusive and res judicata in a subsequent proceeding for dissolution [*Estate of Lahey (1999) 76 Cal. App. 4th 1056, 1059, 91 Cal. Rptr. 2d 30]* .

[5] Choice Between Dissolution and Legal Separation

In most situations, a party contemplating legal proceedings in California with regard to his or her marriage has only the choice between the judgment of dissolution based on irreconcilable differences or a judgment of legal separation based on irreconcilable differences. In the absence of particular religious or moral qualms, dissolution is usually chosen because a judgment of dissolution terminates the marriage and restores the parties to the status of unmarried persons [*Fam. Code § 2300*], whereas a legal separation merely settles the spouses' financial responsibilities to one another and to their minor children [*Estate of Lahey (1999) 76 Cal. App. 4th 1056, 1058-1060, 91 Cal. Rptr. 2d 30* ; *Faught v. Faught (1973) 30 Cal. App. 3d 875, 878, 106 Cal. Rptr. 751]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceFault-Based GroundsInsanityFamily LawMarital Termination & Spousal SupportDissolution & DivorceNo-Fault GroundsIrreconcilable DifferencesFamily LawMarital Termination & Spousal SupportLegal SeparationFamily LawMarriageValidityGeneral Overview

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Chapter 221 DISSOLUTION OF MARRIAGE: PROCEDURE
PART II. LEGAL BACKGROUND
A. Initiating The Proceeding And Preliminary Relief

18-221 California Forms of Pleading and Practice--Annotated § 221.11

§ 221.11 Jurisdiction in Proceeding for Dissolution or Legal Separation

[1] Jurisdiction in Proceeding for Dissolution

[a] Domicile as Basis

Generally, states have jurisdiction to dissolve a marriage if at least one spouse is domiciled in the forum state. Other states must give full faith and credit to a dissolution decree based on domicile as long as domicile is bona fide [*see, e.g., Williams v. North Carolina (1944) 325 U.S. 226, 229-230, 65 S. Ct. 1092, 89 L. Ed. 1577]* . In California, courts may exercise jurisdiction on all judicially established bases of jurisdiction, including domicile, subject only to constitutional considerations [*see Code Civ. Proc. § 410.10*; *see, e.g., Bergan v. Bergan (1981) 114 Cal. App. 3d 567, 570-571, 170 Cal. Rptr. 751]* . Jurisdiction based on the domicile of one spouse is appropriate because the "res" or subject matter of such proceedings is the personal status (i.e., the marital status) of the spouse domiciled in the forum state. A dissolution decree is directed to *that spouse's* status and thus personal jurisdiction over an absent spouse is not necessary, although the absent spouse must be notified of the proceeding [*see Mungia v. Superior Court (1964) 225 Cal. App. 2d 280, 284, 37 Cal. Rptr. 285]* .

Accordingly, a court has subject matter jurisdiction to adjudicate the status of the marriage based on the petitioner's domicile in California at the time of filing the petition [*Muckle v. Superior Court (2002) 102 Cal. App. 4th 218, 226, 125 Cal. Rptr. 2d 303]* . However, to adjudicate the parties' personal rights and obligations, including custody and support of the minor children of the marriage, spousal support, settlement and division of the parties' property rights, and the award of attorney's fees and costs, the court must have personal jurisdiction over the respondent [*Muckle v. Superior Court (2002) 102 Cal. App. 4th 218, 225-226, 125 Cal. Rptr. 2d 303]* .

The parties cannot confer *subject matter* jurisdiction on the court by consent, waiver, or estoppel [*In re Marriage of Jensen (2003) 114 Cal. App. 4th 587, 7 Cal. Rptr. 3d 701]* .

[b] Statutory Residence Requirement

A judgment of dissolution of marriage may not be entered unless one of the parties to the marriage has been a resident of California for six months and of the county in which the proceeding is filed for three months immediately preceding the filing of the petition [*Fam. Code § 2320*; *cf. Code Civ. Proc. § 395(a)* (proper venue for dissolution or legal separation proceeding is county in which *either* petitioner or respondent has resided for three months immediately preceding commencement of proceeding); venue requirements are discussed in *§ 221.212[15]*]. The term "resident" in this context has the same meaning as the term "domiciliary" [*Whealton v. Whealton (1967) 67 Cal. 2d 656, 660, 63 Cal. Rptr. 291, 432 P.2d 979]* .

There is no residence requirement for filing a petition of legal separation [*Hiner v. Hiner (1908) 153 Cal. 254, 260, 94 P. 1044* ; *Forster v. Superior Court (1992) 11 Cal. App. 4th 782, 784, 14 Cal. Rptr. 2d 258]* . Thus, a party may file for legal separation if neither party complies with the residence requirement at the time of the commencement of the proceeding, and either party may amend his or her petition or responsive pleading to request a dissolution of marriage once the residence requirement is met [*Fam. Code § 2321*; *Forster v. Superior Court (1992) 11 Cal. App. 4th 782, 785, 14 Cal. Rptr. 2d 258]* .

[2] Jurisdiction in Proceeding for Legal Separation

[a] Domicile

Because a proceeding for legal separation is very similar to a proceeding for dissolution and is based on the same grounds [*Fam. Code § 2310*], jurisdiction for a decree of legal separation can probably be based on the domicile of one party as can jurisdiction for a decree of dissolution [Restatement of Conflicts (second), § 375]. If spousal or child support is sought or if property rights are to be affected, however, personal jurisdiction over the respondent is necessary [*§ 221.11[4]*].

[b] No Residence Requirement for Legal Separation

No statutory residence requirement is imposed for a judgment of legal separation. A person may file a petition for legal separation before the residence requirements for dissolution are met, and then amend the petition to seek dissolution after at least one party has met the residence requirement [*Fam. Code § 2321(a)*]. Pursuant to statute, the date of the filing of the amended petition is deemed to be the date of commencement of the marital dissolution proceeding "for the purposes only of the residence requirements of [*Fam. Code] Section 2320*" [*Fam. Code § 2321(a)*].

It is somewhat unclear what the quoted portion of the statute means. One possible interpretation is that the court will look to the filing date of the amended petition to evaluate whether a party had met the required six-month--state, and three-month--county, residency periods as of the time just before filing the amended petition [*Fam. Code § 2320*], but that it will not treat the date of filing the amended petition as the date the proceeding commences for the purpose of measuring the six month "waiting period" [*Fam. Code § 2339*] for entry of a dissolution judgment. If that interpretation is correct, the six-month measuring period for the entry of a dissolution judgment, which begins with "the date of service of a copy of summons and petition or the date of appearance of the respondent, whichever occurs first" [*Fam. Code § 2339*] would "relate back" to the earlier of when the legal separation petition was properly served or the respondent appeared. Because *Fam. Code § 2321(a)* uses the qualifying language "for the purposes only of the residence requirements of Section 2320," in describing how the date of filing the amended petition pertains to the commencement of the proceeding, it appears that this interpretation is correct. Otherwise, both the measuring periods for residency and for entry of judgment terminating marital status would begin with the date of the filing of the amended petition, and this does not appear to be the intent of the statute. No reported decision has expressly so held, however.

With respect to the amendment of the legal separation petition, if the other party has appeared in the proceeding, notice of the amendment must be given to that party in the manner provided by the California Rules of Court. If no appearance

has been made by the other party, notice of the amendment may be given to the other party by mail to that party's last known address, or by personal service, "if the intent of the party to so amend upon satisfaction of the residence requirements of Section 2320 is set forth in the initial petition or pleading in the manner provided by rules adopted by the Judicial Council" [*Fam. Code § 2321(a)*].

[3] Support, Custody, and Property in Proceeding for Dissolution or Legal Separation

[a] In General

A spousal or child support award imposes a personal obligation on the party ordered to pay the support; consequently, a court must have in personam jurisdiction over that party to render a valid judgment making such an award [*see Judd v. Superior Court (1976) 60 Cal. App. 3d 38, 45-46, 131 Cal. Rptr. 246* (spousal support); *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 799, 100 Cal. Rptr. 477* (child support)]. If support is to be paid out of community or quasi-community real property located in California [*see Fam. Code § 2011*], however, or other property over which the court has in rem or quasi in rem jurisdiction, a court also has quasi in rem jurisdiction to make such a support order [*cf. Shaffer v. Heitner (1977) 433 U.S. 186, 199 n.17, 97 S. Ct. 2569, 53 L. Ed. 2d 683* ; *see also Fam. Code § 2011* (authority to assert quasi in rem jurisdiction over community and quasi-community real property)].

For a comprehensive discussion of "in personam," "in rem," and "quasi in rem" jurisdiction generally, see Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* .

[b] Marital Property

A court also has in rem or quasi in rem jurisdiction to determine the character of marital property located in California [*see Fam. Code § 2011*; *In re Marriage of Leff (1972) 25 Cal. App. 3d 630, 645-646, 102 Cal. Rptr. 195]* . Furthermore, although California courts may not enter decrees directly affecting title or interest in real property located in another state, they may *establish and declare the interests* in such property [*In re Marriage of Ben-Yehoshua (1979) 91 Cal. App. 3d 259, 269, 154 Cal. Rptr. 80]* .

California courts also may characterize personal property located outside California as long as the property was acquired in California during the marriage. Marital interests in such property are governed by the law of the spouses' domicile at the time of acquisition [*see Rozan v. Rozan (1957) 49 Cal. 2d 322, 326, 317 P.2d 11]* . After a court has determined the character of marital property located outside California, it may order conveyances to comply with its determination [*Fam. Code § 2660(b)(1)*; *In re Marriage of Ben-Yehoshua (1979) 91 Cal. App. 3d 259, 269, 154 Cal. Rptr. 80]* .

[c] Child Custody Matters

Special rules set forth in the Uniform Child Custody Jurisdiction and Enforcement Act [*Fam. Code § 3400 et seq.*] govern jurisdiction over child custody matters. See Ch. 223, *Dissolution of Marriage: Child Custody* , for discussion of this topic.

[d] Constitutional Considerations ("Minimum Contacts")

California courts may exercise jurisdiction on any basis not inconsistent with the California or United States Constitutions [*Code Civ. Proc. § 410.10*]. Under the standards articulated by the United States Supreme Court in *Shaffer v. Heitner* [*Shaffer v. Heitner (1977) 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683]* and *International Shoe Co. v. Washington* [*International Shoe Co. v. Washington (1945) 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95]* , due process requires that a defendant "have certain minimum contacts with [a forum state] such that maintenance of [a] suit [in that state] does not offend 'traditional notions of fair play and substantial justice' " [*Shaffer v. Heitner (1977) 433 U.S. 186, 203, 97 S. Ct. 2569, 53 L. Ed. 2d 683]* . Nevertheless, because jurisdiction based on physical presence alone

comports with due process, the Court has subsequently held that particular "minimum contacts" need not be shown if a nonresident spouse is personally served with process while physically present in California [*Burnham v. Superior Court of Cal. (1990) 495 U.S. 604, 620, 110 S. Ct. 2105, 109 L. Ed. 2d 631]* .

If the respondent is not domiciled in California, the court may assert personal jurisdiction over the respondent only if (1) the respondent was domiciled in California when the proceeding was commenced, (2) the respondent is personally served with process while he or she is physically present in California, (3) the respondent consents to jurisdiction, or (4) the respondent has sufficient minimum contacts with California to support the exercise of jurisdiction. The relevant minimum contacts are the respondent's contacts at the time of the dissolution proceeding, not the respondent's past contacts with California. A minimum contacts analysis may involve a consideration of whether or not the parties met and married in California, had children in California, lived in California at the time of separation, and own property in California [*Muckle v. Superior Court (2002) 102 Cal. App. 4th 218, 226, 125 Cal. Rptr. 2d 303]* . In evaluating whether minimum contacts exist, it has been held that (1) the defendant must have purposefully availed himself or herself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws; and (2) a sufficient relationship or "nexus" must exist between the defendant and the forum state so that the exercise of personal jurisdiction is reasonable and fair. Determining fairness requires balancing the burden or inconvenience to the defendant against the plaintiff's interest in obtaining relief and the state's interest in adjudicating the dispute [*Modlin v. Superior Court (1986) 176 Cal. App. 3d 1176, 1179, 222 Cal. Rptr. 662]* . Generally, a court may find a manifest state interest in the events involved in the litigation, particularly with respect to property within the state's borders, to resolution of a marital relationship commenced within the state, and to protection of a state resident who is a party to the dispute [*see Khan v. Superior Court (1988) 204 Cal. App. 3d 1168, 1179-1180, 251 Cal. Rptr. 815]* .

If the court finds that the respondent has sufficient minimum contacts with California, it must then consider whether the exercise of personal jurisdiction over the respondent is reasonable. On this question, the court may consider such factors as the parties' ages and health, the parties' financial resources, and the differences between the marital property laws of California and the state in which the respondent is domiciled [*Muckle v. Superior Court (2002) 102 Cal. App. 4th 218, 227-230, 125 Cal. Rptr. 2d 303]* .

[4] Proper Court

The superior courts have exclusive jurisdiction over all proceedings for judgments of dissolution and legal separation [*Fam. Code §§ 200, 2010*; *see In re Marriage of Lackey (1983) 143 Cal. App. 3d 698, 707, 191 Cal. Rptr. 309]* . Because jurisdiction is acquired when process is first served, the court in which process is first served has exclusive jurisdiction regardless of which proceeding was filed first [*e.g., Mungia v. Superior Court (1964) 225 Cal. App. 2d 280, 283, 37 Cal. Rptr. 285]* . In such cases, the party who first obtained service can have the second proceeding quashed [*see § 221.16[6]*].

[5] Proceedings Involving Native Americans

Domestic relations proceedings in which at least one of the spouses is a Native American may present special jurisdictional issues. California is one of six states on which federal law confers jurisdiction over civil causes of action between American Indians or to which Indians are parties [*28 U.S.C. § 1360(a)*]. This general grant of civil jurisdiction encompasses jurisdiction over family law matters, including divorce proceedings [*Purnel v. Purnel (In re Purnel) (1997) 52 Cal. App. 4th 527, 535-537, 60 Cal. Rptr. 2d 667* ; *see Bryan v. Itasca County, Minnesota (1976) 426 U.S. 373, 384 n.10, 96 S. Ct. 2102, 48 L. Ed. 2d 710* ; *United States ex rel. Cobell v. Cobell (9th Cir. 1974) 503 F.2d 790, 794-795]* . If the spouses resided on a reservation during marriage, the tribal court for the tribe of which the Indian spouse is a member has at least concurrent jurisdiction with a state court over both spouses for purposes of dissolving their marriage, even if the respondent in the proceeding is not an Indian [*Sanders v. Robinson (9th Cir. 1988) 864 F.2d 630, 632-634]* .

Federal law does not authorize the alienation, encumbrance, or taxation of any real or personal property belonging to any Indian or Indian tribe that is held in trust by the United States or is subject to any restriction on alienation imposed bythe United States [*28 U.S.C. § 1360(b)*]. Also, no money accruing from any lease or sale of lands held in trust by the United States for any Indian may become liable for the payment of any debt of, or claim against, the Indian contracted or arising during the trust period, except with the approval and consent of the Secretary of the Interior [*25 U.S.C. § 410*]. These provisions do not, however, affect the court's jurisdiction to make a child support order, even if the result of the order is that an Indian parent will have to pay child support from income received from Indian Trust Allotments [*Purnel v. Purnel (In re Purnel) (1997) 52 Cal. App. 4th 527, 538-542, 60 Cal. Rptr. 2d 667]* . For a general discussion of child support orders, see Ch. 224 *Dissolution of Marriage: Child Support* .

Note also that the federal Indian Child Welfare Act (ICWA)--(*25 U.S.C. § 1901 et seq.*) regulates the adoption, foster placement, and termination of parental rights with regard to Indian children [*see 25 U.S.C. § 1902*]. However, it expressly does not apply to proceedings for dissolution of marriage, nor does it in any way limit the court's jurisdiction to make child support orders in a dissolution proceeding involving at least one Indian party [*see 25 U.S.C. § 1903(1)* (child custody disputes that arise in context of divorce proceedings are not covered by ICWA as long as custody is granted to one parent); *Purnel Purnel (In re Purnel) (1997) 52 Cal. App. 4th 527, 536-537, 60 Cal. Rptr. 2d 667* ; *see also County of Inyo v. Jeff (1991) 227 Cal. App. 3d 487, 494-495, 277 Cal. Rptr. 841* (California has jurisdiction over Indian parent in district-attorney child support reimbursement and collection proceeding)]. For further discussion of the ICWA, see *Ch. 12B, Adoptions: Unmarried Minors, § 12B.270*.

A family law court is not required to give full force and effect to a tribal custom and tradition providing that funds the tribe distributes to its members should not be used to pay spousal support to nonmembers because it is inconsistent with California law, which requires spouses to support each other [*In re Marriage of Jacobsen (2004) 121 Cal. App. 4th 1187, 1192-1193, 18 Cal. Rptr. 3d 162]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsFamily LawChild CustodyEnforcementUniform Child Custody Jurisdiction & Enforcement ActFamily LawChild SupportJurisdictionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionResidency RequirementsFamily LawMarital Termination & Spousal SupportLegal Separation

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§ 221.12 Venue

[1] In Proceeding for Dissolution

In a proceeding for dissolution of marriage, the county in which *either* the petitioner or the respondent has been a resident for three months immediately preceding the commencement of the proceeding is the proper county for trial of the proceeding [*Code Civ. Proc. § 395(a)*; *cf. Fam. Code § 2320* (residency requirements for entry of judgment in dissolution proceeding); residency requirements are discussed in *§ 221.11[1][a]* and *[b]*]. If the respondent does not reside in California, or if residing in the state and the county in which he or she resides is unknown to the petitioner, the action may be tried in any county the petitioner may designate in his or her complaint. If the respondent is about to depart from the state, the action may be tried in any county where either of the parties reside or service is made [*Code Civ. Proc. § 395(a)*; *see Cal. Rules of Ct., Rule 5.100*]. See *§ 221.16[8]* for further discussion of this topic.

[2] In Proceeding for Legal Separation

In a proceeding for legal separation, the county in which either the petitioner or the respondent resides at the commencement of the proceeding is the proper county for trial of the proceeding [*see Code Civ. Proc. § 395(a)*; *cf. Forster v. Superior Court (1992) 11 Cal. App. 4th 782, 786-787, 14 Cal. Rptr. 2d 258* (applying general venue rules under prior law when no specific statute venue provisions governed legal separation actions)]. If the respondent does not reside in California or if the county in which the respondent resides is unknown to the petitioner, the proceeding may be tried in any county. If the respondent is about to depart from California, the proceeding may be tried in any county where either of the parties reside or where service is made [*Code Civ. Proc. § 395(a)*]. For further discussion, see *§ 221.16[8][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueIndividual DefendantsFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawMarital Termination & Spousal SupportLegal Separation

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18-221 California Forms of Pleading and Practice--Annotated § 221.13

§ 221.13 Initial Client Interview

[1] Objectives

The initial attorney-client interview provides both the attorney and the client with a basis on which to make initial decisions concerning the case, and sets the tone of the attorney-client relationship. Because successful representation in a marital termination case requires a high degree of trust and cooperation between attorney and client, and because clients in such cases frequently are angry, unhappy, and unaccustomed to working with attorneys, the attorney should give special consideration to the structure and objectives of the initial interview. For the attorney, the interview should provide sufficient information to decide whether to take the case, lay the groundwork for a successful attorney-client relationship, and begin the information-gathering process that will be essential to a proper handling of the case. For the client, the interview should provide basic information about legal rights and the procedures that may be necessary to safeguard them, provide information about the cost of legal representation, and result in a decision regarding whether to retain the attorney or seek representation elsewhere, as well as whether to initiate legal proceedings or explore another avenue of approach.

[2] Interview Technique

The attorney can assure that these objectives will be accomplished by developing a sound interview technique. The following guidelines may prove useful in this regard:

(1) Schedule a sufficient amount of time for the interview; avoid interruptions.

(2) Allow the client to tell his or her story, but also direct the interview alonglines that will lead toward the accomplishment of the basic objectives.

(3) Direct the discussion along practical, rather than emotional, lines.

(4) Explain briefly the procedures involved in a marital termination case and the general rights of the client, such as the

right to half the community property, the right to obtain preliminary orders, the potential right to spousal and/or child support, and the standards for custody determinations.

(5) Initiate a discussion of fees and indicate the basis on which the attorney would agree to take the case.

If appropriate, the initial interview also should be used as an opportunity to consider matters such as the possibility of reconciliation, the advantage of seeking some form of counseling, and/or immediate self-help measures.

[3] Use of Checklist

Most experienced family law practitioners use some form of checklist in connection with the initial client interview. See Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, Ch. 91 (Matthew Bender 2d ed.), for an example of a detailed client interview checklist counsel may use as a starting point from which to develop his or her own interview form.

[4] Providing Limited Attorney Assistance in Preparation of Court Documents

A growing trend is the movement to "unbundle" legal services in family law cases by counsel performing such limited tasks as drafting certain pleadings or providing advice on an ad hoc basis during the course of litigation. Apart from the need to carefully draft a fee agreement that limits the scope of representation (and any associated malpractice considerations), there is an issue of whether disclosure must be made to the court concerning the representation.

An attorney who contracts with a client to assist in preparing legal documents, but *not* to make an appearance in a case, is not required to disclose within the text of the document his or her involvement in its preparation [*Cal. Rules of Ct., Rule 5.70(a)*]. But this does not apply to an attorney who has made a general appearance or has contracted with a client to make an appearance on any issue that is subject to the pleadings [*Cal. Rules of Ct., Rule 5.70(c)*]. For a mandatory form of notice that is to be used when an attorney *will appear* on one or more issues, see *§ 221.348* [Cal. Judicial Council Form FL-950].

In addition, a party who applies for an award of attorney's fees for work done by an attorney who only assisted in preparing legal documents and did not make an appearance in the case must disclose to the court information required for a proper determination of attorney fees, including the name of the attorney who assisted in the document preparation, the time involved or other basis for billing, the tasks performed, and the amount billed [*Cal. Rules of Ct., Rule 5.70(b)*].

For related forms, *see §§ 221.348 -221.351*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawMarital Termination & Spousal SupportLegal SeparationLegal EthicsClient RelationsAttorney FeesGeneral OverviewLegal EthicsProfessional ConductTribunals

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§ 221.14 Preliminary Advice

[1] General Topics To Be Covered

At the initial client interview or subsequent interviews, the client may seek and the attorney should give advice concerning the following general topics:

(1) Whether and when proceedings should be filed, and what type of proceedings; or, if the other spouse has already filed, what response should be made.

(2) Self-help steps to be taken prior to or concurrently with filing to protect the client's rights.

(3) Any need to obtain ex parte orders or take other action to protect the safety of the client, the client's children, or other members of the client's family or household.

(4) If appropriate, methods of seeking reconciliation or other alternatives to termination of the marriage.

The attorney also should cover general instructions and warnings concerning the client's activities with respect to the case. For example, the client should be warned against committing any illegal acts, instructed to consult the attorney before entering into any written agreements with the other party or providing any information to the other party's attorney, and advised to notify the attorney promptly of any reconciliation, transaction involving substantial community property, or agreement by the parties to disregard the terms of any court order.

[2] Alternatives to Termination of Marriage

In some situations, a client who consults an attorney concerning termination of his or her marriage or a grant of legal separation may be acting in anger or may be undecided about ending the marriage. A client whose spouse has filed a dissolution or annulment action may not want to terminate the marriage at all. In these situations, the attorney may be able to provide valuable advice concerning reconciliation. In helping the client explore the possibility of reconciliation,

however, the attorney should take care not to assume the role of marriage counselor. In addition, the attorney must remember that he or she cannot contact an adverse party about the subject matter when that party is represented by an attorney, without the permission of that attorney [*Rules of Professional Conduct, Rule 2-100(A)*] and must consider conflict of interest issues in any dealings withan unrepresented spouse. Obviously, an attorney should never counsel a client to reconcile or resume contact with a spouse if it appears that doing so would place the client in danger.

Another alternative to immediate proceedings for the termination of the marriage or legal separation is a trial separation. A trial separation period can ease some of the tension between the spouses, and give them time to consider the desirability of terminating the marriage and the possibility of reconciliation, without the initiation of adversary legal proceedings. If spousal or child support is required, it can be paid under the terms of an agreement negotiated by the spouses. Although not required by law, it generally is advisable to reduce these agreements to writing. Dangers inherent in a trial separation are that the community property may be dissipated or concealed during the separation period, however, and the absence of any court order prohibiting the removal or concealment of the children.

[3] Initial Self-Help Measures

[a] Physical Separation and Protection From Violence

If the client is concerned about a threat of physical violence, the client and the children should consider temporarily moving out of the family home, at least until court orders and other protection can be arranged. Once their immediate safety has been assured, protective orders should be obtained. The client or the attorney can make an ex parte application for a restraining order [*Fam. Code §§ 240-246, 2045, 6300-6388*] or an emergency protective order can be obtained with the help of a law enforcement officer [*see Fam. Code §§ 6240-6273*]. See Ch. 293, *Harassment and Domestic Violence* , for discussion of obtaining domestic violence protection orders.

[b] Protection of Children

In cases in which an immediate risk is present that the other parent will harm or abduct the parties' child, or if that parent has already harmed the child or committed other acts of domestic violence, the client should take immediate action to secure an ex parte order for temporary custody [*see Fam. Code §§ 3064, 6323*] in addition to any other necessary protective orders. The client should be warned not to conceal the child from the other parent, even when no custody order restricts the client's conduct. Child concealment may give rise to criminal and other liability [*see, e.g., Penal Code §§ 277* (removal by person with right of custody in absence of court order), 278 (removal by person without right of custody), 278.5 (removal by person with custody or visitation rights under order that also grants such rights to another person); *Cal Rules Prof. Conduct, Rule 3-210*]. Furthermore, in some cases, child concealment may give rise to an estoppel defense in child support enforcement proceedings [*see In re Marriage of Damico (1994) 7 Cal. 4th 673, 678-679, 29 Cal. Rptr. 2d 787, 872 P.2d 126]* . See discussion in *Ch. 259, Family Law Enforcement: Special Remedies for Support Enforcement, § 259.13*.

[c] Possession and Protection of Property

In the early stages of a marital breakup, the client should be advised to protect his or her interests in the spouses' community property. Because each spouse has equal management and control of the community property [*Fam. Code §§ 1100(a), 1102(a)*], the client generally has the right to take exclusive possession of all community personal property except the other spouse's business, and can sell or encumber any community personal property except the other spouse's business and personal effects, household furnishings, and personal effects of the children. In addition, the client should be advised to obtain copies of all documents concerning community property before the other spouse makes them unavailable. These documents may include, among others, tax returns, deeds, canceled checks, receipts, loan applications, and statements of assets.

[d] Raising Cash

In some marital breakup situations, the most urgent need of one spouse is cash to support himself or herself, to obtain new housing, to pay the attorney a retainer, or to pay outstanding obligations. If the money cannot be obtained from community bank accounts, the spouse should consider borrowing the money using community property as security (subject to any applicable restraining orders) [*see Fam. Code §§ 2040(a)(2), 2045*]. Other potential sources of cash are community credit cards, credit unions, and life insurance policies. If possible, loans from relatives or friends should be avoided because the court may not consider them as valid community debts or may decide that their repayment is not an expense to be considered in determining support. A better method is to have the spouse obtain a loan using the relative or friend as a guarantor or cosigner.

[e] Protection From Other Spouse's Debts

Liability of community property and of the separate property of one spouse for the postseparation debts of the other spouse is governed by statute [*see Fam. Code §§ 910, 914(a)(2), 4302*]. Because some spouses may misrepresent to creditors that both spouses are seeking to incur postseparation debt, some have adopted the practice of notifying prospective creditors that the nonincurring spouse will not accept responsibility for the other spouse's debts. The legal effect of such a notice is unclear, but it would appear that the statutory rules for liability control. The more effective practice is for a spouse to seek an immediate order from the court to restrain the other spouse from, among other things, encumbering property (to obtain funds) except in the usual course of business or for the necessities of life, and to require the other spouse to notify him or her of any proposed extraordinary expenditures and to account to the court for these expenditures [*see Fam. Code §§ 2045(b), 6325*]. The family law summons contains a substantially similarorder, as well as an order restraining a party from "cashing, borrowing against," and taking other specified actions with respect to insurance policies [*see Fam. Code § 2040(b), (c)*].

[f] Assistance From Family Law Information Centers

The Legislature has created a pilot project requiring the Judicial Council to establish and administer family law information centers, which are intended to serve as a legal resource to low-income litigants [*see Fam. Code § 15000 et seq.*]. Each family law information center must be supervised by an active member of the State Bar in good standing, and in superior courts with a family law facilitator, the family law information center must coordinate its services with those of the facilitator [*Fam. Code § 15010(b)(2), (3)*].

The information and services to be offered to low-income litigants are specified by statute [*see Fam. Code § 15010*]. The family law information center may not represent any party, and no attorney-client relationship is created between a party and the center as a result of any information or services provided [*see Fam. Code § 15010(g)*]. Before receiving the services of the family law information center, family law litigants must sign a declaration attesting to their financial eligibility to receive those services. No other efforts to verify financial eligibility are required [*see Fam. Code § 15010(d)*].

The Judicial Council has adopted guidelines for the operation of family law information centers and family law facilitator offices [Cal. Rules of Ct., Appen. Div. V]. These guidelines specify the role of an attorney and other staff members working in a family law information center or family law facilitator office. They specify that the attorney must provide litigants with pertinent information to allow them to bring their matter before the court, which may include referrals to other sources [Cal. Rules of Ct., Appen. Div. V, Gd. 3]. However, they also specify that family law information centers and family law facilitator offices are not intended to replace private counsel [Cal. Rules of Ct., Appen. Div. V, Gd. 6]. A family law information center or family law facilitator office attorney, and his or her staff, must not make any public comment about the litigants or about any pending or impending matter in the court [Cal. Rules of Ct., Appen. Div. V, Gd. 8], and should not assist a litigant who is represented by an attorney unless this attorney consents or the court has referred the litigant for assistance [Cal. Rules of Ct., Appen. Div. V, Gd. 11].

[4] Filing Considerations

[a] No Proceeding Pending

One of the decisions that must be made at or soon after the initial client interview is whether a marital termination proceeding should be filed immediately or whether that decision should be postponed. Some of the possible reasons to file immediately may include the client's need for immediate judicial relief, such as temporary spousal or child support, temporary restraining orders, or a temporary custody order; the client's wish to obtain the final decree as soon as possible because, for instance, he or she wants to remarry or wants to file income tax returns as a single person; the potential respondent may leave the jurisdiction or may try to avoid service of process; and/or the client's emotional or psychological may be best served by taking immediate legal action to terminate the marriage. In contrast, a client may decide to postpone filing because a reasonable chance for reconciliation exists and postponement of filing may enhance that chance and avoid unnecessary expense; the parties decide on a trial separation; the client is ambivalent about whether he or she wants to terminate the marriage; the client prefers to wait and let the other party file to avoid the expense or trauma of the initial filing; and/or the client wants to postpone the final decree for tax reasons or to obtain social security benefits.

The attorney also should consider whether summary dissolution is available [*see Fam. Code § 2400*] and, if it is, advise the client as to the summary dissolution procedures and the advantages and disadvantages of the procedure. See *§ 221.21* for discussion of this topic.

[b] Proceeding Pending

If the other party has filed the proceeding, the responding party has two basic choices. The first is to file a response or appropriate motion (*see § 221.16[1]*). The second is to obtain an extension of time, to negotiate a marital termination agreement, and to let the other party obtain the decree by default (*see § 221.20*). The second alternative, which saves filing and attorney's fees, may be preferable when the parties are acting reasonably and do not require immediate judicial intervention to settle their differences.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewFamily LawChild CustodyAwardsGeneral OverviewFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & NeglectLegal EthicsClient RelationsConflicts of Interest

California Forms of Pleading and Practice--Annotated

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Volume 18: Dissolution of Marriage: Master Procedural Guide thru Dissolution of Marriage: Property Division and Valuation-Chs. 220-222
Chapter 221 DISSOLUTION OF MARRIAGE: PROCEDURE
PART II. LEGAL BACKGROUND
A. Initiating The Proceeding And Preliminary Relief

18-221 California Forms of Pleading and Practice--Annotated § 221.15

§ 221.15 Petitioning for Dissolution or Legal Separation

[1] General Procedural Rules

The Family Law Rules [*Cal. Rules of Ct., Rules 5.10 et seq.*], adopted by the Judicial Council [*Fam. Code § 211*], govern proceedings for dissolution of marriage, nullity of marriage, and legal separation of the parties [*Cal. Rules of Ct., Rules 5.10(c), 5.20*]. Although the rules cover most procedural aspects of these proceedings, they provide that, except as otherwise provided in the rules, all provisions of law applicable to civil actions generally apply to a proceeding under the Family Code if they otherwise would apply to these proceedings without reference to the Family Law Rules [*Cal. Rules of Ct., Rule 5.21*]. To the extent the Family Law Rules conflict with the general provisions of law governing civil actions, the Family Law Rules prevail [*Cal. Rules of Ct., Rule 5.21*; *see, e.g.,* Inre *Marriage of McKim (1972) 6 Cal. 3d 673, 678, 100 Cal. Rptr. 140, 493 P.2d 868]* .

[2] Judicial Council Forms

As a part of the Family Law Rules, the Judicial Council has promulgated forms for use in dissolution and separation proceedings [Cal. Judicial Council Form FL-100 et seq.]. All forms adopted or approved by the Judicial Council for use in any proceeding under the Family Code, including any form in the FL series, are adopted as rules of court under the authority of *Fam. Code § 211*, *Cal. Const., art. VI, § 6*, and other applicable law [*Cal. Rules of Ct., Rule 5.25*; *see Cal. Rules of Ct., Rules 1.31* (mandatory forms), 1.35 (optional forms), 1.37 (use of current version of adopted or approved form)]. Courts may not require the use of an altered mandatory or optional Judicial Council form in place of the Judicial Council form; a judicial officer may, however, modify a Judicial Council form order as necessary or appropriate to adjudicate a particular case [*Cal. Rules of Ct., Rules 1.31(e)* (mandatory forms), 1.35(e) (optional forms)].

These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Petition and Related Papers

[a] Petition for Dissolution or Legal Separation

A party who seeks a judicial determination altering his or her marital status must complete and file a petition in Cal. Judicial Council Form FL-100 (*see § 221.310*). The proceeding is commenced when the petition is filed. A joint petition for summary dissolution may be filed in certain cases [*Fam. Code § 2400 et seq.*; *see § 221.21* for discussion of this topic].

Grounds of irreconcilable differences or incurable insanity must be pled generally [*Fam. Code § 2310*]. Allegations of specific acts of misconduct, such as allegations that parental custody would be detrimental to a child [*Fam. Code § 3041*], are not permitted [*Fam. Code § 2335*], and are subject to a motion to strike [*see Code Civ. Proc. § 435*; *see also § 221.16[5]*].

The petitioner may not assert any cause of action or claim for relief other than those provided in the Family Law Rules and the Family Code [*Cal. Rules of Ct., Rule 5.104*]. For a discussion of joinder in the dissolution context, see *§ 221.17*. For a general discussion of consolidation of actions, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

Only the husband or the wife is permitted to be the petitioner in proceedings for dissolution or legal separation [*Cal. Rules of Ct., Rule 5.102(a)*]. A minor may bring a proceeding for dissolution or legal separation in his or her own name [*see Fam. Code §§ 7002, 7050*].

An incompetent spouse may obtain a dissolution or legal separation if it is established at the hearing that facts exist to show that the marriage should be dissolved or a legal separation obtained on the grounds of irreconcilable differences [*In re Marriage of Higgason (1973) 10 Cal. 3d 476, 483-485, 110 Cal. Rptr. 897, 516 P.2d 289]* . In this context, an "incompetent person" includes any person for whom a guardian ad litem or a conservator may be appointed [*see Code Civ. Proc. § 372*; *Prob. Code § 1801*]. Such a person may bring a dissolution proceeding through the conservator of his or her estate or through a guardian ad litem.

A family court may appoint a guardian ad litem at any time in order to protect an incompetent person's interests [*Code Civ. Proc. § 373*; *see In re Marriage of Caballero (1994) 27 Cal. App. 4th 1139, 1149-1150, 33 Cal. Rptr. 2d 46* (trial court erred in dismissing petition for legal separation filed by attorney-in-fact for wife suffering from Alzheimer's Disease and in summarily rejecting attorney-in-fact's request to be appointed as wife's guardian ad litem)]. In some cases, an incompetent person's property and support rights are best determined by a family court proceeding, rather than a proceeding in probate court, because of the additional statutory remedies available to determine inter-spousal issues. Furthermore, an incompetent spouse is entitled to all the procedural rights and protections of a competent spouse [*see In re Marriage of Caballero (1994) 27 Cal. App. 4th 1139, 1149-1150, 33 Cal. Rptr. 2d 46]* .

For forms and further discussion on appointment of a guardian ad litem, see Ch. 291, *Guardians ad Litem* .

If one of the parties to the family law proceeding assigns, or has assigned, his or her right to receive support to a county as a condition of receiving public benefits, the county is an indispensable party to the proceeding and is entitled to notice of any proceeding that may affect its interest as an assignee [*In re Marriage of Mena (1989) 212 Cal. App. 3d 12, 19, 21, 260 Cal. Rptr. 314]* .

[b] Mandatory Declaration of Disclosure

Each party in a marital dissolution proceeding must serve on the other party a special preliminary declaration of disclosure (*see § 221.311*) of the proceeding, as described below. The declaration is required to provide full and accurate disclosure of all assets and liabilities in which one or both parties may have an interest [*Fam. Code § 2103*]. Along with the preliminary declaration of disclosure, each party must provide the other party with a completed income

and expense declaration [*see* Cal. Judicial Council Form FL-150] (*see § 221.332*), unless an income and expense declaration already has been provided and is current and valid [*Fam. Code § 2104(e)*].

The preliminary declaration of disclosure is required to set forth with sufficient particularity, which a person of reasonable and ordinary intelligence can ascertain, (1) the identity of all assets in which the party has or may have an interest and all liabilities for which he or she is or may be liable, regardless of the characterization of the asset or liability as community, quasi-community, or separate, and (2) the party's percentage of ownership in each asset and percentage of obligation foreach liability when the property is not solely owned by one or both of the parties. The preliminary declaration may also set forth the party's characterization of each asset or liability [*Fam. Code § 2104(c)*].

The declaration of disclosure may be served along with the petition and accompanying papers, although it is not required to be. Instead, the operative statute provides that each party must serve on the other a preliminary declaration of disclosure "after or concurrently with" service of the petition [*Fam. Code § 2104(a)*]. This preliminary declaration must not be filed with the court, except on court order, but proof of service of the preliminary declaration must be filed with the court [*Fam. Code § 2104(b)*; *see § 221.372*].

A party may amend his or her preliminary declaration of disclosure without leave of court [*Fam. Code § 2104(d)*]. As part of the Legislature's expressed policy of promoting complete disclosure of information between parties regarding assets and liabilities and income and expenses early in the proceedings, "each party has a continuing duty to update and augment that disclosure to the extent there have been any material changes so that at the time the parties enter into an agreement for the resolution of any of these issues, or at the time of trial on these issues, each party will have as full and complete knowledge of the relevant underlying facts as is reasonably possible under the circumstances of the case" [*Fam. Code § 2100(c)*]. Proof of service of an amended preliminary declaration of disclosure must be filed with the court [*Fam. Code § 2104(d)*].

In general, except by court order or the parties' stipulation, before or at the time the parties enter into an agreement for the resolution of property or support issues other than pendente lite support, or, if the case goes to trial, no later than 45 days before the first assigned trial date, each party is required to serve on the other party a final declaration of disclosure and an updated or current income and expense declaration, unless the parties have mutually waived the final declaration of disclosure [*Fam. Code §§ 2105(a), (d), 2109, 2110*].

In the event that one party fails to exchange and serve on the other party either a preliminary or a final declaration of disclosure, or fails to provide the information in the declaration with sufficient particularity, and if the other party has served the declaration on the noncomplying party, the following procedure is prescribed. First, the complying party may, within a reasonable time, request preparation of the appropriate declaration of disclosure or further particularity [*Fam. Code § 2107(a)*]. If the noncomplying party then fails to comply, the complying party may do one or more of the following [*Fam. Code § 2107(b)*]:

> (1) File a motion to compel a further response.
>
> (2) File a motion for an order preventing the noncomplying party from presenting evidence on issues that should have been covered in the disclosure declaration.
>
> (3) File a motion showing good cause for the court to grant the complying party's voluntary waiver of receipt of the noncomplying party's preliminary declaration of disclosure under *Fam. Code § 2104* or final declaration of disclosure under *Fam. Code § 2105*. This voluntary waiver does not affect a party's rights under *Fam. Code § 2107(d)*, discussed, *below*.

If any party fails to comply with any provision of *Fam. Code § 2100 et seq.*, in addition to any other remedies provided by law, the court must impose money sanctions against the noncomplying party in an amount sufficient to deter

repetition of the improper conduct or comparable conduct, and must include reasonable attorney's fees, costs incurred, or both, unless the court finds that the noncomplying party acted with substantial justification or that other circumstances make an imposition of the sanction unjust [*Fam. Code § 2107(c)*].

A court must set aside a judgment that is entered when the parties have failed to comply with all of the disclosure requirements of *Fam. Code § 2100 et seq.*, because a failure to comply with these requirements does not constitute harmless error [*Fam. Code § 2107(d)*]. If the court granted the complying party's voluntary waiver of receipt of the noncomplying party's preliminary declaration of disclosure under *Fam. Code § 2107(b)(3)*, it may set aside the judgment only at the request of the complying party, unless the motion to set aside the judgment is based on one of the following [*Fam. Code § 2107(d)*]:

> (1) Actual fraud if the defrauded party was kept in ignorance or in some other manner was fraudulently prevented from fully participating in the proceeding.
>
> (2) Perjury, as defined in *Pen. Code § 118*, in the preliminary or final declaration of disclosure, or in the current income and expense statement.

The parties are not entitled, however, to a reversal of the judgment or a new trial based on their failure to exchange final declarations of disclosure absent a showing of miscarriage of justice [*In re Marriage of Steiner (2004) 117 Cal. App. 4th 519, 522, 528, 11 Cal. Rptr. 3d 671* (before *Fam. Code § 2107(d)* can be basis of reversal on appeal or ground to compel granting of new trial, noncomplying litigant must identify some portion of judgment materially affected by nondisclosure)].

[c] Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act

If there are minor children of the marriage that is the subject of the proceeding, the petitioner must file a declaration under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (*see § 221.312*). In addition, the operative statute requires every party in a custody proceeding to file the declaration in the party's first pleading or in an affidavit attached to that pleading [*Fam. Code § 3429(d)*; *see* Judicial Council Form FL-105]. Each party has a continuing duty to inform the court of any custody proceeding concerning the child in California or any other state of which he or she obtained information during the pending proceeding [*Fam. Code § 3429(d)*].

[d] Lis Pendens

In any family law proceeding in which the title or right to possession of real property is alleged, the petitioner, at the time of filing the petition, may record a notice of pendency of the action. Doing so effectively prevents the property from being conveyed until its status has been determined. The notice must be recorded in the office of the recorder of each county in which all or part of the property is situated and must contain the names of all parties to the action and a description of the property affected by the action [*Code Civ. Proc. § 405.20*]. Although notice need not be filed, doing so as soon as possible provides greater protection until the status of the property at issue is determined. Before the notice is recorded, a copy of the notice must be mailed, by registered or certified mail, return receipt requested, to all known parties adversely affected by the real property claim, and to all owners of record affected by the claim [*see Code Civ. Proc. § 405.22*]. Immediately following recordation, a copy of the notice also must be filed with the court in which the action is pending. Service must be made immediately oneach adverse party later joined in the action [*see Code Civ. Proc. § 405.22*].

A petition for dissolution that does not allege a community interest in specific real property does not state a "real property claim" so as to support the filing of a notice of lis pendens with regard to that property [*Gale v. Superior Court (2004) 122 Cal. App. 4th 1388, 1390, 19 Cal. Rptr. 3d 554* (plain language of *Code Civ. Proc. § 405.4* requires pleading that alleges claim affecting title to or possession to "specific real property")]. Failing to specify items of

community and separate property in the petition or response, and instead referring to "such assets as may be discovered at a later date" or stating that "the full nature and extent of petitioner's community property is unknown at this time," does not comply with the statutory requirements allowing the filing of a notice of lis pendens [*Gale v. Superior Court (2004) 122 Cal. App. 4th 1388, 1390-1391, 19 Cal. Rptr. 3d 554]* .

From the time of recording of the notice, a purchaser, encumbrancer, or other transferee of the real property described in the notice is deemed to have constructive notice of the pendency of the proceeding as it relates to the property [*see Code Civ. Proc. § 405.24*]. Filing a lis pendens notifies all persons of the pendency of an action. Thus, those acquiring an interest in the property after the institution of the action are bound by any judgment secured in the proceeding that affects the property [*Brandolino v. Lindsay (1969) 269 Cal. App. 2d 319, 325, 75 Cal. Rptr. 56* ; *see California Real Estate Law and Practice, §§ 121.30 -121.37* (Matthew Bender)].

The court must order a notice of the pendency of action expunged if the court finds that (1) the pleading on which notice is based does not contain a real property claim [*see Code Civ. Proc. § 405.31*], (2) the claimant has not established by a preponderance of the evidence the probable validity of the real property claim [*see Code Civ. Proc. § 405.32*], or (3) the real property claim has probable validity, but adequate relief can be secured to the claimant by the giving of an undertaking [*see Code Civ. Proc. § 405.33*]. The entry of judgment does not automatically entitle the party in whose favor judgment was rendered to expunge a lis pendens. Instead, the lis pendens remains of record after judgment unless a statutory ground for expungement is established [*see McKnight v. Faber (1986) 185 Cal. App. 3d 639, 645-646, 230 Cal. Rptr. 57]* .

If the court finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim, the court must grant a motion to expunge the lis pendens pending appeal, except in the rare case in which the court makes a finding on the record that its ruling will probably be overturned on appeal [*Mix v. Superior Court (2004) 124 Cal. App. 4th 987, 993, 21 Cal. Rptr. 3d 826* (aggrieved party may seek review of order granting expungement by petition for writ of mandate and request stay of order)].

[e] In Forma Pauperis

Permission to proceed in forma pauperis must be granted to litigants who declare under penalty of perjury either that they receive certain governmental assistance or their monthly income is 125 percent or less of the current monthly poverty threshold annually established by the Secretary of Health and Human Services [*Gov. Code § 68632(b)*; *see Cruz v. Superior Court (2004) 120 Cal. App. 4th 175, 187-191, 14 Cal. Rptr. 3d 917* (hearing on applicant's eligibility for fee waiver)]. Applicable amounts under the second test revised yearly and are printed on the Information Sheet on Waiver of Court Fees and Costs, available from the court clerk. The court also must grant permission to proceed in forma pauperis in any other instance in which the court, in its discretion, determines that it is appropriate because the litigant is unable to proceed without using money necessary for the use of the litigant or the litigant's family to provide for the common necessaries of life [*Gov. Code § 68632(c)*; *see Earls v. Superior Court of San Luis Obispo County (1971) 6 Cal. 3d 109, 114-117, 98 Cal. Rptr. 302, 490 P.2d 814]* .

Mandatory forms for use in obtaining permission to proceed in forma pauperis have been promulgated by the Judicial Council [Cal. Judicial Council Forms Application for Waiver of Court Fees and Costs, Order on Application for Waiver of Court Fees and Costs, Notice of Waiver of Court Fees and Costs, and Application for Waiver of Additional Court Fees and Costs].

For further discussion and forms for use in proceedings in forma pauperis, see Ch. 174, *Costs and Attorney's Fees* .

[4] Summons

[a] Issuance

The procedure for issuance of summons in a family law proceeding [*see § 221.313*] is the same as is applicable to civil actions generally; the clerk does not return the original summons, but maintains it in the file [*Cal. Rules of Ct., Rule 5.110(a)*; *see* Cal. Judicial Council Form FL-110]. However, in any action for marital dissolution or legal separation, the summons must contain certain temporary restraining orders and a warning regarding treatment of jointly held community property in the event of the death of either party before that property is divided [*see Fam. Code § 2040(a), (c)*]. On filing of the petition in the proceeding, issuance of the summons, and personal service of the petition and summons on the respondent (or on waiver and acceptance of service by the respondent [*see § 221.314*]), a temporary restraining order is in effect against both parties until the final decree is entered, the petition is dismissed, or until further order of the court [*Fam. Code §§ 232-235, 2040*]. For further discussion of the orders authorized under this provision, see *§ 221.18*]. For discussion ofjointly held property, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

[b] Joinder Summons

If the court orders a third party joined in the family law proceeding [*Cal. Rules of Ct., Rule 5.154(a)*], it must order that a summons be issued and that the third party be served with a copy of the application for joinder, the pleading attached to the application for joinder, the order of joinder, and the summons [*Cal. Rules of Ct., Rule 5.158(c)*]. The summons must be in the form prescribed by the Family Law Rules for joinder summons [Cal. Judicial Council Form FL-375] and should be prepared by the attorney using information from the petition's heading.

[c] Papers to Be Served With Summons

The copy of the summons (*see § 221.313*) must be served with a copy of the petition [*see Code Civ. Proc. § 415.10 et seq.*] (*see § 221.310*) that conforms to the original filed petition [*see In re Marriage of Van Sickle (1977) 68 Cal. App. 3d 728, 740, 137 Cal. Rptr. 568* (substantial and misleading deviations in copies served with summons operate to defeat court's jurisdiction, although inconsequential irregularities do not)]. Other papers--for example, an order to show cause--also may be served with the summons and petition. Once service is completed, proof of service should be made using the Proof of Service of Summons form [Cal. Judicial Council Form FL-115] (*see § 221.314*).

[5] Service of Summons

[a] Requirement

Regardless of the method used, the court does not acquire jurisdiction over the respondent until the summons has been served on the respondent or the respondent has made a general appearance [*Code Civ. Proc. § 410.50(a)*].

[b] Strategy in Serving Summons

Service of summons can pose problems in family law cases in which the respondent may try to avoid service. If the attorney does not anticipate problems with service of summons service by mail using the Notice and Acknowledgment of Receipt form (*see § 221.315*) is the most simple and least expensive method of service. This method may cause delays if the notice is not signed and returned, however, and will alert the respondent to the fact that service is being attempted. If problems are expected in achieving service, the attorney should retain a competent process server and warn him or her of the difficulties. Usually, a process server can obtain personal service or establish the facts necessary to accomplish service by substituted service or by publication.

If the respondent is out of state, service by mail either by Notice and Acknowledgment of Receipt or with return receipt are the easiest methods. Once again, however, attempts to serve by mail will warn the respondent, although he or she may sign the return receipt without realizing the letter contains a summons and petition. If difficulty is expected, it should not be too expensive to retain a process server in the relevant location and use personal service, which is

permissible out of state.

[c] Persons Who May Serve Summons

A summons may be served by any person who is at least 18 years of age and not a party to the proceeding [*Code Civ. Proc. § 414.10*]. If the petitioner personally serves the summons, the service is invalid and a default cannot be entered [*see, e.g., Sullivan v. Sullivan (1967) 256 Cal. App. 2d 301, 303-305, 64 Cal. Rptr. 82]* . Service is invalid if a "household member" protected by a domestic violence injunctive order serves the summons [*Caldwell v. Coppola (1990) 219 Cal. App. 3d 859, 863-865, 268 Cal. Rptr. 453* ; *see Code Civ. Proc. § 414.10*]. Although it is not advisable to do so, the petitioner's attorney is not a party to the proceeding and can serve the summons [*Guardianship of Andrews (1941) 17 Cal. 2d 500, 505, 110 P.2d 399]* .

[d] Service by Personal Delivery

A summons may be served by personal delivery of a copy of the summons and of the petition to the person to be served. Service of summons in this manner is complete at the time of delivery. The date on which personal delivery is made must be entered on or affixed to the face of the copy of the summons at the time of its delivery, but service of a summons without the date is valid and effective [*Code Civ. Proc. § 415.10*].

[e] Substituted Service

If a copy of the summons and of the complaint cannot with reasonable diligence be personally delivered to the person to be served, a summons may be served by leaving a copy of the summons and of the petition at the person's dwelling house, usual place of abode, usual place of business, or usual mailing address, in the presence of a competent member of the household or a person apparently in charge of his or her office, place of business, or usual mailing address, at least 18 years of age, who must be informed of the contents of the summons. Thereafter, a copy of the summons and petition must be mailed by first class mail, postage prepaid, to the person to be served at the place where a copy of the summons and petition were left. Service of a summons in this manner is deemed complete on the tenth day after the mailing [*Code Civ. Proc. § 415.20(b)*].

Substituted service cannot be used unless personal service has been attempted with reasonable diligence and has been unsuccessful [*see Code Civ. Proc. § 415.20(b)*]. The facts establishing reasonable diligence must be set forth in adeclaration under penalty of perjury, which must be attached to the proof of service [*Code Civ. Proc. § 417.10*; Cal. Judicial Council Form FL-115 (instructions in proof of service)].

[f] Service by Mail

A summons may be served by mailing a copy of the summons and the petition to the person to be served by first class mail, postage prepaid, together with two copies of the Notice and Acknowledgment of Receipt (*see § 221.315*) and a return envelope, postage prepaid, addressed to the sender [*Code Civ. Proc. § 415.30(a)*]. Service of a summons in this manner is only effective and is deemed complete on the date a written acknowledgment of receipt of summons is executed by the person served, if the acknowledgment is returned to the sender. If the person fails to complete and return the acknowledgment form within 20 days from the date of its mailing, he or she is liable for reasonable expenses subsequently incurred in serving or attempting to serve him or her by another method [*Code Civ. Proc. § 415.30(c), (d)*].

[g] Service by Publication

A summons may be served by publication if, upon affidavit (or declaration under penalty of perjury) [*see Code Civ. Proc. § 2015.5*], it appears to the satisfaction of the court in which the proceeding is pending that the party to be served cannot be served, with reasonable diligence, in another authorized manner, and one of the following conditions has been

satisfied [*Code Civ. Proc. § 415.50(a)*]:

(1) A cause of action exists against the party on whom service is to be made or he or she is a necessary or proper party to the proceeding; or

(2) The party to be served has or claims an interest in real or personal property in California that is subject to the jurisdiction of the court or the relief demanded in the proceeding consists wholly or in part in excluding the party from any interest in the property.

An order for service of summons by publication is obtained by application to the court in which the matter is pending [*see Code Civ. Proc. § 415.50(a)*]. The facts on which the application are based must be established by affidavits made by persons with knowledge of the facts--usually the process server--that personal service was attempted and was unsuccessful [*see Code Civ. Proc. § 2015.5*]. Alternatively, the attorney may make an affidavit or declaration describing efforts to locate the party. The petitioner's verification of the petition constitutes an affidavit that a cause of action for dissolution exists against the respondent.

If the court finds that the requisite conditions are present, it must order the summons published in a California newspaper most likely to give actual notice to the party to be served. The court also must direct that a copy of the summons, the complaint, and the order for publication be mailed to the party if his or her address is ascertained before expiration of the time prescribed for publication of summons [*Code Civ. Proc. § 415.50(b)*]. Publication must be once a week for four successive weeks. Four publications in a newspaper regularly published once a week or more, with at least five days intervening between the respective publication dates, not counting the publication dates, are sufficient. Service of summons is deemed complete at the end of 28 days [*Code Civ. Proc. § 415.50(b), (c)*; *Gov. Code § 6064*].

[h] Service on Persons in Other States

In addition to all the methods described above, a summons may be served on a party in a family law proceeding who is outside California under the law of the place where the summons is served or by sending a copy of the summons and petition to the person to be served by first-class mail, postage prepaid, requiring a return receipt [*Code Civ. Proc. § 415.40*]. Service is not made unless the proof of service includes evidence satisfactory to the court establishing actual delivery to the person to be served by a signed return receipt or other evidence [*Code Civ. Proc. § 417.20(a)*]. Thus, a return receipt bearing the notice "unclaimed" is not sufficient to establish receipt [*Stamps v. Superior Court (1971) 14 Cal. App. 3d 108, 110, 92 Cal. Rptr. 151* ; *but see In re Marriage of Tusinger (1985) 170 Cal. App. 3d 80, 82-83, 215 Cal. Rptr. 838* (actual notice)]. The return receipt must be signed by the person served or otherwise establish actual delivery to him or her. Service of summons by this form of mail is deemed complete on the tenth day after the mailing [*Code Civ. Proc. § 415.40*].

[i] Service on Persons in Foreign Countries

A summons may be served on persons outside the United States by any of the means described above or, provided the court before or after service finds that the service is reasonably calculated to give actual notice, (1) as prescribed by the law of the place where the person is served or (2) as directed by the foreign authority in response to a letter rogatory [*Code Civ. Proc. § 413.10(c)*; *see, e.g., In re Alyssa F. (2003) 112 Cal. App. 4th 846, 852, 6 Cal. Rptr. 3d 1* (failure to properly serve party who resides outside United States under Hague Service Convention renders all subsequent proceedings void as to that party even if he or she has notice of proceedings); *see also In re Jorge G. (2008) 164 Cal. App. 4th 125, 134-135, 78 Cal. Rptr. 3d 552* (California does not have personal jurisdiction over party in Mexico who was not properly served in accordance with either Mexican or California law, but it is appropriate to give petitioner reasonable time to make proper service before dismissing case for improper service under Convention)].

[j] Notice When Custody Is at Issue

The Uniform Child Custody Jurisdiction and Enforcement Act [*Fam. Code § 3400 et seq.*] contains specific provisions governing the notice required for the exercise of jurisdiction over out-of-state persons when child custody is involved [*Fam. Code § 3405*]. The specific provisions generally conform to the ordinary statutory scheme for service of summons, but the notice provisions control in cases of conflict [*see Coker v. Superior Court (1945) 70 Cal. App. 2d 199, 201 , 160 P.2d 885* ; Stats. 1973, ch. 693 (Uniform Act); Stats. 1969, ch. 1610 (out-of-state persons)]. Under the UCCJEA, service must be given to out-of-state persons in a manner prescribed by the law of California for service of process or by the law of the state in which the service is made. The notice must be given in a manner reasonably calculated to give actual notice, but may be by publication if other means are ineffective [*Fam. Code § 3408(a)*].

Proof of service may be made in the manner prescribed by the law of California or by the law of the state in which service was made [*Fam. Code § 3408(b)*].

Notice is not required for a California court to exercise jurisdiction over an out-of-state person who submits to the court's jurisdiction [*Fam. Code § 3408(c)*].

[6] Postpetition Procedures

[a] Amended and Supplemental Pleadings

Amendments to pleadings, amended pleadings, and supplemental pleadings may be served and filed in conformity with the provisions of law applicable to this type of matter in civil actions generally [*see Code Civ. Proc. § 464 et seq.*], but the petitioner is not required to file a reply if the respondent has filed a response. If both parties have filed pleadings, no default may be entered on an amended pleading of either party [*Cal. Rules of Ct., Rule 5.108(b)*]. The most common reason for amending a petition or response is to add property to the lists of community or separate property. If the characterization of property is changed by amendment, however, the allegations in the original petition may be used as an admission against interest at trial [*Evid. Code § 1220*].

The petition may be amended once, without a court order, at any time before the response is filed by filing the amendment and serving a copy on the adverse party [*Code Civ. Proc. § 472*]. If the respondent has not yet appeared in the action, a copy of the filed amendment or amended petition must be served on the respondent in the same manner as that for service of summons [*see, e.g., In re Marriage of Rhoades (1984) 157 Cal. App. 3d 169, 172, 211 Cal. Rptr. 531]* . After the response has been filed, the court, without notice to the adverse party, in furtherance of justice and on any terms as may be proper, may allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect [*Code Civ. Proc. § 473(a)(1)*]. Therefore, a motion for an amendment can be made ex parte or orally. Similarly, in its discretion the court may allow, after notice to the adverse party, any terms as may be just, an amendment to any pleading [*Code Civ. Proc. § 473(a)(1)*]. A motion to amend should be made on the Notice of Motion form and accompanied by the Application for Order and Declaration in Support of Notice of Motion [*Cal. Rules of Ct., Rule 5.118*; Cal. Judicial Council Forms FL-301, FL-310] (*see §§ 221.326* and) and a memorandum of points and authorities.

A supplemental pleading is used when events occur that must be included in a party's pleadings after the filing of the original pleading [*Code Civ. Proc. § 464(a)*]. In general, supplemental pleadings are less frequently used in family law proceedings because of the availability of amendment to the pleadings.

A supplemental petition requires the permission of the court [*Code. Civ. Proc. § 464*], and the motion for permission to file the supplemental pleading must be made on the Notice of Motion form and accompanied by the Request for Order and Declaration in Support of Notice of Motion [*Cal. Rules of Ct., Rule 5.118*; Cal. Judicial Council Forms FL-310, FL-329].

[b] Supplemental Complaint for Child Support of Unborn Child

If child support is already in issue in any proceeding for dissolution of marriage, legal separation of the parties, or support of children, a supplemental complaint may be filed, seeking a judgment or order of paternity or support for a child, when paternity or child support are already at issue. The supplemental complaint may be filed either before or after final judgment in the underlying action [*Fam. Code § 2330.1*; *see also Code Civ. Proc. § 464(b)*; *Fam. Code § 2010* (authority of court to order support for unborn children; *Fam. Code § 3651(b)* (authority to modify support order to add support for child named in supplemental complaint)]. Supplemental complaints in such an instance would primarily be used in district attorney support actions, because the marital parties are currently permitted to include *any children* born to them--including those born before marriage (to the same parties)--in the underlying petition for marital dissolution, legal separation, or nullity [*see Fam. Code § 2330.1*].

[c] Motion to Quash Responsive Relief

The petitioner may move to quash, in whole or in part, any request for *affirmative* relief in the response because (1) the respondent lacks legal capacity to sue, (2) a prior judgment exists or other action is pending between the same parties for the same cause, (3) the residence requirement [*see Fam. Code § 2320*] is lacking, or because of the statute of limitations in *Fam. Code § 2211* [*Cal. Rules of Ct., Rule 5.121(c)*; *see Cal. Rules of Ct., Rule 5.120(a)(3)* (motion to quash on these grounds constitutes general appearance)]. See *§ 221.16[6]* and *[7]* for further discussion of motions to quash.

[d] Motion to Strike

The petitioner may move to strike material from the response that is not required by the mandatory form of response [*see Code Civ. Proc. § 435*]. The basis for such a motion and the procedure for filing it are *set forth in § 221.16[5]*.

[e] Redacting Social Security Numbers and Sealing Financial Pleadings

[i] Redacting Social Security Numbers

With limited exception, a petitioner or respondent may redact any Social Security number from any pleading, attachment, document, or other written material filed with the court pursuant to a petition for dissolution of marriage, nullity of marriage, or legal separation. The Judicial Council form of petition, as well as the form of response, must contain a notice of the right to redact these numbers [*Fam. Code § 2024.5(a)*].

However, an abstract of support judgment, as well as the form required pursuant to *Fam. Code § 4014(b)*, and any similar form created to collect child or spousal support payments may not be redacted [*Fam. Code § 2024.5(b)*].

[ii] Sealing Financial Pleadings

Under *Fam. Code § 2024.6*, on the request by a party to a petition for marital dissolution. legal separation, or nullity of marriage, a court must order the sealing of a pleading that lists the parties' financial assets and liabilities and provides the location or identifying information about them [*Fam. Code § 2024.6(a)*; *see § 221.336*]. For these purposes, "pleading" means a document that sets forth or declares the parties' assets and liabilities, income and expenses, a marital settlement agreement that lists and identifies the parties' assets and liabilities, or any document filed with the court incidental to the declaration or agreement that lists and identifies financial information [*Fam. Code § 2024.6(c)*].

A party who makes a request to seal a pleading pursuant to *Fam. Code § 2024.6* must serve a copy of the pleading on the other party and file a proof of service with the request to seal the pleading [*Fam. Code § 2024.6(e)*]. The request may be made by ex parte application [*Fam. Code § 2024.6(a)*].

Nothing sealed pursuant to *Fam. Code § 2024.6* may be unsealed except on petition to the court and for good cause shown [*Fam. Code § 2024.6(a)*]. However, *Family Code Section 2024.6* does not preclude a party to the proceeding from using any document or information contained in a sealed pleading in any manner that is not otherwise prohibited by law [*Fam. Code § 2024.6(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsRequirementsCivil ProceduresPleading & PracticePleadingsProceedings in Forma PauperisGeneral OverviewCivil ProceduresPleading & PracticeService of ProcessSummonsContent & FormFamily LawChild CustodyEnforcementUniform Child Custody Jurisdiction & Enforcement ActFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

California Forms of Pleading and Practice--Annotated

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Volume 18: Dissolution of Marriage: Master Procedural Guide thru Dissolution of Marriage: Property Division and Valuation-Chs. 220-222
Chapter 221 DISSOLUTION OF MARRIAGE: PROCEDURE
PART II. LEGAL BACKGROUND
A. Initiating The Proceeding And Preliminary Relief

18-221 California Forms of Pleading and Practice--Annotated § 221.16

§ 221.16 Responding to the Petition

[1] Respondent's Options

After being served with the petition for dissolution or legal separation, the respondent must take action within 30 days. Failure to take action may result in the respondent's default being taken unless an extension of time is obtained by stipulation or from the court [*see Code Civ. Proc. § 412.20(a)(3), (4)*; Cal. Judicial Council Form FL-110]. Within 30 days after service, the respondent can file either a response or a motion to strike, to quash the proceeding, to quash the service of summons, to change venue, or to stay or dismiss the proceeding on the ground of inconvenient forum. The respondent may also simultaneously file a motion to quash service of summons or a motion to stay or dismiss on the grounds of inconvenient forum and a response [*Code Civ. Proc. § 418.10(e)*]. If the proceeding is uncontested--as, for instance, when the respondent agrees to the relief demanded in the petition or the parties have executed a marriage termination agreement--the respondent can allow a default to be taken, either by taking no action or by filing an appearance (§ 221.16[4]).

[2] Response

[a] In General

Regardless of the type of relief sought in the petition, the respondent may serve and file a responsive pleading--called a "response" (*see § 221.316*)--within 30 days of the date of the service on the respondent of a copy of the petition and the summons [*Fam. Code § 2020*; Cal. Judicial Council Form FL-120].

The respondent's default must be entered on petitioner's application [*Cal. Rules of Ct., Rule 5.122*] unless respondent files a response within 30 days of the service of the petition [*see Fam. Code § 2020*] or one of the following conditions is satisfied:

(1) The time to respond has been extended by the court or by stipulation with opposing counsel [*Code Civ. Proc. § 1054*; *Cal. Rules of Ct., Rule 5.15*].

(2) The respondent files a notice of motion to quash the proceedings, in which case the response must be filed within 15 days after notice of the court's ruling on the motion.

(3) The respondent files a notice of motion to quash service of summons or a notice of filing for a writ of mandate [*Cal. Rules of Ct., Rule 5.122(a)(2), (3)*], in which case the time to respond is extended to 15 days after service on the respondent of a written notice of entry of an order denying the motion. For good cause shown, however, the court may extend the respondent's time to plead for an additional period no greater than 20 days [*Code Civ. Proc. § 418.10(b)*]. The respondent may also move to quash service of summons and simultaneously respond [*Code Civ. Proc. § 418.10(e)*].

(4) The respondent files a motion to transfer the proceeding [*see Code Civ. Proc. §§ 395, 397*], in which case time to respond is extended as described in (3), *above*.

(5) The respondent has entered a general appearance [*Cal. Rules of Ct., Rule 5.122(a)(1)*].

[b] Accompanying Papers

If the custody of a minor child is at issue in the proceeding, the respondent must file a declaration under the Uniform Child Custody Jurisdiction and Enforcement Act (*see § 221.312*) with the response [*see Fam. Code § 3429*]. A motion to strike or a motion to quash the proceeding may be filed at the same time as the response. An order to show cause or notice of motion to secure a temporary order for support, custody, attorney's fees and costs, or injunctive relief also may be filed concurrently with the response.

[c] Service

The response and accompanying papers must be served on the attorney for the petitioner, or directly on the petitioner if he or she has no attorney [*Cal. Rules of Ct., Rules 5.10(b), (e)*]. Although service may be made personally or by express mail, overnight delivery, or facsimile transmission, service usually is made by first class mail [*see Code Civ. Proc. §§ 1012, 1013*]. The person mailing the response should execute a declaration of service by mail, which must be filed with the response and attached to the copy served by mail [*see Code Civ. Proc. §§ 1013(b), 1013a(1)*].

[d] Filing

The original of the response and other accompanying papers, including the declaration of service, must be filed with the clerk. A fee will be charged if the response is the respondent's first pleading.

[3] Mandatory Declaration of Disclosure

In any marital dissolution proceeding commenced on or after January 1, 1993, each party must serve on the other a special preliminary declaration of disclosure (*see § 221.311*) at the outset of the proceeding [*see Fam. Code § 2103*]. The declaration may be served along with the response and accompanying papers, but need not be [*see Fam. Code § 2104(a)*]. See *§ 221.15[3][b]* for discussion of this topic.

[4] Appearance

[a] What Constitutes Appearance

A respondent appears in a proceeding when he or she files any of the following [*Cal. Rules of Ct., Rule 5.120(a)*]:

(1) A response or answer, except as provided in *Code Civ. Proc. § 418.10* (*e.g.* if filed with a motion to

quash) [*§ 221.16[7]*].

(2) A notice of motion to strike under *Code Civ. Proc. § 435*.

(3) A notice of motion to transfer the proceeding under *Code Civ. Proc. § 395*.

(4) A written notice of his or her appearance.

After having made an appearance, the respondent or his or her attorney is entitled to notice of all subsequent proceedings for which notice is required to be given [*Cal. Rules of Ct., Rule 5.120(b)*]. If the respondent prefers to challenge personal jurisdiction, he or she can do so by filing a motion to quash the summons, which constitutes only a special appearance. An appearance at a hearing at which ex parte relief is sought, or an appearance at a hearing for which an ex parte application for a provisional remedy is made, is not a general appearance and does not constitute a waiver of the right to make a motion to quash under *Code Civ. Proc. § 418.10* [*Code Civ. Proc. § 418.11*]. The respondent may also move to quash the summons and simultaneously respond [*Code Civ. Proc. § 418.10(e)*] without making a general appearance unless and until the court denies the motion and enters an order denying the motion [*Code Civ. Proc. § 418.10(e)(1)*].

[b] Notice of Appearance

A respondent who agrees to the relief demanded in the petition or who is willing to sign a stipulated judgment can file an Appearance, Stipulation and Waivers (*see § 221.339*) rather than a response, thus entitling him or her to be given notice of subsequent proceedings. Filing a notice of appearance, however, does not prevent the petitioner from obtaining a default judgment. See *§ 221.20* for discussion of default judgments and uncontested proceedings.

[5] Motion to Strike

[a] Basis for Motion

At the request of either party on noticed motion, or on its own motion, the court may strike or disregard any matter not required by the official forms of petition and response [*see Code Civ. Proc. § 435*; *cf. In re Marriage of DeRoque (1999) 74 Cal. App. 4th 1090, 1093-1094, 88 Cal. Rptr. 2d 618* (court properly denied motion to strike because matter sought to be stricken was merely contested factual matter, which is not proper basis for order to strike)]. Precluded extraneous matters include material expressly prohibited by statute (for example, specific allegations of misconduct) [*see Fam. Code § 2335*], or simply matter that is not required by the form (e.g., factual basis for claim of irreconcilable differences). As a practical matter, the motion to strike is not used very often because the mandatory printed forms of petition and response [Cal. Judicial Council Forms FL-100, FL-120] do not have space for inclusion of extraneous matter.

[b] Filing and Service

The notice of motion must be accompanied by all supporting points and authorities, declarations, and other supporting materials, and must be filed andserved on the attorney for the opposing party or on the opposing party, if he or she has no attorney [*Cal. Rules of Ct., Rule 5.10(b)*], at least 16 court days before the date of the hearing [*Code Civ. Proc. § 1005*]. If service is by mail, the 16-day period is extended from five to twenty days according to the place of mailing and place of address [*Code Civ. Proc. § 1005(b)*], and service is effective on deposit in the mail [*Code Civ. Proc. § 1013*]. If service is by facsimile transmission, Express Mail, or another method of delivery providing for overnight delivery, the required 16-day period of notice before the time appointed for the hearing must be increased by two calendar days [*Code Civ. Proc. § 1005(b)*]. A declaration of service by mail should be executed by the person mailing the notice of motion.

Proof of service of the moving papers must be filed no later than five calendar days before the hearing [*Cal. Rules of Ct., Rule 3.1300(c)*]. A paper that is submitted before the close of the clerk's office to the public on the day the paper is due is considered to be timely filed [*Cal. Rules of Ct., Rule 3.1300(e)*].

[c] No Extension of Time

Unlike motions to quash the proceeding and motions to quash service of summons, a motion to strike any matter in a pleading does not extend the time within which to file a response.

[6] Motion to Quash Proceeding

[a] Bases for Motion

Within the time for filing a response, the respondent may move to quash the proceeding, in whole or in part, for (1) lack of legal capacity to sue, (2) a prior judgment or another action pending between the same parties for the same cause, (3) a failure to meet the residence requirement of *Fam. Code § 2320*, or *(4)* the statute of limitations in *Fam. Code § 2211* [*Cal. Rules of Ct., Rule 5.121(a)*; *see Zaragoza v. Superior Court (1996) 49 Cal. App. 4th 720, 725-726, 57 Cal. Rptr. 2d 1* (residence requirement not satisfied)].

Within 15 days after a response is filed, the petitioner may move to quash, in whole or in part, any request for affirmative relief in the response on the same grounds set forth above [*Cal. Rules of Ct., Rule 5.121(c)*].

A court may not quash a proceeding on the ground of lack of legal capacity to sue in a family law proceeding brought on behalf of an incompetent spouse when the petitioner also requests appointment as guardian ad litem. If the trial court rejects the petitioner's request for appointment as guardian ad litem, it must immediately appoint another guardian ad litem who may proceed on behalf of the incompetent spouse [*In re Marriage of Caballero (1994) 27 Cal. App. 4th 1139, 1152, 33 Cal. Rptr. 2d 46]* . For further discussion, see *§ 221.15[3]*.

When an action is pending in a court in another state, the California court has discretion as to whether to stay the California proceeding. In exercising its discretion, the court should consider the importance of discouraging multiple litigation designed solely to harass an adverse party and avoiding unseemly conflicts with the courts of other jurisdictions. It also should consider whether the rights of the parties can best be determined by the court of the other jurisdiction because of the nature of the subject matter, the availability of witnesses, or the stage to which the proceedings in the other court have already advanced [*Thomson v. Continental Ins. Co. (1967) 66 Cal. 2d 738, 746-747, 59 Cal. Rptr. 101, 427 P.2d 765]* . On the other hand, if the family law matter is filed first in time, the family law court has jurisdiction to proceed with all aspects of the family law action [*see In re Marriage of Caballero (1994) 27 Cal. App. 4th 1139, 1152, 33 Cal. Rptr. 2d 46* (action for legal separation filed before probate action)].

[b] Waiver by Failure to File Timely Motion

The parties are deemed to have waived the grounds for a motion to quash if they do not file a timely motion to quash [*Cal. Rules of Ct., Rule 5.121(d)*].

[c] Time for Hearing

The hearing on the motion must be scheduled not more than 20 days from the date the notice of motion is filed [*Cal. Rules of Ct., Rule 5.121(b)*].

[d] Extension of Time to Respond

If the respondent files a notice of motion to quash, no default may be entered and the time to file a response is extended

until 15 days after notice of the court's ruling [*Cal. Rules of Ct., Rule 5.121(b)*]. A response may be filed, however, at the same time as the motion to quash.

[e] Ruling on Motion

When a motion to quash is granted, the court may grant leave to amend the petition or response and set a date for filing the amended pleadings, or it may dismiss the action without leave to amend. The court may also dismiss the action when it has sustained the motion with leave to amend and the amendment is not made within the time permitted [*Cal. Rules of Ct., Rule 5.121(e)*].

[f] Order

Although local practice should be consulted, the prevailing party ordinarily submits a form of order to the court after the decision.

[7] Motion to Quash Service of Summons

[a] Basis for Motion

The respondent may serve and file a notice of motion to quash the service of summons on the ground that the court lacks jurisdiction over him or her [*Code Civ. Proc. § 418.10(a)(1)*]. The respondent may also simultaneously serve and file a motion to quash the summons for lack of jurisdiction and a response [*Code Civ. Proc. § 418.10(e)*]. The purpose of such a motion is to permit a respondent to challenge the jurisdiction of the court over him or her while preserving the right to defend on the merits by extending the time to respond until the motion is decided [*Nelson v. Horvath (1970) 4 Cal. App. 3d 1, 4, 84 Cal. Rptr. 101]* . Examples of circumstances in which a motion to quash would be appropriate include all of the following:

(1) A defective service of summons that failed to meet the statutory standards;

(2) Filing of a false return of service indicating that service had been made when it had not been made; and

(3) Lack of a basis for personal jurisdiction over the respondent when the summons was served out of state.

The usual basis for such motions is defective service of summons or lack of a basis for personal jurisdiction over the respondent, which is necessary to obtain a judgment for spousal support or division of property.

Although no basis for a motion quashing an order to show cause exists in the family law rules or statutes, it would appear that a motion to quash service of an order to show cause can be filed on the theory that the order to show cause is equivalent to a summons [*see Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 796-797, 100 Cal. Rptr. 477]* .

Once the respondent has challenged the court's jursidiction by means of a motion to quash, the burden of proof is on the petitioner to establish by a preponderance of the evidence that service was proper or that jurisdiction over the respondent exists [*Crea v. Busby (1996) 48 Cal. App. 4th 509, 514, 55 Cal. Rptr. 2d 513]* .

[b] Effect of Motion on Time to Plead

The service and filing of the notice of motion extends the respondent's time to plead until 15 days after service on him or her of a written notice of entry of an order denying the motion. In addition to the 15-day extension, for good cause shown, the court may extend the respondent's time to plead for an additional period no greater than 20 days [*Code Civ.*

Proc. § 418.10(b)].

If the trial court denies the motion, the respondent may file a petition for writ of mandate with an appropriate reviewing court to require the trial court to quash the summons. The petition must be filed before pleading further and within 10 days after receipt of the notice of denial of the motion to quash. For good cause, the court may extend the time to file the petition for an additional 20 days. After filing the petition, the respondent must file or enter a responsive pleading in the trial court within the time prescribed above unless, on or before the last day of the time to plead, he or she serves on the adverse party and files with the trial court a notice that he or she has petitioned for the writ. The service and filing of the notice extends the time to plead until 10 days after service of written notice of the final judgment in the mandate proceeding. The trial court may for good cause extend the time to plead for an additional period not exceeding 20 days [*Code Civ. Proc. § 418.10(c)*].

[c] Motion as Special Appearance

A motion to quash service of summons, a motion to quash combined with a notice to set aside a default under *Code Civ. Proc. § 473* or *473.5*, or an application to the court or stipulation of the parties for an extension of time to plead is not deemed to be a general appearance by the respondent [*Code Civ. Proc. § 418.10(d)*] and does not subject the respondent to the jurisdiction of the court. Filing and serving a motion to quash service of summons and a response simultaneously also does not constitute a general appearance unless and until the court denies the motion and enters an order denying the motion [*Code Civ. Proc. § 418.10(e)(1)*], or until proceedings on petition for writ of mandate have finally concluded [*Code Civ. Proc. § 418.10(e)(2)*]. However, if the respondent raises any issue other than jurisdiction or asks for any relief that can only be granted on the premise that the court has jurisdiction over the respondent, then the respondent's appearance is general [*In re Alyssa F. (2003) 112 Cal. App. 4th 846, 851, 6 Cal. Rptr. 3d 1* ; *see Harding v. Harding (2002) 99 Cal. App. 4th 626, 636, 121 Cal. Rptr. 2d 450* (engaging in discovery related solely to issue of personal jurisdiction does not constitute general appearance)]. Thus, if based on a lack of personal jurisdiction, the motion to quash should always be filed before filing any other type of motion or simultaneously with the response.

If the motion to quash is based on defective service, however, a general appearance made after the judgment does not waive the defective service or make invalid service retroactively valid [*see In re Marriage of Smith (1982) 135 Cal. App. 3d 543, 545, 551-554, 185 Cal. Rptr. 411]* .

An appearance at a hearing at which ex parte relief is sought, or an appearance at a hearing for which an ex parte application for a provisional remedy is made, is not a general appearance and does not constitute a waiver of the right to make a motion to quash under *Code Civ. Proc. § 418.10* [*Code Civ. Proc. § 418.11*]. Furthermore, during the time a motion to quash service of summons is pending pursuant to *Code Civ. Proc. § 418.10*, the respondent may appear in opposition to any order made during the pendency of the proceeding under the Family Law Act without having the appearance deemed a general appearance [*Fam. Code § 2012(a)*]. For example, the respondent may attack orders such as an ex partecustody order without waiving the right to attack the personal jurisdiction of the court. For this purpose, a motion made pursuant to *Code Civ. Proc. § 418.10* is deemed to be pending from the time the motion is served and filed until the time within which to petition for a writ of mandate has expired or, if a petition is made, until the time that final judgment in the mandate proceeding is entered [*Fam. Code § 2012(b)*].

[d] Order

Although local practice should be consulted, the prevailing party ordinarily submits a form of order to the court after the decision.

[8] Motion for Change of Venue

[a] Basis for Motion

The proper place for trial of a dissolution proceeding is the county in the which *either* the petitioner or the respondent has been a resident for three months immediately preceding the commencement of the proceeding [*Code Civ. Proc. § 395(a)*; *see also Fam. Code § 2320* (residence requirement for entry of judgment of dissolution)]. Under *Code Civ. Proc. § 396b*, if the proceeding is filed in a court that has jurisdiction of the subject matter, but is the wrong place for trial of the action, the court may nevertheless try the proceeding unless the respondent moves to transfer the proceeding to the proper court within the time allowed for responding to the petition [*Code Civ. Proc. § 396b(a)*].

If the court finds that the proceeding was filed in the wrong county, it must order the proceedings transferred [*Code Civ. Proc. § 396b(a)*]. If the motion to transfer is denied, the court must allow the respondent time to file a response if he or she has not done so already [*Code Civ. Proc. § 396b(e)*].

In addition, *Code Civ. Proc. § 397* provides that, on motion by the respondent, the court *may* change the place of trial in the following circumstances (insofar as relevant to dissolution proceedings) [*Code Civ. Proc. § 397(d), (e)*]:

(1) There is no judge of the court qualified to act; or

(2) A proceeding for dissolution of marriage has been filed in the county in which the petitioner has been a resident for three months before commencement of the proceeding, the respondent is a resident of another county in California, and the ends of justice would be promoted by changing venue to the county of the respondent's residence [*but see § 221.16[8][b]* for discussion of preliminary orders that may be granted before a change of venue is granted].

Unlike motions under *Code Civ. Proc. § 396b*, there is no express statutory time limit on a motion for change of venue under *Code Civ. Proc. § 397*.

The first ground under *§ 397* listed above applies generally to all civil actions and proceedings. For general discussion of this ground for change of venue, see Ch. 571, *Venue* . The second ground applies specifically to dissolution proceedings, and allows a change of venue to the respondent's county of residence to promote the "ends of justice." Because all the reported cases decided under this ground have been based on the convenience of witnesses [*see, e.g., Henson v. Superior Court (1963) 218 Cal. App. 2d 327, 32 Cal. Rptr. 404* ; *Pearson v. Superior Court (1962) 199 Cal. App. 2d 69, 18 Cal. Rptr. 578* ; *Lummis v. Lummis (1956) 144 Cal. App. 2d 255, 300 P.2d 869]* , it appears that the basic consideration underlying the "ends of justice" is the convenience of witnesses.

The issue most likely to involve the convenience of nonparty witnesses is child custody because the parents' fitness, care, and treatment of the child is at issue. If the parties' children attend school in the respondent's county, disruption of their school attendance resulting from maintenance of venue in the petitioner's county is sufficient to establish inconvenience of witnesses within the meaning of the venue statute [*see Silva v. Superior Court (1981) 119 Cal. App. 3d 301, 306, 173 Cal. Rptr. 832]* . Jurisdiction to determine child custody is discussed in Ch. 223, *Dissolution of Marriage: Child Custody* .

In addition, if both parties move from the county after entry of an order, including an entry of judgment, in a family law proceeding, *Code Civ. Proc. § 397.5* authorizes the court to transfer the proceeding to the county where either party resides if the interests of justice and the convenience of the parties would be promoted by the change. This provision applies to orders made prior to entry of judgment, as well as to post-judgment motions to modify orders or for other post-judgment relief.

The proper place for trial of a legal separation proceeding is the county in which either the petitioner or the respondent resides at the commencement of the proceeding. In contrast to a petition for dissolution, there is no *jurisdictional* residency requirement for filing a petition for legal separation [*Code Civ. Proc. § 395(a)*; *cf. Forster v. Superior Court (1992) 11 Cal. App. 4th 782, 785, 14 Cal. Rptr. 2d 258* (applying prior law to mandate transfer of venue to respondent's county of residence)]. Like a proceeding for dissolution, a proceeding for legal separation filed in the wrong county may

be subject to transfer to a proper county [*see Code Civ. Proc. § 396b*] or subject to transfer to a more convenient forum [*see Code Civ. Proc. § 397*], as discussed above.

[b] Temporary Orders Before Transfer

If a motion to change the place of trial is made either on the ground that the court designated in the petition is not the proper court or the ends of justice will be promoted by change to the court in the county of respondent's residence, before determining the motion, the court may consider and determine motions for allowance of temporary support of the other party and of any children of themarriage, temporary restraining orders, and attorney's fees and costs, and may make all necessary and proper orders in connection with these matters [*Code Civ. Proc. §§ 396b(c), 397*].

[c] Order Transferring Proceeding

Although local practice should be consulted, the prevailing party ordinarily submits a form of order to the court after the decision. The procedure for determining the court to which the proceeding will be transferred is set forth in *Code Civ. Proc. § 398*, which provides that the proceeding must be transferred to a court agreed on by the parties or to the nearest proper court. The procedure to be followed in transferring the proceeding and provisions for the payment of costs are set forth in *Code Civ. Proc. § 399*.

[9] Motion to Stay or Dismiss Proceeding on Ground of Inconvenient Forum

[a] Basis for Motion

A respondent who is not a resident of California can make a motion to dismiss the proceeding on the ground that California is an inconvenient forum. The court, on motion of a party or its own motion, finding that an action should be heard in a forum outside California in the interests of substantial justice, must stay or dismiss the action in whole or in part on any conditions that may be just [*Code Civ. Proc. § 410.30(a)*]. The domicile or residence in California of any party to the action does not preclude the court from staying or dismissing the action. For this purpose, "convenience" or "inconvenience" of a forum involves the following considerations [*Henderson v. Superior Court (1978) 77 Cal. App. 3d 583, 594, 142 Cal. Rptr. 478]* :

(1) The relationship of the respondent's forum-related activities to petitioner's cause of action;

(2) The relative burden of litigation on the parties; and

(3) The forum state's interest in exercising jurisdiction.

The one situation in which the motion based on inconvenient forum has special application to family law proceedings is when custody of children is at issue and the respondent claims that that particular matter should be decided in another state. Motions of this kind are explicitly authorized under the Uniform Child Custody Jurisdiction Act [*Fam. Code § 3407*].

A court should decline jurisdiction as an inconvenient forum only if there is concurrent jurisdiction elsewhere [*In re Marriage of Nurie (2009) 176 Cal. App. 4th 478, 514, 98 Cal. Rptr. 3d 200*].

[b] Procedure

If the respondent makes the motion to stay or dismiss as a special appearance before making a general appearance, the procedure for making the motion is the same as for making a motion to quash service of summons [*see Code Civ. Proc. § 418.10(a)(1)*] (*§ 221.16[7]*). If the motion is made after a general appearance [*see Schlumpf v. Superior Court (1978) 79 Cal. App. 3d 892, 896, 145 Cal. Rptr. 190]* , it may be made at any time and the procedure is the same as for making

a motion to quash the proceeding (*§ 221.16[6]*).

[c] Stay or Dismissal

If the petitioner is a resident of California, the proceeding should not be dismissed if the motion is granted. Instead, it should be stayed pending the outcome of the proceeding in the other state [*Ferreira v. Ferreira (1973) 9 Cal. 3d 824, 838-839, 109 Cal. Rptr. 80, 512 P.2d 304* ; *cf. Code Civ. Proc. § 410.30*].

[d] Order

Although the prevailing party ordinarily submits a form of order to the court after the decision, local practice should be consulted.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil ProcedureVenueIndividual DefendantsCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProceduresPleading & PracticePleadingsAnswersFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

California Forms of Pleading and Practice--Annotated

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Volume 18: Dissolution of Marriage: Master Procedural Guide thru Dissolution of Marriage: Property Division and Valuation-Chs. 220-222

Chapter 221 DISSOLUTION OF MARRIAGE: PROCEDURE
PART II. LEGAL BACKGROUND
A. Initiating The Proceeding And Preliminary Relief

18-221 California Forms of Pleading and Practice--Annotated § 221.17

§ 221.17 Joinder of Parties and Causes of Action

[1] In General

[a] Parties

[i] Authority for Joinder and Definitions

As a general rule, the superior court may join as a party any person who claims or controls an interest subject to disposition in the proceeding, in accordance with the state family law rules, and, in the case of employee benefit plans, subject to the provisions of *Fam. Code § 2060 et seq.* [*see Fam. Code § 2021(a)*; *Cal. Rules of Ct., Rule 5.150*; *see also Fam. Code § 105* (definition of "person" under Family Code)]. "Persons" under the Family Code include a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity [*Fam. Code § 105*]. Presumably, the same expansive definition applies under the state family law rules [*see Cal. Rules of Ct., Rule 5.10 et seq.*], which apply to every proceeding under the Family Code [*Cal. Rules of Ct., Rule 5.20*]. The procedure for joinder of persons is generally set forth in *Cal. Rules of Ct., Rule 5.150 et seq.* Except as otherwise provided by those rules, all provisions of law relating to joinder of parties in civil actions generally apply to the joinder of a person as a party to a family law proceeding [*Cal. Rules of Ct., Rule 5.150*]. As noted above, the joinder of employee benefit plans is subject to both the California Rules of Court and other statutory provisions, which are discussed in *§ 221.17[4]* [*see Fam. Code §§ 2021(b), 2060 et seq.*; *Cal. Rules of Ct., Rule 5.162*]. In addition, the joinder of third parties in a proceeding under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) is subject to both UCCJEA statutes and the Rules of Court [*see Fam. Code § 3425*; *Cal. Rules of Ct., Rules 5.154, 5.158*].

Finally, the term "claimant" is used to describe a person joined, sought to be joined, or seeking to be joined as a party [*Cal. Rules of Ct., Rule 5.152*].

[ii] Personal Jurisdiction Required

Before a person may be joined, the court must have personal jurisdiction over the proposed claimant. The basis for trial court jurisdiction in the joinder of out-of-state third parties is found in *Code Civ. Proc. § 410.10*, which requires "minimum contacts" with California for the exercise of personal jurisdiction [*In re Marriage of Martin (1989) 207 Cal. App. 3d 1426, 1435-1437, 255 Cal. Rptr. 720]* . For discussion of bases for personal jurisdiction, see *§ 221.11[3]* For the definition of "person" under the joinder provisions, see *§ 221.17[1][a][i]*

[iii] Mandatory Versus Permissive Joinder

Joinder of a person who has physical custody or claims custody or visitation rights with regard to a child is mandatory, but joinder of a person claiming an interest in community property is permissive [*see, e.g., Cal. Rules of Ct., Rules 5.154(a), 5.158(a), (b)*; *see Schnabel v. Superior Court (1994) 30 Cal. App. 4th 758, 763, 36 Cal. Rptr. 2d 677]* . Joinder of an employee benefit plan is mandatory, in the sense that it is a ministerial act the court clerk must perform if requested by a party in writing (on the proper Judicial Council form) [*Fam. Code § 2060(a)*]. Joinder may be requested by one of the parties, the third party, or both [*see, e.g., Fam. Code § 2060(a)*; *Cal. Rules of Ct., Rule 5.154*].

[iv] Opposition to Joinder

The rules of court also provide grounds to oppose a motion for joinder. The court may consider any delay that joinder would cause the underlying action. It must consider the possibility of additional joinder to render an order effective, and the potential confusion and complication or other interference with the effective disposition of the issue [*see, e.g., Cal Rules of Ct., Rule 5.158(b)*].

[v] Binding Nature of Judgment on Party Joined

After joinder, a judgment or order is binding on the joined party [*see, e.g., Callnon v. Callnon (1935) 7 Cal. App. 2d 676, 680, 46 P.2d 988]* . An order or judgment generally may not be enforced against an employee benefit plan that was not joined as a party to the proceeding [*Fam. Code § 2060(b)*]. However, special rules apply to "qualified domestic relations orders" (QDROs), which generally must be honored by a plan that is subject to ERISA even if the plan was not joined [*see In re Marriage of Baker (1988) 204 Cal. App. 3d 206, 209, 217-218, 251 Cal. Rptr. 126* ; for related discussion, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation*]. Furthermore, an order for child, family, or spousal support may be enforced against a plan, regardless of whether the plan was joined [*Fam. Code § 5103(a)*].

Relevant illustrative forms are *set out in §§ 221.317* (Notice of Motion and Declaration for Joinder), 221.318 (Responsive Declaration to Motion for Joinder, Consent Order of Joinder), and 221.319 (Summons (Joinder)).

[b] Claims or Causes of Action

Generally, a party to a family law proceeding may not assert any cause of action or claim for relief not specifically provided by the Family Code or the family law rules [*Cal. Rules of Ct., Rules 5.104*]. Some early authority exists in support of the proposition that an action to determine the validity of a marriage may be joined with a dissolution proceeding [*Sharon v. Sharon (1885) 67 Cal. 185, 7 P. 456* ; *see Fam. Code § 309*], but it appears that such an action would now be more properly brought separately and then *consolidated* with the dissolution proceeding, just as some nonmarital cohabitation claims are consolidated with dissolutions (as opposed to being "tacked") under modern practice. Note that the mandatory Judicial Council forms of Petition and Response do not make provision for any causes of action other than for marital dissolution, legal separation, or nullity of marriage [*see* Cal. Judicial Council Forms FL-100, FL-120]. The procedures for consolidation [*see Code Civ. Proc § 1048(a)*] frequently are prescribed by local rule.

Consolidation or joinder may not always work smoothly. For example, the right to trial by jury may exist on a cause of action consolidated with a dissolution, and a judge would, in the absence of a waiver of the jury trial, be required to

decide the nonjury matters and submit the other issues to a jury. Thus, courts may require a jury trial waiver as a condition to consolidation of such issues [*see* former Los Angeles Co. Super. Ct., Man. of Proc. for Fam. Law Dept. § XIII, Rule B (July 1991); *cf. In re Marriage of Gagne (1990) 225 Cal. App. 3d 277, 274 Cal. Rptr. 750* (jurisdiction of court in dissolution proceeding to inquire into enforceability and effect of parties' *Marvin*-type premarital loan agreement on family residence was not unconstitutional even though it deprived husband of jury trial on loan issue; husband voluntarily invoked jurisdiction of court by including family residence in list of assets in dissolution petition)]. For further discussion of consolidation, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

For discussion of the filing of a *supplemental* complaint seeking a judgment or order of paternity or support for a child of the mother and father of the child whose paternity and support are already in issue before the court," see *§ 221.15[6][b]* [*see Fam. Code § 2330.1*].

[c] Attorney's Fees

The court may award attorney's fees and costs against any properly joined party, except a governmental entity [*Fam. Code § 2030(a)*; *see Marriage of Siller (1986) 187 Cal. App. 3d 36, 231 Cal. Rptr. 757* ; *see also Fam. Code §§ 270-272*,*2010*(f), 2030-2034]. The authority to award attorney's fees and costs against a properly joined party extends to a properly joined employee benefit plan [*see, e.g., Marriage of Olivarez (1986) 188 Cal. App. 3d 336, 232 Cal. Rptr. 794]* . One court has suggested that there may be circumstances that would justify joinder of a party solely to obtain attorney's fees [*see Schnabel v. Superior Court (1993) 21 Cal. App. 4th 548, 552 n.1, 553, 26 Cal. Rptr. 2d 169* (involving closely held corporation in which husband owned 30-percent interest)].

[2] Joinder of Persons in General

[a] Claiming Right to Custody or Visitation

Under the California Rules of Court, a court must order joined to the proceeding any person who the court discovers has physical custody, or who claims custody to, or visitation rights with respect to, any minor child of the marriage [*Cal. Rules of Ct., Rule 5.158(a)*]. A person who has or claims custody or physical control of any of the minor children of the marriage, or visitation rights, may apply to be joined to the proceeding [*Cal. Rules of Ct., Rule 5.154(a)*; *see Fam. Code § 2021(a)*]. In addition, the petitioner or the respondent may apply for joinder of such a claimant [*Cal. Rules of Ct., Rule 5.154(a), (b)*].

The joinder requirement is also set forth in the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) [*Fam. Code § 3400 et seq.*], which provides that the obligation to join a party and the right to intervene as a party in a child custody proceding under the UCCJEA are governed by the law of California as in child custody proceedings between residents of California [*Fam. Code § 3425(c)*]. The procedures under the UCCJA are set forth in Ch. 223, *Dissolution of Marriage: Child Custody* .

[b] Claiming Ownership of Community Property

A person who has in his or her possession or control, or claims to own any property, subject to the jurisdiction of the court in the dissolution proceeding also may be joined to the proceeding. For example, a third party may have ostensible control by title over an asset that is claimed to be community property. Another possibility is that a third party may be taking some action that adversely affects a community interest of the parties. Or the community property may include a closely held business that is a separate entity such as a corporation or partnership that is substantially controlled by one of the spouses, making it necessary to make orders that directly affect the entity [*see, e.g., Schnabel v. Superior Court (1993) 21 Cal. App. 4th 548, 552 n.1, 553, 26 Cal. Rptr. 2d 169* (involving closely held corporation in which husband owned 30-percent interest)]. In addition, joinder of a third party is proper when a spouse alleges that the other spouse has illegally made a gift of community funds to that third party [*Babcock v. Superior Court (1994) 29 Cal. App. 4th 721, 725-726, 35 Cal. Rptr. 2d 462* (citing *Fam. Code § 2021*, former Cal. Rules of Ct., Rule 1250) (*now see Cal. Rules*

of Ct., Rule 5.150)].

Except in cases involving restraining orders, which are discussed in *§ 221.17[3][c]* only the petitioner or respondent may apply for such a joinder [*Cal. Rules of Ct., Rule 5.154(a)*; *see Fam. Code § 2021(a)*]. The joinder is permissive even when it appears that the moving party has established that one or more of the criteria for joinder set forth in the applicable rule has been met, and the court is required to consider factors set forth by the rules of court [*see Cal. Rules of Ct., Rule 5.158(b)*; *Schnabel v. Superior Court (1994) 30 Cal. App. 4th 758, 765, 36 Cal. Rptr. 2d 677* (third party corporation, 30 percent of whose stock the spouses owned, showed favoritism toward husband that implicated reasons for joinder set out in the rules: potential control of community assets; it was an indispensable party; and joinder was necessary to enforce any family law judgment)].

[c] Served With Restraining Order

Any person may be joined to a dissolution proceeding who has been served with a temporary restraining order (1) restraining the use of property in his or her possession or control, or which he or she claims to own, or (2) affecting the custody or visitation of minor children of the marriage. The person served with the restraining order is authorized to apply to the court for the joinder [*Cal. Rules of Ct., Rule 5.154(c)*. The court must grant the order if it involves the custody and visitation of the children, but may exercise its discretion if the order involves the possession or control of property [*see Cal. Rules of Ct., Rule 5.158(a), (b)*].

[d] Indispensable or Necessary Party

The court also may order joinder of a person if the court finds that (1) it is appropriate to determine a particular issue in the proceeding and (2) the party to be joined is indispensable to a determination of the issue or necessary to enforce a judgment rendered on the issue [*Cal Rules of Ct., Rule 5.158(b)*]. For example, joinder of a county may be proper when it has become an assignee of a welfare recipient's support rights by operation of law, because the county is considered an indispensable party to any proceeding that may affect its interest as assignee. Even if not joined, it is entitled to notice of any such proceeding [*In re Marriage of Mena (1989) 212 Cal. App. 3d 12, 19, 21, 260 Cal. Rptr. 314]* .

There may be situations in which joinder is appropriate if the only relief requested against the party to be joined is a restraining order [*see Schnabel v. Superior Court (1993) 21 Cal. App. 4th 548, 553 n.6, 26 Cal. Rptr. 2d 169]* . However, joinder is not required in order to obtain certain forms of injunctive relief directed against a nonparty [*Schnabel v. Superior Court (1993) 21 Cal. App. 4th 548, 552,26 Cal. Rptr. 2d 169]* . On application of a party, *Fam. Code § 2045(a)* gives the court the authority to issue an ex parte order restraining *anyperson* from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, except in the usual course of business or for the necessities of life. In appropriate cases, any such ex parte order can be continued as a preliminary injunction following a hearing [*Schnabel v. Superior Court (1993) 21 Cal. App. 4th 548, 552, 26 Cal. Rptr. 2d 169* ; *see In re Marriage of Van Hook (1983) 147 Cal. App. 3d 970, 978, 195 Cal. Rptr. 541]* .

[3] Joinder of Employee Benefit Plan

[a] In General

Special rules and procedures govern the joinder of employee benefit plans [*see Fam. Code §§ 2021(b), 2060-2074*; *Cal. Rules of Ct., Rule 5.162*; *see also In re Marriage of Baker (1988) 204 Cal. App. 3d 206, 215, 251 Cal. Rptr. 126]* . The term "employee pension benefit plan" includes both public and private retirement, pension, profit sharing, stock bonus, thrift, and similar plans of deferred compensation, whether of the defined contribution or defined benefit type [*Fam. Code § 80*].

Joinder of employee benefit plans must be made using the Judicial Council forms. The motions are routinely granted by

the clerk, and no courtroom presentation is necessary. Illustrative forms are set out as Forms 12 (Request for Joinder of Employee Pension Benefit Plan and Order (Family Law)), 13 (Pleading on Joinder--Employee Pension Benefit Plan (Family Law)), and 15 (Notice of Appearance and Response of Employee Pension Benefit Plan (Family Law)).

The plan's notice of appearance (*see § 221.322*) controverts all facts pleaded and requests made. Although the plan may make further appearances in the dissolution matter, it usually does not. Within 30 days of service of any order on the plan, it may move to modify or vacate any order made against it [*Fam. Code §§ 2063, 2065, 2073*; *see In re Marriage of Baker (1988) 204 Cal. App. 3d 206, 215, 251 Cal. Rptr. 126*].*§ 221.17[4][d]*.

In general, court orders involving rights under an employee benefit plan are enforceable directly against the plan only if the plan has been joined as a party to the proceeding [see *Fam. Code § 2060(b)*; *In re Marriage of Sommers (1975) 53 Cal. App. 3d 509, 514-515, 126 Cal. Rptr. 220* ; *see also Educ. Code § 22650 et seq.* (involving division of benefits under State Teachers' Retirement System); *but see Fam. Code § 5103(a)* (order for payment of child, spousal, or family support is enforceable against plan even if plan not joined)]. However, *Fam. Code § 2610* limits the type of direct payment orders involving retirement benefits a court can make against a plan; and plans subject to ERISA [*see* 29 U.S.C. § 1000 et seq.] whether or not joined, are required to make direct payment to a nonemployee spouse only if the court order meets the requirements of a qualified domestic relations order (QDRO), as discussed in Ch. 222, *Dissolution of Marriage: Property Division and Valuation* . Note that California's procedures for joinder of employee benefit plans are not preempted by ERISA [*In re Marriage of Baker (1988) 204 Cal. App. 3d 206, 217-218, 251 Cal. Rptr. 126]* .

Furthermore, an order for the payment of child, spousal, or family support is enforceable against an employee benefit plan regardless of whether the plan has been joined in the proceeding in which support was obtained [*Fam. Code § 5103(a)*]. Nevertheless, joinder is necessary to bind an employee benefit plan by an injunctive order in the dissolution action, such as one prohibiting the plan from honoring an election by the employee to diminish his or her spouse's benefits in the plan [*In re Marriage of Baker (1988) 204 Cal. App. 3d 206, 219-220, 251 Cal. Rptr. 126* ; *see also Cal. Rules of Ct., Rule 5.106(a)(3)* (general authority to grant injunctive relief against trustee, agent, custodian, or similar fiduciary)]. Joinder also gives the court jurisdiction over the plan to award attorney's fees against the plan [*Fam. Code § 2030(a)*; *see In re Marriage of Baker (1988) 204 Cal. App. 3d 206, 219-220, 251 Cal. Rptr. 126]* to the extent that the fees are incurred in litigating the plan's joinder and liability [*see Fam. Code § 2030(d)*]. A California court has personal jurisdiction over an out-of-state employee benefit plan if there are sufficient minimum contacts between the plan and the state [*In re Marriage of Bastian (1979) 94 Cal. App. 3d 483, 487-488, 156 Cal. Rptr. 524]* .

Apart from joinder, a statutory notice of adverse interest can be sent to an employee benefit plan (to the plan sponsor or administrator) on behalf of the nonemployee spouse [*Fam. Code § 755(b)*]. This notice may be filed to provide interim protection for a nonemployee spouse even if joinder is intended or pending and even before a family law action is commenced [*see In re Marriage of Baker (1988) 204 Cal. App. 3d 206, 218-219, 251 Cal. Rptr. 126.]* . For a general discussion of the use of such notices, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

[b] Joinder on Default

If the employee benefit benefit plan has been served, the clerk must enter the default of the plan on the application of the party requesting joinder unless plan files, within the time specified by the summons or such further time as may be allowed, a notice of appearance, a notice of motion to quash service of summons, or a notice of filing of a petition for a writ of mandate on denial of a motion to quash [*Fam. Code § 2065*].

[c] Stipulation

Either party or his or her representative may notify the plan of any proposed property settlement as it concerns the plan before any hearing at which the proposed property settlement will come before the court. If it receives notice, the plan may stipulate to the proposed settlement or advise the representative that the plan will contest it [*Fam. Code § 2071*]. If

a stipulation between the partiesresults in an order that affects an employee benefit plan, the order is automatically stayed until 30 days after it has been served on the plan [*Fam. Code § 2073(a)*]. In addition, the plan may file a request to extend the duration of the stay to 60 days [*Fam. Code § 2073(d)*; *see § 221.17[4][f]*].

[d] Effect of Appearance or Nonappearance at Hearing

Although not required to do so, the plan may appear at any hearing in the proceeding. The plan is considered a party appearing at the trial with respect to any hearing at which the interest of the parties in the plan is an issue before the court, and thus has the rights of an appearing party regardless of whether it chooses to appear. If the plan does not attend a hearing (regardless of whether it received notice) that results in an order affecting the plan or that affects any interest either the petitioner or respondent may have or claim under the plan, the order does not become effective until 30 days after the order has been served on the employee benefit plan. Furthermore, the plan may file a request to extend the duration of the stay to 60 days [*Fam. Code § 2073(d)*; *see § 221.17[4][f]*]. The plan may waive all or any portion of the 30-day period [*Fam. Code § 2073(b)*]. If within the 30-day period, or within a 60-day period, if the plan has requested an extension (*§ 221.17[4][f]*), the plan files in the proceeding a motion to set aside or modify those provisions of the order affecting it, the disputed provisions do not become effective until the court has resolved the motion [*Fam. Code § 2073*; *see In re Marriage of Carnall (1989) 216 Cal. App. 3d 1010, 1015-1016, 1028-1029, 265 Cal. Rptr. 271* ; *see also § 221.17[4][e]*].

[e] Hearing on Motion to Modify or Set Aside

At any hearing on an employee benefit plan's motion to set aside or modify an order (*§ 221.17[4][d]*), any party may present further evidence on any issue relating to the rights of the parties under the employee benefit plan or the extent of the parties' community or quasi-community property interest in the plan, unless the parties have agreed in writing to the contrary [*Fam. Code § 2074(a)*]. Any findings of fact or conclusions of law made by the court must take account of this evidence [*see Fam. Code § 2074(a), (b)*].

If the provisions of the order affecting the plan are modified or set aside, the court, on motion by either party, may set aside or modify other provisions affecting the employee benefit plan [*Fam. Code § 2074(c)*]. Thus, if the change in the provisions for division of the plan affects other aspects of the division of property or spousal support, the other provisions can be changed.

[f] Availability and Duration of Stay of Orders Affecting Plan

The provisions of any order entered by stipulation of the parties or as a result of a hearing not attended by the employee benefit plan that affect the plan or any interest either party may have or claim under the plan must be stayed until 30 days after the order has been served on the plan [*Fam. Code § 2073(a)*; *see § 221.17[4][d]*]. However, the plan may waive all or part of the 30-day stay [*Fam. Code § 2073(b)*]. If the plan files a motion to set aside or modify the provisions of a stayed order within the 30-day period, the stay must be continued until the motion has been resolved [*Fam. Code § 2073(c)*].

The duration of the required 30-day stay, and the 30-day time period for filing a motion to set aside or modify provisions of the order, must be extended to 60 days if, within the 30-day period, the plan files with the court and serves on all affected parties a request for extension [*Fam. Code § 2073(d)*].

Either spousal party may seek an order staying any provisions of the order and associated orders or judgments that relate to or affect a provision to which a plan has objected in order to protect the right of that party to seek relief under *Fam. Code § 2074(c)* [*§ 221.17[4][e]*]. This stay would continue until the court resolves the plan's motion to set aside or modify provisions of the original order [*Fam. Code § 2073(e)*].

[4] Joinder of Causes of Action

Situations involving joinder of causes of action between the same parties are more limited. Ordinarily, the only additional causes of action that might be joined to the dissolution are those related to nonmarital rights that accrued before marriage under *Marvin v. Marvin (1976) 18 Cal. 3d 660, 674-680, 134 Cal. Rptr. 815, 557 P.2d 106* [*see In re Marriage of Gagne (1990) 274 Cal. Rptr. 750]* .

However, if child support is already in issue in any proceeding for dissolution of marriage, legal separation of the parties, or support of children, a supplemental complaint may be filed [*see Code Civ. Proc. § 464*], seeking a judgment or order of paternity or support for a subsequent child [*see Fam. Code § 2330.1*; *see also Fam. Code § 3651(b)* (authority to modify support order to add support for child named in supplemental complaint)]. This supplemental complaint may be filed either before or after final judgment in the underlying action [*Fam. Code § 2330.1*]. For further discussion, *see § 221.15[6][b]*.

Requests for consolidation of two cases, whether for trial or for all purposes, are closely related to joinder [*see Code Civ. Proc § 1048(a)*]. See *§ 221.18[5][b]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedurePartiesJoinderNecessary PartiesCivil ProcedurePartiesJoinderPermissive JoinderFamily LawChild CustodyEnforcementUniform Child Custody Jurisdiction & Enforcement ActFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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Chapter 221 DISSOLUTION OF MARRIAGE: PROCEDURE
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§ 221.18 Pendente Lite Orders, Ex Parte Relief, and Selected Pretrial Motions

[1] Nature of Preliminary Relief

[a] Function of Preliminary Orders in Family Law Proceeding

The function of preliminary orders in family law proceedings is to maintain thestatus quo of the parties and to enable them to prosecute or defend against the proceeding [*see, e.g., In re Marriage of Gonzales (1975) 51 Cal. App. 3d 340, 344, 124 Cal. Rptr. 278]* . The most commonly sought preliminary orders in a family law proceeding are those relating to spousal support, child support, custody and visitation, attorney's fees and costs, and injunctive relief.

[b] Spousal Support

The court may order the husband or wife to pay any amount necessary for the support of the other [*Fam. Code § 3600*]. If it determines that payment of an obligation of a party would benefit either party or a child for whom support may be ordered, the court may order one of the parties to pay the obligation, or a portion of it, directly to the creditor [*Fam. Code § 2023(a)*; *see, e.g., Bushman v. Superior Court (1973) 33 Cal. App. 3d 177, 181-183, 108 Cal. Rptr. 765]* . Obtaining a temporary support order does not prejudice the rights of the parties with respect to any subsequent order that may be made. The order may be modified or terminated at any time except as to amounts that have accrued before the date of filing the notice of motion or order to show cause to modify or terminate an existing order [*Fam. Code §§ 3603, 3604*].

A dissolution matter may not be dismissed for failure to bring it to trial within the specified time limits if a temporary spousal support order has been issued and not terminated [*Code Civ. Proc. § 583.161(b)*]. Unless it specifies otherwise, the order is not enforceable during any period in which the parties have reconciled and are living together [*Fam. Code § 3602*].

[c] Custody

The court may make any orders it deems necessary or proper regarding a child's custody, during the pendency of any dissolution or legal separation proceeding or other proceeding under *Fam. Code §§ 3120, 6200 et seq.*, or *7600 et seq.* to determine child custody or visitation [*Fam. Code § 3022*; *but see Welf. & Inst. Code §§ 302(c), 304* (only juvenile court may hear proceedings and decide custody issues related to minors adjudged dependents of juvenile court)]. The court must award custody according to the best interests of the child [*see Fam. Code § 3040(a)*]. A request for a temporary custody order, which must be made by petition, may be included in the initial filing of the action or may be filed any time thereafter [*Fam. Code § 3060*]. The court may order temporary custody of the minor children of a marriage on application of one party without notice to the other, if there is a showing of immediate harm to the child or immediate risk that the child will be removed from California [*Fam. Code §§ 3062, 3064, 6323*]. An application for such an ex parte child custody order generally must be made by order to show cause [*see Fam. Code §§ 240, 242(a), 6323*].

In making an order granting or denying joint custody pursuant to *Fam. Code §§ 3080-3089*, the court must award reasonable visitation rights to a parent except on a showing that visitation would be detrimental to the child's best interests [*Fam. Code § 3100(a)*]. A visitation order may include a requirement that the parents and child attend counseling sessions [*see Fam. Code §§ 3190-3192*]. The court also has discretion to grant visitation rights to any other person with an interest in the welfare of the child [*Fam. Code § 3100(a)*; *see also Fam. Code §§ 3101-3105* (visitation by stepparents, grandparents, other relatives, and former legal guardians)]. Temporary visitation rights generally are requested at the same time as temporary custody rights. If temporary custody is awarded without reference to visitation rights, a party who seeks visitation usually must request modification of the custody order to allow visitation [*see generally Fam. Code §§ 3087, 3100(a)*]. An ex parte protective order also may be sought to establish visitation rights [*Fam. Code § 6323(b)*].

The court may order any parent who is seeking custody of, or visitation with, a child to undergo alcohol and drug testing if the court determines, based on a preponderance of the evidence, that there is habitual, frequent, or continued alcohol abuse or drug use by the parent [*Fam. Code § 3041.5(a)*]. The court may order either or both parties to pay the costs of the testing [*Fam. Code § 3041.5(a)*]. A positive test result, even if challenged by the parent and upheld by the court, is not, by itself, grounds for an adverse custody decision. Determining the child's best interests requires weighing all relevant factors [*Fam. Code § 3041.5(a)*].

[d] Child Support

During any proceeding involving dissolution of marriage, legal separation, or custody or support of a minor child, the court may order the parent to pay any amount necessary for the support of the child [*Fam. Code § 3600*; *see Fam. Code § 3120* (independent actions for exclusive custody)]. A temporary child support order usually is sought in conjunction with an application for temporary custody. Because a child support order imposes a personal obligation on the party ordered to pay, the court must have personal jurisdiction over the party before it can make the order [*Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 799, 100 Cal. Rptr. 477]* . During the course of any action for child support that has been filed and served, the court may make an expedited child support order without a hearing [*Fam. Code §§ 3620-3622*].

A temporary child support order does not prejudice the rights of the children regarding any subsequent order that may be made. The order may be modified or revoked at any time except as to any amount that may have accrued before the time the notice of motion or order to show cause to modify or revoke was filed [*Fam. Code § 3603*].

Orders for child support entered during the pendency of the proceeding continue in effect until terminated by the court or by operation of law [*Fam. Code§ 3601(a)*; *see Fam. Code §§ 3901, 4007, 4013* (events terminating parental obligations for support)]. A dissolution matter may not be dismissed for failure to bring it to trial within the specified time limits if a child support order has been issued and not terminated [*Fam. Code § 3601(b)*; *see Code Civ. Proc. § 583.161*; *see also County of Orange v. Quinn (2002) 97 Cal. App. 4th 956, 958-964, 118 Cal. Rptr. 2d 833* (trial court

erred in dismissing putative father's motion to dismiss county's action under child support order for reimbursement of assistance payments made on behalf of daughter for county's failure to bring action to trial within five years); *but see County of Orange v. Rosales (2002) 99 Cal. App. 4th 1214, 121 Cal. Rptr. 2d 788* (on virtually identical facts, except county successfully terminated father's parental rights, trial court properly dismissed county's reimbursement action for failure to bring it to trial within five years because of lack of continuing child support order)]. Nevertheless, unless it specifies otherwise, the order is not enforceable during any period in which the parties have reconciled and are living together [*Fam. Code §§ 3601(b), 3602*].

If child support is already in issue in any proceeding for dissolution of marriage, legal separation of the parties, or support of children, the court may order or modify an existing order to include support for an unborn child [*Fam. Code § 2330.1*; *Fam. Code § 3651(b)*; *see § 221.15[6][b]*].

[e] Attorney's Fees and Costs

In a proceeding for dissolution or legal separation, and in any proceeding subsequent to entry of a related judgment, the court must ensure that each party has access to legal representation to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party to pay to the other party or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding [*Fam. Code § 2030(a)(1)*]. Whether a party should be ordered to pay the other party's attorney's fees and costs, and the amount to be paid, must be determined based on the parties' respective incomes and needs and any factors affecting their respective abilities to pay [*Fam. Code § 2030(a)(2)*; *In re Marriage of Dietz (2009) 176 Cal. App. 4th 387, 406, 97 Cal. Rptr. 3d 616* (court must determine how to apportion overall cost of litigation equitably between parties under their relative circumstances); *Alan S. v. Superior Court (2009) 172 Cal. App. 4th 238, 242-243, 91 Cal. Rptr. 3d 241* (court must consider statutory factors in making award)]. A party who lacks the financial ability to hire an attorney may request, as an in proper litigant, that the court order the other party, if he or she has the financial ability, to pay a reasonable amount to allow the unrepresented party to retain an attorney in a timely manner before proceedings in the matter go forward [*Fam. Code § 2030(a)(2)*].

If the order is entered against a party who is not the husband or wife of another party to the proceeding, however, it must be limited to an amount reasonably necessary to maintain or defend the action on the issues relating to that party [*Fam. Code § 2030(d)*].

The court also may implement a "case management plan" to allocate attorney's fees, court costs, and the like between the parties [*see Fam. Code § 2032(d)*] (*see § 221.43[2]*), or may make an award of attorney's fees and costs that is in the nature of a sanction, pursuant to statute [*see Fam. Code § 271*; *In re Marriage of Corona (2009) 172 Cal. App. 4th 1205, 1226, 92 Cal. Rptr. 3d 17* (sanctions award need not be limited to cost to other party resulting from bad conduct and correlation between sanctioned conduct and specific attorney's fees is not required)].

An application for a pendente lite order for costs and attorney's fees, or for a reasonable retainer to hire an attorney, during a family law proceeding is made by motion on notice or by order to show cause [*Fam. Code § 2031(a)(1)*], as appropriate. The court must rule on the application within 15 days of the hearing on the motion or order to show cause [*Fam. Code § 2031(a)(2)*]. The application also may be made by oral motion in open court without notice at the time of the hearing of the cause on the merits or at any time before entry of judgment against a party whose default has been entered pursuant to *Code Civ. Proc. § 585* or *586* [*Fam. Code § 2031(b)*]. The court must rule on the motion within 15 days and before entry of any judgment [*Fam. Code § 2031(b)(2)*]. Ordinarily, the amount of labor and costs that will be required or the value of the services to be performed in the prosecution or defense of the proceeding cannot be precisely determined at the commencement of the proceeding. Thus, the court from time to time may augment or modify the award as necessary, including after any appeal has been concluded [*Fam. Code § 2030*; *see Rosenthal v. Rosenthal (1961) 197 Cal. App. 2d 289, 295, 17 Cal. Rptr. 186]* . Proof of the fees subsequently incurred then may be made at the trial on the merits and an award made in the judgment or before trial by subsequent order made on proper application.

[f] Disposition of Property

Before the judgment, the trial court may require one potential community asset to be sold to save another asset. Such a sale may be ordered after a partial trial to determine the nature of the property, the need for sale, and methods of protecting the interests of the objecting spouse. Alternatively, the sale may be ordered without such a trial if security is ordered to protect the interests of the objecting spouse [*Lee v. Superior Court (1976) 63 Cal. App. 3d 705, 711, 134 Cal. Rptr. 43* ; *see Fam. Code §§ 2550-2556, 2600-2604* (division of community estate)].

In addition, in proceedings begun on or after January 1, 1993, the court has the authority at any time during the proceedings to order the liquidation of community or quasi-community assets to avoid unreasonable market or investment risks. In no event, however, is the court permitted to grant the application unless the moving party has served the appropriate "declaration of disclosure" (*see § 221.311*) required by statute [*see Fam. Code §§ 2103, 2108, 2113*].

[g] Implementation of Case Management Plan

Either party may request, at any time before the hearing of the cause on the merits, on noticed motion, that the court make a finding that the case involves complex or substantial issues of fact or law related to property rights, visitation, custody, or support. On making that finding, the court has the discretion to directthe implementation of a "case management plan" to equitably allocate attorney's fees, court costs, expert fees, and consultant fees between the parties [*Fam. Code § 2032(d)*]. For forms that may be adapted for use in bringing and responding to a motion to determine that a case involves complex or substantial issues, see *§§ 221.326* (notice of motion) and 221.329 (responsive declaration), respectively.

[h] Mandatory Disclosure of Property, Income, and Expenses

In any marital dissolution proceeding commenced on or after January 1, 1993, each party must serve a special preliminary declaration of disclosure (*see § 221.311*) at the outset of the proceeding on the other party. The declaration is required to provide full and accurate disclosure of all assets and liabilities in which one or both parties may have an interest [*Fam. Code §§ 2103, 2113*]. See *§ 221.15[3][b]* for discussion of this declaration.

[i] Injunctive Relief

The summons in an action for marital dissolution, legal separation, or annulment (*see § 221.313*), contains temporary restraining orders as set forth in *Fam. Code § 2040*. A temporary restraining order is in effect against both parties until the underlying judgment is entered, the petition is dismissed, or until further order of the court, on the filing of a petition for marital dissolution, legal separation, or annulment by the petitioner, issuance of the summons, and personal service of the petition and summons on the respondent, or on waiver and acceptance of service by the respondent [*Fam. Code § 233(a)*]. The restraining order set forth in the summons includes provisions accomplishing the following [*Fam. Code § 2040(a)*; *but cf. Estate of Mitchell (1999) 76 Cal. App. 4th 1378, 1382, 91 Cal. Rptr. 2d 192* (unilateral severance of joint tenancy does not violate automatic temporary restraining orders or similarly worded court-ordered temporary restraining order, or preliminary injunction)]:

(1) Restraining both parties from removing the minor child or children of the parties, if any, from California without the prior written consent of the other party or an order of the court;

(2) Restraining both parties from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the written consent of the other party or an order of the court, except in the usual course of business or for the necessities of life, and requiring each party to notify the other party of any proposed extraordinary

expenditures at least five business days before incurring those expenditures, and requiring each party to account to the court for all extraordinary expenditures made after service of the summons on that party (nothing in the restraining order, however, can preclude the parties from using community, quasi-community, or a party's own separate property to pay reasonable attorney's fees to retain legal counsel in the action; but a party must account to the community for the use of community or quasi-community property, and if property used is later determined to be the other party's *separate* property, that party must account to the other party for the use of the property);

(3) Restraining both parties from cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage, including life, health, automobile, and disability held for the benefit of the parties and their child or children for whom support may be ordered; and

(4) Restraining both parties from creating a nonprobate transfer or modifying a nonprobate transfer in a manner affecting the disposition of property subject to the transfer, without the other party's written consent or a court order.

Fam. Code § 2040(a)(4), under which both parties are restrained from creating or modifying a nonprobate transfer, does not restrain any of the following: (1) creation, modification, or revocation of a will; (2) revocation of a nonprobate transfer, including a revocable trust, under the instrument, provided that notice of the change is filed and served on the other party before the change takes effect; (3) elimination of a right of survivorship to property, provided that notice of the change is filed and served on the other party before the change takes effect; (4) creation of an unfounded revocable or irrevocable trust; or (5) execution and filing of a disclaimer under *Prob. Code § 260-295* [*Fam. Code § 2040(b)*].

A "nonprobate transfer" means an instrument, other than a will, that makes a transfer of property on death, including a revocable trust, pay-on-death account in a financial institution, Totten trust, transfer on death registration of personal property, or other instrument of a type described in *Prob. Code § 5000* [*Fam. Code § 2040(d)(1)*]. It does not include a provision for the transfer of property on death in an insurance policy or other coverage held for the benefit of the parties and their child or children for whom support may be ordered, to the extent that the provision is subject to *Fam. Code § 2040(a)(3)* [*Fam. Code § 2040(d)(2)*]. The restraining order in the summons must include descriptions of the notices required by *Fam. Code § 2040(b)* [*Fam. Code § 2040(e)*].

Neither party is precluded from applying to the court for further temporary orders, an expanded temporary ex parte order, or modification or revocation of the order [*Fam. Code § 235*; *see Cal. Rules of Ct., Rule 5.110(c)*]. Furthermore, the automatic granting of these ex parte orders does not constitute a court determination or competent evidence in any proceeding of any prior history of the conduct so proscribed occurring between the parties [*Fam. Code § 234*].

The court may issue orders for any of the following on the ex parte applicationof either party [*Fam. Code § 2045*; *see Fam. Code § 240 et seq.*]:

(1) An order restraining any person from transferring, encumbering, hypothecating (i.e., pledging as security), concealing, or in any way disposing of any real or personal property, whether community, quasi-community, or separate, except in the usual course of business or for the necessities of life and, if the order is directed against a party, requiring that party to notify the other party of any proposed extraordinary expenditures and to account to the court for them [*see Fam. Code § 6325*; *Schnabel v. Superior Court (1993) 21 Cal. App. 4th 548, 552-553, 26 Cal. Rptr. 2d. 169* (petitioner could have used former *Civ. Code § 4359* (*now see Fam. Code § 2045*) ex-parte restraining order to protect any community interest in closely held corporation rather than attempting to join corporation); *Stone v. Godbehere (9th Cir. 1990) 894 F.2d 1131, 1134-1135 (Arizona law)]* ;

(2) A protective order [*see Fam. Code § 6218*] and any other order under *Fam. Code § 6320*, which include the following:

(a) Enjoining any party from contacting, molesting, attacking, striking, threatening, sexually assaulting, battering, telephoning, contacting repeatedly by mail with the intent to harass, or disturbing the peace of the other party, and, in the court's discretion and on a showing of good cause, of other named family and household members [*see Fam. Code § 6320*];

(b) Excluding one party from the family dwelling, the dwelling of the other party, the common dwelling of both parties, or the dwelling of the person who has the care, custody, and control of a child to be protected from domestic violence for the period of time and on the conditions the court determines, regardless of which party holds legal or equitable title or is the lessee of the dwelling, on a showing of all of the following [*see Fam. Code § 6321*]:

(i) Facts sufficient for the court to ascertain that the party who will stay in the dwelling has a right under color of law to possession of the premises;

(ii) That the party to be excluded has assaulted or threatens to assault the other party, any other person under the care, custody, or control of the other party, or any minor child of the parties or of the other party; and

(iii) That physical or emotional harm otherwise would result to any of these persons;

(c) Enjoining a party from specified behavior that the court determines is necessary to effectuate orders under paragraphs (a) or (b), *above* [*see Fam. Code § 6322*];

(d) Determining the temporary custody of any minor children, together with visitation rights [*see Fam. Code § 6323*; *see also In re Marriage of Kim (1989) 208 Cal. App. 3d 364, 371, 256 Cal. Rptr. 217]* ;

(e) Imposing certain specific conditions on custody or visitation where allegations of domestic violence have been made and a protective or restraining order is in effect, including orders for precise arrangements for transfer of the child to ensure safety of all family members, and orders to prevent disclosure of the shelter or confidential location where the parent is staying; determining whether any custody or visitation must be supervised, suspended, or denied altogether [*see Fam. Code §§ 3100(c), (d), 3031(b), (c), 6323(b), (c)*]; and/or

(f) Determining the temporary use, possession, and control of real or personal property of the parties and the payment of any liens or encumbrances coming due during the period the order is in effect [*see Fam. Code § 6324*].

For further discussion of orders obtained under the Domestic Violence Prevention Act [*Fam. Code § 6200-6388*], see Ch. 293 *Harassment and Domestic Violence* .

On the application of either party and to protect the parties' rights, the court may grant injunctive or other relief against *any* person who has or claims an interest in the controversy, or who, but for *Cal. Rules of Ct., Rule 5.102* (limiting persons who may be made parties to a proceeding), would be a necessary party to a complete adjudication of the controversy. Relief also may be granted against one acting as a trustee, agent, custodian, or similar fiduciary for any property subject to disposition by the court in the proceeding, or other matter subject to the court's jurisdiction in the

proceeding [*Cal. Rules of Ct., Rule 5.106(a)(3)*]. Similarly, the judgment creditor of one spouse may be enjoined from executing on community property involved in a marital dissolution proceeding [*In re Marriage of Van Hook (1983) 147 Cal. App. 3d 970, 982, 195 Cal. Rptr. 541* ; *see Fam. Code § 6324*]. A bond may be required if a third party is enjoined [*see generally Code Civ. Proc. § 529*; *see, e.g., In re Marriage of Van Hook (1983) 147 Cal. App. 3d 970, 988-989, 195 Cal. Rptr. 541]* , unless the injunction is granted under the Domestic Violence Prevention Act [*Fam. Code § 6200 et seq.*; *see Fam. Code § 6324*] or in a paternity action [*see Fam. Code § 7600 et seq.*].

[j] Maintenance of Health, Life, Disability, or Other Insurance Coverage

Orders to maintain various types of insurance coverage for parties to domesticrelations proceedings and their dependents are authorized under a number of statutes. Thus, for example, the family law summons contains a standard restraining order concerning any insurance or other coverage, including life, health, automobile, and disability insurance [*see Fam. Code § 2040(a)(3)*] (*see § 221.313*). Other injunctive relief that is tailored to a particular insurance need also may be obtained by ex parte application or on notice and a hearing [*see generally Fam. Code §§ 2337(b)(2), 3750 et seq.*; *see also Fam. Code § 2050 et seq.*].

On the filing of a petition for marital dissolution, legal separation or annulment, or at any time during the proceeding, a party may transmit, or the court may order the transmittal of, a standardized notice of the pendency of the proceeding to a health, life, or disability insurance carrier [*see Fam. Code § 2050*] (*see § 221.323*). The insured or policyholder who is a party to the proceeding must furnish the other party with the name, title, and address of the insurer or the insurer's agent for service of process [*Fam. Code § 2053*]. The notice instructs the carrier to maintain the beneficiaries or covered dependents under the policy unless the terms of the policy or other legal provisions require otherwise, or until receipt of a court order, judgment, or stipulation of the parties that provides other instructions. The notice also instructs the carrier to notify the affected persons of any cancellation, lapse, change of coverage, or change of designated beneficiaries under the policy [*see Fam. Code § 2050*]. The involved insurance carrier may notify covered dependents, named beneficiaries, or others who have requested receipt of notification of the policy changes set forth above by first class mail, postage prepaid, to the last known address of such persons [*Fam. Code § 2052*]. A separate statutory notice may be transmitted to a health, life, or disability insurance carrier on the entry of a family law order or judgment that requires a party to maintain existing insurance coverage or to purchase such coverage [*see Fam. Code § 2051*].

[2] Application for Preliminary Orders

[a] Decision to Seek Preliminary Orders

In cases in which a party needs spousal or child support, needs attorney's fees or costs, when a spouse threatens to dissipate or waste community property in his or her possession, or when the separation of the spouses was not amicable and physical violence is a possibility, preliminary orders should be sought. In any event, certain temporary mutual restraining orders are immediately effective against both parties because of the requirement that they be included in the summons issued as part of the family law action [*see Fam. Code § 2040*].

[b] Methods of Applying for Preliminary Orders

Preliminary orders may be sought under a stipulation of the parties and court order (*see §§ 221.324* and *221.325*), by notice of motion (*see § 221.326*), and by order to show cause (*see § 221.331*). If some orders may be sought by notice of motion and some must be sought by order to show cause, the order to show cause procedure must be used for all. Special procedures and considerations govern applications for temporary restraining orders to restrain domestic violence under the Domestic Violence Prevention Act [*Fam. Code § 6200 et seq.*] and to obtain an ex parte custody order under *Fam. Code §§ 3060-3064*.

A temporary restraining order (T.R.O.) under *Fam. Code § 240*, if sought ex parte, must be issued or denied on the same day that the application is submitted to the court, unless the application is filed too late in the day to permit

effective review, in which case the order will be issued or denied on the next day of judicial business in sufficient time for the order to be filed that day with the clerk of the court [*Fam. Code § 246*].

When any order under *Fam. Code § 240* is issued, the matter will be made returnable on an order to show cause why a permanent order should not be granted [*Fam. Code § 242(a)*].

[c] Stipulation and Order

The parties may come to an agreement regarding the preliminary orders to be entered in the family law proceeding (*see §§ 221.324* and *221.325*). If they do, their attorneys may stipulate to the entry of these preliminary orders [*see In re Marriage of Helsel (1988) 198 Cal. App. 3d 332, 339-340, 243 Cal. Rptr. 657]* . Stipulations may be made orally in open court, in which case the court, before making its order, normally must ascertain from the parties that the stipulation is in accordance with their agreement. Agreements and stipulations also may be executed in writing and presented ex parte by one party to the court.

[d] Notice of Motion

An application for an order is a "motion" [*Code Civ. Proc. § 1003*], a definition that also applies in family law proceedings [*see Code Civ. Proc. § 1064*; *Cal. Rules of Ct., Rule 5.21*]. If the order sought will affect the rights of the adverse party, procedural due process demands that party be given prior notice of the time and place where the order will be sought and an opportunity to be heard in opposition. In such cases, prior notice is given by the service and filing of a "notice of motion." A notice of motion may be used only when the party against whom the order is sought has made an appearance in the action or proceeding [*see Code Civ. Proc. § 1014*; *Cal. Rules of Ct., Rule 5.120*] and when no temporary restraining orders or temporary custody order on ex parte application are sought [*cf. Cal. Rules of Ct., Rule 3.1150(a)* (applicable to family law discovery proceedings under *Cal. Rules of Ct., Rule 3.1100*)].

If the notice of motion procedure is used to seek preliminary orders, counsel should follow the procedures listed below:

- Determine time of hearing for insertion in the notice of motion;

- Prepare the following papers in an original for filing, a copy to be served on the other party, an office copy, and a copy for the client, if desired:

  - Notice of motion [Cal. Judicial Council Form FL-301] (*see § 221.326*);

  - Application for order and supporting declaration [Cal. Judicial Council Form FL-310] (*see* § 221.37);

  - Income and expense declaration (*see § 221.332*), together with property declaration (*see § 221.334*), if applicable [Cal. Judicial Council Forms FL-150, FL-160];

  - Memorandum of points and authorities, if applicable;

  - Declaration under Uniform Child Custody Jurisdiction and Enforcement Act, if applicable (*see § 221.312*); and

  - Proof of service by mail, if applicable;

- Serve a copy of the notice of motion and supporting papers on the attorney for the other party or, if there is none, on the party [*see Code Civ. Proc. §§ 1011-1020*]; and

- Attach proof of service to the original of the notice of motion and supporting papers, and present them to a deputy court clerk for filing within the time limitations imposed by local rule.

[e] Order to Show Cause

An order to show cause is a court order issued on ex parte application. Ordinarily, it requires the party or person to whom it is directed to appear at a specified time and place to show cause why the relief sought by the applicant should not be granted [*see Sturm v. Sturm (1955) 138 Cal. App. 2d 25, 28, 291 P.2d 527]* . As a result, it constitutes a notice of the application for relief and provides an opportunity to be heard in opposition; that is, it serves the same function as a notice of motion [*see McAuliffe v. Coughlin (1894) 105 Cal. 268, 270, 38 P. 730]* . Unlike a notice of motion, however, an order to show cause may be directed to a party or person who has not yet appeared in the action or proceeding. In situations in which a party or person has not yet appeared in the proceeding, an order to show cause serves not only as a notice of motion but also as a citation or summons, the proper service of which gives the court personal jurisdiction over that person [*see, e.g., Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 8 n.6, 118 Cal. Rptr. 21, 529 P.2d 53 cf. Cal. Rules of Ct., Rules 3.1150(a)*, 3.1260-3.1267, (applicable to family law discovery proceedings under *Cal. Rules of Ct., Rule 3.1100*)].

Thus, the order to show cause procedure must be used in a family law proceeding in the following circumstances:

- To secure relief against a party or person who has not appeared in the proceeding as of the time the relief is sought;

- To secure injunctive relief without prior notice to the party or person to be restrained, regardless of whether that party or person has appeared in the proceeding [*see, e.g., Fam. Code §§ 2045* (ex parte protective orders during pendency of proceedings), 6200 et seq. (Domestic Violence Prevention Act)]; and

- To secure an immediate award of child custody without prior notice to the other party [*see Fam. Code §§ 3062, 3064*].

Because of its nature as a "citation," the order to show cause procedure also is frequently used in family law proceedings to secure preliminary orders, even when the party against whom the orders will be directed has already appeared in the proceeding and the use of a notice of motion is permissible. Because it is a form of notice of motion, the order to show cause generally is deemed to be governed by the same statutes as those governing the notice of motion.

The following procedures commonly are followed to obtain preliminary orders by means of the order to show cause procedure:

- Determine the time of the hearing.

- Prepare the following papers in an original for filing, a copy to be served on the other party, an office copy, and a copy for the client, if desired:

  - Order to show cause, which may or may not contain temporary restraining orders [Cal. Judicial Council Form FL-300; *see also Fam. Code §§ 242, 246*] (*see § 221.331*);

  - Application for order and supporting declaration [Cal. Judicial Council Form FL-310] (*see* § 221.37);

- Income and expense declaration (*see § 221.332*), together with a property declaration (*see § 221.334*), if applicable [Cal. Judicial Council Forms FL-150, FL-160];

- Memorandum of points and authorities, if applicable; and

- Declaration under Uniform Child Custody Jurisdiction and Enforcement Act, if applicable (*see § 221.312*);

- Present the original order, supporting papers, and all copies to the judge of the court in which the proceeding is pending, or to a clerk of that court for presentation to the judge (If the judge signs the order to show cause,the court clerk then files the originals, conforms them, and returns the copies to counsel stamped "endorsed-filed" or "filed." In some counties, the court clerk may be authorized to issue an order to show cause not containing temporary restraining orders by stamping it with the judge's facsimile signature.);

- Serve a conformed, endorsed-filed copy of the order and supporting papers on the nonmoving party; and

- Prepare an original and copies of proof of service, have the person who made the service sign the original, conform the copies, and deliver the original and as many copies as counsel wants stamped "endorsed-filed" to the court clerk's office for filing of the original and return of the copies within the time limitations imposed by local rule].

[f] Informal Notice of Ex Parte Application

Although ex-parte orders are, by definition, issued without formal notice or a formal hearing, local court rules in most counties require some form of informal notice to opposing counsel or the other party, unless certain conditions are satisfied. The general civil rules regarding notice for temporary restraining orders (*Code Civ. Proc. § 527(b)*; *Cal. Rules of Ct., Rule 3.1200-3.1207*) do not apply to ex-parte orders in family law proceedings, except in discovery proceedings [*see Code Civ. Proc. § 527(g)*; *Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(1)*]. Counsel must consult local rules in the county in which the proceeding is pending to determine the notice requirements for ex-parte relief in family law proceedings in that county. In the absence of a controlling local rule, it is suggested that counsel follow the provisions of *Cal. Rules of Ct., Rules 3.1200-3.1207*, which govern general civil law and motion proceedings, and family law discovery proceedings [*Cal. Rules of Ct., Rules 3.1100, 3.1200-3.1207, see Cal. Rules of Ct., Rule 3.1150(g)*].

[g] Memorandum of Points and Authorities

The Family Law Rules generally provide that a memorandum of points and authorities need not be filed unless required by the court [*Cal. Rules of Ct., Rule 5.118(a)*]. Nevertheless, if the order sought is one other than those printed on the application for order and supporting declaration form [*see* Cal. Judicial Council Form FL-310 (form of application for order); *see, e.g., Code Civ. Proc. § 564 et seq.* (appointment of receiver)], the better practice is to prepare, serve, and file a supporting memorandum of points and authorities establishing the applicant's legal right to the order under the circumstances.

[h] Other Papers to Be Served by Party Seeking Relief

The declaration under the Uniform Child Custody Jurisdiction and Enforcement Act (*see § 221.312*) must be completed by each party to a family law proceeding and attached to his or her pleading whenever child custody is in issue [*see Fam. Code § 3429*]. A separate declaration is filed with the petition and response, and normally need not be served again and filed with a notice of motion or order to show cause. If a substantial period of time has elapsed since the

original filing and the hearing of the application for pendente lite relief, however, a current declaration may be required.

A blank copy of the responsive declaration [Cal. Judicial Council Form FL-320] (*see* §§ 221.329 and *221.337*) must be served with the order to show cause or notice of motion [*Cal. Rules of Ct., Rule 5.118(a)*], as must a blank copy of the income and expense declaration (*see § 221.332*) or simplified financial statement and property declaration (*see §§ 221.334* and *221.335*) [Cal. Judicial Council Form FL-150 or FL-155, FL-160] whenever completed declarations are required to be served [*Cal. Rules of Ct., Rule 5.118(e)*]. The moving party also must serve a copy of the State Department of Social Services booklet describing the proper procedures for the collection and payment of child and spousal support, supplied by the clerk of the court, on the responding party in any action involving the support of a minor child [*see Fam. Code § 17434(c)*].

[i] Determining Time of Hearing in Relation to Service Requirements

Unless time is shortened by court order, notices of motion must be served at least 16 court days before the date of the hearing [*Code Civ. Proc. § 1005(b)*]. This requirement applies by analogy to orders to show cause, subject to special time settings for specific types of orders, and to the ability of the court to grant an order shortening time (*see § 221.18[3][j]*). If service is by mail, the required period of notice is increased by five days if the mailing address and place of mailing are within California, by 10 days if either the mailing address or place of mailing is in another state, and by 20 days if either the mailing address or place of mailing is outside the United States. If the notice is served by fax, Express Mail or another method of overnight delivery, the 16-day period is increased by two calendar days [*Code Civ. Proc. § 1005(b)*].

When a temporary restraining order under *Fam. Code § 240* is issued, the matter is made returnable on an order to show cause why a permanent order should not be granted, on the on the earliest day that the business of the court will permit, but no later than 20 days, or if good cause appears to the court, 25 days from the date of the order [*Fam. Code § 242(a)*]. If a hearing is not so held, the court may nonetheless hear the matter, but the order is unenforceable unless reissued under *Fam. Code § 245* [*Fam. Code § 242(b)*]. If the order to show cause contains a temporary child custody order under *Fam. Code § 3060*, the matter ordinarily must be heard within 20 days from the date the custody order is granted [*Fam. Code § 3062(a)*].

In addition, when a temporary restraining order under *Fam. Code § 240* has been issued *without notice* pending the hearing, the applicant must have served the moving papers on the respondent at least five days before the hearing [*Fam. Code § 243(b)*]. However, if a temporary restraining order under *Fam. Code § 240* has been issued *with notice* pending the hearing, the applicant must have served the moving papers on the respondent at least 15 days before the hearing [*Fam. Code § 243(c)*].

[j] Obtaining Order Shortening Time

Occasionally, a moving party may wish to obtain an order shortening time for the hearing on the relief requested and/or the time for serving the moving papers on the responding party [*see Code Civ. Proc. § 1005(b)*; *Fam. Code § 243(e)*]. Either a Notice of Motion or Order to Show Cause form may be used to include an order shortening time for hearing and/or for service. However, any order shortening time requires a judge's signature. Both forms provide space for the judge's signature. The request for an order shortening time for hearing and/or for service should be supported by a declaration stating facts showing why the order shortening time is necessary.

[k] Service of Papers

If an order to show cause is granted at the time the petition is filed and the summons issued, the order and its supporting papers may be served with the petition and summons [*see Code Civ. Proc. § 415.10*; *Cal. Rules of Ct., Rule 5.110(a)*]. If the order to show cause is served before the respondent has appeared in the proceeding, it operates both as a notice of

motion and as a citation to appear at the hearing on the order. In this case, it is recommended that service be made by hand delivery of the papers to ensure that service will be deemed complete within the time limits for scheduling the show cause hearing. Service is deemed complete when delivery is made by personal or hand delivery [*Code Civ. Proc. § 415.10*].

Service of an order to show cause after service of the summons may be accomplished in any of the ways that a summons may be served (*§ 221.15[4]*). If the party to be served has appeared in the proceeding, however, service may be effected in the same manner in which a notice of motion is served. Therefore, it must be served on the party's attorney if he or she has one [*Code Civ. Proc. § 1015*; *Cal. Rules of Ct., Rule 5.10(b)*; *see Conae v. Conae (1952) 109 Cal. App. 2d 696, 697, 241 P.2d 266]* and, if none, then on the party.

When the order to show cause also contains a temporary restraining order--or other order, violation of which would subject the person to whom it is directed to a contempt of court proceeding [*see Code Civ. Proc. § 1209(a)(5)*; *Penal Code § 166(a)(4)*]--the better practice is to serve a copy of the order on the party as well as on his or her attorney because of the requirement that, before a party can be found in contempt of court for willful failure to have complied with a court order, it must appear that he or she had knowledge of the order [*see, e.g., Phillips v. Superior Court (1943) 22 Cal. 2d 256, 257-258, 137 P.2d 838]* . Knowledge, of course, is established by a showing that the party was served with a copy of the order [*Phillips v. Superior Court (1943) 22 Cal. 2d 256, 258, 137 P.2d 838]* .

Service also should be effected on a county assignee of support rights if support is at issue in the proceeding. A county assignee of support rights is entitled to notice of any proceeding that may affect its interest as assignee [*see In re Marriage of Mena (1989) 212 Cal. App. 3d 12, 19, 21, 260 Cal. Rptr. 314]* .

If service of the order to show cause is not effected before the date of the hearing, the matter usually is dropped from the calendar and counsel must file new papers to reset it unless counsel secures a written order continuing the matter to a new date [*compare, e.g.*, Bay Area Super. Ct. Uniform Dom. Rel. Rules, Rule I(B)(5); San Francisco City and County Uniform Local Rules of Court, Rule 4.1(I), *with Fam. Code §§ 242(b), 245(a), (b)* (requiring court to dissolve order when applicant is not ready to proceed and has not effected timely and proper service); *see* Cal. Judicial Council Form DV-125 (form); *see also* Ch. 293, *Harassment and Domestic Violence*].

A notice of motion and its supporting papers must be served in one of the manners specified in *Code Civ. Proc. § 1011* (personal delivery to party, attorney, court clerk, or judge; abode service; service by mail), *Code Civ. Proc. §§ 1012, 1013* (service by mail, Express Mail, Overnight Delivery, or facsimile transmission), *Code Civ. Proc. § 1015* (service on attorney; delivery to court clerk), *Code Civ. Proc. § 1017* (service by telegraph), or *Code Civ. Proc. § 1020* (registered mail). The most common manner of service is by mail pursuant to the provisions of *Code Civ. Proc. §§ 1012* and *1013*. A notice of motion and its supporting papers must be served on the party's attorney if the party has one and, if none, on the party [*see Code Civ. Proc. § 1015*; *Cal. Rules of Ct., Rule 5.10(b)*]. Service also should be effected on a county assignee of support rights if support is at issue in the proceeding [*see In re Marriage of Mena (1989) 212 Cal. App. 3d 12, 19, 21, 260 Cal. Rptr. 314]* .

If an order to show cause and its supporting papers are served with the summons, proof of service is made by checking the appropriate boxes on the Judicial Council form of Proof of Service (Summons) adopted for use in family law proceedings [*see* Cal. Judicial Council Form FL-115]. After the balance of the form is completed, it must be filed in the court clerk's office. If the order to show cause and its supporting papers are not served with the summons but are served in the same manner as a summons on a party who has not yet appeared in the proceeding, the same proof of service form mentioned above may be used by crossing out the words "the Summons with Standard Restraining Orders (Family Law), blank Response, and Petition (Family Law)" after "I served" at the top ofthe form, otherwise completing the form, and filing the original. If an order to show cause or notice of motion and supporting papers are served by mail pursuant to the provisions of *Code Civ. Proc. §§ 1012* and *1013*, on the attorney of a party who has appeared in the proceeding, or on the party if he or she has no attorney, a proof of service must be drafted that complies with the

requirements of *Code Civ. Proc. § 1013a* [*see Cal. Rules of Ct., Rule 5.10(e)*]. Proof of service by mail also may be made by an affidavit stating that the person making service is familiar with postal collection practices and leaves papers to be served in a place where they will be deposited with the Postal Service in the ordinary course of business [*see Code Civ. Proc. § 1013a(3)*].

Similarly, a proof of service must be drafted if the order to show cause or notice of motion and its supporting papers are served in a manner authorized by *Code Civ. Proc. §§ 1011, 1015, 1017,* or *1020* (service on attorney or party, on resident or nonresident appearing by attorney, service by telegraph, and service by registered mail, respectively) [*see Cal. Rules of Ct., Rule 5.10(e)*]. If the party to be served admits service of the papers by signing an acknowledgment of service at the time the papers are served, the signed acknowledgment constitutes the proof of service [*see Code Civ. Proc. §§ 417.10(d), 417.20(d)*].

Proof of service of the moving papers generally must be filed no later than five calendar days before the hearing [*Cal. Rules of Ct., Rule 3.1300(c)*]. A paper that is submitted before the close of the clerk's office to the public on the day the paper is due is considered to be timely filed [*Cal. Rules of Ct., Rule 3.1300(e)*].

[l] Child Custody Award Pursuant to Agreement or on Ex Parte Application

If, before commencement of the proceeding or afterwards, the parties agree that one of them is to have custody or temporary custody of the children, counsel should draft a written agreement for their signatures and have them sign it (*see § 221.324*).

If the parties have reached an oral understanding that one party should have custody, counsel for that party should complete the Application for Order and Supporting Declaration form [Cal. Judicial Council Form FL-310] containing his or her client's understanding of the agreement in the form of a declaration under penalty of perjury [*see Fam. Code § 3061*]. Thus, it would appear that if one party left the other party, saying something to the effect of "I'm leaving, and you can keep the children," this would constitute an oral understanding sufficient to form the basis of an ex parte custody order under *Fam. Code § 3061*. The practical effect of this interpretation is that the party to whom the above or a similar statement was addressed could obtain ex parte temporary custody of the children pending the outcome of the proceeding without the necessity of scheduling and attending a show cause hearing. Although the other party would be served with a copy of the custody order after the fact, it would be up to that party to challenge the order by a motion to vacate or by other means [*compare Fam. Code § 3061 with Fam. Code § 3062(a)*].

Counsel also should draft a court order awarding temporary custody in conformity with the agreement and prepare a proof of service. If the party seeking the temporary order has yet to file the declaration under Uniform Child Custody Jurisdiction and Enforcement Act, that form also should be attached to the application for order. Thereafter, counsel should present the originals of the request for order, the order, and attachments, together with all copies, for the judge's signature on the original of the order. When the applicant for the order is the petitioner, this may be done immediately after the petition is filed. If the judge signs the order, a deputy court clerk must conform the copies of the order, file the originals of the order and request for order, stamp all copies "endorsed-filed" or "filed," and return all copies to counsel. Counsel then should have a conformed, endorsed-filed copy of each of these papers served on the other party, together with an unsigned copy of the proof of service if service is by mail [*see Code Civ. Proc. § 1013(b)*]. Next, counsel should file the original of the proof of service. If service was by mail, a conformed, endorsed-filed copy of each of the papers served must be attached [*see Code Civ. Proc. § 1013a*].

If the parties have made an agreement regarding custody and each is represented by counsel, counsel for one of the parties should draft a stipulation setting forth the agreement and have each of the parties and their respective attorneys sign it [*see Fam. Code § 3061*]. Counsel also must draft a court order awarding temporary custody in conformity with the stipulation and a proof of service. The order may be appended to the stipulation or set forth separately in the form of a formal order. Counsel then should follow the same procedure as set forth above for securing, filing, and serving the

order. Alternatively, the stipulation may be presented at an oral hearing or the parties may orally stipulate in open court as to custody.

If the parties do not agree regarding the custody or temporary custody of their children, either of them may apply ex parte for a temporary custody order that, if granted, must be made returnable on an order to show cause [*see Fam. Code § 3062(a)*]. To do so, counsel should complete the Application for Order and Supporting Declaration form [Cal. Judicial Council Form FL-310], the declaration under the Uniform Child Custody Jurisdiction and Enforcement Act form, and the Order to Show Cause form [Cal. Judicial Council Form FL-300]. The temporary custody order should be inserted in the blank space at the bottom of the Order to Show Cause form. The procedure thereafter is the same as for any order to show cause containing temporary ex parte orders.

[m] Mediation

When it appears on the face of a petition, application, or other pleading toobtain or modify a temporary or permanent custody or visitation order that custody, visitation, or both are contested, the court is required to set the contested issues for mediation before or concurrent with the setting of the matter for hearing [*Fam. Code §§ 3170, 3175*]. When the parties have a history of domestic violence or when a domestic violence prevention order is in effect, court-ordered custody investigations and mediation sessions must be held separately at separate times [*Fam. Code §§ 3113, 3181(a)*; *see Fam. Code § 6211* ("domestic violence" defined); *see also Fam. Code §§ 2045(b), 3113, 3181(a), 6203, 6218, 6320, 6321, 6323, 7710*]. The party who is protected by the restraining order or who alleges a history of domestic violence must make the request for separate mediation sessions [*Fam. Code §§ 3113, 3181(a)*]. For further discussion, see Ch. 293, *Harassment and Domestic Violence* .

Mediation is usually provided by special units in the courts called "Family Court Services" or "Family Mediation Services," by local probation departments, or by private contractors who are usually mental health professionals. Mediation involving domestic violence cases must be handled by Family Court Services in accordance with the protocol adopted by the Judicial Council [*Fam. Code § 3170(b)*; *Cal. Rules of Ct., Rule 5.215*].

Custody mediation is in contrast to voluntary, private mediation of additional issues, which in family law cases is not specifically defined or regulated by statute, except for provisions establishing the confidentiality of certain mediation proceedings [*see Evid. Code § 1119*; *Foxgate Homeowners Assn. v. Bramalea California, Inc. (2001) 26 Cal. 4th 1, 14, 108 Cal. Rptr. 2d 642, 25 P.3d 1117* (courts may not create exceptions to confidentiality of mediation communications afforded by *Evid. Code § 1119*, or to confidentiality of mediator's reports and findings afforded by *Evid. Code § 1121*); *Eisendrath v. Superior Court (Rogers) (2003) 109 Cal. App. 4th 351, 357-358, 364-365, 134 Cal. Rptr. 2d 716* (confidential mediation communications are not admissible absent both parties' express consent; confidential communications made before end of mediation remain confidential after mediation ends)]. For a complete discussion of private mediation in family law cases, see Kirkland, Lurvey, & Richmond, California Family Law Practice and Procedure, 2nd ed., Ch. 98 (Matthew Bender).

[3] Responding Party's Papers

[a] Responsive Declaration

A responsive declaration (*see* §§ 221.329 and *221.337*) must be completed in all cases in which the responding party wishes to oppose (1) an application for an order or orders, or (2) the continuance of an order or orders originally granted on ex parte application. The responsive declaration must be filed with the court and served on each party at least nine court days before the time appointed for the hearing if the application for preliminary orders was made by noticed motion [*Code Civ. Proc. § 1005(b)*]. Assuming that time for service of the application for the order was not shortened to a period so short as to prevent service and filing of the responsive declaration within the statutory time limit, the five-day response requirement may apply by analogy when the application was made by order to show cause. Even if

this requirement does not apply to orders to show cause, the respondent who wishes to respond to the order to show cause by presenting affidavits relating to the granting of the order must do so by serving them on the applicant at least two days before the hearing. If the respondent complies with this time limitation, the applicant is not entitled to a continuance on account of the affidavits [*Fam. Code § 243(g)*]. For related discussion, see *§ 221.18[5][c][i]*.

A responding party may seek affirmative relief instead of that requested by the moving party on the *same issues* raised by the moving party by filing a responsive declaration within the time set by statute or rules of court [*Fam. Code § 213(a)*]. A responding party wishing to seek affirmative relief from the moving party must file and serve a separate order to show cause or notice of motion and request a hearing at the same time as that set by the moving party only if the issues for which affirmative relief is requested *differ* from those raised by the moving party [*see Fam. Code § 213(a)*].

[b] Responding Party's Other Papers

The responding party must serve and file a complete an income and expense declaration and property declaration [Cal. Judicial Council Forms FL-150, FL-160; *see §§ 221.332 -221.335*] when he or she wishes to oppose an application for an order to pay money or disagrees with the amount sought [*Cal. Rules of Ct., Rule 5.128(a)*]. Although counsel may wish to do so anyway, a memorandum of points and authorities [*Cal. Rules of Ct., Rules 3.1113, 5.21, 5.22*] need not be filed unless required by the court [*Cal. Rules of Ct., Rule 5.118(a)*]. If the order sought is other than one for child custody, visitation, or support, spousal support, suit money, or standard noncontroversial injunctive orders, however, and if the applicant has served and filed points and authorities with the application for the order, the better practice is to prepare, serve, and file points and authorities in opposition.

[c] Service and Filing

The responsive declaration and all papers opposing a noticed motion must be filed with the court and served on each party at least nine court days before the time appointed for the hearing [*Code Civ. Proc. § 1005(b)*]. The responsive declaration and supporting papers must be served on the attorney for the party requesting the orders if he or she has one and, if not, then on the party [*see Code Civ. Proc. § 1015*; *Cal. Rules of Ct., Rule 5.10(b)*] in person [*Code Civ. Proc. § 1011*; *Cal. Rules of Ct., Rule 5.10(b)*], or as otherwise provided by statute [*see Code of Civ. Proc. §§ 1011-1013, 1015, 1017, 1020*]. The most common method of service is by mail pursuant to the provisions of *Code Civ. Proc. §§ 1012* and *1013*.

A proof of service [*see Code Civ. Proc. § 1011*] must be prepared and executed, and the original attached to the originals of the responsive declaration and other papers to be filed with the court. When service is by mail, an additional, unsigned copy also should be prepared and enclosed with the copies of the papers served. Alternatively, the person who makes the service may note on the copies served their date and place of mailing [*Code Civ. Proc. § 1013(b)*; *Cal. Rules of Ct., Rule 5.10(e)*]. After the papers have been served, the originals with the proof of service attached must be filed in the court clerk's office. No fee is imposed for filing a declaration in response to an order to show cause [*see Gov. Code § 26826(a)(2)*].

[4] Bifurcation and Consolidation

[a] Bifurcation

Bifurcation is commonly used in family law matters to separate trial of the issue of dissolution or legal separation from related issues of custody, support, and property rights [*see, e.g., In re Marriage of Lusk (1978) 86 Cal. App. 3d 228, 234-235, 150 Cal. Rptr. 63]* . This procedure enables the parties to obtain a relatively quick determination of the marital status while allowing them to prepare for subsequent trial of complicated property and support issues. Parties also may find bifurcation useful to reach resolution on a particular matter, such as the validity or effect of a separate property agreement or the character of a particular asset, that simplifies or determines other issues [*see Cal. Rules of Ct., Rule*

5.175(b); *Lee v. Superior Court (1976) 63 Cal. App. 3d 705, 711, 134 Cal. Rptr. 43]* .

Only *slight evidence* is necessary to obtain bifurcation and resolution of marital status. Conversely, a spouse opposing bifurcation must present *compelling* reasons for denial of a bifurcation motion [*Gionis v. Superior Court (1988) 202 Cal. App. 3d 786, 790, 248 Cal. Rptr. 741]* . Parties seeking bifurcation have successfully cited the desire for remarriage, the delay posed by resolution of certain dissolution issues, and various business and tax reasons as grounds for bifurcation [*see In re Marriage of Lusk (1978) 86 Cal. App. 3d 228, 231, 150 Cal. Rptr. 63]* .

For an example of the Judicial Council forms for use to obtain bifurcation of marital status, *see § 221.328*.

A party who moves to bifurcate must serve a preliminary declaration of disclosure with a completed schedule of assets and debts on the opposing party along with the noticed motion to bifurcate, unless the preliminary declaration has been served previously or the parties stipulate in writing that filing of the preliminary declaration may be deferred until a later time [*Fam. Code § 2337(b)*; *see § 221.15[3][b]*].

A court may impose on the bifurcating party a duty to take any of the following actions or assume any of the following duties on severing the issue of the dissolution of marital status until judgment has been entered on all remaining issues and has become final:

(1) Indemnify and hold the other party harmless from any and all taxes, reassessments, interest, and penalties payable by the other party if dissolving the marriage before dividing the parties' community estate results in a taxable event to either of them because of the ultimate division of their community estate, when these taxes would not have been payable if the parties were still married when the division was made [*see Fam. Code § 2337(c)(1)*];

(2) Maintain all existing health and medical insurance coverage for the other party and the minor children as named dependents, so long as he or she is legally able to do so. It also may order that when the bifurcating party is no longer legally eligible to maintain the other party as a named dependent under the existing health and medical policies, the bifurcating party or his or her estate must purchase and maintain, at his or her sole expense, health and medical insurance coverage that is comparable to the existing health and medical insurance coverage [*see Fam. Code § 2337(c)(2)*];

(3) Indemnify and hold the other party harmless from any and all adverse consequences resulting to the other party in the event the bifurcation results in a termination of the other party's right to a probate homestead in the residence in which the other party resides when the severance is granted [*see Fam. Code § 2337(c)(3)*];

(4) Indemnify and hold the other party harmless from any and all adverse consequences resulting to the other party in the event that the bifurcation results in the loss of the rights of the other party to a probate family allowance as the surviving spouse of the bifurcating party [*see Fam. Code § 2337(c)(4)*];

(5) Indemnify and hold the other party harmless from any and all adverse consequences resulting to the other party if bifurcation results in the loss of the other party's rights to pension benefits, elections, or survivors' benefits under the bifurcating party's pension or retirement plan to the extent that the other party would have been entitled to those benefits or elections as the surviving spouse of the bifurcating party [*see Fam. Code § 2337(c)(5)*];

(6) Require that, before entry of judgment terminating marital status, the moving party's retirement or pension plan must be joined as a party, and,if applicable, that orders dividing plan benefits be entered pending the ultimate resolution of the distribution of benefits [*Fam. Code § 2337(c)(6)*] and that any

orders necessary to ensure that a party receives his or her full community property share in any retirement plan be entered [*Fam. Code § 2610(a)*]; and

(7) Indemnify and hold the other party harmless from any and all adverse consequences in the event that bifurcation results in the loss of rights to Social Security benefits or elections to the extent the other party would have been entitled to those benefits or elections as the surviving spouse of the bifurcating party [*see Fam. Code § 2337(c)(7)*].

A court also may order any other condition that it determines is just and equitable in granting bifurcation of marital status [*Fam. Code § 2337(c)(8)*]. Furthermore, in the event of the bifurcating party's death after entry of a judgment of dissolution of marriage, any obligation imposed by *Fam. Code § 2337* is enforceable against any asset, including the proceeds thereof, against which these obligations would have been enforceable prior to that party's death [*Fam. Code § 2337(e)*].

[b] Consolidation

[i] In General

A dissolution proceeding may be consolidated with a civil action in certain instances. Consolidation is governed by *Code Civ. Proc. § 1048(a)*, which provides for a joint hearing or trial when actions involving a common question of law or fact are pending before the court. One court of appeal addressing this issue has held that an order consolidating a husband's civil fraud action with the parties' dissolution action was not erroneous when a wife had fraudulently induced her husband to sign a marital settlement agreement transferring his separate assets to her and a grant deed placing their joint tenancy residence in her name alone [*see In re Marriage of McNeill (1984) 160 Cal. App. 3d 548, 206 Cal. Rptr. 641]* . Conversely, in another case involving custody and visitation, a court found it improper to order consolidation of that case with a purportedly related civil rights proceeding. The court found that the two cases failed to share a single factual or legal issue [*see In re Marriage of Kim (1989) 208 Cal. App. 3d 364, 372-373, 256 Cal. Rptr. 217]* .

Note that if a final judgment has been issued and nothing is pending in the dissolution proceeding, the dissolution proceeding may not be reopened and consolidated with a tort action, even if the tort action relates to matters adjudicated in the dissolution proceeding [*see Sosnick v. Sosnick (1999) 71 Cal. App. 4th 1335, 1339-1340, 84 Cal. Rptr. 2d 700* (court erred in consolidating former wife's civil action for assault and battery against husband with dissolution proceeding, when judgment had been entered in dissolution proceeding and no appeal taken)].

[ii] Cases Involving Child Support Agencies

When an order for consolidation is made in a cases in which a local child support agency is appearing under *Fam. Code § 17400*, the cases must be consolidated in accordance with the requirements of *Cal. Rules of Ct., Rule 5.365*. For a complete discussion of these requirements, see Kirkland, Luvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Chapter 111 (§ 111.22) (Matthew Bender). For a related form by which a court notifies parties of the consolidation of several cases into one court file, *see § 221.347* [*see* Cal. Judicial Council Form FL-920].

[5] Hearing and Orders

[a] Continuance

Continuances in family law proceedings involving temporary restraining orders and injunctive relief primarily are governed by *Fam. Code § 243*. Local court rule may impose additional requirements on the procedure for obtaining continuances. For a general discussion of the grounds, forms, and procedure for obtaining a continuance, see Ch. 136, *Continuances* .

Ordinarily, the party against whom the relief is sought in a family law proceeding is entitled to one continuance as of course for a reasonable period to prepare for the hearing [*Fam. Code § 243(e)*]. The applicant for a temporary restraining order, on the other hand, probably is entitled to a continuance on account of any affidavits presented by the respondent relating to the granting of the order when the respondent fails to serve them on the applicant at least two days before the hearing [*see Fam. Code § 243(g)*].

When the party who secured issuance of an order to show cause is unable to effect service on the other party before the hearing date, the court should be notified in advance of the hearing date so that the matter may be taken off calendar. Some courts, pursuant to local rule and on application within a specified time before the hearing date, will grant an application for an order continuing the hearing rather than require the applicant to secure issuance of a new order to show cause. The continuance order may be secured ex parte by presenting a prepared order to the proper judge of the court and explaining orally that counsel has been unable to effect service. A conformed, endorsed copy of the court's order continuing the hearing date must be served when the order to show cause is finally served on the other party.

The granting of a continuance on the application of either party at the hearing on the order to show cause or motion is within the discretion of the trial court. Conflicts in an attorney's schedule, however, do not justify a continuance unless brought promptly to the court's attention [*In re Marriage of Perkal (1978) 77 Cal. App. 3d 413, 143 Cal. Rptr. 575]* .

[b] Hearing

Family law courts usually divide their calendars for hearings on temporary orders into at least two categories: short cause and long cause matters. Short cause matters are usually defined as requiring 20 minutes or less for presentation of both sides of the matter and the court's ruling thereon. Short cause calendar hearings generally do not permit oral testimony. Long cause matters generally require a specific setting by the court of a date and time certain for the hearing, because these hearings contemplate that there will be oral testimony and the introduction into evidence of various documents. The amount of time made available by the court depends on the number of witnesses and the complexity of the issues.

Counsel should be as accurate as possible in estimating the time necessary for a long cause hearing. The majority of cases in which temporary orders are being requested will be on the short cause calendar and will be ruled on by the court on the basis of the declarations submitted by the parties, including Income and Expense Declarations. Counsel who intentionally prolong a short cause matter to prevent the court from making a ruling may incur substantial sanctions [*see In re Marriage of Quinlan (1989) 209 Cal. App. 3d 1417, 1422-1423, 257 Cal. Rptr. 850* ; *see also Fam. Code § 271*].

Counsel should confer before the hearing and agree to stipulate to the existence of noncontested facts to narrow the issues to be determined, the admission of exhibits or other evidence and, if applicable, to the entry of standard noncontroversial restraining orders (*see § 221.325*) and that the hearing be held before a court commissioner presiding as temporary judge. If support is at issue, documents supporting the statements made in the income and expense declarations and that were not incorporated into the declarations by attachment must be brought to the hearing. These supporting documents would include statements of earnings received after the declarations were filed. Local court rules often require specific additional information to be provided, including, for example, the previous year's tax returns. More detailed documentation (for example, monthly statements and bills from creditors, cancelled checks, and the like) is generally not needed at an OSC or motion hearing unless one party or the other has indicated an intention to challenge the information in the income and expense declaration, in which case the matter may need to be specially set on the "long cause" calendar. Local rules in many counties require counsel to exchange documents and attempt in good faith to reach stipulations before the hearing.

Just as the court has the ability to exclude oral testimony at the hearing, however [*see Cal Rules of Ct., Rule 5.118(f)*], as a concomitant it has the discretion to receive it [*see, e.g., In re Marriage of Hunt (1985) 172 Cal. App. 3d 872, 875,*

218 Cal. Rptr. 451] . Nevertheless, the court may not resolve disputed factual issues based on mere statements of counsel or the parties, but must, instead, make its ruling on the basis of evidence presented in declarations made under penalty of perjury, by offers of proof, or through formal oral testimony [*County of Alameda v. Moore (1995) 33 Cal. App. 4th 1422, 1424, 1426-1427, 40 Cal. Rptr. 2d 18]* . Accordingly, if a request to admit oral testimony is denied, counsel should make an offer of proof to preserve the point on appeal [*see Evid. Code § 354(a)*; *In re Marriage of Perkal (1978) 77 Cal. App. 3d 413, 419, 143 Cal. Rptr. 575]* .

At the beginning of the hearing, many courts ask counsel to apprise the court of any stipulations the parties have reached on issues raised by the moving and responding papers, and to have such stipulations "put on the record" before proceeding to the contested issues. The parties might also stipulate to the existence of facts and to the introduction of exhibits, if any (for example, a W-2 form, setting forth a party's earnings). Courts will frequently ask counsel to also stipulate that the declarations of both parties may be received in evidence, subject to reasonable cross examination.

Subject to any time constraints imposed by the court and particular rules of local practice, the court may permit each party to testify to any substantial changes that may have occurred since the time his or her declaration was executed, and to cross-examine the other party on statements made in that party's declarations. Unnecessary or repetitious testimony should be avoided. Detailed cross-examination of matters not seriously contested will not be well received by the court. Counsel's main efforts should be directed toward argument on the basis of the evidentiary data before the court.

[c] Attack on Order in Trial Court

An order taken against a party through his or her mistake, inadvertence, surprise, or excusable neglect may be set aside on *any* terms as the court may deem just on motion of the aggrieved party [*Code Civ. Proc. § 473(b)*]. Similarly, on the motion of either party after notice to the other, the court may set aside any void order [*Code Civ. Proc. § 473(d)*; *Greene v. Superior Court (1961) 55 Cal. 2d 403, 405, 10 Cal. Rptr. 817, 359 P.2d 249]* or any order obtained by extrinsic fraud [*Greene v. Superior Court (1961) 55 Cal. 2d 403, 405, 10 Cal. Rptr. 817, 359 P.2d 249]* .

Code Civ. Proc. § 657 authorizes a motion for new trial on certain specified grounds after a verdict or "any other decision." Whether a motion for new trial may be used to attack a pendente lite order on a motion or order to show cause is not clear [*see Greene v. Superior Court (1961) 55 Cal. 2d 403, 405-406, 10 Cal. Rptr. 817, 359 P.2d 249]* . For further discussion of procedure and grounds for a new trial, *see § 221.15[6]*.

When an application for an order has been made to a judge or to the court and has been refused in whole or in part, granted, or granted conditionally or on terms, any party affected by the order may apply to the same judge or court who madethe order to reconsider the matter and modify, amend, or revoke the prior order. The application for reconsideration must be made within 10 days after knowledge of the order has been obtained and *must be based on alleged new or different facts, circumstances, or law* [*Code Civ. Proc. § 1008(a), (f)*]. If the moving party fails to present new or different facts, circumstances, or law, the court lacks jurisdiction to entertain the motion [*Sakiyama v. AMF Bowling Centers, Inc. (2003) 110 Cal. App. 4th 398, 413-414, 1 Cal. Rptr. 3d 762]* .

Judges also have inherent authority to reconsider their interim orders and to change those orders at any time before entry of judgment, notwithstanding *Code Civ. Proc. § 1008*, which states that compliance with its procedural provisions is jurisdictional [*Scott Co. v. U.S. Fidelity & Guaranty Ins. Co. (2003) 107 Cal. App. 4th 197, 205-212, 132 Cal. Rptr. 2d 89* ; *Wozniak v. Lucutz (2002) 102 Cal. App. 4th 1031, 1041-1042, 126 Cal. Rptr. 2d 310]* . For example, the requirement that new or different facts, circumstances, or law must be shown on a party's motion for reconsideration, does not apply to a judge's motion for reconsideration [*Kerns v. CSE Ins. Group (2003) 106 Cal. App. 4th 368, 385, 130 Cal. Rptr. 2d 754]* .

A motion similar to the motion to reconsider is authorized under *Code Civ. Proc. § 1008(b)*. It, however, is not subject to the 10-day limitation to which the motion for reconsideration is subject. This motion has been termed a "motion for

renewal" or "renewed motion," in that it involves an application for renewal of an earlier motion based on different ("new") facts [*see, e.g., Monsan Homes, Inc. v. Pogrebneak (1989) 210 Cal. App. 3d 826, 831, 258 Cal. Rptr. 676]* . Unlike a motion for reconsideration, a motion for renewal need not be heard by the judge who ruled on the original motion [*Deauville Restaurant, Inc. v. Superior Court (2001) 90 Cal. App. 4th 843, 849-851, 108 Cal. Rptr. 2d 863]* .

On its own motion or on that of the injured party, the court may correct a clerical mistake in its order as entered to conform to the order directed [*Code Civ. Proc. § 473(d)*].

[d] Appeal

Orders granting or dissolving an injunction, or refusing to grant or dissolve an injunction, are appealable [*Code Civ. Proc. § 904.1(a)(6)*]. In addition, pendente lite orders for support and the like are considered final judgments in collateral matters, and also are appealable [*see In re Marriage of Skelley (1976) 18 Cal. 3d 365, 368, 134 Cal. Rptr. 197, 556 P.2d 297]* . Because of the length of time required before securing a decision on appeal, however, this remedy may be more illusory than real; that is, in most cases the order is superseded by the judgment in the trial court before the propriety of the court's ruling can be determined on appeal.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementFamily LawChild SupportObligationsTypesTemporary SupportFamily LawMarital Termination & Spousal SupportCosts & Attorney FeesFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsTemporary Support

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§ 221.19 Reconciliation Proceedings

The Family Conciliation Court Law [*Fam. Code § 1800 et seq.*] establishes procedures and provides resources for conciliation of marital difficulties. It was designed to protect the rights of children, to promote the public welfare by preserving, promoting, and protecting family life and the institution of marriage, and to provide a means for the reconciliation of spouses and the amicable settlement of domestic and family controversies [*Fam. Code § 1801*]. The Family Conciliation Court Law applies only in those counties in which the superior court determines each January that the social conditions in the county and the number of domestic relations cases in the courts render the procedures provided by the law necessary to their full and proper consideration and the effectuation of the purposes of the law [*Fam. Code § 1802*].

Conciliation counseling is a short-term process that attempts to save a marriage by means of some form of reconciliation agreement. Even if reconciliation is not achieved, the counseling process can reduce tensions, facilitate an amicable settlement between the parties, and in general, achieve as friendly and constructive a separation as possible. The Family Conciliation Court Law provides for a staff of professional marriage counselors attached to the conciliation court and headed by an individual generally designated the counselor of conciliation [*Fam. Code §§ 1814, 1815*]. As directed by the court, counselors of conciliation and their staffs are responsible for holding hearings and conferences with the parties, conducting investigations, making recommendations to the court, preparing reports and statistics, maintaining records, making recommendations relating to underage marriage, assisting individuals in the preparation and presentation of petitions for conciliation, acting as domestic relations case investigators, conducting mediation of child custody and visitation disputes, and carrying out supervision in connection with the jurisdiction of the conciliation court [*Fam. Code § 1814(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAlternative Dispute ResolutionMediation

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§ 221.20 Uncontested Proceedings

[1] In General

Many proceedings for dissolution and legal separation end up as uncontested proceedings when the parties find themselves able to agree on custody, support, and property issues without the necessity of a contested trial. In cases in which the parties have reached an agreement settling all issues between them, they usually also agree that the petitioner take the respondent's default. In addition, the parties generally stipulate to extend the time in which respondent must respond to allow time for negotiations to settle issues between them. Provision usually is made for notice to the respondent before the entry of a default. If the notice prior to entry of default is not given or if the agreed settlement is not given effect at the defaulthearing, the respondent may be able to have the judgment set aside under *Code Civ. Proc. § 473*.

A preliminary declaration of disclosure of all assets and liabilities in which one or both parties may have an interest must be served. Although a final disclosure declaration is also generally required (absent good cause), the final declaration may be waived by the petitioner in the case of a *default* judgment, and in other cases the parties may *stipulate* to waive the final declaration [*Fam. Code §§ 2105, 2106, 2110*]. For further discussion of these declarations and their related declaration of service, *§§ 221.15[3]*, and, *221.15[3][b]*.

The respondent's default may be entered when he or she fails within the time allowed for response to file a response or a notice of motion to quash the proceeding, to quash service of summons, of filing a petition for writ of mandate, or to transfer the proceeding. Once the respondent's default has been entered by the clerk after the petitioner has filed a request for default, the proceeding goes to trial on the uncontested calendar.

One advantage to the respondent in allowing the dissolution to take place without a response or appearance is the avoidance of the cost of having the response or appearance prepared and of paying the fee required for the filing of a "first paper" [*Code Civ. Proc. § 411.20*; *Gov. Code §§ 26826, 26826.1*]. In addition, no filing fee is imposed for a marital settlement agreement signed by a defaulted respondent and intended for incorporation in a proposed decree of

dissolution of marriage [*Gov. Code § 26826(a)(3)*].

[2] Representing Petitioner

The attorney representing the petitioner in an uncontested proceeding generally has the same responsibilities as if the proceeding were contested. He or she bears the burden of establishing the client's right to the relief requested in the petition. The basic difference between a contested and uncontested proceeding is that in the latter all evidence is solicited from one party rather than from both.

The initial steps leading up to an uncontested hearing are the same as those leading to a contested hearing. If a response or other appropriate proceeding is not timely filed, the petitioner should file the Request to Enter Default [Cal. Judicial Council Form FL-165] (*see § 221.340*) to have the respondent's default entered. If the respondent does file a response or other appropriate pleading, the matter still may be heard as uncontested in the situations described in *§ 221.20[1]*, but the Request for Default does not have to be filed.

If the attorney discovers any defects in the petition, a motion to amend the petition should be filed immediately because the court will not allow the petition to be amended at the time of the default hearing. If the respondent has not yet appeared in the action and the petition has been amended, the copy of the filed amendment or amended petition must be served on the respondent in the same manner as that for service of summons. Otherwise, the petition will not be deemed validly amended and a default judgment based on the amended petition will be subject to a motion to set aside [*see, e.g., In re Marriage of Rhoades (1984) 157 Cal. App. 3d 169, 172, 211 Cal. Rptr. 531]* .

No default may be entered in any proceeding unless the Request to Enter Default [*see* Cal. Judicial Council Form FL-165 (*see § 221.340*) is completed in full and filed by the petitioner [*Cal. Rules of Ct., Rule 5.124*]. The mailing declaration must be filled out and a copy of the request mailed unless the service was by publication and the address is still unknown [*Cal. Rules of Ct., Rule 5.124(b)*].

A declaration of nonmilitary status is required by the Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*] which, in relevant part, protects persons in military service [*see 50 U.S.C. App. § 511(1)*-(3)] from default judgment [*50 U.S.C. App. § 521*]. This part of the form consists of a declaration by the petitioner that the respondent is not in the military service and thus not entitled to the protection of the Act. In situations in which the respondent's whereabouts are unknown, the respondent's military status may be unknown to the petitioner, and thus the petitioner will not be able to declare under penalty of perjury that the respondent is not a member of the armed services on active duty. In such cases, the petitioner still may meet the requirements of the Act by filing, with the request for default, a declaration re: military service showing facts tending to prove the respondent is not in military service. If the respondent is in the military service, the court must appoint an attorney to represent him or her and protect his or her interest in the dissolution [*50 U.S.C. App. § 521(b)(2)*], unless the respondent waives these rights by use of the Appearance, Stipulation and Waivers form (*see § 221.339*). For further discussion of the Servicemembers Civil Relief Act and forms for use when the declaration on the request for default is not sufficient, see Ch. 205, *Defaults and Default Judgments* . California law requires a similar declaration concerning the military status of a respondent before a default may be entered, and specifies procedures for appointment of counsel and posting of a bond for absent service members, as well as permitting a stay of proceedings and reopening of judgments for the benefit of service members [*see Mil. & Vet. Code §§ 402, 403*].

Even in a default or uncontested proceeding, the court has a duty to determine issues of support, property division, and attorney's fees and costs [*Cal. Rules of Ct., Rule 5.122*; *see Fam. Code § 2550*]. Thus, unless the petitioner does not seek any such relief [*see Fam. Code § 2330.5*] or unless the court orders otherwise, a current income and expense declaration and property declaration (*see §§ 221.332 -221.335*) must be filed by the petitioner if the information contained in the declaration is relevant to any issue to be determined by the court at thehearing [*Cal. Rules of Ct., Rule 5.128(a)*]. For additional discussion of establishing the basis for relief, see *§ 221.20[6][b]*.

In some jurisdictions the petitioner must file a formal request for setting the hearing date at the time the Request to Enter Default is filed. In those jurisdictions where such a request is not required, an oral request to the clerk is necessary to set the matter for hearing on the uncontested calendar.

[3] Representing Respondent

Depending on the scope of the retention agreement, the attorney for the respondent may be responsible for representing his or her client in settlement negotiations, for drafting a marital termination agreement, for conducting pretrial investigation and discovery, and for advising the client concerning actions that should be taken as soon as possible after the parties have separated or after the petition for dissolution has been filed.

If possible, the respondent's attorney should attend the uncontested hearing to guard against the possibility that the petitioner might refuse to acknowledge a marital termination agreement negotiated by the parties or any stipulations entered into by the parties. If this happens, the court should permit the respondent's attorney to be heard, perhaps as a friend to the court [*see Loomis v. Loomis (1948) 89 Cal. App. 2d 232, 236-238, 201 P.2d 33]* .

[4] Representing Both Parties

At times, a couple seeking to save attorney's fees and believing they have no conflicting interests will ask one attorney to represent them both in the dissolution of their marriage. Dual representation is technically permissible with the informed written consent of each client [*see Cal. Rules of Prof. Conduct, Rule 3-310(C)*]. The matter must be truly uncontested, such that there is no existing dispute between the parties as to any part of the proceeding. There must be full disclosure of all facts and circumstances necessary to enable each party to make a fully-informed decision regarding the areas of potential conflict and the possibility and desirability of seeking independent legal advice *In re Marriage of Egedi (2001) 88 Cal. App. 4th 17, 23, 105 Cal. Rptr. 2d 518* ; [*see Klemm v. Superior Court (1977) 75 Cal. App. 3d 893, 899-901, 142 Cal. Rptr. 509]* .

However, despite the technical permissibility of dual representation in uncontested cases, it is not recommended because of the potential for conflict between the parties [*see Flatt v. Superior Court (1994) 9 Cal. 4th 275, 282-285, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* . From an ethical and malpractice standpoint, it is strongly suggested that dual representation not be undertaken.

[5] Entry of Default and Setting for Hearing

Once the petitioner has applied to the court for entry of the default by filing the Request to Enter Default form (*see § 221.340*), the clerk will inspect the file to verify service of process on the respondent [*see Cal. Rules of Ct., Rule 5.122*]. Assuming all is in order, the clerk will enter the default, and the petitioner should then apply to the court for the relief sought in the petition. In some jurisdictions, a written request for setting the hearing must be filed with the clerk.

The petitioner must provide the clerk with an envelope bearing sufficient postage and addressed to the respondent, with the clerk's address as the return address. The clerk must mail a copy of the Request to Enter Default to the respondent in the envelope provided. A judgment of dissolution or legal separation, including relief requested in the petition, will not be denied solely on the basis that the Request to Enter Default was returned unopened to the court. The clerk is required to maintain any such document returned by the post office as part of the court file in the case [*Fam. Code § 2335.5*].

[6] The Uncontested Hearing

[a] Establishing Grounds

The court is without power to grant a judgment of dissolution on the default of the respondent unless the grounds for

dissolution alleged in the petition are proved in court [*Fam. Code § 2336(a)*]. Proof of irreconcilable differences [*see Fam. Code § 2310(a)*] may be established without courtroom testimony by use of the Judicial Council form of Declaration for Default or Uncontested Dissolution (*see § 221.341*), which contains a preprinted statement asserting this ground [*Fam. Code § 2336(a)*; Cal. Judicial Council Form FL-170]. Courtroom testimony is needed in such cases only when it appears to the court that reconciliation of the parties is reasonably possible, a proposed child custody order is not in the best interests of the child, a proposed child support order is less than a noncustodial parent is capable of paying, or a personal appearance of any party or interested person would be in the best interests of justice [*Fam. Code § 2336(b)*].

Live testimony appears to be required when the ground for dissolution or legal separation is incurable insanity [*see Fam. Code §§ 2310(b), 2312*]. In limited instances, a petitioner may be allowed by "exceptional circumstances" to establish proof of the grounds alleged in the petition by affidavit (or declaration) [*see Code Civ. Proc. § 2015.5*] in lieu of a courtroom appearance by the petitioner [*see Fam. Code §§ 2200-2210, 2336(b)*].

[b] Evidence Regarding Property, Custody, and Support

If the parties have negotiated a settlement of all issues between them and their agreement is evidenced by a marital termination agreement, the agreement may be submitted to the court for approval and incorporated in the judgment, just as would be the case if the proceeding were not uncontested. The court may require the petitioner to clarify and justify any details of the agreement, and counsel mustbe certain the client is fully prepared to do so. If the agreement includes a provision for child custody and support, the court has jurisdiction to make its own orders in regard to this issue, notwithstanding the agreement of the parties [*Fam. Code § 3651(a), (d)*].

If the parties have not settled all issues of support and property division before the hearing, and no settlement agreement has been negotiated and executed for submission to the court, the court will require evidence to be presented on these matters. This places the responsibility on petitioner's counsel to present all evidence on these issues in a fair and objective manner. Because the court has a duty to exercise discretion in granting the relief requested, it has the power to inquire into the financial condition of the parties--including that of the respondent--if this information is available. When the parties have minor children, each affidavit or offer of proof must include the affiant's or declarant's estimate of each party's monthly gross income. An affiant or declarant who has no knowledge of a party's estimated monthly income must state why he or she has no knowledge. If there is a community estate, each affidavit or offer of proof must include an estimate of the value of the assets and debts the affiant or declarant proposes to be distributed to each party [*Fam. Code § 2336(a)*]. If attorney's fees are at issue, counsel should be prepared to justify the attorney's fees, perhaps by a statement of time spent on the matter.

If there are minor children of the parties, the affidavit or offer or proof must include an estimate of each party's monthly gross income, or a statement of why the declarant or affiant has no knowledge of a party's estimated monthly gross income. If there is a community estate, the affidavit or offer or proof must include an estimate of the value of the assets and debts the declarant or affiant proposes to be distributed to each party, unless the declarant or affiant has filed (or concurrently files) a complete and accurate property declaration with the court [*Fam. Code § 2336(a)*].

[c] The Proposed Judgment of Dissolution

The proposed judgment should be prepared before the hearing and submitted to the court at the time of the hearing. Although agreement between the parties on the terms of the judgment may be reached long before the hearing, the judgment itself is not effective until signed by the court.

When the parties to the proceeding want to include the provisions of a marital termination agreement as part of the judgment, they may use the stipulation for judgment prescribed by *Cal. Rules of Ct., Rule 5.116*. The stipulated judgment must be completed and signed [*Cal. Rules of Ct., Rule 5.116*], and must include a disposition of all matters

subject to the court's jurisdiction for which a party seeks adjudication or an explicit reservation of jurisdiction over any matter not proposed for disposition at that time. In default cases, the signature of the defaulting spouse on any marital settlement agreement or stipulated judgment must be notarized [*Fam. Code § 2338.5(a)*]. Note that the court may set aside a judgment for failure to comply with the disclosure requirements. The court may limit the set aside to those portions of the judgment that were materially affected by the nondisclosure [*Fam. Code § 2105(e)*].

The court clerk must give notice of entry of judgment to the attorney for each party, or if a party is not represented by counsel, to that party. For the purpose of mailing the notice of entry of judgment, the party submitting the judgment must provide the court clerk with stamped envelopes bearing sufficient postage for this purpose, with the address of the court clerk as the return address. If returned, the court clerk must maintain any such returned document as part of the court file in the case [*Fam. Code § 2338.5(b)-(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsFamily LawChild SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionProperty SettlementsLegal EthicsClient RelationsConflicts of Interest

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§ 221.21 Summary Dissolution

[1] In General

The summary dissolution procedure provides a relatively uncomplicated and inexpensive means for dissolving a marriage of no more than five years in duration with no children and limited assets and liabilities [*see Fam. Code § 2400*]. The parties must agree that the marriage should be dissolved, and must file a joint petition seeking dissolution [*see Fam. Code § 2401*]. The parties also must have executed an agreement on the division of the assets and liabilities [*see Fam. Code § 2400(a)(8)*]. Unlike the procedures involved in a conventional dissolution proceeding, once the joint petition of the parties has been filed with the court, no further action is necessary until application for a final judgment of dissolution is made. No requirement exists that a hearing be held on the petition [*see Fam. Code § 2403*].

[2] Role of Attorney

The attorney does not play as active a role in a summary dissolution proceeding as he or she would in a conventional dissolution because the summary procedure involves no formal court hearing and no support, custody, or property issues [*see Fam. Code § 2400*]. The attorney may be called upon to give the client advice on whether the summary procedure is available in a particular situation, the nature of the summary procedure, and the settlement of community property. In addition, the attorney may be called upon to draft, file, and/or supervise the execution of the document embodying the agreement, documents required to implement the agreement (such as title certificates and bills of sale), the joint petition, the application for final judgment, and--when necessary--a notice of revocation of the petition.

Because the summary dissolution procedure requires the spouses to work out whatever differences they may have before filing the petition, and because it isinitiated by their joint petition, less inherent potential exists for a conflict of interest to arise when an attorney assists the parties in reaching an agreement. If more than a nominal amount of property is involved, however, counsel should advise the parties to have a second attorney review their agreement to ensure its fairness.

[3] When Summary Procedure Is Available

The summary dissolution procedure is available to the parties only when the following specific conditions exist at the time the joint petition for dissolution is filed [*Fam. Code § 2400*]:

(1) Either party to the dissolution has met the residence requirements for dissolution [*see Fam. Code § 2320 et seq.*];

(2) Irreconcilable differences have caused the irremediable breakdown of the marriage, and the marriage should be dissolved;

(3) There are no minor children of the relationship born before or during the marriage or adopted by the parties during the marriage, and the wife, to her knowledge, is not pregnant;

(4) The marriage is not more than five years in duration at the time the petition is filed;

(5) Neither party has any interest in real property wherever situated, with the exception of the lease of a residence occupied by either party if it does not include an option to purchase and if it terminates within one year from the date of the filing of the petition;

(6) There are no unpaid obligations in excess of $4,000 (or other amount adjusted in odd-numbered years for the cost of living) incurred by either or both of the parties after the date of the marriage, excluding the amount of any unpaid obligation with respect to an automobile [*see Fam. Code § 2400(b)*];

(7) The total fair market value of community property assets, excluding all encumbrances and automobiles, but including any deferred compensation or retirement plan, is less than $25,000 (or other amount adjusted in odd-numbered years for the cost of living), and neither party has separate property assets, excluding all encumbrances and automobiles, in excess of $25,000 [*see Fam. Code § 2400(b)*];

(8) The parties have executed an agreement setting forth the division of community assets and the assumption of community liabilities, and have executed any documents, title certificates, bills of sale, or other evidence of transfer necessary to effectuate the agreement;

(9) The parties waive any rights to spousal support;

(10) On entry of the judgment of dissolution of marriage, the parties must irrevocably waive their respective rights to appeal and to move for a new trial;

(11) The parties have read and understand the summary dissolution brochure provided for in *Fam. Code § 2406*; and

(12) The parties desire that the court dissolve the marriage.

[4] Procedure

The proceeding for summary dissolution is commenced by filing a joint petition in the form prescribed by the Judicial Council [*Fam. Code § 2401(a)*]. The fee for filing the joint petition is the same as that charged for filing the standard petition for dissolution. No additional fee is chargeable for the filing of any form prescribed for use in a summary dissolution proceeding, except as required for the court clerk's cost of sending a copy of the judgment to the state registrar [*see Gov. Code § 26859*; *Health & Safety Code § 103200*]. In keeping with the summary nature of this proceeding for dissolution, there is no requirement for a hearing on the joint petition as is the case in other dissolution

proceedings. Once the joint petition is filed, no further action is necessary on the part of either spouse except to apply for entry of the final judgment when six months have passed from the filing of the petition [*see Fam. Code § 2403*].

[5] Revocation of Petition

The summary dissolution proceeding may be terminated if either party to the dissolution files a notice revoking the joint petition (*see § 221.344*) at any time before an application for final judgment is filed [*Fam. Code § 2402(a)*]. In addition to filing the notice of revocation with the clerk, the revoking party also must send a copy of the notice to the other party by first-class mail, postage prepaid, to his or her last known address [*Fam. Code § 2402(c)*].

[6] Entry of Final Judgment

[a] When Judgment May Be Entered

When six months have expired from the date of the filing of the joint petition for summary dissolution, either party may apply to the court for entry of the final judgment dissolving the marriage and the court may enter the judgment [*see* Cal. Judicial Council Form FL-820] (*see § 221.343*). The clerk is required to send a notice of entry of final judgment to each party at his or her last known address [*Fam. Code § 2403*; *see* Cal. Judicial Council Form FL-190].

[b] Effect of Entry of Final Judgment

The entry of final judgment constitutes a final adjudication of the rights andobligations of the parties with respect to the status of the marriage and their property rights, and operates as a waiver of their respective rights to spousal support, to appeal, and to move for a new trial [*Fam. Code § 2404*].

[c] Availability of Set Aside

The final judgment entered in a summary dissolution proceeding does not prejudice or bar the rights of either party to institute an action to set aside the final judgment for fraud, duress, accident, mistake, or other grounds recognized at law or in equity, or to make a motion from a judgment taken against a party through his or her mistake, inadvertence, surprise, or excusable neglect [*Fam. Code § 2405(a)*; *Code Civ. Proc. § 473(b)*]. In addition, the court is required to set aside a final judgment as to all matters except the status of the marriage on proof that, at the time the petition for dissolution was filed, neither of the parties had met the residence requirements of *Fam. Code §§ 2320* and *2322* for dissolution of marriage [*Fam. Code § 2405(b)*]. See discussion in *§ 221.15[6]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceNo-Fault GroundsIrreconcilable DifferencesFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionProperty Settlements

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[Reserved]

§§ 221.22[Reserved]

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§ 221.40 Applicability of Civil Trial Rules and Procedures

Except as otherwise provided in the family law rules [*Cal. Rules of Ct., Rules 5.10 et seq.*], all provisions of law applicable to civil actions generally apply to any proceeding, regardless of nomenclature, under the Family Code. In case of conflict, the family law rules prevail over contrary provisions of law generally applicable to civil actions [*Fam. Code § 211*; *Cal. Rules of Ct., Rule 5.21*].

Although in practice the procedures governing family law proceedings may be less formal than those observed in general civil actions, the attorney should assume that general civil action principles will be observed [*see* 1978 Family Law Symposium, Los Angeles Superior Court, Fainer, *General Observations About Family Law Trials and Hearings*, pp. 165-166]. Superior courts that have adopted special local rules to expedite civil actions under the Trial Court Delay Reduction Act [*Gov. Code § 68600 et seq.*], however, may not apply those rules in domestic relations cases [*Gov. Code § 68609(b)*]. Furthermore, except in discovery proceedings, the Civil Law and Motion Rules [*Cal. Rules of Ct., Rules 3.1100 et seq.*] do not apply to proceedings on application before trial for an order in causes arising under the Family Code [*see Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-221 California Forms of Pleading and Practice--Annotated § 221.41

§ 221.41 Avoiding Trial and Limiting Issues by Settlement

Many family law proceedings are settled by the parties themselves with the aid of their attorneys and, sometimes, the court. In other cases, the parties may substantially reduce the number of contested issues by reaching pretrial agreement over some issues and by stipulating to an agreement concerning these issues. Because a pretrial settlement generally resolves the issues in a more equitable, workable, and inexpensive manner than a decision after a contested trial, the attorney in a family law proceeding should counsel the parties to regard trial as a last resort.

Settlement should be discussed when both sides feel that they have gathered all the information on the issues. If the court is to be involved in the discussions, it generally requires that all or most discovery be completed. In a case involving few contested issues with little information to be gathered, the opportunity to reach a complete settlement often arises early in the proceeding, thereby saving time and expense. In a proceeding involving complex issues of property valuation and division with much information to be discovered and compiled, however, it is not always possible to have meaningful settlement discussions until all information has been gathered and organized. These cases or some of the pertinent issues often are settled at a voluntary or mandatory settlement conference.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureTrialsGeneral Overview

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§ 221.42 Mediation of Child Custody and Visitation Issues Before Trial

When it appears on the face of a petition, application, or other pleading to obtain or modify a temporary or permanent custody or visitation order that custody, visitation, or both are contested, the court is required to set the contested issues for mediation before or concurrent with the setting of the matter for hearing [*Fam. Code §§ 3170, 3175*]. The purposes of the mediation are to reduce acrimony that may exist between the parties, to develop an agreement assuring the child's close and continuing contact with both parents that is in the child's best interests, and to effect a settlement of the issue of visitation rights of all parties that is in the child's best interests [*Fam. Code § 3161*].

Mediation is usually provided by special units in the courts called "Family Court Services" or "Family Mediation Services," by local probation departments, or by private contractors who are usually mental health professionals. Mediation involving domestic violence cases must be handled by Family Court Services in accordance with the protocol adopted by the Judicial Council [*Fam. Code § 3170(b)*; *Cal. Rules of Ct., Rule 5.215*].

A party who contends that a court-program mediator may have violated a provision of the rules of conduct for court-program mediators may submit a written complaint to the court's complaint coordinator [*see Cal. Rules of Ct., Rules 3.865-3.872*].

For further discussion of mediation, in general, see Ch. 37, *Judicially Mandated Civil Action Mediation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediationsFamily LawAlternative Dispute ResolutionMediationFamily LawChild CustodyProceduresFamily LawChild CustodyVisitationGeneral Overview

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§ 221.43 Pretrial Procedures Affecting Conduct of Trial

[1] Bifurcation

Bifurcation, commonly used in family law matters to separate trial of the issue of dissolution or legal separation from related issues of custody, support, and property rights [*see, e.g.,* In re Marriage of Lusk (l978) *86 Cal. App. 3d 228,234-235, 150 Cal. Rptr. 63]* , is discussed in Subpart A.

[2] Case Management

All dissolution actions, to the greatest extent possible, must be assigned to the same superior court department for all purposes, in order that all decisions in a case through final judgment will be made by the same judicial officer. The Judicial Council is required to adopt a standard of judicial administration prescribing a minimum length of assignment of a judicial officer to a family law assignment [*Fam. Code § 2330.3*].

When a case has been assigned to a judge for trial, the judge may not declare a mistrial merely because the parties have not completed the trial by the deadline set by the judge, the sole purpose of which is to enable the judge to begin a new assignment [*Blumenthal v. Superior Court (2006) 137 Cal. App. 4th 672, 680-687, 40 Cal. Rptr. 3d 509* (judge should have taken case to new courtroom assignment under *Fam. Code § 2330.3*)]. The purpose of declaring a mistrial is to protect the parties, not the court's institutional interest in managing its time efficiently [*Blumenthal v. Superior Court (2006) 137 Cal. App. 4th 672, 682, 40 Cal. Rptr. 3d 509]* .

In an effort to provide judicial assistance and management to the parties in marital dissolution actions in order to expedite the processing of cases, reduce the expenses of litigation, and focus on early resolution by settlement, the Legislature has enacted *case management* provisions. As discussed hereafter, the use of case management under the statutes requires a stipulation by the parties [*Fam. Code §§ 2450(a), (b), 2451*]. Under *Fam. Code § 2450*, on motion of a party, or on the court's own motion, the court must hold a preliminary status conference for the purpose of considering whether case management must be undertaken and a case management plan ordered. On stipulation of the parties, the

court must order a case management plan. Conversely, no case management plan may be ordered without a stipulation of the parties, and the case management plan may be terminated at any time on stipulation of the parties or order of the court [*Fam. Code § 2450(b), (c)*].

Fam. Code § 2451 sets forth the broad scope of areas that a stipulated case management plan may address, including:

1. Early neutral case evaluation;

2. Alternative dispute resolution;

3. Limitations on discovery, including temporary suspension of discovery pending exploration of settlement; and with a rebuttable presumption that an attorney who carries out discovery as provided in a case management plan has fulfilled his or her duty of care to the client as to the existence of community property;

4. Use of telephone conference calls to ascertain the status of the case, encourage cooperation, and assist counsel in reaching agreement; provided, however, that if the court is required to issue an order other than by stipulation, a hearing must be held;

5. Use of telephone conference calls for hearing contested motions; and recording of these conference call hearings by a court reporter;

6. Modification or waiver of the requirements of procedural statutes;

7. The powers of the judicial officer who is managing the case under the case management plan;

8. A requirement that any expert witness be selected by the parties jointly or be appointed by the court; provided, however, that if at any time the court determines that the issues for which experts are required cannot be settled under these conditions, the court must permit each party to employ his or her own expert;

9. Bifurcation of issues for trial;

10. A case management plan pursuant to *Fam. Code § 2032(d)* or *Fam. Code § 2034(b)*; or

11. Any other matters.

[3] Reference of Case or Factual Issues to Referee

[a] In General

In some situations, the parties may stipulate to having their case heard by a referee or a privately compensated judge. In others, the determination of an issue of fact may be ordered heard by a referee for decision before trial. For example, the issues involved in a complex property division may require the examination of a long account on either side, or the taking of an account may be necessary for the information of the court before judgment. Thus, the court may decide to direct a reference in these cases [*see Code Civ. Proc. § 639*; *Cal. Rules of Ct., Rule 3.920*; *but see Ruisi v. Thieriot (1997) 53 Cal. App. 4th 1197, 1209, 1211, 62 Cal. Rptr. 2d 766* (reference was overbroad, given lack of parties' stipulation to reference); *In re Marriage of Olson (1993) 14 Cal. App. 4th 1, 7-8, 17 Cal. Rptr. 2d 480* (unless done by agreement of parties, delegation of judicial authority to special master to make factual findings and exercise judgment in determining parties' incomes to set spousal support is abuse of discretion); *see also* Cal. Rules of Ct., Rule 880

("temporary judge," "referee," and "privately compensated" defined); *see also Settlemire v. Superior Court (2002)103 Cal. App. 4th 1150, 1156-1157, 127 Cal. Rptr. 2d 381* (without parties' stipulation, court's assignment to commissioner of order to show cause involving domestic restraining order,temporary child custody, visitation, disposition of community asset, relinquishment of firearms, and exclusion of husband from his residence was improper delegation of judicial duties)]. See further discussion in *§ 221.43[3][c]*.

A party may object to the appointment of a person as referee on certain specified grounds [*see Code Civ. Proc. §§ 641, 642*; *Cal. Rules of Ct., Rules 3.905, 3.925*]. When a referee is appointed on consent of the parties (*§ 221.43[3][b]*), the referee's fees must be paid as agreed by the parties, but if the parties do not agree on payment and request court resolution of the matter, the court may order the parties to pay the fees [*Code Civ. Proc. § 645.1(a)*]. When a referee is appointed on court order (*§ 221.43[3][c]*), at any time after a determination of ability to pay is made under *Code Civ. Proc. § 639*, the court may order the parties to pay the fees of referees who are not employees or officers of the court at the time of appointment, as fixed under *Code Civ. Proc. § 1023*, in any manner determined by the court to be fair and reasonable, including the apportionment of fees among the parties [*Code Civ. Proc. § 645.1*]. For this purpose, the term "parties" does not include the parties' counsel. In addition, when a reference is made on court order, the order must include the maximum hourly rate the referee may charge and, at a party's request, the maximum number of hours for which the referee may charge, subject to special rules on modification of these [*Code Civ. Proc. § 639(d)(5)*]. But a referee may not be *ordered* appointed at a cost to the parties under *Code Civ. Proc. § 639* unless the court can make one of the findings required by that statute [*see Code Civ. Proc. § 639(d)(6)* (findings)].

[b] On Consent of Parties

A referee may be appointed on the written agreement of the parties filed with the clerk, or judge, or entered in the minutes or in the docket, or on the motion of a party to a written contract or lease that provides that any controversy arising from the contract or lease must be heard by a reference, if the court finds that a reference agreement exists between the parties to do one of the following [*Code Civ. Proc. § 638*; *see Cal. Rules of Ct., Rules 3.901, 3.902* (requirements for written agreement and proposed order directing reference)]:

- To hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision on them; or

- To ascertain a fact necessary to enable the court to determine an action or proceeding.

An attorney does not have authority to consent to a general reference under *Code Civ. Proc. § 638* on the client's behalf. The statute requires the parties' consent to a general reference in a writing filed with the clerk or orally on the record [*Jovine v. FHP, Inc. (1998) 64 Cal. App. 4th 1506, 1529, 76 Cal. Rptr. 2d 322]* .

When the parties agree to a reference, they must present a written agreement along with a proposed order to the judge to which the case has been assigned or to the presiding or supervising judge, if the case has not been assigned. The proposed order must state the name, telephone number, and business address of the proposed referee, bear the proposed referee's signature indicating his or her consent to serve, and clearly state whether the scope of reference covers all issues or is limited to specified issues [*Cal. Rules of Ct., Rules 3.901, 3.902*]. The proposed order must also state if the proposed referee is a State Bar member (and, if so, his or her State Bar number). If he or she is a former California judicial officer, he or she must be an active or inactive State Bar member. Finally, the proposed order must bear the proposed referee's certification that he or she is aware of and will comply with the provisions of Canon 6 of the Code of Judicial Ethics and the rules of court.

A party may withdraw a stipulation for the appointment of a referee only on a showing of good cause. The fact that a referee's ruling is based on an error of fact or law does not establish good cause for withdrawing a stipulation to a reference [*Code Civ. Proc. § 1023, Cal. Rules of Ct., Rule 3.906*].

Parties who elect to use the services of a privately compensated referee under *Code Civ. Proc. § 638* are deemed to have elected to proceed outside the courthouse. The parties may not use court facilities or personnel, except on a finding by the presiding judge that use of court facilities or personnel will further the interests of justice [*Cal. Rules of Ct., Rule 3.909*; *see also Cal. Rules of Ct., Rule 3.905* (court may order that hearing before privately compensated referee be heard at a site "easily accessible to the public and appropriate for seating those who have made known their plan to attend hearings")].

A court may not use the reference procedure described above to appoint a person to conduct a mediation. But this rule does not prevent a court from appointing a referee to conduct a mandatory settlement conference or, after the termination of a reference, from appointing a person who previously served as a referee to conduct a mediation [*Cal. Rules of Ct., Rule 3.900*].

A copy of the order appointing the referee, the referee's report, and any order of the court concerning the compensation of the referee must be forwarded to the presiding judge of the court [*Code Civ. Proc. § 638(c)*; *Cal. Rules of Ct., Rule 3.902*].

Motions to withdraw a stipulation for the appointment of a temporary judge must be supported by a declaration of facts establishing good cause for permitting the party to withdraw the stipulation, and must be heard by the presiding judge or a judge designated by the presiding judge. For this purpose, a declaration that aruling is based on error of fact or law does not establish good cause for withdrawing a stipulation [*Cal. Rules of Ct., Rule 3.906*].

The death of a temporary judge after the parties have stipulated to that person hearing a matter poses the issue of appointing a successor judge. One court has held that the parties' stipulation to the appointment of a temporary judge to conduct an accounting does not give the court the authority to appoint a different temporary judge without the parties' consent following the death of the original appointee [*Kim v. Superior Court (1998) 64 Cal. App. 4th 256, 259-262, 75 Cal. Rptr. 2d 468]* .

[c] By Court Order

When the parties do not consent to the appointment of a referee to hear a particular matter or matters, the court may appoint a referee in the following cases on the written motion of any party or on its own motion: (1) when the trial of an issue of fact requires the examination of a long account on either side, in which case the referee may be directed to hear and decide the whole issue, or report on any specific question of fact involved; (2) when the taking of an account is necessary for the information of the court in a special proceeding or before judgment, or for carrying a judgment or order into effect; (3) when a question of fact, other than on the pleadings, arises on motion or otherwise, in any stage of the action; (4) when the reference is necessary for the information of the court in a special proceeding; or (5) when the court in any pending action determines in its discretion that it is necessary for the court to appoint a referee to hear and determine any and all discovery motions and disputes relevant to discovery in the action, and to report findings and make recommendations [*Code Civ. Proc. § 639*; *see Cal. Rules of Ct., Rule 3.920-3.927* (procedure); *Ruisi v. Thieriot (1997) 53 Cal. App. 4th 1197, 1209, 1211, 62 Cal. Rptr. 2d 766* (reference of "any and all issues concerning child custody" was overbroad, given lack of parties' stipulation to reference); *In re Marriage of Galis (1983) 149 Cal. App. 3d 147, 152-153, 196 Cal. Rptr. 659* ; *but cf.*; *see also Settlemire v. Superior Court (2002) 103 Cal. App. 4th 1150, 1155-1157, 127 Cal. Rptr. 2d 381* (court referred all issues to commissioner "for a hearing, and findings on any matter of fact upon which information is required by the Court" and did not specify particular facts or issues to be decided by commissioner; this was general reference and improper delegation of judicial authority absent parties' consent); *Kim v. Superior Court (1998) 64 Cal. App. 4th 256, 261-262, 75 Cal. Rptr. 2d 468* (fact that *Code Civ. Proc. § 639(a)* allows reference of "whole issue" does not authorize court to appoint referee with broad powers that parties had given to temporary judge, who later died, in absence of parties' consent)].

A motion for appointment of a referee under *Code Civ. Proc. § 639* is heard by the department to which the case has been assigned, or if the case has not been assigned, by the department that hears law and motion matters. The motion must specify the scope of the matter or matters to be included in the requested reference [*Cal. Rules of Ct., Rule 3.921*].

A court may order the appointment of a referee under *Code Civ. Proc. § 639* only for the purposes specified in that section, as described above. It may not use the reference procedure to appoint a person to conduct a mediation. But this rule does not prevent a court from appointing a referee to conduct a mandatory settlement conference in a complex case, or, after the termination of a reference, from appointing a person who previously served as a referee to conduct a mediation [*Cal. Rules of Ct., Rule 3.920*]. For discussion of special rules concerning discovery referees, see Ch. 38, *Reference* .

Any appointment of a referee under *Code Civ. Proc. § 639* must be by written order, which must include the following [*Code Civ. Proc. § 639(d)*]:

> 1. When the referee is appointed to hear and determine discovery motions and disputes, the exceptional circumstances requiring the reference. These circumstances must be specific to the circumstances of the particular case.
>
> 2. In all other cases, a statement of the reason the referee is being appointed.
>
> 3. The subject matter(s) included in the reference.
>
> 4. The referee's name, business address, and telephone number. If the referee is a former California judicial officer, he or she must be an active or inactive State Bar member. In any event, if the referee is a State Bar member, the order must include his or her Bar number, as well as the referee's certification that he or she is aware of applicable provisions of Canon 6 of the Code of Judicial Ethics and the rules of court. Further, the referee is subject to special disclosure provisions [*Cal. Rules of Ct., Rules 3.923, 3.924*].
>
> 5. The maximum hourly rate the referee may charge and, at the request of a party, the maximum number of hours for which the referee may charge. On the written application of a party or the referee, the court may, for good cause, modify the maximum number of hours, subject to any findings as set forth in the following item.
>
> 6. Either a finding that no party has established an economic inability to pay a pro rata share of the referee's fees or a finding that one or more parties has established an economic inability to pay a pro rata share of the fees and that another party has agreed voluntarily to pay that additional share. A court may not appoint a referee at a cost to the parties if neither of these findings is made. In determining whether a party has established an inability to pay the referee's fees, the court may consider only the party's ability to pay, not counsel's ability to pay. A party proceeding in formapauperis is deemed to have an economic inability to pay. For other parties, the court shall consider, among other things, the estimated cost of the referral and the impact of the proposed fees on the party's ability to proceed with the litigation. If the issue of economic hardship is raised before the commencement of the referee's services, the court must determine a fair and reasonable apportionment of reference costs. The court may modify its apportionment order and may consider the referee's recommendation as a factor in determining any modification [*Cal. Rules of Ct., Rule 3.922*].

When a referee is appointed to hear and determine discovery motions and disputes, the order must indicate whether the referee is being appointed for all discovery purposes in the action or only for limited purposes [*Code Civ. Proc. 639(h)*].

A copy of the order appointing a referee, along with the referee's report, and any order of the court concerning compensation of the referee must be forwarded to the presiding judge of the court [*Code Civ. Proc. 639(i)*].

Any objections to the reference or to the referee must be made in writing, and must be heard and resolved by the court, not by the referee [*Code Civ. Proc. § 642*; *see Code Civ. Proc. § 641* (grounds for objecting to referee)].

When a reference is ordered under *Code Civ. Pro. § 639*, the parties are entitled to use court facilities and personnel to the extent provided in the order of reference. Private facilities may be used, but if so, the facility must be open to the public on request of any person [*Cal. Rules of Ct., Rule 3.926*].

[d] Referee's Findings

Unless the court orders otherwise, the referee must report his or her statement of decision in writing to the court within 20 days after the hearing, if any, has been concluded and the parties have submitted the matter [*Code Civ. Proc. § 643(a)*; *see In re Marriage of Demblewski (1994) 26 Cal. App. 4th 232, 236, 31 Cal. Rptr. 2d 533* (statement of decision is mandatory even if not requested by parties)]. A referee who has been appointed on the parties' consent must report as agreed by the parties and approved by the court [*Code Civ. Proc. § 643(b)*]. When a referee has been appointed by court order, the following requirements apply [*Code Civ. Proc. § 643(c)*]:

1. The referee must file a report with the court that includes a recommendation on the merits of any disputed issue, a statement of the total hours spent and the total fees charged by the referee, and the referee's recommended allocation of payment.

2. The referee must serve the report on all parties.

3. A party must file any objection to the referee's report or recommendations within 10 days after the referee serves and files the report, or within such other time as the court directs.

4. Any objection must be served on the referee and all other parties.

5. Responses to the objections must be filed with the court and served on the referee and all other parties within 10 days after the objection is served.

6. The court must review any objections and responses and enter appropriate orders.

7. The court retains the power to change the terms of the referee's appointment, and to modify or disregard the referee's recommendations. The court may exercise this power at any time on its own motion or on a party's motion for good cause shown.

When the referee has been appointed on the parties' consent, the referee's decision stands as the decision of the court [*Code Civ. Proc. § 644(a)*]. On the filing of the statement of decision with the court, judgment may be entered on the statement in the same manner as if the action had been tried by the court [*Code Civ. Proc. § 644(a)*]. The referee's decision may be excepted to and reviewed in the same manner as if made by the court [*Code Civ. Proc. § 645*]. The referee's fees must be paid as agreed by the parties [*Code Civ. Proc. § 645.1(a)*]. If the parties do not agree on the payment of the fees, they may request the court to resolve the matter [*Code Civ. Proc. § 645.1(a)*].

When the referee has been appointed by court order, the referee's decision is advisory only [*Code Civ. Proc. § 644(b)*; *Kim v. Superior Court (1998) 64 Cal. App. 4th 256, 261, 75 Cal. Rptr. 2d 468]* . The court may adopt the referee's recommendations, in whole or in part, after independently considering the referee's findings and any objections and responses to objections filed with the court [*Code Civ. Proc. § 644(b)*]. At any time after a determination of ability to

pay is made [*Code Civ. Proc. § 639(b)(6)*], the court may order the parties to pay the referee's fee in any manner the court determines is fair and reasonable, including apportionment of the fees among the parties [*Code Civ. Proc. § 645.1(b)*].

[4] Submission to Arbitration

Provided that the court is of the opinion that the total value of the community estate in controversy does not exceed $50,000, the court may submit at any time the issue of the character, the value, and the division of the community estate to arbitration for resolution [*see Code Civ. Proc. § 1141.10 et seq.*] in any case in which the parties do not agree in writing to a voluntary division of their community estate [*Fam. Code § 2554*].

[5] Joinder

Those who claim or control interests that are subject to disposition in familylaw proceedings may be joined as parties [*Fam. Code § 2021(a)*]. Special provisions govern joinder of pension benefit plans [*Fam. Code § 2021(b)*]. Joinder is discussed in detail in *§ 221.17*.

[6] Consolidation

A dissolution proceeding may be consolidated with a civil action in certain instances when actions involving a common question of law or fact are pending before the court [*Code Civ. Proc. § 1048(a)*]. Consolidation is discussed in detail in *§ 221.18[5]*.

[7] Closed Hearing

The court, whenever it considers it necessary in the interests of justice and the persons involved, may direct the trial of any issue of fact joined in a proceeding under the Family Code to be private and may exclude everyone except the officers of the court, the parties, their witnesses, and counsel [*Fam. Code § 214*; *see Whitney v. Whitney (1958) 164 Cal. App. 2d 577, 582, 330 P.2d 947* (child custody proceedings)]. In certain situations, exclusion may be mandatory [*see, e.g., Fam. Code §§ 1818* (conciliation proceedings), 7884 (proceedings to declare child free from parental custody and control), 8611 (adoption proceedings)].

However,as a general rule otherwise, before closing a court proceeding the court must expressly find that (1) there exists an overriding interest supporting the closure, (2) there is a substantial probability that the interest will be prejudiced absent closure, (3) the proposed closure is narrowly tailored to serve the overriding interest, and (4) there is no less restrictive means of achieving the overriding interest [*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 Cal. 4th 1178, 1218-1219, 1222 n.26, 86 Cal. Rptr. 2d 778* (privacy interests may constitute overriding interest)].

[8] Request for Jury

Family law proceedings are not inherently entitled to a jury trial [*Code Civ. Proc. § 592*; *see Sharon v. Sharon (1885) 67 Cal. 185, 193-194, 7 P. 456]* . Although the court has the power to order any issue of fact to be tried by a jury, such an order is rarely, if ever, issued in a family law proceeding [*Code Civ. Proc. § 592*; *see In re Marriage of Kim (1989) 208 Cal. App. 3d 364, 373, 256 Cal. Rptr. 217]* . Furthermore, when issues of fact are tried to a jury, its findings are only advisory [*see Cutter Lab. v. R. W. Ogle & Co. (1957) 151 Cal. App. 2d 410, 418, 311 P.2d 627]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedureJudicial OfficersRefereesAppointmentsCivil

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§ 221.44 Pretrial Statement

Some local jurisdictions require the filing of a pretrial statement or brief, sometimes on a prescribed form, prior to a conference before trial or within a specific time before the trial itself. The statement may take the form of a brief detailing the issues to be raised and the contentions of the filing party with respect to those issues [*see, e.g.*, Uniform Domestic Relations Local Rules for Bay Area Superior Courts, Rule II(B)(5) (superseded in some counties)].

Some jurisdictions requiring a pretrial statement also may regard it as a request for admissions. In such jurisdictions, if an opposing party fails to file a reply statement, the factual contentions made in the statement filed by the other party are considered admitted [*see La Bue v. Superior Court (1977) 75 Cal. App. 3d 264, 142 Cal. Rptr. 83]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPretrial MattersConferencesGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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§ 221.45 Settlement Conferences

On the court's motion, or at the request of any party, the court may set a mandatory settlement conference [*Cal. Rules of Ct., Rule 3.1380(a)*]. Trial counsel and the parties must personally attend the conference, unless excused by the court for good cause [*Cal. Rules of Ct., Rule 3.1380(b)*]. At least five court days before the conference, each party must submit to the court and serve on the other party a mandatory settlement conference statement [*Cal. Rules of Ct., Rule 3.1380(c)*].

Settlement conferences are discussed in detail in Ch. 425, *Pretrial Proceedings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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§ 221.46 Preference Given Contested Custody and Child Support Issues

Any case in which child custody is the only contested issue will be given preference over other civil cases, except matters to which special precedence is given by law, for assigning a trial date, and the case will be given an early hearing [*Fam. Code § 3023(a)*]. The court must order a separate trial of the custody issue when child custody is one of several contested issues, which then will be given preference for assigning a trial date over civil cases other than those to which special precedence is given by law [*Fam. Code § 3023(b)*].

Similarly, in any case in which the support of a minor child is at issue, on a showing of good cause the court may order a separate trial on that issue, which then will be given preference for assigning a trial date over civil cases other than those to which special precedence may be given by law. If the court also has ordered a separate trial on the issue of custody, the issues of custody and child support must be tried together [*Fam. Code § 4003*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewFamily LawChild CustodyProceduresFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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§ 221.47 Adjusting Trial Date

[1] Continuances

Although disfavored, a trial may be postponed or continued by the court on its own motion [*see Code Civ. Proc. § 594a*] or by stipulation of the parties [*CodeCiv. Proc. § 595.2*]. By analogy to the rules governing general civil law and motion practice, a party who seeks a continuance of the trial date, whether contested or uncontested or stipulated to by the parties, must make the request by a noticed motion or an ex parte application under *Cal. Rules of Ct., Rules 3.1200-3.1207* with supporting declarations. The motion or application must be made as soon as reasonably practical once the necessity for the continuance is discovered [*Cal. Rules of Ct., Rule 3.1332(b)*; *see In re Marriage of James M. & Christine C. (2008) 158 Cal. App. 4th 1261, 1272-1277, 70 Cal. Rptr. 3d 715* (court may grant trial continuance as an accommodation to self-represented party who is unable to appear in court on original trial date due to his or her disability)]. A detailed discussion of continuances is contained in Ch. 136, *Continuances.*

[2] Advancing, Resetting, or Specially Setting Trial

A party who seeks to advance, specially set, or reset a case for trial must make this request by noticed motion or an ex parte application under *Cal. Rules of Ct., Rules 3.1200-3.1207* [*Cal. Rules of Ct., Rule 3.1335(a)*]. The request may be granted only on an affirmative showing by the moving party of good cause based on a declaration filed and served with the motion or application [*Cal. Rules of Ct., Rule 3.1335(a)*]. Motions to advance, reset, or specially set cases for trial are discussed in detail in Ch. 425, *Pretrial Proceedings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersContinuancesCivil ProcedureTrialsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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§ 221.48 Mandatory Declaration of Disclosure

[1] When Declaration Required

In general, each party to a dissolution, legal separation, or nullity proceeding must serve on the other party a "final declaration of disclosure" before trial [*see Fam. Code §§ 2103, 2105, 2113*]. The purpose of the declaration is to provide full and accurate disclosure of all assets and liabilities in which one or both parties may have an interest [*Fam. Code § 2103*].

The final declaration of disclosure requirement does not apply to summary dissolution proceedings, but the parties must file preliminary disclosure declarations [*Fam. Code § 2109*]. In the case of a default judgment, the petitioner may waive the final declaration of disclosure requirement, and is not required to either serve on, or receive from, the respondent a final declaration of disclosure, but must serve a preliminary declaration of disclosure [*Fam. Code § 2110*]. In addition, no final declaration is required if the parties *stipulate to waive* this requirement or the court makes an order dispensing with the requirement for good cause [*Fam. Code § 2105(a), (d)*], as discussed in *§ 221.48[2]*.

For discussion of the preliminary declaration of disclosure, which each party must serve on the other party [*see Fam. Code § 2104*], see *§ 221.10* et seq.

The declaration of disclosure requirement does not abrogate the attorney work product privilege or impede the court's power to issue protective orders [*Fam. Code § 2111*].

[2] Stipulation to Waive Final Declaration

Parties who otherwise would be required to serve a final declaration of disclosure may stipulate to a mutual waiver of the statutory requirements concerning the final declaration by execution of such a waiver under penalty of perjury entered into in open court or by a separate stipulation [*Fam. Code § 2105(d)*; *see* Cal. Judicial Council Form FL-144 (stipulation and waiver of final declaration of disclosure)]. The waiver must include all of the following representations

[*Fam. Code § 2105(d)*]:

> 1. Both parties have complied with *Fam. Code § 2104* and the preliminary declarations of disclosure have been completed and exchanged;
>
> 2. Both parties have completed and exchanged a current income and expense declaration that includes all material facts and information regarding that party's earnings, accumulations, and expenses;
>
> 3. Both parties have complied fully with *Fam. Code § 2102* and have augmented fully the preliminary declarations of disclosure, including disclosure of all material facts and information regarding the characterization of all assets and liabilities, the valuation of all assets that are contended to be community property or in which it is contended the community has an interest, and the amounts of all obligations that are contended to be community obligations or for which it is contended the community has liability;
>
> 4. The waiver is knowingly, intelligently, and voluntarily entered into by each of the parties; and
>
> 5. Each party understands that the waiver does not limit the legal disclosure obligations of the parties, but rather is a statement under penalty of perjury that those obligations have been fulfilled, and each party further understands that noncompliance with those obligations will result in the court setting aside the judgment.

When the parties have failed to comply with all of the disclosure requirements, the court must set aside the judgment [*Fam. Code § 2107(d)* (failure to comply with disclosure requirements is not harmless error)]. On a motion to set aside the judgment, the court may order the parties to provide the preliminary and final declarations of disclosure that were exchanged between them, but these declarations should not be filed with the court absent a court order to the contrary [*Fam. Code § 2107(e)*]. In making an order setting aside a judgment for failure to comply with *Fam. Code § 2105*, the court may limit the set aside to those portions of the judgment materially affected by the nondisclosure [*Fam. Code § 2105(c)*].

For an illustrative reproduction of the Judicial Council form of stipulation and waiver of final declaration of disclosure, see *§ 221.370*.

For a general discussion of spousal fiduciary obligations and of setting aside judgments, see *§ 221.150* et seq.

[3] Form and Service of Declaration

When the final declaration is required, it must be served on the other party before or at the time the parties enter into an agreement for the resolution of property orsupport issues (other than pendente lite support) or, if the case goes to trial, no later than 45 days before the first assigned trial date [*Fam. Code § 2105(a)*]. The declaration must be executed under penalty of perjury on the form prescribed by the Judicial Council [*see Fam. Code § 2112* (Judicial Council's responsibility to adopt declaration forms); Cal. Judicial Council Form FL-140 (declaration of disclosure form)] and be accompanied by a current income and expense declaration [*Fam. Code § 2105(a), (c)*; *see* Cal. Judicial Council Form FL-150 (income and expense declaration form)]. Legislation that became operative January 1, 1997, amended *Fam. Code § 2105* to state that "... each party, *or the attorney for the party in this matter*, shall serve" the final disclosure declaration (and income and expense declaration) on the other party (emphasis added). Similarly, this legislation amended *Fam. Code § 2106* to provide, as of January 1, 1997, that absent good cause or the parties' stipulation to waive the requirements for the final declaration, no judgment may be entered with respect to the parties' property rights without each party " *or the attorney for that party in this matter*," having executed and served a copy of the final declaration of disclosure and current income and expense declaration (emphasis added). It is unclear why these provisions were amended in this way. Pending further clarification from the Judicial Council, Legislature, or courts, it is

suggested that counsel *continue preexisting practice* for service of pleadings and papers without reference to these amendments.

The statute does not require that the declaration of disclosure be filed with the court. However, each party must execute and file with the court a declaration under penalty of perjury stating that service of the final declaration and current income and expense declaration has been made on the other party, or that service of the final declaration has been waived by the parties' stipulation [*Fam. Code § 2106*; *cf. In re Marriage of Jones (1998) 60 Cal. App. 4th 685, 694, 70 Cal. Rptr. 2d 542* (court was not required to vacate dissolution judgment based on party's failure to execute and serve final declaration of disclosure before trial)].

For an illustrative reproduction of the Judicial Council forms of (1) declaration of disclosure and (2) declaration of service of the declaration of disclosure, *see §§ 221.371* and *221.372*, respectively.

[4] Contents of Declaration

The final declaration of disclosure must include all of the following information [*Fam. Code § 2105(b)*]:

1. All material facts and information regarding the characterization of all assets and liabilities;

2. All material facts and information regarding the valuation of all assets that are contended to be community property, or in which it is contended the community has an interest;

3. All material facts and information regarding the amounts of all obligations that are contended to be community obligations, or for which it is contended the community has liability; and

4. All material facts and information regarding the earnings, accumulations, and expenses of each party that have been set forth in the income and expense declaration.

In addition, a current income and expense declaration [*see* Cal. Judicial Council Form FL-150] must be served with the final declaration [*Fam. Code § 2105(a)*].

For purposes of the above provisions, an "asset" includes, but is not limited to, any real or personal property of any nature, whether tangible or intangible, and whether currently existing or contingent [*Fam. Code § 2101(a)*]. "Earnings and accumulations" include income from whatever source derived, as provided in *Fam. Code § 4058* (definition of gross income for purposes of child support guidelines) [*Fam. Code § 2101(c)*. For discussion of *Fam. Code § 4058*, see Ch. 223, *Dissolution of Marriage: Child Custody*]. "Expenses" include, but are not limited to, all personal living expenses, but do not include business-related expenses [*Fam. Code § 2101(d)*]. "Income and expense declaration" includes the Income and Expense Declaration forms approved for use by the Judicial Council, and any other financial statement approved for use by the Judicial council in place of the Income and Expense Declaration, if the financial statement form satisfies all other applicable criteria [*Fam. Code § 2101(e)*]. "Liability" includes, but is not limited to, any debt or obligation, whether currently existing or contingent [*Fam. Code § 2101(e)*].

[5] Remedies for Noncompliance With Disclosure Requirements

If one party fails to exchange and serve on the other party a final declaration of disclosure, or fails to provide the information required in the declaration with sufficient particularity, and the other party has served his or her final declaration, the complying party may, within a reasonable time, request preparation of a final declaration or further particularity [*Fam. Code § 2107(a)*]. If the other party fails to comply with such a request, the complying party may do either of both of the following [*Fam. Code § 2107(b)*]:

1. File a motion to compel further response; or

2. File a motion for an order preventing the noncomplying party from presenting evidence on issues that should have been covered in the declaration of disclosure.

In addition, the court must impose money sanctions against the noncomplying party in an amount sufficient to deter repetition of the improper conduct or comparable conduct, and must include reasonable attorney's fees, costs incurred, or both, unless the court finds that the noncomplying party acted with substantial justification or that other circumstances make imposition of the sanction unjust [*Fam. Code § 2107(c)*].

The parties are not entitled to a reversal of the judgment or a new trial based on their failure to exchange final declarations of disclosure absent a showing of miscarriage of justice [*In re Marriage of Steiner & Hosseini (2004) 117 Cal. App. 4th 519, 522, 528, 11 Cal. Rptr. 3d 671* (before *Fam. Code § 2107(d)* can be basis of reversal on appeal or ground to compel granting of new trial, noncomplying litigant must identify some portion of judgment materially affected by nondisclosure)].

For discussion of setting aside a judgment for failing to comply with the disclosurerequirements, *see § 221.153* [*see Fam. Code §§ 2105(e), 2122*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewFamily LawMarital Termination & Spousal SupportAnnulmentProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportLegal Separation

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18-221 California Forms of Pleading and Practice--Annotated §§ 221.49-221.59

[Reserved]

§§ 221.49[Reserved]

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18-221 California Forms of Pleading and Practice--Annotated § 221.60

§ 221.60 Disqualification of Judge

[1] By Peremptory Challenge

Counsel should be prepared to disqualify any judge that he or she believes is prejudiced against the client or counsel. A party or an attorney appearing in an action or proceeding may establish prejudice by an oral or written motion brought without notice, but supported by affidavit or declaration under penalty of perjury or an oral statement under oath that the judge, court commissioner, or referee before whom the action or proceeding is pending, or to whom it is assigned, is prejudiced against the party, attorney, or the interest of the party or attorney, such that the party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial or hearing [*see Code Civ. Proc. § 170.6*; *Andrisani v. Saugus Colony Ltd. (1992) 8 Cal. App. 4th 517, 523-524, 10 Cal. Rptr. 2d 444* ; *see also Code Civ. Proc. § 170.6(a)(5)* (form of affidavit)].

Counsel must strictly follow the times set forth in the underlying statute and any local rules for bringing the motion [*see Code Civ. Proc. § 170.6(a)(2)*; *Shipp v. Superior Court (1992) 5 Cal. App. 4th 147, 151-152, 6 Cal. Rptr. 2d 685]* . Only one peremptory disqualification is allowed [*Code Civ. Proc. § 170.6(a)(3)*].

A peremptory challenge in proper form that is timely filed must be accepted by the judge without further inquiry [*Code Civ. Proc. § 170.6(a)(3)*; *Hemingway v. Superior Court (2004) 122 Cal. App. 4th 1148, 1153-1154, 19 Cal. Rptr. 3d 363* (right to disqualify judge is "automatic" in sense that good faith belief in prejudice is alone sufficient, and proof of facts showing actual prejudice is not required); *Davcon, Inc. v. Roberts & Morgan (2003) 110 Cal. App. 4th 1355, 1359, 2 Cal. Rptr. 3d 782* ; *Stephens v. Superior Court (2002) 96 Cal. App. 4th 54, 59, 116 Cal. Rptr. 2d 616]* . The court must make an instant determination regarding the validity of a properly made peremptory challenge. If the challenge is properly made, the disqualification takes effect immediately and requires the court to transfer the case for reassignment [*Hemingway v. Superior Court (2004) 122 Cal. App. 4th 1148, 1157, 19 Cal. Rptr. 3d 363* ; *Davcon, Inc. v. Roberts & Morgan (2003) 110 Cal. App. 4th 1355, 1360, 2 Cal. Rptr. 3d 782]* .

Disqualification of judges is discussed in detail in Ch. 317, *Judges* .

[2] For Cause

The grounds on which a judge may be disqualified for cause are set forth by statute [*see Code Civ. Proc. §§ 170-170.5*].

Irrespective of when a judge's disqualifying conduct is discovered or when a motion to disqualify the judge is made, all of the actions that the judge takes in the proceedings after the facts creating the disqualification arise must be set aside [*Christie v. City of El Centro (2006) 135 Cal. App. 4th 767, 776-780, 37 Cal. Rptr. 3d 718]* .

Disqualification of judges is completely discussed and the relevant forms set forth in Ch. 317, *Judges* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPersonal BiasFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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§ 221.61 Notice of Trial

A court may not proceed with the trial in the absence of a party who has not received at least 15 days' notice of the trial date as required by *Code Civ. Proc. § 594(a)* [*Au-Yang v. Barton (1999) 21 Cal. 4th 958, 962, 90 Cal. Rptr. 2d 227, 987 P.2d 697* ; *In re Marriage of Hock & Gordon-Hock (2000) 80 Cal. App. 4th 1438, 1443-1444, 96 Cal. Rptr. 2d 546]* . Competent evidence must be introduced showing that an absent party was served with notice of trial. Proof of service may be made by introducing into evidence the proof of service or other evidence [*Code Civ. Proc. § 594(b)*]. Compliance with this evidentiary rule is mandatory [*In re Marriage of Goddard (2004) 33 Cal. 4th 49, 54-55, 14 Cal. Rptr. 3d 50, 90 P.3d 1209]* . However, if it is clear from the record that the required notice was given and proof of service of that notice was filed with the court but not introduced into evidence, the failure to comply with *Code Civ. Proc. § 594(b)* is not a jurisdictional defect, but merely harmless error [*In re Marriage of Goddard (2004) 33 Cal. 4th 49, 56-60, 14 Cal. Rptr. 3d 50, 90 P.3d 1209]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-221 California Forms of Pleading and Practice--Annotated § 221.62

§ 221.62 Private Trial and Sealing of Court Files

Except as otherwise provided by the Family Code or by court rule, the court may order that the trial of any issue of fact be private, and may exclude all persons from the trial except the officers of the court, the parties, their witnesses, and counsel, when it considers it necessary in the interests of justice and the persons involved [*Fam. Code § 214*]. Under the statute, a court may order *some* of the proceedings before it closed to the public, but the court may not close *all* of the proceedings in a given family law matter [*In re Marriage of Lechowick (1998) 65 Cal. App. 4th 1406, 1414, 77 Cal. Rptr. 2d 395]* . An order for a closed trial under the statute must pertain to the trial of one or more particular issues of fact and must be justified by a showing of particularized need by the moving party [*In re Marriage of Lechowick (1998) 65 Cal. App. 4th 1406, 1414-1415, 77 Cal. Rptr. 2d 395]* . *Fam. Code § 214* only authorizes the closing of court hearings and proceedings. It is not generally applicable to the issue of sealing court files [*In re Marriage of Lechowick (1998) 65 Cal. App. 4th 1406, 1413, 77 Cal. Rptr. 2d 395]* .

Cal. Rules of Ct., Rule 2.550 et seq. set forth detailed procedures for filing records under seal that are not otherwise required to be kept confidential by law [*Cal. Rules of Ct., Rule 2.550(a)*]. The rules provide that a party may not file a record under seal without a court order, and a judge may not permit a record to be filed under seal based solely on the parties' stipulation or agreement [*Cal. Rules of Ct., Rule 2.551(a)*]. A party who requests that a record be filed under seal must file a motion or an application for an order sealing the record, which must be supported by a memorandum of points and authorities and a declaration containing sufficient facts to justify the sealing [*Cal.Rules of Ct., Rule 2.551(b)(1)*]. A copy of the motion or application must be served on the other party [*Cal. Rules of Ct., Rule 2.551(b)(2)*].

A judge may order that a record be filed under seal only if the judge expressly finds facts that establish (1) the existence of an overriding interest that overcomes the right of public access to the record, (2) an overriding interest that supports sealing the record, (3) the existence of a substantial probability that the overriding interest will be prejudiced if the record is not sealed, (4) the proposed sealing is narrowly tailored, and (5) no less restrictive means exist to achieve the overriding interest [*Cal. Rules of Ct., Rule 2.550(d)*]. The order must specifically set forth the facts that support the

findings and direct the sealing of only those documents and pages, or portions of those documents and pages, that contain the material that needs to be placed under seal [*Cal. Rules of Ct., Rule 2.550(e)(1)*]. Once a record is sealed, it may not be unsealed except on court order [*Cal. Rules of Ct., Rule 2.551(h)(1)*]. Court files in family law cases should not be treated differently from court files in other types of cases for purposes of considering the appropriateness of an order sealing any of those files [*In re Marriage of Lechowick (1998) 65 Cal. App. 4th 1406, 1414, 77 Cal. Rptr. 2d 395* ; *see, e.g., City of Los Angeles v. Superior Court (Williamson) (2003) 111 Cal. App. 4th 883, 897, 3 Cal. Rptr. 3d 915* (personnel records of spouse who is peace officer may be sealed to protect his or her privacy)].

For further discussion and a declaration in support of sealing particular records in a family law court file, see Denner, Rothschild, and Johnson, *California Family Law Trial Guide, Ch. 4, § 4.60* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresGovernmentsCourtsCourt Records

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§ 221.63 Trial Brief

[1] In General

A trial brief or memorandum is a document that concisely sets forth a party's statement of the factual and legal issues to be *tried*, including specific contentions, and applicable points and authorities. It generally is filed and served on or before the commencement of a contested trial, as prescribed by local court rule.

Trial briefs frequently are similar in content and presentation to pretrial and settlement conference statements, to the extent that they present an outline of the issues that are settled, issues in dispute, and contentions regarding specific matters (such as community property, support, or child custody). They should be viewed as the final, definitive position taken by a party, however, for purposes of trying the case after all issues have been narrowed in pretrial settlement attempts.

Whether a trial brief should be filed in a particular case depends on the requirements of the court, as set forth in its local rules, and on the complexity of the case. Many courts do not require a trial brief. Courts in several of the more populous counties, however, either require or expressly permit the filing of trial briefs by local rule.

Even when a trial brief is not required by local court rule, filing one generally is good practice, particularly if the issues are complex. Presentation of a brief will aid the court in understanding the issues and will permit counsel to demonstrate the merits of his or her client's position on particular issues. Preparation of the brief also aids the attorney submitting the brief by requiring him or her to identify all the triable issues remaining in the case and organize arguments (and related evidence) in favor of his or her client. Settlement also may be facilitated by use of a trial brief by each party, to the extent that it encourages counsel to closely examine the legal bases for the contentions made and exposes the strengths and weaknesses of those contentions.

See Denner, Rothschild & Johnson, California Family Law Trial Guide, Unit 1 (Matthew Bender), for an illustrative

sample form of a trial brief.

[2] Other Papers

Some counties require that a proposed distribution of property or other settlement proposal be filed along with the trial brief. Other counties require that counsel verify that a settlement conference was held and include within the trial brief an offer of proof regarding the listing and valuation of separate and community property [*see* Santa Barbara Co. Super. Ct. Rules, Rule 1422]. Current Judicial Council forms of property, and income and expense, declarations [*see* Cal. Judicial Council Forms FL-150-FL-160] also may be required.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 221.64 General Considerations in Presenting Case

The procedures involved in presenting the facts at a trial or hearing in a family law proceeding generally are the same as those involved in other civil trials. Although the procedures in a family law proceeding may seem more informal, nonetheless, at trial, the court and the attorneys are bound to observe the laws of evidence and court procedure for civil trials [*see, e.g., Cal. Rules of Ct., Rule 5.21*].

A judge may not, for example, curtail the parties' right to present evidence on all material disputed issues [*see In re Marriage of Carlsson (2008) 163 Cal. App. 4th 281, 290-293, 77 Cal. Rptr. 3d 305* (judge's actions in abruptly ending trial before husband finished putting on his case-in-chief deprived husband of his due process right to fair hearing)].

Legal Topics:

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18-221 California Forms of Pleading and Practice--Annotated § 221.65

§ 221.65 Use of Opening and Closing Statements

[1] Opening Statement

The purpose of an opening statement is to inform the court of the nature of the case or defense; to state the facts on which the party relies; and to highlight the questions involved, issues to be tried, and the facts to be proved [*see Williams v. Goodman (1963) 214 Cal. App. 2d 856, 869, 29 Cal. Rptr. 877]* . In family law proceedings, which ordinarily are tried without a jury, opening statements generally are not necessary because the court is aware of the issues and the statement will not add anything to what will be brought out by the witnesses.

[2] Final Argument

Each attorney has a right to present a final argument, or summation, to the trier of fact at the conclusion of the presentation of evidence. The petitioner argues first, followed by the respondent; the petitioner then is entitled to conclude [*Code Civ. Proc. §§ 607, 631.7*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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§ 221.66 Anticipating Evidentiary Problems

[1] Review of Evidence Before Trial

In preparing for trial, counsel should review all tangible physical evidence--particularly documentary evidence--that he or she intends to introduce, and consider the nature and scope of any testimony that will be presented. As part of this review, counsel should attempt to anticipate particular evidentiary problems that must be overcome to admit the proffered evidence [*see, e.g., In re Marriage of Schoettgen (1986) 183 Cal. App. 3d 1, 5-9, 227 Cal. Rptr. 758]* .

If evidentiary problems are expected in advance of trial, the best forum for resolving these problems is not during the trial itself, but at an in-chambers conference before trial, such as the pretrial or trial setting conference. Even if some problems are not resolved, the judge will have some familiarity with the nature of the problem involved, thereby enabling him or her to rule correctly on the admissibility of the proffered evidence.

For further discussion, see Denner, Rothschild & Johnson, California Family Law Trial Guide, Unit 20 (Matthew Bender).

[2] Prohibited Evidence

Except as otherwise provided by statute (i.e., when child custody is an issue and the evidence is relevant to that issue, or when a domestic violence prevention order is sought or has been obtained and the evidence is relevant in connection with the order [*see Fam. Code §§ 3011(b), 6300*]), evidence of specific acts of misconduct is improper and inadmissible in any pleading or proceeding for dissolution or legal separation, including depositions and discovery proceedings [*Fam. Code § 2335*].

Evidence derived from illegal eavesdropping is inadmissable [*Fam. Code § 2022(a)*]. In addition, the court may refer a potential violation to the proper authorities for investigation and prosecution [*Fam. Code § 2022(b)*], and the victim is provided by statute with a civil cause of action [*Penal Code § 637.2*; *see, e.g., Ribas v. Clark (1985) 38 Cal. 3d 355,*

358-363, 212 Cal. Rptr. 143, 696 P.2d 637] . Illegal eavesdropping in the domestic relations setting also has been held a violation of federal law [*People v. Otto (1992) 2 Cal. 4th 1088, 1099-1100, 9 Cal. Rptr. 2d 596, 831 P.2d 1178]* .

Confidential mediation communications are not admissible absent both parties' express consent [*Eisendrath v. Superior Court(Rogers) (2003) 134 Cal. Rptr. 2d 716* (nonconsenting party is entitled to protective order barring discovery into and admission of these commuications)]. Confidential communications made before the end of the mediation remain confidential after the mediation ends [*Evid. Code §§ 1125, 1126*; *Eisendrath v. Superior Court (Rogers) (2003) 109 Cal. App. 4th 351, 358, 364-365, 134 Cal. Rptr. 2d 716]* . In general, a mediator may not testify as to any statement, conduct, decision, or ruling occurring at or in conjunction with the mediation proceeding [*Evid. Code § 703.5*; *Eisendrath v. Superior Court (Rogers) (2003) 109 Cal. App. 4th 351, 358, 365-366, 134 Cal. Rptr. 2d 716* (mediator may testify if party's constitutional rights are implicated or if both parties expressly waive their confidentiality rights)].

This protection applies to derivative material, such as charts, diagrams, information compilations, and expert opinions and reports, prepared for the purpose of, in the course of, or pursuant to mediation; this material is not discoverable on a showing of good cause [*Rojas v. Superior Court (2004) 33 Cal. 4th 407, 423-424, 15 Cal. Rptr. 3d 643, 93 P.3d 260]* . Under *Evid. Code § 1119(b)*, because both photographs and written witness statements qualify as "writings" as defined in *Evid. Code § 250*, if they are prepared for purpose of, in course of, or pursuant to mediation, then they are not admissible or subject to discovery, and their disclosure may not be compelled [*Rojas v. Superior Court (2004) 33 Cal. 4th 407, 416-417, 422-423*].

For further discussion, see Denner, Rothschild & Johnson, California Family Law Trial Guide, Unit 20 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceIllegal EavesdroppingGeneral OverviewEvidenceRelevanceCompromise & Settlement NegotiationsEvidenceRelevanceRelevant EvidenceFamily LawAlternative Dispute ResolutionMediationFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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§ 221.67 Use of Expert's Reports

Written reports of experts relevant to some issue in a family law proceeding generally are not admissible as evidence [*see Evid. Code §§ 720, 1200*] in the absence of a stipulation of the parties or by establishment of qualification for admission under one of the statutory exceptions to the hearsay rule [*see Evid. Code §§ 1220-1341*] and satisfaction of the requirements for admission of opinion evidence [*see Evid. Code § 801*]. Parties generally stipulate to the admission of these reports in the interests of judicial economy, however, and counsel may wish to consider moving for sanctions in cases in which no stipulation on admission of the report has been reached and a great deal of court time has been expended to admit its contents through testimony [*see Code Civ. Proc. § 128.5*; *Fam. Code § 271*]. For further discussion, see Denner, Rothschild & Johnson, California Family Law Trial Guide, Unit 20 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral OverviewEvidenceRelevanceGeneral OverviewEvidenceTestimonyExpertsAdmissibilityFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-221 California Forms of Pleading and Practice--Annotated § 221.68

§ 221.68 Use of and Preparation of Exhibits

The important consideration regarding the use of exhibits at trial is that they will not be considered by the court unless they have been properly admitted into evidence. Ideally, each side should provide a list of its exhibits to the other side at a conference before trial with the goal of gaining their admission by agreement or stipulation, thus eliminating the need to call witnesses to testify for the sole purpose of admitting the exhibits. When agreement cannot be reached or certain exhibits are to be used for impeachment or tactical surprise, the basis for their admission must be by way of testimony at trial.

Family law counsel should not neglect using prepared demonstrative exhibits such as charts indicating the equality of a proposed division of community property or the tax impact on the parties of an award of spousal support. For further discussion of evidentiary matters, see Denner, Rothschild & Johnson, California Family Law Trial Guide, Unit 20 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDocumentary EvidenceWritingsGeneral OverviewEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-221 California Forms of Pleading and Practice--Annotated § 221.69

§ 221.69 Discovery Evidence at Trial

[1] In General

Information obtained in the course of pretrial discovery may be used at trial (1) to refresh the memory of a witness [*Evid. Code § 771*]; (2) to impeach an adverse party or an adverse witness by showing prior statements inconsistent with offered testimony [*Evid. Code §§ 770, 1235*]; (3) to rehabilitate a friendly witness whose credibility has been attacked on cross-examination [*Evid. Code § 791*]; (4) to show the recorded past recollection of a witness, provided a proper foundation is laid [*Evid. Code § 1237*]; and (5) under proper circumstances, to substitute for testimony of a witness [*Code Civ. Proc. §§ 2025.620, 2030.410*; *Evid. Code § 240*; *see Ritter v. State Bar (1985) 40 Cal. 3d 595, 601, 221 Cal. Rptr. 134, 709 P.2d 1303]* . For further discussion, see Denner, Rothschild & Johnson, California Family Law Trial Guide, Unit 20 (Matthew Bender).

[2] Electronic Recordings

Electronic sound or sound-and-video recordings may be admitted into evidence. Unless otherwise ordered by the trial judge, the party offering recordings into evidence must tender to the court and to opposing parties a typewritten transcript of the recording [*Cal. Rules of Ct., Rule 2.1040(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewEvidenceHearsayCredibility of DeclarantsImpeachment EvidenceEvidenceHearsayExceptionsRecorded RecollectionRecollection RefreshedEvidenceTestimonyCredibilityImpeachmentPrior Inconsistent StatementsEvidenceTestimonyRefreshing RecollectionRefreshing During Testimony

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18-221 California Forms of Pleading and Practice--Annotated § 221.70

§ 221.70 Stipulations at Trial

A binding stipulation, accepted by the court, eliminates the necessity of producing evidence on the issue or facts so stipulated as long as the stipulation is not contrary to law, public policy, or a court rule [*see Leonard v. City of Los Angeles (1973) 31 Cal. App. 3d 473, 107 Cal. Rptr. 378]* . To be binding on the parties, a written stipulation must be filed and an oral stipulation must be entered on the minutes [*Code Civ. Proc. § 283*]. The best practice is to have oral stipulations reduced to writing and filed in the case. If matters are stipulated to in open court, however, care should be taken that the intent of the parties is explicitly stated. Although a stipulation that is ambiguous on its face may be clarified by parol evidence in the absence of any patent ambiguity [*Insurance Co. of North America v. Bechtel (1973) 36 Cal. App. 3d 310, 320, 111 Cal. Rptr. 507]* , resortmay not be had to extrinsic evidence to alter the apparent intent of the parties [*see In re Marriage of Wright (1976) 54 Cal. App. 3d 1115, 1121, 126 Cal. Rptr. 894]* .

Attorneys may stipulate to certain matters on behalf of their clients without the clients' express authorization, but may not do so if the stipulation settles issues that are central to the controversy [*see, e.g., In re Marriage of Helsel (1988) 198 Cal. App. 3d 332, 339-340, 243 Cal. Rptr. 657]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDocumentary EvidenceParol EvidenceEvidenceJudicial AdmissionsAdmissions During TrialsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-221 California Forms of Pleading and Practice--Annotated § 221.71

§ 221.71 Witnesses

[1] In General

The procedures and techniques for examining witnesses in a family law proceeding are essentially the same as those employed in any civil proceeding. One exception to this general similarity may be the right to call minor children to testify at a custody hearing. For further discussion of issues relating to witnesses, see Denner, Rothschild & Johnson, California Family Law Trial Guide, Unit 20 (Matthew Bender).

[2] Restoration of Birth Name or Former Name

If one of the parties wants to have his or her birth or former name restored, counsel should ask an appropriate question in a proceeding for dissolution or nullity of marriage and obtain an affirmative response. After such a request, the court must restore the birth or former name by an appropriate order in the judgment, regardless of whether the requested name restoration was included in the petition [*Fam. Code §§ 2080, 2081*].

[3] Qualification of Experts

Before an expert is allowed to testify at trial, his or her special knowledge, skill, training, or education sufficient to qualify him or her as an expert must be established to the court's satisfaction [*Evid. Code § 720*]. Although it is not uncommon for each side to stipulate to the qualification of a particular expert to testify, and although the stipulation will undoubtedly save time at trial, counsel putting forward the expert who agrees to such a stipulation may lose the opportunity to demonstrate the expert's qualifications and realize the potentially valuable side effect of lending additional credibility to his or her testimony in the mind of the court.

Legal Topics:

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

EvidenceCompetencyDisabilityChildrenEvidenceTestimonyExpertsQualificationsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawName ChangesProcedures

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§ 221.72 Request for Statement of Decision

The court must file its decision and any statement of decision as in any other case in a proceeding for dissolution of marriage or for legal separation [*Fam. Code § 2338(a)*]. Thus, at the request of any party appearing at the trial, the court must issue a statement of decision explaining the factual and legal basis for its decision as to each of the principally controverted issues at trial. Such a request, which ordinarily must be made within 10 days after the court announces its tentative decision unless trial is concluded within one calendar day [*In re Marriage of Ananeh-Firempong (1990) 219 Cal. App. 3d 272, 283-284, 268 Cal. Rptr. 83* ; *see Code Civ. Proc. § 632*; *Cal. Rules of Ct., Rule 3.1590*; *Khan v. Superior Court (1988) 204 Cal. App. 3d 1168, 1173 n.4, 251 Cal. Rptr. 815* ; *see also Banning v. Newdow (2004) 119 Cal. App. 4th 438, 457, 14 Cal. Rptr. 3d 447* (statement of reasons is not required with respect to an interim custody order)], must specify those controverted issues as to which the party requests a statement of decision. Once a party has requested a statement of decision, any party may make proposals as to its content [*Code Civ. Proc. § 632*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-221 California Forms of Pleading and Practice--Annotated § 221.73

§ 221.73 Preparation, Rendition, and Entry of Judgment

A copy of a proposed judgment of dissolution must be submitted to the court and served with the proposed statement of decision in any contested proceeding in which a written statement of decision is requested [*see Cal. Rules of Ct., Rule 3.1590(c)*]. When a statement of decision is not required in a contested dissolution because it was not requested or was waived, the court must prepare and mail a proposed judgment to all parties who appeared at the trial within 10 days after the expiration of the time for requesting a statement of decision. Alternatively, the court may notify counsel for a party to prepare a proposed judgment. Counsel has 10 days after notice to prepare, serve on opposing counsel, and submit to the court for approval a proposed judgment of dissolution of marriage [*Cal. Rules of Ct., Rule 3.1590(e)*]. Before a judgment of dissolution may be entered in the judgment book by the clerk, it must be "rendered" and signed by the court [*see, e.g., Estate of Dargie (1912) 162 Cal. 51, 53, 121 P. 320]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewFamily LawMarital Termination & Spousal SupportAnnulmentProcedures

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18-221 California Forms of Pleading and Practice--Annotated § 221.74

§ 221.74 Attorney's Withdrawal After Entry of Final Judgment

An attorney of record for any party in an action or proceeding for dissolution of marriage, legal separation, or for a declaration of void or voidable marriage, or for the support, maintenance, or custody of minor children, may withdraw at any time after the judgment in the action or proceeding becomes final and before service on him or her of pleadings or motion papers in any proceeding pending in the cause. Formal consent of the client is unnecessary, nor is a court order required. Rather, to withdraw, the attorney must file a notice of withdrawal stating the date of entry of the final decree or judgment, the last known address of the party, and that the attorney withdraws as attorney for the party. A copy of the notice must be mailed to the party at his or her last known address, and must be served on the adverse party [*Code Civ. Proc. § 285.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewFamily LawMarital Termination & Spousal SupportAnnulmentProceduresLegal EthicsClient RelationsGeneral Overview

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18-221 California Forms of Pleading and Practice--Annotated §§ 221.75-221.89

[Reserved]

§§ 221.75[Reserved]

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§ 221.90 Grounds for Dismissal

In general, a proceeding under the Family Code for dissolution of marriage, nullity of marriage, or legal separation of the parties may be dismissed on the same grounds and in the same manner as an ordinary civil action [*see Fam. Code § 210*; *Cal. Rules of Ct., Rule 5.21*]. Thus, a family law proceeding may be dismissed under the circumstances and in the manner provided by *Code Civ. Proc. §§ 581, 581c, 581d,* and *583.110 et seq.*, which govern dismissal of civil actions generally [*see generally* Ch. 212, *Dismissal*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewFamily LawMarital Termination & Spousal SupportAnnulmentProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportLegal Separation

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18-221 California Forms of Pleading and Practice--Annotated § 221.91

§ 221.91 Types of Dismissals

[1] With or Without Prejudice

Apart from some situations in which a voluntary or involuntary dismissal of a proceeding under the Family Code might bar, for one reason or another, a subsequent proceeding from being brought under the Code for the same purpose, in most proceedings under the Family Code, the distinction between a dismissal with prejudice and a dismissal without prejudice is less important than it would be in an ordinary civil action [*see, e.g., Stephan v. American Home Builders (1971) 21 Cal. App. 3d 402, 406, 98 Cal. Rptr. 354* (noting general proposition that judgment of dismissal that is not rendered on merits does not operate as bar to filing of subsequent action based on same facts)]. A dismissal with prejudice of a proceeding for dissolution of marriage does not bar the filing of a new dissolution proceeding on the ground that irreconcilable differences--even the same ones as were the basis of the prior proceeding--exist between the parties at the time the subsequent proceeding is filed [*see Fam. Code § 2310(a)*].

[2] Discretionary or Mandatory

[a] Discretionary Dismissals

The court generally has discretion to dismiss a family law proceeding in the following circumstances:

(1) Without prejudice, when no party appears for trial following 30 days' notice of the time and place of trial [*Code Civ. Proc. § 581(b)(3)*; *but see Mustalo v. Mustalo (1974) 37 Cal. App. 3d 580, 584-585, 112 Cal. Rptr. 594* (judgment of dismissal for failure to prosecute proceeding for dissolution of marriage or legal separation of parties does not bar filing new proceeding for dissolution or legal separation)];

(2) Without prejudice, when dismissal is made pursuant to the applicable provisions of *Code Civ. Proc. § 583.110 et seq.* governing discretionary dismissal for delay in prosecution [*Code Civ. Proc. § 581(b)(4), (g)*; *see Code Civ. Proc. §§ 583.410, 583.420*];

(3) Without prejudice, when either party fails to appear at the trial and the other party appears and asks for dismissal [*Code Civ. Proc. § 581(b)(5), (l)*]; and

(4) When a motion to quash the proceeding is granted, with or without leave to amend the petition [*cf. Goddard v. Security Title Ins. & Guar. Co. (1939) 14 Cal. 2d 47, 52-53, 92 P.2d 804* (judgment of dismissal entered in civil action after demurrer to complaint was sustained)].

See Ch. 212, *Dismissal* , for detailed discussion of this topic in the context of civil actions generally.

[b] Mandatory Dismissals

In general, and with certain statutory exceptions (summarized below), dismissal of a family law proceeding is mandatory in the following circumstances:

(1) When the petitioner fails to serve the summons and petition on the respondent within three years after the proceeding is commenced against the respondent [*see Code Civ. Proc. §§ 583.210(a), 583.250*; *see Bernasconi Commercial Real Estate v. St. Joseph's Regional Healthcare System (1997) 57 Cal. App. 4th 1078, 1081-1083, 67 Cal. Rptr. 2d 475]* ;

(2) When the petitioner fails to file a return of the summons or other proof of service within three years and 60 days after the proceeding is commenced against the respondent [*see Code Civ. Proc. §§ 583.210(b), 583.250*];

(3) When the parties fail to bring the proceeding to trial within five years after it was commenced against the respondent [*see Code Civ. Proc. §§ 583.310, 583.360*; *Sanchez v. City of Los Angeles (2003) 109 Cal. App. 4th 1262, 1270-1271, 135 Cal. Rptr. 2d 869* (failure to bring the proceeding to trial within five years is not excused by counsel's mistake in calculating end of five-year period)];

(4) When the parties fail to bring a proceeding again to trial within three years after one of the following:

(a) A mistrial is entered, if a new trial has been granted in the proceeding [*see Code Civ. Proc. §§ 583.320(a)(1), 583.360*];

(b) An order granting a new trial is entered, if after judgment a new trial is granted and no appeal is taken [*see Code Civ. Proc. §§ 583.320(a)(2), 583.360*]; or

(c) The remittitur is filed by the clerk of the trial court, if on appeal an order granting a new trial is affirmed or a judgment is reversed and the proceeding is remanded for a new trial [*see Code Civ. Proc. §§ 583.320(a)(3), 583.360*];

(5) The petitioner abandons the case during trial, but before final submission [*see Code Civ. Proc. § 581(d)*; *Burnett v. Burnett (1948) 88 Cal. App. 2d 805, 807, 199 P.2d 685]* ; and

(6) The petitioner requests a dismissal after commencement of trial [*see Code Civ. Proc. § 581(e)*; *see also Carvel v. Arents (1954) 126 Cal. App. 2d 776, 779, 272 P.2d 858* (petitioner's motion for dismissal deemed abandonment of case; dismissal held on appeal to be with prejudice)].

Statutory exceptions to mandatory dismissal include the following:

(a) *Code Civ. Proc. § 583.140* (principles of waiver and estoppel apply);

(b) *Code Civ. Proc. §§ 583.140, 583.220, 583.230* (when the respondent makes a general appearance or enters into a written stipulation or oral agreement in open court to extend the time for service and return);

(c) *Code Civ. Proc. § 583.240(a), (b)* (time during which the respondent was not amenable to process of the court or the prosecution of the proceeding was stayed and the stay affected service); or

(d) *Code Civ. Proc. § 583.240(c), (d)* (time during which the validity of service was the subject of litigation by the parties or service, for any other reason, was impossible, impracticable, or futile due to causes beyond the petitioner's control)].

See Ch. 212, *Dismissal* , for detailed discussion of this topic in the context of civil actions generally.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals With PrejudiceCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersDismissals Without PrejudiceFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-221 California Forms of Pleading and Practice--Annotated § 221.92

§ 221.92 Dismissal by Petitioner Before Trial

[1] When Available

The petitioner in a Family Code proceeding may dismiss the proceeding at any time before the actual commencement of the trial by filing a written request for dismissal with the clerk of court and paying the clerk's costs [*Code Civ. Proc. § 581(b)(1)*; *see § 221.395* (Request for Dismissal)].

The voluntary dismissal of a proceeding before commencement of trial in accordance with *Code Civ. Proc. § 581* is exercisable by a petitioner as a matter of right. If the petitioner files with the clerk a written request for dismissal in proper form, the dismissal is immediately effective [*see, e.g., Associated Convalescent Enters. v. Carl Marks & Co., Inc. (1973) 33 Cal. App. 3d 116, 120, 108 Cal. Rptr. 782]* . Nevertheless, the dismissal will not be effective and cannot be made except on court order with proper notice unless it is made with the written consent of the petitioner's attorney of record [*Code Civ. Proc. § 581(j)*].

A party who requests the dismissal must serve on all parties and file notice of entry of the dismissal [*Cal. Rules of Ct., Rule 3.1390*].

[2] When Prohibited

In cases in which a respondent requests affirmative or alternative relief in his or her response, however, the request for affirmative or alternative relief might arguably be treated as a cross complaint, and thereby prevent the petitioner from dismissing the proceeding before trial, unless the affirmative relief itself is subject to dismissal. Unilateral dismissal is also prohibited when a respondent seeks affirmative relief in some form other than the petition, such as a motion for entry of judgment [*see In re Marriage of Tamraz (1994) 24 Cal. App. 4th 1740, 1746-1749, 30 Cal. Rptr. 2d 233* (husband could not unilaterally dismiss his 1976 petition for dissolution when wife's motion for entry of judgment in 1976 action also requested affirmative relief)]. For discussion of motions to quash requests for affirmative relief contained in the response, see Subpart A.

The petitioner also is prohibited from dismissing the action before trial if the respondent has filed a motion under *Code Civ. Proc. § 396b* for an order transferring the proceeding to another court. Motions to transfer a family law proceeding from one court to another also are discussed in *§ 221.10* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProcedureDismissalsVoluntary DismissalsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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Volume 18: Dissolution of Marriage: Master Procedural Guide thru Dissolution of Marriage: Property Division and Valuation-Chs. 220-222
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18-221 California Forms of Pleading and Practice--Annotated § 221.93

§ 221.93 Voluntary Dismissal by Either Party Before Judgment

A family law proceeding may be dismissed by either party at any time before entry of a judgment of dissolution if the other party gives written consent [*Code Civ. Proc. § 581(b)(2)*; *see Fam. Code § 2338(c)* (after entry of judgment and before it becomes final, neither party has right to dismiss action without consent of other party); *see § 221.395* (Request for Dismissal)]. However, the dismissal will not be effective unless it is made with the written consent of the attorney of record for the party applying for the dismissal. If the attorney's consent is not obtained, the dismissal may be entered only on order of court after notice to the attorney [*Code Civ. Proc. § 581(j)*].

A party who requests the dismissal must serve on all parties and file notice of entry of the dismissal [*Cal. Rules of Ct., Rule 3.1390*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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§ 221.94 No Dismissal When Child or Spousal Support Order in Force

If an order for child or spousal support has been issued in a proceeding for dissolution or legal separation and the child support order has not been terminated by the court or by operation of law [*see Fam. Code §§ 3591, 3600, 3603, 3900, 3901, 4007, 4013, 4335, 4336*], the proceeding may not be dismissed for delay in prosecution [*Code Civ. Proc. § 583.161(a), (b)*; *see also County of Orange v. Quinn (2002) 97 Cal. App. 4th 956, 958-964, 118 Cal. Rptr. 2d 833* (trial court erred in dismissing putative father's motion to dismiss county's action under child support order for reimbursement of assistance payments made on behalf of daughter for county's failure to bring action to trial within five years); *In re Marriage of Hinds (1988) 205 Cal. App. 3d 1398, 1403-1405, 253 Cal. Rptr. 170* (construing former version of *Code Civ. Proc. § 583.161* as prohibiting dismissal of bifurcated dissolution action that was not brought to retrial within three years after mistrial on community property issues involving third parties, because temporary order for unsegregated child and spousal support remained in effect); *but see County of Orange v. Rosales (2002) 99 Cal. App. 4th 1214, 121 Cal. Rptr. 2d 788* (on facts virtually identical to *Quinn*, except county successfully terminated father's parental rights, trial court properly dismissed county's reimbursement action for failure to bring it to trial within five years because of lack of continuing child support order); *now see* Code Civ. Proc. § 581.161(c) (prohibiting dismissal of dissolution proceeding after separate trial on marital status); *see* discussion in *§ 221.95*]. Child support orders remain in effect, even when proceedings are not brought to timely trial, unless the support orders are terminated by the court or by operation of law [*see Fam. Code § 3601(a), (b)*]. For discussion of termination of child support orders, see Ch. 224, *Dissolution of Marriage: Child Support* . For discussion of termination of spousal support orders, see Ch. 225, *Dissolution of Marriage: Spousal Support* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 221.95 No Dismissal After Separate Trial on Marital Status

Code Civ. Proc. § 583.161 prohibits dismissal of a dissolution proceeding after a separate trial on the issue of the status of the marriage has been conducted pursuant to *Fam. Code § 2337* [*Code Civ. Proc. § 583.161(c)*]. The term "trial" refers to a proceeding in which the court adjudicates the status of the marriage in a judgment, regardless of whether the proceeding was contested or uncontested [*In re Marriage of Dunmore (1996) 45 Cal. App. 4th 1372, 1375, 53 Cal. Rptr. 2d 450]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 221.96 Effect of Dismissal on Pendente Lite Orders

A judgment of dismissal in a Family Code proceeding, regardless of whether it is with prejudice, will not prevent the respondent from being held in contempt for any previous failure to obey a pendente lite order for temporary child support, spousal support, attorney's fees, or costs. After the dismissal is entered, further payments under the pendente lite order no longer accrue, but the payments that have accrued under the order before entry of the dismissal and have not been paid remain due and payable. Further, the dismissal of the main proceeding will not deprive the court of jurisdiction to enforce payment of the accrued amount due under a pendente lite order by execution, supplementary proceedings, or contempt [*Moore v. Superior Court (1970) 8 Cal. App. 3d 804, 810-811, 87 Cal. Rptr. 620]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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18-221 California Forms of Pleading and Practice--Annotated §§ 221.97-221.109

[Reserved]

§§ 221.97[Reserved]

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18-221 California Forms of Pleading and Practice--Annotated § 221.110

§ 221.110 Necessity for Statement of Decision in Family Law Proceedings

[1] General Nature and Purpose of Statement

A statement of decision is a written statement issued by the court on the request of a party that explains the factual and legal basis for the court's decision regarding the principal controverted issues at trial [*see Code Civ. Proc. § 632*]. The Family Code provides that in proceedings for dissolution of marriage or legal separation, the court must file its decision and any statement of decision "as in other cases" [*Fam. Code § 2338(a)*].

The principal purpose of obtaining a statement of decision is to provide a record of the reasoning and basis for the trial court's decision for use in attacking or defending the decision on appeal. For discussion of appeals in a general civil context, see Ch. 40, *Appeal: An Overview* , through Ch. 54, *Appeal: California Supreme Court Review* .

In matters submitted to a referee, the statement of decision serves the additional purpose of informing the trial court and allowing it to intelligently decide whether to accept or reject the referee's decision. Furthermore, when a matter is submitted to a referee, the general rule that issuance is optional does not apply; the referee must issue a statement of decision whether or not it is requested by one of the parties [*see Code Civ. Proc. §§ 638, 643*; *see also In re Marriage of Demblewski (1994) 26 Cal. App. 4th 232, 236, 31 Cal. Rptr. 2d 533* ; *§ 221.110[2]*].

With respect to judgments that include modifiable provisions (for example, regarding child custody or child or spousal support), the statement of decision provides a record of the circumstances that existed at the time of the judgment, from which the court, in a later proceeding to modify those provisions, can determine whether circumstances have changed so as to warrant a modification.

For detailed discussion of statements of decision, see Ch. 529, *Statement of Decision* . See *§ 221.10* et seq. for discussion of statements of decision in bifurcated proceedings. For discussion of rules governing modification ofjudgments and orders, see *§ 221.180* et seq.

[2] When Statement Not Required

A statement of decision may be requested "upon the trial of a question of fact" [*see Code Civ. Proc. § 632*]. Generally, a statement of decision is not required after a ruling on a motion or order to show cause unless a statutory or judicially created exception exists for the particular type of order. Thus, for example, a statement of decision is not required, even if requested, before issuance of an order for equitable relief from a family law judgment [*In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 79-80, 260 Cal. Rptr. 403* ; *see In re Marriage of Askmo (2000) 85 Cal. App. 4th 1032, 1040, 102 Cal. Rptr. 2d 662* (court did not have to issue statement of decision on its ruling on order to show cause); *Khan v. Superior Court (1988) 204 Cal. App. 3d 1168, 1173 n.4, 251 Cal. Rptr. 815* (court had authority but no obligation to issue statement of decision regarding denial of motion to quash)]. However, by statute, an order modifying, terminating, or setting aside a spousal support order must include a statement of decision if requested by either party [*Fam. Code § 3654*].

With regard to judicial exceptions, the courts balance "(1) the importance of the issues at stake in the proceeding, including the significance of the rights affected and the magnitude of the potential adverse effect on these rights; and (2) absence of express findings" [*Gruendl v. Oewel Partnership, Inc. (1997) 55 Cal. App. 4th 654, 660]* .

[3] When Statement Must Be Issued Without Request

Code Civ. Proc. 643 creates an exception to the general rule that issuance of a statement of decision is optional unless requested whenever a case or particular issues in a case are referred to a referee. A referee must issue *sua sponte* a statement of decision explaining the factual and legal basis for his or her decision on each of the principal controverted issues [*see Code Civ. Proc. § 643(a)*; *In re Marriage of Demblewski (1994) 26 Cal. App. 4th 232, 236, 31 Cal. Rptr. 2d 533]* . This requirement serves the additional purpose of assisting the trial court in deciding whether to accept or reject the referee's decision [*see In re Marriage of Demblewski (1994) 26 Cal. App. 4th 232, 236, 31 Cal. Rptr. 2d 533]* .

Note, however, that a distinction is made between referees appointed under *Code Civ. Proc. § 638* (by agreement of the parties) and those appointed under *Code Civ. Proc. § 639* (appointment on motion of a party or on the court's own motion), with respect to reporting a statement of decision. If the appointment was made under *Section 638*, the referee must report as agreed by the parties and approved by the court. If the appointment was made under *Section 639*, the referee must file a report with the court that includes a recommendation on the merits of any disputed issue, a statement of the total hours spent and total fees charged by the referee, and the referee's recommended allocation of payment [*Code Civ. Proc. § 643(b), (c)*]. For further discussion of issues when cases are referred to a referee, see *§ 221.40* et seq.

[4] Effect of Statement on Appeal

There is no absolute statutory requirement that a party obtain a statement of decision as a prerequisite to appealing a trial court decision, and a statement of decision is unnecessary if the transcript of proceedings adequately sets forth the basis of the trial court's ruling [*In re Marriage of Powers (1990) 218 Cal. App. 3d 626, 634 n.5, 267 Cal. Rptr. 350]* . As a practical matter, however, the failure to obtain a statement of decision may be fatal to a party's attempt to obtain appellate relief from a decision. Without a statement of decision, the appellant may lack the basis for showing that the lower court's ruling was erroneous because there will be no record of the reasoning applied by the trial court in reaching its factual findings and legal conclusions [*see, e.g., In re Marriage of Ditto (1988) 206 Cal. App. 3d 643, 647-648, 253 Cal. Rptr. 770* ; *see also In re Marriage of Green (1992) 6 Cal. App. 4th 584, 593, 7 Cal. Rptr. 2d 872* (failure to request mathematical breakdown in statement of decision precluded challenge to amount of attorney's fees award)].

Legal Topics:

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

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§ 221.111 Procedures Applicable to Statements of Decision

[1] Governing Law

Procedures governing statements of decision in family law proceedings (that is, announcement of a tentative decision, proposals regarding the contents of statement of decision, preparation and service of a proposed statement of decision, general contents and format, objections, and consequences of a failure to make a requested statement of decision) are the same as those applicable to civil actions [*see Fam. Code §§ 210, 2338(a)*; *Cal. Rules of Ct., Rule 5.21*]. Those procedures are set forth in *Code Civ. Proc. § 632* and *Cal. Rules of Ct., Rules 3.1590* and *3.1591*. When the trial judge becomes unavailable before the entire process contemplated in *§ 632* and Rule 3.1590 has been completed, the parties have been deprived of a full and fair trial [*see Raville v. Singh (1994) 25 Cal. App. 4th 1127, 1132, 31 Cal. Rptr. 2d 58* (reversing judgment based on proposed statement of decision when trial judge died before ruling on those objections or issuing final statement)]. See Ch. 529, *Statement of Decision* , for discussion in the context of civil actions.

[2] Party Designated to Prepare Statement or Use of Tentative Decision

If the court does not designate a party to prepare the statement of decision in the announcement of intended decision, the court may, within five days after the request for the statement of decision, notify counsel for any party to prepare the statement [*see Cal. Rules of Ct., Rule 3.1590(c)*]. If the court fails to designate aparty to prepare the statement of decision, the court itself must prepare it [*In re Marriage of Reilley (1987) 196 Cal. App. 3d 1119, 1125-1126, 242 Cal. Rptr. 302]* . A tentative decision does not constitute a judgment and is not binding on the court. If the court later modifies its announced tentative decision, the clerk must mail a copy of the modification to all parties who appeared at the trial [*Cal. Rules of Ct., Rule 3.1590(a)*; *see In re Marriage of Hafferkamp (1998) 61 Cal. App. 4th 789, 793-794, 71 Cal. Rptr. 2d 761* (party may not appeal from tentative decision)].

The court may also direct that the tentative decision will be the statement of decision unless, within 10 days, either party specifies controverted issues or makes proposals not covered in the tentative decision [*Cal. Rules of Ct., Rule 3.1590(a)*]. However, a tentative decision does not substitute for a statement of decision on appeal unless a statement of

decision is requested. A tentative decision by itself is not considered part of the appellate record and may not be considered by the reviewing court [*In re Marriage of Ditto (1988) 206 Cal. App. 3d 643, 646-647, 253 Cal. Rptr. 770]* .

[3] When Request Must Be Made

A party who desires a statement of decision ordinarily must request one from the court within 10 days after the court announces a tentative decision. However, if the trial is concluded within one calendar day, or in less than eight hours over more than one day, the request must be made before submission of the matter for decision [*Code Civ. Proc. § 632*; *see In re Marriage of Ananeh-Firempong (1990) 219 Cal. App. 3d 272, 284, 268 Cal. Rptr. 83* ; *see also In re Marriage of Gray (2002) 103 Cal. App. 4th 974, 977-978, 980, 127 Cal. Rptr. 2d 271* (absent any court record of time taken for trial, court's finding that trial did not last more than eight hours over more than one day was presumed correct, and wife did not meet burden of showing that court erred in its finding)]. If the court's memorandum of intended decision is served by mail, the time within which a party may request a statement of decision is extended by five days (if the place of address is in California) [*Code Civ. Proc. § 1013(a)*; *In re Marriage of McDole (1985) 176 Cal. App. 3d 214, 219, 221 Cal. Rptr. 734* ; *see Code Civ. Proc. § 1013(c), (e)* (extension when service is by Express Mail or fax)]. For a form of request for a statement of decision, *see § 221.390*.

[4] Contents and Format of Statement of Decision

The statement of decision must be in writing unless the parties appearing at trial agree otherwise [*Code Civ. Proc. § 632*]. If the trial is concluded within one calendar day, or in less than eight hours over more than one day, the statement of decision may be made orally on the record in the presence of the parties [*Code Civ. Proc. § 632*; *see In re Marriage of Katz (1991) 234 Cal. App. 3d 1711, 1717-1718, 286 Cal. Rptr. 495* ; *In re Marriage of Ananeh-Firempong (1990) 219 Cal. App. 3d 272, 283-284, 268 Cal. Rptr. 83]* . An oral "statement of decision" may be supplemented by a subsequent written statement of decision [*Khan v. Superior Court (1988) 204 Cal. App. 3d 1168, 1173 n.4, 251 Cal. Rptr. 815* ; *see In re Marriage of Katz (1991) 234 Cal. App. 3d 1711, 1717-1718, 286 Cal. Rptr. 495* ; *see also Code Civ. Proc. § 632*].

If a statement of decision is requested and rendered, it must be confined to ultimate material legal and factual issues in the case. The evidentiary facts from which an ultimate fact is determined need not and should not be set forth by the court [*see In re Marriage of Garrity & Bishton (1986) 181 Cal. App. 3d 675, 686-688, 226 Cal. Rptr. 485* ; *In re Marriage of Roesch (1978) 83 Cal. App. 3d 96, 108-109, 147 Cal. Rptr. 586 , cert. denied, 440 U.S. 915 (1979)]* . For a form of proposed statement of decision, *see § 221.391*.

[5] Failure to Object to Proposed Statement of Decision

A party who fails to object to a proposed statement of decision within 15 days after receiving service of the proposed statement of decision and judgment [*Cal. Rules of Ct., Rule 3.1590(d)*] is deemed to waive the right to complain of alleged deficiencies in the statement. The party's mere request that a statement of decision be provided with respect to specific issues will not preserve those issues for appeal if the statement erroneously omits findings on those issues, but the party does not object. The appellate court will imply findings to support the judgment [*see, e.g., In re Marriage of McQuoid (1992) 9 Cal. App. 4th 1353, 1360-1361, 12 Cal. Rptr. 2d 737]* .

[6] Failure to Make Requested Statement of Decision

When a timely request has been made, the court must issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at the trial [*Code Civ. Proc. § 632*; *see In re Marriage of Ramer (1986) 187 Cal. App. 3d 263, 271, 231 Cal. Rptr. 647]* . Failure to render a statement of decision that was timely requested is reversible error [*see, e.g., In re Marriage of Sellers (2003) 110 Cal. App. 4th 1007, 2 Cal. Rptr. 3d 293* (court committed reversible error in failing to issue statement after husband requested statement, but later withdrew

request; wife did not waive right to statement, but was entitled to believe court would prepare statement in accordance with statutory requirement); *In re Marriage of Ananeh-Firempong (1990) 219 Cal. App. 3d 272, 284, 268 Cal. Rptr. 83]* .

Legal Topics:

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§ 221.112 Required Findings on Particular Issues

[1] Spousal Support

In a dissolution or legal separation proceeding in which spousal support is at issue, the court is required to make specific factual findings regarding the parties' standard of living during the marriage. Furthermore, at the request of either party, the court is required to make appropriate factual determinations with respect to the circumstances relevant to spousal support [*Fam. Code § 4332*]. *Fam. Code § 4320 et seq.* set forth the circumstances that the court is required to consider when awarding spousal support. Any failure of a party to request that the court make factual determinations or to issue a statement of decision can be fatal to a subsequent appeal of a spousal support order or to a motion to modify the amount of the support (because of the lack of a factual basis for showing changed circumstances) [*see, e.g., In re Marriage of Laube (1988) 204 Cal. App. 3d 1222, 1226, 251 Cal. Rptr. 745]* .

In addition, at the request of either party, an order modifying, terminating, or setting aside a spousal support order must include a statement of decision [*Fam. Code § 3654*].

For discussion of the factors to be considered by the court in ordering spousal support, see Ch. 225, *Dissolution of Marriage: Spousal Support* .

[2] Child Support

In ordering and setting the amount of child support, courts are required to adhere to the statewide uniform child support guideline set forth in *Fam. Code § 4050 et seq.* [*Fam. Code § 4052*]. The guideline sets forth a formula for computation of child support [*see Fam. Code § 4055(a)*], which is presumed to be the correct amount of child support to be ordered [*see Fam. Code § 4057(a)*]. This presumption may be rebutted by proving that ordering child support based on the formula amount would be unjust or inappropriate in a particular case because of the existence of one or more specified "rebuttal" factors [*see Fam. Code § 4057(b)*]. If the net disposable income per month of the obligor is less than $1,000, the court must determine whether to allow a low-income adjustment to the formula. If a low-income adjustment is

allowed, the court must state, in writing or on the record, the reasons supporting the adjustment [*see Fam. Code § 4055(b)(7), (c)*].

To comply with federal law, whenever the court orders a child support amount that differs from the guideline formula amount, the court must state, in writing or on the record, (1) the amount of support that would have been ordered under the guideline formula, (2) the reasons why the amount of support ordered differs from the guideline formula amount, and (3) the reasons why the amount of support ordered is consistent with the best interests of the children [*Fam. Code § 4056(a)*]. In addition, at the request of either party, the court is required to state, in writing or on the record, specified information used in determining the amount of support under the guideline formula [*see Fam. Code § 4056(b)*]. If either party requests it, the court must also make appropriate findings with respect to the circumstances on which an order for child support is based [*Fam. Code § 4005*].

For discussion of uniform statewide child support guidelines, the required court findings, and a form of child support order containing the required findings, see Ch. 224, *Dissolution of Marriage: Child Support* .

[3] Child Custody

Before a court makes any order awarding custody of a child to a person or persons other than a parent, without the parents' consent, the court must make a finding that (1) an award of custody to a parent would be detrimental to the child, and (2) the award to a nonparent is required to serve the best interests of the child [*Fam. Code § 3041*; *see, e.g., In re Baby Girl M. (1984) 37 Cal. 3d 65, 68, 207 Cal. Rptr. 309, 688 P.2d 918]* . The court must make a specific finding on each of these two matters before awarding custody to a nonparent [*see, e.g., In re B.G. (1974) 11 Cal. 3d 679, 699, 114 Cal. Rptr. 444, 523 P.2d 244* (identically worded predecessor statute)].

Although the statute does not clearly state whether the findings must be in writing, at least one court of appeal, interpreting the identically worded predecessor statute, has held that written findings are not required unless requested by one of the parties [*Chaffin v. Frye (1975) 45 Cal. App. 3d 39, 44-45, 119 Cal. Rptr. 22]* .

In addition, whenever a request for joint custody is granted or denied, the court, on the request of any party, must state in its decision the reasons for granting or denying the request. A statement that joint physical custody is, or is not, in the best interest of the child is not sufficient to meet the requirements of the subdivision [*Fam. Code § 3082*; *see In re Marriage of Buser (1987) 190 Cal. App. 3d 639, 642-643, 235 Cal. Rptr. 785* ; *see also In re Marriage of DeRoque (1999) 74 Cal. App. 4th 1090, 1097, 88 Cal. Rptr. 2d 618* (court's notice of intended decision was a sufficient statement of reasons)].

For discussion of the factors considered by the court in awarding custody, see Ch. 223, *Dissolution of Marriage: Child Custody* .

[4] Property Division

To comply with its duty to divide the parties' community and quasi-community property equally in the absence of an agreement by the parties [*see Fam. Code §§ 63, 2550*], the court must determine the character of the property and the value of each asset [*In re Marriage of Knickerbocker (1974) 43 Cal. App. 3d 1039, 1048, 118 Cal. Rptr. 232]* .

One court of appeal has held that the trial court must make specific findings of fact regarding the nature and value of the parties' property [*In re Marriage of Lopez (1974) 38 Cal. App. 3d 93, 107, 113 Cal. Rptr. 58]* . However, it is not clear whether the specific findings of fact concerning the nature and value of the parties' property must be in writing in the absence of a request from the parties for a statement of decision. One court of appeal has held that after making its determination as to the character and value of the parties' assets, the court may direct one of the parties to prepare and submit proposed findings in the same manner as if one of the parties had requested findings [*In re Marriage of*

Knickerbocker (1974) 43 Cal. App. 3d 1039, 1048 n.5, 118 Cal. Rptr. 232] .

For discussion of the factors considered by the court in dividing property, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

Legal Topics:

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

§§ 221.113[Reserved]

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3. Judgment Of Dissolution Or Legal Separation

18-221 California Forms of Pleading and Practice--Annotated § 221.130

§ 221.130 Single Final Judgment of Dissolution

To terminate a marriage in California under the Family Code, the parties must obtain either a judgment of nullity [*see Fam. Code § 2200 et seq.*] or a judgment of dissolution [*see Fam. Code §§ 2338-2344*]. Unless the issue of marital status has been bifurcated for early trial and judgment [*see Fam. Code § 2337*; *Cal. Rules of Ct., Rule 5.175*], dissolution of the marriage is accomplished by a single judgment [*see Fam. Code §§ 2338(c), 2340*] that generally adjudicates all of the parties' rights and obligations toward each other (such as support, child custody, and property division). The judgment does not operate to terminate the marriage until it becomes "final" [*see Fam. Code §§ 2339, 2340, 2343*], which usually is six months after service of a copy of the summons and petition on the respondent or the date of the respondent's appearance, whichever occurs first [*Fam. Code § 2339(a)*].

See Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights* , for discussion and forms relating to judgments of nullity.

Legal Topics:

For related research and practice materials, see the following legal topics:
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18-221 California Forms of Pleading and Practice--Annotated § 221.131

§ 221.131 Refusal to Enter Judgment

[1] In General

Fam. Code § 2338(c) provides that "[i]f the court determines that a dissolution should be granted, a judgment of dissolution of marriage shall be entered." The Family Code also provides, however, that "[i]f the court determines that no dissolution should be granted, a judgment to that effect only shall be entered" [*Fam. Code § 2338(b)*]. Because the usual ground asserted for dissolution of marriage, "irreconcilable differences" [*see Fam. Code §§ 2310(a), 2311*], is liberally construed by the courts in favor of permitting dissolution and is rarely contested by the parties, ordinarily there is no substantive basis for the court to refuse a judgment of dissolution that is requested by one or both of the parties [*see, e.g., In re Marriage of Gray (1988) 204 Cal. App. 3d 1239, 1252-1254, 251 Cal. Rptr. 846* (court may not refuse to grant dissolution of marriage as sanction for party's refusal to obey court orders); *In re Marriage of Bastian (1979) 94 Cal. App. 3d 483, 485-486, 156 Cal. Rptr. 524* (improper to refuse to enter judgment of dissolution until petitioner who filed in forma pauperis reimbursed county for filing fee by selling certain property)].

[2] Reconciliation of Parties

If the parties reconcile before judgment is entered, or after judgment is entered but before it becomes final, they may jointly dismiss the proceeding [*see Code Civ. Proc. § 581(b)(2)*; *Fam. Code § 2338(c)*]. Furthermore, the court must continue the dissolution or legal separation proceeding for up to 30 days if it appears to the court that there is a reasonable possibility of reconciliation [*see Fam. Code § 2334(a)*; *see also In re Marriage of Modnick (1983) 33 Cal. 3d 897, 911, 191 Cal. Rptr. 629, 663 P.2d 187* (burden of proof resting on party asserting fact of reconciliation)]. Pendente lite orders for child and spousal support are not enforceable during any period in which the parties have reconciled and are living together [*Fam. Code § 3602*].

Legal Topics:

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

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18-221 California Forms of Pleading and Practice--Annotated § 221.132

§ 221.132 Finality of Judgment for Purposes of Terminating Marital Status

[1] Six-Month Waiting Period

A judgment of dissolution does not become final for purposes of terminating the marriage relationship of the parties until six months have expired from the date of the first to occur of (a) the service of a copy of the summons and petition on the respondent or (b) the appearance of the respondent [*Fam. Code § 2339(a)*]. The court may extend the six-month period for good cause shown [*Fam. Code § 2339(b)*].

[2] Specification of Date of Finality in Judgment

A judgment of dissolution must specify the date on which the judgment becomes finally effective for purposes of terminating the marriage relationship of the parties [*Fam. Code § 2340*]. On the date of termination of the marital status, the parties are restored to the status of unmarried persons [*Fam. Code § 2343*].

[3] Retention of Jurisdiction Over Date of Termination of Marital Status

On notice and for good cause shown, or on stipulation of the parties, the courtmay retain jurisdiction over the date of termination of the marital status, or may order that the marital status be terminated at a future specified date [*Fam. Code § 2343*]. On the date of termination of the marital status, the parties are restored to the status of unmarried persons [*Fam. Code § 2343*].

[4] Effect of Death of Party

A spouse's death *before* the entry of judgment dissolving the marriage abates a dissolution proceeding and deprives the court of jurisdiction to dissolve the marriage or adjudicate any other issues [*see, e.g., In re Marriage of Hilke (1992) 4 Cal. 4th 215, 220, 14 Cal. Rptr. 2d 371, 841 P.2d 891]* . Thus, the court can make no further orders regarding property rights, spousal support, costs, or attorney's fees [*In re Marriage of Allen (1992) 8 Cal. App. 4th 1225, 1229, 10 Cal.*

Rptr. 2d 916] .

When either party dies *after* a judgment of dissolution has been entered but before it becomes final, however, the party's death does not prevent the judgment from subsequently becoming final [*Fam. Code § 2344(a)*]. But the party's death does not validate any marriage by either party before the judgment became final, nor constitute a defense in any criminal prosecution for bigamy against either party [*Fam. Code § 2344(b)*].

[5] Effect of Appeal or Motion for New Trial

A judgment of dissolution does not become final until final disposition of any appeal taken from the judgment or any motion for a new trial [*Fam. Code § 2341(a)*]. If the motion for new trial is granted or the judgment is reversed, the judgment of dissolution will not become final [*see Fam. Code § 2341(a)*]. Notwithstanding any other provision of law, however, the filing of an appeal or of a motion for new trial does not stay the effect of a judgment insofar as it relates to the dissolution of marriage status and restoring the parties to the status of unmarried persons unless (1) the appealing or moving party specifies in the notice of appeal or motion for new trial an objection to the termination of the marriage status and (2) that party also made the objection at trial [*Fam. Code § 2341(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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§ 221.133 Res Judicata

[1] Application to Judgment of Dissolution

The judgment of dissolution is a binding adjudication of the matters determined by it, including property, support, and attorney's fees awards. Once the judgment is final and the time for appeal has passed, the judgment on these matters is res judicata [*Badillo v. Badillo (1981) 123 Cal. App. 3d 1009, 1011, 177 Cal. Rptr. 56]* . Under the concept of "divisible divorce," however, the division of marital property need not be litigated in the proceeding brought to dissolve the marriage. Instead, controversies over matters collateral to the issue of the dissolution of marriage, such as the division of marital property, the custody of minor children, and, under appropriate circumstances, spousal support, may be litigated at a later date [*see Code Civ. Proc. § 1048(b)*; *Fam. Code § 2550*; *Cal. Rules of Ct., Rule 5.140*; *see, e.g., Irwin v. Irwin (1977) 69 Cal. App. 3d 317, 320, 138 Cal. Rptr. 9]* .

In addition, by express statute, the court has continuing jurisdiction to award community assets or liabilities omitted from the judgment [*Fam. Code § 2556*]. See *§ 221.150* et seq. for discussion of postjudgment motions or orders to show cause to divide unadjudicated assets or liabilities.

[2] Not Applicable to Child Support and Custody Orders

Because they may be modified at any time on a showing of changed circumstances, the doctrine of res judicata is not applicable to the provisions of the judgment concerning child custody and child support [*In re Marriage of Goodarzirad (1986) 185 Cal. App. 3d 1020, 1025, 230 Cal. Rptr. 203* ; *see Fam Code § 3651(a), (d)* (modification of support order)]. In child support and custody matters, the court has continuing jurisdiction. The judgment of dissolution, as it relates to child support and custody, is not final; these matters remain pending, even after the court enters a judgment of dissolution [*In re Marriage of Kreiss (2004) 122 Cal. App. 4th 1082, 1084-1085, 19 Cal. Rptr. 3d 260]* .

[3] Not Applicable to Spousal Support Orders

Generally, spousal support orders included in the judgment may be modified or terminated by the court, unless the parties have agreed otherwise [*see Fam. Code §§ 3591, 3651(a), (d)*]. See discussion of modification and termination of spousal support orders in Ch. 225, *Dissolution of Marriage: Spousal Support* .

[4] Not Applicable in Absence of Fair Hearing

The application of res judicata to bar relitigation of a decision presumes that the parties had a full and fair opportunity to litigate the issues determined by the judgment. That is, the judgment is not res judicata as against a party who, by fraud or other interference not of his or her creation, was prevented from fully presenting his or her case [*see Worton v. Worton (1991) 234 Cal. App. 3d 1638, 1649, 286 Cal. Rptr. 410]* . Res judicata also has not prevented postdissolution litigation concerning the effect of one spouse's warranty in a marital agreement on which the other spouse relied in releasing an interest in a community asset [*In re Marriage of Lane (1985) 165 Cal. App. 3d 1143, 1147, 211 Cal. Rptr. 262]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataFamily LawChild CustodyGeneral OverviewFamily LawChild SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral Overview

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18-221 California Forms of Pleading and Practice--Annotated § 221.134

§ 221.134 Community Property Division in Judgment

[1] Propriety of Immediate Division

Fam. Code § 2550 provides that "the court shall, either in its judgment of dissolution of the marriage ... or at a later time if it expressly reservesjurisdiction to make such a property division, divide the community estate of the parties equally." This language appears to permit a conclusive and immediate disposition of the community property in the judgment unless it is challenged by appeal, or jurisdiction is reserved to divide the property at a later date. Once a judgment of dissolution becomes effective, it normally will control in determining the true ownership of property distributed by the judgment, even if record title remains in the name of another person, assuming that no bona fide purchaser of the property is involved [*see Buic v. Buic (1992) 5 Cal. App. 4th 1600, 1604-1605, 7 Cal. Rptr. 2d 738]* .

[2] Unadjudicated Community Property

The court has continuing jurisdiction to award community estate assets or community estate liabilities to the parties that have not been previously adjudicated by a judgment in the proceeding. The court's continuing jurisdiction over omitted community property assets or debts is invoked by a party's postjudgment motion or order to show cause in the family law proceeding [*Fam. Code § 2556*; *see, e.g., In re Marriage of Graves (1988) 198 Cal. App. 3d 1047, 1050, 1052, 244 Cal. Rptr. 110]* . See Subpart D for discussion of these postjudgment motions or orders to show cause.

[3] Qualified Domestic Relations Orders (QDROs)

If a judgment divides pension or retirement benefits governed by the Employee Retirement Income Security Act (ERISA) [*29 U.S.C. § 1001 et seq.*], it must meet the requirements for a "qualified domestic relations order" (QDRO) [*see 29 U.S.C. § 1056(d)(3)(B)(i)*] to ensure recognition of, and payment pursuant to, the division by the involved employee benefit plan [*see 29 U.S.C. §§ 1056(d)(3)(A), 1144(b)(7)*]. For discussion of the requirements for a QDRO, and a form of stipulated QDRO that may be incorporated into a judgment of dissolution or legal separation, or into a marriage termination agreement, see Ch. 222, *Dissolution of Marriage: Property Division* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionDivisible DivorceFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)Participation & VestingQualified Domestic Relations Orders

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§ 221.135 Spousal Support in Judgment

[1] Temporary Support

An order for temporary spousal support is terminated by expiration under its own terms, issuance of a judgment [*Wilson v. Superior Court (1948) 31 Cal. 2d 458, 462, 189 P.2d 266]* , or dismissal [*Moore v. Superior Court (1970) 8 Cal. App. 3d 804, 810, 87 Cal. Rptr. 620]* . Temporary support payments not terminated by one of these three events continue to accrue even when the action is not being actively prosecuted, and payments that accrue before termination remain enforceable after termination [*Moore v. Superior Court (1970) 8 Cal. App. 3d 804, 810, 87 Cal. Rptr. 620]* .

[2] Permanent Support

An order for permanent spousal support terminates at the end of the period provided in the order, and may not be extended unless the court retains jurisdiction in the order or pursuant to the provisions for a marriage of long duration under *Fam. Code § 4336*. Under that section, in a marriage of long duration, the court retains jurisdiction over spousal support indefinitely, absent a written agreement of the parties or a court order terminating support [*Fam. Code § 4336(a)*]. The statute includes a presumption that ten years or more constitutes a marriage of long duration, but the court is not precluded from determining that a shorter marriage qualifies as of "long duration" [*Fam. Code § 4336(b)*].

A party's obligation under an order for the support of the other party terminates on the death of either party or the remarriage of the other party, except as otherwise agreed by the parties in writing [*Fam. Code § 4337*; *In re Marriage of Cesnalis (2003) 106 Cal. App. 4th 1267, 1271-1276, 131 Cal. Rptr. 2d 436* (husband waived his rights under *Fam. Code § 4337* by agreeing in stipulated judgment that wife's remarriage would not terminate her spousal support)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 221.136 Marital Settlement Agreements and Judgment

A marital settlement agreement is a document that exists separately from the Judicial Council form of Judgment [*see* Cal. Judicial Council Form FL-180]. The agreement may be incorporated into the judgment, and, once incorporated, may be either approved by the court as fair and equitable, or merged into the judgment. A judgment may be based on a marital settlement agreement in the case of either a default proceeding, or a proceeding based on the parties' stipulation for an uncontested judgment [*see Flynn v. Flynn (1954) 42 Cal. 2d 55, 58, 265 P.2d 865]* . The signature of a *defaulting* spouse on any marital settlement agreement must be notarized [*Fam. Code § 2338.5(a)*].

For discussion and forms relating to marital settlement agreements, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Chs. 211- 215 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionProperty Settlements

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§ 221.137 Stipulated Judgment

The Rules of Court provide for a stipulation for judgment that is, in effect, a judgment of dissolution prepared on the mandatory Judicial Council judgment form [Cal. Judicial Council Form FL-180], and approved by both parties and their attorneys [*see Cal. Rules of Ct., Rule 5.116*; *see also Levy v. Superior Court (1995) 10 Cal. 4th 578, 580, 585-586, 41 Cal. Rptr. 2d 878, 896 P.2d 171]* . The stipulation constitutes a written agreement between the parties with regard to all matters covered in the stipulated judgment [*Cal. Rules of Ct., Rule 5.116(b)*; *see Code Civ. Proc. § 664.6*]. If the stipulated judgment is entered into after one partyhas defaulted in the proceeding, the signature of the defaulting spouse must be notarized [*Fam. Code § 2338.5(a)*].

A stipulation for judgment may be submitted to the court for its signature at the time of the hearing on the merits of the proceeding and must contain the exact terms of any judgment to be entered in the case [*Cal. Rules of Ct., Rule 5.116(a)*]. The stipulation for judgment must also include a disposition of all matters subject to the court's jurisdiction for which a party seeks adjudication, or an explicit reservation of jurisdiction by the court over any matter not proposed for disposition at that time [*Cal. Rules of Ct., Rule 5.116(b)*].

A court may also enter a judgment for dissolution based on the parties' oral or written stipulation for settlement pursuant to the statutory provisions for settlement agreements in civil actions generally [*Code Civ. Proc. § 664.6*; *see In re Marriage of Assemi (1994) 7 Cal. 4th 896, 906, 30 Cal. Rptr. 2d 265, 872 P.2d 1190* ; *see also Levy v. Superior Court (1995) 10 Cal. 4th 578, 580, 585-586, 41 Cal. Rptr. 2d 878, 896 P.2d 171* (*Code Civ. Proc. § 664.6* requires signature of parties in order for court to enter judgment pursuant to written settlement)]. Under these provisions, if the stipulation for settlement is oral, it must be made before the court [*Code Civ. Proc. § 664.6*]. An oral stipulation before an arbitrator who actually was fulfilling the role of a temporary judge supervising settlement negotiations meets this requirement [*see In re Marriage of Assemi (1994) 7 Cal. 4th 896, 906, 30 Cal. Rptr. 2d 265, 872 P.2d 1190* (regardless of title, retired judge was serving as temporary judge in these circumstances)].

A judgment may not be entered based on a written settlement agreement unless the agreement has been signed by the

parties. An agreement signed only by the parties' attorneys is insufficient [*Levy v. Superior Court (1995) 10 Cal. 4th 578, 580, 585, 586, 41 Cal. Rptr. 2d 878, 896 P.2d 171* ; *Williams v. Saunders (1997) 55 Cal. App. 4th 1158, 1163-1164, 64 Cal. Rptr. 2d 571]* . In a multiparty action, in which some parties agreed to a settlement orally and some parties agreed to the settlement in writing, it was held that nothing in the statutory language suggests that *all parties* must agree to the settlement *in the same manner*. As long as the parties agree to the *same material terms*, be it orally or in writing, the purpose of *Code Civ. Proc. § 664.6* is satisfied [*Elyaoudayan v. Hoffman (2003) 104 Cal. App. 4th 1421, 1430, 129 Cal. Rptr. 2d 41]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 221.138 Procedure for Obtaining Judgment

[1] Governing Law

In actions for dissolution of marriage, the court must file its decision and any statement of decision as in other cases [*Fam. Code § 2338(a)*; *see Code Civ. Proc. § 632*; *Cal. Rules of Ct., Rules 3.1590, 5.22*]. If the court determines that a dissolution should be granted, a judgment of dissolution must be entered [*Fam. Code § 2338(c)*].

[2] Submission and Signing of Proposed Judgment

When a written statement of decision is requested in a contested proceeding, a copy of a proposed judgment of dissolution must be submitted to the court and served with the proposed statement of decision [*see Fam. Code § 2338* (statement of decision); *Cal. Rules of Ct., Rule 3.1590(c)* (preparation and service of proposed statement of decision and judgment), *Cal. Rules of Ct., Rule 3.1590(h)* (rule as not applying when trial completed within one day)]. The proposed judgment that is submitted to the court and served on the parties with the proposed statement of decision must be on the mandatory Judicial Council printed form of judgment of dissolution of marriage [*see* Cal. Judicial Council Form FL-180]. For an illustrative Judicial Council form of judgment, *see § 221.392*.

In a contested dissolution in which a written statement of decision is not required, the time within which a proposed judgment must be prepared depends on the reason a statement is not required. When a statement of decision is not required because it is not requested, the court must prepare and mail a proposed judgment to all parties who appeared at the trial within 10 days after the expiration of the time for requesting a statement of decision; if not required because it has been waived, the court must prepare and mail a proposed judgment to all parties who appeared at the trial within 10 days of the time of waiver [*Cal. Rules of Ct., Rule 3.1590(e)*].

Instead of preparing the proposed judgment itself, the court in a contested proceeding in which a statement of a decision is not required may notify the counsel for a party to prepare a proposed judgment. In such cases, counsel has 10 days after notice to prepare, serve on opposing counsel, and submit to the court for approval a proposed judgment of

dissolution of marriage [*Cal. Rules of Ct., Rule 3.1590(e)*].

See *§ 221.10* et seq. for discussion of submission and signing of proposed judgments in uncontested proceedings.

[3] Objections to Proposed Judgment; Signing and Filing

In a contested dissolution proceeding in which written findings are not required, any party affected by the judgment may serve and file objections to it within 10 days after service of the proposed judgment on him or her [*Cal. Rules of Ct., Rule 3.1590(e)*]. The court may order a hearing on the objections [*Cal. Rules of Ct., Rule 3.1590(f)*]. Within 10 days after expiration of the time for filing objections to the proposed judgment or, if a hearing is held, within 10 days after the hearing, the court must sign and file its judgment of dissolution of marriage [*Cal. Rules of Ct., Rule 3.1590(e)*].

[4] Service of Final Declaration of Disclosure

Absent good cause, no judgment shall be entered regarding the parties' propertyrights without each party having executed and served a copy of the final declaration of disclosure and current income and expense declaration, unless the parties have stipulated to waive the requirements for the final declaration, or the court for good cause has dispensed with those requirements. Each party must execute and file with the court a declaration stating, under penalty of perjury, that service of these documents was made on the other party, or that service of the final declaration has been waived [*Fam. Code § 2106*]. For further discussion of the final declaration of disclosure and applicable forms, see *§ 221.40* et seq.

[5] Entry of Judgment

Once the judgment is signed by the court and filed with the court clerk, the clerk must immediately enter the signed judgment in the the court's records [*see Code Civ. Proc. §§ 664, 668, 668.5*]. There is no record of a judgment until it is entered by the clerk [*see Brown v. Barham (1966) 242 Cal. App. 2d 696, 702, 51 Cal. Rptr. 718]* .

[6] Notice of Entry of Judgment

[a] Notice to Parties

The party who submits a judgment for signature by the court must also submit the following [*Fam. Code § 2338.5(c)*; *Cal. Rules of Ct., Rule 5.136(a)*]:

(1) An original and at least two copies of the Judicial Council form of notice of entry of judgment [*see* Cal. Judicial Council Form FL-190]; and

(2) Two stamped envelopes addressed to the parties, with the court clerk's address listed as the return address.

For an illustrative reproduction of the form, *see § 221.393*.

Once the judgment has been signed and entered in the court records, the clerk of the court must give notice of entry of judgment to the attorney for each party to the proceeding, or to the party directly if he or she is self-represented [*Fam. Code § 2338.5(b)*; *Cal. Rules of Ct., Rule 5.134(a)*]. The court will use the notice forms and envelopes supplied by the attorney submitting the judgment for signature to give notice of entry of the judgment.

[b] Notice to Insurer

Notice to a health, life, or disability insurer may be necessary when a judgment is entered in a proceeding for dissolution, legal separation, or annulment that requires a party to do either of the following [*Fam. Code § 2051*]:

(1) Maintain existing health, life, or disability insurance coverage for a spouse or children; or

(2) Purchase life or disability insurance and name the spouse or children as beneficiaries.

A party may give the notice, or the court may order that notice be given [*Fam. Code § 2051*]. On receipt of the name, title, and address of the insurer, or the name of the plan's trustee, administrator, or agent for service of process, a party may transmit to, or the court may order transmittal to, the insurer or plan a copy of the judgment endorsed by the court, together with a notice substantially in the form set forth in *Fam. Code § 2051*.

Because the statute does not specify the method by which the notice should be "transmitted" to the carrier [*see Fam. Code § 2051*], it appears that it may be sent in accordance with the Code of Civil Procedure provisions generally applicable to notices in legal proceedings, including service by mail [*see Code Civ. Proc. § 1010 et seq.*].

For a form notice to insurer, *see § 221.394*.

[7] Judgment of Legal Separation

The superior court may enter a judgment of legal separation of the parties to a marriage on the same grounds as those for dissolution of the marriage [*see Fam. Code § 2310*; *see also* discussion in *§ 221.10* et seq.]. Both parties must consent to entry of a judgment of legal separation before the court may render judgment. Absent both parties' consent, the court may not enter a judgment of legal separation unless one party has not made a general appearance in the proceeding and the petition is for legal separation and not for dissolution of marriage [*Fam. Code § 2345*].

A judgment of legal separation of the parties must be prepared and submitted to the court on the same form prescribed by the Judicial Council for judgments of dissolution of marriage [*see* Cal. Judicial Council Form FL-180].

There is no waiting period before a judgment of legal separation becomes final, as there is for a judgment of dissolution; the decree of legal separation is effective immediately on entry [*cf. Fam. Code §§ 2333, 2339*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportLegal Separation

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[Reserved]

§§ 221.139[Reserved]

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§ 221.150 Motion for New Trial

[1] Availability in Family Code Proceeding

The procedures for seeking a new trial in a civil action after an adverse judgment apply to and may be invoked by a party to any proceeding under the Family Code [*see Fam. Code § 210* (in absence of Judicial Council rule or other statutory provision, rules of practice and procedure governing civil actions generally apply to proceedings under Family Code); *Cal. Rules of Ct., Rule 5.22* (same)]. A motion for new trial is proper whether the judgment being attacked by the motion is based on law or facts or both. For purposes of a motion for new trial, a hearing on a motion may in some cases be regarded as a trial if a decision was reached on the merits of opposing claims after presentation of evidence and legal argument [*see, e.g., In re Marriage of Beilock (1978) 81 Cal. App. 3d 713, 720-721, 146 Cal. Rptr. 675]* .

However, a party may not file and serve a notice of intention to move for a new trial when the court has merely entered a "tentative decision." A tentative decision does not constitute a judgment and is not binding on the court [*Cal. Rules of Ct., Rule 3.1590(a)*; *In re Marriage of Hafferkamp (1998) 61 Cal. App. 4th 789, 793-794, 71 Cal. Rptr. 2d 761* ; *see § 221.232[8]*].

[2] Grounds for New Trial Motion

A motion for new trial in a family law proceeding must be made on any of the following six statutory grounds [*see Code Civ. Proc. §§ 657, 657.1*; *see also Fomco, Inc. v. Joe Maggio, Inc. (1961) 55 Cal. 2d 162, 166, 10 Cal. Rptr. 462, 358 P.2d 918* (trial court has no discretionary power to grant motion)]:

> (1) Irregularity in the proceedings of the court or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial; [*see Christie v. City of El Centro (2006) 135 Cal. App. 4th 767, 780-781, 37 Cal. Rptr. 3d 718* (judge's misconduct is irregularity in proceedings, including judge's discussion of case with previously disqualified judge); *Travelers Cas. & Sur. Co. v. Superior Court (2005) 126 Cal. App. 4th 1131, 1145, 24 Cal. Rptr. 3d 751* (under *Code Civ. Proc. § 1775.12* and *Evid. Code § 1128*, any reference to mediation during subsequent proceedings

is irregularity in proceedings and grounds for new trial)]

(2) Accident or surprise that ordinary prudence could not have guarded against [*see In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 154-155, 242 Cal. Rptr. 649]* ;

(3) Newly discovered evidence material to the party making the application that he or she could not with reasonable diligence have discovered and produced at the trial [*see Sherman v. Kinetic Concepts, Inc. (1998) 67 Cal. App. 4th 1152, 1161, 79 Cal. Rptr. 2d 641* ; *In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 153, 242 Cal. Rptr. 649]* ;

(4) Insufficiency of the evidence to justify the court's decision, or the decision is "against law";

(5) Error in law occurring at the trial and excepted to by the party moving for a new trial; and/or

(6) Impossibility of transcription of the reporter's record of the trial due to the reporter's death or disability, or to loss or destruction of the record before transcription.

The parties are not entitled to a new trial based on their failure to exchange final declarations of disclosure absent a showing of a miscarriage of justice [*In re Marriage of Steiner & Hosseini (2004) 117 Cal. App. 4th 519, 522, 528, 11 Cal. Rptr. 3d 671]* .

An appellate court will rarely disturb an order granting a new trial, and then only on a clear showing of abuse of discretion [*In re Marriage of Beilock (1978) 81 Cal. App. 3d 713, 728, 146 Cal. Rptr. 675]* . On appeal from an order granting a new trial, the order generally will be affirmed if it should have been granted on any ground stated in the motion for new trial regardless of whether that ground is specified in the order granting the motion [*Code Civ. Proc. § 657*; *see In re Marriage of Beilock (1978) 81 Cal. App. 3d 713, 727-728, 146 Cal. Rptr. 675]* .

For further discussion of and forms of motion for a new trial, see *Ch. 371, Motions After Trial, § 371.60* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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§ 221.151 Motion to Vacate Judgment and Enter Different Judgment

[1] Grounds for Motion

A judgment or decree based on a decision of the court may be set aside and vacated on motion of the aggrieved party and another and different judgment entered when there was an incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts [*Code Civ. Proc. § 663*; *Craven v. Crout (1985) 163 Cal. App. 3d 779, 782-783, 209 Cal. Rptr. 649]* . Such a judgment is, of course, subject to reversal on appeal, but a motion to vacate is a quicker and less expensive remedy. The moving party must show the inconsistency materially affected his or her substantial rights and entitled him or her to a different judgment [*Code Civ. Proc. § 663*; *cf. In re Marriage of Jones (1998) 60 Cal. App. 4th 685, 694, 70 Cal. Rptr. 2d 542* (court not required to vacate dissolution judgment for party's failure to execute and serve final disclosure declaration before trial; judgment reversible only if reasonably probable that more favorable result would have been reached absent erroneous entry of judgment contrary to disclosure statute)].

The party intending to make a motion to vacate a judgment and have another judgment entered must timely file and serve a notice of intention to do so that should designate the grounds on which the motion will be made and specify the particulars in which the legal basis for the decision is not consistent or supported by the facts, or in which the judgment or decree is not consistent with the special verdict [*Code Civ. Proc. § 663a*].

For general forms pertaining to motions to vacate a judgment under *Code Civ.Proc. §§ 663* and *663a* that may be adapted for use in a family law proceeding, see *Ch. 371, Motions After Trial, § 371.90* et seq.

[2] Ruling on Motion to Vacate

Ordinarily, the judge who presided at the trial is the judge who hears and determines a motion to vacate judgment under *Code Civ. Proc. § 663* [*Cal. Rules of Ct., Rule 3.1602*]. When the motion is granted, the court must vacate and set aside the judgment already entered, and also enter another and different judgment [*see Code Civ. Proc. § 663*]. Thus, in a case in which the trial court made an order granting the motion and vacating the judgment already entered without directing the entry of a new and different judgment, the court's order was void [*see, e.g., Dolan v. Superior Court (1920) 47 Cal.*

App. 235, 241, 190 P. 469] .

An order granting a motion to vacate a judgment and enter another and different judgment may be reviewed on appeal in the same manner as a special order made after final judgment [*Code Civ. Proc. § 663a*; *cf. In re Marriage of Wickander (1986) 187 Cal. App. 3d 1364, 1367, 232 Cal. Rptr. 621* (special order after judgment as probably not subject to motion to vacate); *but see Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian (1990) 218 Cal. App. 3d 1058, 1076, 267 Cal. Rptr. 457* (denial will be affirmed if any applicable ground will sustain order of denial)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 221.152 Motion to Set Aside Default and Default Judgment

[1] Improper Service of Summons

The respondent's default cannot be entered unless he or she fails to enter an appearance within the time permitted to respond to the petition [*see Cal. Rules of Ct., Rule 5.122(a)*], which ordinarily is 30 days from the date of service of a copy of the petition and summons [*Fam. Code § 2020*]. Thus, a respondent's default may not be entered, nor may judgment be entered by reason of his or her default, if he or she enters a general appearance or unless has been properly served with a copy of the summons and petition in the proceedings and the court acquires jurisdiction [*see Fam. Code § 2020*; *Cal. Rules of Ct., Rule 5.122(a)*; *Sakaguchi v. Sakaguchi (2009) 173 Cal. App. 4th 852, 858, 92 Cal. Rptr. 3d 717* (compliance with statutory requirements for service of summons is prerequisite to valid default judgment). A default that is entered prematurely (i.e., before the expiration of the respondent's time to plead) is invalid, and any judgment entered on the invalid default is void [*see Schwab v. Southern Cal. Gas Co. (2004) 114 Cal. App. 4th 1308, 1320, 8 Cal. Rptr. 3d 627]* .

For further discussion of service of summons and the entry of defaults in uncontested family law proceedings, see *§ 221.10* et seq.

[2] Violation of Servicemembers Civil Relief Act and Related California Law

Even if the summons and petition are properly served on the respondent, he or she may be able to have a default set aside for violation of the Servicemembers Civil Relief Act (*50 U.S.C. App. § 501 et seq.*). Under this Act, the judge in an action or proceeding in any court involving a person in military service must stay the proceedings on application of the person in military service or on its own motion unless the ability of the plaintiff to prosecute the action or the defendant to conduct his or her defense is not materially affected by reason of his or her military service [*50 U.S.C. App. § 522(b)*; *see George P. v. Superior Court (2005) 127 Cal. App. 4th 216, 223-226, 24 Cal. Rptr. 3d 919* (90-day stay of proceedings is required, but it is within judge's discretion to grant motion for additional stay); *Louis J. v. Superior Court (2002) 103 Cal. App. 4th 711, 716, 127 Cal. Rptr. 2d 26* (judge may deny stay when purpose of request for stay is not to postpone hearing until service member is free to attend and participate in hearing, but is instead to give service

member time to be in better position to contest or respond to proceedings); *Christine M. v. Superior Court (1999) 69 Cal. App. 4th 1233, 1244-1245, 82 Cal. Rptr. 2d 220* (in dependency proceeding, court properly denied request for stay by father who was in military because he never expressed any intent to act as parent to child who was subject of proceeding)]. The Act also requires that before any default judgment may be entered, including a case in state court, the plaintiff must file an affidavit setting forth facts showing the defendant is not in military service, or the court itself must order the default judgment entered [*50 U.S.C. App. § 521(b)(1)*; *see Cal. Rules of Ct., Rules 5.124*; *see also* Cal. Judicial Council Form FL-165]. Furthermore, the court must appoint an attorney to represent a defendant in military service before it can order a default judgment entered [*50 U.S.C. App. § 521(b)(2)*].

For further discussion and forms relating to the Servicemembers Civil Relief Act, see Ch. 489, *Relief From Judgments and Orders* .

In addition to the federal act, California legislation contains protections from defaults for persons called into active military service [*see Mil. & Vet. Code § 400 et seq.* (applicable to reservists and National Guard members called to active service)]. It provides, in part, for:

- A declaration that must be filed in every action or proceeding concerning a respondent's military service status (with attendant protections if the respondent is on active duty) [*see Mil. & Vet. Code § 402(a), (c)*];

- Reopening a judgment within a limited time period to allow a service member to defend an action if he or she was prejudiced by the military service and the application to reopen states a meritorious or legal defense (however, rights of bona fide purchasers for value are not to be impaired)[*see Mil. & Vet. Code § 402(d)*];

- Stay of an action or proceeding in which a service member is involved, unless the petitioner's ability to bring the action or the respondent's ability to conduct a defense is not materially affected by the military service [*see Mil. & Vet. Code § 403(a)*];

- Stay of the execution of a judgment or order, or vacation or stay of any attachment or garnishment of property, money, or debts in another's hands, unless the ability of the service member to comply is not materially affected by the military service [*see Mil. & Vet. Code § 403(c)*]; and

- Permitting a service member to apply for relief (during the period of service or within six months thereafter) from any obligation or liability incurred prior to his or her period of military service or regarding any tax or assessment, whether coming due before or during the service period [*see Mil. & Vet. Code § 409.3(a)*]. This last provision does not permit a service member to obtain a delay, deferment, or stay of an obligation to pay child support; but the service member retains the right to (1) seek a modification of a child support order due to a reduction in income resulting from the order to active service, or (2) to seek the imposition of a special statutory limit (six percent) on interest on obligations, including on arrearages in child support payments existing prior to the order to enter into active service [*see Mil. & Vet. Code §§ 405, 409.3(a), (c)*].

[3] Mistake, Inadvertence, Surprise, or Excusable Neglect

The court, on such as may be just, may relieve a party, or his or her legal representative, from an adverse judgment, dismissal, order, or other proceeding on the grounds of mistake, inadvertence, surprise, or excusable neglect [*Code Civ. Proc. § 473(b)*; *see, e.g., In re Marriage of Hock & Gordon-Hock (2000) 80 Cal. App. 4th 1438, 1443-1444, 96 Cal. Rptr. 2d 546* (mandatory relief provision of *Code Civ. Proc. § 473(b)* applies when circumstances of case are procedural equivalent of default)]. Relief from default is mandatory when an affidavit of fault by the defaulting party's attorney is

filed, even if the attorney's neglect was inexcusable [*Solv-All v. Superior Court (2005) 131 Cal. App. 4th 1003, 1008, 32 Cal. Rptr. 3d 202]* . The mandatory relief provision applies, when the error resulting in the default was made by a paralegal and not the attorney; a paralegal's mistake is attributable to the attorney who is responsible for supervising the paralegal [*Hu v. Fang (2002) 104 Cal. App. 4th 61, 64-65, 127 Cal. Rptr. 2d 756*]. Mandatory relief under *Code Civ. Proc. § 473(b)* is available when the attorney's action or inaction caused the default, even when the client was also at fault [*SJP Ltd. Partnership v. City of Los Angeles (2006) 136 Cal. App. 4th 511, 519-520, 39 Cal. Rptr. 3d 55]* . A judge may deny relief only if the judge finds that the default was not in fact the attorney's fault, for example, when the attorney is simply covering up for the client [*Rodrigues v. Superior Court (2005) 127 Cal. App. 4th 1027, 1033, 26 Cal. Rptr. 3d 194]* .

Relief under the discretionary provision of *Code Civ. Proc. § 473(b)* is available only on a showing by a preponderance of the evidence that the failure to file a timely responsive pleading was reasonable when tested by an objective, reasonably prudent person standard [*see Renteria v. Juvenile Justice, Dept. of Corrections and Rehabilitation (2006) 135 Cal. App. 4th 903, 909-910, 37 Cal. Rptr. 3d 777* ("excusable neglect" means act or omission that might be expected of prudent person under similar circumstances)].

Ordinarily an application for relief from a default judgment for mistake, inadvertence, surprise, or excusable neglect is made by notice of motion served on counsel for plaintiff or petitioner and filed with the court. Service must be made on the party, however, if the motion is made after entry of a judgment decreeing the dissolution of the marriage or the legal separation of the parties, or after a declaration of void or voidable marriage or paternity, or after a permanent order in any other proceeding in which the custody or support of a minor child was at issue [*Fam. Code § 215*; *see In re Marriage of Kreiss (1990) 224 Cal. App. 3d 1033, 1036-1039, 274 Cal. Rptr. 226* ; *but see In re Marriage of Askren (1984) 157 Cal. App. 3d 205, 203 Cal. Rptr. 606* (statutory provision for service on party personally does not prevent service of post-decree show cause orders on respondent's attorney of record when attorney had just moved to terminate support on behalf of out-of-state respondent and respondent personally appeared at hearing on orders; representation difficulties that statute enacted to eliminate were not present and respondent waived any defects in service by personal appearance)].

A *Code Civ. Proc. § 473(b)* motion is within the group of motions for which an extension of time to file an appeal from an underlying judgment may be authorized under the California Rules of Court. But in order to extend the jurisdictional time for filing a *notice of appeal* from an underlying judgment, the Section 473(b) motion must itself have been timely in the context of the Court Rules. Accordingly, although *Code Civ. Proc. § 473(b)* provides that a motion under that statute must be made "within a reasonable time, not exceeding six months after the judgment," in order to also extend the time for filing a notice of appeal from the underlying judgment the Section 473(b) motion must be filed within the more limited parameters of the Rules of Court--that is, within the usual 60-day period from mailing or service of entry of judgment. Thus, the *outside* time limit for filing a notice of appeal remains 180 days after entry of judgment in all cases; and authorized extensions of the filing period will not extend the appeal deadline beyond this limit [*In re Marriage of Eben-King & King (2000) 80 Cal. App. 4th 92, 113, 95 Cal. Rptr. 2d 113* ; *see Cal. Rules of Ct., Rules 8.104, 8.108*].

For general discussion and forms pertaining to Section 473(b) motions that maybe adapted for use in a family law proceeding, see Ch. 489, *Relief From Judgments and Orders* .

If relief is sought from a family law judgment after the six-month time limit for relief specified in *Code Civ. Proc. § 473(b)*, has passed, the motion must be made on the grounds and within the time limits provided in *Fam. Code § 2120 et seq.*, as discussed in *§ 221.153* [*Fam. Code §§ 2120(d), 2121(a)*].

Legal Topics:

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

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§ 221.153 Family Code Motion to Set Aside Judgment

[1] Availability

Equitable motions to set aside a judgment concerning support or the division of property in a family law proceeding are governed by *Fam. Code § 2120 et seq.* In proceedings for dissolution of marriage, for nullity of marriage, or for legal separation of the parties, the court may, on any terms that may be just, relieve a spouse from a judgment, or any part or parts of the judgment, adjudicating support or division of property, after the six-month time limit of *Code Civ. Proc. § 473(b)*, has run, based on the grounds and within the time limits provided in *Fam. Code § 2120 et seq.* [*Fam. Code § 2121(a)*; *see Fam. Code § 2120* (legislative findings and declarations regarding finality of and relief from judgments); In re marriage of *Kieturakis (2006) 138 Cal. App. 4th 56, 87, 41 Cal. Rptr. 3d 119* (after expiration of six-month time limit of *Code Civ. Proc. § 473(b)*, party is limited to grounds for relief specified in *Fam. Code § 2122*); *see § 221.152[3]*].

The provisions of *Fam. Code § 2120 et seq.* apply to judgments entered on or after January 1, 1993 [*Fam. Code § 2129*]. These statutory provisions effectively preempt a large body of prior case law allowing equitable set-aside relief in cases of extrinsic fraud [*see Fam. Code §§ 2120, 2121(a)*; *cf. Hoversten v. Superior Court (1999) 74 Cal. App. 4th 636, 640, 88 Cal. Rptr. 2d 197* ; *In re Marriage of Stevenot (1984) 154 Cal. App. 3d 1051, 202 Cal. Rptr. 116]* . However, because of the operative date of *Fam. Code § 2120 et seq.*, prior law will continue to have importance with respect to pre-1993 judgments [*see, e.g., Kuehn v. Kuehn (2000) 85 Cal. App. 4th 824, 831-833, 102 Cal. Rptr. 2d 743* (dissolution judgment entered in 1990 was not subject to *Fam. Code § 2120 et seq.*; thus plaintiff successfully pled under traditional rules of equitable set-aside that defendant had prevented her from fully presenting her case by telling her that his counsel represented them both); *In re Marriage of Grissom (1994) 30 Cal. App. 4th 40, 48-50, 35 Cal. Rptr. 2d 530* (decided on basis of traditional analysis of extrinsic fraud); *see also Dale v. Dale (1998) 66 Cal. App. 4th 1172, 1179, 1179 n.5, 78 Cal. Rptr. 2d 513* (permitting postjudgment tort action to go forward for 1988 judgment, but declining to rule on effect of *Fam. Code § 2120 et seq.* on efficacy of such action for judgments entered on or after January 1, 1993)].

[2] Preliminary Finding of Materiality

Before granting relief under *Fam. Code § 2120 et seq.*, the court must find that the facts alleged as the grounds for relief materially affected the original outcome and that the moving party would materially benefit from the granting of the relief [*Fam. Code § 2121(b)*].

[3] Grounds and Time Limits for Set-Aside Motion

The exclusive grounds and applicable time limits for a motion to set aside a judgment, or any part or parts of a judgment, are as follows [*Fam. Code §§ 2121(a), 2122*; *see In re Marriage of Rosevear (1998) 65 Cal. App. 4th 673, 684, 76 Cal. Rptr. 2d 691* (*Fam. Code § 2122* sets out exclusive grounds and time limits for motion to set aside marital dissolution judgment)]:

- Actual fraud if the defrauded party was kept in ignorance or in some other manner, other than his or her own lack of care or attention, was fraudulently prevented from fully participating in the proceeding. An action or motion based on fraud must be brought within one year after the date on which the complaining party either did discover, or should have discovered, the fraud, but not when a party merely begins to suspect the fraud [*Rubenstein v. Rubenstein (2000) 81 Cal. App. 4th 1131, 1148-1149, 97 Cal. Rptr. 2d 707* ; *but cf. Kuehn v. Kuehn (2000) 85 Cal. App. 4th 824, 830-831, 102 Cal. Rptr. 2d 743* (judgment made before January 1, 1993, was not subject to one-year time limitation of Family Code; plaintiff brought her equitable set aside action with reasonable diligence after learning of defendant's fraud seven years after dissolution judgment)];

- Perjury. An action or motion based on perjury in the preliminary or final declaration of disclosure [*see Fam. Code § 2100 et seq.*] or in the current income and expense statement [*see Fam. Code § 3664*; Cal. Judicial Council Form FL-150] must be brought within one year after the date on which the complaining party either did discover, or should have discovered, the perjury;

- Duress. An action or motion based on duress must be brought within two years after the date of entry of judgment;

- Mental incapacity [*cf. Zastrow v. Zastrow (1976) 61 Cal. App. 3d 710, 716, 132 Cal. Rptr. 536]* . An action or motion based on mental incapacity must be brought within two years after the date of entry of judgment; or

- Mistake, either mutual or unilateral, whether mistake of law or mistake of fact, regarding stipulated or uncontested judgments or that part of a judgment stipulated to by the parties [*Fam. Code § 2122(e)*; *In reMarriage of Brewer and Federici (2001) 93 Cal. App. 4th 1334, 1346-1349, 113 Cal. Rptr. 2d 849* (mistake of fact); *In re Marriage of Fell (1997) 55 Cal. App. 4th 1058, 1063, 64 Cal. Rptr. 2d 522* (mistake of law on face of disclosure declarations); *In re Marriage of Varner (1997) 55 Cal. App. 4th 128, 144, 63 Cal. Rptr. 2d 894* (failure to disclose existence or value of community asset is basis for set aside on grounds of mistake)]. However, subsequent changes in the law that cause a prior division of assets or liabilitites to become inequitable or a prior award of support to become inadequate would probably not allow a set-aside based on mistake [*see Fam. Code § 2123*; *In re Marriage of Alexander (1989) 212 Cal. App. 3d 677, 681, 261 Cal. Rptr. 9* ; *cf. In re Marriage of Olsen (1994) 24 Cal. App. 4th 1702,1706-1707, 30 Cal. Rptr. 2d 306* (case law prior to enactment of *Fam. Code § 2120 et seq.* allowed equitable set-aside of 1989 order terminating spousal support without retaining jurisdiction when unforeseen amendment to federal law on military retirement benefits destroyed effect of order); *see § 221.153[4]*]. An action or motion based on mistake must be brought within one year after the date of entry of judgment.

- Failure to comply with the disclosure requirements of *Fam. Code §§ 2100-2113*.

The motion must be brought within the time appropriate to the ground alleged, or be forever barred, notwithstanding the fact that, under prior law, the passage of time could affect the right to equitable set-aside relief only when laches was asserted as a defense when the moving party had unreasonably delayed seeking relief [*see In re Marriage of Modnick (1983) 33 Cal. 3d 897, 911, 191 Cal. Rptr. 629, 663 P.2d 187]* .

An illustrative form of declaration in support of a motion to set aside a judgment under *Fam. Code § 2120 et seq.* is set forth in *see § 221.410*.

[4] Ruling on Set-Aside Motion

When ruling on an action or motion to set aside a judgment, the court must set aside only those provisions materially affected by the circumstances leading to the court's decision to grant relief. However, the court has discretion to set aside the entire judgment, if necessary, for equitable considerations [*Fam. Code § 2125*; *see In re Marriage of Brewer and Federici (2001) 93 Cal. App. 4th 1334, 1346-1349, 113 Cal. Rptr. 2d 849* (stipulated dissolution judgment and marital settlement agreement set aside based on husband's unilateral mistake, because wife undervalued her pension plans)]. As applied to declarations of disclosure, a court *may* limit the set aside to those portions of the judgment that were materially affected by the nondisclosure [*Fam. Code § 2105(c)*; *see In re Marriage of McLaughlin (2000) 82 Cal. App. 4th 327, 336-337, 98 Cal. Rptr. 2d 136* (judgment must be set aside for failure to comply with disclosure requirements only when complaining party demonstrates miscarriage of justice); *see also In re Marriage of Fell (1997) 55 Cal. App. 4th 1058, 64 Cal. Rptr. 2d 522]* .

Notwithstanding any other provision of *Fam. Code § 2120 et seq.* or any other law, a judgment may not be set aside simply because the court finds that it was inequitable when made, nor simply because subsequent circumstances caused the division of assets or liabilities to become inequitable, or the support to become inadequate [*Fam. Code § 2123*; *see In re Marriage of Heggie (2002) 99 Cal. App. 4th 28, 33, 120 Cal. Rptr. 2d 707* ; *In re Marriage of Rosevear (1998) 65 Cal. App. 4th 673, 684, 76 Cal. Rptr. 2d 691* ; *In re Marriage of Alexander (1989) 212 Cal. App. 3d 677, 681, 261 Cal. Rptr. 9* ; *cf. In re Marriage of Olsen (1994) 24 Cal. App. 4th 1702, 1706-1707, 30 Cal. Rptr. 2d 306* (case law prior to enactment of *Fam. Code § 2120 et seq.* allowed equitable set-aside of 1989 order terminating spousal support without retaining jurisdiction when unforeseen amendment to federal law on military retirement benefits destroyed effect of order)].

The negligence of an attorney is not imputed to a client to bar an order setting aside a judgment unless the court finds that the client knew, or should have known, of the attorney's negligence and unreasonably failed to protect himself or herself [*Fam. Code § 2124*]. However, attorney negligence is not, itself, one of the specified grounds for setting aside a judgment. Thus, even though an attorney's negligence is not imputed to a client so as to bar an order setting aside a judgment, there must otherwise be a basis for the set aside under *Fam. Code § 2120 et seq.* [*In re Marriage of Rosevear (1998) 65 Cal. App. 4th 673, 686, 76 Cal. Rptr. 2d 691]* .

If a timely request is made, the court must render a statement of decision when the court has resolved controverted factual evidence [*Fam. Code § 2127*; *see* discussion of statements of decision in § 221.110 et seq.].

[5] Property Division After Set-Aside

Once a judgment or part of a judgment has been set aside, the date of valuation for the affected assets and liabilities is "subject to equitable considerations" [*Fam. Code § 2126*]. Thus, the assets and liabilities subject to the set-aside judgment need not be valued as of the date of the new trial. As to the assets and liabilities subject to the set-aside, the court must make an equal division, unless it finds on good cause shown that the interests of justice require an unequal division [*Fam. Code § 2126*].

[6] Other Rights and Remedies Unaffected

Nothing in *Fam. Code § 2120 et seq.* prohibits a party from seeking relief under *Fam. Code § 2556* [*Fam. Code § 2128(a)*], which gives the court continuing jurisdiction to divide assets or liabilities left unadjudicated by thejudgment, rather then seeking to have the judgment set aside [*see Fam. Code § 2556*, and discussion in *§ 221.156[1]* et seq.]. A family law court is also not restricted from acting as a court of equity [*Fam. Code § 2128(c)*].

Fam. Code § 2120 et seq. applies only to relief from a judgment. When a marital settlement agreement has not been merged or incorporated into a judgment, relief from the agreement is available under conventional contract remedies [*see Fam. Code § 2128(b)*]. *Fam. Code § 2120 et seq.* does not address what happens when the marital settlement agreement has been merged or incorporated into the judgment. Under judicial precedent, in such a situation the moving party must specifically request that both the judgment and the underlying agreement be vacated [*see, e.g., In re Marriage of Testa (1983) 149 Cal. App. 3d 319, 322, 196 Cal. Rptr. 780]* .

Furthermore, nothing in *Fam. Code § 2120 et seq.* limits existing law with respect to modification or enforcement of support orders [*Fam. Code § 2128(d)*; *see* discussion of modification of orders in *§ 221.180* et seq., and discussion of enforcement in Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies,* and Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*].

The rights of an aggrieved spouse seeking equitable set-aside of a property judgment lie solely against the other spouse. Intervening lessees, purchasers, or encumbrancers who acquire the parties' community or quasi-community real property for value and without notice of adverse claims are unaffected by a proceeding to set aside a judgment under *Fam. Code § 2120 et seq.* [*see Fam. Code § 2128(e)*].

[7] Appeal Period Not Extended

The provisions of *Fam. Code § 2120 et seq.* do not operate to supersede the rules governing the timing of a notice of appeal, or to extend the period for filing a notice of appeal from a family law judgment or order [*In re Marriage of Eben-King & King (2000) 80 Cal. App. 4th 92, 109, 95 Cal. Rptr. 2d 113]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 221.154 Postjudgment Tort Action for Concealment of Community Assets

One reported decision has held that in the absence of a pending marital dissolution proceeding, a plaintiff who contends that he or she suffered injury as the result of tortious concealment of community assets--thereby preventing the plaintiff from fully presenting his or her case in the dissolution proceeding--may bring a subsequent tort action based on the alleged concealment [*Dale v. Dale (1998) 66 Cal. App. 4th 1172, 1175, 1187, 78 Cal. Rptr. 2d 513]* . That court, however, expressly declined to rule on the effect of *Fam. Code § 2120 et seq.* on the availability of such a tort remedy, because the judgment at issue was entered in 1988, and the provisions of *Fam. Code § 2120 et seq.* apply to judgments entered on or after January 1, 1993, as discussed in *§ 221.156[1]* [*Dale v. Dale (1998) 66 Cal. App. 4th 1172, 1179, 1179 n.5, 78 Cal. Rptr. 2d 513]* .

However, the effect of *Dale* has been severely eroded by subsequent case law. One appellate court expressly declined to follow *Dale* as it "clearly was a major departure from existing law." That case held that if a dissolution judgment is obtained by extrinsic fraud, such as the concealment of community assets, the only remedy available to the plaintiff is to seek equitable relief to vacate the judgment, not to sue in tort [*Kuehn v. Kuehn, (2000) 85 Cal. App. 4th 824, 834, 102 Cal. Rptr. 2d 743]* . And another case held that a tort remedy applies, if at all, only with respect to judgments entered before January 1, 1993--the operative date of the remedies provided under *Fam. Code § 2120 et seq.* [*Rubenstein v. Rubenstein (2000) 81 Cal. App. 4th 1131, 1146-1148, 97 Cal. Rptr. 2d 707]* . In the face of these decisions, the viability of a separate tort action for concealment of community assets appears increasingly tenuous. The issue appears ripe for consideration by the California Supreme Court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewTortsBusiness TortsFraud & MisrepresentationGeneral Overview

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18-221 California Forms of Pleading and Practice--Annotated § 221.155

§ 221.155 Motion for Relief From Void Judgment or Order

[1] Availability

A void judgment is a judgment in excess of jurisdiction or without the requisite personal jurisdiction over the respondent. Default judgments often may be voided for either of these reasons[*see Ellard v. Conway (2001) 94 Cal. App. 4th 540, 544, 114 Cal. Rptr. 2d 399* (default judgment entered against respondent who was not served with summons in manner prescribed by statute is void)]. Under *Code Civ. Proc. § 473(d)*, the court has the power to vacate any void judgment or order, on the noticed motion of either party [*see, e.g., Marriage of Goodarzirad (1986) 185 Cal. App. 3d 1020, 1028-1030, 230 Cal. Rptr. 203]* . The motion also may be made under the equitable power of the court to set aside judgments for actual fraud, duress, or one of the other grounds specified in *Fam. Code § 2120 et seq.* [*see § 221.153[3]* et seq.].

For general discussion and forms pertaining to motions to set aside void judgments and orders that may be adapted for use in a family law proceeding, see Ch. 489, *Relief From Judgments and Orders* .

[2] Grounds for Relief From Void Judgment or Order

Proper grounds for relief include lack of jurisdiction [*see, e.g., In re Marriage of Jackson (2006) 136 Cal. App. 4th 980, 988, 39 Cal. Rptr. 3d 365]* , bias of the trial judge [*see, e.g., Christie v. City of El Centro (2006) 135 Cal. App. 4th 767, 776-780, 37 Cal. Rptr. 3d 718]* , and unconstitutionality of the judgment [*see, e.g., County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 112-113, 183 Cal. Rptr. 741* , disapproved on other grounds, *County of Los Angeles v. Soto (1984) 35 Cal.3d 483, 492 n.4, 198 Cal. Rptr. 779, 674 P.2d 750]* .

Once a party has appeared in the action, the court may not enter that party's default for his or her failure to appear at trial [*Garamendi v. Golden Eagle Ins. Co. (2004) 116 Cal. App. 4th 694, 705, 10 Cal. Rptr. 3d 724]* . Any judgment entered on the default is void and subject to expungement at any time on the party's motion under *Code Civ. Proc. § 473(d)* or by virtue of the court's inherent power to vacate a judgment or order that is void on its face [*Heidary v. Yadollahi (2002) 99 Cal. App. 4th 857, 862-864]* .

A default that is entered prematurely (i.e., before the expiration of the respondent's time to plead) is invalid, and any judgment entered on the invalid default is void [*see Schwab v. Southern Cal. Gas Co. (2004) 114 Cal. App. 4th 1308, 1320, 8 Cal. Rptr. 3d 627]* .

[3] Time Limits When Judgment or Order Void on Face or Void in Fact

A void judgment may be set aside at any time, and is not subject to the six-month time limitation of *Code Civ. Proc. § 473(b)* [*Heidary v. Yadollahi (2002) 99 Cal. App. 4th 857, 862, 121 Cal. Rptr. 2d 695* ; *Hoversten v. Superior Court (1999) 74 Cal. App. 4th 636, 640, 88 Cal. Rptr. 2d 197* (apart from statutory authority, court has inherent power to correct its judgment or to vacate void judgment)].

When a motion is brought for relief from a default judgment valid on its face but otherwise void for improper service, the time limits set forth in *Code Civ. Proc. § 473.5(a)* apply by analogy [*see Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1121-1123, 265 Cal. Rptr. 286]* .

For further discussion of time limitations on motions under *Code Civ. Proc. § 473(d)*, see Ch. 489, *Relief From Judgments and Orders* .

[4] Nonstatutory Motion to Vacate Void Judgment

In addition to a motion to vacate a void judgment pursuant to *Code Civ. Proc. § 473(d)*, a nonstatutory motion to vacate a void judgment also appears to exist, such as one that is not accompanied by a statement of decision, which may be stricken on the motion of a party made before the judgment is entered. The court may then vacate the judgment, issue the required statement of decision, and enter the new judgment. The court may set aside a wholly void judgment even though an appeal is pending, although the appeal would ordinarily deprive the trial court of jurisdiction over the matter [*In re Marriage of McNaughton (1983) 145 Cal. App. 3d 845, 849, 194 Cal. Rptr. 176]* .

[5] Collateral Attack on Void Judgment

A void judgment may be ignored and attacked later in a separate, collateral proceeding, so that it may be unnecessary to move to set aside the judgment. If title to real property is involved, however, it may be advisable to move to set aside the judgment to clear title to the property. Furthermore, a collateral attack may be based only on the judgment roll or on matters admitted by the parties [*Phelan v. Superior Court (1950) 35 Cal. 2d 363, 372-373, 217 P.2d 951]* . Therefore, if the collateral attack will be based on extrinsic evidence, a motion to set aside the void judgment is required.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil ProcedureEquityReliefCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments

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18-221 California Forms of Pleading and Practice--Annotated § 221.156

§ 221.156 Postjudgment Motion or Order to Show Cause to Divide Unadjudicated Property

[1] Availability

In a proceeding for dissolution of marriage, legal separation, or nullity of marriage, the court has continuing jurisdiction to award community estate assets or community estate liabilities to the parties that have not been previously adjudicated by a judgment in that proceeding. Thus, a party may file a postjudgment motion or order to show cause in the proceeding to obtain adjudication of any community estate asset or debt omitted or not adjudicated by the judgment. The court must equally divide the omitted or unadjudicated community asset or debt, unless the court finds on good cause shown that the interests of justice require an unequal division [*Fam. Code § 2556*].

An increase in the value of a party's pension benefit does not constitute an unadjudicated asset within the meaning of *Fam. Code § 2556* when the other party agreed to accept a specified amount of the pension benefit [*In re Simundza (2004) 121 Cal. App. 4th 1513, 1517-1522, 18 Cal. Rptr. 3d 377]* . When a party has agreed to accept a specified percentage of the other party's pension benefit and the value of the benefit is significantly higher than it had been estimated to be at the time the stipulated judgment was entered, the amount constituting the difference between the actual benefit value and the lower estimated benefit value constitutes an omitted asset to be divided by the court [*In re Marriage of Melton (1994) 28 Cal. App. 4th 931, 935-936, 939, 33 Cal. Rptr. 2d 761]* .

An illustrative form of declaration in support of a motion to divide unadjudicated community estate assets and liabilities is set forth in *see § 221.411*. For a blank form of order to show cause [Cal. Judicial Council Form FL-300], or forms of notice of motion [Cal. Judicial Council Form FL-301] and application for order and supporting declaration [Cal. Judicial Council Form FL-310], which may be used to request division of unadjudicated property, see California Forms of Pleading and Practice, *Judicial Council Forms Volumes*, Vol. II, Part F (Matthew Bender).

[2] Hearing on Application Regarding Unadjudicated Property

A hearing on the order to show cause or motion to award previouslyunadjudicated community assets or liabilities [*see Fam. Code § 2556*] generally follows the procedure for other postjudgment proceedings, such as modification

proceedings. Because there may be extensive evidence to present, the time needed for the hearing may exceed that established by the court for the "short cause" calendar onto which the matter may have been placed, however, and the parties should be prepared to request a longer hearing and ascertain from the court whether the matter is required to be specially set under the local court rules. See *§ 221.180* et seq. for discussion of modification of orders and judgments.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral Overview

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§ 221.157 Motion for Correction of Clerical Error

When inadvertent clerical errors occur in a judgment or order, or when the judgment as entered does not conform to the judgment issued, the court issuing the judgment or order may correct the error on its own motion or on motion of the injured party [*Code Civ. Proc. § 473(d)*; *see, e.g., In re Marriage of Kaufman (1980) 101 Cal. App. 3d 147, 151, 161 Cal. Rptr. 538* ; *see also In re Marriage of Barthold (2008) 158 Cal. App. 4th 1301, 1303-1304, 1308-1309, 70 Cal. Rptr. 3d 691* (court's inherent authority to correct its errors applies even when it was prompted to reconsider its prior ruling by party's motion filed in violation of *Code Civ. Proc. § 1008*)]. "Clerical errors" result when the order or judgment actually misstates the intent of the court, and can include such mistakes as misnomers, wrong initials in a name, improper birth dates, or minor errors in descriptions of real property. In contrast, judicial error may be corrected only by an attack on the judgment [*see Aspen Internat. Capital Corp. v. Marsch (1991) 235 Cal. App. 3d 1199, 1204, 286 Cal. Rptr. 921]* .

A party may seek correction of clerical error by ex parte application [*see Code Civ. Proc. § 473(d)*]. The motion should include a supporting declaration setting forth the necessity for the order, together with a proposed order. The motion may be made at any time, regardless of when the mistake was made [*In re Marriage of Kaufman (1980) 101 Cal. App. 3d 147, 151, 161 Cal. Rptr. 538]* , but good practice suggest it be brought as soon as possible to avoid problems with enforceability of the judgment.

For general forms pertaining to motions to correct clerical errors that may be adapted for use in a family law proceeding, see Ch. 318, *Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsNunc Pro Tunc ReliefFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-221 California Forms of Pleading and Practice--Annotated § 221.158

§ 221.158 Motion to Reconsider and Renewed Motions

Any party affected by an order may apply to the judge who made the order to reconsider the matter, and modify, amend, or revoke the prior order, based on new or different facts, circumstances, or law. A motion for reconsideration may be made when an application for an order has been refused, granted, granted in whole or in part, or granted conditionally or on terms. The motion must be made within 10 days after service on the party of written notice of the entry of the order. The applicant must state by affidavit or declaration what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown [*Code Civ. Proc. § 1008(a)*]. If the moving party fails to present new or different facts, circumstances, or law, the court lacks jurisdiction to entertain the motion [*Sakiyama v. AMF Bowling Centers, Inc. (2003) 110 Cal. App. 4th 398, 413-414, 1 Cal. Rptr. 3d 762*]. However, the court has inherent authority to reconsider its prior rulings at any time on its own initiative and without complying with the requirements of *Code Civ. Proc. § 1008* [*Le Francois v. Goel (2005) 35 Cal. 4th 1094, 1096-1097, 1103-1105, 29 Cal. Rptr. 3d 249* ; *In re Marriage of Barthold (2008) 158 Cal. App. 4th 1301, 1308-1309, 70 Cal. Rptr. 3d 691* (court may reconsider its prior ruling even when it is prompted to do so by party's motion that does not comply with *Code Civ. Proc. § 1008*)]. In order to grant reconsideration on its own motion, the court must conclude that its earlier ruling was wrong, and change that ruling based on the evidence that was originally submitted [*In re Marriage of Barthold (2008) 158 Cal. App. 4th 1301, 1314, 70 Cal. Rptr. 3d 691*].

A party seeking reconsideration must provide not just new evidence or different facts, but a satisfactory explanation for the failure to produce it at an earlier time. [*New York Times Co. v. Superior Court (2005) 135 Cal. App. 4th 206, 215, 37 Cal. Rptr. 3d 338* ; *Mink v. Superior Court (1992) 2 Cal. App. 4th 1338, 1342, 4 Cal. Rptr. 2d 195]* .

A party who seeks reconsideration of a prior order denying attorney's fees need not comply with *Code Civ. Proc. § 1008*. *Fam. Code § 2030* provides a different method for seeking reconsideration of attorney fee orders in family law cases. It states that from time to time and before entry of judgment, the court may augment or modify the original award for attorney's fees and costs as may be reasonably necessary for the prosecution or defense of the proceeding or any related proceeding. The moving party is not required to show changed events [*In re Marriage of Hobdy (2004) 123 Cal. App. 4th 360, 365-373, 20 Cal. Rptr. 3d 104]* .

A party who originally made an application for an order that was refused in whole or part, or granted conditionally, or on terms, may make a subsequent application (or a "renewed motion") for the same order based on new or different facts, circumstances, or law. An affidavit also must accompany the renewal motion, setting forth the same information as in a motion for reconsideration. If the moving party fails to comply with the affidavit requirement, any subsequent order issued may be revoked or set aside on ex parte motion [*Code Civ. Proc. § 1008(b)*]. Unlike a motion for reconsideration, a motion for renewal need not be heard by the judge who ruled on the original motion [*Deauville Restaurant, Inc. v. Superior Court (2001) 90 Cal. App. 4th 843, 849-851, 108 Cal. Rptr. 2d 863]* .

Motions for reconsideration and renewed motions may be made with respect to both interim and final orders [*Code Civ. Proc. § 1008(e)*]. In addition to a party's ability to bring a motion for reconsideration or renewal, if a court determines that there has been a change of law warranting reconsideration of a prior order, the court may do so on its own motion and enter a different order [*Code Civ. Proc. § 1008(c)*].

Most courts hold that an order denying a motion for reconsideration is not appealable. Other courts hold that such an order is appealable if (1) the underlying order is appealable, and (2) motion for reconsideration is based on new or different facts [*In re Marriage of Burgard (1999) 72 Cal. App. 4th 74, 80-81, 84 Cal. Rptr. 2d 739* (order was not appealable in this case because no new or different facts were shown)].

For discussion and forms pertaining to motions to reconsider and renewed motionsthat may be adapted for use in a family law proceeding, see Ch. 374, *Motions to Reconsider and Renewed Motions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureAppealsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-221 California Forms of Pleading and Practice--Annotated § 221.159

§ 221.159 Relief From Support Orders

[1] Fraud, Perjury, or Lack of Notice

On any terms that may be just, a court may relieve a party from a support order after the six-month time limit of *Code Civ. Proc. § 473* has run [*Fam. Code § 3690(a)*]. Before granting relief, the court must find that the facts alleged as the grounds for relief materially affected the original order and that the moving party would materially benefit from the granting of the relief [*Fam. Code § 3690(b)*].

The motion must be based on one of the following grounds [*Fam. Code § 3691(a)*]:

1. Actual fraud, that is, the defrauded party was kept in ignorance or in some manner, other than his or her own lack of care or attention, was fraudulently prevented from fully participating in the proceeding. An action or motion based on this ground must be brought within six monthsafter the date on which the complaining party discovered or reasonably should have discovered the fraud.

2. Perjury. An action or motion based on this ground must be brought within six months after the date on which the complaining party discovered or reasonably should have discovered the perjury.

3. Lack of notice, based on service of a summons that did not result in notice to the party in time to defend the action for support, and a default or default judgment has been entered against this party. A notice of motion to set aside the default and for leave to defend the action must be served and filed within a reasonable time, but in no event later than six months after the party obtains or reasonably should have obtained notice of the order, or that the party's income and assets are subject to attachment under the order. The motion must be accompanied by an affidavit showing, under oath, that the party's lack of notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect. The party must serve and file with the notice a copy of the answer, motion, or other pleading proposed to be filed in the action [*Fam. Code § 3691(c)(2)*]. The court may not set aside or

otherwise relieve a party from a support order on this ground if service of the summons was accomplished in accordance with existing requirements of law regarding service of process [*Fam. Code § 3691(c)(3)*].

A support order may not be set aside simply because the court finds that it was inequitable when made, nor simply because subsequent circumstances caused the support ordered to become excessive or inadequate [*Fam. Code § 3692*].

In ruling on an action or motion to set aside a support order, the court must set aside only those provisions materially affected by the circumstances leading to the court's decision to grant relief. The court has discretion, however, to set aside the entire order, if necessary, for equitable considerations [*Fam. Code § 3693*].

For Judicial Council forms concerning the above motion, *see §§ 221.412 -221.414* [*see* Cal. Judicial Council Forms FL-360, FL-365, FL-367]. For a general discussion of support orders, see Ch. 224, *Dissolution of Marriage: Child Support* , and Ch. 225, *Dissolution of Marriage: Spousal Support* .

[2] Proceedings Brought by Child Support Agencies

[a] Default Judgments Based on Presumed Income

After the *Code Civ. Proc. § 473* time period has elapsed, a court may, on any terms that are just, set aside the child support portion of a default judgment or order entered in any action filed by a local child support agency under *Fam. Code § 17400, 17402,* or *17404*, when the judgment or order was based on a *presumed income* amount that "substantially differed" from the defendant's actual income for the time period covered by the judgment or order [*Fam. Code § 17432(a), (b), (c)*; *see Fam. Code § 17400(d)(2)* (providing for presumed income)].

A "substantial difference" between presumed income that was the basis for the judgment or order and the defendant's actual income, means an amount that would result in an order that deviates by 20 percent or more from the amount ordered by default [*Fam. Code § 17432(c)*]. If the deviation is less than 20 percent, the court may set aside the order only if it states on the record or in writing that the defendant is experiencing extreme financial hardship due to circumstances set forth in *Fam. Code § 4071* and that a set aside is necessary to accommodate those circumstances [*Fam. Code § 17432(c)*]. The defendant bears the burden of proving that his or her actual income deviated substantially from the income presumed [*Fam. Code § 17432(e)*].

A motion for relief from judgment on this ground must be filed within 90 days of the first collection of money by the support agency or the obligee. This period runs "from the date that the local child support agency receives the first collection or from the date that the defendant is served with notice of the collection, whichever date occurs first." If service of the notice is by mail, the date of service shall be as specified in *Code Civ. Proc. § 1013* [*Fam. Code § 17432(f)*].

Before granting relief, the court must consider the amount of time that has passed since entry of the order, the circumstances surrounding the defendant's default, the relative hardship on the child or children to whom the duty of support is owed, the caretaker parent, and the defendant, and other equitable factors that the court deems appropriate [*Fam. Code § 17432(g)*].

If the court grants the relief requested, it must issue a new child support order using the appropriate child support guidelines currently in effect. The new order will have the same commencement date as the order set aside [*Fam. Code § 17432(h)*].

Note that this set aside remedy under *Fam. Code § 17432* is in addition to any other provided by law, such as that discussed in *§ 221.153* [*see Fam. Code § 3690(c)*].

For a general discussion of enforcement of support orders by local child support agencies, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* .

[b] Mistaken Identity Cases

In any action in which a default judgment or order for support was entered under *Fam. Code § 17430* (a local child support agency case), the court must relieve the defendant from the judgment or order if the defendant establishes that he or she was mistakenly identified in the order or in any subsequent documentsor proceedings as the person having a support obligation. The defendant is also entitled to the remedies set forth in *Fam. Code § 17530(d), (e)* with respect to any actions taken to enforce that judgment or order [*Fam. Code § 17433*; *see Fam. Code § 17530(d), (e)* (providing for termination of enforcement activities, return of assets seized, and other remedies, as well as right of action by defendant if agency fails to take remedial action)]. These provisions apply only when an order has been entered against a person who is not the support obligor named in the judgment or order [*Fam. Code § 17433*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentFraudFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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[Reserved]

§§ 221.160[Reserved]

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18-221 California Forms of Pleading and Practice--Annotated § 221.180

§ 221.180 Orders Subject to Modification

[1] Temporary Spousal and Child Support

A temporary order made during the pendency of a family law proceeding for spousal and/or child support may be modified or terminated at any time except as to any amount that may have accrued before the date of filing of the notice of motion or order to show cause to modify or terminate [*Fam. Code § 3603*; *see In re Marriage of Van Sickle (1977) 68 Cal. App. 3d 728, 739-740, 137 Cal. Rptr. 568]* .

[2] Permanent Spousal Support

A permanent spousal support order may be modified or terminated at any time, except (1) with regard to any amount that accrued before the date of filing of the notice of motion or order to show cause to modify or terminate [*Fam. Code § 3651(b)*] and (2) to the extent that any written agreement or, if there is no written agreement, any oral agreement entered into in open court between the parties, specifically provides to the contrary [*Fam. Code § 3651(c)*; *see, e.g., In re Marriage of Vomacka (1984) 36 Cal. 3d 459, 465, 204 Cal. Rptr. 568, 683 P.2d 248]* .

At the request of either party, the order modifying or terminating the spousal support order may be made retroactive to the date that the notice of motion or order to show cause to modify or terminate was filed, or to any subsequent date (except as provided by federal law under *42 U.S.C. § 666(a)(9)*) [*Fam. Code § 3653*; *see, e.g., In re Marriage of Acosta (1977) 67 Cal. App. 3d 899, 137 Cal. Rptr. 33]* .

A spousal support order for a limited period terminates at the end of that period and may not be extended unless the court in its original order retains jurisdiction [*Fam. Code § 4335*]. Unless there is a written agreement of the parties to the contrary or a court order terminating spousal support, the court retains jurisdiction indefinitely if the marriage is of "long duration" [*Fam. Code § 4336(a)*].

[3] Permanent Child Support

The court may modify or terminate a permanent child support order at any time, except as to any amount that may have accrued before the date the notice of motion or the order to show cause to modify or terminate was filed [*Fam. Code § 3651*; *see Fam. Code § 3650*]. In addition, an order modifying or terminating a support order may be made retroactive to the date that the notice of motion or order to show cause to modify or revoke was filed, or to any subsequent date except as provided by federal law under *42 U.S.C. § 666(a)(9)* [*Fam. Code § 3653*; *see In re Marriage of Acosta (1977) 67 Cal. App. 3d 899, 902, 137 Cal. Rptr. 33]* . Under Section 666(a)(9), child support orders are not subject to retroactive modification except as to amounts accruing after a petition to modify has been filed and notice of the petition has been given to the opposing party.

A motion to modify a prior child support order may be made not only with respect to a minor child, but also with respect to a child who has reached the age of majority and is indigent. Thus, for example, a motion to modify has been held a proper method of raising the issue of support for an indigent (and disabled) adult child, whose support had terminated and over whom future jurisdiction to determine support had been purportedly waived pursuant to a parental stipulation and court order [*In re Marriage of Lambe & Meehan (1995) 37 Cal. App. 4th 388, 392* (parents cannot agree to divest family law court of jurisdiction over support order for adult indigent child); *see Fam. Code §§ 2010(c), 3910(a)*]. For further discussion of motions and independent actions for support of indigent children, see Ch. 224, *Dissolution of Marriage: Child Support* .

In addition, if a supplemental complaint is filed seeking support for a child born after the initial petition is filed or the final judgment is entered, a child support order may be modified to include an order for support of children of the same parents who were not named in the initial pleadings [*see Fam. Code §§ 2330.1, 3651(b)*; *see also § 221.10* et seq.]. For a discussion of the grounds for modification of permanent child support orders, see Ch. 224, *Dissolution of Marriage: Child Support* .

[4] Child Custody and Visitation

A child custody order may be modified at any time on a showing of changed circumstances and that modification is in the best interests of the child [*see Fam. Code §§ 3011, 3022, 3040*; *see, e.g., In re Marriage of Carney (1979) 24 Cal. 3d 725, 730-731, 157 Cal. Rptr. 383, 598 P.2d 36* (to justify ordering change in custody there must generally be a persuasive showing of changed circumstances affecting the child)]. The court also can modify a visitation order [*Fay v. Fay(1938) 12 Cal. 2d 279, 282-284, 83 P.2d 716* ; *see In re Marriage of Burgess (1996) 13 Cal. 4th 25, 40, 51 Cal. Rptr. 2d 444, 913 P.2d 473* (noting court's authority to modify visitation order, when noncustodial parent cannot meet burden of proof necessary to warrant change in custody, to minimize children's loss of contact and visitation with noncustodial parent in event of move)].

The general rule regarding the showing that must be made was stated by the California Supreme Court in *In re Marriage of Burgess* [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 51 Cal. Rptr. 2d 444, 913 P.2d 473]* . The Court noted that the trial court is always bound to make a custody decision based on the child's best interest; however, depending on the posture of the case, the trial court will use either the "best interest" analysis or the "changed circumstances" analysis. The best interest analysis is used when making the initial permanent custody determination. In making that determination, the court has "the widest discretion to choose a parenting plan that is in the best interest of the child," and must look to all of the circumstances bearing on the child's best interest [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 31-32, 51 Cal. Rptr. 2d 444, 913 P.2d 473]* . The changed circumstances test requires a threshold showing of detriment before the trial court may modify an existing final custody order that was previously based on the child's best interest. A child should not be removed from the custody of one parent and given to the custody of the other parent, unless the material facts and circumstances occurring subsequently render it essential or expedient for the child's welfare that there be a change [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 38, 51 Cal. Rptr. 2d 444, 913 P.2d 473* ; *see Ragghanti v. Reyes (2004) 123 Cal. App. 4th 989, 998, 20 Cal. Rptr. 3d 522* (when there is no existing final determination of what custody arrangement is in child's best interest, noncustodial parent does not have burden to show that existing arrangement is detrimental); *In re Marriage of Heath (2004) 122 Cal. App. 4th 444, 449 n.3, 18 Cal. Rptr.*

3d 760 (noncustodial parent has burden of showing a *substantial* change of circumstances making modification essential to child's welfare)]. In *Burchard v. Garay* [*Burchard v. Garay (1986) 42 Cal. 3d 531, 229 Cal. Rptr. 800, 724 P.2d 486]* , the Court explained that the changed circumstances rule is an adjunct to the best interest test in the context of requests to modify custody. It provides, in essence, that once it has been established that a particular custodial arrangement is in the child's best interests, the court need not reexamine that question, but should instead preserve the established arrangement unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest [*Burchard v. Garay (1986) 42 Cal. 3d 531, 535, 229 Cal. Rptr. 800, 724 P.2d 486]* . The Court has recently emphasized that the changed-circumstances rule should be flexible and should reflect the children's changing needs as they grow up [*Montenegro v. Diaz (2001) 26 Cal. 4th 249, 259, 109 Cal. Rptr. 2d 575, 27 P.3d 289]* .

When the parents have joint physical custody of the children, the changed circumstances rule does not apply [*Montenegro v. Diaz (2001) 26 Cal. 4th 249, 254 n.1, 109 Cal. Rptr. 2d 575, 27 P.3d 289]* . A parent seeking modification of a joint custody order to effect a change in parenting time must show that the change is in the child's best interest, but need not show changed circumstances [*Enrique M. v. Angelina V. (2004) 121 Cal. App. 4th 1371, 1378-1382, 18 Cal. Rptr. 3d 306]* .

In any case, the court's decision to modify a custody order must be based on evidence in the record, e.g., the testimony of the parties, a custody evaluation ordered by the court [*see Fam. Code § 3110*; *Cal. Rules of Ct., Rule 5.220*], or expert opinion [*In re Marriage of Heath (2004) 122 Cal. App. 4th 444, 450, 18 Cal. Rptr. 3d 760* ("[s]peculation by lawyers, conflicting argument on behalf of parents, and 'hunches' of judges do not suffice")].

For a discussion of the Uniform Child Custody Jurisdiction and Enforcement Act (*Fam. Code § 3400 et seq.*) and the federal Parental Kidnapping Prevention Act of 1980 (*28 U.S.C. § 1738A*), and the effect of these statutes on the power of the court to modify custody orders, see Ch. 394, *Parent and Child* .

[5] Attorney's Fees and Costs

The court must augment or modify an original award for attorney's fees and costs as may be reasonably necessary for the prosecution or defense of the proceeding, or any related proceeding, including after any appeal has been concluded [*Fam. Code § 2030(c)*].

Standards for the award of attorney's fees and costs and for modification of such awards before and after judgment are discussed in Ch. 226, *Dissolution of Marriage: Attorney's Fees* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyModificationGeneral OverviewFamily LawChild SupportObligationsModificationGeneral OverviewFamily LawMarital Termination & Spousal SupportCosts & Attorney FeesFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral Overview

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18-221 California Forms of Pleading and Practice--Annotated § 221.181

§ 221.181 Discovery of Other Party's Income and Expense Information Before Support Modification Proceeding

[1] Information From Party

Fam. Code § 3660 et seq. provides a procedure whereby a support obligor or recipient may inexpensively discover information about the other party's income and expenses, including federal and state personal income tax returns, before commencing a proceeding for modification or termination of a child, family, or spousal support order [*see Fam. Code §§ 3660, 3664, 3665*]. At any time following a judgment of marital dissolution or legal separation, or a determination of paternity, that provides for payment of support, either the party ordered to pay support or the party to whom the support was ordered to be paid (or that party's assignee) may, without leave of court, serve a request on the other party for the production of a completed current income and expense declaration [*see* Cal. Judicial Council Form FL-150 (income and expense declaration form)] in the form adopted by the Judicial Council [*Fam. Code § 3664(a)*] (*see § 221.430*). Ifthere is no response within a prescribed time period or an incomplete response, a request may be made for the information from the party's employer, as discussed in *§ 221.181[2]* [*Fam. Code § 3664(b)-(d)*].

A copy of the prior year's federal and state personal income tax returns must be attached to the income and expense declaration of each party [*Fam. Code § 3665(a)*]. Neither party may disclose the contents nor provide copies of the other party's tax returns to anyone except to the court; to his or her attorney, accountant, or other financial consultant assisting with matters relating to the proceeding; or to any other person as permitted by the court [*Fam. Code § 3665(b)*].

Apart from the request for production directed to a party (or the party's employer, as discussed in *§ 221.181[2]*), no other method of discovery may be used unless a motion for modification or termination of support is pending [*Fam. Code § 3662*]. In the absence of a pending motion for modification or termination of a support order, a request for discovery of income and expense information under *Fam. Code § 3660 et seq.* may not be made more frequently than once every 12 months [*Fam. Code § 3663*].

For an illustrative filled-in copy of the form the Judicial Council has adopted for mandatory use in seeking discovery

under these provisions [*see Fam. Code § 3668*; Cal. Judicial Council Form FL-396], see *§ 221.430*.

[2] Information From Employer on Party's Noncompliance With Request

[a] Request for Production of Income and Benefits Information

If the party on whom the request for production (*§ 221.181[1][a]*) is served fails to respond within 35 days of service of the request, or if the responsive income and expense declaration is incomplete as to any wage information, including the attachment of pay stubs and income tax returns, the requesting party may serve a request for information on the other party's *employer*. This request must be made on a form adopted by the Judicial Council, and is limited in scope to the income and benefits provided to the party. The date specified in the request for production that is served on the employer must not be less than 15 days from the date the request is issued [*Fam. Code § 3664(b)*].

However, no employer is required to produce the employee's income and benefits information unless there is a court order for production, or an agreement of "the parties, employers, and employees affected." In other words, in the absence of a court order or qualifying agreement, compliance by the employer is voluntary, and the Judicial Council form must reflect this. In addition, the employer may require the requesting party to pay the reasonable costs for copying the information requested [*Fam. Code § 3664(b), (d), (f)*].

[b] Required Notice to Employee

If the party seeking information serves a request for production on the other party's employer (*§ 221.181[2][a]*), the requesting party must also serve on that other party (or on his or her attorney) a copy of this request, and service must be made before the date that is specified in the request. The copy served on the employee must also contain a notice, set out in a "typeface that is intended to call attention to its terms," which indicates that [*Fam. Code § 3664(c)*]:

1. Information limited to the income and benefits provided to the employee by his or her employer is being sought from the employer named in the request for production;

2. The information being sought may be protected by right of privacy;

3. If the employee objects to the production of this information by the employer to the requesting party, the employee must notify the court, in writing, of this objection prior to the date specified in the request served on the employer for the production of income and benefit information; and

4. If the requesting party does not agree, in writing, to cancel or narrow the scope of the request for the production of this information by the employer, the employee should consult an attorney regarding the employee's right to privacy and how to protect this right.

[c] Employee's Motion to Quash or Modify Request

If a request for production of income and benefit information has been served on a party's employer (§ 221.181[2][a]), the party may, prior to the date specified in the request, bring a motion under *Code of Civ. Proc. § 1987.1* to quash or modify this request in the same manner as a subpoena duces tecum. Notice of this motion must be given to the employer prior to the date specified in the request for production that was served on the employer [*Fam. Code § 3664(d)*]. For a general discussion of motions to quash under *Code of Civ. Proc. § 1987.1*, see Ch. 535, *Subpoena* .

[3] Service of Request

Service of a request for the production of an income and expense declaration (*§ 221.181[1]*), or for production of income and benefit information, or a copy thereof (*§ 221.181[1]*) under *Fam. Code § 3664* must be by certified mail,

postage prepaid, return receipt requested, to the last known address of the party to be served, or by personal service [*Fam. Code § 3664(b)*]. Paragraph 1.a. of the Judicial Council request form indicates that a blank income and expense declaration must be served with the request [*see* Cal. Judicial Council Form FL-396].

[4] Enforcement of Discovery Right

Discovery under *Fam. Code § 3660 et seq.* may be enforced in the manner specified in (1) *Code Civ. Proc. §§ 1991-1993* (regarding civil subpoenas), (2) the Civil Discovery Act [*see Code Civ. Proc. § 2016.010 et seq.*], and (3) any other statutes applicable to the enforcement of discovery procedures [*Fam. Code § 3666*; *see In re Marriage of Chakko (2004) 115 Cal. App. 4th 104, 8 Cal. Rptr. 3d 699* ("issue sanction" order declaring husband's income to be specified amount and precluding him from offering any contrary evidence was upheld based on his failure to comply with court's order compelling him to provide discovery of his financial records to ex-wife); *see generally* Ch. 190, *Depositions and Discovery* ; Ch. 535, *Subpoena*].

In addition, on the subsequent filing of a motion for modification or termination of support by a party requesting the production of an income and expense declaration under Section 3660 et seq., if the court finds that the declaration submitted by the responding party was incomplete, inaccurate, or missing the prior year's federal and state personal income tax returns, or that the declaration was not submitted in good faith, the court may order sanctions against the responding party in the form of payment of all costs of the motion, including the filing fee and the costs of the depositions and subpoenas necessary to obtain complete and accurate information [*Fam. Code § 3667*]. This provision is applicable regardless of whether a party has utilized the procedures for seeking information from a party's employer under *Fam. Code § 3664(b)*, discussed in *§ 221.181[2]* [*Fam. Code § 3667*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryDisclosuresSanctionsFamily LawChild CustodyGeneral OverviewFamily LawChild SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral Overview

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18-221 California Forms of Pleading and Practice--Annotated § 221.182

§ 221.182 Application for Modification

[1] Papers and Format

An application for an order modifying or terminating a prior order made in a dissolution, legal separation, or nullity proceeding under the Family Code must be in Cal. Judicial Council Form FL-300 (Order to Show Cause) or Cal. Judicial Council Form FL-301 (Notice of Motion) and Cal. Judicial Council Form FL-310 (Application for Order and Supporting Declaration) [*see* Cal. Rules of Ct., Rules 5.11(8)(a)]. Illustrative filled-in reproductions of the Judicial Council Notice of Motion, Order to Show Cause, and Application for Order and Supporting Declaration forms are set out in Subpart A. In addition, the Income and Expense Declaration and Property Declaration [Cal. Judicial Council Forms FL-150, FL-160] must be filed if relevant to the application [*see Cal. Rules of Ct., Rules 5.118(b), 5.128*]. Illustrative filled-in copies of these forms also are set out in Subpart A. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

A memorandum of points and authorities, if needed to establish the applicant's legal right under the circumstances to a modification of the prior order or judgment, also may be filed [*see Fam. Code § 210*; *Cal. Rules of Ct., Rules 5.21, 5.22, 5.118(a)*]. Although the general law and motion rules do not apply to family law proceedings [*see Cal. Rules of Ct., Rule 3.1103(a)*], counsel filing a memorandum of points and authorities may wish to consult *Cal. Rules of Ct., Rule 3.1113* for guidance on content and format.

[2] Use of Order to Show Cause or Notice of Motion

An application for modification of a temporary or permanent order may be made either by noticed motion [*see, e.g., In re Marriage of Judd (1977) 68 Cal. App. 3d 515, 518, 137 Cal. Rptr. 318]* or by order to show cause [*see, e.g., In re Marriage of Acosta (1977) 67 Cal. App. 3d 899, 901, 137 Cal. Rptr. 33]* . Because of the "citation" nature of the order to show cause, it is usually used to obtain modification, particularly when the application is to modify a permanent, as opposed to a pendente lite, order. But if the application is in effect a countermotion by a responding party, the notice of

motion procedure may be used [*see, e.g., In re Marriage of Hawkins (1975) 48 Cal. App. 3d 208, 211, 121 Cal. Rptr. 681]* .

[3] Local Court Rules

With respect to the contents of the printed forms, some courts by local rule impose requirements in addition to those indicated by the Judicial Council forms. Counsel should always check local rules for special additional requirements for modifications or other motions [*see, e.g., In re Marriage of Tydlaska (2003) 114 Cal. App. 4th 572, 7 Cal. Rptr. 3d 594* (court properly denied husband's motion for support modification based on his failure to comply with local court rules requiring him to file income and expense declaration executed within 60 days of hearing)].

[4] Service of Application Papers

[a] General Rules

The notice of motion or order to show cause and all supporting points and authorities, declarations, and other supporting materials, together with a blank copy of the responsive declaration and blank copies of the Income and Expense Declaration and Property Declaration (if those completed forms must be attached to the declaration), must be served on the party against whom relief is sought [*see Cal. Rules of Ct., Rule 5.118(b), (c)*].

General law governing service of such papers in civil actions applies to the manner and time for service of a notice of motion or order to show cause to modify an order in family law proceedings [*see Fam. Code § 210*; *Cal. Rules of Ct., Rules 5.10(e), 5.21, 5.22*]. For discussion of the procedures and deadlines forservice of papers generally, see *§ 221.10* et seq. relating to service of selected pretrial motions.

[b] Service Before or After Judgment

For modification motions made before judgment, service of papers is made on the party's attorney of record if there is one, or on the party if there is no attorney of record, as in civil proceedings generally [*see Cal. Rules of Ct., Rule 5.10(b), (e)*; *see also Code Civ. Proc. § 1015*; *Fam. Code § 210*].

For modification motions made after judgment, service of papers must be made directly on the party, and not on the attorney of record, if the motion is for one of the following [*Fam. Code § 215*; *see Gortner v. Gortner (1976) 60 Cal. App. 3d 996, 1000, 131 Cal. Rptr. 919* ; *In re Marriage of Gabriel (1975) 50 Cal. App. 3d 556, 558, 123 Cal. Rptr. 454]* :

(1) Modification of an order in the final judgment of dissolution, legal separation, or nullity;

(2) Modification of a permanent order in any other proceeding in which child custody, visitation, or support was in issue; or

(3) Any other postjudgment order in a family law proceeding.

Even though the moving papers must be served directly on the other party, a courtesy copy is normally sent to the party's attorney of record, unless the attorney has withdrawn from the case.

In any action to suspend or reduce support for a child to whom a county has provided financial assistance, the county is an indispensable party and also must be given notice of the proposed action, in conformity with the provisions governing notices of motions in civil actions [*In re Marriage of Mena (1989) 212 Cal. App. 3d 12, 19, 260 Cal. Rptr. 314]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyModificationGeneral OverviewFamily LawChild CustodyVisitationModificationGeneral OverviewFamily LawChild SupportObligationsModificationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral Overview

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18-221 California Forms of Pleading and Practice--Annotated § 221.183

§ 221.183 Response to Application

[1] Papers to Be Prepared and Filed

The response to the application for modification of an order or judgment in a family law proceeding must be in Cal. Judicial Council Form FL-320 (Responsive Declaration). A current Income and Expense Declaration and Property Declaration [Cal. Judicial Council Forms FL-150, FL-160] must also be prepared if relevant to the order sought to be modified [*see Cal. Rules of Ct., Rule 5.128(a)*]. Although a memorandum of points and authorities need not be filed unless required by the court [*see Cal. Rules of Ct., Rule 5.118(a)*], the better practice is to prepare, serve, and file a memorandum if the moving party has filed and served a memorandum of points and authorities, or if legal points as to the propriety of the modification are to be raised.

An illustrative filled-in form of responsive declaration is set forth and discussed in *§ 221.10* et seq.

[2] Countermotion

If the responding party seeks modification of the order in a different manner than that sought by the moving party, he or she should prepare, file, and serve a motion seeking such relief. The procedure is the same as for the original motion or order to show cause. However, because at least 16 court days' notice must be given [*see Code Civ. Proc. § 1005(b)*], an order shortening time will often have to be obtained to have the motion heard at the same time as the original application for modification. Attorney's fees can be requested by the responding party orally at the hearing on the motion without the necessity of a separate motion [*see Fam. Code § 2031(b)(1)*].

[3] Service of Responsive Papers and Return of Service

The responsive declaration must be filed with the court and served on each party in the manner and within the time frame established for service of responsive papers in civil actions generally [*see Fam. Code § 210*; *Cal. Rules of Ct., Rules 5.10(e), 5.21, 5.22*]. For discussion of the procedures and deadlines for service of responsive papers generally, see *§ 221.10* et seq. relating to responses to selected pretrial motions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyModificationGeneral OverviewFamily LawChild CustodyVisitationModificationGeneral OverviewFamily LawChild SupportObligationsModificationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral Overview

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18-221 California Forms of Pleading and Practice--Annotated § 221.184

§ 221.184 Change of Venue

If it appears that both the petitioner and respondent have moved from the county rendering the original judgment or a prior order in a proceeding for dissolution, nullity, or legal separation, the court may, if the ends of justice and the convenience of the parties would be promoted by the change, order that the proceeding be transferred to the county where either party resides [*see Code Civ. Proc. § 397.5*; *Schlumpf v. Superior Court (1978) 79 Cal. App. 3d 892, 895-896, 145 Cal. Rptr. 190]* . Motions for change of venue also are discussed in *§ 221.10* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferConvenience of PartiesFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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§ 221.185 Submission and Examination of Tax Returns

In a proceeding involving child, family, or spousal support, no party may refuse to submit copies of his or her state and federal income tax returns to the court, whether individual or joint [*Fam. Code § 3552(a)*]. The tax returns may be examined by, and are discoverable by, the other party. A party also may be examined by the other party about the content of a tax return that has been submitted [*Fam. Code § 3552(b)*]. If the court finds that it is relevant to the case to retain the tax return, the tax return must be sealed and maintained as a confidential record of the court. If the court finds that the tax return is not relevant to the disposition of the case, all copies of the return must be returned to the partywho submitted it [*Fam. Code § 3552(c)*]. For discussion of the discovery of tax returns in relation to determining spousal support, see Ch. 225, *Dissolution of Marriage: Spousal Support* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewFamily LawChild SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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§ 221.186 Mediation of Child Custody and Visitation Issues

If it appears on the face of an application for modification of an order that child custody or visitation are contested, the court must set the contested issues for mediation before or concurrent with the setting of the matter for hearing [*Fam. Code §§ 3170, 3175*]. Mediation of contested custody and visitation issues, governed by *Fam. Code § 3160 et seq.*, is discussed in *§ 221.40* et seq. and in Ch. 223, *Dissolution of Marriage: Child Custody* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAlternative Dispute ResolutionMediationFamily LawChild CustodyGeneral OverviewFamily LawChild CustodyVisitationGeneral Overview

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18-221 California Forms of Pleading and Practice--Annotated § 221.187

§ 221.187 Hearing

[1] Privacy of Proceeding

Except as otherwise provided by the Family Code or by the California Rules of Court, the court may order that the hearing be private and may exclude all persons from the hearing except the officers of the court, the parties, their witnesses, and counsel, when it considers it necessary in the interests of justice and the persons involved [*Fam. Code § 214*]. However, the statutory and case law context of post-judgment modification orders appears to contemplate an oral hearing rather than orders being issued from chambers [*In re Marriage of Dunn (2002) 103 Cal. App. 4th 345, 348-349, 126 Cal. Rptr. 2d 636]* .

[2] Basis of Ruling

The court may grant or deny the relief sought solely on the basis of the application and response and any accompanying memorandum of points and authorities [*In re Marriage of Perkal (1978) 77 Cal. App. 3d 413, 418, 143 Cal. Rptr. 575]* . Courts must exercise their discretion, however, and may not exclude oral testimony based on a court policy always to exclude it [*Reifler v. Superior Court (1974) 39 Cal. App. 3d 479, 485, 114 Cal. Rptr. 356]* .

[3] Burden of Proof

As in civil actions and special proceedings generally, a party to a modification proceeding has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he or she is asserting [*see Evid. Code § 500*; *Fam. Code § 210*; *Cal. Rules of Ct., Rule 5.21, 5.22*; *In re Marriage of Smith (1978) 79 Cal. App. 3d 725, 741, 145 Cal. Rptr. 205* (spousal support); *In re Marriage of Mehlmauer (1976) 60 Cal. App. 3d 104, 107-109, 131 Cal. Rptr. 325* (child custody)].

For discussion of substantive rules governing modification of child custody and visitation orders, see Ch. 223, *Dissolution of Marriage: Child Custody* . For discussion of the substantive standards for modification of child and spousal support orders, see Ch. 224, *Dissolution of Marriage: Child Support* , and Ch. 225, *Dissolution of Marriage:*

Spousal Support , respectively.

[4] Disclosure of Public Assistance Status

At a hearing on a motion to modify a child support obligation, the court must require the parties to reveal whether a party is currently receiving or intends to apply for public assistance for the maintenance of the child [*see Fam. Code § 4004*]. If the custodial parent is receiving public assistance, the county is an indispensable party [*see, e.g., In re Marriage of Mena (1989) 212 Cal. App. 3d 12, 19, 260 Cal. Rptr. 314]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyGeneral OverviewFamily LawChild SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewPublic Health & Welfare LawSocial SecurityAssistance to FamiliesGeneral Overview

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18-221 California Forms of Pleading and Practice--Annotated § 221.188

§ 221.188 Orders

The order must be prepared on the prescribed Judicial Council form of Findings and Order After Hearing [*see* Cal. Judicial Council Form FL-340]. An illustrative filled-in reproduction of that form is set out in *§ 221.338*.

At the request of either party, an order modifying or terminating a spousal support order must include a statement of decision [*Fam. Code § 3654*]. For discussion of statements of decision, see *§ 221.90* et seq., as well as Ch. 529, *Statement of Decision* .

If the modified order includes a provision for child support, at the time that written notice of the order is given the court must provide the parties with a document describing the procedures by which the support order may be modified [*Fam. Code § 4010*].

If the order modifies a child, family, or spousal support order, an earnings assignment order also must be issued by the court [*see Fam. Code § 5230(a)*], although it may grant a request to stay service of the earnings assignment order for good cause [*see Fam. Code § 5260(a)*]. For further discussion and a form of wage assignment, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement,* §§ 459.50 et seq., 459.202. See also the discussion in Ch. 224, *Dissolution of Marriage: Child Support* , and Ch. 225, *Dissolution of Marriage: Spousal Support* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyGeneral OverviewFamily LawChild CustodyVisitationGeneral OverviewFamily LawChild SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral Overview

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18-221 California Forms of Pleading and Practice--Annotated § 221.189

§ 221.189 Modification by Stipulation

A judgment in a family law proceeding--insofar as it relates to child custody and visitation and spousal support--may be modified on stipulation of the parties and subsequent court order based on the stipulation [*see, e.g., Smith v. Superior Court (1977) 68 Cal. App. 3d 457, 462-463, 137 Cal. Rptr. 348* (child custody and visitation rights)].

Child support orders also may be modified by stipulation, but are subject to court approval under the standards set forth in *Fam. Code § 4065* [*see Fam. Code §§ 4057(b)(1), 4065(a)*]. For discussion of guidelines for court approval of parties' agreements regarding child support, see Ch. 224, *Dissolution of Marriage: Child Support* . If the stipulation results in a suspension or reduction in the payment of child support and the child has been receiving public financial assistance from a county, that county is an indispensable party to, and must receive prior notice of, the proposed action [*see In re Marriage of Lugo (1985) 170 Cal. App. 3d 427, 430, 433, 217 Cal. Rptr. 74]* .

No "first paper" filing fee need be paid on behalf of a respondent for filing a document relating to a stipulated postjudgment modification of child support, or for a stipulation to modify a marital settlement agreement that was signed by a defaulted respondent and incorporated in a decree of dissolution if the stipulation is presented by the petitioner [*Gov. Code § 26826(b)(5), (6)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyGeneral OverviewFamily LawChild CustodyVisitationGeneral OverviewFamily LawChild SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral Overview

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18-221 California Forms of Pleading and Practice--Annotated § 221.190

§ 221.190 Motion for Reconsideration

A party may move for reconsideration of any order or denial of any order within 10 days after service on the party of notice of entry of the order. The motion must be based on new or different facts, circumstances, or law, and must be made to the same judge or court that made the order [*Code Civ. Proc. § 1008(a)*; *see Fam. Code § 210*; *Cal. Rules of Ct., Rule 5.21*]. Motions for reconsideration are discussed in *§ 221.150* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyGeneral OverviewFamily LawChild CustodyVisitationGeneral OverviewFamily LawChild SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral Overview

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18-221 California Forms of Pleading and Practice--Annotated § 221.191

§ 221.191 Vacating Order

An order or a stipulation on which an order is based may, on motion and a proper showing, be set aside under the provisions of *Code Civ. Proc. § 473*, which authorizes relief from orders taken through a party's mistake, inadvertence, surprise, or excusable neglect and from void judgments and orders. These motions are discussed in *§ 221.150* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsFamily LawChild CustodyGeneral OverviewFamily LawChild SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral Overview

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18-221 California Forms of Pleading and Practice--Annotated § 221.192

§ 221.192 Appeal

Both orders made on applications for modification of pendente lite orders and orders made on postjudgment applications for modification are appealable [*see Code Civ. Proc. § 904.1(a)(10)*; *In re Marriage of Judd (1977) 68 Cal. App. 3d 515, 524, 137 Cal. Rptr. 318* (order denying motion to modify pendente lite spousal support order); *see also In re Marriage of Lautsbaugh (1999) 72 Cal. App. 4th 1131, 1133, 85 Cal. Rptr. 2d 688* (appellate review of orders modifying spousal support)]. General forms pertaining to appeals, which may be adapted for use in family law proceedings, are contained in Ch. 40, *Appeal: An Overview*, through Ch. 54, *Appeal: California Supreme Court Review*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionGeneral OverviewFamily LawChild CustodyGeneral OverviewFamily LawChild SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral Overview

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18-221 California Forms of Pleading and Practice--Annotated § 221.193

§ 221.193 Effect of Bankruptcy

For bankruptcy cases commenced on or after October 24, 1994 [*see* Pub. L. No. 103-394, § 702], proceedings to establish paternity, or to modify, or enforce child or spousal support, are exempt from the automatic stay of other proceedings that goes into effect on the filing of a bankruptcy petition [*see 11 U.S.C. § 362(b)(2)*, as amended by Pub. L. No. 103-394, § 304]. Under prior law, only proceedings to "collect" child and spousal support are exempt from the automatic stay [*see 11 U.S.C. § 362(a)(1), (b)(2)*, before amendment by Pub. L. No. 103-394, § 304; *see also In re Stringer (9th Cir. 1988) 847 F.2d 549, 550-552* ; *In re Mac Donald (9th Cir. 1985) 755 F.2d 715, 717* (*11 U.S.C. § 362(d)* allows bankruptcy court to grant relief from automatic stay for cause, based on facts of particular case)].

Another exception to the automatic stay exists to allow for the commencement or continuation of criminal proceedings against the debtor, including criminal prosecution under *Penal Code § 270* for wilful failure to pay child support [*see 11 U.S.C. § 362(b)(1)*; *In re Gruntz (9th Cir. 2000) 202 F. 3d 1074, 1087* ; *People v. Gruntz (1994) 29 Cal. App. 4th 412, 421, 35 Cal. Rptr. 2d 55]* . Further protection is provided in bankruptcy cases commenced on or after October 24, 1994 [*see* Pub. L. No. 103-394, § 702], by a provision that prohibits a trustee from avoiding a debtor's pre-petition transfer of funds to pay bona fide child support or spousal support obligations [*11 U.S.C. § 522(f)(1)(A)*]. For further discussion on the effect of bankruptcy on support obligations and other family law issues, see Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysCoverageExceptionsAlimony, Maintenance & SupportFamily LawChild SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityGeneral Overview

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18-221 California Forms of Pleading and Practice--Annotated § 221.194

§ 221.194 Procedures for Simplified Modification of Child, Spousal, or Family Support Orders

Under the authority of *Fam.Code § 3680*, the Judicial Council has prescribed forms and accompanying instructions that provide for a simplified method of modifying child, spousal, or family support. This method may be used both by parties who are not represented by counsel and by represented parties--although the underlying intent in creating the method was apparently to enable unrepresented parties to more easily seek modification of support orders [*see Fam. Code § 3680(b)*; Cal. Judicial Council Forms FL-390, FL-391, FL-392, FL-393]. Consistent with that intent, the prescribed forms contain no preprinted boxes by which to request the recovery of attorney's fees and costs [§§ 221.433, 221.434].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsModificationGeneral OverviewFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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18-221 California Forms of Pleading and Practice--Annotated §§ 221.195-221.209

[Reserved]

§§ 221.195[Reserved]

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18-221 California Forms of Pleading and Practice--Annotated § 221.210

§ 221.210 State Statutes

Attorney's fees and costs during pendency of proceeding. *Fam. Code §§ 270-272, 2030-2034*

Custody of Children

Appointment of counsel to represent child. *Fam. Code §§ 3150-3153*

Temporary custody orders during pendency of proceeding. *Fam. Code §§ 3060-3064*

Dissolution of Marriage and Legal Separation

Dissolution; effect of. *Fam. Code § 2300*

General Procedural Provisions

Motion to transfer. *Code Civ. Proc. §§ 395, 397*

Motion to quash service of summons. *Code Civ. Proc. § 418.10*

Motion to strike. *Code Civ. Proc. § 435*

Default proceedings. *Fam. Code §§ 2330.5, 2336*

Petition for dissolution or legal separation. *Fam. Code § 2330*

Reconciliation, continuance for. *Fam. Code § 2334*

Service on other spouse. *Fam. Code § 2331*

Status, severance and grant of early trial on issue of dissolution of status of. *Fam. Code § 2337*

Grounds. *Fam. Code §§ 2310-2313*

Residence requirement. *Fam. Code §§ 2320-2322*

"Employee benefit plan" defined. *Fam. Code § 80*

Family Conciliation Court proceedings. *Fam. Code §§ 1800-1852*

General procedural provisions. *Fam. Code §§ 210-215*

Joinder

Employee benefit plans. *Fam. Code §§ 2021, 2060-2074*

Interested persons. *Fam. Code § 2021*

Jurisdiction in superior court. *Fam. Code §§ 200, 2010-2012*

Legal separation; consent of parties to. *Fam. Code § 2345*

Notice to insurance carriers. *Fam. Code §§ 2050-2053*

Responsive pleadings. *Fam. Code § 2020*

Summary dissolution. *Fam. Code §§ 2400-2406*

Support During Pendency of Proceeding

In general. *Fam. Code §§ 3600-3604*

Expedited child support orders. *Fam. Code §§ 3620-3634*

Temporary Restraining Orders

Summons, temporary restraining orders in. *Fam. Code §§ 231-235, 2040-2041*

Orders issued during pendency of proceeding. *Fam. Code §§ 2045, 6218, 6320-6327*

Temporary restraining orders issued without notice. *Fam. Code §§ 240-246*

Void or voidable marriages. *Fam. Code §§ 2200-2255*

Legal Topics:

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

Family LawChild SupportObligationsTypesTemporary SupportFamily LawMarital Termination & Spousal SupportCosts & Attorney FeesFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionResidency RequirementsFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsTemporary SupportFamily LawMarriageValidityVoid & Voidable MarriagesGeneral Overview

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18-221 California Forms of Pleading and Practice--Annotated § 221.211

§ 221.211 California Rules of Court

Bifurcation of issues. *Cal. Rules of Ct., Rule 5.175*

Child support, computer software standards for determining. *Cal. Rules of Ct., Rule 5.275*

General Provisions of Family Law Rules

Definitions and use of terms. *Cal. Rules of Ct., Rule 5.10*

Extensions of time. *Cal. Rules of Ct., Rule 5.15*

Family Law Rules, applicability of. *Cal. Rules of Ct., Rules 5.20, 5.22*

General law, applicability of. *Cal. Rules of Ct., Rules 5.21, 5.22*

Providing limited attorney assistance in preparation of court documents. *Cal. Rules of Ct., Rule 5.70*

Joinder

"Claimant" defined. *Cal. Rules of Ct., Rule 5.152*

Joinder application, form of. *Cal. Rules of Ct., Rule 5.156*

Joinder of employee pension benefit plan. *Cal. Rules of Ct., Rule 5.162*

Joinder of persons claiming interest. *Cal. Rules of Ct., Rules 5.150, 5.154, 5.158*

Procedural Rules

Alternative relief. *Cal. Rules of Ct., Rule 5.114*

Appearance. *Cal. Rules of Ct., Rule 5.120*

Applications for court order. *Cal. Rules of Ct., Rule 5.118*

Motion to quash proceeding or responsive relief. *Cal. Rules of Ct., Rule 5.121*

Defaults and uncontested proceedings. *Cal. Rules of Ct., Rules 5.122, 5.124*

Designation of parties, parties to proceeding, and other causes of action. *Cal. Rules of Ct., Rules 5.100-5.104*

Injunctive relief, restraining orders, and reservation of jurisdiction. *Cal. Rules of Ct., Rules 5.106, 5.110, 5.112*

Pleadings. *Cal. Rules of Ct., Rules 5.108, 5.128*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial MattersSeparate TrialsFamily LawChild SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-221 California Forms of Pleading and Practice--Annotated § 221.212

§ 221.212 Decisions

[1] Attorneys

Court must determine how to apportion overall cost of litigation equitably between parties under their relative circumstances. *In re Marriage of Dietz (2009) 176 Cal. App. 4th 387, 406, 97 Cal. Rptr. 3d 616*

Court has broad discretion in awarding attorney's fees in marital proceedings, but exercise of this discretion is guided by statute (*Fam. Code §§ 2030-2034*). *Alan S. v. Superior Court (2009) 172 Cal. App. 4th 238, 242-243, 91 Cal. Rptr. 3d 241* ; *In re Marriage of Lynn (2002) 101 Cal. App. 4th 120, 133-134, 123 Cal. Rptr. 2d 611*

Sanctions award under *Fam. Code § 271* need not be limited to cost to other party resulting from bad conduct; correlation between sanctioned conduct and specific attorney's fees is not required. *In re Marriage of Corona (2009) 172 Cal. App. 4th 1205, 1226, 92 Cal. Rptr. 3d 17*

Court must scale sanctions award to payor's ability to pay. *In re Marriage of Falcone & Fyke (2008) 164 Cal. App. 4th 814, 827-828, 79 Cal. Rptr. 3d 588*

Party requesting attorney's fees under *Fam. Code § 271* need not demonstrate financial need for award. *In re Marriage of Lucio (2008) 161 Cal. App. 4th 1068, 1081-1082, 74 Cal. Rptr. 3d 803*

Agreement prepared by husband's attorney was enforceable, when wife was advised of potential conflict and agreed to act as her own attorney, and there was no misrepresentation, fraud, or overreaching. *In re Marriage of Friedman (2002) 100 Cal. App. 4th 65, 70-71, 122 Cal. Rptr. 2d 412*

Attorney who undertakes to represent both spouses must make full disclosure of all facts and circumstances necessary to enable them to make fully informed decision regarding subject matter of litigation, including areas of potential conflict and possibility and desirability of seeking independent legal advice. *In re Marriage of Egedi (2001) 88 Cal.*

App. 4th 17, 23, 105 Cal. Rptr. 2d 518

A marital settlement agreement drafted by an attorney who is representing both parties is enforceable, as long as the attorney has informed the parties of the potential conflict of interest caused by his or her acting as the drafter of the agreement, and the parties sign a waiver of the conflict. *In re Marriage of Egedi (2001) 88 Cal. App. 4th 17, 23-25, 105 Cal. Rptr. 2d 518*

Purpose of award of attorney's fees is to provide party, if necessary, with adequate amount to properly litigate the controversy. In assessing one party's relative need and other party's ability to pay, court may consider evidence of parties' current incomes, assets, and abilities, including investment and income-producing properties. *In re Marriage of Duncan (2001) 90 Cal. App. 4th 617, 629-631, 108 Cal. Rptr. 2d 833*

Attorney fees in marital dissolution action are left to sound discretion of trial court; not overturned absent abuse of discretion. *In re Marriage of Huntington (1992) 10 Cal. App. 4th 1513, 1523, 14 Cal. Rptr. 2d 1*

Wife was improperly denied award of attorney's fees under former *Civ. Code § 4370(a)* (*now see Fam. Code §§ 270-272, 2030-2034*), allowing court to make temporary order awarding fees and costs reasonably necessary to family law litigation, when her income and expense declaration showed that her only liquid assets were spousal and child support awarded under interlocutory judgment and when husband's net income showed ability to pay. *In re Marriage of Jacobs (1982) 128 Cal. App. 3d 273, 288-289, 180 Cal. Rptr. 234*

Failure of attorney representing wife to assert her community interest in husband's military retirement benefits in divorce proceeding was legal malpractice rendering attorney liable for wife's resulting damages. *Smith v. Lewis (1975) 13 Cal. 3d 349, 355-362, 118 Cal. Rptr. 621, 530 P.2d 589*

Award of pendente lite attorney's fees related to wife's anticipated expense in establishing community property interest in malpractice judgment of husband was improper when wife had contingent fee arrangement with her attorney. *In re Marriage of Gonzales (1975) 51 Cal. App. 3d 340, 344-345, 124 Cal. Rptr. 278*

Failure of attorney employed by husband to represent wife in uncontested divorce action, who drafted property settlement agreement on basis of information furnished by husband, to inform wife that husband's financial statement was unconfirmed, that wives may be cheated, and that prudence called for investigation and verification as negligence that would render attorney liable to wife for any damages sustained by her. *Ishmael v. Millington (1966) 241 Cal. App. 2d 520, 524-529, 50 Cal. Rptr. 592*

[2] Bifurcation of Trial

Division of property when one spouse dies after judgment terminating marital status but before determination of bifurcated property issues. *In re Marriage of Allen (1992) 8 Cal. App. 4th 1225, 1226-1227, 10 Cal. Rptr. 2d 916*

Domiciliary's action for termination of marital status as allowable despite divorce counterclaim pending in foreign state, because comity discretionary, and rule of jurisdictional priority not controlling if countervailing state policies apply. *In re Marriage of Gray (1988) 204 Cal. App. 3d 1239, 1248-1251, 251 Cal. Rptr. 846*

Moving party as required to present only slight evidence to obtain order granting bifurcation of marital status, whereas opposing party must present compelling reasons for denial. *Gionis v. Superior Court (1988) 202 Cal. App. 3d 786, 790, 248 Cal. Rptr. 741*

Bifurcated trial and entry of interlocutory decree of dissolution while reserving jurisdiction over other issues as

authorized by statute and Family Law Rules and court as not abusing discretion in bifurcating trial when person opposing bifurcation presented no good reasons not to do so. *In re Marriage of Lusk (1978) 86 Cal. App. 3d 228, 232-236, 150 Cal. Rptr. 63*

Family Law Act, as augmented and interpreted by Judicial Council Rules, as authorizing trial court, in its discretion, not only to bifurcate trial, but to enter separate interlocutory judgment of dissolution before other issues, including spousal support, have been litigated. *In re Marriage of Fink (1976) 54 Cal. App. 3d 357, 366, 126 Cal. Rptr. 626*

[3] Court Costs

Dissolution petitioner who qualified as indigent as not required to reimburse filing fee as condition precedent to entry of final decree. *In re Marriage of Sanabia (1979) 95 Cal. App. 3d 483, 485, 157 Cal. Rptr. 56*

Whenever motion to proceed in forma pauperis is supported by affidavit or declaration sufficient on its face to show indigency, court as required to grant motion unless it doubts truthfulness of allegations, in which event it may take additional evidence; in any event, court as required to state its reasons if petition is denied to provideappellate court with basis for review. *In re Marriage of Reese (1977) 73 Cal. App. 3d 120, 124, 140 Cal. Rptr. 589*

Indigent petitioner as entitled to file petition for dissolution of marriage without payment of filing fee. *Earls v. Superior Court (1971) 6 Cal. 3d 109, 113, 98 Cal. Rptr. 302, 490 P.2d 814*

[4] Family Law Rules

Local court rules adopted for practice and procedure in Family Law Act proceedings as not permitted to be inconsistent with statutory law or with rules adopted and prescribed by *Judicial Council. Iand v. Superior Court (1984) 153 Cal. App. 3d 510, 515, 200 Cal. Rptr. 526*

Family law rules as controlling over statutory and decisional law. *In re Marriage of McKim (1972) 6 Cal. 3d 673, 678 n.4, 100 Cal. Rptr. 140, 493 P.2d 868* ; *In re Marriage of Fink (1976) 54 Cal. App. 3d 357, 365 n.4, 126 Cal. Rptr. 626* ; *In re Marriage of Dover (1971) 15 Cal. App. 3d 675, 678, 93 Cal. Rptr. 384*

[5] Grounds

"Irreconcilable differences, which have caused irremediable breakdown of marriage" as not unconstitutionally vague. *In re Marriage of Walton (1972) 28 Cal. App. 3d 108, 116, 104 Cal. Rptr. 472*

Court and not parties as deciding whether evidence adduced supports finding that irreconcilable differences exist and that marriage has broken down irremediably and should be dissolved. *In re Marriage of McKim (1972) 6 Cal. 3d 673, 680, 100 Cal. Rptr. 140, 493 P.2d 868* ; *In re Marriage of Walton (1972) 28 Cal. App. 3d 108, 115 n.2, 116-117, 104 Cal. Rptr. 472*

[6] Hearing on Petition

Use of affidavit in lieu of petitioner's presence at hearing. *In re Marriage of Higgason (1973) 10 Cal. 3d 476, 482, 110 Cal. Rptr. 897, 516 P.2d 289*

Requirement that petitioner appear at hearing and testify. *In re Marriage of McKim (1972) 6 Cal. 3d 673, 682, 100*

Cal. Rptr. 140, 493 P.2d 868

Application for continuance of hearing on petition as addressed to sound discretion of trial court; trial court's order as not disturbed on appeal unless discretion has been arbitrarily exercised. *In re Marriage of Brown (1972) 27 Cal. App. 3d 188, 191, 103 Cal. Rptr. 510*

[7] Joinder

Children's residence in California as insufficient "minimum contacts" for joinder of parent's out-of-state dental insurance plan. *In re Marriage of Martin (1989) 207 Cal. App. 3d 1426, 1433, 255 Cal. Rptr. 720*

ERISA as not preempting California procedures for joinder of pension plans or notification of adverse interest in such plans; but order dividing marital interest in ERISA plan as required to meet requirements of "qualified domestic relations order" for it to be binding or enforceable against plan. *In re Marriage of Baker (1988) 204 Cal. App. 3d 206, 217-218, 251 Cal. Rptr. 126*

[8] Jurisdiction

[a] In General

Court as having subject matter jurisdiction to adjudicate status of marriage based on petitioner's domicile in California at time of filing petition. *Muckle v. Superior Court (2002) 102 Cal. App. 4th 218, 226, 125 Cal. Rptr. 2d 303*

California court as having jurisdiction to determine community interest in property not adjudicated in dissolution proceeding of another state. *In re Marriage of Moore & Ferrie (1993) 14 Cal. App. 4th 1472, 1479, 18 Cal. Rptr. 2d 543*

Spouse's scheduling of community property as exempt in bankruptcy petition as not operating to oust state court of jurisdiction to determine community interests in that property. *In re Marriage of Seligman (1993) 14 Cal. App. 4th 300, 309, 18 Cal. Rptr. 2d 209*

Court as without authority to order interspousal auction of a community asset, over the objection of a party, as a substitute for the court valuing and making its award of that asset. *In re Marriage of Cream (1993) 13 Cal. App. 4th 81, 89, 16 Cal. Rptr. 2d 575*

State courts as having jurisdiction to review pension plan administrator's determination that marital judgment dividing community interests in plan is or is not a qualified domestic relations order. *In re Marriage of Levingston (1993) 12 Cal. App. 4th 1303, 1306, 16 Cal. Rptr. 2d 100*

Court as having power in marital dissolution to order maintenance of life insurance for benefit of children and former spouse as a support substitute; motion to reduce support put life insurance in issue; change of beneficiary was not gift of community property of subsequent marriage. *In re Marriage of O'Connell (1992) 8 Cal. App. 4th 565, 573, 576, 580, 10 Cal. Rptr. 2d 334*

Lesbian nonparent as lacking standing to seek custody or visitation rights to child born to partner during same-sex relationship. *Curiale v. Reagan (1990) 222 Cal. App. 3d 1597, 1600, 272 Cal. Rptr. 520*

Court as having jurisdiction to determine issue of custody and visitation rights of spouse over child who was not of marriage when court had subject matter jurisdiction over issue at commencement of action. *In re Marriage of Halpern*

(1982) 133 Cal. App. 3d 297, 309-310, 184 Cal. Rptr. 740

Power to exercise jurisdiction over child support as governed primarily by principles applicable to jurisdiction over persons. *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 797, 100 Cal. Rptr. 477*

Bases on which court may exercise jurisdiction over defendant or respondent served with process. *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 799-805, 100 Cal. Rptr. 477*

Court as without power in divorce action to assign one spouse's separate property to the other. *Mears v. Mears (1960) 180 Cal. App. 2d 484, 500, 4 Cal. Rptr. 618*

Court as having jurisdiction in divorce action when issue is presented as to nature or character of property to determine whether it is separate or community; court alsomay determine property is held in joint tenancy. *Mears v. Mears (1960) 180 Cal. App. 2d 484, 500, 4 Cal. Rptr. 618*

Court as having jurisdiction to award alimony in default interlocutory judgment of divorce when alimony was not requested in complaint. *Craft v. Craft (1957) 49 Cal. 2d 189, 191-194, 316 P.2d 345*

[b] Native Americans

Tribal court for tribe of which Indian spouse is member as having at least concurrent jurisdiction with state court over both spouses, including non-Indian respondent spouse, for purpose of dissolving their marriage, if spouses resided on Indian reservation during marriage. *Sanders v. Robinson (9th Cir. 1988) 864 F.2d 630, 633-634*

Trial court as having jurisdiction to classify asset as separate but without jurisdiction to divide asset in family law proceeding. *In re Marriage of Buford (1984) 155 Cal. App. 3d 74, 78-79, 202 Cal. Rptr. 20* , disapproved on other grounds, *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n. 13, 224 Cal. Rptr. 333, 715 P.2d 253*)

[c] Nonresidents

Jurisdiction based on physical presence alone as constituting due process of law; therefore, California court as properly establishing personal jurisdiction in dissolution action over nonresident father who was served with process while physically present in California, without need to show other "minimum contacts" between nonresident and *State of California. Burnham v. Superior Court of Cal. (1990) 495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631, 637-638, 645*

Relevant minimum contacts are respondent's contacts at time of dissolution proceeding, not respondent's past contacts with *California. Muckle v. Superior Court (2002) 102 Cal. App. 4th 218, 227-230 125 Cal. Rptr. 2d 303*

Nonresident respondent's acknowledgment of receipt of summons in dissolution action did not constitute consent to jurisdiction to award child support. *In re Marriage of Merideth (1982) 129 Cal. App. 3d 356, 361-362, 180 Cal. Rptr. 909*

Act of nonresident, nondomiciliary father in sending his child to California pursuant to child's wishes to live with her mother was contact with California insufficient under due process clause to permit California courts to exercise in personam jurisdiction over father in child support action filed by mother in California court. *Kulko v. Superior Court (1978) 436 U.S. 84, 98 S. Ct. 1690, 56 L. Ed. 2d 132, 137 , reh'g denied, 438 U.S. 908*

[9] Legal Separation

Matters settled by legal separation proceeding. *Faught v. Faught (1973) 30 Cal. App. 3d 875, 878, 106 Cal. Rptr. 751*

[10] Order to Show Cause

Order to show cause serves not only as a notice of hearing but also as citation or summons, giving court personal jurisdiction over party served. *Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 8 n.6, 118 Cal. Rptr. 21, 529 P.2d 53* ; *McAuliffe v. Coughlin (1894) 105 Cal. 268, 270, 38 P. 730*

[11] Pendente Lite Relief and Orders

[a] In General

Nature and effect of pendente lite order. *Moore v. Superior Court (1970) 8 Cal. App. 3d 804, 809-810, 87 Cal. Rptr. 620*

[b] Court Commissioners

When application for pendente lite relief may be heard by court commissioner. *Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 5-7, 118 Cal. Rptr. 21, 529 P.2d 53*

[c] Oral Testimony

Court's dismissal of order to show cause to modify spousal support was error requiring rehearing, after erroneously stating it had no discretion regarding receiving or excluding oral testimony at hearing. *In re Marriage of Hunt (1985) 172 Cal. App. 3d 872, 875-876, 218 Cal. Rptr. 451*

Ability of court to exclude oral testimony at hearing on application for pendente lite relief under former Cal. Rules of Ct., Rule 1225(a) also included discretion to receive it. *In re Marriage of Hunt (1985) 172 Cal. App. 3d 872, 875, 218 Cal. Rptr. 451* ; *In re Marriage of Perkal (1978) 77 Cal. App. 3d 413, 418, 143 Cal. Rptr. 575*

[d] Property

Trial court has power to order one potential community asset to be sold to save another such asset. *Lee v. Superior Court (1976) 63 Cal. App. 3d 705, 711, 134 Cal. Rptr. 43*

Fact that property is listed in petition under paragraph three requiring statement of property subject to court's disposition does not foreclose trial court from making inquiry into character of property and making a finding or precluding petitioner from offering proof on issue. *In re Marriage of Wall (1973) 30 Cal. App. 3d 1042, 1047-1048 n. 3, 106 Cal. Rptr. 690*

[e] Temporary Restraining Orders

Because proceeding is deemed pending from time of commencement until final determination on appeal or until time for appeal has passed, court may issue temporary restraining orders under former *Civ. Code § 4359* (*now see Fam. Code §§ 231-235, 240-246, 2040-2041, 2045, 6218, 6320-6327*) during appeal. *In re Marriage of Van Hook (1983) 147*

Cal. App. 3d 970, 982, 195 Cal. Rptr. 541

Temporary restraining orders issued under former *Civ. Code § 4359* (*now see Fam. Code §§ 231-235, 240-246, 2040-2041, 2045, 6218, 6320-6327*) converted, following hearing, into preliminary injunctions authorized by former *Civ. Code § 4351* (*now see Fam. Code §§ 200, 2010, 2060(b)*). *In re Marriage of Van Hook (1983) 147 Cal. App. 3d 970, 977-978, 195 Cal. Rptr. 541*

[f] Temporary Support

Temporary support is authorized pending appeal of order setting aside obligee's default. *In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 94-95, 260 Cal. Rptr. 403*

Husband was not entitled to offset against temporary support payments based on rental income received by wife when original temporary support order was based on declaration by wife showing rental income. *In re Marriage of Johnson (1983) 143 Cal. App. 3d 57, 64, 191 Cal. Rptr. 545*

Application for temporary support is heard and determined on record of its own; although not a separate action, proceeding is one for separate judgment independent of final judgment in case. *Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 9, 118 Cal. Rptr. 21, 529 P.2d 53*

Temporary support pending litigation is independent of any alimony award in main action; power of court to make such award continues during pendency of any appeal. *Bain v. Superior Court (1974) 36 Cal. App. 3d 804, 807-808, 111 Cal. Rptr. 848*

When principal action or proceeding is subsequently terminated by dismissal or abatement, temporary support order remains enforceable as to amounts accruing prior to termination. *Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 8-9, 118 Cal. Rptr. 21, 529 P.2d 53*

Pendente lite order for support as remaining in full force and effect until main proceeding is adjudicated, dismissed, or otherwise terminated. *Moore v. Superior Court (1970) 8 Cal. App. 3d 804, 809-811, 87 Cal. Rptr. 620* ; *Bryan v. Bryan (1967) 255 Cal. App. 2d 833, 839, 63 Cal. Rptr. 612* .

Purpose of pendente lite support. *Estate of Fawcett (1965) 232 Cal. App. 2d 770, 784, 43 Cal. Rptr. 160* ; *Whelan v. Whelan (1948) 87 Cal. App. 2d 690, 692, 197 P.2d 361*

[12] Public Policy

Marital relationship as one infused with substantial public interest subject to plenary control by state. *In re Marriage of Walton (1972) 28 Cal. App. 3d 108, 112, 104 Cal. Rptr. 472*

[13] Response

[a] Allegations Admitted

Allegations of petition for dissolution admitted by response as binding on parties and outside issues to be tried. *In re Marriage of Karlin (1972) 24 Cal. App. 3d 25, 32, 101 Cal. Rptr. 240*

[b] Motion to Quash

Trial court as erring in grant of motion to quash family law proceeding brought by genuinely interested person on behalf of incompetent spouse; trial court as required to appoint another guardian ad litem if it summarily rejects petitioner's request for appointment as guardian ad litem. *In re Marriage of Caballero (1994) 27 Cal. App. 4th 1139, 1152, 33 Cal. Rptr. 2d 46* .

Motion to quash action for legal separation on grounds that probate action is pending as improper when family law proceeding was filed first in time; family law court as having jurisdiction to proceed with all aspects of family law action. *In re Marriage of Caballero (1994) 27 Cal. App. 4th 1139, 1152, 33 Cal. Rptr. 2d 46* .

[14] Uncontested Proceeding

Petition and attachments in family law proceeding as not required to assign specific values to property items listed there in order to divide that property in a default judgment. *In re Marriage of Andresen (1994) 28 Cal. App. 4th 873, 878-880, 34 Cal. Rptr. 2d 147* (distinguishing *In re Marriage of Lippel (1990) 51 Cal. 3d 1160, 1166-1167, 276 Cal. Rptr. 290, 801 P.2d 1041* as requiring that petition specify *type* of relief, not *amount* of relief)

[15] Venue

Spouse's nonimmigrant status as a tourist as not precluding finding of residence under California law for purposes of obtaining dissolution. *In re Marriage of Dick (1993) 15 Cal. App. 4th 144, 154, 18 Cal. Rptr. 2d 743*

Residence requirement as not applying to legal separation proceedings, although venue and change of venue is the same as that for dissolution. *Forster v. Superior Court (1992) 11 Cal. App. 4th 782, 785-787, 14 Cal. Rptr. 2d 258*

Change of venue as proper under both *Code Civ. Proc. § 397(a)* and *(e)* when petitioner is unemployed and has no obligations tying him or her to original forum, community will have to bear litigation and support costs, and respondent is employed in second county and has daily responsibility of caring for parties' children whose schooling would be disrupted if case were heard in petitioner's county. *Silva v. Superior Court (1981) 119 Cal. App. 3d 301, 305-307, 173 Cal. Rptr. 832*

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(1980)

Gozansky, Renjilian, & Zuckman, *Divorce Law Practice (Part 1)*, 26(8) Prac. Law. 11 (1980)

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For related research and practice materials, see the following legal topics:
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Adverse witnesses. *Evid. Code § 776*

Attorney authority to stipulate and bind client. *Code Civ. Proc. § 283*

Attorney withdrawal as attorney of record. *Code Civ. Proc. § 285.1*

Awards for attorney fees based on conduct of attorney or party. *Fam. Code § 271*

Awards of attorney fees, costs, and/or punitive damages for frivolous actions, delaying tactics, or failure to comply with local rules. *Code Civ. Proc. §§ 128.5, 575.2(b)*

Case management in family law actions. *Fam. Code §§ 2330.3, 2450 et seq.*

Decisions and judgments. *Fam. Code § 2338*

Declarations of disclosure. *Fam. Code §§ 2103, 2105-2113*

Disqualification of judges. *Code Civ. Proc. §§ 170-170.6*

Judgment books; alternative entry of judgments. *Code Civ. Proc. §§ 668, 668.5*

Opinions of experts. *Evid. Code § 801*

Order of proceedings. *Code Civ. Proc. §§ 607, 631.7*

Postponements. *Code Civ. Proc. §§ 594a, 595.2*

Preference of child custody and support cases. *Fam. Code §§ 3023, 4003*

Prohibition against eavesdropping evidence. *Fam. Code § 2022*

Qualification of expert witness. *Evid. Code § 720*

References and trials by referees. *Code Civ. Proc. §§ 638, 639, 641-645.1*

Restoration of former or birth name. *Fam. Code §§ 2080, 2081*

Specific acts of misconduct. *Fam. Code § 2335*

Statements of decision. *Code Civ. Proc. § 632*

Unavailability at trial. *Evid. Code § 240*

Use of discovery material at trial. *Code Civ. Proc. §§ 2025.620, 2030.410*

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§ 221.231 California Rules of Court

Applicability of general law to family law proceedings. *Cal. Rules of Ct., Rule 5.21*

Civil Law and Motion Rules. *Cal. Rules of Ct., Rules 3.1100-3.1370*

Electronic recordings offered in evidence. *Cal. Rules of Ct., Rule 2.1040*

References to temporary judges. *Cal. Rules of Ct., Rule 3.900-3.927*

Sealing court records. *Cal. Rules of Ct., Rule 2.550 et seq.*

Settlement conferences. *Cal. Rules of Ct., Rule 3.1380*

Statements of decision. *Cal. Rules of Ct., Rule 3.1590*

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§ 221.232 Decisions

[1] Closed Hearings

Court as empowered to direct trial of any issue of fact joined in family law proceeding to be private, and as being empowered to exclude everyone except officers of court, parties, witnesses, and counsel. *Whitney v. Whitney (1958) 164 Cal. App. 2d 577, 582, 330 P.2d 947*

[2] Disqualification of Judge

Party asserting disqualification by peremptory challenge who fails to bring issue to trial court's attention as waiving right to assert disqualification on appeal. *Andrisani v. Saugus Colony Ltd. (1992) 8 Cal. App. 4th 517, 523-524, 10 Cal. Rptr. 2d 444*

[3] Judgments

Clerk as having no authority to enter judgment on his or her own without court action. *Estate of Dargie (1912) 162 Cal. 51, 53, 121 P. 320]*

[4] Pretrial Statements

Failure to file reply statement in jurisdiction requiring pretrial statement and regarding it a request for admissions as constituting admission admission of factual contentions made in statement filed by other party. *La Bue v. Superior Court (1977) 75 Cal. App. 3d 264, 142 Cal. Rptr. 83*

[5] Prohibited Evidence

Illegal eavesdropping in domestic relations setting as constituting violation of federal law. *People v. Otto (1992) 2 Cal. 4th 1088, 1099-1100, 9 Cal. Rptr. 2d 596, 831 P.2d 1178*

Victim of illegal eavesdropping to obtain evidence in family law proceeding as entitled to civil cause of action for damages. *Ribas v. Clark (1985) 38 Cal. 3d 355, 358-363, 212 Cal. Rptr. 143, 696 P.2d 637*

[6] Reference of Case or Factual Issues to Referee

Unless done by agreement of parties, delegation of judicial authority to special master to make factual findings and exercise judgment in determining parties' incomes to set spousal support as abuse of discretion. *In re Marriage of Olson (1993) 14 Cal. App. 4th 1, 3, 17 Cal. Rptr. 2d 480*

Party's failure to file timely objections in writing to referee's report or to move to set aside report as constituting waiver of party's right to object to referee's findings. *Martino v. Denevi (1986) 182 Cal. App. 3d 553, 555-557, 227 Cal. Rptr. 354*

Absent parties' agreement, court as being prohibited from ordering reference in dissolution proceeding unless issue specifically falls within matters addressed by *Code Civ. Proc. § 639*. *In re Marriage of Galis (1983) 149 Cal. App. 3d 147, 152-153, 196 Cal. Rptr. 659*

[7] Request for Jury

Although court has power to order any issue of fact to be tried by jury, order as rarely, if ever, issued in family law proceeding; denial of request for jury trial as not constituting abuse of discretion. *In re Marriage of Kim (1989) 208 Cal. App. 3d 364, 373, 256 Cal. Rptr. 217*

Findings of jury as only advisory and not binding on court in rendering its statement of decision. *Cutter Lab. v. R. W. Ogle & Co. (1957) 151 Cal. App. 2d 410, 418, 311 P.2d 627*

[8] Statements of Decision

Party's failure to request mathematical breakdown of attorney's fees for posttrial proceedings as preventing appellate court from determining how trial court ruled regarding challenged fees when statement of decision otherwise contained no fee allocation for any particular proceeding. *In re Marriage of Green (1992) 6 Cal. App. 4th 584, 593, 7 Cal. Rptr. 2d 872*

Omission from statement of decision of requested calculations on valuation of medical practice as reversible error. *In re Marriage of Ananeh-Firempong (1990) 219 Cal. App. 3d 272, 284, 268 Cal. Rptr. 83*

Transcript of proceedings setting forth basis of trial court's ruling as making statement of decision unnecessary on appeal. *In re Marriage of Powers (1990) 218 Cal. App. 3d 626, 634 n.5, 267 Cal. Rptr. 350*

Failure to request statement of decision on trial court's valuation of community interest in asset as fatal to appellate attack on the valuation. *In re Marriage of Hebbring (1989) 207 Cal. App. 3d 1260, 1274, 255 Cal. Rptr. 488*

Oral "statement of decision" as permitted supplementation by written statement of decision because *Code Civ. Proc. § 632* and former Cal. Rules of Ct., Rule 232 (now *Cal. Rules of Ct., Rule 3.1590*) merely describe situations that require

written statements. *Khan v. Superior Court (1988) 204 Cal. App. 3d 1168, 1173 n.4, 251 Cal. Rptr. 815*

[9] Stipulations

Stipulation entered into by attorney without client's authorization as subject to being set aside if dispute is substantially resolved by stipulation. *In re Marriage of Helsel (1988) 198 Cal. App. 3d 332, 339-340, 243 Cal. Rptr. 657*

Although stipulation that is ambiguous on its face may be clarified by parol evidence in absence of any patent ambiguity, extrinsic evidence as not being available to alter apparent intent of parties. *In re Marriage of Wright (1976) 54 Cal. App. 3d 1115, 1121, 126 Cal. Rptr. 894*

[10] Withdrawal of Attorney

Attorney's failure to withdraw formally from family law proceeding as not tolling statute of limitations for legal malpractice action against attorney. *Shapero v. Fliegel (1987) 191 Cal. App. 3d 842, 846-849, 236 Cal. Rptr. 696*

Failure to notify client of withdrawal of attorney of record as constituting valid ground for disciplinary action against attorney. *Finch v. State Bar (1981) 28 Cal. 3d 659, 664-665, 170 Cal. Rptr. 629, 621 P.2d 253*

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Witkin, Summary of California Law, vol. 11, *Husband and Wife*, §§ 20, 57-70, 72-143, 156, 370, 385 (dissolution of marriage), 144-147 (legal separation) (10th ed. 2005)

Courtroom Conduct: Tactics, Ethics, Contempt, and Common Sense (Cal. C.E.B., 1977)

Practice Under the California Family Law Act: Dissolution, Legal Separation, Nullity (Cal. C.E.B. 1992)

Preparing and Examining Expert Witnesses (Cal. C.E.B., 1978)

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§ 221.250 California Family Law Practice and Procedure

For discussion and forms relating to dismissals, statements of decision, and judgments in family law proceedings, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, Chs. 120- 122 (Matthew Bender 2d ed.)

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Qualified Domestic Relations Orders (QDROs). *29 U.S.C. § 1056(d)(3)*

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[1] Dismissal of Proceedings

Dismissals. *Code Civ. Proc. § 581*

[2] Judgment of Dissolution or Legal Separation

Continuance for reconciliation. *Fam. Code § 2334*

Decisions; judgments. *Fam. Code § 2338*.

Waiting period before dissolution judgment becomes final. *Fam. Code § 2339*

Statement in judgment of date marriage terminates. *Fam. Code § 2340*

Effect on judgment of appeal or motion for new trial. *Fam. Code § 2341*

Retention of jurisdiction over date of termination. *Fam. Code § 2343*

Death of either party; effect of after entry of judgment. *Fam. Code § 2344*

Entry of judgment nunc pro tunc. *Fam. Code § 2346*

Continuing jurisdiction to award community estate assets or liabilities. *Fam. Code § 2556*

Retention of jurisdiction. *Fam. Code § 4336*

[3] Restoration of Name

Restoration of party's former name. *Fam. Code §§ 2080-2082*; Cal. Judicial Council Form FL-395 (form of ex parte application)

[4] Statement of Decision

Statement of decision in lieu of written findings and conclusions. *Code Civ. Proc. § 632*

Court findings regarding standard of living and other circumstances. *Fam. Code § 4332*

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18-221 California Forms of Pleading and Practice--Annotated § 221.253

§ 221.253 California Rules of Court

Announcement of tentative decision, statement of decision and judgment. *Cal. Rules of Ct., Rule 3.1590*

Statement of decision, judgment, and motion for new trial following bifurcated trial. *Cal. Rules of Ct., Rule 3.1591*

Legal Topics:

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

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18-221 California Forms of Pleading and Practice--Annotated § 221.254

§ 221.254 Decisions

[1] Dismissal for Failure to Prosecute

Trial court erred in dismissing putative father's motion to dismiss county's action under child support order for reimbursement of assistance payments made on behalf of daughter for county's failure to bring action to trial within five years. *County of Orange v. Quinn (2002) 97 Cal. App. 4th 956, 958-964, 118 Cal. Rptr. 2d 833 But see County of Orange v. Rosales (2002) 99 Cal. App. 4th 1214, 121 Cal. Rptr. 2d 788* (on facts virtually identical to *Quinn*, except county successfully terminated father's parental rights, trial court properly dismissed county's reimbursement action for failure to bring it to trial within five years because of lack of continuing child support order).

Bifurcated proceeding in which court terminated marital status and had later received evidence, sworn witnesses, and taken testimony on issues related to property was "partial trial" that satisfied five-year dismissal statutes. *In re Marriage of MacFarlane & Lang (1992) 8 Cal. App. 4th 247, 253-254, 10 Cal. Rptr. 2d 157*

Dismissal of bifurcated dissolution action not brought to retrial within three years when temporary child support order still in force is prohibited. *In re Marriage of Hinds (1988) 205 Cal. App. 3d 1398, 1403-1405, 253 Cal. Rptr. 170*

[2] Judgments

Court's withholding of dissolution judgment to punish party's contempt violates law and public policy that favors elimination of fault. *In re Marriage of Gray (1988) 204 Cal. App. 3d 1239, 1254, 251 Cal. Rptr. 846*

Rules for construing ambiguous judgment or order. *Verner v. Verner (1978) 77 Cal. App. 3d 718, 724, 143 Cal. Rptr. 826*

Trial court has power to correct mistakes and annul orders and judgments inadvertently or improvidently made, that is,

judgments and orders that were not actually the result of the exercise of judgment. *In re Marriage of Mercado (1977) 75 Cal. App. 3d 701, 704, 141 Cal. Rptr. 423*

[3] Statements of Decision

Code Civ. Proc. § 638 requires that referee issue *sua sponte* a statement of decision explaining factual and legal basis for his or her decision on each controverted issue. *In re Marriage of Demblewski (1994) 26 Cal. App. 4th 232, 236, 31 Cal. Rptr. 2d 533*

Omission from statement of decision of requested calculations on valuation of medical practice was reversible error. *In re Marriage of Ananeh-Firempong (1990) 219 Cal. App. 3d 272, 284, 268 Cal. Rptr. 83*

Omission of mathematical calculations from trial court's statement of decision did not constitute reversible error on appeal. *In re Marriage of Zaentz (1990) 218 Cal. App. 3d 154, 167, 267 Cal. Rptr. 31*

Transcript of proceedings that adequately sets forth basis of trial court's ruling makes statement of decision unnecessary on appeal. *In re Marriage of Powers (1990) 218 Cal. App. 3d 626, 634 n.5, 267 Cal. Rptr. 350*

Failure to request statement of decision on trial court's valuation of community interest in asset as fatal to appellate attack on the valuation. *In re Marriage of Hebbring (1989) 207 Cal. App. 3d 1260, 1274, 255 Cal. Rptr. 488*

Memorandum of trial court's intended decision as no substitute for properly requested statement of decision, and not a part of record on appeal. *In re Marriage of Ditto (1988) 206 Cal. App. 3d 643, 646-647, 253 Cal. Rptr. 770*

Oral "statement of decision" as permitted supplementation by written statement of decision. *Khan v. Superior Court (1988) 204 Cal. App. 3d 1168, 1173 n.4, 251 Cal. Rptr. 815*

Postjudgment spousal support orders as reversed when statement of decision is inadequate and is based on assumptions unsupported by record. *In re Marriage of Hoffmeister (1987) 191 Cal. App. 3d 351, 360-366, 236 Cal. Rptr. 543* (*Hoffmeister II*)

Legal Topics:

For related research and practice materials, see the following legal topics:
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18-221 California Forms of Pleading and Practice--Annotated § 221.255

§ 221.255 Law Reviews

Gozansky, Renjilian, & Zuckman, *Divorce Law (Part 3)*, 27(2) Prac. Law. 67 (1981)

Gozansky, Renjilian, & Zuckman, *Divorce Law Practice (Part 2)*, 27(1) Prac. Law. 27 (1981)

Gozansky, Renjilian, & Zuckman, *Divorce Law Practice (Part 1)*, 26(8) Prac. Law. 11 (1980)

Gardner, *Summary Judgment And Dismissal Motion In Dissolution of Marriage Proceedings*, 15 Bev. Hills B.J. 373 (1980)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureSummary JudgmentGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-221 California Forms of Pleading and Practice--Annotated § 221.256

§ 221.256 Text References

California Points and Authorities, Ch. 90, *Dismissal* , Ch. 215, *Statement of Decision* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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18-221 California Forms of Pleading and Practice--Annotated §§ 221.257-221.269

[Reserved]

§§ 221.257[Reserved]

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18-221 California Forms of Pleading and Practice--Annotated § 221.270

§ 221.270 California Family Law Practice and Procedure

For discussion and forms relating to relief from judgments and orders in the trial court, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, Ch. 131 (Matthew Bender 2d ed.)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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§ 221.271 State Statutes

Relief from mistake, inadvertence, surprise, or excusable neglect. *Code Civ. Proc. § 473(b)*

Correction of clerical errors in judgment or order. *Code Civ. Proc. § 473(d)*

Motion to set aside void judgment or order. *Code Civ. Proc. § 473(d)*

Time limit on seeking relief from default or default judgment. *Code Civ. Proc. § 473.5*

Motion for new trial. *Code Civ. Proc. §§ 655-662.5, 663.1, 663.2*

Motion to vacate judgment and enter different judgment. *Code Civ. Proc. §§ 663, 663a*

Motion to reconsider or renewed motion. *Code Civ. Proc. § 1008*

Notice required for any order subsequent to entry of judgment or permanent order. *Fam. Code § 215*

Motion to set aside judgment on specified equitable grounds. *Fam. Code § 2120 et seq.*

Continuing jurisdiction of court to award community estate assets or liabilities. *Fam. Code § 2556*

Motion for relief from support order. *Fam. Code § 3690 et seq.*

Relief from support judgment in agency-initiated action, based on mistaken identity. *Fam. Code § 17530*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsNunc Pro Tunc ReliefCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-221 California Forms of Pleading and Practice--Annotated § 221.272

§ 221.272 California Rules of Court

Hearing on motion to vacate judgment. *Cal. Rules of Ct., Rule 3.1602*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions to VacateFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-221 California Forms of Pleading and Practice--Annotated § 221.273

§ 221.273 Decisions--New Trial

Negligence of moving party's attorney as insufficient basis for establishing facts under which moving party was prejudicially surprised without any default or negligence on his or her part. *In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 154-155, 242 Cal. Rptr. 649*

Merits of motion for new trial denied by operation of law as reviewable on appeal in same manner as if expressly denied by court, even in case in which appellant has caused failure to have motion heard within statutory time period or when motion is based on affidavits that trial court did not pass on. *In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 152-153, 152 n.3, 242 Cal. Rptr. 649*

Timely filing of notice of intention to move for new trial as jurisdictional; time cannot be extended or waived by parties. *In re Marriage of Beilock (1978) 81 Cal. App. 3d 713, 721, 146 Cal. Rptr. 675*

In case of order quashing writ of execution, period for moving for new trial as starting to run on date judge signs formal order; in case when order quashing writ of execution is denied, period as starting to run from date of minute order of judge's decision. *In re Marriage of Beilock (1978) 81 Cal. App. 3d 713, 723, 146 Cal. Rptr. 675*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-221 California Forms of Pleading and Practice--Annotated § 221.274

§ 221.274 Posttrial Relief From Judgment

[1] General Grounds for Relief

Imbalance in division of community property attributable to stock market fluctuations subsequent to filing of judgment, resulting in stock run-up in values, could not support trial court's decision to set aside stipulated judgment in divorce case. *In re Marriage of Heggie (2002) 99 Cal. App. 4th 28, 33, 120 Cal. Rptr. 2d 707*

Trial court's denial of attorney's motion for personal relief from sanctions under *Code Civ. Proc. § 473* in marital dissolution proceeding as not disturbed on appeal without showing of abuse of discretion by trial court. *In re Marriage of Fuller (1985) 163 Cal. App. 3d 1070, 1075, 210 Cal. Rptr. 73*

For purposes of Section 473 motion attacking stipulated judgment of dissolution, measuring event for six-month filing period is date of entry of judgment, not date of stipulation. *In re Marriage of Jacobs (1982) 128 Cal. App. 3d 273, 283, 180 Cal. Rptr. 234*

Provisions of Servicemembers Civil Relief Act as applicable to any order modifying judgment of dissolution or nullity of marriage or legal separation. *In re Marriage of Lopez (1981) 115 Cal. App. 3d 776, 782-784, 173 Cal. Rptr. 718*

[2] Consent Lacking

Mentally weakened condition due to anxiety, emotional anguish, or exhaustion that renders one unable to protect herself or himself as showing lack of consent; lack of capacity to contract as not necessary to show lack of consent. *In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 85, 260 Cal. Rptr. 403* ; *O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 155, 119 Cal. Rptr. 245*

[3] Duress

Husband's refusal to deal with wife's counsel, repeated derogatory remarks that undermined wife psychologically, threats of bankruptcy, misrepresentations regarding division of property and his entitlement to reimbursement, and pressure to take immediate action that resulted in wife's signing unconscionable agreement as establishing duress sufficient to void agreement. *In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 84-87, 260 Cal. Rptr. 403*

Evidence of grantee's threats against grantor if she did not sign quitclaim deeds, coupled with evidence of actual acts of violence before and after deeds were signed as sufficient to support finding of duress. *Alderson v. Alderson (1986) 180 Cal. App. 3d 450, 465, 225 Cal. Rptr. 610*

Court as not able to hold as matter of law that no duress exists when wife bargains away substantial property rights to protect custody rights to children and court as not required to recognize agreement if threatened use of child custody hearing caused so much fear in wife's mind that contractual volition was destroyed. *In re Marriage of Gonzalez (1976) 57 Cal. App. 3d 736, 747-748, 129 Cal. Rptr. 566*

[4] Fraud

Former wife sufficiently pleaded extrinsic fraud as basis for equitable relief from dissolution judgment by alleging that former husband, an attorney, falsely represented that he had disclosed all assets and that wife did not need separate counsel, which deprived her of opportunity to present her claim fully to court. *Kuehn v. Kuehn (2000) 85 Cal. App. 4th 824, 831-832, 102 Cal. Rptr. 2d 743*

Before party may invoke aid of equity for relief from dissolution judgment, party must not only allege matters by which judgment was fraudulently obtained, but must also allege that party has meritorious case, so that if facts were proven, differentresult would ensue. *Kuehn v. Kuehn (2000) 85 Cal. App. 4th 824, 831, 102 Cal. Rptr. 2d 743*

Marital settlement agreement and judgment thereon as able to be set aside for extrinsic fraud, which is fraud that prevents party from fully participating in proceeding. *In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 81, 260 Cal. Rptr. 403*

Extrinsic fraud as constructive fraud practiced by husband, while parties were still in confidential relationship, by threats and misrepresentations regarding value and character of assets, while he had psychological, emotional, and financial control over wife. *In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 87-89, 260 Cal. Rptr. 403*

[5] Mistake

Reasonable mistake of law as justifying setting aside stipulated judgment of dissolution when judgment is in accordance with parties' stipulation on disposition of their marital property and they operated under mistake of law when agreement was made. *In re Marriage of Jacobs (1982) 128 Cal. App. 3d 273, 284-285, 180 Cal. Rptr. 234*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentFraudContracts LawDefensesDuress & Undue InfluenceGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionProperty Settlements

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18-221 California Forms of Pleading and Practice--Annotated § 221.275

§ 221.275 Law Reviews

Gozansky, Renjilian, & Zuckman, *Divorce Law Practice (Part 3),* 27(2) Prac. Law. 67 (1981)

Gozansky, Renjilian, & Zuckman, *Divorce Law Practice (Part 2),* 27(1) Pract. Law. 27 (1981)

Gozansky, Renjilian, & Zuckman, *Divorce Law Practice (Part 1),* 26(8) Prac. Law. 11 (1980)

Note, *Written Specification of Reasons for New Trial Orders, 64 Cal. L. Rev. 286 (1976)*

Note, *Code of Civil Procedure Section 473.5: Setting Aside Defaults and Default Judgments, 21 Hastings L.J. 1291 (1970)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-221 California Forms of Pleading and Practice--Annotated § 221.276

§ 221.276 Text References

California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* , Ch. 155, *Motions After Trial* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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18-221 California Forms of Pleading and Practice--Annotated §§ 221.277-221.289

[Reserved]

§§ 221.277[Reserved]

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18-221 California Forms of Pleading and Practice--Annotated § 221.290

§ 221.290 California Family Law Practice and Procedure

For discussion and forms relating to modification of child or spousal support orders, and to the procedures for modifying such orders, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, Chs. 42, 52, 130 (Matthew Bender 2d ed.)

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsModificationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral Overview

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18-221 California Forms of Pleading and Practice--Annotated § 221.291

§ 221.291 California Family Law Trial Guide

For discussion, checklists, and forms relating to modification of orders and judgments at trial, see Denner, Rothschild & Johnson, California Family Law Trial Guide, Unit 10 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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18-221 California Forms of Pleading and Practice--Annotated § 221.292

§ 221.292 State Statutes

[1] Child Support

Notice of modification procedures. *Fam. Code § 4010*

Stipulated child support agreements. *Fam. Code § 4065*

[2] Mediation of Custody and Visitation

In general. *Fam. Code §§ 3160-3164*

Availability. *Fam. Code §§ 3170-3173*

Proceedings. *Fam. Code §§ 3175-3186*

[3] Modification or Termination of Support

Transfer of venue when both parties have moved from county. *Code Civ. Proc. § 397.5*

Availability of tax returns. *Fam. Code § 3552*

Modification in general. *Fam. Code §§ 3650-3654*

Modification or termination of temporary support. *Fam. Code § 3603*

Discovery before beginning modification or termination proceedings. *Fam. Code §§ 3660-3668*

Simplified modification of support. *Fam. Code § 3680*

Retention of jurisdiction over permanent support order. *Fam. Code § 4336*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral OverviewFamily LawChild SupportObligationsModificationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral Overview

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18-221 California Forms of Pleading and Practice--Annotated § 221.293

§ 221.293 California Rules of Court

Application for court order. *Cal. Rules of Ct., Rule 5.118*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-221 California Forms of Pleading and Practice--Annotated § 221.294

§ 221.294 Decisions

Given importance of associational interests husband claimed were impaired by post-judgment order issued from chambers modifying custody, court of appeal remanded for new hearing to consider pertinent factors concerning both children and two families of which they are a part. *In re Marriage of Dunn (2002) 103 Cal. App. 4th 345, 348-349, 126 Cal. Rptr. 2d 636*

District attorney is not empowered to defend recipient spouses in actions for reduction or termination of spousal support. *In re Marriage of Brown (1987) 189 Cal. App. 3d 491, 495-497, 234 Cal. Rptr. 535*

Trial court did not abuse discretion in denying request to modify spousal support in judgment providing that nonmodifiable support terminated after five years, because modification motion was brought more than one year after five-year period ended and there was no indication parties intended that court's jurisdiction to award support would extend beyond that period. *In re Marriage of Segel (1986) 177 Cal. App. 3d 1030, 1041, 223 Cal. Rptr. 430*

Court cannot treat motion to modify dissolution judgment as motion to set aside judgment on equitable grounds if portions of judgment sought to be set aside are not product of extrinsic fraud or mistake. *In re Marriage of Dorris (1984) 160 Cal. App. 3d 1208, 1213, 207 Cal. Rptr. 160*

Modification of foreign order granting visitation rights, conditioning payment of support on visitation, does not abridge or interfere with custody of children. *Creed v. Schultz (1983) 148 Cal. App. 3d 733, 742, 196 Cal. Rptr. 252*

Legal Topics:

For related research and practice materials, see the following legal topics:
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18-221 California Forms of Pleading and Practice--Annotated § 221.295

§ 221.295 Law Reviews

Note, *In re Marriage of Birnbaum: Modifying Child Custody Arrangements by Ignoring the Rules of the Game, 24 Loy. L.A. L. Rev. 467 (1991)*

Comment, *Recognizing Constitutional Rights of Custodial Parents: The Primacy of the Post-Divorce Family in Child Custody Modification Proceedings, 35 UCLA L. Rev. 677 (1988)*

Wexler, *Rethinking the Modification of Child Custody Decrees, 94 Yale L.J. 757 (1985)*

Legal Topics:

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18-221 California Forms of Pleading and Practice--Annotated §§ 221.296-221.309

[Reserved]

§§ 221.296[Reserved]

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PART IV. FORMS
A. Initiating The Proceeding And Preliminary Relief

18-221 California Forms of Pleading and Practice--Annotated § 221.310

§ 221.310 Petition [Fam. Code § 2330; Cal. Judicial Council Form FL-100]

[1] FORM Petition [Fam. Code § 2330; Cal. Judicial Council Form FL-100]

Click here to view image.

[2] Use of Form

This form is the mandatory Judicial Council form of petition by which to commence a proceeding for marital dissolution, legal separation, or nullity of marriage [Cal. Judicial Council Form FL-100]. For illustrative purposes, it has been completed as a petition for marital dissolution. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. For an illustrative filled-in petition for nullity of marriage, see Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights* .

In limited cases, a joint petition for *summary* dissolution of marriage may be filed instead of this form [*Fam. Code § 2400 et seq.*; *see § 221.342*].

[3] Completing the Form

[a] Caption

If the petitioner is appearing in propria persona, his or her name, address, and telephone number should be inserted. If this is the case, the "Attorney(s) for" designation should be crossed out, and "In pro. per." should be inserted.

Every proceeding must be prosecuted and defended in the names of the real parties in interest [*Cal. Rules of Ct., Rule 5.100*], and therefore only the husband or the wife can be the petitioner in a dissolution or legal separation action [*Cal. Rules of Ct., Rule 5.102*]. However, an incompetent spouse may bring a dissolution proceeding through the conservator

of his or her estate or through a guardian ad litem [*see In re Marriage of Caballero (1994) 27 Cal. App. 4th 1139, 1149-1150, 33 Cal. Rptr. 2d 46]* . A party may file the petition using the name by which he or she is known rather than his or her married name, and thus a petition is valid when filed using a party's birth name [*Weathers v. Superior Court (1976) 54 Cal. App. 3d 286, 288-289, 126 Cal. Rptr. 547]* . If a lis pendens will be filed, however, the petitioner should use the name by which he or she holds title to the real property in question so that the lis pendens will give notice of the proceeding [*see Code Civ. Proc. § 405.20*].

[b] Residence

If the petition is for dissolution, one of the two boxes must be checked to establish that the court has jurisdiction.

[c] Statistical Facts

The appropriate dates should be filled in. The date of separation alleged is important, as separation changes the status of property earned during marriage to separate property [*see Fam. Code § 771*].

[d] Minor Children

Either Box 3.a. or 3.b. should be checked to indicate whether there are minor children. If there are, their names and other information must be set forth. Also, if there are children, a completed Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act form must be attached [*Fam. Code § 3429*]. Foran approved form of declaration, *see § 221.312* [*see* Cal. Judicial Council Form FL-105].

Note that minor children of the petitioner and respondent who were born before the date of marriage or who were adopted during the marriage should be included as part of the petitioner's declaration regarding children. If paternity of children born to the parties before the date of marriage is disputed, that issue may be decided in the dissolution or legal separation proceeding [*Fam. Code § 2330.1*]. If paternity is not in dispute, the parties should complete and attach a voluntary declaration of paternity, and mark the checkoff box in Item 3 indicating that the declaration is attached.

[e] Separate Property

All property that the petitioner wishes to have confirmed as separate assets or separate obligations should be listed in Paragraph 4 or on an attachment to the petition. The assets and obligations may also be set forth in the Judicial Council form of property declaration [*see* Cal. Judicial Council Forms FL-160 (property declaration); FL-161 (continuation of property declaration)]. The descriptions should be as specific as practical to avoid a later contention that a particular piece of property or obligation was not properly claimed to be separate.

[f] Community and Quasi-Community Property

Paragraph 5 requires the petitioner to indicate whether there are community and quasi-community assets and obligations subject to disposition by the court (and, if so, to list that property) or whether the parties have disposed of their property by written agreement.

By checking Box 5.a., the petitioner indicates that no property is subject to disposition by the court "in this proceeding." Unless counsel is absolutely certain that no property is subject to disposition by the court, Box 5.a. should not be checked. If it is, the petitioner may be barred by res judicata from claiming in a later action that community property actually existed and from asserting rights in the property. Box 5.b. should be checked when there are community assets and obligations subject to disposition by the court. These assets and obligations must be listed in the petition, the Judicial Council form of property declaration [*see* Cal. Judicial Council Forms FL-160 (property declaration); FL-161 (continuation of property declaration)], or in an attachment to the petition.

Generally, it is prudent to include as complete and accurate a declaration regarding property as possible with the petition, rather than relying on a later amendment or other filing in which to make the declaration. Some general descriptions such as "household furniture and furnishings" can be used, but significant valuable items should be listed separately to avoid a later contention that they were not claimed as community property [*see In re Marriage of Wall (1973) 30 Cal. App. 3d 1042, 1049, 106 Cal. Rptr. 690]* . Similarly, community liabilities should be listed and identified as completely and clearly as possible. It also is prudent to include a catch-all description to avoid omitting any unknown community property, such as "Various other items of community property, the exact nature, extent, and location of which is unknown to petitioner," and to state that the petitioner will seek to amend the petition to include an exact description when discovery is completed.

Strictly speaking, no listing in the petition of the value of the property to be divided is required, even when a Judicial Council form of Property Declaration, which contains columns for setting out both value and a proposed property division, is attached to the petition [*see § 221.334*]. The Property Declaration itself contains instructions indicating that when it is attached to a petition or response, neither property values nor a proposal regarding division needs to be completed. Accordingly, it is sufficient, for the purposes of later evaluating the petition in default proceedings, that the property to be divided is listed and that all appropriate boxes in the petition and any accompanying Judicial Council forms are filled in according to the instructions provided by the Judicial Council [*see In re Marriage of Andresen (1994) 28 Cal. App. 4th 873, 879-880, 34 Cal. Rptr. 2d 147* ; for a Judicial Council form of Property Declaration (Cal. Judicial Council Form FL-160) *see § 221.334*].

Care should be taken not to list as community property any asset that is claimed to be separate property. However, it has been held that merely listing the property as property "subject to disposition by the court" is not an admission that it is community property without a specific allegation in the petition to that effect [*In re Marriage of Wall (1973) 30 Cal. App. 3d 1042, 1047-1048, 106 Cal. Rptr. 690]* .

[g] Type of Relief Sought

Paragraph 6 requires the petitioner to specify whether the petition is for legal separation, dissolution, or nullity, as well as the exact statutory basis or bases for the relief sought.

[h] Request for Relief

The appropriate boxes must be checked in Paragraph 7 to indicate the relief requested. Boxes 7.a.-d. are applicable if there are minor children of the marriage. Box 7.c. also should be used when the petitioner is a stepparent seeking visitation of the respondent's child, who is not a child of the marriage [*see Fam. Code § 2010*]. Box 7.f. should be checked if spousal support is sought or if the petitioner concedes that the respondent should receive spousal support. The petitioner should check Box 7.h. when seeking court determination of property rights, unless the parties have no community or separate property to be divided or separate property to be confirmed. Box 7.e. for attorney's fees and costs boxshould be checked if they are sought. Box 7.i. is for use in obtaining restoration of the petitioner's former name.

The petition contains additional checkoff boxes. The first of these (Box 7.g.) is to request termination of the court's jurisdiction to award spousal support to the respondent. Although a court may have authority to terminate spousal support over a party, strict statutory guidelines govern when the court must reserve jurisdiction over support, particularly with respect to marriages of long duration [*see Fam. Code § 4336*]. A separate checkoff box (Box 7.d.) is provided to request that the court determine the parentage of any child born to the petitioner and respondent before the date of their marriage [*see Fam. Code § 2330.1*]. A third additional checkoff box (Box 7.j.) is to request "other" relief, which must then be specified. In view of the general prohibition on asserting other causes of action or claims for relief in the petition (apart from those in the California Rules of Court or the Family Code), it presently is unclear what "other" relief may be requested [*see Cal. Rules of Ct., Rule 5.104*]. Nevertheless, it appears that this box at least may be

used to explain requests regarding child custody, visitation, or child support in which the relief requested was other than that printed on the form.

[i] Notice of Child Support

The statement in Paragraph 8 informs the respondent that, if there are minor children of the marriage, including children born to the petitioner and respondent before the date of their marriage, or adopted by them after marriage, the court will order child support on request and submission of financial forms without further notice to either party, and a wage assignment will be issued. In addition, a notice on the front of the petition warns that any party required to pay child support must pay interest on overdue amounts at the "legal" amount [*Code Civ. Proc. § 695.210* (amount required to satisfy money judgment includes interest); *see also Code Civ. Proc. § 695.211* (every money judgment or order for child support must provide this notice), which is currently 10 percent *see Code Civ. Proc. § 685.010*].

[j] Declaration Regarding Orders in Summons

Paragraph 9 contains a preprinted declaration indicating that the petitioner has read the restraining orders that are set forth on the back of the Family Law Summons (*see § 221.313*) and understands that they apply to the petitioner when the petition is filed [*see Fam. Code § 2040(a)*].

[k] Social Security Numbers

A petition for dissolution, nullity, or legal separation must include a separate, one-page document that lists all relevant Social Security numbers known to the petitioner, which pertain to the petitioner, the respondent, and the parties' minor children [*Fam. Code § 2024.5(a)*]. This list must be placed in the confidential portion of the court file of the proceeding, and may not be disclosed except for good cause shown to the court [*Fam. Code § 2024.5(c)*]. The petitioner may redact any Social Security number that was placed in the confidential portion of the court file from any pleading, attachment, document, or other written material filed with the court only after the document listing all relevant Social Security numbers is placed in the confidential portion of the court file [*Fam. Code § 2024.5(e)*].

[4] State Statutes

Required notice regarding accrued interest on child support arrearages. *Code Civ. Proc. § 695.211*

Jurisdiction in Superior Court. *Fam. Code §§ 200, 2010-2012*

General procedural provisions. *Fam. Code §§ 210-215*

Summons, temporary restraining orders in. *Fam. Code §§ 231-235, 2040-2041*

Social Security numbers. *Fam. Code § 2024.5*

Summons, warning regarding jointly held property in. *Fam. Code § 2040(b)*

Grounds. *Fam. Code §§ 2310-2313*

Residence requirement. *Fam. Code §§ 2320-2322*

Petition for dissolution or legal separation. *Fam. Code § 2330*

Service on other spouse. *Fam. Code § 2331*

Legal Separation; consent of parties to. *Fam. Code §§ 2345*

[5] Family Law Rules

Family Law Rules, applicability of. *Cal. Rules of Ct., Rules 5.20, 5.21*

Designation of parties, parties to proceeding, and other causes of action. *Cal. Rules of Ct., Rules 5.100-5.104*

Injunctive relief, restraining orders, and reservation of jurisdiction. *Cal. Rules of Ct., Rules 5.106, 5.110, 5.112*

Pleadings. *Cal. Rules of Ct., Rules 5.108, 5.128*

Appearance. *Cal. Rules of Ct., Rule 5.120*

Family law forms. Cal. Judicial Council Forms FL-100 et seq.

[6] Text References

Kirkland, Lurvey & Richmond, California Family Law Practice And procedure, 2nd ed., Ch. 92 (Matthew Bender)

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18-221 California Forms of Pleading and Practice--Annotated § 221.311

§ 221.311 Preliminary Declaration of Disclosure--Judicial Council Form [Fam. Code §§ 2103-2113; Cal. Judicial Council Form FL-140]

[1] FORM Preliminary Declaration of Disclosure--Judicial Council Form [Fam. Code §§ 2103-2113; Cal. Judicial Council Form FL-140]

Click here to view image.

[2] Use of Form

The form reproduced above is the special preliminary declaration of disclosure that each party in a marital dissolution proceeding must serve on the other within 60 days of service of the petition [*see Fam. Code § 2104*; Cal. Judicial Council Form FL-140]. The declaration is not to be filed with the court [*Fam. Code § 2104(b)*], except on court order.

The preliminary declaration of disclosure must be set forth with sufficient particularity that "a person of reasonable and ordinary intelligence can ascertain" the identity of all assets in which the declarant has or may have an interest, together with all liabilities for which the declarant is or may be liable, regardless of the characterization of the asset or liability as community, quasi-community, or separate property. The declarant must set forth his or her percentage of ownership in each asset and percentage of obligation for each liability in those instances in which property is not solely owned by one or both of the parties to the dissolution action. In addition, the declarant may set forth his or her characterization of each asset or liability [*Fam. Code § 2104(c)*].

For a form for use for a final declaration of disclosure, see *§ 221.370* et seq.

[3] Completing the Form

The form functions largely as a cover or face sheet for attachments not reproduced here. In view of the statutory requirements for a preliminary declaration of disclosure [*see Fam. Code § 2104(c)*], it appears that, at a minimum, boxes 1 (Completed Schedule of Assets and Debts) and 2 (Completed Income and Expense Declaration) of the form

must be marked and the corresponding items attached. A separate attachment may be needed in conjunction with the Schedule of Assets and Debts form to set forth, in appropriate cases, the percentage of ownership in each asset and the percentage of obligation for each liability in which property is not solely owned by one or both of the parties [*see Fam. Code § 2104(c)(1)*].

In addition, though no check-off box for this is provided, the declarant may set forth his or her characterization of each asset or liability [*see Fam. Code § 2104(c)(2)*], apparently through a separate attachment, with reference to the attachment made on the disclosure form [*see, e.g.,* Cal. Judicial Council Form FL-160].

In an appropriate case, the declarant also may have sufficient information to use the additional check-off boxes and their corresponding attachments for statements of valuation of community property assets (Box 3) and statements regarding community obligations (Box 4).

Box 5 is for use in indicating that an attachment is included that sets forth an accurate and complete written disclosure of any investment opportunity, business opportunity, or other income-producing opportunity presented since the date of separation that results directly from any investment, significant business activityoutside the ordinary course of business, or other income-producing opportunity of either spouse from the date of marriage to the date of separation, inclusive [*Fam. Code § 2102(a)(2)*]. The written disclosure must be made "in sufficient time for the other spouse to make an informed decision as to whether he or she desires to participate in the investment opportunity, business, or other potential income-producing opportunity, and for the court to resolve any dispute regarding the right of the other spouse to participate in the opportunity" [*Fam. Code § 2102(a)(2)*].

[4] State Statutes

Service of preliminary declaration of disclosure on other party. *Fam. Code § 2103*

Requirements for service and contents of preliminary declaration of disclosure. *Fam. Code § 2104*

Failure to comply or to specify with particularity. *Fam. Code § 2107*

No liquidation of assets without service of declaration. *Fam. Code § 2108*

Disclosure as not abrogating work product privilege or court power to issue protective orders. *Fam. Code § 2111*

Forms to be adopted by Judicial Council. *Fam. Code § 2112*

Applicability of requirements to proceedings commenced on or after January 1, 1993. *Fam. Code § 2113*

[5] Cross References

For a related form, *see § 221.310*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.312

§ 221.312 Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act--Cal. Judicial Council Form FL-105 [Fam. Code § 3429]

[1] FORM Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act--Cal. Judicial Council Form FL-105 [Fam. Code § 3429]

Click here to view image.

[2] Use of Form

This form is the Judicial Council's approved form of Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act [Cal. Judicial Council Form FL-105]. Every party must file a declaration under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) with his or her first pleading in any case in which there are minor children of the marriage that is the subject of the proceeding. The contents of the declaration are prescribed by statute [*see Fam. Code § 3429*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

For discussion of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA; *Fam. Code § 3400 et seq.*), see Ch. 394, *Parent and Child* .

[3] State Statutes

Information regarding children to be provided to court by every party to custody proceeding in his or her first pleading or in affidavit attached to first pleading. *Fam. Code § 3429*

[4] Cross References

For a related form, *see § 221.310*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.313

§ 221.313 Summons--Family Law--Judicial Council Form [Cal. Judicial Council Form FL-110]

[1] FORM Summons--Family Law--Judicial Council Form [Cal. Judicial Council Form FL-110]

Click here to view image.

[2] Use of Form

The form set forth above is the mandatory Judicial Council form of Summons for use in a family law proceeding. The summons must be prepared by the petitioner and presented to the clerk for issuance by the clerk immediately after the petition is filed. Preparation of the summons requires filling in the names ofthe parties, the case number (inserted by the court clerk), the name and address of the court, and the name, address, telephone number, and State Bar number of the petitioner's attorney (or of the petitioner, if unrepresented). The reverse side of the form contains the standard family law restraining orders applicable to both parties. Sufficient copies should be made to provide several copies for use in service and a file copy.

[3] State Statutes

Motion to quash service of summons. *Code Civ. Proc. § 418.10*

Summons, temporary restraining orders in. *Fam. Code §§ 231-235, 2040-2041*

Summons, warning regarding jointly held property in. *Fam. Code § 2040(c)*

Service of petition and summons on other spouse. *Fam. Code § 2331*

[4] Cross References

For a related form, *see § 221.310*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.314

§ 221.314 Proof of Service of Summons--Judicial Council Form (Family Law) [Cal. Judicial Council Form FL-115]

[1] FORM Proof of Service of Summons--Judicial Council Form (Family Law) [Cal. Judicial Council Form FL-115]

Click here to view image.

[2] Use of Form

Set forth above is the Judicial Council form of Proof of Service of Summons [Cal. Judicial Council Form FL-115] adopted for use in family law proceedings. Although the family law summons also contains a blank space below the recitation of the standard restraining orders that may be used for proof of service (*see § 221.313*), the form reproduced here is tailored to the service of family law-related pleadings and other papers, and its use is recommended.

When service has been made, the person who effected service must complete the information required on the original version of the proof (return) of service before it is filed along with the original summons [*see Code Civ. Proc. § 417.30*]. The person making the return of service must check the applicable boxes and fill in the requisite information depending on the type of service [*see Code Civ. Proc. §§ 417.10, 417.20*]. Certain types of service require attachments (for example, the notice and acknowledgment of receipt (*see § 221.315*) or the signed return receipt).

The return of service must be executed by the person making it [*see Code Civ. Proc. § 417.10(a)*]. If that person is a registered process server, he or she must include the county in which he or she is registered and his or her registration number [*Code Civ. Proc. § 417.40*; *see Bus. & Prof. Code § 22355*].

[3] State Statutes

Manner of showing proof that summons was served. *Code Civ. Proc. §§ 417.10, 417.20*

Return of summons after service. *Code Civ. Proc. § 417.30*

Signature and information required on proof of service. *Code Civ. Proc. § 417.40*

[4] Cross References

For related forms, see *§§ 221.310* and *221.313*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.315

§ 221.315 Notice and Acknowledgment of Receipt--Family Law--Judicial Council Form [Judicial Council Form FL-117]

[1] FORM Notice and Acknowledgment of Receipt--Family Law--Judicial Council Form [Judicial Council Form FL-117]

Click here to view image.

[2] Use of Form

This form is the approved (optional) Judicial Council form of Notice and Acknowledgment of Receipt--Family Law [Cal. Judicial Council Form FL-117]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Two copies of the Notice and Acknowledgment of Receipt form should be mailed (by first-class or airmail, postage prepaid) along with a copy of the summons and of the petition, and a return envelope addressed to the sender, postage prepaid [*Code Civ. Proc. § 415.30(a)*]. Service of the summons is deemed complete on the date signed by the respondent, if the acknowledgment is afterwards returned to the sender [*Code Civ. Proc. § 415.30(c)*].

[3] State Statutes

Notice and acknowledgment of receipt of copy of summons and complaint. *Code Civ. Proc. § 415.30(c)*

[4] Cross References

For related forms, see *§§ 221.310* and *221.313*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.316

§ 221.316 Response [Cal. Judicial Council Form FL-120]

[1] FORM Response [Cal. Judicial Council Form FL-120]

Click here to view image.

[2] Use of Form

This form is the mandatory Judicial Council form of Response, which is used in family law proceedings to respond to a petition for marital dissolution, legal separation, or nullity of marriage [Cal. Judicial Council Form FL-120]. Regardless of the type of relief sought in the petition (*see § 221.310*), the respondentmay serve and file the response within 30 days of the date of the service on the respondent of a copy of the petition and the summons [*Fam. Code § 2020*]. For purposes of illustration, this form has been completed as a response to a petition for marital dissolution. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

For an illustrative, filled-in response to a petition for nullity of marriage, see Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights* .

[3] Completing the Form

[a] Residence

If the response includes a request for dissolution, one of the two boxes must be checked to establish that the court has jurisdiction.

[b] Statistical Facts

The appropriate information should be inserted in paragraph 2. Counsel should check the date of separation listed in the petition, which is significant for determining whether earnings and property are community or separate, to see whether respondent agrees with that date.

[c] Minor Children

Either box 3(a) or 3(b) should be checked to indicate if there are any minor children. If there are, their names, birth dates, ages, and sex must be indicated, and a completed Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act form must be attached [*Fam. Code § 3429*]. For an approved form of declaration, *see § 221.312* [*see* Cal. Judicial Council Form FL-105].

Note that minor children of the petitioner and respondent who were born before the date of marriage or who were adopted during the marriage should be included as part of the petitioner's declaration regarding children. If paternity of children born to the parties before the date of marriage is disputed, that issue may be decided in the dissolution or legal separation proceeding [*Fam. Code § 2330.1*]. If paternity is not in dispute, the parties should complete and attach a voluntary declaration of paternity, and mark the checkoff box in Item 3 indicating that the declaration is attached.

[d] Separate Property and Obligations

In paragraph 4, the respondent must list the property and obligations that he or she wants confirmed as his or her separate property. In addition, the respondent may wish to set forth items of separate property, including obligations, that he or she asserts should be confirmed to the petitioner.

[e] Community Property Declaration

If the petitioner has listed community or quasi-community property and/or obligations subject to disposition by the court, the respondent must check this list carefully and, if it is incorrect, insert his or her own list.

[f] Reconciliation

If the box in paragraph 6 is checked, the court will inquire into prospects for reconciliation and may refer the matter to the conciliation court [*see Fam. Code § 1800 et seq.*]

[g] Denial of Grounds for Proceeding

The box in paragraph 7 must be checked if the respondent denies the grounds for relief alleged in the petition. This most often occurs in nullity proceedings in which the respondent denies that the asserted grounds exist.

[h] Marital Status; Dissolution, Separation, or Nullity

Paragraph 8 should be filled in to request the particular resolution of marital status sought by the respondent. If the petition is for dissolution of marriage, the respondent may agree to a dissolution by checking item 8a, or assert grounds for nullity in items 8c or 8d. Or, the respondent may request no relief, in which case, the court may still enter a judgment of dissolution.

Because a judgment of legal separation cannot be rendered without the consent of a respondent who has appeared generally [*see Fam. Code § 2345*], it is futile to request a legal separation in response to a petition for dissolution. However, if the petition is for legal separation, the respondent may effectively preclude it by requesting a dissolution in the response.

If the petition is for nullity, but the respondent denies that grounds exist, he or she may request a dissolution instead. If

neither a dissolution nor an annulment is sought, the respondent should not check any box in item 8. For further discussion of nullity proceedings and related forms, see Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights* .

[i] Request for Relief

Paragraph 9 is used to specify the relief sought by the respondent regarding custody, visitation, spousal support, property division, and attorney's fees. It also can be used to concede that the petitioner is entitled to certain relief, such as child custody or visitation. A separate checkoff box is also provided to request that the court determine the parentage of any child born to the petitioner and respondent before the date of their marriage [*see Fam. Code § 2330.1*].

Paragraph 9 also includes a checkoff box to request "other" relief. Other causesof action or claims for relief, apart from those authorized by the Family Code or the California Rules of Court, may not be asserted in a family law matter [*see Cal. Rules of Ct., Rule 5.104*]. However, it appears that this box at least may be used to explain requests regarding items listed under Paragraph 9 in which the relief sought varies from that printed exactly on the form.

[j] Notice of Child Support

The statement in Paragraph 10 informs the parties that, if there are minor children of the marriage, including children born to the petitioner and respondent before the date of their marriage, or adopted by them after marriage, the court will order child support and a wage assignment without further notice. In addition, a notice on the front of the response warns that any party required to pay child support must pay interest on overdue amounts at the "legal" amount [*Code Civ. Proc. § 695.210* (amount required to satisfy money judgment includes interest); *see also Code Civ. Proc. § 695.211* (every money judgment or order for child support must provide this notice), which is currently 10 percent *see Code Civ. Proc. § 685.010*].

[k] Social Security Numbers

The first responsive pleading filed in a proceeding for dissolution, nullity, or legal separation must include a separate, one-page document that lists all relevant Social Security numbers known to the respondent, which pertain to the petitioner, the respondent, and the parties' minor children [*Fam. Code § 2024.5(b)*]. This list must be placed in the confidential portion of the court file of the proceeding, and may not be disclosed except for good cause shown to the court [*Fam. Code § 2024.5(c)*]. The respondent may redact any Social Security number that was placed in the confidential portion of the court file from any pleading, attachment, document, or other written material filed with the court only after the document listing all relevant Social Security numbers is placed in the confidential portion of the court file [*Fam. Code § 2024.5(e)*].

[4] State Statutes

Required notice regarding accrued interest on child support arrearages. *Code Civ. Proc. § 695.211*

Responsive pleadings. *Fam. Code § 2020*

[5] Text References

Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, Ch. 93 (Matthew Bender 2nd ed.)

[6] Cross References

For a related form, see *§ 221.310*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.317

§ 221.317 Notice of Motion and Declaration for Joinder--Judicial Council Form [Cal. Judicial Council Form FL-371]

[1] FORM Notice of Motion and Declaration for Joinder--Judicial Council Form [Cal. Judicial Council Form FL-371]

Click here to view image.

[2] Use of Form

An application for joinder is made by serving and filing a notice of motion and declaration in the form set forth above. The application must state with particularity the claimant's interest in the proceeding and the relief sought, and must be accompanied by an appropriate pleading setting forth the claim as if asserted in a separate action or proceeding [*Cal. Rules of Ct., Rule 5.156(a)*].

[3] Notice of Motion

The name-of-attorney box should be filled in, and the title of the proceeding and case number should be inserted as in the petition (*see § 221.310*). The remainder of the form should be filled in as indicated. A memorandum of points and authorities should be filed with the notice of motion [*Cal. Rules of Ct., Rule 5.160*; *see Cal. Rules of Ct., Rule 5.118(a)*; *see also Cal. Rules of Ct., Rule 3.1113*].

[4] Declaration for Joinder

Facts should be set forth showing that each person sought to be joined (or seeking to be joined) has in his or her possession or control or claims to own any property subject to disposition by the court, or that the person has or claims custody or control of any minor children of the marriage [*Cal. Rules of Ct., Rule 5.156(a)*]. Items 5 and 6 should be completed only if the applicant is moving for permissive joinder; that is, joinder of a person who has in his or her possession or control or claims to own any property subject to the jurisdiction of the court in the proceeding [*see Cal.*

Rules of Ct., Rules 5.158(b)]. Facts that can be stated in Item 5 tending to show that the court should determine the particular issue in the proceeding might include (1) amenability of the claimant to process; (2) avoidance of multiplicity of actions; (3) convenience of having all the issues in the dissolution decided together; (4) that no parties other than the claimant will have to be joined; and (5) that the joinder will not unduly delay, complicate, or confuse the dissolution proceeding [*see Cal. Rules of Ct., Rule 5.158(b)*; *see also In re Marriage of Wilson (1989) 209 Cal. App. 3d 720, 721, 723, 257 Cal. Rptr. 477]* . In Item 6, facts must be stated showing that each person sought or seeking to be joined either is indispensable to the determination or any particular issue or necessary to the enforcement of any judgment rendered on the issue (for example, the claimant has recorded title to property claimed to be community) [*see Cal. Rules of Ct., Rule 5.158(b)*].

[5] Pleading to Accompany Notice of Motion and Declaration for Joinder

An application for joinder must be accompanied by an appropriate pleading setting forth the claim against or by the claimant to be joined [*see Cal. Rules of Ct., Rule 5.156(a)*]. When title to real property is involved, the pleading might bea complaint to quiet title, for partition, or for declaratory relief. If personal property is involved, the pleading might be a complaint for conversion, claim and delivery, or to impose a constructive trust. If child custody is involved, the pleading might be an application for a writ of habeas corpus or an application to change a prior custody order.

[6] Filing and Service

The notice of motion and the accompanying pleading must be filed with the clerk and served on the attorney for the other party to the proceeding or on the other party if he or she has no attorney, if a party makes the motion. It need not be served on the party to be joined. If the motion for joinder is made by a third party claimant, the notice of motion and pleading must be served on both the attorneys for petitioner and respondent, not just on the party against whom relief is sought [*see In re Marriage of Meier (1975) 51 Cal. App. 3d 120, 123 Cal. Rptr. 822]* . Service usually is made by mail, in which case it is effective when deposited by mail. A declaration of service by mail should be executed by the person mailing the notice of motion and filed with the notice of motion. A copy should be attached to the copy of notice served by mail [*Code Civ. Proc. § 1013*].

[7] State Statutes

Joinder of interested person and employee benefit plan as parties. *Fam. Code § 2021*

[8] California Rules of Court

Joinder of persons claiming interest. *Cal. Rules of Ct., Rules 5.150, 5.154, 5.158*

"Claimant" defined. *Cal. Rules of Ct., Rule 5.152*

Mandatory form of joinder application. *Cal. Rules of Ct., Rule 5.156*

[9] Text References

Kirkland, Lurvey & Richmond, California Family Law Practice Andprocedure, Ch. 94 (Matthew Bender 2d ed.)

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18-221 California Forms of Pleading and Practice--Annotated § 221.318

§ 221.318 Responsive Declaration to Motion for Joinder, Consent Order of Joinder--Judicial Council Form [Cal. Judicial Council Form FL-373]

[1] FORM Responsive Declaration to Motion for Joinder, Consent Order of Joinder--Judicial Council Form [Cal. Judicial Council Form FL-373]

Click here to view image.

[2] Use of Form

The response must be made on the form reproduced above, the mandatory Judicial Council form of Responsive Declaration to Motion for Joinder and Consent Order of Joinder [Cal. Judicial Council Form FL-373]. If desired, the party opposing the motion may file the response. If the party filing the motion is the claimant, it would appear that either the petitioner or respondent to the dissolution may file a response. The form should be completed as indicated. If the responding party consents to the joinder, box 1(a) should be checked and paragraph 3 (consent order) completed.

A memorandum of points and authorities may be filed in opposition to the motion [*see Cal. Rules of Ct., Rule 5.118(a)*.

If no responsive declaration is filed, the court will assume that the other party does not oppose the joinder. The Family Law Rules do not set forth any specific time within which the responsive declaration must be filed, but it must be filed before the date set for hearing if it is to be considered by the court at the hearing. Some courts have local rules governing when papers opposing motions must be filed.

[3] Order of Joinder

If the petitioner and respondent consent to the joinder, the order of joinder is made on the second page of the Responsive Declaration to Motion for Joinder [Cal. Judicial Council Form FL-373]. If the joinder is opposed, the order should be made on the mandatory Judicial Council Form of Findings and Order after Hearing [*see* Cal. Judicial Council Form FL-340]. See *§ 221.338* for an illustrative Findings and Order After Hearing. Counsel should check the box

before the words "as attached" in Paragraph 8 of that form and attach an order for joinder as an additional page. Standard pleading paper or the Judicial Council form of additional page may be used (MC-020).

If a party is joined to the proceeding, Summons (Joinder) must be issued and the claimant served with the copy of the motion for joinder with the pleading attached, a copy of the order, and a copy of the Summons (Joinder). The claimant has 30 days after service within which to file an appropriate response [*see Cal. Rules of Ct., Rule 5.158(c)*]. Once a party is joined, his or her name must appear in all future pleadings as the "Claimant" in the proceeding.

[4] Cross References

For a related form, see *§ 221.317*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.319

§ 221.319 Summons (Joinder)--Judicial Council Form [Cal. Judicial Council Form FL-375]

[1] FORM Summons (Joinder)--Judicial Council Form [Cal. Judicial Council Form FL-375]

Click here to view image.

[2] Use of Form

When the court orders a third party joined to the proceeding, it will order thata summons be issued and that the third party be served with a copy of the application for joinder, the pleading attached to it, the order of joinder, and the summons. The claimant has 30 days after service within which to file an appropriate response [*Cal. Rules of Ct., Rule 5.158(c)*]. The summons must be on the Judicial Council form [*see* Cal. Judicial Council Form FL-375] reproduced above.

If a third party is joined to the proceeding on his or her own motion, summons must be served on the petitioner and respondent, along with the papers noted *above*. In this case, both the "petitioner" and "respondent" boxes should be checked at Paragraph 1 [*see Cal. Rules of Ct., Rule 5.158(c)*]. Although the parties are already within the personal jurisdiction of the court, service of summons gives them formal notice of the third-party claim and defines the court's powers to grant relief.

[3] Cross References

For related forms, see *§§ 221.317* and *221.318*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.320

§ 221.320 Request for Joinder of Employee Pension Benefit Plan and Order (Family Law)--Judicial Council Form [Fam. Code §§ 2060-2062; Cal. Judicial Council Form FL-372]

[1] FORM Request for Joinder of Employee Pension Benefit Plan and Order (Family Law)--Judicial Council Form [Fam. Code §§ 2060-2062; Cal. Judicial Council Form FL-372]

Click here to view image.

[2] Use of Form

On written application by a party to a family law proceeding, the clerk must enter an order joining as a party to the proceeding any employee benefit plan in which either party to the proceeding claims an interest which is or may be subject to disposition by the court [*Fam. Code § 2060(a)*]. The form of request prescribed by the Judicial Council [*Cal. Rules of Ct., Rule 5.162*] is set forth above.

[3] State Statutes

"Employee benefit plan" defined. *Fam. Code § 80*

Discharge of employee benefit plan from adverse claims. *Fam. Code § 755*

Employee benefit plans. *Fam. Code §§ 2021, 2060-2074*

[4] California Rules of Court

Joinder of employee benefit plan. *Cal. Rules of Ct., Rule 5.162*

[5] Decisions

ERISA does not preempt California procedures for joinder of employee benefit plans or notification of adverse interest in such plans; but order dividing marital interest in ERISA plan is required to meet requirements of "qualified domestic relations order" for it to be binding or enforceable against plan. *In re Marriage of Baker (1988) 204 Cal. App. 3d 206, 217-218, 251 Cal. Rptr. 126*

[6] Cross References

For a related form, see *§ 221.317*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.321

§ 221.321 Pleading on Joinder--Employee Pension Benefit Plan (Family Law)--Judicial Council Form [Fam. Code §§ 2060-2062; Cal. Judicial Council Form FL-370]

[1] FORM Pleading on Joinder--Employee Pension Benefit Plan (Family Law)--Judicial Council Form [Fam. Code §§ 2060-2062; Cal. Judicial Council Form FL-370]

Click here to view image.

[2] Use of Form

On the entry of an order joining an employee benefit plan (*see § 221.320*), the party requesting joinder must file a pleading setting forth the party's claim against the plan and the nature of the relief sought [*Fam. Code § 2061*]. The prescribed Judicial Council form of pleading [*Cal. Rules of Ct., Rule 5.162*] is set forth above.

[3] Cross References

For related forms, see *§§ 221.317* and *221.320*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.322

§ 221.322 Notice of Appearance and Response of Employee Benefit Plan (Family Law)--Judicial Council Form [Fam. Code §§ 2060-2062; Cal. Judicial Council Form FL-374]

[1] FORM Notice of Appearance and Response of Employee Benefit Plan (Family Law)--Judicial Council Form [Fam. Code §§ 2060-2062; Cal. Judicial Council Form FL-374]

Click here to view image.

[2] Use of Form

A notice of appearance [*Cal. Rules of Ct., Rule 5.162*] as set forth above may be filed and served by the employee benefit plan within 30 days of the date of service on the plan of a copy of the joinder request and summons. The failure to file a notice of appearance may result in the entry of the plan's default. The plan does not have to pay any fee for filing the notice of appearance or any subsequent paper. It may, but need not, file an appropriate responsive pleading with its notice of appearance. If it does not, then all statements of fact and requests for relief contained in any pleading served on the plan are deemed controverted [*Fam. Code §§ 2063-2065*].

[3] State Statutes

Notice of appearance and responsive pleading by plan. *Fam. Code § 2063*

Plan not required to pay filing fees. *Fam. Code § 2064*

Entry of plan's default. *Fam. Code § 2065*

[4] Cross References

For a related form, see *§ 221.320*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.323

§ 221.323 Notice to Maintain Insurance During Pendency of Proceeding

[1] FORM Notice to Maintain Insurance During Pendency of Proceeding

YOU ARE HEREBY NOTIFIED, PURSUANT TO A PENDING PROCEEDING, IN RE MARRIAGE OF _____, CASE NUMBER _____, FILED IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF _____, THAT OWNERSHIP OF, OR BENEFITS PAYABLE UNDER, A POLICY OF HEALTH, LIFE, OR DISABILITY INSURANCE THAT YOU HAVE ISSUED TO ONE OF THE PARTIES TO THIS PROCEEDING, POLICY NO. _____, IS AT ISSUE OR MAY BE AT ISSUE IN THE PROCEEDING.

YOU ARE HEREBY INSTRUCTED TO MAINTAIN THE NAMED BENEFICIARIES OR COVERED DEPENDENTS UNDER THE POLICY, UNLESS THE TERMS OF THE POLICY OR OTHER PROVISIONS OF LAW REQUIRE OTHERWISE, OR UNTIL RECEIPT OF A COURT ORDER, JUDGMENT, OR STIPULATION BETWEEN THE PARTIES PROVIDING OTHER INSTRUCTIONS.

YOU ARE FURTHER INSTRUCTED TO SEND NOTICE TO THE NAMED BENEFICIARIES, COVERED DEPENDENTS, OR OTHER SPECIFIED PERSONS UPON CANCELLATION, LAPSE, OR CHANGE OF THE COVERAGE, OR CHANGE OF DESIGNATED BENEFICIARIES UNDER THE POLICY.

[2] Use of Form

Set forth above is the statutory form of notice to a health, life, or disability insurance carrier of the pendency of a family law proceeding [*see Fam. Code § 2050*]. The form language might be conveniently set forth as part of a letter that contains the insurance carrier's name and address, and the names and addresses of any persons to whom the carrier should send notification of policy changes. Notice must be sent by first class mail, postage prepaid, to the last known address of the covered dependents, named beneficiaries, and specific others who have requested notice [*see Fam. Code § 2052*].

[3] State Statutes

Notice to insurance carrier of pending proceeding. *Fam. Code § 2050*

Notice of entry and requirements of judgment. *Fam. Code § 2051*

Manner of giving notice by insurance carrier. *Fam. Code § 2052*

Requirement that policyholder furnish other party with name and address of insurer. *Fam. Code § 2053*

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18-221 California Forms of Pleading and Practice--Annotated § 221.324

§ 221.324 Stipulation for Custody

[1] FORM Stipulation for Custody

AGREEMENT AND STIPULATION

_____ [*name of first spouse*] and _____ [*name of second spouse*], herein referred to as "husband" and "wife," respectively, or "the parties," agree and stipulate that there is/are _____ [*number of child(ren)*] minor child(ren) of the marriage, _____ [*name of first child*], born _____ [*date of child's birth*], [*add as necessary, repeating for each child:* and _____ (*name of child*), born _____ (*date of child's birth*], and that while husband and wife are living separate and apart, _____ [*name of spouse being given custody*] shall have the sole and exclusive custody of this/these minor child(ren), with reasonable visitation rights by _____ [*name of noncustodial spouse*]. The parties further agree and stipulate that in the event either of them commences a proceeding for dissolution of marriage or legal separation the court may, on the ex parte application of _____ [*name of custodial spouse*], enter both a temporary order and judgment awarding custody of this/these child(ren) to _____ [*name of custodial spouse*] with reasonable visitation rights by _____ [*name of noncustodial spouse*]. Date: _____.

_____ [*signature of first spouse*]

_____ [*typed name of first spouse*]

_____ [*signature of second spouse*]

_____ [*typed name of second spouse*]

[2] Use of Form

The form set out above may be used by parties who, before commencement of the proceeding or afterwards, agree that one of them is to have custody or temporary custody of the children. Counsel also should complete the Application for Order and Supporting Declaration form (*see* §), to which a copy of the agreement must be attached. In addition, counsel should draft a court order awarding temporary custody in conformity with the agreement and prepare a proof of service, then present the originals of the request for order and order and attachments together with all copies to the proper judge for the latter's signature on the original of the order.

If the judge signs the order, counsel should have a deputy court clerk conform the copies of the order, file the originals of the order and request for order, and stamp all copies "endorsed-filed" or "filed." A conformed, endorsed-filed copy of the order and of the request for order then should be served on the other party [*see Code Civ. Proc. §§ 1013(b), 1013a*].

The form may be modified for use in situations in which the parties have madean agreement regarding custody and each is represented by counsel, in which case counsel for one of the parties should draft a stipulation setting forth the agreement and have each of the parties and their respective attorneys sign it. Counsel also must draft a court order awarding temporary custody in conformity with the stipulation and a proof of service. The order may be appended to the stipulation or set forth separately in the form of a formal order. Alternatively, the stipulation may be presented at a hearing or the parties may orally stipulate in open court as to custody.

[3] State Statutes

Temporary custody orders during pendency of proceeding. *Fam. Code §§ 3060-3064*

[4] Text References

Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, Ch. 95 (Matthew Bender 2d ed.)

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18-221 California Forms of Pleading and Practice--Annotated § 221.325

§ 221.325 Stipulation for Temporary Orders

[1] FORM Stipulation for Temporary Orders

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In re the marriage of _____	)	
[*name*], Petitioner,	)	STIPULATION FOR TEMPORARY ORDERS
vs.	)	AND ORDER
_____ [*name*], Respondent	)	
	)	

_____

IT IS STIPULATED by and between petitioner and respondent, until further order of the court, as follows:

[*In separately numbered paragraphs specify stipulated orders, such as the following*]

1. The parties shall have joint legal custody of the minor child/children of the marriage, _____ [*name(s)*].

2. Petitioner/Respondent _____ [*name*] shall have physical custody of _____ [*name(s) of child/children*], subject to reasonable visitation by respondent/petitioner _____ [*name*]. [*Set forth terms and conditions of visitation, if desired, e.g.,* Respondent/petitioner will have visitation rights with the children from 5 p.m. Friday through 8 p.m. Sunday on the first weekend of every month.]

3. Respondent/Petitioner shall pay to petitioner/respondent the sum of $ _____ per month [per child]

for the support of the minor child/children, for a total monthly sum of $ _____. Child support payments shall be made _____ [*specify time for payment, e.g.,* on the first of every month].

4. The parties have been fully informed of their rights concerning child support. The child support order being sought in paragraph 3 is being agreed to without coercion or duress. The agreement is in the best interests of the child/children, whose needs will be adequately met by the amount of child support being agreed to. The right to child support has not been assigned to the county under *Welf. & Inst. Code § 11477*, and no public assistance application is pending.

5. Respondent/Petitioner shall pay to petitioner/respondent for his/her support the sum of $ _____ per month. Spousal support payments shall be made _____ [*specify time for payment, e.g.,* on the first of every month], and shall continue until further order of the court, or until the death of either party or the remarriage of petitioner/respondent.

6. Respondent/Petitioner shall pay directly to petitioner's/respondent's attorney(s), _____ [*name(s)*], at _____ [*address*], the sum of $ _____, for attorney's fees [as and for additional spousal support].

7. Petitioner/Respondent shall have exclusive use and possession of the family residence located at _____ [*address*].

8. Respondent/Petitioner shall have exclusive use and possession and use of the following item(s) of personal property: _____ [*specify, e.g.,* the family car, a 1985 Pontiac 6000 STE, California License number _____].

9. Respondent/Petitioner shall make the payments as they become due on all existing community obligations and debts [, including, but not limited to, the following: _____ (*specify*)].

10. _____ [Respondent/petitioner *or* Each party] will stay at least _____ yards away from _____ [petitioner/respondent *or* the other party] [and _____ (*name(s) of other person(s) from whom party must stay away)*] and from the following place(s): _____ [*specify, e.g., petitioner's/respondent's residence and place of employment*].

[*CONTINUE*]

Date: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner_____ [*name*]

_____ [*signature of petitioner*]

_____ [*typed name of petitioner*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent_____ [*name*]

_____ [*signature of respondent*]

_____ [*typed name of respondent*]

IT IS SO ORDERED.

_____ [*date*]

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form set out above is for use by the parties to a pending family law proceeding to agree and stipulate to the court's entry of temporary orders. The orders set forth in this form are illustrative of those that might be included in a particular case. Because attachments to the Judicial Council form of Findings and Order After Hearing [*see* Cal. Judicial Council Forms FL-341-FL-344] contain boxes to be checked when orders issued by the court have been stipulated to by the parties, this form of stipulated order would only be needed for orders that are not covered by the Judicial Council form, or if the Judicial Council form does not provide sufficient space or detail to set forth all the particulars of the parties' stipulation.

Some courts also provide local forms (often a triplicate "NCR type") for counsel to prepare in hand-written form in court on the day of the hearing. These hand-written forms have places for the signatures of the parties and their respective attorneys, and the judge. These forms are then filed with the court and are valid and enforceable orders.

This form should be signed by both parties and their attorneys prior to submission to the court for the judge's signature. By analogy to stipulated judgments, it should conform to the form set forth in *Cal. Rules of Court, Rule 5.116*.

If the stipulation relates to child support, the stipulation must be approved by the court and meet certain criteria [*see Fam. Code § 4065*], which are discussed in see Ch. 224, *Dissolution of Marriage: Child Support* .

[3] Cross References

For a related form, see *§ 221.324*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.326

§ 221.326 Notice of Motion (General)--Cal. Judicial Council Form FL-301

[1] FORM Notice of Motion (General)--Cal. Judicial Council Form FL-301

Click here to view image.

[2] Notice of Motion

The general form of notice of motion reproduced here is for use in a family law proceeding to secure orders on notice. A notice of motion may be used only when the party against whom the order is sought has made an appearance in the action or proceeding [*see Code Civ. Proc. § 1014*] and when no temporary restraining orders or temporary custody order on ex parte application are sought.

The checkoff boxes below the caption in the form must be marked to indicate the nature of the motion being brought. The box marked "Other" may be used to designate a motion that is not among those specificially listed. For illustrative purposes only, this form indicates that the motion being brought is for joinder of a party [*see Fam. Code § 2021(a)*; *Cal. Rules of Ct., Rules 5.150 et seq.*; for further discussion of this motion, see Denner, Rothschild & Johnson, California Family Law Trial Guide, Unit 4 (Matthew Bender)].

The mandatory Judicial Council form of Application for Order and Supporting Declaration must be used to indicate the exact nature of the order being sought and the facts in support of the relief requested [*see* Cal. Judicial Council Form FL-310]. An illustrative version of that form is set forth as in § 221.327.

This form and its accompanying papers should be served well in advance of the hearing date, so that this particular due process issue may be eliminated as a grounds for denial [*see Code Civ. Proc. §§ 1005, 1010 et seq.* (period for service of papers is extended when service by mail)].

[3] California Rules of Court

Applications for court order. *Cal. Rules of Ct., Rule 5.118*

[4] Text References

Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Ch. 95 (Matthew Bender)

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18-221 California Forms of Pleading and Practice--Annotated § 221.327

§ 221.327 Application for Order and Supporting Declaration--Cal. Judicial Council Form FL-310

[1] FORM Application for Order and Supporting Declaration--Cal. Judicial Council Form FL-310

Click here to view image.

[2] Use of Form

The above form is the Judicial Council form of Application for Order and Supporting Declaration [Cal. Judicial Council Form FL-310]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. Blank forms may also be obtained from the superior court clerk's office.

Use of this form is required whenever temporary orders are sought, whether by noticed motion (*see § 221.326*) or order to show cause (*see § 221.331*) [*see Cal. Rules of Ct., Rule 5.118(a)*]. The form must be attached to the Judicial Council notice of motion or order to show cause form [*see Cal. Rules of Ct., Rule 5.118(a)*]. If relevant to the relief sought, the Judicial Council forms of Income and Expense Declaration (*see § 221.332*) and Property Declaration (*see § 221.334*) must also accompany this form [*Cal. Rules of Ct., Rules 5.118(b), 5.128(a)*; Cal. Judicial Council Forms FL-150, FL-160].

The box next to each type of order sought should be marked and the required information for each type of order should be inserted in the space provided. When requesting child abduction prevention orders, the Request for Child Abduction Orders must be attached [Cal. Judicial Council Form FL-312]. If counsel seeks an order other than one of the standard orders printed on the form, the box next to Paragraph 9 ("Other Relief") should be checked and the nature of the order sought should be indicated in the space provided.

The facts supporting each order sought must be set forth, either in Paragraph 10, or in an attached declaration, as further discussed below. The party applying for the orders (rather than his or her attorney) should sign the application form

under penalty of perjury, except in unusual situations in which the facts supporting the declaration are within the attorney's personal knowledge, rather than the client's.

The application for order and supporting declaration must be prepared in an original for filing and at least one copy for service on the responding party's attorney, if any, and if none, on the responding party [*see Cal. Rules of Ct., Rule 5.10(b)*; *Code Civ. Proc. § 1015*]. Counsel also should prepare an additional copy to be stamped "endorsed-filed" by the court clerk for counsel's office file and, in cases in which the papers are filed by mail, yet another copy to be retained in counsel's office file until return of the endorsed-filed copy from the court. Counsel may also want to prepare a copy for the client.

If a protective or restraining order against domestic violence is being sought, the applicant must use additional Judicial Council forms to apply for that type of order--DV-100 (Request for Order (Domestic Violence Prevention) and DV-110(Temporary Restraining Order and Notice of Hearing (CLETS) (Domestic Violence Prevention). Accordingly, if a temporary restraining order is sought using those forms, the order to show cause procedure would be used, as opposed to a notice of motion. For illustrative, filled-in reproductions of those forms, see Ch. 293, *Harassment and Domestic Violence* .

[3] Contents of Supporting Declaration

Affidavits and declarations are a means of taking testimony [*see Code Civ. Proc. §§ 2002, 2003, 2009, 2015.5*]. They must set forth evidentiary facts to which the affiant or declarant is competent to testify; that is, they must consist of facts of which the affiant or declarant has personal knowledge [*see Evid. Code § 702*]. Mere conclusory statements in the form of ultimate facts or conclusions of law normally are insufficient to meet this requirement. Counsel should be prepared for a motion to strike such material, either attacking the opposition's declaration or defending his or her own client's declaration.

The statements in the declaration should consist of evidentiary facts and should be as specific and complete as possible. Counsel should not assume that defective declarations can be corrected by oral testimony at the hearing. Although some courts may be lax at times in enforcing limits on oral evidence in the case of standard orders (for example, temporary spousal or child support), and may be liberal in admitting testimony at the hearing, courts do have discretion to grant or deny the relief requested solely on the basis of the papers filed.

Because the declaration must be made by someone with personal knowledge of the facts, it may be necessary, in some cases, to present declarations of more than one person if no one person (such as the applicant) has personal knowledge of all the facts supporting the application. This may particularly be true in the case of contested child custody issues.

For discussion of the showing required to obtain temporary orders for child custody and visitation, child support, spousal support, and attorney's fees, see Ch. 223, *Dissolution of Marriage: Child Custody* , through Ch. 226, *Dissolution of Marriage: Attorney's Fees* , respectively. For discussion of the showing required to obtain a protective order against domestic violence, see Ch. 293, *Harassment and Domestic Violence* .

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18-221 California Forms of Pleading and Practice--Annotated § 221.328

§ 221.328 Application or Response to Application for Separate Trial--Cal. Judicial Council Form FL-315

[1] FORM Application for Separate Trial--Cal. Judicial Council Form FL-315

Click here to view image.

[2] Use of Form

The above form is the mandatory Judicial Council form of Application or Response to Application for Separate Trial [Cal. Judicial Council Form FL-315; *see Fam. Code § 2337*; *Cal. Rules of Ct., Rule 5.175*]. It is designed to be attached to a Judicial Council form of Order to Show Cause or Notice of Motion [*see* Cal. Judicial Council Forms FL-300, FL-301 (*§§ 221.326, 221.331*)] or to a Judicial Council form of Response Declaration to Order to Show Cause or Notice of Motion [*see* Cal. Judicial Council Form FL-320 (§ 221.337)]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. Blank forms may also be obtained from the superior court clerk's office.

[3] Supporting Declaration

The appropriate boxes in item No. 3 on the form should be checked to indicate that supporting declarations and/or a supporting memorandum are attached [*see Cal. Rules of Ct., Rule 5.118(a)* (no memorandum of points and authorities need be filed unless required by court)].

[4] Joinder of Pension Plans

If requesting or opposing a separate trial on dissolution of the status of the marriage, box (e) in item No. 1 must be checked and all pension or retirement plans in which the community has an interest must be listed below item No. 1(e)(2) or on an attachment. These plans must have been joined as parties to the proceeding, unless joinder is precluded or unnecessary as a matter of law. The parties may refer to Judicial Council form FL-318, Retirement Plan

Joinder--Information Sheet, to determine if joinder is required. For a discussion of joinder of pension plans, see *§ 221.17[3]*.

[5] Requested Orders

Bifurcation of the status of the marriage may be subject to specified conditions [*see Fam. Code § 2337(c)*]. The appropriate boxes in item No. 4 should be checked to indicate the orders requested. Any additional orders requested should be stated in item No. 4(b)(10).

[6] Time for Hearing and Clerk's Mailing

A motion for a separate trial must be heard not later than the trial setting conference [*Cal. Rules of Ct., Rule 5.175(a)*].

The court clerk must mail copies of an order deciding a bifurcated issue, and any statement of decision, within 10 days of their filing and file a certificate of mailing [*Cal. Rules of Ct., Rule 5.175(b)*].

For further discussion of bifurcation and separate trials, see *§ 221.43[1]*.

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18-221 California Forms of Pleading and Practice--Annotated §§ 221.329-221.330

[Reserved]

§§ 221.329[Reserved]

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18-221 California Forms of Pleading and Practice--Annotated § 221.331

§ 221.331 Order to Show Cause and Temporary Orders--Cal. Judicial Council Forms FL-300, FL-305

[1] FORM Order to Show Cause and Temporary Orders--Cal. Judicial Council Forms FL-300, FL-305

Click here to view image.

[2] Use of Form

The form of order to show cause set out here is for use in family law proceedings to secure pendente lite orders on notice. The form is Cal. Judicial Council Form FL-300, and its use is mandatory [Cal. Rules of Ct., Rules 5.11(a)] whenever the order to show cause procedure is used in a family law proceeding. For discussion, see *§ 221.18[3][e]*.

The order to show cause must be accompanied by the Judicial Council form of Application for Order and Supporting Declaration [*Cal. Rules of Ct., Rule 5.118(b)*; Cal. Judicial Council Form FL-310; *see § 221.432*). The Judicial Council forms of Income and Expense Declaration (*see § 221.332*) and Property Declaration (Form 2647) [Cal. Judicial Council Forms FL-150, FL-160] must also be attached to the order to show cause if relevant to the relief sought (e.g., if support is at issue) [*Cal. Rules of Ct., Rules 5.118(b), 5.128*]. If the Income and Expense and Property Declarations are attached, the appropriate boxes in Paragraph 3 should be marked to indicate that blank copies of these documents are also served with the order to show cause.

If a protective or restraining order against domestic violence is involved, the applicant must use additional Judicial Council forms for that type of order--DV-100 (Request for Order (Domestic Violence Prevention) and DV-110 (Temporary Restraining Order and Notice of Hearing (CLETS) (Domestic Violence Prevention). For illustrative, filled-in reproductions of those forms, see Ch. 293, *Harassment and Domestic Violence* .

[3] Completing the Form

The date, time, and location of the hearing are inserted in Paragraph 2 by either counsel or the court clerk, depending on local practice. If counsel seeks an order shortening the time for the service before the hearing, the appropriate boxes in

Paragraph 3b should be marked.

An appropriate proof of service should be completed by the person making service.

The order to show cause must be prepared in an original for filing and at least one copy for service on the responding party and his or her attorney, if any [*see Cal. Rules of Ct., Rule 5.10(b)*; *Code Civ. Proc. § 1015*]. Counsel also should prepare an additional copy to be stamped "endorsed-filed" by the court clerk for counsel's office file and, in cases in which the papers are filed by mail, yet another copy to be retained in counsel's office file until return of the endorsed-filed copy from the court. Counsel may also want to prepare a copy for the client.

Unlike a notice of motion, which is signed by the moving party's attorney, the order to show cause must be signed by the court.

[4] Temporary Orders

If ex-parte temporary orders are granted pending the hearing, Paragraph 3c of the Order to Show Cause should be checked and the Judicial Council form of Temporary Orders [Cal. Judicial Council Form FL-305] (set out here) must be attached. The Temporary Orders form illustrated contains preprinted provisions for orders concerning property restraints and control, and custody and visitation of minor children, as well as an undesignated "Other Orders" box. When child abduction prevention orders are made, the Child Abduction Prevention Orders Attachment [Cal. Judicial Council Form FL-341(B)] must be attached to the Judicial Council form of temporary orders.

See *§ 221.18[2][g]*, and Ch. 293, *Harassment and Domestic Violence* , for discussion of temporary restraining orders, preliminary injunctions, and prevention of domestic violence.

[5] State Statutes

Orders issued during pendency of proceeding. *Fam. Code §§ 2045, 6218, 6320-6327*

Temporary restraining orders issued without notice. *Fam. Code §§ 240-246*

[6] California Rules of Court

Applications for court order. *Cal. Rules of Ct., Rule 5.118*

[7] Decisions

Order to show cause serves not only as a notice of hearing but also as citation or summons, giving court personal jurisdiction over party served. *Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 8 n.6, 118 Cal. Rptr. 21, 529 P.2d 53*

Court's dismissal of order to show cause to modify spousal support was error requiring rehearing, after erroneously stating it had no discretion regarding receiving or excluding oral testimony at hearing. *In re Marriage of Hunt (1985) 172 Cal. App. 3d 872, 875-876, 218 Cal. Rptr. 451*

[8] Text References

Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure 2d ed., Ch. 95 (Matthew Bender)

Denner, Rothschild & Johnson, California Family Law Trial Guide, Unit 4 (Matthew Bender)

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18-221 California Forms of Pleading and Practice--Annotated § 221.332

§ 221.332 Income and Expense Declaration [Cal. Judicial Council Form FL-150] With Income Information, Expense Information, and Child Support Information--Judicial Council Form

[1] FORM Income and Expense Declaration [Cal. Judicial Council Form FL-150] With Income Information, Expense Information, and Child Support Information--Judicial Council Form

Click here to view image.

[2] Use of Form

Whenever the information is relevant to the relief sought, and with the exception of certain matters to be disposed of by default or as uncontested proceedings, a completed Income and Expense Declaration (I & E) must be attached to all applications for court orders in family law proceedings, regardless of whether the application is by notice of motion or order to show cause [*Cal. Rules of Ct., Rules 5.118(b), 5.128*; *see Cal. Rules of Ct., Rules 5.122*]. Thus, a financial declaration must be attached to any application for a temporary spousal or child support order, or order for attorney's fees and costs. Up-to-date declarations also must be filed at the time of trial and when any modifications of spousal or child support orders are sought.

The declarations should be prepared in an original for filing and in the same number of copies, for the same distribution, as the application for order (*see § 221.432*).

The Judicial Council form of Financial Statement (Simplified), which is set forth in § 221.332A may be used instead of these forms in certain circumstances [*see* Cal. Judicial Council Form FL-155].

[3] Completion of Forms

The I & E is one of the most important documents to be prepared if an order for payment of child or spousal support or attorney's fees is sought. The I & E, standing alone without oral testimony, is a sufficient basis for a support order [*In re Marriage of McQuoid (1991) 9 Cal. App. 4th 1353, 1359, 12 Cal. Rptr. 2d 737]* .

Page 1 of the I & E is used to set forth general information about the declarant's employment and education, tax information, and the other party's income. Page 2 of the I & E is used to set forth detailed information about the declarant's income and assets. Page 3 of the I & E is used to set forth detailed information about the declarant's expenses. Page 4, Child Support Information page is for use to set forth other pertinent information that is required under the statewide uniform child support guideline [*see Fam. Code § 4055 et seq.*] and must be included whenever child support is sought.

[4] Income Averaging

The guideline provides that the annual net disposable income amount is to be divided by 12 to reflect the monthly net disposable income. However, if the monthly figure does not accurately reflect the actual or prospective earnings at the time the determination of support is made, the court may adjust the amount appropriately [*Fam. Code § 4060*]. Therefore, paragraphs 5 and 6 of the I & E ask for the last month's income from each source, as well as for the average monthly income from each source for the past 12 months. Paragraph 8 should be checked and completed if the declarant has received one-time income during the past 12 months, such as an inheritance. Paragraph 9 should be checked and completed if the declarant has had a significant change in income during the past 12 months.

The 12-month average figures will usually be more appropriate for parents with a fluctuating source of income, such as the self-employed. However, for the parent whose income comes primarily from salary or wages, the current monthly figures are more appropriate, assuming that salary or wages are expected to remain at their current level for the foreseeable future.

[5] Children of Other Relationships (Child Support and Hardship Deductions)

To determine net disposable monthly income under the child support guideline, deductions are allowed for child support actually paid on behalf of children of other relationships (child support deduction; paragraph 10(d)) [*see Fam. Code § 4059(e)*] and for children from other relationships who reside with the parent (hardship deduction; paragraph 19) [*see Fam. Code §§ 4059(g), 4071(a)(2)*]. The amount of both of these deductions is limited by the amount of child support under the guideline. If the support is not being paid under a court order, the amount of the child support deduction may not exceed the amount established by the guideline [*Fam. Code § 4059(e)*]. The amount of the hardship deduction may not exceed the support ordered for each child subject to the order [*Fam. Code § 4071(b)*].

In this regard, it must be remembered that the Income and Expense Declaration, although it follows the guideline, is not a guideline child support worksheet. Since the amount of child support to be ordered obviously cannot be known at the time when the I & E must be filed, actual child support being paid should be entered.

The ultimate hardship deduction allowed will not only be capped by the amount of support to be ordered for the children in the instant matter, but will also be affected by the status of the other parent. Actual child support being received from the other parent on behalf of the hardship child should lower the hardship deduction. Further, if the child's other parent is living in the household and has income, that parent's presumed contributions to the support of the child [*see Fam. Code § 4053(i)*] should lower any hardship deduction.

These deductions reflect the importance of careful scrutiny of claimed deductions from income by counsel for the other parent. While there is nothing improper about claiming a high number as a hardship deduction on the I & E, the other party should not allow that number to become an unchallenged component of the child support computation.

The hardship deduction is discussed in detail in see Ch. 224, *Dissolution of Marriage: Child Support* .

[6] Attachments

Various documents must be attached to the I & E to substantiate the income and expenses claimed, including:

- Copies of the declarant's pay stubs for the last two months (with Social Security numbers crossed out) [paragraph 1].

- Proof of any other income [paragraph 5].

- A schedule showing gross receipts less cash expenses for each piece of rental property claimed [paragraph 6].

- A profit and loss statement for the last two years or a schedule C from the declarant's last federal tax return for each business from which the declarant claims income [paragraph 7].

- An explanation of any necessary job-related expenses not reimbursed by the declarant's employer [paragraph 10(g)].

- Documentation of any special financial hardships the declarant would like the court to consider in determining child support [paragraph 19].

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18-221 California Forms of Pleading and Practice--Annotated § 221.333

§ 221.333 Financial Statement (Simplified)--Judicial Council Form [Cal. Judicial Council Form FL-155]

[1] FORM Financial Statement (Simplified)--Judicial Council Form [Cal. Judicial Council Form FL-155]

Click here to view image.

[2] Use of Form

This form is the Judicial Council form of Simplified Financial Statement, [*see* Cal. Judicial Council Form FL-155]. It was promulgated for use as a result of a legislative mandate to provide a simplified method of providing the information necessary to compute child support under the statewide uniform child support guideline [*see Fam. Code § 4068(b)*]. The form is designed for use by unrepresented parties. However, it may be filed by a represented party who otherwise qualifies. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. Blank forms may also be obtained from the superior court clerk's office.

The Legislature also directed the Judicial Council to develop the factors to determine when the simplified form may be used and when a complete Income and Expense Declaration (*see § 221.331*) is required [*see Fam. Code § 4068(b)*]. The factors adopted by the Judicial Council are set forth on page 2 of the form in terms of exclusions. The form may *not* be used if spousal support or attorney's fees are at issue, or if the party has income from other than salary or wages, welfare benefits, unemployment, worker's compensation, social security, or other retirement income. The form also may not be used if the party is self-employed.

A party who is eligible to use the form may still elect to complete the full Income and Expense Declaration (*see § 221.331*). Note that the fact that the form may not be used if the other party is requesting attorney's fees may severely limit its use if the other party is represented. A claim for attorney's fees is usually routinely made, even in a low-income situation.

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18-221 California Forms of Pleading and Practice--Annotated § 221.334

§ 221.334 Property Declaration--Judicial Council Form [Cal. Judicial Council Form FL-160]

[1] FORM Property Declaration--Judicial Council Form [Cal. Judicial Council Form FL-160]

Click here to view image.

[2] Use of Form

The form reproduced above is the Judicial Council mandatory form of Property Declaration [*see* Cal. Judicial Council Form FL-160]. In filling out the property declaration, the sections detailing values and the filer's proposal for division do not have to be completed if the declaration is attached to the petition or response. If the petitioner or respondent seeks support, however, it is advisable to fill in the values insofar as known so that the court will have a clear idea of the parties' financial situation. If either of the parties has separate property, it should be described on an additional Property Declaration other than that used for property of the community estate. If the Property Declaration has insufficient space to list all the property, the Continuation of Property Declaration [Cal. Judicial Council Form FL-161] (*see § 221.335*) must be used.

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§ 221.335 Continuation of Property Declaration--Judicial Council Form [Cal. Judicial Council Form FL-161]

[1] FORM Continuation of Property Declaration--Judicial Council Form [Cal. Judicial Council Form FL-161]

Click here to view image.

[2] Use of Form

The form reproduced above is an illustrative example of the Judicial Council mandatory form of Continuation of Property Declaration [*see* Cal. Judicial Council Form FL-161]. This form is used when the Property Declaration (*see § 221.334*) has insufficient space to report all the parties' property. The form should be attached to the Property Declaration.

[3] Cross References

For a related form, see *§ 221.334*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.336

§ 221.336 Ex Parte Application and Order to Seal Financial Forms--Judicial Council Form [Cal. Judicial Council Form FL-316]

[1] FORM Ex Parte Application and Order to Seal Financial Forms--Judicial Council Form [Cal. Judicial Council Form FL-316]

[2] Use of Form

The optional Judicial Couuncil form of Ex Parte Application and Order to Seal Financial Forms [Cal. Judicial Council Form FL-316] may be used to request an order sealing any pleading that lists the parties' financial assets and liabilities, and that provides the location or identifying information about those assets and liabilities [*see Fam. Code § 2024.6(a)*]. The term "pleading" means any document that sets forth or declares the parties' assets and liabilities or income and expenses, a marital settlement agreement that lists and identifies the parties' assets and liabilities, or any document filed with the court incidental to the declaration or agreement that lists or identifies financial information [*Fam. Code § 2024.6(c)*]. The forms and documents to be sealed must be listed in item 2 of the form.

The party making the request to seal a pleading must serve a copy of the pleading on the other party and file a separate proof of service with the request to seal the pleading [*Fam. Code § 2024.6(e)*]. Item 3 of the form indicates that such service has been made. Notice of the ex parte application must be given to the other party and proof of service must be attached to the form, as indicated in item 4.

If the party making the request uses a pleading other than the Judicial Council form, the pleading must exhibit a notice on the front page, in bold capital letters, that the pleading lists and identifies financial information and is therefore subject to *Fam. Code § 2024.6* [*Fam. Code § 2024.6(b)*].

Any pleading that has been sealed may only be unsealed on petition to the court and a showing of good cause [*Fam. Code § 2024.6(a)*]. A party is not precluded, however, from using any document or information contained in a sealed pleading in any manner that is not otherwise prohibited by law [*Fam. Code § 2024.6(f)*].

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18-221 California Forms of Pleading and Practice--Annotated § 221.337

§ 221.337 Responsive Declaration to Order to Show Cause or Notice of Motion--Judicial Council Form [Cal. Judicial Council Form FL-320]

[1] FORM Responsive Declaration to Order to Show Cause or Notice of Motion--Judicial Council Form [Cal. Judicial Council Form FL-320]

Click here to view image.

[2] Use of Form

The form of responsive declaration reproduced above is for use in a family law proceeding by the party responding to an application for preliminary orders either by noticed motion or order to show cause. The form, the use of which is mandatory, is Cal. Judicial Council Form FL-320. However, commencing January 1, 1999, this form may not be used to respond to a motion or order to show cause seeking a protective or restraining order against domestic violence. Instead, the Judicial Council form DV-120--Responsive Declaration to Order to Show Cause (Domestic Violence)--should be used. For an illustrative, filled-in version of that form, see *Ch. 293, Harassment and Domestic Violence, § 293.153*.

The responsive declaration must be prepared in an original for filing and at least one copy for service on the applicant's attorney, if any, and if none, on the applicant [*see Code Civ. Proc. § 1015*; *Cal. Rules of Ct., Rule 5.10(b)*]. Counsel also should prepare an additional copy to be stamped "endorsed-filed" by the court clerk for counsel's office file and, in cases in which the papers are filed by mail, yet another copy to be retained in counsel's office file until return of the endorsed-filed copy from the court. Additional copies may be prepared as desired; for example, counsel may want to prepare a copy for the client.

[3] Cross References

For a related form, see *§ 221.331*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.338

§ 221.338 Findings and Order After Hearing and Attachments--Judicial Council Form [Cal. Judicial Council Forms FL-340-FL-344, FL-347]

[1] FORM Findings and Order After Hearing and Attachments--Judicial Council Form [Cal. Judicial Council Forms FL-340-FL-344]

Click here to view image.

Click here to view image.

[2] Use of Form

Illustrated above are the Judicial Council's mandatory forms of Findings and Order After Hearing and attachments to set forth orders for child custody and visitation, child support, spousal support, and property control and restraints, including property orders needed to prevent domestic violence [Cal. Judicial Council Forms FL-340, FL-341, FL-341(A), FL-342, FL-342(A), FL-343, FL-344]. When the court has ordered bifurcation of the status of the marriage, the Judicial Council form of Bifurcation of Status of Marriage--Attachment [Cal. Judicial Council Form FL-347] should be completed and attached to the Findings and Order After Hearing. Individual attachments to the Findings and Order After Hearing form need only be used to the extent that the court made a corresponding order. The forms are generally designed for use in family law, domestic violence, and parentage proceedings. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. Blank forms may also be obtained from the superior court clerk's office.

The Findings and Order After Hearing form [Cal. Judicial Council Form FL-340] essentially functions as a face sheet to identify the proceedings and itemize the nature (categories) of the orders made. Except for the issue or attorney's fees, for which a space is provided to enter the amount of fees ordered, the form refers to attachments for other orders. The form provides spaces for signatures by the judicial officer who heard the matter, as well as by the counsel (or unrepresented party) who did not prepare the order--to signify approval that it conforms to the judicial officer's oral

recitation of the order in court. In an appropriate case, this form may also be used in conjunction with the Judicial Council form of Restraining Order After Hearing (CLETS--DV-130), as discussed in Ch. 293, *Harassment and Domestic Violence* .

Each attachment form must be carefully reviewed for any specialized instructions and admonitions. Some of the forms contemplate the completion and attachment of additional forms. In the case of child support, the Child Support Information and Order Attachment [Cal. Judicial Council Form FL-342] provides for the court to require attachment of a printout of a computerized calculation of support and findings (Paragraph 1). A Health Insurance Coverage Assignment Order also may be required. Paragraph 11 of the Child Support Information and Order Attachment requires the attachment of Judicial Council forms of Notice of Rights and Responsibilities re: Health Care Costs and Reimbursement Procedures, and the Information Sheet on Changing a Child Support Order [Cal. Judicial Council Form FL-192]. In addition, both parties must complete and file with the court a Child Support Case Registry form [Cal. Judicial Council Form FL-191] within 10 days from the issuance of the underlying child support order. Finally, if a child support order varies from the statewide uniform guideline, the Judicial Council form of Non-Guideline Child Support Findings Attachment, illustrated above, must be attached [Cal. Judicial Council Form FL-342(A)].

If the court has ordered spousal or family support and the corresponding attachment is needed (Spousal or Family Support Order Attachment) [Cal. Judicial Council Form FL-343], that form also calls for the attachment of certain additional forms. A wage assignment form will be required, unless service is conditionally ordered stayed. If family support has been ordered, the Child Support Case Registry form [Cal. Judicial Council Form FL-191] must be completed by both parties and filed within 10 days of the issuance of the underlying family support order. In addition, as in the case of child support orders, if family support has been ordered, the Notice of Rights and Responsibilities re: Health Care Costs and Reimbursement Procedures and the Information Sheet Regarding Change of Child Support Orders must be attached to the Spousal or Family Support Order Attachment [*see* Cal. Judicial Council Form FL-192].

Both the Property Order Attachment [Cal. Judicial Council Form FL-344, DV-130] makes reference to various orders concerning the control of property, and payment of debts. If domestic violence is not a factor, it is suggested that the general Property Order Attachment form [Cal. Judicial Council Form FL-344] should be used. For additional discussion of domestic violence-related forms, see Ch. 293, *Harassment and Domestic Violence* .

After the forms are completed, they should be sent to the opposing counsel, or to the opposing party if he or she is not represented. The opposing counsel or party should sign on the front of the Findings and Order After Hearing form, approving the form and its attachments as to form and content. After the court has signed the order and the order has been filed, a file-endorsed copy should be sent to the opposing counsel or (unrepresented) opposing party. If the opposing party has not yet appeared in the action and was not present at the hearing, a file-endorsed copy of the order should be personally served on that party and proof of service filed with the court.

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18-221 California Forms of Pleading and Practice--Annotated § 221.339

§ 221.339 Appearance, Stipulation, and Waivers--Judicial Council Form [Cal. Judicial Council Forms FL-130]

[1] FORM Appearance, Stipulation, and Waivers--Judicial Council Form [Cal. Judicial Council Forms FL-130]

Click here to view image.

[2] Use of Form

Checking box 1 of the Judicial Council approved form of Appearance, Stipulation and Waivers reproduced above constitutes a general appearance admitting personal jurisdiction over the respondent and entitling him or her to notice of subsequent proceedings [*Cal. Rules of Ct., Rule 5.120*]. It does not prevent the petitioner from trying the proceeding as uncontested, just as if it were based on a default. A general appearance often is filed when the respondent intends the matter to be heard based on a stipulated judgment or a marital settlement agreement.

If the parties want an uncontested trial, such as when they have entered into a stipulated judgment or a written marital settlement agreement and the respondent has already filed a response, they must stipulate to the uncontested trial by checking box 4.

The waiver of rights to notice of trial, findings of fact and conclusions of law, motion for a new trial, and appeal contained in box 5 may be used before a default or uncontested hearing to expedite the proceeding. The waiver also may be made after trial to allow a final judgment to be entered before the time limits for moving for new trial and appealing from the judgment have expired.

If the parties intend to submit a marital settlement agreement (or stipulation for judgment) for the court's approval, box 9 should be checked, which provides that none of the indicated stipulations or waiver apply unless the court approves the written settlement agreement or stipulation for judgment. Checking this box will help to protect the nonappearing party from unexpected judicial action regarding the settlement agreement.

[3] State Statutes

Default proceedings. *Fam. Code §§ 2335.5, 2336*

[4] California Rules of Court

Defaults and uncontested proceedings. *Cal. Rules of Ct., Rules 5.122, 5.124*

[5] Text References

Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, Ch. 97 (Matthew Bender 2d ed.)

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18-221 California Forms of Pleading and Practice--Annotated § 221.340

§ 221.340 Request to Enter Default--Judicial Council Form [Cal. Judicial Council Forms FL-165]

[1] FORM Request to Enter Default--Judicial Council Form [Cal. Judicial Council Forms FL-165]

Click here to view image.

[2] Use of Form

The Request to Enter Default reproduced above has been adopted by the Judicial Council for mandatory use [Cal. Judicial Council Forms FL-165]. The form contemplates that the requesting party (petitioner) will attach a completed Income and Expense Declaration (and its series of attachments), or the Financial Statement (Simplified) form, along with a standard Property Declaration, unless at least one of the six reasons set forth under Paragraph 2 applies--in which case the corresponding box should be marked [*see* Cal. Judicial Council Forms FL-150, FL-155, FL-160; *see §§ 221.332 -221.335*].

If the petitioner seeks to recover the costs incurred in the proceeding as part of the relief requested in the petition, the memorandum of costs set out as item 4 must specify the cost of filing fees, costs of service, reporter's fees incurred in taking any depositions, etc.

[3] Cross References

For related forms, see *§§ 221.339, 221.341*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.341

§ 221.341 Declaration for Default or Uncontested Dissolution or Legal Separation [Fam. Code § 2336; Cal. Judicial Council Form FL-170]

[1] FORM Declaration for Default or Uncontested Dissolution or Legal Separation [Fam. Code § 2336; Cal. Judicial Council Form FL-170]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of the mandatory Judicial Council form of Declaration for Default or Uncontested Dissolution or Legal Separation [Cal. Judicial Council Form FL-170]. Its use is required when a courtroom appearance is not otherwise required--the usual case when irreconcilable differences are the basis for the petition [*see Fam. Code § 2336(b)*]. This form should not be used, however, when the dissolution or legal separation is sought on the ground of incurable insanity. In those instances, a separate affidavit (or declaration) must be drafted for the petitioner if he or she has been excused from attending the proceeding. Medical, psychiatric, or other corroborating testimony in court may be required in those cases [*see, e.g., Fam. Code §§ 2210(c), (f), 2312*].

The form declaration should be presented at the time of the default or uncontested hearing, if in fact a hearing has been set. If no hearing has been set or will be needed, the form declaration may be transmitted to the court clerk for review by the court, along with any supporting declarations. As indicated by the form instructions, if a support order or attorney's fees and costs have been requested, an income and expense declaration should be submitted unless a current form is on file. If the parties have minor children, the party submitting the form also must complete the income information in Paragraph 13, as well as provide information concerning the receipt of public assistance (Paragraphs 11 and 12).

In addition, a property declaration should be submitted unless one is already on file if the petitioner seeks a division of community or quasi-community property or the confirmation of separate property and the parties have not entered into a marital settlement agreement or stipulated judgment [*see Cal. Rules of Ct., Rules 5.122, 5.128*; Cal. Judicial Council Form FL-150]. Additional required proof for default cases is set forth in *Fam. Code § 2336*, as discussed in *§*

221.20[6][b]. In the case of a default judgment, the petitioner may waive the final declaration of disclosure requirements of the Family Code, and is not required to either serve a final declaration of disclosure on the respondent or receive one from the respondent [*Fam. Code § 2110*; *see Fam. Code §§ 2103, 2105*]. The parties may otherwise stipulate to waive the requirements for the final declaration of disclosure [*Fam. Code §§ 2105, 2106*]. In completing the Declaration for Default or Uncontested Dissolution or Legal Separation form, the appropriate checkoff box under Paragraph 6 should be marked to indicate the means of compliance with the disclosure declaration requirements.

If the parties have reached a settlement regarding their property and other marital rights, including support, their written agreement or stipulated judgment may be submitted for approval by the court and possible incorporation in the judgment. In default cases, the signature of the defaulting spouse on any marital settlement agreement or stipulated judgment must be *notarized* [*Fam. Code § 2338.5(a)*].

The party seeking the judgment should submit sufficient stamped, preaddressed envelopes to the court clerk for mailing the notice of entry of judgment. The address of the court clerk must be given as the return address [*Fam. Code § 2338.5(c)*; *see Cal. Rules of Ct., Rule 5.136(a)*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Cross References

For a related form, see *§ 221.339*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.342

§ 221.342 Joint Petition for Summary Dissolution of Marriage--Judicial Council Form [Fam. Code §§ 200, 2401, 2406; Cal. Judicial Council Form FL-800]

[1] FORM Joint Petition for Summary Dissolution of Marriage--Judicial Council Form [Fam. Code §§ 200, 2401, 2406; Cal. Judicial Council Form FL-800]

Click here to view image.

[2] Use of Form

The joint petition required by *Fam. Code § 2401* must include all the information set forth on the Judicial Council form reproduced above. Local court rules should be consulted for additional requirements.

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18-221 California Forms of Pleading and Practice--Annotated § 221.343

§ 221.343 Request for Final Judgment, Final Judgment of Dissolution of Marriage, and Notice of Entry of Judgment--Judicial Council Form [Fam. Code § 2403; Cal. Judicial Council Form FL-820]

[1] FORM Request for Final Judgment, Final Judgment of Dissolution of Marriage, and Notice of Entry of Judgment--Judicial Council Form [Fam. Code § 2403; Cal. Judicial Council Form FL-820]

Click here to view image.

[2] Use of Form

The Judicial Council form reproduced above constitutes the request, final judgment and notice of entry. Two additional copies of the form and two addressed, stamped envelopes for mailing to the parties by the clerk of the court should be submitted along with the form.

[3] Cross References

For a related form, see *§ 221.342*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.344

§ 221.344 Notice of Revocation of Petition for Summary Dissolution--Judicial Council Form [Fam. Code § 2402; Cal. Judicial Council Form FL-830]

[1] FORM Notice of Revocation of Petition for Summary Dissolution--Judicial Council Form [Fam. Code § 2402; Cal. Judicial Council Form FL-830]

Click here to view image.

[2] Use of Form

The original and two copies of the Notice of Revocation of Petition for Summary Dissolution form reproduced above must be submitted to the clerk of the court where the proceeding was commenced when either party wishes to revoke the joint petition and terminate the summary dissolution proceeding. In turn, the clerk is required to mail the two copies to the respective parties [*Fam. Code § 2402*].

[3] Cross References

For a related form, see *§ 221.342*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.345

§ 221.345 Proof of Personal Service--Judicial Council Form [Code Civ. Proc. § 1011; Cal. Judicial Council Form FL-330]

[1] FORM Proof of Personal Service--Judicial Council Form [Code Civ. Proc. § 1011; Cal. Judicial Council Form FL-330]

Click here to view image.

[2] Use of Form

This form is an optional Judicial Council form of proof of personal service that has been approved for general use in family law cases [*see* Cal. Judicial Council Form FL-330]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form has been designed for use in a broad variety of family law proceedings, by either individuals or governmental agencies. It therefore includes an extra space in the caption, entitled "Other Parent," by which to indicate the name of a child's parent who has an interest in the proceeding as a result of a support enforcement action through the district attorney's office [*see Cal. Rules of Ct., Rule 5.310*; *see also Welf. & Inst. Code § 11350.1(e)*]. When such an action is not involved, that space will not need to be filled in.

The form also includes a special checkoff box (Paragraph 1) by which to indicate that service has been made of a restraining order regarding "personal conduct, stayaway, or residence exclusion." It should be marked only if an order of that type has been served. For an alternative proof of service form for domestic violence restraining orders, see *Ch. 293, Harassment and Domestic Violence, § 293.152*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.346

§ 221.346 Proof of Service by Mail--Judicial Council Form [Code Civ. Proc. §§ 1013, 1013a; Cal. Judicial Council Form FL-335]

[1] FORM Proof of Service by Mail--Judicial Council Form [Code Civ. Proc. §§ 1013, 1013a; Cal. Judicial Council Form FL-335]

Click here to view image.

[2] Use of Form

This form is an optional Judicial Council form of proof of service by mail that has been approved for general use in family law cases [*see* Cal. Judicial Council Form FL-335]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form has been designed for use in a broad variety of family law proceedings when service by mail is appropriate [*see Code Civ. Proc. § 1013, 1013a*]. It should not be used, for example, to serve restraining orders, as expressly noted on the face of the form. See also *§ 221.345*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.347

§ 221.347 Notice of Consolidation--Cal. Judicial Council Form FL-920

[1] FORM Notice of Consolidation--Cal. Judicial Council Form FL-920

Click here to view image.

[2] Use of Form

This form is a reproduction of the optional Judicial Council form of Notice of Consolidation [Cal. Judicial Council Form FL-920]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is for use by a court to notify parties of the consolidation of several cases into a single, primary case file. The court will designate the party who is to complete the form for the court's use. For related discussion, see *§ 221.18[5][b]*, and Kirkland, Luvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Ch. 111 (§ 111.22) (Matthew Bender).

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18-221 California Forms of Pleading and Practice--Annotated § 221.348

§ 221.348 Notice of Limited Scope Representation--Cal. Judicial Council Form FL-950

[1] FORM Notice of Limited Scope Representation--Cal. Judicial Council Form FL-950

Click here to view image.

[2] Use of Form

This form is a Notice of Limited Scope Representation [Cal. Judicial Council Form FL-950]. It has been adopted by the Judicial Council for mandatory use. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is served on all other parties and counsel who are of record in the case when the notifying party and an attorney have entered into a written agreement of limited scope representation. Section 2 contains information regarding the duration of representation. Section 3 should be checked according to which issues the attorney has agreed to serve as "attorney of record" for the party. Section 5 states that the attorney will be available for service of documents only for issues specifically checked in Section 3, and the party must be served directly for all other matters.

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18-221 California Forms of Pleading and Practice--Annotated § 221.349

§ 221.349 Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation--Cal. Judicial Council Form FL-955

[1] FORM Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation--Cal. Judicial Council Form FL-955

Click here to view image.

[2] Use of Form

This form is an Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation [Cal. Judicial Council Form FL-955]. It has been approved by the Judicial Council for optional use. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is filed and served on the client and on all other parties and counsel who are of record in the case when an attorney has completed the tasks specified in the Notice of Limited Scope Representation [Cal. Judicial Council Form FL-950; *see § 221.348*] and seeks to be relieved as counsel in cases in which the attorney has appeared before the court as attorney of record and the client has not signed a substitution of attorney form [*Cal. Rules of Ct., Rule 5.71*; *see* Cal. Judicial Council Form MC-050 (Substitution of Attorney--Civil)]. If Section 3 is checked, the Notice of Limited Scope Representation [Cal. Judicial Form FL-950] should be attached.

When this form is used, it must be accompanied by a Judicial Council form of objection to the relief requested [*Cal. Rules of Ct., Rule 5.71(b), (c)*, Cal. Judicial Council Form FL-956; *see § 221.350*].

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18-221 California Forms of Pleading and Practice--Annotated § 221.350

§ 221.350 Objection to Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation--Cal. Judicial Council Form FL-956

[1] FORM Objection to Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation--Cal. Judicial Council Form FL-956

Click here to view image.

[2] Use of Form

This form is an Objection to Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation [Cal. Judicial Council Form FL-956]. It has been approved by the Judicial Council for optional use. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is to be filed and served if a party objects to his or her attorney's application to be relieved as counsel of record after completing a limited scope representation [*see* Cal. Judicial Council form FL-955]. Section 3 should be completed with information on what services the party believes the attorney has yet to complete under the limited scope representation agreement, and reasons for that belief.

If an objection is filed by the party within 15 days after service of the attorney's application to be relieved of counsel, the clerk must set a hearing date no later than 25 days from the date the objection is filed. The clerk must send the notice of the hearing to the parties and counsel [*Cal. Rules of Ct., Rule 5.71(e)*].

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18-221 California Forms of Pleading and Practice--Annotated § 221.351

§ 221.351 Order on Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation--Cal. Judicial Council Form FL-958

[1] FORM Order on Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation--Cal. Judicial Council Form FL-958

Click here to view image.

[2] Use of Form

This form is the Judicial Council form of Order on Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation [Cal. Judicial Council Form FL-958]. It has been approved by the Judicial Council for optional use. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Section 2 should be checked if the application was uncontested. Section 3 should be checked if the application was contested. Sections 4 to 6 should be checked according to the orders made. The attorney who filed the application must serve copies of the order on the parties and opposing counsel, and proof of service must be filed with the court.

A copy of the signed order must be served by the attorney who applied to be relieved as counsel of record on the client and on all parties who have appeared in the case. The court may delay the effective date of the order relieving counsel until proof of service of a copy of the signed order on the client has been filed with the court [*Cal. Rules of Ct., Rule 5.71(f)*].

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18-221 California Forms of Pleading and Practice--Annotated §§ 221.352-221.369

[Reserved]

§§ 221.352[Reserved]

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18-221 California Forms of Pleading and Practice--Annotated § 221.370

§ 221.370 Stipulation and Waiver of Final Declaration of Disclosure--Judicial Council Form [Fam. Code § 2105(d); Cal. Judicial Council Form FL-144]

[1] FORM Stipulation and Waiver of Final Declaration of Disclosure--Judicial Council Form [Fam. Code § 2105(d); Cal. Judicial Council Form FL-144]

Click here to view image.

[2] Use of Form

Set forth above is the optional Judicial Council form of Stipulation and Waiver of Final Declaration of Disclosure [Cal. Judicial Council Fom FL-144]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is for use by the parties to stipulate to a waiver of the statutory requirements concerning the final declaration of disclosure [*see Fam. Code § 2105(d)*]. It must be signed by both parties. For related discussion, see *§ 221.48[2]*.

[3] Cross References

For a related form, see *§ 221.371*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.371

§ 221.371 Final Declaration of Disclosure--Judicial Council Form [Fam. Code § 2105; Cal. Judicial Council Form FL-140]

[1] FORM Final Declaration of Disclosure--Judicial Council Form [Fam. Code § 2105; Cal. Judicial Council Form FL-140]

Click here to view image.

[2] Use of Form

Set forth above is the Judicial Council form adopted for mandatory use in complying with the disclosure requirements of *Fam. Code § 2105* applicable to any marital dissolution proceeding begun on or after January 1, 1993 [*see Fam. Code § 2113*]. By completing the appropriate check-off boxes, the same form is to be used both for preliminary (*see § 221.10* et seq.) and final declarations of disclosure. As illustrated here, the form is presented as a final declaration of disclosure. Appropriate check-off boxes must be marked to refer to particular attachments the party is using to set forth the substantive information required for the declaration. The form functions largely as a cover or face sheet for these attachments, and contains a standard form statement to be signed by the party-declarant that the declaration is being made under penalty of perjury.

Unless the parties stipulate to waive the final declaration of disclosure, or the court makes an order (for good cause) dispensing with the requirement of making that declaration, the final declaration must be served on the other party before or at the time the parties enter into an agreement for the resolution of property or support issues (other than pendente lite support) or, in the event the case goes to trial, no later than 45 days before the first assigned trial date [*Fam. Code § 2105(a)*].

The completed declaration of disclosure form and accompanying attachments should be served on the other party, but are not filed with the court. Instead, counsel should complete and file with the court a Judicial Council form of declaration [Cal. Judicial Council Form FL-141 (*see § 221.372*)] stating that service of the final declaration of disclosure and a current income and expense declaration was made on the other party, or that service of the final

declaration has been waived [*see Fam. Code § 2106*].

[3] State Statutes

Service of final declarations of disclosure on other party. *Fam. Code § 2103*

Requirements for service and contents of final declaration of disclosure. *Fam. Code § 2105*

Declaration of service to other party filed with court. *Fam. Code § 2106*

Failure to comply or to specify with particularity. *Fam. Code § 2107*

No liquidation of assets without service of declaration. *Fam. Code § 2108*

Final declaration not required if summary dissolution. *Fam. Code § 2109*

Final declaration not required if default judgment. *Fam. Code § 2110*

Disclosure as not abrogating work product privilege or court power to issue protective orders. *Fam. Code § 2111*

Forms to be adopted by Judicial Council. *Fam. Code § 2112*

Applicability of requirements to proceedings commenced on or after January 1, 1993. *Fam. Code § 2113*

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18-221 California Forms of Pleading and Practice--Annotated § 221.372

§ 221.372 Declaration Regarding Service of Declaration of Disclosure and Income and Expense Declaration--Judicial Council Form [Fam. Code § 2106; Cal. Judicial Council Form FL-141]

[1] FORM Declaration Regarding Service of Declaration of Disclosure and Income and Expense Declaration--Judicial Council Form [Fam. Code § 2106; Cal. Judicial Council Form FL-141]

Click here to view image.

[2] Use of Form

This form is an illustrated, filled-in version of the mandatory Judicial Council form of Declaration Regarding Service of Declaration of Disclosure and Income and Expense Declaration, for use in proceedings for marital dissolution or legal separation [*see Fam. Code §§ 2106, 2113*; Cal. Judicial Council Form FL-141]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is designed for use as a declaration of service for either the preliminary or final declaration of disclosure and of any Income and Expense declaration served contemporaneously with a disclosure declaration. This declaration of service form should be filed with the court as soon as possible following service of each of the disclosure declarations (and associated Income and Expense declarations) [*see generally Fam. Code §§ 2104-2106*]. For discussion of the timing and circumstances under which disclosure declarations need to be served, see §§ 221.25[3][b] and *221.48[1]*.

[3] Cross References

For a related form, see *§ 221.371*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.373

§ 221.373 Notice of Withdrawal of Attorney of Record [Code Civ. Proc. § 285.1; Cal. Judicial Council Form FL-960]

[1] FORM Notice of Withdrawal of Attorney of Record [Code Civ. Proc. § 285.1; Cal. Judicial Council Form FL-960]

Click here to view image.

[2] Use of Form

This form is the mandatory Judicial Council form of Notice of Withdrawal of Attorney of Record adopted for use in family law and parentage proceedings [Cal. Judicial Council Form FL-960]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

It may be used at any time after the judgment becomes final and before any further pleadings or motion papers in any proceeding pending in the cause are served on the attorney. Although neither the formal consent of the client nor a court order are necessary, copies of the withdrawal must be mailed to the client at his or her last known address and served on the adverse party [*Code Civ. Proc. § 285.1*].

[3] State Statutes

Withdrawal of attorney as attorney of record in family law proceedings. *Code Civ. Proc. § 285.1*

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18-221 California Forms of Pleading and Practice--Annotated §§ 221.374-221.389

[Reserved]

§§ 221.374[Reserved]

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18-221 California Forms of Pleading and Practice--Annotated § 221.390

§ 221.390 Request for Statement of Decision [Code Civ. Proc. § 632; Fam. Code § 2338(a)]

[1] FORM Request for Statement of Decision [Code Civ. Proc. § 632; Fam. Code § 2338(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In re the Marriage of _____ [*name*], Petitioner, and _____ [*name*], Respondent.	))))))))	NO. _____ REQUEST FOR STATEMENT OF DECISION

To the Clerk of the Superior Court and to _____ [*petitioner or respondent*] _____ [*name of opposing party*]:

_____ [Petitioner or Respondent] _____[*name of requesting party*] hereby requests that a statement of decision be prepared and filed in this proceeding concerning each of the following issues that were controverted at trial:

[*In separately numbered paragraphs, specify controverted issues regarding which the statement of decision is requested, such as the following*]

1. The circumstances supporting the award of spousal support to _____ [Petitioner or Respondent], including the standard of living during the marriage, the need of _____ [Petitioner or Respondent] for the support, and the ability of _____ [Petitioner or Respondent] to pay.

2. The reasonableness of the amount of the attorney's fee award to _____ [Petitioner or Respondent].

3. The character, whether separate or community, of the interests of each of the parties in _____ [*identify asset*].

4. The valuation of each party's interest in _____ [*identify asset*].

5. The extent of the community's interest in the retirement benefit plan of _____ [Petitioner or Respondent] with _____ [*name of employer*].

[*CONTINUE*]

The court's tentative decision in this proceeding was announced on _____ [*date*].

_____ [*date*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Use of Form

The foregoing form is a sample form of request by a party to a family law proceeding for a statement of decision. The request must specify the controverted issues regarding which the party is requesting a statement of decision [*see Code Civ. Proc. § 632*; *Fam. Code § 2338(a)*]. See the discussion in *§ 221.111[4]*.

[3] State Statutes

Statement of decision required in lieu of written findings and conclusions. *Code Civ. Proc. § 632*

Court as being required to file statement of decision as in other cases. *Fam. Code § 2338(a)*

[4] California Rules of Court

Preparation and service of proposed statement of decision and judgment. *Cal. Rules of Ct., Rule 3.1590*

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18-221 California Forms of Pleading and Practice--Annotated § 221.391

§ 221.391 Proposed Statement of Decision [Code Civ. Proc. § 632; Fam. Code § 2338(a); Cal. Rules of Ct., Rule 232(c)]

[1] FORM Proposed Statement of Decision [Code Civ. Proc. § 632; Fam. Code § 2338(a); Cal. Rules of Ct., Rule 232(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In re the Marriage of	)	
_____ [*name*],	)	NO. _____
Petitioner,	)	[PROPOSED] STATEMENT OF DECISION
and	)	
_____ [*name*],	)	
Respondent.	)	
	)	

The above-entitled proceeding was tried on _____ [*date(s)*] in Dept. _____ of the above-entitled Court, the Honorable _____ [*name*], Judge, presiding without a jury. Petitioner _____ [*name*] appeared [in person and was represented] by counsel _____ [*name of petitioner's counsel*]. Respondent _____ [*name*] appeared [in person and was represented] by counsel _____ [*name of respondent's counsel*].

Both oral and documentary evidence was received by the court on all controverted issues [reserved for trial after bifurcation], and the matter was argued by counsel and submitted for decision by the court.

On request of _____ [Petitioner or Respondent] and pursuant to *Code of Civil Procedure Section 632* and *Family Code Section 2338(a)*, the court, having considered all the evidence and the arguments of counsel, makes the following statement of decision concerning the issues regarding which _____ [Petitioner or Respondent] has requested a statement of decision.

The court finds as follows:

[*In separately numbered paragraphs, set forth factual and legal bases supporting the court's decision concerning each issue identified in the request for statement of decision*]

Judgment in this proceeding will be entered in accordance with this statement of decision.

_____ [*date*]

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The foregoing form is a sample form of proposed statement of decision [*see Code Civ. Proc. § 632*; *Fam. Code § 2338(a)*; *Cal. Rules of Ct., Rule 3.1590(c)*] for use in a family law proceeding. If a party is directed by the court to prepare the statement of decision, the party must prepare, file, and serve the proposed statement of decision, along with a proposed judgment, within 15 days after the expiration of the time for filing proposals for the content of the statement or 15 days after the party was notified to prepare the statement, whichever occurs later [*Cal. Rules of Ct., Rule 3.1590(c)*].

[3] Cross References

For a related form, see *§ 221.390*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.392

§ 221.392 Judgment of Dissolution [Cal. Judicial Council Form FL-180]

[1] FORM Judgment of Dissolution [Cal. Judicial Council Form FL-180]

Click here to view image.

[2] Use of Form

This form is a reproduction of the mandatory Judicial Council form of judgment [*see* Cal. Judicial Council Form FL-180] for use in a proceeding for a judgment of dissolution. It may be adapted for use in a proceeding for judgment of legal separation or nullity, with appropriate modifications [*see Fam. Code §§ 2210, 2212(a), 2310, 2333*], or may be adapted for use following a bifurcated trial in a "status only" judgment dissolving the marriage before the property and support issues involved in the proceeding have been litigated [*see Fam. Code § 2337*; *Code Civ. Proc. § 1048(b)*; *Cal. Rules of Ct., Rule 5.175*]. It may also be used in a proceeding for judgment of dissolution or nullity of a domestic partnership, or for legal separation of partners in a domestic partnership, under *Fam. Code § 299(d)* [*see Cal. Rules of Ct., Rule 5.28(a)(2)*].

The form should be completed and submitted to the court as a proposed judgment. When a statement of decision has been requested in a contested proceeding, the proposed judgment must be submitted to the court and served with the proposed statement of decision [*see Code Civ. Proc. § 632*; *Cal. Rules of Ct., Rule 3.1590(c)*].

The form is intended for use with a variety of attachments, particularly to set forth orders for child custody, child support, and family or spousal support. For discussion of these attachments, see *§ 221.392[3][e]*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Completing Form

[a] Caption

Counsel should complete the caption of the form of judgment by setting forth his or her name, address, telephone and fax numbers, and state bar number [*see Cal. Rules of Ct., Rule 2.111*]. Counsel's e-mail address, if any, may also be listed, but neither a fax number nor an e-mail address is mandatory, and the inclusion of either is not tantamount to consent to service by fax or e-mail unless otherwise provided by law [*Cal. Rules of Ct., Rule 2.111*]. After the "Attorney for" designation, counsel should specify the name of the party represented and whether the party is the petitioner or the respondent. If the party has no attorney and is appearing in propria persona, the party should insert his or her name, address, telephone and fax numbers in the designated space. In that case, the "Attorney for" designation should be crossed out and replaced by the words "In pro per." An unrepresented party's e-mail address, if any, also may be listed, but neither a fax number nor an e-mail address is mandatory [*Cal. Rules of Ct., Rule 2.111*]. Thecounty, address, and branch of the superior court, the names of the petitioner and the respondent, and the case number should also be set forth in the appropriate spaces.

The form contains boxes to mark to specify whether the judgment is a Judgment of Dissolution of Marriage for Status Only, Reserving Jurisdiction Over Termination of Marital Status, a Judgment on Reserved Issues, a Judgment of Legal Separation, or a Judgment of Nullity. In the case of a dissolution, counsel should check the box entitled "Dissolution," and then should set forth the date on which marital status ends [*see Fam. Code § 2340*]. *Fam. Code § 2339(a)* provides that no judgment of dissolution is final for the purpose of terminating the marriage of the parties until six months have expired from the date of service of a copy of the summons and petition on the respondent or the date of appearance of the respondent, whichever occurs first. If the judgment will be entered before the earliest possible date for termination of the marital status, insert the specific date when the marriage will end in the caption and in 4a(1). If, on the other hand, the judgment will be entered after the earliest date for termination, the marital status usually will end on the date of entry of the judgment. In that case, leave the date blank for the court clerk to complete. If the court has reserved jurisdiction over the termination date, leave the date blank [*see Fam. Code § 2343*]. However, if the judge has ordered a later date for termination of the marital status, insert that date [*see Fam. Code §§ 2339(b), 2343*].

[b] Restraining or Protective Orders

If the judgment contains original or modified personal conduct restraining orders, counsel should check the appropriate box in Paragraph 1, as well as listing their expiration date [*see generally Fam. Code § 6200 et seq.*]. The orders must be set out in an attachment. In addition, in Paragraph 1 of the judgment, counsel must specify which page or pages of the attachment contain the personal conduct restraining orders.

[c] Hearing Information (Paragraph 2)

Counsel should check the appropriate box in Paragraph 2, indicating whether the proceeding was heard as a default or as an uncontested proceeding; was heard by declaration of the petitioner to establish the grounds for dissolution in an uncontested or default proceeding [*see Fam. Code § 2336*]; or was heard as a contested proceeding. For discussion of default and uncontested proceedings, see *§ 221.10* et seq.

In the appropriate spaces in the form, counsel should also set forth the date, time, department, division, room of the hearing, and the name of the judicial officer. Counsel should then check the boxes indicating which parties were present at the hearing and specify the names of attorneys present in court.

[d] Jurisdiction Over Respondent (Paragraph 3)

In Paragraph 3, counsel should indicate the manner in which the court acquired jurisdiction over the respondent by specifying the date the court acquired jurisdiction and by checking the appropriate box specifying that respondent was either served with process or appeared in the action [*see Fam. Code § 2339(a)*].

[e] Orders of the Court (Paragraph 4)

Paragraph 4 allows the court to set forth its orders. In dissolution proceedings, counsel should select Item 4a. Counsel should also insert the appropriate date on which the judgment will finally become effective to terminate the marriage relationship in Item 4a(1) [*see Fam. Code §§ 2339, 2340, 2343*].

Item 4a(2), which states that the marriage status is terminated on a date "to be determined on noticed motion of either party or on stipulation," appears to be intended for use when the court reserves jurisdiction over the date of termination of marital status [*see Fam. Code § 2343*]. Item 4d is marked if the form is being used for entry of judgment nunc pro tunc [*see Fam. Code § 2346*].

Items 4b and 4c are used to enter a judgment of legal separation or nullity, respectively.

Item 4e should be checked if the judgment being entered is on reserved issues. Item 4f should be checked if the former name of either spouse (or both spouses) is to be restored [*see Fam. Code §§ 2080-2082*].

Item 4g should be checked if the court is reserving jurisdiction over other issues (not decided by the judgment) and is requiring all other orders to remain in effect, except as provided elsewhere in the judgment.

Items 4h through 4n of the form are for use in specifying that the judgment contains (1) provisions for child or family support, (2) attachment of a marital settlement agreement, (3) attachment of a written stipulation for judgment, (4) provisions for child custody and visitation, and child support, (5) provisions for spousal support, and establishment of parentage of children born before marriage. If provisions for support are contained in the judgment, a group of specialized forms must also be attached, to the extent they otherwise apply to the orders made, unless the support provisions are set forth in a marital settlement agreememt or stipulated judgment being submitted to the court. For child support, these include the Judicial Council forms of Child Support Information and Order Attachment, and Stipulation to Establish or Modify Child Support Order [Cal. Judicial Council Forms FL-350, FL-342]. For spousal support, the Judicial Council form of Spousal or Family Support Order Attachment must be attached [Cal. Judicial Council Form FL-343]. In addition, when the judgment contains provisions for child or family support, the Judicial Council forms of Notice of Rights and Responsibilities--Health Care Costs and Reimbursement Procedures, and of Information Sheet on Changing a Child Support Order must be attached to the judgment [Cal. Judicial Council Form FL-192], and, within 10 days of the issuance of the judgment, both parties must complete and file with the court a Child Support Case Registry Form [Cal. Judicial Council Form FL-191]. When provisions for child custody or visitation are contained in the judgment, they must be set forth in the Judicial Council form of Child Custody and Visitation Order Attachment [Cal. Judicial Council Form Fl-341], unless the custody and visitation provisions are set forth in a marital settlement agreememt or stipulated judgment being submitted to the court. If the custody and visitation order was entered pursuant to stipulation, the Judicial Council form of Stipulation to Establish or Modify Child Support and Order should beattached [Cal. Judicial Council Form FL-350].

If property division orders are made, box 4o should be checked, as well as the most appropriate of three boxes within 4o, to indicate how the division is memorialized (by marital settlement or other written agreement or stipulation for judgment, by the Judicial Council form of Property Order Attachment to Judgment [Cal. Judicial Council Form FL-345], or otherwise). If the judgment divides retirement and survivor benefits between the parties, the Judicial Council form Pension Benefits--Attachment to Judgment [Cal. Judicial Council Form FL-348] must be completed and attached to the judgment form.

Item 4p provides a space for counsel to list "Other" types of others. This box might be used to set out orders concerning attorney's fees, for example, when these are not otherwise embodied in a settlement agreement or stipulation for judgment that will be attached to the judgment. When the space adjacent to Item 4p is not sufficient to describe the order, counsel should include an attached page, marked to indicate that it is "Attachment 4p" to the judgment.

[f] Continuation Pages; Signature of Judge

Paragraph 5 requires counsel to specify the number of pages attached to the printed form of judgment. Continuation pages are authorized by *Cal. Rules of Ct., Rule 2.100*, which governs the form of papers presented for filing. For convenience, counsel may wish to use the Judicial Council form of Additional Page (Cal. Judicial Council Form MC-020), which may be attached to any Judicial Council form.

A box following Paragraph 5 allows the judge to specify if his or her signature follows the last attachment.

Local rules in some counties set forth rules governing the format of continuation pages. Counsel is advised to consult these rules in order to determine any local requirements.

[4] Number of Copies to Prepare

Ordinarily, at least six copies of the proposed judgment should be made and submitted to the court. The court will require two copies for its own use: one for filing in the court file and one for entering in the judgment book. The opposing party will also desire a copy stamped "endorsed-filed," as will his or her attorney. Counsel's client will also desire a copy stamped "endorsed-filed," and counsel will wish to retain one copy for his or her office file. Stamped envelopes addressed to the parties and one original and at least two copies of the notice of entry of judgment must also be submitted with the proposed judgment [*Cal. Rules of Ct., Rule 5.136(a)* (requiring "sufficient" copies for each party of notice of entry of judgment)]. For an illustrative form of the notice of entry of judgment, *see § 221.393*. Failure to submit the envelopes or the completed notices of entry of judgment is cause for refusal to sign the judgment [*see Cal. Rules of Ct., Rule 5.136(d)*].

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18-221 California Forms of Pleading and Practice--Annotated § 221.393

§ 221.393 Notice of Entry of Judgment--Judicial Council Form [Cal. Judicial Council Form FL-190]

[1] FORM Notice of Entry of Judgment--Judicial Council Form [Cal. Judicial Council Form FL-190]

Click here to view image.

[2] Use of Form

This form is a reproduction of the mandatory Judicial Council form of notice of entry of judgment [*see Cal. Rules of Ct., Rule 5.134*; Cal. Judicial Council Form FL-190] for use in a proceeding for dissolution, legal separation, nullity, or to determine parentage. The form must be prepared and submitted by the attorney for the party submitting the judgment [*Cal. Rules of Ct., Rule 5.136(a)*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Completing Form

Counsel should complete the caption and nature of the judgment in the same manner set forth in the judgment [*see* Comments to *see § 221.392*]. If a date was specified in the judgment for termination of the parties' marital status [*see Fam. Code §§ 2340, 2343*], the same date must be set forth in the notice of entry. The remainder of the notice should be filled in except for the date when the judgment will be entered, the date and place of mailing, and the clerk's signature [*see Cal. Rules of Ct., Rule 5.136(b)*].

The form should also specify in the blank spaces under the portion entitled "Clerk's Certificate of Mailing" the place where notices have been given to the other party. If there has been no appearance by the other party, counsel should set forth the address stated in the declaration of mailing in Paragraph 3 of the printed form of Request to Enter Default [*see* Cal. Judicial Council Form FL-165, and discussion in *§ 221.10* et seq.], which is the party's last known address [*see Cal.*

Rules of Ct., Rule 5.136(c)]. If service was by publication and the address of the respondent is unknown, those facts must be stated in place of the required address [*see Cal. Rules of Ct., Rule 5.136(c)*].

[4] Copies

An original and at least two copies of the notice of entry of judgment, with two stamped envelopes addressed to the parties--but with a return address of the court clerk--must be submitted to the court at the same time the judgment is submitted [*Fam. Code § 2338.5(c)*; *Cal. Rules of Ct., Rule 5.136(a)* (requiring "sufficient" copies for each party of notice of entry of judgment)]. Failure to submit the stamped envelopes or the completed notices of entry of judgment is cause for refusal to sign the judgment [*see Cal. Rules of Ct., Rule 5.136(d)*]. The deputy clerk will sign the original notice of entry, which will be retained in the court files, and stamp his or her name on the copies sent to counsel.

[5] Cross References

For a related form, *see § 221.392*.

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§ 221.394 Notice to Health, Life, or Disability Insurer After Order or Judgment [Fam. Code § 2051]

[1] FORM Notice to Health, Life, or Disability Insurer After Order or Judgment [Fam. Code § 2051]

To: _____ [*name of insurer*]:

PURSUANT TO A PROCEEDING, IN RE MARRIAGE OF _____ [*name*], CASE NUMBER _____, IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF _____, YOUR INSURED, _____ [*name of insured party*], HAS BEEN ORDERED TO MAINTAIN THE EXISTING _____ [HEALTH *and/or* LIFE *and/or* DISABILITY] INSURANCE COVERAGE, POLICY NO. _____, IN FORCE FOR THE NAMED BENEFICIARIES OR COVERED DEPENDENTS AS SPECIFIED IN THE ATTACHED ORDER OR JUDGMENT.

THE ATTACHED ORDER OR JUDGMENT REQUIRES YOU TO MAINTAIN THE NAMED BENEFICIARIES UNDER THE POLICY AS IRREVOCABLE BENEFICIARIES OR COVERED DEPENDENTS OF THE POLICY AND YOU MUST ADMINISTER THE COVERAGE ACCORDINGLY, UNTIL THE DATE SPECIFIED, IF ANY, IN THE ORDER OR JUDGMENT, OR UNTIL THE RECEIPT OF A COURT ORDER, JUDGMENT, OR STIPULATION PROVIDING OTHER INSTRUCTIONS.

YOU ARE FURTHER INSTRUCTED TO SEND NOTICE TO THE NAMED BENEFICIARIES, COVERED DEPENDENTS, OR OTHER SPECIFIED PERSONS UPON ANY CANCELLATION, LAPSE, OR CHANGE OF COVERAGE, OR CHANGE OF DESIGNATED BENEFICIARIES UNDER THIS POLICY.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Use of Form

This form is the statutory form of notice to an insurance carrier, for use in giving notice to a health, life, or disability insurance carrier of the existence of a family law order or judgment that requires a party to maintain or purchase insurance [*Fam. Code § 2051*]. For discussion of the notice, see *§ 221.138[6][b]*.

The notice is in the form required by *Fam. Code § 2051*. It appears that the form language could be set forth as part of a letter that contains the insurance carrier's name and address, and the names and addresses of any persons to whom the carrier should send notification of policy changes.

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18-221 California Forms of Pleading and Practice--Annotated § 221.395

§ 221.395 Request for Dismissal--Judicial Council Form [Cal. Judicial Council Form FL-618]

[1] FORM Request for Dismissal--Judicial Council Form [Cal. Judicial Council Form FL-618]

Click here to view image.

[2] Use of Form

This form may be used by a petitioner in a Family Code proceeding to request dismissal of the proceeding at any time before the actual commencement of the trial [*see Code Civ. Proc. § 581(b)(1)*]. It may also be used by either party to request a dismissal at any time before entry of a judgment of dissolution if the other party gives written consent [*see Code Civ. Proc. § 581(b)(2)*; *Fam. Code § 2338(c)*]. The dismissal will not be effective unless it it made with the written consent of the attorney of record for the party applying for the dismissal. If the attorney's consent is not obtained, the dismissal may be entered only on order of court after notice to the attorney [*Code Civ. Proc. § 581(j)*]. A party who requests the dismissal must serve on all parties and file notice of entry of the dismissal [*Cal. Rules of Ct., Rule 3.1390*].

This form is available in an interactive, electronic format in *LexisNexis[(R)] Automated California Judicial Council Forms,* which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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18-221 California Forms of Pleading and Practice--Annotated §§ 221.396-221.409

[Reserved]

§§ 221.396[Reserved]

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18-221 California Forms of Pleading and Practice--Annotated § 221.410

§ 221.410 Declaration in Support of Motion to Set Aside Judgment [Fam. Code § 2122]

[1] FORM Declaration in Support of Motion to Set Aside Judgment [Fam. Code § 2122]

[*Attachment to Paragraphs 13 and 14 of Judicial Council form of Application for Order and Supporting Declaration (Cal. Judicial Council Form FL-310); print on pleading paper or on Judicial Council form of Additional Page (MC-020)*]

In support of this motion under *Family Code Section 2120 et seq.* to set aside the judgment entered in this proceeding on _____ [*date*], I, _____ [*name of declarant*], declare:

1. I am _____ [*identify declarant, e.g.,* the _____ (petitioner *or* respondent) in this proceeding *or* an attorney at law admitted to practice before all the courts of this State and the attorney of record for _____ (petitioner *or* respondent) in this proceeding].

2. On _____ [*date*], this court entered its judgment in this proceeding, a copy of which is attached hereto as Exhibit A. [The judgment provided, in pertinent part, that _____ (*specify provisions of judgment that moving party seeks to set aside*).]

[3. The judgment referred to in Paragraph 2 incorporated a marital settlement agreement entered into between _____ (*specify appropriate parties, e.g.,* respondent and I) on _____ (*date*). A copy of the agreement is attached hereto as Exhibit B.]

4. The judgment referred to in Paragraph 2 [and the marital settlement agreement incorporated into that judgment] should be set aside on grounds of _____ [actual fraud *and/or* perjury *and/or* duress *and/or* mental incapacity *and/or* mistake] based on the following facts:

[*Set forth detailed facts supporting the alleged ground(s) for setting aside the judgment or portion of the judgment, such as the following*]

a. On _____ [*date*], I executed the marital settlement agreement referred to in Paragraph 3. The agreement contained provisions that purported to list and divide all the community property of the marriage between respondent and myself. At the time I was bedridden with a heart ailment and was not represented by an attorney.

b. In connection with execution of the agreement, respondent represented tome that he/she had listed all of our community property. I totally relied on respondent's representation and, at the time, had no reason to doubt his/her representation.

c. In reliance on respondent's representation that "everything was taken care of," and that there was no need for me to go to the trouble and expense of retaining an attorney or appearing in the dissolution proceeding, I agreed to allow my default to be entered and the dissolution to proceed uncontested.

d. On _____ [*date*], _____ [*number*] months after the entry of the judgment of dissolution in this proceeding, which incorporated the marital settlement agreement, I discovered that, on or about _____ [*date*], respondent had purchased the following asset with community funds: a 10-acre tract of land in _____ [*location*], on which respondent is planning to build a retail shopping center.

e. Respondent never mentioned the 10-acre tract of land to me at any time. It was not listed in petitioner's preliminary or final declaration of property disclosure under *Family Code Section 2100 et seq.*, nor was it divided in the judgment in this dissolution proceeding. If I had been aware of the existence of the 10-acre tract of community real property, I would not have signed the marital settlement agreement, nor would I have allowed my default to be taken.

f. I have incurred and am indebted to my attorney, _____ [*name*] for attorney's fees in the amount of $_____ for expenses incurred in making this motion.

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form is a declaration supporting a motion to set aside a judgment under *Fam. Code § 2120 et seq.* [*see Fam. Code § 2122*]. This procedure is for use when the limitation period for setting aside a judgment under *Code Civ. Proc. § 473* for mistake, inadvertence, surprise, or excusable neglect has expired [*see Fam. Code § 2121(a)*].

The set-aside provisions of *Family Code Section 2120 et seq.* apply only to judgments entered on or after January 1, 1993 [*Fam. Code § 2129*]. Judgments entered before that date, however, may be set aside under equitable principles set forth in prior case law. For forms pertaining to equitable motions to set aside judgments that may be adapted for use regarding family law judgments entered before January 1, 1993, see *Ch. 489, Relief from Judgments and Orders, §*

489.430 et seq.

[3] Completing Declaration and Accompanying Papers

The declaration may be typed on the Judicial Council form of Additional Page (Form MC-020). This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. The declaration may also be typed on standard pleading paper.

This form should be attached to the mandatory Judicial Council form of Order to Show Cause [Cal. Judicial Council Form FL-300] or the Judicial Council form of Notice of Motion [Cal. Judicial Council Form FL-301], either of which should be accompanied by the Judicial Council form of Application for Order and Supporting Declaration [Cal. Judicial Council Form FL-310]. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. An illustrative filled-in copy of the order to show cause form seeking relief on other grounds is set forth in *§ 221.310* et seq.

In either the Order to Show Cause or Notice of Motion form, the box in the caption for "Other (specify)" should be checked and "Motion to Set Aside Judgment Under *Family Code Section 2120 et seq.*" should be inserted in the space provided. In the Application for Order form, the Paragraph 13 box ("OTHER RELIEF (specify)") should be checked, and the following should be inserted in the space provided:

> I request that the court set aside the judgment entered in this proceeding under *Family Code Section 2120 et seq.* on the ground of _____ [actual fraud *and/or* perjury *and/or* duress *and/or* mental incapacity *and/or* mistake].

The boxes in Paragraph 14 also should be checked to indicate that the supporting facts are contained in the attached declaration.

[4] Cross References

For discussion of the general form and content requirements for declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

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18-221 California Forms of Pleading and Practice--Annotated § 221.411

§ 221.411 Declaration [Code Civ. Proc. § 2015.5] in Support of Motion to Divide Unadjudicated Community Estate Assets and Liabilities [Fam. Code § 2556]

[1] FORM Declaration [Code Civ. Proc. § 2015.5] in Support of Motion to Divide Unadjudicated Community Estate Assets and Liabilities [Fam. Code § 2556]

[*Attachment to Paragraphs 13 and 14 of Judicial Council form of Application for Order and Supporting Declaration (Cal. Judicial Council Form FL-310); print on pleading paper or on Judicial Council form of Additional Page (MC-020)*]

In support of this motion under *Family Code Section 2556* to divide and award previously unadjudicated community estate _____ [assets *and/or* liabilities], I, _____ [*name of declarant*], declare:

1. I am the _____ [petitioner *or* respondent] in this proceeding.

2. On _____ [*date*], this court entered its judgment in this proceeding, a copy of which is attached hereto as Exhibit A. Among other things, the judgment purported to confirm the separate property of myself and _____ [petitioner *or* respondent] and to divide the community estate assets and liabilities of myself and _____ [petitioner *or* respondent].

[*EITHER*]

3. The judgment referred to in Paragraph 2 did not adjudicate the interests of myself and/or _____ [petitioner *or* respondent] in the following community estate asset(s): _____ [*describe asset(s) and petitioner's and respondent's respective interests, e.g.,* the community's interest in respondent's deferred compensation plan with his/her employer, _____ (*name of employer*). Respondent has been employed by

_____ (*name of employer*) for _____ years, _____ months, during all of which time the employer has offered and respondent has participated in a deferred compensation savings plan under *Internal Revenue Code Section 401(k)* (hereafter called "the 401(k) plan"). All contributions made to the 401(k) plan from _____ (*date*), the date respondent was first employed, until _____ (*date*), the date of our separation, were made with funds that were community property of respondent and myself. The community property interest in this plan should be adjudicated according to the time rule, and my half interest, as further calculated in the attached property declaration, should be awarded to me. I have made no previous agreement with respondent regarding this plan and have not waived my rights in the plan].

[*AND/OR*]

4. The judgment referred to in Paragraph 2 [also] did not adjudicate or assign responsibility to myself or _____ [petitioner *or* respondent] for the following community estate debt(s): _____ [*describe debt(s), e.g.*, a home equity loan that respondent and I took out with _____ (*name of lender*) on _____ (*date*), which was secured by the equity in our family home located at _____ (*address*). Respondent used the proceeds of this loan to pay off outstanding credit card balances representing personal debts that he/she had incurred prior to our marriage. The responsibility for repayment of this loan therefore, in fairness, should be assigned and allocated to respondent].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form is a declaration in support of a postjudgment motion for an order to divide unadjudicated community estate assets or liabilities. The order may be sought through either a noticed motion or order to show cause proceeding [*see Fam. Code § 2556*].

[3] Completing Declaration and Accompanying Papers

For instructions on how to type the declaration and attach it to the Judicial Council form of Order to Show Cause or form of Notice of Motion, along with the form of Application for Order and Supporting Declaration, see *§ 221.410*.

In either the Order to Show Cause or the Notice of Motion form, the box in the caption for "Other (specify)" should be checked and "Motion to Divide Previously Unadjudicated Community Estate _____ [Assets *and/or* Liabilities]" should be inserted in the space provided. In the Application for Order form, the Paragraph 13 box ("OTHER RELIEF (specify)") should be checked, and the following inserted in the space provided:

> I request that the court enter an order under *Family Code Section 2556* dividing previously unadjudicated community estate _____ [assets *and/or* liabilities], as more fully described in the attached declaration.

The appropriate box in Paragraph 14 also should be checked to indicate that the supporting facts are contained in the attached declaration.

The motion also should be accompanied by a memorandum of points and authorities, as well as a completed Property Declaration [*see* Cal. Judicial Council Form FL-160] when, as in the example, it is relevant to the relief requested [*see Cal. Rules of Ct., Rule 5.118(b)*]. For an illustration of a Property Declaration, see *§ 221.310* et seq.

[4] Cross References

For a related form, see *§ 221.410*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.412

§ 221.412 Request for Hearing and Application to Set Aside Support Order Under Family Code Section 3691--Cal. Judicial Council Form FL-360

[1] FORM Request for Hearing and Application to Set Aside Support Order--Cal. Judicial Council Form FL-360

Click here to view image.

[2] Use of Form

This form is an illustrated, filled-in version of the mandatory Judicial Council form of Request for Hearing and Application to Set Aside Support Order Under *Family Code Section 3691* [Cal. Judicial Council Form FL-360]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form is designed to be used by a support obligor to request a hearing so as to set aside a support order after the six-month time limit of *Code Civ. Proc. § 473* has run. The applicant must allege at least one of the following grounds for the set aside: fraud, perjury, or lack of notice, and must bring the motion within strict time limits. In the case of fraud, for example, the motion must be brought within six months of the time the complainant either discovered, or reasonably should have discovered the fraud [*Fam. Code §§ 3690, 3691*]. For further discussion of the grounds, see *§ 221.159[1]*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.413

§ 221.413 Responsive Declaration to Application to Set Aside Support Order--Cal. Judicial Council Form FL-365

[1] FORM Responsive Declaration to Application to Set Aside Support Order--Cal. Judicial Council Form FL-365

Click here to view image.

[2] Use of Form

This form is an illustrated, filled-in version of the mandatory Judicial Council form of Responsive Declaration to Application to Set Aside Support Order [Cal. Judicial Council Form FL-365]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form is designed to be used by a supported parent or enforcing support agency to respond to a request to set aside a support order that has been made on the ground of fraud, perjury, or lack of notice. For related discussion, see *§ 221.159[1]*.

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18-221 California Forms of Pleading and Practice--Annotated § 221.414

§ 221.414 Order After Hearing to Set Aside Support Order--Cal. Judicial Council Form FL-367

[1] FORM Order After Hearing to Set Aside Support Order--Cal. Judicial Council Form FL-367

Click here to view image.

[2] Use of Form

This form is an illustrated, filled-in version of the mandatory Judicial Council form of Order After Hearing on Motion to Set Aside Support Order [Cal. Judicial Council Form FL-367]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form is designed to be used to set forth a court's order after a hearing on a set-aside motion that has been brought on the ground of fraud, perjury, or lack of notice. Before granting relief, the court must find that the facts alleged as the grounds for relief materially affected the original order and that the moving party would materially benefit from the granting of the relief [*Fam. Code § 3690(b)*]. A support order may not be set aside simply because the court finds that it was inequitable when made, or because later circumstances caused the support to become excessive or inadequate [*Fam. Code § 3692*]. For related discussion, see *§ 221.159[1]*.

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18-221 California Forms of Pleading and Practice--Annotated §§ 221.415-221.429

[Reserved]

§§ 221.415[Reserved]

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18-221 California Forms of Pleading and Practice--Annotated § 221.430

§ 221.430 Request for Production of Income and Expense Declaration After Judgment [Fam. Code § 3664]--Judicial Council Form [Cal. Judicial Council Form FL-396]

[1] FORM Request for Production of Income and Expense Declaration After Judgment [Fam. Code § 3664]--Judicial Council Form [Cal. Judicial Council Form FL-396]

Click here to view image.

[2] Use of Form

This form is copy of the mandatory Judicial Council form of Request for Production of Income and Expense Declaration After Judgment [*see Fam. Code § 3664(a)*; Cal. Judicial Council Form FL-396]. The form may be used as an inexpensive method of discovering financial facts before commencing proceedings to modify a support order [*see Fam. Code § 3660*]. It is for use by a party after entry of a judgment of dissolution of marriage or legal separation, or a determination of paternity, that directs payment of child or spousal support, but before bringing a motion for the modification or termination of support, to request the production of a completed current income and expense declaration from the other party [*see Fam. Code § 3664(a)*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] State Statutes

Discovery before beginning modification or termination proceedings. *Fam. Code §§ 3660-3668*

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18-221 California Forms of Pleading and Practice--Annotated § 221.431

§ 221.431 Order to Show Cause for Modification of Order--Judicial Council Form [Cal. Judicial Council Form FL-300]

[1] FORM Order to Show Cause for Modification of Order--Judicial Council Form [Cal. Judicial Council Form FL-300]

Click here to view image.

[2] Use of Form

This form is an illustrative copy of the Judicial Council form of Order to Show Cause [Cal. Judicial Council Form FL-300] for mandatory use when a party seeks modification of an order in a family law proceeding by the order-to-show cause procedure. For discussion of procedures for applying for modification of an order, see *§ 221.182[1]*.

A completed Application for Order and Supporting Declaration [*see* Cal. Rules of Ct., Rule 5.18(b); Cal. Judicial Council Form FL-310; *see also see § 221.432*] should be attached to the order to show cause, along with an income and expense declaration, if relevant [*see Cal. Rules of Ct., Rules 5.118(b), 5.128(a)*; Cal. Judicial Council Form FL-150]. For an illustrative filled-in reproduction of the income and expense declaration, see *§ 221.310* et seq.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Completing the Form

The box for "MODIFICATION" in the caption should be checked, and other appropriate boxes should be checked for the type of order to be modified. The name of the party against whom the order is sought is inserted in Paragraph 1. The date of the hearing is set forth in Paragraph 2(a). In some counties a hearing date may be obtained by contacting the

clerk; in others, the clerk inserts the hearing date when the order to show cause is issued.Unless otherwise specified by law because of the nature of the relief requested, the date set must be at least 16 court days after service of the moving and supporting papers unless an order shortening time is obtained. If service is by mail is appropriate under the circumstances of the case, the required 16-day notice is extended depending on the place of mailing and place of address [*see Code Civ. Proc. § 1005(b)*]. Paragraph 3 is filled in as appropriate.

[4] Presentment to Judge

After completing the order to show cause and supporting papers, counsel should present the originals to the proper judge of the court in which the matter is pending, or to a deputy court clerk for presentation to the judge in chambers [*see Code Civ. Proc. § 166(a)(1)*]. If the judge signs the Order to Show Cause, a deputy court clerk will conform the copies, retain and file the originals of the papers [*see Cal. Rules of Ct., Rule 5.118(d)*], stamp all copies "endorsed filed," and return all copies to counsel for service on the other party [*see Fam. Code § 215*].

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18-221 California Forms of Pleading and Practice--Annotated § 221.432

§ 221.432 Application for Modification of Order and Supporting Declaration--Judicial Council Form [Cal. Judicial Council Form FL-310]

[1] FORM Application for Modification of Order and Supporting Declaration--Judicial Council Form [Cal. Judicial Council Form FL-310]

Click here to view image.

[2] Use of Form

This form is the mandatory Judicial Council form of Application for Order and Supporting Declaration [Cal. Judicial Council Form FL-310], which must be prepared by the party seeking modification and attached to the Judicial Council form of Order to Show Cause [*see § 221.431*] or Notice of Motion [*see Cal. Rules of Ct., Rule 5.118(b)*] along with an income and expense declaration, if relevant [*see Cal. Rules of Ct., Rules 5.118(b), 5.128(a)*; Cal. Judicial Council Form FL-150].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Completing the Form

On the first page of the application, the appropriate boxes should be checked to indicate the orders for which modification is sought.

If modification of custody and visitation is sought, check the appropriate boxes in Paragraphs 1 and 2 and enter the appropriate information. When requesting child abduction prevention orders, the Request for Child Abduction Orders must be attached [Cal. Judicial Council Form FL-312]. Under most circumstances, modification of custody will also require modification of visitation, as the prior custodial parent will now be entitled to visitation rights. For further

discussion, see Ch. 223, *Dissolution of Marriage: Child Custody* .

If modification of child support is sought, Paragraph 3 should be checked. The amount of support will be set according to the statewide uniform child support guideline [*see Fam. Code § 4050 et seq.*; *see also* discussion in Ch. 224, *Dissolution of Marriage: Child Support*], and it is not necessary to request a specific amount in the application. Therefore, no entry is required under 3b unless an amount that deviates from the guideline is being requested. The box for 3c should be checked and the date and amount of the prior order set forth.

If modification of spousal support is sought, check the box for Paragraph 4 and enter the appropriate information. Attorney's fees and costs are requested by checking the boxes for Paragraph 5.

Facts in support of modification may be set forth in the space under Paragraph 10 on the second page of the application, if space permits. However, in most cases, it is recommended that the Judicial Council form for an Attached Declaration (Form MC-031) be used, particularly if any degree of detail at all is required to set forth the change of circumstances since the prior order. For discussion of what constitutes a change of circumstances for purposes of modification of child custody, child support, and spousal support, see Ch. 223, *Dissolution of Marriage: Child Custody* , Ch. 224, *Dissolution of Marriage: Child Support* , and Ch. 225, *Dissolution of Marriage: Spousal Support* , respectively.

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18-221 California Forms of Pleading and Practice--Annotated § 221.433

§ 221.433 Notice of Motion and Motion for Simplified Modification of Order for Child, Spousal, or Family Support and Information Sheet--Judicial Council Forms [Cal. Judicial Council Forms FL-390, FL-391]

[1] FORM Notice of Motion and Motion for Simplified Modification of Order for Child, Spousal, or Family Support and Information Sheet--Judicial Council Forms [Cal. Judicial Council Forms FL-390, FL-391]

Click here to view image.

[2] Use of Form

The above forms are reproductions of the Judicial Council forms adopted for use in initiating "simplified" proceedings for the modification of child, spousal, or family support; and include a two-page information sheet [Cal. Judicial Council Forms FL-390, FL-391]. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The Notice of Motion and Motion for Simplified Modification of Order for Child, Spousal, or Family Support form is designed to act as both a notice of motion and written motion in support of modification, and includes a proof of service declaration as part of the form [Cal. Judicial Council Forms FL-390]. Although the form is designed with the unrepresented party in mind, insofar as it purports to simplify procedures by combining various elements into one form, the form instructions indicate that the party may be represented by counsel--implying that the form may be used by parties who are represented by counsel [Cal. Judicial Council Forms FL-390, FL-391; *Fam. Code § 3680(b)*]. However, the form contains no reference to the recovery of attorney's fees and costs.

The form contemplates that the moving party will obtain a hearing date from the court clerk in advance of serving and filing the form. A space is provided on the form for setting forth this information. The form also requires a statement of the underlying bases for modification, and includes the requirement that the moving party attach a completed Income and Expense Declaration [Cal. Judicial Council Form FL-150] or Financial Statement (Simplified) [Cal. Judicial Council Form FL-155], whichever is more appropriate to the party's circumstances in view of the requirements for using

those forms. In addition, the moving party must mark the appropriate check-off boxes in Item no. 6 to show any additional bases for the modification request. If there is insufficient room on the form to explain this, an attachment to the form should be used.

If the underlying court action was originally brought by the county district attorney, the district attorney is enforcing the order, or if children are involved who are receiving public assistance benefits, the form and any attachments must be served on the applicable district attorney, as well as on the opposing party. Other forms that must be served include *blank versions* of (1) the Responsive Declaration to Motion for Simplified Modification for Child, Spousal, or Family Support, (2) the Financial Statement (Simplified) or Income and Expense Declaration, and (3) Information Sheet--How to Oppose a Motion for Simplified Support [Cal. Judicial Council Forms FL-392, FL-393, FL-150, FL-155].

The information sheet describes the simplified modification method, including accompanying forms, service requirements, filing, and hearing-related matters [Cal. Judicial Council Form FL-391]].

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18-221 California Forms of Pleading and Practice--Annotated § 221.434

§ 221.434 Responsive Declaration to Motion for Simplified Modification of Order for Child, Spousal, or Family Support and Information Sheet--Judicial Council Forms [Cal. Judicial Council Forms FL-392, FL-393]

[1] FORM Responsive Declaration to Motion for Simplified Modification of Order for Child, Spousal, or Family Support and Information Sheet--Judicial Council Forms [Cal. Judicial Council Forms FL-392, FL-393]

Click here to view image.

[2] Use of Form

The above forms are illustrative, filled-in versions of forms adopted by the Judicial Council to respond to a motion for modifying child, spousal, or family support in "simplified" modification proceedings [Cal. Judicial Council Forms FL-392, FL-393]. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Although the Responsive Declaration form is designed with the unrepresented party in mind, insofar as it purports to simplify procedures by combining various elements into one form, the form instructions indicate that the party may be represented by counsel--implying that the form may be used by parties who are represented by counsel [Cal. Judicial Council Forms FL-392, FL-393]. However, the form contains no reference to the recovery of attorney's fees and costs.

The form provides the responding party with the opportunity to consent or object to the relief requested by the moving party, and incorporates within it a proof of service declaration [Cal. Judicial Council Form FL-392]. If objection to the requested relief is made, the responding party must set forth the bases for objection using the check-off boxes in Item no. 2 of the form. If there is insufficient room on the form to explain this, an attachment to the form should be used.

The form requires the responding party to attach a completed Income and Expense Declaration [Cal. Judicial Council Form FL-150] or Financial Statement (Simplified) [Cal. Judicial Council Form FL-155], whichever is more appropriate to the party's circumstances in view of the requirements for using those forms.

If the underlying court action was brought by the county district attorney, the district attorney is enforcing the order, or if children are involved who are receiving public assistance benefits, the responsive declaration form and any attachments must be served on the applicable district attorney, as well as on the other party.

The Information Sheet describes how a party may oppose a request for simplified modification. It explains the need for including accompanying forms, service requirements, filing, and hearing-related matters [Cal. Judicial Council Form FL-393].

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18-221 California Forms of Pleading and Practice--Annotated § 221.435

§ 221.435 Request for Income and Benefit Information From Employer--Cal. Judicial Council Form FL-397

[1] FORM Request for Income and Benefit Information From Employer--Cal. Judicial Council Form FL-397

Click here to view image.

[2] Use of Form

This form is a reproduction of the mandatory Judicial Council form of Request for Income and Benefit Information From Employer [Cal. Judicial Council Form FL-397].This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form is designed to be used to request income and benefit information about an employee from his or her employer if the employee failed to either timely respond (within 35 days of service) to a prior Request for Production of an Income and Expense Declaration After Judgment [*see § 221.430*], or the employee's response was incomplete regarding any wage information [*Fam. Code § 3664(b)*].

This form must be served on both the employer and the employee by either certified mail (postage prepaid, return receipt requested), or by personal service [*Fam. Code § 3664(c)*]. For further discussion of the request process and its requirements, see *§ 221.181[2]*.

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18-222 California Forms of Pleading and Practice--Annotated 222.syn

§ 222.syn Synopsis to Chapter 222: DISSOLUTION OF MARRIAGE: PROPERTY DIVISION AND VALUATION

§ 222.01 Scope of Chapter

§ 222.02 Cross References

§§ 222.03-222.09 [Reserved]

§ 222.10 Governing Law

§ 222.11 "Community Property" Defined

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Chapter 222 DISSOLUTION OF MARRIAGE: PROPERTY DIVISION AND VALUATION
PART I. SCOPE

18-222 California Forms of Pleading and Practice--Annotated § 222.01

§ 222.01 Scope of Chapter

This chapter discusses the valuation and division of community assets and liabilities for the purpose of proceedings for marital dissolution or legal separation. Major topics include definitions of types of property [*§ 222.10 et seq.*], general aspects of dividing community property [*§ 222.30 et seq.*], dividing and valuing real property interests [*§ 222.90 et seq.*], and dividing and valuing specific personal property interests, including employment-related rights and benefits [*§ 222.130 et seq.*]. This chapter also discusses the characterization and division of liabilities, as well as rules for reimbursement [*§ 222.260 et seq.*].

This chapter also contains a form for use in connection with a court ordered deferred sale of a family home [*see § 222.360*].

For discussion of the procedural aspects of marital dissolution and legal separation proceedings and related forms, see Chapter 221, *Dissolution of Marriage: Procedure* . For a general discussion of the tax effects of dissolution, see Chapter 227, *Dissolution of Marriage: Tax Effects of Dissolution* . For discussion of principles used in characterizing separate and community property and of management and control of community property and related forms, see Ch. 122, *Community Property* .

For discussion of related property matters and corresponding forms, see Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights ;* Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies ;* and Ch. 359, *Marriage* . For a discussion of the property rights of parties to a nonmarital relationship, see Ch. 387, *Nonmarital Cohabitation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportLegal Separation

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§ 222.02 Cross References

For discussion of management and control of community property, see Ch. 122, *Community Property*

For discussion of the property rights of parties to a nonmarital relationship, see Ch. 387, *Nonmarital Cohabitation*

For discussion of setting aside judgments having merged property division provisions, see Ch. 221, *Dissolution of Marriage: Procedure*

For forms of complaint that may be adapted for use in enforcing property agreements that are not merged in a judgment, see Chs. 140, *Contracts* , 488, *Reformation of Instruments* , 490, *Rescission and Restitution* , and 561, *Trusts: Constructive Trusts* , and 562, *Trusts: Resulting Trusts*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsConstructive TrustsEstate, Gift & Trust LawTrustsResulting TrustsFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity Property

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§ 222.10 Governing Law

Dissolution of marriage and legal separation are governed by *Fam. Code § 2000 et seq.* Property rights of the parties on dissolution are governed by *Fam. Code § 2500 et seq.* The means by which a marriage may be terminated are set forth in *Fam. Code § 310* and the general jurisdiction of the superior court in *Fam. Code §§ 200* and *2010*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral Overview

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§ 222.11 "Community Property" Defined

Community property is generally defined as "all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in [California]," except as otherwise provided by statute [*Fam. Code § 760*; *see Civ. Code § 687*; *Fam. Code § 65*; *see also Fam. Code § 761*].

The concept of community property includes both assets and obligations [*see Cal. Rules of Ct., Rule 5.10(d)*; *see also Fam. Code § 902*]. This is of particular significance in characterizing debts incurred by the parties, both from the standpoint of third party creditors' rights, and from the standpoint of dividing debts on marital dissolution or legal separation, as discussed in *§ 222.260*.

This general definition embraces not only the substance of the long-standing community presumption of former *Civ. Code § 5110*, which referred to community real property in terms of "all real property situated in this state," but also includes real property situated *outside* California [*Fam. Code § 760*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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18-222 California Forms of Pleading and Practice--Annotated § 222.12

§ 222.12 "Community Estate" Distinguished

The term "community estate" includes both community property and quasi-community property [*Fam. Code § 63*]. It is used primarily with reference to dividing property (assets and obligations) on dissolution of marriage or on legal separation, as discussed in *§ 222.30* et seq. [*see Fam. Code §§ 2550, 2551*; *see also* former *Civ. Code § 4800(a)*]. For discussion of quasi-community property, see *§ 222.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity Property

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18-222 California Forms of Pleading and Practice--Annotated § 222.13

§ 222.13 "Quasi-Community Property" Distinguished

For the purpose of family law proceedings, the term "quasi-community property" refers to all real or personal property, wherever situated, acquired before or after January 1, 1994, in the following ways [*Fam. Code § 125*]:

- By either spouse while domiciled elsewhere that would have beencommunity property if the spouse who acquired the property had been domiciled in California at the time of its acquisition; or

- In exchange for real or personal property, wherever situated, that would have been community property if the spouse who acquired the property so exhanged had been domiciled in California at the time of its acquisition.

The quasi-community property concept permits treatment of certain types of property as community property for purposes of its disposition on death [*see Prob. Code § 66*] and, as set forth in the foregoing definition, on marital dissolution or legal separation [*see Fam. Code § 125*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity Property

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18-222 California Forms of Pleading and Practice--Annotated § 222.14

§ 222.14 "Quasi-Marital Property" Distinguished

"Quasi-marital property" is property acquired by parties to a void or voidable marriage that at least one of the parties entered into in the good faith belief that the marriage was valid [*see Fam. Code § 2251(a)*; *see also In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 156-157, 242 Cal. Rptr. 649* ; *Patillo v. Norris (1976) 65 Cal. App. 3d 209, 217 n.4, 135 Cal. Rptr. 210* ; *Estate of Vargas (1975) 36 Cal. App. 3d 714, 717, 111 Cal. Rptr. 779]* . Property acquired during such a union that would have been community or quasi-community property if the union had been a valid marriage is divided in the proceeding to terminate the marriage as if it were community property [*see Fam. Code §§ 2251, 2550 et seq.*]. The property so divided is liable for debts of the parties to the same extent as if the property had been community or quasi-community property [*Fam. Code § 2252*].

For discussion of property rights arising out of a putative marriage and related discussion of grounds for terminating void and voidable marriages through annulment proceedings, see Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights* . For coverage of property rights arising from nonmarital family relationships, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, Chs. 1, 2 (Matthew Bender 2d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsProperty RightsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationMarital PropertyFamily LawMarriageValidityVoid & Voidable MarriagesVoid MarriagesFamily LawMarriageValidityVoid & Voidable MarriagesVoidable Marriages

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18-222 California Forms of Pleading and Practice--Annotated § 222.15

§ 222.15 "Separate Property" Defined

In general, all property owned by a spouse that is not classifiable as community property is considered to be that spouse's separate property [*see Siberell v. Siberell (1932) 214 Cal. 767, 770, 7 P.2d 1003]* , except in the circumstances in which it is appropriate to classify particular property as "quasi-community property." More specifically, separate property of a married person includes the following [*Fam. Code §§ 130, 770(a)*; *Cal. Const., art. I, § 21*]:

(1) All property owned by the person before marriage;

(2) All property acquired by the person after marriage by gift, bequest, devise, or descent; and

(3) The rents, issues, and profits of the foregoing property.

Other statutory provisions also classify particular property as separate property. For example, the earnings and accumulations of a spouse and the minor children living with, or in the custody of, the spouse, while living separate and apart from the other spouse, are the separate property of the spouse [*Fam. Code § 771*]. Similarly, after entry of a judgment of legal separation, the earnings and accumulations of each party are the separate property of the acquiring party [*Fam. Code § 772*]. A special statutory provision also sets forth the circumstances under which personal injury damages can be considered separate property, as discussed in *§ 222.74* [*see Fam. Code § 781*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsProperty RightsCharacterizationSeparate PropertyReal Property LawEstatesPresent EstatesMarital EstatesSeparate Property

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18-222 California Forms of Pleading and Practice--Annotated § 222.16

§ 222.16 Transmutation

Statutes specify the manner by which interests in community property or one spouse's separate property can be changed, or "transmuted," into the separate property of the other spouse [*see Fam. Code § 850 et seq.*]. Transmutation is discussed in Ch. 122, *Community Property* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Duties & RightsProperty RightsCharacterizationSeparate PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationTransmutation

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§ 222.17 Presumptions

In some cases, the form of title to property will give rise to a special presumption concerning the parties' interests in it [*see, e.g., Fam. Code §§ 2580, 2581*]. This often gives rise to complex issues in the characterization of property. For discussion of characterization, including the application presumptions, see Ch. 122, *Community Property* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationMarital PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationSeparate PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionPresumptionsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionPresumptionsCommunity Property

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18-222 California Forms of Pleading and Practice--Annotated §§ 222.18-222.29

[Reserved]

§§ 222.18[Reserved]

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18-222 California Forms of Pleading and Practice--Annotated § 222.30

§ 222.30 Injunctive Orders and Related Procedures

During a family law proceeding, various orders restraining the transfer, encumbrance, or other disposition of community, quasi-community, or separate property may be sought by the parties, either ex parte or after notice and a hearing [*see Fam. Code §§ 2010(e), 2045, 2047, 6320 et seq., 6340 et seq.*; *Cal. Rules of Ct., Rule 5.118*; *Glade v. Glade (1995) 38 Cal. App. 4th 1441, 1453, 45 Cal. Rptr. 2d 695* ; *In re Marriage of Van Hook (1983) 147 Cal. App. 3d 970, 980, 195 Cal. Rptr. 541]* . In addition, the family law summons contains "automatic" temporary restraining orders, a portion of which restrain the disposition of property without the written consent of the adversely affected party or a court order, "except in theusual course of business or for the necessities of life" [*see Fam. Code §§ 233, 2040*; *see also In re Marriage of McTiernan & Dubrow (2005) 133 Cal. App. 4th 1090, 1102-1103, 35 Cal. Rptr. 3d 287* (court properly awarded wife share of profits lost by husband's sale of community property stocks to pay community expenses in violation of TRO contained in summons; award was not form of "punitive damages" and court need not find husband's violation was malicious before ordering restitution to wife)].

"Summons orders" become effective against a petitioner on the filing of the petition and issuance of the summons. They become effective against a respondent on personal service of the petition and summons, or on the respondent's waiver and acceptance of service. These orders remain in effect until the "final" judgment is entered, the petition is dismissed, or further order of the court [*see Fam. Code §§ 231(a), 233(a), 2040(a)(2), (3)*; *Cal. Rules of Ct., Rule 5.110*; *see also* Cal. Judicial Council Form FL-100 (petition form, containing admonition about summons orders); Cal. Judicial Council Form FL-110 (summons form, containing temporary restraining orders)].

Besides injunctive orders, other pretrial procedures may result in a restriction of a party's control over property, or otherwise affect property. These include, for example, the following:

(1) The recording of a notice of pending litigation (*lis pendens*) in the county in which a husband or wife resides on real property that is the separate property of the other, which precludes the property's transfer, encumbrance, or other disposition for a period of three months without the joinder of both spouses or a court order [*see Fam. Code § 754*];

(2) Ordering the sale of one potential community asset to preserve another community asset [*see Lee v. Superior Court (1976) 63 Cal. App. 3d 705, 711, 134 Cal. Rptr. 43* ; *see also Fam. Code § 2108*; for discussion, see *§ 222.34*]; and

(3) An order, after determining that payment of a party's obligation would benefit either party or a child for whom support may be ordered, requiring one of the parties to pay the obligation, or any portion of it, directly to the creditor (who has no right to enforce the order, and whose rights are not affected by the determination) [*Fam. Code § 2023,* discussed in Ch. 224, *Dissolution of Marriage: Child Support*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEnforcementInjunctionsReal Property LawPriorities & RecordingLis Pendens

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18-222 California Forms of Pleading and Practice--Annotated § 222.31

§ 222.31 Joinder of Third Parties

A petitioner or respondent may apply to the court for an order joining as a party a person who has in his or her possession or control, or who claims to own, any property subject to the jurisdiction of the court in a family law proceeding. Likewise, a person who has been served with an order temporarily restraining the use of property in his or her possession or control, or property that he or she claims to own, may apply to the court for an order joining him or her as a party [*Cal. Rules of Ct., Rule 5.154*; *see Fam. Code § 2021*; *Cal. Rules of Ct., Rule 5.150*; *Glade v. Glade (1995) 38 Cal. App. 4th 1441, 1451-1452, 45 Cal. Rptr. 2d 695]* . The court may order such a third party joined if it finds that it would be appropriate to determine the particular issue in the proceeding and that the person to be joined as a party is either indispensable to a determination of that issue or necessary to the enforcement of any judgment rendered on that issue [*Cal. Rules of Ct., Rule 5.158(b)*].

If pension or retirement benefits are at issue in the proceeding, a specific procedure is provided for joinder of the retirement or pension plan as a party [*see Fam. Code § 2021, 2060 et seq.*; *Cal. Rules of Ct., Rule 5.162*; *see also Cal. Rules of Ct., Rule 5.156*]. For a discussion of the advisability of joining such plans to the proceeding, see the discussion of pension and retirement benefits in § 222.130 et seq.

For discussion of joinder, as well as illustrative forms for joining individuals and pension plans, see Ch. 221, *Dissolution of Marriage: Procedure* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPartiesJoinderGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral Overview

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18-222 California Forms of Pleading and Practice--Annotated § 222.32

§ 222.32 Bifurcation

"Bifurcation" is the term used to describe the procedure for severing issues for trial. A court may bifurcate one or more issues on the noticed motion of a party, the stipulation of the parties, or its own motion. The motion must be heard not later than the trial-setting conference [*Cal. Rules of Ct., Rule 5.175(a)*]. A trial court has broad discretion to consider the manner in which issues should be tried, including the bifurcation and separate trial of pivotal issues [*In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 756, 214 Cal. Rptr. 661* (decided before enactment of express statutory authority to bifurcate proceeding); *see In re Marriage of Wolfe (1985) 173 Cal. App. 3d 889, 894, 219 Cal. Rptr. 337* ; *In re Marriage of Van Sickle (1977) 68 Cal. App. 3d 728, 736, 137 Cal. Rptr. 568* ; *In re Marriage of Fink (1976) 54 Cal. App. 3d 357, 364, 366, 126 Cal. Rptr. 626* ; *see also In re Marriage of Lusk (1978) 86 Cal. App. 3d 228, 232-235, 150 Cal. Rptr. 63* (decision to bifurcate is in court's discretion)].

In marital dissolution proceedings, severance of the issue of the termination of the parties' marital status from other issues is often desired, particularly when it appears that the proceedings will be protracted and one of the parties desires to remarry [*see Fam. Code § 2337*; *Cal. Rules of Ct., Rule 5.175*; *Gionis v. Superior Court (1988) 202 Cal. App. 3d 786, 788, 248 Cal. Rptr. 741* ; *see also Pinson v. Cole (2003) 106 Cal. App. 4th 494, 496, 131 Cal. Rptr. 2d 113]* . Thus, bifurcation for the purpose of obtaining an early dissolution of marital status frequently occurs. If a motion to bifurcate marital status is granted, the responding party may suffer losses related to the early termination of the marriage before other issues in the case are finally decided. Thus, the court may impose on a party any or all ofseveral statutory conditions in granting the motion, and may make these conditions binding on the party's estate if he or she should die [*see Fam. Code § 2337(b)*]. Moreover, a bifurcated judgment granting a dissolution of the status of marriage must expressly reserve the court's jurisdiction over all other pending issues for later determination [*Fam. Code § 2337(c)*].

In addition, bifurcation may be employed to simplify the determination of other issues, and for that purpose may apparently be used in legal separation and nullity proceedings, as well as in dissolution proceedings [*see Cal. Rules of Ct., Rule 5.175*]. Accordingly, bifurcation may be used to help the parties resolve a pivotal or threshold issue that has to be tried, such as the following [*Cal. Rules of Ct., Rule 5.175(c)*; *see In re Marriage of Wolfe (1985) 173 Cal. App. 3d*

889, 894, 219 Cal. Rptr. 337] :

(1) The validity of a premarital or postmarital agreement;

(2) The date of the parties' separation;

(3) The date to use for valuation of assets;

(4) The character of property as separate or community;

(5) Apportionment of increases in the value of a business; or

(6) The existence or value of business or professional goodwill.

Therefore, bifurcation is encouraged if it appears that the resolution of a pivotal issue by a separate trial is likely to simplify other issues for determination [*see Cal. Rules of Ct., Rule 5.175(c)*], or will otherwise enable the parties to settle all other issues [*In re Marriage of Wolfe (1985) 173 Cal. App. 3d 889, 894, 219 Cal. Rptr. 337]* .

For general discussion of bifurcation, including illustrated forms for use in moving for bifurcation, see Ch. 221, *Dissolution of Marriage: Procedure* . For discussion of special considerations in bifurcating trial when retirement benefits are in issue, see *§ 222.181[5]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSeparate TrialsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-222 California Forms of Pleading and Practice--Annotated § 222.33

§ 222.33 Submission to Arbitration

In proceedings for marital dissolution or legal separation, the issues of the character, value, and division of the parties' community estate may be submitted by the court to arbitration pursuant to statute [*see Code Civ. Proc. § 1141.10 et seq.*], in any case in which the parties do not agree in writing to a voluntary division of the community estate. However, the total value of the community and quasi-community property in controversy, in the opinion of the court, must not exceed $50,000 for this provision to apply. The decision of the court regarding the value of the community and quasi-community property for this purpose is not appealable [*Fam. Code § 2554(a)*; *cf. Cal. Rules of Ct., Rule 3.870 et seq.* (mediation rules regarding items in controversy up to $50,000)]. The court may submit the matter to arbitration at any time it believes the parties are unable to agree on a division of the property [*Fam. Code § 2554(b)*].

A court may also, in some circumstances, order the determination of a factual issue by a referee, as discussed in *Ch. 221, Dissolution of Marriage: Procedure, § 221.40* et seq. [*see Code Civ. Proc. § 639*; *see, e.g., Fam. Code § 2032(d)* (appointment of referee to oversee case management plan); *but see In re Marriage of Olson (1993) 14 Cal. App. 4th 1, 7-8, 17 Cal. Rptr. 2d 480* (discussing limitations on appointment and exercise of powers)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewFamily LawAlternative Dispute ResolutionArbitrationFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral Overview

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18-222 California Forms of Pleading and Practice--Annotated § 222.34

§ 222.34 Sale of One Community Asset to Preserve Another

[1] Circumstances Permitting Sale

A trial court may, with appropriate safeguards, require one potential community asset to be sold to save another such asset. To accomplish this sale, the trial court may conduct a partial trial limited to a determination of the community or separate character of the asset and the existence of other community assets sufficient to offset any loss the opposing spouse might incur because of the loss of proceeds from the asset to be sold. Alternatively, the trial court may order the sale of a claimed community asset, particularly when the opposing spouse has no objection to the sale, without making any factual determinations beyond the value of the asset to be sold, provided the court requires security sufficient to protect the opposing spouse [*Lee v. Superior Court (1976) 63 Cal. App. 3d 705, 711, 134 Cal. Rptr. 43* ; *see Fam. Code §§ 2010(e), 2553, 2601*].

In addition, in proceedings commenced on or after January 1, 1993 [*see Fam. Code § 2113*], a court has authority, at any time during the proceedings, on application of a party and for good cause, to order the liquidation of community or quasi-community assets to avoid unreasonable market or investment risks, given the relative nature, scope, and extent of the community estate. However, the court may in no event grant the application to liquidate these assets unless the moving party has served the appropriate property disclosure declaration required by statute [*Fam. Code § 2108*]. For further discussion of the court's subject matter jurisdiction to divide property, see *§ 222.53*.

[2] Limitations on Court's Authority

Except for a court's authority at any time during the proceedings to order the liquidation of community or quasi-community assets to avoid unreasonable market or investment risks [*Fam. Code § 2108*], the court does not have general authority to issue a preliminary injunction ordering that a disputed asset be sold and the proceeds distributed to one spouse over the other's objections [*see Lee v. Superior Court (1976) 63 Cal. App. 3d 705, 709-710, 134 Cal. Rptr. 43* (construing former law)].

The statutory language authorizing orders restraining the transfer or other disposition of property, in *Fam. Code § 2045* (former *Civ. Code § 4359(a)*), makes clear that this section is intended to maintain the status quo by preventing a transfer. It does not authorize a trial court, ex parte or otherwise, to change the status quo by authorizing the sale of property involved in a dissolution proceeding and the transfer of the proceeds to one of the parties without adequate safeguards for the other. Furthermore, *Code Civ. Proc. §§ 128* and *187*, which confer general powers on trial courts, do not give a trial court authority to order pendente lite the sale of an asset [*Lee v. Superior Court (1976) 63 Cal. App. 3d 705, 709-710, 134 Cal. Rptr. 43* (construing former law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity Property

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18-222 California Forms of Pleading and Practice--Annotated § 222.35

§ 222.35 Determining Family Law Attorney's Real Property Lien and Need for Case Management Plan

[1] Effect of Lien on Equal Division

A spouse may unilaterally encumber his or her community interest in real property to pay reasonable attorney's fees in order to retain or maintain counsel in a proceeding for marital dissolution, legal separation, or nullity of marriage. This encumbrance is known as a "family law attorney's real property lien." It attaches only to the encumbering party's interest in the real property [*Fam. Code §§ 1102(e), 2033(a)*].

However, on either party's application, the court may deny the family law attorney's real property lien, based on a finding that the encumbrance would likely result in an unequal division of property because it would impair the encumbering party's ability to meet his or her fair share of the community obligations, or would otherwise be unjust under the circumstances. The court for good cause may also limit the amount of the lien, but this limitation is not to be construed as a determination of reasonable attorney's fees [*Fam. Code § 2034(a)*; *see Fam. Code § 2033(c)* (objection to lien)]. The court has jurisdiction to resolve any dispute arising from the existence of a family law attorney's real property lien [*Fam. Code § 2034(c)*]. For further discussion of this lien, which ordinarily would be sought before trial, see Ch. 226, *Dissolution of Marriage: Attorney's Fees* .

[2] Need for Case Management Plan

If a court receives an objection to the establishment of a family law attorney's real property lien, the court may on its own motion determine whether the case involves complex or substantial issues of fact or law related to property rights, visitation, custody, or support. If the court finds that the case involves one or more of these complex or substantial issues, it may direct implementation of a case management plan as provided by statute [*Fam. Code § 2034(b)*].

If implemented, a "case management plan" may allocate attorney's fees, court costs, expert fees, and consultant fees equitably between the parties, and must focus on specific, designated issues. The plan may provide for the allocation of separate or community assets, security against these assets, and for payments from income or anticipated income of

either party for the foregoing fee and cost allocation and for the benefit of one or both parties. Payments are authorized only on agreement of the parties, or, absent agreement, by court order. Also, a court may order that a referee be appointed pursuant to *Code Civ. Proc. § 639* to oversee the case management plan [*see Fam. Code § 2032(d)*]. For further discussion of the relationship of case management plans to awards of attorney's fees and costs, see Ch. 226, *Dissolution of Marriage: Attorney's Fees* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyLegal EthicsClient RelationsBilling & Collection

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18-222 California Forms of Pleading and Practice--Annotated § 222.36

§ 222.36 Property Disclosure Requirements During Proceeding

Beginning January 1, 1993 [*Fam. Code § 2113*], spouses are subject to specific duties of disclosure with respect to community property from the date of separation to the date of distribution of community assets and liabilities [*see Fam. Code §§ 2102-2106*], in addition to those previously required [*see Fam. Code §§ 721, 1100*]. Pursuant to statute, in proceedings commenced on or after January 1, 1993, spouses are required to serve on one another preliminary and final declarations of disclosure regarding assets and liabilities [*see Fam. Code §§ 2103-2105*].

Unless the parties stipulate to waive the requirements for the final declaration or there is a showing of good cause, no judgment will be entered with respect to the parties' property rights unless each party has executed and served a copy of the final declaration of disclosure and current income and expense declaration [*Fam. Code § 2106*]. Service must take place before or at the time the parties enter into a property or support agreement or if the case goes to trial, at least 45 days before the first assigned trial date [*see Fam. Code § 2105(a)*]. Each pary must execute and file with the court a declaration under penalty of perjury that the final disclosure and income and expense declaration was served on the other party or that service of the final declaration has been waived pursuant to the parties' stipulation [*Fam. Code § 2106*]. For further discussion of these requirements, see Ch. 221, *Dissolution of Marriage: Procedure* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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18-222 California Forms of Pleading and Practice--Annotated § 222.37

§ 222.37 Motion for Alternate Valuation Date

Valuation of the assets and liabilities of the community estate generally must be made as near as practicable to the time of trial for the purpose of dividing the community estate on marital dissolution or legal separation [*Fam. Code § 2552(a)*]. However, on 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and before trial to accomplish an equal division of the community estate in an equitable manner [*Fam. Code § 2552(b)*; *see In re Marriage of Hargrave (1985) 163 Cal. App. 3d 346, 355, 209 Cal. Rptr. 764* ; *seealso In re Marriage of Reuling (1994) 23 Cal. App. 4th 1428, 1435, 28 Cal. Rptr. 2d 726* (absent written agreement, oral stipulation, or motion for alternative valuation date, stock was properly valued at time of trial)]. For discussion of good cause, see *§ 222.52[2][b][i]*.

A party who desires to have property valued as of a date *other than* "as near as practicable to the time of trial" is required to request an alternate valuation date by means of a noticed motion. *Fam. Code § 2552* requires 30 days' notice by the moving party to the other party to move for a date of valuation that is after separation and before trial, but does not specify the form of notice required [*see Fam. Code § 2552(b)*]. However, under the rules of court, a noticed motion for an alternate valuation date must be made using the Judicial Council form of Application for Separate Trial, and must contain the following additional information [*Cal. Rules of Ct., Rule 5.126*; *see* Cal. Judicial Council Form 315 (reference in rule, as issued in 2003, to "form FL-325" was possible typographical error)]:

1. The proposed alternate valuation date;

2. Whether the proposed alternate valuation date will apply to all, or only a portion, of the assets; and, if the motion is directed to only a portion of the assets, the declaration must separately identify each such asset; and

3. The reasons supporting the alternate valuation date.

The requirement of the Family Law Rules of using a written, noticed motion appears to codify a long-standing practice

among family law practitioners [*see In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 760 n.15, 214 Cal. Rptr. 661* (noting that an early determination reduces unnecessary discovery, minimizes experts' fees, and may assist in reaching settlement); *see also* 1995 Cal. Fam. Law Monthly 87 (April 1995; Matthew Bender)]. Counsel must, however, use the special form noted above [*see* Cal. Judicial Council Form FL-315], instead of a general notice of motion form.

For a sample filled-in form that may be adapted for use to request an alternate valuation date, as well as a general discussion of bringing orders to show cause and noticed motions in family law proceedings, see Ch. 221, *Dissolution of Marriage: Procedure* . This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. For a factual declaration that may be adapted for use in support of the motion, see Denner, Rothschild & Johnson, *California Family Law Trial Guide, § 4.52[1][c]* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationValuation

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Chapter 222 DISSOLUTION OF MARRIAGE: PROPERTY DIVISION AND VALUATION
PART II. LEGAL BACKGROUND
B. General Division And Valuation Principles
1. Summary Of Pretrial Procedures Affecting Property

18-222 California Forms of Pleading and Practice--Annotated §§ 222.38-222.49

[Reserved]

§§ 222.38[Reserved]

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18-222 California Forms of Pleading and Practice--Annotated § 222.50

§ 222.50 Equal Division Requirement

In a proceeding for marital dissolution or legal separation, the court generally is required to equally divide the parties' community and quasi-community assets and liabilities, that is, their "community estate" [*see Fam. Code §§ 63, 2551, 2552*], unless the parties dispose of their property by written agreement or by oral stipulation in open court [*Fam. Code § 2550*]. However, a number of exceptions to this "equal division requirement" are provided by statute, as discussed in *§ 222.70* [*see Fam. Code § 2600 et seq.*]. The property division concepts applicable in dissolution and legal separation proceedings will also generally apply in nullity proceedings when "quasi-marital" property is to be divided [*see Fam. Code §§ 2251(a)(2), 2252*].

Although an ideal property disposition by a court would be a mathematically equal division [*In re Marriage of Tammen (1976) 63 Cal. App. 3d 927, 930, 134 Cal. Rptr. 161* ; *In re Marriage of Warren (1972) 28 Cal. App. 3d 777, 783, 104 Cal. Rptr. 860]* , it is not necessary that each community estate asset be precisely divided [*Bensing v. Bensing (1972) 25 Cal. App. 3d 889, 894, 102 Cal. Rptr. 255* (disapproved on another point in *In re Marriage of Brown (1976) 15 Cal. 3d 838, 851 n.14, 126 Cal. Rptr. 633, 544 P.2d 561*)]. Instead, a court must distribute both the community estate assets and liabilities so that the residual assets awarded to each party after the deduction of liabilities are equal [*In re Marriage of Olson (1980) 27 Cal. 3d 414, 421, 165 Cal. Rptr. 820, 612 P.2d 910]* . For discussion of the methods by which a court may equally divide the community estate, such as by a division in kind, see *§ 222.53[5]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportAnnulmentEffectsProperty DivisionFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral Overview

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18-222 California Forms of Pleading and Practice--Annotated § 222.51

§ 222.51 Timing of Court's Division

If a court divides the community estate, it must make its division either as part of its judgment of marital dissolution or legal separation, or make its division at a later time if it expressly reserves jurisdiction to do so [*Fam. Code § 2550*; *but see In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 756, 214 Cal. Rptr. 661* (positing that court may not indefinitely retain open-ended jurisdiction to divide community assets, such as retirement benefits, in the future; but may make a present division and reserve jurisdiction to supervise distribution of the asset); *see also Fam. Code § 2337* (bifurcation); for further discussion, *see § 222.32*].

Moreover, when community estate assets or liabilities have not previously been adjudicated in a family law proceeding, the court has continuing jurisdiction to divide them, pursuant to a postjudgment motion or order to show cause [*Fam. Code § 2556*], or in an independent action, as discussed in *§ 222.53[5][e]* [*see Henn v. Henn (1980) 26 Cal. 3d 323, 330, 161 Cal. Rptr. 502, 605 P.2d 10]* . For further discussion of a court's methods of dividing property, see *§ 222.53[5]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportAnnulmentEffectsProperty DivisionFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral Overview

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18-222 California Forms of Pleading and Practice--Annotated § 222.52

§ 222.52 Court's Duty to Characterize and Value Property

[1] Characterization

For a court to assure an equal division of the community estate, it must determine the nature and value of the specific items of the parties' community property [*In re Marriage of Tammen (1976) 63 Cal. App. 3d 927, 930, 134 Cal. Rptr. 161]* . The court must characterize the disputed assets and liabilities as separate or community [*see Fam. Code §§ 2551, 2552*] and, in the case of liabilities, must confirm or assign them to the parties as provided by statute [*see Fam. Code §§ 2551, 2620 et seq.*, discussed in *§ 222.260*]. For discussion of characterization of property, see Ch. 122, *Community Property* .

[2] Valuation

[a] As of Time of Trial

In dividing the community estate, the court must value the assets and liabilities at issue as near as practicable to the time of trial. However, on 30 days' notice by the moving party to the other party, the court for good cause shown may value all or any portion of the assets and liabilities at a date after separation and prior to trial to accomplish an equal division of the parties' community estate in an equitable manner [*Fam. Code § 2552*]. For discussion of moving for an alternate valuation date, see *§ 222.37*.

[b] Valuation at Different Time

[i] Factors Showing Good Cause

"Good cause" for valuing property to be divided after separation and before trial is not defined by statute [*see Fam. Code § 2552(b)*; *see § 222.37* for procedure to give 30 days' notice], but has been considered in several cases. For example, courts have found good cause for an alternate valuation date when the nature and value of the community

assets could not be determined as of the date of trial. Trial courts are permitted reasonable flexibility in ascertaining whether good cause exists to accomplish substantial justice. The court's valuation must be supported by substantial evidence, however, to withstand appellate review [*In re Marriage of Stephenson (1984) 162 Cal. App. 3d 1057, 1087-1088, 209 Cal. Rptr. 383* ; *see In re Marriage of Olson (1980) 27 Cal. 3d 414, 422, 165 Cal. Rptr. 820, 612 P.2d 910]* .

Relevant factors that may be cited in support of a finding of good cause for valuation after separation and before trial include the following:

(1) Obstructive conduct, such as a party's willful refusal to deliver the necessary records for valuation of the marital estate at the time of trial [*see, e.g., In re Marriage of Nelson (2006) 139 Cal. App. 4th 1546, 1550-1552, 44 Cal. Rptr. 3d 52* (when party precludes expert from valuing property as of date of trial by failing to provide needed information, *e.g.*, due to poor record-keeping, court may value property as of alternate date, such as date of separation); *In re Marriage of Stallcup (1979) 97 Cal. App. 3d 294, 301, 158 Cal. Rptr. 679* (refusal to deliver records of claimed post-separation business reverses)];

(2) A party's dissipation of community assets after separation [*see, e.g., In re Marriage of Barnert (1978) 85 Cal. App. 3d 413, 423-424, 149 Cal. Rptr. 616* (husband attempted to show reduced income from medical practice in period immediately preceding trial)];

(3) A party's lone, postseparation action that greatly increases the value of the community estate [*see In re Marriage of Barnert (1978) 85 Cal. App. 3d 413, 423, 149 Cal. Rptr. 616]* ;

(4) A party's waste or mismanagement of community assets, or other breach of his or her fiduciary duty (to the extent that such a duty exists) to the community [*see In re Marriage of Koppelman (1984) 159 Cal. App. 3d 627, 635, 205 Cal. Rptr. 629* , disapproved on other grounds, *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253]* ;

(5) A party's commingling of community and separate funds after separation that makes it impossible to value an asset at the time of trial [*see In re Marriage of Koppelman (1984) 159 Cal. App. 3d 627, 634-635, 205 Cal. Rptr. 629* , disapproved on other grounds, *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253* ; *but see In re Marriage of Fink (1979) 25 Cal. 3d 877, 888, 160 Cal. Rptr. 516, 603 P.2d 881* (valuation of husband's law practice made as of date of trial and not date of separation when, after separation, husband so commingled preseparation and postseparation accounts that it was impossible to value practice at separation)]; or

(6) When valuation after separation and before trial is proven to be the only way to accomplish an equal division of the community estate in an equitable manner [*see In re Marriage of Koppelman (1984) 159 Cal. App. 3d 627, 635, 205 Cal. Rptr. 629* , disapproved on other grounds, *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253]* .

Apart from these factors note that, with regard to pension and retirement benefits, although a *date-of-trial* valuation is *generally preferred*--particularly if the benefit involved can be characterized as an an "indivisible appreciating asset"--courts have taken into account the unique circumstances of the parties, including the nature of the particular pension or benefit involved, in evaluating whether an alternate date, such as the date of separation, is appropriate [*see, e.g., Bowman v. Bowman (1985) 171 Cal. App. 3d 148, 158, 217 Cal. Rptr. 174* ; *see generally In re Marriage of Crook (1992) 2 Cal. App. 4th 1606, 1612, 3 Cal. Rptr. 2d 905* (appropriate valuation date is date of trial or date of payment of benefits);*see also In re Marriage of Jacobson (1984) 161 Cal. App. 3d 465, 474-475, 207 Cal. Rptr. 512* (wife's interest in military retirement benefits was properly calculated as though husband retired at date of trial rather than at date of separation when he worked after separation and increased benefits were affectedby community contributions accrued before separation); *In re Marriage of Behrens (1982) 137 Cal. App. 3d 562, 577, 187 Cal. Rptr.*

200] . Specialized principles applicable to the time of valuation of pension and retirement benefits that take into account the type of pension involved, are discussed in *§ 222.180* et seq.

By contrast, courts have held that valuation of a law practice normally should be effected as of the date of separation, subject to limited exceptions [*In re Marriage of Green (1989) 213 Cal. App. 3d 14, 20-21, 261 Cal. Rptr. 294* ; *see In re Marriage of Kilbourne (1991) 232 Cal. App. 3d 1518, 1524, 284 Cal. Rptr. 201* ; *see also In re Marriage of Stevenson (1993) 20 Cal. App. 4th 250, 253-254, 24 Cal. Rptr. 2d 411* (small contracting business); *but see In re Marriage of Fink (1979) 25 Cal. 3d 877, 888, 160 Cal. Rptr. 516, 603 P.2d 881* (valuation of law practice made as of date of trial when, after separation, husband so commingled preseparation and postseparation accounts that it was impossible to value practice at separation)]. Other small businesses that rely primarily on the skill, industry, and reputation of the operating spouse for their value, rather than on their capital assets, also may be valued as of the date of separation [*In re Marriage of Stevenson (1993) 20 Cal. App. 4th 250, 253-254, 24 Cal. Rptr. 2d 411* (small contracting business); *see In re Marriage of Duncan (2001) 90 Cal. App. 4th 617, 627, 108 Cal. Rptr. 2d 833* (investment advisory company)]. For discussion of valuing business and professional practices, see *§ 222.131*.

[ii] Factors Insufficient to Show Good Cause

Many reported cases have involved fact situations in which the trial court held the movant's claimed reasons for valuation after separation and before trial *insufficient* to constitute the requisite good cause. For example, a lengthy period between the parties' separation and the date of trial was found insufficient to constitute good cause for valuation at separation. In that case, the appellate court reasoned that the long separation period warranted valuation at the date of trial, thus giving the parties equal shares in the change in value of the assets during this period. In addition, because the moving party (wife) failed to show that the decrease in value was due to her husband's mismanagement, the court found that she had failed to show good cause for valuation of community stock after separation when the stock had declined in value since separation [*In re Marriage of Priddis (1982) 132 Cal. App. 3d 349, 357-358, 183 Cal. Rptr. 37]* .

Courts have cited other factors in finding a lack of good cause for alternate valuation. For example, a court determined that no showing of good cause was made for valuation at the time of separation rather than at the time of trial under circumstances in which a family residence increased in value after separation simply because of inflation, rather than as a result of the efforts of one spouse [*In re Marriage of McNeill (1984) 160 Cal. App. 3d 548, 565, 206 Cal. Rptr. 641* , *disapproved on other grounds, In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253*); *see In re Marriage of Priddis (1982) 132 Cal. App. 3d 349, 356, 183 Cal. Rptr. 37* ; see also *In re Marriage of Sherman (2005) 133 Cal. App. 4th 795, 800-802, 35 Cal. Rptr. 3d 137* (rejecting husband's contention that date of separation should have been used as valuation date for marital residence, when increase in value of residence between date of separation and trial had nothing to do with husband's efforts; fact that husband made all mortgage payments after separation does not change this analysis because he also received exclusive benefit of continuing to live in residence)].

In addition, a court may not use a valuation date before trial for an appreciating asset in an attempt to compensate one of the spouses for *support* in any case in which no support order or agreement for support is in effect between separation and the date of trial [*see In re Marriage of Koppelman (1984) 159 Cal. App. 3d 627, 633, 635, 205 Cal. Rptr. 629* , disapproved on other grounds, *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253]* .

[c] Time of Trial Defined

[i] In Bifurcated Proceeding

The statutory requirement that the valuation be made "as near as practicable to the time of trial" [*see Fam. Code § 2552(a)*] has led to questions about whether this means the date of the *dissolution hearing* or the date of the trial

dividing the property in bifurcated proceedings. A related aspect of this issue is California's "divisible divorce" concept, in which property not divided by the judgment remains unadjudicated and may be determined in a later action [*see Fam. Code § 2556*; *Irwin v. Irwin (1977) 69 Cal. App. 3d 317, 320-321, 138 Cal. Rptr. 9]* .

In general, courts appear to have favored the interpretation that a valuation should be made as of the time of the proceeding in which the property is divided [*In re Marriage of Walters (1979) 91 Cal. App. 3d 535, 538-539, 154 Cal. Rptr. 180* ; *see In re Marriage of Fischer (1976) 78 Cal. App. 3d 556, 562-563, 146 Cal. Rptr. 384* , disapproved on other grounds, *In re Marriage of Epstein (1979) 24 Cal. 3d 76, 85 n.2, 154 Cal. Rptr. 413, 592 P.2d 1165]* . One court has noted that division and valuation go "hand in hand" because a court's property division usually depends on the value of the marital estate. Unless compelling reasons exist for valuation on an alternate date, the court reasoned, based on equitable considerations, the property should be valued on the date it is divided [*In re Marriage of Walters (1979) 91 Cal. App. 3d 535, 539, 154 Cal. Rptr. 180]* . Similarly, other courts have held that the community estate should be valued as near to the *property division* trial as possible, unless good cause is shown for an alternate date of valuation [*see In re Marriage of Priddis (1982) 132 Cal. App. 3d 349, 355-358, 183 Cal. Rptr. 37* ; *see also In re Marriage of Stallcup (1979) 97 Cal. App. 3d 294, 301, 158 Cal. Rptr. 679* (discussing date near separation versus date near trial)].

[ii] On Remand After Appeal

A related issue is whether the time of trial for valuation purposes is the date of the original trial or the date of a trial on *remand* from an appellate court. In considering a situation in which either valuation date was possible, one court held that equity required former *Civ. Code § 4800* (now *Fam. Code § 2552*) to be interpreted to require the community estate to be divided as near as possible to the court proceeding in which a "proper" division is carried out; that is,, either at trial or on remand after appeal [*In re Marriage of Hayden (1981) 124 Cal. App. 3d 72, 79, 177 Cal. Rptr. 183* ; *cf. In re Marriage of Johnson (1983) 143 Cal. App. 3d 57, 61, 191 Cal. Rptr. 545* (revaluation proper on motion for reconsideration filed after court's memorandum of intended decision but before judgment when one party sold property before judgment for far more than value assigned by court)]. For discussion of revision of property values on appeal, see *§ 222.53[d]*.

[3] Consideration of Tax Effects

In general, interspousal transfers of property incident to dissolution now are less prone to income taxation than they were in previous years. Nevertheless, important tax consequences may result on, for example, a transfer of property to a third party or from a delay in the division of an asset [*see I.R.C. § 1041*; *Rev. & Tax. Code §§ 17024.5, 18031*].

For purposes of valuing property subject to division, the court normally must consider only the "immediate and specific tax effects," if any, of a proposed division, as opposed to those effects that are deemed remote and speculative. "Immediate" refers to the time of any taxable event that is triggered by the division ordered. "Specific" refers to the monetary amount involved [*In re Marriage of Fonstein (1976) 17 Cal. 3d 738, 747-751, 131 Cal. Rptr. 873, 552 P.2d 1169* ; *In re Marriage of Nelson (1986) 177 Cal. App. 3d 150, 156, 222 Cal. Rptr. 790]* . For a general discussion of the tax effects of property transfers at dissolution, see Ch. 227, *Dissolution of Marriage: Tax Effects of Dissolution* . For discussion of tax effects in connection with division of a family home and the division of stock, see *§§ 222.90 et seq. and 222.130* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationMarital PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral

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§ 222.53 Property Division by Court

[1] Subject Matter Jurisdiction--Scope of Jurisdiction in General

In family law proceedings, the superior court has jurisdiction generally to inquire into and render any judgment and make appropriate orders concerning, among other things, the status of the marriage and the settlement of the parties' property rights [*Fam. Code §§ 200, 2010(a), (e)*]. *Fam. Code § 2550 et seq.* and related provisions define the court's power to divide the community estate by mandating equal division when the parties have not agreed to divide their community estate or when certain other exceptions to equal division do not apply [*Fam. Code § 2550*].

In general, once a family law court acquires jurisdiction to divide the community estate in a marital dissolution proceeding, no other department of a superior court may make an order adversely affecting that division. This principle may be of particular importance if, for example, a spouse has commenced both a proceeding for marital dissolution or legal separation, as well as a general civil action against his or her spouse pertaining to the same property [*see Askew v. Askew (1994) 22 Cal. App. 4th 942, 961-962, 28 Cal. Rptr. 2d 284* ; *In re Marriage of Schenck (1991) 228 Cal. App. 3d 1474, 1483-1484, 279 Cal. Rptr. 651* ; *see also Glade v. Glade (1995) 38 Cal. App. 4th 1441, 1455, 45 Cal. Rptr. 2d 695* (dissolution court's jurisdiction prevailed over that of other division of same court that was hearing related foreclosure action); *but cf. In re Marriage of Hilke (1992) 4 Cal. 4th 215, 220, 14 Cal. Rptr. 2d 371, 841 P.2d 891* (discussing abatement of dissolution action under certain circumstances)].

In one case, the court warned that civil actions that are "reruns of a family law case" are generally disfavored. Because almost all events in family law litigation can be reframed as civil actions "if a litigant wants to be creative with various causes of action," courts should examine the *substance* of claims, and not just their nominal headings. In that case, the wife succeeded in her demurrer to the civil complaint because of the "inextricable connection" between the purported civil claims and the family law case [*Neal v. Superior Court (2001) 90 Cal. App. 4th 22, 26-27, 108 Cal. Rptr. 2d 262]* .

In addition, if a California court has jurisdiction over particular community property, a party to a dissolution proceeding cannot divest the court of jurisdiction to divide that property by self-dealing, or other unilateral, action that operates to the detriment of the other party's interest in the property [*see In re Marriage of Seligman (1993) 14 Cal. App. 4th 300, 308, 310, 18 Cal. Rptr. 2d 209* (wife's scheduling of community personalty as "exempt property" on bankruptcy petition filed during dissolution did not transmute it to her separate property, nor was California court divested of jurisdiction to divide community interests in it after wife's bankruptcy discharge)].

[2] Quasi In Rem Jurisdiction

If service of process is made by publication on a spouse who cannot otherwise be served in a family law proceeding [*see Code Civ. Proc. § 415.50*; *see also Ch. 221, Dissolution of Marriage: Procedure, § 221.10* et seq.], the court, without the aid of attachment or the appointment of a receiver, has and may exercise the same jurisdiction over the community or quasi-community *real property* of that spouse situated in California as the court has or may exercise over the community or quasi-community real property of a spouse who is personally served with processin California [*see Fam. Code § 2011*]. This provision establishes "quasi in rem" jurisdiction over such property in California. A judgment quasi in rem affects the interests of particular persons in designated property [*see Shaffer v. Heitner (1977) 433 U.S. 186, 199, 199 n.17, 97 S. Ct. 2569, 53 L. Ed. 2d 683]* .

Quasi in rem jurisdiction over community and quasi-community property is, however, limited by constitutional considerations. Generally, unless a spouse has been served while physically present within California [*see Burnham v. Superior Court of Cal. (1990) 495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631, 645]* , an absent spouse must, under the standards articulated by the United States Supreme Court in *Shaffer v. Heitner* [*Shaffer v. Heitner (1977) 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683]* and *International Shoe Co. v. Washington* [*International Shoe Co. v. Washington (1945) 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95]* , have "minimum contacts" with California so that the exercise of personal jurisdiction over that spouse does not offend "traditional notions of fair play and substantial justice" [*see Shaffer v. Heitner (1977) 433 U.S. 186, 203, 97 S. Ct. 2569, 53 L. Ed. 2d 683* ; *International Shoe Co. v. Washington (1945) 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95* ; *but see Burnham v. Superior Court of Cal. (1990) 495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631, 637-638, 645-646* (*International Shoe* confined "minimum contacts" requirements to situations in which defendant was not present in forum state, and nothing in *Shaffer* expands the requirement beyond that; thus, jurisdiction was proper over nonresident father personally served while physically present in California); *see also Muckle v. Superior Court (2002) 102 Cal. App. 4th 218, 227, 125 Cal. Rptr. 2d 303* (court looks at "minimum contacts" at time of proceeding, not past contacts)].

The presence of property in a state, however, bears on the determination of jurisdiction because it provides contacts among the forum state, the defendant, and the litigation. According to the Court, when claims to the property itself are the source of the underlying controversy, it would be unusual for the state where the property is located not to have jurisdiction [*Shaffer v. Heitner (1977) 433 U.S. 186, 204, 212, 97 S. Ct. 2569, 53 L. Ed. 2d 683]* .

Shaffer expressly leaves open the question of whether the mere presence of the defendant's property in the state is a sufficient basis for jurisdiction when no other forum is available to the plaintiff [*Shaffer v. Heitner (1977) 433 U.S. 186, 211 n.37, 97 S. Ct. 2569, 53 L. Ed. 2d 683]* . This situation might arise in a dissolution proceeding when a respondent, who has no contacts with California, has entirely disappeared and the petitioner is in California with personal property. Because the respondent cannot be found, no other forum is available, and jurisdiction may be proper in California. Before *Shaffer*, the issue of the situs of personal property was significant because a state could not exercise quasi in rem jurisdiction over personal property unless its situs was in the state [*see Waite v. Waite (1972) 6 Cal. 3d 461, 467-468, 99 Cal. Rptr. 325, 492 P.2d 13* (disapproved on another point in *In re Marriage of Brown (1976) 15 Cal. 3d 838, 851 n.14, 126 Cal. Rptr. 633, 544 P.2d 561*)].

[a] Jurisdiction to Divide Separate Property

Courts have jurisdiction, at a party's request, to divide the parties' separate property interests in real and personal property held by the parties as joint tenants or tenants in common, regardless of where the property is situated or when it was acquired, in a proceeding to divide the community estate. The property must be divided together with, and in accordance with the same procedure for and limitations on, division of the community estate [*Fam. Code § 2650*; *Askew v. Askew (1994) 22 Cal. App. 4th 942, 962, 28 Cal. Rptr. 2d 284* ; *see In re Marriage of Gagne (1990) 225 Cal. App. 3d 277, 282-284, 274 Cal. Rptr. 750]* . When the statutory predecessor to this provision was first enacted, it was limited in its application to "proceedings commenced on or after January 1, 1986, regardless of whether the property was acquired before, on, or after January 1, 1986 [former *Civ. Code § 4800.4(b)*]. This limiting language was deleted when the Family Code was enacted. The Law Revision Commission comments indicate that continuation of this language was "unnecessary in view of [*Fam. Code] § 4(c)*" [*see* Cal. L. Revision Comm'n Comment to *Fam. Code § 2650*; *see also Fam. Code § 4(c)* ("[s]ubject to the limitations provided in this section, the new law applies on the operative date to all matters governed by the new law, regardless of whether an event occurred or circumstances existed before, on, or after the operative date, including, but not limited to, commencement of a proceeding, making of an order, or taking of an action")].

Several points should be kept in mind in applying the foregoing provisions. First, if the property at issue was acquired during marriage in joint tenancy or tenancy in common, it ordinarily will be subject to the "joint form-community property" presumption [*Fam. Code §§ 2580, 2581*]. It follows then, that only if such property is found to be true joint tenancy or tenancy in common property, on rebutting the "joint form-community property presumption," that it will be subject to division under *Fam. Code § 2650*, at a party's request.

However, if the property had been purchased in joint tenancy or tenancy in common *before* marriage, the "joint form-community property" presumption does not apply [*see Fam. Code §§ 2580, 2581*], and, as a practical result, it often will be easier to establish that the property is true joint tenancy or tenancy in common property. However, even if the property had been acquired before marriage, there may be some type of community apportionment necessary if community funds were used, for example, to help pay the purchase price (*see* related discussion in *§ 222.130* et seq.).

Before January 1, 1986, the original operative date of the predecessor [*see* former *Civ. Code § 4800.4*] to *Fam. Code § 2650*, joint tenancy property thatwas acquired by the spouses before marriage could only be divided in a *partition* action [*see Code Civ. Proc. § 872.010 et seq.*], which, in turn, could often be consolidated with a proceeding for marital dissolution or legal separation [*see In re Marriage of Leversee (1984) 156 Cal. App. 3d 891, 897, 203 Cal. Rptr. 481]* . Appellate courts had held that, although a trial court has jurisdiction to determine whether a particular asset was community or separate property, it had no jurisdiction in a dissolution proceeding to dispose of either party's separate property [*see, e.g., In re Marriage of Dorris (1984) 160 Cal. App. 3d 1208, 1215, 207 Cal. Rptr. 160* . The enactment of former *Civ. Code § 4800.4* reversed that rule. Courts found that this section is consistent with the general rule that a court has jurisdiction to settle the parties' property rights, and with the principle that a court has jurisdiction to settle matters submitted to it by the parties [*In re Marriage of Graves (1988) 198 Cal. App. 3d 1047, 1051-1052, 244 Cal. Rptr. 110* (quoting Legislative Committee Comment--Senate, 1985, and reading former *Civ. Code § 4800.4* in light of the comments); *see Fam. Code § 2010* (jurisdiction)].

By contrast, *Fam. Code § 2650* is not a grant of jurisdiction to divide *community* property. The statute simply confers jurisdiction on the court to divide separate property of the parties when the community estate is divided [*In re Marriage of Graves (1988) 198 Cal. App. 3d 1047, 1051, 244 Cal. Rptr. 110]* . Thus, it does not change the rule that property not mentioned in the pleadings or in any of the decrees adjudicating and dividing the parties' community property is held by the parties as tenants in common after the dissolution. Such property, prior to January 1, 1990, had to be adjudicated in a subsequent action for partition of the missed community asset and not in a show cause hearing for division of an omitted community asset [*In re Marriage of Graves (1988) 198 Cal. App. 3d 1047, 1051-1052, 244 Cal. Rptr. 110]* . However, on and after January 1, 1990, a court has continuing jurisdiction to divide unadjudicated community property, by use of a postjudgment motion or order to show cause, as discussed in *§ 222.53[5][e]* [*see Fam. Code § 2556*].

[b] Treatment of Out-of-State Real Property

A California court lacks jurisdiction to enter a judgment that directly affects a title or interest in real property in another state, even if the court has personal jurisdiction over both spouses in a family law proceeding [*Rozan v. Rozan (1957) 49 Cal. 2d 322, 330, 317 P.2d 11* ; *In re Marriage of Economou (1990) 224 Cal. App. 3d 1466, 1479-1482, 274 Cal. Rptr. 473* ; *In re Marriage of Ben-Yehoshua (1979) 91 Cal. App. 3d 259, 269, 154 Cal. Rptr. 80* ; *see In re Marriage of Fink (1979) 25 Cal. 3d 877, 884, 884 n.5, 160 Cal. Rptr. 516, 603 P.2d 881* ; *see also Fall v. Eastin (1909) 215 U.S. 1, 11, 30 S. Ct. 3, 54 L. Ed. 65* ; *In re Marriage of Leff (1972) 25 Cal. App. 3d 630, 645, 102 Cal. Rptr. 195]* . However, if the court has both parties before it, the court may establish and declare the parties' interests in out-of-state property and enter orders requiring the parties to execute conveyances in compliance with the court's determination [*see Fam. Code § 2660*; *Rozan v. Rozan (1957) 49 Cal. 2d 322, 330, 317 P.2d 11* ; *In re Marriage of Economou (1990) 224 Cal. App. 3d 1466, 1479-1482, 274 Cal. Rptr. 473* ; *In re Marriage of Ben-Yehoshua (1979) 91 Cal. App. 3d 259, 269, 154 Cal. Rptr. 80]* . For discussion of statutory provisions governing the disposition of such property [*see Fam. Code § 2660*], see the discussion in *§ 222.90* et seq.

[3] Personal Jurisdiction

Personal jurisdiction is required over a respondent in order to adjudicate his or her marital property rights in a family law proceeding. Thus, when a court lacks personal jurisdiction over one spouse, the court may not litigate the personal rights of the spouses in property that is not within the court's jurisdiction. Furthermore, a judgment affecting property rights made without personal jurisdiction is not entitled to full faith and credit [*Estin v. Estin (1948) 334 U.S. 541, 548-549, 68 S. Ct. 1213, 92 L. Ed. 1561* ; *Worthley v. Worthley (1955) 44 Cal. 2d 465, 468, 283 P.2d 19* ; *In re Marriage of Leff (1972) 25 Cal. App. 3d 630, 643, 644, 102 Cal. Rptr. 195* ; *see Muckle v. Superior Court (2002) 102 Cal. App. 4th 218, 225-227, 125 Cal. Rptr. 2d 303* (absent personal jurisdiction over nonresident husband, court lacked jurisdiction to divide Georgia home purchased during husband's California residency)].

Special jurisdictional requirements of the Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA) must be satisfied for a trial court to divide the community interest in a military pension [*see 10 U.S.C. § 1408(c)(4)*] (see discussion in *§ 222.130* et seq.)]. Other jurisdictional considerations may apply when at least one of the spouses is a member of an American Indian tribe and the spouses resided on an Indian reservation during marriage [*see Sanders v. Robinson (9th Cir. 1988) 864 F.2d 630, 632, 634 n.4*]. For a general discussion of the bases for personal jurisdiction in a family law context, as well as discussion of state and county residency requirements of a party that must be met in adjudicating a marital dissolution [*see Fam. Code § 2320*; *see also Fam. Code § 2322*], see *Ch. 221, Dissolution of Marriage: Procedure, § 221.10* et seq.

[4] Termination of Jurisdiction

After a final judgment is rendered, a court's jurisdiction over the parties or cause of action ordinarily terminates, unless jurisdiction is reserved or a statute [*see, e.g., Fam. Code § 2556* (division of omitted assets or liabilities)] confers continuing jurisdiction. Until fairly recently, courts have not had continuing jurisdiction to divide omitted community property by motion in the context of the same proceeding [*see Tarvin v. Tarvin (1986) 232 Cal. Rptr. 13* ; *Fam. Code § 2556*], and, ordinarily, once a court adjudicates the parties' property rights it does not have jurisdiction to later modify its division of property,absent a specific reservation of jurisdiction [*see Mueller v. Walker (1985) 167 Cal. App. 3d 600, 605-606, 213 Cal. Rptr. 442* (discussing general rule)]. For a general discussion of the court's power to reserve jurisdiction, see *§ 222.53[c]*.

[5] Court's Exercise of Jurisdiction in Dividing Property

[a] Method of Division at Trial

If a court divides the parties' community estate [*see Fam. Code § 2550*], it may choose among several alternative

division methods. Determining which method is most appropriate may depend on the nature of the property and the parties' overall circumstances. Although some courts have stated that a division of property in kind is usually preferable [*see, e.g., In re Marriage of Rives (1982) 130 Cal. App. 3d 138, 153, 181 Cal. Rptr. 572]* , it is not statutorily required [*see Fam. Code § 2550*; *see also In re Marriage of Emmett (1980) 109 Cal. App. 3d 753, 759, 169 Cal. Rptr. 473]* and courts possess broad discretion to determine the manner in which property is divided to accomplish an equal division [*see generally In re Marriage of Cream (1993) 13 Cal. App. 4th 81, 88, 16 Cal. Rptr. 2d 575* ; *see also In re Marriage of Connolly (1979) 23 Cal. 3d 590, 603, 153 Cal. Rptr. 423, 591 P.2d 911* (approving trial court's decision not to divide stock in kind)].

Accordingly, a court may choose to divide some assets in kind, order other assets sold and the proceeds divided, and award still others to one spouse with an offsetting award to the other (asset distribution or "cash out"). A court may also make necessary related orders, such as an order for a party to change the title to a family home to tenancy in common in conjunction with ordering sale of the home deferred [*see Fam. Code § 3800 et seq.* (deferred sale; see discussion in *§ 222.92[1]*); *see generally In re Marriage of Cream (1993) 13 Cal. App. 4th 81, 88, 16 Cal. Rptr. 2d 575* ; *see also Fam. Code § 2553* (court may make such orders as it deems necessary to carry out purposes of its authority to divide parties' community estate); *In re Marriage of Davis (1977) 68 Cal. App. 3d 294, 306-309, 137 Cal. Rptr. 265* ; *In re Marriage of Holmgren (1976) 60 Cal. App. 3d 869, 872-873, 130 Cal. Rptr. 440]* .

[b] Modification Before Judgment

[i] Amendment of Pleadings

If community property is omitted from the pleadings in a family law proceeding, either inadvertently or as the result of intentional concealment by one of the parties, and its existence is discovered before rendition of the judgment, either party may, by noticed motion, seek an order allowing amendment of his or her pleadings to include a description of the property, and a request that it be divided [*see Cal. Rules of Ct., Rule 5.108(b)* (amendment of pleadings); *see also Code Civ. Proc. §§ 472, 473(a)*].

In the case of intentional concealment of community property by a party, special remedies are provided by statute, both to compel disclosure and to set aside a judgment rendered or agreement made on the basis of the inaccurate or incomplete disclosure [*see Fam. Code §§ 2107, 2122(a), (b)*; *see also Ch. 221, Dissolution of Marriage: Procedure, § 221.150* et seq.]. For discussion of statutory disclosure requirements regarding property that must be observed in connection with family law proceedings [*see generally Fam. Code § 2100 et seq.*], see *§ 222.36* and *Ch. 221, Dissolution of Marriage: Procedure, § 221.40* et seq.

[ii] Substantial Change in Community Property

When a trial court is informed, before it issues its judgment, that there has been a substantial change in the nature of the community property, the court is obligated by statute [*see Fam. Code § 2550 et seq.*] either to redistribute equally the residue of the property then remaining in the community, or, alternatively, find one of the statutory exceptions [*see Fam. Code § 2600 et seq.*] that permit an unequal distribution applicable. Rather than attempting to impose a rigid formula on the courts, the Legislature has recognized that there may be situations in which both the nature and value of community property cannot be fixed or ascertained at the precise time of trial. Under these circumstances, trial courts are thus permitted a reasonable degree of flexibility in accomplishing substantial justice [*In re Marriage of Olson (1980) 27 Cal. 3d 414, 421-422, 165 Cal. Rptr. 820, 612 P.2d 910* (trial court abused discretion in not reopening trial to make more current, accurate determination of community estate, given that family residence, which was tentatively awarded to wife, was sold at nonjudicial foreclosure sale and neither party would receive any sale proceeds)].

[c] Reservation of Jurisdiction

A court's authority to divide the community estate when the parties have not agreed to a division in writing or by oral

stipulation in open court includes the power to make the division at a time after its judgment of marital dissolution or legal separation has been entered and is final, but only if the court has *expressly reserved* its jurisdiction to do so [*Fam. Code § 2550*]. Conversely, if a court divides the community estate and the judgment becomes final, but it has not expressly reserved jurisdiction over that division (and unadjudicated community property is not involved), it ordinarily loses jurisdiction to later modify the division [*see In re Marriage of Curtis (1989) 208 Cal. App. 3d 387, 391, 256 Cal. Rptr. 76* (reservation of jurisdiction to "make such other and further orders as may be necessary to carry out the provisions of this judgment" did not empower court to amend judgment to include previously unprovided for debt arising from money judgment against spouse after dissolution final; decided before 1989 enactment of former *Civ. Code § 4353*, but apparently not abrogated because of facts involved)].

Although the general statutory authority to reserve jurisdiction exists [*Fam. Code § 2550*] and has been utilized in family law matters [*see In re Marriage of Carl (1977) 67 Cal. App. 3d 542, 546, 136 Cal. Rptr. 703]* , the practice of some courts of making "open-ended" reservations of jurisdiction to determine interests in certain assets has been strongly criticized as being unauthorized and not in keeping with the spirit underlying the statute [*see In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 756-757, 214 Cal. Rptr. 661]* . Accordingly, as a general rule, the better practice appears to be to attempt to avoid long term, "open-ended" reservations of jurisdiction whenever possible, even if parties are willing to stipulate to such a reservation.

By contrast, there are situations in which a reservation of the court's jurisdiction is preferable to an immediate division of the asset in question. For example, a court should reserve jurisdiction and defer division when a community asset's value will be markedly different depending on future events. The court's statutory authority over division has been held to authorize it expressly to reserve jurisdiction over certain properties to avoid the unequal distribution of community assets that cannot be accurately valued at the time of trial. Thus, for instance, when there is a great disparity in property value depending on whether a lease for the premises of a community property business is renewed, the court should retain jurisdiction over the asset until the lease can be concluded, to insure an equal division of community property pursuant to statute [*In re Marriage of Munguia (1983) 146 Cal. App. 3d 853, 859, 195 Cal. Rptr. 199* ; *see In re Marriage of Kilbourne (1991) 232 Cal. App. 3d 1518, 1525, 284 Cal. Rptr. 201]* . Moreover, courts may reserve jurisdiction to supervise the distribution of an asset, such as retirement or pension benefits, the interests in which have already been adjudicated [*see In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 756-757, 214 Cal. Rptr. 661]* . For discussion, see *§ 222.130* et seq.

Finally, there are some circumstances under which a court *must* reserve its jurisdiction regarding particular property, such as when it renders a bifurcated judgment of marital dissolution that terminates the parties' marital status only [*see Fam. Code § 2337(a), (c)*], as well as when a court orders a deferred sale of a family residence pursuant to statute [*Fam. Code § 3809*], as discussed in *§ 222.90* et seq.

From the standpoint of drafting a judgment, counsel should exercise care in setting forth the scope of a court's reserved jurisdiction with respect to property. Otherwise, later actions in the purported exercise of that reserved jurisdiction may be overturned as being *in excess* of the court's jurisdiction [*see, e.g., In re Marriage of Melton (1994) 28 Cal. App. 4th 931, 938-939, 33 Cal. Rptr. 2d 761* (trial court was empowered by judgment simply to "implement" pension division portion of judgment, but not to, effectively, "rewrite that judgment")].

For discussion of reserving jurisdiction to divide pension and retirement benefits, including special rules applicable to military retirement benefits, see *§ 222.130* et seq.[*see, e.g., 10 U.S.C. § 1408(c)(1)* (as amended by Pub. L. No. 101-510, § 555; precluding division of military retired pay as community property if final decree of divorce, dissolution, annulment, or legal separation (or property settlement incident to decree) was issued *before* June 25, 1981, and neither divided (nor reserved jurisdiction to divide) the pay); *In re Marriage of Curtis (1992) 7 Cal. App. 4th 1, 15, 15 n.7, 16, 9 Cal. Rptr. 2d 145]* .

[d] Effect of Appellate Court's Power to Revise Property Disposition

Despite a trial court's power to divide the community estate and to reserve its own jurisdiction to make the division in certain instances [*see Fam. Code § 2550*], the court's authority remains subject to the power of the appellate court to revise the disposition on appeal [*see Fam. Code § 2555*]. Courts have held that when there is sufficient evidence to support a trial court's characterization of property as separate or community, its findings on the status of the property must ordinarily stand and are not subject to revision by an apellate court [*see Maher v. Maher (1963) 216 Cal. App. 2d 30, 31, 30 Cal. Rptr. 516]* . On the other hand, the disposition of the community estate is subject to revision on appeal in all particulars, including those stated to be in the trial court's discretion [*see Fam. Code § 2555*; *see* Cal. Const., Arts. VI, XI; *Code Civ. Proc. § 909*; *In re Marriage of Karlin (1972) 24 Cal. App. 3d 25, 101 Cal. Rptr. 240* , disapproved on other grounds, *In re Marriage of Brown (1976) 15 Cal. 3d 838, 851 n.14, 126 Cal. Rptr. 633, 544 P.2d 561]* .

For a reviewing court to determine whether an equal division of the community estate has been achieved, explicit values and exact amounts of encumbrances must be shown in the trial court's findings. When the evidence about values is sufficient, a defect in the findings may be remedied by an appellate court or that court may remand the case to the trial court to rectify the findings [*In re Marriage of Juick (1971) 21 Cal. App. 3d 421, 425, 98 Cal. Rptr. 324]* .

Revaluation of assets in the community estate is not barred under *Fam. Code § 2552(a)*, which provides for property valuation as near as practicable to time of trial, because this would defeat the statute's "overriding purpose of insuring equal division of community property" [*In re Marriage of Hayden (1981) 124 Cal. App. 3d 72, 79, 177 Cal. Rptr. 183* (construing former *Civ. Code § 4800*; *now see Fam. Code § 2552*)]. This section must be interpreted to require that the community estate be divided as near as possible to the court proceeding in which a proper division of the community estate occurs. Thus, one court held that equity requires revaluation of undivided community assets on remand when a delay in the division of the community estate is not due to a party's conduct or the pendency of an appeal [*In re Marriage of Hayden (1981) 124 Cal. App. 3d 72, 79, 177 Cal. Rptr. 183* ; *see In re Marriage of Walters (1979) 91 Cal. App. 3d 535, 538-540, 154 Cal. Rptr. 180]* . In another case, however, the reviewing court noted that the betterinterpretation of the operative statute is that on retrial the court should consider equitable factors to determine whether the community estate should be valued as of the time of the original trial or the retrial [*see In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 761 n.17, 214 Cal. Rptr. 661]* .

Note, however, that valuation of undivided community assets on remand must be distinguished from a revaluation of the community estate, in which assets that have been valued by a trial court as of a particular date must be valued, on remand, as of another date or at trial [*see In re Marriage of Priddis (1982) 132 Cal. App. 3d 349, 355-358, 183 Cal. Rptr. 37* ; *see also In re Marriage of Koppelman (1984) 159 Cal. App. 3d 627, 635, 205 Cal. Rptr. 629* , *disapproved on other grounds, In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253*)]. Furthermore, a motion in an existing dissolution action to vacate a judgment dividing property interests concerning which the requirements of *Fam. Code § 2552* apply must be distinguished from an independent equitable action for relief from a judgment dividing property interests. For discussion of indpendent actions, see *§ 222.53[5][e][iv]*. For discussion of the timing of the court's valuation, see *§ 222.52[2][c][i]*.

[e] Division of Omitted Community Property

[i] Postjudgment Motion to Divide Property

Under current law, in any action for marital dissolution, legal separation, or annulment, the court has continuing jurisdiction to award community estate assets or liabilities to the parties that have not been previously adjudicated by a judgment in the proceeding. A party may file a postjudgment motion or order to show cause in the proceeding in order to obtain adjudication of any community estate asset or liability omitted or not adjudicated by the judgment. The court must then equally divide the omitted or unadjudicated asset or liability, unless the court finds on good cause that the interests of justice require an unequal division of the asset or liability [*Fam. Code § 2556*; *see In re Marriage of Umphrey (1990) 218 Cal. App. 3d 647, 659-660, 267 Cal. Rptr. 218* (statute applicable to actions pending on operative

date); *but see 10 U.S.C. § 1408(c)(1)* (as amended by Pub. L. No. 101-510, § 555; precluding division of military retired pay as community property if final decree of divorce, dissolution, annulment, or legal separation (or property settlement incident to decree) was issued *before* June 25, 1981, and neither divided nor reserved jurisdiction to divide the pay); *see also In re Marriage of Simundza (2004) 121 Cal. App. 4th 1513, 1514-1515, 18 Cal. Rptr. 3d 377* (increased value of pension benefit over time did *not* constitute omitted asset under *Fam. Code § 2556*); *In re Marriage of Hixson (2003) 111 Cal. App. 4th 1116, 1125, 4 Cal. Rptr. 3d 483* (court properly quashed discovery and denied relief on order to show cause under *Fam. Code § 2556* when former wife failed to present evidence or argument on existence of unadjudicated assets); *In re Marriage of Mason (1996) 46 Cal. App. 4th 1025, 1028, 54 Cal. Rptr. 2d 263* (husband could not litigate issue under guise of "missed asset" that could have been litigated in prior set aside motion; thus, res judicata barred his motion)]. For a form of a declaration supporting a postdissolution order to show cause to divide unadjudicated property, see Ch. 221, *Dissolution of Marriage: Procedure*, § 222.410 et seq.

[ii] Vacating Judgment Within Six Months After Entry

If community property that is not mentioned in the pleadings is discovered within six months after entry of the judgment in the proceeding, as specified in *Code Civ. Proc. § 473(b)*, a party may move under that section to vacate the judgment insofar as it divided the community property. The moving party must, of course, establish the grounds for a Section 473 motion [*see Code Civ. Proc. § 473(b)* (in general, requiring showing of "mistake, inadvertence, surprise, or excusable neglect")]. On granting the motion, the trial court will comply with the requirement of equally dividing all community property [*see Fam. Code § 2550*], including property disposed of by the judgment [*In re Marriage of Elkins (1972) 28 Cal.App. 3d 899, 904, 105 Cal. Rptr. 59* ; *see Smith v. Lewis (1975) 13 Cal. 3d 349, 354, 118 Cal. Rptr. 621, 530 P.2d 589* (disapproved on another point in *In re Marriage of Brown (1976) 15 Cal. 3d 838, 851 n.14, 126 Cal. Rptr. 633, 544 P.2d 561*)].

[iii] Statutory and Equitable Motions to Vacate or Modify Judgment

After expiration of the period for relief from a judgment under *Code Civ. Proc. § 473(b)*, a motion to vacate or modify a family law judgment may be brought under special statutory provisions set forth in the Family Code [*see Fam. Code § 2120 et seq.*], or pursuant to the inherent equitable power of the court to grant relief from a judgment obtained through "extrinsic" fraud or mistake [*see In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 148-149, 151, 133 Cal. Rptr. 583* ; *see also Resnik v. Superior Court (1986) 185 Cal. App. 3d 634, 637-638, 230 Cal. Rptr. 1]* . The statutory grounds, applicable with respect to family law judgments entered on or after January 1, 1993, now appear to be the preferred avenue for relief because of their specificity and clarity, as outlined below [*see Fam. Code §§ 2121-2122, 2129*]. Equitable grounds are discussed thereafter.

Under *Fam. Code § 2120 et seq.* a court, on such terms as may be just, may relieve a spouse from a judgment in a family law proceeding that adjudicates support or a division of property, after the *Code Civ. Proc. § 473(b)* six-month time limit for relief has expired [*Fam. Code § 2121(a)*]. The grounds for relief and associated time limits include the following [*Fam. Code § 2122*]:

- Actual fraud, in which the defrauded party was kept in ignorance or in some other manner, other than his or her own lack of care or attention,was fraudulently prevented from fully participating in the proceeding; the motion must be brought within one year of the date on which the complaining party discovered, or should have discovered, the fraud.

- Perjury in the "declarations of disclosure" or current income and expense statement required by *Fam. Code § 2100 et seq.*; the motion must be brought within one year of the date on which the complaining party discovered, or should have discovered, the perjury.

- Duress; the motion must be brought within two years from the date of entry of the judgment.

- Mental incapacity; the motion must be brought within two years from the date of entry of the judgment.

- Mistake, either mutual or unilateral, of law or of fact, with respect to stipulated or uncontested judgments, or to that part of a judgment stipulated to by the parties; the motion must be brought within one year of the date of entry of the judgment.

The court may set aside only those provisions of the judgment materially affected by the circumstances leading to the court's decision to grant relief. However, the court has discretion to set aside the entire judgment, if necessary, for equitable considerations [*Fam. Code § 2125*]. These statutory provisions do not preclude a party from seeking the division of property under the court's continuing jurisdiction under *Fam. Code § 2556*, do not change the law regarding contract remedies when an agreement has not been merged in a judgment, do not restrict a court from acting as a court of equity, and do not limit existing law regarding the modification or enforcement of support orders [*see Fam. Code § 2128*].

The law existing before enactment of the statutory remedy permitted a motion to set aside or modify a judgment on the basis of "extrinsic fraud" or "extrinsic mistake," based on a trial court's inherent equitable power. Accordingly, even though the six-month period for relief under *Code Civ. Proc. § 473* had expired, courts have granted relief when a sufficient showing could be made on either of those grounds [*see In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 148-149, 151, 133 Cal. Rptr. 583* ; *see also In re Marriage of Olsen (1994) 24 Cal. App. 4th 1702, 1706-1707, 30 Cal. Rptr. 2d 306* ; *Resnik v. Superior Court (1986) 185 Cal. App. 3d 634, 637-638, 230 Cal. Rptr. 1]* . For example, one spouse's intentional failure to disclose the existence of community assets to the other has been held to constitute extrinsic fraud [*see In re Marriage of Modnick (1983) 33 Cal. 3d 897, 905-906, 191 Cal. Rptr. 629, 663 P.2d 187]* . It appears that a motion on the basis of the courts' equitable power may still be made when the statutory relief outlined above is not applicable, such as with respect to family law judgments entered *before* January 1, 1993 [*see Fam. Code § 2129*]. The extent to which preexisting law will apply to judgments entered on and after January 1, 1993, is presently unclear. For further discussion of statutory and equitable motions and actions to set aside or modify a family law judgment, including related forms, see the discussion in Ch. 221, *Dissolution of Marriage: Procedure*, § 222.150 et seq.

[iv] Division in Subsequent Independent Action

Before the enactment of legislation [*see Fam. Code § 2556*; former *Civ. Code § 4353*] that conferred continuing jurisdiction on the court to award community estate assets or liabilities that were not adjudicated in a family law judgment, a body of case law developed around the use of independent partition actions to divide such unadjudicated property. Consistent with the concept of "divisible divorce," which recognizes that termination of marital status and adjudication of collateral rights may theoretically occur in separate proceedings, courts held that property that is not mentioned in the pleadings as community property or adjudicated during a dissolution proceeding, is left unadjudicated by the dissolution judgment and subject to partition in a subsequent, independent action [*see Henn v. Henn (1980) 26 Cal. 3d 323, 330, 161 Cal. Rptr. 502, 605 P.2d 10* ; *In re Marriage of Moore & Ferrie (1993) 14 Cal. App. 4th 1472, 1479-1482, 18 Cal. Rptr. 2d 543* (pension omitted from Ohio divorce decree); *Bowman v. Bowman (1985) 171 Cal. App. 3d 148, 156-157, 217 Cal. Rptr. 174* (omission of pension and term life insurance benefits); *Simon v. Simon (1985) 165 Cal. App. 3d 1044, 1048-1049, 212 Cal. Rptr. 87* ; *Giovannoni v. Giovannoni (1981) 122 Cal. App. 3d 666, 672, 176 Cal. Rptr. 154* (pension pleaded as community property but erroneously withdrawn from court's consideration by stipulation was not actually litigated); *In re Marriage of Davis (1980) 113 Cal. App. 3d 485, 487-488, 169 Cal. Rptr. 863* ; *Gorman v. Gorman (1979) 90 Cal. App. 3d 454, 464-465, 153 Cal. Rptr. 479* ; *Bridges v. Bridges (1978) 82 Cal. App. 3d 976, 978-980, 147 Cal. Rptr. 471* ; *Lewis v. Superior Court (1978) 77 Cal. App. 3d 844, 847-852, 144 Cal. Rptr. 1* ; *Irwin v. Irwin (1977) 69 Cal. App. 3d 317, 320-321, 138 Cal. Rptr. 9]* .

Thus, for example, courts held that omitted pension and savings plans can be divided in an equitable action to partition

community property, and in such a proceeding, the court has broad discretion to fashion any appropriate equitable remedy, including one that would result under the former Family Law Act [*see Zarrahy v. Zarrahy (1988) 205 Cal. App. 3d 1, 4-5, 252 Cal. Rptr. 20]* . Until the property is adjudicated in an independent action, the parties own it as tenants in common [*see In re Marriage of Cobb (1977) 68 Cal. App. 3d 855, 860 n.1, 137 Cal. Rptr. 670* ; *Wilkinson v. Wilkinson (1970) 12 Cal. App. 3d 1164, 1168, 91 Cal. Rptr. 372* . *Bowman v. Bowman (1985) 171 Cal. App. 3d 148, 156-157, 217 Cal. Rptr. 174* (omission of pension and term life insurance benefits); *see also In re Marriage of Melton (1994) 28 Cal. App. 4th 931, 938-939, 33 Cal. Rptr. 2d 761* ; *In re Marriage of Moore & Ferrie (1993) 14 Cal. App. 4th 1472, 1479-1482, 18Cal. Rptr. 2d 543* , (pension omitted from Ohio divorce decree); *In re Marriage of Dorris (1984) 160 Cal. App. 3d 1208, 1215, 207 Cal. Rptr. 160]* . Moreover, because of the equitable nature of the partition action, a trial court may consider such defenses as waiver, estoppel, and laches, and, when retroactive awards of property are at issue, it may consider facts relevant to the fairness of such payments [*see generally Casas v. Thompson (1986) 42 Cal. 3d 131, 151-152, 228 Cal. Rptr. 33, 720 P.2d 921* ; *Henn v. Henn (1980) 26 Cal. 3d 323, 333, 161 Cal. Rptr. 502, 605 P.2d 10* ; *see also In re Marriage of Graves (1988) 198 Cal. App. 3d 1047, 1052, 244 Cal. Rptr. 110* (former husband sought to raise defenses of laches, equitable estoppel, and statute of limitations that would have applied in partition action)].

However, because of the legislation mentioned above [*see Fam. Code § 2556*; former *Civ. Code § 4353*], which authorizes a postjudgment motion or order to show cause to divide previously unadjudicated community estate assets or liabilities, independent actions appear to be no longer the primary remedy to divide omitted property. Nevertheless, appellate decisions concerning partition actions continue to be reported, and therefore to the extent that independent actions are still utilized, several concepts remain of importance.

First, the doctrine of res judicata does not bar a subsequent action for partition of a missed community asset [*In re Marriage of Graves (1988) 198 Cal. App. 3d 1047, 1050, 244 Cal. Rptr. 110]* . For additional discussion of the res judicata effect of the judgment in a prior dissolution proceeding on a spouse's right to bring a later action to divide omitted community property, including pension plans see *Ch. 221, Dissolution of Marriage: Procedure, § 222.90* et seq. [*see, e.g., Zarrahy v. Zarrahy (1988) 205 Cal. App. 3d 1, 4-5, 252 Cal. Rptr. 20* (omitted pension and savings plans as divisible in *equitable* action to partition community property; court has discretion to fashion appropriate equitable remedy, including one under (now former) Family Law Act); *cf. In re Marriage of Olsen (1994) 24 Cal. App. 4th 1702, 1706-1707, 30 Cal. Rptr. 2d 306* (trial court, in motion to reinstate spousal support that was waived on partition of military retirement benefits, had inherent equitable power to set aside order terminating support, when order was based on mistake of fact that supported spouse would receive share of military benefits and this did not occur due to change in federal law)].

In addition, the fact that a court in *another state* dissolves the parties' marriage does not as such preclude a California court's later division of community property that has been omitted from the sister-state's divorce judgment. Thus, for example, if parties acquire community property while domiciled in California, but later change domiciles to a common law state and that state's court dissolves their marriage, but without adjudicating the interests the parties acquired in the asset while California domiciliaries, a California court that otherwise obtains jurisdiction over the parties can later adjudicate their interests in the omitted asset [*see In re Marriage of Moore & Ferrie (1993) 14 Cal. App. 4th 1472, 1479-1482, 18 Cal. Rptr. 2d 543* (California court could adjudicate parties' interests in community pension acquired while they were domiciled in California but that was omitted from Ohio divorce decree, given that move from California to Ohio did not cause loss of community interest; however, under facts involved, no additional community interest accrued in pension after parties relocated to Ohio beyond what existed when they relocated)].

Furthermore, one court of appeal has recognized that a provision in a judgment stating that "each party represents to the other party that there is no property of any nature known to the party, other than that listed herein, having a value in excess of $500" guarantees each spouse the right to seek redress from the other when there is additional property [*In re Marriage of Smethurst (1980) 102 Cal. App. 3d 494, 497, 162 Cal. Rptr. 300]* . The court noted that as a catch-all paragraph it is frequently used as an expeditious but preventive technique by attorneys stipulating to the various

provisions of a judgment to assure continuing access to the court when the division of property is either intentionally or inadvertently incomplete [*In re Marriage of Smethurst (1980) 102 Cal. App. 3d 494, 497-498, 162 Cal. Rptr. 300]* .

Finally, the parties may effect a division of omitted property by mutual agreement, to save both the cost and time that litigation in a separate action would entail [*see Wilkinson v. Wilkinson (1970) 12 Cal. App. 3d 1164, 1168, 91 Cal. Rptr. 372]* .

For discussion of the division of omitted military pensions, including retroactive awards of benefits, see the discussion in *§ 222.220* et seq. For a complete discussion of partition actions and related forms, see Ch. 397, *Partition* .

[v] Postjudgment Tort Action for Concealment of Community Assets

One reported decision has held that in the absence of a pending marital dissolution proceeding, a plaintiff who contends that he or she suffered injury as the result of tortious concealment of community assets--thereby preventing the plaintiff from fully presenting his or her case in the dissolution proceeding--may bring a subsequent tort action based on the alleged concealment [*Dale v. Dale (1998) 66 Cal. App. 4th 1172, 1175, 1187, 78 Cal. Rptr. 2d 513]* . That court, however, expressly declined to rule on the effect of *Fam. Code § 2120 et seq.* on the availability of such a tort remedy, because the judgment at issue was entered in 1988, and the provisions of *Fam. Code § 2120 et seq.* apply to judgments entered on or after January 1, 1993 [*Dale v. Dale (1998) 66 Cal. App. 4th 1172, 1175, 1187*].

However, the effect of this decision has been severely eroded by subsequent case law. One appellate court expressly declined to follow the former decision asit "clearly was a major departure from existing law." That case held that if a dissolution judgment is obtained by extrinsic fraud such as the concealment of community assets, the only remedy available to the plaintiff is to seek equitable relief to vacate the judgment, not to sue in tort [*Kuehn v. Kuehn, (2000) 85 Cal. App. 4th 824, 834, 102 Cal. Rptr. 2d 743]* . And another case held that a tort remedy applies, if at all, only with respect to judgments entered before January 1, 1993--the operative date of the remedies provided under *Fam. Code § 2120 et seq.* [*Rubenstein v. Rubenstein (2000) 81 Cal. App. 4th 1131, 1146-1148, 97 Cal. Rptr. 2d 707]* . Thus, the issue seems ripe for consideration by the California Supreme Court.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 222 DISSOLUTION OF MARRIAGE: PROPERTY DIVISION AND VALUATION
PART II. LEGAL BACKGROUND
B. General Division And Valuation Principles
2. Court's Equal Division and Parties' Agreements

18-222 California Forms of Pleading and Practice--Annotated § 222.54

§ 222.54 Property Division by Parties

[1] Qualifying Agreements and Stipulations in General

In a marital dissolution or legal separation proceeding, a court need not equally divide the parties' interests in the community estate if the parties have entered into a written agreement, or oral stipulation in open court, that divides the property. If their agreement or stipulation is only partial, leaving some community estate assets or liabilities undivided, the court will be required to make an equal division of the otherwise undivided property [*see Fam. Code § 2550*; *see also Fam. Code §§ 721, 3580*]. A parties' oral agreement to divide their community property is void and unenforceable when the agreement is not reduced to writing and the parties do not enter into an in-court stipulation to divide the property in accordance with the oral agreement [*In re Marriage of Dellaria & Blickman-Dellaria (2009) 172 Cal. App. 4th 196, 201, 198, 90 Cal. Rptr. 3d 802*].

Private agreements dividing the community estate occupy a favored position in California law. They are usually made with the advice of counsel after careful negotiations, and the courts, in accordance with legislative sanction, prefer agreement rather than litigation. When the parties have finally agreed on the property division, courts prefer not to disturb their agreement except for equitable considerations. Thus, in general, absent fraud or mistake, or other overreaching [*see In re Marriage of Gonzalez (1976) 57 Cal. App. 3d 736, 743-748, 129 Cal. Rptr. 566]* , courts will accept the parties' property agreement as binding, and it cannot be modified without the parties'consent [*see Adams v. Adams (1947) 29 Cal. 2d 621, 624, 177 P.2d 265* (decided under former divorce law; *In re Marriage of Egedi (2001) 88 Cal. App. 4th 17, 19, 105 Cal. Rptr. 2d 518* (agreement upheld, despite fact that one attorney helped drafted it for both parties); *see also In re Marriage of Friedman (2002) 100 Cal. App. 4th 65, 67-68, 122 Cal. Rptr. 2d 412* (dual representation on spouses' estate plan did not void postnuptial agreement prepared for one spouse)]. *Fam. Code § 2550* contemplates that the parties in a marital dissolution action can agree on an unequal division of community property, as long as the agreement complies with the statutory requirements. If such an agreement is entered into, the court *must* accept it and, if requested, incorporate it into the judgment [*In re Marriage of Dellaria & Blickman-Dellaria (2009) 172 Cal. App. 4th 196, 201, 90 Cal. Rptr. 3d 802*].

The rights of any third-party creditors must be considered, however, in determining whether an agreement is enforceable [*cf. In re Roosevelt (9th Cir. 2000) 220 F.3d 1032* (husband's transfer of community share in family home to wife before filing for bankruptcy was fraudulent transfer); *In re Marriage of Katz (1991) 234 Cal. App. 3d 1711, 1721-1722, 286 Cal. Rptr. 495* (wife's transfer to husband of property subject to third party creditor's lien as part of community property settlement gave rise to wife's liability to creditor under circumstances)]. For discussion of grounds for setting aside a property agreement that has been merged in a judgment, see the discussion in Ch. 221, *Dissolution of Marriage: Procedure*, § 222.150 et seq.

Besides the division of the community estate, the parties may also choose to address other issues in the same agreement or stipulation. For example, they may wish to confirm the interest of each party in any separate property, and to agree on matters such as child custody, child support, or spousal support, subject to any necessary court approval regarding those issues. Note that agreements pertaining to custody and support are subject to a number of special considerations, as discussed in Ch. 223, *Dissolution of Marriage: Child Custody* , and Ch. 224, *Dissolution of Marriage: Child Support* [*see Fam. Code §§ 2550, 4065*]. Moreover, the provisions of any agreement for child or spousal support are considered separate and severable from those concerning property. Support orders that are based on an agreement are considered law-imposed and made under the power of the court [*see Fam. Code §§ 3585, 3590*]. For a discussion of the treatment of support and property provisions under former law, in the context of modifying spousal support awards, see *Ch. 221, Dissolution of Marriage: Procedure, § 222.180* et seq. [*see Di Marco v. Di Marco (1963) 60 Cal. 2d 387, 391, 33 Cal. Rptr. 610, 385 P.2d 2* ; *Matthews v. Matthews (1977) 74 Cal. App. 3d 683, 690, 141 Cal. Rptr. 634]* .

Further considerations pertaining to written agreements and oral stipulations in open court are discussed below. For discussion of special property disclosure requirements that must be observed for entry of a family law judgment [*see Fam. Code § 2106*], see *§ 222.36* and Ch. 221, *Dissolution of Marriage: Procedure* . For coverage of drafting written agreements in contemplation of marital dissolution or legal separation, and sample forms of agreement, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2d ed., chs. 211-216 (Matthew Bender). For discussion of completing the Family Law Petition and Response [Cal. Judicial Council Forms FL-100, FL-120] to indicate that the parties have reached an agreement on property rights, see *Ch. 221, Dissolution of Marriage: Procedure, § 222.10* et seq.

[2] Written Agreements

The parties to a proceeding for marital dissolution or legal separation may divide their property pursuant to a written agreement [*see Fam. Code § 2550*]. Such an agreement, when made in contemplation of marital dissolution, is often referred to as a "marital settlement agreement" or "marital termination agreement," and frequently embraces both the property issues and other matters in need of resolution in the proceeding. The agreement may also take the form of a written"stipulation for judgment," as contemplated by *Cal. Rules of Ct., Rule 5.116*.

[3] Enforcement; Merger in Judgment

Agreements may also be incorporated into the family law judgment, either for the purpose of identification only, or for the purpose of merging the agreement into the judgment. If the agreement is merged in whole or in part into the judgment, usually, pursuant to the agreement's own terms, the provisions of the agreement so merged must be enforced as a judgment and not as a contract, using remedies such as contempt [*Plummer v. Superior Court (1942) 20 Cal. 2d 158, 163, 124 P.2d 5* ; *Lazar v. Superior Court (1940) 16 Cal. 2d 617, 620, 107 P.2d 249* ; *see In re Marriage of Lane (1985) 165 Cal. App. 3d 1143, 1147, 211 Cal. Rptr. 262]* . Otherwise, an agreement that merely has been approved but not merged may be enforced as a contract, such as through an action for breach of contract, and remedies such as contempt are not available [*Plummer v. Superior Court (1942) 20 Cal. 2d 158, 161-165, 124 P.2d 5* ; *Lazar v. Superior Court (1940) 16 Cal. 2d 617, 620, 107 P.2d 249* ; *see Howarth v. Howarth (1947) 81 Cal. App. 2d 266, 270-273, 183 P.2d 670* ; *see, e.g., In re Marriage of Smith & Maescher (1993) 21 Cal. App. 4th 100, 103, 26 Cal. Rptr.*

2d 133 (agreement incorporated by reference in Massachusetts divorce judgment)]. For further discussion of the considerations involved in merging agreements into judgments, and sample language, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Ch. 211 (Matthew Bender).

For discussion of grounds for setting aside a family law judgment into which a property settlement agreement has been merged, see Ch. 221, *Dissolution of Marriage: Procedure,* § 222.150 et seq. [*see Fam. Code § 2120 et seq.*]. For forms of complaint that may be adapted for use in bringing an action to enforce the provisions of a property agreement that has not been merged into a judgment, see Ch. 140, *Contracts* , Ch. 488, *Reformation of Instruments* , Ch. 490, *Rescission and Restitution* , and Ch. 561, *Trusts: Constructive Trusts* , Ch. 562, *Trusts: Resulting Trusts* .

[4] Oral Stipulation in Open Court

Parties are permitted to divide their community estate by oral stipulation in open court and such a stipulation is considered as binding as if made in writing [*see Fam. Code § 2550*; *In re Marriage of Carletti (1975) 53 Cal. App. 3d 989, 993 n.2, 126 Cal. Rptr. 1* ; *see also In re Marriage of Carter (1971) 19 Cal. App. 3d 479, 487-488, 97 Cal. Rptr. 274]* . An oral stipulation may, of course, be subsequently followed by a judgment that sets forth the terms of the parties' stipulation in written form. When this procedure is followed, counsel for one party will normally prepare the written form of judgment, subject to service on and approval by opposing counsel before submission to the court for signature and filing, as discussed in *Ch. 221, Dissolution of Marriage: Procedure, § 222.90* et seq.

Strictly speaking, a trial court is not required to obtain a party's express assent to an oral stipulation, as distinguished from his or her counsel's agreement. However, an attorney may not bind his or her client to a stipulation regarding the division of community property without the client's knowledge and assent. Likewise, a litigant cannot sit idly by in open court while a stipulation is read and approved by the court, and later deny the authority of his or her trial counsel to enter into the stipulation. Thus, a litigant's silence that gives the appearance of assent is sufficient to validate a stipulation [*In re Marriage of Hendle (1976) 56 Cal. App. 3d 814, 818, 128 Cal. Rptr. 854* ; *see In re Marriage of Maricle (1990) 220 Cal. App. 3d 55, 57-58, 269 Cal. Rptr. 204* (when party is represented by counsel, court should not accept stipulation or agreement made without attorney's knowledge and consent); *see also In re Marriage of Wickander (1986) 187 Cal. App. 3d 1364, 1367, 232 Cal. Rptr. 621]* . The better practice, however, and one followed by many, if not most, courts, is for the trial court to ask both counsel and the parties present in open court whether the stipulation, as understood by the court, represents the parties' agreement [*see In re Marriage of Hendle (1976) 56 Cal. App. 3d 814, 823-824, 128 Cal. Rptr. 854* (dissent recommends that trial court follow procedure carried out in *In re Marriage of Carter (1971) 19 Cal. App. 3d 479, 487-488, 97 Cal. Rptr. 274*)].

In approving an oral stipulation, the court is only bound to ascertain the nature and extent of community property to the degree necessary to exercise its discretion. The purpose of the stipulation in resolving issues for trial would be obliterated if the court were required to make a detailed investigation of each asset [*In re Marriage of Carter (1971) 19 Cal. App. 3d 479, 485, 97 Cal. Rptr. 274]* . Furthermore, the statute requiring an equal division of the community estate by a *court* [*see Fam. Code § 2550*] does not require findings either of value or of an equal division if the judgment is based on a stipulation made in open court [*In re Marriage of Hendle (1976) 56 Cal. App. 3d 814, 817, 128 Cal. Rptr. 854]* .

Once an oral stipulation is made at the time of trial, a court has no obligation as such to reopen the case for the admission of new evidence showing variations in the property value that occur before judgment is formally entered. The parties take the risk that the stipulated value may be incorrect [*In re Marriage of Hahn (1990) 224 Cal. App. 3d 1236, 1241, 273 Cal. Rptr. 516]* . Similarly, a party may not stipulate to the community nature of an asset at trial and then on appeal challenge the court's finding on the basis of that stipulation [*In re Marriage of Denny (1981) 115 Cal. App. 3d 543, 552-553, 171 Cal. Rptr. 440* ; *see In re Marriage of Carter (1971) 19 Cal. App. 3d 479, 488, 97 Cal. Rptr. 274* (consenting party may not prosecute appeal of stipulation)].

[5] Other Oral Agreements

[a] Executed Oral Agreement

Spouses are not precluded as such from making oral agreements to divide or dispose of their community estate [*see Fam. Code §§ 721, 1500, 1620*; *see also Civ. Code § 1622*]. However, there appear to be at least two exceptions to this general principle that greatly diminish the practical ability of spouses to do make enforceable oral agreements. First, once the parties place their property in issue before the court in the pleadings, any agreement they reach on property division must ordinarily be in the form of a written agreement or oral stipulation in open court [*see Fam. Code § 2550*]; parties cannot make enforceable oral "side agreements" [*see In re Marriage of Maricle (1990) 220 Cal. App. 3d 55, 57-58, 269 Cal. Rptr. 204* (executed oral agreement held invalid when made without attorney's knowledge and not ratified in open court)].

Second, to the extent that the agreement contemplates a transmutation of property, it appears that the statutory provisions requiring a writing for transmutations of property between spouses would apply [*see Fam. Code § 850 et seq.* (applicable to transmutations made on or after January 1, 1985)], except for those insubstantial items that spouses may give to one another, concerning which the transmutation provisions do not apply [*see Fam. Code § 852(c)*]. Whether conventional "statute of frauds" exceptions such as "complete execution on one side," or "part performance," will apply to the transmutation provisions is presently unclear. However, the "express declaration" requirement of the transmutation statutes [*see Fam. Code § 852(a)*; *Estate of MacDonald (1990) 51 Cal. 3d 262, 264, 272-273, 272 Cal. Rptr. 153, 794 P.2d 911]* , may possibly preclude application of these standard exceptions.

In any event, it appears that purely oral agreements that do not amount to an "oral stipulation in open court" have very limited application in the property division context, and the better practice is to have parties reduce all property division matters to writing.

[b] Effect of Parties' Undisclosed Oral Side Agreement

If the pleadings in a family law proceeding request the court to divide the parties' community estate, It appears that any oral side agreement between the parties to dispose of a portion of the property privately and not in open court will be invalid and unenforceable [*see In re Marriage of Elkins (1972) 28 Cal. App. 3d 899, 903-904, 105 Cal. Rptr. 59* ; *see also In re Marriage of Maricle (1990) 220 Cal. App. 3d 55, 57-58, 269 Cal. Rptr. 204* (executed oral agreement held invalid when made without attorney's knowledge and not ratified in open court)].

One appellate court invalidated an undisclosed oral "side agreement" between the parties regarding their rights to portions of community assets not listed in the pleadings. The court stated that such an undisclosed agreement in contemplation of dissolution is against public policy because of its inherent deception and because of the positive terms of the statute that confers jurisdiction to divide property [*Fam. Code § 2550*]. Accordingly, it concluded, such an agreement creates no rights for either party, regardless of whether the agreement was made under compulsion of fraud or mistake, or freely, competently, and in good faith as between the parties. Otherwise, the court reasoned, parties could virtually write into the property division statute an exception for an oral agreement made privately and not in open court, instead of confining the statute to its express exceptions, namely, a written agreement or oral stipulation in open court [*In re Marriage of Elkins (1972) 28 Cal. App. 3d 899, 903-904, 105 Cal. Rptr. 59]* .

Legal Topics:

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

§§ 222.55[Reserved]

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§ 222.70 Overview of Exceptions and Division Alternatives

The general requirement that a court equally divide the parties' community estate in marital dissolution or legal separation proceedings [*see Fam. Code § 2550*] is subject to a number of statutory exceptions and other special division rules [*see Fam. Code § 2600 et seq.*], in addition to the exception for division of the property by the parties' written agreement or oral stipulation in open court [*see Fam. Code § 2550* (discussed in *§ 222.54[1]* et seq.)]. These exceptions and related, alternative division rules provide for the following:

(1) The award to a party of an entire asset, if economic circumstances warrant, to effect a substantially equal division of the property [*see Fam. Code § 2601* (discussed in *§ 222.71[1]*)];

(2) An award or offset against existing property from a party's share of any sum that was deliberately misappropriated by a party to the exclusion of the other party's interest in the community estate [*see Fam. Code § 2602* (discussed in *§ 222.72*)];

(3) The award to a party, on such conditions as the court deems just, of the entire community estate, if its net value is less than $5,000 and one party cannot be located throught the exercise of reasonable diligence [*see Fam. Code § 2604* (discussed in *§ 222.73*)];

(4) The award of community estate personal injury damages to the party who suffered the attendant injuries, subject to certain exceptions [*see Fam. Code § 2603* (summarized under § 222.136)]; and

(5) The assignment of educational loans [*see Fam. Code §§ 2627, 2641* (summarized under § 222.75)].

In addition, special provisions apply to the assignment of community liabilities. Perhaps the most notable of these, in the equal division context, is the provision for assignment of more liabilities to one party than the other on an equitable basis, if community liabilities exceed community assets (the "negative estate" case) [*see Fam. Code § 2622*

(summarized in § 222.76)].

Other special rules require the award of certain federal benefits to only one spouse because of various public policies, including the preemption of federal law over state community property law. These rules, pertaining to certain military life insurance policies [*see Ridgway v. Ridgway (1981) 454 U.S. 46, 56-57, 102 S. Ct. 49, 70 L. Ed 2d 39]* , military separation pay received on involuntary discharge [*see In re Marriage of Kuzmiak (1986) 176 Cal. App. 3d 1152, 1157-1158, 222 Cal. Rptr. 644]* , military retirement pay that has been waived to receive veteran's disability benefits [*see Mansell v. Mansell (1989) 490 U.S. 581, 583, 109 S. Ct. 2023, 104 L. Ed. 2d 675]* , and Social Security benefits [*see In re Marriage of Hillerman (1980) 109 Cal. App. 3d 334, 345, 167 Cal. Rptr. 240* ; *In re Marriage of Cohen (1980) 105 Cal. App. 3d 836, 842-843, 164 Cal. Rptr. 672]* , are discussed in *§ 222.130* et seq.

Finally, notwithstanding the general rules for characterization and division of retirement and pension benefits, a spouse is entitled to an award of all of his or her own retirement and pension benefits if he or she is the victim of a murder attempt by the other spouse [*Fam. Code § 782.5*]. For discussion of this provision, see *§ 222.77*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 222.71 Single Asset Award

[1] When Economic Circumstances Warrant

Despite the general requirement that a dissolution court equally divide the parties' community estate [*see Fam. Code § 2550*], it may award a single asset to one party on such conditions as the court deems proper to effect a substantially equal division of the community estate when economic circumstances warrant [*Fam. Code § 2601*; *see In re Marriage of Boseman (1973) 31 Cal. App. 3d 372, 375-376, 107 Cal. Rptr. 232* ; *see, e.g., In re Marriage of Burlini (1983) 143 Cal. App. 3d 65, 70, 191 Cal. Rptr. 541* (award of business to manager-husband); *In re Marriage of Emmett (1980) 109 Cal. App. 3d 753, 759-761, 169 Cal. Rptr. 473* (award of pension to noncustodial spouse and equivalent property consisting of residence to custodial spouse)]. This is known as the "single asset proviso." Although it is cast in the statutes as one of the "special rules for division" in relation to the "equal division rule," [*see Fam. Code § 2600 et seq.*] it is not a true "exception" to equal division, but rather, an alternative means of accomplishing such a division [*see In re Marriage of Tammen (1976) 63 Cal. App. 3d 927, 930, 134 Cal. Rptr. 161* ; *In re Marriage of Holmgren (1976) 60 Cal. App. 3d 869, 873, 130 Cal. Rptr. 440]* .

The determination of whether "economic circumstances warrant" an award of a particular asset to one party is entrusted to the trial court's sound discretion [*see In re Marriage of Burlini (1983) 143 Cal. App. 3d 65, 70, 191 Cal. Rptr. 541* ; *In re Marriage of Juick (1971) 21 Cal. App. 3d 421, 428, 430 n.13, 98 Cal. Rptr. 324]* . The authorizing statute [*see Fam. Code § 2601*] gives the court considerable discretion in the division of community property to assure that an equitable settlement is reached [*In re Marriage of Connolly (1979) 23 Cal. 3d 590, 603, 153 Cal. Rptr. 423, 591 P.2d 911* ; *In re Marriage of House (1980) 106 Cal. App. 3d 434, 439-440, 165 Cal. Rptr. 145* (both cases construing the predecessor statute)]. Thus, for example, courts have discretion to reject strict "in kind" divisions to avoid financial inequalities [*In re Marriage of Rives (1982) 130 Cal. App. 3d 138, 155-157, 181 Cal. Rptr. 572]* .

The single asset proviso has been used frequently as authority for awarding to one spouse a community property closely-held business or a block of community property stock when the economic circumstances warrant such a

disposition [*see, e.g.,* *In re Marriage of Connolly (1979) 23 Cal. 3d 590, 603, 153 Cal. Rptr. 423, 591 P.2d 911* (block of high-risk stock awarded to high-income husband); *In re Marriage of Kozen (1986) 185 Cal. App. 3d 1258, 1262-1263, 230 Cal. Rptr. 304* (award of franchise to wife)]. Awards of stock and closely-held businesses are discussed in *§ 222.130* et seq.

If the court awards an entire asset to one party under the single asset proviso, it must award comparable property to the other spouse to equalize the division, as discussed in *§ 222.71[3]*. An important factor that the court may consider is how personal the asset is to a spouse. In the case of a home or a business, the court may wish to consider whether the spouse requesting the home has lived in it for many years, or whether he or she operated the community property business [*see* *In re Marriage of Connolly (1979) 23 Cal. 3d 590, 603, 153 Cal. Rptr. 423, 591 P.2d 911* ; *In re Marriage of Kozen (1986) 185 Cal. App. 3d 1258, 1262-1263, 230 Cal. Rptr. 304]* .

Furthermore, the equality of division of community property is intimately tied to valuation of that property. In many cases, an apparently equal division is inherently unequal when economic circumstances are considered in light of the situation of the parties. Valuation becomes more difficult when a court awards an entire asset to one spouse. Thus, an award will be reversed when inequity results from the court's failure to consider the specific circumstances of each spouse in valuing and awarding the asset [*see* *In re Marriage of Rives (1982) 130 Cal. App. 3d 138, 155-157, 181 Cal. Rptr. 572* (improper valuation of goodwill of community property business managed by and awarded to husband); *In re Marriage of Brigden (1978) 80 Cal. App. 3d 380, 391, 393-396, 145 Cal. Rptr. 716* (award of entire block of publicly traded stock to husband was inequitable in terms of parties' financial positions, security, and tax consequences); In re *Marriage of Hopkins (1977) 74 Cal. App. 3d 591, 597-598, 141 Cal. Rptr. 597* (court abused discretion in awarding residence to one spouse and secured equalizing note to other spouse, when spouse who received residence could refinance it and pay other spouse immediately)].

[2] Delayed Division of Asset

The "single asset proviso" [*see Fam. Code § 2601*] also has been frequently used to delay division of a community asset until the appropriate time to sell it and divide the proceeds. Thus, "when economic circumstances warrant," the court, instead of making an immediate award of one asset to one party and an equalizing award of property to the other, may impose delayed division as a condition to effect a substantially equal division of the community property [*see* *In re Marriage of Herrmann (1978) 84 Cal. App. 3d 361, 365-366, 148 Cal. Rptr. 550* (delayed division of family home until parties' youngest child reached majority); *In re Marriage of Boseman (1973) 31 Cal. App. 3d 372, 375-376, 107 Cal. Rptr. 232]* .

Delayed division has been imposed most frequently with respect to the family home, as an additional form of child support [*see Fam. Code § 3800 et seq.*; *In re Marriage of Boseman (1973) 31 Cal. App. 3d 372, 375-376, 107 Cal. Rptr. 232]* . This practice is currently referred to as a "deferred sale of home order" [*see Fam. Code § 3800 et seq.*], as discussed in *§ 222.90* et seq. However, the same concept should permit delayed division of other community assets in the appropriate economic circumstances [*see Fam. Code § 2601*; *In re Marriage of Juick (1971) 21 Cal. App. 3d 421, 427 n.6, 98 Cal. Rptr. 324* (quoting Cline, *California's Divorce Reform: Its Effect on Community Property Awards, 1 Pac. L.J. 310 (1970)*, the court stated that former *Civ. Code § 4800(b)(1)* allows trial court to make equitable allotment of income-producing asset without forfeiting its income-producing potential, or of shelter asset without forfeiting its economic advantage to spouse and children)].

[3] Compensation to Equalize Division

[a] When Required

Under the "single asset proviso," [*see Fam. Code § 2601*] it is contemplated that when a major item of community property not reasonably subject to division is awarded to one party, rather than ordered sold and the proceeds divided,

the other party must be compensated in some manner to maintain the required equal division [*In re Marriage of Tammen (1976) 63 Cal. App. 3d 927, 930, 134 Cal. Rptr. 161* ; *see In re Marriage of Holmgren (1976) 60 Cal. App. 3d 869, 873, 130 Cal. Rptr. 440*)]. When other community assets of sufficient value are available, the court can, of course, make an offsetting award utilizing those assets. More problematic has been the use of promissory notes, which is discussed in *§ 222.71[3][b]*.

[b] Awarding Note to Equalize Division

A number of modern cases have discussed the propriety of utilizing promissory notes to equalize the division of the community estate when a court has awarded a single major asset to one spouse on the basis of the parties' economic circumstances. As discussed further below, promissory notes to equalize division have been invalidated when the notes were for an extended period of time and bore inadequate interest rates; but courts have discretion to use notes for relatively short time periods at reasonable interest rates [*see In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 761, 214 Cal. Rptr. 661]* . Cases on this issue turn on the terms of the note.

In *Bergman* the use of the note was upheld. The note bore interest of 10 percent compounded annually, was secured by substantial equity in the family residence and would be paid in full, at the latest, within three years after the husband relinquished possession of it to the wife. In addition, the entire payment might become due sooner because the note required payment in full if the wife sold the residence sooner. Under those circumstances, the award of an equalizing note did not impose on the husband a long and uncertain deferment of his enjoyment of the award, and the 10 percent interest and short payment period adequately compensated him for the potential effects of inflation [*In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 761-762, 214 Cal. Rptr. 661]* .

On the other hand, the court in *In re Marriage of Tammen* held that the note did not comply with the statutory "equal division" requirement [*In re Marriage of Tammen (1976) 63 Cal. App. 3d 927, 931, 134 Cal. Rptr. 161]* . The trial court had awarded the family residence to the wife and ordered her to execute a promissory note bearing simple interest at seven percent, secured by a second trust deed on the residence. Neither interest nor principal was payable for 10 years, except on certain contingencies including the wife's remarriage, sale of the property, voluntary refinancing by the wife, or her death, whichever occurred first [*In re Marriage of Tammen (1976) 63 Cal. App. 3d 927, 929-931, 134 Cal. Rptr. 161]* . The appellate court in *Tammen* concluded that the note was not worth its face value and consequently that the property had not been equally divided. The market value of the note would be discounted by the inferiority of its security, the long and uncertain deferment of its enjoyment, the probable effect of inflation, and the concerns of its ownership. The court took judicial notice that market value would be at least substantially less than the note's face value [*In re Marriage of Tammen (1976) 63 Cal. App. 3d 927, 929-931, 134 Cal. Rptr. 161* (case remanded for retrial of all issues relating to value and disposition of community property); *see In re Marriage of Morrison (1978) 20 Cal. 3d 437, 456, 143 Cal. Rptr. 139, 573 P.2d 41* (trial court ordered on remand to consider husband's contention that community property was not equally divided because market value of promissory note received from wife was less than face value); In re Marriage of Hopkins *(1977) 74 Cal. App. 3d 591, 598, 141 Cal. Rptr. 597]* .

In re Marriage of Herrmann also involved a trial court award of the family residence and child custody to a wife and awarded the husband a promissory note for one-half the equity value in the residence. The note bore interest at seven percent, was not due and payable until sale of the residence, which might not occur for eight years, and was subject to numerous conditions. The court of appeal upheld the trial court's refusal immediately to divide the residence, but reversed its award of the note. It held that the note was not worth its face value based on *Tammen*, but that the solution was not to increase the amount of the note by 40 to 50 percent, because the added cost to the wife would be substantial, and, if the note might be sold, would have to be paid to the purchaser. The result might be an unequal division of community property. Instead, the trial court was ordered to place the house in tenancy in common with the various contingencies for sale and division of proceeds that were involved in the note [*In re Marriage of Herrmann (1978) 84 Cal. App. 3d 361, 366-367, 148 Cal. Rptr. 550]* .

In *In re Marriage of Slater*, the court upheld the award of a note to equalize the division of community property against a wife's claim that the market value of the note was substantially less than its face value. The court noted that, in contrast to the note awarded in *Tammen*, the note in *Slater* was for a term of only five years, was adequately secured, provided for yearly installments, and bore a sufficiently high interest rate (and low payment term) to compensate for inflation. The court concluded that the promissory note was not, as a matter of law, worth substantially less than its face value. The court also rejected the wife's claim that the note did not equalize the division of community property because trial court failed to consider the tax liability that she would incur. The court reasoned that the wife had presented no evidence of an immediate and specific tax liability as a result of the award [*In re Marriage of Slater (1979) 100 Cal. App. 3d 241, 247-249, 160 Cal. Rptr. 686]* . For discussion of the tax consequences of property division, see Ch. 227, *Dissolution of Marriage: Tax Consequences of Dissolution* .

Finally, in *In re Marriage of Bergman*, the court of appeal upheld the use of a promissory note to equalize a property division involving a family residence and other assets. It held that a trial court, in order to accomplish an equal division of community property, may require a spouse who has been awarded more than one-half of the community estate to execute a secured, short-term promissory note in favor of the other spouse that bears a reasonable rate of interest [*In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 746-747, 214 Cal. Rptr. 661]* .

A spouse who receives a promissory note secured by one or more deeds of trust on the other spouse's property is a secured creditor of the other spouse and, in the event of a default, will be subject to the antideficiency statutes [*In re Marriage of Oropallo (1998) 68 Cal. App. 4th 997, 1007, 80 Cal. Rptr. 2d 669* ; *see Civ. Code § 580*]. A creditor who elects to proceed against real property securing a debt under the power of sale contained in the deed of trust may not seek a deficiency judgment [*Civ. Code § 580(d)*]. Thus, if the spouse awarded the property defaults on the equalizing payments and the lienholder spouse holds a trustee's sale of the property securing the promissory note, he or she may not seek a deficiency judgment for the balance [*In re Marriage of Oropallo (1998) 68 Cal. App. 4th 997, 1003-1004, 80 Cal. Rptr. 2d 669* ; *see Civ. Code § 580(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 222.72 Offset for Misappropriated Assets

Notwithstanding statutory provisions for equal division of the community estate in marital dissolution or legal separation proceedings [*see Fam. Code § 2550*], a court may award from a party's share, as an additional award or offset against existing property, any sum it determines to have been deliberately misappropriated by such party to the exclusion of the interest of the other party in the community estate [*Fam. Code § 2602*; *see In re Marriage of Economou (1990) 224 Cal. App. 3d 1466, 1483, 274 Cal. Rptr. 473* (additional award); *see also In re Marriage of Partridge (1990) 226 Cal. App. 3d 120, 276 Cal. Rptr. 8* (negligent failure to maintain business records and to cooperate in filing tax returns was not deliberate misappropriation); *In re Marriage of Schultz (1980) 105 Cal. App. 3d 846, 855, 164 Cal. Rptr. 653* ("deliberate misappropriation" has reference to "calculated thievery" by spouse, as opposed to simple mishandling of assets)].

This provision is set forth as one of the special rules for division of the community estate [*see Fam. Code § 2600 et seq.*], and has in fact been cited as an exception to "equal division" [*see In re Marriage of Economou (1990) 224 Cal. App. 3d 1466, 1483, 274 Cal. Rptr. 473]* , though at least one commentator has suggested that it may more properly be thought of as a rule assuring equal division than an exception to it [*see* Comment, *California's Divorce Reform: Its Effect on Community Property Awards, 1 Pac. L.J. 310, 319 (1970)*; *see also In re Marriage of Juick (1971) 21 Cal. App. 3d 421, 427 n.6, 98 Cal. Rptr. 324]* .

The "award or offset" authorized [*see Fam. Code § 2602*] is similar in concept to other provisions for reimbursement to one spouse for various unilateral and unconsented to actions taken by the other spouse regarding the community estate. For a discussion of reimbursement issues, see *§ 222.260* et seq. For discussion of issues relating to management and control of property, and statutory remedies for breach of spousal duties regarding property [*see Fam. Code §§ 1100-1101*], see Ch. 122, *Community Property* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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18-222 California Forms of Pleading and Practice--Annotated § 222.73

§ 222.73 Property Valued Less Than $5,000

[1] Statutory Conditions of Award

Notwithstanding statutory provisions for equal division of the communityestate [*see Fam. Code § 2550*], if the net value of the community estate is less than $5,000 and one party cannot be located through the exercise of reasonable diligence, a court may award all of the community estate to the other party on conditions it deems proper in its judgment of marital dissolution or legal separation [*Fam. Code § 2604*].

[2] Inability to Locate Party

[a] Interpretation of Statute

The statute authorizing an award of the entire community estate to one party [*Fam. Code § 2604*] fails to specify the circumstances in which the court should deem that a party cannot be located "through the exercise of reasonable diligence." At a minimum, it appears that service of the summons and petition should be attempted by the methods of service required in civil actions generally [*see Fam. Code § 2331*; *see also Code Civ. Proc. § 415.10 et seq.*]. However, the statute fails to answer a number of questions. For example, are additional efforts required beyond attempted service of the summons? Should a search be made at the time the summons is served and again before the judgment is entered? Additionally, if service is successful, what if the respondent cannot be found at the time of the entry of judgment? Finally, what if the petitioner is the "party" who cannot be located at the time of the judgment?

It has been suggested (1) that the statute probably does *not* apply if the respondent has been personally served with the summons, regardless of whether his or her whereabouts can be ascertained at the time the property is divided; and (2) that, if the respondent is served by publication [*Code Civ. Proc. § 415.50*] because he or she could not "with reasonable diligence be served in another manner," it is unclear whether the statute's condition is thereby fully satisfied, or if it requires an additional showing that the respondent cannot be found at the time for awarding the property, or even that he or she was continuously unavailable from the time of service to the time of the award [*see* Attorney's Guide to

Family Law Act Practice, § 5.15 (Cal. C.E.B. 2d ed. 1972)].

It is also not clear, however, that the statute [*Fam. Code § 2604*] was intended to be applied merely to a person who cannot be served with process, because it refers to the inability *to locate* a party. Arguably, the statutory language may suggest that this inability must again be examined at the time of the judgment awarding the parties' property, because it refers to locating a party instead of service of a summons.

[b] Proof

The statute [*Fam. Code § 2604*] also fails to specify how proof of inability to locate a party must be made. It appears that counsel should at least be prepared at the hearing to establish through testimony of the party seeking the award that reasonable diligence has been exercised to locate the other party and that the requesting party lacks knowledge of the missing party's whereabouts. If the summons was served by publication on a missing respondent, the application for an order authorizing publication and its related affidavits or declarations [*see Cal. Rules of Ct., Rule 5.118*; Cal. Judicial Council Form FL-310; *see also Code Civil Proc. § 415.50*] in support of the application should be in the court's case file.

The court may require the filing of an additional affidavit or declaration under penalty of perjury [*see Code Civ. Proc. §§ 2003, 2015.5*] or, if service of the summons was attempted by methods other than publication, an affidavit or declaration setting forth the steps taken to locate the respondent. Mere unsworn representations of counsel in open court describing steps taken to locate the missing party would appear to be insufficient to support a finding that the party cannot be located through the exercise of reasonable diligence. For discussion of service of process, see *Ch. 221, Dissolution of Marriage: Procedure, § 221.10* et seq., and Ch. 518, *Service of Summons and Papers* . For discussion of obtaining orders for preliminary relief, see *Ch. 221, Dissolution of Marriage: Procedure, § 221.10* et seq.

[3] Clarifying Nature of Award in Judgment

When a court awards an entire community estate to one party pursuant to *Fam. Code § 2604*, it is good practice to set forth any findings the court has made regarding the value of the community estate and concerning the inability to locate one party in the judgment. Accordingly, it is suggested that the judgment state, after the printed orders, that the court finds that the net value of the community estate is less than $5,000, with the actual finding of value also set forth, that the respondent (or possibly petitioner) cannot be located through the exercise of reasonable diligence, and that the court therefore awards the community estate to the petitioner (or respondent). For further discussion and a form of judgments [*see* Cal. Judicial Council Form FL-180], see *Ch. 221, Dissolution of Marriage: Procedure, § 221.90* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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18-222 California Forms of Pleading and Practice--Annotated § 222.74

§ 222.74 Personal Injury Damages

Personal injury damages are subject to a number of special statutory provisions that govern their characterization and division [*see Fam. Code §§ 780, 781, 2603*]. In general, although damages based on a cause of action that arose during marriage and before the parties' separation are characterized as community property [*see Fam. Code §§ 780, 781(a), 2603(a)*], they are subject to an allocation rule that requires a court to award *no less* than half the damages to the injured spouse and, absent prescribed findings based on exceptional circumstances, *all* of the damages to that spouse [*see Fam. Code §§ 780, 2603(b)*].

Furthermore, damages are generally characterized as separate property if theyare based on a cause of action that arose after the entry of a judgment of marital dissolution or legal separation, or while either spouse, if he or she is the injured person, was living separately from the other spouse, subject to special reimbursement rules [*Fam. Code § 781*]. For a complete discussion of personal injury damages, see *§ 222.130* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 222.75 Educational Loans

Notwithstanding the equal division requirement in proceedings for marital dissolution or legal separation [*Fam. Code § 2550*; *see Fam. Code § 2622* (assignment of community estate debts)], a loan incurred during marriage for the education or training of a party is not included among the liabilities of the community for purposes of division, but must be assigned for payment by the party, subject to certain statutory limitations [*see Fam. Code §§ 2627, 2641*].

In addition, the community must be reimbursed for community contributions to education or training of a party that substantially enhances the earning capacity of the party, unless any of several prescribed conditions exist that requires a reduction or modification of the amount otherwise reimbursable [*Fam. Code § 2641(b), (c)*; *see also In re Marriage of Weiner (2003) 105 Cal. App. 4th 235, 237, 129 Cal. Rptr. 2d 288* (*Fam. Code § 2641* applies when spouse's education took place before marriage and community funds were used during marriage to repay spouse's educational loans)]. For further discussion of the assignment of educational loans and the reimbursement of the community for contributions to education or training, see *§ 222.260* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 222.76 Community Debts Exceed Community Assets

Another exception to the equal division requirement [*see Fam. Code § 2550*] exists with respect to "negative estate" cases, that is, when community debts exceed community assets. Ordinarily, debts incurred by either spouse after the date of marriage but before the date of the parties' separation are required to be divided in accordance with *Fam. Code §§ 2550-2552*, and *2601-2604*. However, to the extent that community debts exceed total community and quasi-community assets, the excess of debt must be assigned as the court deems just and equitable, taking into account factors such as each party's relative ability to pay [*see Fam. Code § 2622*]. For further discussion of dividing community estate liabilities, see *§ 222.260* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 222.77 Retention of Retirement Benefits by Victim of Murder Attempt

[1] Award of Entire Community Interest in Benefits

As of January 1, 1996, a spouse who is injured as the result of a murder attempt by the other spouse is entitled to an award of 100 percent of the community property interest in the retirement and pension benefits of the injured spouse. In other words, the injured spouse is entitled to retain all of his or her retirement and pension benefits, even if the other spouse would otherwise have a community property interest in the benefits. For this provision to apply, the culpable spouse must have been convicted of attempted murder. This remedy is provided in addition to any other that may be available [*see Fam. Code § 782.5*; *Penal Code § 664*; *see also Fam. Code § 4324* (defining "injured spouse")].

For a general discussion of awarding retirement and pension benefits in proceedings for marital dissolution or legal separation, see *§ 222.180* et seq.

[2] Related Remedies for Victim

[a] Prohibition on Support or Insurance Award

As of January 1, 1996, when a spouse is convicted of attempting to murder the other spouse, the injured spouse is entitled to a prohibition of any temporary or permanent award for spousal support or medical, life, or other insurance benefits or payments from the injured spouse to the other spouse. For this purpose, the term "injured spouse" means the spouse who has been the subject of the murder attempt, whether or not actual physical injury occurred [*see Fam. Code § 4324*; *Penal Code § 664*].

For a complete discussion of spousal support orders, see Ch. 225, *Dissolution of Marriage: Spousal Support* .

[b] Award of Attorney's Fees and Costs

As of January 1, 1996, when a spouse who is the subject of a murder attempt is entitled to a remedy under *Fam. Code § 4324* (*see § 222.77[2][a]*), that spouse is also entitled to an award of reasonable attorney's fees and costs as a sanction, after notice to the other party and an opportunity for that party to be heard [*Fam. Code § 274(a), (b)*; *see Fam. Code § 4324* (defining "injured spouse")]. An award of attorney's fees and costs under the above provision is payable only from the property or income of the party against whom the sanction is imposed, except that the award may be against the sanctioned party's share of the community property. In seeking the fees and cost award, the moving party is not required to demonstrate any financial need [*Fam. Code § 274(c)*].

For a complete discussion of court orders for attorney's fees and costs, see Ch. 226, *Dissolution of Marriage: Attorney's Fees* .

Legal Topics:

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

§§ 222.78[Reserved]

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1. Division Principles

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§ 222.90 Out-of-State Real Property

[1] Court Lacks Authority to Affect Title

A California court lacks jurisdiction to enter a judgment that directly affects a title or interest in real property in another state, even if the court has personal jurisdiction over both spouses in a family law proceeding [*Rozan v. Rozan (1957) 49 Cal. 2d 322, 330, 317 P.2d 11* ; *In re Marriage of Economou (1990) 224 Cal. App. 3d 1466, 1479-1482, 274 Cal. Rptr. 473* ; *see § 222.53[2][b]*].

However, if the court has both parties before it, the court may determine and declare the parties' interests in out-of-state property and enter orders requiring the parties to execute conveyances in compliance with the court's determination [*see Fam. Code § 2660*; *Rozan v. Rozan (1957) 49 Cal. 2d 322, 330, 317 P.2d 11* ; *In re Marriage of Economou (1990) 224 Cal. App. 3d 1466, 1479-1482, 274 Cal. Rptr. 473* ; *In re Marriage of Ben-Yehoshua (1979) 91 Cal. App. 3d 259, 269, 154 Cal. Rptr. 80]* .

[2] Preferred Division Method

Except as provided in *Fam. Code § 2660(b)* (*§ 222.90[3]*), if the property subject to division includes real property situated in another state, the court must, if possible, divide the community and quasi-community property as provided for in the Family Code in such a manner that it is not necessary to change the nature of the interests held in that out-of-state real property [*Fam. Code § 2660(a)*; *see In re Marriage of Valle (1975) 53 Cal. App. 3d 837, 839-840, 126 Cal. Rptr. 38]* . The foregoing reference to not changing "the nature of the interests held" pertains to the manner in which record title is held [*In re Marriage of Fink (1979) 25 Cal. 3d 877, 884, 160 Cal. Rptr. 516, 603 P.2d 881]* .

[3] Alternative Division Methods

If it is not possible to divide the property in the manner set forth in *Fam. Code § 2660(a)* (*§ 222.90[2]*), a court may do any of the following in order to effect a division of the property [*Fam. Code § 2660(b)*]:

(1) Require the parties to execute conveyances or take other actions with respect to the out-of-state real property as are necessary; or

(2) Award to the party who would have been benefited by the conveyances or other actions the money value of the interest in the property that would have been received if the conveyances had been executed or other actions taken.

For discussion of a trial court's authority, at the request of either party, to divide separate property regardless of where it is located [*Fam. Code § 2650*], see *§ 222.30* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral OverviewReal Property LawTitle QualityGeneral Overview

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Volume 18: Dissolution of Marriage: Master Procedural Guide thru Dissolution of Marriage: Property Division and Valuation-Chs. 220-222
Chapter 222 DISSOLUTION OF MARRIAGE: PROPERTY DIVISION AND VALUATION
PART II. LEGAL BACKGROUND
C. Division and Valuation of Real Property
1. Division Principles

18-222 California Forms of Pleading and Practice--Annotated § 222.91

§ 222.91 Apportioning Community and Separate Interests

[1] General Concept of Apportionment

Apportionment typically involves a calculation of the percentage of community and separate interests, respectively, in the entire property. Unless the property is clearly of one character alone, a court usually will first characterize it as being primarily separate or community property and then evaluate any additional interests by applying one of the apportionment methods developed in case law.

A court also may find that the property is of a single character, but that contributions to its acquisition or improvement must be reimbursed to separate or community property. Thus, for example, if the court determines that separate property reimbursement is appropriate for contributions to the acquisition of community realty, it will determine the reimbursement amount under *Fam. Code § 2640*, as discussed in *§ 222.260* et seq., if this statute otherwise applies [*see In re Marriage of Walrath (1998) 17 Cal. 4th 907, 918, 72 Cal. Rptr. 2d 856, 952 P.2d 1124* ; for discussion, *see* Ch. 122, *Community Property*].

[2] Application of Apportionment Methods to Family Home

[a] Home Acquired Before Marriage in Separate Title--Effect of Community Contributions to Acquisition

A spouse may have acquired a home in separate title before marriage, making it a separate property acquisition [*see Fam. Code §§ 760, 770(a)*], and may have made no title changes after marriage. If the parties to the current marriage make community contributions to the home's acquisition that are not gifts to separate property, an apportionment of separate and community interests will be needed. In general, the community will acquire a pro tanto interest in the home in the ratio that the principal payments on the purchase price made with community funds bear to the payments made with separate funds [*see In re Marriage of Moore (1980) 28 Cal. 3d 366, 372-374, 168 Cal. Rptr. 662, 618 P.2d 208* ; *In re Marriage of Frick (1986) 181 Cal. App. 3d 997, 1007-1008, 226 Cal. Rptr. 766* ; *In re Marriage of Marsden (1982) 130 Cal. App. 3d 426, 436-439, 181 Cal. Rptr. 910]* . The community will also acquire a "pro tanto" interest in

that manner if the parties use community *loan proceeds* to make such payments, because there is no discernible difference between using community funds and loan proceeds for this purpose [*Branco v. Branco (In re Branco) (1996) 47 Cal. App. 4th 1621, 1629, 55 Cal. Rptr. 2d 493]* . Any appreciation of the property must be valued and divided correspondingly [*see In re Marriage of Moore (1980) 28 Cal. 3d 366, 372-374, 168 Cal. Rptr. 662, 618 P.2d 208* ; *Branco v. Branco (In re Branco) (1996) 47 Cal. App. 4th 1621, 1629, 55 Cal. Rptr. 2d 493* ; *In re Marriage of Frick (1986) 181 Cal. App. 3d 997, 1007-1008, 226 Cal. Rptr. 766* ; *In re Marriage of Marsden (1982) 130 Cal. App. 3d 426, 436-439, 181 Cal. Rptr. 910]* .

In general, the formula expressed in *In re Marriage of Moore* [*In re Marriage of Moore (1980) 28 Cal. 3d 366, 373-374, 168 Cal. Rptr. 662, 618 P.2d 208]* , as modified by that set forth in *In re Marriage of Marsden* [*In re Marriage of Marsden (1982) 130 Cal. App. 3d 426, 436-440, 181 Cal. Rptr. 910]* , will be used to compute the respective interests if community contributions have been made to the acquisition of a spouse's premarital home [*see In re Marriage of Frick (1986) 181 Cal. App. 3d 997, 1008, 226 Cal. Rptr. 766]* .

Under this formula, when the down payment was made with separate funds and the loan was based on separate property, the separate and community property percentage interests are first determined. The separate property percentage interest is determined by crediting the separate property with the down payment and full amount of the loan on the property less the amount by which the community property payments reduced the principal balance of the loan. This sum is divided by the purchase price. The resulting figure is the separate property percentage share. The community property percentage share is determined by dividing the amount in which community property payments reduced the principal by the purchase price. The separate property interest as valued at the end of marriage is determined by adding all the prenuptial appreciation, the amount of capital appreciation during marriage attributable to the separate funds (determined by multiplying the capital appreciation during marriage by the separate property percentage interest), and the amount of equity paid by separate funds. The community property share in the value of the property is determined by adding the amount of capital appreciation during marriage attributable to community funds to the equity paid by community funds [*see In re Marriage of Frick (1986) 181 Cal. App. 3d 997, 1008, 226 Cal. Rptr. 766]* . For a differing approach in the case of community improvements to a spouse's separate home, see *§ 222.91[2][d]* [*Bono v. Clark (2002) 103 Cal. App. 4th 1409,1426-1427, 128 Cal. Rptr. 2d 31]* .

The source and amount of funds paid for interest on a purchase money loan, and for taxes and insurance, are not considered in computing the separate and community interests, because such expenditures do not increase the equity value of the property; that is, they do not "contribute to capital investment" [*In re Marriage of Moore (1980) 28 Cal. 3d 366, 372-373, 168 Cal. Rptr. 662, 618 P.2d 208* ; *In re Marriage of Marsden (1982) 130 Cal. App. 3d 426, 438, 181 Cal. Rptr. 910* ; *see In re Marriage of Frick (1986) 181 Cal. App. 3d 997, 1013, 226 Cal. Rptr. 766]* .

Community improvements to a spouse's separate home are discussed in *§ 222.91[2][d]*.

[b] Premarital Home Converted to Joint Title During Marriage

A spouse may have acquired a home in separate title before marriage, but converted the title to joint form during marriage. A home converted to joint title is presumed to be a community asset for the purpose of its division on dissolution or legal separation under a statutory presumption concerning property acquired during marriage in certain joint title forms, unless the presumption is rebutted [*Fam. Code §§ 2580, 2581*; *In re Marriage of Bankovich (1988) 203 Cal. App. 3d 49, 54-56, 249 Cal. Rptr. 713* ; *see* Ch. 122, *Community Property*].

If this community presumption [*Fam. Code §§ 2580, 2581*] is not rebutted, then the spouse who originally held separate title may obtain reimbursement under *Fam. Code § 2640(b)* for his or her traceable separate property contributions to the property's acquisition, unless he or she has made a written waiver of the right to reimbursement or signed a writing that has the effect of a waiver, assuming this section applies. "Contributions to the acquisition of property" are defined by *Fam. Code § 2640(a)* and are discussed more fully in § 222.302[1] et seq.

When *Fam. Code § 2640(b)* applies, generally with respect to property acquired on or after January 1, 1984 [*see In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1225, 44 Cal. Rptr. 2d 155, 899 P.2d 1349* ; *In re Marriage of Bankovich (1988) 203 Cal. App. 3d 49, 54-56, 249 Cal. Rptr. 713]* , the measure of separate property reimbursement is the value of the separate property equity in the home at the time of its conversion to joint form without enhancement for interest or appreciation [*see In re Marriage of Perkal (1988) 203 Cal. App. 3d 1198, 1202, 250 Cal. Rptr. 296]* .

Moreover, if, prior to conversion to joint form, nongift community contributions were made to the home's acquisition, the community would acquire a pro tanto interest in the separate property up to the time of conversion, using the *Moore/Marsden* formula. This pro tanto interest must be taken into account in computing the amount of the separate property reimbursement permitted under *Fam. Code § 2640*. For discussion of computing separate and community interests in premarital property held in one spouse's name alone (which would apply to preconversion property), see *§ 222.91[2][a]* [*In re Marriage of Kahan (1985) 174 Cal. App. 3d 63, 72, 219 Cal. Rptr. 700* ; *In re Marriage of Neal (1984) 153 Cal. App. 3d 117, 124, 124 n.11, 200 Cal. Rptr. 341* (disapproved on other grounds in *In re Marriage of Buol (1985) 39 Cal. 3d 751, 763 n.10, 218 Cal. Rptr. 31, 705 P.2d 354* , and *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253*); *see In re Marriage of Moore (1980) 28 Cal. 3d 366, 372-374, 168 Cal. Rptr. 662, 618 P.2d 208* ; *In re Marriage of Marsden (1982) 130 Cal. App. 3d 426, 436-440, 181 Cal. Rptr. 910]* .

Similarly, if both spouses have separate property interests in the property whenit is converted during marriage to joint title, such as by purchasing the property as tenants in common *before* marriage, the same reimbursement concept [*see Fam. Code § 2640*] would apply on marital dissolution when the joint form-community presumption [*see Fam. Code §§ 2580, 2581*] is not rebutted. The proper measure of reimbursement for each party is the fair value of his or her separate property interest at the time of conversion, less encumbrances and non-gift community property contributions to principal before conversion. However, before valuing each party's separate interest at the time of conversion, it is necessary to determine the extent of each party's preconversion separate interest, because the parties' respective interests might not be equal. If the spouses each contribute separate funds before marriage to purchase real property as tenants in common and make mortgage payments during marriage with community funds prior to its conversion to joint title form, the *Moore-Marsden* rule [*In re Marriage of Moore (1980) 28 Cal. 3d 366, 373-374, 168 Cal. Rptr. 662, 618 P.2d 208* , as modified by *In re Marriage of Marsden (1982) 130 Cal. App. 3d 426, 181 Cal. Rptr. 910]* should be used to apportion the spouses' separate and community interests on dissolution, just as if the property were the separate property of only one spouse and payments were made after marriage with community funds [*see In re Marriage of Rico (1992) 10 Cal. App. 4th 706, 708, 710, 12 Cal. Rptr. 2d 659]* .

In the situation in which only one spouse had a separate property interest, if the current joint form-community property presumption [*see Fam. Code §§ 2580, 2581*] is rebutted, so that the premarital property remained separate property, the *Moore/Marsden* formula also generally would be used to apportion the various interests in the property when non-gift community contributions were made to its acquisition [*see In re Marriage of Kahan (1985) 174 Cal. App. 3d 63, 72, 219 Cal. Rptr. 700* ; *see also In re Marriage of Moore (1980) 28 Cal. 3d 366, 372-374, 168 Cal. Rptr. 662, 618 P.2d 208* ; *In re Marriage of Marsden (1982) 130 Cal. App. 3d 426, 436-440, 181 Cal. Rptr. 910]* . Additionally, it appears that this apportionment method would be used when the "joint tenancy residence-community property" presumption of prior law applies and is rebutted, assuming that non-gift community contributions were made to help acquire the property [*see* former *Civ. Code § 5110*; *see also In re Marriage of Hilke (1992) 4 Cal. 4th 215, 222-224, 14 Cal. Rptr. 2d 371, 841 P.2d 891* ; *In re Marriage of Lucas (1980) 27 Cal. 3d 808, 814-816, 166 Cal. Rptr. 853, 614 P.2d 285* ; *In re Marriage of Benart (1984) 160 Cal. App. 3d 183, 190, 206 Cal. Rptr. 495* (disapproved on other grounds in *In re Marriage of Buol (1985) 39 Cal. 3d 751, 763 n.10, 218 Cal. Rptr. 31, 705 P.2d 354* and *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253*); *In re Marriage of Frick (1986) 181 Cal. App. 3d 997, 1007-1008, 226 Cal. Rptr. 766]* .

Although it appears that a conversion of title after marriage constitutes an "acquisition during marriage" for the purpose

of raising the statutory presumptions relating to joint title, this issue has not been definitively resolved with respect to the "joint tenancy residence-community property" presumption of prior law [former *Civ. Code § 5110*], at least when the joint tenancy was taken for survivorship purposes only [*see In re Marriage of Scherr (1986) 177 Cal. App. 3d 314, 317-319, 222 Cal. Rptr. 872* (community presumption raised by conversion to joint tenancy was rebutted in any event by parties' agreement, subject to pro tanto community interest)]. The circumstances under which prior law applies are discussed in Ch. 122, *Community Property* . A contrasting use of the term "acquired during marriage" is explained hereafter.

[c] Home Acquired During Marriage

[i] "Acquired During Marriage" Defined

In apportioning interests in a family home acquired during marriage, the term "acquisition" is often used in the sense of a simultaneous purchase (or other means of transfer) and obtaining of title to the property. However, "acquisition" also may be used to refer solely to the date on which a change in title took place, such as when a spouse's premarital home is converted from sole title to a form of joint title during marriage. Acquisition of a community interest during marriage as a result of a change in premarital title is discussed in *§ 222.91[2][b]*.

In the discussion that follows, "acquisition" refers to an original purchase by, or other transfer of the home to, one or both spouses during marriage, and an attendant transfer of title at the same time. For a general discussion of the time of acquisition, see Ch. 122, *Community Property* .

[ii] Effect of Separate Down Payment on Community Acquisition

Spouses may have acquired a home during marriage with a separate property down payment and community payments on a purchase money loan that was secured by the property and obtained on the basis of community credit. While these factors are important in ascertaining interests in the home, they will not be determinative of characterization if a more specific factor, such as a statutory title presumption, applies. Thus, counsel should examine the form of title to determine if any special presumption arises from the title.

If title was taken by the spouses during marriage in one of the joint forms specified by *Fam. Code § 2581* and this statute applies, or if prior law applies but the home is a single-family residence with title in joint tenancy (or title as "husband and wife"), the home will be rebuttably presumed community property on dissolution or legal separation [*see Fam. Code §§ 2580, 2581*; former *Civ. Code § 5110*; *In re Marriage of Lucas (1980) 27 Cal. 3d 808, 814, 166 Cal. Rptr. 853, 614 P.2d 285]* .

When the current "joint form-community property" presumption [*Fam. Code § 2581*] applies and is not rebutted, the property will be found to be communityproperty. However, traceable separate property contributions to its acquisition must be reimbursed pursuant to *Fam. Code § 2640*, if that statute also applies, and no waiver of the reimbursement right was made [*see § 222.302[2][c]* for discussion of characterization and tracing, *see* Ch. 122, *Community Property*]. If, however, the "joint form-community property" presumption is rebutted by written evidence that a separate interest in the home was to be maintained, the community is ordinarily entitled to an apportioned interest in the home for nongift community contributions to its acquisition [*cf. In re Marriage of Lucas (1980) 27 Cal. 3d 808, 816, 166 Cal. Rptr. 853, 614 P.2d 285* (applying apportionment formula of *In re Marriage of Aufmuth (1979) 89 Cal. App. 3d 446, 456-457, 152 Cal. Rptr. 668*)]. Any written agreement entered into by the parties that rebuts the *Fam. Code § 2581* presumption must be scrutinized to determine if the parties intended some other allocation of interests, such as an agreement that the entire property be separate property [*see Fam. Code § 2581* (providing for rebuttal of community presumption by written agreement or statement in deed); *see also Fam. Code § 850 et seq.* (transmutation of interests)].

By contrast, if the "joint tenancy residence-community property" presumption of prior law [former *Civ. Code § 5110*]

applies and is not rebutted, the home will be found to be community property, and no separate reimbursement is required absent an agreement or understanding to the contrary [*In re Marriage of Lucas (1980) 27 Cal. 3d 808, 816, 166 Cal. Rptr. 853, 614 P.2d 285* ; *see* *In re Marriage of Bankovich (1988) 203 Cal. App. 3d 49, 54-56, 249 Cal. Rptr. 713]* . However, if that presumption is rebutted, so that one party is found to have preserved a separate interest, the community ordinarily will be allowed an apportioned interest in the home to account for nongift community contributions to its acquisition [*see* *In re Marriage of Lucas (1980) 27 Cal. 3d 808, 816, 166 Cal. Rptr. 853, 614 P.2d 285* (applying apportionment formula of *In re Marriage of Aufmuth (1979) 89 Cal. App. 3d 446, 456-457, 152 Cal. Rptr. 668*)]. On the rebuttal of the community presumption by a sufficient evidentiary showing of an intent to preserve a separate interest, the community and separate interests in the property have been apportioned as percentages of the whole. Under the *Aufmuth* formula, a spouse who made a separate down payment is given a separate property interest in the property in the proportion that the down payment bears to the purchase price; the community acquires that percentage of the residence that the community loan bears to the purchase price. As explained in *In re Marriage of Lucas* [*In re Marriage of Lucas (1980) 27 Cal. 3d 808, 816 n.3, 166 Cal. Rptr. 853, 614 P.2d 285* (applying apportionment formula of *In re Marriage of Aufmuth (1979) 89 Cal. App. 3d 446, 456-457, 152 Cal. Rptr. 668*)], the value of those interests is computed by:

(1) Determining the amount of capital appreciation, which is computed by subtracting the purchase price from the property's fair market value;

(2) The separate property interest would be determined by adding the amount of capital appreciation attributable to separate funds to the amount of equity paid by separate funds; and

(3) The community interest would be the amount of capital appreciation attributable to community funds plus the amount of equity paid by community funds; the amount of equity paid by community funds is represented by the amount by which the principal balance on the loan has been reduced.

For discussion of a special apportionment rule for separate property interests when a court has made a "deferred sale of home order," see *§§ 222.302[1]* and *[2][e]*.

[iii] Effect of Community Contributions to Separate Acquisition

A spouse may have acquired a family home during marriage under circumstances that ordinarily confer separate property ownership, such as, for example, by obtaining a purchase money loan on the basis of separate credit alone and using separate funds for a down payment [*see* *In re Marriage of Mix (1975) 14 Cal. 3d 604, 610, 122 Cal. Rptr. 79, 536 P.2d 479]* . When community funds are then used to make monthly loan payments, the issue arises whether the community has obtained an interest.

In general, when community funds (or community loan proceeds) are applied during marriage towards the acquisition of a spouse's separate home, the community will acquire a pro tanto interest in the home in the ratio that the payments on the purchase price made with community funds bear to the part paid with separate funds, unless the community contributions were intended as a gift [*see* *Branco v. Branco (In re Branco) (1996) 47 Cal. App. 4th 1621, 1629, 55 Cal. Rptr. 2d 493* ; *In re Marriage of Broderick (1989) 209 Cal. App. 3d 489, 502, 257 Cal. Rptr. 397* (pro tanto formula of *In re Marriage of Moore* applied, given that parties failed to raise gift issue); *In re Marriage of Gowdy (1986) 178 Cal. App. 3d 1228, 1234, 224 Cal. Rptr. 400* ; *In re Marriage of Stoner (1983) 147 Cal. App. 3d 858, 864, 195 Cal. Rptr. 351* (reliance on community credit and use of community funds ordinarily would result in pro tanto community interest, but execution of quitclaim deed transmuted interest, and permissive use of community funds was gift); *but see* *In re Marriage of Camire (1980) 105 Cal. App. 3d 859, 866-867, 164 Cal. Rptr. 667* (community not entitled to interest in home given to wife during marriage despite use of community funds to reduce encumbrance, given that rule denying apportionment or reimbursement for community contribution to wife's separate property has not been overruled); *see also* *In re Marriage of Nelson (2006) 139 Cal. App. 4th 1546, 1557, 44 Cal. Rptr. 3d 52* (community

payments on home equity loan secured by one spouse's separate property do not confer interest in this property on community because home equity loan was not substituted in whole or in part for purchase money loan)].

On dissolution, the separate property percentage interest in the property, like the community's percentage interest, is determined relative to the original purchase price. The separate property interest is the ratio (in percentage terms) of the separate property owner's contribution to the payment of this price--including separate property loans--over the price itself. The community's interest is the ratio (in percentage terms) of what is effectively the community's contribution to the payment of this price--that is, the extent to which community funds have reduced the balance owed on the separate property loans used to purchase the property--over the price itself [*In re Marriage of Nelson (2006) 139 Cal. App. 4th 1546, 1557, 44 Cal. Rptr. 3d 52]* .

The rental value of the property should not be an item of credit to the spouse who owns the property when calculating the reimbursement to the community for its contribution to the property's equity value. Only those community funds that increase the property's equity should be considered in dividing the property on dissolution. By implication, just as the equity in real property is not influenced by finance charges, it is also not influenced by the use or occupancy of the property [*In re Marriage of Nelson (2006) 139 Cal. App. 4th 1546, 1555, 44 Cal. Rptr. 3d 52]* .

For a detailed discussion of apportionment and reimbursement issues, see Gray & Wagner, Complex Issues in California Family Law, Vol. E: *Equitable Remedies--Moore-Marsden and Beyond* (Matthew Bender).

Some courts have distinguished the making of improvements to separate property using community funds, from using these funds for acquisition, as discussed in *§ 222.91[2][d]*.

[d] Community Improvements to Separate Home

Improvements made from community property to one spouse's separate property home have posed special characterization and apportionment problems. When husbands had sole management and control of community property (before January 1, 1975), the rule developed that a husband's use of community funds during marriage to improve his wife's separate property should be presumed a gift, but his use of community funds to improve his own separate property entitled the community to reimbursement unless the wife consented to this use [*see In re Marriage of Jafeman (1972) 29 Cal. App. 3d 244, 256, 105 Cal. Rptr. 483* ; *see also In re Marriage of Allen (2002) 96 Cal. App. 4th 497, 502, 116 Cal. Rptr. 2d 887]* . When community reimbursement was proper, it was measured either by the increased value of the property or the amount expended, whichever was greater [*see In re Marriage of Frick (1986) 181 Cal. App. 3d 997, 1019, 226 Cal. Rptr. 766]* .

One appellate court applied these rules to community funds used both for acquisition and improvement, reasoning that despite the enactment of statutes conferring equal management and control, the traditional rule that denies either apportionment or reimbursement for community contributions to a wife's separate property had not been overruled [*see In re Marriage of Camire (1980) 105 Cal. App. 3d 859, 867, 164 Cal. Rptr. 667* ; *see also In re Marriage of Allen (2002) 96 Cal. App. 4th 497, 503-504, 116 Cal. Rptr. 2d 887* (discussing and disagreeing with *Camire and Frick); In re Marriage of Gowdy (1986) 178 Cal. App. 3d 1228, 1232, 224 Cal. Rptr. 400* (discussing *Camire* holding)].

Later decisions, however, have not followed this analysis [*see, e.g., In re Marriage of Gowdy (1986) 178 Cal. App. 3d 1228, 1232, 1234, 224 Cal. Rptr. 400* (*Camire* holding contradicts pro tanto interest rule followed in *In re Marriage of Moore* regarding use of community funds to reduce encumbrance)]. At least one appellate court has concluded that the effect of enacting "equal management and control" statutes was to place each spouse in the husband's pre-1975 position [*see* former *Civ. Code §§ 5125, 5127*; *Fam. Code §§ 1100, 1102*]. Thus, if one spouse uses community funds to improve his or her own separate property without the other spouse's consent, the community should be reimbursed. This is premised on the concept that if one spouse acts in his or her self-interest to the detriment of the community interest, the community is entitled to restitution [*see In re Marriage of Frick (1986) 181 Cal. App. 3d 997, 1019, 226 Cal. Rptr.*

766] .

If a spouse expends community funds for the improvement of the *other spouse's* separate property, the preexisting rule has been to presume that the spouse had made a gift of community funds and the community was not entitled to reimbursement for the expenditures [*In re Marriage of Camire (1980) 105 Cal. App. 3d 859, 866, 164 Cal. Rptr. 667]* . However, at least one reported decision has rejected the gift presumption as "outside the mainstream of community property principles applied in other American jurisdictions" [*In re Marriage of Wolfe (2001) 91 Cal. App. 4th 962, 969]* . Therefore, in that court's view, a gift is no longer presumed even if community funds are used by one spouse to improve the other spouse's separate property [*In re Marriage of Wolfe (2001) 91 Cal. App. 4th 962, 110 Cal. Rptr. 2d 921* (husband was ordered to reimburse community for half of amount paid to install irrigation system on his separate property, but was not liable to reimburse community for funds used to pay property taxes on his personal property)]. Similarly, another appellate court upheld the right of a community to reimbursement when a wife used community funds to make improvements to her husband's separate property [*In re Marriage of Allen (2002) 96 Cal. App. 4th 497, 501, 116 Cal. Rptr. 2d 887* ; *In re Marriage of Wolfe (2001) 91 Cal. App. 4th 962, 972, 110 Cal. Rptr. 2d 921]* . That court indicated that when community funds are used to make capital improvements to a spouse's separate real property, the community is entitled to reimbursement or a pro tanto interest under the *Moore/Marsden* rule (see *§ 222.91[2][a][i]*), both because its rationale applies equally to the reduction of an encumbrance and to capital improvements, and because the legal underpinnings of the older "gift presumption" rule have been destroyed by intervening changes in family law [*In re Marriage of Allen (2002) 96 Cal. App. 4th 497, 501, 116 Cal. Rptr. 2d 887* ; *see Dunn v. Mullan (1931) 211 Cal. 583, 590, 296 P. 604* (presumption that if husband expended community funds for benefit of wife's separate property he intended, absent evidence of contrary intent, improvements or benefits as gift)].

More recently, *Bono v. Clark (2002) 103 Cal. App. 4th 1409, 128 Cal. Rptr. 2d 31* also rejected the gift presumption when community funds are used to improve a spouse's separate property, and held that (1) if improvements do not enhance the property's value, the other spouse's recovery will be limited to reimbursement of one-half of the community funds spent on improvements [*Bono v. Clark (2002) 103 Cal. App. 4th 1409, 1425, 128 Cal. Rptr. 2d 31* , *citing In re Marriage of Wolfe (2001) 91 Cal. App. 4th 962, 972]* , and (2) if improvements contribute to an increase in the property's equity value, the community is entitled to a *pro tanto* interest in the property [*Bono v. Clark (2002) 103 Cal. App. 4th 1409, 1425, 128 Cal. Rptr. 2d 31* , *citing In re Marriage of Allen (2002) 96 Cal. App. 4th 497, 502, 116 Cal. Rptr. 2d 887]* . However, *Bono* departed from the traditional *Moore/Marsden* calculation of a pro tanto interest in three ways: (1) instead of apportioning equity appreciation to the community from the time the marriage begins, the right of the community to share in the property's appreciation begins only at the time of funding of improvements, (2) premarital/preimprovement equity appreciation is credited to the separate property interest, and (3) the community's share of property appreciation ends as of the date of separation [*Bono v. Clark (2002) 103 Cal. App. 4th 1409, 1426-1427, 128 Cal. Rptr. 2d 31]* .

If separate funds are used to improve a community home, *Fam. Code § 2640*, to the extent it applies, permits reimbursement on dissolution or legal separation (see *§ 222.260* et seq.). Also, any purported transmutation of property must be evaluated under applicable statutes and case law [*see Fam. Code § 850 et seq.*].

[3] Related Division and Valuation Issues

In addition to apportioning the parties' interests in the property, the court will rule on the method by which those apportioned interests are to be satisfied. Generally, this entails a determination of whether the property should be divided in kind, typically through a sale and division of the proceeds (deferred or not), whether one party may effect a "cash out" of the other's interest, or whether, when an award of the entire home to one party is appropriate under the "single asset proviso," a promissory note to equalize the division is appropriate [*see Fam. Code §§ 2550, 2552, 2600 et seq.*; *In re Marriage of Slater (1979) 100 Cal. App. 3d 241, 247-249, 160 Cal. Rptr. 686* ; *In re Marriage of Herrmann (1978) 84 Cal. App. 3d 361, 366-367, 148 Cal. Rptr. 550]* . For discussion of a special apportionment rule for separate property interests when a court has made a "deferred sale of home order," see *§ 222.302[1]* and *[2][e]*.

At the outset of the proceedings, counsel will not necessarily know the home's value or the division method that will be ultimately ordered. Therefore, counsel should anticipate the need for, and plan on presenting evidence of value. For discussion of a court's jurisdiction to determine division methods, see *§ 222.53[5][a]* et seq. Valuation of real property is discussed in *§ 222.92[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 222.92 Deferred Sale of Home Orders

[1] Statutory Requirements--Authority and Definition

Apart from its authority to award a family home or other single asset to a spouse "when economic circumstances" warrant [*see Fam. Code § 2601*], a trial court is authorized by statute to defer sale and to award the temporary use of the home to a custodial parent under the circumstances described below [*see Fam. Code § 3800 et seq.*; *see also* former *Civ. Code §§ 4700.10, 4800.7*]. Pursuant to statute, a "deferred sale of home order" is an order that temporarily delays the sale and awards the temporary exclusive use and possession of the family home to a custodial parent of a minor child [*see Fam. Code § 3800(a)*] or child for whom support is authorized under *Fam. Code §§ 3900* and *3901*, or *3910*, whether or not the custodial parent has sole or joint custody, in order to minimize the adverse impact of dissolution or legal separation on the child's welfare [*Fam. Code § 3800(b)*]. The order is considered a form of child support, though not expressly stated to be as such by statute [*see In re Marriage of Braud (1996) 45 Cal. App. 4th 797, 813, 53 Cal. Rptr. 2d 179]* .

For discussion of a special apportionment rule for separate property interests when a court has made a "deferred sale of home order," see *§ 222.302[1]* and *[2][e]*.

[2] Determination of Economic Feasibility

If one of the parties requests a deferred sale of home order [*see Fam. Code § 3800 et seq.*], the court must first determine whether it is *economically feasible* to maintain the following: (1) payments of any note secured by a trust deed; (2) property taxes; (3) insurance for the home during the deferred sale period; and (4) the condition of the home comparable to that at the time of trial. In making this determination, the court must consider the resident parent's [*see Fam. Code § 3800(c)* (defining "resident parent")] income, the availability of child or spousal support (or both), and any other sources of funds available to make the payments [*Fam. Code § 3801(a), (b)*].

In requiring this determination of economic feasibility, the Legislature's intent is (1) to avoid the likelihood of possible

defaults on the payments of notes and resulting foreclosures, (2) to avoid inadequate insurance coverage, (3) to prevent deterioration of the condition of the family home, and (4) to prevent any other circumstance that would jeopardize both parents' equity in the home [*Fam. Code § 3801(c)*].

[a] Considerations in Granting or Denying Order

[i] Statutory Factors Summarized

After determining that it is economically feasible to consider ordering a deferred sale of the family home, the court may grant a deferred sale if it determines that the order is necessary to minimize the adverse impact of the parties' marital dissolution or legal separation on the child [*Fam. Code § 3802(a)*]. In exercising its discretion to grant or deny a deferred sale of home order, the court must consider all of the following [*Fam. Code § 3802(b)*]:

(1) The length of time the child has resided in the home;

(2) The child's placement or grade in school;

(3) The accessibility and convenience of the home to the child's school and other services or facilities used by and available to the child, including child care;

(4) Whether or not the home has been adapted or modified to accommodate any physical disabilities of a child or a resident parent in a manner such that a change in residence may adversely affect the ability of the resident parent to meet the child's needs;

(5) The emotional detriment to the child associated with a change in residence;

(6) The extent to which the location of the home permits the resident parent to continue his or her employment;

(7) The financial ability of each parent to obtain suitable housing;

(8) The tax consequences to the parents;

(9) The economic detriment to the nonresident parent in the event of a deferred sale of home order; and

(10) Any other factors the court deems just and equitable.

[ii] Effect of Separate Ownership Interest in Home

In providing for deferred sale orders, the Family Code neither defines the term "family home" nor expressly limits such orders only with respect to homes that are the community property of the parties [*see Fam. Code § 3800 et seq.*; *In re Marriage of Braud (1996) 45 Cal. App. 4th 797, 809-812]* . One appellate court has held that a deferred sale order may be made with respect to a home in which the nonresident parent has a *separate property* interest, and has suggested that such an order could be made even as to a home that the nonresident parent owns fully as separate property. In this court's view, the Family Code authorizes deferred sale orders that impinge on separate property interests of nonresident parents who are also child support obligors, at least (1) when the trial court determines that the deferral order is "economically feasible" and "necessary in order to minimize the adverse impace of dissolution of marriage or legal separation of the parties on the child" and that (2) subjecting the separate property interest of the nonresident spouse to the deferral order would be "just." The court must exercise its considerable discretion in determining whether to make the order, and consider all the factors set forth in *§ 222.92[2][a][i]*, particularly those involving the financial ability of each parent to obtain suitable housing, the economic detriment to the nonresident parent if the order is granted, and "any

other factors the court deems just and equitable" [*see Fam. Code § 3802*; *In re Marriage of Braud (1996) 45 Cal. App. 4th 797, 812-813, 813 n.15, 53 Cal. Rptr. 2d 179]* .

[b] Contents and Recording of Order

A deferred sale of home order must state the duration of the order and may include the legal description and assessor's parcel number of the real property that is subject to the order [*Fam. Code § 3803*]. In addition, the court may make an order specifying the parties' respective responsibilities for the payment of costs of routine maintenance and capital improvements [*Fam. Code § 3806*]. For a form of deferred sale order, *see § 222.360*.

A deferred sale order may be recorded in the office of the county recorder in the county where the property is located [*Fam. Code § 3804*].

[c] Modification or Termination

[i] Court's Discretion

Except as otherwise agreed by the parties in writing, a deferred sale of home order may be modified or terminated at any time at the court's discretion [*Fam. Code § 3807*].

[ii] Rebuttable Presumption for Termination

Except as otherwise agreed by the parties in writing, if the party awarded the order remarries, or if there is otherwise a change of circumstances affecting the determinations made pursuant to *Fam. Code § 3801* or *3802*, or affecting the economic status of the parties or the children on which the award is based, a rebuttable presumption, affecting the burden of proof, is created that further deferral of the sale is no longer an equitable method of minimizing the adverse impact of the dissolution or legal separation on the children [*Fam. Code § 3808*].

Whether a sufficient "change of circumstances" has occurred in order to terminate the order is a question of fact for the trial court. Economic circumstances are considered a key factor, in this regard. For example, nonmarital cohabitation on a part-time, or even full-time, basis by the resident parent and another person *may, but need not necessarily*, constitute a change of circumstances that warrants termination of a deferred sale order. It is only when the cohabitation constitutes "a change in circumstances affecting the determinations made pursuant to [*Family Code] Section 3801* or *3802* or affecting the economic circumstances of the parties or the children on which the award is based" that the trial court should reconsider its deferred sale order. The amount of support being provided by the nonmarital cohabitant of the resident parent must be examined, in this regard [*see In re Marriage of Braud (1996) 45 Cal. App. 4th 797, 812-813, 53 Cal. Rptr. 2d 179 n,15*].

For a related discussion of the effect of income provided by a subsequent spouse or nonmarital partner on the payment of child or spousal support (so-called "new mate" income), see Ch. 224, *Dissolution of Marriage: Child Support* and Ch. 225, *Dissolution of Marriage: Spousal Support* .

[d] Reservation of Jurisdiction

In making a deferred sale of home order pursuant to *Fam. Code § 3800 et seq.*, the court must reserve jurisdiction to determine any issues that arise with respect to the order including, but not limited to, the maintenance of the home and the tax consequences to each party [*Fam. Code § 3809*; *cf. In re Marriage of Schenck (1991) 228 Cal. App. 3d 1474, 279 Cal. Rptr. 651* (reservation of jurisdiction over deferred sale gave family law department priority over law and motion department, which properly denied wife's application for order to sell home for enforcement of support orders)].

[3] Family Home Awards Under Prior Case Law

Cases decided before the enactment of the current statutes governing deferred sale orders recognized the delayed division of the community residence as an acceptable method of dividing the community estate under certain circumstances [*see, e.g., In re Marriage of Stallworth (1987) 192 Cal. App. 3d 742, 746-750, 237 Cal. Rptr. 829* (decided after enactment of former *Civ. Code § 4800.7*, the predecessor of former *Civ. Code § 4700.10*); *In re Marriage of Duke (1980) 101 Cal. App. 3d 152, 155-159, 161 Cal. Rptr. 444* ; *In re Marriage of Herrmann (1978) 84 Cal. App. 3d 361, 365-366, 148 Cal. Rptr. 550* (delayed division of family home until parties' youngest child reached majority); *In re Marriage of Boseman (1973) 31 Cal. App. 3d 372, 375-378, 107 Cal. Rptr. 232* ; *see Fam. Code § 2601*]. After the seminal case of *In re Marriage of Duke (1980) 101 Cal. App. 3d 152, 155-159, 161 Cal. Rptr. 444* , orders deferring sale of the home became known as *"Duke"* orders, and courts granted them on the basis of the parties' economic circumstances, coupled with consideration of the needs of their children.

Many of the considerations developed in appellate court decisions regarding delayed division of a family residence have been incorporated in *Fam. Code § 3800 et seq.* [*see, e.g., Fam. Code § 3802* (factors for court's consideration in exercising discretion)]. To the extent that they do not conflict with the statutory requirements, these cases still provide guidance concerning the court's exercise of its discretion to order a deferred sale of the family home [*see, e.g., In re Marriage of Stallworth (1987) 192 Cal. App. 3d 742, 749, 237 Cal. Rptr. 829* (decided after enactment of former *Civ. Code § 4800.7*, the predecessor to former *Civ. Code § 4700.10*)].

[4] Awards Under Prior Statutory Law

The current statutory authorization for deferred sale orders under the Family Code [*see Fam. Code § 3800 et seq.*] continued the substance of former *Civ. Code § 4700.10*. That statute was itself preceded by former *Civ. Code § 4800.7*, operative from January 1, 1985 through December 31, 1988, which provided in part that, except as the parties otherwise agreed in writing, a "family home award" to the party having custody of the minor children could be modified or terminated at any time at the discretion of the court [former *Civ. Code § 4800.7(b)(1)*; *see In re Marriage of Howard (1986) 184 Cal. App. 3d 1, 7, 228 Cal. Rptr. 813]* . "Family home award" was defined as an order that awards temporary use of the family home to the party having custody of minor children and children for whom support is authorized under (now) former *Civ. Code § 206* (adult indigent children) in order to minimize the adverse impact of dissolution or legal separation on the welfare of the children [former *Civ. Code § 4800.7(a)*].

Furthermore, except as the parties otherwise agreed in writing, former *Civ. Code § 4800.7* created a rebuttable presumption, similar to the provision in *Fam. Code § 3808*, concerning termination of the need for further delay in the sale [former *Civ. Code § 4800.7(b)(2)*]. These prior provisions applied regardless of whether the family home award was made before or after January 1, 1985 [former *Civ. Code § 4800.7(c)*], but courts found limits to their retroactivity [*see In re Marriage of Guthrie (1987) 191 Cal. App. 3d 654, 660-664, 236 Cal. Rptr. 583* (retroactive application to modify or terminate *stipulated* family home award was unconstitutional impairment of contractual rights, at least when stipulation was made as integral part of stipulated property division and was not intended as additional child support); *but see In re Marriage of Howard (1986) 184 Cal. App. 3d 1, 6-8, 228 Cal. Rptr. 813* (retroactive application upheld, when award was clearly intended as additional child support; as additional support, award was modifiable even without express reservation of jurisdiction)].

Former *Civ. Code § 4800.7* was repealed operative January 1, 1989 [*see* Stats. 1988, ch. 729, § 2]. It was superseded by (now) former *Civ. Code § 4700.10*, the predecessor to the current statutes under the Family Code. Former *Civ. Code § 4700.10* was expressly applicable regardless of whether the deferred sale of home order was made before or after January 1, 1989 [former *Civ. Code § 4700.10(g)*].

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[Reserved]

§§ 222.93[Reserved]

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§ 222.110 Value Defined

The value of real property normally is its market value; that is, the highest price estimated in terms of money that the property would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser buying with knowledge of all the uses and purposes to which it was adapted and for which it is capable [*see In re Marriage of Folb (1975) 53 Cal. App. 3d 862, 868-869, 871, 126 Cal. Rptr. 306* , disapproved on other grounds, *In re Marriage of Fonstein (1976) 17 Cal. 3d 738, 749 n.5, 131 Cal. Rptr. 873, 552 P.2d 1169* ; *see also Evid. Code § 811* ("value of property" defined)]. In contrast, the value of property for which no relevant, comparable market exists may be determined by any method of valuation that is just and equitable [*Evid. Code § 823*], except when another rule is provided by statute [*see Evid. Code § 810(a)*].

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§ 222.111 Manner of Establishing Value

[1] Application of Evidence Code Provisions

The market value of real property or any interest in real property must beestablished in accordance with *Evid. Code § 810 et seq.*, except when another rule is provided by statute [*Evid. Code § 810*]. These provisions also apply to real property, or any interest in real property, and tangible personal property that are *valued together as a unit* [*Evid. Code § 811*; *but see* Sen. Comm. Comments to *Evid. Code § 810* (1980) (when valuation standard other than market value used, *Evid. Code § 810 et seq.* do not apply)].

For discussion of *Evid. Code §§ 810 et seq.*, see Ch. 551, *Trial* .

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§ 222.112 Effect of Commissions and Taxes

[1] Commissions

Deduction of a normal real estate commission from the current market value of real property is not improper in making a finding of its net value when that property is awarded to one of the spouses and evidence is presented that it will have to be sold to pay the community debts awarded to that party [*In re Marriage of Drivon (1972) 28 Cal. App. 3d 896, 898, 105 Cal. Rptr. 124* ; *see In re Marriage of Hokanson (1998) 68 Cal. App. 4th 987, 994, 80 Cal. Rptr. 2d 699* (real estate commission was taken into account in establishing net or adjusted sales price)]. Conversely, if evidence is lacking that the property is to be sold or refinanced in a relatively short time, costs of sale or refinancing may not be deducted from the property's market value in determining its value [*see In re Marriage of Stratton (1975) 46 Cal. App. 3d 173, 175-176, 119 Cal. Rptr. 924]* .

Whether it is proper to deduct a commission may depend on the particular circumstances of the case. For example, one appellate court found that a trial court had properly valued a residence and had not erred in ordering that a real estate commission be deducted from its value and a wife awarded one half of the balance to equitably resolve a dispute over the residence. In that instance, an agreement to buy out the wife's interest in the residence could not be reached and a determination of value of the residence by the parties was not made after months of legal proceedings [*In re Marriage of Denny (1981) 115 Cal. App. 3d 543, 552, 171 Cal. Rptr. 440]* .

[2] Taxes

[a] Immediate and Specific Consequences Considered

If a court order dividing the community estate will result in a taxable event, the court must consider the tax consequences. In general, a court must consider only any "immediate and specific" tax consequences that are expected to arise from the division of a particular asset. The court will not consider consequences that are remote or speculative [*see In re Marriage of Fonstein (1976) 17 Cal. 3d 738, 747-751, 131 Cal. Rptr. 873, 552 P.2d 1169* ; *In re Marriage*

of Nelson (1986) 177 Cal. App. 3d 150, 156, 222 Cal. Rptr. 790 ; *In re Marriage of Davies (1983) 143 Cal. App. 3d 851, 857, 192 Cal. Rptr. 212]* .

[b] Capital Gains

Because divisions of the community estate between spouses are generally less prone to income taxation than in the past [*see I.R.C. § 1041*; *Rev. & Tax. Code §§ 17024.5, 18031*], the focus of concern, particularly with respect to the family residence, is primarily on any capital gains tax effect resulting from sale of a particular asset to a third party [*see In re Marriage of Harrington (1992) 6 Cal. App. 4th 1847, 1851-1852, 8 Cal. Rptr. 2d 631* ; *In re Marriage of Davies (1983) 143 Cal. App. 3d 851, 857, 192 Cal. Rptr. 212* ; *I.R.C. §§ 1001, 1221*; *Rev. & Tax. Code § 18031*; *see also Fam. Code § 3802(b)(8)* (consideration of tax consequences to parents in making "deferred sale of home" order)]. This is of less concern with the gain exclusion rules for sales of principal residences [*I.R.C. § 121*, as discussed in Ch. 227, *Dissolution of Marriage: Tax Effects of Dissolution*] and the ability of one spouse to tack on the periods the other spouse owned and used the property for purposes of satisfying the statutory exclusion requirements [*see I.R.C. § 121(d)(3)*]. A related issue involving capital gains may arise if the court awards assets with varying tax bases to the parties, such as, for example, a family home to one party and a block of stock to the other.

In determining the effect of capital gains taxes on the division of a family residence, courts have drawn a distinction between instances in which an equal division of sales proceeds is contemplated and those involving an unequal division. If, for example, the property has been sold during the dissolution proceeding and the sales proceeds equally divided, each party alone will be liable, as between the parties, for payment of any capital gains taxes arising from that party's receipt of a share of the sales proceeds. [*See In re Marriage of Harrington (1992) 6 Cal. App. 4th 1847, 1849, 1851-1852, 8 Cal. Rptr. 2d 631* (decided before Internal Revenue Code amendments that eliminated provisions for "rollover of gain" in former *I.R.C. § 1034* and provided for liberal exclusions of gain on sale of principal residence in *I.R.C. § 121*, as discussed in Ch. 227, *Dissolution of Marriage: Tax Effects of Dissolution*)]. In In re Marriage of Harrington, a husband used his equal share of sales proceeds to purchase another qualifying residence (thereby deferring tax on all of his gain under former *I.R.C. § 1034*), but the wife was able to defer tax on only a portion of her gain because the cost of her new residence was less than her share of the proceeds. She alone was held liable for the tax on her portion of the proceeds [*In re Marriage of Harrington (1992) 6 Cal. App. 4th 1847, 1849, 1851-1852, 8 Cal. Rptr. 2d 631]* .

In contrast, when an unequal distribution of sales proceeds is ordered to equalize an uneven division of other community assets, each party is responsible for one-half of the capital gains taxes incurred by the sale, regardless of the party's share of the sales proceeds [*In re Marriage of Harrington (1992) 6 Cal. App. 4th 1847, 1849, 1852, 8 Cal. Rptr. 2d 631]* , unless the trial court chooses to award toone party all tax liability incurred to further offset the division of other community assets [*In re Marriage of Davies (1983) 143 Cal. App. 3d 851, 857, 192 Cal. Rptr. 212]* . If the amount of capital gains taxes is uncertain, the court may provide that the liability incurred, if any, is owed equally by both parties [*In re Marriage of Epstein (1979) 24 Cal. 3d 76, 88, 154 Cal. Rptr. 413, 592 P.2d 1165* ; *In re Marriage of Davies (1983) 143 Cal. App. 3d 851, 856, 192 Cal. Rptr. 212]* .

Furthermore, when the extent of capital gains taxes is unknown, it ordinarily is not appropriate for a trial court to retain jurisdiction to consider apportionment of tax liabilities when any capital gains taxes become recognized. Reservation of the court's jurisdiction to supervise the payment of taxes and adjust the division of the community estate in consideration of such taxes has been held to be appropriate only in "unusual" cases [*In re Marriage of Epstein (1979) 24 Cal. 3d 76, 88, 154 Cal. Rptr. 413, 592 P.2d 1165* ; *see In re Marriage of Harrington (1992) 6 Cal. App. 4th 1847, 1849, 1852, 8 Cal. Rptr. 2d 631* ; *In re Marriage of Davies (1983) 143 Cal. App. 3d 851, 858, 192 Cal. Rptr. 212]* .

Accordingly, a trial court is not required to account for the possibility that either spouse may or may not be able to exclude a portion of the gain from the sale of a residence and thereby avoid capital gains tax [*see In re Marriage of Harrington (1992) 6 Cal. App. 4th 1847, 1849, 1852, 8 Cal. Rptr. 2d 631* (trial court could not take into account a

spouse's ability to use former *I.R.C. § 1034* to roll over gain from the sale of a principal residence); *In re Marriage of Davies (1983) 143 Cal. App. 3d 851, 858, 192 Cal. Rptr. 212* (possibility that either spouse could qualify for deferral of gain recognition from the sale of a principal residence under former *I.R.C. § 1034* was not a tax consequence that needed to be considered in achieving an equal division of existent community property)]. For a general discussion of tax effects of dividing the community estate, including the tax treatment of gain on the sale or exchange of a principal residence [*see I.R.C. § 121*], see Ch. 227, *Dissolution of Marriage: Tax Effects of Dissolution* .

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[Reserved]

§§ 222.113[Reserved]

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§ 222.130 Bank and Savings Accounts

[1] Characterization in General

Accounts held by spouses in banks, credit unions, savings and loan associations, and other financial institutions generally are subject to the same rules governing characterization as other types of property, though specialized rules, such as those governing tracing and commingling, transmutation, or nonprobate transfers of property [*see* Ch. 122, *Community Property*] may have to be applied in a particular case [*see Fam. Code §§ 750, 760, 770, 850 et seq.*; *In re Marriage of Mix (1975) 14 Cal. 3d 604, 611, 122 Cal. Rptr. 79, 536 P.2d 479* (discussing tracing of commingled funds in accounts); *Estate of Petersen (1994) 28 Cal. App. 4th 1742, 1752-1754, 34 Cal. Rptr. 2d 449* (annuity contracts and money market fund account treated as accounts subject to multiple party account provisions, as well as nonprobate transfer provisions)]. However, because spouses may choose to hold accounts in various forms of common ownership, it may be necessary to apply the law relating to multiple-party accounts, which is discussed in *§ 222.140[1][a]*.

Counsel should note that this law appears to control at least in all actions between the spouses and third parties, such as creditors, and on the death of a spouse during marriage [*see Prob. Code § 5201(a)*; *Estate of Petersen (1994) 28 Cal. App. 4th 1742, 1752-1754, 34 Cal. Rptr. 2d 449* ; *see also Estate of Castiglioni (1995) 40 Cal. App. 4th 367, 383-385, 47 Cal. Rptr. 2d 288* (construing *Prob. Code § 5305* in context of murder of joint tenant-spouse)]. However, it is unclear whether this law was intended to supersede the general community property presumptions that apply for purposes of dividing property on marital dissolution or legal separation, and a definitive interpretation of this law has yet to appear in the reported cases. Counsel, therefore, may wish to raise this as an issue in dissolution proceedings if the disposition of property under the mulitiple party account statutes differs in a particular case from that which would result by applying general characterization principles [*compare Fam. Code §§ 2580-2581, 2640 with Prob. Code §§ 5305-5307*].

[2] Multiple-Party Accounts Law

[a] Overview

The California Multiple-Party Accounts Law [*see Prob. Code § 5100 et seq.*,] became operative July 1, 1990, and applies to accounts in existence on that date and to accounts thereafter established [*see* Stats. 1989, ch. 397, § 41; *see also Prob. Code § 3*]. The Law governs multiple-party accounts without regard to the type of financial institution involved, and affects accounts held by spouses in various forms, such as joint tenancy and community property [*see Prob. Code §§ 5203, 5305, 5307*]. The provisions most likely to be relevant to characterization of property and liability of property for debts are discussed below. As noted above, this law appears to control in all actions between the spouses and third parties, such as creditors, and on the death of a spouse during marriage [*see Prob. Code § 5201*; *Estate of Petersen (1994) 28 Cal. App. 4th 1742, 1752-1754, 34 Cal. Rptr. 2d 449]* , but its application in marital dissolution proceedings is presently unclear. For a detailed discussion of the law relating to multiple-partyaccounts, see *Ch. 95, Banks, Deposits, and Checks, § 95.180* et seq.

[b] Creation of Accounts

The Multiple-Party Accounts Law includes a provision setting forth language that may be used in creating various types of accounts [*see Prob. Code § 5203*]. Words in substantially the following form in a signature card, passbook, contract, or instrument evidencing an account, or words to the same effect, executed before, on, or after July 1, 1990, create the following accounts [*Prob. Code § 5203(a)(4), (5)*]:

- Joint account of husband and wife with right of survivorship: "This account or certificate is owned by the named parties, who are husband and wife, and is presumed to be their community property. On the death of either of them, ownership passes to the survivor."

- Community property account of husband and wife: "This account or certificate is the community property of the named parties who are husband and wife. The ownership during lifetime and after the death of a spouse is determined by the law applicable to community property generally and may be affected by a will."

The statute provides additional language for creating a general joint account, account payable on death, and tenancy in common account [*see Prob. Code § 5203(a)(1)-(3), (6)*]. Use of the form language is not necessary to create an account that is governed by *Prob. Code § 5100 et seq.* if the contract of deposit creates substantially the same relationship between the parties as an account created using the form language [*Prob. Code § 5203(b)*].

[c] Survivorship Rights and Withdrawal of Funds

Rights of survivorship generally applicable to accounts are determined by the form of the account at the death of a party [*see Prob. Code §§ 5302, 5303(a)*]. Account terms may be changed in accordance with statute during a party's lifetime to eliminate or add rights of survivorship [*see Prob. Code § 5303(b)*], but withdrawal of funds from the account by a party having a present right of withdrawal during his or her lifetime eliminates rights of survivorship on that party's death with respect to the funds withdrawn [*Prob. Code § 5303(c)*; *cf. Estate of Propst (1990) 50 Cal. 3d 448, 460-461, 268 Cal. Rptr. 114, 788 P.2d 628* (*Prob. Code § 5303(c)* supports case law rule that joint tenancy in personal property may be unilaterally severed)].

The right of withdrawal is determined by the terms of the account [*Prob. Code §§ 5201(a), 5401(a), (c)(3)*; *Lee v. Yang (2003) 111 Cal. App. 4th 481, 489, 3 Cal. Rptr. 3d 819* (discussing Multiple-Party accounts Law scheme in context of party's withdrawal of funds following broken engagement)]. Withdrawal of funds in excess of a party's net contribution to the account will transfer ownership by way of gift, to the extent that there is no agreement, special power of attorney, or independent legal obligation that requires the withdrawing party to account for the funds [*Lee v. Yang (2003) 111 Cal. App. 4th 481, 491-492, 3 Cal. Rptr. 3d 819* (no right to reimbursement of funds withdrawn by party after broken engagement); *see Prob. Code § 5301(a)*].

Eliminating survivorship rights by withdrawing funds would not seem to preclude the assertion of remedies that a spouse might otherwise have regarding community assets that were disposed of unilaterally during marriage. For example, because even a "joint account of husband and wife with right of survivorship," is presumed to be community property [*see Prob. Code § 5203(a)(4)*], the loss of a survivorship right would not seem to preclude assertion of other community property rights during life [*see Prob. Code § 5305(a), (d)*], but this remains subject to court interpretation. For discussion of management and control of community personal property, see Ch. 122, *Community Property* .

[d] Treatment of Accounts Expressly Designated as Community Property

For the purposes of *Prob. Code § 5100 et seq.*, except to the extent the terms of the account or deposit agreement provide otherwise, if the parties to an account are married to each other and the account is expressly described in the account agreement as a "community property" account, the ownership of the account during the lifetime and after the death of a spouse is controlled by the law governing community property generally [*Prob. Code § 5307*]. For discussion of a statutory community presumption arising from married persons holding an account, § 222.130[e].

[e] Community Presumption of Net Contribution to Account

Under the Multiple-Party Accounts Law, notwithstanding general provisions relating to ownership and survivorship rights in accounts [*see Prob. Code § 5301 et seq.*], if parties to an account are married to each other, regardless of whether they are so described in the deposit agreement, their net contribution to the account [*see Prob. Code § 5134(a)*] is presumed to be and remains their community property [*Prob. Code § 5305(a)*].

Furthermore, notwithstanding *Fam. Code §§ 2581* and *2640*, the community presumption established with regard to "net contributions" of married persons is one affecting the burden of proof and may be rebutted by proof of either of the following [*Prob. Code § 5305(b)*; *see, e.g., Estate of Petersen (1994) 28 Cal. App. 4th 1742, 1754, 34 Cal. Rptr. 2d 449* (mere designation of account as "joint tenants," without unambiguous statement of right of surviviorship, did not, as matter of law, overcome community presumption raised by account statute, butreference to joint tenancy in account statement raised triable issue of fact on form of ownership and control of funds)]:

- The sums on deposit that are claimed to be separate property can be traced from separate property unless it is proved that the married persons made a written agreement that expressed their clear intent that such sums be their community property; or

- The married persons made a written agreement, separate from the deposit agreement, that expressly provided that the sums on deposit, claimed not to be community property, were not to be community property.

In addition, except as provided in *Prob. Code § 5307*, a right of survivorship arising from the account's express terms, under the general survivorship provision [*see Prob. Code § 5302*], under a beneficiary designation in a Totten trust account, or under a pay on death (P.O.D.) payee designation, may not be changed by will [*Prob. Code § 5305(c)*].

In any event, except as provided above [*see Prob. Code § 5305(b), (c)*], a multiple-party account created with community property funds does not in any way alter community property rights [*Prob. Code § 5305(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsGeneral OverviewBanking LawBank ActivitiesBank AccountsDeposit AccountsJoint AccountsFamily LawMarital Termination & Spousal SupportDissolution &

DivorceProperty DistributionCharacterizationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionPresumptionsGeneral Overview

California Forms of Pleading and Practice--Annotated

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§ 222.131 Businesses and Professional Practices

[1] Characterization in General

If a spouse claims a community property interest in a small business or professional practice in proceedings for marital dissolution or legal separation, the trial court must (1) characterize the asset as community or separate, and (2) determine the feasibility of dividing any community interest in it. If the evidence shows that the business or practice was acquired or established with community property during marriage, then the asset is presumed community [*see Fam. Code § 760*]. If this presumption is not rebutted, the court must decide the most appropriate method of equally dividing that community interest, whether by a division in kind of the asset, ordering its sale and a division of the proceeds, or a "cash out" of one party and award of the entire asset to the other [*see Fam. Code § 2550*].

Note that in making this determination, the court, if economic circumstances warrant, may award the asset to one spouse, with an offsetting award to the other on such conditions as the court deems proper to effect a substantially equal division of the community estate [*see Fam. Code § 2601*].

A spouse who claims a separate property interest in a business or practice must prove that the business or practice was acquired or commenced before marriage or from a separate property source during marriage [*see Fam. Code §§ 760, 770*]. If the evidence is sufficient to trace the separate property source, the court must determine to what extent any of the interest, and any increase in value and profits, should be apportioned to the community, as discussed in *§ 222.131[4]*.

A business that was acquired or commenced before marriage does not lose its character as separate property merely because it is incorporated during the marriage. Incorporation of a business is a change in the legal form of the business, and does not transmute the business into community property [*In re Marriage of Koester (1999) 73 Cal. App. 4th 1032, 1037-1038, 87 Cal. Rptr. 2d 76]* .

[2] Effect of Professional License

A licensed business or professional practice must be allocated to the licensed spouse. The right to engage in a licensed profession is a property right that cannot be classified as community property. Therefore, although the value of the practice or business may be deemed community property, the license to engage in it may not be divided on dissolution of marriage [*In re Marriage of Lopez (1974) 38 Cal. App. 3d 93, 105, 113 Cal. Rptr. 58* , disapproved on other grounds, *In re Marriage of Morrison (1978) 20 Cal. 3d 437, 453, 143 Cal. Rptr. 139, 573 P.2d 41* (law partnership); *Todd v. Todd (1969) 272 Cal. App. 2d 786, 791, 78 Cal. Rptr. 131* (law practice)]. For discussion of the community's right to reimbursement for contributions to a spouse's education or training [*see Fam. Code § 2641*], see *§ 222.75*.

Professional practices cannot generally be divided in-kind, unless both parties are licensed practitioners in a joint practice [*In re Marriage of Lopez (1974) 38 Cal. App. 3d 93, 105, 113 Cal. Rptr. 58 , disapproved on other grounds, In re Marriage of Morrison (1978) 20 Cal. 3d 437, 453, 143 Cal. Rptr. 139, 573 P.2d 41* (law partnership); *Todd v. Todd (1969) 272 Cal. App. 2d 786, 791, 78 Cal. Rptr. 131* (law practice)]. Accordingly, the most practical division method is frequently an award of the practice to the practitioner spouse and an award of other community property of equal value to the other spouse. For general discussion of such awards, see *§ 222.71[1]* et seq. For discussion of the community's right to reimbursement for community contributions to a spouse's education or training under *Fam. Code § 2641*, see *§ 222.301*.

[3] Discretion of Court Regarding Business

[a] Options Available

A trial court has broad discretion in dividing a community property business. Except when a professional practice is involved, (§ 222.131[2]), the court is often faced with the dilemma of whether to order a division in kind or to award the entire business to one spouse and comparable community property to the other spouse. Two broad catagories of factors must be considered in reaching a determination: (1) economic circumstances of the parties and (2) factors relatingto the operation of the business after its division. Sale of the businees to a third party is another option.

[b] Single Asset Award

If economic circumstances warrant, a trial court may award any community asset to one party on any conditions it deems proper to effect a substantially equal division of the property [*Fam. Code § 2601*]. This is known as the "single asset proviso" and is discussed in more general terms in *§ 222.71[1] et seq.* [*see In re Marriage of Juick (1971) 21 Cal. App. 3d 421, 428, 430 n.13, 98 Cal. Rptr. 324]* . The single asset proviso is commonly applied to divide a community business or professional practice. It has been used, for example, to award one spouse the entire interest in a community property business operated by that spouse and in community property stock of a closely held corporation [*see, e.g., In re Marriage of Winn (1979) 98 Cal. App. 3d 363, 365, 159 Cal. Rptr. 554* ; *In re Marriage of Clark (1978) 80 Cal. App. 3d 417, 420-421, 145 Cal. Rptr. 602* ; for discussion of stock division, *see § 222.140*]. The determination of whether economic circumstances warrant an award of an asset to one party is within the trial court's discretion [*In re Marriage of Burlini (1983) 143 Cal. App. 3d 65, 70, 191 Cal. Rptr. 541* ; *In re Marriage of Connolly (1979) 23 Cal. 3d 590, 603, 153 Cal. Rptr. 423, 591 P.2d 911]* .

[c] Factors Supporting Single Asset Award

In general, courts have found an award of a business or practice to one spouse warranted under the following circumstances:

1. When the business or practice would be financially impaired or destroyed by division [*see, e.g., In re Marriage of Burlini (1983) 143 Cal. App. 3d 65, 70-71, 191 Cal. Rptr. 541* ; *In re Marriage of Clark (1978) 80 Cal. App. 3d 417, 420-421, 145 Cal. Rptr. 602]* ;

2. When only one spouse has the skills to operate the business or practice [*see, e.g., In re Marriage of Burlini (1983) 143 Cal. App. 3d 65, 70-71, 191 Cal. Rptr. 541* ; *In re Marriage of Smith (1978) 79 Cal. App. 3d 725, 751, 145 Cal. Rptr. 205]* ;

3. When the spouses are unable to operate the business or practice jointly because of animosity between them [*see, e.g., In re Marriage of Rives (1982) 130 Cal. App. 3d 138, 154, 181 Cal. Rptr. 572* ; *In re Marriage of Lotz (1981) 120 Cal. App. 3d 379, 385-386, 174 Cal. Rptr. 618* ; *In re Marriage of Clark (1978) 80 Cal. App. 3d 417, 420-421, 145 Cal. Rptr. 602]* ;

4. When the business or practice has no saleable value and one spouse intends to continue operating it [*see, e.g., In re Marriage of Winn (1979) 98 Cal. App. 3d 363, 365-367, 159 Cal. Rptr. 554* (husband's horse slaughter and auction business was reorganized after bankruptcy and had no saleable value)]; or

5. When the business or practice assets are subject to substantial fluctuations in value and one spouse has sufficient income so as to afford a high-risk investment [*see, e.g., In re Marriage of Connolly (1979) 23 Cal. 3d 590, 603, 153 Cal. Rptr. 423, 591 P.2d 911* (in-kind division of husband's stock in his business would have placed disproportionate risk of loss on wife who was not otherwise financially secure)].

An additional factor the court should consider is whether the nonoperating spouse is equally capable of continuing the community business after marital dissolution. For example, one court of appeal upheld a trial court's award of the more profitable of two restaurant franchises to a wife, who had not previously operated the business, but who was found by the trial court to be equally capable of doing so [*In re Marriage of Kozen (1986) 185 Cal. App. 3d 1258, 1262-1263, 230 Cal. Rptr. 304* (distinguishing *In re Marriage of Burlini (1983) 143 Cal. App. 3d 65, 70-71, 191 Cal. Rptr. 541* , and *In re Marriage of Smith (1978) 79 Cal. App. 3d 725, 748-751, 145 Cal. Rptr. 205* , and stating that statute giving "primary" management and control of community business to operating spouse does not require that all separate family businesses be awarded to that spouse)].

[d] Sale to Third Party

If the issue is whether a family business should be sold instead of awarded to one party, additional considerations apply. Although courts may order the sale of a business and division of its proceeds in order to achieve an equal division of the community estate, ordering a sale may be an abuse of discretion. One court has stated that sale to a third party should not be ordered if the trial court finds that (1) either party is capable of operating the business, (2) each seeks its award, and (3) each can purchase the other's share. Even if the business is difficult to value, and the trial court faces difficulty in determining to whom to award it, if both spouses have been operating the business and both want it and can purchase it, such as through an offset of other property to "cash out" the other spouse, it will usually be an abuse of discretion not to award it to one of the spouses [*see In re Marriage of Cream (1993) 13 Cal. App. 4th 81, 90, 16 Cal. Rptr. 2d 575]* .

[4] Need for Apportionment

An apportionment between separate and community property may be required when a spouse's separate property has increased in value as the result of that spouse's expenditure of skill, effort, and industry during marriage. The separate property often takes the form of a business or other enterprise into which the owner-spouse puts his or her community skill, efforts, and industry during marriage, resulting in an increase in value of the business and increased earnings for that spouse. The increased value of the business also could be attributed to the original separate property investment [*Beam v. Bank of America (1971) 6 Cal. 3d 12, 17, 98 Cal. Rptr. 137, 490 P.2d 257]* .

Case law requires apportionment of profits between community and separate property in a business context and in the investment of separate funds in real estate or securities. In these situations, a portion of the increased value and profits of a spouse's separate property due to that spouse's expenditure of skill, efforts, and industry during marriage must be

allocated as community property, and divided in the family law proceeding [*see* *Beam v. Bank of America (1971) 6 Cal. 3d 12, 17, 98 Cal. Rptr. 137, 490 P.2d 257* ; *Weinberg v. Weinberg (1967) 67 Cal. 2d 557, 567-568, 63 Cal. Rptr. 13, 432 P.2d 709* ; *In re Marriage of House (1980) 106 Cal. App. 3d 434, 438, 165 Cal. Rptr. 145* ; *see also* *In re Marriage of Zaentz (1990) 218 Cal. App. 3d 154, 159, 165-167, 267 Cal. Rptr. 31* (portion of film producer's post-separation movie profits was allocated equitably to community estate, even though profits inured contractually to his movie production company)].

Similarly, an apportionment may be required when a spouse's expenditure of skill, effort, and industry during marriage increases the value of the other spouse's separate property business or capital investment [*see* *In re Marriage of Dekker (1993) 17 Cal. App. 4th 842, 851-852, 21 Cal. Rptr. 2d 642* (stock in family corporation was issued in wife's name, but husband's full-time efforts built up successful business)]. Also, an apportionment may be required when a spouse's separate efforts, such as after the parties' separation, increase the value of a community asset. For further discussion of the apportionment required because of a spouse's efforts, see *§ 222.134[1]*) et seq.

[5] When Valuation of Ongoing Business Required--Methods Generally Applicable

Unless an in-kind division is ordered [*In re Marriage of Behrens (1982) 137 Cal. App. 3d 562, 572, 187 Cal. Rptr. 200]* , the community interest in an ongoing business must be valued before it can be divided by the court. Under certain conditions, the court may award a community property business or community interest in a business to one spouse if it awards the other spouse property of equal value. If the business or interest is to be awarded to one of the spouses, it must be valued so that property of equal value may be awarded to the other spouse [*see* *In re Marriage of Kozen (1986) 185 Cal. App. 3d 1258, 1262-1263, 230 Cal. Rptr. 304* ; *In re Marriage of Burlini (1983) 143 Cal. App. 3d 65, 70, 191 Cal. Rptr. 541]* . In fact, trial courts are charged with the responsibility of fixing the value when such a "cash out" method is used and cannot delegate their responsibility to fix value, such as by ordering an interspousal auction of the business over a party's objection [*see* *In re Marriage of Cream (1993) 13 Cal. App. 4th 81, 88-90, 16 Cal. Rptr. 2d 575]* .

The "value" of a community business (or community interest in a business) normally is defined as the fair market value of the business or interest. "Fair market value" is defined as the "amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts" [Black's Law Dictionary 537 (5th ed. 1979)]. In contrast, the use of a "going business" concept as an equivalent to market value is not considered to be sound valuation methodology because it does not have the same meaning and relevance as fair market value [*In re Marriage of Sharp (1983) 143 Cal. App. 3d 714, 719, 192 Cal. Rptr. 97]* . If the market value approach is employed, the value of unpaid postseparation earnings owed to one of the spouses by the business should be deducted [*In re Marriage of Stephenson (1984) 162 Cal. App. 3d 1057, 1088-1089, 209 Cal. Rptr. 383* ; *see Fam. Code § 771* (postseparation earnings are separate property)].

Nevertheless, alternative methods of valuation (e.g., price-earnings ratio for publicly held corporations, book value, and investment value) also may be used if the parties agree to it, if their decision is made without fraud or concealment of relevant facts [*see* *In re Marriage of Folb (1975) 53 Cal. App. 3d 862, 868-869, 871, 126 Cal. Rptr. 306* , disapproved on other grounds, *In re Marriage of Fonstein (1976) 17 Cal. 3d 738, 749 n.5, 131 Cal. Rptr. 873, 552 P.2d 1169]* , and if each party was separately represented by his or her own counsel in working out the stipulation [*see* *In re Marriage of Carter (1971) 19 Cal. App. 3d 479, 489, 491, 97 Cal. Rptr. 274* ; *see also* *Boeseke v. Boeseke (1974) 10 Cal. 3d 844, 850, 112 Cal. Rptr. 401, 519 P.2d 161]* .

[6] Specific Assets and Liabilities to Be Considered

[a] In General

In valuing a business or a community property interest in a business, furniture and other equipment, accounts

receivable, liquid assets (cash on hand), earnings, goodwill, and debts and liabilities should be included. Also of value and to be considered are vacation pay, stock options, or other forms of deferred compensation to the extent that these affect the value of the business. Business leases, which may have value or represent liabilities depending on whether they are over or under market rates, should not be ignored. Various credit and loss carryforwards, if material, also should not be overlooked.

An appellate court cannot substitute its judgment for that of the trial court in deciding which of two appraisers should have been believed in valuing a business [*In re Marriage of Palmer (1985) 168 Cal. App. 3d 190, 194, 214 Cal. Rptr. 79* , disapproved on other grounds, *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253]* .

A debt owed by a community business to a separate pension plan must be apportioned when valuing the business, as discussed in *§ 222.134[3]* [*see In re Marriage of Hargrave (1985) 163 Cal. App. 3d 346, 355-356, 209 Cal. Rptr. 764]* .For discussion of valuing stock in a business, see *§ 222.140[3]*. Valuation of stock options is discussed in *§ 222.160[3]*.

[b] Treatment of Professional Practices

[i] Specific Factors

In valuing an enterprise such as a law practice, a trial court should determine the existence and value of all the following [*see In re Marriage of Lopez (1974) 38 Cal. App. 3d 93, 110, 113 Cal. Rptr. 58 , disapproved on other grounds in In re Marriage of Morrison (1978) 20 Cal. 3d 437, 453, 143 Cal. Rptr. 139, 573 P.2d 41* ; *see also In re Marriage of Kilbourne (1991) 232 Cal. App. 3d 1518, 1522, 284 Cal. Rptr. 201* ; *In re Marriage of Garrity & Bishton (1986) 181 Cal. App. 3d 675, 688-689, 226 Cal. Rptr. 485]* :

(1) Fixed assets, including cash, furniture, equipment, supplies, and library;

(2) Other assets, including properly aged accounts receivable; costs advanced with due regard for their collectibility; work in progress, partially completed but not billed as a receivable; and work completed but not billed;

(3) Goodwill of the practitioner in the business as a going concern (§ 222.131[7]); and

(4) Liabilities of the practitioner related to the business.

[ii] Reservation of Jurisdiction

The fact that an asset of a professional practice is difficult to value or, in the case of receivables, is contingent on the outcome of some future event such as the disposition of a lawsuit (and the receipt of contingency fees), does not preclude valuation. A reservation of the court's jurisdiction to make a later valuation and division of an asset may be necessary in a particular case, however, when it is not possible to do this at trial [*see In re Marriage of Kilbourne (1991) 232 Cal. App. 3d 1518, 1524 n.5, 1525, 284 Cal. Rptr. 201* ; *Fam. Code § 2550*].

[iii] Methods of Valuation

Valuation of professional practices may require application of not only specific accounting methodologies to evaluate various assets (see summary under *§ 222.131[6][b][i]*), but also consideration of agreements entered into by the practitioner, and items such as work in progress.

With respect to agreements, professionals frequently enter into agreements with their firms that control withdrawal rights, transfers of stock, or other matters. The community interest of the practitioner can be affected by these types of

agreements, and valuation of that interest may in fact be controlled by the agreement. For example, in one case, involving a law partnership, the court considered the value of a spouse's contractual *withdrawal rights* from the law firm as a basis for valuing the partnership interest [*In re Marriage of Fonstein (1976) 17 Cal. 3d 738, 743-747, 131 Cal. Rptr. 873, 552 P.2d 1169* ; *cf. In re Marriage of Micalizio (1988) 199 Cal. App. 3d 662, 672-676, 245 Cal. Rptr. 673* (consideration of restrictive agreements in valuing law partnership)]. Although the value of the withdrawal right may be considered, the trial court is not precluded from considering other factors in valuing the community interest in such a partnership [*see In re Marriage of Slater (1979) 100 Cal. App. 3d 241, 246-247, 160 Cal. Rptr. 686]* .

Similarly, use of a *stock purchase agreement* entered into by a practitioner on joining a professional law corporation was upheld as a proper basis for valuing his community shareholder interest in the firm [*In re Marriage of Nichols (1994) 27 Cal. App. 4th 661, 672-673, 33 Cal. Rptr. 2d 13* ; *see In re Marriage of Iredale & Cates (2004) 121 Cal. App. 4th 321, 328-329, 16 Cal. Rptr. 3d 505* (partnership agreement limited spouse's interest to share of firm's hard assets)]. In its analysis, the appellate court that upheld the agreement's usage set forth several factors for consideration in determining whether it is appropriate to use a valuation formula in an "arm's-length buy-out agreement," and these factors appear to have application beyond the facts of that case. They include [*In re Marriage of Nichols (1994) 27 Cal. App. 4th 661, 672, 33 Cal. Rptr. 2d 13* (*citing* 1 Cal. Marital Dissolution Practice, § 9.77 (Cont. Ed. Bar 1981)]:

(1) The proximity of the date of the agreement to the date of the spouse's separation to ensure that the agreement was not entered into in contemplation of marital dissolution;

(2) The existence of an independent motive for entering into the agreement, such as (in the case of a partnership, as opposed to a corporation) the desire to protect all partners against the effect of a partnership dissolution; and

(3) Whether the value resulting from the agreement's purchase price formula is similar to the value produced by other approaches.

With respect to work in progress, apportionment of such work by a "time rule" is proper, when use of this method otherwise is appropriate under the circumstances, although other formulations may be more appropriate in particular instances. Under this method, the time a case has been open (from the date of the first cost to the date of recovery) is measured, and proportionate shares of the proceeds are allocated to the time before separation and the time after. The rule may be applied to cases in which no fees have been collected by a reservation of jurisdiction to effectuate distribution [*see In re Marriage of Kilbourne (1991) 232 Cal. App. 3d 1518, 1526-1527, 284 Cal. Rptr. 201* (use of time rule formula to value certain work in progress satisfactorily accounted for operating expenses needed to generate fees, though formula was not absolutely accurate; use of timerule was acceptable when husband presented no credible evidence of actual operating expenses)].

Use of the "excess earnings" method to value an entire professional practice, such as a law practice, has been disapproved by at least one appellate court. This method calculates annual pretax net earnings, minus a fair return on tangible assets, and the typical annual salary of a comparably experienced salaried employee, capitalized over a period of years and discounted to reflect present value. The court found that this method fails to take into account fixed assets, accounts receivable, costs advanced, unbilled work, and other variables. It reversed a trial court's valuation of two law practices using the "excess earnings" method in favor of the approach adopted in *In re Marriage of Lopez,* which took into account the above factors [*In re Marriage of Garrity & Bishton (1986) 181 Cal. App. 3d 675, 688, 688 n.14, 689, 226 Cal. Rptr. 485* ; *see In re Marriage of Lopez (1974) 38 Cal. App. 3d 93, 110, 113 Cal. Rptr. 58 , disapproved on other grounds in In re Marriage of Morrison (1978) 20 Cal. 3d 437, 453, 143 Cal. Rptr. 139, 573 P.2d 41]* . Nevertheless, the court appeared to imply that the "excess earnings" method might be suitable in establishing a practice's *goodwill* value alone [*In re Marriage of Garrity & Bishton (1986) 181 Cal. App. 3d 675, 689 n.15, 226 Cal. Rptr. 485]* . In fact, the "capitalized excess earnings" method for valuing professional goodwill is possibly the favored method of most forensic accountants.

[iv] Time of Valuation

The timing of the valuation of a professional practice presents another problem. Although the general rule requires valuation of community assets and liabilities as near as practicable to the time of trial (absent a showing of good cause) [*see Fam. Code § 2552*], courts of appeal have held that law practices and similar professional practices, normally should be valued as of the date of separation [*In re Marriage of Duncan (2001) 90 Cal. App. 4th 617, 627, 108 Cal. Rptr. 2d 833* (investment advisory business); *In re Marriage of Kilbourne (1991) 232 Cal. App. 3d 1518, 1524, 284 Cal. Rptr. 201* ; *In re Marriage of Green (1989) 213 Cal. App. 3d 14, 20-21, 261 Cal. Rptr. 294* ; *see In re Marriage of Stevenson (1993) 20 Cal. App. 4th 250, 253-254, 24 Cal. Rptr. 2d 411* (small contracting business); *but see In re Marriage of Fink (1979) 25 Cal. 3d 877, 888, 160 Cal. Rptr. 516, 603 P.2d 881* (valuation of law practice made at date of trial when, after separation, attorney had so commingled postseparation and preseparation accounts that it was impossible to value practice on separation date)]. The court in *In re Marriage of Green* recognized that exceptions to valuation as of the date of separation exist, however, such as when the lawyer's postseparation efforts minimally impact any increase in value, or when a formula in a partnership agreement for a partner's withdrawal accurately determines the ongoing value [*In re Marriage of Green (1989) 213 Cal. App. 3d 14, 20-21, 261 Cal. Rptr. 294]* . For a general discussion of the time of valuation, see *§ 222.51*.

[7] Determination and Valuation of Goodwill

[a] Definition and Existence

The "goodwill" of a business is the expectation of continued public patronage [*Bus. & Prof. Code § 14100*]. It is property [*Bus. & Prof. Code § 14102*] of an intangible nature and is a thing of value [*Burton v. Burton (1958) 161 Cal. App. 2d 572, 576, 326 P.2d 855]* . Goodwill is the probability that the old customers will resort to the old place and that the business will continue in the future as it has in the past, adding to its profits and contributing to the means of meeting its obligations as they arise. It is not the patronage of the general public but, rather, the patronage that has become an asset of the business [*see In re Marriage of Watts (1985) 171 Cal. App. 3d 366, 370-371, 217 Cal. Rptr. 301* ; *In re Marriage of Foster (1974) 42 Cal. App. 3d 577, 581-582, 117 Cal. Rptr. 49]* .

Saleable goodwill can arise in a professional business that depends on the personal skill of, and confidence in, a particular person to the same extent that it arises in a commercial or trade enterprise [*Mueller v. Mueller (1956) 144 Cal. App. 2d 245, 251, 301 P.2d 90]* . Accordingly, goodwill has been found to exist in all of the following:

(1) A dental laboratory business [*see Mueller v. Mueller (1956) 144 Cal. App. 2d 245, 251, 301 P.2d 90]* ;

(2) A medical practice [*see In re Marriage of Ackerman (2006) 146 Cal. App. 4th 191, 52 Cal. Rptr. 3d 744* ; *In re Marriage of Watts (1985) 171 Cal. App. 3d 366, 370-372, 217 Cal. Rptr. 301* ; *In re Marriage of Fortier (1973) 34 Cal. App. 3d 384, 388-389, 109 Cal. Rptr. 915* ; *Golden v. Golden (1969) 270 Cal. App. 2d 401, 404-405, 75 Cal. Rptr. 735]* ;

(3) An advertising partnership [*see Smith v. Bull (1958) 50 Cal. 2d 294, 302, 325 P.2d 463]* ;

(4) A joint orthodontic practice [*see In re Marriage of Asbury (1983) 144 Cal. App. 3d 918, 923, 193 Cal. Rptr. 562]* ;

(5) The law practice of a sole practitioner [*Todd v. Todd (1969) 272 Cal. App. 2d 786, 793, 78 Cal. Rptr. 131* ; *Brawman v. Brawman (1962) 199 Cal. App. 2d 876, 877, 882, 19 Cal. Rptr. 106]* ;

(6) A law partnership [*In re Marriage of Lopez (1974) 38 Cal. App. 3d 93, 110, 113 Cal. Rptr. 58 , disapproved on other grounds in In re Marriage of Morrison (1978) 20 Cal. 3d 437, 453, 143 Cal. Rptr. 139, 573 P.2d 41]* ;

(7) A private investigation business [*see* *In re Marriage of Webb (1979) 94 Cal. App. 3d 335, 344, 156 Cal. Rptr. 334]* ; and

(8) A consulting engineering firm [*In re Marriage of King (1983) 150 Cal. App. 3d 304, 308-309, 197 Cal. Rptr. 716]* .

Under appropriate circumstances, however, a court may find no goodwill is attached to a spouse's share of a business [*see* *In re Marriage of Slivka (1986) 183 Cal. App. 3d 159, 163-164, 228 Cal. Rptr. 76* (physician's interest in medical partnership lacked value for goodwill when he made no capital contribution to partnership, had no assets to take on withdrawal, would receive no payment on departure, could not sell his interest, and was compensated in a manner similar to employee); *In re Marriage of Aufmuth (1979) 89 Cal. App. 3d 446, 463, 152 Cal. Rptr. 668* (law corporation's buyout agreement expressly precluded allowance for goodwill; spouse with share in business was recent shareholder who reasonably could be expected not to havecontributed to goodwill); *but see* *In re Marriage of Watts (1985) 171 Cal. App. 3d 366, 372, 217 Cal. Rptr. 301* (mere fact professional practice cannot be sold, by itself, cannot justify finding that practice has no goodwill or that community goodwill has no value); *In re Marriage of Fenton (1982) 134 Cal. App. 3d 451, 463, 184 Cal. Rptr. 597* (when spouse was highest wage earner in professional corporation, with established professional reputation over his peers in the corporation, value of goodwill could not be eliminated by recital in corporate documents)].

A court found that there was no goodwill in a husband's career as a motion picture director because there was no "business." It noted that *Bus. & Prof. Code §§ 14101* and *14102* refer to the goodwill of a business, and that a business is a professional, commercial, or industrial enterprise with assets, not a natural person. The court rejected the contention that the term "business" also includes "a person doing business" [*In re Marriage of McTiernan & Dubrow (2005) 133 Cal. App. 4th 1090, 1096, 1098-1099, 35 Cal. Rptr. 3d 287]* . It noted that no California case has held that a natural person, apart and distinct from a "business," can create or generate goodwill. It is the business or practice that generates goodwill, even if the business or practice is conducted by one person [*In re Marriage of McTiernan & Dubrow (2005) 133 Cal. App. 4th 1090, 1098, 35 Cal. Rptr. 3d 287]* . It also noted that the husband's "elite professional standing" was not "property" because it was entirely personal to him, and could not be transferred or sold [*In re Marriage of McTiernan & Dubrow (2005) 133 Cal. App. 4th 1090, 1100-1101, 35 Cal. Rptr. 3d 287]* .

[b] Valuation

[i] General Factors Considered

Courts have not applied a rigid and unvarying rule for the valuation of goodwill. Rather, they have recognized that each case must be determined on its own facts [*In re Marriage of Ackerman (2006) 146 Cal. App. 4th 191, 197, 52 Cal. Rptr. 3d 744* ; *In re Marriage of Asbury (1983) 144 Cal. App. 3d 918, 923, 193 Cal. Rptr. 562* ; *Mueller v. Mueller (1956) 144 Cal. App. 2d 245, 251, 301 P.2d 90* ; *see* *In re Marriage of Foster (1974) 42 Cal. App. 3d 577, 582-583, 117 Cal. Rptr. 49* ; *cf.* *In re Marriage of Garrity & Bishton (1986) 181 Cal. App. 3d 675, 689 n.15, 226 Cal. Rptr. 485* (expert used "excess earnings" method to determine that law practice had no goodwill value; however, trial court erred in using that method to value *entire* practice)].

A proper method of valuing goodwill involves the use of any legitimate means of valuation that measures the present value by taking into account some past result, and that contemplates continuation of the business in the future [*see, e.g.,* *In re Marriage of Ackerman (2006) 146 Cal. App. 4th 191, 198, 52 Cal. Rptr. 3d 744* (medical practice); *In re Marriage of Iredale & Cates (2004) 121 Cal. App. 4th 321, 329-330, 16 Cal. Rptr. 3d 505* (law partnership); *In re Marriage of Watts (1985) 171 Cal. App. 3d 366, 371-372, 217 Cal. Rptr. 301* ; *In re Marriage of King (1983) 150 Cal. App. 3d 304, 309, 197 Cal. Rptr. 716* ; *In re Marriage of Webb (1979) 94 Cal. App. 3d 335, 344-345, 156 Cal. Rptr. 334* ; *In re Marriage of Foster (1974) 42 Cal. App. 3d 577, 584, 117 Cal. Rptr. 49* ; *but see* *In re Marriage of Slater (1979) 100 Cal. App. 3d 241, 244-247, 160 Cal. Rptr. 686* (error to assign zero value to goodwill just because "buy-sell"

provision in partnership agreement stipulated that no value would be given)]. For example, the court may consider the situation of the business premises, the amount of patronage, the personality of the parties engaged in the business, the length of time the business has been established, and the habit of its customers in continuing to patronize the business [*In re Marriage of Ackerman (2006) 146 Cal. App. 4th 191, 201, 52 Cal. Rptr. 3d 744*].

In the case of a professional practice, such as a law or medical practice, the following factors merit consideration because they may contribute to, diminish, or otherwise affect the value of goodwill at the time of dissolution [*see In re Marriage of Fenton (1982) 134 Cal. App. 3d 451, 461, 184 Cal. Rptr. 597* ; *In re Marriage of Rives (1982) 130 Cal. App. 3d 138, 150-151, 181 Cal. Rptr. 572* ; *In re Marriage of Lopez (1974) 38 Cal. App. 3d 93, 109-110, 113 Cal. Rptr. 58* , *disapproved on other grounds in In re Marriage of Morrison (1978) 20 Cal. 3d 437, 453, 143 Cal. Rptr. 139, 573 P.2d 41]* :

(1) The practitioner's age, health, and past demonstrated earning power;

(2) The professional reputation in the community regarding the practitioner's judgment, skill, and knowledge;

(3) The practitioner's comparative professional success;

(4) The nature and duration of his or her business as a sole practitioner or as a member of a partnership or professional corporation to which his or her professional efforts have made a proprietary contribution; and

(5) The value of the fixed and other assets of the professional business with which the goodwill will continue to be related.

Other than setting forth the above criteria and factors to be considered, as well as discussing the valuation approaches used in particular cases, however, the appellate courts have failed to provide any definitive formula for valuing the goodwill of an ongoing business. The inference to be drawn from the cases is that the court in a family law proceeding will be receptive to any reasonable approach that fairly values goodwill [*see In re Marriage of Watts (1985) 171 Cal. App. 3d 366, 370-372, 217 Cal. Rptr. 301* ; *see also* Comment, *Valuation of Professional Goodwill Upon Marital Dissolution, 7 Sw. U.L. Rev. 186 (1975)* (suggesting formula for use in valuing goodwill)]. The valuation method used must be supported by substantial evidence, however, and if the trial court rejects evidence of value submitted by both parties it either should require the parties to furnish additional evidence or appoint its own expert [*In re Marriage of Hargrave (1985) 163 Cal. App. 3d 346, 355, 209 Cal. Rptr. 764* ; *see also In re Marriage of Rosen (2002) 105 Cal. App. 4th 808, 825, 130 Cal. Rptr. 2d 1* (excess earnings analysis of wife's expert did not *legitimately* establish value under excess earnings method, and there was no evidence on value under any other method; therefore case remanded to assign zero value to goodwill)].

One method that is commonly used to determine the value of the goodwill in a professional practice is the "excess earnings" method, which compares the earnings of the professional in question with that of a peer whose performance is average [*In reMarriage of Ackerman (2006) 146 Cal. App. 4th 191, 198-199, 52 Cal. Rptr. 3d 744* ; *In re Marriage of McTiernan & Dubrow (2005) 133 Cal. App. 4th 1090, 1095, 35 Cal. Rptr. 3d 287]* . Using this method, the court first determines the professional spouse's average annual net earnings (before income taxes) by referring to any period that seems reasonably illustrative of the current rate of earnings. Then the court determines the annual salary of a typical salaried employee who has had experience commensurate with the spouse. Next, the court deducts from the average net pretax earnings of the business or practice a "fair return" on the net tangible assets used by the business. Then the court determines the "excess earnings" by subtracting the annual salary of the average salaried person from the average net pretax earnings of the business or practice remaining after deducting a fair return on tangible assets. Finally, the court capitalizes the excess earnings over a period of years by multiplying it by a factor equal to a specific period of years, discounted to reflect the present value of the excess earnings over that period [*In re Marriage of McTiernan & Dubrow (2005) 133 Cal. App. 4th 1090, 1095 n.1, 35 Cal. Rptr. 3d 287]* . Although not binding, experts and courts may

use professional compensation surveys as guidelines for determining the reasonable compensation of a practitioner's peers. To be relevant, however, these surveys must account for similarly situated professional practices and practitioners [*In re Marriage of Ackerman (2006) 146 Cal. App. 4th 191, 200, 52 Cal. Rptr. 3d 744*].

Both a prior sale of the business or an interest in the business and past profits have been held valid bases for determining the value of goodwill [*see In re Marriage of Lopez (1974) 38 Cal. App. 3d 93, 110-111, 113 Cal. Rptr. 58 , disapproved on other grounds in In re Marriage of Morrison (1978) 20 Cal. 3d 437, 453, 143 Cal. Rptr. 139, 573 P.2d 41* ; *In re Marriage of Fortier (1973) 34 Cal. App. 3d 384, 387, 390, 109 Cal. Rptr. 915* ; *Burton v. Burton (1958) 161 Cal. App. 2d 572, 577, 326 P.2d 855* ; *Mueller v. Mueller (1956) 144 Cal. App. 2d 245, 251, 301 P.2d 90* , cited with approval in *People ex rel. Dep't of Transportation v. Muller (1984) 36 Cal. 3d 263, 271, 203 Cal. Rptr. 772, 681 P.2d 1340]* .

The expectancy of future earnings, however, is not a proper basis for valuing goodwill. Community interests may be acquired only during marriage, and it would be inconsistent with that philosophy to assign value to the postmarital efforts of either spouse [*In re Marriage of King (1983) 150 Cal. App. 3d 304, 309, 197 Cal. Rptr. 716* ; *In re Marriage of Rives (1982) 130 Cal. App. 3d 138, 150, 181 Cal. Rptr. 572* ; *In re Marriage of Lopez (1974) 38 Cal. App. 3d 93, 109, 113 Cal. Rptr. 58 , disapproved on other grounds in In re Marriage of Morrison (1978) 20 Cal. 3d 437, 453, 143 Cal. Rptr. 139, 573 P.2d 41]* .

The fact that no particular "market" may exist for a business or practice does not mean that the business to be valued has no goodwill [*see In re Marriage of Hargrave (1985) 163 Cal. App. 3d 346, 353, 209 Cal. Rptr. 764* ; *see also In re Marriage of Watts (1985) 171 Cal. App. 3d 366, 371-372, 217 Cal. Rptr. 301]* . As discussed above, factors other than an established "market" may have to be considered in determining the existence of goodwill, such as the practitioner's personality, age, health, past demonstrated earning power, professional reputation, the location of the business premises, and length of time the business has been established [*see In re Marriage of Lopez (1974) 38 Cal. App. 3d 93, 109-110, 113 Cal. Rptr. 58 , disapproved on other grounds in In re Marriage of Morrison (1978) 20 Cal. 3d 437, 453, 143 Cal. Rptr. 139, 573 P.2d 41* ; *see also In re Marriage of King (1983) 150 Cal. App. 3d 304, 309-310, 197 Cal. Rptr. 716]* .

Goodwill is a distinct business interest that must not be confused with contractual withdrawal rights or a "buy-out interest" under an employment termination agreement [*In re Marriage of Fenton (1982) 134 Cal. App. 3d 451, 461, 463, 184 Cal Rptr. 597]* . Thus, for example, in one case a party's goodwill interest in a law firm existed despite an agreement terminating a shareholder's income on leaving. Because the party had a long employment history with the firm and had contributed to its growth, a goodwill interest was found by the court, to be valued and divided as community property. The fact that the goodwill interest was not compensable in the market place was not material [*In re Marriage of Fenton (1982) 134 Cal. App. 3d 451, 461, 184 Cal. Rptr. 597* ; *In re Marriage of Slater (1979) 100 Cal. App. 3d 241, 244-247, 160 Cal. Rptr. 686]* .

Furthermore, goodwill valuation cannot be based on speculation regarding future circumstances such as, for example, the effect if all of the business's contracts were canceled or if the business were sold [*In re Marriage of Hargrave (1985) 163 Cal. App. 3d 346, 353, 209 Cal. Rptr. 764]* . Similarly, when awarding a business to one spouse it is inappropriate for the court to reduce the value of the business by the speculative value of a future, hypothetical noncompetition agreement. A covenant not to compete is a means of protecting the value of business goodwill, and until such a covenant actually has been negotiated, it is too speculative. Thus, establishing a value for a future hypothetical covenant not to compete, separate from the value of the business goodwill itself, is inappropriate.The true value of such a covenant can be determined only with reference to the circumstances of the party when he or she actually negotiates for the sale of the business [*In re Marriage of Czapar (1991) 232 Cal. App. 3d 1308, 1314-1315, 285 Cal. Rptr. 479* (also concluding that consideration paid for noncompetition agreement, or value of that agreement, is separate property of covenanting spouse if covenant actually has been negotiated as part of sale of property); *but see In re Marriage of Quay (1993) 18 Cal. App. 4th 961, 968, 22 Cal. Rptr. 2d 537* (community was required to bear entire detriment of postseparation covenant not to compete when community property stock was valueless without covenant); *In re*

Marriage of Lotz (1981) 120 Cal. App. 3d 379, 383, 174 Cal. Rptr. 618 (finding on goodwill value and that covenant not to compete would be required if business were sold is not improper consideration of postmarital efforts)].

[ii] Use of Expert Testimony

Courts have accepted expert testimony on the value of goodwill when founded on some reasonable basis, even though the precise methodology used was unclear [*see, e.g.,* *In re Marriage of Foster (1974) 42 Cal. App. 3d 577, 580-581, 585, 117 Cal. Rptr. 49* (medical practice had a goodwill value of $27,000 based on the testimony of accountant who made that determination by taking "an approximation of the last three months received on account"); *In re Marriage of Asbury (1983) 144 Cal. App. 3d 918, 923-924, 193 Cal. Rptr. 562* (in determining value of wife's interest in intangible assets of joint orthodontic practice, the valuation was adequately supported by expert testimony and record as a whole)].

However, an expert's valuation that is not contradicted by another expert's testimony is not necessarily conclusive from the court's perspective, and may be rejected [*In re Marriage of Rosen (2002) 105 Cal. App. 4th 808, 823, 130 Cal. Rptr. 2d 1* (wife's expert did not use average of husband's volatile income over several years in his calculations, but erroneously took husband's highest earning year to represent his annual income)].

Expert testimony on valuation of goodwill is covered by the privilege accorded to statements made in judicial proceedings. "Publications" made both in a business evaluation prepared for litigation and in court testimony are covered by the privilege set forth in *Civ. Code § 47(b)* [*Carden v. Getzoff (1987) 190 Cal. App. 3d 907, 913, 915-916, 235 Cal. Rptr. 698* (accountant's "manufactured" goodwill valuation of medical practice as privileged publication)].

[iii] Summary of Evidentiary Considerations

Although no definitive rule for valuing goodwill for the purpose of dividing the community estate has been enunciated by the courts, the following observations summarize the various aspects of valuation discussed above [*see, e.g.,* *In re Marriage of Slivka (1986) 183 Cal. App. 3d 159, 163-164, 228 Cal. Rptr. 76* ; *In re Marriage of Asbury (1983) 144 Cal. App. 3d 918, 923, 193 Cal. Rptr. 562* (orthodontic practice); *In re Marriage of Foster (1974) 42 Cal. App. 3d 577, 582-584, 117 Cal. Rptr. 49* ; *see* *Burton v. Burton (1958) 161 Cal. App. 2d 572, 576, 326 P.2d 855]* :

(1) The value of goodwill is a question of fact;

(2) Each case must be determined on its own facts and circumstances, and the evidence must be that which legitimately establishes value;

(3) Opinion evidence is admissible, but not conclusive;

(4) The trier of fact may take into consideration the location of the business premises, the amount of patronage, the personality of the parties engaged in the business, the length of time the business has been established, and the habits of its customers in continuing to patronize the business;

(5) The value is not necessarily the amount of money a willing buyer would pay (which might be less than the true goodwill value);

(6) No goodwill interest is present when the spouse has no saleable interest in the business and functions like a salaried employee compensated for services rendered;

(7) No method that takes into account the postmarital efforts of either spouse may be used in making the valuation; and

(8) A proper means of arriving at the value contemplates any legitimate method of valuation measuring the present

value of the goodwill by taking into account some past result.

[8] Apportioning Business Receivables

The accounts receivable of a community business or professional practice must be valued to effect an equal division of the business or practice. For discussion of valuing accounts receivable, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Ch. 22 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationSeparate PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationBusiness & PracticeFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationDegrees, Licenses & Enhanced EarningsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationValuation

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1. Tangible And Intangible Assets In General

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§ 222.132 Treatment of Assets Held in Partnership With Third Persons

A partner's right in specific partnership property is not community property [*Corp. Code § 15025(2)(e)*]. Thus, if one spouse is a member of a partnership with third persons, and community assets are transferred to the partnership, those specific assets are divested of their community character. However, if community assets are transferred to a partnership of which one spouse is a member, that spouse's interest in the partnership is itself community property, and the nonpartner spouse acquires a general claim in the partner-spouse's share of the partnership in place of the nonpartner's interest in specific community assets transferred to the partnership [*Rosenthal v. Rosenthal (1966) 240 Cal. App. 2d927, 50 Cal. Rptr. 385]* . When the parties are divorced and the community property is divided, the nonpartner spouse should be compensated for giving up his or her claim to the partner-spouse's share of the partnership [*Rosenthal v. Rosenthal (1966) 240 Cal. App. 2d 927, 931, 50 Cal. Rptr. 385]* .

With respect to valuing an interest in a partnership, most valuation issues have arisen in connection with the division of professional practices on dissolution of marriage. These issues, in turn, have focused largely on the valuation of goodwill (*§ 222.131[7]*) and other intangible assets of the practices involved. The tangible assets of a partnership are subject to valuation through objective means, such as fair market value or cost analysis.

As with other assets, in valuing a partnership interest for purposes of dividing community assets on dissolution of marriage, a trial court must account for the effect of immediate and specific tax consequences to the parties, if any. If a spouse might incur a tax liability on withdrawing from the partnership but has no present intent or need to do so, such a liability is neither immediate nor specific, and therefore should not be considered [*In re Marriage of Fonstein (1976) 17 Cal. 3d 738, 749-750, 131 Cal. Rptr. 873, 552 P.2d 1169]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsGeneral OverviewFamily LawMarital Termination & Spousal

SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationSeparate PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationBusiness & PracticeFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationValuation

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18-222 California Forms of Pleading and Practice--Annotated § 222.133

§ 222.133 Copyrights and Royalties

A copyright deriving from an artistic work produced during marriage constitutes community property [*In re Marriage of Worth (1987) 195 Cal. App. 3d 768, 774-775, 241 Cal. Rptr. 135* ; *but cf. Rodrigue v. Rodrigue (5th Cir. 2000) 218 F.3d 432, 443* (under *Lousiana* community property law, non-author spouse is entitled to undivided one-half interest in *economic benefits* of author spouse's copyrighted works, with author spouse retaining managerial control of copyrights after property division)]. Royalties from an artistic work produced during marriage also constitute community property [*In re Marriage of Worth (1987) 195 Cal. App. 3d 768, 774, 241 Cal. Rptr. 135* (dictum)].

The fact that a copyright is intangible property does not affect its community character or the community nature of any tangible benefits directly associated with the copyright [*In re Marriage of Worth (1987) 195 Cal. App. 3d 768, 774-775, 241 Cal. Rptr. 135]* . The doctrine of federal preemption is not a bar to characterization of copyrights as community property. There is no inconsistency between California community property law and federal copyright law because federal law fails to expressly define a copyright as the separate property of the copyright holder and, in addition, provides for transfer of copyrights by "operation of law" [*In re Marriage of Worth (1987) 195 Cal. App. 3d 768, 774, 777, 241 Cal. Rptr. 135]* .

When a copyright is not distributed under the terms of a dissolution judgment, the former spouses remain co-owners of an undivided interest in the copyright. If the artist-spouse later brings a federal action against a copyright infringer, the other spouse is entitled to share equally in any of the proceeds directly or indirectly related to the lawsuit [*In re Marriage of Worth (1987) 195 Cal. App. 3d 768, 771, 778, 241 Cal. Rptr. 135]* .

Factors that may be relevant in ascertaining the value of the copyright include the duration of the copyright, any prior assignments for value, and any offers to purchase the copyright. Counsel should attempt to secure any documentation that relates to these factors, as well as documentation verifying that a copyright has been established, in fact, for the artistic work involved.

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawOwner RightsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationValuation

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§ 222.134 Increases in Value Due to Spouse's Efforts (*Pereira/Van Camp*)

[1] Community Effort Increasing Value of Separate Property

Apportionment between separate and community property may be required when a spouse's separate property has increased in value as the result of that spouse's expenditure of skill, effort, and industry during marriage [*see generally Fam. Code §§ 2550, 2553* (court has jurisdiction to make orders necessary to divide community estate)]. The separate property involved is often a business or other enterprise into which the owner-spouse puts his or her community skill, efforts, and industry during marriage, resulting in an increase in value of the business and increased earnings for that spouse. The increased value of the business also could be attributed to the original separate property investment [*Beam v. Bank of America (1971) 6 Cal. 3d 12, 17, 98 Cal. Rptr. 137, 490 P.2d 257]* . Such an apportionment is to be distinguished from reimbursement under *Fam. Code § 2640* for separate property contributions to the acquisition of a community asset (*see § 222.302*). Reimbursement under that statute is generally not appropriate in the case of a separate property business, even if that business is incorporated during marriage, unless the rigorous requirements for transmutation of property under *Fam. Code § 852* are met [*In re Marriage of Koester (1999) 73 Cal. App. 4th 1032, 1036-1038, 87 Cal. Rptr. 2d 76* (court should have applied *Pereira* method, rather than awarding husband value of his separate property business on date of marriage with no return for his capital investment)].

Case law requires apportionment of profits between community and separate property in a business context and in the investment of separate funds in real estate or securities. A portion of the increased value and profits of a spouse's separate property due to that spouse's expenditure of skill, efforts, and industry during marriage must be allocated as community property, and divided in the family law proceeding [*see Beam v. Bank of America (1971) 6 Cal. 3d 12, 17, 98 Cal. Rptr. 137, 490 P.2d 257* ; *Weinberg v. Weinberg (1967) 67 Cal. 2d 557, 567-568, 63 Cal. Rptr. 13, 432 P.2d 709* ; *In re Marriage of House (1980) 106 Cal. App. 3d 434, 438, 165 Cal. Rptr. 145* ; *see also In re Marriage of Zaentz (1990) 218 Cal. App. 3d 154, 159, 165-167, 267 Cal. Rptr. 31]* .

Similarly, an apportionment between community and separate property is required when a spouse's expenditure of skill,

effort, and industry during marriage increases the value of the *other* spouse's separate property business or capital investment. Regardless of whether the community receives a fair market salary for the spouse's services, the amount of increased value in the separate property business or capital investment that is attributable to the spouse's skill, effort, and industry must be determined, because the community is entitled to the increase attributable to community endeavor [*see In re Marriage of Dekker (1993) 17 Cal. App. 4th 842, 851-852, 854-855, 21 Cal. Rptr. 2d 642* (*Pereira* applied to family corporation, developed by husband's efforts, that had all stock issued in wife's name)].

Not every increase in the value of a spouse's separate property or the proceeds from that property during marriage may become community property, but only that portion of the increase or proceeds *directly attributable* to a spouse's skill, efforts, and industry during marriage. Therefore, evidence showing what proportion of the increase and proceeds is attributable to the spouse's skill, efforts, and industry must be produced at the hearing or trial [*see Estate of Ney (1963) 212 Cal. App. 2d 891, 898, 28 Cal. Rptr. 442]* .

[2] Apportionment Methods

Two alternative formulas, referred to as the *Pereira* [*Pereira v. Pereira (1909) 156 Cal. 1]* and *Van Camp* [*Van Camp v. Van Camp (1921) 53 Cal. App. 17, 199 P. 885]* approaches, have been developed by the courts to divide separate and community interests in a separate property interest on dissolution. The formula applied in a particular case depends on whether the spouse's efforts and skill were the cause of increased value and profits (*Pereira*) or whether the increased value and profits occurred apart from the skills of the spouse (*Van Camp*).

The *Pereira* approach allocates a fair return on the spouse's separate property investment to that spouse as separate property and allocates any excess to the community estate as arising from the spouse's efforts. Community income, under *Pereira*, is the amount by which the actual income of the separate property business exceeds the return that the initial capital investment could have been expected to earn absent the owner-spouse's personal management. The fair return to the owner-spouse as a separate property interest is valued at the legal interest rate unless a different rate of return is presented [*Pereira v. Pereira (1909) 156 Cal. 1, 7, 103 P. 488* ; *Weinberg v. Weinberg (1967) 67 Cal. 2d 557, 565, 63 Cal. Rptr. 13, 432 P.2d 709]* .

The *Van Camp* approach should be applied to value community and separate interests accruing in the separate property business during marriage when increased value and profits were due to efforts *other than* those of the owner-spouse. Under *Van Camp*, a reasonable value (less any salary taken) is attributed to the services performed by the owner-spouse and that amount is valued as community property [*Van Camp v. Van Camp (1921) 53 Cal. App. 17, 27-28, 199 P. 885* ; *see Beam v. Bank of America (1971) 6 Cal. 3d 12, 18-20, 98 Cal. Rptr. 137, 490 P.2d 257* ; *In re Marriage of House (1980) 106 Cal. App. 3d 434, 438, 165 Cal. Rptr. 145]* . Increases in the value of the separate property due to factors other than the owner-spouse's efforts and skill are allocated as separate property to the owner-spouse under *Van Camp* [*see Van Camp v. Van Camp (1921) 53 Cal. App. 17, 27-28, 199 P. 885]* .

The apportionment of community and separate interests is quite different, depending on which valuation approach is utilized. To illustrate, assume a wife had put $10,000 into a separate property business by the time of marriage. At the time of dissolution, the business is worth $60,000. If the *Pereira* approach is applied because the wife's skill and effort during marriage, which is community effort, caused the increase in value and profits of the business during marriage, the wife receives her original investment of $10,000 plus a reasonable return (to be determined by an expert) as her separate property, and the remainder is valued as community interest, to be divided between the spouses.

If *Van Camp* applies because the increased value and profits of the separate property business were due to factors other than the owner-spouse's efforts, the court first would hear evidence of the value of services rendered by the spouse to the business, and then determine whether this value had already been paid to the spouse in the form of a salary (or otherwise), or whether such services had been uncompensated. The value of unpaid services would be deemed community property and subtracted from the earnings and increased value of the business. The remainder would be

deemed the owner-spouse's separate property [*Van Camp v. Van Camp (1921) 53 Cal. App. 17, 27-28, 199 P. 885]* . In the hypothetical situation posed above, based on the income she withdrew from the business during marriage, the wife would receive substantially more under *Van Camp* than her original separate property investment of $10,000 plus interest, as under *Pereira*.

It is possible that the value of the community property share of a separate property business may be zero or less. This may occur when, using *Pereira,* the separate property business is valued at the end of the marriage at less than the amount of the original separate property investment in the business plus interest at the legal rate (that is, the value of the separate property share), or when, using *Van Camp,* the value of the owner-spouse's community efforts was exceeded by withdrawals for the family's expenses, so that no element attached to the separate property business during marriage [*Beam v. Bank of America (1971) 6 Cal. 3d 12, 18-20, 98 Cal. Rptr. 137, 490 P.2d 257]* .

In apportioning between separate and the community estate, the courts havedeveloped no precise criterion or fixed standard. Instead, they have tried to adopt the standard that is most appropriate and equitable in each particular situation, depending on whether the character of the capital investment in the separate property or the personal activity, ability, and capacity of the spouse is the chief contributing factor in the realization of income and profits. In applying this principle, the court is neither bound to adopt a predetermined percentage as a fair return on business capital that is separate property (the *Pereira* approach), nor need it limit the community interest only to a salary fixed as a reward for a spouse's service (the *Van Camp* approach), but may select whichever formula will achieve substantial justice between the parties [*Beam v. Bank of America (1971) 6 Cal. 3d 12, 18, 98 Cal. Rptr. 137, 490 P.2d 257* ; *cf. In re Marriage of Zaentz (1990) 218 Cal. App. 3d 154, 165-167, 267 Cal. Rptr. 31* (equitable apportionment based on evaluation of multifaceted financial picture); *In re Marriage of Dekker (1993) 17 Cal. App. 4th 842, 851-852, 854-855, 21 Cal. Rptr. 2d 642* (*Pereira* applied to family corporation, developed by husband's efforts, that had all stock issued in wife's name)]. Some experts suggest that *Pereira* is applicable in labor intensive businesses, whereas capital intensive businesses require the application of the *Van Camp* approach. The reported decisions, however, appear to have applied the approach that best achieves the court's concept of equity [*see Beam v. Bank of America (1971) 6 Cal. 3d 12, 18, 98 Cal. Rptr. 137, 490 P.2d 257]* .

[3] Separate Efforts Increasing Value of Community Property

The earnings and accumulations of a spouse living separate and apart from the other spouse are the earner-spouse's separate property [*see Fam. Code § 771*]. Thus, if these separate earnings or efforts in some manner increase the value of a community asset, the court must determine what portion of the increased value is community property and what portion is separate property [*In re Marriage of Imperato (1975) 45 Cal. App. 3d 432, 436, 119 Cal. Rptr. 590* (*accord, In re Marriage of Hug (1984) 154 Cal. App. 3d 780, 792, 201 Cal. Rptr. 676*); *see In re Marriage of Barnert (1978) 85 Cal. App. 3d 413, 423-424, 149 Cal. Rptr. 616* ; *In re Marriage of Fischer (1976) 78 Cal. App. 3d 556, 562-563, 146 Cal. Rptr. 384* , disapproved on other grounds, *In re Marriage of Epstein (1979) 24 Cal. 3d 76, 85 n.2, 154 Cal. Rptr. 413, 592 P.2d 1165* ; *see also In re Marriage of Hargrave (1985) 163 Cal. App. 3d 346, 355-356, 209 Cal. Rptr. 764* ; *but see Grappo v. Coventry Financial Corp. (1991) 235 Cal. App. 3d 496, 508, 286 Cal. Rptr. 714* (husband's postseparation advances of his separate funds to enable wife to construct home on her separate property Nevada lot did not give rise to community interest under circumstances); *In re Marriage of Shelton (1981) 118 Cal. App. 3d 811, 815-816, 173 Cal. Rptr. 629* (when community property is used as gambling stakes after separation, proceeds are community property due to minimal skill, effort, and industry required of gambling spouse)]. This increase can be substantial; for example, when the community asset is a professional practice, the earnings of the professional person may be substantial and the time period from separation to trial may be considerable [*see In re Marriage of Lopez (1974) 38 Cal. App. 3d 93, 110, 113 Cal. Rptr. 58]* .

For the court to make this determination, the value of the asset must be ascertained both at the time of separation and at the time of trial. The value of the asset at the time of separation must be subtracted from the value of the asset at the time of trial and the difference, if positive, is the increase in the value of the asset. It is not proper, however, simply to

award the increased value as separate property to the spouse who devoted time and effort to preservation of the asset because doing so would overlook the growth factor found in many assets, the investment and reinvestment of capital, market fluctuations, and numerous other components that can increase the value of most assets. Once the amount of the increase has been determined, that portion of it attributable to inherent growth or some factor other than the efforts of a spouse must be added to the valuation of the asset at the time of separation; the sum of these two figures gives the valuation of the community property interest of the asset at the time of trial [*see In re Marriage of Imperato (1975) 45 Cal. App. 3d 432, 436-437, 119 Cal. Rptr. 590]* .

Different formulas may be used, however, in apportioning the increased value between separate and community property. The court in one case observed that in allocating the increase in value of a community asset occurring after separation of the parties between community and separate interests, the apportionment formulas used in *Pereira* and *Van Camp* should be applied *in reverse* [*In re Marriage of Imperato (1975) 45 Cal. App. 3d 432, 438-439, 119 Cal. Rptr. 590* ; *see Pereira v. Pereira (1909) 156 Cal. 1, 103 P. 488* ; *Van Camp v. Van Camp (1921) 53 Cal. App. 17, 199 P. 885* (discussed in *§ 222.134[1]*)].

Applying *Pereira* in reverse results in allocating a fair return of the increase to community property, with the remainder allocated to the employed spouse's separate property. Application of "reverse *Van Camp,*" on the other hand, results in an award of the reasonable value of the employed spouse's service (minus salary) as separate property of the employed spouse, with the balance to the community [*Pereira v. Pereira (1909) 156 Cal. 1, 7, 103 P. 488* ; *Van Camp v. Van Camp (1921) 53 Cal. App. 17, 27-28, 199 P. 885* ; *see In re Marriage of Imperato (1975) 45 Cal. App. 3d 432, 438-439, 119 Cal. Rptr. 590]* .

A debt owed by a community business to a separate pension plan also must be apportioned [*In re Marriage of Hargrave (1985) 163 Cal. App. 3d 346, 355-356, 209 Cal. Rptr. 764]* . When valuing the business, the apportionment method approved in *In re Marriage of Imperato* and *In re Marriage of Barnert* must be used to determine the effect of a debt owed by a community business operated by one of the spouses to that spouse's separate property pension plan [*In re Marriage of Hargrave (1985) 163 Cal. App. 3d 346, 355-356, 209 Cal. Rptr. 764* ; *see* In re *Marriage of Barnert (1978) 85 Cal. App. 3d 413, 149 Cal. Rptr. 616* ; *In re Marriage of Imperato (1975) 45 Cal. App. 3d 432, 119 Cal. Rptr. 590]* .

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§ 222.135 Life Insurance

[1] Characterization in General

In general, a life insurance policy and its proceeds are community assets to the extent that the policy is earned by employment during marriage or purchased with community funds during marriage [*see In re Marriage of Donnelly (1983) 142 Cal. App. 3d 135, 137, 190 Cal. Rptr. 756 , disapproved on another point, in In re Marriage of Saslow (1985) 40 Cal. 3d 848, 861 n.5, 221 Cal. Rptr. 546, 710 P.2d 346]* . When both community and separate funds have been used to acquire a policy, the community and separate property interests in the proceeds must be apportioned. Each interest is given a proportionate share in the same ratio that the amount of premiums paid from community earnings bears to the amount of premiums paid from separate property [*Biltoft v. Wootten (1979) 96 Cal. App. 3d 58, 61-62, 157 Cal. Rptr. 581]* .

The characterization of whole life insurance is clear. In California, courts have recognized the value of whole life insurance as its cash surrender value and have divided that value when the policy was determined to be community property [*see In re Marriage of Holmgren (1976) 60 Cal. App. 3d 869, 871, 130 Cal. Rptr. 440* ; *Brawman v. Brawman (1962) 199 Cal. App. 2d 876, 878, 19 Cal. Rptr. 106* ; *see also In re Marriage of Lorenz (1983) 146 Cal. App. 3d 464, 468, 194 Cal. Rptr. 237]* .

Additionally, the proceeds from insurance have been characterized as community property to some extent by the courts. Once the insured dies, the proceeds of life insurance, even term insurance, may be community property to the extent that premiums paid on the policy were derived from community funds [*see Biltoft v. Wootten (1979) 96 Cal. App. 3d 58, 61-62, 157 Cal. Rptr. 581* ; *In re Marriage of Lorenz (1983) 146 Cal. App. 3d 464, 468, 194 Cal. Rptr. 237* (term policy is worthless until proceeds are payable)]. For term policies, characterization of the *proceeds* generally depends on whether community or separate funds were used to pay the premium for the final term of the policy. The proceeds are a community asset if the insured died during a term paid for with community funds, and a separate asset if the final term was paid for with separate funds [*Estate of Logan (1987) 191 Cal. App. 3d 319, 321, 236 Cal. Rptr. 368* ; *see*

also Minnesota Mutual Life Ins. v. Ensley (9th Cir. 1999) 174 F.3d 977, 983] . However, appellate courts have not agreed on the divisibility of term insurance during an insured spouse's lifetime, as discussed in *§ 222.135[2]*. Also, special rules apply to military life insurance policies, as discussed in *§ 222.135[4]*.

Apart from strict characterization issues, note that in structuring the payment of child or spousal support, a court has authority to order maintenance of a life insurance policy for the benefit of a supported child or spouse, as discussed in *§ 222.135[3][b]*, and Ch. 224, *Dissolution of Marriage: Child Support* § 222.150et seq., and *Ch. 225, Dissolution of Marriage: Spousal Support § 222.110* et seq. [*see Fam. Code § 4360*; *In re Marriage of O'Connell (1992) 8 Cal. App. 4th 565, 571-573, 10 Cal. Rptr. 2d 334]* . In addition, counsel should keep in mind that questions of postdissolution insurance policy ownership and control, including the right of one party to maintain insurance on the life of the other, may require consideration of applicable insurance principles and law [*see, e.g., In re Marriage of Bratton (1994) 28 Cal. App. 4th 791, 794, 34 Cal. Rptr. 2d 86* (former wife could maintain policy on former husband's life, despite marital dissolution, when she had insurable interest at inception of policy during marriage; and husband lacked standing to contest her continued ownership of policy)].

[2] Term Insurance During Insured's Lifetime

[a] Scope

Appellate courts are not in agreement regarding the characterization of term life insurance when the proceeds have not yet become payable, that is, during the lifetime of the insured spouse. Several aspects to this characterization issue exist: (1) whether a term policy is a divisible community asset at all when the policy period extends beyond the expiration of a term acquired with community funds, (2) whether a contractual right of renewal of a term policy constitutes a divisible community asset, and (3) what effect, if any, there is on these issues if the insured spouse no longer qualifies to purchase a new policy--that is, has become uninsurable, particularly when that spouse becomes uninsurable during a term paid for with community funds. Although the California Supreme Court has made reference to these issues and cited certain of the related cases in ruling on the division of *disability* insurance benefits [*see In re Marriage of Elfmont (1995) 9 Cal. 4th 1026, 1033-1035, 39 Cal. Rptr. 2d 590, 891 P.2d 136]* , it has not ruled definitively on the term life insurance issue. It is, therefore, a matter ripe for decision by the Court, pending which counsel should refer to the positions taken in the appellate districts that are discussed in *§ 222.135[2][b]* and *[2][c]*.

[b] Opposition to Division

Several appellate districts have opposed characterization of a term life insurance policy as a divisible community asset to the extent that the policy at issue extends beyond expiration of the term acquired with community funds or efforts [*see In re Marriage of Spengler (1992) 5 Cal. App. 4th 288, 293, 6 Cal. Rptr. 2d 764]* . These courts, however, have not taken a uniform position on characterization, particularly when the issue of an insured spouse's continued insurability is considered. Because of the divergent views taken, a detailed explanation of case holdings follows.

One appellate court has expressed outright opposition to division of term insurance during the insured's lifetime. In *In re Marriage of Lorenz* [*In re Marriage of Lorenz (1983) 146 Cal. App. 3d 464, 194 Cal. Rptr. 237]* , the court of appeal (Second District) held that term life insurance generally has no value because it is worthless after the term expires. The court reasoned that if the policy proceeds have not been paid, the term policy has no cash value that can be divided on dissolution of marriage [*In re Marriage of Lorenz (1983) 146 Cal. App. 3d 464, 468, 194 Cal. Rptr. 237* ; *Estate of Logan (1987) 191 Cal. App. 3d 319, 236 Cal. Rptr. 368]* .

However, the First District Court of Appeal has taken a somewhat less restrictive view, by considering the continued insurability of the insured spouse. In *Estate of Logan* [*Estate of Logan (1987) 191 Cal. App. 3d 319, 236 Cal. Rptr. 368]* , the court of appeal concluded (1) that if the insured spouse dies *during* the term paid with community funds, the proceeds of the policy are community property, but (2) that a term insurance policy on the life of one spouse is not

divisible as community property *after expiration* of the term acquired with community funds or efforts [*In re Marriage of Spengler (1992) 5 Cal. App. 4th 288, 293, 6 Cal. Rptr. 2d 764* (citing *Estate of Logan*)], subject to consideration of the insured spouse's continued insurability. With respect to dollar coverage, it said that the insurance has no value after the term has ended without the insured having died. If the insured remains insurable, the right to renew the policy has no value because the insured could obtain comparable insurance for a comparable price in the open market. Thus, for a spouse who *remains insurable,* term insurance is community property only for the period beyond the date of separation for which community funds were used to pay the premium; but when the premiums for a new term have been paid from postseparation separate property earnings (and the spouse remains insurable), the policy must be confirmed to the insured as separate property. Nevertheless, it said that an exception arises if the insured spouse *becomes uninsurable* during a term paid with community funds, because the right to continued coverage on payment of future premiums is a valuable community asset for one who is uninsurable [*Estate of Logan (1987) 191 Cal. App. 3d 319, 321, 325-326, 236 Cal. Rptr. 368* ; *see In re Marriage of Elfmont (1995) 9 Cal. 4th 1026, 1033-1034, 39 Cal. Rptr. 2d 590, 891 P.2d 136]* . Accordingly, if the insured becomes uninsurable during a term paid with community funds, the right to future insurance coverage that cannot otherwise be purchased is a community asset to be divided on dissolution [*In re Marriage of Spengler (1992) 5 Cal. App. 4th 288, 296, 6 Cal. Rptr. 2d 764* (quoting from *Logan* and characterizing this statement as dictum); *see also In re Marriage of Elfmont (1995) 9 Cal. 4th 1026, 1034, 39 Cal. Rptr. 2d 590, 891 P.2d 136* (noting--without holding--that if spouse who is uninsurable dies during term purchased by exercising policy's renewal right, courts have held that the community has interest in insurance proceeds commensurate with its contributions to right of renewal; and stating that "[t]o provide for a former spouse's participation in [proceeds of a term life insurance policy] when premium payments from community funds have purchased policy renewal rights necessary to keep the insurance in force, may well be appropriate")].

However, in this court's view [*Estate of Logan (1987) 191 Cal. App. 3d 319, 236 Cal. Rptr. 368]* , the need to value the right to obtain continued coverage for the insurable spouse will rarely arise. If it does arise, expert testimony may be used to establish the value. The measure may be the actuarial present value of the proceeds payable under the policy, considering the shortened life expectancy, resulting from whatever has caused the uninsurability [*Estate of Logan (1987) 191 Cal. App. 3d 319, 326 n.8, 236 Cal. Rptr. 368]* .

A later (Third District) decision followed *Estate of Logan,* but only in agreeing that an employment-related *group* term policy is not a community asset beyond the expiration of the term acquired with community efforts. It disagreed with *Estate of Logan* on the effect of uninsurability of an insured spouse, by concluding that a policy's *right of renewal* without proof of current insurability is not a divisible community asset if the insured employee has no enforceable right to compel the employer to renew the policy. While a renewal right has potential value, the court reasoned, in the absence of a right by the insured to enforce that value, the renewal right is not "property," but a mere expectancy [*In re Marriage of Spengler (1992) 5 Cal. App. 4th 288, 297-299, 6 Cal. Rptr. 2d 764]* . *Spengler* only addressed *group* term policies concerning which an employee has no right to enforce renewal. It did not address the situation in which an insured becomes uninsurable after individually purchasing a term policy, nor the situation in which an employment or union contract requires an employer to provide group term insurance even if the insured becomes uninsurable [*see* Comment, *8 Cal. Fam.* Law Monthly 469 (June 1992)].

[c] Division Permitted

On the other hand, some courts have held that term life insurance may be divisible as community property. The Fourth District, in *In re Marriage of Gonzalez* [*In re Marriage of Gonzalez (1985) 168 Cal. App. 3d 1021, 214 Cal. Rptr. 634]* , held that term life insurance policies have an ascertainable value and may be divided on dissolution of marriage. The court analogized term life insurance to nonvested pension benefits and accrued vacation time and stated that the insurance should not be labeled a mere expectancy rather than divisible property. It rejected the earlier *Lorenz* case (*§ 222.135[2][b]*) as "simply incorrect" in the assertion that assets such as term life insurance have no economic value [*In re Marriage of Gonzalez (1985) 168 Cal. App. 3d 1021, 1024-1025, 214 Cal. Rptr. 634* ; *see Bowman v. Bowman (1985) 171 Cal. App. 3d 148, 159-160, 217 Cal. Rptr. 174* (same appellate district reaffirmed and applied *Gonzalez*);

(strongly criticized by *Estate of Logan (1987) 191 Cal. App. 3d 319, 325, 236 Cal.Rptr. 368* for "incorrect conclusions"); *cf. In re Marriage of Elfmont (1995) 9 Cal. 4th 1026, 1034, 39 Cal. Rptr. 2d 590, 891 P.2d 136* (citing *Bowman* and *Gonzalez* in connection with characterizing insurance proceeds after an insured spouse has become uninsurable)]. To properly determine the value of a term life insurance policy, the trial court might examine several factors, such as the face value of the policy, the amount of the premium, the insured's life expectancy, whether the policy is convertible to whole life insurance, replacement cost, and when, if ever, the policy "vests" and is deemed fully paid [*In re Marriage of Gonzalez (1985) 168 Cal. App. 3d 1021, 1024-1025, 214 Cal. Rptr. 634* ("vesting" criticized in *Estate of Logan (1987) 191 Cal. App. 3d 319, 326 n.8, 236 Cal. Rptr. 368*)]. When apportioning community ad separate interests in term life insurance, the trial court must decide to what life insurance benefits, if any, the employed spouse would have been entitled had the employment terminated at the date of separation. That percentage, if any, will constitute the community property portion of the life insurance proceeds, and the nonemployed spouse's interest will be one half [*Bowman v. Bowman (1985) 171 Cal. App. 3d 148, 160, 217 Cal. Rptr. 174]* .

Gonzalez has been given the same limited retroactivity as the Supreme Court decision in *In re Marriage of Brown* [*In re Marriage of Brown (1976) 15 Cal. 3d 838, 851, 126 Cal. Rptr. 633, 544 P.2d 561]* , which recognized nonvested pension rights as divisible community assets. Thus, *Gonzalez* will apply retroactively only when the property rights arising from the marriage have not yet been adjudicated, the adjudication is still subject to appellate review, or the trial court has expressly reserved jurisdiction to divide the term life insurance [*Bowman v. Bowman (1985) 171 Cal. App. 3d 148, 160 n.10, 217 Cal. Rptr. 174* (criticized on other grounds by *Estate of Logan (1987) 191 Cal. App. 3d 319, 325, 236 Cal. Rptr. 368*)].

[3] Unauthorized Gifts of Community Insurance Benefits

[a] Right to Set Aside Gift

When insurance premiums are paid with community funds or the benefits are earned by the insured spouse during marriage, and the insured spouse designates someone else as the beneficiary, without receiving fair and reasonable value and without the spouse's consent, the surviving spouse may set aside the gift [*see Fam. Code § 1100(b)*; *Tyre v. Aetna Life Ins. Co. (1960) 54 Cal. 2d 399, 404, 6 Cal. Rptr. 13, 353 P.2d 725]* . An insured spouse may dispose of only one-half of the community property in a will, and thus, he or she may give only one-half of the community property to the named, nonspouse beneficiary [*see* former *Prob. Code §§ 201, 202* (applicable only when decedent died before January 1, 1985); *Prob. Code §§ 100, 6101(b), (c), 6103, 6401(a), (b), 6414* (applicable only when decedent died on or after January 1, 1985); *cf. Cripps v. Life Ins. Co. of North America (9th Cir. 1992) 980 F. 2d 1261, 1263, 1267-1269* (without deciding on merits, appellate court remanded for determination of entitlement to life insurance proceeds as between surviving wife, who was legatee of proceeds under holographic will, and former wife, who was maintained as named policy beneficiary pursuant to divorce settlement)]. The surviving spouse may set aside such an unauthorized gift to the extent of his or her one-half community property interest [*see Patillo v. Norris (1976) 65 Cal. App. 3d 209, 217, 135 Cal. Rptr. 210]* . For additional discussion of the community property rights of a surviving spouse, see Ch. 122, *Community Property* .

[b] Insurance as Support Substitute Contrasted

No unauthorized gift of life insurance occurs when a court orders an insured spouse to change an insurance beneficiary designation to include a former spouse or child from a previous marriage as a beneficiary, as a form of support. Although the issue is unsettled of whether a community interest exists in an insured's right to change beneficiaries to a policy purchased with community funds, one court has suggested that any such purported community interest is limited to a spouse's right to avoid unauthorized gifts of community personal property. Thus, a surviving spouse ordinarily may not overturn a change of life insurance beneficiaries that was ordered by a court as a support substitute [*see Fam. Code § 4360*; *In re Marriage of O'Connell (1992) 8 Cal. App. 4th 565, 571-573, 10 Cal. Rptr. 2d 334]* , for this is not a gift [*see In re Marriage of O'Connell (1992) 8 Cal. App. 4th 565, 578-580, 10 Cal. Rptr. 2d 334* (upholding award of

two-thirds of insurance proceeds to former wife and child of prior marriage, and one-third to surviving spouse, who was policy beneficiary, pursuant to earlier court order that decedent change beneficiaries to include child and former wife); *cf. Ins. Code § 10170(e)* (right to change insurance beneficiary unless beneficiary's rights are irrevocable); *In re Marriage of Bratton (1994) 28 Cal. App. 4th 791, 794, 34 Cal. Rptr. 2d 86* (former wife could maintain policy on former husband's life, despite marital dissolution, when she had insurable interest at inception of policy during marriage; and husband lacked standing to contest her continued ownership of policy; characterization of policy was not in issue)].

[4] Military Life Insurance Policies

Military life insurance policies do not appear to be divisible as community property on marital dissolution or legal separation. The United States Supreme Court has held that federal law preempts state domestic relations law with respect to military life insurance policies. It ruled that a Maine court's imposition of a constructive trust on policy benefits, based on a divorce decree ordering a husband to maintain his military life insurance policy in favor of his children and formerwife, was preempted by the federal interest in granting the service member complete freedom to name a policy beneficiary [*Ridgway v. Ridgway (1981) 454 U.S. 46, 56-57, 102 S. Ct. 49, 70 L. Ed. 2d 39]* .

The Court also held that imposing a constructive trust on the policy proceeds would violate a federal statutory prohibition against attachment, levy, or seizure of the benefits. Although the case did not involve an assertion of community property interests in the policy, the Court held that federal law confers on the service member an absolute, personal right to designate the policy beneficiary, and that right is not subject to the interests of another, as is community property [*Ridgway v. Ridgway (1981) 454 U.S. 46, 60, 102 S. Ct. 49, 70 L. Ed. 2d 39* ; *see Wissner v. Wissner (1949) 338 U.S. 655, 658-661, 70 S. Ct. 398, 94 L. Ed. 424]* .

Ridgway thus appears to preclude application of a California Supreme Court decision, which held that the federal object of securing a policyholder's choice as beneficiary is not harmed by awarding other community assets to the nonservice member spouse to offset his or her interest in the federal policy [*In re Marriage of Milhan (1980) 27 Cal. 3d 765, 777-778, 166 Cal. Rptr. 533, 613 P.2d 812]* .

The federal preemption of military life insurance policies contrasts with the treatment of policies issued under the Federal Employees' Group Life Insurance Program (EGLI), which can be divided as community property [*see Carlson v. Carlson (1974) 11 Cal. 3d 474, 476-477, 113 Cal. Rptr. 722, 521 P.2d 1114* , *cert. denied, 419 U.S. 1105 (1975)]* .

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§ 222.136 Personal Injury Damages

[1] Characterization--General Status as Community Property

Personal injury damages from a cause of action that arises during marriage are a community asset, even if they are received after separation [*see Fam. Code § 780*; *In re Marriage of Saslow (1985) 40 Cal. 3d 848, 857, 221 Cal. Rptr. 546, 710 P.2d 346* ; *Estate of Powell (2000) 83 Cal. App. 4th 1434, 100 Cal. Rptr. 2d 501* ; *see also Fam. Code §§ 781(a), 2603(a)*]. There are statutory exceptions to this rule, which provide, for example, that the damages are separate property if the cause of action arose while the parties were separated (*§ 222.136[2]*) [*see Fam. Code § 781(a)*].

Personal injury damages that are found to be community property are termed "community estate personal injury damages," and special rules apply to their division on marital dissolution or legal separation, as discussed in *§ 222.136[3]* et seq. These assignment rules generally require the court to distribute such damages to the injured spouse [*see Fam. Code § 2603*; *In re Marriage of Jackson (1989) 212 Cal. App. 3d 479, 483, 260 Cal. Rptr. 508* ; *In re Marriage of Devlin (1982) 138 Cal. App. 3d 804, 808-810, 189 Cal. Rptr. 1]* . Particular recoveries must be analyzed to determine whether they constitute "community estate personal injury damages" [*see generally Fam. Code § 2603*; *see, e.g., In re Marriage of Jackson (1989) 212 Cal. App. 3d 479, 485-486, 260 Cal. Rptr. 508* (proceeds from uninsured motorist coverage, along with property purchased from those proceeds, were community estate personal injury damages)] For discussion of the definition of "community estate personal injury damages," see *§ 222.136[b]*.

[2] Exceptions

[a] In General

Money or other property received, or to be received, by a spouse in satisfaction of a judgment for damages for personal injuries, or pursuant to an agreement for the settlement or compromise of a claim for those damages, is the separate property of the injured spouse if the cause of action for the damages arose in the following circumstances [*Fam. Code § 781(a)*]:

(1) After entry of a judgment of marital dissolution or legal separation; or

(2) While either spouse, if he or she is the injured person, is living separate from the other other spouse.

However, if the uninjured spouse has paid expenses because of the personal injuries from his or her separate property or from community property, he or she is entitled to reimbursement of the separate or community property. The reimbursement should come from the separate property received by the injured spouse in connection with the injuries [*Fam. Code § 781(b)*]. This reimbursement rule, however, does not apply with respect to a worker's compensation permanent disability award received after a marital separation [*In re Marriage of Fisk (1992) 2 Cal. App. 4th 1698, 1706, 4 Cal. Rptr. 2d 95]* . For discussion of workers' compensation awards, see *§ 222.137*.

A further exception to the general rule that personal injury damages are community property [*Fam. Code § 780*] applies when one spouse sues the other for personal injuries based on a cause of action arising during the marriage. In such a case, all money or other property paid by the tortfeasor spouse to the injured spouse in satisfaction of a damages judgment or pursuant to a settlement or compromise of the claim is the separate property of the injured spouse [*Fam. Code § 781(c)*]. A judgment for civil damages for domestic violence obtained by one spouse against the other before entry of final judgment in a proceeding for dissolution or legal separation may be enforced against the abusive spouse's share of community property [*Fam. Code § 2603.5*].

For example, a wife's recovery in her settlement of her legal malpractice action against the couple's former attorney was held to be her separate property, even though two necessary elements of her cause of action--duty and breach--occurred during marriage, when she did not suffer any loss or injury untilafter separation, and when it was the husband's actions, with the attorney's aid, in transferring funds offshore that resulted in the injury the wife claimed in the malpractice action. Although the attorney was negligent in representing the wife, it was the husband who benefited from that negligence. Under these circumstances, it would be inequitable for the husband to benefit by sharing in the wife's settlement proceeds [see *In re Marriage of Klug (2005) 130 Cal. App. 4th 1389, 1393-1403, 31 Cal. Rptr. 3d 327]* .

[b] Imputed Negligence Problem Solved

Under prior law, the "imputed negligence rule" barred recovery by an injured spouse for injuries inflicted by a third person when the plaintiff's spouse was contributorily negligent [*see Zaragosa v. Craven (1949) 33 Cal. 2d 315, 321, 202 P.2d 73]* . The Legislature statutorily abolished the imputation of negligence between spouses insofar as it is based *exclusively* on their marital status [*Fam. Code § 783* (continuing former *Civ. Code § 5112*)]. The statute provides that if a married person is injured by the negligent or wrongful act or omission of a person other than his or her spouse, the fact that the negligent or wrongful act or omission of the injured person's spouse was a concurring cause of the injury is not a defense in a personal injury action unless it would be a defense if the marriage did not exist [*Fam. Code § 783*; *see Estate of Kirby (1976) 59 Cal. App. 3d 288, 291, 130 Cal. Rptr. 691]* .

[3] Award on Division of Community Estate

[a] Assignment to Injured Party

In proceedings for marital dissolution or legal separation, amounts that constitute "community estate personal injury damages" must be assigned to the party who suffered the injuries unless the court, after taking into account the economic condition and needs of each party, the time that has elapsed since the recovery of the damages or the accrual of the cause of action, and all other facts of the case, determines that the interests of justice require another disposition. In such a case, the damages must be assigned to the parties in such proportions as the court determines to be just, except that at least one half of the damages must be assigned to the party who suffered the injuries [*Fam. Code § 2603(b)*].

Fam. Code § 2603 is designed to ensure that, other than in exceptional circumstances, community estate personal injury damages, or the bulk thereof, will be awarded to the injured spouse and that under no circumstances will the injured spouse receive less than one-half of the damages. On the other hand, the statute gives the court discretion in exceptional circumstances to assign community estate personal injury damages in such proportions as the court determines to be just, subject to the limitation that not less than one-half be awarded to the injured spouse [*see In re Marriage of Morris (1983) 139 Cal. App. 3d 823, 827, 189 Cal. Rptr. 80]* .

[b] "Community Estate" Damages Defined

"Community estate personal injury damages," as used in *Fam. Code § 2603*, means all money or other property received or to be received by a person in satisfaction of a judgment for damages for his or her personal injuries or pursuant to an agreement for the settlement or compromise of a claim for the damages, if the cause of action for the damages arose during marriage but is not separate property as defined in *Fam. Code § 781*, unless the money or other property has been commingled with other assets of the community estate [*Fam. Code § 2603(a)*; *cf. In re Marriage of Jackson (1989) 212 Cal. App. 3d 479, 483, 260 Cal. Rptr. 508* (when injured spouse received proceeds from uninsured motorist insurance, the proceeds are "community estate personal injury damages," despite existence of pending, unliquidated claim against uninsured motorist)].

Generally, "commingling" is a term of art used to describe the mixture of separate property or funds with community property or funds. As used in *Fam. Code § 2603*, however, "commingling" clearly refers to the mixture of community estate personal injury damages with other community assets into one indistinguishable, amorphous mass. Thus, the only time proceeds from a personal injury award lose their character as community estate personal injury damages is, in the absence of an express agreement, when such proceeds have been commingled with other community property and it is impossible to trace the source of the property or funds [*see Fam. Code § 2603(a)*; *In re Marriage of Devlin (1982) 138 Cal. App. 3d 804, 810, 189 Cal. Rptr. 1* ; *In re Marriage of Mason (1979) 93 Cal. App. 3d 215, 225, 155 Cal. Rptr. 350]* . For discussion of commingling of community and *separate* property, see Ch. 122, *Community Property* . For discussion of the characterization of personal injury damages as separate property, see *§ 222.136[2]*.

[c] Division of Other Community Property

Fam. Code § 2603 does not specify how the other community property of the parties should be divided after the community estate personal injury damages have been assigned to the injured spouse. Two possibilities follow: (1) to divide the remaining property equally, which will result in an unequal division of the community property in favor of the injured spouse; or (2) to offset as much as possible the award of personal injury damages to one spouse by awarding more than half of the remaining community property to the other spouse. Despite this uncertainty, the first method seems to be fairer and consistent with *Fam. Code § 2600*, which indicates that *Fam. Code § 2603* applies notwithstanding the equal division requirement [*see Fam. Code § 2600* (general provision for exceptions to equal division)].

Fam. Code § 2603 vests the trial court with broad discretion to distribute personal injury damages on dissolution, subject to the limitation that not less thanone-half be awarded to the injured spouse. Factors that the court might consider include duration of marriage after injuries occurred, effect of injuries on the noninjured spouse, and whether a major portion if not the entire award is necessary to "make whole" the injured spouse [*In re Marriage of Jacobson (1984) 161 Cal. App. 3d 465, 474, 207 Cal. Rptr. 512]* . Thus, courts have upheld an award of all personal injury damages to the injured party, even though the award resulted in a substantially unequal division of the community property [*In re Marriage of Morris (1983) 139 Cal. App. 3d 823, 828, 189 Cal. Rptr. 80* ; *In re Marriage of Mason (1979) 93 Cal. App. 3d 215, 222, 155 Cal. Rptr. 350* ; *see In re Marriage of Jacobson (1984) 161 Cal. App. 3d 465, 474, 207 Cal. Rptr. 512]* .

Notwithstanding the general rules for characterization and division of retrement and pension benefis set forth in the

Family Code, a spouse is entitled to an award of all of his or her retirement and pension benefits if he or she is the victim of a murder attempt by the other spouse [*See Fam. Code § 782.5*]. For further discussion, see *§ 222.77*.

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§ 222.137 Workers' Compensation Benefits

Workers' compensation benefits have traditionally been characterized under the community property system by analogy to personal injury damages [*see Fam. Code §§ 780, 781*; *In re Marriage of McDonald (1975) 52 Cal. App. 3d 509, 512-513, 125 Cal. Rptr. 160* ; *see § 222.136*], rather than by analogy to earnings or retirement pay. Thus, workers' compensation payments made during marriage are community property [*see Northwestern Redwood Co. v. Industrial Accident Comm'n (1920) 184 Cal. 484, 486, 194 P. 31* ; *In re Marriage of Robinson (1976) 54 Cal. App. 3d 682, 684-686, 126 Cal. Rptr. 779* ; *Estate of Simoni (1963) 220 Cal. App. 2d 339, 344, 33 Cal. Rptr. 845* ; *see also In re Marriage of Jones (1975) 13 Cal. 3d 457, 464 n.7, 119 Cal. Rptr. 108, 531 P.2d 420* (postdissolution military disability pay)].

However, courts have begun characterizing workers' compensation benefits by analogy to disability benefits rather than to personal injury benefits, and have examined the *purpose* of the payments to determine whether compensation received by an injured spouse is community or separate property [*see Raphael v. Bloomfield (2003) 113 Cal. App. 4th 617, 622, 6 Cal. Rptr. 3d 583* (courts in majority of community property states examine purpose of postdissolution military disability pay and postseparation worker's compensation awards); *see also In re Marriage of Fisk (1992) 2 Cal. App. 4th 1698, 1701, 1705, 4 Cal. Rptr. 2d 95* (cases construing "purpose" of disability pension do not undermine cases recognizing workers' compensation *permanent disability* award received after separation is injured spouse's separate property); *In re Marriage of Saslow (1985) 40 Cal. 3d 848, 857, 221 Cal. Rptr. 546, 710 P.2d 346* (discussing significant 1979 amendments to law governing personal injury damages and "purpose" approach to disability benefits); see *§ 222.180[3]*]. As a result, workers' compensation benefits received by an injured spouse *after* separation or dissolution have been held to be the injured spouse's separate property [*In re Marriage of McDonald (1975) 52 Cal. App. 3d 509, 513, 125 Cal. Rptr. 160* ; *see In re Marriage of Fisk (1992) 2 Cal. App. 4th 1698, 1701, 1703, 4 Cal. Rptr. 2d 95]* .

As one court explained, a workers' compensation *permanent disability* award received *after* separation compensates the injured person for future loss of earning capacity, and is that person's separate property. Thus, the personal injury

damages statutes [*see Fam. Code §§ 780, 781*] are inapplicable, and the injured person's spouse is not entitled to reimbursement from the permanent disability award for any community property funds used to pay expenses that resulted from the injury that occurred during the marriage [*In re Marriage of Fisk (1992) 2 Cal.App.4th 1698, 1701, 1703, 4 Cal. Rptr. 2d 95* (construing statutes prior to passage of Family Code)].

Using similar reasoning, another court has held that a lump sum *permanent disability* award received *before* separation is the injured spouse's separate property to the extent that the award is meant to compensate for the injured spouse's diminished earning capacity or medical expenses *after* separation [*Raphael v. Bloomfield (2003) 113 Cal. App. 4th 617, 623, 6 Cal. Rptr. 3d 583]* . The court stated that there was no reason to treat a lump sum *permanent disability* award differently based on whether it was received before or after separation, because (1) the timing of the receipt was unrelated to the purpose of the award, and (2) the noninjured spouse would receive a windfall if an award received the day before separation were deemed to be community property [*Raphael v. Bloomfield (2003) 113 Cal. App. 4th 617, 623-624, 6 Cal. Rptr. 3d 583]* . However, the same court also held that any portion of a *permanent disability* award received *before* separation that is intended to compensate for the injured spouse's reduced earnings *during marriage* or for injury-related expenses paid with community funds, is properly characterized as community property [*Raphael v. Bloomfield (2003) 113 Cal. App. 4th 617, 624, 6 Cal. Rptr. 3d 583]* .

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§ 222.138 Qui Tam Actions

A *qui tam* action is a type of private attorney general lawsuit that permits an individual to sue to enforce a public statutory right and retain a portion of the moneys recovered thereby. Although a qui tam plaintiff does not "own" the cause of action in the same sense that plaintiffs can own conventional causes of action, the money generated by the action that is ultimately awarded to the plaintiff is clearly property. Correspondingly, the right to that award is also capable of ownership--a contingent future interest. Thus, when a qui tam action is filed during marriage and before a couple's separation, it is divisible communityproperty [*Biddle v. Biddle (In re Biddle) (1997) 52 Cal. App. 4th 396, 398, 400, 60 Cal. Rptr. 2d 569]* .

Legal Topics:

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§ 222.139 Social Security Benefits

A spouse's interest in federal Social Security old age and survivor's benefits is separate property that is not divisible on dissolution of marriage [*In re Marriage of Cohen (1980) 105 Cal. App. 3d 836, 843, 164 Cal. Rptr. 672* ; *In re Marriage of Hillerman (1980) 109 Cal. App. 3d 334, 345, 167 Cal. Rptr. 240* ; *In re Marriage of Nizenkoff (1976) 65 Cal. App. 3d 136, 139, 135 Cal. Rptr. 189* ; *In re Marriage of Kelley (1976) 64 Cal. App. 3d 82, 95-99, 134 Cal. Rptr. 259]* . The Social Security Act (*42 U.S.C. § 301 et seq.*) creates neither a contract nor property right, but only a public benefit that may be reduced or altered so long as Congress has a rational basis for doing so [*see 42 U.S.C. § 1304*; *In re Marriage of Nizenkoff (1976) 65 Cal. App. 3d 136, 139, 135 Cal. Rptr. 189]* .

Legal Topics:

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§ 222.140 Stock

[1] Court's Discretion in Awarding Stock to One Party--Overview

Stock is subject to the general rules of characterization applicable to other assets of the parties [*see* Ch. 122, *Community Property*]. When stock is a community estate asset it may be subject to one of the special exceptions to equal division that is authorized by statute, the "single asset proviso," which is discussed in *§ 222.71* et seq. [*see Fam. Code § 2601*]. Courts have applied the "single asset proviso" in numerous cases to find that economic circumstances warrant special treatment of stock of a closely held corporation [*see, e.g., In re Marriage of Clark (1978) 80 Cal. App. 3d 417, 420-421, 145 Cal. Rptr. 602]* , or of publicly traded stock owned by the parties [*see, e.g., In re Marriage of Connolly (1979) 23 Cal. 3d 590, 603, 153 Cal. Rptr. 423, 591 P.2d 911]* .

Accordingly, when a trial court divides community property stock in proceedings for marital dissolution or legal separation, it may be proper to award all the stock to one spouse with appropriate compensation to the other spouse, provided the overall division is equitable. The trial court has broad discretion to fashion an equitable division of the community property [*see In re Marriage of Connolly (1979) 23 Cal. 3d 590, 603, 153 Cal. Rptr. 423, 591 P.2d 911]* .

Two additional, general considerations regarding stock concern the disclosures spouses must make to one another after separation about the extent or value of their holdings, and degree of discovery that is otherwise available about stock holdings. For discussion of general postseparation duties of disclosure between spouses, see *§ 222.36*. Regarding discovery of matters related to publicly traded stock, the policies and requirements found in state and federal law that favor broad disclosure of matters concerning such stock may work to the benefit of a spouse seeking discovery. Nevertheless, publicly traded stock may be subject to federal securities regulations that preempt state law. Thus, when applicable, federal law may restrict the exchange of financial information regarding stocks, and may effect the manner and timing of division of the assets themselves [*see In re Marriage of Reuling (1994) 23 Cal. App. 4th 1428, 1435-1437, 28 Cal. Rptr. 2d 726* (value of stock and stock options was affected by federal action involving securities trading violations)]. Similarly, with respect to closely held stock, third party privacy interests may limit the exchange of

financial information about such stock [*see Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 714, 21 Cal. Rptr. 2d 200, 854 P.2d 1117* (spouse's need for discovery of records of closely held corporation must be balanced against privacy interests of third party shareholder)]. However, at least one court has held that there is no legal basis for applying laws pertaining to the *sales* of securities to a division of stock on marital dissolution [*D'Elia v. D'Elia (1997) 58 Cal. App. 4th 415, 427, 432, 68 Cal. Rptr. 2d 324* (California's securities laws do not apply to agreements between husband and wife dividing community property)].

[2] Application to Closely Held Stock

[a] In General

Courts generally treat a block of stock as a single asset, even though shares of stock frequently are highly fungible and therefore easily divided in kind [*see In re Marriage of Behrens (1982) 137 Cal. App. 3d 562, 570, 187 Cal. Rptr. 200* (common stock in family corporation); *In re Marriage of Brigden (1978) 80 Cal. App. 3d 380, 392-393, 392 n.6, 145 Cal. Rptr. 716* (publicly traded stock)].

A court is not compelled, however, to divide shares of common stock in kind [*In re Marriage of House (1980) 106 Cal. App. 3d 434, 440, 165 Cal. Rptr. 145* (common stock of closely-held business)]. Courts will examine the circumstances in determining whether an award of all stock in a closely held corporation should be made to one party or some other disposition is appropriate [*In re Marriage of Behrens (1982) 137 Cal. App. 3d 562, 570-572, 187 Cal. Rptr. 200* (record revealed no economic circumstances compelling award of entire block of stock to husband); *In re Marriage of House (1980) 106 Cal. App. 3d 434, 439-440, 165 Cal. Rptr. 145* (award to husband of block of stock in closely-held business and to wife of equalizing note was proper); *In re Marriage of Clark (1978) 80 Cal. App. 3d 417, 421, 145 Cal. Rptr. 602* (trial court did not abuse discretion in finding that division of stock in kind would impair community business, which was principal asset)]. For further discussion, see *§ 222.131[1]*.

[b] Publicly Traded Stock

Courts have also interpreted the "single asset proviso" [*see Fam. Code § 2601*] in the context of dividing publicly traded stock. Although it is possible to establish the requisite showing for an award to one spouse of the entire amount of stock,such a showing may be more difficult to make. For example, one court reversed an award of a block of publicly traded stock to a husband. It found that when stock is traded on a national exchange and its possession is merely helpful, "economic circumstances" do not warrant the award of the entire block to one spouse. The stock was subject to division without impairment and both spouses had economic concerns that caused them to desire it [*In re Marriage of Brigden (1978) 80 Cal. App. 3d 380, 392-393, 145 Cal. Rptr. 716]* . Also, even assuming that economic circumstances warranted the court's division pursuant to statute, the spouses did not receive property of substantially equal value as required by the statute. The court noted that no award was made to the wife to offset the award of stock to the husband. Moreover, the judgment awarding the stock was inequitable in terms of the financial position in which it placed the parties, the security they were given, and their tax consequences [*In re Marriage of Brigden (1978) 80 Cal. App. 3d 380, 393-394, 145 Cal. Rptr. 716]* .

In contrast, the California Supreme Court held that a trial court did not abuse its discretion in awarding a block of high-risk publicly-traded stock to a husband with an equalizing note to the wife instead of dividing the stock in kind. Strict in-kind division can sometimes cause, rather than avoid, financial inequities. A spouse with high income may be better able to afford to retain high-risk assets than an unemployed spouse wholly dependent on spousal support [*In re Marriage of Connolly (1979) 23 Cal. 3d 590, 602-603, 153 Cal. Rptr. 423, 591 P.2d 911* (distinguishing *In re Marriage of Brigden (1978) 80 Cal. App. 3d 380, 145 Cal. Rptr. 716*)].

[3] Valuation

[a] Publicly Traded Stock

In general, stock, like other assets, is to be valued at fair market value. In the case of publicly traded stock, the market value of stock actively traded on a stock exchange may be ascertained by verifying the closing price for the particular stock or bond as of the day before the hearing or trial, assuming that this is as near as practicable to the time of trial [*see Fam. Code § 2552(a)*; *see also In re Marriage of Reuling (1994) 23 Cal. App. 4th 1428, 1435, 28 Cal. Rptr. 2d 726* (stocks valued at time of trial, even though value was adversely affected by federal action regarding trading violations)]. Unlisted stocks and bonds may require appraisal for valuation.

[b] Closely Held Stock

Valuation of a closely held stock may be at issue when the spouses own stock in a corporation operated by some third party, or, more usually, when they own stock in a family business or professional practice [*see, e.g., Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 708-710, 21 Cal. Rptr. 2d 200, 854 P.2d 1117* (involving discovery of financial records of closely held corporation); *cf. In re Marriage of Nichols (1994) 27 Cal. App. 4th 661, 666, 33 Cal. Rptr. 2d 13* (involving purchase of shares in professional law corporation)]. Determining the value of closely held stock frequently proves difficult because of the lack of an established market for it. Various methods of ascertaining fair market value have been developed and are utilized by appraisers, such as the "rule of thumb" or "the gross income multiplier" method, the "comparable sales" method, and the "price-earnings ratio" method. Courts have severely criticized the use of the "price-earnings ratio" method, which uses prices paid for publicly traded stock to establish the value of closely held stock. A trial court may not rely exclusively on the opinion of an expert to establish market value when that opinion is based on the price-earnings ratio method [*see In re Marriage of Hewitson (1983) 142 Cal. App. 3d 874, 885-886, 191 Cal. Rptr. 392]* . When fair market value cannot be ascertained, "investment value" methods of valuation generally are acceptable. These include, for example, the "capitalization of earnings" method, the "capitalization of dividends" method, and the "book value" method [*see In re Marriage of Hewitson (1983) 142 Cal. App. 3d 874, 881, 881* ns.3-5, *191 Cal. Rptr. 392]* . Many factors are utilized in determining the value of closely held stock under these various methods, and only certain of the factors apply to each method.

For a related discussion of dividing community interests in a business or professional practice, see *§ 222.131* et seq.

[c] Consideration of Tax Consequences

Furthermore, although dispositions of property on marital dissolution are now less prone to income taxation (*see* Ch. 227, *Dissolution of Marriage: Tax Effects of Dissolution*), when an *immediate and specific* tax consequence results from an award of stock to one of the parties, the trial court is required to consider the tax liability in its division of assets and liabilities of the community estate [*see In re Marriage of Fonstein (1976) 17 Cal. 3d 738, 747-751, 131 Cal. Rptr. 873, 552 P.2d 1169* ; *In re Marriage of Nelson (1986) 177 Cal. App. 3d 150, 156, 222 Cal. Rptr. 790* ; *In re Marriage of Clark (1978) 80 Cal. App. 3d 417, 145 Cal. Rptr. 602]* . Divisions of stock that do not take account of such tax consequences will be held improper [*see In re Marriage of Clark (1978) 80 Cal. App. 3d 417, 422-423, 145 Cal. Rptr. 602]* . Courts are not required to speculate, however, about future actions of a party in relation to stock [*In re Marriage of Clark (1978) 80 Cal. App. 3d 417, 423, 145 Cal. Rptr 602* ; *see In re Marriage of Fonstein (1976) 17 Cal. 3d 738, 749, 131 Cal. Rptr. 873, 552 P.2d 1169* ; *see also Weinberg v. Weinberg (1967) 67 Cal. 2d 557, 566, 63 Cal. Rptr. 13, 432 P.2d 709]* .

For further discussion of valuing stock on marital dissolution or legal separation, see Kirland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Ch. 22 (Matthew Bender). For further discussion of tax consequences of dissolution, see Ch. 227, *Dissolution of Marriage: Tax Effects of Dissolution* .

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[Reserved]

§§ 222.141[Reserved]

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§ 222.160 Compensation Other Than Salary, Including Rights Under Express Contracts

[1] Distinguishing Separate and Community Interests in General

In general, rights to nonsalary compensation arising from an employment relationship, including rights under an express contract, are analogous to pension rights, and when the right to payment is earned during marriage, they are community property subject to equal division, even though they may be contingent on future events [*see Fam. Code § 2550*; *In re Marriage of Lehman (1998) 18 Cal. 4th 169, 179, 183, 74 Cal. Rptr. 2d 825, 955 P.2d 451* ; *In re Marriage of Skaden (1977) 19 Cal. 3d 679, 687-689, 139 Cal. Rptr. 615, 566 P.2d 249* ; *In re Marriage of Fonstein (1976) 17 Cal. 3d 738, 746, 131 Cal. Rptr. 873, 552 P.2d 1169* ; *In re Marriage of Horn (1986) 181 Cal. App. 3d 540, 547-548, 226 Cal. Rptr. 666* ; *see In re Marriage of Lawson (1989) 208 Cal. App. 3d 446, 450-452, 256 Cal. Rptr. 283* ; *In re Marriage of Vanderbeek (1986) 177 Cal. App. 3d 224, 232-233, 222 Cal. Rptr. 832* ; for discussion of pension rights, see *§ 222.180* et seq.].

However, some rights are clearly the employee's separate property, and therefore are not divisible on marital dissolution or legal separation. Analysis of the right involved is required to determine its characterization, as discussed in *§ 222.160[2]*. For discussion of characterizing salaries and other earnings in general, see Ch. 122, *Community Property* .

[2] Termination Pay, Severance Pay, and Related Benefits

[a] Consideration of Purpose of Payment

In characterizing termination pay, severance pay, and related employee benefits, courts look beyond the label given to the benefits and examine their purpose in relation to when the right to the benefits accrues. The benefits constitute a community asset only to the extent that an employee accrues a right to them during marriage and before a spousal separation, and this factor is paramount in the analysis. The motive of the employer in providing the benefits is irrelevant [*In re Marriage of Lehman (1998) 18 Cal. 4th 169, 180, 186, 74 Cal. Rptr. 2d 825, 955 P.2d 451]* . Termination or similar pay from an employer received by a spouse after separation is analogous to disability pay [*§*

222.180[3]] and workers' compensation [*see § 222.137*] in that it is compensation for a present or future loss of earnings. It is generally the separate property of the spouse receiving it, as discussed in *§ 222.160[2][b][ii]* [*In re Marriage of Wright (1983) 140 Cal. App. 3d 342, 344-345, 189 Cal. Rptr. 336* ; *see In re Marriage of Steinberger (2001) 91 Cal. App. 4th 1449, 1462, 111 Cal. Rptr. 2d 521* ; *Hanson v. Gram (In re Gram) (1994) 25 Cal. App. 4th 859, 862, 30 Cal. Rptr. 2d 792* ; *In re Marriage of Lawson (1989) 208 Cal. App. 3d 446, 450-452, 256 Cal. Rptr. 283* ; *In re Marriage of DeShurley (1989) 207 Cal. App. 3d 992, 994, 255 Cal. Rptr. 150* ; *In re Marriage of Flockhart (1981) 119 Cal. App. 3d 240, 243, 173 Cal. Rptr. 818]* . However, termination or similar pay received after separation that is based on a contract between employer and employee and that represents deferred compensation for services previously rendered during marriage and before separation is community property, as discussed below [*In re Marriage of Skaden (1977) 19 Cal. 3d 679, 687-688, 139 Cal. Rptr. 615, 566 P. 2d 249* ; *see In re Marriage of Lawson (1989) 208 Cal. App. 3d 446, 450-452, 256 Cal. Rptr. 283]* .

[b] Deferred Compensation for Services Rendered as Community Property

[i] In General

Benefits to be received by an employee after separation from his or her spouse and that represent deferred compensation for services previously rendered during marriage and before separation are generally characterized as community property [*In re Marriage of Lehman (1998) 18 Cal. 4th 169, 179, 74 Cal. Rptr. 2d 825, 955 P.2d 451* ; (citing *In re Marriage of Brown (1976) 15 Cal. 3d 838, 841-842, 126 Cal. Rptr. 633, 544 P.2d 561*)]. Courts have considered a number of types of benefits in the reported cases, including, for example, severance pay and early retirement benefits. Because the cases have not been consistent, however, the guiding principle should be the fundamental rule that benefits constitute a community asset only to the extent that an employee accrues a right to them during marriage and before a spousal separation, with the employer's motive in providing the benefits being irrelevant [*In re Marriage of Lehman (1998) 18 Cal. 4th 169, 179-180, 74 Cal. Rptr. 2d 825, 955 P.2d 451]* . Examination of the leading reported cases in this area is helpful to gain a more complete understanding of the courts' characterization of benefits.

For example, *severance pay* to which a football player had an absolute contractual right was found to be a community asset [*In re Marriage of Horn (1986) 181 Cal. App. 3d 540, 547-548, 226 Cal. Rptr. 666]* . This type of pay was found analogous to the termination benefits in an earlier leading case [*In re Marriage of Skaden (1977) 19 Cal. 3d 679, 139 Cal. Rptr. 615, 566 P.2d 249]* , because of a player's *absolute right* to payment, and it was a form of deferred compensation for past services [*In re Marriage of Horn (1986) 181 Cal. App. 3d 540, 547-548, 226 Cal. Rptr. 666]* . Note, however, that severance pay has frequently been found to be separate property, as discussed in *§ 222.160[2][b][i]*.

With respect to *early retirement benefits*, if an enhancement is added toretirement benefits that are themselves community property, the benefits, as enhanced, should also be community property, irrespective of the employer's motive in providing the enhancement. To the extent that the underlying benefits are partially separate and partially community in nature, the benefits, as enhanced, will follow that apportionment (between separate and community). Thus, for example, in *In re Marriage of Lehman*, the Supreme Court held that enhanced early retirement benefits under a defined benefit pension plan were community property to the same extent as an employee spouse's basic retirement benefits, even though the enhancement was added years after a married couple separated and divorced. The right to share in an increased benefit--in this case, "[a] stream of income that ... begins to flow on retirement, as that stream is then defined," derives from the right to share in the basic benefit; and to the extent that the basic benefit was earned during marriage and before separation, the benefit, as enhanced, will be community. In apportioning the community and separate property shares in such a case, *putative* years of service credited to the employee should not be added to any formula (such as the "time rule") that is used to divide the benefits [*In re Marriage of Lehman (1998) 18 Cal. 4th 169, 177, 187-188, 74 Cal. Rptr. 2d 825, 955 P.2d 451 , disapproving, to extent contrary, Hanson v. Gram (In re Gram) (1994) 25 Cal. App. 4th 859, 30 Cal. Rptr. 2d 792* ; *see In re Marriage of Davis (2004) 120 Cal. App. 4th 1007, 1015-1017, 16 Cal. Rptr. 3d 220* (enhanced benefits from policeman's "Deferred Retirement Option Plan" constituted

community property)].

Similarly, with respect to an early retirement benefit available to certain partners between the ages of 56 and 62 and calculated on the partner's earnings, the extent to which the right to the early retirement benefit accrued during marriage before separation, was held to be a community asset. When, among other factors, all 10 years of qualifying employment occurred before the parties' separation, and the early retirement benefit was derived from a contractual right acquired during the marriage, the benefit was characterized as community property [*In re Marriage of Drapeau (2001) 93 Cal. App. 4th 1086, 1093-1095, 114 Cal. Rptr. 2d 6]* .

By contrast, when the right to a purported "early retirement" benefit did not accrue during an employee's marriage, an appellate court deemed it to be the employee spouse's separate property, characterizing it as a severance benefit, as discussed in *§ 222.160[2][b][i]* [*see In re Marriage of Frahm (1996) 45 Cal. App. 4th 536, 53 Cal. Rptr. 2d 31* ; *see also In re Marriage of Steinberger (2001) 91 Cal. App. 4th 1449, 1469-1471, 111 Cal. Rptr. 2d 521]* . For a general discussion of dividing nonmatured retirement benefits, see *§ 222.183[1]*.

[ii] Compensation for Present/Future Loss of Earnings as Separate Property

In characterizing severance pay and similar termination benefits received after a spousal separation, courts have utilized the principle that if the pay is compensation for present or future loss of earnings, and not for services previously performed, it generally is the employee spouse's separate property [*see Hanson v. Gram (In re Gram)(1994) 25 Cal. App. 4th 859, 862, 30 Cal. Rptr. 2d 792]* .

In characterizing the benefit, no one factor is determinative, and the court must consider all relevant circumstances. Courts have not considered a tie between the benefit amount and the number of years of employment as necessarily indicative of the character of the benefit [*In re Marriage of Frahm (1996) 45 Cal. App. 4th 536, 53 Cal. Rptr. 2d 31]* . Thus, for example, an appellate court found that, although the severance pay at issue was partially based on years of employment it should be characterized as separate property, when (1) the entitlement to the pay was derived from a court order, rather than being based on a contract right, (2) it represented an employee's option between returning to work and accepting payment for giving up the right to return to work, and (3) it was only incidentally based on the number of years of service. The employee spouse had no absolute right to payment because he would not have received the pay if he had returned to work. The appellate court found that the severance pay was present compensation for loss of future earnings, not deferred compensation for prior services [*In re Marriage of DeShurley (1989) 207 Cal. App. 3d 992, 995-996, 255 Cal. Rptr. 150]* .

Similarly, when a former spouse's postdissolution employment separation allowance was intended as future compensation during his employment transition period, it was found to be his separate property. The pay at issue did not involve a contractual right to deferred compensation. Separate-property characterization was proper because (1) the right to participate in the separation plan was not absolute, (2) the allowance did not arise from any employment agreement with the involved employer, and (3) its purpose was to compensate the spouse for loss of future earnings and living expenses while seeking new employment. This characterization would not change simply because the amount of the allowance was based, in part, on the longevity of the spouse's employment and that the separation plan was subject to ERISA [*In re Marriage of Lawson (1989) 208 Cal. App. 3d 446, 453-454, 256 Cal. Rptr. 283]* .

A severance benefit mislabeled as a lump sum "early retirement benefit" that was offered as an incentive for an employee to leave the work force was, nevertheless, correctly characterized as an employee's separate property, despite some correlation between the amount of the benefit and length of employment. Although the appellate court in that case based its reasoning, in part, on the irrelevant fact that the payment "resulted solely from [the employer's] beneficence" it correctly determined that *the right* to the benefit did not accrue during the employee's marriage and before a marital separation [*In re Marriage of Frahm (1996) 45 Cal. App. 4th 536, 542-545, 53 Cal. Rptr. 2d 31* (construing GTE's 1993 Voluntary Separation Incentive Program); *In re Marriage of Lehman (1998) 18 Cal. 4th 169, 182 n.6, 74 Cal.*

Rptr. 2d 825, 955 P.2d 451 (approving overall approach of *Frahm*, but indicating that issue of "employer's beneficence" was of "no consequence here")]. This holding has been otherwise cited by the Supreme Court for the soundness of its reasoning, with respect to its following of principles laid down in *In re Marriage of Brown* [*In re Marriage of Lehman (1998) 18 Cal. 4th 169, 183, 74 Cal. Rptr. 2d 825, 955 P.2d 451* ; *see* *In re Marriage of Brown (1976) 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561]* .

A severance package negotiated after an employee has been terminated may also be separate property. In one case, for example, an employee was terminated for cause and would have received nothing under her employment contract, but she negotiated for a severance package at the time of her termination by agreeing to waive certain legal rights against her employer. The court found that the severance was her separate property because it was a new right acquired after separation and did not accrue during the marriage [*In re Marriage of Steinberger (2001) 91 Cal. App. 4th 1449, 1463-1464, 111 Cal. Rptr. 2d 521]* .

[c] Division

The proper division of nonsalary compensation and other rights in future employment benefits that are determined to be community property will be left to the trial court's sound discretion, exercised in light of the particular circumstances of the case. Essentially, the court may use any of the division methods available for dividing community interests in retirement benefits [*see § 222.182[1]* et seq.]. Thus, for example, the court may divide the benefits in kind between the spouses or award the benefits entirely to one spouse with an equal offsetting award (cash out) to the other spouse [*see In re Marriage of Skaden (1977) 19 Cal. 3d 679, 688, 139 Cal. Rptr. 615, 566 P.2d 249* ; *In re Marriage of Brown (1976) 15 Cal. 3d 838, 847, 126 Cal. Rptr. 633, 544 P.2d 561]* .

As with pension rights, rights to other benefits derived from employment relationships, including express contracts between employer and employee, are not considered mere expectancies. They are subject to the community property laws when the employee's right to receive contract benefits is subject only to conditions within the employee's control [Waite v. Waite (1972) 6 Cal. 3d 461, 472, 99 Cal. Rptr. 325, 492 P.2d 13, *overruled on other grounds by* In re Marriage of Brown (1976) 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561; *In re Marriage of Fonstein (1976) 17 Cal. 3d 738, 745-746, 131 Cal. Rptr. 873, 552 P.2d 1169]* . This rule has been applied to situations that involve the following:

(1) A law partner's contractual right to receive payments on voluntary withdrawal from his firm [*In re Marriage of Fonstein (1976) 17 Cal. 3d 738, 745-746, 131 Cal. Rptr. 873, 552 P.2d 1169]* ;

(2) The right of an insurance agent after termination of his relationship with a particular insurance company, to receive benefits based on the amount of premiums received after termination from policies such agent sold prior to termination [*In re Marriage of Skaden (1977) 19 Cal. 3d 679, 685-688, 139 Cal. Rptr. 615, 566 P.2d 249]* ;

(3) The absolute right of a football player to receive severance pay after leaving football, based on the number of seasons played in a professional football league [*In re Marriage of Horn (1986) 181 Cal. App. 3d 540, 547-548, 226 Cal. Rptr. 666]* ;

(4) The right of an employee to receive an enhanced early retirement benefit that was offered as an incentive to voluntarily terminate employement [*see* *In re Marriage of Lehman (1998) 18 Cal. 4th 169, 185-186, 74 Cal. Rptr. 2d 825, 955 P.2d 451]* ; and

(5) The special features of a consulting agreement between a "key employee" and a corporate employer that accrued during marriage and before separation, including provisions for certain debt retirement of a loan made to him by the corporation [*see* *In re Marriage of Vanderbeek (1986) 177 Cal. App. 3d 224,*

232-233, 222 Cal. Rptr. 832 (special features of employee's agreement with respect to debt retirement that were accrued while the parties lived together had a community value; thus, court upheld trial court's allowance of credit of $85,000 to community for the agreement)].

[3] Employee Stock Options

[a] Characterization in General

Stock options may be considered as employment benefits that are alternatives to fixed salaries and that are analogous to pensions and retirement plans [*see In re Marriage of Hug (1984) 154 Cal. App. 3d 780, 785, 201 Cal. Rptr. 676]* . Fringe benefits such as stock options are community property to the extent they are earned by the time, skill, and efforts of a spouse during marriage [*see In re Marriage of Hug (1984) 154 Cal. App. 3d 780, 791, 201 Cal. Rptr. 676* ; *see also In re Marriage of Harrison (1986) 179 Cal. App. 3d 1216, 1226, 225 Cal. Rptr. 234]* .

However, no single characterization can be given to employee stock options. An employer's purpose in providing stock options to employees may vary. The character of options as community or separate property depends on the specific facts of an option plan and the size and circumstances of the employer. Thus, the characterization of a particular stock option plan as community or separate property will be determined by the purposes of the plan and the facts of each case [*In re Marriage of Hug (1984) 154 Cal. App. 3d 780, 786-788, 201 Cal. Rptr. 676]* .

Problems concerning characterization and division of stock options often arisein the context of options that are acquired during marriage and before the parties' separation, but that are not exercisable until after separation. In general, a trial court has broad discretion to select an equitable method of allocating community and separate property interests in such options [*In re Marriage of Walker (1989) 216 Cal. App. 3d 644, 650, 265 Cal. Rptr. 32* ; *In re Marriage of Nelson (1986) 177 Cal. App. 3d 150, 155, 222 Cal. Rptr. 790* ; *In re Marriage of Hug (1984) 154 Cal. App. 3d 780, 782-783, 793, 201 Cal. Rptr. 676]* .

[b] Division and Valuation

No single division rule or formula is applicable to every dissolution case involving employee stock options. Appellate courts have approved several division formulas, depending on the nature of the options involved and the time when they were exercisable. With respect to options granted before the spouses' date of separation, which are exercisable after separation, the court of appeal in *In re Marriage of Hug* [*In re Marriage of Hug (1984) 154 Cal. App. 3d 780, 201 Cal. Rptr. 676]* approved of a "time rule" formula for allocating community and separate interests. In *Hug*, the options were earned as of the commencement of the employment as a form of employment incentive and therefore were not compensation for future services. The community portion of the stock options was determined first by creating a fraction in which the numerator was the number of months between the commencement of the employment and the date of separation, and the denominator was the number of months between the commencement of employment and the date when each group of options first became exercisable. This fraction was then multiplied by the number of shares of stock that could be purchased with each block of options, yielding the community figure. Any remaining shares were the employee spouse's separate property. Although these particular benefits could not be valued or divided at the time of trial, the court of appeal ruled that it was appropriate to divide the benefits, using the time rule formula, as they are paid [*In re Marriage of Hug (1984) 154 Cal. App. 3d 780, 782-783, 791, 793, 201 Cal. Rptr. 676]* .

In a later decision, the court of appeal approved the use of an apportionment formula to divide stock options, although it differed from that used in *Hug*. The court analogized the options to a pension plan that is subject to divestment by termination of employment, because they were granted for services rendered and to be rendered [*In re Marriage of Nelson (1986) 177 Cal. App. 3d 150, 153-154, 222 Cal. Rptr. 790]* . The court affirmed an apportionment formula for the options in which the numerator was the number of months from the date each block of options was granted to the date of separation, and the denominator was the period from the date of each grant to its date of exercisability [*see In*

re Marriage of Nelson (1986) 177 Cal. App. 3d 150, 155, 222 Cal. Rptr. 790 ; *see also In re Marriage of Steinberger (2001) 91 Cal. App. 4th 1449, 1463, 111 Cal. Rptr. 2d 521* (severance package on employment termination included extension of vesting of stock option plan for one year in exchange for waiver of certain rights against employer; one-year period was included in denominator of time rule fraction as part of "new deal" and was not derived from anything earned during marriage)].

The court of appeal in *Nelson* also approved the trial court's reduction in the value of the community share of the options by an assumed future income tax rate of 20 percent and a credit to the employee spouse of one half this amount. It rejected the contention that a higher assumed tax rate should have been used because a trial court is required to consider tax consequences only when it is proven that an "immediate and specific" consequences only when it is proven that an "immediate and specific" liability will arise on the ordered division [*In re Marriage of Nelson (1986) 177 Cal. App. 3d 150, 156, 222 Cal. Rptr. 790* ; *see Weinberg v. Weinberg (1967) 67 Cal. 2d 557, 566, 63 Cal. Rptr. 13, 432 P.2d 709* ; *In re Marriage of Sharp (1983) 143 Cal. App. 3d 714, 718-719, 192 Cal. Rptr. 97]* . In this case, the time at which the employee spouse's tax liability might arise and the extent of that liability were exclusively within his control, and the dissolution judgment did not require him to exercise the options immediately. The appellate court found that the trial court's tax reimbursement formula was a substitute for what, it declared, would have been a more equitable distribution: "to divide the options in kind and let each party be at the mercy of his or her own tax circumstance" [*In re Marriage of Nelson (1986) 177 Cal. App. 3d 150, 156, 222 Cal. Rptr. 790]* .

A third time-based formula was approved in *In re Marriage of Harrison* [*In re Marriage of Harrison (1986) 179 Cal. App. 3d 1216, 225 Cal. Rptr. 234]* , which involved "qualified" and "unqualified" option agreements granted to a husband by his employer before he separated from his wife. The trial court devised a formula to value the community share of the options by applying a fraction to the gain on each option on its exercise date. The numerator of the fraction was the total number of days between the granting of the option and the date of separation, and the denominator was the total number of days from the granting of the option until the day on which each portion of the option became fully vested and not subject to divestment [*In re Marriage of Harrison (1986) 179 Cal. App. 3d 1216, 1223 n.1, 1223-1224, 225 Cal. Rptr. 234]* . The court of appeal upheld the use of such a time formula, although it found the formula technically incorrect in several respects, because it determined that no reversible error occurred [*In re Marriage of Harrison (1986) 179 Cal. App. 3d 1216, 1225, 225 Cal. Rptr. 234]* .

Another case applied the *Harrison* formula [*see In re Marriage of Harrison (1986) 179 Cal. App. 3d 1216, 1223-1225, 225 Cal. Rptr. 234]* to stock options that were subject to forfeiture if a spouse's employment terminated before the receipt of purchased stock [*see In re Marriage of Walker (1989) 216 Cal. App. 3d 644, 650-651, 265 Cal. Rptr. 32]* . For a complete discussion of valuing employee stock options, see Kirkland, Lurvey & Richmond, California Family Law Practiceand Procedure, 2nd ed., Ch. 22 (Matthew Bender).

[4] Housing Subsidized by Employer

Little authority exists for the characterization of relocation housing benefits or mortgage subsidies provided by employers. However, one appellate court has held that a mortgage subsidy commenced during marriage and continued after separation is supplemental income, rather than a vested contract right to a future benefit, when the subsidy depends on both the employee spouse's continued employment and the employer's continued desire to pay the subsidy [*In re Marriage of Doherty (2002) 103 Cal. App. 4th 895, 899, 126 Cal. Rptr. 2d 919]* . Such a subsidy is not vested because it is not a right that survives the employee spouse's discharge or involuntary termination [*see In re Marriage of Brown (1976) 15 Cal.3d 838, 842, 126 Cal. Rptr. 633, 544 P.2d 561]* ; therefore, the continuing subsidy is not allocated between the spouses' community and separate estates at dissolution, but is treated as the employee spouse's separate property following separation [*In re Marriage of Doherty (2002) 103 Cal. App. 4th 895, 899, 126 Cal. Rptr. 2d 919* ; *cf. Garfein v. Garfein (1971) 16 Cal. App. 3d 155, 158-159, 93 Cal. Rptr. 714* (post-separation payments from movie contract that guaranteed actress payment for six films were her separate property, because payments were earned after separation)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationSeparate PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationValuationFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral Overview

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2. Contractual, Survivor, And Related Employment Benefits

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§ 222.161 Survivor and Death Benefits in General--Statutory Recognition of Surviving Former Spouses

Some employment-based retirement plans provide benefits for the spouse of an employee on the employee's death, either before or after retirement. Many plans also provide alternatively for payment to former spouses, under specified circumstances. As discussed in *§ 222.205*, plans governed by the Employee Retirement Income Security Act, applicable to pension plans maintained by most private employers, must provide that a former spouse be treated as the surviving spouse for purposes of a joint and survivor annuity, to the extent provided in any qualified domestic relations order. If the plan requires that the employee and spouse have been married for at least one year, this requirement must be met [*29 U.S.C. §§ 1055(f), 1056(d)(3)(F)*]. Many public entity plans contain similar provisions, although the marriage duration requirement and other coverage details vary [*see 5 U.S.C. § 8341(h)* (federal civil service annuities to former spouses); *see also Gov. Code §§ 21290(b), 21298* (Public Employees' Retirement System); *Educ. Code §§ 22650 et seq.* (State Teachers' Retirement System), *23812* (entitlement of surviving spouse, but not surviving domestic partner, to benefits under State Teacher's Retirement System following remarriage)]. Nevertheless, there are many public entity plans, especially municipal plans, that still do not provide survivor benefits to surviving former spouses or any means to spread the former spouse's share of the payments over the former spouse's lifetime [*see e.g. Gov. Code § 31450 et seq.* (County Employees Retirement Law of 1937); *In re Marriage of Cramer (1993) 20 Cal. App. 4th 73, 78, 24 Cal. Rptr. 2d 372* (term "surviving spouse" in *Gov. Code § 31760.1* does not include surviving former spouse)].

With respect to proceedings for marital dissolution or legal separation, *Fam. Code § 2610* requires the court to make whatever orders are necessary or appropriate to ensure that each party receives his or her full community share in any retirement plan, whether public or private, including all survivor and death benefits. This includes the power to order a party to elect a survivor benefit annuity or other similar election for the benefit of the other party if the retirement plan provides for such an election, as long as the court does not order the plan to provide incresed benefits determined on the basis of actuarial value [*Fam. Code § 2610*; *see, e.g., In re Marriage of Carnall (1989) 216 Cal. App. 3d 1010, 1023, 1024-1026, 265 Cal. Rptr. 271* (statutory predecessor, former *Civ. Code § 4800.8*, as applied to County Employees Retirement Law of 1937 entitled nonemployee former spouse to receive prorated share of total survivor and death benefits provided under pension contract); *but cf. In re Marriage of Cramer (1993) 20 Cal. App. 4th 73, 75-76, 24 Cal.*

Rptr. 2d 372 (court could not order county plan to pay survivor benefits to surviving former spouse when, under plan, there was no provision for designating former spouse as surviving spouse, and term "surviving spouse" as used in County Employee's Retirement Law and in plan option included only spouse who was married to employee at time of employee's death); for general discussion of court's statutory power to make orders regarding retirement benefits, including survivor and death benefits, *see § 222.182*].

Furthermore, in the case of public entity plans, even if a public entity plan does not provide benefits that are denominated as "survivor benefits" to a nonemployee former spouse, the dissolution judgment must compensate that spouse fully for all community contributions made to the employee spouse's retirement plan. Thus, the court must carefully review the type of contributions made to ensure that the nonemployee spouse has been compensated for all portions of the employee spouse's retirement benefits attributable to the community [*see In re Marriage of Nice (1991) 230 Cal. App. 3d 444, 446, 452-453, 281 Cal. Rptr. 415]* .

If a nonemployee spouse is foreclosed for some reason from making a claim under *Fam. Code § 2610*, he or she may be able to recover a portion of community contributions to the retirement fund under a resulting trust theory, which developed before the enactment of *Fam. Code § 2610* and its predecessor [*see In re Marriage of Becker (1984) 161 Cal. App. 3d 65, 70-71, 74-77, 207 Cal. Rptr. 392* (surviving spouse holds portion of each monthly payment received from PERS as resulting trustee for former spouse, since surviving spouse in effect purchased lifetime annuity in part with former spouse's community share of decedent's retirement contributions)]. For further discussion of orders authorizedby *Fam. Code § 2610*, see *§ 222.182[1]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 222.162 Federal Survivor and Other Former Spouse Benefits

[1] Former Spouses of Uniformed Services Members--Access to Survivor and Other Benefits

Federal legislation in 1984 broadened the scope of health care, survivorship, and other benefits of former spouses of members of the uniformed services. The Department of Defense Authorization Act (Pub. L. No. 98-525) (hereafter "act") clarified and expanded provisions governing payments of retirement pay of current and former members of the uniformed services to former spouses pursuant to court order [*see, e.g., 10 U.S.C. §§ 1072(2)* (definition of dependent), *1408(a)(2)(C)* (definition of court order providing payment to spouse or former spouse)].

The act (Pub. L. No. 98-525) clarified the authority to elect former spouses as beneficiaries under the Survivor Benefit Plan [*see 10 U.S.C. § 1448*; *see also 10 U.S.C. § 1450(b)* (age at which remarriage terminates spouse survivor benefit; as amended by Pub. L. No. 99-661, § 643)]. A court may order a person to elect, or enter into an agreement to elect, to provide an annuity to a former spouse, or to both a former spouse and child [*10 U.S.C. § 1450(f)(4)* (as amended by Pub. L. No. 99-661, § 641(a)); *see 10 U.S.C. § 1448(b)* (specifying manner of election); *cf. In re Marriage of Ziegler (1989) 207 Cal. App. 3d 788, 790-791, 255 Cal. Rptr. 100* (maintenance of survivor benefit plan authorized by now former *Civ. Code § 4801.4*)]. Furthermore, a person who fails or refuses to elect the former spouse pursuant to a written agreement or court order shall be "deemed" to have made the election if the former spouse makes a written request within one year of the date of the court order or filing involved accompanied by a copy of the agreement or order [*see 10 U.S.C. § 1450(f)(3)*]. Failure to meet this one-year requirement cannot be cured by issuing a new court order to provide former spouse coverage, because such a new order will not be considered a "modification" of a previous court order, as that term is used in the operative statute; and will not, therefore, serve to start a new one-year period in which to elect or deem coverage [*In matter of Constance Posner (1992) 71 Comp. Gen. 478* ; *In matter of Nawanna Driggers (1992) 71 Comp. Gen. 475* ; *see 10 U.S.C. § 1447(9), (10)*]. Members of the uniformed services may elect former spouses as beneficiaries under the Survivor Benefit Plan, even if the member has already elected a dependent child as a beneficiary [Pub. L. No. 101-189, § 1405]. The act also limits a service member's ability to change an annuity election made to a former spouse [*see 10 U.S.C. §§ 1448(b), 1450(f)(1), (2)*].

In addition to survivor benefits, federal legislation also expanded health benefits for certain unremarried former spouses, as well as commissary and post exchange benefits [*see generally* Pub. L. No. 97-252, Title X, § 1004; *10 U.S.C. §§ 1076(b), 1086(c)(3)*]. For further discussion of survivor benefits of former spouses of military service members, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, Ch. 21 (Matthew Bender 2d ed.).

[2] CHAMPUS Benefits

Federal legislation has expanded eligibility for benefits under the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) [*see, generally, 10 U.S.C. §§ 1072, 1079* et seq.; *32 C.F.R. § 199.3*; Pub. L. No. 98-525, § 645 (1984)]. CHAMPUS, in many respects, is similar to private medical insurance and is designed to provide financial assistance to beneficiaries of service members for certain prescribed medical care obtained from civilian sources [*see 32 C.F.R. § 199.4(a)*]. Former spouses are entitled to CHAMPUS benefits for a limited time after dissolution if they meet certain requirements [*see 10 U.S.C. §§ 1072(2)(F)-(H), 1076(a)(2), 1086a*]. In addition, if certain former spouses purchase a conversion health policy while still considered a dependent, the person is eligible for certain medical, dental and other health benefits for up to 24 months after (1) the date the person is no longer qualified as a dependent, or (2) the date of the purchase of the policy, whichever is later. This extended period of eligibility applies only with regard to a "condition of the person that (1) exists on the date on which coverage under the conversion health policy begins; and (2) for which care is not provided under the policy solely on the grounds that the condition is a preexisting condition [*10 U.S.C. § 1086a(b)*]. For further discussion of CHAMPUS benefits, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Ch. 21 (Matthew Bender).

[3] Former Spouses of Federal Civil Service Members

The federal Civil Service Retirement Spouse Equity Act of 1984 (Pub. L. No. 98-615) permits a former spouse of a federal civil service member to obtain survivor benefits by court order or by the member's voluntary election to provide a survivor annuity [*see Newman v. Love (Fed. Cir. 1992) 962 F.2d 1008, 1011-1013* (bifurcation of divorce proceeding did not preclude award of survivor benefits)]. However, if the member has a current spouse when the election is sought to be made, the member may not voluntarily elect to provide an annuity for the former spouse without the current spouse's written consent, subject to limited exceptions [*5 U.S.C. § 8339(j)(3)*].

In addition, transitional provisions considered certain former spouses qualified for a survivor annuity [*see 5 U.S.C. § 8341(b)*] even if the member did not make an election for them [*see* Pub. L. No. 98-615 § 2(4)(b) (as amended by Pub. L. No. 99-251, § 201(b))]. For further discussion of these provisions, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Ch. 21 (Matthew Bender).

[4] Continued Access to Health Care Benefits (COBRA)

As a result of 1986 federal legislation (Pub. L. No. 99-272, as amended by Pub. L. No. 99-514), many plan sponsors of group health insurance plans must now offer a continuation of group insurance coverage to qualified beneficiaries who otherwise would lose their coverage because of a marital dissolution, death of an employee spouse, or other "qualifying event." The legislation was enacted as part of the Consolidated Omnibus Reconciliation Act of 1985 (COBRA) [Pub. L. No. 99-272, § 10001 et seq.].

Subject to certain exceptions, COBRA is applicable to private group health plans [*see 29 U.S.C. § 1161(a)*], as well as to public group health plans that are maintained by any state, or any agency or instrumentality or political subdivision of a state, that receive funds under the Public Health Service Act [*see 42 U.S.C. § 300bb-1(a)*]. It does not apply to any group health plan for any calendar year if all employers maintaining such a plan normally employed fewer than 20 employees on a typical business day during the preceding calendar year and in certain other cases [*see 29 U.S.C. § 1161(b)*; *42 U.S.C. § 300bb-1(b)*]. COBRA's provisions generally apply to plan years beginning on or after July 1, 1986,

subject to specified exceptions [Pub. L. No. 99-272, §§ 10001(e)(1), 10002(d)(1), 10003(b)(1); *see 29 U.S.C. § 1166(3)(a)* (60-day requirement for notification by covered employee or qualified beneficiary, effective with respect to events after October 22, 1986); *see also* Pub. L. No. 99-509, § 9501(e)(2), (3) (treatment of certain bankruptcy proceedings and current retirees); Pub. L. No. 99-272, §§ 10001(e)(2), 10002(d)(2), 10003(b)(2)]. For further discussion of COBRA, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Ch. 21 (Matthew Bender).

Apart from the federal legislation discussed above in this section, California state law also requires extended "COBRA" continuation coverage for those former employees who had worked for an employer (subject to "COBRA") for at least five years before the termination of employment and are at least 60 years old, and who elect to continue coverage for themselves (and for their spouses). The provisions for continuing benefits under California law also contain conditions under which those benefits terminate [*see Health & Safety Code §§ 1373.621, 1399.63*; *Ins. Code §§ 10116.5, 10128.3*; *Lab. Code § 2800.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationSeparate PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationRetirement BenefitsMilitary BenefitsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral OverviewPensions & Benefits LawConsolidated Omnibus Budget Reconciliation Act (COBRA)General Overview

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18-222 California Forms of Pleading and Practice--Annotated § 222.163

§ 222.163 Health Insurance Subsidized by Employer

Group health insurance subsidized by an employer is a typical fringe benefit of employment, and falls within the catagory of "employee benefit welfare plans" under ERISA [*29 U.S.C. § 1001 et seq.*] when the employer is otherwise subject to ERISA [*In re Marriage of Havins (1996) 43 Cal. App. 4th 414, 418, 418 n.2, 50 Cal. Rptr. 2d 763]* . Group health insurance has been compared to both term life insurance and term disability insurance. Some plans cover both active employees as well as retirees [*In re Marriage of Havins (1996) 43 Cal. App. 4th 414, 418, 423, 50 Cal. Rptr. 2d 763]* .

Divisibility of employer-subsidized health insurance at the time of marital dissolution has been analyzed in terms of whether the *right to renew* the insurance is a property right susceptible of division. Courts that have addressed the question have concluded that employer-subsidized health insurance is a fringe benefit derived from employment, but not a property right that may be divided as community property [*In re Marriage of Ellis (2002) 101 Cal. App. 4th 400, 407-408, 124 Cal. Rptr. 2d 719* ; *In re Marriage of Havins (1996) 43 Cal. App. 4th 414, 423-424, 50 Cal. Rptr. 2d 763]* . They have suggested several possible rationales: (1) the right to subsidized health insurance is not convertible to cash, (2) some employee or retiree fringe benefits are not divisible on divorce (*e.g.*, discounts at an employer-owned cafeteria), and (3) renewal of health insurance after divorce occurs outside marriage, and additional premiums after divorce come from the separate property of the employee or retiree [*In re Marriage of Ellis (2002) 101 Cal. App. 4th 400, 408, 124 Cal. Rptr. 2d 719* ; *In re Marriage of Havins (1996) 43 Cal. App. 4th 414, 418-422, 50 Cal. Rptr. 2d 763]* .

In *In re Marriage of Havins*, a case of first impression, the appellate court held that although an employee's or retiree's continuing, postseparation right to renew employer-subsidized health insurance by the payment of premiums and without evidence of good health is a property right having some value, it is not divisible community property when the employee or retiree continues to pay for the insurance with separate funds. The court reasoned that (1) an employee's/retiree's continuing right to renew health insurance coverage by continued payment of premiums from separate property does not give rise to a continuing community interest in the benefits, and (2) when an

employee/retiree continues to pay for health insurance with separate property funds, there there is simply no community asset to divide. In reaching its conclusion, the court analogized to renewal rights under term life and disability insurance policies, which are respectively discussed in *§ 222.135[2]* and *§ 222.180[3]* [*In re Marriage of Havins (1996) 43 Cal. App. 4th 414, 416, 423-424, 50 Cal. Rptr. 2d 763* (relying on *In re Marriage of Elfmont (1995) 9 Cal. 4th 1026, 39 Cal. Rptr. 2d 590, 891 P.2d 136* and *Estate of Logan (1987) 191 Cal. App. 3d 319, 236 Cal. Rptr. 368*); *see In re Marriage of Ellis (2002) 101 Cal. App. 4th 400, 124 Cal. Rptr. 2d 719]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationSeparate PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral OverviewPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)General Overview

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[Reserved]

§§ 222.164[Reserved]

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18-222 California Forms of Pleading and Practice--Annotated § 222.180

§ 222.180 Characterizing Community and Separate Interests

[1] Pension or Retirement Benefits Based on Longevity--Scope of Interests Covered

Pension or retirement benefits based on longevity of service may be characterized as community or separate property, regardless of whether they are considered "vested," "unvested," "matured" or "nonmatured." While early case law deemed certain classes of benefits and, in particular, "nonvested" benefits, as mere "expectancies," this view has been supplanted by the current rule that such benefits constitute a property right in the family law context, even if that right is intangible and subject to a condition, or otherwise is not presently exercisable [*see In re Marriage of Brown (1976) 15 Cal. 3d 838, 851-852, 126 Cal. Rptr. 633, 544 P.2d 561]* .

Accordingly, to the extent a particular retirement benefit derives from employment during marriage, it ordinarily comprises a community asset that is subject to division on dissolution or legal separation. By contrast, retirement benefits earned before marriage or after separation are the employee-spouse's separate property [*see In re Marriage of Brown (1976) 15 Cal. 3d 838, 851-852, 126 Cal. Rptr. 633, 544 P.2d 561* ; *In re Marriage of Judd (1977) 68 Cal. App. 3d 515, 519 n.1, 137 Cal. Rptr. 318]* . Thus, in a particular case, if retirement benefits result from employment both before and after marriage (or before and after separation), the benefits must be apportioned between separate and community interests, as discussed in *§ 222.180[2]* [*see In re Marriage of Wilson (1974) 10 Cal. 3d 851, 854-855, 112 Cal. Rptr. 405, 519 P.2d 165]* . A special exception to the above apportionment rule is made when one spouse has been convicted of attempting to murder the other spouse [*Fam. Code § 782.5*]. For discussion of this exception and related remedies, see *§ 222.77*.

Provisions of the Employee Retirement Income Security Act of 1974 (ERISA) [*29 U.S.C. § 1001 et seq.*], which govern most private pension plans and retirement benefits, do not preempt a state court's division of spouses' community property rights in a "qualified domestic relations order," as defined in the Act [*see 29 U.S.C. § 1144(a), 1056(d)(3)(B)*]. Thus, California courts are not precluded by federal law from dividing the parties' community interests in ERISA pensions, as discussed in *§ 222.200[1][a]*. For discussion of dividing the longevity component of military pension and

retirement benefits, see *§ 222.220* et seq. Division of other public employee retirement benefits is discussed in *§ 222.240* et seq. For discussion of employment termination benefits related to retirement, such as "enhanced early retirement" benefits, see *§ 222.160[2]*.

Notwithstanding the general rules for characterization and division of community property, a spouse is entitled to an award of all of his or her retirement and pension benefits if he or she is the victim of a murder attempt by the other spouse, as discussed in *§ 222.77[1]* [*see Fam. Code § 782.5*].

[2] Apportioning Community and Separate Interests

[a] In General

Apportionment of community and separate interests in retirement or pension benefits will be required if any period of employment that is applicable to the earning of the benefits occurred before as well as during marriage, or before and after the parties' separation. Thus, the period between the date of marriage and the date of separation is generally the relevant measuring period for the purpose of determining the community interest, because benefits attributable to employment after separation are separate property [*see Fam. Code §§ 760, 770, 771, 2550*]. In contrast, for purposes of valuing the benefits, there is not an absolute time, though the date of trial is the usual time [*see Fam. Code § 2552*], and whether the date of separation or the date of trial should be used may depend on the type of benefits involved (see *§ 222.181[1]* et seq.).

In apportioning the parties' respective interests, the most frequently used method is the "time rule" formula, which ordinarily will be applicable when the amount of retirement benefits is substantially related to the total number of years of service [*see In re Marriage of Henkle (1987) 189 Cal. App. 3d 97, 99, 234 Cal. Rptr. 351* ; *In re Marriage of Judd (1977) 68 Cal. App. 3d 515, 522-523, 137 Cal. Rptr. 318]* . For further discussion of the "time rule" and of limitations on its use, see *§ 222.182[1]* et seq. [*see generally In re Marriage of Henkle (1987) 189 Cal. App. 3d 97, 99, 234 Cal. Rptr. 351* (limitations on use of time rule)].

[b] Rules for Military Retirement Benefits

Under current law, military nondisability retirement benefits, technically, "retired pay" [*see 10 U.S.C. § 1408(a)*], generally may be characterized and divided as community property to the extent that the benefits are earned during marriage and before separation. However, provisions for the characterization and division of such benefits have changed over time, and a highly detailed body of law has developed in this area that contains numerous qualifications to the foregoing general rule [*see generally 10 U.S.C. § 1408*; *McCarty v. McCarty (1981) 453 U.S. 210, 223, 232-233, 101 S. Ct. 2728, 69 L. Ed. 2d 589*]. For a complete discussion of military benefits, see *§ 222.220* et seq. Military disability benefits are briefly discussed in *§ 222.180[3][c]*.

[3] Disability Benefits--Application of "Purpose Analysis"

[a] Pensions

A private disability pension may have both community and separate property components, and the court will examine the purpose of the benefits to characterize the parties' interests. The purpose of the disability benefits may be to compensate the employee-spouse for lost earnings and personal suffering caused by the disability and, to that extent, they have been held to constitute that spouse's separate property. In fact, disability benefits received before an employee-spouse is eligible to receive a retirement pension based on age and longevity of employment have been held to serve the principal purpose of compensating the employee for his or her injury, including loss of earnings and diminished earning capacity. After the employee-spouse reaches the minimum retirement age based on longevity, however, the predominant purpose of the payments shifts to support rather than disability compensation resulting from premature retirement [*see In re Marriage of Samuels (1979) 96 Cal. App. 3d 122, 128, 158 Cal. Rptr. 38]* .

Thus, to the extent that disability benefits are received in lieu of retirement benefits based on longevity of employment and are earned by employment during marriage, they are community property. Accordingly, if a disabled person elects to receive payments that are termed "disability payments" but that would in whole or in part replace payments that would be retirement benefits based on employment during marriage and longevity of service, the payments may, nevertheless, be community property. In that instance, the employee-spouse's separate property interest consists only of the portion of the disability benefits attributable to employment prior to marriage (or after separation), and the portion of the payments that exceed the retirement pension that would have been received if the employee-spouse had not been disabled [*see In re Marriage of Stenquist (1978) 21 Cal. 3d 779, 788, 148 Cal. Rptr. 9, 582 P.2d 96* ; *see also Levy v. OPM (Fed. Cir. 1990) 902 F.2d 1550, 1553-1554* (federal civil service disability retirement)].

The foregoing principles will not apply, however, with respect to military disability retirement benefits, as discussed in *§ 222.180[3][c]*. Furthermore, note that a disabled employee is generally free to choose among available retirement programs so long as that choice does not defeat the community interest of the nonemployee-spouse [*Willis v. Board of Administration (1986) 181 Cal. App. 3d 779, 782, 226 Cal. Rptr. 567* ; *In re Marriage of Samuels (1979) 96 Cal. App. 3d 122, 127-128, 158 Cal. Rptr. 38]* .

Once it has been determined that a portion of the disability payments is community property, the next step is to determine the percentage interests. The first step is to classify the portion of the payment attributable to employment before marriage or after separation. Of the balance of the payment, only the excess of the payment over the retirement pension that would have been received if the recipient had not been disabled is separate property [*In re Marriage of Stenquist (1978) 21 Cal. 3d 779, 788, 148 Cal. Rptr. 9, 582 P.2d 96]* .

One appellate court has held that the comparison with respect to amounts received for disability pay and retirement pay must be based on the net amount after taxes and not just on the gross amounts received [*see In re Marriage of Mueller (1977) 70 Cal. App. 3d 66, 72, 137 Cal. Rptr. 129]* . On the basis of that principle, it has been held that tax savings resulting from the tax exempt nature of a disability pension that has been elected over longevity retirement are the separate property of the employee-spouse [*In re Marriage of Higinbotham (1988) 203 Cal. App. 3d 322, 332, 249 Cal. Rptr. 798]* .

This "purpose" analysis, which originated with *Stenquist* [*In re Marriage of Stenquist (1978) 21 Cal. 3d 779, 788, 148 Cal. Rptr. 9, 582 P.2d 96]* , appears to remain valid, although the *Stenquist* holding with regard to the divisibility of military disability retirement benefits has now apparently been abrogated by the U.S. Supreme Court [*see Mansell v. Mansell (1989) 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675, 688-689* (FUSFSPA does not grant state courts power to treat, as property divisible on divorce, military retirement pay that has been waived in order to receive veterans' disability benefits); *but see In re Marriage of Krempin (1999) 70 Cal. App. 4th 1008, 1020-1021, 83 Cal. Rptr. 2d 134* (permitting remedies for loss of military retirement benefits due to disability election under some circumstances)].

[b] Private Insurance Benefits

In general, the characterization of private disability insurance benefits requires consideration of (1) the nature of the funds used to pay the disability insurance premiums, (2) the time at which the disability benefits are paid to the insured and of when the insured spouse becomes disabled in relation to the dates of the parties' marriage and separation, (3) the parties' intent in purchasing the insurance, and (4) a special "purpose" analysis--if community funds are used during marriage to pay the premiums [*see generally In re Marriage of Saslow (1985) 40 Cal. 3d 848, 860-862, 869, 221 Cal. Rptr. 546, 710 P.2d 346]* . Private disability insurance purchased on a term basis is somewhat similar to term life insurance (*§ 222.180[3][a]*). However, the purposes of term disability and term life insurance differ; and, unlike disability insurance, a community interest in term life insurance does not depend on the requirement--discussed hereafter--that an intent to provide community retirement income accompany the premium payment for the term in which the proceeds become payable [*see In re Marriage of Elfmont (1995) 9 Cal. 4th 1026, 1029, 1033-1035, 39 Cal.*

Rptr. 2d 590, 891 P.2d 136] .

Because the most fundamental purpose of term disability insurance is to replace lost earnings, disability benefits received during marriage and *before* separation--based on a spouse becoming disabled in that same time frame--are community property because they replace community earnings [*In re Marriage of Elfmont (1995) 9 Cal. 4th 1026, 1034, 39 Cal. Rptr. 2d 590, 891 P.2d 136* (citing *In re Marriage of Jones (1975) 13 Cal. 3d 457, 462, 119 Cal. Rptr. 108, 531 P.2d 420*)]. However, private disability benefits paid to a spouse during marriage are that spouse's separate property when the spouse acquired the right to those benefits before marriage without any contribution from the community [*In re Marriage of Rossin (2009) 172 Cal. App. 4th 725, 730, 734-739, 91 Cal. Rptr. 3d 427* (pivotal factor is time of acquisition of right to benefits and secondary consideration is source of funds for acquisition)]. For property characterization purposes, the critical question is when the right to the disability benefits accrued; the timing of the receipt of those benefits is irrelevant [*In re Marriage of Rossin (2009) 172 Cal. App. 4th 725, 736, 91 Cal. Rptr. 3d 427* (it is unnecessary to consider function or purpose of disability payments as either wage replacement or pension substitute)].

Characterization of disability benefits received *after* a spousal separation requires further analysis. If payment of disability benefits commences before separation and continues thereafter, the post-separation benefits are the separate property of the insured, disabled spouse, *unless* during the marriage the premiums were paid out of community funds with the intent that the benefits provide community retirement income [*see* *In re Marriage of Elfmont (1995) 9 Cal. 4th 1026, 1034, 39 Cal. Rptr. 2d 590, 891 P.2d 136* (citing *In re Marriage of Saslow (1985) 40 Cal. 3d 848, 860-861, 221 Cal. Rptr. 546, 710 P.2d 346]* . If retirement income was intended, the *Stenquist* [*In re Marriage of Stenquist (1978) 21 Cal. 3d 779, 788, 148 Cal. Rptr. 9, 582 P.2d 96]* "purpose" analysis (see *§ 222.180[3][a]*) must be applied, under which the portion of the benefits intended by the parties to provide retirement support must be denominated community property. The portion of the benefits, if any, that was intended to replace the employee-spouse's lost earnings in the event of his or her disability must be considered his or her separate property [*In re Marriage of Saslow (1985) 40 Cal. 3d 848, 869, 221 Cal. Rptr. 546, 710 P.2d 346]* .

If, by contrast, the insured spouse did not become disabled during the last policy term for which a premium was paid before the parties' separation, the community will have no interest in benefits produced by renewals of the policy for subsequent (that is, post-separation) terms, because the renewal premium will not have been paid "during the marriage with community funds" and with the intent of providing community retirement income. Moreover, the fact that a term disability policy that was originally purchased and renewed during marriage with community funds includes a contractual right to renew after separation does not, as such, give rise to any community property interest in the insured's disability benefits--even if the insured spouse becomes medically ineligible for new insurance as of the time of separation [*In re Marriage of Elfmont (1995) 9 Cal. 4th 1026, 1034-1035, 39 Cal. Rptr. 2d 590, 891 P.2d 136* (citing *In re Marriage of Saslow (1985) 40 Cal. 3d 848, 854, 861, 861 n.5, 221 Cal. Rptr. 546, 710 P.2d 346]* . In determining the parties' interests, a trial court may consider testimony on the spouses' intent, both at the time the disability insurance was originally purchased and at the times that decisions were made to continue it in force rather than to let it lapse [*In re Marriage of Elfmont (1995) 9 Cal. 4th 1026, 1033, 39 Cal. Rptr. 2d 590, 891 P.2d 136* ; *In re Marriage of Saslow (1985) 40 Cal. 3d 848, 861, 221 Cal. Rptr. 546, 710 P.2d 346]* . Spousal intent at those times in which decisions were made to keep the insurance in force is especially important when a basic change of circumstances, such as the parties' separation, has intervened since the insurance was originally purchased [*In re Marriage of Elfmont (1995) 9 Cal. 4th 1026, 1033, 39 Cal. Rptr. 2d 590, 891 P.2d 136]* . Absent evidence of actual intent, a trial court may ascertain a normal retirement age at which the disabled spouse would have been most likely to retire ad there been no disability [*In re Marriage of Saslow (1985) 40 Cal. 3d 848, 861, 221 Cal. Rptr. 546, 710 P.2d 346]* .

In applying the above standards, the *California Supreme Court, in In re Marriage of Elfmont, (1995) 9 Cal. 4th 1026, 39 Cal. Rptr. 2d 590, 891 P.2d 136* , appears to have given considerable weight to the insured spouse's intent at the time of disability policy renewals. In *Elfmont*, it found that disability benefits received some 32 months after a spousal separation were entirely the disabled spouse's separate property, even though the underlying insurance policies were

originally purchased and maintained before separation with community funds. In that case, however, and in contrast to the facts of *In re Marriage of Saslow* [*In re Marriage of Saslow (1985) 40 Cal. 3d 848, 861, 221 Cal. Rptr. 546, 710 P.2d 346]* , none of the disability benefits *became payable* during a term of policy coverage for which the premiums had been paid out of community funds during marriage with the intent of providing community retirement income. Instead, the insured became entitled to draw the benefits only after he had renewed the (three) policies following the parties' separation, with premiums paid out of his *separate* property and with *no intent* to provide community retirement income [*see* *In re Marriage of Elfmont (1995) 9 Cal. 4th 1026, 1035, 39 Cal. Rptr. 2d 590, 891 P.2d 136]* . Note that the *Elfmont* Court's focus on the insured's own postseparation intent has drawn criticism from both on the Court and from leading family law commentators [*see* *In re Marriage of Elfmont (1995) 9 Cal. 4th 1026, 1043-1044, 1049, 39 Cal. Rptr. 2d 590, 891 P.2d 136* (dissenting opinion of Kennard, J., noting that parties intended portion of benefits to provide community retirement income when policies first purchased; and majority's opinion failed to recognize value of right to renew policy with no increase in premiums; she would have apportioned benefits in accordance with *Saslow*); 1995 Cal. Fam. Law Monthly 131 (June 1995, commentary of Prof. Grace Ganz Blumberg, and Hugh T. Thomson, Esq.)].

[c] Federal Preemption of Military Benefits

In general, military disability retirement benefits are not subject to division as community property because of the preemptive effect of federal law. One limited exception pertains to "Chapter 61" retired pay, which is based on both length of service and a percentage disability rating. A state court may divide this pay as community property, but only after first deducting a percentage of the gross amount that is based on the service member's disability rating [*see 10 U.S.C. § 1408(a)(4)(C)* (effective with respect to orders issued after November 14, 1986, under Pub. L. No. 99-661, § 644(b))].

Otherwise, federal law excludes from the definition of "disposable retired pay" that is subject to division certain amounts waived by a servicemember in order to receive disability retirement benefits under specific federal statutes [*see 10 U.S.C. § 1408(a)(4)(B)* (referring to "Title 5" and "Title 38" benefits)]. *The U.S. Supreme Court, in Mansell v. Mansell (1989) 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675, 688-689* , clarified that FUSFSPA does not grant state courts the power to treat, as property divisible on divorce, military retirement pay that has been waived in order to receive veterans' disability benefits [*Mansell v. Mansell (1989) 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675, 688-689]* . For further discussion of military disability benefits, see *§ 222.220* et seq.

[4] Benefits Terminology

[a] Vested--Defined in Dissolution Context

Some decisions that discuss pension rights generally, but do not involve division of community property, describe a pension right as "vested" if the employer cannot unilaterally repudiate that right without terminating the employment relationship. These decisions correctly define the point at which a pension right becomes a property interest [*In re Marriage of Brown (1976) 15 Cal. 3d 838, 842, 126 Cal. Rptr. 633, 544 P.2d 561]* .

However, the term "vested" has acquired a special meaning in the context of a dissolution proceeding. A right that is "vested" in this context cannot be forfeited if employment ends. Rather, it survives the discharge or voluntary termination of the employee [*In re Marriage of Skaden (1977) 19 Cal. 3d 679, 685, 139 Cal. Rptr. 615, 566 P.2d 249* ; *In re Marriage of Brown (1976) 15 Cal. 3d 838, 842, 126 Cal. Rptr. 633, 544 P.2d 561* ; *see* *In re Marriage of Gillmore (1981) 29 Cal. 3d 418, 422 n.2, 174 Cal. Rptr. 493, 629 P.2d 1]* .

[b] No Substantive Distinction Between Vested and Nonvested

The California Supreme Court in In re Marriage of Brown (1976) 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561 , ended any substantive distinction between vested and nonvested pension rights derived as a result of employment during marriage [*In re Marriage of Samuels (1979) 96 Cal. App. 3d 122, 127, 158 Cal. Rptr. 38]* . Whatever abstract

terminology courts impose, the joint effort that composes the community and respective contributions of spouses that make up its assets are the meaningful criteria. Furthermore, an employee spouse's pension rights, whether vested or not, comprise a property interest of the community [*In re Marriage of Brown (1976) 15 Cal. 3d 838, 851-852, 126 Cal. Rptr. 633, 544 P.2d 561* ; *see In re Marriage of Stenquist (1978) 21 Cal. 3d 779, 784, 148 Cal. Rptr. 9, 582 P.2d 96]* . Thus, *Brown* has established that the extent to which an employee spouse's benefits are "vested" is no longer the touchstone for determining the community interest in them [*see In re Marriage of Judd (1977) 68 Cal. App. 3d 515, 521, 137 Cal. Rptr. 318]* .

[c] Matured and Nonmatured

A vested right may be either "matured" or "nonmatured." If payment is subject to one or more conditions, such as, for example, a condition of survival to a specified time, the right is said to be vested but nonmatured. If, on the other hand, it is subject to no conditions and constitutes an unconditional right to immediate payment, the right is said to be matured [*In re Marriage of Skaden (1977) 19 Cal. 3d 679, 685, 139 Cal. Rptr. 615, 566 P.2d 249* ; *In re Marriage of Brown (1976) 15 Cal. 3d 838, 842, 126 Cal. Rptr. 633, 544 P.2d 561* ; *see In re Marriage of Gillmore (1981) 29 Cal. 3d 418, 422 n.2, 174 Cal. Rptr. 493, 629 P.2d 1]* . For discussion of dividing benefits based on their being matured or nonmatured, see *§ 222.183[1][a]* et seq.

[d] Types of Plans

[i] Defined Benefit Plan

A defined benefit pension plan generally requires employee contributions [*see, e.g., In re Marriage of Bowen (2001) 91 Cal. App. 4th 1291, 1295-1298, 111 Cal. Rptr. 2d 431]* . The employee's pension benefit, however, does not depend on the amount contributed by employee or employer, but is based on a combination of factors, including highest income level achieved, years of service at retirement, and age at retirement. Expert testimony, normally from actuaries, is necessary to determine the present value of a defined benefit plan. This testimony includes not only the expert's opinion about present value, but also the factors (economic, health, and otherwise) the expert considered in reaching his or her opinion [*In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 748 n.4, 214 Cal. Rptr. 661* ; *see I.R.C. § 414(j)*].

[ii] Defined Contribution Plan

The other kind of retirement plan is a defined contribution plan, in which the employer's obligation is related to its annual contributions [*see, e.g., In re Marriage of Bowen (2001) 91 Cal. App. 4th 1291, 1295, 111 Cal. Rptr. 2d 431* (variable plan initially established as defined contribution plan became more of hybrid plan than defined contribution plan)]. The employee's benefit on retirement depends on the value of the employee's account at that time. Expert testimony is not required to establish the present value of a defined contribution plan at dissolution, because its value is the amount of contributions made between the marriage and separation, plus accruals thereon, and all accruals thereon between the date of separation and the trial of the issue [*In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 748 n.4, 214 Cal. Rptr. 661* ; *see I.R.C. § 414(i)*]. However, the services of an accountant may be needed to properly interpret the various account statements that evidence the present value of a defined contribution plan.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationSeparate PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationRetirement BenefitsMilitary BenefitsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationRetirement BenefitsPensionsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty

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§ 222.181 Procedural Considerations in Dividing Benefits

[1] Joinder of Plan

Joinder of a pension or retirement plan as a party to a family law proceeding is considered the most prudent method of protecting the community interest of a nonemployee-spouse in the plan. Counsel also should consider sending to the plan representative a notice of a nonemployee-spouse's adverse interest in the plan, as discussed in *§ 222.181[2]* [*see Fam. Code § 755*]. If the plan is joined, the court can issue injunctive orders directly against the plan. Formal discovery can also be ordered directly against the plan. Joinder also gives the court jurisdiction to award attorney's fees against the plan. In addition, a joined plan generally will be bound by the court's judgment dividing the parties' interests in the plan benefits [*see In re Marriage of Baker (1988) 204 Cal. App. 3d 206, 219-220, 251 Cal. Rptr. 126* ; *see also Fam. Code § 2060 et seq.*; *Cal. Rules of Ct., Rule 5.106*; *but see AT & T Management Pension Plan v. Tucker (C.D. Cal. 1995) 902 F. Supp. 1168, 1175-1178* (ERISA preempts state court's order for attorney's fees against ERISA-governed plan)].

In addition, some plans, such as the State Teacher's Retirement System, expressly provide that no judgment or court order is binding on the plan unless it has been joined as a party [*see, e.g., Educ. Code § 22656*; *see also Gov. Code § 31685(a)* (direct division of community benefits under County Employee's Retirement Law of 1937 contemplates joinder of plan)]. Therefore, as a general rule, it is strongly suggested that joinder be undertaken at the outset of each proceeding in which a pension or retirement plan is at issue, assuming that proper jurisdiction over the plan can be acquired. For further discussion and forms for joinder, see Ch. 221, *Dissolution of Marriage: Procedure* .

Nonetheless, joinder is not a prerequisite for a valid division of community interest as between the parties [*see Fam. Code §§ 2060, 2061*], nor is it generally a prerequisite for the enforcement of a child or spousal support order against a plan [*see Fam. Code § 5103*; *Trs. of the Dirs. Guild of America-Producer Pension Benefits Plans v. Tise (9th Cir. 2000) 234 F.3d 415, 418 n.2* (plan need not be joined to support proceeding)]. Moreover, if the plan is subject to the provisions of ERISA and the court's order dividing the benefits constitutes a Qualified Domestic Relations Order (QDRO), the ERISA plan ordinarily must honor the order even if the plan had not been joined to the proceeding.

Conversely, an order dividing an ERISA plan need not be honored by the plan if it does not constitute a QDRO, even if the plan had been joined [*see In re Marriage of Baker (1988) 204 Cal. App. 3d 206, 209, 217-218, 251 Cal. Rptr. 126* ; *see also Trs. of the Dirs. Guild of America-Producer Pension Plans v. Tise (9th Cir. 2000) 234 F.3d 415, 418* ; *but see Fam. Code § 5103(a)* (enforcement of support orders)]. For further discussion of dividing ERISA plans, see *§ 222.200* et seq.

[2] Notice of Adverse Interest

Apart from joinder, counsel for the nonemployee-spouse should also give strong consideration to sending notice of that spouse's adverse interest under the plan to the plan administrator [*see, e.g., Trs. of the Dirs. Guild of America-Producer Pension Benefits Plans v. Tise (9th Cir. 2000) 234 F.3d 415 , reh'g denied, 255 F.3d 661(9th Cir. June 22, 2001)* (QDRO may be obtained to enforce valid DRO after participant's death if *notice* of DRO has been given to plan)]. This might be done, for example, while a motion to join the plan is pending in order to help forestall the employee-spouse's improper withdrawal of the benefits before the community interest in them can be adjudicated [*see Fam. Code § 755*; *In re Marriage of Baker (1988) 204 Cal. App. 3d 206, 220, 251 Cal. Rptr. 126* (procedures for notice of adverse interest and joinder as not preempted by ERISA)]. Sending notice should also be done as a matter of course with respect to any plan that is not joined as a party to the proceeding.

Note that, in the absence of a proper written notice of adverse interest, payment or refund to a plan participant of an employee benefit plan, or to the participant's, employee's, or former employee's beneficiary, or estate fully discharges the plan sponsor and the administrator, trustee, or insurance company making the payment or refund from adverse claims. Lack of a written notice of adverse interest to the plan sponsor or administrator does not, however, release or discharge the *plan participant* (namely, the employee spouse) from the other spouse's claims [*Fam. Code § 755(b)*]. For a form that may be used to send notice of adverse interest, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2d ed., Ch. 21 (Matthew Bender).

[3] Restraining Orders Against Employee Spouse

A court may issue orders concerning retirement or pension plans under *Fam. Code § 2610*, as discussed in *§ 222.182[1]* et seq. Apart from orders that are expressly authorized by *Fam. Code § 2610*, it may be advisable to seek other protective orders under the general authority granted to the court by that statute. For example, the following orders were recommended by one court to secure a nonemployee spouse's interest against the employee spouse's death or withdrawal of employee contributions in contravention of the nonemployee spouse's community property rights [*In re Marriage of Ramer (1986) 187 Cal. App. 3d 263, 275, 231 Cal. Rptr. 647]* :

- Restraining the employee spouse from withdrawing funds from or assigning or hypothecating (pledging as security) any interest in the retirement benefits without prior court approval;

- Ordering the employee spouse to name the nonemployee spouse and keep that spouse named as the beneficiary of any benefits payable or availablein the event of the employee spouse's death; and

- Ordering that if the employee spouse should violate the orders in any fashion, the retirement benefits should immediately be valued and divided and that the employee spouse or his or her estate should indemnify the nonemployee spouse for any loss caused by the employee spouse's failure to abide by the court's orders or otherwise protect nonemployee spouse's community property interest in the retirement benefits.

[4] Valuation Date Other Than Trial

Fam. Code § 2552(a) generally requires a court in the division of the parties' community estate to value the assets and

liabilities as near as practicable to the time of trial, and this valuation time is generally followed with respect to pension and retirement benefits [*see In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 752, 760, 214 Cal. Rptr. 661* ; *In re Marriage of Behrens (1982) 137 Cal. App. 3d 562, 577, 187 Cal. Rptr. 200* ; *In re Marriage of Marsden (1982) 130 Cal. App. 3d 426, 448, 181 Cal. Rptr. 910]* . This stands in contrast to the principle that the extent of community interest in the benefits is determined as of the date of the parties' separation [*In re Marriage of Marsden (1982) 130 Cal. App. 3d 426, 448, 181 Cal. Rptr. 910]* .

However, *Fam. Code § 2552(b)* provides that the court, for good cause shown, may value all or any portion of the community estate at a date other than that of trial. In some cases, because of the type of retirement or pension plan involved or because of the parties' special circumstances, it may be necessary to move under *Fam. Code § 2552* for an alternate valuation date, such as the date of separation [*see e.g., Bowman v. Bowman (1985) 171 Cal. App. 3d 148, 158, 217 Cal. Rptr. 174* ; *In re Marriage of Behrens (1982) 137 Cal. App. 3d 562, 577, 187 Cal. Rptr. 200]* . If so, the party seeking the alternate valuation date must give at least 30 days' notice to the other party [*Fam. Code § 2552(b)*], by means of a noticed motion [*see Cal. Rules of Ct., Rule 5.126*; Cal. Judicial Council Form FL-315; *see also In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 760 n.15, 214 Cal. Rptr. 661]* . For further discussion of moving for an alternate valuation date, see *§ 222.37*.

[5] Bifurcation and Reservation of Jurisdiction

California law permits the bifurcation of trial of various issues in a proceeding for marital dissolution or legal separation. Bifurcation is commonly sought concerning the termination of the parties' marital status from the remaining issues. However, bifurcation may be sought regarding other issues as well, including the division of the parties' community interest in pension or retirement benefits [*see Fam. Code § 2337*; *Cal. Rules of Ct., Rule 5.175*; *In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 755, 214 Cal. Rptr. 661]* . When bifurcation is granted for the purpose of terminating marital status only, the court *must* reserve jurisdiction over all other pending issues, including the division of community pension or retirement benefits [*see Fam. Code § 2337(b), (c)*].

As a condition of granting bifurcation for a marital "status only" dissolution, the court may order, pursuant to *Fam. Code § 2337*, that until judgment has been entered on all remaining issues and has become final, the bifurcating party must indemnify and hold the other party harmless from any adverse consequences resulting to the other party if the bifurcation results in the loss of the other party's rights to pension benefits, elections, or survivor's benefits to which that party would otherwise have been entitled [*Fam. Code § 2337(b)(5)*]. Such losses appear preventable, however, because the court may also impose the condition that, *before entry* of a judgment terminating marital status, both of the following must occur: (1) the party's retirement or pension plan must be joined as a party to the proceeding, and (2) "if applicable, an order pursuant to Section 2611 shall be entered with reference to the defined benefit or similar plan pending the ultimate resolution of the distribution of benefits under the employee benefit plan." Note that the preceding reference to "Section 2611" in *Fam. Code § 2337* is erroneous, as there is no such statute, and it apparently was intended to refer to orders under *Fam. Code § 2610* [*see Fam. Code § 2337(b)(6)*].

For further discussion of bifurcation, including discussion of other conditions that a court may impose to bifurcate the issue of marital status, see *§ 222.32*, and *Ch. 221, Dissolution of Marriage: Procedure, § 221.18[5]*.

In addition to bifurcation authority as discussed above, a court has general authority to render a judgment of dissolution or legal separation that reserves its jurisdiction to determine the parties' interests in particular assets, including retirement or pension benefits, and parties can generally stipulate to such provisions, as well [*see Fam. Code § 2550*; *In re Marriage of Carl (1977) 67 Cal. App. 3d 542, 546, 136 Cal. Rptr. 703]* . While this general authority exists and has, in fact, been utilized in dissolution matters, the practice by some courts of making open-ended reservations of jurisdiction to determine interests in retirement benefits has been strongly criticized as being unauthorized and not in keeping with the spirit underlying *Fam. Code § 2550* [*see In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 756-757, 214 Cal. Rptr. 661]* .

Thus, it has been suggested that trial courts should at least make a determination of the extent of the parties' community interest in the benefits using the "time rule" or other applicable apportionment formula and thereby make a present division, and resort to a reservation of jurisdiction only for the purpose of supervising payment of the benefits [*see In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 758, 214 Cal. Rptr. 661* ; *see also In re Marriage of Gowan (1997) 54 Cal. App. 4th 80, 86, 62 Cal. Rptr. 2d 453]* . This approach helps avoid protracted litigation over the parties' interests and, when coupled with any necessary protective orders, helps assure that the nonemployee-spouse will notforfeit his or her community share in the benefits. Courts otherwise have broad discretion in determining whether the benefits, once apportioned, are amenable to a present valuation and cash-out, or whether they must be divided in-kind, as discussed in *§ 222.182[3]* and *§ 222.183[1][b]*, et seq. [*see In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 759, 214 Cal. Rptr. 661]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 222.182 Court's Discretion in Dividing Benefits

[1] Duty of Court to Avoid Termination of Community Interest--Necessary or Appropriate Orders

Subject to special rules and limitations described hereafter (*§ 222.182[2]*), trial courts are required by statute to make whatever orders are necessary or appropriate to ensure that each party receives his or her full community property share in any retirement plan, whether public or private, including all survivor and death benefits, in a proceeding for marital dissolution or legal separation [*see Fam. Code § 2610(a)*; *In re Marriage of Higinbotham (1988) 203 Cal. App. 3d 322, 334-335, 249 Cal. Rptr. 798]* .

Under current law, the orders authorized by statute include, but are not limited to, any of the following [*Fam. Code § 2610(a)*]:

1. Ordering the disposition of any retirement benefits payable on or after the death of either party in a manner consistent with the Family Code provisions for division of the community estate [*see Fam. Code § 2500 et seq.*], which generally require an equal division, in the absence of the parties' agreement otherwise [*Fam. Code § 2550*];

2. Ordering a party to elect a survivor benefit annuity or other similar election for the benefit of the other party, as specified by the court, in any case in which a retirement plan provides for such an election, provided that no court shall order a retirement plan to provide increased benefits determined on the basis of actuarial value [*see In re Marriage of Cooper (2008) 160 Cal. App. 4th 574, 580-581, 73 Cal. Rptr. 3d 71* (because equal division requirement applies to retirement plan survivor benefits, court cannot allocate entire amount of these benefits to one spouse without compensating other spouse for his or her community property interest in these benefits)];

3. On the agreement of the nonemployee spouse, ordering the division of accumulated community

property contributions and service credit as provided in the following or similar enactments: (a) *Gov. Code § 21215 et seq.* (*now see Gov. Code § 21290 et seq.*), pertaining to benefits under the Public Employees' Retirement System (PERS); (b) *Educ. Code § 22650 et seq.*, pertaining to benefits under the State Teachers' Retirement System (STRS); (c) *Gov. Code § 31685 et seq.*, pertaining to benefits under the County Employee's Retirement Law of 1937; or (d) *Gov. Code § 75050 et seq.*, pertaining to state Judge's Retirement Law; and

4. Ordering a retirement plan to make payments directly to a nonmember party of his or her community property interest in retirement benefits, subject to the limitations discussed in *§ 222.182[2]*.

For discussion of dividing state public employees' benefits, see *§ 222.241*.

[2] Express Limitations on Orders

[a] In General

A court's authority under *Fam. Code § 2610* to make any of the orders *set forth in § 222.182[1]* is limited by the provision that a court must not make any order that requires a retirement plan to do either of the following [*Fam. Code § 2610(b)*]:

1. Make payments in any manner that will result in an increase in the amount of benefits provided by the plan [*Fam. Code § 2610(b)(1)*; *In re Marriage of Cramer (1993) 20 Cal. App. 4th 73, 78, 79-80, 24 Cal. Rptr. 2d 372* (potential for increase in plan liability precluded order for payment of survivor's benefits to decedent's former spouse under county retirement plan; only spouse married to decedent at time of his death could have survivor's benefits under plan)]; or

2. Make the payment of benefits to any party at any time before the member retires, except as provided in *Fam. Code § 2610(a)(3)* (concerning certain public employee benefits, as set forth in *§ 222.182[1]*), unless the plan so provides.

The first of these limitations is consistent with case law governing private and public entity retirement plans. The second is consistent with case law regarding public entity plans; however, it may disrupt the judicial treatment of private retirement plans governed by the Employee Retirement Income Security Act (ERISA) that has been established under ERISA and *In re Marriage of Gillmore* [*see Fam. Code § 2610(b)(2)*; 9 Cal. Fam. Law Monthly 150 (Dec. 1992) (Matthew Bender) (article and commentary of Prof. Grace Ganz Blumberg, UCLA School of Law); *see also In re Marriage of Gillmore (1981) 29 Cal. 3d 418, 174 Cal. Rptr. 493, 629 P.2d 1]* . Nevertheless, the second limitation may have been intended to apply only to public entity pensions, but further legislative or judicial clarification will be required for a definitive interpretation [*see* 9 Cal. Fam. Law Monthly 150 (Dec. 1992) (Matthew Bender) (article and commentary of Prof. Grace Ganz Blumberg, UCLA School of Law); *but cf. In re Marriage of Oddino (1997) 16 Cal. 4th 67, 82 n.8, 65 Cal. Rptr. 2d 566, 939 P.2d 1266 , cert. denied, 523 U.S. 1021* (noting that *Fam. Code § 2610(b)(2)* prohibits court from ordering preretirement payment of benefits by a plan unless plan provides for such benefits or such benefits are provided for in certain California statutes regarding public employee retirement benefits, or in "similar enactments")].

Fam. Code § 2610, which sets forth the foregoing orders and limitations, maynot be applied retroactively to payments made by a retirement plan to any person who retired or died before January 1, 1987, or to payments made to any person who retired or died prior to June 1, 1988, for plans subject to *Fam. Code § 2610(a)(3)* (concerning certain public employee benefits) [*Fam. Code § 2610(c)*; *see* Stats. 1988, ch. 542, §§ 8, 9, 11 (prior law making provisions for PERS and STRS benefits retroactive to June 1, 1988); *see also* Stats. 1992, ch. 176, §§ 1, 13 (urgency legislation, signed July 11, 1992, and chaptered July 13, 1992, amending former *Civ. Code § 4800.8* retroactively to make reference to certain

judge's retirement benefits, but superseded on and after January 1, 1993, by other provisions of former *Civ. Code § 4800.8* in Stats. 1992, ch. 431].

[b] Construction of Authorizing Statute

Fam. Code § 2610, the authorizing statute for the orders *set forth in § 222.182[1]* is a recodification of former *Civ. Code § 4800.8*. Since former *Civ. Code § 4800.8* was first enacted, a substantial body of case law interpreting the statute has developed, and courts are also now construing its Family Code successor [*see Fam. Code § 2610*; *see, e.g., In re Marriage of Cramer (1993) 20 Cal. App. 4th 73, 78, 79-80, 24 Cal. Rptr. 2d 372]* .

Case law has established that an order that alters or enlarges the pension contract obligation of a third party is neither "necessary" nor "appropriate" under the section. Thus, for example, *Fam. Code § 2610* may not be used to alter or enlarge a third party's liability under a pension contract to pay survivor or death benefits to a former spouse. The section was intended to permit an equitable distribution of the benefits payable under the third party's plan, based on the proportion of the various community contributions used to fund the plan [*see In re Marriage of Carnall (1989) 216 Cal. App. 3d 1010, 1023, 265 Cal. Rptr. 271]* . Likewise, an order that has the *potential* to alter or enlarge a retirement plan's liability is improper, even though, under the facts, the order does not actually result in an increase in the plan's liability [*see In re Marriage of Cramer (1993) 20 Cal. App. 4th 73, 78, 79-80, 24 Cal. Rptr. 2d 372* (order to pay survivor benefits to former spouse risked impairment of contractual obligation to pay survivor benefits to potential minor children)].

Even before the statute [*see* former *Civ. Code § 4800.8*; *now see Fam. Code § 2610*] was amended to expressly set forth such a limitation, a trial court could not require a public entity pension plan, such as a plan covering state or county employees, to distribute pension benefits directly to a nonemployee former spouse before the time the employee spouse actually retires, absent a specific provision in the plan for such distribution, although a private pension plan might, in a particular case, be subject to the direct payment requirements of applicable federal law (*see § 222.200[1][a]* et seq.). Instead, when a public employee continues to work after becoming eligible to retire under a plan that does not provide for direct payment to a former spouse, the employee spouse must himself or herself compensate the former spouse for that spouse's community interest in the plan [*see In re Marriage of Jensen (1991) 235 Cal. App. 3d 1137, 1141-1143, 286 Cal. Rptr. 911* ; *In re Marriage of Nice (1991) 230 Cal. App. 3d 444, 446, 450, 281 Cal. Rptr. 415* ; *see also In re Marriage of Crook (1992) 2 Cal. App. 4th 1606, 1608, 1612, 3 Cal. Rptr. 2d 905]* .

By contrast, even if a public entity plan does not provide benefits that are denominated as "survivor benefits" to a nonemployee former spouse, the dissolution judgment must compensate that spouse fully for all community contributions made to the employee spouse's retirement plan. Thus, the court must carefully review the type of contributions made to ensure that the nonemployee spouse has been compensated for all portions of the employee spouse's retirement benefits attributable to the community [*see In re Marriage of Nice (1991) 230 Cal. App. 3d 444, 446, 452-453, 281 Cal. Rptr. 415]* . For further discussion of survivor's benefits in general, see *§ 222.161* et seq.

Other special statutory provisions also apply with respect to public entity plans, which are discussed in *§ 222.241* [*see Educ. Code § 22656*; *Gov. Code §§ 31685(b), 75050(b)*]. Moreover, additional protective orders concerning pension and retirement benefits may be advisable in a given case, apart from those specified in *Fam. Code § 2610*. For a discussion of such protective orders, see *§ 222.161* et seq. [*see In re Marriage of Ramer (1986) 187 Cal. App. 3d 263, 275, 231 Cal. Rptr. 647* (citing former *Civ. Code § 4800.8*, but noting its later operative date)].

[c] Abolition of Terminable Interest Rule

As part of the legislation enacting former *Civ. Code § 4800.8*, the predecessor to *Fam. Code § 2610*, an uncodified provision stated that it intended to abolish the "terminable interest rule" set forth in *Waite v. Waite* [Waite v. Waite (1972) 6 Cal. 3d 461, 99 Cal. Rptr. 325, 492 P.2d 13, *overruled on other grounds by* In re Marriage of Brown (1976) 15

Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561] and *Benson v. City of Los Angeles* [*Benson v. City of Los Angeles (1963) 60 Cal. 2d 355, 33 Cal. Rptr. 257, 384 P.2d 649]* in order that retirement benefits be divided in accordance with former *Civ. Code § 4800* (now recodified as *Fam. Code § 2550*) [Stats. 1986, ch. 686, § 2]. The terminable interest rule, which has been criticized frequently [*see, e.g., In re Marriage of Powers (1990) 218 Cal. App. 3d 626, 634-639, 267 Cal. Rptr. 350* ; *Bowman v. Bowman (1985) 171 Cal. App. 3d 148, 154-156, 217 Cal. Rptr. 174]* , provides that a nonemployee spouse's community property interest in a pension terminates on the death of either spouse [*see* Waite v. Waite (1972) 6 Cal. 3d 461, 472-474, 99 Cal. Rptr. 325, 492 P.2d 13, *overruled on other grounds by* In re Marriage of Brown, 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561; *Benson v. City of Los Angeles (1963) 60 Cal. 2d 355, 360-361, 33 Cal. Rptr. 257, 384 P.2d 649]* .

As the result of former *Civ. Code § 4800.8* (as recodified in *Fam. Code § 2610*), one court held that the estate of a nonemployee spouse is entitled to receive that spouse's share of community benefits in any plan when that spousepredeceases the employee spouse. The statute also entitles the nonemployee spouse to receive his or her community share of survivor benefits when the employee spouse dies first [*see In re Marriage of Taylor (1987) 189 Cal. App. 3d 435, 440-443, 234 Cal. Rptr. 486* ; *see also In re Marriage of Powers (1990) 218 Cal. App. 3d 626, 634-639, 267 Cal. Rptr. 350]* . Prior to 1992 amendments that restricted its retroactive application (*see § 222.182[2]*), courts had held that the statute can be applied retroactively, at least to decisions not yet final on January 1, 1987, the date the legislation became operative, and in cases in which the trial court reserved jurisdiction regarding the retirement benefits [*see In re Marriage of Powers (1990) 218 Cal. App. 3d 626, 639-642, 267 Cal. Rptr. 350* ; *In re Marriage of Taylor (1987) 189 Cal. App. 3d 435, 440-443, 234 Cal. Rptr. 486* (both cases decided before amendments, operative January 1, 1993, precluding certain retroactive applications of former *Civ. Code § 4800.8*)]. In any event, however, with respect to private pension plans subject to ERISA, a deceased nonemployee spouse may not make a testamentary transfer of any community interest in the employee spouse's fully vested ERISA pension benefits while the employee spouse is still living, because of federal preemption [*see Ablamis v. Roper (1991) 937 F.2d 1450, 1459-1460]* .

[3] Choice of Division Method

[a] Trial Court's Broad Discretion

A trial court possesses broad discretion in determining the most appropriate method of dividing the parties' community retirement or pension benefits so as to comply with the equal division requirement of *Fam. Code § 2550*. In general, the court may either divide the benefits in-kind between the spouses, or "cash out" the nonemployee spouse, although some other disposition may be appropriate in a given case [*see In re Marriage of Brown (1976) 15 Cal. 3d 838, 848 n.10, 126 Cal. Rptr. 633, 544 P.2d 561* ; *In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 749, 214 Cal. Rptr. 661* ; *In re Marriage of Verlinde (1987) 189 Cal. App. 3d 918, 922-923, 234 Cal. Rptr. 694* ; *see also In re Marriage of Colvin (1992) 2 Cal. App. 4th 1570, 1580, 4 Cal. Rptr. 2d 323* ; *Fam. Code § 2601*]. For example, economic circumstances may justify awarding all of the community property pension rights to one spouse to effect a substantially equal division of the community estate [*see Fam. Code § 2601*; *In re Marriage of Emmett (1980) 109 Cal. App. 3d 753, 759-760, 169 Cal. Rptr. 473]* .

Moreover, *Fam. Code § 2610* requires a court to make whatever orders are necessary or appropriate to ensure that each party receives his or her full community property share in any retirement plan, including all survivor and death benefits, as discussed in *§ 222.182[1]* et seq. For discussion of a so-called judicial preference for awarding an entire pension to an employee spouse and property of equal value to the nonemployee spouse (cash out), see *§ 222.182[3][b]*.

[b] "Preference" for Pension Award to Employee Spouse

Prior to its well-known pension decision in *In re Marriage of Brown* [*In re Marriage of Brown (1976) 15 Cal. 3d 838, 126 Cal. Rptr. 633, 544 P.2d 561]* , the California Supreme Court had expressed a "preference," when feasible, for a trial court to award an employee spouse all of the community interest in his or her pension rights and to compensate

the other spouse with other property of equal value [*see In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 749, 214 Cal. Rptr. 661* (discussing pre-*Brown* decision of *Phillipson v. Board of Administration (1970) 3 Cal. 3d 32, 46, 89 Cal. Rptr. 61, 473 P.2d 765 , disapproved on another point, In re Marriage of Brown (1976) 15 Cal. 3d 838, 851 n.14, 126 Cal. Rptr. 633, 544 P.2d 561*)]. Many courts have relied on this earlier case, *Phillipson v. Board of Administration*, in attempting to fashion a division of pension benefits by the so-called "preferable" method [*see Phillipson v. Board of Administration (1970) 3 Cal. 3d 32, 46, 89 Cal. Rptr. 61, 473 P.2d 765 , disapproved on another point, In re Marriage of Brown (1976) 15 Cal. 3d 838, 851 n.14, 126 Cal. Rptr. 633, 544 P.2d 561]* .

However, in *In re Marriage of Bergman*, the court of appeal noted that the Supreme Court in deciding *Brown* had referred to its statement in *Phillipson* and expressly stated it had not intended to specify a preference. Therefore, the *Bergman* court emphasized that the trial court "retains the discretion to divide the community assets in any fashion that complies with the [equal division] provisions of [now former] *Civil Code Section 4800*" (recodified, in part, in *Fam. Code § 2550*) [*In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 749, 214 Cal. Rptr. 661* ; *see In re Marriage of Brown (1976) 15 Cal. 3d 838, 848 n.10, 126 Cal. Rptr. 633, 544 P.2d 561* ; *In re Marriage of Verlinde (1987) 189 Cal. App. 3d 918, 922-923, 234 Cal. Rptr. 694]* . Thus, courts have broad discretion over the method of division and need not demonstrate a "preference" for one method over another. Nevertheless, there may be circumstances when awarding an entire pension to the employee spouse (with off-setting property to the other spouse) is clearly preferable. For discussion of this "preference" in connection with matured benefits, see *§ 222.183[1][a]* et seq.

[c] Overview of Considerations in Dividing Benefits

In making its division, the court must first determine the parties' respective interests in the pension or retirement benefits using the most appropriate apportionment method, which frequently is the time rule formula (*see § 222.182[4]*). If the court makes an in-kind division, it normally would order that the apportioned benefits be paid to each spouse at the earlier of the time at which the employee-spouse begins receiving the benefits, or when the employee-spouse is first eligible to receive them, depending on whether the benefits have vested and matured. In some cases, this may be immediately.

If the retirement or pension plan has been joined to the proceeding and anin-kind division is involved, the court may order the plan to make the payments directly to each spouse, unless the nature of the plan is such that this is not permissible [*see Fam. Code § 2610(a)(4), (b)(2)*; *see also In re Marriage of Jensen (1991) 235 Cal. App. 3d 1137, 1141-1143, 286 Cal. Rptr. 911]* . If the plan has not been joined to the proceeding or the plan is not otherwise required to make direct payment to the nonemployee-spouse, the employee-spouse remains responsible for compensating the nonemployee-spouse for his or her community share of the benefits. Thus, in some cases, the employee-spouse will have to pay over a share of the benefits as they are being received. In any event, the court may also reserve jurisdiction to supervise the payment of benefits by the plan or the employee-spouse, and make appropriate protective orders under *Fam. Code § 2610* [*see In re Marriage of Jensen (1991) 235 Cal. App. 3d 1137, 1141-1143, 286 Cal. Rptr. 911* ; *In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 746, 214 Cal. Rptr. 661]* .

Alternatively, if the benefits are amenable to valuation, the court may determine their present value, usually from the testimony of experts presented by the parties, and award the benefits to one spouse, with an offsetting award of other property to the other spouse to accomplish an equal division [*see In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 746, 214 Cal. Rptr. 661]* . For discussion of a court's discretion in choosing a "cash out" versus an in-kind division of benefits, see *§ 222.182*.

In determining present value, courts are guided by the general principal that the benefit must be valued as near as practicable to the time of trial [*see Fam. Code § 2552(a)*], and this appears to be the preferred time of valuation [*see In re Marriage of Jacobson (1984) 161 Cal. App. 3d 465, 475, 207 Cal. Rptr. 512* (wife's interest in military retirement benefits properly calculated as though husband retired at date of trial and not separation when he worked after separation and increased benefits were affected by community contributions accrued before separation); *In re*

Marriage of Marsden (1982) 130 Cal. App. 3d 426, 447-448, 181 Cal. Rptr. 910 , citing In re Marriage of Skaden (1977) 139 Cal. Rptr. 615, 566 P.2d 249); *see also In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 752, 214 Cal. Rptr. 661* (value of husband's right to retirement benefits after age 62 determined at time of trial)], particularly when the benefit involved can be characterized as an "individual appreciating asset" [*see In re Marriage of Behrens (1982) 137 Cal. App. 3d 562, 577, 187 Cal. Rptr. 200* ; *In re Marriage of Crook (1992) 2 Cal. App. 4th 1606, 1612, 3 Cal. Rptr. 2d 905* (appropriate valuation date is date of trial or date of payment benefits; when, as in this case, payments were ordered to commence on first eligibility to receive pension, they are to be based on rate of pay at that time)]. However, courts have recognized that the unique circumstances of the parties, including, particularly, the nature of the benefit involved, may justify valuation as of an alternate date, such as the date of separation [*see Bowman v. Bowman (1985) 171 Cal. App. 3d 148, 158, 217 Cal. Rptr. 174* ; *see also In re Marriage of Stephenson (1984) 162 Cal. App. 3d 1057, 1083, 209 Cal. Rptr. 383* (actuary properly valued husband's future right to receive pension as of date of separation, adding only interest that had accrued since separation); *In re Marriage of Shattuck (1982) 134 Cal. App. 3d 683, 687, 184 Cal. Rptr. 698* ; *Fam. Code § 771* (postseparation earnings and accumulations as separate property of earning spouse)]. In the case of benefits such as profit-sharing plans, the value of which can be readily divided between preseparation and postseparation increments, it may be proper to use as a "baseline" community value the amount of contributions in the employee's account as of the time of separation, plus any postseparation increases attributable to that baseline amount up to the date of trial [*In re Marriage of Behrens (1982) 137 Cal. App. 3d 562, 577, 187 Cal. Rptr. 200* ; *In re Marriage of Marsden (1982) 130 Cal. App. 3d 426, 447-448, 181 Cal. Rptr. 910* ; *see also In re Marriage of Stephenson (1984) 162 Cal. App. 3d 1057, 1083, 209 Cal Rptr. 383]* . The date of separation also may be apporpriate if, in a particular case, other "good cause" can be determined for using it as an alternative valuation date [*Fam. Code § 2552(b)*; for discussion of making a motion for valuation at other than the time of trial, see *§ 222.181[4]*]. In some cases, the cash-out may be accomplished through the making of monthly payments to the nonemployee spouse but there may be factors, including tax consequences, that affect the precise method of equalizing the division [*see, e.g., In re Marriage of Gillmore (1981) 29 Cal. 3d 418, 429, 174 Cal. Rptr. 493, 629 P.2d 1* (husband with matured benefits could buy out spouse's share by paying her present value of benefits or by paying her share on monthly basis, with exact distribution method left to trial court's discretion)].

Whether, in a particular case, it is appropriate to use a cash-out or an in-kind division method may depend on many factors, including, for example, the type of pension or retirement plan involved ("defined benefit" or "defined contribution"), the degree of vesting or maturation of the employee-spouse's interest in the plan, the age and health of the parties, and the existence of sufficient other community property from which an offsetting award could be made. One appellate court has stated that it is not possible to develop comprehensive guidelines for courts to follow in deciding which division method to use, because this decision is reached primarily by weighing equitable and factual considerations. Thus, it appears that the court must weigh the totality of the circumstances, and so long as its exercise of discretion is reasonable, its choice of division method will be upheld [*see In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 746, 751, 214 Cal. Rptr. 661]* .

Special considerations in choosing a division method that relate to the degree of maturation of an employee-spouse's benefits are discussed in *§ 222.183[1][a]* et seq.

[4] Use of "Time Rule" and Other Apportionment Methods

[a] Description and Acceptance of Time Rule Formula

The most frequently employed method of apportioning retirement benefits between the community and separate estates is the "time rule" formula. The formula is described and limitations on its use are discussed in *§ 222.182[4][b]*. As described by the California Supreme Court, under the time rule "... the community property interest in retirement benefits is the percentage representing the fraction whose numerator is the employee spouse's length of service during marriage before separation ..., and whose denominator is the employee spouse's length of service in total ...; the separate property interest is the percentage representing the remainder of 100 minus the community property interest percentage"

[*In re Marriage of Lehman (1998) 18 Cal. 4th 169, 176, 187-188, 74 Cal. Rptr. 2d 825, 955 P.2d 451]* .

Therefore, to determine the total community interest (expressed in dollar amounts) in retirement or pension benefits using the time rule, multiply the employee's benefit amount by a fraction, the numerator consisting of the employee's service period during marriage but before separation, and the denominator consisting of the employee's total service period--but not exceeding the period necessary to earn maximum benefits under the plan, and not including certain amounts of putative service credit (§ 222.182[4][b][i]). This resulting amount is divided equally between the spouses, as their respective community shares. The remaining benefit amount, after subtracting the community interest from the total pension, is the employee spouse's separate property, because it is not attributable to employment during marriage [*see In re Marriage of Lehman (1998) 18 Cal. 4th 169, 176, 187-188, 74 Cal. Rptr. 2d 825, 955 P.2d 451* ; *In re Marriage of Gowan (1997) 54 Cal. App. 4th 80, 88, 62 Cal. Rptr. 2d 453* ; *In re Marriage of Henkle (1987) 189 Cal. App. 3d 97, 99, 99 n.3, 234 Cal. Rptr. 351* ; *In re Marriage of Judd (1977) 68 Cal. App. 3d 515, 522, 137 Cal. Rptr. 318* ; *see, e.g., In re Marriage of Wilson (1974) 10 Cal. 3d 851, 855, 112 Cal. Rptr. 405, 519 P.2d 165* ; *In re Marriage of Jacobson (1984) 161 Cal. App. 3d 465, 475, 207 Cal. Rptr. 512* ; *In re Marriage of Webb (1979) 94 Cal. App. 3d 335, 343, 156 Cal. Rptr. 334]* .

Months, weeks, or even days may be used instead of years in the numerator and denominator to facilitate calculation of the apportionment [*see, e.g., In re Marriage of Taylor (1987) 189 Cal. App. 3d 435, 437 n.2, 234 Cal. Rptr. 486* (appellate court stated without approval or disapproval that trial court had used months in apportioning benefits under time rule formula); *In re Marriage of Ward (1975) 50 Cal. App. 3d 150, 154 n.1, 123 Cal. Rptr. 234* (court suggested numerator and denominator consisting of number of days) (*disapproved on another point in In re Marriage of Brown (1976) 15 Cal. 3d 838, 851 n.14, 126 Cal. Rptr. 633, 544 P.2d 561]* .

The court of appeal in one leading case [*see In re Marriage of Judd (1977) 68 Cal. App. 3d 515, 522-523, 137 Cal. Rptr. 318]* described the reasons for courts' broad acceptance of the time rule formula, as follows:

The reason why California courts have accepted this manner of division as properly implementive of the "equal division" requirement of [now former] *Civil Code Section 4800* is apparent: Where the total number of years served by an employee-spouse is a substantial factor in computing the amount of retirement benefits to be received by that spouse, the community is entitled to have its share based upon the length of service performed on behalf of the community in proportion to the total length of service necessary to earn those benefits. The relation between years of community service to total years of service provides a fair gauge of that portion of retirement benefits attributable to community effort.

The time rule may be used to divide retirement benefits even if an employee spouse has had a break in periods of employment with the same employer, when the benefit amount is calculated on the basis of that person's total cumulative service time with the employer. In other words, the mere fact that employment is not continuous will not preclude application of the time rule, when the benefit is based on the total service period. The time rule fairly accounts for both marital and postmarital periods of service because it assigns to the community only the portion of the benefits that correspond to the portion of service during marriage and before separation [*In re Marriage of Gowan (1997) 54 Cal. App. 4th 80, 89-90, 62 Cal. Rptr. 2d 453]* .

[b] Limitations on Application

[i] When Application Inappropriate

Apportionment on the basis of the time rule is appropriate only when the amount of the retirement benefits is substantially related to the total number of years of service. Thus, for example, the time rule does not apply when retirement benefits are based on a point system that depends on the nature and frequency of the service rendered, not the number of years served [*In re Marriage of Poppe (1979) 97 Cal. App. 3d 1, 8-9, 158 Cal. Rptr. 500* ; *see In re*

Marriage of Henkle (1987) 189 Cal. App. 3d 97, 99, 234 Cal. Rptr. 351 (*Poppe* did not govern because employee spouse's retirement benefits were substantially related to number of years served)].

[ii] Maximum Years in Denominator

Once maximum retirement benefits have been earned, further employment thereafter during marriage does not count as service during marriage for the purpose of applying the time rule to determine the community interest in an employee spouse's retirement pay. Thus, the time rule formula's denominator can be no greater than the number of years "necessary to earn the benefits," that is, thenumber of years required to earn the maximum amount of benefits payable under the provisions of the plan [*In re Marriage of Henkle (1987) 189 Cal. App. 3d 97, 98, 99-100, 234 Cal. Rptr. 351]* .

In one case, for example, a husband had served 26 years in the Air Force prior to marrying his wife and retired with 32 years of service. After 30 years of service, the husband had been eligible to retire with a pension consisting of 75 percent of his base pay, the maximum amount available under the plan. At the time of the husband's retirement, he and his wife had separated. The former wife contended that under the time rule formula, the community estate was entitled to 6/32 of the value of the pension. However, the court of appeal concluded that the community was entitled only to 4/30 of the pension. It reasoned that the former husband's service during the last two years of marriage was not necessary to earn any benefits nor did it earn any additional benefits [*In re Marriage of Henkle (1987) 189 Cal. App. 3d 97, 99-100, 234 Cal. Rptr. 351]* . The court distinguished cases in which courts have held that the first few years of service during the marriage must be given just as much weight in computing total service as the last few years after separation. In those cases, the pension's postseparation increase in value attributable to continued employment was not entirely separate property because the amount of the pension was dependent on the total number of years of service. By contrast, the last two years of the ex-husband's military service in this case did not contribute to the total number of years of service (30) on which the amount of retirement pay depended [*In re Marriage of Henkle (1987) 189 Cal. App. 3d 97, 100, 234 Cal. Rptr. 351]* .

Similarly, additional years of service with an employer's successor in a merger that *did not* affect and was not necessary to earn any benefits under the relevant plan could not be included in the denominator of the time rule fraction [*In re Marriage of Bowen (2001) 91 Cal. App. 4th 1291, 1296-1297, 111 Cal. Rptr. 2d 431* (benefits in question were fully earned by date of merger, successor employer offered alternative pension plan, and pension benefits would have been same amount whether or not husband continued working for successor employer)].

In addition, when an employer credits an employee with putative years of service that is unrelated to time actually worked as part of a retirement plan enhancement, this credit is not utilized in the denominator of the time rule fraction. To the extent that the retirement plan is a community asset, the marital community must also share in the enhancement [*In re Marriage of Lehman (1998) 18 Cal. 4th 169, 188, 74 Cal. Rptr. 2d 825, 955 P.2d 451]* . Thus, for example, in *In re Marriage of Lehman*, the Supreme Court held that enhanced early retirement benefits under a defined benefit pension plan were community property to the same extent as an employee spouse's basic retirement benefits, even though the enhancement was added years after a married couple separated and divorced. The right to share in an increased benefit derives from the right to share in the basic benefit; and to the extent that the basic benefit was earned during marriage and before separation, the benefit, as enhanced, will be community [*In re Marriage of Lehman (1998) 18 Cal. 4th 169, 183, 185, 74 Cal. Rptr. 2d 825, 955 P.2d 451* (disapproving, to extent contrary, *Hanson v. Gram (In re Gram) (1994) 25 Cal. App. 4th 859, 30 Cal. Rptr. 2d 792*)].

However, in a case in which the wife's employment was terminated and her stock options were subject to forfeiture, but she negotiated a new severance package with her employer that included an extension of the vesting of her stock option plan for one year after termination, the court held that the additional one-year period was included in the denominator of the time rule fraction because it was part of a "new deal" and was not derived from anything earned during marriage [*In re Marriage of Steinberger (2001) 91 Cal. App. 4th 1449, 1463-1464, 111 Cal. Rptr. 2d 521]* .

Legal Topics:

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§ 222.183 Effect of Benefit's "Maturity" on Division

[1] Division of Nonmatured Benefits

[a] Benefits Paid When Employee Spouse Retires

When an employee spouse's rights to a future pension have *not* matured as of the date the judgment is entered, the court has discretion to choose the most appropriate method of dividing the benefits. First, a court may order the employee spouse to pay to the nonemployee spouse his or her apportioned share in each pension payment as it is later received, assuming the community has some interest in the pension [*see In re Marriage of Brown (1976) 15 Cal. 3d 838, 848, 126 Cal. Rptr. 633, 544 P.2d 561* ; *In re Marriage of Peterson (1974) 41 Cal. App. 3d 642, 656-657, 115 Cal. Rptr. 184 , disapproved on another point, In re Marriage of Brown (1976) 15 Cal. 3d 838, 851 n.14, 126 Cal. Rptr. 633, 544 P.2d 561*)].

Subject to limited exceptions, the court also may order direct payment by a pension plan that has been joined in the dissolution proceeding [*see Fam. Code § 2060 et seq.*] or that is otherwise subject to the provisions of ERISA for qualified domestic relations orders (QDROs), as discussed in *§ 222.201[1]* et seq. However, *Fam. Code § 2610(b)* sets forth limitations on ordering direct payment by a plan prior to the time an employee retires and has created some uncertainty over which plans can be ordered to make direct payment before the employee's retirement [*see* discussion in *§ 222.182[2]*]. In addition, joinder alone of a plan subject to ERISA will not subject the plan to direct payment requirements if the court order does not constitute a QDRO [*see In re Marriage of Baker (1988) 204 Cal. App. 3d 206, 209, 217-218, 251 Cal. Rptr. 126]* .

[b] Cash Out

Alternatively, the court may make a present valuation of the benefits to effecta "cash out" of the nonemployee spouse, but it must take into account the possibility that death or termination of employment may destroy those rights before they mature, and the court is otherwise required to make protective orders under *Fam. Code § 2610* (*see § 222.182[1]* et

seq.). If the court concludes, because of uncertainties affecting the vesting or maturation of the pension, that it should not attempt to divide the present value, it can instead make an in-kind division, as discussed above [*see In re Marriage of Brown (1976) 15 Cal. 3d 838, 848, 126 Cal. Rptr. 633, 544 P.2d 561]* . The choice between a present valuation and an in-kind division may be guided, at least in part, by whether a present valuation is feasible. The feasibility of a present valuation will depend partially on the number of variables and amount of time until the rights mature [*In re Marriage of Skaden (1977) 19 Cal. 3d 679, 689, 139 Cal. Rptr. 615, 566 P.2d 249* ; *see In re Marriage of Stenquist (1978) 21 Cal. 3d 779, 784-785, 148 Cal. Rptr. 9, 582 P.2d 96* ; *see also In re Marriage of Alarcon (1983) 149 Cal. App. 3d 544, 558-559, 196 Cal. Rptr. 887]* .

When a nonemployee spouse waits until the employee spouse's retirement to receive the pension benefits, the nonemployee spouse's share can be based on the employee's salary at retirement, despite the fact it may have risen due to a promotion after separation [*In re Marriage of Andreen (1978) 76 Cal. App. 3d 667, 675, 143 Cal. Rptr. 94]* . Thus, it has been held that if a dissolution judgment awards a nonemployee spouse a percentage of gross monthly benefits to which an employee spouse becomes entitled in the future, the nonemployee spouse is entitled to share in the increased value of the pension plan that might accrue due to the employee spouse's increased age, longer service, and higher salary [*In re Marriage of Gillmore (1981) 29 Cal. 3d 418, 428, 428 n.9, 174 Cal. Rptr. 493, 629 P.2d 1]* .

[2] Disposition After Benefits Mature

[a] In General

After the pension benefits mature and if the employee spouse does not retire, the nonemployee spouse generally may then choose whether to obtain immediate compensation for his or her interest in the benefits or to wait until the employee spouse actually retires and share in the possibly larger benefits then payable. An election to receive compensation before the employee spouse's actual retirement, however, constitutes an irrevocable election to give up increased payments in the future, which might accrue due to increased age, longer service, and a higher salary [*In re Marriage of Gillmore (1981) 29 Cal. 3d 418 n.9, 428, 174 Cal. Rptr. 493, 629 P.2d 1* ; *In re Marriage of Luciano (1980) 104 Cal. App. 3d 956, 960-961, 164 Cal. Rptr. 93]* . The nonemployee spouse cannot be forced by the employee spouse to make a "Gillmore election" [*In re Marriage of Davis (2004) 120 Cal. App. 4th 1007, 1020-1021, 16 Cal. Rptr. 3d 220* (nonemployee spouse's election to begin receiving pension payments would have terminated spousal support obligation of employee spouse)]. For further discussion of dividing matured benefits, see *§ 222.183[3][a]* et seq.

[b] Risks of Awarding Future Payment

If a nonemployee spouse is awarded a portion of each pension payment as it is paid to the employee spouse, and thereby defers receipt of his or her community share of the benefits until the employee spouse retires, the nonemployee spouse accepts the risk that the benefits may be divested or may never mature [*In re Marriage of Foster (1986) 180 Cal. App. 3d 1068, 1071-1073, 227 Cal. Rptr. 446]* . For discussion of protective orders a court is required to make in dividing retirement benefits, see *§ 222.182[1]* et seq. [*see Fam. Code § 2610*].

[3] Division of Matured Benefits

[a] "Preference" for Award to Employee Spouse

Historically, courts have often stated that, if the community has sufficient assets, the preferable method of dividing retirement benefits is to award the entire pension to the employee spouse and property of equal value to the nonemployee spouse ("cash out" method) [*In re Marriage of Judd (1977) 68 Cal. App. 3d 515, 520, 137 Cal. Rptr. 318* ; *see, e.g., Waite v. Waite (1972) 6 Cal. 3d 461, 473-474, 99 Cal. Rptr. 325, 492 P.2d 13* ; *Phillipson v. Board of Administration (1970) 3 Cal. 3d 32, 46, 89 Cal. Rptr. 61, 473 P.2d 765* ; *In re Marriage of Kasper (1978) 83 Cal. App. 3d 388, 390-391, 147 Cal. Rptr. 821* ; *Bensing v. Bensing (1972) 25 Cal. App. 3d 889, 894, 102 Cal. Rptr. 255* (

Waite, Phillipson, and *Bensing* were disapproved on another point in *In re Marriage of Brown (1976) 15 Cal. 3d 838, 851 n.14, 126 Cal. Rptr. 633, 544 P.2d 561*); *but see In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 749, 214 Cal. Rptr. 661* (Supreme Court expressly stated in *Brown* that it had not intended to specify preference for cash-out method; *see § 21.42[2]*)]. This expressed preference is not intended, however, to tie the hands of the trial court. Thus, the court retains the discretion to divide the community assets in any fashion that complies with the equal division provisions of *Fam. Code § 2550* [*In re Marriage of Brown (1976) 15 Cal. 3d 838, 848 n.10, 126 Cal. Rptr. 633, 544 P.2d 561* ; *In re Marriage of Judd (1977) 68 Cal. App. 3d 515, 520, 137 Cal. Rptr. 318]* .

If a nonemployee spouse elects to receive his or her community share of vested and matured benefits immediately, however, it is an abuse of discretion for the trial court to delay distribution until the employee spouse actually retires [*In re Marriage of Gillmore (1981) 29 Cal. 3d 418, 426, 428, 174 Cal. Rptr. 493, 629 P.2d 1]* , as discussed in *§ 222.183[3][c][i]*. Therefore, the issue in reviewing a trial court's disposition of a community pension interest is not whether an alternative division was preferable, but whether the trial court abused its discretion in dividing the pension in the manner it selected [*In re Marriage of Judd(1977) 68 Cal. App. 3d 515, 520, 137 Cal. Rptr. 318]* .

[b] Insufficient Community Assets

The "preferable" (cash out) method of dividing pension rights presupposes the existence of other community assets equivalent in worth to the discounted (present) value of the nonemployee spouse's community interest in the retirement benefits. When the community does not have sufficient other assets, however, the court will be required to fashion division by some other method, such as awarding the nonemployee spouse a share of each monthly payment as it is received [*see Smith v. Lewis (1975) 13 Cal. 3d 349, 362, 118 Cal. Rptr. 621, 530 P.2d 589* (disapproved on another point in *In re Marriage of Brown (1976) 15 Cal. 3d 838, 851 n.14, 126 Cal. Rptr. 633, 544 P.2d 561*); *In re Marriage of Judd (1977) 68 Cal. App. 3d 515, 520, 137 Cal. Rptr. 318* ; *Bensing v. Bensing (1972) 25 Cal. App. 3d 889, 893-894, 102 Cal. Rptr. 255* (disapproved on another point in *In re Marriage of Brown (1976) 15 Cal. 3d 838, 851 n.14, 126 Cal. Rptr. 633, 544 P.2d 561*)].

Alternatively, the court may divide the accumulated contributions and order the employee spouse to pay the nonemployee spouse his or her share immediately, if he or she has sufficient separate property with which to do so, or at a future date, in installments, or otherwise [*see Ball v. McDonnell Douglas Corp. (1973) 30 Cal. App. 3d 624, 630, 106 Cal. Rptr. 662]* . If the court simply divides the contributions and requires payment out of retirement benefits when received, and retains jurisdiction to supervise the future payments, the court's order should require the employee spouse to make appropriate provisions to secure payment to the nonemployee spouse in the event of the employee spouse's death, or the nonemployee spouse might lose his or her interest [*see Fam. Code § 2610*; *In re Marriage of Foster (1986) 180 Cal. App. 3d 1068, 1073-1074, 227 Cal. Rptr. 446* ; *Berry v. Board of Retirement (1972) 23 Cal. App. 3d 757, 758-759, 100 Cal. Rptr. 549* ; *see also Ball v. McDonnell Douglas Corp. (1973) 30 Cal. App. 3d 624, 627, 630, 106 Cal. Rptr. 662]* .

[c] Nonemployee Spouse's Right to Immediate or Future Distribution

[i] Election of Time of Distribution

A nonemployee spouse may elect to receive the present value of his or her community share in a vested, matured pension as of the date of the employee spouse's eligibility to retire, or may elect, or to delay receipt until the employee spouse retires and receives payments under the pension plan [*In re Marriage of Gillmore (1981) 29 Cal. 3d 418, 428, 174 Cal. Rptr. 493, 629 P.2d 1* ; *In re Marriage of Castle (1986) 180 Cal. App. 3d 206, 216, 225 Cal. Rptr. 382* ; *In re Marriage of Scott (1984) 156 Cal. App. 3d 251, 253-254, 202 Cal. Rptr. 716]* . The nonemployee spouse's decision to receive immediate payments, however, constitutes an irrevocable election to give up increased payments in the future that might accrue due to the employee spouse's increased age, longer service, and higher salary [*In re Marriage of Gillmore (1981) 29 Cal. 3d 418, 428 n.9, 174 Cal. Rptr. 493, 629 P.2d 1* ; *In re Marriage of Castle (1986) 180 Cal.*

App. 3d 206, 216, 225 Cal. Rptr. 382 ; *In re Marriage of Scott (1984) 156 Cal. App. 3d 251, 253-254, 202 Cal. Rptr. 716* ; *In re Marriage of Luciano (1980) 104 Cal. App. 3d 956, 960-961, 164 Cal. Rptr. 93* ; *see § 222.183[3][a]*]. The nonemployee spouse cannot be forced by the employee spouse to make a "Gillmore election" [*In re Marriage of Davis (2004) 120 Cal. App. 4th 1007, 1020-1021, 16 Cal. Rptr. 3d 220* (nonemployee spouse's election to begin receiving pension payments would have terminated spousal support obligation of employee spouse)]. For discussion of obtaining immediate payment, see *§ 222.183[3][iii]*.

[ii] Limitation on Trial Court's Discretion

If a nonemployee spouse elects to receive immediately his or her community share of matured benefits, it is an abuse of discretion for the trial court to delay distribution until the employee spouse actually retires. There are no uncertainties affecting vesting or maturation that could lead the trial court to conclude that distribution of such a pension must be delayed [*In re Marriage of Gillmore (1981) 29 Cal. 3d 418, 426, 428, 174 Cal. Rptr. 493, 629 P.2d 1* ; *In re Marriage of Luciano (1980) 104 Cal. App. 3d 956, 960, 164 Cal. Rptr. 93* ; *see In re Marriage of Scott (1984) 156 Cal. App. 3d 251, 253-254, 202 Cal. Rptr. 716]* . However, the nonemployee spouse may not compel the employee spouse actually to retire at the time of first eligibility for retirement benefits [*In re Marriage of Becker (1984) 161 Cal. App. 3d 65, 72, 207 Cal. Rptr. 392]* .

In addition, the court's power to make orders against the *retirement or pension plan* in dividing benefits and ordering their distribution is limited both by state statute [*see Fam. Code § 2610*] and by any supervening federal law, such as the requirements for qualified domestic relations orders (QDROs) under the Employee Retirement Income Security Act (ERISA) as amended by the Retirement Equity Act, as discussed in *§ 222.183[3][d]* [*In re Marriage of Oddino (1997) 16 Cal. 4th 67, 82, 65 Cal. Rptr. 2d 566, 939 P.2d 1266 , cert. denied, 523 U.S. 1021* ; *see also § 222.201*].

[iii] Election by Nonemployee Spouse to Receive Immediate Payment

A nonemployee spouse's election to receive his or her community share of the employee spouse's pension can be made by motion in the trial court, at any time after the pension becomes matured; that is, after the employee spouse becomes eligible to retire [*In re Marriage of Cornejo (1996) 13 Cal. 4th 381, 53 Cal. Rptr. 2d 81, 916 P.2d 476* ; *In re Marriage of Gillmore (1981) 29 Cal. 3d 418, 428-429, 174 Cal. Rptr. 493, 629 P.2d 1* ; *In re Marriage of Luciano (1980) 104 Cal. App. 3d 956, 960-961, 164 Cal. Rptr. 93]* . For discussion of the effect of making anelection for an immediate distribution, see *§ 222.183[3][g]*.

[iv] Formal Motion Required

If an employee spouse continues to work after becoming eligible to retire and the nonemployee spouse choose immediate payment, the nonemployee spouse is entitled to payment as of the date of *filing a motion* seeking immediate payment. A mere written demand, although unequivocal in nature, is insufficient. A formal motion clearly puts the employee spouse on notice of the nonemployee spouse's choice of immediate payment [*In re Marriage of Cornejo (1996) 13 Cal. 4th 381, 53 Cal. Rptr. 2d 81, 916 P.2d 476]* .

[v] Demonstration of Financial Need Unnecessary

A nonemployee spouse is not required to demonstrate a financial need to justify immediate distribution of the retirement benefits. Financial status is not relevant when dividing community property [*In re Marriage of Gillmore (1981) 29 Cal. 3d 418, 427-428, 174 Cal. Rptr. 493, 629 P.2d 1]* .

[vi] Distribution When Employee Spouse Retires

Instead of immediate distribution at trial, or division on posttrial motion after benefits mature, the nonemployee spouse can elect to postpone division of a pension until the employee spouse's actual retirement, whenever that may occur. If he

or she makes that election, the nonemployee spouse's community interest is calculated as of the parties' separation but the entitlement to the community's share in the pension will include any increases in the pension amount before retirement. The nonemployee spouse would also in such circumstances take the risk of nonpayment of the benefit if the employee spouse were to die, or in the case of a military pension, be dishonorably discharged before retiring [*see In re Marriage of Castle (1986) 180 Cal. App. 3d 206, 216, 217, 225 Cal. Rptr. 382* ; *In re Marriage of Adams (1976) 64 Cal. App. 3d 181, 186, 134 Cal. Rptr 298* ; *Fam. Code § 771* (earnings and accumulations after separation are separate property)].

[d] Payment Amount on Immediate Distribution

[i] Amount Equivalent to Present Interest

A nonemployee spouse who elects to receive immediate distribution of his or her community property share of the parties' pension fund before the employee spouse actually retires is entitled at the time of trial to receive an amount equivalent to his or her community interest [*In re Marriage of Gillmore (1981) 29 Cal. 3d 418, 427, 174 Cal. Rptr. 493, 629 P.2d 1* ; *In re Marriage of Shattuck (1982) 134 Cal. App. 3d 683, 686-687, 184 Cal. Rptr. 698]* . In other words, if an election for immediate distribution is made, the employee spouse will not be required to pay to the nonemployee spouse the same amount that he or she would receive if the employee spouse were actually retired at the time of trial [*see In re Marriage of Shattuck (1982) 134 Cal. App. 3d 683, 686-687, 184 Cal. Rptr. 698* ; *see also In re Marriage of Castle (1986) 180 Cal. App. 3d 206, 215-216, 225 Cal. Rptr. 382]* . The nonemployee spouse would be entitled to his or her community share of the actual payments, however, if the employee spouse were retired and receiving benefits at the time of trial [*see In re Marriage of Judd (1977) 68 Cal. App. 3d 515, 521-522, 137 Cal. Rptr. 318]* .

When the benefits at issue include an employer-provided "early retirement subsidy," such as an enhancement to the benefits under the "Rule of 75" (a subsidy for employees aged 55 or older whose age and years of service add up to 75), a court may not order the *employee benefit plan* to pay a purported community share of that subsidy to a nonemployee spouse when an employee spouse who is eligible for early retirement continues to work. Thus, for example, while a nonemployee spouse may, under *In re Marriage of Gillmore (1981) 29 Cal. 3d 418, 174 Cal. Rptr. 493, 629 P.2d 1* be entitled to an immediate distribution of a community property share of matured retirement or pension benefits earned during marriage under an ERISA-governed plan, a court that divides the benefits on dissolution using a QDRO is limited by the technical QDRO rules, as well as by *Fam. Code § 2610* in making orders against the plan and may not order the plan to pay the nonemployee spouse a share of an early retirement subsidy--even if it is a community asset [*In re Marriage of Oddino (1997) 16 Cal. 4th 67, 82, 88, 65 Cal. Rptr. 2d 566, 939 P.2d 1266 , cert. denied, 523 U.S. 1021]* .

This limitation, however, does not preclude a court with reserved jurisdiction over the benefits from recalculating the nonemployee spouse's share of them if the employee spouse *actually takes* early retirement with employer-subsidized early retirement benefits, because ERISA does not prohibit modification of a prior order on early retirement so that the nonemployee spouse ("alternate payee") also receives a share of the subsidized benefit. Moreover, this limitation, arguably, does not preclude a court at the time of the dissolution from ordering the employee spouse to pay over to the nonemployee spouse a community property share of the subsidized benefit outside the QDRO [*In re Marriage of Oddino (1997) 16 Cal. 4th 67, 82 n.8, 88, 65 Cal. Rptr. 2d 566, 939 P.2d 1266 , cert. denied, 523 U.S. 1021]* .

If an election for immediate distribution is made after the trial in the dissolution proceeding and before the employee spouse actually retires, the nonemployee spouse is only entitled to receive his or her community share of the amount to which the employee is entitled as of the time *a formal motion* is brought to obtain immediate payment, and not of the amount the employee would receive if later actually retired, as discussed in *§ 222.183[3][c][iii]* [*In re Marriage of Cornejo (1996) 13 Cal. 4th 381, 53 Cal. Rptr. 2d 81, 916 P.2d 476]* .

[ii] Immediate Distribution Based on Future Value Not Permitted

A nonemployee spouse may not elect between receiving immediately (1) thepresent value of the retirement if the employee spouse were to retire at the time of trial, or (2) the value of the retirement at some later time when the employee spouse becomes entitled, because of longer service, to a higher pension. Permitting the nonemployee spouse to elect to base his or her immediate entitlement on a higher pension amount due to the employee spouse's increased length of service contemplated in the future, long after the parties' separation and the time of trial, would violate the *Gillmore* rule [*In re Marriage of Gillmore (1981) 29 Cal. 3d 418, 428-429, 174 Cal. Rptr. 493, 629 P.2d 1]* that a spouse electing a preretirement payment foregoes later appreciation due to salary increases [*see In re Marriage of Castle (1986) 180 Cal. App. 3d 206, 215-216, 225 Cal. Rptr. 382]* .

[e] Payment Amount on Employee Spouse's Actual Retirement

If the nonemployee spouse waives the right to receive a present distribution of matured pension rights and elects to commence receiving his or her share of these benefits when the employee spouse actually retires, the nonemployee spouse will be entitled to 50 percent of the community portion of each pension payment as it is paid, even though the amount of each pension payment may have substantially increased because of the continued employment of the employee spouse after separation of the parties [*see In re Marriage of Adams (1976) 64 Cal. App. 3d 181, 185-186, 134 Cal. Rptr. 298]* .

By making such an election, however, the nonemployee spouse would not then be entitled to an early distribution of any portion of the matured benefits as of the time the employee spouse first becomes eligible to retire, assuming that the employee spouse retires at a later time. Morever, absent protective orders [*see Fam. Code § 2610*], the nonemployee spouse will receive nothing if either spouse should die before the employee spouse actually retires [*see In re Marriage of Foster (1986) 180 Cal. App. 3d 1068, 1072-1073, 227 Cal. Rptr. 446]* . For discussion of protective orders a court is required to make to ensure that a spouse receives his or her share of pension or retirement benefits, see *§ 222.182[1]* et seq.

[f] Methods of Payment

[i] Options for Immediate Distribution

A court may order an employee spouse to compensate a nonemployee spouse who desires immediate payment of his or her community share of pension or retirement benefits in one of several ways, depending on the circumstances. First, the employee spouse could be ordered to "buy out" the nonemployee spouse's share of the benefits by paying to him or her the present value (at trial) of his or her community interest in the benefits. Alternatively, the employee spouse could begin paying the present value of the benefits to the nonemployee spouse on a monthly basis [*In re Marriage of Gillmore (1981) 29 Cal. 3d 418, 429, 174 Cal. Rptr. 493, 629 P.2d 1* ; *see Waite v. Waite (1972) 6 Cal. 3d 461, 472, 99 Cal. Rptr. 325, 492 P.2d 13 , rev'd on other grounds, In re Marriage of Brocon (1976) 15 Cal. 3d 838, 851 n.14, 126 Cal. Rptr. 633, 544 P.2d 561* ; *In re Marriage of Taylor (1987) 189 Cal. App. 3d 435, 440-443, 234 Cal. Rptr. 486* ; *see also Fam. Code § 2610*]. The exact payment method is within the court's discretion based on the parties' preferences and may include consideration of numerous factors, such as the tax consequences of alternative payment plans [*see In re Marriage of Gillmore (1981) 29 Cal. 3d 418, 429, 174 Cal. Rptr. 493, 629 P.2d 1* ; *In re Marriage of Brown (1976) 15 Cal. 3d 838, 848 n.10, 126 Cal. Rptr. 633, 544 P.2d 561* ; *In re Marriage of Shattuck (1982) 134 Cal. App. 3d 683, 687, 184 Cal. Rptr. 698]* .

[ii] Benefits Presently Being Paid

When pension or retirement benefits have matured at the time judgment is entered and are presently being paid, the court may simply divide them in kind and order the employee spouse to pay to the nonemployee spouse half of the gross amount of the community property portion of each payment [*see In re Marriage of Judd (1977) 68 Cal. App. 3d*

515, 522, 137 Cal. Rptr. 318 ; *see also In re Marriage of Scott (1984) 156 Cal. App. 3d 251, 253-254, 202 Cal. Rptr. 716]* . The award of matured benefits being presently paid may be made retroactive to the date of separation. In that case, the retroactive award of a percentage of undivided, paid-out pension benefits is a money judgment enforceable by writ of execution [*see In re Marriage of Farner (1989) 216 Cal. App. 3d 1370, 1375-1376, 265 Cal. Rptr. 531* (military pension)].

[iii] Direct Payment by Pension Plan

In general, if a pension plan has been joined as a party to the proceeding, the court may make orders directly against the plan, including an order to send an applicable portion of each payment, as it becomes due, directly to the nonemployee spouse [*see Fam. Code § 2060 et seq.*]. However, this general authority is subject to qualification, because in some instances, such as with respect to private pension plans subject to ERISA, joinder alone is not sufficient to assure direct payment to the nonemployee spouse. Pension plans governed by ERISA must permit payment of a portion of the participant's (employee spouse's) benefits directly to a former spouse, but only under a qualified domestic relations order (QDRO), whether or not the plan is joined [*see 29 U.S.C. § 1056(d)(3); In re Marriage of Baker (1988) 204 Cal. App. 3d 206, 217-218, 251 Cal. Rptr. 126* (order that is not a "QDRO," but divides marital interests in employee benefit plan, would not be binding or enforceable against plan, even if plan had been joined in proceeding); for further discussion, *see § 222.201[1]* et seq.]. In addition, many public plans now provide for the establishment of separate retirement accounts for and direct payment to the member and a nonmember spouse (including a former spouse) [*see Fam. Code § 2610*; *Educ. Code § 22650* et seq. (State Teachers' Retirement System); *Gov. Code §§ 21290 et seq., 31685 et seq.* (Public Employees' Retirement System; County Employees Retirement Law, respectively)].

However, *Fam. Code § 2610(b)* sets forth limitations on ordering direct payment by a plan prior to the time an employee retires and has created some uncertainty over which plans can be ordered to make direct payment before the employee's retirement [*see* discussion in *§ 222.182[2]*; *see also In re Marriage of Jensen (1991) 235 Cal. App. 3d 1137, 1141-1143, 286 Cal. Rptr. 911* ; *In re Marriage of Nice (1991) 230 Cal. App. 3d 444, 446, 450, 281 Cal. Rptr. 415]* .

A court that divides retirement or pension benefits subject to ERISA is subject to both the technical requirements for QDROs and *Fam. Code § 2610* in making orders for direct payment against an employee benefit plan, which can affect both the mode of payment (i.e., payment by plan versus payment by employee spouse) and the nature of benefits ordered to be paid [*see In re Marriage of Oddino (1997) 16 Cal. 4th 67, 82 n.8, 88, 65 Cal. Rptr. 2d 566, 939 P.2d 1266* , *cert. denied, 523 U.S. 1021* ; *see also § 222.201*].

[g] Risks of Future Increases and Decreases

[i] In General

If the nonemployee spouse has elected immediate distribution of a pension benefit, the choice is irrevocable and he or she gives up the right to any future increases in the pension resulting from the employee spouse's longevity of service, increased age, or higher salary. The nonemployee spouse may, however, share in any increase in benefits that would have been received had the employee spouse retired on the date the nonemployee spouse elected to receive his or her interest, such as automatic cost-of-living adjustments. Likewise, the value of the nonemployee spouse's interest will decrease proportionately if the benefits are adjusted downward. A decrease is possible (although unlikely), for example, with respect to military pensions that depend on Congress for funding [*In re Marriage of Castle (1986) 180 Cal. App. 3d 206, 214-216, 225 Cal. Rptr. 382* ; *In re Marriage of Scott (1984) 156 Cal. App. 3d 251, 254-255, 202 Cal. Rptr. 716* ; *see In re Marriage of Crook (1992) 2 Cal. App. 4th 1606, 1612, 3 Cal. Rptr. 2d 905]* .

[ii] Pension Forfeited Through Wrongful Act

As a matter of equity, criminal conduct by an employee spouse that directly causes forfeiture of community pension

benefits entitles the nonemployee spouse to reimbursement for his or her share of the lost community property [*In re Marriage of Beltran (1986) 183 Cal. App. 3d 292, 294-295, 227 Cal. Rptr. 924]* . In one case, for example, a military employee spouse who was convicted of child abuse was required to reimburse the community for the amount of military pension forfeited as part of the sentence in a military court-martial. In dicta, the court stated that the same reasoning should apply if the loss is incurred by contractual obligation, tort liability, or criminal penalty [*In re Marriage of Beltran (1986) 183 Cal. App. 3d 292, 295, 227 Cal. Rptr. 924* ; *see In re Marriage of Stitt (1983) 147 Cal. App. 3d 579, 588, 195 Cal. Rptr. 172* (spouse required to reimburse community for attorney's fees to defend charges of embezzlement); *see also 10 U.S.C. § 1408(h)* (providing for military benefits for spouse or former spouse who was abuse victim of military service member whose rights to retired pay were lost because of misconduct involving abuse of spouse or dependent child while service member)].

[4] Relationship to Spousal Support

In general, courts are required by *Fam. Code § 2550* to divide community property equally. In addition, a court may consider the equities of the parties' financial situations in determining spousal support, but only after the community property has been equitably divided. Adjustments in the amount of spousal support will not mitigate the hardship caused to a nonemployee spouse by the denial of his or her community interest in pension payments. Spousal support lies within the discretion of the trial court and may be modified with changing circumstances. A spouse should not be dependent on the discretion of the court to provide him or her with the equivalent of community property that should be his or hers as a matter of absolute right. Thus, spousal support cannot be used to compensate a nonemployee spouse for his or her community interest in retirement benefits [*In re Marriage of Gillmore (1981) 29 Cal. 3d 418, 427-428, 174 Cal. Rptr. 493, 629 P.2d 1* ; *In re Marriage of Brown (1976) 15 Cal. 3d 838, 848, 126 Cal. Rptr. 633, 544 P.2d 561* ; *see In re Marriage of Stenquist (1978) 21 Cal. 3d 779, 787 n.8, 148 Cal. Rptr. 9, 582 P.2d 96* (*Stenquist I); In re Marriage of Luciano (1980) 104 Cal. App. 3d 956, 960, 164 Cal. Rptr. 93* ; *but cf. In re Marriage of Olsen (1994) 24 Cal. App. 4th 1702, 1706-1707, 30 Cal. Rptr. 2d 306* (trial court, in motion to reinstate spousal support that was waived on obtaining judgment partitioning military retirement benefits, had inherent equitable power to set aside order terminating support and make new support order, when termination order was based on mistake of fact that supported spouse would receive share of military benefits and this did not occur due to changes in federal law; prior order was not res judicata on spouse's right to receive support, given that neither spouse nor court could envision that her entitlement to military benefits would be taken away)].

Nevertheless, after the community interest in retirement benefits has been divided equally, if the nonemployee spouse has elected immediate distribution, the employee spouse may move for modification of spousal support in light of this new distribution of the community property. Any inequities caused by the immediate distribution of retirement benefits can be resolved through adjustments in spousal support [*In re Marriage of Gillmore (1981) 29 Cal. 3d 418, 428* Cal. Rptr. 493, *629 P.2d 1]* . Also, if the nonemployee spouse defers receipt of benefits, the spouses can agree that the employee spouse will pay spousal support until the pension payments to the nonemployee spouse commence [*see, e.g., In re Marriage of Davis (2004) 120 Cal. App. 4th 1007, 1019, 16 Cal. Rptr. 3d 220]* .

For further discussion of spousal support, see Ch. 225, *Dissolution of Marriage: Spousal Support* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationRetirement BenefitsPensionsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral Overview

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[Reserved]

§§ 222.184[Reserved]

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Chapter 222 DISSOLUTION OF MARRIAGE: PROPERTY DIVISION AND VALUATION
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4. Division of ERISA Pension and Retirement Benefits

18-222 California Forms of Pleading and Practice--Annotated § 222.200

§ 222.200 ERISA and Federal Preemption Issues

[1] Qualified Domestic Relations Orders Not Preempted

[a] Effect of 1984 Retirement Equity Act

Congress enacted the Employee Retirement Income Security Act (ERISA) in 1974 to establish a uniform national law governing employee pension benefits. A broad ERISA preemption provision stated that, with the specific exception of state criminal law [*see 29 U.S.C. § 1144(b)(4)*], ERISA superseded "any and all State laws insofar as they may ... relate to any employee benefit plan" to which ERISA applied [*see 29 U.S.C. § 1144(a), (b)(4)*; *see, e.g., Egelhoff v. Egelhoff (2001) 532 U.S. 141, 121 S. Ct. 1322, 1327-1329, 149 L. Ed. 2d 264* (Washington statute providing that designation of spouse as beneficiary of nonprobate asset, including employee benefit plan, is revoked automatically on divorce, was expressly preempted)]. The original ERISA provisions raised the question of whether California community property law was preempted [*see 29 U.S.C. § 1144*]. However, California courts consistently held that the ERISA preemption clause did not include California community property law, though the precedential value of these earlier decisions is now highly questionable, in light of subsequent amendments to ERISA [*see Boggs v. Boggs (1997) 520 U.S. 833, 849-850, 117 S. Ct. 1754, 138 L. Ed. 2d 45]* .

The Retirement Equity Act of 1984 (REA) [Pub. L. No. 98-397], operative January 1, 1985, clarified ERISA preemption provisions. It specifically provides that the ERISA preemption provision "shall not apply to qualified domestic relations orders within the meaning of Section 206(d)(3)(b)(i)" [*29 U.S.C. § 1056(d)(3)(B)(i)*; *see Ablamis v. Roper (1991) 937 F.2d 1450, 1454* ; *In re Marriage of Baker (1988) 204 Cal. App. 3d 206, 217-218, 251 Cal. Rptr. 126]* . The REA further provides that the ERISA "spendthrift" provision, which prohibits assignment or alienation of plan benefits [*see 29 U.S.C. § 1056(d)(1)*], "shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, *except* that paragraph (1) [the spendthrift provision] *shall not apply* if the order is determined to be a qualified domestic relations order" [*29 U.S.C. § 1056(d)(3)(A)* (emphasis added); I.R.S. Letter Ruling 8538063 (October 4, 1985); *see In re Nelson (8th Cir. 2003) 322 F.3d 541, 545-546* (funds transfer from retirement plan to alternate payee by QDRO is *not* subject to "spendthrift"

provision, but funds transfer from alternate payee's bankruptcy estate to creditors *is* subject to "spendthrift" provision); *see § 222.201[1]* et seq.].

Conversely, under the REA, an order that is not "qualified" (that is, not a "QDRO"), but divides marital interests in an employee benefit plan subject to ERISA, would not be binding or enforceable against the plan, even if the plan had been joined in the proceeding [*In re Marriage of Baker (1988) 204 Cal. App. 3d 206, 217-218, 251 Cal. Rptr. 126* (California's statutory procedure for notice of adverse interest and/or joinder is not preempted by ERISA; however, order must be qualified or is not binding or enforceable against plan)]. Thus, while ERISA (as modified by the REA) does not preempt California's statutory procedures for joinder or for notifying a plan of adverse interest, the court's order must qualify as a QDRO in order to be recognized by the plan [*In re Marriage of Baker (1988) 204 Cal. App. 3d 206, 217-219, 251 Cal. Rptr. 126]* .

The Ninth Circuit Court of Appeals, however, has taken a somewhat expansive view in permitting nonemployee spouses to assert their community property interests in employee benefits. Thus, it has said that even though a state court order does not meet the requirements of a QDRO, the order may recognize a party's interest in the proceeds of the pension plan, giving the bearer of that interest "the right to obtain a proper QDRO" [*Stewart v. Thorpe Holding Co. (9th Cir. 2000) 207 F.3d 1143, 1156]* . The bearer can "stake a claim" in the pension proceeds, and return to state court to seek a *revised order* that would constitute a QDRO, to enforce his or her interest [*Trs. of the Dirs. Guild of America-Producer Pension Benefits Plans v. Tise (9th Cir. 2000) 234 F.3d 415]* . The Ninth Circuit rejected the "no QDRO-no interest" analysis of another court; and held that the QDRO provisions of ERISA do not suggest that the alternate payee has no interest in the plan until he or she obtains a QDRO, they merely prevent the alternate payee from enforcing that interest (against the plan) until the QDRO is obtained [*Trs. of the Dirs. Guild of America-Producer Pension Benefits Plans v. Tise (9th Cir. 2000) 234 F.3d 415* (*citing In re Gendreau (9th Cir. 1997) 122 F.3d 815, 819* ; *see In re Carbaugh (10th Cir. B.A.P. 2002) 278 Bankr. 512, 526-527* (10th Circuit bankruptcy appellate panel decision rejecting "no QDRO-no interest" analysis, and following *Gendreau*)].

The federal circuits disagree about whether a nonemployee spouse may obtain a *nunc pro tunc* QDRO for survivor's benefits after the death of the employee spouse, when employee benefits have been inadvertently omitted from a domestic relations order [*see Patton v. Denver Post Corp. (10th Cir. 2003) 326 F.3d 1148,1151-1153* , (*nunc pro tunc* order considered as entered before employee spouse's death did not increase plan benefits, and constituted *QDRO); Samaroo v. Samaroo (3d Cir. 1999) 193 F.3d 185, 189-191* (*nunc pro tunc* order entered after date of plan participant's death, even though back-dated to date prior to death, was attempt to obtain increased benefits, and could not be QDRO)].

Domestic relations orders entered before January 1, 1985, generally will be treated as qualified domestic relations orders (QDROs) under the transitional provisions of REA, though some discretion is given to plan administrators [*see* Pub. L. No. 98-397, § 303(d) (plan administrators required to treat orders as QDROs if benefits were being paid pursuant to the order on that date, but permitted to treat other orders as QDROs even if they did not otherwise meet current QDRO requirements); *In re Marriage of Williams (1985) 163 Cal. App. 3d 753, 766, 209 Cal. Rptr. 827]* . For discussion of preemption issues and court orders for the payment of attorney's fees, see Part VI [*see AT & T Management Pension Plan v. Tucker (C.D. Cal. 1995) 902 F. Supp. 1168, 1175-1178* (ERISA preempts state court's order for attorney's fees against ERISA-governed plan)].

[b] Limitations on Applicability

[i] Inapplicable Plans

The qualified domestic relations order (QDRO) provisions [*29 U.S.C. § 1056(d)(3)*] do not apply to pension plans to which the assignment or alienation restrictions of ERISA do not apply, such as plans maintained by certain government employers [*see 29 U.S.C. §§ 1003, 1051, 1056(d)(3)(L)* (as amended by Tax Reform Act of 1986, Pub. L. No. 99-514, §

1898(c)(4)(B)); *I.R.C. § 414(p)(9)* (as amended by Tax Reform Act of 1986, Pub. L. No. 99-514, § 1898(c)(4)(A)); *but see I.R.C. § 414(p)(11)* (at least for taxation purposes, distribution from specified types of plan, including "governmental plan," as defined, will be treated as made pursuant to qualified domestic relations order if made pursuant to domestic relations order meeting requirements of *I.R.C. § 414(p)(1)(A)(i)*)]. The QDRO provisions also do not apply to plans that do not have employee participants [*see* 29 C.F.R. § 2510.3-3(b)]. A plan participant is not an employee if the business, whether incorporated or unincorporated, is wholly owned by the participant and his or her spouse [*see* 29 C.F.R. § 2510.3-3(c)(1)]. Therefore, a plan covering only the owner and his or her immediate family members is not covered by ERISA [*In re Watson (9th Cir. 1998) 161 F.3d 593, 596-597* ; *Peterson v. American Life & Health Ins. Co., 48 F.3d 404 (9th Cir. 1995)* ; *see also In re Stern (9th Cir. 2003) 345 F.3d 1036, 1040-1041* (pension plan was not ERISA-qualified when bankruptcy filed because owner had married his sole employee)].

[ii] Death and Testamentary Dispositions

A participant spouse retains any interest that a QDRO does not assign to an alternate payee. Therefore, if a QDRO provides that payments to the alternate payee will terminate on his or her death, the participant spouse will become entitled to the full amount of the pension benefit under the terms of the plan on the death of the alternate payee [*In re Marriage of Rich (1999) 73 Cal. App. 4th 419, 422-423, 86 Cal. Rptr. 2d 452* (when QDRO provided that payments would continue until participant or alternate payee's death, plan was required to pay participant husband full amount of benefits on wife's death)].

ERISA, as amended by the REA, preempts a state law that allows a nonparticipant spouse to make a testamentary transfer of an interest in undistributed ERISA pension plan benefits [*Boggs v. Boggs (1997) 520 U.S. 833, 835-836, 117 S. Ct. 1754, 138 L. Ed. 2d 45*]. As explained by the U.S. Supreme Court and the Ninth Circuit Court of Appeals, ERISA's concerns for the economic security of surviving spouses would be undermined by allowing a predeceasing spouse's heirs and legatees to have a community property interest in such plan benefits [*Boggs v. Boggs (1997) 520 U.S. 833, 852, 117 S. Ct. 1754, 138 L. Ed. 2d 45* ; *see Ablamis v. Roper (9th Cir. 1991) 937 F.2d 1450, 1459-1460]* . Except with respect to qualified domestic relations orders (QDROs), ERISA's spendthrift provision precludes an assignment or alienation of ERISA benefits during an employee's lifetime, and a probate transfer is not a QDRO [*see Boggs v. Boggs (1997) 520 U.S. 833, 851-852, 117 S. Ct. 1754, 138 L. Ed. 2d 45* ; *Ablamis v. Roper (1991) 937 F.2d 1450, 1459-1460* (court did not decide whether California community property laws confer right of testamentary disposition by nonemployee spouse, but said that federal preemption would overcome any such laws); *see also Branco v. Northern Cal. Employers Joint Pension Plan, 279 F.3d 1154, 1157-1160 (9th Cir. 2002)* (ERISA preempts California statute allowing predeceased spouse's interest in former spouse's pension plan to pass to predeceased spouse's heirs)].

Note that the U.S. Supreme Court has not determined whether ERISA would permit a nonparticipant spouse to obtain a devisable community property interest in pension plan benefits that have *already been paid out* during the existence of the marital community [*see Boggs v. Boggs (1997) 520 U.S. 833, 845, 117 S. Ct. 1754, 138 L. Ed. 2d 45]* .

A domestic relations order requiring an ERISA plan administrator to pay benefits to a person who does not fall within the definition of an "alternate payee" will not meet QDRO requirements. The Retirement Equity Act (REA) defines "alternate payee" to mean "any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect tosuch participant" [*29 U.S.C. § 1056(d)(3)(K)*; *but cf. Trs. of the Dirs. Guild of America-Producer Pension Benefits Plans v. Tise (9th Cir. 2000) 234 F.3d 415, 420 n.3* (question is still open about whether "alternate payee" can be a "significant other" who was never married to participant)]. An order that may require a qualified pension plan administrator to pay benefits to an individual such as an alternate payee's designated successor, who may not fit the definition of an alternate payee within the meaning of ERISA, will for that reason fail to constitute a QDRO [*In re Marriage of Shelstead (1998) 66 Cal. App. 4th 893, 904, 78 Cal. Rptr. 2d 365]* . However, not yet ruled on by the courts is the remaining possibility that a domestic relations order would be valid under ERISA if it specifically identifies the alternate payee's "successor in interest" to be a particular individual who comes within the "alternate payee"

definition--such as, for example, the plan participant's child [*In re Marriage of Shelstead (1998) 66 Cal. App. 4th 893, 904-905, 78 Cal. Rptr. 2d 365]* .

[iii] Enforcement of Obligations

ERISA's antiassignment ("spendthrift") provision [*see 29 U.S.C. § 1056(d)(1)*] has been vigorously enforced and exceptions to it have been narrowly construed, particularly in the area of enforcing obligations set forth in judgments. The statutory provisions that define "domestic relations orders" effectively limit the manner in which QDROs may be used by requiring that they relate "to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of a [pension plan] participant" [*see 29 U.S.C. § 1056(d)(3)(B)(ii)*; *Marshall v. Marshall (1995) 36 Cal. App. 4th 1170, 1175, 43 Cal. Rptr. 2d 38* ; *§ 222.201[1]*].

One federal circuit court has held that an alternate payee who acquires an interest in an ERISA plan via a QDRO may exclude that interest from a bankruptcy estate in the same way as a plan participant, because ERISA's plain language grants beneficiary status to alternate payees, and thus entitles them to protection under ERISA's "spendthrift" provision [*In re Nelson (8th Cir. 2003) 322 F.3d 541, 544-545]* .

Garnishment of ERISA benefits is generally a precluded "assignment or alienation" under the "spendthrift" provision [*Marshall v. Marshall (1995) 36 Cal. App. 4th 1170, 1174, 43 Cal. Rptr. 2d 38* ; *Guidry v. Sheet Metal Workers Pension Fund (1990) 493 U.S. 365, 371-372, 110 S. Ct. 680, 107 L. Ed. 2d 782* ; *but see Guidry v. Sheet Metal Workers Int'l Ass'n (10th Cir. 1993) 10 F.3d 700, 712* (on remand from Supreme Court, finding law ambiguous and holding that garnishment of ERISA benefits may be permitted, once *paid* to pension holder)]. Thus, for example, a QDRO may not be used to enforce, through garnishment of an annuity account under an ERISA plan, a *collateral* obligation assumed by an employee spouse under a dissolution judgment; that is, an obligation, such as a tax liability assumed by a spouse, that does not fall within the statutory purposes of a "domestic relations order" defined above (relating to support or marital property rights) [*see Marshall v. Marshall (1995) 36 Cal. App. 4th 1170, 1175-1176, 43 Cal. Rptr. 2d 38* (postdissolution order enforcing wife's rights as creditor under dissolution judgment did not "relate to the provision of marital property rights" so as to permit garnishment of husband's annuity account under ERISA pension plan); *but cf. Fam. Code § 5103* (enforcement of order for child, family, or spousal support is permitted against employee benefit plan)].

However, the Internal Revenue Service is not constrained by ERISA's "anti-alienation" or "spendthrift" provision and has authority to garnish the delinquent taxpayer's community property interest in benefits from an ERISA-governed plan. ERISA does not preempt the Internal Revenue Code, because it contains a savings clause, which prohibits construction of the anti-alienation provision to alter, amend, modify, invalidate, impair, or supersede any law of the United States. The tax levy extends to the whole community property interest, and therefore also affects the other spouse's share in the pension plan benefits. Under California law, each spouse has an equal undivided interest in the whole of the community property, as opposed to exclusive interests in only half of the community property [*McIntyre v. United States (9th Cir. 2000) 222 F.3d 655, 660* (citing *Babb v. Schmidt, (9th Cir. 1974) 496 F.2d 957* ; by granting creditors recourse against whole community estate on debts of only one spouse, California law "implicitly" establishes that spouse's "interest" in whole of community property, at least to degree sufficient for IRS to impose tax liens under Internal Revenue Code)].

For an additional discussion of garnishment by use of a QDRO, see *Ch. 259, Family Law Enforcement: Special Remedies for Enforcement of Support, § 259.11[8]*. For a complete discussion of QDROs, see *§ 222.201*.

[2] Jurisdictional Limits by Federal Law

[a] Scope of State Court's Jurisdiction

Federal law limits state court jurisdiction to hearing only those actions brought to recover benefits due under the terms of a pension plan, to enforce rights under the plan's terms, or to clarify rights to future benefits under the terms of the plan [*In re Marriage of Allison (1987) 189 Cal. App. 3d 849, 855, 234 Cal. Rptr. 671* (*citing 29 U.S.C. § 1132(a)(1)(B), (e)(1)*); *see In re Marriage of Levingston (1993) 12 Cal. App. 4th 1303, 1304, 1306, 16 Cal. Rptr. 2d 100]* . This restriction is not significant, however, because generally any attempt to establish a right to benefits will involve a determination of the terms of the plan, thus conferring jurisdiction on the state court. Furthermore, the federal law limits the *actions* that a state court can hear; it does not deny state courts the jurisdiction to interpret federal law [*In re Marriage of Allison (1987) 189 Cal. App. 3d 849, 855-856, 234 Cal. Rptr. 671]* .

[b] Applicability to Determinations of Pension Plan Administrators

State courts have jurisdiction concurrently with federal district courts over actions brought by a participant or beneficiary to obtain or clarify benefits under the terms of an ERISA plan. This concurrent state-federal jurisdiction extends to determinations of whether a domestic relations order is a QDRO, including determinations made by retirement plan administrators regarding a particular state court domestic relations order. In fact, when a retirement plan administrator determines that a marital judgment dividing community interests in the plan is not a qualified domestic relations order (QDRO) as defined by federal law, state and federal courts have *concurrent* jurisdiction to review that determination [*In re Marriage of Levingston (1993) 12 Cal. App. 4th 1303, 1304, 1306, 16 Cal. Rptr. 2d 100* (construing *29 U.S.C. § 1132(a)(1)(B), (e)(1)*; *accord In re Marriage of Oddino (1997) 16 Cal. 4th 67, 78-81, 65 Cal. Rptr. 2d 566, 939 P.2d 1266 , cert. denied, 523 U.S. 1021* ; *Board of Tr. of Laborers Pension Tr. v. Levingston (N.D. Cal. 1993) 816 F. Supp. 1496, 1498-1501]* . When Congress amended ERISA through the REA in 1984, it did not intend to strip state courts of the power to enforce QDROs against plan administrators [*In re Marriage of Oddino (1997) 16 Cal. 4th 67, 80, 65 Cal. Rptr. 2d 566, 939 P.2d 1266]* .

A plan participant must exhaust any administrative remedies available under the plan before bringing suit in state or federal court. However, the exhaustion requirement does not apply if an administrative review is "demonstrably doomed to fail" [*Diaz v. United Agr. Employee Welf. Benefit Plan (9th Cir. 1995) 50 F.3d 1478, 1485* ; *In re Marriage of Rich (1999) 73 Cal. App. 4th 419, 424, 86 Cal. Rptr. 2d 452* (attempt to exhaust administrative remedies would have been futile when trust fund opposed participant's motion on substantive grounds)].

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Chapter 222 DISSOLUTION OF MARRIAGE: PROPERTY DIVISION AND VALUATION
PART II. LEGAL BACKGROUND
D. Division And Valuation Of Specific Personal Property
4. Division of ERISA Pension and Retirement Benefits

18-222 California Forms of Pleading and Practice--Annotated § 222.201

§ 222.201 Requirements for Qualified Domestic Relations Orders (QDROs)

[1] Definitions

A "domestic relations order" means any judgment, decree, or order, including approval of a property settlement agreement, that does the following: (1) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of a participant; and (2) is made pursuant to a state domestic relations law, including a community property law [*29 U.S.C. § 1056(d)(3)(B)(ii)*].

A domestic relations order is "qualified" if it does the following [*29 U.S.C. § 1056(d)(3)(B)(i),(C), (D)*; *see Marshall v. Marshall (1995) 36 Cal. App. 4th 1170, 1175-1176, 43 Cal. Rptr. 2d 38]* :

1. Creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan;

2. Clearly specifies certain necessary information (*§ 222.201[2]*); and

3. Does not alter the form or amount of benefits (*§ 222.201[2][b]*).

Finally, the term "alternate payee" means any spouse, former spouse, child, or other dependent of a participant, who is recognized by a domestic relations order as having a right to receive all or a portion of the benefits payable under a plan with respect to such participant [*29 U.S.C. § 1056(d)(3)(K)*].

Note, however, that the question is still open about whether the alternate payee can be a "significant other" who was never married to the participant [*Trs. of the Dirs. Guild of America-Producer Pension Benefits Plans v. Tise (9th Cir. 2000) 234 F.3d 415, 420 n.3* (former cohabitant was appropriate alternate payee when DRO was intended to benefit couple's children when they were minors, and as their mother, she correctly represented their legal interests)].

[2] Necessary Information and Other Requirements

[a] Clear Specification in Order

A domestic relations order will be "qualified" only if it clearly specifies the following information [*29 U.S.C. § 1056(d)(3)(C)*]:

1. The name and the last known mailing address, if any, of the participant;

2. The name and mailing address of each alternate payee covered by the order;

3. The amount or percentage of the participant's benefits to be paid by the plan to each alternate payee, or the manner in which such amount or percentage is to be determined;

4. The number of payments or period to which the order applies; and

5. Each plan to which the qualified domestic relations order applies.

All California domestic relations orders dividing ERISA pensions should be drafted in accordance with the foregoing requirements for "qualified" orders to avoid the ERISA preemption and spendthrift provisions [*see § 222.200[1][a]* et seq.]. Most practitioners set forth the required information in a separate "QDRO document" that is referred to as an exhibit in the judgment of marital dissolution. Use of a separate document is preferable because it enables the pension division provisions to be contained in one instrument, for submission to, and convenient reference by, the pension plan. However, a dissolution judgment that otherwise amounted to a domestic relations order and set forth the required information has been held to constitute a valid QDRO, even though some of the information, such as the address to which payments were to be sent, had to be ascertained from thenonpension portions of the judgment [*see Stewart v. Thorpe Holding Co. Profit Sharing Plan (2000) 207 F.3d 1143, 1146, 1153, 1157 n.14* ; *see also Trs. of the Dirs. Guild of America-Producer Pension Benefits Plans v. Tise (9th Cir. 2000) 234 F.3d 415]* .

The Senate Finance Committee Report on the Retirement Equity Act states that an order should not fail to qualify merely because it does not specify the current mailing address of the participant and alternate payee, if the plan administrator has reason to know that address independently of the order. The report gives the following example: if a plan administrator is aware that the alternate payee is also a participant under the plan and the plan records include a current address for each participant, the plan administrator may not treat the order as failing to qualify.

Items (3) and (4) of the required information can be satisfied by using the "time rule" formula [*cf. In re Marriage of Brown (1976) 15 Cal. 3d 838, 848, 848 n.10, 126 Cal. Rptr. 633, 544 P.2d 561* (if court concludes that, because of uncertainties concerning maturation or vesting, it should not attempt to divide present value of pension rights it can award each spouse appropriate portion of each pension payment as it is paid; in any event, trial court retains discretion to divide community estate in any fashion that complies with former *Civ. Code § 4800*--now *Fam. Code § 2550*] for determining the appropriate percentage or amount of benefits that will be paid to an alternate payee. For a description of the time rule formula, see *§ 222.182[4]* [*see In re Marriage of Judd (1977) 68 Cal. App. 3d 515, 522, 137 Cal. Rptr. 318]* .

Item (5) may be satisfied by using discovery methods to determine the correct name of the plan and by making sure that the judgment or order accurately states the name.

For a form of qualified domestic relations order (QDRO) that may be included in a judgment or marital agreement, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, Ch. 21 (Matthew Bender 2d ed.).

[b] No Alteration of Form or Amount of Benefits

In addition to the matters set forth in *§ 222.201[2][a]*, a domestic relations order must meet the following requirements to be "qualified":

- It does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan [*29 U.S.C. § 1056(d)(3)(D)(i)*; *see I.R.C. § 414(p)(3)(A)*];

- It does not require the plan to provide increased benefits, determined on the basis of actuarial value [*29 U.S.C. § 1056(d)(3)(D)(ii)*; *see I.R.C. § 414(p)(3)(B)*; *In re Marriage of Oddino (1997) 16 Cal. 4th 67, 82-84, 88, 65 Cal. Rptr. 2d 566, 939 P.2d 1266]* ; and

- It does not require the payment of benefits to an alternate payee when the benefits are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order [*29 U.S.C. § 1056(d)(3)(D)(iii)*; *see I.R.C. § 414(p)(3)(C)*].

The Senate Finance Committee Report on the Retirement Equity Act states that an order does not require a plan to provide "increased benefits" if the order does not provide for the payment of benefits in excess of the amount that the participant (employee spouse) would be entitled to receive without the order [*see 29 U.S.C. § 1056(d)(3)(D)(ii)*; *see also I.R.C. § 414(p)(3)(B)*].

[c] Former Spouse Treated as Surviving Spouse

To the extent provided in any qualified domestic relations order, the former spouse of a plan participant is to be treated as the surviving spouse for purposes of joint and survivor annuity requirements under the plan [*see 29 U.S.C. § 1055*; *see also* Treas. Reg. § 1.40(a)-(11), (a)-(13); I.R.S. Notice 97-11, 1997-1 C.B. 379]. Consequently, any current spouse of a participant would not be treated as a spouse for those purposes [*29 U.S.C. § 1056(d)(3)(F)(i)*; *see I.R.C. § 414(p)(5)(A)*]. The former spouse, if married to the participant for at least one year, shall be treated as meeting any one-year marriage duration requirements of the joint and survivor annutiy provisions, if such a requirement is imposed by the plan [*see 29 U.S.C. §§ 1055(f), 1056(d)(3)(F)(ii)*; *I.R.C. §§ 414(p)(5)(B), 417(d)*]. For further discussion, see *§ 222.205*.

[d] Reservation of Jurisdiction

In an appropriate case, counsel may wish to consider requesting the court to retain jurisdiction to supervise the payment of retirement benefits, even though there should be a reduced need for court supervision if the QDRO has been properly drafted and sent to the pension plan administrator [*see In re Marriage of Bergman (1985) 168 Cal. App. 3d 742, 755 n.10, 214 Cal. Rptr. 661]* . Counsel also may wish to consider a reservation of jurisdiction to redetermine the percentage awarded to the nonemployee spouse in the event that the employee spouse selects a retirement option that makes the current percentage inappropriate. For instance, a pension holder who has remarried may attempt to select an option of lower retirement payments and higher death benefits for the new spouse. If the pension election is altered, the former spouse's percentage of benefits may then have to be adjusted to accomplish equal division of the community property [*see In re Marriage of Lionberger (1979) 97 Cal. App. 3d 56, 66-71, 158 Cal. Rptr. 535]* .

When the plan participant dies or retires before the former spouse secures an order awarding that spouse any interest in the plan, a domestic relations order entered before the plan participant's death that does not award the former spouse an interest in the plan, but simply "reserves jurisdiction" over the plan, provides an inadequate basis for entry nunc pro tunc of either a QDRO or an order determining the former spouse's interest in the plan that later may be qualified as a QDRO [*In re Marriage of Padgett (2009) 172 Cal. App. 4th 830, 836, 855, 91 Cal. Rptr. 3d 475*]. Entry of a nunc pro tunc order following the retirement or preretirement death of the plan participant to facilitate qualification of a domestic

relations order as a QDRO when that order was obtained before the benefit-triggering event is proper in circumstances in which the record indicates that the parties or the court intended the order to create an interest in surviving spouse benefits in the former spouse [*In re Marriage of Padgett (2009) 172 Cal. App. 4th 830, 854-855, 91 Cal. Rptr. 3d 475*].

[3] Effect of Benefits Being Payable at Earliest Retirement Age

[a] Permissible Provisions for Payment

A domestic relations order shall not be treated as violating the prohibitionagainst requiring a plan to provide any type or form of benefits not otherwise provided under the plan [*see 29 U.S.C. § 1056(d)(3)(D)(i)*; *see also I.R.C. § 414(p)(3)(A)*] solely because the order requires that payment of benefits be made to an alternate payee as follows [*29 U.S.C. § 1056(d)(3)(E)(i)(I)-(III)*; *see I.R.C. § 414(p)(4)(A)*]:

(1) In the case of any payment before a participant has separated from service on or after the date on which the participant attains, or would have attained, the earliest retirement age;

(2) As if the participant had retired on the date payment is to begin under the order, but taking into account only the present value of benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement; and

(3) In any form in which the benefits may be paid under the plan to the participant, other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse.

[b] "Earliest Retirement Age" Defined

The term "earliest retirement age" means the *earlier* of the following [*29 U.S.C. § 1056(d)(3)(E)(ii)* (as amended by Tax Reform Act of 1986, Pub. L. No. 99-514, § 1898(c)(7)(B)(iv); *see I.R.C. § 414(p)(4)(B)*]:

(1) The date on which the participant is entitled to a distribution under the plan; or

(2) The later of (a) the date the participant attains age 50, or (b) the earliest date on which the participant could begin receiving under the plan if the participant separated from service.

It appears that the rationale of *In re Marriage of Gillmore (1981) 29 Cal. 3d 418, 174 Cal. Rptr. 493, 629 P. 2d 1* , has been imposed on the retirement plan itself. Under the *Gillmore* doctrine, the nonparticipant spouse may obtain an order requiring the participant spouse to begin immediate payments of a community share of the monthly pension at the earliest possible retirement date, even though the participant has chosen to work past that date. Until the Retirement Equity Act, however, no statute or case had required the retirement plan to commence early payments.

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§ 222.202 Plan Procedures and Duties

[1] Requirements of Plan Procedures

Each pension plan must establish reasonable, written procedures to determine the qualified status of domestic relations orders and to administer distributions under qualified orders [*see 29 U.S.C. § 1056(d)(3)(G), (ii)(I)*], and it is suggested that counsel ask the plan administrator for the plan involved to furnish a copy of the procedures relating to that particular plan in advance of submitting the domestic relations order to the administrator (*see § 222.202[2]* regarding the administrator's duty, on receipt of the domestic relations order, to notify the parties of the procedures). The procedures must provide for notification of each person specified in a domestic relations order as entitled to payment of benefits under the plan promptly on the plan's receipt of the order [*see 29 U.S.C. § 1056(d)(3)(G)(ii)(II)*]. The plan must also permit an alternate payee to designate a representative for receipt of notices sent to the alternative payee with respect to a domestic relations order [*see 29 U.S.C. § 1056(d)(3)(G)(ii)(III)*].

[2] Duties of Plan Administrator

The REA outlines procedures to be followed by plan administrators. For example, when the administrator receives a domestic relations order, he or she must (1) promptly notify the participant and each alternate payee of the receipt of the order and the plan's procedures for determining the qualified status of domestic relations orders; (2) determine whether the order is a qualified domestic relations order within a reasonable period after receiving it; and (3) notify the participant and each alternate payee of the determination [*see 29 U.S.C. § 1056(d)(3)(G)(i)(I), (II)*; *see also I.R.S. Notice 97-11, 1997-2 I.R.B. 1* (only receipt of actual issued order triggers statutory compliance by plan adminstrator)].

During any period in which the qualified status of a domestic relations order is being determined by a plan administrator, court, or otherwise, the plan administrator must separately account for the amounts (referred to as "segregated amounts") that would have been payable to the alternate payee for that period if the order had been determined to be qualified [*see 29 U.S.C. § 1056(d)(3)(H)(i)*; *see also Stewart v. Thorpe Holding Co. Profit Sharing Plan (2000) 207 F.3d 1143, 1157 n.14* (*29 U.S.C. § 1056(d)(3)(H)(i)* gave alternate payee right to challenge, in "court

of competent jurisdiction," plan's determination that her marital dissolution order was not QDRO)]. If the order, or a modification of it, is determined to be qualified within 18 months, beginning with the date on which the first payment would be required under the order [*29 U.S.C. § 1056(d)(3)(H)(v)*], the plan administrator must pay the segregated amounts, including interest, to the person or persons entitled [*29 U.S.C. § 1056(d)(3)(H)(ii)*]. However, if during this same period the order is found not to be qualified or the issue of qualification is not resolved, the plan administrator must pay the segregated amounts, including any interest, to the person or persons who would have been entitled to the amounts if there had been no order [*29 U.S.C. § 1056(d)(3)(H)(iii)*]. Any determination that an order is qualified, which is made after the close of this 18-month period, shall be applied prospectively only [*29 U.S.C. § 1056(d)(3)(H)(iv)* (as amended by Tax Reform Act of 1986, Pub. L. No. 99-514, § 1898(c)(2)(B)(iv)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationRetirement BenefitsPensionsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral OverviewPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)Disclosure, Notice & ReportingGeneral OverviewPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)FiduciariesGeneral OverviewPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)Participation & VestingQualified Domestic Relations Orders

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18-222 California Forms of Pleading and Practice--Annotated § 222.203

§ 222.203 Effective Dates

Except as indicated in § 222.204, the ERISA and related Internal Revenue Code amendments, including those made to ERISA by the Tax Reform Act of 1986 [*see* Pub. L. No. 99-514, § 1898(j) (amendments to take effect as if included in applicable provisions of Retirement Equity Act of 1984)], became effective on January 1, 1985. The plan administrator must treat an order entered before that date as a qualified domestic relations order if the administrator is paying benefits pursuant to the order on January 1, 1985. In addition, the administrator may treat any other order entered before January 1, 1985, as a qualified domestic relations order even if the order does not meet the requirements of the amendments [Pub. L. No. 98-397, Retirement Equity Act, § 303(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationRetirement BenefitsPensionsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral OverviewPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)Disclosure, Notice & ReportingGeneral OverviewPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)OperabilityPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)Participation & VestingQualified Domestic Relations Orders

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18-222 California Forms of Pleading and Practice--Annotated § 222.204

§ 222.204 Consideration of Tax Consequences

The Retirement Equity Act of 1984 created special rules for the tax treatment of distributions under qualified domestic relations orders governed by ERISA. Any alternate payee who is the spouse or former spouse of the participant shall be treated as the distributee of any distribution or payment made to the alternate payee under a qualified domestic relations order [*I.R.C. § 402(e)(1)(A)*; *see I.R.C. § 414(p)* (defining qualified domestic relations order); *cf. Darby v. Commissioner (1991) 97 T.C. 51* (under pre-1984 law, no recognition of distribution other than to plan participant for tax purposes)]. An amendment enacted by the Tax Reform Act of 1986, limited this tax treatment to an alternate payee who is the spouse or former spouse of the plan participant [*see* Pub. L. No. 99-514, § 1898(c)(1)(A)]. Thus, if the alternate payee is another dependent, such as a child [*see 29 U.S.C. § 1056(d)(3)(K)*; *I.R.C. § 414(p)(8)* (defining alternate payee to include spouse, former spouse, child, or other dependent of participant who is recognized by qualified order as having right to receive all or portion of benefits)], the participant may be required to include the distribution in his or her gross income [*see I.R.C. § 402(e)(1)(A)*].

According to another provision of the 1986 Act, this amendment applies to payments made "after the date of the enactment of this Act," which apparently means after October 22, 1986 [*see* Tax Reform Act of 1986, Pub. L. No. 99-514, § 1898(c)(1)(C)].

The foregoing is but a brief introduction to the tax considerations involved in distributions under a QDRO, and numerous special rules apply that are beyond the scope of this work [*see, e.g., I.R.C. § 402(c), (e)(1)(B)* (pertaining to "rollover" rules); *I.R.C. § 414(p)(11)* (distribution or payment from specified types of plan will be treated as made pursuant to qualified domestic relations order if made pursuant to domestic relations order meeting requirements of *I.R.C. § 414(p)(1)(A)(i)*, regarding transfers after Dec. 19, 1989, in tax years ending after that date); I.R.S. Letter Rul. 8712066 (rel. May 20, 1987) (alternate payee permitted to roll over distribution without tax or penalty); I.R.S. Letter Ruling 8546133 (August 26, 1985; released November 29, 1985) (alternate payee's rollover required to be within 60 days after receipt pursuant to qualified domestic relations order under particular facts of case)]. For additional general discussion of tax considerations in dividing or distributing retirement benefits, see Part VII, *Tax Effects of Dissolution.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationRetirement BenefitsPensionsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral OverviewPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)Disclosure, Notice & ReportingGeneral OverviewPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)Participation & VestingQualified Domestic Relations Orders

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18-222 California Forms of Pleading and Practice--Annotated § 222.205

§ 222.205 Survivor Benefits Under ERISA Plans

Retirement plans subject to ERISA must provide joint and survivor annuities that benefit the spouse of a retired employee, unless the plan has a one-year marriage requirement and the employee and the spouse have not been married for the full year preceding retirement or death [*see 29 U.S.C. § 1055(a), (f)*]. All pensions must be taken as joint and survivor annunities unless the employee's spouse waives the right in writing [*see 29 U.S.C. § 1055(c)*; *see also Hearn v. Western Conference of Teamsters Pension Trust Fund (9th Cir. 1995) 68 F.3d 301* (surviving wife of retiree who lied about his marital status was not entitled, under ERISA, to recover benefits from plan *already paid* to decedent, but could recover remaining amount of benefits that would be provided under "joint and survivor annuity")]. ERISA grants the state courts flexibility in dividing ERISA plan pensions by providing that the trial court may make a qualified domestic relations order that provides that a former spouse has the same right to a joint and survivor annuity as a current spouse. Any plan requirement that the parties be married for one full year preceding the annuity is satisfied if the participant and former spouse were married at any time for at least one year [*see 29 U.S.C. § 1056(d)(3)(F)*].

When dissolution proceedings are bifurcated and the employee spouse retires after entry of the dissolution judgment but before a qualified domestic relations order is in effect, a trial court has jurisdiction to issue a qualified domestic relations order awarding the nonemployee spouse an annuity under the plan [*see In re Marriage of Allison (1987) 189 Cal. App. 3d 849, 852-857, 234 Cal. Rptr. 671]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationRetirement BenefitsPensionsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral OverviewPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)Participation & VestingQualified Domestic Relations OrdersPublic Health & Welfare LawSocial

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[Reserved]

§§ 222.206[Reserved]

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18-222 California Forms of Pleading and Practice--Annotated § 222.220

§ 222.220 Historical Background

[1] Pre-1981 Law

California law regarding the characterization of military pensions was unsettled until 1974, when the Supreme Court held in *In re Marriage of Fithian (1974) 10 Cal. 3d 592, 111 Cal. Rptr. 369, 517 P.2d 449* , that vested military pensions arecommunity property. After 1974, California courts uniformly characterized military pensions as community property [*Casas v. Thompson (1986) 42 Cal. 3d 131, 139, 228 Cal. Rptr. 33, 720 P.2d 921]* . In 1976, the California Supreme Court held that nonvested retirement benefits are also divisible as community property on dissolution [*In re Marriage of Brown (1976) 15 Cal. 3d 838, 841, 846-847, 126 Cal. Rptr. 633, 544 P.2d 561* (overruling *French v. French (1941) 17 Cal. 2d 775, 112 P.2d 235* , which held that nonvested rights were mere expectancy and thus not a community asset subject to division on dissolution)].

[2] *McCarty* and Enactment of FUSFSPA

The community property characterization of military pensions changed in 1981, when the United States Supreme Court held in *McCarty v. McCarty (1981) 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589* , that the federal legislative scheme authorizing military pensions impliedly preempted state community property law and prohibited the division of military retirement pay in dissolution proceedings [*McCarty v. McCarty (1981) 453 U.S. 210, 223, 232-233, 101 S. Ct. 2728, 69 L. Ed. 2d 589* ; *see Mansell v. Mansell (1989) 490 U.S. 581, 583, 109 S. Ct. 2023, 104 L. Ed. 2d 675]* .

The law again changed when Congress, reacting to *McCarty*, enacted the Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA) [*10 U.S.C. § 1408*], effective February 1, 1983. It currently provides, in part, that "[s]ubject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court" [*10 U.S.C. § 1408(c)(1)*; *see 10 U.S.C. § 1408(a)(7)* (term "retired" pay includes "retainer" pay); *see also In re Marriage of Hughes (1994) 26 Cal. App. 4th 34, 38, 31 Cal. Rptr. 2d 250* (retired and retainer pay are synonymous)]. In other words, under current law (FUSFSPA), military nondisability

retirement benefits, technically, "retired pay," generally may be characterized and divided as community property [*see 10 U.S.C. § 1408(a)*].

"Disposable retired pay" is statutorily defined as the total monthly retired pay to which a member is entitled less the following amounts that [*10 U.S.C. § 1408(a)(4)(A)-(D)* (applicable with respect to divorces, dissolutions, annulments, and legal separations that become effective after the end of the 90-day period beginning on Nov. 5, 1990); *see Mansell v. Mansell (1989) 490 U.S. 581, 583, 109 S. Ct. 2023, 104 L. Ed. 2d 675* ; *In re Marriage of Stephens (1986) 184 Cal. App. 3d 616, 622-629, 229 Cal. Rptr. 238* (decided before amendment of *10 U.S.C. § 1408(a)(4)* by Pub. L. No. 99-661, § 644, which changed definition of disposable retired pay in relation to "Chapter 61" disability pay)]:

> (1) Are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;
>
> (2) Are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under Title 5 or Title 38 of the United States Code;
>
> (3) In the case of a member entitled to retired pay under Title 10 of the United States Code, Chaper 61 [*10 U.S.C. § 1201 et seq.*], are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or
>
> (4) Are deducted because of an election under Title 10 of the United States Code, Chapter 73 [*10 U.S.C. § 1431 et seq.*] to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

Because, as noted above, "retired pay" includes "retainer pay," even if longevity retirement benefits are denomintaed as "retainer pay" this designation will not preclude a court's division of community interest in the benefits. Moreover, if a service member has completed sufficient active duty service to qualify for retired pay but chooses to remain in a "reserve status" for some period thereafter during which he or she receives "retainer pay," the community interest in the benefits (based on the active duty service) can be divided and a court can order that the spouse of the service member be paid his or her community share without waiting until the period of reserve service ends. Furthermore, in that situation, it is not appropriate to "add-in" the period of reserve service to the formula for computing the community interest. In general, the scheme underlying the military retirement system bases retired pay on the years of active duty, and the service member cannot delay the division of community benefits or "dilute" the community interest by remaining in a reserve status after the qualifying period of active duty service has been met [*see In re Marriage of Hughes (1994) 26 Cal. App. 4th 34, 38, 31 Cal. Rptr. 2d 250]* .

Note, however, that whether the service member or the military is responsible for paying over the community share of the non-service member to him or her pursuant to a court order dividing the benefits depends on whether eligibility for direct payment is met under the governing federal statute and regulations [*see 10 U.S.C. § 1408(d)*; 32 C.F.R. § 63.3 et seq.]. For discussion of direct payment, see *§ 222.223*.

For discussion of federal legislation that has restricted the scope of priorjudgments that could be reopened to adjudicate military retirement benefits, see *§ 222.220[4]* [*see 10 U.S.C. § 1408(c)(1)* (as amended by Pub. L. No. 101-510, § 555, precluding division of military retired pay as community property if final decree in a family law proceeding was issued before June 25, 1981, and neither divided nor reserved jurisdiction to divide the pay; also limiting duration of payments required under certain court orders issued before Nov. 5, 1990)].

[3] California Legislation Covering "Window Period"

FUSFSPA became effective February 1, 1983, thereby creating an 18-month "window period" between June 26, 1981 and February 1, 1983, during which *McCarty* was the supreme law of the land. The result was that dissolution judgments entered during the *McCarty* "window period" routinely denied any interest in military retirement benefits to nonmilitary spouses [*In re Marriage of McDonough (1986) 183 Cal. App. 3d 45, 49, 227 Cal. Rptr. 872]* .

To address this inequity, and pursuant to what it perceived as the intent of Congress in passing FUSFSPA, the California Legislature enacted former *Civ. Code § 5124* in 1983 to allow division of military pensions that had been awarded to the military spouse as separate property during the "window period" between the filing of *McCarty* and the effective date of FUSFSPA. This statute, which was automatically repealed on January 1, 1986, provided that community property settlements, judgments, or decrees that had become final on or after June 25, 1981, and before February 1, 1983, could be modified to include a division of military benefits payable on or after February 1, 1983, in a manner consistent with federal law and the law of California as it has existed since February 1, 1983 [former *Civ. Code § 5124(a)*].

Modification of community property settlements, judgments, or decrees under former *Civ. Code § 5124* could be granted regardless of whether the property settlement, judgment, or decree expressly reserved the pension issue for further determination, omitted any reference to a military pension, or assumed in any manner, implicitly or otherwise, that a pension divisible as community property before June 25, 1981, and on or after February 1, 1983, was not, as of the date the property settlement judgment or decree became final, divisible community property [former *Civ. Code § 5124(b)*; *see Mueller v. Walker (1985) 167 Cal. App. 3d 600, 606-607, 213 Cal. Rptr. 442]* . Any proceeding pursuant to former *Civ. Code § 5124* must have been brought before its repeal date, January 1, 1986 [*see* former *Civ. Code § 5124(c), (d)*; *In re Marriage of Flack (1988) 200 Cal. App. 3d 18, 20-22, 245 Cal. Rptr. 745* (motion under former *Civ. Code § 5124* was timely "brought" when filed on December 31, 1985, even though not served or heard until 1986)]. However, former *Civil Code Section 5124* did not bar common law equitable partition actions for pensions omitted from judgments falling within the statute's "window period" [*Berry v. Berry (1989) 216 Cal. App. 3d 1155, 1160-1161, 265 Cal. Rptr. 338]* .

The California Supreme Court upheld former *Civ. Code § 5124* as constitutional, ruling that the statute's retroactive application did not violate constitutional guarantees of due process or freedom from impairment of contracts [*In re Marriage of Barnes (1987) 43 Cal. 3d 1371, 1377-1378, 240 Cal. Rptr. 855, 743 P.2d 915]* . Courts of appeal have also upheld the former statute's consitutionality and its application to "window judgments" that became final between the rendition of *McCarty* and the enactment of FUSFSPA [*10 U.S.C. § 1408*; *In re Marriage of Deryck (1987) 190 Cal. App. 3d 293, 298, 235 Cal. Rptr. 381* ; *In re Marriage of Carpenter (1986) 188 Cal. App. 3d 604, 615, 231 Cal. Rptr. 783* ; *In re Marriage of McDonough (1986) 183 Cal. App. 3d 45, 53-56, 227 Cal. Rptr. 872* ; *In re Marriage of Doud (1986) 181 Cal. App. 3d 510, 519-522, 226 Cal. Rptr. 423* ; *In re Marriage of Van Dyke (1985) 172 Cal. App. 3d 145, 147, 150, 218 Cal. Rptr. 11* ; *Mueller v. Walker (1985) 167 Cal. App. 3d 600, 607-609, 213 Cal. Rptr. 442]* .

[4] Effect of Legislation Amending FUSFSPA

Federal legislation enacted in 1990 that amended FUSFSPA [*see 10 U.S.C. § 1408*] has created some uncertainty regarding the continuing validity of prior decisional law [*see* Pub. L. No. 101-510, § 555]. It is presently unclear, for example, whether and to what extent, if any, challenges may now be made as a result of the legislation to judgments entered before its enactment pursuant to former *Civ. Code § 5124*.

In general, the legislation precludes the reopening of "pre-*McCarty*" [*McCarty v. McCarty (1981) 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589]* judgments in order to divide previously undivided military retired pay, and applies to judgments or orders issued "before, on, or after" the enactment date (November 5, 1990), which determine that a pre-*McCarty* judgment should be reopened [*see In re Marriage of Curtis (1992) 7 Cal. App. 4th 1, 15, 15 n.7, 16, 9 Cal. Rptr. 2d 145* ; Pub. L. No. 101-510, § 555; *see also In re Marriage of Olsen (1994) 24 Cal. App. 4th 1702, 1705,*

30 Cal. Rptr. 2d 306 (note that court uses Nov. 8, 1990, as effective date of amendments)].

The legislation also provides that, with respect to a judgment issued *before* the November 5, 1990, enactment date, the amendment "shall not relieve any obligation, otherwise valid, to make a payment that is due to be made before the end of the two-year period beginning on the date of the enactment of this Act" In other words, the service member must only continue to make those current payments that become due under such a judgment until November 5, 1992, though any past benefits that were awarded to the nonmilitary former spouse must still be paid [*see In re Marriage of Curtis (1992) 7 Cal. App. 4th 1, 16, 9 Cal. Rptr. 2d 145* ; Pub. L. No. 101-510, § 555].

Construing these amendments, one court concluded that (1) on and afterNovember 5, 1990, state courts may no longer reopen a pre-*McCarty* dissolution in order to divide unadjudicated military retirement benefits because they lack subject matter jurisdiction to do so; (2) with respect to an order to "reopen" a judgment (subject to the amendments) that was issued before November 5, 1990, to the extent that the order provides that a portion of military retirement benefits be paid to a nonmilitary spouse as the benefits become payable to the military spouse, that order will be given effect up to November 5, 1992, but no payment of future benefits would be made pursuant to such an order after November 5, 1992; and (3) the amendments do not disturb any finding in such pre-November 5, 1990, proceedings that the military spouse owes a portion of past benefits to the nonmilitary spouse, nor do they place any limitation on the court's power to order payments of those past benefits in such manner as the court deems proper [*see In re Marriage of Curtis (1992) 7 Cal. App. 4th 1, 14, 16, 9 Cal. Rptr. 2d 145* (referring interchangeably to "pre-*McCarty*" and "pre-FUSFSPA" judgments); *see also In re Marriage of Olsen (1994) 24 Cal. App. 4th 1702, 1705, 30 Cal. Rptr. 2d 306* (wife's share of military benefits, obtained in postdissolution partition action, terminated pursuant to 1990 FUSFSPA amendments; orginal 1974 dissolution did not adjudicate or mention benefits)]. The court in *Curtis* did not specifically address the issue of whether a pre-*McCarty* judgment in which a court had reserved jurisdiction to divide the benefits as community property could still be reopened, as the amendments appear to suggest. Therefore, that aspect of the amendments remains subject to further court interpretation, as does the effect of the amendments on judgments entered pursuant to former *Civ. Code § 5124*.

With respect to pre-November 5, 1990, judgments, the legislation appears to be directed at those judgments that divided military retired pay after a court previously (by a judgment that was final before June 25, 1981) neither divided, nor reserved jurisdiction to divide, such pay [*see 10 U.S.C. § 1408(c)(1)*]. Given a narrow construction, the legislation possibly may not affect judgments entered pursuant to former *Civ. Code § 5124*, because modifications under that statute were authorized for judgments that became final on or after June 25, 1981, and before February 1, 1983 (the so-called "window period") [*see* former *Civ. Code § 5124* (applicable to community property settlements, judgments, or decrees that became final on or after June 25, 1981, and before February 1, 1983); *but see In re Marriage of McDonough (1986) 183 Cal. App. 3d 45, 52-56, 227 Cal. Rptr. 872* (statute permitted party to modify final dissolution judgment, although interlocutory judgment was entered before rendition of *McCarty* but was modified after *McCarty* and before FUSFSPA)].

However, if the legislation is more broadly construed, additional judgments, including those entered pursuant to former *Civ. Code § 5124*, could be affected. Pending any further clarification, judgments entered pursuant to this section appear to remain valid and enforceable, though the legislation raises the possibility of a limitation on enforcement that counsel for a military spouse may wish to raise.

[5] FUSFSPA Jurisdictional Requirements

Another limitation imposed by FUSFSPA is its jurisdictional requirement with respect to the service member spouse. A state court may only divide military retirement benefits as community property if it has jurisdiction over the service member based on the member's (1) residence, other than by military assignment, in the court's territorial jurisdiction, (2) domicile in the court's territorial jurisdiction, or (3) consent to the court's jurisdiction [*10 U.S.C. § 1408(c)(4)*; *In re Marriage of Tucker (1991) 226 Cal. App. 3d 1249, 1255-1256, 277 Cal. Rptr. 403* (trial court property declined to

divide military pension, given FUSFSPA's jurisdictional requirements)]. As used in FUSFSPA, "domicile" refers to present, not past, domicile within the court's territorial jurisdiction. Moreover, a court may not base personal jurisdiction on a "minimum contacts" analysis; it must determine jurisdiction using the three defined categories set forth in FUSFSPA [*see In re Marriage of Hattis (1987) 196 Cal. App. 3d 1162, 1167, 1170, 242 Cal. Rptr. 410* (postdissolution partition action); *see also In re Marriage of McDonough (1986) 183 Cal. App. 3d 45, 52, 227 Cal. Rptr. 872]* .

[6] Treatment of Military Separation Pay

Certain military benefits may not be divisible as community property, despite the benefits having been earned during marriage or based on service during marriage. For example, "separation pay" received on *involuntary* discharge from the military was in one case held to be a service member's separate property when it was a one-time payment and was not designed to be compensation for past services [*In re Marriage of Kuzmiak (1986) 176 Cal. App. 3d 1152, 1159, 222 Cal. Rptr. 644]* . Nevertheless, the appellate court in that case also found that the service member's former spouse had a present community interest in the member's nonmatured longevity retirement benefits, including the separation pay the government would withhold from the benefits. It said that if the member were to reenlist after involuntary discharge and then receive a longevity pension after the requisite period of service, the purposes of the separation pay (such as, to make an adjustment to civilian life) would not have been fulfilled. There would then be no reason to find the separation pay to be the service member's separate property once the member reenlists and earns a longevity pension [*In re Marriage of Kuzmiak (1986) 176 Cal. App. 3d 1152, 1159, 222 Cal. Rptr. 644]* .

However, in the case of *voluntary* separation pay, a different analysis may apply. Subject to federal regulations, a service member with fewer than 20 years of service may opt to forego retired pay and instead receive voluntary separation incentive pay (VSI), a monthly benefit, or Special Separation Benefits (SSB), a single lump-sum payment, under *10 U.S.C. § 1175* [In re Marriage of Babauta *(1998) 66 Cal. App. 4th 784, 788* ; *78 Cal. Rptr. 2d 281]* . In *In re Marriage of Babauta*, the court held that VSI benefits are within the jurisdiction of a state trial court for purposes of dividing the benefits on marital dissolution [*In re Marriage of Babauta (1998) 66 Cal. App. 4th 784, 788, 78 Cal. Rptr. 2d 281]* . The court held that such benefits constitute a form of retirement benefits subject to division as community property, based on the fact that the member might choose to obtain them earlier than, and *in lieu of* disposable retired pay [*In re Marriage of Babauta (1998) 66 Cal. App. 4th 784, 788, 78 Cal. Rptr. 2d 281* (*relying on In re Marriage of Lehman (1998) 18 Cal.4th 169, 74 Cal. Rptr. 2d 825, 955 P.2d 451]* . The *Babauta* court cited a Department of Defense (DOD) brochure to the effect that "[t]he treatment of VSI or SSB [by a state court in a divorce] is not dictated by Federal law[;] [i]t will be up to the state courts to rule on the divisibility of these incentives" [*In re Marriage of Babauta (1998) 66 Cal. App. 4th 784, 788, 78 Cal. Rptr. 2d 281* (citing with approval the holding and analysis of *In re Marriage of Heupel (Colo., 1997) 936 P.2d 561, 562)]* . Although *Babauta* involved the VSI benefit, the result, arguably, should be the same for benefits payable under the Special Separation Benefits (SSB) program [*10 U.S.C. § 1174a*], but no reported decision has yet expressly so held. In addition, note that the analysis that gave rise to separate property treatment of the separation pay in *Kuzmiak* may have been undermined by the *Babauta* case, and resolution of their holdings remains subject to further court interpretation [*In re Marriage of Babauta (1998) 66 Cal. App. 4th 784, 788, 78 Cal. Rptr. 2d 281]* .

Furthermore, military disability pensions generally may not be treated as divisible community property, as discussed in *§ 222.221* [*see Mansell v. Mansell (1989) 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675, 688-689]* .

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§ 222.221 Military Disability Pensions

[1] Controlling Federal Law

In general, military disability retirement benefits are no longer subject to division as community property because of the preemptive effect of federal law. One limited exception pertains to "Chapter 61" retired pay, which is based on both length of service and a percentage disability rating. It appears that a state court may divide this pay as community property, but only after first deducting a percentage of the gross amount that is based on the service member's disability rating [*see 10 U.S.C. § 1408(a)(4)(C)* (effective with respect to orders issued after November 14, 1986, under Pub. L. No. 99-661, § 644(b))]. In addition, if military retired pay is waived for disability benefits *after* an order or judgment has been entered that divides the retired pay as community property, at least one decision supports using a resulting trust remedy to compensate the nonmilitary spouse, as discussed in *§ 222.221[2]* [*In re Marriage of Krempin (1999) 70 Cal. App. 4th 1008, 1021, 83 Cal. Rptr. 2d 134]* .

Otherwise, however, FUSFSPA itself excludes from the definition of "disposable retired pay" that is subject to division certain amounts waived by a service member in order to receive disability retirement benefits under specific federal statutes [*see 10 U.S.C. § 1408(a)(4)(B)* (referring to "Title 5" and "Title 38" benefits)]. The U.S. Supreme Court, in *Mansell v. Mansell* [*Mansell v. Mansell (1989) 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675]* , clarified that FUSFSPA does not grant state courts the power to treat, as property divisible on divorce, military retirement pay that has been waived in order to receive veterans' disability benefits. The Court found that in enacting FUSFSPA, Congress intended both to create new benefits for former spouses and to place limits designed to protect military retirees. Thus, FUSFSPA did not remove the preemptive effect of federal law on which *McCarty v. McCarty* [*McCarty v. McCarty (1981) 453 U.S. 210, 223, 232-233, 101 S. Ct. 2728, 69 L. Ed. 2d 589]* was based with respect to the treatment of military disability benefits [*Mansell v. Mansell (1989) 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675, 688-689]* .

An issue left undecided in *Mansell* is whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-*McCarty* settlements. Whether additional pre-*McCarty* or other cases are subject to being reopened

as a result of *Mansell* is presently unclear. However, in the *Mansell* case itself, the California appellate court, on remand from the U.S. Supreme Court, reaffirmed the original trial court's denial of the military retiree's request for modification of his long-final, pre-*McCarty*, pre-FUSFSPA dissolution judgment, although the judgment divided his disability benefits according to California community property law rather than federal law. The appellate court stated that it never intended to reopen the judgment, and reasoned that the judgment was not void for lack of subject matter jurisdiction, because the trial court had jurisdiction to divide military benefits, rightly or wrongly, at the time of the original decree [*In re Marriage of Mansell (1989) 217 Cal. App. 3d 219, 225, 227-229, 265 Cal. Rptr. 227]* .

A separate issue has been whether state courts are precluded by FUSFSPA from considering disability retirement pay in calculating underpayment of a community property obligation contained in a judgment that was final long before the enactment of FUSFSPA. One California court had held that FUSFSPA does not preclude such consideration [*see In re Marriage of Stier (1986) 178 Cal. App. 3d 42, 49-55, 223 Cal. Rptr. 599]* , but this issue was not before the U.S. Supreme Court in *Mansell*. However, to the extent that the California court relied on a lack of federal preemption over military disability benefits in reaching its conclusion, its reasoning would appear inconsistent with that in *Mansell*, and its decision is now possibly abrogated by *Mansell*.

[2] Remedies to Compensate Nonmilitary Spouse

Despite the preemptive effect of federal law in the treatment of militarydisability retirement benefits (*§ 222.221[1]*), courts in various states have increasingly sought means to ensure that former spouses' marital property interests are protected in the event of a future award of veteran's disability benefits to the service member [*In re Marriage of Krempin (1999) 70 Cal. App. 4th 1008, 1013-1015, 83 Cal. Rptr. 2d 134* (analyzing out-of-state cases)]. California has been slow to follow that trend. However, at least one published decision, *In re Marriage of Krempin*, supports using a *resulting trust* remedy to compensate the nonmilitary spouse if military retired pay is waived for disability benefits *after* an order or judgment has been entered that divides the retired pay as community property [*In re Marriage of Krempin (1999) 70 Cal. App. 4th 1008, 1021, 83 Cal. Rptr. 2d 134* (involving "Title 38" veteran's disability benefits)].

In *Krempin*, the parties divorced while the military service member (husband) was still in the Air Force. They stipulated to a division of the community interest in his (longevity) retired pay, providing for a percentage of future military retirement to be paid to the nonmilitary spouse (wife). Their incorporated marital settlement agreement provided for a reservation of the court's jurisdiction to "to make such orders relating to these retirement benefits as are necessary to carry out this agreement." After the former husband's retirement, the parties filed a stipulation with the court requiring a specific retirement dollar amount to be paid to the former wife--by the husband initially, and then by the Defense Accounting and Finance Center. Thereafter, the husband elected to waive retired pay for disability pay in several increments, ultimately resulting in a waiver of all of longevity-based retired pay [*In re Marriage of Krempin (1999) 70 Cal. App. 4th 1008, 1010-1011, 83 Cal. Rptr. 2d 134]* . On appeal of the denial of the former wife's motion to restore the monthly payments, an appellate court reversed and remanded. It found that her claim hinged on the scope of the judgment's reservation of jurisdiction and the agreements in the judgment and postjudgment stipulation regarding the payments. It concluded that the *resulting trust* theory, which had been advanced by an earlier case [*In re Marriage of Daniels (1986) 186 Cal. App. 3d 1084, 1092, 231 Cal. Rptr. 169]* , could well apply, because *Mansell* did not derogate any equitable doctrine; and, although the resulting trust would adhere to money received as disability benefits, there would be no impermissible division of the benefits if the husband remained free to satisfy the obligation with other assets. The court noted that the underlying basis for a resulting trust might not apply when military retirement had already been waived in favor of disability pay *at the time* that the order or judgment were entered, as had occurred in *Mansell*, On remand, the trial court was directed to consider whether the payment provisions of the judgment and stipulation, together with the reservation language--and, in this instance, any extrinsic evidence proffered to support the parties' positions--would be sufficient to show an intent that the nonmilitary former wife continue to receive her original share of the retired pay even if the service member husband waived all or a portion of it to receive disability benefits. If so, the court could impose a resulting trust in favor of the former wife, with payments to her directly from the former husband [*In re Marriage of Krempin (1999) 70 Cal. App. 4th 1008, 1020-1021, 83 Cal. Rptr. 2d 134* (also noting that

laches or other principles to assure fairness might apply regarding past payments owing from husband); *cf. Mansell v. Mansell (1989) 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 222.222 Division of Gross Versus "Disposable" (Net) Pay

Language in FUSFSPA [*see 10 U.S.C. § 1408(c)(1)*] that permits a state to treat "disposable retired pay" either as separate or community property has been subject to dispute. Prior to the United States' Supreme Court decision in *Mansell v. Mansell* [*Mansell v. Mansell (1989) 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675]* , the California Supreme Court had construed this language. It held in *Casas v. Thompson* [*Casas v. Thompson (1986) 42 Cal. 3d 131, 228 Cal. Rptr. 33, 720 P.2d 921]* that, under FUSFSPA [*10 U.S.C. § 1408*], a court may divide the community interest in a military pension by using a retiree's gross pay and not simply his or her "disposable" (net) pay. FUSFSPA defines disposable pay and states that state courts "may treat" it as separate or community property according to their own laws [*see 10 U.S.C. § 1408(a)(4), (c)(1)*]. The Court in *Casas* stated that under FUSFSPA, "disposable" pay is essentially gross pay less statutorily specified deductions, which, except for the retiree's withholding tax liability, are under the retiree's direct or indirect control and will significantly vary among retirees with the same gross retirement pay [*Casas v. Thompson (1986) 42 Cal. 3d 131, 143-151, 228 Cal. Rptr. 33, 720 P.2d 921* ; *see 10 U.S.C. § 1408(a)(4)*; *In re Marriage of Daniels (1986) 186 Cal. App. 3d 1084, 1090-1091, 231 Cal. Rptr. 169* (both partially superseded by *Mansell v. Mansell (1989) 490 U.S. 581, 583, 109 S. Ct. 2023, 104 L. Ed. 2d 675* ; and by 1990 federal legislation under which *10 U.S.C. § 1408(a)(4)* no longer includes as a deduction from "disposable retired pay" amounts withheld for federal, state, or local income tax purposes, or amounts withheld under *I.R.C. § 3402(i)*)].

However, in *Mansell,* the United States Supreme Court implicitly rejected this analysis, because it found that under FUSFSPA's plain and precise language, state courts have been granted the authority to treat only *disposable* retired pay as community property; they have not been granted the authority to treat *total* retired pay as community property. It also rejected the proposition that the "disposable retired or retainer pay" language only applies to the garnishment aspects of FUSFSPA [*see Mansell v. Mansell (1989) 490 U.S. 581, 583, 109 S. Ct. 2023, 104 L. Ed. 2d 675]* . While the Court in *Mansell* was construing FUSFSPA in the context of military retirement pay waived in order to receive veterans' disability benefits, it appears that its view on "total" versus "net" pay would extend to other types of deductions embraced within the concept of "disposable retired pay" Thus,it appears that the *Casas* view would no longer be applicable to the extent that it is inconsistent with *Mansell* 's.

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§ 222.223 Direct Payment to Nonmilitary Spouse

[1] What Benefits May Be Paid

Title *10 U.S.C. § 1408* provides a means of direct payment to a former spouse of his or her community share of military retirement benefits acquired by the service member spouse under a court-ordered division of the benefits, as well as direct payment of child or spousal support [*see 10 U.S.C. § 1408(d)(1)*; 32 C.F.R. § 63.6(c)(7); *Casas v. Thompson (1986) 42 Cal. 3d 131, 147, 151, 228 Cal. Rptr. 33, 720 P.2d 921 , cert. denied, 479 U.S. 1012 (1986)]* . The benefits include only disposable "retired" pay, as defined by statute [*10 U.S.C. § 1408(a)(4), (d)(1)*; *see 10 U.S.C. § 1408(a)(7)*]. Use of the terms "retirement benefits" or "retired pay" in this discussion refers only to retired pay.

Title *10 U.S.C. § 1408* also authorizes direct payment of amounts from disposable retired pay to enforce a division of other property [*10 U.S.C. § 1408(d)(5)*; 32 C.F.R. § 63.6(d)]. Payments made under *10 U.S.C. § 1408(d)* to a spouse or former spouse with respect to a division of retired pay between the spouses under *10 U.S.C. § 1408(c)* are not to be treated as amounts received as retired pay for service in the uniformed services [*10 U.S.C. § 1408(c)(2)* (applicable to divorces, dissolutions, annulments, and legal separations that become effective after the end of the 90-day period beginning on the Nov. 5, 1990, date of enactment)].

For discussion of garnishment of earnings of federal employees, including military personnel, to enforce a support obligation, see *Ch. 259, Family Law Enforcement: Special Remedies for Support Enforcement, § 259.11[8]*.

[2] Eligibility

In order to be eligible for direct payment under an order dividing a pension, a former spouse must have been married to the service member for 10 or more years, during which time the member must have performed 10 or more years of "creditable" service for retirement purposes. By contrast, this 10-year requirement is inapplicable to direct payment of benefits for child and spousal support [*10 U.S.C. § 1408(d)(2)*; 32 C.F.R. § 63.6(a)(2); *see also* 32 C.F.R. § 63.3(f) (creditable service defined)]. Although failure to satisfy the 10 years of "marriage-during-service" requirement

precludes direct payment to a former spouse, it does not prevent division of the military pension as community property as between the parties [*see Mansell v. Mansell (1989) 490 U.S. 581, 109 S. Ct. 2023, 104 L. Ed. 2d 675* ; *see also In re Marriage of Beltran (1986) 183 Cal. App. 3d 292, 296-298, 227 Cal. Rptr. 924]* .

[3] Enforceable Court Orders

[a] Types of Enforceable Orders

Court orders that are enforceable by direct payment from a former spouse's military pension include final decrees of divorce, dissolution, annulment, or legal separation, as well as property settlements incident to those decrees that are ordered, ratified, or approved by a court [*10 U.S.C. § 1408(a)(2)*; 32 C.F.R. §§ 63.3(e), 63.6(c)(3); *see also 10 U.S.C. § 1408(d)(1), (5)* (support and property division orders, respectively)]. As used in the direct payment provisions, a final decree is one from which no appeal may be, or has been, taken, or from which appeal has been taken and finally decided [*10 U.S.C. § 1408(a)(3)*; 32 C.F.R. § 63.3(j)]. Enforceable orders also include final modifications of these previously issued decrees, or property settlements that are ordered, ratified, or approved by a court [*10 U.S.C. § 1408(a)(2)*; 32 C.F.R. §§ 63.3(e), 63.6(c)(3)].

[b] Requirements for All Orders

To be enforceable by direct payment from a former spouse's military pension, an order must be "regular on its face" [*10 U.S.C. § 1408(b)(1)(B)*; *see 10 U.S.C. § 1408(b)(2)* (defining "regular on its face")]. It must also be authenticated or certified within 90 days immediately preceding its service (§ 222.223[4]) on the designated agent for the secretary of the relevant uniformed service [32 C.F.R. § 63.6(c)(2)]. If the order was issued while the service member was on active duty and was not represented in court, the order or other court documents must certify that there has been compliance under the Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*] with the service member's rights [*10 U.S.C. § 1408(b)(1)(D)*; 32 C.F.R. § 63.6(c)(4)]. Additionally, an enforceable order must show sufficient information to identify the service member, including his or her social security number if it can be obtained [*10 U.S.C. § 1408(b)(1)(C)*; 32 C.F.R. § 63.6(c)(5)].

[c] Additional Requirements for Orders Dividing Property

An order allocating military retirement benefits to a nonmilitary spouse in a division of property must specifically provide that payment must be made from the service member's disposable retired pay to the spouse or former spouse of that member. It must also specify a fixed dollar amount, percentage, or fraction of that pay. This requirement is not satisfied by a formula for division whose elements are not specifically set forth or are not readily apparent on the face of the order, unless the court clarifies the formula [*see 10 U.S.C. § 1408(a)(2)(C)*; 32 C.F.R. § 63.6(c)(8)].

In addition, the order for property division must have been made by a court having jurisdiction over the military spouse either through residence, domicile, or consent. However, jurisdiction based on residence must not have been founded onthe service member's residence for military assignment. Furthermore, treatment of the benefits as separate or community property must have been in accordance with the jurisdiction's law [*see 10 U.S.C. § 1408(c)(1), (4)*; 32 C.F.R. § 63.6(c)(6)(i), (ii)].

Finally, a spouse who seeks to enforce a property division must present an order showing that he or she has satisfied the 10-year eligibility criteria for direct payment [32 C.F.R. § 63.6(c)(6)(iii); *see* discussion under *§ 222.223[2]*]. If the order fails to state that the former spouse meets the eligibility criteria, the former spouse must submit sufficient evidence with an application for direct payment so that the designated agent can verify that the eligibility criteria are satisfied [32 C.F.R. § 63.6(b)(2)].

[4] Procedure

[a] Required Request and Accompanying Documents

To obtain direct payment of military retirement pay, a former spouse must deliver to the designated agent of the involved uniformed service a signed Defense Department Form DD 2293, "Request for Former Spouse Payments from Retired Pay" [32 C.F.R. § 63.6(b)(1)]. A copy of this form may be obtained from the designated agent for the relevant uniformed service branch. The address and telephone number for each designated agent is listed in 32, C.F.R. § 63.6(b)(5). Some service branches have developed their own versions of this form, so counsel should ascertain which form is required by the relevant service branch.

The form must be accompanied by a certified copy of the operative court order and copies of any other certified documents that provide for payment of child support, spousal support, or a division of property [32 C.F.R. § 63.6(b)(1)(ii)]. The court order accompanying the form must have been authenticated or certified within 90 days immediately preceding its service on the designated agent [32 C.F.R. § 63.6(c)(2)]. If the court order for a division of retired pay as property fails to state that the applicant satisfies the "10-year" eligibility criteria (*§ 222.223[2]*), the form also must be accompanied by evidence that the applicant was married to the service member for 10 years or more, during which the member performed 10 years' creditable service [32 C.F.R. § 63.6(b)(2); *see 10 U.S.C. § 1408(d)(2)*; 32 C.F.R. § 63.6(a)(2)].

Instead of the official form, the former spouse may submit a signed statement that includes the following [32 C.F.R. § 63.6(b)(1)]:

- Notice to make direct payment to the former spouse from the service member's retired pay;

- A copy of the court order and other accompanying documents certified by an official of the issuing court that provides for child support, spousal support, or division of property;

- A statement that the court order has not been amended, superseded, or set aside;

- Sufficient identifying information about the service member to enable processing of the application, and this should include the service member's full name, Social Security number, and uniformed service;

- The full name, address, and Social Security number of the former spouse;

- Agreement by the former spouse, before payment, that any future overpayments are recoverable and subject to involuntary collection from the former spouse or his or her estate; and

- Agreement by the former spouse to personally notify the designated uniformed service agent promptly if the court order is vacated, modified, or set aside, which must include (a) notice of the former spouse's remarriage, if all or part of the payment is for spousal support, or (b) notice of a change in eligibility for child support payments under the circumstances of death, emancipation, adoption, or attainment of majority of a child whose support is provided through direct payment to a former spouse from retired pay.

Furthermore, if the court order for property division does not state that the former spouse satisfies the "10-year" eligibility criteria (see *§ 222.223[2]*), the former spouse must furnish sufficient evidence for the designated agent to verify that the requirement was met [32 C.F.R. § 63.6(b)(2)].

[b] Service of Notice and Response

Notification of the designated uniformed service agent must be made by certified or registered mail, return receipt

requested, or by personal service. Effective service is not made until a complete application providing all information required (*§ 222.223[1]*) is received in the office of the designated agent, who must note the date and time of receipt on the notification document [32 C.F.R. § 63.6(b)(3); *see 10 U.S.C. § 1408(b)(1)(A)*].

Not later than 90 days after effective service, the designated agent must respond by informing the former spouse if the court order will be honored. If it will be honored, the designated agent must inform the former spouse of (1) the date payments will tentatively begin; (2) the amount of each payment; (3) the amount of gross retired pay; (4) total deductions; and (5) disposable retired pay, except if full payment of a court-ordered fixed amount will be made. If the order will not be honored, the agent must explain the reasons in writing [32 C.F.R. § 63.6(b)(4)].

The designated agents for each uniformed service are set forth in 32 C.F.R. § 63.6(b)(5).

[5] Notification of Service Member

As soon as possible, but not more than 30 calendar days after effective service of a court order (or garnishment action) under *10 U.S.C. § 1408*, the uniformed service's designated agent must send written notice to the affected service member at his or her last known address [*10 U.S.C. § 1408(g)*; 32 C.F.R. § 63.6(f)(1)]. This notice must include [32 C.F.R. § 63.6(f)(2)]:

- A copy of the court order and accompanying documentation;
- An explanation of the limitations placed on the direct payment to a former spouse from a service member's retired pay;
- A request that the service member notify the designated agent if the court order has been amended, superseded, or set aside;
- The amount or percentage that will be deducted if the service member fails to respond to the notification as prescribed;
- The effective date that direct payments to the former spouse will tentatively begin;
- Notice that the service member's failure to respond within 30 days from the date the notice is mailed may result in the payment of retired pay as provided in the notification; and
- Notice that if the service member submits information in response to the notification, he or she thereby consents to the disclosure of that information to the former spouse or his or her agent.

If the service member responds to the notification, the uniformed service's designated agent must consider the response and will not honor the court order if it is shown to be defective, or that the order is modified, superseded, or set aside [32 C.F.R. § 63.6(f)(3)].

[6] Payment Procedure

[a] Commencement and Frequency of Payments

If the service member is entitled to receive retired pay when the court order is served,the uniformed service involved must begin payments to the former spouse not later than 90 days after the date of effective service of the order. If the member is not entitled to receive that pay as of the date of service, the payments must begin not later than 90 days after the date on which he or she first becomes entitled to receive it [*10 U.S.C. § 1408(d)(1)*; 32 C.F.R. § 63.6(h)(1), (7)].

Payments to the former spouse must not be made more frequently than once each month and must conform to the normal pay and disbursement cycle of the uniformed service for retired pay [*10 U.S.C. § 1408(d)(3)*; 32 C.F.R. § 63.6(h)(2)]. With regard to payments based on a percentage or fraction of disposable retired pay, the amount will change in direct proportion and at the effective date of future cost-of-living adjustments that are authorized, unless the court order directs otherwise [32 C.F.R. § 63.6(h)(2)].

[b] Limitations on Amount Payable

Payments to the former spouse are prospective in terms of the amount stated in the court order. Arrearages will not be considered in determining the amount payable [32 C.F.R. § 63.6(h)(10)]. Furthermore, the total amount payable of the member's disposable retired pay for all court orders and garnishment actions paid under *10 U.S.C.§ 1408*, and garnishments paid under *42 U.S.C. § 659* [*see* discussion in Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*] may not exceed [*10 U.S.C. § 1408(e)(1), (4)(B)*; 32 C.F.R. § 63.6(e)(1)]:

- 50 percent of the disposable retired pay for all court orders and garnishment actions paid under *10 U.S.C. § 1408*; or

- 65 percent of the amount of the retired pay payable to the member that is considered under Section 462 of the Social Security Act [*42 U.S.C. § 662*] to be remuneration for employment that is payable by the United States.

[c] Treatment of Multiple Orders

If several court orders are served with regard to a service member's retired pay, payment must be satisfied on a first-come, first-served basis within the amount limitations prescribed [*10 U.S.C. § 1408(e)(2)*; *10 U.S.C. § 1408(e)(4)(A)* (garnishment orders); 32 C.F.R. § 63.6(h)(4)] (*§ 222.223[6][b]*). If conflicting court orders are served directing different amounts to be paid during a month to the same former spouse, payment of the least amount must be made. The difference in amounts of conflicting court orders must be retained by the uniformed service's designated agent pending resolution by the court that has jurisdiction, or by agreement of the parties. The amount retained must be paid as provided in a subsequent court order or agreement, but the total of all payments plus monies retained must be within the limitations prescribed [*10 U.S.C. § 1408(e)(3)*; 32 C.F.R. § 63.6(h)(5); *see also Steel v. U.S. (9th Cir. 1987) 813 F.2d 1545]* (see *§ 222.223[6][b]*).

[d] Termination of Payments

Direct payments terminate on the death of the service member, death of the former spouse, or as stated in the applicable court order, whichever occurs first [*10 U.S.C. § 1408(d)(4)*; 32 C.F.R. § 63.6(h)(3)]. Furthermore, payments must be terminated or reduced on the occurrence of a condition requiring termination orreduction under applicable state law, such as the remarriage of a spouse receiving spousal support [32 C.F.R. § 63.6(h)(3); *see Fam. Code § 4337*].

[e] Request for Reconsideration by Former Spouse or Service Member

A former spouse or service member may request that the designated agent reconsider the determination made in response to service of an application for direct payments from retired pay [*see* 32 C.F.R. § 63.6(b)(4)] (*§ 222.223[4]*) or to the member's answer to the designated agent with respect to notice of such service [32 C.F.R. § 63.6(f)(3)] (*§ 222.223[5]*). For reconsideration, the request must express the issues that the former spouse or the member believes were incorrectly resolved by the designated agent. The designated agent must respond to the request for reconsideration, giving an explanation of the determination reached [32 C.F.R. § 63.6(i)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationRetirement BenefitsMilitary BenefitsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral OverviewMilitary & Veterans LawServicemembersRetirement

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18-222 California Forms of Pleading and Practice--Annotated § 222.224

§ 222.224 Division of Omitted Pensions

[1] Postjudgment Motion Versus Partition Action-Motions

Under current law, a court has continuing jurisdiction to award community estate assets or liabilities to the parties that have not been previously adjudicated by a judgment in the proceeding. A party may file a postjudgment motion or an order to show cause in the proceeding in order to obtain adjudication of any community estate asset or liability omitted or not awarded by the judgment [*Fam. Code § 2556*].

However, special provisions of FUSFSPA appear to limit the operation of this statutory provision for postjudment relief. First, 1990 federal legislation [Pub. L. No. 101-510, § 555] amended FUSFSPA [*see 10 U.S.C. § 1408(c)(1)*] to preclude a division of military retired pay as community property if a final decree of divorce, dissolution, annulment, or legal separation (or property settlement incident to the decree) was issued *before* June 25, 1981, and neither divided (nor reserved jurisdiction to divide) the pay.

Moreover, FUSFSPA sets forth requirements for personal jurisdiction over a military service member that may limit the practical ability of a nonmilitary former spouse to bring a postjudgment motion [*see 10 U.S.C. § 1408(c)(4)*]. Nevertheless, whether the moving party must reestablish jurisdiction over the military spouse using the criteria set forth in FUSFSPA at the time the motion or order to show cause is filed, or whether the court's original personal jurisdiction over that spouse is sufficient, is unclear. In a case decided before the enactment of former *Civ. Code § 4353*, the predecessor to *Fam. Code § 2556*, an appellate court held that if a trial court has originally obtained personal jurisdiction over a military spouse under one of the bases set forth in FUSFSPA, the court still has personal jurisdiction for purposes of modifying the disposition that was addressed by a modified judgment [*see In re Marriage of McDonough (1986) 183 Cal. App. 3d 45, 52, 227 Cal. Rptr. 872]* .

Arguably, this holding could apply with regard to a postdissolution motion to divide an omitted or unadjudicated benefit. On the other hand, when a very long period has elapsed between the original judgment and the motion, the

same considerations that underlie reestablishing jurisdiction in independent partition actions [*see In re Marriage of Hattis (1987) 196 Cal. App. 3d 1162, 1167, 1170, 242 Cal. Rptr. 410* , discussed *below*] may be present. Hence, the jurisdiction issue remains subject to court interpretation. Pending interpretation, the most prudent approach appears to be to attempt to acquire jurisdiction over the military spouse using the FUSFSPA criteria, as discussed in *§ 222.220[5]*.

[2] Partition Actions

A former spouse may bring an independent partition action to divide a pension omitted from a dissolution judgment if the spouse had a divisible interest in the asset at the time of the original dissolution decree [*Casas v. Thompson (1986) 42 Cal. 3d 131, 139, 228 Cal. Rptr. 33, 720 P.2d 921* (superseded on other grounds in *Mansell v. Mansell (1989) 490 U.S. 581, 583, 109 S. Ct. 2023, 104 L. Ed. 2d 675*); *Henn v. Henn (1980) 26 Cal. 3d 323, 328-329, 161 Cal. Rptr. 502, 605 P.2d 10* ; *Shaver v. Shaver (1980) 107 Cal. App. 3d 788, 794, 165 Cal. Rptr. 672* ; *see Berry v. Berry (1989) 216 Cal. App. 3d 1155, 1161, 265 Cal. Rptr. 338* ; *In re Marriage of Graves (1988) 198 Cal. App. 3d 1047, 1050, 244 Cal. Rptr. 110]* . However, as in the postjudgment motion situation discussed above, federal law limits the scope of judgments that may be reopened in order to divide omitted military retirement benefits [*see 10 U.S.C. § 1408(c)(1)* (as amended by Pub. L. No. 101-510, § 555; precluding division of military retired pay as community property if final decree of divorce, dissolution, annulment, or legal separation (or property settlement incident to decree) was issued before June 25, 1981, and neither divided, nor reserved jurisdiction to divide, the pay)].

Furthermore, to entertain the partition action, the court must acquire personal jurisdiction over the service member spouse on one of the bases specified in FUSFSPA, as presently applied to the service member. "Minimum contacts" with California will not sustain jurisdiction [*see In re Marriage of Hattis (1987) 196 Cal. App. 3d 1162, 1167, 1170, 242 Cal. Rptr. 410* (court lacked jurisdiction over service member under FUSFSPA)].

In *Casas v. Thompson*, a former husband argued that the partition of a military pension omitted from a 1966 dissolution judgment was improper because *McCarty v. McCarty (1981) 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589* (federal legislative scheme impliedly preempts state community property law and prohibits division of military retirement pay), applied retroactively to their 1966 divorce and precluded a former wife from having a community interest in thepension. The California Supreme Court refused, however, to give *McCarty* retroactive application. The Court also held that the former wife's community interest in the pension arose under *In re Marriage of Fithian (1974) 10 Cal. 3d 592, 111 Cal. Rptr. 369, 517 P.2d 449* , which held that vested military pensions are community property. The Court further concluded that *Fithian*, which was decided in 1974, should be given full retroactive effect because it did not overturn a settled rule of law and its purposes are achieved by retroactive application. Finally, the Court in *Casas* held that res judicata and collateral estoppel did not bar the former wife's new partition action to determine her interest in the pension [*Casas v. Thompson (1986) 42 Cal. 3d 131, 140-142, 228 Cal. Rptr. 33, 720 P.2d 921* (superseded on other grounds in *Mansell v. Mansell (1989) 490 U.S. 581, 583, 109 S. Ct. 2023, 104 L. Ed. 2d 675*); *see Henn v. Henn (1980) 26 Cal. 3d 323, 328-329, 161 Cal. Rptr. 502, 605 P.2d 10]* .

For additional discussion of dividing omitted community property, see *§ 222.53[5][e][i]* et seq.

[a] Retroactive Award of Benefits

[i] Postjudgment Motions

In the case of a postdissolution motion or order to show cause to divide an omitted or unadjudicated community estate asset, the court must equally divide the asset, unless the court finds on good cause shown that the interests of justice require an unequal division [*Fam. Code § 2556*]. Though this provision does not expressly address the issue of retroactivity of the award, it seems to confer implicit authority on the court to adjust the award according to the interests of justice, which may take into account the retroactivity issue. However, no court has expressly so held, and the issue remains subject to court interpretation.

[ii] Partition Actions

In appropriate circumstances, a trial court may award by restitution to a former spouse a community share of pension payments received by the retiree spouse before a partition action to divide an omitted pension. The trial court must apply "equitable principles," both defenses and general considerations, in determining whether to enforce in whole or part a spouse's community share in retirement benefits received. The trial court is not limited to consideration of "equitable defenses" such as waiver, estoppel, and laches in deciding whether to award retroactive pension payments. It may consider any facts relevant to the fairness of retroactive payments. If the court decides that retroactive benefits should be awarded, it must then determine whether to tailor the form of that award to avoid placing an undue burden on the spouse ordered to pay [*Casas v. Thompson (1986) 42 Cal. 3d 131, 151-152, 228 Cal. Rptr. 33, 720 P.2d 921* (under circumstances, trial court did not abuse discretion in determining that it would be inequitable to award to former wife retroactive pension benefits received by retiree spouse during 10 years preceding partition action)].

A retroactive award of a percentage of undivided, paid-out military pension benefits can be in the form of a money judgment enforceable by writ of execution [*see In re Marriage of Farner (1989) 216 Cal. App. 3d 1370, 1375-1376, 265 Cal. Rptr. 531* (award retroactive to date of separation in dissolution action)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationRetirement BenefitsMilitary BenefitsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionPartition

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[Reserved]

§§ 222.225[Reserved]

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18-222 California Forms of Pleading and Practice--Annotated § 222.240

§ 222.240 Federal Railroad Retirement Benefits

[1] "Tiered" System

Annuities under the Railroad Retirement Act [*45 U.S.C. § 231 et seq.*] are composed of independently calculated levels called "tiers." Tier I is calculated using Social Security benefit formulas and includes earnings in the railroad industry and in employment covered by the Social Security Act. Tier II is based on railroad retirement earnings alone [*see 45 U.S.C. §§ 231b(a), 231b(b)*]. Railroad employees that meet certain eligibility requirements on January 1, 1974 (or in certain cases, as of an earlier date) for dual benefits under both the Railroad Retirement Act and the Social Security Act may receive a third component called the "dual benefit" component. Furthermore, some pensioners may receive a supplemental annuity up to a specified maximum amount per month, depending on their length of service and other requirements [*45 U.S.C. §§ 231a(b), 231b(h)*].

[2] Characterization and Division of Benefits

In 1979, the United States Supreme Court held in *Hisquierdo v. Hisquierdo (1979) 439 U.S. 572, 99 S. Ct. 802, 59 L. Ed. 2d 1* , that the Federal Railroad Retirement Act preempted state community property law and precluded any division of railroad retirement benefits as community property [*Hisquierdo v. Hisquierdo (1979) 439 U.S. 572, 581, 99 S. Ct. 802, 59 L. Ed. 2d 1]* .

On August 12, 1983, however, Congress amended the antiassignment statute of the Railroad Retirement Act on which *Hisquierdo* was based. The statute does not now prohibit the characterization of supplemental annuities and specified components of railroad retirement annuities as community property in accordance with a court decree of dissolution, annulment, or legal separation, or a court-approved marital termination property agreement incident to any such court decree. Thus, the Tier II annuity component, the dual benefit component, and the supplemental annuity is subject to division by dissolution decrees in accordance with state law. This amendment is effective with respect to any benefits payablefor months beginning in September 1983. Because Congress specifically exempted other annuity components from the amendment, federal law continues to preempt state community property law with respect to these components

pursuant to *Hisquierdo* [*see* the Railroad Retirement Act of 1983 (*45 U.S.C. § 231m*, amended by Pub. Law 98-76, § 419); *Hisquierdo v. Hisquierdo (1979) 439 U.S. 572, 581, 99 S. Ct. 802, 59 L. Ed. 2d 1]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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18-222 California Forms of Pleading and Practice--Annotated § 222.241

§ 222.241 Employee Benefits of California Public Entities

[1] Public Employees' Retirement System (PERS) Benefits

Pursuant to legislation that initially was deemed retroactive to June 1, 1988, a court has authority, on the agreement of the nonemployee spouse, to make certain direct divisions of community benefits earned by a member of the Public Employees' Retirement System (PERS) in dissolution or legal separation proceedings [*see Fam. Code § 2610(a)(3)* (amendments operative January 1, 1995, provide that order directly dividing benefits be made *on agreement* of nonemployee spouse, but this was not previously required); *see also* Stats. 1988, ch. 542, §§ 8, 9, 11 (applicable to public retirement benefits having undivided community property interest and in dissolution or legal separation cases pending on effective date of act or in which court reserved jurisdiction over benefit or has not yet awarded benefit); *but see Fam. Code § 2610(c)* (prohibiting retroactive application of that statute to payments made by retirement plan to any person who retired or died before January 1, 1987, or to payments made to any person who retired or died before June 1, 1988, for plans subject to *Fam. Code § 2610(a)(3),(4)*, involving PERS, STRS, or similar public entity benefits)].

The original authorizing legislation also added a new chapter of the Government Code [*see Gov. Code § 21290 et seq.*] setting forth the requirements for dividing community PERS benefits. It includes provisions for dividing accumulated contributions and service credits into two separate accounts, provisions for the contents of court orders, and for obtaining retirement allowances, refunds, and other benefits by both members and nonmembers (including former spouses) [*see Gov. Code § 21290 et seq.*]. It also specifies that a PERS member may not designate a beneficiary in derogation of the community property share of any nonmember spouse, unless he or she has previously obtained an alternative order for division pursuant to *Fam. Code § 2610* [*see Gov. Code § 21490*]. For additional information, see *Gov. Code § 21215 et seq.*

[2] State Teachers' Retirement System (STRS) Benefits

The legislation discussed in *§ 222.241[1]*, which was initially deemed retroactive to June 1, 1988, also established the authority of a court to make certain direct divisions of community benefits earned by a member of the State Teachers'

Retirement System (STRS), on the agreement of the nonemployee spouse [*see Fam. Code § 2610(a)(3)* (amendments operative January 1, 1995, provide that order directly dividing benefits be made *on agreement* of nonemployee spouse, but this was not previously required); *see also* Stats. 1988, ch. 542, §§ 8, 9, 11 (applicable to public retirement benefits having an undivided community property interest and in dissolution or legal separation cases pending on effective date of act or in which court reserved jurisdiction over benefit or has not yet awarded benefit); *but see Fam. Code § 2610(c)* (prohibiting retroactive application of statute to payments made by retirement plan to any person who retired or died before January 1, 1987, or to payments made to any person who retired or died before June 1, 1988, for plans subject to *Fam. Code § 2610(a)(3),(4)*, involving PERS, STRS, or similar public entity benefits). The original authorizing legislation created a new chapter within the Education Code [*see Educ. Code § 22650 et seq.*]. This chapter establishes the court's power over community property rights in accounts with the system and defines the rights of nonmember spouses and domestic partners in the system [*see Educ. Code § 22650(a)*].

The legislation prescribes the contents of court orders to divide the benefits and includes court authorization to order the establishment of separate accounts within STRS for both member and nonmember spouses, including former spouses. It also specifies the rights of nonmember spouses, such as the right to a retirement allowance, or to a refund of accumulated retirement contributions, which must be addressed in a court order [*see Educ. Code § 22652*; *see also Educ. Code § 22655*; *cf. Educ. Code § 23812* (entitlement of surviving spouse, but not surviving domestic partner, to benefits under State Teacher's Retirement System following remarriage)]. The legislation further clarifies that a member or retiree may not designate a beneficiary in derogation of the community property share of any nonmember spouse, unless the nonmember spouse has previously obtained an alternative order for distribution under *Fam. Code § 2610* [*see Educ. Code § 23300*].

However, no judgment or court order issued pursuant to these provisions is binding on STRS until it has been joined as a party to the action and served with a certified copy of the judgment or order [*Educ. Code § 22656*]. For additional information, see *Educ. Code § 22650 et seq.*

[3] Judge's Retirement System Benefits

Retirement and related benefits acquired by California state judges for service during marriage are subject to special rules concerning division on marital dissolution or legal separation. If community property is divided pursuant to *Fam. Code § 2610*, which authorizes certain direct divisions of public entity benefits on the agreement of the nonemployee spouse [*see Fam. Code § 2610(a)(3)*], the accumulated contributions and service credit attributable to periods of service during marriage must be divided into two separate and distinct accounts in the name of the member and nonmember (spouse or former spouse), respectively.Any service credit or accumulated contributions that are not explicitly awarded by the judgment or order will be deemed the exclusive property of the member [*Gov. Code § 75050(b)* (as amended by Stats. 1993, ch. 219; earlier urgency legislation, Stats. 1992, ch. 176, §§ 1, 4, 13, 14; signed July 11, 1992; chaptered July 13, 1992, was made retroactive to June 1, 1988, but was not intended to authorize an unequal division of community property on marital dissolution)].

Furthermore, on receipt of a court order separating the account of a member and nonmember, the administrative board must determine the nonmember's rights, taking into consideration the court order and member's account. These rights may include (1) the right to a retirement allowance, (2) the right to a refund of accumulated retirement contributions, (3) the right to redeposit eligible accumulated contributions, (4) the right to purchase eligible service credit, (5) the right to designate a beneficiary to receive accumulated contributions that are payable if death occurs before retirement, and (6) the right to designate a beneficiary for any unpaid allowance payable at the time of the nonmember's death [*Gov. Code § 75050(c)* (as amended by Stats. 1993, ch. 219; and by earlier urgency legislation, Stats. 1992, ch. 176, §§ 1, 4, 13, 14; signed July 11, 1992; chaptered July 13, 1992, made retroactive to June 1, 1988, and not intended to authorize an unequal division of community property on marital dissolution); *see In re Marriage of Colvin (1992) 2 Cal. App. 4th 1570, 1579-1582, 4 Cal. Rptr. 2d 323* (court properly divided judge's retirement benefits using "time rule" formula pursuant to 1979 stipulated order and was not required to apply statutory formula under circumstances; decided prior to

1992 amendments to Judge's Retirement Law)].

Other sections address each of the above subject areas, along with actual calculation of the parties' retirement allowances [*see Gov. Code §§ 75033.6, 75051-75058, 75076.1*; *see also Gov. Code § 75058(a)* (nonemployee spouse's retirement allowance based on judicial service during marriage and in accordance with property settlement agreement, subject to prescribed calculation method)]. Special rules apply for electing to come within the terms of these retirement provisions [*see Gov. Code § 75090*].

Uncodified legislation originally set forth provisions for applicability of the property division statutes, and these have subsequently been amended [*see* Stats. 1989, ch. 1379, §§ 6, 7; *but see* Stats. 1992, ch. 176, § 12 (urgency legislation, signed July 11, 1992, and chaptered July 13, 1992, amending Stats. 1989, ch. 1379, to provide that certain provisions of that act are deemed retroactive to June 1, 1988, and are not applicable to any action in which the division of retirement benefits was adjudicated before that date); Stats. 1992, ch. 176, § 13 (making certain amended provisions of Judge's Retirement Law retroactive to June 1, 1988)].

[4] County Benefits

Counties within California may choose to provide retirement benefits to their employees under the County Employees' Retirement Law of 1937 [*see Gov. Code § 31450 et seq.*]. As in the case of other retirement or pension benefits provided by California public entities, a court in proceedings for marital dissolution or legal separation will adjudicate the community interest of the employee-spouse and nonemployee-spouse in county benefits, and must make orders to assure that each party receives his or her full community share, including a share in any survivor benefits, pursuant to *Fam. Code § 2610*. Important limitations on the court's ability to make orders that directly affect the plan regarding the benefits (as opposed to rights between the spouses themselves) are set forth in that statute, as well as in the Government Code [*see Fam. Code § 2610(b)*; *Gov. Code § 31685 et seq.*; *see also Fam. Code § 2610(c)* (limitations on retroactivity of that section)].

Pursuant to legislation operative January 1, 1995, a court in dissolution or legal separation proceedings may, after joinder of the county retirement plan, make orders dividing the parties' community interest in the plan into separate accounts for the employee and nonemployee spouse, and on receipt of such a court order the plan's administative governing board will determine the rights of the nonemployee to various allowances and refunds of accumulated contributions and sevice credit [*see Gov. Code § 31685*]. A court order for the division of accumulated community property contributions and service credit of the county plan may be made on the agreement of the nonemployee spouse [*see Fam. Code § 2610(a)(3)* (amendments operative January 1, 1995, provide that an order directly dividing the benefits be made on the agreement of the nonemployee spouse; however, the statute did not require this prior to that date)]. Detailed provisions for distribution of the community interest in county benefits are set forth in *Gov. Code § 31685 et seq.* Note, however, that, those provisions are only operative in any particular county when the county board of supervisors passes a resolution adopting them. Accordingly, counsel should verify whether adoption has taken place in the particular county before proceeding.

For a related general discussion of adjudicating rights to survivor and other benefits under public entity plans, see *§§ 222.161* and *222.182[2][b]*.

Legal Topics:

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

§§ 222.242[Reserved]

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18-222 California Forms of Pleading and Practice--Annotated § 222.260

§ 222.260 Need for Characterization Before Division

Debts and other obligations (referred to as "debts" collectively) must be characterized as separate or community before they can be divided or assigned on dissolution of marriage or legal separation [*Fam. Code § 2550*].

Fam. Code § 2620 et seq. sets forth a method of dividing and confirming those debts for which the community estate is liable that are unpaid at the time of trial or for which the community estate becomes liable after trial. However, as discussed in this subpart, certain classes and types of debts are subject to additional division rules [*see, e.g., Fam. Code § 2625* (division of debts not incurred for community's benefit)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 222.261 Application of Characterization Principles

[1] In General

Determining the character of a particular debt requires consideration of both general and specialized characterization principles. General principles include, for example, those that facially apply because of the time at which a debt was incurred in relation to the parties' marriage or separation, or because the debt was the subject of an agreement between the parties. For example, the general presumption that property acquired by a married person during marriage while domiciled in California is community property facially applies to debts as well as assets, because "property" in the context of family law litigation includes both of these [*see Fam. Code § 760*; *Cal. Rules of Ct., Rule 5.10(d)*].

However, the general characterization rules that otherwise might be applied to debts have been largely supplanted by a statutory scheme for debt liability that serves both to define interspousal rights, and to identify property available to satisfy the claims of third-party creditors [*see Fam. Code § 900 et seq.*].

As a result, counsel should not limit evaluation of the character of a particular debt to an application of the general rules of community property characterization. A court's characterization and division of debts will usually involve the following analytical process:

- Characterization pursuant to *Fam. Code § 900 et seq.*;

- Application, if appropriate, of more specialized characterization principles, such as, for example, transmutation of property [*see Fam. Code § 850 et seq.*];

- Application, if appropriate, of specialized reimbursement rules, such as, for example, the "credit" for postseparation payment of community obligations using separate property [*see In re Marriage of Epstein (1979) 24 Cal. 3d 76, 80, 84, 154 Cal. Rptr. 413, 592 P.2d 1165* ; *see also Fam. Code § 2626*];

and

- Application of the statutory division rules set forth in *Fam. Code § 2620 et seq.*

A discrepancy may exist between the characterization of a particular asset and a debt that was incurred to acquire the asset. While characterization of a given asset as separate or community frequently results in a like characterization of its attendant debt, this may not necessarily follow. For example, the parties may have agreed to change the character of the debt or one party may have intentionally incurred separate debt in order to finance a community acquisition as a gift. Whether a right of reimbursement arises in any particular case is a separate issue.

In addition, while not common, credit acquisition rules may occasionally compel a different result. As discussed in Ch. 122, *Community Property* , a lender's intent will affect the characterization of loan proceeds. While these rules are applied in most instances to divide an asset acquired by the proceeds of a loan, there may be reasons to argue their applicability when the asset has a present value of less than the remaining loan. If the lender relied solely on one spouse's separate property, it may be argued that the debt is separate.

For discussion of reimbursement under *Fam. Code § 2640*, see *§ 222.302*. For discussion of apportioning interests in a family residence, see *§ 222.91[2][a]* et seq. For discussion of grounds on which a court may deny imposition of a family law attorney's real property lien, including that the encumbrance may result in an unequal division of community property because it would impair the encumbering party's ability to meet his or her fair share of community obligations, see *§ 222.35[1]* et seq. [*see Fam. Code §§ 1102(e), 2034*].

[2] Effect of Liability Statutes

[a] Scope and Applicability of Statutes

Fam. Code § 900 et seq. sets forth the liability of community, quasi-community, and separate property for both contract and tort debts. These statutes distinguish between liability with regard to such property both before and after its division by a court in proceedings for marital dissolution or legal separation. Because characterization of debts is required to be made "[f]or the purposes of division and in confirming or assigning the liabilities of the parties for which the community estate is *liable*," each debt at issue must be evaluated in the light ofthese statutes [*see Fam. Code § 2551* (emphasis added)].

The predecessor to *Fam. Code § 900 et seq.*, former *Civ. Code § 5120.010 et seq.*, became operative on January 1, 1985. Except as otherwise provided by statute, the provisions of *Fam. Code § 900 et seq.* [*see* former *Civ. Code § 5120.010 et seq.*] govern the liability of separate and community estate property and the personal liability of a married person for a debt enforced on or after January 1, 1985, regardless of whether the debt was incurred before, on, or after that date [*Fam. Code § 930*; *see American Olean Tile Co. v. Schultze (1985) 169 Cal. App. 3d 359, 366-367, 215 Cal. Rptr. 184* (retroactive application of enacting legislation to debts incurred before operative date of amendments does not violate due process)].

In addition, the debt liability statutes contain provisions governing rights of reimbursement between spouses, which may be at issue on marital dissolution or legal separation. The provisions of *Fam. Code § 900 et seq.* governing reimbursement apply to all debts, regardless of whether satisfied before, on, or after January 1, 1985 [*Fam. Code § 931*; *see Fam. Code § 920*].

[b] Definitions and Construction of Terms

[i] Community Estate Defined

For purposes of liability for debts, as for other purposes, the term "community estate" includes both community

property and quasi--community property [*Fam. Code § 63*]. Also for purposes of debt liability, quasi-community property is liable to the same extent, and must be treated the same in all other respects, as community property [*see Fam. Code § 912* (discussed in *§ 222.261[2][c]*)].

[ii] Debt Defined and When Incurred

A "debt" is an obligation incurred by a married person before or during marriage, whether based on contract, tort, or otherwise [*see Fam. Code § 902*]. Thus, except for specific statutory distinctions, the same general rules apply to contract and tort debts [*see Fam. Code §§ 902, 903*].

A contract debt is "incurred" at the time the contract is made [*Fam. Code § 903(a)*]. A contract is "made" when the consideration for the contract is exchanged, without regard to the time of the performance required under the contract. Thus, for example, a contract to construct a building was held to be "made during marriage" when the consideration given and received--namely, the promise to build (and, if necessary, to do any remedial work to assure compliance with agreed on plans), and the *right* to payment, respectively--was exchanged before a spousal separation. A postseparation breach of a contract that was "made during marriage" gives rise to a community liability, subject to the rules for credit and reimbursement if the community is diminished for a separate wrongful act [*In re Marriage of Feldner (1995) 40 Cal. App. 4th 617, 619-620, 622, 47 Cal. Rptr. 2d 312]* .

Note that if the liability flowing from a breach of contract results from "emotional distress damages" it is more properly treated within the framework of tort debts [*In re Marriage of Feldner (1995) 40 Cal. App. 4th 617, 627-628, 47 Cal. Rptr. 2d 312]* .

A tort debt is "incurred" at the time the tort occurs. In other cases, a debt is incurred at the time the obligation arises [*Fam. Code § 903(b), (c)*]. For complete discussion of liability for tort debts, see *§ 222.320* et seq.

[c] Liability of Quasi-Community Property

Effective January 1, 1985, for purposes of debt liability [*see Fam. Code § 900 et seq.*], quasi-community property is liable for the parties' debts to the same extent, and must be treated the same in all other respects, as community property [*Fam. Code § 912*; *see Fam. Code § 902* ("debt" defined); *cf. Recommendation Relating to Liability of Marital Property for Debts*, 17 Cal. L. Revision Comm'n Reports 1 (1983) (under pre-1985 law, quasi--community property was treated as separate property for debt liability purposes)].

Under the statutory scheme embodied in *Fam. Code § 912* and case law interpreting its predecessor, former *Civ. Code § 5120.120*, no constitutional problem appears to have been presented in treating quasi-community property as community property for debt purposes at death, dissolution, or legal separation. On the occurrence of these events, property may be constitutionally reclassified as quasi-community property provided that, in marital situations, both parties have changed their domicile to California and seek to have a California court alter their marital status [*see Fam. Code §§ 125, 912*; *Prob. Code § 66*; *In re Marriage of Roesch (1978) 83 Cal. App. 3d 96, 106-107, 147 Cal. Rptr. 586* ; *Estate of Rogers (1966) 245 Cal. App. 2d 101, 106, 53 Cal. Rptr. 572]* . For further discussion of quasi-community property in general, see *§ 222.13*.

[d] Liability of Quasi-Marital Property

Quasi-marital property, which is property acquired by the parties during a void or voidable marriage (that at least one spouse believed in good faith was valid), is liable on division for the debts of the parties to the same extent as if the property had been community property or quasi-community property [*see Fam. Code § 2252*; *see Fam. Code § 2251*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsDebt LiabilityFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationSeparate PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionMarital Liabilities

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§ 222.262 Statutory Division Rules for Contract and Tort Debts

Because the parties' "community estate" includes both "assets and liabilities," community debts are subject to the general rule of equal division and theexceptions to that rule set forth by statute [*see Fam. Code § 2550 et seq.*] unless the parties have executed a written agreement or made an oral stipulation in open court governing the division of their debts [*see Fam. Code § 2550*; *cf. Fam. Code § 2556* (division of previously unadjudicated or omitted assets or debts)].

When no such agreement has been made, the court is required to "characterize liabilities as separate or community, and confirm or assign them to the parties in accordance with [*Fam. Code § 2620 et seq.*]." *Fam. Code § 2620* provides that the debts for which the community estate is liable that are unpaid at the time of trial or for which it becomes liable after trial, are to be confirmed or divided based on the following classification scheme [*see Fam. Code § 2620 et seq.*]:

- Premarital debts [*see Fam. Code § 2621*];
- Debts incurred during marriage and before separation [*see Fam. Code § 2622*];
- Debts incurred during marriage, but after separation and before entry of a judgment of marital dissolution or legal separation [*see Fam. Code § 2623*]; and
- Postjudgment debts incurred before termination of the parties' marital status [*see Fam. Code § 2624*].

However, special provisions apply to certain types of debts. For example, tort liabilities subject to *Fam. Code § 1000(b)(2)* (arising from activities not for community's benefit) are required to be assigned to the spouse whose act or omission provided the basis for the liability, without offset. Furthermore, educational loans are to be assigned pursuant to *Fam. Code § 2641* [*see Fam. Code § 2627*; *§ 222.301*].

In addition, all separate debts, including those incurred by a spouse during marriage and before the date of separation

that were not incurred for the benefit of the community, must be confirmed without offset to the spouse who incurred the debt [*Fam. Code § 2625*].

Finally, the court may order reimbursement in cases it deems appropriate for debts paid after separation but prior to trial, and it may make such orders as it deems necessary to carry out the purposes of *Fam. Code § 2500 et seq.* [*Fam. Code §§ 2553, 2626*].

A separate issue is whether, and to what extent, a spouse may avoid property-related obligations imposed by a dissolution judgment in favor of the other spouse or of a third party by filing bankruptcy [*see, e.g., Farrey v. Sanderfoot (1991) 500 U.S. 291, 111 S. Ct. 1825, 114 L. Ed. 2d 337, 342, 346-347* (bankrupt former husband could not avoid lien that secured former wife's interest in marital realty)]. For a discussion of bankruptcy-related issues, see Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* , and Collier, Family Law and The Bankruptcy Code (Matthew Bender).

Legal Topics:

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

§§ 222.263[Reserved]

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18-222 California Forms of Pleading and Practice--Annotated § 222.280

§ 222.280 Premarital Debts

[1] Characterization--General Rules

The separate property of a married person is liable for a debt incurred by the person before marriage [*Fam. Code § 913(a)*]. Except as otherwise expressly provided by statute, the spouses' community estate also is liable for a debt incurred by either spouse before or during marriage, regardless of which spouse has management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt [*Fam. Code § 910(a)*; *see, e.g., In re Marriage of Orchard (1990) 224 Cal. App. 3d 155, 157, 161, 273 Cal. Rptr. 499* (real estate was community property despite husband's quitclaim to his wife; property could be sold to satisfy lien for husband's child support arrearages from previous marriage); *cf. 11601 Wilshire Associates v. Grebow (1998) 64 Cal. App. 4th 453, 457, 74 Cal. Rptr. 2d 912* (although wife's share of community property ultimately could be subject to execution in creditor's action against husband, it was improper to name wife as defendant when creditor did not and could not state cause of action against her)]. For purposes of determining liability of community property under these statutory provisions, the term "during marriage" does not include the period during which the spouses are living separate and apart before a judgment of marital dissolution or legal separation [*Fam. Code § 910(b)*].

Under certain conditions, a spouse's earnings are not liable for a premarital debt incurred by the other spouse, as discussed in *§ 222.280[2]* [*see Fam. Code § 911*].

[2] Exception for Spouse's Earnings

[a] In General

A spouse's earnings during marriage are not liable for a debt incurred by the other spouse before marriage [*Fam. Code § 911(a)*]. For this purpose, effective January 1, 1990, the term "during marriage" does not include any period during which the spouses live separate and apart before receiving a judgment of marital dissolution or legal separation [*Fam. Code § 910(b)*]. To remain not liable for a debt incurred by the other spouse before marriage, the earnings (1) must be

held in a deposit account in which the other spouse has no right of withdrawal and (2)must remain uncommingled with other community property, except property insignificant in amount [*Fam. Code § 911(a)*; *see Fam. Code § 911(b)(1)* ("deposit account" has meaning prescribed in *Com. Code § 9102(2)(29)*)]. "Earnings" are defined as compensation for personal services performed, whether as an employee or otherwise [*Fam. Code § 911(b)(2)*].

[b] Exception for Spouse's Separate Property

Except as otherwise provided by statute, the separate property of a married person is not liable for a debt incurred by the person's spouse before or during marriage [*Fam. Code § 913(b)(1)*]. Furthermore, for this purpose, the joinder or consent of a married person to an encumbrance of community estate property to secure payment of a debt incurred by the person's spouse does not subject the person's separate property to liability for the debt unless the person also incurred the debt [*Fam. Code § 913(b)(2)*].

For discussion of the liability of property for necessaries, an exception to the rule generally exempting the separate property of one spouse from liability for debts incurred by the other before or during marriage,*§ 222.281[2][a]* [*see Fam. Code § 914*].

[c] Preexisting Support Obligations

For purposes of debt liability [*see Fam. Code § 900 et seq.*], a married person's child or spousal support obligation that does not arise out of the marriage must be treated as a debt incurred before marriage, regardless of whether a court order for support is made or modified before or during marriage, and regardless of whether any installment payment on the obligation accrues before or during marriage [*Fam. Code § 915(a)*]. If community estate property is applied to the satisfaction of such a support obligation, the community estate is entitled to reimbursement from the married person if nonexempt separate income was available to him or her when property from the community estate was applied [*see Fam. Code § 915(b)*; *In re Marriage of Williams (1989) 213 Cal. App. 3d 1239, 1244-1246, 262 Cal. Rptr. 317* (if community funds were applied after date of separation but before date of dissolution trial to satisfy married person's debt for child support arrearages from prior marriage, community is entitled to reimbursement)].

Fam. Code § 915 does not limit the matters a court may take into consideration in determining or modifying the amount of a support order [*Fam. Code § 915(c)*].

[3] Division

If the debts are unpaid at the time of trial or the community estate becomes liable after trial, debts incurred by either spouse before the date of marriage must be confirmed without offset to the spouse who incurred the debts [*Fam. Code § 2621*]. This is further reinforced by the provision that all separate debts are to be confirmed without offset to the spouse who incurred the debt [*see Fam. Code § 2625*].

Note, however, that an agreement made by the parties to transmute debt can alter the division requirements [*see Fam. Code § 850 et seq.*]. In addition, another statute governs the liability of property for premarital debt *after* division of the community estate [*see Fam. Code § 916*].

Legal Topics:

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18-222 California Forms of Pleading and Practice--Annotated § 222.281

§ 222.281 Debts Incurred During Marriage and Before Separation

[1] Characterization--General Rule of Community Characterization

Except as otherwise expressly provided by statute, the spouses' community estate property is liable for any debt incurred by either spouse during marriage, regardless of which spouse has management and control of the property and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt [*Fam. Code § 910*; *cf. Collection Bureau of San Jose v. Rumsey (2000) 24 Cal. 4th 301, 99 Cal. Rptr. 2d 792, 6 P.3d 713* (under Probate Code, on death of debtor spouse, surviving spouse becomes personally liable for "any debts" of deceased spouse, but only to extent such debts are chargeable against community property, and deceased spouse's separate property passing to surviving spouse without formal probate administration);]. For purposes of determining the liability of community property under these circumstances, however, the term "during marriage" does not include the period during which the spouses are living separate and apart before entry of a judgment of marital dissolution or legal separation [*Fam. Code § 910(b)*; *see In re McCoy (1990) 111 Bankr. 276]* .

Note that another statute governs the liability for debt of community estate property after division of the parties' community and quasi--community property [*see Fam. Code § 916*].

[2] Treatment of Separate Property in General

The separate property of a married person is liable for a debt incurred by the person during marriage [*Fam. Code § 913(a)*]. Except as otherwise provided by statute, the separate property of a married person is not liable for a debt incurred by the person's spouse during marriage [*Fam. Code § 913(b)(1)*]. Furthermore, for this purpose, the joinder or consent of a married person to an encumbrance of community estate property to secure payment of a debt incurred by the person's spouse does not subject the person's separate property to liability for the debt unless the person also incurred the debt [*Fam. Code § 913(b)(2)*].

For discussion of the liability of property for necessaries, an exception to the rule generally exempting the separate

property of one spouse from liability for debts incurred by the other during marriage,*§ 222.281[2][a]* [*see Fam. Code § 914*].

[a] Rules for "Necessaries" and "Common Necessaries"

[i] Personal Liability of Spouse

Despite the statutory rule generally governing separate property liability [*see Fam. Code § 913(a)*], a married person is personally liable for the following debts incurred by the person's spouse during marriage [*Fam. Code § 914(a)*]:

(1) Any debt incurred for *necessaries of life* of the person's spouse while the spouses are living together; and

(2) Except as provided in *Fam. Code § 4302*, which provides that a spouse is not liable for the support of the other spouse when they are living separate from each other by agreement unless the support is stipulated in the agreement, any debt incurred for *common necessaries of life* of the person's spouse while the spouses are living separately.

A distinction is made between "necessaries of life" and "common necessaries of life." Under this statutory scheme, a spouse is personally liable for the other spouse's debt incurred for "necessaries" while the parties are living together, but is personally liable only for the other spouse's "common necessaries" while the spouses are living separately [*Fam. Code § 914(a)*]. Unfortunately, however, the statute does not define the terms "necessaries" and "common necessaries" [*see Fam. Code § 914(a)*] Nevertheless, the phrase "common necessaries of life," which appears more restrictive, also is used in *Code Civ. Proc. § 706.051*, which governs the exemption of certain earnings from attachment and execution. In that section, the phrase is defined as meaning those essentials that are necessary for the support of the individual or the individual's family supported or partially supported by the individual. The phrase has been judicially interpreted to include those items commonly required by all persons for the sustenance of life, whatever their employment status, including medical care [*J.J. MacIntyre Co. v. Duren (1981) 118 Cal. App. 3d Supp. 16, 173 Cal. Rptr. 715* (interpreting former Code Civ. Proc. § 723.051, which essentially contained same provision); *see Ratzlaff v. Portillo (1971) 14 Cal. App. 3d 1013, 1016, 92 Cal. Rptr. 722* (automobile is not necessary to sustain life and cannot be viewed as "common necessary of life" under former *Code Civ. Proc. § 690.11*)].

Note that, although *Fam. Code § 914* addresses debts incurred during marriage for a spouse's "necessaries of life," and the availability of a nondebtor spouse's separate property to satisfy such debts, § 914 was *not* drafted to govern creditors' claims made after a community estate is terminated by a spouse's death [*Collection Bureau of San Jose v. Rumsey (2000) 24 Cal. 4th 301, 311, 99 Cal. Rptr. 2d 792, 6 P.3d 713]* . A surviving spouse's liability for a deceased spouse's debts is generally governed by the Probate Code. Thus, a surviving spouse is liable for a deceased spouse's debts only to the extent of his or her own share of the community property, plus those portions of the deceased spouse's share of the community property and the deceased spouse's separate property that passed to him or her without formal administration [*Collection Bureau of San Jose v. Rumsey (2000) 24 Cal. 4th 301, 306-307, 309, 99 Cal. Rptr. 2d 792, 6 P.3d 713* ; *see Prob. Code §§ 13550, 13551, 13554*]. Furthermore, while there is a general four-year limitations period on claims by creditors on open book accounts, chargeable against the value of a spouse's separate property, to satisfy debts incurred by the other spouse for "necessaries of life," [*see Code Civ. Proc. § 337*] if the debtor spouse *has died*, creditors are bound by a one-year limitations period [*see Fam. Code § 914(c)(1)*]. However, if the surviving spouse has actual knowledge of the debt before the expiration of the one-year period and the personal representative of the deceased spouse's estate failed to provide the creditor with a timely written notice of the probate administration of the estate, the statute of limitations set forth in *Code Civ. Proc. § 337* (four years) or Section 339 (two years), as applicable, will apply [*Fam. Code § 914(d)*].

"Necessaries" is a relative term, the application of which has been restricted or enlarged according to the circumstances and conditions of the parties. Under any application it certainly includes things that are requisite for survival and sustenance [*see Evans v. Noonan (1912) 20 Cal. App. 288, 293, 128 P. 794]* , such as lodging, shelter [*Taggart v.*

Shepherd (1932) 122 Cal. App. 755, 759, 10 P.2d 808] , and food [*Evans v. Noonan (1912) 20 Cal. App. 288, 293, 128 P. 794]* . It also includes medical expenses incurred to relieve physical suffering and pain, and to overcome or conquer disease [*see Follansbee v. Benzenberg (1954) 122 Cal. App. 2d 466, 476, 265 P.2d 183* ; *Credit Bureau of San Diego v. Johnson (1943) 142 P.2d 963]* , as well as dental expenses [*see Credit Bureau of Santa Monica Bay Dist., Inc. v. Terranova (1971) 15 Cal. App. 3d 854, 93 Cal. Rptr. 538]* .

[ii] Creditor's Action for Debt

A creditor who supplies necessaries to an indigent spouse while the spouses are living together may sue the other spouse directly to satisfy the debt from that spouse's separate property [*see In re Marriage of Higgason (1973) 10 Cal. 3d 476, 488, 110 Cal. Rptr. 897, 516 P.2d 289* , disapproved on another ground, *In re Marriage of Dawley (1976) 17 Cal. 3d 342, 352, 131 Cal. Rptr. 3, 551 P.2d 323]* . To be successful, the creditor must plead and prove that (1) the debt was incurred for necessaries of life and (2) the spouses were living together at the time the debt was incurred. An allegation that the nondebtor-spouse has separate property from which the judgment may be satisfied is permitted, but not required [*see Credit Bureau of Santa Monica Bay Dist., Inc. v. Terranova (1971) 15 Cal. App. 3d 854, 860, 93 Cal. Rptr. 538]* . Although the reported cases setting forth the required allegations in a creditor's action were decided before amendment of the law, operative January 1, 1985, they appear equally applicable to a creditor's action on a debt for furnishing "necessaries of life" while the spouses are living together[*see Fam. Code § 914(a)(1)* (former *Civ. Code § 5120.140(a)(1)*)].

No court appears to have interpreted the "common necessaries" provision of *Fam. Code § 914(a)(2)*, the successor to former *Civ. Code § 5120.140(a)(2)*, which also became operative on January 1, 1985. A creditor's action on a debt for "common necessaries of life" furnished while the parties are living separately seemingly requires pleading and proof that (1) the debt was incurred for common necessaries of life and (2) the spouses lived separately at the time the debt was incurred [*see Fam. Code § 914(a)(2)*]. When the spouses were living separately by agreement, it is unclear whether the creditor also would be required to plead and prove that the agreement stipulated that one spouse is to support the other [*see Fam. Code §§ 914(a)(2), 4302*].

An allegation that a spouse incurred a debt for necessaries generally will be accepted without question in cases in which the creditor supplied a spouse with food, clothing, or shelter [*see Taggart v. Shepherd (1932) 122 Cal. App. 755, 759, 10 P.2d 808]* . The burden of proof required in other situations, however, such as expenses incurred for some of the less fundamental conveniences of modern society, is more substantial. It requires a showing that the claimed necessaries are in keeping with the standard of living to which the parties to the marriage are accustomed [*see Wisnom v. McCarthy (1920) 48 Cal. App. 697, 701, 192 P. 337* (expenses required for domestic servants)].

[iii] Satisfaction From Spouse's Separate Property

The separate property of a married person may be applied to the satisfaction of a debt for which the person is personally liable for necessaries or common necessaries pursuant to *Fam. Code § 914*. If separate property is applied at a time when nonexempt property in the community estate or separate property of the person's spouse is available but not applied to the satisfaction of the debt, the married person is entitled to reimbursement to the extent the property was available [*Fam. Code § 914(b)*].

[3] Division

[a] General Rules

On dissolution or legal separation, debts incurred by either spouse after the date of marriage but before the date of separation must be divided as set forth in *Fam. Code §§ 2550-2552* and *2601-2604*. In general, and with certain exceptions, this means that debts incurred by either spouse after the date of marriage but before the date of separation usually must be divided equally [*see Fam. Code § 2622(a)*], subject to specified exceptions [*see Fam. Code §§ 2550 et*

seq., 2600 et seq.; *In re Marriage of Partridge (1990) 226 Cal. App. 3d 120, 124-125, 276 Cal. Rptr. 8]* . Because each asset in the community estate need not be divided in half, a court may award different assets to each party, balanced by the award of debts so that the residual assets are equal [*In re Marriage of Barnert (1978) 85 Cal. App. 3d 413, 421, 149 Cal. Rptr. 616* ; *see In re Marriage of Schultz (1980) 105 Cal. App. 3d 846, 853, 164 Cal. Rptr. 653]* .

In applying the equal division mandate to community debts, courts have considerable discretion. Nevertheless, when a debt is associated with a particular asset, courts often award the asset along with its corresponding debt to the same party. For example, if an asset is encumbered by a mortgage or lien, the party receiving that asset generally receives, for computation purposes, the value of the asset minus the lien and the same party becomes primarily liable for the lien debt. The debt then ceases to play a part in the further considerations of the court. Thus, when a trial court awarded the net equity in a family residence to a wife after deducting the amount of the encumbrance from the fair market value, and then used the encumbrance amount in its computation of the amount of debt awarded to her, the debt award was reversed on appeal. The trial court should not have added the amount of the encumbrance back into its computation of total outstanding debt being awarded, according to the appellate court [*see In re Marriage of Barnert (1978) 85 Cal. App. 3d 413, 421-422, 149 Cal. Rptr. 616]* .

Prominent exceptions to the equal division requirement are educational loans, which are to be assigned pursuant to *Fam. Code § 2641* [*see § 222.301*], and tort liabilities subject to *Fam. Code § 1000(b)(2)*, which are to be assigned to the spouse whose act or omission provided the basis for the liability, without offset [*Fam. Code § 2627*; for discussion, *see § 222.321[1][a]* et seq.].

In addition, all separate debts, including those debts incurred during marriage and before separation that were not incurred for the benefit of the community, are to be confirmed without offset to the spouse who incurred the debt [*Fam. Code § 2625*; *see In re Marriage of Cairo (1988) 204 Cal. App. 3d 1255, 1267, 251 Cal. Rptr. 731* (credit card charges for gambling money were assigned to spouse who gambled)]. A special exception for "negative estate" cases is discussed below.

Apart from the statutes governing the division of debts referred to above, principles of reimbursement and credit may apply. For example, if a contract that is "made during marriage" is breached by a spouse after separation, the community may have a right of reimbursement if the breaching spouse's "separate" conduct has diminished the community's value, even though liability for the breach is community in nature because the debt is "incurred" when the contract is made. Likewise, a credit may be appropriate for a spouse who uses his or her separate property resources, including personal services, to fulfill a contractual obligation that is community in nature. However, the party claiming entitlement to reimbursement or credit has an affirmative duty to assert that entitlement and to show that the claim is meritorious under controlling law [*In re Marriage of Feldner (1995) 40 Cal. App. 4th 617, 619-620, 622, 625-626* ,].

[b] "Negative Estate" Cases

To the extent that community debts exceed total community and quasi-community assets, the excess of debt must be assigned as the court deems just and equitable. In making this determination, the court must take factors into account such as the parties' relative ability to pay [*Fam. Code § 2622(b)*; *see In re Marriage of Vanderbeek (1986) 177 Cal. App. 3d 224, 233-237, 222 Cal. Rptr. 832* ; *In re Marriage of Eastis (1975) 47 Cal. App. 3d 459, 463-464, 120 Cal. Rptr. 861]* .

[c] Reimbursement Issues

Apart from the general reimbursement provisions under the debt liability statutes, *Fam. Code § 2626* confers jurisdiction on the court to order reimbursement in cases that it deems appropriate for debts paid after separation but prior to trial. Debts paid at this time by one or both parties often include debts incurred during marriage and before separation, as well as those incurred after separation and before trial. Reimbursement for the payment of such debts is

discussed in *§ 222.300[3][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsDebt LiabilityFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationSeparate PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionMarital Liabilities

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§ 222.282 Debts Incurred After Separation and Before Judgment

[1] Characterization--General Exclusion From Community Liability

Community property is not liable for a debt incurred by either spouse while the spouses are living apart before a judgment of marital dissolution or legal separation [*Fam. Code § 910*; *see In re McCoy (Bankr. 9th Cir. 1990) 111 Bankr. 276]* . Although the separated spouses are still married, the statute on community debt liability is expressly limited, in that "during marriage" is defined to exclude the separation period [*Fam. Code § 910(b)*]. The definitional statute applies to all debts enforced on or after January 1, 1985, the operative date for overall revisions to the debt liability statutes [*Fam. Code § 930*; former *Civ. Code § 5120.310*; *see In re McCoy (1990) 111 Bankr. 276* ; *cf. Fam. Code § 931* (for purposes of reimbursement, definition applies to all debts, regardless of whether satisfied before, on, or after January 1, 1985)], even though the legislation that added the provision was passed during 1989]. Thus, as the result of the passage of former *Civ. Code § 5120.110(c)* [*now see Fam. Code § 910*], creditors could not reach one spouse's share of community property to satisfy debts incurred by the other spouse after separation, but before entry of a judgment of dissolution [*In re McCoy (Bankr. 9th Cir. 1990) 111 Bankr. 276]* .

[2] Common Necessaries of Life

A married person is personally liable for the debts incurred for common necessaries of life of the person's spouse while the spouses are living separately, except as provided in *Fam. Code § 4302* (governing separations by agreement) [*Fam. Code § 914(a)(2)*; *cf. Code Civ. Proc. § 706.051(c)* (referring to common necessaries of life)]. Common necessaries of life are those essentials commonly required by all persons for the sustenance of life, whatever their employment status, and may include medical care in a particular case [*see J.J. MacIntyre Co. v. Duren (1981) 173 Cal. Rptr. 715* ; *Ratzlaff v. Portillo (1971) 14 Cal. App. 3d 1013, 1016, 92 Cal. Rptr. 722]* .

Therefore, the nonincurring spouse's separate property, as well as the parties' community property, would be subject to the claims of creditors for such debts, unless the parties provided otherwise in a written separation agreement under *Fam. Code § 4302* [*see Fam. Code § 914(a)*].

Nevertheless, if the nonincurring spouse's separate property is applied to the satisfaction of the debt at a time when nonexempt community property or separate property of the incurring spouse is available but is not applied to the satisfaction of the debt, the nonincurring spouse is entitled to reimbursement to the extent the property was available [*see Fam. Code § 914(b)*].

[a] Division/Confirmation of Debts to Parties

The court in a dissolution or legal separation proceeding must confirm or divide unpaid debts that are incurred by either spouse after separation but before entry of the decree, and for which the community estate is liable at the time of trial or may become liable after trial [*Fam. Code § 2551*]. *Fam. Code § 2623* provides that debts incurred by either spouse after the date of separation but before entry of a judgment of marital dissolution or legal separation are to be confirmed to the parties as follows:

1. Debts incurred by either spouse for the common necessaries of life of either spouse or the necessaries of life of the children of the marriage for whom support may be ordered, absent a court order or written agreement for the payment of support or for the payment of these debts, must be confirmed to either spouse according to the parties' respective needs and abilities to pay at the time the debt was incurred; and

2. Debts incurred by either spouse for nonnecessaries of that spouse or children of the marriage for whom support may be ordered must be confirmed without offset to the spouse who incurred the debt.

For discussion of special division rules regarding educational loans and tort liabilities subject to *Fam. Code § 1000(b)(2)*, see *§ 222.301* and *§ 222.321[1][a]* et seq., respectively [*see Fam. Code § 2627*]. Also, note the general provision that all separate debts are to be confirmed without offset to the spouse who incurred the debt [*see Fam. Code § 2625*]. General authority for reimbursement for debts paid after separation and prior to trial is set forth in *Fam. Code § 2626*, as discussed in *§ 222.300* et seq.

The division and assignment of debts between the parties does not necessarily affect the rights of creditors. Thus, if a party to whom a debt has been assigned as part of the division of property and liabilities fails to pay, the creditor may be able to collect from the other party [*cf. Fam. Code § 916(b)* (right of reimbursement)].

[b] Creditor's Rights When Property Transmuted

If the community property is transmuted into the separate property of a spouse after the spouses separate but before a judgment is rendered dissolving their marriage, it appears that a creditor of one of the spouses generally will be limited to the separate property of the debtor spouse in satisfying the debt, provided:

(1) The transmutation was not made to defraud an existing creditor of either spouse [*American Olean Tile Co. v. Schultze (1985) 169 Cal. App. 3d 359, 364, 215 Cal. Rptr. 184* ; *see Fam. Code § 851*; *Robertson v. Willis (1978) 77 Cal. App. 3d 358, 363, 143 Cal. Rptr. 523* ; *Gould v. Fuller (1967) 249 Cal. App. 2d 18, 24, 57 Cal. Rptr. 23]* ;

(2) The creditor was not misled to its detriment by the failure of the spouses to inform it that by virtue of an agreement between them the supposed community assets on which the creditor relied were, in fact, separate assets [*In re Marriage of Dawley (1976) 17 Cal. 3d 342, 357 n.11, 131 Cal. Rptr. 3, 551 P.2d 323* ; *American Olean Tile Co. v. Schultze (1985) 169 Cal. App. 3d 359, 364, 215 Cal. Rptr. 184]* ; and

(3) All statutory notice requirements are met, as described below [*see Fam. Code § 852(b)* (notice to third parties regarding real property)].

Although third-party contract-creditors are not entitled to recover against former community assets transmuted into the separate property of the noncontracting spouse, they easily can avoid the risk of unknown interspousal transfers by obtaining both spouses' signatures on contracts or notes [*American Olean Tile Co. v. Schultze (1985) 169 Cal. App. 3d 359, 365, 215 Cal. Rptr. 184* ; *see Kennedy v. Taylor (1984) 155 Cal. App. 3d 126, 130, 201 Cal. Rptr. 779]* . Furthermore, on or after January 1, 1985 [*Fam. Code § 852(e)*], transmutations are subject to the laws governing fraudulent transfers [*Fam. Code § 851*; *see State Board of Equalization v. Woo (2000) 82 Cal. App. 4th 481, 98 Cal. Rptr. 2d 206* (wife's attempt to transmute community earnings to separate property was subject to laws governing fraudulent transfers)]. Transmutations of real property, unless recorded, are not effective as to third parties without notice [*Fam. Code § 852(b)*].

Transmutations that take place by way of marital settlement agreements executed during the course of dissolution proceedings are subject to fraudulent transfer law [*Mejia v. Reed (2003) 31 Cal. 4th 657, 668-669, 3 Cal. Rptr. 3d 390, 74 P.3d 166]* . Thus, a marital property division may be challenged as a fraudulent transfer, and set aside because of either actual [*Civ. Code § 3439.04(a)*] or constructive [*Civ. Code §§ 3439.04(b), 3439.05*] fraud [*Mejia v. Reed (2003) 31 Cal. 4th 657, 661, 3 Cal. Rptr. 3d 390, 74 P.3d 166]* . However, when deciding whether a transfer constitutes constructive fraud under fraudulent transfer law, courts should *not* consider the discounted value of future child support in determining a debtor's solvency, because child support is usually paid from future income rather than from current assets [*Mejia v. Reed (2003) 31 Cal. 4th 657, 661, 3 Cal. Rptr. 3d 390, 74 P.3d 166* ; *see Civ. Code § 3439.05*].

The California Supreme Court has observed that the state legislature has a general policy of protecting creditors from fraudulent transfers, including transfers between spouses: a transfer before dissolution can be set aside as a fraudulent conveyance under *Fam. Code § 851*; a transfer after dissolution can be set aside under the Uniform Fraudulent Transfer Act [*Civ. Code § 3439 et seq.*]. And if a court divides the marital property, a creditor of only one spouse receives some protection under the equal division requirement of *Fam. Code § 2550*. Consequently, the Court has concluded that the state legislature's enactment of *Fam. Code § 916*, which protects property transferred to a spouse incident to divorce from the debts of the other spouse, was *not* intended to grant married couples a one-time-only opportunity to defraud creditors by including a fraudulent transfer in a marital settlement agreement [*Mejia v. Reed (2003) 31 Cal. 4th 657, 668-669, 3 Cal. Rptr. 3d 390, 74 P.3d 166]* . The Court has expressly rejected the argument that allowing marital settlement agreement transfers to be considered fraudulent to creditors would needlessly complicate marital settlement negotiations [*Mejia v. Reed (2003) 31 Cal. 4th 657, 668-669, 3 Cal. Rptr. 3d 390, 74 P.3d 166* ; *see Gagan v. Gouyd (1999) 73 Cal. App. 4th 835, 842-843, 86 Cal. Rptr. 2d 733 , disapproved to the extent that it is inconsistent with Mejia v. Reed (2003) 31 Cal. 4th 657, 3 Cal. Rptr. 3d 390, 74 P.3d 166]* .

To be found fraudulent, a transfer must be made with a debtor's actual intent to hinder, delay, or defraud a creditor [*Civ. Code § 3439.04(a)*]. Thus, in one case, a former husband's transfer of retirement assets from a nonexempt Individual Retirement Account into an exempt retirement plan, executed immediately after the husband lost a multimillion dollar arbitration and just before he filed for bankruptcy, was held *not* to be a fraudulent transfer under state law, because the purposeful conversion of nonexempt to exempt assets on the eve of bankruptcy is not fraudulent per se under federal bankruptcy law [*In re Stern (9th Cir. 2003) 345 F.3d 1036, 1039, 1044-1045* ; *see Code Civ. Proc. § 704.115(b)* (exempting private retirement plans from enforcement of money judgments)]. In that case, the husband divorced his wife after losing the arbitration, and, under a stipulated property settlement agreement, transferred his nonexempt community property (more than two million dollars' worth) to the wife, retaining his exempt assets and assuming the arbitration award (a community debt) [*In re Stern (9th Cir. 2003) 345 F.3d 1036, 1045* (dissenting opinion)]. However, the federal circuit courtdecided that the sole "unspectacular" fact that the husband had lost a multimillion dollar arbitration did not satisfy the burden of proving fraud by a preponderance of the evidence [*In re Stern (9th Cir. 2003) 345 F.3d 1036, 1045]* .

For additional discussion of transmutations of property, see Ch. 122, *Community Property* . For discussion of Uniform Fraudulent Transfer Act [*Civ. Code § 3439 et seq.*], see Ch. 270, *Fraudulent Conveyances* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 222.283 Postjudgment Debts Incurred Before Marital Status Terminated

[1] Characterization

Debts incurred by a spouse after entry of a decree of marital dissolution or legal separation and prior to the termination of his or her actual marital status are ordinarily the separate liability of the incurring spouse. This characterization follows from the parties' separation in connection with the family law proceeding, the court's judgment that they are entitled to be restored to the status of single persons as of a particular date and, unless bifurcated for later trial, the complete adjudication of their rights in marital property [*see Fam. Code §§ 910, 913, 1000(b)(2), 2340*].

However, one of the debt liability statutes sets forth the property to which creditors may resort for satisfaction of debts after a division of community and quasi-community property. A special right of reimbursement is provided if property of a spouse is applied to the satisfaction of a money judgment pursuant to the liability statute [*see Fam. Code § 916*].

[2] Division

Fam. Code § 2624 provides that debts incurred by either spouse after entry of a judgment of dissolution but prior to termination of the parties' marital status, or after entry of a judgment of legal separation, must be confirmed without offset to the spouse who incurred the debt [*cf. Fam Code §§ 2625* (separate debts as required to be confirmed without offset to incurring spouse), 2627 (exception to equal division for educational loans and tort liability subject to *Fam. Code § 1000(b)(2)*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 222.284 Debt Liability After Division of Community Estate

[1] Property Liable

After a court divides property in a proceeding for marital dissolution or legal separation, *Fam. Code § 916* governs the personal liability of a party and the liability of particular property for a debt incurred before or during marriage, as well as the right of a spouse to be reimbursed for property applied to the satisfaction of a money judgment for such debt. This section is important primarily with respect to actions by creditors against one or both of the spouses. Creditor's actions, of course, might take place at various times, including, for example, during marriage, on dissolution, or thereafter [*see, e.g., In re Marriage of Katz (1991) 234 Cal. App. 3d 1711, 1720-1722, 286 Cal. Rptr. 495* (judgment creditor filed lien in dissolution action)].

Notwithstanding any other provision of the general marital property liability statutes [*see Fam. Code § 910 et seq.*], after division of community and quasi-community property [*see Fam. Code § 2500 et seq.*], the married person is personally liable, and the property he or she owns at the time of division or receives in the division is liable, for the following debts:

(1) A debt incurred by the married person before or during marriage, regardless of whether the debt was assigned for payment by the person's spouse in the division [*Fam. Code § 916(a)(1)*]; and

(2) A debt incurred by the married person's spouse before or during marriage if the debt was assigned for payment by the married person in the division of the property. If a money judgment for the debt is entered after the division, the judgment may not be enforced against the property or the married person unless the person is made a party to the judgment to pay the debt assigned in the division of property [*Fam. Code § 916(a)(3)*; *see In re Chenich (9th Cir. 1988) 87 Bankr. 101* (former wife's share of community property was protected from liability for torts committed by husband before property division; tort judgment was not entered until after property division)].

For discussion of possible reimbursement for property applied to satisfaction of a money judgment assigned for payment to the payor's spouse, see *§ 222.284[3]*.

[2] Property Not Liable

Notwithstanding any other provision of the general marital property liability statutes [*see Fam. Code §§ 910-916*], after division of community and quasi-community property [*see Fam. Code § 2500 et seq.*], the married person is not personally liable, and the property he or she owns at the time of division or receives in the division is not liable, for any debt incurred by the person's spouse before or during the marriage unless payment of the debt was assigned to the person in the property division. Nothing in the operative statute, however, affects the liability of property for the satisfaction of a lien on the property [*Fam. Code § 916(a)(2)*; *see also Gagan v. Gouyd (1999) 73 Cal. App. 4th 835, 841-842, 86 Cal. Rptr. 2d 733 , disapproved on other grounds* in *Mejia v. Reed (2003) 31 Cal. 4th 657, 3 Cal. Rptr. 3d 390, 74 P.3d 166* (former wife's postdivision property was not liable for creditor's claim, when transfer of assets provided in marital settlement agreement was not fraudulent conveyance and former husband's debt was not assigned to wife); *cf. In re Marriage of Katz (1991) 234 Cal. App. 3d 1711, 1721-1722, 286 Cal. Rptr. 495* (under circumstances of case, wife's transferto husband of property subject to third party creditor's lien as part of community property settlement gave rise to wife's liability to creditor); *see In re Marriage of Braendle (1996) 46 Cal. App. 4th 1037, 1042, 54 Cal. Rptr. 2d 397] .*

A married person's separate property or property received in the division of the community property is not liable for payment of a money judgment entered after the division if the person is not made a party [*Fam. Code § 916(a)(3)*]. This rule applies to all debts enforced on or after January 1, 1985, regardless of whether the debt was incurred before, on, or after that date [*Fam. Code § 930*; *see, e.g., In re Chenich (9th Cir. 1988) 87 Bankr. 101* (tort claim that arose before January 1, 1985, but that was not reduced to money judgment until after that date, could not be collected from former community property of former spouse because she was not made party to tort suit); *see In re Marriage of Braendle (1996) 46 Cal. App. 4th 1037, 1042, 54 Cal. Rptr. 2d 397] .*

[3] Property Applied to Satisfaction of Judgment

If property of a married person is applied to satisfy a money judgment for a debt incurred by the person but assigned in the court's property division for payment to the person's spouse, the person is entitled to reimbursement from the spouse to the extent of the property applied, plus interest at the legal rate. The person also may recover reasonable attorneys' fees incurred in enforcing the reimbursement right [*Fam. Code § 916(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionFamily LawMarital Duties & RightsDebt LiabilityFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationSeparate PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionMarital Liabilities

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[Reserved]

§§ 222.285[Reserved]

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3. Reimbursement Issues In General

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§ 222.300 Debt Reimbursement in General

[1] Applicable Law

Before 1985, case law established a limited right of reimbursement in cases in which community property was used to pay separate property debts, or when separate property was used to pay community debts or the separate debts of the other spouse [*see, e.g., Weinberg v. Weinberg (1967) 67 Cal. 2d 557, 563-564, 63 Cal. Rptr. 13, 432 P.2d 709* ; *see also In re Marriage of Smaltz (1978) 82 Cal. App. 3d 568, 147 Cal. Rptr. 154]* . Operative January 1, 1985, the provisions of *Fam. Code § 900 et seq.* (former *Civ. Code § 5120.010 et seq.*) that govern reimbursement apply to all debts, regardless of whether satisfied before, on, or after January 1, 1985 [*Fam. Code § 931*]. In addition, specific statutory provisions govern reimbursement for separate property contributions to the acquisition of community property [*Fam. Code § 2640*].

While specific reimbursement provisions must be applied to particular types of debts, as discussed hereafter, the following general provisions apply regarding rights of reimbursement pursuant to *Fam. Code § 900 et seq.* First, a reimbursement right provided by those statutes arises regardless of which spouse applies the property to the satisfaction of the debt, regardless of whether the application of the property is voluntary or involuntary, and regardless of whether the debt is satisfied in whole or in part. The right is subject to an express written waiver by the spouse in whose favor the right arises [*Fam. Code § 920(a)*].

Second, the measure of reimbursement under the debt liability statutes is the value of the property or interest at the time the right arises [*Fam. Code § 920(b)*]. Third, the reimbursement right must be exercised not later than the earlier of the following times [*Fam. Code § 920(c)*; *see In re Marriage of Curtis (1989) 208 Cal. App. 3d 387, 391-392, 256 Cal. Rptr. 76* ; *but see Fam. Code § 1000(c)* (special reimbursement rule for certain tort liabilities)]:

(1) Within three years after the spouse in whose favor the right arises has actual knowledge of the application of the property to the satisfaction of the debt; or

(2) In proceedings for the division of community and quasi-community property pursuant to *Fam. Code § 2500 et seq.*, or in proceedings on the death of a spouse.

[2] Debts Incurred Before or During Marriage--When Reimbursement Available

[a] Satisfaction of Debt Assigned to Spouse

A married person may obtain reimbursement from the spouse if the married person's property is applied to the satisfaction of a money judgment pursuant to *Fam. Code § 916* for a debt incurred by the married person that is assigned for payment by the person's spouse on division of the parties' community and quasi-community property [*see Fam. Code § 2500 et seq.*]. The married person has a right of reimbursement to the extent of the property applied, with interest at the legal rate, and also may recover reasonable attorney's fees incurred in enforcing the reimbursement right [*Fam. Code § 916(b)*].

[b] Satisfaction of Support Obligation

For purposes of the general rules of liability [*see Fam. Code § 900 et seq.*], a married person's child or spousal support obligation that does not arise out of the marriage is treated as a debt incurred before marriage, regardless of whether a court order is made or modified before or during marriage, and regardless of whether any installment payment on the obligation accrues before or during marriage [*Fam. Code § 915(a)*]. If property in the community estate is applied to the satisfaction of a married person's child or spousal support obligation that does not arise out of the marriage at a time when nonexempt separate income of theperson is available but is not applied to the satisfaction of the obligation, the community estate is entitled to reimbursement from the person in the amount of the separate income, not exceeding the community estate property so applied [*Fam. Code § 915(b)*]. Thus, if community funds are used to satisfy a married person's debt for child support arrearages from a prior marriage after the date of separation but before the date of a trial for dissolution, the community is entitled to reimbursement for the funds used [*In re Marriage of Williams (1989) 213 Cal. App. 3d 1239, 1244-1246, 262 Cal. Rptr. 317* ; *see Fam. Code §§ 915, 2621, 2626*].

A court must treat each support payment as a separate obligation or debt. To secure reimbursement under *Fam. Code § 915*, a party must show that the other spouse had nonexempt separate income available at the time that spouse used community funds to make a support payment. A spouse has a right to use community funds to make a support payment when the spouse does not have nonexempt separate income available to use for that purpose [*In re Marriage of Sherman (2005) 133 Cal. App. 4th 795, 805, 35 Cal. Rptr. 3d 137]* .

Accordingly, a child or former spouse may enforce a support obligation not only against the separate property of the support obligor, but also against all community property of the subsequent marriage [*see Fam. Code §§ 910, 915*; *see also In re Marriage of Ramer (1986) 187 Cal. App. 3d 263, 272-273, 231 Cal. Rptr. 647* (community earnings of obligor's new spouse increased amount available for support to obligor's former spouse)]. The earnings of the nonobligor spouse are not liable for the other spouse's premarital support obligations, however, so long as his or her earnings (1) remain uncommingled with other community property (unless insignificant in amount) and (2) are held in a deposit account in which the person's spouse has no right of withdrawal [*Fam. Code § 911*]. Nothing, however, in *Fam. Code § 915* limits the matters a court may take into consideration in determining or modifying the amount of a support order [*see Fam. Code § 915(c)* (specifically providing that this statute does not preclude court from considering earnings of parties' spouses with regard to setting or modifying support; but *Fam. Code § 4057.5*, a more specific statute on "new mate" income, greatly restricts consideration of new spouse's or partner's income for support modification purposes, as discussed in Ch. 224, *Dissolution of Marriage: Child Support*)]. For discussion of special rules that apply with respect to the determination of support orders, see Ch. 224, *Dissolution of Marriage: Child Support* , and Ch. 225, *Dissolution of Marriage: Spousal Support* .

A married person's obligation to support an indigent parent is also a community obligation for which the person is not required to reimburse the community. An individual has an obligation under *Fam. Code § 4400* to support an indigent parent to the extent the individual is able, and such an obligation imposed by statute is a "debt" within the meaning of *Fam. Code § 910* [*In re Marriage of Leni (2006) 144 Cal. App. 4th 1087, 1096-1098, 50 Cal. Rptr. 3d 886*].

[c] Satisfaction of Debt for Necessaries

A married person is personally liable for debts incurred by the person's spouse for necessaries of life while the spouses are living together and, except as provided in *Fam. Code § 4302* (governing spouses living apart by agreement), for common necessaries of life incurred by the spouse while the spouses are living separately [*Fam. Code § 914*]. The separate property of a married person may be applied to the satisfaction of a debt for which the person is personally liable under this rule. If separate property is applied at a time when nonexempt community estate property or separate property of the person's spouse is available but is not used to satisfy the debt, however, the married person is entitled to reimbursement to the extent the property was available [*Fam. Code § 914(b)*].

For additional discussion of spouses' liability for necessaries and common necessaries, see *§ 222.281[2][a][i]* et seq.

[3] Debts Incurred or Paid After Separation

[a] Debts Incurred After Separation

Under current law, and unless the parties have altered the usual characterization principles by their own agreement, debts incurred while married persons are living separate and apart before entry of a judgment of marital dissolution or legal separation generally are not subject to a community property presumption [*see Fam. Code § 910*; *see also In re McCoy (Bankr. 9th Cir. 1990) 111 Bankr. 276, 281-282* (statutory rule applies to all debts enforced on or after January 1, 1985)]. Unlike prior law, which generally did not distinguish between preseparation and postseparation debts, current law generally limits liability for postseparation debts to the separate property of the incurring spouse. An exception to this rule of limited liability and special rules on division exist for debts incurred for "necessaries" and "common necessaries" of the parties and their minor children [*see Fam. Code §§ 913, 914(a)(2), 2623*]. Thus, reimbursement by the community to a spouse's separate property for payments made on a debt incurred after separation is not a common issue.

A court, in dividing community property, has jurisdiction to order reimbursement in cases it deems appropriate for debts paid after separation but before trial [*Fam. Code § 2626*]. Although this statute often is applied to postseparation payments made on preseparation debts, it also may apply to postseparation payments made on a debt incurred after separation and before trial. In addition, the parties may have altered the usual characterization principles by their own agreement.

Debts incurred by a spouse after entry of a decree of marital dissolution or legal separation and before the termination of the parties' marital status also ordinarily are the separate liability of the incurring spouse [*see Fam. Code §§ 910, 913*]. Thus, reimbursement by the community to separate property for payments made on a debt incurred after entry of the decree is not a common issue.

Nevertheless, one of the debt liability statutes lists the property to which third party creditors may resort for satisfaction of debts after a division of community estate property [*Fam. Code § 916*]. Under this statute, a special right ofreimbursement is provided in cases in which the property of one spouse is applied to the satisfaction of a money judgment assigned to the other spouse for payment pursuant to that liability statute, as discussed in *§ 222.284[3]* [*see Fam. Code § 916(b)*].

For discussion of reimbursement to the community for payment of a separate debt with community property, see *§*

222.304.

[b] Debts Paid After Separation

[i] Overview of Considerations

After spouses have separated with no intention of resuming their marital relationship, one or both of them may have paid debts with separate or community property. Most litigation concerning postseparation payment of debts arises out of a spouse's use of his or her separate property, usually earnings, to pay a community debt that was incurred before separation. Often, the debt involves monthly loan payments on a family residence. In other cases, community income may have been used after separation to discharge a separate debt. In either case, the issue of reimbursement may arise.

In the case of paying a separate debt with community property, it appears that the long-standing rule entitling the community to reimbursement is still valid, if the spouses have not agreed to the contrary [*see In re Marriage of Epstein (1979) 24 Cal. 3d 76, 89, 154 Cal. Rptr. 413, 592 P.2d 1165* ; *see also Fam. Code § 915(b)* (reimbursement to community for payment of premarital support obligation)]. In addition, *Fam. Code § 2626* permits a court to order reimbursement "in cases it deems appropriate" for debts paid after separation but prior to trial.

With respect to the payment of a community debt with separate property, at least two bases for reimbursement must be considered. First, as in the case of a separate debt, the court has statutory authority to order reimbursement for the postseparation payment of a community debt [*see Fam. Code § 2626*]. Second, case law has established a right of reimbursement when certain criteria are met, which is called *Epstein* reimbursement [*see In re Marriage of Epstein (1979) 24 Cal. 3d 76, 82-85, 154 Cal. Rptr. 413, 592 P.2d 1165]* .

A related consideration concerns the application of *Fam. Code § 2640*, which requires reimbursement in certain cases for separate property contributions to the acquisition of community property. Although it is not limited by its terms to preseparation "contributions," the reported appellate cases appear to have so construed its application. Thus, for example, one court found that the limitations on reimbursement imposed by *Fam. Code § 2640* are inapplicable to and do not limit a trial court's discretion in ordering reimbursement for postseparation payments from separate property on community debts under *In re Marriage of Epstein (1979) 24 Cal. 3d 76, 82-85, 154 Cal. Rptr. 413, 592 P.2d 1165* , or *Fam. Code § 2626* [*see In re Marriage of Hebbring (1989) 207 Cal. App. 3d 1260, 1271-1272, 255 Cal. Rptr. 488]* .

Thus, pending any further construction of its application, *Fam. Code § 2640* appears not to limit reimbursement for postseparation payments on community debts that is otherwise available under *Epstein* or by statute. Reimbursement under *Fam. Code § 2640* is discussed in *§ 222.302[1]* et seq.

In addition, a related issue concerns reimbursement for postseparation payment from separate property of improvements to community property, when the improvements were unilaterally made after separation by one spouse without any agreement between the spouses regarding them. One court approved, in general, of permitting reimbursement to the extent it can be demonstrated the expenditure increased the fair market value of the property, after determining that *Fam. Code § 2640* was inapplicable, but suggested that an increase in value may not be the only measure of reimbursement in a particular case, depending on the equitable factors involved [*see In re Marriage of Reilley (1987) 196 Cal. App. 3d 1119, 1124, 1124 n.3, 242 Cal. Rptr. 302]* . *Reilley* appears to be consistent with the principles underlying *Epstein* to the extent that it found that there should be no presumption that the contributing spouse intended to make a postseparation gift of separate property, but it did not involve postseparation payment of a preseparation community debt, which is usually involved in *Epstein* reimbursment.

[ii] Statutory Authorization for Reimbursement

The court has jurisdiction to order reimbursement when it deems appropriate for debts paid after separation but before

trial [*Fam. Code § 2626*]. Thus, for example, a spouse who uses separate property after separation but before trial to pay a community debt incurred before separation may be reimbursed by means of a set-off in the division of community property interests [*see In re Marriage of Jeffries (1991) 228 Cal. App. 3d 548, 278 Cal. Rptr. 830]* .

This statutory provision became operative on January 1, 1987, and does not distinguish between the payment of separate or community debts. It appears to apply to both, as discussed above.

The effect of *Fam. Code § 2626* on the rules of reimbursement established by preexisting case law has been uncertain. However, it appears that this section clarifies the right of a court to order reimbursement in appropriate cases and does not conflict with the reimbursement rights outlined in *In re Marriage of Epstein (1979) 24 Cal. 3d 76, 82-85, 154 Cal. Rptr. 413, 592 P.2d 1165* , which are discussed in *§ 222.300[3][b][iii]* and *[iv]* [*see In re Marriage of Hebbring (1989) 207 Cal. App. 3d 1260, 1271-1272, 255 Cal. Rptr. 488]* .

Thus, for example, pursuant to *Fam. Code § 2626*, a court ordered reimbursement for postseparation payment (from community funds) of a spouse's supportobligation from a prior marriage, even though this tended to enlarge the reimbursement remedy to which he otherwise would have been entitled under the debt liability statutes [*see In re Marriage of Williams (1989) 213 Cal. App. 3d 1239, 1244-1246, 262 Cal. Rptr. 317]* .

[iii] *Epstein Reimbursment* in General

The California Supreme Court set forth reimbursement guidelines in *In re Marriage of Epstein (1979) 24 Cal. 3d 76, 82-85, 154 Cal. Rptr. 413, 592 P.2d 1165* , for postseparation payment of community debts using separate property, before the enactment of comprehensive "debt liability" statutes or the statutory authorization for reimbursement [*see Fam. Code § 2626*; *see also Fam. Code § 900 et seq.*].

In *Epstein*, the Court concluded that, although a spouse is generally not entitled to reimbursement for separate property utilized to meet community debts (because of a long-standing gift presumption) unless there is an agreement for reimbursement, that rule does not apply to postseparation expenditures. The Court adopted the reasoning of an earlier appellate decision to the effect that when parties have separated in anticipation of marital dissolution, the rational basis for presuming an intention by the paying spouse to make a gift no longer exists [*In re Marriage of Epstein (1979) 24 Cal. 3d 76, 84, 154 Cal. Rptr. 413, 592 P.2d 1165* (quoting from *In re Marriage of Smith (1978) 79 Cal. App. 3d 725, 745-747, 145 Cal. Rptr. 205* ; and decided before enactment of *Fam. Code § 2640*)].

Furthermore, because of the practical realities of most situations, application of a no-reimbursement rule would discourage payment of community debts after separation, exacerbate the financial and emotional disruption that often accompanies a marital breakup, and possibly result in impaired credit reputations of both spouses [*In re Marriage of Epstein (1979) 24 Cal. 3d 76, 84, 154 Cal. Rptr. 413, 592 P.2d 1165* (quoting from *In re Marriage of Smith (1978) 79 Cal. App. 3d 725, 745-747, 145 Cal. Rptr. 205*)].

Thus, in *Epstein*, the Court held that a husband could claim reimbursement for amounts paid after separation to preserve and maintain the parties' family residence, unless these amounts were spent to fulfill his support obligations. It said that as a general rule, a spouse who, after separation, uses earnings or other separate funds to pay preexisting community debts should be reimbursed for these out of community property on dissolution. However, reimbursement should not be ordered automatically, because there are several situations in which reimbursement would be inappropriate, including the following [*In re Marriage of Epstein (1979) 24 Cal. 3d 76, 84-85, 154 Cal. Rptr. 413, 592 P.2d 1165]* :

1. Payment made under circumstances in which it would be unreasonable to expect reimbursement, such as, for example, when there was an agreement for no reimbursement, when the paying spouse truly intended a gift, or generally, when payment was made on account of a debt for the acquisition or preservation of an asset the paying spouse was using and the amount paid was not substantially in excess of the value of the use; or

2. Payment which constituted in reality a discharge of the paying spouse's duty to support the other spouse or dependent child of the parties.

In determining whether a given payment was in reality a discharge of the paying spouse's support duty, there are two primary factors to be considered (absent a court order determining the right to reimbursement), namely (1) whether there was a need for spousal or child support at the time the payment was made, and (2) whether the payment was made in addition to the reasonable support already being provided by the paying spouse, with or without a court order [*In re Marriage of Epstein (1979) 24 Cal. 3d 76, 86 n.5, 154 Cal. Rptr. 413, 592 P.2d 1165* ; *see In re Marriage of Green (1989) 213 Cal. App. 3d 14, 22, 261 Cal. Rptr. 294]* .

As indicated above, the use of *In re Marriage of Epstein* as authority for reimbursement appears to have survived the enactment of later reimbursement-related legislation, including *Fam. Code § 2640* [*see In re Marriage of Hebbring (1989) 207 Cal. App. 3d 1260, 1264, 1269-1270, 255 Cal. Rptr. 488* ; *see also In re Marriage of Green (1989) 213 Cal. App. 3d 14, 22 n.4, 261 Cal. Rptr. 294* ; *Fam. Code § 2640* is discussed in *§ 222.302*].

Although *Epstein* reimbursement is largely associated with the payment of community debts, its linkage to any support duty of a spouse who claims reimbursement also makes it a support issue. In fact, the court in *In re Marriage of Hebbring* [*In re Marriage of Hebbring (1989) 207 Cal. App. 3d 1260, 255 Cal. Rptr. 488]* distinguished *Epstein* from *Fam. Code § 2640* reimbursement and stated that the issue of *Epstein* credits is "almost never a property issue, but a support issue." If, as in *Epstein*, no temporary support order has been made, but support is otherwise at issue, the right of reimbursement is restricted so that a spouse's support obligation is considered before allowing that spouse credits for postseparation payments on community debts. If a temporary support order has issued, the issuing court has several alternatives if it has allocated the payment of community debts between the parties pending trial. The best practice, in the view of the *Hebbring* court, is a combination of ordering reimbursement from the community for payment of certain community debts and ordering none for others, using *Epstein* guidelines [*see In re Marriage of Hebbring (1989) 207 Cal. App. 3d 1260, 1271, 255 Cal. Rptr. 488* (dictum on applying *Epstein*); *see also In re Marriage of Katz (1988) 201 Cal. App. 3d 1029, 1038, 247 Cal. Rptr. 562* ; *In re Marriage of Stallworth (1987) 192 Cal. App. 3d 742, 750-751, 237 Cal. Rptr. 829]* .

Under the *Epstein* guidelines, in the *Hebbring* court's view, if one spouse hasused separate property to pay community debts, the failure to provide reimbursement from the community would, in effect, result in an unequal division of community property (assuming reimbursement would otherwise be proper). However, the *Hebbring* court suggested that when the paying spouse has actually been using the asset that is the subject of the debt, such as a residence or vehicle, no reimbursement ordinarily should be ordered, unless the amount of the debt payment greatly exceeds the value of the asset's use [*In re Marriage of Hebbring (1989) 207 Cal. App. 3d 1260, 1271, 255 Cal. Rptr. 488* (dictum); *see also In re Marriage of Epstein (1979) 24 Cal. 3d 76, 85, 154 Cal. Rptr. 413, 592 P.2d 1165* ; *In re Marriage of Garcia (1990) 224 Cal. App. 3d 885, 891, 274 Cal. Rptr. 194]* .

Therefore, in addition to considering the paying spouse's support obligation, counsel must fully consider the relationship between an entitlement to reimbursement for payment of a debt and use of the asset for which the debt was incurred, as discussed in *§ 222.300[3][b][iv]*.

[iv] Relationship to "Use" Charges

The issue of the relationship between reimbursement "credits" under *Epstein*, for postseparation payment of a community debt, and "use charges," (also known as "*Watts* charges") for the asset that is the subject of the debt has arisen with some frequency, and often in connection with a family residence. It has been held that if one spouse has the exclusive use of a community asset during the period between separation and trial, that spouse may be required to compensate the community for the reasonable value of the use [*see In re Marriage of Garcia (1990) 224 Cal. App. 3d*

885, 890, 274 Cal. Rptr. 194 ; *In re Marriage of Watts (1985) 171 Cal. App. 3d 366, 372-374, 217 Cal. Rptr. 301* (use of family residence and medical practice)].

However, no compensation for exclusive use is ordinarily required if the "user" spouse also pays monthly finance payments for the asset out of his or her separate property, if these payments equal or exceed the reasonable value of the asset's use. The same result is reached when a user spouse makes separate property payments on the debt that equal or exceed the reasonable use value and he or she has not been awarded *Epstein* credits for making the payments [*In re Marriage of Garcia (1990) 224 Cal. App. 3d 885, 890-891, 274 Cal. Rptr. 194* (occupying wife, in effect, made mortgage payments because of husband's payments in lieu of spousal support)]. Although a spouse who exclusively uses an asset would not ordinarily receive *Epstein* credits, he or she may receive credits when the amount of the debt payment substantially exceeds the use value [*In re Marriage of Epstein (1979) 24 Cal. 3d 76, 85, 154 Cal. Rptr. 413, 592 P.2d 1165* ; *In re Marriage of Hebbring (1989) 207 Cal. App. 3d 1260, 1271, 255 Cal. Rptr. 488]* .

When one spouse exclusively uses a community asset while the other spouse is making postseparation debt payments from separate property, the issue of *Epstein* credits and "use" charges also arises. In one decision, an appellate court held that a trial court achieved a net equal division of a couple's community estate, even though it allocated *Epstein* credits to one spouse, who made postseparation payments on a community residence from separate property, while allocating "usage charges" to the other spouse, who exclusively occupied the residence. In that instance, a trial court had reduced the total (overall) value of community property awarded to the paying spouse as separate property by a certain amount as credit for advances made by that spouse for house payments while the house was exclusively used by the other spouse. In addition, the trial court awarded to the occupying spouse as her separate property a use value attributed to her exclusive occupation, based on reasonable rental value [*In re Marriage of Jeffries (1991) 228 Cal. App. 3d 548, 551, 278 Cal. Rptr. 830]* .

In upholding the trial court's method of division in *Jeffries*, the appellate court reasoned that the net effect of the allocation was an equal sharing of *Epstein* credits by both spouses and an equal bearing of use charges, in view of the fact that the credits and charges are, respectively, to be paid from, or paid to, the community [*In re Marriage of Jeffries (1991) 228 Cal. App. 3d 548, 553, 278 Cal. Rptr. 830]* .

Thus, in any particular case, counsel must determine whether "use" charges are at issue by themselves, or in addition to, *Epstein* credits. If both are involved, the court may properly allocate an appropriate amount for "credits" and "use charges" as set forth in *Jeffries* [*In re Marriage of Jeffries (1991) 228 Cal. App. 3d 548, 553-554, 278 Cal. Rptr. 830]* , so as to achieve a net equal division of the community estate. Counsel must also take into account the effect of any support duty of the spouse who has been paying the debt on the asset being used [*see* *In re Marriage of Garcia (1990) 224 Cal. App. 3d 885, 890-891, 274 Cal. Rptr. 194* (occupying wife, in effect, made mortgage payments because of husband's payments in lieu of spousal support and was not required to compensate community for use value)].

For a general discussion of determining interests in a family residence, see *§ 222.90* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionFamily LawMarital Duties & RightsDebt LiabilityFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationSeparate PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionMarital Liabilities

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Volume 18: Dissolution of Marriage: Master Procedural Guide thru Dissolution of Marriage: Property Division and Valuation-Chs. 220-222
Chapter 222 DISSOLUTION OF MARRIAGE: PROPERTY DIVISION AND VALUATION
PART II. LEGAL BACKGROUND
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3. Reimbursement Issues In General

18-222 California Forms of Pleading and Practice--Annotated § 222.301

§ 222.301 Treatment of Educational Loans

Subject to the parties' express written agreements to the contrary [*Fam. Code § 2641(e)*], educational loans must be assigned pursuant to the terms of *Fam. Code § 2641* notwithstanding the general statutory provisions applicable to division of the community estate (*Fam. Code § 2550 et seq.*) and confirmation and division of community estate debts (*Fam. Code § 2620 et seq.*) [*Fam. Code § 2627*]. *Section 2627* governs both reimbursement and assignment of "community contributions to education or training," a phrase defined as meaning payments made with community or quasi--community property for education or training, orfor the repayment of a loan incurred for education or training, regardless of whether the payments were made while the parties were California residents [*Fam. Code § 2641(a)*; *see generally In re Marriage of Sullivan (1984) 37 Cal. 3d 762, 767-768, 209 Cal. Rptr. 354, 691 P.2d 1020* ; *In re Marriage of Watt (1989) 214 Cal. App. 3d 340, 353-354, 262 Cal. Rptr. 783]* .

Under *Fam. Code § 2641*, the community must be reimbursed for any community contributions to education or training of a party that substantially enhance the earning capacity of that party [*but see In re Marriage of Graham (2003) 109 Cal. App. 4th 1321, 1325-1326, 135 Cal. Rptr. 2d 685* (no reimbursement when spouse's enhanced earning capacity from legal education was only speculative)]. The amount reimbursed is to be made with interest at the legal rate, accruing from the end of the calendar year in which the contributions were made [*Fam. Code § 2641(b)(1)*]. Furthermore, any loans incurred during the marriage for the education or training of one of the spouses is not included among the liabilities of the community for purposes of division, but is assigned for payment to the party who received the education or training [*Fam. Code § 2641(b)(2)*].

The required reimbursement and assignment can be reduced or modified to the extent that circumstances render such a disposition unjust. Circumstances qualifying for this exception include, but are not limited to, any of the following [*Fam. Code § 2641(c)*]:

(1) The community has benefitted substantially from the education, training, or loan incurred for the party's education or training;

(2) The education or training received by the party is offset by the education or training received by the other party for which community contributions have been made; and/or

(3) The education or training enables the party receiving the education or training to engage in gainful employment that substantially reduces the need of the party for support that otherwise would be required.

Reimbursement for community contributions and assignment of loans as discussed above is the exclusive remedy available to a party or to the community [*Fam. Code § 2641(d)*; *see In re Marriage of Weiner (2003) 105 Cal. App. 4th 235, 239-240, 129 Cal. Rptr. 2d 288* (medical education received before marriage)]. This rule of exclusivity, however, does not limit the court's consideration of the effect of the education, training, or enhancement, or the amount reimbursed, on the circumstances of the parties for purposes of an order for support [*Fam. Code § 2641(d)*; *see Fam. Code § 4320* (factors considered in awards of spousal support)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawAdministration & OperationStudent Financial AidGeneral OverviewFamily LawMarital Duties & RightsDebt LiabilityFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionMarital Liabilities

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18-222 California Forms of Pleading and Practice--Annotated § 222.302

§ 222.302 Separate Property Contributions to Acquisition of Community Property

[1] Statutory Reimbursement--General Rule and Applicable Proceedings

For the purpose of dividing the community estate in proceedings for marital dissolution or legal separation, unless a party has made a written waiver of the right to reimbursement or has signed a writing that has the effect of a waiver [*see, e.g., In re Marriage of Weaver (2005) 127 Cal. App. 4th 858, 870, 26 Cal. Rptr. 3d 121* (spouse does not waive right to reimbursement of contribution of separate property interest in real property by adding other spouse's name to deed for this property); *In re Marriage of Carpenter (2002) 100 Cal. App. 4th 424, 427-429, 122 Cal. Rptr. 2d 526* (written waiver must show actual intention to waive reimbursement right)], the party must be reimbursed for his or her contributions to the acquisition of the property to the extent the party traces the contributions to a separate property source [*see, e.g., In re Marriage of Cochran (2001) 87 Cal. App. 4th 1050, 1059, 104 Cal. Rptr. 2d 920, 929* (parties stipulated regarding portions of separate and community property deposited in bank; under family expense presumption, once community property funds were exhausted, it could be presumed that subsequent payments were expenditures from separate property funds)]. The amount reimbursed must be without interest or adjustment for change in monetary values and must not exceed the net value of the property at the time of the division [*Fam. Code § 2640(b)*; *see* former *Civ. Code § 4800.2*]. The separate property contribution is reimbursed before the division of the community asset to which the contribution was made [*see In re Marriage of Walrath (1998) 17 Cal. 4th 907, 913, 72 Cal. Rptr. 2d 856, 952 P.2d 1124]* . For discussion of "contributions to the acquisition of property" [*see Fam. Code § 2640*], see *§ 222.302[2]*.

A contributing spouse's right of reimbursement under this provision is not defeated, absent an effective written waiver, even if he or she intended to make a gift of separate property [*see In re Marriage of Witt (1987) 197 Cal. App. 3d 103, 108, 242 Cal. Rptr. 646* ; *see also In re Marriage of Perkal (1988) 203 Cal. App. 3d 1198, 1202-1203, 250 Cal. Rptr. 296* (use of words "for a gift" in joint tenancy deed did not constitute waiver of right to reimbursement)].

However, because reimbursement under *Fam. Code § 2640* only arises in the context of dividing community property

on dissolution or legal separation [*Fam. Code § 2640(b)*], the fact that a separate property contributor has a potential reimbursement claim will not prevent a community asset, or the proceeds of its sale, from being treated as entirely community in a forum such as bankruptcy court--prior to the time that the reimbursement right is adjudicated in family court [*In re Mantle (9th Cir. 1998) 153 F.3d 1082, 1086]* .

In addition, *Fam. Code § 2640* does not apply to a separate property businessthat was incorporated during marriage, absent a transmutation that complies with the requirements of *Fam. Code § 852*. Instead, the spouse who owned the business prior to the marriage is entitled to a share of the business based on the *Pereira* method of apportionment [*In re Marriage of Koester (1999) 73 Cal. App. 4th 1032, 1036-1038, 87 Cal. Rptr. 2d 76* (trial court should have applied *Pereira* method, rather than awarding husband value of his separate property business on date of marriage with no return for his capital investment)]. For a discussion of transmutation, see Ch. 122, *Community Property* . For a discussion of the *Pereira* apportionment method, see *§ 222.134* [*see Pereira v. Pereira (1909) 156 Cal. 1, 7, 103 P. 488]* .

For discussion of the applicability of *Fam. Code § 2640* in various proceedings, see Ch. 122, *Community Property* [*see Fam. Code § 2580*; *In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1225, 44 Cal. Rptr. 2d 155, 899 P.2d 1349* (reimbursement statute may not constitutionally be applied to property *acquired* before January 1, 1984); *In re Marriage of Bankovich (1988) 203 Cal. App. 3d 49, 54-56, 249 Cal. Rptr. 713* ; *see also In re Mantle (9th Cir. 1998) 153 F.3d 1082* (because *Fam. Code § 2640* reimbursement right does not arise until adjudication of asset as part of community estate, unadjudicated property will be treated as community property of both spouses for *bankruptcy estate* purposes)]. For discussion of the treatment of separate property contributions when the property involved is subject to a deferred sale of home order, see *§ 222.302[2][e]*.

[2] Reimbursable Contributions

[a] In General

"Contributions to the acquisition of property," as used in the separate property reimbursement statute [*Fam. Code § 2640*], include down payments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property. The term does not, however, include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property [*Fam. Code § 2640(a)*; *see In re Marriage of Cochran (2001) 87 Cal. App. 4th 1050, 1062, 104 Cal. Rptr. 2d 920, 939* (payment of school fee required to obtain building permit for home was reimbursable as "home improvement" expense; but evidence was unclear on whether amount paid into "interest reserve" fund was used for interest, and husband failed to meet burden of establishing that amount was not used for interest--and was not reimbursable)]. Payments *specifically included* as "contributions to the acquisition of the property" are those that either directly contribute to equity acquisition, or are expenses or costs of making improvements that may increase equity, assuming that the improvement actually results in an increase in property value. On the other hand, payments *specifically excluded* are those that do not contribute to equity acquisition, despite the fact that they are expenses necessary to retain ownership, or preserve, and protect the owner's interest [*In re Marriage of Nicholson & Sparks (2002)104 Cal. App. 4th 289, 296, 127 Cal. Rptr. 2d 882* (no reimbursement of separate property funds used to reduce preexisting community debt so that couple could qualify for home loan)].

Property covered by *Fam. Code § 2640* includes not only specific community property to which separate property was originally contributed, but any other community property that is later acquired from the proceeds of *refinancing* the initial property and to which the separate property contribution can be traced [*see In re Marriage of Walrath (1998) 17 Cal. 4th 907, 918, 72 Cal. Rptr. 2d 856, 952 P.2d 1124* ; *In re Marriage of Cochran (2001) 87 Cal. App. 4th 1050, 104 Cal. Rptr. 2d 920]* .

The value of separate contributions is to be determined as of the time they were made, and is expressed in terms of

separate equity. These "contributions" include, for example, separate property gifts to a spouse that are used to acquire property placed in joint tenancy. Such joint tenancy property, of course, is rebuttably presumed to be community property on marital dissolution or legal separation under current law [*see Fam. Code § 2580, 2581*]. Assuming the community presumption is not rebutted, the reimbursement amount is limited to the fair market value of the property at the time it was transferred to the spouses, less any outstanding encumbrances for which the community was obligated [*see In re Marriage of Perkal (1988) 203 Cal. App. 3d 1198, 1202, 250 Cal. Rptr. 296* ; *In re Marriage of Martinez (1984) 156 Cal. App. 3d 20, 31, 202 Cal. Rptr. 646* (disapproved on other grounds in *In re Marriage of Buol (1985) 39 Cal. 3d 751, 764 n.10, 218 Cal. Rptr. 31, 705 P.2d 354* , and *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253*)].

Similarly, when property has been converted from separate property to joint tenancy, and the applicable community presumption [*see Fam. Code §§ 2580, 2581*] is not rebutted, the measure of separate property reimbursement is the value of the separate property equity at the time of its conversion to joint tenancy form; that is, the property's fair market value, less outstanding encumbrances and less any community property contributions prior to its conversion that are found not to be a gift to separate property. The reimbursement cannot include any appreciation in the property's value [*see Fam. Code § 2640*; *In re Marriage of Weaver (2005) 127 Cal. App. 4th 858, 869-870, 26 Cal. Rptr. 3d 121* ; *In re Marriage of Neal (1984) 153 Cal. App. 3d 117, 123, 123 n.11, 200 Cal. Rptr. 341* (disapproved on other grounds in *In re Marriage of Buol (1985) 39 Cal. 3d 751, 764 n.10, 218 Cal. Rptr. 31, 705 P.2d 354* , and *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253*); *see also In re Marriage of Perkal (1988) 203 Cal. App. 3d 1198, 1202, 250 Cal. Rptr. 296]* .

By contrast, if the value of the community property is less than the original equity value of the separate property contributed, the court may award the entireproperty to the contributing spouse as the measure of reimbursement [*In re Marriage of Witt (1987) 197 Cal. App. 3d 103, 108, 242 Cal. Rptr. 646* (dairy farm declined in value from time contributing spouse made gift of farm to community; court restored entire farm to contributing spouse); *accord In re Marriage of Walrath (1998) 17 Cal. 4th 907, 913, 72 Cal. Rptr. 2d 856, 952 P.2d 1124]* .

With respect to real property, in addition to any other evidence of value, a party who converted real property from separate to joint form is competent to testify about its value as of the time of its conversion. The requirement of *Fam. Code § 2640* that a party claiming reimbursement be able to "trace" a contribution to a separate property source does not impose a rigid requirement that a spouse submit authenticated written documentation establishing an exact value for separate realty later transmuted to community property; thus, it does not preclude the property owner from giving an opinion on value [*In re Marriage of Stoll (1998) 63 Cal. App. 4th 837, 843, 74 Cal. Rptr. 2d 506]* .

The form of the separate contribution includes, for example, money used towards the purchase of property derived from a spouse's inheritance proceeds [*see, e.g., In re Marriage of Palmer (1985) 168 Cal. App. 3d 190, 193, 214 Cal. Rptr. 79* (loan and inheritance); *In re Marriage of Koppelman (1984) 159 Cal. App. 3d 627, 636, 205 Cal. Rptr. 629* ; both cases disapproved on other grounds in *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253]* ; money derived from stock, profit-sharing funds, or real property [*In re Marriage of Cochran (2001) 87 Cal. App. 4th 1050, 1054, 104 Cal. Rptr. 2d 920* (separate contribution from profit-sharing funds); *In re Marriage of Grinius (1985) 166 Cal. App. 3d 1179, 1190-1191, 212 Cal. Rptr. 803]* ; and one spouse's separate property that is converted to community property [*In re Marriage of Carpenter (2002) 100 Cal. App. 4th 424, 427, 122 Cal. Rptr. 2d 526* (husband's home purchased before marriage)], joint tenancy [*see, e.g., In re Marriage of Perkal (1988) 203 Cal. App. 3d 1198, 1202, 250 Cal. Rptr. 296* (husband's home acquired before marriage); *In re Marriage of McNeill (1984) 160 Cal. App. 3d 548, 562-563, 206 Cal. Rptr. 641* (disapproved on other grounds in *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253*); *In re Marriage of Benart (1984) 160 Cal. App. 3d 183, 188, 206 Cal. Rptr. 495* (disapproved on other grounds in *In re Marriage of Buol (1985) 39 Cal. 3d 751, 764 n.10, 218 Cal. Rptr. 31, 705 P.2d 354* , and *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253*)], or other joint title during marriage [*see, e.g, In re Marriage of Witt (1987) 197 Cal. App. 3d 103, 106-108, 242 Cal. Rptr. 646* (separate property deeded to grantor and spouse as "husband and wife")].

Because reimbursement is made on a dollar-for-dollar basis and without adjustment for monetary values [*see Fam. Code § 2640(b)*], the reimbursable amount may not exceed the amount of the separate property contribution even if the contribution produces a monetary benefit to the community that is greater than the contribution. Thus, for example, a spouse's reimbursement was limited to the exact dollar amount of her $40,000 separate contribution toward acquisition of a family residence, even though by making the contribution the creditor forgave the spouses' entire debt on the property, totaling $53,000, and thereby allowed the community to realize an additional $13,000 benefit. The $13,000 savings inured to the community's benefit, rather than being reimbursable to the spouse who made the separate contribution [*In re Marriage of Tallman (1994) 22 Cal. App. 4th 1697, 1699-1700, 28 Cal. Rptr. 2d 323]* .

When the community asset to which the separate property contribution was made is *refinanced* and the resulting loan proceeds are used in part to purchase or pay down the indebtedness on that original asset and other community assets, reimbursement through tracing is still possible. However, the court must ascertain what percentage of loan proceeds traceable to each asset is based on the separate property contribution. Thus, for example, a trial court would calculate the ratio of the separate property contribution to the original property's total equity at the time of refinancing to ascertain what portion of the loan proceeds represented the contributor's separate property contribution traceable to that original property and any other community assets acquired with the proceeds [*see In re Marriage of Walrath (1998) 17 Cal. 4th 907, 922, 72 Cal. Rptr. 2d 856, 952 P.2d 1124* ; *see also In re Marriage of Cochran (2001) 87 Cal. App. 4th 1050, 104 Cal. Rptr. 2d 920]* .

[b] Effect of Contributions by Both Spouses

If both spouses made traceable separate contributions to the acquisition of community property, both may be entitled to reimbursement under *Fam. Code § 2640*, unless one has made a written waiver of the right to reimbursement or signed a writing that has the effect of a waiver [*In re Marriage of Taylor (1984) 160 Cal. App. 3d 471, 473-474, 206 Cal. Rptr. 557* (disapproved on other grounds in *In re Marriage of Buol (1985) 39 Cal. 3d 751, 764 n.10, 218 Cal. Rptr. 31, 705 P.2d 354* , and *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253*)]. This principle also applies if the original property to which the contributions were made has been refinanced, and the loan proceeds from refinancing have been used in part to purchase or pay down the indebtedness on the original and other community assets. In that event, the calculation method discussed in *§ 222.302[2]*, would be used [*see In re Marriage of Walrath (1998) 17 Cal. 4th 907, 922, 72 Cal. Rptr. 2d 856, 952 P.2d 1124]* . For related discussion of the valuation of reimbursable contributions in the context of a division of real property, see *§ 222.90* et seq.

[c] Waiver of Reimbursement Right

Although *Fam. Code § 2640* provides that the right to reimbursement may be relinquished by making a written waiver or by signing a writing that has the effectof a waiver, it does not otherwise define the elements of an effective waiver. However, no waiver will be inferred, for example, from the mere execution of a joint tenancy deed [*In re Marriage of Perkal (1988) 203 Cal. App. 3d 1198, 1202-1203, 250 Cal. Rptr. 296* ; *In re Marriage of Kahan (1985) 174 Cal. App. 3d 63, 71-72, 219 Cal. Rptr. 700]* , from placement of title to property in community property form [*In re Marriage of Fabian (1986) 41 Cal. 3d 440, 448 n.9, 224 Cal. Rptr. 333, 715 P.2d 253]* , or from execution of other property-related documents not clearly intended as waivers [*In re Marriage of Carpenter (2002) 100 Cal. App. 4th 424, 426, 122 Cal. Rptr. 2d 526* (premarital agreement); *In re Marriage of Lange (2002) 102 Cal. App. 4th 360, 365, 125 Cal. Rptr. 2d 379* (promissory note and deed of trust)]. In addition, a spouse's conveyance of his or her separate property to both spouses as joint tenants by a deed reciting that the transfer is "for a gift" and not "for a valuable consideration" is not necessarily a waiver of the right to reimbursement under *Fam. Code § 2640*, if the conveying spouse has no intention of relinquishing that right [*see In re Marriage of Perkal (1988) 203 Cal. App. 3d 1198, 1202-1204, 250 Cal. Rptr. 296* (words "for a gift" were used to avoid payment of transfer taxes and reassessment of property value on transfer)].

[d] Application to Postseparation Contributions

By its terms, *Fam. Code § 2640* does not distinguish between *preseparation* and *postseparation* contributions to the acquisition of community property. The Legislature apparently intended it to apply to reimbursement for *preseparation* contributions, but it is not limited literally to that time frame [*see In re Marriage of Reilley (1987) 196 Cal. App. 3d 1119, 1124 n.3, 242 Cal. Rptr. 302]* .

Nevertheless, the statute's limitations on reimbursement do not apply to *postseparation* separate property payments on community obligations [*In re Marriage of Hebbring (1989) 207 Cal. App. 3d 1260, 1264, 1272, 255 Cal. Rptr. 488]* . Instead, trial courts retain broad discretion under *Fam. Code § 2626* and under *In re Marriage of Epstein (1979) 24 Cal. 3d 76, 154 Cal. Rptr. 413, 592 P. 2d 1165* , to order reimbursement of separate property income used after separation to pay existing community property obligations [*In re Marriage of Hebbring (1989) 207 Cal. App. 3d 1260, 1272, 255 Cal. Rptr. 488* (construing former *Civ. Code §§ 4800(e), 4800.2*)].

Reimbursement may also be possible, despite the inapplicability of *Fam. Code § 2640*, with respect to postseparation improvements to community property. One court of appeal held that reimbursement was possible when separate property was used to make postseparation improvements to a community residence. However, because the improvements were made unilaterally, the reimbursement was authorized only to the extent that the improvements increased the property's fair market value, rather than on a dollar-for-dollar basis. However, there may be situations in which factors exist that, in equity, will justify reimbursement in an amount that discounts a pure benefit approach. These might include, for example, situations in which the parties agreed that the improvement should be made, or the improvement may have been necessary to preserve the asset [*see In re Marriage of Reilley (1987) 196 Cal. App. 3d 1119, 1124, 242 Cal. Rptr. 302* (statute inapplicable because it could not be applied retroactively)].

[e] Treatment of Home Subject to Deferred Sale Order

Under certain conditions, a court will defer the sale of the family home in order to minimize the adverse impact of marital dissolution or legal separation on the welfare of a child, as discussed in *§ 222.92* [*Fam. Code § 3800 et seq.*]. Because of the potential for long-term delay in the ultimate sale of the home under such an order, an argument has been raised that a mere "tracing right of reimbursement" under *Fam. Code § 2640* insufficiently compensates a party who has made a separate property contribution to the acquisition of the property, and that this party's separate interest should share in the appreciation of the property over the period of the court-ordered deferral of sale. One court of appeal, in *In re Marriage of Braud (1996) 45 Cal. App. 4th 797, 820-822, 53 Cal. Rptr. 2d 179* , has agreed with this position. It held that when a deferred sale of home order has been entered, a party who made traceable separate property contributions to a home's acquisition before the parties' separation is not limited to recovering the amount of those contributions when the home is eventually sold, but effectively acquires a *separate property percentage interest* in the home that permits the contributor to share in any appreciation in the home's value over time, but also requires him or her to share in any possible *depreciation* in value. In essence, the contributor in that situation "trades the certainty of recovering [the amount of his or her separate property contribution] at the time of sale, for a chance to recover more, but with a risk of recovering less" [*see In re Marriage of Braud (1996) 45 Cal. App. 4th 797, 820-822, 821 n.25, 53 Cal. Rptr. 2d 179]* .

The *Braud* court reasoned that there is no indication that *Fam. Code § 2640* was intended to apply in this type of situation, in which the "out-spouse" has a separate property interest (by way of contributions) in a family home as to which a deferred sale order has been entered, effectively tying up that ex-spouse's separate property interest, without affording him or her the opportunity to benefit from any appreciation (or be subject to the potential loss in value) during the deferral period. At the point at which the deferred sale order is made, the court said, there is no longer any reason to apply marital property presumptions to either party's interests, and except for the fact that the family law court retains jurisdiction to enforce, modify, or terminate the order, the former spouses' respective interests should be viewed as ordinary joint ownership interests, in the nature of a tenancy in common. Thus, it suggested, a trial court may reconfigure title to the family home, recognizing the parties as tenants in common with unequal ownership interests,

and, concomitantly, order that they be paid in proportion to those ownership interests at the time of sale of the family home [*see In re Marriage of Braud (1996) 45 Cal. App. 4th 797, 820-822, 821 n.25, 53 Cal. Rptr. 2d 179]* .

[3] Reimbursement Under Prior Law

[a] Presumption of Gift

Before the enactment of former *Civ. Code § 4800.2* [*now see Fam. Code § 2640(a), (b)*], it was presumed that unless an agreement between the parties specified that the contributing party would be reimbursed, a party who utilized his or her separate property for community purposes intended a gift to the community [*In re Marriage of Epstein (1979) 24 Cal. 3d 76, 82, 154 Cal. Rptr. 413, 592 P.2d 1165* ; *In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1218, 44 Cal. Rptr. 2d 155, 899 P.2d 1349* (husband's 1976 transfer of separate realty to joint tenancy with wife during marriage was unconditional gift; reimbursement statute inapplicable as property was acquired before January 1, 1984); *see In re Marriage of Reilley (1987) 196 Cal. App. 3d 1119, 1123, 242 Cal. Rptr. 302* (husband was not presumed to have made gift in making postseparation separate property improvements to community residence)]. The rule of *See v. See* [*See v. See (1966) 64 Cal. 2d 778*] stated that a party who uses his or her separate property for community purposes is entitled to reimbursement from the community or separate property of the other only if there is an agreement of the parties to that effect [*See v. See (1966) 64 Cal. 2d 778, 785*]. Under this rule, for example, if there was no understanding or agreement that joint tenancy property was to be separate property on division of the property, or an agreement providing for reimbursement, a party would be barred from reimbursement for his or her separate property contributions [*see In re Marriage of Lucas (1980) 27 Cal. 3d 808, 816, 166 Cal. Rptr. 853, 614 P.2d 285]* .

On the other hand, if there was an agreement for reimbursement, the courts devised a formula that allowed the contributing party to receive the benefit of the appreciation in the value of the property. Thus, when the down payment on a residence was made with separate funds and the loan was based on a community or joint obligation, the court would allow the contributing party to receive a pro rata share, apportioning the equity appreciation between the separate and community property contributions to the purchase price [*see In re Marriage of Aufmuth (1979) 89 Cal. App. 3d 446, 456-457, 152 Cal. Rptr. 668* (disapproved in part in *In re Marriage of Lucas (1980) 27 Cal. 3d 803, 815, 166 Cal. Rptr. 853, 614 P.2d 285*); *see also In re Marriage of Lucas (1980) 27 Cal. 3d 808, 813, 816, 816 n.3, 166 Cal. Rptr. 853, 614 P.2d 285]* .

[b] Effect of Statutory Reimbursement Provision

However, because of the enactment of former *Civ. Code § 4800.2* and its successor, *Fam. Code § 2640(a), (b)*, a party is now entitled to reimbursement for "contributions to the acquisition of property" absent a written waiver of the right to reimbursement, assuming the property was acquired on or after January 1, 1984 [*see, e.g., In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1225, 44 Cal. Rptr. 2d 155, 899 P.2d 1349* (reimbursement statute may not constitutionally be applied to property *acquired* before January 1, 1984); *In re Marriage of Craig (1990) 219 Cal. App. 3d 683, 686-687, 268 Cal. Rptr. 396* (quasi-community property); *In re Marriage of Lockman (1988) 204 Cal. App. 3d 782, 251 Cal. Rptr. 434* ; *In re Marriage of Bankovich (1988) 203 Cal. App. 3d 49, 249 Cal. Rptr. 713]* . A separate property down payment on a residence will no longer be presumed to be a "gift" to the community even if there is no agreement for reimbursement [*see In re Marriage of Cairo (1988) 204 Cal. App. 3d 1255, 251 Cal. Rptr. 731* (property acquired before January 1, 1984)]. Furthermore, the amount reimbursed is apparently dollar for dollar and cannot be adjusted for change in monetary values. Thus, the pro rata calculation devised in *Aufmuth* [*see In re Marriage of Aufmuth (1979) 89 Cal. App. 3d 446, 456-457, 152 Cal. Rptr. 668]* appears to be abrogated with regard to reimbursement for contributions to the acquisition of property under *Fam. Code § 2640*. The reimbursement must also be without interest [*see Fam. Code § 2640*; *but cf. In re Marriage of Braud (1996) 45 Cal. App. 4th 797, 820-822, 821 n.25, 53 Cal. Rptr. 2d 179* (if court ordered deferred sale of home, party who made separate property contributions to acquisition of property before separation is not limited to return of traceable contributions, but acquires separate property percentage ownership in home, as discussed in *§ 222.302[2][e]*)].

Furthermore, the no-reimbursement rule of *See v. See* [*See v. See (1966) 64 Cal. 2d 778, 785, 51 Cal. Rptr. 888, 415 P.2d 776]* appears to have been voided only insofar as the separate property contributions are within the category of "contributions to the acquisition of property" as defined in *Fam. Code § 2640(a)*, which includes down payments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property. It appears that payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property, if made from separate property funds of the contributing spouse without an agreement for reimbursement, will be rebuttably presumed to be a gift to the community [*see Fam. Code § 2640*]. For discussion of apportioning interests in a family residence, see *§ 222.90* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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18-222 California Forms of Pleading and Practice--Annotated § 222.303

§ 222.303 Separate Property Contributions to Acquisition of Separate Property of Other Spouse

A party's separate property contributions to the acquisition of property of the other spouse's separate property estate during marriage are reimbursable, unless there is a written transmutation or waiver of the right to reimbursement [*Fam. Code § 2640(c)* (operative January 1, 2005)]. This rule covers contributions made on or after January 1, 2005 [*see In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1225, 44 CAl. Rptr. 2d 155, 899 P.2d 1349* (reimbursement statute for separate property contributions to acquisition of community property may not constitutionally be applied to property acquired before effective date of statute)].

Reimbursable separate property contributions to acquisition of separate property of the other spouse are subject to the same definition as reimbursable separate property contributions to acquisition of community property [*see Fam. Code § 2640(a)*]. Thus, reimbursable contributions include down payments, payments for improvements, and payments that reduce the principal of a loan used to finance the purchase or improvement of the property; but do not include payments of interest on the loan or payments made for maintenance, insurance, or taxation of the property [*Fam. Code § 2640(a)*].

The amount of reimbursement for separate property contributions to acquisition of separate property of the other spouse is determined in the same manner as for reimbursement of separate property contributions to acquisition of community property [*see Fam. Code § 2640(b), (c)*]. Thus, reimbursement is made on a dollar-for-dollar basis without interest or adjustment for change in monetary values, and the amount of reimbursement may not exceed the net value of the property at the time of the division [*Fam. Code § 2640(c)*].

A written waiver of the right to reimbursement will prevent any right to reimbursement for separate property contributions to acquisition of separate property of the other spouse from arising [*see Fam. Code § 2640(c)*]. Waiver of the right to reimbursement is discussed in *§ 222.302[1]* and *[2][c]*.

Likewise, a valid transmutation will prevent any right to reimbursement for separate property contributions to acquisition of separate property of the other spouse from arising [*Fam. Code § 2640(c)*]. However, such a transmutation

must meet the requirements of *Fam. Code § 850 et seq.*

Legal Topics:

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18-222 California Forms of Pleading and Practice--Annotated § 222.304

§ 222.304 Payment of Separate Debt With Community Property

The community is entitled to reimbursement, absent an agreement to the contrary, when a spouse pays a separate debt, such as taxes due on separate property, with community funds [*In re Marriage of Epstein (1979) 24 Cal. 3d 76, 89, 154 Cal. Rptr. 413, 592 P.2d 1165* ; *see* *In re Marriage of Fabian (1986) 41 Cal. 3d 440, 447, 451, 224 Cal. Rptr. 333, 715 P.2d 253* (affirming trial court's order for reimbursement to community for separate expenditures)]. The effect of statutory amendments operative January 1, 1985, remains somewhat uncertain because the affected statutes apparently do not address this reimbursement issue [*see Fam. Code § 900 et seq.* (former *Civ. Code § 5120.010 et seq.*)].

Fam. Code § 2626, whose predecessor (former *Civ. Code § 4800(e)*) became operative January 1, 1987, states that the court has jurisdiction to order reimbursement in cases it deems appropriate for debts paid after separation but before trial. The apparent broadness of the language indicates that it probably applies to reimbursement of separate debt payments to the community. One court of appeal, construing former *Civ. Code § 4800(e)*, held that this statute, when read together with former *Civ. Code § 5120.150(b)* [*now see Fam. Code § 915(b)*], creates a limited exception to the rule against community reimbursement for debts paid during marriage for premarital support obligations that are paid by one spouse using community property after the date of separation [*see* *In re Marriage of Williams (1989) 213 Cal. App. 3d 1239, 1245-1246, 262 Cal. Rptr. 317]* .

Legal Topics:

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18-222 California Forms of Pleading and Practice--Annotated §§ 222.305-222.319

[Reserved]

§§ 222.305[Reserved]

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18-222 California Forms of Pleading and Practice--Annotated § 222.320

§ 222.320 Applicable Law

For purposes of debt liability, no distinction is made between contract and tort. As defined by statute, a "debt" is an obligation incurred by a married person before or during marriage, whether based on contract, tort, or otherwise [*Fam. Code § 902*]. Notwithstanding the general statutes governing the liability of community estate property for debts [*Fam. Code §§ 2620-2624*], all separate debts, including debts incurred by a spouse during marriage and before separation that were not incurred for the benefit of the community, must be confirmed without offset to the spouse who incurred the debt [*Fam. Code § 2625*]. A debt based on tort is incurred at the time the tort occurs [*Fam. Code § 903(b)*].

Legal Topics:

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4. Rules Specific To Tort Liability

18-222 California Forms of Pleading and Practice--Annotated § 222.321

§ 222.321 Torts Committed During Marriage

[1] General Rule

[a] Personal Liability

Neither spouse is personally liable for any injury or damage caused by the other spouse except when he or she would have been held be liable for the injury or damage if the marriage did not exist [*Fam. Code § 1000(a)*]. Although imputed negligence between spouses based solely on the marriage relationship has been abolished [*Fam. Code § 783*], negligence sometimes may be imputed between spouses on grounds independent of the fact that the spouses are married, such as when one spouse is driving an automobile with the other's consent [*see, e.g., Cooke v. Tsipouroglou (1963) 59 Cal. 2d 660, 664, 31 Cal. Rptr. 60, 381 P.2d 940* ; *see Veh. Code § 17150*; *cf. International Service Ins. Co. v. Gonzales (1987) 194 Cal. App. 3d 110, 115, 239 Cal. Rptr. 341* (insurance coverage denied to husband who drove wife's vehicle when insurance had been issued during wife's former marriage)]. If one spouse is found vicariously liable for the other's tort, theseparate property of the passively liable spouse is subject to execution for the tort committed by the actively liable spouse [*see Fam. Code § 913(a)*].

[b] Corporate Liability

Similarly, one spouse may be personally liable for a tortious act of a corporation that is controlled primarily by the other spouse if the requirements for imposing *alter ego* liability on the first spouse are met. One spouse's mere community interest in a corporation controlled by the other spouse and passive receipt of benefits from the other spouse's mishandling of the corporation, however, are insufficient to impose such liability [*see Firstmark Capital Corp. v. Hempel Fin. Corp. (9th Cir. 1988) 859 F.2d 92, 94-95* ; *cf. Coppola v. Superior Court (1989) 211 Cal. App. 3d 848, 862, 259 Cal. Rptr. 811]* .

[2] Satisfaction of Liability

[a] In General

The liability of a married person for death or injury to person or property must be satisfied in the following manner [*Fam. Code § 1000(b)*]:

(1) If the liability of the married person is based on an act or omission that occurred while the married person was performing an activity for the benefit of the community, the liability must be satisfied first from property of the community estate, then from the person's separate property;

(2) If the liability of the married person is not based on an act or omission that occurred while the married person was performing an activity for the benefit of the community, the liability must be satisfied first from the person's separate property, then from the community estate property.

This rule does not apply to the extent that the liability is satisfied out of the liability insurance proceeds, regardless of whether the proceeds are community estate property or separate property [*Fam. Code § 1000(c)*]. In addition, notwithstanding the general statutory reimbursement provisions [*Fam. Code § 920*], this right of reimbursement must be exercised within seven years after the spouse in whose favor the right arises has actual knowledge of the application of the property to the satisfaction of the debt [*Fam. Code § 1000(c)*; *see In re Marriage of Stitt, (1983) 147 Cal. App. 3d 579, 195 Cal. Rptr. 172]* .

Liabilities not stemming from an act or omission of a married person while performing an activity for the benefit of the community must be assigned, without offset, to the spouse whose act or omission provided the basis for liability [*Fam. Code § 2627*; *see Fam. Code § 1000(b)(2)*].

The order in which creditors may satisfy tort claims from the spouses' property if the tort was not an act or omission that occurred while a spouse was performing an activity for the benefit of the community is set forth by statute [*Fam. Code § 1000(b)(2)*]. This provision does not forbid one spouse from later disclaiming responsibility for the tort liability of the other spouse in a dissolution proceeding [*In re Marriage of Stitt (1983) 147 Cal. App. 3d 579, 588, 195 Cal. Rptr. 172* ; *but see In re Marriage of Hirsch (1989) 211 Cal. App. 3d 104, 110, 259 Cal. Rptr. 39* (opinion in *Stitt* is incorrect to extent it holds that *negligent* conduct of spouse engaged in activity for benefit of community provides sufficient justification to characterize debt as separate obligation)]. The underlying statute does not constitute a legislative return to the pre-1970 "fault" concept in dividing marital property, however--it is a creditor's statute. Thus, tortious conduct that *benefits* the community, whether *intentional* or *negligent*, can create a community debt [*In re Marriage of Hirsch (1989) 211 Cal. App. 3d 104, 110, 259 Cal. Rptr. 39* ; *see In re Marriage of Bell (1996) 49 Cal. App. 4th 300, 309-310, 56 Cal. Rptr. 2d 623]* .

[b] Criminal Activity or Intentionally Tortious Conduct

A court may order that the remaining community property be divided in a manner that will carry out the law's intention that only responsible participants in crime or tort bear the loss, at least when it has conclusive evidence of criminal activity that culminated in financial consequences at the time the marriage was coming to an end [*In re Marriage of Stitt (1983) 147 Cal. App. 3d 579, 588, 195 Cal. Rptr. 172* ; *see In re Marriage of Bell (1996) 49 Cal. App. 4th 300, 309-310, 56 Cal. Rptr. 2d 623]* . A shared community debt is created, however, when criminal or intentionally tortious conduct results in obtaining substantial ill-gotten assets for the community. Conversely, an innocent spouse is not required to share in losses incurred by intentionally tortious or criminal conduct of the other spouse if the community derives no benefit. [*In re Marriage of Hirsch (1989) 211 Cal. App. 3d 104, 110-111, 259 Cal. Rptr. 39* ; *see In re Marriage of Bell (1996) 49 Cal. App. 4th 300, 309-310, 56 Cal. Rptr. 2d 623]* . An executed tort judgment is not necessary to establish the nature of the obligation; a settlement agreement made out of community assets when the separate property of the wrongdoing spouse has been exhausted is sufficient to prompt an adjustment of the community property distribution [*In re Marriage of Stitt (1983) 147 Cal. App. 3d 579, 587-588, 195 Cal. Rptr. 172]* .

In bankruptcy proceedings, one spouse's fraud may be imputed to the other spouse under agency principles when the spouses are business partners, thus making a debt incurred by one spouse's fraudulent activity nondischargeable by either spouse. However, fraud is imputed on the basis of the spouses' business partnership or agency relationship, and not on the basis of the marriage relationship alone [*Tsurukawa v. Nikon Precision, Inc. (In re Tsurukawa) (9th Cir. B.A.P. 2002) 287 B.R. 515, 526]* .

[3] Community Torts

California first introduced the concept of community torts, or torts stemming from an act or omission that occurred while a married person was performing an activity for the benefit of the community, in 1975 [*see Fam. Code § 1000(b)* (former *Civ. Code § 5122*, as amended by Stats. 1973, ch. 987 (eff. Jan. 1, 1975))]. Ascertaining those acts or omissions that "benefit the community" can pose some difficulty. In interpreting similar statutes, courts in Arizona and Washington have resorted to the application of agency law to determine the respective liability of community and separate property [*see Babcock v. Tam (9th Cir. 1946) 156 F.2d 116* ; *see also Aichlmayr v. Lynch (1972) 6 Wash. App. 434, 493 P.2d 1026]* .

In California, tortious activity for the benefit of the community may include conduct that either is intentional or negligent [*In re Marriage of Hirsch (1989) 211 Cal. App. 3d 104, 110-111, 259 Cal. Rptr. 39* ; *see In re Marriage of Bell (1996) 49 Cal. App. 4th 300, 309-310, 56 Cal. Rptr. 2d 623* (community benefited from wife's embezzled funds and had to share costs of settlement, but wife was liable for attorney's fees in actions arising from embezzlement and related taxes because husband did not participate in her fraud and could not avoid it; *cf. United States v. Hooper (9th Cir. 2000) 229 F.3d 818, 823* (federal statute subjects innocent spouse's community property interest in drug-sale proceeds or items purchased with drug-sale proceeds to forfeiture)]. One court suggested that community liability could result in the following instances, which it gave as examples [*In re Marriage of Hirsch (1989) 211 Cal. App. 3d 104, 110, 110 n.8, 111, 259 Cal. Rptr. 39* (although unable to determine whether tortious conduct was negligent or intentional, court found that conduct was for community's benefit)]:

(1) A spouse who is an attorney commits malpractice and is held liable for a substantial judgment--if the law practice was an activity intended to produce income for the community, the malpractice judgment would be a shared community debt, even though it results from one spouse's negligence;

(2) A spouse's negligence in driving the family car on a personal errand should have the same result as in (1), above--neither spouse should bear the entire financial burden of such a loss; and

(3) Intentionally tortious (or even criminal) conduct, such as placing embezzled funds into a community account, that results in obtaining substantial ill-gotten assets for the community creates a shared community debt.

The operative statute, *Fam. Code § 1000(b)*, is a creditors' statute, designed for creditors' protection [*In re Marriage of Hirsch (1989) 211 Cal. App. 3d 104, 110, 259 Cal. Rptr. 39]* , that permits recovery both from separate and community property. The distinction between community and separate torts exists solely for purposes of characterizing the property to which the plaintiff must resort first. For example, when the tort is characterized as not arising from an activity for the benefit of the community, the plaintiff first must exhaust the tortfeasor's separate property before looking to the community estate property for satisfaction. The community property is available, however, in the event the tortfeasor's separate property either is nonexistent or insufficient [*Fam. Code § 1000(b)(2)*].

Before relying on out-of-state authority to define the concept of "community tort," counsel should examine the statute under which the sister state case was decided. In some community property states, community property may be reached to satisfy a tort judgment only if the tort occurred in the course of community activity [*see Babcock v. Tam (9th Cir. 1946) 156 F.2d 116* ; *see also Gagan v. Sharar (2004) 376 F.3d 987, 992* (federal judgment obtained in Indiana against

one spouse could be executed in Arizona on community property of both spouses); *Aichlmayr v. Lynch (1972) 6 Wash. App. 434, 493 P.2d 1026]* . In those states, when the tortfeasor has lacked separate property it has sometimes been necessary to strain the concept of "activity for the benefit of the community" to subject community property to liability and avoid injustice. In California, however, as discussed above, community property is ultimately available to satisfy a tort judgment regardless of whether the tortfeasor was acting for the benefit of the community [*Fam. Code § 1000(b)(2)*].

[4] Reimbursement of Community

Fam. Code § 1000(c) does not specifically state a right of reimbursement, but obviously contemplates such a right by setting a time limit for exercising a reimbursement right arising out of the statute. Thus, the statute states that a right of reimbursement under *Fam. Code § 1000(c)* must be exercised within seven years after the spouse in whose favor the right arises has actual knowledge of the application of the property to the satisfaction of the debt [*Fam. Code § 1000(c)*; *cf. Fam. Code § 920(c)* (general reimbursement time limit)]. As a result, to the extent the liability is not satisfied out of insurance proceeds (regardless of their character), reimbursement appears to be available to the community when community property is used to satisfy a tort obligation arising out of one spouse's act or omission that was not for the community's benefit [*see Fam. Code § 1000(c)*].

The measure of reimbursement is the value of the property or interest in property at the time the right arises [*Fam. Code § 920(b)*]. Because of the continuing nature of the marital relationship, in most cases principles of waiver, condonation, and laches prevent any belated attempt at the time of the dissolution proceedings to seek an accounting of all community property losses attributable to the independent wrongs of the spouses. Thus, whether a right to reimbursement will be found in a given case may depend on evidence that the innocent spouse did not waive or condone the other spouse's acts, or the repayment of the obligation created by the other spouse's acts by the community [In re Marriage of Stitt *(1983) 147 Cal. App. 3d 579, 588, 195 Cal. Rptr. 172* (decided before enactment of former *Civ. Code § 5122(c)* (*now see Fam. Code § 1000(c)*), operative January 1, 1985)].

[5] Retroactivity of Debt Provisions

Except as otherwise provided by statute, *Fam. Code § 1000* governs the liability of separate and community property and the personal liability of a married person for a debt enforced on or after January 1, 1985, regardless of whether the debt was incurred before, on, or after that date [*Fam. Code § 930*]. Furthermore, the general provisions of *Fam. Code § 900 et seq.* that govern reimbursement apply to all debts, regardless of whether satisfied before, on, or after January 1, 1985 [*Fam. Code § 931*].

[6] Interspousal Torts

If the negligent or wrongful act or omission of one spouse causes, in whole or in part, injury to the other spouse, the tortfeasor spouse may not use community property to discharge his or her liability to the injured spouse, or to make contribution to any joint tortfeasor, until the separate property of the tortfeasor spouse that is not exempt from enforcement of a money judgment is exhausted [*Fam. Code § 782(a)*]. This rule does not apply if the injured spouse gives written consent to the use of community property to satisfy the tortfeasor spouse's liability after the injury occurs [*Fam. Code § 782(b)*]. These rules do not affect the right to indemnity provided by any insurance or other contract to discharge the tortfeasor spouse's liability, however, regardless of whether the consideration given for the contract consisted of community property [*Fam. Code § 782(c)*].

Notwithstanding any other provisions of the Family Code, a spouse is entitled to an award of all of his or her own retirement and pension benefits if he or she is the victim of a murder attempt by the other spouse [*see Fam. Code § 782.5*]. For further discussion, see *§ 222.77*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationSeparate PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionMarital LiabilitiesTortsVicarious LiabilityFamily MembersSpouses

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PART II. LEGAL BACKGROUND
E. Characterization And Division Of Debts And Related Reimbursement Issues
4. Rules Specific To Tort Liability

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[Reserved]

§§ 222.322[Reserved]

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PART III. RESEARCH GUIDE

18-222 California Forms of Pleading and Practice--Annotated § 222.340

§ 222.340 California Family Law

For discussion of the property rights of parties to a nonmarital relationship, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Chs. 1, 2 (Matthew Bender)

For discussion of general principles regarding characterization and division of property, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Ch. 20 (Matthew Bender)

For discussion of issues regarding characterization and division of particular types of property, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Ch. 21 (Matthew Bender)

For discussion of valuation of property, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Ch. 22 (Matthew Bender)

For discussion of liability for and division of debts, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Ch. 23 (Matthew Bender)

For discussion of management and control of property, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Ch. 24 (Matthew Bender)

For discussion of succession to marital property, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Ch. 25 (Matthew Bender)

For discussion and forms relating to agreements dividing marital property, see Kirkland, Lurvey & Richmond, California Family Law, Practice and Procedure, 2nd ed., chs. 211- 216 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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18-222 California Forms of Pleading and Practice--Annotated § 222.341

§ 222.341 California Family Law Trial Guide

For discussion and trial scripts relating to the trial of general property issues, see California Family Law Trial Guide, Unit 40 et seq. (Matthew Bender)

For discussion and trial scripts relating to the trial of issues regarding family homes, small businesses, and retirement and disability benefits, see California Family Law Trial Guide, Unit 60 et seq. (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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18-222 California Forms of Pleading and Practice--Annotated § 222.342

§ 222.342 Federal Statutes

Federal Uniformed Services Former Spouses' Protection Act (FUSFSPA). *10 U.S.C. § 1408*

Employee Retirement Income Security Act (ERISA). *29 U.S.C. § 1001 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Military & Veterans LawServicemembersRetirementPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)General Overview

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18-222 California Forms of Pleading and Practice--Annotated § 222.343

§ 222.343 State Statutes

[1] General Provisions

Restraining orders regarding disposition of property pending proceedings. *Fam. Code §§ 2045, 6325*

Separate property defined. *Fam. Code § 2502*

Orders. *Fam. Code § 2553*

Judicial arbitration of property issues. *Fam. Code § 2554*

Revision on appeal of trial court disposition of property. *Fam. Code § 2555*

Continuing jurisdiction to award omitted assets and liabilities. *Fam. Code § 2556*

Division of jointly-held separate property interests. *Fam. Code § 2650*

Deferred sale of home. *Fam. Code § 3800 et seq.*

[2] Characterization

Characterization of liabilities. *Fam. Code § 2551*

Community property presumption when title held in joint form. *Fam. Code §§ 2580, 2581*

[3] Rules for Division of Property

Equal division. *Fam. Code § 2550*

Assignment of liabilities. *Fam. Code § 2551*

Valuation date. *Fam. Code § 2552*

Single-asset award when economic circumstances warrant. *Fam. Code § 2601*

Offset for misappropriated property. *Fam. Code § 2602*

Personal injury damages. *Fam. Code § 2603*

Domestic violence damages. *Fam. Code § 2603.5*

Disposition of small estate when one spouse cannot be located. *Fam. Code § 2604*

Retirement benefits. *Fam. Code §§ 782.5, 2610*

Debts. *Fam. Code § 2620 et seq.*

Division of real property outside *California. Fam. Code § 2660*

[4] Reimbursement

Reimbursement for separate property contributions to community asset or to separate property of other spouse. *Fam. Code § 2640*

Reimbursement for community contributions to education or training. *Fam. Code § 2641*

Legal Topics:

For related research and practice materials, see the following legal topics:
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PART III. RESEARCH GUIDE

18-222 California Forms of Pleading and Practice--Annotated § 222.344

§ 222.344 Law Reviews

[1] Miscellaneous Subjects

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Abney, *Joint Tenancy/Community Property Presumption and Separate Property Reimbursement: Legislative History of California Law Provides Guidance*, 11 Com. Prop. J. 275 (1984)

Pedlar, *Community Property and the Bankruptcy Reform Act of 1978*, 7 Com. Prop. J. 283 (1981)

Reppy, *Debt Collection for Married Californians: Problems Caused by Transmutations, Single-Spouse Management, and Invalid Marriage, 18 San Diego L. Rev. 143 (1981)*

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[2] Character of Property

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Weekley, *Appreciation of a Closely-Held Business Interest Owned Prior to Marriage--Is It Separate or Community Property*, 7 Com. Prop. J. 261 (1981)

Young, *Community Property Classification of Credit Acquisitions in California: Law Without Logic, 17 Cal. W.L. Rev. 173 (1981)*

Comment, *Form of Title Presumptions in California Community Property Law: The Test for a "Common Understanding or Agreement," 15 U.C. Davis L. Rev. 95 (1981)*

Traverse, *In re Marriage of Stenquist: Equal Protection for the Disability Pension Recipient in California Community Property Law, 7 Hast. Const. L.Q. 1061 (1980)*

Reppy, *Learning to Live With* Hisquierdo, 6 Com. Prop. J. 5 (1979)

Comment, *Community Property Interests in the Right of Publicity: Fame and/or Fortune, 25 U.C.L.A. L. Rev. 1095 (1978)*

McNamara, *California Community Property Aspects of Executive Compensation*, 13 U.S.C. Tax Inst. 151 (1978)

Peschel and Spurgeon, *Community Property Trusts*, 5 Com. Prop. J. 164 (1978)

Note, *Community Property--For Apportionment of Community Business Where Appreciation Is Attributable to the Husband's Efforts After Separation-- In re Marriage of Imperato, 45 Cal. App. 3d 432, 119 Cal. Rptr. 590 (1975) , 16 Santa Clara Law. 682 (1976)*

[3] Division of Property

Chernow, Sommer, Mcdonald and LaGuardia, *Valuation of Real Property*, 27 Bev. Hills B.A.J. 5 (Winter 1993)

Rosenson, *Disposition of Community Property Partnership Interests: Current Approaches in Need of a Statutory Solution*, 27 Bev. Hills B.A.J. 39 (Winter 1993)

Hume, *Enhanced Earning Capacity of One Spouse as a Factor in the Property Settlement or in Maintenance*, 15 Com. Prop. J. 31 (Jan. 1989)

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Process? 16 Pacific L.J. 1007 (1985)

Glazer, *Divorce and the Financial Planner*, 18 Bev. Hills B.J. 170 (1984)

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Comment, *The Mix-Hicks Mix: Tracing Troubles Under California's Community Property System, 26 U.C.L.A. L. Rev. 1231 (1979)*

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For related research and practice materials, see the following legal topics:
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18-222 California Forms of Pleading and Practice--Annotated § 222.345

§ 222.345 Text References

California Community Property With Tax Analysis (Matthew Bender)

Ch. 1, *The Accountant's Role as an Expert and Consultant in Community Property Litigation*

Ch. 2, *Characterization of Community Property*

Ch. 5, *Division of Property on Dissolution of Marriage*

Ch. 6, *Accountant's Valuation of Property*

Valuation and Distribution of Marital Property (Matthew Bender)

Ch. 22, *Valuation of a Closely Held Corporation, Small Business or Professional Practice*

Ch. 27, *Valuation of Real Property*

Ch. 45, *Pension Evaluation for Marriage Dissolution Actions: A Pension Evaluator's Perspective*

Legal Topics:

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[Reserved]

§§ 222.346[Reserved]

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PART IV. FORMS

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§ 222.360 Order for Deferred Sale of Home [Fam. Code § 3800 et seq.]

[1] FORM Order for Deferred Sale of Home [Fam. Code § 3800 et seq.]

THE COURT FURTHER FINDS AS FOLLOWS:

[*SET FORTH court's findings*]

1. It is economically feasible for the parties to continue to pay the note secured by the trust deed on their family residence, property taxes, and insurance for the deferral period, and to maintain the condition of the home comparable to that at the time of trial.

2. A deferred sale of the residence would minimize the adverse impact of the dissolution on the parties' minor child, _____ [*state child's name, e.g.,* George B. Brown], in that _____ [*state relevant factors, e.g.,* the child has resided in the home for more than 10 years, is well established in a convenient neighborhood school, and shows emotional disturbance over a possible change in residence, and in that the resident parent, _____ (*name, e.g.,* Mary P. Brown), is employed near the home, the parents would incur substantial financial difficulties and tax consequences in providing other suitable housing, and the nonresidential parent, _____ (*name, e.g.,* Robert Q. Brown), will not be substantially burdened economically by the deferred sale].

THEREFORE, THE COURT FURTHER ORDERS AS FOLLOWS:

[*SET FORTH terms of order*]

1. The sale of the following community property, referred to hereafter as the "family residence," is temporarily deferred: The real property _____ [*state legal description, e.g.,* in the County of Pacifica, State of California,

more particularly described as follows: Lot 17A of Matton as shown on the official plat thereof, recorded November 12, 1965, in Book M of Maps, Map No. 56, in the Official Records in the office of the County Recorder of Pacifica County, California].

2. _____ [*Set forth party awarded home, e.g.,* Petitioner Mary P. Brown] is awarded temporary exclusive use and possession of the family residence, as custodial parent of the parties' minor children, _____ [*set forth names of child/children, e.g.,* George B. Brown and Ellen C. Brown].

3. The period of temporary deferral and exclusive use and possession shall terminate _____ [*state termination time, e.g.,* at the time the youngest child of the parties, George B. Brown, reaches the age of 18 years].

4. _____ [*State responsibilities of party awarded home, e.g.,* Petitioner Mary P. Brown is responsible for the payment of insurance premiums to maintain adequate coverage on the marital residence during the deferral period and for the payment of property taxes].

5. _____ [*State responsibilities of other party, e.g.,* Respondent Robert Q. Brown is responsible for payment of the note secured by the trust deed on the family residence].

[*Continue, with other terms of order*]

6. Petitioner and Respondent must maintain the family residence in a condition comparable to that at the time of trial. The parties shall share equally the costs of routine maintenance and capital improvements to the residence.

7. Neither party may encumber the family residence with any other encumbrances than those existing at the time of trial.

8. The court hereby reserves jurisdiction over the deferral of the sale of the family residence for the purpose of determining any and all issues that arise with respect to the order, including maintenance of the home and tax consequences to each party.

[2] Use of Form

This form is an order for the deferred sale of a family home, pursuant to *Fam. Code § 3800 et seq.* The order may be used as an attachment to a judgment of marital dissolution or legal separation. In an appropriate case, the form may be modified for use as an order for temporary relief pending trial. For forms that illustrate attachments to dissolution judgments, see *Ch. 221, Dissolution of Marriage: Procedure, § 221.90*.

[3] State Statutes

Deferred sale of home order. *Fam. Code § 3800 et seq.*

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Chapter 223 DISSOLUTION OF MARRIAGE: CHILD CUSTODY

19-223 California Forms of Pleading and Practice--Annotated 223.syn

§ 223.syn Synopsis to Chapter 223: DISSOLUTION OF MARRIAGE: CHILD CUSTODY

§ 223.01 Scope

§ 223.02 Cross References

§§ 223.03-223.09 [Reserved]

§ 223.10 Governing Law

§ 223.11 Jurisdiction to Make Custody Orders

[1] In General

[2] Meaning of "Children of Marriage"

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§ 223.01 Scope

This chapter discusses child custody and related issues in the context of a marital dissolution. It covers the court's jurisdiction to make custody and visitation determinations in a dissolution proceeding; the factors considered by the court in making custody and visitation determinations, including the "best interests of the child" standard and parenting plans [*see §§ 223.63 -223.65*]; types of custody arrangements; the procedures for initiating temporary [*see §§ 223.60, 223.61*] and permanent custody proceedings; mandatory mediation of custody disputes; custody trials; and modification of custody and visitation orders generally and specifically with respect to change of the custodial parent's residence [*see §§ 223.66 -223.68*]. Custody and visitation rights of nonparents are also addressed [*see §§ 223.61, 223.62*]. For discussion of interstate and international custody jurisdiction issues under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA--*Fam. Code § 3400 et seq.*), as well as discussion of nonparent custody and visitation issues not arising within the context of the termination of a marriage, see Ch. 394, *Parent and Child* . Parental custody and visitation issues not arising in this context are also discussed in that chapter.

For discussion of child support issues, which are ordinarily litigated at the same time as custody issues in marital dissolution proceedings, see Ch. 224, *Dissolution of Marriage: Child Support* . The Uniform Parentage Act (UPA) [*Fam. Code § 7600 et seq.*] is discussed only peripherally in this part, since children of a marriage are not typically the subjects of parentage actions. For discussion of actions under the UPA, see Ch. 412, *Paternity* . Proceedings to enforce interstate custody orders are discussed in Ch. 260, *Family Law Enforcement: Foreign Judgments* .

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§ 223.02 Cross References

For forms and discussion relating to child support, see Ch. 224, *Dissolution of Marriage: Child Support*

For discussion of child custody and visitation issues in annulment proceedings, see Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights*

For forms and discussion relating to juvenile court dependency proceedings, see Ch. 328, *Juvenile Courts: Dependency Proceedings*

For forms and discussion relating to custody and visitation issues not arising within the context of the termination of a marriage, see Ch. 394, *Parent and Child*

For discussion of actions under the Uniform Parentage Act, and general discussion and forms relating to establishment of the parent--child relationship, see Ch. 412, *Paternity*

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[Reserved]

§§ 223.03[Reserved]

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§ 223.10 Governing Law

Child custody proceedings in California are governed by *Fam. Code § 3000 et seq.* If more than one state may have jurisdiction to make a custody determination, California's version of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) may also apply [*Fam. Code § 3400 et seq.*].

Although child custody issues are generally governed by state law, including the forum state's version of the UCCJEA, certain federal statutes address interstate and international custody problems. The federal Parental Kidnapping Prevention Act [*28 U.S.C. § 1738A*] provides remedies for custodial interference on an interstate or international level. The federal Parent Locator Service [*see 42 U.S.C. § 663*] and the Federal Fugitive Felon Act [*see 18 U.S.C. § 1073*; Pub. L. No. 96-611 § 10(a)] also contain provisions dealing with this problem.

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§ 223.11 Jurisdiction to Make Custody Orders

[1] In General

In a proceeding for dissolution of marriage, nullity of marriage, or for legal separation of the parties, the court has subject matter jurisdiction to inquire into, and render any judgment, and make appropriate orders concerning the custody of minor children of the marriage [*Fam. Code § 2010(b)*; *see Fam. Code § 3022*]. A court has no jurisdiction to order visitation between a noncustodial parent and an adult child, even a disabled adult child for whom the noncustodial parent is paying child support [*see In re Marriage of Jensen (2003) 114 Cal. App. 4th 587, 592-598, 7 Cal. Rptr. 3d 701* (marital settlement agreement did not give court continuing jurisdiction to order visitation between noncustodial father and adult disabled child or to order custodial mother to cooperate and encourage visitation)]. All subject matter jurisdiction under the Family Code is in the superior court [*Fam. Code § 200*; *see Greene v. Superior Court (1951) 37 Cal. 2d 307, 312, 231 P.2d 821* (venue may be transferred to superior court in another county if child moves there)].

Family Code Section 2010 is not a jurisdictional statute in the fundamental sense of involving an entire absence of power to hear or determine the matter. Rather, it simply places a limit on the court's authority. While fundamental jurisdiction can never be conferred by consent, acts in excess of statutory jurisdictional limitations are subject to principles of consent and waiver [*In re Marriage of Hinman (1992) 6 Cal. App. 4th 711, 716-718, 8 Cal. Rptr. 2d 245* (waiver by natural parent of right to object to order awarding custody to stepparent by listing children as children of marriage in pleadings); *see In re Marriage of Johnson (1979) 88 Cal. App. 3d 848, 849-852, 152 Cal. Rptr. 121* (estoppel of right to deny that child is issue of marriage by representing child as own and holding child out to others as own); *cf. Weir v. Ferreira (Estate of Kelm) (1997) 59 Cal. App. 4th 1509, 1521, 70 Cal. Rptr. 2d 33* (prior dissolution judgment found parentage as to child for whom party was only guardian)].

In child custody matters, a family court retains jurisdiction and a family law case remains pending even after a judgment of dissolution to monitor a child's welfare [*In re Marriage of Kreiss (2004) 122 Cal. App. 4th 1082, 1084, 19 Cal. Rptr. 3d 260* (error to refuse to enforce parental discovery stipulation in postdissolution custody matter)].

[2] Meaning of "Children of Marriage"

The phrase "children of the marriage" as used in *Fam. Code § 2010(b)* includes the parties' natural and adopted children, but does not include children as to whom a party's parental rights have previously been terminated [*see Marckwardt v. Superior Court (1984) 150 Cal. App. 3d 471, 475-476, 198 Cal. Rptr. 41* ; *see also Fam. Code §§ 8616* (adoptive parents have all legal rights of parent-child relationship), 8617 (adoption relieves natural parents of all rights over child)] or children who are the natural children of one party but the stepchildren of the other [*see In re Marriage of W. (2003) 114 Cal. App. 4th 68, 72-75, 7 Cal. Rptr. 3d 461* ; *Perry v. Superior Court (1980) 108 Cal. App. 3d 480, 484, 166 Cal. Rptr. 583* (court may not issue custody orders with regard to stepchildren in dissolution proceeding); *but see Fam. Code § 3101(a)(1)* (stepparent visitation)].

The presumption that a child born to a married woman cohabiting with her husband is a child of the marriage [*Fam. Code § 7540*] is discussed in Ch. 412, *Paternity* .

[3] Jurisdictional Conflict

[a] Interstate

California's subject matter jurisdiction over child custody disputes is subject to the federal Parental Kidnapping Prevention Act [*28 U.S.C. § 1738A*; *see § 223.11[4]*] and California's version of the Uniform Child Custody and Jurisdiction Act [*Fam. Code § 3400 et seq.*; *see* Ch. 394, *Parent and Child*]. These statutes must be considered in any custody dispute with interstate or international aspects.

[b] Intrastate

If two or more courts in California have concurrent jurisdiction, the general rule is that the court first assuming jurisdiction retains it to the exclusion of all other courts in which the action might have been initiated. Thus, the California court that first makes a custody award retains exclusive jurisdiction over custody, and no other court in California has jurisdiction. For example, a court cannot appointa guardian of the person of a minor if another court in California has made an earlier custody award in a dissolution proceeding [*Greene v. Superior Court (1951) 37 Cal. 2d 307, 310-313, 231 P.2d 821]* . However, if circumstances change or the child moves to a different county within the state, a motion for change of venue, made in the county of original jurisdiction, may be appropriate [*Greene v. Superior Court (1951) 37 Cal. 2d 307, 312, 231 P.2d 821* ; *see Ferreira v. Ferreira (1973) 9 Cal. 3d 824, 843, 109 Cal. Rptr. 80, 512 P.2d 304* ; for discussion of motions to change venue, *see* Ch. 221, *Dissolution of Marriage: Procedure*].

[c] Juvenile Court Jurisdiction

An important exception to the rule that the first court to assume jurisdiction generally retains jurisdiction (*§ 223.11[3]*) is that the juvenile court has exclusive jurisdiction over custody matters regarding minors adjudged dependent children of the juvenile court [*see Welf. & Inst. Code §§ 302, 304*; *Dupes v. Superior Court (1917) 176 Cal. 440, 441-442, 168 P. 888* ; *In re Farley (1958) 162 Cal. App. 2d 474, 478-479, 328 P.2d 230]* . No other division of the superior court may hear proceedings under the Family Code regarding the custody of a dependent minor [*Welf. & Inst. Code § 304*; *see In re William T. (1985) 172 Cal. App. 3d 790, 797, 799-800, 218 Cal. Rptr. 420* (court with concurrent jurisdiction over related custody matters involving minor may not enforce custody orders that conflict with orders properly issued by juvenile court)]. However, the domestic relations division of a superior court may hear custody issues involving a minor who was, but is no longer, a dependent of the juvenile court [*Fam. Code § 304*].

There is some uncertainty whether exclusive juvenile court jurisdiction is limited by collateral estoppel principles. In one case, the court stated, in dicta, that a juvenile court may not take jurisdiction over a child solely on the basis of allegations that have been fully considered in a previous family law proceeding [*In re Brendan P. (1986) 184 Cal. App. 3d 910, 916-920, 230 Cal. Rptr 720]* . However, other courts, while refusing to find collateral estoppel applicable on the facts, have indicated that such a limitation is unsound and should not be applied [*see In re Travis C. (1991) 233*

Cal. App. 3d 492, 501-504, 284 Cal. Rptr. 469 ; *In re Benjamin D. (1991) 227 Cal. App. 3d 1464, 1471-1472, 278 Cal. Rptr. 468]* .

The juvenile court may terminate its jurisdiction over a dependent minor and transfer its custody and visitation order to the general jurisdiction of the superior court [*Welf. & Inst. Code § 362.4*; *see In re Jennifer R. (1993) 14 Cal. App. 4th 704, 711-713, 17 Cal. Rptr. 2d 759]* . Such a transfer is sometimes referred to as an "exit order" [*see In re Marriage of David & Martha M. (2006) 140 Cal. App. 4th 96, 102, 44 Cal. Rptr. 3d 388* ; *In re Katherine M. (1994) 27 Cal. App. 4th 91, 96, 33 Cal. Rptr. 2d 298]* , but is more properly termed a juvenile court custody or visitation order on termination of jurisdiction. If there was another marital or paternity proceeding concerning the minor, the juvenile court's order must be filed in that proceeding. If no other proceeding was filed or is pending relating to the custody of the child, the juvenile court order may be used as the sole basis for opening a file with an assigned case number in the superior court in the county in which the custodial parent resides [see *Cal. Rules of Ct., Rule 5.475* (procedure for filing juvenile court order with superior court)]. Thereafter, the parties may move to modify the order in the superior court proceeding in which it was filed [*Welf. & Inst. Code § 362.4*; *In re Michael B. (1992) 8 Cal. App. 4th 1698, 1704-1705, 11 Cal. Rptr. 2d 290* ; *see In re Jennifer R. (1993) 14 Cal. App. 4th 704, 712-714, 17 Cal. Rptr. 2d 759]* .

For further discussion of juvenile dependency proceedings, see Ch. 328, *Juvenile Courts: Dependency Proceedings* .

[4] Federal Court Jurisdiction

Federal courts do not have jurisdiction to issue child custody decrees [*Ankenbrandt v. Richards (1992) 504 U.S. 689, 112 S. Ct. 2206, 119 L. Ed. 2d 468, 482]* . Federal habeas corpus is also not available as a remedy in child custody matters [*Lehman v. Lycoming County Children's Services (1982) 458 U.S. 502, 513-516, 102 S. Ct. 3231, 73 L. Ed. 2d 928]* . Moreover, the federal Parental Kidnapping Prevention Act of 1980 [*28 U.S.C. § 1738A*] does not create an implied private cause of action in federal court to determine which of two conflicting state custody decisions is valid [*Thompson v. Thompson (1988) 484 U.S. 174, 187, 108 S. Ct. 513, 98 L. Ed. 2d 512]* .

Parents have, however, brought actions in federal court against their former spouses and various governmental defendants, based on alleged tortious conduct and constitutional violations arising from the wrongful deprivation of the plaintiff's right to child custody [*see, e.g., Coats v. Woods (9th Cir. 1987) 819 F.2d 236, 236-237 , cert. denied, 484 U.S. 802* (alleging deprivation of liberty interest in violation of *42 U.S.C. §§ 1983, 1985(2),* and *1985(3)*); *Meyers v. Contra Costa County Dep't of Social Services (9th Cir. 1987) 812 F.2d 1154, 1155 , cert denied, 484 U.S. 829* (alleging defendants conspired under color of state law and without due process to prevent plaintiff from associating with his children in violation of *42 U.S.C. § 1983*)]. Some of these actions have been dismissed from federal court under the doctrine of equitable abstention, because the subject matter of domestic relations cases has traditionally been considered an area of state interest [*see, e.g., Coats v. Woods (9th Cir. 1987) 819 F.2d 236, 236-237 , cert. denied, 484 U.S. 802* ; *Peterson v. Babbitt (9th Cir. 1983) 708 F.2d 465, 466]* . The United States Supreme Court has now limited the scope of domestic relations abstention to situations in which related issues are pending in other proceedings in state court [*Ankenbrandt v. Richards (1992) 504 U.S. 689, 112 S. Ct. 2206, 119 L. Ed. 2d 468, 483-484]* .

In addition, under *Younger v. Harris (1971) 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669* , the U.S. Supreme Court espoused a strong federal policy against federal court interference with pending state judicial proceedings. " *Younger*" abstention is required if state proceedings are (1) on-going, (2) implicate important state interests, and (3) provide a plaintiff with an adequate opportunity to litigate federal claims. In such instances, federal cases must be dismissed [*H.C. v. Koppel (9th Cir. 2000) 203 F.3d 610, 613]* .

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§ 223.12 Discretion of Court and Factors Considered in Custody Determinations

[1] In General

Fam. Code § 3040(b) grants the court the widest discretion to choose a parenting plan that is in the best interests of the child [*In re Marriage of Brown & Yana (2006) 37 Cal. 4th 947, 38 Cal. Rptr. 3d 610, 127 P.3d 28* ; *see § 223.12[5]*]. There is no abuse of discretion if there is substantial evidence to support the findings of the trial court [*Sanchez v. Sanchez (1961) 55 Cal. 2d 118, 126, 10 Cal. Rptr. 261, 358 P.2d 533* ; *In re Marriage of Russo (1971) 21 Cal. App. 3d 72, 86, 98 Cal. Rptr. 501]* . Substantial evidence has been defined as evidence that is reasonable in nature, credible, and of solid value [*Forslund v. Forslund (1964) 225 Cal. App. 2d 476, 499-500, 37 Cal. Rptr. 489* ; *Stack v. Stack (1961) 189 Cal. App. 2d 357, 368, 11 Cal. Rptr. 177]* . An abuse of discretion exists, however, if the court rules on the basis of preexisting bias, rather than on the evidence adduced [*In re Marriage of Schwartz (1980) 104 Cal. App. 3d 92, 95, 163 Cal. Rptr. 408* (bias against joint custody arrangement)].

To guide the courts in exercising discretion, the Legislature has set forth in *Fam. Code § 3011* certain specific issues that the court must consider [*see Fam. Code § 3040(a)*]. These include the following [*Fam. Code § 3011*]:

(1) The child's health, safety, and welfare,

(2) An history of domestic violence or substance abuse (*see § 223.12[1]*), and

(3) The nature and amount of contact with both parents (*see § 223.12[5][b])*.

[2] Effect of Preference of Child

If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court must consider and give due weight to his or her wishes in making a custody order [*Fam. Code § 3042(a)*; *see In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1101, 12 Cal. Rptr. 3d 356, 88 P.3d 81* (in move-away case, court

should consider wishes of children if they are mature enough for such inquiry to be appropriate)]. Although the court must consider the child's preference, it is not bound by that preference. The preference is evidence to be weighed by the court with all other evidence concerning the best interests of the child [*Sanchez v. Sanchez (1961) 55 Cal. 2d 118, 124-125, 10 Cal. Rptr. 261, 358 P.2d 533* ; *see In re Marriage of Mehlmauer (1976) 60 Cal. App. 3d 104, 110, 131 Cal. Rptr. 325* (child's preference may be rejected if court finds it is not supported by mature reasoning)].

There is no automatic chronological age below which a child is not of sufficient age and capacity to reason. The court in its discretion may consider the preference of children as young as seven or eight years [*Stuart v. Stuart (1962) 209 Cal. App. 2d 478, 482-483, 25 Cal. Rptr. 893* ; *Kelly v. Kelly (1946) 75 Cal. App. 2d 408, 413-414, 171 P.2d 95]* . The likelihood that the child's preference will be honored, however, increases with the child's age. It has been observed that there are practical difficulties involved in placing court-coerced restraints on adolescents that require them to live with one parent when they prefer to live with the other parent [*Barton v. Barton (1964) 230 Cal. App. 2d 43, 49, 40 Cal. Rptr. 676]* .

The child's preference is entitled to greater consideration in a modification proceeding than in an initial custody determination, because there is less uncertainty regarding how the custody arrangement will work out at the time of modification proceedings than when the parents first separated. A child's preference must be given serious consideration by the court in acting on a motion for modification of custody if the following circumstances exist: (1) the issue is whether children will be moved from the community where they have lived for most of their lives; (2) an excellent parent who remains in that community wishes to have the children reside with him or her; and (3) the children, for valid reasons, express a preference to remain in the community [*In re Marriage of Rosson (1986) 178 Cal. App. 3d 1094, 1098, 1102-1103, 224 Cal. Rptr. 250]* .

The court must control the examination of the child so as to protect his or her interests. The court may preclude the calling of the child as a witness if the child's interests so indicate, and may provide alternative means of obtaining information regarding the child's preferences [*Fam. Code § 3042(b)*; *see Evid. Code § 765*].

[3] Effect of Temporary Custody Order

The general rule is that custody is to be decided de novo at trial. The court's permanent custody order is made according to the child's best interests despite a different temporary order or a stipulation of the parties [*In re Marriage of Lewin (1986) 186 Cal. App. 3d 1482, 1487-1489, 231 Cal. Rptr. 433* ; *see Montenegro v. Diaz (2001) 26 Cal. 4th 249, 258, 109 Cal. Rptr. 2d 575, 27 P.3d 289* ("temporary custody orders serve an important role in child custody proceedings" and parties should not be discouraged from entering into these stipulations)]. It is not necessary to show a change of circumstances from those that existed when the existing custodial arrangement was established, whether by pendente lite order or extrajudicial agreement [*Burchard v. Garay (1986) 42 Cal. 3d 531, 535-539, 229 Cal. Rptr. 800, 724 P.2d 486* ; *In re Marriage of Lewin (1986) 186 Cal. App. 3d 1482, 1487-1489, 231 Cal. Rptr. 433* ; *see Catherine D. v. Dennis B. (1990) 220 Cal. App. 3d 922, 927-930, 269 Cal. Rptr. 547* (change of circumstances not required unless there has been prior actual judicial determination that particular custodial plan is in best interests of child); *see also In re Marriage of Rose & Richardson (2002) 102 Cal. App. 4th 941, 952, 126 Cal. Rptr. 2d 45]* . For purposes of determining when a stipulated order is temporary or permanent in order to apply either the best interests or changed circumstances standard, a stipulated custody order will not be considered a permanent custody order unless there is a clear, affirmative indication that the parties intended that it be a permanent order [*Montenegro v. Diaz (2001) 26 Cal. 4th 249, 258, 109 Cal. Rptr. 2d 575, 27 P.3d 289* ; *see In re Marriage of Rose & Richardson (2002) 102 Cal. App. 4th 941, 944,126 Cal. Rptr. 2d 45* (custody orders in stipulated dissolution judgment were nonfinal orders)].

However, counsel should not misconstrue this general rule as meaning that the temporary custodial arrangement will not be a significant factor in making a permanent custody order. In *Burchard v. Garay* [*Burchard v. Garay (1986) 42 Cal. 3d 531, 229 Cal. Rptr. 800, 724 P.2d 486]* , the California Supreme Court stressed the importance of continuity and stability in custody arrangements [*Burchard v. Garay (1986) 42 Cal. 3d 531, 535, 229 Cal. Rptr. 800, 724 P.2d*

486 ; *see* *Adoption of Matthew B. (1991) 232 Cal. App. 3d 1239, 1264, 284 Cal. Rptr. 18* (stability, continuity, and loving relationship are *the most important criteria* for determining best interests of child [emphasis in original])]. Thus, the length of time that the child has been in the custody of the parent who has custody at the time of the hearing must be considered by the court [*Cochran v. Cochran (1966) 240 Cal. App. 2d 418, 421, 49 Cal. Rptr. 670]* . Obviously, the longer the temporary custodial arrangement is in effect, the greater the difficulty in convincing a court that it should be altered [*see* *In re Marriage of Lewin (1986) 186 Cal. App. 3d 1482, 1488, 231 Cal. Rptr. 433]* . As between two relatively equal custodial proposals of parents who are both able to provide an appropriate home, it is unlikely that a court will remove the child from a home where appropriate care is being provided. Therefore, the parent who does not obtain temporary custody should expect to have to make some affirmative showing of detriment if the child is left in the home of the other parent [*see* *In re Marriage of Lewin (1986) 186 Cal. App. 3d 1482, 1489 n.3, 231 Cal. Rptr. 433]* .

[4] Effect of Agreement of Parents

Parental agreements regarding child custody, while not void or illegal, are not binding on the court. The best interests of the child control custody determinations, regardless of the parents' agreement [*Adoption of Matthew B. (1991) 232 Cal. App. 3d 1239, 1258-1259, 284 Cal. Rptr. 18* ; *Stewart v. Stewart (1955) 130 Cal. App. 2d 186, 193, 278 P.2d 441* ; *see § 223.12[5][a]* et seq]. Nevertheless, in the overwhelming majority of cases, parental agreements will be approved by the court. In nearly every case, it is preferable that the parents come to some resolution of custody themselves rather than litigate the issue for determination by the court [*see* *Montenegro v. Diaz (2001) 26 Cal. 4th 249, 255, 109 Cal. Rptr. 2d 575, 27 P.3d 289* (although statutory scheme provides for court determinations of custody and visitation, private resolutions are preferred)].

Stipulations between parents that attempt to divest the court of continuing jurisdiction over child custody are void and unenforceable regardless of any possible estoppel argument [*In re Marriage of Goodarzirad (1986) 185 Cal. App. 3d 1020, 1026, 230 Cal. Rptr. 203* (stipulation to give up custody rights and agree to termination of parental rights in exchange for forbearance on child support)]. A court acts in excess of its jurisdiction if it approves such a stipulation [*In re Marriage of Goodarzirad (1986) 185 Cal. App. 3d 1020, 1030, 230 Cal. Rptr. 203]* .

Conversely, the parties cannot, by their agreement, confer jurisdiction on the court that it does not have [*In re Marriage of Jensen (2003) 114 Cal. App. 4th 587, 593, 598, 7 Cal. Rptr. 3d 701]* . For example, a court does not have subject matter jurisdiction to enforce provisions of a marital settlement agreement that require the mother to encourage and implement visitation by the parties' adult disabled child with his father [*In re Marriage of Jensen (2003) 114 Cal. App. 4th 587, 593-598, 7 Cal. Rptr. 3d 701]* . Under the Family Code, a court may only make custody and visitation orders concerning the parties' *minor* children [*see Fam. Code §§ 2010(b), 3022*].

[5] "Best Interests of Child" Standard

[a] General Parameters of Best Interest Test

The guiding principle followed by the courts in making child custody determinations is the best interest of the child [*see Fam. Code § 3011*; *In re Marriage of Brown & Yana (2006) 37 Cal. 4th 947, 38 Cal. Rptr. 3d 610, 127 P.3d 28* ; *In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1088, 12 Cal. Rptr. 3d 356, 88 P.3d 81* ; *Keith R. v. Superior Court (2009) 174 Cal. App. 4th 1047, 1053, 96 Cal. Rptr. 3d 298* (child's welfare is paramount and overarching concern)].

Courts must determine the child's best interests solely from the child's standpoint, and should not consider the feelings and desires of the parents, except insofar as they affect the child's best interests [*Taber v. Taber (1930) 209 Cal. 755, 757* ; *Adoption of Matthew B. (1991) 232 Cal. App. 3d 1239, 1264, 284 Cal. Rptr. 18]* . Custody may not be granted to one parent as a disciplinary action to punish the other for conduct unrelated to the best interests of the child [*In re Marriage of Stoker (1977) 65 Cal. App. 3d 878, 881-882, 135 Cal. Rptr. 616* (father's coercive acts, including threats to withhold child support, do not in themselves support grant of custody to mother)].

Finally, the best-interests standard is a relative one. The question is not simply whether a particular set of circumstances is in the best interests of the child, butwhether a particular set of circumstances relative to an alternative set of circumstances is in the best interests of the child [*Adoption of Matthew B. (1991) 232 Cal. App. 3d 1239, 1264, 284 Cal. Rptr. 18* ; *see Adoption of Michelle T. (1975) 44 Cal. App. 3d 699, 707, 117 Cal. Rptr. 856]* .

When the parents are unable to agree on a custody arrangement, the court must determine the child's best interest by setting the matter for an adversarial hearing and considering all relevant factors, including the child's health, safety, and welfare, any history of abuse by one parent against any child or the other parent, and the nature and amount of the child's contact with the parents [*In re Marriage of Brown & Yana (2006) 37 Cal. 4th 947, 38 Cal. Rptr. 3d 610, 127 P.3d 28]* . The court must look to *all* of the circumstances bearing on the child's best interests before devising a parenting plan [*Keith R. v. Superior Court (2009) 174 Cal. App. 4th 1047, 1053, 96 Cal. Rptr. 3d 298]* .

The Family Code contemplates that, in making a custody determination, consideration of the child's best interest may lead the court to award custody either to both parents (joint or shared custody) or to only one parent (sole custody) [*In re Marriage of Brown & Yana (2006) 37 Cal. 4th 947, 38 Cal. Rptr. 3d 610, 127 P.3d 28* ; *see § 223.16*].

[b] Bonding, Stability, and Continuity

An understanding of the importance of stability and continuity in the life of a child, and of the harm that may result from the disruption of established patterns of care and emotional bonds, is crucial to a best-interests determination [*Burchard v. Garay (1986) 42 Cal. 3d 531, 539-541, 229 Cal. Rptr. 800, 724 P.2d 486* ; *Adoption of Matthew B. (1991) 232 Cal. App. 3d 1239, 1264, 284 Cal. Rptr. 18]* . Indeed, stability, continuity, and a loving relationship are generally considered the most important criteria for determining the best interests of the child [*Adoption of Matthew B. (1991) 232 Cal. App. 3d 1239, 1264, 284 Cal. Rptr. 18* ; *see Burchard v. Garay (1986) 42 Cal. 3d 531, 542, 229 Cal. Rptr. 800, 724 P.2d 486* (opinion of Bird, C.J., concurring)]. Therefore, the length of time that the child has been in the continuous, actual, physical custody of the parent who has custody at the time of the hearing must be considered by the court [*Cochran v. Cochran (1966) 240 Cal. App. 2d 418, 421, 49 Cal. Rptr. 670]* .

[c] Care and Health of Child

The court may consider the quality of the care given to the child by the custodial parent [*Stack v. Stack (1961) 189 Cal. App. 2d 357, 370, 11 Cal. Rptr. 177]* , and may grant custody to the other parent if the child is not being properly cared for by the custodial parent [*Harris v. Harris (1960) 186 Cal. App. 2d 788, 790-792, 9 Cal. Rptr. 300]* . However, the fact that the child is placed in day care or with a baby sitter during the parent's working hours does not establish that the custodial parent is not properly caring for the child. In an era in which a majority of single parents must work, courts must not presume that a working parent is a less satisfactory parent or is less fully committed to the child's care than a parent who provides full-time care [*Burchard v. Garay (1986) 42 Cal. 3d 531, 540, 229 Cal. Rptr. 800, 724 P.2d 486]* .

The fact that the child does not receive proper medical attention while with one parent may be a factor supporting an order of custody to the other parent [*see Gobar v. Gobar (1959) 175 Cal. App. 2d 129, 133-135, 345 P.2d 480* ; *In re Bensfield (1929) 102 Cal. App. 445, 449-451* (child's health factor in finding father unfit)].

[d] Education of Child

If the child has special educational needs, a parent's willingness to provide for those needs may be a significant factor in granting custody to that parent, particularly if the other parent refuses to acknowledge the child's special needs [*see Holsinger v. Holsinger (1955) 44 Cal. 2d 132, 133-134, 279 P.2d 961]* .

Furthermore, a court may properly order a custodial parent to send the child to an appropriate public, private, or parochial school, instead of being home-schooled by the custodial parent, on a showing that this would be in the child's best interests [*Cassady v. Signorelli (1996) 49 Cal. App. 4th 55, 61-62, 56 Cal. Rptr. 2d 545]* .

[e] Relative Wealth of Parents

Comparative income or economic advantage is not a permissible basis for a custody determination [*Burchard v. Garay (1986) 42 Cal. 3d 531, 539, 229 Cal. Rptr. 800, 724 P.2d 486]* . In addition to presuming an unsupportable connection between material wealth and emotional well-being, any rule based on the relative wealth of the parents would almost invariably favor men, and have the effect of discriminating against women [*In re Marriage of Fingert (1990) 221 Cal. App. 3d 1575, 1581, 271 Cal. Rptr. 389]* . If the income of the preferred custodial parent is insufficient to provide proper care for the child, the remedy is to grant increased child support, not to deny custody [*Burchard v. Garay (1986) 42 Cal. 3d 531, 539, 229 Cal. Rptr. 800, 724 P.2d 486]* . Similarly, a custody determination may not be based on the assumption that a parent who can afford to care for the children at home would provide better care than a working parent who would rely on child care while working [*In re Marriage of Loyd (2003) 106 Cal. App. 4th 754, 131 Cal. Rptr. 2d 80 citing Burchard v. Garay (1986) 42 Cal.3d 531, 539, 229 Cal. Rptr. 800, 724 P.2d 486]* .

[f] Past Conduct of Parent

Whether a parent should have custody of a child is determined on the basis of conditions existing at the time of the hearing and is not necessarily controlled by the parent's prior conduct [*In re Marriage of Russo (1971) 21 Cal. App. 3d 72, 85-86, 98 Cal. Rptr. 501* ; *Munson v. Munson (1946) 27 Cal. 2d 659, 166 P.2d 268*]. Prior conduct, however, may be considered by the court in determining the best interests of the child [*In re Marriage of Russo (1971) 98 Cal. Rptr. 501* ; *Sanchez v. Sanchez (1961) 55 Cal. 2d 118, 124, 10 Cal. Rptr. 261, 358 P.2d 533* ; *see In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1095, 12 Cal. Rptr. 3d 356, 88 P.3d 81* (in determining whether change of custody should be ordered based on parent's proposed move with children, court may consider parent's consistent attempts to limit contact between children and other parent as indication that move would be detrimental to children)]. Evidence of prior conduct should only be admitted if it has a direct bearing on the issue of the present best interests of the child and should be limited to that issue alone [*Morgan v. Morgan (1956) 139 Cal. App. 2d 704, 705, 294 P.2d 45* ; *Stewart v. Stewart (1955) 130 Cal. App. 2d 186, 194, 278 P.2d 441]* .

[g] Sexual Conduct of Parent

Sexual conduct of a parent that offends the other parent, or even the public at large, does not in itself render a parent unfit to have custody of his or her children [*In re Marriage of Russo (1971) 21 Cal. App. 3d 72, 88-89, 98 Cal. Rptr. 501]* . In determining the custody of children, the courts are not engaged in a disciplinary action to punish parents for their shortcomings as individuals or to reward the unoffending parent for any wrong suffered by the acts of the other [*Clarke v. Clarke (1970) 4 Cal. App. 3d 583, 589, 84 Cal. Rptr. 393* ; *Ashwell v. Ashwell (1955) 135 Cal. App. 2d 211, 217, 286 P.2d 983]* . In order for a parent's sexual conduct to justify depriving him or her of custody, the conduct must be shown to affect directly the welfare and best interest of the child [*In re Marriage of Biggums-Slayton (2001) 86 Cal. App. 4th 653, 662, 103 Cal. Rptr. 2d 545* (wife did not show that former husband's adultery would adversely affect child's home environment); *Washburn v. Washburn (1942) 49 Cal. App. 2d 581, 587, 122 P.2d 96* ; *see Bialac v. Bialac (1966) 240 Cal. App. 2d 940, 946-947, 50 Cal. Rptr. 12* (welfare of children is less likely to be placed in jeopardy by conduct of which they are not aware)].

There are a number of older cases in which custody has been denied to parents, almost always mothers, because of their involvement in adulterous relationships or other behavior deemed licentious or immoral by the standards of the time [*see, e.g., Dahl v. Dahl (1965) 237 Cal. App. 2d 407, 411-412, 46 Cal. Rptr. 881* ; *Coil v. Coil (1962) 211 Cal. App. 2d 411, 413-416, 27 Cal. Rptr. 378* ; *Mathewson v. Mathewson (1962) 207 Cal. App. 2d 532, 538-539, 24 Cal. Rptr. 466* ; *Santens v. Santens (1960) 180 Cal. App. 2d 809, 818-819, 4 Cal. Rptr. 635* ; *Kelly v. Kelly (1959) 173 Cal. App.*

2d 469, 473-476] . All of these cases were decided before the Legislature legalized all sex acts between consenting adults and repealed the law against adultery [Stats. 1975, Ch. 71]. In one case decided after this legislation was enacted, an order providing that the mother should have no overnight visitation with a member of the opposite sex in the presence of the children until or unless she was married to him was held to be an abuse of discretion because it was intrusive on the privacy and association interests of the mother and lacked evidentiary support in terms of the interests of the children [*In re Marriage of Wellman (1980) 104 Cal. App. 3d 992, 999, 164 Cal. Rptr. 148]* .

[h] Gay or Lesbian Parent

The fact that one parent is lesbian or gay is not as a matter of law sufficient reason to deny custody to that parent [*Nadler v. Superior Court (1967) 255 Cal. App. 2d 523, 525, 63 Cal. Rptr. 352]* . This fact is merely one of many that the court may consider in making a custody decision [*Immerman v. Immerman (1959) 176 Cal. App. 2d 122, 126-127, 1 Cal. Rptr. 298]* .

One court has stated that, in exercising a choice between a heterosexual and a lesbian or gay household, a trial court could conclude that permanent residence in a lesbian or gay household would be detrimental to the children and contrary to their best interests [*Chaffin v. Frye (1975) 45 Cal. App. 3d 39, 47, 119 Cal. Rptr. 22* (decision based on homosexuality plus other factors)]. That statement was made, however, before homosexual conduct was decriminalized in 1975 [Stats. 1975, ch. 71].

The reasonable conclusion to be drawn from the early cases, when considered with the modern trend toward increased sexual tolerance, is that a parent's sexual preference can be considered as a factor by the court but only as it is related to the best interests of the child. A party who bases his or her case on the fact that the other parent is lesbian or gay should be prepared to present specific evidence that the parent's sexual preference adversely affects the child.

[i] Physical Disability of Parent

It is impermissible for the court to rely solely on a parent's physical handicap as evidence of the person's unfitness as a parent or of probable detriment to the child. Rather, the court must view the handicapped person as an individual and the family as a whole. The court should inquire into the person's actual potential physical capabilities, learn how he or she has adapted to the disability and manages its problems, consider how the other members of the household have adjusted to it, and take into account the special contributions the person may make to the family despite, or even because of, the disability. Weighing these and all other relevant factors together, the court should then determine whether the parent's condition will in fact have a substantial and lasting adverse effect on the best interests of the child [*In re Marriage of Carney (1979) 24 Cal. 3d 725, 736, 157 Cal. Rptr. 383, 598 P.2d 36]* .

[j] Mental Condition of Parent

The mental condition of a parent is obviously a factor that may be consideredin a custody determination. Nevertheless, harm to the child cannot be presumed from the mere fact of mental illness of the parent, and it is fallacious to assume that the child will somehow be "infected" by the parent. Rather the focus must be on how the parent's conduct that is caused by the disability has affected and will adversely affect the child or jeopardize the child's safety [*In re David D. (1994) 28 Cal. App. 4th 941, 953, 33 Cal. Rptr. 2d 861* ; *see* *Combs v. Combs (1958) 162 Cal. App. 2d 33, 35, 327 P.2d 164* (abuse); *Colombo v. Colombo (1945) 71 Cal. App. 2d 577, 582-584, 162 P.2d 995* (neglect); *In re Elizabeth R. (1995) 35 Cal. App. 4th 1774, 1789-1790, 42 Cal. Rptr. 2d 200]* .

The physician-patient and psychotherapist-patient privileges [*see Evid. Code §§ 990 et seq., 1010 et seq.*] apply in custody proceedings. Thus, a parent may not be compelled to disclose privileged communications between himself or herself and his or her physician or psychotherapist, absent a valid waiver. A parent does not voluntarily "tender" the issue of his or her mental or physical condition, thereby automatically waiving the privilege [*see Evid. Code §§ 996,*

1016], merely by claiming child custody or visitation rights [*see Simek v. Superior Court (1981) 117 Cal. App. 3d 169, 176-177, 172 Cal. Rptr. 564* ; *Koshman v. Superior Court (1980) 111 Cal. App. 3d 294, 297-299, 168 Cal. Rptr. 558* ; *see also Cutter v. Brownbridge (1986) 183 Cal. App. 3d 836, 846-847, 228 Cal. Rptr. 545* (psychotherapist's voluntary disclosure of father's confidential information subjected psychotherapist to tort action)].

Nevertheless, a parent with a history of mental illness and treatment may prejudice his or her likelihood of obtaining custody or visitation by invoking the psychotherapist-patient privilege. Without the testimony, there will be no profssional evidence before the court that the person's mental state is such that the child will not be adversely affected. It is unlikely that the court will grant custody to the parent without that evidence [*but see In re David D. (1994) 28 Cal. App. 4th 941, 952-953, 33 Cal. Rptr. 2d 861* (inappropriate for juvenile court to suspend reunification and parental visitation because parent refused to waive privilege and produce records without considering interests of children)].

[k] Religion of Parents

A parent's religion or the religion in which the child is being raised is not per se a basis for denying custody to that parent [*see Cory v. Cory (1945) 70 Cal. App. 2d 563, 565-576, 161 P.2d 385]* . Religion may be a factor in a custody determination if some aspect of a parent's religious observance is detrimental to the child. However, the fact that a parent's religion prohibits resort to standard medical procedures under some circumstances is not, by itself, sufficient grounds to grant custody to the other parent [*In re Marriage of Urband (1977) 68 Cal. App. 3d 796, 797-798, 137 Cal. Rptr. 433* (blood transfusions)].

Under current law and practice, the child's religion may be dealt with as an aspect of granting either joint or sole legal custody [*see Fam. Code §§ 3003, 3006*; *§ 223.16[2]*]. The fact that the parents cannot agree on religious training may indicate in some situations that sole legal custody is preferred, giving the sole legal custodian the right to make the determination of religion. However, in one case in which the father was Jewish and the mother Christian, the court of appeal upheld a trial court decision ordering joint legal custody with a substantial schedule of activities in both religions. The court stated there is no presumption of harm from a mixed religious upbringing and that a parent should not be enjoined from involving a child with the parent's religious activities, absent a clear, affirmative showing of harm [*In re Marriage of Weiss (1996) 42 Cal. App. 4th 106, 117, 49 Cal. Rptr. 2d 339]* .

There are protections, however, for the rights of the noncustodial parent. A court will not enjoin the noncustodial parent from discussing religion with the child or involving the child in his or her religious activities absent a showing that the child will be harmed by such discussion or involvement [*In re Marriage of Mentry (1983) 142 Cal. App. 3d 260, 269-270, 190 Cal. Rptr. 843]* . A court's decision to intervene in a parent's religious upbringing of a child, even after dissolution of the marriage, must be based on the court's judgment that the harm or threatened harm to the child caused by the parent's behavior outweighs the harm caused by coercive intervention in matters of family privacy [*In re Marriage of Mentry (1983) 142 Cal. App. 3d 260, 269-270, 190 Cal. Rptr. 843]* .

[l] Domestic Violence

In making a determination of the best interest of the child, the court must consider any history of abuse by one parent or any other person seeking custody against any of the following: (1) any child to whom he or she is related by blood or affinity or with whom he or she has had a caretaking relationship, no matter how temporary; (2) the other parent; or (3) a parent, current spouse, or cohabitant, of the parent or person seeking custody, or a person with whom the parent or person seeking custody has a dating or engagement relationship [*Fam. Code § 3011(b)*]. "Abuse against a child" means "child abuse" as defined in *Penal Code § 11165.6*. Abuse against any of the other persons listed above (parents, current spouse, and so on) means "abuse" as defined in *Fam. Code § 6203*. As a prerequisite to considering allegations of abuse, the court may require substantial independent corroboration of the facts [*Fam. Code § 3011(b)* (sources of corroboration include, but are not limited to, written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities, or other public agencies or private nonprofit organizations

providing services to victims of sexual assault or domestic violence)].

When allegations about a parent under *Fam. Code § 3011(b)* are brought to the court's attention, and the court makes an order for sole or joint custody to that parent, the court must state its reasons for doing so in writing or on the record, andmust ensure that any order regarding custody or visitation is specific as to time, day, place, and manner of transfer of the child [*Fam. Code § 3011(e)(1)*]. These requirements do not apply if the parties stipulate in writing or on the record regarding custody and visitation [*Fam. Code § 3011(e)(2)*].

There is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence against the other party seeking custody of the child, or against the child or the child's siblings, within the previous five years, is detrimental to the child's best interest under *Fam. Code § 3011* [*Fam. Code § 3044(a)*]. The presumption may be rebutted only by a preponderance of the evidence [*Fam. Code § 3044(a)*]. In determining whether the presumption has been overcome, the court must consider all of the following factors [*Fam. Code § 3044(b)*]:

> 1. Whether the perpetrator of domestic violence has demonstrated that giving him or her sole or joint physical or legal custody of the child is in the child's best interest. In determining the best interest of the child, the preference for frequent and continuing contact with both parents set forth in *Fam. Code § 3020(b)*, or with the noncustodial parent set forth in *Fam. Code § 3040(a)(1)* [*see* discussion in *§ 223.13[2]*], may not be used to rebut the presumption, in whole or in part.
>
> 2. Whether the perpetrator has successfully completed a batterer's treatment program that meets the criteria outlined in *Penal Code § 1203.097(c)*.
>
> 3. Whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling when the court has determined that counseling is appropriate.
>
> 4. Whether the perpetrator has successfully completed a parenting class if the court has determined that a class is appropriate.
>
> 5. Whether the perpetrator is on probation or parole, and whether he or she has complied with the terms and conditions of probation or parole.
>
> 6. Whether the perpetrator is restrained by a protective order or restraining order, and whether he or she has complied with its terms and conditions.
>
> 7. Whether the perpetrator has committed any further acts of domestic violence.

A person has "perpetrated domestic violence" if he or she has intentionally or recklessly caused or attempted to cause bodily injury or sexual assault, or has placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another [*Fam. Code § 3044(c)*]. A person perpetrates domestic violence by engaging in any behavior involving, but not limited to, threatening, striking, harassing, destroying personal property, or disturbing the peace of another, for which a court may issue an ex parte order under *Fam. Code § 6320* to protect the other party who is seeking custody or to protect the child and the child's siblings [*Fam. Code § 3044(c)*].

For these purposes, the requirement of a court finding is satisfied by, among other things, and not limited to, evidence that a party seeking custody has been convicted within the previous five years, after a trial or a plea of guilty or no contest, of any crime against the other party that comes within the definition of domestic violence in *Fam. Code § 6211* and of abuse in *Fam. Code § 6203*, including, but not limited to, a crime described in *Pen. Code §§ 243(e)*, *261*, *262*, *273.5*, *422*, or *646.9*. The requirement of a court finding is also satisfied if any court, whether or not that court hears or

has heard the child custody proceedings, has made a finding pursuant to *Fam. Code § 3044(a)* based on conduct occurring within the previous five years [*Fam. Code § 3044(d)*]. When a court makes a finding that a party has perpetrated domestic violence, the court may not base its findings solely on conclusions reached by a child custody evaluator or on the recommendation of the Family Court Services staff. The court must consider any relevant, admissible evidence submitted by the parties [*Fam. Code § 3044(e)*].

In any custody or restraining order proceeding in which a party has alleged that the other party has perpetrated domestic violence in accordance with *Fam. Code § 3044*, the court must inform the parties of section 3044 and give them a copy of section 3044 prior to any custody mediation [*Fam. Code § 3044(f)*]. This obligation does not arise during the proceeding in which a party is seeking a domestic violence protection order unless the parties are entering into custody mediation [*Sabbah v. Sabbah (2007) 151 Cal. App. 4th 818, 823-825, 60 Cal. Rptr. 3d 175*].

The court may not grant custody to a person who has been convicted under *Penal Code §§ 273a* (abusing or endangering child's health), 273d (inflicting corporal injury on child), or 647.6 (child molesting), or who is required to be registered as a sex offender under *Penal Code § 290* if the victim was a minor, unless the court finds that there is no significant risk to the child, and states its reasons in writing or on the record [*Fam. Code § 3030(a)(1)*]. A court may not grant physical or legal custody of a child to a person if anyone residing in the person's household is required, as a result of a felony conviction in which the victim was a minor, to register as a sex offender under *Penal Code § 290*, unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record [*Fam. Code § 3030(a)(2)*]. The child may not be placed in a home in which that person resides, nor may the child be permitted to have unsupervised visitation with that person, unless the court states the reasons for its findings in writing or on the record [*Fam. Code § 3030(a)(1), (2)*]. The fact that a child is permitted unsupervised contact with a person who is required to register as a sex offender is prima facie evidence that the child is at significant risk. This prima facie evidence constitutes a presumption affecting the burden of producing evidence; but the presumption does not apply if there are factors mitigating against its application, including whether the party seeking custody is also required, as the result of a felony conviction in which the victim was a minor, to register as a sex offender [*Fam. Code § 3030(a)(3)*].

In addition, the court may not grant custody to an individual who has been convicted of rape under *Penal Code § 261* when the child was conceived as aresult of that crime [*Fam. Code § 3030(b)*]. Further, the court may not grant custody of, or unsupervised visitation with, a child to a person who has been convicted of the first-degree murder of the child's other parent unless the court finds that there is no risk to the child's health, safety, and welfare, and states the reasons for its finding in writing or on the record [*Fam. Code § 3030(c)*]. In making its finding, the court may consider the child's wishes if the child is of sufficient age and capacity to reason so as to form an intelligent preference, credible evidence that the convicted parent was a victim of abuse committed by the deceased parent, and testimony of an expert witness qualified under *Evid. Code § 1107* that the convicted parent experiences intimate partner battering [*Fam. Code § 3030(c)*]. No person may permit the child to visit or remain in the custody of the convicted parent without the consent of the child's custodian or legal guardian until a custody or visitation order is issued granting the convicted parent custody or visitation [*Fam. Code § 3030(c)*].

The court may order an individual convicted of any of the above described offenses to pay child support through the local child support agency's office [*Fam. Code § 3030(d)*]. The court may not disclose the custodial parent's place of residence or employment, or the child's school, unless the court finds that the disclosure would be in the child's best interests [*Fam. Code § 3030(e)*].

In a custody proceeding, the court is encouraged to make a reasonable effort to ascertain whether or not any civil restraining orders or criminal protective orders are in effect that concern the parties or the child. The court is also encouraged not to make a custody order that is inonsistent with the civil restraining order or criminal protective order, unless the court finds that (1) the custody order cannot be made consistent with the civil restraining order or criminal protective order; and (2) the custody order is in the best interest of the child [*Fam. Code § 3031(a)*].

If an emergency protective order, protective order, or other restraining order has been issued, the court must consider whether the best interests of the child, based on the circumstances of the case, require that custody or visitation be suspended or denied, or limited to situations in which a third person specified by the court is present [*Fam. Code § 3031(c)*]. Any order made must specify the time, day, place, and manner of transfer of the child for custody or visitation to limit the child's exposure to potential domestic conflict or violence and to ensure the safety of all family members. If the court finds that a party is staying in a place designated as a shelter for victims of domestic violence or other confidential location, the court's order for time, day, place, and manner of transfer of the child for custody or visitation must be designed to prevent disclosure of the location of the shelter or other confidential location [*Fam. Code § 3031(b)*].

[m] Substance Abuse

In making a determination of the best interest of the child, the court must consider the habitual or continual illegal use of controlled substances or habitual or continual abuse of alcohol by either parent. However, before considering these allegations, the court may first require independent corroboration, including, but not limited to, written reports from law enforcement agencies, courts, probation departments, social welfare agencies, medical facilities, rehabilitation facilities, or other public agencies or nonprofit organizations providing drug and alcohol abuse services. "Controlled substances" has the same meaning as defined in the California Uniform Controlled Substance Act [*Fam. Code § 3011(d)*; *see Health & Safety Code § 11000 et seq.*].

When allegations about a parent under *Fam. Code § 3011(d)* are brought to the court's attention, and the court makes an order for sole or joint custody to that parent, the court must state its reasons for doing so in writing or on the record, and must ensure that any order regarding custody or visitation is specific as to time, day, place, and manner of transfer of the child [*Fam. Code § 3011(e)(1)*]. These requirements do not apply if the parties stipulate in writing or on the record regarding custody and visitation [*Fam. Code § 3011(e)(2)*].

A court may also order alcohol or drug testing for a parent or legal custodian who is seeking child custody or visitation if the court determines by a preponderance of the evidence that there is habitual or continual abuse of alcohol or habitual, frequent, or continual illegal use of controlled substances by the parent or legal custodian [*Fam. Code § 3041.5(a)*]. In that event, the court must order the least intrusive method of testing, and the testing must be performed according to standards established for drug testing of federal employees [*Fam. Code § 3041.5(a)*; *Deborah M. v. Superior Court (2005) 128 Cal. App. 4th 1181, 1189-1192, 27 Cal. Rptr. 3d 757* ("least intrusive method of testing" means urine testing and that testing must comply with strict federal standards; hair follicle drug testing is not permitted)]. Either or both parties may be ordered to pay the costs of the testing [*Fam. Code § 3041.5(a)*].

The test results must be kept confidential, be maintained as a sealed record in the court file, and may not be released to any person other than the court, the parties, their attorneys, the Judicial Council (for purposes of completing a study of the testing process), and persons to whom the court expressly grants access by written order made with prior notice to all parties [*Fam. Code § 3041.5(a)*]. These results may only be used to assist the court in determining the child's best interest and the content of the custody or visitation order or judgment. They may not be used for any other purpose, including criminal, civil, or administrative proceedings. Any breach of these confidentiality requirements is punishable by civil sanctions of up to $2,500 [*Fam. Code § 3041.5(a)*].

A parent or legal custodian who undergoes drug or alcohol testing is entitled to a hearing to challenge a positive test result [*Fam. Code § 3041.5(a)*]. A positive test result that is upheld by the court does not, by itself, constitute grounds for anadverse custody decision. Instead, to determine the best interests of the child, the court must weigh all relevant factors [*see Fam. Code § 3041.5(a)*].

[n] Separation of Siblings

A court may enter a custody order that has the effect of separating siblings only when compelling circumstances require it for the children's best interests, and there is supporting evidence in the record. Children have, at a minimum, a right to the society and companionship of their siblings; they are not community property to be divided equally for the benefit of their parents [*In re Marriage of Heath (2004) 122 Cal. App. 4th 444, 449, 18 Cal. Rptr. 3d 760* ; *In re Marriage of Williams (2001) 88 Cal. App. 4th 808, 814, 105 Cal. Rptr. 2d 923]* . In a decision involving a parent who sought to move out of state with all four children of the marriage, the family court had ordered two of the siblings to move with the moving parent and two to remain in California with the other parent [*In re Marriage of Williams (2001) 88 Cal. App. 4th 808, 105 Cal. Rptr. 2d 923* ; for discussion of modification of custody in "move-away" cases, *see § 223.28*]. In reversing the trial court's order, the appellate court examined cases from other states and concluded that many states afford strong protection to sibling relationships. The court found that the rule and rationale of Florida jurisprudence provide a practical and workable rule to guide family law courts considering sibling separation orders in California, and remanded the case with instructions that the trial court could only order a separation of siblings on a showing of compelling circumstances, and was required to articulate those circumstances in a manner permitting meaningful appellate review [*In re Marriage of Williams (2001) 88 Cal. App. 4th 808, 105 Cal. Rptr. 2d 923* ; *see Fam. Code, § 3087*; *see also In re Marriage of Heath (2004) 122 Cal. App. 4th 444, 449-451, 18 Cal. Rptr. 3d 760* (abuse of discretion in splitting custody of siblings based on speculation by father and children's counsel and trial court's "hunch" presuming detriment to younger brother from older brother's autism)].

[6] Reported Sexual Abuse of Child

A parent may not be placed on supervised visitation or denied custody of or visitation with his or her child, and the parent's custody or visitation rights may not be limited, solely because the parent lawfully reported suspected sexual abuse of the child, otherwise acted lawfully to determine if the child was the victim of sexual abuse (based on a reasonable belief), or sought treatment for the child from a licensed mental health professional for suspected sexual abuse [*Fam. Code § 3027.5(a)*].

A court may, however, order supervised visitation or limit a parent's custody or visitation if the court finds substantial evidence that the parent, with the intent to interfere with the other parent's lawful contact with the child, made a false report of child sexual abuse during a child custody proceeding or at any other time, and that he or she knew the report was false at the time it was made [*Fam. Code § 3027.5(b)*]. Any limitation of custody or visitation, including an order for supervised visitation, may be imposed only if the court determines that the limitation is necessary to protect the child's health, safety, and welfare, and after the court has considered the state's policy of assuring that children have frequent and continuing contact with both parents [*Fam. Code § 3027.5(b)*].

Any supervised visitation maintained or imposed by the court must be administered in accordance with Section 26.2 of the California Standards of Judicial Administration [*Fam. Code § 3201*].

A party who has been falsely accused of child abuse or neglect in a child custody proceeding may move for sanctions under *Fam. Code § 3027.1* against the person or persons who made the allegations. Any motion for sanctions must be filed on or before the earlier of 60 days after the judgment or order exonerating the moving party is served or 180 days from the entry of the judgment or order [*Robert J. v. Catherine D. (2009) 171 Cal. App. 4th 1500, 1504, 1522-1527, 91 Cal. Rptr. 3d 6]* .

[7] Absence or Relocation From Family Residence

If a party is absent or relocates from the family residence, the court may not consider this absence or relocation as a factor in determining custody or visitation in the following circumstances [*Fam. Code § 3046*]:

1. The absence or relocation is of short duration, and the court finds that during the period of absence or relocation, the party has demonstrated an interest in maintaining custody or visitation, the party

maintains or makes reasonable efforts to maintain regular contact with the child, and the party's behavior demonstrates no intent to abandon the child.

2. The party is absent or relocates because of an act or acts of actual or threatened domestic or family violence by the other party.

3. The court may consider attempts by one party to interfere with the other party's regular contact with the child in determining if the party has satisfied the foregoing requirements.

These provisions do not apply to (1) a party who has abandoned the child as provided in *Fam. Code § 7822*, or *(2)* a party against whom a protective or restraining order has been issued excluding the party from the dwelling of the other party or the child, or otherwise enjoining the party from assault or harassment against the other party or the child [*Fam. Code § 3046(c)(1)*].

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§ 223.13 Custody Rights as Between Parents

[1] Basic Right to Custody

The most basic of parents' rights with respect to their children is the right to custody [*see Odell v. Lutz (1947) 78 Cal. App. 2d 104, 106, 177 P.2d 628]* . A parent's interest in the custody of his or her children is a cognizable and substantial right that extends to all parents, and is within the protection of the federal due-process and equal-protection clauses [*Stanley v. Illinois (1972) 405 U.S. 645, 649-659, 92 S. Ct. 1208, 31 L. Ed. 2d 551* ; *see U.S. Const. amend. XIV*; *In re Carmaleta B. (1978) 21 Cal. 3d 482, 489, 146 Cal. Rptr. 623, 579 P.2d 514* ; *see also City of Carmel-by-the-Sea v. Young (1970) 2 Cal. 3d 259, 266-267, 85 Cal. Rptr. 1, 466 P.2d 225* (canvassing cases finding constitutionally protected rights in family relationship)].

This constitutional right underlies the statutory parental preference doctrine [*Fam. Code § 3040(a)(1)*], which gives first preference to parents in custody contests (*see § 223.17[1]*).

[2] Policy Favoring Continuing Contact With Both Parents

It is the public policy of California to assure children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child-rearing, unless contact would not be in the best interests of the child [*Fam. Code § 3020*]. In making an order for custody to either parent, the court must consider which parent is more likely to allow the children frequent and continuing contact with the noncustodial parent [*Fam. Code § 3040(a)(1)*; *see Wilson v. Shea (2001) 87 Cal. App. 4th 887, 893, 104 Cal. Rptr. 2d 880* (need to assure frequent and continuing contact with noncustodial parent may justify variance from guideline amount for support to provide for necessary travel expense in move-away case)]. The Legislature has not defined "frequent and continuing" or specified a preference for any particular form of contact, and the California Supreme Court has indicated that the policy of considering which parent will provide such contact is not as all-powerful as often advocated by counsel for noncustodial parents [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 35, 38-40, 51 Cal. Rptr. 2d 444, 913 P.2d 473]* .

[3] No Gender Preference

The court may not prefer one parent as custodian because of that parent's sex [*Fam. Code § 3040(a)(1)*; *see Lester v. Lennane (2000) 84 Cal. App. 4th 536, 101 Cal. Rptr. 2d 86* (court does not unlawfully prefer parent as custodian because of that parent's gender by making temporary custody order that does not give other parent equal time)]. Prior statutory preferences for the mother as the custodian of very young children (the "tender years" doctrine) [*see Messer v. Messer (1968) 259 Cal. App. 2d 507, 509, 65 Cal. Rptr. 417]* and for the father as custodian of children of an age to require education and preparation for business or labor [*see Cunningham v. Cunningham (1963) 217 Cal. App. 2d 65, 67, 31 Cal. Rptr. 448]* have been discarded.

Although there is no longer a gender-based tender-years doctrine, counsel should anticipate a judicial preference for a mother who has stayed home with young children over an employed father, particularly if the father has worked long hours and spent little time with the children. This preference will take the form of a gender-neutral favoring of the *primary* parent based on the need to maintain the continuity of existing parent-child relationships.

[4] Noncustodial Parent's Right of Access to Child's Records

Access to records and information pertaining to a minor child, including, but not limited to, medical, dental, and school records, may not be denied to a parent because he or she is not the child's custodial parent [*Fam. Code § 3025*]. However, this statutory right does not override other legal principles, such as the psychotherapist-patient privilege, that may preclude parental access to such records [*see In re Daniel C.H. (1990) 220 Cal. App. 3d 814, 827, 269 Cal. Rptr. 624]* .

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§ 223.14 Supervised Visitation and Exchange Services, Education, and Counseling

Subject to the availability of federal funding, the family law division of the superior court in each county may establish and administer a supervised visitation and exchange program, a program for education about protecting children during family disruption [*Fam. Code § 3201(b)*], and group counseling programs for parents and children [*Fam. Code § 3203*]. These programs must allow parties and children to participate in supervised visitation between a custodial party and a noncustodial party or joint custodians, and to participate in the education and group counseling programs, regardless of whether the parties are or are not married to each other or are currently living separately and apart on a permanent or temporary basis [*Fam. Code § 3203*]. The family law division may contract with eligible providers of supervised visitation and exchange services, education, and group counseling, to provide services under these provisions [*Fam. Code § 3202(a)*; *see Fam. Code § 3203(b)* ("eligible provider" defined)].

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§ 223.15 Child Abduction Prevention

[1] In General

If a court becomes aware of facts which may indicate that there is a risk of abduction of a child, it must consider imposing conditions to prevent abduction [*Fam. Code § 3048(b)*]. The court must consider specified factors in determining the risk, and it must consider imposing specified conditions. All custody and visitation orders, whether or not there is any perceived risk, must contain certain basic information [*Fam. Code § 3048(a)*]. For remedies when children have been abducted, including the Uniform Child Custody Jurisdiction and Enforcement Act and the Hague Convention, see Ch. 260, *Family Law Enforcement, Enforcement of Foreign Judgments* .

[2] Risk Factors

In cases in which a court becomes aware of facts which may indicate that there is a risk of abduction of a child, the court must, either on its own motion or at therequest of a party, determine whether measures are needed to prevent abduction of the child by one parent. The court must consider the risk of abduction of the child; obstacles to location, recovery, and return if the child is abducted; and potential harm to the child if he or she is abducted. To determine whether there is a risk of abduction, the court must consider specified factors that mostly relate to the previous behavior and mobility of the party who poses the risk of abduction [*see generally Fam. Code § 3048(b)(1)*].

[3] Preventative Measures

The court must consider taking one or more of a list of specified measures if it finds there is a need for preventative measures after considering the risk factors [*Fam. Code § 3048(b)(2)*]. The measures initially specified include custody modifications, travel restrictions and conditions, and preparations for response if an abduction is carried out.

The measures to be considered include supervised visitation; requiring a bond; restricting the right of either the custodial or the noncustodial parent to remove the child; placing conditions on the right of the custodial parent to relocate with the child; requiring the surrender of passports; prohibiting a parent from applying for a passport for the child; requiring notice to foreign officials of passport restrictions; requiring registration of a California order in another

state or requiring a foreign order with the same terms as the U. S. order; requiring a traveling parent to provide the child's itinerary, copies of round trip airline tickets, addresses and telephone numbers where the child can be reached, or an open airline ticket for the left-behind parent; including provisions in the custody order to facilitate use of the UCCJEA or the Hague Convention; and authorizing the assistance of law enforcement [*Fam. Code § 3048(b)*].

[4] Requirements for Orders

Every custody or visitation order must contain all the following: (1) The basis for the court's exercise of jurisdiction; (2) the manner in which notice and opportunity to be heard were given; (3) a clear description of the custody and visitation rights of each party; (4) provision stating that a violation of the order may subject the party in violation to civil or criminal penalties, or both; and (5) identification of the country of habitual residence of the child or children [*Fam. Code § 3048(a)*].

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§ 223.16 Types of Custody Arrangements

[1] Legal and Physical Custody

The right of custody has two components: legal custody and physical custody. Legal custody refers to the right and the responsibility to make decisions relating to the health, education, and welfare of the child [*Fam. Code §§ 3003, 3006*]. Physical custody refers to with whom the child actually resides [*see Fam. Code § 3007*].

[2] Sole or Joint Custody

[a] In General

Both legal and physical custody may be sole or joint. A court may grant joint legal custody without granting joint physical custody [*Fam. Code § 3085*]. Arrangements involving sole legal custody and either joint physical custody or sole physical custody in the parent without legal custody, while not specifically prohibited by statute, would probably be unworkable.

The term "joint custody," when used without reference to legal or physical custody, means joint legal and joint physical custody [*Fam. Code § 3002*].

[b] Sole vs. Joint Legal Custody

Joint legal custody means the parents share the right and responsibility to make decisions relating to the health, education, and welfare of the child [*Fam. Code § 3003*]. Sole legal custody means one parent has the sole right and responsibiliy to make these decisions [*Fam. Code § 3006*]. In making an order of joint legal custody, the court must specify the circumstances, if any, under which the consent of both parents must be obtained in order to exercise legal control of the child and the consequences of the failure to obtain mutual consent. In all other circumstances, either parent acting alone may exercise legal control of the child. An order of joint legal custody may not be construed to permit an action that is inconsistent with the physical custody order unless the action is expressly authorized by the court [*Fam. Code § 3083*; *see In re Marriage of Buser (1987) 190 Cal. App. 3d 639, 643-644, 235 Cal. Rptr. 785*

(specification need only be made if order contemplates that there will be circumstances requiring joint consent; if no such circumstances are contemplated by court, no specification is required)].

[c] Sole vs. Joint Physical Custody

Joint physical custody means that each parent has *significant* periods of physical custody, shared in such a way so as to assure the child of frequent and continuing contact with both parents [*Fam. Code § 3004*; *see § 223.28[2][iv]*]. Sole physical custody means that the child resides with and is under the supervision of one parent, subject to the power of the court to order visitation [*Fam. Code § 3007*].

[d] Characterization of Physical Custody Arrangement as Joint or Sole

Joint physical custody contemplates that each parent will have significant,although not necessarily equal, periods of physical custody [*see Fam. Code § 3004*; *In re Marriage of Birnbaum (1989) 211 Cal. App. 3d 1508, 1515, 260 Cal. Rptr. 210]* . There is no statutory or other bright line that demarcates a joint physical custody arrangement involving something other than a 50-50 time share from a sole custodial arrangement under which the noncustodial parent has substantial visitation [*see In re Marriage of Biallas (1998) 65 Cal. App. 4th 755, 759-760, 76 Cal. Rptr. 2d 717* (examples of joint custody and sole custody situations)]. Although the significance of being labeled the custodial or noncustodial parent is diminishing, particularly with regard to child support [*see Fam. Code § 4055(b)(1)(D)* (statewide uniform child support guideline does not distinguish between "custodial" and "noncustodial" parents, but rather considers the respective amount of time during which each parent has "primary physical responsibility" for the children), discussed in Ch. 224, *Dissolution of Marriage: Child Support*], there may still be areas in which rights depend on the label [*see, e.g., Fam. Code 3800 et seq.* (deferred sale of home order available to "custodial" parent)]. Also, in "move-away" cases (*see § 223.28[2][b]*), the question of whether the "primary" custodial parent has de facto "sole" or "joint" custody is highly significant [*see In re Marriage of Burgess (1996) 13 Cal. 4th 25, 37-38, 40 n.12, 51 Cal. Rptr. 2d 444, 913 P.2d 473* (parent with sole custody has presumptive right to relocate, but relocation by parent with joint custody requires de novo custody review); *In re Marriage of Lasich (2002) 99 Cal. App. 4th 702, 714-716, 121 Cal. Rptr. 2d 356* ("joint physical custody" label disallowed, in international move-away case)]. For these reasons, physical custody arrangement should also address the issue of whether a parent with something like 35 percent physical custody should be labelled as noncustodial, or whether he or she should be considered a joint custodial parent.

In making an order of joint custody, the court may specify one parent as the primary caretaker of the child and one home as the primary home of the child, for purposes of determining eligibility for public assistance [*Fam. Code § 3086*].

[e] Standards for Ordering Joint Custody

Joint custody may be ordered in the court's discretion on the application of either parent if it is in the best interests of the child [*Fam. Code § 3081*; *see Fam. Code § 3040(a)(1)*]. The determining factor as to whether joint physical custody is in the child's best interests is the nature of the relationship between the parents with regard to their parental responsibilities [*see In re Marriage of Birnbaum (1989) 211 Cal. App. 3d 1508, 1515-1516, 260 Cal. Rptr. 210]* . The court's opinion in *Birnbaum* includes a significant analysis of the actual variations on joint physical custody arrangements according to the parents' attitudes toward eah other at pages 1515-1518. The opinion is recommended reading for all parents and their counsel who are considering a joint physical custody plan. For discussion of the best interests standard [*see Fam. Code § 3011*], *see also § 223.12[5][a]* et seq.].

There is no general statutory preference or presumption for or against any particular custody arrangement [*Fam. Code § 3040(b)*]. However, if the parents have agreed to joint custody, there is a presumption that affects the burden of proof [*see Evid. Code §§ 605, 606*] that joint custody is in the best interests of the child [*Fam. Code § 3080*].

Joint custody may be ordered, if it is in the best interests of the child, between a father and an intended surrogate mother whose parental rights are subsequently established [*In re Marriage of Moschetta (1994) 25 Cal. App. 4th 1218, 1234 n.21, 30 Cal. Rptr. 2d 893]* . However, the father's litigation position of vigorously opposing establishment of the surrogate's rights is not a factor that may be taken into account [*In re Marriage of Moschetta (1994) 25 Cal. App. 4th 1218, 1231-1234, 30 Cal. Rptr. 2d 893]* .

[f] Requirements for Orders Granting or Denying Joint Custody

In granting or denying joint custody, the court, on request of any party, must state in its decision the reasons for granting or denying the request. A statement that joint physical custody is or is not in the best interests of the child is not sufficient [*Fam. Code § 3082*]. There is no statutory time limit within which a statement of reasons must be requested. However, one court has applied the time limits within which a statement of decision must be requested under *Code Civ. Proc. § 632* [*In re Marriage of Buser (1987) 190 Cal. App. 3d 639, 643, 235 Cal. Rptr. 785]* . Thus, the request should be made within a reasonable time that is no more than 10 days after the court announces its intended decision. If the trial lasts less than one day, the request should be made before submitting the joint custody issue for decision [*Code Civ. Proc. § 632*].

In making an order of joint physical custody, the court must specify the right of each parent to the physical control of the child in sufficient detail to enable a parent deprived of that control to implement laws for relief from child snatching and kidnapping [*Fam. Code § 3084*].

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§ 223.17 Custody Rights of Nonparents

[1] Order of Preference in Granting Custody

Custody should be granted in the following order of preference, according to the best interests of the child [*Fam. Code § 3040(a)*; *see Fam. Code § 3021*]:

(1) To both parents jointly (*see § 223.16[1]* et seq.) or to either parent;

(2) To the person or persons in whose home the child has been living in a wholesome and stable environment; and

(3) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

All parents are entitled to custody as against all nonparents, unless the trial court finds that parental custody would be detrimental and that nonparental custody is in the best interest of the child, as discussed in *§ 223.12[5]* [*Adoption of Daniele G. (2001) 87 Cal. App. 4th 1392, 1403, 105 Cal. Rptr. 2d 341]* . Denying custody to biological fathers and mothers once it has been proven that such custody would be detrimental to their children is directly and substantially related to the state's important and valid interest in the well-being of children [*Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 844, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* ; *Adoption of Daniele G. (2001) 87 Cal. App. 4th 1392, 1404, 105 Cal. Rptr. 2d 341* (constitutional to apply detriment standard to natural fathers as well as to mothers and presumed fathers)]. Although parents generally have the right to custody of their children over a third party, this right is not absolute and must be balanced against the child's fundamental right to have a placement that is stable and permanent [*H.S. v. N.S. (2009) 173 Cal. App. 4th 1131, 1139, 93 Cal. Rptr. 3d 470]* .

If the court determines that custody must be granted to a nonparent, it must consider and give due weight to a parent's nomination of a guardian of the person of the child [*Fam. Code § 3043*; *see In re Vanessa P. (1995) 38 Cal. App. 4th 1763, 1769-1770, 45 Cal. Rptr. 2d 760* ; for discussion of nominations, *see Ch. 280, Guardianship and*

Conservatorship: Appointment of Guardians, § 280.45, and *Ch. 281, Guardianship and Conservatorship: Appointment of Conservators, § 281.31*]. This rule would appear to require the court to at least consider a parent's nomination for guardian, even if the child currently has a different nonparent custodian who would otherwise have a preferential right to custody under category (2), *above*.

[2] Detriment Test for Granting Custody to Nonparent

Before granting custody to a nonparent over the objection of a parent, the court must find that granting custody to a parent would be detrimental to the child and that granting custody to a nonparent is required to serve the best interest of the child [*Fam. Code § 3041*; *see Adoption of Daniele G. (2001) 87 Cal. App. 4th 1392, 1401, 105 Cal. Rptr. 2d 341* (under parental preference doctrine, award of custody to nonparent as against parent cannot be based on child's best interest alone, but must be supported by express finding that parental custody would be detrimental to child); for discussion of findings and standard of proof, *see § 223.17[3]*]. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, may not appear in the pleadings [*Fam. Code § 3041*; *Guardianship of Olivia J. (2000) 84 Cal. App. 4th 1146, 1154-1155, 101 Cal. Rptr. 2d 364* (nonparent need not allege specific facts showing detriment in pleadings)]. The court may, in its discretion, exclude the public from the hearing on this issue [*Fam. Code § 3041*; *see Adoption of Daniele G. (2001) 87 Cal. App. 4th 1392, 1404-1405, 105 Cal. Rptr. 2d 341* (detriment standard may constitutionally apply to natural fathers as well as to mothers and presumed fathers; unlike adoption statutes, there is no distinction in guardianship and custody statutes between natural mother's and natural father's right to withhold consent)].

A showing that parental custody would be detrimental to the child requires a clear showing that nonparent custody is essential to avert harm to the child. A finding that nonparent custody will promote the best interests or the welfare of the child will not suffice [*In re B.G. (1974) 11 Cal. 3d 679, 699, 114 Cal. Rptr. 444, 523 P.2d 244* ; *see Guardianship of Diana B. (1994) 30 Cal. App. 4th 1766, 1774-1775, 36 Cal. Rptr. 2d 447]* . The question of whether parental custody is detrimental to the child is highly dependent on facts unique to each child and parent [*Guardianship of Olivia J. (2000) 84 Cal. App. 4th 1146, 1157, 101 Cal. Rptr. 2d 364]* . Custody may be awarded to a nonparent without a finding of parental unfitness [*H.S. v. N.S. (2009) 173 Cal. App. 4th 1131, 1141, 93 Cal. Rptr. 3d 470* (detriment standard comports with constitutional due process)]. The legislature's imposition of a detriment-to-the-child requirement, instead of a parental-unfitness requirement, focuses on the child's interest. There may be circumstances in which placement with a parent is detrimental to the child even though the parent is not unfit [*H.S. v. N.S. (2009) 173 Cal. App. 4th 1131, 1141-1143, 93 Cal. Rptr. 3d 470* (because parental relationship can still be maintained even when custody is awarded to nonparent and because of state's compelling interest in protecting child's well-being, legislature could properly conclude that determinative factor should be harm to child rather than parental fitness)].

Current law requires that a finding that parental custody would be detrimental to the child must be supported by clear and convincing evidence [*Fam. Code § 3041(b)*], and that "detriment to the child" includes the harm of removing a child from a stable placement with a person who has assumed the role of the child's parent, fulfilling the child's physical and psychological needs on a day-to-day basis for a substantial period of time; no showing of parental unfitness is required to establish detriment [*Fam. Code § 3041(c)*]. A finding by a preponderance of the evidence that the nonparent seeking custody is such a person who has assumed the role of parent will serve as a finding that the custody is in the best interest of the child and that parental custody would be detrimental to the child, unless there is a showing by a preponderance of the evidence to the contrary [*Fam. Code § 3041(d)*; *see H.S. v. N.S. (2009) 173 Cal. App. 4th 1131, 1137-1138, 93 Cal. Rptr. 3d 470* (under this provision, showing of de facto parent status creates rebuttable presumption that it would be detrimental to place child in parent's custody and child's best interest requires nonparental custody)].

Prior to statutory amendments that became operative in 2003, what is "detriment to the child" was not set forth with further particularity in the statutes, and courts utilized the flexibility they were given to respond to the particular circumstances of each case [*see Guardianship of Olivia J. (2000) 84 Cal. App. 4th 1146, 1155-1156, 101 Cal. Rptr. 2d 364* ; *Guardianship of Zachary H. (1999) 73 Cal. App. 4th 51, 86 Cal. Rptr. 2d 7* ; *Guardianship of Phillip B. (1983)*

139 Cal. App. 3d 407, 188 Cal. Rptr. 781 ; *Guardianship of Marino (1973) 30 Cal. App. 3d 952, 959-960 n.5, 106 Cal. Rptr. 655]* . Because the detriment test focuses on the child rather than the parent, the application of the test appears to vary depending on the existing custodial situation [*see In re B.G. (1974) 11 Cal. 3d 679, 699, 114 Cal. Rptr. 444, 523 P.2d 244* ; *In re Angelica M. (1985) 170 Cal. App. 3d 210, 214-215, 216 Cal. Rptr. 18* (in contest between parent and nonparent, neither of whom currently has custody, parental preference and detriment test requires court to do more than compare child's likely well-being in the respective homes and determine that child's interests would be best served by nonparent custody); *In re Volkland (1977) 74 Cal. App. 3d 674, 679-680, 141 Cal. Rptr. 625* ; *In re Reyna (1976) 55 Cal. App. 3d 288, 302-303, 126 Cal. Rptr. 138* (when child is currently living and thriving with nonparent and parent attempts to obtain orregain custody, court can conclude that it would be detrimental to uproot child and grant custody to parent with whom child has had little or no contact); *see H.S. v. N.S. (2009) 173 Cal. App. 4th 1131, 1138, 93 Cal. Rptr. 3d 470* (removing child from stable, continuous, and successful placement is detrimental to child in absence of contrary proof)].

A nonparent can establish that parental custody is detrimental to a child even in the absence of an allegation of serious abuse, neglect, or abandonment by the parent [*Guardianship of Olivia J. (2000) 84 Cal. App. 4th 1146, 1152-1157, 101 Cal. Rptr. 2d 364]* . For example, a finding of detriment may be based on harm the child would suffer from being separated from a nonparent caregiver [*Adoption of Daniele G. (2001) 87 Cal. App. 4th 1392, 1403-1406, 105 Cal. Rptr. 2d 341* (child will not necessarily become bonded to nonparent caregiver in time it takes biological father to obtain custody hearing); *Guardianship of Olivia J. (2000) 84 Cal. App. 4th 1146, 1158-1161, 101 Cal. Rptr. 2d 364* (loss of relationship with nonparent who has acted as de facto or psychological parent is factor court may consider in determining whether parental custody is detrimental to child); *Guardianship of Zachary H. (1999) 73 Cal. App. 4th 51, 65, 86 Cal. Rptr. 2d 7* ; *In re Bridget R. (1996) 41 Cal. App. 4th 1483, 1520, 49 Cal. Rptr. 2d 507* ; *In re Brittany H. (1988) 198 Cal. App. 3d 533, 551-552, 243 Cal. Rptr. 763]* . The absence of a meaningful parent-child relationship in the face of a strong relationship with a nonparent is a significant fact that would weigh in support of a court's ultimate conclusion that the loss of a relationship with a nonparent is sufficiently detrimental to the child to warrant an award of custody to a nonparent [*Guardianship of Olivia J. (2000) 84 Cal. App. 4th 1146, 1160, 101 Cal. Rptr. 2d 364]* .

A parent who loses legal and/or physical custody in a family law custody proceeding is not foreclosed from regaining custody based on changed circumstances [*H.S. v. N.S. (2009) 173 Cal. App. 4th 1131, 1143, 93 Cal. Rptr. 3d 470]* .

The detriment test of *Fam. Code § 3041* may not be used by a nonparent to wrest custody from a current custodial parent. To remove a child from parental custody, there must first be sufficient facts of parental misconduct to bring the matter within the dependency jurisdiction of the juvenile court [*see Welf. & Inst. Code § 300 et seq.*]. There must also be clear and convincing evidence of one or more of the standards on which a minor may be removed from the home under *Welf. & Inst. Code § 361(c)*. A less stringent standard under the Family Code may not be applied to remove a child from parental custody [*see In re James T. (1987) 190 Cal. App. 3d 58, 65-67, 235 Cal. Rptr. 127* ; *but see Guardianship of Phillip B. (1983) 139 Cal. App. 3d 407, 419-424, 426, 188 Cal. Rptr. 781* and *In re Phillip B. (1979) 92 Cal. App. 3d 796, 156 Cal. Rptr. 48* (nonparent guardians appointed under detriment test even though juvenile court jurisdiction was previously denied on essentially same facts). *Phillip B.* was a highly publicized and unusual case of parents who refused to authorize a life-extending operation for their Down's-syndrome child. Because the child was institutionalized rather than living with the parents, it is questionable whether the case supports the proposition that a change of custody from a parent to a nonparent can be accomplished through a guardianship under the detriment test without facts sufficient to bring the child under juvenile court dependency jurisdiction].

[3] Findings and Standard of Proof

Before granting custody to a nonparent over a parent, the court must make a specific finding that a grant of custody to a parent would be detrimental to the child and that granting custody to a nonparent is required to serve the best interests of the child [*Fam. Code § 3041*; *see H.S. v. N.S. (2009) 173 Cal. App. 4th 1131, 1138, 93 Cal. Rptr. 3d 470*]. The court's finding must be supported by evidence showing that parental custody would actually harm the child [*In re*

B.G. (1974) 11 Cal. 3d 679, 683, 114 Cal. Rptr. 444, 523 P.2d 244 ; *Adoption of Daniele G. (2001) 87 Cal. App. 4th 1392, 1401, 105 Cal. Rptr. 2d 341]* . However, if it is clear that the trial court used the proper standard and no request was made for written findings, the appellate court can presume that the requisite finding was made [*Chaffin v. Frye (1975) 45 Cal. App. 3d 39, 44-45, 119 Cal. Rptr. 22]* or make the finding itself [*Code Civ. Proc. § 909*; *Guardianship of Marino (1973) 30 Cal. App. 3d 952, 960-961, 106 Cal. Rptr. 655]* .

By statute, an award of custody to the nonparent must be based on a finding supported by clear and convincing evidence that parental custody would be detrimental to the child [*Fam. Code § 3041(b)*; *but see Fam. Code § 3041(d)* (showing by preponderance that nonparent has assumed parental role for substantial period of time suffices to show detriment to child)]. This showing of detriment may be established by a rebuttable presumption in cases involving de facto parents [*H.S. v. N.S. (2009) 173 Cal. App. 4th 1131, 1138, 1140, 93 Cal. Rptr. 3d 470]* (rebuttable presumption comports with due process). In cases involving nonparental custody, the detriment requirement is imposed in addition to the requirement of the child's best interest. These standards and criteria represent an appropriate balancing of the competing interests involved in nonparental custody cases [*H.S. v. N.S. (2009) 173 Cal. App. 4th 1131, 1138, 93 Cal. Rptr. 3d 470]* .

[4] Parental Custody Resulting in Actual Physical Custody to Nonparents

One issue that has arisen involving the doctrine of parental preference is the propriety of granting legal custody to a parent and physical custody to a nonparent as against the rights of the other parent. Several older cases have held that custody may not be given to a parent who intends to leave the child in the actual physical custody of a nonparent unless the other parent consented or was found to be unfit [*Roche v. Roche (1944) 25 Cal. 2d 141, 142-144, 152 P.2d 999* ; *Moffitt v. Moffitt (1966) 242 Cal. App. 2d 580, 582-583, 51 Cal. Rptr. 683* ; *see Stauffacher v. Stauffacher (1964) 227 Cal. App. 2d 735, 737-738, 39 Cal. Rptr. 31* (grant of custody to father who intended to place child in foster home held to be grant to nonparent); *cf. Booth v. Booth (1945) 69 Cal. App. 2d 496, 501-502, 159 P.2d 93* (fact that children were residing with grandparents in father's home while father was in armed forces and stationed overseas did not mean that custody had beengranted to nonparent and did not entitle mother to custody absent a finding of her unfitness)].

The situation in which a custodial parent provides a home for the child but places the child in day care or with a baby sitter during his or her working hours (discussed in *§ 223.12[5][c]*) should be distinguished from this situation.

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§ 223.18 Visitation Rights of Parents

[1] "Reasonable" Visitation

In making an order for custody in a dissolution or other marital termination proceeding, the court must grant reasonable visitation rights to a parent unless it is shown that visitation would be detrimental to the best interests of the child [*Fam. Code § 3100(a)*; *see Fam. Code § 3021*; *see also § 223.18[3]*]. This provision is made applicable in the Family Code to a variety of domestic relations proceedings [*see Fam. Code § 3021*]. However, it would appear that visitation as a fundamental parental right should not be abridged by statute absent a powerful countervailing state interest. Thus, it would seem that visitation should not be denied to a noncustodial parent, regardless of the *procedural stance* in which the matter comes before the court, absent the requisite showing [*see Stanley v. Illinois (1972) 405 U.S. 645, 649-659, 92 S. Ct. 1208, 31 L. Ed. 2d 551*]. On the other hand, after parental rights have been terminated, the parent no longer has any right to visitation [*see In re Jacob E. (2004) 121 Cal. App. 4th 909, 925, 18 Cal. Rptr. 3d 15* (having failed to appeal termination order, mother's attempt to obtain visitation was in substance collateral attack on termination of her parental rights and request to reinstate her as parent, for which juvenile court had no jurisdiction)].

As to what constitutes "reasonable" visitation, each case must be decided on its particular circumstances. The court may specify the times and conditions for the exercise of visitation rights in detail if necessary [*Fay v. Fay (1938) 12 Cal. 2d 279, 282, 83 P.2d 716]* . For example, the court may require a noncustodial parent to pick up and return the children to the grandparents' home, rather than the home of the custodial parent, in order to avoid parental confrontation that may be detrimental to the children [*In re Marriage of Oldfield (1979) 94 Cal. App. 3d 259, 261-262, 156 Cal. Rptr. 224]* . Another case held that there was no abuse of discretion in giving a noncustodial parent midweek overnight visitation rights with a child because the parents lived in close proximity and the custodial parent's concerns about excessive driving time were purely speculative and not substantiated by evidence presented [*Cassady v. Signorelli (1996) 49 Cal. App. 4th 55, 61, 56 Cal. Rptr. 2d 545]* .

[2] Child Support and Visitation as Independent Rights of Child

Child support and visitation are independent rights, both accruing to the child's benefit. Therefore, visitation may not be conditioned on the noncustodial parent's payment of support [*Camacho v. Camacho (1985) 173 Cal. App. 3d 214,*

219, 218 Cal. Rptr. 810 ; *see Fam. Code § 3556*].

[3] Showing Required to Deny Parental Visitation

Parental visitation may be denied only if it is shown that the visitation would be detrimental to the best interest of the child [*Fam. Code § 3100(a)*]. This standard requires evidence of specific conduct that is harmful to the child [*see Friedland v. Friedland (1959) 174 Cal. App. 2d 874, 879-880, 345 P.2d 322* (potential for abduction of child by noncustodial parent); *Runsvold v. Runsvold (1943) 61 Cal. App. 2d 731, 733-734, 143 P.2d 746* (domestic violence); *Cheeseman v. Cheeseman (1929) 99 Cal. App. 290, 291-292, 278 P. 242* (sexual abuse)].

It is an abuse of discretion to deny visitation rights to a parent if there is no showing that the child's best interests require isolation from the parent [*Brasher v. Brasher (1967) 253 Cal. App. 2d 867, 869, 61 Cal. Rptr. 136* ; *Devine v. Devine (1963) 213 Cal. App. 2d 549, 553-555, 29 Cal. Rptr. 132]* .

[4] Showing Required to Restrict Parental Visitation

In some cases in which the custodial parent cannot meet the standard for completely denying visitation to the other parent (*§ 223.18[3]*), grounds may exist for restricting the time, place, frequency, or other aspects of visitation. An affirmative showing of harm or likely harm to the child is necessary to restrict parental visitation [*In re Marriage of Birdsall (1988) 197 Cal. App. 3d 1024, 1030, 243 Cal. Rptr. 287]* . Also a causal connection must exist between the conduct of the noncustodial parent and the harm. Evidence that the child is upset or confused by the conduct is insufficient [*In re Marriage of Mentry (1983) 142 Cal. App. 3d 260, 266-269, 190 Cal. Rptr. 843]* . The unconventional life-style of one parent, or the opposing moral positions of the parties, or the outright condemnation of one parent's beliefs by the other parent's religion, any of which may result in confusion to the child, does not provide an adequate basis for restricting visitation rights absent a showing of detriment to the child [*In re Marriage of Birdsall (1988) 197 Cal. App. 3d 1024, 1031, 243 Cal. Rptr. 287* (abuse of discretion to restrict visitation rights of homosexual parent); *see In re Marriage of Mentry (1983) 142 Cal. App. 3d 260, 266-269, 190 Cal. Rptr. 843* (abuse of discretion to prohibit noncustodial parent from engaging children in religious activity or discussion during visitation)].

It has been held to be an abuse of discretion to allow visitation only at the uncontrolled discretion of the custodial parent [*Messer v. Messer (1968) 259 Cal. App. 2d 507, 510, 66 Cal. Rptr. 417]* .

[5] Effect of Noncustodial Parent's Mental Condition

To protect the best interests of the child, the court may consider the noncustodial parent's emotional condition or behavior in relation to visitation [*Simek v. Superior Court (1981) 117 Cal. App. 3d 169, 177, 172 Cal. Rptr. 564* ; *see In re David D. (1994) 28 Cal. App. 4th 941, 953, 33 Cal. Rptr. 2d 861]* . If the mental health of the parent is at issue, the court may order the parent to submit to a mental examination under (*Code Civ. Proc. § 2032.020(a)*). However, unless there is evidence in the record to justify subjection of the parent to involuntary psychiatric treatment, a requirement of treatment as a condition on visitation is a violation of due process. It constitutes a fundamental restriction on liberty unaccompanied by any procedural safeguards [*Camacho v. Camacho (1985) 173 Cal. App. 3d 214, 220-221, 218 Cal. Rptr. 810* ; *In re Marriage of Matthews (1980) 101 Cal. App. 3d 811, 817-818, 161 Cal. Rptr. 879* ; *cf. In re Chantal S. (1996) 13 Cal. 4th 196, 212 n.2, 51 Cal. Rptr. 2d 866, 913 P.2d 1075* (expressing no opinion regarding correctness of *Matthews* and *Camacho*)]. However, the court may order a parent to participate in out-patient counseling for up to one year under *Fam. Code § 3190 et seq.* [*see In re Katherine M. (1994) 27 Cal. App. 4th 91, 99-100, 33 Cal. Rptr. 2d 298 , disapproved on other grounds in In re Chantal S. (1996) 13 Cal. 4th 196, 212, 51 Cal. Rptr. 2d 866, 913 P.2d 1075* ; *see § 223.20[8]*].

[6] Effect of Domestic Violence

The court may not grant unsupervised visitation to a parent who has been convicted under *Penal Code § 273a* (abusing

or endangering child's health), *273d* (inflicting corporal injury on child), or *647.6* (child molesting), or who is required to be registered as a sex offender under *Penal Code § 290* if the victim was a minor, unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record [*Fam. Code § 3030(a)(1), (b)*]. The child may not be placed in a home in which that person resides, nor may the child be permitted to have unsupervised visitation with that person, unless the court states the reasons for its findings in writing or on the record [*Fam. Code § 3030(a)(1)*].

In addition, a court may not grant unsupervised visitation with a child to a person if anyone residing in the person's household is required, as a result of a felony conviction in which the victim was a minor, to register as a sex offender under *Penal Code § 290*, unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record [*Fam. Code § 3030(a)(2)*]. The child may not be placed in a home in which that person resides, nor may the child be permitted to have unsupervised visitation with that person, unless the court states the reasons for its findings in writing or on the record [*Fam. Code § 3030(a)(2)*]. The fact that a child is permitted unsupervised contact with a person who is required to register as a sex offender is prima facie evidence that the child is at significant risk. This prima facie evidence constitutes a presumption affecting the burden of producing evidence; but the presumption does not apply if there are factors mitigating against its application, including whether the party seeking visitation is also required, as the result of a felony conviction in which the victim was a minor, to register as a sex offender [*Fam. Code § 3030(a)(3)*].

A court is also prohibited from granting visitation to an individual who has been convicted of rape under *Penal Code § 261* when the child was conceived as a result of that crime (*§ 223.12[5][l]*).

When a court makes an order for supervised visitation, it must require this visitation to be administered in accordance with the "standards for practice for providers of supervised visitation" recommended by the Judicial Council [*Fam. Code § 3201*]. The standards are set forth as Cal. Rules of Ct., App., Div. I, § 26.2.

The court is encouraged to make a reasonable effort to ascertain whether or not any civil restraining orders or criminal protective orders are in effect that concern the parties or the child. The court is also encouraged not to make a visitation order that is inconsistent with the civil restraining order or criminal protective order, unless the court finds that (1) the visitation order cannot be made consistent with the civil restraining order or criminal protective order; and (2) the visitation order is in the best interest of the child [*Fam. Code § 3031(a)*].

If a domestic violence protective order [*see Fam. Code § 6218*] has been directed to a parent, the court must consider whether the best interests of the child require that visitation by that parent be suspended or denied, or limited to situations in which a third person specified by the court is present. In its deliberations, the court must consider the nature of the acts from which the parent was enjoined and the period of time that has elapsed since the order. A parent may submit to the court the name of a person that he or she deems suitable to be present during visitation [*Fam. Code § 3100(b)*]. Any visitation order made must specify the time, day, place, and manner of transfer of the child for custody or visitation to limit the child's exposure to potential domestic conflict or violence and to ensure the safety of all family members [*Fam. Code § 3100(c)*]. If a criminal protective order has been issued under *Penal Code § 136.2*, the visitation order must refer to, and acknowledge the precedence of enforcement of, any appropriate criminal protective order [*Fam. Code § 3100(c)*]. If the court finds a party is staying in a place designated as a shelter for victims of domestic violence or other confidential location, the court's order for time, day, place, and manner of transfer of the child for custody or visitation must be designed to prevent disclosure of the location of the shelter or other confidential location [*Fam. Code § 3100(d)*].

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§ 223.19 Visitation Rights of Nonparents

[1] In General

Family Code Section 3100(a) provides that, in the discretion of the court, reasonable visitation rights may be granted to any person "having an interest in the welfare of the child."

It has been held that visitation may not be granted to a nonparent over the joint opposition of parents having custody of the children merely on a finding that itwould promote the best interests of the child [*cf. Fam. Code §§ 3103(d), 3104(e)* (rebuttable presumption that grandparent visitation is not in best interests of child if both parents are opposed), discussed in *§ 223.19[2]*]. If the parents are unified in opposition, nonparent visitation may not be ordered unless it is clearly and convincingly shown that denial would be detrimental to the child [*In re Marriage of Gayden (1991) 229 Cal. App. 3d 1510, 1520, 280 Cal. Rptr. 862* ; *see Nancy S. v. Michele G. (1991) 228 Cal. App. 3d 831, 835 n.1, 837-838, 279 Cal. Rptr. 212]* .

One California court denied visitation to a biological father who was barred from establishing his paternity because the mother's husband was conclusively presumed to be the father of the child under *Family Code Section 7540* (issue of wife cohabiting with her husband who is not impotent or sterile is presumed child of the marriage, discussed in Ch. 412, *Paternity*). The court found that visitation would not be in the best interests of the child. It is not entirely clear from the court's language whether it was holding that, under the circumstances (opposition of mother and presumed father), it had no discretion under the statute to award visitation to the biological father, or whether the court was exercising its discretion to deny visitation [*see Vincent B. v. Joan R. (1981) 126 Cal. App. 3d 619, 627-628, 179 Cal. Rptr. 9]* . In the view of one United States Supreme Court justice, the latter view is required, on at least some facts, to support the constitutionality of the conclusive presumption [*see Michael H. v. Gerald D. (1989) 491 U.S. 110, 133-134, 109 S. Ct. 2333, 105 L. Ed. 2d 91, 112-113* (opinion of Stevens, J., concurring in judgment)].

The Due Process Clause of the *U.S. Const., Amend. XIV* protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children [*Troxel v. Granville (2000) 530 U.S. 57, 66, 120 S. Ct. 2054, 147 L. Ed. 2d 49* (plurality opinion by O'Connor, J.)]. The U.S. Supreme Court has held that a nonparent

visitation statute that allows visitation in the child's best interest and allows a judge, based solely on the judge's determination of the child's best interests, to overturn a decision by a fit custodial parent concerning visitation, can exceed the bounds of the Due Process Clause as applied to a particular set of circumstances. The Court has not stated, however, whether the Due Process Clause requires all nonparent visitation statutes to include a showing of harm or potential harm to the child as a condition precedent to granting visitation [*Troxel v. Granville (2000) 530 U.S. 57, 73, 120 S. Ct. 2054, 147 L. Ed. 2d 49* (plurality opinion by O'Connor, J.)].

[2] Rights of Grandparents

Under *Family Code Section 3103*, grandparents may be granted reasonable visitation with a minor child of a party to any of the proceedings enumerated in *Fam. Code § 3021* if the court determines that the visitation is in the best interest of the child. Visitation rights may not be ordered that would conflict with custody or visitation rights of a birth parent who is not a party to the proceeding [*Fam. Code § 3103(e)*; *see Fam. Code § 8512* ("birth parent" defined)]. If a protective order under *Fam. Code § 6218* (domestic violence) has been directed to the grandparent during the pendency of the proceeding, the court must consider whether the best interest of the child requires denial of grandparent visitation [*Fam. Code § 3103(b)*].

There is a rebuttable presumption affecting the burden of proof that grandparent visitation is not in the best interest of a minor child if the child's parents agree that the grandparent should not be granted visitation rights [*Fam. Code § 3103(d)*]. If there is no other proceeding pending, and a grandparent has petitioned for visitation, there is a rebuttable presumption affecting the burden of proof that the visitation is not in the best interest of the minor child if there is objection from (1) the parent who has been granted sole legal and physical custody of the child in another proceeding, or (2) the parent with whom the child resides if there is currently no operative custody order [*Fam. Code § 3104(f)*].

Fam. Code § 3104 does not violate federal or California Constitutions, either on its face or as applied [*In re Marriage of Harris (2004) 34 Cal. 4th 210, 223-230, 17 Cal. Rptr. 3d 842, 96 P.3d 141]* . The presumption that visitation is not in the child's best interest if there is objection from the parent must be applied by the court when *Fam. Code § 3104* applies [*see In re Marriage of Harris (2004) 34 Cal. 4th 210, 230, 17 Cal. Rptr. 3d 842, 96 P.3d 141* (trial court erred in expressly utilizing best interest of child standard and not considering presumption, where mother was awarded sole custody and objected to paternal grandparent visitation)].

An order for grandparent visitation may not create a basis for or against a change of residence of the child, but may be one of the factors for the court to consider in ordering a change of residence [*Fam. Code § 3103(f)*].

When there is no allegation or finding that the parent is unfit, and the parent agrees to some visitation, a court order establishing a grandparent visitation schedule over the parent's objection infringes on the parent's fundamental parenting right to make decisions about the care, custody and control of his or her children [*see Kyle O. v. Donald R. (2000) 85 Cal. App. 4th 848, 862-863, 102 Cal. Rptr. 2d 476* ; *Punsly v. Ho (2001) 87 Cal. App. 4th 1099, 1105, 105 Cal. Rptr. 2d 139* (citing *Troxel v. Granville (2000) 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49*)]. There is a presumption that a fit parent acts in the best interest of his or her children, and deference should be given to the parent's decision regarding the amount of visitation [*Kyle O. v. Donald R. (2000) 85 Cal. App. 4th 848, 863, 102 Cal. Rptr. 2d 476* ; *see In re Marriage of Ross & Kelley (2003) 114 Cal. App. 4th 130, 139-140, 7 Cal. Rptr. 3d 287* (court abused discretion by refusing to grant grandparents visitation rights agreed to by both parents based on erroneous conclusion that it lacked jurisdiction to do so under *Troxel* and *Punsley v. Ho*)].

If a court orders grandparent visitation, it may, based on the relevantcircumstances of the case, allocate the percentage of grandparent visitation between the parents for purposes of the calculation of child support pursuant to the statewide uniform guideline [*Fam. Code § 3103(g)(1)*; *see Fam. Code § 4050 et seq.* (child support guideline)]. The court may also order a parent or grandparent to pay to the other an amount for the costs related to visitation, such as transportation and medical expenses and day care costs [*Fam. Code § 3103(g)(2)*]. In addition, a court may order a grandparent to pay

litigation expenses in an appropriate case [*see In re Marriage of Perry (1998) 61 Cal. App. 4th 295, 313, 71 Cal. Rptr. 2d 499* ; *but see Punsly v. Ho (2003) 105 Cal. App. 4th 102, 129 Cal. Rptr.2d 89* (mother's request for private attorney general fees under *Code Civ. Proc. § 1021.5* incurred in grandparent visitation dispute was denied)].

Grandparents may also bring a separate petition for visitation if there is no other proceeding pending regarding the child [*see Fam. Code § 3104*]. For further discussion, see Ch. 394, *Parent and Child* . In addition, grandparents may petition for visitation under *Fam. Code § 3102* if the parent of an unemancipated minor is deceased [*see, e.g., Fenn v. Sherriff (2003) 109 Cal. App. 4th 1466, 1470, 1 Cal. Rptr. 3d 185* (pursuant to *Fam. Code § 3102*, maternal grandparents petitioned for visitation with grandchildren following death of their daughter, which father opposed)]. For discussion of *Fam. Code § 3102* generally, see *§ 223.19[3]*.

[3] Rights of Relatives of Deceased Parent

If a parent of an unemancipated minor is deceased, the children, parents, siblings, and grandparents of the deceased parent may be granted reasonable visitation with the child during the child's minority on a finding that visitation would be in the child's best interests [*Fam. Code § 3102(a)*]. This situation may occur in a termination of marriage proceeding if one of the parties to the marriage dies before the proceeding is completed. Note that with respect to grandparents, several California appellate decisions have found *Fam. Code § 3102* unconstitutional, as applied, without an allegation of parental unfitness [*Zasueta v. Zasueta (2002) 102 Cal. App. 4th 1242, 126 Cal. Rptr. 2d 245* ; *Punsly v. Ho (2001) 87 Cal. App. 4th 1099, 105 Cal. Rptr. 2d 139* ; *Kyle O. v. Donald R. (2000) 85 Cal. App. 4th 848, 102 Cal. Rptr. 2d 476]* . However, one California appellate decision found *Fam. Code § 3102* constitutional as applied to grandparents, even without an allegation of parental unfitness. Although the decision of one or two fit parents about whether and under what conditions grandparents should have visitation is entitled to special weight, it does not insulate the parent's determination from court intervention [*see Fenn v. Sherriff (2003) 109 Cal. App. 4th 1466, 1470, 1473-1494, 1 Cal. Rptr. 3d 185]* .

With respect to a sibling, at least one appellate decision has found *Fam. Code § 3102* unconstitutional, as applied, without an allegation of parental unfitness [*Herbst v. Swan (2002) 102 Cal. App. 4th 813, 814, 820, 125 Cal. Rptr. 2d 836* (adult sibling)].

In granting visitation under *Fam. Code § 3102* to a person other than a grandparent of the child, the court must consider the amount of personal contact between the person and the child before the application for the visitation order [*Fam. Code 3102(b)*]. In addition, absent a finding that the parent is unfit, when the parent agrees to some visitation then deference should be given to the parent's decision regarding the amount of visitation or even the parent's preference for a "less structured and more normal and spontaneous manner of visitation" [*Kyle O. v. Donald R. (2000) 85 Cal. App. 4th 848, 863, 102 Cal. Rptr. 2d 476* ; *see also Zasueta v. Zasueta (2002) 102 Cal. App. 4th 1242, 1254-1255, 126 Cal. Rptr. 2d 245* (fit parent's decision not to allow any visitation was entitled to deference); *§ 223.19[2]*]. Termination of the visitation order is proper if friction between the child's surviving parent and the relative becomes a "battle" in which the children are likely to be hurt and if it is clearly in the best interests of the children that the surviving parent have complete discretion to determine the question of visitation [*see Adoption of Berman (1975) 44 Cal. App. 3d 687, 696-697, 118 Cal. Rptr. 804* (father and stepmother battling maternal grandparents)].

Note that in the case of an adoption of a child following a parent's death, *Fam. Code § 3102* does not apply if the child has been adopted by someone other than a stepparent or grandparent of the child, and any visitation rights granted under the section before an adoption (by someone other than a stepparent or grandparent) automatically terminate [*Fam. Code § 3102(a)*].

[4] Rights of Stepparents

The court may grant reasonable visitation to a stepparent if it is determined to be in the child's best interest [*Fam. Code*

§§ 3100(a), 3101(a)]. If a protective order under *Fam. Code § 6218* (domestic violence) has been directed to the stepparent, the court must consider whether the best interests of the child require that stepparent visitation be denied [*Fam. Code § 3101(b)*]. Visitation rights may not be ordered for a stepparent that would conflict with custody or visitation rights of a birth parent who is not a party to the proceeding [*Fam. Code § 3101(c)*; *see Fam. Code § 8512* ("birth parent" defined)].

The rationale of the U.S. Supreme Court's decision in *Troxel v. Granville (2000) 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49* applies to a proceeding involving stepparent visitation under *Fam. Code § 3101*, namely, a court must apply a presumption favoring the parents' decision that visiting the stepparent is not in the best interest of their child [*In re Marriage of W. (2003) 114 Cal. App. 4th 68, 75, 7 Cal. Rptr. 3d 461* (*Fam. Code § 3101* not facially unconstitutional, but was unconstitutionally applied because court failed to accord special weight to parents' position)].

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Volume 19: Dissolution of Marriage: Child Custody thru Dissolution of Marriage: Tax Effects of Dissolution-Chs.223-239
Chapter 223 DISSOLUTION OF MARRIAGE: CHILD CUSTODY
PART II. LEGAL BACKGROUND

19-223 California Forms of Pleading and Practice--Annotated § 223.20

§ 223.20 Initiating a Contested Custody Proceeding

[1] Decision to Contest Custody

An attorney who is consulted by a parent concerning a custody proceeding must first help the client decide whether to contest custody. In nearly all cases, a contested custody proceeding should be avoided if at all possible. Such proceedings are almost always costly, stressful to the child, and damaging to the parents' relationship and ability to cooperate in the future for the best interests of the child.

The attorney must realistically evaluate the parent-client's chances for success. He or she should also evaluate the client's motives to determine if there are legitimate child-related concerns, or whether the parent is motivated primarily by hostility toward the other parent. The attorney should emphasize to the client that if the court senses that the parent has a punitive motive, it is likely to adversely affect the determination [*see Fam. Code § 3040(a)(1)* (court is to consider which parent is more likely to allow child frequent and continuing contact with noncustodial parent)].

[2] Temporary Custody Orders

In dissolution of marriage, nullity of marriage, legal separation, and certain other proceedings in which child custody is at issue [*see Fam. Code § 3021*], a petition for a temporary custody order may be included with the initial filing or may be filed at any time after the initial filing, and the Judicial Council form of that declaration should be utilized [*Fam. Code § 3060*; *see Fam. Code § 3429* (Uniform Child Custody Jurisdiction and Enforcement Act declaration, which must be included with petition)]. For the Judicial Council form of petition, see *§ 223.60*, and for the form of declaration, see *Ch. 221, Dissolution of Marriage: Procedure, § 221.311*.

If the parties have agreed to or reached an understanding on the custody or temporary custody of their children, a copy of the agreement or a declaration as to their understanding must be attached to the petition or moving papers. As promptly as possible after filing, the court must, except in exceptional circumstances, enter an order granting temporary custody in conformity with the agreement or understanding, or in accordance with any stipulation of the parties [*Fam. Code § 3061*]. The effect of the temporary custody order on the permanent custody determination is discussed in *§ 223.12[5][b]*.

[3] Ex Parte Custody Orders

Absent an agreement, understanding, or stipulation of the parties concerning custody, the court may, if jurisdiction is appropriate (*see § 223.11[1]*), enter an ex parte temporary custody order, set a hearing date within 20 days, and issue an order to show cause on the responding party. If the responding party does not appear or respond within the time set, the temporary custody order may be extended as necessary, pending the termination of the proceedings [*Fam. Code § 3062(a)*].

The court may not make an ex parte custody order unless there has been a showing of immediate harm to the child or immediate risk that the child will be removed from the State of California [*Fam. Code § 3064(a)*]. "Immediate harm to the child" includes having a parent who has committed acts of domestic violence, if the court determines that the acts of domestic violence are of recent origin or are a part of a demonstrated and continuing pattern of acts of domestic violence [*Fam. Code § 3064(b)(1)*; *see Fam. Code § 6323(a)*]. It also includes, but is not limited to, sexual abuse of the child, when the court determines that the acts of sexual abuse are of recent origin or are a part of a demonstrated and continuing pattern of acts of sexual abuse [*Fam. Code § 3064(b)(2)*]. In one case, for example, an ex parte change of custody order was issued after a mother left her four-year-old son alone at home while she went out to purchase medication. The appellate court stated that a parent's failure to provide adequate supervision of a child should qualify as "immediate harm" for purposes of issuing a *Fam. Code § 3064* ex parte custody order. Besides the fact of leaving the child alone, the trial court also relied on a mediator's testimony expressing concern about the mother's judgment and emotional stability, that were not in the best interest of the minor [*In re Marriage of Biggums-Slayton (2001) 86 Cal. App. 4th 653, 658, 103 Cal. Rptr. 2d 545]* .

If, despite good faith efforts, service of the ex parte order and order to show cause has not been made and there is reason to believe, based on proof made under penalty of perjury by the petitioner, that the respondent has possession of the children and seeks to avoid the jurisdiction of the court or is concealing their whereabouts, the hearing date may be reset and the ex parte order extended up to an additional 90 days. After service has been made, either party may request ex parte that the hearing date be advanced or the ex parte order be dissolved or modified [*Fam. Code § 3062(b)*].

The Domestic Violence Prevention Act [*Fam. Code § 6200 et seq.*] also provides for emergency protective custody orders [*see Fam. Code 6252(b)*] and ex parte temporary custody orders [*see Fam. Code § 6323(a)*]. Since all custody orders under this act are subject to the otherwise applicable provisions of the Family Code [*see Fam. Code § 3020 et seq.*] governing the custody of children [*Fam. Code § 6223*; *see Fam. Code § 3021(e)*], these provisions would seem to be simply a reiteration of the right to an ex parte temporary custody order under *Family Code Section 3062* subject to a showing of immediate harm as defined in *Family Code Section 3064*. Note, however, that custody rights may not be obtained by use of the DVPA by a party who has not established a parent and child relationship under *Fam. Code § 6323(a)(2)* [*Fam. Code § 3021(e)*].

[4] Ex Parte Visitation Orders

The provisions of the Family Code governing temporary custody orders generally [*see Fam. Code § 3060 et seq.*] do not specifically authorize the courtto make an ex parte visitation order [*see Fam. Code § 3062*]. However, there is a provision in the Domestic Violence Prevention Act that authorizes the court to make an ex parte visitation order in certain enumerated proceedings. A party who has not established a parent and child relationship under *Fam. Code § 6323(a)(2)* may not obtain visitation rights by use of the DVPA, however [*Fam. Code § 3021(e)*].

Under *Fam. Code § 6323(a)(2)* the court may issue an ex parte order determining the right of a party to visit a minor child, on conditions as the court determines, in a proceeding for dissolution of marriage, nullity of marriage, legal separation, and in certain other proceedings. Such orders require a showing of immediate harm to the child or immediate risk that the child will be removed from the State of California, as discussed in *§ 223.20[3]* [*Fam. Code §§ 3064, 6323(a)(2)*].

For forms for use in obtaining ex parte visitation orders under the Domestic Violence Prevention Act, see Ch. 293, *Harassment and Domestic Violence* .

[5] Orders Restraining Removal of Child From State

The summons in a proceeding for dissolution of marriage, nullity of marriage, or legal separation [*see Fam. Code § 2000*] must contain a temporary restraining orer restraining all parties from removing the minor children of the parties from the state without prior written consent of the other party or a court order [*Fam. Code §§ 2040(a)(1), 7700*; *see Fam. Code § 231 et seq.*]. The order continues in effect until the final judgment is entered or the petition is dismissed, or until further order of the court [*Fam. Code § 233(a)*].

The order is enforceable anywhere in California by any law enforcement agency that has received the order or mailed notice of it or by any law enforcement officer who has been shown the order [*Fam. Code § 233(b)*]. Any willful or knowing violation of the order is a criminal offense [*Fam. Code § 233(c)*; *see Penal Code § 278.5*].

In conjunction with any ex parte order seeking or modifying a custody order (§ 223.20[3]), the court must enter an order restraining the person receiving custody from removing the child from the state pending notice and a hearing on the order seeking or modifying custody [*Fam. Code § 3063*].

[6] Submission of Birth Certificate to Determine Whether Child Is Missing Person

If the custody proceeding arises in the context of a marital dissolution or the adjudication of paternity rights or duties and (1) one or both parents of the child have not appeared, either personally or by counsel, and (2) there is no proof of personal service of the petition on the absent parent, the court must require the parent, petitioner, or other party appearing in the case to submit a certified copy of the child's birth certificate to the court. The court or its designee must forward the certified copy of the birth certificate to the local police or sheriff's department, which must check with the National Crime Information Center Missing Person System to ascertain whether the child has been reported missing or is the victim of an abduction and must report the results of the check to the court [*Fam. Code § 3140(a), (b)*]. For good cause shown, the court may waive this requirement [*Fam. Code § 3140(c)*].

[7] Appointment of Counsel

[a] For Child

If the court determines that it would be in the best interests of the child, the court may appoint private counsel to represent the child's interests in a custody or visitation proceeding [*Fam. Code § 3150(a)*; *see § 223.79* (Order Appointing Counsel for a Child)].

In determining whether to appoint counsel, the court should take into account the following factors, including whether [*Cal. Rules of Ct., Rule 5.240(a)*]:

- The issues of child custody and visitation are highly contested or protracted;

- The child is subjected to stress as a result of the dispute that might be alleviated by the intervention of counsel representing the child;

- Counsel for the child would be likely to provide the court with relevant information not otherwise readily available or likely to be presented;

- The dispute involves allegations of physical, emotional, or sexual abuse or neglect of the child;

- It appears that one or both parents are incapable of providing a stable, safe, and secure environment;
- Counsel is available for appointment who is knowledgeable about the issues regarding the child;
- The child's best interest appears to require independent representation; and
- When there are two or more children, any child would require separate counsel to avoid a conflict of interest.

The court may appoint counsel for the child on the court's own motion or if requested to do so by a party, the attorney for a party, the child or any relative of the child, a mediator under *Fam. Code § 3184*, a court-appointed guardian ad litem or special advocate, a county counsel (or district attorney, city attorney, or city prosecutor) authorized to prosecute child abuse and neglect or child abduction cases under state law, or a professional person making a custody recommendation under *Fam. Code §§ 3111* and *3118*, *Evid. Code § 730*, or *Code Civ. Proc. § 2032.010 et seq.* Counsel may also be appointed on the request of any other person the court deems appropriate [*Cal. Rules of Ct., Rule 5.240(b)*].

Counsel must receive reasonable compensation and expenses, the amount of which is to be determined by the court. This amount must be paid by the parties, including parties joined to the proceeding, in proportions as the court deems just [*Fam. Code § 3153(a)*; *Cal. Rules of Ct., Rule 5.241(a), (b)*; *In re Marriage of Perry (1998) 61 Cal.App.4th 295, 311, 71 Cal. Rptr. 2d.499* (order against grandparent joined as party to dissolution proceeding)]. If the court determines that both parties together are financially unable to pay all or a portion of the cost of counsel, the portion that the parties are unable to pay must be paid by the court [*Fam. Code § 3153(b)*; *Cal. Rules of Ct., Rule 5.241(d)*]. In determining the parties' financial ability to pay all or aportion of counsel's compensation, the court should consider such factors as their income and assets reasonably available at the time of the determination and their eligibility for or the existence of a fee waiver under *Gov. Code §§ 68630-68641*. The parties must also have on file a current Income and Expense Declaration [Cal. Judicial Council Form FL-150] or a Financial Statement (Simplified) [Cal. Judicial Council Form FL-155] [*Cal. Rules of Ct., Rule 5.241(b)(1)*, referring to former *Gov. Code § 68511.3*, now *Gov. Code §§ 68630-68641*]. The court should determine the parties' ability to pay at the time counsel is appointed, within 30 days after the appointment, or at the next subsequent hearing [*Cal. Rules of Ct., Rule 5.241(b)(2)*].

The suggestion that independent counsel be appointed for a child may present an ethical problem for counsel of either parent unless the client agrees to it. The California State Bar has issued a formal ethics opinion [Formal Opinion No. 1976-37], which states that an attorney who perceives a conflict of interest between the interests of his or her client, a parent, and the interests of the child, cannot ethically notify he court of the conflict or even suggest separate counsel for the child without permission from the client because he or she would be disclosing the confidences of his or her client. The opinion states that the attorney should do everything in his or her power to persuade the client to allow the attorney to suggest to the court that independent counsel be appointed for the child, but if that cannot be done, counsel cannot suggest representation to the court. If the situation becomes untenable, counsel can withdraw as attorney.

Counsel for the child must represent the child's best interests. Counsel's role is to gather facts bearing on the child's best interests, and to present those facts to the court, including the child's wishes, when counsel deems it appropriate for consideration by the court [*Fam. Code § 3151(a)*; *Cal. Rules of Ct., Rule 5.242(j)*].

At the court's request, counsel must prepare a written statement of issues and contentions setting forth the facts that bear on the child's best interests. The statement must contain a summary of information received by counsel, a list of the sources of this information, the results of counsel's investigation, and any other matters as the court may direct. The statement may not contain any communication that is subject to the attorney-client privilege afforded by *Evid. Code § 954*. Counsel must file the statement with the court and submit it to the parties (or their attorneys of record) at least 10 days before the hearing unless the court orders otherwise. The Judicial Council may specify standards for the

preparation of the statement, and may promulgate a model statement that includes instructions on how to subpoena a witness and a blank subpoena form [*Fam. Code § 3151(b)*].

Counsel has the following rights: (1) reasonable access to the child; (2) standing to seek affirmative relief on the child's behalf; (3) notice of any proceeding, and all phases of that proceeding, including a request for examination affecting the child; (4) the right to take any action available to a party to the proceeding, including, but not limited to, filing pleadings, making evidentiary objections, presenting evidence and being heard in the proceeding, presenting motions and orders to show cause, and participating in settlement conferences, trials, writ proceedings, appeals, and arbitrations; (5) access to the child's medical, dental, mental health, and other health care records, school and educational records, and the right to interview school personnel, caretakers, health care providers, mental health professionals, and others who have assessed the child or provided care to the child [*Fam. Code § 3151(c)(5)* (release of this information to counsel does not waive confidentiality of reports, files, or disclosed communications; counsel may interview mediators subject to provisions of *Fam. Code §§ 3177, 3182*)]; (6) the right to reasonable advance notice of and the right to refuse any physical or psychological examination or evaluation, for purposes of the proceeding, which has not been ordered by the court; (7) the right to assert or waive any privilege on the child's behalf; and (8) the right to seek an independent psychological or physical examination or evaluation of the child for purposes of the pending proceeding on approval by the court [*Fam. Code § 3151(c)*; *Cal. Rules of Ct., Rule 5.242(i)*].

At the court's request, counsel may orally state the child's wishes for consideration by the court if that information is not a privileged communication under *Evid. Code § 954*. Counsel may introduce and examine his or her own witnesses, present arguments to the court concerning the child's welfare, and participate further in the proceeding to the degree necessary to adequately represent the child [*Fam. Code § 3151(b)*].

When a child is represented by court-appointed counsel, at every hearing in which the court makes a judicial determination concerning custody or visitation, the court must consider any statement of issues and contentions filed by the child's counsel. Any party may subpoena as a witness any person listed in the statement as having provided information to counsel, but counsel may not be called as a witness [*Fam. Code § 3151.5*].

Once an attorney has entered an appearance on behalf of a child, as provided above, the attorney must continue to represent the child until (1) the conclusion of the proceeding for which the attorney was appointed, (2) the attorney is relieved by the court, (3) the attorney is substituted by the court with other counsel, (4) the attorney is removed on the court's own motion or on the request of the attorney or the parties for good cause shown, or (5) the child reaches the age of majority or is emancipated [*Fam. Code § 3150(b)*; *Cal. Rules of Ct., Rule 5.240(f)*]. No later than 30 days after the attorney is relieved as attorney of record, the court may make a redetermination of the attorney's compensation on the court's own motion, at the request of a party or party's counsel, or at the request of the attorney for the child [*Cal. Rules of Ct., Rule 5.241(a)(2)*].

[b] For Parent

A family law court has no jurisdiction to furnish appointed counsel to a party to a child custody proceeding, even if the party is indigent [*see In re Marriage of Laursen & Fogarty (1988) 197 Cal. App. 3d 1082, 1087, 243 Cal. Rptr. 398* (family law court has no authority to order party's attorney to repay earned fees into trust account to enable that party to substitute another attorney)].

[8] Court-Ordered Parental Counseling

The court may require the parents of the child or any other party involved in acustody or visitation dispute, and the child, to participate in outpatient counseling.Court-ordered counseling requires a finding that the dispute between the parent, between a parent and the child, or between the parents and another party seeking custody or visitation rights with the child, poses a substantial danger to the best interests of the child and that the counseling is in the best interests

of the child [*Fam. Code § 3190(a)*]. In determining whether the dispute poses a substantial danger to the child's best interests, the court must consider any history of domestic violence within the past five years between the parents, the parents and the child, or between a parent and another party seeking custody or visitation rights with the child [*Fam. Code § 3190(b)*].

The counseling may be with a licensed mental health professional or through other community programs and srvices that provide appropriate counseling, including, but not limited to, mental health or substance abuse services. The duration of the period of court-ordered counseling may not exceed one year, provided that the program selected has counseling available for the designated period of time [*Fam. Code § 3190(a)*]. The court, in its finding, must set forth reasons why it has found both of the following: (1) that the dispute poses a substantial danger to the best interests of the child and the counseling is in the best interests of the child; and (2) the financial burden created by the order does not otherwise jeopardize a party's other financial obligations [*Fam. Code § 3190(c)*]. The counseling must be specifically designed to facilitate communication between the parties regarding the child's best interests, to reduce conflict regarding custody or visitation, and to improve the quality of the parenting skills of each parent [*Fam. Code § 3191*].

The statutory provisions for court-ordered counseling are designed to address due process concerns with open-ended and unlimited orders requiring a parent to participate in psychotherapy [*see, e.g., Camacho v. Camacho (1985) 173 Cal. App. 3d 214, 220-221, 218 Cal. Rptr. 810* ; *In re Marriage of Matthews (1980) 101 Cal. App. 3d 811, 817-818, 161 Cal. Rptr. 879* ; *cf. In re Chantal S. (1996) 13 Cal. 4th 196, 212 n.2, 51 Cal. Rptr. 2d 866, 913 P.2d 1075* (expressing no opinion regarding correctness of *Matthews* and *Camacho*)]. Any order for counseling must conform to all the statutory requirements, including the one-year limitation [*see In re Katherine M. (1994) 27 Cal. App. 4th 91, 98-100, 33 Cal. Rptr. 2d 298* ; *but see In re Chantal S. (1996) 13 Cal. 4th 196, 212, 51 Cal. Rptr. 2d 866, 913 P.2d 1075* (*Fam. Code § 3190* does not apply to juvenile court exit orders, *disapproving Kathryn M.* on this point; for discussion of exit orders, *see* Ch. 394, *Parent and Child*)].

The statutes do not expressly provide for when the order for counseling may be made, but it is clear that such an order may be made as part of the court's permanent custody and visitation order [*see Fam. Code § 3190(d)*, discussed *below*]. Nothing in the statutes appears to prohibit the order from being made at an earlier point in the proceedings.

In any proceeding in which counseling is ordered and there has been a history of abuse by either parent against the child or by one parent against the other, or if a protective order [*see Fam. Code § 6218*] is in effect, the court may order the parties to participate in counseling separately and at separate times [*Fam. Code § 3192*].

If the court finds that the financial burden created by the order for counseling does not otherwise jeopardize a party's other financial obligations, the court must fix the cost and order the entire cost to be borne by the parties in the proportions that the court deems reasonable [*Fam. Code § 3190(b)*]. In a case involving domestic violence in which separate counseling has been ordered, each party must bear the cost of his or her own counseling separately unless good cause is shown for a different apportionment. The costs associated with the child's participation in counseling must be apportioned between the parents [*Fam. Code § 3192*; *see Fam. Code §§ 4061(a), 4062*, discussed in *Ch. 224, Dissolution of Marriage: Child Support, § 224.112[2]*].

If counseling is ordered at the end of the matter with the permanent custody and visitation order, the court may not order the parties to return to court on completion of counseling. However, either party may file a new order to show cause or motion after counseling has been completed, and the court may then again order counseling [*Fam. Code § 3190(d)*].

[9] Appointment of Interpreter

The Judicial Council is required to establish a one-year pilot project, beginning July 1, 1999, in at least two counties (including Los Angeles County), to provide that in any child custody proceeding, including mediation and other proceedings, the court must appoint an interpreter to interpret the proceedings at court expense if one or both of the

parties is unable to participate fully in the proceeding because of a lack of proficiency in the English language, and the court determines that the parties are financially unable to pay the cost of an interpreter [*Fam. Code § 3032(a)(1), (2)*]. When the interpreter is not present the court may still issue an order if the necessity for the order outweighs the necessity for an interpreter, extend the duration of a previously issued temporary order if an interpreter is not readily available, and issue a permanent order when a party who requires an interpreter fails to make appropriate arrangements for an interpreter after receiving proper notice of the hearing [*Fam. Code § 3032(a)(3)*].

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§ 223.21 Mandatory Mediation

[1] Requirement

In a proceeding for dissolution of marriage, nullity of marriage, or legal separation [*see Fam. Code § 3021*] in which child custody or visitation is a contested issue, mediation of that issue is mandatory [*Fam. Code § 3170*; *see* Cal. Judicial Council Form FL-341 referral to mandatory mediation is included in Judicial Council form used to set forth temporary custody orders); *see also Fam. Code §§ 1815, 1816, 3164* (qualifications of mediators)]. Mandatory mediation applies to disputes involving temporary as well as permanent custody [*Fam. Code § 3170(a)*; *see Fam. Code § 3170(b)* (requiring special, separate written protocol for handling domestic violence cases).] It also applies to disputes concerning modification of custody or visitation orders [*Fam. Code § 3170*], and to situations in which a stepparent or grandparent has petitioned or applied for visitation rights [*Fam. Code § 3171(a)*; *see § 223.19[2]* and *[4]*].

According to the Family Code, the purposes of mandatory mediation are (1) to reduce acrimony that may exist between the parties [*Fam. Code § 3161(a)*; (2) to assist the parties to develop an agreement assuring that the child or children will haveclose and continuing contact with both parents, to the extent consistent with the children's best interests [*Fam. Code § 3161(b)*]; and (3) to effect a settlement of the issue of visitation rights of all parties that is in the best interest of the child [*Fam. Code § 3161(c)*].

In some counties, a party may file a petition for mediation of a dispute relating to an existing order for custody or visitation, or both. The board of supervisors of the county must have adopted a resolution authorizing the procedure [*Fam. Code § 3173(a)*].

Mediation may not be denied to the parties on the basis that paternity is at issue in the proceeding [*Fam. Code § 3172*]. However, the court may deny a request made at trial for additional custody and visitation mediation once mandatory mediation has been provided [*In re Marriage of Green (1989) 213 Cal. App. 3d 14, 24-25, 261 Cal. Rptr. 294]* .

Many courts have organized departments called "family court services" to provide the mandatory mediation services [*see generally* Statewide Office of Family Court Services, Judicial Council of California, Managing the Family Court

Services Organization (1989)].

[2] Governing Statutes and Rules

Court mediators must operate in compliance with the Family Code statutes, the uniform standards of the California Rules of Court, and the policies and procedures set by each county. *California Rules of Court, Rule 5.210* sets forth standards of practice and administration for court-connected child custody mediation services [*Cal. Rules of Ct., Rule 5.210(b)*]. The courts are also required to develop local rules to respond to requests for a change of mediator or other general mediation problems [*Fam. Code § 3163*; *cf. Hogoboom v. Superior Court (1996) 51 Cal. App. 4th 653, 661-671, 59 Cal. Rptr. 2d 254* (*Fam. Code § 3163* does not authorize local courts to impose fees exceeding those charged for use of mediation process, given that imposition of fees for family law and domestic violence mediation has been preempted by state statute)].

[3] Role of Mediator

A mediator has the duty to assess the needs and interests of the child involved in the controversy, and must use his or her best efforts to effect a settlement that is in the best interests of the child [*Fam. Code § 3180*; *see Fam. Code § 3011*]. At all times, the mediator's overriding concern should be the best interests of the child [*see In re Marriage of Rosson (1986) 178 Cal. App. 3d 1094, 1104 n.8, 224 Cal. Rptr. 250* (mediator acts as "advocate" for child, though not in sense of legal representative)]. Mediators must attempt to integrate the child's best interests within the family context [*Cal. Rules of Ct., Rule 5.210(d)(2)*].

Mediators have no authority to make custody or visitation decisions, which are within the nondelegable authority of the court [*see In re Marriage of Matthews (1980) 101 Cal. App. 3d 811, 816-817, 161 Cal. Rptr. 879* (trial court improperly delegated authority to modify visitation schedule)]. Nevertheless, in some counties, when local rules permit, mediators may make recommendations to the courts concerning custody and visitation if mediation is unsuccessful in bringing the parents to an agreement [*see Fam. Code § 3183(a)*].

[4] Procedural Issues

Mediation must be set before or concurrent with the setting of the custody dispute for hearing [*Fam. Code § 3175*]. If a petition is filed for mediation of a dispute relating to an existing custody or visitation order, the matter must be set for mediation within 60 days of the filing of the petition [*Fam. Code § 3173(b)*].

Notice of mediation, and of any hearing to be held, must be given to each party and to each party's counsel of record [*Fam. Code § 3176(a)(1)*]. If a stepparent or grandparent seeks visitation rights, notice must be given to the stepparent or grandparent, to both parents of the child, and to each parent's counsel of record [*Fam. Code § 3176(a)(2)*]. Notice must be given by certified mail, return receipt requested, postage prepaid, to the last known address of the person to be notified [*Fam. Code § 3176(b)*].

[5] Confidentiality of Mediation

Mediation proceedings must be held in private and are confidential. All communications, oral and written, from the parties to the mediator made in a mandatory mediation proceeding are deemed to be official information under *Evid. Code 1040* [*Fam. Code § 3177*; *see Cal. Rules of Ct., Rule 5.210(d)(1)(F)* (courts must ensure that mediation services protect party confidentiality in storage and disposal of records and personal information); *see also Fam. Code § 6303(c)* ("support persons" accompanying parties to mediation are bound by confidentiality)]. *Evid. Code § 1119* (admissibility provisions applicable to generally to private mediation) does not apply to mandatory custody and visitation mediation [*Evid. Code § 1117(b)(1)*].

The confidentiality provided by *Fam. Code § 3177* does not mean that a parent may say or do anything in the course of

mediation without fear that it might affect the court's future custody determination. By statute, the mediator may, consistent with local court rules (if they so permit), submit a recommendation to the court as to the custody of or visitation with the child [*Fam. Code § 3183(a)*; *see § 223.21[13]*]. The official-information privilege of *Evid. Code § 1040* belongs to the court personnel, not to the parties. It prohibits the public disclosure of official information, but it may not be invoked by a parent to prohibit the mediator from making a recommendation and testifying at the hearing [*In re Marriage of Rosson (1986) 178 Cal. App. 3d 1094, 1105, 224 Cal. Rptr. 250]* . Therefore, counsel must ensure that the client understands that if mediation is unsuccessful in bringing the parties to an agreement, the mediator may become an adversary.

[6] Attendance of Counsel

The mediator has the discretion to exclude counsel from participation in the mediation proceedings if the mediator deems it to be appropriate or necessary [*Fam. Code § 3182(a)*]. On the other hand, the attorneys may be required to attend mediation sessions in some cases [*see, e.g.*, San Francisco City and County Uniform Local Rules of Court, Rule 11.28(B) (attorneys must attend initial mediation session and may nothave other matters on any court calendar at time of mediation)].

[7] Cases Involving History or Allegations of Domestic Violence

If a domestic violence protective order [*see Fam. Code § 6218*] is in effect, the mediator must meet with the parties separately and at separate times if the party protected by the order requests [*Fam. Code § 3181(a)*]. If there has been a history of domestic violence but no protective order is in effect, separate sessions are required on the request of a party alleging domestic violence in a written declaration under penalty of perjury [*Fam. Code § 3181(a)*].

If a court has issued a domestic violence protective order, a support person may accompany the party protected by the order during mediation sessions [*Fam. Code § 6303(c)*]. The support person's function is to provide moral and emotional support for a victim of domestic violence, and to assist the victim in feeling more confident that he or she will not be injured or threatened during the proceedings. The support person cannot be a legal advisor or give legal advice [*Fam. Code § 6303(a)*; *see Fam. Code § 6303(c)* (support person's presence does not waive confidentiality of mediation, and support person is bound by confidentiality of sessions)]. The mediator may exclude a support person from a mediation session if the support person participates in the session or acts as an advocate, or if the support person's presence is disruptive or disrupts the mediation process [*Fam. Code §§ 3182(b), 6303(c)*]. If allegations of child abuse or neglect are made, mediation must be suspended until a designated agency performs an investigation and reports a case determination to the mediator [*Cal. Rules of Ct., Rule 5.210(e)(6)*].

[8] Meeting With Children

Normally, the children who are the subject of the mediation do not attend mediation sessions. Nevertheless, the mediator may interview a child as the mediator deems necessary [*Fam. Code § 3180(a)*; *see* Paquin, *The Child's Input in the Mediation Process: Promoting the Best Interests of the Child*, Mediation Q., No. 22, pp. 69, 73-76 (Winter 1988) (survey of court mediators found that, depending on the age of the children, 15 to 30 percent of the mediators reported that they always obtained input from children; the other mediators reported that they obtained input from children only under certain conditions, such as when there were allegations of abuse or neglect, the parents could not agree on the child's feelings or needs, or the mediation was at an impasse)].

[9] Participation of Nonparty Natural or Adoptive Parent

A biological or adoptive parent who is not a party to a proceeding involving the custody of his or her child is not required to participate in mediation. However, the failure to participate constitutes a waiver of that parent's right to object to any settlement reached by the other parties in mediation and right to require a hearing on the matter [*Fam. Code § 3171(b)*; *but see Fam. Code § 3185(b)* (right to appear and be heard at hearing regarding stepparent or

grandparent visitation not waived)].

[10] Agreement Reached Through Mediation

If agreement is reached by the parties, mediation concludes with preparation of a written parenting plan [*Cal. Rules of Ct., Rule 5.210(e)(8)(A)*; *see Fam. Code § 3188* (limitations on subject of agreement)]. A "parenting plan" is defined as a plan describing how parents or other parties will share and divide their decision making and caretaking responsibilities to protect the health, safety, welfare, and best interest of each child who is a subject of the proceedings [*Cal. Rules of Ct., Rule 5.210(c)(2)*]. The mediator must report the parents' agreement to counsel and to the court [*Fam. Code § 3186(a)*].

The agreement may not be confirmed or otherwise incorporated into a court order unless each party, in person or by counsel of record, has affirmed and assented to the agreement in open court or by written stipulation [*Fam. Code § 3186(b)*; for Judicial Council form of Stipulation and Order for Custody and/or Visitation of Children (Cal. Judicial Council Form FL-355), *see § 223.77*]. If, however, a party fails to appear at a noticed hearing on the issue involved in the agreement, the agreement may nonetheless be confirmed or incorporated in an order [*Fam. Code § 3186(c)*]. A judge may refuse to approve and incorporate an agreement that he or she feels is contrary to the best interests of a child, as part of the court's discretionary authority in custody matters.

[11] Modification of Agreement

A custody or visitation agreement reached in mediation may be modified at any time in the court's discretion, subject to the applicable law regarding modification of custody orders [*Fam. Code § 3179*; *see § 223.27[1]* et seq.].

[12] No Agreement

If an agreement is not reached, the court must set the matter for hearing on the unresolved issues [*Fam. Code § 3185(a)*].

[13] Mediator's Recommendation to Court

Mediators have no formal authority to make custody or visitation determinations [*see In re Marriage of Matthews (1980) 101 Cal. App. 3d 811, 816-817, 161 Cal. Rptr. 879* (trial court improperly delegated authority to modify visitation schedule)]. Nevertheless, in some counties, they may have significant influence on the determination ultimately made by the court. The mediator may, consistent with local court rules (if they so permit), submit a recommendation to the court as to the custody of or visitation with the child [*Fam. Code § 3183(a)*; *see In re Marriage of Rosson (1986) 178 Cal. App. 3d 1094, 1104, 224 Cal. Rptr. 250* (recommendations must be in writing)]. One appellate court upheld a trial court's order, even though the court had remarked that it was inclined to follow the mediator's recommendation in the absence of other evidence. It held that there was a full evidentiary hearing, and there was no indication of any unwillingness by the trial court to exercise its independent judgment [*In re Marriage of Biggums-Slayton (2001) 86 Cal. App. 4th 653, 659, 103 Cal. Rptr. 2d 545]* .

The mediator may also recommend to the court that counsel be appointed to represent the child [*Fam. Code § 3184*; *see Fam. Code § 3150 et seq.*]. In addition, attorneys and parties should be aware that there may be significant informalcommunication between mediators, judges , and other court personnel [*see* Newman, *The Balancing Act in Family Court, 7 Cal. Law. 44, 46*-47 (Jan. 1987)].

If a mediator makes a recommendation to the court, all parties have a due process right to examine the mediator about the recommendation at a hearing on the contested issues [*McLaughlin v. Superior Court (1983) 140 Cal. App. 3d 473, 480-484, 189 Cal. Rptr. 479]* . Thus, the mediator must appear and testify if called as a witness by either party, subject to cross examination by the other party [*see In re Marriage of Rosson (1986) 178 Cal. App. 3d 1094, 1105, 224 Cal.*

Rptr. 250] . However, the right of examination may be waived [*McLaughlin v. Superior Court (1983) 140 Cal. App. 3d 473, 484, 189 Cal. Rptr. 479]* .

[14] Procedure for Complaints Against Mediator

A party who contends that a court-program mediator may have violated a provision of the rules of conduct for court-program mediators may submit a written complaint to the court's complaint coordinator [*see Cal. Rules of Ct., Rules 3.865-3.872*]. The complaint coordinator must send the party a written acknowledgment that the court has received the complaint and must conduct a preliminary review to determine whether the complaint can be resolved informally or closed, or whether the complaint warrants investigation [*Cal. Rules of Ct., Rule 3.869(b), (c)*]. If the complaint is not resolved or closed after a preliminary review, the mediator must be given notice of the complaint and an opportunity to respond [*Cal. Rules of Ct., Rule 3.869(d)(1)*]. A final decision on the complaint must be made by the presiding judge or his or her designee [*Cal. Rules of Ct., Rule 3.869(d)(3)*]. The complaint proceedings must be kept confidential [*Cal. Rules of Ct., Rule 3.871(c)*].

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§ 223.22 Custody Investigation and Report

[1] Appointment of Investigator

In any contested proceeding involving child custody or visitation rights, the court may appoint a child custody evaluator to conduct a child custody evaluation if the court determines that it is in the child's best interests [*Fam. Code § 3111(a)*; *see Fam. Code § 3110*; *Cal. Rules of Ct., Rule 5.220(c)(1)*; *see also § 223.80* (Order Appointing Child Custody Evaluator)]. No person may be a court-connected or private child custody evaluator unless he or she has completed the domestic violence training program described in *Fam. Code § 1816*, and has complied with *Cal. Rules of Ct., Rules 5.220* and *5.230* [*Fam. Code § 3110.5(a)*].

Because each party may also obtain a professional expert evaluator, often three such experts will be involved in a custody dispute, one on behalf of each parent and one appointed by the court. However, it has been common judicial policy to avoid multiple examinations of the child by different examiners whenever possible. In fact, courts will frequently order that only a court-appointed evaluator may interview the child. If the parties can agree, the court will normally appoint an evaluator on whom they have agreed [*cf. Cal. Rules of Ct., Rule 5.220(h)(10)* (evaluator's ethical duty to not accept appointment except by court order or parties' stipulation)]. All child custody evaluators, however, whether appointed by stipulation or without, must meet the qualifications, training and continuing education requirements specified by statute and court rule [*Cal. Rules of Ct., Rule 5.220(g)*; *see Fam. Code §§ 1815, 1816, 3111*; *Cal. Rules of Ct., Rule 5.230*]. Each court must adopt rules on whether a peremptory challenge to an evaluator will be allowed, and if so, when the challenge must be exercised [*Cal. Rules of Ct., Rule 5.220(d)(1)(A)*].

[2] Cost of Investigation

The court must inquire into the financial condition of the parent, guardian, or other person charged with the support and maintenance of the minor. If the court finds the person able to pay all or part of the expense of an investigation by a court-appointed investigator, the court may make an order requiring him or her to repay to the county that part, or all, of the expense of investigation, report, and recommendation as, in the court's opinion, is proper [*Fam. Code § 3112(a)*; *see Cal. Rules of Ct., Rule 5.220(d)(1)(D)* (if evaluation is ordered, and if any fees or costs will be charged for it, court must allocate payment of evaluator's fees and costs between parties)]. The repayment must be made to the court, which must

keep suitable accounts of these expenses and repayments and deposit the collections as directed by the Judicial Council [*Fam. Code § 3112(b)*].

[3] Conduct of Investigation

The investigator conducts the investigation by interviewing the parents and the children. Other persons with knowledge of the situation, such as relatives, neighbors, teachers, doctors, or psychiatrists, may also be interviewed. In some counties, the parties are asked to furnish the names of witnesses. One or more home visits will probably be made, and proposed arrangements of care for the children are investigated. The process may take two months or longer.

Each superior court must adopt local rules to implement the comprehensive standards for practice for court-ordered evaluations set forth in *Cal. Rules of Ct., Rule 5.220*, which include, among other things, standards for contact between the evaluator and the child. Under that state court rule, for example, child custody evaluators must include in their initial meeting with a child an age-appropriate explanation of the evaluation process, including limitations on the confidentiality of that process. An evaluator's data collection and analysis that are consistent with the requirements of *Family Code Section 3118* may include conducting age-appropriate interviews with, and observations of, the child, both parents, any stepparents, step and half-siblings--whether together, separately, or both, unless contraindicated to the protect the best interest of the child. The state court rule also imposes on the evaluator the general duty to consider the health, safety, welfare, and best interest of the child in all phases of the process [*Cal. Rules of Ct., Rule 5.220(d)(2), (e)(2), (h)*]. In addition, each court must adopt local rules to address ex parte communications [*Cal. Rules of Ct., Rule 5.220(d)(1)(A)(v)*].

If there has been a history of domestic violence between the parties, or if aprotective order [*see Fam. Code § 6218*] is in effect, at the request of a party alleging domestic violence in a written declaration under penalty of perjury or at the request of a party who is protected by the order, the parties must meet with the investigator separately and at separate times [*Fam. Code § 3113*; *see Cal. Rules of Ct., Rule 5.220(e)(2)(C)*].

Although the court cannot delegate its judicial responsibilities to the investigator and may disregard the report and recommendation [*Fewel v. Fewel (1943) 23 Cal. 2d 431, 436, 144 P.2d 592]* , it is usually very influential. Therefore, counsel should advise the client to cooperate with the investigator and try to furnish him or her with as much favorable information as possible.

[4] Confidentiality of Report

The investigator's report is confidential [*Fam. Code § 3111(a)*] and may not be made available except to the court and to the parties or their attorneys, and any other counsel appointed for the child pursuant to *Fam. Code § 3150* [*Fam. Code § 3111(b)*].

[5] Use of Report at Trial

The investigation report may be considered by the court [*Fam. Code § 3111(a)*], and is competent evidence as to matters contained in it. The report may be received in evidence on the stipulation of all interested parties [*Fam. Code § 3111(c)*]. The report should be presented in affidavit form or otherwise under oath [*Fewel v. Fewel (1943) 23 Cal. 2d 431, 436, 144 P.2d 592]* .

Due process of law requires that each party receive a copy of the report [*Wheeler v. Wheeler (1973) 34 Cal. App. 3d 239, 242, 109 Cal. Rptr. 782* ; *see Fam. Code § 3111(a)* (report to be filed and served on parties or their attorneys and any counsel appointed for the child at least 10 days before any hearing)]. It also requires that each party be given an opportunity to cross examine the investigator and to subpoena and examine persons whose hearsay statements are contained in the report, and to be permitted to introduce rebuttal evidence [*Wheeler v. Wheeler (1973) 34 Cal. App. 3d*

239, 242, 109 Cal. Rptr. 782] . In support of these due process requirements, *Fam. Code § 3115* provides that "no statement, whether written or oral, or conduct shall be held to constitute a waiver by a party of the right to cross examine the court-appointed investigator, unless the statement is made, or the conduct occurs, after the report has been received by a party or his or her attorney." The testimony is subject to proper direct and cross examination, and is competent evidence [*see In re Marriage of Russo (1971) 21 Cal. App. 3d 72, 77-78, 98 Cal. Rptr. 501* (court can consider report if parties stipulate that it be deemed admitted, though it was not introduced); *Swain v. Swain (1967) 250 Cal. App. 2d 1, 8, 58 Cal. Rptr. 83* (dealing with similar, but identical, statute)].

A party may waive the right to object to the contents of a report and the right to examine the investigator or to present rebuttal evidence, either by stipulation that the report may be received and considered by the court as evidence without further hearing, or by the failure to make timely objection [*Long v. Long (1967) 251 Cal. App. 2d 732, 736-737, 59 Cal. Rptr. 790]* . Each local court must develop procedures for the expeditious and cost-effective cross examination of court appointed investigators. These may include, but are not limited to, consideration of videoconferences, telephone conferences, audio or video examination, and scheduling of appearances [*Cal. Rules of Ct., Rule 5.220(i)*]. The underlying statutory authorization for such procedures provides that they must in no way "limit the requirement that the court-appointed investigator be available for the purposes of cross examination" [*Fam. Code § 3117(b)*].

Beginning on January 1, 2010, if the court determines that an unwarranted disclosure has been made of a written confidential report, it may impose a monetary sanction against the disclosing party [*Fam. Code § 3111(d)*]. A disclosure is unwarranted if it is made either recklessly or maliciously and is not in the child's best interests [*Fam. Code § 3111(f)*]. The sanction must be in an amount that is sufficient to deter repetition of the conduct and may include reasonable attorney's fees and costs incurred, unless the court finds that the disclosing party acted with substantial justification or other circumstances making the imposition of sanctions unjust [*Fam. Code § 3111(d)*]. It may not, however, impose an unreasonable financial burden on the sanctioned party [*Fam. Code § 3111(d)*].

[6] Special Rules for Investigation of Child Sexual Abuse

In any contested proceeding involving child custody or visitation rights, in which the court has either appointed a child custody evaluator or referred a case for court-connected evaluation, investigation, or assessment, and in which the court determines that there is a serious allegation of child sexual abuse, the court must require an evaluation, investigation, or assessment meeting special standards [*Fam. Code § 3118(a)*]. Any subsequent evaluation, investigation, or assessment may not be considered by the court unless it meets those standards [*Fam. Code § 3118(a)*]. In an emergency, the court may consider a partial investigation conducted for the purpose of assisting the court in determining what immediate temporary orders may be necessary to protect a child, but this exception does not apply after the emergency is resolved and the court is considering permanent child custody or visitation orders [*Fam. Code § 3118(a)(1)*]. Generally, the court is not prohibited from considering evidence relevant to the safety and protection needs of the child [*Fam. Code § 3118(a)(2)*].

A "serious allegation of child sexual abuse" means an allegation of child sexual abuse, as defined in *Penal Code § 11165.1*, that is based in whole or in part on statements made by the child to law enforcement, a child welfare services agency investigator, any person required by statute to report suspected child abuse, or any other court appointed personnel, or that is supported by substantial independent corroboration [*Fam. Code § 3118(a)*; *see Fam. Code § 3011(b)*]. When an allegation of child sexual abuse arises in a custody or visitation proceeding in circumstances where the court has not appointed an evaluator or referred the case, the court may still require an evaluation, investigation, or assessment [*Fam. Code § 3118(a)*], or it may request the local child welfare services agency to investigate and report to the court [*Fam. Code § 3027(b)*]. An order appointing an evaluator or investigator must provide that the evaluator or investigator will have access to all juvenile court records pertaining to the child, and that any such records or information gained from themshall remain confidential and shall only be released as provided in *Fam. Code § 3111* [*Fam. Code § 3118(a)*].

The evaluator or investigator must file a confidential written report with the court that includes recommendations regarding the child's therapeutic needs and how to ensure the child's safety [*Fam. Code § 3118(b)(6)(D)*]. This report must be served on the parties at least 10 days before the hearing [*Fam. Code § 3118(b)(6)*].

If the court orders evaluation, investigation, or assessment of allegations of child sexual abuse, the court must consider whether the best interest of the child requires that a temporary order be issued that limits visitation with the parent against whom the allegations have been made to situations in which a third person specified by the court is present [*Fam. Code § 3118(f)*]. The court must also consider whether visitation should be suspended or denied under *Fam. Code § 3011* [*Fam. Code § 3118(f)*].

Any evaluation of allegations of child sexual abuse must be suspended if a petition is filed to declare the child a dependent child of the juvenile court under *Welf. & Inst. Code § 300* [*Fam. Code § 3118(g)*].

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§ 223.23 Use of Psychiatrist or Other Expert

The court has the authority to appoint a psychiatrist or other mental health expert to examine the parents and the children in a custody proceeding, instead of, or in addition to, the investigation discussed in *§ 223.22[1]* [*Evid. Code § 730*; *see In re Marriage of Kim (1989) 208 Cal. App. 3d 364, 372, 256 Cal. Rptr. 217]* . The court will apportion the cost between the parties [*Evid. Code § 731(c)*].

Counsel may also have his or her client and the child, if the client has custody of the child, consult a psychiatrist, medical doctor, or child psychologist, and use the testimony of the expert if it will be helpful. If the attorney suspects that the mental or physical condition of the other party is such that he or she should not have custody, or that the mental or physical condition of the child establishes the unfitness of the custodial parent, the attorney may move to have the other party or the child in his or her custody examined by a psychiatrist or doctor under *Code Civ. Proc. § 2032.010 et seq.* The attorney may also seek discovery of the other parent's relevant medical records that are not privileged [*see Manela v. Superior Court (2009) 177 Cal. App. 4th 1139, 1143, 1146-1147, 1150-1152, 99 Cal. Rptr. 3d 736* (father waived physician-patient privilege with respect to doctor who examined father for neurological condition, when mother was present during exam)].

An attorney's recommendation to the parties concerning the hiring of an independent psychologist to evaluate both parents and the children to determine appropriate custody and visitation has been held to be a privileged communication under *Civ. Code § 47(b)* [*see Silberg v. Anderson (1990) 50 Cal. 3d 205, 219-220, 266 Cal. Rptr. 638, 786 P.2d 365* (rejecting tort and breach of contract action brought by husband against wife's attorney under several theories); *Laborde v. Aronson (2001) 92 Cal. App. 4th 459, 463-464, 112 Cal. Rptr. 2d 119* (litigation privilege protected child custody evaluator after parents unequivocally agreed to submit to independent evaluation rather than to retain own experts); *see also Gootee v. Lightner (1990) 224 Cal. App. 3d 587, 593-596, 274 Cal. Rptr. 697* (privilege extends to evaluator for alleged negligent and intentional torts arising from preparation and testimony in custody matter)]. In addition, an expert's communication that is connected or logically related to custody litigation is protected by the privilege, even if it concerns a nonparty [*Obos v. Scripps Psychological Associates, Inc. (1997) 59 Cal. App. 4th 103, 108-109, 69 Cal. Rptr. 2d 30* (court-appointed psychologist)].

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§ 223.24 Calendar Preference

A case in which child custody is the sole contested issue must be given calendar preference over other civil cases, except matters to which special precedence may be given by law, for assigning a trial date and must be given an early hearing [*Fam. Code § 3023(a)*]. If child custody is one of multiple contested issues, the court must order a separate trial as to the custody matter. This separate trial then has the same calendar preference over other civil cases [*Fam. Code § 3023(b)*].

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§ 223.25 Conduct of Hearing

The court, in its discretion, may exclude the public from a custody hearing [*Fam. Code § 214*; *see Fam. Code § 3041* (public may be excluded from hearing on whether parental custody would be detrimental to child)]. Witnesses may also be excluded from the courtroom except during their own examination [*Evid. Code § 777*].

The court has the power to protect a child under the age of 14 from undue harassment or embarrassment and to restrict questioning [*Evid. Code § 765(b)*]. The judge may even conduct the examination entirely, prohibiting the attorneys from examining the child [*see In re Marriage of Okum (1987) 195 Cal. App. 3d 176, 183, 240 Cal. Rptr. 458]* . The court will often exclude the children at issue from the courtroom to avoid harm to them from the testimony of their parents and other witnesses.

If the child's preference is to be considered (*§ 223.12[2]*), the court may talk to the child in chambers in lieu of testimony in court if the parties do not object [*Tarling v. Tarling (1960) 186 Cal. App. 2d 8, 10-11, 8 Cal. Rptr. 621]* .

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§ 223.26 Appellate Review

The standard of appellate review of custody and visitation orders is the deferential "abuse of discretion" test. Under this test, the appellate court must uphold the trial court ruling if it is correct on any basis, regardless of whether that basis was actually invoked [*Montenegro v. Diaz (2001) 26 Cal. 4th 249, 255, 109 Cal. Rptr. 2d 575, 27 P.3d 289* (trial court did not abuse discretion by refusing to apply changed circumstance rule); *In re Marriage of Burgess (1996) 13 Cal. 4th 25, 32, 913 P.2d 473* ; *see In re Marriage of Williams (2001) 88 Cal. App. 4th 808, 812, 105 Cal. Rptr. 2d 923* (standard of appellate review of custody and visitation orders is deferential abuse of discretion test; precise measure is whether family law court could have reasonably concluded that order in question advanced best interest of child)].

However, because of the nature of custody, appeal is seldom an adequate remedy to correct trial court error. By the time that review is completed, the circumstances have often changed, so that determination of what was in the child's best interests based on the record of the trial may no longer be appropriate [*see Zenide v. Superior Court (1994) 22 Cal. App. 4th 1287, 1293, 27 Cal. Rptr. 2d 703* ; *Stack v. Stack (1961) 189 Cal. App. 2d 357, 359, 11 Cal. Rptr. 177]* . Further, because of the child's need for continuity and stability of the custodial arrangement, the appellate court generally will not order a change of custody on appeal, even if it finds that the trial court erred in reaching its initial custody determination [*see Burchard v. Garay (1986) 42 Cal. 3d 531, 541, 229 Cal. Rptr. 800, 724 P2d 486* ; *In re Marriage of Carney (1979) 24 Cal. 3d 725, 741, 157 Cal. Rptr. 383, 598 P.2d 36]* . Even if a stay is granted, the facts remain that the existing custodial arrangement is continuing and circumstances may be changing, so that the appellate court will be reluctant to reach a resolution that may not be in the child's best interests as of the time when the appeal is decided, even if it would have been in the child's best interests as of the time of trial [*see Stack v. Stack (1961) 189 Cal. App. 2d 357, 359, 11 Cal. Rptr. 177]* . For this reason, review of child custody determinations by extraordinary writ is favored [*see Zenide v. Superior Court (1994) 22 Cal. App. 4th 1287, 1293, 27 Cal. Rptr. 2d 703]* . At least one appellate court has chosen to treat a motion for a stay as a petition for writ of mandate, so as to be able to resolve the matter immediately [*see Speelman v. Superior Court (1983) 152 Cal. App. 3d 124, 128, 199 Cal. Rptr. 784]* .

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Volume 19: Dissolution of Marriage: Child Custody thru Dissolution of Marriage: Tax Effects of Dissolution-Chs.223-239
Chapter 223 DISSOLUTION OF MARRIAGE: CHILD CUSTODY
PART II. LEGAL BACKGROUND

19-223 California Forms of Pleading and Practice--Annotated § 223.27

§ 223.27 Modification of Custody and Visitation Orders

[1] Jurisdiction to Modify Orders

A court may, during the pendency of a proceeding for dissolution of marriage, nullity of marriage, or legal separation, and in certain other proceedings, *or at any time thereafter*, make such orders for the custody of a child during minority as may be necessary or proper [*Fam. Code § 3022*; *see Fam. Code § 3021* (referring also to proceedings under *Fam. Code §§ 3120* (exclusive custody), *6323, 6340(a)* (DVPA), *7637* (UPA); *Prob. Code § 1514(b)* (guardianship))]. Thus, the court that makes a custody order has continuing jurisdiction over the matter, and may modify the order in the future as circumstances require [*see Gudelj v. Gudelj (1953) 41 Cal. 2d 202, 209, 259 P.2d 656]* .

The jurisdiction of a California court to modify its own custody order if the child has moved out of the state is controlled by the federal Parental Kidnapping Prevention Act (PKPA) [*28 U.S.C. § 1738A*] and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) [*Fam. Code § 3400 et seq.*]. Similarly, the jurisdiction of a California court to modify a custody order of another jurisdiction concerning a child who is physically present in California is controlled by the PKPA and the UCCJEA. These laws are considered in detail in Ch. 394, *Parent and Child* .

For discussion and forms relating to obtaining modification of orders, see *Ch. 221, Dissolution of Marriage: Procedure, § 221.180et seq.* and *§ 221.430* et seq.

[2] Change-of-Circumstances Requirement

[a] In General

Once a court has entered a final or permanent custody order reflecting that a particular custodial arrangement is in the child's best interest, the paramount need for continuity and stability in custody arrangements, and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker, weigh heavily in favor of maintaining that custody arrangement [*In re Marriage of Brown & Yana (2006) 37 Cal. 4th 947, 38 Cal. Rptr. 3d 610, 127 P.3d 28]* . Therefore, to justify a change in custody, there must generally be a showing of changed

circumstances affecting the child. The change-of-circumstances rule requires the existence of a prior permanent custody decision based on the then-existing circumstances that rendered that decision in the best interests of the child [*see Montenegro v. Diaz (2001) 26 Cal. 4th 249, 256, 109 Cal. Rptr. 2d 575, 27 P.3d 289* (party can obtain modification of permanent custody order only by demonstrating significant change of circumstances justifying modification); *In re Marriage of Burgess (1996) 13 Cal. 4th 25, 37, 913 P.2d 473* ; *see Keith R. v. Superior Court (2009) 174 Cal. App. 4th 1047, 1054-1055, 96 Cal. Rptr. 3d 298* (because custody order made in proceeding to obtain domestic violence order is interim order, custodial parent's subsequent request for move-away order is subject to best interest test, not change of circumstances test)].

The change of circumstances must be substantial; a child will not be removed from the custody of one parent and placed in the custody of the other unless the material facts and circumstances occurring subsequent to the original order are of a kind to render it essential or expedient for the welfare of the child that there be a change. It is undesirable for courts to change the child's established mode of living except for imperative reasons [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 37-38, 51 Cal. Rptr. 2d 444, 913 P.2d 473* ; *In re Marriage of Carney (1979) 24 Cal. 3d 725, 729-731, 157 Cal. Rptr. 383, 598 P.2d 36]* . Requiring a significant change of circumstances indicating that a different custody arrangement would be in the child's best interest not only serves to protect the weighty interest in stable custody arrangements, but it also fosters judicial economy [*In re Marriage of Brown & Yana (2006) 37 Cal. 4th 947, 38 Cal. Rptr. 3d 610, 127 P.3d 28]* .

The burden of showing a sufficient change in circumstances is on the party seeking the change in custody [*In re Marriage of Carney (1979) 24 Cal. 3d 725, 731, 157 Cal. Rptr. 383, 598 P.2d 36* ; *Speelman v. Superior Court (1983) 152 Cal. App. 3d 124, 128, 199 Cal. Rptr. 784]* .

A party's absence, relocation, or failure to comply with a custody order is not,by itself, sufficient to justify a modification of the order if the reason for the absence, relocation, or failure to comply is the party's activation to military service and deployment out of state [*Fam. Code § 3047*].

[b] Between Parents

As between parents, there is some uncertainty as to just exactly what showing must be made once a change of circumstances is established. The California Supreme Court has, at various times, including in the same case, used language suggesting that once a change of circumstances is established, the test is simply the best interests of the child, and also language suggesting that a showing that the child will suffer detriment unless there is a change of custody is required. On the one hand, the Court has said that once it has been established under a judicial custody decision that a particular custody arrangement is in the best interests of the child, the trial court should preserve the established mode of custody unless some significant change in circumstances indicates that a different arrangement would be in the child's best interests [*Burchard v. Garay, (1986) 42 Cal. 3d 531, 229 Cal. Rptr. 800, 724 P.2d 486]* . However, in *Marriage of Burgess*, a move-away case (*see § 223.28*), the Court both quoted the above language regarding child's best interests and also stated that custody should only be changed if the child will suffer detriment rendering it essential or expedient for the welfare of the child that there be a change [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 37-38, 51 Cal. Rptr. 2d 444, 913 P.2d 473]* .

The Court's addressing of the change-of-circumstances requirement in *Burgess* was dicta in that the case involved the establishment of custody in the first instance, rather than a modification [*see In re Marriage of Burgess (1996) 13 Cal. 4th 25, 37 n.8, 51 Cal. Rptr. 2d 444, 913 P.2d 473]* .

In 2004, the Court addressed the change-of-circumstances requirement in a move-away case that *did* involve modification of an existing custody order, and clarified what it meant by the above statement in *Burgess*. In *In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 12 Cal. Rptr. 3d 356, 88 P.3d 81* , the Court held that a noncustodial parent *does* have an initial burden of showing that the proposed move would cause detriment to the child, requiring

reevaluation of the child's custody, but the noncustodial parent does *not* have a burden of establishing that a change of custody is *essential* to prevent detriment to the child [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1078, 12 Cal. Rptr. 3d 356, 88 P.3d 81]* . If the noncustodial parent makes an initial showing of detriment, the court must perform the "delicate and difficult task" of determining whether a change in custody is in the child's best interests [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1078, 12 Cal. Rptr. 3d 356, 88 P.3d 81]* .

[c] Between Parent and Nonparent

As between a parent and a nonparent, any attempt to remove the child from parental custody based on a change of circumstances probably requires the initiation of proceedings to declare the child a dependent of the juvenile court under *Welfare and Institutions Code Section 300 et seq.* [*see In re James T. (1987) 190 Cal. App. 3d 58, 65-67, 235 Cal. Rptr. 127]* .

If a parent is attempting to obtain custody from a nonparent based on a change of circumstances, the court may not deny the motion unless it finds that changing custody to the parent would be detrimental to the child, and that continuing custody with the nonparent is required to serve the best interests of the child [*see Fam. Code § 3041*; *but see Fam. Code § 3041(c)* (removal from stable placement as detriment)]. For further discussion of the parental preference doctrine, see *§ 223.17*.

[d] Situations in Which Showing of Change in Circumstances Not Required

If there has been a prior permanent custody order, a change of circumstances must be shown to modify the order whether the parties agreed to the arrangement or contested custody in an adversarial proceeding [*Montenegro v. Diaz (2001) 26 Cal. 4th 249, 256, 109 Cal. Rptr. 2d 575, 27 P.3d 289* (changed circumstances rule applies "whenever [final] custody has been established by judicial decree," regardless of whether initial custody determination resulted from parents' agreement, default judgment, or litigation); *Burchard v. Garay (1986) 42 Cal. 3d 531, 535 n.2, 229 Cal. Rptr. 800, 724 P.2d 486* ; *see In re Marriage of Edlund & Hales (1998) 66 Cal. App. 4th 1454, 1466-1470, 78 Cal. Rptr. 2d 671* (applying changed circumstance rule to request for modification of stipulated permanent custody order); *In re Marriage of Biallas (1998) 65 Cal. App. 4th 755, 760-761* (rejecting argument that changed circumstance rule did not apply because trial court entered permanent custody order pursuant to stipulation between the parties)]. A stipulated custody order can be a final judicial custody determination for purposes of the changed circumstance rule even absent a judicial inquiry about whether the agreement results in an actual custody arrangement that fosters the child's best interest. However, a stipulated custody order is a final judicial custody determination for these purposes only if there is a clear, affirmative indication that the parties intended that result [*Montenegro v. Diaz (2001) 26 Cal. 4th 249, 257-258, 109 Cal. Rptr. 2d 575, 27 P.3d 289* (orders including detailed visitation schedules and not providing for further hearings did not constitute final judicial custody determinations, when they did not clearly state they were final judgments on custody and parties' conduct following entry of orders strongly suggested they did not intend orders to be final custody judgments); *see In re Marriage of Rose & Richardson (2002) 102 Cal. App. 4th 941, 951-952, 126 Cal. Rptr. 2d 45* (initial custody orders were nonfinal when stipulated dissolution judgment included language regarding selection of therapist to resolve parents' future custody and visitation issues)].

The changed-circumstance requirement does not apply to a temporary custody arrangement that has been implemented under a pendente lite stipulation, order to show cause, or pretrial order. At trial, the court may award custody to the other parent, if it determines that it is in the child's best interests regardless of whether there has been a change in circumstances since the temporary order or agreement [*In re Marriage of Lewin (1986) 186 Cal. App. 3d 1482, 1485-1489, 231 Cal. Rptr. 433* ; *see also Montenegro v. Diaz (2001) 26 Cal. 4th 249, 258, 109 Cal. Rptr. 2d 575, 27 P.3d 289* ("temporary custody orders serve an important role in child custody proceedings," and parties should not be discouraged from entering into these stipulations)].

The change-of-circumstances rule also does not apply in the case of a custody arrangement that was established without

a court order that specifically addressed the physical custody of the child. In this situation, the inquiry is focused solely on the best interests of the child, and it is not necessary to show that there has been a change of circumstances since the arrangement began. The court may consider all facts that bear on the child's best interests even if they do not constitute changed circumstances [*Burchard v. Garay (1986) 42 Cal. 3d 531, 534-539, 229 Cal. Rptr. 800, 724 P.2d 486* (*but see* opinion of Mosk, J., joined by Lucas, J., concurring, strongly disagreeing on this point and arguing that changed circumstances must always be required to support change in custody, regardless of how the custody arrangement initially came about); *see also Catherine D. v. Dennis B. (1990) 220 Cal. App. 3d 922, 927-930, 269 Cal. Rptr. 547* (rejecting several prior orders regarding paternity, support, visitation, legal custody, mediation, and child's surname as sufficient to invoke changed-circumstances requirement)].

On the other hand, established modes of custody are entitled to judicial protection. Therefore, even though it is not necessary to show a change of circumstances absent a prior custody order, the parent who does not have the actual physical custody of the child bears the burden of showing that a change of custody is required in the child's best interests [*Burchard v. Garay (1986) 42 Cal. 3d 531, 538, 229 Cal. Rptr. 800, 724 P.2d 486]* .

The changed-circumstances requirement does not apply to a court-ordered rearrangement of the children's residential timetable under a joint physical custody order. Modification of the coparenting residential arrangement, without modifying the order for joint physical custody, is not considered a change of custody [*In re Marriage of Birnbaum (1989) 211 Cal. App. 3d 1508, 1513, 260 Cal. Rptr. 210]* . Similarly, the standard of proof a parent sharing joint custody must meet to effect a change in parenting time is the best interest of the child, not changed circumstances [*Enrique M. v. Angelina V. (2004) 121 Cal. App. 4th 1371, 1378-1382, 18 Cal. Rptr. 3d 306* (father with joint physical and legal custody requesting modification of parenting time and child's schooling required to show modification was in child's best interests, not changed circumstances)].

[e] What Constitutes Change of Circumstances

The custodial parent's frustration of the noncustodial parent's visitation rights is a changed circumstance that may justify a change in custody [*Catherine D. v. Dennis B. (1990) 220 Cal. App. 3d 922, 931-933, 269 Cal. Rptr. 547* ; *In re Marriage of Wood (1983) 141 Cal. App. 3d 671, 682, 190 Cal. Rptr. 469]* . This rule is supported by the statutory preference that custody be awarded to the parent who is more likely to allow the child frequent and continuing contact with the noncustodial parent [*Fam. Code § 3040(a)(1)*].

The remarriage of either or both parties may cause a change of circumstances that justifies a change of custody. However, the focus must be on the changes in the life of the child, not simply on the fact of remarriage [*see Stack v. Stack (1961) 189 Cal. App. 2d 357, 370-372, 11 Cal. Rptr. 177]* . The United States Supreme Court has held that the mere fact that the custodial parent has married a person of a different race than either of the parents cannot justify an order changing custody of a child. The reality of private biases and the possible injury that the child might suffer because of them are not permissible considerations for the removal of an infant child from its custodial parent [*Palmore v. Sidoti (1984) 466 U.S. 429, 104 S. Ct. 1879, 80 L. Ed. 2d 421, 426]* .

The California Supreme Court has held that a custodial parent's becoming physically disabled so as to affect his or her ability to participate with the children in purely physical activities is not a change of circumstances of sufficient relevance to justify a change of custody [In re Marriage of Carney (979) *24 Cal. 3d 725, 740, 157 Cal. Rptr. 383, 598 P.2d 36* ; *see Burchard v. Garay (1986) 42 Cal. 3d 531, 535, 537, 229 Cal. Rptr. 800, 724 P.2d 486]* .

A proposed change of the child's residence as a change of circumstances justifying modification of custody is discussed in *§ 223.28*.

On the motion of one or both parents or of the legal guardian or custodian, or on the court's own motion, an order granting physical or legal custody of, or unsupervised visitation with, a child may be modified or terminated if either of

the following circumstances has occurred since the order was entered, unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record [*Fam. Code § 3030.5(a)*]:

- The person who has been granted physical or legal custody of, or unsupervised visitation with, the child is required, as a result of a felony conviction in which the victim was a minor, to register as a sex offender under *Penal Code § 290*.

- The person who has been granted physical or legal custody of, or unsupervised visitation with, the child resides with another person who is required, as a result of such a felony conviction, to register as a sex offender.

The fact that the child is permitted unsupervised contact with such a person is prima facie evidence that the child is at significant risk. This prima facie evidence constitutes a presumption affecting the burden of producing evidence; but the presumption does not apply if there are factors mitigating against its application, including whether the party seeking custody or visitation is also required, as the result of a felony conviction in which the victim was a minor, to register as a sex offender [*Fam. Code § 3030.5(b)*]. A court may not modify an existing custody or visitation order on a party's ex parte petition without providing notice to the other party and an opportunity to be heard. This notice provision only applies when the motion for a change in custody or visitation is based solely on the fact that the child is allowed unsupervised contact with a person required to register as a sex offender and does not affect the court's ability to remove a child on an ex parte motion when there is a showing of immediate harm to the child [*Fam. Code § 3030.5(c)*].

[3] Death of Custodial Parent

If the custodial parent dies, the right of custody automatically reverts to the other parent [*Fam. Code § 3010(b)*; *In re Marriage of Jenkins (1981) 116 Cal. App. 3d 767, 771, 172 Cal. Rptr. 331]* . *Section 3010(b)* appears to grant a father rights equal to those of the mother only if he can meet one of the presumptions of paternity of *Fam. Code § 7611* [*see* Ch. 412, *Paternity*]. The constitutionality of such a distinction is questionable [*see Stanley v. Illinois (1972) 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551* , discussed in Ch. 394, *Parent and Child*]. The right to custody is immediate, so that the surviving parent may exercise the incidents of the right without first obtaining a custody order [*see Guardianship of Donaldson (1986) 178 Cal. App. 3d 477, 485-486, 223 Cal. Rptr. 707]* .

If the court had jurisdiction over the custody of the children through a proceeding for dissolution of marriage, a parent's death abates the cause of action [*Guardianship of Donaldson (1986) 178 Cal. App. 3d 477, 485-486, 223 Cal. Rptr. 707]* , and there is no longer any jurisdiction to consider modification of any custody order granted in the proceeding. Therefore, a nonparent who alleges that the surviving parent is unfit to have custody of the children must initiate some other proceeding, such as a guardianship or juvenile court dependency, in order to contest the parent's right to custody [*see In re Marriage of Jenkins (1981) 116 Cal. App. 3d 767, 773, 172 Cal. Rptr. 331]* . Any rights of nonparents for visitation with the child must arise through *Fam. Code § 3102*, discussed in *§ 223.19[3]* [*see In re Marriage of Jenkins (1981) 116 Cal. App. 3d 767, 774, 172 Cal. Rptr. 331]* .

[4] Modification of Legal Custody

A parent who requests a change in the legal custody of a child must establish that the modification is in the best interests of the child based on a change in circumstances [*In re Marriage of McLoren (1988) 202 Cal. App. 3d 108, 110, 247 Cal. Rptr. 897]* . A prior order granting one parent sole legal custody may be modified to an order for joint legal custody [*see Fam. Code § 3088*]; however, the record must reflect that there has been a substantial change in the parents' willingness and ability to cooperate with each other since the prior order [*In re Marriage of McLoren (1988) 202 Cal. App. 3d 108, 114-116, 247 Cal. Rptr. 897]* .

[5] Modification of Visitation Orders

Like custody orders (*§ 223.27[2]*), visitation orders may be modified on a showing of a change of circumstances affecting the child's welfare, and that the requested modification will be in the child's best interests [*see In re Marriage of Murga (1980) 103 Cal. App. 3d 493, 502, 163 Cal. Rptr. 79]* . For instance, the noncustodial parent's decision to establish a residence in a place that is far enough away to preclude the exercise of existing visitation rights obviously constitutes a changed circumstance sufficient to support a modification of a visitation order [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 39-40, 51 Cal. Rptr. 2d 444, 913 P.2d 473* ; *In re Marriage of Murga (1980) 103 Cal. App. 3d 498, 503, 163 Cal. Rptr. 79]* .

A party's absence, relocation, or failure to comply with a visitation order is not, by itself, sufficient to justify a modification of the order if the reason for the absence, relocation, or failure to comply is the party's activation to military service and deployment out of state [*Fam. Code § 3047*].

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§ 223.28 Change of Child's Residence

[1] Temporary Removal of Child From State

In a proceeding for dissolution of marriage, nullity of marriage or the legal separation of the parties [*see Fam. Code § 2000 et seq.*], the summons must contain a temporary restraining order restraining all parties from removing the parties' minor children from the state without the other party's prior written consent or a court order [*Fam. Code §§ 2040(a), 7700*; *see Fam. Code § 231 et seq.*]. The order continues in effect against the parties until the final judgment is entered or the petition is dismissed, or until further order of the court [*Fam. Code § 233(a)*].

After a permanent custody order is granted, the court may restrain either or both parents from removing the child from the state, even temporarily [*see Ward v. Ward (1957) 150 Cal. App. 2d 438, 440-444, 309 P.2d 965* (restraints on joint custodial parents); *cf. Fam. Code § 7501* (custodial parent's right to permanently change child's residence)]. If such an order has been made, the court, under its continuing jurisdiction, may modify the order to allow a parent to temporarily remove the child from the state if it determines that it is in the child's best interests. The court may set conditions that it deems appropriate to ensure the return of the child to the state [*see Gantner v. Gantner (1952) 39 Cal. 2d 272,279-282* , (cash bond required)].

[2] Permanent Change of Residence

[a] Notice of Intent to Change Child's Residence

In making an order for custody, if it deems it appropriate, the court may require one parent to give notice to the other if he or she plans to change the residence of the child for more than 30 days, unless there is prior written agreement to the removal [*Fam. Code § 3024* (applicable only to orders made on or after January 1, 1989)]. For a form of notice, see *§ 223.66*.

It has been said that a custody decision that allows a parent to remove a child to a new and distant residence is one of the most serious decisions that a family lawcourt is required to make. It should not be made in haste; the best interests of the child require that the competing claims be considered only after the parties have had an opportunity to be

meaningfully heard [*Keith R. v. Superior Court (2009) 174 Cal. App. 4th 1047, 1056, 96 Cal. Rptr. 3d 298* ; *In re Marriage of McGinnis (1992) 7 Cal. App. 4th 473, 477, 9 Cal. Rptr. 2d 182* , *overturned on other grounds in*]. Mediation is mandatory, and the parents should be afforded the time and opportunity to marshal appropriate evidence, including professional evaluation [*In re Marriage of McGinnis (1992) 7 Cal. App. 4th 473, 478-479, 9 Cal. Rptr. 2d 182* , *overturned on other grounds in In re Marriage of Burgess (1996) 13 Cal. 4th 25, 51 Cal. Rptr. 2d 444, 913 P.2d 473* (criticizing trial court for failing to make interim ruling maintaining status quo, even though appellate court itself denied supersedeas relief); *see also In re Marriage of Roe (1993) 18 Cal. App. 4th 1483, 1489, 23 Cal. Rptr. 2d 295]* .

Nevertheless, a notice requirement is not mandatory, and it does not limit, expressly or by implication, the right of a custodial parent to relocate [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 37-38 n.9, 51 Cal. Rptr. 2d 444, 913 P.2d 473]* .

[b] Kinds of Move-Away Cases

Cases involving a permanent change in a child's residence have come to be known as "move-away" cases [*see In re Marriage of Paillier (2006) 144 Cal. App. 4th 461, 464, 50 Cal. Rptr. 3d 459* ; *In re Marriage of McGinnis (1992) 7 Cal. App. 4th 473, 475, 9 Cal. Rptr. 2d 182* , *overruled on other grounds in 1In re Marriage of Burgess (1996) 13 Cal. 4th 25, 51 Cal. Rptr. 2d 444, 913 P.2d 473*]. These cases have come before the courts in essentially three different procedural stances. The least common situation is when the parent are contesting custody in the initial instance, and the parent who has temporary custody pending dissolution proceedings intends to move before a permanent custody order has been made in the matter [*see, e.g., In re Marriage of Burgess (1996) 13 Cal. 4th 25, 31, 51 Cal. Rptr. 2d 444, 913 P.2d 473]* . This situation is discussed in *§ 223.28[2][c]*. Other cases involve the stay-behind parent's attempt to restrain the other parent from moving without affirmatively seeking custody himself or herself [*see, e.g., Selzer v. Selzer (1994) 29 Cal. App. 4th 637, 639, 34 Cal. Rptr. 2d 824* ; *In re Marriage of Carlson (1991) 229 Cal. App. 3d 1330, 1334, 280 Cal. Rptr. 840* ; *see also Fam. Code § 7501*, which gives the court the power to restrain a move without changing custody]. This situation is discussed in *§ 223.28[2][d]*. The increasingly common situation is when the move causes the stay-behind parent to seek a change in the custody order so that the child stays rather than moves with the moving parent [*see, e.g., In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1078-1079, 12 Cal. Rptr. 3d 356, 88 P.3d 81* ; *In re Marriage of Rosson (1986) 178 Cal. App. 3d 1094, 1099, 224 Cal. Rptr. 250* , *overturned on other grounds in Marriage of Burgess (1996) 13 Cal. 4th 25, 51 Cal. Rptr. 2d 244, 913 P.2d 473* ; *Brody v. Kroll (1996) 45 Cal. App. 4th 1732, 1737, 53 Cal. Rptr. 2d 280]* . These cases, in turn, involve different considerations depending on whether the existing custody arrangement is traditional or involves joint custody or some significant amount of shared physical custody. These situations are discussed in *§ 223.28[2][e]*.

[c] Effect of Move on Initial Custody Determination

In an initial custody determination, the court has wide discretion to choose a parenting plan that is in the best interests of the child [*Fam. Code § 3040(b)*; *see § 223.12*]. Thus, if there is no existing final custody order, the best interests analysis applies regardless of how the court characterizes a preexisting custody arrangement [*Ragghanti v. Reyes (2004) 123 Cal. App. 4th 989, 997-998, 20 Cal. Rptr. 3d 522]* .

A parent seeking to relocate with the child bears no burden of establishing that the move is "necessary" [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 36-37, 51 Cal. Rptr. 2d 444, 913 P.2d 473* (rule requiring parent who wishes to change child's residence to prove that move is "necessary" would lead to costly litigation and require courts to "micromanage" family decision-making by second-guessing reasons for everyday decisions about career and family); *see In re Marriage of LaMusga (2004) 32 Cal. 4th 1072,1088, 12 Cal. Rptr. 3d 356, 88 P.3d 81* (Court reiterated decision in *Burgess* that custodial parent does not have burden of showing that planned move is "necessary" whether case involves initial determination of custody or proposed move by parent with sole physical custody)]. However, the trial court must consider, among other factors, the effects of relocation on the best interests of the child, including the health, safety, and welfare of the child and the nature and amount of contact with both parents [*In re Marriage of*

Burgess (1996) 13 Cal. 4th 25, 34, 51 Cal. Rptr. 2d 444, 913 P.2d 473 ; *see Fam. Code § 3011*]. While *Fam. Code § 3020* states the public policy of maintaining a child's continuing contact with both parents after divorce, it does not impose a burden of proof on a parent seeking to relocate with the child to establish necessity for the move. A trial court may consider the extent to which the minor child's contact with the noncustodial parent will be impaired by relocating, but it is not restricted to any particular formula for contact or visitation. Nor is it required to make a custody determination that preserves the predissolution status quo [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 36, 51 Cal. Rptr. 2d 444, 913 P.2d 473]* . There is no statutory basis for imposing a specific additional burden of persuasion on *either* parent to justify a choice of residence as acondition of custody [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 34, 51 Cal. Rptr. 2d 444, 913 P.2d 473* (emphasis the Court's)].

In an initial custody decision, although the trial court must take into account a planned move and any resulting prejudice to the child, those considerations do not preclude the court from also considering all the other circumstances bearing upon the child's best interest. Under the best interests analysis, even if the detriment resulting from a planned move is insufficient by itself to warrant changing a temporary custody order, other circumstances can support the finding that a change in custody is in the child's best interest [*Ragghanti v. Reyes (2004) 123 Cal. App. 4th 989, 998, 20 Cal. Rptr. 3d 522]* . In view of the child's interest in stable custodial and emotional ties, custody lawfully acquired and maintained for a significant period will have the effect of compelling the noncustodial parent to assume the burden of persuading the trier of fact that a change is in the child's best interest. But if there was no existing final determination of what custody arrangement was in the child's best interest, the noncustodial parent does not have a burden to show that an existing arrangement is detrimental [*Ragghanti v. Reyes (2004) 123 Cal. App. 4th 989, 998, 20 Cal. Rptr. 3d 522* (father had burden of proving that even considering six years that child had lived with mother from birth, child's interest would be best served by awarding custody to him on mother's move; he was not required to show mother's care was seriously deficient)].

For discussion of the other factors that a court must consider in making an initial custody determination, see *§ 223.12[5]*.

[d] Restraint on Move Without Change of Custody

An 1872 statute provides that the parent entitled to custody of the child has the right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child [*Fam. Code § 7501*; *cf. Rosin v. Superior Court (1960) 181 Cal. App. 2d 486, 497-498, 5 Cal. Rptr. 421* (statute inapplicable if decree of divorce provides otherwise)]. This statute creates a presumptive right of a custodial parent to change the residence of a child as long as the removal would not be prejudicial to the child's rights or welfare [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 32, 51 Cal. Rptr. 2d 444, 913 P.2d 473* ; *see In re Marriage of LaMusga (2004) 32 Cal. 4th 1072,1094-1095, 12 Cal. Rptr. 3d 356, 88 P.3d 81* (reaffirming that right)]. An order restraining such a move is considered appropriate only in cases of bad faith, in which the move is shown to be a vindictive act by the custodial parent calculated to deprive the noncustodial parent of visitation privileges [*In re Marriage of Ciganovich (1976) 61 Cal. App. 3d 289, 293, 132 Cal. Rptr. 261* ; *see In re Marriage of Burgess (1996) 13 Cal. 4th 25, 35-36 ns. 4, 5, 51 Cal. Rptr. 2d 444, 913 P.2d 473* (moving parent's motivation in moving not relevant as long as it is in good faith, i.e., not intended to frustrate other parent's contact with children); *see Cassady v. Signorelli (1996) 49 Cal. App. 4th 55, 60-61, 56 Cal. Rptr. 2d 545* (proposed move was "apparent pretext to defeat visitation")]. Even in a case of bad faith, the preferred remedy is more likely to be a change of custody rather than a restraining order [*see In re Marriage of Burgess (1996) 13 Cal. 4th 25, 36 n.6, 51 Cal. Rptr. 2d 444, 913 P.2d 473* (bad faith as ground for change of custody, discussed in *§ 223.28[2][e][iii]*)].

A 1991 case attempted to broaden the grounds on which a move could be restrained beyond instances of bad faith, finding that under current statutes, impairment of the noncustodial parent's visitation rights could be sufficient grounds to restrain the move in the absence of a countervailing compelling reason to permit the move [*see In re Marriage of Carlson (1991) 229 Cal. App. 3d 1330, 1334-1338, 280 Cal. Rptr. 840* (based on policy expressed in *Fam. Code § 3020*

of maintaining a child's continuing contact with both parents after divorce)].

However, in *Marriage of Burgess*, the California Supreme Court clearly rejected this standard. The Court said that a trial court may consider the extent to which the minor children's contact with their noncustodial parent will be impaired by relocating, but it is not restricted to any particular formula for contact or visitation; nor is it required to make a custody determination that preserves the predissolution status quo. It found that a trial court adequately satisfied the statutory policy in favor of "frequent and continuing contact" by ordering "liberal visitation" with the noncustodial father if the custodial mother relocated. The Court also observed that it has long been established that, under *Fam. Code § 7501*, the "general rule [is that] a parent having child custody is entitled to change residence unless the move is detrimental to the child." Thus, apart from any bad faith motivations on the part of a custodial parent to frustrate visitation rights that might, arguably, still be a basis for restraining the move (as discussed above), the noncustodial parent otherwise has the burden of proving that a move is detrimental to the child--in order to restrain a move by the custodial parent without seeking a change in custody [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 35, 51 Cal. Rptr. 2d 444, 913 P.2d 473* (citing *In re Marriage of Ciganovich (1976) 61 Cal. App. 3d 289, 293, 132 Cal. Rptr. 261*); *see* *In re Marriage of Lasich (2002) 99 Cal. App. 4th 702, 720, 121 Cal. Rptr. 2d 356* (father failed to prove that relocation to Spain would be detrimental to children); *Cassady v. Signorelli (1996) 49 Cal. App. 4th 55, 59-61* (trial court properly concluded that it was in child's best interest to continue existing custody arrangement in California, with mother as primary caretaker, instead of allowing her to move with child to Florida, when mother had no serious job prospects in Florida and proposed move seemed intended merely to frustrate father's relationship with child). The Legislature has expressed its intent to affirm *In re Marriage of Burgess* and to declare it to be the public policy and law of California [*Fam. Code § 7501(b)*].

Most recently, in *In re Marriage of Brown & Yana*, the California Supreme Court noted that *Fam. Code § 7501* contains no qualifying language purporting to limit its application to parents with only certain custodial rights. Although *Fam. Code §§ 3006* and *3007* recognize the general right of a parent with sole custody to supervise and make decisions regarding a child's residence and education [*see § 223.16*], *Fam. Code § 7501* contemplates that even a parent with sole legal and sole physical custody may be restrained from changing the child's residence if the court determines the change would be detrimental to the child's rights or welfare [*In re Marriage of Brown & Yana (2006) 37 Cal. 4th 947, 38 Cal. Rptr. 3d 610, 127 P.3d 28]* . The Court also noted that decisions subsequent to *Burgess* uniformly acknowledge that, even when a permanent custody order is in place, the custodial parent's right to relocate with a child remains subject to the changed circumstance rule [*In re Marriage of Brown & Yana (2006) 37 Cal. 4th 947, 38 Cal. Rptr. 3d 610, 127 P.3d 28]* .

The award of sole custody to one parent does not terminate the other parent's right to seek relief under *Fam. Code § 7501* [*In re Marriage of Brown & Yana (2006) 37 Cal. 4th 947, 38 Cal. Rptr. 3d 610, 127 P.3d 28]* .

Family Code § 7501 does not specify whether an evidentiary hearing is required when a noncustodial parent seeks to restrain a removal that allegedly prejudices the rights or welfare of the child. The Supreme Court held in *In re Marriage of Brown & Yana* that an evidentiary hearing in a move-away situation should be held only if necessary [*In re Marriage of Brown & Yana (2006) 37 Cal. 4th 947, 38 Cal. Rptr. 3d 610, 127 P.3d 28]* . A court may deny the noncustodial parent's request to modify custody based on the relocation without holding an evidentiary hearing to take oral evidence if this parent's allegation or showing of detriment to the child is insubstantial in light of all of the circumstances presented in the case or is otherwise legally insufficient to warrant relief [*In re Marriage of Brown & Yana (2006) 37 Cal. 4th 947, 38 Cal. Rptr. 3d 610, 127 P.3d 28* (noncustodial parent's general assertions concerning standard of living and education in proposed new location did not show that move would prejudice child's rights or welfare)]. An evidentiary hearing serves no legitimate purpose or function if the noncustodial parent is unable to make a prima facie showing of detriment or has failed to identify a material, contested factual issue that should be resolved by taking oral testimony. Application of this procedure in move-away cases fosters the goal of judicial economy and reduces litigation costs and unnecessary distress for the parents and children involved. It also protects the policy considerations underlying the changed circumstances rule, particularly in cases in which the court has already

determined that the moving parent shall have the right and responsibility to make decisions relating to the child's health, education, and welfare under *Fam. Code § 3006* [*In re Marriage of Brown & Yana (2006) 37 Cal. 4th 947, 38 Cal. Rptr. 3d 610, 127 P.3d 28]* .

However, a court must give the noncustodial parent a meaningful opportunity to be heard before granting the custodial parent's move-away request [*In re Marriage of Seagondollar (2006) 139 Cal. App. 4th 1116, 1120, 43 Cal. Rptr. 3d 575]* . Because a custody decision allowing one parent to move the children out of California necessarily interferes with the other parent's ability to have frequent and continuing contact with them, such a decision should not be made "in haste," and the best interests of the children require that the parents' competing claims be considered in a calm, dispassionate manner and only after the parties have had an opportunity to be meaningfully heard [*In re Marriage of Seagondollar (2006) 139 Cal. App. 4th 1116, 1120, 43 Cal. Rptr. 3d 575* (numerous procedural errors required reversal of modification order)].

For a form for a declaration supporting a motion for an order restraining a change of residence, see *§ 223.68*.

[e] Move as Ground for Change of Custody

[i] Proposed Move as Changed Circumstance

The sole fact that a custodial parent proposes to change the residence of the child does not automatically constitute "changed circumstances" requiring a reevaluation of an existing custody order [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1096, 12 Cal. Rptr. 3d 356, 88 P.3d 81*]. However, the Supreme Court has stated that, when considered in the light of all relevant factors, (1) the likely consequences of a proposed change in a child's residence may constitute a change in circumstances that warrants a change in custody, and (2) therefore the detriment to the child's relationship with the noncustodial parent that will be caused by the proposed move may warrant denying a request to change the child's residence or changing custody [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1097, 12 Cal. Rptr. 3d 356, 88 P.3d 81]* . As with any allegation that changed circumstances warrant modification of an existing custody order, the noncustodial parent has a substantial burden of showing that a significant change in circumstances indicates that a different custody arrangement would be in the child's best interest [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 38, 51 Cal. Rptr. 2d 444, 913 P.2d 473* ; *see In re Marriage of Melville (2004) 122 Cal. App. 4th 601, 610-612, 18 Cal. Rptr. 3d 685* (father presented ample evidence that mother's move to Oregon constituted material change in circumstances warranting modification of existing custody order for child with Down's syndrome and heart condition)]; *but see Osgood v. Landon (2005) 127 Cal. App. 4th 425, 436, 25 Cal. Rptr. 3d 379* (father failed to establish any detriment to child from mother's proposed move to Tennessee; move was contemplated in good faith and to secure substantial increase in income and superior job stability which would benefit child, and without any intent to frustrate father's visitation with child).

The court need not defer its decision until after the parent and child haveactually moved if it is undisputed that the parent is moving [*In re Marriage of Rosson (1986) 178 Cal. App. 3d 1094, 1101-1102, 224 Cal. Rptr. 250]* . In one case, a move-away provision in a stipulated custody judgment precluded either party from moving the children out of the county "without the written consent of both parties or until further order of the court." It was held that the move-away provision shifted the burden to the custodial parent to seek and obtain a judicial review of the proposed move *before* actually moving [*In re Marriage of Abrams (2003) 105 Cal. App. 4th 979, 995, 130 Cal. Rptr. 2d 16* (noncustodial parent was *not* relieved of burden under *Burgess* of showing that move would be so detrimental to children that it warranted change in custody)]. A recent decision has noted that it is neither practical nor in the child's best interests to require a parent to move first and then seek permission and modification after the fact. The law allows a court to conduct a hearing based on the *intention* to move and make a custody order conditioned on the occurrence of the move. Such a conditional modification order is not considered to be "an advisory opinion" [*Niko v. Foreman (2006) 144 Cal. App. 4th 344, 50 Cal. Rptr. 3d 398]*

[ii] Importance of Custodial Designation

As discussed hereafter, in *In re Marriage of Burgess*, the Court's stringent standard for a change of custody was expressly limited to cases in which one parent has sole physical custody under an existing custody order. In a footnote, the Court said that a "different analysis may be required when parents share joint physical custody of the minor children under an existing order and in fact, and one parent seeks to relocate with the minor children" [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 32, 40 n.12, 51 Cal. Rptr. 2d 444, 913 P.2d 473* ; *see § 223.28[2][e][iv]*]. In its 2004 decision in *In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 12 Cal. Rptr. 3d 356, 88 P.3d 81* , the Court referred to this distinction it made in *Burgess* without comment, but stated that the extent to which the parents currently are sharing custody is one of the factors the court should consider when deciding whether to modify a custody order in light of a custodial parent's proposed move [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1089 n.3, 1101, 12 Cal. Rptr. 3d 356, 88 P.3d 81]* . As a result, the terminology associated with custodial arrangements has become increasingly important, as has the necessity for examining the nature of the arrangement "in fact" [*see In re Marriage of Biallas (1998) 65 Cal. App. 4th 755, 759-760, 76 Cal. Rptr. 2d 717* (examples of joint custody and sole custody situations)].

Until *Burgess* was decided, a deviation from use of the statutory language "joint" or "sole" custody seemed harmless. But in one post-*Burgess* decision, for example, the court of appeal noted "primary" was not necessarily equivalent to "sole" physical custody [*Ruisi v. Thieriot (1997) 53 Cal. App. 4th 1197, 1205, 62 Cal. Rptr. 2d 766]* . In a later decision by a different division in the same district, the court applied the "sole custody" rules when the mother had the majority of time with the child and the label "shared" had been applied in the most recent court order [*In re Marriage of Edlund & Hales (1998) 66 Cal. App. 4th 1454, 1466, n.5, 78 Cal. Rptr. 2d 671]* . Thus, the incentive has become stronger for attorneys who represent clients regarding whom a move-away seems possible to obtain a "sole physical" custody designation.

[iii] Sole or Primary Physical Custody Cases

A parent who has sole or "primary" physical custody under an existing judicial custody order and who seeks to relocate does not have a burden of establishing that the planned move is *necessary* [*In re Marriage of Brown & Yana (2006) 38 Cal. Rptr. 3d 610, 127 P.3d 28* ; *In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1078, 12 Cal. Rptr. 3d 356, 88 P.3d 81* ; *see In re Marriage of Burgess (1996) 13 Cal. 4th 25, 28-29, 51 Cal. Rptr. 2d 444, 913 P.2d 473]* . Conversely, a noncustodial parent who opposes the move need not establish that a custody change is *essential* to prevent detriment to the children from the planned move [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1078, 12 Cal. Rptr. 3d 356, 88 P.3d 81* (appellate court misapplied *Burgess* holding in stating that custodial parent with good faith reason to move cannot be prevented, directly or indirectly, from exercising right to change child's residence, unless noncustodial parent makes substantial showing that change of custody is essential to prevent detriment to child)]. Instead, the noncustodial parent has an initial burden of showing that the proposed move would cause detriment to the children, requiring a reevaluation of the children's custody. The likely impact of the proposed move on the noncustodial parent's relationship with the children is a relevant factor in determining whether the move would cause detriment to the children. When considered in light of *all* relevant factors, it may be sufficient to justify a change in custody [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1078, 12 Cal. Rptr. 3d 356, 88 P.3d 81]* .

If a noncustodial parent who opposes a proposed move makes an initial showing of detriment, the court must perform the "delicate and difficult task" of determining whether a change in custody is in the children's best interests [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1078, 12 Cal. Rptr. 3d 356, 88 P.3d 81* ; *In re Marriage of Burgess (1996) 13 Cal. 4th 25, 37, 51 Cal. Rptr. 2d 444, 913 P.2d 473]* . Showing that a proposed move will cause detriment to the relationship between the children and the noncustodial parent does not mandate a change in custody; but it is within the court's broad discretion to order a change in custody based on this detriment if such a change is in the children's best interests in light of all the relevant factors [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1095, 12 Cal. Rptr. 3d 356, 88 P.3d 81]* .

In deciding whether to modify a custody order in light of a custodial parent's proposed move, the court should consider the following factors [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1101, 12 Cal. Rptr. 3d 356, 88 P.3d 81]* :

- The children's interest in the stability and continuity of the custodial arrangement [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1093, 12 Cal. Rptr. 3d 356, 88 P.3d 81* (court should state on record that it has considered this interest in stability, but lack of statement is not error)].

- The distance of the move [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 39, 51 Cal. Rptr. 2d 444, 913 P.2d 473* (in assessing "prejudice" to child's welfare as result of relocating even distance of 40 or 50 miles, court may consider nature of child's contact with both parents, as well as child's age, community ties, health and educational needs, and preference)].

- The children's ages.

- The children's relationship with both parents [*see* *In re Marriage of Bryant (2001) 91 Cal. App. 4th 789, 792-794, 110 Cal. Rptr. 2d 791* ; *In re Marriage of Edlund & Hales (1998) 66 Cal. App. 4th 1454, 1473-1474, 78 Cal. Rptr. 2d 671]* .

- The relationship between the parents, including, but not limited to, their ability to communicate and cooperate effectively, and their willingness to put the children's interests above their own interests. The court may consider the past conduct of the parents in determining what future arrangement will be best for the children [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1094, 12 Cal. Rptr. 3d 356, 88 P.3d 81]* . For example, in *LaMusga*, the court considered the history of animosity between the parents, and the failure of the mother, who was the custodial parent, to foster and encourage a healthy relationship between the children and their father, as an indication that it was unlikely she would follow through on her promises to encourage the children's relationship with their father following their move out of state [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1093-1095, 12 Cal. Rptr. 3d 356, 88 P.3d 81]* . The parents' history of animosity and the mother's consistent attempts to limit contact between the children and the father indicated that the proposed move would be detrimental to the children [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1095, 12 Cal. Rptr. 3d 356, 88 P.3d 81* ; *see* *In re Marriage of Abargil (2003) 106 Cal. App. 4th 1294, 1299, 131 Cal. Rptr. 2d 429* (in permitting mother's move with child to Israel, court considered evidence that she respected father's relationship with child and was likely to foster continuing contact between them, as well as evidence of her past efforts to nurture their relationship, in contrast to father's disparagement of her parenting skills)].

- The children's wishes if they are mature enough for such an inquiry to be appropriate [*see* *In re Marriage of Campos (2003) 108 Cal. App. 4th 839, 842-844, 134 Cal. Rptr. 2d 300* (court should have considered children's opposition to move because it would separate them from their extended family, friends, and classmates); *In re Marriage of Abrams (2003) 105 Cal. App. 4th 979, 986-987, 130 Cal. Rptr. 2d 16* (children's preference to stay in California was outweighed by close bond with mother and it was in their best interest to remain in her care out-of-state); *see also* *Niko v. Foreman (2006) 144 Cal. App. 4th 344, 50 Cal. Rptr. 3d 398* (under *Fam. Code § 3042*, court need not call child as witness when child's best interests so dictate, and may instead provide alternative means of obtaining information regarding child's preferences, *e.g.*, by appointing counsel to represent and interview child or by appointing expert under *Evid. Code § 730* to determine child's best interests as it relates to parent's requested move)].

- The reasons for the proposed move [*see* *In re Marriage of Condon (1998) 62 Cal. App. 4th 533, 539, 73 Cal. Rptr. 2d 33* (mother permitted to move with children to Australia based on ability to financially support herself there rather than entirely depend on father for support, mother's extensive

family in Australia, children's lack of firm long-time base in California, children's primary emotional attachment to mother, and impact of parties' stressful relationship on children)].

- The extent to which the parents currently are sharing custody.

In *In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 12 Cal. Rptr. 3d 356, 88 P.3d 81* , the California Supreme Court reaffirmed its statement in *Burgess* that "the paramount need for continuity and stability in custody arrangements--and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker--weigh heavily in favor of maintaining ongoing custody arrangements" [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1093, 12 Cal. Rptr. 3d 356, 88 P.3d 81* ; *In re Marriage of Burgess (1996) 13 Cal. 4th 25, 32-33, 51 Cal. Rptr. 2d 444, 913 P.2d 473]* . It also reaffirmed its statement in *Burgess* that the parent with primary physical custody of the children has a presumptive right to change the children's residence unless the proposed move would result in prejudice to the children's rights or welfare [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1094-1095, 12 Cal. Rptr. 3d 356, 88 P.3d 81* ; *In re Marriage of Burgess (1996) 13 Cal. 4th 25, 29, 38, 51 Cal. Rptr. 2d 444, 913 P.2d 473]* . However, the court has the discretion to determine the weight that should be given to (1) the children's interest in stable custodial and emotional ties with the custodial parent, and (2) the detriment to the children's relationship with the noncustodial parent that would be caused by the proposed move [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1093, 12 Cal. Rptr. 3d 356, 88 P.3d 81]* .

"Bright line" rules in move-away cases are inappropriate; each case must beevaluated on its own unique facts [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1089, 12 Cal. Rptr. 3d 356, 88 P.3d 81* ; *In re Marriage of Burgess (1996) 13 Cal. 4th 25, 39, 51 Cal. Rptr. 2d 444, 913 P.2d 473]* . The Supreme Court has noted that this area of the law is not amenable to inflexible rules. Instead, judges have discretion, guided by statute and the principles stated in *Burgess* and *LaMusga*, to fashion custody orders that best serve the interests of the children in the cases before them [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1101, 12 Cal. Rptr. 3d 356, 88 P.3d 81]* .

A decision to change the children's residence ordinarily does not have a bearing on the custodial parent's suitability to retain primary physical custody of them [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 36 n. 5, 51 Cal. Rptr. 2d 444, 913 P.2d 473* (once court determines that custodial parent is not relocating to frustrate noncustodial parent's contact with children, but for sound, good faith reasons, court not required to inquire further into wisdom of custodial parent's inherently subjective decision making); *see In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1100, 12 Cal. Rptr. 3d 356, 88 P.3d 81* (this does not mean that reasons for proposed move are irrelevant if custodial parent is acting in good faith)]. However, an obvious exception to this general rule is when a custodial parent's decision to relocate is simply to frustrate the noncustodial parent's contact with the children. Even if the custodial parent is otherwise a "fit" parent, the court may consider this bad faith conduct in determining what permanent custody arrangement is in the children's best interests [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 36 n. 6, 51 Cal. Rptr. 2d 444, 913 P.2d 473]* .

In a move-away case, a change of custody is not justified merely because the custodial parent has chosen, for any sound good faith reason, to reside in a different location, but only if, as a result of the move, the children will suffer detriment making it "essential or expedient" for the children's welfare that there be a change [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 38, 51 Cal. Rptr. 2d 444, 913 P.2d 473* ; *see In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1098, 12 Cal. Rptr. 3d 356, 88 P.3d 81* (change in custody is "essential or expedient" within meaning of *Burgess* if it is in child's best interest)].

The Supreme Court has noted that absolute concepts of good faith and bad faith are often difficult to apply because human beings may act for a complex variety of sometimes conflicting motives [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1100, 12 Cal. Rptr. 3d 356, 88 P.3d 81]* . Even if the custodial parent has legitimate reasons for the proposed move and is not acting simply to frustrate the noncustodial parent's contact with the children, a court may still consider whether one reason for the move is to lessen the children's contact with the noncustodial parent and whether

that indicates, in light of all the relevant factors, that a change in custody would be in the children's best interests [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1100, 12 Cal. Rptr. 3d 356, 88 P.3d 81]* .

The noncustodial parent has a right to present evidence on the issue of the custodial parent's bad faith *and* on the issue of the detriment to the child that will result from the proposed move [*In re Marriage of Campos (2003) 108 Cal. App. 4th 839, 844, 134 Cal. Rptr. 2d 300]* . The court may not preclude the noncustodial parent from presenting evidence on the issue of detriment merely because the court has concluded that the proposed move is in good faith [*In re Marriage of Campos (2003) 108 Cal. App. 4th 839, 842-844, 134 Cal. Rptr. 2d 300]* .

A court may not issue a conditional order transferring primary physical custody to the noncustodial parent as a device to restrain the custodial parent from relocating [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1098, 12 Cal. Rptr. 3d 356, 88 P.3d 81]* . A court should not issue such an order expecting that the order will not take effect because the custodial parent will decide not to relocate rather than lose primary physical custody of the children [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1098, 12 Cal. Rptr. 3d 356, 88 P.3d 81]* .

For a form of declaration in support of a motion to modify custody based on a change of residence, see *§ 223.67*. For forms for use to permit the custodial parent to change the child's residence, see *§ 223.69* (supporting declaration) and *§ 223.70* (order).

[iv] Joint or Shared Custody Cases

The standard for change of custody in move-away cases stated by the California Supreme Court in *Marriage of Burgess* was expressly limited to cases in which one parent has sole physical custody under an existing judicial custody order [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 37, 51 Cal. Rptr. 2d 444, 913 P.2d 473* ; *see In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 12 Cal. Rptr. 3d 356, 88 P.3d 81]* . However, a number of move-away cases both before and after *Burgess* have involved parents who had joint custody or some degree of shared physical custody under the existing order [*see In re Marriage of Battenburg (1994) 28 Cal. App. 4th 1338, 1342, 33 Cal. Rptr. 2d 871* ; *In re Marriage of McGinnis (1992) 7 Cal. App. 4th 473, 475, 9 Cal. Rptr. 2d 182* (in both cases, mother had physical custody 4 days, and father 3 days, every week); *see also In re Marriage of Melville (2004) 122 Cal. App. 4th 601, 610-612, 18 Cal. Rptr. 3d 685* (shared legal custody; parent with whom child resided at time had primary physical custody); *Cassady v. Signorelli (1996) 49 Cal. App. 4th 55, 58, 56 Cal. Rptr. 2d 545* ("joint custody" with mother having "primary physical custody")].

Increasing attention has been paid to the actual arrangement for time-sharing between parents in move-away situations, particularly in view of the footnoted commentary by the *Burgess* Court that a "different analysis may be required when parents share joint physical custody of the minor children under an existing order and in fact, and one parent seeks to relocate with the minor children[;] [i]n such cases, the custody order may be modified or terminated upon the petition of one or both parents or on the court's own motion if it is shown that the best interest of the child requires modification or termination of the order (*Fam. Code, § 3087*)[;] [t]he trial court must determine de novo what arrangement for primary custody is in the best interest of the minor children" [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 32, 40 n.12, 51 Cal. Rptr. 2d 444, 913 P.2d 473* ; *see, e.g, In re Marriage of Williams (2001) 88 Cal. App. 4th 808, 812, 105 Cal. Rptr. 2d 923* (trial court abused discretion in joint custody "move-away" case by requiring two siblings to move to Utah with their mother and two siblings to remain in Cal. with their father, in absence of record evidence pertaining to impact of separation on children); *In re Marriage of Biallas (1998) 65 Cal. App. 4th 755, 759* (weekly overnight visitation plus every other "long" weekend was not joint physical custody; court found that "primary physical custody" had no legal meaning and case should be treated as "sole physical custody")].

In *LaMusga*, although the Court did not pronounce a rule on "joint physical custody," it articulated standards applicable to the situation in which one parent has "primary physical custody," as discussed above [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 12 Cal. Rptr. 3d 356, 88 P.3d 81]* . Because many "joint physical custody" arrangements

involve one parent with "primary physical custody," the circumstances are less clear under which a nonmoving parent would need to show only that a custody change is in a child's best interests (as opposed to the showing otherwise required for "primary physical custody"). In *LaMusga*, the Court articulated eight factors to be considered in deciding whether to modify custody, given a custodial parent's proposed move, one of which is "the extent to which the parents are currently sharing custody" [*In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 12 Cal. Rptr. 3d 356, 88 P.3d 81]* . Given the language of *LaMusga*, and particularly its reference to assessing the extent of physical custody sharing, and the frequency of joint physical custody situations in which one parent has "primary physical custody," it appears that standards articulated for ""primary physical custody" in *LaMusga* may also apply when parents are deemed to have "joint physical custody."

In *Burgess*, the Court rejected a "necessity" test [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 34, 51 Cal. Rptr. 2d 444, 913 P.2d 473* ; *see In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1078, 12 Cal. Rptr. 3d 356, 88 P.3d 81* (reaffirming that "necessity" for move need not be shown); *see also § 223.28[2][c]*], and undoubtedly, the moving parent does not have to prove the necessity of the move in a joint custody case.

Post-*Burgess* cases have held that when there is a genuine (or "de facto") joint physical custody arrangement, the usual presumption against reexamining the basic custody arrangement does not apply, and the trial court must determine de novo what arrangement for primary physical custody is in the best interests of the child. In making this determination, the court must look to all relevant circumstances that bear on best interests [*In re Marriage of Williams (2001) 88 Cal. App. 4th 808, 812-813, 105 Cal. Rptr. 2d 923* (when parties had working joint custody arrangement that would be disrupted by mother's move to Utah, and mother supplied good faith, rational reasons to move with children, court required to determine de novo custody arrangement in children's best interests); *In re Marriage of Whealon (1997) 53 Cal. App. 4th 132, 142, 61 Cal. Rptr. 2d 559* (affirming order permitting mother to move with young child to New York to accept new job); *see Brody v. Kroll (1996) 45 Cal. App. 4th 1732, 1737, 53 Cal. Rptr. 2d 280* ; *see also Ruisi v. Thieriot (1997) 53 Cal. App. 4th 1197, 1204, 62 Cal. Rptr. 2d 766]* .

At least one appellate court has held that a trial court may not enter a custody order that has the effect of separating siblings unless compelling circumstances dictate that the separation is in the children's best interest [*In re Marriage of Williams (2001) 88 Cal. App. 4th 808, 809, 813-814, 105 Cal. Rptr. 2d 923* (reversing order permitting one parent to relocate with two of four children, when neither parent testified on relationships among children; record contained no psychological evaluations, school or medical records or input from children; and there was no evidence on extent to which siblings bonded to one another or to which their separation would hinder or serve their best interests)].

When children are being relocated to a foreign country this best interest analysis should particularly take into consideration the following concerns: (1) the issue of culture, (2) the issue of distance, and (3) the issue of jurisdiction. Of these, jurisdiction may be the most difficult to resolve, and it may be necessary to require the custodial parent to post a bond or other security that would be forfeited if he or she fails to comply with the custody or visitation orders. Thus, with foreign move-aways, the court should include provisions designed to guarantee that the order will be enforceable throughout the children's minority [*In re Marriage of Abargil (2003) 106 Cal. App. 4th 1294, 1299-1301, 1303-1304, 131 Cal. Rptr. 2d 429* (relocation to *Israel); In re Marriage of Condon (1998) 62 Cal. App. 4th 533, 551-555, 562, 73 Cal. Rptr. 2d 33* (relocation to Australia); *see In re Marriage of Lasich (2002) 99 Cal. App. 4th 702, 121 Cal. Rptr. 2d 356* (detailed description of trial court's proper findings and orders in foreign move-away case)].

In the course of implementing the above (*Condon*) considerations in a foreign relocation situation, at least one court has imposed the following conditions: (1) requiring the relocating parent to post a substantial bond to ensure compliance with the trial court's custody orders, (2) prohibiting the relocating parent from attempting to modify the judgment except on application to a California state court, and (3) requiring the relocating parent to register the trial court's judgment with the proper foreign authorities before taking the child to the foreign jurisdiction [*In re Marriage of Abargil (2003) 106 Cal. App. 4th 1294, 1298, 131 Cal. Rptr. 2d 429* (upholding trial court's findings that it was in child's best interest to remain with his mother, who was primary caregiver and more likely to facilitate visitation with father than if parental

roles were reversed)].

[f] Effect of Right to Travel

The effect of the constitutional right to travel [*see Shapiro v. Thompson (1969) 394 U.S. 618, 629, 89 S. Ct. 1322, 22 L. Ed. 2d 600]* on move-away custody cases has been the subject of some judicial attention without a clear resolution. One California appellate court has broadly stated that the right encompasses the custodial parent's right to resettle, find new employment, and start a new life without losing custody of the children [*In re Marriage of Fingert (1990) 221 Cal. App. 3d 1575, 1581-1582, 271 Cal. Rptr. 389]* . However, this court seems to have retreated from this position. In a joint custody case, the court noted that the stay-behind parent also has a constitutional right *not* to travel in order to retain a relationship with the children. Thus, the right to travel did not require a particular resolution of the move-away issue [*see In re Marriage of McGinnis (1992) 7 Cal. App. 4th 473, 480, 9 Cal. Rptr. 2d 182* ; *see also Selzer v. Selzer (1994) 29 Cal. App. 4th 637, 642-643, 34 Cal. Rptr. 2d 824]* . Another court refused to reach the issue, but strongly suggested that any impairment of the right to travel in restraining the custodial parent from removing the children from the state is only indirect, and justified by the compelling state interest in the welfare of children from dissolved families [*see In re Marriage of Carlson (1991) 229 Cal. App. 3d 1330, 1339-1340, 280 Cal. Rptr. 240]* .

In *Marriage of Burgess*, the California Supreme Court made no mention whatsoever of the right to travel, suggesting that the right is not implicated inmove-away cases, and that the rights of the moving parent can receive adequate protection under traditional family law rules [*see In re Marriage of Burgess (1996) 13 Cal. 4th 25, 51 Cal. Rptr. 2d 444, 913 P.2d 473]* .

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[Reserved]

§§ 223.29[Reserved]

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§ 223.40 California Family Law

For discussion and forms relating to child custody, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, Chs. 32, 33, 35 (Matthew Bender 2d ed.)

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§ 223.41 Federal Statutes

Custody proceedings under Indian Child Welfare Act of 1978. *25 U.S.C. § 1901 et seq.*

Judicial and administrative remedies under International Child Abduction Remedies Act. *42 U.S.C. § 11601 et seq.*

Enforcement of custody determinations of other states under Parental Kidnapping Prevention Act. *28 U.S.C. § 1738A(a)*

Use of Parent Locator Service by state to locate absent parent or child. *42 U.S.C. §§ 654(17), 663*

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§ 223.42 State Statutes

[1] Definitions and General Principles

Jurisdiction of superior court in dissolution of marriage, nullity of marriage, and legal separation proceedings to inquire into and render judgments and make orders concerning child custody. *Fam. Code §§ 200, 2010(b)*

"Joint custody," "joint legal custody," "joint physical custody," "sole legal custody," and "sole physical custody" defined. *Fam. Code §§ 3000-3007*

Mother and father of unemancipated minor as equally entitled to custoy of minor. *Fam. Code § 3010*

Legislative findings and declarations concerning child custody. *Fam. Code § 3020*

Authority of court to make custody orders. *Fam. Code § 3021*

Trial preference for custody issues. *Fam. Code § 3023*

Location of missing party or child. *Fam. Code § 3130 et seq.*

Check to determine if child is reported as missing person. *Fam. Code § 3140*

Appointment of counsel to represent child in custody and visitation proceedings. *Fam. Code § 3150 et seq.*

[2] Determining Custody

Factors considered in determining best interest of child. *Fam. Code § 3022*

Matters to be considered in awarding custody. *Fam. Code § 3040 et seq.*

Temporary custody orders. *Fam. Code § 3060 et seq.*

Joint custody. *Fam. Code § 3080 et seq.*

Custody investigation and report. *Fam. Code § 3110 et seq.*

Mediation of custody and visitation issues. *Fam. Code § 3160 et seq.*

Court-ordered counseling in custody proceedings. *Fam. Code § 3190 et seq.*

Uniform Child Custody Jurisdiction Act. *Fam. Code § 3400 et seq.*

[3] Paternity

Presumption concerning child born to married woman. *Fam. Code § 7500*

Uniform Act on Blood Tests to Determine Paternity. *Fam. Code § 7550 et seq.*

Uniform Parentage Act. *Fam. Code § 7600 et seq.*

[4] Restraining Orders

Restraining orders in summons restraining parties from removing minor children from state. *Fam. Code § 2040*

Ex parte restraining orders and custody orders. *Fam. Code § 2045*

[5] Visitation

Visitation rights of parents and others. *Fam. Code § 3100 et seq.*

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§ 223.43 California Rules of Court

Joinder of parties regarding custody issues. *Cal. Rules of Ct., Rule 5.154*

Role of court-ordered investigators in custody disputes. *Cal. Rules of Ct., Rule 5.220*

Appointment of counsel to represent child in custody or visitation proceeding. *Cal. Rules of Ct., Rules 5.240-5.242*

Court-connected child custody mediation. *Cal. Rules of Ct., Rule 5.10*

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§ 223.44 Decisions

Stipulated custody order is final judicial determination for purposes of changed circumstances rule only if there is clear, affirmative indication that the parties intended this result; changed circumstances rule applies whenever final custody has been established by judicial decree, regardless of whether initial custody determination resulted from parents' agreement, default judgment, or litigation. *Montenegro v. Diaz (2001) 26 Cal. 4th 249, 258, 109 Cal. Rptr. 2d 575, 27 P.3d 289*

Showing of changed circumstances is not required to support change of custody arrangements from those established by temporary order or extrajudicial agreement, although court must consider length of time existing arrangement was in effect and importance of continuity and stability in child's life. *Burchard v. Garay (1986) 42 Cal. 3d 531, 535-539, 229 Cal. Rptr. 800, 724 P.2d 486*

Comparative income or economic advantage is impermissible basis for custody determination. *Burchard v. Garay (1986) 42 Cal. 3d 531, 539, 229 Cal. Rptr. 800, 724 P.2d 486*

Parents' reconciliation after interlocutory dissolution judgment nullifies provisions of child custody order and, therefore, *Penal Code § 278.5* is inapplicable to one parent's unauthorized taking of child. *People v. Howard (1984) 36 Cal. 3d 852, 859, 206 Cal. Rptr. 124, 686 P.2d 644*

Trial court's order allowing mother to move with child to Israel based on child's best interest was proper when mother would maintain father-child contact, California order would be enforceable in Israel, and benefits to child of growing up there under his mother's care outweighed risks. *In re Marriage of Abargil (2003) 106 Cal. App. 4th 1294, 1299-1301, 1303-1304, 131 Cal. Rptr. 2d 429*

Trial court erred in refusing to permit noncustodial father to present evidence that mother's move with children to city two hours away would be detrimental to children's welfare, because trial court's reasoning that under *Burgess* husband's order to show cause had to be denied without evidentiary hearing because there was no allegation of wife's bad faith

adopted too narrow reading of *Burgess*, and because non-custodial parent opposing move away order has right to present evidence on both relevant issues: bad faith and detriment to child and court erroneously denied husband opportunity to present evidence on whether move would cause detriment to children. *In re Marriage of Campos (2003) 108 Cal. App. 4th 839, 842-844, 134 Cal. Rptr. 2d 300*

Change in custody is not mandated simply because move will require more travel or change in child's visitation schedule with noncustodial parent. *In re Marriage of Lasich (2002) 99 Cal. App. 4th 702, 717-718, 121 Cal. Rptr. 2d 356*

Parent is having statutory right to change children's residence, unless parent's reason for moving is to frustrate other parent's relationship with the children. *In re Marriage of Bryant (2001) 91 Cal. App. 4th 789, 793-794, 110 Cal. Rptr. 2d 791*

Court is prohibited from entering custody order that separates siblings unless compelling circumstances dictate that separation is in children's best interest. *In re Marriage of Williams (2001) 88 Cal. App. 4th 808, 809, 813-814, 105 Cal. Rptr. 2d 923* .

Nonparent who seeks custody of child lacks standing to initiate custody proceeding under Family Code; guardianship petition under Probate Code is only judicial means for nonparent to obtain custody when parents have not initiated custody proceeding. *Scott v. Superior Court (2009) 171 Cal. App. 4th 540, 546, 89 Cal. Rptr. 3d 843*

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§ 223.45 Law Reviews

Scott, *Pluralism, Parental Preference, and Child Custody, 80 Calif. L. Rev. 615 (1992)*

Comment, *Homosexual Parenting: Child Custody and Adoption, 22 U.C. Davis L. Rev. 1009 (1989)*

Comment, *Recognizing Constitutional Rights of Custodial Parents: The Primacy of the Post-Divorce Family in Child Custody Modification Proceedings, 35 UCLA L. Rev. 677 (1988)*

Pastis, *Residence Restrictions on Custodial Parents: Sex-Based Discrimination? 16 Golden Gate U.L. Rev. 419 (1986)*

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§§ 223.46[Reserved]

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§ 223.60 Declaration in Support of Petition for Temporary Custody and Visitation Order [Fam. Code § 3060]

[1] FORM Declaration in Support of Petition for Temporary Custody and Visitation Order [Fam. Code § 3060]

I, _____ [*name*], am the petitioner in this matter, and _____ [*e.g.*, mother] of _____ [*name of child*], born _____ [*date*], [*add if proceeding is for dissolution of marriage*] who is a child of the marriage that is the subject of these dissolution of marriage proceedings]. Respondent _____ [*name*] is the _____ [*e.g.*, father] of the child.

_____ [*Set forth facts supporting need for temporary custody order, including facts supporting need for interim ex parte order pending hearing, if any, e.g.*, On _____ (*date*), Respondent moved out of our marital home by mutual agreement. The child and I continue to reside in the home. Respondent indicated that he would be moving into a hotel temporarily, and would make arrangements to see the children when he could. We did not further discuss the issue of the temporary custody of the children. I have not heard from him since, and it is imperative that immediate orders be issued regarding the custody of the child in case respondent attempts to remove the child from my home].

At this time, I request orders _____ [*specify, requested orders regarding physical custody, visitation, and legal custody, e.g.*, granting me the temporary physical custody of the child, granting respondent visitation every Saturday from 10:00 a.m. to 6:00 p.m, and granting the parties temporary joint legal custody of the children].

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

CAUTION:

Every party in a custody proceeding in his or her first pleading or in an attached affidavit or declaration [*see Code Civ. Proc. § 2015.5*] must give the information required under *Fam. Code § 3429* relating to the residence and custody of the child. For the required form of declaration, see *Ch. 221, Dissolution of Marriage: Procedure, § 221.312*.

[2] Use of Form

This form is a declaration in support of an application for a court order for temporary child custody and visitation. It is intended for use as an attachment to the Judicial Council forms required to apply for the order when there is insufficient space on the forms to describe the factual basis for the application. In cases in which there is no need for a temporary restraining order on *personal conduct* that includes a companion custody order, the form would be attached to the Judicial Council form of Application for Order and Supporting Declaration Cal. Judicial Council Form FL-310; see *Ch. 221, Dissolution of Marriage: Procedure, § 221.327*].

However, if a personal conduct restraining order is sought in addition to a custody order, this form of declaration would be attached to the Judicial Council form of Request for Order (Domestic Violence Prevention--DV-100), which is illustrated in Ch. 293, *Harassment and Domestic Violence*, § 293.150. In that case, a companion Child Custody, Visitation, and Support Attachment (Form DV-100A) must also be attached.

In either case, a standard Judicial Council form of Declaration Under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA--form MC-150) must be attached to the application [*see Fam. Code § 3429* (UCCJEA declaration required in party's first pleading or in affidavit attached to it); *see Ch. 221, Dissolution of Marriage: Procedure, § 221.312*].

For discussion of the criteria and standards for temporary custody and visitation awards, see *§ 223.20*.

For discussion of motion practice in a family law matter, including examples of the Judicial Council forms for Order to Show Cause [Cal. Judicial Council FL-300], Notice of Motion [Cal. Judicial Council Form FL-301], Application for Order and Supporting Declaration [Cal. Judicial Council Form FL-310], and Findings and Order After Hearing [Cal. Judicial Council Form FL-340], see Ch. 221, *Dissolution of Marriage: Procedure* .

[3] State Statutes

Petition for temporary custody order. *Fam. Code § 3060*

Supporting declaration. *Fam. Code § 3429*

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§ 223.61 Child Custody and Visitation Order--Attachment to Findings and Order After Hearing and Supervised Visitation Order [Cal. Judicial Council Forms FL-341, FL-341(A)]

[1] FORM Child Custody and Visitation Order--Attachment to Findings and Order After Hearing and Supervised Visitation Order [Cal. Judicial Council Forms FL-341, FL-341(A)]

Click here to view image.

[2] Use of Form

These forms are the mandatory Judicial Council forms of Child Custody and Visitation Order Attachment [Cal. Judicial Council Form FL-341] and Supervised Visitation Order [Cal. Judicial Council Form FL-341(A)], for use with the Findings and Order After Hearing form [Cal. Judicial Council Form FL-340] or Stipulation and Order for Custody and/or Visitation of Children [Cal. Judicial Council form FL-355]. The "As attached" box in Paragraph 3 of the Findings and Order After Hearing form or Paragraph 4(b) of the Stipulation and Order for Custody and/or Visitation of Children form should be checked to indicate that these forms are attached.

The Child Custody and Visitation Order Attachment and Supervised Visitation Order forms also are required to be used with the Judicial Council form of Judgment [Cal. Judicial Council Form FL-180]. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Paragraph 1 of the Child Custody and Visitation Order Attachment form contains space within which to set forth the name and birth date of a child, along with the arrangement for legal and physical custody of that child. Because of limited space on the form, it may be necessary to continue this description in a separate attachment, particularly when there are several children involved. The box should be checked if temporary custody is ordered. In addition, if the parties wish to attach an agreement on custody and visitation, Paragraph 2b must be marked. Paragraph 2 otherwise sets forth an array of common visitation arrangements, and these should be reviewed and utilized to the extent consistent with the visitation order made. If supervised visitation is ordered, Paragraph 3 must be completed; and when the

arrangement for this type of visitation is not sufficiently described in Paragraph 2, the Supervised Visitation Order form, which is discussed further below, must be attached [*see* Cal. Judicial Council Form FL-341(A)]. The Child Custody and Visitation Order Attachment also contains preprinted orders to specify, in an appropriate case, each of the following:

- Transportation arrangements for visitation (Paragraph 4).

- Who must have written permission from whom to take the children outside of the state, specified counties and/or specified other places (Paragraph 5).

- A holiday schedule (Paragraph 7) [Cal. Judicial Council Form FL-341(C)].

- Additional custody provisions (Paragraph 8) [Cal. Judicial Council Form FL-341(D)].

- Joint legal custody order (Paragraph 9) [Cal. Judicial Council Form FL-341(E)].

If child abduction prevention orders are made, it is necessary to attach the ChildAbduction Prevention Orders Attachment (see paragraph 6) [Cal. Judicial Council Form FL-341(B)].

The Child Custody and Visitation Order Attachment has provisions stating the following:

- The court has jurisdiction to make child custody orders in the case under the Uniform Child Custody Jurisdiction and Enforcement Act [*Fam. Code § 3400 et seq.*].

- The responding party was given notice and an opportunity to be heard as provided by California law.

- The children's country of habitual residence is the United States or another specified place, presumably for purposes of the Hague Convention.

- A notification to the parties that if they violate the order, they may be subject to civil or criminal penalties, or both.

The Supervised Visitation Order form contains preprinted findings (Paragraphs 1, 2) and orders (Paragraphs 3-10). Paragraph 1 must be completed to show the nature of the evidence presented in support of supervised visitation. Also, if the supervised party disputes the allegations underlying the request for supervision, the separate box in Paragraph 1 must be marked to reflect that a dispute exists and that the court reserves findings on those issues pending further investigation and hearing or trial. Paragraph 2 must be marked to identify the party being supervised. Paragraph 3 provides space to identify the child or children who are the subject of the order. Paragraph 4 must be completed to indicate the nature of the supervision order made: (1) supervised visitation, (2) supervised exchange of the child only, or (3) "therapeutic visitation." Paragraph 5 must be marked to show whether supervision will be performed by a professional or nonprofessional person, and Paragraph 6 must name this person (the "Authorized Provider"). This paragraph also permits the parties to indicate that supervision may be performed by "any other mutually agreed-upon third party as arranged." Paragraph 7, concerning duration and frequency of visits, refers back to the Child Custody and Visitation Order Attachment. Paragraph 8 requires setting forth the responsibility of each party for payment of the supervision, if any, in percentages. Paragraph 9 is designed to permit the court to specify a date by which the party being supervised must contact a professional provider or supervised visitation center. Paragraph 10 is undesignated, and is intended to be used to insert "other" orders.

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§ 223.62 Declaration Supporting Petition for Mediation of Dispute Relating to Existing Custody Order [Fam. Code § 3173(a)]

[1] FORM Declaration Supporting Petition for Mediation of Dispute Relating to Existing Custody Order [Fam. Code § 3173(a)]

I, _____ [*name of petitioner*], am the petitioner in this matter and the _____ [father *or* mother] of the minor children of the marriage, _____ [*name of first child*], born _____ [*date of birth*] and _____[*name of second child*], born _____ [*date of birth*]. Under the court's current custody order, _____ [*briefly describe existing order, e.g.,* _____ (*name of person having custody*), the children's _____ (mother *or* father *or specify relationship of primary custodian to children*) has primary physical custody, subject to my right to exercise reasonable visitation at times to be agreed to by the parties, without further specification)].

_____ [*Briefly set forth nature of current dispute; e.g.,* The visitation order is no longer working. _____ (*name of person having custody*) has rejected nearly all of my requests for visitation during the last 60 days. She/He has taken the position that I can only exercise visitation if the children are not involved in other activities, and there has always been some conflicting activity when I have requested visitation. During this period, I have seen my children only twice, despite having requested visitation time every week. Unless Respondent can be convinced to cooperate, it will be necessary for me to initiate modification proceedings for different custody and visitation orders in order to preserve my parent-child relationship. I believe that it is always in the best interests of the children to resolve custody and visitation matters without adversary proceedings if at all possible. Therefore, I am petitioning this court to refer this dispute to mandatory mediation under *Family Code Section 3173* with the hope that an agreement may be reached that will either make the existing order workable or that will result in a stipulated modified order.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form is a declaration in support of a petition for medition of a dispute relating to an existing custody order. In some counties, a party may file a petition for mediation of a dispute relating to an existing order for custody or visitation, or both. The county board of supervisors must have adopted a resolution authorizing the procedure [*Fam. Code § 3173(a)*]. The mediation must be set notlater than 60 days after the filing of the petition [*Fam. Code § 3173(b)*].

The petition for mediation may be made on the Judicial Council form of Application for Order and Supporting Declaration. Paragraph 9 allows a party to request "other relief" not specifically included elsewhere on the form. For all declarations supporting family law motions, it is recommended that the Judicial Council form for Attached Declaration (MC-031) be used and attached to the Judicial Council form. For discussion of motion practice in a family law matter, including examples of the Judicial Council forms for Order to Show Cause FL-300, Noticed Motion FL-301, Application for Order and Supporting Declaration FL-310, and Findings and Order After Hearing FL-340, see *Ch. 221, Dissolution of Marriage: Procedure, § 221.310* et seq. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] State Statutes

Mediation of custody and visitation disputes. *Fam. Code § 3160 et seq.*

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19-223 California Forms of Pleading and Practice--Annotated § 223.63

§ 223.63 Parenting Plan Provision for Joint Legal Custody

[1] FORM Parenting Plan Provision for Joint Legal Custody

The parties shall have the joint legal custody of their children _____ [*names and birth dates of children*]. The children shall be reared in the _____ [*name or denomination of religion*] faith and tradition, and neither parent may change the children's religious faith and training without the other's consent. The children shall attend _____ [*name of school*] in the city of _____, California, and neither parent shall enroll the children in another school without the other's consent. Both parents must consent to nonemergency medical treatment of the children. In all other respects, either parent may exercise legal control over the child without the other's express consent.

[2] Use of Form

This form is a provision for joint legal custody that may included in a parenting plan, which may be judicially approved as the court's custody determination and order. This provision is only an example, and is designed to suggest the scope of issues that must be considered in developing a parenting plan and an order for legal custody. Each parenting plan must be tailored to the specific needs of the parties and their children.

A parenting plan should address both legal and physical custody. In providing for joint legal custody [*see Fam. Code § 3085* (court may grant joint legal custody without granting joint physical custody)], the plan should specify the circumstances under whic the consent of both parents must be obtained in order to exercise legal control of the child. A court order for joint legal custody must specify the circumstances under which the consent of both parents is required to exercise legal control of the child, and the consequences of the failure to obtain mutual consent in these situations. In all other circumstances, either parent acting alone may exercise legal control of the child [*Fam. Code § 3083*].

For further discussion of issues relating to legal custody, see *§ 223.16[1]* and *§ 223.16[2][b]*.

[3] State Statutes

"Joint legal custody" defined. *Fam. Code § 3003*

"Sole legal custody" defined. *Fam. Code § 3006*

Presumption for joint custody where parents agree to joint custody. *Fam. Code § 3080*

Content and effect of joint legal custody order. *Fam. Code § 3083*

Awarding joint legal custody without joint physical custody. *Fam. Code § 3085*

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19-223 California Forms of Pleading and Practice--Annotated § 223.64

§ 223.64 Parenting Plan Provision for Sole Physical Custody With Visitation Rights

[1] FORM Parenting Plan Provision for Sole Physical Custody With Visitation Rights

Sole physical custody of the children, _____ [*names and birth dates of children*], is granted to _____ [petitioner *or* respondent] _____ [*name*]. _____ [Respondent *or* Petitioner] _____ [*name*] shall have the right to exercise reasonable visitation with the children at such times and places as may be agreed to by the parties. Should it prove that the parties are unable to agree as to Respondent's exercise of visitation rights, visitation shall be as follows:

[*SET OUT visitation schedule, e.g.:*]

(1) Every Saturday from 10:00 a.m. until 8:00 p.m.;

(2) Every Thursday from 5:30 p.m. until 8:00 p.m.;

(3) From the first Monday of July through the second Sunday of July each year;

(4) On Christmas day and on each child's birthday from 1:00 p.m. through 8:00 p.m. each year;

(5) _____ [Fathers' *or* Mothers'] Day each year;

(6) The Friday after Thanksgiving Day from 10:00 a.m. until 8:00 p.m. each year;

(7) For every legal holiday each year that is added to a weekend to make a three-day holiday period, on the third day of that period from 10:00 a.m. to 8:00 p.m.

[*CONTINUE*]

The above schedule may be invoked by either party's giving written notice to that effect to the other. This visitation schedule shall be enforceable by any law enforcement agency on presentation of a copy of a court order containing the schedule with the notice and proof of service by regular mail attached.

[2] Use of Form

The foregoing form is a provision for sole physical custody in one parent and reasonable visitation to the other parent. The provision is designed to be included in a parenting plan, which may then be judicially approved as the court's custody determination and order. The provision is only an example, and is designed to suggest the scope of issues that must be considered in developing a "traditional" custody and visitation plan in which the children reside with one parent and visit the other on a regular basis.

Visitation rights in a sole physical custody situation are among the most troublesome of custody issues. Visitation generally works best when the parents are flexible, can communicate with each other, and can adjust to the changing needs and schedules of the children. For this reason, an order for "reasonable" visitation without need for further specification is the ideal. Unfortunately, many separating parents are unable to communicate and cooperate to the degree necessary to make a nonspecific visitation schedule work. In this situation, an order for "reasonable visitation" that does not spell out the noncustodial parent's rights in detail does not provide him or her with readily enforceable righs. Therefore, it is recommended that any order for reasonable visitation include a structured visitation schedule that will be implemented by one parent giving the other notice to that effect, as illustrated in the foregoing form.

For further discussion of parental visitation rights, see *§ 223.18[1]* et seq.

[3] State Statutes

"Sole physical custody" defined. *Fam. Code § 3007*

Parental visitation rights. *Fam. Code § 3100*

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19-223 California Forms of Pleading and Practice--Annotated § 223.65

§ 223.65 Parenting Plan Provision for Joint Physical Custody [Fam. Code § 3004

[1] FORM Parenting Plan Provision for Joint Physical Custody [Fam. Code § 3004

The parties shall share the physical custody of their minor children, _____ [*names and birth dates of children*], according to the following schedule. _____ [*Specify schedule, including transportation arrangements and places where children will be picked up and dropped off, e.g.,* Petitioner _____ (*name*) shall pick up the children at the end of the school day each Tuesday and have the actual physical custody of the children from that time through 12:00 noon each Saturday. Respondent _____ (*name*) shall pick up the children at Petitioner's home each Saturday at noon and have physical custody through the end of the school day each Tuesday. Each parent may exercise reasonable visitation with the children during the custodial time of the other parent at times to be mutually agreed to by the parents. Each parent is entitled to a two-week uninterrupted custodial period between June 15 and August 31 each year for the purpose of taking a vacation with the children. Each parent is entitled to at least 8 hours of time with the children on Thanksgiving, Christmas Day, and the children's birthdays regardless of within whose custodial time the event actually falls.]

[2] Use of Form

The foregoing form is a provision for joint physical custody. It is designed to be inclued in a parenting plan, which may then be judicially approved as the court's custody determination and order. The provision is only an example, and is designed to suggest the scope of issues that must be considered in developing a joint or shared custody plan in which the children spend significant (but not necessarily equal) amounts of time with, and maintain a home with, each parent.

In providing for joint physical custody, the plan should specify the rights of each parent to physical control of the child in sufficient detail to enable a parent deprived of that control to implement laws for relief of child snatching and kidnapping [*see Fam. Code § 3084*].

For discussion of issues concerning joint custody, see *§ 223.16[2][c]* et seq.

[3] State Statutes

"Joint physical custody" defined. *Fam. Code § 3004*

Content of joint physical custody order. *Fam. Code § 3084*

Order may specify one parent as primary caretaker. *Fam. Code § 3086*

[4] Cross References

For a related form, see *§ 223.63*.

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19-223 California Forms of Pleading and Practice--Annotated § 223.66

§ 223.66 Notice of Intended Change of Custodial Parent's Residence [Fam. Code § 3024]

[1] FORM Notice of Intended Change of Custodial Parent's Residence [Fam. Code § 3024]

_____ [*date*]

[_____ (I have been transferred by my employer to _____ (*city and state*), effective _____ (*date*) *or set forth other reason for move, if applicable*).] Sometime between _____ [*date*] and _____ [*date*], I will be moving from _____ [*city where custodial parent and children currently reside*], California to _____ [*new city and state*] and taking the children with me. This is a permanent relocation in the sense that I have no particular plans to return to California at any time. I am willing to discuss a rearrangement of your visitation schedule, either with or without the assistance of a mediator.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form is a notice to be used by a parent with physical custody of the children to give notice to the noncustodial parent of an intended change of residence. The court may require that such a notice be given in its custody order [*see Fam. Code § 3024*].

The notice must be given by mail, return receipt requested, postage prepaid, to the last known address of the parent to be notified. A copy must be sent to that parent's attorney of record. The notice must be given before the contemplated move is made. To the extent feasible, it must be given within a minimum of 45 days prior to the proposed change of residence so as to allow time for mediation of a new agreement concerning custody [*Fam. Code § 3024*].

The recommended approach, exemplified in this form, is for the custodial parent to write a simple letter to the noncustodial parent that has been reviewed by counsel to ensure that it contains sufficient information to meet the statutory requirements. A copy of the letter should be attached to a proof of service and filed in the matter.

[3] State Statutes

Notice to noncustodial parent of change of residence of child. *Fam. Code § 3024*

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19-223 California Forms of Pleading and Practice--Annotated § 223.67

§ 223.67 Declaration Supporting Motion to Modify Custody--Change of Primary Custodian's Residence

[1] FORM Declaration Supporting Motion to Modify Custody--Change of Primary Custodian's Residence

I, _____ [*name*], am the _____ petitioner in this matter and the _____ [father *or* mother] of _____ [*names of children*], born _____ [*birth dates of children*] [, respectively], who are chilren of the marriage that is the subject of these proceedings. Respondent _____ [*name*] is the _____ [mother *or* father] of the children. Under the current custody order of _____ [*date of current order*], we have joint legal custody of the children. _____ [*Briefly describe custody arrangement under current order, e.g.,* _____ (*name of other parent*) has the primary physical custody, and I have the right of visitation every Wednesday evening from 5:00 to 9:00 and every weekend from 12:00 noon on Saturday through 9:00 p.m. on Sunday.] Since this order was entered, I have exercised my rights under it regularly.

On _____ [*date*], I received a notice from Respondent stating that on or before _____ [*date*], she/he intended to move from _____ [*city where both parties and children currently reside*] California to _____ [*proposed new city and state*] and to take the children with her/him. Obviously, if the children move to _____ [*proposed new city and state*], I will be unable to exercise my rights under the current order and a new custody and visitation order will be required. I believe that it is in the best interests of the children that they remain with me in _____ [*city where both parties and children currently reside*] California and that I be granted their primary physical custody.

I am currently living in a _____ [*describe living arrangements, e.g.,* three-bedroom home owned by me in the city of _____], in the neighborhood where the children are currently attending school. I am able to provide appropriate care for the children in that [*specify, e.g.,* I have rearranged my work schedule so that I can be home by 4:00 p.m. on most days].

The children are established in my neighborhood and their school. They are doing well in their school work and are involved in on-going school and community activities [, including _____ [*specify children's*

after-school, sports, or other community-based activities]. They are stable and well-adjusted in their current home, neighborhood, and school environment. [Both sets of grandparents continue to live in this area and are actively involved with the children.]

For all of these reasons, I do not believe that it is in the best interests of the children to leave this community and to relocate to a distant environment, where they will lose contact with a parent and also their [extended family,] friends and activities. Therefore, I respectfully request that this court modify its order of _____ [*date of current order*], and grant me the primary physical custody of the children, subject to Respondent's right to exercise visitation during those periods of the year when school is not in session, including summer vacation, Christmas vacation, Spring vacation, and any such other times as may be arranged by the parties.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form above is a sample declaration for use in obtaining a modification of custody after the custodial parent has given notice that he or she intends to change the child's residence. Modification of child custody based on the custodial parent's intent to change the child's residence is discussed in *§ 223.28[2][e]*.

For discussion of motion practice in a family law matter, including examples of the Judicial Council forms for Order to Show Cause [Cal. Judicial Council FL-300], Notice of Motion [Cal. Judicial Council Form FL-301], Application for Order and Supporting Declaration [Cal. Judicial Council Form FL-310], and Findings and Order After Hearing [Cal. Judicial Council Form FL-340], see *Ch. 221, Dissolution of Marriage: Procedure, § 221.310* et seq. Declarations supporting family law motions, it is recommended that the Judicial Council form for Attached Declaration (MC-031) be used and attached to the Application for Order and Supporting Declaration form. If the motion is granted, the court's order changing custody must be made on the Judicial Council form of Child Custody and Visitation Order Attachment to Findings and Order After Hearing [Cal. Judicial Council Form FL-341A], which is reproduced in § 223.61. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] State Statutes

Jurisdiction of court to modify custody orders. *Fam. Code § 3021*

Modification or termination of joint custody order. *Fam. Code § 3087*

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19-223 California Forms of Pleading and Practice--Annotated § 223.68

§ 223.68 Declaration Supporting Motion for Order Restraining Change of Residence

[1] FORM Declaration Supporting Motion for Order Restraining Change of Residence

I, _____ [*name*], am the Respondent in this matter and the _____ [father *or* mother] of _____ [*names of children*], born [*birth dates of children*] [, *respectively*], who are children of the marriage that is the subject of these proceedings. Petitioner _____ [*name of petitioner*] is the _____ [mother *or* father] of the children. Under the current custody order of _____ [*date of current order*], we have joint legal custody of the children. Petitioner has the primary physical custody, and I have _____ [*describe visitation rights under current order, e.g.,* the right of visitation every Wednesday evening from 5:00 to 9:00 and every weekend from 12:00 noon on Saturday through 9:00 p.m. on Sunday]. Since this order was entered, I have exercised these rights regularly.

On _____ [*date*], I receivd a notice from Petitioner stating that on or before _____ [*date of proposed move*], she/he intended to move from _____ [*city where petitioner and children currently reside*], California to _____ [*proposed new city and state*] and to take the children with her/him. Obviously, if the children move to _____ [*proposed new city and state*], I will be unable to exercise my rights under the current order and a new custody and visitation order will be required.

[*SET FORTH in as many paragraphs as necessary any facts supporting Respondent's position, e.g.:*]

Petitioner on a number of occasions has threatened to make this move whenever we have had a disagreement about the children. Whenever she/he has been upset with me concerning some aspect of my exercise of visitation, she/he has stated that she/he wants me out of their life and is going to move away to some place where I won't be able to bother them. Therefore, I believe that her/his motive in making this move is primarily to frustrate my rights and to interfere with my relationship with my children.

[*CONTINUE*]

For these reasons, I respectfully request that the court issue an order under *Family Code Section 7501* restraining Petitioner from removing the children from the State of California without my written consent.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form above is a sample declaration for use in obtaining an order restraining the custodial parent from changing the child's residence to a place where the noncustodial parent's opportunity to exercise visitation would be significantly diminished. In the absence of such an order, the custodial parent has a right to change the residence of the child [*Fam Code § 7501*]. For further discussion, see *§ 223.28[2][d]*

For discussion of motion practice in a family law matter, including examples of the Judicial Council forms for Order to Show Cause [Cal. Judicial Council FL-300], Notice of Motion [Cal. Judicial Council Form FL-301], Application for Order and Supporting Declaration [Cal. Judicial Council Form FL-310], and Findings and Order After Hearing [Cal. Judicial Council Form FL-340], see *Ch. 221, Dissolution of Marriage: Procedure, § 221.310* et seq. For all declarations supporting family law motions, it is recommended that the Judicial Council form for Attached Declaration (MC-031) be used and attached to the Application for Order and Supporting Declaration form. If the motion is granted, the mandatory Judicial Council form of Child Custody and Visitation Order Attachment to Findings and Order After Hearing [Cal. Judicial Council Form FL-341A], which is reproduced in § 223.61, contains a section to prohibit removal of the child from the state or county (Paragraph 2.d.). These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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§ 223.69 Declaration Supporting Motion for Order Authorizing Change of Residence

[1] FORM Declaration Supporting Motion for Order Authorizing Change of Residence

I, _____ [*name*], am the petitioner in this matter and the _____ [mother *or* father] of _____ [*name of first child*], born _____ [*birth date of first child*] and _____ [*name of second child*], born _____ [*birth date of second child*], who are children of the marriage that is the subject of these proceedings. Respondent _____ [*name*] is the _____ [father *or* mother] of the children. Under the current custody order of _____ [*dte of current order*], we have joint legal custody of the children. I have the primary physical custody, and respondent has the right _____ [*specify respondent's visitation rights, e.g.,* to exercise reasonable visitation at times to be agreed to by the parties]. Further, both parties are prohibited from removing the minor children from the State of California without the written consent of the other party or order of the court.

[*SET FORTH in as many paragraphs as necessary facts supporting petitioner's position, e.g.:*]

Since the current custody order was made, Respondent has exercised his/her visitation rights only sporadically. He/She has not requested visitation according to any regular or predictable schedule. His/Her customary manner of requesting visitation is to call up immediately before some activity is about to take place and ask to pick up the children and take them to the activity. He/She makes requests of this nature on the average of only about two times per month, and has seen the children even fewer times, because it has not always been possible to accommodate his/her last-minute requests.

On _____ [*date*], I received notice from my employer, _____ [*name of employer*], that I would be transferred to _____ [*proposed new city and state*], effective _____ [*date*]. This is not a voluntary transfer; I am required as a condition of my employment to accept the position and move to the _____ [*proposed new city*] area. If I am not permitted to remove the children from _____ [*city where petitioner and children currently reside*] California and change their residence to

_____ [*proposed new city and state*], I will be forced to choose between my career and the custody of my children. Given respondent's extremely peripheral involvement in the lives of the children, it would not be in their best interests for him/her to assume the primary custodial role. Futher, through a specific visitation schedule revolving around periods of school vacation, respondent would actually be spending more time with the children than he/she is currently under the unstructured, reasonable visitation order.

[*CONTINUE*]

For these reasons, I respectfully request that this court issue its order permitting me to remove the children from the State of California and permanently change their residence to the State of _____ [*proposed new state*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form above is a sample declaration in support of a custodial parent's motion for permission to move outside of California with the children. In general, the custodial parent has a right to change the child's residence [*Fam. Code § 7501*], and no court order authorizing the move is required. However, the existing custody order may prohibit either or both parents from removing the child from the state or county without the consent of the other or order of the court [*see, e.g., Ward v. Ward (1957) 150 Cal. App. 2d 438, 440-444, 309 P.2d 965]* . In such a case, the custodial parent must bring this motion. For further discussion, see *§ 223.28[2][e][iii]*.

For discussion of motion practice in a family law matter, including examples of the Judicial Council forms for Order to Show Cause [Cal. Judicial Council FL-300], Notice of Motion [Cal. Judicial Council Form FL-301], Application for Order and Supporting Declaration [Cal. Judicial Council Form FL-310], and Findings and Order After Hearing [Cal. Judicial Council Form FL-340], see *Ch. 221, Dissolution of Marriage: Procedure, § 221.310* et seq. For all declarations supporting family law motions, it is recommended that the Judicial Council form for Attached Declaration (MC-031) be used and attached to the Application for Order and Supporting Declaration form. The order must be made on the mandatory Judicial Council form of Child Custody and Visitation Order Attachment to Findings and Order After Hearing [Cal. Judicial Council Form FL-341A], which is reproduced in *see § 223.61*. The boxes in Paragraphs 2.c. (visitation as set forth in attached schedule) and 5 (other orders) should be checked. The Judicial Council form for Additional Page (MC-020) should then be used to set forth the court's removal and visitation orders. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] State Statutes

Right of custodial parent to change child's residence. *Fam. Code § 7501*

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19-223 California Forms of Pleading and Practice--Annotated § 223.70

§ 223.70 Order Permitting Removal of Children From California

[1] FORM Order Permitting Removal of Children From California

1. The primary physical custody of the minor children _____ [*names of children*], born _____ [*birth dates of children*] [, respectively], shall remain with their _____ [mother *or* father], petitioner _____ [*name of petitioner*]. Petitioner may remove the children from the State of California and change their residence to the State of _____ [*proposed new state*].

2. Respondent _____ [*name*] shall be entitled to the physical custody of the children _____ [*specify visitation schedule, e.g.,* for a period of three weeks during the months of July or August each year on dates to be subsequently agreed to by the parties. In absence of such agreement, Respondent shall have physical custody from July 1 through July 21 each year. Respondent shall also have the physical custody of the children each year from December 26 though January 1 of the following year, and during one week in the spring of each year that corresponds to the children's spring vacation from school]. Respondent shall bear the cost of transporting the children from their residence to his/her place of residence; Petitioner shall bear the cost of returning the children to her/his place of residence. Respondent may exercise reasonable visitation with the children at all other times as may subsequently be agreed to by the parties.

3. This court retains its jurisdiction to modify this order under the Parental Kidnapping Prevention Act, *28 U.S.C. § 1738A*, and the Uniform Child Custody Jurisdiction and Enforcement Act, *Fam. Code § 3400 et seq.*, as long as Respondent continues to maintain his/her domicile in this jurisdiction.

_____ [*date*]

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form above is a sample order permitting the custodial parent to move from California and take the children with her or him. For further discussion, see *§ 223.28[2][e][iii]*.

The order contains a provision expressly retaining jurisdiction under the Parental Kidnapping Prevention Act (PKPA) [*28 U.S.C. § 1738A*] and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) [*Fam. Code § 3400 et seq.*]. This serves to emphasize to the courts of the children's new domicile that California has not declined to exercise its continuing jurisdiction in the matter [*see 28 U.S.C. § 1738A(f)(2)*; *Fam. Code § 3414(a)*]. For furtherdiscussion of modification jurisdiction under the PKPA and the UCCJEA, see Ch. 394, *Parent and Child* .

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19-223 California Forms of Pleading and Practice--Annotated § 223.71

§ 223.71 Nonparent's Declaration in Support of Motion for Joinder and Custody or Visitation [Cal. Rules of Ct., Rule 5.154]

[1] FORM Nonparent's Declaration in Support of Motion for Joinder and Custody or Visitation [Cal. Rules of Ct., Rule 5.154]

I, _____ [*name of person seeking joinder*], am the _____ *specify relation to child, e.g.,* maternal grandmother] [and current custodian] of _____ [*name of child*], a child who is the subject of this proceeding for _____ [*specify, e.g.,* dissolution of marriage]. As shown by the Petition and Response in this matter, _____ [*specify facts showing actual physical custody or claim to custody or visitation, e.g.,* the child is now six years old. He has been in my custody since the age two, when his parents, the parties herein, gave me exclusive physical custody because they were not then able to properly care for the child. I am listed on both parties Declaration Under Uniform Child Custody Jurisdiction Act as a person, not a party to this proceeding, who has the physical custody of the child].

By this motion, I request joinder as a party to this proceeding under *California Rules of Court, Rule 5.154(b)* as a person who _____ [*specify, e.g.,* has custody or physical control of the minor child of the marriage *or* claims visitation rights with the minor child of the marriage]. [*Add if custody is sought*: I further request that the primary physical custody of the child be granted to me under *Family Code Section 3041*]. This motion is made on the ground that _____ [*specify, e.g.,* a change of custody and disruption of the child's current stable custodial arrangement would be detrimental to the child and that granting custody to me is required to serve the best interest of the child *or* I am entitled to visitation rights under *Family Code Section 3100(a)* as a person having an interest in the welfare of the child, and it would be in the best interests of the child to have continued, regular visitation with me]. [*Add if custody is sought*: Alternatively, I request reasonable visitation rights with the child under *Family Code Section 3100(a)* as a person having an interest in the welfare of the child].

I declare under penalty of perjuy under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form above is a sample declaration in support of a motion for joinder in a dissolution of marriage, nullity of marriage, or legal separation proceeding. It may be used by a grandparent or other relative of a minor child of the marriage, or by a nonrelative who has an interest in the welfare of the child, to join theproceedings in order to obtain custody or visitation rights [*see Cal. Rules of Ct., Rule 5.154(b)*].

A person who has or claims custody or physical control of a child who is subject to the action, or visitation rights, may apply to the court for an order of joinder as a party to the proceeding [*Cal. Rules of Ct., Rule 5.154(b)*]. Once properly joined, a nonparent claimant may file an application in the proceeding for custody or visitation [*see § 223.60*].

For discussion of motion practice in a family law matter, including examples of the Judicial Council forms for Order to Show Cause [Cal. Judicial Council FL-300], Notice of Motion [Cal. Judicial Council Form FL-301], Application for Order and Supporting Declaration [Cal. Judicial Council Form FL-310], and Findings and Order After Hearing [Cal. Judicial Council Form FL-340], see Ch. 221, *Dissolution of Marriage: Procedure* . For all declarations supporting family law motions, it is recommended that the Judicial Council form for Attached Declaration (MC-031) be used and attached to the Application for Order and Supporting Declaration form. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] State Statutes

Custody awards to nonparents. *Fam. Code § 3041*

Discretion of court to grant reasonable visitation to nonparents having an interest in the welfare of the child in dissolution of marriage, nullity of marriage, and legal separation proceedings. *Fam. Code § 3100(a)*

Visitation rights of stepparents. *Fam. Code § 3101*

Visitation rights of relatives of deceased parent. *Fam. Code § 3102*

Visitation rights of grandparents. *Fam. Code §§ 3013, 3104*

[4] State Regulations

Judicial Council form for Responsive Declaration to Motion for Joinder and Consent Order of Joinder (Family Law). Cal. Judicial Council Form FL-373

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19-223 California Forms of Pleading and Practice--Annotated § 223.72

§ 223.72 Order of Joinder of Nonparent

[1] FORM Order of Joinder of Nonparent

1. _____ [*name*], _____ [*status, e.g.,* maternal grandmother and current physical custodian] of _____ [*name of child*], a child whose custody is at issue in these proceedings, is joined as party to these proceedings. Her/His participation in these proceedings shall be limited to the issues of child custody, visitation, and child support.

2. The court-appointed investigator in this matter shall investigate and determine _____ [*specify scope of investigation with regard to custody, if requested, and visitation, e.g.,* if a grant of physical custody to a parent would be detrimental to the child and whether a grant of primary physical custody to _____ (*name*) is required to serve the best interests of the child]. The investigator shall also investigate and consider whether visitation rights granted to _____ [*name*] would be in the best interests of the child.

_____ [*date*]

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form above is a sample order joining a nonparent to a proceeding for dissolution of marriage, nullity of marriage, or legal separation, for the purpose of determining that person's right to custody of or visitation with a minor child who is subject to the action [*see Cal. Rules of Ct., Rule 5.154(b)*].

The Judicial Council form for Additional Page (MC-020) may be used to attach orders to the Findings and Order After Hearing [Cal. Judicial Council Form FL-340] that do not appear on the face of that form, such as the form of order

above. If such an attachment is used, Paragraph 8 should be checked on the Findings and Order After Hearing form. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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19-223 California Forms of Pleading and Practice--Annotated § 223.73

§ 223.73 Child Custody and Visitation Application Attachment [Cal. Judicial Council Form FL-311]

[1] FORM Child Custody and Visitation Application Attachment [Cal. Judicial Council Form FL-311]

Click here to view image.

[2] Use of Form

This form is the optional Judicial Council form of Child Custody and Visitation Application Attachment [Cal. Judicial Council Form FL-311]. The boxes in this form may be checked to provide more details on an applicant's request for child custody orders, visitation schedule and supervised visitation schedule, includinghow the costs of supervision are to be paid, transportation for visitation and place of exchange, a requirement that the father, mother or another person have written permission from the other parent or a court order to take the children outside of the State of California, specified counties, and/or other specified places, a request for a holiday and visitation schedule [*see* Cal. Judicial Council form FL-341(C); *see § 223.76*], a request for additional orders regarding custody [*see* Cal. Judicial Council form FL-341(D); *see § 223.76*], and a request for joint legal custody and additional orders [*see* Cal. Judicial Council form FL-341(E); *see § 223.76*]. When requesting child abduction prevention orders, the Request for Child Abduction Orders must be attached [Cal. Judicial Council Form FL-312; *see § 223.74*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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19-223 California Forms of Pleading and Practice--Annotated § 223.74

§ 223.74 Request for Child Abduction Prevention Orders [Cal. Judicial Council Form FL-312]

[1] FORM Request for Child Abduction Prevention Orders [Cal. Judicial Council Form FL-312]

Click here to view image.

[2] Use of Form

This form is a Request for Child Abduction Prevention Orders [Cal. Judicial Council Form FL-312]. It is a mandatory attachment to a petition, response, application for order and supporting declaration, responsive declaration, or other child custody or visitation form. This form is intended for use in obtaining orders to prevent the abduction of a child by one parent [*see Fam. Code § 3048(b)*]. Section 1 of Form FL-312 asks for the name of the requesting parent. Section 2 requests information on where the requesting parent believes the other parent may take the child. In Section 3, the requesting parent must state reasons for why he or she believes the other parent may take the child without permission. Sections 4 to 13 should be checked according to the orders being sought.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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19-223 California Forms of Pleading and Practice--Annotated § 223.75

§ 223.75 Child Abduction Prevention Orders Attachment [Cal. Judicial Council Form FL-341(B)]

[1] FORM Child Abduction Prevention Orders Attachment [Cal. Judicial Council Form FL-341(B)]

Click here to view image.

[2] Use of Form

This form is the Judicial Council form of Child Abduction Prevention Orders Attachment [Cal. Judicial Council Form FL-341(B)]. It is a mandatory attachment to the Child Custody and Visitation Order Attachment [Cal. Judicial Council Form FL-341]. Section 1 contains the court's finding that there is a risk that the namedparent might take the children without permission, and the check boxes indicate the reason(s) for the decision. Section 2 through 10 should be checked according to the orders being made. Section 11, when checked, authorizes any law enforcement officer to enforce this order.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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19-223 California Forms of Pleading and Practice--Annotated § 223.76

§ 223.76 Children's Holiday Schedule Attachment; Additional Provisions--Physical Custody Attachment; and Joint Legal Custody Attachment [Cal. Judicial Council Forms FL-341(C), FL-341(D), FL-341(E)]

[1] FORM Children's Holiday Schedule Attachment; Additional Provisions--Physical Custody Attachment; and Joint Legal Custody Attachment [Cal. Judicial Council Forms FL-341(C), FL-341(D), FL-341(E)]

Click here to view image.

[2] Use of Form

These forms are the approved Judicial Council forms of a Children's Holiday Schedule [Cal. Judicial Council Form FL-341(C)], Additional Provisions--Custody Attachment [Cal. Judicial Council Form FL-341(D)], and Joint Legal Custody Attachment [Cal. Judicial Council Form FL-341(E)]. They are approved for optional use to be attached to any of the following:

- Petition [Cal. Judicial Council Form FL-100] or Application for Order [Cal. Judicial Council Form FL-310].
- Findings and Order After Hearing or Judgment [Cal. Judicial Council Form FL-340].
- Stipulation and Order for Custody and/or Visitation of Children [Cal. Judicial Council Form FL-355].

These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The holiday schedule attachment [Cal. Judicial Council Form FL-341(C)] lists specific holiday and vacation parenting schedules and provides a box to check if the children may be taken outside of California for vacation.

The attachment for additional provisions regarding physical custody [Cal. Judicial Council Form FL-341(D)] contains provisions for each of the following:

1. Requiring each parent to keep the other current as to the parent's address and telephone numbers, but not use that information to harass, annoy or disturb the other's peace or invade the other's privacy.

2. Requiring each parent to notify the other of a proposed change in the child's residence.

3. Child care.

4. Canceling parenting time.

5. Phone contact between parents and children.

6. Prohibiting the parents from making negative comments about the other parent or the other parent's past or present relationships, family or friends within the children's hearing distance.

7. Prohibiting the parents from using the children as messengers.

8. Prohibiting one parent, both parents, or a third party from consuming alcoholic beverages, narcotics, or restricted dangerous drugs (except by prescription) within a specified number of hours prior to or during periods of time with the children.

9. Prohibiting the exposure of the children to secondhand cigarette smoke while in the home or car of the other parent.

10. Prohibiting each parent from scheduling activities during the other parent's scheduled parenting time without the other parent's prior agreement.

11. Restricting or prohibiting specified third party contact with the children.

12. Providing for the children's clothing and belongings.

13. Requiring the parents to maintain a log book with information related to the health, education, and welfare issues that arise during the time the children are with them.

14. Allowing changes to the order as the needs of the children and parents change.

The joint legal custody attachment [Cal. Judicial Council Form FL-341(E)] specifies areas in which the parents must confer in decision making, the consequences of making such decisions alone, health care and school notification provisions, and a provision regarding changing the children's last name.

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19-223 California Forms of Pleading and Practice--Annotated § 223.77

§ 223.77 Stipulation and Order for Custody and/or Visitation of Children [Cal. Judicial Council Form FL-355]

[1] FORM Stipulation and Order for Custody and/or Visitation of Children [Cal. Judicial Council Form FL-355]

Click here to view image.

[2] Use of Form

This form is the approved Judicial Council form for Stipulation and Order for Custody and/or Visitation of Children [Cal. Judicial Council Form FL-355]. It is approved for optional use. It can be used as either an original stipulation and order or for modification of an existing custody and/or visitation order. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form provides two options for attachments constituting the custody and/or visitation agreement: An attached document or any of the following Judicial Council forms:

- The Child Custody and Visitation Order Attachment [Cal. Judicial Council Form FL-341; *see § 223.61*].
- The Supervised Visitation Order Attachment [Cal. Judicial Council Form FL-341(A); *see § 223.61*].
- The Child Abduction Prevention Orders Attachment [Cal. Judicial Council Form FL-341(B); *see § 223.75*].
- The Children's Holiday Schedule Attachment [Cal. Judicial Council Form FL-341(C); *see § 223.76*].
- The Additional Provisions--Physical Custody Attachment [Cal. Judicial Council Form FL-341(D); *see § 223.76*].

- The Joint Legal Custody Attachment [Cal. Judicial Council Form FL-341(E); *see § 223.76*].

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19-223 California Forms of Pleading and Practice--Annotated § 223.78

§ 223.78 Declaration of Counsel for a Child Regarding Qualifications [Cal. Judicial Council Form FL-322]

[1] FORM

Click here to view image.

[2] Use of Form

This form is available in an interactive, electronic format in *LexisNexis[(R)] Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

This form may be completed and filed with the court by an attorney who has been appointed to represent the best interest of the child in a custody or visitation proceeding under *Fam. Code § 3150*, to set forth the attorney's education and experience, which establish his or her qualifications to serve in this position [*see Cal. Rules of Ct., Rule 5.242(h)(1)*]. It must be filed within 10 days after the attorney's appointment and before the attorney begins work on the case [*Cal. Rules of Ct., Rule 5.242(h)(1)*].

By checking item 6(a) on the form, the attorney must indicate his or her compliance with the experience requirements for appointment, i.e., that the attorney has represented a party or a child in at least six proceedings involving child custody within the preceding five years. At least two of the six proceedings must have involved contested child custody and visitation issues in family law, and child custody proceedings in dependency or guardianship cases can count for no more than three of the six proceedings [*Cal. Rules of Ct., Rule 5.242(f)(1)*]. By checking item 6(b) on the form, the attorney may indicate that he or she has complied with any additional experience requirements imposed by local court rules [*see Cal. Rules of Ct., Rule 5.242(f)(2)*].

An attorney who does not meet these experience requirements must indicate, by checking the appropriate box in item 7, his or her compliance with one of the permissible alternative experience requirements, *i.e.*, the attorney [*Cal. Rules of Ct., Rule 5.242(g)*]:

1. Is employed by a legal services organization, a governmental agency, or a private law firm that has been approved by the presiding or supervising judge of the local family court as qualified to represent a child in family law proceedings and is directly supervised by an attorney in an organization, an agency, or a private law firm who meets the initial experience requirements specified in *Cal. Rules of Ct., Rule 5.242(f)*;

2. Is an attorney working in consultation with an attorney approved by the presiding or supervising judge of the local family court as qualified to represent a child in family law proceedings; or

3. Demonstrates substantial equivalent experience as determined by local court rule or procedure.

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19-223 California Forms of Pleading and Practice--Annotated § 223.79

§ 223.79 Order Appointing Counsel for a Child [Cal. Judicial Council Form FL-323]

[1] FORM 223.79.1 Order Appointing Counsel for a Child [Cal. Judicial Council Form FL-323]

Click here to view image.

[2] Use of Form

This form is available in an interactive, electronic format in *LexisNexis[(R)] Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

This form may be used as an order appointing private counsel to represent the interests of the child in a custody or visitation proceeding [*see Fam. Code § 3150(a)*; *Cal. Rules of Ct., Rule 5.240(c)(3)*].

The order must specify: (1) the appointed counsel's name, address, and telephone number (item 1); (2) the name of the child for whom counsel is appointed (item 2); and (3) the child's date of birth [*Cal. Rules of Ct., Rule 5.240(c)(1)*].

It may also include: (1) the child's address, if appropriate (item 2); (2) the issues to be addressed in the case (item 3); (3) the tasks related to the case that would benefit from the services of counsel for the child (item 3); (4) responsibilities and rights of the child's counsel (items 4 and 5); (5) counsel's rate or amount of compensation (item 6(a)); (6) allocation of fees payable by each party or the court (item 6(b), (c)); (7) the source of funds and manner of reimbursement for costs and attorney's fees (item 6(d)); (8) allocation of payment of attorney's fees to one party subject to reimbursement by the other party; (9) the terms and amount of any progress or installment payments; and (10) the ability of the court to reserve jurisdiction to modify retroactively the order on fees and payment (item 6(b)(2)) [*Cal. Rules of Ct., Rule 5.240(c)(2)*].

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19-223 California Forms of Pleading and Practice--Annotated § 223.80

§ 223.80 Order Appointing Child Custody Evaluator [Cal. Judicial Council Form FL-327]

[1] FORM Order Appointing Child Custody Evaluator [Cal. Judicial Council Form FL-327]

Click here to view image.

[2] Use of Form

This form is an order appointing a child custody evaluator [Cal. Judicial Council form FL-327, approved for mandatory use]. In any contested proceeding involving child custody or visitation rights, the court may appoint a child custody evaluator to conduct a child custody evaluation after determining that this is in the child's best interests [*Fam. Code § 3111(a)*]. The order should specify whether the evaluator is appointed to conduct a full or a partial custody evaluation, and should indicate the statutory authority under which the evaluator is appointed (item 1). The scope of the evaluation should also be specified (item 3). Payment of the fees and costs of the evaluation should be specified in item 4.

This form is available in an interactive, electronic format in *LexisNexis[(R)] Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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§ 224.syn Synopsis to Chapter 224: DISSOLUTION OF MARRIAGE: CHILD SUPPORT

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§ 224.02 Cross References

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§ 224.10 Governing Law

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§ 224.30 General Obligation

§ 224.31 Mutual Responsibility of Both Parents

§ 224.32 Effect of Agreement Between Parents

§ 224.33 Effect of Child's Independent Resources

§ 224.34 Effect of Interference With Visitation

§ 224.35 Effect of Bankruptcy

§ 224.36 Parents' Obligation to Persons Supplying Necessaries

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[2] Necessaries Supplied by Other Parent or Relatives

§ 224.37 Property Liable for Child Support

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[2] Property of Subsequent Marriage

[3] Estate of Deceased Parent

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[b] Family Allowance

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§ 224.51 Extension of Duty Beyond Age of Majority

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[2] Extension by Agreement

[3] Adult Indigent Children

§ 224.52 Effect of Emancipation

§ 224.53 Automatic Termination on Occurrence of Event

§ 224.54 Treatment of Unallocated Amount for More Than One Child

§ 224.55 Effect of Reconciliation or Remarriage of Parents to Each Other

§ 224.56 Effect of Order Terminating Parental Rights

§ 224.57 Effect of Death of Payee Parent

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§ 224.70 Subject Matter Jurisdiction In Superior Court

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§ 224.72 Children for Whom Support May Be Ordered

§ 224.73 Personal Jurisdiction

§ 224.74 Continuing Jurisdiction

§ 224.75 Notice to Obligor

§ 224.76 County as Indispensable Party

§ 224.77 Temporary Support

§ 224.78 Expedited Support Orders

§ 224.79 Deferred Sale of Family Home

§ 224.80 Retroactivity of Order

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§§ 224.82-224.99 [Reserved]

§ 224.100 Operative Date and Applicability

§ 224.101 Federal Compulsion for Guideline

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§ 224.103 Applicability of Prior Case Law

§ 224.104 Child Support Formula

§ 224.105 Computation of Income

[1] Gross Income; Inclusions and Exclusions

[2] Net Income; Allowable Deductions

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[4] Annual Averaging and Seasonal Adjustments

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[6] Income of Subsequent Spouse or Nonmarital Partner

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[2] When H Must Be Zero or 100

§ 224.107 Income Level Adjustment Factor K

§ 224.108 Determining Who Is Obligor

§ 224.109 Adjustment Factor for More Than One Child

§ 224.110 Low-Income Adjustment

§ 224.111 Factors Rebutting Presumption of Correctness

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[4] Extraordinarily High Income of Obligor Parent

[a] Statutory Standard for Rebuttal

[b] "Extraordinarily High Income" Not Defined

[c] Consideration of Obligor's Income

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[ii] Effect of Obligor's Stipulation to Pay Support

[iii] Findings on Obligor's Income

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[2] Manner of Allocating Costs

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[4] Receipt of Public Assistance and Order to Pay County Officer

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§ 224.170 Jurisdiction to Modify or Terminate Support Order

§ 224.171 No Retroactive Modification

§ 224.172 Termination of Child Support Orders

§ 224.173 Standing of Party Adjudged in Contempt

§ 224.174 Effect of Denial of Visitation

§ 224.175 Procedure for Simplified Discovery

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[1] In General

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[3] Parents' Ability to Pay as Changed Circumstance

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§ 224.177 Two-Step Phase-In

§ 224.178 Notice of Activation of Military Service and Request to Modify Support Order

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§ 224.190 Federal Statutes

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[3] Child's Right to Support From Both Parents

[4] Enforcement by Contempt

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[1] FORM

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[1] FORM

[2] Use of Form

§ 224.212 Application and Order for Health Insurance Coverage [Cal. Judicial Council Form FL-470]

[1] FORM

[2] Use of Form

[3] Notice of Intent to Seek Order

[4] When Order May be Issued

[5] Issuance and Service

[6] State Statutes

§ 224.213 Employer's Health Insurance Return [Cal. Judicial Council Form FL-475; Fam. Code § 3772]

[1] FORM

[2] Use of Form

[3] Contents of Form

§ 224.214 Application for Expedited Child Support Order [Cal. Judicial Council Form FL-380]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 224.215 Response to Application for Expedited Child Support Order and Notice of Hearing [Cal. Judicial Council Form FL-381; Fam. Code § 3625]

[1] FORM

[2] Use of Form

[3] Cross References

§ 224.216 Expedited Child Support Order [Cal. Judicial Council Form FL-382; Fam. Code § 3621]

[1] FORM

[2] Use of Form

[3] Cross References

§ 224.217 Child Support Information and Order Attachments to Findings and Order After Hearing or Judgment [Cal. Judicial Council Forms FL-192, FL-342, FL-342(A)]

[1] FORM

[2] Use of Forms

[3] Earnings Assignment

[4] State Statutes

[5] Cross References

§ 224.218 Supplemental Petition for Support for After-Born Child [Fam. Code § 2330.1]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 224.219 Qualified Medical Child Support Order (QMCSO) [29 U.S.C. § 1169]

[1] FORM

[2] Use of Form

[3] Contents of QMCSO

[4] Effect of QMCSO

[5] Service and Determination

§ 224.220 Notice of Activation of Military Service and Deployment and Request to Modify a Support Order [Cal. Judicial Council Form FL-398; Fam. Code § 3651]

[1] FORM

[2] Use of Form

[3] Cross References

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19-224 California Forms of Pleading and Practice--Annotated § 224.01

§ 224.01 Scope of Chapter

This chapter discusses the substantive law of the duty of child support. It sets forth the general duty of support owed by parents toward their children [*see § 224.30* et seq.], and the duration of that duty [*see § 224.50* et seq.]. It discusses jurisdiction to order child support under California law [*see § 224.70* et seq.], including the various proceedings in which child support may be ordered. Detailed consideration is given to the computation of the amount of child support under California's statewide uniform child support guideline [*see § 224.100* et seq.]. Health care coverage requirements, discovery, and trial considerations and orders are discussed [*see §§ 224.130* et seq., *224.150* et seq.]. This chapter also sets forth the substantive law regarding modification of child support [*see § 224.170* et seq.].

This chapter includes the following forms:

- Stipulation to support [*see § 224.210*].
- Provisions for support to be included in a judgment of dissolution [*see § 224.211*].
- Application and order for health insurance coverage [*see § 224.212*].
- Application, response, and order for expedited child support [*see §§ 224.214 -224.216*].
- Child support information and order attachments to findings and order after hearing [*see § 224.217*].

Although the law of child support does not differ substantially depending on the parent's marital status, there are different proceedings that may be brought by unmarried parents. Forms for use in these proceedings are presented in Ch. 394, *Parent and Child* .

Legal Topics:

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

Civil ProcedureDiscoveryGeneral OverviewFamily LawChild SupportJurisdictionGeneral OverviewFamily LawChild SupportObligationsComputationGeneral OverviewFamily LawChild SupportProcedures

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19-224 California Forms of Pleading and Practice--Annotated § 224.02

§ 224.02 Cross References

For discussion and forms relating to modification of orders generally, see Ch. 221, Dissolution of Marriage: Procedure

For forms and discussion relating to child custody, see Ch. 223, Dissolution of Marriage: Child Custody

For discussion and forms relating to proceedings for the emancipation of minors, see Ch. 245, *Emancipation of Minors*

For forms and discussion relating to enforcement of support orders, see Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* , and Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*

For discussion and forms relating to obtaining funds for support of a ward from guardian of the estate, see Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee*

For forms and discussion relating to juvenile court dependency proceedings, see Ch. 328, *Juvenile Courts: Dependency Proceedings*

For forms and discussion relating to child support issues not arising within the context of the termination of a marriage, see Ch. 394, *Parent and Child*

For discussion and forms concerning the establishing of the parent--child relationship and the obtaining of child support under the Uniform Parentage Act without regard to the marital status of the parents, see Ch. 412, *Paternity*

For discussion and forms relating to the support of children after the death of their parents, see Ch. 448, *Probate: Family Allowance* , Ch. 454, *Probate: Claims Against the Estate*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbatePersonal RepresentativesClaims By & AgainstFamily LawChild CustodyGeneral OverviewFamily LawChild SupportObligationsModificationEmancipation of ChildFamily LawDelinquency & DependencyDependency ProceedingsFamily LawGuardiansGeneral Overview

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19-224 California Forms of Pleading and Practice--Annotated §§ 224.03-224.09

[Reserved]

§§ 224.03[Reserved]

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§ 224.10 Governing Law

The existence and duration of the parental duty of support, the type and amount of child support owed, and the conduct of support proceedings are primarily state law issues. The Family Code contains most of the relevant statutes. Additional statutes concerning child support may be found in the Penal Code [*see Penal Code § 270* (criminal penalties for willful failure to support minor child)], and the Probate Code [*see Prob. Code § 6540* (family allowance)].

The statewide uniform child support guideline set forth in *Fam. Code § 4050 et seq.* was enacted to comply with federal statutes and regulations governing state receipt of federally subsidized public assistance funds [*see 42 U.S.C. § 651 et seq.* (federal child support requirements for state plans); *45 C.F.R. § 302.56*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGuidelinesFamily LawChild SupportObligationsEnforcementCriminal PenaltiesFamily LawChild SupportObligationsTypesGeneral Overview

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[Reserved]

§§ 224.11[Reserved]

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§ 224.30 General Obligation

A child's parents are equally responsible for supporting their child in the manner suitable to the child's circumstances [*Fam. Code § 3900*; *see United States v. Ballek (9th Cir. 1999) 170 F.3d. 871, 874 n.3*]. A child support obligor who is present or resident in the state has the duty regardless of the presence or residence of the obligee [*Fam. Code § 3550(b)*]. In addition, a person who is found to be a parent by estoppel, even though not the child's biological parent, is responsible for supporting the child [*see In re Marriage of Pedregon (2003) 107 Cal. App. 4th 1284, 1287-1291, 132 Cal. Rptr. 2d 861* ; for discussion of paternity by estoppel and presumptions of paternity generally, *see* Ch. 412, *Paternity*].

The duty to support cannot, by any act, conduct, or arrangement be shifted from a parent's shoulders [*Smith v. Smith (1954) 125 Cal. App. 2d 154, 164, 270 P.2d 613* ; *see El Dorado County Dept. of Child Support Services v. Nutt (2008) 167 Cal. App. 4th 990, 994, 84 Cal. Rptr. 3d 523* (court properly refused to find father "exempt" from all current and future child support obligations due to fact that he was serving sentence of 50 years to life and had no income; father has obligation to provide support even if that obligation cannot currently be satisfied)]. Because the support obligation is a continuing one, there is no statute of limitations that will prevent the obligation from being enforced as long as the child is entitled to care and support [*Fernandez v. Aburrea (1919) 42 Cal. App. 131, 132, 183 P. 366]* .

The parent of a child is not relieved of the duty to support that child on the ground of his or her own minority. Thus, a minor who is a parent has a duty to support his or her own child [*McLain v. Meadows (1919) 44 Cal. App. 402, 404, 186 P. 411* ; *see County of San Luis Obispo v. Nathaniel J. (1996) 50 Cal. App. 4th 842, 844-846, 57 Cal. Rptr. 2d 843* (15-year-old father who was willing victim of crime of unlawful intercourse with 34-year-old woman was not exempt from obligation to pay support for child conceived as result of this intercourse)]. That duty does not shift to the minor's parents--that is, to the grandparents of the child--because a grandparent does not have a duty to support his or her own grandchild [*Fam. Code § 3930*; *see County of Fresno v. Walker (1981) 115 Cal. App. 3d 814, 825, 171 Cal. Rptr. 572]* .

However, when a child lives apart from his or her own parents, has children, and receives public assistance benefits for

both the children and himself or herself, the public entity providing the benefits may have limited grounds for seeking ongoing support and reimbursement for the benefits from a grandparent--on the premise that reimbursement is being sought as part of that individual's support obligation to his or her own child, and not for a grandchild. When reimbursement is proper in such a case, one court has held that it should not exceed the amount of the parent's own support obligation for the child (living away from home) under the statewide uniform support guideline [*County of San Bernardino v. Martinez (1996) 51 Cal. App. 4th 600, 605-606, 59 Cal. Rptr. 2d 142]* .

The underlying right of reimbursement, however, appears to depend on whether the grandparent would be considered, pursuant to applicable statute [*Fam. Code § 17402*], a "noncustodial" or "absent" parent of the child who is living apart, and that the reason for the parent and child living apart is a "separation of the parents." Accordingly, in the view of another court, the parent of a child who has simply run away from home, had children, and received public assistance benefits is not a "noncustodial parent" within the meaning of the reimbursement statute, and therefore need not reimburse a county that provided public benefits to the run-away child and her children [*County of San Diego v. Lamb (1998) 63 Cal. App. 4th 845, 851, 73 Cal. Rptr. 2d 912]* .

The parental obligation to provide support need not be fulfilled by providing items in kind. Financial support is all that is required by law. No possessory right to a parental residence or to other specific items of personal property is implied by the duty of support [*In re Andrew I. (1991) 230 Cal. App. 3d 572, 579, 281 Cal. Rptr. 570* ; *In re Richard M. (1988) 205 Cal. App. 3d 7, 13-15, 252 Cal. Rptr. 36]* . A court may also determine that a parent has satisfied his or her support obligation in a manner other than direct financial payments, as when the parent assumes increased physical custody of the child [*In re Marriage of Tavares (2007) 151 Cal. App. 4th 620, 628, 60 Cal. Rptr. 3d 39* ; *see § 224.31*].

A parent who willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter, medical attendance, or other remedial care for his or her minor child is guilty of a crime [*Penal Code § 270*].

An unmarried man who expends funds to support a child in reliance on the mother's representation that he is the child's father, may not sue the mother on an unjust enrichment theory for the return of the funds after discovering that the child is not his biological offspring [*McBride v. Boughton (2004) 123 Cal. App. 4th 379, 384-394, 20 Cal. Rptr. 3d 115]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsEnforcementCriminal PenaltiesFamily LawParental Duties & RightsDutiesSupport of ChildrenFamily LawPaternity & SurrogacyGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral Overview

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§ 224.31 Mutual Responsibility of Both Parents

The mother and father of a minor child have an equal responsibility to support of the child [*Fam. Code § 3900*]. Equal responsibility exists regardless of which parent has custody of the child [*see Levy v. Levy (1966) 245 Cal. App. 2d 341, 358, 53 Cal. Rptr. 790]* . However, it is presumed that a parent having primary physical responsibility for the children contributes a significant portion of available resources for the support of the children [*see Fam. Code § 4053(i)*]. The statewide uniform child support guideline [*see Fam. Code § 4050 et seq.*, discussed in *§ 224.100*] takes into account each parent's actual income and level of custodial responsibility for the children in setting child support amounts [*Fam. Code § 4053(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGuidelinesFamily LawParental Duties & RightsDutiesSupport of Children

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19-224 California Forms of Pleading and Practice--Annotated § 224.32

§ 224.32 Effect of Agreement Between Parents

Parents may make agreements between themselves relating to their relative child support responsibilities. However, neither the court nor the children are bound by such agreements [*In re Marriage of Alter (2009) 171 Cal. App. 4th 718, 722, 727, 729-730, 89 Cal. Rptr. 3d 849* (court always has power to modify child support order up or down, notwithstanding parties' contrary agreement, and is not bound by agreement setting absolute minimum for child support); *Hoover-Reynolds v. Superior Court (1996) 50 Cal. App. 4th 1273, 1279, 58 Cal. Rptr. 2d 173* (agreement between parents purporting to modify child's right to support is not binding on court or on child); *In re Marriage of O'Connell (1978) 80 Cal. App. 3d 849, 856, 146 Cal. Rptr. 26* ; *see Armstrong v. Armstrong (1976) 15 Cal. 3d 942, 947, 126 Cal. Rptr. 805, 544 P.2d 941* ; *In re Marriage of Ayo (1987) 190 Cal. App. 3d 442, 449, 235 Cal. Rptr. 458]* . Parents may not agree to waive or limit the right of a child to support [*Elkind v. Byck (1968) 68 Cal. 2d 453, 457-458, 67 Cal. Rptr. 404, 439 P.2d 316]* , including the rights of an adult indigent child under *Fam. Code § 3910* [*In re Marriage of Lambe & Meehan (1995) 37 Cal. App. 4th 388, 393-394, 44 Cal. Rptr. 2d 641* ; *see § 224.51[3]*]. Nor may they agree to abrogate their own statutory duty to support a child [*Plumer v. Superior Court (1958) 50 Cal. 2d 631, 637, 328 P.2d 193]* , or attempt to divest the court of jurisdiction over child support [*In re Marriage of Lambe & Meehan (1995) 37 Cal. App. 4th 388, 393-394, 44 Cal. Rptr. 2d 641* ; *In re Marriage of Goodarzirad (1986) 185 Cal. App. 3d 1020, 1026, 230 Cal. Rptr. 203]* .

Parents may stipulate to a child support obligation and submit their agreement to the court for approval [*see Fam. Code §§ 4057(b)(1), 4065*; *see also In re Marriage of Armato (2001) 88 Cal. App. 4th 1030, 1045-1047, 106 Cal. Rptr. 2d 395* (parties' postjudgment letter agreement modifying child support was enforced under *Code Civ. Proc. § 664.6*); for further discussion and *see § 224.210*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsModificationGeneral OverviewFamily LawParental Duties & RightsDutiesSupport of Children

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19-224 California Forms of Pleading and Practice--Annotated § 224.33

§ 224.33 Effect of Child's Independent Resources

A parent's duty of child support is not affected by the fact that a child may have income or other resources from which he or she can be self-supporting [*Crowe v. Crowe (1969) 1 Cal. App. 3d 109, 114, 81 Cal. Rptr. 570* ; *see Armstrong v. Armstrong (1976) 15 Cal. 3d 942, 947, 126 Cal. Rptr. 805, 544 P.2d 941* (case decided before adoption of statewide guideline, holding that court could consider child's independent resources for child's basic needs if parents were financially unable to fulfill obligation themselves)]. Under the statewide uniform child support guideline [*Fam. Code § 4050 et seq.*; *see § 224.104* et seq.], independent resources should have no effect on the amount of the parents' obligation, which is based on entitlement to a statutory percentage of parental income rather than need [*see generally Fam. Code § 4055 et seq.*]. However, the court may direct that an allowance be made to the parent of a child out of the child's property for the child's past or future support, on conditions that are proper, if the direction is for the child's benefit [*Fam. Code § 3902*]. Thus, the appropriate amount of support under the guideline may be supplemented with the child's own resources, but the parental duty of support may not be supplanted by them.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGuidelinesFamily LawParental Duties & RightsDutiesSupport of Children

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§ 224.34 Effect of Interference With Visitation

A custodial parent's interference with the visitation rights of a noncustodial parent does not affect the latter's duty to pay child support [*Fam. Code §§ 3556, 4845(b)*; *see Moffat v. Moffat (1980) 27 Cal. 3d 645, 651-653, 165 Cal. Rptr. 877, 612 P.2d 967* ; *Solberg v. Wenker (1985) 163 Cal. App. 3d 475, 479, 209 Cal. Rptr. 545* ; *see also Cooper v. O'Rourke (1995) 32 Cal. App. 4th 243, 246-247, 38 Cal. Rptr. 2d 444* ; *Camacho v. Camacho (1985) 173 Cal. App. 3d 214, 219-220, 218 Cal. Rptr. 810* (stating converse of rule, that visitation rights are not conditional on timely payment of child support); *see Cooper v. O'Rourke (1995) 32 Cal. App. 4th 243, 246-247, 38 Cal. Rptr. 2d 444]* . Child support and visitation are independent rights, both accruing to the benefit of the child, which should not be defeated by the conduct of a parent [*Camacho v. Camacho (1985) 173 Cal. App. 3d 214, 219, 218 Cal. Rptr. 810* ; *see Solberg v. Wenker (1985) 163 Cal. App. 3d 475, 479-480, 209 Cal. Rptr. 545]* .

Notwithstanding *Fam. Code § 3556* and policies on which it rests, the California Supreme Court has held that active concealment of the child, as opposed to mere interference with visitation rights, may give rise to an estoppel defense to enforcement of child support when the parent who has concealed the child attempts to recoup arrearages after the child has attained majority [*In re Marriage of Damico (1994) 7 Cal. 4th 673, 685, 29 Cal. Rptr. 2d 787, 872 P.2d 126* ; *County of Orange v. Carl D. (1999) 76 Cal. App. 4th 429, 439-441, 90 Cal. Rptr. 2d 440*]. Past concealment is not a defense, however, to payment of arrears for a child who is still a minor because the overdue support will still benefit the child [*In re Marriage of Comer (1996) 14 Cal. 4th 504, 515-517, 59 Cal. Rptr. 2d 155, 927 P.2d 265* ; *In re Marriage of Tavares (2007) 151 Cal. App. 4th 620, 625, 60 Cal. Rptr. 3d 39*]. For further discussion of child concealment as a defense to support enforcement, see *Ch. 259, Family Law Enforcement: Special Remedies for Support Enforcement, § 259.14*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyVisitationGeneral OverviewFamily LawChild SupportObligationsGeneral OverviewFamily LawParental Duties & RightsDutiesSupport of Children

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§ 224.35 Effect of Bankruptcy

The discharge in bankruptcy of an obligated parent's debts does not release or affect liabilities for past due or future child support. Furthermore, a debtor may not discharge in bankruptcy any debt to his or her child for support in connection with a separation agreement, divorce decree, court order, or property settlement agreement including attorney's fees ordered in a support or custody hearing [*11 U.S.C. § 523(a)(5)*; *see Fam. Code § 4013* (to extent federal law does provide for discharge in bankruptcy of child support obligations, court may make all proper orders for support, maintenance, and education of child)]. Postpetition interest, as an integral part of the nondischargeable child support obligation, is also nondischargeable and may be collected personally against the debtor after the underlying debt is discharged [*Foster v. Bradbury (9th Cir. 2003) 319 F.3d 495, 497-498]* .

An obligation for attorney's fees ordered payable as child support is also not discharged in bankruptcy; but a prospective order to pay attorney's fees that is not designated to be payable as child support *is* discharged [*Cal-Western Reconveyance Corp. v. Reed (2007) 152 Cal. App. 4th 1308, 1320, 62 Cal. Rptr. 3d 244*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsAlimony, Divorce Settlements & SupportFamily LawChild SupportObligationsGeneral OverviewFamily LawParental Duties & RightsDutiesSupport of Children

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§ 224.36 Parents' Obligation to Persons Supplying Necessaries

[1] In General

If a parent neglects to provide articles necessary for his or her child who is under the charge of the parent, according to his or her circumstances, a third person may in good faith supply the necessaries and recover the reasonable value of them from the parent [*Fam. Code § 3950*]. Necessaries include food, clothing, habitation, and medical treatment [*see Nielsen v. Richards (1925) 75 Cal. App. 680, 686, 243 P. 697]* .

Because the statute refers to the parent having the child under his or her "charge," it has been held that no liability attaches by its terms to a noncustodial parent who is paying child support under a support order [*Lewis v. Lewis (1917) 174 Cal. 336, 339-340, 163 P. 42* ; *see Blair v. Williams (1927) 86 Cal. App. 676, 688, 261 P. 539]* . However, if there is no outstanding child support order, a noncustodial parent may be liable to third parties supplying necessaries [*see In re Marriage of O'Connell (1978) 80 Cal. App. 3d 849, 856, 146 Cal. Rptr 26]* . If a child is in the custody of a third person, and a parent stands willing to take custody of the child and provide support, the third person may not recover from the parent expenses incurred in supplying necessaries to the child without the parent's knowledge [*In re Guardianship of Ross (1907) 6 Cal. App. 597, 600-601, 92 P. 671]* .

A parent is not liable to a third party for necessaries if the child has "abandoned" the parent without just cause [*Fam. Code § 3951(b)*]. However, abandonment does not relieve a parent of the obligation to support a child during any period in which a governmental entity furnishes support for the child [*Fam. Code § 3951(c)*]. Thus, for example, there are circumstances under which a parent is liable for reimbursement for public assistance benefits paid on behalf of a child who has left the home, but the scope of this liability is somewhat unclear. Case authority, interpreting reimbursement rights under the Welfare and Institutions Code, appears to impose liability on the "noncustodial parent" of the child, and to limit reimbursement situations to those in which a "separation of the parents" was an underlying cause of the child living away from home (*see § 224.30*) [*County of San Bernardino v. Martinez (1996) 51 Cal. App. 4th 600, 605-606, 59 Cal. Rptr. 2d 142* (ordering reimbursement); *but see County of San Diego v. Lamb (1998) 63 Cal. App. 4th 845, 851, 73 Cal. Rptr. 2d 912* (reversing grant of reimbursement)]. Abandonment is shown by proof of the child's

permanent relinquishment of submission to parental control. The question of abandonment is a factual issue that can be proven by circumstantial evidence. Abandonment is not necessarily negated by the child's assertion that he or she entertained no intent to abandon or by an ambiguous statement that he or she did not know whether or not he or she intended to stay away forever. Furthermore, under some circumstances, a relinquishment for a finite period may be permanent and irrevocable in nature, giving rise to an inference of abandonment [*County of Fresno v. Walker (1981) 115 Cal. App. 3d 814, 824, 171 Cal. Rptr. 572* (construing former *Civ. Code § 208*, which is continued without substantive change in *Fam. Code § 3951*)].

For discussion of emancipation of minors, which is conceptually similar to abandonment of a parent in that it frees the child from parental control and relieves the parent of the duty to support the child, see Ch. 245, *Emancipation of Minors* .

[2] Necessaries Supplied by Other Parent or Relatives

A parent is not bound to compensate the other parent or a relative for the "voluntary" support of his or her child, absent an agreement for compensation [*Fam. Code § 3951(a)*; *see In re Bruegger (1928) 94 Cal. App. 589, 592, 271 P. 523* ; *Crane v. Livingston (1950) 98 Cal. App. 2d 699, 701-702, 220 P.2d 744* (construing former *Civ. Code § 208*)]. With regard to the other parent, of course, there is no such thing as "voluntary" support. One parent's obligation to "compensate" the other is subsumed within the law of child support, which in no way depends on an agreement for compensation. However, *Family Code Section 3951(a)* has been cited to support denial of a parent's claim for retroactive child support for periods during which no support order was in effect [*see In re Marriage of Koppelman (1984) 159 Cal. App. 3d 627, 633, 205 Cal. Rptr. 629 , disapproved, other grounds, in In re Marriage of Fabian (1986) 41 Cal. 3d 440, 451 n.13, 224 Cal. Rptr. 333, 715 P.2d 253 , 224 Cal. Rptr. 333, 715 P.2d 253* (decided under former *Civ. Code § 208*)]. It also supports denial of a parent's claim for reimbursement, beyond the basic child support obligation, for particular child-related expenses already incurred [*see Dougal v. Dougal (1956) 143 Cal. App. 2d 272, 276, 299 P.2d 404]* .

Presumably, *Fam. Code § 3951(a)* would not bar a relative who has the actual physical custody of a child from obtaining a support order from the child's parents, under a guardianship or otherwise [*see Fam. Code § 4000* (civil suit to enforce duty of support on behalf of child)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawParental Duties & RightsDutiesSupport of Children

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19-224 California Forms of Pleading and Practice--Annotated § 224.37

§ 224.37 Property Liable for Child Support

[1] General Rule

By statute, the parents' community, quasi-community, and separate property may be subjected, in such proportions as the court deems just, to the support of their children [*Fam. Code § 4008*].

[2] Property of Subsequent Marriage

For purposes of determining what property is liable for support, a child support obligation of a married person that does not arise from the current marriage is treated as a premarital debt, regardless of whether a court order for support is made or modified before or during marriage and regardless of whether any installment payment on the obligation accrues before or during marriage [*Fam. Code § 915(a)*]. The separate property of the obligor parent is liable for such a debt [*Fam. Code § 913(a)*], but the separate property of the obligor's subsequent spouse is not [*Fam. Code § 913(b)(1)*].

The community property of the subsequent marriage is generally liable for either spouse's premarital support debts, subject to a right of reimbursement [*see Fam. Code § 915(b)*]. However, the subsequent spouse's earnings during marriage are not liable for the obligor spouse's premarital support debts as long as the earnings are held in a deposit account in which the obligated spouse has no right of withdrawal and are not commingled with other community property, except property insignificant in amount [*Fam. Code § 911(a)*; *see Wightman v. Franchise Tax Board (1988) 202 Cal. App. 3d 966, 970 n.4, 249 Cal. Rptr. 207]* .

Whether or not the earnings of a subsequent spouse are available for child support debts, the court generally cannot consider such earnings as part of the obligated parent's overall financial circumstances in determining or modifying the amount of child support under the statewide uniform child support guideline [*Fam. Code § 4057.5*; *§ 224.105[6]*].

[3] Estate of Deceased Parent

[a] In General

A parent's child support obligation that is fixed by a court decree or a property settlement agreement does not cease on the parent's death, but survives as a charge against his or her estate [*Taylor v. George (1949) 34 Cal. 2d 552, 556, 212 P.2d 505* ; *In re Marriage of O'Connell (1992) 8 Cal. App. 4th 565, 572, 10 Cal. Rptr. 2d 334* ; *see In re Marriage of Perry (1997) 58 Cal. App. 4th 1104, 1106, 68 Cal. Rptr. 2d 445* ; *In re Marriage of Bertrand (1995) 33 Cal. App. 4th 437, 439-441, 39 Cal. Rptr. 2d 151* (no credit for Social Security benefit paid to child on behalf of deceased parent); *see Fam. Code § 4504* (credit for Social Security and certain other federal benefits paid to child on account of parent's retirement or disability)]. For purposes of ascertaining which property is subject to this surviving support obligation, there is no difference, in substance, between property that would comprise what is conventionally thought of as the deceased parent's "estate," and property held by a living trust that was established by the decedent. Just as a will cannot insulate a support obligor's property from child support claims, neither can the device of a living trust [*In re Marriage of Perry (1997) 58 Cal. App. 4th 1104, 1106, 1109, 68 Cal. Rptr. 2d 445]* .

A parent's obligation of support may be discharged in a manner specified in his or her will, such as by a specific bequest, or through the proceeds of life insurance policies [*Taylor v. George (1949) 34 Cal. 2d 552, 558, 212 P.2d 505* ; *Estate of Schumacher (1971) 18 Cal. App. 3d 146, 150-153, 95 Cal. Rptr. 572* ; *see In re Marriage of O'Connell (1992) 8 Cal. App. 4th 565, 571-572, 10 Cal. Rptr. 2d 334]* . The court must find that the provision in the will is sufficient to discharge the support obligation before it can deny recovery for the support against the estate [*Stein v. Hubbard (1972) 25 Cal. App. 3d 603, 605, 102 Cal. Rptr. 303* (will's residual clause did not discharge support obligation because estate was not sufficient)].

The probate court does not have jurisdiction to reduce the amount of support provided in a decree or support agreement [*Stebbins v. Imerman (1971) 21 Cal. App. 3d 942, 945-946, 98 Cal. Rptr. 865]* . Such a modification may be sought in the proceeding in which the decree or agreement was obtained, based on changed circumstances (as discussed in *§ 224.176* et seq.), by substituting the personal representative for the deceased parent in that proceeding [*Kress v. Kress (1963) 219 Cal. App. 2d 173, 174-175, 33 Cal. Rptr. 77* ; *see Code Civ. Proc. §§ 377.31, 377.41*; *In re Marriage of Drake (1997) 53 Cal. App. 4th 1139, 1151-1153, 62 Cal. Rptr. 2d 466* ; *see also In re Marriage of Perry (1997) 58 Cal. App. 4th 1104, 1111, 68 Cal. Rptr. 2d 445* ; *In re Marriage of Bertrand (1995) 33 Cal. App. 4th 437, 440-441, 39 Cal. Rptr. 2d 151]* . Because the duty of support does not terminate on death, the rule that death normally abates a proceeding for dissolution of marriage does not apply [*Kress v. Kress (1963) 219 Cal. App. 2d 173, 175, 33 Cal. Rptr. 77* ; *see In re Marriage of Drake (1997) 53 Cal. App. 4th 1139, 1151, 62 Cal. Rptr. 2d 466]* .

The proper procedure to obtain support payments from the parent's estate is to make a creditor's claim for the payments. If a timely claim is not made, the decree or agreement cannot be enforced against the estate [*Thomas v. Hobart (1969) 274 Cal. App. 2d 139, 141-142, 78 Cal. Rptr. 844]* . As noted hereafter, there is also authority for bringing a deceased parent's estate representative or successor in interest, including the trustee of a decedent's living trust, into a pending family law proceeding in order to adjudicate the ongoing support issue [*see In re Marriage of Perry (1997) 58 Cal. App. 4th 1104, 1106, 1109, 68 Cal. Rptr. 2d 445* ; *In re Marriage of Drake (1997) 53 Cal. App. 4th 1139, 1151-1153, 62 Cal. Rptr. 2d 466]* .

Even without an existing support order, if a parent chargeable with the support of a child dies, leaving the child's support chargeable to the county or leaving the child confined in a state institution to be cared for in whole or in part at the expense of the state, and the parent leaves an estate sufficient for its support, the supervisors of the county, or the director of the state department having jurisdiction over the institution involved, may claim provision for the child's support from the parent's estate by civil action. For this purpose, the supervisor or director has the same remedies as any creditors against the estate and against the heirs, devisees, and next of kin of the parent [*Fam. Code § 3952*].

The effect of the death of the designated payee (usually, the custodial parent) on an existing child support order is discussed in *§ 224.57*.

It has been held that social security death benefits that are paid to a child on account of the death of the payor parent do not discharge to parent's estate's continuing support obligation, nor are they to be credited against the support obligation under *Fam. Code § 4504* (credit for social security or railroad retirement benefits paid to child on account of retirement or disability of parent) [*In re Marriage of Bertrand (1995) 33 Cal. App. 4th 437, 439-441, 39 Cal. Rptr. 2d 151]* . However, the court stated that the child's receipt of such benefits may be considered in ruling on a personal representative's motion to modify the estate's support obligation based on changed circumstances [*In re Marriage of Bertrand (1995) 33 Cal. App. 4th 437, 440-441, 39 Cal. Rptr. 2d 151]* .

[b] Family Allowance

A minor is entitled to a family allowance from the estate of a deceased parent [*see Prob. Code § 6540(a)*; *Estate of Goulart (1963) 218 Cal. App. 2d 260, 263-266, 32 Cal. Rptr. 229* ; *see also Estate of Barkdull (1969) 275 Cal. App. 2d 729, 730-731, 80 Cal. Rptr. 317* (although dependent who has reasonable maintenance derived from other sources is not necessarily entitled to family allowance if there are other entitled persons (construing former *Prob. Code § 682*; *now see Prob. Code § 6540(c)*), minor child may obtain family allowance if his or her capital would have to be invaded to provide support)].

If the decedent provided for continuing support for the minor child by agreeing with the other parent to maintain the minor as a life insurance beneficiary, the parents' agreement is enforceable, and the court will not award a further family allowance from the decedent's estate. The actual fund, however, must be sufficient to meet the child support obligation [*Estate of Schumacher (1971) 18 Cal. App. 3d 146, 150-153, 95 Cal. Rptr. 572]* .

For further discussion of family allowances, see California Probate Practice, Ch. 8 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbatePersonal RepresentativesClaims By & AgainstFamily LawChild SupportObligationsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Duties & RightsProperty RightsCharacterizationSeparate PropertyFamily LawParental Duties & RightsDutiesSupport of Children

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[Reserved]

§§ 224.38[Reserved]

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19-224 California Forms of Pleading and Practice--Annotated § 224.50

§ 224.50 Support to Age of Majority

A parent has an obligation to support his or her children during their minority [*Fam. Code § 3900*]. A child is a minor until his or her 18th birthday [*see Fam. Code § 6502(a)(2)*; *In re Marriage of Pilcher (1975) 51 Cal. App. 3d 142, 145-150, 123 Cal. Rptr. 868]* . Thus, except as discussed in *§ 224.51*, a parent's duty of support terminates when the child reaches 18 years of age.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 224.51 Extension of Duty Beyond Age of Majority

[1] Through High School or to Age 19

A parent continues to owe support to any unmarried child who has attained the age of 18, is a full-time high school student, and who is not self-supporting, until the child either completes the twelfth grade or turns 19, whichever occurs first [*Fam. Code § 3901(a)*]. This duty of support is self-operative to extend an existing support obligation without the need of a hearing [*Politzer v. Himmelsbach (1989) 212 Cal. App. 3d 295, 299, 260 Cal. Rptr. 450]* . It may also be enforced in a civil suit, if necessary [*Fam. Code § 4000, 4500*; *see Politzer v. Himmelsbach (1989) 212 Cal. App. 3d 295, 298-299, 260 Cal. Rptr. 450* ; *In re Marriage of Gonzales (1989) 207 Cal. App. 3d 1198, 1202, 255 Cal. Rptr. 336* ; *see also Fam. Code § 4001*].

[2] Extension by Agreement

Notwithstanding any other provision of law, a court may approve a stipulated agreement by the parents to pay child support for the support of an adult child or for the continuation of child support after a child attains the age of 18. The court may make a support order to effectuate the agreement [*Fam. Code § 3587*; *cf. In re Marriage of Lurie (1995) 33 Cal. App. 4th 658, 670-672, 39 Cal. Rptr. 2d 835* (refusing to construe New York agreement that father pay support until child turns 21 as agreement to pay child support beyond age of majority because age of majority in New York is 21)]. If the parents agree that child support will continue past the age of 18 and the agreement is incorporated in a judgment, the court may not modify the judgment to terminate child support at age 18 [*see In re Marriage of Beilock (1978) 81 Cal. App. 3d 713, 730, 146 Cal. Rptr. 675* ; *In re Marriage of Whitney (1977) 71 Cal. App. 3d 179, 182, 139 Cal. Rptr. 324]* .

The Statewide Uniform Child Support Guideline [*see § 224.100* et seq.] does not apply in determining the appropriate amount of support for an adult child when neither parent has physical responsibility for the adult child for any percentage of time [*Edwards v. Edwards (2008) 162 Cal. App. 4th 136, 141-144, 75 Cal. Rptr. 3d 458*].

[3] Adult Indigent Children

Both parents of a child have an equal responsibility to maintain, to the extent of their ability, a child of whatever age who is incapacitated from earning a living and without sufficient means [*Fam. Code § 3910(a)*; *see In re Marriage of Drake (1997) 53 Cal. App. 4th 1139, 1154-1155, 62 Cal. Rptr. 2d 466* (parent's establishment of trust to support disabled adult child does not discharge other parent's statutory duty of support); *Chun v. Chun (1987) 190 Cal. App. 3d 589, 597, 235 Cal. Rptr. 553* (predecessor statute imposed duty of support that is closely akin to joint and several obligation)]. Children for whom support is authorized under *Fam. Code § 3910* are generally referred to as "adult indigent" children. Parents may not, by agreement, abrogate their statutory duty to support an adult indigent child or attempt to divest the court of jurisdiction to order support for an adult indigent child [*In re Marriage of Lambe & Meeham (1995) 37 Cal. App. 4th 388, 392-394, 44 Cal. Rptr. 2d 641* ; *see § 224.32*]. It is doubtful that the statewide uniform child support guideline (*Fam. Code § 4050 et seq.*, discussed in *§ 224.100* et seq.) applies to the support of adult indigent children [*see Fam. Code § 4053(a)* (parent's first and principal obligation is to support his or her *minor* children)].

This continuing duty of support, which runs contrary to the general rule that a parent's support obligation terminates when the child attains majority or is otherwise emancipated [*Levy v. Levy (1966) 245 Cal. App. 2d 341, 363, 53 Cal. Rptr. 790* ; *Bryant v. Swoap (1975) 48 Cal. App. 3d 431, 437, 121 Cal. Rptr. 867* ; *see § 224.50*], is primarily intended to protect the public from the financial burden of supporting an individual whose parents are able to provide the requisite support [*Jones v. Jones (1986) 179 Cal. App. 3d 1011, 1014, 225 Cal. Rptr. 95* (citing Matthew Bender, Cal. Family Law Practice and Procedure)]. It does not establish a right of action by a provider of services against the parents of an adult child [*Rehabilitation Inst. of Chicago v. Einhorn (1983) 141 Cal. App. 3d 1036, 1039-1040, 190 Cal. Rptr. 702* (decided under former *Civ. Code § 206*)]. Nor does it provide for any liability to a public agency for reimbursement of benefits provided to the indigent child [*County of San Bernardino v. Simmons (1956) 46 Cal. 2d 394, 398, 296 P.2d 329* ; *Freitas v. County of Contra Costa (1994) 28 Cal. App. 4th 163, 172 n.8, 33 Cal. Rptr. 2d 406]* .

A child's indigence alone does not give rise to a parent's obligation of support under *Fam. Code § 3910*. The language "incapacitated from earning a living and without sufficient means" has been held to require that the child demonstrate an inability to be self supporting because of a mental or physical disability or proof of inability to find work because of factors beyond the child's control [*In re Jesse V. (1989) 214 Cal. App. 3d 1619, 1623-1624, 263 Cal. Rptr. 369* ; *see Freitas v. County of Contra Costa (1994) 28 Cal. App. 4th 163, 172, 33 Cal. Rptr. 2d 406]* . Adult indigent children may include the developmentally disabled [*see In re Marriage of Drake (1997) 53 Cal. App. 4th 1139, 1154-1155, 62 Cal. Rptr. 2d 466* ; *In re Marriage of Cooper (1985) 170 Cal. App. 3d 883, 886-887, 216 Cal. Rptr. 611]* , the emotionally disabled [*see Chun v. Chun (1987) 190 Cal. App. 3d 589, 592-597, 235 Cal. Rptr. 553]* , and the mentally ill [*see Scott v. Superior Court (1984) 156 Cal. App. 3d 577, 584-586, 202 Cal. Rptr. 920]* . They do not include incarcerated adult children [*In re Jesse V. (1989) 214 Cal. App. 3d 1619, 1623-1624, 263 Cal. Rptr. 369]* or adult children whose resources are otherwise insufficient to allow them to attend college [*Jones v. Jones (1986) 179 Cal. App. 3d 1011, 1014-1016, 225 Cal. Rptr. 95* ; *see In re Marriage of Chandler (1997) 60 Cal. App. 4th 124, 130* (trial court has no authority, even in "very high income parent" case, to order parent to pay for child's college education or otherwise order parent to support an [able-bodied] adult child)].

The duty to support adult indigent children may be enforced in an action under *Fam. Code § 4000*. For a form of petition to obtain support for an adult indigent child, see Ch. 394, *Parent and Child* .

In determining the amount of support a parent is required to pay for an adult child under *Fam. Code § 3910*, a judge must use the statewide uniform child support guideline set forth in *Fam. Code § 4050 et seq.* To the extent that the guideline embodies assumptions that are true of minor children, but not of adult disabled children, the guideline permits a trial court to adapt or depart from the basic child support formula in accordance with the "special circumstances" of the adult disabled child or the child's parents [*In re Marriage of Drake (1997) 53 Cal. App. 4th 1139, 1155-1158, 62 Cal. Rptr. 2d 466]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 224.52 Effect of Emancipation

A minor who becomes emancipated by contracting a valid marriage [*Fam. Code § 7002(a)*], entering active duty with the United States armed forces [*Fam. Code § 7002(b)*], or receiving a judicial declaration of emancipation [*Fam. Code § 7002(c)*; *see Fam. Code § 7120 et seq.* (procedure for declaration of emancipation)] is considered as being over the age of majority for the purpose of the minor's right to support by his or her parents [*Fam. Code § 7050(a)*; *see Codorniz v. Codorniz (1950) 34 Cal. 2d 811, 817, 215 P.2d 32]* . However, a declaration of emancipation of a minor who is indigent and has no means of support is subject to rescission [*Fam. Code § 7130(b)*].

Emancipation of a minor by other conduct or by agreement with the parent, while recognized for some purposes, does not automatically terminate the right of the minor to parental support [*County of Alameda v. Kaiser (1965) 238 Cal. App. 2d 815, 817, 48 Cal. Rptr. 343* ; *see In re Marriage of O'Connell (1978) 80 Cal. App. 3d 849, 856, 146 Cal. Rptr. 26]* . However, courts have prospectively terminated a parent's support obligation, without a decree of emancipation, if the minor has moved out of the custodial home and become self-supporting, while denying retroactive effect of the de facto emancipation [*see Lehrer v. Lehrer (1976) 63 Cal. App. 3d 276, 279-280, 133 Cal. Rptr. 709* ; *In re Marriage of Hancock (1973) 32 Cal. App. 3d 264, 266-267, 107 Cal. Rptr. 897]* .

For discussion of emancipation of minors, see Ch. 245, *Emancipation of Minors* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 224.53 Automatic Termination on Occurrence of Event

If the court orders a parent to make specified payments for child support during the child's minority, or until the child is married or otherwise emancipated (*see § 224.52*), the parent's liability terminates on the happening of the contingency [*Fam. Code § 4007(a)*]. Similarly, if the court orders a parent to make child support payments for an adult indigent child [*see Fam. Code § 3910(a)*, discussed in *§ 224.51[3]*] until the occurrence of a specified event (such as the child's death), the parent's liability terminates on the happening of the contingency [*Fam. Code § 4007(a)*].

In the original order, the court may require the obligee parent to notify the obligor (or his or her attorney of record) of the happening of the event [*Fam. Code § 4007(a)*]. The obligor parent is entitled to a refund of any overpayments made because he or she was not informed of the occurrence of the contingency, subject to the obligee's right to apply the overpayments to existing arrearages [*Fam. Code § 4007(b)*].

Under *Fam. Code § 4007*, termination of the particular child support obligation established in a court order is automatic with regard to marriage and probably other determinable events that establish emancipation, such as entry into the armed forces and a judicial decree of emancipation [*see Fam. Code § 7002*], as long as the language of the order tracks the statute [*see Lehrer v. Lehrer (1976) 63 Cal. App. 3d 276, 280, 133 Cal. Rptr. 709]* . Emancipation that is based on other conduct or agreement (*see § 224.52*) does not automatically terminate such an obligation, but must be addressed by motion for modification [*Lehrer v. Lehrer (1976) 63 Cal. App. 3d 276, 279-280, 133 Cal. Rptr. 709* ; *In re Marriage of Hancock (1973) 32 Cal. App. 3d 264, 266-267, 107 Cal. Rptr. 897]* .

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§ 224.54 Treatment of Unallocated Amount for More Than One Child

Under *Fam. Code § 4050 et seq.*, the statewide uniform guideline (see *§ 224.100* et seq.), the amount of child support to be ordered for more than one child is less than the product of the amount for one child times the number of children [*see Fam. Code § 4055(b)(4)*]. Unless the court orders otherwise or unless there are different time-sharing arrangements for different children, the order must allocate the support amount so that the amount of support for the youngest child is the amount of support for one child, and the amount for the next youngest child is the difference between that amount and the amount for two children, with similar allocations for additional children [*Fam. Code § 4055(b)(8)*]. This provision does not apply to cases in which there are different time sharing arrangements for different children or in which the court determines that the allocation would be inappropriate in the particular case [*Fam. Code § 4055(b)(8)*].

Thus, as support terminates for the oldest child, support is to be reduced only by the incremental increase, computed by subtracting the support for the number of remaining minor children from the amount of support previously ordered [*see Comstock v. Comstock (1981) 116 Cal. App. 3d 481, 489, 172 Cal. Rptr. 148* ; *Spivey v. Furtado (1966) 242 Cal. App. 2d 259, 262-263, 51 Cal. Rptr. 362]* .

Legal Topics:

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§ 224.55 Effect of Reconciliation or Remarriage of Parents to Each Other

A pendente lite order for child support in a proceeding for dissolution of marriage, nullity of marriage, or legal separation is not enforceable during any period in which the parties have reconciled and are living together, unless the order specifies otherwise [*Fam. Code § 3602*]. An order requiring one parent to make payments to the other parent for child support is terminated if the parties remarry each other, although both parents continue to have a duty to support their children [*Davis v. Davis (1968) 68 Cal. 2d 290, 292, 66 Cal. Rptr. 14, 437 P.2d 502]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 224.56 Effect of Order Terminating Parental Rights

A declaration freeing a minor from parental custody and control under *Family Code Section 7800 et seq.* terminates all parental responsibilities with regard to the child, including the duty of support [*Fam. Code § 7803*; *see In re Robert J. (1982) 129 Cal. App. 3d 894, 904, 181 Cal. Rptr. 188]* . A decree of adoption has the same effect [*see Fam. Code § 8617*]. Likewise, an order terminating parental rights under *Welf. & Inst. Code § 366.26* completely severs the parent-child relationship, and terminates the parental duty of support [*County of Ventura (2001) 88 Cal. App. 4th 1120, 1123-1124, 106 Cal. Rptr. 2d 461]* .

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19-224 California Forms of Pleading and Practice--Annotated § 224.57

§ 224.57 Effect of Death of Payee Parent

Courts in two district-attorney-enforcement cases have held that a child support obligation does not terminate by operation of law on the death of the payee-custodial parent and that the payor must seek a judicial modification or termination of support [*see In re Marriage of McCann (1994) 27 Cal. App. 4th 102, 106, 32 Cal. Rptr. 2d 639* ; *In re Marriage of Gregory (1991) 230 Cal. App. 3d 112, 115-117, 281 Cal. Rptr. 188]* . In one case, the county was the designated payee because of an extension of public assistance benefits on behalf of the child, both before and after the death [*In re Marriage of Gregory (1991) 230 Cal. App. 3d 112, 281 Cal. Rptr. 188* ; *see Fam. Code § 4200* (county must be made recipient of child support if parent is receiving benefits on behalf of child)]. In the other, the county was made the designated payee after the custodial parent's death, even though no public assistence benefits had been provided [*In re Marriage of McCann (1994) 27 Cal. App. 4th 102, 105, 32 Cal. Rptr. 2d 639* ; *see Fam. Code § 4201* (county may be made designated payee of any child support order)].

In the second case, the court held that the order remained enforceable even though the obligor assumed custody of the children [*In re Marriage of McCann (1994) 27 Cal. App. 4th 102, 107, 32 Cal. Rptr. 2d 639]* . In the view of this court, because the duty of support runs to the child and not to the custodial parent, the county may appear on behalf of the child (see Ch. 259, *Family Law Enforcement; Special Remedies for Support Enforcement*) to enforce the order. The death of the custodial parent affects neither the children's right to enforce the order nor the support agency authority to appear on their behalf [*In re Marriage of McCann (1994) 27 Cal. App. 4th 102, 108-109, 32 Cal. Rptr. 2d 639]* .

Legal Topics:

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

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19-224 California Forms of Pleading and Practice--Annotated §§ 224.58-224.69

[Reserved]

§§ 224.58[Reserved]

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19-224 California Forms of Pleading and Practice--Annotated § 224.70

§ 224.70 Subject Matter Jurisdiction In Superior Court

[1] Support Proceedings in General

Before a court may order a party to pay child support, it must have subject matter jurisdiction over the proceeding [*see Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 799, 100 Cal. Rptr. 477]* . Superior courts have exclusive jurisdiction over child support matters under the Family Code [*Fam. Code §§ 200, 2010(c)*; *see In re Marriage of Richardson (2009) 179 Cal. App. 4th 1240, 1243, 102 Cal. Rptr. 3d 391* (California court has jurisdiction to order child support in dissolution proceeding pending in California even if child is not in California when there is no out-of-state proceeding addressing issue of support); *see also Fam. Code § 17400(n)* (venue in child support proceedings brought by local child support agency)].

[2] Support Proceedings Involving Native Americans as Parties

The subject matter jurisdiction of the superior court extends to support matters involving a party who is a Native American and whose child is domiciled in California. A California trial court may make an order for child support and attorney's fees and costs against a Native American over whom it has properly obtained personal jurisdiction regardless of the nature of the sources of his or her income. Federal law, nevertheless, may preclude enforcement actions against certain property interests of Native Americans [*Purnel v. Purnel (In re Purnel) (1997) 52 Cal. App. 4th 527, 540-542, 60 Cal. Rptr. 2d 667]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportJurisdictionSubject Matter JurisdictionGovernmentsNative AmericansAuthority & Jurisdiction

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19-224 California Forms of Pleading and Practice--Annotated § 224.71

§ 224.71 Proceedings in Which Child Support May Be Ordered

In a proceeding for dissolution of marriage, nullity of marriage, or for legal separation of the parties, the court has jurisdiction to inquire into and render any judgment and make appropriate orders concerning the support of children for whom support may be ordered, including children born after the filing of the initial petition or the final decree of dissolution [*Fam. Code § 2010(c)*].

Child support orders may also be issued in various statutorily-defined situations not involving termination of the parents' marriage [*see Fam. Code §§ 4000* (action by other parent or guardian ad litem for parent's willful failure to support child), *4002* (action by district attorney for child support orders), *4900 et seq.* (interstate establishment and enforcement of child support orders under UIFSA), *7637* (action for determination of parentage and child support orders under UPA); *Fam. Code § 17400 et seq.* (action by support agency for paternity determination and child support orders)]. For discussion of these types of actions, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* , Ch. 394, *Parent and Child* , and Ch. 412, *Paternity* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportJurisdictionSubject Matter JurisdictionFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewFamily LawMarital Termination & Spousal SupportLegal SeparationFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act

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19-224 California Forms of Pleading and Practice--Annotated § 224.72

§ 224.72 Children for Whom Support May Be Ordered

According to statute, all of the following are children for whom support may be ordered in a proceeding for dissolution of marriage, nullity of marriage, or legal separation of the parties [*Fam. Code § 58*; *see §§ 224.50, 224.51*]:

(1) Minor children (under the age of 18) [*see Fam. Code § 6500*];

(2) Adult children who are the subject of an agreement for continuing support [*see Fam. Code § 3587*];

(3) Adult children who are under the age of 19 and still in high school [*see Fam. Code § 3901*];

(4) Adult indigent children [*see Fam. Code § 3910*].

Under prior law, the superior court's jurisdiction to order child support in a proceeding for dissolution of marriage, nullity of marriage, or legal separation extended only to "children of the marriage" [*see* former *Civ. Code § 4351*]. In transferring this provision to the Family Code, the Law Revision Commission omitted the limiting words "of the marriage" in providing for jurisdiction concerning child support [*see Fam. Code § 2010(c)*; *cf. Fam. Code § 2010(b)*]. Nevertheless, a Family Code provision, insofar as it is substantially the same as a previously existing provision relating to the same subject matter, is to be considered as a restatement and continuation of prior law and not as a new enactment [*Fam. Code § 2*]. Therefore, prior judicial determinations of a court's jurisdiction to award child support with regard to children "of the marriage" are probably still operative.

Under cases construing former *Civ. Code § 4351*, "children of the marriage" include those who are the biological children of both spouses and children who have been adopted by both spouses [*see Adoption of Bonner (1968) 260 Cal. App. 2d 17, 20-21, 66 Cal. Rptr. 812* ; *Fam. Code § 8616*]. If a spouse disputes that he or she is the biological parent of a child, courts in dissolution matters have made determinations of parentage according to the Uniform Parentage Act [*see, e.g., In re Marriage of Groner (1972) 23 Cal. App. 3d 115, 116-117, 99 Cal. Rptr. 765* ; *Fam. Code § 7600 et seq.* (UPA)], and now there is express statutory authority for such a determination [*see Fam. Code §*

2010 (authority of court in dissolution proceeding); *Fam. Code § 2330.1* (in any proceeding for dissolution of marriage, legal separation, or child support, petition or complaint may list children born before marriage to parties); *see also § 224.81*]. Similarly, courts have applied the presumption of *Fam. Code § 7540*, that the issue of a wife cohabiting with her husband who is not impotent or sterile is a child of the marriage, to support jurisdiction to make a child support order for the benefit of such a child [*see, e.g., In re Marriage of B. (1981) 124 Cal. App. 3d 524, 526-527, 177 Cal. Rptr. 429]* . Presumably, the husband may move to rebut the presumption by blood test evidence under *Fam. Code § 7541(b)* if the matter may be heard within two years of the child's birth, as required by that section.

The phrase "children of the marriage" does not include a parent's stepchildren, and the court generally has no jurisdiction to order a stepparent to support a stepchild [*In re Marriage of Lewis and Goetz (1988) 203 Cal. App. 3d 514, 518-519, 250 Cal. Rptr 30]* . However, a spouse may be estopped by conduct to deny that a child is a child of the marriage, even though the child, in reality, is neither his or her natural or adopted child [*see In re Marriage of Johnson (1979) 88 Cal. App. 3d 848, 849-850, 152 Cal. Rptr. 121* (husband, who was not natural father, was estopped from denying paternity to avoid support obligation because he assumed role and represented himself as child's father); *In re Marriage of Valle (1975) 53 Cal. App. 3d 837, 840, 126 Cal. Rptr. 38* (husband estopped from denying paternity to avoid support obligation because he and wife brought brother's children from Mexico on forged birth certificates and reared children as their own); *see also In re Marriage of Hinman (1992) 6 Cal. App. 4th 711, 716-717, 8 Cal. Rptr. 2d 245* (waiver)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsTerminationAttainment of MajorityFamily LawChild SupportObligationsTypesGeneral OverviewFamily LawChild SupportObligationsTypesDependent Adult Support

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§ 224.73 Personal Jurisdiction

A child's physical presence in this state gives California courts *subject matter* jurisdiction to adjudicate a child support claim, but the child's presence does not automatically confer *personal* jurisdiction over a parent [*Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 799, 100 Cal. Rptr. 477]* . A state must obtain personal jurisdiction over an obligor in order to impose a personal liability in favor of an obligee [*Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 799, 100 Cal. Rptr. 477]* .

Personal jurisdiction exists if the parent is domiciled in California [*Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 799, 100 Cal. Rptr. 477* ; *see Code Civ. Proc. § 410.10*]. In addition, the United States Supreme Court has held that service of process on a nonresident while physically present in California is a sufficient basis for personal jurisdiction in a child support proceeding, even if he or she was not present in California for reasons relating to the children [*Burnham v. Superior Court of Cal. (1990) 495 U.S. 604, 607-608, 619, 110 S.Ct. 2105, 109 L. Ed. 2d 631]* . However, if a nonresident is served with summons and complaint outside the state and comes into the state to litigate custody, subsequent service in California of an order to show cause for child support does not confer jurisdiction on that issue [*In re Marriage of Fitzgerald & King (1995) 39 Cal. App. 4th 1419, 1429-1430, 46 Cal. Rptr. 2d 558]* .

If the respondent does not live in California and cannot be served while physically present in the state, personal jurisdiction must be established on the basis of his or her "minimum contacts" with California [*see Code Civ. Proc. § 410.10*; *Kulko v. California Superior Court (1978) 436 U.S. 84, 97, 98 S. Ct. 1690, 56 L. Ed. 2d 132* ; *Kumar v. Superior Court (1982) 32 Cal. 3d 689, 694, 186 Cal. Rptr. 772, 652 P.2d 1003]* . Minimum contacts sufficient to satisfy constitutional due process requirements may be established by an act committed in California, or an act or omission causing an effect in California [*see* Judicial Council Comment to *Code Civ. Proc. § 410.10*; *Sibley v. Superior Court (1976) 16 Cal. 3d 442, 445-446, 128 Cal. Rptr. 34, 546 P.2d 322* , *cert. denied, 429 U.S. 826 (1977)* ; *see also* Restatement (Second), Conflict of Laws, § 37; *Calder v. Jones (1984) 465 U.S. 783, 789, 104 S. Ct. 1482, 79 L. Ed. 2d 804* (relying on Restatement; jurisdiction proper in California based on effects in California of petitioners' Florida conduct)]. If the act done in California is not a tortious one, the existence of personal jurisdiction is determined according to a reasonableness standard [*see* Judicial Council Comment to *Code Civ. Proc. § 410.10*; Restatement

(Second), Conflict of Laws § 36; *see also Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 803, 100 Cal. Rptr. 477* (relying on Restatement)]. Extensions of personal jurisdiction based on nontortious acts have been limited [*see, e.g., McArthur v. Superior Court (1991) 235 Cal. App. 3d 1287, 1293-1295, 1 Cal. Rptr. 2d 296* (nonresident parent's exercise of visitation rights in California insufficient to confer personal jurisdiction; also finding irrelevant fact that nonresident parent used resident parent's credit card while in California for purposes of exercising visitation); *Modlin v. Superior Court (1986) 176 Cal. App. 3d 1176, 1181, 222 Cal. Rptr. 662* (visits with child in conjunction with attendance at medical conferences insufficient to establish personal jurisdiction)].

The determination that an act or omission done outside California had an effect in the state, and the decision to exercise personal jurisdiction based on such an act or omission, also depends on a reasonableness test [*see* Judicial Council Comment to *Code Civ. Proc. § 410.10*; *Sibley v. Superior Court (1976) 16 Cal. 3d 442, 446 , 128 Cal. Rptr. 34, 546 P.2d 322 , cert. denied, 429 U.S. 826 (1977)* (relying on *Judicial Council Comment); Judd v. Superior Court (1976) 60 Cal. App. 3d 38, 45, 131 Cal. Rptr. 246* (relying on Judicial Council Comment and Restatement)].

The United States Supreme Court has held that a California court may not exercise jurisdiction over an absent parent merely because the parent has allowed his or her child to live in California with a former spouse [*Kulko v. California Superior Court (1978) 436 U.S. 84, 97, 98 S. Ct. 1690, 56 L. Ed. 2d 132* ; *see Bartlett v. Superior Court (1978) 86 Cal. App. 3d 72, 75-78, 150 Cal. Rptr. 25* ; *Hoerler v. Superior Court (1978) 85 Cal. App. 3d 533, 535, 149 Cal. Rptr. 569* ; *see also In re Marriage of Nosbisch (1992) 5 Cal. App. 4th 629, 633, 6 Cal. Rptr. 2d 817* (finding Texas statute that gave state personal jurisdiction over parent of child who resides in state with parent's approval unconstitutional)]. Conversely, it has been held that a parent causes an effect in California by abandoning the family in another state with knowledge that the family will have to return to California and take advantage of California law. Under these circumstances, subjecting the parent to personal jurisdiction in California is reasonable [*In re Marriage of Lontos (1979) 89 Cal. App. 3d 61, 71-72, 152 Cal. Rptr. 271]* .

A California court may not base personal jurisdiction for child support purposes on an absent parent's consent to the children's visitation with the other parent who is a California resident [*Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 801-802, 100 Cal. Rptr. 477]* . It may also not base personal jurisdiction on an absent parent's communicating with a child in California [*Judd v. Superior Court (1976) 60 Cal. App. 3d 38, 45, 131 Cal. Rptr. 246]* , attempting to enforce visitation rights in California [*Kumar v. Superior Court (1982) 32 Cal. 3d 689, 703-704, 186 Cal. Rptr. 772, 652 P.2d 1003]* , or mailing child support payments [*Judd v. Superior Court (1976) 60 Cal. App. 3d 38, 45, 131 Cal. Rptr. 246]* or a proposed visitation agreement to California [*Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 803, 100 Cal. Rptr. 477]* .

One court has held that what is now *Fam. Code § 7620(a)*, which gives California jurisdiction under the Uniform Parentage Act over an action to declare paternity and fix a support obligation with regard to a child conceived in the state, meets the constitutional minimum-contacts requirement [*County of Humboldt v. Harris (1988) 206 Cal. App. 3d 857, 861-864, 254 Cal. Rptr. 49]* . However, it is doubtful whether the conception or birth of a child in California alone would give California personal jurisdiction over a nonresident parent if the marital domicile was in another state and the marriage was dissolved there, the custodial parent then established domicile in California, but the noncustodial parent had few or no other contacts with California [*see Modlin v. Superior Court (1986) 176 Cal. App. 3d 1176, 1178-1181, 222 Cal. Rptr. 662* (court did not even consider birth of child in California as potential basis for personal jurisdiction under these facts, but decided case on basis of provision in settlement agreement providing for continuing jurisdiction in New York); *see also Kulko v. California Superior Court (1978) 436 U.S. 84, 97, 98 S. Ct. 1690, 56 L. Ed. 2d 132* (indicating that state of marital domicile has strong claim to personal jurisdiction if one party has remained there); *Hoerler v. Superior Court (1978) 85 Cal. App. 3d 533, 534-535, 149 Cal. Rptr. 569* (reading *Kulko* as barring personal jurisdiction over parent remaining in state where marriage was dissolved, even though California was marital domicile when children were born)].

For discussion of personal jurisdiction issues in civil actions generally, see Ch. 323, *Jurisdiction: Personal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsFamily LawChild SupportJurisdictionPersonal JurisdictionFamily LawChild SupportJurisdictionSubject Matter Jurisdiction

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§ 224.74 Continuing Jurisdiction

Once the court properly acquires jurisdiction over the parties in an action in which child support is an issue, its jurisdiction continues and it may make additional child support orders or modify existing orders [*see Code Civ. Proc. § 410.50(b)*; *Fam. Code § 3651*; *Moore v. Superior Court (1928) 203 Cal. 238, 241-243, 263 P. 1009* ; *In re Marriage of Lusby (1998) 64 Cal. App. 4th 459, 473, 75 Cal. Rptr. 2d 263* ; *Schoch v. Superior Court (1970) 11 Cal. App. 3d 1200, 1204-1205, 90 Cal. Rptr. 365]* . The original court has primary jurisdiction over child support issues, and another action for child support cannot be brought in a different superior court even if the original court did not make a child support award in the original dissolution proceedings [*Kresteller v. Superior Court (1967) 248 Cal. App. 2d 545, 549, 56 Cal. Rptr. 771]* , unless the support issue involves a child for which the court had no jurisdiction to award support in the original proceeding [*see Fam. Code § 58*]. However, if the parties' residences have changed and a hearing in another court would be more convenient, a party may move for change of venue [*Kresteller v. Superior Court (1967) 248 Cal. App. 2d 545, 550, 56 Cal. Rptr. 771]* .

A stipulation between the parties to engage in binding arbitration on child support issues is void as against public policy to the extent it purports to deprive the court of jurisdiction to modify child support [*In re Marriage of Bereznak and Heminger (2003) 110 Cal. App. 4th 1062, 1067-1070, 2 Cal. Rptr. 3d 351]* .

The court's continuing jurisdiction over child support matters does not confer authority on an individual judge to retain jurisdiction for himself or herself personally [*In re Marriage of Matthews (1980) 101 Cal. App. 3d 811, 815-816, 161 Cal. Rptr. 879* ; *but see In re Marriage of Regnery (1989) 214 Cal. App. 3d 1367, 1377-1378, 263 Cal. Rptr. 243* (resulting judgment valid despite erroneous retention of personal jurisdiction by judge)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewFamily LawChild SupportJurisdictionContinuing Jurisdiction

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19-224 California Forms of Pleading and Practice--Annotated § 224.75

§ 224.75 Notice to Obligor

Child support awarded without notice to the obligor is beyond the court's jurisdiction as a violation of due process, and the award may be collaterally attacked at any time [*In re Marriage of Lippel (1990) 51 Cal. 3d 1160, 1166-1167, 276 Cal. Rptr. 290, 801 P.2d 1041]* . The former Judicial Council forms of petition and response for use in a dissolution of marriage or legal separation matter specified that if there are minor children of the marriage, the court will make child support orders without further notice to either party. Therefore, it was not possible for the petitioner to effectively waive the child's entitlement to child support by failing or refusing to request child support in the petition [*see* *In re Marriage of Lippel (1990) 51 Cal. 3d 1160, 1169-1173, 276 Cal. Rptr. 290, 801 P.2d 1041* ; *see also Code Civ. Proc. § 580* (relief granted on default may not exceed that prayed for)]. However, the current Judicial Council forms of petition and response for use in a dissolution or nullity of marriage or legal separation matter state that if there are minor children born to or adopted by the parties before or during the marriage, the court will make orders for the support of the children upon request and submission of financial forms by the requesting party, but that an earnings assignment may be issued without further notice [*see* Cal. Judicial Council Forms FL-100, FL-120].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewFamily LawChild SupportObligationsGeneral OverviewFamily LawChild SupportProceduresFamily LawParental Duties & RightsDutiesSupport of Children

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§ 224.76 County as Indispensable Party

A county that has provided public benefits to a custodial parent is an indispensable party to any proceeding in which the level of child support is at issue [*In re Marriage of Mena (1989) 212 Cal. App. 3d 12, 19, 260 Cal. Rptr. 314* ; *In re Marriage of Lugo (1985) 170 Cal. App. 3d 427, 432-434, 217 Cal. Rptr. 74* ; *see Code Civ. Proc. § 389(a)(2)(i)*]. The county is entitled to notice of any proceeding or motion to establish or modify a child support obligation, regardless of whether the motion is brought by the custodial or noncustodial parent. The county is also entitled to notice of a trial under any law, including the Family Code or the Uniform Parentage Act, at which support is one of the issues to be determined [*see* *In re Marriage of Mena (1989) 212 Cal. App. 3d 12, 19, 260 Cal. Rptr. 314]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderIndispensable PartiesFamily LawChild SupportObligationsGeneral OverviewFamily LawChild SupportProceduresFamily LawParental Duties & RightsDutiesSupport of ChildrenFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act

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§ 224.77 Temporary Support

During the pendency of any proceeding in which the support of a child is at issue, the court may order either or both parents to pay any amount necessary for the support of the child [*Fam. Code § 3600*]. For discussion of the procedure to obtain temporary orders generally, see *§ 221.10* et seq. The factors for determining the amount of temporary support under the statewide uniform child support guideline are the same as the factors for determining permanent support, as discussed in *§ 224.100* et seq.

An award of temporary support is effective from the moment of the court's pronouncement and not from the date a formal order is entered [*In re Marriage of Pearce (1978) 84 Cal. App. 3d 221, 223, 148 Cal. Rptr. 509]* . A temporary order does not prejudice the rights of the parties or the children with respect to any subsequent order [*Fam. Code § 3604*]. The order may be modified or revoked at any time, except as to any amount accruing prior to the date of filing of the notice of motion or order to show cause to modify or terminate [*Fam. Code § 3603*]. Jurisdiction to award temporary child support continues during the pendency of any appeal [*In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 94-95, 260 Cal. Rptr. 403* (involving temporary order pending appeal of order setting aside obligee's default)].

Notwithstanding any other provision of law, orders for pendente lite child support remain in full force and effect until revoked by the court or until the order terminates by operation of law under *Fam. Code § 3900, 3901, 4007,* or *4013,* even if the proceeding has not been brought to trial within the time limits specified in *Code Civ. Proc. § 583.110 et seq.* [*Fam. Code § 3601*]. However, the order is not enforceable during any period in which the parties have reconciled and are living together, unless the order specifies otherwise [*Fam. Code § 3602*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsModificationGeneral OverviewFamily LawChild SupportObligationsTypesTemporary Support

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§ 224.78 Expedited Support Orders

During the pendency of an action for child support that has been filed and served, the court may, without a hearing, make an order requiring a parent or parents to pay for the support of their minor child the amount required under the statewide uniform child support guideline formula [*Fam. Code §§ 3621, 3622*; *see Fam. Code §§ 3624* (service requirements), *4055* (guideline formula); *Welf. & Inst. Code §§ 11452, 11452.018* (needs standard, to be used as minimum support amount if income of parent from whom support sought is unknown); *see also 224.100* et seq.]. Such an order is known as an expedited child support order [*Fam. Code § 3620*].

An application for expedited child support must set forth the minimum amount that the obligated parent or parents are required to pay under the formula. The applicant must also complete and file the Judicial Council form of Income and Expense Declaration for both parents [*Fam. Code § 3622(a), (b)*; *see* Cal. Judicial Council Form FL-150], and a worksheet setting forth the basis of the required amount and a proposed expedited support order [*Fam. Code § 3622(c), (d)*]. Unless the respondent requests a hearing, the amount set forth in the application is the amount that the obligor will be required to pay [*Fam. Code § 3624(c)*; *see Fam. Code §§ 3625-3628*].

The obligated parent may file and serve his or her response to the application and income and expense declaration at any time before the effective date of the expedited support order. No fee is required in connection with the filing of the response. The simultaneous filing of the response and the obligated parent's income and expense declaration will stay the effective date of the expedited support order [*Fam. Code § 3625(c)*], and the matter will be set for hearing [*Fam. Code §§ 3626, 3629*; *see Fam. Code § 3623* (neither party is prevented from raising separately noticed relevant and proper issues other than support at hearing)]. The hearing will be set for not less than 20 days nor more than 30 days from the filing of the response [*Fam. Code § 3626*].

At the hearing, both parents must produce copies of their most recently filed federal and state income tax returns. These returns may be reviewed by the other parent, and a parent may also be examined by the other as to the contents of the return. A parent who fails to submit the required documents is normally barred from the relief that he or she has requested. However, the court may grant the requested relief if the parent submits a declaration under penalty of perjury

that (1) no such documents exist; or (2) in the case of a tax return, it cannot be produced but a copy has been requested from the Internal Revenue Service or Franchise Tax Board [*Fam. Code § 3629*].

Unless the obligated parent responds to the application, the expedited order become effective without further court action 30 days after service on the required papers on the obligated parent [*Fam. Code § 3624(a), (c)*]. If there is a hearing, the order after hearing becomes effective no more than 30 days after the filing of the response to the application for the expedited support order. It may be given retroactive effect to the date of the filing of the application [*Fam. Code § 3632*].

Any order for expedited child support may be modified at any time on the same basis as any other order for child support [*Fam. Code § 3633*; *see § 224.170*].

The Judicial Council forms of Application for Expedited Child Support Order, Response to Application and Notice of Hearing, and Child Support Order are set forth in *see §§ 224.214 -224.216*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsModificationGeneral OverviewFamily LawChild SupportProceduresFamily LawParental Duties & RightsDutiesSupport of Children

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19-224 California Forms of Pleading and Practice--Annotated § 224.79

§ 224.79 Deferred Sale of Family Home

In a family law proceeding, a party may request a "deferred sale of home order" [*see Fam. Code § 3800 et seq.*]. Such an order temporarily delays the sale of the family home and awards the temporary exclusive use and possession of the home to a custodial parent of minor children or to a parent with whom an adult child under age 19 who has not yet completed high school [*see Fam. Code § 3901*; *see also § 224.51[1]*] or an adult indigent child [*see Fam. Code § 3910*; § 224.51[3]] resides [*see Fam. Code § 3800(b)*; *cf. In re Marriage of Cooper (1985) 170 Cal. App. 3d 883, 886-887, 216 Cal. Rptr. 611* (decided when statute was limited to *minor* children)]. Such an order may have the effect of lowering the child support obligation of the parent not remaining in the family home [*see Fam. Code § 4057(b)(2)*]. The fact that a custodial parent cohabits in the subject house with a person of the opposite sex is not necessarily a bar to a deferred sale order [*In re Marriage of Braud (1995) 45 Cal. App. 4th 797, 814, 53 Cal. Rptr. 2d 179]* . The court may specify the parties' respective responsibilities for the payment of maintenance and improvements during the period of deferment [*Fam. Code § 3806*]. A deferred sale of home order is subject to modification and termination at any time at the court's discretion, unless the parties have agreed otherwise [*Fam. Code § 3807*].

In a case decided prior to the effective date of the current deferred sale statute, the court held that a deferred sale award is contingent on the supported child's remaining in the physical custody of the parent who lives in the home. The need for the award ends if primary custody of the child is awarded to the nonresident parent, despite the resident parent's desire to maintain a home for the child during periods of secondary physical custody [*see In re Marriage of Katz (1988) 201 Cal. App. 3d 1029, 1037-1038, 247 Cal. Rptr. 562]* . The current version of the statute provides for the award to a "custodial parent," defined as a party awarded physical custody of a child [*Fam. Code § 3800(a)*], whether or not the custodial parent has sole or joint custody [*Fam. Code § 3800(b)*]. Thus, as under the case, the statute prohibits continuation of the award after a change of physical custody to the nonresident parent unless the parents' custodial arrangement may be characterized as joint custody.

For further discussion of deferred home sales, see Ch. 222, Dissolution of Marriage: Property Division and Valuation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewFamily LawParental Duties & RightsDutiesSupport of Children

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§ 224.80 Retroactivity of Order

An order for child support may be made retroactive to the date of filing the petition, complaint, or other initial pleading (except as provided in *Fam. Code § 17402*) [*Fam. Code § 4009*; *cf. In re Marriage of Goosmann (1994) 26 Cal. App. 4th 838, 844-845, 31 Cal. Rptr. 2d 613]* . However, if the parent ordered to pay support was not served with the petition, complaint, or other initial pleading within 90 days after filing, and the court finds that the parent was not evading service intentionally, the child support order is not effective earlier than the date of service [*Fam. Code § 4009*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsTypesRetroactive SupportFamily LawChild SupportProceduresFamily LawParental Duties & RightsDutiesSupport of Children

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19-224 California Forms of Pleading and Practice--Annotated § 224.81

§ 224.81 Supplemental Complaint for After-Born Child

Under *Fam. Code § 2330.1*, in any proceeding for dissolution of marriage or legal separation of the parties, or for the support of children, the petition or complaint may list children born before the marriage to the parties. Under the terms of the Uniform Parentage Act, a determination of paternity may be made in the action. In addition, the statute provides that a supplemental complaint may be filed [*see Code Civ. Proc. § 464*] in any of those proceedings seeking a judgment or order of paternity or support for a child of the parents of another child whose paternity and support are already at issue before the court. The complaint may be filed without leave of the court either before or after final judgment in the underlying proceeding. Service of the supplemental summons and complaint must be made in the manner provided for the initial service of a summons under the Family Code [*Fam. Code § 2330.1*]. For a form for a supplemental complaint, *see § 224.218*.

On the filing of a supplemental complaint, a child support order in the original proceeding may be modified in conformity with the statewide uniform child support guidelines to include an order for the support of all of the children who were not named in the initial and supplemental pleadings, to consolidate arrearages and wage assignments for children of the parties, and to consolidate orders for support [*Fam. Code § 3651(b)*]. Modification of child support is the subject of § 224.170 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental PleadingsFamily LawChild SupportObligationsGeneral OverviewFamily LawChild SupportProceduresFamily LawParental Duties & RightsDutiesSupport of Children

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19-224 California Forms of Pleading and Practice--Annotated §§ 224.82-224.99

[Reserved]

§§ 224.82[Reserved]

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19-224 California Forms of Pleading and Practice--Annotated § 224.100

§ 224.100 Operative Date and Applicability

On and after July 1, 1992 [*see Fam. Code § 4051*], the amount of all child support orders in California must be determined under the statewide uniform child support guideline set forth in *Fam. Code § 4050 et seq.* [*M.S. v. O.S. (2009) 176 Cal. App. 4th 548, 554, 97 Cal. Rptr. 3d 812]* . The legislation does not contain a clear statement of the scope of procedures to which the guideline applies. However, the federal regulations under which the guideline was enacted require the establishment of a single set of guidelines for setting and modifying child support orders within the state [*45 C.F.R. § 302.56(a)*; *see 42 U.S.C. § 667(a)*; *Fam. Code § 4050*], and that those guidelines be followed in *any* judicial or administrative proceeding for the award of child support [*45 C.F.R. § 302.56(f)*; *see 42 U.S.C. § 667(b)(2)*]. The guidelines apply not only with respect to the support of minor children, but also with respect to the support of adult disabled children [*In re Marriage of Drake (1997) 53 Cal. App. 4th 1139, 1163, 62 Cal. Rptr. 2d 466]* . In short, the guidelines apply in *any* type of proceeding in which child support is at issue [*see, e.g.,* *M.S. v. O.S. (2009) 176 Cal. App. 4th 548, 554-559, 97 Cal. Rptr. 3d 812* (applying guidelines in paternity action)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGeneral OverviewFamily LawChild SupportObligationsComputationGuidelinesFamily LawParental Duties & RightsDutiesSupport of Children

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19-224 California Forms of Pleading and Practice--Annotated § 224.101

§ 224.101 Federal Compulsion for Guideline

To receive federal funds for the federally authorized public assistance program for persons with dependent children, states must have in effect a plan for enforcement of child support obligations that complies with extensive federal requirements [*42 U.S.C. § 602(a)(2)*; *see 42 U.S.C. § 651 et seq.* (federal child support requirements for state plans)]. The federal requirements include, among other things, a requirement that states promulgate guidelines for support order amounts [*42 U.S.C. § 667(a)*; *see 45 C.F.R. § 302.56(b)*]. These guidelines are binding on the courts in that they must include a rebuttable presumption, in any judicial or administrative proceeding for the award of child support, that the amount of the order that would result from the application of the guidelines is the correct amount of child support to be ordered [*42 U.S.C. § 667(b)(2)*; *see Fam. Code § 4057*; *In re Marriage of Williams (2007) 150 Cal. App. 4th 1221, 1233, 58 Cal. Rptr. 3d 877* (guideline amount of support, which is calculated by applying mathematical formula to parents' incomes, is presumptively correct); *see also § 224.111[1]*].

Implementing regulations go even further, requiring that the guidelines be based on specific descriptive and numeric criteria and result in a computation of the support obligation [*45 C.F.R. § 302.56(c)(2)*]. Prior California law, the Agnos Child Support Standards Act of 1984 [*see* former *Civ. Code §§ 4720-4732*] provided specific numeric criteria and computed amounts for a mandatory minimum order [*see* former *Civ. Code § 4722*], but there were no such criteria for orders above the mandatory minimum. The amount was essentially left to the court's discretion, subject to certain legislative declarations of policy [*see* former *Civ. Code § 4724*]. Therefore, the legislature enacted the statewide uniform child support guideline to provide for numeric computation of all child support orders in California, not just mandatory minimum amounts [*see Fam. Code § 4055*; *cf. In re Marriage of Fini (1994) 26 Cal. App. 4th 1033, 1040-1044, 31 Cal. Rptr. 2d 749* (severe judicial criticism of guideline because of excessive limitations on judicial discretion, needless complexity of formula, and legislative micromanaging of child support hearings)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGeneral

OverviewFamily LawChild SupportObligationsComputationGuidelinesFamily LawParental Duties & RightsDutiesSupport of ChildrenPublic Health & Welfare LawSocial SecurityAssistance to FamiliesChild & Spousal Support

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19-224 California Forms of Pleading and Practice--Annotated § 224.102

§ 224.102 Legislative Intent and Principles Behind Guideline

The legislative intent and underlying principles with regard to the child support guideline are set forth in *Fam. Code §§ 4050, 4052,* and *4053*. In addition to complying with federal regulations [*see Fam. Code § 4050*; *§ 224.101*], the Legislature also intends that the courts adhere to the guideline and depart from it only in the special circumstances set forth in the guideline [*Fam. Code § 4052*; *M.S. v. O.S. (2009) 176 Cal. App. 4th 548, 554, 97 Cal. Rptr. 3d 812* (courts must calculate child support under statutory guidelines because of California's strong public policy in favor of adequate child support); *Brothers v. Kern (2007) 154 Cal. App. 4th 126, 130, 64 Cal. Rptr. 3d 239* (adherence to statutory guideline in determining amount of child support is mandatory and court has discretion to depart from it only as permitted by statute)]. The guideline amount, which is calculated by applying a mathematical formula to the parents' incomes [*see § 224.104*], is presumptively correct [*Fam. Code § 4057(a)*; *M.S. v. O.S. (2009) 176 Cal. App. 4th 548, 554, 97 Cal. Rptr. 3d 812]* . Before the court can make an order differing from the guideline formula, it must calculate and state the amount of support that would have been ordered under the guideline formula [*Fam. Code § 4056(a)(1)*].

In implementing the guideline, the courts must adhere to the following principles [*Fam. Code § 4053*]:

(1) A parent's first and principal obligation is to support his or her minor children according to the parent's circumstances and station in life.

(2) Both parents are mutually responsible for the support of their children.

(3) The guideline takes into account each parent's actual income and level of responsibility for the children.

(4) Each parent should pay for the support of the children according to his or her ability.

(5) This guideline seeks to place the interests of children as the state's top priority.

(6) Children should share in the standard of living of both parents. Child support may therefore appropriately improve the standard of living of the custodial household to improve the lives of the children.

(7) Child support orders in cases in which both parents have high levels of responsibility for the children should reflect the increased costs of raising the children in two homes and should minimize significant disparities in the children's living standards in the two homes.

(8) The financial needs of the children should be met through private financial resources as much as possible.

(9) It is presumed that a parent having primary physical responsibility for the children contributes a significant portion of available resources for the support of the children.

(10) The guideline seeks to encourage fair and efficient settlements of conflicts between parents and seeks to minimize the need for litigation.

(11) The guideline is intended to be presumptively correct in all cases, and only under special circumstances should child support orders fall below the child support mandated by the guideline formula.

(12) Child support orders must ensure that children actually receive fair, timely, and sufficient support reflecting the state's high standard of living and high costs of raising children compared to other states.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGeneral OverviewFamily LawChild SupportObligationsComputationGuidelinesFamily LawParental Duties & RightsDutiesSupport of Children

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§ 224.103 Applicability of Prior Case Law

Under California case law before 1984, in computing the amount of child support to be awarded, the amount of child support was within the trial court's discretion and would be disturbed only for abuse of discretion [*In re Marriage of Flaherty (1982) 31 Cal. 3d 637, 644-645, 183 Cal. Rptr. 508, 646 P.2d 179]* . The primary considerations in setting the support amount were the child's needs and the parents' ability to pay [*In re Marriage of Neal (1979) 92 Cal. App. 3d 834, 847, 155 Cal. Rptr. 157]* .

The Agnos Child Support Standards Act of 1984 [former *Civ. Code §§ 4720-4732*] removed the court's discretion with regard to a mandatory minimum amount [*see* former *Civ. Code § 4722*] and provided specific guidance for exercising discretion with regard to supplemental awards [*see* former *Civ. Code § 4724*]. The statewide uniform guideline now restricts discretion with regard to all child support orders [*see Fam. Code § 4050 et seq.*].

Thus, any prior case holding must be weighed against the standards of *Fam. Code § 4050 et seq.* to determine whether it is in harmony or in conflict with those standards, or whether it has been preempted by a specific provision regarding the subject of the holding. Cases setting child support on the basis of a child's needs are particularly questionable, since the guideline is based not on need but on the child's entitlement to share in the parents' standard of living [*see Fam. Code § 4053(f)*; *White v. Marciano (1987) 190 Cal. App. 3d 1026, 1032-1033, 235 Cal. Rptr. 779* (rejecting relevance of evidence of obligor's net worth and opulent life style); *see Johnson v. Superior Court (1998) 66 Cal. App. 4th 68, 72, 77 Cal. Rptr. 2d 624]* . The child's needs come into higher focus in cases in which a parent's income is deemed "extraordinarily high," as discussed in *§ 224.111[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGuidelinesFamily LawParental Duties & RightsDutiesSupport of Children

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§ 224.104 Child Support Formula

The central feature of the statewide uniform child support guideline [*Fam. Code § 4050 et seq.*] is the child support formula set forth in *Fam. Code § 4055(a)*. This formula is as follows [*Fam. Code § 4055(a)*]:

CS = K [HN - (H%)(TN)]

In the formula CS represents the amount of child support [*see Fam. Code § 4055(b)(1)(A)*]. HN is the high earner's net monthly disposable income and TN is the total net monthly disposable income of both parties [*see Fam. Code § 4055(b)(1)(C), (E)*]. Factor K is the percentage of parental income that is to be allocated to the support of children. Factor K varies according to the parents' actual total income level [*see Fam. Code § 4055(b)(1)(B)*]. Factor H represents the approximate percentage of time the high earner has or will have primary physical responsibility for the children [*see Fam. Code § 4055(b)(1)(D)*].

Under the formula, child support is computed by the following mathematical steps:

(1) Figure the total net monthly income of each parent under the standards set forth in *Family Code Sections 4058* and *4059* (see *§ 224.105*), and add them together;

(2) Multiply that figure by the percentage of time that the higher earner has primary physical responsibility for the children (*see § 224.106[1]*);

(3) Subtract the result from the higher earner's net monthly disposable income. That yields the part of the higher earner's monthly income on which child support is computed;

(4) Find the appropriate value of K as set forth in *Fam. Code § 4055(b)(3)* (*see § 224.107*), and take K percent of the result of step 3.

If the result is a positive number, the higher earner pays that amount to the lower earner. If the result is a negative number, the lower earner pays the absolute value (the number without the minus sign) of that amount to the higher earner [*Fam. Code § 4055(b)(5)*].

Although not included as a formula variable, a final component is the multi-child multiplier. After CS is computed under the formula, it is then multiplied by the appropriate factor set forth in *Fam. Code § 4055(b)(4)* depending on the number of children who are to be supported under the order [*see* § 240.109].

There is a rebuttable presumption affecting the burden of proof that the amount of child support established by the formula is the correct amount of child support to be ordered [*Fam. Code § 4057(a)*]. The presumption may be rebutted in favor of an amount that is lower than the amount computed under the formula, or higher than that amount [*see, e.g., Fam. Code § 4057(b)(5)(C)* (special medical or other needs justifying higher support amount)]. For further discussion, see *§ 224.111*.

To ensure that the formula and any applicable statutory adjustments have been properly applied in a given case, the court must, at the request of any party, state in writing or include in the record certain information used in determining the amount of support under the formula and guideline [*see Fam. Code § 4056*]. For a form for a child-support order that contains all of the required findings, see *§ 224.211*.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceInferences & PresumptionsPresumptionsFamily LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGuidelinesFamily LawParental Duties & RightsDutiesSupport of Children

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19-224 California Forms of Pleading and Practice--Annotated § 224.105

§ 224.105 Computation of Income

[1] Gross Income; Inclusions and Exclusions

For purposes of calculating child support under the guideline, the annual gross income of each parent generally means income from whatever source derived, including (but not limited to) salaries, commissions, royalties, wages, bonuses, rents, dividends, pensions, interest, trust income, annuities, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, social security benefits, and spousal support actually received from a person who is not a party to the child support order [*Fam. Code § 4058(a)*; *Brothers v. Kern (2007) 154 Cal. App. 4th 126, 131, 64 Cal. Rptr. 3d 239* (gross income may include imputed interest income that reasonably could have been earned but was not actually earned); *In re Marriage of Williams (2007) 150 Cal. App. 4th 1221, 1234, 58 Cal. Rptr. 3d 877* (statutory list of possible income sources is not exhaustive, but is by way of illustration only, and income from other sources should properly be factored into annual gross income computation); *County of Placer v. Andrade (1997) 55 Cal. App. 4th 1393, 1396-1397, 64 Cal. Rptr. 2d 739* (error to exclude bonus and overtime pay from "annual gross income" absent evidence that net disposable income figure did not accurately reflect payor's prospective earnings); *but see In re Marriage of Mosley (2008) 165 Cal. App. 4th 1375, 1379, 1385, 1387, 82 Cal. Rptr. 3d 497* (court should not base support obligation on predicted receipt of large bonus that might never materialize, but must include in its order a method for requiring payor spouse to pay support based on any bonus income he or she may in fact receive); *In re Marriage of Rothrock (2008) 159 Cal. App. 4th 223, 230-235, 70 Cal. Rptr. 3d 881* (court properly excluded as income annuity purchased from undifferentiated and unallocated personal injury settlement); *In re Marriage of Pearlstein (2006) 137 Cal. App. 4th 1361, 1363, 1372-1376, 40 Cal. Rptr. 3d 910* (market value of unsold shares of stock business owner receives in connection with sale of business generally is not income for child support purposes; however, court may treat realized gain that is not reinvested as income, and reasonable rate of investment return may be imputed to value of stock available for sale and this amount added to owner's gross income); *In re Marriage of Scheppers (2001) 86 Cal. App. 4th 646, 649-652, 103 Cal. Rptr. 2d 529* (life insurance benefits are not included in "annual gross income"); *In re Marriage of Corman (1997) 59 Cal. App. 4th 1492, 1499* (spousal support received from party to proceeding is not part of gross income)].

Gross income also includes income from the proprietorship of a business, such as gross receipts from the business reduced by expenditures required for the operation of the business and, in the discretion of the court, employee benefits [*Stewart v. Gomez (1996) 47 Cal. App. 4th 1748, 1755, 55 Cal. Rptr. 2d 531* (proper to include value of rent-free housing supplied by employer and meal allowance paid by vocational training program)] or self-employment benefits, taking into consideration the benefit to the employee, any corresponding reduction in living expenses, and other relevant facts [*Fam. Code § 4058(a)*; *Stewart v. Gomez (1996) 47 Cal. App. 4th 1748, 1753, 55 Cal. Rptr. 2d 531* (describing section as an "expansive definition of gross income"); *but see In re Marriage of Loh (2001) 93 Cal. App. 4th 325, 334-335, 112 Cal. Rptr. 2d 893* (declining to follow *Stewart*'s "anything that reduces living expenses" approach to determining gross income)]. Depreciation of a parent's rental properties is not properly deductible from the parent's gross income [*Asfaw v. Woldberhan (2007) 147 Cal. App. 4th 1407, 1412-1426, 55 Cal. Rptr. 3d 323* (depreciating asset does not involve reduction of cash available for child support nor is depreciation required for operation of business)].

An increase in the equity value of a parent's residence generally does not constitute income or earning capacity for purposes of calculating child support [*In re Marriage of Williams (2007) 150 Cal. App. 4th 1221, 1236, 58 Cal. Rptr. 3d 877*]. Home equity can only be considered if special circumstances under *Fam. Code § 4057(b)* are shown, which make guideline support unjust or inappropriate [*In re Marriage of Williams (2007) 150 Cal. App. 4th 1221, 1236, 58 Cal. Rptr. 3d 877* ; *see § 224.111*]. Thus, a court generally cannot attribute an assumed rate of return on the supporting parent's home equity in determining the parent's income for the purpose of calculating guideline child support, even if a certain amount of home equity is sheltered [*In re Marriage of Williams (2007) 150 Cal. App. 4th 1221, 1236, 58 Cal. Rptr. 3d 877*].

Annual gross income also does not include any income derived from child support payments actually received, or any income derived from public assistance programs for which eligibility is based on a determination of need. Child support received by a party for children from another relationship is not included as part of that party's gross or net income [*Fam. Code § 4058(c)*].

In construing these provisions, at least one reported decision has held that proceeds of an educational loan that included amounts for living expenses over and above the cost of books and tuition was not "income" [*In re Marriage of Rocha (1998) 68 Cal. App. 4th 514, 518, 80 Cal. Rptr. 2d 376]* . Another case held that benefits from a life insurance policy were capital and not income [*In re Marriage of Scheppers (2001) 86 Cal. App. 4th 646, 651, 103 Cal. Rptr. 2d 529]* .

The statutory guideline scheme does not address whether inheritances may be treated as income, and the reported cases have made a distinction between welfare cases and nonwelfare cases in determining this question. In *County of Kern v. Castle* [*County of Kern v. Castle (1999) 75 Cal. App. 4th 1442, 89 Cal. Rptr. 2d 874]* , a paternity action, an appellate court held that a trial court's failure to consider a father's inheritance in setting the amount of child support was an abuse of discretion. The appellate court found that an inheritance itself is not income, but that *interest, rents and dividends* actually earned from an inheritance are income, and that a court has discretion to impute income based on the inheritance corpus or on interest the inheritance corpus could have earned if invested [*County of Kern v. Castle (1999) 75 Cal. App. 4th 1442, 89 Cal. Rptr. 2d 874* ; *cf. In re Marriage of Destein (2001) 91 Cal. App. 4th 1385, 1393-1396, 111 Cal. Rptr. 2d 487* (income imputed to parent based on hypothetical rate of return on non-income-producing real estate investments held for long-term growth)]. Additionally, the appellate court held that an inheritance may be treated as income to the extent that it is used to reduce the recipient parent's living expenses, with an associated increase in funds available for child support [*County of Kern v. Castle (1999) 75 Cal. App. 4th 1442, 89 Cal. Rptr. 2d 874* (citing *Fam. Code § 4058(a)(3)*, which permits court to consider employee benefits in setting child support, to extent benefits reduce employee's living expenses); *but see* In re *Marriage of Loh (2001) 93 Cal. App. 4th 325, 334-335, 112 Cal. Rptr. 2d 893* (declining to follow *Castle*'s "anything that reduces living expenses" approach to determining gross income)].

In making its ruling, the *Castle* court indicated that the result would be different if this were a welfare situation, in

which a child was being supported by (the now former) Aid to Families with Dependent Children (AFDC) benefits and the father's actual income was insufficient to provide the minimum basic standard [*County of Kern v. Castle (1999) 75 Cal. App. 4th 1442, 1445]* . The court made this statement to distinguish an older case, *County of Contra Costa v. Lemon (1988) 205 Cal. App. 3d 683, 252 Cal. Rptr. 455* , in which the noncustodial father's lottery winnings were considered as income for purposes of calculating child support, the mother was receiving AFDC benefits, and the father worked odd jobs. The *Castle* court stated that if this had been a welfare case, *Lemon* would be controlling and the inheritance would be considered income in determining child support [*County of Kern v. Castle (1999) 75 Cal. App. 4th 1442, 1452]* .

Courts have also considered the effect of nontaxable benefits on gross income. According to one court, a blanket "anything that reduces living expenses" approach to determining gross income under *Fam. Code § 4058* is inappropriate [*In re Marriage of Loh (2001) 93 Cal. App. 4th 325, 334, 112 Cal. Rptr. 2d 893]* . Rather, significant nontaxable benefits, such as free housing [*see, e.g., Stewart v. Gomez (1996) 47 Cal. App. 4th 1748, 1754-1755, 55 Cal. Rptr. 2d 531* (free housing on Indian reservation was income)], should be dealt with under *Fam. Code § 4057*, which sets forth factors rebutting the correctness of the guideline formula amount of child support [*In re Marriage of Loh (2001) 93 Cal. App. 4th 325, 333-336, 112 Cal. Rptr. 2d 893]* . Under the latter approach, the proper course would be to first calculate the guideline formula amount in light of the parents' incomes as revealed by their tax returns, pay stubs, and income and expense declarations, and then, if application of the guidelines amount would be inappropriate or unjust, to adjust the amount upward in light of the significant nontaxable benefit of free housing [*In re Marriage of Loh (2001) 93 Cal. App. 4th 325, 335, 112 Cal. Rptr. 2d 893]* .

In considering tax return information, a parent's gross income as stated under penalty of perjury on recent tax returns is considered presumptively correct [*M.S. v. O.S. (2009) 176 Cal. App. 4th 548, 559, 97 Cal. Rptr. 3d 812* ; *In re Marriage of Loh (2001) 93 Cal. App. 4th 325, 332, 112 Cal. Rptr. 2d 893* ; *see In re Marriage of Scheppers (2000) 86 Cal. App. 4th 646, 650, 103 Cal. Rptr. 2d 529* (in interpreting *Fam. Code § 4058*, federal law is persuasive)]. However, a court may consider monies a parent receives that are not required to be included as income under federal tax law. For example, a court may consider gifts to a parent to be income for purposes of child support, as long as they bear a reasonable relationship to the traditional meaning of "income" as a recurrent monetary benefit [*In re Marriage of Alter (2009) 171 Cal. App. 4th 718, 735-737, 89 Cal. Rptr. 3d 849]* .

[2] Net Income; Allowable Deductions

The annual net disposable income of each parent is computed by deducting from his or her annual gross income the actual amounts attributable to the following items [*Fam. Code § 4059*]:

(1) The state and federal income tax liability resulting from the parties' taxable income [*see Fam. Code §§ 3552(a)* (in proceedings involving child support, no party may refuse to submit copies of his or her state and federal income tax returns to court), *4059(a)* (amount deducted must bear accurate relationship to tax status of parties and amount actually payable); *In re Marriage of McQuoid (1991) 9 Cal. App. 4th 1353, 1357-1358, 12 Cal. Rptr. 2d 737* (amounts not deductible unless actually paid); *see County of Tulare v. Campbell (1996) 50 Cal. App. 4th 847, 57 Cal. Rptr. 2d 902* (despite provisions of *Fam. Code § 4057.5*, when parent has remarried and is filing joint tax returns, trial court may properly consider couple's combined gross income for limited purpose of determining parent's actual tax liability); *see also In re Marriage of Drake (1997) 53 Cal. App. 4th 1139, 1163, 62 Cal. Rptr. 2d 466* ; *In re Marriage of Carlsen (1996) 50 Cal. App. 4th 212, 218-219, 57 Cal. Rptr. 2d 630*)];

(2) Deductions attributed to the employee's contribution or the self-employed worker's contribution under the Federal Insurance Contributions Act (FICA), or an amount not to exceed that allowed under FICA for persons not subject to FICA, as long as the deducted amount is used to secure retirement or disability benefits for the parent;

(3) Deductions for mandatory union dues and retirement benefits, if they are required as a condition of employment;

(4) Deductions for health insurance or health plan premiums for the parent and for any children that the parent has an obligation to support and deductions for state disability insurance premiums;

(5) Any child or spousal support actually being paid by the parent under a court order, to or for the benefit of any person who is not a subject of the child support order to be established by the court (i.e., for children of previous relationships and former spouses); In the absence of a court order, any child support actually being paid, not to exceed the amount established by the guideline, for natural or adopted children of the parent who are not residing in that parent's home, who are not the subject of the order to be established by the court, and of whom the parent has a duty of support;

(6) Job-related expenses, if allowed by the court after consideration of whether the expenses are necessary, the benefit to the employee, and any other relevant facts [*see Stewart v. Gomez (1996) 47 Cal. App. 4th 1748, 1755, 55 Cal. Rptr. 2d 531* (meal allowance paid by vocational training program should not be treated as deduction)];

(7) A deduction for hardship, as defined by *Fam. Code § 4070 et seq.* and applicable published appellate court decisions (*§ 224.105[3]*).

[3] Hardship Deduction

If a parent is experiencing extreme financial hardship due to justifiable expenses resulting from certain statutorily enumerated circumstances [*see Fam. Code § 4071*], the court may allow certain income deductions to accommodate those circumstances [*Fam. Code §§ 4059(g), 4070*]. A hardship deduction is not a deduction from child support, but from gross income as used in the formula to compute child support [*Fam. Code § 4059(g)*].

Circumstances evidencing hardship include extraordinary health expenses for which a parent is financially responsible, and uninsured catastrophic losses [*Fam. Code § 4071(a)(1)*]. Also included are the minimum basic living expenses of either parent's natural or adopted children from other marriages or relationships for whom the parent has the obligation to support and who reside with the parent [*Fam. Code § 4071(a)(2)*]. The court, on its own motion or on a party's request, may allow these income deductions as necessary to accomodate the living expenses after making the health and catastrophe deductions provided for under *Fam. Code § 4071(a)(1)* [*Fam. Code § 4071(a)(2)*].

The hardship deduction is available only with regard to the factors specifically listed in *Fam. Code § 4071* [*Fam. Code §§ 4059(g), 4070*; *see County of San Diego v. Sierra (1990) 217 Cal. App. 3d 126, 132, 265 Cal. Rptr. 749* (construing substantially equivalent prior law)]. It has been held that a parent's business losses do not constitute financial hardship within the meaning of the statute [*In re Marriage of Norvall (1987) 192 Cal. App. 3d 1047, 1055-1057, 237 Cal. Rptr 770* (construing substantially equivalent prior law)]. Also, the statute does not permit a hardship deduction for expected back tax liability [*In re Marriage of McQuoid (1991) 9 Cal. App. 4th 1353, 1359-1360, 12 Cal. Rptr 2d 737* (construing substantially equivalent prior law)], or for a parent's voluntary support of his or her own parents and siblings [*In re Marriage of Butler & Gill (1997) 53 Cal. App. 4th 462, 466, 61 Cal. Rptr. 2d 781* (involving voluntary support of elderly parent); *County of San Diego v. Sierra (1990) 217 Cal. App. 3d 126, 132, 265 Cal. Rptr. 749* (construing substantially equivalent prior law)], or stepchildren [*Haggard v. Haggard (1995) 38 Cal. App. 4th 1566, 1570-1571, 45 Cal. Rptr. 2d 638]* . However, certain of these otherwise unrecognized factors may possibly constitute special circumstances rebutting the presumption that the formula amount of support is the correct amount under *Fam. Code § 4057(b)(5)* [*see County of Lake v. Antoni (1993) 18 Cal. App. 4th 1102, 1105, 22 Cal. Rptr. 2d 804* ; *cf. Haggard v. Haggard (1995) 38 Cal. App. 4th 1566, 1570-1571, 45 Cal. Rptr. 2d 638* ; *but see In re Marriage of Butler & Gill*

(1997) 53 Cal. App. 4th 462, 466-469, 61 Cal. Rptr. 2d 781 (father's support of his elderly mother was not "special circumstance")].

If deductions for hardship expenses are allowed, the court must state in writing or on the record the reasons supporting the deductions, documenting the underlying facts and circumstances and setting forth the amount of deductions allowed. Whenever possible, the court must specify the duration that any deduction will be in effect [*Fam. Code § 4072*; *In re Marriage of Paulin (1996) 46 Cal. App. 4th 1378, 1382, 54 Cal. Rptr. 2d 314]* . In considering whether to allow a hardship deduction, and in determining the amount of any such deduction, the court must be guided by the goals set forth in the expression of legislative intent in with regard to the guideline [*Fam. Code § 4073*; *see § 224.102*].

PRACTICE TIP:

Counsel and trial courts sometimes are careless about making a specific finding of "extreme financial hardship" before calculating and subtracting a hardship deduction. As the court points out in *Paulin*, "... a hardship deduction is not a foregone conclusion on the birth of new children; ..." [*In re Marriage of Paulin (1996) 46 Cal. App. 4th 1378, 1382, 54 Cal. Rptr. 2d 314]* . Sometimes, as in *Paulin*, the court of appeal may find facts in the record to support such a finding, but this cannot be counted on [*In re Marriage of Carlsen (1996) 50 Cal. App. 4th 212, 218, 57 Cal. Rptr. 2d 630]* . Counsel requesting a hardship deduction should be careful to obtain an oral finding by the court on the record as required by the statute.

In applying a hardship deduction for children of other relationships who reside with the parent [*see Fam. Code § 4071(a)(2)*], the court must seek equity between competing child support orders [*Fam. Code § 4059(g)*]. The maximum hardship deduction for each such child may be equal to, but may not exceed, the support awarded to each child subject to the order [*Fam. Code § 4071(b)*]. For purposes of calculating this deduction, the amount of support per child established under the guideline is the total amount ordered divided by the number of children, and not the scaled amount under the multi-child multiplier factor in *Fam. Code § 4055(b)(8)* [*Fam. Code § 4071(b)*].

The Judicial Council may develop tables to reflect the maximum hardship deduction [*Fam. Code § 4071(c)*]. The Judicial Council also must develop a formula for calculating the maximum hardship deduction and submit it to the legislature for consideration on or before July 1, 1995 [*Fam. Code § 4059(g)*].

Note that under former *Fam. Code § 4071.5*, no hardship was deemed to exist and no deduction from income could be granted if aid payments were being made under certain public assistance provisions on behalf of a child or children of the parent seeking the deduction, even if the payments were being received by the other parent. The constitutionality of this statute had become the subject of a split of authority within California appellate courts [*see, e.g.,* *City and County of San Francisco v. Freeman (1999) 71 Cal. App. 4th 869, 84 Cal. Rptr. 2d 132* ; *City and County of San Francisco v. Garnett (1999) 70 Cal. App. 4th 845, 82 Cal. Rptr. 2d 924* ; *Moreno v. Draper (1999) 70 Cal. App. 4th 886, 83 Cal. Rptr. 2d 82* ; *County of Orange v. Ivansco (1998) 67 Cal. App. 4th 328, 78 Cal. Rptr. 2d 886]* . However, the statute was repealed, operative January 1, 2000.

[4] Annual Averaging and Seasonal Adjustments

A parent's annual net disposable income must be divided by 12 to reflect the monthly net disposable income. If the monthly net-income figure does not accurately reflect the actual or prospective earnings of the parties at the time the determination of support is made, the court may adjust the amount appropriately [*Fam. Code § 4060*]. The court may also adjust the child support order as appropriate to accommodate seasonal or fluctuating income of either parent [*Fam. Code § 4064*]. For example, under these provisions a court may consider bonuses that a parent receives [*see Fam. Code § 4058(a)(1)* (bonuses are part of parent's gross income)] when it appears likely the bonuses will continue [*M.S. v. O.S. (2009) 176 Cal. App. 4th 548, 554-557, 97 Cal. Rptr. 3d 812* (employee parent can petition for modification of child support order if bonuses do *not* continue)].

The guideline formula does not permit one parent's income to be a fluctuating variable while the other parent's income is assumed to be static [*In re Marriage of Hall (2000) 81 Cal. App. 4th 313, 317, 96 Cal. Rptr. 2d 772]* . The formula is predicated on knowing what both parents' income is in nominal status dollars at the time the order is made [*In re Marriage of Hall (2000) 81 Cal. App. 4th 313, 317-318*]. This is not to say that the court cannot make an order that accounts for the seasonal or fluctuating income of either parent; it can under *Fam. Code § 4064*. Such an order cannot be called the "guideline" amount, however, under *Fam. Code § 4055* [*In re Marriage of Hall (2000) 81 Cal. App. 4th 313, 318 fn. 3, 96 Cal. Rptr. 2d 772]* .

[5] Earning Capacity

Earning capacity refers to what a parent *could* earn, rather than what he or she actually is earning. The California Supreme Court has defined earning capacity as the income that a spouse is reasonably capable of earning based on his or her age, health, education, marketable skills, employment history, and the availability of employment opportunities [*In re Marriage of Simpson (1992) 4 Cal. 4th 225, 234, 14 Cal. Rptr. 2d 411, 841 P.2d 931]* . In addition, earning capacity may be based on income that could be derived from income-producing assets, such as rental property [*Mejia v. Reed (2003) 31 Cal. 4th 657, 671, 3 Cal. Rptr. 3d 390, 74 P.3d 166* (court may take into account earnings from invested assets in computing child support); *In re Marriage of Williams (2007) 150 Cal. App. 4th 1221, 1235, 58 Cal. Rptr. 877* (under earning capacity doctrine court has discretion to impute reasonable rate of return on supporting parent's underutilized or non-income-producing investment assets in order to calculate guideline child support in best interests of child); *In re Marriage of Dacumos (1999) 76 Cal. App. 4th 150, 90 Cal. Rptr. 2d 159* (court properly imputed rental income to husband, based on both fair market rental value of husband's properties and his equity in those properties)].

Under the statewide uniform guideline, the court may, in its discretion, consider the earning capacity of a parent in lieu of that parent's income, if consistent with the best interests of the child [*Fam. Code § 4058(b)*; *Stewart v. Gomez (1996) 47 Cal. App. 4th 1748, 1753, 55 Cal. Rptr. 2d 531* ("in lieu of" language in statute does not preclude considering capacity to earn a wage while party is receiving disability benefits in appropriate case); *see Fam. Code § 4057.5(b)* (earning capacity with regard to consideration of income of subsequent spouse or partner), discussed in *§ 224.105[6]*]. Earning capacity may even be based on non-income producing assets, such as real estate investment property acquired for long-term capital growth, by imputing a hypothetical rate of return to the assets [*In re Marriage of Destein (2001) 91 Cal. App. 4th 1385, 1391-1394, 111 Cal. Rptr. 2d 487* ; *see In re Marriage of Williams (2007) 150 Cal. App. 4th 1221, 1236, 58 Cal. Rptr. 877* (court attributed assumed 3 percent rate of return on obligor's investment assets in calculating child support); *In re Marriage of De Guigne (2002) 97 Cal. App. 4th 1353, 1362-1364, 119 Cal. Rptr. 2d 430* (enhanced child support based on value of inherited ancestral estate); *In re Marriage of Cheriton (2001) 92 Cal. App. 4th 269, 288-289, 111 Cal. Rptr. 2d 755* (enhanced child support based on receipt of stock options)]. Under *Fam. Code § 4058(b)*, a court may also impute interest income that reasonably could have been earned but that was not actually earned [*Brothers v. Kern (2007) 154 Cal. App. 4th 126, 131, 64 Cal. Rptr. 3d 239* (statute does not exclude capacity to earn interest from "earning capacity," for example, by limiting that term to capacity to earn wages)].

By this provision, the guideline restores the discretionary earning-capacity standard that predated the Agnos Child Support Standards Act of 1984, which was construed as making consideration of earning capacity mandatory [*County of Yolo v. Garcia (1993) 20 Cal. App. 4th 1771, 1782, 25 Cal. Rptr. 2d 681* ; *see* former *Civ. Code § 4721(a)* (providing that court *shall* consider earning capacity of both parents to extent consistent with best interests of children); *In re Marriage of Regnery (1989) 214 Cal. App. 3d 1367, 1371, 263 Cal. Rptr. 243* (and cases cited therein); *see also In re Marriage of Nolte (1987) 191 Cal. App. 3d 966, 973, 236 Cal. Rptr. 706* (construing Agnos Act as changing prior rule)]. However, the guideline does not provide for when earning capacity should be considered, other than through the general charge that it must be in the best interests of the child [*In re Marriage of Simpson (1992) 4 Cal. 4th 225, 231 n.3, 14 Cal. Rptr. 2d 411, 841 P.2d 931]* .

Prior case law has not been consistent in applying an earning-capacity standard. One line of cases has followed the

so-called *Philbin* rule [*see* *Philbin v. Philbin (1971) 19 Cal. App. 3d 115, 96 Cal. Rptr. 408* ; *see* *In re Marriage of Padilla (1995) 38 Cal. App. 4th 1212, 1216-1217, 45 Cal. Rptr. 2d 555* (revisiting *Philbin* and determining that it never required rule bearing its name)], in which it was held that reliance on earning capacity is warranted only if it appears that there has been a deliberate attempt to avoid financial family responsibilities by refusing to seek or accept gainful employment [*Philbin v. Philbin (1971) 19 Cal. App. 3d 115, 121, 96 Cal. Rptr. 408* ; *see* *County of Yolo v. Garcia (1993) 20 Cal. App. 4th 1771, 1781, 25 Cal. Rptr. 2d 681* (refusing to impute earning capacity at minimum wage to AFDC recipient parent because there was no evidence that she was shirking work); *In re Marriage of Meegan (1992) 11 Cal. App. 4th 156, 163, 13 Cal. Rptr. 2d 799* (spousal support only)]. Under this rule, willful avoidance has been considered a condition precedent to applying earning capacity in all cases. Quitting a high paying job is insufficient, alone, to impose the standard absent evidence that the parent's intent was to avoid financial responsibility [*In re Marriage of Williams (1984) 155 Cal. App. 3d 57, 62-63, 202 Cal. Rptr. 10]* .

Relying on the changes to the child support statute discussed above, appellate decisions began in 1993 to affirm decisions imputing income to parents without regard to their subjective motivation for reducing available income, looking instead to the payor's objective ability and opportunity to earn [*In re Marriage of Hinman (1997) 55 Cal. App. 4th 988, 998-999, 64 Cal. Rptr. 2d 383* ; *see* *In re Marriage of LaBass & Munsee (1997) 56 Cal. App. 4th 1331, 1338, 1338 n.2, 66 Cal. Rptr. 2d 393]* . In a case dealing with enforcement of a child support order through contempt, the California Supreme Court approved this line of cases and specifically found that trial courts have discretion to consider earning capacity in all cases in which it is in the child's best interest to do so [*Moss v. Superior Court (1998) 17 Cal. 4th 396, 424, 950 P.2d 59* ; *cf.* *United States v. Ballek (9th Cir. 1999) 170 F.3d 871, 875* (citing *Moss* on involuntary servitude issue)]. Under the more recent approach taken by the courts, imputed income is not limited to cases of bad faith failure to earn, because such a limitation would conflict with the law's policy of making the child's best interests the leading consideration in child support cases [*Brothers v. Kern (2007) 154 Cal. App. 4th 126, 132, 64 Cal. Rptr. 3d 239*].

In considering earning capacity cases in the future, courts should be expected to continue to look to a three-prong test that was first advanced in *In re Marriage of Regnery (1989) 214 Cal. App. 3d 1367, 1372, 263 Cal. Rptr. 243* , although it was not discussed or cited in *Moss* [*see, e.g.,* *In re Marriage of Berger (2009) 170 Cal. App. 4th 1070, 1079-1080, 88 Cal. Rptr. 3d 766* ; *In re Marriage of LaBass & Munsee (1997) 56 Cal. App. 4th 1331, 1337-1338, 1338 n.2, 66 Cal. Rptr. 2d 393* ; *In re Marriage of Hinman (1997) 55 Cal. App. 4th 988, 995, 64 Cal. Rptr. 2d 383* ; *In re Marriage of Paulin (1996) 46 Cal. App. 4th 1378, 1383, 54 Cal. Rptr. 2d 314* ; *In re Marriage of Padilla (1995) 38 Cal. App. 4th 1212, 1217-1219, 45 Cal. Rptr. 2d 555* ; *In re Marriage of Ilas (1993) 12 Cal. App. 4th 1630, 1634-1639, 16 Cal. Rptr. 2d 345]* . Under this test, earning capacity is composed of (1) the ability to work, including factors such as age, occupation, skills, education, health, background, work experience and qualifications; (2) the willingness to work, shown by good-faith efforts, due diligence, and meaningful attempts to secure employment; and (3) the opportunity to work, shown by an employer willing to hire [*In re Marriage of Regnery (1989) 214 Cal. App. 3d 1367, 1372, 263 Cal. Rptr. 243* (construing Agnos Act)]. When the first and third factors (ability and opportunity to work) are present, but the payor is unwilling to work, the court held it was appropriate to apply the earning capacity standard to "deter the shirking of one's family obligations" [*In re Marriage of Regnery (1989) 214 Cal. App. 3d 1367, 1373, 263 Cal. Rptr. 243* (construing Agnos Act)].

In exercising its discretion to consider earning capacity under the *Regnery* standard, the court may consider all relevant circumstances, and take into account arguments concerning the payor's motivations or the reasonableness of the payor's actions in light of all of the relevant circumstances [*In re Marriage of Hinman (1997) 55 Cal. App. 4th 988, 999, 64 Cal. Rptr. 2d 383]* . Thus, for example, if an obligor does not have an opportunity to work because he or she is incarcerated, the earning capacity test is not satisfied and cannot be used to determine child support payments [*El Dorado County Dept. of Child Support Services v. Nutt (2008) 167 Cal. App. 4th 990, 993, 84 Cal. Rptr. 3d 523* ; *In re Marriage of Smith (2001) 90 Cal. App. 4th 74, 77, 108 Cal. Rptr. 2d 537* ; *State of Oregon v. Vargas (1999) 70 Cal. App. 4th 1123, 1127, 83 Cal. Rptr. 2d 229]* . Furthermore, if a supporting parent wants to change careers, he or she may only do so if there are other means to pay support at the level commensurate with past income [*In re Marriage of Ilas*

(1993) 12 Cal. App. 4th 1630, 1639, 16 Cal. Rptr. 2d 345] . As stated by one court, once persons become parents, their desires for self-realization, self-fulfillment, personal job satisfaction, and other commendable goals must be considered in the context of their responsibilities to provide for their children's reasonable needs. If they wish to lead a simpler life, change professions, or start a business, they may do so, but only if they satisfy their primary responsibility to provide for their children [*In re Marriage of Padilla (1995) 38 Cal. App. 4th 1212, 1220, 45 Cal. Rptr. 2d 555]* .

Conversely, a parent might be acting entirely in bad faith, but earning capacity would not necessarily be shown. If either ability to work or opportunity to work is lacking, earning capacity is absent, and the application of the standard is inappropriate [*In re Marriage of Regnery (1989) 214 Cal. App. 3d 1367, 1373, 263 Cal. Rptr. 243* (construing Agnos Act); *see State of Oregon v. Vargas (1999) 70 Cal. App. 4th 1123, 1127, 83 Cal. Rptr. 2d 229]* . However, the opportunity to work is not limited to the parent's chosen or preferred occupation, but extends to any job opportunity that will allow the parent to pay child support [*In re Marriage of Regnery (1989) 214 Cal. App. 3d 1367, 1376, 263 Cal. Rptr. 243* (construing Agnos Act)].

Earning capacity generally may not be based on an extraordinary work regimen. Instead, it must be based on an objectively reasonable work schedule as it would exist at the time when the determination is made. A reasonable regimen is dependent on all relevant circumstances, including the choice of jobs available within a particular occupation, working hours, and working conditions. Established employment norms such as the 40-hour work week are not controlling, but are pertinent to the determination [*In re Marriage of Simpson (1992) 4 Cal. 4th 225, 236, 14 Cal. Rptr. 2d 411, 841 P.2d 931* ; *cf. County of Placer v. Andrade (1997) 55 Cal. App. 4th 1393, 1396-1397, 64 Cal. Rptr. 2d 739* (discussing propriety of considering bonus and overtime pay)].

The amounts asserted for earning capacity must have some tangible evidentiary foundation [*see In re Marriage of Graham (2003) 109 Cal. App. 4th 1321, 1327-1328, 135 Cal. Rptr. 2d 685* (evidence did not support hourly rate court used to impute income)].

Earning capacity may not be considered as a way of circumventing the exclusion of certain public assistance benefits from income for child support purposes under *Fam. Code § 4058(c)*. Furthermore, at least one case has held that a parent-recipient of such benefits who chooses not to work in order to remain in the home with young children cannot be ordered to pay child support with regard to other children based on what he or she could have earned had he or she chosen to work [*County of Yolo v. Garcia (1993) 20 Cal. App. 4th 1771, 1776-1780, 25 Cal. Rptr. 2d 681* (involving county action for reimbursement of foster care costs related to one child of mother who remained in home with other children)]. Such an order is in violation of the policy expressed in the eligibility requirements of that particular benefit program (the former AFDC program), that single parents of very young children are exempt from work registration requirements [*County of Yolo v. Garcia (1993) 20 Cal. App. 4th 1771, 1777-1778* ; *see Welf. & Inst. Code § 11320.3(b)(6)*]. Whether that holding can be applied to parents receiving benefits under the successor program to AFDC is presently unclear.

Another earning-capacity issue is whether a trial court may impute additional income to a self-employed parent whose past earnings substantially exceeded current earnings. Some appellate courts have imputed additional income in that situation, even if the supporting parent did not act in bad faith in engaging in a lesser-paying occupation. For example, in one case, the *Philbin* rule was dismissed as incorrect and inapplicable dicta (because bad faith was not even addressed there) and income was imputed to the parent in setting child support, despite the fact that the trial judge found that there was no bad faith in his leaving a higher paying position to open his own lower-paying business. The appellate court in that case also noted, in dictum, that a former income level should not always be imputed to a parent who leaves a high-paying job for one paying less, if the child's reasonable needs are satisfied, but that dictum has in turn been criticized as reviving a pre-Guideline, and now-abandoned, construct. The *Philbin* rule or dictum, nonetheless, appears to have been laid to rest in such cases [*see In re Marriage of Padilla (1995) 38 Cal. App. 4th 1212, 1217-1219, 45 Cal. Rptr. 2d 555* ; *In re Marriage of Ilas (1993) 12 Cal. App. 4th 1630, 1634-1639, 16 Cal. Rptr. 2d 345* ; *see also* 1995 Cal. Fam. Law Monthly 320-321, December 1995 (Matthew Bender), commentary of Grace Ganz Blumberg and Hon.

Roderic Duncan].

Two somewhat older decisions that are still sometimes cited in support of the *Philbin* rule are *In re Marriage of Williams* and *In re Marriage of Everett* [*see In re Marriage of Williams (1984) 155 Cal. App. 3d 57, 202 Cal. Rptr. 10* ; *In re Marriage of Everett (1990) 220 Cal. App. 3d 846, 269 Cal. Rptr. 917]* . *Williams* is distinguished as having been decided before the enactment of the predecessor of *Fam. Code § 4058(b)* [*see In re Marriage of Ilas (1993) 12 Cal. App. 4th 1630, 1638, 16 Cal. Rptr. 2d 345]* . *Everett* is distinguished by the fact that it had been 12 years since the father had held the prior job and in the interim he had recovered from drinking problems. The trial court held it was not in the children's best interests to impute a higher income [*see In re Marriage of Everett (1990) 220 Cal. App. 3d 846, 862, 269 Cal. Rptr. 917]* .

[6] Income of Subsequent Spouse or Nonmarital Partner

Under *Fam. Code § 4057.5*, the income of a parent's subsequent spouse or nonmarital partner may not be considered in determining or modifying child support, except in an extraordinary case in which excluding that income would lead to extreme and severe hardship to any child subject to the child support order. If the court finds extreme and severe hardship, it must also consider whether including the income would lead to extreme and severe hardship to any other child supported by the parent or by the parent's subsequent spouse or nonmarital partner [*Fam. Code § 4057.5(a)*]. An extraordinary case may include a parent who voluntarily or intentionally quits work or reduces income, or who intentionally remains unemployed or underemployed and relies on a subsequent spouse's income [*Fam. Code § 4057.5(b)*; *§ 224.105[5]*]. An uncodified section of this legislation expressed the Legislature's intent to prohibit the use of any formula or local court guideline in considering new-mate income [*see* Stats. 1994, ch. 1140, § 3].

A court can consider the subsequent spouse's income *only* if the child would suffer extreme and severe hardship. It must look to the needs of the child, not the needs or conduct of the parents [*In re Marriage of Knowles (2009) 178 Cal. App. 4th 35, 41, 100 Cal. Rptr. 3d 199]* .

Although under *Fam. Code § 4008* the obligor parent's community interest in the subsequent spouse's income may be looked to in *discharge* of his or her child support obligation, a court may not consider the subsequent spouse's community income in *calculating* the child support obligation [*In re Marriage of Knowles (2009) 178 Cal. App. 4th 35, 41, 100 Cal. Rptr. 3d 199]* . *Fam. Code § 4057.5* prohibits use of the community income attributable to the subsequent spouse, whether the income is earned or is a return on investment, in calculating the child support obligation [*In re Marriage of Knowles (2009) 178 Cal. App. 4th 35, 41-42, 100 Cal. Rptr. 3d 199]* .

The statute treats both the obligor parent and obligee parent the same [*see Fam. Code § 4057.5(a)(1),(2)*], which may be constitutionally required [*see In re Marriage of Dade (1991) 230 Cal. App. 3d 621, 630-633, 281 Cal. Rptr. 609* (finding prior law on subsequent spouse or partner income constitutional by construing it as permitting consideration with regard to either parent)].

Although a court may not generally consider the income of a parent's new spouse or nonmarital partner in determining the amount of child support, a court may do so for the limited purpose of determining a parent's actual tax liability under *Fam. Code § 4059*. This tax liability may then be taken into account in determining the parent's real net disposable income [*In re Marriage of Drake (1997) 53 Cal. App. 4th 1139, 1163, 62 Cal. Rptr. 2d 466* ; *County of Tulare v. Campbell (1996) 50 Cal. App. 4th 847, 856, 57 Cal. Rptr. 2d 902* ; *In re Marriage of Carlsen (1996) 50 Cal. App. 4th 212, 218-219, 57 Cal. Rptr. 2d 630]* . As explained in *County of Tulare v. Campbell*, which involved the inclusion of the income of a supporting (obligor) parent's new spouse--who filed a joint tax return with the parent--the parent's deduction for tax liability is calculated as follows: (1) the incomes of the parent and new spouse are combined to obtain an adjusted gross income, (2) the couple's tax liability on the adjusted gross income is calculated, and (3) the tax liability is apportioned between the parent and the new spouse "in direct proportion to their respective gross incomes." Thus, the actual tax liability of the parent, not the couple's total tax bill, is deducted from the parent's gross income [

County of Tulare v. Campbell (1996) 50 Cal. App. 4th 847, 856, 57 Cal. Rptr. 2d 902] .

If any portion of the income of either parent's subsequent spouse or nonmarital partner is allowed to be considered, discovery for the purposes of determining income must be based on W-2 and 1099 income tax forms, unless the court determines that application would be unjust or inappropriate [*Fam. Code § 4057.5(c)*]. Also, the court must allow a hardship deduction based on the minimum living expenses for one or more stepchildren of the party subject to the order [*Fam. Code § 4057.5(d)*; *see § 224.105[3]*]. *Fam. Code § 4057.5* was enacted by 1993 legislation, operative January 1, 1994 [*see* Stats. 1993, ch. 935, § 2]. Its enactment constitutes cause to bring a motion for modification of a child support order entered before that date [*Fam. Code § 4057.5(e)*; *see § 224.170* et seq.].

Previously, the guideline treated subsequent spouse or partner income as a rebuttal factor, focused not on the amount of the income, but on its effect on the financial condition of the parent. The court could raise or lower the amount of support if either parent's subsequent spouse or nonmarital partner had income that helped meet that parent's basic living expenses, thereby increasing the parent's disposable income available to spend on the children [*see* former *Fam. Code § 4057(b)(3)*; *In re Marriage of Tapia (1989) 211 Cal. App. 3d 628, 630-632, 259 Cal. Rptr. 459* ; *see also Harris v. Superior Court (1992) 3 Cal. App. 4th 661, 667-668, 4 Cal. Rptr. 2d 564]* .

Also under case law predating the guideline, a custodial parent's remarriage, alone, was not a change of circumstance justifying a modification of child support [*Burns v. Burns (1961) 190 Cal. App. 2d 714, 715-716, 12 Cal. Rptr. 68]* , but the remarried parent's acquisition of a community property interest in the earnings and property of the subsequent spouse was a change of circumstances [*see In re Marriage of Havens (1981) 125 Cal. App. 3d 1012, 1014-1015, 178 Cal. Rptr. 477* (court may not impose sole burden of support on noncustodial parent after custodial parent acquires community property interest in income of subsequent spouse)]. Conceptually, it might still be argued that a parent's community property interest in the earnings of a subsequent spouse is the income of the parent and not the income of the spouse that is excluded from consideration under *Fam. Code § 4057.5*. However, in the absence of marriage, there is no new community, so any such approach would not apply equally to subsequent spouses and nonmarital partners [*see In re Marriage of Tapia (1989) 211 Cal. App. 3d 628, 630-632, 259 Cal. Rptr. 459]* .

Legal Topics:

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§ 224.106 Factor to Reflect Custodial Time

[1] Operation of H Factor

The child support formula set forth in *Fam. Code § 4055(a)* (*see § 224.104*) does not distinguish between custodial and noncustodial parents, but rather between higher-earning and lower-earning parents [*see Fam. Code § 4055(a),(b)(1)*]. The effect of the parents' custodial plan is controlled by formula factor H, which represents the approximate percentage of time that the higher earner has or will have primary physical responsibility for the children compared to the other parent [*see Fam. Code § 4055(b)(1)(D)*; *In re Marriage of Katzberg (2001) 88 Cal. App. 4th 974, 981-983, 106 Cal. Rptr. 2d 157* (child's time at boarding school imputed to parent with primary physical responsibility for child)]. The H factor adjusts child support according to the respective amounts of time that each parent has physical custody of the children. In cases in which parents have different time-sharing arrangements for different children, H must be the average of the approximate percentages of time that the higher earner spends with each child [*Fam. Code § 4055(b)(1)(D)*].

The H factor comes into play in two places in the formula. First, the high earner's income is reduced by the amount of total parental income that corresponds to H percent [*see Fam. Code § 4055(a)*]. Here, the H factor reduces child support because it is presumed that parents' spend their own funds on children proportionate to their custodial time (the time-share reduction) [*see Fam. Code § 4057(b)(4)* (rebuttal factor if parent is not contributing to needs of children at level commensurate with custodial time)]. The H factor is also a component in determining formula component K, the percentage of both parents' income that is allocated to child support. After the base figure for K percent is computed, it is multiplied by 1 plus H percent (if H is less than or equal to 50 percent) or 2 minus H percent (if H is greater than 50 percent) [*Fam. Code § 4055(b)(3)*]. Here, the H factor increases child support.

[2] When H Must Be Zero or 100

In any default proceeding in which proof is by affidavit [*see Fam. Code § 2336*], or in any proceeding for child support in which a party fails to appear after being duly noticed, H percent must be set at zero in the formula if the higher earner is the noncustodial parent or at 100 if the higher earner is the custodial parent ["Noncustodial" and "custodial" are

undefined in the guideline, but presumably for this purpose, a noncustodial parent is one with less than 50 percent primary physical responsibility for the child and a custodial parent is one with more than 50 percent] if there is no evidence presented demonstrating the percentage of time that the noncustodial parent has physical custody of the children [*Fam. Code § 4055(b)(6)*].

H is not set in this manner, however, if the moving party in a *default* proceeding is the noncustodial parent or if the party who fails to appear after being duly noticed is the custodial parent. A statement by the party not in default as to the percentage of time the noncustodial parent has primary physical responsibility for the children is deemed sufficient evidence [*Fam. Code § 4055(b)(6)*].

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§ 224.107 Income Level Adjustment Factor K

Formula factor K represents the percentage of parental income that is to be allocated to child support [*Fam. Code § 4055(b)(1)(B)*]. K is multiplied by the higher earner's income (after making the time-share reduction, as discussed in *§ 224.106[1]*) to find the amount of child support that is to be paid by one parent to the other. The guideline is based further on the assumption that the *obligee* parent will also spend K percent of his or her income for the benefit of the children [*see Fam. Code § 4053(i)*]. Thus, the K factor determines what percentage of *total parental income* is to be allocated to the children.

The base K brackets are as follows [*Fam. Code § 4055(b)(3)*]:

Total Net Disposable Monthly Income	K
$0-800	0.20 + TN/16,000
$801-6,666	0.25
$6,667-10,000	0.10 + 1000/TN
Over $10,000	0.12 + 800/TN

The base K bracket amount is multiplied by either 1 + H, if H is less than or equal to 50 percent (that is, if the higher earner has less actual physical custodial time than the lower earner) or by 2 - H, if H is greater than 50 percent (that is, if the higher earner has more actual physical custodial time than the lower earner) [*Fam. Code § 4055(b)(3)*].

For example, if H equals 20 percent and the total monthly net disposable income of the parents is $1,000, K = (1 + 0.20) x 0.25; K = 0.30. If H equals 80 percent and the total monthly net disposable income of the parents is $1,000, K = (2 - 0.80) x 0.25; K = 0.30 [*Fam. Code § 4055(b)(3)*]. The H-increase multiplier may go as high as 1.5 if both parents have primary physical responsibility for the child approximately 50 percent of the time (H = 50 percent).

Although the statute sets forth four income brackets for base K [*Fam. Code § 4055(b)(3)*], K is actually a sliding scale for total parental income up to $800 and as total parental income increases over $6,666. Only in the bracket for income in the range between $801 and $6,667 (at which base K is 0.25) does K remain constant no matter what the income level is within the bracket. In the low bracket, the total parental income (TN) is a component of the numerator of the fraction that determines K percent. Thus, as TN increases within this bracket, K increases correspondingly, and child support goes up. In all other brackets, TN is a component of the denominator of the fraction that determines K percent. In these brackets, K decreases as TN increases. That does not mean that the dollar amount of child support decreases; only that the percentage of TN allocated to children decreases. The incremental increases in child support are more gradual as total parental income rises over $6,666.

Legal Topics:

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§ 224.108 Determining Who Is Obligor

The guideline formula [*Fam. Code § 4055(a)*; *§ 224.104*] operates from the logical starting point that if both parents had exactly equal income and a 50/50 time share, neither would pay any child support to the other. One parent becomes the obligor and the other parent the obligee under the formula according to the operation of disparities in their income and custodial time-sharing.

If the amount calculated under the formula results in a positive number, the higher earner pays that amount to the lower earner. If the amount calculated under the formula results in a negative number, the lower earner pays the absolute value of that amount to the higher earner [*Fam. Code § 4055(b)(5)*]. Absolute value means the dollar amount, disregarding the minus sign [*see* Webster's Ninth New Collegiate Dictionary 46 (Merriam-Webster 1988)].

A negative number will result if the higher earner's percentage of total parental income is less than his or her H factor (custodial time). For example, suppose a mother has $3,000 net monthly income (HN = 3000) and 80 percent physical custody (H = 0.8). Father has $2,000 net monthly income (TN = 5000) and 20 percent custody. Because the mother is the higher earner, the formula works off of her income and H factor, even though she is the "custodial" parent. The mother's HN ($3,000) is actually 0.6(TN). Thus:

CS = K [0.6(TN) - 0.8(TN)]

Because 0.8 times TN must be greater than 0.6 times TN, the formula will generate a negative number, and the father will pay the child support to the mother.

As seen from this example, a negative number can occur only if the higher earner is the primary custodial parent. As long as H is less than 0.5, there can never be a negative number because HN will always be greater than 0.5 of TN.

The formula does not always keep the child support obligation on the "noncustodial" parent, that is, the parent whose physical custodial time is less than half (H < 0.5). If the higher earner is a custodial parent but has income that is a

higher percentage of the parents' total income than the H factor, a positive number will result and the "custodial" higher earner will pay child support to the lower earner.

For example, say father has $4,000 net monthly income (HN = 4000) and 60 percent physical custody (H = 0.6). Mother has $1,000 net monthly income (TN = 5,000) and 40 percent physical custody. Dad's 4000 HN is also 0.8(TN). This time:

CS = K [0.8(TN) - 0.6(TN)]

Because 0.8 of TN must be greater than 0.6 of TN, the formula will generate a positive number and the father will pay the child support to the mother, even though he has more custodial time.

The above examples demonstrate the following principle of the formula: if HN/TN >> H, then the higher earner is the obligor; if HN/TN < H, then the lower earner is the obligor. In other words, if the higher earner's percentage share of the parents' total net monthly income is greater than his or her custodial time-share percentage, then he or she will pay the child support [*see, e.g., In re Marriage of Carter (1994) 26 Cal. App. 4th 1024, 1028, 33 Cal. Rptr. 2d 1* (mother with 50 percent of custodial time and approximately 60 percent of total income owed support to father)]. If the higher earner's time share is greater than his or her percent of total net monthly income, then he or she will receive the child support.

Legal Topics:

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§ 224.109 Adjustment Factor for More Than One Child

If more than one child is to be supported, the amount of child support under the guideline is not determined merely by multiplying the number of children times the amount of support for one child. Instead, the amount of support for one child under the guideline is multiplied by the following applicable factor [*Fam. Code § 4055(b)(4)*]:

2 children	1.6
3 children	2
4 children	2.3
5 children	2.5
6 children	2.625
7 children	2.75
8 children	2.813
9 children	2.844
10 children	2.86

Unless the court orders otherwise or unless there are different time-sharing arrangements for different children, the order must allocate the support amount so that the amount of support for the youngest child is the amount of support for one child, and the amount for the next youngest child is the difference between that amount and the amount for two children, with similar allocations for additional children [*Fam. Code § 4055(b)(8)*]. This provision does not apply to cases in which there are different time sharing arrangements for different children or in which the court determines that the allocation would be inappropriate in a particular case [*Fam. Code § 4055(b)(8)*].

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§ 224.110 Low-Income Adjustment

When the obligor's net disposable income per month is less than $1,000, there is a rebuttable presumption that the obligor is entitled to a low-income adjustment. The presumption may be rebutted by evidence showing that the application of the low-income adjustment would be unjust and inappropriate in the particular case. In determining whether the presumption is rebutted, the court must consider the principles underlying the guideline [*see Fam. Code § 4053*, discussed in *§ 224.102*], and the impact of the contemplated adjustment on the respective net incomes of the obligor and the obligee [*Fam. Code § 4055(b)(7)*].

If the presumption applies, the maximum amount of the adjustment is determined by a mathematical computation. The child support amount otherwise determined under the guideline is reduced by an amount that is no greater than the amount calculated by multiplying the guideline amount by a fraction, the numerator of which is 1,000 minus the obligor's net monthly disposable income, and the denominator of which is 1,000 [*Fam. Code § 4055(b)(7)*]. Note, however, that in one reported decision, a trial court reduced a parent's obligation to zero when he clearly had virtually no disposable income left after applying the formula. Thus, it would appear that a court may, in such an extreme case, reduce a parent's support obligation below the low income adjustment calculated under the above formula [*City and County of San Francisco v. Miller (1996) 49 Cal. App. 4th 866, 869, 56 Cal. Rptr. 2d 887]* .

If the court uses a computer to calculate the child support order (see *§ 224.114*), the computer program may not automatically default affirmatively or negatively on whether a low-income adjustment is to be applied. If the low-income adjustment is applied, the computer program may not provide the amount of the adjustment. Instead, it must ask the user whether or not to apply the adjustment, and if answered affirmatively, the program must provide the range of the adjustment [*Fam. Code § 4055(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 224.111 Factors Rebutting Presumption of Correctness

[1] In General

The presumption that the amount of child support under the guideline formula [*see Fam. Code § 4055(a)*] is the correct amount is a rebuttable presumption affecting the burden of proof. It may be rebutted by admissible evidence showing that application of the guidelines would be unjust or inappropriate in a particular case because one or more of the rebuttal factors set forth in the guideline is found to be applicable by a preponderance of the evidence. The court must find, in writing or on the record, that application of the formula would be unjust or inappropriate in the particular case and that the revised amount is in the best interests of the children [*Fam. Code § 4057(b)*]. A finding that the presumption has been rebutted must be consistent with the principles set forth in *Fam. Code § 4053* and the court must make, in writing or on the record the findings required by *Fam. Code § 4056(a)* for deviating from the guideline [*Fam. Code § 4057(b)*; *see § 224.102*]. Unless the court finds that a rebuttal factor applies, it must order the formula amount [*In re Marriage of Carter (1994) 26 Cal. App. 4th 1024, 1028-1029, 33 Cal. Rptr. 2d 1]* . The court's determination should not be made in an unreported conference in the judge's chambers because such a procedure deprives the parents of their right under *Fam. Code § 4057(b)* to have the court consider whether the guideline result should be varied under the circumstances of their case [*In re Marriage of Hall (2000) 81 Cal. App. 4th 313, 319-320, 96 Cal. Rptr. 2d 772]* .

[2] Agreement of Parties

Unless prohibited by federal law, the parents may stipulate to a child support amount, subject to the court's approval [*Fam. Code § 4065(a)*]. The Judicial Council form for use as a stipulation to establish child support is set forth in *see § 224.210*.

The presumption that the amount of child support computed under *Fam. Code § 4055(a)* is the correct amount may be rebutted by such a stipulation [*Fam. Code § 4057(b)(1)*].

The court may not approve a stipulated child support agreement below the guideline formula amount unless the parties declare all of the following [*Fam. Code § 4065(a)*; *In re Marriage of Laudeman (2001) 92 Cal. App. 4th 1009, 1014,*

112 Cal. Rptr. 2d 378 (*Fam. Code § 4065(a)* declarations required only when stipulated amount is *below* guideline amount)]:

(1) They are fully informed of their rights concerning child support.

(2) The order is being agreed to without coercion or duress.

(3) The agreement is in the best interests of the children involved.

(4) The needs of the children will be adequately met by the stipulated amount.

(5) The right to support has not been assigned to the county and no public assistance application is pending.

Further, a stipulated agreement of child support is not valid unless the local child support agency has joined in the stipulation by signing it in any case in which the agency is providing services pursuant to *Fam. Code § 17400*. The local child support agency must not stipulate to a child support order below the guideline amount if the children are receiving assistance under the CalWORKs program, if an application for public assistance is pending, or if the parent receiving support has not consented to the order [*Fam. Code § 4065(c)*].

In addition, by stipulation, the parties may require the support obligor to designate an account for the purpose of paying the child support obligation by electronic funds transfer under *Fam. Code § 4508* [*Fam. Code § 4065(b)*].

However, a stipulation between the parties to engage in binding arbitration on future child support issues will be void as against public policy to the extent it purports to deprive the court of jurisdiction to modify child support [*In re Marriage of Bereznak and Heminger (2003) 110 Cal. App. 4th 1062, 1067-1070, 2 Cal. Rptr. 3d 351]* .

[3] Rental Value of Family Residence Subject to Deferred Sale

The presumption that the amount of child support computed under the guideline formula [*Fam. Code § 4055(a)*] is the correct amount may be rebutted if (1) the family residence in which the children will continue to reside is subject to a deferred-sale order under *Fam. Code § 3800 et seq.*, and *(2)* the rental value of the residence exceeds the mortgage payments, homeowner's insurance, and property taxes. The amount of any such adjustment may not be greater than the excess amount [*Fam. Code § 4057(b)(2)*]. The decision to grant an offset for net fair rental value is a matter within the equitable discretion of the trial court, to be decided on a case-by-case basis [*In re Marriage of Braud (1996) 45 Cal. App. 4th 797, 819, 53 Cal. Rptr. 2d 179]* .

[4] Extraordinarily High Income of Obligor Parent

[a] Statutory Standard for Rebuttal

The presumption that child support computed under the statewide uniform guideline formula [*Fam. Code § 4055(a)*] is correct may be rebutted by admissible evidence showing that application of the formula would be unjust or inappropriate in the particular case [*Fam. Code § 4057(b)*] because (1) the obligor parent under the formula has an "extraordinarily high income," and (2) the amount determined under the formula would exceed the needs of the children [*Fam. Code § 4057(b)(3)*; *see In re Marriage of Hubner (2001) 94 Cal. App. 4th 175, 180-188, 114 Cal. Rptr. 2d 646]* .

[b] "Extraordinarily High Income" Not Defined

The term "extraordinarily high income" in *Fam. Code § 4057(b)(3)* is not statutorily defined, and the reported cases

have frequently dealt with situations in which the obligor parent stipulated that he or she was an extraordinarily high earner (see *§ 224.111[4][c][ii]*). In practice, trial courts appear to at least take into account the wealth of the obligor parent in relation to the community at large, although there arguably are persons whose incomes are so high as to be considered "extraordinarily high" by any reasonable objective standard.

[c] Consideration of Obligor's Income

[i] Right to Discover Obligor's Income

Current case law provides that, absent a stipulation between the parties on the appropriate amount of support, the party requesting support and the court are entitled to know the obligor parent's *actual income*, regardless of his or her admission of an ability to pay "any reasonable child support order." Assumptions on which a support order are founded must have a legitimate factual basis regarding the amount of the high earner's actual annual income, rather than on a fictional annual income invented for the purposes of the guideline calculation. Before a court may exercise its discretion to determine that a deviation from the guideline is warranted under the circumstances, it must first calculate the amount of support required by strict adherence to the guideline. Only after the guideline formula is computed on a legitimate evidentiary basis concerning the obligor parent's income may a court conclude that the guideline amount exceeds the child's reasonable needs [*In re Marriage of Hubner (2001) 94 Cal. App. 4th 175, 184, 114 Cal. Rptr. 2d 646]* .

[ii] Effect of Obligor's Stipulation to Pay Support

Cases initially interpreting the "extraordinarily high income" factor held that the support guideline does not prohibit a practice by which a high income obligor would stipulate to the ability to pay any "reasonable" amount of child support, and then refuse to provide further financial information--the court then determining what amount is reasonable "under the circumstances" [*Estevez v. Superior Court (1994) 22 Cal. App. 4th 423, 428-431, 27 Cal. Rptr. 2d 470* ; *see White v. Marciano (1987) 190 Cal. App. 3d 1026, 1029-1032, 235 Cal. Rptr. 779* (rejecting relevance of evidence of obligor's net worth and opulent life-style)].

However, that practice now appears to be limited to cases in which *both parties agree* on the appropriate amount of child support [*In re Marriage of Hubner (2001) 94 Cal. App. 4th 175, 186, 114 Cal. Rptr. 2d 646]* . When the parties dispute the amount of the high earner's income and cannot agree on the child support amount, the court must make the least beneficial income assumptions against the obligor parent [*In re Marriage of Hubner (2001) 94 Cal. App. 4th 175, 186, 114 Cal. Rptr. 2d 646* ; *Johnson v. Superior Court (1998) 66 Cal. App. 4th 68, 74-75, 77 Cal. Rptr. 2d 624* ; *see § 224.111[4][c][iii]*]. In one case, for example, a professional basketball player stipulated that his annual income "exceeds $1 million" and that he could pay any reasonable amount. The appellate court in that case found that the appropriate amount of support will differ "depending on whether [the payor] earns $12 million a year instead of the $1 million income that he has conceded." It ruled that limited discovery to determine the payor's income would be necessary if reliable information on that subject was not available from other sources. If the payor resisted discovery on determining his net disposable income as required by the child support formula, the appellate court held that the trial court should make the "least favorable assumptions on the liability side of the net income equation" and then go forward on determining a reasonable amount of support [*Johnson v. Superior Court (1998) 66 Cal. App. 4th 68, 75, 77 Cal. Rptr. 2d 624]* .

[iii] Findings on Obligor's Income

In ordering child support under the statewide guideline, a court may not set a completely arbitrary figure that bears no relationship to the child's needs or the obligor's income [*McGinley v. Herman (1996) 50 Cal. App. 4th 936, 57 Cal. Rptr. 2d 921* ; *see In re Marriage of Chandler (1997) 60 Cal. App. 4th 124, 129, 70 Cal. Rptr. 2d 109]* . The court must at least make findings of the approximate amount of the payor's net disposable income, of the point at which support under the formula exceeds the child's needs--and correspondingly, the point at which the payor's net disposable income becomes extraordinarily high--as well as the reasons why the support awarded is consistent with the child's

interests [*Johnson v. Superior Court (1998)) 66 Cal. App. 4th 68, 74-75, 77 Cal. Rptr. 2d 624* ; *McGinley v. Herman (1996) 50 Cal. App. 4th 936, 945, 57 Cal. Rptr. 2d 921* ; *see In re Marriage of Kerr (1999) 77 Cal. App. 4th 87, 97, 91 Cal. Rptr. 2d 374* (involving award of income from future exercise of stock options) *In re Marriage of Chandler (1997) 60 Cal. App. 4th 124, 129, 70 Cal. Rptr. 2d 109* ; *see also Fam. Code § 4056(a)(3)*].

[d] Obligor's Burden of Proof in Rebutting Guideline Amount

Case law holds that an obligor parent who seeks to rebut the statutory formula and gain protection from disclosure of detailed financial information as an "extraordinary high earner" must show (1) he or she has an extraordinarily high income, and (2) the guideline support amount exceeds the child's needs. When an extraordinarily high-earning obligor seeks a downward departure from a presumptively correct guideline amount, it is that parent's burden to establish that (1) application of the formula would be unjust or inappropriate, and (2) the lower award would be consistent with the child's best interests [*In re Marriage of Hubner (2001) 94 Cal. App. 4th 175, 183, 114 Cal. Rptr. 2d 646* (citing *County of Stanislaus v. Gibbs (1997) 59 Cal. App. 4th 1417, 1424* ; *Fam. Code §§ 4053(k), 4056(a)(3), 4057(b)(3)*)].

[e] Deferred Income Plans Not Authorized by Statute

There is no provision in California law for ordering child support in the form of a deferred income plan, such as a trust for college, in the case of extremely high income obligors. At least one reported decision has rejected the court's use of such a device [*In re Marriage of Chandler (1997) 60 Cal. App. 4th 124, 129, 70 Cal. Rptr. 2d 109]* . However, the parties may agree to such a plan [*see Family Code § 3587 see also In re Marriage of Chandler (1997) 60 Cal. App. 4th 124, 129, 70 Cal. Rptr. 2d 109]* .

[5] Contribution Not Commensurate With Custodial Time

The presumption that the amount of child support computed under the guideline formula [*Fam. Code § 4055(a)*] is the correct amount may be rebutted if a parent is not contributing to the needs of the children at a level commensurate with that parent's custodial time [*Fam. Code § 4057(b)(4)*]. The assumption behind the time-share reduction of the H factor [*see Fam. Code § 4055(a),(b)(1)(D)*; *§ 224.106*] is that a parent incurs child-related costs in exercising periods of physical custody (including brief visitation periods), and that the amount of these expenses increases as custodial time increases. This rebuttal factor allows the court to adjust support if the assumption proves not to be true in the particular case.

[6] Special Circumstances

The presumption that the amount of child support computed under the guideline formula [*Fam. Code § 4055(a)*;*§ 224.104*] is the correct amount may be rebutted if application of the formula would be unjust or inappropriate due to special circumstances in the particular case. These special circumstances include, *but are not limited to*, (1) cases in which the parents have different time-sharing arrangements for different children; (2) cases in which both parents have substantially equal time-sharing of the children and one parent has a much lower or higher percentage of income used for housing than the other parent; and (3) cases in which the children have special medical or other needs that could require child support above the formula amount [*Fam. Code § 4057(b)(5)*].

This rebuttal factor vests trial courts with considerable discretion to approach unique cases on an *ad hoc* basis. For example, a very low net disposable income after payment of guideline child support [*City and County of San Francisco v. Miller (1996) 49 Cal. App. 4th 866, 869, 56 Cal. Rptr. 2d 887]* or high consumer debt may be such special circumstances on appropriate facts [*see County of Lake v. Antoni (1993) 18 Cal. App. 4th 1102, 1105-1106, 22 Cal. Rptr. 2d 804* (no abuse of discretion in treating consumer debt incurred in supporting second family over 9 years as special circumstance lowering support); *see also City and County of San Francisco v. Miller (1996) 49 Cal. App. 4th 866, 869, 56 Cal. Rptr. 2d 887* (zero support award affirmed when payor would be left with just $14 a month to live on after paying guideline child support and his $450 monthly rent); *cf. In re Marriage of Gigliotti (1995) 33 Cal. App. 4th*

518, 527, 39 Cal. Rptr. 2d 367 (increased costs in connection with visitation due to child's moving to Massachusetts are not special circumstance); *but cf. County of Stanislaus v. Gibbs (1997) 59 Cal. App. 4th 1417, 1426-1427, 69 Cal. Rptr. 2d 819* (limiting high consumer debt factor in *Antoni*, to situations in which it is established that debts incurred were for "living needs such as clothing and household items" and requiring consideration of household income in addition to that of payor in determining severity of "financial bind")]. However, the fact that a child support award will effectively curtail an obligor parent's *discretionary spending ability* is not an "injustice" within the meaning of this rebuttal factor, given the strong presumption in the law that parental income levels, coupled with custodial time, and not parental discretionary spending patterns, will deterermine the support level, absent some special and unusual circumstance resulting in injustice [*In re Marriage of Denise & Kevin C. (1997) 57 Cal. App. 4th 1100, 1102, 1106-1107, 67 Cal. Rptr. 2d 508]* . Furthermore, at least one court has held that this factor is not so broad as to allow the court to consider noneconomic factors, such as the family background or the child's development and character. The court may not seek to address equitable issues outside of the economic sphere within which the child support guideline is structured [*see County of San Diego v. Guy (1994) 30 Cal. App. 4th 1325, 1334-1336, 36 Cal. Rptr. 2d 222* (trial court incorrectly lowered child support in public benefits reimbursement proceeding due to developmental difficulties with adopted child that had caused parents considerable personal hardship)].

There may be some divergent appellate views as to whether an obligor's voluntary support of stepchildren may be a special circumstance justifying lower support. In *County of Lake v. Antoni*, lower support was affirmed under what is now *Fam. Code § 4057(b)*. The fact that the obligor was supporting a stepchild was one factor that the court noted in support of the order [*County of Lake v. Antoni (1993) 18 Cal. App. 4th 1102, 1105-1106, 22 Cal. Rptr. 2d 804* ; *see City and County of San Francisco v. Miller (1996) 49 Cal. App. 4th 866, 869, 56 Cal. Rptr. 2d 887]* . In another case, the court specifically denied lower support on account of voluntary support of stepchildren, but noted that in a special case, the provisions construed in *Antoni* appear to allow a variance from the formula in recognition of a spouse's support of children of a new marriage who would otherwise be without support. Nevertheless, the court went on to state that in the absence of an adoption, the obligor's principal obligation must be to the children whom he or she has a duty to support [*Haggard v. Haggard (1995) 38 Cal. App. 4th 1566, 1572, 45 Cal. Rptr. 2d 638]* .

A parent's support of his or her own elderly mother or father is not a "special circumstance" under *Fam. Code § 4057(b)(5)*. The fact that an aging parent looks to an adult child for support is not a circumstance that is so unusual or extraordinary as to diminish that adult's obligation to his or her own children [*In re Marriage of Butler & Gill (1997) 53 Cal. App. 4th 462, 468-469, 61 Cal. Rptr. 2d 781* (no showing that father would have any acute difficulty in providing full guideline level of support to his children and support for his elderly mother; exceptional circumstances for deviation from guidelines not shown)]. Moreover, a "special circumstance" finding may not be used to circumvent other provisions of the child support law that expressly or impliedly provide to the contrary [*In re Marriage of Corman (1997) 59 Cal. App. 4th 1492, 1499, 69 Cal. Rptr. 2d 880* (considering payment of nonmodifiable spousal support as impliedly excluded from payee's gross income); *County of Stanislaus v. Gibbs (1997) 59 Cal. App. 4th 1417, 1426, 69 Cal. Rptr. 2d 819* (considering expenses of subsequent children contrary to intent of *Fam. Code § 4071.5*); *In re Marriage of Wood (1995) 37 Cal. App. 4th 1059, 1066-1070, 44 Cal. Rptr. 2d 236* (consideration of new mate income despite provisions of *Fam. Code § 4057.5*)].

According to one court, the special circumstances rebuttal factor also permits trial courts to adjust guideline formula child support amounts *upward* to take into account significant nontaxable benefits, such as free housing, that reduce a parent's living expenses without being included in the parent's gross income under *Fam. Code § 4058*. In such cases, the guideline formula amount is arguably too low, making application of the guidelines formula amount unjust or inappropriate [*In re Marriage of Loh (2001) 93 Cal. App. 4th 325, 333-336, 112 Cal. Rptr. 2d 893]* .

Trial courts have broad discretion to determine when special circumstances apply, because *Fam. Code § 4057(b)* uses the words "including, but not limited to" instead of cataloguing all of the special circumstances in which the guideline formula amount would be inappropriate. Thus, based on special circumstances, a child support award may *exceed* guideline amounts, as long as the award is consistent with the principles of *Fam. Code § 4053*, which designates

interests of the children as a top priority and provides that parents should support their children at a level commensurate with their ability [*Mejia v. Reed (2003) 31 Cal. 4th 657, 671, 3 Cal. Rptr. 3d 390, 74 P.3d 166* (court may deem parent's assets to be "special circumstance"); *In re Marriage of De Guigne (2002) 97 Cal. App. 4th 1353, 1361, 119 Cal. Rptr. 2d 430* (drastic reduction in children's lifestyle constituted special circumstance that justified support award in excess of obligor's total income); *see Brothers v. Kern (2007) 154 Cal. App. 4th 126, 133, 64 Cal. Rptr. 3d 239* (special circumstances found when child's standard of living could not be sustained if guideline figure were used, and father would no longer be contributing support via visitation and his own standard of living would not be impacted because of his incarceration); *see also M.S. v. O.S. (2009) 176 Cal. App. 4th 548, 558-561, 97 Cal. Rptr. 3d 812* (third party's payment of parent's attorney's fees directly to attorney, are not part of parent's income or cash flow available for child support, but may be considered as circumstance potentially warranting upward departure from guideline amount); *In re Marriage of Berger (2009) 170 Cal. App. 4th 1070, 1083-1085, 88 Cal. Rptr. 3d 766* (father's decision to defer his salary was "special circumstance" warranting departure from guideline amount of support)]. In such cases, the trial court is not required to tie the elevated child support level to specific unmet needs of the children [*In re Marriage of De Guigne (2002) 97 Cal. App. 4th 1353, 1364-1365, 119 Cal. Rptr. 2d 430]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceInferences & PresumptionsPresumptionsEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewFamily LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGuidelinesFamily LawParental Duties & RightsDutiesSupport of Children

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E. Statewide Uniform Child Support Guideline

19-224 California Forms of Pleading and Practice--Annotated § 224.112

§ 224.112 Additional Support Amounts

[1] Mandatory and Discretionary Add-Ons

The court *must* order as additional child support any child-care costs related to employment or to reasonably necessary education or training for employment skills [*Fam. Code § 4062(a)(1)*; *see In re Marriage of Gigliotti (1995) 33 Cal. App. 4th 518, 525 n.2, 39 Cal. Rptr. 2d 367* (noting unresolved issue as to whether court may consider *reasonable* costs of child care as opposed to *actual* costs); *see also In re Marriage of Tavares (2007) 151 Cal. App. 4th 620, 629, 60 Cal. Rptr. 3d 39* (equity favors preserving option of childcare payments made to other parent rather than directly to provider and that, when so ordered, convenience and certainty of fixed amount outweigh any benefit of accounting or itemized statement when child is not in daycare or costs fluctuate)]. The court must also order as additional child support the reasonable uninsured health care costs for the children [*Fam. Code § 4062(a)(2)*]. There is a rebuttable presumption that the costs actually paid for the uninsured health care needs of the children are reasonable [*Fam. Code § 4063(d)*]. For further discussion of payment of medical expenses, *§ 224.112[3]*.

The court *may* order as additional child support costs related to the educational or other special needs of the children and travel expenses for visitation [*Fam. Code § 4062(b)*]. One court has suggested in a footnote that the provision for travel expenses is confusing because these expenses are usually incurred by the noncustodial parent who is paying support. The court stated that calling the provision an add-on is a misnomer because such expenses might justify a reduction, rather than an increase, in support. It proposed the possibility that the provision was actually a negative add-on [*see In re Marriage of Fini (1994) 26 Cal. App. 4th 1033, 1039 n.5, 31 Cal. Rptr. 2d 749]* . There is language in one case that might be read for the proposition that only additions to (and not deductions from) the guideline amount for travel are authorized [*In re Marriage of Gigliotti (1995) 33 Cal. App. 4th 518, 527-529, 39 Cal. Rptr. 2d 367]* . However, another court rejected this language as dicta, and held that in light of the public policy to assure minor children frequent and continuing contact with both parents after the parents have separated [*see Fam. Code § 3020*], there may be times when visitation expenses can be a sufficient reason to vary the guideline amount in move-away cases, either upward or downward, according to the circumstances [*Wilson v. Shea (2001) 87 Cal. App. 4th 887, 898, 104 Cal. Rptr. 2d 880]* . Another possible application is an add-on for the situation in which the higher earner is the

primary custodial parent, and the lower earner does not have sufficient funds to travel to exercise visitation [*see § 224.108*].

In a "move-away situation," the Supreme Court has stated the trial court has broad discretion to allocate transportation expenses to the custodial parent or to require that parent to provide the transportation of the children to the noncustodial parent's home [*In re Marriage of Burgess (1996) 13 Cal. 4th 25, 40, 51 Cal. Rptr. 2d 444, 913 P.2d 473]* .

However, a court does not have the discretion to fashion other "add-ons" in the absence of statutory authority. Thus, for example, a court's order purporting to convert a common attorney's fee award into additional child support under *Fam. Code § 4062* contravenes both the letter and spirit of the Family Code, and is erroneous as a matter of law [*Boutte v. Nears (1996) 50 Cal. App. 4th 162, 166, 57 Cal. Rptr. 2d 655* ; *see also In re Marriage of De Guigne (2002) 97 Cal. App. 4th 1353, 1367, 119 Cal. Rptr. 2d 430* (rental deposit/furniture payment not authorized as additional child support)].

[2] Manner of Allocating Costs

Add-on amounts under *Fam. Code § 4062* are considered additional child support [*Fam. Code § 4061*]. If any of these costs are ordered, they will be divided one-half to each parent unless either parent requests a different apportionment and presents evidence that a different apportionment would be more appropriate [*Fam. Code § 4061(a)*; *see Fam. Code § 4061(b), (d)* (mandatory formulas for apportioning add-ons); *In re Marriage of De Guigne (2002) 97 Cal. App. 4th 1353, 1367-1368, 119 Cal. Rptr. 2d 430* ; *In re Marriage of Lusby (1998) 64 Cal. App. 4th 459, 473, 75 Cal. Rptr. 2d 263]* . Whether to make a different apportionment is within the discretion of the court based on the evidence, at least if the incomes of the parents are not greatly divergent [*In re Marriage of Fini (1994) 26 Cal. App. 4th 1033, 1039-1040, 31 Cal. Rptr. 2d 749]* . Alternate formulas for apportioning these costs are programmed into the major child support software programs.

[3] Additional Considerations Regarding Health Care Costs

Fam. Code § 4062(a)(2) provides for mandatory child support add-ons [*see In re Marriage of Fini (1994) 26 Cal. App. 4th 1033, 1039, 31 Cal. Rptr. 2d 749]* with regard to uninsured medical expenses [*see § 224.112[1]*]. *Fam. Code § 4063* provides additional requirements with regard to such an order. In making an order regarding uninsured medical expenses, the court must (1) advise each parent, in writing or on the record, of his or her rights and liabilities, including financial responsibilities, and (2) include in its order the time period for a parent to reimburse the other parent for the reimbursing parent's share of the expenses [*Fam. Code § 4063(a)*, expressly referring to *Fam. Code § 4062(a)(2)*]. However, this statute also addresses the role of health insurance coverage in the payment of the child's medical expenses [*Fam. Code § 4063(e)-(g)*]. Therefore, the statute actually presents a set of rules regarding how a child's medical expenses are to be paid, regardless of whether or not third-party-payor coverage is available.

Unless there has been an assignment of rights under *Welf. & Inst. Code § 11477*, if either parent accrues or pays costs covered by an order regarding for uninsured medical expenses, that parent must provide the other parent with an itemized statement of the costs within a reasonable time, but not more than 30 days after accruing the costs [*Fam. Code § 4063(b)*]. If a parent has already paid all of these costs, that parent must provide proof of payment and a request for reimbursement of his or her court-ordered share to the other parent [*Fam. Code § 4063(b)(1)*]. If a parent has paid his or her court-ordered share of the costs only, that parent must provide proof of payment to the other parent, request the other parent to pay the remainder of the costs directly to the provider, and provide the reimbursing parent with any necessary information about how to make the payment to the provider [*Fam. Code § 4063(b)(2)*]. The other parent must make the reimbursement or pay the remaining costs within the time period specified by the court, or, if no period is specified, within a reasonable time not to exceed 30 days from notification of the amount due, or according to any payment schedule set by the health care provider for either parent, unless the parties agree in writing to another payment schedule or the court finds good cause for setting another payment schedule [*Fam. Code § 4063(b)(3)*]. If the

reimbursing parent disputes a request for payment, that parent must pay the requested amount and thereafter may seek judicial relief. If the reimbursing parent fails to pay the other parent, the other parent may seek judicial relief [*Fam. Code § 4063(b)(4)*].

Either parent may file a noticed motion to enforce an order regarding payment of uninsured medical expenses. The court may issue any enforcement orders authorized by the Family Code [*see Fam. Code § 290*], and may also award filing costs and reasonable attorney's fees if it finds that either party acted without reasonable cause regarding his or her obligations [*Fam. Code § 4063(c)*; *In re Marriage of Rothrock (2008) 159 Cal. App. 4th 223, 236-237, 70 Cal. Rptr. 3d 881* (Section 4063 does not prohibit party from seeking reimbursement in case of failure to timely present itemization of costs)].

In determining any right to reimbursement, there is a rebuttable presumption that the costs actually paid for the uninsured health care needs of the children are reasonable [*Fam. Code § 4063(d)*]. However, under most circumstances, a parent is not free to incur uninsured medical expenses for a child and obtain reimbursement from the other parent if health care insurance coverage was actually available for the cost.

The health care insurance coverage, including, but not limited to, coverage for emergency treatment, provided by a parent as required by a court order (*see § 224.130*), is to be used at all times, consistent with the requirements of that coverage, unless the other parent can show that the health care insurance coverage is inadequate to meet the child's needs [*Fam. Code § 4063(e)(1)*]. Further, if that coverage designates a preferred health care provider, that preferred provider must be used at all times, consistent with the terms and requirements of that coverage [*Fam. Code § 4063(f)(1)*].

And, if either parent obtains health care insurance coverage in addition to that provided as required by court order, that parent bears sole financial responsibility for the costs of that additional coverage and the costs of any care or treatment obtained under it in excess of the costs that would have been incurred under the health care insurance coverage provided for in the court order [*Fam. Code § 4063(e)(2)*]. Further, if either parent uses a health care provider other than the preferred provider inconsistent with the terms and requirements of the court-ordered health care insurance coverage, the parent obtaining that care bears the sole responsibility for any nonreimbursable health care costs in excess of the costs that would have been incurred under the court-ordered health care insurance coverage had the preferred provider been used [*Fam. Code § 4063(f)(2)*].

In order to ensure that the health care needs of the child are met, the above limitations on incurring medical expenses that might otherwise be covered by insurance are subject to some exceptions [*see Fam. Code § 4063(e), (f)*, which are expressly made subject to *Fam. Code § 4063(g)*]. In ruling on a motion for reimbursement or payment of uninsured health care costs, the court must consider all relevant facts, including, but not limited to, the following [*Fam. Code § 4063(g)*]:

> (1) The geographic access and reasonable availability of necessary health care for the child that complies with the terms of the health care insurance coverage paid for by either parent as required by a court order;
>
> (2) The necessity of emergency medical treatment that may have precluded the use of the health care insurance, or the preferred health care provider required under the insurance, provided by either parent as required by a court order;
>
> (3) The special medical needs of the child; and
>
> (4) The reasonable inability of a parent to pay the full amount of reimbursement within a 30-day period and the resulting necessity for a court-ordered payment schedule.

The Judicial Council has promulgated an informational form entitled Notice of Rights and Responsibilities--Health Care Costs and Reimbursement Procedures [*see* Cal. Judicial Council Form FL-192]. It is set forth in *§ 224.217*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGuidelinesFamily LawChild SupportObligationsTypesMedical SupportFamily LawParental Duties & RightsDutiesSupport of Children

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§ 224.113 Required Findings

[1] In General

At the request of either party, the court must make appropriate findings with respect to the circumstances on which a child support order is based [*Fam. Code § 4005*; *but see In re Marriage of Katzberg (2001) 88 Cal. App. 4th 974, 984, 106 Cal. Rptr. 2d 157* (court that applies guideline formula not required to state any reasons for making award)]. When the court evaluates support using the statewide guideline, deviations from the guideline cannot be justified by the court simply by making an estimate. If the court intends to use its discretion to vary from the guideline amount, it must make an accurate computation of that amount, then actually use its discretion and state reasons for the variance on the record [*Wilson v. Shea (2001) 87 Cal. App. 4th 887, 898-899, 104 Cal. Rptr. 2d 880* ; *In re Marriage of Whealon (1997) 53 Cal. App. 4th 132, 144-145, 61 Cal. Rptr. 2d 559]* .

To comply with federal law, the court must state, in writing or on the record, the following information whenever the court is ordering an amount for child support that differs from the statewide uniform guideline's formula [*Fam. Code § 4056(a)*; *see Wilson v. Shea (2001) 87 Cal. App. 4th 887, 899, 104 Cal. Rptr. 2d 880* (reversal required because trial judge was obligated to recalculate child support using guidelines, to reflect custodial parent's relocation and put in her nominal income); *In re Marriage of Hall (2000) 81 Cal. App. 4th 313, 318-319, 96 Cal. Rptr. 2d 772* (reversal required because court increased child support without making required statement of justification for deviating from formula guideline); *In re Marriage of Gigliotti (1995) 33 Cal. App. 4th 518, 526-527, 39 Cal. Rptr. 2d 367* (reversal required because court lowered child support based on "special circumstances" without making required findings); *but see In re Marriage of Laudeman (2001) 92 Cal. App. 4th 1009, 1014, 112 Cal. Rptr. 2d 378* (statements required by *Fam. Code § 4056(a)* are irrelevant when stipulated child support order is for *more* than amount established by guideline formula)]:

(1) The amount of support that would have been ordered under the formula;

(2) The reasons the amount of support ordered differs from the formula amount; and

(3) The reasons the amount of support ordered is consistent with the best interests of the children.

At the request of any party, the court must state in writing or on the record the following information used in determining the guideline amount of child support [*Fam. Code § 4056(b)*]:

(1) The net monthly disposable income of each parent;

(2) The actual federal income tax filing status of each parent (for example, single, married, married filing separately, or head of household and number of exemptions);

(3) Deductions from gross income for each parent; and

(4) The approximate percentage of time that each parent has primary physical responsibility for the children compared to the other parent.

For a form for a child-support order that contains all of these required findings, *see § 224.217*.

Although no specific procedure under the Family Code exists for a dissatisfied party to follow when a trial court takes a child support matter under submission and then enters a written child support judgment without supplying the information required by *Fam. Code § 4056*, one appellate court has suggested that the party has at least two possible alternatives. One is to appeal and seek a reversal, and if this course of action is chosen, the standard appellate procedures and time frames apply. Another alternative, in that court's opinion, is to bring the matter to the trial court's attention and ask the court to supply the missing information. If this is done, because there is no specific time frame set forth in the Family Code, the general rules of civil practice and procedure apply, under which--if the missing information constitutes both a finding and the trial court's reasons--the time limit for a motion to vacate an erroneous decision or for a motion for a new trial would be appropriate [*see Rojas v. Mitchell (1996) 50 Cal. App. 4th 1445, 1452, 58 Cal. Rptr. 2d 354* ; *Code Civ. Proc. §§ 659, 663a*]. However, it also appears that the procedures and times for requesting a statement of decision may be followed. While these were not mentioned by the appellate court, they are available in child support litigation and would appear to be a viable alternative [*see Code Civ. Proc. § 632*; *Cal. Rules of Ct., Rule 3.1590*; 1997 Cal. Fam. Law Monthly 19 (January 1997; commentary of Bernard Wolf, Esq.)].

[2] Family Support

Orders and stipulations otherwise in compliance with the guideline may designate as "family support" an unallocated total sum for support of the spouse and any children, without specifically labeling all or any portion as "child support," as long as the amount is adjusted to reflect the effect of additional income tax deductibility. The amount of the order must be adjusted to maximize the tax benefits for both parents [*Fam. Code § 4066*; *see In re Marriage of Schulze (1997) 60 Cal. App. 4th 519, 522-528, n.12 532, 70 Cal. Rptr. 2d 488]* . Family support is discussed further in Ch. 227, Dissolution of Marriage: Tax Effects.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGuidelinesFamily LawChild SupportProceduresFamily LawParental Duties & RightsDutiesSupport of ChildrenPublic Health & Welfare LawSocial SecurityAssistance to FamiliesChild & Spousal Support

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§ 224.114 Software Used to Determine Support

Because of the formidable mathematics of computing child support under the statewide uniform guideline, there are several computer software products that are now routinely used by California judges and attorneys for the purpose of computing the amount of child support under the guideline's formula [*see In re Marriage of Williams (2007) 150 Cal. App. 4th 1221, 1225 n.5, 58 Cal. Rptr. 3d 877* (use of DissoMaster to calculate guideline child support). On and after January 1, 1994, no court may use any computer software to assist in determining the appropriate amount of support unless the software conforms to rules of court adopted by the Judicial Council prescribing standards for the software. These standards must ensure that the product performs in a manner consistent with the applicable statutes and rules of court for the determination of the amount of support [*Fam. Code § 3830(a)*]. All courts must permit the parties or their counsel to use any software that the Judicial Council has certified under *Cal. Rules of Ct., Rule 5.275* [*Cal. Rules of Ct., Rule 5.275(j)(2)*].

The numbers that are entered into the software program for income and other variables must be supported by a proper evidentiary foundation [*see County of Alameda v. Moore (1995) 33 Cal. App. 4th 1422, 1426, 40 Cal. Rptr. 2d 18]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGeneral OverviewFamily LawChild SupportObligationsComputationGuidelinesFamily LawParental Duties & RightsDutiesSupport of ChildrenPublic Health & Welfare LawSocial SecurityAssistance to FamiliesChild & Spousal Support

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19-224 California Forms of Pleading and Practice--Annotated §§ 224.115-224.129

[Reserved]

§§ 224.115[Reserved]

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19-224 California Forms of Pleading and Practice--Annotated § 224.130

§ 224.130 Mandatory Element of Support if Available

In any case in which a current child support order is issued, the court must require that health insurance coverage for the supported children be maintained by either or both parents if the insurance is available at no cost or at reasonable cost to the parent [*Fam. Code § 3751(a)(2)*; *see Fam. Code § 4006*]. The cost of health insurance is in addition to the amount of child support otherwise ordered under the uniform statewide child support guideline [*Fam. Code § 3753*].

"Health insurance coverage" is broadly defined, and specifically includes vision care and dental care coverage. Health insurance coverage also includes arrangments under which health care services are provided by a fee-for-service health maintenance organization (HMO), or any other type of health care delivery system, to the dependent children of an "absent parent" [*Fam. Code § 3750*]. The meaning of the term "absent parent" in this context is unclear. The term is not defined, and does not appear to be the equivalent of "noncustodial" parent in its plain-meaning sense. Even if the term is being used to refer to a noncustodial parent, such a limitation is contrary to the statutory scheme. The statute otherwise allows the court to require *either* parent or *both* parents to maintain health insurance coverage, regardless of their custodial plan [*see Fam. Code § 3751(a)(2)*]. The court may order the most comprehensive and appropriate coverage, regardless of to which parent the coverage is available. This parent is then allowed a deduction from income for the cost of the coverage in computing the child support obligation under the statewide uniform guideline [*see Fam. Code § 4059(d)*; *see also Fam. Code § 3753*]. The court may even order both parents to provide coverage if the available plans provide different benefits [*see Fam. Code § 3751(a)(2)*]. Thus, there is no logic in extending the definition of health insurance more broadly with regard to the "absent" parent, but not with regard to the other parent.

The cost of health insurance coverage is rebuttably presumed to be reasonable if it is employment-related group health insurance or other group health insurance, regardless of the service-delivery mechanism. The actual cost of the health insurance to the obligor must be considered in determining whether the cost of insurance is reasonable. If the court determines that the cost of health insurance coverage is not reasonable, the court must state its reasons on the record [*Fam. Code § 3751(a)(2)*]. If the court determines that health insurance coverage is not available at no cost or at a reasonable cost, its order for support must require health insurance coverage to be obtained when it becomes available at no cost or at a reasonable cost. The parent must apply for coverage at that time [*Fam. Code § 3751(b)*]. The court's

order for support must also require the parent who, at the time of the order or subsequently, provides health insurance coverage for a supported child to seek continuation of coverage for the child on attaining the limiting age for a dependent child under the health insurance coverage if the child meets the criteria specified in *Health & Saf. Code § 1373* or *Ins. Code §§ 10277* or *10278*, and coverage is available at no cost or at a reasonable cost [*Fam. Code § 3751(b)*].

Child support orders must require both the support obligee and obligor to inform the other of the availability of insurance through his or her employer and to provide policy information [*see Fam. Code § 3752.5*].

Special notice and information-sharing requirements concerning health insurance coverage apply if the local child support agency has been designated as the assigned payee for child support [*see Fam. Code §§ 3752, 4200*]. When a local child support agency is providing support enforcement services under *Fam. Code § 17400*, and the court has ordered a parent to provide health insurance coverage, the agency must serve the employer with a national medical support notice [*Fam. Code § 3773(a), (b)*; *see Fam. Code § 3760(d)* ("national medical support notice" defined)]. The national medical support notice may be combined with the order/notice to withhold income for child support [*Fam. Code § 3773(b)*]. It has the same force and effect as a health insurance coverage assignment order [*Fam. Code § 3773(c)*]. The obligor has the same right to move to quash or terminate a national medical support notice as the obligor has to quash or terminate a health insurance coverage assignment order [*Fam. Code § 3773(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 224.131 Assignment of Right to Reimbursement

Under prior law, in any proceeding in which there was an order requiring either party to provide coverage under a health plan to a dependent, the court had to order the covered party to assign to the other party the rights that he or she had to reimbursement, excepting any rights to reimbursement for payments actually made by the covered party [former *Fam. Code § 3781*]. Operative January 1, 1998, however, the California statutes requiring such an assignment of reimbursement rights were repealed as part of legislation intended to maintain California's compliance with related federal law [Stats. 1997, ch. 599, §§ 10-12]. Prior law may have continuing relevance, however, with respect to any assignments of reimbursement rights that were made before the repeal of the authorizing statutes.

For a related discussion of provisions (operative January 1, 1998) that impose duties on *insurers* with respect to permitting noncovered parents (or custodial parents or providers) to make claims for covered services without a covered parent's approval and requiring insurers to make payment directly to those noncovered parents, see *§ 224.133* [*see Fam. Code § 3751.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 224.132 Health Insurance Coverage Assignment Order

On the application of a party or district attorney in any proceeding in which the court has ordered either or both parents to maintain health insurance coverage under *Fam. Code § 3750 et seq.* [*see § 224.130*], the court must order the employer of the obligor parent or any other person providing health insurance to the obligor, including vision and dental care coverage [*see Fam. Code § 3760(b)*] to enroll the supported children in the health insurance plan available to the obligor and to deduct the appropriate premium or costs from the wages or earnings of the obligor. This order is called a "health insurance coverage assignment order" [*Fam. Code §§ 3760(b), (c), 3761(a), (b)(1)*]. It is for use if the obligor is in "default" in the sense that he or she has been ordered to provide health insurance coverage through employment, but has failed to enroll in the plan [*see Fam. Code § 3761(b)(1)*]. The total amount that may be withheld from earnings for all obligations, including health insurance assignments, is limited by *Code Civ. Proc. § 706.052(a)* or *15 U.S.C. § 1673*, whichever is less [*Fam. Code § 3761(c)*]. These statutes involve restrictions on earnings withholding under wage garnishment.

For the Judicial Council form of application, *see § 224.212*.

The court may decline to make a health insurance coverage assignment order on a finding of good cause, as specified by statute, not to make the order [*Fam. Code § 3761(a)*]. The obligor parent may also move to quash an order for a health insurance coverage assignment [*Fam. Code § 3765(a)*; *see Fam. Code §§ 3764(b)* (service of order), *3765(b)* (notice requirements)]. On a finding of error on any of the grounds specified by statute [*see Fam. Code § 3765(a)*], the court must quash the assignment [*Fam. Code § 3765(c)*].

On notice of motion by the obligor, the court must terminate a health insurance coverage assignment order if any of the following conditions exist: (1) a new order has been issued for the maintenance of health care coverage that is inconsistent with the existing assignment; (2) the employer or other provider has discontinued health coverage to the obligor; (3) the court determines that there is good cause to terminate the assignment [*see Fam. Code § 3765*]; or (4) a child for whom the health insurance coverage has been obtained has died or become emancipated [*Fam. Code § 3770*].

No employer may use a health insurance coverage assignment order as grounds for refusing to hire a person or for discharging or taking disciplinary action against an employee. An employer in violation of this prohibition may be assessed a civil penalty [*Fam. Code § 3769*; *see generally* Wilcox, California Employment Law, ch. 60 (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 224.133 Qualified Medical Child Support Orders Under ERISA

A provision of ERISA, the Employee Retirement Income Security Act, requires all group health plans to provide benefits in accordance with the applicable requirements of any "qualified medical child support order" (QMCSO) [*29 U.S.C. § 1169(a)(1)*]. A qualified medical child support order creates or recognizes the existence of a child's right to, or assigns to a child the right to, receive benefits for which a parent is eligible as a participant or beneficiary under a group health plan [*29 U.S.C. § 1169(a)(2)(A)*; *see 29 U.S.C. § 1169(a)(2)(C)*]. It must be set forth in a judgment, decree, or order, including approval of a settlement agreement, that provides for child support with respect to a child of a participant under a group health plan, or provides for health benefit coverage to such a child. It must be made under state domestic relations law (including community property law) and relate to benefits under the plan [*29 U.S.C. § 1169(a)(2)(B)*]. Certain information must be specified in the order [*see 29 U.S.C. § 1169(a)(3)*], and there are certain restrictions on what may be ordered [*see 29 U.S.C. § 1169(a)(4)*]. If all conditions are met, the child must be considered to be a beneficiary under the plan [*29 U.S.C. § 1169(a)(7)*].

A qualified medical child support order is deemed to apply to each group health plan that has received the order, from which the plan participant or beneficiary is eligible to receive benefits and with respect to which the other requirements of the applicable federal statute are met [*29 U.S.C. § 1169(a)*].

Implementing California legislation places more specific limitations on employers and insurers. An employer or insurer may not deny enrollment of a child under the health coverage of a child's parent on any of the following grounds: (1) the child was born out of wedlock; (2) the child is not claimed as a dependent on the parent's federal income tax returns; (3) the child does not reside with the parent or in the insurer's service area [*Fam. Code § 3751.5(a)*].

When a parent is required by a court or administrative order to provide health insurance coverage for a child and the parent is eligible for family health coverage through his or her employer doing business in California or an insurer, the employer or insurer must: (1) permit the parent to enroll under health insurance coverage any child otherwise eligible to enroll for that coverage without regard to any enrollment period restrictions; (2) if the parent is enrolled in health insurance coverage but fails to apply to obtain coverage for the child, enroll the child under such health coverage on

presentation of a court order or request by the district attorney, the other parent or person having custody, or the Medi-Cal program; (3) not disenroll or eliminate coverage for the child unless the employer has eliminated family health insurance coverage for all of its employees, or the employer or insurer is provided with satisfactory written evidence that the order is no longer in effect or is terminated under *Fam. Code § 3770* or that the child is or will be enrolled in other comparable health insurance coverage [*Fam. Code § 3751.5(b)*].

In addition, under current law, in any case in which health insurance coverage is provided for a child pursuant to a court or administrative order, the insurer must: (1) provide any information, including, but not limited to, the health insurance membership or identification card regarding the child, the evidence of coverage and disclosure form, and any other information provided to the covered parent about the child's health care coverage, to the noncovered parent having custody of the child or any other person having custody of the child and to the local child support agency when requested by the agency; (2) permit the noncovered parent or person having custody, or a provider with the approval of the noncovered parent or person having custody, to submit claims for covered services without the covered parent's approval; and (3) make payment on claims submitted in accordance with (2) directly to the noncovered parent or person having custody, the provider, or to the Medi-Cal program. Payment on claims for services to the child must be made to the covered parent for claims submitted or paid by the covered parent [*Fam. Code § 3751.5(c)*]. For a form of a qualified medical child support order under ERISA, *see § 224.219*.

The insurer must notify the covered parent and noncovered parent having custody of the child or any other person having custody of the child, in writing, at any time that health insurance for the child is terminated [*Fam. Code § 3751.5(g)*]. This requirement does not apply unless the court, employer, or person having custody of the child provides the insurer with a qualified medical child support order, a health insurance coverage assignment or assignment order, or a national medical support notice [*Fam. Code § 3751.5(h)*].

The noncovered parent or person having custody of the child may contact the insurer by telephone or in writing and request information about the child's health insurance coverage. On receiving such a request, the insurer must provide the requested information that is specific to the child's health insurance coverage [*Fam. Code § 3751.5(i)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19-224 California Forms of Pleading and Practice--Annotated §§ 224.134-224.149

[Reserved]

§§ 224.134[Reserved]

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§ 224.150 Discovery Issues

A fair and proper determination of child support amounts under the statewide guideline will often depend on the ability of the parties and the court to obtain reliable financial information about each parent. Certain discovery statutes and privacy protections are particularly relevant to this task.

Fam. Code § 3552 provides that no party to a proceeding under the Family Code involving child support may refuse to submit copies of his or her state and federal income tax returns to the court, whether individual or joint [*Fam. Code § 3552(a)*]. The tax returns may be examined by the other party and are discoverable by the other party. A party also may be examined by the other party as to the contents of a tax return so submitted [*Fam. Code § 3552(b)*]. If the court finds that it is relevant to the case to retain the tax return, the tax return must be sealed and maintained as a confidential court record. If the court finds that the tax return is not relevant to disposition of the case, all copies of the tax return must be returned to the party who submitted it [*Fam. Code § 3552(c)*].

As discussed in *§ 224.105[6]*, the income of a parent's subsequent spouse or nonmarital partner may be considered in determining child support only in an extraordinary case in which excluding the income would lead to extreme and severe hardship to the child [*Fam. Code § 4057.5(a)*]. If any portion of the income of either parent's subsequent spouse or nonmarital partner is allowed to be considered, discovery for the purposes of determining income must be based on W2 and 1099 income tax forms, unless the court determines that application would be unjust or inappropriate [*Fam. Code § 4057.5(c)*].

There are privacy limitations on discovery of financial records of the subsequent spouse or partner [*see Harris v. Superior Court (1992) 3 Cal. App. 4th 661, 667-668, 4 Cal. Rptr. 2d 564* (person does not waive right of privacy by living with child support obligor); *see also Babcock v. Superior Court (1994) 29 Cal. App. 4th 721, 726, 35 Cal. Rptr. 2d 462]* . Under prior law, which provided a substantially different standard for consideration of the income of subsequent spouse or partner [*see* former *Civ. Code § 4721(e)(3)* (rebuttal factor if parent's sub sequent spouse or nonmarital partner had income that helped meet parent's basic living expenses, thus increasing parent's disposable income available for children)], the right of privacy prohibited broad inquiry into the financial affairs of the subsequent

spouse or partner [*Harris v. Superior Court (1992) 3 Cal. App. 4th 661, 668, 4 Cal. Rptr. 2d 564]* . The extent to which the right of privacy limits discovery under *Fam. Code § 4057.5* is as yet undetermined.

When a parent fails to comply with a court order compelling the parent to provide discovery of his or her financial records, the court has discretion to impose sanctions against that parent, including an "issue sanction" declaring that, for purposes of calculating child support, the court will impute a specified amount as the parent's income and preclude the parent from offering any evidence to the contrary [*In re Marriage of Chakko (2004) 115 Cal. App. 4th 104, 108-110, 8 Cal. Rptr. 3d 699* (court imputed income of $40,000 per month to father)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryPrivileged MattersGeneral OverviewFamily LawChild SupportObligationsGeneral OverviewFamily LawChild SupportProceduresFamily LawParental Duties & RightsDutiesSupport of Children

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§ 224.151 Form and Time of Payment

[1] In General

In most situations, child support is provided by cash payments from the noncustodial parent to the custodial parent on a weekly or monthly basis. The obligated parent must make a child support payment before payment of any debts owing to creditors [*Fam. Code § 4011*].

[2] Electronic Funds Transfer

If the obligor is not subject to an earnings assignment order [*Fam. Code § 4508(a)*; *see Fam. Code § 5230*, discussed in *§ 224.152[1]*], the court may require him or her to designate an account for the purpose of paying child support by electronic funds transfer [*Fam. Code § 4508(b)*; *see Rev. & Tax. Code § 6479.5*]. The order may require the obligor to deposit funds in an interest-bearing account with a financial institution, and, if such an account is ordered, to maintain funds in the account sufficient to pay the monthly child support obligation [*Fam. Code § 4508(b)*].

The court may order that each payment be electronically transferred to either the obligee's account or to the district attorney's account [*Fam. Code § 4508(b)*; *see Fam. Code § 4200* (payment to public officer, discussed in *§ 224.152[4]*)]. The obligor must be required to notify the obligee if the depository institution or the account number is changed. No interest accrues on any amount subject to electronic funds transfer as long as funds are maintained in the account that are sufficient to pay the monthly child support obligation [*Fam. Code § 4508(b)*].

[3] Payments to Providers

At least with regard to additional child support amounts for uninsured medical expenses under the statewide uniform child support guideline [*see Fam. Code § 4063(a)(2)*, discussed in *§ 224.112[1]*], the court would seem to have the authority to order payment directly to the provider [*see Fam. Code § 4063(b)*, discussed in *§ 224.112[3]*]. The court in a dissolution proceeding also has general authority to order either parent to pay an obligation, or any portion thereof, directly to a creditor if the court determines that the payment would benefit a minor child of the parties [*Fam. Code §*

2023; *see Fam. Code § 2000* (provision limited to proceedings for dissolution of marriage, legal separation, and nullity of marriage)]. The creditor has no right to enforce the order, nor are the creditor's rights affected by this determination [*Fam. Code § 2023*; *see also Pinson v. Cole (2003) 106 Cal. App. 4th 494, 496, 131 Cal. Rptr. 2d 113]* . 1994 legislation repealed a provision that expressly allowed direct payment to providers of all child-support add-ons under *Fam. Code § 4062* [*see* Stats. 1994, ch. 466, § 2, repealing former *Fam. Code § 4063* and replacing it with new version limited to medical expenses; *see also Owens v. Owens (1962) 210 Cal. App. 2d 705, 708, 26 Cal. Rptr. 847* ; *Dougal v. Dougal (1956) 143 Cal. App. 2d 272, 275-276, 299 P.2d 404]* . Whether this repealer was intended to prohibit the payment of child support in the form of direct payments to providers is not clear. The general provision would allow direct-payment orders under the court's jurisdiction to divide community debts, but would not necessarily provide for a child support credit for payments made to providers, such as for child care, on an ongoing basis.

[4] Transfers of Property

Under prior law, courts permitted the discharge of child support in forms other than by periodic cash payments. One court approved the parents' agreement that provided for the transfer of real property from the noncustodial parent to the custodial parent, who would hold the property in trust and use the trust income to support the children. Title to the property would revert to the noncustodial parent when the children reached majority [*Nicholas v. Nicholas (1952) 110 Cal. App. 2d 349, 352-353, 242 P.2d 679]* .

Under the statewide uniform child support guideline [*Fam. Code § 4050 et seq.*], such a trust arrangement might still be valid, depending on the circumstances. Stipulations regarding child support are still authorized [*see Fam. Code § 4057(b)(1), 4065*; *see also § 224.111[2]*]; however, to assure court approval, the parties should first determine the child support obligation under the guideline, considering the income from the trust property as part of the transferor's annual gross income [*see Fam. Code § 4058(a)(1)*]. If the amount of income that is produced by the trust is reasonably close to the guideline amount, there would seem to be no reason why the child support obligation could not be met by the transfer.

[5] Life Insurance Order

The court may order a parent to obtain or maintain life insurance for the benefit of the children as a form of child support [*In re Marriage of O'Connell (1992) 8 Cal. App. 4th 565, 571-573, 10 Cal. Rptr. 2d 334* (court may require insured spouse to designate children as cobeneficiaries of existing policy, without notice to current beneficiary); *cf. Fam. Code § 4360(a)* (express statutory authority for court order requiring life insurance, annuity, or trust as substitute for spousal support after death of supporting spouse)].

[6] Credit for Federal Disability and Retirement Benefits

If a court has ordered a noncustodial parent to pay child support, payments made by the federal government for the child's support, under the Social Security or Railroad Retirement Acts, or by the Department of Veterans Affairs, because of the obligor parent's retirement or disability that are received by the custodial parent or other child support obligee each month must be credited by the court to the amount of child support ordered to be paid by the obligor parent for that month [*Fam. Code § 4504(b)*; *see Code Civ. Proc. § 695.221* (prescribing order for crediting payments)]. If the amount of the payment exceeds the amount of child support due for the month, the excess cannot be credited against arrearages or interest accrued on arrearages [*In re Marriage of Robinson (1998) 65 Cal. App. 4th 93, 96, 76 Cal. Rptr. 2d 134]* . The payments do not have to be credited, however, if the court considered them in determining the amount of child support to be paid by the obligor parent. If a lump-sum payment representing payments for more than one month is received by the custodial parent or other child support obligee, credit must be given for each month covered by the lump-sum payment [*see In re Marriage of Denny (1981) 115 Cal. App. 3d 543, 553-554, 171 Cal. Rptr. 440]* .

If the noncustodial parent gives notice that he or she is receiving disability or retirement payments from the federal

government under the Social Security or Railroad Retirement Acts, or from the Department of Veterans Affairs, then the custodial parent or other child support obligee has the responsibility to contact the appropriate federal agency within 30 days to verify eligibility for the child to receive payments. If the child is potentially eligible for those payments, the custodial parent or other child support obligee must apply for the benefits. Both parents have a duty to cooperate in obtaining the benefits [*Fam. Code § 4504(a)*].

If the custodial parent or other child support obligee refuses to apply for benefits for which the child is eligible, or fails to cooperate with the federal agency in completing the application, the noncustodial parent is credited with the amount that the child would have received. The noncustodial parent must provide evidence to the local child support agency of the amount the child would have received. The credit continues as long as the child support order is in effect and the children are eligible for the benefits [*Fam. Code § 4504(c)*].

Under the statewide uniform child support guideline, it does not appear that payments such as those covered by *Fam. Code § 4504* would be considered as the income of the parent, because only the child and not the parent has the right to receive the benefit [*see Fam. Code § 4058*]. However, at least one court has held that a court has the discretion to charge monthly Social Security disability benefits paid to the child to the custodial parent's side of the guideline formula, indirectly reducing the noncustodial parent's support obligation, rather than directly crediting these benefits as part of the noncustodial parent's support payments [*In re Marriage of Drake (1997) 53 Cal. App. 4th 1139, 1162-1163, 62 Cal. Rptr. 2d 466]* . It has been held that the scope of *Fam. Code § 4504* is limited to disability and retirement benefits, and that it does not provide a credit for Social Security survivor benefits paid to a child on account of the death of either the payor parent [*In re Marriage of Bertrand (1995) 33 Cal. App. 4th 437, 439-441, 39 Cal. Rptr. 2d 151]* or the payee parent [*County of Napa v. Combs (1990) 222 Cal. App. 3d 1077, 1080-1081, 272 Cal. Rptr. 282]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 224.152 Enforcement Provisions Issued With Order

[1] Mandatory Earnings Assignment

For child support orders issued or modified on or after July 1, 1990, an earnings assignment order will be issued at the time of the support order [*Fam. Code § 5230*; *see also Fam. Code § 5250* (obtaining assignment order re support orders issued or modified prior to July 1, 1990)]. However, service of the assignment order on an employer may be stayed on a showing of good cause [*see Fam. Code § 5260*]. For discussion of earnings assignment orders, see *Ch. 259, Family Law Enforcement: Special Remedies for Support Enforcement, § 259.50* et seq.

[2] Security for Payment

On a showing of good cause, the court may order a parent who is required to make child support payments to furnish reasonable security to ensure that payments will be made [*Fam. Code § 4012*; *Brothers v. Kern (2007) 154 Cal. App. 4th 126, 134, 64 Cal. Rptr. 3d 239* (good cause shown by evidence that father planned and attempted to direct all his resources to his attorney, leaving none for child support)]. Security may be in the form of a child support security deposit account, which may be ordered without any showing of good cause [*see Fam. Code § 4560 et seq.*].

Other security devises, which may be ordered only on a showing of good cause, may be a child support bond [*see Code Civ. Proc. § 995.010 et seq.*], a life insurance policy with the supported child as beneficiary [*see Franklin Life Ins. Co. v. Kitchens (1967) 249 Cal. App. 2d 623, 631-632, 57 Cal. Rptr. 652]* , or a lien on the property of the obligor parent [*see Gaston v. Gaston (1896) 114 Cal. 542, 546-547, 46 P. 609* ; *In re Marriage of Drake (1997) 53 Cal. App. 4th 1139, 1163-1166, 62 Cal. Rptr. 2d 466* (court properly issued order requiring father to pledge securities for child's benefit and placing lien on certain real property to provide for continuing support of adult disabled child); *Baylis v. Baylis (1941) 48 Cal. App. 2d 674, 680, 120 P.2d 89* ; *but see In re Marriage of Johnson (1982) 134 Cal. App. 3d 148, 160-162, 184 Cal. Rptr. 444* (lien was abuse of discretion because it lacked certainty regarding time or circumstances that would permit husband to receive portion of his share)].

For further discussion of child support security accounts and other devises for security, see *Ch. 259, Family Law*

Enforcement: Special Remedies for Support Enforcement, § 259.80 et seq.

[3] State Employee Earnings Deduction

If the court orders a state employee to pay child support, the court may order the employee to make payment through a mandatory deduction from salary or wages [*Fam. Code § 4507*; *see Gov. Code § 1151.5*]. A service charge may be assessed for this deduction [*Gov. Code § 1151.5(a)*]. Public agencies are authorize to establish programs for payroll deductions for purposes that include payment of child and spousal support and payment of legal judgments [*Gov. Code § 1151.5(b)*].

[4] Receipt of Public Assistance and Order to Pay County Officer

An order awarding custody to a parent who is receiving, or in the opinion of the court is likely to receive, public assistance [*Welf. & Inst. Code § 11200 et seq.*] for the maintenance of a child [*see Fam. Code § 4004* (parties in child support proceedings required to reveal whether they are currently receiving or intend to apply for certain public assistance for child's maintenance)] must include a child support order under the statewide uniform child support guideline [*Fam. Code § 3029*]. When the court orders child support to be paid to a parent who is receiving such public assistance benefits for the maintenance of children for whom support may be ordered, the court must further direct that the support payments be made to the county officer designated by the court for that purpose, and must direct the local child support agency to appear on behalf of the welfare recipient in any proceeding to enforce the order [*Fam. Code § 4200*]. If the custodial parent is not receiving public assistance, the court has discretion to order payment of child support directly to the county and/or to direct the local child support agency to appear on behalf of the minor children in any proceeding to enforce the order [*Fam. Code § 4201*].

Once the State Disbursement Unit described in *Fam. Code § 17309* is implemented, all payments (that otherwise would go to the county officer) must be directed to the Unit instead of the county officer designated by the court [*Fam. Code §§ 4200(a), 4201(a)*].

In any proceeding in which the court has made an order requiring the payment of child support to a person having custody of a child and the child support is subsequently assigned to the county, or the person having custody has requested the support agency to provide child support enforcement services, agency may issue a notice directing that the payments be made to the district attorney, another county office, or the State Disbursement Unit pursuant to *Fam. Code § 17309*. The notice must be served on both the support obligor and obligee in compliance with *Code Civ. Proc. § 1013*. The agency must file the notice in the action in which the support order was issued [*Fam. Code § 4204*].

[5] Information Regarding Current Employer

Any order for child support must include a provision requiring each parent to notify the other of the name and address of his or her current employer. If the order requires payment through an agency designated under Title IV-D of the Social Security Act [*see 42 U.S.C. § 651 et seq.*], the agency must also be notified [*Fam. Code § 4014(a)*].

In addition, in a proceeding involving child or family support, a court may require either parent to attend job training, job placement and vocational rehabilitation, and work programs, as designated by the court, at regular intervals and times and for durations specified by the court. If such an order is made, the court may also require a parent to provide documentation of participation in the programs, in a format that is acceptable to the court, in order to enable the court to make a finding that good faith attempts at job training and placement have been undertaken by the parent [*Fam. Code § 3558*].

[6] Information Regarding Obligor and Obligee

In cases in which the local child support agency is not providing child support services pursuant to *Fam. Code § 17400*,

and to the extent required by federal law, and subject to applicable confidentiality provisions of state or federal law, any order for child support must include a provision requiring the child support obligor and obligee to file with the court the following information: (1) residential and mailing address; (2) Social Security number; (3) telephone number; (4) driver's license number; (5) name, address, and telephone number of the employer; and (6) any other information prescribed by the Judicial Council. The order must specify that each parent is responsible for providing his or her own information, that the information must be filed with the court within 10 days of the order, and that new or different information must be filed with the court within 10 days after any event that causes a change in the previously provided information [*Fam. Code § 4014(b)*]. The Judicial Council is required to develop forms for providing this information, which are be developed so as not to delay the implementation of the Statewide Child Support Registry (*see § 224.153*) and must be available no later than 30 days prior to the implementation of the Registry [*Fam. Code § 4014(d)*].

In cases in which the local child support agency is not providing child support services pursuant to *Fam. Code § 17400*, once a child support registry is operational (*see § 224.153*), any order for child support must include a provision requiring the obligor and obligee to file and keep updated this information with the child support registry [*Fam. Code § 4014(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGuidelinesFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsEnforcementIncome WithholdingFamily LawParental Duties & RightsDutiesSupport of Children

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19-224 California Forms of Pleading and Practice--Annotated § 224.153

§ 224.153 Statewide Registry for Child Support Orders

The Statewide Automated Child Support System (SACSS)--which has been delayed in implementation--or its replacement, may be used to provide a single statewide registry of all child support orders in California [*Welf. & Inst. Code § 16575(b)*]. The Judicial Council is required to develop the necessary forms to implement the statewide child support registry. These forms may be in electronic form or in hard copy, as appropriate. The forms must be developed so as not to delay implementation of the registry, and must be available no later than 30 days before its implementation [*Welf. & Inst. Code § 16577(a)*]. The clerk of each court must provide this information to the department or the registry from each new or modified child support order, including child support arrearage orders, within 20 days [*Welf. & Inst. Code § 16576(b)*]. The department must enter this information into the registry within 10 days of receipt [*Welf. & Inst. Code § 16576(c)*]. This information must be provided to county district attorneys, the Franchise Tax Board, the courts, and others as provided by law [*Welf. & Inst. Code § 16576(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGeneral OverviewGovernmentsCourtsClerks of Court

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[Reserved]

§§ 224.154[Reserved]

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19-224 California Forms of Pleading and Practice--Annotated § 224.170

§ 224.170 Jurisdiction to Modify or Terminate Support Order

The court may modify or terminate any order for child support as it may deem necessary [*Fam. Code § 3651(a)*], except as to any amount accruing prior to the date of the filing of the notice of motion or order to show cause to modify or terminate [*Fam. Code § 3651(c)*; *see In re Marriage of Gong & Kwong (2008) 163 Cal. App. 4th 510, 518, 77 Cal. Rptr. 3d 540* ; *County of Santa Clara v. Wilson (2003) 111 Cal. App. 4th 1324, 1326-1327, 4 Cal. Rptr. 3d 653* (trial court lacked equitable power to eliminate four months of child support arrearages accruing before father filed modification motion); *but see 42 U.S.C. § 666(a)(9)(C)* (limiting retroactivity of modification orders, as discussed in *§ 224.171*)]. On the filing of a supplemental complaint under *Fam. Code § 2330.1* (*see § 224.81*), a child support order in the original proceeding may be modified in conformity with the statewide uniform child support guidelines to provide for the support of all of the children of the same parents who were named in the initial and supplemental pleadings, to consolidate arrearages and wage assignments for children of the parties, and to consolidate orders for support [*Fam. Code § 3651(b)*].

No section in the Family Code allows a recommendation of a family court settlement officer to terminate or modify a duly entered support order of the family court. Thus, for example, a filed copy of the settlement officer's recommendation is not a court order modifying a previously entered support order. If either of the parties wants the recommendation to have the force and effect of an order, that party must comply with the procedure described on the form to obtain an order [*In re Marriage of Brinkman (2003) 111 Cal. App. 4th 1281, 1287-1289, 4 Cal. Rptr. 3d 722]* .

The court's jurisdiction to modify includes the power to require payment of child support even though the original dissolution judgment did not impose any child support liability [*Krog v. Krog (1948) 32 Cal. 2d 812, 816-817, 198 P.2d 510]* .

The court may modify or terminate an order for child support at any time, even if the parties have entered into an agreement on the subject of child support [*Fam. Code § 3651(a)*; *see In re Marriage of Lackey (1983) 143 Cal. App. 3d 698, 705, 191 Cal. Rptr. 309]* . The court may also enforce postjudgment agreements between the parties that modify

child support [*see* *In re Marriage of Armato (2001) 88 Cal. App. 4th 1030, 1045-1047, 106 Cal. Rptr. 2d 395* (parties' signed letter agreement modifying child support was enforced under *Code Civ. Proc. § 664.6*)]. However, a stipulation between the parties to engage in binding arbitration on future child support issues is void as against public policy to the extent it purports to deprive the court of jurisdiction to modify child support [*In re Marriage of Bereznak and Heminger (2003) 110 Cal. App. 4th 1062, 1067-1070, 2 Cal. Rptr. 3d 351]* .

A court's jurisdiction to modify a prior child support order continues even if a custodial parent who has moved to modify dies during the pendency of the motion. In that situation, the court may substitute in place of the deceased parent an appropriate representative of his or her estate [*In re Marriage of Drake (1997) 53 Cal. App. 4th 1139, 1151-1153, 62 Cal. Rptr. 2d 466]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportJurisdictionSubject Matter JurisdictionFamily LawChild SupportObligationsModificationGeneral Overview

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19-224 California Forms of Pleading and Practice--Annotated § 224.171

§ 224.171 No Retroactive Modification

An order modifying or terminating a child support order may not apply to any amount that accrued before the date of filing the notice of motion or order to show cause to modify or terminate, except as provided in *Fam. Code § 3651(b)* (concerning supplemental complaints, as discussed in *§ 224.170*) [*Fam. Code § 3651(c)*; *Armstrong v. Armstrong (1976) 15 Cal. 3d 942, 947, 126 Cal. Rptr. 805, 544 P.2d 941* ; *In re Marriage of Tavares (2007) 151 Cal. App. 4th 620, 623, 60 Cal. Rptr. 3d 39* (parent who has skipped opportunity to modify support order may not undermine accrued arrears by later contesting expenses); *County of Santa Clara v. Wilson (2003) 111 Cal. App. 4th 1324, 1326-1327, 4 Cal. Rptr. 3d 653* (trial court lacked equitable power to eliminate four months of child support arrearages accruing before father filed modification motion); *In re Marriage of Perez (1995) 35 Cal. App. 4th 77, 80, 41 Cal. Rptr. 2d 377]* . The legislature has established a bright-line rule that accrued child support is vested and cannot be adjusted up or down [*In re Marriage of Tavares (2007) 151 Cal. App. 4th 620, 627, 60 Cal. Rptr. 3d 39* ; *see Fam. Code §§ 3651(c)(1), 3653(a), 3692*]. When a parent believes the amount ordered is too high, or too low, he or she must seek *prospective* modification [*Fam. Code § 3653*; *In re Marriage of Tavares (2007) 151 Cal. App. 4th 620, 627, 630, 60 Cal. Rptr. 3d 39* (noting that neither obligor nor obligee is entitled to modification of support amounts that predate notice to other party of filing of motion to modify support)]. A court has no discretion to absolve an obligor of support arrearages or of interest on this amount [*In re Marriage of Tavares (2007) 151 Cal. App. 4th 620, 627, 60 Cal. Rptr. 3d 39*].

The resulting order, however, may be made retroactive to the date of filing the notice of motion or order to show cause, or to any subsequent date, except as may otherwise be prescribed by federal law [*see Fam. Code § 3653* (referring to *42 U.S.C. § 666(a)(9)*]. Under *42 U.S.C. § 666(a)(9)*, modification is permitted with respect to any period during which there is pending a petition for modification, but only from the date that *notice* of the petition has been given, either directly or through the appropriate agent, to the obligee, or, if the obligee is the petitioner, to the obligor [*see In re Marriage of Goosmann (1994) 26 Cal. App. 4th 838, 843, 31 Cal. Rptr. 2d 613]* .

The trial court, in exercising its discretion to make a child support modification order retroactive, must focus on the children's previously current needs, as measured by the parents' ability to provide support, rather than on the parents'

expenses or overall situation [*In re Marriage of Cheriton (2001) 92 Cal. App. 4th 269, 300, 111 Cal. Rptr. 2d 755]* .

If an order modifying or terminating a support order is entered because of the unemployment of either spouse, the order must be made retroactive to the date of service on the opposing party of the notice of motion or order to show cause to modify or terminate or the date of unemployment, whichever is later, subject to the notice requirements under federal law [*42 U.S.C. § 666(a)(9)*], unless the court finds good cause not to make the order retroactive and states its reasons on the record [*Fam. Code § 3653(b)*].

If an order decreasing or terminating a support order is entered retroactively, the support obligor may be entitled to, and the support obligee may be ordered to repay, any amounts previously paid by the support obligor under the prior order that are in excess of the amounts due under the retroactive order [*Fam. Code § 3653(c)*]. The court may order that repayment by the support obligee be made over any time period and in any manner, including, but not limited to, by an offset against future support payments or wage assignment, as the court deems just and reasonable. In determining whether to order a repayment, and in establishing the terms of the repayment, the court must consider the amount to be repaid, the duration of the support order before modification or termination, the financial impact on the support obligee of any particular method of repayment, such as an offset against future support payments or wage assignment, and any other facts or circumstances the court deems relevant [*Fam. Code § 3653(c)*]. The clerk of each court must transmit the following information to the registry: (1) any information required under federal law; and (2) any other information the Department of Social Services and the Judicial Council find appropriate [*Welf. & Inst. Code § 16577(b)*].

In 1998, the Legislature mistakenly amended *Fam. Code § 3653(c)* to provide that a support obligee would have *no* obligation to repay any amounts previously paid by a support obligor that were in excess of the support amounts due under an order entered retroactively that decreased or terminated support [*see* Stats. 1998, ch. 854]. But in 1999, the Legislature again amended the statute to correct the mistake and clarify that trial courts have discretion to order repayment of overpaid support amounts [*see* Stats. 1999, ch. 653, § 4; Sen. Com. on Judiciary Analysis of Assem. Bill No. 614 (1999-2000 Reg. Sess.) as amended August 16, 1999, p. 9]. The statute, as amended in 1999, applies retroactively, so that trial courts may order support obliges to repay support amounts overpaid during 1999, when the mistaken statute was in effect [*In re Marriage of Dandona & Araluce (2001) 91 Cal. App. 4th 1120, 1125-1126, 111 Cal. Rptr. 2d 390* ; *see Fam. Code § 3653(c)*].

The prohibition on retroactive modification also applies to accrued interest on arrearages. Interest accrues on each installment as it becomes due, and a court has no equitable power thereafter to forgive payment of accrued interest [*In re Marriage of Perez (1995) 35 Cal. App. 4th 77, 80, 41 Cal. Rptr. 2d 377]* .

One court of appeal has held that the trial court may order the noncustodial parent to pay a child's unpaid emergency medical and hospital expenses for care rendered before the custodial parent's filing of a motion for modification. The court reasoned that an order directing payment of unanticipated medical bills is not a retroactive increase but a modification based on changed circumstances [*In re Marriage of Ford (1972) 24 Cal. App. 3d 62, 65-68, 100 Cal. Rptr. 817* ; *but see Fam. Code § 3951(a)* (parent not bound to compensate other parent for voluntary support of child absent agreement for compensation; meaning that noncustodial parent could not be ordered to reimburse custodial parent in situation set forth in *Ford* if custodial parent had paid medical bills)].

In addition, when a judgment was entered providing for child support retroactive to a stipulated date--but in which no mandatory "add-on" child care arrearages had been requested or provided--an appellate court found that adding a provision for retroactive add-ons pursuant to a motion filed two weeks after trial was not an impermissible "retroactive modification," because add-ons had not been addressed at trial [*In re Marriage of Lusby (1998) 64 Cal. App. 4th 459, 473, 75 Cal. Rptr. 2d 263]* .

An order to pay off child support arrearages at a small monthly amount over a long period of time is not a retroactive support modification, but a proper exercise of a court's equitable discretion to enforce its orders. Such an installment

order does not forgive or compromise the outstanding debt, nor preclude future modification or enforcement efforts [*In re Marriage of Everett (1990) 220 Cal. App. 3d 846, 855, 269 Cal. Rptr. 917]* .

Although child support may not be modified retroactively, a court has discretionary or equitable powers it may exercise to reduce or eliminate arrearages in response to an obligor's defense to a support action. Arrearages may be reduced by amounts accruing during a period in which there was a de facto change in custody and the obligor had the actual physical custody of the child [*In re Marriage of Okum (1987) 195 Cal. App. 3d 176, 182, 240 Cal. Rptr. 458]* . Further, the court has discretion to credit overpayments [*see In re Marriage of Peet (1978) 84 Cal. App. 3d 974, 977-980, 149 Cal. Rptr. 108]* or payments made directly to the children [*see In re Marriage of Utigard (1981) 126 Cal. App. 3d 133, 145-146, 178 Cal. Rptr. 546]* against arrearages under some limited circumstances.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsModificationGeneral OverviewFamily LawChild SupportObligationsModificationChanged CircumstancesFamily LawChild SupportObligationsTypesRetroactive Support

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§ 224.172 Termination of Child Support Orders

An order for child support remains in effect until the order is either terminated by the court or terminates by operation of law [*Fam. Code § 3601(a)*; *see Fam. Code § 3651(a)* (court may terminate support order at any time it determines to be necessary)]. A child support order terminates by operation of law when the legal duty of a parent to support his or her child terminates under *Fam. Code § 3900* (when child turns 18) or 3901 (extension to age 19 for child who is still full-time high school student). A support order may also terminate by operation of law under *Fam. Code § 4007*, on the happening of a contingent event such as the statutory emancipation or death of the child [*Fam. Code § 3601(a)*; *but see Lehrer v. Lehrer (1976) 63 Cal. App. 3d 276, 279-280, 133 Cal. Rptr. 709* (emancipation based on totality of circumstances does not terminate support by operation of law, but requires motion to terminate); *but cf. In re Marriage of Dunmore (2000) 83 Cal. App. 4th 1, 4-6, 98 Cal. Rptr. 2d 885* (father's child support obligation is not terminated by finding in adoption action that adoption could proceed without his consent based on his failure to communicate and pay support)]. It does not, however, terminate by operation of law on the death of either the payor parent or the payee parent [*In re Marriage of McCann (1994) 27 Cal. App. 4th 102, 106, 32 Cal. Rptr. 2d 639* (payee parent); *In re Marriage of O'Connell (1992) 8 Cal. App. 4th 565, 572, 10 Cal. Rptr. 2d 334* (payor parent)]. For further discussion, see *§ 224.37[3]* (death of payor) and *§ 224.57*.

Fam. Code § 3601 also refers to a possible termination of support by operation of law under *Fam. Code § 4013*, which refers to discharge of an obligation for support of a child in bankruptcy. However, the operable bankruptcy rule is that child support is not dischargeable [*11 U.S.C. § 523(a)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsTerminationAttainment of MajorityFamily LawChild SupportObligationsTerminationDeathFamily LawChild SupportObligationsTerminationEmancipation of Child

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§ 224.173 Standing of Party Adjudged in Contempt

A parent adjudged to be in contempt of a child support order lacks standing to seek a modification of the order. However, if the court has exonerated a parent from a charge of contempt because the parent lacks the financial ability to comply with the order, the parent has standing to petition for modification of the order [*In re Marriage of Milch (1975) 47 Cal. App. 3d 666, 669-670, 120 Cal. Rptr. 901* ; *see Ramirez v. Superior Court (1977) 72 Cal. App. 3d 351, 354-355, 140 Cal. Rptr. 108* (because contempt involves ability to comply with court order, court should not refuse to hear motion for modification because parent has not made prior child support payments without first ascertaining whether parent is presently able to pay)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewFamily LawChild SupportObligationsEnforcementContemptFamily LawChild SupportObligationsModificationGeneral Overview

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19-224 California Forms of Pleading and Practice--Annotated § 224.174

§ 224.174 Effect of Denial of Visitation

Although a custodial parent's interference with the noncustodial parent's visitation rights does not affect the latter's duty to pay child support [*Fam. Code §§ 3556, 4845(b)*; *see § 224.34*], interference with visitation may provide grounds for modification of a child support order. Several courts have stated, in dicta, that a court has authority to modify child support orders based on interference with visitation rights [*see Moffat v. Moffat (1980) 27 Cal. 3d 645, 652, 165 Cal. Rptr. 877, 612 P.2d 967* ; *Solberg v. Wenker (1985) 163 Cal. App. 3d 475, 480, 209 Cal. Rptr. 545* ; *see also In re Marriage of Damico (1994) 7 Cal. 4th 673, 680, 29 Cal. Rptr. 2d 787, 872 P.2d 126* (citing *Solberg* on this point)].

Additionally, or perhaps alternatively, the court may order the custodial parent to pay certain financial compensation to the noncustodial parent for periods during which the noncustodial parent has been thwarted in attempting to exercise visitation rights [*see Fam. Code § 3028*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyVisitationEnforcementSanctionsFamily LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsModificationGeneral OverviewFamily LawParental Duties & RightsDutiesSupport of Children

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19-224 California Forms of Pleading and Practice--Annotated § 224.175

§ 224.175 Procedure for Simplified Discovery

At any time after a judgment that provides for child support is entered, either parent (or the supported parent's assignee) without leave of the court, may serve a request for the production of a completed current income and expense declaration on the other parent, in a form adopted by the Judicial Council [*Fam. Code § 3664(a)*]. The purpose of this procedure is to permit inexpensive discovery of facts before the commencement of a proceeding for modification or termination of support [*Fam. Code § 3660*]. The procedure may be used once every 12 months [*Fam. Code § 3663*]. A copy of the prior year's federal and state personal income tax returns must be attached to the income and expense declarations of each party [*Fam. Code § 3665(a)*]. If there is no sufficient response within 35 days, the parent may then serve on the other parent's employer a request for information limited to the income and benefits provided to the parent [*Fam. Code § 3664(b)*]. For further discussion of this procedure, including the rights of the employer and parent-employee, and for illustrative Judicial Council forms [*see Fam. Code §§ 3664(b), (f), 3668*], see Ch. 221, *Dissolution of Marriage: Procedure* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewFamily LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawParental Duties & RightsDutiesSupport of Children

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19-224 California Forms of Pleading and Practice--Annotated § 224.176

§ 224.176 Change of Circumstances Requirement

[1] In General

The court will not modify a child support order unless there has been a material change of circumstances since the last prior child support order [*In re Marriage of Popenhager (1979) 99 Cal. App. 3d 514, 521, 160 Cal. Rptr. 379* ; *see Edwards v. Edwards (1975) 52 Cal. App. 3d 12, 15, 124 Cal. Rptr. 742* ; *In re Marriage of Kuppinger (1975) 48 Cal. App. 3d 628, 633, 120 Cal. Rptr. 654]* . If the original order has been modified, the change must have occurred after the last prior order in order to justify further modification [*Miller v. Miller (1970) 11 Cal. App. 3d 197, 199, 89 Cal. Rptr. 643* ; *Evans v. Evans (1960) 185 Cal. App. 2d 566, 570-571, 8 Cal. Rptr. 412]* .

Showing a material change in circumstances necessitates comparing financial information on which the original support order was based with the most recent financial information relevant to a new order, for example, the parties' current income and expense declarations [*In re Marriage of Tydlaska (2003) 114 Cal. App. 4th 572, 575-576, 7 Cal. Rptr. 3d 594* (when husband failed to present "evidentiary yardstick" with which court could determine appropriateness of modification order, request to modify support was properly denied)].

The statewide uniform child support guideline [*Fam. Code § 4055 et seq.*; *see § 224.100* et seq.] constitutes a change of circumstances for the purpose of modification of any child support order entered before July 1, 1992 [*Fam. Code § 4069*; *see Fam. Code § 4051* (operative date); *see, e.g., In re Marriage of Hubner (2001) 94 Cal. App. 4th 175, 179, 114 Cal. Rptr. 2d 646* (manner and presumptions regarding calculation of child support under statewide uniform guidelines had changed since previous support order)].

[2] Not Required for Prior Stipulated Orders for Less Than Guideline Amount

Under the statewide uniform child support guideline, if the parents stipulate to a child support order in an amount that is below the amount established under the guideline [*see Fam. Code § 4065*], no change of circumstances need be demonstrated to obtain a modification of the child support order to the applicable level or above [*Fam. Code § 4065(d)*; *In re Marriage of Williams (2007) 150 Cal. App. 4th 1221, 1232, 58 Cal. Rptr. 3d 877]* . The "or above" language in

Fam. Code § 4065(d), read literally, would in effect allow a modification above the formula amount without a showing of changed circumstances. Given that the formula amount is the presumed correct amount based on the circumstances of the parties at the time of the order [*Fam. Code § 4057(a)*], there appears to be no reason why modification to a higher amount should be allowed without a showing of some change in the factors that are relevant under the formula, that is, the parents' net monthly disposable income and time-share [*see Fam. Code § 4055(a), (b)(1)(C)-(E)*].

When the stipulated child support order is at the guideline amount, a showing of changed circumstances is a necessary predicate to an upward modification of the order [*In re Marriage of Williams (2007) 150 Cal. App. 4th 1221, 1232, 58 Cal. Rptr. 3d 877*].

If parties stipulate by agreement to a child support order that is above the amount established under the guideline [*Fam. Code § 4055*], the child support order cannot be modified downward without a showing of materially changed financial circumstances [*In re Marriage of Laudeman (2001) 92 Cal. App. 4th 1009, 1011, 112 Cal. Rptr. 2d 378]* . Although *Fam. Code § 4065(d)* allows either party to withdraw from a stipulation that is below the guideline amount, as previously discussed, the guideline statute [*Fam. Code § 4050 et seq.*] otherwise adheres to preguideline law and requires proof of changed circumstances to reduce a higher award [*In re Marriage of Laudeman (2001) 92 Cal. App. 4th 1009, 1015, 112 Cal. Rptr. 2d 378]* .

[3] Parents' Ability to Pay as Changed Circumstance

Because parental income is a principal factor in determining a child support obligation under the guideline [*see Fam. Code § 4055(b)(1)(C),(E)*], any increase in either parent's income should be a sufficient change of circumstance to support a modification [*see In re Marriage of Catalano (1988) 204 Cal. App. 3d 543, 551, 251 Cal. Rptr. 370* (supporting parent's increased earnings and improved standard of living as sufficient change of circumstances regardless of standard of living enjoyed by family during parents' marriage)].

A court may also modify, or refuse to modify, a child support order based on a parent's "capacity" to earn, as opposed to actual earnings, at least if the supporting parent's conduct indicates deliberate behavior to avoid financial responsibilities to the child [*see In re Marriage of Williams (1984) 155 Cal. App. 3d 57, 62, 202 Cal. Rptr. 10]* . The parent that seeks to modify an existing order so as to have income imputed to the other parent bears the burden of showing that the other parent has the ability and opportunity to earn that imputed income [*In re Marriage of Bardzik (2008) 165 Cal. App. 4th 1291, 1294-1295, 1302-1308, 83 Cal. Rptr. 3d 72* (father did not meet burden by merely showing that mother had retired before age 65 and what she made before her retirement was not enough to show her present ability and opportunity to earn); *In re Marriage of Rothrock (2008) 159 Cal. App. 4th 223, 236, 70 Cal. Rptr. 3d 881* (no competent evidence was presented for court to have imputed income to father)].

When a parent fails to comply with a court order compelling the parent to provide discovery of his or her financial records, the court has the discretion to impose sanctions against that parent, including an "issue sanction" declaring that, for purposes of calculating child support, the court will impute a specified amount as the parent's income and preclude the parent from offering any evidence to the contrary. In one case, for example, a court imputed income of $40,000 per month to a father, which was the amount of monthly income he stated in a loan application, after he failed to comply with the court's order requiring parties to exchange income and expense declarations, their most recent tax returns, and other financial documents, and failed to comply with court's order compelling him to answer interrogatories about corporations he controlled [*In re Marriage of Chakko (2004) 115 Cal. App. 4th 104, 108-110, 8 Cal. Rptr. 3d 699]* . For additional discussion, see *§ 224.105[5]*.

[4] Subsequent Marriage or Nonmarital Partner as Changed Circumstance

Under *Fam. Code § 4057.5*, the income of a parent's subsequent spouse or nonmarital partner may not be considered in modifying child support, except in an extraordinary case in which excluding the income would lead to extreme and

severe hardship to the child. If the court finds extreme and severe hardship, it must also consider whether including the income would lead to extreme and severe hardship to any other child supported by the parent or by the parent's subsequent spouse or nonmarital partner [*Fam. Code § 4057.5(a)*]. In addition, courts have determined that consideration of such "new mate income" is proper for the purpose of determining a parent's *actual tax liability* in order to calculate that parent's net disposable income [*County of Tulare v. Campbell (1996) 50 Cal. App. 4th 847, 856, 57 Cal. Rptr. 2d 902* ; *In re Marriage of Carlsen (1996) 50 Cal. App. 4th 212, 218-219, 57 Cal. Rptr. 2d 630* ; *see In re Marriage of Drake (1997) 53 Cal. App. 4th 1139, 1163, 62 Cal. Rptr. 2d 466]* . For further discussion of this statute, see *§ 224.105[6]*.

Fam. Code § 4057.5 was enacted by 1993 legislation, operative January 1,1994 [*see* Stats. 1993, ch. 935, § 2]. Its enactment constitutes cause to bring a motion for modification of a child support order entered before that date [*Fam. Code § 4057.5(e)*].

Under prior law, a custodial parent's remarriage, alone, was not a change of circumstance justifying a modification of child support [*Burns v. Burns (1961) 190 Cal. App. 2d 714, 715-716, 12 Cal. Rptr. 68]* . However, because both parents have a legal obligation to support their children, a parent's acquisition of a community property interest in the earnings and property of a subsequent spouse was a change of circumstances. A court could not impose the sole burden of support on the noncustodial parent after the custodial parent acquired a community property interest in the income of a subsequent spouse [*see In re Marriage of Havens (1981) 125 Cal. App. 3d 1012, 1014-1015, 178 Cal. Rptr. 477]* . Conceptually, it might still be argued that a parent's community property interest in the income of a subsequent spouse is the income of the parent and not the income of the spouse excluded under *Fam. Code § 4057.5*. For discussion of the liability of the property of a subsequent marriage for a child support obligation, see *§ 224.37[2]*.

[5] Needs of Child as Changed Circumstance

Under the statewide uniform child support guideline, need is not a quantified factor in the guideline's formula [*see Fam. Code § 4055(a), (b)*; *§ 224.100 et seq*.]. Also, only special circumstances are relevant factors in considering whether the presumption that the formula amount is the correct amount has been rebutted [*see Fam. Code § 4057(b)(5)(C)*], or whether additional child support amounts should be ordered [*Fam. Code § 4062(b)(1)*]. Thus, increases in the cost of the ordinary day-to-day needs of the children, whether due to inflation or other causes, should not constitute a change of circumstances absent a corresponding increase in the obligor-parent's income.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGuidelinesFamily LawChild SupportObligationsModificationChanged CircumstancesFamily LawParental Duties & RightsDutiesSupport of Children

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19-224 California Forms of Pleading and Practice--Annotated § 224.177

§ 224.177 Two-Step Phase-In

Whenever the court modifies a child support order that was issued before July 1, 1992 for the purpose of conforming to the statewide child support guideline, and the amount of child support to be ordered is the amount provided under the guideline's formula [*see Fam. Code § 4055(a)*], the court may, in its discretion, order a two-step phase-in of the formula amount of support to provide the obligor with time for transition to the full formula amount [*Fam. Code § 4076(a)*]. To order the two-step phase-in, the court must find all of the following to be true [*Fam. Code § 4076(a)*]:

(1) The period of the phase-in is carefully limited to the time necessary for the obligor to rearrange his or her financial obligations in order to meet the full formula amount of support;

(2) The obligor is immediately being ordered to pay not less than 30 percent of the amount of the child support increase, in addition to the amount of child support required under the prior order;

(3) The obligor has not unreasonably increased his or her financial obligations following notice of the motion for modification of support, has no arrearages owing, and has a history of good faith compliance with prior support orders.

Whenever the court grants a request for a phase-in, it must state the following in writing [*Fam. Code § 4076(b)*]:

(1) The specific reasons why the immediate imposition of the full formula amount of support would place an extraordinary hardship on the obligor, and that this extraordinary hardship on the obligor would outweigh the hardship caused the supported children by the temporary phase-in of the full formula amount of support;

(2) The full guideline amount of support, the date and amount of each phase-in, and the date that the obligor must begin paying the full formula amount of support, which may be no later than one year after the filing of the motion for modification of support.

If the court orders a phase-in, and the court thereafter determines that the obligor has violated the phase-in schedule or

has intentionally lowered the income available for the payment of child support during the phase-in period, the court may order the immediate payment of the full formula amount of child support and the difference in the amount of support that would have been due without the phase-in and the amount of support due with the phase-in, in addition to any other penalties provided for by law [*Fam. Code § 4076(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGuidelinesFamily LawChild SupportObligationsModificationGeneral OverviewFamily LawParental Duties & RightsDutiesSupport of Children

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19-224 California Forms of Pleading and Practice--Annotated § 224.178

§ 224.178 Notice of Activation of Military Service and Request to Modify Support Order

A party to a support order who is activated to United States military duty or National Guard service and deployed out of state may file and serve a notice of activation of military service and request to modify a support order, in place of a notice of motion or order to show cause, by informing the court and the other party of the request to modify the support order based on a change in circumstances [*Fam. Code § 3651(c)(2)*; see *§ 224.220* (Judicial Council form of Notice and Request)]. The service member must indicate the date of deployment; and, if possible, the court must schedule the hearing before that date. If the court cannot hear the matter before the deployment date and the service member complies with the conditions of the Servicemembers Civil Relief Act (*50 U.S.C.A. § 522*), the court must grant a stay of proceedings consistent with the timelines for stays set forth in the Act. If the court fails to grant a discretionary stay after the expiration of the mandatory stay required by the Act, it must appoint counsel to represent the interests of the deployed service member, unless he or she is represented by other counsel. If the court stays the proceedings until after the service member returns, the service member must request the court to set the matter for hearing within 90 days of return from deployment or the matter must be taken off calendar and the existing order may not be made retroactive under *Fam. Code § 3653(c)* [*Fam. Code § 3651(c)(2)*].

A service member who does not request modification of a support order before deployment out of state is not subject to the penalties authorized by *Fam. Code §§ 4720-4733* on the amount of child support that would not have accrued if the order had been modified, unless the court finds good cause [*Fam. Code § 3651(c)(3)*]. No interest accrues on that amount of a child support obligation that would not have become due and owing if the activated service member modified the support order on activation to reflect the change in income due to the activation. If the court finds that good cause did not exist for the service member's failure to seek or delay in seeking the modification, then interest will accrue as otherwise allowed by law [*Fam. Code § 3651(c)(4)*].

If an order modifying or terminating a support order is entered due to a change in income resulting from activation to the United States military service or National Guard duty and deployment out of state for either the support obligor or the support oblige, the order must be made retroactive to the later of the date of service on the opposing party of the notice of activation, notice of motion, or order to show cause to modify or terminate, or the date of activation, unless the

court finds good cause not to make the order retroactive [*Fam. Code § 3653(c)*]. Good cause includes, but is not limited to, a finding by the court that the delay in seeking modification was not reasonable under the circumstances the service member faced [*Fam. Code § 3653(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsComputationGuidelinesFamily LawChild SupportObligationsModificationGeneral OverviewFamily LawParental Duties & RightsDutiesSupport of ChildrenMilitary & Veterans LawServicemembersFamilies

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[Reserved]

§§ 224.179[Reserved]

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§ 224.190 Federal Statutes

Limitation on percentage of earnings subject to garnishment to enforce child support order. *15 U.S.C. § 1673(b)(2)(A)*

Disclosure of tax return information by Secretary of Treasury or Commissioner of Social Security to federal, state, or local child support enforcement agency. *I.R.C. § 6103(l)(6),(8)*

Authority of Secretary of Treasury to collect child support obligations. *I.R.C. § 6305(a)*

Portions of income necessary to comply with judgment for child support as exempt from levy for failure to pay tax if judgment entered prior to date of levy. *I.R.C. § 6334(a)(8)*

Federal Child Support Enforcement Act. *42 U.S.C. § 651 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGarnishmentsFamily LawChild SupportObligationsEnforcementIncome WithholdingPublic Health & Welfare LawSocial SecurityAssistance to FamiliesChild & Spousal SupportTax LawFederal Tax Administration & ProcedureAudits & InvestigationsDisclosure of Information (IRC secs. 6103-6104, 6108-6110, 6713, 7213, 7216, 7431, 7435)Disclosure of Returns & Return InformationTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesLevy & Distraint (IRC secs. 6330-6344, 7429)Property Exempt From Levy

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19-224 California Forms of Pleading and Practice--Annotated § 224.191

§ 224.191 State Statutes

[1] Court-Ordered Support

Noncustodial parent's duty to support minor child as not affected by interference with custody or visitation rights. *Fam. Code § 3556*

Use of software to determine support. *Fam. Code § 3830*

Civil suit to enforce parents' obligation to support and educate minor child. *Fam. Code § 3900, 4000*

Court-ordered child support. *Fam. Code § 4000 et seq.*

Statewide uniform child support guideline. *Fam. Code § 4050 et seq.*

Court as authorized to order convict to work for support of child. *Penal Code § 273h*

Joint and several liability of parents for certain services rendered to or for minor child by order of juvenile court. *Welf. & Inst. Code § 903 et seq.*

Liability of parents or children for support of patient in state hospital for mentally disordered. *Welf. & Inst. Code § 7275 et seq.*

[2] Criminal Sanctions

Criminal liability of parent for willful failure to support minor child. *Penal Code § 270 et seq.*

Criminal liability for abandonment of or failure to maintain child under age of 14. *Penal Code § 271, 271a*

Venue of criminal action for nonsupport of child. *Penal Code § 777a*

[3] Duty to Support

Equal responsibility of parents to support and educate minor child in manner suitable to child's circumstances. *Fam. Code § 3900*

Continuing parental duty to support unmarried child who resides with parent and attends high school full time until graduation or 19th birthday. *Fam. Code § 3901(a)*

Court-ordered allowance out of child's property for child's past or future support. *Fam. Code § 3902*

Equal responsibility of mother and father to support child of any age who is incapacitated from earning a living and without sufficient means. *Fam. Code § 3910(a)*

Person as not liable for support of grandchild *Fam. Code § 3930*

Right of third parties supplying necessaries to child to be reimbursed by parent. *Fam. Code §§ 3950, 3951*

Support of public charge out of parent's estate. *Fam. Code § 3952*

Emancipation of minors. *Fam. Code § 7000 et seq.*

Written promise to support child growing out of presumed or alleged father-child relationship as not requiring consideration and as enforceable according to its terms. *Fam. Code § 7614(a)*

Liability of parents of developmentally disabled minor for costs of services to child. *Welf. & Inst. Code § 4782 et seq.*

[4] Enforcement

County where child resides as proper county for trial of action to enforce child support obligation. *Code Civ. Proc. § 395(a)*

Recorded, certified copy of superior court judgment for child support as lien on judgment debtor's nonexempt real property. *Code Civ. Proc. §§ 697.320(a)(1), 697.350(c)*

Noncompliance with child support order as contempt of court. *Code Civ. Proc. § 1209.5*

Payment of child support to county officer and enforcement of child support orders by district attorney. *Fam. Code § 4200 et seq.*

Security deposit for child support payments. *Fam. Code § 4550 et seq.*

Deposit of assets to secure future child support payments. *Fam. Code § 4600 et seq.*

Child support delinquency reporting. *Fam. Code §§ 4700, 4701*

Civil penalties for child support delinquency. *Fam. Code § 4720 et seq.*

Uniform Reciprocal Enforcement of Support Act. *Fam. Code § 4800 et seq.*

Enforcement of child support orders by writ of execution. *Fam. Code § 5100 et seq.*

Earnings assignment order for child support. *Fam. Code § 5200 et seq.*

Action by district attorney to recover for aid to families with dependent children resulting from separation or desertion of parent from child. *Welf. & Inst. Code §§ 11350, 11350.1*

Action by district attorney to establish, modify, or enforce child support obligation. *Welf. & Inst. Code § 11475.1*

Settlement of action to enforce child support obligation by district attorney against noncustodial parent. *Welf. & Inst. Code § 11476.1*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionFamily LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsEnforcementContemptFamily LawChild SupportObligationsEnforcementCriminal PenaltiesFamily LawChild SupportProcedures

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§ 224.192 Decisions

[1] Adult Child

Parents of adult child in need and unable to support himself or herself by work as having "joint and several" obligation under former *Civ. Code § 206* (*now see Fam. Code § 3910*) to support child to extent of ability to pay. *Chun v. Chun (1987) 190 Cal. App. 3d 589, 595-597, 235 Cal. Rptr. 553*

Duty of support for adult developmentally disabled child under former *Civ. Code § 206* (*now see Fam. Code § 3910*) may be enforced by one parent against other, even if adult child has conservator. *Johnson v. Superior Court (1984) 159 Cal. App. 3d 573, 584-585, 205 Cal. Rptr. 605*

Treatment by prayer as shielding parents from liability for fiscal nonsupport under *Penal Code Section 270* but not from prosecution under manslaughter and felony child-endangerment statutes. *Walker v. Superior Court (1988) 47 Cal. 3d 112, 126, 138, 253 Cal. Rptr. 1, 763 P.2d 852 , cert. denied, 491 U.S. 905*

[2] AFDC Reimbursement

California courts as having subject matter jurisdiction over district attorney actions for reimbursement from reservation-domiciled Indian parent to recoup AFDC payments made on behalf of Indian child. *County of Inyo v. Jeff (1991) 227 Cal. App. 3d 487, 490-494, 277 Cal. Rptr. 841*

Although prior dissolution judgment in another county ordered father to pay support, county as permitted to seek AFDC reimbursement and ongoing support from child's mother, when child did not live with mother when AFDC benefits were received. *County of El Dorado v. Spence (1986) 182 Cal. App. 3d 698, 703-708, 227 Cal. Rptr. 365*

[3] Child's Right to Support From Both Parents

Postdissolution agreement between adoptive and natural parents, which purported to release adoptive parent from child support claims by natural parent in return for lump sum payment and declaration of abandonment of interest in child, as void for violation of public policy favoring child's statutory right to support from both parents. *In re Marriage of Ayo (1987) 190 Cal. App. 3d 442, 449, 450-451, 235 Cal. Rptr. 458*

[4] Enforcement by Contempt

Application of *Code Civ. Proc. § 1209.5* (prima facie showing of contempt for nonpayment of child support) to shift to alleged contemnor burden of disproving element of offense as constitutional only if contempt proceeding is civil, rather than criminal. *Hicks v. Feiock (1988) 485 U.S. 624, 629-630, 638, 108 S. Ct. 1423, 99 L. Ed. 2d 721*

[5] Reimbursement for Support Provided by Another

Requiring parent to reimburse county, pursuant to *Welf. & Inst. Code § 903* (prior to 1983 amendment), for costs of maintaining minor child committed to juvenile facilities pursuant to *Welf. & Inst. Code § 602* as denial of equal protection under state or federal law. *In re Jerald C. (1984) 36 Cal. 3d 1, 7, 201 Cal. Rptr. 342, 678 P.2d 917*

[6] Workfare Program

Parent's duty to support child as insufficient to justify family court order requiring custodial parent receiving welfare to seek employment or to participate in state workfare program without notice and opportunity to be heard. *Anderson v. Superior Court (1989) 213 Cal. App. 3d 1321, 1331, 262 Cal. Rptr. 405*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewFamily LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsEnforcementContemptFamily LawChild SupportObligationsTypesDependent Adult Support

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19-224 California Forms of Pleading and Practice--Annotated § 224.193

§ 224.193 Law Reviews

Parnas and Cermak, *Rethinking Child Support, 22 U.C. Davis L. Rev. 759 (1989)*

Fisher, *Stepparent Responsibility for Child Support in California's Community Property System, 22 Loy. L.A.L. Rev. 73 (1988)*

Note, *Criminal Nonsupport and a Proposal for an Effective Felony-Misdemeanor Distinction, 37 Hastings L.J. 1075 (1986)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsEnforcementCriminal PenaltiesFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawParental Duties & RightsDutiesSupport of Children

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19-224 California Forms of Pleading and Practice--Annotated §§ 224.194-224.209

[Reserved]

§§ 224.194[Reserved]

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PART IV. FORMS

19-224 California Forms of Pleading and Practice--Annotated § 224.210

§ 224.210 Stipulation to Establish or Modify Child Support and Order [Cal. Judicial Council Form FL-350]

[1] FORM Stipulation to Establish or Modify Child Support and Order [Cal. Judicial Council Form FL-350]

Click here to view image.

[2] Use of Form

This form is the mandatory Judicial Council form of Stipulation to Establish or Modify Child Support and Order [Cal. Judicial Council Form FL-350]. Unless prohibited by applicable federal law, the parents may stipulate to a child support amount, subject to court approval [*Fam. Code § 4065(a)*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

For discussion of the use of a stipulation under *Fam. Code § 4057(b)(1)* to rebut the presumption that the amount of support under the statewide uniform child support guideline is the correct amount, see *§ 224.111[2]*. For discussion of the steps for determining support amounts under the guideline, which must be done in order to properly complete the stipulation form, see *§ 224.104* et seq.

The court may not approve a stipulated child support agreement unless the agreement includes declarations required by statute [*Fam. Code § 4065(a)*]. The Judicial Council form includes language satisfying these declaration requirements (Paragraphs 6, 14, 15). The boxes at the beginning of Paragraph 6 and in Paragraph 6.a. should always be checked so as to include the required language of that paragraph.

If the right to child support has been assigned to the county under *Welf. & Inst. Code § 11477*, or if a public assistance application concerning the child is pending, the local child support agency must join in the stipulation by signing it [*Fam. Code § 4065(b)*] (*see* Paragraph 16).

For a Child Support Case Registry form that is required to be delivered to the court along with any court order for support, including, presumably, a stipulated order, see *§ 224.211* [*see* Cal. Judicial Council Form FL-191].

[3] Enforcement Provisions

An earnings assignment order must be issued for all child support orders [*Fam. Code § 5230(a)*]. Service of the assignment on the obligor's employer may be stayed if the parties agree in writing for an alternative arrangement to ensure that support will be paid [*Fam. Code § 5260(a), (b)(2)*] (*see* Paragraph 9). In the case of a new child support order, counsel should verify ahead of time whether the court will accept the parties' assurance that the obligor will pay without the need of an earnings assignment as a sufficient alternative arrangement. Earnings assignments are discussed in *§ 224.152*.

[4] State Statutes

Stipulations for child support. *Fam. Code § 4065(a)*

Requirement that district attorney general join in stipulation if right to child support has been assigned to county or if application for public assistance is pending. *Fam. Code § 4065(b)*

Statewide uniform child support guideline. *Fam. Code § 4050 et seq.*

Stipulated agreement as rebutting presumption that amount of support established under statewide guideline is correct amount. *Fam. Code 4057(b)(1)*

Earnings assignment orders for collection of child support. *Fam. Code § 5200 et seq.*

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19-224 California Forms of Pleading and Practice--Annotated § 224.211

§ 224.211 Child Support Case Registry Form [Cal. Judicial Council Form FL-191]

[1] FORM Child Support Case Registry Form [Cal. Judicial Council Form FL-191]

Click here to view image.

[2] Use of Form

This form is the Child Support Case Registry Form adopted by the Judicial Council for mandatory use in connection with a court order for child support [Cal. Judicial Council Form FL-191]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

In cases that do not involve the local child support agency, this form must be completed and delivered to the *court* along with any child or family support order, regardless of whether it is an initial order or a modification of such an order [*Cal. Rules of Ct., Rule 5.330(c)*; *but see Cal. Rules of Ct., Rule 5.330(b)* (rule inapplicable to cases in which local child support agency provides enforcement services)]. If a party did not prepare and file the support order, but instead received a copy of a filed order, this form must be completed and delivered to the court within 10 days of the date of receipt of a copy of the support order. Any later change to the information on this form must be delivered to the court on a new form within 10 days of that change, and the court must be kept informed of any changes of address or telephone number of the party who completes the form [*Fam. Code § 4014*]. No filing fees are to be charged for filing the form [*Cal. Rules of Ct., Rule 5.330(c)*].

If the form is submitted with a judgment or order for court approval, the court clerk must complete Item 1(a) of the form ("Date order filed") once the judgment or order has been signed by the judicial officer and filed [*Cal. Rules of Ct., Rule 5.330(c)*].

After the court clerk receives the completed form, it is not to be stored in the court file, but instead, is to be date-stamped when received and stored in an area to which the public does not have access, pending transmission to the

State Department of Social Services. However, if the information is kept confidential, the court may keep a copy of the form or may store the information on the form in an electronic format [*Cal. Rules of Ct., Rule 5.330(g)*].

If the local child support agency is involved in the case, the form (and any updates) must be delivered to the *local child support agency* instead of to the court.

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19-224 California Forms of Pleading and Practice--Annotated § 224.212

§ 224.212 Application and Order for Health Insurance Coverage [Cal. Judicial Council Form FL-470]

[1] FORM Application and Order for Health Insurance Coverage [Cal. Judicial Council Form FL-470]

Click here to view image.

[2] Use of Form

This form is a reproduction of the mandatory Judicial Council form for an application and order for a health insurance coverage assignment [*see* Cal. Judicial Council Form FL-470; *Fam. Code § 3772*]. The application section on page 1 should be filled out by the applicant's attorney and signed by the applicant. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Notice of Intent to Seek Order

The application must be preceded by a written notice of intent to seek the assignment order if the parent who is required to furnish health care coverage fails to do so. It must be personally served, or transmitted by first-class mail, postage prepaid, at least 15 days before the date of the filing of this form [*Fam. Code § 3761(b)(1)*].

The substantive law governing health insurance coverage assignments is discussed in *§ 224.132*.

[4] When Order May be Issued

A health insurance coverage assignment order may be made at the time of trial or entry of a judgment or other order for health insurance coverage [*Fam. Code § 3763(a)*]. However, it appears that the assignment order should only be issued if the obligor is in "default," that is, the obligor has failed to institute the coverage required by the court's order [*see Fam. Code § 3761(b)(1)*]. Therefore, the application would normally be presented a reasonable time after the court has made an order requiring a parent to provide health care coverage and the parent has failed or refused to put the coverage

in place.

[5] Issuance and Service

While no statute provides for issuance of the order ex parte, neither is service of the application required before the order may be issued. *Fam. Code § 3764* indicates that the procedure is for the order to be issued without hearing [*but see Fam. Code §§ 3761(a), 3762* (good cause for not making assignment order)]. The order does not become effective until 20 days after service by first-class mail of the order on the employer [*Fam. Code § 3764(a), (c)*]. The party or local child support agency seeking the order must file a certificate of service showing the method and date of service [*Fam. Code § 3761(b)(2)*]. The employer must give a copy of the order to the obligor within ten days of service [*Fam. Code § 3764(b)*], and the obligor then may institute proceedings to quash the order [*see Fam. Code § 3765*]. If no health care coverage is available to the obligor, the Declaration of No Health Insurance Coverage must be filled out by the employer or other provider and returned by mail to the attorney of the person seeking enrollment [*Fam. Code § 3766(c)*].

[6] State Statutes

"Health insurance coverage" defined. *Fam. Code § 3750*

Requirement that health insurance coverage be maintained for supported child if available at no cost or reasonable cost to parents. *Fam. Code § 3751*

Health insurance coverage assignments. *Fam. Code § 3760 et seq.*

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19-224 California Forms of Pleading and Practice--Annotated § 224.213

§ 224.213 Employer's Health Insurance Return [Cal. Judicial Council Form FL-475; Fam. Code § 3772]

[1] FORM Employer's Health Insurance Return [Cal. Judicial Council Form FL-475; Fam. Code § 3772]

Click here to view image.

[2] Use of Form

The form, above, is the mandatory Judicial Council form of employer's health insurance return [*see* Cal. Judicial Council Form FL-475; *see also Fam. Code § 3772*]. This form is to be filled out by a parent's employer, on the request of a local child support agency, and returned to the agency within 30 days [*Fam. Code § 3771*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The Judicial Council has designed this form as an attachment sheet. Apparently it is for use as an attachment to the Judicial Council form for Application and Order for Health Insurance Coverage (*see § 224.212*).

[3] Contents of Form

The required contents of the form are set forth in *Fam. Code §§ 3771* and *3772*. *Fam. Code § 3771* requires information about the "absent" parent, a term that is not defined anywhere in the statute, but appears in line 2 of the form. Other statutory references regarding health insurance coverage are to the "obligor" parent, who is a parent who has been ordered to maintain health insurance coverage under *Fam. Code § 3750 et seq.* [*see Fam. Code § 3761*]. Either or both parents may be health care coverage obligors, regardless of custodial status and regardless of whether the parent is "present" or "absent" in any sense of the word [*see Fam. Code § 3751(a)(2)*].

It should be noted that *Fam. Code § 3771* requires (and the form asks for) only information about the coverage that the employee currently has and not what coverage is available. Thus, after receiving the form, the district attorney still may not know whether family coverage is available to the employee at no or reasonable cost [*see Fam. Code § 3751(a)(2)*],

which appears to be the crucial information that is needed in order for the district attorney to determine whether to seek a health insurance coverage order.

Additionally, although the form refers only to *insurance* policies, "health insurance coverage" within the meaning of the statute is broadly defined and includes services provided by health maintenance organizations (HMOs) [*see Fam. Code § 3750(b)*]. This form has been modified and filled in to show disclosure of HMO membership.

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19-224 California Forms of Pleading and Practice--Annotated § 224.214

§ 224.214 Application for Expedited Child Support Order [Cal. Judicial Council Form FL-380]

[1] FORM Application for Expedited Child Support Order [Cal. Judicial Council Form FL-380]

Click here to view image.

[2] Use of Form

The form, above, is the mandatory Judicial Council form for application for an expedited child support order under *Fam. Code § 3622(a)* [Cal. Judicial Council Form FL-380; *see Fam. Code § 3634*]. This form includes the notice of consequences of failure to file a response [*see § 224.215*], which the moving party is required to serve on the responding party [*see Fam. Code § 3624(a)(2)*], and a proof of service on the reverse side. Service on the obligated party may be made by personal service or by any method available under *Code Civ. Proc. §§ 415.10-415.40* [*Fam. Code § 3624(b)*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The procedure for obtaining expedited child support orders is discussed in *§ 224.78*.

[3] State Statutes

Expedited child support orders. *Fam. Code §§ 3620-3634*

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19-224 California Forms of Pleading and Practice--Annotated § 224.215

§ 224.215 Response to Application for Expedited Child Support Order and Notice of Hearing [Cal. Judicial Council Form FL-381; Fam. Code § 3625]

[1] FORM Response to Application for Expedited Child Support Order and Notice of Hearing [Cal. Judicial Council Form FL-381; Fam. Code § 3625]

Click here to view image.

[2] Use of Form

The form, above, is the Judicial Council form of response to an application for expedited child support and notice of hearing [Cal. Judicial Council Form FL-381; *see Fam. Code § 3634*]. It should be used to respond to an application for an order for expedited child support filed pursuant to *Fam. Code § 3621* [*see § 224.214*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The response contains standard objections to the application, which the opposing party may check as appropriate. It is recommended that Paragraph 1(f) be checked in all cases, as it is unlikely that the respondent will know with certainty that all of the data on which the computation is based is correct. If an objection is not listed on the printed form, the opposing party should state it clearly at Paragraph 1(g).

To complete the response, the opposing party must request a hearing date, time, and place from the court clerk (*see* Paragraph 3) [*see Fam. Code § 3626*]. This information may be completed by the court clerk at the time of filing. A proof of service is included on the reverse side.

The respondent must file a completed income and expense declaration with the response [*see Fam. Code § 3625(a)*]. If the response and the respondent's income and expense declaration are not filed within 30 days after the application for expedited child support order is served on the respondent, the expedited order will automatically become effective without further action by the court [*Fam. Code §§ 3624(a), (c), 3625(c)*].

[3] Cross References

For a related form, *see § 224.214*.

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19-224 California Forms of Pleading and Practice--Annotated § 224.216

§ 224.216 Expedited Child Support Order [Cal. Judicial Council Form FL-382; Fam. Code § 3621]

[1] FORM Expedited Child Support Order [Cal. Judicial Council Form FL-382; Fam. Code § 3621]

Click here to view image.

[2] Use of Form

The form, above, is the Judicial Council form for an expedited child support order under *Family Code § 3621* [Cal. Judicial Council Form FL-382; *see Fam. Code § 3634*]. It should be used in conjunction with the application for an order for expedited child support [*see § 224.214*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The proposed order must be filed with the court along with the application [*Fam. Code § 3622(d)*]. A copy of the proposed order, along with the application and certain other documents, must be served on the parent from whom support is sought [*Fam. Code § 3624(a)*; *see Code Civ. Proc. §§ 415.10-415.40*; *Fam. Code § 3624(b)* (methods of service)].

The current version of this form does not include all of the findings that may be required under the statewide uniform child support guideline. At the request of any party, the court must state in writing or on the record the information that was used in determining the amount of child support under the guideline [*see Fam. Code § 4056*].

The figures in Paragraph 2 of the order relating to the amount of child support payable monthly for each child should be obtained from the worksheet calculating the proper amount of child support payable under the statewide guideline [*see Fam. Code § 4055 et seq.*; *see also* § 222.104 et seq.].

Paragraphs 3 and 4 of the order relate to the hardship deduction, discussed in *§ 224.105[3]*.

[3] Cross References

For a related form, *see § 224.214*.

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19-224 California Forms of Pleading and Practice--Annotated § 224.217

§ 224.217 Child Support Information and Order Attachments to Findings and Order After Hearing or Judgment [Cal. Judicial Council Forms FL-192, FL-342, FL-342(A)]

[1] FORM Child Support Information and Order Attachments to Findings and Order After Hearing or Judgment [Cal. Judicial Council Forms FL-192, FL-342, FL-342(A)]

Click here to view image.

[2] Use of Forms

Illustrated above are a series of Judicial Council attachments to orders and judgments for child support, which are intended for use in all family law proceedings, including those involving domestic violence, parentage, and governmental agencies. They include the mandatory forms of Child Support Information and Order Attachment [Cal. Judicial Council Form FL-342] and Non-Guideline Child Support Attachment [Cal. Judicial Council Form FL-342(A)]. Also illustrated is the informational form that has Notice of Rights and Responsibilities--Health Care Costs and Reimbursement Procedures on side one and Information Sheet on Changing a Child Support Order on side two [Cal. Judicial Council Form FL-192].

These attachments must be used in conjunction with the Judicial Council form of Findings and Order After Hearing [Cal. Judicial Council Form FL-340] as well as with the Judicial Council forms of Judgment [Cal. Judicial Council Form FL-180] and Restraining Order After Hearing (CLETS) [Cal. Judicial Council Form DV-130]. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Counsel for the prevailing party will usually complete the forms in accordance with the court's order and present them to the court for signature.

The attachments reflect the requirements of *Fam. Code § 4050 et seq.*, the statewide uniform child support guideline, which is discussed in § 222.104 et seq. The Child Support Information and Order Attachment will be used after any

hearing at which child support is awarded. The form provides for the court to require attachment of a printout of a computerized calculation of support and findings (Paragraph 1). Also, a notice/order to withhold income for child support should be prepared for possible use [Judicial Council form FL-195/FL-196; *see* Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* ; *see also* § 222.217[3]]. A Health Insurance Coverage Assignment Order also may be required. Paragraph 12 of the Child Support Information and Order Attachment requires the attachment of the Judicial Council form of Notice of Rights and Responsibilities--Health Care Costs and Reimbursement Procedures and Information Sheet on Changing a Child Support Order [Cal. Judicial Council Form FL-192], which is illustrated above. Line 13 requires that both parties complete and file a Child Support Case Registry form [Cal. Judicial Council Form FL-140] within 10 days from the issuance of the underlying child support order.

The Non-Guideline Child Support Findings Attachment sets forth the basis for a support order that deviates from the statewide guideline, including an order based on the parties' stipulation [*see Fam. Code §§ 4056, 4057, 4065*]. If a "nonguideline" order is made, the box in Paragraph 9 of the Child Support Information and Order Attachment must be marked, and the Non-Guideline form attached.

[3] Earnings Assignment

Paragraph 8 of the Child Support Information and Order Attachment states that a Wage and Earnings Assignment Order for child support must issue, which is a requirement for all child support orders [*see Fam. Code § 5230(a)*]. However, service of the assignment on the obligor's employer may be stayed on a finding of good cause [*Fam. Code § 5260*]. These forms contain no language dealing with such a stay. The appropriate findings and order may be added to Paragraph 8, or, alternatively, may be set forth in the blank space at the bottom of the Child Support Extended Order Attachment. Earnings assignments are discussed in § 222.152[1].

[4] State Statutes

Requirement under statewide uniform child support guideline that court state on record net monthly disposable income of each parent. *Fam. Code § 4056*

Requirement that all child support orders include earnings assignment order. *Fam. Code § 5230*

[5] Cross References

For a related form, *see § 224.212*.

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19-224 California Forms of Pleading and Practice--Annotated § 224.218

§ 224.218 Supplemental Petition for Support for After-Born Child [Fam. Code § 2330.1]

[1] FORM Supplemental Petition for Support for After-Born Child [Fam. Code § 2330.1]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	SUPPLEMENTAL PETITION FOR SUPPORT OF
Respondent.	)	AFTER-BORN CHILD
	)	
	)	

_____

1. The initial petition in this matter for dissolution of marriage was filed on _____ [*date*].

2. _____ [*Name*], who brings this supplemental complaint, is the petitioner in this matter and _____ [*e.g.*, mother] of the child whose support was originally at issue.

3. _____ [*name*] is the respondent in this matter and _____ [*e.g.*, father] of that child.

[4. A _____ (judgment of dissolution of marriage *or* temporary support order) was entered in this matter with regard to the child named in the original petition on _____ (*date*).]

5. On _____ [*date*], another child, _____, [*name*], was born to the parties; _____ [*e.g.*, petitioner] is the mother and _____ [*e.g.*, respondent] is the father of this

child.

WHEREFORE, petitioner prays for orders of court as follows:

1. Requiring _____ [*name*] to pay support for the benefit of the child as provided by the California uniform child support guideline, *Family Code Section 4055 et seq.*;

2. For costs of suit herein incurred, including reasonable attorney's fees;

3. For such other and further relief as the court deems proper.

_____ [*date*]

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

Petitioner

[2] Use of Form

The form, *above*, is a supplemental complaint [*see Code Civ. Proc. § 464*] for use under *Fam. Code § 2330.1* to obtain support for a child who was born to the parties to a proceeding for dissolution of marriage after the proceeding was initiated. Service must be made in the manner provided for the initial service of summons under the Family Code [*Fam. Code § 2330.1*]. For further discussion, see § 222.81.

Fam. Code § 2330.1 provides for a supplemental "complaint." However, a proceeding under the Family Code is commenced by the filing of a petition (rather than complaint) and defended by filing an appropriate response (rather than answer) within 30 days after service on the respondent of the summons and a copy of the petition [*Cal. Rules of Ct. Rule 5.22*; *see also Fam. Code §§ 110* ("proceeding" under Family Code includes action), 127 ("respondent" includes

defendant)]. Therefore, this pleading should be denominated a supplemental "petition" to conform to current family law practice.

[3] State Statutes

Superior Court Jurisdiction. *Fam. Code § 200*

Verification required. *Fam. Code § 212*

Attorney signature required. *Code Civ. Proc. § 128.7*

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19-224 California Forms of Pleading and Practice--Annotated § 224.219

§ 224.219 Qualified Medical Child Support Order (QMCSO) [29 U.S.C. § 1169]

[1] FORM Qualified Medical Child Support Order (QMCSO) [29 U.S.C. § 1169]

THE COURT FINDS AS FOLLOWS:

1. There are _____ [*e.g.*, two] children of the parties, whose names are _____, and whose addresses are _____, for whom child support has been ordered in this matter.

2. The _____ [*parent covered by health plan, e.g.,* mother], whose address is _____, is a participant, through employment, in the following group health benefit plans: _____ [*specify each such plan, including dental and vision care plans*].

THEREFORE, THE COURT ORDERS AS FOLLOWS:

[*EITHER*]

1. Each group health plan specified above shall provide benefits to each child named above, as required by Title *29 United States Code, Section 1169*, as follows: _____ [*specify reasonable description of type of coverage to be provided by each plan, paying particular attention to any optional or alternative coverages that may be provided for under plan*].

[*OR*]

1. Each group health plan specified above shall provide benefits to each child named above, as required by Title *29*

United States Code, Section 1169. The benefits to be provided are all benefits that are otherwise available to plan participants as set forth in _____ [*specify governing instrument controlling plan*], including all amendments to and modifications of the plan as may from time to time be made.

2. These benefits must be provided for as long as _____ [*participant parent*] remains a member of the plan, including any period of continuation coverage provided under *29 United States Code Section 1161*; and with regard to each child named above, for as long as that child is entitled to child support under any order made in this matter.

_____ [*date*]

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form, *above*, is designed to meet the requirements of a "qualified medical child support order" (QMCSO) under ERISA (the Employee Retirement Income Security Act) [*see 29 U.S.C. § 1169*]. The order is intended to be typed on an additional page and submitted as an attachment either with the mandatory Judicial Council form of Judgment [*see* Cal. Judicial Council Form FL-180] or with the Child Support Information and Order Attachment [*see* Cal. Judicial Council Form FL-342] to the Judicial Council's mandatory form of Findings and Order After Hearing [*see* Cal. Judicial Council Form 340]. The optional Judicial Council form of Additional Page (MC-020) may be used.

Examples of these Judicial Council forms are set forth in Ch. 221, *Dissolution of Marriage: Procedure* . These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents of QMCSO

The order must clearly specify (1) the name and last known mailing address (if any) of the participant and the name and mailing address of each child covered by the order; (2) a reasonable description of the type of coverage to be provided by the plan to each child, or the manner in which the type of coverage is to be determined; (3) the period to which the order applies; and (4) each plan to which the order applies [*29 U.S.C. § 1169(a)(3)*]. The order may not require a plan to provide any type or form of benefit, or any option, that is not otherwise provided under the plan [*29 U.S.C. § 1169(a)(4)*].

[4] Effect of QMCSO

A qualified medical child support order is directed at a group health plan. The significance of the order is that if all requirements for qualification are met, the plan must provide benefits to any child of a parent who is a plan participant [*see 29 U.S.C. § 1169(a)(1), (7)*; *see also 29 U.S.C. § 1169(a)(2)(C)* ("alternate recipient" means child of participant who is recognized under medical support order as having right of enrollment under group health plan); *Welf. & Inst. Code § 14124.93*].

It would seem that even if no qualified medical child support order under ERISA is issued, a child would not be excluded from coverage under any plan that, by its terms, enrolls children of plan participants regardless of matters such as the participant's marital status and the parents' custodial arrangement. However, if the plan would otherwise exclude children from coverage under some circumstances, enrollment can be compelled by meeting the ERISA requirements [

Fam. Code § 3751.5 (implementing state statute prohibiting denial of enrollment of children in parent's plan)]. The plan must permit the parent to enroll his or her child without regard to any enrollment period restrictions [*see Fam. Code § 3751.5(b)*.

[5] Service and Determination

The order should immediately be served on each plan administrator to which it applies. The administrator is then to make a determination as to whether it qualifies as a QMCSO, and must notify the plan participant and each child of the determination [*see 29 U.S.C. § 1169(a)(5)*].

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19-224 California Forms of Pleading and Practice--Annotated § 224.220

§ 224.220 Notice of Activation of Military Service and Deployment and Request to Modify a Support Order [Cal. Judicial Council Form FL-398; Fam. Code § 3651]

[1] FORM Child Support Information and Order Attachments to Findings and Order After Hearing or Judgment [Cal. Judicial Council Forms FL-192, FL-342, FL-342(A)]

Click here to view image.

[2] Use of Form

The form, above, is the mandatory Judicial Council form for notice of activation of military service and request to modify a child support order under *Fam. Code § 3651(c)(2)* [Cal. Judicial Council Form FL-398; see *§ 224.178*]. It may be used by a party to a support order who is activated to United States military duty or National Guard service and deployed out of state, in place of a notice of motion or order to show cause, to inform the court and the other party of a request to modify the support order based on a change in circumstances [*Fam. Code § 3651(c)(2)*]. The service member must indicate the date of deployment; and, if possible, the court must schedule the hearing before that date [*Fam. Code § 3651(c)(2)*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Cross References

Notice of activation of military service and request to modify support order. *Fam. Code § 3651(c)(2)-(4)*

Retroactivity of order modifying or terminating support. *Fam. Code § 3653(c)*

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Chapter 225 DISSOLUTION OF MARRIAGE: SPOUSAL SUPPORT

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Chapter 225 DISSOLUTION OF MARRIAGE: SPOUSAL SUPPORT
PART I. SCOPE

19-225 California Forms of Pleading and Practice--Annotated § 225.01

§ 225.01 Scope of Chapter

This chapter discusses spousal support, including general support obligations between husband and wife, spousal support orders in proceedings for dissolution of marriage or legal separation, and modification and termination of spousal support orders.

This chapter starts with an overview of the general duty of spousal support and jurisdiction of the court over spousal support awards [*see § 225.10* et seq.].

This chapter then provides a discussion of the general duty of spouses to support each other, and forms for use in actions to enforce the general duty of support [*see § 225.30* et seq.].

This chapter then discusses the standards that govern awards of both temporary and permanent support [*see § 225.60* et seq.]. It also discusses additional issues that must be addressed in an order for permanent support, including reservation of jurisdiction, future modifiability of the order, and certain enforcement remedies. It contains forms for numerous types of spousal support orders.

This chapter then discusses modification and termination of existing spousal support orders, including the threshold change of circumstances requirement for modification, basic jurisdictional and procedural matters, termination of payments, and termination of jurisdiction [*see § 225.200* et seq.]. It also contains forms for use in modifying or terminating spousal support.

Modification of family law orders and judgments in general is discussed in Ch. 221, *Dissolution of Marriage: Procedure* . Attorney's fees and costs in family law proceedings are discussed in Ch. 226, *Dissolution of Marriage: Attorney's Fees* . Tax consequences of dissolution proceedings are discussed in Ch. 227, *Dissolution of Marriage: Tax Effects of Dissolution* .

For a general discussion of the liability of marital property for support, see Ch. 122, *Community Property* . The enforcement of spousal support orders is discussed in Ch. 259, *Family Law Enforcement: Special Remedies for Support*

Enforcement . For a discussion of the family allowance and other probate devices for protection of the surviving spouse, see Ch. 440, *Probate: Is Probate Necessary ?* et seq. For a general discussion of marital agreements, including agreements for spousal support, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, Chs. 200- 216 (Matthew Bender 2d ed.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsDuty of SupportFamily LawMarital Termination & Spousal SupportSpousal SupportJurisdictionFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral Overview

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§ 225.02 Cross References

For discussion regarding liability of marital property for support, see Ch. 122, *Community Property*

For discussion of the family allowance and other probate devices for protection of the surviving spouse, see Ch. 440, *Probate: Is Probate Necessary ?* et seq.

For discussion regarding enforcement of spousal support orders, including earnings assignment orders and payments to a county officer, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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[Reserved]

§§ 225.03[Reserved]

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§ 225.10 Governing Statutes

The Family Code governs the general duty of spousal support and support orders in proceedings for dissolution and legal separation. Legal relations between husband and wife are generally governed by *Fam. Code § 700 et seq.*, and spousal support in general is governed by *Fam. Code § 4300 et seq.* Liability of property for spousal support is governed by *Fam. Code §§ 910-916* and *4301*.

Welf. & Inst. Code §§ 7275 and *7282* address the duty to support a spouse institutionalized because of insanity or illness. Provisions for spousal support after the death of the supporting party are set forth in *Fam. Code § 4360*, and certain other measures that may be taken for the support of one spouse after the death of the other are included in *Prob. Code §§ 6500, 6510, 6520-6528*, and *6540-6545*.

Temporary spousal support awards in proceedings for dissolution or legal separation are governed by *Fam. Code §§ 3600-3604*. Permanent support orders are governed by *Fam. Code §§ 4330-4339*. Factors to be considered in granting permanent support are set forth in *Fam. Code §§ 4320-4323*. Agreements between the parties for support are governed by *Fam. Code §§ 3580* and *3590-3593*. Discovery of tax returns of the parties in spousal support proceedings is governed by *Fam. Code § 3552*. Security measures that may be included in spousal support orders are governed by *Fam. Code §§ 4339, 4350-4352*, and *5200-5295*.

Modification or termination of spousal support generally is governed by *Fam. Code §§ 3650-3654*. Discovery before the commencement of a modification or termination proceeding is governed by *Fam. Code §§ 3660-3668*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsDuty of SupportFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal

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19-225 California Forms of Pleading and Practice--Annotated § 225.11

§ 225.11 "Support" Defined

"Support" is broadly defined as a source or means of living; subsistence, sustenance, or living. In a broad sense, the term includes all such means of living as would enable one to live in the degree of comfort suitable and becoming to his or her station in life. It is said to include anything requisite to housing, feeding, clothing, health, proper recreation, vacation, travel expenses, or other proper purposes. It includes proper care, nursing, and medical attendance in sickness, and suitable burial at death. Thus, "support" is a general term used to describe a wide variety of types of assistance designed to cover everyday living expenses, including medical care [*In re Marriage of Benjamins (1994) 26 Cal. App. 4th 423, 429, 31 Cal. Rptr. 2d 313* (agreement to pay medical insurance premiums is one for spousal support)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsDuty of Support

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§ 225.12 Mutual Obligations of Support Between Spouses

The marital relationship imposes a mutual duty of support on the spouses [*see Fam. Code §§ 720, 4300*]. The obligation of support is an implicit term of the marriage relationship and has been said to be as binding on the spouses as if an express avowal of the obligation had been made [*Boyd v. Boyd (1964) 228 Cal. App. 2d 374, 379]* . The legal duty is entirely gender-neutral [*see Orr v. Orr (1979) 440 U.S. 268, 278-283, 99 S. Ct. 1102, 59 L. Ed. 2d 306* (Alabama statute that allowed wife, but not husband, to be awarded alimony held unconstitutional)]; distinctions in prior law between the duties of husband and wife were eliminated in 1976 [*see* Stats. 1976, Ch. 130 (amending former *Civ. Code § 242* and repealing former *Civ. Code § 243* to eliminate gender-based distinctions)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsDuty of Support

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19-225 California Forms of Pleading and Practice--Annotated § 225.13

§ 225.13 Subject Matter Jurisdiction

[1] Proceedings in Which Spousal Support May Be Ordered

In a proceeding for dissolution of marriage, nullity of marriage, or legal separation, the court has jurisdiction to inquire into and render any judgment and make such orders as are appropriate concerning the support of either party [*Fam. Code § 2010(d)*; *see Fam. Code §§ 3600* (temporary support, discussed in *§ 225.80* et seq.), *4330* (permanent support, discussed in *§ 225.110* et seq.); *In re Marriage of Stimel (1996) 49 Cal. App. 4th 991, 996, 57 Cal. Rptr. 2d 18* ; *see also Fam. Code § 2254* (permitting order to support putative spouse during proceeding for nullity or on judgment of nullity)]. The duty of support may also be enforced in an action that does not address the status of the marital relationship [*see Fam. Code § 4303(a)*]. Enforcing the right to spousal support without filing for dissolution of marriage, and the right to support in an action for nullity of marriage, are discussed in *§ 225.30* et seq.

A California domiciliary whose marriage was dissolved ex parte in another jurisdiction that did not have personal jurisdiction [*see § 225.14*] over him or her may seek spousal support from a California court [*Hudson v. Hudson (1959) 52 Cal. 2d 735, 744-745, 344 P.2d 295* ; *see In re Marriage of Newman (2000) 80 Cal. App. 4th 846, 851, 95 Cal. Rptr. 2d 691* (Cal. court that otherwise has jurisdiction over issues and parties is not deprived of jurisdiction to award spousal support by pendency of proceeding in another state that does not address that issue)].

[2] Proper Court

The superior court has jurisdiction in all proceedings under the Family Code [*Fam. Code § 200*]. Federal courts do not have subject matter jurisdiction to award spousal support [*Ankenbrandt v. Richards (1992) 504 U.S. 689, 703-704, 112 S. Ct. 2206, 119 L. Ed. 2d 468]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewFamily LawMarital Termination & Spousal

SupportAnnulmentGeneral OverviewFamily LawMarital Termination & Spousal SupportAnnulmentJurisdictionFamily LawMarital Termination & Spousal SupportLegal SeparationFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral Overview

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§ 225.14 Personal Jurisdiction

Because a spousal support award imposes a personal obligation on the spouse ordered to pay the support, a court ordinarily must have in personam jurisdiction over that party in order to award support [*see Baldwin v. Baldwin (1946) 28 Cal. 2d 406, 415-416, 170 P.2d 670* ; *Comfort v. Comfort (1941) 17 Cal. 2d 736, 741, 751, 112 P.2d 259* ; *Judd v. Superior Court (1976) 60 Cal. App. 3d 38, 45-46, 131 Cal. Rptr. 246]* . However, if there is community or quasi-community property over which the court has quasi in rem jurisdiction [*see Fam. Code § 2011* (authority to assert quasi in rem jurisdiction over community and quasi-community property)], a court may perhaps fashion a spousal support order to be paid from designated property [*see Shaffer v. Heitner (1977) 433 U.S. 186, 199 n.17, 97 S. Ct. 2569, 53 L. Ed. 2d 683* ; *Hanson v. Denckla (1958) 357 U.S. 235, 246 n.12, 78 S. Ct. 1228, 2 L. Ed. 2d 1283]* . For further discussion relating to personal jurisdiction in dissolution proceedings, see Ch. 221, *Dissolution of Marriage: Procedure* . For a comprehensive discussion of "in personam," "in rem," and "quasi in rem" jurisdiction generally, see Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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19-225 California Forms of Pleading and Practice--Annotated § 225.15

§ 225.15 Relation Between Spousal Support and Community Property Rights

Spousal support may not be ordered in lieu of an equal division of community property. Spousal support is discretionary, while property rights are absolute, and a party should not have to appeal to the discretion of the court in order to receive what is rightfully his or hers [*In re Marriage of Brown (1976) 15 Cal. 3d 838, 848, 126 Cal. Rptr. 633, 544 P.2d 561* ; *see* *In re Marriage of White (1987) 192 Cal. App. 3d 1022, 1026, 237 Cal. Rptr. 764]* .

Thus, a court may not increase spousal support as a method to achieve payment of amounts required to be paid to the supported spouse to equally divide the parties' community property [*In re Marriage of Maunder (1976) 57 Cal. App. 3d 570, 573, 127 Cal. Rptr. 707* ; *see* *In re Marriage of Cobb (1977) 68 Cal. App. 3d 855, 861, 137 Cal. Rptr. 670]* . However, a court may order the debtor spouse to make periodic payments to the creditor spouse on a property division obligation, in addition to amounts awarded for spousal support [*Verner v. Verner (1978) 77 Cal. App. 3d 718, 727, 143 Cal. Rptr. 826* ; *cf.* *In re Marriage of Schofield (1998) 62 Cal. App. 4th 131, 73 Cal. Rptr. 2d 1]* .

Although spousal support may not be ordered in lieu of a proper property division, the propriety and amount of support may well depend on the division of community property. If a party receives income-producing community property or quasi-community property sufficient to give that party proper support, the court may deny support to be paid from the separate property of the other party [*Fam. Code § 4321(a)*; *see* *In re Marriage of Mastropaolo (1985) 166 Cal. App. 3d 953, 957-958, 213 Cal. Rptr. 26* (propriety of spousal support award depended on whether husband's military retirement pay was divisible community property); *cf.* *In re Marriage of Terry (2000) 80 Cal. App. 4th 921, 932, 95 Cal. Rptr. 2d 760* (dictates of *Fam. Code § 4322* compelled termination of spousal support when former wife had sufficient income to meet support needs)]. For further discussion of the effect of property received in the division of community property on spousal support obligations, see *§ 225.60* et seq.

Although it may not be imposed on the parties by the court, one party may agree to a nonmodifiable support obligation in exchange for a more or less favorable division of property [*see Fam. Code §§ 3591(c), 3651(d)*; *In re Marriage of Carletti (1975) 53 Cal. App. 3d 989, 995, 126 Cal. Rptr. 1]* . For further discussion, see *§§ 225.60 et seq., 225.200* et seq.

One court permitted a short-term deferred disposition of the community residence, characterizing the out-of-residence husband's forbearance of immediate receipt of his monetary interest in the residence and the denial of interest on that sum as spousal support [*In re Marriage of Hurtienne (1981) 126 Cal. App. 3d 374, 380, 178 Cal. Rptr. 748* (husband was unemployed, and otherwise unable to pay support)]. Another court refused to adopt this approach in a case in which the husband was able to pay and was currently paying spousal support, presumably at an appropriate level [*In re Marriage of Horowitz (1984) 159 Cal. App. 3d 368, 371-372, 205 Cal. Rptr. 874]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEquitable DistributionGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral Overview

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19-225 California Forms of Pleading and Practice--Annotated § 225.16

§ 225.16 Family Support

Family support is an agreement between the parties, or an order or judgment, that combines child support and spousal support without designating the amount allocated to each [*Fam. Code § 92*; *see Fam. Code § 4066*]. The primary purpose behind a family support designation is to effect income tax savings. For discussion, see Ch. 227, *Dissolution of Marriage: Tax Effects of Dissolution* .

If the family support designation is used, the court is not obligated to make a separate order for child support [*Fam. Code § 3586* (referring to parents' agreement for combined child and spousal support)]. However, in the absence of a family support designation, it is error to award unreasonably high spousal support and unreasonably low child support so as to permit the obligor to achieve favorable tax treatment [*In re Marriage of Ames (1976) 59 Cal. App. 3d 234, 239-240, 130 Cal. Rptr. 435]* .

Note that child support software programs provide a means for computing the tax savings that are available by using family support rather than the customary designations of child and spousal support [*see In re Marriage of Schulze (1997) 60 Cal. App. 4th 519, 525, 70 Cal. Rptr. 2d 488* (providing an example of results of such computation)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportGeneral OverviewFamily LawChild SupportTaxationFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportTaxation

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19-225 California Forms of Pleading and Practice--Annotated §§ 225.17-225.29

[Reserved]

§§ 225.17[Reserved]

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19-225 California Forms of Pleading and Practice--Annotated § 225.30

§ 225.30 Governing Statutes

The marital duty of support between spouses is set forth in *Fam. Code §§ 720* and *4300*. Legal relations between husband and wife are more generally governed by *Fam. Code § 700 et seq.*, and the duty of spousal support is more generally governed by *Fam. Code §§ 4300-4303*. Judicial determination of the validity of a void or voidable marriage is governed by *Fam. Code § 2200 et seq.*

Liability of property for spousal support is governed by *Fam. Code §§ 910-916* and *4301*. The duty to support a spouse institutionalized because of insanity or illness is governed by *Welf. & Inst. Code §§ 7275* and *7282*. The right to spousal support during the pendency of a proceeding for dissolution or legal separation is governed by *Fam. Code §§ 3600-3604*, and the right to spousal support on a judgment of dissolution or legal separation is governed by *Fam. Code §§ 4330-4339*. Various legal devices for the support of a spouse on the death of the other spouse are set forth in *Prob. Code §§ 6500* (temporary right to remain in possession of family home), *6510* (petition to set aside exempt property), *6520-6528* (probate homestead), and *6540-6545* (family allowance).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsDuty of SupportFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsTemporary SupportFamily LawMarriageValidityVoid & Voidable MarriagesVoid Marriages

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19-225 California Forms of Pleading and Practice--Annotated § 225.31

§ 225.31 Marriage Requirement

[1] Nonmarital Cohabitants

Except as discussed in *§ 225.31[2]*, there must be a valid marriage in order for there to be any obligation of support [*see Hudson v. Hudson (1959) 52 Cal. 2d 735, 738, 344 P.2d 295]* . No common-law marriage can be created under California law [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 684 n.24, 134 Cal. Rptr. 815, 557 P.2d 106* ; *but see Fam. Code § 308* (marriage contracted outside California is valid in California if valid under laws where contracted); *Colbert v. Colbert (1946) 28 Cal. 2d 276, 280, 169 P.2d 633* (support can be awarded to partner in common-law marriage valid under Texas law)], and there is no right to support between unmarried cohabitants that arises merely from cohabitation or from the relationship [*see Friedman v. Friedman (1993) 20 Cal. App. 4th 876, 883-890, 24 Cal. Rptr. 2d 892]* . However, obligations in the nature of support between unmarried partners may be enforced under general principles of contract law [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 667-685, 134 Cal. Rptr. 815, 557 P.2d 106]* . Effective January 1, 2005, registered domestic partners and former and surviving registered domestic partners have the same rights, protections, and benefits, and are subject to the same responsibilities, obligations, and duties under law, as spouses [*Fam. Code § 297.5*]. For further discussion, see Ch. 387, *Nonmarital Cohabitation* .

[2] Void or Voidable Marriage

During the pendency of a proceeding for nullity of marriage, or on judgment of nullity of marriage, the court may order a party to pay for the support of the other party in the same manner as if the marriage had not been void or voidable [*see Fam. Code §§ 2200, 2201* (void marriages), *2210* (voidable marriage)], if the party for whose benefit the order is made is found to be a putative spouse [*Fam. Code § 2254*; *see Fam. Code § 2010(d)*]. A putative spouse is a party to a void or voidable marriage who believed in good faith that the marriage was valid [*see Fam. Code § 2251(a)(1)*]. For further discussion of nullity of marriage, see Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights* .

Legal Topics:

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

Family LawMarital Duties & RightsDuty of SupportFamily LawMarital Termination & Spousal SupportAnnulmentGeneral OverviewFamily LawMarital Termination & Spousal SupportAnnulmentEffectsGeneral OverviewFamily LawMarriageValidityCommon Law MarriagesFamily LawMarriageValidityVoid & Voidable MarriagesGeneral Overview

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19-225 California Forms of Pleading and Practice--Annotated § 225.32

§ 225.32 Scope of Support Obligation

[1] Effect of "Liability of Property" Statutes

Statutory rules regarding the respective liabilities of community property, quasi-community property, and separate property, for debts incurred by a married person, are set forth in *Fam. Code § 900 et seq.* These rules are primarily designed to define creditors' rights against married persons and their property. However, these rules, in effect, also serve to qualify the extent of the duty of support, both while the spouses are living together and while they are living apart [*see Fam. Code § 914* (liability for necessaries); *see also Fam. Code § 4301* (duty to support spouse out of separate property subject to *Fam. Code § 914*)]. These matters are discussed in *§§ 225.34, 225.35*. Spousal liability and the liability of property for marital debts is discussed further in Ch. 122, *Community Property,* and Ch. 359, *Marriage.*

[2] Necessaries

The duty of support encompasses the obligation to pay the debts of the spouse, provided that the debts are for "necessaries" of life [*see Fam. Code § 914*]. What is necessary is determined according to the parties' station in life [*In re Marriage of Higgason (1973) 10 Cal. 3d 476, 488, 110 Cal. Rptr. 897, 516 P.2d 289]* .

Necessaries of life have been found, in various cases, to include the following:

1. Food, habitation, medical treatment [*Department of Mental Hygiene v. Kolts (1966) 247 Cal. App. 2d 154, 157, 55 Cal. Rptr. 437]* ;

2. Nursing services [*Davis v. Fyfe (1930) 107 Cal. App. 281, 284, 290 P. 468]* ;

3. Medical expenses of final illness and funeral expenses [*Odone v. Marzocchi (1949) 34 Cal. 2d 431, 439, 211 P.2d 297]* ;

4. Legal services [*Stone v. Conkle (1939) 31 Cal. App. 2d 348, 351, 88 P.2d 197]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsDebt LiabilityFamily LawMarital Duties & RightsDuty of SupportFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Duties & RightsProperty RightsCharacterizationMarital PropertyFamily LawMarital Duties & RightsProperty RightsCharacterizationSeparate Property

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§ 225.33 Waiver of Spousal Support Duty

Except as otherwise provided by law, spouses cannot, by contract with each other, alter their legal relationships [*Fam. Code § 1620*]. Thus, historically, courts have considered any attempt by the parties to diminish or waive their duty of support in a premarital agreement to be against public policy and unenforceable. In one leading case, an appellate court held that this limitation extended both to attempted waivers of a duty to support during the marriage, and to attempted waivers of spousal support should the marriage terminate in the future [*In re Marriage of Higgason (1973) 10 Cal. 3d 476, 486-487, 110 Cal. Rptr. 897, 516 P.2d 289]* . Provisions that purport to waive the support duty *during marriage* appear to remain prohibited.

However, the California Supreme Court held in 2000 that a premarital agreement containing a spousal support waiver on marital dissolution does *not* violate public policy and is *not* per se unenforceable, when the waiver is executed by intelligent, well-educated persons, each of whom has the advice of counsel regarding his or her rights and obligations as marital partners at the time they execute the waiver [*In re Marriage of Pendleton & Fireman (2000) 24 Cal. 4th 39, 53-54, 99 Cal. Rptr. 2d 278, 5 P.3d 839]* . The Court left open the question of whether circumstances existing at the time of a marital dissolution might make enforcement of a premarital agreement containing a spousal support waiver unjust [*In re Marriage of Pendleton & Fireman (2000) 24 Cal. 4th 39, 53-54, 99 Cal. Rptr. 2d 278, 5 P.3d 839]* . In response, the Legislature amended California's Uniform Premarital Agreement Act, operative January 1, 2002 [*Fam. Code § 1600 et seq.*], to provide that a provision in a premarital agreement relating to spousal support is unenforceable if (1) the party against whom enforcement is sought was not represented by independent counsel at the time the agreement was signed, or (2) if the spousal support provision is unconscionable at the time of enforcement [*Fam. Code § 1612(c)*; *see also Fam. Code § 1615(c)* (premarital agreement was not executed voluntarily unless party against whom enforcement is sought was either represented by independent legal counsel or executed express written waiver of representation by independent legal counsel)]. Thus, premarital agreements with spousal support waivers are not automatically enforceable, simply because the agreements were fair and just when executed; rather, their enforceability will be determined by trial courts on a case-by-case basis [*see Fam. Code § 1615(c)*; *In re Marriage of Pendleton & Fireman (2000) 24 Cal. 4th 39, 53-54, 99 Cal. Rptr. 2d 278, 5 P.3d 839]* .

For further discussion and forms of premarital and marital agreements, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Chs. 201, 211- 216 (Matthew Bender); and California Legal Forms, Chs. 108, 109, 120 (Matthew Bender).

Inheritance rights, including those in the nature of support such as a family allowance, may be waived [*see Estate of Wamack (1955) 137 Cal. App. 2d 112, 113-116, 289 P.2d 871]* . Also, spouses may agree to a waiver or limitation of support in a separation, property settlement, or marital termination agreement [*see Fam. Code § 3580*; *Patton v. Patton (1948) 32 Cal. 2d 520, 523, 196 P.2d 909]* . For further discussion, see *§ 225.60* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsDuty of SupportFamily LawMarital Duties & RightsProperty RightsPremarital AgreementsRequirementsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPremarital AgreementsRequirementsFull & Frank DisclosureFamily LawMarital Duties & RightsProperty RightsPremarital AgreementsRequirementsIndependent Legal CounselFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral Overview

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19-225 California Forms of Pleading and Practice--Annotated § 225.34

§ 225.34 Duty of Spouses Living Together

Spouses must support each other while they are living together [*Fam. Code § 4300*; *cf. Fam. Code § 4302* (no duty to support spouse living separately by agreement unless agreement provides for support)]. Their community property, which with certain exceptions is under the management and control of either spouse [*see Fam. Code §§ 1100, 1102*; for further discussion, *see* Ch. 122, *Community Property*], is primarily liable for this support [*see Fam. Code § 910(a)*]. But if there is no community or quasi-community property, a spouse must support the other from his or her separate property [*Fam. Code § 4301*]. However, liability of one spouse's separate property for the debts of the other is limited to debts for which the spouse is personally liable [*Fam. Code § 914(b)*; *see Fam. Code § 913(b)(1)*]. The personal liability of a married person for the debts of the spouse while living together is limited to debts incurred for necessaries of life [*Fam. Code § 914(a)(1)*; *see § 225.32[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsDebt LiabilityFamily LawMarital Duties & RightsDuty of SupportFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Duties & RightsProperty RightsCharacterizationSeparate Property

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§ 225.35 Duty of Spouses Living Apart

One spouse is not liable for the support of the other if they are living separately by agreement unless support is stipulated in the agreement [*Fam. Code § 4302*; *see Fam. Code § 3580*]. If there is no agreement for support during separation, the duty is suspended, not terminated. Either party may subsequently seek support in a legal proceeding to resolve the status of the marriage [*see London Guarantee & Acci. Co. v. Industrial Acci. Com. (1919) 181 Cal. 460, 466-467, 184 P. 864]* . Reconciliation of the parties and resumption of cohabitation restores any duty of support that was suspended under the agreement [*Lloyd Corp. v. Industrial Acci. Com. (1943) 61 Cal. App. 2d 275, 142 P.2d 754]* .

There is no guidance in the statute and little in the cases as to what constitutes a sufficient agreement under *Fam. Code § 4302*. It is not clear whether an oral agreement is sufficient if its terms can be proved, or if the agreement must be in writing [*compare In re Marriage of Epstein (1979) 24 Cal. 3d 76, 85-86 n.4, 154 Cal. Rptr. 413, 592 P.2d 1165* (noting that existence of agreement was unresolved, but leaving open possibility that agreement could be proved by conduct of parties), *with Fam. Code § 3580* (amenable to construction that separation agreement must be written)]. Nor does it appear to be of any significance whether the intent of the spouses is that the separation will be permanent or temporary.

It appears to be possible to permanently waive the right to support by an express provision in the agreement [*see Estate of Kalal (1981) 121 Cal. App. 3d 841, 850-851, 175 Cal. Rptr. 582* (noting that there may be instances in which court can clearly find that parties intended by agreement to separate and permanently waive spousal support); *see also Patton v. Patton (1948) 32 Cal. 2d 520, 523, 196 P.2d 909]* . For further discussion of the binding effect of agreements waiving support on the court in a dissolution of marriage matter, see *§ 225.60* et seq.

Under *Fam. Code § 4302*, if no separation agreement is proved, the duty of support continues for spouses living apart [*see In re Marriage of Epstein (1979) 24 Cal. 3d 76, 85-86 n.4, 154 Cal. Rptr. 413, 592 P.2d 1165]* . Further, in the absence of an agreement to separate, a spouse (and his or her separate property) remains liable for debts incurred by the other for common necessaries of life while they are living separately [*Fam. Code § 914(a)(2), (b)*; *see § 225.32[2]*].

Therefore, a unilateral abandonment has no effect on the mutual duty of support [*Estate of Hafner (1986) 184 Cal. App. 3d 1371, 1399, 229 Cal. Rptr. 676* ; *but see In re Estate of Fulton (1936) 15 Cal. App. 2d 202, 204-211, 59 P.2d 508* (holding, and surveying older line of cases holding, that spouse who abandons the other without cause forfeits right to support from abandoned spouse)].

The community estate is not liable for debts incurred by either spouse after separation and before a judgment of dissolution of marriage or legal separation [*Fam. Code § 910(b)*].

For an illustrative form of an agreement to separate, which includes provisions regarding support, *see § 225.351*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsDebt LiabilityFamily LawMarital Duties & RightsDuty of SupportFamily LawMarital Termination & Spousal SupportLegal Separation

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19-225 California Forms of Pleading and Practice--Annotated § 225.36

§ 225.36 Effect of Incompetence

The duty to support one's spouse does not end if the spouse has been adjudged insane or a conservator has been appointed [*Guardianship of Thrasher (1951) 105 Cal. App. 2d 768, 776, 234 P.2d 230]* , even if the spouse has been institutionalized because of insanity or illness [*Welf. & Inst. Code § 7275*; *Department of Mental Hygiene v. Kolts (1966) 247 Cal. App. 2d 154, 156-158, 55 Cal. Rptr. 437]* . This is true even if the incompetent spouse has an estate of his or her own [*Department of Mental Hygiene v. Kolts (1966) 247 Cal. App. 2d 154, 157-158, 55 Cal. Rptr. 437* ; *Guardianship of Thrasher (1951) 105 Cal. App. 2d 768, 776-778, 234 P.2d 230]* . Nor can the duty be terminated by dissolution of marriage [*see Fam. Code § 2313*; *see also § 225.37*].

The State Department of Health may, in its own name, bring an action under *Welf. & Inst. Code § 7282* against the supporting spouse to recover the costs and charges of transporting the patient to the state hospital and the amount due for the care, support, and maintenance of the patient in the institution. Any payments made to the department would apply towards the discharge of the paying spouse's obligation to support the insane spouse [*see Young v. Young (1970) 14 Cal. App. 3d 1, 3-5, 92 Cal. Rptr. 148* (holding, however, that State Department of Health was not authorized to compromise incurably insane wife's support rights against husband by consenting to modification of divorce decree to reduce amount of spousal support)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsDuty of SupportFamily LawMarital Termination & Spousal SupportDissolution & DivorceFault-Based GroundsInsanityFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProceduresPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentGeneral Overview

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§ 225.37 Effect of Dissolution or Legal Separation

[1] Duty of Support Continues

Except perhaps in the case of a permanent waiver in a separation agreement [*see Fam. Code § 4302*; *see also § 225.35*; *see § 225.351*], the mutual duty of support is not terminated by legal proceedings for dissolution of marriage or legal separation. In such a matter, the court may order either party to pay spousal support to the other, during the pendency of the proceeding [*see Fam. Code § 3600*], and in the judgment [*Fam. Code § 4330*]. Spousal support in dissolution proceedings is discussed in *§ 225.60* et seq.

[2] On Ground of Incurable Insanity

If a marriage is dissolved on the ground of incurable insanity [*see Fam. Code § 2310(b)*], the judgment does not relieve a spouse from any obligation imposed by law as a result of the marriage for the support of the spouse who is incurably insane. The court may make any order for support, or require a bond therefor, as the circumstances require [*Fam. Code § 2313*].

If the insane spouse is committed to a state mental hospital or developmental center and has no conservator of the estate, the executive director of the hospital or center may collect any money due or owing to the spouse, such as spousal support, not exceeding a specified amount to be adjusted annually, and deposit it in the patient's personal deposit fund [*Welf. & Inst. Code § 7289*; *see Welf. & Inst. Code §§ 7281, 7289.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsDuty of SupportFamily LawMarital Termination & Spousal SupportDissolution & DivorceFault-Based GroundsInsanityFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProceduresPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentGeneral Overview

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19-225 California Forms of Pleading and Practice--Annotated § 225.38

§ 225.38 Effect of Death

[1] Right to Family Allowance

On the death of a married person, the surviving spouse may petition the court for a family allowance [*Prob. Code § 6540(a)(1)*]. If the allowance is granted, it is paid out of the decedent's estate [*Prob. Code §§ 6540(a), 6544*]. The allowance may be denied if the surviving spouse has reasonable maintenance from other sources and there are other persons entitled to the allowance [*Prob. Code § 6540(c)* ; *see Estate of Wallace (1977) 74 Cal. App. 3d 196, 202, 141 Cal. Rptr. 426* (allowance may not be denied if spouse has other sources of support unless other persons are also entitled to allowance)]. The family allowance is an extension of the decedent's obligation of support [*Estate of Schumacher (1971) 18 Cal. App. 3d 146, 152, 95 Cal. Rptr. 572* ; *see Fam. Code § 4337* (absent agreement to contrary, spousal support order terminates on death of either party)].

The survivor's right to the allowance requires that the marital relationship exist at the time of death [*Estate of Hafner (1986) 184 Cal. App. 3d 1371, 1396-1397, 229 Cal. Rptr. 676* (putative spouse may not claim allowance)]. Therefore, dissolution of marriage before death terminates the survivor's right to the allowance, even if the decedent is under an order to pay spousal support [*Estate of Casimir (1971) 19 Cal. App. 3d 773, 782-783, 97 Cal. Rptr. 623]* . Agreements continuing spousal support on the death of the supporting party [*see Fam. Code § 4337*], are discussed, and forms are provided, in *§§ 225.60* et seq., *225.370* et seq.

The surviving spouse can recover the allowance only if he or she was entitled to support from the decedent at the time of death [*see Estate of Kalal (1981) 121 Cal. App. 3d 841, 847, 175 Cal. Rptr. 582]* . The right is not automatically lost merely because the spouses were living apart at the time of death [*Estate of Fallon (1957) 49 Cal. 2d 402, 404, 317 P.2d 963* ; *see § 225.35*]. Nor does the fact that the surviving spouse was not actually receiving support preclude an allowance [*Estate of Hafner (1986) 184 Cal. App. 3d 1371, 1398-1399, 229 Cal. Rptr. 676]* .

The family allowance is strictly a creation of probate law, designed to provide support for the surviving spouse during the pendency of probate proceedings. When there is no estate to be administered, such as when all assets have been

placed in a revocable trust before the decedent's death, it is improper to award a family allowance [*Parson v. Parson (1996) 49 Cal. App. 4th 537, 542, 56 Cal. Rptr. 2d 686* (disinherited surviving wife was not entitled to family allowance)].

Similarly, standards that might apply in other types of proceedings are not determinative of whether the allowance is proper. Factors for the award of spousal support in a dissolution matter [*see Fam. Code § 4320*; *see also § 225.60* et seq.], including duration of the marriage, are irrelevant [*Estate of Wallace (1977) 74 Cal. App. 3d 196, 202-203, 141 Cal. Rptr. 426]* .

The right to a family allowance may be waived by agreement to that effect [*Estate of Wiedemann (1964) 228 Cal. App. 2d 362, 367, 39 Cal. Rptr. 496]* . And unlike other waivers of a right to support (*see § 225.33*), the right to a family allowance may be waived in an antenuptial agreement [*Estate of Wamack (1955) 137 Cal. App. 2d 112, 115-116 . 289 P.2d 871]* . It is not waived, however, simply by delay in petitioning for it [*Estate of Secord (1948) 84 Cal. App. 2d 783, 785, 192 P.2d 81]* .

It has also been said that a surviving spouse may lose the right to a family allowance by conduct [*see Estate of Brooks (1946) 28 Cal. 2d 748, 750, 171 P.2d 724]* . However, cases standing for that proposition, all of which are from the era when marital fault was a factor in awarding support, appear to actually involve the surviving spouse's abandonment of the decedent under circumstances that terminated the decedent's duty to support [*see, e.g., Estate of Fulton (1936) 15 Cal. App. 2d 202, 204, 59 P.2d 508]* . The better rule is that the court has no discretionary right to withhold a family allowance to one who is statutorily entitled to it, although the amount and duration of the allowance are within the discretion of the court [*Estate of Secord (1948) 84 Cal. App. 2d 783, 785-786, 192 P.2d 81]* .

For further discussion of the family allowance, see Ch. 448, *Probate: Family Allowance* .

[2] Other Family Protection

If a married person dies, the surviving spouse may remain in possession of the family home until the filing of the probate inventory and for 60 days thereafter, or for such other period as may be ordered by the court [*Prob. Code § 6500*]. The surviving spouse may also petition to set aside property that is exempt from execution by creditors [*see Prob. Code § 6510*], and petition to set aside property for a probate homestead [*see Prob. Code § 6520 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsDuty of SupportFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral Overview

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19-225 California Forms of Pleading and Practice--Annotated § 225.39

§ 225.39 Enforcement of Support Obligation During Marriage

One spouse may bring an action against the other to enforce the duty of support [*Fam. Code § 4303(a)*; *see Galland v. Galland (1869) 38 Cal. 265, 268-272* (general equity power of court to order support)]. In such an action, *pendente lite* support may be ordered, despite the lack of an express statutory provision authorizing it, under the court's general equity power [*Kilroy v. Kilroy (1995) 35 Cal. App. 4th 1141, 1144-1148, 41 Cal. Rptr. 2d 812]* . For an illustrative complaint in such an action, *see § 225.350*. If a county has furnished support to a married person, the county has the same right to secure reimbursement and obtain continuing support [*Fam. Code § 4303(b)*]. A married person may also file for a judgment of legal separation, in which spousal support may be ordered [*Fam. Code § 4330*].

In addition, there are criminal penalties for nonsupport. It is a misdemeanor for a married person to fail to provide the necessary food, clothing, shelter, and medical attention for his or her spouse if he or she has the ability to provide for support [*Penal Code § 270a*]. If the defendant is convicted and a fine imposed, the fine may be ordered paid to the spouse of the defendant [*Penal Code § 270d*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsDomestic OffensesGeneral OverviewFamily LawMarital Duties & RightsDuty of SupportFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral Overview

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19-225 California Forms of Pleading and Practice--Annotated §§ 225.40-225.59

[Reserved]

§§ 225.40[Reserved]

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19-225 California Forms of Pleading and Practice--Annotated § 225.60

§ 225.60 Governing Statutes

The definition of spousal support is set forth in *Fam. Code § 150*. Temporary spousal support awards in proceedings for dissolution or legal separation are governed by *Fam. Code §§ 3600-3604*. Permanent support orders are governed by *Fam. Code §§ 4330-4339*. Factors to be considered in granting permanent support are set forth in *Fam. Code §§ 4320-4323*. Support agreements are governed by *Fam. Code §§ 3580* and *3590-3593*. Discovery of tax returns of the parties in a proceeding involving spousal support is governed by *Fam. Code § 3552*. Provisions for spousal support after the death of the supporting party are set forth in *Fam. Code § 4360*. Security measures which may be included in spousal support orders are governed by *Fam. Code § 4339* (court-ordered security for support), *Fam. Code §§ 5200-5295* (earnings assignment orders), and *Fam. Code §§ 4350-4352* (payment of support to court-designated officer).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsPeriodic SupportFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsTemporary Support

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[Reserved]

§§ 225.61[Reserved]

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19-225 California Forms of Pleading and Practice--Annotated § 225.80

§ 225.80 When Temporary Support Is Authorized

During the pendency of any proceeding for dissolution of marriage or for legal separation, the court may order the husband or wife to pay any amount that is necessary for the support of the other consistent with the requirements relating to domestic violence in *Family Code Sections 4320(i), (m)* and *4325* [*see Fam. Code § 2010(d)*]. A proceeding for dissolution is commenced by filing a petition [*Fam. Code § 2330(a)*], and remains pending until its final determination on appeal or until the time for appeal has passed [*Code Civil Proc. § 1049*; *see In re Marriage of Askmo (2000) 85 Cal. App. 4th 1032, 1038-1040, 102 Cal. Rptr. 2d 662* (temporary support and attorney's fees were awarded to wife, while prior appeal was pending and default judgment against her had not been set aside)]. For further discussion of temporary support pending appeal, see *§ 225.92*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsTemporary Support

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19-225 California Forms of Pleading and Practice--Annotated § 225.81

§ 225.81 Purpose of Award

The purpose of a temporary support order is to maintain the status quo of the parties until trial, in order to pay creditors and to enable a spouse to live in substantially the same manner to which he or she has been accustomed pending disposition of the case [*In re Marriage of Campbell (2006) 136 Cal. App. 4th 502, 509, 38 Cal. Rptr. 3d 908* ; *In re Marriage of Winter (1992) 7 Cal. App. 4th 1926, 1932, 10 Cal. Rptr. 2d 225* ; *see In re Marriage of Smith (1990) 225 Cal. App. 3d 469, 494 n.16, 274 Cal. Rptr. 911* ; *Estate of Fawcett (1965) 232 Cal. App. 2d 770, 784, 43 Cal. Rptr. 160* ; *Whelan v. Whelan (1948) 87 Cal. App. 2d 690, 692, 197 P.2d 361]* . It is also to provide the less financially able spouse with whatever is needed by him or her to litigate properly that spouse's side of the controversy [*Estate of Fawcett (1965) 232 Cal. App. 2d 770, 784* ; *Heller v. Heller (1948) 88 Cal. App. 2d 603, 606, 199 P.2d 44]* . The same is true of an award of temporary support pending appeal [*Bain v. Superior Court (1974) 36 Cal. App. 3d 804, 810, 111 Cal. Rptr. 848]* . However, if the parties' resources are limited, it should be explained to the client that neither will be able to maintain the same standard of living while living separately as they did while living together, because it costs more to support two households than it does to support one [*see In re Marriage of Morrison (1978) 20 Cal. 3d 437, 455, 143 Cal. Rptr. 139, 573 P.2d 41]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportObligationsTemporary Support

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§ 225.82 Standard for Making Award

The standards for temporary and permanent spousal support have historically been significantly different. Because the purpose of temporary support has traditionally been to maintain the living conditions and standards of the parties in as close to the status quo position as possible pending trial and the division of property and liabilities, a temporary support order based solely on income has been deemed appropriate [*In re Marriage of Winter (1992) 7 Cal. App. 4th 1926, 1933, 10 Cal. Rptr. 2d 225]* . In contrast, an order for permanent spousal support requires consideration of numerous factors, set forth in *Fam. Code § 4320*, in addition to the income of the parties. Historically, no factual findings under *Family Code Section 4320* have been required for temporary spousal support orders [*In re Marriage of Czapar (1991) 232 Cal. App. 3d 1308, 1316, 285 Cal. Rptr. 479]* .

Effective January 1, 2003, temporary support orders must be "consistent with the requirements of" *Family Code Section 4320(i), (m)* (history of domestic violence must be considered in making spousal support award) and *Family Code Section 4325* (presumption against awarding support to abuser convicted of domestic violence) [*Fam. Code § 3600*]. From January 1, 2002, to January 1, 2003, the statute required consistency with "the requirements" of Section 4320 without limitation, but the legislature quickly retreated from this position.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsDomestic OffensesDomestic AssaultGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsPeriodic SupportFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsTemporary Support

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19-225 California Forms of Pleading and Practice--Annotated § 225.83

§ 225.83 Court Schedules and Computer Software

Many courts have promulgated temporary spousal support schedules or formulas based solely on income in an attempt to obtain uniformity of decisions and encourage stipulations [*see, e.g.,* Sonoma Co. Super. Ct. Rules, Rule 9.2(E), Appendix 9-c]. Use of these calculation methods has been entirely appropriate to determine temporary support [*In re Marriage of Winter (1992) 7 Cal. App. 4th 1926, 10 Cal. Rptr. 2d 225* ; *see § 225.82*]. Consideration of income *alone* may now be inappropriate because of the statutory requirement that temporary support orders be "consistent" with *Family Code Sections 4320* and *4325*. In any event, it is inappropriate to use income tables or like calculation methods in setting permanent spousal support, because the many factors under *Fam. Code § 4320* must also be considered [*see In re Marriage of Burlini (1983) 143 Cal. App. 3d 65, 69, 191 Cal. Rptr. 541* ; *see also In re Marriage of Schulze (1997) 60 Cal. App. 4th 519, 528, 70 Cal. Rptr. 2d 488* ; *In re Marriage of Zywiciel (2000) 83 Cal. App. 4th 1078, 100 Cal. Rptr. 2d 242]* .

There are several computer software products that have been used by California judges and attorneys for the purpose of computing temporary spousal support [*see In re Marriage of Schulze (1997) 60 Cal. App. 4th 519, 522-528, 70 Cal. Rptr. 2d 488]* . The use of this software has been considered appropriate as long as it conforms to the standards set out in *Cal. Rules of Ct., Rule 5.275* [*see Fam. Code § 3830*; *see also Cal. Rules of Ct., Rule 5.275(j)* (all courts must permit parties or their counsel to use any software that Judicial Council has certified under *Rule 5.275*)]. If unusual circumstances exist in a given case, the temporary spousal support amount generated by the computer program must be adjusted in consideration of those circumstances. As with temporary support schedules, use of computer software alone to determine the amount of permanent spousal support is inappropriate [*In re Marriage of Olson (1993) 14 Cal. App. 4th 1, 5-6 n.3, 17 Cal. Rptr. 2d 480]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportObligationsTemporary Support

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19-225 California Forms of Pleading and Practice--Annotated § 225.84

§ 225.84 Manner of Making Application

Application for a temporary spousal support order is ordinarily made by an application for order [*see* Cal. Judicial Council Form 310] and order to show cause [*see* Cal. Judicial Council Form 300]. If the party from whom support is sought has appeared in the proceeding [*see Cal. Rules of Ct., Rule 5.120* (acts constituting an appearance)], the order may be sought by noticed motion [*see* Cal. Judicial Council Form 301]. Note that a pendente lite order awarding support or attorney's fees can technically be made on a court's own motion [*In re Marriage of Askmo (2000) 85 Cal. App. 4th 1032, 1038, 102 Cal. Rptr. 2d 662]* .

The general procedure for obtaining or opposing temporary orders is discussed in Ch. 221, *Dissolution of Marriage: Procedure* , and illustrative forms of applications for orders, noticed motions, and orders to show cause are also set out in Ch. 221.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportObligationsTemporary SupportFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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19-225 California Forms of Pleading and Practice--Annotated § 225.85

§ 225.85 Showing Required

[1] Need

Fam. Code § 3600 authorizes the court during the pendency of the proceeding to order either spouse to pay any amount that is *necessary* for the support of the other spouse, subject to the condition that it be consistent with the requirements relating to domestic violence in *Family Code Sections 4320(i), (m)* and *4325*. The amount of support lies within the trial court's discretion, based on the needs of the parties [*In re Marriage of Campbell (2006) 136 Cal. App. 4th 502, 509, 38 Cal. Rptr. 3d 908* ; *In re Marriage of Czapar (1991) 232 Cal. App. 3d 1308, 1316, 285 Cal. Rptr. 479]* . The burden of showing the need is on the party seeking the support [*see Evid. Code § 500*].

There is no need for the spouse seeking support to set out penny by penny his or her requirements; there need only be a showing on which the court can determine approximately what his or her needs are [*Zinke v. Zinke (1963) 212 Cal. App. 2d 379, 385, 28 Cal. Rptr. 7]* . This showing is made primarily on the Income and Expense Declaration [*see* Cal. Judicial Council Form FL-150 which must be filed with the court before any hearing on temporary support [*see Cal. Rules of Ct., Rule 5.128*]. For an illustrative example of an Income and Expense Declaration, see *§ 225.370*.

Documentation in support of the declared expenses should be produced, particularly if an expense is unusual in nature, or unusually high. The Income and Expense Declaration should be filled out keeping in mind that the purpose of temporary support is to preserve the status quo pending final settlement (*see § 225.81*). In most cases, the available resources will be insufficient to support both spouses at the marital standard of living.

The parties may, of course, stipulate to the amount of spousal support to be allowed pendente lite, and obviate the need for proof of the supported spouse's need and of the paying spouse's ability to pay. The stipulation may be entered into orally in open court [*see In re Marriage of Borson (1974) 37 Cal. App. 3d 632, 635, 112 Cal. Rptr. 432]* .

The authority of the court to direct a spouse to pay temporary support is not divested by the fact that the spouse is

paying all the bills contracted by the other spouse, or by the declaration that he or she is willing to pay those bills during the pendency of the proceeding. The other spouse is not required to depend on the will or caprice of the spouse for support, but is entitled to receive a definite amount of money with which to supply his or her needs, and to have the power of disbursing it [*Anderson v. Anderson (1902) 137 Cal. 225, 226-227, 69 P. 1061]* .

[2] Ability to Pay

A principal factor to be considered on an application for temporary support is the ability to pay of the spouse from whom support is sought. A trial court's rejection of evidence offered to show a lack of ability to pay has been held to constitute prejudicial error requiring reversal of the support order [*Arnold v. Arnold (1932) 215 Cal. 613, 614-615, 12 P.2d 435* ; *see also In re Marriage of Murray (2002) 101 Cal. App. 4th 581, 594, 124 Cal. Rptr. 2d 342* (court cannot provisionally reduce temporary support obligation subject to reinstatement if facts on which reduction was based are later determined to be inaccurate)].

The court may, however, base the award on the supporting party's earning capacity, rather than actual earnings, under some circumstances [*see Meagher v. Meagher (1961) 190 Cal. App. 2d 62, 63-65, 11 Cal. Rptr. 650* (husband quit job after separation and took work paying substantially less)]. These issues are discussed in the context of permanent support orders in *§ 225.113*.

Although federal law directs state courts to give full force and effect to American Indian tribal law and custom in civil matters, the court will not deny temporary spousal support on the basis of a tribal custom and tradition that is inconsistent with California law and public policy regarding temporary spousal support [*see In re Marriage of Jacobsen (2004) 121 Cal. App. 4th 1187, 1191-1193, 18 Cal. Rptr. 3d 162* (Chumash tribal custom and tradition providing that funds distributed by tribe to its members should not be used to pay spousal support to nonmembers not applied as contrary to California support law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsDomestic OffensesDomestic AssaultGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsTemporary Support

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§ 225.86 Effect of Separate Estate

If there are no children and a party has or acquires a separate estate, including income from employment, sufficient for his or her proper support, no support order may be made or continued against the other party [*Fam. Code § 4322*; *In re Marriage of Terry (2000) 80 Cal. App. 4th 921, 932, 95 Cal. Rptr. 2d 760* (dictates of *Fam. Code § 4322* compelled termination of spousal support when former wife had sufficient income to meet support needs); *see § 225.116*]. However, a spouse is not required to impair the capital of her or his separate estate before seeking an award of temporary support [*Whelan v. Whelan (1948) 87 Cal. App. 2d 690, 692, 197 P.2d 361* ; *Loeb v. Loeb (1948) 84 Cal. App. 2d 141, 145, 190 P.2d 246]* .

One court has held that for the purpose of setting temporary spousal support, a "separate estate" does not include community property preliminarily distributed to the supported spouse. The court stated that these funds must continue to be characterized as community property until the final property division [*In re Marriage of Winter (1992) 7 Cal. App. 4th 1926, 1934, 10 Cal. Rptr. 2d 225]* . *Fam. Code § 4321*, which allows the court to deny support to a party out of the separate property of the other party if the party has separate property, or is earning a livelihood, or if there is community or quasi-community property sufficient to provide for her or his support, applies only to permanent support [*see Fam. Code § 4321(a)* (court may deny support in judgment of dissolution or legal separation), discussed in *§ 225.116*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationSeparate PropertyFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsTemporary Support

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19-225 California Forms of Pleading and Practice--Annotated § 225.87

§ 225.87 Effect of Raising Certain Defenses

[1] Denial That Marriage Exists

The existence of a marriage is a jurisdictional prerequisite for the right of the court to order support [*Colbert v. Colbert (1946) 28 Cal. 2d 276, 279, 169 P.2d 633]* , although the court may award support in a proceeding for nullity of marriage to a putative spouse, that is, one who had a good-faith belief in the validity of the marriage [*Fam. Code §§ 2251(a)(1), 2254*; *see § 225.30* et seq.]. However, if the respondent in a dissolution action asserts the nonexistence of the marriage, the evidence necessary to prove a marriage (or, presumably, putative spouse status) need not be as complete on an application for temporary support as that required at the time of trial to prove the marriage [*Colbert v. Colbert (1946) 28 Cal. 2d 276, 280, 169 P.2d 633* ; *In re Marriage of Stich (1985) 169 Cal. App. 3d 64, 71-72, 214 Cal. Rptr. 919* , *cert. denied, 479 U.S. 946]* . Ordinarily, if a ceremonial marriage is shown and if the ceremony is followed by the assumption of marital relations, no further proof of the fact of marriage need be made in preliminary proceedings in order to sustain an award of temporary support. An extended inquiry into the validity of the marriage will not be allowed in preliminary proceedings [*Dietrich v. Dietrich (1953) 41 Cal. 2d 497, 502, 261 P.2d 269* , *cert. denied, 346 U.S. 938]* . Although an order for temporary support implies a finding of the existence of the relationship, the order does not finally determine those issues or affect the final judgment [*Dietrich v. Dietrich (1953) 41 Cal. 2d 497, 502-503, 261 P.2d 269* , *cert. denied, 346 U.S. 938 (1954)* ; *see Gromeeko v. Gromeeko (1952) 110 Cal. App. 2d 117, 123-127, 242 P.2d 41]* .

[2] Waiver by Agreement

If the respondent asserts that the right to support has been previously waived by agreement, temporary support may be awarded until the court makes its determination on the validity of the agreement [*Patton v. Patton (1948) 32 Cal. 2d 520, 523, 196 P.2d 909]* . For further discussion of agreements waiving spousal support, see *§ 225.30 et seq. and § 225.125*.

[3] Change of Venue

The court in a proceeding for dissolution of marriage or legal separation may, before the determination of a motion to transfer venue, consider and determine motions for allowance of temporary support and make all necessary and proper orders in connection therewith [*Code Civ. Proc. § 396b(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueIndividual DefendantsFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsTemporary SupportFamily LawMarriageValidityVoid & Voidable MarriagesVoid MarriagesFamily LawMarriageValidityVoid & Voidable MarriagesVoidable Marriages

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19-225 California Forms of Pleading and Practice--Annotated § 225.88

§ 225.88 Effect of Dismissal

If a proceeding in which support is at issue is subsequently terminated by dismissal or abatement, a temporary support order remains enforceable as to amounts accruing before the termination [*Sarracino v. Superior Court of Los Angeles County (1974) 13 Cal. 3d 1, 118 Cal. Rptr. 21, 529 P.2d 53]* . However, after dismissal, further payments under the order no longer accrue [*Moore v. Superior Court (1970) 8 Cal. App. 3d 804, 810, 87 Cal. Rptr. 620]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsTemporary Support

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§ 225.89 Effect of Reconciliation

Unless the order specifies otherwise, a temporary support order is not enforceable during any period in which the parties have reconciled and are living together [*Fam. Code § 3602*]. Reconciliation is essentially a question of fact. It must be shown that the parties intended to reunite as husband and wife; occasional cohabitation does not alone establish a reconciliation [*Walsh v. Walsh (1952) 108 Cal. App. 2d 575, 580, 239 P.2d 472]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceFault-Based DefensesReconciliationFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsTemporary Support

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19-225 California Forms of Pleading and Practice--Annotated § 225.90

§ 225.90 Renewal of Motion, Reconsideration, and Relief From Order

A temporary support order does not prejudice the rights of the parties with respect to any subsequent order that may be made [*Fam. Code § 3604*]. Therefore, if temporary support is denied, the party seeking support may renew the motion at a later time during the pendency of the proceeding if different facts are present. If temporary support is awarded, it may be modified or terminated at any time, except as to any amount that accrued before the date of filing of the notice of motion or order to show cause to modify or terminate [*Fam. Code § 3603*; *see § 225.94*; *see also Code Civ. Proc. § 1008(b)*].

Either party may also move for reconsideration within 10 days after service on the party of notice of entry of the order, based on new or different facts, circumstances, or law [*Code Civ. Proc. § 1008(a)*; *see Cal. Rules of Ct., Rule 5.21* (provisions of law applicable to civil actions generally also apply to family law proceedings absent specific provision or conflict with family law rules)]. Reconsideration, if granted, would keep arrearages from accruing, in contrast to a motion to revoke under *Fam. Code § 3603*, which does not affect amounts that accrued before the notice of motion or order to show cause was filed.

In limited circumstances, a party against whom a temporary support order is made may also seek relief from the order based on mistake, inadvertence, surprise, or excusable neglect [*see Code Civ. Proc. § 473(b)*; *Cal. Rules of Ct., Rule 5.21*]. A court also has inherent equitable power to set aside an order obtained through extrinsic fraud or mistake [*see Olivera v. Grace (1942) 19 Cal. 2d 570, 575-576, 122 P.2d 564]* . As with reconsideration, relief from the order would eliminate any arrearages under the order. For further discussion of relief from family law judgments and orders, see Ch. 221, *Dissolution of Marriage: Procedure* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil

ProcedureJudgmentsRelief From JudgmentIndependent ActionsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsTemporary SupportFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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§ 225.91 Appealability of Order

[1] Order Granting Support

An order granting temporary support compels the performance of an act, is considered a final judgment in a collateral matter, and is appealable [*In re Marriage of Skelley (1976) 18 Cal. 3d 365, 368, 134 Cal. Rptr. 197, 556 P.2d 297* ; *Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 8, 118 Cal. Rptr. 21, 529 P.2d 53* ; *In re Marriage of Campbell (2006) 136 Cal. App. 4th 502, 508, 38 Cal. Rptr. 3d 908* (order denying obligor's motion to terminate temporary spousal support is appealable order)]. Appeal does not stay enforcement of the order unless a bond is given [*see Code Civ. Proc. § 917.1(a)(1)*]. For further discussion of appeal of family law judgments and orders, see Ch. 221, *Dissolution of Marriage: Procedure* . For discussion of enforcement matters, see Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* , and Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* .

[2] Order Denying Support

It would appear that an order denying temporary spousal support is also appealable. In *Greene v. Superior Court (1961) 55 Cal. 2d 403, 405, 10 Cal. Rptr. 817, 359 P.2d 249* , *Lincoln v. Superior Court (1943) 22 Cal. 2d 304, 310, 139 P.2d 13* , and *White v. White (1890) 86 Cal. 212, 213, 24 P. 1030* , the California Supreme Court stated that such an order is appealable. *Greene* was a proceeding in prohibition to prohibit the trial court's giving effect to an order vacating an order modifying a spousal support award. The Supreme Court issued a peremptory writ of prohibition. *Lincoln* was a mandate proceeding to compel the superior court to grant a hearing on an order to show cause on the wife's application for temporary alimony, costs, and attorney's fees in which the trial court had granted the husband's motion to dismiss the order to show cause. After reviewing the facts, the Supreme Court held that the order of dismissal was, in effect, an order denying the application for pendente relief, that the order was appealable, and that mandate therefore did not lie. *White* involved an appeal from an order denying without prejudice temporary alimony in a divorce case. Relying on *Sharon v. Sharon (1885) 67 Cal. 185, 7 P. 456* , the Supreme Court in *White* held that the order was appealable. The Court stated that, for the purposes of determining a right of appeal, there seemed to be no distinction on

principle between an order denying and an order granting alimony *pendente lite* [*White v. White (1890) 86 Cal. 212, 213, 24 P. 1030]* .

However, in *In re Marriage of Harbach (1975) 49 Cal. App. 3d 405, 407, 122 Cal. Rptr. 518* , a court of appeal held that an order denying temporary support is nonappealable. The court reviewed a number of early cases but concluded they presented no rationale or authority supporting a conclusion that the order should be appealable. In its citation of cases, the court did not distinguish between those involving an order granting temporary support and those involving an order denying it, and it failed to cite *White*, discussed above, in which the California Supreme Court expressly held that an order denying temporary spousal support is appealable. *Harbach* was subsequently disapproved by the *California Supreme Court in In re Marriage of Skelley (1976) 18 Cal. 3d 365, 370, 134 Cal. Rptr. 197, 556 P.2d 297* , "insofar as it is inconsistent with the views expressed herein." *Skelley* involved an order granting temporary support, but it cited *White* as one of the cases the court in *Harbach* failed to consider. The implication is that the Supreme Court was disapproving *Harbach's* holding that an order denying spousal support is nonappealable, as well as language in that case that might imply that an order granting spousal support is equally nonappealable.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionCollateral Order DoctrineFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsTemporary SupportFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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§ 225.92 Temporary Support Pending Appeal

The power of the trial court to make an award of temporary support continues during the pendency of any appeal from the judgment. The power is not affected by which party takes the appeal, nor by what issues are appealed [*Bain v. Superior Court (1974) 36 Cal. App. 3d 804, 807-809, 111 Cal. Rptr. 848* ; *see In re Marriage of Askmo (2000) 85 Cal. App. 4th 1032, 1038-1040, 102 Cal. Rptr. 2d 662* (temporary support and attorney's fees were awarded to wife, while prior appeal was pending and default judgment against her had not been set aside); *In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 260 Cal. Rptr. 403* (involving temporary support order pending appeal of order setting aside obligee's default)]. However, a temporary support order is terminated by judgment [*Wilson v. Superior Court (1948) 31 Cal. 2d 458, 462-463, 189 P.2d 266]* , so that a new motion for temporary support is required for temporary support during the pendency of postjudgment proceedings.

Further, temporary support may be awarded pending appeal even if the duration of the temporary order thereby extends beyond the period for which the court has retained jurisdiction in the judgment to order permanent support [*Bain v. Superior Court (1974) 36 Cal. App. 3d 804, 807-810, 111 Cal. Rptr. 848]* . However, the amount of temporary support allowed pending appeal from a judgment should not exceed the permanent support awarded in the absence of a showing of changed conditions requiring the increase or error in the amount originally awarded [*Farrar v. Farrar (1920) 45 Cal. App. 584, 587, 188 P. 289]* .

It is the trial court's duty to prevent a possible double recovery of support if the judgment is affirmed, that is, to ensure that a party does not recover both the temporary award pending appeal and the permanent award in the judgment for the same period [*Farrar v. Farrar (1920) 45 Cal. App. 584, 587-588, 188 P. 289]* . Double recovery can be prevented by providing in the order for temporary support that the amounts paid thereunder are to be credited against the permanent support awarded in the judgment for that period if the judgment is affirmed on appeal. If the order directing payment of permanent support is not stayed during the appeal [*see Code Civ. Proc. § 917.1*], the order for temporary support should provide that payment under the temporary order is in lieu of any payment required under the permanent order. It might not be advisable in this situation simply to deny temporary spousal support and allow the permanent support to be paid,

because if the judgment is reversed on appeal, the supported party may be liable to reimburse any support received under the judgment [*see Code Civ. Proc. § 908*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionCollateral Order DoctrineFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsTemporary SupportFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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§ 225.93 Security for Payment of Temporary Support

The court may order the supporting party to give reasonable security for payment of spousal support [*Fam. Code § 4339*]. This statutory right does not distinguish between temporary and permanent support [*cf.* former *Civ. Code § 4801(a)* (limited to support orders in judgment); *see also Fam. Code § 290* (broad judicial discretion to shape enforcement remedies)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportObligationsPeriodic SupportFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsTemporary SupportFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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§ 225.94 Modification and Revocation of Order

The court may modify or terminate a temporary support order at any time, except as to any amount that may have accrued before the date on which the notice of motion or order to show cause to modify or revoke was filed [*Fam. Code § 3603*]. The court may not provisionally reduce or "suspend" the supporting party's temporary support obligation, subject to retroactive reinstatement of the full amount if the court later determines that the facts on which the reduction or suspension was based were inaccurate or incomplete [*In re Marriage of Murray (2002) 101 Cal. App. 4th 581, 593-594, 124 Cal. Rptr. 2d 342]* .

A temporary spousal support order is not terminated under *Fam. Code § 4337* when the supported spouse attempts to remarry before entry of judgment dissolving his or her existing marriage [*In re Marriage of Campbell (2006) 136 Cal. App. 4th 502, 508, 511-513, 38 Cal. Rptr. 3d 908*]. A temporary spousal support order could, however, be terminated under *Fam. Code § 4337* if the supported spouse enters into a valid marriage after entry of a status-only judgment dissolving the first marriage [*In re Marriage of Campbell (2006) 136 Cal. App. 4th 502, 511, 38 Cal. Rptr. 3d 908]* .

A temporary spousal support order terminates by operation of law on the death of either party before dissolution of the marital status [*In re Marriage of Campbell (2006) 136 Cal. App. 4th 502, 511 n.4, 38 Cal. Rptr. 3d 908]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsTemporary SupportFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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[Reserved]

§§ 225.95[Reserved]

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§ 225.110 Discretion of Court to Award Support

In a judgment of dissolution of marriage or legal separation of the parties, the court may order a party to pay for the support of the other party any amount, and for any period of time, as the court may deem just and reasonable, based on the standard of living established during the marriage, taking into consideration the circumstances as provided in *Fam. Code § 4320 et seq.* [*Fam. Code § 4330*]. Although awards of spousal support on dissolution or legal separation are not, strictly speaking, "permanent," they are referred to as such in order to distinguish them from temporary spousal support orders made under *Fam. Code § 3600* [*In re Marriage of Campbell (2006) 136 Cal. App. 4th 502, 511, 38 Cal. Rptr. 3d 908]* .

The grant or denial of permanent spousal support and its amount and duration are matters that rest within the sound discretion of the trial court, and fall within the court's equitable jurisdiction. Although not unlimited, the trial court's discretion in determining support is broad [*see* *In re Marriage of Morrison (1978) 20 Cal. 3d 437, 454, 143 Cal. Rptr. 139, 573 P.2d 41* ; *In re Marriage of Plescia (1997) 59 Cal. App. 4th 252, 258, 69 Cal. Rptr. 2d 120* (party seeking equitable grant of spousal support must be willing to grant equitable defense of laches in same controversy); *see also In re Marriage of Epstein (1979) 24 Cal. 3d 76, 89-90, 154 Cal. Rptr. 413* , *592 P.2d 1165* ; *In re Marriage of Bukaty (1986) 180 Cal. App. 3d 143, 149, 225 Cal. Rptr. 492]* .

However, the court's discretion must be exercised with reference to the showing made and not arbitrarily [*In re Marriage of Kelley (1976) 64 Cal. App. 3d 82, 93, 134 Cal. Rptr. 259* ; *see* *In re Marriage of Teegarden (1986) 181 Cal. App. 3d 401, 409-410, 226 Cal. Rptr. 417]* . Further, the criteria set forth in *Fam. Code § 4320* must all be recognized and applied correctly [*In re Marriage of Ackerman (2006) 146 Cal. App. 4th 191, 204, 52 Cal. Rptr. 3d 744* ; *In re Marriage of Watt (1989) 214 Cal. App. 3d 340, 347, 262 Cal. Rptr. 783* ; *In re Marriage of Fransen (1983) 142 Cal. App. 3d 419, 425, 190 Cal. Rptr. 885* ; *see § 225.111*]. A grossly inadequate spousal support award is subject to reversal as an abuse of discretion [*In re Marriage of Ramer (1986) 187 Cal. App. 3d 263, 273, 231 Cal. Rptr. 647]* .

If temporary support was awarded, the determination of permanent spousal support at trial must be de novo, based on the circumstances existing at the time of the trial. An award of permanent support different from the amount ordered as temporary support need not be based on a showing of changed circumstances [*In re Marriage of McNaughton (1983) 145 Cal. App. 3d 845, 850, 194 Cal. Rptr. 176]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsPeriodic Support

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§ 225.111 Statutory Factors: Fam. Code § 4320

In ordering spousal support, the court must consider all of the following circumstances of the parties:

(1) The extent to which the earning capacity of each spouse is sufficient to maintain the standard of living established during the marriage taking into account all of the following [*Fam. Code § 4320(a)*; *see § 225.112*]:

a. The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.

b. The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.

(2) The extent to which the supported spouse contributed to the attainment of an education, training, a career position, or a license by the other spouse [*Fam. Code § 4320(b)*; *see § 225.115*];

(3) The supporting spouse's ability to pay Spousal Support, taking into account the supporting spouse's earning capacity, earned and unearned income, assets, and standard of living [*Fam. Code § 4320(c) see § 225.113*];

(4) The needs of each party, based on the standard of living established during the marriage [*Fam. Code § 4320(d)*; *see §§ 225.112*, *225.114*];

(5) The obligations and assets, including the separate property, of each party [*Fam. Code § 4320(e)*; *see § 225.116*];

(6) The duration of the marriage [*Fam. Code § 4320(f)*; *see § 225.117*];

(7) The ability of the supported spouse to engage in gainful employment without interfering with the interests of dependent children in the custody of the spouse [*Fam. Code § 4320(g)*; *see § 225.114*];

(8) The age and health of the parties [*Fam. Code § 4320(h)*; *see § 225.118*];

(9) Documented evidence of any history of domestic violence between the parties [*Fam. Code § 4320(i)*; *see § 225.119*];

(10) The immediate and specific tax consequences to each party [*Fam. Code § 4320(j)*; for further discussion, *see* Ch. 227, *Dissolution of Marriage: Tax Effects of Dissolution*];

(11) The balance of the hardships to each party [*Fam. Code § 4320(k)*];

(12) The goal that the supported party must be self-supporting within a reasonable period of time, with a "reasonable period of time" generally being one-half the length of the marriage (except with respect to a marriage of long duration, as described in *Fam. Code § 4336*), although the court retains discretion to order support for a greater or lesser length of time, based on any of the other factors listed in *Family Code Section 4320* and the parties' circumstances [*Fam. Code § 4320(l)*]; *In re Marriage of Rising (1999) 76 Cal. App. 4th 472, 479* ; *90 Cal. Rptr. 2d 380* (no abuse of discretion to conclude that "marital standard of living" is of less weight many years after divorce than at time of separation);

(13) The criminal conviction of an abusive spouse [*Fam. Code § 4320(m)*; *see § 225.119*]; and

(14) Any other factors the court deems just and equitable [*Fam. Code § 4320(n)*; for further discussion, *see § 225.121*].

When making an order for spousal support, the court may advise the support recipient that he or she should make reasonable efforts to assist in providing for his or her support needs, taking into account the particular circumstances the court considered under *Fam. Code § 4320*, unless, in the case of a marriage of long duration as provided for in *Fam. Code § 4336* (*see § 225.141[1]*) the court decides this warning is inadvisable [*Fam. Code § 4330(b)*].

Courts sometimes use schedules or tables based solely on income to determine temporary support [*see § 225.83*]. It is almost certainly inappropriate to use these schedules as anything more than a starting point in setting permanent spousal support, given the many other factors under *Fam. Code § 4320* that must also be considered [*see In re Marriage of Burlini (1983) 143 Cal. App. 3d 65, 69, 191 Cal. Rptr. 541* ; *see also In re Marriage of McTiernan & Dubrow (2005) 133 Cal. App. 4th 1090, 1107-1108, 35 Cal. Rptr. 3d 287* (court must consider and apply all relevant factors under *Fam. Code § 4320*; failure to consider "key factor" of obligor spouse's ability to pay is abuse of discretion)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19-225 California Forms of Pleading and Practice--Annotated § 225.112

§ 225.112 Standard of Living Established During Marriage

In awarding spousal support, the court must consider the standard of living established by the parties during marriage in determining the parties' earning capacity and needs [*Fam. Code § 4320(a), (d)*; *see §§ 225.113, 225.114*]. The marital standard of living is relevant as a reference point against which the other statutory factors are to be weighed; it is not in and of itself sufficient to justify an award of permanent support [*In re Marriage of Ackerman (2006) 146 Cal. App. 4th 191, 204-205, 52 Cal. Rptr. 3d 744*]. A high standard of living enjoyed by the parties during marriage, and a low ability on the part of the supported spouse to maintain that standard, combine to establish a greater need for support [*see In re Marriage of Andreen (1978) 76 Cal. App. 3d 667, 671-672, 143 Cal. Rptr. 94* ; *In re Marriage of Wright (1976) 60 Cal. App. 3d 253, 256, 131 Cal. Rptr. 870]* . The court must make specific factual findings with respect to this standard of living [*Fam. Code § 4332*; *see § 225.373*].

"Marital standard of living" is a general description of the station in life that the parties had achieved by the date of separation. It is satisfied by the everyday understanding of the term in its ordinary sense, that is upper, middle, or lower income *In re Marriage of Ackerman (2006) 146 Cal. App. 4th 191, 204, 52 Cal. Rptr. 3d 744* ; [*In re Marriage of Smith (1990) 225 Cal. App. 3d 469, 491, 274 Cal. Rptr. 911]* . In determining the parties' marital standard of living, the court may consider their income, expenses, and lifestyle during their marriage [*In re Marriage of Ackerman (2006) 146 Cal. App. 4th 191, 204, 52 Cal. Rptr. 3d 744*]. The court may also base the parties' marital standard of living on the family's average income, rather than expenses [*In re Marriage of Ackerman (2006) 146 Cal. App. 4th 191, 206, 52 Cal. Rptr. 3d 744* (this is particularly appropriate when evidence shows parties lived beyond their means)].

The marital standard of living is not an absolute measure of reasonable need, but merely the reference point for determining need and support. All of the other applicable circumstances enumerated in *Fam. Code § 4320* must also be considered [*In re Marriage of Cheriton (2001) 92 Cal. App. 4th 269, 303, 111 Cal. Rptr. 2d 755* ; *In re Marriage of Smith (1990) 225 Cal. App. 3d 469, 484-485, 274 Cal. Rptr. 911* ; *In re Marriage of Smith & Ostler (1990) 223 Cal. App. 3d 33, 48, 272 Cal. Rptr. 560* (contributions to supporting spouse's education justified spousal support in excess of that needed to sustain standard of living attained during marriage)].

If the marital standard of living was deliberately depressed because only one spouse was working while the other was absent from the workforce pursuing studies, spousal support may not be denied to the working spouse solely because his or her standard of living did not decline after separation. To limit the working spouse to the marital standard of living would be to make irrelevant the contributions of the working spouse to the student spouse's education and career [*In re Marriage of Watt (1989) 214 Cal. App. 3d 340, 351-352, 262 Cal. Rptr. 783* (standard during time husband was in medical school improperly used to deny support to wife); *see Fam. Code § 4320(b)*; *see also In re Marriage of Sullivan (1984) 37 Cal. 3d 762, 767-768, 209 Cal. Rptr. 354, 691 P.2d 1020* ; for further discussion, *see § 225.115*]. Conversely, the parties may have been living beyond their means during marriage. In such a case, spousal support should be based on the reasonable, rather than the actual, marital standard of living, given the resources available to the parties during marriage [*see In re Marriage of Smith (1990) 225 Cal. App. 3d 469, 485-486, 274 Cal. Rptr. 911* ; *see also In re Marriage of Weinstein (1992) 4 Cal. App. 4th 555, 565-566, 5 Cal. Rptr. 2d 558* (court acted properly in determining marital standard of living based on income rather than on expenses because it could determine that parties' actual expenditures were not reasonable); *but see In re Marriage of De Guigne (2002) 97 Cal. App. 4th 1353, 1362, 1367, 119 Cal. Rptr. 2d 430* (when opulent marital standard of living was achieved in part through liquidation of obligor's inherited assets, court properly based support awards on obligor's total assets)]. Consideration of available income rather than expenditures is also proper if the parties lived frugally and allocated significant income to savings and investment. A spouse should not be deprived of the accustomed lifestyle just because it involved the purchase of stocks and bonds rather than personal luxuries [*In re Marriage of Winter (1992) 7 Cal. App. 4th 1926, 1932-1933, 10 Cal. Rptr. 2d 225* ; *see In re Marriage of Drapeau (2001) 93 Cal. App. 4th 1086, 1098, 114 Cal. Rptr. 2d 6* (when supporting spouse's ability to pay reasonable level of support is not limiting factor, court should consider parties' practice of saving substantial portion of earnings as element in their marital standard of living)].

The marital standard of living is of less significance in a short-term marriage in which the joint efforts of the parties had little or nothing to do with achieving the standard. The right of a nonworking spouse to be maintained at the marital standard of living applies with greatest force when the standard of living derived from the joint efforts of the spouses to achieve a certain standard over a significant period of time, in which case, the earner spouse should not benefit at the expense of the other. On the other hand, if the marriage is of short duration and the standard of living derived from one spouse's separate property, other factors may justify a smaller award of support [*see In re Marriage of Huntington (1992) 10 Cal. App. 4th 1513, 1520-1521, 14 Cal. Rptr. 2d 1* (wife in short-term marriage is not entitled to be maintained at affluent marital standard of living when standard derived from husband's inherited wealth)].

The supported spouse is not guaranteed enough support to live at the marital standard of living if the supporting spouse's ability to pay is insufficient to maintain both parties at that level [*see, e.g., In re Marriage of Epstein (1979) 24 Cal. 3d 76, 89-90, 154 Cal. Rptr. 413, 592 P.2d 1165]* . Often, economic realities compel a reduction in the standard of living for both parties [*see, e.g., In re Marriage of Morrison (1978) 20 Cal. 3d 437, 455, 143 Cal. Rptr. 139, 573 P.2d 41]* . Therefore, the court should make specific findings as to whether the amount of support ordered is or is not sufficient to meet the supported spouse's reasonable needs, considering the marital standard of living and the other factors contained in *Fam. Code § 4320*; a modification in support based on increased earnings of the supporting spouse may depend on whether the original order was sufficient to maintain the supported spouse at the marital standard of living [*In re Marriage of Smith (1990) 225 Cal. App. 3d 469, 491, 274 Cal. Rptr. 911* ; for a form of findings of fact in a spousal support proceeding, *see § 225.373*; *see also § 225.200* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19-225 California Forms of Pleading and Practice--Annotated § 225.113

§ 225.113 Ability to Pay and Earning Capacity of Supporting Spouse

[1] Computation of Income

In awarding spousal support, the court must consider the supporting spouse's ability to pay, taking into account his or her earning capacity, earned and unearned income, assets, and standard of living [*Fam. Code § 4320(c)*; *see also Fam. Code § 4320(a)*; *In re Marriage of McTiernan & Dubrow (2005) 133 Cal. App. 4th 1090, 1107-1108, 35 Cal. Rptr. 3d 287* (failure to consider "key factor" of obligor spouse's ability to pay is abuse of discretion)]. There are no statutes that specify the computation of income for the purpose of determining spousal support, although the income of the supporting spouse's subsequent spouse or nonmarital partner is not to be considered when determining or modifying spousal support [*Fam. Code § 4323(b)*; *see § 225.113[3]*]. However, the statewide uniform child support guideline specifies what is to be included in gross income and what deductions are allowed to determine net income for the purpose of computing child support [*see Fam. Code §§ 4058, 4059*]. For discussion of the uniform child support guideline, see Ch. 224, *Dissolution of Marriage: Child Support* .

Courts may consider investment income in determining a supporting spouse's ability to pay, along with income from property that was originally part of the community estate [*In re Marriage of Epstein (1979) 24 Cal. 3d 76, 91 n.14, 154 Cal. Rptr. 413, 592 P.2d 1165* ; *In re Marriage of Olson (1993) 14 Cal. App. 4th 1, 10-13, 17 Cal. Rptr. 2d 480]* . Other forms of income from employment, such as income from the future exercise of stock options, also may be considered in awarding spousal support. However, a trial court may not base the support award on a fixed percentage of future stock option income if doing so results in an award that substantially exceeds the parties' marital standard of living. This might occur, for example, if the underlying value of the stock is rapidly increasing. Instead, the trial court must make an award that is "just and equitable," using the marital standard of living as a reference point against which other statutory factors must be weighed. Once having done this, the court may make a percentage award of future exercised option income so long as it sets a maximum amount proportionate to its findings concerning the marital standard of living [*In re Marriage of Kerr (1999) 77 Cal. App. 4th 87, 95, 91 Cal. Rptr. 2d 374]* .

Apart from imputing income from assets that traditionally are considered "income producing," there is authority--from a case that considered child support--that a court may also consider imputing income to a historically non-income producing asset, such as real estate. However, the decision to impute "rests on an analysis that is particularly fact intensive[, and] [f]actors which do not eliminate discretion may significantly affect whether it should be exercised" [*In re Marriage of Destein (2001) 91 Cal. App. 4th 1385, 1396, 111 Cal. Rptr. 2d 487]* .

Courts have broad discretion to exclude, include, or partially include contributions to individual retirement plans, and earnings or accruals of such plans not actually withdrawn, as income available for determining spousal support. Thus, for example, one reported decision has held that a trial court has discretion to determine whether to consider as income available for spousal support *nonmandatory* contributions made to an individual retirement plan, accruals, or accrued earnings of that plan that are not withdrawn and--once no penalty is incurred--even reasonable withdrawals from the principal of a retirement plan [*In re Marriage of Olson (1993) 14 Cal. App. 4th 1, 13, 17 Cal. Rptr. 2d 480* ; *see In re Marriage of Terry (2000) 80 Cal. App. 4th 921, 931-932, 95 Cal. Rptr. 2d 760* (*Fam. Code § 4322* compelled termination of spousal support when former wife had sufficient income to meet support needs, including availability of funds from retirement account, from which withdrawal could be made without penalty)]. However, it has been held that only under "extreme circumstances" would it be appropriate to base a spousal support order on funds in a retirement plan that, if withdrawn, would be subject to a mandatory penalty [*In re Marriage of Olson (1993) 14 Cal. App. 4th 1, 11-13, 17 Cal. Rptr. 2d 480]* . Another court has observed that it would be improper to require a party to invade or exhaust the principal of his or her retirement assets to pay spousal support, given that "only investment income, not investment principal, should be available to pay spousal support" [*In re Marriage of Reynolds (1998) 63 Cal. App. 4th 1373, 1380, 74 Cal. Rptr. 2d 636* ; *but cf. In re Marriage of Epstein (1979) 24 Cal. 3d 76, 91 n.14, 154 Cal. Rptr. 413, 592 P.2d 1165* (even if future award of spousal support must come from supporting party's half of community property [retirement benefits] there is no requirement excluding such property as source of support; but supporting party's financial position may be reexamined if necessary at time of retirement in light of both parties' circumstances)].

Gambling winnings of the supporting spouse are not considered as income for the purposes of setting support. Attribution of substantial future income to gambling activity encourages or compels the supporting spouse to engage in that activity, with the danger of dissipating other income from which support is to be paid [*In re Marriage of Rosan (1972) 24 Cal. App. 3d 885, 891-892, 101 Cal. Rptr. 295]* .

[2] Earning Capacity

Fam. Code § 4320(a) and *(c)* require the court to consider the parties' earning capacity in setting spousal support. The California Supreme Court has defined earning capacity as the income that a spouse is reasonably capable of earning based on his or her age, health, education, marketable skills, employment history, and the availability of employment opportunities [*In re Marriage of Simpson (1992) 4 Cal. 4th 225, 234, 14 Cal. Rptr. 2d 411, 841 P.2d 931]* . Historically, support has been based on earning capacity instead of actual income only in cases of bad faith; that is, cases in which the paying spouse deliberately attempted to avoid his or her obligation of support by quitting or refusing to seek or accept gainful employment, deliberately not applying himself or herself to business, or intentionally depressing income to an artificial level [*Philbin v. Philbin (1971) 19 Cal. App. 3d 115, 121, 96 Cal. Rptr. 408* ; *see In re Marriage of Meegan (1992) 11 Cal. App. 4th 156, 163, 13 Cal. Rptr. 2d 799* ; *In re Marriage of Regnery (1989) 214 Cal. App. 3d 1367, 1371, 263 Cal. Rptr. 243* (and cases cited therein); *In re Marriage of Sinks (1988) 204 Cal. App. 3d 586, 594, 251 Cal. Rptr. 379* (earning capacity used in case of early retirement taken for purpose of avoiding support obligation); *In re Marriage of Johnson (1982) 134 Cal. App. 3d 148, 156-157, 184 Cal. Rptr. 444* (court based support on earning capacity rather than actual earnings, without any consideration of the supporting spouse's motive, because his unemployment was due to alcoholism)].

One case has held that a finding that the supporting spouse was acting in good faith, and not attempting to avoid his or her support obligation, justified a modification reducing the amount of support to be paid by a spouse whose income was reduced by a voluntary change of jobs; the court also rejected the argument that a modification reducing the amount

of support is proper only if the change of circumstances is beyond the control of the supporting spouse [*In re Marriage of Meegan (1992) 11 Cal. App. 4th 156, 162-163, 13 Cal. Rptr. 2d 799* (husband stopped working to join religious order)]. However, another court rejected that court's reliance on the good faith of the supporting spouse, and held that earning capacity can be used even without a finding of bad faith if the supporting spouse has the ability and opportunity to work, but is unwilling to do so [*In re Marriage of Ilas (1993) 12 Cal. App. 4th 1630, 1638-1639, 16 Cal. Rptr. 2d 345* (husband stopped working to enter medical school)]. However, in recent cases, courts have rejected this bad-faith rule. Under this view, *Fam. Code § 4320* provides for consideration of earning capacity without the necessity of showing deliberate avoidance of financial responsibility as a prerequisite [*see In re Marriage of Stephenson (1995) 39 Cal. App. 4th 71, 76, 82, 46 Cal. Rptr. 2d 8* (involving early retirement compelled by economic circumstances)]. In one case dealing with both child and spousal support, the California Supreme Court has expressly reserved the question of whether a finding of bad faith is required in order to apply the earning-capacity standard [*see In re Marriage of Simpson (1992) 4 Cal. 4th 225, 233-234, 14 Cal. Rptr. 2d 411, 841 P.2d 931]* . However in a subsequent case dealing only with *child support*, the Supreme Court specifically ruled that a finding of bad faith was no longer necessary to use the standard [*Moss v. Superior Court (1998) 17 Cal. 4th 396, 424, 71 Cal. Rptr. 2d 215, 950 P.2d 59]* . Thus, although the Supreme Court has not spoken on the death of the *Philbin* rule as it applies to spousal support and cases such as *Meegan* are still viable authority, the trend of the law is clearly to the contrary.

Even in cases of deliberate avoidance, earning capacity generally may not be based on an extraordinary work regimen. Instead, it must be based on an objectively reasonable work schedule as it would exist at the time when the determination is made. A reasonable regimen depends on all relevant circumstances, including the choice of job available within a particular occupation, working hours, and working conditions. Established employment norms such as the 40-hour work week are not controlling, but are pertinent to the determination [*In re Marriage of Simpson (1992) 4 Cal. 4th 225, 234-236, 14 Cal. Rptr. 2d 411, 841 P.2d 931* ; *In re Marriage of Serna, (2000) 85 Cal. App. 4th 482, 487, 102 Cal. Rptr. 2d 188]* . There must be evidence of an actual ability to work, legitimate earning opportunities, and specifics concerning the amount that might be earned [*Reynolds v. Reynolds (1998) 63 Cal. App. 4th 1373, 1378, 74 Cal. Rptr. 2d 636*].

If a spouse has recently become unemployed through no fault of his or her own, the court should not immediately make a spousal support order. Rather, the matter should be continued for a reasonable period of time to allow the party to seek employment. At the end of the period, the court should determine the party's good-faith efforts in seeking employment [*In re Marriage of Hurtienne (1981) 126 Cal. App. 3d 374, 379-380, 178 Cal. Rptr. 748* ; *see In re Marriage of Rome (1980) 109 Cal. App. 3d 961, 167 Cal. Rptr. 351]* .

Earning capacity is discussed further in the context of child support in Ch. 224, *Dissolution of Marriage: Child Support*.

[3] Income of Subsequent Spouse or Partner

By statute, the income of a supporting spouse's subsequent spouse or nonmarital partner is not to be considered when determining or modifying spousal support [*Fam. Code § 4323(b)*; *In re Marriage of Romero (2002) 99 Cal. App. 4th 1436, 1442-1443, 122 Cal. Rptr. 2d 220* (*Fam. Code § 4323(b)* precludes both direct and indirect consideration of new mate income); *In re Serna (2000) 85 Cal. App. 4th 482, 487, 102 Cal. Rptr. 2d 188* ; *Reynolds v. Reynolds (1998) 63 Cal. App. 4th 1373, 1378, 74 Cal. Rptr. 2d 636*]. Added by 1993 legislation, *Fam. Code § 4323(b)* overturned prior case law [*see In re Marriage of Ramer (1986) 187 Cal. App. 3d 263, 272-273, 231 Cal. Rptr. 647* (community earnings of supporting spouse's new spouse could be considered as available to defray expenses of new community, and thus increase amount available from supporting spouse for support)].

To comply with the *Family Code Section 4323(b)* prohibition against considering new mate income, the court must eliminate from consideration all new mate income and all additional expenses resulting from remarriage [*In re Marriage of Romero (2002) 99 Cal. App. 4th 1436, 1445, 122 Cal. Rptr. 2d 220]* . The court can accomplish this feat by first determining the net monthly income of the supporting spouse, and then exercising its discretion in determining the

reasonable expenses of the supporting spouse based only on that income [*In re Marriage of Romero (2002) 99 Cal. App. 4th 1436, 1445-1446, 122 Cal. Rptr. 2d 220]* .

Subsequent spouse or partner income as it relates to child support is discussed further in Ch. 224, *Dissolution of Marriage: Child Support* .

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§ 225.114 Need and Earning Capacity of Supported Spouse

Spousal support must be based, in part, on the reasonable needs of the supported spouse [*Fam. Code § 4320(d)*]. The court must also take into consideration the supported spouse's earning capacity and the effect of possible employment on the interests of any dependent children in her or his custody [*Fam. Code § 4320(a), (g)*; *see In re Marriage of Prietsch & Calhoun (1987) 190 Cal. App. 3d 645, 658, 235 Cal. Rptr. 587]* . Need and earning capacity are to be determined with reference to (but not absolutely limited by) the standard of living established during the marriage [*Fam. Code § 4320(a)(1), (d)*; *see In re Marriage of Cheriton (2001) 92 Cal. App. 4th 269, 307-308, 111 Cal. Rptr. 2d 755* ; *In re Marriage of Smith & Ostler (1990) 223 Cal. App. 3d 33, 48, 272 Cal. Rptr. 560* ; *see also In re Marriage of McTiernan & Dubrow (2005) 133 Cal. App. 4th 1090, 1107, 35 Cal. Rptr. 3d 287* (court's conclusion that neither party can presently enjoy lifestyle they enjoyed during marriage does not excuse court from considering supported party's current needs); *§ 225.112*]. A disparity in income, standing alone, does not justify an award of spousal support [*In re Marriage of Ackerman (2006) 146 Cal. App. 4th 191, 204, 52 Cal. Rptr. 3d 744*]. Equality of post-separation income is not an element of *Fam. Code § 4320* in setting spousal support [*In re Marriage of Ackerman (2006) 146 Cal. App. 4th 191, 207 52 Cal. Rptr. 3d 744*].

In determining the supported spouse's earning capacity, the court must take into account (1) the marketable skills of the supported spouse, the job market for those skills, the time and expenses required for the supported spouse to acquire the appropriate education or training to develop those skills, and the possible need for retraining or education to acquire other more marketable skills or employment [*Fam. Code § 4320(a)(1)*]; and (2) the extent to which the supported spouse's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported spouse to devote time to domestic duties [*Fam. Code § 4320(a)(2)*].

The supported spouse is to be encouraged to seek gainful employment rather than to rely on spousal support, and it is the expressed policy of the Legislature to encourage supported spouses to become self-supporting within a reasonable period of time. This policy is reflected in the circumstances a court may consider in ordering spousal support, and in the admonition a court may give in ordering support or in reserving jurisdiction over support [*Fam. Code §§ 4320(l),*

4330(b) (discussed in *§ 225.110*); *In re Marriage of Mason (1979) 93 Cal. App. 3d 215, 221, 155 Cal. Rptr. 350* (affirming denial of spousal support to wife whose earning capacity exceeded her disabled husband's, despite husband's greater assets)]. Indeed, if there is evidence that the supported spouse has unreasonably delayed or refused to seek employment consistent with his or her ability, that factor may be taken into account in fixing the amount of spousal support in the first instance, or in modifying or terminating support [*Fam. Code § 4330(b)*; *In re Marriage of Rosan (1972) 24 Cal. App. 3d 885, 896, 101 Cal. Rptr. 295* ; *see In re Marriage of Prietsch & Calhoun (1987) 190 Cal. App. 3d 645, 657, 235 Cal. Rptr. 587]* . However, if there is no evidence of any unreasonable delay or willful refusal to seek employment consistent with a spouse's health and parental responsibilities, and if the other spouse has the ability to pay the needed support, it is inappropriate to make a spousal support order in an amount substantially less than that needed in order to provide an incentive for the supported spouse to seek employment [*In re Marriage of Rosan (1972) 24 Cal. App. 3d 885, 896-897, 101 Cal. Rptr. 295]* .

There is a rebuttable presumption affecting the burden of proof that a former spouse who is cohabiting with a person of the opposite sex has a decreased need for support [*Fam. Code § 4323(a)*; *see In re Marriage of Bower (2002) 96 Cal. App. 4th 893, 901* ; *In re Marriage of Regnery (1989) 214 Cal. App. 3d 1367, 1378, 263 Cal. Rptr. 243]* . Remarriage terminates the right to spousal support unless the parties have agreed to the contrary [*Fam. Code § 4337*; *In re Marriage of Thornton (2002) 95 Cal. App. 4th 251, 254, 115 Cal. Rptr. 2d 380]* .

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§ 225.115 Contributions to Education and Career

In awarding spousal support, the court must consider the extent to which the supported spouse contributed to the attainment of an education, training, career, or license by the other spouse [*Fam. Code § 4320(b)*]. This language is interpreted broadly to require consideration of all of a working spouse's efforts to assist a student spouse in acquiring an education and enhanced earning capacity [*In re Marriage of Watt (1989) 214 Cal. App. 3d 340, 350, 262 Cal. Rptr. 783]* . Contributions are not limited to direct educational expenses, but include the payment by a working spouse of the ordinary living expenses of the marriage during the period when the other spouse is pursuing studies [*In re Marriage of Watt (1989) 214 Cal. App. 3d 340, 350-351, 262 Cal. Rptr. 783]* . These contributions may justify a spousal support award in excess of that needed to sustain the standard of living attained during marriage [*In re Marriage of Smith & Ostler (1990) 223 Cal. App. 3d 33, 48-49, 272 Cal. Rptr. 560* ; *In re Marriage of Watt (1989) 214 Cal. App. 3d 340, 351-352, 262 Cal. Rptr. 783]* .

In addition to spousal support, a court may award one spouse reimbursement for community contributions to the education or training of the other spouse [*see Fam. Code § 2641*]. For further discussion, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

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§ 225.116 Assets and Obligations; Separate Estate

In awarding spousal support, the court must consider the obligations and assets of each party, including the separate property of each [*Fam. Code § 4320(e)*]. *Fam. Code §§ 4321* and *4322* provide additional directions to the court if a party seeking support has separate property. The court *may* deny support to a party out of the separate property of the other in either of the following circumstances:

> (1) If the party seeking support has separate property, or is earning her or his own livelihood, or if there is community or quasi-community property sufficient to give the party proper support [*Fam. Code § 4321(a)*]; or
>
> (2) If the custody of the children has been awarded to the party from whom support is sought and he or she is supporting them [*Fam. Code § 4321(b)*].

The court *must* deny support if there are no children and a party has or acquires a separate estate, including income from employment, sufficient for the party's proper support [*Fam. Code § 4322*; *In re Marriage of Terry (2000) 80 Cal. App. 4th 921, 928, 95 Cal. Rptr. 2d 760]* .

Fam. Code §§ 4321 and *4322* are derived from former Civ. Code § 142, which predated both the former Family Law Act and the Family Code [*see* Stats. 1969, ch. 1608]. As such, the phrase "sufficient for the party's proper support" should be viewed in light of the standards set forth in *Fam. Code § 4320* [*see* *In re Marriage of McNaughton (1983) 145 Cal. App. 3d 845, 850-851, 194 Cal. Rptr. 176* ; *see also* *In re Marriage of Terry (2000) 80 Cal. App. 4th 921, 928, 95 Cal. Rptr. 2d 760* (in modification proceeding, court considers *Fam. Code § 4320* factors, but under *Fam. Code § 4322*, denial of continued support is mandatory if sufficiency standard met irrespective of circumstances court would otherwise need to consider under § 4320)]. Spousal support should not be awarded to a party who is currently capable of providing for his or her own support through employment or other separate property [*Fam. Code § 4322*; *In re Marriage of Terry (2000) 80 Cal. App. 4th 921, 928, 95 Cal. Rptr. 2d 760* ; *In re Marriage of Cosgrove (1972) 27 Cal.*

App. 3d 424, 428, 434, 103 Cal. Rptr. 733 ; *see In re Marriage of Rives (1982) 130 Cal. App. 3d 138, 164, 181 Cal. Rptr. 572]* .

The rule that a spouse is not required to exhaust his or her separate estate before seeking spousal support pendente lite does not apply to permanent support. However, the court will take into consideration the time in which the separate estate will be exhausted in determining whether the estate is sufficient for that spouse's "proper" support [*Dallman v. Dallman (1959) 170 Cal. App. 2d 729, 735, 339 P.2d 636* (distinguishing *De Leshe v. De Leshe (1947) 80 Cal. App. 2d 513, 515, 181 P.2d 929*)].

Community property that is awarded to a spouse in the dissolution becomes that spouse's separate property, and the manner in which the property is utilized may be considered in determining whether he or she should also receive spousal support [*In re Marriage of Kennedy (1987) 193 Cal. App. 3d 1633, 1640-1641, 239 Cal. Rptr. 151* ; *see In re Marriage of Cheriton (2001) 92 Cal. App. 4th 269, 307-308, 111 Cal. Rptr. 2d 755* ; *In re Marriage of McElwee (1988) 197 Cal. App. 3d 902, 908, 243 Cal. Rptr. 179* ; *Dallman v. Dallman (1959) 170 Cal. App. 2d 729, 733-734, 339 P.2d 636]* . Income from income-producing assets received in the division of community property must be taken into account [*see In re Marriage of Winick (1979) 89 Cal. App. 3d 525, 528-529, 152 Cal. Rptr. 635* ; *see also In re Marriage of Martin (1991) 229 Cal. App. 3d 1196, 1201, 280 Cal. Rptr. 565]* . Support has been limited based on the supported spouse's improvident management of assets that should have been sufficient to provide self-sufficiency at the marital standard of living [*In re Marriage of McElwee (1988) 197 Cal. App. 3d 902, 909-910, 243 Cal. Rptr. 179]* . One court, in dicta, has expressed doubt that a spouse may be ordered to invest his or her share of community assets in income-producing property in order to obviate the need for spousal support [*see In re Marriage of Kennedy (1987) 193 Cal. App. 3d 1633, 1640 n.3, 239 Cal. Rptr. 151* ; *see also In re Marriage of Martin (1991) 229 Cal. App. 3d 1196, 1201, 280 Cal. Rptr. 565* (payment of cash to equalize community property division did not preclude award of support); *but see In re Marriage of McNaughton (1983) 145 Cal. App. 3d 845, 852-853, 194 Cal. Rptr. 176* (dicta that wife's diligence in finding and making permanent investments of estate of over $3 million distributed to her will be relevant as to future duration and amount of support)]. Under *Fam. Code § 4322*, it is not up to the trial court to direct a supported party to make any particular investment, but to ascertain whether that party's estate could reasonably generate sufficient income for proper support [*In re Marriage of Terry (2000) 80 Cal. App. 4th 921, 932, 95 Cal. Rptr. 2d 760]* .

Income from property that was originally part of the community estate may also properly be considered in determining the supporting spouse's ability to pay [*In re Marriage of Epstein (1979) 24 Cal. 3d 76, 91 n.14, 154 Cal. Rptr. 413, 592 P.2d 1165]* . Thus, a pension that was community property but is awarded entirely to the earner spouse in an equal division of assets may be considered as property from which spousal support may be paid [*In re Marriage of White (1987) 192 Cal. App. 3d 1022, 1026-1029, 237 Cal. Rptr. 764]* . In considering the parties' retirement plans in setting spousal support, the courts have weighed the public policy favoring provision for one's retirement against all other circumstances in the case, and have concluded that a court has broad discretion to determine whether to consider as income available for spousal support purposes contributions made by a participant to his or her retirement plan [*In re Marriage of Schmir (2005) 134 Cal. App. 4th 43, 52-53, 35 Cal. Rptr. 3d 716* (supported spouse may be required to withdraw funds from his or her individual retirement account to pay for portion of his or her monthly expenses)].

Although a supporting spouse's obligations generally must be considered in determining his or her ability to pay, an amount to be paid to the supported spouse to effect an equal division of community property is not to be considered. To allow the obligor spouse to pay less support in order to accumulate funds to pay an obligation arising from the property division contravenes the statutory mandate that the community property be divided equally [*In re Marriage of Rosan (1972) 24 Cal. App. 3d 885, 895 n.5, 101 Cal. Rptr. 295]* .

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§ 225.117 Duration of Marriage

The duration of the marriage is a factor in setting spousal support [*Fam. Code § 4320(f)*]. Duration of marriage is generally considered a factor that is more relevant to the *duration* of a spousal support obligation than to the *amount* of support to be awarded [*see In re Marriage of Hebbring (1989) 207 Cal. App. 3d 1260, 1266, 255 Cal. Rptr. 488]* . Thus, the duration of the marriage is of primary concern in determining whether jurisdiction should be retained indefinitely over spousal support, or whether spousal support should be ordered for a limited term, after which jurisdiction is terminated [*see In re Marriage of Prietsch & Calhoun (1987) 190 Cal. App. 3d 645, 659-667, 235 Cal. Rptr. 587]* .

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§ 225.118 Age and Health of Parties

In determining a spousal support award, the court must consider the age and health of the parties [*Fam. Code § 4320(h)*]. The younger and healthier a person is, the less likely it is that the person will need spousal support [*see In re Marriage of Mason (1979) 93 Cal. App. 3d 215, 221, 155 Cal. Rptr. 350]* . Nevertheless, the total disability of one spouse, alone, does not require that spousal support be awarded in perpetuity, if other statutory factors indicate that support is no longer appropriate. At some point, it may be appropriate to shift the burden of supporting a totally disabled person from a former spouse to society. In other words, marriage alone does not make one spouse a guarantor that the other will never become a public charge [*see In re Marriage of Wilson (1988) 201 Cal. App. 3d 913, 916-920, 247 Cal. Rptr. 522* (involving short-term marriage of middle-aged persons with adult children, during which wife became totally disabled)]. Similarly, a disability does not alone justify an order of spousal support to the disabled spouse if the disability does not have a major effect on earning capacity, and the spouse would otherwise be expected to be employed rather than receive spousal support [*see In re Marriage of Harrison (1986) 179 Cal. App. 3d 1216, 1230, 225 Cal. Rptr. 234* (involving 33-year-old epileptic wife who had been employed before 65-month marriage)].

Advanced age and poor health also may affect a supporting spouse's ability to pay, but these factors alone do not justify a termination of a support obligation if the supporting spouse has sufficient assets from which support may be paid [*compare In re Marriage of Crobarger (1986) 178 Cal. App. 3d 56, 60, 223 Cal. Rptr. 480* (retired husband with retirement income required to continue to support elderly wife with less employment income) *with In re Marriage of Mason (1979) 93 Cal. App. 3d 215, 221, 155 Cal. Rptr. 350* (totally disabled husband with income from property not required to support younger wife with adequate earning capacity)]. Nevertheless, at least one reported decision has held that no one may be compelled to work "after the usual age retirement age of 65 in order to pay the same level of spousal support as when he was employed." The court reasoned that in the instance of a bona fide retirement, a supporting spouse should not be forced to continue working. Under those circumstances, the trial court may determine that there has been a material change in circumstances to justify a modification of support. Just as a married couple may expect a reduction in income due to retirement, a divorced spouse cannot expect to receive the same high level of support after the supporting spouse retires [*Reynolds v. Reynolds (1998) 63 Cal. App. 4th 1373, 1378, 74 Cal. Rptr. 2d 636*].

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§ 225.119 Domestic Violence

Documented evidence of any history of domestic violence between the parties is among the circumstances that must be considered in ordering spousal support [*Fam. Code § 4320(i)*]. The court must consider both emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and any history of violence against the supporting party by the supported party, as well as other matters [*Fam. Code § 4320(i)*].

There is a rebuttable presumption against the award of either temporary or permanent spousal support to a spouse who is criminally convicted of an act of domestic violence against the other spouse within five years before the filing of a dissolution proceeding, or at any time thereafter [*Fam. Code § 4325(a)*]. This presumption may be rebutted by a preponderance of the evidence [*Fam. Code § 4325(c)*]. The court may consider documented evidence of a convicted spouse's history as a victim of domestic violence perpetrated by the other spouse, or any other factors the court deems just and equitable, as conditions for rebutting the presumption [*Fam. Code § 4325(b)*]. The criminal conviction of an abusive spouse must be considered in making a reduction or elimination of a spousal support award in accordance with this presumption [*Fam. Code § 4320(m)*]. The court is not required to consider the factors outlined in *Fam. Code § 4320* in making its determination under *Fam. Code § 4325* [*In re Marriage of Cauley (2006) 138 Cal. App. 4th 1100, 1109, 41 Cal. Rptr. 3d 902]* .

The presumption of *Fam. Code § 4325* applies even when the parties' settlement agreement provides that spousal support is not subject to modification or termination [*In re Marriage of Cauley (2006) 138 Cal. App. 4th 1100, 1106-1109, 41 Cal. Rptr. 3d 902]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsDomestic OffensesDomestic AssaultGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewFamily LawMarital Termination &

Spousal SupportSpousal SupportObligationsPeriodic Support

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19-225 California Forms of Pleading and Practice--Annotated § 225.120

§ 225.120 Tax Consequences of Support

For a detailed discussion of the tax consequences of spousal support awards in proceedings for dissolution or legal separation, see Ch. 227, *Dissolution of Marriage: Tax Effects of Dissolution* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportObligationsPeriodic SupportFamily LawMarital Termination & Spousal SupportTaxation

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19-225 California Forms of Pleading and Practice--Annotated § 225.121

§ 225.121 Other Just and Equitable Factors

In addition to the factors discussed *above*, the court must consider any other factors that it deems just and equitable in making a spousal support award [*Fam. Code § 4320(n)*]. Under this "catch-all" category, the court may consider practically anything that has a legitimate bearing on the present and prospective matters relating to the lives of both parties [*In re Marriage of Chapman (1987) 191 Cal. App. 3d 1308, 1313, 237 Cal. Rptr. 84]* . However, culpability or fault in having caused the breakup of the marital relationship is no longer a factor to be considered in awarding spousal support [*In re Marriage of Rosan (1972) 24 Cal. App. 3d 885, 892, 101 Cal. Rptr. 295* ; *see also Fam. Code § 2335* (evidence of misconduct generally irrelevant and inadmissible in dissolution proceedings)].

Factors that may be considered might include, for example, the responsibility of either spouse for the support of persons other than the minor children of the marriage [*see* *In re Marriage of Paul (1985) 173 Cal. App. 3d 913, 919-921, 219 Cal. Rptr. 318* (educational expenses of adult child); *Ganschow v. Ganschow (1975) 14 Cal. 3d 150, 159 n.10, 120 Cal. Rptr. 865, 534 P.2d 705* ; for further discussion, *see § 225.122*]. They might also include the length of a prior marriage between the same parties and court orders arising from the dissolution of the parties' prior marriage to each other [*see* *In re Marriage of Chapman (1987) 191 Cal. App. 3d 1308, 1312-1316, 237 Cal. Rptr. 84]* . Under this provision, a court may also consider monetary gifts made to the supported spouse [*In re Marriage of Shaughnessy (2006) 139 Cal. App. 4th 1225, 1240-1241, 43 Cal. Rptr. 3d 642]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsPeriodic SupportFamily LawMarriageGeneral Overview

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19-225 California Forms of Pleading and Practice--Annotated § 225.122

§ 225.122 Support and Education of Adult Children

A series of cases have held that voluntary payments made by a parent for the support or education of an adult child not otherwise entitled to support may be taken into account in determining spousal support. Payments made by the supporting spouse may be considered as reducing his or her ability to pay [*see, e.g., In re Marriage of Epstein (1979) 24 Cal. 3d 76, 90, 154 Cal. Rptr. 413, 592 P.2d 1165* ; *see also In re Marriage of Paul (1985) 173 Cal. App. 3d 913, 919, 219 Cal. Rptr. 318* ; *In re Marriage of Kelley (1976) 64 Cal. App. 3d 82, 95, 134 Cal. Rptr. 259]* . Payments made by the supported spouse may be considered as increasing his or her need [*In re Marriage of Paul (1985) 173 Cal. App. 3d 913, 918-921, 219 Cal. Rptr. 318* ; *In re Marriage of Siegel (1972) 26 Cal. App. 3d 88, 90, 102 Cal. Rptr. 613]* .

However, at least one reported appellate decision, *In re Marriage of Serna* [*In re Marriage of Serna, (2000) 85 Cal. App. 4th 482, 486-491, 102 Cal. Rptr. 2d 188]* , refused to follow *In re Marriage of Siegel (1972) 26 Cal. App. 3d 88* and *In re Marriage of Paul (1985) 173 Cal. App. 3d 913, 918-921* --cases cited for the proposition that spousal support may be increased to account for support of adult children. *Serna* held that *Siegel* and *Paul* were wrongly decided, because "they allow for the naked circumvention of a decision that has already been made by the Legislature--namely, that child support ends at 19 at the latest, absent incapacity to earn a living." Neither case directly confronted the idea that it was allowing something to be done indirectly that could not be done directly. That is, because a parent cannot be ordered to make *direct* support payments for an adult child, absent incapacity of the adult child to earn a living [*Fam. Code §§ 3901(a), 3910(a)*; *In re Marriage of Chandler (1997) 60 Cal. App. 4th 124, 130]* , he or she cannot be ordered to make "indirect" adult child support payments under the guise of spousal support [*In re Marriage of Serna, (2000) 85 Cal. App. 4th 482, 491, 102 Cal. Rptr. 2d 188* citing *In re Marriage of McElwee (1988) 197 Cal. App. 3d 902, 910-911, 243 Cal. Rptr. 179* ; *see In re Marriage of Lynn (2002) 101 Cal. App. 4th 120, 133, 123 Cal. Rptr. 2d 611* (court may not award support of adult children under guise of spousal support)].

There is also dicta in *Serna*, criticizing the position that supporting spouses who voluntarily support adult children could receive a decrease in spousal support. It was reasoned that case law has established that supporting spouses "cannot deliberately shirk support obligations by refusing to work" [*In re Marriage of Serna, (2000) 85 Cal. App. 4th 482, 492*

citing *Reynolds v. Reynolds (1998) 63 Cal. App. 4th 1373, 1379, 74 Cal. Rptr. 2d 636*]. Similarly, if a supporting spouse were to voluntarily help an adult child through a very expensive private college, which left very little left to pay spousal support, the supported spouse would be subsidizing the supporting spouse's child support to the degree that the expense was factored into the support decision.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportObligationsPeriodic Support

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19-225 California Forms of Pleading and Practice--Annotated § 225.123

§ 225.123 Annuities, Life Insurance, and Trust Funds

If it is just and reasonable in view of the parties' circumstances, the court, in determining the needs of a supported spouse, may include an amount sufficient to purchase an annuity for the supported spouse, or to maintain insurance for the benefit of that spouse on the life of the spouse required to make support payments. Alternatively, the supporting spouse may be required to establish a trust fund for the benefit of the supported spouse should the order for support be terminated by the death of the supporting spouse. Except as otherwise agreed by the parties in writing, such an order may be modified or terminated at the court's discretion at any time before the death of supporting spouse [*see Fam. Code § 4360*; *In re Marriage of Ziegler (1989) 207 Cal. App. 3d 788, 793, 255 Cal. Rptr. 100]* .

The court may also order the supporting spouse to cooperate in the *supported spouse's purchase* of insurance on the supporting spouse's life, by requiring the supporting spouse to apply for life insurance naming the supported spouse as beneficiary--that the supported spouse will pay for. This is not, however, treated as an order under *Fam. Code § 4360*, but an order under the court's general power to make orders on specific family law matters, including support and injunctive relief [*In re Marriage of Stimel (1996) 49 Cal. App. 4th 991, 994-996, 57 Cal. Rptr. 2d 18* (wife's motion for order directing her former husband to apply for life insurance naming her as beneficiary and stipulating she would pay all insurance premiums was not motion to modify spousal support); *see Fam. Code § 2010*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19-225 California Forms of Pleading and Practice--Annotated § 225.124

§ 225.124 Payment to Creditors

On a determination that payment of an obligation of a party would benefit either party or a child for whom support may be ordered, the court may order one of the parties to pay the obligation, or any portion of it, directly to the creditor. The creditor does not have a right to enforce such an order; however, the creditor's other remedies are not affected by the order [*Fam. Code § 2023*; *see In re Marriage of Higgason (1973) 10 Cal. 3d 476, 488, 110 Cal. Rptr. 897, 516 P.2d 289]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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19-225 California Forms of Pleading and Practice--Annotated § 225.125

§ 225.125 Effect of Agreement Between Parties

The factors set forth in *Fam. Code § 4320* are considered by the court in setting spousal support if there has been no agreement of the parties [*see In re Marriage of Carletti (1975) 53 Cal. App. 3d 989, 995, 126 Cal. Rptr. 1* ; *In re Marriage of Hawkins (1975) 48 Cal. App. 3d 208, 212, 121 Cal. Rptr. 681]* . Under current California law, an agreement of the parties regarding spousal support is subject to judicial review to determine that it is fair and not tainted by fraud, compulsion, collusion, or undue influence. But if there is no reason for questioning the validity or fairness of the agreement, the court may not withhold its approval [*Garrett v. Garrett (1968) 258 Cal. App. 2d 407, 416-417]* . Under prior law, the enforceability of a spousal support agreement depended on whether the agreement was deemed to be "integrated" with the disposition of the community property. The concept of integrated and nonintegrated agreements has now disappeared from the family law landscape [*see Fam. Code § 3590*; *In re Marriage of Glasser (1986) 181 Cal. App. 3d 149, 152, 226 Cal. Rptr. 229* ; *Tilghman v. Superior Court (1974) 40 Cal. App. 3d 599, 611-612, 115 Cal. Rptr. 195]* .

One or both parties may waive the right to spousal support in a separation or marital termination agreement [*see Estate of Kalal (1981) 121 Cal. App. 3d 841, 851, 175 Cal. Rptr. 582* ; *Cochrum v. Cochrum (1958) 162 Cal. App. 2d 825, 831-832, 328 P.2d 1000* ; *see also In re Marriage of Paboojian (1987) 189 Cal. App. 3d 1434, 1437-1439, 235 Cal. Rptr. 65* (postjudgment oral waiver of support)]. However, such a waiver is subject to particular scrutiny because waiver of a right favored in law is not lightly found [*see In re Marriage of Moore (1980) 113 Cal. App. 3d 22, 27, 169 Cal. Rptr. 619]* . Language constituting a waiver must clearly and explicitly manifest that intention [*In re Marriage of Moore (1980) 113 Cal. App. 3d 22, 28, 169 Cal. Rptr. 619]* . Waiver must be a voluntary act, knowingly done with sufficient awareness of the relevant circumstances and likely consequences. Contract formation defenses such as fraud, compulsion, or breach of fiduciary duty, may render the agreement invalid [*see In re Marriage of Moore (1980) 113 Cal. App. 3d 22, 27, 169 Cal. Rptr. 619]* . Finally, marital settlement agreements may be set aside if the court finds them inequitable even though not induced through fraud or compulsion [*In re Marriage of Moore (1980) 113 Cal. App. 3d 22, 32, 169 Cal. Rptr. 619]* .

The parties may also agree that spousal support may not be modified or terminated by court order [*see Fam. Code §§ 3591(c), 3651(d)*], and the court must abide by that agreement [*In re Marriage of Carletti (1975) 53 Cal. App. 3d 989, 995, 126 Cal. Rptr. 1]* . For further discussion, see *§ 225.160*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsValidityFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionProperty SettlementsFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsPeriodic Support

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19-225 California Forms of Pleading and Practice--Annotated § 225.126

§ 225.126 Examination by Vocational Training Counselor

If spousal support is at issue, the court may order either party to submit to an examination by a vocational training counselor [*Fam. Code § 4331(a)*; *see Fam. Code § 4331(e)* (required qualifications of vocational training counselor)]; *see also Fam. Code § 3558* (power of court to require either parent to attend job training, job placement, and vocational rehabilitation and work programs in any proceeding involving family or child support)]. A party refusing to comply with such an order is subject to the same consequences provided for failure to comply with an examination ordered under *Code Civ. Proc. § 2032* (*Code Civ. Proc. § 2032.010 et seq.* effective July1, 2005) [*Fam. Code § 4331(c)*].

The examination must include an assessment of the party's ability to obtain employment, based on the party's age, health, education, marketable skills, employment history, and the current availability of employment opportunities. The focus of the examination must be on an assessment of the party's ability to obtain employment that would allow him or her to maintain herself or himself at the marital standard of living [*Fam. Code § 4331(a)*]. The court may order the supporting spouse to pay, in addition to spousal support, the necessary expenses and costs of the counseling, retraining, or education [*Fam. Code § 4331(f)*]. For forms for use in moving for an examination by a vocational training counselor, *see §§ 225.371* and *225.372*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportObligationsPeriodic Support

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19-225 California Forms of Pleading and Practice--Annotated § 225.127

§ 225.127 Discovery of Tax Returns

In a proceeding involving spousal support, no party to the proceeding may refuse to submit copies of his or her federal and state income tax returns to the court, whether individual or joint [*Fam. Code § 3552(a)*]. The tax returns may be examined by the other party and are discoverable by the other party. A party also may be examined by the other party as to the content of a tax return [*Fam. Code § 3552(b)*].

If the court finds that it is relevant to the case to retain the tax return, it must be sealed and maintained as a confidential record of the court. If the court finds that the tax return is not relevant to disposition of the case, all copies of the tax return must be returned to the party who submitted it [*Fam. Code § 3552(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsPeriodic SupportFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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19-225 California Forms of Pleading and Practice--Annotated § 225.128

§ 225.128 Award of Support in Default Judgment if Support Is Not Requested

The relief that may be granted on default in a family law matter cannot exceed that requested in the petition [*In re Marriage of Lippel (1990) 51 Cal. 3d 1160, 1166-1171, 276 Cal. Rptr. 290, 801 P.2d 1041]* . This rule is imposed both by due process requirements and the Code of Civil Procedure [*In re Marriage of Lippel (1990) 51 Cal. 3d 1160, 1166-1167, 276 Cal. Rptr. 290, 801 P.2d 1041* ; *see Code Civ. Proc. § 580*; *Cal. Rules of Ct., Rule 5.21* (general applicability of Code of Civil Procedure to family law proceedings)]. Therefore, if no spousal support is requested in the petition and the respondent defaults, no spousal support may be awarded in the judgment [*see In re Marriage of Lippel (1990) 51 Cal. 3d 1160, 1167, 1170-1171, 276 Cal. Rptr. 290, 801 P.2d 1041* (involving child support)].

The above rule may prohibit a reservation of jurisdiction to award spousal support in the future to be paid by a defaulting respondent if it is not requested in the petition [*see In re Marriage of Liss (1992) 10 Cal. App. 4th 1426, 1429-1430, 13 Cal. Rptr. 2d 397]* . However, it has been held that jurisdiction may be reserved to award spousal support *to* a defaulting spouse even though the petition does not request spousal support for either party [*In re Marriage of Wells (1988) 206 Cal. App. 3d 1434, 1437-1440, 254 Cal. Rptr. 185* (default dissolution of 14-year marriage with default taken against supported AFDC spouse)]. If a default is taken against the supported spouse, and the supporting spouse is both present at the default hearing and represented by counsel, reservation of the spousal support issue does not violate *Code Civ. Proc. § 580* by granting relief in excess of the relief requested [*In re Marriage of Wells (1988) 206 Cal. App. 3d 1434, 1439, 254 Cal. Rptr. 185* ; *cf. Cushman v. Cushman (1960) 178 Cal. App. 2d 492, 496, 3 Cal. Rptr. 24* (supporting spouse who appeared at default trial needed no *Code Civ. Proc. § 580* protection against undue advantage)]. The supporting spouse's active participation at the default hearing eliminates the need to protect him or her against open-ended liability or undue advantage, so that the reason behind *Code Civ. Proc. § 580* ceases to exist [*In re Marriage of Wells (1988) 206 Cal. App. 3d 1434, 1437-1439, 254 Cal. Rptr. 185]* . The same reasoning supports reservation of jurisdiction to award support to a party who did not request it in the pleadings if both parties are before the court [*In re Marriage of Liss (1992) 10 Cal. App. 4th 1426, 1429, 13 Cal. Rptr. 2d 397]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportJurisdictionFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsPeriodic Support

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[Reserved]

§§ 225.129[Reserved]

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19-225 California Forms of Pleading and Practice--Annotated § 225.140

§ 225.140 Need to Address Retention of Jurisdiction in Order or Judgment

In making any order addressing the subject of spousal support, whether affecting a marital settlement agreement or otherwise and whether or not spousal support is actually ordered, the parties and the court must consider the question of whether the court is to retain jurisdiction over the matter after entry of judgement. If the court neither awards spousal support nor retains jurisdiction over spousal support, jurisdiction to award support terminates, and no award may be made in the future [*see Howell v. Howell (1894) 104 Cal. 45, 47, 37 P. 770* ; *Bain v. Superior Court (1974) 36 Cal. App. 3d 804, 808-809, 111 Cal. Rptr. 848* ; *but see In re Marriage of Olsen (1994) 24 Cal. App. 4th 1702, 1706-1707, 30 Cal. Rptr. 2d 306* (under its equitable power, court may set aside prior order terminating jurisdiction that was obtained by fraud, mistake, or accident)].

Retention of jurisdiction is also fundamental to extending the duration of support if it is otherwise to terminate at the end of a particular period [*see Fam. Code § 4335*; for further discussion of extending a spousal support award, *see § 225.143*]. Related issues that should also be addressed by the parties are whether spousal support is to be modifiable as to amount [*see Fam. Code §§ 3591, 3651*; for further discussion, *see § 225.160*], and whether spousal support is to terminate by operation of law on the death of either party or the remarriage of the supported spouse [*see Fam. Code § 4337*; *In re Marriage of Thornton (2002) 95 Cal. App. 4th 251, 254, 115 Cal. Rptr. 2d 380* ; for further discussion, *see § 225.161*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportJurisdictionFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsPeriodic Support

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19-225 California Forms of Pleading and Practice--Annotated § 225.141

§ 225.141 Manner of Retaining Jurisdiction in Marriage of Long Duration

[1] In General

Except on written agreement of the parties to the contrary or a court order terminating spousal support, the court retains jurisdiction indefinitely if the marriage is of long duration [*Fam. Code § 4336(a)*]. Thus, no express language retaining jurisdiction is required in a spousal support order if the marriage is of long duration. Rather, the rule is now that only specific language of termination will divest the court of its fundamental jurisdiction--by either the parties' agreement or a court order [*see In re Marriage of Jones (1990) 222 Cal. App. 3d 505, 511-514, 271 Cal. Rptr. 761* (in long-term marriage, *termination* of jurisdiction must appear expressly in agreement); *cf. In re Marriage of Morrison (1978) 20 Cal. 3d 437, 446-447, 143 Cal. Rptr. 139, 573 P.2d 41* (under prior law, jurisdiction terminated unless expressly reserved); *In re Marriage of Ostrander (1997) 53 Cal. App. 4th 63, 65-66, 61 Cal. Rptr. 2d 348* (original stipulated dissolution judgment did not mention spousal support)].

Fam. Code § 4336 applies to proceedings filed on or after January 1, 1988, and to proceedings pending on January 1, 1988 in which the court had not entered a permanent support order or in which the court order is subject to modification [*Fam. Code § 4336(d)*]. For discussion of the law if *Section 4336* does not apply, see *§ 225.142*.

Because of the apparent mandatory nature of *Fam. Code § 4336*, the court should make specific findings as to whether the marriage is one of long duration to which the statute applies (*see § 225.373*). For further discussion, see *§ 225.144[2]*.

Nothing in *Fam. Code § 4336* limits the right of a court to terminate all spousal support in later proceedings on the ground of changed circumstances [*Fam. Code § 4336(c)*]. For further discussion of termination of support, see *§ 225.200* et seq.

[2] What Constitutes Marriage of Long Duration

No bright-line rule can determine whether or not a marriage is of long duration [*see In re Marriage of Prietsch & Calhoun (1987) 190 Cal. App. 3d 645, 663, 235 Cal. Rptr. 587]* . However, there is a presumption that affects the burden of providing evidence that a marriage of 10 years or more (from date of marriage to date of separation) is of long duration. The court may consider periods of separation during the marriage in determining whether the marriage is, in fact, of long duration [*Fam. Code § 4336(b)*]. The presumption does not preclude a court from determining that a marriage of less than 10 years is a marriage of long duration [*Fam. Code § 4336(b)*]. Periods of nonmarital cohabitation are not to be considered in determining the length of a marriage [*In re Marriage of Bukaty (1986) 180 Cal. App. 3d 143, 151, 225 Cal. Rptr. 492]* .

If the parties were married, divorced, and then remarried to each other, there may be some conflict as to whether the term of the first marriage may be considered. One court refused to consider a 12-year first marriage that was followed by a period of divorce/cohabitation of over 20 years, and a brief second marriage [*see In re Marriage of Bukaty (1986) 180 Cal. App. 3d 143, 145-151, 225 Cal. Rptr. 492]* . Another refused to limit support based on a marriage of less than four months because the parties had been previously married for nineteen years, and divorced for only three [*see In re Marriage of Chapman (1987) 191 Cal. App. 3d 1308, 1312-1316, 237 Cal. Rptr. 84]* . Although these cases may be distinguished based on the length of the interval between marriages, the latter court relied heavily on the continuing duty of support arising from the first marriage during the nonmarital period [*see In re Marriage of Chapman (1987) 191 Cal. App. 3d 1308, 1315-1316, 237 Cal. Rptr. 84]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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19-225 California Forms of Pleading and Practice--Annotated § 225.142

§ 225.142 Retaining Jurisdiction if Fam. Code § 4336 Does Not Apply

Fam. Code § 4336 does not apply if the court determines that the marriage is not of long duration, or to nonmodifiable orders entered before January 1, 1988 [*see Fam. Code § 4336(a), (b), (d)*; *see, e.g., In re Marriage of Beck (1997) 57 Cal. App. 4th 341, 344-346, 67 Cal. Rptr. 2d 79* (improper for trial court to have reinstated support 16 years after expiration date)]. In these cases, the pre-1988 law still governs.

Under this law, a spousal support order carries within it, without the necessity of language to that effect, a reservation of jurisdiction to modify it at any time prior to the expiration of the term for which it is awarded [*In re Marriage of Christie (1994) 28 Cal. App. 4th 849, 864, 34 Cal. Rptr. 2d 135* ; *Dahlstet v. Dahlstet (1969) 272 Cal. App. 2d 174, 178, 77 Cal. Rptr. 45]* . This is true even if only a token amount, such as $1.00 per year, is ordered, and that award was made only for the purpose of reserving jurisdiction [*see In re Marriage of West (2007) 152 Cal. App. 4th 240, 253, 60 Cal. Rptr. 3d 858* ; *In re Marriage of Beust (1994) 23 Cal. App. 4th 24, 26, 28 Cal. Rptr. 2d 201* . If no spousal support is ordered, jurisdiction is lost unless retained expressly in the order or by agreement [*see Cochran v. Cochran (1970) 13 Cal. App. 3d 339, 344, 91 Cal. Rptr. 630]* . Therefore, jurisdiction may be reserved by a simple recitation in the order without making a token award [*see, e.g., In re Marriage of Liss (1992) 10 Cal. App. 4th 1426, 1428, 13 Cal. Rptr. 2d 397* ; *In re Marriage of Wells (1988) 206 Cal. App. 3d 1434, 1436, 254 Cal. Rptr. 185* ; *see also § 225.388*].

Legal Topics:

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19-225 California Forms of Pleading and Practice--Annotated § 225.143

§ 225.143 Jurisdiction to Extend Award Beyond Period of Express Limitation

[1] When Express Language Is Required Under Family Code

Most retention-of-jurisdiction issues have arisen in the context of spousal support orders that award support for a limited period of time. Before 1988, the statute provided that an order for spousal support for a fixed period of time terminated at the end of the period specified, and could not be extended unless the court retained jurisdiction in the order [*see* former *Civ. Code § 4801(d)* (prior to amendment by Stats. 1987, ch. 1086); *In re Marriage of Foreman (1986) 183 Cal. App. 3d 129, 133-134, 228 Cal. Rptr. 4]* .

In 1987, the Legislature added what is now *Fam. Code § 4336* to former *Civ. Code § 4801(d)*, providing that the court retained jurisdiction indefinitely if the marriage was of long duration. However, it was not clear whether this additional language entirely obviated the need for express language retaining jurisdiction in the case of a long-term marriage, or whether it merely clarified that if jurisdiction were expressly retained, it continued indefinitely (that is, beyond the termination date specified in the order) [*see In re Marriage of Segel (1986) 177 Cal. App. 3d 1030, 1040-1041, 223 Cal. Rptr. 430]* .

In converting former *Civ. Code § 4801(d)* to the Family Code, the California Law Revision Commission appears to have resolved the ambiguity in favor of the former construction [*see In re Marriage of Jones (1990) 222 Cal. App. 3d 505, 511-514, 271 Cal. Rptr. 761]* . Under *Fam. Code § 4335*, an order for spousal support terminates at the end of the period provided in the order and may not be extended unless the court retains jurisdiction in the order *or under § 4336* . Thus, it appears that if the court determines that the marriage is of long duration under *Fam. Code § 4336(b)*, jurisdiction is retained automatically and indefinitely over a spousal support order scheduled to terminate after a fixed term [*see Fam. Code § 4336(a)*, discussed in *§ 225.141[1]*]; no express language retaining jurisdiction is required in the order [*but see In re Marriage of Christie (1994) 28 Cal. App. 4th 849, 861, 862 n.5, 34 Cal. Rptr. 2d 135* (dicta suggesting that statute does not alter prior rule)]. Of course, there should now be an express finding that the marriage is of long duration in order to obtain the effect of *Section 4336* [*see § 225.373*].

As so construed, *Fam. Code § 4335* shifts the focus of a rather voluminous body of case law regarding retention of jurisdiction in limited-duration spousal support orders. A need for express language reserving jurisdiction is now limited to those orders to which *Fam. Code § 4336* does not apply. These include orders in short-term marriages, and nonmodifiable orders entered before January 1, 1988 [*see Fam. Code § 4336(a), (d)*; *see, e.g., In re Marriage of Beck (1997) 57 Cal. App. 4th 341, 344-346, 67 Cal. Rptr. 2d 79* (improper for trial court to have reinstated support 16 years after expiration date)]. This law is discussed in *§ 225.143[2]*. If *Fam. Code § 4336* does apply, then there must be an express termination of jurisdiction in the order [*In re Marriage of Brown (1995) 35 Cal. App. 4th 785, 790, 41 Cal. Rptr. 2d 506* ; *see In re Marriage of Ousterman (1996) 46 Cal. App. 4th 1090, 1094, 54 Cal. Rptr. 2d 403]* . This law is discussed in *§ 225.143[3]*.

As long as the court has retained jurisdiction over spousal support ordered for a limited period, it has fundamental jurisdiction to take new action concerning the support. It may both modify the amount of support (unless it is made nonmodifiable by agreement [*see Fam. Code § 3591*; *see also § 225.160*]), and extend the duration of support beyond the termination date [*In re Marriage of Vomacka (1984) 36 Cal. 3d 459, 474, 204 Cal. Rptr. 568, 683 P.2d 248* ; *In re Marriage of Brown (1995) 35 Cal. App. 4th 785, 790-791, 41 Cal. Rptr. 2d 506* ; *see In re Marriage of Maxfield (1983) 142 Cal. App. 3d 755, 762-763, 191 Cal. Rptr. 267]* . However, some courts have construed language establishing a termination date as retaining jurisdiction to modify as to amount, but not to extend the duration of support past the stated date [*see In re Marriage of Zlatnik (1988) 197 Cal. App. 3d 1284, 1290, 243 Cal. Rptr. 454* (provision setting termination date also construed as terminating jurisdiction on that date; motion to extend date brought before date denied); *In re Marriage of Foreman (1986) 183 Cal. App. 3d 129, 133-134, 228 Cal. Rptr. 4* ; *see also § 225.144*; *§ 225.143[3]*].

[2] What Constitutes Language Sufficient to Retain Jurisdiction

Many cases decided under the pre-1988 version of former *Civ. Code § 4801(d)* have addressed the question of what language is sufficient to constitute an express retention of jurisdiction over spousal support awarded for a limited duration. These cases must be read in context of the state of the law that required such language in all cases, regardless of the length of the marriage. In that context, the loss of spousal support, a fundamental right incident to marriage, was subject to strict interpretation. If the order was vague or ambiguous with regard to the period of time for which a court could extend support, it was to be construed in favor of a retention of jurisdiction. In fact, retention of jurisdiction need not have been expressly stated at all, but could be implied [*see In re Marriage of Vomacka (1984) 36 Cal. 3d 459, 466-467, 204 Cal. Rptr. 568, 683 P.2d 248]* .

Fam. Code §§ 4335 and *4336* reverse the need for express jurisdictional language with regard to long-term marriages. In orders regarding these marriages, the parties must expressly agree that jurisdiction is to terminate on a given date; otherwise it is retained indefinitely [*Fam. Code §§ 4335, 4336(a)*; *see § 225.143[3]*]. Express language retaining jurisdiction is still required with regard to short-term marriages, but in these marriages, the protective policy concerns are of less significance. Therefore, it may be anticipated that courts will be less likely to construe language in a manner that favors retention of jurisdiction. The prior cases on this point should not necessarily be viewed as definitive.

In these cases, it has been held that no particular language in the order is required to avoid loss of jurisdiction [*In re Marriage of Keeva (1977) 66 Cal. App. 3d 512, 519, 136 Cal. Rptr. 82]* . Any language in a spousal support order that suggests that modification of its terms will be permitted is to be interpreted as a retention of the court's fundamental jurisdiction to both modify and, on a proper factual showing, to extend the award [*In re Marriage of Vomacka (1984) 36 Cal. 3d 459, 466-467, 204 Cal. Rptr. 568, 683 P.2d 248* ; *In re Marriage of Ousterman (1996) 46 Cal. App. 4th 1090, 1098, 54 Cal. Rptr. 2d 403* ; *In re Marriage of Benson (1985) 171 Cal. App. 3d 907, 912, 217 Cal. Rptr. 589]* . However, one court has held that the power to modify must derive from some express language in the order and not solely from the court's inherent power to modify the award, absent agreement to the contrary [*In re Marriage of Foreman (1986) 183 Cal. App. 3d 129, 134, 228 Cal. Rptr. 4* (also refusing to infer jurisdiction to extend *duration of*

support from express right to modify *amount*); *accord* *In re Marriage of Beck (1997) 57 Cal. App. 4th 341, 345-346, 67 Cal. Rptr. 2d 79]* .

Retention of jurisdiction has been found in a provision giving only one party the right to seek modification and expressly denying it to the other [*see* *In re Marriage of Harbach (1987) 195 Cal. App. 3d 629, 634, 240 Cal. Rptr. 698* ; *but see* *In re Marriage of Zlatnik (1988) 197 Cal. App. 3d 1284, 1290, 243 Cal. Rptr. 454* (discussed in *§ 225.143[3]*)].

Another court rejected an asserted retention of jurisdiction to modify spousal support based on a family home award (allowing the wife and children in her custody to remain in the home and requiring husband to make mortgage payments). The court refused to characterize the award as a form of spousal support because it was contingent on the minor children living there [*In re Marriage of Katz (1988) 201 Cal. App. 3d 1029, 1035-1036, 247 Cal. Rptr. 562]* .

If the court fails to reserve jurisdiction expressly in a judgment, but its intent to reserve is indicated in a transcript, the judgment may later be modified by way of a correction of a clerical error to reserve jurisdiction [*In re Marriage of Sheridan (1983) 140 Cal. App. 3d 742, 746, 189 Cal. Rptr. 622* ; *see Code Civ. Proc. § 473*].

One court has held that in absence of an express reservation, the parties may confer jurisdiction to modify or extend a spousal support award by agreement. Thus, if the parties submit to the court's jurisdiction for the purpose of altering a support award by stipulation, they lose the right to complain about the court's failure to reserve jurisdiction in the original order [*In re Marriage of Segel (1986) 177 Cal. App. 3d 1030, 1042, 223 Cal. Rptr. 430]* .

[3] What Constitutes Language Sufficient to Terminate Jurisdiction

As noted in *§ 225.143[1], [2], Fam. Code § 4336* now places the burden on the parties to expressly terminate (rather than retain) jurisdiction in their agreement in a marriage of long duration. Therefore, the focus of construction of an agreement has shifted from whether the language is sufficient to retain jurisdiction to whether it is sufficient to terminate it. As such, the rule that language is to be liberally construed in favor of retaining jurisdiction [*§ 225.143[2]*] is now recast as a rule that language should be strictly construed against terminating jurisdiction. In both cases, ambiguity must be decided in favor of the right to spousal support [*In re Marriage of Brown (1995) 35 Cal. App. 4th 785, 790, 41 Cal. Rptr. 2d 506]* . In one case, for example, parties agreed to spousal support until death, remarriage, or a certain date (January 31, 1995), whichever occurred first. They further agreed that the wife could not modify the payments on any ground before that date. The appellate court held that because the agreement provided it was nonmodifiable until a certain date, it appeared *to permit* modification if the wife requested support after that date [*In re Marriage of Ousterman (1996) 46 Cal. App. 4th 1090, 1094, 54 Cal. Rptr. 2d 403]* .

Similarly, in *In re Marriage of Brown,* the language of the agreement stated that after payment of the 60th installment of spousal support, husband's obligation shall terminate forever, and no court shall have any jurisdiction to extend spousal support as to amount or duration after that date [*In re Marriage of Brown (1995) 35 Cal. App. 4th 785, 787, 41 Cal. Rptr. 2d 506]* . The appellate court held that this language did not expressly divest the court of jurisdiction before expiration of the term and that therefore, the court implicitly retained jurisdiction before the termination date to extend the duration of support [*In re Marriage of Brown (1995) 35 Cal. App. 4th 785, 788-791, 41 Cal. Rptr. 2d 506]* . Nevertheless, the court reaffirmed that it is possible to draft a provision terminating jurisdiction to extend the duration of support beyond a limited term [*In re Marriage of Brown (1995) 35 Cal. App. 4th 785, 790, 41 Cal. Rptr. 2d 506]* .

One case in which sufficient language was found is *In re Marriage of Zlatnik* [*In re Marriage of Zlatnik (1988) 197 Cal. App. 3d 1284, 1286, 243 Cal. Rptr. 454]* , in which the agreement stated that spousal support was to be for 7 years, and modifiable as to amount *only* during that time. The agreement continued that "in no event, shall husband be obligated to pay spousal support to wife after [date]." The court found that this language unequivocably expressed the parties' intent to terminate jurisdiction to extend the term, even though jurisdiction to modify until the termination date

had been retained [*In re Marriage of Zlatnik (1988) 197 Cal. App. 3d 1284, 1286, 1290, 243 Cal. Rptr. 454* ; *see also In re Marriage of Foreman (1986) 183 Cal. App. 3d 129, 134, 228 Cal. Rptr. 4]* .

An unequivocal expression of intention to terminate spousal support was also found when the court's retention of jurisdiction was limited to "sett[ling] any disputes arising from or to interpret this Judgment and to make any further orders necessary to enforce the provisions of this judgment [; but] nothing contained in this paragraph shall be deemed to modify the provisions re spousal support contained herein," and the order contained a date certain for express, irrevocable termination, before which termination could also occur on the happening of several specific events--one of which *did occur* [*In re Marriage of Iberti (1997) 55 Cal. App. 4th 1434, 1437, 1441, 64 Cal. Rptr. 2d 766]* .

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§ 225.144 When Court Should Retain Jurisdiction

[1] Factors to Be Considered

Except perhaps in the case of a marriage of long duration pursuant to *Fam. Code § 4336*, if the retention of jurisdiction has not been resolved by agreement of the parties, the court must determine whether the spousal support order should be formulated to terminate jurisdiction at some point in time. In determining whether to retain jurisdiction indefinitely or terminate jurisdiction after a specified period, the court must consider all of the factors in *Fam. Code § 4320* affecting the appropriateness of spousal support in the first instance [*In re Marriage of Prietsch & Calhoun (1987) 190 Cal. App. 3d 645, 663, 235 Cal. Rptr. 587* ; *In re Marriage of Kelley (1976) 64 Cal. App. 3d 82, 93-94, 134 Cal. Rptr. 259* ; *see* discussion in *§ 225.111*].

Of these factors, the duration of the marriage [*see Fam. Code § 4320(f)*; *see also § 225.117*], must always be considered [*In re Marriage of Prietsch & Calhoun (1987) 190 Cal. App. 3d 645, 663-664, 235 Cal. Rptr. 587]* . As a general principle, the longer the marriage, the more likely it is that it will be an abuse of discretion if the court fixes a date for termination of jurisdiction over the issue of future spousal support without a clear showing that it is reasonably probable that the supported spouse will be self-sufficient by the termination date [*In re Marriage of Prietsch & Calhoun (1987) 190 Cal. App. 3d 645, 663, 235 Cal. Rptr. 587]* . However, duration is not, alone, determinative; all other factors must be considered and weighed [*In re Marriage of Kelley (1976) 64 Cal. App. 3d 82, 93-95, 134 Cal. Rptr. 259]* . For example, termination of jurisdiction in a 10-year marriage might be appropriate for parties in their 30s, but not if they were in their 60's [*see In re Marriage of Prietsch & Calhoun (1987) 190 Cal. App. 3d 645, 664, 235 Cal. Rptr. 587]* .

In making its decision concerning retention of jurisdiction, the trial court must rely on the evidence in the record and the reasonable inferences to be drawn from it, and must not engage in speculation [*In re Marriage of Morrison (1978) 20 Cal. 3d 437, 453, 143 Cal. Rptr. 139, 573 P.2d 41* ; *In re Marriage of McTiernan & Dubrow (2005) 133 Cal. App. 4th 1090, 1108-1109, 35 Cal. Rptr. 3d 287* (court should not "burn its bridges" by terminating jurisdiction to extend duration of spousal support when court's expectations about supported spouse's capacity to become adequately

employed and self-supporting were tentative and untested)]. The trial court is not required to base its decision on the mere numerical weight of the factors for and against retention of jurisdiction, but, rather, on the relative weight of the factors in combination [*In re Marriage of Kelley (1976) 64 Cal. App. 3d 82, 95, 134 Cal. Rptr. 259]* .

[2] Long-Term Marriage

In the case of a long-term marriage, *Fam. Code §§ 4335* and *4336* clearly express the legislative policy that jurisdiction should be retained indefinitely, and no express judicial action appears to be required to retain jurisdiction [*In re Marriage of Ostrander (1997) 53 Cal. App. 4th 63, 65-66, 61 Cal. Rptr. 2d 348]* . This policy conforms to prior case law that generally considered it to be an abuse of discretion to fail to retain jurisdiction over spousal support in a long-term marriage, at least absent clear evidence that the supported spouse would achieve economic self-sufficiency by the termination date [*In re Marriage of Christie (1994) 28 Cal. App. 4th 849, 864-865, 34 Cal. Rptr. 2d 135* ; *see In re Marriage of Morrison (1978) 20 Cal. 3d 437, 453, 143 Cal. Rptr. 139, 573 P.2d 41* ; *see also In re Marriage of Brantner (1977) 67 Cal. App. 3d 416, 420, 136 Cal. Rptr. 635* (in long-term marriage in which one spouse has stayed at home and acquired no marketable employment skills, other spouse's support obligation is likely to be of extended duration, even for life)].

However, the statutes appear to go even farther than this prior case law in that jurisdiction over support in long-term marriages will be deemed automatically reserved in the absence of specific language of termination [*In re Marriage of Ostrander (1997) 53 Cal. App. 4th 63, 65-66, 61 Cal. Rptr. 2d 348]* . One possible further interpretation of the statutes is that courts must now retain jurisdiction in long-term marriage cases and actually have no discretion to terminate it, regardless of the parties' circumstances, in the absence of the parties' agreement to terminate it [*see In re Marriage of Jones (1990) 222 Cal. App. 3d 505, 514 n.3, 271 Cal. Rptr. 761* (legislative history indicates section was intended to require courts to retain permanent jurisdiction in long-term marriage cases)]. That view would be a substantial departure from prior case law, which did not require the court to retain jurisdiction in every case involving a lengthy marriage. If both spouses were employed, or if there were sufficient assets available to enable each to provide for his or her needs, no support, or support for only a limited time without a retention of jurisdiction, was appropriate [*In re Marriage of Morrison (1978) 20 Cal. 3d 437, 453, 143 Cal. Rptr. 139, 573 P.2d 41* ; *see In re Marriage of McElwee (1988) 197 Cal. App. 3d 902, 908, 243 Cal. Rptr. 179]* . And, in fact, such an expansive reading of *Fam. Code § 4336(a)* may not be justified, because it provides for termination of support jurisdiction both by the parties' agreement and by "a court order terminating spousal support." Although the quoted words do not specify whether they refer to an order made at the time a court terminates the parties' marriage or whether, viewed from the context of a later modification proceeding, they refer to some other order, it appears that the former is correct. In one case, for example, the court rejected a former husband's argument that the retained jurisdiction feature of *Fam. Code § 4336(a)* arises only for modification of a prior support award. Instead, the court found, this section clearly provides two mechanisms for divesting the court of jurisdiction in long-term marriage cases: the parties may agree to such termination or the court may order it. In either case, only specific language of termination will divest the court of its fundamental jurisdiction, and in the absence of such language jurisdiction will be deemed retained. While this court faced a situation in which the original dissolutionjudgment was silent concerning spousal support and it did not rule directly on the propriety of an original order terminating support, the case appears to support the view that a trial court still has discretion to make an order terminating support in long-term marriage cases [*In re Marriage of Ostrander (1997) 53 Cal. App. 4th 63, 65-66, 61 Cal. Rptr. 2d 348]* .

In addition, in *In re Marriage of Baker (1992) 3 Cal. App. 4th 491, 4 Cal. Rptr. 2d 553* , a marriage of just less than 10 years was treated as one of long duration by the trial court, which then determined that an open-ended order with no termination of jurisdiction was appropriate. In affirming, the appellate court made no mention whatsoever of the language of former *Civ. Code § 4801(d)* (*now see Fam. Code § 4336*), which would seem to compel the result reached by the trial court. Instead, the appellate court emphasized the broad discretion of the trial court in determining whether or not to divest itself of jurisdiction over spousal support on a certain date [*In re Marriage of Baker (1992) 3 Cal. App. 4th 491, 498-500, 4 Cal. Rptr. 2d 553]* . In fact, the court expressly stated that a trial court must not be reluctant,

and indeed has a duty, to fix a termination date for spousal support if justified after considering the applicable circumstances of the case and the reasonable inferences to be drawn from the evidence [*In re Marriage of Baker (1992) 3 Cal. App. 4th 491, 500, 4 Cal. Rptr. 2d 553]* . Thus, it seems that this court would not view *Fam. Code § 4336* as eliminating the court's discretion to terminate jurisdiction over spousal support in a long-term marriage on appropriate facts.

[3] Short-Term Marriage

In a marriage of short duration, one court has held that it is reversible error for a trial court to retain jurisdiction over spousal support, if the spouse seeking retention of jurisdiction is in good health and permanently employed at a self-supporting income level [*In re Marriage of Hebbring (1989) 207 Cal. App. 3d 1260, 1266-1267, 255 Cal. Rptr. 488]* . The legislative policy behind the former Family Law Act (*now see* Family Code) aims at ending support obligations so that former spouses may proceed to develop their future lives [*In re Marriage of Hebbring (1989) 207 Cal. App. 3d 1260, 1267, 255 Cal. Rptr. 488]* .

If the court determines that some period of support is appropriate in a short-term marriage, the duration of the marriage, considered alone, will usually militate against any but a short-term spousal support award with a fixed termination date [*In re Marriage of Prietsch & Calhoun (1987) 190 Cal. App. 3d 645, 663, 235 Cal. Rptr. 587]* . Long-term spousal support may be denied in a short-term marriage even if the supported spouse has no capacity at all for economic self-sufficiency [*In re Marriage of Wilson (1988) 201 Cal. App. 3d 913, 917-920, 247 Cal. Rptr. 522* (affirming trial court's determination that obligation to support disabled person must shift, at some point, from short-term spouse to society); *see also In re Marriage of Bukaty (1986) 180 Cal. App. 3d 143, 147-150, 225 Cal. Rptr. 492]* . Further, the court is not required to award sufficient support to maintain the supported spouse at the marital standard of living in a short-term marriage, at least if the standard of living was not created by the joint efforts of the spouses [*In re Marriage of Huntington (1992) 10 Cal. App. 4th 1513, 1520-1522, 14 Cal. Rptr. 2d 1* (involving nonworking spouses who lived affluently on husband's inherited wealth)].

[4] Medium-Term Marriage

There is no statutory guidance or other bright line as to what might constitute a "medium-term" marriage [*see Fam. Code § 4336*; *In re Marriage of Prietsch & Calhoun (1987) 190 Cal. App. 3d 645, 663, 235 Cal. Rptr. 587* ; *see also § 225.141[2]*], but jurisdictional issues seem to be particularly difficult in marriages of slightly less than 10 years in which the factors to be considered under *Fam. Code § 4320* indicate that spousal support is appropriate [*see, e.g., In re Marriage of Baker (1992) 3 Cal. App. 4th 491, 4 Cal. Rptr. 2d 553* ; *In re Marriage of Heistermann (1991) 234 Cal. App. 3d 1195, 286 Cal. Rptr. 127]* . In these marriages, the duration of the marriage, by itself, does not preclude the exercise of the court's discretion to terminate jurisdiction over future spousal support after a specified term [*In re Marriage of Prietsch & Calhoun (1987) 190 Cal. App. 3d 645, 663, 235 Cal. Rptr. 587]* . On the other hand, it is generally not an abuse of discretion to make an open-ended spousal support order with no termination of jurisdiction in such a case [*In re Marriage of Baker (1992) 3 Cal. App. 4th 491, 496-501, 4 Cal. Rptr. 2d 553]* .

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[Reserved]

§§ 225.145[Reserved]

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5. Nonmodification And Nontermination Agreements

19-225 California Forms of Pleading and Practice--Annotated § 225.160

§ 225.160 Agreement That Support Is Nonmodifiable

[1] General Rule of Validity for Agreement Executed on or After January 1, 1970

Under current law, the general rule is that spousal support orders may be modified or terminated at any time, whether the order was agreed to by the parties [*see In re Marriage of Maytag (1994) 26 Cal. App. 4th 1711, 1713-1716, 32 Cal. Rptr. 2d 334* (not necessary that agreement be approved by court and merged into judgment or order)] or was imposed by the court [*Fam. Code §§ 3591(a), 3651(a), (e)*; *see Esserman v. Esserman (1982) 136 Cal. App. 3d 572, 578, 186 Cal. Rptr. 329* (court may also modify agreement made after final judgment of dissolution); *see also Fam. Code §§ 3591(b), 3651(c)* (support may not be modified or terminated as to amounts that accrued before moving papers were filed)]. However, spousal support may not be modified or terminated to the extent that a written agreement (or oral agreement entered into in open court) between the parties specifically provides that the spousal support is not subject to modification or termination [*Fam. Code §§ 3591(c), 3651(d)*]. Current law applies to property settlement agreements entered into on or after January 1, 1970 [*Fam. Code §§ 3593, 3651(f)*].

The parties' agreement that support may not be modified must be enforced by the court regardless of any change of circumstances that might occur [*In re Marriage of Carletti (1975) 53 Cal. App. 3d 989, 995, 126 Cal. Rptr. 1* (oral agreement in open court); *Tilghman v. Superior Court (1974) 40 Cal. App. 3d 599, 613, 115 Cal. Rptr. 195* (written agreement)]. The parties are entitled to relinquish the possibility of a potentially more beneficial support order in exchange for certainty in their rights and obligations. Because of that certainty, both can better plan their affairs and adjust their lives to the new circumstances created by the termination of marriage [*In re Marriage of Hawkins (1975) 48 Cal. App. 3d 208, 213, 121 Cal. Rptr. 681* (finding no public policy bar to enforcement of nonmodifiable support agreement)].

If support is made nonmodifiable by agreement, it also cannot be "terminated," in the sense of being modified down to zero dollars, based on changed circumstances [*In re Marriage of Bennett (1983) 144 Cal. App. 3d 1022, 1024-1026, 193 Cal. Rptr. 113* ; *In re Marriage of Harris (1976) 65 Cal. App. 3d 143, 152, 134 Cal. Rptr. 891* ; *cf. In re*

Marriage of Benjamins (1994) 26 Cal. App. 4th 423, 433, 31 Cal. Rptr. 2d 313 (modification in this sense should not be confused with true termination, in which the obligation to pay support ends permanently)]. A nonmodifiable provision does not avoid termination by operation of law on the remarriage of the supported spouse [*see Fam. Code § 4337*], but may do so if there is language or other evidence that such was the intent of the parties [*see In re Marriage of Ousterman (1996) 46 Cal. App. 4th 1090, 1098, 54 Cal. Rptr. 2d 403* ; *In re Marriage of Sherman (1984) 162 Cal. App. 3d 1132, 1135-1139, 208 Cal. Rptr. 832* ; *but see In re Marriage of Glasser (1986) 181 Cal. App. 3d 149, 152-153, 226 Cal. Rptr. 229]* . For further discussion, see *§ 225.161*.

In entering into an agreement concerning spousal support, the parties are presumed to be aware that, absent an express prohibition against modification, the trial court has the power to modify or terminate support in accordance with changed circumstances [*see Levitt v. Levitt (1965) 62 Cal. 2d 477, 482, 42 Cal. Rptr. 577, 399 P.2d 33]* . If the agreement does not contain a clause prohibiting modification, parol evidence is inadmissible to prove that the parties intended that the support provisions be nonmodifiable. However, extrinsic evidence may be admitted to prove the meaning of language reasonably susceptible to an interpretation precluding modification [*In re Marriage of Wright (1976) 54 Cal. App. 3d 1115, 1121 n.10, 126 Cal. Rptr. 894* ; *see In re Marriage of Trearse (1987) 195 Cal. App. 3d 1189, 1193, 241 Cal. Rptr. 257]* .

[2] Language Required

If the parties intend that the spousal support provisions be nonmodifiable, they should clearly express that intent in their written agreement or oral stipulation [*see Fam. Code §§ 3591(c), 3651(d)*]. A nonmodifiable clause is set forth in *see § 225.391*.

Some earlier cases indicated a judicial willingness to find a nonmodifiable clause in general boiler plate language in the agreement. In *In re Marriage of Smiley (1975) 53 Cal. App. 3d 228, 125 Cal. Rptr. 717* , a general provision in the agreement stated that the agreement was not subject to modification and could not be amended except by an instrument in writing signed by both parties. The court concluded that this language was sufficient to preclude modification of spousal support [*In re Marriage of Smiley (1975) 53 Cal. App. 3d 228, 232-233, 125 Cal. Rptr. 717]* . Similarly, a support agreement that characterized its terms as "absolute, unconditional, and irrevocable" was held to be nonmodifiable [*In re Marriage of Kilkenny (1979) 96 Cal. App. 3d 617, 619-620, 158 Cal. Rptr. 158]* . A provision in an agreement, stating that the agreement "shall not depend for its effectiveness on [court] approval nor be affected thereby," has also been held to be a specific provision precluding judicial modification [*In re Marriage of Nielsen (1980) 100 Cal. App. 3d 874, 878, 161 Cal. Rptr. 272]* .

However, more recently, courts have generally reached the opposite result. These cases hold that, though no "magic words" are required, there must be some specific unequivocal language directly on the question of modification of spousal support [*Fukuzaki v. Superior Court (1981) 120 Cal. App. 3d 454, 458, 174 Cal. Rptr. 536* (provision that agreement is intended to be "final and complete" settlement, including release of all obligations, did not preclude modification)]. Because a specific provision making spousal support nonmodifiable may be easily drafted and inserted, the basic policy of modifiability should not be eroded by inferring specific intent from boilerplate provisions [*In re Marriage of Hufford (1984) 152 Cal. App. 3d 825, 834-835, 199 Cal. Rptr. 726* (provision that agreement may not be altered, amended, or modified except by instrument in writing executed by both parties is insufficient)]. Even if general boilerplate language is otherwise sufficient to establish nonmodifiability, the language may be overcome by other language in the specific provision related to spousal support that indicates an intent that support be subject to modification [*In re Marriage of Forcum (1983) 145 Cal. App. 3d 599, 604-605, 193 Cal. Rptr. 596]* .

It has also been held that a "step-down" support provision in a marital termination agreement, that is, one that provides for payment of support but periodically reduces the amount until no more support is due (*see § 225.380*), does not by itself qualify as a specific provision making spousal support nonmodifiable [*In re Marriage of Jones (1990) 222 Cal. App. 3d 505, 509-511, 271 Cal. Rptr. 761]* .

[3] Interrelationship With Reservation of Jurisdiction

An express provision in an agreement that a spousal support award may not be modified may also be construed as a stipulation that jurisdiction is not to be retained to extend the award if it otherwise expires at the end of a specific period [*see, e.g., In re Marriage of Segel (1986) 177 Cal. App. 3d 1030, 223 Cal. Rptr. 430* ; *see Fam. Code § 4336(a)*]. However, such an equation is not automatic, and language that otherwise would be sufficient to make the agreement nonmodifiable may be insufficient to terminate jurisdiction if there is other specific language that is construed to retain jurisdiction [*In re Marriage of Ousterman (1996) 46 Cal. App. 4th 1090, 1098, 54 Cal. Rptr. 2d 403* ; *In re Marriage of Forcum (1983) 145 Cal. App. 3d 599, 604-605, 193 Cal. Rptr. 596]* . Conversely, the fact that spousal support remains modifiable as to amount does not necessarily mean that jurisdiction is retained to extend the duration of support [*In re Marriage of Zlatnik (1988) 197 Cal. App. 3d 1284, 1286, 1290, 243 Cal. Rptr. 454* ; *In re Marriage of Foreman (1986) 183 Cal. App. 3d 129, 131, 134, 228 Cal. Rptr. 4]* .

One court even construed a clause precluding modification as a reservation of jurisdiction to extend the award. In *In re Marriage of Harbach (1987) 195 Cal. App. 3d 629, 240 Cal. Rptr. 698* , the parties agreed to a spousal support order that would expire on a specific date. They further stipulated that the award could not be modified by the obligee-spouse, but could be modified by the obligor-spouse on the happening of certain specified conditions. On the obligee's motion, the court modified the award by extending the term, despite the stipulation. It reasoned that the right of the obligor to move to modify the award constituted a reservation of jurisdiction over the matter, allowing the court to consider as well the obligee's motion [*In re Marriage of Harbach (1987) 195 Cal. App. 3d 629, 634, 240 Cal. Rptr. 698]* . The dissenting judge did not dispute the court's analysis of the jurisdictional question, but criticized its failure to enforce the provision precluding modification. The dissent noted that whether or not the court retained jurisdiction, there was no basis not to give effect to the agreement that had been entered into freely between the parties [*In re Marriage of Harbach (1987) 195 Cal. App. 3d 629, 634-636, 240 Cal. Rptr. 698* (Wiener, J., dissenting)].

[4] Agreement Executed Before January 1, 1970

Current law applies to agreements entered into on or after January 1, 1970. As to agreements entered into before that date, Chapter 1308 of the laws of 1967 applies [*Fam. Code §§ 3593, 3651(f)*]. Chapter 1308 amended former *Civ. Code § 139*, which governed support before the enactment of the Family Law Act. Section 139, as amended by Chapter 1308, provided that amendments made to it in 1959, 1963, and 1967 were to apply only with respect to agreements entered into after the effective date of the amendments. Thus, the law under *Fam. Code §§ 3593* and *3651(e)* and Chapter 1308 of Stats. 1967 is essentially that spousal support agreements are to be governed by the law in effect when the agreement was entered into.

Before 1959, the pertinent paragraphs of former *Civ. Code § 139* provided:

> That portion of the decree or judgment [for divorce or separate maintenance] making any such allowance or allowances [for spousal or child support], and the order or orders of the court to enforce the same may be modified or revoked at any time at the discretion of the court except as to any amount that may have accrued prior to the order of modification or revocation.
>
> Except as otherwise agreed by the parties in writing, the obligation of any party in any decree, judgment or order for the support and maintenance of the other party shall terminate upon the death of the obligor or upon the remarriage of the other party.

Unlike current law [*see Fam. Code §§ 3591(a), 3651(e)*], the statute made no specific reference to support under an agreement of the parties, and case law came to consider modifiability of the support provisions in an agreement as a question of contract law outside of the statute [*see, e.g., Adams v. Adams (1947) 29 Cal. 2d 621, 627, 177 P.2d 265]* . Thus, the right to support on divorce could be addressed from two different perspectives; the obligation could be created

and governed by the agreement or contract of the parties; or it could be "law-imposed" under the authority of Section 139, in which case it was called "alimony" [*see Messenger v. Messenger (1956) 46 Cal. 2d 619, 624-625, 297 P.2d 988* ; *Hecht v. Hecht (1968) 259 Cal. App. 2d 1, 6, 67 Cal. Rptr. 293]* .

Alimony was subject to modification and revocation, and terminated on death or remarriage as set forth in Section 139. However, if the support was contractual, it was nonmodifiable if the agreement was deemed to be "integrated" [*Messenger v. Messenger (1956) 46 Cal. 2d 619, 628, 297 P.2d 988* ; *Dexter v. Dexter (1954) 42 Cal. 2d 36, 40, 265 P.2d 873]* .

An agreement was integrated if it provided that the provisions relating to division of property and the provisions relating to support were reciprocal consideration. That is, the support provisions and the community property division provisions were integrally intertwined, so that the support provisions were nonseverable [*see Plumer v. Plumer (1957) 48 Cal. 2d 820, 824, 313 P.2d 549* ; *Sprenger v. Superior Court (1969) 268 Cal. App. 2d 857, 860 n.1, 74 Cal. Rptr. 638]* . If the agreement was determined not to be integrated, the support provisions were deemed to be in the nature of alimony and subject to future modification on a showing of changed circumstances [*see Puckett v. Puckett (1943) 21 Cal. 2d 833, 840, 136 P.2d 1* ; *Matthews v. Matthews (1977) 74 Cal. App. 3d 683, 687, 141 Cal. Rptr. 634*].

Often, the judicial determination of whether an agreement was in fact integrated seemed to turn on whether specific "magic" words were used, rather than on the substance of the agreement. For example, an agreement between husband and wife providing that the purpose of the parties is to reach a final settlement of their rights and duties with respect to both property and support, that they intend each provision to be in consideration for each of the other provisions, and that they waive all rights arising out of the marital relationship except those expressly set out in the agreement was deemed conclusive evidence that an integrated agreement was intended [*Di Marco v. Di Marco (1963) 60 Cal. 2d 387, 391, 33 Cal. Rptr. 610, 385 P.2d 2* ; *Matthews v. Matthews (1977) 74 Cal. App. 3d 683, 690, 141 Cal. Rptr. 634*]. In some cases, integrated agreements involved a trade-off, in which the wife accepted a less favorable division of property in exchange for permanent (nonmodifiable) support. However, such a situation was not an absolute condition precedent to a finding of integration [*see Dexter v. Dexter (1954) 42 Cal. 2d 36, 43-44, 265 P.2d 873]* .

Discontent with the law of integrated support agreements caused the Legislature to enact a series of amendments to former *Civ. Code § 139* between 1959 and 1967 [*see Heller v. Heller (1964) 230 Cal. App. 2d 679, 684-685, 41 Cal. Rptr. 177* (chronicle of amendment history); *see also Tremayne v. Striepeke (1968) 262 Cal. App. 2d 107, 117-118, 68 Cal. Rptr. 470* ; *Hecht v. Hecht (1968) 259 Cal. App. 2d 1, 3-7, 67 Cal. Rptr. 293]* . In 1959, child support provisions in an integrated agreement incorporated into a judgment were made modifiable, but there was no change in the treatment of spousal support [*see* Stats. 1959, ch. 1399, effective September 18, 1959; *Heller v. Heller (1964) 230 Cal. App. 2d 679, 684-685, 41 Cal. Rptr. 177]* .

In 1961, spousal support established in an integrated agreement was made modifiable. However, the Legislature further provided that the statute "shall not be construed to render an integrated property settlement agreement modifiable when there are no minor children of the parties to the agreement" [*see* Stats. 1961, ch. 2098]. As no effective date was prescribed, it was presumed that this amendment applied only to agreements executed after it became the law on September 15, 1961 [*see Heller v. Heller (1964) 230 Cal. App. 2d 679, 685, 41 Cal. Rptr. 177]* .

In 1963 the Legislature repealed the 1961 language and returned the statute to its 1959 form. Once again, only child support provisions in an integrated agreement were modifiable, but the repeal was prospective only [*see* Stats. 1963, ch. 861, effective September 20, 1963; *Heller v. Heller (1964) 230 Cal. App. 2d 679, 685, 41 Cal. Rptr. 177]* .

Therefore, with the exception of the period from September 15, 1961 to September 20, 1963, the law was that spousal support provided for in an integrated agreement was nonmodifiable. In the interim period, it was modifiable only if there were minor children of the marriage.

In 1967, former *Civ. Code § 139* was again amended, and spousal support was finally made modifiable, regardless of whether or not the provision was contained in an agreement, unless the agreement provided to the contrary. The pertinent provisions of Section 139, as it read after the amendments made by Chapter 1308 of Stats. 1967, effective November 8, 1967, were the following:

> The provisions of any agreement for the support of either party shall be deemed to be separate and severable from the provisions of the agreement relating to property. All orders for the support of either party based on such agreement shall be deemed law imposed and shall be deemed made under the power of the court to make such orders. The provisions of any agreement or order for the support of either party shall be subject to subsequent modification or revocation by court order except as to any amount that may have accrued prior to the order of modification or revocation, and except to the extent that any written agreement, or if there is no written agreement, any oral agreement entered into in open court between the parties, specifically provides to the contrary. All such orders of the court for the support of the other party, even if there has been an agreement of the parties, may be enforced by the court by execution, contempt, or by such other order or orders as the court in its discretion may from time to time deem necessary.
>
> The amendments to the second paragraph of this section enacted at the 1959 Regular Session of the Legislature are effective only with respect to property settlement agreements entered into after the effective date of such amendments.
>
> The 1963 amendments to this section apply only with respect to agreements entered into after the effective date of such amendments.
>
> The 1967 amendments to this section apply only with respect to agreements entered into after the effective date of such amendments.

The effect of that amendment was to make all spousal support provisions of a property settlement agreement, whether or not merged in the interlocutory decree, whether or not merely approved, and whether or not "integrated" under the previous cases, modifiable unless the parties agreed to the contrary [*In re Marriage of Smiley (1975) 53 Cal. App. 3d 228, 232, 125 Cal. Rptr. 717* ; *see In re Marriage of Harris (1976) 65 Cal. App. 3d 143, 150, 134 Cal. Rptr. 891* ; *see also Sprenger v. Superior Court (1969) 268 Cal. App. 2d 857, 867-868, 74 Cal. Rptr. 638* ; *Garrett v. Garrett (1968) 258 Cal. App. 2d 407, 416, 65 Cal. Rptr. 580]* .

The 1967 version of former *Civ. Code § 139* was carried into the former Family Law Act. The first three sentences of the amended section were contained in former *Civ. Code § 4811(b)*, with only one minor change; the words "except as to any amount that may have accrued prior to the order of modification or revocation" was replaced by the words "except as to any amounts that may have accrued prior to the date of filing of the notice of motion or order to show cause to modify or revoke." The fourth sentence regarding enforcement was covered by the broad language of former *Civ. Code § 4380*.

The Family Law Act statutes were carried forward into the Family Code without substantive change [*see* California Law Revision Commission Comments to *Fam. Code §§ 3590, 3591*]. The first two sentences of former *Civ. Code § 4811(b)* are now *Fam. Code § 3590*. The provisions in former *Civ. Code § 4811(b)* related to modification of support by agreement are found in *Fam. Code § 3591*. They are reiterated in *Fam. Code § 3651*. Former *Civ. Code § 4380*, on enforcement, is *Fam. Code § 290*. Thus, with the exception of the minor change related to retroactivity, the current law on modification of support agreements is the same as the law under former *Civ. Code § 139* on and after November 8, 1967, the effective date of Chapter 1308 of Stats. 1967.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportJurisdictionFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsPeriodic Support

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19-225 California Forms of Pleading and Practice--Annotated § 225.161

§ 225.161 Agreements Avoiding Termination by Operation of Law: Death, Remarriage, Cohabitation

The death of either party or the remarriage of the supported spouse terminates the support obligation of the supporting spouse by operation of law [*Fam. Code § 4337*; *see In re Marriage of Glasser (1984) 181 Cal. App. 3d 149, 153, 226 Cal. Rptr. 229]* . Also, there is a rebuttable presumption affecting the burden of proof that the supported spouse has a decreased need for spousal support if he or she is cohabiting with a person of the opposite sex [*Fam. Code § 4323(a)(1)*; *In re Marriage of Bower (2002) 96 Cal. App. 4th 893, 900]* . However, these legal effects of death, remarriage, and cohabitation may be avoided by a written agreement of the parties [*Fam. Code §§ 4323(a)(1), 4337*; *In re Marriage of Thornton (2002) 95 Cal. App. 4th 251, 254-255, 115 Cal. Rptr. 2d 380]* . For forms of these provisions, *see §§ 225.392* and *225.393*. Even if an agreement does not expressly extend support beyond remarriage or death, an extension may be implied if that was the clear intent of the parties [*see, e.g., Lucas v. Elliott (1992) 3 Cal. App. 4th 888, 893-894, 4 Cal. Rptr. 2d 746* (finding provision in agreement requiring payor to maintain life insurance in amount of present value of support obligation as such an agreement, despite lack of express language continuing support obligation after death); *In re Marriage of McGhee (1982) 131 Cal. App. 3d 408, 414-415, 182 Cal. Rptr. 456* (language of interlocutory agreement and nature of agreement implied extension beyond remarriage)].

Nevertheless, a written agreement to waive the provisions of *Fam. Code § 4337* must be specific and express. Thus, for example, an agreement providing for nonmodifiability of a certain sum of spousal support, and specifying that the support continue "until further Order of the Court, death of either party, or for a period until March 1, 2003, whichever first occurs," was held not to waive termination by operation of law [*see Fam. Code § 4337*] on remarriage. The court stated that although no particular words are required for the waiver, "[o]n the other hand, silence will not do" [*In re Marriage of Thornton (2002) 95 Cal. App. 4th 251, 254, 115 Cal. Rptr. 2d 380* (noting that husband attempted to rectify claimed inadvertent omission of remarriage proviso in judgment, but failed to pursue motion)].

There is perhaps some division of authority over whether a general nonmodifiability clause avoids termination by operation of law on remarriage under *Fam. Code § 4337*. One court has held that remarriage does not terminate spousal support if the parties' agreement states that support is not modifiable *on any ground*, and does not provide an express

exception for remarriage [*In re Marriage of Sherman (1984) 162 Cal. App. 3d 1132, 1135-1139, 208 Cal. Rptr. 832 see also In re Marriage of Cesnalis (2003)106 Cal. App. 4th 1267, 1275-1276, 131 Cal. Rptr. 2d 436* (husband waived right under *Fam. Code § 4337* to terminate spousal support on wife's remarriage when nonmodifiability provision in stipulated judgment was expressly limited to three-year "duration of spousal support" that "will not be modifiable under any circumstances" and that will end only if three years are up or one of parties dies)]. However, other courts have held that agreements providing that spousal support (1) simply was "nonmodifiable" or (2) "nonmodifiable for any reason whatsoever," did not preclude automatic termination by operation of law on the remarriage of the supported spouse [*see In re Marriage of Thornton (2002) 95 Cal. App. 4th 251, 254-255, 115 Cal. Rptr. 2d 380* ; *In re Marriage of Glasser (1986) 181 Cal. App. 3d 149, 151-153, 226 Cal. Rptr. 229]* . The cases may be distinguished on the ground that in *Sherman* there was evidence, both in the agreement and extrinsic to it, that nontermination on remarriage was the intent of the parties. In a subsequent case, the court noted that termination and modification are distinct concepts describing different ways to alter support obligations. It rejected the view that a termination of support was simply a modification down to zero dollars, and refused to apply a nonmodifiable clause to extend the payor's obligation to make medical insurance premium payments after the death of the supported spouse [*In re Marriage of Benjamins (1994) 26 Cal. App. 4th 423, 432-433, 31 Cal. Rptr. 2d 313]* .

For further discussion of termination of support by death or remarriage, and of the effect of cohabitation, see *§ 225.200* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationCohabitationFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationDeathFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationRemarriageFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsPeriodic Support

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19-225 California Forms of Pleading and Practice--Annotated §§ 225.162-225.179

[Reserved]

§§ 225.162[Reserved]

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19-225 California Forms of Pleading and Practice--Annotated § 225.180

§ 225.180 Earnings Assignment Order

When the court orders a party to pay spousal support, it must include in its order an earnings assignment order directed at the obligor's employer. The earnings assignment order directs the employer to withhold the amount of support (and any amount ordered by the court to be paid toward the liquidation of any arrearage) from the obligor's earnings and to pay it directly to the obligee [*Fam. Code § 5230*; *see Fam. Code § 150* ("support" as used in Family Code includes spousal support)]. However, service of the order on the employer may be stayed if the court makes a finding of good cause to stay service of the order, or if an alternative arrangement for payment exists pursuant to *Fam. Code § 5260(b)(2)* [*Fam. Code § 5260(a)*]. Earnings assignment orders are discussed in detail, and forms are provided, in *Ch. 259, Family Law Enforcement: Special Remedies for Support Enforcement, § 259.50* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsPeriodic SupportFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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19-225 California Forms of Pleading and Practice--Annotated § 225.181

§ 225.181 Security for Payment

The court may order the supporting party to give reasonable security for payment of spousal support [*Fam. Code § 4339*]. This provision has been construed as authorizing the court, for example, to impress a lien on the paying spouse's separate property, including the community property awarded to him or her, to secure payment of spousal support [*see Sanguinetti v. Sanguinetti (1937) 9 Cal. 2d 95, 102, 69 P.2d 845* ; *Miller v. Miller (1964) 227 Cal. App. 2d 322, 328, 38 Cal. Rptr. 571* ; *Rosenthal v. Rosenthal (1961) 197 Cal. App. 2d 289, 298, 17 Cal. Rptr. 186]* .

The court may not impose such a lien on its own motion without notice, however [*Blankenship v. Blankenship (1963) 212 Cal. App. 2d 736, 745, 28 Cal. Rptr. 176]* . Rather, notice of the application for an order impressing a lien on the separate property of the paying spouse, and an opportunity to be heard, are essential [*Clopton v. Clopton (1911) 161 Cal. 481, 483, 119 P. 651]* . That is, before the court may make such an order, it must first give the paying spouse an opportunity to show why security should not be ordered [*Blankenship v. Blankenship (1963) 212 Cal. App. 2d 736, 745-746, 28 Cal. Rptr. 176]* . The power of the court to impose such a lien is a delicate one and must be exercised with caution. The remedy is an extraordinary one that could directly affect the marketability of the spouse's title to the property and could have harsh results. Hence, it should be resorted to only in cases in which less onerous remedies are not available [*see Blankenship v. Blankenship (1963) 212 Cal. App. 2d 736, 746, 28 Cal. Rptr. 176* ; *Loomis v. Loomis (1960) 181 Cal. App. 2d 345, 346, 5 Cal. Rptr. 550]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityLiensFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationSeparate PropertyFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsPeriodic SupportFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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19-225 California Forms of Pleading and Practice--Annotated § 225.182

§ 225.182 Payment to County Officer

In any proceeding in which the court makes a spousal support order, the court may direct that payment be made to the county officer designated by the court for that purpose [*Fam. Code § 4350*; *see Welf. & Inst. Code §§ 276(a), 279*]. The local child support agency will then enforce the order [*Fam. Code § 4351(a)*]. Although it is not expressly so limited, the purpose of this procedure is to allow a county to receive support payments directly in cases in which the supported spouse has assigned her or his rights to the county as a condition to receiving public benefits [*see Welf. & Inst. Code § 11477(a)*]. Whether, and on what conditions, a court might order payments made to a designated county officer in a non-public benefits case has not been addressed. Enforcement of support by local child support agencies is discussed in detail in *Ch. 259, Family Law Enforcement: Special Remedies for Support Enforcement, § 259.150* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDeposits in CourtFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsPeriodic SupportFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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19-225 California Forms of Pleading and Practice--Annotated §§ 225.183-225.199

[Reserved]

§§ 225.183[Reserved]

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19-225 California Forms of Pleading and Practice--Annotated § 225.200

§ 225.200 Governing Statutes

Modification or termination of spousal support generally is governed by *Fam. Code §§ 3650-3654*. Discovery before the commencement of a modification or termination proceeding is governed by *Fam. Code §§ 3660-3668*.

Legal Topics:

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

§§ 225.201[Reserved]

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19-225 California Forms of Pleading and Practice--Annotated 225.220

225.220 Jurisdiction of Court to Modify or Terminate Spousal Support

Generally, a spousal support order may be modified or terminated at any time as the court determines to be necessary [*Fam. Code § 3651(a)*; *see Fam. Code §§ 3650* ("support order" includes spousal or family support), *3651(e)* (statute applies whether or not support is based on agreement of parties); *see also In re Marriage of Maytag (1994) 26 Cal. App. 4th 1711, 1713-1716, 32 Cal. Rptr. 2d 334* (not necessary that agreement have been approved by court or merged into judgment or order)]. However, a trial court loses its jurisdiction to terminate spousal support during the pendency of an appeal of a judgment awarding spousal support [*In re Marriage of Varner (1999) 68 Cal. App. 4th 932, 937, 80 Cal. Rptr. 2d 628]* . In addition, there are exceptions to the general rules concerning modifiability with respect to retroactive modification [*see Fam. Code § 3651(c)*; *see also § 225.223*], and support made nonmodifiable by agreement [*see Fam. Code § 3651(d)*; *see also § 225.60* et seq.]. For a discussion of modification procedures generally, see Ch. 261, *Dissolution of Marriage: Procedure* .

In order for the court to modify a spousal support order, it must have retained jurisdiction over the question of spousal support, and that retained jurisdiction must be in effect as of the date of the modification proceeding. If jurisdiction was either not retained initially [*see Bain v. Superior Court (1974) 36 Cal. App. 3d 804, 809, 111 Cal. Rptr. 848* ; *Cochran v. Cochran (1970) 13 Cal. App. 3d 339, 344, 91 Cal. Rptr. 630]* , or terminated before the date of the modification proceeding [*see In re Marriage of Segel (1986) 177 Cal. App. 3d 1030, 1040-1041, 223 Cal. Rptr. 430]* , the court has no power to act further with regard to spousal support [*but see In re Marriage of Olsen (1994) 24 Cal. App. 4th 1702, 1706-1707, 30 Cal. Rptr. 2d 306* (under its equitable power, court may set aside prior order terminating jurisdiction that was obtained by fraud, mistake, or accident)]. For a discussion of retention of jurisdiction, see *§ 225.60* et seq.

Modification jurisdiction involves two distinct components. First, there is the power to modify the *amount* of support ordered, by increasing or decreasing it. Second, there is the power to extend the *duration* of support beyond a limited term that is established in the existing order [*see Fam. Code § 4335*; *In re Marriage of Beust (1994) 23 Cal. App. 4th 24, 29, 28 Cal. Rptr. 2d 201]* . It is possible to construct a spousal support order that gives the court continuing

jurisdiction over one aspect but not the other. For example, the court may have jurisdiction to modify the amount of support during the term for which it is provided, but no jurisdiction to extend the duration of support beyond the termination date set in the order [*In re Marriage of Zlatnik (1988) 197 Cal. App. 3d 1284, 1286, 1290, 243 Cal. Rptr. 454* ; *In re Marriage of Foreman (1986) 183 Cal. App. 3d 129, 131, 134, 228 Cal. Rptr. 4]* . For further discussion of modification agreements, see *§ 225.60* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsFamily LawMarital Termination & Spousal SupportSpousal SupportJurisdictionFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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19-225 California Forms of Pleading and Practice--Annotated § 225.221

§ 225.221 Court Cannot Delegate Authority Without Parties' Stipulation

Although the court has the power to appoint a special master to gather data to be used in determining the proper level of support, the special master cannot be empowered to make binding factual findings or judicial determinations absent a stipulation by the parties [*In re Marriage of Olson (1993) 14 Cal. App. 4th 1, 8, 17 Cal. Rptr. 2d 480]* . Thus, if the reference to a special master is made on the court's own motion, the court itself must make the determinations concerning levels of support, after considering the special master's report, which the court may either adopt as its own or modify [*In re Marriage of Olson (1993) 14 Cal. App. 4th 1, 8, 17 Cal. Rptr. 2d 480* (delegation to special master of power to determine husband's allowable business deductions, and tax consequences of husband's changed income sources, held to be improper delegation of judicial authority)].

However, if the reference is by agreement of the parties, the parties can stipulate to the special master making determinations that otherwise would be an unlawful delegation of judicial authority [*In re Marriage of Olson (1993) 14 Cal. App. 4th 1, 8, 17 Cal. Rptr. 2d 480]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersGeneral OverviewCivil ProcedureJudicial OfficersReferencesFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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19-225 California Forms of Pleading and Practice--Annotated § 225.222

§ 225.222 Judicial Discretion

In deciding whether to modify or terminate a spousal support order, the trial court has a broad discretion [*In re Marriage of Kuppinger (1975) 48 Cal. App. 3d 628, 633, 120 Cal. Rptr. 654* ; *see In re Marriage of Crobarger (1986) 178 Cal. App. 3d 56, 60, 223 Cal. Rptr. 480]* . "Discretion" means an exercise of discriminating judgment within the bounds of reason that, as contemplated by law, is not capricious or arbitrary, but impartial, guided and controlled in its exercise by fixed legal principles [*Webb v. Webb (1970) 12 Cal. App. 3d 259, 262, 90 Cal. Rptr. 565]* .

Whether a modification is warranted depends on the facts and circumstances of each case, and its propriety rests in the sound discretion of the trial court, the exercise of which will not be disturbed on appeal unless as a matter of law an abuse of discretion is shown. In determining whether there has been an abuse of discretion, the appellate court will resolve any conflict in the evidence or reasonable inferences to be drawn from the facts in support of the trial court's determination [*Philbin v. Philbin (1971) 19 Cal. App. 3d 115, 119, 96 Cal. Rptr. 408* ; *see § 225.228*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral Overview

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19-225 California Forms of Pleading and Practice--Annotated § 225.223

§ 225.223 Effective Date of Modification Order

An order modifying or terminating a spousal support order may be made retroactive to the date on which the moving papers were filed, or to any subsequent date [*Fam. Code § 3653(a)*; *In re Marriage of Cheriton (2001) 92 Cal. App. 4th 269, 312-313, 111 Cal. Rptr. 2d 755* (court must exercise discretion in modifying spousal support retroactively)]. A support order may not be modified or terminated as to an amount that accrued before the date on which the moving papers were filed [*Fam. Code § 3651(c)*; *see In re Marriage of Acosta (1977) 67 Cal. App. 3d 899, 902, 137 Cal. Rptr. 33]* . Thus, an order that a spouse must repay temporary support from his or her share of the community property received later in the division of property is improper as a retroactive modification of a support order [*In re Marriage of Van Sickle (1977) 68 Cal. App. 3d 728, 739-740, 137 Cal. Rptr. 568]* . If monthly payments accrue on the first day of the month, and the notice of motion or order to show cause is filed on the second day of the month or later, the court has no power to reduce the payment due for that particular month [*see Hangen v. Hangen (1966) 241 Cal. App. 2d 11, 13-14, 50 Cal. Rptr. 203]* .

If an order modifying or terminating a support order is entered because of the *unemployment* of either spouse, the order must be made retroactive to the date of service on the opposing party of the notice of motion or order to show cause to modify or terminate or the date of unemployment, whichever is later, subject to the notice requirements under federal law [*42 U.S.C. § 666(a)(9)*], unless the court finds good cause not to make the order retroactive and states its reasons on the record [Fam. Code § 8653(b)].

If an order decreasing or terminating a support order is entered retroactively, the support obligor may be entitled to, and the support obligee may be ordered to repay, any amounts previously paid by the support obligor under the prior order that are in excess of the amounts due under the retroactive order [*Fam. Code § 3653(c)*]. The court may order that repayment by the support obligee be made over any time period and in any manner, including, but not limited to, by an offset against future support payments or wage assignment, as the court deems just and reasonable. In determining whether to order a repayment, and in establishing the terms of the repayment, the court must consider the amount to be repaid, the duration of the support order before modification or termination, the financial impact on the support obligee

of any particular method of repayment, such as an offset against future support payments or wage assignment, and any other facts or circumstances the court deems relevant [*Fam. Code § 3653(c)*].

In 1998, the Legislature mistakenly amended *Family Code Section 3653(c)* to provide that a support obligee would have *no* obligation to repay any amounts previously paid by a support obligor that were in excess of the support amounts due under an order entered retroactively that decreased or terminated support [*see* Stats. 1998, ch. 854]. But in 1999, the Legislature again amended the statute to correct the mistake and to clarify that trial courts have discretion to order repayment of overpaid support amounts [*see* Stats. 1999, ch. 653, § 4; Sen. Com. on Judiciary, Analysis of Assem. Bill No. 614 (1999-2000 Reg. Sess.) as amended August 16, 1999, p. 9]. The statute as amended in 1999 applies retroactively, so that trial courts may order support obliges to repay support amounts overpaid during 1999, when the mistaken statute was in effect [*In re Marriage of Dandona & Araluce (2001) 91 Cal. App. 4th 1120, 1125-1126, 111 Cal.Rptr. 2d 390* ; *see Fam. Code § 3653(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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19-225 California Forms of Pleading and Practice--Annotated § 225.224

§ 225.224 Effect of Motion for Modification on Paying Spouse's Contempt Under Current Order

A supporting party who has willfully refused to comply with a spousal support order despite a present ability to pay is in contempt of court, and no order of modification on his or her application may be granted. However, a party who does not have the present ability to comply with the order is not in contempt of court, and modification will not be refused simply on the ground that payments are in arrears. To refuse modification in a proper case would be inequitable and, in many cases, useless [*Triest v. Triest (1944) 67 Cal. App. 2d 320, 322-324, 154 P.2d 2* ; *see In re Marriage of Crobarger (1986) 178 Cal. App. 3d 56, 57, 223 Cal. Rptr. 480* (in which court both ordered payment of arrearages and reduced support)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportEnforcementContemptFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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19-225 California Forms of Pleading and Practice--Annotated § 225.225

§ 225.225 Temporary Modification of Order

The trial court may, in a proper case, order that support payments be reduced for a specified period of time and that on expiration of that period the payments revert to their previous level [*see, e.g., Miller v. Miller (1970) 11 Cal. App. 3d 197, 199-200, 89 Cal. Rptr. 643]* . However, there must be evidence in the record supporting a reasonable expectation that at the time for reinstatement of the original amount, the former circumstances will be restored [*Philbin v. Philbin (1971) 19 Cal. App. 3d 115, 121-123, 96 Cal. Rptr. 408* (no evidence that ex-husband's income level would revert to prior level by time support was to revert to prior level)].

An order may also be modified temporarily, until the happening of a contingent event. For example, if the supporting party becomes unemployed, the court may make an order reducing or terminating support, but reinstating the original amount if the supporting party becomes reemployed [*see In re Marriage of Acosta (1977) 67 Cal. App. 3d 899, 902-903, 137 Cal. Rptr. 33]* . Such an order should be without prejudice to either party seeking support at a higher or reduced amount if the facts of the contingency justify such a change. The use of this procedure eliminates the need for subsequent hearings in many instances, and relieves the supported spouse of the burden of going forward and proving that the supporting spouse's ability to pay has been restored [*see In re Marriage of Laube (1988) 204 Cal. App. 3d 1222, 1226-1227, 251 Cal. Rptr. 745]* .

For temporary and conditional modification orders, see *§§ 225.412* and *225.413*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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19-225 California Forms of Pleading and Practice--Annotated § 225.226

§ 225.226 Prefiling Discovery

At any time after a judgment for spousal support is entered, either the party (or the supported party's assignee) may, without leave of court, serve a request for the production of a completed current income and expense declaration in the form adopted by the Judicial Council [*Fam. Code § 3664(a)*]. The purpose is to permit inexpensive discovery of facts before the commencement of a proceeding for modification or termination of support [*Fam. Code § 3660*]. The procedure may be used once every 12 months [*Fam. Code § 3663*]. A copy of the prior year's federal and state personal income tax returns must be attached to the income and expense declarations of each party [*Fam. Code § 3665(a)*]. If there is no sufficient response within 35 days, the party may then serve on the other party's employer a request for information limited to the income and benefits provided to the party [*see Fam. Code § 3664(b)*].

For further discussion of this procedure, including the rights of the employer and employee-party, and for illustrative Judicial Council forms [*see Fam. Code §§ 3664(b), (f), 3668*], see Ch. 221, *Dissolution of Marriage: Procedure* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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19-225 California Forms of Pleading and Practice--Annotated § 225.227

§ 225.227 Findings; Statement of Decision

At the request of either party, an order modifying, terminating, or setting aside a spousal support order must include a statement of decision [*Fam. Code § 3654*; *see Code Civ. Proc. § 632* (statement of decision defined)]. If one party requests a statement of decision, the other party is entitled to the statement even if the requesting party later waives it [*In re Marriage of Sellers (2003) 110 Cal. App. 4th 1007, 1010, 2 Cal. Rptr. 3d 293]* . The court should make appropriate factual determinations with respect to the changed circumstances that were relied on in modifying the amount of the award [*see In re Marriage of Rising (1999) 76 Cal. App. 4th 472, 478, 90 Cal. Rptr. 2d 380* (step-down order reversed for lack of adequate supporting reasons); *In re Marriage of Davis (1983) 141 Cal. App. 3d 71, 76-77, 190 Cal. Rptr. 104]* . For illustrative findings for use in modification proceedings, see *§ 225.411*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 225.228 Review by Appellate Court

An appellate court will interfere with a trial court's order modifying or terminating a spousal support order only if, in viewing all the evidence most favorably in support of the trial court's action, it appears from the total circumstances of the case that the trial court has abused its discretion [*In re Marriage of Kuppinger (1975) 48 Cal. App. 3d 628, 633-634, 120 Cal. Rptr. 654* (abuse shown); *see Miller v. Miller (1970) 11 Cal. App. 3d 197, 199, 89 Cal. Rptr. 643* ; *see also § 225.220*]. An order modifying a spousal support award constitutes an abuse of discretion only if, under all of the evidence viewed most favorable in support of it, it must be concluded that no judge reasonably could have made the order [*In re Marriage of Olson (1993) 14 Cal. App. 4th 1, 7, 17 Cal. Rptr. 2d 480* ; *In re Marriage of Richmond (1980) 105 Cal. App. 3d 352, 357, 164 Cal. Rptr. 381]* . If there is any substantial evidence supporting the trial judge's decision, the modification order will be affirmed [*In re Marriage of Richmond (1980) 105 Cal. App. 3d 352, 357, 164 Cal. Rptr. 381* ; *In re Marriage of Siegel (1972) 26 Cal. App. 3d 88, 90, 102 Cal. Rptr. 613]* . And, as in the case of appellate review of other trial court orders and judgments, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the trial court's determination [*Philbin v. Philbin (1971) 19 Cal. App. 3d 115, 119, 96 Cal. Rptr. 408]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsStandards of ReviewAbuse of DiscretionFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral Overview

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19-225 California Forms of Pleading and Practice--Annotated § 225.229

§ 225.229 Notice of Activation of Military Service and Request to Modify Support Order

A party to a support order who is activated to United States military duty or National Guard service and deployed out of state may file and serve a notice of activation of military service and request to modify a support order, in place of a notice of motion or order to show cause, by informing the court and the other party of the request to modify the support order based on a change in circumstances [*Fam. Code § 3651(c)(2)*; *see § 225.417* (Judicial Council form of Notice and Request)]. The service member must indicate the date of deployment; and, if possible, the court must schedule the hearing before that date. If the court cannot hear the matter before the deployment date and the service member complies with the conditions of the Servicemembers Civil Relief Act (*50 U.S.C.A. § 522*), the court must grant a stay of proceedings consistent with the timelines for stays set forth in the Act. If the court fails to grant a discretionary stay after the expiration of the mandatory stay required by the Act, it must appoint counsel to represent the interests of the deployed service member, unless he or she is represented by other counsel. If the court stays the proceedings until after the service member returns, the service member must request the court to set the matter for hearing within 90 days of return from deployment or the matter must be taken off calendar and the existing order may not be made retroactive under *Fam. Code § 3653(c)* [*Fam. Code § 3651(c)(2)*].

A service member who does not request modification of a support order before deployment out of state is not subject to the penalties authorized by *Fam. Code §§ 4720-4733* on the amount of spousal support that would not have accrued if the order had been modified, unless the court finds good cause [*Fam. Code § 3651(c)(3)*]. No interest accrues on that amount of a spousal support obligation that would not have become due and owing if the activated service member modified the support order on activation to reflect the change in income due to the activation. If the court finds that good cause did not exist for the service member's failure to seek or delay in seeking the modification, then interest will accrue as otherwise allowed by law [*Fam. Code § 3651(c)(4)*].

If an order modifying or terminating a support order is entered due to a change in income resulting from activation to the United States military service or National Guard duty and deployment out of state for either the support obligor or the support obligee, the order must be made retroactive to the later of the date of service on the opposing party of the

notice of activation, notice of motion, or order to show cause to modify or terminate, or the date of activation, unless the court finds good cause not to make the order retroactive [*Fam. Code § 3653(c)*]. Good cause includes, but is not limited to, a finding by the court that the delay in seeking modification was not reasonable under the circumstances the service member faced [*Fam. Code § 3653(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral OverviewMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act

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19-225 California Forms of Pleading and Practice--Annotated §§ 225.230-225.239

[Reserved]

§§ 225.230[Reserved]

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3. The Change-Of-Circumstances Requirement

19-225 California Forms of Pleading and Practice--Annotated § 225.240

§ 225.240 Showing of Change of Circumstances Required

To obtain a modification of a previous spousal support order, it has long been the rule that the moving party must show a material change of circumstances since the time of the prior order [*In re Marriage of West (2007) 152 Cal. App. 4th 240, 246, 60 Cal. Rptr. 3d 858* ; *In re Marriage of Schmir (2005) 134 Cal. App. 4th 43, 47, 35 Cal. Rptr. 3d 716* ; *In re Marriage of Tydlaska (2003) 114 Cal. App. 4th 572, 575, 7 Cal. Rptr. 3d 594]* . A change of circumstances means a reduction or increase in the supporting spouse's ability to pay and/or an increase or decrease in the supported spouse's needs. It includes all factors that affect need and the ability to pay [*In re Marriage of West (2007) 152 Cal. App. 4th 240, 246, 60 Cal. Rptr. 3d 858*]. A change of circumstances must be shown whether the support order resulted from litigated issues between the parties or was based on a stipulated agreement between them [*In re Marriage of McCann (1996) 41 Cal. App. 4th 978, 984, 48 Cal. Rptr. 2d 864* (increase in statutory child support was change justifying decrease in spousal support); *In re Marriage of Hentz (1976) 57 Cal. App. 3d 899, 901-902, 129 Cal. Rptr. 678* ; *but see Fam. Code § 3591(c)* (permitting agreement that support is nonmodifiable), discussed in *§ 225.60* et seq.; *see also In re Marriage of West (2007) 152 Cal. App. 4th 240, 246, 60 Cal. Rptr. 3d 858* (parties may have power to decide whether particular event will or will not be deemed material change of circumstances for purposes of modifying support order and may arguably agree to judicial reevaluation of support even in absence of material change in circumstances)]. If the circumstances in question existed at the time of the previous support order, those circumstances presumably were considered when that order was made; bringing them to the court's attention years later does not constitute a change n the circumstances. Nor is there change in circumstances merely because a different judge disagrees with the previous order [*In re Marriage of Schmir (2005) 134 Cal. App. 4th 43, 47, 35 Cal. Rptr. 3d 716]* .

However, the rule that spousal support modifications require a material change of circumstances cannot be "mechanistically applied" when a party's conduct is relevant over a period that extends beyond the time since the last order to show cause hearing. Thus, for example, when 10 modification hearings held over 15 years resulted in extensions of spousal support for a one to three years at a time, an appellate court held that the "material change of circumstances rule" should not prevent a trial court from looking at "overall patterns" established "over the course of many years and many proceedings." It affirmed a trial court's decision to discontinue current spousal support (but not to

terminate jurisdiction over support), finding that the supported party had "made reasonable, though unsuccessful, efforts to find a job" in a field in which she was not suited to work. Under this decision, the change of circumstances rule continues to be valid, but it permits a court to take a broader view of the history of a case in determining how to apply that rule [*In re Marriage of Schaffer (1999) 69 Cal. App. 4th 801, 812, 81 Cal. Rptr. 2d 797]* .

In determining whether a change of circumstances has occurred, the court may not be arbitrary. It must exercise its discretion along legal lines, considering the applicable standards as set forth in *Fam. Code § 4320*, especially changes in the parties' reasonable needs and financial abilities [*In re Marriage of West (2007) 152 Cal. App. 4th 240, 246, 60 Cal. Rptr. 3d 858]* . If the current order was made according to a stipulated agreement, the court must give effect to the intent and reasonable expectations of the parties as expressed in the agreement [*In re Marriage of Aninger (1990) 220 Cal. App. 3d 230, 238, 269 Cal. Rptr. 388]* .

Showing a material change in circumstances necessitates comparing financial information on which the original support order was based with the most recent financial information relevant to a new order, for example, the parties' current income and expense declarations [*In re Marriage of Tydlaska (2003) 114 Cal. App. 4th 572, 575-576, 7 Cal. Rptr. 3d 594* (when husband failed to present "evidentiary yardstick" with which court could determine appropriateness of modification order, request to modify support was properly denied)].

It is not error for the court to make no findings of changed circumstances if the parties have stipulated to a modification and their attorneys have drafted and submitted to the court the order ultimately entered. Doctrines of waiver and invited error will generally bar attacks on an order entered by stipulation [*In re Marriage of Maxfield (1983) 142 Cal. App. 3d 755, 759, 191 Cal. Rptr. 267]* .

The mere fact that circumstances may change in the future will not support a present modification of a support award [*In re Marriage of Kuppinger (1975) 48 Cal. App. 3d 628, 638-639, 120 Cal. Rptr. 654* ; *see Philbin v. Philbin (1971) 19 Cal. App. 3d 115, 122, 96 Cal. Rptr. 408* ; *Miller v. Miller (1970) 11 Cal. App. 3d 197, 200-201, 89 Cal. Rptr. 643]* .

Whether a modification is actually being sought, however, must be carefully determined from the moving party's papers. The fact that the moving party seeks an order *pertaining to* support does not necessarily mean that a modification has been sought. If, in fact, no modification is sought, the change of circumstances requirement does not apply. Instead, it may be appropriate to determine whether the moving party is seeking to invoke the court's general power to make orders on specific family law matters, including support and injunctive relief [*In re Marriage of Stimel (1996) 49 Cal. App. 4th 991, 994-996, 57 Cal. Rptr. 2d 18* (wife's motion for order directing her former husband to apply for life insurance naming her as beneficiary and stipulating she would pay all insurance premiums was not motion to modify spousal support)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationChanged Circumstances

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19-225 California Forms of Pleading and Practice--Annotated § 225.241

§ 225.241 Conclusiveness of Order on Then-Existing Circumstances

A judgment awarding spousal support is conclusive as to the circumstances existing when it was entered [*In re Marriage of Schaffer (1984) 158 Cal. App. 3d 930, 934, 205 Cal. Rptr. 88* ; *Hester v. Hester (1969) 2 Cal. App. 3d 1091, 1097, 82 Cal. Rptr. 811]* . All matters that were at issue in the original proceedings and that were disposed of by the judgment are res judicata. The original award may be subject to direct attack, for example, by motion for new trial [*see Code Civ. Proc. § 657*; *Cal. Rules of Ct., Rule 5.21*], or by appeal [*see Code Civ. Proc. § 904.1(a)(1), (10)*; *Cal. Rules of Ct., Rule 5.21*], but it is not subject to collateral attack by application for modification [*In re Marriage of Mulhern (1973) 29 Cal. App. 3d 988, 992, 106 Cal. Rptr. 78]* .

If determinations have been made on a motion to modify after the original award, the most recent order is conclusive as to the circumstances existing when it was made. On a new motion to modify, the determinations generally are to be made with respect to facts arising during the period commencing with the date of the most recent order, not with respect to the time since the original decree was entered [*Hester v. Hester (1969) 2 Cal. App. 3d 1091, 1095, 82 Cal. Rptr. 811* ; *but cf. In re Marriage of Schaffer (1999) 69 Cal. App. 4th 801, 812, 81 Cal. Rptr. 2d 797* ("material change of circumstances" rule cannot be "mechanistically applied" when party's conduct is relevant over period that extends beyond time since last order to show cause hearing)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionCollateral Order DoctrineFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationChanged Circumstances

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19-225 California Forms of Pleading and Practice--Annotated § 225.242

§ 225.242 Need and Ability to Pay

The basic consideration of the trial court on an application for modification is change in the need of the supported spouse and in the ability of the supporting spouse to pay [*Philbin v. Philbin (1971) 19 Cal. App. 3d 115, 119, 96 Cal. Rptr. 408]* .

As a general rule, subsequently acquired wealth of the supporting spouse does not alone justify an increase in spousal support [*In re Marriage of Hopwood (1989) 214 Cal. App. 3d 1604, 1607-1608, 263 Cal. Rptr. 401* ; *see Modglin v. Modglin (1966) 246 Cal. App. 2d 411, 417, 54 Cal. Rptr. 582* (Fleming, J., concurring)]. However, in *In re Marriage of Hoffmeister (1984) 161 Cal. App. 3d 1163, 208 Cal. Rptr. 345* , the court of appeal held that if the supporting spouse's ability to pay has increased and the needs of the supported spouse have not changed, an increase in support is appropriate if the supported spouse's reasonable present needs are not being satisfied by the existing award [*In re Marriage of Hoffmeister (1984) 161 Cal. App. 3d 1163, 1172-1175, 208 Cal. Rptr. 345]* . In a subsequent opinion issued in the same case, the court qualified this rule, holding that the supported spouse's reasonable present needs must bear some relationship to the standard of living of the parties during their marriage rather than the standard of living of the supporting spouse at the time that modification is sought [*In re Marriage of Hoffmeister (1987) 191 Cal. App. 3d 351, 363, 236 Cal. Rptr. 543]* .

For example, the supported spouse originally may not have received sufficient support to maintain the style of living of the marriage because the supporting spouse lacked the ability to pay at the time that spousal support was originally awarded [*see, e.g., In re Marriage of White (1987) 192 Cal. App. 3d 1022, 1029, 237 Cal. Rptr. 764* ; *In re Marriage of Sammut (1980) 103 Cal. App. 3d 557, 563-564, 163 Cal. Rptr. 193*]. For this reason, a spousal support order should include findings as to whether the amount awarded is deemed sufficient to meet the supported spouse's reasonable needs, considering the marital standard of living of the parties and the other factors that must be considered under *Fam. Code § 4320* [*In re Marriage of Smith (1990) 225 Cal. App. 3d 469, 491, 274 Cal. Rptr. 911]* . For further discussion of the standard of living attained during marriage, see *§ 225.60* et seq.

Both *Hoffmeister* cases state that spousal support may be increased if the supported spouse's current need (as measured by the standard of living attained during marriage) is not *currently* being satisfied by the last previous award [*In re Marriage of Hoffmeister (1987) 191 Cal. App. 3d 351, 363-364, 236 Cal. Rptr. 543* ; *In re Marriage of Hoffmeister (1984) 161 Cal. App. 3d 1163, 1173-1174, 208 Cal. Rptr. 345* ; *see* *In re Marriage of Sammut (1980) 103 Cal. App. 3d 557, 163 Cal. Rptr. 193*]. Thus, it would seem that as the supporting spouse's income increases, spousal support should also increase to account for inflation and to maintain the supported spouse at the appropriate standard of living [*see* *In re Marriage of Smith (1990) 225 Cal. App. 3d 469, 475, 274 Cal. Rptr. 911* (supported spouse must prove that prior order, when made, was insufficient to meet his or her reasonable needs, or that reasonable cost of satisfying those needs has increased)]. However, one court has denied an increase on what appears to be essentially these facts. In *In re Marriage of Hopwood (1989) 214 Cal. App. 3d 1604, 263 Cal. Rptr. 401* , the court held that because the award of $200 per month was adequate to meet the supported spouse's needs at the time of separation (1969), it could not be increased 18 years later, even though the trial court had found that the award was clearly no longer adequate to meet the supported spouse's needs, as measured by the standard of living enjoyed at the time of separation [*In re Marriage of Hopwood (1989) 214 Cal. App. 3d 1604, 1607-1608, 263 Cal. Rptr. 401]* . The court held that spousal support cannot be increased based on the supporting spouse's ability to pay unless the needs of the supported spouse at the time of the separation were *never* met [*In re Marriage of Hopwood (1989) 214 Cal. App. 3d 1604, 1608, 263 Cal. Rptr. 401]* . In addition, if statutory child support increases and thus total support *exceeds* the marital standard of living, it is appropriate to decrease spousal support despite the fact that the supporting spouse's income has increased [*In re Marriage of McCann (1996) 41 Cal. App. 4th 978, 984, 48 Cal. Rptr. 2d 864]* .

If the supporting spouse becomes unemployed or otherwise incurs a decrease in earnings, modification of support downward may be denied if it is shown that the party's actual earnings do not equal his or her earning capacity, but specific evidence on what that capacity is must be presented [*see* *Reynolds v. Reynolds (1998) 63 Cal. App. 4th 1373, 1378, 74 Cal. Rptr. 2d 636* ; *In re Marriage of Stephenson (1995) 39 Cal. App. 4th 71, 76, 80, 46 Cal. Rptr. 2d 8* (and cases cited therein)]. For further discussion of earning capacity, see *§ 225.60* et seq. For discussion of the effect of retirement see *§ 225.250*.

By contrast, if a supported spouse has a decreased need for support as of the time of a modification proceeding, a trial court may make an appropriate order that reduces the amount of support [see *In re Marriage of Schmir (2005) 134 Cal. App. 4th 43, 48-51, 35 Cal. Rptr. 3d 716* (change in supported spouse's circumstances was shown based on her present ability to earn income, a reduction in her monthly medical expenses, and her ability to make withdrawals from her individual retirement account without penalty)]. In making an order to reduce support, the court also has the discretion to provide for "step-downs" in the support amount over a period of time--without there necessarily being evidence of the supported spouse's needs at each step-down date. Instead, such a step-down is proper if *at the time* of making the (modification) order, the court had discretion to decrease support to the ultimate step-down level, and it states that it is implementing the step-down to ease the impact of the decrease on the supported spouse [*In re Marriage of Rising (1999) 76 Cal. App. 4th 472, 478, 90 Cal. Rptr. 2d 380* (step-down order reversed for lack of adequate supporting reasons)]. The step-down order modifying support must be based on reasonable inferences to be drawn from the evidence, not mere hopes or speculative expectations. It need not be shown, however, that the supported spouse certainly will be earning the presumed income at the time support is to be reduced [*In re Marriage of West (2007) 152 Cal. App. 4th 240, 250, 60 Cal. Rptr. 3d 858* (sufficient evidence shown by supported spouse's current earnings and expert opinion as to supported spouse's reasonable future earnings)]. The effect of such a step-down order is to shift the burden of showing changed circumstances from the supporting spouse to the supported spouse. Just as the supporting spouse is entitled to seek a modification because of the unrealized expectation that the supported spouse will become self-supporting, the supported spouse is entitled to seek a modification of the step-down order because of an unrealized expectation of his or her future earnings [*In re Marriage of West (2007) 152 Cal. App. 4th 240, 250-251, 60 Cal. Rptr. 3d 858*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19-225 California Forms of Pleading and Practice--Annotated § 225.243

§ 225.243 Disposition of Community Property

The disposition of the parties' community property may be considered in determining need in setting support in the first instance [*In re Marriage of Kennedy (1987) 193 Cal. App. 3d 1633, 1640-1641, 239 Cal. Rptr. 151* ; *see § 225.60* et seq.]. However, once the division of property has been determined and support is established, one spouse's subsequent receipt of income or property pursuant to the division is not a change of circumstance justifying modification of support [*In re Marriage of Rabkin (1986) 179 Cal. App. 3d 1071, 1081, 225 Cal. Rptr. 219* (it makes no more sense to reduce wife's spousal support because she received her rightful share of community property than it would to increase wife's spousal support because husband received his rightful share of community property); *see In re Marriage of West (2007) 152 Cal. App. 4th 240, 251, 60 Cal. Rptr. 3d 858* (it also makes no more sense to reduce wife's support because she failed to invest her share of community property than it would to increase husband's support payments because he invested his share)]. A supported spouse cannot dispose of income-earning property and expect the supporting spouse to make up the difference. It may be appropriate to impute income to a spouse of sums that could be earned by an income-producing investment strategy [*In re Marriage of West (2007) 152 Cal. App. 4th 240, 251, 60 Cal. Rptr. 3d 858*]. However, it is unfair to penalize a supported spouse for failing to invest community property proceeds without first warning the spouse that he or she would be expected to invest these proceeds [*In re Marriage of West (2007) 152 Cal. App. 4th 240, 251, 60 Cal. Rptr. 3d 858*].

The failure to carry out property settlement obligations, alone, is not a change of circumstances justifying modification of spousal support. It is error to restructure an unpaid debt between the parties as support under the guise of a change of circumstances [*In re Marriage of Farrell (1985) 171 Cal. App. 3d 695, 700-703, 217 Cal. Rptr. 397* ; *see In re Marriage of Brown (1976) 15 Cal. 3d 838, 848, 126 Cal. Rptr. 633, 544 P.2d 561* (support cannot be ordered in place of equal division of community property)]. Nor can spousal support be increased to compensate for the supported spouse's inability to execute on his or her community property interest in the supporting spouse's pension [*In re Marriage of Maunder (1976) 57 Cal. App. 3d 570, 572-573, 127 Cal. Rptr. 707* ; *cf. In re Marriage of McGhee (1982) 131 Cal. App. 3d 408, 412-414, 182 Cal. Rptr. 456* (court enforced stipulated order providing for spousal support as security should wife be unable to collect her share of husband's military pension)]. However, it has been held that the maturation

of a community property pension awarded entirely to the supporting spouse constituted changed circumstances supporting an increase in support based on an increased ability to pay [*In re Marriage of White (1987) 192 Cal. App. 3d 1022, 1026-1028, 237 Cal. Rptr. 764]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationChanged Circumstances

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19-225 California Forms of Pleading and Practice--Annotated § 225.244

§ 225.244 Failure of Expectation on Which Order Is Based

If a support order is based on a particular expectation that does not occur, the failure of the expectation may be considered a change of circumstances supporting modification [*In re Marriage of West (2007) 152 Cal. App. 4th 240, 247, 60 Cal. Rptr. 3d 858* ; *In re Marriage of Shaughnessy (2006) 139 Cal. App. 4th 1225, 1233, 43 Cal. Rptr. 3d 642* ; This is the rule whether or not the prior order was entered on the stipulation of the parties [*see* *In re Marriage of West (2007) 152 Cal. App. 4th 240, 246-247, 60 Cal. Rptr. 3d 858*].

Commonly, the expectation is that the supported spouse will become self-supporting by a particular time, at which time support is scheduled to terminate or be reduced in amount [*see* *In re Marriage of Schaffer (1984) 158 Cal. App. 3d 930, 933, 205 Cal. Rptr. 88* (expectation that wife would recover from emotional disorders, complete schooling, and become self-supporting)]. For example, if a court's initial award of spousal support contemplates that a supported spouse will take some action to decrease the need for support following the issuance of the order and the supported spouse fails to take that action, the court may modify the award on the ground of changed circumstances [*In re Marriage of West (2007) 152 Cal. App. 4th 240, 248, 60 Cal. Rptr. 3d 858* (when original support order was entered on expectation that wife would pursue teaching career, her decision to abandon that career and to take a different career path was material change in circumstances)]. If the expectation fails to materialize on schedule, despite the reasonable efforts of the supported spouse, support may be continued without a further showing of changed circumstances [*In re Marriage of Aninger (1990) 220 Cal. App. 3d 230, 240, 269 Cal. Rptr. 388* ; *see* *In re Marriage of Beust (1994) 23 Cal. App. 4th 24, 29, 28 Cal. Rptr. 2d 201]* . Under the traditional analysis, the supported spouse's lack of diligence in pursuing self-sufficiency justified allowing support to terminate as scheduled, whether the conduct was bad faith or poor judgment [*In re Marriage of Sheridan (1983) 140 Cal. App. 3d 742, 748-749, 189 Cal. Rptr. 622* (decided before amendments to *Fam. Code §§ 4320, 4330*, operative January 1, 1997)].

However, in ordering spousal support, courts are now required to balance the hardships to each party and consider the goal that the supported party must be self-supporting within a reasonable time period--defined for general purposes as one-half the length of the marriage, but leaving discretion to the court to order support for a greater or lesser period.

Courts must also admonish the parties concerning this goal of becoming self-supporting, and of each party's obligation to make reasonable, good faith efforts in this regard. The failure to make such efforts may be a factor in modifying or terminating support [*Fam. Code §§ 4320(j), (k), 4330(b)*; *In re Marriage of Shaughnessy (2006) 139 Cal. App. 4th 1225, 1233-1236, 43 Cal. Rptr. 3d 642* (if court's initial spousal support award contemplates that supported spouse will take some action to decrease need for spousal support following issuance of order and supported spouse fails to take that action, court may modify award on ground of changed circumstances); *cf. In re Marriage of Schaffer (1999) 69 Cal. App. 4th 801, 810, 81 Cal. Rptr. 2d 797* (noting that statutory guideline to become self-supporting--generally one-half length of marriage--"flies in the face of a reading of the material change of circumstances rule that would prevent a trial judge from looking at long-term patterns of job training and employability")].

If the current support order was according to the agreement of the parties, any expectation as to future events must appear from the agreement itself. The court may not reevaluate the spousal support order at a later time in light of the then-applicable facts if there is no evidence that the agreement was structured according to particular expectations that did not materialize [*In re Marriage of Aninger (1990) 220 Cal. App. 3d 230, 238, 242-243, 269 Cal. Rptr. 388]* .

Because of this failed-expectations rule, it is important that the expectations on which spousal support is based be set forth expressly, either by the court in its findings or by the parties in their agreement, and that there be a proper record of the court's required admonitions [*see Fam. Code §§ 4320(k), 4330(b)*; *In re Marriage of Schmir (2005) 134 Cal. App. 4th 43, 53-58, 35 Cal. Rptr. 3d 716* (court may not terminate spousal support by imputing employment income to supported spouse when judgment does not contain termination date for support or notice that supported spouse is expected to become self-supporting; court must afford supported spouse reasonable advance notice and opportunity to secure employment before terminating support); *cf. In re Marriage of Biderman (1992) 5 Cal. App. 4th 409, 413-414, 6 Cal. Rptr. 2d 791* (payee failed to establish that prior order was to terminate based on assumption that he would recuperate from mental problems so that his failure to do so was failed expectation)]. For appropriate forms, see *§ 225.60* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationChanged Circumstances

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19-225 California Forms of Pleading and Practice--Annotated § 225.245

§ 225.245 Remarriage of Supporting Spouse

By statute, the income of a supporting spouse's subsequent spouse or nonmarital partner is not to be considered when determining or modifying spousal support [*Fam. Code § 4323(b)*]. The income of a new mate may not be considered either directly [*Fam. Code § 4323(b)*], or indirectly as it relates to the supporting spouse's ability to pay and standard of living [*In re Marriage of Romero (2002) 99 Cal. App. 4th 1436, 1438, 1442-1444, 122 Cal. Rptr. 2d 220]* . Therefore, in calculating a spousal support modification, the court must first determine the supporting spouse's net monthly income, and then determine the supporting spouse's "reasonable" monthly expenses based only on that income, thereby excluding both the new mate's income and any new mate expenses [*In re Marriage of Romero (2002) 99 Cal. App. 4th 1436, 1445-1447, 122 Cal. Rptr. 2d 220]* .

Under prior law, the remarriage of the supporting spouse did not, alone, constitute a change of circumstances warranting a modification of spousal support. However, it was a factor that the court could, under most circumstances, consider [*In re Marriage of Kuppinger (1975) 48 Cal. App. 3d 628, 638, 120 Cal. Rptr. 654]* . Under case law decided prior to enactment of *Fam. Code § 4323(b)*, the community property earnings of a supporting spouse's new mate could be considered as being available to defray expenses of the new community, and thus increase the funds available from the supporting spouse for support. Courts commonly determined the funds available by treating the combined income of the supporting spouse and the new mate as income of the new community and then deducting the combined reasonably necessary living expenses of the new community from that income [*see* *In re Marriage of Tapia (1989) 211 Cal. App. 3d 628, 630-632, 259 Cal. Rptr. 459* (new nonmarital cohabitant); *In re Marriage of Ramer (1986) 187 Cal. App. 3d 263, 272-273, 231 Cal. Rptr. 647* (new spouse)].

Subsequent spouse or partner income as it relates to child support is discussed further in Ch. 224, *Dissolution of Marriage: Child Support* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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19-225 California Forms of Pleading and Practice--Annotated § 225.246

§ 225.246 Supported Spouse's Cohabitation With Person of Opposite Sex

[1] Rebuttable Presumption of Decreased Need

Except as otherwise agreed to by the parties in writing, there is a rebuttable presumption affecting the burden of proof of decreased need for support if the supported party is cohabiting with a person of the opposite sex. On a determination that circumstances have changed, the court may modify or terminate spousal support [*Fam. Code § 4323(a)*; *see, e.g., In re Marriage of Bower (2002) 96 Cal. App. 4th 893, 899-901, 117 Cal. Rptr. 2d 520* (cohabitation warranted reduction of support from $1,700 to $500 for one year, then termination)].

Nothing in *Fam. Code § 4323* precludes later modification of support on proof of change of circumstances [*Fam. Code § 4323(c)*]. Therefore, even if support is decreased or terminated on account of cohabitation, the supported spouse may seek a subsequent increase or reinstatement of support if cohabitation ends.

The use of a rebuttable presumption indicates the legislative determination that cohabiting is not, in and of itself, sufficient to terminate or reduce spousal support [*In re Marriage of Leib (1978) 80 Cal. App. 3d 629, 635, 145 Cal. Rptr. 763]* . It is also clear that the Legislature anticipated the presentation of evidence on the issue of decreased need for support. Once the supporting party establishes cohabitation, the burden shifts to the supported party to present evidence to overcome the presumption that the need for support has decreased [*In re Marriage of Denney (1981) 115 Cal. App. 3d 543, 556, 171 Cal. Rptr. 440]* .

In determining if the presumption is rebutted, the court must examine the totality of the cohabitation relationship and not just the supported party's personal income and expense disparity [*see In re Marriage of Leib (1978) 80 Cal. App. 3d 629, 643, 145 Cal. Rptr. 763]* . Cohabitants may superficially structure their relationship in any number of ways to make it appear that the supported party's need for support has not decreased. For example, it may appear that the cohabitant is making no significant financial contribution to the supported party's living expenses [*see In re Marriage of Schroeder (1987) 192 Cal. App. 3d 1154, 1158, 238 Cal. Rptr. 12]* , or it may appear that the supported party is

expected to make the same payments to the cohabitant for living expenses that he or she would make for those expenses were they not cohabiting [*see In re Marriage of Leib (1978) 80 Cal. App. 3d 629, 638-640, 145 Cal. Rptr. 763]* .

Therefore, any arrangement between the supported party and a cohabitant must be fair to the supporting party. It may not allocate expenses in a manner that creates an appearance of continuing need in order to maintain the flow of income from the supporting party [*In re Marriage of Schroeder (1987) 192 Cal. App. 3d 1154, 1164, 238 Cal. Rptr. 12]* . A supported spouse may neither give nor receive things of economic value, including personal services, in lieu of monetary reimbursement for joint household expenses, and thereby create a situation of apparent continuing need [*In re Marriage of Schroeder (1987) 192 Cal. App. 3d 1154, 1163, 238 Cal. Rptr. 12* (supported ex-wife's receipt of reimbursement from cohabitant by way of gifts evaded strictures of statute); *In re Marriage of Leib (1978) 80 Cal. App. 3d 629, 640-644, 145 Cal. Rptr. 763* (value of supported ex-wife's donated domestic services to cohabitant justified reduction of support to $10 per month)].

[2] "Cohabiting" Defined

Holding oneself out to be the husband or wife of the person with whom one is cohabiting is not necessary to constitute cohabitation [*Fam. Code § 4323(a)(2)*]. Beyond this provision, *Fam. Code § 4323* does not further define the term "cohabiting."

It has been held that it is not enough to show that the supported party and a person of the opposite sex are merely sharing living accommodations. If there is no evidence of a sexual relationship, a romantic involvement, or even a homemaker-companion relationship, there is no cohabitation within the meaning of the statute [*In re Marriage of Thweatt (1979) 96 Cal. App. 3d 530, 535, 157 Cal. Rptr. 826]* . Of course, any cohabitation, regardless of the genders of the persons and the nature of their relationship, may involve shared expenses and decreased need. In such a case, support may be reduced or terminated because of changed circumstances, even if the presumption does not apply [*see In re Marriage of Thweatt (1979) 96 Cal. App. 3d 530, 535-537, 157 Cal. Rptr. 826]* .

[3] Effect of Agreement

Fam. Code § 4323(a) applies except as otherwise agreed to by the parties in writing [*Fam. Code § 4323(a)(1)*]. Therefore, if spousal support is made nonmodifiable on any ground by agreement, it is not modifiable because of subsequent cohabitation [*In re Marriage of Sasson (1982) 129 Cal. App. 3d 140, 147, 180 Cal. Rptr. 815* ; *In re Marriage of Harris (1976) 65 Cal. App. 3d 143, 151-152, 134 Cal. Rptr. 891]* . As with all such agreements, however, the terms must be precisely stated so that there be no ambiguity. For further discussion and applicable forms, see *§ 225.60* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceInferences & PresumptionsPresumptionsEvidenceInferences & PresumptionsRebuttal of PresumptionsFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationCohabitation

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19-225 California Forms of Pleading and Practice--Annotated § 225.247

§ 225.247 Passage of Time

Generally, the mere passage of time does not constitute a change of circumstances warranting modification of a spousal support order [*Edwards v. Edwards (1975) 52 Cal. App. 3d 12, 15, 124 Cal. Rptr. 742* ; *In re Marriage of Wilson (1975) 51 Cal. App. 3d 116, 119, 123 Cal. Rptr. 887* ; *see also In re Marriage of Hopwood (1989) 214 Cal. App. 3d 1604, 1608, 263 Cal. Rptr. 401]* . However, two cases suggest that this rule may not apply to marriages of slightly less than 10 years that are treated as long-term marriages [*see Fam. Code § 4336(b)* (presumption that marriage of 10 years or more is long-term marriage for purposes of retaining jurisdiction); *see also § 225.60* et seq.].

In *In re Marriage of Baker (1992) 3 Cal. App. 4th 491, 4 Cal. Rptr. 2d 553* , although the marriage lasted less than 10 years, the appellate court upheld the trial court's refusal to set a termination date or step-down schedule in the original order, thus treating the marriage as long-term rather than short-term [*In re Marriage of Baker (1992) 3 Cal. App. 4th 491, 496-501, 4 Cal. Rptr. 2d 553* ; *cf. In re Marriage of Wilson (1988) 201 Cal. App. 3d 913, 919, 247 Cal. Rptr. 522* (short-term support appropriate in short-term marriage, regardless of evidence of self-sufficiency); *see § 225.60* et seq.]. However, in the court's view, support might be terminable in the future based on the fact that the duration of support has become unjust in light of the duration of the marriage, even if there were no other changes of circumstances [*In re Marriage of Baker (1992) 3 Cal. App. 4th 491, 502, 4 Cal. Rptr. 2d 553]* .

But in In re Marriage of Heistermann (1991) 234 Cal. App. 3d 1195, 286 Cal. Rptr. 127 , involving a marriage of almost nine years, a two-justice majority of the panel rejected this proposition. In a modification proceeding, the trial court had set a termination date for support on the ground that after eight years of support, the burden of supporting the wife should shift from the husband to society. In reversing, the majority noted the lack of any limitation on the duration of support in the original order and reiterated that passage of time alone does not constitute a change of circumstances [*In re Marriage of Heistermann (1991) 234 Cal. App. 3d 1195, 1201-1204, 286 Cal. Rptr. 127]* . The third justice concurred only in the result and stated that at some point, it is conceivable that the lengthy duration of support will be clearly unjust in light of the short duration of the marriage and will alone qualify as a change of circumstance under now *Fam. Code § 4320(j)* [*In re Marriage of Heistermann (1991) 234 Cal. App. 3d 1195, 1205, 286 Cal. Rptr. 127*

(opinion of Benke, J., concurring in result)]. Thus, of the six justices who addressed the issue in the two cases, four were of the opinion that it was conceivable that passage of time alone could justify terminating support under the circumstances of a "medium term" marriage.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationChanged Circumstances

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§ 225.248 Change of Law

The change of circumstances that authorizes a court to modify spousal support means a change in the circumstances of the respective parties. A change or clarification of the law does not qualify as a change of circumstances warranting modification [*In re Marriage of Cobb (1977) 68 Cal. App. 3d 855, 860-861, 137 Cal. Rptr. 670* (spousal support increase in response to change in property law regarding pensions improper)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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19-225 California Forms of Pleading and Practice--Annotated § 225.249

§ 225.249 Bankruptcy

Spousal support is not dischargeable in bankruptcy [*11 U.S.C. § 523(a)(5)*; *see Cal-Western Reconveyance Corp. v. Reed (2007) 152 Cal. App. 4th 1308, 1319, 62 Cal. Rptr. 3d 244* ; *In re Kritt (9th Cir. 1995) 190 Bankr. 382]* . Under prior law, payments provided for in a marital or property settlement that were intended as a division of community property were dischargeable [*see In re Marriage of Williams (1984) 157 Cal. App. 3d 1215, 1220-1221, 203 Cal. Rptr. 909* ; *Sloan v. Mitchell (1972) 28 Cal. App. 3d 47, 50-52, 104 Cal. Rptr. 418* ; *Myhers v. Myhers (1970) 6 Cal. App. 3d 855, 858-859, 86 Cal. Rptr. 356* ; *Carlton v. Superior Court (1966) 240 Cal. App. 2d 586, 588, 49 Cal. Rptr. 759]* . However, 1994 amendments to the Bankruptcy Code now make many debts incurred in the course of dissolution of marriage nondischargeable, including payments required under the parties' division of their community property [*see 11 U.S.C. § 523(a)(15)*; discussed in *Ch. 258, Family Law Enforcement: General Enforcement Principles and Remedies, § 258.16*]. Therefore, the need to distinguish whether payments are for support or part of a division of property is no longer so great with regard to bankruptcy.

If an obligation under a property settlement agreement is discharged in bankruptcy, the court may make all proper orders for the support of the spouse as the court may deem just, having regard for the circumstances of the respective parties and the amount of any obligations under the property settlement agreement that are discharged [*Fam. Code § 3592*; *see In re Marriage of Lynn (2002) 101 Cal. App. 4th 120, 130, 123 Cal. Rptr. 2d 611* (*Fam. Code § 3592* applies to only to discharge of former spouse's obligation under *property settlement agreement*)]. Therefore, the discharge in bankruptcy of a debt created by or allocated under a property settlement agreement may be taken into account in determining whether the parties' circumstances have changed sufficiently to justify a modification of spousal support [*In re Marriage of Clements (1982) 134 Cal. App. 3d 737, 746, 184 Cal. Rptr. 756* ; *see In re Siragusa (9th Cir. 1994) 27 F.3d 406, 408* (affirming jurisdiction of state court to increase spousal support after property settlement is discharged in bankruptcy)].

If a property settlement obligation ordered in a dissolution proceeding (for example, an equalizing payment or an assigned debt) is discharged in bankruptcy, the court may consider the discharge as a factor in determining whether to

modify spousal support [*In re Marriage of Lynn (2002) 101 Cal. App. 4th 120, 130-132, 123 Cal. Rptr. 2d 611* ; *see Fam. Code § 4320*]. However, the court must consider all of the *Family Code 4320* factors before ordering a spousal support modification [*In re Marriage of Lynn (2002) 101 Cal. App. 4th 120, 132-134, 123 Cal. Rptr. 2d 611]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsAlimony, Divorce Settlements & SupportFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationChanged Circumstances

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19-225 California Forms of Pleading and Practice--Annotated § 225.250

§ 225.250 Retirement

As a general principle, the supporting spouse's retirement should constitute a change of circumstances justifying a reduction or termination of spousal support because it normally is accompanied by reduced income and a reduced ability to pay [*see § 225.242*]. Thus, for example, one appellate court has held that no one may be compelled to work "after the usual age retirement age of 65 in order to pay the same level of spousal support as when he was employed" [*Reynolds v. Reynolds (1998) 63 Cal. App. 4th 1373, 1378, 74 Cal. Rptr. 2d 636* (court also held support payee had burden of showing specifics regarding any postretirement earning capacity)]. However, *Fam. Code § 4320(a)* and *(c)* provide for a consideration of earning capacity, not actual income, in determining spousal support. It may be that a party's actual income after retirement does not reflect his or her earning capacity, meaning that he or she is still capable of earning income on which support should be determined.

There is some disagreement among appellate courts as to whether earning capacity may be considered in the absence of evidence of the supporting spouse's bad faith in taking retirement [*see In re Marriage of Stephenson (1995) 39 Cal. App. 4th 71, 76-80, 46 Cal. Rptr. 2d 8* (and cases cited therein)].

It has been held that earning capacity may be considered if the evidence shows that the supporting spouse took early retirement in bad faith so as to avoid his support responsibilities [*In re Marriage of Sinks (1988) 204 Cal. App. 3d 586, 592-593, 251 Cal. Rptr. 379]* . However, another court has held that the supporting spouse's motive is irrelevant and that no showing of deliberate avoidance of support is required. The court held that, at least in the case of early retirement, the supporting spouse bears the burden of showing changed circumstances by proving that earning capacity does not exceed actual income after retirement [*see In re Marriage of Stephenson (1995) 39 Cal. App. 4th 71, 81-83, n.7, 46 Cal. Rptr. 2d 8* (59-year-old accepted generous early retirement severance package when faced with likely layoff; court held record supported finding that retirement was in good faith, approved order continuing support at current level during period of time for which severance pay equaled prior earnings, but rejected order automatically reducing support at end of period, and remanded for further hearing at which supporting spouse would be required to disprove continuing earning capacity)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationAbility to PayFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationChanged Circumstances

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19-225 California Forms of Pleading and Practice--Annotated §§ 225.251-225.269

[Reserved]

§§ 225.251[Reserved]

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19-225 California Forms of Pleading and Practice--Annotated § 225.270

§ 225.270 Effect of Order Terminating Support Payments

Inherent in the requirement that the court must consider the changed circumstances of the parties on a motion to modify spousal support is the power and duty of the trial court to terminate the support order on appropriate facts [*Peterson v. Peterson (1973) 30 Cal. App. 3d 477, 482, 106 Cal. Rptr. 482]* . "Termination" in this sense, has been characterized as simply a modification of the amount of support down to $0, and as such, just one form of modification having the same legal significance [*see In re Marriage of Bennett (1983) 144 Cal. App. 3d 1022, 1025-1026, 193 Cal. Rptr. 113* (nonmodifiable agreement precludes termination); *In re Marriage of Harris (1976) 65 Cal. App. 3d 143, 151-152, 134 Cal. Rptr. 891]* . However, one court has noted that the use of "termination" in this sense is unnecessarily ambiguous and confusing because modification and termination of support are separate matters [*see In re Marriage of Benjamins (1994) 26 Cal. App. 4th 423, 433, 31 Cal. Rptr. 2d 313]* . Even if support is to be modified down to $0, the court (or the parties by agreement) must also address the issue of whether jurisdiction over spousal support should be retained so that support might be reinstated (modified upward from $0) in the future on a showing of further change of circumstances.

Historically, the rule has been that a decree awarding spousal support carries within it, without the necessity of language to that effect, a reservation of jurisdiction so that the court may readdress the order in the future [*see Bain v. Superior Court (1974) 36 Cal. App. 3d 804, 808-809, 111 Cal. Rptr. 848* ; *see also Howell v. Howell (1894) 104 Cal. 45, 47, 37 P. 770]* . The converse of this rule is that if there is no award, then there is no further jurisdiction [*see Cochran v. Cochran (1970) 13 Cal. App. 3d 339, 344, 91 Cal. Rptr. 630]* . Thus, any order terminating support by reducing it to $0 would also terminate jurisdiction and permanently relieve the supporting spouse of the obligation [*McClure v. McClure (1935) 4 Cal. 2d 356, 360-361, 49 P.2d 584]* . For this reason, courts would often reduce support to a token amount, such as $1 per year, as a way of retaining jurisdiction to reinstate it in the future [*see In re Marriage of Beust (1994) 23 Cal. App. 4th 24, 26, 28 Cal. Rptr. 2d 201* ; *In re Marriage of Forcum (1983) 145 Cal. App. 3d 599, 605, 193 Cal. Rptr. 596]* . In recent cases, it has been recognized that jurisdiction may be retained by a simple statement to that effect in the order, and it is not necessary to order a token amount [*see In re Marriage of Liss (1992) 10 Cal. App. 4th 1426, 1428, 13 Cal. Rptr. 2d 397* ; *In re Marriage of Wells (1988) 206 Cal. App. 3d 1434, 1436, 254 Cal. Rptr. 185]* .

Under the Family Code, it appears that the law has not changed: an order terminating support payments in the sense of awarding $0 dollars also terminates the court's jurisdiction over spousal support. *Fam. Code § 4336(a)* provides for indefinite retention of jurisdiction in a long-term marriage "except on written agreement of the parties to the contrary or a court order terminating spousal support." Further, nothing in the statute limits the court's discretion to terminate spousal support in later proceedings on a showing of changed circumstances [*Fam. Code § 4336(c)*]. Read together, these two provisions make it reasonably clear that the "termination" order referred to in the statute terminates both support payments and jurisdiction over support. Therefore, if the court on a motion to modify determines that circumstances have changed and no support is currently appropriate, but that they might change again so that support should be reinstated, the order should include express language retaining jurisdiction. For an illustrative order terminating support payments and retaining jurisdiction, see *§ 225.414*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationChanged CircumstancesFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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§ 225.271 Payment Ordered for Fixed Period

In a short-term marriage, an order for spousal support terminates at the end of the period provided for in the order and may not be extended unless the court retained jurisdiction in the order [*Fam. Code § 4335*; *cf. Fam. Code § 4336(b)* (defining marriage of long duration)]. "Terminates" as used in this statute clearly means termination of both support payments and of jurisdiction to reinstate support in the future. As to what constitutes a short-term marriage and what suffices as sufficient language to retain jurisdiction in an order for spousal support, see *§ 225.60* et seq.

In a long-term marriage, the court retains jurisdiction indefinitely, subject to two exceptions, even if support is only ordered for a limited period [*Fam. Code § 4336(a)*; *see Fam. Code § 4335*]. Therefore, unless one of the exceptions applies, support that terminates at the end of a limited term provided for in the order may be reinstated thereafter on a showing of changed circumstances.

One exception is that the rule of *Fam. Code § 4336* may be altered by a written agreement of the parties to the contrary [*Fam. Code § 4336(a)*]. Therefore, the parties may agree to terminate both support payments and jurisdiction at a particular future time [*see In re Marriage of Zlatnik (1988) 197 Cal. App. 3d 1284, 1290, 243 Cal. Rptr. 454]* . Agreements involving termination of jurisdiction are discussed, and forms are provided, in § 225.60 et seq.

The other exception is that a court order terminating support also terminates the court's jurisdiction over support [*Fam. Code § 4336(a), (c)*; *see § 225.270*]. This means that if, in a long-term marriage, the court orders support for a limited period, and the period ends without the supported party obtaining an extension, a supporting party who wants the support obligation to be terminated permanently must notice a motion for a court order terminating jurisdiction over support. For illustrative forms for use in bringing such a motion, see *§§ 225.415* and *225.416*. Note that law is to the contrary for agreements entered into before January 1, 1988, because of the operative date of *Fam. Code § 4336*, which applies to proceedings that were pending on, or filed on or after, January 1, 1988 [*In re Marriage of Ousterman (1996) 46 Cal. App. 4th 1090, 1094, 54 Cal. Rptr. 2d 403]* .

Legal Topics:

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19-225 California Forms of Pleading and Practice--Annotated § 225.272

§ 225.272 Payment Ordered for Contingent Period

If the court orders spousal support for a contingent period of time, the obligation of the supporting party terminates on the happening of the contingency [*Fam. Code § 4334(a)*]. This "termination" of the obligation apparently refers to both the support payments and the court's jurisdiction to order support. However, the statute is unclear in this respect and there is possibly room to argue that jurisdiction over support payments could continue in a given case, despite termination of a current payment obligation. This remains subject to further construction by case law or legislative clarification.

Legal Topics:

For related research and practice materials, see the following legal topics:
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19-225 California Forms of Pleading and Practice--Annotated § 225.273

§ 225.273 When Court Should Terminate Both Support Payments and Jurisdiction

A change of circumstances that may warrant termination of spousal support, and also of jurisdiction over support, includes all factors affecting need and ability to pay [*In re Marriage of Heistermann (1991) 234 Cal. App. 3d 1195, 1202, 286 Cal. Rptr. 127]* . A change of circumstances that eliminates the supported spouse's need for support justifies both a termination of support payments and of jurisdiction over support [*see In re Marriage of Webb (1979) 94 Cal. App. 3d 335, 346, 156 Cal. Rptr. 334* ; *Peterson v. Peterson (1973) 30 Cal. App. 3d 477, 482, 106 Cal. Rptr. 482* (court has both power and duty to terminate support if need for support no longer exists); *see also Fam. Code § 4322* (in modification proceeding, if there are no children and party acquires separate estate, including income from employment, sufficient for party's proper support, no support shall be continued against other party); *In re Marriage of Terry (2000) 80 Cal. App. 4th 921, 931-932, 95 Cal. Rptr. 2d 760* (court should have terminated spousal support based on supporting spouse's loss of employment and increase in value of supported spouse's separate estate, which was sufficient for her proper support)].

A change in the supporting spouse's ability to pay is a different matter. If the court determines that a supporting spouse no longer has the ability to pay any support, it should nevertheless retain jurisdiction to reinstate support in the future should the ability be restored [*see In re Marriage of Acosta (1977) 67 Cal. App. 3d 899, 901, 903, 137 Cal. Rptr. 33* ; *see also In re Marriage of Laube (1988) 204 Cal. App. 3d 1222, 1224 251 Cal. Rptr. 745* ; *see § 225.225*].

In determining whether support should be terminated, the court must also consider all of the factors relevant to the appropriateness of a spousal support award in the first instance [*In re Marriage of Prietsch & Calhoun (1987) 190 Cal. App. 3d 645, 663-664, 235 Cal. Rptr. 587* ; *see Fam. Code § 4320* (setting forth factors for consideration)]. The factors that the court must consider in determining whether to retain or terminate jurisdiction in its original order may also be relevant on a later motion to terminate. For discussion of these factors, see *§ 225.30* et seq.

The conduct of the supported spouse during the period since the prior support order may also be considered. The supported spouse's lack of diligence in seeking employment consistent with that party's ability may justify a termination

of spousal support [*see In re Marriage of Sheridan (1983) 140 Cal. App. 3d 742, 748-749, 189 Cal. Rptr. 622* (court may consider unreasonable delay in seeking employment consistent with party's ability, regardless of whether delay caused by poor judgment or bad faith; decided before amendments to *Fam. Code §§ 4320, 4330*, operative January 1, 1997)]. Support may only be terminated for lack of diligence in obtaining employment if the supported spouse was clearly expected to become self-sufficient under the terms of the prior order. Otherwise, there is no change of circumstances that justifies termination of support [*In re Marriage of Gavron (1988) 203 Cal. App. 3d 705, 710-712, 250 Cal. Rptr. 148* (57-year-old supported spouse with minimal employment experience during 25-year marriage)].

By statute, courts may formally give a "*Gavron* warning" when making a support order, unless, in the case of a long term marriage, the court feels this is inadvisable by admonishing the parties concerning the goal of becoming self-supporting, and of each party's obligation to make reasonable, good faith efforts in this regard [*Fam. Code §§ 4320(j), (k), 4330(b)*]. If the court finds that there was a failure to exercise reasonable diligence, but that even if reasonable diligence had been exercised the supported spouse would still not have become fully self-supporting, it has the discretion to extend the duration of the order and to fix the support in the amount that the supported spouse would have required had reasonable diligence been exercised. The trial court also has the discretion to determine whether or not the supporting spouse should be required to assist the supported spouse with financial needs that are unmet because of the failure of the supported spouse to exercise reasonable diligence [*In re Marriage of Berland (1989) 215 Cal. App. 3d 1257, 1260-1261, 264 Cal. Rptr. 210]* .

Improvident management of assets that otherwise would be sufficient to provide the supported spouse with self sufficiency in the accustomed lifestyle also justifies termination of support, even though the result may be a lowering of the supported spouse's lifestyle. To hold otherwise would encourage profligacy and discourage sound investment and prudent management of financial resources [*In re Marriage of McElwee (1988) 197 Cal. App. 3d 902, 909-910, 243 Cal. Rptr. 179]* .

On a motion to terminate support, the court might determine that support should be continued, but that support payments and jurisdiction should both terminate at some point in the future. The various options, such as a substantive step-down order [*see In re Marriage of Prietsch & Calhoun (1987) 190 Cal. App. 3d 645, 658-659, 235 Cal. Rptr. 587]* or a so-called Richmond order [*see In re Marriage of Richmond (1980) 105 Cal. App. 3d 352, 164 Cal. Rptr. 381]* , are discussed, and forms are provided, in § 225.60 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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19-225 California Forms of Pleading and Practice--Annotated § 225.274

§ 225.274 Termination by Operation of Law on Death or Remarriage

Except as otherwise agreed by the parties in writing, the obligation to make spousal support payments under any court order or judgment terminates on the death of either party or the remarriage of the supported party [*Fam. Code § 4337*]. Unless the parties agree in writing that support payments are to continue despite the event, the payments cease by operation of law [*In re Marriage of Thornton (2002) 95 Cal. App. 4th 251, 254-255, 257, 115 Cal. Rptr. 2d 380* (support agreement providing for nonmodifiability of certain sum and terminating obligation on death of party or on certain date in 2003, did not waive provisions of *Fam. Code § 4337*); *In re Marriage of Glasser (1986) 181 Cal. App. 3d 149, 151, 226 Cal. Rptr. 229* ; *see Hilton v. McNitt (1957) 49 Cal. 2d 79, 82-83, 315 P.2d 1* ; *but see In re Marriage of Cesnalis (2003)106 Cal. App. 4th 1267, 1275-1276, 131 Cal. Rptr. 2d 436* (husband waived right under *Fam. Code § 4337* to terminate spousal support on wife's remarriage when nonmodifiability provision in stipulated judgment was expressly limited to three-year "duration of spousal support" that "will not be modifiable under any circumstances" and that will end only if three years are up or one of parties dies)]. Agreements avoiding termination by operation of law on death or remarriage are discussed, and forms are provided, in *§ 225.60 et seq*.

Under most circumstances, the subsequent annulment of a void or voidable remarriage does not reinstate a prior spouse's duty of paying spousal support [*Sefton v. Sefton (1955) 45 Cal. 2d 872, 875-877, 291 P.2d 439* ; *Berkely v. Berkely (1969) 269 Cal. App. 2d 872, 874-875, 75 Cal. Rptr. 294]* . However, if the remarriage was effected wholly by the involuntary conduct of the supported spouse, the court may weigh the equities and reinstate the previous spouse's support obligation if the court finds it necessary to achieve substantial justice between the parties. "Involuntary" does not encompass consent induced by fraud or misrepresentation, but rather physical coercion [*see In re Marriage of Weintraub (1985) 167 Cal. App. 3d 420, 426-427, 213 Cal. Rptr. 159]* .

In weighing the equities to determine if support should be reinstated, excessive delay in seeking annulment may imply that the supported spouse has ratified the remarriage by voluntary cohabitation or that he or she is attempting to reserve an election between two marriages for a duty of support [*In re Marriage of Weintraub (1985) 167 Cal. App. 3d 420, 427, 213 Cal. Rptr. 159* ; *see Fam. Code §§ 2251(a)(1), 2254* (support may be awarded in proceeding for nullity of

marriage to party who believed in good faith that marriage was valid); *see also § 225.30* et seq.]. Another important factor is whether the supporting spouse has reasonably relied to his or her detriment on the apparent remarriage [*In re Marriage of Weintraub (1985) 167 Cal. App. 3d 420, 427, 213 Cal. Rptr. 159]* .

Legal Topics:

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

§§ 225.275[Reserved]

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A. Duty To Support Spouse

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§ 225.290 State Statutes

[1] Duty of Support

[a] Effect of Death

Spousal support obligation as terminating on death of either party. *Fam. Code § 4337*

Family allowance from probate estate. *Prob. Code § 6540*

Temporary right to remain in possession of family home. *Prob. Code § 6500*

Petition to set aside exempt property. *Prob. Code § 6510*

Right of spouse to probate homestead. *Prob. Code § 6521*

[b] Effect of Dissolution

Spousal support orders during pendency of dissolution proceeding. *Fam. Code § 3600*

Spousal support orders in judgment of dissolution or legal separation. *Fam. Code § 4330*

[c] Effect of Incompetence

Duty of support as not affected by dissolution on ground of insanity. *Fam. Code § 2313*

Duty to support spouse as continuing when spouse institutionalized because of insanity or illness. *Welf. & Inst. Code §*

7275

Action by State Department of Health to recover costs from supporting spouse. *Welf. & Inst. Code § 7282*

[d] General Provisions

General spousal duty of support. *Fam. Code § 4300*

Husband and wife as prohibited from altering their legal relations. *Fam. Code § 1620*

[e] Marital Requirement

Marriage outside state as valid in California if valid in jurisdiction where contracted. *Fam. Code § 308*

Incestuous marriage as void. *Fam. Code § 2200*

Bigamous and polygamous marriages as void. *Fam. Code § 2201*

Grounds for nullity of marriage. *Fam. Code § 2210*

Putative marriage; support of putative spouse. *Fam. Code §§ 2251, 2254*

[f] When Spouses Living Apart

Provisions for spousal support in separation agreement. *Fam. Code § 3580*

Spouse as not liable for support of other when spouses living separate by agreement unless support stipulated in agreement. *Fam. Code § 4302*

[2] Enforcement of Right of Support

Civil action to enforce spouse's right of support. *Fam. Code § 4303*

Married person's failure to provide necessaries for spouse as misdemeanor. *Penal Code § 270a*

Order for fine to be paid to spouse of defendant upon conviction for failure to provide necessaries to spouse. *Penal Code § 270d*

[3] Liability of Marital Property for Support

Community estate as liable for debt of either spouse. *Fam. Code § 910*

Separate property of spouse as liable for his or her debt during marriage, not liable for debt of other during marriage. *Fam. Code § 913*

Liability for necessaries. *Fam. Code § 914*

Liability for support obligations. *Fam. Code § 915*

Spouse's separate property as liable for support of other while spouses live together, if no community estate exists. *Fam. Code § 4301*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsDebt LiabilityFamily LawMarital Duties & RightsDuty of SupportFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewFamily LawMarriageValidityVoid & Voidable MarriagesVoid Marriages

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A. Duty To Support Spouse

19-225 California Forms of Pleading and Practice--Annotated §§ 225.291-225.309

[Reserved]

§§ 225.291[Reserved]

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19-225 California Forms of Pleading and Practice--Annotated § 225.310

§ 225.310 State Statutes

[1] Agreements for Spousal Support

Provisions for support in separation agreements. *Fam. Code § 3580*

Support agreements as severable and enforceable by court. *Fam. Code § 3590*

Court as having power to modify or terminate support agreement. *Fam. Code § 3591*

[2] Factors Considered in Setting Spousal Support

List of factors considered. *Fam. Code § 4320*

Court as permitted to deny support out of separate property of other party if supported party has separate property or is earning livelihood, or if other party has custody or children and is supporting them. *Fam. Code § 4321*

No support as permitted to be ordered against other party when there are no children and supported party acquires separate estate. *Fam. Code § 4322*

Rebuttable presumption of decreased need when supported party cohabiting. *Fam. Code § 4323(a)*

Income of supporting spouse's subsequent spouse or nonmarital partner as not to be considered when determining spousal support. *Fam. Code § 4323(b)*

[3] Permanent Spousal Support

Order for permanent support in proceeding for dissolution or legal separation. *Fam. Code § 4330*

Examination by vocational training counselor. *Fam. Code § 4331*

Court as required to make specific findings of fact with respect to standard of living. *Fam. Code § 4332*

Spousal support order as retroactive to date of filing of notice of motion. *Fam. Code § 4333*

Support orders for contingent period of time. *Fam. Code § 4334*

Support orders for fixed period of time. *Fam. Code § 4335*

Court as retaining jurisdiction over spousal support indefinitely when marriage is of long duration; definition of long duration. *Fam. Code § 4336*

Absent agreement of parties, support obligation as terminating on death of either party or remarriage of supported party. *Fam. Code § 4337*

Order of resort to property for payment of spousal support. *Fam. Code § 4338*

Court as having power to order security for payment of spousal support. *Fam. Code § 4339*

Court as having power to order purchase of annuity, maintenance of life insurance, or establishment of trust to provide spousal support after death of supporting party. *Fam. Code § 4360*

[4] Temporary Spousal Support

Order for temporary support during pendency of proceeding for dissolution or legal separation. *Fam. Code § 3600*

Temporary support orders as not enforceable if parties reconcile. *Fam. Code § 3602*

Modification or termination of temporary support order. *Fam. Code § 3603*

Temporary support order as not prejudicial to rights of parties regarding any subsequent order. *Fam. Code § 3604*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsEvidenceInferences & PresumptionsPresumptionsFamily LawMarital Termination & Spousal SupportSpousal SupportJurisdictionFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationCohabitationFamily LawMarital Termination & Spousal SupportSpousal SupportObligationsPeriodic Support

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19-225 California Forms of Pleading and Practice--Annotated §§ 225.311-225.329

[Reserved]

§§ 225.311[Reserved]

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C. Modification Or Termination Of Spousal Support Orders

19-225 California Forms of Pleading and Practice--Annotated § 225.330

§ 225.330 State Statutes

[1] Jurisdiction to Modify Spousal Support

When support order is for contingent period of time, support as terminating at time of contingency provided for. *Fam. Code § 4334*

When support order is for fixed period of time, support as terminating at end of period provided for, with no extension permitted unless court has retained jurisdiction. *Fam. Code § 4335*

Court as retaining jurisdiction over spousal support indefinitely when marriage is of long duration; definition of long duration. *Fam. Code § 4336*

[2] Modification or Termination of Spousal Support

Court as having power to modify or terminate agreement for support. *Fam. Code § 3591*

Definition of "support order" with respect to statutes governing modification or termination. *Fam. Code § 3650*

Court as having authority to modify or terminate support as it deems necessary. *Fam. Code § 3651*

Order for modification or termination of support as retroactive to date of filing of notice of motion. *Fam. Code § 3653*

Order modifying or terminating support as required to include statement of decision, at request of either party. *Fam. Code § 3654*

Discovery before commencement of modification or termination proceeding. *Fam. Code §§ 3660-3668*

Simplified modification procedure. *Fam. Code § 3680*

Cohabitation of supported spouse as raising rebuttable presumption of decreased need; support as subject to modification or termination on proof of changed circumstances with regard to cohabitation. *Fam. Code § 4323*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsFamily LawMarital Termination & Spousal SupportSpousal SupportJurisdictionFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationCohabitation

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19-225 California Forms of Pleading and Practice--Annotated §§ 225.331-225.349

[Reserved]

§§ 225.331[Reserved]

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19-225 California Forms of Pleading and Practice--Annotated § 225.350

§ 225.350 Complaint to Enforce Spousal Duty of Support [Fam. Code § 4303]

[1] FORM Complaint to Enforce Spousal Duty of Support [Fam. Code § 4303]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In re the Marriage of	)	
_____ [*name*],	)	NO. _____
Petitioner,	)	COMPLAINT FOR SUPPORT
and	)	
_____[*name*],	)	
Respondent.	)	
	)	

Plaintiff alleges:

1. Plaintiff _____ [*name*] is a resident of the State of California, County of _____[*county*].

2. Defendant _____ [*name*] is a resident of the State of California, County of _____[*county*].

3. This action is brought under the authority of *Family Code Section 4303*.

4. Plaintiff and Defendant were married on _____ [*date of marriage*], and since that time have

remained husband and wife. No judgment of nullity of marriage, legal separation, or dissolution of marriage has been entered, and no such proceedings are currently pending in any court of competent jurisdiction.

[*SET FORTH allegations of defendant's failure or refusal to provide support, e.g.:*]

5. On _____ [*date*], defendant abandoned plaintiff and ceased cohabitation. Since that date, defendant has not provided plaintiff with any support in any form from any source.

6. Plaintiff is disabled, unemployed, and unable to support himself. Plaintiff has, at all times during marriage, relied on defendant's community property earnings for his support.

7. No application for public assistance is currently pending.

[*CONTINUE*]

WHEREFORE, Plaintiff prays for judgment as follows:

1. For an order requiring defendant to pay support to plaintiff in such amounts and at such times as the court deems proper under the standards of *Family Code Section 4320*;

2. For costs of suit incurred;

3. For attorney's fees; and

4. For such other relief as the court deems proper.
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____[*name*]

[*Add verification as follows, if desired*]

VERIFICATION

I, _____ [*name*] am the petitioner in this action. I have read the foregoing complaint and know its contents. They are true of my own knowledge, except as to those matters that are alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature*]

[2] Use of Form

This form is a brief complaint that illustrates an action under *Fam. Code § 4303* seeking support from a spouse. There are no statutory requirements regarding the contents of such a complaint. By reference to dissolution of marriage matters, in which spousal support may be requested merely by checking a box [*see* Cal. Judicial Council Form FL-100 (Judicial Council form of Petition for Dissolution of Marriage)], it is probably sufficient to allege the existence and validity of the marriage and the defendant's failure or refusal to provide support. Subject matter jurisdiction for all Family Code proceedings is in the superior court [*Fam. Code § 200*]. *Pendente lite* support may be ordered under the court's general equity powers [*Kilroy v. Kilroy (1995) 35 Cal. App. 4th 1141, 1144-1148, 41 Cal. Rptr. 2d 812]* , and should be prayed for.

Fam. Code § 4303 is derived from former *Civ. Code § 248*, a provision of the former Uniform Civil Liability for Support Act. Its primary purpose is to allow a public entity that has provided public assistance to a married adult to seek reimbursement from the person's spouse [*see Fam. Code § 4303(b)*]. The person entitled to support may also bring the action, whether or not the parties have separated [*Fam. Code § 4303(a)*].

[3] Difference From Action for Legal Separation

With regard to spousal support, there is little, if any, functional difference between an obligee's action under *Fam. Code § 4303* and a proceeding for legal separation. A married person may obtain an order for spousal support by either proceeding [*see Fam. Code § 4330*]. Of course, in a legal separation, a party may obtain all other relief available in a dissolution of marriage, such as child custody [*see Fam. Code § 3021(c)*], child support orders [*see Fam. Code § 4001*], and division of property [*see Fam. Code § 2550*].

For this reason, there is little need for the *4303* action, and it is seldom used today by private parties. However, a judgment of legal separation, although of little or no legal significance apart from the orders contained in it, might connote a certain finality of the relationship that the person does not feel. Also, legal separation cannot be adjudged over the opposition of the respondent [*Fam. Code § 2345*]. The *4303* action allows the court to issue a spousal support order without resolving issues related to the status of the marriage, which the parties might not be ready to address.

[4] State Statutes

Subject matter jurisdiction in superior court for proceedings under Family Code. *Fam. Code § 200*

Spouse's liability for necessaries of other spouse. *Fam. Code § 914*

General spousal duty of support. *Fam. Code § 4300*

Civil action to enforce spouse's right to support. *Fam. Code § 4303*

Factors considered in ordering support. *Fam. Code § 4320*

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19-225 California Forms of Pleading and Practice--Annotated § 225.351

§ 225.351 Agreement to Separate [Fam. Code § 4302]

[1] FORM Agreement to Separate [Fam. Code § 4302]

AGREEMENT TO SEPARATE
[*Set forth allegations of marriage and separation, e.g.,*]

1. This agreement is entered into on the date set forth below between _____ [*name of husband*] (Husband) and _____ [*name of wife*] (Wife) under the authority of *Family Code Section 4302*. The parties were married on _____ [*date*]. The parties acknowledge that they ceased cohabitation and separated as of _____ [*date of separation*]. This separation is mutually agreed to, and they are living separately by agreement.

[*EITHER, if support is to be paid during the parties' separation*]

2. During the period of separation, [Husband *or* Wife] shall pay to [Wife *or* Husband] the sum of $_____ monthly for his/her support, on or before the _____ [*day of month payments will be due, e.g.,* 5th] day of the month, beginning _____[*date payments to begin*]. This obligation shall continue until further agreement of the parties or order of a court of competent jurisdiction.

3. The payments provided in Paragraph 2, above, shall be considered as complete satisfaction of [Husband *or* Wife]'s duty to support [Wife *or* Husband]. Each party agrees to indemnify and hold the other harmless from any liability to third persons for debts and obligations incurred solely by the party during the period of separation.

4. The payments provided in Paragraph 2, above, shall be without prejudice to either party to seek any appropriate order or judgment regarding spousal support, including an order or judgment denying spousal support and permanently

terminating jurisdiction to award spousal support, in any subsequent legal proceeding related to the marriage of the parties.

[*OR, if no support will be paid during the separation*]

2. During the period of separation, the parties' mutual duty to support each other shall be suspended, and neither shall have any right to receive support from the other. The duties of support shall remain suspended until further agreement of the parties or order of a court of competent jurisdiction.

3. Each party agrees to indemnify and hold the other harmless from any liability to third persons for debts and obligations incurred solely by the party during the period of separation.

4. This mutual suspension of the duty of support shall be without prejudice to either party to seek any appropriate order or judgment regarding spousal support, including an order or judgment denying spousal support and permanently terminating jurisdiction to award spousal support, in any subsequent legal proceeding related to the marriage of the parties.

[*CONTINUE*]

Dated: _____.

_____[*signature*]
Husband

Dated: _____.

_____[*signature*]
Wife

[2] Use of Form

The foregoing form illustrates an agreement to separate pursuant to *Fam. Code § 4302*, which provides that a person is not liable for support of the person's spouse when the person is living separate from the spouse by agreement unless support is stipulated in the agreement (*see § 225.35*). Paragraph 1 of the form is an opening paragraph setting forth the facts of marriage and separation. The first Alternative Paragraphs 2-4 provide for one spouse to support the other during the separation, and protect the supported spouse from any claim that the other's duty of support was suspended by operation of the statute. In exchange for periodic payments of support, the supported spouse agrees to hold the supporting spouse harmless for his or her debts incurred during the period of separation. The second Alternative Paragraphs 2-4 provide for no support, but clarify that by so agreeing, the parties do not intend to permanently waive their right to support from each other. The operation of the statute will achieve the same result in the absence of the clarifying language [*see London Guarantee & Acci. Co. v. Industrial Acci. Com. (1919) 181 Cal. 460, 466-467, 184 P. 864]* , but it is always preferable to express the intent of the parties explicitly.

[3] Liability to Creditors

Short separation agreements such as this form, which address the duty of support, should probably be used in most cases in order to protect the client from unforeseen liability to creditors. Often a client will seek counsel immediately after separation, but not be ready to file for dissolution. The danger for a separated spouse is that the creditors of the other will seek recourse from him or her for debts incurred during the separation if the duty of support is not suspended [*see Fam. Code § 914(a)(2)*; *see also § 225.35*]. If the separation is mutually agreed to, a written agreement will assure

that the statute will suspend the duty of support, if that is the parties' desire. However, the danger is equally present if the separation is unilateral, that is, if one spouse has left the other. Of course, if the spouse left behind is in need, counsel should seek to enforce, not suspend, the duty of support. But if the spouse who is left behind is not in need, he or she should be counseled to agree to the separation in writing, and thereby obtain the protection of the statute from the potential creditors of the other spouse.

[4] State Statutes

Liability for spouse's necessaries of life while spouses living apart. *Fam. Code § 914*

Provisions for spousal support in separation agreement. *Fam. Code § 3580*

Spouse as not liable for support of other when spouses living separate by agreement unless support stipulated in agreement. *Fam. Code § 4302*

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[Reserved]

§§ 225.352[Reserved]

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19-225 California Forms of Pleading and Practice--Annotated § 225.370

§ 225.370 Income and Expense Declaration [Cal. Rules of Ct., Rule 5.128; Cal. Judicial Council Form FL-150]

[1] FORM Income and Expense Declaration [Cal. Rules of Ct., Rule 5.128; Cal. Judicial Council Form FL-150]

Click here to view image.

[2] Use of Form

This form is a reproduction of the mandatory Judicial Council form of Income and Expense Declaration, including the pages for Income (page 2) and Expenses (page 3) [Cal. Judicial Council Form FL-150]. A page for Child Support (page 4) is to be completed if child support is in issue. This form is often referred to as "the I&E." These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. Blank copies may also be obtained from the court clerk.

[3] State Statutes

Party has burden of proof regarding existence or nonexistence of fact essential to party's claim for relief. *Evid. Code § 500*

During pendency of family law proceeding, court has authority to order any amount necessary for support of other spouse. *Fam. Code § 3600*

Factors considered in ordering permanent spousal support. *Fam. Code § 4320*

[4] California Rules of Court

When financial information must be served and filed. *Cal. Rules of Ct., Rule 5.128*

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19-225 California Forms of Pleading and Practice--Annotated § 225.371

§ 225.371 Examination by Vocational Training Counselor [Fam. Code § 4331]--Declaration in Support of Motion [Cal. Rules of Ct., Rule 5.118]

[1] FORM Examination by Vocational Training Counselor [Fam. Code § 4331]--Declaration in Support of Motion [Cal. Rules of Ct., Rule 5.118]

DECLARATION IN SUPPORT OF MOTION FOR EXAMINATION BY VOCATIONAL TRAINING COUNSELOR

I, _____ [*name*], am the _____ [petitioner *or* respondent] in this matter in which _____ [respondent *or* petitioner], _____ [*name*], has requested spousal support.

_____ [*Set forth details supporting request for examination of opposing party, e.g.,* Petitioner is 45 years old and in good health. She has a Bachelor of Arts degree from the University of California, although she has not worked during marriage in order to devote time to domestic duties. The children of the marriage, however, are now ages 14 and 17 and are both in high school].

I believe that Petitioner is now employable, or, at a minimum, could become employable within a reasonable time with appropriate training or education. To that end, I request that she be examined by a vocational training counselor, as authorized by *Family Code Section 4331*.

_____ [*Name of vocational training counselor*] is a vocational training counselor who is qualified as required by *Family Code Section 4331(d)* and *(e)* to conduct the examination. He/She has his/her office at _____ [*office address of vocational training counselor*].

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19-225 California Forms of Pleading and Practice--Annotated § 225.372

§ 225.372 Examination by Vocational Training Counselor [Fam. Code § 4331]--Order Requiring Examination by Vocational Training Counselor

[1] FORM Examination by Vocational Training Counselor [Fam. Code § 4331]--Order Requiring Examination by Vocational Training Counselor

THE COURT ORDERS:

1. _____ [Respondent *or* Petitioner] shall be examined by _____ [*name of vocational training counselor*], a vocational training counselor who is qualified under *Family Code Section 4331*, on _____ [*date of examination*] at _____ [*time of examination*] at _____ [*office address of vocational training counselor*].

2. The scope of the examination shall be limited to determining whether _____ [respondent *or* petitioner] is currently employable at a wage that would allow him/her to maintain himself/herself at the marital standard of living, or if not, the approximate time and expense that would be required to provide him/her with sufficient training or education to become so employable. Intelligence testing shall not be administered.

3. The cost of the examination shall be paid by _____ [petitioner *or* respondent], _____ [*name*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Forms

The foregoing two forms are for use in obtaining an order that a party be examined by a vocational training counselor. *see § 225.371* is a declaration in support of a motion that a party be examined by a vocational training counselor [*see*

Fam. Code § 4331]. *§ 225.372[1]* is a sample order to submit to the examination.

The order may be made only on motion, for good cause, and on notice to the party to be examined and to all parties. The order must specify the time, place, manner, conditions, scope of the examination, and the person or persons by whom it is to be made [*Fam. Code § 4331(b)*]. For further discussion, see *§ 225.126*.

[3] Judicial Council Forms

For discussion of how to present a pretrial motion in a family law matter, including examples of the Judicial Council forms for Order to Show Cause [Cal. Judicial Council FL-300], Notice of Motion [Cal. Judicial Council Form FL-301], Application for Order and Supporting Declaration [Cal. Judicial Council Form FL-310], and Findings and Order After Hearing [Cal. Judicial Council Form FL-340], see Ch. 221, *Dissolution of Marriage: Procedure* .

For all declarations supporting family law motions, it is recommended that the Judicial Council form for Attached Declaration (MC-031) be used and attached to the Application for Order and Supporting Declaration form. The Judicial Council form for Additional Page (MC-020) may be used to attach orders to the Findings and Order after hearing form that do not appear on the face of that form, such as the order in § 225.372.

[4] State Statutes

Factors to consider in ordering spousal support. *Fam. Code § 4320*

Motion and order for examination by vocational training counselor. *Fam. Code § 4331*

In ordering support, at request of either party, court as required to make specific findings of fact as to any circumstances in addition to standard of living during marriage. *Fam. Code § 4332*

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19-225 California Forms of Pleading and Practice--Annotated § 225.373

§ 225.373 Findings of Fact Regarding Spousal Support Orders [Code Civ. Proc. § 632; Fam. Code §§ 4320, 4332]--Sample Provisions

[1] FORM Findings of Fact Regarding Spousal Support Orders [Code Civ. Proc. § 632; Fam. Code §§ 4320, 4332]--Sample Provisions

With regard to the issue of spousal support, the court finds as follows:

[*Set forth specific findings of court with regard to marital standard of living and any other findings requested by parties, e.g.,*]

1. The parties were married on February 22, 1980 and separated on July 28, 1994. Therefore, this is a marriage of long duration within the meaning of *Family Code Section 4336*, and that statute applies to this matter.

2. Petitioner is 42 years old and respondent is 49 years old. Both are in good health. The children of the marriage are in high school, and both parties may engage in gainful employment without unduly interfering with the interests of the children.

3. The marital standard of living was middle class; comfortable, but not lavish. Total marital net monthly income at the time of separation was approximately $5,000.

4. Respondent was employed at all times throughout the marriage, and is currently employed as sales manager of Giantco, Inc. Respondent's net monthly income of approximately $4,000 is a reasonable reflection of his earning capacity and support should be based on his actual earnings. Respondent has the ability to pay spousal support. However, respondent's current income is insufficient to maintain both parties separately at the marital standard of living.

5. Petitioner has a bachelor of arts degree from the University of California, but was unemployed during the marriage

until 1991 to devote time to domestic duties. Since 1991, petitioner has worked part time as a graphic designer, but her current average monthly net income of approximately $1,000 is insufficient to support herself at the marital standard of living.

6. Petitioner's reasonable needs to maintain herself at the marital standard of living, considering the cost of living as of the date of judgment, require approximately $3500 per month of total net disposable income. The support to be ordered in this matter, together with petitioner's reasonably anticipated income, is insufficient to meet petitioner's reasonable needs.

7. Support for a limited term is appropriate based on petitioner's stated intention to attend community college to obtain additional training as a computer programmer, which she anticipates will allow her to become self-supporting in approximately two years. However, jurisdiction should be retained indefinitely to extend the duration of support should petitioner, though acting in good faith, be unable to achieve her objectives.

[2] Use of Form

This form is a series of sample findings of fact with regard to a court's spousal support order. Although this form may be used for an order for temporary spousal support, the findings are more appropriately applied to an order for permanent spousal support. The trial court should make specific findings for the purpose of guiding reviewing courts and courts that may be called on to consider future motions to modify or terminate the support [*see In re Marriage of Laube (1988) 204 Cal. App. 3d 1222, 1226, 251 Cal. Rptr. 745]* .

By statute, the court is required to make specific factual findings with respect to the standard of living during marriage. And, at the request of either party, the court must make appropriate factual determinations with respect to other circumstances [*Fam. Code § 4332*]. Findings regarding the factors under *Fam. Code § 4320* that the court deems critical in determining spousal support should be requested and made in all cases to assist a reviewing court [*see In re Marriage of Fenton (1982) 134 Cal. App. 3d 451, 457-458, 184 Cal. Rptr. 597* (remanding for reconsideration and appropriate findings)]. However, a court is not required to make separate findings regarding each circumstance listed in *Fam. Code § 4320* [*In re Marriage of Lucero (1981) 118 Cal. App. 3d 836, 845, 173 Cal. Rptr. 680]* .

If the order is structured based on a particular expectation, as, for example, that the supported spouse will become self-sufficient by a particular time, the expectation should be set forth in the order. This will assist a future court in determining whether to modify or terminate support based on either the fulfillment or failure of the expectation [*see In re Marriage of Biderman (1992) 5 Cal. App. 4th 409, 413-414, 6 Cal. Rptr. 2d 791]* .

In light of the apparent mandatory nature of *Fam. Code § 4336* [*see § 225.144[2]*], it is extremely important for the court to make a finding as to whether the marriage is one of long duration within the meaning of that statute. If the court determines that, under the facts of the case, an open-ended spousal support order is not appropriate and that jurisdiction should be terminated as of some specific time, it should *not* find that the marriage is of long duration. The statute would appear to require the court to retain jurisdiction over support in a marriage of long duration.

[3] Failure to Request Findings

An appellant's failure to request findings or a statement of decision can be fatal to success on appeal, because it means that the support order appealed from will be presumed correct, and all presumptions will be indulged to support it on matters on which the record is silent. Error must be affirmatively shown [*In re Marriage of Laube (1988) 204 Cal. App. 3d 1222, 1226, 251 Cal. Rptr. 745]* . However, no such presumption or inference is permissible if the appellant brings an inadequate or ambiguous statement of decision to the attention of the court before the entry of judgment [*Code Civ. Proc. § 634*; *see In re Marriage of Hoffmeister (1987) 191 Cal. App. 3d 351, 359-365, 236 Cal. Rptr. 543* (remanding spousal support matter for lack of proper findings)].

[4] Statement of Decision

Findings may be made through a statement of decision under *Code Civ. Proc. § 632* [*Fam. Code § 2338*]. That statute requires that the statement must be requested *before* submission if the matter is concluded within one calendar day or in less than eight hours over more than one day. Further, the request must specify the controverted issues as to which the party is requesting the statement. These requirements have been found to be somewhat unrealistic with regard to contested spousal support hearings because often the controverted issues are not fully developed until after the evidence has been presented at the hearing [*see In re Marriage of Ramer (1986) 187 Cal. App. 3d 263, 271, 231 Cal. Rptr. 647]* . However, *Fam. Code § 4332* provides an independent basis, apart from *Code Civ. Proc. § 632*, on which a party may obtain appropriate factual determinations regarding spousal support after the hearing in light of the evidence presented and the issues developed [*see In re Marriage of Davis (1983) 141 Cal. App. 3d 71, 76, 190 Cal. Rptr. 104]* . Certain issues have been noted by reviewing courts as particularly important to clarify in the original order. If the amount of support awarded is insufficient to meet the supported spouse's needs at the marital standard of living, the order should so specify [*In re Marriage of Smith (1990) 225 Cal. App. 3d 469, 491-493, 274 Cal. Rptr. 911]* . Such a finding is crucial to the power of the court to increase support in the future based solely on the supporting spouse's increased income [*In re Marriage of Hoffmeister (1987) 191 Cal. App. 3d 351, 363-364, 236 Cal. Rptr. 543]* . For further discussion, see *§ 225.200* et seq.

[5] State Statutes

Statement of decision in lieu of written findings of fact. *Code Civ. Proc. § 632*

Factors to consider in ordering spousal support. *Fam. Code § 4320*

In ordering support, court as required to make specific findings of fact concerning standard of living during marriage, and also concerning any other circumstances for which findings are requested by parties. *Fam. Code § 4332*

Court as required to retain jurisdiction over spousal support in marriage of long duration. *Fam. Code § 4336*

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19-225 California Forms of Pleading and Practice--Annotated § 225.374

§ 225.374 Open-Ended Order; Support for Indefinite Period [Fam. Code §§ 4330, 4336, 4337]

[1] FORM Open-Ended Order; Support for Indefinite Period [Fam. Code §§ 4330, 4336, 4337]

THE COURT ORDERS:

_____ [*Supporting party, e.g.,* Respondent] is order to pay _____ [*supported party, e.g.,* petitioner] spousal support in the sum of $_____ [*amount*] per month[, *set forth additional payment terms, if any, e.g.,* payable one-half on the first day of each month and one-half on the fifteenth day of each month,] commencing on _____ [*date support payments to begin*], and continuing thereafter until death of either party, remarriage of _____ [*supported party, e.g.,* petitioner], or further order of the court.

[2] Use of Form

This form is an open-ended spousal support order; that is, one for a stated amount for an indefinite period. The order will terminate only on death or remarriage under *Fam. Code § 4337*. For further discussion of the termination of support orders, see *§ 225.200* et seq.

An order awarding support without a termination date contains within it a reservation of jurisdiction regardless of the length of the marriage [*see In re Marriage of Christie (1994) 28 Cal. App. 4th 849, 864, 34 Cal. Rptr. 2d 135* ; *Dahlstet v. Dahlstet (1969) 272 Cal. App. 2d 174, 178, 77 Cal. Rptr. 45* ; *see also Fam. Code § 4336* (court retains jurisdiction indefinitely if marriage is of long duration); § 225.141]. Because no specific language of nonmodifiability is included, this order is subject to future modification or termination on changed circumstances, except as to any amount that may have accrued prior to the date of the filing of the notice of motion or order to show cause to modify or terminate [*Fam. Code §§ 3591(a), (b), 3651(a), (c)*].

[3] State Statutes

Court as having authority to modify or terminate spousal support as it deems necessary. *Fam. Code § 3651*

General duty of spousal support. *Fam. Code § 4300*

Factors considered in spousal support awards. *Fam. Code § 4320*

Court as having authority to order spousal support in proceeding for dissolution or legal separation. *Fam. Code § 4330*

Court as retaining jurisdiction over spousal support indefinitely in marriage of long duration. *Fam. Code § 4336*

Except by agreement of parties, spousal support obligation as terminating upon death of either party or remarriage of supported party. *Fam. Code § 4337*

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19-225 California Forms of Pleading and Practice--Annotated § 225.375

§ 225.375 Support for Limited Period; Jurisdiction Retained Indefinitely [Fam. Code §§ 4330, 4335, 4336]

[1] FORM Support for Limited Period; Jurisdiction Retained Indefinitely [Fam. Code §§ 4330, 4335, 4336]

THE COURT ORDERS:

_____ [Petitioner *or* Respondent] is ordered to pay _____ [respondent *or* petitioner] spousal support in the sum of $_____ [*amount*] per month for a period of _____ [*period of support, e.g.,* five years], commencing on _____ [*date support payments to begin*], and payable through _____ [*date support payments to end*], as follows: [*set forth payment terms, e.g.,* $250 on the first day of each month and $250 on the fifteenth day of each month]. The court reserves jurisdiction indefinitely to modify, extend the duration of, reinstate, or terminate support payments and jurisdiction over support on a proper showing made to the court.

[2] Use of Form

This form is a spousal support order for a limited period that includes specific language retaining jurisdiction indefinitely. The express language retaining jurisdiction is required to accomplish this result in a short-term marriage [*see Fam. Code § 4335*]. The language is probably not necessary to retain jurisdiction in a marriage of long duration under *Fam. Code § 4336*. However, because of some uncertainty over the meaning and construction of that statute, this language should be included in all cases in which an open-ended reservation of jurisdiction is appropriate [*see § 225.141*]. For similar orders that retain jurisdiction only for a limited time, see *§§ 225.376 -225.379*.

[3] State Statutes

When support order is for fixed period of time, support as terminating at end of period provided for, with no extension permitted unless court has retained jurisdiction. *Fam. Code § 4335*

[4] Cross References

For a related form, *see § 225.374*.

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19-225 California Forms of Pleading and Practice--Annotated § 225.376

§ 225.376 Richmond Order; Support for Limited Period With Limited Reservation of Jurisdiction [Fam. Code §§ 4330, 4334, 4335]

[1] FORM Richmond Order; Support for Limited Period With Limited Reservation of Jurisdiction [Fam. Code §§ 4330, 4334, 4335]

THE COURT ORDERS:

_____ [Petitioner *or* Respondent] is ordered to pay _____ [respondent *or* petitioner] spousal support in the sum of $_____ [*amount*] per month for a period of _____ [*period of support, e.g.,* five years], commencing on _____ [*date support payments to begin*], and payable through _____ [*date support payments to end*], as follows: [*set forth payment terms, e.g.,* $250 on the first day of each month and $250 on the fifteenth day of each month]. The court reserves jurisdiction to modify the amount of, extend the duration of, or extend jurisdiction over spousal support on a proper showing made to the court in proceedings initiated on or before _____ [*date support payments to end*]. If support or jurisdiction over support is not extended beyond _____ [*date support payments to end*] pursuant to a motion or order to show cause brought on or before that date, the court's jurisdiction over spousal support shall terminate on that date, and thereafter, the court shall no longer have jurisdiction to award any additional spousal support to _____ [*supported spouse, e.g., petitioner*], regardless of any subsequent change in circumstances. Spousal support [shall *or* shall not] terminate on the death of either party or the remarriage of _____ [*e.g.,* petitioner] before _____ [*restate above ending date*].

[2] Use of Form

This form is a so-called "*Richmond* order" [*see In re Marriage of Richmond (1980) 105 Cal. App. 3d 352, 164 Cal. Rptr. 381]* . A *Richmond* order is one that sets spousal support for a fixed period based on evidence that the supported spouse will be self-supporting by the end of the period, but retains jurisdiction to modify the amount, and/or to extend the term, as long as the supported spouse acts before the date of termination [*In re Marriage of Prietsch & Calhoun (1987) 190 Cal. App. 3d 645, 665-666, 235 Cal. Rptr. 587]* . The effect of the order is to shift the burden to the

supported spouse to show cause to extend the order [*In re Marriage of Stallworth (1987) 192 Cal. App. 3d 742, 755, 237 Cal. Rptr. 829* ; *In re Marriage of Prietsch & Calhoun (1987) 190 Cal. App. 3d 645, 665-666, 235 Cal. Rptr. 587]* . The failure to achieve self-sufficiency by the expected date can constitute the change of circumstances necessary to support extension of the spousal support obligation [*In re Marriage of Pekar (1985) 173 Cal. App. 3d 367, 369-372, 218 Cal. Rptr. 823]* .

Under a *Richmond* order, jurisdiction is reserved only until the termination date. If that date passes without the supported spouse having moved to extend the term, jurisdiction is terminated and the court has no further power to extend or award spousal support [*see* *In re Marriage of Prietsch & Calhoun (1987) 190 Cal. App. 3d 645, 665, 235 Cal. Rptr. 587* ; *In re Marriage of Segel (1986) 177 Cal. App. 3d 1030, 1040-1041, 223 Cal. Rptr. 430]* .

Accordingly, it is important to specify that jurisdiction may be extended as long as the proceedings are initiated before the termination date. Otherwise, the court's order extending jurisdiction must actually be entered before the termination date or jurisdiction is lost [*see* *In re Marriage of Carter (1994) 26 Cal. App. 4th 1024, 1030, 33 Cal. Rptr. 2d 1]* .

Addition statutory provisions must be taken into account in determining whether it is appropriate for a court to make a *Richmond* order. These provisions require a court, when making an order for spousal support, to advise the support recipient that he or she should make reasonable efforts to assist in providing for his or her support needs, taking into account the particular circumstances the court considered under *Fam. Code § 4320*, unless, in the case of a marriage of long duration as provided for in *Fam. Code § 4336* the court decides this warning is inadvisable [*Fam. Code § 4330(b)*]. A related provision states the goal that a supported party must become self-supporting within a reasonable period of time, with this period generally to be one-half the length of the marriage (except in marriages of long duration)--keeping in mind that the court retains discretion to order support for a greater or lesser time period based on any of the other factors in *Family Code Section 4320* and the circumstances of the parties [*Fam. Code § 4320(l)*]. For a related discussion concerning long term marriages, see *§ 225.144*. For sample language parties may use in *stipulating* to the circumstances under which a support order is made, see Kirkland, Lurvey, & Richmond, California Family Law Practice and Procedure (Matthew Bender), Ch. 214, § 214.123. 2nd ed.

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19-225 California Forms of Pleading and Practice--Annotated § 225.377

§ 225.377 Fixed Amount for Limited Period; No Reservation of Jurisdiction to Extend Duration of Support [Fam. Code §§ 4330, 4334, 4335]

[1] FORM Fixed Amount for Limited Period; No Reservation of Jurisdiction to Extend Duration of Support [Fam. Code §§ 4330, 4334, 4335]

THE COURT ORDERS:

_____ [Petitioner *or* Respondent] is ordered to pay _____ [respondent *or* petitioner] spousal support in the sum of $_____ [*amount*] per month for a period of _____ [*period of support, e.g.,* five years], commencing on _____ [*date support payments to begin*], and payable through _____ [*date support payments to end*], as follows: [*set forth payment terms, e.g.,* $250 on the first day of each month and $250 on the fifteenth day of each month]. Spousal support shall be modifiable as to amount only by further order of this court on a showing of changed circumstances. However, jurisdiction over spousal support shall terminate on _____ [*date support payments to end*], and this court does not retain jurisdiction to extend the duration of support past that date, regardless of whether proceedings are commenced before or after that date.

[2] Use of Form

This form is a spousal support order for a limited term in which the court does not retain jurisdiction to extend support beyond the stated termination date. This form of order may be appropriate in a short-term marriage [*see In re Marriage of Wilson (1988) 201 Cal. App. 3d 913, 918-919, 247 Cal. Rptr. 522* ; *see also § 225.144[3]*]. It is doubtful that the court may impose this order on the parties absent their agreement if the marriage was of long duration. *Fam. Code § 4336* would seem to require the court to retain jurisdiction indefinitely in a marriage of long duration. Even before the statute was enacted, it was generally an abuse of discretion to terminate jurisdiction over spousal support in a long-term marriage [*see In re Marriage of Morrison (1978) 20 Cal. 3d 437, 453, 143 Cal. Rptr. 139, 573 P.2d 41]* . For discussion, see *§ 225.144[2]*.

Unless the parties agree that the amount of support is to be nonmodifiable [*see § 225.160*], the court will have jurisdiction to modify the amount of support until the termination date. However, under this order, the court will have no jurisdiction to extend the duration beyond that date, even if the supported spouse moves before that date to extend the duration [*see In re Marriage of Zlatnik (1988) 197 Cal. App. 3d 1284, 1286, 1291, 243 Cal. Rptr. 454* ; *In re Marriage of Foreman (1986) 183 Cal. App. 3d 129, 133-134, 228 Cal. Rptr. 4]* .

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19-225 California Forms of Pleading and Practice--Annotated § 225.378

§ 225.378 Nonmodifiable Support for Limited Period; Jurisdiction Terminated [Fam. Code §§ 3591(c), 3651(d), 4330, 4334, 4335]

[1] FORM Nonmodifiable Support for Limited Period; Jurisdiction Terminated [Fam. Code §§ 3591(c), 3651(d), 4330, 4334, 4335]

THE COURT ORDERS:

_____ [Petitioner *or* Respondent] is ordered to pay _____ [respondent *or* petitioner] spousal support in the sum of $_____ [*amount*] per month for a period of _____ [*period of support, e.g.*, ten years], commencing on _____ [*date support payments to begin*], and payable through _____ [*date support payments to end*], as follows: [*set forth payment terms, e.g.*, $250 on the first day of each month and $250 on the fifteenth day of each month]. This order is nonmodifiable, and the court does not retain jurisdiction over spousal support, either for the purpose of modifying the amount of support payments or for the purpose of extending the duration of support beyond the stated period.

[2] Use of Form

This form is a spousal support order for a fixed amount for a limited period. Under this order, the court does not retain jurisdiction with regard to either modification of the amount of support or extension of the duration of support.

The aspect of this order that terminates jurisdiction probably cannot be imposed in a long term marriage absent the agreement of the parties [*see Fam. Code § 4336(a)*; *In re Marriage of Christie (1994) 28 Cal. App. 4th 849, 861-865, 34 Cal. Rptr. 2d 135* , discussed in *§ 225.144[2]*]. Further, the amount of spousal support is always modifiable on a subsequent showing of changed circumstances unless the parties have agreed to the contrary [*Fam. Code §§ 3591(c), 3651(d)*]. Therefore, this order may only be made if the parties have agreed to it.

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19-225 California Forms of Pleading and Practice--Annotated § 225.379

§ 225.379 Support for Contingent Period of Time [Fam. Code §§ 4330, 4334]

[1] FORM Support for Contingent Period of Time [Fam. Code §§ 4330, 4334]

THE COURT ORDERS:

_____ [Petitioner *or* Respondent] is ordered to pay _____ [respondent *or* petitioner] spousal support in the sum of $_____ [*amount*] per month, payable [*set forth terms of payment, e.g.,* $250 on the first day of each month and $250 on the fifteenth day of each month], commencing on _____ [*date payments to begin*], and continuing thereafter until [*set forth contingent event when jurisdiction over support to terminate, e.g.,* such time as petitioner begins receiving her $1,000 monthly payments under her annuity contract, at which time this court's jurisdiction over spousal support shall terminate]. _____ [Respondent *or* Petitioner] is hereby expressly ordered to notify _____ [petitioner *or* respondent] on the happening of the contingency specified. This court retains jurisdiction to modify the amount of spousal support payments until the happening of the contingent event, but does not retain jurisdiction to modify this order so as to in any way change the effect of the happening of the contingent event.

[2] Use of Form

This form is a spousal support order for a contingent period of time until the happening of some event. The event should be one other than the death of either party or the remarriage of the supported spouse, which terminate support by operation of law absent agreement to the contrary [*see Fam. Code § 4337*].

If the court orders spousal support for a contingent period of time, the obligation terminates on the happening of the contingency. The court may in its order, require the supported party to notify the supporting party, or the supporting party's attorney of record, of the happening of the contingency [*Fam. Code § 4334(a)*]. If the supported party fails to give proper notice of the happening of the contingency and continues to accept spousal support payments, the supported party must refund payments received that accrued after the happening of the contingency. However, overpayments must be applied to any arrearages [*Fam. Code § 4334(b)*].

The amount of support under this order may be modified at any time before the happening of the contingency [*see Fam. Code § 3651*; for discussion of modification of support, *see § 225.200* et seq.]. However, this form is drafted so that jurisdiction is not retained to eliminate the effect of the contingent event on the support ordered. The form may be modified to achieve the opposite results with regard to modification [*see Fam. Code §§ 3591(c), 3651(d)*] and jurisdiction.

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19-225 California Forms of Pleading and Practice--Annotated § 225.380

§ 225.380 Change in Amount of Support [Fam. Code §§ 4320, 4330]--Substantive Step-Down

[1] FORM Change in Amount of Support [Fam. Code §§ 4320, 4330]--Substantive Step-Down

THE COURT ORDERS:

_____ [Petitioner *or* Respondent] is ordered to pay _____ [respondent *or* petitioner] spousal support in the sum of $_____ [*amount of initial payments*] per month for _____ [*term of initial payments, e.g.,* five years], commencing on _____ [*date initial payments to begin*], and ending on _____ [*date initial payments to end*]; thereafter, the sum of $_____ [*amount of stepped-down payments*] per month for [*term of stepped-down payments, e.g.,* three years], commencing on _____ [*date stepped- down payments to begin*] and ending _____ [*date stepped-down payments to end*]. The amount of spousal support payments for these periods shall not be subject to future modification or termination. However, jurisdiction over spousal support shall terminate on _____ [*date stepped-down payments to end*], and this court does not retain jurisdiction to extend the duration of support past that date, regardless of whether proceedings are commenced before or after that date.

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19-225 California Forms of Pleading and Practice--Annotated § 225.381

§ 225.381 Change in Amount of Support [Fam. Code §§ 4320, 4330]--Substantive Step-Up

[1] FORM Change in Amount of Support [Fam. Code §§ 4320, 4330]--Substantive Step-Up

THE COURT ORDERS:

_____ [Petitioner *or* Respondent] is ordered to pay _____ [respondent *or* petitioner] spousal support in the sum of $_____ [*amount of initial payments*] per month for _____ [*term of initial payments, e.g.,* nine months], commencing on _____ [*date initial payments to begin*], and ending on _____ [*date initial payments to end*]; thereafter, the sum of $_____ [*amount of stepped-up payments*] per month for [*term of stepped-up payments, e.g.,* three years], commencing on _____ [*date stepped- up payments to begin*], and continuing until _____ [petitioner *or* respondent]'s death or the death or remarriage of _____ [respondent *or* petitioner], or until further order of this court, whichever first occurs.

[2] Use of Forms

These forms exemplify possible step-down (*see § 225.380*) and step-up (*see § 225.381*) orders; that is, orders that require payment of a specified amount for a fixed period and specified lesser or greater amounts thereafter for an additional period or periods.

[3] Termination of Jurisdiction

A step-up or step-down order must address the question of jurisdiction at the end of the last term specified in the order. Jurisdiction may either be terminated without further recourse on that date (*see § 225.377*), retained indefinitely after the date passes (*see § 225.375*), or terminated on that date unless the supported spouse moves to extend duration before that date (*see § 225.376*). Whether the amounts of the various levels of payments are subject to future modification should also be addressed [*see In re Marriage of Jones (1990) 222 Cal. App. 3d 505, 509-511, 271 Cal. Rptr. 761* (step-down order is not per se nonmodifiable)]. Nonmodifiability must be by agreement and expressed in the order [

Fam. Code §§ 3591(c), 3651(d)]. Otherwise, the order is subject to future modification and termination [*Fam. Code §§ 3591(a), 3651(a)*]. *see §§ 225.380* and *225.381* demonstrate two possible resolutions of jurisdiction and modifiability.

[4] Basis for Change in Support

As a general rule, any change of support ordered to take place in the future must be based on reasonable inferences drawn from the evidence, not mere hopes or speculative expectations [*In re Marriage of Harrison (1986) 179 Cal. App. 3d 1216, 1230, 225 Cal. Rptr. 234* ; *In re Marriage of Martinez (1984) 156 Cal. App. 3d 20, 34 n.6, 202 Cal. Rptr. 646* (to support step-down there must be proof that supported spouse's earnings will improve or that his or her needs will decrease or that the supporting spouse's ability to pay will decrease); *see In re Marriage of Cheriton (2001) 92 Cal. App. 4th 269, 308-310, 111 Cal. Rptr. 2d 755* ; *In re Marriage of Prietsch & Calhoun (1987) 190 Cal. App. 3d 645, 658-659, 235 Cal. Rptr. 587* (no evidence to support step-down)]. Step-down orders have been approved in cases in which there was evidence that the supported spouse's needs would decrease because of potential employment [*In re Marriage of Kelley (1976) 64 Cal. App. 3d 82, 94-95, 134 Cal. Rptr. 259* ; *In re Marriage of Dennis (1973) 35 Cal. App. 3d 279, 282-284, 110 Cal. Rptr. 619* ; *see In re Marriage of Andreen (1978) 76 Cal. App. 3d 667, 672, 143 Cal. Rptr. 94* ; *see also In re Marriage of Rising (1999) 76 Cal. App. 4th 472, 479 n.9, 90 Cal. Rptr. 2d 380* (in modification action, when court finds change of circumstances justifying support decrease, court may allow decrease to be phased in over time, provided at time order issued, court had discretion to reduce support to final step-down amount)].

A step-down order was disapproved insofar as it reduced support each year for three years even though there was no showing that needs would be less, but approved insofar as it reduced the award to $1 after four years because there was evidence that the supported spouse would have completed her education in that time [*In re Marriage of Smith (1978) 79 Cal. App. 3d 725, 739-741, 145 Cal. Rptr. 205]* . A step-up in spousal support payments was approved based on the evidence that the supporting spouse would resume full-time employment at the time when support would be increased [*In re Marriage of Acosta (1977) 67 Cal. App. 3d 899, 902, 137 Cal. Rptr. 33]* .

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§ 225.382 Payment of Debts [Fam. Code § 2023(a)]--Sample Provision

[1] FORM Payment of Debts [Fam. Code § 2023(a)]--Sample Provision

THE COURT FURTHER ORDERS:

As additional spousal support, Respondent shall pay directly to _____ [*specify creditor of supported spouse, e.g.,* the University of California] on behalf of Petitioner the _____ [*specify nature of debt, e.g.,* actual cost of Petitioner's tuition], _____ [*specify duration of payments, e.g.,* beginning with the 1994 Fall semester, and continuing for eight consecutive semesters or until further order of this court. Payments shall be made on or before the due date for payment of tuition each semester as established by the University of California].

[2] Use of Form

This form is an illustration of a spousal support order for support in the form of payment to a creditor of the supported spouse. If payment of an obligation would benefit a party to a family law proceeding, or a child for whom support may be ordered, the court may order the other party to pay the obligation, or a portion of it, directly to the creditor [*Fam. Code § 2023(a)*]. The creditor has no right to enforce the order directly against the spouse ordered to make the payment; but the creditor's rights are in no way affected by the order [*Fam. Code § 2023(b)*]. Ordering direct payment protects the supporting spouse by assuring that the debt is paid [*see In re Marriage of Higgason (1973) 10 Cal. 3d 476, 488, 110 Cal. Rptr. 897, 516 P.2d 289* (disapproved on another point in *In re Marriage of Dawley (1976) 17 Cal. 3d 342, 352, 131 Cal. Rptr. 3, 551 P.2d 323*)].

[3] Payments to Creditors as Spousal Support

Direct payments to creditors for the benefit of the supported spouse are part of the supporting spouse's spousal support obligation [*In re Marriage of Smith (1978) 79 Cal. App. 3d 725, 748, 145 Cal. Rptr. 205]* . They may be ordered for either overdue or future obligations [*In re Marriage of Chala (1979) 92 Cal. App. 3d 996, 1000, 155 Cal. Rptr. 605]* . With regard to periodic obligations to fall due in the future, a direct payment order is appropriate if there is a need for

spousal support and the total support ordered (payments to creditors plus payments directly to spouse) is reasonable [*In re Marriage of Chala (1979) 92 Cal. App. 3d 996, 1002, 155 Cal. Rptr. 605* ; *see In re Marriage of De Guigne (2002) 97 Cal. App. 4th 1353, 1367, 119 Cal. Rptr. 2d 430* (payments for future living expenses do not include refundable rent or security deposits); *In re Marriage of Garcia (1990) 224 Cal. App. 3d 885, 892, 274 Cal. Rptr. 194* (payment of continuing debt to third party is form of spousal support if related to living expenses); *In re Marriage of Smith (1978) 79 Cal. App. 3d 725, 748, 145 Cal. Rptr. 205]* .

If the direct payment order is properly characterized as spousal support, alimony tax treatment is proper [Temp. Treas. Reg. § 1.71-1T(b), Q-6, Q-7; *see I.R.C. § 71(b)(1)(A)*]. For further discussion, see Ch. 227, *Dissolution of Marriage: Tax Effects of Dissolution* .

[4] Payments to Creditors as Community Obligation

Court-ordered direct payments of past obligations incurred during marriage (community obligations) are to be distinguished from payments that constitute spousal support. If such a direct-payment order results in an unequal division of community property, it is questionable whether the order is appropriate as a form of spousal support because it confuses the discretionary right to spousal support with a spouse's absolute right to an equal division of the community assets [*see In re Marriage of Brown (1976) 15 Cal. 3d 838, 848, 126 Cal. Rptr. 633, 544 P.2d 561* (discussed in *§ 225.15*); *see also In re Marriage of Fonstein (1976) 17 Cal. 3d 738, 748, 131 Cal. Rptr. 873, 552 P.2d 1169* (parties entitled to equal division of net community estate, subtracting community obligations from community assets)].

In one case, the court of appeal rejected a direct-payment order that resulted in an unequal division of community property and ordered the community obligations to be paid from community cash on hand. The court stated that the trial court should have considered the appropriateness of spousal support separately, according to the appropriate statutory standards [*In re Marriage of Chala (1979) 92 Cal. App. 3d 996, 1003, 155 Cal. Rptr. 605]* . However, the court's reasoning suggested that under some circumstances, such an order would be appropriate if the amount ordered to be paid directly to creditors was, in fact, reflective of a reasonable spousal support award [*In re Marriage of Chala (1979) 92 Cal. App. 3d 996, 1001-1003, 155 Cal. Rptr. 605* (analyzing *In re Marriage of Epstein (1979) 24 Cal. 3d 76, 82-86, 154 Cal. Rptr. 413, 592 P.2d 1165* , in which Supreme Court held that spouse who after separation voluntarily discharges community debts with separate property is entitled to reimbursement from community unless payment is made to discharge duty of support)]. Shortly thereafter, the same court confronted a similar case and held that an unequal distribution of community obligations could not stand as spousal support because the spouse ordered to make the payments was already ordered to pay a reasonable amount of spousal support [*In re Marriage of Marx (1979) 97 Cal. App. 3d 552, 557-558, 159 Cal. Rptr. 215]* . Again, the court suggested that the direct-payment order might be valid if it were in lieu of, rather than in addition to, reasonable support [*In re Marriage of Marx (1979) 97 Cal. App. 3d 552, 558, 159 Cal. Rptr. 215]* . However, the court also noted another problem with casting an unequal division of community obligations as spousal support. In the absence of an agreement, a spousal support obligation terminates on the death of either party or on remarriage of the supported spouse [*Fam. Code § 4337*; *see § 225.200* et seq.]. An order to directly pay community obligations would not reasonably be expected to terminate on the happening of these events [*In re Marriage of Marx (1979) 97 Cal. App. 3d 552, 558-559, 159 Cal. Rptr. 215]* . This difficulty demonstrates the problem of attempting to resolve community estate issues through spousal support awards and suggests that such an award is not appropriate.

If direct payment of community debts cannot be characterized as spousal support, the payor spouse is entitled to *Epstein* credits to equalize the division of the community estate [*In re Marriage of Garcia (1990) 224 Cal. App. 3d 885, 895, 274 Cal. Rptr. 194* ; *see In re Marriage of Epstein (1979) 24 Cal. 3d 76, 154 Cal. Rptr. 413, 592 P.2d 1165]* . Whether a given payment is, in reality, in discharge of an obligation of support or simply the discharge of a community obligation is determined on the basis of the nonpaying spouse's need for support, and whether the payment was in lieu of support, or in addition to reasonable support already being provided [*In re Marriage of Garcia (1990) 224 Cal.*

App. 3d 885, 893, 274 Cal. Rptr. 194] . For full discussion of property and debt division issues, including *Epstein* credits, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

[5] State Statutes

Court as having power to order payment directly to creditor, on determination that payment would benefit either party. *Fam. Code § 2023(a)*

Creditor as having no right to enforcement against spouse ordered to make payment. *Fam. Code § 2023(b)*

[6] Federal Statutes

Alimony tax treatment as proper when direct payment to creditor is in lieu of spousal support. Temp. Treas. Reg. § 1.71-1T(b), Q-6, Q-7

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19-225 California Forms of Pleading and Practice--Annotated § 225.383

§ 225.383 Provisions for Support After Death of Supporting Party [Fam. Code § 4360]--Purchase of Annuity

[1] FORM Provisions for Support After Death of Supporting Party [Fam. Code § 4360]--Purchase of Annuity

THE COURT FURTHER ORDERS:

As additional spousal support, _____ [petitioner *or* respondent] shall purchase at his/her sole cost, within _____ days of the date of this judgment, an annuity contract for the benefit of _____ [respondent *or* petitioner]. The annuity shall provide for payments to _____ [respondent *or* petitioner] in a minimum amount of $_____ per month, beginning _____ [*date*]. [*Specify any condition terminating obligation, e.g.,* This obligation shall be terminated should _____ [respondent *or* petitioner] die or remarry during _____ [petitioner *or* respondent]'s lifetime.]

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19-225 California Forms of Pleading and Practice--Annotated § 225.384

§ 225.384 Provisions for Support After Death of Supporting Party [Fam. Code § 4360]--Maintenance of Life Insurance

[1] FORM Provisions for Support After Death of Supporting Party [Fam. Code § 4360]--Maintenance of Life Insurance

THE COURT FURTHER ORDERS:

As additional spousal support, _____ [petitioner *or* respondent] shall purchase at his/her sole cost, within _____ days of the date of this judgment, a term life insurance policy on his/her life, naming _____ [respondent *or* petitioner] as sole primary beneficiary, and providing for a death benefit of not less than $_____. _____ [Petitioner *or* Respondent] shall maintain this insurance in effect for a minimum term of _____ [*minimum term, e.g.,* 15 years] from the date of purchase. [*Specify any condition terminating obligation, e.g.,* This obligation shall be terminated should _____ [respondent *or* petitioner] die or remarry during _____ [petitioner *or* respondent]'s lifetime.]

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19-225 California Forms of Pleading and Practice--Annotated § 225.385

§ 225.385 Provisions for Support After Death of Supporting Party [Fam. Code § 4360]--Establishment of Trust

[1] FORM Provisions for Support After Death of Supporting Party [Fam. Code § 4360]--Establishment of Trust

THE COURT FURTHER ORDERS:

As additional spousal support, _____ [petitioner *or* respondent] shall establish an inter vivos trust within _____ days of the date of this judgment, naming _____ [respondent *or* petitioner] as sole primary beneficiary and _____ [(*name*) *or* an institutional fiduciary] as trustee. This trust shall be initially funded with property worth not less than $_____. The trust instrument shall provide for distributions of principal and interest to _____ [respondent *or* petitioner] for his/her support to commence on the death of _____ [petitioner *or* respondent], or earlier. [*Specify any condition terminating obligation, e.g.,* This obligation shall be terminated should _____ [respondent *or* petitioner] die or remarry during _____ [petitioner's *or* respondent's] lifetime.]

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19-225 California Forms of Pleading and Practice--Annotated § 225.386

§ 225.386 Supporting Party Required to Cooperate in Purchase of Life Insurance by Other Party [Fam. Code § 2010]

[1] FORM Supporting Party Required to Cooperate in Purchase of Life Insurance by Other Party [Fam. Code § 2010]

_____ [*Supported party, e.g.,* Petitioner] may purchase and maintain a life insurance policy on _____ [*supporting party's, e.g.,* respondent's] life, at _____ [*supported party's, e.g.,* petitioner's] own expense, [with a face value of $_____]. _____ [*Supporting party, e.g.,* Respondent] shall cooperate with _____ [*supported party's, e.g.,* petitioner's] acquisition of life insurance on his/her life by taking all reasonable steps to facilitate such acquisition, including, but not limited to, promptly completing an insurance application and submitting to a medical examination.

[2] Use of Forms

§§ 225.383-225.386, are examples of spousal support orders intended to continue support after the death of the supporting spouse [*see Fam. Code § 4360*; *In re Marriage of O'Connell (1992) 8 Cal. App. 4th 565, 572, 10 Cal. Rptr. 2d 334* ; *cf. Fam. Code § 4337* (support generally terminates on death of supporting spouse)]. In structuring spousal support, the court may order the supporting spouse to purchase an annuity (*see § 225.383*), maintain life insurance (*see § 225.384*), or establish a trust (*see § 225.385*) for the benefit of the supported spouse so that the supported spouse will not be left without means for support if spousal support is otherwise terminated by the death of the supporting spouse [*Fam. Code § 4360(a)*]. Except as otherwise agreed to by the parties in writing, the order may be modified or terminated at the discretion of the court at any time before the death of the supporting spouse [*Fam. Code § 4360(b)*].

The court may also order the supporting spouse to cooperate in the *supported spouse's purchase* of insurance on the supporting spouse's life, by requiring the supporting spouse to apply for life insurance naming the supported spouse as beneficiary--that the supported spouse will pay for (*see § 225.386*). This is not, however, treated as an order under *Fam. Code § 4360*, but an order under the court's general power to make orders on specific family law matters, including support and injunctive relief [*In re Marriage of Stimel (1996) 49 Cal. App. 4th 991, 994-996, 57 Cal. Rptr. 2d 18*

(wife's motion for order directing her former husband to apply for life insurance naming her as beneficiary and stipulating she would pay all insurance premiums was not motion to modify spousal support); *see Fam. Code § 2010*].

[3] Nature of Order

An order requiring the supporting spouse to purchase an annuity, maintain life insurance, or establish a trust does not effect a property division, but rather is merely a form of awarding spousal support [*In re Marriage of Ziegler (1989) 207 Cal. App. 3d 788, 791, 255 Cal. Rptr. 100]* . Nor does an order for security for support to be paid during the obligor's lifetime effect a division of property [*In re Marriage of O'Connell (1992) 8 Cal. App. 4th 565, 572, 10 Cal. Rptr. 2d 334]* .

However, with regard to the extent of the supporting party's obligation, there is some disparity of viewpoint as to the nature of an order under *Fam. Code § 4360*. It has been said that such a provision does not extend the obligor's support obligation beyond his or her death. Death still ends the obligor's support obligation, but creates a new obligation in the insurer, annuity provider, or trust to the supported spouse [*see In re Marriage of O'Connell (1992) 8 Cal. App. 4th 565, 572, 10 Cal. Rptr. 2d 334]* . On the other hand, an unexecuted provision has been found to be an agreement of the parties to extend support beyond the death of the payor, so that the provision was enforceable against the estate of the supporting spouse [*see Lucas v. Elliott (1992) 3 Cal. App. 4th 888, 893-894, 4 Cal. Rptr. 2d 746]* .

The propriety of such an order is placed before the court if support is properly placed at issue by the pleadings. It is not necessary to specifically request an order under *Fam. Code § 4360* [*see In re Marriage of O'Connell (1992) 8 Cal. App. 4th 565, 573-576, 10 Cal. Rptr. 2d 334* (court could consider propriety of life insurance order on obligor's motion to decrease support due to disability)].

[4] Cobeneficiaries on Insurance Policy

With regard to life insurance, one court has stated that the court may require an insured spouse to designate his or her support obligees as cobeneficiaries of an existing policy, without notice to the current beneficiary, even if the current beneficiary is a subsequent spouse and the premiums are being paid with community property from the second marriage [*In re Marriage of O'Connell (1992) 8 Cal. App. 4th 565, 576-581, 10 Cal. Rptr. 2d 334* (language is dicta to extent that it addresses community property interests, because appellate court noted that absence of factual finding regarding source of payment of premiums)]. In the view of this court, a change in life insurance beneficiaries to fulfill an existing support obligation is not a gift of community property that may be set aside by the second spouse, because the community property of the subsequent marriage is liable for an obligor's support obligations from a prior relationship [*In re Marriage of O'Connell (1992) 8 Cal. App. 4th 565, 580, 10 Cal. Rptr. 2d 334* ; *see § 225.113[3]*]. Apparently, the court was of the view that the redesignation would not defeat the subsequent spouse's community property interest in the proceeds of insurance, although that point was not at issue in the case and the court's treatment of it is unclear [*see In re Marriage of O'Connell (1992) 8 Cal. App. 4th 565, 577-578, 581 n.13, 10 Cal. Rptr. 2d 334]* .

[5] State Statutes

Absent agreement of parties, support as terminating on death of either party or remarriage of supported party. *Fam. Code § 4337*

Purchase of annuity, maintenance of life insurance, or establishment of trust for spousal support. *Fam. Code § 4360(a)*

Court as having power to modify or terminate order for annuity, life insurance, or trust for support, except as otherwise agreed by parties. *Fam. Code § 4360(b)*

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19-225 California Forms of Pleading and Practice--Annotated § 225.387

§ 225.387 Percentage of Potential Future Income [Fam. Code §§ 4320, 4330]

[1] FORM Percentage of Potential Future Income [Fam. Code §§ 4320, 4330]

THE COURT FURTHER ORDERS:

As additional spousal support, _____ [petitioner *or* respondent] shall pay to _____ [respondent *or* petitioner] _____ [*percentage of income to be paid, e.g.,* 20] percent of the amount of all supplemental income received on account of his/her employment with _____ [*name of supporting party's employer*]. No later than _____ [*date when supporting spouse must provide annual accounting, e.g.,* February 15] of each year, beginning in _____ [*year*], _____ [petitioner *or* respondent] shall provide _____ [respondent *or* petitioner] with a written accounting of all supplemental income received during the previous calendar year and shall attach a copy of his/her prior year W-2 form received from _____ [*name of supporting party's employer*]. Payment of _____ [*percentage of income to be paid, e.g.,* 20] percent of total supplemental income shall accompany the accounting; however, _____ [petitioner *or* respondent], at his/her option, may pay _____ [*percentage of income to be paid, e.g.,* 20] percent of supplemental income to _____ [respondent *or* petitioner] when received. For purposes of this order, supplemental income means all monetary compensation received by _____ [petitioner *or* respondent] from _____ [*name of supporting party's employer*], regardless of how designated, except for his/her base annual salary. This order shall remain in effect as long as _____ [petitioner *or* respondent] is employed by _____ [*name of supporting party's employer*], or until further order of this court.

[2] Use of Form

This form provides for additional spousal support, computed as a percentage of contingent income. A spousal support order may be fashioned to provide for payment of a percentage of future income, the receipt of which or the amount of which is uncertain at the time when the order is made. For example, if a supporting spouse customarily receives periodic and substantial employment bonuses, a percentage of the bonuses, if and when received, may be awarded as

spousal support [*In re Marriage of Smith & Ostler (1990) 223 Cal. App. 3d 33, 41-42, 46-50, 272 Cal. Rptr. 560]* .

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19-225 California Forms of Pleading and Practice--Annotated § 225.388

§ 225.388 Reservation of Jurisdiction Only [Fam. Code §§ 4320, 4336]

[1] FORM Reservation of Jurisdiction Only [Fam. Code §§ 4320, 4336]

THE COURT FURTHER ORDERS:

This court retains jurisdiction over the issue of spousal support for each party until the party's death, remarriage, or further order of this court.

[2] Use of Form

This form is a provision that retains jurisdiction to award spousal support in the future even though no award is currently being made. The lack of any support award indicates that the court has determined, or the parties have agreed, that neither is currently entitled to support under the standards of *Fam. Code § 4320*.

The rule has been that if no spousal support is ordered, jurisdiction is lost unless retained expressly in the order or by agreement [*see Cochran v. Cochran (1970) 13 Cal. App. 3d 339, 344, 91 Cal. Rptr. 630]* . However, it appears that in a marriage of long duration under *Fam. Code § 4336*, jurisdiction is retained indefinitely without the need for any express language in the judgment. But because of some uncertainty over the construction of this statute, it is recommended that express language reserving jurisdiction be included regardless of the length of the marriage, if the determination of the court or the agreement of the parties is that jurisdiction should be reserved. For further discussion, see *§ 225.141*.

[3] Token Award

Traditionally, a token award, such as $1.00 per year, was awarded for the purpose of reserving jurisdiction if the court felt that one party might be in need of support at a later date [*see In re Marriage of Forcum (1983) 145 Cal. App. 3d 599, 605, 193 Cal. Rptr. 596* ; *In re Marriage of Boseman (1973) 31 Cal. App. 3d 372, 378, 107 Cal. Rptr. 232]* . However, jurisdiction may be retained by a simple recitation in the order without making a token award [*see, e.g., In*

re Marriage of Liss (1992) 10 Cal. App. 4th 1426, 1428, 13 Cal. Rptr. 2d 397 ; *In re Marriage of Wells (1988) 206 Cal. App. 3d 1434, 1436, 254 Cal. Rptr. 185]* . Such a recitation has the advantage of clarifying that jurisdiction is being retained to award support to either party in the future, not just to the party to whom the dollar is awarded.

[4] Duration of Marriage

It has been held to be an abuse of discretion to retain jurisdiction to award spousal support to a spouse in a short-term marriage who is in good health and permanently employed at a self-supporting income level [*see In re Marriage of Hebbring (1989) 207 Cal. App. 3d 1260, 1266-1267, 255 Cal. Rptr. 488]* . If both spouses meet this definition, it is unresolved whether it would also be an abuse of discretion for the court to retain jurisdiction to award support in the future to either party, should unforeseen circumstances, such as disability or unemployment, create a need for support. In light of *Fam. Code § 4336*, it is undoubtedly not an abuse of discretion to retain jurisdiction indefinitely in a long-term marriage, even if neither party is currently in need of support. In fact, retention of jurisdiction appears to be required by the statute unless the parties agree that it should not be retained [*see § 225.144[2]*].

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19-225 California Forms of Pleading and Practice--Annotated § 225.389

§ 225.389 No Support; Jurisdiction Terminated [Fam. Code §§ 4320, 4336]

[1] FORM No Support; Jurisdiction Terminated [Fam. Code §§ 4320, 4336]

THE COURT FURTHER ORDERS:

Each party waives and releases all rights to receive spousal support from the other for all time. This court does not retain jurisdiction to order spousal support in the future to either party, regardless of any circumstances that may arise.

[2] Use of Form

This form is a provision designed to dispense with spousal support permanently. It neither awards support nor retains jurisdiction to consider the matter in the future. In a marriage of long duration, this provision probably may only be ordered on the agreement of the parties. *Fam. Code § 4336* appears to require indefinite retention of jurisdiction in a long-term marriage except on written agreement of the parties to the contrary [*see Fam. Code § 4336(a)*]. For further discussion, see *§ 225.144[2]*.

[3] State Statutes

Factors considered in ordering spousal support. *Fam. Code § 4320*

Court as having power to order spousal support in proceeding for dissolution or legal separation. *Fam. Code § 4330*

Court as required to retain jurisdiction over spousal support indefinitely in marriage of long duration. *Fam. Code § 4336*

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19-225 California Forms of Pleading and Practice--Annotated § 225.390

§ 225.390 Spousal, Partner, or Family Support Order Attachment to Findings and Order After Hearing, or Judgment [Fam. Code §§ 4320, 4332]-- Cal. Judicial Council Form FL-343]

[1] FORM Spousal, Partner, or Family Support Order Attachment to Findings and Order After Hearing, or Judgment [Fam. Code §§ 4320, 4332]-- Cal. Judicial Council Form FL-343]

Click here to view image.

[2] Use of Form

This form is the Judicial Council form of Spousal, Partner, or Family Support Order Attachment [Cal. Judicial Council Form FL-343], for use as an attachment to either the Judicial Council form of Judgment or the form of Findings and Order After Hearing [*see* Cal. Judicial Council Forms FL-180, FL-340]. The legend in the lower left corner of the form indicates "approved for optional use," but in the official forms list, an asterisk next to the form indicates it has been adopted for mandatory use. For an example of the latter forms, see Ch. 221, *Dissolution of Marriage: Procedure* . This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents of Form

When this form is used, particular care and attention to detail are required. Paragraph 1 requires that a "printout of a computer calculation of the parties' financial circumstances [be] attached for all required items not filled out ..." in the form. However, it appears that the printout referred to at the beginning of the form is only appropriate if the order is for family support. It is not appropriate if the order is for spousal support only.

In addition, because income is only one of several factors that must be considered in making a spousal support order, it will be necessary to set forth additional findings [*see Fam. Code § 4320*; *In re Marriage of Fenton (1982) 134 Cal. App. 3d 451, 457-458, 184 Cal. Rptr. 597]* . At a minimum, *Fam. Code § 4332*, requires a finding on the standard of

living during marriage.

It appears that Paragraph 3, "Other factors regarding permanent spousal or partner support," is intended for use in setting forth other findings of this nature. Checkoff boxes are provided to indicate the length of marriage or the duration of the registered domestic partnership, to recite that *Fam. Code § 4320* factors were considered (and contemplates an attachment listing them), and to describe the marital standard of living. An additional box for "other" factors is also provided. Because of the space limitations of the form, one or more attachments may be needed to fully describe this information. An attachment, such as the Judicial Council Additional Page Form, may be used for that purpose. If the parties have reached an agreement on support, it may also be appropriate to make reference to that agreement by marking the "other" box, indicating there is an attachment, and then appending the provisions of the support agreement in the attachment. If a statement of decision has been requested that sets forth the desired findings, it appears that this may also be attached by marking the "other" box and making reference to the statement as being attached [*see Fam. Code § 2338(a)*]. Findings are discussed in detail, and sample findings are *set forth, in § 225.373*.

The *Orders* part of the form (Paragraphs 4-10) also requires careful attorney attention. Paragraph 4 contains checkoff boxes by which counsel can indicate to whom support will be paid, whether it is characterized as spousal, partner, or family support, and the actual payment amount and times of payment. The duration of support should also be specified, which, depending on the circumstances, could be indefinite, or until a specific date or, if appropriate, until an event, such as the supported party becoming employed full time. Paragraph 4 also contains the preprinted statement that the support payor's obligation to pay support terminates on the death, remarriage, or registration of a new domestic partnership of the support payee. Paragraph 4 further provides for issuance of a wage assignment for support, but also for the option that service of the wage assignment be stayed if the support payor is not a specified amount of time late in payment of support ordered. Note that if the preprinted payment provisions of Paragraph 4 are not appropriate to the circumstances, the form provides for an "Other" box in Paragraph 10. §§ 225.375-225.389 demonstrate the common variations of modification, duration, and jurisdiction, from which counsel should select the appropriate language to include in Paragraph 10. Optional Paragraphs 5 and 6, respectively, should be marked if the court orders that the parties must notify each other of changes in employment; and if the court requires that notice be given of the statutory goal that each party make good faith efforts to become self-supporting.

If the order is one for family support, the box in Paragraph 7 is to be marked, and both parties must complete and file with the court a Child Support Case Registry Form [Cal. Judicial Council Form FL-191] within 10 days after issuance of the order. Parents must notify the court of any change of information in that form within 10 days of the change by filing an updated form. In addition, when a family support order is made, the informational form of Notice of Rights and Responsibilities--Health Care Costs and Reimbursement Procedures and Information Sheet on Changing a Child Support Order [Cal. Judicial Council Form FL-192] must be attached.

Paragraph 8 allows the court to reserve the issue of spousal or partner support for a later determination. Paragraph 9 allows the court to terminate jurisdiction over the issue of spousal or partner support.

[4] State Statutes

Statement of decision in lieu of written findings of fact. *Code Civ. Proc. § 632*

Provisions of agreement for spousal support as subject to modification or termination by court. *Fam. Code § 3591*

Court as having authority to modify or terminate spousal support as it deems necessary. *Fam. Code § 3651*

General duty of spousal support. *Fam. Code § 4300*

Factors considered in awarding spousal support. *Fam. Code § 4320*

Court as having authority to order spousal support in proceeding for dissolution or legal separation. *Fam. Code § 4330*

In ordering support, court as required to make specific findings of fact concerning standard of living during marriage, and also concerning any other circumstances for which findings are requested by parties. *Fam. Code § 4332*

When support ordered for fixed time period, support as terminating at end of period provided in order, not to be extended unless court retains jurisdiction. *Fam. Code § 4335*

Court as retaining jurisdiction over spousal support indefinitely in marriage of long duration. *Fam. Code § 4336*

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19-225 California Forms of Pleading and Practice--Annotated § 225.391

§ 225.391 Nonmodifiable Clause [Fam. Code §§ 3591(c), 3651(c), 4323]

[1] FORM Nonmodifiable Clause [Fam. Code §§ 3591(c), 3651(c), 4323]

THE COURT FURTHER ORDERS:

The amount of spousal support provided in this judgment may not be modified either upward or downward or terminated by any court in the future, regardless of any change of circumstances that might occur. However, _____ [petitioner *or* respondent]'s obligation to pay spousal support shall terminate on the death of either party or on the remarriage of _____ [respondent *or* petitioner]. [Further, the effect of _____ (respondent *or* petitioner)'s cohabitation with a person of the opposite sex may be considered by the court under *Family Code Section 4323(a)(1)*.]

[2] Use of Form

This form is a provision to make the amount of spousal support nonmodifiable. In general, a support order may be modified or terminated at any time as the court determines to be necessary, except as to amounts that accrued before the date of the filing of the moving papers to modify or terminate [*Fam. Code §§ 3591(a), (b), 3651(a), (b)*]. However, an order for spousal support may not be modified or terminated if a written agreement, or an oral agreement entered into in open court, between the parties specifically provides that the spousal support is not subject to modification or termination [*Fam. Code §§ 3591(c), 3651(d)*]. For further discussion, see *§ 225.160*.

[3] Factors to Consider in Nonmodifiable Support Agreements

Modification of amount should be considered in conjunction with retention of jurisdiction to extend the duration of support if it is ordered for a limited period (*see §§ 225.375 -225.378*). Commonly, one party will agree to pay a nonmodifiable amount of support in exchange for a definite termination of support after a given period of time (*see § 225.378*). However, the parties might agree that support should be both for an open-ended period (*see § 225.375*) and also nonmodifiable, or for a limited period that can be extended (*see §§ 225.376, 225.377*), but nonmodifiable as to

amount during the period stated.

Modification should also be considered in conjunction with whether support should terminate by operation of law or be continued by agreement on the death of either party or on the remarriage of the supported spouse [*see Fam. Code § 4337*]. One court construed nonmodification provisions in the parties' agreement as overriding the statute and continuing support beyond the remarriage of the supported spouse; there was ample evidence in the case that this was, in fact, the intent of the parties [*see In re Marriage of Sherman (1984) 162 Cal. App. 3d 1132, 1134-1139, 208 Cal. Rptr. 832* ; *but see In re Marriage of Glasser (1986) 181 Cal. App. 3d 149, 152-153, 226 Cal. Rptr. 229* (opposite result; offer of extrinsic evidence to prove intent not allowed)]. For this reason, it is recommended that a nonmodifiable clause be followed by language reaffirming that support is to terminate by operation of law under *Fam. Code § 4337*, if that is the intent of the parties. For further discussion, see *§ 225.161*.

The effect of cohabitation and *Fam. Code § 4323* should also be considered. It has been held that support may not be reduced on account of the supported spouse's subsequent cohabitation if the agreement provides that it is not modifiable on any ground [*see In re Marriage of Sasson (1982) 129 Cal. App. 3d 140, 147, 180 Cal. Rptr. 815]* . If it is the intent of the parties that subsequent cohabitation by the supported spouse should be considered as a potential basis for modification, counsel should include the optional language permitting that consideration.

If support is made nonmodifiable by agreement, it also cannot be terminated in the sense of being modified down to $0 [*In re Marriage of Bennett (1983) 144 Cal. App. 3d 1022, 1025-1026, 193 Cal. Rptr. 113]* . Termination in this sense is a different matter from termination of jurisdiction and termination by operation of law, and the drafter must consider the intent of the parties as to all three issues. For further discussion of termination of support, see *§ 225.200* et seq.

[4] State Statutes

Provisions of agreement for spousal support as subject to modification or termination by court. *Fam. Code § 3591*

Court as having authority to modify or terminate spousal support as it deems necessary. *Fam. Code § 3651*

Rebuttable presumption of decreased need for support when supported party cohabiting with person of opposite sex. *Fam. Code § 4323(a)*

When support ordered for fixed time period, support as terminating at end of period provided in order, not to be extended unless court retains jurisdiction. *Fam. Code § 4335*

Court as retaining jurisdiction over spousal support indefinitely in marriage of long duration. *Fam. Code § 4336*

Absent agreement of the parties, spousal support obligation as terminating upon death of either party or remarriage of supported party. *Fam. Code § 4337*

[5] Cross References

For a related form, see *§ 225.375*.

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19-225 California Forms of Pleading and Practice--Annotated § 225.392

§ 225.392 Nontermination on Remarriage [Fam. Code § 4337]

[1] FORM Nontermination on Remarriage [Fam. Code § 4337]

THE COURT FURTHER ORDERS:

The spousal support payments provided for in this agreement shall not terminate should _____ [respondent *or* petitioner] remarry, but instead will continue until the death of either party or further order of the court.

[2] Use of Form

The foregoing form is a provision in a support agreement that provides that support will continue even if the supported spouse remarries. Use of this provision will avoid termination that will otherwise occur by operation of law on the remarriage of the supported spouse [*see Fam. Code § 4337* (absent agreement, remarriage of supported spouse terminates support)]. It has been held that such express language is required to negate the operation of the statute [*see In re Marriage of Glasser (1986) 181 Cal. App. 3d 149, 152-153, 226 Cal. Rptr. 229]* , and although there is authority to the effect that a general nonmodifiable clause (*see § 225.391*) is sufficient [*see In re Marriage of Sherman (1984) 162 Cal. App. 3d 1132, 1134-1139, 208 Cal. Rptr. 832]* , use of this form will resolve any ambiguity. For further discussion, see *§ 225.161*.

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19-225 California Forms of Pleading and Practice--Annotated § 225.393

§ 225.393 Nontermination on Death [Fam. Code § 4337]--Death of Supporting Spouse

[1] FORM Nontermination on Death [Fam. Code § 4337]--Death of Supporting Spouse

THE COURT FURTHER ORDERS:

The spousal support payments provided for in this agreement shall not terminate on the death of _____ [respondent *or* petitioner] (the supporting party), but instead shall constitute a claim against _____ [petitioner *or* respondent]'s estate until the death or remarriage of _____ [respondent *or* petitioner] or further order of this court.

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19-225 California Forms of Pleading and Practice--Annotated § 225.394

§ 225.394 Nontermination on Death [Fam. Code § 4337]--Life Insurance Requirements Enforceable Against Estate

[1] FORM Nontermination on Death [Fam. Code § 4337]--Life Insurance Requirements Enforceable Against Estate

THE COURT FURTHER ORDERS:

The spousal support payments provided for in this agreement shall terminate on _____ [respondent *or* petitioner]'s remarriage, or on the death or either party, or on further order of this court. However, the requirement that _____ [petitioner *or* respondent] procure life insurance as set forth in paragraph _____ [*paragraph number*] of this agreement shall be an enforceable obligation and claim against _____ [petitioner *or* respondent]'s estate, should he/she predecease _____ [respondent *or* petitioner].

[2] Use of Forms

The foregoing forms are possible provisions to continue support after the death of the supporting spouse. In the absence of such a provision, support terminates by operation of law on the death of either the payor or the payee [*Fam. Code § 4337*; *see Hilton v. McNitt (1957) 49 Cal. 2d 79, 82-83, 315 P.2d 1]* . For further discussion, see *§ 225.161*.

§ 225.393 provides that support will continue after the death of the supporting spouse and is payable from his or her estate. The more common approach to continuing support after the death of the payor is to include an annuity, life insurance, or trust provision under *Fam. Code § 4360* (*see §§ 225.383 -225.385*). *§ 225.394* is for use in conjunction with such a provision. It clarifies that the obligation of support terminates on the payor's death, but that the annuity, life insurance, or trust provision is enforceable against the payor's estate if the payor does not put the provision into effect during his or her lifetime [*see In re Marriage of O'Connell (1992) 8 Cal. App. 4th 565, 572, 10 Cal. Rptr. 2d 334* ; *Lucas v. Elliott (1992) 3 Cal. App. 4th 888, 893-894, 4 Cal. Rptr. 2d 746]* .

[3] State Statutes

Absent agreement of the parties, spousal support obligation as terminating upon death of either party or remarriage of supported party. *Fam. Code § 4337*

Provision for support after death of supporting party by annuity, life insurance, or trust. *Fam. Code § 4360*

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19-225 California Forms of Pleading and Practice--Annotated § 225.395

§ 225.395 Subsequent Cohabitation [Fam. Code § 4323]--Cohabitation to Have No Effect

[1] FORM Subsequent Cohabitation [Fam. Code § 4323]--Cohabitation to Have No Effect

THE COURT FURTHER ORDERS:

The spousal support payments provided for in this agreement shall not be subject to modification or termination should _____ [respondent *or* petitioner] begin cohabiting with a person of the opposite sex. This paragraph constitutes a writing within the meaning of *Family Code Section 4323*, which section shall not apply to the support obligation created by this agreement.

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19-225 California Forms of Pleading and Practice--Annotated § 225.396

§ 225.396 Subsequent Cohabitation [Fam. Code § 4323]--Termination on Cohabitation

[1] FORM Subsequent Cohabitation [Fam. Code § 4323]--Termination on Cohabitation

THE COURT FURTHER ORDERS:

The spousal support payments provided for in this agreement and the court's jurisdiction to award spousal support shall terminate forever should _____ [respondent *or* petitioner] begin cohabiting with a person of the opposite sex. For purposes of this paragraph, cohabitation will occur when _____ [respondent *or* petitioner] has been living for a period of six months with a man/woman with whom she/he is engaging in sexual relations.

[2] Use of Forms

The foregoing two forms address the effect of the supported spouse's subsequent cohabitation on the support obligation. § 225.395 provides that the support obligation set forth in the agreement will not be affected should the supported spouse begin cohabiting with a person of the opposite sex. Use of this provision will avoid the operation of *Fam. Code § 4323(a)*, which provides for a rebuttable presumption of decreased need for support if the supported party is cohabiting. One court has held that the presumption of *Fam. Code § 4323(a)* is overcome by a clause in the agreement that support is not modifiable on any ground [*see In re Marriage of Sasson (1982) 129 Cal. App. 3d 140, 147, 180 Cal. Rptr. 815]* . However, the safer practice is include a specific provision directed at the statute.

§ 225.396 provides that spousal support will terminate should the supported spouse cohabit with a person of the opposite sex. Such a provision has been judicially recommended [*see In re Marriage of Sasson (1982) 129 Cal. App. 3d 140, 150, 180 Cal. Rptr. 815* (concurring opinion of Hanson, J.)], but requires careful drafting to identify the exact conduct that will lead to termination of support. Otherwise, for example, a supported former wife might lose her support payments by sharing a house with her brother. For further discussion, see *§ 225.161*, and *§ 225.200* et seq.

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19-225 California Forms of Pleading and Practice--Annotated § 225.397

§ 225.397 Conditional Nonmodifiability [Fam. Code §§ 3591(c), 3651(c)]

[1] FORM Conditional Nonmodifiability [Fam. Code §§ 3591(c), 3651(c)]

THE COURT FURTHER ORDERS:

The spousal support payments provided for in this agreement shall not be subject to modification or termination unless _____ [petitioner *or* respondent] is involuntarily terminated from his/her current employment as _____ [*specify supporting party's employment, e.g.,* Vice President in charge of sales and marketing for Giantco, Inc.]. Should _____ [petitioner *or* respondent] be involuntarily terminated from his/her employment, the court may consider whether the changed circumstance justifies modification of support, both as to amount and duration, as the court deems proper.

[2] Use of Form

The foregoing form is a provision that makes spousal support nonmodifiable unless a particular condition occurs. If a settlement agreement provides that it may only be modified under certain circumstances, the agreement will not be modifiable by the court under any other circumstances [*see In re Marriage of Sasson (1982) 129 Cal. App. 3d 140, 144, 147, 180 Cal. Rptr. 815]* .

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19-225 California Forms of Pleading and Practice--Annotated § 225.398

§ 225.398 Event Does Not Constitute Change of Circumstances [Fam. Code §§ 3591(c), 3651(c)]

[1] FORM Event Does Not Constitute Change of Circumstances [Fam. Code §§ 3591(c), 3651(c)]

THE COURT FURTHER ORDERS:

The spousal support payments provided for in this agreement shall be subject to future modification or termination due to changed circumstances. However, the amount of support agreed to by the parties has been established taking into consideration _____ [*specify nature of event that is not to be considered a change of circumstances, e.g.,* respondent's expected receipt of an inheritance of approximately $50,000 from her Great Aunt Margaret. Receipt of this inheritance shall not constitute a change of circumstances justifying future modification or termination of support. However, nonreceipt of this inheritance shall constitute such a change of circumstance.]

[2] Use of Form

The foregoing form is a variation on a nonmodifiable clause. It is a provision that specifies that the occurrence of a particular event will not constitute a changed circumstance allowing for a modification. Such a provision is enforceable and may be used to tie the division-of-property and support provisions of an agreement together [*In re Marriage of Rabkin (1986) 179 Cal. App. 3d 1071, 1078-1082, 225 Cal. Rptr. 219* (agreement provided that sale of marital residence could not constitute substantial change of circumstances on which to base motion for change in spousal support)].

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19-225 California Forms of Pleading and Practice--Annotated §§ 225.399-225.409

[Reserved]

§§ 225.399[Reserved]

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19-225 California Forms of Pleading and Practice--Annotated § 225.410

§ 225.410 Modification of Spousal Support [Fam. Code § 3651]--Declaration in Support of Motion to Modify Support [Cal. Rules of Ct., Rule 5.118]

[1] FORM Modification of Spousal Support [Fam. Code § 3651]--Declaration in Support of Motion to Modify Support [Cal. Rules of Ct., Rule 5.118]

DECLARATION IN SUPPORT OF MOTION TO MODIFY SPOUSAL SUPPORT

I, _____ [*name*], am the _____ [petitioner *or* respondent] and supporting party in this matter in which _____ [respondent *or* petitioner], _____ [*name*] receives spousal support. The current spousal support order was entered [as part of the judgment of dissolution of marriage] on _____ [*date of entry of current support order*]. Under this order, I am paying petitioner the amount of $_____ [*amount*] per month in spousal support. I have made all of the payments as required under the order and am not in arrears.

[*Set forth facts showing change of circumstances, e.g.*,]

At the time when the current order was entered, petitioner was awarded primary physical custody of our children. She was allowed to remain in the family home under a deferred sale-of-home order, and required to make the mortgage, taxes, and insurance payments, until January 13, 1994, when our youngest child Clark was to turn 18 years old. Spousal support was set at an amount sufficient to allow her to maintain the family home under the order.

On July 10, 1994, the family home was sold, and petitioner received from the proceeds of sale the net sum of $76,432. Further, I am informed and believe, and on that basis allege, that petitioner is currently cohabiting with one John Rich in his home, for which she pays little or nothing in housing costs. Further, Clark is currently attending college at the University of California at Pacifica, and I am assisting him with tuition, room, and board. Petitioner is not contributing

to his educational expenses.

[*CONTINUE*]

Due to these changes of circumstances since the current spousal support order was entered[, including petitioner's reduced needs because of cohabitation under *Family Code Section 4323*], I request that spousal support payments be reduced to $_____ [*amount*] per month beginning _____ [*date reduced payments to begin*].

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19-225 California Forms of Pleading and Practice--Annotated § 225.411

§ 225.411 Modification of Spousal Support [Fam. Code § 3651]--Findings and Order Modifying Spousal Support [Code Civ. Proc. § 632; Fam. Code § 3654]

[1] FORM Modification of Spousal Support [Fam. Code § 3651]--Findings and Order Modifying Spousal Support [Code Civ. Proc. § 632; Fam. Code § 3654]

THE COURT FINDS:

1. The current order for spousal support was entered on _____ [*date of entry of current support order*], and requires _____ [petitioner *or* respondent] to pay support to _____ [respondent *or* petitioner] in the amount of $_____ [*amount*] per month.

[*Set forth specific findings regarding change of circumstances, e.g.,*]

2. The amount of support ordered in the current order was based, in part, on petitioner's needs under a deferred sale-of-home order.

3. The circumstances of the parties since the current order was entered have changed in the following regards:

a. Petitioner's reasonable need for support has been reduced because the period of deferred sale has expired, the family home has been sold, and petitioner received the sum of $76,432 from the proceeds of sale.

b. Petitioner is cohabiting with a person of the opposite sex, and has not produced evidence to rebut the presumption of *Family Code Section 4323* that she has decreased need for support.

c. Respondent's ability to pay is reduced because he is voluntarily assisting his son Clark with the expenses of higher education.

[*CONTINUE*]

THE COURT ORDERS:

_____ [Petitioner *or* Respondent] shall pay to _____ [respondent *or* petitioner] the sum of $_____ [*amount*] per month as spousal support, beginning _____ [*date modified support payments to begin*], payable on or before the _____ [*day of month when modified support payments to be due, e.g.,* 5th] day of each month.
Dated:_____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Forms

The foregoing two forms are for use in bringing proceedings to modify the amount of spousal support based on changed circumstances. § 225.410 is a sample declaration in support of a motion to modify that sets forth the facts constituting the change of circumstances. § 225.411 includes illustrative findings and the court's order modifying support. The forms assume that the supporting party is seeking a reduction in the amount of support, but they may be modified as appropriate if the moving party is seeking an increase in support based on change of circumstances.

[3] Judicial Council Forms

For discussion of how to present a motion for modification in a family law matter, including examples of the Judicial Council forms for Order to Show Cause [Cal. Judicial Council FL-300], Notice of Motion [Cal. Judicial Council Form FL-301], Application for Order and Supporting Declaration [Cal. Judicial Council Form FL-310], and Findings and Order After Hearing [Cal. Judicial Council Form FL-340], see Ch. 221, *Dissolution of Marriage: Procedure* .

For all declarations supporting family law motions, it is recommended that the Judicial Council form for Attached Declaration (MC-031) be used and attached to the Application for Order and Supporting Declaration form. The findings and order must be set forth on the Judicial Council form for Spousal Support Attachment [Cal. Judicial Council Form FL-343], to the form of Findings and Order After Hearing [Cal. Judicial Council Form FL-340]. An example of the Spousal Support Attachment form is included in § 225.390. The findings should be set forth on line 1c or on the Judicial Council form for Additional Page (MC-020) if the provided space is insufficient. The order should be set forth on line 2.

[4] State Statutes

Court as having power to modify parties' agreement for support. *Fam. Code § 3591*

Definition of "support order" with respect to statutes governing modification. *Fam. Code § 3650*

Court as having authority to modify support as it deems necessary. *Fam. Code § 3651*

Order for modification or termination of support as retroactive to date of filing of notice of motion. *Fam. Code § 3653*

Order modifying or terminating support as required to include statement of decision, at request of either party. *Fam. Code § 3654*

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19-225 California Forms of Pleading and Practice--Annotated § 225.412

§ 225.412 Temporary Modification Orders [Fam. Code § 3651]--Modification for Limited Time [Code Civ. Proc. § 632; Fam. Code § 3654]

[1] FORM Temporary Modification Orders [Fam. Code § 3651]--Modification for Limited Time [Code Civ. Proc. § 632; Fam. Code § 3654]

THE COURT FINDS:

[*Set forth findings of court and order for temporary modification, e.g.,*]

On July 15, 1994, respondent was injured and is unable to work. He is on temporary disability leave from his employment and is no longer receiving his prior earnings of $1750 per month. He is currently receiving state disability benefits in the amount of $1225 per month. The medical evidence shows that respondent will be able to resume his full time employment on November 1, 1994.

THE COURT ORDERS:

Spousal support payments are reduced from $500 per month to $350 per month for the Months of August, September, and October 1994. Support shall then be reinstated at $500 per month beginning on November 1, 1994 until further order of this court. This order is without prejudice to either party to move for further modification of spousal support because of further changed circumstances, either before or after November 1, 1994.

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19-225 California Forms of Pleading and Practice--Annotated § 225.413

§ 225.413 Temporary Modification Orders [Fam. Code § 3651]--Modification for Contingent Time [Code Civ. Proc. § 632; Fam. Code § 3654]

[1] FORM Temporary Modification Orders [Fam. Code § 3651]--Modification for Contingent Time [Code Civ. Proc. § 632; Fam. Code § 3654]

THE COURT FINDS:

[*Set forth findings of court and order for contingent modification, e.g.,*]

On July 15, 1994, respondent was laid off from his employment as a digital developer at Giantco, Inc. and is no longer receiving his prior earnings of $2600 per month. Respondent is currently collecting unemployment insurance benefits in the amount of $1800 per month. Respondent is eligible for rehire for his former position at Giantco, but there is currently no evidence that Giantco plans to rehire respondent.

THE COURT ORDERS:

Spousal support payments are reduced from $500 per month to $350 per month beginning August 1, 1994. Support shall be reinstated at $500, without further order of this court, if respondent is reemployed by Giantco, Inc. as a digital developer at a monthly net income of at least $2600. Support shall be restored to $500 per month as of the first month after the month in which respondent is so reemployed. This order is without prejudice to either party to move for further modification of spousal support because of further changed circumstances.

[2] Use of Forms

The foregoing two forms are illustrations of findings and orders modifying support temporarily or conditionally. § 225.412 modifies the amount of support for a limited period of time, after which the amount reverts to the prior level. Such an order may only be made if there is evidence in the record that the supporting party's ability to pay will be

restored as of the given time [*cf. Philbin v. Philbin (1971) 19 Cal. App. 3d 115, 121-123, 96 Cal. Rptr. 408* (no evidence that ex-husband's income level would revert to prior level by time when support was to revert to prior level)]. Therefore, such a finding should always be made.

§ 225.413 is an order modifying support until the happening of a given contingent event. Commonly, the event is the reemployment of the supporting spouse. For further discussion of temporary modification of support, see *§ 225.225*.

[3] Judicial Council Forms

These findings and order must be set forth on the Judicial Council form for Spousal Support Attachment [Cal. Judicial Council Form FL-343], to the form of Findings and Order After Hearing [Cal. Judicial Council Form FL-340]. An example of the Spousal Support Attachment form is included in *§ 225.390*. The findings should be set forth on line 1c or on the Judicial Council form for Additional Page (MC-020) if the provided space is insufficient. The order should be set forth on line 4.

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19-225 California Forms of Pleading and Practice--Annotated § 225.414

§ 225.414 Order Terminating Support Payments and Retaining Jurisdiction [Fam. Code §§ 3591, 4336]

[1] FORM Order Terminating Support Payments and Retaining Jurisdiction [Fam. Code §§ 3591, 4336]

THE COURT FINDS:

1. The current order for spousal support in this matter requires _____ [petitioner *or* respondent] to pay to _____ [respondent *or* petitioner] the sum of $_____ [*amount*] per month until further order of the court.

[*Set forth findings of court supporting termination of payments e.g.,*]

2. On June 10, 1994, Petitioner completed a teacher preparation course at the University of California at Pacifica and was issued a standard California elementary teaching credential.

3. On August 31, 1994, Petitioner obtained employment with the Farallones Unified School District as a probationary elementary school teacher, beginning September 1, 1994. Petitioner will earn a beginning annual salary of $30,000 in this position.

4. Petitioner's earnings from this employment will be sufficient to meet her reasonable needs as measured by the marital standard of living.

5. As a probationary teacher, Petitioner will be subject to nonrenewal of her teaching contract, with or without cause, for a period of three years, ending with the 1996-1997 school year.

6. In light of the duration of this marriage of 15 years and the reasonable possibility that Petitioner will not obtain tenure through her employment, continued retention of jurisdiction over spousal support is appropriate so that support may be

reinstated if there is a further change of circumstances.

[*CONTINUE*]

THE COURT ORDERS:

The support payments previously ordered in this matter are terminated after payment of the monthly payment due on _____ [*date*]. However, jurisdiction over spousal support is retained until _____ [*date*], and may be extended beyond that date for good cause shown in a proceeding initiated before that date. Should no such proceeding be initiated and good cause be shown, this court's jurisdiction over spousal support shall terminate absolutely and forever on that date.

[2] Use of Form

The foregoing form contains illustrative findings and an order for use if the court determines that circumstances have changed such that support is no longer currently warranted, but that jurisdiction should be retained to reinstate it in the future, if necessary. For further discussion, see the § 225.270.

[3] Judicial Council Forms

These findings and order must be set forth on the Judicial Council form for Spousal Support Attachment [Cal. Judicial Council Form FL-343], to the form of Findings and Order After Hearing [Cal. Judicial Council Form FL-340]. An example of the Spousal Support Attachment form is included in § 225.390. The findings should be set forth on line 1c or on the Judicial Council form for Additional Page (MC-020) if the provided space is insufficient. The order should be set forth on line 4.

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PART IV. FORMS
C. Modification Or Termination Of Spousal Support Orders

19-225 California Forms of Pleading and Practice--Annotated § 225.415

§ 225.415 Termination of Jurisdiction Over Spousal Support in Long-Term Marriage [Fam. Code §§ 4335, 4336]--Declaration in Support of Motion to Terminate Jurisdiction [Cal. Rules of Ct., Rule 5.118]

[1] FORM Termination of Jurisdiction Over Spousal Support in Long-Term Marriage [Fam. Code §§ 4335, 4336]--Declaration in Support of Motion to Terminate Jurisdiction [Cal. Rules of Ct., Rule 5.118]

I, _____ [*name*], am the _____ [petitioner *or* respondent] and supporting party in this matter in which _____ [respondent *or* petitioner], _____ [*name*], received spousal support. The current spousal support order was entered [as a part of the court's judgment of dissolution of marriage] on _____ [*date*]. Under this order, I was to pay _____ [respondent *or* petitioner] the amount of $_____ [*amount*] per month in spousal support for a period of _____ [*period of support, e.g.,* four years] beginning _____ [*date*], up to and including _____ [*date*].

[*Specify terms of original order under which support payments were to terminate and allegations that terms have been met, e.g.,*]

Under the terms of the support order, payments were to terminate on _____ [*date*] based on the projection that petitioner would complete her course of study at Pacifica College of Law and obtain employment as an attorney as of that date. I made all of the payments as required under the order and am not in arrears.

Petitioner did, in fact, obtain her Juris Doctor degree in June of 1993. She was hired as an associate attorney in the law firm of Remington and Steele in August of 1993. In November of 1993, she was notified that she passed the California Bar Examination and was admitted as an active member of the California bar.

[*CONTINUE*]

Our marriage was of long duration within the meaning of *Family Code Section 4336* because _____ [it lasted more than 10 years *or specify other reasons that marriage of less than 10 years should be considered of long duration*]. Under the provisions of *Family Code Sections 4335* and *4336*, the court retained jurisdiction indefinitely over spousal support, despite the fact that support was ordered only for a limited term.

The term of support has now expired, and petitioner has not sought a continuation of support. She now has earnings from employment sufficient to meet her reasonable needs as measured by the marital standard of living. Therefore, I request that the court's jurisdiction over spousal support be terminated forever at this time.

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19-225 California Forms of Pleading and Practice--Annotated § 225.416

§ 225.416 Termination of Jurisdiction Over Spousal Support in Long-Term Marriage [Fam. Code §§ 4335, 4336]--Findings and Order Terminating Jurisdiction [Code Civ. Proc. § 632; Fam. Code § 3654]

[1] FORM Termination of Jurisdiction Over Spousal Support in Long-Term Marriage [Fam. Code §§ 4335, 4336]--Findings and Order Terminating Jurisdiction [Code Civ. Proc. § 632; Fam. Code § 3654]

THE COURT FINDS:

1. The current order for spousal support was entered on _____ [*date*], and requires _____ [petitioner *or* respondent] to pay support to _____ [respondent *or* petitioner] in the amount of $_____ [*amount*] per month for a limited period of _____ [*period of support, e.g.,* four years].

2. The duration of support ordered in the current order was based on the expectation that _____ [*specify basis for duration of support, e.g.,* petitioner would complete her legal education and obtain employment as an attorney within the four-year period].

[*CONTINUE*]

3. The period of support has now ended and the expectations of the current order have all been fulfilled. Petitioner now has both sufficient earnings from employment and sufficient earning capacity to allow her to support herself at the marital standard of living without further spousal support from respondent.

THE COURT ORDERS:

This court's jurisdiction over spousal support in this matter is terminated absolutely and forever as of the date set forth below.

Dated:_____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Forms

The foregoing two forms are for use in bringing proceedings to terminate the court's jurisdiction over spousal support after a limited period of support has ended. Such a motion is required to terminate jurisdiction over support in a long-term marriage after support payments have terminated at the end of a limited period [*see Fam. Code §§ 4335, 4336*]. For further discussion, see *§ 225.271*.

§ 225.415 is a sample declaration in support of a motion to terminate jurisdiction. *§ 225.416* includes illustrative findings and the court's order terminating jurisdiction.

[3] Judicial Council Forms

For discussion of how to present a motion for modification or termination of support in a family law matter, including examples of the Judicial Council forms for Order to Show Cause [Cal. Judicial Council FL-300], Notice of Motion [Cal. Judicial Council Form FL-301], Application for Order and Supporting Declaration [Cal. Judicial Council Form FL-310], and Findings and Order After Hearing [Cal. Judicial Council Form FL-340], see Ch. 221, *Dissolution of Marriage: Procedure* .

For all declarations supporting family law motions, it is recommended that the Judicial Council form for Attached Declaration (MC-031) be used and attached to the Application for Order and Supporting Declaration form.

The findings and order must be set forth on the Judicial Council form for Spousal Support Attachment [Cal. Judicial Council Form FL-343], to the form of Findings and Order After Hearing [Cal. Judicial Council Form FL-340]. An example of the Spousal Support Attachment form is included in § 225.390. The findings should be set forth on line 1c or on the Judicial Council form for Additional Page (MC-020) if the provided space is insufficient. The order should be set forth on line 2.

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19-225 California Forms of Pleading and Practice--Annotated § 225.417

§ 225.417 Notice of Activation of Military Service and Deployment and Request to Modify a Support Order [Cal. Judicial Council Form FL-398; Fam. Code § 3651]

[1] FORM Notice of Activation of Military Service and Deployment and Request to Modify a Support Order [Cal. Judicial Council Form FL-398; Fam. Code § 3651]

Click here to view image.

[2] Use of Form

The form, above, is the mandatory Judicial Council form for notice of activation of military service and request to modify a spousal support order under *Fam. Code § 3651(c)(2)* [Cal. Judicial Council Form FL-398; see *§ 225.229*]. It may be used by a party to a support order who is activated to United States military duty or National Guard service and deployed out of state, in place of a notice of motion or order to show cause, to inform the court and the other party of a request to modify the support order based on a change in circumstances [*Fam. Code § 3651(c)(2)*]. The service member must indicate the date of deployment; and, if possible, the court must schedule the hearing before that date [*Fam. Code § 3651(c)(2)*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Cross References

Notice of activation of military service and request to modify support order. *Fam. Code § 3651(c)(2)-(4)*

Retroactivity of order modifying or terminating support. *Fam. Code § 3653(c)*

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Chapter 226 DISSOLUTION OF MARRIAGE: ATTORNEY'S FEES

19-226 California Forms of Pleading and Practice--Annotated 226.syn

§ 226.syn Synopsis to Chapter 226: DISSOLUTION OF MARRIAGE: ATTORNEY'S FEES

§ 226.01 Scope of Chapter

§ 226.02 Cross References

§§ 226.03-226.09 [Reserved]

§ 226.10 Jurisdiction of Court to Award Fees

[1] Preliminary Determinations

[2] Award to Prevailing or Nonprevailing Party

[3] Child Custody and Visitation Proceedings

[4] Award Against Parties Other Than Spouses

[5] Award Against Pension or Retirement Plan

[6] Pendente Lite Awards

[7] Award in Writ Proceedings

[8] Award in Judgment

[9] Award on Appeal

[10] Award in Proceedings Subsequent to Judgment

[a] In General

[b] Modification or Termination of Child Support

[c] Enforcement of Support

[11] Fees Incurred in Other Proceedings

§ 226.11 Application for Award

[1] Who May Apply

[2] Waiver by Agreement

[3] Manner of Applying

[a] Before Judgment

[b] On Appeal

[c] Modification Proceeding

[d] Contempt Proceeding

§ 226.12 Standards for Award of Attorney's Fees and Costs

[1] Respective Income and Needs of Parties

[2] Need in Case of Legal Aid or Pro Bono Representation

[3] Ability to Pay

[4] Noncooperation in Promoting Settlement

[5] Frivolous Actions or Delaying Tactics

[a] In General

[b] Frivolous Appeal

[c] False Accusations of Child Abuse or Neglect

§ 226.13 Amount of Award

[1] Discretion of Court

[2] Factors Considered

[3] Showing Required

[a] Value of Services

[b] Necessity

[c] Disclosure of Fee Agreement

[4] Costs Allowed

§ 226.14 Order for Payment Directly to Attorney

§ 226.15 Effect of Award on Community Property Division

§ 226.16 Appealability of Order

§ 226.17 Stay of Proceeding on Failure to Pay

§ 226.18 Case Management Plan for Complex Cases

§§ 226.19-226.29 [Reserved]

§ 226.30 California Family Law Practice and Procedure

§ 226.31 California Family Law Trial Guide

§ 226.32 California Legal Forms

§ 226.33 California Points and Authorities

§ 226.34 State Statutes

[1] Attorney's Fees and Costs

[2] Sanctions

§ 226.35 California Rules of Court

§ 226.36 Decisions

[1] Award as Improper

[2] Award as Proper

[3] Bankruptcy

[4] Discretion of Court

[5] Factors to Be Considered

[6] Jurisdiction

[7] Sanctions

§ 226.37 Law Reviews

§§ 226.38-226.49 [Reserved]

§ 226.50 Declaration [Code Civ. Proc. § 2015.5] in Support of Motion to Establish Case Management Plan [Fam. Code § 2032(d)]

[1] FORM

[2] Use of Form

[3] Completing Declaration and Accompanying Papers

[4] Cross References

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PART I. SCOPE

19-226 California Forms of Pleading and Practice--Annotated § 226.01

§ 226.01 Scope of Chapter

This chapter discusses court-ordered awards of attorney's fees in family law proceedings. It covers the court's jurisdiction to award fees, the types of proceedings in which fees may be awarded, the standards applied in awarding fees, the amount of the award, the method of payment, the effect of the award on the division of community property, and case management plans to allocate fees in complex cases. The chapter also contains a form of declaration in support of a motion to establish a case management plan [*see § 226.50*].

For general discussion of fee agreements and arbitration of fee disputes, see Ch. 72, *Attorney Practice and Ethics* . For discussion and forms relating to the recovery of fees from other parties and security for costs and fees, see Ch. 174, *Costs and Attorney's Fees* . For discussion of awards of attorney's fees and costs in proceedings to nullify marriages, see Ch. 25, *Annulments (Nullity) of Marriage and Related Spousal Rights* . For discussion and forms relating to the imposition of monetary and nonmonetary sanctions in trial courts, see Ch. 510, *Sanctions* .

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19-226 California Forms of Pleading and Practice--Annotated § 226.02

§ 226.02 Cross References

See generally Ch. 25, *Annulment (Nullity) of Marriage* ; Ch. 40, *Appeal: An Overview* , through Ch. 54, *Appeal: California Supreme Court Review* ; Ch. 72, *Attorney Practice and Ethics* ; Ch. 174, *Costs and Attorney's Fees* ; Ch. 372, *Motions and Orders* ; Ch. 510, *Sanctions*

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[Reserved]

§§ 226.03[Reserved]

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PART II. LEGAL BACKGROUND

19-226 California Forms of Pleading and Practice--Annotated § 226.10

§ 226.10 Jurisdiction of Court to Award Fees

[1] Preliminary Determinations

In a proceeding for dissolution or nullity of marriage or legal separation, and in any proceeding subsequent to entry of a related judgment, the court must ensure that each party has access to legal representation to preserve each party's rights by ordering, if necessary based on the income and needs assessments, one party, except a governmental entity, to pay to the other party, or to the other party's attorney, whatever amount is reasonably necessary for attorney's fees and for the cost of maintaining or defending the proceeding during the pendency of the proceeding [*Fam. Code § 2030(a)(1)*; *see also Fam. Code § 270*]. Whether the court will order one party to pay attorney's fees and costs for another party, and what amount to pay, is determined based on the respective incomes and needs of the parties, and any factors affecting the parties' respective abilities to pay [*Fam. Code § 2030(a)(2)*]. A party who lacks the financial ability to hire an attorney may request, as an in pro per litigant, that the court order the other party, if that other party has the financial ability, to pay a reasonable amount to allow the unrepresented party to retain an attorney in a timely manner before proceedings in the matter go forward [*Fam. Code § 2030(a)(2)*].

The purpose of an award of attorney's fees is to ensure that a party has adequate resources to properly litigate the family law controversy, and to further the public policy favoring parity between spouses in their ability to obtain legal representation [*see, e.g., In re Marriage of Sullivan (1984) 37 Cal. 3d 762, 768, 209 Cal. Rptr. 354, 691 P.2d 1020]* .

Because an award of attorney's fees and costs is a personal judgment against a party, personal jurisdiction over the party appears to be necessary to make such an award, just as personal jurisdiction is necessary tomake an award of support [*see Baldwin v. Baldwin (1946) 28 Cal. 2d 406, 415-416, 170 P.2d 670]* . No personal obligation to pay, however, is required for the court to make an attorney's fee award [*In re Marriage of Ward (1992) 3 Cal. App. 4th 618, 627, 4 Cal. Rptr. 2d 365]* .

It has also been held that litigants in family law cases are not precluded from an award of attorney's fees made under the private attorney general doctrine of *Code Civ. Proc. § 1021.5*. However, it must be shown that the family law litigation (1) served to vindicate an important public right; (2) resulted in significant benefit to the general public or large class of

persons; and (3) imposed a financial burden on the plaintiff that was out of proportion to his or her individual stake in the matter [*see Punsly v. Ho (2003) 105 Cal. App. 4th 102, n.4, 129 Cal. Rptr. 2d 89* (*citing County of San Diego v. Lamb (1998) 63 Cal. App. 4th 845, 852-853)]* .

In addition, a party who applies for an award of attorney's fees for work done by an attorney who only assisted in preparing legal documents and did not make an appearance in the case must disclose to the court information required for a proper determination of attorney fees, including the name of the attorney who assisted in the document preparation, the time involved or other basis for billing, the tasks performed, and the amount billed [Cal. Rules of Ct., Rule 5.170(b)].

[2] Award to Prevailing or Nonprevailing Party

Attorney's fees need not be awarded only to a "prevailing" party. In fact, they may be awarded against a prevailing party if the applicable standard is established [*see In re Marriage of Hublou (1991) 231 Cal. App. 3d 956, 966, 282 Cal. Rptr. 695* ; *see also § 226.10[4]*].

[3] Child Custody and Visitation Proceedings

In addition to its general authority to award attorney's fees and costs in family law proceedings [*see Fam. Code § 2030 et seq.*], including proceedings that involve child custody and visitation, other specific statutes allow attorney's fees when child custody is involved. For example, the court may award fees to private counsel appointed to represent the interests of a minor child in a proceeding involving custody or visitation if the court finds it would be in the best interests of the child to do so [*Fam. Code §§ 3150(a), 3153(a)*]. If the court determines that both parties together are financially unable to pay all or a portion of the cost of counsel, the portion that the parties are unable to pay must be paid by the county [*Fam. Code § 3153(b)*].

Under the Uniform Child Custody Jurisdiction and Enforcement Act (*Fam. Code § 3400 et seq.*), a person who violates a custody decree of another state and makes it necessary to enforce the decree in this state may be required to pay necessary travel and other expenses, including attorney's fees, incurred by the party entitled to custody or his or her witnesses [*see Fam. Code §§ 3450(b), 3452*].

[4] Award Against Parties Other Than Spouses

Under the Family Code, any party, including a third party who has been joined to the proceeding and is not a governmental entity, may be ordered to pay attorney's fees in a proceeding for dissolution, legal separation, or nullity [*see Fam. Code § 2030(a)*; for special rules concerning pension plans, *see also § 226.10[5]*]. An award against a nonspouse third party, however, is limited to an amount reasonably necessary to maintain or defend the action on the *issues related* to that third party [*Fam. Code § 2030(d)*]. Nevertheless, a judge is not required to apportion attorney's fees among spouse and nonspouse parties when an issue relates to both. The court has discretion to order a nonspouse third party to pay all attorney's fees and costs relating to issues that affect both the third party and the spousal parties. The court must consider the respective incomes and needs of all parties, including evidence of their incomes and assets, in exercising its discretion to award attorney's fees [*Jovel v. Jovel (In re Jovel) ((1996) 49 Cal. App. 4th 575, 586-587, 56 Cal. Rptr. 2d 740]* .

A particular application of this principle is that a nonspouse party may be ordered to pay attorney's fees pendente lite [*see Fam. Code § 2030(a)*]. It is not necessary that the person to whom the fees are to be paid have "prevailed" on the matters at issue. However, there may be a constitutional limitation requiring that an award of fees and costs against a nonparty be based on some consideration of the merits of the dispute and not simply because the party has money and the spouse does not [*In re Marriage of Siller (1986) 187 Cal. App. 3d 36, 51-52, 231 Cal. Rptr. 757]* .

It is not necessary that the party against whom the order is entered have resisted joinder or the jurisdiction of the court. Furthermore, fees awarded under the Family Code from a nonspouse party may be based on services rendered or costs incurred prior to the joinder of the party if required by the acts of that party [*In re Marriage of Siller (1986) 187 Cal. App. 3d 36, 45-46, 53, 231 Cal. Rptr. 757]* .

A nonspouse third party also may be ordered to pay all or a portion of the attorney's fees and costs on appeal of an issue related to that party [*Jovel v. Jovel (In re Jovel) (1996) 49 Cal. App. 4th 575, 586-587, 56 Cal. Rptr. 2d 740]* .

[5] Award Against Pension or Retirement Plan

The Family Code's grant of authority to award attorney's fees against third parties who are not governmental entities [*§ 226.10[10][a]*] has been construed to include a private pension or retirement plan that has been properly joined to the proceeding [*In re Marriage of Olivarez (1986) 188 Cal. App. 3d 336, 342-344, 232 Cal. Rptr. 794* ; *see Fam. Code § 2030(a),(d)*]. However, the probability of preemption of California law on this issue by ERISA (*29 U.S.C. § 1001 et seq.*)--with respect to plans subject to ERISA--has cast doubt on the continuing validity of the California authority in making awards against such plans. As discussed hereafter, it now appears that litigants who join ERISA plans must resort to the fee provisions set forth in ERISA, rather than attempting to rely on California law [*see AT & T Management Pension Plan v. Tucker (C.D. Cal. 1995) 902 F. Supp. 1168, 1175-1178* ; *29 U.S.C. § 1144*]. Non-ERISA plans that are not governmental entities are still apparently subject to the Family Code's attorney's fee provisions, however [*see generally Fam. Code § 2030*].

ERISA itself also provides for an award of attorney's fees and costs in actions under it by a participant, beneficiary, or fiduciary [*see 29 U.S.C. § 1132(g)(1)*; *see also Hummell v. S.E. Rykoff & Co. (9th Cir. 1980) 634 F.2d 446, 453* (suggested guidelines for use in determining whether to award attorney's fees under ERISA)]. The Ninth Circuit Court of Appeals has suggested several guidelines for use in determining whether to award attorney's fees under ERISA: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions [*Hummell v. S.E. Rykoff & Co. (9th Cir. 1980) 634 F.2d 446, 453]* .

Note, however, that attorney's fees under the provisions of ERISA [*see 29 U.S.C. § 1132(g)*] will not be awarded for work performed prior to preparation and filing of an action [*Cann v. Carpenters' Pension Trust Fund (9th Cir. 1993) 989 F.2d 313, 316-317]* . Therefore, early joinder of the plan may be advisable.

Despite the existence of authority for attorney's fees awards under ERISA, California courts have held that the preemption provision of ERISA does not prohibit an award of attorney's fees under California law [*In re Marriage of Olivarez (1986) 188 Cal. App. 3d 336, 342-344, 232 Cal. Rptr. 794* ; *see In re Marriage of Baker (1988) 204 Cal. App. 3d 206, 220, 251 Cal. Rptr. 126]* . According to these cases, a court in a California family law proceeding may award attorney's fees against a properly joined pension plan pursuant to the otherwise applicable standards of federal law and need not conform to the federal guidelines [*In re Marriage of Olivarez (1986) 188 Cal. App. 3d 336, 342-344, 232 Cal. Rptr. 794]* .

However, a 1995 federal district court ruling has now cast doubt on the continued validity of the earlier California cases with respect to ERISA-governed plans. In *AT & T Management Pension Plan v. Tucker*, the federal district court granted summary judgment to plaintiff pension plan, holding that ERISA, as amended by the 1984 Retirement Equity Act, preempts a state court's order for attorney's fees (made pursuant to state statute) against an ERISA-governed pension plan. It also found that the California court order granting fees did not constitute a QDRO, on the ground that it would sanction a prohibited "assignment or alienation" of moneys held by the plan, and that the fee order impermissibly required the plan administrator to violate fiduciary duties imposed by ERISA. It granted injunctive relief to prevent the

defendant former wife from seeking to enforce her California fee order [*see AT & T Management Pension Plan v. Tucker (C.D. Cal. 1995) 902 F. Supp. 1168, 1175-1178* (California trial court had granted fees under *Fam. Code §§ 271, 2030*, and not under federal statute)]. In view of this case, and pending any further judicial or legislative clarification of the preemption issue, it is suggested that counsel seek fees under ERISA instead of, or in addition to, the California statutes.

[6] Pendente Lite Awards

The court may make an award of attorney's fees and costs at any time during the pendency of a family law proceeding [*Fam. Code § 2030(a)*; *see, e.g., In re Marriage of Higgason (1973) 10 Cal. 3d 476, 488, 110 Cal. Rptr. 897, 516 P.2d 289* ; *In re Marriage of Dick (1993) 15 Cal. App. 4th 144, 159, 166-168, 18 Cal. Rptr. 2d 743]* . From time to time before entry of judgment, the court may augment or modify the original award as necessary for the prosecution or defense of the proceeding or any proceeding relating to it, including after any appeal has been concluded [*Fam. Code § 2030(c)*; *In re Marriage of Hatch (1985) 169 Cal. App. 3d 1213, 1218-1219, 215 Cal. Rptr. 789]* . Attorney's fees and costs may be awarded for legal services rendered and costs incurred before or after the commencement of the proceeding [*Fam. Code § 2030(b)*].

A renewed request for attorney's fees under *Fam. Code § 2030* need not comply with the requirements of *Code Civ Proc. § 1008* as a motion for reconsideration of an order denying fees [*In re Marriage of Hobdy (2004) 123 Cal. App. 4th 360, 364-372, 20 Cal. Rptr. 3d 104* (application of statutory construction rules favoring specific legislation over the more general, disfavoring implied repeal, harmonizing statutes on similar subjects, and making paramount legislative intent, compelled conclusion that trial court properly utilized *Fam. Code § 2030*, not *Code Civ. Proc. § 1008* in making attorney's fees award)].

For further discussion of procedures regarding applications for pendente lite attorney's fee awards, see *Ch. 221, Dissolution of Marriage: Procedure, § 221.10* et seq..

[7] Award in Writ Proceedings

Counsel fees and costs may also be awarded in writ proceedings arising out of the family law proceeding [*see, e.g., Lerner v. Superior Court (1952) 38 Cal. 2d 676, 686, 242 P.2d 321* ; *see also Neal v. Superior Court (2001) 90 Cal. App. 4th 22, 26-27, 108 Cal. Rptr. 2d 262* (mandate proceeding arising from civil action was duplicative of family law proceeding)]. A habeas corpus proceeding involving the custody of minor children is a proceeding involving the custody of minors for purposes of the family law statutes and, hence, counsel fees and costs may be awarded under those statutes. Although the appellate court, in an original writ proceeding before it, has jurisdiction to make the award of attorney's fees, it may nevertheless direct the trial court, which is in a better position to consider questions of fact, to do so [*Perry v. Superior Court (1970) 7 Cal. App. 3d 236, 242, 244, 86 Cal. Rptr. 607]* .

[8] Award in Judgment

The court has jurisdiction to make an award of attorney's fees and costs in the judgment [*see Fam. Code § 2030(a)*]. In fact, the court has a duty at the end of the case to make an appropriate attorney's fees award [*In re Marriage of Green (1992) 6 Cal. App. 4th 584, 593, 7 Cal. Rptr. 2d 872]* . The judgment may include an order that the party against whom pendente lite attorney's fees and costs were awarded pay any balance due under that order, as well as additional attorney's fees and costs if an additional award is justified [*see Chernow v. Chernow (1954) 128 Cal. App. 2d 816, 817-819, 276 P.2d 622]* . The judgment is res judicata on the need for attorney's fees and costs for services rendered prior to the judgment [*In re Marriage of Mulhern (1973) 29 Cal. App. 3d 988, 993, 106 Cal. Rptr. 78]* . For an illustrative form of judgment, see *Ch. 221, Dissolution of Marriage: Procedure, § 221.90* et seq.

[9] Award on Appeal

Either party may be awarded attorney's fees and costs on appeal [*see Fam. Code § 2030(c)*; *see In re Marriage of Shaban (2001) 88 Cal. App. 4th 398, 407-411, 105 Cal. Rptr. 2d 863* (reasons why fee awards for appellate work are necessary)]. The filing of a notice of appeal does not stay the trial court's jurisdiction to grant fees [*In re Marriage of Stachon (1978) 77 Cal. App. 3d 506, 508-509, 143 Cal. Rptr. 599]* , and no order or direction from the appellate court is required [*In re Marriage of Colvin (1992) 2 Cal. App. 4th 1570, 1582, 4 Cal. Rptr. 2d 323]* . To warrant an award of fees on appeal, the requesting spouse must show a need for the award, the paying spouse must be able to pay, the appeal must be taken in good faith and, although the requesting spouse need not prevail on the appeal, reasonable grounds must exist for it [*see, e.g., In re Marriage of Martin (1991) 229 Cal. App. 3d 1196, 1201, 280 Cal. Rptr. 565]* .

In case of need, the trial court should award attorney's fees required to pursue or defend an appeal before the appeal is concluded. The public policy favoring parity between spouses in obtaining legal representation is equally applicable to representation on appeal [*In re Marriage of Green (1989) 213 Cal. App. 3d 14, 27, 261 Cal. Rptr. 294]* .

[10] Award in Proceedings Subsequent to Judgment

[a] In General

The court may augment or modify the original award for attorney's fees and costs as may be reasonably necessary for the prosecution or defense of the proceeding, or any proceeding related thereto, including after any appeal has been concluded [*Fam. Code § 2030(c)*]. Attorney's fees and costs may be awarded for legal services rendered or costs incurred before or after the commencement of the proceeding [*see Fam. Code § 2030(b)*; *In re Marriage of Mulhern (1973) 29 Cal. App. 3d 988, 994, 106 Cal. Rptr.78]* . The order, if not appealed, is res judicata on the issue of attorney's fees and costs [*see Allen v. Allen (1956) 138 Cal. App. 2d 706, 711, 292 P.2d 581]* .

There is no limitation on the kind of subsequent family law proceeding in which the award may be made [*see, e.g., In re Marriage of Crobarger (1986) 178 Cal. App. 3d 56, 59-60, 223 Cal. Rptr. 480* (enforcement of judgment)]. An award also is proper in other non-family-law postjudgment contexts [*see, e.g., In re Marriage of Kerry (1984) 158 Cal. App. 3d 456, 465, 204 Cal. Rptr. 660* (motion to set aside judgment under *Code Civ. Proc. § 473*)]. Attorney's fees and costs also may be awarded in a postjudgment proceeding on issues bifurcated at trial for later determination [*In re Marriage of Wolfe (1985) 173 Cal. App. 3d 889, 891, 219 Cal. Rptr. 337]* .

[b] Modification or Termination of Child Support

An order modifying, terminating, or setting aside a child support order may include an award of attorney's fees and court costs to the prevailing party [*Fam. Code § 3652*], although such an award is not available to party who prevails against a governmental agency [*see also Fam. Code § 273* (prohibiting attorney's fees award against governmental agency involved in family law matter or child support proceeding except when sanctions are warranted)].

Fam. Code § 2030, which provides general authority for attorney's fees awards in family law proceedings, requires that the award be based on *ability to pay and need*, rather than on which party is successful on the merits. Although both standards may apply to a child support modification proceeding, the general provisions for attorney's fees control to ensure that persons otherwise financially unable to litigate the child support matter have their day in court. Only if the court first finds that both parties to the proceeding could otherwise afford to pay their own attorney's fees may the court award attorney's fees to the prevailing party [*In re Marriage of Popenhager (1979) 99 Cal. App. 3d 514, 524-525, 160 Cal. Rptr. 379]* .

[c] Enforcement of Support

Notwithstanding any other provision of law, in any action to enforce an existing order for child or spousal support, or a penalty incurred under *Fam. Code § 4720 et seq.* (delinquent payments of child support), the court must award reasonable attorney's fees to the custodial parent or supported spouse, absent good cause to the contrary [*Fam. Code §*

3557]. The court must determine that the obligor has the ability to pay, and must consider the respective incomes and needs of the parties [*Fam. Code § 3557*; *see Fam. Code § 270*; *In re Marriage of Schenck (1991) 228 Cal. App. 3d 1474, 1485, 279 Cal. Rptr. 651* (fact no support is due constitutes good cause for denial of award)]. However, *Fam. Code § 3557* does not require or allow an award of attorney's fees to or against a governmental entity [*see Fam. Code § 3557(b)*; *see also Fam. Code § 273* (prohibiting attorney's fees award against governmental agency involved in family law matter or child support proceeding except when sanctions are warranted)].

[11] Fees Incurred in Other Proceedings

Fam. Code § 2030(c) authorizes the court in family law proceedings to award attorney's fees reasonably necessary for the prosecution or defense of the proceeding "or any proceeding related thereto." Courts have construed *Fam. Code § 2030(c)* and identical language in predecessor statutes as allowing the court to award fees incurred in proceedings other than the family law proceeding in which the motion for fees is brought [*Askew v. Askew (1994) 22 Cal. App. 4th 942, 964-965, 28 Cal. Rptr. 2d 284* (attorney's fees award to wife proper for defense of civil action for fraud brought by husband after wife filed for dissolution); *In re Marriage of Seaman & Menjou (1991) 1 Cal. App. 4th 1489, 1494, 2 Cal. Rptr. 2d 690* (construing predecessor statute to *Fam. Code § 2030*); *see also Crook v. Crook (1960) 184 Cal. App. 2d 745, 750, 7 Cal. Rptr. 892* ; *In re Marriage of Green (1989) 213 Cal. App. 3d 14, 28 n.8, 261 Cal. Rptr. 294]* .

Another proceeding that is consolidated with a family law matter is a related proceeding within the scope of the attorney's fees provisions [*Guardianship of Paduano (1989) 215 Cal. App. 3d 346, 350-352, 263 Cal. Rptr. 589* (allowing award of fees against non-parent in consolidated guardianship and dissolution proceedings involving child custody)].

Apart from and in addition to its authority to award fees for "related proceedings," a court may award attorney's fees and costs against a party as a sanction for improper litigation conduct and strategy under *Fam. Code § 271*. The scope of this provision extends to fees incurred in collateral litigation [*see Neal v. Superior Court (2001) 90 Cal. App. 4th 22, 26-27, 108 Cal. Rptr. 2d 262* (attorney's fees and costs awarded in civil action that was "family law OSC with civil headings" and that "put [wife] to a wholly unnecessary legal expense"); *In re Marriage of Green (1992) 6 Cal. App. 4th 584, 592, 7 Cal. Rptr. 2d 872* (decided under former *Civ. Code § 4370.6*; *now see Fam. Code § 271*)]. For discussion of when attorney's fees may be awarded as sanctions, *see § 226.12*.

The question of whether another proceeding is related to the family law proceeding depends on whether an award of fees in the other proceeding would serve the purpose of *Fam. Code § 2030*, the general statute authorizing awards of fees in family law proceedings. This allows the family law court to prevent a spouse with greater financial resources from harassing or coercing the less-advantaged spouse into submission in the family law matter by forcing him or her to defend other lawsuits [*In re Marriage of Seaman & Menjou (1991) 1 Cal. App. 4th 1489, 1494, 1496-1497, 2 Cal. Rptr. 2d 690* (identically worded predecessor statute)]. Normally, whether another action is related to the family law matter is a factual question for determination by the trial court [*In re Marriage of Green (1992) 6 Cal. App. 4th 584, 591, 7 Cal. Rptr. 2d 872]* .

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§ 226.11 Application for Award

[1] Who May Apply

Only a party to the family law proceeding may apply for an award of attorney's fees and costs from another party to the proceeding [*Barnes v. McKendry (1968) 260 Cal. App. 2d 671, 678, 67 Cal. Rptr. 336]* . The application for the award must be in the client's--not the attorney's--name [*Sorell v. Superior Court of San Francisco (1967) 248 Cal. App. 2d 157, 160, 56 Cal. Rptr. 222]* , and it is the party's need for the award--as opposed to the attorney's need--that must be shown [*In re Marriage of Gonzales (1975) 51 Cal. App. 3d 340, 344, 124 Cal. Rptr. 278]* .

However, the court may, in its discretion, order that all or part of the fee award be paid directly to the attorney [*see Fam. Code § 272(a)*]. Furthermore, even if the attorney has been discharged by the client, he or she may still have implied authority to apply on the client's behalf for an attorney's fee award from the other party while still the attorney of record, and a motion to collect attorney's fees in this manner from the opposing party is commonly referred to as a "Borson motion" [*see, e.g.,* *In re Marriage of Borson (1974) 37 Cal. App. 3d 632, 639, 112 Cal. Rptr. 432* ; *cf.* *In re Marriage of Tushinsky (1988) 203 Cal. App. 3d 136, 142, 249 Cal. Rptr. 611* (discharged attorney lacks standing to appeal denial of attorneys' fees; attorney has no right in family law proceeding, either before or after discharge, to seek award of attorney's fees and costs against own client)]. Fees cannot be awarded to discharged attorneys pursuant to a "Borson motion" if the client instructs the attorneys to take no further action on the client's behalf and withdraws the fee motion before the court signs the order awarding fees [*see* *In re Marriage of Read (2002) 97 Cal. App. 4th 476, 480-481, 118 Cal. Rptr. 2d 497]* .

A judicial officer who has been disqualified from ruling on a "Borson motion" because of bias against a party's attorney may not decide the motion indirectly by ruling against the party [*In re Marriage of Kelso (1998) 67 Cal. App. 4th 374, 383, 79 Cal. Rptr. 2d 39* (commissioner should not have heard subsequent motions for sanctions against party and for award of attorney's fees to party's new counsel to be paid by party's spouse)]. This is because a "Borson motion" is made on behalf of the party, not the attorney, given that the right to the award is the party's, not the attorney's. As a result, the issues are too intertwined to permit such a splitting of the judicial officer's disqualification [*In re Marriage of Kelso (1998) 67 Cal. App. 4th 374, 383, 79 Cal. Rptr. 2d 39]* .

[2] Waiver by Agreement

Attorney's fees and costs may not be awarded to a party who has waived all rights to them in a valid property settlement agreement [*see, e.g., Garrett v. Garrett (1968) 258 Cal. App. 2d 407, 411, 419-420, 65 Cal. Rptr. 580]* . Fees may be awarded pendente lite despite an agreement to the contrary, however, if the party seeking the attorney's fees attacks the agreement as having been fraudulently obtained [*see, e.g., Spreckels v. Spreckels (1952) 111 Cal. App. 2d 529, 532, 244 P.2d 917]* .

Because a child's right to support cannot be waived or controlled by the agreement of the parents, no agreement between the parents can defeat the power of the court to award attorney's fees in a proceeding to obtain child support [*Krog v. Krog (1948) 32 Cal. 2d 812, 816-817, 198 P.2d 510]* . The same rule applies to attorney's fees incurred in a postjudgment child custody matter [*In re Marriage of Joseph (1990) 217 Cal. App. 3d 1277, 1282-1286, 266 Cal. Rptr. 548]* .

[3] Manner of Applying

[a] Before Judgment

A request for attorney's fees and costs in a family law proceeding is made initially in the petition or response and, unless an award of the full amount of the fees and costs incurred is made pendente lite, any award, or an award in addition to the pendente lite award, will be included in the judgment of dissolution or legal separation. An application for an order pendente lite making, augmenting, or modifying an award of attorney's fees or costs during the pendency of the family law proceeding is generally made in the trial court by noticed motion or order to show cause [*Fam. Code § 2031(a)(1)*]. The court must rule on an application within 15 days of the hearing on the motion or order to show cause [*Fam. Code § 2031(a)(2)*]. The application also may be made by oral motion in open court without notice at the time of the hearing of the cause on the merits or at any time prior to entry of judgment against a party whose default has been entered [*Fam. Code § 2031(b)*]. If the oral motion is made prior to entry of judgment against a party whose default has been entered, the court must rule on the motion within 15 days and prior to the entry of any judgment [*Fam. Code § 2031(b)(2)*].

For discussion and forms relating to the request of fees in the petition or response, and to the procedure and forms for use in securing a pendente lite award of attorney's fees and costs, see *Ch. 221, Dissolution of Marriage: Procedure, § 221.10* et seq.

[b] On Appeal

An application for attorney's fees and costs on appeal is made in the trial court rather than in the court of appeal [*see, e.g., In re Marriage of Leff (1972) 25 Cal. App. 3d 630, 648, 102 Cal. Rptr. 195]* , and can be made at the beginning of the appeal process. The procedure is the same as applying for a temporary order pending hearing or trial [*§ 226.11[3]*]. In fixing the amount of an attorney's fee for services on appeal, or in determining whether such an award is required at all, the trial judge may take into account the orders for fees that have previously been made in the litigation [*Howard v. Howard (1957) 148 Cal. App. 2d 755, 759, 307 P.2d 412]* .

[c] Modification Proceeding

In a proceeding subsequent to judgment for modification of a support or custody award, the application for attorney's fees and costs is made in the request for order and declaration in support of the order to show cause or notice of motion [*see* Cal. Judicial Council Form FL-310 (application for order and supporting declaration)]. For discussion and forms for use in modification proceedings, see *Ch. 221, Dissolution of Marriage: Procedure, § 221.180* et seq.

[d] Contempt Proceeding

An application for attorney's fees in a show cause proceeding re contempt to enforce any money award in a pendente lite order or in the judgment is made in the order to show cause and declaration re contempt form. For discussion and forms for use in contempt proceedings, see *Ch. 258, Family Law Enforcement: General Enforcement Principles and Remedies, § 258.80* et seq.

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§ 226.12 Standards for Award of Attorney's Fees and Costs

[1] Respective Income and Needs of Parties

To make an award of attorney's fees, the court first must consider the respective incomes and needs of the parties, then the potential payor's ability to pay [*Fam. Code §§ 270, 2030(a)*; *see, e.g.,* *In re Marriage of Cheriton (2001) 92 Cal. App. 4th 269, 317-318, 111 Cal. Rptr. 2d 755* (abuse of discretion for court to decline to reopen trial to take evidence regarding request for need-based attorney's fees); *In re Marriage of Hublou (1991) 231 Cal. App. 3d 956, 966, 282 Cal. Rptr. 695]* . Once it has made these determinations, the court may order an award of attorney's fees and costs if just and reasonable under the relative circumstances of the respective parties [*Fam. Code § 2032(a)*]. In determining what is just and reasonable under the relative circumstances, the court must take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to adequately present his or her case [*Fam. Code § 2032(b)*; *see, e.g.,* *In re Marriage of Falcone & Fyke (2008) 164 Cal. App. 4th 814, 824, 79 Cal. Rptr. 3d 588* (party requesting fees has burden of presenting evidence showing need and of parties' relative financial positions); *In re Marriage of Shaban (2001) 88 Cal. App. 4th 398, 407-408, 105 Cal. Rptr. 2d 863* (in division of $3 million estate, wife lacked liquidity to finance appeal); *In re Marriage of Keech (1999) 75 Cal. App. 4th 860, 867-871, 89 Cal. Rptr. 2d 525* (in ordering husband to pay wife's legal fees and accountant's fees, court failed to consider husband's need to pay his own outstanding legal fees)].

The fact that the party requesting an award of attorneys' fees and costs has the resources from which he or she could pay his or her own attorney's fees and costs is not itself a bar to an order that the other party pay part, or all, of the fees and costs requested. Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of litigation equitably between the parties under the relative circumstances [*Fam. Code § 2032(b)*; *In re Marriage of O'Connor (1997) 59 Cal. App. 4th 877, 69 Cal. Rptr. 2d 480* ; see *In re Marriage of McTiernan & Dubrow (2005) 133 Cal. App. 4th 1090, 1109-1111, 35 Cal. Rptr. 3d 287* (court could properly consider value of estate awarded to wife, including nonliquid assets, as proper basis for disallowing her recovery of some fees)].

A party who lacks the financial ability to hire an attorney may request, as an in pro per litigant, that the court order the other party, if that other party has the financial ability, to pay a reasonable amount to allow the unrepresented party to

retain an attorney in a timely manner before proceedings in the matter go forward [*Fam. Code § 2030(a)(2)*].

[2] Need in Case of Legal Aid or Pro Bono Representation

When necessary to satisfy the legislative intent of providing one of the parties with an amount of money adequate to properly litigate thecontroversy, a legal services organization providing pro bono representation to an indigent party is entitled to receive an award of attorney's fees and costs valued at the reasonable market rate of the services [*see, e.g., In re Marriage of Ward (1992) 3 Cal. App. 4th 618, 623, 626, 4 Cal. Rptr. 2d 365]* .

[3] Ability to Pay

The court must determine that the party who is to pay the attorney's fees has or is reasonably likely to have the ability to pay the award [*Fam. Code § 270*; *see Fam. Code § 2030(a)*]. All of a party's assets and income must be considered in determining his or her ability to pay attorney's fees [*see In re Marriage of Rosen (2002) 105 Cal. App. 4th 808, 811, 130 Cal. Rptr. 2d 1* (trial court's findings on husband's ability to pay were erroneous; therefore it abused its discretion in ordering husband to pay $10,000 in attorney fees to wife's attorney)], and the mere fact that the party from whom attorney's fees and costs are sought has a past or present cash deficit does not control the question of ability to pay [*Rosenthal v. Rosenthal (1961) 197 Cal. App. 2d 289, 297-298, 17 Cal. Rptr. 186]* . It is also proper to order one party to pay the other's attorney's fees and costs based on evidence of earning ability that indicates income will substantially increase in a short period of time, although present expenses exceed present monthly income [*In re Marriage of Sullivan (1984) 37 Cal. 3d 762, 769, 209 Cal. Rptr. 354, 691 P.2d 1020]* . One appellate court, however, has held that a trial court's order requiring an ex-husband to pay his former wife's attorney's fees was an abuse of discretion, because both parties were on welfare, both were impecunious, and there was no showing of a reasonable expectation of relief from that condition [*In re Marriage of Pollard (1979) 97 Cal. App. 3d 535, 539-540, 158 Cal. Rptr. 849]* . In addition, it has been held that a court should not base an attorney's fee order on the assumption that the payor spouse's parents will provide gifts that will enable that spouse to fund the order [*In re Marriage of Schulze (1997) 60 Cal. App. 4th 519, 70 Cal. Rptr. 2d 488]* .

In addition to considering a party's ability to pay when determining the total amount of an award of attorney's fees and costs, the court must consider a party's ability to pay in fashioning a *payment schedule*. For example, one appellate court held that even if the trial court acted within its discretion in ordering a husband to pay his wife's accountant fees of $3,500, it erred in ordering payment in monthly installments of $1,000, leaving the husband with $93 a month after paying his rent and court-ordered obligations [*In re Marriage of Keech (1999) 75 Cal. App. 4th 860, 868, 89 Cal. Rptr. 2d 525]* .

Furthermore, the court may order payment of an attorney's fee and cost award from any type of property, whether community or separate, principal or income [*Fam. Code § 2032(c)*; *see In re Marriage of Jafeman (1972) 29 Cal. App. 3d 244, 262-267, 105 Cal. Rptr. 483]* .

[4] Noncooperation in Promoting Settlement

Notwithstanding any other provision of the Family Code, the court may base an award of attorney's fees and costs on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation, and if possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys [*Fam. Code § 271(a)*; *see In re Marriage of Falcone & Fyke (2008) 164 Cal. App. 4th 814, 827-828, 79 Cal. Rptr. 3d 588* (policy of law is to promote settlement and to encourage cooperation which will reduce litigation costs); *In re Marriage of Burgard (1999) 72 Cal. App. 4th 74, 82, 84 Cal. Rptr. 2d 739* (no abuse of discretion in assessing additional sanctions); *In re Marriage of Freeman (2005) 132 Cal. App. 4th 1, 6, 33 Cal. Rptr. 3d 237* (sanctions under *Fam. Code § 271* have been upheld for obstreperous conduct that frustrated policy in favor of settlement and caused litigation costs to greatly increase, and for making one-sided, overreaching demand); *In re*

Marriage of Abrams (2003) 105 Cal. App. 4th 979, 130 Cal. Rptr. 2d 16 (father's settlement offer was overreaching and violated policy to promote settlement; case remanded to trial court to determine if it would warrant award of sanctions)]. This provision applies to all proceedings under the Family Code [*In re Marriage of Freeman (2005) 132 Cal. App. 4th 1, 6, 33 Cal. Rptr. 3d 237]* . However, a court may not award attorney's fees or court costs against a governmental agency [*Fam. Code § 3652*; *see also Fam. Code § 273* (prohibiting attorney's fees award against governmental agency involved in family law matter or child support proceeding except when sanctions are warranted)].

An award under *Fam. Code § 271* is in the nature of a sanction [*Fam. Code § 271(a)*; *see In re Marriage of Green (1989) 213 Cal. App. 3d 14, 27-29, 261 Cal. Rptr. 294* ; *see also In re Marriage of Freeman (2005) 132 Cal. App. 4th 1, 6, 33 Cal. Rptr. 3d 237* (statute contemplates that sanctions will be assessed at end of proceeding when extent and severity of party's bad conduct can be judged); *In re Marriage of Hargrave (1995) 36 Cal. App. 4th 1313, 43 Cal. Rptr. 2d 474* (approving attorney's fees order as sanctions, but making payment contingent on failure to perform other duties under order)]. The court must take into consideration all evidence concerning the parties' income, assets, and liabilities, but may not impose a fee sanction that imposes an unreasonable financial burden on the party against whom the sanction is ordered [*Fam. Code § 271(a)*; *In re Marriage of Falcone & Fyke (2008) 164 Cal. App. 4th 814, 828, 79 Cal. Rptr. 3d 588* (sanction must be scaled to payor's ability to pay and must be made in light of both parties' financial circumstances)]. The court may not impose an attorney's fee sanction that imposes an unreasonable financial burden on the party against whom the sanction is ordered [*see In re Marriage of Battenburg (1994) 28 Cal. App. 4th 1338, 1346, 33 Cal. Rptr. 2d 871]* . However, the party to receive the award is not required to demonstrate any financial need for the award [*Fam. Code § 271(a)*].

The award of attorney's fees and costs may be imposed only after notice to the party against whom the sanction is proposed to be imposed and an opportunity for that party to be heard [*Fam. Code § 271(b)*]. It is payable only from the property or income of the party against whom it is imposed, except that the award may be against the sanctioned party's share of the community property [*Fam. Code § 271(c)*; *In re Marriage of Falcone & Fyke (2008) 164 Cal. App. 4th 814, 828, 79 Cal. Rptr. 3d 588* (in determining payor's ability to pay, court may consider property awarded to payor which, if sold, will provide payor with sufficient resources to satisfy sanction order)]. Sanctions may be imposed against a self-represented litigant; self-represented parties are not entitled to greater consideration than other litigants and attorneys [*In re Marriage of Falcone & Fyke (2008) 164 Cal. App. 4th 814, 830, 79 Cal. Rptr. 3d 588*].

[5] Frivolous Actions or Delaying Tactics

[a] In General

Under *Code Civ. Proc. § 128.7*, sanctions are tied to a requirement that every pleading, petition, written notice of motion, or other similar paper must be signed by at least one attorney of record in that attorney's individual name, or, if a party is unrepresented, by the party. By presenting, or later advocating, any of these papers to the court, an attorney or an unrepresented party certifies that specified conditions are met and may be subject to sanctions if a court later determines that they are not [*Code Civ. Proc. § 128.7(a)-(c)*; *see In re Marriage of Falcone & Fyke (2008) 164 Cal. App. 4th 814, 825, 79 Cal. Rptr. 3d 588* (court did not err in considering husband's sanctions motions because they were not verified by husband but by his attorneys, when wife failed to show prejudice from this alleged irregularity or that attorneys' allegations lacked good faith)]. The provisions of *Code Civ. Proc. § 128.7* are patterned after Fed. Rule *Civ. Proc. 11*. These provisions do not apply to disclosures and discovery requests, responses, objections, and motions [*Code Civ. Proc. § 128.7(g)*]. Sanctions relating to discovery are contained in the statutes governing specific discovery proceedings [*see, e.g., Code Civ. Proc. § 2025.010 et seq.* (oral deposition), *Code Civ. Proc. § 2030.010 et seq.* (interrogatories), *Code Civ. Proc. § 2031.010 et seq.* (production, inspection, and entry)].

A party must seek sanctions by a noticed motion made separately from other motions or requests and describing the specific conduct alleged to violate *Code Civ. Proc. § 128.7(b)*. The papers to be served on the opposing party as notice of intent to file a Section 128.7 sanctions motion must be the same papers that are ultimately filed with the court no less

than 21 days later [*In re Marriage of Falcone & Fyke (2008) 164 Cal. App. 4th 814, 827, 79 Cal. Rptr. 3d 588*]. In determining what sanction, if any, to impose, the court must consider whether the party seeking sanctions has exercised due diligence [*Code Civ. Proc. § 128.7(c)(1)*; *see also Eichenbaum v. Alon (2003) 106 Cal. App. 4th 967, 968, 131 Cal. Rptr. 2d 296* (trial court has authority to impose sanctions on plaintiff who voluntarily dismisses his action *after* defendant's motion for sanctions has been filed)]. Furthermore, a court may, on its own motion, enter an order describing specific conduct that appears to violate *Code Civ. Proc. § 128.7(b)* and direct an attorney, law firm, or party to show cause why it has not violated the specified provision unless that party timely corrects or withdraws the challenged paper, claim, defense, contention, allegation, or denial [*Code Civ. Proc. § 128.7(c)(1), (2)*].

Under *Code of Civil Procedure Section 128.7*, a court may award sanctions in an amount that is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated, impose nonmonetary directives, or order the payment of penalties to the court [*Code Civ. Proc. § 128.7(d)*]. In specified circumstances, the court may award punitive damages in addition to available sanctions [*Code Civ. Proc. § 128.7(f)*].

Sanctions may be imposed against a self-represented litigant; self-represented parties are not entitled to greater consideration than other litigants and attorneys [*In re Marriage of Falcone & Fyke (2008) 164 Cal. App. 4th 814, 830, 79 Cal. Rptr. 3d 588*]. An attorney who responds in pro se to a filing abuse may not recover sanctions under *Code Civ. Proc. § 128.7* in the form of an award of attorney fees [*Musaelian v. Adams (2009) 45 Cal. 4th 512, 520, 87 Cal. Rptr. 3d 475, 198 P.3d 560]*.

Sanctions for frivolous actions or delaying tactics under *Code Civ. Proc. § 128.7* are discussed in Ch. 510, *Sanctions* . For discussion of *Fed. R. Civ. P., Rule 11* and cases applying it, see Moore's Federal Practice, Ch. 11 (3d ed. Matthew Bender).

[b] Frivolous Appeal

Costs and attorney's fees also may be awarded in the form of sanctions against a party or attorney for a frivolous appeal or an appeal taken solely for delay [*see Code Civ. Proc. § 907*; *Cal. Rules of Ct., Rule 8.276(e)*; *In re Marriage of Gong & Kwong (2008) 163 Cal. App. 4th 510, 518-521, 77 Cal. Rptr. 3d 540* (factors relevant to determining amount of sanctions to be awarded party responding to frivolous appeal include amount of respondent's attorney's fees on appeal, amount of the judgment against appellant, degree of objective frivolousness and delay, and need for discouragement of like conduct in future; concluding that sanctions of $6,000 were appropriate)]. The appellate court may order that the sanctions for a frivolous appeal should be paid directly to the appellate court [*see In re Marriage of Gong & Kwong (2008) 163 Cal. App. 4th 510, 520, 77 Cal. Rptr. 3d 540* ; *In re Marriage of Schnabel (1994) 30 Cal. App. 4th 747, 753, 756, 36 Cal. Rptr. 2d 682]* . For further discussion and authorities, see Ch. 49, *Appeal: Sanctions* .

[c] False Accusations of Child Abuse or Neglect

In addition to any other remedy provided by law, if a court determines that an accusation of child abuse or neglect made during a child custody proceeding was false and that the person making the accusation knew it to be false at the time the accusation was made, the court may impose reasonable monetary sanctions, not exceeding the costs incurred by the accused party in defending the accusation, and reasonable attorney's fees incurred in recovering the sanctions against the person making the accusation. A "person" for this purpose includes a witness, a party, or a party's attorney [*Fam. Code § 3027.1(a)*; *see also Fam. Code § 3022.5* (motion for reconsideration must be granted if based on conviction of other parent for false allegations of child abuse)].

On motion by any person requesting the sanctions, the court must issue an order to show cause why the requested sanctions should not be imposed. The order to show cause must be served on the person against whom the sanctions are sought, and a hearing must be scheduled by the court, to be conducted at least 15 days after the order is served [*Fam. Code § 3027.1(b)*].

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§ 226.13 Amount of Award

[1] Discretion of Court

The amount awarded as attorney's fees and costs lies within the sound discretion of the trial court and, absent a clear showing of abuse, the trial court's determination will not be disturbed on appeal [*see, e.g., In re Marriage of Dick (1993) 15 Cal. App. 4th 144, 165, 18 Cal. Rptr. 2d 743]* . The trial court's order will be overturned only if, considering all of the evidence viewed most favorably in support of its order, no judge could reasonably have made it [*see, e.g., In re Marriage of Huntington (1992) 10 Cal. App. 4th 1513, 1523, 14 Cal. Rptr. 2d 1]* . The trial record, however, must reflect that the court actually exercised its discretion and considered the statutory factors required in doing so [*In re Marriage of Keech (1999) 75 Cal. App. 4th 860, 869-871, 89 Cal. Rptr. 2d 525* (trial court abused its discretion in ordering husband to pay wife's attorney's fees without inquiring into reasonableness of fees); *In re Marriage of Braud (1996) 45 Cal. App. 4th 797, 827, 53 Cal. Rptr. 2d 179* (trial court abused its discretion in awarding party only $500, in face of claim for over $6,000 in fees and costs, when there was no apparent reason to award fees so grossly disproportionate to those actually charged)].

The burden is on the party attacking the award to establish an abuse of discretion [*see, e.g., In re Marriage of Huntington (1992) 10 Cal. App. 4th 1513, 1523-1524, 14 Cal. Rptr. 2d 1 , 14 Cal. Rptr. 2d 1]* . Thus, if a party does not request a statement of decision regarding how attorney's fees were computed, he or she waives any failure to provide such a computation [*In re Marriage of McQuoid (1991) 9 Cal. App. 4th 1353, 1361, 12 Cal. Rptr. 2d 737* ; *see also Ch. 221, Dissolution of Marriage: Procedure, § 221.90* et seq. (regarding statements of decision)].

[2] Factors Considered

The amount of an attorney's fee award must be just and reasonable under the circumstances [*Fam. Code § 2032(a)*]. In fixing the amount to be awarded, the court must consider the nature of the litigation, its complexity or difficulty, the nature and extent of the contest, the amount involved, the financial circumstances of the parties, the skill required, and the standing, experience, professional competence, and special expertise of the attorney, together with the results obtained for the client [*see, e.g., In re Marriage of Ward (1992) 3 Cal. App. 4th 618, 628, 4 Cal. Rptr. 2d 365* ; *cf. In re Marriage of Shaban (2001) 88 Cal. App. 4th 398, 407-411, 105 Cal. Rptr. 2d 863* (justifications for high appellate

fee awards)]. Compensable professional legal skill is not limited to trial time or courtroom techniques alone, and conscientious and successful efforts by counsel to resolve as many areas of disagreement as possible without judicial intervention will be given serious consideration by the court in awarding attorney's fees [*see, e.g., In re Marriage of Behrens (1982) 137 Cal. App. 3d 562, 576, 187 Cal. Rptr. 200]* . An award that is insufficient to cover the attorney's fees that may be justified under these factors may constitute an abuse of discretion [*see, e.g., In re Marriage of Munguia (1983) 146 Cal. App. 3d 853, 195 Cal. Rptr. 199]* .

Occasionally, the trial court may award fees on some basis other than the actual amount of work involved. If it does so and the award is reasonable, the order will be affirmed on appeal [*see Marriage of Millet (1974) 41 Cal. App. 3d 729, 731-732, 116 Cal. Rptr. 390* (fee to collect support based on prevalent fee charged in geographical area of court for collection of an uncontested debt, i.e., 30 percent of amount recovered through collection process)].

In the case of a pendente lite award, the court cannot know, of course, at the commencement of the case the amount of labor that will be required or the value of the services to be performed in maintaining or defending the proceeding on behalf of the spouse. Therefore, instead of fixing the entire amount of counsel fees to be awarded at the beginning of the case, the court may make an initial award of fees and then augment the award from time to time as needed [*see Fam. Code § 2030(a)(c)*; *Rosenthal v. Rosenthal (1961) 197 Cal. App. 2d 289, 295, 17 Cal. Rptr. 186]* .

[3] Showing Required

[a] Value of Services

Direct evidence of the reasonable value of an attorney's services need not be presented because the evidence is necessarily before the court that hears the case [*In re Marriage of McQuoid (1991) 9 Cal. App. 4th 1353, 1361, 12 Cal. Rptr. 2d 737]* . If the trial court is informed of the extent and nature of the services rendered, it may rely on its own experience and knowledge in determining their reasonable value [*see, e.g., In re Marriage of Cueva (1978) 86 Cal. App. 3d 290, 300, 149 Cal. Rptr. 918]* . Hence, if the case is simple and the amount requested as fees and costs is clearly reasonable, counsel may choose to present no evidence as to the work done or its value, preferring to allow the trial court pursuant to the above rule to fix the value.

In other cases when, for example, the proceeding is contested or involves complex issues, evidence of the legal work performed and the expenses and costs incurred may be required. Therefore, counsel always should be prepared at the hearing to support the request for fees and costs with such evidence. Frequently, it may be sufficient if counsel merely testifies as to the number of hours spent with or without stating his or her hourly rate [*see Frank v. Frank (1963) 213 Cal. App. 2d 135, 137, 28 Cal. Rptr. 687* ; *see also In re Marriage of Kozen (1986) 185 Cal. App. 3d 1258, 1264, 230 Cal. Rptr. 304* (mixed award of attorney and accountant fees upheld); *cf. In re Marriage of Cueva (1978) 86 Cal. App. 3d 290, 149 Cal. Rptr. 918* (award of attorney's fees reversed when nothing in record supported fee claimed)].

If the attorney is seeking a large fee based on a large number of hours or on other factors such as the skill required, the special expertise of the attorney, and the results obtained, an expert witness may be used to establish the reasonableness of the fee. The witness may be any attorney who has experience in practicing family law in the community involved, and who thus has special knowledge and experience to qualify him or her as an expert on the subject of family law fees [*see Evid. Code § 720*; *see, e.g., In re Marriage of Borson (1974) 37 Cal. App. 3d 632, 640, 112 Cal. Rptr. 432]* .

For additional discussion regarding the trial of attorney's fees issues, see Denner, Rothschild & Johnson, California Family Law Trial Guide, Unit 34 (Matthew Bender).

[b] Necessity

The court may order a party to pay on behalf of the other party only an amount that may be "reasonably necessary" for

attorney's fees and for the cost of maintaining or defending the proceeding [*Fam. Code § 2030(a)*]. For example, an appellate court reversed an award of attorney's fees, holding that the trial court erred in ordering the husband to pay fees incurred by the wife's new attorney without evaluating the necessity of work performed on the wife's behalf, despite the husband's objection that much of the attorney's time was spent seeking and reviewing files from the wife's previous attorney and requesting continuances [*In re Marriage of Keech (1999) 75 Cal. App. 4th 860, 869, 89 Cal. Rptr. 2d 525]* .

Counsel seeking an award of fees and costs on behalf of a party must be prepared to show that the legal services performed, or to be performed, and the costs incurred, or to be incured, were or are reasonably necessary. Absent such a showing by counsel, cost items may be disallowed and the amount awarded for attorney's fees may be substantially less than that sought [*see, e.g., Marriage of Rosan (1972) 24 Cal. App. 3d 885, 898-899, 101 Cal. Rptr. 295]* .

[c] Disclosure of Fee Agreement

The fee agreement and the amount of the fee already paid by the client to the attorney must appear in the income and expense declaration served on the other party and filed with the court. An attorney's intentional concealment from the court of material facts has been held to involve moral turpitude and to constitute a ground for professional discipline [*see Davidson v. State Bar (1976) 17 Cal. 3d 570, 574, 131 Cal. Rptr. 379, 551 P.2d 1211]* . Hence, any concealment from the court of sums paid on fees or costs is a ground for professional discipline. Moreover, false statements in the income and expense declaration might subject both the client who signed it to prosecution for perjury [*see Penal Code § 118*] and the attorney who counseled it to prosecution for subornation or perjury [*see Penal Code § 127*] and to disciplinary proceedings under the State Bar Act [*see Medoff v. State Bar (1969) 71 Cal. 2d 535, 540-541, 78 Cal. Rptr. 696, 455 P.2d 800]* . For an illustrative income and expense declaration, see *Ch. 221, Dissolution of Marriage: Procedure, § 221.10* et seq.

[4] Costs Allowed

The cost provisions of *Code Civ. Proc. § 1021 et seq.* are applicable to contested family law proceedings in the same manner as in civil actions generally [*see Cal. Rules of Ct., Rule 5.21*]. See generally *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq. for discussion of this topic.

However, the authorization for cost awards in *Fam. Code § 2030(a)* does not specifically limit the award of costs to the kinds of costs normally awarded in a civil action. Rather, that section authorizes the court to award whatever amount as may be reasonably necessary for the costs of maintaining or defending the proceeding. Consequently, the cost award in a family law proceeding, when need and ability to pay are shown, may include accountants', auditors', and appraisers' fees [*see, e.g., In re Marriage of Rosan (1972) 24 Cal. App. 3d 885, 898, 101 Cal. Rptr. 295]* . Nevertheless, as a precautionary measure to assure that any fees paid to experts for services rendered in connection with the proceeding will be recoverable, counsel may wish to seek a court order authorizing the employment of the expert prior to the actual employment. Such an order may be sought at the same time that pendente lite relief is sought.

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§ 226.14 Order for Payment Directly to Attorney

The court in its discretion, when it orders one of the parties to pay costs and attorney's fees for the benefit of the other party, may make the fees and costs payable, in whole or in part, to the attorney entitled to them [*Fam. Code § 272(a)*]. If the court orders direct payment to the attorney, the order may be enforced directly by the attorney in his or her own name or by the party on whose behalf the order was made [*Fam. Code § 272(b)*]. Entry of a judgment ordering a party to pay attorney's fees to the other party's attorney gives that attorney an independent statutory right to enforce the judgment even if the party the attorney represented opposes payment of the fees [*In re Marriage of Green (2006) 143 Cal. App. 4th 1312, 1320-1321, 49 Cal. Rptr. 3d 908*].

If at the time enforcement is sought, however, the attorney has ceased to be the attorney for the party on whose behalf the fees were awarded, the attorney may enforce the order only if it appears of record that the attorney has given the former client or successor counsel 10 days' written notice of the application for enforcement of the order. During the 10-day period, the client may file in the proceeding a motion directed to the former attorney for partial or total reallocation of fees and costs to cover the services and cost of successor counsel. Once the motion is filed, the proceeding must be stayed until the court has resolved the motion [*Fam. Code § 272(c)*; *see, e.g., In re Marriage of Wagoner (1986) 176 Cal. App. 3d 936, 940-941, 222 Cal. Rptr. 479]* . The pivotal factor governing a court's jurisdiction to award a direct fee payment is whether the former client authorized the former attorney to make the fee request on the former client's behalf [*In re Marriage of Simpson (2006) 141 Cal. App. 4th 707, 710, 46 Cal. Rptr. 3d 253* (court had jurisdiction when firm's request for direct fee payment was made while it was still attorney of record and with client's express authorization)]. Because the right to have fees paid belongs to the client, not to counsel, the client must expressly or impliedly authorize a discharged attorney to pursue a motion requesting fee payment on the client's behalf for the court to have jurisdiction over the motion; a client's failure to convey this authorization is fatal to the court's power to rule [*In re Marriage of Simpson (2006) 141 Cal. App. 4th 707, 713, 46 Cal. Rptr. 3d 253]* .

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§ 226.15 Effect of Award on Community Property Division

In making an award of costs or attorney's fees under *Fam. Code § 2030* or *2031*, the court may order payment of the award from any type of property [*Fam. Code § 2032(c)*]. An award of attorney's fees is independent of the division of the community property, and therefore, notwithstanding the equal division requirement [*see Fam. Code § 2550*], a trial court may properly order that one spouse pay the other spouse's attorney's fees out of the paying spouse's share of the community property [*see, e.g., In re Marriage of Jafeman (1972) 29 Cal. App. 3d 244, 266, 105 Cal. Rptr. 483* (decided under substantially similar predecessor statute)].

A spouse's liability for the other spouse's attorney's fees under court order should be distinguished from a spouse's liability for his or her *own* attorney's fees. Generally, the community property is not liable for debts incurred by a spouse during marriage, but after separation [*see Fam. Code § 910*]. In the division of community property, however, a court has jurisdiction to order reimbursement in cases it deems appropriate for debts paid after separation but before trial [*Fam. Code § 2626*]. Thus, a party's liability for or payment of attorney's fees to his or her own attorney may be considered in relation to the division of community property in appropriate circumstances [*see, e.g., In re Marriage of Jafeman (1972) 29 Cal. App. 3d 244, 266-267, 105 Cal. Rptr. 483]* .

For discussion of the characterization and division of debts in dissolution proceedings, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

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§ 226.16 Appealability of Order

An order for the payment of attorney's fees and costs pendente lite is appealable as a final judgment in a collateral matter, unless the trial court reserves jurisdiction to consider the matter further. In the latter case, the ruling is in the nature of an interlocutory order directing that further proceedings be taken before a determination is made, and it is not appealable [*Marriage of Jafeman (1972) 29 Cal. App. 3d 244, 268, 105 Cal. Rptr. 483]* . An order for attorney's fees and costs contained in a judgment is appealable under the provisions of *Code Civ. Proc. § 904.1(a)(1), (10).* An order made in a proceeding subsequent to the entry of judgment is appealable under the provisions of *Code Civ. Proc. § 904.1(a)(2).*

An appeal may also be taken from an order or an interlocutory judgment directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds $5,000 [*Code Civ. Proc. § 904.1(a)(11), (12)*]. Sanction orders or judgments of $5,000 or less against a party or an attorney for a party may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ [*Code Civ. Proc. § 904.1(b)*].

For discussion of appeal procedures and further discussion of the appealability of orders and judgments, see Ch. 40, *Appeal: An Overview* , through Ch. 54, *Appeal: California Supreme Court Review* .

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§ 226.17 Stay of Proceeding on Failure to Pay

In view of the envisioned purpose of an award of attorney's fees and costs to enable the party in whose favor the award is made to have sufficient resources to present his or her case adequately [*see, e.g., In re Marriage of Gonzales (1975) 51 Cal. App. 3d 340, 344, 124 Cal. Rptr. 278]* , the trial court may order the proceeding stayed until the costs and attorney's fees are paid in any proceeding in which the party ordered to pay is the party prosecuting the proceeding and he or she fails to pay [*see, e.g., Allen v. Superior Court (1901) 133 Cal. 504, 505, 65 P. 977]* . The same rule applies if the losing party in the trial court is seeking to have the judgment reversed on appeal and is ordered by the trial court to pay respondent's costs and attorney's fees on appeal. The appellant's failure to pay as ordered may result in a stay of the appeal on motion of the respondent [*Kopasz v. Kopasz (1949) 34 Cal. 2d 423, 425, 210 P.2d 846]* .

A contrary rule applies, however, if the party ordered to pay is unable to do so and the moving party fails to allege that he or she is unable to pay his or her own costs and attorney's fees to resist the appeal. In such a situation, the motion to stay the appeal may be denied [*Pugliese v. Pugliese (1927) 200 Cal. 652, 653, 254 P. 266* ; *see Kopasz v. Kopasz (1949) 34 Cal. 2d 423, 425, 210 P.2d 846* ; *cf. Dimon v. Dimon (1950) 101 Cal. App. 2d 190, 192-193, 225 P.2d 282* (motion to stay may be denied when to do so would be manifest disservice to respondent and parties would benefit by letting case proceed to final determination)].

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§ 226.18 Case Management Plan for Complex Cases

At any time before hearing on the merits, either party may move the court to direct the implementation of a case management plan to allocate attorney's fees, court costs, expert fees, and consultant fees equitably between the parties. In exercising its discretion to order a plan, the court must find that the case involves complex or substantial issues of fact or law related to property rights, visitation, custody, or support [*Fam. Code § 2032(d)*].

The case management plan must focus on specific, designated issues. Thus, it may provide for the allocation of separate or community assets, for security against these assets, and for payments from income or anticipated income of either party for the payment of fees and costs for the benefit of one or both parties. Payments must be authorized only on agreement of the parties, or in the absence of agreement, by court order. The court may order that a referee be appointed to oversee the case management plan [*Fam. Code § 2032(d)*; *see Code Civ. Proc. § 639* (appointment of referee); *see also* King, *Save the Court Save the Family, 12(1)* Cal. Law. 42 (1992) (detailed discussion of law, its ambiguities, and potential scope)].

For a form of declaration supporting a motion to establish a case management plan, *see § 226.50*.

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[Reserved]

§§ 226.19[Reserved]

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§ 226.30 California Family Law Practice and Procedure

For discussion and forms relating to attorney fee agreements, award of fees, and fee provisions in marital settlement agreements, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, Chs. 61, 62, 216 (Matthew Bender 2d ed.)

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§ 226.31 California Family Law Trial Guide

For discussion and forms relating to the trial of attorney's fees and costs, see Denner, Rothschild & Johnson, California Family Law Trial Guide, Unit 34 (Matthew Bender)

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§ 226.32 California Legal Forms

For forms of agreement for professional services of attorneys, see California Legal Forms, Ch. 86, *Agreements for Professional Services* (Matthew Bender)

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§ 226.33 California Points and Authorities

For forms of points and authorities relating to the recovery of fees from the client and from the opposing parties, see California Points and Authorities, *Attorney's Fees*; *Costs*, Pts. II, III (Matthew Bender)

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§ 226.34 State Statutes

[1] Attorney's Fees and Costs

Ability to pay attorney's fees or costs. *Fam. Code § 270*

Prohibition against award of attorney's fees or costs against governmental agency except when sanctions are warranted. *Fam. Code § 273*

Awards during pendency of proceeding. *Fam. Code §§ 2030-2034*

Case management plans. *Fam. Code § 2032(d)*

Compensation of counsel appointed to represent child in custody or visitation proceeding. *Fam. Code § 3153*

Factors considered by court in awarding fees in support proceedings, and persons to whom fees may be awarded. *Fam. Code § 3557*

Award to prevailing party in child support proceeding. *Fam. Code § 3652*

[2] Sanctions

Frivolous actions or delaying tactics; violation of certification requirements; awards of attorney's fees, expenses, nonmonetary sanctions, and punitive damages. *Code Civ. Proc. § 128.7*

Appeal of interlocutory judgment or order imposing sanctions in excess of $5,000. *Code Civ. Proc. § 904.1(a)(11), (12)*

Review of sanction order judgment of $5,000 or less. *Code Civ. Proc. § 904.1(b)*

Award based on conduct of party or attorney. *Fam. Code § 271*

Award based on false accusation of child abuse or neglect. *Fam. Code § 3027*

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§ 226.35 California Rules of Court

Sanctions for frivolous appeals. *Cal. Rules of Ct., Rule 8.276(e)*

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§ 226.36 Decisions

[1] Award as Improper

Ten-percent fee award to wife in marital dissolution was abuse of discretion because trial court found that fee amount was due to discovery burdens and husband had received virtually all income producing community property, had substantially greater income and large pension fund. *In re Marriage of Hargrave (1985) 163 Cal. App. 3d 346, 356-357, 209 Cal. Rptr. 764*

Conditioning grant of motion to set aside stipulated judgment under *Code Civ. Proc. § 473* on payment of nonprevailing party's attorney's fees was abuse of discretion, despite inconvenience in defending motion, when prevailing party was needy, had moved for fees, and entered into stipulation by mistake. *In re Marriage of Kerry (1984) 158 Cal. App. 3d 456, 465, 204 Cal. Rptr. 660*

Trial court abused discretion in making small award despite showing of need, reasonableness of fees charged, and greater resources of other spouse. *In re Marriage of Munguia (1983) 146 Cal. App. 3d 853, 863, 195 Cal. Rptr. 199*

Costs of expert witnesses on topics of child custody and valuation of community assets was properly included in award; trial court's refusal to consider award of costs as erroneous. *In re Marriage of Munguia (1983) 146 Cal. App. 3d 853, 864-865, 195 Cal. Rptr. 199*

Award of $1,500 in fees was improper when case spanned over nine years with same attorney of record, case was complex and required additional legal effort due to obstructive activities of defendant, and attorney had not charged client during entire period due to client's inability to pay. *In re Marriage of Fransen (1983) 142 Cal. App. 3d 419, 426-427, 190 Cal. Rptr. 885*

[2] Award as Proper

Award attorney's fees to wife for defense of civil action for fraud brought by husband after she filed for dissolution as proper; trial court erred in refusing to award these fees. *Askew v. Askew (1994) 22 Cal. App. 4th 942, 964-965, 28 Cal. Rptr. 2d 284*

Trial court's award of future attorney's fees in amount greater than wife requested was proper. *In re Marriage of Dick (1993) 15 Cal. App. 4th 144, 159, 166-168, 18 Cal. Rptr. 2d 743*

Fee waiver clause in marital settlement agreement was no bar to award of attorney's fees in postjudgment custody dispute. *In re Marriage of Joseph (1990) 217 Cal. App. 3d 1277, 1284-1285, 266 Cal. Rptr. 548*

Award of attorney's fees to wife in separation proceeding was warranted when husband was better able to pay attorney's fees and costs, failed to take advantage of offered stipulation, and then tenaciously pursued unnecessary litigation to correct his own negligence. *In re Marriage of Melone (1987) 193 Cal. App. 3d 757, 765-766, 238 Cal. Rptr. 510*

Attorney's fees award was proper in postdissolution proceeding to obtain child support, despite bifurcation of support amount from issue of validity of agreement relating to support obligation. *In re Marriage of Ayo (1987) 190 Cal. App. 3d 442, 452, 235 Cal. Rptr. 458*

Trial court's award of $80,000 in attorney's fees was proper given extensive case preparation required, withdrawal of opponent from settlement, and conflicting evidence that opponent had "stonewalled" and had been uncooperative during discovery. *In re Marriage of Kozen (1986) 185 Cal. App. 3d 1258, 1264, 230 Cal. Rptr. 304*

Trial court properly awarded attorney's fees and costs incurred after dissolution judgment but connected with trial of bifurcated issue if court gives due consideration to income and needs of parties, despite original judgment that had become final and provided that each party will bear own attorney's fees and costs to date. *In re Marriage of Wolfe (1985) 173 Cal. App. 3d 889, 891, 219 Cal. Rptr. 337*

Award of attorney's fees was proper when party can establish need for attorney's fees and costs, other party's ability to pay, and reasonableness of fees regardless if petitioner has remarried and waived spousal support in prior hearing. *In re Marriage of Newport (1984) 154 Cal. App. 3d 915, 918, 201 Cal. Rptr. 647*

[3] Bankruptcy

Trial court's award of attorney's fees and costs was dischargeable in bankruptcy when award is not based on need, but is equitable division of debt, so that court's action in making award is more consistent with division of community property and debt than with support award. *In re Gibson (Bankr. 9th Cir. 1989) 103 Bankr. 218*

[4] Discretion of Court

Family law court has no jurisdiction to order a party's attorney to repay earned fees into a trust account to enable party to substitute another attorney. *In re Marriage of Laursen & Fogarty (1988) 197 Cal. App. 3d 1082, 1089, 243 Cal. Rptr. 398*

Court has mandatory duty, absent good cause to contrary, to award reasonable attorney's fees to supported spouse in action to enforce order for spousal support on determining other party's ability to pay. *In re Marriage of Kennedy (1987) 193 Cal. App. 3d 1633, 1643, 239 Cal. Rptr. 151*

Denial of attorney's fees without hearing was error when record did not indicate that court considered respective

incomes and needs of parties. *In re Marriage of Popenhager (1979) 99 Cal. App. 3d 514, 525-526, 160 Cal. Rptr. 379*

Court was not required to deduct attorney's fees as community obligations before dividing property, but can require one party to pay other's attorney's fees out of separate property after division. *In re Marriage of Barnert (1978) 85 Cal. App. 3d 413, 428-429, 149 Cal. Rptr. 616*

Award and amount of attorney's fees and costs on appeal were matters addressed to sound judicial discretion of trial court and, absent clear showing of abuse, trial court's determination as not disturbable by appellate court. *In re Marriage of Stachon (1978) 77 Cal. App. 3d 506, 510, 143 Cal. Rptr. 599*

[5] Factors to Be Considered

Court must determine how to apportion overall cost of litigation equitably between parties under their relative circumstances. *In re Marriage of Dietz (2009) 176 Cal. App. 4th 387, 406, 97 Cal. Rptr. 3d 616*

Court must consider statutory factors in making award. *Alan S. v. Superior Court (2009) 172 Cal. App. 4th 238, 242-243, 91 Cal. Rptr. 3d 241*

Court must consider parties' relative financial needs. *In re Marriage of Falcone & Fyke (2008) 164 Cal. App. 4th 814, 824, 79 Cal. Rptr. 3d 588*

In awarding attorney's fees in dissolution action, court properly considered counsel's efforts to expedite proceedings and to resolve disagreements without judicial intervention. *In re Marriage of Behrens (1982) 137 Cal. App. 3d 562, 576, 187 Cal. Rptr. 200*

[6] Jurisdiction

Court had jurisdiction to order attorney's fees to be paid by nonparent whose petition for guardianship of minor child of marriage has been consolidated with family law proceeding concerning custody of child. *Guardianship of Paduano (1989) 215 Cal. App. 3d 346, 350-352, 263 Cal. Rptr. 589*

Discharged attorney lacked standing to appeal judgment for fees awarded on client's behalf in dissolution action; right to fees belongs to client and attorney was not "aggrieved party." *In re Marriage of Tushinsky (1988) 203 Cal. App. 3d 136, 142, 249 Cal. Rptr. 611*

Trial court had subject matter jurisdiction to award fees against third parties when complaint in joinder alleges that those parties hold and claim property in which husband or wife has community property interest; jurisdiction as not defeated even if it is ultimately shown that third parties do not possess community property. *In re Marriage of Siller (1986) 187 Cal. App. 3d 36, 47, 231 Cal. Rptr. 757*

[7] Sanctions

Sanctions award need not be limited to cost to other party resulting from bad conduct; correlation between sanctioned conduct and specific attorney's fees is not required. *In re Marriage of Corona (2009) 172 Cal. App. 4th 1205, 1226, 92 Cal. Rptr. 3d 17*

Court must scale sanction to payor's ability to pay. *In re Marriage of Falcone & Fyke (2008) 164 Cal. App. 4th 814, 827-828, 79 Cal. Rptr. 3d 588*

Party requesting fees is not required to demonstrate financial need for award. *In re Marriage of Lucio (2008) 161 Cal. App. 4th 1068, 1081-1082, 74 Cal. rptr. 3d 03*

Court properly imposed sanctions for party's obstreperous conduct that caused litigation costs to greatly increase. *In re Marriage of Freemen (2005) 132 Cal. App. 4th 1, 6, 33 Cal. Rptr. 3d 237*

Monetary sanctions imposed under *Fam. Code § 271* are not required to compensate for all fees and costs expended. *In re Marriage of Battenburg (1994) 28 Cal. App. 4th 1338, 1346, 33 Cal. Rptr. 2d 871*

Attorney's fees and expenses under *Fam. Code § 271* or *Code Civ. Proc. § 128.5* are only remedy for repeated unsuccessful OSCs to modify child custody order. *Bidna v. Rosen (1993) 19 Cal.App. 4th 27, 36, 23 Cal. Rptr. 2d 251* (dismissing action for malicious prosecution)

Accounting delays, violations of restraining orders, and obstruction of proceedings because husband did not "believe" in community property justified $100,000 fee award. *In re Marriage of Quay (1993) 18 Cal. App. 4th 961, 969-971, 22 Cal. Rptr. 2d 537*

Due process requires that any order imposing sanctions state with particularity basis for finding violation. *Caldwell v. Samuels Jewelers (1990) 222 Cal. App. 3d 970, 977-978, 272 Cal. Rptr. 126*

Trial transcript, nonconforming brief, and delays in payment indicates attempts to frustrate policy of law and justifying award of attorney's fees on appeal. *In re Marriage of Green (1989) 213 Cal. App. 3d 14, 27-29, 261 Cal. Rptr. 294*

Frivolous motion for new trial merits sanctions under *Code Civ. Proc. § 128.5*. *In re Marriage of Green (1989) 213 Cal. App. 3d 14, 25-26, 261 Cal. Rptr. 294*

Imposition of monetary sanctions against attorney who exceeds hearing time limit after motion to disqualify trial judge is denied was improper when court failed to give attorney notice and opportunity to be heard on sanctions issue, even though attorney's conduct might otherwise be deserving of substantial sanctions. *In re Marriage of Quinlan (1989) 209 Cal. App. 3d 1417, 1422-1423, 257 Cal. Rptr. 850*

Request for attorney's fees or sanctions within dissolution proceeding was proper relief for bad faith conduct relating to orders to show cause re contempt. *Green v. Uccelli (1989) 207 Cal. App. 3d 1112, 1121, 255 Cal. Rptr. 315*

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§ 226.37 Law Reviews

King, *Save the Court Save the Family, 12(1)* Cal. Law. 42 (1992).

Gozansky, Renjilian & Zuckman, *Divorce Law (Part 3)*, 27(2) Prac. Law. 67 (1981)

Gozansky, Renjilian & Zuckman, *Divorce Law Practice (Part 2)*, 27(1) Prac. Law. 27 (1981)

Gozansky, Renjilian & Zuckman, *Divorce Law Practice (Part 1)*, 26(8) Prac. Law. 11 (1980)

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19-226 California Forms of Pleading and Practice--Annotated §§ 226.38-226.49

[Reserved]

§§ 226.38[Reserved]

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Chapter 226 DISSOLUTION OF MARRIAGE: ATTORNEY'S FEES
PART IV. FORMS

19-226 California Forms of Pleading and Practice--Annotated § 226.50

§ 226.50 Declaration [Code Civ. Proc. § 2015.5] in Support of Motion to Establish Case Management Plan [Fam. Code § 2032(d)]

[1] FORM Declaration [Code Civ. Proc. § 2015.5] in Support of Motion to Establish Case Management Plan [Fam. Code § 2032(d)]

[*Attachment to Paragraphs 13 and 14 of Judicial Council form of Application for Order and Supporting Declaration (Cal. Rules of Ct., Rule 1285.20); print on pleading paper or on Judicial Council form of Additional Page (MC-020)*]

I, _____ [*name*], request that the court direct implementation of a Case Management Plan. In support of the request, I declare:

1. I am the _____ [petitioner *or* respondent] in this proceeding for dissolution of marriage.

2. This case involves the following complex issues of law and fact relating to _____ [property rights *and/or* child custody *and/or* visitation *and/or* support]: _____ [*specify, e.g.,* respondent and I have been unable to reach agreement on the division of our community property, child support, and spousal support. Respondent is self-employed as an orthopedic surgeon and reported net earnings on our joint 1994 federal and state income tax returns of over $250,000. I claim a community property interest in his practice, for which expert evaluators will have to be retained. Further, I contend that respondent's net income for determining both spousal and child support is considerably more than that reported on his tax returns. I intend to produce expert testimony that will show that many of his alleged business expenses, whether or not they are proper deductions for tax purposes, are actually for personal expenses and should not be allowed as deductions from gross income for the purpose of determining net income for support. These issues will all involve complex and lengthy analyses of respondent's business records].

[3. The following assets could be set aside under a case management plan to pay the costs and attorney's fees associated with discovery, testimony, and other expenses that arise in this manner: _____ (*specify, e.g.,* Respondent manages a community investment portfolio that produces over $ _____ annually in

income. The income from this portfolio could be set aside and allocated equitably to cover the attorney's fees and costs of litigation).]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form is a declaration in support of a motion to establish a case management plan [*see Fam. Code § 2032(d)*].

[3] Completing Declaration and Accompanying Papers

The declaration may be typed on the Judicial Council form of Additional Page (Form MC-020). This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. The declaration may also be typed on standard pleading paper.

This form should be attached to the mandatory Judicial Council form of Order to Show Cause [FL-300] or the Judicial Council form of Notice of Motion [FL-301], either of which should be accompanied by the Judicial Council form of Application for Order and Supporting Declaration [FL-310]. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.. An illustrative filled-in copy of the notice of motion and the order to show cause forms seeking relief on other grounds are *set forth in Ch. 221, Dissolution of Marriage: Procedure, § 221.10* et seq.

In either the Order to Show Cause or Notice of Motion form, the box in the caption for "Other (specify)" should be checked and "Establishment of Case Management Plan" should be inserted in the space provided. In the Application for Order form, the Paragraph 13 box ("OTHER RELIEF (specify)") should be checked, and the following should be inserted in the space provided:

I request that the court direct implementation of a case management plan under *Family Code Section 2032(d)*.

The boxes in Paragraph 14 also should be checked to indicate that the supporting facts are contained in the attached declaration.

[4] Cross References

For discussion of the general form and content requirements for declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

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Volume 19: Dissolution of Marriage: Child Custody thru Dissolution of Marriage: Tax Effects of Dissolution-Chs.223-239
SPECIAL ALERT TO CHAPTER 227 Status of the Federal Estate Tax, GST Tax, and Gift Tax in 2010

19-227SA California Forms of Pleading and Practice--Annotated Scope

Scope

Background:

The Economic Growth and Tax Relief Reconciliation Act (EGTRRA), enacted in 2001, provided for gradual increases in estate and gift tax exemption amounts and decreases in maximum tax rates. That law mandated repeal, only for the year 2010, of the estate tax and generation-skipping transfer tax, but not the gift tax. It was long assumed that this repeal would never be permitted--that Congress would act to either extend the law as it existed in 2009, or possibly enact a new law on a similar basis but with different exclusion and tax rates.

As late as December 2009, Congress expressed its intent to pass legislation to prevent repeal. However, Congress failed to act and, as of this writing, there is no estate tax or generation-skipping transfer (GST) tax.

EGTRRA also provided that, in 2011, the estate tax and GST tax would be reinstated, but with only a $1 million applicable exclusion amount for each.

The estate tax applicable exclusion amount was $3.5 million per person in 2009, and the GST tax exemption was also $3.5 million. In 2010, both taxes were repealed, allowing unlimited bequests free of these taxes.

Unlike the estate and GSTs taxes, the gift tax was not repealed for 2010. The amount of lifetime gifts that may be made free from gift tax using the gift tax applicable exclusion amount (after any annual gift tax exclusion amounts) remains at $1 million in 2010, and any excess is subject to tax at the highest individual income tax rate, currently 35 percent. The maximum rate for federal estate tax and GST tax in 2009 was 45 percent. Because of the repeal, there is no estate or GST tax in 2010. In 2011, if new legislation is not enacted, the estate tax and GST tax each will carry a maximum rate of 55 percent, and the maximum rate for gift tax will climb to 55 percent.

The annual gift tax exclusion amount permits individuals to make gifts up to that amount, per donee, without incurring gift tax or using any of their lifetime applicable exclusion amount against estate and gift tax. This exclusion remains at $13,000 per donee in 2010. Because a husband and wife may agree to combine their gifts, together they will be able to gift $26,000 to each done in 2010. The annual gift tax exclusion with respect to gifts made to non-citizen spouses is

$134,000 in 2010.

Another effect of EGTRRA in 2010 was to significantly limit the step-up in basis of appreciated assets that had long been granted to the beneficiary of a decedent. In 2010, the beneficiary will receive a step-up only for the first $1.3 million of unrealized gain or appreciation. A surviving spouse will receive a step-up in the basis of acquired assets for an additional $3 million of unrealized gain or appreciation. Assets exceeding this amount take a carryover basis, thus making it much more likely for at least part of the distribution to be subject to capital gains tax. The gift tax laws have always conveyed a carryover basis; the step-up in basis for property acquired from a decedent had long been a benefit to a decedent's beneficiaries. Allocation of the stepped-up basis will be made by the executor or trustee. It is anticipated that administrative difficulties will arise, in terms of determining and reporting the basis of assets when acquired as well as their fair market value at the time of decedent's death.

Planning Ideas and Cautions:

Certain estate planning techniques require caution, in light of the unknown future of the estate and GST taxes.

One major caution concerns wills that use a formula to divide an estate between marital and by-pass trusts. If the by-pass trust is not capped, i.e., if the formula does not set a maximum funding for the by-pass trust, the portion intended for the surviving spouse may be largely or entirely depleted.

Similarly, a will that defines a charitable bequest in terms of the charitable deduction allowed under the now-repealed estate tax laws may produce unintended results.

Other techniques are still viable, whether there is an estate tax or not.

For example, a discounted and leveraged gift of a residence or second home may still be effected through a qualified personal residence trust (QPRT). The donor may reside in the home until the end of the QPRT, and may even be able to lease back the property at fair market value from the new owners.

The donor of a gift to a charitable remainder trust may retain a life payment of up to 90 percent of the value of the gifted property. The donor would receive an income tax deduction equal to the value of the gifted property not retained. There is no gain or loss recognized by the charitable remainder trust on sale of the property. Payments to the donor from the trust will be taxed partly as income, partly as capital gain; it is possible that a portion of the payments will be considered a distribution from principal and thus not taxable.

If new legislation is not enacted, the GST tax exemption will drop to $1 million in 2011. Therefore, it might be expedient to make lifetime gifts now. Of course, if Congress acts before the end of 2010, this strategy may lose its effectiveness.

For continuing coverage of developments on Capitol Hill affecting the estate and GST taxes, please visit our FREE website, the LexisNexis Estate Practice & Elder Law Center, at http://law.lexisnexis.com/practiceareas/Estate-Practice-Elder-Law.

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19-227 California Forms of Pleading and Practice--Annotated 227.syn

AUTHOR: Original text by Frederick W. Campbell-Craven, J.D.

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§ 227.44 Law Reviews

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Original text by Frederick W. Campbell-Craven, J.D. n*

FOOTNOTES:
(n43)Footnote *. Periodic updates include contributions from additional authors and the Publisher's Editorial Staff.

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PART I. SCOPE

19-227 California Forms of Pleading and Practice--Annotated § 227.01

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§ 227.01 Scope of Chapter

This chapter discusses the tax effects of a dissolution of marriage. It concentrates on federal income tax consequences, but discusses California law and includes relevant discussion of federal estate and gift taxation. It discusses the tax effects of both spousal and child support, including the dependency exemption. It also covers the tax effects of equal and unequal divisions of property, as well as the tax consequences of a sale or exchange of a principal residence. This chapter also discusses the deductibility of attorney's fees and the filing of income tax returns. All discussion covers both current law and, when still applicable, prior law.

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§ 227.02 Cross References

For discussion of community property and issues relating to its management and control, see Ch. 122, *Community Property*

For further discussion of gifts, estates, and trusts, together with associated taxation issues, see Ch. 278, *Gifts* , Ch. 440, *Probate: Necessity* through Ch. 458E, *Probate: Discharge* , and Ch. 560, *Trusts: Express, Charitable, and Totten Trusts*

For discussion of California personal income tax, see Ch. 540, *Taxes and Assessments*

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19-227 California Forms of Pleading and Practice--Annotated §§ 227.03-227.09

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§§ 227.03[Reserved]

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PART II. LEGAL BACKGROUND

19-227 California Forms of Pleading and Practice--Annotated § 227.10

AUTHOR: Original text by Frederick W. Campbell-Craven, J.D.

§ 227.10 Income Taxation of Spousal Support

[1] Background and Purpose of Current Law

[a] In General

Payments that qualify as alimony or separate maintenance payments are deductible by the payor-spouse under *I.R.C. § 215* and includable in the income of the payee-spouse under *I.R.C. § 71*. Thus, the payor-spouse is treated as a conduit of income to the payee-spouse, unless the payments are made pursuant to an agreement that expressly designates that they are not to be deductible or includible as alimony [*see Richardson v. Commissioner (1995), T.C. Memo 1995-554* ; *see also Keegan (Kirk A., Jr.) v. Commissioner, T.C. Memo. 1997-359* ; *Daugharty (John F.) v. Commissioner, T.C. Memo. 1997-349]* .

This tax treatment of qualifying payments has remained unchanged for many years, but Congress fundamentally revised the requirements for qualification in 1984 and amended them in 1986 [*see* Tax Reform Act of 1984, Pub. L. No. 98-369, § 422(a), as amended by Tax Reform Act of 1986, Pub. L. No. 99-514, §§ 1843(b), 1881 (elimination of rule that instrument must expressly provide for termination of obligation on death and retroactivity to operative date of Tax Reform Act of 1984); *see also Walters (Arlene) T.C. Memo. 1994-639* (1986 amendments also eliminated minimum term requirement that alimony must be paid for six years)]. Current and prior law seek to distinguish spousal support payments from both child support and payments made in satisfaction of a division of property, and to allow alimony tax treatment only to true spousal support. However, due to the considerable amount of litigation under prior law as to whether particular payments qualified for alimony tax treatment, Congress believed that a more objective test was required. Current law attempts to define alimony in a way that conforms to general notions of what types of payments constitute alimony [House Committee Report on § 422, Tax Reform Act of 1984, Pub. L. No. 98-369, written prior to enactment of Tax Reform Act of 1986, Pub. L. No. 99-514, §§ 1843(b), 1881, eliminating retroactively to operative date of Tax Reform Act of 1984 rule that instrument must expressly provide for termination of obligation on death]. Payments not meeting the objective test of current law will not qualify for alimony tax treatment regardless of whether they were intended by both parties to constitute spousal support.

PRACTICE TIP:

Many of the cases involving disputes over alimony tax treatment arise when the I.R.S. matches the payor's and payee's returns, and finds one deducting the payment while the other omits it from income.

[b] Effective Dates

Current federal law applies to payments made under dissolution or separation instruments signed, filed, and entered after 1984. If a decree of dissolution or legal separation entered after 1984 incorporates or adopts without change the terms of the alimony or separate maintenance payments under a dissolution or separation instrument entered before 1985, the decree is treated as entered before 1985. A change in the amount of alimony or separate maintenance payments, the time period over which the payments are to continue, or the addition or deletion of any contingencies or conditions relating to such payments, is a change of terms [Temp. Treas. Reg. § 1.71-1T(e), Q-26; *but cf. Marten (Virginia M.) v. Commissioner (1999) T.C. Memo. 1999-340 , reconsid. den.,* in Marten (Virginia M.) v. Commissioner (1999) T.C. Memo 2000-185 (under divorce decree entered in 1984 and modified in 1987, pre-1985 law applied to determine alimony tax treatment when modified decree did not expressly provide that post-1984 law would apply)].

Current federal law also applies to instruments executed or entered into (or treated as executed or entered into) before January 1, 1985, that are modified after that date, if the modification expressly provides that *I.R.C. § 71*, as amended by the Tax Reform Act of 1984, applies to the instrument as modified [Temp. Treas. Reg. § 1.71-1T(e), Q-26; *see* I.R.S. Letter Rul. 8634040 (Aug. 22, 1986)]. One court has held that an "express reference" is not limited to a "formulaic recitation of buzzwords" (for example, the law's formal statutory title). Any clear indication that the "new law" would apply is sufficient [*Christoph v. United States (S.D. Ga. 1995) 919 F. Supp. 1576* (nunc pro tunc "clarification" to invoke new law was upheld, but retroactive "modification" would not likely be upheld if it affected rights of federal government)].

One private letter ruling indicates that the Internal Revenue Service (hereinafter the IRS) may take a relatively narrow view of the circumstances under which a modification after 1984 of a pre-1985 divorce decree will subject the decree to post-1984 tax law. In that ruling, the IRS stated that such a modification would not subject a pre-1985 decree to post-1984 tax law unless the modification *expressly states* that post-1984 law applies [I.R.S. Letter Rul. 8634040 (Aug. 22, 1986); *see*Temp. Treas. Reg. § 1.71-1T(e), Q-26; *see also Libman v. Commissioner (1990) T.C. Memo 1990-629* (pre-1984 award of unallocated family support retained alimony treatment because 1988 modification for "child support" lacked express statement that post-1984 law applied)]. The IRS reasoned that, for purposes of applying the term "divorce or separation instrument" [*see I.R.C. § 71(b)(2)*] in ascertaining which tax laws apply, the underlying decree (or instrument) that establishes the obligation of paying support, rather than a modification decree, is determinative [I.R.S. Letter Rul. 8634040 (Aug. 22, 1986)].

[c] California Conformity to Federal Law

California's income tax treatment of spousal support is the same as that provided by federal income tax law for treatment of alimony [*Rev. & Tax. Code §§ 17081, 17201*; *see § 227.10[1][a]*]. Before 1987, California law contained the same requirements as federal income tax law before 1984 [*see* Stats. 1987, ch. 1138, §§ 53, 54, 66 (repealing *Rev. & Tax. Code §§ 17090, 17091, 17205*), 189; *see* former *Rev. & Tax. Code §§ 17090, 17091, 17205*].

[2] Requirements for Alimony Tax Treatment

[a] Qualified Payments

The Internal Revenue Code uses the term "alimony or separate maintenance payment" to characterize a payment that qualifies for alimony tax treatment; i.e., one that is deductible by the payor and includable in the payee's gross income [*I.R.C. §§ 71(a), 215(a)*]. A payment qualifies as an alimony or separate maintenance payment if it (1) is a cash payment [*I.R.C. § 71(b)(1)*; *see § 227.10[2][b]*], (2) received under a divorce or separation instrument [*I.R.C. §*

71(b)(1)(A); *see § 227.10[2][c]*], (3) by or on behalf of a spouse [*I.R.C. § 71(b)(1)(A)*; *see § 227.10[2][d]*]. In addition, no liability to make any payments, whether in cash or property, may exist after the death of the payee-spouse [*I.R.C. § 71(b)(1)(D)*; *see § 227.10[2][f]*], the spouses must not have filed a joint return for the taxable year in which the payments are made [*see I.R.C. § 71(e)*], and legally separated spouses must not be members of the same household when the payment is made [*I.R.C. § 71(b)(1)(C)*; *see § 227.10[e]*].

In general, state court adjudications that retroactively designate divorce-related payments as alimony or child support are ignored for federal income tax purposes [*see, e.g., Engelhardt v. Commissioner (1972) 58 T.C. 641, 649 , acq., 1978-1 C.B. 1*]. An exception to this rule may be made, however, if the retroactive order is entered to correct a decree that mistakenly failed to reflect the true intention of the court when the decree was entered. In these cases, a nunc pro tunc order may be honored for federal income tax purposes if it is held to have clarified the true intent of the original decree [*Johnson v. Commissioner, (1989) T.C. Memo 1989-415* ; *see Christoph v. United States (S.D. Ga. 1995) 919 F. Supp. 1576]* .

Some types of expenditures are ineligible for alimony tax treatment. For example, expenses incurred by a father to discover the whereabouts of his child and former spouse were held not to be deductible alimony [*Radu Marian (1985, T.C. Memo 1985-554*]. Although the case was decided under prior law, the result should not change under current law because current law retains the requirement that alimony payments must be made pursuant to a divorce decree or written separation instrument [*I.R.C. § 71(b)(1)(A)*; *see § 227.10[2][c]*].

[b] Payment in Cash

To qualify as an alimony or separate maintenance payment, a payment must be made in cash [*I.R.C. § 71(b)(1)*], which includes checks and money orderspayable on demand. Transfers of services or property (including debt instruments of a third party or an annuity contract), execution of a debt instrument by the payor, or the use of the payor's property do not qualify as alimony or separate maintenance payments [Temp. Treas. Reg. § 1.71-1T(b), Q-5; *see also David M. Daley (1991), T.C. Memo 1991-555* (in case involving indirect alimony under pre-1985 law, rent-free use of house by taxpayer's ex-spouse was not deductible as alimony because evidence indicated use either was intended as child support or was in lieu of interest payments owing to ex-spouse)]. Note that amounts garnished from wages to pay alimony are includable in a support obligor's taxable income, but are eligible for alimony tax treatment, and are deductible [*Chambers v. Commissioner (2000), T.C. Memo 2000-218* ; *see I.R.C. § 215*].

[c] Received Under Divorce or Separation Instrument

To qualify as an alimony or separate maintenance payment, the payment must be received [*see I.R.C. § 71(a)*; *see also Feldman v. Commissioner, T.C. Memo 1991-153* (payments received but ordered refunded to payor-spouse); *Caroline M. Coleman (1988) T.C. Memo 1988-442* (year of receipt)] under a "divorce or separation instrument" [*I.R.C. § 71(b)(1)(A)*] that *does not* expressly designate the payment as one that is not includible in the payee's gross income and not allowable as a deduction from the payor's gross income [*see I.R.C. § 71(b)(1)(B)*; Temp. Treas. Reg. § 1.71-1T(a), Q-2; *see also I.R.C. § 71(b)(2)(A)* (qualified divorce and separation instruments); *Ewell v. Commissioner, T.C. Memo. 1996-253* ; *Richardson v. Commissioner (1995), T.C. Memo 1995-554* ; *Harris v. Commissioner, T.C. Memo 1991-375* . The term "divorce or separation instrument" means a decree of divorce or separate maintenance, a written instrument incident to such a decree, a written separation agreement, or a decree requiring a spouse to make payments for the support and maintenance of the other spouse (for example, a decree awarding temporary spousal support) [*I.R.C. § 71(b)(2)*; Treas. Reg. § 1.71-1T(a); *see* Estate of Felt v. Commissioner, T.C. Memo 1987-465, 1987 Tax Ct. Memo LEXIS 461 (effect of foreign divorce); *cf. Landreth (Barbara A.) v. Commissioner, T.C. Memo. 1997-169* (judge's handwritten docket sheet entry constituted "decree" for purposes of alimony tax treatment)]. Generally, there are no strict formalities governing written instruments for federal income tax purposes. A clear statement in written form memorializing the terms of support between the parties, along with evidence of mutual agreement or a meeting of the minds, are all that is required [*see Dato-Nodurft (Antoinette J.) v. Commissioner, T.C. Memo. 2004-119* (payments

made under written separation agreement may be taxable alimony even though agreement is not enforceable under state law); *Leventhal v. Commissioner (2000) T.C. Memo 2000-92* (attorney's letters constituted written separation agreement with respect to postseparation mortgage and rental payments, but not postseparation support payments, so that husband's voluntary support payments did not qualify for alimony tax treatment); *Benham v. Commissioner (2000) T.C. Memo 2000-165* (written agreement entered "in contemplation of separation status"); *see also Jacklin v. Commissioner (1982) 79 T.C. 340, 350]* . The IRS has privately ruled that a written transcription of an oral stipulation made in court qualifies as a written instrument [I.R.S. Letter Rul. 8821069 (Mar. 1, 1986)]. Similarly, the Tax Court has ruled that a letter from one party's attorney containing a proposed spousal and child support offer, signed and returned by the other spouse, constitutes a written separation agreement for purposes of federal income tax law [*see Azenaro v. Commissioner (1989) T.C. Memo 1989-224* (interpreting former *I.R.C. § 71(a)(2)*); *see also I.R.C. § 71(b)(2)(B)*].

PRACTICE TIP:

Support Payments Must Be in Divorce or Separation Instrument. The parties to a California dissolution action may be disqualified from including voluntary payments made during separation and prior to final judgment in the payee spouse's income (and deducting those payments from the payor's income), if the parties fail to make the payments an obligation in the requisite divorce or separation instrument. At a minimum, the parties should include this obligation in a written separation agreement. The better practice, however, is for the parties to enter into a decree requiring support payments, if the payor is willing to be bound by the payment obligation. This decree can be a temporary support order in the form of a written pendente lite (or pretrial) stipulation first signed by the parties, submitted to the family law judge for signature, and then filed with the court. In addition to unequivocally setting a specific commencement date for the prejudgment, separation period spousal support, the IRS will treat such a stipulated order as presumptively valid; therefore, the order will avoid any questions which might be raised by a marital settlement agreement purporting to set prejudgment spousal support, particularly if such a document has been inartfully drafted by the parties. Further, the stipulated order removes any incentive the parties might otherwise have to prepare a marital settlement agreement immediately prior to the tax filing deadline, or to involve counsel or a tax preparer in the preparation or submission of an agreement that backdates the commencement of support payments.

The label that the parties attach to payments required under their marital termination agreement is not controlling. Therefore, merely stating in the agreement that a particular payment is to be treated as alimony will be ignored by the IRS if the payment does not meet the requirements for alimony tax treatment [*Heffron (Ruthann M.), T.C. Memo. 1995-253* (payment of debts did not qualify as alimony, despite parties' label, because obligation did not cease on death or remarriage of supported spouse)]. Nor is the particular meaning of the term "alimony" under state law relevant if it is different from its meaning under federal tax law [*Hoover (Linda), T.C. Memo. 1995-183]* .

If a state court rewords the provisions of a separation agreement in its divorce decree, the separation agreement may be superseded by the decree for purposes ofdetermining whether payments are child support or alimony. For example, a divorce court reworded provisions of a separation agreement providing for combined child and spousal support to specify particular amounts for each type of support. The Tax Court held that the divorce decree superseded the agreement because the parties intended that the agreement be merged into the decree, thereby making the child support amount nondeductible. The court noted, however, that even if no merger had occurred, the decree still would supersede the agreement because alimony tax treatment is precluded for amounts fixed as child support in a divorce or separation instrument, and fixing the amounts for child support in the decree "overrides the lack of specificity in the separation agreement" [*Platt v. Commissioner (1985), T.C. Memo 1985-592* ; *see I.R.C. § 71(c)(1)*].

PRACTICE TIP:

Consistent Treatment of Support Tax Consequences in Both Marital Settlement Agreements and Final Decree. The risk of the final decree overriding the tax benefits contemplated in a pretrial agreement between the parties generally is not a problem. If the parties have provided for specific tax consequences

of support in a marital settlement agreement or pretrial stipulated order, they will usually agree to a final decree containing consistent terms. The danger, if any, will more often lie with attorney oversights in consistency of draftsmanship. Should the dissolution action proceed to trial as a contested matter, however, counsel should be prepared to emphasize to the court the adverse tax consequences that will result from the rendering of a decree that departs from previous specific support agreements between the parties.

Payments made to a supported spouse in anticipation that a court will *retroactively* order them do not qualify for alimony tax treatment. An amendment to a state court decree cannot be given retroactive effect for tax purposes unless the amendment merely corrects mathematical or clerical errors in the original order or is a "nunc pro tunc" order that merely clarifies the intent of the court in the original order [I.R.S. Letter Rul. 8645072 (Aug. 14, 1986); *Christoph v. United States (S.D. Ga. 1995) 919 F. Supp. 1576* ; *Johnson v. Commissioner (1989), T.C. Memo 1989-415* ; *see Zurn v. Commissioner, T.C. Memo. 1996-386* (Tax Court honored state court order that retroactively ("nunc pro tunc") changed alimony award from $1.00, to $1,000, per month)]. In contrast, payments made under the terms of a temporary support order that has been *stayed* may be subject to alimony tax treatment, depending on the legal effect of a stay on the support order in the jurisdiction involved [*see Myrna LaBow (1987), T.C. Memo 1987-191* (stay did not render judgment ineffective under Connecticut law); *see also Richardson v. Commissioner (1995), T.C. Memo 1995-554* (agreement that is unenforceable or invalidated does not change deductibility or inclusion of prior payments that *otherwise* qualify as alimony)].

Voluntary payments made under an oral agreement that is never incorporated into a divorce decree or reduced to writing do not qualify for alimony tax treatment, and neither income tax returns nor checks written to the supported spouse constitute the necessary written agreement [*see O'Donnell v. Commissioner (1991) T.C. Memo 1991-74* ; *see also Anderson (Curtis L.) v. Commissioner, T.C. Memo. 1999-53* (voluntary support payments made by taxpayer to mentally ill ex-wife did not qualify for alimony tax treatment when there was no written obligation to make payments)]. Further, a unilateral written statement that a person is willing to pay a certain sum as spousal support does not constitute a "divorce or separation instrument." An agreement between the parties must be reduced to writing and signed by both parties [*Mercurio v. Commissioner, T.C. Memo 1995-312* (taxpayer was also assessed an accuracy-related penalty for negligence because he understood the need for a written agreement)]. Overpayments of amounts required by the written instrument are not deductible [*see Ritchie v. Commissioner, T.C. Memo. 1989-426]* , and voluntary increases that maintain support at a fixed percentage of the payor's income are not deductible if the written instrument requires a lower dollar amount [*see Ellis v. Commissioner, T.C. Memo. 1990-456]* .

PRACTICE TIP:

Alimony Tax Treatment Foreclosed for All Periods Without Written Instrument. Providing for alimony tax treatment of spousal support payments is important at all stages of the proceedings, because alimony tax treatment of spousal support payments will normally be foreclosed for all periods of time, both prior to and after the final decree, during which there is no written instrument specifically providing for this desired tax treatment. During the period preceding the final decree, counsel should at least provide for alimony tax treatment in a marital settlement agreement. The more cautious practice is to obtain a temporary support order, in open court if necessary, but more conveniently, if possible, in the parties' written, signed stipulation on which the family law judge also signs off. Counsel should follow through and ensure that consistent provisions are included in the final decree.

If a taxpayer makes a lump-sum payment in settlement of both *past* and *future* support obligations, an allocation must be made between both types for federal income tax purposes. In the absence of an *unequivocal* allocation between these components, the lump sum is treated as paid in settlement of arrearages to the extent they exist, with the balance allocated to the satisfaction of future obligations. The amount allocated to arrearages retains the tax character that would have applied to timely payments made under the divorce or separation instrument. The tax character of the amount allocated to future obligations, however, must be determined separately [*Bernard v. Commissioner (1986) 87 T.C.*

1029, 1035-1037] .

[d] By or on Behalf of Spouse

To qualify as an alimony or separate maintenance payment, a payment must be received by or on behalf of a spouse or former spouse [*I.R.C. § 71(b)(1)(A),(d)*]. Payments to third parties qualify as alimony payments made on behalf of the payee-spouse if they are made either under the terms of the divorce or separation instrument, or if they are made under a written request, consent, or ratification by the payee-spouse. The request, consent, or ratification must state that the parties intend the payment to be treated as an alimony or separate maintenance payment subject to *I.R.C. § 71* [*but see Heffron v. Commissioner,T.C. Memo 1995-253* (statement alone is insufficient if payment does not otherwise meet requirements of federal tax law)], and must be received by the payor-spouse before the filing date of the payor's first tax return for the taxable year in which payment is made. To qualify, payment actually must be "on behalf" of the payee-spouse. For example, cash payments of the payee-spouse's rent, mortgage, tax, or tuition liabilities qualify. Premiums paid by the payor-spouse for term or life insurance on the payor's life under the terms of a divorce or separation instrument also qualify as payments on behalf of the payee-spouse to the extent that the payee-spouse is the owner of the policy. However, payments to maintain property owned by the payor-spouse and used by the payee-spouse (including mortgage payments, real estate taxes, and insurance premiums) are not payments on behalf of a spouse [Temp. Treas. Reg. § 1.71-1T(b), Q-6, Q-7; *see Baxter (Linda J.) v. Commissioner, T.C. Memo. 1999-190* (mortgage payments made on residence as form of support qualified for alimony tax treatment); I.R.S. Letter Rul. 8710089 (Dec. 11, 1986) (payments under temporary support order qualify for alimony tax treatment only to extent not used to maintain payor-spouse's property)]. However, the payor can deduct mortgage interest and taxes paid on jointly held property if paid with separate property even if he or she has a right to reimbursement [*Ewell v. Commissioner, T.C. Memo. 1996-253* ; *71 T.C.M. 3134]* . Further, it should be made clear that the obligation to make the payments terminates on the death or remarriage of the spouse on whose behalf they are to be made [*see Heffron v. Commissioner, T.C. Memo 1995-253*]; *see also Ewell v. Commissioner, T.C. Memo. 1996-253* ; *71 T.C.M. 3134* ; *Israel v. Commissioner (1995) T.C. Memo 1995-500* (*see § 227.10[3][f]*).

Other examples of qualifying payments include payments for education expenses [*Hopkinson (Helen C.) v. Commissioner, T.C. Memo. 1999-154]* , medical insurance premiums, and car expenses made directly to the vendors on behalf of the payee spouse [*Medlin (Alexandra M.) v. Commissioner, T.C. Memo. 1998-378]* .

[e] Legally Separated Spouses Not Members of Same Household

In the case of an individual legally separated from his or her spouse under a decree of divorce or of separate maintenance, a payment qualifies for alimony tax treatment only if the payor and payee are not members of the same household when the payment is made [*I.R.C. § 71(b)(1)(C)*]. For purposes of this requirement, a dwelling unit formerly shared by both spouses is not considered two separate households even if the separated spouses physically separate themselves within the dwelling unit. However, separated spouses are not treated as members of the same household if one spouse is preparing to depart from the household of the other spouse on the date the payment is made and does depart no more than one month after that date [Temp. Treas. Reg. § 1.71-1T(b), Q-9].

For individuals who are not legally separated under a decree of divorce or separate maintenance, a payment of temporary spousal support under a written separation agreement or temporary support order may qualify for alimony tax treatment whether or not the spouses occupy the same household [Temp. Treas. Reg. § 1.71-1T(b), Q-9; *see Benham v. Commissioner (2000) T.C. Memo 2000-165* (support payments qualified for alimony tax treatment despite fact that couple shared marital residence, when payments were made under written separation agreement and couple was not legally separated); *cf.*Bertram W. Coltman, Jr. (1991) *61 T.C.M. 2207 (CCH) , aff'd, 980 F.2d 1134 (7th Cir. 1992)* (separate residences required to qualify for alimony tax treatment under pre-1985 law)].

[f] No Payment Liability After Payee-Spouse's Death

To qualify for alimony tax treatment, no liability to make any payments, whether in cash or property, may exist after the death of the payee-spouse [*I.R.C. § 71(b)(1)(D)*; *see Kean v. Comm'r, T.C. Memo 2003-163* (temporary family support payments qualified for alimony tax treatment); *Berry v. Comm'r, T.C. Memo 2000-373* (payment of wife's attorney's fees was for attorney's benefit and nondeductible as alimony); *Gonzales (Marie A.) v. Commissioner (1999) T.C. Memo 1999-332* (temporary family support payments did not qualify for alimony tax treatment); *Sroufe (Carl and Dolores) v. Commissioner, T.C. Memo. 1995-256* (alimony tax treatment denied because payments were required to be guaranteed and secured by payor, meaning that he would have been required to continue payments to payee's estate after death); *Stokes v. Commissioner, T.C. Memo. 1994-456]* . If the payor-spouse is required to make payments after the death of the payee-spouse, none of the payments (whether made before or after the death of the payee) qualifies as an alimony or separate maintenance payment [Temp. Treas. Reg. § 1.71-1T(b), Q-10]. Under California law, unless the parties agree otherwise in writing, the obligation of a party under an order for the support of the other party terminates on the death of either party or the remarriage of the supported party [*Fam. Code § 4337*]. For example, a court of appeal recently held that payment of the supported spouse's medical insurance premiums is in the nature of spousal support; therefore, the obligation to pay premiums ends on the supported spouse's death, if the parties' agreement provided for no continuing spousal support payments on either party'sdeath [*In re Marriage of Benjamins (1994) 26 Cal. App. 4th 423, 432, 31 Cal. Rptr. 2d 313]* .

Under provisions of the Tax Reform Act of 1984 [Pub. L. No. 98-369] that have now been eliminated [*see I.R.C. § 71(b)(1)(D)*, as amended by Tax Reform Act of 1986, Pub. L. No. 99-514, § 1843(b)], the divorce or separation instrument was required to state expressly that the liability to pay support would terminate on the death of the recipient or the payments made under that instrument would not qualify as deductible alimony [former *I.R.C. § 71(b)(1)(D)*, as amended by Tax Reform Act of 1984, Pub. L. No. 98-369, § 422; *see* I.R.S. Letter Rul. 8551012 (Sept. 19, 1985)]. This requirement has been eliminated, retroactive to the operative date of the 1984 Act [*see* Pub. L. No. 99-514, § 1881; *see also*I.R.S. *Notice 87-9 (Jan. 14, 1987)*], and the failure to include such a provision in an instrument does not affect the deductibility of support payments [*I.R.C. § 71(b)(1)(D)*; *Mukherjee v. Comm'r, T.C. Memo 2004-98* (award of "lump sum alimony" by Georgia jury did not qualify for alimony tax treatment, because under Georgia law payments of "lump sum alimony" are in nature of property settlement and do not terminate at payee's death by operation of state law); *Pettid (Fred J.) v. Commissioner, T.C. Memo. 1999-126* (support payments made pursuant to annulment settlement qualified for alimony tax treatment)]. Nevertheless, the provision may be added merely to clarify that all support obligations will terminate on the recipient's death and that the payments, therefore, are deductible [*see I.R.C. § 71(b)(1)(D)*, as amended by Tax Reform Act of 1986, Pub. L. No. 99-514, § 1843(b)].

PRACTICE TIP:

Inclusion of Provision Terminating Support on Payee's Death. Although not required under current law, inclusion in a written agreement or decree of a provision expressly stating that the liability to pay support terminates on the payee's death safeguards the payor's right to deduction of support payments if the law changes in the future and issues of retroactivity arise.

The requirement that liability for payment terminate at the supported spouse's death establishes an objective test to distinguish spousal support from child support or property settlement payments, which are not contingent on the survival of the payee-spouse. To prevent violation of this rule, no liability to make payments must survive after the death of the payee-spouse as a substitute for predeath payments that otherwise would qualify as alimony or separate maintenance payments. If liability to make substitute payments exists, none of the otherwise qualifying payments will qualify as alimony or separate maintenance payments [*see I.R.C. § 71(b)(1)(D)*; Temp. Treas. Reg. § 1.71-1T(b), Q-13; *Okerson v. Comm'r (2004) 123 T.C. 258* (payments that were to continue, in order to finance children's education, if payee died before specified amount was paid in full did not qualify for alimony tax treatment); *Gilbert v. Comm'r, T.C. Memo 2003-92* (unallocated spousal and child support payments did not qualify for alimony tax treatment when wage attachment provision might permit court to attach obligor's wages after obligee's death); *Miller (Cheryl J.) v. Commissioner, 273, T.C. Memo. 1999-273* (unallocated payments for spousal and child support did not qualify for

alimony tax treatment when payments were made under temporary court orders that would not automatically terminate on payee's death); *Preston (Forest R.) v. Commissioner, T.C. Memo. 1999-49* ; *Megibow (Alex Jeffrey) v. Commissioner, T.C. Memo. 1998-455]* . The divorce or separation instrument need not state, however, that no liability to make substitute payments exists [Temp. Treas. Reg. § 1.71-1T(b), Q-13]. Whether postdeath payments constitute substitute payments and the amount of the predeath payments for which they are a substitute depend on all of the facts and circumstances in each case [Temp. Treas. Reg. § 1.71-1T(b), Q-14]. Legislative history indicates that amounts payable under a life insurance contract on the life of the payee-spouse are not a liability that would affect the status of other payments made by the payor-spouse [House Committee Report on § 422, Tax Reform Act of 1984, Pub. L. No. 98-369].

[g] Nondeductibility of Property Settlement Payments

The Tax Court has held that for purposes of *I.R.C. §§ 71* and *215*, payments made by one spouse to another in settlement of property rights, unlike alimony payments, are not tax deductible [*I.R.C. §§ 71, 215*]. The characterization of payments as either alimony or property settlement is a question for federal, not state, law. However, state law regarding property and support, and a state court's intent in ordering the payment, are relevant in making the determination [*Prater v. C.I.R. (10th Cir. 1995) 55 F.3d 527, 529-530* ; *see Maloney v. Commissioner (2000) T.C. Memo 200-214* (payment transferring share of ex-husband's military separation pay to ex-wife did not qualify for alimony tax treatment when divorce decree explicitly denied spousal support and provided that transfer of share would not be considered taxable event)]. In deciding whether payments are alimony or property settlement payments, the Tax Court in *Shirley Jean Beard* delineated the following factors: (1) whether the parties intended the payments to divide assets; (2) whether the payee spouse relinquished property rights to receive the payments; (3) whether the payment amount is fixed and not contingent on events including the payee's death or remarriage; and (4) whether the payments together with other property awarded to the payee spouse equalled more or less one half of the property acquired by the parties during the marriage [*see Beard v. Commissioner (1981) 77 T.C. 1275, 1284-1285]* . Although the case was decided under the versions of *I.R.C. §§ 71* and *215* before the Tax Reform Act of 1984, later Tax Court decisions have continued to consider at least some, if not most of, these factors in determining whether payments are alimony or nondeductible as property settlement payments [*see, e.g., Walstatter v. Commissioner T.C. Memo. 1992-152* (payment terms were more akin to property settlement than support despite judgment's characterization of payments as alimony); *cf. Spector v. Commisioner, T.C. Memo 1996-298* (payments to ex-wife labelled as "alimony" were allocated between alimony and property settlement on basis of all facts and circumstances); *Prater v. C.I.R. (10th Cir. 1995) 55 F.3d 527, 529* (similar, but not identical list of factors in 10th Circuit)].

In addition, if the spouses' divorce or separation instrument clearly designates that a payment is not deductible by the payor under *I.R.C. § 215* and not includable in the recipient's income under *I.R.C. § 71*, then the payment cannot qualify later for alimony tax treatment, even if the spouses change their minds [*see I.R.C. § 71(b)(1)(B)*; *see Maloney v. Commissioner (2000) T.C. Memo 2000-214* (payment transferring share of ex-husband's military separation pay to ex-wife did not qualify for alimony tax treatment when divorce decree explicitly denied spousal support and provided that transfer of share would not be considered taxable event); *cf. Baker v. Commissioner (2000) T.C. Memo 2000-164* (military retirement payments labeled "property settlement" in divorce decree were alimony for federal income tax purposes when decree lacked express direction that payments would not be taxable under *I.R.C. § 71* nor deductible under *I.R.C. § 215*)].

[3] Payments Fixed for Child Support

[a] Inapplicability of Alimony Tax Treatment

Alimony tax treatment does not apply to any part of any payment that the divorce or separation instrument fixes, in terms of an amount of money or a part of the payment, as a sum payable for the support of the children of the payor-spouse [*I.R.C. § 71(c)(1)*; *Treas. Reg. § 1.71-1(e)*; *Bay (John B.) T.C. Memo. 1994-389]* . Child support is

therefore not deductible by the payor or includable in income by the payee. If any payment is less than the amount specified for child and spousal support in the divorce or separation instrument, only the amount of the payment in excess of the amount payable for child support may receive alimony tax treatment. For example, if the divorce decree specifies that $500 per month is to be paid for child support and $1,000 per month is to be paid for spousal support, and only $1,200 is paid in a given month, $500 is treated as child support and $700 may qualify for alimony tax treatment. If only $400 is paid, the entire amount is child support and none of the payment is deductible by the payor [*see I.R.C. § 71(c)(3)*; *see also Blair (Gary Dee) T.C. Memo. 1988-581* (reduced monthly payments to former spouse treated as child support despite contrary oral agreement)].

[b] Use of Family Support Under Prior Law to Treat Child Support as Spousal Support

"Family support" is an agreement between the parents (or an order or judgment) for the payment of combined child and spousal support without designating the amount to be paid for each [*Fam. Code §§ 92, 3586*]. The primary purpose behind a family support agreement is to obtain alimony tax treatment for payments that are, in fact, child support. Under the law as it existed before the Tax Reform Act of 1984, the United States Supreme Court held that a payment was not to be treated as child support unless explicitly so designated in the divorce or separation instrument [*Commissioner v. Lester (1961) 366 U.S. 299, 306, 81 S. Ct. 1343, 6 L. Ed. 2d 306]* . The same rule governs even now if a divorce decree, entered prior to 1985, is modified after 1984 without expressly providing that the Tax Reform Act of 1984 applies [*see, e.g., Walstatter (Bennett S.) T.C. Memo. 1992-152* ; *Libman (Nancy W.) T.C. Memo. 1990-629* (payee spouse required to treat pre-1984 award of "unallocated family support" as alimony despite 1988 modification referring to "child support"; *Thornton v. Commissioner,T.C. Memo 1992-286* (Tax Court would not recharacterize as child support payments denominated as alimony in decree entered prior to 1985)]. Under this rule, taxpayers were able to disguise child support payments as spousal support to obtain alimony tax treatment by providing for a cutback in spousal support on the death or emancipation of a child. This treatment was attractive if the payor-spouse, as was usually the case, was subject to higher tax rates than the payee-spouse.

[c] Restrictions on Use of Family Support Under Current Law

[i] Reduction on Happening of Contingency Relating to Child

Current law greatly restricts, but does not completely eliminate, the potentially advantageous tax treatment of family support [*see I.R.C. § 71(c)(2)*; *see also § 227.10[3][b]*] by providing that if an amount specified in the divorce or separation instrument will be reduced on the happening of a contingency relating to a child, such as attaining a specified age, marrying, dying, leaving school, or a similar event, an amount equal to the amount of the reduction must be treated as fixed for child support [*I.R.C. § 71(c)(2)(A)*; *cf. Murphy (Ronald J.) v. Commissioner, T.C. Memo. 1996-258* (payments of "family support" did not qualify for alimony tax treatment when payments might have continued after death of former wife)]. Although the statute is not specific, it is clear that only contingencies relating to a child of the payor-spouse, rather than a child of the payee alone, are intended [*see* Temp. Treas. Reg. § 1.71-1T(c), Q-16; *cf. Treas. Reg. § 1.71-1(e)*]. A contingency relates to a child of the payor-spouse if it depends on any event relating to that child, whether or not the event is certain or likely to occur. Such events include the child's attaining a specified age or income level, dying, marrying, leaving school, leaving the spouse's household, or gaining employment [Temp. Treas. Reg. § 1.71-1T(c), Q-17].

In a private ruling, the IRS has indicated that reductions for each week that achild has uninterrupted visitation with the noncustodial parent constitute reductions on the happening of a contingency relating to a child. As a result, the reduction in payments reduced the amount treated as alimony. Although the agreement did not allocate a portion of the fixed payments as child support, a provision that payments not be reduced by a specific amount for each week that the children visited with the noncustodial parent led the I.R.S. to conclude that the total amount of the weekly reduction constituted child support, not deductible by the noncustodial parent nor taxable to the custodial parent [I.R.S. Letter Rul. 8746085 (Aug. 21, 1987)].

A reduction in payments is treated as fixed for child support if the reduction will occur at a time that clearly can be associated with a contingency relating to a child [*I.R.C. § 71(c)(2)(B)*]. A reduction is presumed clearly associated with the happening of a contingency relating to a child of the payor under *either* of the following circumstances [Temp. Treas. Reg. § 1.71-1T(c), Q-18]:

(1) The payments are to be reduced no more than six months before or after the date the child is to attain the age of 18, 21, or the local age of majority.

(2) The payments are to be reduced on two or more occasions that occur no more than one year before or after a different child of the payor-spouse attains a certain age between the ages of 18 and 24, inclusive. The certain age must be the same for each child, but need not be a whole number of years.

In all other situations, reductions will not be treated as clearly associated with the happening of a contingency relating to a child of the payor [Temp. Treas. Reg. § 1.71-1T(c), Q-18; *see Heller (Madeline Davis) T.C. Memo. 1994-423* (provision in divorce instrument allowing spousal support to be decreased by court-ordered increases in child support did not constitute contingency related to child under *I.R.C. § 71(c)(2)*); *see*Letter Rul. 9625050 (termination on "expected retirement date"); Letter Rul. 8820052 (Feb. 19, 1988) (alimony treatment allowed if presumptions are avoided)]. Either the IRS or the taxpayer may rebut the presumption by showing that the time at which the payments are to be reduced was determined independently of any contingencies relating to the children of the payor. Thus, for example, the presumption may be rebutted by showing that spousal support payments are to be made for a period customarily provided in the local jurisdiction, such as a period equal to one half of the duration of the marriage [Temp. Treas. Reg. § 1.71-1T(c), Q-18; *see Hill v. Commissioner, T.C. Memo. 1996-179* (payments were alimony as I.R.S. proved that termination date was determined independently); *see also Shepherd v. Commissioner (2000) T.C. Memo 2000-174* (payments treated as alimony when it was mere coincidence that 10-year term of alimony payments ended within six months of child's 18th birthday)].

EXAMPLE:

H and W are divorced on July 1, 1992, when their children C (born July 15, 1977) and D (born September 23, 1979) are 14 and 12, respectively. Under the divorce decree, H is to make alimony payments of $2,000 per month to W. The payments are to be reduced to $1,500 per month on January 1, 1998, and to $1,000 per month on January 1, 2002. On January 1, 1998, C will be 20 years, 5 months and 17 days old. On January 1, 2002, D will be 22 years, 3 months and 9 days old. Each of the reductions is to occur no more than one year before or after a different child of H attains the age of 21 years and 4 months. (Actually, the reductions are to occur no more than one year before or after C and D attain any of the ages 21 years, 3 months and 9 days through 21 years 5 months and 17 days.) Therefore, the reductions are presumed to be clearly associated with a contingency relating to C and D. Unless the presumption is rebutted, $1,000 per month must be treated as fixed for child support and will not receive alimony tax treatment [*see* Temp. Treas. Reg. § 1.71-1T(c), Q-18].

In contrast, in cases in which an original child support order was lacking, an amount fixed for *spousal* support under a marital termination agreement remains fully deductible even though the agreement requires that the amount to be paid must be reduced if the supported spouse obtains a later order for a "contingency relating to a child" within the meaning of *I.R.C. § 71(c)*. If a child support order were obtained under those circumstances, however, only the reduced spousal support, rather than the child support, would remain deductible [I.R.S. Letter Rul. 8633040 (May 21, 1986)].

[ii] Effect of Statewide Uniform Child Support Guideline

Under the statewide uniform child support guideline [*see Fam. Code § 4055 et seq.*], orders and stipulations otherwise in compliance with the guideline may designate as "family support" an unallocated total sum for support of the spouse

and any children without specifically labeling all or any portion as "child support," as long as the amount is adjusted to reflect the effect of additional deductibility. The amount of the order must be adjusted to maximize the tax benefits for both parents [*Fam. Code § 4066*; *see Fam. Code § 4074*]. However, another statute in the guideline requires the court to state in writing or on the record the amount of support that would have been ordered under the guideline's formula whenever the court is ordering an amount for support that differs from the formula amount [*Fam. Code § 4056(a)(1)*]. This provision is required by federal law [*45 C.F.R. § 302.56(g)*].

Compliance with this provision may risk losing alimony tax treatment for family support. The IRS considers any part of family support that has been identified by the court or agreed to by the parties as actually for the support of children, such as the amount found by the court to be due as child support under the guideline's formula, as nondeductible child support. However, there is no apparent risk of losing alimony tax treatment if the allocation is only *suggested* and not ordered by the court or agreed to by the parties--such as when a court, in the context of ruling on a stipulated support order, has merely posed a possible segregation of amounts between child and spousal support without formally setting these forth in the order [*Ambrose (Evelyn R.) v. Commissioner, T.C. Memo. 1996-128* (alimony tax treatment upheld)].

To minimize the risk, no findings as to the amount of formula support should be included in an agreement for family support. Counsel may also wish to argue that such a finding is not required under *Fam. Code § 4056* with regard to family support. *Fam. Code §§ 4066* and *4074* make it clear that family support is available under the guideline. It may be contended that Section 4056 findings are required only if the total amount of support is less than the formula amount; with regard to family support, the total ordered would exceed the formula amount.

[4] Rules to Prevent Front-Loading of Payments

[a] Purpose

The so-called anti-front-loading rules are designed to prevent support payments from being structured in such a way that large payments are received in the first few years and greatly decreased thereafter. In the past, property settlement payments were sometimes combined with support payments in this manner. The larger payments were designed to compensate the payee-spouse for a division of property and, by treating the property settlement payments as alimony, to produce an overall tax advantage for both spouses.

Because there are other reasons besides tax reduction for front-loading payments to a payee spouse, the anti-front-loading rules provide a safe harbor test for the decrease in alimony/support payments that may be made over the first three years. If payments decrease more than the safe harbor amount, the payor spouse must take the excess into income in the third postseparation year, and the payee spouse is allowed a deduction for the same amount [*I.R.C. § 71(f)*]. It is highly important to follow the safe harbor rules, because payor spouses who deduct alimony payments can be liable for substantial penalties for understatement of tax if their payments are later found to be ineligible for alimony tax treatment [*see Magnus (Alexander B.) T.C. Memo. 1990-596* (25-percent penalty under former *I.R.C. § 6661* for lump-sum payment not qualified under pre-1984 rules)].

[b] Postseparation Years Defined

The "first postseparation year" is defined as the first calendar year in which the payor spouse paid to the payee spouse alimony or separate maintenance payments to which *I.R.C. § 71* applies. The second and third postseparation years are defined as the first and second succeeding calendar years, respectively [*I.R.C. § 71(f)(6)*].

[c] Excess Alimony Payments

Under the anti-front-loading rules, excess alimony payments in the first and second post-separation years will trigger recapture of alimony deductions in the third post-separation year [*I.R.C. § 71(f)(1)*]. For the first post-separation year, the excess payments are the amount, if any, by which the first-year payments exceed $15,000 plus the average of the

following [*I.R.C. § 71(f)(3)*]: (1) the total payments made in the second post-separation year reduced by any excess payments for that year [*I.R.C. § 71(f)(3)(B)(i)(I)*]; and (2) the total payments made in the third post-separation year. Excess payments for the second post-separation year are the amount, if any, by which the total of second-year payments exceeds the sum of (1) $15,000 plus (2) the total third-year payments [*I.R.C. § 71(f)(4)*].

[d] Recapture Rule

Excess alimony payments must be recaptured and included in the payor spouse's gross income for the payor spouse's taxable year that begins in the third postseparation year [*I.R.C. § 71(f)(1)(A),(2)*]. The payee spouse is allowed a deduction for the amount of the excess payments in computing his or her adjusted gross income for his or her taxable year that begins in the third post-separation year [*I.R.C. § 71(f)(1)(B)*].

EXAMPLE:

X pays $50,000 in alimony in the first postseparation year, $20,000 in the second, and nothing in the third. These payments generate both first and second postseparation year excesses. In the second postseparation year, the amount of excess is $5,000 (($20,000 - 0) - $15,000). To determine the first postseparation year excess, the $5,000 must be subtracted from X's $20,000 second postseparation year payment, yielding $15,000. Thus, the average of the adjusted second postseparation year and the third postseparation year payments equals $7,500 (($15,000 + 0) / 2). The first postseparation year excess is $27,500 (($50,000 - $7,500) - $15,000). In the third postseparation year, the payor spouse must include $32,500 in gross income (the $5,000 second postseparation year excess amount plus the $27,500 first postseparation year excess amount). The payee spouse may take corresponding deductions for the same years [*see* Tax Reform Act of 1986, Conference Committee Report, Title XVIII, p. II-849; *see also I.R.C. § 71(f)*].

[e] Exceptions to Recapture

There are three exceptions to the rule requiring recapture of excess alimony payments. First, the recapture rule does not apply to payments made under a decree awarding temporary spousal support [*I.R.C. § 71(b)(2)(C),(f)(5)(B)*]. Second, recapture is not required if payments cease due to the death of either the payor or payee, or due to the remarriage of the payee-spouse before the close ofthe third postseparation computation year [*I.R.C. § 71(f)(5)(A)*; Temp. Treas. Reg. § 1.71-1T(d), Q-25].

The third exception to the recapture rule applies to payments made pursuant to a continuing liability over a period of not less than three years to pay a fixed portion of the income from a business or property, or from compensation for unemployment or self-employment. Recapture does not apply to these payments because they are fluctuating payments not within the control of the payor-spouse [*I.R.C. § 71(f)(5)(C)*].

[f] Unplanned Events Triggering Recapture

The exceptions to the recapture rule discussed in *§ 227.10[5][e]* are the only recognized exceptions to the recapture rule. Treasury Regulations issued under prior law suggested that recapture could be triggered by a decline in payments due to any other reason, including the payor's failure to make timely payments, a modification of the divorce or separation instrument, a reduction in the support needs of the payee, or a reduction in the ability of the payor to provide support [Temp. Treas. Reg. § 1.71-1T(d), Q-25]. However, because of changes brought about by enactment of the Tax Reform Act of 1986, [Pub. L. No. 99-514], which eliminated the "minimum-term" rule and made other changes to the recapture rule, it is unclear whether all of the events suggested in the Treasury Regulations would still trigger recapture. Nevertheless, practitioners would do well to advise their clients that recapture is a continuing possibility, even if recapture could not occur under the arrangement originally worked out in the divorce or separation instrument.

PRACTICE TIP:

Impact of Recapture. Any decision by counsel to recommend seeking modification of a support obligation should first consider the impact of recapture. Counsel for the payor spouse should also caution the client that failure to make timely payments may trigger recapture.

[5] Election to Forgo Alimony Tax Treatment

The parties may designate in the divorce or separation instrument that payments that otherwise would qualify for alimony tax treatment are nondeductible by the payor and excludable from the gross income of the payee [Temp. Treas. Reg. § 1.71-1T(b), Q-8; *see I.R.C. § 71(b)(1)(B)*]. If the spouses have executed a written separation agreement, any writing signed by both spouses that expressly designates otherwise qualifying alimony or separate maintenance payments as nondeductible and excludable, and that refers to the written separation agreement, is sufficient to elect out of alimony tax treatment. If the spouses are subject to temporary spousal support orders, the designation must be made in the original or a subsequent temporary order. A copy of the instrument containing the designation of payments as nondeductible and excludable must be attached to the first tax return filed by the payee for each year in which the designation applies [Temp. Treas. Reg. § 1.71-1T(b), Q-8; *see Richardson v. Commissioner (1995) T.C. Memo 1995-554* ; *see also Dato-Nodurft (Antoinette J.) v. Commissioner, T.C. Memo. 2004-119* (payments made under written separation agreement that failed to state that payments were not deductible by husband or includable in wife's income were taxable alimony payments)].

[6] Payor's Inclusion of Payee's Taxpayer I.D. Number

The payor-spouse must include the payee's social security number on his or her tax return for the taxable year in which payment is made. Failure to comply with this requirement does not cause loss of the deduction, but does subject the payor to a $50 penalty. The penalty is waived, however, if the failure to comply was due to reasonable cause rather than willful neglect. A similar penalty is imposed on any spouse who fails to provide his or her tax identification number to the payor for reporting purposes [*I.R.C. § 215(c)*; Temp. Treas. Reg. § 1.215-1T, Q-1; *see I.R.C. §§ 6723, 6724(a)*].

PRACTICE TIP:

IRS Correlation of Income and Deductions. Counsel for the payee spouse in particular should tactfully remind the client that the payor's reporting of the payee's social security number will enable the IRS to easily identify amounts deducted by the payor but not reported as income by the payee.

[7] Alimony Trusts

[a] Nature and Purpose

A trust can be used to assure that spousal support payments are made on time. In the absence of special rules applicable to alimony trusts, the supporting spouse is required, under the grantor trust rules, to include in his or her income the trust income paid to the supported spouse because that income is used to satisfy the support obligation of the supporting spouse [*I.R.C. §§ 677, 678*; *Treas. Reg. § 1.682(a)-1(a)(3)*]. However, if the parties are divorced or separated under a decree of divorce or separate maintenance or a written separation agreement, trust income that the supported spouse is entitled to receive is includable in his or her income, and not in the income of the supporting spouse, regardless of the grantor trust rules [*I.R.C. § 682(a)*; *cf. I.R.C. § 672(e)(2)*, as amended by Pub. L. No. 100-647, § 1014(a)(1) (person legally separated from spouse under decree of divorce or separate maintenance not considered married for purpose of applying "spousal attribution" provisions of grantor trust rules)]. The supported spouse is treated as a beneficiary of the trust, subject to the rules generally applicable to trust beneficiaries [*I.R.C. § 682(b)*]. Thus, the supported spouse is taxable only on distributions from the trust made out of the trust's distributable net income and notout of trust corpus [*I.R.C. §§ 652(a), 662(a)*]. The trust income distributed retains its tax character (for example, capital gain, tax-exempt, etc.) in the hands of the supported spouse [*I.R.C. §§ 652(b), 662(b)*]. The supporting spouse may not deduct trust distributions included in the income of the supported spouse because these amounts are not included in the supporting spouse's income in the first place, and therefore do not need to be deducted [*I.R.C. §§ 215(d), 682*; *see Treas. Reg. §*

1.682(a)-1(a)(3)].

[b] Recognition of Gain or Loss on Transfers Into Trust

A transfer of property to create the trust, in contrast to *income* derived from the trust, should be examined to determine whether taxable gain or loss must be recognized on the transfer. In general, transfers of property into an alimony trust [*see I.R.C. § 682*] may be made without recognition of taxable gain or loss [*see I.R.C. § 1041(a)*] (except to the extent that the sum of the liabilities assumed and the liabilities to which the property is subject exceeds the total adjusted basis in the property [*see I.R.C. § 1041(e)*]), if the transfer in trust is not of an installment obligation [*I.R.C. §§ 453B(g), 1041(a)*].

[c] Amount Fixed as Payable for Child Support

The tax treatment afforded alimony trusts is not available to the extent that the decree, written separation agreement, or trust instrument fixes an amount of the trust income as payable for child support. If trust income is less than the amount necessary to pay both spousal and child support, all income is allocated first to child support [*I.R.C. § 682(a)*]. Thus, trust income fixed for child support is taxable to the supporting parent under the grantor trust rules, achieving the same result as under the regular alimony rules.

However, under the regular alimony rules, as amended in 1984, the amount deemed to be fixed for child support includes any amount otherwise qualifying as alimony that will be reduced on the happening of a contingency related to a child [*I.R.C. § 71(c)(2)*; *see § 227.10[3][c]*]. Before enactment of this amendment, it was possible to achieve alimony tax treatment for child support by combining it with spousal support as a single obligation, and by causing the payments to be reduced on the death or emancipation of the child. The 1984 amendment to the alimony rules was not added to the alimony trust rules. As a result, it is unclear whether prior law still governs in this area. If it does, it appears that amounts received from a trust for child support that are not specifically designated as child support are taxable to the supported spouse rather than the supporting spouse, even if these amounts will be eliminated on the death or emancipation of the child. No reported decision has adopted this interpretation, however.

[d] Use to Avoid Requirements for Alimony Tax Treatment

The establishment of an alimony trust appears to permit the parties to avoid the rules and requirements governing spousal support paid outside of a trust [*see* discussion of these rules and requirements in *§ 227.10[2]*]. For example, there is no requirement that payments terminate on the death of the payee-spouse or that payments be made in cash [*I.R.C. §§ 71(b), 682(a)*]. In addition, no front-loading rules apply to alimony trusts [*see I.R.C. §§ 71(f), 682(a)*]. The sole requirement for alimony trust treatment is that the parties be divorced or separated under a decree or written separation agreement [*I.R.C. § 682(a)*].

PRACTICE TIP:

Advantages of Alimony Trust. At least until antiabuse legislation is enacted, an alimony trust is presently an obvious, effective, and legitimate means to avoid the strict limitations otherwise governing spousal support.

[e] Relevance of Prior Law

Current law applies to divorce or separation instruments executed after 1984 and to instruments executed before 1985 that have been modified after 1984 to provide expressly for the applicability of current law. Prior law continues to govern arrangements under earlier instruments. Only two types of alimony trusts were recognized under prior law: Section 71 trusts and Section 682 trusts. The boundary line between these two trusts was unclear, but the regulations state that *I.R.C. § 71* applied to a trust if the payments from the trust qualified for alimony tax treatment under then-current law [*Treas. Reg. § 1.682(a)-1(a)(2)*]. Section 682 trusts were those whose payments did not qualify for

alimony tax treatment under *I.R.C. § 71* [*Treas. Reg. § 1.682(a)-1(a)(2)*]. The regulations also indicate that *I.R.C. § 682* governed preexisting trusts, created for another purpose, that were used to fund support obligations at the time of divorce or separation. Section 71 trusts, on the other hand, were those created to fund spousal support [*see Treas. Reg. § 1.682(a)-1(a)(2)*].

The proper tax treatment of these two types of trusts was equally unsettled. The IRS takes the position that all payments received from a Section 71 trust are taxable ordinary income to the recipient spouse, regardless of whether made out of trust income or out of corpus [*Treas. Reg. § 1.71-1(c)(3)*]. Under *I.R.C. § 682(b)*, however, which formerly specifically stated its application to both Section 71 trusts and Section 682 trusts, the recipient spouse is treated as a beneficiary of the trust and thus is taxable only to the extent that trust distributions are made out of distributable net income [*see I.R.C. §§ 652(a), 662(a)*]. Furthermore, because the recipient is a trust beneficiary, the tax character of trust income is passed through to the recipient. Thus, for example, tax-exempt income remains tax-exempt in the hands of the recipient spouse [*Ellis v. United States (6th Cir. 1969) 416 F.2d 894, 896-897* ; *see I.R.C. §§ 652(b), 662(b)*].

California Forms of Pleading and Practice--Annotated

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Volume 19: Dissolution of Marriage: Child Custody thru Dissolution of Marriage: Tax Effects of Dissolution-Chs.223-239
Chapter 227 DISSOLUTION OF MARRIAGE: TAX EFFECTS OF DISSOLUTION
PART II. LEGAL BACKGROUND

19-227 California Forms of Pleading and Practice--Annotated § 227.11

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§ 227.11 Estate and Gift Tax Consequences of Spousal Support

[1] Gift Tax

Payments made in satisfaction of support rights, whether in the form of periodic payments or as a lump sum, are not taxable gifts. A taxable gift results, however, to the extent that the payments exceed the value of the support rights [*see Jones v. Commissioner, (1943) 1 T.C. 1207* ; *Rev. Rul. 68-379, 1968-2 C.B. 414*]. If the spouses are still married at the time of the payment, the entire amount is exempt from gift tax if made in a form qualifying for the unlimited marital deduction, regardless of whether the amount of the payment exceeds the value of the support rights relinquished [*see I.R.C. § 2523(a)*]. This exemption is subject to special rules concerning disallowance of the deduction if the donor's spouse is not a United States citizen [*see I.R.C. § 2523(i)*, as added by Pub. L. No. 100-647, § 5033(b), effective for gifts on or after July 14, 1988)].

The interests of all the transferees must be valued for gift tax purposes if one spouse gives up his or her support rights in exchange for a transfer benefiting that spouse and other adults. The value of the support rights offsets the value of what the spouse receives, but any value in excess of the support rights is deemed a gift. The taxation of any transfer to an adult other than the spouse is not ordinarily affected by the released support rights [*Rev. Rul. 77-314, 1977-2 C.B. 349*].

EXAMPLE:

H and W execute a separation agreement and divorce three years later. W releases support rights worth $50,000 in exchange for H placing $100,000 in trust once the divorce becomes final. W has a life income interest worth $60,000 and the remainder, worth $40,000, belongs to an adult child. H is deemed to have made a gift to W of $10,000 ($60,000 - $50,000) and a gift to the child of $40,000 [*see Rev. Rul. 77-314, 1977-2 C.B. 349*].

If the value of the spouse's support rights exceeds the value of what the spouse receives, the excess may serve as consideration for the transfer to those other than the spouse. The donor spouse must show that the other spouse

specifically released the support rights in return for having the donor make the transfer to a third party. If the spouse releasing support rights actively bargained for the transfer, the value of the transferor's gift to the third party is reduced by the amount of the support rights that were released. The spouse releasing support rights, however, is deemed to have made a gift to the third party to the extent support rights are released for that party's benefit [*Rev. Rul. 79-363, 1979-2 C.B. 345* ; *Rev. Rul. 77-314, 1977-2 C.B. 349*]. If the spouse releasing marital rights did not intend to benefit a third party, the release of support rights is not deemed consideration for a transfer to the third party. If one spouse accepts less than the value of his or her support rights from the other spouse, a gift to the donor spouse results [*Rev. Rul. 77-314, 1977-2 C.B. 349*]. An exchange of support rights in violation of public policy results in the transfer of property being deemed a gift [*Ellis v. Commissioner, (1968) 51 T.C. 182 , aff'd, 437 F.2d 442 (9th Cir. 1971)* (antenuptial agreement violative of public policy)].

[2] Estate Tax

The same rule of nontaxability that applies to gift tax [*see § 227.11[1]*] also applies to estate tax. Claims for support of the surviving spouse or ex-spouse are deductible from the decedent's gross estate [*see I.R.C. § 2053(a)(3)*]. However, because the obligation of support can only exist during the payor's life, the deduction is allowed only to the extent that payments made during the payor's life were less than what the payee-spouse was entitled to receive under state law [*Rev. Rul. 71-67, 1971-1 C.B. 271* ; *see Estate of Fenton (1978) 70 T.C. 263* ; *Rev. Rul. 68-379, 1968-2 C.B. 414*]. Similarly, if a payment is made out of an estate to a former spouse for support rights, consideration for the payment exists only to the extent that the former spouse had foregone support payments during the payor's life. Thus, a deduction from the gross estate is allowed only to the extent of those foregone support payments [*Estate of Scholl (1987) 88 T.C. 1265, 1271-1276* (payment to decedent's former wife); *cf. Robert A. Nesselrodt Est. (1986) T.C. Memo 1986-286* (if divorce decree provided for payment of decedent's obligation in installments, only present value of installments on decedent's date of death allowed as deduction despite estate's payment of full amount of all future payments)].

If payments required to be made under the terms of a divorce decree are to last until the death or remarriage of the former spouse, the amount of the deduction is calculated by using actuarial tables based on the probabilities of death or remarriage [*Maresi v. Commissioner (1946) 6 T.C. 582, 586 , aff'd, 156 F.2d 929 (2d Cir. 1946)]* . If support payments required under a separation agreement are to be paid in part by a trust set up by the decedent, the amount of the deduction is the commuted value of the remaining payments actuarially computed less the value of the trust assets [*Sherman v. United States (5th Cir. 1974) 492 F.2d 1045, 1046-1047]* .

As with the gift tax, all amounts passing to the surviving spouse in a form qualifying for the unlimited marital deduction are deductible from the decedent's gross estate if the spouses are still married at the time of death [*see I.R.C. §§ 2056(d), 2056A*, as added by Pub. L. No. 100-647, § 5033(a)(2), applicable to estates of decedents dying after November 10, 1988)]. Special rules applicable to surviving spouses who are not United States citizens disallow the marital deduction unless a prescribed trust is used. The gift tax marital deduction for transfers of benefits under a joint and survivor annuity has been extended to include such gifts to noncitizen spouses [*I.R.C. § 2056(d)*, as amended by Revenue Reconciliation Act of 1990, Pub. L. No. 101-508, §§ 11701, 11702, effective as if included in the provision of the Revenue Reconciliation Act of1989, Pub. L. No. 101-239, to which it relates].

California Forms of Pleading and Practice--Annotated

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Volume 19: Dissolution of Marriage: Child Custody thru Dissolution of Marriage: Tax Effects of Dissolution-Chs.223-239
Chapter 227 DISSOLUTION OF MARRIAGE: TAX EFFECTS OF DISSOLUTION
PART II. LEGAL BACKGROUND

19-227 California Forms of Pleading and Practice--Annotated § 227.12

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§ 227.12 Income Tax Consequences Related to Children

[1] Treatment of Child Support

Unlike spousal support, child support is neither income of the payee parent nor deductible by the payor parent. If the payor makes support payments directly to the child, or to a third party (instead of to the other parent) on behalf of the child, the payments are not deductible because they are personal or family expenses for which the Internal Revenue Code does not otherwise allow a deduction [*see I.R.C. §§ 71(c)(1), 262(a)*; *Treas. Reg. § 1.71-1(e)*; *Bay v. Commissioner T.C. Memo. 1994-389* . California income tax treatment of child support is the same as that provide by federal income tax law [Rev. & Tax. Code §§ 17801, *17201*]. Payments that are in fact for the benefit of children may receive alimony tax treatment if they can properly be characterized as "family support" (*§ 227.10[4][c]*).

[2] Dependency Exemption

[a] When Permitted

Under *I.R.C. § 151(c)*, applicable to tax years beginning after December 31, 2004, a taxpayer is entitled to an exemption for each individual who is a dependent, as defined in *I.R.C. § 152*, for the taxable year [*see* Pub. Law 108-311, § 208]. Prior tax years are governed by provisions with somewhat different structure and language [*see generally* former *I.R.C. §§ 151(c), 152*; *see also*Pub. Law 108-311, §§ 206, 208 (amending former *I.R.C. §§ 151(c), 152*)].

"Dependent" is defined as either a "qualifying child" or a "qualifying relative" [*I.R.C. § 152(a)*].

A "qualifying child" must be under the age of 19 at the close of the taxable year, or be a student who is under the age of 24 at the close of that year; and must be a child, sibling, or stepsibling of the taxpayer, or a descendant of a child, sibling, or stepsibling of the taxpayer [*I.R.C. § 152(c)(2), (3)*]. A qualifying child must have the same principal place of abode as the taxpayer for more than one-half of the taxable year, and must *not* provide over one-half of his or her own support in the taxable year [*I.R.C. § 152(c)(1)(B), (D)*]. In general, a "child" is a son, daughter, stepson, stepdaughter,

adopted child, or eligible foster child of the taxpayer, and a "student" is an individual who, during each of five months in the taxable year, is a full-time student or is pursuing a full-time course of on-farm training [*I.R.C. § 152(f)(1), (2)*].

A "qualifying relative" can be a child of the taxpayer who is not a qualifying child of any taxpayer because of age or some other reason, but may also be one of several other specified categories of relative of any age (i.e., grandparents, parents, siblings, aunts or uncles, nieces or nephews, in-laws, step-relatives, household members) [*I.R.C. § 152(d)(1)(A),(D), (2)*]. For most types of qualifying relatives (i.e., blood and legal relatives), there is no requirement of common abode, but there is a requirement that the qualifying relative must *not* have gross income for the taxable year greater than the exemption amount, and a requirement that the taxpayer must provide over one-half of the qualifying relative's support for the taxable year [*I.R.C. § 152(d)(1)(B), (C)*; see *§ 227.12[2][d]*].

For tax years ending on or before December 31, 2004, the rule for all dependents (both children and relatives) was that the taxpayer was required to provide over half the person's support for the taxable year [*see* former *I.R.C. § 152(a)*].

An individual who is claimed as a taxpayer's dependent for a taxable year is treated as having no dependents for that taxable year [*I.R.C. § 152(b)(1)*]. A taxpayer may not claim an exemption for a married child who files a joint return with his or her spouse [*I.R.C. § 152(b)(2)*]. A taxpayer may not claim an exemption for an individual who is *not* a citizen or national of the United States, unless (1) the individual is a resident of the United States or a country contiguous to the United States, or (2) the taxpayer is a citizen or national of the United States and the individual is an adopted child who has the same principal place of abode as the taxpayer and is a member of the taxpayer's household [*I.R.C. § 152(b)(3)*].

Special rules apply to parents who are divorced or legally separated, or are separated under a written separation agreement, or live apart at all times during the last six months of the year [*see I.R.C. § 152(e)*]. For discussion, see *§ 227.12[2][e]*.

[b] Qualifying Child

A "qualifying child" with respect to a taxpayer is an individual who meets certain relationship and age requirements, who does not provide over half of his or her own support, and who has the same principal place of abode as the taxpayer for more than one-half of the taxable year [*I.R.C. § 152(c)(1)*]. Under the law as amended in 2004, there is no requirement that the taxpayer provide any specific portion of the child's support [*see* Pub. Law 108-311, §§ 206, 208 (amending former *I.R.C. §§ 151(c), 152*)].

The class of permitted relationships for a qualifying child is relatively small. The child may be (1) the taxpayer's own child or a descendant of the taxpayer's child, or (2) a brother, sister, stepbrother, or stepsister of the taxpayer or a descendant of any of these [*I.R.C. § 152(c)(2)*]. In general, the term "child" includes a taxpayer's stepchild, adopted child, or eligible foster child, and the terms "brother" and "sister" include a taxpayer's brother or sister by the half blood [*I.R.C. § 152(f)(1), (f)(4)*].

The basic age requirement for a qualifying child is that the child must be under the age of 19 at the close of the taxable year or a student who is under the age of 24 at the close of the taxable year [*I.R.C. § 152(c)(3)(A)*]. A student is an individual who during each of five calendar months during the taxable year of the taxpayer is a full-time student or pursuing a full-time course of on-farm training [*I.R.C. § 152(f)(2)*]. There is no age restriction applicable to an individual who is permanently and totally disabled at any time during the taxable year [*I.R.C. § 152(c)(3)(B)*].

If a parent and another taxpayer are both entitled to claim a child as a qualifying child, the parent prevails [*I.R.C. § 152(c)(4)(A)*]. If both parents claim a child as a qualifying child, then the child is treated as the qualifying child of (i) the parent with whom the child resided for the longest period of time during the taxable year, or (ii) if the child resides with both parents for the same amount of time during the taxable year, the parent with the highest adjusted gross income

[*I.R.C. § 152(c)(4)(B)*].

[c] Qualifying Relative

A "qualifying relative" with respect to a taxpayer is an individual [*I.R.C. § 152(d)(1)*]:

1. Who meets a specified relationship requirement;

2. Whose gross income for the taxable year does not exceed the exemption amount;

3. Over half of whose support during the taxable year was provided by the taxpayer; and

4. Who is not a qualifying child of any taxpayer in the taxable year.

There is no age restriction, and in most cases there is no requirement to be part of the taxpayer's household [*see I.R.C. § 152(d)(1)*].

A large class of relationships is permitted. A qualifying relative may be, with respect to the taxpayer, (1) a child or a descendant of a child; (2) a brother, sister, stepbrother, or stepsister; (3) a father or mother or an ancestor of either; (4) a stepfather or stepmother; (5) a son or daughter of a brother or sister of the taxpayer; (6) a brother or sister of the father or mother of the taxpayer; (7) a son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law; or (8) an individual who has the same principal place of abode as the taxpayer and is a member of the taxpayer's household throughout the taxable year [*I.R.C. § 152(d)(2)*].

An individual unrelated to the taxpayer by blood or adoption can be a qualifying relative, but that individual must be a member of the taxpayer's household [*I.R.C. § 152(d)(2)(H)*; *see Rasco v. Commissioner, T.C. Memo. 1999-169* (unmarried man could take dependency exemptions for his girlfriend and her two children when all three lived in his home and received more than half their support from him)]. An individual will not be treated as a member of the taxpayer's household if the relationship between that individual and the taxpayer is in violation of local law [*I.R.C. § 152(f)(3)*].

[d] Support Requirement

For tax years beginning after December 31, 2004, the only support requirement for a qualifying child is that the child must not provide over half of his or her own support in the taxable year [*I.R.C. § 152(c)(1)(D)*; *see*Pub. Law 108-311, §§ 206, 208 (amending former *I.R.C. §§ 151(c), 152*)]. In contrast, the taxpayer must furnish more than half of a qualifying relative's support [*I.R.C. § 152(d)(1)(C)*]. For prior tax years, the rule for all dependents was that the taxpayer must furnish more than half of the dependent's support for the year in question [former *I.R.C. § 152(a)*; *see Molina v. Comm'r, T.C. Memo 2003-254* (taxpayer's uncontroverted oral testimony concerning household facts met burden of proof to claim dependency exemption)].

In determining whether the taxpayer provided over half of the support of an individual for a given year, the entire amount of support that the individual received from all sources must be considered, including support that the individual supplied for himself or herself and income that ordinarily is excludible from gross income [*Treas. Reg. § 1.152-1(a)(2)*]. Support includes food, clothing, medical and dental care, education, the fair market value of shelter or lodging, and like items. Thus, in computing the amount expended for support, taxpayers are not limited to the actual expenses of maintaining a house [*see Treas. Reg. § 1.152-1(a)(2)(i)*], such as electricity, heat, taxes, repairs, and interest payments on a mortgage. Rather, the measure is what the dependent receives, which is the fair rental value of the lodging [*see, e.g., Carter v. Commissioner (1974) 62 T.C. 20* ; *Blarek v. Commissioner (1955) 23 T.C. 1037, 1038-1039* ; *Flachner v. Commissioner, T.C. Memo 1978-417* ; *Rev. Rul. 58-302, 1958-1 C.B. 62*]. IRS rulings have indicated that transportation, holiday gifts, church contributions, and expenses for entertainment and recreation are included in

support. Although health insurance premium payments are treated as payments for medical expenses, any benefits provided under the policy are not considered support [*see, e.g., McGuire v. Commissioner (1981) 77 T.C. 765, 774* ; *Rev. Rul. 64-223, 1964-2 C.B. 50*].

Certain items of a nonrecurring nature, such as the cost of a car, furniture, or appliances, may or may not qualify as support, depending on the particular circumstances of each case [*see Rev. Rul. 77-282, 1977-2 C.B. 52*]. None of the following, however, can be treated as items of support:

1. The cost of life insurance premiums paid by the taxpayer on a policy heor she owns that lists the dependent as a beneficiary [*see, e.g., Vance v. Commissioner (1961) 36 T.C. 547, 550* ; *Rempert v. Commissioner, T.C. Memo. 1970-226]* ;

2. Costs associated with the dependent's use of an automobile owned by the taxpayer, except to the extent that the owner's payment of automobile operating expenses benefits the dependent [*Rev. Rul 77-282, 1977-2 C.B. 52*];

3. Loans made by the taxpayer to the dependent [*Gatling v. Commissioner, T.C. Memo. 1959-224],* ;

4. The value of services rendered by the taxpayer to the dependent [*see, e.g., Markarian v. Commissioner (7th Cir. 1965) 352 F.2d 870 , cert. denied, 384 U.S. 988* ; *Beck v. Commissioner, T.C. Memo 1970-153]* ;

5. Liability insurance proceeds paid to a third party for an accident caused by the dependent [*Kincheloe v. Commissioner, T.C. Memo 1971-35]* ;

6. The cost of tools to make a dependent's assigned chores easier [*Rev. Rul. 77-282, 1977-2 C.B. 52*] or, because the benefit is deemed too remote to be counted as support, the cost of items purchased to benefit children as they grow older [*Gajda v. Commissioner (1965) 44 T.C. 783 , acq., 1966-2 C.B. 4*];

7. The dependent's funeral expenses [*Rev. Rul. 65-307, 1965-2 C.B. 40*];

8. The dependent's payment of his or her own income taxes [*Rev. Rul. 58-67, 1958-1 C.B. 62*];

9. Expenses incurred for an induced abortion, even if the child is born alive [*Rev. Rul. 85-118, 1985-2 C.B. 59*]; or

10. The costs associated with exercising visitation with the dependent [*Hopkins v. Commissioner (1970) 55 T.C. 538, 541-542* ; *Vance v. Commissioner (1961) 36 T.C. 547]* .

Payments made by an institution to assist in furthering a child's education may or may not constitute support payments. For example, amounts received as scholarships for study at an educational institution are not considered in determining whether the taxpayer furnishes more than half of the support for the child [*Treas. Reg. § 1.152-1(c)*]. These scholarships may include payments for tuition, books, travel, meals, and lodging [*Commissioner v. Ide (3d Cir. 1964) 335 F.2d 852, 854-855* ; *Rev. Rul. 58-338, 1958-2 C.B. 54*]. Similarly, room, board, and tuition payments made by the state for developmentally challenged persons qualify as scholarship payments and are not counted toward support if the children qualify as students and the institution qualifies as an educational institution [*Rev. Rul. 71-347, 1971-2 C.B. 114* ; *Rev. Rul. 64-221, 1964-2 C.B. 46* ; *Rev. Rul. 61-186, 1961-2 C.B. 30* ; *Rev. Rul. 60-190, 1960-1 C.B. 51*]. Student loans, however, generally constitute support even though they are scholarship-related [*McCauley v. Commissioner (1971) 56 T.C. 48, 50]* .

[e] Children of Divorced or Separated Parents

[i] Applicability of Special Rule for Divorced Parents

A special rule for divorced parents allows transfer of the dependency exemption by agreement or court order to the noncustodial parent [*I.R.C. § 152(e)* (applicable to tax years beginning after December 31, 2004)]. A child to whom this rule applies will be treated as the qualifying child or qualifying relative of the noncustodial parent if a decree of divorce or a written separation agreement provides either [*I.R.C. § 152(e)(1), (2)*]:

1. That the noncustodial parent shall be entitled to any deduction allowable for the child, or

2. That the custodial parent will sign a written declaration (in the form required by the IRS) that he or she will not claim the child as a dependent for the taxable year.

If the agreement was executed before January 1, 1985, the noncustodial parent must provide at least $600 for the support of the child during the calendar year [*I.R.C. § 152(e)(2)(B)*; *see § 227.12[2][e][iii]*].

The special rule for divorced parents applies when all of the following conditions are satisfied [*I.R.C. § 152(e)(1)*]:

1. A child receives over half of his or her support during the taxable year from his or her parents together;

2. The child is in the custody of one or both the parents for more than half the year; and

3. The parents are divorced or legally separated under a decree of divorce or separate maintenance, or are separated under a written separation agreement, or live apart at all times during the last six months of the calendar year.

"Custodial parent" is defined under current law to mean the parent with whom a child shared the same principal place of abode for the greater portion of the calendar year. The "noncustodial parent" is the parent who is not the custodial parent [*I.R.C. § 152(e)(3)*].

Former *I.R.C. § 152(e)* set forth the general rule that the custodial parent was considered as providing more than one-half of the support for a child during the calendar year. Now *I.R.C. § 152(e)(1)* does not state this rule explicitly, but provides instead that a child will be considered a qualifying child or qualifying relative of the *non*custodial parent in certain defined circumstances, as previously discussed. In normal cases a child who lives with the custodial parent over one-half the time will be a qualifying child without regard to what portion of support the custodial parent provides [*see I.R.C. § 152(c)(1)(B)*]. The prior law allowed the custodial parent to release his or her claim to the exemption by a written declaration, as discussed in *§ 227.12[2][e][ii]*, and it defined the custodial parent as the parent who had custody for the greater portion of the calendar year [former *I.R.C. § 152(e)(1)*; *see Duby v. Comm'r, T.C. Memo 2003-33, 2003 Tax Ct. Memo LEXIS 33* (denial of dependency exemptions to parent who obtained temporary custody in July after custodial parent abducted children); *but see Rios v. Pulido (2002) 100 Cal. App. 4th 359, 360, 122 Cal. Rptr. 2d 501* (family law court may order parents to take dependency exemption in alternate years, even though one parent may have custody of child for less than half time during calendar year)].

Former *I.R.C. § 152(e)* was held to apply to any parents, regardless of marital status, as long as they had lived apart at all times during the last six months of the calendar year [*King v. Comm'r (2003) 121 T.C. 245, 250* (child's parents never married each other)]. In determining whether the parents together had provided more than half of the support of the child, support received from a parent's new spouse was treated as received from the parent [*see* former *I.R.C. § 152(e)(5)*; *Schneier v. Commissioner (9th Cir. 1984) 735 F.2d 375, 377]* .

There was authority that legal custody alone might be considered in determining whether the child was in the custody of one or both parents for more than half of the year [*see Stanford v. Commissioner, T.C. Memo 1995-78* (dependency exemption allowed to parent who had legal custody only, but who furnished more than half of child's support to unrelated third persons who had actual physical custody)]. A divorced parent did not qualify for a dependency exemption for a child who is in both the legal and physical custody of grandparents [*Penny v. Commissioner, T.C. Memo 1985-590* (Tax Court refused to consider grandparents as parents for purposes of dependency exemption); *cf. Stanford v. Commissioner, T.C. Memo. 1995-78]* .

The special rule for divorced parents is not applicable to any case in which over one-half of the support of the child is treated as having been received from a taxpayer under the "qualifying relative" special rule relating to multiple support agreements [*I.R.C. § 152(e)(4)*; *see I.R.C. § 152(d)(3)* (special multiple support agreements rule); *see also § 227.12[2][f]*]. Prior law also made an exception for multiple support agreements [*see* former *I.R.C. § 152(e)(3)*].

[ii] Custodial Parent's Release of Exemption

Under the special rule for divorced parents applicable to tax years beginning after December 31, 2004, a child is treated as the qualifying child or qualifying relative of the noncustodial parent if a decree of divorce or a written separation agreement provides either [*I.R.C. § 152(e)(1), (2)*]:

1. That the noncustodial parent shall be entitled to any deduction allowable for the child, or

2. That the custodial parent will sign a written declaration (in the form required by the IRS) that he or she will not claim the child as a dependent for the taxable year.

As discussed below, prior law contained an express requirement that the noncustodial parent actually obtain a suitable declaration and attach it to his or her return [*see* former *I.R.C. § 152(e)(2)*].

In tax years beginning on or before December 31, 2004, the custodial parent released his or her claim to the exemption to the other spouse by completing a written declaration, in the form required by the IRS, that he or she would not claim the child as a dependent [*see* former *I.R.C. § 152(e)(2)(A)*; Temp. Treas. Reg. § 1.152-4T, Q&A 3; *see King v. Comm'r (2003) 121 T.C. 245* (IRS waiver form executed by unmarried parents was enforceable); *Boltinghouse (Michael K.) v. Commissioner, T.C. Memo. 2003-134* (signed separation agreement not incorporated into divorce decree conformed to substance of IRS waiver form); *Loffer v. Comm'r, T.C. Memo 2002-298* (signed divorce decree did *not* conform to substance of IRS waiver form); *Horn v. Comm'r, T.C. Memo 2002-290* (formal requirements for valid waiver of dependency exemption); *Neal v. Commissioner, T.C. Memo. 1999-97* (upholding denial of dependency exemptions to noncustodial, divorced father when custodial mother had not signed waiver of her right to exemptions)].

It is likely that the IRS will continue to require the noncustodial parent to attach the form to his or her income tax return to claim the exemption [*see* former *I.R.C. § 152(e)(2)(B)*; *Peck v. Commissioner (1996) T.C. Memo 1996-33* ; *see Brissett v. Comm'r, T.C. Memo 2003-310* (noncustodial parent denied dependency exemption, despite terms of divorce settlement, when custodial parent refused to sign IRS waiver form); *Horn v. Comm'r, T.C. Memo 2002-290* (unsigned, undated IRS waiver form accompanied by inconclusive handwritten waiver was insufficient to support noncustodial parent's dependency exemption); *White (William C.) v. Commissioner, T.C. Memo. 1996-438* (exemption waiver signed by ex-wife pursuant to divorce decree was not effective when it did not meet tax regulations requirements); *see also I.R.C. § 152(e)(2)(A)*]. The exemption may be released to the noncustodial spouse for a single year, for a number of specified years (for example, alternate years), or for all future years, but is effective only as specified in the form. If the exemption is released for more thanone year, the noncustodial parent must attach the original form to his or her tax return for the first year for which he or she claims the exemption, and a copy to his or her return for each succeeding year for which the exemption is claimed [Temp. Treas. Reg. § 1.152-4T, Q&A 4].

PRACTICE TIP:

If the custodial parent has agreed to release the exemption to the noncustodial parent, counsel should ensure that the form or written declaration releasing the claim clearly indicates the specific years to which the release applies.

EXAMPLE:

On January 5, 1990, a custodial parent fills out only Part II of IRS Form 8332, which is labelled "Release of Claim to Exemption for Future Years," stating that she agrees not to claim an exemption for her three children for "all future years." The noncustodial parent attaches this form to his 1989 income tax return. However, he was not entitled to the exemption for 1989 because Part I of the form, which is labelled "Release of Claim to Exemption for Current Year," was uncompleted and left completely blank, and because the form did not specify that it was applicable to the 1989 tax year [Nancy L. Cafarelli, T.C.M. 1994-265].

The California Supreme Court has held that the court may order the custodial parent to execute the form to release the right to the dependency exemption to the noncustodial parent over the custodial parent's objection. Allocation of the exemption in order to obtain maximum tax savings to the parents makes more money available for the children. Child support should be increased to offset the cash value of the exemption [*Monterey County v. Cornejo (1991) 53 Cal. 3d 1271, 1275-1281, 283 Cal. Rptr. 405, 812 P.2d 586* ; *see Rios v. Pulido (2002) 100 Cal. App. 4th 359, 362, 122 Cal. Rptr. 2d 501* (alternate-year exemptions)]. The case in which the issue was decided was brought by a district attorney under child support enforcement provisions that formerly were in the Welfare and Institutions Code [*see* former *Welf. & Inst. Code §§ 11350, 11350.1, 11475.1*, (*now see Fam. Code § 17400 et seq.*, discussed in *Ch. 259, Family Law Enforcement: Special Remedies for Support Enforcement, § 259.150* et seq.)], in which the jurisdiction of the court is limited to determining paternity and child support [*Welf. & Inst. Code § 11350.1(a)* (*now see Fam. Code § 17404(a)*)]. However, the court's holding was that allocation of the dependency exemption is a determination that is pertinent to child support, meaning that it may be addressed in any proceeding in which child support is at issue, such as one for dissolution of marriage [*Monterey County v. Cornejo (1991) 53 Cal. 3d 1271, 1282-1284, 283 Cal. Rptr. 405, 812 P.2d 586* (Court specifically noted parent's right to independent determination of issue under former Family Law Act, now Family Code); *see Rios v. Pulido (2002) 100 Cal. App. 4th 359, 122 Cal. Rptr. 2d 501* (allocation of exemption by family law court)].

PRACTICE TIP:

The judicial shifting of dependency exemptions to a payor spouse, along with increased child support, is common. Counsel for the custodial-payee parent should consider offering to sign the exemption over to the payor parent whenever she or he stands to gain more from increased support than will be lost by surrendering the exemption (typically the case with a low-income payee). Conversely, counsel for the payor parent should avoid raising the issue if his or her exposure to increased support will outweigh the benefit of claiming the exemption. Computer software programs that calculate support, including the effect on support of exemption-shifting, are now in wide-spread use by both family law courts and counsel. If the custodial parent has agreed to release the exemption to the noncustodial parent, counsel should ensure that the form or written declaration releasing the claim clearly indicates the specific years to which the release applies.

There is an issue of whether the requirement that the parent claiming the exemption contribute more than half of the child's support [*see I.R.C. § 151(a)*] can be ignored in transferring the exemption to the noncustodial parent. The custodial parent's voluntary release of the exemption under *I.R.C. § 152(e)(2)* requires only that she or he agree not to claim the exemption; no affirmation that the other parent has, in fact, provided more than half of the child's support is required [*see Valarian v. Commissioner, T.C. Memo. 1996-511* ; *see also Roberts v. Commissioner, T.C. Memo 1996-467* . However, if the court compels the parent to transfer the exemption involuntarily, it would seem that the court must first find that the noncustodial parent has contributed, or at least will contribute, more than half of the

support of the child. An involuntary transfer of the exemption solely to maximize tax savings, without the support requirement having been met, would seem to not be permitted by the Internal Revenue Code.

[iii] When Rules Do Not Apply

The rules regarding the dependency exemption for divorced or separated parents do not apply if the right to the dependency exemption is governed by a multiple support agreement with respect to the child [*I.R.C. § 152(e)(4)*; *see* former *I.R.C. § 152(e)(3)*; *see also § 227.12[2][f]*].

In addition, there is special provision for agreements executed prior to January 1, 1985, requiring that the noncustodial parent provide at least $600 of support during the calendar year [*I.R.C. § 152(e)(2)(B)*]. This carries forward a rule of the law applicable to tax years starting on or before December 31, 2004, under which if a qualified pre-1985 instrument provided that the noncustodial parent was entitled to the exemption, and that parent provided $600 for the support of the child during the year, then the noncustodial parent was entitled to the exemption [*see* former *I.R.C. § 152(e)(4)(A)*]. For purposes of the $600-support test, amounts expended for the support of the child are treated as received from the noncustodial parent to the extent that he or she provided amounts for support [*I.R.C. § 152(e)(2)(B)*; *see* former *I.R.C. § 152(e)(4)(a)*; *see Broughton v. Commissioner, T.C. Memo 1998-409* ; *Zion v. Commissioner, T.C. Memo 1991-119* (custodial parent provided more than half of children's support, but noncustodial parent paid more than $600 per child and was entitled to dependency exemptions granted under pre-1985 settlement agreement)].

There is authority for the proposition that the rules for divorced or separated parents do not apply if the parents are not yet divorced but are living in separate parts of the same household, so that there is no custodial or noncustodial parent. In such circumstances, the right to the exemption may have to be decided according to the ordinary rules relating to dependents [*see Dawkins v. Commissioner, T.C. Memo 1991-225* ; *contra Sydnes v. Commissioner (8th Cir. 1978) 577 F.2d 60* ; *see also I.R.C. § 152(c)(4)(B)(ii)* (child residing with both parents for same amount of time may be claimed by parent with highest adjusted gross income)].

[f] Multiple Support Agreements

If no single person contributes more than half of the support of an individual, but over half of the individual's support is received from persons each of whom would have been permitted to claim the individual as a dependent had the person contributed more than half of the support, all such persons may agree to give the dependency exemption to any one of them who contributes at least 10 percent of the dependent's support [*I.R.C. § 152(d)(3)*; *see* former *I.R.C. § 152(c)*]. To designate the taxpayer entitled to the exemptions, all other persons who contribute over 10 percent of the dependent's support must file a declaration in the manner required by the IRS [*I.R.C. § 152(d)(3)(D)*; *see* former *I.R.C. § 152(c)(4)*]. For tax years beginning before 2002, all must make declarations in their own tax returns [*Treas. Reg. § 1-152-3(c)(1)*]. For tax years beginning in 2002 or later, the taxpayer claiming the exemption must obtain written waivers from the others, and must provide with the return both a statement identifying each of the other persons who contributed more than 10 percent of the support and a statement indicating that the taxpayer obtained a written declaration from each of the others waiving the right to claim an exemption for the dependent [*Treas. Reg. § 1-152-3(c)(2)*].

As there is no requirement, in tax years beginning after December 31, 2004, that a person claiming a "qualifying child" provide over half the child's support, it appears that the rule permitting multiple support agreements is applicable only when the individual claimed as a dependent does not meet the requirements for a "qualifying child" but does meet the requirements for a "qualifying relative" [*see I.R.C. § 152(c), (d)*; *see also § 227.12[2]*]. When it is applicable, either in a "qualifying relative" case or in a tax year beginning on or before December 31, 2004, the rule applies only when no single person provided more than half the support of the dependent [*I.R.C. § 152(d)(3)(A)*]. Thus, if a child lives full-time with an unrelated third party who provides more than half the child's support, a multiple support agreement cannot be used to shift the exemption to a parent. The child is probably a "qualifying relative" of the third party as a member of the third party's household [*see I.R.C. § 152(d)(2)(H)*]. Consequently the third party can claim the child, but

cannot transfer the exemption. If one parent provides more than half the support of the child living with the third party, then the child is a "qualifying relative," but *not* a "qualifying child" of that parent, who can take the exemption but cannot transfer it. However, if the two parents and the third party each provide one third of the child's support, then they can use a multiple support agreement to designate which of the three will take the exemption.

[3] Related Tax Credits

A child tax credit is available for each qualifying child of a taxpayer [*I.R.C. § 24*]. The credit cannot exceed the individual's regular income tax and alternative minimum tax [*I.R.C. § 24(b)(3)*, effective for tax years beginning after December 31, 2001]. To be eligible for the credit, the qualifying child must be a qualifying child under the definition for determination of dependents, and must in addition be under 17 years old [*I.R.C. § 24(c)* (applicable to tax years beginning after December 31, 2004); *see I.R.C. § 152(c)* (definition); former *I.R.C. § 24(c)* (requiring that taxpayer be allowed a personal exemption deduction and that child meet the relationship test of *I.R.C. § 32(c)(3)(B)*)].

The amount of the credit is $1,000 per qualifying child, subject to phaseout at higher income levels [*I.R.C. § 24(a)* (basic amount per child); *I.R.C. § 24(b)* (phaseout)]. In some circumstances, it is refundable to a limited extent [*I.R.C. § 24(d)*].

This credit is distinct from and in addition to the dependent care credit [*see I.R.C. § 21*; *see also § 227.12[5]*]. There are also credits for post-secondary education [*I.R.C. § 25A*], Education Individual Retirement Accounts [*I.R.C. § 530*], and qualified tuition programs under which tuition credits may be purchased for a designated beneficiary [*I.R.C. § 529*]. These measures are beyond the scope of this chapter, but may figure into the overall planning needed by divorcing couples with respect to the education of their children.

[4] Deduction for Medical Expenses

A taxpayer may deduct his or her medical expenses, including those of a dependent child, to the extent that they exceed 7.5 percent of adjusted gross income [*I.R.C. § 213(a)*; *see I.R.C. § 152* (definition of dependent). Note that certain elements introduced into the *I.R.C. § 152* definition of "dependent" for tax years beginning after December 31, 2004, are not considered for purposes of *I.R.C. § 213(a)*. For example, an individual can be treated as a dependent for the medical expense deduction even if he or she is married and files a joint return with his or her spouse.]. In the case of separated or divorced parents, if the specialdependency exemption rule for divorced parents applies to the child, the child is deemed to be a dependent of both parents for the purposes of the medical expense deduction [*I.R.C. § 213(d)(5)*; *see I.R.C. § 152(e)*; *see also § 227.12[2][e]*]. Therefore, despite the fact that only one parent is entitled to a dependency exemption for a child, each parent may include the child's medical expenses that he or she has paid in determining whether the 7.5 percent threshold has been met. The same rule applies to the income exclusion for medical expenses paid by an employer for a dependent child [*see I.R.C. § 105(b)*]. If the special rule is not applicable, only the parent who shares a residence with the child for over half the year may consider the child as a dependent and be entitled to a medical expense deduction for amounts expended on medical care for the child [*I.R.C. §§ 152(c), 213(a)*].

[5] Dependent Care Credit

A taxpayer who has at least one qualifying individual may claim a nonrefundable credit against income tax liability for up to 30 percent (35 percent, for taxable years beginning after 2002) of a limited amount of employment-related expenses. Through 2002, eligible employment-related expenses were limited to $2,400 if there was one qualifying individual or $4,800 if there were two or more qualifying individuals. For taxable years beginning after December 31, 2002, these amounts have been raised to $3,000 and $6,000 [*I.R.C. § 21(c)*]. Thus, the maximum credit is $720 if there is one qualifying individual and $1,440 if there are two or more qualifying individuals. The applicable dollar limit of otherwise eligible employment-related expenses is reduced by any amount excluded from income under an employer-provided dependent care assistance program [*I.R.C. § 21(c)*; *see I.R.C. § 129*]. The credit rate is reduced, but

not below 20 percent, by 1 percentage point for each $2,000 (or fraction of that amount) of adjusted gross income above $10,000. The phase-down trigger for the credit has been increased to $15,000, effective for taxable years beginning after December 31, 2002. This reduces the credit percentage to 20 percent for taxpayers with adjusted gross income over $43,000 [*I.R.C. § 21(a)(2)*].

A qualifying individual is one of the following [*I.R.C. § 21(b)(1)* (applicable to tax years starting after December 31, 2004; *see*Pub. Law 108-311, § 203)]:

1. A dependent of the taxpayer who is under the age of 13;

2. A dependent of the taxpayer who is physically or mentally incapable of caring for himself or herself and who has the same principal place of abode as the taxpayer for more than one-half of the taxable year; or

3. The spouse of the taxpayer, if the spouse is physically or mentally incapable of caring for himself or herself and has the same principal place of abode as the taxpayer for more than one-half of the taxable year.

Regulations state that incapability of caring for oneself requires a physical or mental defect [*Treas. Reg. § 1.44A-1(b)(4)*]. Therefore, the credit does not appear to extend to a child of age of 13 or older whom the parent believes is not yet able to stay home without child care.

Unlike the dependency exemption, the dependent care credit is not transferrable to the noncustodial parent, even if he or she is the one who is paying all or most of the child care expenses [*I.R.C. § 21(e)(5)*; see *I.R.C. § 152(e)(3)* (defining custodial parent as the parent with whom a child shared the same principal place of abode for the greater portion of the calendar year)]. In fact, the right to claim a dependent care credit for a child remains with the custodial parent even if the dependency exemption is released to the noncustodial parent [*I.R.C. § 21(e)(5)*].

An individual will not be treated as having the same principal place of abode as a taxpayer if the relationship between the individual and the taxpayer is in violation of local law [*I.R.C. § 21(e)(1)*]. Under the law applicable to tax years beginning on or before December 31, 2004, a taxpayer was entitled to the dependent care credit only if he or she maintained a household that included as a member one or more qualifying individuals [*see* former *I.R.C. § 21(a), (e)(1)*], but the household was required to be the principal place of abode of both the taxpayer and the qualifying individual [*McDonald (Lillie B.) v. Commissioner, T.C. Memo. 1991-242* (taxpayer who bore expense of disabled adult child's separate residence was not entitled to credit)]. Under prior law, an individual has not been considered to have terminated a household as his or her principal place of abode because of a temporary absence due to illness, education, business, vacation, military service, or a custody agreement [*Treas. Reg. § 1.44A-1(d)(1)*].

Married taxpayers may only claim the dependent care credit on a joint return [*I.R.C. § 21(e)(2)*]. However, an individual who is legally separated from his or her spouse under a decree of divorce or legal separation is not considered as married [*I.R.C. § 21(e)(3)*]. In addition, a person is treated as unmarried if he or she (1) files a separate return for the year; (2) maintains a household that is the child's principal place of abode for more than one half of the taxable year; and (3) furnishes over half the cost of maintaining the household during the taxable year. The rule applies only if the individual's spouse is not a member of the household at any time during the last six months of the year [*Treas. Reg. § 1.44A-3*].

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Volume 19: Dissolution of Marriage: Child Custody thru Dissolution of Marriage: Tax Effects of Dissolution-Chs.223-239
Chapter 227 DISSOLUTION OF MARRIAGE: TAX EFFECTS OF DISSOLUTION
PART II. LEGAL BACKGROUND

19-227 California Forms of Pleading and Practice--Annotated § 227.13

AUTHOR: Original text by Frederick W. Campbell-Craven, J.D.

§ 227.13 Estate and Gift Taxation of Child Support

[1] Gift Tax

Payments made to satisfy a child support obligation are not taxable gifts [*see Commissioner of Internal Revenue v. Converse (2d Cir. 1947) 163 F.2d 131, 133* ; *Hooker (1948) 10 T.C. 388 , aff'd, 174 F.2d 863 (5th Cir. 1949)* ; *see also Rev. Rul. 68-379, 1968-2 C.B. 414*]. However, payments made in excess of reasonable support obligations, or payments to adult children to whom the payorowes no obligation of support, are taxable gifts [*see Rosenthal v. Commissioner of Internal Revenue (2d Cir. 1953) 205 F.2d 505, 508-510* ; *Spruance v. Commissioner (1973) 60 T.C. 141, 150-153 , aff'd without op., 505 F.2d 731 (3d Cir. 1974)]* .

Payments that provide reasonable allowance for support for the transferor's issue during their minority are not taxable gifts if the transfers are made under a written marital settlement agreement entered into between the parents within two years before and one year after the final decree of divorce. The agreement need not be approved by the divorce decree [*I.R.C. § 2516*]. This rule applies only to the children of the marriage being dissolved, but includes legally adopted children [*Treas. Reg. § 25.2516-2*]. In addition, an unlimited exclusion from gift tax applies to all direct payments made for an individual's medical or tuition expenses, without regard to whether the individual for whose benefit the payment is made is related to the donor [*I.R.C. § 2503(e)*].

[2] Estate Tax

Payments made to support a child are not subject to federal estate tax. Claims for the support of children are deductible from the decedent's gross estate to the extent of the decedent's support obligation [*see I.R.C. § 2053*]. The deduction from the gross estate should not exceed the amount that the decedent was obligated to pay, but failed to pay, during his or her life [*see Estate of Edward Satz (1982) 78 T.C. 1172, 1180* ; *see also Rev. Rul. 71-67, 1971-1 C.B. 271* ; *cf. Kitch v. Commissioner (10th Cir. 1996) 103 F.3d 104* (payment by decedent's estate of all net assets to estate of decedent's former wife to settle alimony arrearages was taxable alimony to wife's estate and thus taxable to beneficiaries who received distributions of it)].

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Chapter 227 DISSOLUTION OF MARRIAGE: TAX EFFECTS OF DISSOLUTION
PART II. LEGAL BACKGROUND

19-227 California Forms of Pleading and Practice--Annotated § 227.14

AUTHOR: Original text by Frederick W. Campbell-Craven, J.D.

§ 227.14 Income Taxation of Property Division

[1] No Recognition of Gain or Loss on Transfers Between Spouses

[a] Current Law

Under *I.R.C. § 1041*, generally no gain or loss is recognized on a transfer of property from an individual to (or in trust for the benefit of) a spouse. Transfers to (or for the benefit of) a former spouse also generally qualify for nonrecognition if the transfers are made incident to divorce [*I.R.C. § 1041(a)(2)*; Temp. Treas. Reg. § 1.1041-1T(a) Q&A 2; *but see § 227.14[4]* and *[5]*, for discussion of exceptions to general rule for transfers in trust and transfers to nonresident alien spouses; *see § 227.17*, for special rules for nontaxability of distributions made under employee benefit plan; *but cf. Tahamtan v. Commissioner, T.C. Memo 1995-226* (when spouse transferred community business assets to other spouse under duress, court ignored § 1041 and allowed the business a loss deduction for *theft* by conversion)]. The transfer is treated as a gift, and the transferor's basis in the property is carried over to the transferee [*I.R.C. § 1041(b)*]. The carryover of basis assures that the transferee retains any unrecognized gain or loss in the property. Thus, for example, a taxpayer who received appreciated real property from her former husband in settlement of a liability that originated from their marital property division was taxable on the appreciation when she later sold the property. The court found that the transfer from her former spouse was subject to nonrecognition treatment under *I.R.C. § 1041*, so any appreciation on the property was not taxable until its later sale to a third party [*Young (John B.) v. Commissioner (1999) 113 T.C. 152, 156* ; *see Walker v. Comm'r, T.C. Memo 2003-335* (former wife responsible for taxable gain on sale of former husband's 25 percent property interest that was transferred to her within one year of divorce in return for credit against equalizing money judgment)]. Note that while the spouses are still married qualify regardless of whether any divorce is anticipated or ever occurs [Temp. Treas. Reg. § 1.1041-1T(a), Q-2]. Property transferred to a former spouse need not have been owned by the transferor during marriage to qualify [Temp. Treas. Reg. § 1.1041-1T(a), Q-5].

Gain is not recognized under *I.R.C. § 1041* even if the transferred property is subject to liabilities in excess of basis, unless the transfer is in trust [Temp. Treas. Reg. § 1.1041-1T(d), Q-12; *see I.R.C. § 1041(e)* (excepting certain transfers in trust from nonrecognition treatment); I.R.S. Letter Rul. 9615026]. The transfer of an installment obligation does not

trigger gain [*see I.R.C. § 453B*] if *I.R.C. § 1041* applies to the transfer, unless the transfer is in trust [House Committee Report on § 421, Tax Reform Act of 1984, Pub. L. No. 98-369]. The transferor of investment credit property recaptures no investment credit on the transfer, if the credit was taken before 1986 or pursuant to a transitional rule effective for a subsequent year. If the transferred property is disposed of by the transferee, or otherwise ceases to be investment credit property with respect to the transferee, however, the transferee is subject to recapture of the investment credit taken by the transferor [Temp. Treas. Reg. § 1.1041-1T(d), Q-13; *see I.R.C. § 47*; *see also I.R.C. § 49*]. Furthermore, because of the carryover basis rule, the proceeds of a life insurance policy transferred between spouses cannot be subject to income tax [*I.R.C. § 101(a)(2)(A)*].

Transfers of nonstatutory stock options and nonqualified deferred compensation between spouses incident to divorce are not taxable events for the transferor. Instead, the transferee spouse recognizes income when the options are exercised and the deferred compensation is received. The stock options and deferred compensation are treated as property within the meaning of *I.R.C. § 1041*, rather than an assignment of income, even though the transfers amount to a right to receive accrued income at a later date [*see Rev. Rul. 2002-22* (inapplicable to transfers of nonstatutory stock options, unfunded deferred compensation rights, or other future income rights to extent such options or rights are unvested or subject to substantial contingencies at time of transfer)].

The Tax Court has also distinguished between payments made between spouses in order to settle their rights to a community asset, and payments received by the spouses directly from a third party entity--such as a pension plan--as a result of the division of their community property. Thus, in a 1992 decision, the Tax Court held that three payments made by a military retiree to his former spouse in settlement of her community interest in the retiree's military retirement benefits were not taxable to her, but did not rule on the taxability of the retirement income if it had been paid to her directly by the government [*Balding v. Commissioner (1992) 98 T.C. 368* ; *see I.R.C. § 1041*]. However, in a 1996 decision, the Tax Court held that a former spouse was taxable on retirement benefits she received directly from the federal government that were her community property share of her former husband's benefits [*Graham (Angela M.) v. Commissioner, T.C. Memo. 1996-512]* .

PRACTICE TIP:

Counsel should deal with the issue of who pays the taxes when the buy-out negotiations occur. The spouses should provide in their marital settlement agreement or judgment for allocation of tax liability. One of the things to consider is that the assignment of income doctrine generally will not apply. The general rule is that no tax recognition arises to either spouse on a division in kind incident to divorce of the community's economic interest in a commonly held business or asset [Temp. Treas. Reg. § 1.1041-1T(d), Q&A 10, 11]. Under existing case authority, it appears equally clear that after a court makes its division in kind of the community's economic interest in a partnership or similar business, each spouse will thereafter be taxed on his or her proportional share of the income stream arising from that division in kind. It will not matter that the interest may continue to be held in the name of one spouse and administered by him or her solely [*Kenfield v. United States (10th Cir. 1986) 783 F.2d 966* ; *Schulze v. Commissioner (1983) T.C. Memo. 1983-263* ; ***see*** *Friscone v. Commissioner (1996) 71 T.C.M. 2837]* .

[b] Pre-1984 Law Contrasted

Before the 1984 enactment of the rule governing transfers of property between spouses or incident to divorce contained in *I.R.C. § 1041* [*see* [a], *above*], although equal divisions of the community estate were not subject to tax, unequal divisions were taxable events [*Carrieres v. Commissioner (1975) 64 T.C. 959 , aff'd per curium, (9th Cir. 1977) 552 F.2d 1350]* . An unequal division of community property or co-owned property was treated as a nontaxable equal division followed by a taxable transfer of a portion of the property between the spouses. Each spouse carried over the community basis in the property except that the spouse receiving the taxable portion took a cost basis in that portion [*Rev. Rul. 74-347, 1974-2 C.B. 26* ; *see Rev. Rul. 81-292, 1981-2 C.B. 158* ; *Siewert v. Commissioner (1979) 72 T.C. 326, 332* ; *Davis v. Commissioner (1987) 88 T.C. 1460* (applying both *Carrieres* and *Siewert* to hold that former wife's

award of money judgment on divorce, representing portion of debt reimbursable to community by her former husband, was nontaxable--that is, equal--community property division); *United States v. Davis (1962) 370 U.S. 65, 82 S. Ct. 1190, 8 L. Ed. 2d 335* (transfer of inchoate rights for property taxable transaction)].

The pre-1984 rules remain important for transfers pursuant to marital settlement agreements executed before 1984 if no transition elections were made, and also for transfers to nonresident alien spouses, and transfers between unmarried cohabitants.

[2] Nonrecognition Applicable to Appreciated Gain but Not Income

The IRS has taken the position that nonrecognition of gain applies only to market appreciation and not to ordinary income items. In a published ruling, a spouse transferred United States savings bonds with accrued interest to the other spouse incident to divorce. The IRS ruled that the transferor spouse must report the accrued interest as taxable income, because this was not "gain" within the meaning of *I.R.C. § 1041*. The transferee spouse was allowed a basis reflecting the accrued interest taxed to the transferor [*Rev. Rul. 87-112, 1987-2 C.B. 207*]. In a subsequent private ruling, a husband purchased his wife's interest in the husband's military pension. The IRS ruled that the spouse receiving the cash payment realized taxable income because the value of her right to receive a portion of the pension could not be considered "gain" [I.R.S. Letter Rul. 8813023 (Dec. 29, 1987)].

[3] Unequal Division of Property to Adjust for Tax Consequences

Property settlements may be adjusted to account for tax factors without risking loss of nonrecognition treatment for the settlement [*see I.R.C. § 1041*]. Although such an adjustment may result in an unequal division in terms of fair market value, the settlement is still nontaxable and the division may be equal after tax consequences are considered. Unequal community property divisions also may be equalized by a transfer of separate property to adjust for the shifting of tax liabilities and benefits, again without the recognition of gain or loss.

In addition, apart from the nonrecognition provisions, it appears that if a property settlement is considered an unequal division because it involves a transfer of property in return for a promissory note bearing interest at below the market rate, the transaction will *not* be subject to the imputed interest rules or the below-market interest loan rules [*see* I.R.S. Letter Rul. 8645082 (Aug. 14, 1986); *see also I.R.C. §§ 483* (unstated interest), *1271-1274* (classification as original issue discount), *7872* (loans with below-market interest rates)]. However, the Taxpayer Relief Act of 1997 amended the provisions of *I.R.C. § 1271* that exempted debt obligations issued by natural persons from the rule that treats gain or loss realized on retirement of the debt as gain or loss realized on an exchange.Accordingly, with respect to obligations issued by a natural person on or after June 9, 1997, gain or loss on the retirement of this type of debt is capital gain or loss if the debt is a capital asset [*see I.R.C. § 1271(b)(1)(A)*]. Until guidance is given by regulations or case law, it appears that while no gain is recognized on a transfer of property to a spouse incident to divorce, gain may nonetheless be recognized on retirement of debt obligations related to such a transfer [*compare I.R.C. § 1041 with I.R.C. § 1271(b)(1)(A)* (amended by Pub. L. No. 105-34, § 1003(c)(2)].

[4] Transfers Deemed Incident to Divorce

A transfer is deemed to be incident to divorce for purposes of nonrecognition under *I.R.C. § 1041* if it occurs within one year after the date the marriage ceases or if it is related to the cessation of marriage [*I.R.C. § 1041(c)*]. Thus, if a transfer occurs more than one year after divorce, it must be related to the cessation of marriage to qualify for nonrecognition treatment. A transfer is treated as related to the cessation of marriage if the transfer is pursuant to a divorce or separation instrument and the transfer occurs no more than six years after the date of divorce [Temp. Treas. Reg. § 1.1041-1T(b), Q-7]. Decrees of divorce or separate maintenance, written agreements incident to decrees of divorce or separate maintenance, and written separation agreements all qualify as divorce or separation instruments, as do modifications and amendments to them [Temp. Treas. Reg. § 1.1041-1T(b), Q-7; *see I.R.C. § 71(b)(2)*; *Harris v. Commissioner*

(1991) T.C. Memo 1991-375 . Transfers may be closely scrutinized to ascertain whether they bear a sufficient connection to the marital settlement to be deemed "incident to divorce" [*see, e.g., Praegitzer (Dennis A.) v. Commissioner, T.C. Memo. 1997-79* (cash distribution by closely held corporation as part of overall marital settlement was taxable because it was not made "incident to divorce" because distribution was not necessary part of settlement)].

Any transfer occurring more than six years after divorce is presumed not to be related to the cessation of marriage [*see* I.R.S. Letter Rul. 9306015 (Nov. 13, 1992) (party's transfer of interest in former marital residence unrelated to termination of marriage occurring more than eight years after final decree and not addressed in divorce judgment)]. This presumption can be rebutted only by showing that the transfer was made to effect a division of property owned by the former spouses at the time of divorce. For example, the presumption may be rebutted by showing that (1) the transfer was not made within six years of divorce because of factors that hampered an earlier transfer, such as legal or business impediments to transfer or disputes about value, and (2) the transfer was effected promptly after the impediments were removed [Temp. Treas. Reg. § 1.1041-1T(b), Q-7; *see* I.R.S. Letter Rul. 9123053 (March 1, 1991)]. Annulments and cessations of marriage that are void *ab initio* due to violations of state law are treated as divorces [Temp. Treas. Reg. § 1.1041-1T(b), Q-8].

[5] Transfers to Third Parties on Behalf of Spouse

[a] Qualification for Nonrecognition

Transfers of property to third parties on behalf of a spouse or former spouse may qualify for nonrecognition under *I.R.C. § 1041* [*see Ingham v. United States (9th Cir. 1999) 167 F.3d 1240, 1244]* . In general, a transfer to a third party on behalf of a spouse or former spouse qualifies if the transfer to a third party is required by the divorce or separation agreement, or is made pursuant to the written request of the spouse or former spouse. A transfer to a third party also qualifies, generally, if the transferor receives a written consent or ratification from the other spouse or former spouse. The consent or ratification must state that the parties intend the transfer to be treated as a transfer to the spouse or former spouse subject to *I.R.C. § 1041*, and it must be received by the transferor prior to the date of filing the transferor's first tax return for the taxable year in which the transfer is made. In these circumstances, the transfer to the third party will be treated as made directly to the spouse or former spouse, who is then deemed to have transferred the property to the third party. Only the first of these two deemed transfers (that is, to the transferee spouse or former spouse) is subject to nonrecognition [*I.R.C. § 1041(a)*; Temp. Treas. Reg. § 1.1041-1T(c), Q-9; *see Walker v. Comm'r, T.C. Memo 2003-335* (former wife's sale of former husband's 25 percent property interest that was transferred to her in return for credit against equalizing money judgment did *not* constitute sale to third party on behalf of former spouse); *Ingham v. United States (9th Cir. 1999) 167 F.3d 1240, 1244* (former wife's postdivision sale of property to third party did not qualify as transfer "to former spouse incident to divorce" when it did not relieve former husband of any obligation or liability that he owed to former wife or third party--but merely allowed her to satisfy debt she owed to him)].

[b] Split of Authority Between Ninth Circuit and Tax Court

In one case involving a transfer to a third party, the husband and wife held all the shares of a corporation in their joint names. The corporation was formed to operate a franchise that required 100-percent ownership of equity and profits by the owner/operator. When the couple agreed to divorce, joint ownership of the franchise was no longer possible, and their decree of dissolution therefore included an agreement to have the corporation redeem the wife's 50-percent interest in the outstanding stock. This transfer qualified for nonrecognition treatment under *I.R.C. § 1041* as a transfer on behalf of the husband because it relieved him of his obligation to purchase his wife's stock. The transfer was a constructive transfer from the wife to the husband, who then transferred the stock to the corporation [*Arnes v. U.S. (9th Cir. 1992) 981 F.2d 456, 459-460]* .

However, the Tax Court has recently declined to follow the Ninth Circuit's decision in *Arnes v. U.S.* In a case involving

similar facts, the Tax Court held thatredemption of the wife's shares, although incident to the divorce judgment, was not a transfer "on behalf of" the husband pursuant to Temp. Reg. § 1.1041-1T(b), Q & A-9 [*Blatt v. Commissioner,(1994) 102 T.C. 77, 80-83]* .

[6] Transfers in Trust

The nonrecognition provisions of *I.R.C. § 1041* do not apply to the transfer of property in trust to the extent that the sum of the amount of the liabilities assumed, plus the amount of the liabilities to which the property is subject, exceeds the total of the adjusted basis of the property transferred. Thus, gain must be recognized on these types of transfers by the transferor spouse. Proper adjustment must be made under *I.R.C. § 1041(b)* to the transferee's basis in the property to take into account the gain recognized [*I.R.C. § 1041(e)*].

EXAMPLE:

W purchases an apartment building in 1970 for $50,000. In 1986, W obtains an $80,000 loan using the building as security. One year later, when the building has appreciated to $200,000, H and W dissolve their marriage. As part of their marital termination agreement, W agrees to place the building in trust for H, with rent payments to be used to pay the mortgage and any remainder to be paid to H. Because the building's liabilities ($80,000) exceed W's basis (the $50,000 purchase price) the excess liabilities ($30,000) are taxable to W [*see I.R.C. § 1041(e)*].

Similarly, the nonrecognition provisions for transfer of an installment obligation do not apply if the obligation is transferred in trust [*I.R.C. § 453B(g)*].

If the spouses choose to create an "alimony trust" by the transfer of property, the transaction may require consideration of both of these exceptions to the general rule of nonrecognition, as well as the provisions concerning taxation of *income* from the trust [*see § 227.10[7][a]*].

[7] Transfers to Nonresident Alien Spouse

Transfers to a spouse or former spouse who is a nonresident alien do not qualify for nonrecognition under *I.R.C. § 1041* [*I.R.C. § 1041(d)*]. Transfers that do not qualify for nonrecognition treatment may result in the recognition of gain or loss, except to the extent precluded by the disallowance of losses on transactions between "related parties" [*see generally I.R.C. § 267*].

[8] Basis of Transferred Property

A transferor's basis in transferred property is carried over to the transferee [*I.R.C. § 1041(b)(2)*]. Because the transfer is treated as a gift, the transferee realizes no income from the receipt of the property [*see I.R.C. § 102(a)*]. The carryover of basis assures that the transferee retains any unrecognized gain or loss in the property.

Although transfers under *I.R.C. § 1041* are treated as gifts, the carryover basis rule of *I.R.C. § 1041* differs from the carryover basis rule generally applying to gifts. Under the rule generally applicable to gifts, the donee's basis is the lesser of the donor's basis or the fair market value of the property at the date of the gift [*I.R.C. § 1015(a)*]. Thus, an unrecognized loss cannot be transferred to the donee by gift. If the property qualifies for nonrecognition of gain or loss under *I.R.C. § 1041*, however, the basis of property in the hands of the transferee remains the same as the transferor's basis. As a result, an unrecognized loss can be transferred to the transferee. In addition, the transferee assumes the transferor's holding period for the transferred property [*I.R.C. § 1223(2)*].

[9] All Transfers Covered; Step Transaction Doctrine

Although *I.R.C. § 1041* was enacted to eliminate the taxability of marital property settlements, its effect is much

broader. All transfers of property between spouses generally are subject to *I.R.C. § 1041*, without regard to divorce. Thus, if a husband sells property to his wife, the transaction is treated as a gift of the property to the wife and a gift of the purchase price to the husband. The husband does not recognize gain or loss on the transfer of the property, and neither spouse realizes gain on the receipt of either the property or the purchase price. Furthermore, by application of the step transaction doctrine, a transfer from a corporation owned by a spouse to the other spouse may be treated, in appropriate circumstances, as a transfer made directly by the owner spouse [*see* Temp. Treas. Reg. § 1.1041-1T(a), Q-2].

[10] Obligation of Transferor to Supply Records

The transferor must supply, at the time of the transfer, records sufficient to determine the adjusted basis and holding period of the property as of the date of the transfer to the transferee. If the property is subject to potential investment tax credit recapture, the transferor also must supply the transferee with records sufficient to determine the amount and period of potential liability [Temp. Treas. Reg. § 1.1041-1T(e), Q-14].

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Chapter 227 DISSOLUTION OF MARRIAGE: TAX EFFECTS OF DISSOLUTION
PART II. LEGAL BACKGROUND

19-227 California Forms of Pleading and Practice--Annotated § 227.15

AUTHOR: Original text by Frederick W. Campbell-Craven, J.D.

§ 227.15 Estate and Gift Taxation of Property Divisions

[1] Gift Tax

Equal divisions of the community estate do not result in taxable gifts, either because, theoretically, no transfer occurs between the spouses, or because the transfer is for full consideration [*Commissioner of Internal Revenue v. Mills (9th Cir. 1950) 183 F.2d 32, 34* ; *see I.R.C. §§ 2501, 2511, 2512(b)* (transfers and valuation of gifts)]. Unequal divisions of the community estate that are equalized by a payment out of separate property are also deemed nontaxable because the exchange of excess community property for separate property is for fullconsideration from the point of view of both parties [*see I.R.C. § 2512(b)* (property transferred for less than adequate and full consideration)].

Apart from one statutory exception discussed below, divisions of the community property in which there is no (or insufficient) consideration in the form of separate property or relinquishment of spousal support rights appear to result in taxable gifts to the extent of the inequality [*see I.R.C. §§ 2511, 2512(b)*]. Even more clearly, uncompensated transfers of separate property at the time of divorce are taxable gifts. If the division or transfer is accomplished while the parties are still married, the gift is exempted from tax by the unlimited marital deduction, [*see I.R.C. § 2523(a)*]. However, if the donor's spouse is not a United States citizen, this deduction is no longer allowed and other special gift tax rules apply [*see I.R.C. § 2523(i)*].

If the division or transfer takes place after divorce, it is arguable that the transfer may be exempt under a statutory provision [*see I.R.C. § 2516*] or judicial rule [*Harris v. Commissioner (1950) 340 U.S. 106, 108-113, 71 S. Ct. 181, 95 L. Ed. 111]* . The statutory provision, *I.R.C. § 2516*, exempts from gift tax any transfers either in settlement of marital or property rights or to provide a reasonable allowance for support of minor children of the marriage, if the transfers are made pursuant to a written agreement of the spouses and divorce occurs within the three-year period beginning on the date one year before the agreement is entered. This rule applies whether or not the agreement is approved by the divorce decree [*I.R.C. § 2516*]. Because each spouse has a right to only one half of the community estate, it is unclear whether the transfer of excess property actually is a transfer in settlement of property rights within

the meaning of the statute. The statute originally was drafted to exempt transfers in settlement of inchoate marital property rights in common law jurisdictions, in effect allowing equal divisions of the marital property in common-law states to receive the same freedom from gift tax as equal divisions of community property [*see I.R.C. § 2516*].

A possible alternative exemption theory may be found in the judicial rule that transfers are exempt if "founded" on the divorce decree rather than on an agreement of the parties [*Harris v. Commissioner (1950) 340 U.S. 106, 108-113, 71 S. Ct. 181, 95 L. Ed. 111]* . The scope of this exemption is somewhat unclear, but it applies only if the settlement is incorporated into the divorce decree. This rule, too, was fashioned in a case involving transfers in settlement of inchoate marital rights that were otherwise taxable under the law existing at that time, and the decision was motivated by the desire to exempt such transfers from gift tax. Strictly speaking, it should not apply to transfers that are not made in satisfaction of property rights. The Court's confusing opinion in *Harris v. Commissioner,* however, arguably can be read broadly to exempt all transfers that are incorporated in the divorce decree [*see Harris v. Commissioner (1950) 340 U.S. 106, 71 S. Ct. 181, 95 L. Ed. 111]* .

In addition, some practitioners take the (arguably) aggressive view that when a settlement agreement is incorporated into a dissolution decree, no gift occurs on transfers pursuant to the settlement agreement, even if there is not a final divorce decree within the three-year period beginning one year before or two years after the agreement is entered, as normally required for exemption from gift taxes under *I.R.C. § 2516*. This view, if correct, will certainly provide relief in instances when the statutory time limits cannot be met due to protracted litigation. However, rather than relying completely on such an alternative exemption theory, the more conservative (and prudent) approach is to assure the exemption of gift tax by avoiding whenever possible any undue delay to getting a final decree, after execution of the marital settlement agreement, so that it is obtained within the time limits required under the Internal Revenue Code.

[2] Estate Tax

[a] Death Before Property Settlement or Divorce

If a spouse dies before a property settlement is effected or completed, estate taxes are avoided to the extent that the property to be transferred in the settlement is deductible from the decedent's gross estate [*see I.R.C. §§ 2001, 2053(a)(3)*]. On the other hand, with limited exception, the decedent's right to receive property from the other spouse is includable in the gross estate [*I.R.C. § 2031*; *see I.R.C. § 2031(c)* (providing special rules for "qualified conservation easements")]. If the spouses are still married at the time of death, and the community estate still exists, all of the decedent's separate property and one half of the community property is includable in the gross estate [*I.R.C. § 2033*]. If the property settlement then to be effected between the surviving spouse and the decedent spouse's estate involves an equal division of the community estate or an unequal division with an equalizing payment out of separate property, the size of the decedent's estate is not affected. This results from the deduction for the claims of the surviving spouse being offset by the inclusion of an equal amount of property to be received by the estate from the surviving spouse. If the property settlement would effect an unequal division of community property (without equalization out of separate property) in which the surviving spouse is to receive a greater share, or would effect an uncompensated transfer of separate property to the surviving spouse, the decedent's estate will be depleted below what it would have been had it included one-half of the community property and all of the decedent's separate property. This depletion is not deductible from the gross estate as a claim against the estate because it is not made for adequate consideration [*see I.R.C. § 2053(c)(1)(A)*]. It is deductible, however, if made in a form qualifying for the unlimited marital deduction [*see I.R.C. § 2056(a)*], subject to special rules regarding transfers tosurviving spouses who are not United States citizens [*see I.R.C. §§ 2056(d), 2056A*]. Thus, if the spouses are still married at the time of death, the taxable estate of the decedent will contain only the property that passes from the estate to persons other than the surviving spouse [*see I.R.C. § 2056(a)*].

[b] Spouses Divorced at Time of Death

If the spouses are already divorced or legally separated when one of them dies but transfers pursuant to the property

settlement remain to be effected, the property to be transferred by the decedent's estate to the other spouse to complete an equal division of the community estate or an unequal division with equalizing payment out of separate property is deductible from the gross estate. The deduction is permitted because the claims of the surviving ex-spouse are supported by adequate consideration in the form of the property received by the decedent, or to be received by the estate [*I.R.C. § 2053(a)(3),(c)(1)(A)*]. Claims to complete an unequal division of community property (without separate property consideration) in which the surviving spouse receives the greater portion are not deductible to the extent of the inequality because of the absence of full consideration in money or money's worth [*I.R.C. § 2053(a)(3),(c)(1)(A)*; *see Estate of Scholl (1987) 88 T.C. 1265* (claims against estate in satisfaction of unpaid spousal support)]. The same rule applies to the surviving ex-spouse's claims for uncompensated transfers out of the decedent's separate property. Because the spouses are no longer married, the marital deduction is not available [*see I.R.C. § 2056*]. Thus, the decedent's taxable estate includes these amounts despite the obligation of the estate to make the transfers to the surviving ex-spouse.

A deduction is allowed to the decedent's taxable estate for all transfers made after death to a former spouse that satisfy the requirements for transfers exempt from gift tax [*I.R.C. § 2043(b)*; *see I.R.C. § 2516* (property settlements); *cf. Estate of Herrmann (Herbert R.) T.C. Memo. 1995-90* (for purposes of deducting claim against estate of decedent married at time of death, waiver of marital rights in premarital agreement is not adequate consideration "in money or money's worth")].

[c] Similarities to Gift Tax

Several areas of uncertainty applicable to gift tax also apply to estate tax. First, it is unclear whether the claims of surviving ex-spouses for property can be deducted if they are not supported by consideration. A deduction from the gross estate is allowed for claims made pursuant to a written agreement relative to marital property rights, if the claim is in settlement of marital or property rights and if divorce occurred within the three-year period beginning one year before the agreement was entered [*I.R.C. §§ 2043(b), 2516*]. As discussed with respect to the gift tax [*see § 227.15[1]*], this provision was enacted to eliminate the estate taxation of amounts to be transferred to surviving spouses in satisfaction of inchoate marital property rights in common-law jurisdictions. Given this purpose, it appears that claims to more than one-half of the community property or to the decedent's separate property (if uncompensated) should not be treated as in settlement of property rights, and therefore would not be deductible.

In addition, the *Harris* rule can be invoked for estate tax as well as gift tax purposes to permit a deduction if the claims are made pursuant to a settlement incorporated in the divorce decree. However, the applicability of the *Harris* rule in the community property context is uncertain [*see Harris v. Commissioner (1950) 340 U.S. 106, 71 S. Ct. 181, 95 L. Ed. 111* ; *see also § 227.15[1]*].

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PART II. LEGAL BACKGROUND

19-227 California Forms of Pleading and Practice--Annotated § 227.16

AUTHOR: Original text by Frederick W. Campbell-Craven, J.D.

§ 227.16 Income Tax Consequences of Sale or Exchange of Personal Residence

[1] Determining Amount of Gain or Loss

Gain on the sale or exchange of a personal residence is the amount a taxpayer realizes from the sale or exchange less the taxpayer's adjusted basis in the residence. Loss is the excess of the adjusted basis over the amount realized [*I.R.C. § 1001(a)*]. The amount realized from a sale or exchange of a personal residence is the sum of money received plus the fair market value of any other property received. The amount realized does not include any amount received by the seller as reimbursement for real property taxes that are treated for income tax purchases as imposed on the purchaser. The amount realized does include amounts representing real property taxes that are treated for income tax purposes as imposed on the seller but paid by the purchaser [*I.R.C. § 1001(b)*; *see also I.R.C. § 164(d)*].

A taxpayer's basis in a personal residence generally is its cost [*I.R.C. § 1012*]. A separate basis must be calculated, however, if the taxpayer inherited the residence or received it as a gift. [*see I.R.C. §§ 1014, 1015, 1022*]. Adjustments to basis, in general, are additions for capital improvements made to the residence and subtractions for depreciation of any part of the residence [*I.R.C. § 1016*].

PRACTICE TIP:

Advantages of Alimony Trust. Keeping records of capital improvements in order to increase basis is important to increase basis in the event that gain on the sale of the principal residence will exceed the exclusion amounts. It is therefore important to keep documentation of purchase price and capital improvements to a residence [*see I.R.C. § 121*]. Also, if the taxpayer's acquisition of a new residence resulted in nonrecognition of gain from a sale, exchange, or involuntary conversion of a former residence under (now former) *I.R.C. § 1034*, as in effect on the day before enactment of the Taxpayer Relief Act of 1997, the taxpayer's basis in the new personal residence is reduced to the extent of the gain not recognized on sale of that former residence [*see I.R.C. § 1016(a)(7)*]. Forfurther discussion, see *§ 227.16[3]*.

As a general rule, all gain or loss on the sale or exchange of property must be recognized [*I.R.C. § 1001(c)*]. But, for all practical purposes, the recognition of gain or loss on the sale or exchange of a personal residence is rare. Loss, although realized, normally is not recognized because there is no profit motive in an investment sense when a personal residence is acquired and therefore the loss is not deductible [*Treas. Reg. § 1.165-9(a)*; *Pulliam v. Commissioner (1963) 39 T.C. 883, 885* ; *but see §§ 227.16[2][a]* and *[b]*]. All or a portion of the gain on the sale of a personal residence is not recognized if the residence is the taxpayer's "principal residence" and the seller can satisfy the other requirements of the statutory exclusion [*I.R.C. § 121*].

Gain realized on the sale or exchange of a "principal residence" of up to $250,000, for individuals, and up to $500,000, for married couples who file joint returns, generally may be excluded from taxable income, with respect to sales or exchanges after May 6, 1997 [*see I.R.C. § 121(b)(1),(2)*].

The sale or exchange of a personal residence is treated as a capital transaction. Therefore, any gain that is recognized is treated as capital gain [*see I.R.C. § 1221*] and capital gains are taxed more favorably than ordinary income for sales of long-term capital assets held for the statutory period [*I.R.C. §§ 1(a)-(d), (h), (i)*; *see I.R.C. § 1222(3)* (one-year holding period required for long-term capital gain)].

[2] Recognition of Loss on Residences Held for Profit or Investment

[a] Profit Motive Essential

A taxpayer cannot recognize loss on the sale of a personal residence unless the taxpayer can establish that the property was held for profit or investment [*Treas. Reg. § 1.165-9(b)*; *Gordon v. Commissioner (1928) 12 B.T.A. 1191, 1194]* . The intent to hold property for profit or investment is clearly shown if the property is held for production of rental, trade, or business income [*Treas. Reg. § 1.165-9(b)(1)*]. Insignificant acts, such as leasing the property at low rent for a short period, are not evidence of a profit motive [*Charles A. Foehl (1961) 20 T.C.M. 418 (CCH)]* . Once the taxpayer establishes a profit motive, vacancy of the property does not defeat the profit motive [*McBride v. Commissioner (A) (1968) 50 T.C. 1, 10]* .

Taxpayers may recognize loss realized on the sale of rental homes that they own and in which they temporarily resided, if they can show that they always intended to occupy a different dwelling as their personal residence [*Willcox v. Commissioner (1953) 20 T.C. 305, 307]* . Thus, the taxpayer's intentions generally will determine the availability of loss on the sale of a home [*see* Tillotson v. Commissioner (1953) 12 T.C.M. 171 (CCH)] . However, a taxpayer's intent not to use a residence permanently is insufficient to show that the property was purchased with the requisite profit motive [*Warrick v. Commissioner (1941) 44 B.T.A. 1068, 1071-1073]* . Similarly, loss will be disallowed if a taxpayer's primary intent for purchasing a home is to reside there temporarily while constructing a permanent residence [*Meyer v. Commissioner (1960) 34 T.C. 528, 531-532]* . A profit motive is evidenced, however, if a taxpayer changes the construction of a custom residence to a commercial residence [*see Treas. Reg. § 1.165-9(b)*; *Heiner v. Tindle (1928) 276 U.S. 582, 48 S. Ct. 326, 72 L. Ed. 714]* . If a taxpayer cannot show a profit motive on multiple sales of personal residences, the taxpayer's actual losses cannot be used to offset realized gains. Furthermore, two or more transactions may not be aggregated to produce a net result, because these multiple sales must be considered as separate transactions; as a result, only the gain may be recognized [*Koehn v. Commissioner (1951) 16. T.C. 1378, 1380-1381*]. Similarly, only gain is recognized from the sale of a single unit of personal residential property even if the sale is made in separate transactions to different buyers [*Rev. Rul. 54-95, 1954-1 C.B. 98*].

[b] Conversion of Personal Residence to Income-Producing Property

The conversion of a personal residence to income-producing property allows the taxpayer to recognize loss. The taxpayer's measure for determining loss is based on the lesser of either the property's adjusted basis or the property's fair market value at the time of conversion, adjusted for depreciation for the period between the conversion and the sale [

Treas. Reg. § 1.165-9(b)(2); *Heiner v. Tindle (1928) 276 U.S. 582, 584-587, 48 S. Ct. 326, 72 L. Ed. 714* ; *see* Estate of De Lucchi v. Commissioner, T.C. Memo 1957-234, 1957 Tax Ct. Memo LEXIS 15 . Thus, loss is limited to the difference between the lesser of these two amounts and the amount realized on the sale [*Treas. Reg. § 1.165-9(b)*; *Heiner v. Tindle (1928) 276 U.S. 582, 586-587, 48 S. Ct. 326, 72 L. Ed. 714* ; *see Parsons v. United States (3d Cir. 1955) 227 F.2d 437, 438-439* (value of property at time of conversion to rental property is taxpayer's basis for figuring depreciation if property declined in value between purchase and conversion)]. Gain, however, is based on the taxpayer's original purchase price and is determined by subtracting the adjusted basis from the amount realized on the sale [*I.R.C. § 1001*; *see I.R.C. § 1011* (adjusted basis); *Parsons v. United States (3d Cir. 1955) 227 F.2d 437, 438-439* (taxpayer's basis for depreciation purposes is limited by property's value at time of conversion)]. Neither gain nor loss results if the amount realized is greater than the basis for loss, but less than the basis for gain; this outcome may occur if the fair market value on the conversion date is less than the adjusted basis on that date.

[3] Treatment of Gain on Sale of Principal Residence

[a] Exclusion of Gain Under Current Law

[i] Overview

Individuals are permitted to exclude from taxable income up to $250,000 of gain on the sale or exchange of a "principal residence," and this amount is $500,000 for married couples who file a joint return [*see I.R.C. § 121 (b)(1),(2)*]. The exclusion is allowed each time a taxpayer selling or exchanging a principal residence meets the eligibility requirements discussed hereafter, but generally no more often than once every two years [*see I.R.C. § 121(b)(3)*].

To qualify, a taxpayer must have both owned and used the property as his or her principal residence for at least two years during the five year period ending on the date of the sale or exchange [*see I.R.C. § 121(a)*]. However, married couples who file a joint return may claim the $500,000 exclusion if (1) either spouse meets the ownership requirement; (2) both spouses meet the use requirement; and (3) neither spouse is ineligible for exclusion by way of a sale or exchange of a residence within the last two years [*I.R.C. § 121(b)(2)(A)-(D)*].

PRACTICE TIP:

Effect of Marriage When One Spouse Used Exclusion Within Two Years Before Marriage. If a single taxpayer who is otherwise eligible for an exclusion marries someone who has used the exclusion within the two years prior to the marriage, the newly married taxpayer is allowed a maximum exclusion of $250,000; that is, the fact that an individual's spouse used the exclusion within the past two years does not preclude the individual from claiming the exclusion. Once both spouses satisfy the eligibility rules and two years have elapsed since the last exclusion was allowed to either of them, the taxpayers may exclude $500,000 of gain on their joint return [*see* House Ways and Means Comm. Report (H.R. 2014), rel. June 18, 1997 (construing the bill preceding final enactment of § 312(a) of the Taxpayer Relief Act of 1997, amending *I.R.C. § 121*].

If spouses who file a joint return do not meet the requirements for the $500,000 exclusion, the amount of the exclusion will be the "sum of the limitations under paragraph (1) [of *I.R.C. § 121(b)*] to which each spouse would be entitled if such spouses had not been married ... [and for this purpose,] each spouse shall be treated as owning the property during the period that either spouse owned the property" [*I.R.C. § 121(b)(3)*].

In addition, the law allows an exception under which a taxpayer is entitled to a *prorated* amount of the exclusion on failing to meet either of the two year requirements (i.e., ownership and use) because of a change in the place of employment, health, or other unforeseen circumstances [*see I.R.C. § 121(c)(2)(A), (B)*]. In this event, the taxpayer's exclusion is a percentage of the amount that would have been allowed if the two-year requirements had been met. Accordingly, the percentage exclusion equals the amount that "... bears the same ratio to the [statutory exclusion amount (if the requirements were met)] ... as the shorter of [a][1] the aggregate periods, during the 5-year period ending on the

date of [the] sale or exchange, [the] property has been owned and used by the taxpayer as the taxpayer's principal residence; or [2] the period after the date of the most recent prior sale or exchange by the taxpayer to which [*I.R.C. § 121(a)*] applied and before the date of [the] sale or exchange, bears to [2] two years" [*see I.R.C. § 121(c)(1)*]. For discussion of a special, additional provision concerning the ability of a spouse or former spouse to claim an exclusion from gain despite having lived away from the residence pursuant to a divorce or separation instrument, see *§ 227.16[3][b][i]* [*see I.R.C. § 121(d)(3)*].

The exclusion of gain does not apply to any gain attributable to depreciation deductions taken in connection with the rental or business use of the property for periods after May 6, 1997 [*I.R.C. § 121(d)(6)*].

A special rule applies when a principal residence for which gain was excluded under *I.R.C. § 121* is later reacquired by the taxpayer. In that case, no gain is recognized upon either the reacquisition or resale of the residence if within one year after reacquisition the taxpayer resells the property [*see I.R.C. § 1038(e)*].

For estates of decedents dying after 2009, the exclusion for sales of a principal residence is extended to estates and heirs [*I.R.C. § 121(d)(9)*]. If the decedent's estate or an heir sells the decedent's principal residence, $250,000 of gain can be excluded on the sale of the residence, provided the decedent used the property as a principal residence for two or more years during the five-year period prior to the sale. The exclusion also applies to property sold by a trust that was a qualified revocable trust under *I.R.C. § 645* immediately prior to the decedent's death. The decedent's period of occupancy of the property as a principal residence can be added to an heir's subsequent ownership and occupancy in determining whether the property was owned and occupied for two years as a principal residence, regardless of whether the residence was owned by the trust during the decedent's occupancy [*I.R.C. § 121(d)(9)(C)*].

[ii] Principal Residence

To qualify for the exclusion of gain on the sale or exchange of a residence, the taxpayer must have owned or used the property as a "principal residence" during the applicable time period [*see I.R.C. § 121(a)*; *see also § 227.16[3][a][i]*]. In construing this term, resort to decisions under the former "rollover" rules [*see* former *I.R.C. § 1034*, before repeal by Pub. Law 105-34] may be instructive, because it would seem that such decisions would have analogous application, except to the extent inconsistent with the statutory exclusion available for sales of principal residences [*see I.R.C. § 121*]. Thus, whether a residence constitutes thetaxpayer's principal residence has been required to be determined from all the facts and circumstances of each case. Although a taxpayer may have more than one residence, only one of those residences is the taxpayer's principal residence [*see, e.g., Grace v. Commissioner (1969) 51 T.C. 685, 686-690 , aff'd, (5th Cir. 1969) 421 F.2d 165* ; *Smith v. Commissioner (9th Cir. 1964) 332 F.2d 671, 673]* . It has been held that a principal residence can be stock held by a tenant-shareholder in a cooperative housing corporation [*Treas. Reg. § 1.1034-1(c)(3)(i)*], a house-trailer [*Disney v. Commissioner, T.C. Memo. 1961-177]* , a houseboat [*Treas. Reg. § 1.1034-1(c)(3)*], a condominium [*Rev. Rul. 64-31, 1964-1* C.B. (Part 1) 300; *see Rev. Rul. 85-132, 1985-2 C.B. 182*], a mobile home [*Treas. Reg. § 1.1034-1(c)(3)*], or a cooperative apartment [*Barnum v. Commissioner (1952) 19 T.C. 401, 408-409* ; *see Treas. Reg. § 1.1034-1(c)(3)(i)*]. The primary factor has been whether the taxpayer uses the property as a residence [*Stanley v. Commissioner (1959) 33 T.C. 614, 616* ; *see Skorniak v. Commissioner, T.C. Memo. 1996-178]* . Although land and a house may together constitute a personal residence, it has been held that land in itself does not [*O'Barr v. Commissioner (1965) 44 T.C. 501, 503]* .

Under a special statutory provision, an individual is treated as using property as a principal residence during any period of ownership in which the individual's *spouse or former spouse* is granted use of the property under a divorce or separation instrument, as defined in *I.R.C. § 71(b)(2)* [*see I.R.C. § 121(d)(3)*].

PRACTICE TIP:

Deferred Sales. This provision affords significant relief to "out spouses" who live away from the family residence pursuant to a court order, such as an order for deferred sale of the residence [*see Fam. Code §*

3800 et seq.] or other "divorce or separation instrument." The key for the "out spouse" would appear to be to ensure that a "divorce or separation instrument" is in place to establish the other spouse's right to use the residence [*see I.R.C. § 121(d)(3)*].

[iii] Effective Dates and Election to Be Bound by Former Law

The current rules for exclusion of gain (*§ 227.16[3][a][i]*) are generally effective for sales or exchanges after May 6, 1997--which, of necessity, would be those taking place *on or after* May 7, 1997. Sales before May 7, 1997, are subject to the former "rollover" and "once-in-a-lifetime exclusion" provisions [*I.R.C. § 121(b)(3)(B)* (excluding "pre-May 7, 1997" sales or exchanges)].

A taxpayer may nonetheless elect to be subject to the former provisions if: (1) the sale or exchange occurred prior to August 5, 1997, the enactment date of the new law; (2) the sale or exchange occurs after August 5, 1997, but is pursuant to a binding contract in effect on that date; or (3) no gain on the sale would be recognized, under the prior rollover rules, due to a replacement residence that was acquired on or before August 5, 1997, or pursuant to a binding contract effective on that date [Pub. L. No. 105-34, § 312(d), (e)(2)-(4)].

In addition, a taxpayer can elect not to have the revised *I.R.C. § 121* exclusion apply to any sale or exchange [*see I.R.C. § 121(f)*].

[b] Former "Rollover" Rule and "Once-in-a-Lifetime" Exclusion

[i] Rollover of Gain

Under former law, if property used by the taxpayer as his or her principal residence was sold or exchanged, and the taxpayer acquired a new principal residence within a period beginning two years before and ending two years after the sale or exchange, the taxpayer recognized any gain for both federal and California income tax purposes only to the extent that the adjusted sales price of the old residence exceeded the cost of the new residence [former *I.R.C. § 1034*; *Treas. Reg. § 1.1034-1(a)*; *Rev. & Tax. Code § 18031*; *see Kirst (Randall L.) v. Commissioner, T.C. Memo. 1997-353* ; *Snowa (Jeanne G.) v. Commissioner (4th Cir. 1997), 123 F.3d 190* , reversing *T.C. Memo. 1995-336* ; *Ryan v. Commissioner, T.C. Memo 1995-579* ; *Pagliarulo v. Commissioner, T.C. Memo 1994-506* (parties failed to meet two-year requirement for purchase of new residence)].

In determining whether a particular property remained a taxpayer's principal residence for rollover purposes, the Tax Court generally demonstrated a remarkable tolerance for periods of absence from the property. Thus, for example, the court found that a house remained the taxpayers' principal residence for rollover purposes despite a three year absence, when the taxpayers could not sell the house because of depressed market conditions [*Clapham v. Commissioner (1975) 63 T.C. 505]* . In another case, a taxpayer's principal residence was found to have remained her principal residence for rollover purposes even though she had not lived in the house on a permanent basis for six years at the time she sold it, because she was prevented from selling the house by her co-owner [*Green v. Commissioner, T.C. Memo. 1992-439]* .

By contrast, a court held that divorce is not a "force beyond [the taxpayer's] control," so a voluntary release of exclusive possession without a mandate for immediate sale of a residence prevented the "out-spouse" from treating it as his or her "principal residence" [*Perry (Curtis B.) v. Commissioner (9th Cir. 1996) 91 F.3d 82]* . Thus, an order allowing one party to have "exclusive use," such as a "deferred sale of home order" (also known as a "Duke" order), without an order for immediate sale of the home, apparently precluded its use as a "residence" by the nonpossessory party and thereby precluded that party from taking a rollover [*see Perry (Curtis B.) v. Commissioner (9th Cir. 1996) 91 F.3d 82]* .

PRACTICE TIP:

This adverse treatment of "out spouses" has been eliminatedunder current law regarding the exclusion of gain, under which an individual is treated as using property as a "principal residence" during any period

of ownership in which the individual's spouse or former spouse is granted use of the property under a "divorce or separation instrument," as defined in *I.R.C. § 71(b)(2)* [*see I.R.C. § 121(d)(3)*]. Thus, the considerations discussed above, pertaining to the "out spouse" being precluded from treating a property occupied by a former spouse as a "principal residence' for rollover of gain purposes (as well as, in general, all rollover discussion in this discussion) are relevant now only to the extent that the rollover provisions still have limited application under the 1997 tax law (*§ 227.16[3][b][ii]*).

The rollover provisions did not eliminate gain on the sale of a principal residence, but only deferred the gain by adjusting the basis of the new principal residence. The amount of gain that was not recognized under the rollover provisions was subtracted from the basis of the replacement principal residence. Thus, the gain was preserved and was recognized on the sale of the replacement property [former *I.R.C. § 1034(e)*].

[ii] "Once-in-a-Lifetime" Exclusion of Gain by Older Taxpayer

Under former law, which applied generally for sales and exchanges before May 7, 1997, a taxpayer at least 55 years of age could elect to exclude from gross income up to $125,000 of gain on the sale or exchange of property owned and used as his or her principal residence [prior version of *I.R.C. § 121*]. The residence had to be the taxpayer's principal residence for an aggregate period of three or more years during the five-year period ending on the date of the sale or exchange [prior version of *I.R.C. § 121(a)(2)*]. A married taxpayer who filed a separate return could exclude up to $62,500 [prior version of *I.R.C. § 121(b)(1)*]. If a property was used partly as a taxpayer's principal residence and partly for other purposes, only that part used for the residence qualified for the election [prior version of *I.R.C. § 121(d)(5)*]. The same exclusion applied for California personal income tax purposes [*Rev. & Tax. Code §§ 17131, 17152*]. Subject to limited exception, the federal exclusion could normally be elected only once in a lifetime by the taxpayer aged 55 or older [prior version of *I.R.C. § 121*]. "Principal residence," for purposes of the exclusion-of-gain rule, has been defined in the same manner as for the rollover-of-gain provisions [*see § 227.16[3][a][ii]*]. The exclusion was available for jointly owned residences. If each unmarried joint owner fully met the age, ownership, and use tests, each was entitled to a full exclusion [*Rev. Rul. 67-235, 1967-2 C.B. 79* ; *Rev. Rul. 67-234, 1967-2 C.B. 78* ; I.R.S. Letter Rul. 8942008 (July 17, 1989)]. The exclusion was unavailable if one spouse met two of the three tests and the other spouse met the third requirement [I.R.S. Letter Rul. 8909020 (Dec. 2, 1988)].

If a taxpayer at least 55 years old replaced his or her principal residence within the former rollover-of-gain period [*see* former *I.R.C. § 1034*] and also elected to exclude gain from the sale, the taxpayer was entitled to reduce the amount required for reinvestment under the former rollover provisions by the amount of gain excluded [prior version of *I.R.C. § 121(d)(7)*; *see* former *I.R.C. §§ 1033, 1034*]. Under these circumstances, the taxpayer presumably could increase his or her basis in the replacement property by the excluded amount [*see* former *Treas. Reg. § 1.121-5(g)(2)* (examples) (removed December 24, 2002, *67 Fed. Reg. 78367*)].

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Volume 19: Dissolution of Marriage: Child Custody thru Dissolution of Marriage: Tax Effects of Dissolution-Chs.223-239
Chapter 227 DISSOLUTION OF MARRIAGE: TAX EFFECTS OF DISSOLUTION
PART II. LEGAL BACKGROUND

19-227 California Forms of Pleading and Practice--Annotated § 227.17

AUTHOR: Original text by Frederick W. Campbell-Craven, J.D.

§ 227.17 General Tax Considerations in Dividing or Distributing Retirement Benefits

[1] Distribution Under Pension Plan Pursuant to QDRO

Distributions from a retirement or pension plan are normally taxable to the plan participant, as the distributee [*see I.R.C. § 402(a)*]. However, special rules apply for the tax treatment of distributions governed by ERISA under a qualified domestic relations order (QDRO) to an alternate payee who is the spouse or former spouse of the plan participant, from certain employee benefit plans that are prescribed by federal law. Under these rules, an "alternate payee" who is the *spouse or former spouse* of the plan participant must be treated as the distributee, for tax purposes, of any distribution or payment made to the alternate payee under a QDRO [*see I.R.C. §§ 402(e)(1)(A), 414(p)(8)*; *29 U.S.C. § 1056(d)(3)(K)* (defining alternate payee); if alternate payee is another dependent, such as a child, plan participant may be required to include distribution in his or her gross income)].

The rule of distributee tax liability applies even if the parties include language in their QDRO that requires the employee party to pay all of the tax on the distribution. The nonemployee in that instance must still include his or her share of the benefits distribution on that party's income tax return and is responsible for paying the tax thereon--subject to his or her right under state law to seek reimbursement from the other party pursuant to the court order or agreement [*see Clawson (Kay A) v. Commissioner, T.C. Memo. 1996-446]* .

In general, distributee tax liability will apply with respect to distributions or payments from employee benefit plans that are considered "qualified" [*see Brotman v. Commissioner (1995) 105 T.C. 141* (noting that, whether order meets QDRO requirements and plan is entitled to tax-exempt treatment by being "qualified" are separate issues; distinction between orders providing for assignment of benefits under qualified plan versus assignment under nonqualified plan is accomplished "by providing for special tax treatment of a QDRO only in respect of distributions from a qualified plan"); *see also I.R.C. §§ 403(b), 414(p)(9)*; *Treas. Reg. § 1.403(b)-2*]. Nevertheless, certain other plans may also be subject to ERISA. For example, although an *unfunded* "excess benefit" plan is not subject to ERISA [*29 U.S.C. § 1003(b)*], at least one reported decision heldthat a distribution from an unfunded, nonqualified plan that was considered

a "top hat plan" was subject to division by means of a QDRO [*Bass v. Mid-America Co., Inc. (N.Dist. Illinois, Eastern Division, 1995) 1995 U. S. Dist. LEXIS 15719]* . In addition, while governmental plans [*see I.R.C. § 414(d)*], "non-ERISA coverage-electing" church plans, and eligible deferred compensation plans (within the meaning of *I.R.C. § 457(b)*), are not subject to ERISA, a distribution from a such a plan will be treated as made pursuant to a QDRO if made pursuant to a domestic relations order meeting the requirements of *I.R.C. § 414(p)(1)(A)(i)* [*I.R.C. § 414(p)(11)*; the provision with respect to eligible deferred compensation plans applies to distributions made after December 31, 2001; *cf. I.R.C. § 410(d)* (permitting church plan to "elect into" ERISA coverage)].

The failure of a court order that purports to divide employee benefits to meet the strict requirements for a QDRO may subject an employee spouse to taxation on both spouses' shares of a retirement plan distribution [*see Hawkins v. C.I.R. (10th Cir. 1996) 86 F.3d 982, 987-988, 993-994* (divorce decree with minimally acceptable language qualified as QDRO despite failure to reference applicable federal statute or use statutory language)]. Similarly, if the distribution from an employee benefit plan is made *before* a QDRO issues, and therefore is not made *pursuant* to a QDRO, it will be fully taxable to an employee who initially receives the entire distribution [*see Rodoni v. Commissioner (1995) 105 T.C. 29* ; *see also Bougas v. Comm'r (2003) T.C. Memo 2003-194* (withdrawal of pension funds pursuant to court's suggestion but without court order is not treated as pursuant to QDRO, and subject to 10 percent penalty tax)]. Thus, use of a QDRO is desirable and essential, both because it provides a means of direct payment from an ERISA employee benefit plan to a former spouse of his or her share of the benefits divided, and because it makes the alternate payee the taxable distributee of that share [*see I.R.C. §§ 402(e)(1)(A), 414(p)*].

Arguably, in a community property state, a QDRO may not be theoretically necessary to shift the taxability of the distribution to an alternate payee. In one case arising out of a California pension distribution *prior to* the operative date of the QDRO provisions, the Tax Court held that a nonemployee spouse was the taxable distributee of her community property share of the pension, which her former husband paid over to her after receiving a lump sum distribution from the plan. The court based its ruling on the *community property* nature of the pension, which created a right of ownership in both spouses, so that there was no improper "alienation" of the benefits in its division [*Powell v. Commissioner (1993) 101 T.C. 489* distinguishing *Darby v. Commissioner (1991) 97 T.C. 51]* . The extent, if any, to which the rationale for that decision might conceivably be applied to a current division of community property benefits that fails to qualify as a QDRO, or to a distribution from a nonqualified plan that is not subject to ERISA coverage, is presently unclear, particularly in view of some countervailing authority. Therefore, pending further decisional or statutory clarification, the most prudent course of action appears to be to ensure that the instrument dividing the benefits meets the requirements for a QDRO to avert the potential for taxation of the employee spouse on the entire distribution [*see Hawkins v. C.I.R. (10th Cir. 1996) 86 F.3d 982, 987-988, 993-994* ; *Karem (Robert L.) 100 T.C. 521* ; *see also I.R.C. § 414(p)(11)*].

PRACTICE TIP:

It is advisable for counsel to insert in a marital settlement agreement a provision under which the nonemployee spouse must indemnify the employee spouse against any tax liability arising from distributions made to the nonemployee spouse either directly by the plan or by the employee spouse. However, the clients should be advised that such an agreement is strictly between the spouses and does not bind the IRS, which is not a party to the agreement [*see Alioto v. Commissioner (1994) T.C. Memo 1994-51* .

[2] IRA's and Other Plans to Which Tax-Free Rollover May Be Made

[a] Distributions to Spouse on Employee Spouse's Death

If, on the death of an employee spouse, a retirement distribution is paid to an employee's immediate surviving spouse--that is, the person to whom the employee was married at the time of death, as opposed to a former spouse-alternate payee who is treated as a surviving spouse--that surviving spouse is entitled to transfer (or "roll over")

the distribution to an Individual Retirement Account (IRA) [*see I.R.C. § 408(a)*] or an individual retirement annuity (other than an endowment contract) [*see I.R.C. § 408(b)*] to the extent that the distribution would be eligible for rollover if made to the employee spouse. Effective for distributions after 2001, surviving spouses may also roll over distributions to a qualified plan, an annuity plan [see *I.R.C. § 403(a)*], an eligible governmental section 457 plan, or an annuity contract [*I.R.C. § 402(c)(9)*; see *I.R.C. § 403(b)* (annuity contract)]. For distributions before 2002, the surviving spouse could not roll over the distributions to a qualified plan, an annuity plan, a governmental section 457 plan, or an annuity contract [*I.R.C. § 402(c)(9)*, before amendment by Pub. Law 107-16]. In general, an "eligible rollover distribution" is all or any portion of the balance credited to the employee in a qualified trust [*see I.R.C. § 402(c)(2), (4)*; *Treas. Reg. § 1.402 (c)-2 (c) Q&A 3*]. An eligible rollover distribution does not include certain substantially equal periodic payments measured by the lives of the employee and/or the employee's beneficiary, distributions made over a specified period of at least 10 years, required minimum distributions, and certain distributions made on the hardship of the employee [*I.R.C. § 402(c)(4)*; Treas. Reg. § 1.402(c)(2), Q&A 3(b), 4; see *I.R.C. § 401(a)(9)* (required minimum distributions)].

By rolling over the distribution within the time period prescribed by law, thesurviving spouse payee need not include it in his or her current income, in contrast to the inclusion that would be required in the absence of the rollover [*see I.R.C. §§ 402(c)(3), (9), 408(d)(3)*]. The surviving spouse may also avoid the otherwise mandatory 20 percent withholding with respect to the distribution [*see I.R.C. § 3405(c)(1)(B)*; *Treas. Reg. § 1.401(a)(31)-1, Q&A 1*] by making a timely and direct rollover of the distribution to an eligible retirement plan [*Treas. Reg. § 1.402(c)-2, Q&A 1*; *see I.R.C. §§ 401(a)(31)(A), 402(c), 408(d)(3)(C)(ii)(II), 3405(c)(2)*].

[b] Distributions Under QDRO During Employee Spouse's Lifetime

A spouse or former spouse of a participant in a plan who receives a distribution under a QDRO as an alternate payee is treated as the distributee [*I.R.C. § 402(e)(1)(A)*]. Accordingly, unless a timely rollover of the distribution is made, the spouse or former spouse will be taxable on the distribution [*I.R.C. §§ 72, 402(a)*]. Any amount that is distributed to the spouse or former spouse of the participant as an alternate payee by reason of any QDRO, however, may be rolled over in the same manner as if the distribution were made to the participant directly [*I.R.C. § 402(e)(1)(B)*]. Accordingly, effective for distributions after 2001, spouses and former spouses may roll over distributions received under a QDRO as an alternate payee to an IRA [*see I.R.C. § 408(a)*], an individual retirement annuity (other than an endowment contract) [*see I.R.C. § 408(b)*], a qualified plan, an annuity plan [*see I.R.C. § 403(a)*], an eligible governmental section 457 plan, or an annuity contract [*I.R.C. § 402(c)(9)*; *see I.R.C. § 403(b)* (annuity contract)]. For distributions before 2002, rollovers could be made only to an individual retirement account or individual retirement annuity [*I.R.C. § 402(c)(9)*, before amendment by Pub. Law 107-16].

The rollover generally must be made within 60 days of receipt [*I.R.C. § 402(c)(3)(A)*], but for distributions made after 2001, the IRS may waive the 60-day requirement if the failure to do so would be against equity or good conscience, including cases of casualty, disaster, or other events beyond the reasonable control of the individual subject to the requirement [*I.R.C. § 402(c)(3)(B)*]. Besides preventing immediate taxation of the distribution [*I.R.C. §§ 72, 402(a)*], a timely rollover will avoid the mandatory 20-percent tax withholding on the distribution [*Treas. Reg. § 1.402(c)-2, Q&A 1*; *see I.R.C. §§ 401(a)(31)(A), 402(c), 408(d)(3)(C)(ii)(II), 3405(c)(1)(B), (2)*; *Treas. Reg. § 1.401(a)(31)-1, Q&A 1*].

The foregoing explanation is a brief overview of rollovers, and should not be viewed as a comprehensive treatment of this subject. It is suggested that ERISA tax counsel be consulted whenever a rollover is contemplated.

PRACTICE TIP:

Counsel for both spouses should note carefully the requirements for nontaxability of retirement distributions. Tax consequences to both parties will turn on strict compliance with all statutory requirements [*see, e.g., Rodoni v. Commissioner (1995) 105 T.C. 29* (distribution and rollover to IRA took place before QDRO issued; court noted that rules relating to QDROs are strictly construed and "substantial compliance" is not sufficient); *Rudzin v. Commissioner, T.C. Memo. 1995-13* (wife had to

incur tax on stock distribution via QDRO, which she failed to roll over to IRA, despite fact that delay was caused by her uncertainty over how much stock should have been distributed to her)]. In addition, counsel should exercise caution in providing any advice to the plan fiduciary. Violation of highly technical plan disclosure and notice requirements required to be made to an alternate payee relating to a rollover can be cause for disqualification of the plan [*see I.R.C. § 401(a)(31)*; *Treas. Reg. § 1.401(a)(31)-1*]. In such cases, referral to ERISA-knowledgeable counsel is advisable.

[3] Transfers From Individual Retirement Plans ("IRAs")

"IRA" is an acronym for two species of "individual retirement plans": the Individual Retirement Account [*I.R.C. § 408(a)*] and the Individual Retirement Annuity [*I.R.C. § 408(b)*]. The Individual Retirement Annuity must be an annuity contract or an endowment contract issued by an insurance company that meets certain other requirements [*see I.R.C. § 403(b)*]. Simplified Employee Pensions (SEP-IRAs) are a species of IRA [*see I.R.C. § 408(k)*], as are SIMPLE retirement accounts [*see I.R.C. § 408(p)*].

An IRA or an interest therein (including specific assets) may be transferred without taxable event from one spouse to the IRA of the other in the context of a dissolution of marriage or separation by appropriate court order or agreement [*I.R.C. §§ 408(d)(6), 1041*].

An order providing that the nontitled spouse receive a distribution from an IRA will result in a 10 percent penalty tax in addition to the ordinary income tax that must always be paid on such distributions [*I.R.C. § 72(t)(3)(a)*; *but cf. I.R.C. § 408A(d)(3)* (special rules for conversion of regular IRA account into "Roth IRA Account" during 1998 without payment of 10 percent penalty)]. In order to insure that an IRA transfer is tax-free, counsel should use an order or judgment meeting both the requirements of *I.R.C. § 408(d)(6)* and *I.R.C. § 71(b)(2)(A)*, so that the transfer document be a "divorce or separation instrument." In one instance, for example, *I.R.C. § 1041* "nonrecognition of income treatment" was denied to separated individuals who had not filed a divorce or separation action and who contemplated none, and who proposed to transfer an IRA from the husband to the wife by written agreement. Because the spouses were not separating, the agreement did not meet the "divorce or separation instrument" test [I.R.S. Letter Rul. 9344027; *see, Bunney (Michael G.) v. Commissioner (2000) 114 T.C. 259* (husband's IRA distributions did not qualify as nonrecognition event--a transfer incident to divorce--when he cashed out IRAs and paid some proceeds to former wife, instead of transferring an "interest" in IRAs to her)].

On the other hand, the direct transfer of an employee spouse's interest in an IRA to the IRA of his or her spouse or former spouse pursuant to a divorce or separation instrument is a nontaxable transfer to both spouses. Thereafter, the account or annuity or portion thereof is treated as belonging to the distributee spouse or former spouse [*see I.R.C. §§ 71(b)(2)(A), 408(d)(6)*; *see also I.R.C. § 408(d)(3)* (describing qualifying rollovers)]. Thus, the distributee spouse or former spouse is subject to ordinary income tax on withdrawals and to an additional 10 percent penalty tax on early withdrawals [*Cohen v. Comm'r, T.C. Memo 2004-227* (court order for equal division of IRA); *see I.R.C. § 408(d)(6)*].

An incarcerated spouse's withdrawal of funds from an IRA account to pay support arrearages or to satisfy a marital property judgment and thereby obtain release from jail will result in a 10 percent penalty tax in addition to the ordinary income tax on IRA distributions [*see I.R.C. 72(t)*; *see also Baas v. Comm'r, T.C. Memo. 2002-130* ; *Czepiel (Richard D.) v. Commissioner, T.C. Memo. 1999-289* (withdrawal compelled by family court orders, but taxpayer actively participated in withdrawal)]. Similarly, a spouse's withdrawal of IRA funds in order to pay divorce obligations, pursuant to a court's suggestion but without a formal court order, will result in a 10 percent penalty tax [*Bougas v. Comm'r, T.C. Memo 2003-194* (*I.R.C. § 72(t)(2)(C)* exception to penalty tax was inapplicable when divorce judgment failed to meet QDRO requirements)].

Note that special rules apply to transfers involving "Roth IRA Accounts," a variety of IRA that was created as part of the Tax Reform Act of 1997, and is effective for tax years after 1997. Contributions to a Roth IRA are made with "after

tax" income, meaning that they are not deductible like a "regular" IRA [*I.R.C. § 408A(c)(1)*], but the ultimate distributions, including the accumulations and value increases, are tax-free [*I.R.C. § 408A(d)(1)*]. Roth IRAs are subject to contribution limits per year [*see I.R.C. § 408A(c)(2), (3)*], as well as to special rules for rolling over amounts into a Roth IRA from either another Roth IRA or from a "regular" IRA [*see I.R.C. § 408A(c)(3)(B), (6), (d)(2), (3), (e)*].

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Chapter 227 DISSOLUTION OF MARRIAGE: TAX EFFECTS OF DISSOLUTION
PART II. LEGAL BACKGROUND

19-227 California Forms of Pleading and Practice--Annotated § 227.18

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§ 227.18 Deductibility of Attorney's Fees

[1] General Rules

As a general rule, attorney's fees or other costs paid in connection with a dissolution, judgment of nullity, separation, or decree for support are not deductible by either spouse [*Treas. Reg. § 1.262-1(b)(7)*; *Wolfson v. Commissioner (1966) 47 T.C. 290, 294]* , because personal expenses are not deductible [*United States v. Gilmore (1963) 372 U.S. 39, 44-46, 83 S. Ct. 623, 9 L. Ed. 2d 570* ; *United States v. Patrick (1963) 372 U.S. 53, 56, 83 S. Ct. 618, 9 L. Ed. 2d 580]* . The characterization of expenses as personal or business depends on whether the expense arose in connection with the taxpayer's profit-seeking activities and not on the potential consequences that might result to the taxpayer's income-producing property [*United States v. Gilmore (1963) 372 U.S. 39, 44-45, 83 S. Ct. 623, 9 L. Ed. 2d 570]* . Because legal expenses relating to dissolution or separation arise from the marital relationship, they are personal expenses [*United States v. Patrick (1963) 372 U.S. 53, 56, 83 S. Ct. 618, 9 L. Ed. 2d 580]* .

However, a deduction is permitted for expenses, including legal expenses, incurred (1) for the production or collection of income; (2) for the management, conservation, or maintenance of income-producing property; or (3) in connection with the determination, collection, or refund of any tax (tax advice expenses) [*I.R.C. § 212*]. This deduction, which is limited in application to a taxpayer's profit-seeking or business activities [*United States v. Gilmore (1963) 372 U.S. 39, 44-46, 83 S. Ct. 623, 9 L. Ed. 2d 570* ; *United States v. Patrick (1963) 372 U.S. 53, 56-57, 83 S. Ct. 618, 9 L. Ed. 2d 580]* , may be applicable to legal fees involving dissolutions, judgments of nullity, separations, or decrees for support [*see I.R.C. § 212(1),(2)*; *see Jasko v. Commissioner (1996), 107 T.C. 30* (legal fees incurred to recover fire insurance proceeds on family home were not deductible, as property was not held for income-producing purposes); *see §§ 227.18[2]* and *[3]*]. The taxpayer has the burden of establishing that these legal expenses qualify for the deduction [*Rose v. Commissioner of Internal Revenue (6th Cir. 1972) 459 F.2d 28, 29* , *cert. denied, 409 U.S. 879* ; *see Jasko v. Commissioner (1996), 107 T.C. 30]* .

Even if the taxpayer's legal expenses qualify for this deduction, the amount of qualifying attorney's fees that is

deductible is limited. As one of the "miscellaneous itemized deductions," the deduction for attorney's fees is allowed only to the extent that the aggregate of *all* miscellaneous itemized deductions claimed exceeds 2 percent of adjusted gross income [*see I.R.C. § 67(a),(b)*].

[2] Attorney's Fees Incurred for Production of Income

[a] Production of Spousal Support

Attorney's fees paid in connection with a dissolution, judgment of nullity, legal separation, or decree for support are deductible as an expense for the production of income, if they are properly attributable to the production or collection of spousal support payments includable in the gross income of the recipient spouse under *I.R.C. § 71* [*Treas. Reg. § 1.262-1(b)(7)*; *Wild v. Commissioner (1964) 42 T.C. 706, 709-711 , acq., 1967-2 C.B. 4* ; *see § 227.10*,]. Even those legal expenses that are incurred in obtaining temporary support or support arrearages are deductible, as long as the support will be included in the recipient's gross income under *I.R.C. § 71* when it is obtained [*Wolfson v. Commissioner (1966) 47 T.C. 290, 294-296* ; *Dalton v. Commissioner (1960) 34 T.C. 879, 885-886]* .

Only those expenses attributable to the production of spousal support included in the recipient's gross income qualify for deduction. If the entire amount incurred cannot be attributed to spousal support, the taxpayer has the burden of allocating the portion of attorney's fees spent on the production of spousal support [*see Mirsky v. Commissioner (1971) 56 T.C. 664, 677]* . The evidence necessary to satisfy the taxpayer's burden varies from case to case [*see Munn v. United States (Ct. Cl. 1972) 455 F.2d 1028, 1035* ; *see also Merians v. Commissioner (1973) 60 T.C. 187, 188 , acq., 1973-2 C.B. 2* (any bill for legal or accounting services should be itemized to reflect portion for deductible or tax-related services)]. If there are sufficient facts in the record as a whole, however, it is possible that an allocation may be inferred despite the taxpayer's failure to provide a breakdown of legal fees incurred [*see Hazel Porter (1966) 25 T.C.M. 448 (CCH) , aff'd per curium, 388 F.2d 670 (6th. Cir. 1968)]* .

[b] Production of Income Other Than Spousal Support

Attorney's fees incurred during dissolution or separation that are attributable to the production of income other than spousal support also may be deductible. A deduction for attorney's fees incurred for the production of income in connection with a profit-seeking activity is not precluded merely because the fees arose as part of a dissolution or separation proceeding [*see Genevieve M. Hahn (1976) 35 T.C.M. 509 (CCH)* ; *Beth Van Sickle (1986) 52 T.C.M. 982 (CCH)]* . For example, a spouse was permitted to deduct legal expenses incurred in a dissolution proceeding to establish the right to possession of, or participation in, the income of property jointly owned with the other spouse. However, these expenses related to a profit-seeking activity were carefully distinguished from expenses incurred to establish ownership of property [Genevieve M. Hahn (1976) *35 T.C.M. 509 (CCH)]* .

[c] Payment by Other Spouse

The deduction permitted for the production of income is personal to the spouse seeking the production of income. Thus, if one spouse incurs attorney's fees to produce income in a dissolution or separation proceeding and the other spouse either agrees to pay the fees or is ordered by the court to do so, the expenses are not deductible [*see I.R.C. § 212*; *Treas. Reg. § 1.212-1*].

Payments to a spouse that qualify for alimony tax treatment, however, are deductible by the payor-spouse and includable in the income of the payee-spouse [*I.R.C. §§ 71, 215*]. If these payments then are used by the payee-spouse to pay deductible legal expenses, the payee-spouse may deduct them, subject to the 2 percent limitation on miscellaneous deductions [*see § 227.18[1]*].

In addition, payments may qualify for alimony tax treatment if they are made to a third party on behalf of the payee-spouse. Thus, for example, a payor spouse may deduct direct payments made to the payee-spouse's attorney for

attorney fees incurred by the payee-spouse. However, to obtain alimony tax treatment for direct payments that are not required by the terms of the divorce or separation agreement, the payee-spouse must give the payor a written request, consent, or ratification stating that the parties intend the payment to be treated as an alimony or separate maintenance payment to the payee-spouse. The payor-spouse must receive the request, consent, or ratification before the date the payor-spouse files his or her first return for the taxable year in which the payment was made. The direct payment is treated as though it were paid to the payee-spouse, who then pays it to the attorney. Thus, the payment is deductible by the payor-spouse, includable in the income of the payee-spouse, and then deductible by the payee-spouse to the extent that the payment of attorney's fees is deductible [Temp. Treas. Reg. § 1.71-1T(b), Q-6, Q-7; *see § 227.10[2]*].

PRACTICE TIP:

Payments Structured to Include Attorney Fees. Counsel for the lower-earning spouse throws away potential tax benefits for both parties by merely seeking an award of attorney fees. The parties can allow for deduction of alimony payments by the payor, as well as deduction of attorney fees owed by the payee, by characterizing payments as spousal support qualifying for alimony tax treatment. To do this, the parties should structure a stipulated judgment that sets spousal support in an amount above the state guidelines and includes attorney fees and that contains a step-down in payments to an agreed amount on a specified later date. The payor-spouse may then deduct the spousal support payments and the payee-spouse can deduct attorney fees paid directly, to the extent the fees are otherwise deductible.

[d] Resisting Other Spouse's Claims for Income

Legal expenses incurred by one spouse in resisting the other spouse's income demands, as opposed to expenses incurred for the actual production or collection of income, are not deductible. Resisting the other spouse's money demands in a dissolution or separation proceeding does not create legal expenses that are deductible as expenses for the management, conservation, or maintenance of income-producing property [*United States v. Gilmore (1963) 372 U.S. 39, 51-52, 83 S. Ct. 623, 9 L. Ed. 2d 570* ; *United States v. Patrick (1963) 372 U.S. 53, 56, 83 S. Ct. 618, 9 L. Ed. 2d 580* ; *see Wild v. Commissioner (1964) 42 T.C. 706, 710-711 , acq., 1967-2 C.B. 4*].

[e] Relating to Child Support

Attorney's fees incurred in connection with demands for child support are not deductible as an expense for the production or collection of income. The deduction is limited to expenses related to the production of income that must beincluded in the spouse's income for income tax purposes [*see Treas. Reg. § 1.212-1(a)(1)*]. Similarly, attorney's fees incurred in resisting demands for child support are not deductible. Resisting money demands in a dissolution or separation proceeding does not create legal expenses that are deductible as expenses for the management, conservation, or maintenance of income-producing property [*United States v. Gilmore (1963) 372 U.S. 39, 51-52, 83 S. Ct. 623, 9 L. Ed. 2d 570* ; *United States v. Patrick (1963) 372 U.S. 53, 56, 83 S. Ct. 618, 9 L. Ed. 2d 580* ; *see Wild v. Commissioner (1964) 42 T.C. 706, 710 , acq., 1967-2 C.B. 4*].

[f] Allocation of Attorney's Fees

A taxpayer claiming a deduction for attorney's fees has the burden of allocating the fees by showing what portion of them is attributable to the production of income [*see Treas. Reg. § 1.262-1(b)(7)*; *see also Mirsky v. Commissioner (1971) 56 T.C. 664, 677]* . Thus, an attorney who charges fees for obtaining spousal support or other forms of income for his or her client should provide a breakdown of fees charged and carefully itemize the number of hours and expenses incurred for the production of this income, both in the attorney's records and in the client's bill. If the attorney provides such a breakdown, the client should have adequate proof to enable him or her to claim the deduction for attorney's fees [*see Beth Van Sickle (1986) 52 T.C.M. 982 (CCH)]* .

[3] Attorney's Fees Incurred for Tax Advice

[a] Deductibility

Legal expenses incurred in connection with the determination, collection, or refund of any tax (tax advice expenses) are deductible [*I.R.C. § 212(3)*; *Treas. Reg. § 1.212-1(a)(1)(iii)*]. This deduction applies not only to expenses relating to a contest of tax liability or the preparation of tax returns for a particular year, but also to expenses relating to tax advice given merely for tax planning purposes [*Carpenter v. United States (Ct. Cl. 1964) 338 F.2d 366, 369]* . The deduction clearly extends to tax advice regarding dissolution, judgments of nullity, or separation. Therefore, taxpayers may deduct fees paid for legal advice regarding the tax consequences of a property settlement agreement or proposed property transfer or division between spouses, the tax consequences of various forms of spousal and child support payments, or the right to claim a dependency exemption for a child [*see Rev. Rul. 72-545, 1972-2 C.B. 179*].

[b] Payment by Other Spouse

The deduction for legal fees incurred for tax advice regarding issues stemming from dissolution or separation can be claimed only by the spouse seeking the advice. Therefore, if one spouse either agrees to or is ordered by the court to pay the expenses incurred for tax advice sought by the other spouse, the expenses are not deductible by either spouse [*Carpenter v. United States (Ct. Cl. 1964) 338 F.2d 366, 368]* . For discussion of deducting these payments by qualifying them for alimony tax treatment, *see § 227.18[2][c]*.

[c] Allocation of Attorney's Fees

A taxpayer claiming a deduction for attorney's fees has the burden of allocating the fees by substantiating what portion of them is attributable to tax advice [*see Rev. Rul. 72-545, 1972-2 C.B. 179*]. If the bill for attorney's fees is not specifically itemized and the attorney who provided the tax advice cannot give any specific information as to the number of hours worked on tax advice (as compared to other legal matters), it may be difficult to determine the amount of the fee allocable to tax advice. Such a failure, however, does not preclude an allocation. Rather, an allocation may be made by looking to the record as a whole and examining documents such as the bill for fees and the attorney's ledger sheets that deal with the taxpayer's account, thereby determining the approximate portion of time spent on tax advice and the value of the service [*see Howard C. Goldaper (1977) 36 T.C.M. 1381 (CCH)* ; *see also Munn v. United States (Ct. Cl. 1972) 455 F.2d 1028, 1035]* .

[4] Attorney's Fees Incurred for Division of Property--Nondeductible Expenses Added to Basis of Property

Legal expenses arising from dissolution or separation that are attributable to division of property or claims regarding the existence of community property and the spouses' rights in it are not deductible by either spouse [*see* Justin R. Melat (1993) *65 T.C.M. 2868 (CCH)* (legal fees for valuing a law partnership interest as part of property division were nondeductible personal expenses)]. These expenses are personal expenses arising from the marital relationship and not expenses incurred either for the production of income or for the management, conservation, or maintenance of property held for the production of income [*United States v. Gilmore (1963) 372 U.S. 39, 51-52, 83 S. Ct. 623, 9 L. Ed. 2d 570* ; *Georgia Leary Neill (1964) 42 T.C. 793, 798-799* ; Genevieve M. Hahn (1976) *35 T.C.M. 509 (CCH)* ; *see § 227.18[1]*]. However, these nondeductible fees are capital expenditures [Genevieve M. Hahn (1976) *35 T.C.M. 509 (CCH)]* and may be added to the cost basis of an asset obtained as a result of the legal expenses [*George v. United States (Ct. Cl. 1970) 434 F.2d 1336, 1338-1340]* . Expenses incurred in protecting title to a capital investment have been held to constitute capital expenditures [*see* Samuel Berger (1954) *13 T.C.M. 177 (CCH) , aff'd, 234 F.2d 959 (2d Cir. 1956)]* . Thus, it could be argued that legal fees spent protecting the title to property should be allowed as an addition to the property's cost basis.

PRACTICE TIP:

Client Billing Statements Should Specifically Describe Attorney Activities. To be in compliance with *Bus. & Prof. Code § 6148(b),*attorneys should generate monthly statements that specifically describe the activities for which the client is billed. Providing the small degree of extra specificity required to

categorize attorney fees will give the client a clear record of deductible fees for tax advice or advice relating to the production of income, and will document fees that should arguably be added to the basis of property as related to property division. If past billing statments have been too general, counsel should prepare a statement specifically categorizing the fees as accurately as possible. However, such after-the-fact statements may, of course, be suspect and may be difficult to substantiate absent underlying timesheets or other documents detailing attorney activities.

California Forms of Pleading and Practice--Annotated

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Volume 19: Dissolution of Marriage: Child Custody thru Dissolution of Marriage: Tax Effects of Dissolution-Chs.223-239
Chapter 227 DISSOLUTION OF MARRIAGE: TAX EFFECTS OF DISSOLUTION
PART II. LEGAL BACKGROUND

19-227 California Forms of Pleading and Practice--Annotated § 227.19

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§ 227.19 Right to File Joint Returns

[1] General Rules--Marriage Requirement

Spouses are entitled to file joint returns [*I.R.C. § 6013(a)*] if they are married as of the end of the taxable (calendar) year, except that, if a spouse dies during the taxable year, the date of the spouse's death will be used to determine marital status for filing purposes [*I.R.C. § 7703(a)(1)*; *cf. Mueller (Robert) v. Commissioner, T.C. Memo. 2001-274* (same-sex economic partners may not file joint return)]. Problems may arise in determining the right to file a joint return when spouses have taken action to terminate their marriage, to live separately under a judgment of legal separation, and in other cases. Therefore, the determination of marital status plays an important role in evaluating whether filing a joint return is appropriate. General rules for determining marital status are discussed in *§ 227.19[2]*. Special rules concerning final judgments of dissolution of marriage, legal separation, and nullity of marriage are discussed in *§ 227.19[2][c][i] -[iii]*.

[2] Determination of Marital Status

[a] Federal Law

The determination of whether a particular individual is married or single for income tax purposes is made by reference to state law [*Calhoun (Robert), T.C. Memo. 1992-246* ; *see Mueller v. Comm'r, T.C. Memo 2001-274* (same-sex economic partners may not file joint return); *but cf. Rinehart v. Comm'r, T.C. Memo 2003-109* (fraudulent annulment disregarded in determining couple's marital status)]. An individual who is legally separated from his or her spouse under a judgment of dissolution or legal separation is not considered as married for income tax purposes [*I.R.C. § 7703(a)(2)*] (*§ 227.19[c][i]-[iii]*). In certain cases, married taxpayers living apart are not considered married [*I.R.C. § 7703(b)*; *but see Patterson v. Commissioner, T.C. Memo. 1989-193* (legally married taxpayer not permitted to file as single taxpayer, despite prohibition of divorce by taxpayer's religion; treatment of estranged spouse as unmarried person for tax purposes does not necessarily entitle other spouse to same treatment). A taxpayer is not considered as married as of the close of the taxable year, and is not permitted to file a joint return, if at any time during the taxable year the taxpayer's spouse

was a nonresident alien [*I.R.C. § 6013(a)(1)*].

A taxpayer's marital status not only determines whether a joint return may be filed, but also is decisive in determining whether the gross income filing requirement has been met [*see I.R.C. § 6012*], how many personal exemptions may be claimed [*see I.R.C. §§ 151-153*], whether the spouse's medical deductions may be claimed [*see I.R.C. § 213*], and other tax-related issues. In addition, each spouse is liable for tax on half of the community income even though the dissolution becomes final and separate returns must be filed, as discussed in *§ 227.19[3]*.

[b] California Law

In general, for purposes of filing a California personal income tax return, marital status is to be determined in accordance with *I.R.C. § 7703* [*see Rev. & Tax. Code § 17021.5*; *18 Cal. Code Reg. § 18402(a)*], keeping in mind that federal law must look to state (California) law concerning marriage in assessing whether an individual is married or single [*see Calhoun (Robert), T.C. Memo. 1992-246]* . However, California law imposes special requirements concerning the filing of joint returns if one of the taxpayers is a nonresident or part-time resident of California during the taxable year [*see Rev. & Tax. Code §§ 17045, 17046, 18521, 18522, 19006*].

[c] Effect of Parties' Intent to Make Joint Return

[i] In General

Whether an income tax return is a joint return depends on the intent of the spouses. Intent may become a key issue particularly if only one of the spouses signs the return (for the signing spouse or for both spouses), or when a spouse claims that a signature was made by mistake, under duress, without knowledge of the contents of the return, or was forged [*see, e.g., Stanley v. Commissioner (1983) 81 T.C. 634, 637-638* ; *Douglas (J.) (1956) 27 T.C. 306, 312-314* , *aff'd, 256 F.2d 4 (5th Cir. 1958)]* . An extensive treatment of the intent issue is beyond the scope of this work, and therefore only the following general principles are discussed.

Although the federal tax regulations generally require that joint returns be signed by both spouses, the presence or absence of a signature is not determinative of the validity of a joint return, and the parties' intent in making the return must be examined. For example, a "filing spouse" may have implied authority to file a joint return on behalf of a nonsigning spouse if the nonsigner's signature has been a mere formality or the parties have filed a joint return for many years [*Estate of Quirk v. Commissioner (1995) T.C.Memo 1995-234* ; *see Treas. Reg. § 1.6013-1(a)(2)*; *seealso Treas. Reg. § 1.6013-1(a)(5)* (permitting authorized agent to sign return, when accompanied by required form); *but cf. Levitt v. Commissioner, T.C. Memo. 1993-294* (court lacked jurisdiction over wife whose husband signed her name to petition, even though husband had signed her name to all financial documents, including tax returns, for many years)]. Similarly, a joint return may be binding on a nonsigning spouse if the facts show that both parties intended to file a joint return [*see Noonan (Daniel C.) v. Commissioner, T.C. Memo. 1997-22* (ex-wife who refused to sign joint return was held to have consented to filing jointly when she was obligated to do so under binding agreement); *Ashworth v. Commissioner (1990) T.C. Memo 1990-423* ; *Parker v. Commissioner (1978) T.C. Memo 1978-23* ; *see also Ziegler v. Comm'r, T.C. Memo 2003-282* (spouse seeking innocent spouse relief effectively conceded ratification of filing joint return lacking her signature); *but see Olpin v. Comm'r (10th Cir. 2001) 270 F.3d 1297, 1300-1301* (joint return filed without signatures was invalid when spouses divorced and one spouse subsequently filed separate return)].

In addition, although the burden of proof rests on a spouse seeking to disavow a joint return, the courts generally are willing to disregard a spouse's signature if the other evidence indicated that a joint return *was not* intended [*Sharwell v. Commissioner (6th Cir. 1969) 419 F.2d 1057* ; *Warmack v. Commissioner, T.C. Memo. 1992-431* ; *see Hoyle v. Commissioner, T.C. Memo 1994-592* (though husband signed both spouses' names to return and stated he believed he had her consent, there was insufficient evidence of wife's intent to hold that joint return had been intended)].

[ii] Final Decree of Divorce

In California, the judgment of dissolution is equivalent to the final judgment of divorce [*see Fam. Code § 2300*] and terminates the right to file a joint return [*I.R.C. §§ 6013(d)(2), 7703(a)(2)*]. A final judgment of divorce, for purposes of filing a joint return, includes a judgment that is on appeal at the end of the taxable year [*Sullivan v. Commissioner (1957) 29 T.C. 71, 76 , aff'd, 256 F.2d 664 (4th Cir. 1958)]* . However, note that entry of an interlocutory judgment of dissolution does not terminate the right to file jointly, as it is not sufficient to terminate the parties' marital status. This concept remains of at least limited importance in California, because, while interlocutory dissolution judgments have been abolished, there may remain some spouses who obtained an interlocutory judgment under former law but who never applied for and obtained the final judgment [*Treas. Reg. § 1.6013-4(a)*; *Commissioner of Int. Rev. v. Ostler (9th Cir. 1956) 237 F.2d 501* ; *Rev. Rul. 75-536, 1975-2 C.B. 462* ; *see McDonald (Bill) T.C. Memo. 1994-607]* .

With respect to parties who only obtained an interlocutory judgment, an attempt to retroactively enter a final judgment through the use of a *nunc pro tunc* order is technically possible, but such an order will be recognized for tax purposes only if it is consistent with underlying state law. The Tax Court has, in effect, taken the position that it may look behind a California trial court's entry of a nunc pro tunc order to determine whether the order is contrary to or consistent with state law when the issue is raised [*see McDonald v. Commissioner, T.C. Memo. 1994-607* (finding that nunc pro tunc order was not consistent with California law)].

[iii] Legal Separation

A taxpayer and his or her spouse do not lose their right to file a joint return for the taxable year if they become legally separated or have their marriage dissolved after the close of that taxable year [*Treas. Reg. § 1.6013-4(a)*; *see* 18 Cal. Code Reg. §§ 18410-18410.9]. Nevertheless, the entry of a judgment of legal separation [*see generally Fam. Code § 2300 et seq.*] during the taxable year terminates the right to file a joint return for that taxable year [*see I.R.C. §§ 6013(d)(2), 7703(a)(2)*; *Rev. & Tax. Code § 17021.5*; *18 Cal. Code Reg. § 18402(a)*; *see also Kenneth V. Klementowski (1986) T.C. Memo 1986-145*]. Spouses who are not legally separated under a court judgment of legal separation, even though they are living apart under a written separation agreement, are considered married for income tax purposes [*see, e.g., Elizabeth S. C. Ashby (1984) T.C. Memo 1984-121* ; *Donigan v. Commissioner (1977) 68 T.C. 632, 635-637]* . Furthermore, one court has held that an order granting exclusive possession of a couple's residence to a spouse, without more, did not meet the statutory requirements of a legal separation accomplished by a decree of divorce or separate maintenance [*Klementowski v. Commissioner (1986) T.C. Memo 1986-145*]. The mere fact that spouses have not lived together during the course of the taxable year does not prohibit them from making a joint return [*Treas. Reg. § 1.6013-4(a)*]. Physical separation of the spouses during the taxable year, however, coupled with other factors, may qualify a spouse to file as a "head of household" [*see § 227.19[4][d]*].

[iv] Judgment of Nullity

A judgment of nullity based on the fact that the marriage was void [*Fam. Code §§ 2200, 2201*] terminates the right to file a joint return for the taxable year in which the judgment is entered. A judgment of nullity may relate back to rescind any joint returns made in prior taxable years because the marriage was never valid, and the taxpayers must file amended separate returns for those years [*Rev. Rul. 76-255, 1976-2 C.B. 40* ; *William R. (Bob) Wilson (1976) T.C. Memo 1976-285]* . However, this rule may not apply when the rights of third parties (including the I.R.S.) are adversely affected [*Shackelford v. C.I.R., T.C. Memo. 1995-484* (laches prevents retroactive application); *see Rinehart v. Comm'r, T.C. Memo 2003-109* (fraudulent annulment does not relate back)]. A judgment of nullity based on the fact the marriage was voidable terminates the right to file a joint return for the taxable year in which the judgment is entered but does not operate retroactively because the marriage was only voidable and therefore valid until the judgment [*see Fam. Code § 2210*].

[d] Joint and Several Liability for Tax

[i] Assessments Against One or Both Spouses

If spouses file a joint return, each spouse is jointly and severally liable for the tax due, even if only one spouse had income [*I.R.C. § 6013(d)(3)*; *Treas. Reg. § 1.6013-4(b)*; *see Steffen v. Comm'r, T.C. Memo 2002-229* (spouses were jointly and severally liable for negligence penalties); *cf. Carrick v. Commissioner, T.C. Memo. 1991-502]* . The IRS may assess the full amount of tax, penalties, and interest against either spouse [*Furnish v. C.I.R. (9th Cir. 1958) 262 F.2d 727, 731]* . An allocation and indemnification clause in a couple's marital settlement agreement, under which one spouse promises to indemnify the other for all tax liabilities, will not prevent the IRS from collecting a deficiency from the supposedly indemnified spouse, because the IRS is not a party to the agreement [*Alioto (Angelina G.) v. Commissioner, T.C. Memo. 1994-51* ; *but see Karp v. U.S. (1994) 868 F. Supp. 235* (if I.R.S. officially knows of agreement and includes it in its settlement agreement, it can be bound)]. Note that the I.R.S. has announced a policy of notifying both spouses when a collection action is brought against one of them [I.R.S. *1996-14 I.R.B. 28, Notice 96-19*].

One spouse may be relieved from joint and several liability, however, when "innocent spouse" provisions are applicable (*§ 227.19[2][g]*) or when the civil fraud penalty is imposed [*I.R.C. § 6663(c)*; *see Kaye v. Commissioner, T.C. Memo. 1995-345]* . If a supposedly indemnified spouse is denied innocent spouse relief, the spouse may have to pay any assessed deficiency and seek recovery from the other spouse in state court under the terms of the marital settlement agreement [*see, e.g., Barriga v. Comm'r, T.C. Memo 2004-102* (equitable innocent spouse relief denied, despite clause in former wife's divorce decree that allocated all tax liabilities to former husband)].

The fact that the IRS designates a party as an "innocent spouse" will not preclude a state family law court from enforcing a preexisting provision of an agreement and judgment requiring both spouses to equally share tax obligations, because the IRS's designation does not preempt state law efforts to impose liability for federal income taxes [*In re Marriage of Hargrave (1995) 36 Cal. App. 4th 1313, 1320-1321, 43 Cal. Rptr. 2d 474* ; *see § 227.19[2][h]*].

For California personal income tax purposes, the Franchise Tax Board or a court in a dissolution proceeding may revise the joint liability of one spouse with respect to income earned by or subject to the exclusive management of the other spouse [*Rev. & Tax. Code § 19006*; *see Murchison v. Murchison (1963) 219 Cal. App. 2d 600, 33 Cal. Rptr. 285]* .

An assessment against one spouse does not prevent assessment against the other [*Bloomfield v. Commissioner (1969) 52 T.C. 745, 751-752* ; *Dolan v. Commissioner (1965) 44 T.C. 420, 426-427]* . Thus, the IRS may assess an entire deficiency against one spouse even after paying a refund to the other spouse [*Bloomfield v. Commissioner (1969) 52 T.C. 745, 751-752* ; *see Gordon v. United States (11th Cir. 1985) 757 F.2d 1157, 1159-1160]* . This assessment power, however, does not extend to the civil fraud penalty for underpayment of tax unless the government can prove that some part of the underpayment was due to fraud on that spouse's part [*I.R.C. § 6663(c)*; *Treas. Reg. § 301.6653-1(f)*; *see Meier v. Commissioner (1988) 91 T.C. 273, 297-303* ; *Turner v. Commissioner (1988) T.C. Memo 1988-339*]. This exception to joint and several liability applies only to the addition of tax for fraud and does not prevent a spouse from being held liable for the tax deficiency itself if the spouse is otherwise unable to meet the innocent spouse requirements [*see Hicks Co. (1971) 56 T.C. 982, 1030* ; Keene v. Commissioner (1979) T.C. Memo 1979-121 ; *see § 227.19[2][g]*]. In addition, even though a return may be fraudulent only with respect to one spouse, the unlimited period for assessment and collection of tax applies to both spouses [*Hicks Co. (1971) 56 T.C. 982, 1030* ; *see I.R.C. § 6501(c)*]. Thus, the nonfraudulent spouse still may be jointly and severally liable for the tax owed due to omissions of income [*Furnish v. C.I.R. (9th Cir. 1958) 262 F.2d 727, 731-732* ; *United States v. Diehl (S.D. Tex. 1978) 460 F. Supp. 1282, 1287-1288 , aff'd per curium, 586 F.2d 1080 (5th Cir. 1978)]* .

[ii] Standing to Sue for Refund

An issue related to joint and several liability is the question of standing to sue for a tax refund. This issue may pose problems, particularly when a spouse has acquired property in a divorce context that is subject to a tax lien as a result of deficiencies assessed against the other spouse. Although parties may not generally challenge the tax liabilities of others,

the U.S. Supreme Court has held that a spouse who, under protest, pays taxes owed by the other (former) spouse in order to remove a lien from the paying spouse's property, has standing to sue for a refund [*United States v. Williams (1995) 514 U.S. 527, 115 S. Ct. 1611, 131 L. Ed. 2d 608, 613* , *aff'g Williams v. U.S. (9th Cir. 1994) 24 F.3d 1143* ; *see 28 U.S.C. § 1346(a)(1)*].

A spouse who is granted "innocent spouse" relief from joint and several liability (*§ 227.19[2][g]*) is entitled to a refund of overpaid taxes, provided that the spouse files a timely refund claim [*Washington v. Comm'r (2003) 120 T.C. 137, 160* ; *see Bartman v. Comm'r, T.C. Memo 2004-93* (untimely refund claim based on grant of innocent spouse relief)]. A refund claim must be filed within three years from the date that the tax return at issue was filed or within two years from the date that the tax was paid [*I.R.C. § 6511(a)*].

[iii] Offsetting Interests

With respect to satisfying a tax liability by offsetting another interest, note that a spouse's community property interest in a joint income tax refund may be used to offset the other spouse's separate premarital tax liability if state law permits allcommunity assets to be reached to satisfy premarital debts [*Rev. Rul. 85-70, 1985-1 C.B. 361*]. Under California law, the community property generally is liable for a debt incurred by either spouse before or during marriage [*see Fam. Code § 910(a)*]. "During marriage" does not include the period during which the spouses are living separate and apart before a judgment for dissolution of marriage or a judgment for legal separation is entered [*Fam. Code § 910(b)*]. The nondebtor-spouse's community property earnings are not liable for the other spouse's premarital debts, however, as long as the earnings are held in a deposit account in which the debtor-spouse has no right of withdrawal and are not commingled with other community property, except for property insignificant in amount [*Fam. Code § 911*]. The same result should be reached if the parties have a valid premarital agreement that characterizes each party's income during marriage as separate property.

[e] Failure to File

Failure to file a return for a particular taxable year does not preclude a married couple from eventually filing a joint return even after the three-year period of limitations contained in *I.R.C. § 6013(b)(2)* has expired [*Rev. Rul. 72-539, 1972-2 C.B. 634* ; *but see Durovic v. C.I.R. (7th Cir. 1973) 487 F.2d 36, 41-42]* . If separate deficiency notices have been issued to each spouse, however, the couple cannot thereafter elect to file jointly [*Joan D. Thompson (1982) 78 T.C. 558, 561* ; *Dritz v. Commissioner (1969) T.C. Memo 1969-175* , *aff'd per curiam, 427 F.2d 1176 (5th Cir. 1970)* ; *but see Phillips v. C.I.R. (D.C. Cir. 1988) 851 F.2d 1492, 1496, 1498* (limitations of *I.R.C. § 6013(b)* on filing joint return did not apply if taxpayer had not already filed separate return)]. Failure to file a joint return precludes the application of joint rates to the spouse's taxable income [*Anderson v. Commissioner (1973) T.C. Memo 1973-155* ; *see* I.R.S. Letter Rul. 7825086; *but see Stone v. Commissioner (1954) 22 T.C. 893, 901]* . However, the Tax Court has reversed long-established authority and ruled that a taxpayer who has failed to file any return and for whom the IRS has filed a "substitute return" under *I.R.C. § 6020(b)* may thereafter file a return on which the taxpayer elects joint return filing status [*Millsap v. Commissioner (1989) 91 T.C. 926, 938* , *acq., 1991-2 C.B. 1*].

Individual liability has been imposed even in cases in which the spouses filed joint returns in the taxable years before and after the year in which no return was filed [*Simms v. Commissioner (1968) T.C. Memo 1968-298* , *aff'd, 422 F.2d 340 (4th Cir. 1970)]* . Joint and several liability may be imposed, however, if the spouses in effect have authorized the calculation of the deficiency as if a joint return were made [*United States v. Martin (E.D. Mo. 1967) 274 F. Supp. 1002, 1005* , *aff'd, 411 F.2d 1164 (8th Cir. 1969)* ; *but see Estate of Quirk v. C.I.R., T.C. Memo. 1995-234]* . A couple may be deemed to have filed a joint return, and thus be jointly and severally liable, if the couple jointly files certain forms such as a waiver of restrictions (federal Form 870) [*Rev. Rul. 74-203, 1974-1 C.B. 330*]. A spouse is jointly and severally liable even though that spouse gains no benefit from filing the form [*see Fine v. Commissioner (1978) 70 T.C. 684, 690]* .

[f] Notifying IRS of Separation

Separated spouses who have filed a joint return should notify the IRS that they are separated and living apart. Many problems can arise when the IRS is not kept informed of the separated taxpayer's filing status and current address. For example, the IRS must send separate joint deficiency notices to each spouse if the IRS has notice that the couple maintains separate addresses, even if it only knows one of the addresses [*Kir v. Commissioner (1991) T.C. Memo 1991-504* ; *see Abeles v. Commissioner (1988) 91 T.C. 1019]* . Nevertheless, the Tax Court has dismissed an action as untimely filed despite the taxpayer's delayed receipt of a tax deficiency notice that had been forwarded to an ex-spouse in the United Kingdom [*Wisdom v. Commissioner (1991) T.C. Memo 1991-327* ; *see I.R.C. § 6213*]. In a similar case, the Tax Court held that an ex-wife's failure to notify the IRS of her new address precluded her from complaining that she had not received a copy of a joint deficiency notice in time to file a petition with the Tax Court [*Kirk v. Commissioner (1991)T.C. Memo 1991-504* ; *see I.R.C. § 6213*].

[g] Innocent Spouse Relief

[i] Current Law

The "innocent spouse" provisions of the Internal Revenue Code are intended to ameliorate some of the hard practical consequences of the joint income tax return. In filing jointly, the spouses merge their incomes and deductions, and no attempt is made to attribute tax items to one spouse rather than the other. A natural consequence is that both spouses are made jointly and severally liable for the payment of the tax [*I.R.C. § 6013(d)*]. But problems arise when a tax deficiency is subsequently determined for the taxable year, whether due to the omission of taxable income or to the disallowance of a deduction or credit. As these adjustments should have been made on the original joint return, they are not attributed to either of the individual spouses. The additional tax becomes part of the amount for which both spouses are jointly and severally liable.

If the spouses are still married (or at least not legally separated) at the time the deficiency is established, there will generally be no unfairness in collecting the tax from both spouses. The spouses are yet in a marital property relationship. But if the spouses are divorced or legally separated, it may be unfair to impose joint and several liability for tax liabilities arising during the marriage, perhaps many years before. The innocent spouse provisions of current and prior law have sought to define the circumstances under which a spouse (or, more typically, an ex-spouse) may be relieved of joint and several liability. The key word is "innocent." Relief is premised on the idea that a spouse should be relieved of liabilities that are attributable to the other spouse if the spouse seeking relief played no part increating the tax deficiency and did not know of it.

Stated another way, the purpose of innocent spouse relief is to protect one spouse from the overreaching or dishonesty of the other spouse [*Purcell v. Commissioner (6th Cir. 1987) 826 F.2d 470, 475]* . However, innocent spouse relief is inappropriate when it would allow one spouse to escape liability for apparently legitimate claims that the IRS subsequently disallows [*Bartlett (Sharon Lee) v. Commissioner, T.C. Memo. 1997-413* ; *see Bartak v. Comm'r, T.C. Memo 2004-83* (relief denied when wife reluctantly participated in tax shelter at husband's urging, but was not abused or coerced)].

The current innocent spouse provision is found in *I.R.C. § 6015*, which provides for two overlapping types of relief. One type, contained in subsection (b), applies to all taxpayers, regardless of whether they are still married and living with the spouse with whom they filed the joint return (*§ 227.19[2][g][iii]*). A second, and more liberal provision, is available to a taxpayer who is divorced, separated from, or not sharing the same household with, the other spouse. This type of relief, under *I.R.C. § 6015(c)* provides an election to limit liability to each spouse's allocated share of the deficiency (*§ 227.19[2][g][iv]*).

It is important to understand that state community property law is irrelevant to innocent spouse relief [*I.R.C. § 6015(a)*].

When a joint return is filed, all income, both community and separate, is lumped together without distinction. When a taxpayer seeks relief under Section 6015, the determination of whether a tax liability is attributable or allocable to the other spouse is made without regard to community property law. Thus the earnings of one spouse are allocated to that spouse, regardless of the fact that they would constitute community property under state law.

Note that in addition to relief provided under subsections (b) and (c) of *I.R.C. § 6015*, subsection (f) provides for general equitable relief. Under that provision, if, taking into account all the facts and circumstances, it is inequitable to hold the individual liable for any unpaid tax or any deficiency (or portion of either), and relief is not available under *I.R.C. § 6015(b)*, or *(c)*, the Internal Revenue Service is authorized to relieve the individual of liability [*I.R.C. § 6015(f)*; *see § 227.19[2][g][v]*].

Relief under *I.R.C. § 6015(b)* or *(c)* requires a tax understatement or deficiency for the year for which relief is sought [*see I.R.C. §§ 6015(b)(1), (c)(1)*; *Foor v. Comm'r, T.C. Memo 2004-54* (no understatement when proper tax amount reported but not paid); *Demirjian v. Comm'r, T.C. Memo 2004-22* (no deficiency when amended returns corrected earlier understatement)]. However, if no understatement or deficiency exists, equitable relief may still be available under *I.R.C. § 6015(f)* [*see, e.g., Foor v. Comm'r, T.C. Memo 2004-54* (relief granted even though taxpayer had reason to know that taxes would not be paid); *Demirjian v. Comm'r, T.C. Memo 2004-22* (relief denied due to taxpayer's constructive knowledge of understatement)]. Relief under *I.R.C. § 6015* is barred once a taxpayer settles his or her tax liability by submitting an offer in compromise that the IRS accepts [*Dutton v. Comm'r (2004) 122 T.C. 133* ; *see I.R.C. §§ 6015(g), 7122*].

Requests for innocent spouse relief must be made within two years of the time the IRS begins collection activities with respect to the taxes at issue [*I.R.C. § 6015(b)(1)(E), (c)(3)(B)*; *2003-32 I.R.B. 296, Rev. Proc. 2003-61* , *supersedes 2000-1 C.B. 447, Rev. Proc. 2000-15* , effective for requests for relief filed on or after November 1, 2003 (limitations period for equitable relief under *I.R.C. § 6015(f)*); *McGee v. Comm'r (2004) 123 T.C. 314]* . The IRS must notify taxpayers of their right to seek innocent spouse relief on all collection-related notices [Pub. Law 105-206, § 3501(b); (2004) Prevo v. Comm'r, (limitations period not commenced by IRS collection activity that omitted notice of taxpayer's right to seek innocent spouse relief)].

The current provisions, which were initiated through enactment of the Internal Revenue Service Restructuring and Reform Act of 1998 [Pub. L. No. 105-206], became operative as follows. In general, the amendments made by the Act apply to any liability for tax arising after the date of its enactment (July 22, 1998), and any liability for tax arising on or before that date but remaining unpaid as of that date. However, under a special provision, the two-year period set forth in *I.R.C. § 6015(b)(1)(E)* or *I.R.C. § 6015(c)(3)(B)* will not expire before a date that is two years after the date of the first collection activity after the date of the enactment of the Act [Pub. L. No. 105-206, § 3201(g)].

The IRS has issued final regulations governing innocent spouse relief under *I.R.C. § 6015* [*Treas. Regs. 1.6015-1-1.6015-9*, Treas. Dec. Int. Rev. 9003, published at *67 FR 47278 (July 18, 2002)* , with correction published at 67 FR 54735 (August 26, 2002)].

In some instances, a taxpayer who has been awarded innocent spouse relief may be able to recover litigation costs. Under *I.R.C. § 7430*, a party who has prevailed in a court proceeding against the United States may be awarded reasonable litigation costs if the party establishes, among other things, that the position of the United States was not substantially justified [*see I.R.C. § 7430*; *see Kean v. Comm'r, T.C. Memo 2003-275* (IRS position was substantially justified, despite inconsistency of its positions on unallocated support payments); *Goertler v. Comm'r, T.C. Memo 2003-136* (IRS position substantially justified, given that taxpayers triggered litigation by failing to timely respond to IRS inquiry); *Rowe v. Comm'r, T.C. Memo 2002-136* (position of IRS in opposing innocent spouse relief was substantiallyjustified, given that taxpayer's case involved newly enacted *I.R.C. § 6015*)].

[ii] Former Law Contrasted

Innocent spouse relief has existed for many years, and has been periodically revised to address perceived inadequacies. The present version of the statute, in particular, can only be understood in the light of its antecedents. Originally, the law applied only to cases in which one spouse omitted income from the tax return that the other spouse knew nothing about, but the law as it stood before the I.R.S. Restructuring and Reform Act of 1998 [Pub. L. No. 105-206] was more expansive, and fairly complex.

Former *I.R.C. § 6013(e)*, the innocent spouse provision prior to the 1998 Act, provided relief from joint and several liability when:

1. A joint return was filed;

2. There was a substantial understatement of tax attributable to grossly erroneous items of the other spouse on the return;

3. The spouse seeking relief established that, in signing the return, he or she did not know (or have reason to know) of the substantial understatement; and

4. Under all the circumstances, it would be inequitable to hold the spouse liable for the tax deficiency.

A "substantial understatement" was defined by a dollar amount or percentage of adjusted gross income (AGI) that eliminated controversy over small sums, and this requirement was rarely a barrier to relief. The requirement that the deficiency be attributable to "grossly erroneous" items, however, has been a considerable source of trouble. Such items included all forms of omitted income, but only such disallowed deductions and credits that had "no basis in law or fact." Congress was unclear concerning what unlawful deductions or credits should provide the basis for innocent spouse relief. At one extreme, purely fraudulent deductions taken by one spouse were clearly covered. But most disallowed deductions had some legal premise, however weak, and courts were often reluctant to permit a spouse to disavow liability for run-of-the-mill disallowed tax deductions that seemed to involve little or no fraud [*see Dillon v. Commissioner, T.C. Memo. 1998-5]* .

The largest problem area in former Section 6013(e) was in the "lack-of-knowledge" requirement. A spouse could hardly claim to be innocent of misreported items of which he or she had knowledge. But it was often unclear how to treat a spouse who had knowledge of the underlying economic facts behind a tax decision, but no knowledge that the decision was unlawful. For example, a spouse might well know of a tax shelter investment, and even know that deductions had been claimed, but not know that the deductions were illegal. Another aspect of the "knowledge" problem has been in the requirement that the spouse seeking relief did not have reason to know of the deficiency, even if he or she did not have actual knowledge. This requirement was intended to cull out culpable negligence, and to preserve a minimum sense of responsibility in signing a joint income tax return. But it has proved troublesome and inconsistent in application because it often turns on a court's assessment of the sophistication of the spouse seeking relief [*see Infelise v. Commissioner, T.C. Memo. 1998-191]* .

The 1998 Act repealed subsection (e) of *I.R.C. § 6013* and replaced it with two provisions found in new *I.R.C. § 6015*. A revised version of the traditional innocent spouse provision was placed in subsection (b), and this provision applies to all taxpayers seeking relief from joint return liability [*I.R.C. § 6015(b)*]. Subsection (c) applies only to a taxpayer who is divorced or legally separated from the person with whom he or she filed a joint return [*I.R.C. § 6015(c)*].

Because subsection (c) is considerably more lenient than subsection (b), and because the overwhelming majority of persons seeking innocent spouse relief are divorced or separated, it is not clear how often subsection (b) will apply in practice. The prior statute made no formal distinction between taxpayers who were still married and living with the fraudulent spouse and those who were divorced or legally separated. But marital status found its way into the statute

obliquely, through the requirement that relief be justified on equitable grounds. Innocent spouse relief was generally intended to protect taxpayers who have broken their economic ties with the fraudulent spouse, and taxpayers who remained married had difficulty asserting the unfairness of joint liability. The 1998 Act acknowledges that divorce or legal separation is a factor in providing expanded relief under subsection (c), yet it still provides more basic relief to all taxpayers. Thus it is arguable that the new statute intends greater protection for taxpayers who are still married to fraudulent spouses than was available under prior law.

[iii] Relief for All Joint Filers

I.R.C. § 6015(b) provides for relief to all taxpayers who filed a joint return, regardless of their current marital or household status. To qualify for relief under this section--which includes relief from liability for tax (including interest, penalties, and other amounts) to the extent that liability is attributable to an understatement of tax--the following requirements must be met [*I.R.C. § 6015(b)(1)*; *Aranda v. Comm'r, T.C. Memo 2003-306* (relief denied to spouse absent proof she satisfied each requirement of *I.R.C. § 6015(b)(1)*)]:

1. A joint return has been made for the taxable year;

2. The return contains an understatement of tax attributable to erroneous items of one individual filing the return;

3. The other individual filing the joint return establishes that in signing it, he or she did not know, and had no reason to know, that there was an understatement;

4. Taking into account all the facts and circumstances, it is inequitable to hold that other individual liable for the deficiency in tax that is attributable to the understatement; and

5. That other individual elects the benefits of *I.R.C. § 6015* not later than a date that is two years after the date that the IRS has begun collection activities with respect to him or her.

A special apportionment provision permits an individual who would be relieved from liability but for the "knowledge" requirement of item 3, above [*I.R.C § 6015(b)(1)(C)*], to limit the *amount* of his or her liability by establishing that in signing the return he or she did not know, and had no reason to know, the *extent* of the understatement. In that case, the individual will be relieved of liability for tax (including interest, penalties, and other amounts) to the extent that the liability is attributable to the portion of the understatement of which that individual did not know and had no reason to know [*I.R.C. § 6015(b)(2)*].

This language largely tracks the provisions of former *I.R.C. § 6013(e)*, and to the extent that it does, prior case law should presumably still govern. The deficiency must, obviously, not be attributable to the spouse seeking relief [*see Ishizaki v. Comm'r, T.C. Memo 2001-318* (relief denied when spouses were equally involved in business operations); *Marzullo v. Commissioner, T.C. Memo. 1997-261]* . As under prior law, the spouse claiming relief must demonstrate lack of knowledge (or constructive knowledge), and relief must be equitable under the circumstances [*see Barranco v. Comm'r, T.C. Memo 2003-18* (relief denied; wife had constructive knowledge and enjoyed comfortable lifestyle and financial security with culpable husband); *Penfield v. Comm'r, T.C. Memo 2002-254* (former spouse's intervention showed that spouse seeking relief had knowledge of unreported pension withdrawal)]. In deciding whether a taxpayer has carried his or her burden of proof, witness credibility is an important consideration [*see Ishizaki v. Comm'r, T.C. Memo 2001-318]* . Actual knowledge of the impropriety of the tax return always forecloses relief [*see, e.g., Cullen v. Comm'r, T.C. Memo 2004-176* (relief denied when husband knew estranged wife was employed but failed to report her income on joint return); *Entezam v. Comm'r, T.C. Memo 2003-253* (relief denied; spouse actively involved in husband's business operations and record-keeping, and had actual knowledge of large amounts of unreported income)]. However, the courts have been inconsistent in the treatment of taxpayers who knew of the underlying economic facts, but not of

their proper tax effect. There is important authority for the proposition that knowledge of the transaction alone is sufficient to deny relief [*Purcell v. Commissioner (6th Cir. 1987), 826 F.2d 470* ; *Quinn v. Commissioner (7th Cir. 1975) 524 F.2d 617]* . However, other decisions have granted relief when the spouse knew of the transaction--such as the payment of an item that was claimed as a deduction--but did not understand the impropriety of its treatment by the other spouse on the joint tax return [*Price v. Commissioner (9th Cir. 1989) 887 F.2d 959* ; *Guth v. Commissioner (9th Cir. 1990) 897 F.2d 441* ; *but see Capehart v. Comm'r, T.C. Memo 2004-268* (relief denied when wife held tax shelter partnership units in joint tenancy with spouse); *Bartak v. Comm'r, T.C. Memo 2004-83* (relief denied when wife participated in tax shelter with reluctance but was not abused or coerced); *Doyel v. Comm'r, T.C. Memo 2004-35* (relief denied when spouse was aware of large tax shelter deductions taken on joint returns); *Mora v. Comm'r (2001) 117 T.C. 279* (relief denied when spouse lacked factual knowledge of tax shelter, but had "reason to know" of understatement, given size of losses relative to income)]. Even when there was actual knowledge of the impropriety of the tax return, the Tax Court has granted innocent spouse relief in compelling circumstances, such as when a battered wife was too frightened to question her husband about their return [*Aude v. Commissioner, T.C. Memo. 1997-478]* .

When a taxpayer lacks actual knowledge, he or she must not have had "reason to know" of the deficiency. The following factors are generally consulted in making this determination [*Laird v. Commissioner, T.C. Memo. 1994-564]* :

1. The presence of unusual or lavish expenditures;

2. Whether the couple's standard of living improved significantly;

3. Participation in business affairs or bookkeeping by the party claiming innocent spouse status;

4. The culpable spouse's openness or refusal to be forthright concerning the couple's income and business transactions; and

5. The level of education, business knowledge, and experience of the party claiming innocent spouse status.

In determining whether, under all the facts and circumstances, it is inequitable to impose joint and several liability, certain factors have been given special weight under prior law. The most important is whether the spouse claiming relief significantly benefited from the understatement of tax [*Ebeling v. Commissioner, T.C. Memo. 1994-277* ; *Walker v. Commissioner, T.C. Memo. 1985-278* ; *see Alt v. Comm'r (2002) 119 T.C. 306, 313-315* (relief denied; wife benefited from deficiencies, was not deceived, and would not experience economic hardship if not granted relief); Treas. Reg. § 1.6013-5(b)]. But the significance of the benefit is measured against the taxpayer's normal standard of living, and thus more affluent taxpayers are more likely to obtain relief than lessaffluent ones [*Hinds v. Commissioner, T.C. Memo. 1988-426]* . The courts have also weighed the probable future hardship to the spouse if relief is not granted, and have found such hardship even when a spouse, now divorced, received a fair distribution of the marital assets [*Dillon v. Commissioner, T.C. Memo. 1998-5]* .

I.R.C. § 6015(b) departed from prior law in eliminating any requirement that the understatement of tax be "substantial," and thus relief is available without regard to the dollar amount of the deficiency [*see* former *I.R.C. § 6013(e)(3),(4)*].

A much more important change, however, was the removal of the former requirement that the tax items at issue be "grossly" erroneous, having "no basis in law or fact" [*see* former *I.R.C. § 6013(e)*; *Friedman v. Commissioner (2d Cir. 1995) 53 F.3d 523]* . The practical impact of this revision in the courts is uncertain. For example, assume that (as is very common) a husband takes a tax position on the advice of an accountant for which there was significant legal support. If this position is ultimately rejected in the Tax Court, the wife (or ex-wife) may attempt to disavow liability simply on the basis that the "erroneous" deduction was attributable to the husband. The statute would seem to allow relief in cases in

which there is no serious claim of fraud toward either against the spouse or the fisc, and perhaps only honest error. The courts may choose to place greater emphasis on the requirement that relief be equitable in order to prevent dilution of the principle of joint and several liability when both spouses benefitted financially from a disallowed deduction or credit.

Prior law was confusing on the issue of whether innocent spouse relief was available when the spouse knew something of the deficiency, but not of its magnitude. The language of the statute could be read to eliminate relief when a spouse had knowledge to any extent, although at least one court had decided otherwise [*Wiksell v. Commissioner (9th Cir. 1996) 90 F.3d 1459]* . The new statute explicitly provides that, when the spouse is unaware of the extent of the understatement, relief is available as to the portion of the understatement of which he or she was without knowledge [*I.R.C. § 6015(b)(2)*].

[iv] Separate Liability Election for Divorced or Separated Taxpayers--Generally

I.R.C. § 6015(c), applicable only to taxpayers who are no longer married to or living with the other joint filer, is significantly more liberal than *I.R.C. § 6015(b)* (*§ 227.19[2][g][iii]*). It provides for what amounts to an election to revoke joint return status with respect to tax deficiencies determined after separation or divorce. Subject to limited exception, subsection (c) limits a taxpayer's liability on the joint return to his or her "portion" of the deficiency, which is determined under *I.R.C. § 6015(d)* [*see § 227.19[2][g][v]*].

A person who elects the application of subsection (c) bears the burden of proof with respect to establishing the portion of the deficiency allocable to that person, except as provided in *I.R.C. § 6015(c)(3)(A)(ii)*, or *I.R.C. § 6015(c)(3)(C)*--which, respectively, concern persons who were not members of the same household during the 12 months preceding the filing of the election, and certain deficiencies not covered by the election (discussed below) [*I.R.C. § 6015(c)(2)*].

The threshold issue is whether a taxpayer can elect relief. An individual is eligible to elect the application of *I.R.C. § 6015(c)* if [*I.R.C. § 6015(c)(3)(A)(i)*; *Jonson v. Comm'r (2002) 118 T.C. 106* (deceased spouse, married at time of death, does not meet eligibility requirements of *I.R.C. § 6015(c)*)]:

1. At the time the election is filed, the individual is no longer married to, or is legally separated from, the person with whom he or she filed the joint return to which the election relates; or

2. The individual was not a member of the same household as the person with whom the joint return was filed at any time during the 12-month period ending on the date the election is filed.

However, the election may nonetheless be voided by a fraudulent transfer of assets between individuals. The statute provides that if the Internal Revenue Service demonstrates that assets were transferred between individuals filing a joint return as part of a fraudulent scheme by them, an election under *I.R.C. § 6015(c)* by either individual will be invalid and joint and several liability will apply to the joint return [*I.R.C. § 6015(c)(3)(A)(ii)*]. The intention is to prevent spouses from colluding to defraud the public fisc by transferring assets to a spouse who then seeks innocent spouse relief.

With respect to timing of the election, the statute provides that an election for any taxable year must be made not later than two years after the date on which the Internal Revenue Service has begun collection activities with respect to the individual making the election [*I.R.C. § 6015(c)(3)(B)*].

The only significant barrier to relief applies to a taxpayer who, at the time he or she signed the return, had *actual knowledge* of the tax item giving rise to the deficiency. The statute, significantly, places the burden on the Internal Revenue Service to demonstrate that the individual making an election had actual knowledge at the time he or she signed the return of any item giving rise to a deficiency (or portion of it) that is not allocable to that individual under

I.R.C. § 6015(d) (*§ 227.19[2][g][v]*). If this is shown, the election will not apply to the deficiency (or portion).

Nevertheless, even a taxpayer with actual knowledge may still obtain relief if he or she can establish that the return was signed under *duress* [*I.R.C. § 6015(c)(3)(C)*; *see, e.g., Cullen v. Comm'r, T.C. Memo 2004- 176* (relief denied when husband had actual knowledge of estranged wife's unreported income and joint return was *not* signed under duress); *Aude v. Commissioner, T.C. Memo. 1997-478* (construing prior law)].

In the context of disallowed deductions, a taxpayer with actual knowledge of a claimed deduction must lack actual knowledge of the *factual circumstances* that made the item at issue nondeductible [*King v. Comm'r, 116 T.C. 198 (2001)* (spouse unaware that husband lacked profit motive for cattle-raising activity); *see I.R.C. § 6015(c)(3)(C)*]. Also, a taxpayer with actual knowledge of income but with only a superficial knowledge of a spouse's complex business transactions and the amount of financial gain, or a taxpayer unaware that a spouse has not accounted for all income, may be granted relief [*Martin (Evelyn M.) v. Commissioner,T.C. Memo. 2000-346* ; *Charlton (Fredie L.) v. Commissioner, 114 T.C. 333, 341-342 (2000)]* . However, a taxpayer who is aware of omitted income but unaware of applicable tax laws, or a taxpayer who merely avoids reviewing or "turns a blind eye" to facts on a joint tax return, will be denied relief [*Von Kalinowski (Julian O.) v. Commissioner, T.C. Memo. 2001-21* ; *Cheshire (Kathryn) v. Commissioner, 115 T.C. 183 (2000)]* . If a taxpayer has actual knowledge of some misreported items but not others, relief will be denied or granted accordingly [*see, e.g., Orsino v. Comm'r, T.C. Memo 2003-174* (relief denied on husband's early 401(k) withdrawal but granted on husband's savings bond interest)].

Note that the "actual knowledge" standard is much more liberal than the "reason to know" standard in subsection (b) and in prior law. If a taxpayer did not know of the other spouse's understatements, it does not matter whether he or she was negligent or reckless in failing to notice the problem. The courts often see cases in which a wife signs a joint return reporting little or no income for a year in which the couple spent considerable amounts of money. Under prior law, a court could readily find that the wife "had reason to know" that the tax return was false or fraudulent, and thus avoid the issue of whether she had actual knowledge (see [b], *above*). Unlike subsection (b), the subsection (c) separate liability election does not contain an equity standard that a court might use to protect the public fisc.

I.R.C. § 6015(c)(4) provides that the portion of any deficiency for which an individual making an election is otherwise liable will be increased by the value of any "disqualified asset" transferred to the individual, but the election is not invalidated, and only the value of the transferred assets is excluded from the amount of the deficiency covered by the election [*I.R.C. § 6015(c)(4)*]. In general, a "disqualified asset" is any property or right to property transferred to an individual making the election by the other individual filing the joint return if the principal purpose of the transfer was the avoidance of tax or payment of tax. For this purpose, any transfer that is made after a date that is one year before the date on which the first letter of proposed deficiency that allows the taxpayer an opportunity for administrative review in the Internal Revenue Service Office of Appeals is sent will be presumed to have as its principal purpose the avoidance of tax or payment of tax. However, this presumption will not apply to any transfer pursuant to a decree of divorce or separate maintenance or a written instrument incident to such a decree, or to any transfer that an individual establishes did not have as its principal purpose the avoidance of tax or payment or tax [*I.R.C. § 6015(c)(4)*; *but see Ohrman v. Comm'r, T.C. Memo 2003-301* (spouse who obtained legal separation to shield assets from IRS efforts to collect tax deficiency caused by husband's gambling addiction received transfer of disqualified assets)].

[v] Separate Liability Election for Divorced or Separated Taxpayers--Allocation of Deficiency

I.R.C. § 6015(c) limits an electing taxpayer's liability to the portion of the joint return deficiency "properly allocable to the individual under subsection (d)" [*I.R.C. § 6015(c)(1)*]. As explained further hereafter, the statutory allocation is achieved by dividing the items of omitted income or disallowed deductions that generated the deficiency between the spouses, and then dividing the tax liability in the same proportion [*I.R.C. § 6015(d)(1)*]. The fact that the division is based on items of income and deduction explains the special rule for tax credits and taxes other than the income tax or minimum tax, which are allocated separately [*I.R.C. § 6015(d)(2)*].

Under *I.R.C. § 6015(d)*, the portion of any deficiency on a joint return allocated to an individual is the amount that bears the same ratio to the deficiency as the net amount of items taken into account in computing the deficiency and allocable to the individual under paragraph (3) of that section bears to the net amount of all items taken into account in computing the deficiency [*I.R.C. § 6015(d)(1)*].

If a deficiency (in whole or in part) is attributable to (1) the disallowance of a credit, or (2) any tax (other than tax imposed by *I.R.C. § 1* or *55*) required to be included with the joint return, and that item is allocated to one person under *I.R.C. § 6015(d)(3)*, the deficiency will be allocated to that person. Any item of that nature will not be taken into account under *I.R.C. § 6015(d)(1)*--the general deficiency apportionment discussed in the first paragraph above [*I.R.C. § 6015(d)(2)*].

Statute sets forth an allocation of items giving rise to the deficiency. Subject to two exceptions discussed hereafter, any item giving rise to a deficiency on a joint return must be allocated to the individuals filing the return in the same manner as it would have been allocated if the individuals had filed *separate* returns for the taxable year [*I.R.C. § 6015(d)(3)(A)*]. Note that community property laws aredisregarded (see [a], *above*), which would otherwise require each spouse to report half of all community income and deductions on separate returns [*I.R.C. § 6015(a)*]. Wage income is allocated to the spouse performing the job and receiving the Form W-2. Business and investment income (including capital gains) is allocated in the same proportion as the ownership of the business or investment that produces the income. If the ownership of the business or investment is held by both spouses as joint tenants, it is expected that any income is allocated equally to each spouse, in the absence of clear and convincing evidence supporting a different allocation. The allocation of business deductions is expected to follow the ownership of the business. Personal deductions are expected to be allocated equally between the spouses, unless the evidence shows that a different allocation is appropriate--such as the situation in which an overvalued charitable deduction is made with the sole property of one of the spouses [S. Rep. No. 105-174].

There are, however, exceptions to the general allocation rule discussed above. First, an item otherwise allocable to any individual under *I.R.C. § 6015(d)(3)(A)* must be allocated to the other individual filing the joint return to the extent the item gave rise to a *tax benefit* on the joint return to the other individual [*I.R.C. § 6015(d)(3)(B)*; *Mora v. Comm'r (2001) 117 T.C. 279* (innocent spouse relief limited due to receipt of tax benefit)]. Second, the Internal Revenue Service may provide for an allocation of any item in a manner not prescribed by *I.R.C. § 6015(d)(3)(A)* if the Internal Revenue Service establishes that the allocation is appropriate due to the *fraud* of one or both individuals [*I.R.C. § 6015(d)(3)(A)*].

Under *I.R.C. § 6015(d)*, limitations on separate returns are disregarded. Accordingly, if a deduction or credit is disallowed in its entirety solely because a separate return is filed, that disallowance must be disregarded and the item computed as if a joint return had been filed and then allocated between the spouses appropriately [*I.R.C. § 6015(d)(4)*].

In addition, if the liability of a taxpayer's child is included on a joint return, that liability must be disregarded in computing the separate liability of either spouse and that liability must be allocated appropriately between the spouses [*I.R.C. § 6015(d)(5)*].

[vi] General Equitable Relief

I.R.C. § 6015(f), applicable to all taxpayers who file a joint return [*see Raymond v. Comm'r (2002) 119 T.C. 191* , No. 11], provides general equitable relief to taxpayers who cannot qualify for innocent spouse relief under *I.R.C. § 6015(b)* or *(c)*. Under subsection (f), the IRS has discretion to grant equitable relief if, after taking into account all the facts and circumstances, it is inequitable to hold a taxpayer liable for any unpaid tax or deficiency, and relief is unavailable under subsections (b) or (c) [*I.R.C. § 6015(f)(1), (2)*].

A common situation giving rise to the need for equitable relief occurs when income is properly reported on a joint

return, but the tax remains unpaid due to the actions of the other spouse [*see, e.g., Wiest v. Comm'r, T.C. Memo 2003-91* (relief granted); *Collier v. Comm'r, T.C. Memo 2002-144* (relief denied)].

Standards for granting discretionary relief under *I.R.C. § 6015(f)* are found in *Rev. Proc. 2003-61 Rev. Proc. 2003-61, 2003-32 I.R.B. 296* [*Rev. Proc. 2003-61, 2003-32 I.R.B. 296* (*supersedes Rev. Proc. 2000-15, 2000-1 C.B. 447* , effective for requests for relief filed on or after November 1, 2003)]. To be considered for equitable relief, all of the following conditions must be met [(*Rev. Proc. 200361, 2003-32 I.R.B. 296 supersedes Rev. Proc. 2000-15, 2000-1 C.B. 447* , effective for requests for relief filed on or after November 1, 2003)]:

1. The spouse seeking relief filed a joint return for the taxable year for which relief is sought;

2. Relief is not available to the spouse under *I.R.C. § 6015(b)* or *6015(c)*;

3. The spouse applies for relief no later than two years after the date of the IRS's first collection activity after July 22, 1998, with respect to the spouse;

4. No assets were transferred between the spouses filing the joint return as part of a fraudulent scheme;

5. There were no disqualified assets (as defined in *I.R.C. § 6015(c)(4)(B)*) transferred to the spouse seeking relief by the other spouse [*see, e.g., Ohrman v. Comm'r, T.C. Memo 2003-301]* ; or if disqualified assets were transferred, then relief will be available only to the extent that the liability exceeds the value of the disqualified assets;

6. The spouse seeking relief did not file the return with fraudulent intent; and

7. The income tax liability from which the spouse seeks relief is attributable to an item of the other spouse [*see, e.g., Feldman v. Comm'r, T.C. Memo 2003-201]* , unless an item attributable or partially attributable to the spouse seeking relief falls under one of four exceptions based on (a) attribution solely due to the operation of community property law, (b) nominal ownership, (c) misappropriation of funds, or (d) abuse not amounting to duress.

Once the threshold conditions are met, equitable relief will ordinarily be granted in cases involving an unpaid liability on a joint return, if all of thefollowing elements are satisfied [*Rev. Proc. 2003-61, 2003-32 I.R.B. 296* (*supersedes Rev. Proc. 2000-15, 2000-1 C.B. 447* , effective for requests for relief filed on or after November 1, 2003); *see, e.g., Feldman v. Comm'r, T.C. Memo 2003-201* (relief denied)]:

1. The spouse seeking relief is no longer married to, or is legally separated from, the other spouse, or has not been a member of the same household as the other spouse at any time during the 12-month period ending on the date relief was requested;

2. At the time the return was signed, the spouse seeking relief had no knowledge or reason to know that the tax would not be paid [*see, e.g., George v. Comm'r, T.C. Memo 2004-261* (relief denied when widow claimed she believed taxes reported on returns she signed after husband's death had already been paid by husband); *Wiest v. Comm'r, T.C. Memo 2003-91* (relief granted); *Collier v. Comm'r, T.C. Memo 2002-144* (relief denied when spouse failed to demonstrate lack of knowledge)] and it was reasonable for the spouse to believe that the other spouse would pay the reported liability; and

3. The spouse seeking relief will suffer economic hardship (based on rules similar to those provided in I.R.S. Regulations on Procedure and Administration § 301.6343-1(b)(4)) [*see, e.g., Washington v. Comm'r (2003) 120 T.C. 137, 149-150* (relief granted; spouse would suffer great economic hardship if

not relieved of tax liability); *Castle v. Comm'r, T.C. Memo 2002-142* (relief denied when spouse failed to demonstrate inability to meet basic living expenses if required to pay tax liability)] if relief is not granted.

If a spouse fails, or is ineligible for, this primary test, then additional factors listed in *Rev. Proc. 2003-61* may be considered and balanced to grant equitable relief [*see Rev. Proc. 2003-61, 2003-32 I.R.B. 296* (*supersedes Rev. Proc. 2000-15, 2000-1 C.B. 447* , effective for requests for relief filed on or after November 1, 2003); *see, e.g., Abeid v. Comm'r, 122 T.C. 404* (relief granted after step-by-step analysis of factors under former *Rev. Proc. 2000-15*)]. Factors that may be relevant include, but are not limited to: (1) the marital status of the spouse seeking relief (namely, whether he or she is separated or divorced from the other spouse); (2) whether the spouse seeking relief will suffer economic hardship if relief is not granted; (3) whether the spouse seeking relief knew or had reason to know that a liability would not be paid or would give rise to a deficiency [*see, e.g., Capehart v. Comm'r, T.C. Memo 2004-268* (relief denied to taxpayer who failed to satisfy "duty of inquiry" regarding tax shelter investments); *Sjodin v. Comm'r, T.C. Memo 2004-205* (relief denied to wife whose husband kept financial records in locked office because wife had reason to know from signed joint returns that taxes would not be paid); *Demirjian v. Comm'r, T.C. Memo 2004-22* (relief denied to taxpayer charged with constructive knowledge of understatement due to her failure to fulfill "duty of inquiry" regarding amended return); *Feldman v. Comm'r, T.C. Memo 2003-201* (relief denied when spouse had duty to investigate blatant factual inconsistencies in tax returns)]; (4) whether the other spouse has a legal obligation to pay the outstanding liability pursuant to a divorce decree or agreement (unless the spouse seeking relief knew or had reason to know that the other spouse would not pay the liability); (5) whether the spouse seeking relief received a significant benefit (beyond normal support) from the unpaid liability or item giving rise to the deficiency; and (6) whether the spouse seeking relief has made a good faith effort to comply with income tax laws in the years following the taxable year or years related to the request for relief [*Rev. Proc. 2003-61, 2003-32 I.R.B. 296* (*supersedes Rev. Proc. 2000-15, 2000-1 C.B. 447* , effective for requests for relief filed on or after November 1, 2003)].

"Reason to know" of the item giving rise to the deficiency is not weighed more heavily than other factors. In determining whether the spouse seeking relief had reason to know, the IRS will consider the spouse's level of education, the other spouse's deceit or evasiveness if present, the spouse's involvement in the activity generating the liability, the spouse's involvement in business and household financial matters, the spouse's business or financial expertise, and any lavish or unusual expenditures compared with past spending levels [*Rev. Proc. 2003-61, 2003-32 I.R.B. 296* (*supersedes Rev. Proc. 2000-15, 2000-1 C.B. 447* , effective for requests for relief filed on or after November 1, 2003); *see Ziegler v. Comm'r, T.C. Memo 2003-282* (relief denied; evidence spouse was misled by other spouse insufficient to overcome evidence that spouse had reason to know of omission of own earned income)].

Actual knowledge of the item giving rise to the deficiency is a strong factor weighing against relief [*see, e.g., Cullen v. Comm'r, T.C. Memo 2004-176* (relief denied to former husband who had actual knowledge of estranged wife's unreported income at time of filing joint return)], but the factor may be overcome if factors in favor of relief are particularly compelling [*Rev. Proc. 2003-61, 2003-32 I.R.B. 296* (*supersedes Rev. Proc. 2000-15, 2000-1 C.B. 447* , effective for requests for relief filed on or after November 1, 2003); *see, e.g., Foor v. Comm'r, T.C. Memo 2004-54* (relief granted despite fact that taxpayer should have known taxes would not be paid, due to existence of unusually strong factors in favor of relief); *Washington v. Comm'r (2003) 120 T.C. 137, 148-152* (relief granted; compelling reasons existed for IRS to grant discretionary relief even if spouse was aware that tax liability would not be paid)].

Factors that will weigh in favor of equitable relief include, but are not limitedto: (1) whether the other spouse abused the spouse seeking relief [*see, e.g., Sjodin v. Comm'r, T.C. Memo 2004-205* (spouse's controlling and secretive nature did not constitute abuse); *Bartak v. Comm'r, T.C. Memo 2004-83* (relief denied when wife participated in tax shelter with reluctance but was not abused or coerced)], and (2) whether the spouse seeking relief was in poor mental or physical health on the date the spouse signed the tax return [*Rev. Proc. 2003-61, 2003-32 I.R.B. 296* (*supersedes Rev. Proc. 2000-15, 2000-1 C.B. 447* , effective for requests for relief filed on or after November 1, 2003)].

A key requirement is that the spouse seeking relief reasonably assumed that the other spouse paid the tax or deficiency [*see, e.g.,* *Wiest v. Comm'r, T.C. Memo 2003-91* (relief granted partly due to showing that innocent spouse's W-2 forms were found in trunk of car belonging to deceptive spouse who had supposedly filed tax returns); *Castle v. Comm'r, T.C. Memo 2002-142* (relief denied)]. The spouse needs to demonstrate concrete grounds for his or her assumption [*see Castle v. Comm'r, T.C. Memo 2002-142* (relief denied despite spouse's testimony that she had no reason to know at time she signed return that tax would not be paid)].

Because *Rev. Proc. 2003-61* [*Rev. Proc. 2003-61, 2003-32 I.R.B. 296* (*supersedes* *Rev. Proc. 2000-15, 2000-1 C.B. 447* , effective for requests for relief filed on or after November 1, 2003)] permits great latitude in balancing the equitable factors, it appears that taxpayers who cannot satisfy the primary test for relief under *I.R.C. § 6015(f)* will usually be unsuccessful in obtaining relief by claiming that the IRS abused its discretion in considering the equitable factors [*see* *Wallace v. Comm'r, T.C. Memo 2003-330* (relief denied spouse who owed liability on *own* income, knew liability would be unpaid, significantly benefited from nonpayment, and suffered no economic hardship); *Penfield v. Comm'r, T.C. Memo 2002-254* (relief denied absent hardship, demonstrated lack of knowledge); *Castle v. Comm'r, T.C. Memo 2002-142* (relief denied absent hardship, spousal abuse, and sole liability of other spouse); *Collier v. Comm'r, T.C. Memo 2002-144* (relief denied when spouse benefited from nonpayment of taxes); *but see* *Foor v. Comm'r, T.C. Memo 2004-54* (relief granted despite wife's knowledge that husband was not likely to pay taxes, due to existence of unusually strong factors in favor of equitable relief); *Washington v. Comm'r (2003) 120 T.C. 137, 148-152* (relief granted; compelling reasons existed for IRS to grant discretionary relief even if spouse was aware tax liability would not be paid); *Wiest v. Comm'r, T.C. Memo 2003-91* (relief granted; IRS made arbitrary findings on spouse's lack of knowledge and liability attributable to other spouse)].

[vii] Tax Court Review

The election procedures for both innocent spouse relief under *I.R.C. § 6015(b)* and the separate liability election under *I.R.C. § 6015(c)* anticipate a determination by the IRS If the election is denied, the taxpayer may petition the Tax Court for review. The petition must be filed 90 days following the date on which the denial is mailed or (if earlier) six months after the election is filed [*I.R.C. § 6015(e)(1)*; *see, e.g.,* Raymond (Ranie M.) v. Commissioner (2002)]. The Tax Court has jurisdiction to decide the applicability of relief, but its jurisdiction in "stand alone" cases brought under *I.R.C. § 6015(e)* is limited to reviewing the IRS's denial of relief available under *I.R.C. § 6015(b), (c),* and *(f)* from an otherwise existing joint and several tax liability [*I.R.C. § 6015(e)(1)(A)*; *Block v. Comm'r (2003) 120 T.C. 62* (no jurisdiction to determine whether taxpayer's underlying assessment was barred by statute of limitations)]. Review of denial of relief is a de novo proceeding based on an abuse of discretion standard, and is not limited to matter contained in the IRS's administrative record [*Ewing v. Comm'r (2004) 122 T.C. 32]* . The Tax Court loses jurisdiction if the year at issue is the subject of a tax refund suit in the other federal courts [*I.R.C. § 6015(e)(3)(A)*].

If a current or former spouse seeks innocent spouse relief from the IRS outside a deficiency proceeding, the other ("nonelecting") spouse may participate in any administrative proceedings [*I.R.C. § 6015(e)*; *see also* *Corson (Thomas) v. Commissioner (2000) 114 T.C. 354, 364-365* ; *Hale Exemption Trust v. Commissioner, T.C. Memo. 2001-89]* . However, the nonelecting spouse may not seek judicial review of an administrative grant of innocent spouse relief by the IRS, unless the electing spouse has filed a deficiency, stand-alone, or collection review proceeding [Maier (John, III) v. Commissioner (2002)]. The Tax Court is required to establish rules that provide an individual who has filed a joint return but who has not made the election adequate notice and an opportunity to join the proceeding as a party [*I.R.C. § 6015(e)(4)*; *Van Arsdalen (Diana) v. Commissioner (2004) 123 T.C. 135, 140-143* (spouse may intervene to *support* other spouse's claim); *Corson v. Commissioner (2000) 114 T.C. 354, 360-361* (spouse may intervene to *oppose* other spouse's claim)].

[viii] California Law

The California personal income tax law contains an innocent spouse provision similar to the federal provision in effect

prior to 1998 [*see Rev. and Tax. Code § 18533*]. Until January 1, 2009, a taxpayer who is granted relief under *I.R.C. § 6015* is eligible for California relief if the facts and circumstances are the same [*Rev. and Tax. Code § 18533(i)* (sunset *Rev. and Tax. Code § 18533(m)*)]. In addition, the Franchise Tax Board (FTB) may relieve a spouse of liability for nonpayment of taxes (including interest and penalties) for any year in which a joint return is filed. The spouse must establish that he or she did not know, and hadno reason to know, of the nonpayment at the time the return was filed [*Rev. & Tax. Code §§ 18533(b), 19006(c)(2)*].

A spouse cannot be relieved of liability for tax on income earned by, or subject to the exclusive management of, that spouse. The liability of a spouse for the tax, penalties, and interest due for the taxable year must be in the same ratio to the total tax, penalties, and interest due for the taxable year as the income earned by or subject to the management and control of the spouse is to the total gross income reportable on the return [*Rev. & Tax. Code § 19006(c)(1)(A)*]. Moreover, relief by the FTB cannot lower a spouse's liability by more than the amount actually paid on the liability (including credits from other taxable years available to be applied against the liability) before relief is granted [*Rev. & Tax. Code § 19006(c)(1)(B)*].

The FTB must wait at least 30 days after notifying the other spouse before revising the liability of the innocent spouse. The FTB must decide whether, under all the facts and circumstances, it would be inequitable to hold the spouse requesting relief liable [*Rev. & Tax. Code § 19006(c)(4)*].

[h] Family Court Enforcement of Tax Liabilities Despite Federal "Innocent Spouse" Treatment

Despite the treatment of a party as an "innocent spouse" under federal law, a state family law court is not precluded from enforcing a preexisting provision of an agreement and judgment that requires both spouses to equally share tax obligations. Federal recognition of a party as an "innocent spouse" is an administrative determination--typically involving an administrative hearing or informal negotiation--and is not a formal adjudication of rights and duties as between the spouses. The federal statute that permits innocent spouse relief [*I.R.C. § 6015*] does not preempt a state court's ability to impose federal tax liability on an innocent spouse [*In re Marriage of Hargrave (1995) 36 Cal. App. 4th 1313, 1320-1321, 43 Cal. Rptr. 2d 474]* . Courts have observed that the "federal government has no interest in how states allocate tax liability between divorcing spouses, as long as they do not interfere with IRS collection efforts." The important federal interest, in those courts' view, is the right of the IRS to obtain direct payment of federal taxes from the party of its choosing, rather than in determining how state court's allocate liability between the spouses [*In re Marriage of Hargrave (1995) 36 Cal. App. 4th 1313, 1320-1321, 43 Cal. Rptr. 2d 474* ; *see Ravetti v. United States (9th Cir. 1994) 37 F.3d 1393, 1396-1396]* .

[3] Married Taxpayers Filing Separately

[a] General Rules

Spouses may file separate income tax returns and be subject to the rate schedules for married persons filing separately [*I.R.C. § 1(d), (i)*]. The use of separate returns almost always results in a higher total tax than a joint return, and precludes eligibility for the earned income credit [*Becker v. C.I.R., T.C. Memo. 1995-177]* . Thus, separate returns typically are used only if one or both spouses seek to avoid joint and several tax liability because, for example, the spouses are separated. If separate returns are used in a community property jurisdiction, the general rule is that each spouse must report one-half of the community income and all of his or her separate income [*Poe v. Seaborn (1930) 282 U.S. 101, 118, 51 S. Ct. 58, 75 L. Ed. 239* ; *Mischel (Francis Z.) v. Commissioner, T.C. Memo. 1997-350* ; Prop. *Treas. Reg. § 1.66-1*, Reg. 115054-01, *2002-7 I.R.B. 530 (2/19/02)* (published at *67 FR 2841 (January 22, 2002))]* . The earnings of either spouse or the income from community property (including gains or losses from any sales or exchanges) are divided equally between the spouses; income from separate property is taxable to the owner spouse alone. Quasi-community property is separate property during marriage, and therefore the income from quasi-community property is separate income for tax purposes [*see Sbicca v. Commissioner (1960) 35 T.C. 96]* .

In short, federal tax law generally follows state-created property rights in determining what income is taxable to each spouse filing a separate return. This rule may represent a hardship if, despite each spouse's legal right to one-half of the community income, one spouse is taxed on community income to which he or she has no practical access. In recognition of this problem, the Internal Revenue Code provides that, in certain instances, community income can be treated as separate income for income tax purposes. Community income may be recharacterized as separate income if the spouses are separated for the entire year [*I.R.C. § 66(a)*], if one spouse does not notify the other spouse of the existence of community income [*I.R.C. § 66(b)*], or if it is inequitable to one of the spouses to treat income as community property [*I.R.C. § 66(c)*].

If either spouse is a nonresident alien, the community income of the spouses is recharacterized as separate income for income tax purposes according to special rules [*I.R.C. § 879(a)*]. In addition, the earnings of a child are taxable to the child alone, regardless of the fact that the earnings may be community or separate property of the parents under California law [*I.R.C. § 73*].

PRACTICE TIP:

A joint return filed early can be changed to a separate filing if the separate return is filed before the last filing date for either spouse. A joint return filed after the last filing date cannot be changed. A separate return can be changed to a joint return at any time within three years of the last date to file a separate return (without extensions). If one spouse has a risky financial record, file a separate return, with an agreement to amend the filing to a joint return (if this is otherwise permissible) after an audit or other protection is in place.

[b] Treatment and Recharacterization of Income of Spouses Living Apart

Under California law, the earnings of a spouse while living separate and apart from the other spouse are the separate property of the earning spouse [*Fam. Code § 771*]. This provision applies only if the spouses have separated with no present intention of resuming the marital relationship [*In re Marriage of Imperato (1975) 45 Cal. App. 3d 432, 435, 119 Cal. Rptr. 590]* . If spouses separate without intending a final break in the marital relationship, the earnings of each spouse continue to be treated as community property. Earnings of separated spouses that are treated as community property under California law are also treated as community property for federal and California income tax purposes. The earnings may be treated as separate property for federal income tax purposes, however, under *I.R.C. § 66(a)*. California personal income tax law does not have a similar provision for recharacterizing the community income of separated spouses.

Community income of separated spouses may be recharacterized for federal income tax purposes under *I.R.C. § 66(a)*, if each spouse files a separate return reporting only his or her separate income as recharacterized. In addition, to qualify for separate property tax treatment of community income, the spouses must meet all of the following requirements [*I.R.C. § 66(a)*]:

- They are married to each other at any time during the calendar year.
- They live apart at all times during the calendar year.
- They do not file a joint return with each other for a taxable year beginning or ending during the calendar year.
- One or both have "earned income" that is community income for the calendar year, no portion of which is transferred directly or indirectly between them before the close of the calendar year [*see Layman, II (Daniel F.) v. Commissioner, T.C. Memo. 1999-218* (income earned by separated spouse

living in community property state was divisible between spouses for tax purposes, even though other spouse was domiciled in separate property jurisdiction)].

"Earned income" is defined as wages, salaries, or professional fees, together with other amounts received as compensation for personal services actually rendered. Earned income does not include compensation for personal services rendered by the taxpayer to a corporation, if the compensation represents a distribution of earnings and profits rather than a reasonable allowance for services actually rendered. If the taxpayer is engaged in a trade or business in which both personal services and capital are material income-producing factors, a reasonable allowance as compensation for the personal services of the taxpayer is considered earned income. This reasonable allowance may not exceed 30 percent of the taxpayer's share of the net profits of the trade or business [*I.R.C. §§ 66(d)(1), 911(b), (d)(2)*; *see I.R.C. § 911(b)*, prior to amendment by Pub. L. No. 97-34]. Legislative history indicates that de minimis transfers of earned income between spouses are disregarded. Also, payments to or for the benefit of the couples' dependent children are not considered indirect transfers to the recipient spouse solely because the payments satisfy the recipient spouse's child support obligations [H.R. Rep. No. 96-1278, Pub. L. No. 96-605, *reprinted at 1980-2 C.B. 709, 711* ; *see* IRS Publication 555, *Federal Tax Information on Community Property*]. Legislative history also indicates that Congress conceived of *I.R.C. § 66(a)* as a protection for abandoned spouses [H.R. Rep. No. 96-1278, Pub. L. No. 96-605, *reprinted at* 1980-2 C.B. 709, 711]. However, its application is much broader and extends to separated spouses in general, including, for example, spouses separated for work reasons.

If the requirements of *I.R.C. § 66(a)* are met, the community income of the spouses is recharacterized according to four rules [*I.R.C. §§ 66(a), 879(a)*; *Treas. Reg. § 1.879-1(a)*]. First, earned income, other than trade or business income or a partner's distributive share of partnership income, is treated as the separate income of the spouse who rendered the personal services [*I.R.C. § 879(a)(1)*]. Second, community income and deductions derived from a trade or business, other than a trade or business carried on by a partnership, are treated as the separate income and deductions of the spouse carrying on the trade or business, or if the trade or business is jointly operated, its income and deductions are treated as the income and deductions of each spouse on the basis of his or her distributive share [*I.R.C. §§ 879(a)(2), 1402(a)(5)(A)*]. Third, any portion of a partner's distributive share of ordinary income and loss that is considered community income under state law is treated as the separate income and loss of the partner spouse [*I.R.C. §§ 879(a)(2), 1402(a)(5)(B)*]. Fourth, any community income not described in th first three rules that is derived from the separate property of one spouse is treated as the separate income of that spouse [*I.R.C. § 879(a)(3)*]. No other community income is recharacterized for federal income tax purposes [*I.R.C. § 879(a)(4)*].

[c] Recharacterization of Income by IRS for Failure to Notify Spouse of Community Income

The IRS may disallow the benefits of state community property laws with respect to any income of the taxpayer, if the taxpayer acted as if solely entitled to the income and failed to notify his or her spouse of the nature and amount of the income before the due date (including extensions) for filing the return for the taxable year in which the income was derived [*I.R.C. § 66(b)*]. Thus, a taxpayer who fails to notify his or her spouse of his or her earnings may be required by the IRS to report all of those earnings (rather than half) as separate income on the taxpayer's separate return [Prop. Treas. Reg. § 1.66-3, Reg. 115054-01, *2002-7 I.R.B. 530 (2/19/02)* (published at *67 FR 2841 (January 22, 2002))]* . This statute apparently is directed at instances in which the IRS discovers unreported income and the spouse to whom it is attributable claims that half should be taxed to the other spouse.

[d] Recharacterization of Income by Ignorant Spouse

[i] Distinguished From Recharacterization by IRS

In certain circumstances, taxpayers are permitted to recharacterize community income as separate income for federal tax purposes [*I.R.C. § 66(c)*]. Although *I.R.C. § 66(c)* covers much the same ground as *I.R.C. § 66(b)* [*see § 227.19[3][c]*], *I.R.C. § 66(c)* is more helpful because it is directed at the ignorant spouse, rather than the spouse who conceals

community income. A taxpayer who is unaware of specific items of community income and fails to report half of it on a separate return is not penalized if the taxpayer meets the requirements for recharacterization of community income provided by *I.R.C. § 66(c)*. Instead, those items will be included in the income of his or her spouse [*see, e.g., Dooley v. Commissioner (1992) T.C. Memo 1992-39*], and the IRS will issue a deficiency assessment against the spouse if the spouse has not already reported all of the recharacterized items of income [*I.R.C. § 66(c)*; Prop. *Treas. Reg. § 1.66-4*, Reg. 115054-01, *2002-7 I.R.B. 530 (2/19/02)* (published at *67 FR 2841 (January 22, 2002))]* .

[ii] Requirements for Recharacterization

A taxpayer may recharacterize a specific item of community income as separate income under *I.R.C. § 66(c)* if four requirements are met. First, the taxpayer has not filed a joint return for the taxable year in question [*I.R.C. § 66(c)(1)*]. Second, the taxpayer has not, for that taxable year, included in gross income a properly includable item of community income that would be treated as income of the other spouse under the rules contained in *I.R.C. § 879(a)* [*I.R.C. § 66(c)(2)*]. Third, the taxpayer establishes that he or she did not know of, and had no reason to know of, the item of community income to be recharacterized [*I.R.C. § 66(c)(3)*; *see*Prop. *Treas. Reg. § 1.66-4*, Reg. 115054-01, *2002-7 I.R.B. 530 (2/19/02)* (published at *67 FR 2841 (January 22, 2002))]* . Fourth, it would be inequitable, considering all of the facts and circumstances, to include the item of community income in the taxpayer's gross income [*I.R.C. § 66(c)(4)*; *see*Prop. *Treas. Reg. § 1.66-4*, Reg. 115054-01, *2002-7 I.R.B. 530 (2/19/02)* (published at *67 FR 2841 (January 22, 2002))* ; *Rev. Proc. 2003-61, 2003-32 I.R.B. 296* (*supersedes* Rev. Proc. 2000-15, 2000-1 C.B. 447, effective for requests for relief filed on or after November 1, 2003)].

Although a taxpayer initiates the process by failing to include the items of community income in his or her gross income, the IRS determines whether the taxpayer had no reason to know of the income and whether recharacterization is equitable [*see I.R.C. § 66(c)*]. In determining whether recharacterization is equitable, the IRS may consider whether the taxpayer benefitted from the income and whether the taxpayer made his or her claim for recharacterization sufficiently promptly to prevent the assessment limitations period from running on the other spouse [House Comm. Report on Tax Reform Act of 1984, § 424, Pub. L. No. 98-369].

Apart from the general requirements for recharacterization of income discussed above, a spouse may be relieved from liability on equitable grounds. If, taking into account all the facts and circumstances, it is inequitable to hold the individual liable for any unpaid tax or any deficiency (or any portion of either) attributable to any item for which relief is not available under (*I.R.C. § 66(c)*), the IRS may relieve that individual of the liability [*I.R.C. § 66(c)*].

Ignorant spouse relief under *I.R.C. § 66* generally parallels innocent spouse relief under *I.R.C. § 6015*. Revenue procedures applicable to both provisions are found in *Rev. Proc. 2003-61* . Spouses seeking relief under *I.R.C. § 66* must file the appropriate IRS "Request for Innocent Spouse Relief" form, and the IRS must notify the other spouse of any request for relief and permit him or her an opportunity to participate in the administrative determination of whether relief is appropriate [Prop. *Treas. Reg. § 1.66-4*, Reg. 115054-01, *2002-7 I.R.B. 530 (2/19/02)* , published at *67 FR 2841 (January 22, 2002)* ; *Rev. Proc. 2003-61, 2003-32 I.R.B. 296* (*supersedes Rev. Proc. 2000-15, 2000-1 C.B. 447* , effective for requests for relief filed on or after November 1, 2003)]. However, the Tax Court lacks jurisdiction to consider a spouse's petition for independent ("stand alone") review of an IRS denial of a claim for equitable relief under *I.R.C. § 66*, because *I.R.C. § 66(c)* lacks a provision parallel to *I.R.C. § 6015(e)* [*Bernal v. Comm'r (2003) 120 T.C. 102* ; for discussion of independent review procedure under *I.R.C. § 6015(e), see § 227.19[2][g][vii]*].

[iii] Proving Ignorance

Many spouses seeking recharacterization of items of community income under *I.R.C. § 66(c)* have found it difficult to prove that they lacked knowledge of that income. For example, a taxpayer was not permitted to recharacterize any of her husband's community property earnings, even though he placed his earned income in a savings account with his mother and transferred funds from that account to another account he shared with the taxpayer. The taxpayer knew of

the earned income, but did not initially know about the separate account. The court denied relief under *I.R.C. § 66(c)* because the taxpayer knew her husband was earning income that was community property under state law. It noted that she suffered no hardship because her husband used the funds for community expenses [*Bozek v. Commissioner (1986) T.C. Memo 1986-37* ; *cf., e.g., Hardy v. Comm'r (9th Cir. 1999) 181 F.3d 1002* (wife was taxable on half of community property income earned by husband when she was aware of income); *McGee v. Commissioner (1991) T.C. Memo 1991-510* ; *Jean Thatcher (1988) 56 T.C.M. 707 (CCH)]* .

[iv] Items Subject to Recharacterization

The community income items subject to recharacterization as separate income of the other spouse under *I.R.C. § 66(c)* are those items that would have been treated as separate income of the other spouse if *I.R.C. § 66(a)*, relating to spouses living apart, had applied [*I.R.C. §§ 66(c)(2), 879(a)*; *Treas. Reg. § 1.879-1(a)*]. Thus, the earned income of the other spouse, other than trade or business income and a partner's distributive share of partnership income, may be treated as the separate income of that spouse [*I.R.C. § 879(a)(1)*].

Community income and deductions derived from a trade or business, other than a trade or business carried on by a partnership, also may be shifted to the spouse carrying on the trade or business, or if the trade or business is jointly operated, to each spouse on the basis of his or her distributive share [*I.R.C. §§ 879(a)(2), 1402(a)(5)(A*); *see § 227.19[3][b]*].

If a spouse is a partner in a partnership, partnership income and loss that is considered community income or loss under state law may be treated as the separate income of the partner spouse. Any other community income, not described above, that is derived from the separate property of the other spouse may be treated as the separate income of that spouse [*I.R.C. § 879(a)(3)*].

[4] Status as Head of Household

[a] Qualifying Persons

The tax bracket amounts that apply to a person who qualifies as a head of household are more favorable than those for a person who files as a single person. Accordingly, filing as a head of household is more advantageous than filing as an unmarried individual [*compare I.R.C. § 1(b) with I.R.C. § 1(c)*]. A head of household is a taxpayer who, at the close of the taxable year, is not married, is not a surviving spouse, and who either [*I.R.C. § 2(b)(1)* (applicable to tax years beginning after December 31, 2004; *see*Pub. Law 108-311, § 202)]:

1. Maintains as his home a household which for more than one-half of the taxable year is the principal place of abode of a qualifying child of the individual, as defined, or of another relative for whom the taxpayer can claim a dependency exemption [*I.R.C. § 2(b)(1)(A*); *see I.R.C. § 152(c)* (qualifying child); *I.R.C. § 152(d)* (qualifying relative)]; or

2. Maintains a household which for the taxable year is the principal place of abode of the taxpayer's parent for whom the taxpayer can claim a dependency exemption [*I.R.C. § 2(b)(1)(B)*].

Under no circumstances may the same person be used to qualify more than one person as a head of household for the same taxable year [*Treas. Reg. § 1.2-2(b)(2)*].

A taxpayer who was a nonresident alien at any time during the taxable year may not be considered to be a head of household [*I.R.C. § 2(b)(3)(A)*]. Also, head-of-household status is unavailable if the person claimed as a dependent is unrelated to the taxpayer or is deemed a dependent under a multiple support agreement [*I.R.C. § 2(b)(3)(B)*; *see I.R.C. § 152(d)(2)(H), (3), see also § 227.12[2][f]*].

[b] Cohabitation Requirements

Under present law, in order for a taxpayer to be considered a head of household for maintaining a household that is the abode for more than six months of a qualifying child or other dependent, the household must be the taxpayer's own home [*I.R.C. § 2(b)(1)(A)* (applicable to tax years beginning after December 31, 2004)]. Under prior law, there was authority that with respect to a *child*, it was not sufficient if the taxpayer maintained the household without occupying it [*see Stanford (Sharron K. Wirges) T.C. Memo. 1995-78* ; *McDonald (Lillie B.) T.C. Memo. 1991-242* (taxpayer who maintained separate principal residences for self and son did not qualify for head of household status)], but there was also authority that the household need not be the taxpayer's sole or principal place of abode, as long as there is a substantial period of cohabitation with the child [*see Smith v. Commissioner (9th Cir. 1964) 332 F.2d 671, 673* , reversing *40 T.C. 591 (1963)* ; *see also Grace v. Commissioner (5th Cir. 1969) 421 F.2d 165, 166* , *aff'd, 51 T.C. 685 (1969)* ; *Muse v. United States (4th Cir. 1970) 434 F.2d 349, 352-353]* . There is no cohabitation requirement if the taxpayer maintains a household which for the taxable year is the principal place of abode of the taxpayer's parent [*I.R.C. § 2(b)(1)(B)*; *Treas. Reg. § 1.2-2(b)(1), (c)(1)*].

The household must constitute the principal place of abode of the child for more than one half of the taxable year [*I.R.C. § 2(b)(1)(A)*]. Unlike the dependency exemption, head-of-household filing status is not a tax benefit that may be transferred by the custodial parent to the noncustodial parent based on the payment of more than half of a child's support [*I.R.C. § 2(b)(1)(A)* (applicable to tax years beginning after December 31, 2004, excluding "qualifying child" assigned under *I.R.C. § 152(e)* to noncustodial parent); *see Grace v. Commissioner (5th Cir. [T.C.] 1969) 421 F.2d 165, 166]* .

Temporary absences from the household due to special circumstances do not disqualify the taxpayer under the cohabitation requirement. A custody agreement under which a child is absent from the taxpayer's home for less than six months of the year is considered a temporary absence due to special circumstances [*Treas. Reg. § 1.2-2(c)(1)*].

In order to establish a temporary absence, the taxpayer or child must bereasonably expected to return to the household, and the taxpayer must continue to maintain the household in anticipation of the return [*Treas. Reg. § 1.2-2(c)(1)*; *see Addison (Beverly P.) T.C. Memo. 1992-349* (mother did not meet requirements for head-of-household filing status because daughter's absence from home to attend school was not deemed temporary)]. For example, a taxpayer will not be denied head of household status if the qualifying person is temporarily maintained in a mental institution and the household is held open for his or her return [*W.J. Hein (1957) 28 T.C. 826, 835]* . Head of household status will be denied a parent whose child leaves the family household and establishes a separate residence for more than half the year [*see Prendergast v. C.I.R. (9th Cir. 1973) 483 F.2d 970, 971* (decided under prior law requiring taxpayer's home to be child's principal place of residence for entire year)].

The fact that the person for whom the abode is furnished is born or dies within the taxable year will not prevent the taxpayer from qualifying as a head of household if the household constitutes the principal place of abode for the dependent for the remaining or preceding part of the taxable year [*Treas. Reg. § 1.2-2(c)(1)*].

[c] Costs of Maintaining Household

A taxpayer will be considered as maintaining a household only if he or she pays more than one half of the cost of the household for the taxable year [*I.R.C. § 2(b)(1)*]. "Cost" includes property taxes, mortgage interest, rent, utility charges, upkeep and repairs, property insurance, and food consumed on the premises. Maintenance costs do not include such items as clothing, education, medical treatment, vacations, life insurance, and transportation [*Treas. Reg. § 1.2-2(d)*].

The cost of maintaining the household must be distinguished from the costs of supporting the child or other qualifying person. In the case of divorced parents, there is no requirement that the parent claiming head-of-household status pay more than half of the support for the child, as long as he or she pays over half the cost of maintaining the household [*Treas. Reg. § 1.2-2(b)(3)(i)*]. A custodial parent may release the dependency exemption for a child to a noncustodial

parent who pays more than half of the child's support, but still claim head-of-household status [*I.R.C. § 2(b)(1)(A)(i)*; *see I.R.C. § 152(e)(2)*].

[d] Rights of Certain Married Persons to Head of Household Filing Status

Head-of-household status ordinarily is limited to single persons [*I.R.C. § 2(b)(1)*; *compare I.R.C. § 1(b) with I.R.C. § 1(d)* (tax rates of head of household and married individuals filing separately); *see also I.R.C. § 1(i)* (reduced tax rates after 2000)]. However, an individual who is legally separated from his or her spouse under a decree of divorce or of separate maintenance is not considered as married [*I.R.C. § 2(b)(2)(A)*].

In addition, a married taxpayer who is living apart from his or her spouse is not deemed married, and therefore is eligible to file as a head of household if he or she otherwise qualifies, provided the individual meets *all* of the following requirements [*I.R.C. §§ 2(c), 7703(b)*; *Rev. & Tax. Code §§ 17021.5, 17042*; *see Treas. Reg. § 1.2-2(e)*]:

- Files a separate income tax return;
- Maintains as his or her home a household that is, for more than half of the taxable year, the principal place of abode of a dependent child or stepchild [*see I.R.C. § 152(f)(1)*];
- Is entitled to a dependency deduction for the child or stepchild;
- Furnishes more than half of the cost of maintaining the household; and
- Does not have, for the last six months of the taxable year, his or her spouse as a member of the household [*see Diaz v. Comm'r, T.C. Memo 2004-145* (married taxpayer filing separate return not entitled to earned income credit under *I.R.C. § 32(a)* absent evidence of date of wife's departure from household)].

Although spouses can be living separate and apart under California law and yet reside under the same roof, the Tax Court refuses to follow this approach, holding instead that a married taxpayer living in the same household with his or her spouse while obtaining a divorce is not eligible to file as a head of household [*Hopkins v. Commissioner, T.C. Memo. 1992-326* (head of household status denied taxpayer who occasionally allowed former spouse to sleep in living room because of former spouse's inability to secure housing for himself); *Dawkins v. Commissioner, T.C. Memo. 1991-225* (filing status of divorcing taxpayer who lived in separate quarters under same roof with spouse was "married filing separate," not "head of household")]. As a result, because the Ninth Circuit has not specifically addressed this issue, the current rule is that both spouses cannot live under the same roof and be deemed living separate and apart [*see Hopkins v. Commissioner, T.C. Memo. 1992-326* ; *see also Jackson v. Commissioner (1996), T.C. Memo 1996-54* (taxpayer's home may not constitute "separate household" if it lacks kitchen and telephone privileges); *but see Sydnes v. Commissioner (8th Cir. 1978) 577 F.2d 60, 62* (in case involving tax treatment of support payments, Eighth Circuit rejected this strict standard for separated and living apart)].

The taxpayer's spouse will be considered a member of the household during a period in which the spouse is absent from the household temporarily. For example, the spouse will be considered a household member during periods that he or she is away from the household due to illness, educational activities, business, vacation, or military service [Treas. Reg. § 1.143-1(b)(5) (regulation does not reflect change in requirement regarding former spouse's residence fromentire taxable year to last six months of taxable year)].

PRACTICE TIP:

Note that the IRS regularly matches returns of alimony payors and payees. A deficiency notice may be sent to both parties if the payor reports a deduction while the payee fails to include the payments in

income.

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Volume 19: Dissolution of Marriage: Child Custody thru Dissolution of Marriage: Tax Effects of Dissolution-Chs.223-239
Chapter 227 DISSOLUTION OF MARRIAGE: TAX EFFECTS OF DISSOLUTION
PART II. LEGAL BACKGROUND

19-227 California Forms of Pleading and Practice--Annotated §§ 227.20-227.39

AUTHOR: Original text by Frederick W. Campbell-Craven, J.D.

[Reserved]

§§ 227.20[Reserved]

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PART III. RESEARCH GUIDE

19-227 California Forms of Pleading and Practice--Annotated § 227.40

AUTHOR: Original text by Frederick W. Campbell-Craven, J.D.

§ 227.40 Federal Statutes

Treatment of community income. *I.R.C. § 66*

Alimony and separate maintenance payments. *I.R.C. § 71*

Exclusion of certain death benefits, gifts and inheritances, and amounts received from accident and health plans from gross income. *I.R.C. §§ 101, 102, 105*

Deductions for personal exemptions. *I.R.C. §§ 151-153*

Additional itemized deductions for individuals. *I.R.C. § 211 et seq.*

Taxability of beneficiary of employees' trust. *I.R.C. § 402*

Individual Retirement Accounts (IRAs). *I.R.C. § 408*

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Trusts distributing only current income. *I.R.C. § 652*

Inclusion of amounts in gross income of beneficiaries of estates and trusts accumulating income or distributing corpus. *I.R.C. § 662*

Treating grantors and others as substantial owners. *I.R.C. §§ 672, 677, 678*

Estate or trust income in case of divorce. *I.R.C. § 682*

Determination of amount of and recognition of gain or loss. *I.R.C. §§ 1001, 1012, 1014-1016*

Involuntary conversions. *I.R.C. § 1033*

Transfers of property between spouses or incident to divorce. *I.R.C. § 1041*

Gross estate. *I.R.C. § 2031 et seq.*

Taxable estate. *I.R.C. § 2051 et seq.*

Determination of gift tax liability, transfers, and deductions. *I.R.C. §§ 2503, 2511, 2512, 2516, 2523*

Joint income tax returns. *I.R.C. § 6013*

Failure to comply with information-reporting requirements. *I.R.C. §§ 6723, 6724*

Determination of marital status. *I.R.C. § 7703*

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19-227 California Forms of Pleading and Practice--Annotated § 227.41

AUTHOR: Original text by Frederick W. Campbell-Craven, J.D.

§ 227.41 Federal Regulations

Payments for support of minor children. Treas. Reg. § 1.71-1T(c)

Deduction for periodic alimony payments. *Treas. Reg. § 1.215-1*

Additional exemptions for dependents. *Treas. Reg. § 1.151-2(a)*

Sale of residential property. *Treas. Reg. § 1.165-9*

Examples of personal, living, and family expenses. *Treas. Reg. § 1.262-1(b)*.

Eligible rollover distributions. Treas. Reg. § 1.402(c)-2T

Trust income in case of divorce. *Treas. Reg. § 1.682(a)-1*

Treatment of community income. *Treas. Reg. § 1.879-1*

Joint returns. *Treas. Reg. § 1.6013-1*

Exemption from gift tax of transfers in settlement of support obligations. *Treas. Reg. § 25.2516-2*

Application of post-1984 rules to divorce or separation instruments executed before 1985. Temp Treas. Reg. § 1.71-1T

Dependency support test for children of divorced parents. Temp. Treas. Reg. § 1.152-4T

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19-227 California Forms of Pleading and Practice--Annotated § 227.42

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§ 227.42 State Statutes

Specificity of client billing statements. *Bus. & Prof. Code § 6148(b)*

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Head of household; conformity to Internal Revenue Code. *Rev. & Tax. Code § 17042*

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"Surviving spouse" defined. *Rev. & Tax. Code § 17046*

Gross income; conformity to Internal Revenue Code. *Rev. & Tax. Code § 17081*

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Treatment of community income. *Rev. & Tax. Code § 18534*

Liability of husband and wife for tax. *Rev. & Tax. Code § 19006*

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19-227 California Forms of Pleading and Practice--Annotated § 227.43

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§ 227.43 Decisions

[1] Alimony Tax Treatment

Payments made by one spouse to another in settlement of property rights are not tax-deductible alimony. *Beard v. Commissioner (1981) 77 T.C. 1275*

[2] Child Support

Special rules applicable in determining support of children of divorced or separated parents do not apply to a parent who is ordered to pay child support but who was never married to the child's other parent. *Radin v. Commissioner (1987) T.C. Memo 1987-348*

Special rules applicable in determining support of children of divorced or separated parents do not apply to separated but not yet divorced parent who is living in the family household. *Dawkins v. Commissioner (1991) T.C. Memo 1991-225*

Payments made in excess of reasonable support obligations, or payments to adult children to whom the payor owes no obligation of support, do not constitute taxable gifts. *Spruance v. Commissioner (1973) 60 T.C. 141, 150-153 , aff'd without op., 505 F.2d 731 (3d Cir. 1974)*

[3] Deductibility of Attorney's Fees

Attorney's fees paid in connection with a dissolution, judgment of nullity, legal separation, or decree for support that are properly attributable to the production or collection of spousal support payments are includable in the gross income

of the recipient spouse and deductible as an expense for the production of income. *Wild v. Commissioner (1964) 42 T.C. 706, 709-711 , acq., 1967-2 C.B. 4*

Attorney's fees are not deductible if one spouse either agrees to or is ordered by the court to pay the expenses incurred for tax advice sought by the other spouse. *Carpenter v. United States (Ct. Cl. 1964) 338 F.2d 366, 369*

Legal expenses arising from dissolution or separation that are attributable to division of property or claims regarding the existence of community property and the spouses' rights in it are not deductible by either spouse as an expense incurred either for the production of income or the management, conservation, or maintenance of property held for the production of income. *United States v. Gilmore (1963) 372 U.S. 39, 51-52, 83 S. Ct. 623, 9 L. Ed. 2d 570*

Legal fees for valuing a law partnership interest in property division are nondeductible personal expenses. *Melat v. Commissioner (1993) T.C. Memo 1993-247*

[4] Family Support

Child support payments denominated as alimony in a decree entered prior to 1985 are not recharacterized as child support payments. *Thornton v. Commissioner (1992) T.C. Memo 1992-286*

Provision in divorce instrument that allowed spousal support to be decreased by court-ordered increases in child support does not constitute a contingency relating to a child. *Heller v. Commissioner (1994) T.C. Memo 1994-423*

[5] Income Tax Returns

Whether a particular individual is married or single for income tax purposes is determined under state law. *Calhoun v. Commissioner (1992)T.C. Memo 1992-246*

Spouses who are not legally separated under a court judgment of legal separation, even though they are living apart under a written separation agreement, are considered married for tax purposes. *Ashby v. Commissioner (1984) T.C. Memo 1984-121*

Judgment of nullity operates to rescind any joint returns made in prior taxable years because the marriage was never valid, and as requiring that amended separate returns be filed for those years. *Wilson v. Commissioner (1976) T.C.Memo 1976-285*

Full amount of tax, penalties, and interest are assessable against either spouse. *Furnish v. C.I.R. (9th Cir. 1958) 262 F.2d 727, 731*

Assessment against one spouse does not prevent assessment against the other. *Bloomfield v. Commissioner (1969) 52 T.C. 745, 751-752*

Ex-wife's failure to notify the IRS of her new address precluded her from complaining that she had not received a copy of a joint deficiency notice in time to file a petition with the Tax Court. *Kirk v. Commissioner (1991) T.C. Memo 1991-504*

Spouse seeking innocent spouse relief from tax liability has burden of proving by a preponderance of the evidence that when he or she signed the return, he or she did not know of, and had no reason to know of, the substantial understatement of gross income. *LaBelle v. Commissioner (1986) T.C. Memo 1986-602*

Spouses who establish that they did not know or have reason to know that a deduction would give rise to a substantial understatement are entitled to innocent spouse relief. *Price v. Commissioner (9th Cir. 1989) 887 F.2d 959*

Spouse filing a separate return that omits community income attributable to the other spouse is not entitled to innocent spouse relief. Galliher v. Commissioner (1974) 62 T.C. 760, 762-763, *aff'd,* 512 F.2d 1404 (5th Cir. 1975), *cert. denied,* 423 U.S. 988 (1975)

Filing status of divorcing taxpayer who lived in separate quarters under same roof with spouse is "married filing separate" rather than "head of household." *Dawkins v. Commissioner (1991) T.C. Memo 1991-225*

[6] Property Division

Transfers of property are exempt if "founded" on the divorce decree rather than on an agreement of the parties. *Harris v. Commissioner (1950) 340 U.S. 106, 108-113, 71 S. Ct. 181, 95 L. Ed. 111*

Redemption of wife's shares of stock in family corporation, although incident to a divorce judgment, was not a transfer on behalf of husband and therefore was not entitled to nonrecognition. *Blatt v. Commissioner (1994) 102 T.C. 77, 83*

[7] Retirement Benefits

Failure to provide for pension distributions in Qualified Domestic Relations Order (QDRO) makes pension plan distribution taxable to employee spouse. *Hawkins v. Commissioner (1994) 102 T.C. 61, 77*

[8] Sale or Exchange of Personal Residence

NOTE:
The following cases were decided under former *I.R.C. § 1034*.

Home held of record by taxpayer's child or bought in name of mother is insufficient legal interest in taxpayer to qualify for rollover-of-gain provisions. *Marcello v. Commissioner (1964) T.C. Memo 1964-299 , rev'd on other grounds, 380 F.2d 499 (5th Cir. 1967)*

Taxpayers' previous home remains a principal residence for rollover purposes despite a three-year absence from the home and periods of leasing the home, if they could not sell their home because of depressed real estate market conditions. *Clapham v. Commissioner (1975) 63 T.C. 505, 512*

Taxpayer's principal residence remains her principal residence for rollover purposes even though she had not lived in the house on a permanent basis for six years at the time she sold it because, after moving away, she was prevented from selling the house by her coowner. *Green v. Commissioner (1992) T.C. Memo 1992-439*

Whether family residence qualifies as the principal residence of a taxpayer who moves out and rents another dwelling generally depends on facts and circumstances of each case. *Houlette v. Commissioner (1967) 48 T.C. 350, 354*

Marital settlement agreement that is silent on capital gains tax allocation makes each spouse responsible for respective capital gains recognition. *Marriage of Harrington (1992) 6 Cal. App. 4th 1847, 1850-1852, 8 Cal. Rptr. 2d 631*

One spouse's failure to purchase a new principal residence within two years of sale of former marital residence makes both spouses jointly liable for additional tax plus interest and penalties. *William H. Murphy (1994) 103 T.C. No. 8*

[9] Spousal Support

Pre-1984 award of unallocated family support retains alimony treatment if 1988 modification for "child support" lacked express statement that post-1984 law applied. *Libman v. Commissioner (1990) T.C. Memo 1990-629*

Nunc pro tunc order clarifying true intent of original support decree will be honored for federal tax purposes. *Johnson v. Commissioner (1989) T.C. Memo 1989-415*

Voluntary payments made under an oral agreement that is never incorporated into a divorce decree or reduced to writing did not qualify for alimony tax treatment; neither income tax returns nor checks written to the supported spouse constitute the necessary written agreement. *O'Donnell v. Commissioner (1991) T.C. Memo 1991-74*

Dependency exemptions for grown children of divorced parents is allowable only on basis of financial support rather than on basis of custody. Sharon E. Kaechele (1992) *64 T.C.M. 459 (CCH)*

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Chapter 227 DISSOLUTION OF MARRIAGE: TAX EFFECTS OF DISSOLUTION
PART III. RESEARCH GUIDE

19-227 California Forms of Pleading and Practice--Annotated § 227.44

AUTHOR: Original text by Frederick W. Campbell-Craven, J.D.

§ 227.44 Law Reviews

O'Connell, *The Domestic Relations Tax Reform Act: How We Got It and What We Can Do About It*, 18 Fam. L.Q. 473 (1985)

Lathrope, *State-Defined Marital Status: Its Future as an Operative Tax Factor, 17 U.C. Davis L. Rev. 257 (1983)*

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Rice, *The Controversy With the IRS Over the Rental of Personal Residences, 9 J. Real Est. Tax'n 143 (1982)*

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19-227 California Forms of Pleading and Practice--Annotated § 227.45

AUTHOR: Original text by Frederick W. Campbell-Craven, J.D.

§ 227.45 Tax Pamphlets

Department of Treasury, Internal Revenue Service, Publication 504, *Tax Information for Divorced or Separated Individuals* (1992)

Department of Treasury, Internal Revenue Service, Publication 555, *Federal Tax Information on Community Property* (1992)

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Chapter 227 DISSOLUTION OF MARRIAGE: TAX EFFECTS OF DISSOLUTION
PART III. RESEARCH GUIDE

19-227 California Forms of Pleading and Practice--Annotated § 227.46

AUTHOR: Original text by Frederick W. Campbell-Craven, J.D.

§ 227.46 Text References

Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2d ed., ch. 160, *Tax Effects of Dissolution* (Matthew Bender 2d ed.)

Rice, California Family Tax Planning, Chs. 1, 14 (Matthew Bender)

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Volume 20: Easements thru Eminent Domain-Chs. 240-247
Chapter 240 EASEMENTS

20-240 California Forms of Pleading and Practice--Annotated 240.syn

AUTHOR: by William M. Hensley Editorial Consultant

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Volume 20: Easements thru Eminent Domain-Chs. 240-247
Chapter 240 EASEMENTS
PART I. SCOPE

20-240 California Forms of Pleading and Practice--Annotated § 240.01

AUTHOR: by William M. Hensley Editorial Consultant

§ 240.01 Scope

This chapter discusses actions involving easements other than prescriptive easements, with a brief discussion of profits and licenses. It includes the following forms for use by the owner of an easement:

- A complaint to quiet title to an easement appurtenant [*see § 240.50*].

- A complaint for injunctive relief and damages for interference with or obstruction of an easement [*see § 240.51*].

- A petition for appointment of an arbitrator to determine joint owners' proportional costs of maintaining a private right-of-way [*see § 240.52*] and a complaint to enforce an agreement between the owners regarding those costs [*see § 240.53*].

This chapter also includes the following forms for use by the owner of property that is burdened by an easement (servient tenement):

- A complaint to establish abandonment of an easement and to clear the encumbrance of the easement from the record title [*see § 240.54*].

- A complaint to quiet title to the servient tenement and for declaratory relief on the existence or scope of an easement [*see § 240.55*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsGeneral Overview

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20-240 California Forms of Pleading and Practice--Annotated § 240.02

AUTHOR: by William M. Hensley Editorial Consultant

§ 240.02 Cross References

- For discussion and forms for use in actions involving party walls and encroachments and other interference with the use of real property, see Ch. 11, *Adjoining Landowners* .

- For discussion and forms related to prescriptive easements, see Ch. 13, *Adverse Possession* .

- For discussion and forms for use in actions involving easements acquired by dedication to the public use, see Ch. 183, *Dedication* .

- For discussion of the interpretation of deeds and for a form for use in an action for declaratory relief as to the interpretation of a deed, see Ch. 184, *Deeds* .

- For discussion and forms for use in actions for ejectment, see Ch. 241, *Ejectment* .

- For discussion and forms for use in actions involving condemnation or inverse condemnation of easements, see Ch. 247, *Eminent Domain* .

- For discussion and forms for use in actions against adjoining landowners involving fences, see Ch. 266, *Fences* .

- For a form for use in an action for damages for fraud by suppression of a fact concerning the effect of an easement by the buyer of land against the seller and broker, see Ch. 269, *Fraud and Deceit* .

- For discussion and forms for use in giving notice of the pendency of an action concerning real property, see Ch. 348, *Lis Pendens* .

- For discussion and forms for use in actions involving the rights of surface and subsurface owners of

land, see Ch. 363, *Mining* .

- For discussion and forms for use in actions against title companies for failure to show easements or for misdescription of easements in a title report, see Ch. 548, *Title Insurance* .

- For discussion and forms for use in actions involving prescriptive water rights, see Ch. 575, *Waters* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersGeneral OverviewReal Property LawAdverse PossessionGeneral OverviewReal Property LawDeedsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsEjectment

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20-240 California Forms of Pleading and Practice--Annotated §§ 240.03-240.09

AUTHOR: by William M. Hensley Editorial Consultant

[Reserved]

§§ 240.03[Reserved]

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PART II. LEGAL BACKGROUND

20-240 California Forms of Pleading and Practice--Annotated § 240.10

AUTHOR: by William M. Hensley Editorial Consultant

§ 240.10 Governing Statutes

The creation, transfer, and termination of easements and profits, and the respective rights and duties of the owners of the dominant and servient estates, are governed by *Civ. Code §§ 801-816, 845, 1001,* and *1104*. Creation of easements by covenant in favor of a city or county for specified public purposes are governed by *Gov. Code § 65871 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawLimited Use RightsEasementsTermination of Easements

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PART II. LEGAL BACKGROUND

20-240 California Forms of Pleading and Practice--Annotated § 240.11

AUTHOR: by William M. Hensley Editorial Consultant

§ 240.11 Definitions

[1] Easement or Profit

[a] Right to Use Land (Easement)

An easement is a possessory interest in the land of another, by which the owner of the easement is entitled to make limited use of the land [*Goble v. Dotson (1962) 203 Cal. App. 2d 272, 277, 21 Cal. Rptr. 769]* . An easement involves primarily the right to do a certain act on, or to the detriment of, another's property. It is a restricted right to specific, limited, definable use or activity on another's property and must be less than the right of ownership [*Mesnick v. Caton (1986) 183 Cal. App. 3d 1248, 1261, 228 Cal. Rptr. 779]* .

[b] Right to Take From Land (Profit)

A profit (or profit 'a prendre) is a right to take something from another's land, such as a right to remove minerals. It carries the right of entry and the right to remove and take from the land certain products or substances. It includes the right to use as much of the surface as is necessary and convenient for the exercise of the profit. Like an easement, a profit is a possessory interest in land [*Costa Mesa Union Sch. Dist. v. Security First Nat. Bk. (1967) 254 Cal. App. 2d 4, 11-12, 62 Cal. Rptr. 113]* .

[c] Absence of Legal Distinction

The rules applicable to easements and profits are the same, and the Civil Code designates burdens or servitudes in the nature of a profit as easements [*see Civ. Code §§ 801, 802*; *Gerhard v. Stephens (1968) 68 Cal. 2d 864, 880-881, 890, 69 Cal. Rptr. 612, 442 P.2d 692* ; *Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 879-880, 42 Cal. Rptr. 400]* .

[2] Easement Appurtenant or Easement in Gross

[a] Easement Appurtenant; Dominant and Servient Tenements

An easement is appurtenant to land when it is created to benefit, and does benefit, the possessor of the land in his or her use of the land [*Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 880, 42 Cal. Rptr. 400]* . The land to which an easement appurtenant is attached is called the dominant tenement, and the land on which the burden of the easement is laid is called the servient tenement [*Civ. Code § 803*].

[b] Easement in Gross

An easement in gross is a personal possessory interest in the land of another. It is an interest not created to benefit, and that does not benefit, the possessor in the use of his or her land, but merely benefits the possessor personally [*Balestra v. Button (1942) 54 Cal. App. 2d 192, 197, 128 P.2d 816]* .

[c] Statutory Examples

Examples of rights that may be easements appurtenant are listed in *Civ. Code § 801*, and examples of rights that may be easements in gross are listed in *Civ. Code § 802*. However, these sections do not purport to enumerate all possible servitudes [*Wright v. Best (1942) 19 Cal. 2d 368, 382, 121 P.2d 702* ; *City of Glendora v. Faus (1957) 148 Cal. App. 2d 920, 925-926, 307 P.2d 976]* . Other easements may be created as long as no principle of public policy is violated [*see Wright v. Best (1942) 19 Cal. 2d 368, 382, 121 P.2d 702]* . Additionally, a comparison of *Civ. Code §§ 801* and *802* indicates that a particular use or activity can be either an easement in gross or an easement appurtenant, as determined by the terms of the grant or the nature of the use by which it was acquired [*Civ. Code § 806*; *City of Glendora v. Faus (1957) 148 Cal. App. 2d 920, 925-926, 307 P.2d 976]* .

[d] Rules for Distinguishing

In determining whether an easement is in gross or appurtenant, a court will look primarily to the nature of the right and to the intention of the parties. Courts favor easements appurtenant. If the right in question is an appropriate and useful adjunct to the owner's land, and there is nothing to show that the parties intended a mere personal right, the right will be construed as an easement appurtenant to the land [*Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 879, 42 Cal. Rptr. 400]* .

When a deed does not expressly declare an easement to be appurtenant, or when the language of the deed is ambiguous, and it does not clearlyappear whether an easement was intended to be in gross or appurtenant, parol evidence is admissible to determine the nature of the easement and to identify a dominant tenement [*Continental Baking Co. v. Katz (1968) 68 Cal. 2d 512, 522-523, 67 Cal. Rptr. 761, 439 P.2d 889]* .

[3] License Distinguished From Easement

[a] Privilege to Use Land

A license is a personal, generally revocable, and unassignable privilege to do one or more acts on the land of another without possessing an interest in the land [*Belmont County Water Dist. v. State of California (1976) 65 Cal. App. 3d 13, 17, 135 Cal. Rptr. 163* ; *but see* Restatement of Property § 517 (assignability)]. It is essentially an authority to do a lawful act that without authorization would be unlawful, so that as long as the license remains unrevoked, it is a justification for the acts that it authorizes [*Fisher v. General Petroleum Corp. (1954) 123 Cal. App. 2d 770, 776, 267 P.2d 841]* .

The principal distinction between a license and an easement or profit is that the latter would be fully protected as an interest in land [*see* [1], *above*]. Since the rights involved are often similar, similar language may be used in instruments creating easements and licenses, leading to problems of interpretation. In that case, whether an easement or a license has been created is a question of the parties' intent, and the words used to describe the right created are not controlling [*see*

Guerra v. Packard (1965) 236 Cal. App. 2d 272, 286, 46 Cal. Rptr. 25 ; *Fisher v. General Petroleum Corp. (1954) 123 Cal. App. 2d 770, 776, 267 P.2d 841]* .

PRACTICE TIP:

Courts May Favor Construction of Instrument As Granting Easement Rather Than License. In a case that settled right before trial, this practitioner found that a trial judge favored construing ambiguous language as granting an easement instead of a license. This is consistent with the earlier rule that courts favor interpreting instrument grants as easements running with the land (a real estate interest) rather than an easement in gross (a personal interest). *By William M. Hensley*

[b] Nonpossessory Interest

Although a license is an interest in land in the sense that it confers a privilege to use land [Restatement of Property § 512, comment c], it does not amount to such an interest as would come within the statute of frauds [*Eastman v. Piper (1924) 68 Cal. App. 554, 560, 229 P. 1002* ; *see Civ. Code § 1624(a)(3)*; *Code Civ. Proc. § 1971*], be compensable in a condemnation proceeding [Belmont County Water Dist. v. State of California (1976) 65Cal. App. 3d 13, 17, *135 Cal. Rptr. 163]* , or support an action for trespass or ejectment [*Lucky Auto Supply v. Turner (1966) 244 Cal. App. 2d 872, 881, 53 Cal. Rptr. 628]* . However, when an irrevocable license is involved [*see* [4][a], *below*], a licensee may maintain an action to enjoin or redress an invasion by the licensor or a third party of the licensee's rights under the terms of the license [*Lucky Auto Supply v. Turner (1966) 244 Cal. App. 2d 872, 881, 53 Cal. Rptr. 628]* .

Since it is not within the statute of frauds, a license may be created orally or by writing [*Belmont County Water Dist. v. State of California (1976) 65 Cal. App. 3d 13, 17, 135 Cal. Rptr. 163]* or may be implied by the acts of the landowner or his or her acquiescence in the acts of the licensee [*Zellers v. State of California (1955) 134 Cal. App. 2d 270, 273-275, 285 P.2d 962]* . A license may also result when the parties intend to create an easement but fail to meet formal requirements [Powell on Real Property, Ch. 34, *Easements and Licenses*, P 429 (Matthew Bender)].

[4] Irrevocable License Compared to Easement

[a] When License Is Irrevocable

There are two exceptions to the general rule that a license is revocable at the will of the licensor:

- First, a license is irrevocable if it is coupled with an interest. For example, the owner of personal property has an irrevocable license to remove it when it has been placed on another's land by permission of the owner. Similarly, when there has been a sale of personal property located on the vendor's land, the purchaser has an irrevocable license to enter and remove the property within a reasonable time [*Bomberger v. McKelvey (1950) 35 Cal. 2d 607, 618, 220 P.2d 729]* .

- Second, a license becomes irrevocable when the licensee, acting in reasonable reliance on either the licensor's representations or the terms of the license, makes a substantial expenditure of labor or money in execution of the license. In this situation, it is unjust to permit revocation without first fully compensating the licensee for his or her loss, and the licensor is estopped from such revocation [*Cooke v. Ramponi (1952) 38 Cal. 2d 282, 286, 239 P.2d 638* (oral license); *Belmont County Water Dist. v. State of California (1976) 65 Cal. App. 3d 13, 17-18, 135 Cal. Rptr. 163]* .

An irrevocable license confers essentially the same rights as an easement in that the licensee may enter the licensor's land to maintain structures or improvements involved [*Higgins v. Kadjevich (1960) 186 Cal. App. 2d 520, 523-524, 9 Cal. Rptr. 115]* .

[b] Irrevocable License May Not Be Perpetual

In any case, an irrevocable license will continue to exist only for the period contemplated by its terms [*Bomberger v. McKelvey (1950) 35 Cal. 2d 607, 618, 220 P.2d 729* (license coupled with interest); *Bryant v. Marstelle (1946) 76 Cal. App. 2d 740, 746, 173 P.2d 846* (estoppel theory)]. When the license's duration is expressly limited, the licensor may revoke it at will after the expiration of the specified period [*Bryant v. Marstelle (1946) 76 Cal. App. 2d 740, 746, 173 P.2d 846]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsAppurtenant EasementsReal Property LawLimited Use RightsEasementsEasements in GrossReal Property LawLimited Use RightsLicensesReal Property LawLimited Use RightsProfits a Prendre

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Volume 20: Easements thru Eminent Domain-Chs. 240-247
Chapter 240 EASEMENTS
PART II. LEGAL BACKGROUND

20-240 California Forms of Pleading and Practice--Annotated § 240.12

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§ 240.12 Express Easements

[1] Grant or Reservation of Easement

[a] Deed, Contract, or Covenant

Since an easement is an interest in land, it can be created by express or implied grant or by express reservation in a grant [*Buehler v. Oregon-Washington Plywood Corp. (1976) 17 Cal. 3d 520, 525 n.1, 131 Cal. Rptr. 394, 551 P.2d 1226* (grant); *Elliot v. McCombs (1941) 17 Cal. 2d 23, 28, 30, 109 P.2d 329* (reservation or grant)]. (An easement can be created by prescription as well. For discussion, see Ch. 13, *Adverse Possession* .) The writing creating an easement may be in the form of a contract or covenant, but such agreements are in effect grants [*Pacific Gas & Elec. Co. v. Minnette (1953) 115 Cal. App. 2d 698, 708, 252 P.2d 642]* .

A conveyance or other instrument creating an easement must be subscribed by the easement's grantor or by his or her lawful agent authorized in writing to do so [*Code Civ. Proc. § 1971*; *see Goble v. Dotson (1962) 203 Cal. App. 2d 272, 277, 21 Cal. Rptr. 769* ; *but see* Restatement of Property § 467(a), comment f (easement for term not exceeding one year is not within statute of frauds)].

An easement enforceable in equity may be created by an executed oral agreement based on valuable consideration [*Wilkes v. Brady (1927) 84 Cal. App. 365, 368-371, 258 P. 108]* .

For a complete discussion of the requirements for a conveyance of an interest in real property, see Ch. 184, *Deeds* .

[b] Construction of Grant or Reservation

Whether a deed conveys an easement or a fee is a mixed question of law and fact. The issue is one of intent to be gathered from the language of the conveyance and the surrounding circumstances [*Warren v. Atchison, T. & S.F. Ry. Co. (1971) 19 Cal. App. 3d 24, 35, 96 Cal. Rptr. 317]* . Generally, the rules governing interpretation of deeds are applicable [*see City of Glendora v. Faus (1957) 148 Cal. App. 2d 920, 926, 307 P.2d 976* ; *see generally* Ch. 184,

Deeds]. In addition, the following factors may beconsidered specifically with regard to the question of whether an easement or a fee was conveyed:

- The fact that only a nominal consideration was paid indicates that the grant conveys an easement and not a limited fee [*Warren v. Atchison, T. & S.F. Ry. Co. (1971) 19 Cal. App. 3d 24, 35, 96 Cal. Rptr. 317]* .

- A deed for a railroad right-of-way is usually construed as giving a mere easement, even though its terms otherwise would be effective to convey a fee [*Warren v. Atchison, T. & S.F. Ry. Co. (1971) 19 Cal. App. 3d 24, 35, 96 Cal. Rptr. 317]* .

- When the limitation on a grant appears in the granting clause itself and not merely in the habendum or other parts, the limitation ordinarily operates to confine the grant to that of an easement [*Johnson v. Ocean Shore Railroad Co. (1971) 16 Cal. App. 3d 429, 433, 94 Cal. Rptr. 68]* .

- A grant of a "right of way" for a road indicates conveyance of an easement, while a grant of land "to be used as a road" is consistent with the conveyance of a fee [*Highland Realty Co. v. City of San Rafael (1956) 46 Cal. 2d 669, 677-678, 298 P.2d 15]* .

- A transfer of an unlimited use or enjoyment of a tract is in effect a conveyance of ownership of the fee, not an easement [*Raab v. Casper (1975) 51 Cal. App. 3d 866, 876-877, 124 Cal. Rptr. 590]* .

- A transfer of fee is not vitiated by a clause describing a purpose for which the grantor intends the property will be used [*Machado v. Southern Pacific Transportation Co. (1991) 233 Cal. App. 3d 347, 359, 284 Cal. Rptr. 560]* .

An easement incorporating a right of exclusive use may fall short of ownership in fee when the easement is restricted in scope [*Blackmore v. Powell (2007) 150 Cal. App. 4th 1593, 1599, 59 Cal. Rptr. 3d 527]* . Thus, a grant deed conveying an appurtenant easement for "parking and garage purposes" authorized the holder to build a garage on the easement for his exclusive use as a necessary incident of the easement [*Blackmore v. Powell (2007) 150 Cal. App. 4th 1593, 1599, 59 Cal. Rptr. 3d 527]* . The easement for parking and garage purposes did not rise to fee ownership because (1) the rights accorded under the grant deed were circumscribed, and (2) the award of exclusive control over the garage, which would occupy only a small portion of the easement, was intended solely to protect those restricted rights [*Blackmore v. Powell (2007) 150 Cal. App. 4th 1593, 1600, 59 Cal. Rptr. 3d 527]* .

In another case, the plaintiffs, who held an access easement over the defendants' property, sued to prevent the defendants from using the easement area for any purpose. The court of appeal concluded that the language of the instrument by which the easement was created clearly expressed an intention that the use of the easement area be exclusive to the owners of the dominant tenement, and therefore was sufficient to create an exclusive easement [*Gray v. McCormick (2008) 167 Cal. App. 4th 1019, 1026, 84 Cal. Rptr. 3d 777*]. The court held that the exclusive easement was not prohibited under California law as being tantamount to the taking of fee title by a neighboring property owner. It concluded that plaintiffs had not acquired fee title to the easement area because their use of the easement area was limited to access, ingress, and egress purposes, not all conceivable uses of the property [*Gray v. McCormick (2008) 167 Cal. App. 4th 1019, 1031, 84 Cal. Rptr. 3d 777]* .

[c] Creation of Easements by Owner Who Conveys Less Than Full Title

A property owner who conveys less than full title may validly create easements inhis or her favor on the property. "Owner" under *Civ. Code § 805* ("a servitude thereon cannot be held by the owner of the servient tenement") means the owner of the full fee title, both legal and equitable, such that a property owner who owns less than full title may validly

create easements in his or her own favor on his or her land [*Beyer v. Tahoe Sands Resort (2005) 129 Cal. App. 4th 1458, 1473, 29 Cal. Rptr. 3d 561]* . Thus, three easements were validly created by landowners who expressly reserved the easements when they dedicated a portion of their real property, including common areas, to a time-share project and conveyed legal title of the property to a bank as trustee pursuant to a trust agreement for the time-share project. The landowners' retention of an ownership interest in the property did not preclude their creating easements in their own favor under *Civ. Code § 805* [*Beyer v. Tahoe Sands Resort (2005) 129 Cal. App. 4th 1458, 1474, 1477, 29 Cal. Rptr. 3d 561]* .

[2] Solar Easement

A solar easement is the right to receive sunlight across real property of another for any solar energy system. An instrument creating a solar easement must include at least the following [*Civ. Code § 801.5*]:

- A description of the dimensions of the easement expressed in measurable terms, such as vertical or horizontal angles measured in degrees, or the hours of the day on specified dates during which direct sunlight to a specified surface of a solar collector, device, or structural design feature may not be obstructed, or a combination of these descriptions.

- The restrictions placed on vegetation, structures, and other objects that would impair or obstruct the passage of sunlight through the easement.

- The terms or conditions, if any, under which the easement may be revised or terminated.

[3] Conservation Easement Under Civil Code

[a] Definition

A conservation easement is any limitation in a deed, will, or other instrument in the form of an easement, restriction, covenant, or condition, executed by or on behalf of the owner of the land subject to the easement, binding on successive owners of the land, and for the purpose of retaining land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition [*Civ. Code § 815.1*]. A conservation easement is an interest in real property of perpetual duration that is voluntarily created and freely transferable in whole or in part for the purposes mentioned above [*Civ. Code § 815.2*].

All interests not transferred or conveyed by the instrument creating the easement remain in the grantor, including the right to engage in all uses of the land not affected by the easement or not prohibited by law or by the easement [*Civ. Code § 815.4*].

[b] Ownership Restriction

A conservation easement may be acquired and held only by (1) a tax-exempt nonprofit organization [*see generally I.R.C. § 501(c)(3)* (income tax exemption)] qualified to do business in California and having as its primary purpose the preservation, protection, or enhancement of land in its natural, scenic, historical, agricultural, forested, or open-space condition, or (2) the state, any city, county, city and county, district, or other state or local governmental entity, if that entity is otherwise authorized to acquire and hold title to real property and if the conservation easement is voluntarily conveyed [*Civ. Code § 815.3*].

[c] Recordation of Easement

Like other conveyances, instruments creating, assigning, or otherwise transferring conservation easements are subject to the recording laws. They are required to be recorded in the county recorder's office in the county where the land is

situated in whole or in part [*Civ. Code § 815.5*].

[d] Owner's Remedies

Actual or threatened injury to or impairment of a conservation easement, or actual or threatened violation of its terms may be prohibited or restrained, or the interest intended for protection by the easement may be enforced, by injunctive relief granted by any court of competent jurisdiction in a proceeding initiated by the grantor or by the easement's owner [*Civ. Code § 815.7(b)*]. In addition to the remedy of injunctive relief, the holder of a conservation easement is entitled to recover money damages for any injury to the easement or to the interest being protected by it, or for the violation of the easement's terms. For a form of complaint that can be used for this purpose, see *§ 240.51*. In assessing damages, there may be taken into account, in addition to the cost of restoration and other usual rules of the law of damages, the loss of scenic, aesthetic, or environmental value to the real property subject to the easement [*Civ. Code § 815.7(c)*]. The court may also award to the prevailing party the costs of litigation, including reasonable attorney's fees [*Civ. Code § 815.7(d)*].

In addition, a conservation easement is not unenforceable because of any lack of privity of contract or lack of benefit to particular land, or because the easement is not expressly designated in the instrument creating it as running with the land [*Civ. Code § 815.7(a)*].

[4] Easement by Covenant in Favor of City or County

[a] Creation

In addition to any other method for the creation of an easement, an easement in favor of a city or county may be created by a recorded covenant of easement made by an owner of real property to the city or county. This type of easement may be created for parking, ingress, egress, emergency access, light and air access, landscaping, or open-space purposes [*Gov. Code § 65871(a)*]. The easement must be created in accordance with a municipal ordinance allowing covenants of easement [*Gov. Code §§ 65870, 65871(a)*].

At the time the covenant of easement is recorded, all of the real property benefitted and burdened by the covenant must be in common ownership. The covenant is effective when recorded and acts as an easement under *Civ. Code § 801 et seq.*, except that it will not merge into any other interest in real property. The easement passes with the land [*Gov. Code § 65871(b)*; *see Civ. Code § 1104*].

A recorded covenant of easement must describe the real property to be subject to the easement and the real property to be benefitted. The covenant must also identify the approval, permit, or designation granted that relied on or required the covenant [*Gov. Code § 65871(c)*]. A covenant is enforceable by the successors in interest to the real property benefitted by the covenant [*Gov. Code § 65871(d)*].

The covenant of easement must be recorded in the county where all or part of the restricted property is located and must contain a legal description of the real property and be executed by the owner. From and after the time of recordation, the covenant imparts notice to all persons to the extent afforded by the recording laws. On recordation, the burdens of the covenant are binding on, and the benefits of the covenant will inure to, all successors in interest to the real property [*Gov. Code § 65873*].

[b] Release

The enabling ordinance must provide a procedure for the release of the covenant. The procedure must require a public hearing by the agency designated by the ordinance for that purpose. The hearing must be held at the request of any person whether or not that person has title to the real property [*Gov. Code § 65874(a)*]. On a determination that the restriction of the property is no longer necessary to achieve the land-use goals of the city or county, a release must be

recorded by the city or county in the county where the restricted property is located [*Gov. Code § 65874(b)*]. The ordinance may provide for the imposition of fees to recover the reasonable costs of processing the release from the persons requesting the release [*Gov. Code § 65874(c)*].

[c] Standing

No person other than the city or county and the owner of the real property burdened or benefitted by the covenant has standing to enforce or to challenge the covenant or any amendment or release [*Gov. Code § 65875*].

[5] Comprehensive Index of Conservation Easements

[a] Index Developed and Maintained by County Recorder

The county recorder in each county must develop and maintain, within the county's existing indexing system, a comprehensive index of conservation easements and Notices of Conservation Easements on land within the county. This index must include all conservation easements, as defined, recorded on or after January 1, 2002 [*Gov. Code § 27255(a), (f)*; *see § 240.12[5][b]*]. When a county recorder records a new conservation easement affecting property within the county, the recorder must include the easement in the comprehensive index if the document contains an easement entitled "conservation easement" or if the notice described in [c], *below*, is properly filled out by the submitter and recorded at the same time, or at a later date [*Gov. Code § 27255(c)*; *see Gov. Code §§ 27255(e), (c), 27361* (no fee pursuant to *Gov. Code § 6103*; but standard fee charged for recording)].

[b] Index Includes Conservation, Open-Space, and Agricultural Conservation Easements

For purpose of inclusion in the comprehensive index, a "conservation easement" means any limitation in a recorded instrument that [*Gov. Code § 27255(b)*]:

- Contains an easement, restriction, covenant, condition, or offer to dedicate, which is or has been executed by or on behalf of the owner of the land subject to that limitation.

- Is binding on successive owners of the land.

- Has as its purpose to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition.

Included in the definition of "conservation easement" for these purposes are conservation easements as defined in *Civ. Code § 815.1* [*see § 240.12[3]*], open-space easements as defined in *Gov. Code § 51075* [*see* Ch. 183, *Dedication*], and agricultural conservation easements as defined in *Pub. Res. Code § 10211* [*Gov. Code § 27255(b)*; *see* Ch. 579, *Zoning and Planning*].

[c] Notice of Conservation Easement for Indexing Purposes

In addition to adding information to the comprehensive index concerning recorded documents that contain a specifically named conservation easement, a county recorder must also add information to the index concerning an easement that is described in a notice that is properly filled out by the submitter, and recorded at the same time as it is submitted, or at a later time. The form of that notice, entitled "NOTICE OF CONSERVATION EASEMENT," is prescribed by statute [*Gov. Code § 27255(c)*]. The notice must include information on the recording of the easement, the grantors and grantees, and a declaration under penalty of perjury that the information given is true and correct. The notice itself is for indexing purposes only, and does not by itself constitute a conservation easement [*Gov. Code § 27255(c)*]. For an example of this statutory notice, see *§ 240.56*.

[d] Conservation Easements Recorded Before January 1, 2002

A conservation easement recorded before January 1, 2002, may be included in the comprehensive index of conservation easements if a party to the easement fills out and records a Notice of Conservation Easement for the previously recorded easement, and files the notice in the county in which the affected real property is located [*Gov. Code § 27255(d)*]. Any party to a conservation easement may fill out and record a notice, including, but not limited to, counties, cities, recreation and park districts or agencies, state conservancies, state agencies, the California Coastal Commission, land trusts, and nonprofit organizations [*Gov. Code § 27255(d)*].

[6] State Registry for Conservation Easements

The Natural Resources Agency is required to establish a central public registry of all conservation easements held or required by the state, or purchased with state grant funds provided by any agency, department, or division of the state on or after January 1, 2000 [*Pub. Res. Code § 5096.520(a)*; *see Pub. Res. Code § 5096.520(b)* ("conservation easement" defined for this purpose); *see also* Stats. 2006, ch. 531, § 1 (legislative intent)]. The registry will include the assessor's parcel numbers for the property covered by the easement and the following information on each conservation easement [*Pub. Res. Code § 5096.520(c)*]:

- The easement's purpose;
- The easement's location, identified by county and nearest city;
- The identity of the easement holder;
- The size of the easement in acres;
- The date the easement transaction was recorded; and
- The amount of funding provided by the agency, department, or division of the state holding or requiring the easement or providing state grant funds for the easement.

On or before January 1, 2009, the registry must be made available for use by thegeneral public. Only the first five items of information listed above may be provided on the internet regarding conservation easements held or required by the state, or purchased with state grant funds provided by an agency, department, or division of the state, on or after January 1, 2006. Personal identifying information must not be posted on the internet. The registry is to be updated biennially [*Pub. Res. Code § 5096.520(e)*]. The updating is to be done by each agency, department, or division of the state with conservation easements that are held or required by the state or purchased with state grant funds [*Pub. Res. Code § 5096.520(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewReal Property LawDeedsConstruction & InterpretationReal Property LawLimited Use RightsEasementsAir & LightReal Property LawLimited Use RightsEasementsConservation EasementsReal Property LawLimited Use RightsEasementsCreationExpress Easements

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20-240 California Forms of Pleading and Practice--Annotated § 240.13

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§ 240.13 Implied Easements

[1] Grant or Reservation Implying Intent

[a] Rule of Construction

A transfer of real property creates an easement in favor of the grantee, to use other real property of the grantor in the same manner and to the same extent as the property was obviously and permanently used by the grantor for his or her benefit at the time the transfer was agreed on or completed [*Civ. Code § 1104*]. In other words, when the owner of two parcels sells one of them, or the owner of one tract sells part of it, the purchaser takes the parcel or part sold with all of the benefits and burdens that appear, at the time of sale, to belong to it, as between it and the property that the seller retains [*Glass v. Gulf Oil Corp. (1970) 12 Cal. App. 3d 412, 432, 89 Cal. Rptr. 514]* . This is the doctrine of implied easements, the purpose of which is to give effect to the actual intent of the parties as shown and inferred from all of the facts and circumstances. Accordingly, whether or not an easement was implied depends on the intent of the parties; and to sustain an easement by implication, the intent of the parties to create such an easement must clearly appear [*Walters v. Marler (1978) 83 Cal. App. 3d 1, 21, 147 Cal. Rptr. 655* (*disapproved on other grounds in Gray v. Don Miller & Associates, Inc. (1984) 35 Cal. 3d 498, 507, 198 Cal. Rptr. 551, 674 P.2d 253*)].

PRACTICE TIP:

Make the Intent Conclusive Through Conveyance Recital Language. Since intent is the key consideration in implied easement cases, the grantor can eliminate factual controversies by making his or her purposes clear through recitals in the conveyance instrument. Under *Evid. Code § 622*, these recitals are conclusively presumed as true between the parties *as well as successors in interest*. Use of such recitals can dispel that easements are to be implied or can be used to set forth the intended use of the land so as to easily imply an easement in favor of the grantor or the grantee. *By William M. Hensley*

The following elements are necessary to create an implied easement [*Mikels v. Rager (1991) 232 Cal. App. 3d 334, 357, 284 Cal. Rptr. 87* ; *Warfield v. Basich (1958) 161 Cal. App. 2d 493, 498-499, 326 P.2d 942* (action to quiet title to implied easement)]:

- A separation or severance of title must occur so as to imply a unity of ownership at some time [*see § 240.13[2]*].

- Before the separation takes place, the use that gives rise to the easement must have continued in an obvious manner long enough to show that it was intended to be permanent [*see § 240.13[3]*].

- The easement must be reasonably necessary to the beneficial enjoyment of the land conveyed [*see § 240.13[4]*].

[b] Implied Easement Disfavored

Although the courts will more readily find an implied easement in favor of the grantee than an easement by implied reservation in the grantor's favor [*see Civ. Code § 1069*], easements by implication are generally not favored [*Orr v. Kirk (1950) 100 Cal. App. 2d 678, 681, 224 P.2d 71]* . An implied easement will not be imposed by the court if it is contrary to the express intention of the parties (for example, the deed specifically provides that it does not convey any easements) [*County of Los Angeles v. Bartlett (1962) 203 Cal. App. 2d 523, 529-531, 21 Cal. Rptr. 776]* . Similarly, an easement is not implied when the parties have entered into an agreement that leaves nothing to be inferred, such as when the rights of the parties with regard to the same subject matter as the claimed easement are determined by contract [*Warfield v. Basich (1958) 161 Cal. App. 2d 493, 499, 326 P.2d 942]* .

[2] Severance of Title

Severance of title is required for implication of an easement because as long as unity of possession exists, the owner of the whole may at any time rearrange the quality of the several servitudes. However, on severance by the sale of part of a tract, the owner's right to redistribute ceases, and easements or servitudes are created corresponding to the benefits or burdens existing at the time of sale [*Warfield v. Basich (1958) 161 Cal. App. 2d 493, 498, 326 P.2d 942]* .

[3] Apparent Use

The required obvious or apparent use is one that is visible on the servient estateor consists of an artificial or permanent structure on the servient tenement, such as a pipe, sewer, or ditch [*Warfield v. Basich (1958) 161 Cal. App. 2d 493, 499, 326 P.2d 942* ; *Swarzwald v. Cooley (1940) 39 Cal. App. 2d 306, 325, 103 P.2d 580]* . This type of use may be distinguished from a use of the servient tenement in its natural state and at intervals, leaving no visible sign, such as a right of fishery or pasture, which will not give rise to an implied easement [*see Swarzwald v. Cooley (1940) 39 Cal. App. 2d 306, 325, 103 P.2d 580]* .

Generally the use made before the severance of title controls [*Piazza v. Schaefer (1967) 255 Cal. App. 2d 328, 334, 63 Cal. Rptr. 246* (action to declare implied easement)]. However, easements have been implied in some situations in which there was no prior use. For example, when land was conveyed by reference to a map or plat showing proposed streets, an easement was implied in the grantee's favor for use of the streets as private ways [*Marin County Hospital Dist. v. Cicurel (1957) 154 Cal. App. 2d 294, 303, 316 P.2d 32* ; *see Ratchford v. County of Sonoma (1972) 22 Cal. App. 3d 1056, 1069 n.6, 99 Cal. Rptr. 887]* . Similarly, when land was purchased in reliance on representations regarding use of recreational facilities in a subdivision, aneasement for use of the facilities was implied [*Bradley v. Frazier Park Playgrounds (1952) 110 Cal. App. 2d 436, 441-443, 242 P.2d 958* (declaratory judgment designating property to which easement was related and mandatory injunction granting residents of subdivision unrestricted use of facilities); *see Wool v. Scott (1956) 140 Cal. App. 2d 835, 845-846, 296 P.2d 17* (action seeking declaration of title to easement for park purposes)].

[4] Reasonable Necessity

Reasonable necessity rather than strict necessity is required for implication of an easement [*see Warfield v. Basich (1958) 161 Cal. App. 2d 493, 498, 326 P.2d 942]* . The grantee is required to show, for example, not that there is no other means of access to his or her property [*Owsley v. Hamner(1951) 36 Cal. 2d 710, 720, 227 P.2d 263]* , but only that the easement is reasonably necessary to the beneficial enjoyment of his or her land [*Piazza v. Schaefer (1967) 255 Cal. App. 2d 328, 335, 63 Cal. Rptr. 246]* .

The potential reduction in the value of the benefitted property if the easement were eliminated may be considered, since the property's use and its value are directly related [*Owsley v. Hamner (1951) 36 Cal. 2d 710, 720, 227 P.2d 263]* . The cost of creating a substitute means of access can also be considered in deciding whether use of a right-of-way easement is reasonably necessary [*Leonard v. Haydon (1980) 110 Cal. App. 3d 263, 268-273, 167 Cal. Rptr. 789]* .

[5] Easement for Light and Air

When a conveyance is involved, easements over adjoining land for light and air cannot be created by implication but can be created only by express grant or covenant [*Katcher v. Home S. & L. Assn. (1966) 245 Cal. App. 2d 425, 429-430, 53 Cal. Rptr. 923* ; *Taliaferro v. Salyer (1958) 162 Cal. App. 2d 685, 690, 328 P.2d 799]* . When the relation of landlord and tenant exists between the parties, however, this rule is subject to the qualification that if the premises would be untenantable without the easement, resulting in a constructive eviction, an easement for light and air will be inferred [*Clark v. Mountain States Life Ins. Co. (1934) 1 Cal. App. 2d 301, 304, 36 P.2d 848]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsConstruction & InterpretationReal Property LawLimited Use RightsEasementsAir & LightReal Property LawLimited Use RightsEasementsCreationEasement by Implication

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20-240 California Forms of Pleading and Practice--Annotated § 240.14

AUTHOR: by William M. Hensley Editorial Consultant

§ 240.14 Easements by Operation of Law (Necessity)

[1] Right-of-Way Easement

[a] Recognition of Easement

A right-of-way easement arises by operation of law when it is established that [*Roemer v. Pappas (1988) 203 Cal. App. 3d 201, 205-206, 249 Cal. Rptr. 743* ; *Reese v. Borghi (1963) 216 Cal. App. 2d 324, 332-333, 30 Cal. Rptr. 868]* :

- There is a strict necessity for the easement [*see § 240.14[1][c]*].

- The dominant and servient tenements were under the same ownership at the time of the conveyance giving rise to the necessity.

The main distinction between a way of necessity and an implied easement is that the latter rests primarily on a preexisting use, while the former is based on the need for a right-of-way easement across the granted or reserved premises [*Reese v. Borghi (1963) 216 Cal. App. 2d 324, 330-331, 30 Cal. Rptr. 868]* and on the public policy that land should not be rendered unfit for occupancy or successful cultivation by denial of access [*Daywalt v. Walker (1963) 217 Cal. App. 2d 669, 672, 31 Cal. Rptr. 899* ; *see Reese v. Borghi (1963) 216 Cal. App. 2d 324, 331, 30 Cal. Rptr. 868]* .

[b] Intent of Parties

A way of necessity results from the presumption that when a grantor conveys property, he or she conveys whatever is necessary for the beneficial use of that property and retains whatever is necessary for the beneficial use of the land he or she still possesses. The presumption, however, is one of fact, and creation of a way of necessity depends on the terms of the deed and facts of the particular case [*Daywalt v. Walker (1963) 217 Cal. App. 2d 669, 672-674, 31 Cal. Rptr. 899]* . Accordingly, a way of necessity will not be found if it is shown that it is contrary to the intent of the parties [*County of Los Angeles v. Bartlett (1962) 203 Cal. App. 2d 523, 529-530, 21 Cal. Rptr. 776* ; *see Daywalt v. Walker (1963) 217*

Cal. App. 2d 669, 674-676, 31 Cal. Rptr. 899] .

[c] Strict Necessity

Strict necessity must be shown for a right-of-way easement of necessity toarise. This requires that the easement be the only possible means of access to the property. That a way over the grantee's own land is too steep, narrow, or difficult, or that the only alternative access is by waterway, will not suffice [*Horowitz v. Noble (1978) 79 Cal. App. 3d 120, 130-131, 130 n.4, 144 Cal. Rptr. 710* ; *County of Los Angeles v. Bartlett (1962) 203 Cal. App. 2d 523, 528, 21 Cal. Rptr. 776* (access by canal)]. The fact that a parcel is difficult to develop does not mean that there is no necessity for access; however, it has been suggested that if a property is undevelopable, the requisite necessity would not exist [*Roemer v. Pappas (1988) 203 Cal. App. 3d 201, 206-207, 249 Cal. Rptr. 743]* .

PRACTICE TIP:

Renegotiate Right-Of-Way Easements as Subdivided Property is Sold. In subdivided property areas filling in with residential development in both suburban and rural areas, it is common to find that access easements have been provided, although not necessarily in the best of locations. Frequently, the access easements involve difficult turns or ascents up sloped terrain. This practitioner advises property buyers to renegotiate right-of-way and access easements as part of a property purchase as development is filling in. Since strict necessity would not dictate finding an easement in many situations, the leverage of buying will often make the seller go to neighboring owners and reconnoiter access easements for the benefit of everyone in a subdivision. *By William M. Hensley*

[d] Duration

A way of necessity lasts only as long as the necessity continues to exist. If a legally usable means of access is created, the way of necessity must be eliminated, notwithstanding the fact that the route of the way of necessity may continue to offer the most convenient access to the property [*Daywalt v. Walker (1963) 217 Cal. App. 2d 669, 676-677, 31 Cal. Rptr. 899]* .

[2] Easement for Utility Service

An owner of real property may acquire by eminent domain an appurtenant easement to provide utility service to his or her property [*Civ. Code § 1001*]. When seeking to acquire the easement, the owner is deemed to be a "quasi-public entity" for purposes of applying the Eminent Domain Law [*see generally Code Civ. Proc. § 1230.010 et seq.*]. In lieu of the usual requirements [*see Code Civ. Proc. § 1240.030*], the following must be established [*Civ. Code § 1001*]:

- There is a great necessity for the taking.

- The easement's location affords the most reasonable service to the property to which it is appurtenant, consistent with the least damage to burdened property.

- The hardship to the owner of the benefitted property if the taking is not permitted clearly outweighs any hardship to the burdened property's owner.

For discussion of the Eminent Domain Law and appropriate forms and procedures, see Ch. 247, *Eminent Domain and Inverse Condemnation*.

[3] Balancing Relative Hardships

The doctrine of balancing of relative hardships has been applied to deny removal of an encroachment, such as a roadway, but allow the property owner damages, when the encroachment does not irreparably injure the owner and was

innocently made, and the cost of removal would be great compared to the inconvenience caused to the plaintiff by the encroachment's continuance. When the doctrine applies, the court may grant the encroaching party an easement for continued use of the adjoining land [*Donnell v. Bisso Brothers (1970) 10 Cal. App. 3d 38, 44-47, 88 Cal. Rptr. 645* ; *see Miller v. Johnston (1969) 270 Cal. App. 2d 289, 305-308, 75 Cal. Rptr. 699]* .

For further discussion and a form for use in pleading the doctrine of balancing relative hardships as an affirmative defense, see Ch. 11, *Adjoining Landowners* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawLimited Use RightsEasementsCreationEasement by Necessity

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Volume 20: Easements thru Eminent Domain-Chs. 240-247
Chapter 240 EASEMENTS
PART II. LEGAL BACKGROUND

20-240 California Forms of Pleading and Practice--Annotated § 240.15

AUTHOR: by William M. Hensley Editorial Consultant

§ 240.15 Scope of Easement

[1] Express Easement

[a] Construing Grant or Reservation

The extent of an easement created by grant or reservation is determined by the instrument's terms [*Glass v. Gulf Oil Corp. (1970) 12 Cal. App. 3d 412, 428, 89 Cal. Rptr. 514* ; *see Civ. Code § 806*]. The rules applicable to the construction of deeds generally apply [*Wilson v. Abrams (1969) 1 Cal. App. 3d 1030, 1035, 82 Cal. Rptr. 272* ; *see generally* Ch. 184, *Deeds*].

When the terms of the instrument are specific, they define the limits of the easement [*Wilson v. Abrams (1969) 1 Cal. App. 3d 1030, 1034, 82 Cal. Rptr. 272]* , and only those interests expressed in the grant and those necessarily incident to them pass from the owner of the fee [*Atchison, Topeka & Santa Fe Ry. Co. v. Abar (1969) 275 Cal. App. 2d 456, 464, 79 Cal. Rptr. 807]* .

The directive in *Civ. Code § 1069* that every grant by a public body is to be interpreted in the grantor's favor applies only if there is an ambiguity in the grant [*see City of Los Angeles v. Howard (1966) 244 Cal. App. 2d 538, 545, 53 Cal. Rptr. 274]* . Thus, an access easement had to be construed in favor of the grantor public utility when the agreement to grant the easement was ambiguous as to the easement's scope [*Red Mountain v. Fallbrook Public Utility District (2006) 143 Cal. App. 4th 333, 347, 48 Cal. Rptr. 3d 875]* .

[b] Drawing Inferences From Instrument

If the easement is not specifically defined, the easement's scope is construed as whatever is reasonably necessary and convenient for the purpose for which the easement was created [*Wilson v. Abrams (1969) 1 Cal. App. 3d 1030, 1034, 82 Cal. Rptr. 272]* . This includes a use consistent with normal future development within the scope of the basic purpose of the easement but not an abnormal development that increases the burden on the servient tenement [*Atchison, Topeka & Santa Fe Ry. Co. v. Abar (1969) 275 Cal. App. 2d 456, 464, 79 Cal. Rptr. 807]* .

Consideration is given to actual uses being made at the time of the grant and to such uses as facts and circumstances show were within the reasonable contemplation of the parties at the time of the conveyance [Maywood Mut. Water Co. No. 2 v. *City of Maywood (1972) 23 Cal. App. 3d 266, 270-271, 100 Cal. Rptr. 174]* . Use of the easement after the conveyance may also be considered. For example, when location of a right-of-way easement is in question and the easement has been used at a particular location with the acquiescence of the servient owner, the parties have, in effect, placed their own practical construction on the grant, and the easement will be regarded as fixed at that place [*Haley v. L.A. County Flood Control Dist. (1959) 172 Cal. App. 2d 285, 289, 342 P.2d 476]* .

[c] Resorting to Parol Evidence

If the language of the instrument conveying an easement is clear and explicit, parol evidence is not admissible to show the nature and extent of the easement [*Wilson v. Abrams (1969) 1 Cal. App. 3d 1030, 1035, 82 Cal. Rptr. 272]* . Extrinsic evidence may be admitted to explain the terms used, however, subject to the limitation that it is not admissible to give the terms a meaning to which they are not reasonably susceptible [*Continental Baking Co. v. Katz (1968) 68 Cal. 2d 512, 522, 67 Cal. Rptr. 761, 439 P.2d 889* ; *see Buehler v. Oregon-Washington Plywood Corp. (1976) 17 Cal. 3d 520, 528, 131 Cal. Rptr. 394, 551 P.2d 1226]* .

PRACTICE TIP:

Reformation as Parol Evidence Exception. With regard to easements, an important exception to the parol evidence bar is the doctrine of reformation. Mutual mistake or a manifest scrivener's error rising to the level of reformation, in this practitioner's experience, will not preclude use of parol evidence to demonstrate that an easement should be reformed. *By William M. Hensley*

[2] Implied Easement

The scope of an implied easement is measured by the extent to which the property was obviously and permanently used when the transfer was made. The scope must beinferred from all of the circumstances, including the existing uses and expected uses that were within the reasonable contemplation of the parties [*Kytasty v. Godwin (1980) 102 Cal. App. 3d 762, 771, 162 Cal. Rptr. 556]* . It is assumed that the parties anticipated uses that might reasonably be required by a normal development of the dominant tenement but did not anticipate an abnormal development. The easement's scope does not usually extend to uses required by an abnormal development [*Fristoe v. Drapeau (1950) 35 Cal. 2d 5, 9-10, 215 P.2d 729* ; *Horowitz v. Noble (1978) 79 Cal. App. 3d 120, 133-134, 144 Cal. Rptr. 710* ; Maywood Mut. Water Co. No. 2 v. *City of Maywood (1972) 23 Cal. App. 3d 266, 271 n.3, 100 Cal. Rptr. 174* ; *see Civ. Code § 806*].

In one case where property owners sought an injunction to prevent neighbors from using a roadway across the plaintiffs' property, the trial court properly quieted title to an equitable easement in the roadway in favor of the neighbors [*Linthicum v. Butterfield (2009) 175 Cal. App. 4th 259, 267, 95 Cal. Rptr. 3d 538]* . Through the doctrine of "balancing conveniences" or "relative hardship," the trial court may create an easement by refusing to enjoin an encroachment or nuisance [*Linthicum v. Butterfield (2009) 175 Cal. App. 4th 259, 265, 95 Cal. Rptr. 3d 538]* . The balance of equities favored the neighbor's continued use of the roadway: the roadway was the only access to the neighbor's property, and the existence of the roadway did not prevent plaintiffs from developing their parcel [*Linthicum v. Butterfield (2009) 175 Cal. App. 4th 259, 267, 95 Cal. Rptr. 3d 538]* .

In contrast to private party conveyances, conveyances involving a sovereign as the common owner typically do not give rise to implied reservations of easements or other property interests in conveyed land [*Murphy v. Burch (2009) 46 Cal. 4th 157, 165, 92 Cal. Rptr. 3d 381, 205 P.3d 289]* . When a claimant traces common ownership back to the federal government and seeks to establish an implied reservation of an access right-of-way, the intent of Congress is paramount and the government's power of eminent domain also bears significance. Given the unique historical and legal nature of land patents, extreme caution must be exercised in determining whether the circumstances surrounding a government

land grant are sufficient to overcome the inference prompted by the omission of an express reference to a reserved right of access. The easement claimant bears the burden of producing evidence on the issues regarding the government's intent to reserve an easement and the government's lack of power to condemn. An easement is not a matter of necessity when the federal government had the power of eminent domain to gain access to its property and strict necessity may be extinguished when a sovereign owner failed to exercise that power [*Murphy v. Burch (2009) 46 Cal. 4th 157, 167, 92 Cal. Rptr. 3d 381, 205 P.3d 289* ; *Moores v. Walsh (1995) 38 Cal. App. 4th 1046, 1051, 45 Cal. Rptr. 2d 389]* .

[3] Secondary Easements

Every easement includes so-called secondary easements consisting of the right to do acts that are necessary to the full enjoyment of the easement. This right is limited and must be exercised in a reasonable manner so as not to place an undue burden on, go beyond the boundaries of, or make any changes in, the servient tenement [*Haley v. L.A. County Flood Control Dist. (1959) 172 Cal. App. 2d 285, 290, 342 P.2d 476* (express and implied easements)]. Within these limits, the easement owner may make repairs, improvements, or changes that do not affect the substance of the easement [*White v. Walsh (1951) 105 Cal. App. 2d 828, 832, 234 P.2d 276]* . For example, the owner of a right-of-way easement adjoining a steep embankment may construct and maintain guard rails along the roadway, since the guard rails are reasonably necessary to the owner's use of theeasement and do not unduly burden the servient tenement [*Herzog v. Grosso (1953) 41 Cal. 2d 219, 225, 259 P.2d 429]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsConstruction & InterpretationReal Property LawLimited Use RightsEasementsCreationEasement by ImplicationReal Property LawLimited Use RightsEasementsCreationExpress Easements

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Volume 20: Easements thru Eminent Domain-Chs. 240-247
Chapter 240 EASEMENTS
PART II. LEGAL BACKGROUND

20-240 California Forms of Pleading and Practice--Annotated § 240.16

AUTHOR: by William M. Hensley Editorial Consultant

§ 240.16 Relations Between Owners of Various Interests

[1] Rights Retained by Landowner

Every incident of ownership not inconsistent with the easement and its enjoyment is reserved to the servient tenement's owner [*City of Los Angeles v. Ingersoll-Rand Co. (1976) 57 Cal. App. 3d 889, 893-894, 129 Cal. Rptr. 485* ; *City of Los Angeles v. Howard (1966) 244 Cal. App. 2d 538, 543, 53 Cal. Rptr. 274]* . The landowner may make any use of the land that does not interfere unreasonably with the easement [*McCann v. City of Los Angeles (1978) 79 Cal. App. 3d 112, 116, 144 Cal. Rptr. 696* ; *Atchison, Topeka & Santa Fe Ry. Co. v. Abar (1969) 275 Cal. App. 2d 456, 464, 79 Cal. Rptr. 807* ; *McCoy v. Matich (1954) 128 Cal. App. 2d 50, 53, 274 P.2d 714* (landowner could maintain gates across right-of-way easement if they were constructed so as not to interfere unreasonably with easement, and terms of grant of easement did not preclude maintenance of gates)]. The landowner also may transfer his or her right to make such use of the servient tenement, and whether an assignee's use of the land is permissible depends on whether the landowner could have used the land in that manner [*Pasadena v. California-Michigan etc. Co. (1941) 17 Cal. 2d 576, 579, 110 P.2d 983* ; *Guerra v. Packard (1965) 236 Cal. App. 2d 272, 295, 46 Cal. Rptr. 25]* .

[2] Rights of Owner of Future Interest in Dominant Tenement

The owner of a future interest in a dominant tenement may use easements appurtenant for the purpose of viewing waste, demanding rent, or removing an obstruction of the easement, even if the dominant tenement is occupied by a tenant [*Civ. Code § 808*].

[3] Relocation of Easement

Once the location of an easement has been established, whether by the express terms of a grant or by use and acquiescence, it cannot be substantially changed without the consent of both parties [*Haley v. L.A. County Flood Control Dist. (1959) 172 Cal. App. 2d 285, 289, 342 P.2d 476]* . The mutual consent of the parties to relocate the easement may be express or implied by the acts and acquiescence of the parties. If the parties consent to a new location, existing rights are not affected by the change but attach to the new location [*Kosich v. Braz (1967) 247 Cal. App. 2d*

737, 739-740, 56 Cal. Rptr. 52 ; *McCarty v. Walton (1963) 212 Cal. App. 2d 39, 46, 27 Cal. Rptr. 792]* .

[4] Broadening of Easement by Prescriptive Use

The owner of an easement may broaden its scope by maintaining an enlarged claim and nonconforming use exercised openly, notoriously, continuously, and adversely during the five-year prescriptive period [*Faus v. City of Los Angeles (1967) 67 Cal. 2d 350, 362, 62 Cal. Rptr. 193, 431 P.2d 849* ; *Security Pac. Nat. Bank v. City of San Diego (1971) 19 Cal. App. 3d 421, 432, 97 Cal. Rptr. 61]* . For discussion of prescriptive easements, see Ch. 13, *Adverse Possession* .

[5] Apportionment of Easement on Partition

If the dominant tenement is partitioned or subdivided, the easement must be apportioned accordingly. The owner or assignee of any portion of the dominant tenement may assert rights under the easement that are applicable to his or her part of the property [*Civ. Code § 807*; *Herbert v. Russell (1969) 1 Cal. App. 3d 63, 66, 81 Cal. Rptr. 448* ; *Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 881, 42 Cal. Rptr. 400]* . The burden, however, may not be apportioned so as to impose an undue or unreasonable burden on the servient tenement [*Civ. Code § 807*; *Jordan v. Worthen (1977) 68 Cal. App. 3d 310, 327, 137 Cal. Rptr. 282]* .

[6] Enforcement of Parties' Rights

[a] Action by Easement Owner

The easement owner may sue to enjoin obstruction of the easement or unreasonable interference with his or her use of the easement by the servient owner [*Civ. Code § 809*; *see, e.g., Herzog v. Grosso (1953) 41 Cal. 2d 219, 224-225, 259 P.2d 429]* . When appropriate, the easement owner may also recover compensatory and punitive damages [*see, e.g., Zimmer v. Dykstra (1974) 39 Cal. App. 3d 422, 429-430, 437-439, 114 Cal. Rptr. 380]* . For a form of complaint, see *§ 240.51*.

[b] Action by Landowner

The owner of the servient tenement is entitled to an injunction against uses of the easement that materially increase the burden or impose a new and additional burden on the servient tenement [*Warren v. Atchison, T. & S.F. Ry. Co. (1971) 19 Cal. App. 3d 24, 37, 96 Cal. Rptr. 317* ; *see Wall v. Rudolph (1961) 198 Cal. App. 2d 684, 686,18 Cal. Rptr. 123]* . The landowner may also maintain an action to quiet title, an action for declaratory relief, or both, to have the extent and burdens of the easement defined and determined [*see Warren v. Atchison, T. & S.F. Ry. Co. (1971) 19 Cal. App. 3d 24, 33, 96 Cal. Rptr. 317* (quiet title and injunction)]. For a form of complaint, see *§ 240.55*.

An easement that violates zoning ordinances is unenforceable. In one case, the defendant had an easement to keep horses on a portion of the landowner's property. The landowner brought the action contending that the easement granted by his predecessor violated a municipal ordinance that provided that the keeping of equines was an accessory use to a residential use on property. Therefore, residential use had to be established before keeping equines on the same parcel would be allowed. Another municipal ordinance provided that an accessory use must be on the same lot as the residence. The landowner argued that the easement was invalid because his lot was vacant land. The defendant argued that the equine use was accessory to use of his own residential property, and that it was therefore valid. The court of appeal held that the defendant had a valid easement, but the zoning ordinances prohibited the keeping of horses on the landowner's lot, which not developed for residential use. The easement thus was unenforceable insofar as it would allow a use in violation of those ordinances [*Baccouche v. Blankenship (2007) 154 Cal. App. 4th 1551, 1557, 65 Cal. Rptr. 3d 659]* .

[7] Duty to Maintain Easement

[a] Generally

The owner of the easement ordinarily has the duty to keep the easement in repair, although the parties may alter this obligation by contract [*Rose v. Peters (1943) 59 Cal. App. 2d 833, 835, 139 P.2d 983* ; *see McManus v. Sequoyah Land Assoc. (1966) 240 Cal. App. 2d 348, 356, 49 Cal. Rptr. 592* ; *see also Civ. Code § 845(a)* (right-of-way easement); *Reinsch v. City of Los Angeles (1966) 243 Cal. App. 2d 737, 747, 52 Cal. Rptr. 613* (prescriptive easement)].

[b] Agreement Apportioning Costs of Repairing Right-of-Way Easement

If an easement in the nature of a private right-of-way is owned by more than one person, or is appurtenant to parcels of land under different ownership, the cost of maintaining it in repair may be shared by each easement owner or owner of a benefitted parcel, pursuant to the terms of any agreement entered into by the parties for that purpose. If any owner who is a party to the agreement refuses to perform or fails after demand in writing to pay the owner's portion of the cost, an action for specific performance or contribution may be brought against that owner in a court of competent jurisdiction by the other owners, either jointly or severally [*Civ. Code § 845(b)*]. For a form of complaint, see *§ 240.53*.

[c] Proportional Sharing of Costs

In the absence of an agreement, the cost must be shared in proportion to the use of the easement made by each owner. A property owner may be asked to contribute only to the maintenance of that portion of the right-of-way lying between his or her driveway and the public road. Also, a distinction must be made between an occupied residence and an unimproved lot. Within such general guidelines, the trier of fact must be allowed to fashion any reasonable apportionment scheme [*Healy v. Onstott (1987) 192 Cal. App. 3d 612, 617, 237 Cal. Rptr. 540* (trier of fact need not distinguish between number of cars each resident uses, or those heating their homes with electric power versus those serviced periodically by heavy butane trucks)].

Although nonconsenting owners of an easement in the nature of a right-of-way may be compelled to contribute to keeping the way in repair [*Civ. Code § 845*], they may not be compelled to contribute to the cost of major improvements [*McManus v. Sequoyah Land Assoc. (1966) 240 Cal. App. 2d 348, 355, 49 Cal. Rptr. 592]* . Additionally, the provisions of *Civ. Code § 845* do not apply to rights of way held or used by railroad common carriers subject to the jurisdiction of the Public Utilities Commission [*Civ. Code § 845(e)*].

[d] Arbitrator to Apportion Costs

Any owner of the easement or of a benefitted parcel may apply to the appropriate court where the right-of-way easement is located for the appointment of an impartial arbitrator to apportion the costs of maintenance. For a form of petition, see *§ 240.52*. The application may be made before, during, or after performance of the maintenance work. If the arbitration award is not accepted by all of the owners, the court may enter a judgment determining the proportional liability of each owner [*Civ. Code § 845(c)*]. *Civ. Code § 845* affords the right to a trial de novo if fewer than all of the owners of a private right-of-way accept the arbitrator's award. This right is to receive a trial by the court, not a jury trial [*Healy v. Onstott (1987) 192 Cal. App. 3d 612, 616, 237 Cal. Rptr. 540]* . The judgment may be enforced as a money judgment by any party against any other party to the action [*Civ. Code § 845(c)*].

PRACTICE TIP:

Get Agreement By All Owners to Binding Arbitration. To save costs of litigation, this practitioner suggests that an easement owner should obtain an agreement from all interested parties to treat the impartial arbitrator's award as binding. It is also preferable for the parties to stipulate to an acceptable arbitrator or stipulate to appointment protocol, with court approval, so that the parties are not stuck with an appointment from a court arbitration panel of an arbitrator who may not have the experience or qualifications to serve as a referee for an easement apportionment dispute. *By William M. Hensley*

[e] Snow Removal

If snow removal is not required under *Civ. Code § 845(a)* (requiring the owner of an easement in the nature of a private right-of-way, or of any land to which such an easement is attached, to maintain it in repair) or under any independent contractual or statutory duty, an agreement to maintain the easement in repair must be construed to include snow removal if all of the following conditions are satisfied [*Civ. Code § 845(d)*]:

- Snow removal is not expressly precluded by the terms of the agreement.
- Snow removal is necessary to provide access to the properties served by the agreement.
- Snow removal is approved in advance by the property owners or their elected representatives in the same manner as provided by the agreement for repairs to the easement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewReal Property LawEstatesConcurrent OwnershipPartition ActionsReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsCreationEasement by PrescriptionReal Property LawLimited Use RightsEasementsInterference

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Chapter 240 EASEMENTS
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20-240 California Forms of Pleading and Practice--Annotated § 240.17

AUTHOR: by William M. Hensley Editorial Consultant

§ 240.17 Transfer of Easement

A transfer of the dominant tenement passes all easements appurtenant to the land, whether or not they are specifically mentioned in the deed [*see Civ. Code §§ 801, 1104*; *St. Louis v. DeBon (1962) 204 Cal. App. 2d 464, 466, 22 Cal. Rptr. 443]* . In contrast, transfer of an easement in gross requires an express assignment since the right is only personal [*St. Louis v. DeBon (1962) 204 Cal. App. 2d 464, 466, 22 Cal. Rptr. 443]* . As a personal right, an easement in gross may be conveyed independently of the land, whereas an easement appurtenant may not be transferred to a third party or severed from the land [*City of Anaheim v. Metropolitan Water Dist. of Southern Cal. (1978) 82 Cal. App. 3d 763, 768, 147 Cal. Rptr. 336]* . However, the owner of an easement appurtenant may contract with a third party for the use of the easement in connection with the dominant tenement [*Franceschi v. Kuntz (1967) 253 Cal. App. 2d 1041, 1046, 61 Cal. Rptr. 810]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsAppurtenant EasementsReal Property LawOwnership & TransferGeneral Overview

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20-240 California Forms of Pleading and Practice--Annotated § 240.18

AUTHOR: by William M. Hensley Editorial Consultant

§ 240.18 Termination of Easement

[1] Statutory Termination

[a] Recognized Methods

A granted or implied easement may be extinguished or terminated in three ways [*Civ. Code § 811*]:

- Title to the easement becomes vested in the owner of the servient tenement (merger of titles) [*see* [b], *below*].
- The servient tenement is destroyed [*see* [c], *below*].
- The owner of the easement does or assents to another's doing any act on either tenement that is incompatible with the nature of the easement or the exercise of the owner's right [*see* [d], *below*].

[b] Merger of Titles

An easement is extinguished by merger when the servient tenement and the easement come to be owned by one person, such as when the owner of the dominant tenement acquires title to the servient tenement [*Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 881-883, 42 Cal. Rptr. 400* ; *see Civ. Code §§ 805, 811(1)*]. To effect a merger, there must be unity of title or coextensive ownership of both the servient tenement and the dominant tenement [*Hemmerling v. Tomlev, Inc. (1967) 67 Cal. 2d 572, 575, 63 Cal. Rptr. 1, 432 P.2d 697* ; *Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 883-884, 42 Cal. Rptr. 400]* . Merger does not occur if the owner of the servient tenement acquires only one of several parcels composing the dominant tenement [*Piazza v. Schaefer (1967) 255 Cal. App. 2d 328, 335, 63 Cal. Rptr. 246]* . Similarly, an easement is not extinguished by merger if the estates in the two tenements, acquired by one person, are such that one will or may terminate before the other. In this case, the easement is merely suspended and may be revived when one of the estates terminates [*Renden v. Geneva Development Corp. (1967) 253 Cal. App. 2d 578, 587 n.8, 61 Cal. Rptr. 463]* . However, a person who acquires a partial or limited interest in the dominant tenement may

extinguish the easement by merger as to his or her interest alone [*Leggio v. Haggerty (1965) 231 Cal. App. 2d 873, 884, 42 Cal. Rptr. 400]* .

A view easement was extinguished by merger when property owners (66 Clarendon) bought the neighboring lot (60 Clarendon), and thus became the owners of both the dominant tenement and servient tenement. The fact that the properties were held by two owners did not preclude application of merger. Furthermore, the fact that 66 Clarendon was held in joint tenancy, 60 Clarendon was held as tenants in common, and one of the owners held his interest in 60 Clarendon as trustee for his inter vivos revocable trust did not render the estates held by the two owners unequal so as to preclude extinguishment by merger [*Zanelli v. McGrath (2008) 166 Cal. App. 4th 615, 634, 82 Cal. Rptr. 3d 835*]. Finally, the easement was not revived when 60 Clarendon was sold to a third party, because the act of severance alone does not revive an extinguished easement, and the previous owners had not attempted expressly to recreate the view easement in the conveyance to the buyer [*Zanelli v. McGrath (2008) 166 Cal. App. 4th 615, 635, 82 Cal. Rptr. 3d 835*].

[c] Destruction of Servient Tenement

An easement is extinguished by the destruction of the servient tenement [*Civ. Code § 811(2)*]. This rule applies primarily to situations involving easements in a building, such as a right to use a stairway. An easement survives the destruction of part of the servient tenement when there is anything remaining on which the easement may operate. However, the grant of a right to use part of a building gives no real property interest that will survive destruction of the building. Therefore, a right in the nature of an easement in a building is extinguished by destruction of the building or the part of the building on which the easement is imposed, because nothing remains on which the right can operate [*see Rothschild v. Wolf (1942) 20 Cal. 2d 17, 20-21, 123 P.2d 483]* .

An easement in a building ceases when the building is destroyed involuntarily or without the fault of the owner of the servient tenement. Thereafter, the easement owner will not have an easement in any new building that may be erected in place of the one destroyed [*Rothschild v. Wolf (1942) 20 Cal. 2d 17, 21, 123 P.2d 483]* . The owner of the servient tenement may not voluntarily destroy the building and thus terminate the easement when depreciation of the building has progressed far enough to make it economically advantageous to destroy it. The depreciation or obsolescence must have progressed to the point of becoming the equivalent of destruction or at least so far as to make it economically disadvantageous to maintain the building [*see Rothschild v. Wolf (1942) 20 Cal. 2d 17, 20, 123 P.2d 483* ; *Walner v. City of Turlock (1964) 230 Cal. App. 2d 399, 405-406, 41 Cal. Rptr. 29* (trial court's refusal to make finding on issue of economic obsolescence was reversible error)].

[d] Incompatible Acts

An easement may be extinguished by performance of an act on either the dominant tenement or the servient tenement, by the owner of the easement or with his or her assent, which is incompatible with the easement's nature or exercise [*Civ. Code § 811(3)*]. The incompatible act must be a permanent interference or an act of such a nature that, thereafter, the easement cannot be used without severely burdening the servient tenement [*Buechner v. Jonas (1964) 228 Cal. App. 2d 127, 132, 29 Cal. Rptr. 298]* . That is, the incompatible act must result in a physical change that permanently and materially prevents the dominant owner from using the easement or makes the dominant owner's use of the easement severely burdensome on the servient tenement [*Reichardt v. Hoffman (1997) 52 Cal. App. 4th 754, 767-769, 60 Cal. Rptr. 2d 770]* . For example, the act of the owner of the dominant tenement in grading his or her lot so as to make use of a right-of-way easement impossible extinguishes the easement [*Fletcher v. Stapleton (1932) 123 Cal. App. 133, 137, 10 P.2d 1019]* . However, the easement owner's assent to the landowner's construction of a fence with a gate where the way entered the highway did not extinguish the easement because the gate was never locked and the easement owner continued to use the way as before [*Silveira v. Smith (1926) 198 Cal. 510, 519, 246 P. 58]* . In another case, outrageous conduct by the owner of an easement used as a driveway which prevented the servient owners from making reasonable use of the easement area did not justify extinguishment, because the easement owner's conduct

did not interfere with his own use of the easement. The easement owner's threats that he would run over anything in the easement area including children and pets did not support extinguishment, because they did not permanently prevent the easement owner from using the easement or establish that his continued use of the easement would put a permanent and severe burden on the servient tenement. The appropriate remedy to remove the basis for such threats was an injunction requiring the easement owner to accommodate the servient tenement's use of the easement area [*Reichardt v. Hoffman (1997) 52 Cal. App. 4th 754, 768-769, 60 Cal. Rptr. 2d 770]* .

[2] Common Law Abandonment or Forfeiture

[a] Nonuse With Intent to Abandon

An easement created by grant or implication is not extinguished by mere nonuse, but nonuse accompanied by an express or implied intent to abandon the easement will operate to extinguish it [*Wilson v. Abrams (1969) 1 Cal. App. 3d 1030, 1035-1036, 82 Cal. Rptr. 272]* . The intent that the easement's owner must manifest is an intent to give up making all future conforming uses of the easement [*Faus v. City of Los Angeles (1967) 67 Cal. 2d 350, 363, 62 Cal. Rptr. 193, 431 P.2d 849]* .

For discussion of the abandonment or vacation of an easement for public use, see Ch. 183, *Dedication* .

[b] Misuse or Excessive Use Leading to Forfeiture

Generally, misuse or excessive use by the easement owner is not sufficient to extinguish the easement, although the owner of the servient tenement may obtain an injunction against such use. However, if the burden of the servient tenement is increased through changes in the dominant tenement that increase the use and subject it to use by owner of the servient tenement, a forfeiture will be justified if the unauthorized use may not be severed and enjoined [*Crimmins v. Gould (1957) 149 Cal. App. 2d 383, 391, 308 P.2d 786]* .

[3] Statutory Action to Establish Abandonment

[a] Landowner's Cause of Action

The owner of real property subject to an easement may bring an action to establish the easement's abandonment and to remove the burden of the easement on the record title [*Civ. Code § 887.040(a)*]. The action is brought in the same manner and is subject to the same procedure as an action to quiet title [*see generally Code Civ. Proc. § 760.010 et seq.*; Ch. 482, *Quieting Title*], to the extent applicable [*Civ. Code § 887.040(c)*]. For a form of complaint, see *§ 240.54*.

[b] Definition of Easement

An easement subject to the statutory procedure is any burden or servitude on land, whether or not attached to other land as an incident or appurtenance, that allows the holder of the burden or servitude to do acts on the land [*Civ. Code § 887.010*]. The statutory abandonment procedure does not apply to an easement that is part of a unified or reciprocal system for the mutual benefit of multiple parties [*Civ. Code § 887.020*].

The statutory abandonment procedure applies to any easement except a mutual benefit easement, regardless of when the easement was created [*Civ. Code § 887.090*].

[c] Definition of Abandonment

For purposes of this procedure, an easement is abandoned if all of the following conditions are satisfied for 20 years continuously and immediately preceding commencement of the action to establish the easement's abandonment [*Civ. Code § 887.050(a)*]:

- The easement was not used at any time.
- No property tax was separately assessed on the easement, or no taxes were paid on the assessment.
- No instrument creating, reserving, transferring, or otherwise evidencing the easement was recorded.

The 20-year provision applies despite any provision to the contrary in the instrument creating, reserving, transferring, or otherwise evidencing the easement or in another recorded document, unless the instrument or other document provides an earlier expiration date [*Civ. Code § 887.050(b)*].

[d] Notice of Intent to Preserve Easement

An easement's owner may at any time record a notice of intent to preserve the easement [*Civ. Code § 887.060(a)*]. A notice of intent to preserve an easement may refer generally and without specificity to any or all easements claimed by the claimant in any real property situated in the county, despite any requirements in *Civ. Code §§ 880.330(b)(2), (3)* and *880.340* [*Civ. Code § 887.060(b)*]. For a form of notice, see California Legal Forms, Ch. 28A, *Easements and Licenses* (Matthew Bender). An easement is not abandoned for purposes of the statutory procedure if a notice of intent to preserve the easement is recorded either within 20 years immediately preceding commencement of the action to establish abandonment or after the action's commencement and before judgment is entered [*Civ. Code § 887.060(c)*].

In an action to establish abandonment of an easement under *Civ. Code § 887.010 et seq.*, the court must permit the easement's owner to record a late notice of intent to preserve the easement as a condition of dismissal of the action on payment into court, for the landowner's benefit, the litigation expenses attributable to the easement or portion of it as to which the notice is recorded. Litigation expenses are the recoverable costs and expenses reasonably and necessarily incurred in preparation for the action, including a reasonable attorney's fee [*Civ. Code § 887.070*]. Litigation expenses are payable only when the recordation of the late notice of intent to preserve and dismissal of the action result in preservation of the easement. If the court finds that the easement is extinguished on another basis, an order for payment of litigation expenses is error [*Worthington v. Alcala (1992) 10 Cal. App. 4th 1404, 1408-1411, 13 Cal. Rptr. 2d 374]* .

[e] Effect of Court Order

An abandoned easement is unenforceable and is deemed to have expired. A court order establishing an easement's abandonment is equivalent for all purposes to a conveyance of the easement to the owner of the servient tenement [*Civ. Code § 887.080*].

[f] Effect on Common Law Abandonment

The statutory abandonment procedure supplements and does not limit or otherwise affect either the common law governing abandonment of an easement or any other procedure provided by statute or otherwise for clearing an abandoned easement [*Civ. Code § 887.030*].

[4] Adverse Possession by Landowner

An easement may be extinguished by the landowner's use of the servient tenement in a manner that is adverse to the owner of the easement for the five-year period required to acquire title by prescription [*Glatts v. Henson (1948) 31 Cal. 2d 368, 371, 188 P.2d 745* ; *Guerra v. Packard (1965) 236 Cal. App. 2d 272, 293, 46 Cal. Rptr. 25]* . The elements required to extinguish an easement by adverse possession are the same as to create a prescriptive easement [*see Zimmer v. Dykstra (1974) 39 Cal. App. 3d 422, 435, 114 Cal. Rptr. 380]* . For discussion, see Ch. 13, *Adverse Possession* .

Change of ownership of the servient tenement during the prescriptive period would not affect its running. It is the occupancy of the land adverse to the easement owner, not occupancy by a particular holder, that extinguishes the easement [*Sevier v. Locher (1990) 222 Cal. App. 3d 1082, 1085-1086, 272 Cal. Rptr. 287]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsCreationEasement by ImplicationReal Property LawLimited Use RightsEasementsCreationEasement by PrescriptionReal Property LawLimited Use RightsEasementsCreationExpress EasementsReal Property LawLimited Use RightsEasementsTermination of EasementsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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Chapter 240 EASEMENTS
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20-240 California Forms of Pleading and Practice--Annotated §§ 240.19-240.29

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[Reserved]

§§ 240.19[Reserved]

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20-240 California Forms of Pleading and Practice--Annotated § 240.30

AUTHOR: by William M. Hensley Editorial Consultant

§ 240.30 Related Matthew Bender Publications

For transactional forms relating to easements and licenses, see California Legal Forms, Ch. 28A, *Easements and Licenses,* and Ch. 36, *Oil and Gas Rights and Leases* (Matthew Bender)

For further discussion of easements and licenses, see California Real Estate Law and Practice, Ch. 343, *Easements and Licenses* , and Ch. 370, *Quieting Title and Determining Adverse Claims* (Matthew Bender)

For forms of interrogatories for use in actions involving a claim of property rights in an abandoned street, the existence of easements, and trespass on real property, see Bender's Forms of Discovery, Ch. 158, *Real Property* (Matthew Bender)

For general discussion of easements and licenses, see Powell on Real Property, Ch. 34, *Easements and Licenses* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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20-240 California Forms of Pleading and Practice--Annotated § 240.31

AUTHOR: by William M. Hensley Editorial Consultant

§ 240.31 State Statutes

[1] Apportionment of Burden

Apportionment of burden on partition of dominant tenement. *Civ. Code § 807*

[2] Creation of Easement

Persons who may create easement. *Civ. Code § 804*

Persons who may hold easement. *Civ. Code § 805*

Conservation easements. *Civ. Code §§ 815-816*

Easement to provide utility service. *Civ. Code § 1001*; *Code Civ. Proc. § 1245.325*

Statute of frauds. *Code Civ. Proc. § 1971*

Comprehensive index of conservation easements developed and maintained by county recorder. *Gov. Code § 27255*

[3] Definitions

Easements appurtenant defined and enumerated. *Civ. Code § 801*

Solar easements. *Civ. Code § 801.5*

Easements in gross enumerated. *Civ. Code § 802*

Dominant and servient tenements defined. *Civ. Code § 803*

Definition of "conservation easement" for purpose of inclusion in comprehensive index includes conservation easements, open-space easements, and agricultural conservation easements. *Gov. Code § 27255(b)*

[4] Maintenance of Easement

Right to apportionment of cost of maintenance. *Civ. Code § 845*

[5] Rights of Parties

Rights of owner of future interest in dominant tenement. *Civ. Code § 808*

Right of owner or occupant of dominant tenement to maintain action to enforce easement appurtenant. *Civ. Code § 809*

Right of owner in fee of servient tenement to maintain action for possession of land against anyone unlawfully possessing land. *Civ. Code § 810*

[6] Scope of Easement

Determination of extent of easement. *Civ. Code § 806*

[7] Termination of Easement

Termination of easements. *Civ. Code § 811*

Private easements in abandoned streets and highways. *Sts. & Hy. Code § 8353*

[8] Transfer of Easement

Transfer of real property passes easements appurtenant. *Civ. Code § 1104*

Department of Parks and Recreation may acquire conservation easement if department determines that conservation easement is necessary to protect unit of state park system from incompatible use or to preserve and enhance natural resource, cultural, or historic value of unit of state park system. *Pub. Res. Code § 5011.7*

Legal Topics:

For related research and practice materials, see the following legal topics:
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20-240 California Forms of Pleading and Practice--Annotated § 240.32

AUTHOR: by William M. Hensley Editorial Consultant

§ 240.32 California Rules of Court

Requirements for injunction to protect easements. *Cal. Rules of Ct., Rule 3.1151*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewReal Property LawLimited Use RightsEasementsGeneral Overview

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AUTHOR: by William M. Hensley Editorial Consultant

§ 240.33 Decisions

[1] Commerce Clause

City's imposition of franchise fee based on reasonable fraction (here 50 percent) of appraised value of land abutting pipeline in exchange for granting oil company right to run pipeline under streets where city held easement was not shown to burden interstate commerce; California Constitution was not violated if franchise fee did not discriminate between intercity and intracity businesses. *Shell Oil Co. v. City of Santa Monica (9th Cir. 1987) 830 F.2d 1052, 1060-1061*

[2] Creation of Easement

[a] Easement by Implication

Easement by implication may be created when owner of real property dies intestate and property is divided and distributed to intestate heirs by court decree. *Larsson v. Grabach (2004) 121 Cal. App. 4th 1147, 1153-1154, 18 Cal. Rptr. 3d 136*

Appurtenant easement to use driveway to access rented commercial property could be implied when it was not expressly negated by terms of lease and tenant alleged facts supporting assertion that use of right of way was reasonably necessary to enjoyment of leased premises. *Dubin v. Robert Newhall Chesebrough Trust (2002) 96 Cal. App. 4th 465, 477, 116 Cal. Rptr. 2d 872*

Factual issue as to whether easement was obvious and permanent so as to be impliedeasement when subdivision restrictions gave notice of intention to have utility easement and power line on lot alleged to be servient tenement appeared to be intended to provide electricity to plaintiff's lot. *George v. Goshgarian (1983) 139 Cal. App. 3d 856, 861-863, 189 Cal. Rptr. 94*

[b] Grant or Reservation

Granting clause that did not contain words fee, easement, or right-of-way conveyed fee simple title to city and county for parcel used as part of its underground aqueduct, in light of deed provisions reserving certain rights to grantors; however, parties were bound by agreement to accept decision in another case holding city and county had acquired subsurface easement under similar facts. *City and County of San Francisco v. Union Pacific R.R. Co. (1996) 50 Cal. App. 4th 987, 995, 998, 58 Cal. Rptr. 2d 1*

Recording of subdivision map with streets created private easement in lot owners for use of adjacent streets for access whether or not streets were accepted by public entity or described in subsequent deeds. *Tract Development Services, Inc. v. Kepler (1988) 199 Cal. App. 3d 1374, 1381-1383, 246 Cal. Rptr. 469*

[c] Relative Hardships

Easement for sewer line found by relative hardships when line was under neighbor's property and neighbor could construct around it. *Field-Escandon v. DeMann (1988) 204 Cal. App. 3d 228, 237-239, 251 Cal. Rptr. 49*

[d] Way of Necessity

Way of necessity was appurtenant to land and passed with dominant tenement when it was sold. *Kripp v. Curtis (1886) 71 Cal. 62, 65, 11 P. 879*

Grantor was entitled to first designate way of necessity to be pursued, and in event of his or her failure to do so, grantee was entitled to choose. *Kripp v. Curtis (1886) 71 Cal. 62, 65, 11 P. 879*

Easement of necessity did not exist where property owned by plaintiff and defendants was originally owned by federal government, even though defendants' property entirely surrounded plaintiff's parcel; because federal government had power of eminent domain, critical requirement of "strict necessity" for creation of an easement by necessity did not exist. *Murphy v. Burch (2007) 156 Cal. App. 4th 1434, 1446, 68 Cal. Rptr. 3d 200*

Element of common ownership satisfied when dominant and servient tenements were under ownership of federal government at time of conveyance. *Kellogg v. Garcia (2002) 102 Cal. App. 4th 796, 808, 125 Cal. Rptr. 2d 817*

Subsequent owners of landlocked property did not have easement by necessity over adjacent land when state had previously owned property and had not exercised its power of eminent domain to provide access for parcel. *Moores v. Walsh (1995) 38 Cal. App. 4th 1046, 1050-1051, 45 Cal. Rptr. 2d 389*

Necessary element of common ownership for right-of-way by necessity existed even though one parcel was owned outright and other was purchased by installment sale. *Roemer v. Pappas (1988) 203 Cal. App. 3d 201, 205-206, 249 Cal. Rptr. 743*

Presumption of way of necessity affected burden of proof; presumption was overcome by evidence of later disclaimer that grantor did not intend to reserve easement over property conveyed and evidence that, at time property was conveyed, access over conveyed parcel would have been very difficult. *Hewitt v. Meaney (1986) 181 Cal. App. 3d 361, 367-370, 226 Cal. Rptr. 349*

Way of necessity was granted for running sewer line. *Frederick v. Louis (1935) 10 Cal. App. 2d 649, 651-652, 52 P.2d 533*

Owner of land abutting public highway has all usual rights and remedies of owner of freehold concerning unlawful obstruction or interference with use of public road, including trespass, ejectment, action for damages, injunction, or action to remove obstruction, or abate nuisance. *Fitzgerald v. Smith (1928) 94 Cal. App. 480, 485*

[3] Interpretation

Reasonable expectations of parties in creating easements anticipated uses reasonably required by normal development of dominant tenement. *Camp Meeker Water System, Inc. v. Public Utilities Com. (1990) 51 Cal. 3d 845, 867, 274 Cal. Rptr. 678, 799 P.2d 758*

Deed that did not specify whether easement was in gross or appurtenant was to be interpreted in favor of grantor and of easement appurtenant; finding of easement appurtenant was proper when grantor testified that he intended easement appurtenant and grantee did not testify as to intent. *Moylan v. Dykes (1986) 181 Cal. App. 3d 561, 569-572, 226 Cal. Rptr. 673*

[4] License

Trivial expenditure on improvements did not bring plaintiff within rule that when licensee has entered under oral license and has expended money or its equivalent in labor, in execution of license, license becomes irrevocable. *Kaler v. Brown (1951) 101 Cal. App. 2d 716, 719, 226 P.2d 66*

[5] Scope of Easement

Installation, operation, and maintenance by telecom company of fiber optic cables within county road easements came within scope of easements. *Anderson v. Time Warner Telecom of California Inc. (2005) 129 Cal. App. 4th 411, 419, 28 Cal. Rptr. 3d 289*

Easement for access did not give dominant-tenement owner right to use every portion of easement, and servient-tenement owner could make continued use of area as long as that use did not unreasonably interfere with owner's access to dominant tenement. *Scruby v. Vintage Grapevine, Inc. (1995) 37 Cal. App. 4th 697, 702-704, 43 Cal. Rptr. 2d 810*

Easement granted in general terms, so that it was nonspecific regarding its particular nature, extent, and location, entitled holder to choose reasonable location and to use whatever portion of servient tenement was reasonably necessary for purposes for which easement was created; use actually made by holder over time fixed location, nature, and extent of use. *Colvin v. Southern Cal. Edison Co. (1987) 194 Cal. App. 3d 1306, 1312, 240 Cal. Rptr. 142*

Placing cable television line on telephone poles was within scope of easement. *Salvaty v. Falcon Cable Television (1985) 165 Cal. App. 3d 798, 802-804, 212 Cal. Rptr. 31*

When easement existed as dirt ditch, dominant-tenement owner did not have right to change easement by lining ditch. *Krieger v. Pacific Gas & Electric Co. (1981) 119Cal. App. 3d 137, 142-145, 173 Cal. Rptr. 751*

[6] Statute of Limitation

Statute of limitation was not applicable to action to quiet title to easement by implication. *Lichty v. Sickels (1983) 149*

Cal. App. 3d 696, 702-704, 196 Cal. Rptr. 718

[7] Termination of Easements

Outrageous conduct by owner of easement which prevented servient owners from making reasonable use of easement area did not justify extinguish ment, because easement owner's conduct did not interfere with his own use of easement. *Reichardt v. Hoffman (1997) 52 Cal. App. 4th 754, 768-769, 60 Cal. Rptr. 2d 770*

Right-of-way easement was not abandoned by planting trees on it because trees were not incompatible with future use of right-of-way easement, nor was it abandoned by fencing it off because gate in fence implied intent to use easement. *Tract Development Services, Inc. v. Kepler (1988) 199 Cal. App. 3d 1374, 1384-1387, 246 Cal. Rptr. 469*

Claimant of easement in property of bankruptcy estate that was sold by bankruptcy court free of liens and encumbrances was not barred by res judicata from proceeding against purchaser to establish easement by fact that he knew that parcel was being sold, when he did not file objection or otherwise participate in hearings authorizing sale. *Scheidel v. Lister (1986) 182 Cal. App. 3d 657, 661-667, 227 Cal. Rptr. 510*

Easement for access was terminated by adverse possession when owner of servient tenement blocked road with barrier and stored material on road for more than five years. *Masin v. La Marche (1982) 136 Cal. App. 3d 687, 693-695, 186 Cal. Rptr. 619*

Easement cannot be acquired or extinguished by adverse use unless party whose rights are affected thereby has actual or constructive knowledge of adverse nature of use, such knowledge resulting from either express or implied notice. *Clark v. Redlich (1957) 147 Cal. App. 2d 500, 508, 305 P.2d 239*

Certain uses of servient tenement by their nature constituted notice of adverse claim while other uses appeared to be only reasonable exercise of proprietary rights and therefore not basis for implication of notice of adverse claim. *Clark v. Redlich (1957) 147 Cal. App. 2d 500, 508, 305 P.2d 239*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsConstruction & InterpretationReal Property LawLimited Use RightsEasementsCreationEasement by ImplicationReal Property LawLimited Use RightsEasementsCreationEasement by NecessityReal Property LawLimited Use RightsEasementsCreationExpress EasementsReal Property LawLimited Use RightsLicenses

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AUTHOR: by William M. Hensley Editorial Consultant

§ 240.34 Attorney General Opinions

Easements are subject to provisions of Documentary Transfer Tax Act [*Rev. & Tax. Code § 11901 et seq.*] if they potentially may endure for substantial period or are of sufficient length to approximate perpetual easements or easements for life. *62 Ops. Cal. Atty. Gen. 87 (1979)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsGeneral OverviewTax LawState & Local TaxesReal Property TaxGeneral Overview

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§ 240.35 Law Reviews

Weaver, Easements Are Nuisances, *25 Real Prop. Prob. & Tr. J. 103 (1990)*

Note, *Conservation Easements and the Doctrine of Changed Conditions, 40 Hastings L.J. 1187 (1989)*

Note, *Shell Oil Co. v. City of Santa Monica: The Sticky Business of Setting Oil Pipeline Franchise Fees Under the Dormant Commerce Clause* , *21* Loy. L.A. L. Rev. 581 (1988)

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawCongressional Duties & PowersCommerce ClauseGeneral OverviewReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawLimited Use RightsEasementsConservation Easements

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§ 240.36 Text References

Miller & Starr, Current Law of California Real Estate, vol. 5, ch. 15, *Easements* (2d ed., 1989)

Witkin, Summary of California Law, vol. 12, *Real Property*, §§ 382-430 (10th ed., 2005)

Restatement of Property §§ 450-521

28A C.J.S., *Easements*, §§ 1-211

28 Am. Jur. 2d, *Easements and Licenses in Real Property*, §§ 1-151

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PART IV. FORMS

20-240 California Forms of Pleading and Practice--Annotated § 240.50

AUTHOR: by William M. Hensley Editorial Consultant

§ 240.50 Complaint to Quiet Title to Real Property [Code Civ. Proc. §§ 760.020(a), 761.020]--Easement Appurtenant--By Owner of Dominant Tenement Against Owner of Servient Tenement [Civ. Code § 809]

[1] FORM Complaint to Quiet Title to Real Property [Code Civ. Proc. §§ 760.020(a), 761.020]--Easement Appurtenant--By Owner of Dominant Tenement Against Owner of Servient Tenement [Civ. Code § 809]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s) of known defendant(s)*], _____ [*if person required to be named as defendant is dead, and plaintiff knows identity of personal representative, add:* and _____ (*name*), as _____ (*description, e.g.,* Executor *or* Administrator With Will Annexed) of the Estate of _____ (*name*), Deceased,] _____ [*if person required to be named as defendant is believed by plaintiff to be dead but plaintiff does not know identity of personal representative, and/or if plaintiff wishes to include unknown successors of known decedent, add:* and the testate and intestate successors of _____ (*name of decedent*), _____ (deceased *or* believed to be deceased), and all persons claiming by, through, or under such _____ (decedent *or* per-	)	COMPLAINT TO QUIET TITLE TO EASEMENT

son),] _____ [*if unknown defendants are included, add:* and all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud on plaintiff's title thereto,] [and DOES I through _____,]
Defendant(s).

_____

Plaintiff alleges:

1. Plaintiff _____ [*if not an individual, allege:* is _____ (*capacity*) and] owns real property situated in _____ County, California, _____ [*if appropriate, add:* commonly known as _____ (*street address or other common designation*) and] described as follows ("Plaintiff's Property"): _____ [*legal description*].

2. Defendant _____ [*name*] _____ [*if not an individual, allege:* is _____ (*capacity*) and] owns real property situated in _____ County, California, _____ [*if appropriate, add:* commonly known as _____ (*street address or other common designation*) and] described as follows ("Defendant's Property"): _____ [*legal description*].

3. Plaintiff owns an easement appurtenant to Plaintiff's Property and burdening Defendant's Property. That easement ("Plaintiff's Easement") comprises _____ [*describe easement, e.g.,* a right of way to pass freely with all means of conveyance and livestock, through and across Defendant's Property, over a strip of land _____ (*specify width, e.g.,* 40 feet) wide, which is bounded _____ (*set forth boundaries of easement*)].

4. The basis of plaintiff's title is _____ [*set forth basis, e.g.,* a grant of easement contained in a deed from _____ (*name of grantor*) to plaintiff dated _____ (*date*) and recorded in Official Records of the County of _____ at Book/Reel _____, page/image _____].

5. Plaintiff was _____ [seised *or* possessed] of Plaintiff's Easement within five years before the commencement of this action.

6. Defendant _____ [*name*] claims an interest in Plaintiff's Easement as the holder of the legal title to Defendant's Property, which interest is adverse to plaintiff.

[7. The claim of _____ (*name of defendant*) is _____ (unknown *or* uncertain *or* contingent). (*If lack of knowledge, uncertainty, or contingency is caused by transfer to unborn or unascertained person or class member, or by transfer of contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, allege:* _____[*name*], age _____, is the person who would be entitled to assert an adverse claim if _____ [*describe contingency*] had occurred before the commencement of this action.) (*If such person is subject to a legal disability, allege:* Such person is subject to _____ [*specify legal disability*].)]

[8. Defendants designated as "the testate and intestate successors of _____ (*name of deceased person*),

(believed to be) deceased, and all persons claiming by, through, or under such _____ (decedent *or* person)" ("the Successor Defendants") claim some right, title, estate, lien, or interest in the Plaintiff's Easement adverse to plaintiff's title, and their claim constitutes a cloud on plaintiff's title.]

[9. Defendants designated as "all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud on plaintiff's title thereto" ("the Unknown Defendants") claim rights, titles, estates, liens, or interests in the Plaintiff's Easement adverse to plaintiff's title, and their claims constitute a cloud on plaintiff's title.]

[10. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____ and therefore sues those defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants claims some right, title, estate, lien, or interest in Plaintiff's Easement adverse to plaintiff's title, and their claims constitute a cloud on plaintiff's title.]

11. Plaintiff is seeking to quiet title against all adverse claims of defendant(s) ("the Adverse Claims"), to wit:

[a. The claims of the fictitiously named defendants described in Paragraph 10;]

[b. The claims of the Unknown Defendants described in Paragraph 9, whether or not any such claim is known to plaintiff;]

[c. The claims of the Successor Defendants described in Paragraph 8;]

[d. The unknown, uncertain, or contingent claims, if any, of defendant _____ (*name*) described in Paragraph 7; and]

e. The claim of defendant _____ [*name of defendant*] as holder of the legal title.

12. The Adverse Claims are without any right whatever. Defendants have no right, title, estate, lien, or interest whatever in Plaintiff's Easement adverse to plaintiff's title, or any part of that property [except _____ (*set forth any claims that plaintiff admits are valid, e.g.,* the utility easement held by Pacific Gas and Electric Company)].

13. Plaintiff seeks to quiet title as of _____ [*date*]. [That date should be the effective date because _____ (*if date is other than date complaint is filed, allege why determination as of that date is sought*).]

WHEREFORE, plaintiff prays for judgment as follows:

1. That plaintiff is the owner of Plaintiff's Easement and that no defendant has any interest in Plaintiff's Easement adverse to plaintiff;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____[*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is a complaint for use by the owner of an easement appurtenant in an action against the owner of the servient tenement to quiet title to the easement [*see Civ. Code § 809*; *Warfield v. Basich (1958) 161 Cal. App. 2d 493, 495, 326 P.2d 942* (action to quiet title to implied easement); *Gazos Creek Mill Etc. Co. v. Coburn (1908) 8 Cal. App. 150, 159, 36 P. 359* (owner of right to cut growing timber and of easements in connection therewith had right to maintain action to quiet title)]. The form may be adapted for use in an action involving an easement in gross by appropriately changing references to the easement, so as to refer to it as being in gross. If the facts involve obstruction of the plaintiff's use of the easement, the plaintiff may want to plead a cause of action for injunctive relief and damages [*see § 240.51*].

PRACTICE TIP:

Obtaining Title Reports. The plaintiff may wish to obtain a title report before commencing the action. If the plaintiff intends to add unknown persons as defendants [*see* [4][c], *below*], an examination of the record title and an inspection of the property will be necessary [*see Code Civ. Proc. § 762.060(b)*]. Also, the court may order the plaintiff to obtain a title report and keep it available for inspection and copying by the parties [*Code Civ. Proc. § 762.040(b)*]. *By Publisher's Editorial Staff*

[3] Allegations

[a] Required Allegations

A quiet title complaint must include the following allegations [*Code Civ. Proc. § 761.020*]:

- Both the legal description and the street address or common designation, if any, of the property that is the subject of the action (Paragraphs 1-3) [*Code Civ. Proc. § 761.020(a)*; *see Code Civ. Proc. § 455* (necessity, in action for recovery of real property, to describe property with such certainty that officer levying execution can identify it)].

- The title of the plaintiff as to which determination is sought and the basis of the title (Paragraphs 3 and 4) [*Code Civ. Proc. § 761.020(b)*].

- The adverse claims to the title of the plaintiff against which a determination is sought (Paragraphs 6-12) [*Code Civ. Proc. § 761.020(c)*].

  - If the claim or the share or quantity of the claim of a person required to be named as a defendant is unknown, uncertain, or contingent, the plaintiff must state this in the complaint. If the lack of knowledge, uncertainty, or contingency is caused by a transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, the plaintiff must also state in the complaint, as far as is known to the plaintiff, the name, age, and legal disability, if any, of the person in being who would be entitled to the claim had the contingency on which the claim depends occurred before the action's commencement (Optional Paragraph 7) [*Code Civ. Proc. § 762.020(b)*].

  - If the plaintiff admits the validity of any adverse claim, the complaint must state this (Optional clause at end of Paragraph 12) [*Code Civ. Proc. § 762.060(c)*].

- The date as of which the determination is sought. If the determination is sought as of a date other than the date the complaint is filed, the complaint must include a statement of the reasons why a determination as of that date is sought (Paragraph 13) [*Code Civ. Proc. § 761.020(d)*].

- A prayer for the determination of the plaintiff's title against the adverse claims [*Code Civ. Proc. § 761.020(e)*].

[b] Plaintiff's Identity and Capacity

If the plaintiff is not a natural person, the complaint should allege the plaintiff's identity as an existing legal entity entitled to come into court. If the plaintiff sues in a special capacity, the complaint should allege this capacity to show that the plaintiff is entitled to relief if other facts alleged are true [*see Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6]* .

[c] Defendant's Identity and Capacity

If the defendant is not a natural person, the complaint should allege the defendant's identity as an existing entity, such as a corporation, against which the court's judgment will operate [*see Tanner v. Best (1940) 40 Cal. App. 2d 442, 445, 104 P.2d 1084]* . If the defendant is sued in a particular capacity, for example as executor or trustee, the complaint should allege that capacity [*see, e.g., Katleman v. First Nat. Bank of Nevada (1963) 212 Cal. App. 2d 520, 524, 28 Cal. Rptr. 150* (discharged executor was not subject to suit in representative capacity)]. See [4], *below*, regarding the selection of defendants.

[d] Seisin or Possession Within Five Years

When the plaintiff claims a present interest in real property [*see Civ. Code § 689*], he or she is deemed to sue for the recovery of real property within the meaning of *Code Civ. Proc. § 318* and is required to plead and prove that the plaintiff or his or her ancestor, predecessor, or grantor was seised or possessed of the property in question within five years before the action's commencement (Paragraph 5) [*see Safwenberg v. Marquez (1975) 50 Cal. App. 3d 301, 311, 123 Cal. Rptr. 405* ; *see also Schoenfeld v. Pritzker (1967) 257 Cal. App. 2d 117, 121, 64 Cal. Rptr. 592* (seisin as shown when plaintiff establishes legal title to land)].

[4] Selection of Defendants

[a] Who Must Be Made Defendants

The plaintiff must name as defendants the persons having adverse claims to the title of the plaintiff and against which a determination is sought [*Code Civ. Proc. § 762.010*]. If the name of a person required to be named as a defendant is not known to the plaintiff, the plaintiff must state this in the complaint and must name all persons unknown as parties [*Code Civ. Proc. § 762.020(a)*; *see* [c], *below*].

The court on its own motion may, and on the motion of any party must, make appropriate orders for the joinder of additional parties as necessary or proper [*Code Civ. Proc. § 762.040(a)*].

[b] Decedents and Personal Representatives

If a person required to be named as a defendant is dead and the plaintiff knows of a personal representative, the plaintiff must join the personalrepresentative [*Code Civ. Proc. § 762.030(a)*]. If a person required to be named as a defendant is dead, or is believed by the plaintiff to be dead, and the plaintiff knows of no personal representative, the plaintiff must state these facts in an affidavit filed with the complaint [*Code Civ. Proc. § 762.030(b)(1)*]. If it is stated in the affidavit that the person is dead, the plaintiff may join as defendants "the testate and intestate successors of [*name of deceased person*], deceased, and all persons claiming by, through, or under such decedent" (Optional Paragraph 8) [*Code Civ. Proc. § 762.030(b)(2)*].

If a person required to be named as a defendant is believed by the plaintiff to be deceased, the person believed to be deceased may be named as a defendant as may that person's successors. The successors must be denominated as "the testate and intestate successors of [*name of person believed to be deceased*], believed to be deceased, and all persons claiming by, through, or under such person" [*Code Civ. Proc. § 762.030(b)(3)*].

[c] Unknown Defendants

The plaintiff may name as defendants "all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to the plaintiff's title, or any cloud upon the plaintiff's title thereto" naming them in that manner (Optional Paragraph 9) [*Code Civ. Proc. § 762.060(a)*]. If unknown defendants are named, the plaintiff must name as defendants the persons having adverse claims that are of record or known to the plaintiff or reasonably apparent from an inspection of the property [*Code Civ. Proc. § 762.060(b)*]. Naming unknown defendants and serving them by publication [*see generally* [7], *below*] will entitle the plaintiff to an *in rem* judgment against all persons known and unknown who were parties to the action and all persons not parties to the action and unknown to the plaintiff who had a claim that was not recorded when the lis pendens [*see* [9][b], *below*] was filed [*Code Civ. Proc. § 764.030*]. However, a person who is in open and actual occupancy of the property cannot be named as an unknown defendant [*Code Civ. Proc. § 763.010(c)*].

[d] Fictitious Defendants

Testate and intestate successors and "all persons unknown" may be designated as "DOE" defendants, although that is not recommended because it differs from the statutory language of *Code Civ. Proc. §§ 762.030(b)(2), (3)* and *762.060* by which those defendants are to be designated [*see* [c], *above*] and because it may limit the *in rem* effect of the judgment by limiting the number of adverse claimants in those classes [*see Code Civ. Proc. § 763.030(b)*]. However, fictitious defendants may be named as "DOE" defendants under *Code Civ. Proc. § 474* (Optional Paragraph 10) [*see Code Civ. Proc. § 760.060* (rules governing civil actions generally are applicable in quiet title actions unless they are inconsistent with quiet title provisions)].

[5] Verification

The complaint must be verified [*Code Civ. Proc. § 761.020*].

[6] Jurisdiction and Venue

Quiet title actions are in the jurisdiction of the superior court and are not limited civil cases [*Code Civ. Proc. §§ 85, 580(b)(3), 760.040(a)*]. Subject to the power of the court to transfer actions, the superior court in the county where the real property, or some part of it, is situated is the proper court for the trial of an action to quiet title to real property [*Code Civ. Proc. §§ 392(a)(1), 760.050(a)*].

There is no requirement that facts establishing venue be specially alleged and the plaintiff does not have the burden of showing that venue is proper. Instead, the defendant has the burden, if venue is improper, to raise an objection and prove the point [*see Code Civ. Proc. § 396b*]. Nevertheless, whether venue is proper is determined from the face of the complaint [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 603, 328 P.2d 953]* . Therefore, when venue is proper in only one county, the plaintiff should indicate that county by including a description of the property in the complaint [*see Sheeley v. Jones (1923) 192 Cal. 256, 257, 258, 219 P. 744]* . The description need not be alleged in a separate paragraph if it is included elsewhere in the complaint.

[7] Service of Summons

The form, content, and manner of the service of summons is the same as in civil actions generally [*Code Civ. Proc. § 763.010(a)*]. If unknown defendants are named, there must also be service by publication and posting [*Code Civ. Proc. § 763.010(b)*]. The requirements for service by publication and posting are discussed in Ch. 482, *Quieting Title* . The procedure for service of summons is set forth in Ch. 518, *Service of Summons and Papers* .

[8] Statute of Limitations and Laches

If the party seeking to quiet title is in possession of the land, it is unnecessary to determine which statute would otherwise apply, because no statute of limitation runs against a party seeking to quiet title while the party is in possession of the property [*Muktarian v. Barmby (1965) 63 Cal. 2d 558, 560, 47 Cal. Rptr. 438, 407 P.2d 659* ; *but see Rev. & Tax. Code § 175*; *Sears v. County of Calaveras (1955) 45 Cal. 2d 518, 521-522, 289 P.2d 425]* . The doctrine of laches may still bar the action to quiet title ifthe plaintiff's delay in bringing suit has prejudiced the adverse claimant [*Muktarian v. Barmby (1965) 63 Cal. 2d 558, 561, 47 Cal. Rptr. 483, 407 P.2d. 659* ; *but see Gerhard v. Stephens (1968) 68 Cal. 2d 864, 904, 69 Cal. Rptr. 612, 442 P.2d 692* (laches as no defense if defendant fails to demonstrate that he or she was in adverse possession of contested property during period of delay)].

[9] Ancillary Matters

[a] Appointment of Guardian ad Litem

The court on its own motion may, and on motion of any party must, make such orders for appointment of guardians ad litem as appear necessary to protect the interest of any party [*Code Civ. Proc. § 762.080*]. Appointment of guardians ad litem is discussed in Ch. 291, *Guardians ad Litem* .

[b] Lis Pendens

Immediately after filing the complaint, the plaintiff must file a lis pendens in the office of the county recorder of each county in which any real property described in the complaint is situated [*Code Civ. Proc. § 761.010(a)*]. The lis pendens gives constructive notice of the pendency of the action to subsequent purchasers or encumbrancers [*Code Civ. Proc. § 405.24*]. For discussion and forms of lis pendens, see Ch. 348, *Lis Pendens* .

PRACTICE TIP:

Motion to Strike If No Lis Pendens Recorded. If no lis pendens is recorded in tandem with a quiet title action, the proper method to raise this infirmity is a motion to strike for not filing a pleading in

conformity with the laws of California [*Code Civ. Proc. § 436(b)*]. *By William M. Hensley*

[10] Cross References

For memoranda of points and authorities for use in actions to quiet title, see California Points and Authorities, Ch. 198, *Quieting Title* (Matthew Bender)

For discussion and a form for use in an action to quiet title to a prescriptive easement, see Ch. 13, *Adverse Possession*

For alternative allegations as to agency, capacity, and residence of parties, as well as fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and a form for use when the action to quiet title depends on the right to cancel a deed, see Ch. 184, *Deeds*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to quiet title actions, see Ch. 482, *Quieting Title*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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Volume 20: Easements thru Eminent Domain-Chs. 240-247
Chapter 240 EASEMENTS
PART IV. FORMS

20-240 California Forms of Pleading and Practice--Annotated § 240.51

AUTHOR: by William M. Hensley Editorial Consultant

§ 240.51 Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527], Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526], and Damages [Civ. Code §§ 3294, 3333]--Interference With or Obstruction of Appurtenant Easement--By Owner of Dominant Tenement Against Owner of Servient Tenement [Civ. Code § 809]

[1] FORM Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527], Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526], and Damages [Civ. Code §§ 3294, 3333]--Interference With or Obstruction of Appurtenant Easement--By Owner of Dominant Tenement Against Owner of Servient Tenement [Civ. Code § 809]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR TEMPORARY RESTRAINING
_____ [*name*],	)	ORDER AND PRELIMINARY AND PERMANENT
Defendant.	)	INJUNCTIONS AND DAMAGES
	)	(Interference With Easement)
	)	

_____

Plaintiff alleges:

1. Plaintiff _____ [*if not an individual, allege:* is _____ (*capacity*) and] owns real property situated in _____ County, California, _____ [*if appropriate, add:* commonly known as _____ (*street address or other common designation*) and] described as follows ("Plaintiff's Property"): _____ [*legal description*].

2. Defendant _____ [*if not an individual, allege:* is _____ (*capacity*) and] owns real property situated in _____ County, California, _____ [*if appropriate, add:* commonly known as _____ (*street address or other common designation*) and] described as follows ("Defendant's Property"): _____ [*legal description*].

3. Plaintiff owns an easement appurtenant to Plaintiff's Property and burdening Defendant's Property. That easement ("Plaintiff's Easement") comprises _____ [*describe easement, e.g.,* a right of way to pass freely with all means of conveyance and livestock, through and across Defendant's Property, over a strip of land _____ (*specify width, e.g.,* 40 feet) wide, which is bounded _____ (*set forth boundaries of easement*)].

4. Beginning on or about _____ [*date*] [and continuing to the present time,] defendant unreasonably _____ [interfered with *or* obstructed] Plaintiff's Easement by _____ [*specify, e.g.,* erecting a chain link fence, seven feet in height, across the easement and thereby preventing plaintiff from using Plaintiff's Easement for purposes of ingress to and egress from Plaintiff's Property].

[5. On or about _____ (*date*), plaintiff demanded of defendant that defendant _____ (*specify, e.g.,* remove the fence obstructing plaintiff's use of Plaintiff's Easement).]

6. Unless and until enjoined and restrained by order of this court, defendant's _____ [interference with *or* obstruction of] Plaintiff's Easement will cause great and irreparable injury to plaintiff in that _____ [*specify, e.g.,* the only alternative route from Plaintiff's Property to a public road is by way of a steep, dangerous, and unpaved road that is practically impassable during most of the winter months and is five miles longer than the way over Plaintiff's Easement. If plaintiff is forced to use the alternative route, Plaintiff's Property will be significantly depreciated, plaintiff will be unable to use and enjoy the property during several months of the year, and plaintiff's use and enjoyment of the property during the remaining months will be substantially impaired].

7. Plaintiff has no adequate remedy at law for the injuries being suffered as a result of defendant's _____ [interference with *or* obstruction of] Plaintiff's Easement in that _____ [*specify facts in addition to those previously alleged that tend to show inadequacy of any legal remedy, e.g.,* plaintiff will be forced to commence multiple suits to obtain adequate compensation for the injuries].

8. As a proximate result of defendant's _____ [interference with *or* obstruction of] Plaintiff's Easement, _____ [*allege damages, e.g.,* plaintiff has been unable to use Plaintiff's Easement, to plaintiff's damage in the sum of $_____ per day from _____ (*date*), and continuing to the present. Plaintiff will be further damaged in like manner as long as defendant's _____ (interference with *or* obstruction of) Plaintiff's Easement continues. The full amount of the damages is not now known to plaintiff, and plaintiff will amend this complaint to state such amount when the same becomes known or on proof thereof].

[9. Defendant deliberately and maliciously _____ (interfered with *or* obstructed) plaintiff's use of Plaintiff's Easement for the purpose of injuring plaintiff. Therefore, plaintiff is entitled to exemplary or punitive damages.]

WHEREFORE, plaintiff prays for judgment against defendant as follows:

1. For an order requiring defendant to show cause, if any he/she has, why he/she should not be enjoined, as hereinafter set forth, during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant, and his/her agents, servants, and employees, and all persons acting under, in concert with, or for him/her:

a. From _____ [interfering with *or* obstructing] plaintiff's use of Plaintiff's Easement;

b. To _____ [*specify affirmative acts, e.g.,* dismantle and remove the fence blocking Plaintiff's Easement];

3. For damages in the sum of $_____ [plus damages in such further sums as may be sustained by proof and ascertained before final judgment herein];

[4. For exemplary and punitive damages;]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired or necessary. See § 240.50[1].*]

[2] Use of Form

This form is a complaint for use by the owner of an easement appurtenant to obtain a permanent injunction and damages, as well as a temporary restraining order and a preliminary injunction [*see generally Cal. Rules of Ct., Rule 3.1150* (procedure for obtaining preliminary injunction)], based on interference with or obstruction of the easement by the owner of the servient tenement. This form may be used by the owner of a prescriptive easement [*see LeDeit v. Ehlert (1962) 205 Cal. App. 2d 154, 169, 22 Cal. Rptr. 747]* as well as by the owner of a granted or like easement. For discussion and additional forms related to prescriptive easements, see Ch. 13, *Adverse Possession* .

[3] Supporting Papers

The form in [1], *above*, reflects an assumption that the plaintiff will file affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) in support of the allegations in the complaint in order to obtain the temporary restraining order and preliminary injunction. If the complaint is not supported by affidavits (or declarations), counsel must take care to plead evidentiary facts that would entitle the plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan G. Co. v. San Juan R. etc. Assn. (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* . In addition, when no affidavits (or declarations) are prepared, the complaint must be verified [*see Code Civ. Proc. § 527(a), (c)(1)*; for further discussion, *see § 240.51[10]*].

If a TRO or preliminary injunction is being sought, a separate application will be needed [*see Cal. Rules of Ct., Rule 3.1150(a), (b)*; for further discussion, *see § 240.51[7]*].

[4] Contents of Complaint

[a] Allegations

An allegation of the ultimate fact of the plaintiff's ownership of the easement described in the complaint and a further allegation that the defendant interfered with the plaintiff's use of the easement are sufficient to state a cause of action for an injunction and nominal damages [*Metzger v. Bose (1957) 155 Cal. App. 2d 131, 133, 317 P.2d 128]* . The complaint in [1], *above*, alleges:

- The plaintiff's ownership of the dominant tenement and the easement appurtenant (Paragraphs 1 and 3).

- The defendant's ownership of the servient tenement (Paragraph 2) [*see Ames v. Prodon (1967) 252 Cal. App. 2d 94, 100, 60 Cal. Rptr. 183]* .

- Facts showing the defendant's interference with or obstruction of the easement (Paragraph 4) [*see Metzger v. Bose (1957) 155 Cal. App. 2d 131, 133, 317 P.2d 128]* .

- The plaintiff's optional demand of the defendant to refrain from the interference or obstruction (Paragraph 5).

- Facts showing why the defendant's conduct will cause great and irreparable injury to the plaintiff (Paragraph 6) [*Code Civ. Proc. §§ 526(a)(2), 527(c)(1)*; *see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1]* .

- Facts showing why the plaintiff has no adequate remedy at law (Paragraph 7) [*see Civ. Code § 3422(1)-(3)*; *Code Civ. Proc. § 526(a)(4)-(6)*].

- That the plaintiff sustained compensatory damages because of the defendant's wrongful conduct (Paragraph 8) [*Civ. Code § 3333*].

- Optionally, that the plaintiff is entitled to exemplary or punitive damages (Paragraph 9) [*Civ. Code § 3294*].

For further discussion of the allegations necessary to state a claim for injunctive relief, see Ch. 303, *Injunctions* .

[b] Depiction or Description of Property

An application for an injunction to protect an easement must depict by drawings, plot plans, photographs, or other appropriate means, or must describe in detail, the premises involved (Paragraph 3) [*Cal. Rules of Ct., Rule 3.1151*].

[5] Right to Permanent Injunction

[a] Mandatory Injunction

In a proper case, the court may award a mandatory injunction for the protectionand preservation of an easement, including an order for the removal of an obstruction that the defendant erected [*see, e.g., Greiner v. Kirkpatrick (1952) 109 Cal. App. 2d 798, 802-803, 241 P.2d 564* (injunction requiring removal of part of wall interfering with plaintiff's use of right-of-way easement)]. Whether a mandatory injunction is appropriate depends on:

- The relative adequacy to the plaintiff of the injunction and of other available remedies such as damages.

- The relative hardship likely to result to the defendant if the injunction is granted and to the plaintiff if it is denied.

- The interests of third parties and of the public.

- The practicability of framing and enforcing the order or judgment.

The appropriateness of an injunction is determined as of the time of the order or judgment, unless special circumstances require otherwise [*Pacific Gas & Elec. Co. v. Minnette (1953) 115 Cal. App. 2d 698, 708-709, 252 P.2d 642]* .

Concerning whether to request a mandatory injunction or another form of relief, it should be noted that a mandatory injunction is automatically stayed on appeal whereas a prohibitory injunction is not automatically stayed. The object of this rule is to preserve the status quo [*Paramount Pictures Corp. v. Davis (1964) 228 Cal. App. 2d 827, 835, 39 Cal. Rptr. 791]* . An additional consideration is that a mandatory preliminary injunction is rarely granted, since a clear case of prospective injury and urgency is indispensable [*Alvarez v. Eden Township Hospital Dist. (1961) 191 Cal. App. 2d 309, 312, 12 Cal. Rptr. 661]* .

[b] Prohibitory Injunction

A permanent prohibitory injunction to restrain interference with the plaintiff's use of a way of necessity would terminate by operation of law when the necessity on which the easement is based ceases [*Martinelli v. Luis (1931) 213 Cal. 183, 185, 1 P.2d 980]* .

[6] Right to Damages

Damages may be sought along with an injunction since legal and equitable remedies may be sought in one action [*Pacific Western Oil Co. v. Bern Oil Co. (1939) 13 Cal. 2d 60, 66, 87 P.2d 1045]* . For example:

- The plaintiff may seek compensatory damages [*Civ. Code § 3333*] for loss of use of an obstructed easement [*see, e.g., Zimmer v. Dykstra (1974) 39 Cal. App. 3d 422, 429-430, 437-439, 114 Cal. Rptr. 380* (nuisance theory)] or for actual harm to the easement itself [*see, e.g., Donnell v. Bisso Brothers (1970) 10 Cal. App. 3d 38, 43-44, 88 Cal. Rptr. 645* (trespass theory)].

- Damages for annoyance and discomfort are recoverable by the owner of the dominant tenement once a cause of action for trespass or nuisance is established [*Herzog v. Grosso (1953) 41 Cal. 2d 219, 225, 259 P.2d 429]* .

- Punitive or exemplary damages are available when the defendant has been guilty of oppression, fraud, or malice [*Civ. Code § 3294*; *Zimmer v. Dykstra (1974) 39 Cal. App. 3d 422, 437-439, 114 Cal. Rptr. 380* ; *Donnell v. Bisso Brothers (1970) 10 Cal. App. 3d 38, 44, 88 Cal. Rptr. 645]* .

When the owner of the dominant tenement suffers a permanent depreciation in the value of his or her property because of a tortious interference with the easement, the amount by which the value is decreased may be recovered as damages. When the cost of restoring the easement to its original state is less than the permanent depreciation in value of the property, the former may be used as an alternative measure of damages. However, the burden is on the defendant to prove that the cost of restoration is less [*Herzog v. Grosso (1953) 41 Cal. 2d 219, 226, 259 P.2d 429]* .

For further discussion and forms for use in pleading various kinds of damages in the present situation, see *Ch. 177, Damages, § 177.40* et seq., Ch. 391, *Nuisance* , and Ch. 550, *Trespass* .

[7] Right to Temporary Restraining Order and Preliminary Injunction

[a] Cause of Action Required

A preliminary injunction is warranted only if the complaint states a sufficient cause of action for injunctive relief of the character embraced in the permanent injunction. The essential conditions for granting temporary injunctive relief are that the complaint must allege facts that appear to be sufficient to constitute a cause of action for an injunction and that the injunction is reasonably necessary to protect the legal rights of the plaintiff pending litigation [*Moreno Mut. Irr. Co. v. Beaumont Irr. Dist. (1949) 94 Cal. App. 2d 766, 778, 211 P.2d 928]* .

[b] Application for Temporary Restraining Order and Preliminary Injunction

The application for the TRO and preliminary injunction is made application for an order to show cause [*see Cal. Rules of Ct., Rule 3.1150(a)* (also providing for application for preliminary injunction by noticed motion if the responding party has already appeared in the action)]. The application will need to include a statement whether there has been any previous application for similar relief, and if so, the result of that application [*see Cal. Rules of Ct., Rule 3.1150(f)*].

For a form of application and discussion and a checklist of the procedure forobtaining injunctive relief, see Ch. 303, *Injunctions* .

[c] Certification Regarding Notice

When seeking a temporary restraining order without formal notice, the plaintiff or plaintiff's attorney must accompany the application for an order by an affidavit or a declaration showing that one of the following is true [*Cal. Rules of Ct., Rule 3.1204(b)*]:

- Within the applicable time period (described below), the applicant informed the opposing party when and where the application would be made.

- The applicant in good faith attempted to inform the opposing party but was unable to do so, specifying the efforts made to inform the opposing party.

- For reasons specified, the applicant should not be required to inform the opposing party.

To come within the "applicable time period," a party seeking an ex parte order must notify all parties no later than 10 a.m. on the court day before the ex parte appearance, unless the party can show exceptional circumstances that justify a shorter time for notice [*Cal. Rules of Ct., Rule 3.1203(a)*; *see Cal. Rules of Ct., Rule 3.1205* (clerk must accept ex parte application even if it does not comply with these notification requirements)].

When notice of an ex parte application is given, the person giving notice must state with specificity the nature of the relief to be requested, and the date, time, and place for presentation of the application, and must attempt to determine whether the opposing party will appear to oppose the application [*Cal. Rules of Ct., Rule 3.1204(a)*]. Every ex parte application must be accompanied by a declaration regarding notice that states one of the following [*Cal. Rules of Ct., Rule 3.1204(b)(1)*]:

- The notice given, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected.

- Why notice should not be required.

In addition, if notice was provided later than 10 a.m. on the court day before the ex parte appearance, the declaration regarding note must explain the exceptional circumstances that justify the shorter notice [*Cal. Rules of Ct., Rule 3.1204(c)*].

For a form of declaration and discussion and a checklist of the procedure for obtaining injunctive relief, see Ch. 303, *Injunctions* .

[d] Service Required Before Hearing

The plaintiff must, within five days after the temporary restraining order is issued or two days before the hearing, whichever is earlier, serve on the defendant [*Code Civ. Proc. § 527(d)(2)*]:

- A copy of the complaint (if not previously served).
- The order to show cause stating the date, time, and place of the hearing.
- Any affidavits to be used in the application.
- A copy of the points and authorities in support of the application.

The court may for good cause, on the plaintiff's motion or on its own motion, shorten the time required for service on the defendant [*Code Civ. Proc. § 527(d)(2)*]. When the matter first comes up for hearing, if the party who obtained the order is not ready to proceed or service was not effected as stated above, the court must dissolve the temporary restraining order [*Code Civ. Proc. § 527(d)(3)*]. However, if service was not effected as stated above, and the plaintiff files an affidavit stating that the defendant could not be served within the required time, the court may reissue the temporary restraining order [*Code Civ. Proc. § 527(d)(5)*] and reset the matter for hearing.

For discussion and a checklist of the procedure for obtaining injunctive relief, see Ch. 303, *Injunctions* .

[8] Jurisdiction

[a] Subject-Matter Jurisdiction

Because the complaint in [1], *above*, seeks permanent injunctive relief, the action is in the jurisdiction of the superior court and is not a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86, 580(b)(3)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

[b] Personal Jurisdiction

Issuance of either a preliminary injunction or a permanent injunction requires personal jurisdiction over the person enjoined [*see Comfort v. Comfort (1941) 17 Cal. 2d 736, 741, 112 P.2d 259* (permanent injunction); *Rothschild v. Erda (1968) 258 Cal. App. 2d 750, 753, 66 Cal. Rptr. 209* (preliminary injunction)].

[9] Venue

Subject to the power of the court to transfer actions and proceedings [*see generally Code Civ. Proc. § 392 et seq.*], the superior court in the county where the real property that is the subject of the action, or some part of the property, is situated, is the proper court for the trial of actions for the determination in any form of an estate or interest in real property and for injuries to real property [*Code Civ. Proc. § 392(a)(1)*; *cf. Strosnider v. Pomin (1939) 32 Cal. App. 2d 103,109-110, 89 P.2d 179* (action for damages for slander of title resulting in obstruction of right-of-way easement)].

[10] Verification

A complaint seeking a preliminary injunction or temporary restraining order must either be verified or be accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a), (c)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle the plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

[11] Statute of Limitations

An action for trespass on or injury to real property must be brought within three years after the cause of action accrued [*Code Civ. Proc. § 338(b)*; *Roth v. Cottrell (1952) 112 Cal. App. 2d 621, 624-625, 246 P.2d 958* (action for damages for obstruction of right-of-way easement)]. A cause of action for injury to property accrues at the time of the injury. If the trespass is "permanent," as when a structure is built on the land, the action accrues at the time construction is completed. However, when the character of the trespass is such that it will not be presumed that the wrongful conduct will be continued, each successive trespass gives rise to a cause of action. A similar rule is applied to an action for nuisance, which may be permanent or continuing [*Polin v. Chung Cho (1970) 8 Cal. App. 3d 673, 677-678, 87 Cal. Rptr. 591]* .

[12] Cross References

For memoranda supporting and opposing the issuance of preliminary injunctions generally, see California Points and Authorities, Ch. 116, *Injunctions* (Matthew Bender)

For discussion and forms for use in actions involving fences and spite fences, see Ch. 266, *Fences*

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Volume 20: Easements thru Eminent Domain-Chs. 240-247
Chapter 240 EASEMENTS
PART IV. FORMS

20-240 California Forms of Pleading and Practice--Annotated § 240.52

AUTHOR: by William M. Hensley Editorial Consultant

§ 240.52 Petition for Appointment of Arbitrator [Civ. Code § 845] to Determine Proportional Liability of Owners for Cost of Maintaining Right-of-Way Easement

[1] FORM Petition for Appointment of Arbitrator [Civ. Code § 845] to Determine Proportional Liability of Owners for Cost of Maintaining Right-of-Way Easement

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION FOR APPOINTMENT OF ARBITRAT-
_____ [*name*],	)	OR
Respondent.	)	(Easement Maintenance Costs)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Petitioner respectfully represents:

[*EITHER*]

1. Petitioner _____ [*name*] is, and at all times mentioned herein was, one of the owners of an easement in the nature of a private right of way over a strip of land described as follows: _____ [*set forth legal description and street address or common designation, if any, of easement*].

[*OR*]

1. Petitioner _____ [*name*] is, and at all times mentioned herein was, the owner of a parcel of real property to which an easement in the nature of a private right of way is appurtenant. The easement is described as follows: _____ [*set forth legal description and street address or common designation, if any, of easement*].

[*EITHER*]

2. Respondent _____ [*name*] is, and at all times mentioned herein was, one of the owners of the easement described in Paragraph 1.

[*OR*]

2. Respondent _____ [*name*] is, and at all times mentioned herein was, the owner of a parcel of real property to which the easement in Paragraph 1 is appurtenant. The real property is described as follows: _____ [*set forth description of respondent's property*].

[*CONTINUE*]

3. There is no agreement between petitioner and respondent as to sharing the cost of maintaining the easement in repair.

4. _____ [*Allege use made of easement by petitioner, e.g.,* Petitioner uses the easement as the sole means of access to his/her residence for petitioner and his/her family and guests].

5. _____ [*Allege use made of easement by respondent, e.g.,* Respondent uses the easement as the sole means of access to his/her farm and residence for respondent, his/her family, guests, employees, and others going to and from respondent's land in connection with respondent's farming business].

6. The easement has fallen into a state of disrepair in that it is _____ [*allege condition of easement requiring repair, e.g.,* so marred by numerous ruts and holes that it is inconvenient and dangerous to travel by automobile]. As a result of this state of disrepair, the following repairs are reasonable and necessary to maintain the easement: _____ [*specify repairs required, e.g.,* filling the ruts and holes and regrading the road's surface].

7. Petitioner maintains that the fair and reasonable cost of making the repairs is $_____; that petitioner should pay _____ percent or $_____ of the cost; and that respondent should pay _____ percent or $_____ of the cost.

8. Respondent maintains that _____ [*specify, e.g.,* he/she should pay only _____ percent or $_____ of the cost of repairing the easement].

9. To settle this dispute, it is necessary and advisable that the court appoint an impartial arbitrator to apportion the cost of repairs.

WHEREFORE, petitioner prays for judgment as follows:

1. For appointment of an impartial arbitrator to apportion the cost of maintaining the easement in repair;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification, if desired. See § 240.50[1].*]

[2] Use of Form

This form is a petition for use by one of the owners of a right-of-way easement in gross or an owner of any land to which a right-of-way easement is appurtenant (the dominant tenement), against another owner of the easement or another owner of the dominant tenement, to obtain the appointment of an impartial arbitrator who will apportion the costs of maintaining the easement between the parties [*see Civ. Code § 845*]. If the arbitration award is not accepted by all of the owners, the court may enter a judgment determining the proportional liability of each owner. The judgment may be enforced as a money judgment by any party against any other party to the action [*Civ. Code § 845(c)*]. For further discussion of the right to apportionment, see *§ 240.16[7]*.

[3] Supporting Papers

A notice of hearing of the petition and a supporting memorandum should accompany a petition filed in superior court [*Code Civ. Proc. § 1290.2* (notice of petition to compel arbitration under arbitration agreement); *Cal. Rules of Ct., Rule 3.1113(a)*], since this petition is not listed among the petitions, civil motions, and applications for which a memorandum is not required [*Cal. Rules of Ct., Rule 3.1114(a)*]. Additionally, a memorandum may be required by the court in support of any motion, application, or petition if it would further the interests of justice, or a party may voluntarily submit a memorandum in that situation [*Cal. Rules of Ct., Rule 3.1114(b)*; *see Cal. Rules of Ct., Rule 3.1113*]. For general discussion of points and authorities, see Ch. 417, *Points and Authorities* .

[4] Respondents

The respondents should be all other owners of an easement in gross or, in the case of an easement appurtenant, all other owners of the land (possibly including separate parcels) composing the dominant tenement [*see Civ. Code § 845(b)*; *Whitson v. Goudeseune (1955) 137 Cal. App. 2d 445, 448-449, 290 P.2d 590]* .

[5] Jurisdiction and Venue

The petition must be filed in the county where the right-of-way easement is located [*Civ. Code § 845(c)*].

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86*]. When title or right to possession is to be tried, or permanent injunctive

relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

In limited civil cases, the first page of the first paper must state that it is a limited civil case and whether the amount demanded exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[6] Verification

Verification of this petition is not required [*see Civ. Code § 845*; *see also Code Civ. Proc. §§ 1281.2, 1290*]. If the petition were considered equivalent to a complaint, verification of it would require the defendant to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446*] and would also preclude a general denial except in a limited civil case, and would preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[7] Cross References

For discussion and forms for use in actions involving arbitration under a written arbitration agreement, see Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding*

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Volume 20: Easements thru Eminent Domain-Chs. 240-247
Chapter 240 EASEMENTS
PART IV. FORMS

20-240 California Forms of Pleading and Practice--Annotated § 240.53

AUTHOR: by William M. Hensley Editorial Consultant

§ 240.53 Complaint to Enforce Agreement Regarding Proportional Liability of Owners of Right-of-Way Easement for Maintenance and Cost of Repairs [Civ. Code § 845]--By Party Maintaining Easement Against Owner Refusing to Share Liability

[1] FORM Complaint to Enforce Agreement Regarding Proportional Liability of Owners of Right-of-Way Easement for Maintenance and Cost of Repairs [Civ. Code § 845]--By Party Maintaining Easement Against Owner Refusing to Share Liability

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Maintenance of Right-of-Way Easement)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[*EITHER*]

1. Plaintiff _____ [*name*] is, and at all times mentioned herein was, one of the owners of an easement in the nature of a private right of way over a strip of land described as follows: _____ [*set forth legal description and street address or common designation, if any, of easement*].

[*OR*]

1. Plaintiff _____ [*name*] is, and at all times mentioned herein was, the owner of a parcel of real property to which an easement in the nature of a private right of way is appurtenant. The easement is described as follows: _____ [*set forth legal description and street address or common designation, if any, of easement*].

[*EITHER*]

2. Defendant _____ [*name*] is, and at all times mentioned herein was, one of the owners of the easement described in Paragraph 1.

[*OR*]

2. Defendant _____ [*name*] is, and at all times mentioned herein was, the owner of a parcel of real property to which the easement in Paragraph 1 is appurtenant. The real property is described as follows: _____ [*set forth description of respondent's property*].

[*CONTINUE*]

3. Before _____ [*date*] the easement had fallen into a state of disrepair in that it was _____ [*allege condition of easement requiring repair, e.g.,* so marred by numerous ruts and holes that it was inconvenient and dangerous to travel by automobile, and in inclement weather it was impassable by common vehicles]. As a result of this state of disrepair, the following repairs were reasonable and necessary to maintain the easement: _____ [*specify repairs required, e.g.,* filling the ruts and holes, clearing the adjacent drainage ditch of debris, pouring additional gravel on the road, and regrading the surface of the road].

4. On or about _____ [*date*] in _____ County, California, plaintiff and defendant entered into _____ [an oral *or* a written] agreement to apportion the cost of repairing the easement. Under the agreement, plaintiff was to pay _____ percent and defendant was to pay _____ percent of the costs of repair. A copy of the agreement is attached as an exhibit and made a part of this complaint.

5. Under that agreement, plaintiff has caused the repairs described in Paragraph 3 to be made and has incurred _____ [a debt *or* expenses] in the sum of $_____. Plaintiff has performed all conditions and promises to be performed by him/her under the agreement.

6. [Plaintiff has demanded of defendant that defendant pay defendant's share of the cost of repairs, but] [D]efendant has failed to pay any amount whatever, to plaintiff's damage in the sum of $_____.

WHEREFORE, plaintiff prays for judgment against defendant as follows:

1. For damages in the sum of $_____;

2. For interest on the sum of $_____ from _____ [*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 240.50[1].*]

[2] Use of Form

This form is a complaint for use by one of the owners of an easement in the nature of a right of way, or of a parcel of land to which such an easement is appurtenant, against another owner to obtain damages for the cost of repairs to the easement made under an apportionment agreement [*see Civ. Code § 845*]. For further discussion of the right to apportion the cost of maintaining an easement, see *§ 240.16[7]*.

[3] Allegations

The complaint alleges:

- The plaintiff's ownership of an easement in the nature of a private right of way or of a parcel of land to which such an easement is appurtenant (Paragraph 1).
- The defendant's ownership of the easement or a parcel of land to which the easement is appurtenant (Paragraph 2).
- The repairs required to be performed (Paragraph 3).
- An agreement between the parties to apportion the cost of repair of the easement (Paragraph 4).
- The plaintiff's performance of his or her part of the agreement, and the liability incurred by the plaintiff in making the repairs (Paragraph 5).
- The plaintiff's optional demand that the defendant pay his or her share of the cost, the defendant's failure to pay, and the defendant's indebtedness to the plaintiff (Paragraph 6).

[4] Statute of Limitations

An action on a written contract must be brought within four years [*Code Civ. Proc. § 337(1)*], or an action on an oral contract must be brought within two years [*Code Civ. Proc. § 339(1)*], after the cause of action arose.

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in

controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

In limited civil cases, the first page of the first paper must state that it is a limited civil case and whether the amount demanded exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[6] Venue

Generally, the action may be commenced in the superior court in any of the following counties [*Code Civ. Proc. § 395(a)*]:

- The county in which the defendant signed the agreement.
- The county in which the defendant resided at the time the agreement was entered into.
- The county in which the defendant resides at the commencement of the action.

If a county is a defendant, the action may be commenced in that county [*Code Civ. Proc. § 394*]. In special cases, other counties also may be proper [*see Code Civ. Proc. § 395.1* (action against executor, administrator, guardian, or trustee); *Code Civ. Proc. § 395.2* (action against unincorporated association); *Code Civ. Proc. § 395.5* (action against corporation or association); *Code Civ. Proc. § 401* (action against state, state agency, or state officer)].

[7] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[8] Cross References

For discussion of the elements of a cause of action for breach of contract and of the recovery of interest, and for general forms for use in actions for breach of contract, see Ch. 140, *Contracts*

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Chapter 240 EASEMENTS
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20-240 California Forms of Pleading and Practice--Annotated § 240.54

AUTHOR: by William M. Hensley Editorial Consultant

§ 240.54 Complaint to Establish Abandonment of Easement Appurtenant and to Clear Record Title [Civ. Code § 887.040]--By Landowner Against Owner of Easement

[1] FORM Complaint to Establish Abandonment of Easement Appurtenant and to Clear Record Title [Civ. Code § 887.040]--By Landowner Against Owner of Easement

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	
_____ [*name*],	)	NO. _____
_____ [*if unknown defendants are*	)	COMPLAINT TO ESTABLISH ABANDONMENT
included, add: and all persons unknown, claiming any	)	OF EASEMENT AND TO CLEAR RECORD TITLE
legal or equitable right, title, estate, lien, or interest in	)	
the property described in the complaint adverse to	)	
plaintiff's title, or any cloud on plaintiff's title	)	
thereto,]		
[and DOES I through _____,]		
Defendant(s).		

_____

Plaintiff alleges:

1. Plaintiff is the owner of real property situated in _____ County, California, and described as follows ("Plaintiff's Property"): _____ [*set forth legal description and street address or common designation, if any*].

2. Plaintiff was _____ [seised *or* possessed] of the property in question within five years before commencement of this action.

3. Defendant _____ [*name*] is the owner of real property situated in _____ County, California, and described as follows ("Defendant's Property"): _____ [*set forth legal description and street address or common designation, if any*].

[4. *Fictitious name allegation, if appropriate. See § 240.50[1], Paragraph 10.*]

5. For some period before the commencement of this action, Plaintiff's Property was burdened with an easement appurtenant to Defendant's Property, described as follows ("the Easement"): _____ [*set forth legal description and street address or common designation, if any*].

6. For more than 20 years continuously and immediately before the commencement of this action, the Easement was not used, no separate property tax assessment was made on the Easement, no instrument creating, reserving, transferring, or otherwise evidencing the Easement was recorded, and no notice of intent to preserve the interest was recorded.

[7. *Allegations of all persons unknown, if appropriate. See § 240.50[1], Paragraph 9.*]

8. Plaintiff seeks a determination that the Easement has been abandoned and that the record title to Plaintiff's Property is free of the burden of the Easement and free of any claims of defendant(s) ("the Adverse Claims").

9. The Adverse Claims are without any right whatever. Defendant(s) has/have no right, title, estate, lien, or interest whatever in the Easement adverse to plaintiff's title [except _____ (*set forth any claims that plaintiff admits are valid, e.g.,* the utility easement held by Pacific Gas and Electric Company)].

10. Plaintiff seeks to have the determination made as of _____ [*date*]. [That date should be the effective date because _____ (*if date is other than date complaint is filed, allege why determination as of that date is sought*).]

WHEREFORE, plaintiff prays for judgment against defendant(s) [and each of them] as follows:

1. That the easement has been abandoned and that Plaintiff's Property is unencumbered by the easement or any claims of defendant(s);

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification. See § 240.50[1].*]

[2] Use of Form

This form is a complaint for use by the owner of the servient tenement in an action to establish abandonment of an easement appurtenant and to clear record title of the easement [*Civ. Code § 887.040(a)*; *see generally Civ. Code § 887.010 et seq.* (action to establish abandonment of easement)]. The action must be brought in the same manner and subject to the same procedure as a quiet title action [*see generally Code Civ. Proc. § 760.010 et seq.*; *see also § 240.50*], to the extent applicable [*Civ. Code § 887.040(c)*]. For a complaint to quiet title and discussion, see *§ 240.50*.

[3] Contents of Complaint

[a] Allegations

The complaint alleges:

- The plaintiff's ownership of the real property that is burdened by an easement (Paragraph 1) [*see Code Civ. Proc. § 761.020(b)*].
- The plaintiff's seisin or possession of the property within five years before the action was commenced (Paragraph 2) [*see Code Civ. Proc. § 321*].
- The defendant's ownership of the real property that is the dominant tenement (Paragraph 3) [*Code Civ. Proc. § 761.020(c)*].
- A description of the easement (Paragraph 5) [*Code Civ. Proc. § 761.020(a)*].
- The statutory basis for abandonment (Paragraph 6) [*Civ. Code §§ 887.050, 887.060*].
- Allegations regarding unknown and uncertain defendants (Optional Paragraph 7).
- That the plaintiff is seeking to have the easement determined to be abandoned (Paragraph 8) [*see Civ. Code § 887.040(a)*].
- The date as of which the determination is sought (Paragraph 9) [*see Code Civ. Proc. § 761.020(d)*].

[b] Defendants

The form in [1], *above*, does not contain any allegations regarding defendants who are personal representatives [*Code Civ. Proc. § 762.030(a)*] or heirs and intestate or testate successors [*Code Civ. Proc. § 762.030(b)*] of persons known or believed by the plaintiff to be deceased. If those defendants are necessary [*see generally § 240.50[4]*], appropriate allegations can be *found in § 240.50[1]*.

[4] Jurisdiction and Venue

The action must be brought in the superior court of the county in which the real property subject to the easement (the servient tenement) is located and is not a limited civil case [*Civ. Code § 887.040(b)*; *Code Civ. Proc. §§ 85, 86, 580(b)(3)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

[5] Effect of Judgment

An abandoned easement is unenforceable and is deemed to have expired. Acourt order establishing an easement's

abandonment is equivalent for all purposes to a conveyance of the easement to the owner of the servient tenement [*Civ. Code § 887.080*].

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Volume 20: Easements thru Eminent Domain-Chs. 240-247
Chapter 240 EASEMENTS
PART IV. FORMS

20-240 California Forms of Pleading and Practice--Annotated § 240.55

AUTHOR: by William M. Hensley Editorial Consultant

§ 240.55 Complaint to Quiet Title [Code Civ. Proc. §§ 760.020(a), 761.020] and for Declaratory Judgment [Code Civ. Proc. § 1060] on Existence or Scope of Easement--By Owner of Servient Tenement Against Owner of Dominant Tenement

[1] FORM Complaint to Quiet Title [Code Civ. Proc. §§ 760.020(a), 761.020] and for Declaratory Judgment [Code Civ. Proc. § 1060] on Existence or Scope of Easement--By Owner of Servient Tenement Against Owner of Dominant Tenement

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*]	)	COMPLAINT TO QUIET TITLE AND FOR DE-
_____ [*if unknown defendants are*	)	CLARATORY RELIEF
included, add: and all persons unknown, claiming any	)	(Easement)
legal or equitable right, title, estate, lien, or interest in	)	
the property described in the complaint adverse to	)	
plaintiff's title, or any cloud on plaintiff's title	)	
thereto,]		
[and DOES I through _____,]		
Defendant(s).		

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION

(Declaratory Relief)

1. Plaintiff _____ [*name*] is the owner of real property situated in _____ County, California, and described as follows ("Plaintiff's Property"): _____ [*set forth legal description and street address or common designation, if any*].

2. Defendant _____ [*name*] is the owner of real property situated in _____ County, California, and described as follows ("Defendant's Property"): _____ [*set forth legal description and street address or common designation, if any*].

3. [*Fictitious name allegation, if appropriate. See § 240.50[1], Paragraph 10.*]

4. _____ [*Allege facts giving rise to dispute as to existence or extent of easement, e.g.,* Before the conveyance of Plaintiff's Property to plaintiff and of Defendant's Property to defendant, Plaintiff's Property and Defendant's Propertywere owned by _____ (*name*) ("the Original Owner"). On _____ (*date*), the Original Owner conveyed Plaintiff's Property by deed to plaintiff, purportedly reserving an easement appurtenant to Defendant's Property by the following language contained in the deed: _____ (*set forth clause purportedly granting easement*). A copy of the deed is attached as an exhibit and made a part of this complaint].

5. An actual controversy has arisen and now exists between plaintiff and defendant concerning their respective rights and duties. Plaintiff contends _____ [*specify plaintiff's contentions as to legal consequences resulting from facts alleged in preceding paragraphs*]. Defendant disputes these contentions and contends that _____ [*specify defendant's contentions*].

6. Plaintiff desires a judicial determination of his/her rights and duties, and a declaration as to _____ [*specify, e.g.,* whether the Original Owner reserved a valid easement, whether the easement is appurtenant to Defendant's Property or is an easement in gross, and whether plaintiff's interpretation as to the extent of the easement is correct].

7. A judicial declaration is necessary and appropriate at this time so that plaintiff may ascertain his/her rights and duties because _____ [*allege financial or other burden caused to plaintiff by unsettled state of affairs, e.g.,* plaintiff wishes to develop Plaintiff's Property but cannot safely proceed with the development without knowing the burdens, if any, to which the land is subject by virtue of the facts described above].

SECOND CAUSE OF ACTION

(Quiet Title)

8. Plaintiff refers to and incorporates Paragraphs 1 through 5, inclusive, of the FIRST CAUSE OF ACTION.

9. Plaintiff was _____ [seised *or* possessed] of Plaintiff's Property within five years before the commencement of this action.

10. [*Allegations of all persons unknown, if appropriate. See § 240.50[1], Paragraph 9.*]

11. Plaintiff is seeking to quiet title against all adverse claims of defendant(s) ("the Adverse Claims").

12. The Adverse Claims are without any right whatever. Defendants have no right, title, estate, lien, or interest whatever in Plaintiff's Property adverse to plaintiff's title, or any part of that property [, except the following: _____ (*set forth any claims that plaintiff admits are valid, e.g.,* the utility easement held by Pacific Gas and Electric Company)].

14. Plaintiff seeks to quiet title as of _____ [*date*]. [That date should be the effective date because _____ (*if date is other than date complaint is filed, allege why determination as of that date is sought*).]

WHEREFORE, plaintiff prays for judgment as follows:

On the FIRST CAUSE OF ACTION:

1. That _____ [*specify declaratory judgment sought, e.g.,* Plaintiff's Property is not burdened by an easement appurtenant to Defendant's Property];

On the SECOND CAUSE OF ACTION:

2. That no defendant has any interest in Plaintiff's Property adverse to plaintiff's interest;

On all CAUSES OF ACTION:

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

This form is a complaint for use by the owner of an alleged servient tenement in an action against the owner of the alleged dominant tenement for a declaration as to the nonexistence or limited extent of an easement on the plaintiff's property, and to quiet title to the plaintiff's property.

[3] Landowner's Cause of Action

The owner of a fee interest in real property subject to a servitude is entitled to have the extent and burdens of the servitude defined and determined in a quiet title action [*Warren v. Atchison, T. & S.F. Ry. Co. (1971) 19 Cal. App. 3d 24, 33, 96 Cal. Rptr. 317]* . The owner of a servient tenement is entitled to maintain an action for possession of the land even if a servitude exists in favor of the public [*Civ. Code § 810*].

[4] Contents of Complaint

[a] Allegations

In the first cause of action, for declaratory relief [*see generally Code Civ. Proc. § 1060 et seq.*], the complaint alleges [*Code Civ. Proc. § 1060*]:

- The plaintiff's ownership of the real property that is purportedly theservient tenement (Paragraph 1).
- The defendant's ownership of the real property that is purportedly the dominant tenement (Paragraph 2).
- The facts giving rise to the dispute as to the existence or extent of the alleged easement (Paragraph 4).
- Facts showing that an actual controversy exists between the parties as to their respective rights and duties with regard to the plaintiff's land (Paragraph 5).
- The determination and declaration sought by the plaintiff (Paragraph 6).
- Facts showing that declaratory relief is necessary and appropriate at this time (Paragraph 7).

For discussion of the allegations in the second cause of action, to quiet title, see *§ 240.50[3]*.

[b] Defendants

The form in [1], *above*, does not contain any allegations regarding defendants who are personal representatives [*Code Civ. Proc. § 762.030(a)*] or heirs and intestate or testate successors [*Code Civ. Proc. § 762.030(b)*] of persons known or believed by the plaintiff to be deceased. If those defendants are necessary [*see generally § 240.50[4]*], appropriate allegations can be *found in § 240.50[1]*, along with an expanded caption that includes them as defendants.

[5] Jurisdiction and Venue

An action seeking declaratory relief and quiet title to real property is in the jurisdiction of the superior court and is not a limited civil case [*see Code Civ. Proc. §§ 85, 86(a)(7), 580(b)(3), (4), 1060, 760.040(a)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

The superior court in the county where the real property, or some part of it, is situated is the proper court for the trial of an action for the determination of a right or interest in real property and to quiet title [*Code Civ. Proc. §§ 392(a), 760.050(a)*; *but see Code Civ. Proc. § 394* (action in which city, county, consolidation, or local agency is party)].

[6] Cross References

For discussion of the allegations necessary to state a cause of action for declaratory relief, see Ch. 182, *Declaratory Relief*

For discussion of the allegations required to state a cause of action to quiet title to real property, see Ch. 482, *Quieting Title*

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Chapter 240 EASEMENTS
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20-240 California Forms of Pleading and Practice--Annotated § 240.56

AUTHOR: by William M. Hensley Editorial Consultant

§ 240.56 Notice of Conservation Easement [Gov. Code § 27255(c)] to be Filed with County Recorder for Placement in Comprehensive Index of Conservation Easements and Notices of Conservation Easements

[1] FORM Notice of Conservation Easement [Gov. Code § 27255(c)] to be Filed with County Recorder for Placement in Comprehensive Index of Conservation Easements and Notices of Conservation Easements

Recording Requested by _____ and When Recorded Return To: _____ [*specify name, address, and phone number of person or agency filing*]

NOTICE OF CONSERVATION EASEMENT

The undersigned hereby gives notice that a Conservation Easement was recorded in the _____ County Recorder's Office on _____ [*date*] and recorded as Document Number _____.

The grantors and grantees of the Conservation Easement were

Grantors _____
_____

Grantees _____
_____

I declare under penalty of perjury that the above statement is true and correct.

Signed, _____

Dated, _____

[2] Use of Form

This form is a Notice of Conservation Easement that may be completed and submitted to the county recorder in the county in which the easement is located. The information is to be added to the county's comprehensive index of conservation easements, which also includes information on recorded documents that contain a specifically named conservation easement. The conservation easement must be described in a notice, and all requested information must be properly filled out by the submitter. The notice may be recorded at the same time as it is submitted, or at a later time [*Gov. Code § 27255(c)*]. For information on the elements of a conservation easement, and the types of easements that fall into this category, see *§ 240.12[5]*.

[3] Comprehensive Index of Conservation Easements

The county recorder in each county must develop and maintain, within the county's existing indexing system, a comprehensive index of conservation easements and Notices of Conservation Easements on land within the county. Thisindex must include all conservation easements, as defined, recorded on or after January 1, 2002 [*Gov. Code § 27255(a), (f)*; *see § 240.12[5][a]*]. In addition, a conservation easement recorded before January 1, 2002, may be included in the comprehensive index if a party to the easement fills out and records a notice for the previously recorded easement, and files the notice in the county in which the affected real property is located [*Gov. Code § 27255(d)*]. Any party to a conservation easement may fill out and record a notice, including, but not limited to, counties, cities, recreation and park districts or agencies, state conservancies, state agencies, the California Coastal Commission, land trusts, and nonprofit organizations [*Gov. Code § 27255(d)*].

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Chapter 241 EJECTMENT

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§ 241.syn Synopsis to Chapter 241: EJECTMENT

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§ 241.02 Cross References

§ 241.03 Essential Allegations

§§ 241.04through 241.09 [Reserved]

§ 241.10 Nature of Action

[1] Recovery of Possession

[2] Plaintiff's Possessory Right Sufficient to Bring Action

§ 241.11 When Action Lies

[1] Against Another Lessee

[2] Against Person Adversely Possessing Property or Mere Trespasser

[3] Against Vendee

[4] Against Tenant, Employee, or Mortgagor

§ 241.12 Damages

[1] Plaintiff's Right to Damages

[a] Measure of Damages

[b] Determining Value of Use of Property

[2] Defendant's Right to Setoff

§ 241.13 Pleading

§ 241.14 Enforcement of Judgment

[1] Under Enforcement of Judgments Law

[2] By Contempt Proceedings

§§ 241.15through 241.29 [Reserved]

§ 241.30 Related Matthew Bender Publications

§ 241.31 State Statutes

§ 241.32 Decisions

[1] Damages

[2] Nature and Scope of Ejectment Action

[3] Ouster

[4] Possession

[5] Public Lands, Ejectment From

[6] Statute of Limitations

§ 241.33 Text References

§§ 241.34through 241.49 [Reserved]

§ 241.50 Complaint in Ejectment to Recover Possession of Real Property [Civ. Code § 3375] and Damages for Wrongful Detention [Civ. Code § 3334]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction

[5] Statute of Limitations

[6] Venue

[7] Verification

[8] Cross References

§ 241.51 Complaint in Ejectment to Recover Possession of Real Property [Civ. Code § 3375] Sold Under Contract

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 241.52 Complaint in Ejectment to Recover Possession of Real Property [Civ. Code § 3375] and to Recover Damages for Building Pipeline on Property [Civ. Code § 3334]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 241.53 Judgment Awarding Possession of Premises and Damages to Plaintiff

[1] FORM

[2] Use of Form

[3] Memorandum of Costs

[4] Enforcement of Judgment

[5] Cross References

§ 241.54 Order of Contempt [Code Civ. Proc. §§ 1210, 1219] for Use in Contempt Proceedings Following Reentry After Judicial Ejection

[1] FORM

[2] Use of Form

[3] Requirements of Order of Contempt

[4] Reentry After Judicial Ejection

[5] Alias Writ of Execution

[6] Appeal

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Chapter 241 EJECTMENT
PART I. SCOPE

20-241 California Forms of Pleading and Practice--Annotated § 241.01

§ 241.01 Scope of Chapter

This chapter discusses actions in ejectment for the recovery of real property and for damages for the wrongful use or occupation of the property. It includes the following forms:

- Complaints for use in ejectment actions [*see §§ 241.50 -241.52*].
- Judgment awarding possession of the premises and damages to plaintiff [*see § 241.53*].
- Contempt order for use when defendant reenters the property following ejection [*see § 241.54*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTitle QualityAdverse Claim ActionsEjectment

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§ 241.02 Cross References

- For discussion and forms relating to actions for unlawful detainer and forcible entry, see Ch. 333, *Landlord and Tenant: Eviction Actions* .
- For discussion and forms relating to actions for trespass, see Ch. 550, *Trespass* .
- For discussion and forms relating to actions for quieting title, see Ch. 482, *Quieting Title* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsReal Property LawTitle QualityAdverse Claim ActionsUnlawful DetainerReal Property LawTortsTrespass to Real PropertyTortsPremises Liability & PropertyTrespassGeneral Overview

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20-241 California Forms of Pleading and Practice--Annotated § 241.03

§ 241.03 Essential Allegations

A complaint in ejectment should allege facts showing the following:

- Title or right of possession in the plaintiff [*see Kirsch v. Brigard (1883) 63 Cal. 319, 322-323* ; *Haight v. Green (1861) 19 Cal. 113, 117* ; *see § 241.13*];

- Description of the property made with such certainty as to enable an execution officer to identify it; and [*see Code Civ. Proc. § 455*; *see § 241.13*],

- Defendant's possession of the property and, if applicable, defendant's ouster of plaintiff [*see Payne & Dewey v. Treadwell (1860) 16 Cal. 220* ; *Boles v. Weifenback (1860) 15 Cal. 144* ; *see § 241.13*].

If plaintiff is also seeking damages for the wrongful detention of the property, the complaint should allege facts showing the following:

- The date on which defendant's wrongful possession of the property began and plaintiff's right to possession at that time [*see Payne & Dewey v. Treadwell (1860) 16 Cal. 220* ; *see § 241.13*];

- Damages suffered by plaintiff as a result of the detention [*see Civ. Code § 3334(a)*; *see § 241.12[1][a]*;] and

- Value of the rents and profits of the property, if their recovery is sought [*see Civ. Code § 3334(b)*; *see § 241.12[1][b]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsReal Property LawTitle QualityAdverse Claim ActionsEjectment

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[Reserved]

§§ 241.04[Reserved]

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§ 241.10 Nature of Action

[1] Recovery of Possession

Ejectment is a civil action to recover possession of real property [*see Civ. Code § 3375*; *Code Civ. Proc. § 307*; *Payne & Dewey v. Treadwell (1860) 16 Cal. 220]* by the owner or person entitled to possession of the property against the unlawful occupier of the land [*Paap v. Von Helmholt (1960) 185 Cal. App. 2d 823, 829, 8 Cal. Rptr. 568]* .

The action litigates only the right to possession of the premises demanded by plaintiff, and, unlike a quiet title action, it leaves the title to the property unchanged [*see Whittaker v. Otto (1961) 188 Cal. App. 2d 619, 626, 10 Cal. Rptr. 689* ; *Barcroft v. Livacich (1930) 35 Cal. App. 2d 710, 717, 96 P.2d 951]* .

[2] Plaintiff's Possessory Right Sufficient to Bring Action

Plaintiff may bring an ejectment action on the basis of his or her legal title or, if neither party relies on actual fee title, on the basis of a mere possessory right [*Whittaker v. Otto (1961) 188 Cal. App. 2d 619, 626, 10 Cal. Rptr. 689* ; *see Shusett, Inc. v. Home Sav. & Loan Assn. (1964) 231 Cal. App. 2d 146, 150, 41 Cal. Rptr. 622]* . However, a licensee who has no interest in the property may not ordinarily maintain an action for ejectment [*Lucky Auto Supply v. Turner (1966) 244 Cal. App. 2d 872, 881, 53 Cal. Rptr. 628* ; *Nahas v. Retail Clerks International Asso. (1956) 144 Cal. App. 2d 808, 821, 301 P.2d 932]* .

In any case, plaintiff must recover on the basis of his or her own rights and not on the basis of defendant's lack of title or interest [*Vowinckel v. N. Clark & Sons (1933) 217 Cal. 258, 262, 18 P.2d 58]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTitle QualityAdverse Claim ActionsEjectmentReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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20-241 California Forms of Pleading and Practice--Annotated § 241.11

§ 241.11 When Action Lies

[1] Against Another Lessee

When neither party to an action to recover possession of property asserts a right to possession based on title and there has been no forcible entry or unlawful detainer as defined by statute, an action in ejectment is the only action available to litigate the right to possession. Ejectment is thus properly brought by a party ousted from actual possession of realty when two parties claim the right to possession based on leases either from the same or different lessors [*see Boles v. Weifenback (1906) 15 Cal. 144, 144* ; *Dondero v. O'Hara (1906) 3 Cal. App. 633, 640, 86 P. 985]* .

[2] Against Person Adversely Possessing Property or Mere Trespasser

An action for ejectment is proper to recover possession of real property from an adverse possessor [*see McLeran v. McNamara (1882) 60 Cal. 610, 613-614]* . It is also the proper procedure by which to recover the land from a mere trespasser [*Smpardos v. Piombo Construction Co. (1952) 111 Cal. App. 2d 415, 423, 244 P.2d 435]* . Since a trespasser has no interest in the land, plaintiff may bring an action for ejectment on the basis of his or her prior peaceful possession of the property, without the necessity of showing any greater title or interest in the land [*Smpardos v. Piombo Construction Co. (1952) 111 Cal. App. 2d 415, 423, 244 P.2d 435]* .

[3] Against Vendee

An action in ejectment may be used to recover possession of realty from a vendee who breaches an executory contract for the sale of realty [*see Paap v. Von Helmholt (1960) 185 Cal. App. 2d 823, 828, 8 Cal. Rptr. 568* ; *see Maloney v. White (1960) 182 Cal. App. 2d 787, 788-789, 6 Cal. Rptr. 540]* .

[4] Against Tenant, Employee, or Mortgagor

Although an action in ejectment may also be used to recover realty from a tenant who wrongfully retains possession of his or her landlord's property, an employee who wrongfully retains possession after the termination of his or her employment, a judgment debtor wrongfully in possession after sale of the property under execution and the perfection of title in the purchaser, or a mortgagor wrongfully in possession of property after a mortgage foreclosure sale and the

perfection of title in the purchaser, an action under the unlawful detainer statutes is usually commenced under these circumstances rather than an action in ejectment. Since unlawful detainer is a summary proceeding that has priority over nearly every other civil action on a court's calendar [*Code Civ. Proc. § 1161 et seq.*], it is the most expeditious way to regain possession of property. The unlawful detainer statute lists the situations in which the procedure is available and also requires that certain notice provisions be strictly complied with [*see Code Civ. Proc. §§ 1161, 1161a, 1167,* and Ch. 333, *Landlord and Tenant: Eviction Actions*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdverse PossessionGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawTitle QualityAdverse Claim ActionsEjectmentReal Property LawTitle QualityAdverse Claim ActionsUnlawful DetainerReal Property LawTortsTrespass to Real Property

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20-241 California Forms of Pleading and Practice--Annotated § 241.12

§ 241.12 Damages

[1] Plaintiff's Right to Damages

[a] Measure of Damages

In addition to recovery of possession of the property, the plaintiff may recover damages for the wrongful ouster or unlawful holding of the property [*Civ. Code § 3334(a)*]. The measure of damages is [*Civ. Code § 3334(a)*]:

- The value of the use of the property for the time of the wrongful occupation, not exceeding the five years next preceding the commencement of the action;
- The reasonable cost of repair or restoration of the property to its original condition; and
- The costs of recovering possession.

[b] Determining Value of Use of Property

The value of the use of the property is the greater of [*Civ. Code § 3334(b)*]:

- The reasonable rental value of the property; or
- The benefits obtained by the person wrongfully occupying the property by reason of the wrongful occupation.

If, however, the wrongful occupation is the result of the wrongful occupier's mistake of fact, the value of the use of the property is the reasonable rental value of the property [*Civ. Code § 3334(b)*].

The recovery for lost value of use may include that period of time subsequent to the filing of the complaint and continuing until the plaintiff is let into possession [*Don v. Trojan Constr. Co. (1960) 178 Cal. App. 2d 135, 137-138, 2 Cal. Rptr. 626]* .

In an action to recover damages for groundwater and soil contamination caused by the leakage of leaded gasoline from a pipeline, the jury improperly found that defendant derived a $14,275,237 benefit when it failed to clean up the contamination and awarded that amount to plaintiff pursuant to *Civ. Code § 3334*. A trespass must result in something advantageous for the trespasser or it does not qualify as a benefit for purposes of the statute, and the pipeline leakage and the resulting contamination of plaintiff's land could not be considered something advantageous for the defendant [*Watson Land Co. v. Shell Oil Co. (2005) 130 Cal. App. 4th 69, 79, 29 Cal. Rptr. 3d 343]* .

[2] Defendant's Right to Setoff

If the defendant held the property in good faith under color of title, he or she is entitled to a setoff for any improvements made to the property during the term of his or her possession. This provision applies only in the event the plaintiff seeks damages for the wrongful withholding of the property, and the allowance cannot exceed the amount of damages awarded the plaintiff [*Taliaferro v. Colasso (1956) 139 Cal. App. 2d 903, 906, 294 P.2d 774]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTitle QualityAdverse Claim ActionsEjectmentTortsDamagesCompensatory DamagesProperty DamageGeneral OverviewTortsDamagesCompensatory DamagesProperty DamageLoss of Use

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§ 241.13 Pleading

To allege a cause of action in ejectment, the plaintiff need only allege ownership of the property (described with such certainty as to enable the execution officer to identify it [*Code Civ. Proc. § 455*]), or plaintiff's prior possession and ouster by defendant, and that defendant is still in possession [*Payne & Dewey v. Treadwell (1860) 16 Cal. 220]* .

It is not necessary to allege the probative facts establishing plaintiff's title or right to possession. The right of possession is inherent in the fact of ownership [*Payne & Dewey v. Treadwell (1860) 16 Cal. 220, 243-244]* .

If plaintiff is seeking damages for the wrongful detention of the property, it is necessary to allege the date on which the wrongful possession of the property by defendant began, plaintiff's right to possession at that time as well as at the time the action is commenced, the damages plaintiff suffered as a result of the detention, and the value of rents and profits if their recovery is sought [*see Payne & Dewey v. Treadwell (1860) 16 Cal. 220]* .

For forms of complaints for ejectment, see *§ 241.50* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsReal Property LawTitle QualityAdverse Claim ActionsEjectment

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Chapter 241 EJECTMENT
PART II. LEGAL BACKGROUND

20-241 California Forms of Pleading and Practice--Annotated § 241.14

§ 241.14 Enforcement of Judgment

[1] Under Enforcement of Judgments Law

The party who is decreed to have the right of possession is entitled to have the judgment enforced by process of the court. The successful litigant may enforce the judgment by means of a writ of possession, which will direct the sheriff to carry into effect the directions in the decree of judgment: that is, direct the sheriff to take possession of the real property involved and to satisfy any money judgment that was rendered in the action [*Code Civ. Proc. §§ 715.010, 715.020*; for discussion and forms for enforcing judgments, *see* Ch. 254, *Executions and Enforcement of Judgments*].

[2] By Contempt Proceedings

If the ousted litigant reenters the premises without having acquired any further rights than those asserted at the trial, he or she is guilty of contempt of the court from which the judgment was rendered. Following a finding and conviction of such contempt, the party entitled to the possession of the premises may have an alias writ of possession issued to recover the land [*Code Civ. Proc. § 1210*].

For a form of order of contempt, see *§ 241.54*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureSanctionsContemptCivil ContemptReal Property LawTitle QualityAdverse Claim ActionsEjectment

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[Reserved]

§§ 241.15[Reserved]

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20-241 California Forms of Pleading and Practice--Annotated § 241.30

§ 241.30 Related Matthew Bender Publications

California Real Estate Law & Practice, §§ 210.100 -210.104, 370.09 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTitle QualityAdverse Claim ActionsEjectment

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20-241 California Forms of Pleading and Practice--Annotated § 241.31

§ 241.31 State Statutes

Notice not required for recovery of property leased with right of reentry. *Civ. Code § 793*

Action for recovery of real property. *Civ. Code § 3375*

Necessity of possession within five years prior to commencement of action. *Code Civ. Proc. §§ 318, 319*

Venue of ejectment actions. *Code Civ. Proc. § 392*

Joinder of causes of action. *Code Civ. Proc. § 427.10*

Property required to be sufficiently described. *Code Civ. Proc. § 455*

Enforcement of judgment by writ of possession. *Code Civ. Proc. § 715.010 et seq.*

Damages recoverable in action for possession of realty. *Code Civ. Proc. § 740, 741*; *Civ. Code § 3334*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueIndividual DefendantsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsEjectmentTortsDamagesCompensatory DamagesProperty DamageGeneral Overview

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20-241 California Forms of Pleading and Practice--Annotated § 241.32

§ 241.32 Decisions

[1] Damages

Rental value of property as measure of damages for wrongful detention. *Hodges v. Lochhead (1963) 217 Cal. App. 2d 199, 205, 31 Cal. Rptr. 879*

Damages in ejectment actions. *Paap v. Von Helmholt (1960) 185 Cal. App. 2d 823, 830, 8 Cal. Rptr. 568*

Right to setoff for improvements to property. *Taliaferro v. Colasso (1956) 139 Cal. App. 2d 903, 906-907, 294 P.2d 774*

[2] Nature and Scope of Ejectment Action

Possession sufficient for maintenance of ejectment action. *Kunza v. Gaskell (1979) 91 Cal. App. 3d 201, 207, 154 Cal. Rptr. 101*

Lessor may maintain ejectment action without terminating lease where written lease contains provision reserving to lessor right to reenter premises in event of tenant's default, while continuing to hold tenant to his obligation to pay rent to end of term of lease. *Chinese Hosp. Foundation Fund v. Patterson (1969) 1 Cal. App. 3d 627, 633, 81 Cal. Rptr. 795*

Ejectment is possessory action founded on title, color of title, or prior possession of property by plaintiff. *Whittaker v. Otto (1961) 188 Cal. App. 2d 619, 626, 10 Cal. Rptr. 689*

Landlord may maintain action in ejectment to remove tenant at sufferance, and tenant is not entitled to notice to quit as necessary prerequisite to maintenance of action. *Moon v. Marker (1938) 26 Cal. App. 2d 33, 36-37, 78 P.2d 460*

Trespass and ejectment as possessory actions. *Corrigan v. Stiltz (1965) 233 Cal. App. 2d 381, 386-387, 43 Cal. Rptr.*

548 ; *Shusett, Inc. v. Home Sav. & Loan Asso. (1964) 231 Cal. App. 2d 146, 150, 41 Cal. Rptr. 622*

Ejectment action involving issue of title. *Zaccaria v. Bank of America (1958) 164 Cal. App. 2d 715, 718, 331 P.2d 198*

[3] Ouster

Temporary trespass is not sufficient ouster to support ejectment action. *Wilson v. Diche (1961) 192 Cal. App. 2d 312, 314-315, 13 Cal. Rptr. 243*

[4] Possession

Prior actual possession is sufficient to maintain action for ejectment; sufficiency of acts to constitute possession. *Hart v. Cox (1915) 171 Cal. 364, 367-368, 153 P. 391*

[5] Public Lands, Ejectment From

County owning underlying fee to tidelands in unincorporated area of county had legal right to maintain action in ejectment and have dry docks, installed by defendant company, removed from publicly owned tidelands, by either physical removal or destruction, and for monthly rental value of property for so long as dry docks remain on public lands. *County of Marin v. Roberts (1970) 4 Cal. App. 3d 480, 483-484, 84 Cal. Rptr. 425*

[6] Statute of Limitations

Judgment in ejectment action does not suspend statute of limitations on question of title. *Hodgkins v. People's Water Co. (1918) 177 Cal. 730, 735-736, 171 P. 945*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsPublic LandsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsEjectmentTortsDamagesCompensatory DamagesProperty DamageGeneral Overview

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§ 241.33 Text References

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 594-597; Vol. 8, *Enforcement of Judgment*, § 394 (4th ed. 1997)

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[Reserved]

§§ 241.34[Reserved]

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20-241 California Forms of Pleading and Practice--Annotated § 241.50

§ 241.50 Complaint in Ejectment to Recover Possession of Real Property [Civ. Code § 3375] and Damages for Wrongful Detention [Civ. Code § 3334]

[1] FORM Complaint in Ejectment to Recover Possession of Real Property [Civ. Code § 3375] and Damages for Wrongful Detention [Civ. Code § 3334]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT IN EJECTMENT
_____ [*name(s)*],	)	AND FOR DAMAGES
Defendants.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. Plaintiff _____ [*name*] is, and at all times mentioned in this complaint was, including the time from _____ [*date*], [the owner and] entitled to possession of that certain real property situated in _____ County, California, and described as: _____ [*set forth legal description*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

3. Defendants are now in possession of this real property and have been in possession of the property since on or about _____ [*date*], [, when they ousted plaintiff from peaceful possession of the property].

4. Since _____ [*date*], plaintiff has demanded of defendants, and each of them, on numerous occasions that they [pay him/her a reasonable rental or] remove from these premises, but defendants, and each of them, have ignored these demands, have refused plaintiff admission to the premises, [have refused to pay rent,] and still unlawfully withhold possession of the premises.

5. The reasonable value of the rents and profits of the premises is, and was, the sum of $_____ per month. Plaintiff has been damaged in this sum since _____ [*date*], and will continue to be damaged at the rate of $_____ per month as long as defendants withhold possession of the premises from plaintiff.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For restitution of the premises;

2. For damages for their unlawful _____ [detention *or* possession] at the rate of $_____ per month from and after _____ [*date*], until delivery of possession thereof;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I,_____ [*name*], am the plaintiff in the above entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action to recover possession of real property [*see Civ. Code § 3375*] and to recover damages [*see Paap v. Von Helmholt (1960) 185 Cal. App. 2d 823, 830, 8 Cal. Rptr. 568* ; *Bank of America v. O'Shields (1954) 128 Cal. App. 2d 212, 218, 275 P.2d 153]* for its wrongful retention brought by the owner or person entitled to possession of the property [*see also Chinese Hosp. Foundation Fund v. Patterson (1969) 1 Cal. App. 3d 627, 632, 81 Cal. Rptr. 795* ; *Shusett, Inc. v. Home Sav. & Loan Asso. (1964) 231 Cal. App. 2d 146, 150, 41 Cal. Rptr. 622]* .

[3] Allegations

The complaint alleges:

- Plaintiff's title to the property or his or her right to possession from a certain date (Paragraph 1) [*see Kirsch v. Brigard (1883) 63 Cal. 319, 322-323* ; *Haight v. Green (1861) 19 Cal. 113, 117]* .

- A description of the property (Paragraph 1).

- Defendant's possession of the property and, if applicable, his or her ouster of plaintiff since a certain date (Paragraph 3) [*see Payne & Dewey v. Treadwell (1860) 16 Cal. 220* ; *Boles v. Weifenback (1860) 15 Cal. 144]* .

- Plaintiff's demand that defendant remove from the premises or, if applicable, pay a reasonable rent and defendant's refusal to do so (Paragraph 4).

- The reasonable value of the rents and profits of the property (Paragraph 5).

- The damages suffered by plaintiff as a result of the wrongful detention (Paragraph 5).

For discussion of damages, see *§ 241.12*.

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*]. If the case will involve a determination of title to the property, it cannot be brought as a limited civil case [*Code Civ. Proc. § 580(b)(3)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

In limited civil cases, the first page of the first paper must state whether the amount demanded exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[5] Statute of Limitations

No action for the recovery of real property or for the recovery of the possession of real property can be maintained

unless it appears that the plaintiff or his or her ancestor, predecessor, or grantor was seised or possessed of the property within five years before the commencement of the action [*Code Civ. Proc. § 318*]. The person establishing legal title is presumed to have been in possession for this five-year period unless the property was held and possessed adversely to this legal title for the entire period [*see Code Civ. Proc. § 321*].

[6] Venue

Subject to the power of the court to transfer actions and proceedings as provided in *Code Civ. Proc. § 392 et seq.*, the superior court in the county where the subject real property, or some part of it, is situated is the proper court for the trial of an action for the recovery of real property [*Code Civ. Proc. § 392(a)*].

[7] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[8] Cross References

For alternative allegations as to capacity and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For a notice of lis pendens and related forms, see Ch. 348, *Lis Pendens*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively

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20-241 California Forms of Pleading and Practice--Annotated § 241.51

§ 241.51 Complaint in Ejectment to Recover Possession of Real Property [Civ. Code § 3375] Sold Under Contract

[1] FORM Complaint in Ejectment to Recover Possession of Real Property [Civ. Code § 3375] Sold Under Contract

[*Caption, introduction. See § 241.50* .]

1. Plaintiff _____ [*name*] is, and at all times herein mentioned was, including the time from _____ [*date*], the owner of the property herein described.

[*2. Fictitious name allegation, if appropriate. See § 241.50, Paragraph 2.*]

3. On or about _____ [*date*], plaintiff and defendant entered into a written agreement for the sale of real property, a copy of which is attached to this complaint as Exhibit A and incorporated herein by reference, by the terms of which plaintiff was to sell and defendant was to purchase that certain real property situated in _____ County, California, including the improvements located on this property, more particularly described as follows: _____ [*set forth legal description*].

4. In accordance with the provisions of this agreement, defendant entered into possession of the property and has been in possession of it since on or about _____ [*date*].

5. Defendant has breached and continues to breach the agreement by his/her failure and refusal to comply with the agreement in the following respects: _____ [*list respects in which defendant failed to comply with agreement, e.g.:*

(a) Defendant has failed and continues to fail to make payments provided at the rate of $_____ per month, due on the _____ day of each calendar month, in the total sum of $_____, for the months commencing _____ [*date*] through _____ [*date*], inclusive.

(b) Defendant has failed and continues to fail to pay the real property taxes levied by _____ County, California, on the property and improvements for the years _____ through _____, in the total sum of $_____.

(c) Defendant has failed and continues to fail to keep the premises free and clear of liens in that he/she has executed a deed of trust under which _____ (*name*) is trustee and _____ (*name*) is beneficiary, all as recorded in the Official Records of the County of _____, Book _____, page _____, and has allowed an attachment to remain on the property in favor of _____ (*name*), in the sum of $_____ plus costs, which attachment is recorded in the Official Records of the County of _____, Book _____, page _____].

6. On _____ [*date*], defendant received notice in writing from plaintiff of defendant's breach of the executory agreement of sale as based on the defaults alleged in Paragraph 5, above, together with plaintiff's demand for the possession of the land and improvements on it and a notice of plaintiff's claim of forfeiture of defendant's interest in the land.

7. Defendant has failed and refused, and continues to fail and refuse, to allow plaintiff to enter into possession of the land and the improvements on it.

[8. *Value of rents and profits and damages allegation, if appropriate. See § 241.50, Paragraph 5.*]

[9. *If the agreement provides for the payment of attorney's fees, add:* The sale agreement provides for the payment of reasonable attorney's fees in the event of any breach of the agreement or any action being brought to enforce any of the terms or provisions of the agreement. Plaintiff has been compelled to retain the services of _____ (*name*) to enforce his/her rights under the agreement and has incurred, and will incur, attorney's fees for that purpose. The sum of $ _____ is a reasonable attorney's fee for services rendered and to be rendered in this action.]

[*Prayer. See § 241.50*]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 241.50.*]

[2] Use of Form

This form is for use in an action to recover possession of real property and, if appropriate, damages from a vendee who breaches an executory contract for the sale of the property [*see Maloney v. White (1960) 182 Cal. App. 2d 787, 788-789, 6 Cal. Rptr. 540]* .

[3] Allegations

The complaint alleges:

- Plaintiff's title to the property since a certain date (Paragraph 1).
- A certain description of the property (Paragraph 3).
- The terms of plaintiff's and defendant's contract relating to the sale, purchase, and possession of the property (Paragraph 3).
- Defendant's possession of the property under the terms of the agreement (Paragraph 4).
- Defendant's breach of the agreement (Paragraph 5).
- Plaintiff's demand for possession of the property (Paragraph 6).
- Defendant's refusal to allow plaintiff to enter into possession of property (Paragraph 7).
- The reasonable value of the rents and profits of the property, if appropriate (Paragraph 8).
- The damages suffered by plaintiff as a result of the wrongful detention, if appropriate (Paragraph 8).
- The contractual provision for the payment of attorney's fees and the reasonable amount of these fees incurred, if appropriate (Paragraph 9) [*see also Civ. Code § 1717*].

[4] Cross References

For additional commentary on complaints in ejectment and cross references relating to complaints generally, see *§ 241.50[8]*

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20-241 California Forms of Pleading and Practice--Annotated § 241.52

§ 241.52 Complaint in Ejectment to Recover Possession of Real Property [Civ. Code § 3375] and to Recover Damages for Building Pipeline on Property [Civ. Code § 3334]

[1] FORM Complaint in Ejectment to Recover Possession of Real Property [Civ. Code § 3375] and to Recover Damages for Building Pipeline on Property [Civ. Code § 3334]

[*Caption, introduction. See § 241.50.*]

1. [*Plaintiff's ownership and possession of certain real property. See § 241.50, Paragraph 1.*]

2. Defendant _____ [*name*] is, and at all times herein mentioned was, a corporation organized and existing under the laws of California with its principal office for the transaction of business in _____ County [*or allege other capacity and residence of defendant as appropriate*].

[*3. Fictitious name allegation, if appropriate. See § 241.50, Paragraph 2.*]

4. On or about _____ [*date*], and within five years next immediately preceding the commencement of this action, defendant, without right, title, or the consent of plaintiff, entered on the real property described in Paragraph 1 of this complaint while plaintiff was in possession of the property, and appropriated and took possession of a strip of land thereon approximately _____ feet long and approximately _____ feet wide, ousted plaintiff from the possession of that strip of land, and installed and constructed a pipeline along the entire length of the land so appropriated. A map of the property showing the approximate location of the strip of land appropriated by defendant and the pipeline is attached to this complaint as Exhibit A, and incorporated herein by reference.

5. At all times since _____ [*date*], defendant has been in possession of the strip of land and now maintains and continues the pipeline on it, and withholds the strip of land and the possession of it from plaintiff without his/her permission or consent.

6. Plaintiff has demanded of defendant the surrender and deliverance to him/her of the possession of the strip of land so

appropriated and the removal of the pipeline from it, but defendant has at all times failed and refused, and continues to fail and refuse, to surrender or to deliver possession of the strip of land, or to remove the pipeline from it.

7. The reasonable value of the use and occupation of the strip of land so appropriated by defendant is and was the sum of $_____ per month. Plaintiff has been damaged in this sum since _____ [*date*], and will continue to be damaged at the rate of $_____ per month as long as defendant withholds possession of the strip of land from plaintiff and fails to remove the pipeline from it.

[*Prayer. See § 241.50.*]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 241.50.*]

[2] Use of Form

This form is for use in an action to recover possession of real property and to recover damages for the building of a pipeline on the property [*see Slater v. Shell Oil Co. (1943) 58 Cal. App. 2d 864, 869, 137 P.2d 713]* .

[3] Allegations

This complaint alleges the following:

- Possession of a strip of the property and his or her ouster of plaintiff from that strip by his or her construction of a pipeline on the property since a certain date (Paragraphs 4, 5);
- Plaintiff's demand that defendant remove the pipeline from the property and surrender the property and defendant's refusal to do so (Paragraph 6);
- The reasonable value of the use and occupation of the strip of property (Paragraph 7); and
- The damages suffered by plaintiff as a result of the wrongful appropriation (Paragraph 7).

[4] Cross References

For additional commentary on complaints in ejectment and cross references relating to complaints generally, see *§ 241.50[8]*

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20-241 California Forms of Pleading and Practice--Annotated § 241.53

§ 241.53 Judgment Awarding Possession of Premises and Damages to Plaintiff

[1] FORM Judgment Awarding Possession of Premises and Damages to Plaintiff

[*Caption. As on papers previously filed in action.*]

This cause came on regularly for trial on _____ [*date*] in [_____ (Department *or* Division) _____ of] the above-entitled court, the Honorable _____, Judge, presiding, sitting without a jury, a jury having been duly waived. Plaintiff appeared [in person and] by his/her attorney, _____ [*name*], and defendant appeared [in person and] by his/her attorney, _____ [*name*]. [Both oral and] [D]ocumentary evidence having been introduced, the cause having been argued and submitted for decision, and _____ [the court (, on request of _____ (plaintiff *or* defendant),) having made its written statement of decision and caused it to be filed *or* no statement of decision having been requested],

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff _____ [*name*] have and recover the possession of the real property situated in _____ County, California, and described as: _____ [*set forth legal description*] from defendant _____ [*name*].

2. A writ of possession shall be issued to the sheriff of _____ County, California directing the sheriff to remove defendant and all those claiming by, through, or under defendant, and to place plaintiff in possession of the premises.

3. Plaintiff shall recover damages from defendant in the sum of $_____.

4. Plaintiff shall recover costs from defendant in the sum of $_____.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use in preparing a judgment in an action for the recovery of real property [*see Zaccaria v. Bank of America (1958) 164 Cal. App. 2d 715, 719, 331 P.2d 198]* and for damages [*see Hodges v. Lochhead (1963) 217 Cal. App. 2d 199, 205-207, 31 Cal. Rptr. 879]* for its wrongful detention.

[3] Memorandum of Costs

A party claiming costs must serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment by the clerk under *Code Civ. Proc. § 664.5* or the date of service of written notice of entry of judgment, or within 180 days after entry of judgment, whichever is first [*Cal. Rules of Ct., Rule 3.1700(a)(1)*]. The amount of costs in the judgment will be inserted by the clerk. For additional information, see Ch. 174, *Costs and Attorney's Fees* .

[4] Enforcement of Judgment

A successful litigant may enforce a judgment for the recovery of real property and for damages for its wrongful detention by means of a writ of possession [*see Code Civ. Proc. §§ 715.010, 715.020*]. For complete discussion and forms, see Ch. 254, *Executions and Enforcement of Judgments* .

[5] Cross References

For discussion and forms relating to the entry of judgments and giving notice of judgments, see Ch. 318, *Judgments*

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§ 241.54 Order of Contempt [Code Civ. Proc. §§ 1210, 1219] for Use in Contempt Proceedings Following Reentry After Judicial Ejection

[1] FORM Order of Contempt [Code Civ. Proc. §§ 1210, 1219] for Use in Contempt Proceedings Following Reentry After Judicial Ejection

[*Caption. As on papers previously filed in action*].

The contempt proceedings against _____ [*name*], _____ [defendant *or* respondent] in this matter, came on regularly for hearing by the court on this date pursuant to _____ [*specify, e.g.,* the order to show cause issued by this court on _____ (*date*)]. _____ [Plaintiff *or* Petitioner] appeared by his/her counsel, _____ [*name*]. [Both oral and] [D]ocumentary evidence having been received and considered, the matter having been argued and submitted, [it appearing that _____ (defendant *or* respondent) has the present ability to comply with the order violated as made by this court on _____ (*date*),] and good cause appearing therefor,

IT IS HEREBY ADJUGED, ORDERED, AND DECREED that _____ [*name*], _____ [defendant *or* respondent] herein, is guilty of contempt of court for failure to obey the order of this court made on _____ [*date*], directing _____ [defendant *or* respondent] to _____ [*specify acts which defendant or respondent was directed to perform or was restrained from performing, e.g.,* surrender to plaintiff possession of the real property situated in _____ County, California, and described as: _____ (*set forth legal description*)] in that _____ [*allege facts essential to establish jurisdiction over contemner, e.g.,* he/she knew of the order, had (and still has) the ability to comply with the order, and willfully disobeyed the order by reentering the property].

IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that an alias writ of execution issue out of this court to the sheriff of _____ County, commanding him/her to put _____ [*name*], _____ [plaintiff *or* petitioner] herein in possession of the following described realty together with the improvements and appurtenances thereto: _____ [*set forth legal description*].

[*EITHER*]

IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that _____ [*name*], _____ [defendant *or* respondent] herein is to be punished for the above contempt by _____ [*specify*, *e.g.*, a fine of $ _____ *or* confinement in the county jail for a period of _____ days].

[*OR*]

IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that _____ [*name*], _____ [defendant *or* respondent] herein is to be imprisoned at _____ [*specify*] jail until he/she has performed the following act(s): _____ [*describe act(s) to be performed*].
Dated: _____.

_____ [*signature*]

Judge the Superior Court

[2] Use of Form

The form of contempt order in [1], *above*, is a for use in an indirect contempt proceeding in which the contemner is founding guilty of a contempt for reentering or taking possession of real property, or inducing or procuring a third party without right to do so, following his or her ejectment from the property by the judgment or process of a court. After the finding of contempt, an alias writ of possession is ordered to be issued [*see Code Civ. Proc. § 1210*], and the contemner may be either punished for the contempt [*see Code Civ. Proc. § 1218*] or, if the contempt consists of an omission to perform an act which is still in the contemner's power to perform, imprisoned until he or she performs the act [*see Code Civ. Proc. § 1219*; *People ex rel. Lamby v. Dwinelle (1866) 29 Cal. 632, 633-634]* .

For a complete discussion of contempt and for general forms of contempt orders, see Ch. 135, *Contempt* .

[3] Requirements of Order of Contempt

For discussion of the requirements of contempt orders generally, see Ch. 135, *Contempt* .

[4] Reentry After Judicial Ejection

Every person dispossessed or ejected from any real property by the judgment or process [*see Code Civ. Proc. § 1003*] of any court of competent jurisdiction, who, not having a right to do so, reenters into or on or takes possession of any such real property, or induces or procures any person not having a right to do so, or aids or abets him or her therein, is guilty of a contempt of the court by which the process issued [*Code Civ. Proc. § 1210*; *see also People ex rel. Lamby v. Dwinelle (1866) 29 Cal. 632, 633-634]* .

[5] Alias Writ of Execution

Following a conviction of contempt for reentry after judicial ejectment, the court must immediately issue an alias writ of execution [*see Huerstal v. Muir (1880) 62 Cal. 479, 479-480]* directed to the proper officer, and requiring him or her to restore possession of the property to the party so entitled under the original judgment or process, or to his or her

lessee, grantee, or successor in interest [*Code Civ. Proc. § 1210*].

[6] Appeal

An appeal from the order directing the issuance of an alias writ of execution does not stay the execution of the order unless a written undertaking is executed on the part of the appellant to the effect that the appellant will not commit or suffer to be committed any waste on the property. The appellant must further agree in the undertaking that if the order is affirmed, or the appeal dismissed, he or she will pay the value of the use and occupation of the property from the time of his or her unlawful entry until the delivery of the possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the order for the alias writ was made, and which must be specified in the undertaking [*Code Civ. Proc. § 1210*]. For a discussion of appeals from contempt orders generally, see Ch. 135, *Contempt* .

The undertaking must be executed by two or more sufficient personal sureties, by one sufficient admitted surety insurer, or by any combination of sufficient personal sureties and admitted surety insurers [*see Code Civ. Proc. § 995.310*]. The requirement that the undertaking must be in writing is contained in *Code Civ. Proc. § 995.320(a)*. For discussion of bond and undertakings and related forms, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

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Volume 20: Easements thru Eminent Domain-Chs. 240-247
Chapter 242 ELECTION CAMPAIGNS

20-242 California Forms of Pleading and Practice--Annotated 242.syn

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[2] Use of Form

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[2] Use of Form

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[1] FORM

[2] Use of Form

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Volume 20: Easements thru Eminent Domain-Chs. 240-247
Chapter 242 ELECTION CAMPAIGNS
PART I. SCOPE

20-242 California Forms of Pleading and Practice--Annotated § 242.01

§ 242.01 Scope of Chapter

This chapter discusses and contains forms relating to election proceedings involving violations of the Political Reform Act of 1974 (*Gov. Code § 81000 et seq.*) and Truth in Endorsements Law (*Elec. Code § 20000 et seq.*) pertaining to election campaigns. Discussion of the Truth in Political Advertising Act (*Elec. Code § 20010*) is also included.

For discussion and forms pertaining to conflict of interest provisions of the Political Reform Act of 1974, see Ch. 469, *Public Entities and Officers: Conflicts of Interest* .

Matters related to freedom of speech and right of access for political activities are treated in Ch. 59, *Assemblies and Meetings* .

For discussion and forms relating to election registration, preelection duties, correction of ballot errors, canvassing of election returns, and election contests, see Ch. 243, *Elections* .

For discussion and forms relating to initiative, referendum, and recall proceedings, see Ch. 302, *Initiative, Referendum, and Recall* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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Chapter 242 ELECTION CAMPAIGNS
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§ 242.02 Governing Law

Statutory provisions establish procedures to determine the right to enjoin deceptive practices in campaign advertising [*Elec. Code § 20006*]. The enforcement of campaign financing requirements and provisions regulating lobbyists are also governed by statute [*Gov. Code § 91000 et seq.*].

Penal provisions applicable to all elections [*Elec. Code § 18000*] are set out in *Elec. Code §§ 18000 et seq.* (general provisions), *18300 et seq.* (improper campaign practices).

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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Chapter 242 ELECTION CAMPAIGNS
PART I. SCOPE

20-242 California Forms of Pleading and Practice--Annotated § 242.03

§ 242.03 Definitions

[1] In General

The Elections Code and the Government Code define various key words and terms [*Elec. Code § 300 et seq.*; *Gov. Code § 82000 et seq.*]. These definitions are to be particularly noted in initiating or defending any election proceeding.

[2] Clerk

A "clerk" is any county clerk, registrar of voters, city clerk, or other officer or board charged with the duty of conducting any election [*Elec. Code § 307*].

[3] County Clerk

A "county clerk" is a registrar of voters, in the counties in which that office has been established. In those counties in which the office of registrar of voters has not been established, the county clerk may also be known as "ex officio registrar of voters" [*Elec. Code § 311*].

[4] Elections

A "primary election" includes all primary nominating elections provided for by the Elections Code [*Elec. Code § 341*]. A "presidential primary" is the primary election that is held on the first Tuesday in February in any year which is evenly divisible by the number four, and at which delegations to national party conventions are to be chosen [*Elec. Code § 340*]. A "direct primary" is the primary election, held on the first Tuesday after the first Monday in June in each even-numbered year to nominate candidates to be voted for at the ensuing general election or to elect members of a party central committee [*Elec. Code § 316*].

[5] Elections Official

An "elections official" is a clerk or any person who is charged with the duty of conducting an election, or a county clerk, city clerk, registrar of voters, or elections supervisor having jurisdiction over elections within any county, city, or

district within the state [*Elec. Code § 320*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsClerks of CourtGovernmentsLocal GovernmentsElectionsGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsElectionsGovernmentsState & Territorial GovernmentsEmployees & Officials

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§ 242.04 Cross References

- For a discussion of the right of physical access for the purpose of engaging in political activities, see Ch. 59, *Assemblies and Meetings*
- For forms relating to church elections, see Ch. 110, *Churches and Religious Organizations*
- For forms for jurisdictional allegations in a complaint filed in a federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal*
- For discussion and forms pertaining to administrative agency law, see Ch. 470, *Overview of Public Administrative Law* , et seq.
- For discussion and forms relating to defamatory campaign advertising or communications, see *Ch. 340, Libel and Slander, § 340.10* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureRemovalGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of AssemblyTortsIntentional TortsDefamationGeneral Overview

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[Reserved]

§§ 242.05[Reserved]

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PART II. LEGAL BACKGROUND
A. Financing and Lobbying

20-242 California Forms of Pleading and Practice--Annotated § 242.10

§ 242.10 Scope

This subpart discusses the provisions of the Political Reform Act of 1974 (*Gov. Code § 81000 et seq.*) that govern financing and lobbying activities with respect to state and local election campaigns.

Related forms include:

- Petition for a writ of mandate for review of a decision of the Fair Political Practices Commission [*see § 242.130*].

- Request to the civil prosecutor to commence a civil action for violations of the act [*see § 242.131*].

- Complaints by private litigants for damages caused by violations [*see* § 242.132] and for injunctive relief to enjoin violations of and compel compliance with the provisions of the act [*see § 242.133*

- Ex parte application, declaration, and order pertaining to substituted service of process on a defendant candidate in actions regarding candidacy or election laws [*see* §§ 242.134, 242.135].

Ballot measures are discussed only insofar as they relate generally to campaign financing and lobbying. For additional discussion and forms pertaining to ballot measures, see Ch. 302, *Initiative, Referendum, and Recall* .

For discussion and forms pertaining to conflict of interest provisions of the Political Reform Act of 1974, see Ch. 469, *Public Entities and Officers: Conflicts of Interest* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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§ 242.11 Governing Law

[1] Statutory Provisions

The organization of, and requirements regarding, campaign finance committees is governed by *Gov. Code § 84100 et seq.*

The content and filing of campaign statements and reports is governed by *Gov. Code § 84200 et seq.*

Prohibitions and limitations on campaign contributions and expenditures are set out in *Gov. Code § 84300 et seq.*

Provisions governing lobbyists are set out in *Gov. Code § 86100 et seq.*

Incumbency is governed by *Gov. Code §§ 89000* and *89001*.

Provisions for audits and field investigations with regard to campaign reports and statements are set out in *Gov. Code § 90000 et seq.*

Provisions for enforcement of the Political Reform Act by the Fair Political Practices Commission (hereafter referred to as the "commission") are set out in *Gov. Code §§ 83115-83116.5*, *83118*, and *83119*. Commission hearings to determine if the act has been violated must be conducted in accordance with the Administrative Procedure Act [*Gov. Code § 83116*; *see Gov. Code § 11500 et seq.*]. Judicial review of any action by the commission is authorized by *Gov. Code § 83120*. A review of the commission's action may be obtained by way of administrative mandate, which is governed by *Code Civ. Proc. § 1094.5*. For discussion and forms pertaining to administrative mandate in general, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

Provisions governing civil enforcement by the civil prosecutor and private litigants, and criminal enforcement by the Attorney General and district attorneys, are set out in *Gov. Code § 91000 et seq.*

[2] Regulatory Provisions

The commission may adopt, amend, and rescind rules and regulations to carry out the purposes and provisions of the Political Reform Act [*Gov. Code § 83112*; *see Californians for Political Reform Foundation v. Fair Political Practices Com. (1998) 61 Cal. App. 4th 472, 482-483, 71 Cal. Rptr. 2d 606]* .

Regulations are set out in *2 Cal. Code Reg. §§ 18202 et seq.* (definitions pertaining to terms used in provisions of the act), *18320 et seq*. (requests for and preparation of commission opinions), *18329* (assistance in complying with the act), *18360 et seq*. (complaints and enforcement proceedings), *18401 et seq*. (campaign disclosure requirements), *18600 et seq*. (regulation of lobbyists), *18700 et seq.* (conflict of interest regulations), *18901*, *18902* (incumbency), and *18910 et seq.* (auditing).

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency RulemakingFormal RulemakingAdministrative LawJudicial ReviewGeneral OverviewGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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20-242 California Forms of Pleading and Practice--Annotated §§ 242.12-242.19

[Reserved]

§§ 242.12[Reserved]

California Forms of Pleading and Practice--Annotated

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Volume 20: Easements thru Eminent Domain-Chs. 240-247
Chapter 242 ELECTION CAMPAIGNS
PART II. LEGAL BACKGROUND
1. Political Reform Act of 1974

20-242 California Forms of Pleading and Practice--Annotated § 242.20

§ 242.20 Purpose

The Political Reform Act of 1974 (*Gov. Code § 81000 et seq.*) is intended comprehensively to address the influence of money, whether private or public, on electoral and governmental processes [*see Fair Political Practices Com. v. Suitt (1979) 90 Cal. App. 3d 125, 132, 153 Cal. Rptr. 311* ; *see also People v. Snyder (2000) 22 Cal. 4th 304, 307, 92 Cal. Rptr. 2d 734, 992 P.2d 1102* (act approved as initiative measure concerning elections and various means for preventing corruption and undue influence in political campaigns and governmental activities)].

The act was enacted to accomplish the following purposes [*Gov. Code § 81002*]:

- Receipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited.

- The activities of lobbyists should be regulated and their finances disclosed in order that improper influences will not be directed at public officials.

- Assets and income of public officials that may be materially affected by their official actions should be disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided [for discussion and forms pertaining to conflicts of interest under the act, *see* Ch. 469, *Public Entities and Officers: Conflicts of Interest*].

- The state ballot pamphlet should be converted into a useful document so that voters will not be entirely dependent on paid advertising for information regarding state measures.

- Laws and practices unfairly favoring incumbents should be abolished in order that elections may be conducted more fairly.

- Adequate enforcement mechanisms should be provided to public officials and private citizens so that the act will be vigorously enforced.

The act is to be construed liberally to accomplish its purposes [*Gov. Code § 81003*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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1. Political Reform Act of 1974

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§ 242.21 Definitions

[1] Candidate

A "candidate" is an individual who is listed on the ballot or who has qualified to have write-in votes on his or her behalf counted by election officials, for nomination for or election to any elective office, or who receives a contribution or makes an expenditure or gives his or her consent for any other person to receive a contribution or make an expenditure with a view to bringing about his or her nomination or election to any elective office, whether or not the specific elective office for which he or she will seek nomination or election is known at the time the contribution is received or the expenditure is made and whether or not he or she has announced his or her candidacy or filed a declaration of candidacy at such time. A "candidate" is also any officeholder who is the subject of a recall election. An individual who becomes a candidate must retain his or her status as a candidate until such time as that status is terminated pursuant to *Gov. Code § 84214* (termination of filing obligation by committee and candidate) [*Gov. Code § 82007*].

[2] Committee

[a] In General

A "committee" is any person or combination of persons who directly or indirectly (1) receives contributions totaling $1,000 or more in a calendar year [*Gov. Code § 82013(a)*], (2) makes independent expenditures totaling $1,000 or more in a calendar year [*Gov. Code § 82013(b)*], or (3) makes contributions totaling $10,000 or more in a calendar year to or at the behest of candidates or committees [*Gov. Code § 82013(c)*]. A person or combination of persons that becomes a committee retains its status as a committee until that status is terminated pursuant to *Gov. Code § 84214* (termination of filing obligation by committee and candidate) [*Gov. Code § 82013*].

[b] Controlled Committee

A "controlled committee" is a committee that is controlled directly or indirectly by a candidate or state measure proponent or that acts jointly with a candidate, state measure proponent, or controlled committee in connection with the making of expenditures. A candidate or state measure proponent controls a committee if he or she, his or her agent, or

any other committee he or she controls has a significant influence on the actions or decisions of the committee [*Gov. Code § 82016(a)*]. Notwithstanding *Gov. Code § 82016(a)*, a political party committee, as defined in *Gov. Code § 85205* (*see § 242.41[4]*), is not a controlled committee [*Gov. Code § 82016(b)*].

[c] General Purpose Committee

A "general purpose committee" means all committees under *Gov. Code § 82013(b)* or *(c)*, and any committee under *Gov. Code § 82013(a)* that is formed or exists primarily to support or oppose more than one candidate or ballot measure, except as provided in *Gov. Code § 82047.5* (with regard to a group of specific candidates being voted on in the same city, county, or multicounty election, or two or more ballot measures being voted on in the same city, county, multicounty, or state election) [*Gov. Code § 82027.5(a)*; for discussion of *Gov. Code § 82047.5*, *see § 242.21[2][d]*]. General purpose committees are further classified as follows [*Gov. Code § 82027.5(b)-(d)*]:

- State general purpose committees, political party committees, as defined in *Gov. Code § 85205*, or committees formed or existing primarily to support or oppose candidates or ballot measures voted on in state elections or in more than one county;

- County general purpose committees, formed or existing primarily to support or oppose candidates or ballot measures voted on in only one county, or in more than one jurisdiction within one county; and

- City general purpose committees, formed or existing primarily to support or oppose candidates or ballot measures voted on in only one city.

[d] Primarily Formed Committee

A "primarily formed committee" is a person or combination of persons who receives contributions totaling $1,000 or more in a calendar year, and formed or existing primarily to support or oppose a single candidate, a single measure, a group of specific candidates being voted on in the same city, county, or multicounty election, or two or more measures being voted on in the same city, county, multicounty, or state election [*Gov. Code § 82047.5*; *see Gov. Code § 82013(a)* (definition of "committee")].

[e] Sponsored Committee

A "sponsored committee" is a committee, other than a candidate-controlled committee, that has one or more sponsors. Any person, except a candidate or other individual, may sponsor a committee [*Gov. Code § 82048.7(a)*]. A person sponsors a committee if: (1) the committee receives 80 percent or more of its contributions from the person or its members, officers, employees, or shareholders; (2) the person collects contributions for the committee by use of payroll deductions or dues from its members, officers, or employees; (3) the person alone or in combination with other organizations, provides all or nearly all of the administrative services for the committee; or (4) the person, alone or in combination with other organizations, sets the policies for soliciting contributions or making expenditures of committee funds [*see Gov. Code § 82048.7(b)*].

[3] Contribution

A "contribution" is a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received, unless it is clear from surrounding circumstances that it is not made for political purposes [*Gov. Code § 82015(a)*]. A payment made at the behest of a committee as defined in *Gov. Code § 82013(a)* (*see* [2][a], *above*) is a contribution to the committee unless full and adequate consideration is received from the committee for making the payment [*Gov. Code § 82015(b)(1)*]. A payment made at the behest of a candidate is a contribution to the candidate unless the criteria in either *Gov. Code § 82015(b)(2)(A)* or *Gov. Code § 82015(b)(2)(B)* are satisfied [*Gov. Code § 82015(b)(2)*], *i.e.*, full and adequate

consideration is received from the candidate [*Gov. Code § 82015(b)(2)(A)*], or it is clear from the surrounding circumstances that the payment was made for purposes unrelated to his or her candidacy for elective office [*Gov. Code § 82015(b)(2)(B)*]. The following types of payments are presumed to be for purposes unrelated to a candidate's candidacy for elective office:

1. A payment made principally for personal reasons, in which case it may be considered a gift under *Gov. Code § 82028* (*see § 242.21[6]*) [*Gov. Code § 82015(b)(2)(B)(i)*]. Payments that are otherwise subject to the limits of *Gov. Code § 86203* are presumed to be principally for personal purposes [*Gov. Code § 82015(b)(2)(B)(i)*].

2. A payment made by a state, local, or federal governmental agency or from a nonprofit organization that is exempt from taxation under *I.R.C. § 501(c)(3)* [*Gov. Code § 82015(b)(2)(B)(ii)*].

3. A payment not covered by *Gov. Code § 82015(b)(2)(B)(i)*, made principally for legislative, governmental, or charitable purposes, in which case it is neither a gift nor a contribution [*Gov. Code § 82015(b)(2)(B)(iii)*]. However, reporting requirements may apply to payments of this type that are made at the behest of a candidate who is an elected officer [*see Gov. Code § 82015(b)(2)(B)(iii)*, discussed in *§ 242.53C*].

On the other hand, for purposes of *Gov. Code § 82015(b)(2)(B)*, a payment is made for purposes related to a candidate's candidacy for elective office if all or a portion of the payment is used for election-related activities [*Gov. Code § 82015(b)(2)(C)*]. For purposes of *Gov. Code § 82015(b)(2)(C)*, "election-related activities" include, but are not limited to, the following [*Gov. Code § 82015(b)(2)(C)(i)*-(viii)]:

1. Communications that contain express advocacy of the nomination or election of the candidate or the defeat of his or her opponent.

2. Communications that contain reference to the candidate's candidacy for elective office, the candidate's election campaign, or the candidate's or his or her opponent's qualifications for elective office.

3. Solicitation of contributions to the candidate or to third persons for use in support of the candidate or in opposition to his or her opponent.

4. Arranging, coordinating, developing, writing, distributing, preparing, or planning of any communication or activity described in items 1, 2, or 3 above.

5. Recruiting or coordinating campaign activities of campaign volunteers on behalf of the candidate.

6. Preparing campaign budgets.

7. Preparing campaign finance disclosure statements.

8. Communications directed to voters or potential voters as part of activities encouraging or assisting persons to vote if the communication contains express advocacy of the nomination or election of the candidate or the defeat of his or her opponent.

A contribution made at the behest of a candidate for a different candidate or to a committee not controlled by the behesting candidate is not a contribution to the behesting candidate [*Gov. Code § 82015(b)(2)(D)*].

The term "contribution" further includes the following (subject to specified exclusions listed below):

- The purchase of tickets for events such as dinners, luncheons, rallies, and similar fund-raising events [*Gov. Code § 82015(c)*];

- The candidate's own money or property used on behalf of his or her candidacy, other than personal funds of the candidate used to pay either a filing fee for a declaration of candidacy or a candidate statement prepared pursuant to *Elec. Code § 13307* [*Gov. Code § 82015(c)*];

- The granting of discounts or rebates not extended to the public generally or the granting of discounts or rebates by television and radio stations and newspapers not extended on an equal basis to all candidates for the same office [*Gov. Code § 82015(c)*];

- The payment of compensation by any person for the personal services or expenses of any other person, if the services are rendered or expenses incurred on behalf of a candidate or committee without payment of full and adequate consideration [*Gov. Code § 82015(c)*];

- Any transfer of anything of value received by a committee from another committee, unless full and adequate consideration is received [*Gov. Code § 82015(d)*]; and

- The payment of public money by a state or local governmental agency for a communication to the public, if the communication both (1) expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage, or defeat of a clearly identified measure or, taken as a whole and in context, unambiguously urges a particular result in an election, and (2) is made at the behest of the affected candidate or committee [*Gov. Code § 82015(h)*].

The term "contribution" does not include any of the following:

- Amounts received pursuant to an enforceable promise to the extent those amounts have been previously reported as a contribution (but the fact that those amounts have been received must be indicated in the appropriate campaign statement) [*Gov. Code § 82015(e)*];

- A payment made by an occupant of a home or office for costs related to any meeting or fund-raising event held in the occupant's home or office, if the costs for the meeting or fund-raising event aggregate to not more than $500 [*Gov. Code § 82015(f)*]; or

- Volunteer personal services or payments made by any individual for his or her own travel expenses, if the payments are made voluntarily without any understanding or agreement that they will be, directly or indirectly, repaid to him or her [*Gov. Code § 82015(g)*].

Further refinement of the term "contribution" to accord with changes in the Political Reform Act of 1974 effected by Proposition 208 remains the province of the commission [*Californians for Political Reform Foundation v. Fair Political Practices Com. (1998) 61 Cal. App. 4th 472, 483-489, 71 Cal. Rptr. 2d 606* (upholding *2 Cal. Code Reg. § 18215(c)(16)*, which excepts from statutory definition of "contribution" payments by sponsoring organization to establish and administer its political action committee)].

[3A] Elective State Office

"Elective state office" means the office of Governor, Lieutenant Governor, Attorney General, Insurance Commissioner, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction, Member of the Legislature, member elected to the Board of Administration of the Public Employees' Retirement System, and member of the State Board of

Equalization [*Gov. Code § 82024*].

[4] Expenditure

[a] In General

An "expenditure" is a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment, unless it is clear that it was not made for political purposes [*Gov. Code § 82025*; *see 2 Cal. Code Reg. § 18225*]. An "expenditure," however, does not include a candidate's use of his or her own money to pay for either a filing fee for a declaration of candidacy or a candidate statement prepared pursuant to *Elec. Code § 13307* [*Gov. Code § 82025*].

[b] Independent Expenditure

An "independent expenditure" is an expenditure made by any person, including a payment of public money by a state or local governmental agency, in connection with a communication that expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage, or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election, but that is not made to or at the behest of the affected candidate or committee [*Gov. Code § 82031*].

[5] Fair Market Value

"Fair market value" is the estimated fair market value of goods, services, facilities, or anything of value, other than money. The term "full and adequate consideration" means fair market value. Whenever the amount of goods, services, facilities, or anything of value, other than money, must be reported under the Political Reform Act, the amount reported must be the fair market value, and a description of the item must be appended to the report or statement [*Gov. Code § 82025.5*].

[6] Gift

A "gift" is, except as provided in *Gov. Code § 82028(b)*, any payment that confers a personal benefit on the recipient to the extent that consideration of equal or greater value is not received, and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the general public without regard to official status [*Gov. Code § 82028(a)*]. Any person, other than a defendant in a criminal action, who claims that a payment is not a gift by reason of receipt of consideration bears the burden of proving that the consideration received is of equal or greater value [*Gov. Code § 82028(a)*].

Specific items and contributions that are not included in the term "gift" are set out in *Gov. Code § 82028(b)*. For example, the term "gift" does not include informational material such as books, reports, pamphlets, calendars, or periodicals (however, no payment for travel or reimbursement for any expenses shall be deemed "informational material") [*Gov. Code § 82028(b)(1)*]; gifts which are not used and which, within thirty days after receipt, are either returned to the donor or delivered to a 501(c)(3) nonprofit entity without being claimed as a charitable contribution for tax purposes [*Gov. Code § 82028(b)(2)*]; gifts from specified members of an individual's family, provided that a gift from any such person must be considered a gift if the donor is acting as an agent or intermediary for any person not covered by *Gov. Code § 82028(b)(3)* [*Gov. Code § 82028(b)(3)*]; campaign contributions required to be reported under specified law [*Gov. Code § 82028(b)(4)*]; any devise or inheritance [*Gov. Code § 82028(b)(5)*]; or personalized plaques and trophies with an individual value of less than $250 [*Gov. Code § 82028(b)(6)*].

[7] Jurisdiction

"Jurisdiction" is the state with respect to a state agency and, with respect to a local government agency, the region,

county, city, district, or other geographical area in which the local agency has jurisdiction. Real property is deemed to be "within the jurisdiction" with respect to a local government agency if the property or any part of it is located within or not more than two miles outside the boundaries of the jurisdiction or within two miles of any land owned or used by the local government agency [*Gov. Code § 82035*].

[8] Lobbyists

[a] Lobbyist

A "lobbyist" is any individual who receives $2,000 or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or whose principal duties as an employee are to communicate directly or through his or her agents with any elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action [*Gov. Code § 82039*]. The phrase "influencing legislative or administrative action" means promoting, supporting, influencing, modifying, opposing, or delaying any legislative or administrative action by any means, including but not limited to the provision or use of information, statistics, studies, or analyses [*Gov. Code § 82032*; *see 2 Cal. Code Reg. § 18239(d)(4)*; *see also 2 Cal. Code Reg. § 18239*].

An individual is not a lobbyist by reason of activities described in *Gov. Code § 86300* (exempting certain public officials, state employees, news media, and churches or religious societies) [*Gov. Code § 82039(a)*].

For the purposes of *Gov. Code § 82039(a)*, a proceeding before the Public Utilities Commission constitutes "administrative action" if it meets any of the definitions set forth in *Gov. Code § 82002(b)* or *(c)*. However, a communication made for the purpose of influencing this type of Public Utilities Commission proceeding is not within *Gov. Code § 82039(a)* if the communication is made at a public hearing, public workshop or other public forum that is part of the proceeding, or if the communication is included in the official record of the proceeding [*Gov. Code § 82039(b)*].

[b] Lobbyist Employer

A "lobbyist employer" is any person, other than a lobbying firm, who employs one or more lobbyists or contracts for the services of a lobbying firm, for economic consideration other than reimbursement for reasonable travel expenses, for the purpose of influencing legislative or administrative action [*Gov. Code § 82039.5*].

[c] Lobbying Firm

A "lobbying firm" is any business entity, including an individual contract lobbyist, that meets either of the following criteria [*Gov. Code § 82038.5(a)*]:

(1) The business entity receives or becomes entitled to receive any compensation, other than reimbursement for reasonable travel expenses, for the purpose of influencing legislative or administrative action on behalf of any other person, and any partner, owner, officer, or employee of the business entity is a lobbyist.

(2) The business entity receives or becomes entitled to receive any compensation, other than reimbursement for reasonable travel expenses, to communicate directly with any elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action on behalf of any other person, if a substantial or regular portion of the activities for which the business entity receives compensation is for the purpose of influencing legislative or administrative action.

No business entity is a lobbying firm by reason of activities described in *Gov. Code § 86300* (exempting certain public officials, state employees, news media, and churches or religious societies) [*Gov. Code § 82038.5(b)*].

[9] Local Government Agency

A "local government agency" is a county, city, or district of any kind, including a school district, any other local or regional political subdivision, or any department, division, bureau, office, board, commission, or other agency of the foregoing [*Gov. Code § 82041*].

[10] Mass Mailing

A "mass mailing" is over 200 substantially similar pieces of mail. A "mass mailing" does not include a form letter or other mail that is sent in response to an unsolicited request, letter, or other inquiry [*Gov. Code § 82041.5*].

[11] Person

A "person" is an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, limited liability company, association, committee, and any other organization or group of persons acting in concert [*Gov. Code § 82047*; *see Yes On Measure A v. City of Lake Forest (1997) 60 Cal. App. 4th 620, 623 n.3, 70 Cal. Rptr. 2d 517* (city subject to act)].

[12] Slate Mailer

A "slate mailer" is a mass mailing that supports or opposes a total of four or more candidates or ballot measures [*Gov. Code § 82048.3*].

[13] Slate Mailer Organization

A "slate mailer organization" is any person who, directly or indirectly, both [*Gov. Code § 82048.4(a)*]:

- Is involved in the production of one or more slate mailers and exercises control over the selection of the candidates and ballot measures to be supported or opposed in the slate mailers; and

- Receives, or is promised, payments totaling $500 or more in a calendar year for the production of one or more slate mailers.

The term "slate mailer organization" does not include any of the following [*Gov. Code § 82048.4(b)*]:

- A candidate or officeholder, or a candidate's or officeholder's controlled committee;

- An official committee of any political party;

- A legislative caucus committee; or

- A committee primarily formed to support or oppose a candidate, officeholder, or ballot measure.

[14] State Agency

A "state agency" is every state office, department, division, bureau, board and commission, and the Legislature [*Gov. Code § 82049*; *see 2 Cal. Code Reg. § 18249* (additional definitions)].

[14A] Statewide Elective Office

"Statewide elective office" means the office of Governor, Lieutenant Governor, Attorney General, Insurance

Commissioner, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction and member of the State Board Of Equalization [*Gov. Code § 82053*].

[15] Types of Elections

"Election," "general election," "federal election," "municipal election," "primary election," "presidential primary," "direct primary," "statewide election," "local election," "regular election," and "special election" are defined in *Elec. Code §§ 316, 318, 323, 324, 328, 330, 340, 341, 348, 356,* and *357*.

[16] Uniform District Election Law

Definitions applicable within the context of the Uniform District Election Law (*Elec. Code § 10500 et seq.*) are set out in *Elec. Code § 10500(b).*

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[Reserved]

§§ 242.22[Reserved]

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§ 242.30 Committees

[1] Statement of Organization

Every committee that has become qualified by virtue of *Gov. Code § 82013(a)* (by receiving contributions totaling $1,000 or more in a calendar year) must file a statement of organization with the Secretary of State and with the local filing officer, if any, with whom the committee is required to file the originals of its campaign reports under *Gov. Code § 84215* [*Gov. Code § 84101(a)*]. The contents of the statement are mandated by *Gov. Code § 84102*, and amendments to the statement are governed by *Gov. Code § 84103*. *Gov. Code § 84101* sets forth the manner in which the statement or its contents must be filed and the times within which filing must be made.

If an independent expenditure committee qualifies as a committee pursuant to *Gov. Code § 82013(a)* during the time period described in *Gov. Code § 82036.5* and makes independent expenditures of $1,000 or more to support or oppose a candidate or candidates for office, the committee must file by facsimile transmission, online transmission, guaranteed overnight delivery, or personal delivery within 24 hours of qualifying as a committee, the information required to be reported in the statement of organization [*Gov. Code § 84101(c)*]. The information required by *Gov. Code § 84101(c)* must be filed with the filing officer with whom the committee is required to file the original of its campaign reports pursuant to *Gov. Code § 84215*, and to file at all locations required for the candidate or candidates supported or opposed by the independent expenditures. The filings required by *Gov. Code § 84101(c)* are in addition to filings that may be required by *Gov. Code §§ 84203.5* and *84204*.

[2] Treasurer

Every committee is required to have a treasurer, and no expenditures can be made by or on behalf of a committee without the authorization of the treasurer or his or her designated agents. During a vacancy in the office of treasurer, no contribution or expenditure can be accepted or made by or on behalf of a committee [*Gov. Code § 84100*; *see 2 Cal. Code Reg. § 18426.1*].

[3] Record-Keeping Requirements

Each candidate, treasurer, and elected officer must maintain detailed accounts, records, bills, and receipts that are necessary to prepare campaign statements, to establish that campaign statements were properly filed, and to otherwise comply with the provisions of *Gov. Code § 84100 et seq.* [*Gov. Code § 84104*; *see 2 Cal. Code Reg. § 18401*; *see also § 242.50*]. Additional provisions governing the duties of treasurers and candidates with regard to campaign statements are set out in *2 Cal. Code Reg. § 18427*.

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§ 242.31 Slate Mailer Organizations

Every slate mailer organization is bound by much the same statutory requirements as are committees [*see Gov. Code § 84108(a)*]. Thus, every slate mailer organization must have a treasurer, who alone can accept and authorize contributions received and expenditures made by or on behalf of the organization [*Gov. Code § 84108(a)*; *see Gov. Code § 84100*].

Every slate mailer organization must also file a statement of organization with the Secretary of State and with the local filing officer, if any, with whom the organization is required to file the originals of its campaign reports under *Gov. Code § 84215* [*Gov. Code § 84108(a)*; *see Gov. Code § 84101*]. The statement's contents are mandated by *Gov. Code § 84108(b)*, and amendments to the statement are governed by *Gov. Code § 84103* [*Gov. Code § 84108(a), (b)*; *see Gov. Code § 84103*]. *Gov. Code §§ 84101* and *84108(c)* set forth the manner in which the statement or its contents must be filed and the times within which filing must be made.

Additionally, every slate mailer organization must keep whatever detailed accounts, records, bills, and receipts are necessary to prepare campaign statements and to comply with the financial disclosure provisions of *Gov. Code § 84100 et seq.* [*Gov. Code § 84108(a)*; *see Gov. Code § 84104*].

In May 2001, a federal district court permanently enjoined the Fair Political Practices Commission from enforcing *Gov. Code § 84503*, which provides that any advertisement for or against any ballot measure must include a disclosure statement identifying persons whose cumulative contributions are $50,000 or more, as to slate mail [*see* California Prolife Council v. Scully (E.D. Cal. 2001) No. CIV. S-96-1965 LKK/DAD; *see also California Prolife Council v. Scully (E.D. Cal. 1998) 989 F. Supp. 1282* (same case), *aff'd (9th Cir. 1999) 164 F.3d 1189* (affirming grant of preliminary injunction)].

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[Reserved]

§§ 242.32[Reserved]

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20-242 California Forms of Pleading and Practice--Annotated § 242.40

§ 242.40 Prerequisites for Candidate to Receive or Spend Funds

[1] Filing Statement of Intention of Candidacy

Before soliciting or receiving any contribution or loan, an individual who intends to be a candidate for an elective state office under *Gov. Code § 82024* must file with the Secretary of State an original statement, signed under penalty of perjury, of the individual's intention to be a candidate for a specific office [*Gov. Code § 85200*]. An individual who intends to be a candidate for any other elective office must file the statement of intention with the same filing officer and in the same location as the individual would file an original campaign statement under Gov. Code § 85215(c), (d), and (e) [*Gov. Code § 85200*]. For the purposes of *Gov. Code § 85200*, "contribution" and "loan" do not include any payments from the candidate's personal funds for a candidate filing fee or a candidate statement of qualifications fee [*Gov. Code § 85200*, as enacted by Prop. 73 and later amended].

[2] Establishing Campaign Contribution Account

Once an individual has filed a statement of intention of candidacy, the individual must establish one campaign contribution account at an office of a financial institution located in California [*Gov. Code § 85201(a)*]. The requirement to establish the account does not apply to an individual who will not receive contributions, and who makes expenditures from personal funds, of less than $1,000 in a calendar year to support his or her candidacy [*Gov. Code § 85201(g)*]. However, an individual who raises contributions from others for his or her campaign, but who raises or spends less than $1,000 in a calendar year and does not qualify as a committee under *Gov. Code § 82013*, must establish a campaign contribution account under *Gov. Code § 85201(a)*, but is not required to file a committee statement of organization under *Gov. Code § 84101* or other statement of bank account information [*Gov. Code § 85201(h)*].

As required by *Gov. Code § 84102(f)*, a candidate who raises contributions of $1,000 or more in a calendar year must set forth the name and address of the financial institution and the account number on the committee of organization filed under *Gov. Code §§ 84101* and *84103* [*Gov. Code § 85201(b)*].

All contributions or loans made to the candidate, to a person on behalf of the candidate, or to the candidate's controlled committee must be deposited in the account [*Gov. Code § 85201(c)*]. Any personal funds that will be used to promote

the candidate's election, except the candidate's payment of a filing fee and a statement of qualifications fee, must be deposited in the account before expenditure [*Gov. Code § 85201(d), (f)*].

All campaign expenditures (except a candidate's payment from his or her personal funds of a filing fee and a statement of qualifications fee) must be made from the account [*Gov. Code § 85201(e), (f)*]. This expenditure rule does not apply to a candidate who will not receive contributions and who makes expenditures from personal funds of less than $1,000 in a calendar year to support his or her candidacy [*Gov. Code § 85201(g)*].

For purposes of *Gov. Code § 85201*, a candidate's payment for a filing fee and statement of qualifications is not included in calculating the total expenditures made [*Gov. Code § 85201(g)*].

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§ 242.41 Contribution Limits

[1] Introduction

Gov. Code, tit. 9, ch. 5 (commencing with *Gov. Code § 85100*) is known as the "Campaign Contribution and Voluntary Expenditure Limits Without Taxpayer Financing Amendments to the Political Reform Act of 1974." Most of the provisions of Gov. Code, tit. 9, ch. 5 were enacted by Proposition 34. Unless specifically superseded by Proposition 34, the definitions and provisions of Gov. Code, tit. 9 (commencing with *Gov. Code § 81000*) govern the interpretation of chapter 5 (commencing with *Gov. Code § 85100*) [*Gov. Code § 85202*].

[2] Applicable to Person, Other Than Small Contributor Committee or Political Party Committee

A person, other than a small contributor committee (*see* [3], *below*) or political party committee (*see* [4], *below*), may not make to any candidate for elective state office (*see § 242.21[3A]*) other than a candidate for statewide elective office (*see § 242.21[14A]*), and a candidate for elective state office other, than a candidate for statewide elective office may not accept from a person, any contribution totaling more than $3,000 per election [*Gov. Code § 85301(a)*].

Except to a candidate for Governor, a person, other than a small contributor committee or political party committee, may not make to any candidate for statewide elective office, and except a candidate for Governor, a candidate for statewide elective office may not accept from a person other than a small contributor committee or a political party committee, any contribution totaling more than $5,000 per election [*Gov. Code § 85301(b)*].

A person, other than a small contributor committee or political party committee, may not make to any candidate for Governor, and a candidate for governor may not accept from any person other than a small contributor committee or political party committee, any contribution totaling more than $20,000 per election [*Gov. Code § 85301(c)*].

The provisions of *Gov. Code § 85301*, however, do not apply to a candidate's contributions of his or her personal funds to his or her own campaign [*Gov. Code § 85301(d)*].

Notwithstanding any other provision of Gov. Code, tit. 9, ch. 5, if a candidate for elective state office or the candidate's

controlled committee had net debts resulting from an election held prior to January 1, 2001, contributions to that candidate or committee for that election are not subject to the limits of *Gov. Code §§ 85301* and *85302* [*Gov. Code § 85321*].

Gov. Code § 85301 became operative on January 1, 2001. However, *Gov. Code § 85301* applies to candidates for statewide elective office (*see § 242.21[14A]*) beginning on and after November 6, 2002 [Prop. 34, § 83]. On the commission adjusting the contribution limitations of *Gov. Code § 85301* in January of every odd-numbered year, *see § 242.41B*.

[3] Applicable to Small Contributor Committee

A small contributor committee may not make to any candidate for elective state office (*see § 242.21[3A]*) other than a candidate for statewide elective office (*see § 242.21[14A]*), and a candidate for elective state office, other than a candidate for statewide elective office may not accept from a small contributor committee, any contribution totaling more than $6,000 per election [*Gov. Code § 85302(a)*]. Moreover, except to a candidate for Governor, a small contributor committee may not make to any candidate for statewide elective office and except for a candidate for Governor, a candidate for statewide elective office may not accept from a small contributor committee, any contribution totaling more than $10,000 per election [*Gov. Code § 85302(b)*]. Furthermore, a small contributor committee may not make to any candidate for Governor, and a candidate for governor may not accept from a small contributor committee, any contribution totaling more than $20,000 per election [*Gov. Code § 85302(c)*].

"Small contributor committee" means any committee that meets all of the following criteria [*Gov. Code § 85203(a)-(d)*]:

- The committee has been in existence for at least six months.
- The committee receives contributions from 100 or more persons.
- No one person has contributed to the committee more than $200 per calendar year.
- The committee makes contributions to five or more candidates.

Notwithstanding any other provision of this chapter, if a candidate for elective state office or the candidate's controlled committee had net debts resulting from an election held prior to January 1, 2001, contributions to that candidate or committee for that election are not subject to the limits of *Gov. Code §§ 85301* and *85302* [*Gov. Code § 85321*].

Gov. Code §§ 85203 and *85302* became operative on January 1, 2001. However, *Gov. Code § 85302* applies to candidates for statewide elective office (*see § 242.21[14A]*) beginning on and after November 6, 2002 [Prop. 34, § 83]. On the commission adjusting the contribution limitations of *Gov. Code § 85302* in January of every odd-numbered year, *see § 242.41B*.

[4] Contribution to Committee or Political Party Committee

A person may not make to any committee, other than a political party committee, and a committee other than a political party committee may not accept, any contribution totaling more than $5,000 per calendar year for the purpose of making contributions to candidates for elective state office (*see § 242.21[3A]*) [*Gov. Code § 85303(a)*]. Moreover, a person may not make to any political party committee, and a political party committee may not accept, any contribution totaling more than $25,000 per calendar year for the purpose of making contributions for the support or defeat of candidates for elective state office. Notwithstanding *Gov. Code § 85312*, this limit applies to contributions made to a political party used for the purpose of making expenditures at the behest of a candidate for elective state office for

communications to party members related to the candidate's candidacy for elective state office [*Gov. Code § 85303(b)*].

"Political party committee" means the state central committee or county central committee of an organization that, meets the requirements for recognition as a political party under *Elec. Code § 5100* [*Gov. Code § 85205*].

Except as provided in *Gov. Code § 85310(c)*, nothing in Gov. Code, tit. 9, ch. 5 (commencing with *Gov. Code § 85100*) limits a person's contributions to a committee or political party committee provided the contributions are used for purposes other than making contributions to candidates for elective state office [*Gov. Code § 85303(c)*]. Furthermore, nothing in Gov. Code, tit. 9, ch. 5 limits a candidate for elected state office from transferring contributions received by the candidate in excess of any amount necessary to defray the candidate's expenses for election related activities or holding office to a political party committee, provided those transferred contributions are used for purposes consistent with *Gov. Code § 89519(b)(4)* [*Gov. Code § 85303(d)*; *see § 242.44[5]* (discussing *Gov. Code § 89519*)].

Gov. Code §§ 85205 and *85303* became operative on January 1, 2001. However, *Gov. Code §§ 85205* and *85303* apply to candidates for statewide elective office (*see § 242.21[14A]*) beginning on and after November 6, 2002 [Prop. 34, § 83]. On the commission adjusting the contribution limitations of *Gov. Code § 85303* in January of every odd-numbered year, *see § 242.41B*.

[5] Special Elections and Special Runoff Elections

The contribution limits of Gov. Code, tit. 9, ch. 5 (commencing with *Gov. Code § 85100*) apply to special elections and apply to special runoff elections. A special election and a special runoff election are separate elections for purposes of the contribution and voluntary expenditure limits set forth in Gov. Code, tit. 9, ch. 5 [*Gov. Code § 85314*].

Gov. Code § 85314 became operative on January 1, 2001. However, *Gov. Code § 85314* applies to candidates for statewide elective office (*see § 242.21[14A]*) beginning on or after November 6, 2002 [Prop. 34, § 83].

[6] Recall Elections

Notwithstanding any other provision of Gov. Code, tit. 9, ch. 5 (commencing with *Gov. Code § 85100*), an elected state officer may establish a committee to oppose the qualification of a recall measure, and the recall election. This committee may be established when the elected state officer receives a notice of intent to recall under *Elec. Code § 11021*. An elected state officer may accept campaign contributions to oppose the qualification of a recall measure, and if qualification is successful, the recall election, without regard to the campaign contributions limits set forth in Gov. Code, tit. 9, ch. 5. The voluntary expenditure limits (*see § 242.41A*) do not apply to expenditures made to oppose the qualification of a recall measure or to oppose the recall election [*Gov. Code § 85315(a)*].

After the failure of a recall petition or after the recall election, the committee formed by the elected state officer must wind down its activities, and dissolve. Any remaining funds must be treated as surplus funds and must be expended within 30 days after the failure of the recall petition, or after the recall election for a purpose specified in *Gov. Code § 89519(b)* [*Gov. Code § 85315(a)*; *see § 242.44[5]* (discussing *Gov. Code § 89519*)].

Gov. Code § 85315 became operative on January 1, 2001. Presumably, however, *Gov. Code § 85315* applies to recall of candidates holding statewide elective office (*see § 242.21[14A]*) beginning on or after November 6, 2002 [*see* Prop. 34, § 83; *see also Gov. Code § 82007* (defining candidate to include officeholder subject to recall; also, individual who becomes candidate retains status as candidate until status terminated under *Gov. Code § 84214*)].

[7] Local Elections

Nothing in Propostion 34 (under which the voters in 2000 enacted the contribution limits discussed in [1]-[6] *above*, the

voluntary expenditure limits discussed in *§ 242.41A[1] -[3]* and other prohibitions) nullifies contribution limitations or prohibitions of any local jurisdiction that apply to elections for local elective office, except that these limitations and prohibitions may not conflict with the provisions of *Gov. Code § 85312* [*Gov. Code § 85703(a)*; *see Gov. Code § 85703(b), (c)* (specified restrictions and limitations by local jurisdiction on payments for "member communications," as defined, would conflict with *Gov. Code § 85312* and are prohibited)].

[8] Aggregation of Contributions

For purposes of the contribution limits of Gov. Code, tit. 9, ch. 5 (commencing with *Gov. Code § 85100*), "entity" means any person, other than an individual [*Gov. Code § 85311(a)(1)*]. The contributions of an entity whose contributions are directed and controlled by any individual must be aggregated with contributions made by that individual and any other entity whose contributions are directed and controlled by the same individual [*Gov. Code § 85311(b)*]. If two or more entities make contributions that are directed and controlled by a majority of the same persons, the contributions of those entities must be aggregated [*Gov. Code § 85311(c)*].

For purposes of Gov. Code, tit. 9, ch. 5 (commencing with *Gov. Code § 85100*), "majority-owned" means a direct or indirect ownership of more than 50 percent [*Gov. Code § 85311(a)(2)*]. Contributions made by entities that are majority-owned by any person must be aggregated with the contributions of the majority owner and all other entities majority-owned by that person, unless those entities act independently in their decisions to make contributions [*Gov. Code § 85311(d)*].

Moreover, contributions made by a husband and wife may not be aggregated [*Gov. Code § 85308(a)*]. A contribution made by a child under 18 years of age, however, is presumed to be a contribution from the parent or guardian of the child [*Gov. Code § 85308(b)*].

Gov. Code §§ 85308 and *85311* became operative on January 1, 2001. However, *Gov. Code §§ 85308* and *85311* apply to candidates for statewide elective office (*see § 242.21[14A]*) beginning on or after November 6, 2002 [Prop. 34, § 83].

[9] Account to Defray Attorney Fees and Other Related Costs For Candidate for Elective State Office or Elective State Officer

A candidate for elective state office (*see § 242.21[3A]*) or an elected state officer may establish a separate account to defray attorney's fees and other related legal costs incurred for the candidate's or officer's legal defense if the candidate or officer is subject to one or more civil or criminal proceedings or administrative proceedings arising directly out of the conduct of an election campaign, the electoral process, or the performance of the officer's governmental activities and duties. These funds may be used only to defray those attorney fees and other related legal costs [*Gov. Code § 85304(a)*].

A candidate may receive contributions to this account that are not subject to the contribution limits set forth in Gov. Code, tit. 9, ch. 5, art. 3 (commencing with *Gov. Code § 85300*). However, all contributions must be reported in a manner prescribed by the commission [*Gov. Code § 85304(b)*].

Once the legal dispute is resolved, the candidate must dispose of any funds remaining after all expenses associated with the dispute are discharged for one or more of the purposes set forth in *Gov. Code § 89519(b)(1)-(5)*, inclusive [*Gov. Code § 85304(b)*; *see § 242.44[5]* (discussing *Gov. Code § 89519*)].

Gov. Code § 85304 became operative on January 1, 2001. However, *Gov. Code § 85304* applies to candidates for statewide elective office (*see § 242.21[14A]*) beginning on or after November 6, 2002 [Prop. 34, § 83].

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§ 242.41A Voluntary Expenditure Limits

[1] Limitations as to Amount

A candidate for elective state office (*see § 242.21[3A]*), other than the Board of Administration of the Public Employees' Retirement System, who voluntarily accepts expenditure limits may not make campaign expenditures in excess of the following [*Gov. Code § 85400(a)(1)-(5)*]:

- For an Assembly candidate, $400,000 in the primary or special primary election and $700,000 in the general or special general runoff election.

- For a Senate candidate, $600,000 in the primary or special primary election and $900,000 in the general or special general runoff election.

- For a candidate for the State Board of Equalization, $1,000,000 in the primary election and $1,500,000 in the general election.

- For a statewide candidate other than a candidate for Governor or the State Board of Equalization, $4,000,000 in the primary election and $6,000,000 in the general election.

- For a candidate for Governor, $6,000,000 in the primary election and $10,000,000 in the general election.

For purposes of *Gov. Code § 85400*, "campaign expenditures" has the same meaning as "election-related activities" as defined in clauses (i) to (vi), inclusive, and clause (viii) of *Gov. Code § 82015(b)(2)(C)*.

A campaign expenditure made by a political party on behalf of a candidate may not be attributed to the limitations on campaign expenditures set forth in *Gov. Code § 85400* [*Gov. Code § 85400(c)*].

Gov. Code § 85400 became operative on January 1, 2001. However, *Gov. Code § 85400* applies to candidates for statewide elective office (*see § 242.21[14A]*) beginning on and after November 6, 2002 [Prop. 34, § 83]. On the commission adjusting the contribution limitations of *Gov. Code § 85400* in January of every odd-numbered year, *see § 242.41B*.

[2] Filing Statement of Acceptance and Effect

Each candidate for elective state office (*see § 242.21[3A]*) must file a statement of acceptance or rejection of the voluntary expenditure limits set forth in *Gov. Code § 85400* at the time he or she files the statement of intention specified in *Gov. Code § 85200* [*Gov. Code § 85401(a)*]. Until the deadline for filing nomination papers set forth in *Elections Code § 8020*, a candidate who has not exceeded the voluntary expenditure limits may change his or her statement of acceptance or rejection of those limits. A candidate may not change the statement of acceptance or rejection of voluntary expenditure limits more than twice after the candidate's initial filing of the statement of intention for that election and office [*Gov. Code § 85401(b)*]. Any candidate for elective state office who declined to accept the voluntary expenditure limits but who nevertheless does not exceed the limits in the primary, special primary, or special election, may file a statement of acceptance of the expenditure limits for a general or special runoff election within 14 days following the primary, special primary, or special election [*Gov. Code § 85401(c)*].

Any candidate for elective state office who has filed a statement accepting the voluntary expenditure limits is not bound by those limits if an opposing candidate contributes personal funds to his or her own campaign in excess of the limits set forth in *Gov. Code § 85400* [*Gov. Code § 85402(a)* as enacted by Prop. 34]. The commission shall require by regulation timely notification by candidates for elective state office who make personal contributions to their own campaign [*Gov. Code § 85402(a)*].

Any candidate who files a statement of acceptance under *Gov. Code § 85401* and makes campaign expenditures in excess of the limits is subject to the remedies in Gov. Code, tit. 9, ch. 3 (commencing with *Gov. Code § 83100*) and ch. 11 (commencing with *Gov. Code § 91000*) [*Gov Code § 85403*].

Gov. Code § 85401 became operative on January 1, 2001. However, *Gov. Code § 85400* applies to candidates for statewide elective office (*see § 242.21[14A]*) beginning on and after November 6, 2002 [Prop. 34, § 83].

[3] Ballot Pamphlet

The Secretary of States designates in the state ballot pamphlet those candidates for statewide elective office, as defined in *Gov. Code § 82053*, who have voluntarily agreed to the expenditure limitations set forth in *Gov. Code § 85400*. Local elections officers designate in the voter information portion of the sample ballot those candidates for state Senate and Assembly (*see § 242.21[3A]*) who have voluntarily agreed to expenditure limitations set forth in *Gov. Code § 85400* [*Gov. Code § 85600*].

A candidate for statewide elective office, as defined in *Gov. Code § 82053*, who accepts the voluntary expenditure limits set forth in *Gov. Code § 85400* may purchase the space to place a statement in the state ballot pamphlet that does not exceed 250 words. The statement may not make any reference to any opponent of the candidate. The statement must be submitted in accordance with time frames and procedures set forth by the Secretary of State for the preparation of the state ballot pamphlets [*Gov. Code § 85601(a)*].

Notwithstanding *Gov. Code § 88001(e)* or *Elec. Code § 9084(e)*, on and after November 6, 2002, the Secretary of State may not include in the state ballot pamphlet a statement from a candidate who has not voluntarily agreed to the expenditure limitations set forth in *Gov. Code § 85400* [*Gov. Code § 85601(b)*].

A candidate for State Senate or Assembly who accepts the voluntary expenditure limits set forth in *Gov. Code § 85400*

may purchase the space to place a statement in the voter information portion of the sample ballot that does not exceed 250 words. The statement may not make any reference to any opponent of the candidate. The statement must be submitted in accordance with the time frames and procedures set forth in the Elections Code for the preparation of the voter information portion of the sample ballot [*Gov. Code § 85601(c)*].

Gov. Code § 85600 became operative on January 1, 2001. However, *Gov. Code § 85600* applies to candidates for statewide elective office (*see § 242.21[14A]*) beginning on and after November 6, 2002 [Prop. 34, § 83].

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§ 242.41B Adjustment to Contribution and Voluntary Expenditure Limits

The commission must adjust the contribution limitations and voluntary expenditure limitations provisions in *Gov. Code §§ 85301*, *85302*, *85303*, and *85400* (*see §§ 242.41[1] -[3]*, *242.41A*) in January of every odd-numbered year to reflect any increase or decrease in the Consumer Price Index. Those adjustments must be rounded to the nearest one hundred dollars for limitations on contributions and one thousand dollars for limitations on expenditures [*Gov. Code § 83124*].

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§ 242.42 Other Provisions Concerning Contributions to Candidates and Committees

[1] Receipt of Public Moneys

No candidate is permitted to accept any public moneys for the purpose of seeking elective office [*Gov. Code § 85300*, as enacted by Prop. 73]. "Public moneys" means all bonds and evidence of indebtedness; all moneys belonging to the state, or any city, county, town, district, or public agency in the state; and all moneys, bonds, and evidences of indebtedness received or held by state, county, district, city, town, or public agency officers in their official capacities [*Penal Code § 426*; *Gov. Code § 85206*, as enacted by Prop. 34].

Whether *Gov. Code § 85300* (as enacted by Prop. 73) is a matter of statewide concern, and thus beyond the purview of local legislation governing public financing for candidates for local office, was raised in *County of Sacramento v. Fair Political Practices Com. (1990) 222 Cal. App. 3d 687, 271 Cal. Rptr. 802* . The court concluded that because Prop. 73 is part of a comprehensive scheme of political reform and is intended to establish a single statewide body of law pertaining to the financing of election campaigns, the matter of campaign financing is a matter of statewide concern and local legislation is thus preempted by the state scheme [*County of Sacramento v. Fair Political Practices Com. (1990) 222 Cal. App. 3d 687, 692-693, 271 Cal. Rptr. 802]* . This conclusion, however, was questioned in *Johnson v. Bradley (1992) 4 Cal. 4th 389, 14 Cal. Rptr. 2d 470, 841 P.2d 990* . The Supreme Court found that the court of appeal in *County of Sacramento* offered no "convincing basis" for its determination that public financing of election campaigns, and partial funding of local election campaigns in particular, is necessarily a matter of statewide concern. Consequently, the Court declined to accept *County of Sacramento*'s holding that campaign financing is a statewide concern based on the drafters' and voters' intent to establish a uniform rule [*Johnson v. Bradley (1992) 4 Cal. 4th 389, 404-406, 14 Cal. Rptr. 2d 470, 841 P.2d 990]* .

The Court in *Johnson* also rejected attempts to establish a statewide concern of Prop. 73 by relying on the asserted statewide interest in how local tax proceeds are spent and an asserted legitimate statewide concern regarding the funding of political campaigns of candidates who are outside the mainstream of political thinking [*Johnson v. Bradley (1992) 4 Cal. 4th 389, 407-409, 14 Cal. Rptr. 2d 470, 841 P.2d 990]* . The Court, however, did find that Prop. 73 may be read to identify "the integrity of the electoral process" as a legitimate statewide concern [*Johnson v. Bradley (1992) 4 Cal.*

4th 389, 409, 14 Cal. Rptr. 2d 470, 841 P.2d 990] . But it refused to find that *Gov. Code § 85300* is reasonably related to the resolution of that concern, thereby concluding that the Government Code prohibition does not preempt local legislation [*see Johnson v. Bradley (1992) 4 Cal. 4th 389, 410-411, 14 Cal. Rptr. 2d 470, 841 P.2d 990]* .

[1A] Candidate's Acceptance of Contributions

A candidate for elective statewide office may only accept contributions within the limits provided in Gov. Code, tit. 9, ch. 5 (commencing with *Gov. Code § 85100*) [*Gov. Code § 89510(a)*].

Moreover, a contribution for an election may be accepted by a candidate for elective state office after the date of the election only to the extent that the contribution does not exceed net debts outstanding from the election, and the contribution does not otherwise exceed the applicable contribution limit for that election [*Gov. Code § 85316*].

Gov. Code § 85316 became operative on January 1, 2001. However, *Gov. Code § 85316* applies to candidates for statewide elective office (*see § 242.21[14A]*) beginning on and after November 6, 2002 [Prop. 34, § 83].

[1B] Restriction on Contributions By Lobbyist

An elected state officer or candidate for elected state office may not accept a contribution from a lobbyist, and a lobbyist may not make a contribution to an elected state officer or candidate for elected state office, if that lobbyist is registered to lobby the governmental agency for which the candidate is seeking election or the governmental agency of the elected state officer [*Gov. Code § 85702*]. For other prohibited acts by a lobbyist, *see §§ 242.63, 242.64*.

In rejecting a facial challenge to *Gov. Code § 85702*, the federal district court concluded that California has a legitimate state interest in avoiding the potential for corruption and the appearance of corruption that could occur if lobbyists, whose continued employment depends on their success in influencing legislative action, are allowed to make campaign contributions to the very persons whose decisions they hope to influence. According to the court, *Gov. Code § 85702* achieves this interest by forbidding such contributions from lobbyists to elected state officials or candidates for elected state office when they are registered to lobby those very individuals or their agencies. The statute is thus narrowly tailored to serve the state's important interests [*Institute of Governmental Advocates, et al. v. Fair Political Practices Com. (E.D. Cal. 2001) 164 F. Supp. 2d 1183]* .

Gov. Code § 85702 became operative on January 1, 2001. However, *Gov. Code § 85702* applies to candidates for statewide elective office (*see § 242.21[14A]*) beginning on and after November 6, 2002 [Prop. 34, § 83].

[2] Contributions Between Candidates

A candidate for elective state office (*see § 242.21[3A]*) or committee controlled by that candidate may not make any contribution to any other candidate for elective state office in excess of the limits set forth in *Gov. Code § 85301(a)* (*see § 242.41[1]*) [*Gov. Code § 85305*].

Gov. Code § 85305 became operative on January 1, 2001. However, *Gov. Code § 85305* applies to candidates for statewide elective office (*see § 242.21[14A]*) beginning on and after November 6, 2002 [Prop. 34, § 83].

[2A] Transfer of Campaign Funds Between Controlled Committees

A candidate may transfer campaign funds from one controlled committee (*see § 242.21[2][b]*) to a controlled committee for elective state office (*see § 242.21[3A]*) of the same candidate. Contributions transferred must be attributed to specific contributors using a "last in, first out" or "first in, first out" accounting method, and these attributed contributions when aggregated with all other contributions from the same contributor may not exceed the limits set forth in *Gov. Code §§ 85301* or *85302* (*see § 242.41[1], [2]*) [*Gov. Code § 85306(a)*].

Notwithstanding *Gov. Code § 85306(a)*, a candidate for elective state office, other than a candidate for statewide elective office (*see § 242.21[14A]*) who possesses campaign funds on January 1, 2001, may use the funds to seek elective office without attributing the funds to specific contributors [*Gov. Code § 85306(b)*]. Moreover, notwithstanding *Gov. Code § 85306(a)*, a candidate for statewide elective office who possesses campaign funds on November 6, 2002, may use those funds to seek elective office without attributing the funds to specific contributors [*Gov. Code § 85306(c)*].

Gov. Code § 85306 became operative on January 1, 2001. However, *Gov. Code § 85306* applies to candidates for statewide elective office (*see § 242.21[14A]*) beginning on or after November 6, 2002 [Prop. 34, § 83].

[2B] Carrying Over Contributions For Subsequent Election

Notwithstanding *Gov. Code § 85306(a)* (*see* [2A], *above*), a candidate for elective state office (*see § 242.21[3A]*) may carry over contributions raised in connection with one election for elective state office to pay campaign expenditures incurred in connection with a subsequent election for the same elective state office [*Gov. Code § 85317*].

Gov. Code § 85317 became operative on January 1, 2001. However, *Gov. Code § 85317* applies to candidates for statewide elective office (*see § 242.21[14A]*) beginning on and after November 6, 2002 [Prop. 34, § 83].

[3] Cash and In-Kind Contributions

No contribution of $100 or more may be made or received in cash [*Gov. Code § 84300(a)*]. In addition, no expenditure of $100 or more may be made in cash [*Gov. Code § 84300(b)*]. No contribution of $100 or more, other than an in-kind contribution, may be made unless in the form of a written instrument containing the name of the donor and the name of the payee and drawn from an account of the donor or the intermediary, as defined in *Gov. Code § 84302* [*Gov. Code § 84300(c)*].

A cash contribution will not be deemed received if it is not negotiated or deposited and if it is returned to the contributor before the closing date for the campaign statement on which the contribution would otherwise be reported. If a cash contribution, other than a late contribution [*see Gov. Code § 82036* (received before date of election but after closing date for last campaign statement required before election)], is negotiated or deposited, it will not be deemed received if it is refunded within 72 hours of receipt. A late contribution will not be deemed received if it is returned to the contributor within 48 hours of receipt [*Gov. Code § 84300(a)*].

The value of all in-kind contributions of $100 or more must be reported in writing to the recipient on his or her written request [*Gov. Code § 84300(d)*].

[4] Contributions in Legal Name

All contributions must be made in the contributor's legal name [*Gov. Code § 84301*; *see also People v. Snyder (2000) 22 Cal. 4th 304, 307, 92 Cal. Rptr. 2d 734, 992 P.2d 1102* (*Gov. Code § 84301* contains broad prohibition against what is commonly termed money laundering)]. Any candidate or committee that receives a contribution in violation of *Gov. Code § 84301* must pay to the General Fund of the state the amount of the contribution [*Gov. Code § 85701*].

Gov. Code § 85701 became operative on January 1, 2001. However, *Gov. Code § 85701* applies to candidates for statewide elective office (*see § 242.21[14A]*) beginning on or after November 6, 2002 [Prop. 34, § 83].

[5] Contribution on Behalf of Another

A person making a contribution on behalf of another or while acting as an agent or intermediary of another must

disclose to the recipient his or her identity and the identity of the employer or person on whose behalf the contribution is made [*see Gov. Code § 84302*].

[5A] Contribution to Committee Conditioned On It Being Contributed to Another Candidate

A person may not make any contribution to a committee on the condition or with the agreement that it will be contributed to any particular candidate unless the contribution is fully disclosed pursuant to *Gov. Code § 84302* (*see* [5], *above*) [*Gov. Code § 85704*].

Gov. Code § 85704 became operative on January 1, 2001. However, *Gov. Code § 85704* applies to candidates for statewide elective office (*see § 242.21[14A]*) beginning on or after November 6, 2002 [Prop. 34, § 83].

[6] Contributions Received by Agents

Contributions received by a person acting as an agent of a candidate must promptly be reported to the candidate or any of his or her designated agents. Contributions received by a person acting as an agent of a committee must promptly be reported to the committee's treasurer or any of the treasurer's designated agents. The term "promptly" means not later than the closing date of any campaign statement the committee or candidate for whom the contribution is intended is required to file [*Gov. Code § 84306*].

[7] Anonymous Contributions of $100 or More

No person may make an anonymous contribution or contributions totaling $100 or more in a calendar year to a candidate, committee, or any other person. An anonymous contribution of $100 or more may not be kept by the intended recipient, but instead must be promptly paid to the Secretary of State for deposit in the state's General Fund [*Gov. Code § 84304*].

[8] Specified Contributions in Excess of $250

No elected or appointed officer, or alternate, or candidate for office who serves on any state or local governmental agency (except courts, agencies of the judicial branch, directly elected local governmental agencies, the Legislature, the Board of Equalization, or constitutional officers) may accept, solicit, or direct a contribution of more than $250 from any person, or his or her agent, who has an application for a license, permit, or other entitlement for use pending before any body of which the officer or alternate is a member. This prohibition applies for three months following the decision date on an application. It also restricts contributions from any person, or his or her agent, who actively supports or opposes an application. The officer or alternate, however, must know or have reason to know that the person who supports or opposes the application has a financial interest, as that term is used in *Gov. Code § 87100 et seq.* [*Gov. Code § 84308(b)*; *see Gov. Code §§ 82003, 84308(a)(3)* ("agency" defined)]. Officers or alternates must report contributions of more than $250 as provided in *Gov. Code § 84308(c)*. Applicants for licenses, permits, or other entitlements from a nonexempted agency must disclose contributions of more than $250, and are prohibited from making the contributions during the proceeding or three months thereafter, as provided under *Gov. Code § 84308(d)*.

[9] Commingling

No contribution may be commingled with the personal funds of the recipient or any other person [*Gov. Code § 84307*].

[10] Receipt or Delivery in State Buildings

No person may receive or personally deliver or attempt to deliver a contribution in the State Capitol, in any state office building, or in any office for which the state pays the majority of the rent, other than a legislative district office [*Gov. Code § 84309(a)*; *see Gov. Code § 84309(b)* ("personally deliver" and "receive" defined)].

[11] Notice to Contributor on Receipt of $5,000 or More

A candidate or committee that receives contributions of $5,000 or more must inform the contributor within two weeks of receipt of the contributions that he or she may be required to file campaign reports. Notification need not be sent to any contributor who has filed a committee organization statement under *Gov. Code § 84101* and has been assigned an identification number under that section [*Gov. Code § 84105*; *see § 242.30[1]*].

[12] Return of Contribution

A candidate for state elective office may return all or part of any contribution to the donor who made the contribution at any time, whether or not other contributions are returned [*Gov. Code § 85319*]. A candidate or committee, however, must return not later than 60 days of receipt by the candidate or committee any contribution of $100 or more for which the candidate or committee does not have on file in the records of the candidate or committee the name, address, occupation, and employer of the contributor [*Gov. Code § 85700(a)*; *see also § 242.43[2]* (when general election funds are required to be refunded to contributors on pro rata basis)].

A candidate or committee may return a contribution pursuant to *Gov. Code § 85700(a)* after the date that the candidate or committee has reported the contribution under any provision of Gov. Code, tit. 9 [*Gov. Code § 85700(b)*].

Gov. Code §§ 85319 and *85700* became operative on January 1, 2001. However, *Gov. Code §§ 85319* and *85700* apply to candidates for statewide elective office (*see § 242.21[14A]*) beginning on and after November 6, 2002 [Prop. 34, § 83].

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§ 242.42A Loan to Campaign by Candidate For Elective State Office

Notwithstanding *Gov. Code § 85307(a)*, candidate for elective state office (*see § 242.21[3A]*) may not personally loan to his or her campaign, including the proceeds of a loan obtained by the candidate from a commercial lending institution, an amount, the outstanding balance of which exceeds $100,000. A candidate may not charge interest on any loan he or she made to his or her campaign [*Gov. Code § 85307(b)*; *see also § 242.50[2]* (information required to be in campaign statements concerning loans)].

The provisions of Gov. Code, tit. 9, ch. 5, art. 3 (commencing with *Gov. Code § 85300*) regarding loans apply to extensions of credit, but do not apply to loans made to a candidate by a commercial lending institution in the lender's regular course of business on terms available to members of the general public for which the candidate is personally liable [*Gov. Code § 85307(a)*].

Gov. Code § 85307 became operative on January 1, 2001. However, *Gov. Code § 85600* applies to candidates for statewide elective office (*see § 242.21[14A]*) beginning on and after November 6, 2002 [Prop. 34, § 83].

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§ 242.43 Solicitation of Contributions

[1] By Political Parties

Any person that includes in any part of its name the name of any political party that was qualified to participate in the last preceding primary election may not directly or indirectly solicit funds for any purpose on the representation, either express or implied, that the funds are being solicited for the party's use, unless the person soliciting has previously obtained written consent from the party officials specified in *Elec. Code § 20201* [*Elec. Code § 20201*]. The term "person" includes a firm, association, corporation, campaign committee, or organization [*Elec. Code § 20200*].

All persons soliciting funds in accordance with *Elec. Code § 20201* must be furnished with adequate credentials bearing the name of the solicitor and a copy of the written consent that bears the signature of the person authorizing the solicitation [*Elec. Code § 20201*].

[2] By Candidates or Committees

Before the solicitation of any contribution or loan, an individual who intends to be a candidate for an elective, as provided for in *Gov. Code § 85200*, must file with the Secretary of State an original statement, signed under penalty of perjury, of the individual's intention to be a candidate for a specific office [*Gov. Code § 85200*; *see § 242.40[1]*].

Any person who solicits funds for the purpose of supporting or promoting any candidate or committee may not include in any part of its name the name of that candidate or committee unless the person has previously obtained authorization from the candidate or committee, or from a designated agent [*Elec. Code § 20202*; *see Elec. Code §§ 305, 309* ("candidate" and "committee" defined)].

Any person who solicits or receives contributions on behalf of any candidate or committee for the purported and exclusive use of that committee or the candidate's election campaign and who is not authorized by the candidate or committee, or a designated agent, must include a notice in any magazine, printed literature, direct mailing, or any other type of general public advertising, or through telephone or individual oral fundraising appeal, clearly and conspicuously stating that the person is not authorized and that the candidate or committee is not responsible for the person's actions [

Elec. Code § 20203].

[1A]A candidate for elective state office may raise contributions for a general election prior to the primary election, and for a special general election prior to a special primary election, for the same elective state office if the candidate sets aside these contributions and uses these contributions for the general election or special general election. If the candidate for elective state office is defeated in the primary election or special primary election, or otherwise withdraws from the general election or special general election, the general election or special general election funds must be refunded to the contributors on a pro rata basis less any expenses associated with the raising and administration of general election or special general election contributions. Notwithstanding *Gov. Code § 85201*, candidates for elective state office may establish separate campaign contribution accounts for the primary and general elections or special primary and special general elections [*Gov. Code § 85318*; *see also, above* (concerning acceptance of contributions)]. *Gov. Code § 85318* became operative on January 1, 2001. However, *Gov. Code § 85318* applies to candidates for statewide elective office (*see § 242.21[14A]*) beginning on and after November 6, 2002 [Prop. 34, § 83].

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§ 242.44 Expenditures of Campaign Funds

[1] Governing Law and Definitions

Expenditures of campaign funds held by candidates for elective office, elected officers, controlled committees, ballot measure committees, committees opposed to a candidate or measure, and all committees qualified pursuant to *Gov. Code § 82013(a)* are subject to the provisions of *Gov. Code §§ 85200, 85201*, and *85300* (as enacted by Proposition 73) and the provisions of *Gov. Code § 89510 et seq.* [*Gov. Code § 89511(a)*; *see Gov. Code § 89511(b)(2)* ("committee" defined)].

The term "campaign funds" includes all contributions, cash, cash equivalents, and other assets received or possessed by a committee as defined by *Gov. Code § 82013(a)* [*Gov. Code § 89511(b)(1)*]. For purposes of *Gov. Code § 89510 et seq.*, the term "household" includes the candidate's or elected officer's spouse, dependent children, and parents who reside with the candidate or elected officer [*Gov. Code § 89511(b)(4)*].

[2] Payable From Campaign Contribution Account

All of a candidate's campaign expenditures (except a candidate's payment from his or her personal funds of a filing fee and a statement of qualifications fee) must be made from the campaign contribution account [*Gov. Code § 85201(e), (f)*, as enacted by Prop. 73; *see also § 242.40[2]*].

All contributions deposited into the campaign account are deemed to be held in trust for expenses associated with the election of the candidate or for expenses associated with holding office [*Gov. Code § 89510(b)*].

[3] Prohibition Against Spending Public Moneys

No public officer may expend any public moneys for the purpose of seeking elective office [*Gov. Code § 85300*, as enacted by Prop. 73; for definition of "public moneys," *see § 242.42[1]*].

However, the government has the right--and arguably even the duty--to speak on matters that concern the discharge of

its responsibilities to its citizens. For example, a city has broad discretion to make public expenditures, subject to the limitations that the expenditure be for a public purpose and not expressly forbidden by law. While a government agency may not spend public funds for a partisan campaign advocating the passage or defeat of a ballot measure, a public agency pursues a proper informational role when it simply gives a fair presentation of the facts. Thus, a city did not make improper government expenditures for communications on an initiative election because in its communications, which analyzed the impact of a tax-relief measure, did not contain words of express advocacy [*Vargas v. City of Salinas (2005) 135 Cal. App. 4th 361, 385-387, 37 Cal. Rptr. 3d 506]* .

[4] Lawful Expenditures

[a] Reasonably Related to Political Purpose

An expenditure to seek office is lawful if it is reasonably related to a political purpose. An expenditure associated with holding office is lawful if reasonably related to a political, legislative, or governmental purpose [*Gov. Code § 89512*]. But if an expenditure of campaign funds results in a direct personal benefit valued in excess of $200 to a candidate, elected officer, or to any individuals with authority to approve the expenditure of campaign funds held by a committee, then the expenditure confers a "substantial personal benefit" and is lawful only if directly related to a political, legislative, or governmental purpose [*Gov. Code §§ 89511(b)(3), 89512*]. Any expenditure by a committee that confers a substantial personal benefit on any individual or individuals with authority to approve the expenditure of campaign funds held by the committee also must be directly related to a political, legislative, or governmental purpose of the committee [*Gov. Code § 89512.5(b)*; *see Gov. Code § 89511(b)(3)*].

Gov. Code § 89500 et seq. is not to be construed to permit an expenditure of campaign funds prohibited by *Elec. Code § 18680* [*Gov. Code § 89522*; *see Elec. Code § 18680* (misappropriation of money or things of value entrusted to individual's use in connection with specified initiative, referendum, or recall petitions and statewide ballot measures)].

[b] Specific Expenditure Provisions

Notwithstanding the general limitations of *Gov. Code § 89512*, use of the following expenditures of campaign funds are governed by specific provisions:

- Payment or reimbursement for travel and accommodation expenses of a candidate, an elected officer, any individual with authority to approve the expenditure of campaign funds held by a committee, the employees or staff of the committee, an elected officer's governmental agency, or the household of a candidate or elected officer [*see Gov. Code § 89513(a)*].

- Payment or reimbursement for the cost of professional services, including health-related expenses for a candidate, elected officer, any individual with authority to approve the expenditure of campaign funds held by a committee, or members of his or her household [*see Gov. Code § 89513(b)*].

- Payment or reimbursement for fines, penalties, judgments, or settlements [*see Gov. Code § 89513(c)*].

- Payment or reimbursement for clothing [*see Gov. Code § 89513(d)*].

- Purchase of or reimbursement for purchase of tickets to political fundraising, entertainment, or sporting events for a candidate, elected officer, his or her immediate family, an officer, director, employee, or staff of the committee, or the elected officer's governmental agency [*see Gov. Code § 89513(e)*].

- Payment or reimbursement for personal gifts [*see Gov. Code § 89513(f)*].

- Payment or reimbursement for loans, other than to organizations pursuant to *Gov. Code § 89515* [*see Gov. Code § 89513(g)*].

- Payment or reimbursement for donations or loans to charitable, educational, civic, religious, or similar tax-exempt, nonprofit organizations [*see Gov. Code § 89515*].

- Payment or reimbursement for vehicle expenses [*see Gov. Code § 89516*].

- Payment or reimbursement for purchase or lease of real property, and payment or reimbursement for purchase, lease, or refurbishment of appliances or equipment [*see Gov. Code § 89517*].

- Compensation of a candidate or elected officer for the performance of political, legislative, or governmental activities [*Gov. Code § 89518*].

[c] Attorney's Fees and Costs

Expenditure of campaign funds for attorney's fees and other costs in connection with administrative, civil, or criminal litigation are not directly related to a political, legislative, or governmental purpose, except when the litigation (1) is directly related to activities of a committee that are consistent with its primary objectives; (2) arises directly out of a committee's activities; or (3) arises directly out of a candidate's or elected officer's activities, duties, or status as a candidate or elected officer. For example, litigation that is directly related to or arises directly out of such activities, duties, or status includes an action to enjoin defamation, defense of an action to enjoin defamation, defense of an action brought for a violation of state or local campaign, disclosure, or election laws, and an action arising from an elective contest or recount [*Gov. Code § 89514*].

[5] Use of Surplus Funds Raised After January 1, 1989

On leaving any elected office, or at the end of the postelection reporting period following the defeat of a candidate for elective office, whichever occurs last, campaign funds raised after January 1, 1989, under the control of the former candidate or elected officer, are considered surplus campaign funds. The surplus funds must be disclosed pursuant to the campaign disclosure requirements of *Gov. Code § 84100 et seq.* [*Gov. Code § 89519(a)*]. Surplus campaign funds must be used only for the following purposes [*Gov. Code § 89519(b)(1)-(6)*]:

- The payment of outstanding campaign debts or elected officer's expenses.

- The repayment of contributions.

- Donations to any bona fide charitable, educational, civic, religious, or similar tax-exempt, nonprofit organization, where no substantial part of the proceeds will have a material financial effect on the former candidate or elected officer, any member of his or her immediate family, or his or her campaign treasurer.

- Contributions to a political party committee, provided the campaign funds are not used to support or oppose candidates for elective office. However, the campaign funds may be used by a political party committee to conduct partisan voter registration, partisan get-out-the-vote activities, and slate mailers as that term is defined in *Gov. Code § 82048.3*.

- Contributions to support or oppose any candidate for federal office, any candidate for elective office

in a state other than California, or any ballot measure.

- The payment for professional services reasonably required by the committee to assist in the performance of its administrative functions, including payment for attorney's fees for litigation which arises directly out of a candidate's or elected officer's activities, duties, or status as a candidate or elected officer, including, but not limited to, an action to enjoin defamation, defense of an action brought of a violation of state or local campaign, disclosure, or election laws, and an action from an election contest or recount.

For purposes of *Gov. Code § 89519*, the payment for, or the reimbursement to the state of, the costs of installing and monitoring an electronic security system in the home or office, or both, of a candidate or elected officer who has received threats to his or her physical safety is deemed an outstanding campaign debt or elected officer's expense, provided that the threats arise from his or her activities, duties, or status as a candidate or elected officer and that the threats have been reported to and verified by an appropriate law enforcement agency. Verification must be determined solely by the law enforcement agency to which the threat was reported. The candidate or elected officer must report any expenditure of campaign funds made pursuant to *Gov. Code § 89519* to the commission. The report to the commission must include the date that the candidate or elected officer informed the law enforcement agency of the threat, the name and the telephone number of the law enforcement agency, and a brief description of the threat. No more than $5,000 in surplus campaign funds may be used, cumulatively, by a candidate or elected officer pursuant to *Gov. Code § 89519(c)*. Payments made pursuant to *Gov. Code § 89519(c)* must be made during the two years immediately following the date upon which the campaign funds become surplus campaign funds. The candidate or elected officer must reimburse the surplus fund account for the fair market value of the security system no later than two years immediately following the date upon which the campaign funds became surplus campaign funds. The campaign funds become surplus campaign funds upon sale of the property on which the system is installed, or prior to the closing of the surplus campaign fund account, whichever comes first. The electronic security system shall be the property of the campaign committee of the candidate or elected officer [*Gov. Code § 89519(c)*].

[6] Liability for Violations

Any person who makes or receives an honorarium, gift, or expenditure in violation of the provisions of *Gov. Code § 89510 et seq.* is liable in a civil action brought by the Fair Political Practices Commission for an amount of up to three times the amount of the unlawful honorarium, gift, or expenditure [*Gov. Code § 89521*]. The remedies set forth in *Gov. Code § 91000 et seq.* [*see § 242.70* et seq.] do not apply to violations of *Gov. Code § 89510 et seq.* [*Gov. Code § 89520*].

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[Reserved]

§§ 242.45[Reserved]

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§ 242.50 Campaign Statements

[1] Filing Requirement

Campaign statements are itemized reports that must be prepared on forms prescribed by the Fair Political Practices Commission [*Gov. Code § 82006*; *see also Gov. Code §§ 84205, 84206, 84212*]. As a general rule, all elected officers, candidates, committees under *Gov. Code § 82013(a)* (committees receiving $1,000 or more in contributions in a calendar year), and slate mailer organizations must file semiannual campaign statements each year. The statements must be filed no later than July 31 for the six-month reporting period ending June 30, and no later than January 31 for the six-month reporting period ending December 31 [*Gov. Code § 84200(a)*; *see Gov. Code § 84218(a)*].

[2] Contents, Verification, and Place of Filing

Campaign statements for candidates, committees, elected officers, and specified slate mailer organizations must contain the information required by *Gov. Code § 84211* [*see Gov. Code §§ 84211, 84218(c), 84219(k)*; *see also* [6], *below*, concerning slate mailer organizations]. Additionally, campaign statements for candidates and committees must contain the information relating to loans required by *Gov. Code §§ 84211, 84216(b)* and *84216.5*. For example, for each person contributing $100 or more during a reporting period, the statement must include the contributor's name, address, occupation, employer or business name if self-employed, the date and amount received for each contribution, and the cumulative amount of contributions [*see Gov. Code § 84211(f)*; *see also Gov. Code § 82015* ("contribution" defined), discussed in *§ 242.21[3]*].

A candidate must verify (in accordance with *Gov. Code § 81004*) his or her campaign statement and the campaign statement of each committee subject to his or her control [*Gov. Code § 84213*]. All candidates and elected officers and their controlled committees must file copies of campaign statements at the places specified in *Gov. Code § 84215*.

For discussion of the reporting requirement concerning payments made at the behest of candidate who is an elected officer for purposes unrelated to the candidate's candidacy for elective office [*see Gov. Code § 82015(b)(2)(B)(iii)*], see *§ 242.53C*.

[3] Candidates

A candidate who, during the past six months, has filed a declaration that he or she has received contributions and made expenditures of less than $1,000 in a calendar year need not file a statement for that six-month period [*Gov. Code § 84200(a)(1)*; *see Gov. Code § 84206*].

[4] Committees

[a] In General

Committees under *Gov. Code § 82013(b)* or *(c)* (committees making independent expenditures, including payments to a slate mailer organization, of $1,000 or contributions of $10,000 or more in a calendar year) must file semiannual campaign statements no later than July 31 for the six-month reporting period ending June 30, and no later than January 31 for the six-month reporting period ending December 31, if they have made contributions or independent expenditures during the six-month period before the closing date of the statements [*Gov. Code § 84200(b)*; *see § 242.21[2][a]*].

Ballot measure committees pursuant to *Gov. Code § 82013(a)* and proponents of a state ballot measure who control those committees are also required to file campaign statements for the first half of any semiannual period during which these committees are not required to file preelection statements [*Gov. Code § 84202.3*; *see § 242.51[6]*].

During an odd-numbered year, any committee that makes contributions totaling $10,000 or more during specified periods to elected state officers, their controlled committees, or committees primarily formed to support or oppose any elected state officer must file campaign statements on specified dates [*see Gov. Code § 84202.7(a)*]. If a committee makes contributions totaling $10,000 or more during a specified period to elected state officers, their controlled committees, or committees primarily formed to support or oppose any elected state officer, and all of those contributions are reported under *Gov. Code § 84202.5* (supplemental preelection statements) on or before the appropriate time period, the committee need not file additional statements for that period under *Gov. Code § 84202.7* [*Gov. Code § 84202.7(b)*].

[b] LAFCO Proposal Committee

A "LAFCO proposal" in this context is a proceeding or proposal as defined in *Gov. Code § 56067* or § 56069 [*Gov. Code § 82035.5*]. All requirements of the Political Reform Act of 1974 applicable to a measure [*see Gov. Code § 82043* (definition)] also apply to a LAFCO proposal, except as set forth in *Gov. Code § 84252, below* [*Gov. Code § 84250*].

A committee primarily formed to support or oppose a LAFCO proposal must file all statements required under the disclosure provisions of the Political Reform Act of 1974 [*see Gov. Code § 84100 et seq.*] except that, in lieu of the statements required by *Gov. Code §§ 84200* and *84202.3* [*see* [a], *above*], the committee must file monthly campaign statements from the time circulation of a petition begins until a measure is placed on the ballot or, if a measure is not placed on the ballot, until the committee is terminated pursuant to *Gov. Code § 84214*. The committee must file an original and one copy of each statement on the 15th day of each calendar month, covering the prior calendar month, with the clerk of the county in which the measure may be voted on. If the petition results in a measure that is placed on the ballot, the committee thereafter must file campaign statements required by the disclosure provisions of the Political Reform Act of 1974 [*Gov. Code § 84252(a)*].

In addition to any other statements required by the disclosure provisions of the Political Reform Act of 1974, a committee that makes independent expenditures in connection with a LAFCO proposal must file statements pursuant to *Gov. Code § 84203.5* [*Gov. Code § 84252(b)*].

A payment made for the purpose of influencing or attempting to influence the actions of voters or a local agency formation commission for or against the qualification, adoption, or passage of a LAFCO proposal is a payment made for "political purposes" as that term is used in *Gov. Code §§ 82015* and *82025* defining what are contributions and expenditures for purposes of the Political Reform Act of 1974 [*Gov. Code § 84251*].

[5] Elected Officers, Judges, and Judicial Candidates

Elected officers whose salaries are less than $200 a month, judges, judicial candidates, and their controlled committees need not file semiannual statements under *Gov. Code § 84200(a)* for any six-month period in which they have not made or received any contributions or made any expenditures [*Gov. Code § 84200(a)(2)*; *see Gov. Code § 82020* ("elected officer" defined)].

A judge who is not listed on the ballot for reelection to, or recall from, any elective office during a calendar year need not file semiannual statements for any six-month period in that year if [*Gov. Code § 84200(a)(3)*]:

- The judge has not received any contributions; and

- The only expenditures made by the judge during the calendar year are contributions from the judge's personal funds to other candidates or committees, totaling less than $1,000.

[6] Slate Mailer Organizations

A slate mailer organization must file semiannual campaign statements for each period in which it has done either of the following [*Gov. Code § 84218(a)*]:

- Received payments totaling $500 or more from any person for the support of or opposition to candidates or ballot measures in a slate mailer; or

- Expended $500 or more to produce one or more slate mailers.

The production and distribution of slate mailers by a slate mailer organization do not constitute making contributions or expenditures for purposes of *Gov. Code § 82013(b)* or *(c)* [*see § 242.21[13]*]. If a slate mailer organization makes contributions or expenditures other than by producing or distributing slate mailers, and it reports them under *Gov. Code §§ 84218* and *84219* (campaign statements and reports), no additional campaign reports are required under *Gov. Code § 84200* (time for filing campaign statements and reports) or *§ 84200.5* (time for filing preelection statements) [*Gov. Code § 82048.4(c)*].

The contents of the semiannual statements are mandated by *Gov. Code § 84219*. Whenever a slate mailer organization also qualifies as a general purpose committee under *Gov. Code § 82027.5* [*see § 242.21[2][c]*], the campaign report must include, in addition to any information required by *Gov. Code § 84219*, the information required by *Gov. Code § 84211* [*Gov. Code § 84219(k)*].

The statements must be filed no later than July 31 for the period ending June 30, and no later than January 31 for the period ending December 31 [*Gov. Code § 84218(a)*]. The organization must file two copies of its campaign reports with the clerk of the county in which it is domiciled. It is deemed to be domiciled at the address listed on its statement of organization, unless it is domiciled outside California. If it is domiciled outside California, its domicile is deemed to be Los Angeles County for the purpose of filing statements and reports specified in *Gov. Code § 84218* [*Gov. Code § 84218(c)*].

Slate mailer organizations terminate their filing obligations in the same manner as committees qualifying under *Gov.*

Code § 82013(a) [*Gov. Code § 84221*].

In addition to these campaign statements, the preelection statements [*see § 242.51*] and the late contribution reports [*see § 242.53*], slate mailer organizations must file campaign reports as follows [*Gov. Code § 84218(c)*]:

- A slate mailer organization that produces one or more slate mailers supporting or opposing candidates or measures voted on in a state election, or in more than one county, must file campaign reports in the same manner as state general purpose committees [*see § 242.21[2][c]*] pursuant to *Gov. Code § 84215(a)*.

- A slate mailer organization that produces one or more slate mailers supporting or opposing candidates or ballot measures voted on in only one county, or in more than one jurisdiction within one county, must file campaign reports in the same manner as county general purpose committees [*see § 242.21[2][c]*] pursuant to *Gov. Code § 84215(d)*.

- A slate mailer organization that produces one or more slate mailers supporting or opposing candidates or ballot measures voted on in only one city must file campaign reports in the same manner as city general purpose committees [*see § 242.21[2][c]*] pursuant to *Gov. Code § 84215(e)*.

Notwithstanding the foregoing, no slate mailer organization is required to file more than the original and one copy, or two copies, of a campaign report with any one county or city clerk or with the Secretary of State [*Gov. Code § 84218(c)(4)*].

For discussion of setting up an account to defray attorney fees and related costs for candidates for elective state office, or for an elected state officer, without being subject to the contribution limits set forth in Gov. Code, tit. 9, ch. 5 (commencing with *Gov. Code § 85100*), see *§ 242.41[9]*.

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§ 242.51 Preelection Statements

[1] Filing Requirement

In addition to campaign statements [*see § 242.50*], elected officers, candidates, committees, and slate mailer organizations must file preelection statements [*Gov. Code § 84200.5*; *see Gov. Code § 84218(b)*].

[2] Elected State Officers and Their Committees

During an even numbered year, committees primarily formed to support or oppose an elected state officer being voted on in the statewide direct primary election or statewide general election must file the applicable preelection statements specified in Gov. Code § 82400.7 or 82400.8. All elected state officers who, during the applicable reporting periods covered by § 82400.7 or § 82400.8, contribute to any committee required to report receipts, expenditures, or contributions under the Political Reform Act of 1974, or make an independent expenditure, must also file the applicable preelection statements specified in Gov. Code § 82400.7 or 82400.8 [*Gov. Code § 84200.5(a)*].

[3] Candidates and Their Committees

During an even-numbered year, all candidates for elective state office being voted on in the statewide direct primary or general election, their control committees, and committees primarily formed to support or oppose them must file the applicable preelection statements specified in Gov. Code § 82400.7 or 82400.8 [*Gov. Code § 84200.5(a)*]. A candidate who is not being voted on in the November election, his or her controlled committee, and any committee primarily formed to support or oppose the candidate is not, however, required to file statements in connection with the November election pursuant to Gov. Code § 82400.7(b) unless, during the reporting periods covered by *Gov. Code § 84200.7*, the candidate, his or her controlled committee, or any committee primarily formed to support or oppose the candidate either contributes to any committee required by the Political Reform Act to report receipts, expenditures, or contributions or makes independent expenditures [*Gov. Code § 84200.5(a)*].

During an even-numbered year, all candidates not specified in *Gov. Code § 84200.5(a)* who are being voted on in an election held on the first Tuesday after the first Monday in June or November of that year, their controlled committees,

and committees primarily formed to support or oppose them must file preelection statements specified in *Gov. Code § 84200.7(a)* in case of a June election, or *Gov. Code § 84200.8(b)* in case of a November election [*Gov. Code § 84200.5(b)*].

All candidates being voted on in an election held on a date other than the first Tuesday after the first Monday in June or November of an even-numbered year, their controlled committees, and committees primarily formed to support or oppose them must file the preelection statements specified in *Gov. Code § 84200.8* [*Gov. Code § 84200.5(c)*].

[4] State and County General Purpose Committees

In an even-numbered year in which the statewide direct primary election is held on the first Tuesday after the first Monday in June, a state or county general purpose committee formed pursuant to *Gov. Code § 82013(a)*, other than a political party committee as defined in *Gov. Code § 85205*, (i.e., one receiving contributions of $1,000 or more in a calendar year) must file the preelection statements specified in *Gov. Code § 84200.7* if it makes contributions or independent expenditures totaling $500 or more during the period covered by the preelection statement [*Gov. Code § 84200.5(d)*; for definition of state or county general purpose committee, *see § 242.21[2][c]*]. A state or county general purpose committee formed pursuant to *Gov. Code § 82013(b)* or *82013(c)* (i.e., one that makes either independent expenditures totaling $1,000 or more in a calendar year, or contributions of $10,000 or more in a calendar year to or at the behest of candidates or committees), however, is not required to file the statements specified in *Gov. Code § 84200.7* [*Gov. Code § 84200.5(d)*].

Similarly, during an even-numbered year in which the statewide direct primary election is held on a date other than the first Tuesday after the first Monday in June, a state or county general purpose committee formed pursuant to *Gov. Code § 82013(a)*, other than a political party committee as defined in *Gov. Code § 85205*, (i.e., one receiving contributions of $1,000 or more in a calendar year) must file the preelection statements specified in *Gov. Code § 84200.8* if it makes contributions or independent expenditures totaling $500 or more during the reporting period covered by the statement. A state or county general purpose committee formed pursuant to *Gov. Code § 82013(b)* or *82013(c)* (i.e., one that makes either independent expenditures totaling $1,000 or more in a calendar year, or contributions of $10,000 or more in a calendar year, to or at the behest of candidates or committees), however, is not required to file the statements specified in *Gov. Code § 84200.8* [*Gov. Code § 84200.5(e)*].

[5] Political Party Committees

A political party committee, as defined in *Gov. Code § 85205*, shall file the applicable preelection statements specified in *Gov. Code §§ 84200.7* or *84200.8* in connection with a state election if the committee receives contributions totaling $1,000 or more, or if it makes contributions or independent expenditures totaling $500 or more during the period covered by the preelection statement.

[6] City General Purpose Committees

City general purpose committees in a city that has an election on the first Tuesday after the first Monday in June or November of an even-numbered year must file the statement specified in *Gov. Code § 84200.7(a)* or *84200.7(b)* for the six-month period in which the city election is held if they make contributions or independent expenditures totaling $500 or more during the period covered by the preelection statement [*Gov. Code § 84200.5(g)(1)*].

City general purpose committees in a city that has an election on any other date must file the preelection statements specified in *Gov. Code § 84200.8* if they make contributions or independent expenditures totaling $500 or more during the period covered by the preelection statement [*Gov. Code § 84200.5(g)(2)*].

[7] Slate Mailer Organizations

Slate mailer organizations must, in addition to the semiannual campaign statements required by *Gov. Code § 84218(a)* [*see § 242.50[6]*], file preelection statements as follows [*Gov. Code § 84218(b)*; *see Gov. Code § 84219* (contents of preelection statements)]:

- Any slate mailer organization that produces a slate mailer supporting or opposing candidates or ballot measures voted on in an election held on the first Tuesday after the first Monday in June or November of an even-numbered year must file the preelection statements specified in *Gov. Code § 84200.7* if, during the reporting period covered by the preelection statement, the organization receives payments totaling $500 or more from any person for the support of or opposition to candidates or ballot measures in one or more slate mailers, or expends $500 or more to produce one or more slate mailers.

- Any slate mailer organization that produces a slate mailer supporting or opposing candidates or ballot measures voted on in an election held on a date other than the first Tuesday after the first Monday in June or November of an even-numbered year must file the preelection statements specified in *Gov. Code § 84200.8* if, during the reporting period covered by the preelection statement, the organization receives payments totaling $500 or more from any person for the support of or opposition to candidates or ballot measures in one or more slate mailers, or expends $500 or more to produce one or more slate mailers.

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§ 242.52 Supplemental Preelection Statements

Any candidate or any committee that makes contributions of $10,000 or more in connection with an election, including a runoff election, must file a supplemental preelection statement for the reporting period on the date specified in *Gov. Code § 84202.5(a)* [*Gov. Code § 84200.6(a)*]. This statement need not be filed during any semiannual period in which the candidate or committee must file preelection statements under *Gov. Code § 84200.5* [*Gov. Code § 84202.5(b)*]. Moreover, if a candidate or committee makes contributions totalling $10,000 or more in connection with an election and all those contributions are reported under *Gov. Code § 84200* or *84202.7* on or before the date specified in *Gov. Code § 84202.5(a)*, the candidate or committee is not required to file additional statements for that period under *Gov. Code § 84202.5* [*Gov. Code § 84202.5(c)*].

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§ 242.53 Late Contribution and Independent Expenditure Reports

In addition to the campaign statements required by *Gov. Code §§ 84200* and *84218(a)*, and the preelection statements required by *Gov. Code §§ 84200.5* and *84218(b)* (*see* discussions in *§§ 242.50*, *242.51*), all candidates, committees, and slate mailer organizations must file late contribution reports when required by *Gov. Code §§ 84203* and *84220* [*see Gov. Code §§ 84200.6(b)*, *84220*]. Candidates and committees must also file independent expenditure and late independent expenditure reports when required by *Gov. Code §§ 84203.5* and *84204* [*Gov. Code § 84200.6(c)*, *(d)*; *see Gov. Code § 85500* (discussed in *§ 242.53A[2]*)].

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§ 242.53A Online or Electronic Filing Requirements

[1] Under the Online Disclosure Act

In 1997, Gov. Code, tit. 9, ch. 4.6 (commencing with *Gov. Code § 84600*) was enacted [*see* Stats 1997, ch. 866]. Chapter 4.6 is known and may be cited as the Online Disclosure Act of 1997 [*Gov. Code § 84600*]. The Legislature, in enacting the Act, declared that advances in technology have made it viable for disclosure statements and reports required by the Political Reform Act to be filed online and placed on the internet, thereby maximizing availability to the public [*Gov. Code § 84601(c)*].

Under the Act, numerous persons and entities listed in *Gov. Code §§ 84604* and *84605* that are required to file statements, reports or other documents under Gov. Code, tit. 9, ch. 4 (commencing with *Gov. Code § 84100*) and Gov. Code, tit. 9, ch. 6 (commencing with *Gov. Code § 86100*) must also file them online or electronically with the Secretary of State when certain threshold amounts are met [*see Gov. Code §§ 84602(a), 84604, 84605*]. Similarly, in addition to filing in paper format, persons or entities not required to file online or electronically under *Gov. Code §§ 84604*, or *84605* may do so voluntarily [*Gov. Code §§ 84604(b), 84605(f), (i)*].

The Secretary of State, once all state-mandated development, procurement, and oversight requirements have been met, must make public their availability to accept reports online or electronically. Any filer may then commence voluntarily filing online or electronically any required report or statement that is otherwise required to be filed with the Secretary of State under Gov. Code, tit. 9, ch. 4 (commencing with *Gov. Code § 84100*) or Gov. Code, tit. 9, ch. 6 (commencing with *Gov. Code § 86100*) [*Gov. Code § 84603*].

The Secretary of State must determine and publicly disclose when the online and electronic disclosure systems are operating effectively. The online or electronic disclosure system shall not become operative until the Department of Information Technology approves the system. On this determination, filers required by Gov. Code, tit. 9, ch.4.6 (commencing with *Gov. Code § 84600*) to file online or electronically no longer will be required to file a paper copy or with local filing officers. Furthermore, the date that a filer transmits an online or electronic report shall be the date the report is received by the Secretary of State [*Gov. Code § 84606*].

If the Secretary of State rejects a filing made under the Online Disclosure Act, the Secretary of State must immediately notify the filer, by electronic mail, of the reason or reasons for rejection using plain, straightforward language, avoiding technical terms as much as possible, and using a coherent and easily readable style. The notice must be written or displayed so that the meaning will be easily understood by those persons directly affected by it [*Gov. Code § 84612*].

The Secretary of State must make all data filed available on the internet free of charge as soon as possible after receipt. For example, all late contributions and late independent expenditure reports as defined in *Gov. Code §§ 84203* and *84204* must be made available on the Internet within 24 hours after receipt [*Gov. Code § 84602(d)*; *see Gov. Code §§ 84604(c), 84605(e)*]. The Secretary of State must maintain all filed data online for 10 years after the date it was filed, and then archive the information in a secure format [*Gov. Code § 84602(f)*].

[2] Under Other Specified Provisions

In addition to any other reports required by Gov. Code, tit. 9 (commencing with *Gov. Code § 81000*), a committee, including a political party committee (as defined in *Gov. Code § 85205*; *see § 242.41[3]*), that is required to file reports under *Gov. Code § 84605* (*see* [1], *above*) and that makes independent expenditures of $1,000 or more during an election cycle (as defined in *Gov. Code § 85204*) in connection with a candidate for elective state office or state ballot measure (*see § 242.21[3A]*), must file online or electronically a report with the Secretary of State in accordance with *Gov. Code § 85500(a)* [*see Gov. Code § 85500(a)*]. An expenditure may not be considered independent, however, and must be treated as a contribution from the person making the expenditure to the candidate on whose behalf, or for whose benefit, the expenditure is made, if the expenditure is made under any of the following circumstances [*Gov. Code § 85500(b)*]:

- The expenditure is made with the cooperation of, or in consultation with, the candidate on whose behalf, or for whose benefit, the expenditure is made, or any controlled committee or any agent of the candidate [*Gov. Code § 85500(b)(1)*].

- The expenditure is made in concert with, or at the request or suggestion of, the candidate on whose behalf, or for whose benefit, the expenditure is made, or any controlled committee or any agent of the candidate [*Gov. Code § 85500(b)(2)*].

- The expenditure is made under any arrangement, coordination, or direction with respect to the candidate or the candidate's agent and the person making the expenditure [*Gov. Code § 85500(b)(3)*].

A controlled committee (as defined in *Gov. Code § 82016*) of a candidate may not make independent expenditures and may not contribute funds to another committee for the purpose of making independent expenditures to support or oppose other candidates [*Gov. Code § 85501*].

Furthermore, in addition to any other reports required by Gov. Code, tit. 9 (commencing with *Gov. Code § 81000 et seq.*), a candidate for elective state office who is required to file reports under *Gov. Code § 84605* (*see* [1], *above*) must file online or electronically with the Secretary of State a report disclosing receipt of a contribution of $1,000 or more received during an election cycle (as defined in *Gov. Code § 85204*) in accordance with *Gov. Code § 85309(a)* [*see Gov. Code § 85309(a)*]. Similarly, in addition to any other report required by Gov. Code, tit. 9 (commencing with *Gov. Code § 81000 et seq.*), any committee primarily formed to support or oppose one or more state ballot measures that is required to file reports under *Gov. Code § 84605* must file online or electronically with the Secretary of State a report disclosing receipt of a contribution of $1,000 or more received during an election cycle in accordance with *Gov. Code § 85309(b)* [*see Gov. Code § 85309(b)*].

In addition to any other report required by Gov. Code, tit. 9 [*Gov. Code § 81000 et seq.*], a candidate for elective state

office who is required to file reports pursuant to *Gov. Code § 84605* must file online or electronically with the Secretary of State a report disclosing receipt of a contribution of $5,000 or more received at any time other than during an election cycle. Those reports must disclose the same information required by *Gov. Code § 84203(a)* and must be filed within 10 business days of receipt of the contribution [*Gov. Code § 85309(c)*]. This requirement is also applicable to a committee primarily formed to support or oppose a state ballot measure [*Gov. Code § 85309(d)*].

Gov. Code §§ 85500 and *85309* became operative on January 1, 2001. However, *Gov. Code §§ 85500* and *85309(b)* apply to candidates for statewide elective office (*see § 242.21[14A]*) beginning on and after November 6, 2002 [Prop. 34, § 83].

[3] Report of Payments Concerning Issue Advocacy

Any person who makes a payment or a promise of payment totaling $50,000 or more for a communication that clearly identifies a candidate for elective state office, but does not expressly advocate the election or defeat of the candidate, and that is disseminated, broadcast, or otherwise published within 45 days of an election, must file online or electronically with the Secretary of State a report disclosing the name of the person, address, occupation, and employer, and amount of the payment. The report must be filed within 48 hours of making the payment or the promise to make the payment [*Gov. Code § 85310(a)*].

Except as provided in *Gov. Code § 85319(b)(2)*, if any person has received a payment or a promise of a payment from other persons totaling $5,000 or more for the purpose of making a communication described in *Gov. Code § 85310*, the person receiving the payments must disclose on the report the name, address, occupation and employer, and date and amount received from the person [*Gov. Code § 85310(b)(1)*]. A person who receives or is promised a payment that is otherwise reportable under *Gov. Code § 85310(b)(1)*, however, is not required to report the payment if the person is in the business of providing goods or services and receives or is promised the payment for the purpose of providing those goods or services [*Gov. Code § 85310(b)(2)*].

Any payment received by a person who makes a communication described in *Gov. Code § 85310(a)* is subject to the limits specified in *Gov. Code § 85303(b)* (*see § 242.41[3]*) if the communication is made at the behest of the clearly identified candidate [*Gov. Code § 85310(c)*; *see § 242.21[3]* (defining contribution)].

Gov. Code § 85310 became operative on January 1, 2001. However, *Gov. Code § 85310* applies to candidates for statewide elective office (*see § 242.21[14A]*) beginning on or after November 6, 2002 [Prop. 34, § 83].

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§ 242.53B Certain Payments Not Made For General Public Advertising Not Deemed Contributions or Independent Expenditures

For purposes of Gov. Code, tit. 9 (commencing with *Gov. Code § 81000*), payments for communications to members, employees, shareholders, or families of members, employees, or shareholders of an organization for the purpose of supporting or opposing a candidate or a ballot measure are not contributions or expenditures, provided those payments are not made for general public advertising such as broadcasting, billboards, and newspaper advertisements. However, payments made by a political party for communications to its members who are registered with that party which would otherwise qualify as contributions or expenditures must be reported in accordance with *Gov. Code § 84200 et seq.* and *Gov. Code § 84600 et seq.* [*Gov. Code § 85312*; *see §§ 242.21[3]* (defining contributions), *242.21[4][b]* (defining independent expenditures)].

Gov. Code § 85312 became operative on January 1, 2001. However, *Gov. Code § 85312* applies to candidates for statewide elective office (*see § 242.21[14A]*) beginning on and after November 6, 2002 [Prop. 34, § 83].

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§ 242.53C Payments Made at Behest of Candidate Who Is Elected Officer for Purposes Unrelated to Candidate's Candidacy

A payment not covered by *Gov. Code § 82015(b)(2)(B)(i)* (*i.e.*, not being a payment made principally for personal purposes that may be considered a gift) made principally for legislative, governmental, or charitable purposes is considered neither a gift nor a contribution [*Gov. Code § 82015(b)(2)(B)(iii)*; *see § 242.21[3], above*]. Payments of this type, however, that are made at the behest of a candidate who is an elected officer must be reported within 30 days following the date on which the payment or payments equal or exceed $5,000 in the aggregate from the same source in the same calendar year in which they are made. The report must be filed by the elected officer with the elected officer's agency and is a public record subject to inspection and copying pursuant to *Gov. Code § 81008(a)* [*Gov. Code § 82015(b)(2)(B)(iii)*]. The report must contain the following information [*Gov. Code § 82015(b)(2)(B)(iii)*]:

- Name of the payor.
- Address of the payor.
- Amount of the payment.
- Date the payment was made.
- Name and address of the payee.
- Brief description of any goods or services provided by or purchased from the payee.
- Description of the specific purpose or event for which the payment was made.

Once the $5,000 aggregate threshold from a single source has been reached for a calendar year, all payments for the calendar year made by that source must be disclosed within 30 days after the date the threshold was reached or the payment was made, whichever occurs later. Within 30 days after receipt of the report, state agencies must forward a

copy of these reports to the Fair Political Practices Commission, and local agencies must forward a copy of these reports to the officer with whom elected officers of that agency file their campaign statements [*Gov. Code § 82015(b)(2)(B)(iii)*].

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§ 242.53D Payments Made at Behest of Member of Public Utilities Commission Principally for Legislative, Governmental, or Charitable Purposes

A payment made at the behest of a member of the Public Utilities Commission, made principally for legislative, governmental, or charitable purposes, is not a contribution. However, payments of this type must be reported within 30 days following the date on which the payments equal or exceed $5,000 in the aggregate from the same source in the same calendar year in which they are made. The report must be filed by the member with the Public Utilities Commission and must be a public record subject to inspection and copying pursuant to *Gov. Code § 81008(a)*. The report must contain the following information respecting each payment:

- Name of the payor.
- Address of the payor.
- Amount of the payment.
- Date the payment was made.
- Name and address of the payee.
- Brief description of any goods or services provided by or purchased from the payee.
- Description of the specific purpose or event for which the payment was made.

Once the $5,000 aggregate threshold from a single source has been reached for a calendar year, all payments for the calendar year made by that source must be disclosed within 30 days after the date the threshold was reached or the payment was made, whichever occurs later. Within 30 days after receipt of the report, the Public Utilities Commission must forward a copy of these reports to the Fair Political Practices Commission [*Gov. Code § 82015(b)(3)*].

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§ 242.54 Expenditures

[1] By Agents or Independent Contractors

No expenditure of $500 or more may be made, other than overhead or normal operating expenses, by an agent or independent contractor, including but not limited to an advertising agency, on behalf of or for the benefit of any candidate or committee unless it is reported by the candidate or committee as if it were made directly by the candidate or committee. The agent or independent contractor must make known to the candidate or committee all information required to be reported under this provision [*Gov. Code § 84303*].

[2] For Mass Mailings

No newsletter or other mass mailing may be sent at public expense [*Gov. Code § 89001*]. This prohibition is constitutional, because it neither interferes with the Legislature's authority to govern its internal affairs nor burdens the exercise of any fundamental right [*Watson v. Fair Political Practices Com. (1990) 217 Cal. App. 3d 1059, 1064, 266 Cal. Rptr. 408*]. The prohibition is not unconstitutionally broad nor violative of the single-subject requirement of *Cal. Const., art. II, § 8, subd. (d)* [*Watson v. Fair Political Practices Com. (1990) 217 Cal. App. 3d 1059, 1075-1078, 266 Cal. Rptr. 408]* .

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Volume 20: Easements thru Eminent Domain-Chs. 240-247
Chapter 242 ELECTION CAMPAIGNS
PART II. LEGAL BACKGROUND
4A. Particular Disclosure Requirements

20-242 California Forms of Pleading and Practice--Annotated § 242.55

§ 242.55 Mass Mailings

No candidate or committee may send a mass mailing unless the outside of each piece of mail meets the form and content requirements of *Gov. Code § 84305* [*see 2 Cal. Code Reg. § 18435* (defining "sender" as person who incurs largest portion of expenditures attributable to designing, printing, and posting of mailing)].

The *Gov. Code § 84305* requirement that candidates for public office (or candidate-controlled committees) must identify themselves on mass mailings has been upheld against a challenge that the provision violates the *First Amendment* [*Griset v. Fair Political Practices Com. (1994) 8 Cal. 4th 851, 853, 866 n.5, 35 Cal. Rptr. 2d 659, 884 P.2d 116 (Griset I)* (rejecting candidate's argument that person who sends mass mailings designed to influence election outcome is entitled to remain anonymous under *First Amendment*)].

After *Griset I*, the U.S. Supreme Court considered the question of whether a state statute that prohibits the distribution of anonymous campaign literature is a law abridging the freedom of speech within the meaning of the *First Amendment*. The statute prohibited distribution of political campaign literature that does not include the name and address of the person or campaign official issuing the literature. The Court held that the statute was unconstitutional because the state failed to show that the state's interest in preventing misuse of anonymous election-related speech justified a prohibition of all that speech [*McIntyre v. Ohio Elections Comm'n (1995) 514 U.S. 334, 357, 115 S. Ct. 1511, 131 L. Ed. 2d 426]* .

Arguably, *McIntyre*, brings into question the constitutionality of *Gov. Code § 84305*, because the statute prohibits distribution of anonymous mass mailings. Section 84305 may be distinguished from the statute before the Court, however, because Section 84305 is more narrow and concerns only "candidates or committees." The offending statute in *McIntyre*, on the other hand, applied "not only to the activities of candidates and their organized supporters, but also to individuals acting independently and using only their own modest resources." The Court cited an earlier decision in which it stressed the importance of this distinction [*McIntyre v. Ohio Elections Comm'n (1995) 514 U.S. 334, 351, 115 S. Ct. 1511, 131 L. Ed. 2d 426* ; *see* *Buckley v. Valeo (1976) 424 U.S. 1, 37, 96 S. Ct. 612, 46 L. Ed. 2d 659* (striking down independent expenditure limitations of Federal Election Campaign Act of 1971)].

Relying on *McIntyre*, the *Griset I* plaintiffs, in the same action, again asked the superior court to declare section 84305 unconstitutional. The superior court denied plaintiffs' request and entered judgment for defendant Fair Political Practices Commission. On plaintiffs' appeal from that judgment, the Court of Appeal reversed. However, the California Supreme Court granted the Commission's petition for review, and reversed on the grounds that the Court of Appeal lacked the authority to entertain plaintiffs' second appeal in the same action [*Griset v. Fair Political Practices Com. (2001) 25 Cal. 4th 688, 701-702 107 Cal. Rptr. 2d 149, 23 P. 3d 43 (Griset II)]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 242.55A Slate Mailers

A slate mailer organization or committee formed primarily to support or oppose any ballot measure is prohibited from sending a slate mailer unless the mailer meets the following requirements [*Gov. Code § 84305.5(a)*]:

- The name, street address, and city of the slate mailer organization or committee must be shown on the outside of each piece of slate mail and on at least one of the inserts included with each piece of slate mail, in at least 8-point roman type, in a color or print that contrasts with the background so as to be easily legible. A post office box may be stated in lieu of a street address if the street address of the slate mailer organization or the committee is a matter of public record with the Secretary of State's Political Reform Division [*Gov. Code § 84305.5(a)(1)*].

- At the top or bottom of the front side or surface of at least one insert, or at the top or bottom of one side or surface of a postcard or other self-mailer, must be the following statement, in at least 8-point roman boldface type, in a color or print that contrasts with the background so as to be easily legible, and in a printed or drawn box and set apart from any other printed matter: "NOTICE TO VOTERS: THIS DOCUMENT WAS PREPARED BY (*name of slate mailer organization or committee*), NOT AN OFFICIAL POLITICAL PARTY ORGANIZATION. Appearance in this mailer does not necessarily imply endorsement of others appearing in this mailer, nor does it imply endorsement of, or opposition to, any issues set forth in this mailer. Appearance is paid for and authorized by each candidate and ballot measure which is designated by an *" [*Gov. Code § 84305.5(a)(2)*].

- The name, street address, and city of the slate mailer organization or committee as required above and the statement required above may appear on the same side or surface of an insert [*Gov. Code § 84305.5(a)(3)*].

- Each candidate and each ballot measure that has paid to appear in the slate mailer must be designated by an asterisk (*). Any candidate or ballot measure that has not paid to appear in the slate mailer may not designated by an asterisk. The asterisk must be of the same type size, type style, color or contrast, and

legibility as is used for the name of the candidate or the ballot measure name or number and position advocated to which the asterisk designation applies, except that in no case is the asterisk required to be larger than 10-point boldface type. The designation must immediately follow the name of the candidate, or the name or number and position advocated on the ballot measure when the designation appears in the slate of candidates and measures. If there is no slate listing, the designation must appear at least once in at least 8-point boldface type, immediately following the name of the candidate, or the name or number and position advocated on the ballot measure [*Gov. Code § 84305.5(a)(4)*].

- The name of any candidate appearing in the slate mailer who is a member of a political party differing from the political party which the mailer appears by representation or indicia to represent must be accompanied, immediately below the name, by the party designation of the candidate, in at least 9-point roman type, in a color or print that contrasts with the background so as to be easily legible. The designation is not required in the case of candidates for nonpartisan office, however [*Gov. Code § 84305.5(a)(5)*].

For purposes of the designations required by *Gov. Code § 84305.5(a)(4)*, the payment of any sum made reportable by *Gov. Code § 84219(c)* by or at the behest of a candidate or committee whose name or position appears in the mailer, to the slate mailer organization or committee, will constitute a payment to appear, requiring the asterisk designation. The payment will also be deemed to constitute authorization to appear in the mailer [*Gov. Code § 84305.5(b)*].

NOTE:

In 2004, the Legislature enacted legislation seeking to clarify the status of disclosure requirements affecting slate mail, which had been brought into question by the passage of Propositions 208 and 34 and ensuing litigation [*see Levine v. Fair Political Practices Comm'n (E.D. Cal. 2002) 222 F. Supp. 2d 1182, 1191* ; *California Prolife Council PAC v. Scully (E.D. Cal. 1998) 989 F. Supp. 1282, 1292-1295* , *aff'd (9th Cir. 1999) 164 F. 3d 1189* (affirming preliminary injunction)]. The 2004 legislation repealed the slate mailer disclosure provisions of Proposition 208, as well as the additional requirement contained in Proposition 34, and re-enacted the slate mailer disclosure provisions that were in effect prior to the passage of Proposition 208 [*see* 2004 Stats., ch. 478].

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20-242 California Forms of Pleading and Practice--Annotated § 242.55B

§ 242.55B Advertisements

[1] Advertisement Defined

"Advertisement" means any general or public advertisement which is authorized and paid for by a person or committee for the purpose of supporting or opposing a candidate for elective office or a ballot measure or ballot measures [*Gov. Code § 84501(a)*]. "Advertisement" does not include a communication from an organization other than a political party to its members, a campaign button smaller than 10 inches in diameter, a bumper sticker smaller than 60 square inches, or other advertisement as determined by regulations of the commission [*Gov. Code § 84501(b)*].

[2] Cumulative Contribution Defined

"Cumulative contributions" means the cumulative amount of contributions received by a committee beginning 12 months prior to the date the committee made its first expenditure to qualify, support, or oppose the measure and ending within seven days of the time the advertisement is sent to the printer or broadcast station [*Gov. Code § 84502*].

[3] Disclosure Statement

Any advertisement for or against any ballot measure must include a disclosure statement identifying any person whose cumulative contributions are $50,000) or more [*Gov. Code § 84503(a)*]. If there are more than two donors of $50,000 or more, the committee is only required to disclose the highest and second highest in that order. In the event that more than two donors meet this disclosure threshold at identical contribution levels, the highest and second highest must be selected according to chronological sequence [*Gov. Code § 84503(b)*].

If disclosure of two major donors is required by *Gov. Code § 84503*, the committee is required to disclose, in addition to the committee name, only its highest major contributor in any advertisement which is [*Gov. Code § 84508(a), (b)*]:

- An electronic broadcast of 15 seconds or less, or
- A newspaper, magazine, or other public print media advertisement which is 20 square inches or less.

NOTE:

Gov. Code § 84503 was added by Proposition 208, an initiative approved by the voters in 1996. On January 6, 1998, a federal district court issued a preliminary injunction enjoining the Fair Political Practices Commission from enforcing any of the provisions of Prop. 208 and Prop. 34, a campaign finance initiative passed by voters in November 2000, largely invalidated Prop. 208 [*see California Prolife Council PAC v. Scully (E.D. Cal. 1998) 989 F. Supp. 1282, 1292-1295 , aff'd (9th Cir. 1999) 164 F. 3d 1189]* . However, the constitutionality of two Prop. 208 provisions, including *Gov. Code § 84503*, was left to the federal district court to determine. On March 1, 2001, U.S. District Court Judge Lawrence Karlton declared both provisions to be unconstitutional and permanently enjoined their enforcement. On May 8, 2001, Judge Karlton clarified his earlier ruling by stating, among other things, that the FPPC is enjoined from enforcing *Gov. Code § 84503* only as to slate mail, and not as to any other type of paid political advertisement. On May 22, 2001, the FPPC decided not to appeal this final judgment; intervenors in the defense of Prop. 208 also decided not to appeal the court's ruling.

Any committee that supports or opposes one or more ballot measures must name and identify itself using a name or phrase that clearly identifies the economic or other special interest of its major donors of $50,000 or more in any reference to the committee required by law, including, but not limited, to its statement of organization filed under *Gov. Code § 84101* [*Gov. Code § 84504(a)*]. If the major donors of $50,000 or more share a common employer, the identity of the employer must also be disclosed [*Gov. Code § 84504(b)*]. Any committee that supports or opposes a ballot measure, must print or broadcast its name as provided in *Gov. Code § 84504* as part of any advertisement or other paid public statement [*Gov. Code § 84504(c)*]. If candidates or their controlled committees, as a group or individually, meet the contribution thresholds for a person, they must be identified by the controlling candidate's name [*Gov. Code § 84504(d)*].

[4] Advertisement Involving Independent Expenditures

A broadcast or mass mailing advertisement supporting or opposing a candidate or ballot measure, that is paid for by an independent expenditure, shall include a disclosure statement that identifies both the name of the committee making the independent expenditure and the names of the persons from whom the committee making the independent expenditure has received its two highest cumulative contributions of $50,000 or more during the 12-month period prior to the expenditure [*Gov. Code § 84506(a)*]. If the committee can show, on the basis that contributions are spent in the order they are received, that contributions received from the two highest contributors have been used for expenditures unrelated to the candidate or ballot measure featured in the communication, the committee must disclose the contributors making the next largest cumulative contributions of $50,000 or more [*Gov. Code § 84506(a)*].

If an acronym is used to identify any committee names required by *Gov. Code § 84506*, the names of any sponsoring organization of the committee must be printed on print advertisements or spoken in broadcast advertisements [*Gov. Code § 84506(b)*].

An advertisement supporting or opposing a candidate that is paid for by an independent expenditure must include a statement that it was not authorized by a candidate or a committee controlled by a candidate [*Gov. Code § 84506.5*].

If disclosure of two major donors is required by *Gov. Code §§ 84503* and *84506*, the committee must disclose, in addition to the committee name, only its highest major contributor in any advertisement which is:

- An electronic broadcast of 15 seconds or less [*Gov. Code § 84508(a)*], or

- A newspaper, magazine, or other public print media advertisement that is 20 square inches or less [*Gov. Code § 84508(b)*].

[5] Additional Requirements Concerning Committees

In addition to the requirements of *Gov. Code §§ 84503* [*see* [3], *above*], *84504* [*see* [3], *above*], and 84506 and 84506.5 [*see* [4], *above*], the committee placing the advertisement, or persons acting in concert with that committee, are prohibited from creating or using a noncandidate controlled committee or a nonsponsored committee to avoid, or that results in the avoidance of, the disclosure of any individual, industry, business entity, controlled committee, or sponsored committee as a major funding source [*Gov. Code § 84505*].

[6] Disclosure Format

Any disclosure statement required by Gov. Code, tit. 9, ch. 4, art. 5 (commencing with *Gov. Code § 84501*) must be printed clearly and legibly in no less than 10-point type and in a conspicuous manner as defined by the commission or, if the communication is broadcast, the information must be spoken so as to be clearly audible and understood by the intended public and otherwise appropriately conveyed for the hearing impaired [*Gov. Code § 84507*; *see § 242.93[3]*].

[7] Amended Campaign Statements

When a committee files an amended campaign statement under *Gov. Code § 81004.5*, the committee must change its advertisements to reflect the changed disclosure information [*Gov. Code § 84509*].

[8] Individual Appearing in Advertisement

A committee that makes an expenditure of $5,000 or more to an individual for his or her appearance in an advertisement to support or oppose the qualification, passage or defeat of a ballot measure must file a report within 10 days of the expenditure. The report must identify the measure, the date of the expenditure, the name of the recipient, and the amount expended [*Gov. Code § 84511(a)*]. The advertisement must include the statement "(spokesperson's name) is being paid by this campaign or its donors" in highly visible roman font shown continuously if the advertisement consists of printed or televised material, or spoken in a clearly audible format if the advertisement is a radio broadcast or telephone message [*Gov. Code § 84511(b)*].

[9] Enforcement

In addition to the remedies provided for in Gov. Code, tit. 9, ch. 11 (commencing with *Gov. Code § 91000*), any person who violates Gov. Code, tit. 9, ch. 4, art. 5 (commencing with *Gov. Code § 84501, see* [1]-[8], *above*) is liable in a civil or administrative action brought by the commission or any person for a fine up to three times the cost of the advertisement, including placement costs [*Gov. Code § 84510(a)*]. The remedies provided in *Gov. Code § 84510(a)* also apply to any person who purposely causes any other person to violate any provision of Gov. Code, tit. 9, ch. 4, art. 5 or who aids and abets any other person in a violation [*Gov. Code § 84510(b)*].

If a judgment is entered against the defendant or defendants in an action brought under *Gov. Code § 84510*, the plaintiff receives 50 percent of the amount recovered. The remaining 50 percent must be deposited in the State's General Fund. In an action brought by a local civil prosecutor, 50 percent must be deposited in the account of the agency bringing the action and the often 50 percent must be paid to the State's General Fund [*Gov. Code § 84510(c)*].

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[Reserved]

§§ 242.56[Reserved]

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20-242 California Forms of Pleading and Practice--Annotated § 242.60

§ 242.60 Registration, Renewal, and Termination

Lobbyist employers who contract for the services of a lobbying firm [*see Gov. Code § 82039.5(b)*; *see also § 242.21[8][b]*] and specified persons who make payments of $5,000 or more in any calendar quarter to influence legislative or administrative action need not register, but must file statements with the Secretary of State [*Gov. Code § 86100(d)*; *see Gov. Code § 86115(b)*].

Lobbying firms [*see Gov. Code § 82038.5*; *see also § 242.21[8][c]*] and lobbyist employers who employ one or more lobbyists [*see Gov. Code § 82039.5(a)*] must register with the Secretary of State no later than 10 days after qualifying as lobbying firms or lobbyist employers [*Gov. Code §§ 86100(b), (c), 86101*]. Individual lobbyists [*see Gov. Code § 82039*; *see also § 242.21[8][a]*] are included in the registrations of either the lobbying firms in which they are partners, owners, officers, or employees, or of the lobbyist employers by which they are employed [*see Gov. Code § 86100(a)*].

Registration requirements for lobbying firms and lobbying employers are set out in *Gov. Code §§ 86102* (charges for lobbyists listed on registration statements), *86104* (lobbying firms), and *86105* (lobbyist employers). Individual lobbyists who are covered by the registrations of their lobbying firms or lobbyist employers must file lobbyist certifications with the Secretary of State [*Gov. Code § 86100(a)*]. The contents of the certifications are set out in *Gov. Code § 86103*.

Amendments to reflect changes in registration and certification information are governed by *Gov. Code § 86107(a)* and *(b)*. Renewal of registration and certification is governed by *Gov. Code § 86106*.

Lobbying firms, lobbyist employers, and individual lobbyists that cease, during a regular session of the Legislature, all activity that required registration or certification must file notice of termination with the Secretary of State within 20 days after ceasing the activity that required registration or certification. But lobbying firms, lobbyist employers, and individual lobbyists that cease, at the close of a regular session of the Legislature, all activity that required registration or certification are not required to file notice of termination [*Gov. Code § 86107(a), (b)*]. Lobbyists and lobbying firms remain subject to *Gov. Code § 86203* (prohibiting the making of certain types of gifts) for the earlier of (1) six months after filing notice of termination or (2) six months after the close of a regular session of the Legislature at the close of

which the lobbyist or lobbying firm ceased all activity that required certification or registration [*Gov. Code § 86107(c)*].

All information listed on any registration statement and on any amendment, renewal, or notice of termination must be printed by the Secretary of State and made public within 30 days of filing [*Gov. Code § 86108*]. The Secretary of State must publish a directory of registered individual lobbyists, lobbying firms, and lobbyist employers within 140 days after the commencement of each regular session of the Legislature and, from time to time, must publish any necessary supplements to the directory [*Gov. Code § 86109*].

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§ 242.61 Duty to Keep Detailed Accounts

Lobbyists, lobbying firms, and lobbyist employers that receive payments, make payments, or incur expenses, or expect to receive payments, make payments, or incur expenses, in connection with activities that are reportable under *Gov. Code § 86100 et seq.* must keep detailed accounts, records, bills, and receipts, as required by regulations adopted by the Fair Political Practices Commission [*Gov. Code § 86110*; *see 2 Cal. Code Reg. § 18615* (lobbyists' accounting requirements)].

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20-242 California Forms of Pleading and Practice--Annotated § 242.62

§ 242.62 Periodic Reports

[1] Lobbyists

Each lobbyist must complete a periodic report that contains the following:

(1) Any expense incurred, or payment made or arranged by the lobbyist, that benefits, in whole or in part, any elective state official, legislative official, agency official, state candidate, or member of the immediate family of one of these individuals. These expenses and payments include gifts, honoraria, consulting fees, salaries, and any other form of compensation except campaign contributions [*Gov. Code §§ 86111(a), 86113(a)(1)*].

(2) All contributions of $100 or more made or delivered by the lobbyist to any elected state officer or state candidate during the reporting period [*Gov. Code § 86113(a)(2)*].

[2] Lobbying Firms

Lobbying firms must file periodic reports containing all of the following:

(1) The name, address, and telephone number of the lobbying firm, each person contracting with the firm for lobbying services, and each lobbying firm subcontracting with the reporting firm for lobbying services [*Gov. Code § 86114(a)(1), (2), (6)(A)*].

(2) A description of the specific lobbying interests of each person contracting with the firm for lobbying services and the total payments received from the person for lobbying services during the reporting period [*Gov. Code § 86114(a)(2)*].

(3) The total amount of payments received by the lobbying firm for lobbying services during the reporting period [*Gov. Code § 86114(a)(3)*].

(4) The name of each person for whom another lobbying firm is subcontracted to lobby and the total amount of all

payments made to the subcontractor firm [*Gov. Code § 86114(a)(6)(B), (C)*].

(5) Any expense incurred, or payment made or arranged by the firm, that benefits, in whole or in part, any elective state official, legislative official, agency official, state candidate, or member of the immediate family of one of these individuals. These expenses and payments include those reimbursed by a person contracting with the firm for services. A total of all expenses and payments of the firm and all of its lobbyists must be reported [*Gov. Code § 86114(a)(5)*; *see also Gov. Code § 86111*].

(6) The date, amount, and name of the recipient of any contribution of $100 or more made by the filer to an elected state officer, state candidate, committee controlled by an elected state officer or state candidate, or committee primarily formed to support these officers or candidates [*Gov. Code § 86114(a)(7)*].

(7) Any other information required by the Fair Political Practices Commission consistent with the purposes and provisions of *Gov. Code § 86100 et seq.* [*Gov. Code § 86114(a)(8)*].

A lobbying firm must also submit a periodic report completed by each lobbyist in its firm pursuant to *Gov. Code § 86113* (reporting requirements for lobbyists) [*Gov. Code § 86114(a)(4)*; *see* [1], *above*].

Lobbying firms as defined in *Gov. Code § 82038.5(a)(2)* must, in addition to this information, report the name and title of each partner, owner, officer, and employee of the firm who, on at least five separate occasions during the reporting period, engaged in direct communication with any elective state, legislative, or agency official for the purpose of influencing legislative or administrative action on behalf of a person who contracts with the firm for lobbying services. This reporting requirement does not include individuals whose actions were purely clerical [*Gov. Code § 86114(b)*].

[3] Lobbyist Employers and Nonlobbyists

Subject to the exceptions listed in *Gov. Code § 86300* (certain elected officials, state employees, news personnel, and churches or religious societies), the following persons must file periodic reports:

(1) Any lobbyist employer under *Gov. Code § 82039.5* [*Gov. Code § 86115(a)*; *see also § 242.21[8][b]*]; and

(2) Any person who directly or indirectly makes payments, in any calendar quarter, of $5,000 or more in value to influence legislative or administrative action, unless all of the payments directly or indirectly benefit any elective state official, legislative official, or agency official, or immediate family member of any of these officials [*Gov. Code §§ 86115(b), 82045(c)*].

Periodic reports by lobbyist employers and persons other than lobbyists must contain information similar to the data required in reports by lobbyists and lobbying firms [*see Gov. Code §§ 86116, 86116.5*].

[4] Signature and Verification

All reports and statements filed under the Political Reform Act of 1974 must be signed under penalty of perjury and verified by the filer. The verification must state that the filer has used all reasonable diligence preparing the report or statement and that to the best of his or her knowledge the document is true and complete [*Gov. Code § 81004(a)*].

[5] Filing Reports

The original of a lobbyist's periodic report, required by *Gov. Code § 86113*, must be provided to the lobbyist's lobbying firm or lobbyist employer within two weeks following the end of each calendar quarter [*Gov. Code § 86113(b)*].

The original and one copy of reports required by *Gov. Code §§ 86114* (lobbying firms), 86116 (lobbyist employers and others) must be filed with the Secretary of State during the month following each calendar quarter [*Gov. Code §§ 86117(a), 86118*]. The period covered by the first report required by *Gov. Code §§ 86114, 86116* and *86116.5* begins with the first day of the calendar quarter in which the filer first registers or qualifies and extends through the last day of the quarter prior to the month in which the report is filed [*Gov. Code § 86117(b)*]. After that, the period covered extends from the first day of January of each new biennial legislative session through the last day of the calendar quarter prior to the month in which the report is filed [*Gov. Code § 86117(a)*].

The report for a given period must not include any information reported in previous reports filed by the same person, but when total amounts are required to be reported, totals for both the period covered by the statement and the entire legislative session to date must be reported [*Gov. Code § 86117(a)*]. On the first report a person is required to file, the total amount must be stated for the entire calendar quarter covered by the first report [*Gov. Code § 86117(b)*].

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§ 242.63 Prohibited Acts

Lobbyists and lobbying firms may not perform the following acts [*Gov. Code § 86205*]:

(1) Do anything with the purpose of placing any elected state officer, legislative official, agency official, or state candidate under personal obligation to the lobbyist, the lobbying firm, or the lobbyist's or the firm's employer;

(2) Deceive or attempt to deceive any elected state officer, legislative official, agency official, or state candidate with regard to any material fact pertinent to any pending or proposed legislative or administrative action;

(3) Cause or influence the introduction of any bill or amendment thereto for the purpose of thereafter being employed to secure its passage or defeat;

(4) Attempt to create a fictitious appearance of public favor or disfavor of any proposed legislative or administrative action or to cause any communication to be sent to any elected state officer, legislative official, agency official, or state candidate in the name of any fictitious person or in the name of any real person, except with the real person's consent;

(5) Represent falsely, either directly or indirectly, that the lobbyist or the lobbying firm can control the official action of any elected state officer, legislative official, or agency official; or

(6) Accept or agree to accept any payment in any way contingent on the defeat, enactment, or outcome of any proposed legislative or administrative action.

For restrictions on contributions by a lobbyist, *see § 242.42[1B]*.

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20-242 California Forms of Pleading and Practice--Annotated § 242.64

§ 242.64 Gifts

[1] Limitations

It is unlawful for a lobbyist or lobbying firm to make gifts to a person aggregating more than $10 in a calendar month, to act as an agent or intermediary in the making of any gift, or to arrange for the making of any gift by any other person [*Gov. Code § 86203*; *see also 2 Cal. Code Reg. §§ 18623, 18630* (extent to which honoraria and home hospitality constitute gifts)]. The term "gift" means a gift made directly or indirectly to a state candidate, an elected state officer, a legislative official, or an official of any agency required to be listed on the registration statement of the lobbying firm or the lobbyist employer of the lobbyist [*see Gov. Code § 86201*].

This prohibition, before its amendment in 1985 to include lobbying firms, was upheld as not constituting a substantial limitation on petition and speech rights under *U.S. Const., amend. I* [*Fair Political Practices Com. v. Superior Court (1979) 25 Cal. 3d 33, 49, 157 Cal. Rptr. 855, 599 P.2d 46 , cert. denied, 444 U.S. 1049, 100 S. Ct. 740, 62 L. Ed. 2d 736 (1980)*].

[2] Disclosures to Gift Beneficiaries

Each person filing a report pursuant to the registration and reporting requirements of *Gov. Code § 86100 et seq.* is required to provide specified information to each beneficiary of a gift listed within the report [*see Gov. Code § 86112.5(a)*]. The general categories of persons who are subject to this requirement are persons who are lobbyists, lobbying firms, lobbyist employers, and specified non-lobbyists [*see Gov. Code § 86111 et seq.*; *see also § 242.62[1] -[3]*]. The information required to be provided to each beneficiary of a gift listed in the report is (1) the date and amount of each gift reportable by the beneficiary and (2) a description of the goods or services provided to the beneficiary [*Gov. Code § 86112.5(a)*]. *Gov. Code § 86112.5(b)* governs the time period within which this information must be provided as well as the manner in which lobbying firms and lobbyist employers may provide it [*see Gov. Code § 86112.5(b)*].

It appears that if the gift is not reportable by the beneficiary under the provisions of the Political Reform Act of 1974, then the date and amount of the gift need not be provided to the beneficiary [*see Gov. Code § 86112.5(a)(1)*]. Campaign expenditure and income reporting requirements for individuals and organizations other than lobbyists, lobbyist

employers, lobbying firms, and specified non-lobbyists are set forth in *Gov. Code § 84100 et seq.* Conflict of interest expenditure and income reporting requirements for individuals other than lobbyists, lobbyist employers, lobbying firms, and specified non-lobbyists are set forth in *Gov. Code § 87200 et seq.* The term "gift" is defined in *Gov. Code § 82028* [*see* [1], *above*] and does not include campaign contributions required to be reported under *Gov. Code § 84100 et seq.* [*see Gov. Code § 82028(b)(4)*].

The remedies provided in *Gov. Code § 83100 et seq.*, which include the enforcement powers of the Fair Political Practices Commission, constitute the exclusive penalty for a violation of this disclosure requirement. The remedies set forth in *Gov. Code § 91000 et seq.* (enforcement provisions of the Political Reform Act of 1974) do not apply to *Gov. Code § 86112.5* [*Gov. Code § 86112.5(c)*].

Legal Topics:

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

§§ 242.65[Reserved]

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20-242 California Forms of Pleading and Practice--Annotated § 242.70

§ 242.70 Civil and Criminal Liability in General

As a general rule, violation of any provision of the Political Reform Act of 1974 renders the violator subject to criminal, as well as civil or administrative, liability. The following discussion addresses the criminal penalties and the civil and administrative remedies for violation of the Act's provisions, and the mechanisms for enforcement of the Act's provisions.

Legal Topics:

For related research and practice materials, see the following legal topics:
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20-242 California Forms of Pleading and Practice--Annotated § 242.71

§ 242.71 Violations Resulting in Criminal Liability

Any person who knowingly or willfully violates any provision of the Political Reform Act of 1974 is guilty of a misdemeanor [*Gov. Code § 91000(a)*]. Violations of the Act may also lead to other criminal charges, such as misdemeanor conspiracy and felony perjury [*see, e.g., People v. Hedgecock (1990) 51 Cal. 3d 395, 403, 411, 272 Cal. Rptr. 803, 795 P.2d 1260* (former mayor charged with conflict of interest under *Gov. Code §§ 87100, 87103, 91000(a),* conspiracy under *Penal Code § 182*, and multiple perjury counts under *Penal Code § 118* for violations of both Political Reform Act and local ordinances; perjury conviction reversed when trial court took materiality issue from jury; conspiracy conviction remanded for evidentiary hearing regarding jury misconduct)].

In addition to other penalties provided by law, a fine of up to the greater of $10,000 or three times the amount the person failed to properly report or unlawfully contributed, expended, gave, or received may be imposed, for each violation, on conviction [*Gov. Code § 91000(b)*; *see § 242.72*].

The penalties and remedies set forth in *Gov. Code § 91000 et seq.* do not apply to violations of *Gov. Code § 86112.5* (disclosure of gift to beneficiary) and *Gov. Code § 89510 et seq.* (use of campaign funds) [*Gov. Code §§ 86112.5(c), 89520*; *see §§ 242.44[6], 242.64[2]*]. For when no criminal penalties apply for violations of *Gov. Code § 83116.5* (subjecting violators to enforcement by Fair Political Practices Commission), *see § 242.75[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesAbuse of Public OfficeIllegal GratuitiesGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesAbuse of Public OfficeIllegal Political ActivityGeneral OverviewGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicenses

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20-242 California Forms of Pleading and Practice--Annotated § 242.72

§ 242.72 Enforcement of Criminal Provisions

[1] Prosecution

The Attorney General is responsible for enforcing the criminal provisions of the Act with respect to state agencies, lobbyists, and state elections. The district attorney of any county in which a violation occurs has concurrent powers and responsibilities with the Attorney General [*Gov. Code § 91001(a)*]. In any case in which a district attorney could act as the criminal prosecutor under the Act, the elected city attorney of any charter city may act as the criminal prosecutor with respect to any violations occurring within the city [*Gov. Code § 91001.5*].

[2] Effect of Conviction

No person convicted of a misdemeanor under the Act may be a candidate for any elective office or act as a lobbyist for a period of four years following the date of the conviction, unless the court specifically determines at the time of sentencing that this prohibition will not apply. A plea of nolo contendere is deemed a conviction for purposes of this prohibition. Any person violating the prohibition is guilty of a felony [*Gov. Code § 91002*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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20-242 California Forms of Pleading and Practice--Annotated § 242.73

§ 242.73 Violations Resulting in Civil or Administrative Liability

[1] Reporting Requirements

As a general rule, any person who intentionally or negligently violates any of the reporting requirements [*see Gov. Code §§ 84100 et seq., 86111 et seq.*] of the Political Reform Act is liable in a civil action brought by the civil prosecutor or by a person residing within the jurisdiction for an amount not more than the amount or value not properly reported [*Gov. Code § 91004*; *cf. Community Cause v. Boatwright (1987) 195 Cal. App. 3d 562, 573 n.4, 240 Cal. Rptr. 794* (person who inadvertently violates any of reporting requirements is not liable for damages in civil action under *Gov. Code § 91004*); *see § 242.76*; *see also §§ 242.130, 242.131*].

Civil liability does not result from violations of *Gov. Code § 86112.5* (disclosure of gift to beneficiary) or *Gov. Code § 89510 et seq.* (use of campaign funds) [*Gov. Code §§ 86112.5(c), 89520*; *see §§ 242.44[6], 242.64[2]*]. For when civil liability does not result from violations of *Gov. Code § 83116.5* (subjecting violators to enforcement by Fair Political Practices Commission), *see § 242.75[2]*.

Any report or statement filed pursuant to the Act may be amended by the filer at any time. Amending an incorrect or incomplete report or statement may be considered as evidence of good faith [*Gov. Code § 81004.5*].

[2] Late Filing of Report or Statement

As a general rule, if any person files an original statement or report after any deadline imposed by the Political Reform Act, he or she is liable in the amount of $10 per day after the deadline until the statement or report is filed. This liability is in addition to any other penalties or remedies established by the Act. Any such penalties are owed to the officer with whom the statement or report must be filed. The officer need not enforce liability under this provision if he or she determines, on an impartial basis, that the late filing was not willful and that enforcement will not further the purposes of the Act. But if the filing officer has sent specific written notice of the filing requirement, liability may not be waived if a statement or report is not filed within 10 days, or 5 days for a campaign statement required to be filed 12 days before an election, or 30 days for a statement of economic interest (other than a candidate's statement filed under *Gov. Code § 87201*) after the notice was sent [*Gov. Code § 91013(a)*]. A similar provision applies when copies of a statement

or report are filed late [*see Gov. Code § 91013(b)*].

Liability for late filing does not result from violations of *Gov. Code § 86112.5* (disclosure of gift to beneficiary) or *Gov. Code § 89510 et seq.* (use of campaign funds) [*Gov. Code §§ 86112.5(c), 89520*; *see §§ 242.44[6], 242.64[2]*]. For when liability for late filing does not result from violations of *Gov. Code § 83116.5* (subjecting violators to enforcement by Fair Political Practices Commission), *see § 242.75[2]*.

[3] Gift, Contribution, or Expenditure

As a general rule, any person who makes or receives a contribution, gift, or expenditure in violation of specific provisions of the Political Reform Act enumerated in *Gov. Code § 91005(a)* is liable in a civil action brought by the civil prosecutor or by a person residing within the jurisdiction for an amount up to $1,000 or three times the amount of the unlawful contribution, gift, or expenditure, whichever amount is greater [*Gov. Code § 91005(a)*]. The following provisions are enumerated [*Gov. Code § 91005(a)*; *see § 242.76*]:

- *Gov. Code § 84300* (limitations on cash campaign contributions and expenditures);
- *Gov. Code § 84304* (limitations on anonymous campaign contributions);
- *Gov. Code § 86203* (limitations on lobbyists' and lobbying firms' gifts); and
- *Gov. Code § 86204* (prohibition on receiving from a lobbyist any contribution or gift made unlawful under *Gov. Code § 86203*).

This liability does not result from violations of *Gov. Code § 86112.5* (disclosure of gift to beneficiary) or *Gov. Code § 89510 et seq.* (use of campaign funds) [*Gov. Code §§ 86112.5(c), 89520*; *see §§ 242.44[6], 242.64[2]*]. For when this liability does not result from violations of *Gov. Code § 83116.5* (subjecting violators to enforcement by Fair Political Practices Commission), *see § 242.75[2]*.

[4] Conflict of Interest Code

Any designated employee or public official specified in *Gov. Code § 87200* (judges, court commissioners, members of certain commissions and boards, district attorneys, city treasurers, county treasurers, and other state and local officials and administrative officers), except an elected state officer, who realizes an economic benefit from a violation of *Gov. Code § 87100* (prohibiting conflicts of interest in general) or from a disqualification provision of a Conflict of Interest Code [*see Gov. Code § 87300 et seq.*; *2 Cal. Code Reg. § 18750 et seq.*] is liable in a civil action brought by the civil prosecutor or by a person residing within the jurisdiction for an amount up to three times the value of the benefit [*Gov. Code § 91005(b)*].

Any person who violates a provision of *Gov. Code § 87200 et seq.* (financial disclosure requirements applicable to government officeholders and candidates for office), or *Gov. Code § 87300 et seq.* (procedure for state agency adoption and promulgation of conflict of interest codes), or who violates *Gov. Code § 87450* (restrictions in participation of state officers in decisions relating to contracts) is subject to discipline, including dismissal, by his or her agency consistent with any applicable civil service or other personnel laws, regulations, and procedures [*Gov. Code § 91003.5*].

For discussion and forms pertaining to the conflict of interest provisions of the Political Reform Act, see Ch. 469, *Public Entities and Officers: Conflicts of Interest* .

[5] Violations for Which No Specific Civil Penalty Is Provided

As a general rule, any person who violates any provision of the Political Reform Act for which no specific civil penalty is provided is liable in a civil action brought by the Fair Political Practices Commission or the district attorney pursuant to *Gov. Code § 91001(b)*, or the elected city attorney pursuant to *Gov. Code § 91001.5*, for an amount up to $5,000 [*Gov. Code § 91005.5*]. Violations of *Gov. Code §§ 84305* (requirements for mass mailings), 84307 (prohibition against commingling of contributions with recipient's personal funds), and 89001 (prohibition against sending mass mailing at public expense) are excepted from coverage [*Gov. Code § 91005.5*]. In addition, no civil action alleging a violation of the Political Reform Act may be filed against a person pursuant to *Gov. Code § 91005.5* if the criminal prosecutor is maintaining a criminal action against that person under *Gov. Code § 91000* [*Gov. Code § 91005.5*; *see also § 242.74[3]*].

This liability under *Gov. Code § 91005.5* also does not result from violations of *Gov. Code § 86112.5* (disclosure of gift to beneficiary) or *Gov. Code § 89510 et seq.* (use of campaign funds) [*Gov. Code §§ 86112.5(c)*, *89520*; *see §§ 242.44[6]*, *242.64[2]*]. For when this liability under *Gov. Code § 91005.5* does not result from violations of *Gov. Code § 83116.5* (subjecting violators to enforcement by Fair Political Practices Commission), *see § 242.75[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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20-242 California Forms of Pleading and Practice--Annotated § 242.74

§ 242.74 Procedural Rules Applicable to Civil Enforcement

[1] Statute of Limitations

No civil action alleging a violation in connection with a report or statement [*see Gov. Code § 91004*] required by *Gov. Code § 84100 et seq.* may be filed more than four years after an audit could begin as set forth in *Gov. Code § 90002(c)*, or more than one year after the Franchise Tax Board forwards its report to the Commission, pursuant to *Gov. Code § 90004*, of any audit conducted of the alleged violator, whichever period is less [*Gov. Code § 91011(a)*; *see McCauley v. Howard Jarvis Taxpayers Assn. (1998) 68 Cal. App. 4th 1255, 1260-1261, 80 Cal. Rptr. 2d 900* ; *see also* discussion of time for beginning audit or investigation in *§ 242.76[2][b]*].

No civil action alleging a violation of any provisions of the Political Reform Act, other than those described in *Gov. Code § 91011(a)* [*see Gov. Code §§ 91003, 91005*], may be filed more than four years after the date the violations occurred [*Gov. Code § 91011(b)*; *see McCauley v. Howard Jarvis Taxpayers Assn. (1998) 68 Cal. App. 4th 1255, 1260-1261, 80 Cal. Rptr. 2d 900]* . *Gov. Code § 91011(b)* only applies to civil actions. Its four-year general limitation period does not extend to special proceedings such as mandamus petitions [*Ching v. San Francisco Bd. of Permit Appeals (1998) 60 Cal. App. 4th 888, 895-896, 70 Cal. Rptr. 2d 700* (three-year limitation period of *Code Civ. Proc. § 338(a)* generally applicable to special proceedings under Political Reform Act, but specific 90-day limitation period of former *Gov. Code § 65907* (*now see Gov. Code § 65009*) controls in cases challenging decisions of local board of permit appeals)].

[2] Preferential Treatment of Elections Litigation

Cases involving election proceedings must be given precedence on the court calendar [*Code Civ. Proc. § 35*]. Appeals in contested election cases will be given preference in hearing in the courts of appeal, and in the Supreme Court when transferred to it [*Code Civ. Proc. § 44*]. Actions or appeals involving the election of presidential electors have priority over all other civil matters [*Elec. Code § 16003*]. For further discussion relating to precedence and preference, see Ch. 425, *Pretrial Proceedings* .

[3] Effect of Order by Fair Political Practices Commission

No civil action may be filed under *Gov. Code § 91004, 91005,* or *91005.5* with regard to any person for any violation of the Political Reform Act after the Fair Political Practices Commission has issued an order under *Gov. Code § 83116* against that person for the same violation [*Gov. Code § 91008.5*; *see § 242.75[6]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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20-242 California Forms of Pleading and Practice--Annotated § 242.75

§ 242.75 Enforcement by Fair Political Practices Commission

[1] Powers in General

The Fair Political Practices Commission [*see Gov. Code § 83100 et seq.*] has primary responsibility for the impartial, effective administration and implementation of the Political Reform Act [*Gov. Code § 83111*]. Accordingly, the commission may do the following:

- Conduct investigations [*Gov. Code § 83115*];

- Hold hearings in accordance with the Administrative Procedure Act [*Gov. Code § 83116*; *see Gov. Code § 11500 et seq.*];

- Compel the attendance of witnesses and the production of evidence [*Gov. Code § 83118*; *see People v. Pereira (1989) 207 Cal. App. 3d 1057, 1063-1069, 255 Cal. Rptr. 285* (individual may be liable under *Penal Code §§ 132* (offering false evidence) and 134 (preparing false version of document) in responding to subpoena duces tecum issued by FPPC], provide immunity to witnesses compelled to testify [*Gov. Code § 83119*]; and

- Impose orders and penalties with regard to violations of the Political Reform Act [*see Gov. Code § 83116*].

The commission, however, cannot take any action to implement the Political Reform Act of 1974 that would (1) abridge constitutional guarantees of freedom of speech, (2) deny any person of life, liberty, or property without due process of law, or (3) deny any person the equal protection of the laws [*Gov. Code § 83111.5*].

[2] Persons Subject to Liability

Any person who violates any provision of the Political Reform Act, who purposely or negligently causes any other person to violate any provision of the Act, or who aids and abets any other person in the violation of any provision of

the Act is liable under the provisions of Gov. Code, tit. 9, ch. 3 (commencing with *Gov. Code § 83100*) for the commission's implementation and enforcement of the Act [*Gov. Code § 83116.5*]. Liability under *Gov. Code § 83116.5*, however, applies only to persons who have filing or reporting obligations under the Act, or who are compensated for services involving the planning, organizing, or directing of any activity regulated or required by the Act. Furthermore, a violation under *Gov. Code § 83116.5*will not constitute an additional violation under Gov. Code, tit. 9, ch. 11 (commencing with *Gov. Code § 91000*) [*Gov. Code § 83116.5*].

Gov. Code § 83116.5, by expressly providing that violations of the section do not constitute an additional violation under Chapter 11, connotes that any independent civil or criminal sanctions available when the section was added in 1984 would continue unaffected. The purpose of *Gov. Code § 83116.5* was to broaden the reach of the Political Reform Act. The Legislature sought to expand the class of persons that the commission could hold accountable for reporting violations under the Act [*People v. Snyder (2000) 22 Cal. 4th 304, 307-310, 92 Cal. Rptr. 2d 734, 992 P.2d 1102]* . This expansion of coverage operates in two ways [*People v. Snyder (2000) 22 Cal. 4th 304, 310, 92 Cal. Rptr. 2d 734, 992 P.2d 1102]* :

- First, it imposes administrative liability on persons not previously subject to regulation or penalties under the act, *i.e.*, those persons, such as campaign managers who are compensated for services involving the planning, organization, or directing of any activity regulated or required by the Act. Although neither civil nor criminal sanctions apply, such persons come within the administrative control of the commission.

- Second, *Gov. Code § 83116.5* sanctions conduct not previously subject to regulation or penalties under the Act, *i.e.*, the statute imposes administrative liability on any person who purposely or negligently causes any other person to violate any provisions of the Act, or who aids and abets any other person in violation of any provisions of the Act. Those already having direct reporting obligations are now also subject to administrative liability if they indirectly cause others to engage in prohibited activity.

Thus, under *Gov. Code § 83116.5*, administrative sanctions, but not additional civil or criminal liability, may be imposed on persons with reporting obligations who engage in newly prohibited conduct--aiding and abetting or negligently causing violation--as well as on persons newly regulated by the Act--those such as campaign managers otherwise compensated for services involving filing and reporting activities. There is no basis for concluding that in so amending the Act the Legislature intended to affect liability outside these circumstances [*People v. Snyder (2000) 22 Cal. 4th 304, 310, 92 Cal. Rptr. 2d 734, 992 P.2d 1102* (decided under repealed *Gov. Code § 83116.5* which was reenacted in substantially same language by Prop. 34; lobbyist was subject to criminal penalties under *Gov. Code § 91000(a)* for making political contributions in false name in violation of *Gov. Code § 84301*)].

The FPPC has authority to bring suit against an Indian tribe in enforcing the Political Reform Act. Allowing a tribe immunity from suit in this context would allow tribal members to participate in elections and make campaign contributions using the tribal organization, unfettered by regulations designed to ensure the system's integrity. Allowing tribal members to participate in the state electoral process while leaving the state powerless to effectively guard against political corruption would have put the state in an untenable and indefensible position, in light of the constitutionally significant importance of the state's ability to provide a transparent election process with rules applying equally to all parties in the electoral fray [*Agua Caliente Band of Cahuilla Indians v. Superior Court (2007) 40 Cal. 4th 239, 259, 52 Cal. Rptr. 3d 659]* .

[3] Investigations

[a] Initiation and Procedures

On the sworn complaint [*see 2 Cal. Code Reg. § 18360* (governing contents of formal complaints)] of any person or on

its own initiative, the commission must investigate possible violations of the Political Reform Act relating to any agency, official, election, lobbyist, or legislative or administrative action [*Gov. Code § 83115*]. The commission has the authority to determine whether alleged violations should be adjudicated in administrative hearings pursuant to the Administrative Procedure Act (*Gov. Code § 11500 et seq.*) or in civil litigation [*see 2 Cal. Code Reg. § 18361.2*].

When the commission decides to proceed by administrative adjudication, it must comply with *Gov. Code §§ 83115.5* (notification to alleged violator with a summary of evidence) and 83116 (noticed hearing on a finding of probable cause for a violation) [*see 2 Cal. Code Reg. § 18361.4*; *see also* [5], *below*]. If the commission wishes to bring a civil action that could be brought by a voter or resident of the jurisdiction [*see Gov. Code §§ 91004, 91005*; *see also § 242.73[1], [3]*], a written authorization from the appropriate district attorney must be obtained [*Gov. Code § 91001(b)*].

[b] Notification of Action or Nonaction on Complaint

Within 14 days after receipt of a complaint under *Gov. Code § 83115*, the commission must notify in writing the person who made the complaint of the action, if any, the commission has taken or plans to take on the complaint, together with the reasons for the action or nonaction. If no decision has been made within 14 days, the complainant must be notified of the reasons for the delay and must subsequently receive notification of the commission's plans for action or nonaction [*Gov. Code § 83115*; *see 2 Cal. Code Reg. § 18362* (confidentiality of information in complaints)].

[4] Probable Cause for Violation

No finding of probable cause to believe the Political Reform Act has been violated may be made by the commission unless, at least 21 days before the commission's consideration of an alleged violation, notification of the violation is given to the alleged violator. The notification must be provided by service of process or registered mail with return receipt requested. The alleged violator must be provided with a summary of the evidence, and must be informed of his or her right to be present in person and represented by counsel at any proceeding of the commission held to consider whether probable cause exists for believing that the person violated the Act. Notice will be deemed made on the date of service, the date the registered mail receipt is signed, or if the registered mail receipt is not signed, the date returned by the post office. A proceeding held for the purpose of considering probable cause must be private unless the alleged violator files a written request that it be public [*Gov. Code § 83115.5*].

[5] Hearing on Complaint

If the commission determines that there is probable cause for believing the Act has been violated, it may hold a hearing to determine if the violation has occurred. Notice must be given and the hearing must be conducted in accordance with the Administrative Procedure Act (*Gov. Code § 11500 et seq.*). The commission has all of the powers granted by that Act [*Gov. Code § 83116*]. Regulations pertaining to commission investigations and enforcement proceedings are contained in *2 Cal. Code Reg. § 18360 et seq.* For further discussion and forms pertaining to investigations and trials by administrative agencies, see Ch. 471, *Investigations by Public Agencies* , and Ch. 473, *Public Agency Adjudication* , et seq.

[6] Commission Action Following Hearing

If the commission determines on the basis of the hearing that a violation has occurred, it must issue an order that may require the violator to do all or any of the following [*Gov. Code § 83116*]:

- Cease and desist from violating the Act;
- File any reports, statements, or other documents or information required by the Act; and
- Pay a monetary penalty of up to $5,000 for each violation to the state's General Fund.

When the commission determines that no violation has occurred, it must publish a declaration so stating [*Gov. Code § 83116*].

Whenever the commission rejects an administrative law judge's decision pursuant to *Gov. Code § 11517*, the commission must state the reasons for the rejection in writing [*Gov. Code § 83116.3*].

[7] Judicial Review

[a] Petition of Interested Person

An interested person may seek judicial review of any action of the commission [*Gov. Code § 83120*]. The commission is an agency for purposes of the Administrative Procedure Act [*see Gov. Code §§ 11500(a), 11501(a)*], under which judicial review may be had by filing a petition for a writ of mandate [*Gov. Code § 11523*; *see Code Civ. Proc. § 1094.5*; *see also § 242.130* (form of petition for writ of mandate to review decision of commission)].

The term "interested person" in *Gov. Code § 83120* has not been defined by statute or judicial decision. The term "beneficially interested" for purposes of permitting mandate proceedings [*see Code Civ. Proc. § 1086*] includes anyone who participated in the administrative trial [*see Bodinson Mfg. Co. v. California E. Com. (1941) 17 Cal. 2d 321, 330, 109 P.2d 935]* . If the person directly affected by an administrative decision is a member of an organization and the decision affects the person with respect to his or her activities as a member, the organization is beneficially interested in issuance of a writ and may seek review [*see International Assn. of Fire Fighters v. City of Palo Alto (1963) 60 Cal. 2d 295, 298, 32 Cal. Rptr. 842, 384 P.2d 170* ; *Residents of Beverly Glen, Inc. v. City of Los Angeles (1973) 34 Cal. App. 3d 117, 121-130, 109 Cal. Rptr. 724]* [.

Thus, it appears that the following persons or groups would be entitled to judicial review of the commission's action:

- A person found by the commission to be in violation of the act;
- A person who filed a formal complaint that resulted in commission action or inaction;
- A committee [*see Gov. Code § 82013* ("committee" defined)] or controlled committee [*see Gov. Code § 82016* ("controlled committee" defined)]; or
- A candidate or state measure proponent having direct or indirect control of a committee [*see Gov. Code § 82016*].

The commission action being reviewed must be final [*Code Civ. Proc. § 1094.5*; *see § 242.130* (form of petition for writ of mandate to review decision of commission)]. Courts enforce compliance with the finality requirement by applying the doctrine of exhaustion of administrative remedies [*see* discussion in *Ch. 474, Availability of Review of Agency Decisions, § 474.13*]. For discussion and forms pertaining to judicial review of agency decisions by administrative mandate proceedings under *Code Civ. Proc. § 1094.5*, see Ch. 474, *Availability of Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[b] Preference on Court Docket

When judicial review of a commission action relating to a pending election is being sought, the matter must be advanced on the docket of the court and put ahead of other actions. The court may, consistent with due process of law, shorten deadlines and take other steps necessary to permit a timely decision [*Gov. Code § 83121*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency InvestigationsGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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20-242 California Forms of Pleading and Practice--Annotated § 242.76

§ 242.76 Action for Damages by Private Litigant

[1] Availability

A person residing within the jurisdiction may bring a civil action for damages for violations of reporting requirements or certain restrictions on contributions, gifts, and expenditures [*see Gov. Code §§ 91004, 91005(a)*, discussed in *§ 242.73[1], [3]*; *see also §§ 242.131, 242.132* (form of request to civil prosecutor to commence civil action for violations of Political Reform Act and form of complaint for damages for violation of Political Reform Act by private litigant)].

A civil action by a private litigant is not available if an order has been issued by the Fair Political Practices Commission for the same violation [*see Gov. Code § 91008.5*; *see also § 242.74[3]*]. Additionally, the remedies set forth in *Gov. Code § 91000 et seq.* do not apply to violations of *Gov. Code § 86112.5* (disclosure of gift to beneficiary) or *Gov. Code § 89510 et seq.* (use of campaign funds) [*Gov. Code §§ 86112.5(c), 89520*; *see §§ 242.44[6], 242.64[2]*]. For when a civil action under *Gov. Code §§ 91004* and *91005* is not available for violations of *Gov. Code § 83116.5* (subjecting violators to enforcement by Fair Political Practices Commission), *see § 242.75[2]*.

[2] Request to Civil Prosecutor Before Filing

[a] In General

Before filing a civil action pursuant to *Gov. Code §§ 91004* and *91005*, a person must file with the civil prosecutor a written request for the civil prosecutor to commence the action. The request must include a statement of the grounds for believing a cause of action exists [*Gov. Code § 91007(a)*; *see § 242.131* (form of request)].

The designation of civil prosecutor varies according to the entity or agency involved in enforcement. The civil prosecutor is the Fair Political Practices Commission with respect to the state or any state agency, except itself. The Attorney General is the civil prosecutor with respect to the commission. The district attorneys are the civil prosecutors with respect to any other agency [*Gov. Code § 91001(b)*]. In any case in which a district attorney could act as the civil prosecutor under the Act, the elected city attorney of any charter city may act as the civil prosecutor with respect to any

violations occurring within the city [*Gov. Code § 91001.5*].

[b] Requests Regarding Campaign Statements or Reports

No request to the civil prosecutor pursuant to *Gov. Code § 91007(a)* may be made or filed in connection with a report or statement required by *Gov. Code § 84100 et seq.* (campaign statements and reports) until the time when an audit and investigation could be begun under *Gov. Code § 90002(c)* (audit or investigation may not begin until after last date for filing first report or statement following general, runoff, or special election) [*Gov. Code § 91010*].

[c] Time for Reply

The civil prosecutor must respond to the person in writing, indicating whether he or she intends to file a civil action [*Gov. Code § 91007(a)*]. If the civil prosecutor responds in the affirmative and files suit within 120 days from receipt of the written request to commence the action, no other action may be brought unless the action brought by the civil prosecutor is dismissed without prejudice as provided in *Gov. Code § 91008* (dismissal of pending action without prejudice to any other action for plaintiff's failure to proceed diligently and in good faith) [*Gov. Code § 91007(a)(1)*; *see McCauley v. Howard Jarvis Taxpayers Assn. (1998) 68 Cal. App. 4th 1255, 1260, 80 Cal. Rptr. 2d 900]* .

If the civil prosecutor responds in the negative within 120 days from receipt of the written request to commence the action, the person requesting the action may proceed to file a civil action on receipt of the response from the civil prosecutor. Failure of the civil prosecutor under *Gov. Code § 91007(a)(2)* to respond within 120 days is treated as a negative written response on the 120th day [*Gov. Code § 91007(a)(2)*].

Thus, a private litigant may proceed with an action under the following circumstances: (1) the civil prosecutor responds in the affirmative but fails to suit within the required time, (2) the civil prosecutor responds by indicating that he or she does not intend to file an action, (3) the civil prosecutor fails to respond in the required time, or (4) an action by the civil prosecutor is dismissed without prejudice to any other action for failure to proceed diligently and in good faith [*see Gov. Code §§ 91007(a)*, *91008*; *see also § 242.132* (form of complaint by private litigant)].

[d] Tolling Period For Commencing Action

The time period within which a civil action must be commenced, as set forth in *Gov. Code § 91011* [*see § 242.74*], is tolled from the date of receipt by the civil prosecutor of the written request to either the date the civil action is dismissed without prejudice, or the date of receipt by the person of the negative response from the civil prosecutor, but only for a civil action brought by the person who requested the civil prosecutor to commence the action [Gov. Code § 91700(a)(3)].

[3] Notice to Commission When Filing

Any person filing a complaint, cross complaint, or other initial pleading in an action for injunctive relief under *Gov. Code § 91003* (enjoining violations of or compelling compliance with the Act), or actions for damages under *Gov. Code § 91004* (reporting requirement violations), 91005 (violation of restrictions on contributions, gifts, and expenditures, and for conflict of interest violations), or 91005.5 (violations of provisions of the Act for which no specific civil penalty is provided) must, within 10 days of filing, serve on the Fair Political Practices Commission either a copy of the complaint, cross complaint, or other initial pleading, or a notice containing all of the following provisions [*Gov. Code § 91007(b)*]:

- The full title and number of the case;
- The court in which the case is pending;

- The name and address of the attorney for the person filing; and
- A statement that the case raises issues under the Political Reform Act of 1974.

Failure to so notify the commission is not grounds for dismissal of the complaint, cross complaint, or other initial pleading [*Gov. Code § 91007(c)*].

[4] Determining Liability and Apportioning Damages

The issues of (1) whether a violation is inadvertent, negligent, or deliberate; and (2) the presence or absence of good faith must be considered in applying the remedies and sanctions of the Political Reform Act [*Gov. Code § 91001(c)*; *see Thirteen Committee v. Weinreb (1985) 168 Cal. App. 3d 528, 536, 537, 214 Cal. Rptr. 297* (evidence of candidate's subjective belief is sufficient to support finding that violation was inadvertent or in good faith under *Gov. Code § 91001(c)*)]. In determining the amount of liability under *Gov. Code § 91004* or *91005*, the court may take into account the seriousness of the violation and the degree of culpability of the defendant [*Gov. Code § 91009*].

If a judgment is entered against the defendant or defendants in an action brought under *Gov. Code § 91004* or *91005*, the plaintiff receives 50 percent of the amount recovered. The remaining 50 percent is deposited in the state's General Fund. In an action brought by the civil prosecutor, the entire amount recovered is paid to the general fund or treasury of the jurisdiction [*Gov. Code § 91009*].

[5] Joint and Several Liability

If two or more persons are responsible for any violation, they are jointly and severally liable [*Gov. Code § 91006*].

[6] Multiple Actions for Damages

Not more than one judgment on the merits with respect to any violation may be obtained under *Gov. Code §§ 91004* and *91005*. Actions brought for the same violation have precedence for purposes of trial in order of the time filed. Such actions must be dismissed once judgment has been entered or a settlement approved by the court in a previously filed action [*Gov. Code § 91008*].

The court may dismiss a pending action without prejudice to any other action for failure of the plaintiff to proceed diligently and in good faith. The action may be dismissed on motion of the civil prosecutor or any plaintiff in an action based on the same violation [*Gov. Code § 91008*; *see* [2][c], *above*].

[7] Security for Costs

On motion of any party, the court must require a private plaintiff to post a bond in a reasonable amount at any stage of the litigation to guarantee payment of costs [*Gov. Code § 91012*; *see also Dunn v. Jurupa Unified School Dist. (2000) 79 Cal. App. 4th 957, 960-961, 94 Cal. Rptr. 2d 529* (although provision of security for payment of costs under *Gov. Code § 91012* could not be ordered in favor of agency, individual member of school board entitled to security posting under § 91012 even though agency provided defense)]. This provision is not a violation of due process when interpreted to require a hearing at which the trial court may make a determination of the probable merit of the lawsuit and may set the amount of the undertaking based on the reasonable costs to the defendant and the probability that the lawsuit will be successful [*see Rhodes v. Superior Court (1979) 90 Cal. App. 3d 484, 489, 153 Cal. Rptr. 495]* . Nothing in *Gov. Code § 91012*, however, requires the trial court to take the plaintiff's means into consideration in determining whether to require a bond [*Dunn v. Jurupa Unified School Dist. (2000) 79 Cal. App. 4th 957, 963, 94 Cal. Rptr. 2d 529]* . For further discussion pertaining to security for costs, *see Ch. 174, Costs and Attorney's Fees, § 174.90* et seq.

[8] Award of Costs and Attorney's Fees

The court may award litigation costs, including reasonable attorney's fees, to a plaintiff or defendant, other than an agency, who prevails in any action authorized by the Political Reform Act [*Gov. Code § 91012*; *see Dunn v. Jurupa Unified School Dist. (2000) 79 Cal. App. 4th 957, 961, 94 Cal. Rptr. 2d 529* (although agency precluded from recovering its costs and attorney fees under Gov. Code. § 91012, that section does not prohibit individual school board member from recovering costs including attorney fees even though agency provides individual's defense); *see also Gov. Code §§ 91003, 91004, 91005*].

A voluntary dismissal by a district attorney of a civil lawsuit for injunctive relief under the Political Reform Act does not entitle the defendants to attorneys' fees as prevailing parties [*see People v. Roger Hedgecock for Mayor Com. (1986) 183 Cal. App. 3d 810, 812, 228 Cal. Rptr. 424]* . Prevailing defendants in actions under the Political Reform Act may only be awarded attorney's fees if the suit against them was frivolous, unreasonable, or without foundation [*Community Cause v. Boatwright (1987) 195 Cal. App. 3d 562, 575, 576, 240 Cal. Rptr. 794* ; *People v. Roger Hedgecock for Mayor Com. (1986) 183 Cal. App. 3d 810, 815, 228 Cal. Rptr. 424]* .

An award of attorney's fees may not be denied solely on the ground that a violation was made inadvertently or in good faith [*Thirteen Committee v. Weinreb (1985) 168 Cal. App. 3d 528, 537, 538, 214 Cal. Rptr. 297]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 242.77 Action for Injunctive Relief by Private Litigant

[1] Availability

Any person residing in the jurisdiction may sue for injunctive relief to enjoin violations of or to compel compliance with the Political Reform Act [*Gov. Code § 91003(a)*; *see § 242.133* (form of complaint for injunctive relief)].

This enforcement action is not available for violations of *Gov. Code § 86112.5* (disclosure of gift to beneficiary) or *Gov. Code § 89510 et seq.* (use of campaign funds) [*Gov. Code §§ 86112.5(c), 89520*; *see §§ 242.44[6], 242.64[2]*]. For when this enforcement action is not be available for violations of *Gov. Code § 83116.5* (subjecting violators to enforcement by Fair Political Practices Commission), *see § 242.75[2]*.

[2] Conflict of Interest Violations

On a preliminary showing that a violation of certain conflict of interest provisions has occurred, the court may restrain the execution of any official action in relation to which a violation has occurred, pending final adjudication [*Gov. Code § 91003(b)*; *see § 242.73[4]*]. This provision applies to violations of *Gov. Code § 87100 et seq.* (prohibiting participation in or influence over governmental decision by public official with financial interest), *Gov. Code § 87400 et seq.* (restricting specified activities of former state officers and employees), and *Gov. Code § 87450* (prohibiting state administrative officials from entering into specified contracts), or to violations of a disqualification provision of a Conflict of Interest Code (*see Gov. Code § 87300 et seq.*). If it is ultimately determined that a violation has occurred and that the official action might not otherwise have been taken or approved, the court may set the official action aside as void [*Gov. Code § 91003(b)*].

Official actions covered by *Gov. Code § 91003(b)* include orders, permits, resolutions, and contracts, but do not include the enactment of any state legislation. In considering whether to grant preliminary or permanent relief, the court must accord due weight to any injury that may be suffered by innocent persons relying on the official action [*Gov. Code § 91003(b)*].

Gov. Code § 91001(a) authorizes injunctive relief against future conduct by an official which would violate Gov. Code

§ 87000 independently of whether an official action taken as a result of the unlawful conduct should be set aside under *Gov. Code § 91003(b)* [*City of Vernon v. Central Basin Mun. Water Dist. (1999) 69 Cal. App. 4th 508, 517, 81 Cal. Rptr. 2d 650* (trial court did not abuse discretion in declining to issue injunction when plaintiff did not show reasonable probability that acts complained of would recur)].

For additional discussion of conflicts of interest under the Political Reform Act and a form of complaint for injunctive relief under *Gov. Code § 91003(b)*, see Ch. 469, *Public Entities and Officers: Conflicts of Interest* .

[3] Prior Complaint With Commission

The court may in its discretion require any plaintiff, other than the Fair Political Practices Commission, to file a complaint with the commission prior to seeking injunctive relief [*Gov. Code § 91003(a)*].

[4] Costs and Attorney's Fees to Prevailing Party

The court may award to a prevailing plaintiff or defendant his or her costs of litigation, including reasonable attorney's fees [*Gov. Code § 91003(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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§ 242.78 Enforcement by Civil Prosecutor

The civil prosecutor [*see § 242.76[2]*] is primarily responsible for enforcement of the civil penalties and remedies of the Act. The civil prosecutor may bring any civil action under the Act that could be brought by a voter or resident of the jurisdiction [*Gov. Code § 91001(b)*].

An enforcement action by the civil prosecutor is not available for violations of *Gov. Code § 86112.5* (disclosure of gift to beneficiary) or *Gov. Code § 89510 et seq.* (use of campaign funds) [*Gov. Code §§ 86112.5(c), 89520*; *see §§ 242.44, 242.64[2]*]. For when this enforcement action is not be available for violations of *Gov. Code § 83116.5* (subjecting violators to enforcement by Fair Political Practices Commission), see *§ 242.75[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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20-242 California Forms of Pleading and Practice--Annotated § 242.79

§ 242.79 Civil Action to Recover Penalties and Fees Imposed

In addition to any other available remedies, the commission or filing officer may bring a civil action and obtain a judgment for the purpose of collecting any unpaid monetary penalties, fees, or civil penalties imposed pursuant to the Political Reform Act. This action may be brought in a small claims, municipal, or superior court, depending on the jurisdictional amount, with venue in the county where the penalties or fees were imposed by the commission or filing officer [*Gov. Code § 91013.5*].

To obtain a judgment under *Gov. Code § 91013.5*, the commission or filing officer must follow the procedures and rules of evidence applicable in ordinary civil actions and show the following [*Gov. Code § 91013.5(1)-(3)*]:

- That the monetary penalties, fees, or civil penalties were imposed following the procedures set forth in the Act and implementing regulations;

- That the defendant or defendants in the action were notified, by actual or constructive notice, of the imposition of the monetary penalties, fees, or civil penalties; and

- That a demand for payment has been made by the commission or the filing officer and full payment has not been received.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElectionsGovernmentsState & Territorial GovernmentsEmployees & Officials

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20-242 California Forms of Pleading and Practice--Annotated § 242.80

§ 242.80 Defenses to Enforcement

[1] Commission Opinion

Any person may request the Fair Political Practices Commission to issue an opinion with respect to his or her duties under the Act. The commission must, within 14 days, either issue the opinion or advise the person who made the request whether an opinion will be issued. No person who acts in good faith based on an opinion issued to him or her by the commission is subject to criminal or civil penalties for the actions. But the material facts must have been stated in the opinion request in order for this defense to apply [*Gov. Code § 83114(a)*; *see 2 Cal. Code Reg. § 18320 et seq.*].

[2] Written Advice of Commission

Any person may request the commission to provide written advice with respect to the person's duties under the Act. The advice must be provided within 21 working days of the request. This time may be extended for good cause [*Gov. Code § 83114(b)*].

The written advice is a complete defense in any enforcement proceeding initiated by the commission, and evidence of good faith conduct in any other civil or criminal proceeding, if the requesting person, at least 21 working days prior to the alleged violation, did the following [*Gov. Code § 83114(b)*; *see 2 Cal. Code Reg. § 18329*]:

- Requested written advice from the commission in good faith.
- Disclosed truthfully all the material facts.
- Committed the acts complained of either in reliance on the advice of the commission or because of the failure of the commission to provide advice within 21 days of the request or later extended time.

Legal Topics:

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

GovernmentsLocal GovernmentsElectionsGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsElectionsGovernmentsState & Territorial GovernmentsEmployees & Officials

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[Reserved]

§§ 242.81[Reserved]

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20-242 California Forms of Pleading and Practice--Annotated § 242.90

§ 242.90 Scope

This subpart discusses the state constitutional ban on party endorsements of candidates for nonpartisan offices. This subpart also discusses the requirements of the Truth in Endorsements Law (*Elec. Code § 20000 et seq.*) and the remedies for violation of its provisions (*Elec. Code §§ 20006, 20007, 20009*), as well as other provisions of the Elections Code, the Civil Code, the Penal Code, and the Government Code, relating to improper campaign conduct. It also discusses the Truth in Political Advertising Act (*Elec. Code § 20010*).

Related forms include complaints for injunctive relief as follows:

- To restrain dissemination of unlawful campaign material [*see § 242.140*].
- To restrain unlawful use of an official party name in an election campaign [*see § 242.141*].
- To restrain unlawful use of a simulated ballot or sample ballot [*see § 242.142*].
- To restrain unlawful use of an image, picture or photograph concerning a candidate [*see § 242.143*].
- To enjoin statements and conduct by a candidate pretending to be an incumbent [*see § 242.144*].

Liability for defamatory campaign advertising or communications is discussed in *Ch. 340, Libel and Slander, § 340.10* et seq.; *see also § 242.100*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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§ 242.91 Governing Law

Endorsement of candidates is governed by *Cal. Const., art. II, § 6*, and by *Elec. Code § 20000 et seq.* Injunctions or restraining orders for violations of endorsement laws are provided for by *Elec. Code §§ 20006, 20007*, and *20009*. Provisions concerning, and remedies for, the improper use of a candidates's image, picture or photograph are provided for in *Elec. Code § 20010*.

Elec. Code § 20200 et seq. governs advertising for the purpose of soliciting campaign funds. Pretending to be an incumbent is prohibited by *Elec. Code § 18350*, and injunctive relief to restrain someone from pretending to be an incumbent is provided under *Elec. Code § 18350*. Improper use of unauthorized signatures in campaign advertisements is governed by *Civ. Code § 3344.5* and *Penal Code § 115.1*. Improper use of state resources for campaign activities is governed by *Gov. Code § 8314*.

State statutes prohibiting unfair competition and false and misleading commercial advertising do not apply to political election campaign practices [*O'Connor v. Superior Court (1986) 177 Cal. App. 3d 1013, 1014, 1019-1020, 223 Cal. Rptr. 357* (complaint by incumbent assemblyman against opponent in general election and opponent's campaign consulting firm for damages and injunctive relief under *Bus. & Prof. Code §§ 17200 et seq.* and *17500 et seq.*, for attribution of false and derogatory statements about and endorsements against plaintiff to politicians and other well-known persons)]. For further discussion, see Ch. 14, *Advertising* .

Substituted service on a candidate is governed by *Elec. Code § 12*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 242.92 Purpose of Laws Governing Endorsements

To protect the voting public from deception in political campaigns, the California Legislature has enacted the Truth in Endorsements Law (*Elec. Code § 20000 et seq.*). The rationale of the law is that the public is entitled to protection from deception in political campaigns in the same manner and for the same reasons that it is entitled to protection from deception by advertisers of commercial products [*Elec. Code § 20001(4)*]. Civil enforcement of the law's provisions is provided by way of injunctive relief, available to registered voters [*Elec. Code §§ 20006, 20009*; *see Elec. Code § 359* ("voter" defined)]. Penal provisions applicable to violations of the Truth in Endorsements Law are set out in *Elec. Code § 18000 et seq.*

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§ 242.93 Support or Opposition by Convention or Central Committee

[1] Partisan Offices

Former *Elec. Code §§ 11702-11705* essentially banned any type of partisan preprimary endorsements. The United States Supreme Court held that this outright ban on partisan preprimary endorsements was unconstitutional as a violation of the *First* and *Fourteenth Amendments* [*Eu v. San Francisco County Democratic Cent. Comm. (1989) 489 U.S. 214, 229, 109 S. Ct. 1013, 103 L. Ed. 2d 271]* . As of January 1, 1995, the Elections Code provisions contrary to the ruling of the *United States Supreme Court in Eu v. San Francisco Democratic Com. (1989) 489 U.S. 214, 229, 109 S. Ct. 1013, 103 L. Ed. 2d 271* were repealed by the California Legislature [Cal. Stats. 1994 ch. 1189, §§ 3-6].

[2] Nonpartisan Offices

The state constitution prohibits any political party or party central committee from endorsing, supporting, or opposing a candidate for nonpartisan office [*Cal. Const., art. II, § 6(b)*]. All judicial, school, county, and city offices are nonpartisan [*Cal. Const., art. II, § 6(a)*]. To date, the United States Supreme Court has declined to rule on the constitutionality of this prohibition for want of a justiciable controversy [*see Renne v. Geary (1991) 501 U.S. 312, 315, 111 S. Ct. 2331, 115 L. Ed 2d 288* (vacating respondents' cause of action challenging *Cal. Const., art. II, § 6(b)*, and remanding to court of appeals with instructions to dismiss without prejudice)]. Typically, local elections officials enforce the ban by deleting from voter pamphlet material, including candidate statements, any references to party or central committee endorsements [*see Renne v. Geary (1991) 501 U.S. 312, 329, 111 S. Ct. 2331, 115 L. Ed 2d 288* ; *see also* White, J., dissenting, at *501 U.S. 312, 111 S. Ct. 2331, 115 L. Ed 2d 288, 306]* .

[3] Newspaper Advertisements

Any paid political advertisement that refers to an election or to any candidate for state or local elective office and that is contained in or distributed with a newspaper must bear the words "Paid Political Advertisement," in a typesize and format provided by *Elec. Code § 20008*. A paid political advertisement within the meaning of this section is limited to published statements paid for by advertisers for purposes of supporting or defeating any person who has filed for an elective state or local office [*Elec. Code § 20008*; *see also § 242.55B[6]*].

[4] Action for Injunctive Relief Regarding Identification Requirements

The superior court, in any case brought before it by any registered voter, may issue a temporary or permanent restraining order or injunction against the publication, printing, circulation, posting, broadcasting, or telecasting of any matter in violation of the Truth in Endorsements Law. Preferred calendar positions in both trial and appellate courts must be given to assure the speedy disposition of these cases [*Elec. Code § 20006*; *see § 242.140* (form of complaint for injunctive relief to restrain violation of Truth in Endorsements Law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 242.94 Simulated Ballots

[1] Prohibited Conduct

Simulated ballots and simulated sample ballots are governed by the Truth in Endorsements Law. *Elec. Code § 20009(a)* requires that notice be given to voters that such ballots are unofficial. The notice must also identify the person or organization that prepared it [*Elec. Code § 20009(a)*; *but cf. McIntyre v. Ohio Elections Comm'n (1995) 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426, 446* (holding much broader Ohio law that prohibited anonymous campaign literature to be violation of *First Amendment*; for discussion, *see § 242.54[2]*)]. The notice requirement does not apply to any editorial or other statement appearing in a regularly published newspaper or magazine other than a paid political advertisement [*Elec. Code § 20009(a)*].

No simulated ballot or simulated sample ballot may bear any official seal or the insignia of any public entity, and no such seal or insignia may appear on the envelope in which it is mailed or otherwise delivered [*Elec. Code § 20009(b)*].

[2] Action for Injunctive Relief Regarding Simulated Ballots

The superior court, in any case brought before it by any registered voter, may issue a temporary or permanent restraining order or injunction against the publication, printing, circulation, posting, or distribution, of any matter in violation of the requirements and prohibitions contained in *Elec. Code § 20009*. Preferred calendar positions in both trial and appellate courts must be given, to assure the speedy disposition of these cases [*Elec. Code § 20009(c)*; *see § 242.142* (form of complaint for injunctive relief to restrain unlawful use of simulated ballot)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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20-242 California Forms of Pleading and Practice--Annotated § 242.95

§ 242.95 False Claim of Support of Committee or Organization

[1] Prohibited Conduct

No candidate or committee acting on behalf of a candidate may represent, in connection with an election campaign, either orally or in campaign material, that the candidate has the support of a committee or an organization that includes as part of its name the name, or any variation on the name, of a qualified political party with which the candidate is not affiliated, together with the words "county committee" or "central committee" or "county" or any other term that might tend to lead voters to the mistaken belief that the candidate has the support of that party's county or state central committee [*Elec. Code § 20007*].

The prohibition is against misrepresenting the support of a party's central committee only. A candidate, or committee acting on his or her behalf, may represent that the candidate has the support of a committee or a group of voters both affiliated with another political party and identified by the name of that party, if the name of the committee or group also includes the name of the candidate [*Elec. Code § 20007*]. Thus, there is no prohibition against advertising that a candidate has the support of, for example, "Republicans for Smith" or "Los Angeles Republicans for Smith," when the candidate is not affiliated with the party referred to, as long as there is no representation of support by the party's central committee.

[2] Action by Central Committee Member for Injunctive Relief

Any member of a county or state central committee may commence an action in the superior court to enjoin a violation of *Elec. Code § 20007* [*Elec. Code § 20007*; *see § 242.141* (form of complaint for injunctive relief to restrain unlawful use of party name)].

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§ 242.96 Improper Use of Image, Picture, or Photograph Concerning Candidate

[1] Prohibited Conduct

Under the Truth in Political Advertising Act (*Elec. Code § 20010*), except as provided in *Elec. Code § 20010(b)* (*see* [3], *below*), no person, firm, association, corporation, campaign committee, or organization may, with actual malice, produce, distribute, publish, or broadcast campaign material that contains (1) a picture or photograph of a person or persons into which the image of a candidate for public office is superimposed, or (2) a picture or photograph of a candidate for public office into which the image of another person or persons is superimposed [*Elec. Code § 20010(a)*]. For discussion of when *Elec. Code § 20010* does not apply, *see* [5], *below*.

[2] Definitions

[a] Campaign Material

Campaign material includes, but is not limited to, any printed matter, advertisement in a newspaper or other periodical, television commercial, or computer image [*Elec. Code § 20010(a)*].

[b] Actual Malice

For the purposes of *Elec. Code § 20010*, actual malice means the knowledge that the image of a person has been superimposed on a picture or photograph to create a false representation, or a reckless disregard of whether or not the image of a person has been superimposed on a picture or photograph to create a false representation [*Elec. Code § 20010(a)*].

[3] Conduct Not Prohibited

A person, firm, association, corporation, campaign committee, or organization may produce, distribute, publish, or broadcast campaign material that contains a picture or photograph prohibited by *Elec. Code § 20010(a)* (*see* [1], *above*) only if each picture in the campaign material contains the following statement in the same point size type as the largest

point size type used elsewhere in the campaign material: "This picture is not an accurate representation of fact." The statement must be immediately adjacent to each picture or photograph prohibited by *Elec. Code § 20010(a)* [*Elec. Code § 20010(b)*].

[4] Remedies For Prohibited Conduct

Any registered voter may seek a temporary restraining order and an injunction prohibiting the publication, distribution, or broadcasting of any campaign material in violation of *Elec. Code § 20010*. On filing a petition under *Elec. Code § 20010*, the plaintiff may obtain a temporary restraining order in accordance with *Code Civ. Proc. § 527* [*Elec. Code § 20010(c)(1)*]. For a form of petition, see *§ 242.143*.

Similarly, a candidate for public office whose likeness appears in a picture or photograph prohibited by *Elec. Code § 20010(a)* may bring a civil action against any person, firm, association, corporation, campaign committee, or organization that produced, distributed, published, or broadcast the picture or photograph prohibited by *Elec. Code § 20010(a)*. The court may award damages in an amount equal to the cost of producing, distributing, publishing, or broadcasting the campaign material that violated *Elec. Code § 20010*, in addition to reasonable attorney's fees and costs [*Elec. Code § 20010(c)(2)*].

[5] Situations When Elec. Code § 20010 Inapplicable

The Truth in Political Advertising Act, (*Elec. Code § 20010*), does not apply to a holder of a license granted under the Federal Communications Act of 1934 (*47 U.S.C. § 151 et seq.*) in the performance of the functions for which the license is granted [*Elec. Code § 20010(d)(1)*].

Similarly, the Truth in Political Advertising Act does not apply to the publisher or an employee of a newspaper, magazine, or other periodical that is published on a regular basis for any material published in that newspaper, magazine, or other periodical [*Elec. Code § 20010(d)(2)*]. For purposes of *Elec. Code § 20010(d)(2)*, a "newspaper, magazine, or other periodical that is published on a regular basis" does not include any newspaper, magazine, or other periodical that has as its primary purpose the publication of campaign advertising or communications, as defined in *Elec. Code § 304* [*Elec. Code § 20010(d)(2)*].

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§ 242.97 Misrepresentation of Candidate

[1] Prohibited and Criminal Conduct

Any person who, with the intent to mislead voters in connection with a campaign for nomination or election of that person, or of another person, assumes, implies, or pretends to be an incumbent, or to be acting in the capacity of a public officer, when that is not the case, is guilty of a misdemeanor [*Elec. Code § 18350*].

[2] Action by Candidate for Injunctive Relief

Any person engaging in conduct proscribed by *Elec. Code § 18350* may be enjoined in a civil action brought by any candidate for the public office involved [*Elec. Code § 18350*; *see § 242.144* (form of complaint for injunctive relief to enjoin statements and conduct by candidate pretending to be incumbent)].

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§ 242.98 Unauthorized Signatures on Campaign Materials

[1] Prohibited Conduct

No person shall publish or cause to be published, with intent to deceive, a campaign advertisement containing a signature that the person knows to be unauthorized [*Penal Code § 115.1(b)*]. A "campaign advertisement" is any communication directed to voters by means of a mass mailing (*Gov. Code § 82041.5*), a paid television, radio, or newspaper advertisement, an outdoor advertisement, or any other printed matter if the expenditures for that communication are required to be reported under *Gov. Code § 84100 et seq.* (campaign finance disclosure requirements of Political Reform Act) [*Penal Code § 115.1(c)*]. A "signature" is a handwritten or mechanical signature, a copy of a handwritten or mechanical signature, or any representation of a person's name, including a printed or typewritten representation, that would lead a reasonable person to believe that the contents of an advertisement are attributable to the person whose name is depicted [*Penal Code § 115.1(g)*].

Nothing in *Penal Code § 115.1* prohibits a person from publishing or causing to be published a reproduction of all or part of a document containing an actual or authorized signature, provided that the signature so reproduced shall not, with the intent to deceive, be incorporated into another document in a manner that falsely suggests that the person whose signature is reproduced has signed the other document [*Penal Code § 115.1(e)*]. An authorization to use a signature must be oral or written [*Penal Code § 115.1(d)*].

[2] Action for Damages by Candidate or Person Whose Signature Is Used

Any person whose signature is used in violation of *Penal Code § 115.1(b)*, and any candidate for elective office whose election or defeat is expressly advocated in any campaign advertisement that violates *Penal Code § 115.1(b)*, has a civil cause of action against any person committing the violation [*Civ. Code § 3344.5(a)*]. If a mass mailing or other printed matter that violates *Penal Code § 115.1(b)* expressly advocates the election or defeat of more than one candidate, only a person whose signature is used, and the candidate or candidates to whom the unauthorized signature directly relates, has a civil cause of action under *Civ. Code § 3344.5* [*Civ. Code § 3344.5(b), (d)*].

Any person bringing a cause of action under *Civ. Code § 3344.5* may recover damages in an amount of two times the

cost of the communication, but not to exceed $50,000, with regard to which the unauthorized signature was used [*Civ. Code § 3344.5(c)*].

[3] Criminal Penalty

Any knowing or willful violation of *Penal Code § 115.1* is a public offense punishable by imprisonment in the state prison or in the county jail, or by a fine not to exceed $50,000, or both [*Penal Code § 115.1(f)*].

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For related research and practice materials, see the following legal topics:
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§ 242.99 Improper Use of State Resources

[1] Prohibited Conduct

It is unlawful for any elected state officer, appointee, employee, or consultant to use or permit others to use state resources for a campaign activity, or personal or other purposes that are not authorized by law [*Gov. Code § 8314(a)*].

[2] Definitions

[a] Personal Purpose

"Personal purpose" means personal enjoyment, private gain or advantage, or outside endeavor not related to state business. It does not include an occasional telephone call, or an incidental and minimal use of state resources, such as equipment or office space, for personal purposes [*Gov. Code § 8314(b)(1)*].

[b] Campaign Activity

"Campaign activity" means an activity constituting a contribution as defined in *Gov. Code § 82015* or an expenditure as defined in *Gov. Code § 82025*. It does not include the incidental and minimal use of state resources, such as equipment or office space, for campaign purposes, including the referral of unsolicited political mail, telephone calls, and visitors to private political entities [*Gov. Code § 8314(b)(2)*].

[c] State Resources

"State resources" means any state property or asset, including, but not limited to, state land, buildings, facilities, funds, equipment, supplies, telephones, computers, vehicles, travel, and state-compensated time [*Gov. Code § 8314(b)(3)*].

[d] Use

"Use" means a use of state resources that is substantial enough to result in a gain or advantage to the user or a loss to the

state for which a monetary value may be estimated [*Gov. Code § 8314(b)(4)*].

[3] Civil Action by Attorney General or Local Prosecutor

Any person who intentionally or negligently violates *Gov. Code § 8314* is liable for a civil penalty not to exceed $1,000 for each day on which a violation occurs, plus three times the value of the unlawful use of state resources. The penalty will be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney or any city attorney of a city having a population in excess of 750,000. If two or more persons are responsible for any violation, they are jointly and severally liable for the penalty [*Gov. Code § 8314(c)(1)*]. If the action is brought by the Attorney General, the moneys recovered must be paid into the General Fund. If the action is brought by a district attorney, the moneys recovered must be paid to the treasurer of the county in which the judgment was entered. If the action is brought by a city attorney, the moneys recovered must be paid to the treasurer of that city [*Gov. Code § 8314(c)(2)*].

No civil action alleging a violation of *Gov. Code § 8314* may be commenced more than four years after the date the alleged violation occurred [*Gov. Code § 8314(c)(3)*].

[4] Inapplicability to Public Informational Activities

Nothing in *Gov. Code § 8314* prohibits the use of state resources for providing information to the public about the possible effects of any bond issue or other ballot measure on state activities, operations, or policies, provided that (1) the informational activities are otherwise authorized by the constitution or laws of California, and (2) the information constitutes a fair and impartial presentation of relevant facts to aid the electorate in reaching an informed judgment regarding the bond issue or ballot measure [*Gov. Code § 8314(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 242.99A Improper Use of Official Seal

[1] Prohibited Conduct

Any person who uses or allows to be used any reproduction or facsimile of the seal of the county or the seal of a local government agency in any campaign literature or mass mailing, as defined in *Gov. Code § 82041.5*, with intent to deceive the voters, is guilty of a misdemeanor [*Elec. Code § 18304(a)*; see *Penal Code § 19* (punishment for misdemeanor)].

[2] Evidence of Intent to Deceive

For purposes of *Elec. Code § 18304*, the use of a reproduction or facsimile of a seal in a manner that creates a misleading, erroneous, or false impression that the document is authorized by a public official is evidence of intent to deceive [*Elec. Code § 18304(b)*].

[3] Definition of Local Government Agency

For purposes of *Elec. Code § 18304*, the term "local government agency" means a school district, special or other district, or any other board, commission, or agency of local jurisdiction [*Elec. Code § 18304(c)*].

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§ 242.100 Defamatory Campaign Advertising or Communications

Campaign advertising is subject to libel and slander causes of action under *Elec. Code §§ 20501* and *20502*. These sections apply to candidates for state and federal office [*Beilenson v. Superior Court (1996) 44 Cal. App. 4th 944, 953, 52 Cal. Rptr. 2d 357]* . An action for slander or libel is permitted under *Elec. Code § 20501* provided the commission of the slander or libel is willfully and knowingly made [*Beilenson v. Superior Court (1996) 44 Cal. App. 4th 944, 953, 52 Cal. Rptr. 2d 357* (plaintiff failed to meet this rigorous standard)].

Under *Elec. Code § 20501(a)*, a candidate or state measure proponent is liable for any slander or libel committed by a committee that is controlled by the candidate or state measure proponent as defined in *Gov. Code § 82016* if the candidate or state measure proponent willfully and knowingly directs or permits the libel or slander. Similarly, a person who is a sponsor of a sponsored committee as defined in *Gov. Code § 82048.7* is liable for slander or libel committed by the sponsored committee if the sponsor willfully and knowingly directs or permits the libel or slander [*Elec. Code § 20501(b)*]. For further discussion of liability for defamatory campaign advertising or communications, *see Ch. 340, Libel and Slander, § 340.10* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 242.101 Political Cybersquatting

The "California Political Cyberfraud Abatement Act" [*Elec. Code § 18320 et seq.*] provides that it is unlawful for a person, with intent to mislead, deceive, or defraud, to commit an act of political cyberfraud, defined as a knowing and willful act concerning a political web site that is committed with the intent to deny a person access to a political web site, deny a person the opportunity to register a domain name for a political web site, or cause a person reasonably to believe that a political web site has been posted by a person other than the person who posted the web site, and cause a reasonable person, after reading the web site, to believe the site actually represents the views of the proponent or opponent of a ballot measure. Political cyberfraud includes, but is not limited to, any of the following acts:

- Intentionally diverting or redirecting access to a political web site to another person's web site by the use of a similar domain name, meta-tags, or other electronic measures [*Elec. Code § 18320(c)(1)(A)*];

- Intentionally preventing or denying exit from a political web site by the use of frames, hyperlinks, mouse-trapping, pop-up screens, or other electronic measures [*Elec. Code § 18320(c)(1)(B)*];

- Registering a domain name that is similar to another domain name for a political web site [*Elec. Code § 18320(c)(1)(C)*]; or

- Intentionally preventing the use of a domain name for a political web site by registering and holding the domain name, or by reselling it to another with the intent of preventing its use, or both [*Elec. Code § 18320(c)(1)(D)*].

The term "domain name" means any alphanumeric designation that is registered with or assigned by any domain name registrar, domain name registry, or other domain registration authority as part of an electronic address on the Internet [*Elec. Code § 18320(c)(2)*]. The term "political web site" means a web site that urges or appears to urge the support or opposition of a ballot measure [*Elec. Code § 18320(c)(3)*].

This Act does not apply to a domain name registrar, registry, or registration authority [*Elec. Code § 18321*].

In addition to any other remedies available under law, a court may order the transfer of a domain name as part of the relief awarded for a violation of the Act [*Elec. Code § 18322*].

Legal Topics:

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

§§ 242.102[Reserved]

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§ 242.110 Related Matthew Bender Publications

For forms of points and authorities relating to judicial review of actions taken by administrative agencies, see California Points and Authorities, Ch. 195, *Public Administrative Agencies*

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§ 242.111 State Statutes

[1] Campaign Practices

Code of Fair Campaign Practices. *Elec. Code § 20400 et seq.*

[2] Fair Political Practices Commission

Agency subject to Administrative Procedure Act (*Gov. Code § 11500 et seq.*). *Gov. Code §§ 11501(a), 83116*

Establishment of and provisions governing commission. *Gov. Code § 83100 et seq.*

[3] Political Reform Act of 1974

[a] In General

Title and purposes of Act. *Gov. Code § 81000 et seq.*

Definitions. *Gov. Code § 82000 et seq.*

Campaign disclosure requirements. *Gov. Code § 84100 et seq.*; *see also Gov. Code § 82015(b)(2)(B)(iii)* (payments unrelated to candidate's candidacy)

Prohibitions and limitations on campaign contributions and expenditures. *Gov. Code §§ 84300 et seq., 85101 et seq.* (sections repealed and added by Prop. 34), *89510 et seq.*

Lobbyist regulation. *Gov. Code § 86100 et seq.*

Enforcement provisions. *Gov. Code § 91000 et seq.*

[b] Actions

Persons liable to administrative action by Fair Political Practices Commission. *Gov. Code § 83116.5* (repealed and added by Prop. 34)

Injunctive relief to compel compliance with Act. *Gov. Code § 91003*

Civil action for damages for violation of reporting requirements. *Gov. Code § 91004*

Civil action for damages for violation of provisions prohibiting or limiting gifts, contributions, or expenditures. *Gov. Code § 91005*

Civil action for damages for violations for which no specific civil penalty provided. *Gov. Code § 91005.5*

Limitations on enforcement provisions. *Gov. Code § 91008.5*

Time limit for filing action. *Gov. Code § 91011*

[c] Audits and Investigations by Franchise Tax Board

General provisions. *Gov. Code § 90001 et seq.*

Effect on filing written request with civil prosecutor (*Gov. Code § 91007(a)*). *Gov. Code § 91010*

[d] Penalties

Penalties imposed by Fair Political Practices Commission. *Gov. Code § 83116*

Effect on candidacy of misdemeanor conviction. *Gov. Code § 91002*

Criminal and civil penalties. *Gov. Code § 91009*

Penalties for late filing of campaign statement or report. *Gov. Code § 91013*

[4] Improper Campaign Conduct

Substituted service on a candidate. *Elec. Code § 12*

Injunctive relief against candidate pretending to be an incumbent. *Elec. Code § 18350*

Truth in Endorsements Law. *Elec. Code § 20000 et seq.*

Injunctive relief pursuant to Truth in Endorsements Law. *Elec. Code §§ 20006, 20007, 20009*

Advertising for purpose of soliciting campaign funds. *Elec. Code § 20200 et seq.*

Political Cybersquatting. *Gov. Code § 18320 et seq.*

Legal Topics:

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§ 242.112 Decisions

[1] Financing and Lobbying

[a] Regulation of Campaign Financing

Campaign contribution limits applied on fiscal-year basis unconstitutionally discriminate in favor of incumbents and against challengers by limiting *First Amendment* expressive and associational rights of challengers and their supporters to contribute to political campaigns. *Service Employees International v. Fair Political Practices Commission (9th Cir. 1992) 955 F.2d 1312, 1318-1321 , cert. denied, 505 U.S. 1230, 112 S. Ct. 3056, 112 S. Ct. 3057, 120 L. Ed. 2d 922 (1992)*

California Supreme court declined to reform, that is, rewrite, former *Gov. Code §§ 85301(a), 85302, 85303(a), (b),* and *85304*, as enacted by Proposition 73,(*now see Gov. Code § 85301 et seq.*, as enacted by Prop. 34) to conform to constitutional requirements so as to overcome holding in *Services Employees* of their unconstitutionality. *Kopp v. Fair Pol. Practices Com. (1995) 11 Cal. 4th 607, 615-616, 663-671, 47 Cal. Rptr. 2d 108, 905 P.2d 1248*

Gov. Code § 85300 (as enacted by Proposition 73, prohibiting public officers from expending or contributing public moneys to campaign for public office) preempts Sacramento County charter provision enacted by voters to supply partial public financing for candidates for county offices; campaign financing of elections, whether state or local, is matter of statewide concern and thus beyond purview of county regulation. *County of Sacramento v. Fair Political Practices Com. (1990) 222 Cal. App. 3d 687, 689, 271 Cal. Rptr. 802*

Expenditures "for political purposes," subject to disclosure under *Gov. Code § 82025*, includes attorney's fees paid in defamation action that was brought by incumbent candidate against opponent to influence voters through forthright denial of opponent's charges. *Thirteen Committee v. Weinreb (1985) 168 Cal. App. 3d 528, 532-536, 214 Cal. Rptr. 297*

[b] Political Reform Act of 1974

The FPPC has authority to bring suit against an Indian tribe in enforcing the Political Reform Act. Allowing a tribe immunity from suit in this context would allow tribal members to participate in elections and make campaign contributions using the tribal organization, unfettered by regulations designed to ensure the system's integrity. Allowing tribal members to participate in the state electoral process while leaving the state powerless to effectively guard against political corruption would have put the state in an untenable and indefensible position, in light of the constitutionally significant importance of the state's ability to provide a transparent election process with rules applying equally to all parties in the electoral fray. *Agua Caliente Band of Cahuilla Indians v. Superior Court (2007) 40 Cal. 4th 239, 259, 52 Cal. Rptr. 3d 659*

Application of *Gov. Code § 83116.5* explained; lobbyist held subject to criminal penalties under *Gov. Code § 91000(a)* for making political contributions in false name in violation of *Gov. Code § 84301*. *People v. Snyder (2000) 22 Cal. 4th 304, 307-310, 92 Cal. Rptr. 2d 734, 992 P.2d 1102* (decided under repealed *Gov. Code § 83116.5* which was reenacted in substantially same language by Prop. 34)

In perjury prosecution based on failure to comply with disclosure provisions of Political Reform Act, materiality is element of offense required to be determined by jury; trial court's action in taking materiality question from jury constitutes reversible error. *People v. Hedgecock (1990) 51 Cal. 3d 395, 408, 409, 410, 272 Cal. Rptr. 803, 795 P.2d 1260*

Proposition 73 amends Political Reform Act of 1974 to add *Gov. Code § 85100 et seq.*, limiting campaign contributions for all elected state officeholders and prohibiting public funding of elections; although measures were similar and both approved by voters, Proposition 73 is effective and Proposition 68 is inoperative, because Proposition 73 received highest vote and measures were competing and conflicting. *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com. (1990) 51 Cal. 3d 744, 765, 274 Cal. Rptr. 787, 799 P.2d 1220* (*Gov. Code § 85100 et seq.* repealed and new *Gov. Code § 85100 et seq.* added by Prop. 34 in 2000)

Provisions of the Political Reform Act that authorize enforcement actions, on their face, are limited to violations of the Act. Violations of local campaign finance laws that are independent of the Act fall outside the scope of the enforcement mechanisms established under the Act. *Major v. Silna (2005) 134 Cal. App. 4th 1485, 1502-1503, 36 Cal. Rptr. 3d 875*

The government has the right--and arguably even the duty--to speak on matters that concern the discharge of its responsibilities to its citizens. For example, a city has broad discretion to make public expenditures, subject to the limitations that the expenditure be for a public purpose and not expressly forbidden by law. While a government agency may not spend public funds for a partisan campaign advocating the passage or defeat of a ballot measure, a public agency pursues a proper informational role when it simply gives a fair presentation of the facts. Thus, a city did not make improper government expenditures for communications on an initiative election because in its communications, which analyzed the impact of a tax-relief measure, did not contain words of express advocacy. *Vargas v. City of Salinas (2005) 135 Cal. App. 4th 361, 385-387, 37 Cal. Rptr. 3d 506*

Power of commission under Code Civ. Proc. § 83112 to adopt, amend, and rescind regulations to carry out purposes and provisions of Political Reform Act of 1974 not affected by Proposition 208; commission may refine term "contribution" to accord with changes in Political Reform Act of 1974 effected by Proposition 208; regulation adopted by Fair Political Practices Commission that excepted from statutory definition of "contribution" payments by sponsoring organization to establish and administer its political action committee (*see 2 Cal. Code Reg. § 18215(c)(16)*) upheld. *Californians for Political Reform Foundation v. Fair Political Practices Com. (1998) 61 Cal. App. 4th 472, 482-489, 71 Cal. Rptr. 2d 606*

Analysis of express advocacy versus issue oriented speech; although advertisement directed pointed criticism at

governor, it did not incorporate any reference to a vote, a candidacy, an election, or any other express words of advocacy. *Governor Gray Davis Committee v. American Taxpayers Alliance (2002) 102 Cal. App. 4th 449, 471-472, 125 Cal. Rptr. 2d 534*

Four-year general limitation period of *Gov. Code § 91011(b)* applies only to civil actions, not special proceedings such as mandamus petitions; three-year limitation period of *Code Civ. Proc. § 338(a)* generally applies to special proceedings under Political Reform Act, but specific 90-day limitation period of former *Gov. Code § 65907* (*now see Gov. Code § 65009*) controls over three-year statute of limitations in cases challenging decisions of local board of permit appeals. *Ching v. San Francisco Bd. of Permit Appeals (1998) 60 Cal. App. 4th 888, 895-896, 70 Cal. Rptr. 2d 700*

City's litigation expenses incurred in pursuing preelection challenge to constitutionality or legality of local initiative held not reportable expenditures within meaning of Political Reform Act of 1974 (*Gov. Code § 81000 et seq.*). *Yes On Measure A v. City of Lake Forest (1997) 60 Cal. App. 4th 620, 622, 625-626, 70 Cal. Rptr. 2d 517*

County's failure to report expenditures in developing statewide initiative measure for criminal justice reform does not violate *Political Reform Act. League of Women Voters v. Countywide Crim. Justice Coordination Com. (1988) 203 Cal. App. 3d 529, 556-560, 250 Cal. Rptr. 161*

Inadvertent violation of reporting requirements of Political Reform Act does not result in liability for damages in civil action under *Gov. Code § 91004*. *Community Cause v. Boatwright (1987) 195 Cal. App. 3d 562, 573 n.4, 240 Cal. Rptr. 794*

Principal investigator is entitled to be present during trial when designated by district attorney bringing action on behalf of public against public official under Political Reform Act, pursuant to *Evid. Code § 777(c)*. *People ex rel. Curtis v. Peters (1983) 143 Cal. App. 3d 597, 599-600, 192 Cal. Rptr. 70*

Provision prohibiting candidacy for four years on misdemeanor conviction (*Gov. Code § 91002*) under Political Reform Act is constitutional. *People v. Ballard (1980) 104 Cal. App. 3d 757, 764, 164 Cal. Rptr. 81*

Gifts of public money in the form of services by state employee are subject to disclosure requirements of *Political Reform Act. Fair Political Practices Com. v. Suitt (1979) 90 Cal. App. 3d 125, 132, 153 Cal. Rptr. 311*

Public entities are included within definition of "person" in *Gov. Code § 82047*. *Fair Political Practices Com. v. Suitt (1979) 90 Cal. App. 3d 125, 133, 153 Cal. Rptr. 311*

[c] Action for Damages by Private Litigant

Only two kinds of defendants are subject to an action under Political Reform Act: governmental agencies and individual governmental officials; *Gov. Code § 91012* precludes agency from recovering its costs and attorney fees, but there is no such express exclusion for individual officials; neither is there any provision that individual governmental officials are entitled to award of costs, including attorney fees, only when they have personally incurred such expenses; accordingly, *Gov. Code § 91012* does not prohibit individual member of school board from recovering costs, including attorney fees and thus such individual defendant was entitled to have plaintiff post security under *Gov. Code § 91012* even though agency was providing his defense; moreover, nothing in *Gov. Code § 91012* requires trial court to take plaintiff's means into consideration in determining whether to require bond. *Dunn v. Jurupa Unified School Dist. (2000) 79 Cal. App. 4th 957, 960-961, 963, 94 Cal. Rptr. 2d 529*

Gov. Code § 91011 four-year statute of limitations barred recovery against private organization formed to pass

Proposition 36 for alleged violation of reporting requirements of Political Reform Act of 1974; amended complaint held not to relate back for purpose of limitation period because different reporting violations by single defendant mentioned in amended complaint but not in original complaint were not part of same general set of facts; reporting violations, given discrete deadlines, are necessarily discrete events themselves, not continual ones. *McCauley v. Howard Jarvis Taxpayers Assn. (1998) 68 Cal. App. 4th 1255, 1258-1263, 80 Cal. Rptr. 2d 900*

Validity of *Gov. Code § 91012* requirement of security for costs. *Rhodes v. Superior Court (1979) 90 Cal. App. 3d 484, 489, 153 Cal. Rptr. 495*

[2] Improper Campaign Conduct

Gov. Code § 84301 contains broad prohibition against what is commonly termed money laundering; lobbyist is subject criminal penalties under *Gov. Code § 91000(a)* for making political contributions in false name in violation of *Gov. Code § 84301*. *People v. Snyder (2000) 22 Cal. 4th 304, 307-311, 92 Cal. Rptr. 2d 734, 992 P.2d 1102*

County sheriff's distribution of postcards printed by private campaign committee expressly organized to force chief justice of state supreme court to resign or to be defeated in retention election is prohibited partisan political campaign activity rather than proper informational activity, because it involved illegal expenditures of public funds and use of county personnel. *California Common Cause v. Duffy (1987) 200 Cal. App. 3d 730, 744-749, 246 Cal. Rptr. 285*

Bus. & Prof. Code §§ 17200 et seq. (enforcement provisions of unfair competition law) and 17500 et seq. (prohibited advertising practices) are inapplicable to political election campaign practices; Legislature recognizes, in election regulation scheme, that any attempt at wholesale regulation of, or government intrusion into, content of political literature is constitutionally impermissible. *O'Connor v. Superior Court (1986) 177 Cal. App. 3d 1013, 1020, 223 Cal. Rptr. 357*

Legislator seeking reelection in district expanded by reapportionment is able to claim incumbency in entire district without violating former *Elec. Code § 29450(b)* [*now see Elec. Code 18350(b)*]. *Friends of Assemblywoman La Follett v. Superior Court (1982) 134 Cal. App. 3d 832, 835, 838, 184 Cal. Rptr. 856*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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§ 242.113 Attorney General Opinions

State law or county ordinance requiring ballots to indicate whether candidates for elective county office have signed or refused to sign Code of Fair Campaign Practices provided for in former *Elec. Code § 12520* [*see now Elec. Code § 20440*] violates candidates' constitutional guarantees of freedom of speech. *69 Ops. Cal. Atty. Gen. 278, 286-288 (1986)*

State law or county ordinance providing for citizens' advisory committee appointed by board of supervisors to hold hearings on complaints of unethical campaign practices described in former *Elec. Code § 12500 et seq.* [*see now Elec. Code § 20400 et seq.*] and to publicize findings before election violates candidates' constitutional guarantees of free speech. *69 Ops. Cal. Atty. Gen. 278, 285-286 (1986)*

Funds collected by "friends committees" established for benefit of elected officials classified as campaign funds within meaning of former *Elec. Code §§ 12400-12407* [*see now Elec. Code §§ 20300, 20301*; *Gov. Code § 89510 et seq.*] and not expendable for personal use. *65 Ops. Cal. Atty. Gen. 493, 502 (1982)* (note that *Elec. Code § 20300* has been repealed by Proposition 208; *see* § 242.01A)

Present statutes that duplicate Political Reform Act, as well as future statutes that conflict with Act's provisions, are not necessarily invalid. *58 Ops. Cal. Atty. Gen. 772, 777 (1975)*

Women's Club is considered a committee within meaning of Political Reform Act and as required to report cost of activities to support or oppose candidates or ballot measures. *58 Ops. Cal. Atty. Gen. 546, 551 (1975)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechPolitical SpeechGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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§ 242.114 Law Reviews

Mohr, *Liability of Political Candidates and Their Staffs for Campaign Committee Obligations, 15 Pepperdine L. Rev. 33 (1987)*

Note, *Statutory Limitations on Corporate Spending in Ballot Measure Campaigns: The Case for Constitutionality, 36 Hastings L.J. 433 (1985)*

Comment, *Anonymous Political Literature: California's Compulsory Identification Statute Held Unconstitutional in the Fourth District, 18 Cal. W. L. Rev. 363 (1982)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechPolitical SpeechGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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[Reserved]

§§ 242.115[Reserved]

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PART IV. PROCEDURAL CHECKLIST

20-242 California Forms of Pleading and Practice--Annotated § 242.120

§ 242.120 Filing Formal Complaint With Fair Political Practices Commission

NOTE:

Selecting Proper Forum. The commission usually refers matters involving local jurisdictions, such as cities, counties, special districts, school boards, and the like, to the appropriate district attorney or elected city attorney. Therefore, if the complaint involves local issues, the complainant is advised to go directly to the local prosecutor.

☐ Prepare formal complaint [*Gov. Code § 83115*]. The complaint may be filed on a form available from the commission, and must be in writing and comply substantially with the requirements set forth in *2 Cal. Code Reg. § 18360*. The complaint should provide the following information:

☐ Identify the complainant, including name, address, and telephone number.

☐ Identify person(s) allegedly in violation of the act, including name(s), and address(es) (business and residential, if available).

☐ Specify provision(s) of the Act allegedly violated. If specific sections are known, provide a brief summary of the nature of the allegation(s).

☐ Describe, with as much particularity as possible, facts constituting the alleged violation(s).

☐ Include or describe, with as much particularity as possible, any evidence or means of obtaining evidence in support of the complaint.

☐ Include names and addresses of potential witnesses, if known.

☐ Include any additional information complainant believes helpful to the commission in determining need for investigation.

☐ Attach to complaint copies of any available documentation regarding the alleged violation(s), such as:

☐ Checks.

☐ Campaign materials.

☐ Receipts.

☐ Verify complaint. Only a verified formal complaint filed substantially in conformity with *2 Cal. Code Reg. § 18360(b), (b)* entitles a complainant to procedural rights contained in Gov. Code§ 85115, including the right to notification of disposition of the complaint [*see Gov. Code § 83115*; *2 Cal. Code Reg. § 18360(c)*].

☐ Submit complaint to:

Fair Political Practices Commission
P.O. Box 807
Sacramento, California 95812

or

Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, California 95814
Fax: 916-322-1932

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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[Reserved]

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A. Financing and Lobbying

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§ 242.130 Petition for Writ of Mandate to Review Administrative Decision of Fair Political Practices Commission by Person Who Filed Complaint Before Commission or Person or Entity Found to Be in Violation of Political Reform Act of 1974 [Gov. Code §§ 11523, 83120]

[1] FORM Petition for Writ of Mandate to Review Administrative Decision of Fair Political Practices Commission by Person Who Filed Complaint Before Commission or Person or Entity Found to Be in Violation of Political Reform Act of 1974 [Gov. Code §§ 11523, 83120]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
Fair Political Practices Commission of California,	)	PETITION FOR WRIT OF
Respondent[,]	)	MANDATE
[_____ (*name*)],	)	
Real Party in Interest].	)	
	)	
	)	

Petitioner alleges:

1. Petitioner is _____ [*allege petitioner's capacity as candidate, committee, controlled committee, or other entity, e.g.*, a committee formed to support the candidacy of _____ (*name*) for election, on _____ (*date*), to the office of _____ (*specify*) in _____ County, California)].

2. Respondent, Fair Political Practices Commission, is an administrative agency of the State of California, formed for the purposes of implementation, administration, and enforcement of the Political Reform Act of 1974, contained in *Government Code Section 81000 et seq.*

[3. _____ (*Allege identity and capacity of alleged violator as real party in interest, if petitioner initiated commission action by filing complaint, e.g.*, Real party in interest is a candidate for election, on _____ (*date*), to the office of _____ (*specify*) (in _____ County, California).]

4. On or about _____ [*date*], _____ [pursuant to the sworn complaint of _____ (petitioner *or* real party in interest) _____ (*name*) *or* on its own initiative] under *Government Code Section 83115*, respondent commission began an investigation of possible violations of the Political Reform Act of 1974 by _____ [petitioner *or* real party in interest] _____ [*name*]. Specifically, the commission sought to determine whether or not _____ [petitioner *or* real party in interest] _____ [*name*] violated Government Code Section(s) _____ [*specify, e.g.*, 84200] by _____ [*specify alleged violations, e.g.*, failing to file campaign statements].

5. On _____ [*date*], pursuant to its investigation, the commission held a probable cause hearing and at that hearing found probable cause to believe that there had been [a] violation(s) of the Political Reform Act of 1974.

6. On _____ [*date*], at _____ [*specify place*], the commission held a hearing to receive evidence on the issue of whether or not _____ [petitioner *or* real party in interest] _____ [*name*] had violated provisions of the Political Reform Act of 1974. Petitioner [and real party in interest] attended the hearing.

7. On _____ [*date*], petitioner received the commission's _____ [declaration stating that no violation had occurred *or* decision and order finding _____ (petitioner *or* real party in interest) _____ (*name*) in violation of Government Code Section(s) _____]. [The commission's order commanded _____ (petitioner *or* real party in interest) _____ (*name*) to _____ (cease and desist violating the Act *and/or* file the _____ (reports *and/or* statements *and/or* information) required by Government Code Section(s) _____ *and/or* pay a penalty of $_____ to the state's General Fund).]

[8. _____ (*Allege fact of application for reconsideration, if appropriate, and adverse result*).]

9. The commission's _____ [declaration finding no violation *or* decision and order] is/are invalid for the following reasons:

[*Allege reasons for invalidity of decision, such as the following* :]

a. The Administrative Law Judge found that _____ [*state findings*]. The commission does not have authority to impose sanctions on any of these grounds.

b. At the hearing, _____ [petitioner *or* real party in interest] _____ [*name*] tried to offer evidence to show that _____ [*state facts sought to be proved by evidence in question*]. This evidence was in the form of _____ [*specify, e.g.*, the testimony of _____ (*name*)]. The Administrative Law Judge ruled that this evidence was not admissible, and it was not received. The evidence was admissible and should have been received.

c. The Administrative Law Judge found that _____ [*state findings not supported by the evidence*]. The evidence received at the hearing does not support these findings, as petitioner alleges more particularly below.

d. [*State other reasons for invalidity, if appropriate.*].

10. _____ [A verbatim transcript of the record of the hearing, containing the evidence received, is attached as Exhibit A and made a part hereof *or* The substance of the evidence received at the hearing is as follows: _____ (*state substance of evidence*)]. [*If petitioner claims that evidence does not support findings, add:* The evidence does not support the findings for the following reasons: _____ (*specify reasons*).] [*If petitioner claims that incompetent evidence was received, add:* Petitioner objected at the hearing to the following evidence, on the grounds indicated, but in each instance petitioner's objection was not sustained, and the evidence was received: _____ (*identify evidence, e.g.*, the testimony of _____ (*name*) which was offered to show _____ (*specify*) and which was objected to on the ground that _____ (*specify*)).]

[11. *Allege if appropriate:* Petitioner has the following relevant evidence that was not presented at the hearing _____ (*describe completely*). This evidence could not be produced at the hearing because _____ (*specify why, in the exercise of reasonable diligence, petitioner could not produce evidence and why, if appropriate, evidence could not be produced on reconsideration*). This evidence tends to show that _____ (*state what evidence will prove*).]

12. Petitioner has exhausted all his/her administrative remedies, as alleged above, and the decision of respondent commission has become final insofar as respondent is presently concerned.

13. Petitioner has no plain, speedy, or adequate remedy in the ordinary course of law in that the law provides no other means whereby petitioner can require respondent commission to set aside its decision.

WHEREFORE, petitioner prays judgment as follows:

[*EITHER, if alternative writ procedure is used and petitioner seeks review of declaration that no violation has occurred:*]

1. For an alternative writ of mandate directing respondent commission to set aside its declaration of _____ [*date*], stating that no violation of the Act has occurred, and to _____ [reconsider whether or not real party in interest has violated the act by _____ (*specify alleged violation, e.g.*, failing to file campaign statements as required by *Government Code Section 84200*) *or* enter a decision finding that real party in interest has violated the Act by _____ (*specify alleged violation, e.g.*, failing to file campaign statements, as required by *Government Code Section 84200*)], and ordering real party in interest to _____ [cease and desist violating the Act *and/or* file the required reports, statements, or information *and/or* pay a penalty of $_____ to the state's General Fund], or in the alternative, to show cause why a peremptory writ of mandate to the same effect should not be issued;

[*OR, if alternative writ procedure is used and petitioner seeks review of decision and order finding petitioner in violation of Act:*]

1. For an alternative writ of mandate directing respondent commission to set aside its decision and order of

_____ [*date*], finding petitioner in violation of Government Code Section(s) _____, and to enter a declaration stating that no violation of the act has occurred, or in the alternative, to show cause why a peremptory writ of mandate to the same effect should not be issued;

[*OR, if alternative writ procedure is used and petitioner seeks review of decision and order finding real party in interest in violation in some respects and not in violation in others:*]

1. For an alternative writ of mandate directing respondent commission to set aside the portion of its decision and order of _____ [*date*], stating that real party in interest was not in violation of Government Code Section(s) _____, and to _____ [reconsider whether or not real party in interest has violated the Act by _____ (*specify alleged violation, e.g.,* failing to file campaign statements as required by *Government Code Section 84200*) *or* enter a decision finding that real party in interest has violated the Act by _____ (*specify alleged violation, e.g.,* failing to file campaign statements, as required by *Government Code Section 84200*)], and ordering real party in interest to _____ [cease and desist violating the Act *and/or* file the required reports, statements, or information *and/or* pay a penalty of $_____ to the state's General Fund], or in the alternative, to show cause why a peremptory writ of mandate to the same effect should not be issued;

[*CONTINUE*]

[2. *If petitioner seeks a stay of operation of administrative order or decision pending judgment, add:* For an order restraining respondent commission from giving effect to its order of _____ (*date*), _____ (*specify effect of order, e.g.,* finding petitioner in violation of Government Code Section(s) _____ and ordering petitioner to file campaign statements and to pay a penalty of $_____), until further order of the court and to show cause why operation of that order should not be stayed pending judgment in this proceeding;]

3. For a peremptory writ of mandate _____ [*set out terms of proposed peremptory writ at length as in Paragraph 1 of this prayer, omitting words relating to order to show cause*];

4. For reasonable attorney's fees in the sum of $_____;

5. For costs of suit herein incurred [*add, if appropriate:* including $_____ for preparation of the administrative record]; and

6. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner_____ [*name*]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form of petition for writ of mandate in [1], *above*, may be used by a person or entity seeking judicial review of a decision by the Fair Political Practices Commission. The person or entity seeking review may be a person who is dissatisfied with the commission's disposition of his or her sworn complaint, or a person or entity found to be in violation of the Political Reform Act of 1974 in the commission's administrative proceeding [*see Gov. Code §§ 83115, 83120*; *see also § 242.75[7]*]. For further discussion and forms pertaining to judicial review of administrative actions under *Code Civ. Proc. § 1094.5*, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[3] Procedure When Commission Fails to Act

This form may not be used when the commission, pursuant to an investigation on its own initiative or on a sworn complaint, has elected to take no further action. Under these circumstances, a person seeking additional action by the commission could pursue one of the following courses:

- File a petition for writ of mandate to compel further action [*see Code Civ. Proc. § 1086*; for discussion and forms pertaining to traditional mandate proceedings to compel agency action, see Ch. 358, *Mandate and Prohibition*].

- File a petition for injunctive relief against the alleged violator of the Act to compel compliance [*see Gov. Code § 91003*; *see also § 242.133* (form of complaint against candidate for injunctive relief)].

- Subsequent to filing a written request with the civil prosecutor [*see Gov. Code § 91007(a)*; *see also § 242.131* (form of request to civil prosecutor)], file an action for damages for failure to properly disclose or for making or receiving unlawful contributions, expenditures, or gifts [*see Gov. Code §§ 91004, 91005*; *see also § 242.132* (form of complaint by private litigant against candidate for damages)].

[4] Allegations

The form of petition alleges the following:

- The identity and capacity of the petitioner, respondent commission, and if petitioner was the complainant in the administrative proceeding, the real party in interest charged with violating the act (Paragraphs 1-3).

- Petitioner's interest in issuance of the writ (Paragraph 1) [*see Code Civ. Proc. § 1086*; *Gov. Code § 83120*; *see also § 242.75[7]*].

- The investigation of alleged violations on the commission's own initiative or on the sworn complaint of petitioner (Paragraph 4) [*see Gov. Code § 83115*].

- The commission's probable cause hearing and finding of probable cause to believe violations have occurred (Paragraph 5) [*see Gov. Code §§ 83115.5, 83116*].

- The commission's administrative hearing and petitioner's attendance (Paragraph 6).

- The commission's declaration stating that no violation had occurred or the commission's decision finding a violation and order requiring remedial action by the petitioner or real party in interest (Paragraph 7) [*see Gov. Code § 83116*; *see also § 242.75[6]*].

- Application for reconsideration, if appropriate, and adverse results (Optional Paragraph 8).

- Reasons for the invalidity of the commission's decision (Paragraph 9) [*see Code Civ. Proc. § 1094.5(b), (c)*].

- Attachment of the hearing transcript or a summary of the evidence, if petitioner claims the findings are not supported by the evidence or that incompetent evidence was received (Paragraph 10) [*see Code Civ. Proc. § 1094.5(c)*].

- Relevant evidence that could not be produced or that was improperly excluded at the hearing, if appropriate (Optional Paragraph 11) [*see Code Civ. Proc. § 1094.5(e)*].

- Exhaustion of administrative remedies (Paragraph 12) [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 291-296, 109 P.2d 942]* .

- Petitioner's lack of a plain, speedy, or adequate remedy in the ordinary course of law (Paragraph 13) [*Code Civ. Proc. § 1086*].

A paragraph alleging the existence of fictitious defendants may be added under appropriate circumstances [*see* Ch. 20, *Allegations Commonly Used*].

[5] Verification Required

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Proof of service on each respondent and real party in interest of a copy of a petition that seeks an alternative writ must accompany the petition when it is offered for filing except when, in its discretion and for good cause, the court has granted the application for the writ ex parte [*Code Civ. Proc. § 1107*; for discussion of serving the petition, *see* Ch. 358, *Mandate and Prohibition*]. Points and authorities also customarily accompany a petition filed in a superior court, although they do not appear to be expressly required by statute. When no alternative writ is sought, proof of service of a copy of the petition need not accompany the application, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

Although the petition for writ of mandate must be verified, a public agency need not verify its answer, even though the complaint is verified [*see Code Civ. Proc. § 446*; *Crowl v. Commission on Professional Competence (1990) 225 Cal.*

App. 3d 334, 342, 275 Cal. Rptr. 86] . The verification of a complaint against a public agency precludes a general denial [*see Code Civ. Proc. § 431.30(d)*].

[6] Security for Costs

On motion of any party, the court must require a private plaintiff to post a bond in a reasonable amount at any stage of the litigation to guarantee payment of costs [*Gov. Code § 91012*; *see § 242.76[7]*].

[7] Costs and Attorney's Fees

The court may award litigation costs, including reasonable attorney's fees, to a plaintiff or defendant, other than an agency, who prevails in any action authorized by the Political Reform Act of 1974 [*Gov. Code § 91012*]. A prevailing defendant will be awarded attorney's fees under *Gov. Code § 91012* only if plaintiff's claim is frivolous, unreasonable, malicious, or clearly groundless [*Community Cause v. Boatwright (1987) 195 Cal. App. 3d 562, 574, 575-576, 240 Cal. Rptr. 794]* . As an agency, the commission would not be able to obtain an award of costs and attorney's fees under this provision. For additional discussion and forms pertaining to costs and attorney's fees, see Ch. 174, *Costs and Attorney's Fees* .

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Volume 20: Easements thru Eminent Domain-Chs. 240-247
Chapter 242 ELECTION CAMPAIGNS
PART V. FORMS
A. Financing and Lobbying

20-242 California Forms of Pleading and Practice--Annotated § 242.131

§ 242.131 Request to Civil Prosecutor by Private Litigant to Commence Civil Action for Violations of Political Reform Act of 1974 [Gov. Code §§ 91001(b), 91001.5, 91007(a)]

[1] FORM Request to Civil Prosecutor by Private Litigant to Commence Civil Action for Violations of Political Reform Act of 1974 [Gov. Code §§ 91001(b), 91001.5, 91007(a)]

TO _____ [*name*], _____ [Executive Director of the Fair Political Practices Commission of California *or* Attorney General of California *or* District Attorney of _____ County, California *or* City Attorney of _____ (*specify city*), California]:

IT IS HEREBY REQUESTED that you commence a civil action for damages under *Government Code Section 91005* against _____ [*name*], _____ [*specify capacity, e.g.*, candidate for mayor of the city of _____, California][, _____ (*list names and capacities of other persons or committees against whom a civil action is requested*),] for violations of the Political Reform Act of 1974, Government Code Section(s) _____ [*specify code section(s) allegedly violated, e.g.*, 84300].

The grounds for believing that a cause of action exists are as follows: _____ [*state facts supporting belief that cause of action exists, e.g.*, The candidate, _____ (*name*), received cash contributions and made cash expenditures in an amount of $100 or more, in violation of *Government Code Section 84300(a), (b)*].

You are asked to respond to this request, pursuant to *Government Code § 91007* indicating whether you intend to file a civil action. Please direct your response to _____ [*name of requestor*], _____ [*specify address of requestor*].
Dated: _____.

_____ [*signature of requestor*]

[2] Use of Form

The form of request in [1], *above,* may be used in requesting the civil prosecutor to commence a civil action for violations of the Political Reform Act of 1974 (*Gov. Code § 81000 et seq.*). The appropriate designation of a civil prosecutor is set forth in *Gov. Code §§ 91001* and *91001.5* [*see § 242.76[2]*].

Before filing a civil action under *Gov. Code § 91004* for damages from violations of reporting requirements or under *Gov. Code § 91005* for damages from violations with respect to gifts, contributions, or expenditures, a person must file with the civil prosecutor a written request for the civil prosecutor to commence the action. The civil prosecutor must respond in writing, indicating whether or not he or she intends to file a civil action [*Gov. Code § 91007(a)*]. For discussion of time within which the prosecutor must comply to the request under *Gov. Code § 91007(a)(1), (2),* see *§ 242.76[2][c]*.

For a form of complaint and discussion of civil action to file after the request to the civil prosecutor has been filed see *§ 242.132*.

[3] Contents of Form

The form of request contains the following information:

- The name and capacity of the person designated as civil prosecutor [*see Gov. Code §§ 91001(b), 91001.5*].
- The type of action requested, including appropriate code sections.
- A statement of the grounds for believing that a cause of action exists [*Gov. Code § 91007(a)*].

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20-242 California Forms of Pleading and Practice--Annotated § 242.132

§ 242.132 Complaint by Private Litigant Residing Within Jurisdiction Against Candidate, Committee, and/or Other Alleged Violator for Damages for Violation of Reporting Requirements and/or for Violation of Restrictions on Receiving or Making Gifts, Contributions, or Expenditures Under Political Reform Act of 1974 [Gov. Code §§ 91004, 91005(a)]

[1] FORM Complaint by Private Litigant Residing Within Jurisdiction Against Candidate, Committee, and/or Other Alleged Violator for Damages for Violation of Reporting Requirements and/or for Violation of Restrictions on Receiving or Making Gifts, Contributions, or Expenditures Under Political Reform Act of 1974 [Gov. Code §§ 91004, 91005(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Violation of Political Reform Act of 1974)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff resides in _____ [*city*], _____ County, California.

2. Defendant _____ [*name*] _____ [*allege identity and capacity of defendant, e.g.*, was a candidate for mayor of _____ (*city*), California in an election held on _____ (

date)].

3. Plaintiff's residence is within the jurisdiction of _____ [*specify, e.g.*, the mayor of _____ (*city*), California].

[*EITHER, if alleging violation of reporting requirements under Gov. Code § 91004*]

4. Defendant intentionally or negligently violated reporting requirements of the Political Reform Act of 1974 by _____ [*specify violation, e.g.*, failing to report expenditures of $100 or more in his/her campaign statement filed on _____ (*date*)]. Defendant's _____ [*specify, e.g.*, failure to report the expenditures] was in violation of Government Code Section _____ [*specify, e.g.*, 84211].

[*AND/OR, if alleging violation regarding gift, contribution, or expenditure under Gov. Code § 91005(a)*]

5. On or about _____ [*date*], defendant _____ [made *or* received] _____ [a gift *or* a contribution *or* an expenditure] of approximately $_____ [*specify amount or value*] _____ [to *or* from] _____ [*name of payee, donor, or donee*]. The _____ [gift *and/or* contribution *and/or* expenditure] was _____ [*specify violation, e.g.*, made in cash in an amount of $100 or more] in violation of Government Code Section(s) _____ [*84300 and/or 84304 and/or 86203 and/or 86204*].

[*ADD, if plaintiff is informed or believes of additional violations*]

6. Plaintiff is informed and believes and thereon alleges that defendant, in violation of Government Code Section _____ [*specify*], _____ [*describe violation of reporting requirements or restrictions pertaining to gifts, contributions, or expenditures, e.g.*, received additional cash contributions in amounts of $100 or more. The exact amount and dates of these additional contributions are not presently known, but plaintiff will ask leave of court to amend this complaint when the exact information is ascertained].

[*CONTINUE*]

7. On _____ [*date*], plaintiff made a written request to _____ [*name*], the _____ [*specify title of civil prosecutor, e.g.*, City Attorney for _____ (*city*), California], that he/she file a civil action for damages based on the violations alleged in this complaint. A copy of plaintiff's request is attached hereto as Exhibit A and made a part hereof.

8. The _____ [*specify title of civil prosecutor, e.g.*, City Attorney] _____ [responded on _____ (*date*), that he/she did not intend to file a civil action *or* responded on _____ (*date*), that he/she intended to file a civil action but failed to file a civil action within 120 days from receipt of plaintiff's request *or* failed to respond within 120 days from receipt of plaintiff's request *or* filed a civil action entitled _____ vs. _____ (*specify title*), No. _____, on _____ (*date*), in _____ (*specify court*), which was dismissed without prejudice to any other action for failure to proceed diligently and in good faith]. [A copy of the response to plaintiff's request is attached

as Exhibit B and made a part hereof.]

WHEREFORE, plaintiff prays judgment as follows:

[*EITHER, for action under Gov. Code § 91004*]

1. For damages in the amount of $_____, representing the _____ [amount *or* value] of _____ [gift(s) *and/or* contribution(s) *and/or* expenditure(s)] not properly reported under Government Code Section(s) _____ [*specify*];

[*AND/OR, for action under Gov. Code § 91005 for $1,000 in damages:*]

2. For damages in the amount of $1,000.00;

[*OR, for action under Gov. Code § 91005 for treble damages*]

2. For damages in the amount of _____ [$_____], which is three times the amount of each _____ [gift *and/or* contribution *and/or* expenditure] _____ [made *or* received] in violation of Government Code Section(s) _____ [84300 *and/or* 84304 *and/or* 86203 *and/or* 86204];

[*CONTINUE*]

3. For payment of 50 percent of the damages recovered to plaintiff and payment of the remaining 50 percent to the General Fund of the State of California, pursuant to *Government Code Section 91009*;

4. For reasonable attorney's fees in the sum of $_____;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. For discussion, see [7], below; for form, see § 242.130[1].*]

[2] Use of Form

The form of complaint in [1], *above*, may be used by a person residing within the jurisdiction in an action for damages against a candidate, committee, or other person for violation of reporting requirements [*see Gov. Code § 91004*; *see also § 242.50* et seq.], or for violation of restrictions on making or receiving gifts, contributions, or expenditures [*see Gov. Code § 91005(a)*; *see also § 242.40* et seq.].

Before filing a civil action pursuant to *Gov. Code § 91004* or *91005*, a private litigant must first file with the civil prosecutor a written request for the civil prosecutor to commence the action [*Gov. Code § 91007(a)*; *see § 242.131* (form of request to civil prosecutor); *see also § 242.76[2]*]. A private litigant may not file an action if the civil prosecutor indicates in the affirmative and files suit 120 days from receipt of the request unless the prosecutor's action is dismissed without prejudice [*see Gov. Code §§ 91007(a)(1), 91008*]. On the other hand, a private litigant can file an action when the civil prosecutor responds to the request in the negative within 120 days from receipt of the request, or fails to respond within that time [*Gov. Code § 91007(a)(2)*; for discussion, *see § 242.76[2][c]*]. For discussion of the tolling effect of written request for commencing action under *Gov. Code § 91007(a)(3)*, see *§ 242.76[2][d]*.

Additionally, within 10 days of filing a complaint, cross complaint, or other initial pleading in actions for damages under *Gov. Code §§ 91004* and *91005*, either a copy of the initial pleading or a notice must be served on the Fair Political Practices Commission [*Gov. Code § 91007(b)*; *see § 242.76[3]*]. Failure to so notify the commission is not grounds for dismissal of the pleading [*Gov. Code § 91007(c)*].

[3] Allegations

The form of complaint alleges:

- Plaintiff's residence (Paragraph 1) [*see Gov. Code §§ 91004, 91005(a)*].

- The identity and capacity of defendant (Paragraph 2).

- Plaintiff's residence within the jurisdiction to which the office or measure that is the subject of the violations relates (Paragraph 3) *Gov. Code §§ 91004, 91005(a)*; *see* [4], *below*].

- Violations of reporting requirements if action is brought under *Gov. Code § 91004* and/or violations of restrictions on gifts, contributions, or expenditures if action is brought under *Gov. Code § 91005(a)* (Paragraphs 4, 5).

- Additional violations based on information and belief, if appropriate (Paragraph 6).

- Plaintiff's written request for the civil prosecutor to file suit (Paragraph 7) [*see Gov. Code § 91007*; *see also § 242.131* (form of request to civil prosecutor).

- The civil prosecutor's response to plaintiff's request (Paragraph 8) [*Gov. Code § 91007(a)*].

[4] Standing to Sue

A person residing within the jurisdiction may sue for damages for violations of the Political Reform Act of 1974 under *Gov. Code §§ 91004* and *91005*. If the alleged violations pertain to a campaign involving a state office or agency, a person residing within the state is a person residing within the jurisdiction. If the violations relate to a local government office or agency, a plaintiff has standing to sue if he or she resides within the region, county, city, district, or other geographical area in which the office or agency has jurisdiction [*see Gov. Code § 82035*; *see also § 242.21[7]*].

[5] Amount and Apportionment of Damages

In an action under *Gov. Code § 91004* for violation of reporting requirements, the plaintiff may recover damages in an amount not more than the amount or value not properly reported (Paragraph 1 of prayer) [*Gov. Code § 91004*]. In an action for violation of restrictions on making and receiving a gift, contribution, or expenditure, a person residing within the jurisdiction may recover damages in an amount up to $1,000 or three times the amount of the unlawful contribution, gift, or expenditure, whichever amount is greater (Alternative Paragraphs 2 of prayer) [*Gov. Code § 91005(a)*; *see § 242.76[4]*]. It is not clear under *Gov. Code § 91005(a)* whether plaintiff may recover $1,000 for each violation, if seeking damages for more than one unlawful contribution, gift, or expenditure, or whether the minimum $1,000 recovery covers all violations alleged in one action.

If a judgment is entered against a defendant in an action under *Gov. Code § 91004* or *91005*, the plaintiff receives 50 percent of the amount recovered, and the remaining 50 percent is deposited in the state's General Fund [*Gov. Code § 91009*]. Thus, the prayer should request this allocation of damages (Paragraph 3 of prayer).

[6] Attorney's Fees and Costs

The court may award litigation costs, including reasonable attorney's fees, to a plaintiff or defendant, other than an agency, who prevails in any action authorized by the Act (Paragraphs 4, 5 of prayer) [*Gov. Code § 91012*]. But prevailing defendants in actions under the Political Reform Act may only be awarded attorney's fees if the suit against them was frivolous, unreasonable, or without foundation [*Community Cause v. Boatwright (1987) 195 Cal. App. 3d 562, 575-576, 240 Cal. Rptr. 794* ; *People v. Roger Hedgecock for Mayor Com. (1986) 183 Cal. App. 3d 810, 815, 228 Cal. Rptr. 424]* .

[7] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case in the superior court [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[8] Security for Costs

On motion of any party, the court must require a private plaintiff to post a bond in a reasonable amount at any stage of the litigation to guarantee payment of costs [*Gov. Code § 91012*; *see § 242.76[7]*].

[9] Cross References

For a form and discussion of the request to civil prosector which must be filed before commencing a civil action, see *§ 242.131*.

For a form of complaint and discussion of injunctive relief against candidate, committee, and/or other alleged violator by private litigant, see *§ 242.134*.

For forms for use in recovering costs and attorney's fees, see Ch. 174, *Costs and Attorney's Fees* .

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20-242 California Forms of Pleading and Practice--Annotated § 242.133

§ 242.133 Complaint by Private Litigant Residing Within Jurisdiction Against Candidate, Committee, and/or Other Alleged Violator for Injunctive Relief to Enjoin Violations or to Compel Compliance With Political Reform Act of 1974 [Civ. Code § 3422; Code Civ. Proc. § 527(a); Gov. Code § 91003(a)]

[1] FORM Complaint by Private Litigant Residing Within Jurisdiction Against Candidate, Committee, and/or Other Alleged Violator for Injunctive Relief to Enjoin Violations or to Compel Compliance With Political Reform Act of 1974 [Civ. Code § 3422; Code Civ. Proc. § 527(a); Gov. Code § 91003(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR PRELIMINARY AND PER-
_____ [*name*],	)	MANENT INJUNCTIVE RELIEF
Defendant.	)	(Violation of Political Reform Act of 1974)
	)	
	)	

_____

Plaintiff alleges:

1. [*Allege plaintiff's residence. See § 242.132[1], Paragraph 1*].

2. [*Allege identity and capacity of defendant. See § 242.132[1], Paragraph 2*].

3. [*Allege plaintiff's residence within jurisdiction of office or agency to which violations relate. See § 242.132[1], Paragraph 3*].

[*EITHER, if seeking to enjoin violations*]

4. Defendant is in violation of the Political Reform Act of 1974 as follows: _____ [*allege violations, including code sections violated, that plaintiff seeks to enjoin, e.g.*, (a) defendant has received and continues to receive anonymous contributions of $100 or more and refuses to deposit them in the General Fund, in violation of *Government Code Section 84304*; (b) defendant has made and continues to make cash expenditures of $100 or more, in violation of *Government Code Section 84300(b)*].

[*AND/OR, if seeking to compel compliance*]

5. Defendant has failed to comply with the provisions of the Political Reform Act of 1974 as follows: _____ [*allege actions that plaintiff seeks to compel, e.g.*, (a) defendant has failed to maintain detailed accounts, records, bills, and receipts that are necessary to prepare campaign statements, in violation of *Government Code Section 84104*; (b) defendant has failed to file campaign statements, in violation of *Government Code Section 84200*].

[*CONTINUE*]

[6. On or about _____ (*date*), plaintiff filed a complaint, a copy of which is attached as Exhibit A and made a part hereof, with the Fair Political Practices Commission requesting that the commission act to _____ (enjoin defendant's violations of *and/or* compel defendant's compliance with) the Act, as described in Paragraph(s) _____ (4 *and/or* 5) of this complaint. The commission has _____ (failed *or* refused) to act on that complaint.]

7. Plaintiff has no adequate remedy at law for the injuries _____ [currently being suffered *and/or* that are threatened] from defendant's continued violation(s) of Government Code Section(s) _____ [*specify*]. Plaintiff has no adequate remedy at law because _____ [*specify facts showing inadequacy of legal remedy, e.g.*, plaintiff will be forced to institute a multiplicity of lawsuits to obtain adequate compensation for continued violations of a similar nature].

8. Under *Government Code Section 91003(a)*, this court may award plaintiff his/her costs, including reasonable attorney's fees, incurred in this action.

WHEREFORE, plaintiff prays judgment as follows:

1. For a preliminary injunction enjoining defendant _____ [*name*] from _____ [*specify actions that are to be prohibited, e.g.*, continuing to make cash expenditures of $100 or more in violation of *Government Code Section 84300(b)*];

2. For a permanent injunction enjoining defendant _____ [*name*] as follows:

a. From _____ [*specify actions that are to be prohibited, e.g.*, continuing to make cash expenditures of $100 or more in violation of *Government Code Section 84300(b)*];

b. To _____ [*specify actions that are to be commanded, e.g.*, prepare and file campaign statements in compliance with *Government Code Section 84200 et seq.*];

3. For reasonable attorney's fees in the sum of $_____;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. For discussion, see [5], below; for a form, see § 242.130[1].*]

[2] Use of Form

The form of complaint in [1], *above*, may be used by any person residing in the jurisdiction [*see Gov. Code § 91003(a)*; *see also § 242.132* (form of complaint by private litigant for damages)] in an action for injunctive relief to enjoin violations of or to compel compliance with the provisions of the Political Reform Act of 1974 [*Gov. Code § 91003(a)*; *see § 242.77*]. The complaint seeks preliminary and permanent injunctions [*see Civ. Code § 3422*; *Code Civ. Proc. §§ 526, 527*; *Gov. Code § 91003(a)*].

For discussion and forms pertaining to injunctive relief for violations of conflict of interest provisions of the Political Reform Act of 1974 [*see Gov. Code § 91003(b)*], see Ch. 469, *Public Entities and Officers: Conflicts of Interest* . For additional discussion and forms pertaining to injunctive relief in general, see Ch. 303, *Injunctions* .

[3] Allegations

The form alleges, in part, the following:

- Violations, including code sections violated, that plaintiff seeks to enjoin (Paragraph 4).

- Defendant's failure to comply with provisions of the Act (Paragraph 5).

- Plaintiff's complaint, if any, to the commission before filing a civil action and the commission's response (Optional Paragraph 6).

- The absence of any adequate remedy at law for plaintiff's injuries (Paragraph 7) [*Civ. Code § 3422*; *Code Civ. Proc. §§ 526, 527(a)*; *Gov. Code § 91003(a)*].

- Plaintiff's request for litigation costs, including reasonable attorney's fees (Paragraph 8) [*Gov. Code § 91003(a)*].

A paragraph alleging the existence of fictitious defendants may be added under appropriate circumstances [*see* Ch. 20, *Allegations Commonly Used*].

[4] Supporting Evidence Required

A preliminary injunction may be granted on a verified complaint or on affidavits or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*] showing sufficient grounds for the injunction [*Code Civ. Proc. § 527(a)*]. The form of complaint in [1], *above,* is based on the assumption that counsel will file affidavits or declarations to support the allegations. If the complaint will not be so supported, counsel must take care to plead evidentiary facts that will entitle plaintiff to the relief sought [*see E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* , and have the complaint verified [*Code Civ. Proc. § 527(a)*].

[5] Verification

When a preliminary injunction is sought, the complaint must be verified unless it is supported by affidavits or declarations that provide evidentiary support [*see Code Civ. Proc. § 527(a*); *see* [4], *above*]. Verification of the complaint requires that the defendant file a verified answer, unless the defendant is a public entity [*Code Civ. Proc. § 446*]. Verification of the complaint also precludes a general denial [*Code Civ. Proc. § 431.30(d)*].

[6] Service of Copy of Complaint on Fair Political Practices Commission

Within 10 days of filing a complaint, cross complaint, or other initial pleading in an action for injunctive relief under *Gov. Code § 91003*, either a copy of the initial pleading or a notice must be served on the Fair Political Practices Commission [*Gov. Code § 91007(b*); *see § 242.76[3]*]. Failure to so notify the commission is not grounds for dismissal of the pleading [*Gov. Code § 91007(c)*].

[7] Prior Complaint With Commission

The court may in its discretion require any plaintiff, other than the commission, to file a complaint with the Fair Political Practices Commission before seeking injunctive relief [*Gov. Code § 91003(a)*]. Therefore, if a complaint has previously been filed with the commission, counsel should allege the filing in the subsequent complaint for injunctive relief (Optional Paragraph 6).

[8] Notice to Opposite Party for Preliminary Injunction

No preliminary injunction may be granted without notice to the opposite party [*Code Civ. Proc. § 527(a)*]. For discussion and forms pertaining to the methods of giving notice, see Ch. 303, *Injunctions* .

[9] Attorney's Fees and Costs

The court may award litigation costs, including reasonable attorney's fees, to a plaintiff or defendant who prevails in a suit for injunctive relief under *Gov. Code § 91003(a)* [*Gov. Code § 91003(a)*]. This provision does not exclude agencies, in contrast to the section allowing costs and attorney's fees in other actions for violations of the Political Reform Act of 1974 [*see Gov. Code § 91012*; *see also § 242.76[8]*].

Prevailing defendants in actions under the Political Reform Act may only be awarded attorney's fees if the suit against them was frivolous, unreasonable, or without foundation [*Community Cause v. Boatwright (1987) 195 Cal. App. 3d 562, 575-576, 240 Cal. Rptr. 794* ; *People v. Roger Hedgecock for Mayor Com. (1986) 183 Cal. App. 3d 810, 815, 228 Cal. Rptr. 424]* .

[10] Cross References

For a form and discussion of a complaint against candidate, committee, and/or other alleged violator for damages, see *§*

242.132

For additional forms for use in obtaining injunctive relief, see Ch. 303, *Injunctions*

For further discussion of judicial review of administrative decisions, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions*

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20-242 California Forms of Pleading and Practice--Annotated § 242.134

§ 242.134 Ex Parte Application and Declaration for Order Allowing Substituted Personal Service of Process on Defendant Candidate in Action Pertaining to Candidacy or Election Laws [Code Civ. Proc. § 416.80; Elec. Code § 12]

[1] FORM Ex Parte Application and Declaration for Order Allowing Substituted Personal Service of Process on Defendant Candidate in Action Pertaining to Candidacy or Election Laws [Code Civ. Proc. § 416.80; Elec. Code § 12]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

	)	
	)	NO. _____
_____ [*name*],	)	EX PARTE APPLICATION AND DECLARATION
Plaintiff,	)	OF
vs.	)	_____ [*name*] FOR ORDER AL-
_____ [*name*],	)	LOWING SUBSTITUTED SERVICE
Defendant.	)	OF PROCESS ON
	)	DEFENDANT CANDIDATE
	)	Date: _____
	)	Time: _____
	)	Dept.: _____
		Trial Date: _____

_____

APPLICATION

I, _____ [*name*], hereby apply on behalf of plaintiff, _____ [*name*], for an order,

pursuant to *Elections Code Section 12*, that service be made on defendant candidate, _____ [*name*], by hand delivering one copy of the process together with one copy of the order authorizing service to the _____ [Secretary of State *or specify relevant county elections official*] appointed as the candidate's attorney for service of process, or to any person employed in the _____ [Secretary *or specify county election official*]'s office in the capacity of deputy or assistant.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for plaintiff].

2. This is an action for _____ [*specify nature of case and connection with matters concerning candidacy or election laws, e.g.*, damages under *Government Code Section 91005(a)* for violations of provisions of the Political Reform Act of 1974 restricting a candidate's cash expenditures and contributions].

3. This declaration is made in support of an application for an order for substituted personal service of process on defendant under *Elections Code Section 12*.

4. Defendant _____ [*name*] is a candidate for the office of _____ [*specify*] in an election to be held on _____ [*date*].

5. On or about _____ [*date*], defendant _____ [*name*] filed a _____ [declaration of candidacy *or* nomination paper *or specify other paper evidencing intention of candidacy*] with the _____ [Secretary of State *or specify county elections official*]. The election for which defendant filed the document has not been held.

6. Summons was issued herein on or about _____ [*date*], but personal service of process against defendant _____ [*name*] cannot be made with the exercise of due diligence because _____ [*specify efforts and/or reasons for failure, e.g.*, defendant has not been found at his/her home or office after numerous attempts by the process server].

7. Informing defendant of the foregoing application for an order allowing substituted service _____ [*state whether information regarding the ex parte application was given, attempted to be given, or should be excused, e.g.*, should not be required for the same reason that summons cannot be personally served, as declared in Paragraph 6].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The application and declaration in [1], *above*, may be used when the plaintiff seeks substituted service of process on a defendant candidate under *Elec. Code § 12*, as authorized by *Code Civ. Proc. § 416.80*.

In any action or proceeding arising out of or in connection with any matters concerning a defendant's candidacy or the election laws, the court may order that service of process be made on the candidate by hand delivering one copy of the process together with a copy of the order authorizing service to the Secretary of State or county elections official appointed as the candidate's attorney for service of process, or to any person employed in the Secretary of State's or county official's office in the capacity of assistant or deputy. The court may make an order for substituted service when it is shown by affidavit (or declaration under *Code Civ. Proc. § 2015.5*) that personal service of process against the candidate cannot be made with the exercise of due diligence [*Elec. Code § 12*].

[3] Candidate's Appointment of Attorney for Service of Process

Whenever any candidate files a declaration of candidacy, a nomination paper, or any other paper evidencing an intention to be a candidate for any public office at any election in California with the Secretary of State or a county elections official, the candidate, by that filing, irrevocably appoints the Secretary or county official and their successors in office as the candidate's attorneys on whom all process in any action or proceeding concerning the candidacy or election laws may be served with the same effect as if the candidate had been lawfully served with process. The appointment continues until the day of the election [*Elec. Code § 12*].

[4] Information Regarding Ex Parte Application

An ex parte order must be supported by declaration showing that information regarding when and where the application will be made was timely given or attempted to be given, or that for specified reasons should not be required (Paragraph 7) [*see Cal. Rules of Ct., Rule 3.1204(b)*]. For further discussion, see Ch. 372, *Motions and Orders* .

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PART V. FORMS
A. Financing and Lobbying

20-242 California Forms of Pleading and Practice--Annotated § 242.135

§ 242.135 Order on Ex Parte Application and Declaration in Action Pertaining to Candidacy or Election Laws Allowing Substituted Personal Service of Process on Defendant Candidate [Code Civ. Proc. § 416.80; Elec. Code § 12]

[1] FORM Order on Ex Parte Application and Declaration in Action Pertaining to Candidacy or Election Laws Allowing Substituted Personal Service of Process on Defendant Candidate [Code Civ. Proc. § 416.80; Elec. Code § 12]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

_____

Application having been made by plaintiff and proof having been made to the satisfaction of the court that personal service of process against defendant _____ [*name*] cannot be made with the exercise of due diligence,

IT IS ORDERED that plaintiff's application for substituted service of process be, and hereby is, granted, and that such service is to be made by hand delivering one copy of the process together with a copy of this order to the _____ [Secretary of State *or* County Clerk of _____ County].

Dated: _____.

_____ [*signature*]

Judge of the_____ Court

[2] Use of Form

The form of order in [1], *above*, may be used in granting a plaintiff's ex parte application for substituted service of process on a defendant candidate for public office [*see Code Civ. Proc. § 416.80*; *Elec. Code § 12*]. For a form and discussion of ex parte application for an order allowing substituted personal service and discussion, see *§ 242.134*.

On receipt of service of process under *Elec. Code § 12*, the Secretary of State or county clerk must immediately give notice of the service to the candidate by forwarding the copy of the process to the address shown on the candidate's declaration, nomination paper, affidavit, or other evidence of intention to be a candidate filed with that officer, by special delivery registered mail with request for return receipt [*Elec. Code § 12*].

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[Reserved]

§§ 242.136[Reserved]

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B. Improper Campaign Conduct

20-242 California Forms of Pleading and Practice--Annotated § 242.140

§ 242.140 Complaint by Registered Voter for Injunctive Relief to Restrain Violation of Truth in Endorsements Law; Unlawful Campaign Material [Code Civ. Proc. § 527; Elec. Code §§ 359, 20006]

[1] FORM Complaint by Registered Voter for Injunctive Relief to Restrain Violation of Truth in Endorsements Law; Unlawful Campaign Material [Code Civ. Proc. § 527; Elec. Code §§ 359, 20006]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR TEMPORARY RESTRAINING
_____ [*name*],	)	ORDER, AND PRELIMINARY AND PERMAN-
Defendant(s).	)	ENT INJUNCTION
	)	(Illegal Campaign Material)
	)	

_____

Plaintiff alleges:

1. Plaintiff is a qualified elector and is currently registered to vote.

2. _____ [*Allege identity and capacity of defendant, e.g.*, _____ (*name*), defendant, is a candidate for mayor of the city of _____ (*name*) in the election to be held on _____ (*date*).]

3. Defendant _____ [*name*] is _____ [preparing and intending to undertake *or* now engaged in] the _____ [publication *or* printing *or* circulation *or* posting *or* broadcasting *or* telecasting] of political material of _____ [copy *or* transcription *depending on the form of the political material*] of

which is attached as Exhibit A and made a part hereof.

4. The material complained of does not conform to the requirements of Elections Code Section _____ [*e.g.*, 20008] in that _____ [*specify manner in which material does not comply with Elections Code, e.g.*, it does not include the words "Paid Political Advertisement" as required by that section].

5. Defendant's _____[threatened] wrongful conduct, unless and until enjoined and restrained by order of this court, will cause great and irreparable injury to plaintiff in that _____ [*specify particular acts or conduct that will constitute great and irreparable injury*].

6. Plaintiff has no adequate remedy at law for the injuries _____ [currently being suffered *or* which are threatened] in that _____ [*specify additional acts or conduct that tend to show the inadequacy of any legal remedy, especially monetary damages, which plaintiff might pursue, e.g.*, monetary damages will not afford plaintiff adequate relief for the deception of voters resulting from defendant's unlawful campaign material].

WHEREFORE, plaintiff prays judgment as follows:

1. For an order requiring defendant to show cause, if any, why he/she should not be enjoined as set forth below, during the pendency of this action;

2. For a temporary restraining order, preliminary injunction, and permanent injunction, all enjoining defendant, and his/her agents, servants, and employees, and all persons acting under, in concert with, or for him/her;

3. From _____ [*specify each of the acts defendant is to be prohibited from doing or failing to do, e.g.*, publishing, printing, circulating, posting, broadcasting, or telecasting the material herein referred to, or any other political material, except in conformity with the requirements of the Truth in Endorsements Law set out in *Elections Code Section 20000 et seq.*;

4. For reasonable attorney's fees incurred in this litigation according to proof;

5. For costs of litigation herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

[*Verification, if desired. For discussion, see [4], below; for form, see § 242.130[1].*]

CERTIFICATION RE NOTICE

I hereby certify that _____ [on _____ (*date*), I informed defendant of what time and where the above application for a temporary restraining order would be made *or* in good faith I attempted to inform defendant of what time and where the application for a temporary restraining order would be made, by _____ (*specify efforts*), but I was unable to do so *or* notice to defendant of the above application for a temporary restraining order should not be required because _____ (*specify*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

[2] Use of Form

The complaint in [1], *above*, is for use by any registered voter to enjoin [*Elec. Code § 20006*] a violation of the political advertising provisions [*Elec. Code § 20008*] of the Truth in Endorsements Law. For further discussion and related forms regarding injunctions, see Ch. 303, *Injunctions* .

[3] Allegations

An injunction to restrain unlawful campaign material may be issued on the suit of any registered voter [*Elec. Code § 20006*]. The form of complaint alleges the following:

- The plaintiff's status as a registered voter (Paragraph 1).
- The defendant's identity and capacity and the particular election campaign involved (Paragraph 2).
- The nature of defendant's wrongful conduct (Paragraph 3).
- The specific Elections Code provision that is the basis of the cause of action and the manner in which the campaign material does not comply with such provision (Paragraph 4).
- Facts showing why defendant's conduct will constitute great and irreparable injury (Paragraph 5) [*Code Civ. Proc. §§ 526(a)(2), 527(c)(1)*; *see E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1]* .
- Facts showing why plaintiff lacks an adequate remedy at law (Paragraph 6) [*see Civ. Code § 3422(1)-(3)*; *Code Civ. Proc. § 526(a)(4)-(6)*].

The form includes a prayer for attorney's fees. This is not expressly authorized with respect to this cause of action, but is included because it might be argued that the plaintiff, if successful, should be entitled to attorney's fees under a "private attorney general theory" [*see Code Civ. Proc. § 1021.5*]. For discussion, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

[4] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*; for further discussion, see *§ 242.133[4]*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Certification re Notice

When a temporary restraining order is sought without formal notice, the applicant or the applicant's attorney is required to certify to the court under oath that either (1) within a reasonable time before the application, he or she informed the opposing party (or his or her attorney, if any) at what time and where the application would be made, or (2) he or she in good faith attempted to inform the opposing party (or attorney) but was unable to do so, specifying the efforts made to do so, or (3) for reasons specified he or she should not be required to inform the opposing party (or attorney) [*Code Civ. Proc. § 527(c)(2)*].

[6] Jurisdiction

Jurisdiction in an action brought pursuant to *Elec. Code § 20006* is in the superior court [*Elec. Code § 20006*]. It is not a limited civil case [*see Code Civ. Proc. §§ 85(b), 580(b)(2)*].

For discussion and forms relating to jurisdiction generally, see Ch. 323, *Jurisdiction: Personal* and Ch. 324, *Jurisdiction: Subject Matter* .

[7] Venue

The Elections Code contains no specific provision for venue in an action involving violation of the Truth in Endorsements Law. Presumably general venue provisions apply [*see Code Civ. Proc. § 395(a)* (venue based on of defendant's residence)].

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20-242 California Forms of Pleading and Practice--Annotated § 242.141

§ 242.141 Complaint by Member of County or State Central Committee Against Candidate or Committee for Injunctive Relief to Restrain Candidate's or Committee's Unlawful Use of Official Party Name [Code Civ. Proc. § 527; Elec. Code § 20007]

[1] FORM Complaint by Member of County or State Central Committee Against Candidate or Committee for Injunctive Relief to Restrain Candidate's or Committee's Unlawful Use of Official Party Name [Code Civ. Proc. § 527; Elec. Code § 20007]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR TEMPORARY RESTRAINING
_____ [*name*],	)	ORDER, AND PRELIMINARY AND PERMAN-
Defendant(s).	)	ENT
	)	INJUNCTION
	)	(Unlawful Use of Political Party Name)

_____

Plaintiff alleges:

1. _____ [*Name*], plaintiff, is _____ [*allege status of plaintiff as member of county or state central committee, e.g.*, a member of the Los Angeles County Republican Committee].

2. Defendant _____ [*name of candidate or committee acting on behalf of candidate*] is _____ [preparing and intending to represent *or* representing] that an organization having the name _____ [*committee name being used to mislead voters, e.g.*, "Central Los Angeles Committee of Republicans for Smith"] supports the candidacy of _____ [defendant *or name of candidate*] for the

office of _____ [*specify office sought by candidate involved, e.g.*, Mayor of Los Angeles] at the election to be held on _____ [*date*].

3. _____ [*Allege manner in which representation is or will be made, e.g.*, This representation is now being made, and will continue to be made, both orally and in printed campaign material, and in radio and television advertisements].

4. _____ [Defendant *or name of candidate*] is not affiliated with the _____ [*name*, e.g., Republican] party and does not in fact have the support of the _____ [*name of state or county central committee, e.g.*, Los Angeles County Republican Central Committee]; but the representation that he/she is supported by the _____ [*committee name being used to mislead voters, e.g.*, Central Los Angeles Committee of Republicans for Smith] tends to lead the voters to the mistaken belief that he/she has the support of the _____ [*name of state or county central committee, e.g.*, Los Angeles County Republican Central Committee]. This misrepresentation by the defendant is prohibited by *Elections Code Section 20007*.

5. [*Allege irreparable injury. See § 242.140[1], Paragraph 5.*]

6. [*Allege inadequacy of legal remedy. See § 242.140[1], Paragraph 6.*]

WHEREFORE, plaintiff prays judgment as follows:

1. For an order requiring defendant to show case, if any, why he/she should not be enjoined as set forth below, during the pendency of this action;

2. For a temporary restraining order, preliminary injunction, and permanent injunction, all enjoining defendant, and his/her agents, servants, and employees, and all persons acting under, in concert with, or for him/her;

3. From _____ [*specify each of the acts defendant is to be prohibited from doing or failing to do, e.g.*, representing in any way that the _____ (*name of committee name being used to mislead voters, e.g.*, Central Los Angeles Committee of Republicans for Smith) or any other organization having a name which might reasonably be confused with the _____ [*name of state or county central committee, e.g.*, Los Angeles County Republican Central Committee) supports the candidacy of _____ (defendant *or name of candidate*) for the office of _____ (*specify office involved, e.g.*, Mayor of Los Angeles) at the election to be held on _____ (*date*)];

4. For reasonable attorney's fees incurred in this litigation according to proof;

5. For costs of litigation incurred in this litigation; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

[*Verification, if desired. For discussion, see § 242.133[4], [5]; for form, see § 242.130[1].*]

[*Certification re Notice. See § 242.140[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by any member of a state or county central committee to obtain injunctive relief against advertising that a candidate has the support of an organization having a name so similar to that of the state or county central committee that the voters will tend to be misled into believing that such committee supports the candidate [*see Elec. Code § 20007*]. An injunction may be issued on the suit of any member of a county central committee or state central committee[*Elec. Code § 20007*].

For further discussion of bringing a complaint for injunctive relief for improper campaign conduct, see *§ 242.140*.

[3] Allegations

The complaint alleges:

- Plaintiff's status as a member of the appropriate county or state central committee (Paragraph 1).

- That a candidate or a committee acting on his or her behalf, is representing, or is about to represent, in connection with an election campaign, that the candidate has the support of a committee or an organization that includes as part of its name the name, or any variation thereon, of a qualified political party with which the candidate is not affiliated, together with the words "county committee" or "central committee" or "county" or any other terms that might tend to mislead the voters into believing that the candidate has the support of that party's state or county central committee (Paragraph 2).

- The manner in which the misrepresentation is or will be made (Paragraph 3).

- That the candidate does not have the support of the state or county central committee of which plaintiff is a member (Paragraph 4).

- That the defendant's misrepresentation is misleading to the voters and therefore in violation of *Elec. Code § 20007* (Paragraph 4).

- Irreparable injury and the inadequacy of a legal remedy (Paragraphs 5, 6) [*see Civ. Code § 3422(1)-(3)*; *Code Civ. Proc. §§ 526(a)(2), (4)-(6), 527(c)(1)*].

The form includes a prayer for attorney's fees. This is not expressly authorized with respect to this cause of action, but is included because it might be argued that the plaintiff, if successful, should be entitled to attorney's fees under a "private attorney general theory" [*see Code Civ. Proc. § 1021.5*]. For discussion, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

[4] Jurisdiction

Jurisdiction in an action brought pursuant to *Elec. Code § 20007* is in the superior court [*Elec. Code § 20007*]. It is not a limited civil case [*see Code Civ. Proc. §§ 85(b), 580(b)(2)*].

For discussion and forms relating to jurisdiction generally, see Ch. 324, *Jurisdiction: Subject Matter* .

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20-242 California Forms of Pleading and Practice--Annotated § 242.142

§ 242.142 Complaint for Injunctive Relief by Registered Voter to Restrain Unlawful Use of Simulated Ballot [Code Civ. Proc. § 527; Elec. Code § 20009(c)]

[1] FORM Complaint for Injunctive Relief by Registered Voter to Restrain Unlawful Use of Simulated Ballot [Code Civ. Proc. § 527; Elec. Code § 20009(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR TEMPORARY RESTRAINING
_____ [*name*],	)	ORDER, AND PRELIMINARY AND PERMAN-
Defendant(s).	)	ENT
	)	INJUNCTION
	)	(Unlawful Use of Simulated Ballot)

_____

1. Petitioner is a United States citizen [more than] 18 years of age, a resident in this state, and a duly registered voter in _____ County, California.

2. [*Identity and status of defendant. See, for example, § 242.140[1], Paragraph 2*].

3. Defendant _____ [*name*] is _____ [preparing and intending to undertake *or* now engaged in] the _____ [*specify as appropriate* : publication *or* printing *or* circulation *or* posting *or* distribution] of a simulated ballot [, a copy of which is attached as Exhibit A and made a part hereof].

4. The simulated ballot does not conform to the requirements of *Elections Code Section 20009* in that _____ [*specify as appropriate* : it does not include the "Notice to Voters" as required by that section *or*

it bears the _____ (official seal *or* official insignia) of _____ (*name of public entity*), the use of which is prohibited by that section].

5. [*Allege irreparable injury. See § 242.140[1], Paragraph 5.*]

6. [*Allege inadequacy of legal remedy. See § 242.140[1], Paragraph 6.*]

WHEREFORE, plaintiff prays judgment as follows:

1. For an order requiring defendant to show cause, if any, why he/she should not be enjoined as set forth below, during the pendency of this action;

2. For a temporary restraining order, preliminary injunction, and permanent injunction, all enjoining defendant, and his/her agents, servants, and employees, and all persons acting under, in concert with, or for him/her;

3. From _____ [*specify each of the acts defendant is to be prohibited from doing or failing to do, e.g.*, publishing, printing, circulating, posting, or distributing the simulated ballot herein referred to, or any other simulated ballot, except in conformity with the requirements of *Elections Code Section 20009*];

4. For reasonable attorney's fees incurred in this litigation according to proof;

5. For costs of litigation incurred in this litigation; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

[*Verification, if desired. For discussion, see § 242.133[4], [5]; for form, see § 242.130[1].*]

[*Certification re Notice. See § 242.140[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use to obtain injunctive relief against a violation of *Elec. Code § 20009* which prohibits the publishing, printing, circulation, posting, or distribution of a simulated ballot, or simulated sample ballot, which does not include a "Notice to Voters" as prescribed in that section.

For further discussion of bringing a complaint for injunctive relief for improper campaign conduct, see *§ 242.140*.

[3] Allegations

An injunction may be issued on the suit of any registered voter [*Elec. Code § 20009(c)*]. This form of complaint alleges:

- Plaintiff's status as a registered voter (Paragraph 1).
- Identity and status of defendant (Paragraph 2).
- Defendant's preparation of a simulated ballot (Paragraph 3).
- In what respect the statutory requirements set out in *Elec. Code § 20009(a)* or *(b)* have not been met (Paragraph 4).
- Irreparable injury and the inadequacy of any legal remedy (Paragraphs 5, 6) [*see Civ. Code § 3422(1)-(3)*; *Code Civ. Proc. §§ 526(a)(2), (4)-(6), 527(c)(1)*].

[4] Jurisdiction

Jurisdiction in an action brought pursuant to *Elec. Code § 20009* is in the superior court [*Elec. Code § 20009(c)*]. It is not a limited civil case [*see Code Civ. Proc. §§ 85(b), 580(b)(2)*].

For discussion and forms relating to jurisdiction generally, see Ch. 324, *Jurisdiction: Subject Matter* .

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20-242 California Forms of Pleading and Practice--Annotated § 242.143

§ 242.143 Complaint for Injunctive Relief by Registered Voter to Restrain Unlawful Use of Image, Picture, or Photograph [Code Civ. Proc. § 527; Elec. Code § 200010(c)]

[1] FORM Complaint for Injunctive Relief by Registered Voter to Restrain Unlawful Use of Image, Picture, or Photograph [Code Civ. Proc. § 527; Elec. Code § 200010(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR TEMPORARY RESTRAINING
_____ [*name*],	)	ORDER, AND PRELIMINARY AND PERMAN-
Defendant(s).	)	ENT INJUNCTION
	)	(Unlawful Use of Image, Picture, or Photograph Con-
	)	cerning Candidate)

_____

1. Plaintiff is a resident in this state, and a duly registered voter in _____ County, California.

2. [*Identity and status of defendant. See, for example, § 242.140[1], Paragraph 2]*.

3. Defendant _____[*name*] is _____ [preparing and intending to undertake *or* now engaged in] the _____ [*specify as appropriate:* production *and/or* publication *and/or* distribution *and/or* broadcasting] of campaign material as defined in *Elections Code Section 20010(a)* consisting of _____ [*specify, e.g.*, an advertisement in a newspaper] that contains _____ [*specify, e.g.*, a photograph of persons into which the image of the defendant is superimposed *or* a picture of the defendant into which the image of another person is superimposed], a copy of which is attached as Exhibit A and made a part hereof.

4. The campaign material specified above does not conform to the requirements of *Elections Code Section 20010(b)* in that _____ [*specify, e.g.,* it does not include the words "This picture is not an accurate representation of fact" on _____ (the picture *or* each picture *or* the photograph *or* each photograph) as required by *Elections Code Section 20010(b).*]

[*EITHER*]

5. Defendant is doing the acts alleged above with actual malice as defined in *Elections Code Section 20010(a)*, that is, the defendant has knowledge that the image of a person has been superimposed on a _____ [picture *or* photograph] to create a false representation or is doing this with a reckless disregard of whether or not the image of a person has been superimposed on a _____ [picture *or* photograph] to create a false representation in that _____[*specify facts showing defendant's knowledge or reckless disregard*].

[*OR*]

5. Defendant is doing the acts alleged above with actual malice as defined in *Elections Code Section 20010(a)*, that is, the defendant has knowledge that the image of a person has been superimposed on a _____ [picture *or* photograph] to create a false representation in that _____[*specify facts showing defendant's knowledge*].

[*OR*]

5. Defendant is doing the acts alleged above with actual malice as defined inElections Code Section 20010(a), that is, the defendant is doing this with a reckless disregard of whether or not the image of a person has been superimposed on a _____ [picture *or* photograph] to create a false representation in that _____[*specify facts showing defendant's reckless disregard*].

[*CONTINUE*]

6. [*Allege irreparable injury. See § 242.140[1], Paragraph 5.*]

7. [*Allege inadequacy of legal remedy. See § 242.140[1], Paragraph 6.*]

WHEREFORE, plaintiff prays judgment as follows:

1. For an order requiring defendant to show cause, if any, why he/she/it should not be enjoined as set forth below, during the pendency of this action;

2. For a temporary restraining order, preliminary injunction, and permanent injunction, all enjoining defendant, and his/her/its agents, servants, and employees, and all persons acting under, in concert with, or for him/her/it;

3. From _____ [*specify each of the acts defendant is to be prohibited from doing or failing to do, e.g.,* publishing, distributing or broadcasting the campaign material herein referred to, or any other campaign material, except in conformity with the requirements of *Elections Code Section 20010*];

4. For reasonable attorney's fees incurred in this litigation according to proof;

5. For costs of litigation incurred in this litigation; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if needed or desired. For discussion, see § 242.133[4], [5]; for form, see § 242.130[1].*]

[*Certification re Notice. See § 242.140[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a registered voter to obtain a temporary restraining order and injunctive relief for a violation of *Elec. Code § 20010* which prohibits, except as provided in *Elec. Code § 20010(b)* [*see § 242.96[3]*], a person, firm, association, corporation, campaign committee, or organization, with actual malice [as defined in *Elec. Code § 20010(a), see § 242.96[2][b]*], from producing, distributing, publishing, or broadcasting campaign material [as defined in *Elec. Code § 20010(a), see § 242.96[2][a]*] that contains (1) a picture or photograph of a person or persons into which the image of a candidate for public office is superimposed, or (2) a picture or photograph of a candidate for public office into which the image of another person or persons is superimposed [*Elec. Code § 20010(a)*]. For those to whom the provisions of *Elec. Code § 20010* do not apply, see discussion in *§ 242.96[5]*.

On filing a petition under *Elec. Code § 20010*, the plaintiff may obtain a temporary restraining order in accordance with *Code Civ. Proc. § 527* [*Elec. Code § 20010(c)(1)*]. For discussion and related forms, see Ch. 303, *Injunctions* .

For further discussion of bringing a complaint for injunctive relief for improper campaign conduct, see *§ 242.140*.

[3] Allegations

This form of complaint alleges [*see Elec. Code § 20010(c)(1)*]:

- Plaintiff's status as a registered voter (Paragraph 1).
- Identity and status of defendant (Paragraph 2).
- Defendant's production, publication, distribution, or broadcasting of specified campaign material within the scope of *Elec. Code § 20010* (Paragraph 3).
- In what respect the statutory requirements set out in *Elec. Code § 20010(c)* have not been met (Paragraph 4).
- Defendant doing the prohibited activity with actual malice as defined in *Elec. Code § 20010(a)*

(Paragraph 5).

- Irreparable injury and the inadequacy of any legal remedy (Paragraphs 6, 7) [*see Civ. Code § 3422(1)-(3)*; *Code Civ. Proc. §§ 526(a)(2), (4)-(6), 527(c)(1)*].

[4] Attorney's Fees

Elec. Code § 20010(c)(1) does not explicitly provide for the recovery of attorney's fees when a registered voter seeks a temporary restraining order and injunctive relief under that subsection, while *Elec. Code § 20010(c)(2)* does explicitly provide for the recovery of attorney's fees in an action for damages brought by the candidate whose likeness appears in the picture or photograph. Nevertheless, it might be argued that a registered voter who successfully proceeds under *Elec. Code § 20010(c)(1)* should be entitled to attorney's fees under a "private attorney general theory" [*see Code Civ. Proc. § 1021.5*]. For discussion, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

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20-242 California Forms of Pleading and Practice--Annotated § 242.144

§ 242.144 Complaint for Injunctive Relief by Incumbent Candidate to Enjoin Statements and Conduct by Candidate Pretending to Be Incumbent of Office [Code Civ. Proc. § 527; Elec. Code § 18350]

[1] FORM Complaint for Injunctive Relief by Incumbent Candidate to Enjoin Statements and Conduct by Candidate Pretending to Be Incumbent of Office [Code Civ. Proc. § 527; Elec. Code § 18350]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR TEMPORARY RESTRAINING
_____ [*name*],	)	ORDER, AND PRELIMINARY AND PERMAN-
Defendant(s).	)	ENT INJUNCTION
	)	(Misrepresentation of Incumbency)
	)	

_____

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, the incumbent of the office of _____ [*specify office, e.g.*, Supervisor of _____ County, California].

2. Defendant is, and at all times herein mentioned was, a candidate for _____ [nomination *or* election] to the office held by plaintiff at the election to be held on _____ [*date*].

3. Commencing on or about _____ [*date*], and with intent to mislead the voters in connection with defendant's campaign for _____ [nomination *or* election] to that office, defendant _____ [*allege specific acts constituting misrepresentation by defendant, e.g.*, has assumed, pretended,

and implied, and continues to assume, pretend, and imply, by statements and conduct that he/she is the incumbent of the office held by plaintiff, to plaintiff's irreparable injury] and in direct violation of *Elections Code Section 18350*.

4. The statements and conduct by defendant consist of the following, among others: _____ [*allege specific statements and conduct of defendant*].

5. Defendant has _____ [published *or* printed *or* circulated *or* posted *or* distributed *or other as the case may be*] certain campaign materials, copies of which are attached as Exhibits A through _____ and made a part hereof.

6. Defendant threatens to and, unless restrained, will continue to assume, pretend, and imply that he/she is the incumbent of the office held by plaintiff, with the intent to mislead the voters in connection with defendant's campaign for _____ [nomination *or* election] to the office, to plaintiff's further irreparable injury.

7. [*Allege inadequacy of legal remedy. See § 242.140[1], Paragraph 6*].

WHEREFORE, plaintiff prays judgment as follows:

1. For an order requiring defendant to show cause, if any, why he/she should not be enjoined as set forth below during the pendency of this action;

2. For a temporary restraining order, preliminary injunction, and permanent injunction, all enjoining defendant, and his/her agents, servants, and employees, and all persons acting under, in concert with, or for him/her;

3. From _____ [*specify each of the acts defendant is to be prohibited from doing or failing to do, e.g.*, assuming, pretending, or implying in any manner that defendant is the incumbent of the office of _____ *specify office for which plaintiff is candidate, e.g.*, Supervisor of _____ County, California];

4. For reasonable attorney's fees incurred in this litigation according to proof;

5. For costs of litigation incurred in this litigation; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

[*Verification, if desired. For discussion, see § 242.133[4], [5]; for form, see § 242.130[1].*]

[*Certificate re Notice. See § 242.140[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a candidate, including an incumbent, to restrain a candidate who is running against him or her from pretending to be the incumbent [*see Elec. Code § 18350*].

For further discussion of bringing a complaint for injunctive relief for improper campaign conduct, see *§ 242.140*.

[3] Allegations

This complaint alleges the following:

- The identity and status of the parties (Paragraph 1, 2).
- Defendant's violation of *Elec. Code § 18350* (Paragraph 3).
- Statements and conduct of defendant constituting violation of *Elec. Code § 18350* (Paragraph 4, 5).
- Irreparable injury and the inadequacy of any legal remedy (Paragraphs 6, 7) [*see Civ. Code § 3422(1)-(3)*; *Code Civ. Proc. §§ 526(a)(2), (4)-(6), 527(c)(1)*].

The form includes a prayer for attorney's fees. This is not expressly authorized with respect to this cause of action, but is included because it might be argued that the plaintiff, if successful, should be entitled to attorney's fees under a "private attorney general theory" [*see Code Civ. Proc. § 1021.5*]. For discussion, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

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SPECIAL ALERT TO CHAPTER 243 Special Alert

20-243SA California Forms of Pleading and Practice--Annotated Scope

Scope

Special Alert

The following changes enacted by Stats. 2009, ch. 364, effective January 1, 2010, are to become operative if and when the Secretary of State certifies that California has a statewide voter registration database in compliance with the requirements of the federal Help America Vote Act of 2002 (HAVA) [Stats. 2009, ch. 364, § 7; *see 42 U.S.C. § 15301 et seq.* (HAVA)].

- *Seventeen-Year-Old May Pre-Register to Vote*. A person who is at least 17 years of age and otherwise meets all eligibility requirements to vote may submit his or her affidavit of registration as prescribed by *Elec. Code § 2102*. A properly executed registration made pursuant to this authorization will be deemed effective as of the date the affiant becomes 18 years of age, if the information in the affidavit of registration is still current at that time. If the information provided by the affiant in the affidavit of registration is not current at the time the registration would otherwise become effective, then for his or her registration to become effective, the affiant must provide the current information to the proper county elections official as prescribed by *Elec. Code § 2100 et seq.* (that is, the chapter concerning voter registration) [*Elec. Code § 2102(d)* as enacted by Stats. 2009, ch. 364, § 2]. For discussion of voter registration procedure, see *§ 243.13*.

- *Affidavit of Registration Is Modified Accordingly*. *Elec. Code § 2150*, which mandates the content of an affidavit of registration, is amended to conform to the authorization for a 17-year-old to pre-register [see *Elec. Code § 2150(a)(5)* as enacted by Stats. 2009, ch. 364, §§ 4, 4.5; *see also* Stats. 2009, ch. 364, § 8 (version enacted by section 4 is operative until and unless voters approve certain "voter-nominated primary election" plan that is contingently provided for in Stats. 2009, ch. 1; version enacted by section 4.5, which is identical in all pertinent respects, becomes operative if and when that contingency is met)].

- *Pre-Registration Does Not Allow Signing of Petitions and Papers*. A person who submits his or her affidavit of registration pursuant to *Elec. Code § 2102(d)* is not eligible to sign a petition or paper that is subject to the Elections Code, unless at the time of signing the petition or paper, he or she is 18 years of age [*Elec. Code § 100(a)* as enacted by Stats. 2009, ch. 364, § 1].

In November 2005, the Secretary of State entered into an agreement with the U.S. Department of Justice to ensure the state's compliance with the voter registration list requirements of HAVA. Under the agreement, the state is committed to implementing both a temporary plan and a long-term permanent solution to meet its obligations under HAVA [*see* Memorandum of Agreement (Nov. 2, 2005), available at http://www.justice.gov/crt/voting/hava/ca_moa.php; "Justice Department Reaches Agreement With California on Federally Required Statewide Voter Registration Lists," available at http://www.justice.gov/opa/pr/2005/November/05_crt_585.html].

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Chapter 243 ELECTIONS

20-243 California Forms of Pleading and Practice--Annotated 243.syn

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[9] Dismissal of Contest

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[2] Documents to Be Obtained

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[5] Citation of Parties

[6] Trial

[7] Judgment

[8] Costs

[9] Appeal

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Costs

[5] Verification

[6] Jurisdiction and Venue

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[1] FORM

[2] Source of Form

[3] Use of Form

[4] Allegations

[5] Verification Required

[6] Cross References

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

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[1] FORM

[2] Use of Form

[3] Other Possible Uses of Form

[4] Essential Allegations

[5] Parties to Action

[6] Jurisdiction

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[2] Source of Form

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§ 243.172 Allegation of Election Bribery and Other Offenses Against Elective Franchise for Use in Statement of Contest of Election [Elec. Code §§ 16100(c), 16400, 18000 et seq.]

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[2] Use of Form

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[4] Election Fraud

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[6] Allegation That Misconduct Affected Election Results

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§ 243.174 Allegation of Error in Conducting Election and Canvass of Returns for Use in Statement of Contest of Election [Elec. Code §§ 16100(f), 16400]

[1] FORM

[2] Use of Form

[3] Allegations

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[2] Use of Form

[3] Sufficient Number of Eligible Voters Must Be Involved

§ 243.175 List of Illegal Votes [Elec. Code § 16402]

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[2] Use of Form

[3] Content of List

§ 243.176 Judgment Annulling and Setting Aside Election [Elec. Code § 16603]

[1] FORM

[2] Use of Form

[3] Findings of Fact and Conclusions of Law

[4] Cross References

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[1] FORM

[2] Use of Form

[3] Contents

[4] Jurisdiction and Venue

§ 243.191 Declaration Contesting Right to Nomination for Nonpartisan Office [Elec. Code §§ 16101, 16404, 16420]

[1] FORM

[2] Use of Form

[3] Content of Declaration

§ 243.192 Answer and Cross Contest Declaration in Contest Involving Other Than Simple Recount [Elec. Code § 16443]

[1] FORM

[2] Use of Form

[3] Content of Declaration

§ 243.193 Answering Declaration in Contest Involving Simple Recount [Elec. Code § 16466]

[1] FORM

[2] Use of Form

[3] Time for Filing

[4] Contestant's Reply

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§ 243.200 California Elections Code 1994 Repeal and Reenactment Disposition Table

[1] Repeal and Reenactment of Elections Code

[2] Table

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Volume 20: Easements thru Eminent Domain-Chs. 240-247
Chapter 243 ELECTIONS
PART I. SCOPE

20-243 California Forms of Pleading and Practice--Annotated § 243.01

§ 243.01 Scope

This chapter covers procedures relating to the conduct of elections, as follows:

- Registration of electors is discussed in *§ 243.10* et seq., with forms provided in *§ 243.140* et seq.

- Correction of errors or omissions in election material, including compelling the performance of official election duties, is discussed in *§ 243.30* et seq., with forms provided in § 243 et seq.

- Proceedings for canvassing of election returns are discussed in *§ 243.50* et seq., with a form provided in *§ 243.160*.

- Contests of general elections are discussed in *§ 243.60* et seq., with procedural checklists provided in *§ 243.120* et seq. and forms in *§ 243.170* et seq.

- Contests of primary elections are discussed in *§ 243.80* et seq., with procedural checklists provided in *§ 243.140* et seq. and forms in *§ 243.190* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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20-243 California Forms of Pleading and Practice--Annotated § 243.02

§ 243.02 Cross References

Financing and lobbying in election campaigns and improper election campaign practices are covered in Ch. 242, *Election Campaigns* .

Initiative, referendum, and recall proceedings are covered in Ch. 302, *Initiative, Referendum, and Recall* .

Matters related to freedom of speech and right of access for political activities are treated in Ch. 59, *Assemblies and Meetings* .

Other related discussion and forms include the following:

- For forms relating to church elections, see Ch. 110, *Churches and Religious Organizations*
- For discussion of disenfranchisement of prisoners, see Ch. 114, *Civil Rights: Prisoners' Rights*
- For discussion of disenfranchisement of mental incompetents, see *Ch. 285, Guardianship and Conservatorship: Care of Ward or Conservatee, § 285.26*, and Ch. 304, *Insane and Other Incompetent Persons*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechGeneral OverviewFamily LawGuardiansGeneral OverviewGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElectionsPublic Health & Welfare LawSocial ServicesMentally Ill & Mentally Retarded IndividualsGeneral Overview

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20-243 California Forms of Pleading and Practice--Annotated § 243.03

§ 243.03 Governing Law

The elective franchise is conferred by *Cal. Const., art. II, § 2*, which states the minimum age and residence qualifications for possession of the franchise. *Cal. Const., art. II, § 2.5* provides that a voter who casts a vote in an election in accordance with the laws of California shall have that vote counted [enacted by Proposition 43, March 5, 2002]. *Cal. Const., art. II, § 4*, sets out the bases for disqualification.

These constitutional provisions are not self-executing. Statutes establish procedures to do the following:

- Compel registration of persons qualified under the constitution [*Elec. Code § 2142*; *Code Civ. Proc. §§ 1085-1087* (mandate)].
- Compel cancellation of persons disqualified [*Elec. Code § 2213*].
- Determine the right to be a candidate on the ballots [*Elec. Code § 13314*].
- Determine the right to request a recount of ballots [*Elec. Code § 15620*].
- Determine the right to contest elections [*Elec. Code § 16000 et seq.*].

Penal provisions applicable to all elections [*Elec. Code § 18000*] are set out in *Elec. Code §§ 18000 et seq.* (general provisions), *18100 et seq*. (interference with voter registration), *18200 et seq*. (improper nomination), *18400 et seq*. (illegal practices with regard to ballots), and *18500 et seq.* (corruption of the voting process).

The Elections Code was repealed and reenacted in 1994. This chapter is based on the new code. For your convenience when dealing with case law that construes repealed code sections, a table correlating the old and new Elections Code is provided as an appendix to this chapter [*see § 243.200*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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Chapter 243 ELECTIONS
PART I. SCOPE

20-243 California Forms of Pleading and Practice--Annotated § 243.04

§ 243.04 Definitions

[1] Set Out in Elections and Government Codes

The Elections Code and the Government Code define various key words and terms [*Elec. Code § 300 et seq.*; *Gov. Code § 82000 et seq.*]. These definitions are to be particularly noted in initiating or defending any election proceeding.

[2] Clerk

A "clerk" is any county clerk, registrar of voters, city clerk, or other officer or board charged with the duty of conducting any election [*Elec. Code § 307*].

[3] County Clerk

A "county clerk" is a registrar of voters, in the counties in which that office has been established. In those counties in which the office of registrar of voters has not been established, the county clerk may also be known as "ex officio registrar of voters" [*Elec. Code § 311*].

[4] Elections

A "primary election" includes all primary nominating elections provided for by the Elections Code [*Elec. Code § 341*].

A "presidential primary" is the primary election that is held on the first Tuesday in February in any year which is evenly divisible by the number four, and at which delegations to national party conventions are to be chosen [*Elec. Code § 340*].

A "direct primary" is the primary election, held on the first Tuesday after the first Monday in June in each even-numbered year to nominate candidates to be voted for at the ensuing general election or to elect members of a party central committee [*Elec. Code § 316*].

[5] Elections Official

An "elections official" is a clerk or any person who is charged with the duty of conducting an election, or a county clerk, city clerk, registrar of voters, or elections supervisor having jurisdiction over elections within any county, city, or district within the state [*Elec. Code § 320*].

[6] Elector Distinguished From Voter

An "elector" is any person who is a United States citizen, 18 years of age or older, and a resident of an election precinct for at least 15 days prior to an election [*Elec. Code § 321*]. The term "voter" means any elector who is registered under the provisions of the Elections Code [*Elec. Code § 359*].

Although the terms "elector" and "voter" are often used interchangeably, an elector is one who has the qualifications to vote but may not have complied with the legal prerequisites for exercising his or her right to vote [*People v. Darcy (1943) 59 Cal. App. 2d 342, 348-349, 139 P.2d 118* , *overruled on other grounds,* *Murgia v. Municipal Court (1975) 15 Cal. 3d 286, 301, 124 Cal. Rptr. 204, 540 P.2d 44]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsClerks of CourtGovernmentsLocal GovernmentsElectionsGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsElectionsGovernmentsState & Territorial GovernmentsEmployees & Officials

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[Reserved]

§§ 243.05[Reserved]

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Chapter 243 ELECTIONS
PART II. LEGAL BACKGROUND
A. Proceedings Relating to Registration of Electors

20-243 California Forms of Pleading and Practice--Annotated § 243.10

§ 243.10 Scope

This subpart discusses proceedings related to the registration of voters. Related forms include:

- A complaint to compel voter registration [*see § 243.140*].
- A petition for a writ of mandate to compel voter registration [*see § 243.141*].
- A complaint to compel cancellation of voter registration [*see § 243.142*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 243.11 Governing Law

Qualifications of an elector are contained in *Cal. Const., art. II, §§ 1-4*. Determination of domicile and residence for voting purposes is governed by *Elec. Code § 2020 et seq.* Registration of voters is governed by *Elec. Code § 2100 et seq.* Actions to compel registration are governed by *Elec. Code § 2142*, while actions for cancellation of registration are governed by *Elec. Code § 2200 et seq.*

Additional provisions governing election proceedings are contained in *Code Civ. Proc. §§ 35* and *44*, which give precedence to cases involving elections cases in trial courts and on appeal.

Legal Topics:

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§ 243.12 Qualifications for Electors

[1] Requirements in General

Both the United States and California Constitutions require that a voter be 18 years old and a citizen of the United States [*U.S. Const., amend. XXVI*; *Cal. Const., art. II, § 2*; *see People v. Rodriguez (1973) 35 Cal. App. 3d 900, 902, 904, 111 Cal. Rptr. 238* ; *Padilla v. Allison (1974) 38 Cal. App. 3d 784, 113 Cal. Rptr. 582* (citizenship is valid criterion by which state may measure right to participate in political process, and therefore, state is not required to extend franchise to permanent resident aliens)]. The California Constitution provides that, to be able to vote in California, a person must also be a resident of California [*Cal. Const., art. II, § 2*]. However, electors are disqualified while mentally incompetent or while imprisoned or on parole for the conviction of a felony [*Cal. Const., art. II, § 4*; *Elec. Code § 2101*].

The constitutional provision for the disqualification of electors while imprisoned or on parole for the conviction of a felony is self executing. An elector convicted of any felony is temporarily disenfranchised while serving a sentence of imprisonment or while undergoing an unexpired term of parole. The temporary disenfranchisement of convicted felons while on parole applies uniformly to all paroled felons in California, whether convicted under the law of California, the law of any other state, or federal law [*Flood v. Riggs (1978) 80 Cal. App. 3d 138, 155, 156, 145 Cal. Rptr. 573]* . The constitutional provision does not disenfranchise a person who by plea or verdict has been adjudicated guilty of a felony but either (1) is on probation under the jurisdiction of the court after the court has suspended imposition or execution of sentence or (2) was sentenced under *Penal Code § 18* to punishment other than imprisonment in a state prison [*League of Women Voters v. McPherson (2006) 145 Cal. App. 4th 1469, 1484-1485, 52 Cal. Rptr. 3d 585]* .

California's temporary disenfranchisement of convicted felons comports with the *Fourteenth Amendment's* specific exception, from the guaranty of the *Equal Protection Clause*, for the disenfranchisement of persons "for participation in rebellion or other crime" [*U.S. Const., amend. XIV, § 2*; *League of Women Voters v. McPherson (2006) 145 Cal. App. 4th 1469, 1478 n.6, 52 Cal. Rptr. 3d 585]* . The term "other crime" in the *Fourteenth Amendment* is not limited to common law felonies; therefore, the term "felony" in the California constitutional provision also is not so limited [*Legal Servs. for Prisoners With Children v. Bowen (2009) 170 Cal. App. 4th 447, 450, 459, 87 Cal. Rptr. 3d 869]* .

California's disenfranchisement of convicted felons could possibly violate the federal Voting Rights Act. In a case brought by incarcerated felons in Washington, the Ninth Circuit held that section 2 of the Voting Rights Act [*42 U.S.C. § 1973*] invalidated the Washington disenfranchisement law because the plaintiffs demonstrated that the Washington law had a discriminatory impact that was attributable to racial discrimination in the state's criminal justice system [*Farrakhan v. Gregoire (9th Cir. 2010) 590 F.3d 989*].

[2] Durational Residence Requirement

Because any durational residence requirement both affects the fundamental right to vote and creates a suspect classification of citizens who have lost the right to vote because of the exercise of their right to travel, no durational residence requirement in excess of 30 days may constitutionally be imposed [*Young v. Gnoss (1972) 7 Cal. 3d 18, 27-28, 101 Cal. Rptr. 533, 496 P.2d 445* ; *see Elec. Code § 2020* (term of domicile as including day on which domicile commenced and excluding day of election)].

[3] Residence as Domicile for Voting Purposes

As used in the Elections Code, a person's residence for voting purposes generally means a person's domicile [*Elec. Code § 349(a)*]. Nevertheless, *Elec. Code § 2020 et seq.* contains specific provisions for determining a person's residence for purposes of voting both in California and in a particular precinct. The terms "residence" and "domicile" have acquired a special meaning under these sections. For example, a person's "domicile" is the place of the person's fixed habitation, in which he or she intends to remain and to which he or she intends to return if absent [*Elec. Code § 349(b)*; *see Elec. Code § 2021* (leaving or entering another state or precinct for temporary purposes as not affecting domicile)]. A person's "residence" is the place of the person's fixed habitation for some period of time but in which he or she does not intend to remain [*Elec. Code § 349(c)*]. Thus, at a given time, a person has only one domicile but may have more than one residence [*Elec. Code § 349(b), (c)*]. To acquire a new domicile requires both the intent to acquire a new domicile and the fact of removal [*see Elec. Code § 2024*].

A person may leave his or her domicile with the intention of abandoning it, but may currently reside in a place where he or she does not intend to remain and that is in a precinct different from the former domicile. In that case, the person may vote in the precinct of his or her former domicile until acquiring a new domicile [*Walters v. Weed (1988) 45 Cal. 3d 1, 14, 246 Cal. Rptr. 5, 752 P.2d 443]* . This rule protects the person who leaves a residence with the intention not to return, but who views the new abode as a temporary stopping place and does not intend it to be his or her domicile for voting purposes [*Walters v. Weed (1988) 45 Cal. 3d 1, 8, 246 Cal. Rptr. 5, 752 P.2d 443]* .

The rule in *Walters* also resolves a conflict in the elections statutes. The definition of "domicile" for voting purposes is a fixed habitation where the voter intends to remain and to which, when temporarily absent, the voter intends to return [*see Elec. Code § 349(b), (c)*]. In contrast, other statutes require that everyone be domiciled somewhere, and that the act of leaving one's domicile without the act and intention of establishing a new one does not extinguish the old [*see Elec. Code §§ 2021, 2024*; *see also Gov. Code §§ 243, 244*; *Walters v. Weed (1988) 45 Cal. 3d 1, 6-9, 246 Cal. Rptr. 5, 752 P.2d 443]* .

The *Walters* rule protects a person who has a residence but no domicile. This situation should be distinguished, however, from a situation in which a voter changes domicile more than 28 days before an election, the new domicile is in a precinct different from the old, and the voter fails to either reregister or execute an address change to preserve his or her eligibility to vote. In that case, the voter is neither properly registered nor entitled to vote in either the old or the new precinct [*Escalante v. City of Hermosa Beach (1987) 195 Cal. App. 3d 1009, 1023, 241 Cal. Rptr. 199* ; *see Walters v. Weed (1988) 45 Cal. 3d 1, 13, 246 Cal. Rptr. 5, 752 P.2d 443]* .

[4] Application of Rule of Domicile in Special Instances

Generally, the domicile of one spouse is not presumed to be the same as that of the other, but is determined according to *Elec. Code § 2021 et seq.* [*Elec. Code § 2029*]. However, the place where a person's family is domiciled is considered to be his or her domicile unless it is a temporary establishment for his or her family or for transient objects [*Elec. Code § 2027* (place includes trailer or vehicle at campground)]. This is true even though the person does business in another place, unless the person has taken up an abode in another place with the intention of remaining [*Elec. Code § 2028*].

Moving to a place of fixed habitation in another state with the intent either to acquire a new domicile or to remain there for an indefinite time results in the loss of person's domicile in California [*see Elec. Code §§ 2022, 2023*]. However, a person does not gain or lose a domicile because of his or her presence or absence from a place as a result of being (1) an employee of the United States or of California, (2) an employee engaged in navigation, (3) a student in any institution of learning, unless the student has abandoned his or her former domicile, or (4) an inmate of an almshouse, asylum, or prison [*Elec. Code § 2025*].

A person having more than one residence who has not physically resided at any one of them in the immediate preceding year is rebuttably presumed not to be domiciled at any one of them [*see Elec. Code § 2032*], unless the person has claimed a property tax exemption or renter's tax credit for one of the residences, in which case there is a rebuttable presumption that the residence is his or her domicile [*see Elec. Code §§ 2031* (exception if different residence is listed in information on file with Department of Motor Vehicles), 346 (rebuttable presumption as affecting burden of producing evidence)].

The designation of a public park as a residence, coupled with a present intent to remain in the park, can qualify as a domicile for voting purposes [*Collier v. Menzel (1985) 176 Cal. App. 3d 24, 31, 221 Cal. Rptr. 110]* . A person evidences a present intent to remain in a public park as a residence by declaring, on the registration affidavit, an intent to remain at that place and to return to it after temporary absences and by designating an address at which mail can be received [*Collier v. Menzel (1985) 176 Cal. App. 3d 24, 31-32, 35, 221 Cal. Rptr. 110* (citing former *Elec. Code §§ 302, 304*; *now see Elec. Code §§ 2103, 2105*)]. Even though a person may have no legal right to use a public park as a habitation because the park may, by law, be forbidden for use as a residence, a person can still have an intent to remain in the park independent from any intent to violate the law forbidding such use [*Collier v. Menzel (1985) 176 Cal. App. 3d 24, 31-32, 221 Cal. Rptr. 110]* .

The domicile of a member of the California Legislature or the Congress of the United States is conclusively presumed to be the residence indicated on that person's currently filed affidavit of registration [*Elec. Code § 2026*].

For special rules governing the place of a person's domicile in a particular precinct, see *Elec. Code §§ 2034* and *2035*.

Legal Topics:

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§ 243.13 Registration Procedure

[1] Method of Registration

The only way a person can become a registered voter is by submitting to the county elections official, either by mail or in person, an affidavit of registration [*Elec. Code § 2102(a)*; *but see Elec. Code § 2196* (alternative method); [6], *below*]. The affidavit must contain all of the information prescribed by *Elec. Code § 2150*. A properly executed registration is deemed effective on receipt of the affidavit by the county elections official if received on or before the 15th day prior to an election to be held in the registrant's precinct [*Elec. Code § 2102(a)*]. A properly executed registration is also effective on receipt of the affidavit by the county official if any of the following apply [*Elec. Code § 2102(a)(1)-(3)*]:

- The affidavit is postmarked on or before the 15th day prior to the election and received by mail by the county elections official.

- The affidavit is submitted to the Department of Motor Vehicles or accepted by any other public agency designated as a voter registration agency under the National Voter Registration Act of 1993 (*42 U.S.C. § 1973gg*) on or before the 15th day prior to the election.

- The affidavit is delivered to the county elections official by means other than those described in *Elec. Code § 2102(a)(1), (2)* on or before the 15th day prior to the election.

[2] Time for Registration

With the exception discussed in the next paragraph, the county elections official must accept affidavits of registration at all times except during the 14 days immediately preceding any election, when registration must cease for that election as to electors residing in the territory within which the election is to be held. Nevertheless, transfers of registration for an election may be made from one precinct to another in the same county at any time when registration is in progress in the precinct to which the elector seeks to transfer [*see Elec. Code § 2107(a)*].

The county elections official must accept an affidavit of registration executed as part of a voter registration card in the forthcoming election if the affidavit is executed on or before the 15th day before the election, and if any of the following apply [*Elec. Code. § 2107(b)(1)-(3)*; *see Elec. Code. § 2102(a)(1)-(3)*]:

- The affidavit is postmarked on or before the 15th day prior to the election and received by mail by the county elections official.

- The affidavit is submitted to the Department of Motor Vehicles or accepted by any other public agency designated as a voter registration agency pursuant to the National Registration Act of 1993 (*42 U.S. C. § 1973gg*) prior to the election.

- The affidavit is delivered to the county elections official by means other than those described above, on or before the 15th day prior to the election.

[3] After Change of Residence Address

Whenever a voter, between that person's last voter registration and the time for the closing of registration for any given election, has changed his or her residence address by moving, the voter must execute a new affidavit of registration or a notice or a letter of change of address as permitted in Elec. Code. § 2119 in order to be eligible to vote at the next election [*Elec. Code § 2116(a)*]. Notwithstanding *Elec. Code § 2116(a)*, a voter who has changed his or her residence address by moving may vote at the election immediately following the change of residence if he or she is entitled to vote under *Elec. Code § 2035* or *14311* [*Elec. Code § 2116(b)*]. Under *Elec. Code § 2035*, a person duly registered as a voter in any precinct in California who moves from that precinct with 14 days before an election, for the purpose of that election is entitled to vote in the precinct from which the person moved from until the close of the polls on the date of that election. *Elec. Code § 14311* deals with a voter who has moved to a new address within the same county.

[4] Vote by Mail Voters

Except as provided in Chapter 3 of the Elections Code (commencing with *Elec. Code § 3200*) [for permanent vote by mail voters, *see* [5], *below*], application for a vote by mail voter's ballot must be made in writing to the elections official having jurisdiction over the election between the 29th and the 7th day prior to the election. The application must be signed by the applicant and show his or her place of residence. Any applications received by the elections official prior to the 29th day must be kept and processed during the application period [*Elec. Code § 3001*]. The vote by mail ballot must be available to any registered voter [*Elec. Code § 3003*].

The county elections official must place a notice in any office within the county where applications are taken for federal passports or where military enlistments are received to inform potential special vote by mail voters of their right to a vote by mail voter's ballot and where registration materials and application forms can be obtained [*Elec. Code § 3004*]. *Elec. Code § 3006* sets forth the required information which must be included on any printed application that is distributed to voters for requesting vote by mail voter ballots. Among other things, the application must inform the voter that if he or she is not affiliated with a political party, the voter may request a vote by mail ballot for a particular political party for the primary election, if that political party has adopted a party rule, duly noticed to the Secretary of State, authorizing that vote. The application must contain a toll-free telephone number, established by the Secretary of State, that the voter may call to access information regarding which political parties have adopted such a rule. The application must contain a check-off box with a conspicuously printed statement that reads, as follows: "I am not presently affiliated with any political party. However, for this primary election only, I request a vote by mail ballot for the _____ Party." The name of the political party must be personally affixed by the voter [*Elec. Code § 3006(c)*].

The Secretary of State must prepare and distribute to appropriate elections officials a uniform application format for a

vote by mail voter's ballot that conforms to applicable law. This format must be followed by all individuals, organizations, and groups who distribute applications for a vote by mail voter's ballot. The uniform format need not be utilized by elections officials in preparing a vote by mail voter's ballot application to be included with the sample ballot [*Elec. Code § 3007*].

[5] Permanent Vote by Mail Voters

State law governing permanent vote by mail voter registration and related procedures is contained at *Elections Code § 3200 et seq.* Any voter may apply for permanent vote by mail voter status; application for permanent vote by mail voter status must be made in accordance with *Elec. Code §§ 3001, 3100,* or *3304* [*Elec. Code § 3201*]. The voter must complete an application, which must be available from the county elections official, and which must contain the applicant's name at length; the applicant's residence address; the address where ballot is to be mailed, if different from the place of residence; and the signature of the applicant [*Elec. Code § 3201*]. In lieu of executing the application set forth in *Elec. Code § 3201,* any voter may execute a request for permanent vote by mail voter status by making a written request to the county elections official requesting the status. If a written request is received by the county elections official and it contains the information set forth in *Elec. Code § 3201,* the elections official must process that application in the manner provided in *Elec. Code § 3203* [*Elec. Code § 3202*]. The county elections official must send a copy of the list of all voters who qualify as permanent vote by mail voters to each city elections official or district elections official charged with the duty of conducting an election within the county. The list must be sent by the sixth day before an election [*Elec. Code § 3204*].

Vote by mail voter ballots mailed to, and received from, voters on the permanent vote by mail voter list are subject to the same deadlines and must be processed and counted in the same manner as all other vote by mail voter ballots [*Elec. Code § 3205(a)*]. Prior to each primary election, county elections officials must mail to every voter not affiliated with a political party whose name appears on the permanent vote by mail voter list a notice and application regarding voting in the primary election. The notice must inform the voter that he or she may request a vote by mail ballot for a particular political party for the primary election, if that political party adopted a party rule, duly noticed to the Secretary of State, authorizing these voters to vote in their primary. The notice must also contain a toll-free telephone number, established by the Secretary of State, that the voter may call to access information regarding which political parties have adopted such a rule. The application must contain a check-off box with a conspicuously printed statement that reads as follows: "I am not presently affiliated with any political party. However, for this primary election only, I request a vote by mail ballot for the _____ Party." The name of the political party must be personally affixed by the voter [*Elec. Code § 3205(b)*].

[6] Registration Through Secretary of State's Web Site

Notwithstanding any other provision of law, on and after the date the Secretary of State certifies that California has a statewide voter registration database that complies with the requirements of the Help America Vote Act of 2002 [*42 U.S.C. § 15301 et seq.*], a person who is qualified to register to vote and who has a valid California driver's license or state identification card may submit an affidavit of voter registration electronically on the website of the Secretary of State [*Elec. Code § 2196(a)(1)*]. The affidavit is effective on receipt of the affidavit by the Secretary of State if the affidavit is received on or before the 15th day prior to an election to be held in the precinct of the person submitting the affidavit [*Elec. Code § 2196(a)(2)*].

The affiant must affirmatively attest to the truth of the information provided in the affidavit [*Elec. Code § 2196(a)(3)*]. For voter registration purposes, the applicant must affirmatively assent to the use of his or her signature from his or her driver's license or state identification card [*Elec. Code § 2196(a)(4)*]. For each electronic affidavit, the Secretary of State must obtain an electronic copy of the applicant's signature from his or her driver's license or state identification card directly from the Department of Motor Vehicles [*Elec. Code § 2196(a)(5)*].

The Secretary of State must require a person who submits an affidavit pursuant to *Elec. Code § 2196* to submit all of the following [*Elec. Code § 2196(a)(6)*]:

- The number from his or her California driver's license or state identification card.
- His or her date of birth.
- The last four digits of his or her social security number.
- Any other information the Secretary of State deems necessary to establish the identity of the affiant.

On submission of an affidavit pursuant to *Elec. Code § 2196*, the electronic voter registration system must provide for immediate verification of both of the following [*Elec. Code § 2196(a)(7)*]:

- The applicant has a California driver's license or state identification card, and the number for that driver's license or identification card provided by the applicant matches the number for that person's driver's license or identification card that is on file with the Department of Motor Vehicles.
- The date of birth provided by the applicant matches the date of birth for that person that is on file with the Department of Motor Vehicles.

The Secretary of State must employ security measures to ensure the accuracy and integrity of voter registration affidavits submitted electronically pursuant to *Elec. Code § 2196* [*Elec. Code § 2196(a)(8)*].

The Department of Motor Vehicles must use the electronic voter registration system required by *Elec. Code § 2196* to comply with its duties and responsibilities as a voter registration agency pursuant to the National Voter Registration Act of 1993 [*Elec. Code § 2196(b)*; *see 42 U.S.C. § 1973gg et seq.*].

Legal Topics:

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§ 243.14 Action or Proceeding to Compel Registration

If the county elections official refuses to register any qualified elector in the county, the elector may proceed by action in the superior court to compel his or her registration [*Elec. Code § 2142(b)*]. When the action is decided in the elector's favor, he or she may register on producing and filing a certified copy of the judgment directing registration to be made [*Elec. Code § 2100*].

The clerk of the court may not charge a fee for services rendered in an action under *Elec. Code § 2142* [*Elec. Code § 2142(c)*]. Costs may not be recovered against the county elections official in the action, unless it is alleged and proved that the county elections official knowingly and willfully violated his or her duty [*Elec. Code § 2143*].

Although precedence is given to cases involving elections [*see Code Civ. Proc. §§ 35* (trial court), *44* (appeal)], the statutory remedy of filing a complaint under *Elec. Code § 2142* may nevertheless be ineffective when relief cannot be obtained before the date of the election. In that case, a petition for a writ of mandate under *Code Civ. Proc. § 1086* may be sought to obtain immediate relief [*see Phelan v. Superior Court (1950) 35 Cal. 2d 363, 366, 217 P.2d 951* ; *Keane v. Mihaly (1970) 11 Cal. App. 3d 1037, 1046, 90 Cal. Rptr. 263* ; *see also § 243.140* (form for complaint to compel registration as voter)].

Legal Topics:

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§ 243.15 Cancellation of Voter Registration

[1] Grounds

The county elections official must cancel registration (1) at the signed, written request of the person registered [*Elec. Code § 2201(a)*]; (2) on the production of a certified copy of a judgment directing the cancellation to be made [*Elec. Code § 2201(d)*]; (3) on the death of the person registered [*Elec. Code § 2201(e)*]; (4) on official notification that the voter is registered to vote in another county or state [*Elec. Code § 2201(g)*]; or (5) on proof that the person is otherwise ineligible to vote [*Elec. Code § 2201(h)*]. Registration must also be canceled when the mental incompetency of the person registered is legally established as provided in *Elec. Code §§ 2208-2211* [*Elec. Code § 2201(b)*]. The county elections official is authorized pursuant to *Elec. Code § 2220 et seq.* to cancel the registration of registrants who have moved or whose confirmatory postcards are undeliverable.

In addition, pursuant to *Elec. Code § 2201(c)*, the county elections official must cancel the registration on proof that the person is currently imprisoned or on parole for conviction of a felony [*Elec. Code § 2201(c)*; *see Cal. Const., art. II, § 4* (disqualification while imprisoned or on parole for conviction of felony), and Ch. 114, *Civil Rights: Prisoners' Rights*]. Procedures for the gathering of data by the county clerk and cancellation deadlines are set forth in *Elec. Code § 2212*.

[2] Action to Compel Cancellation

Any person may proceed by an action in the superior court to compel the county elections official to cancel any registration made illegally or that should be canceled by reason of facts that have occurred subsequent to the registration. If the voter whose registration is sought to be canceled is not a party to the action, the court may order him or her to be made a party defendant. The county clerk and as many persons against whom there are causes of action may be joined as defendants [*Elec. Code § 2213*].

Legal Topics:

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§ 243.16 Obtaining Voter Registration Information

[1] Procedure

Elec. Code § 2180 et seq. authorizes political parties, candidates, and specified other persons to obtain copies of the voter registration index in each county. This index is an index, by precinct, to the affidavits of registration. It contains the name, address, residence telephone number if furnished, and political affiliation of each voter, as well as a ruled space by each name within which to write the line number designating the position of the voter's name on the roster of voters [*Elec. Code § 2180*].

Elec. Code § 2188 sets forth the mandatory procedure, unless another is otherwise specifically provided [*see, e.g., Elec. Code § 2194* (specifying the procedure for obtaining information from a confidential affidavit of registration, and discussed in *§ 243.17[2]*)], for applying to the Secretary of State or the local county elections official for access to information contained in the index.

[2] Penalty for Wrongful Acquisition, Use, or Disclosure

It is a misdemeanor for any person in possession of index information obtained under *Elec. Code § 2180 et seq.* knowingly to use or permit the use of all or any part of that information for any purpose other than as permitted by law [*Elec. Code § 18109(a)*]. It is a misdemeanor for any person knowingly to acquire possession or use of information contained in the index without first complying with *Elec. Code § 2188* [*Elec. Code § 18109(b)*].

Legal Topics:

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§ 243.17 Confidentiality of Voter Registration Information

[1] Availability

The home address, telephone number, e-mail address, precinct number, or other number specified by the Secretary of State for voter registration purposes, and prior registration information shown on the voter registration card for all registered voters is confidential, and may not be disclosed to anyone, except pursuant to *Elec. Code § 2194* [*Gov. Code § 6254.4(a)*; *see* [2], *below*]. "Home address" means street address only, not city and post office address [*Gov. Code § 6254.4(b)*]. Moreover, the California driver's license number, the California identification card number, the Social Security number, and any other unique identifier used by the State of California for purposes of voter identification shown on a voter registration card of a registered voter, or added to voter registration records to comply with the requirements of the Help America Vote Act of 2002 (*42 U.S.C. § 15301 et seq.*), are confidential and must not be disclosed to any person [*Elec. Code § 2194(b)(1)*; *Gov. Code § 6254.4(c)*].

The voter registration card information must not be used for any personal, private, or commercial purpose, including, but not limited to the harassment of any voter or voter's household; the advertising, solicitation, sale, or marketing of products or services to any voter or voter's household; or reproduction in print, broadcast visual or audio, or display on the internet or any computer terminal unless pursuant to *Elec. Code § 2194(a)(3)* [*Elec. Code § 2194(a)(2)*]. The term "voter's household" means the voter's place of residence or mailing address or any persons who reside at the place of residence or use the mailing address as supplied on the affidavit of registration pursuant to *Elec. Code § 2150(a)(3), (4)* [*Elec. Code § 2194(e)*].

The signature of the voter shown on the voter registration card is confidential and must not be disclosed to any person, except as provided in *Elec. Code § 2194(c)* [*Elec. Code § 2194(b)(2)*]. An elections official must permit a person to view the signature of a voter for the purpose of determining whether the signature matches a signature on an affidavit of registration or a petition, but shall not permit a signature to be copied [*Elec. Code § 2194(c)(2)*].

[2] Authorized Disclosure of Contents

[a] General Rule

Certain information contained in the confidential affidavit may only be disclosed as set forth in *Elec. Code § 2194* [*Gov. Code § 6254.4(a)*]. The permissible disclosures are set forth *below*.

[b] When Requested by Specified Persons

The home address, telephone number, e-mail address, precinct number, or other number specified by the Secretary of State for voter registration purposes, and prior registration information of a person granted confidentiality under *Gov. Code § 6254.4* may be provided, subject to *Elec. Code §§ 2166.5*, *2166.7*, and *2188*, to a candidate, to any committee for or against any initiative or referendum measure for which legal publication is made, and to any person for election, scholarly, journalistic, or political purposes, or for governmental purposes, as determined by the Secretary of State [*Elec. Code § 2194(a)(3)*].

[c] When Registrant's Vote Is Challenged

The home address or signature of any voter must be released whenever the person's vote is challenged pursuant to *Elec. Code §§ 15105-15108*, inclusive, or *Elec. Code § 14240 et seq.*; the address or signature must be released only to the challenger, to elections officials, and to other persons as necessary to make, defend against, or adjudicate the challenge [*Elec. Code § 2194(c)(1)*]. An elections official must permit a person to view the signature of a voter for the purpose of determining whether the signature matches a signature on an affidavit or registration or a petition, but must not permit a signature to be copied [*Elec. Code § 2194(c)(2)*].

[3] Action for Wrongful Disclosure of Contents

A governmental entity, or its officer or employee, shall not be held civilly liable as a result of disclosure of the voter registration information as provided in *Elec. Code § 2194* except on a showing of gross negligence or willfulness [*Elec. Code § 2194(d)*].

[4] Penalty for Wrongful Use of Contents

It is a misdemeanor for any person in possession of information obtained in a confidential affidavit knowingly to use or permit the use of all or any part of that information for any purpose other than as permitted by law [*Elec. Code § 18109(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationPersonal InformationConditions of DisclosureGeneral OverviewAdministrative LawGovernmental InformationPersonal InformationEnforcementRemediesDamagesCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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20-243 California Forms of Pleading and Practice--Annotated § 243.18

§ 243.18 Voter Bill of Rights

[1] Enumeration of Rights

Elec. Code § 2300 sets forth the Voter *Bill of Rights*, which provides that each voter:

- Has the right to cast a ballot if he/she is a valid registered voter. A valid registered voter means a U.S. citizen who is a resident in this state, who is at least 18 years of age and not in prison or on parole for conviction of a felony, and who is registered to vote at his or her current residence address [*Elec. Code § 2300(a)(1)*].

- Has the right to cast a provisional ballot if name is not listed on the voting rolls [*Elec. Code § 2300(a)(2)*].

- Has the right to cast a ballot if he/she is present and in line at the polling place prior to the close of the polls [*Elec. Code § 2300(a)(3)*].

- Has the right to cast a secret ballot free from intimidation [*Elec. Code § 2300(a)(4)*].

- Has the right to receive a new ballot if, prior to casting his/her ballot, he/she believes that he/she made a mistake. If at any time before he/she finally casts his/her ballot, he/she feels that he/she has made a mistake, he/she has the right to exchange the spoiled ballot for a new ballot. Vote by mail voters may also request and receive a new ballot if they return their spoiled ballot to an elections official prior to the closing of the polls on election day [*Elec. Code § 2300(a)(5)*].

- Has the right to receive assistance in casting the ballot, if he/she is unable to vote without assistance [*Elec. Code § 2300(a)(6)*].

- Has the right to return a completed vote by mail ballot to any precinct in the county [*Elec. Code §*

2300(a)(7)].

- Has the right to election materials in another language, if there are sufficient residents in his/her your precinct to warrant production [*Elec. Code § 2300(a)(8)*].

- Has the right to ask questions about election procedures and observe the elections process [*Elec. Code § 2300(a)(9)(A)*].

- Has the right to ask questions of the precinct board and election officials regarding election procedures and to receive an answer or be directed to the appropriate official for an answer. However, if persistent questioning disrupts the execution of their duties, the board or election officials may discontinue responding to questions [*Elec. Code § 2300(a)(9)(B)*].

- Has the right to report any illegal or fraudulent activity to a local elections official or to the Secretary of State's Office [*Elec. Code § 2300(a)(10)*].

[2] Public Notification and Display of Rights

The Voter *Bill of Rights* must be made available to the public before each election and on election day, at a minimum, as follows [*Elec. Code § 2300(d)*]:

- The Voter *Bill of Rights* must be printed in the statewide voter pamphlet in a minimum of 12-point type (with specified exceptions).

- Posters or other printed materials containing the Voter *Bill of Rights* must be included in precinct supplies.

Beneath the Voter *Bill of Rights* there must be listed a toll-free telephone number to call if a person has been denied a voting right or to report election fraud or misconduct [*Elec. Code § 2300(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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§ 243.19 California Voting Rights Act

The California Voting Rights Act of 2001 (CVRA) [*Elec. Code § 14025 et seq.*] provides that an at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class, as defined pursuant to *Elec. Code § 14026* [*Elec. Code § 14027*]. A violation of *Elec. Code § 14027* is established if it is shown that racially polarized voting occurs in elections for members of the governing body of the political subdivision or in elections incorporating other electoral choices by the voters of the political subdivision [*Elec. Code § 14028(a)*].

The occurrence of racially polarized voting is determined from examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or other electoral choices that affect the rights and privileges of members of a protected class [*Elec. Code § 14028(b)*]. The fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, but may be a factor in determining an appropriate remedy [*Elec. Code § 14028(c)*]. Proof of an intent on the part of the voters or elected officials to discriminate against a protected class is not required [*Elec. Code § 14028(d)*].

Other factors, such as the history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns are probative, but not necessary factors to establish a violation of *Elec. Code §§ 14027* and *14028* [*Elec. Code § 14028(e)*].

Upon a finding of a violation of *Elec. Code §§ 14027* and *14028*, the court must implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation [*Elec. Code § 14029*]. Any voter who is a member of a protected class and who resides in a political subdivision where a violation of *Elec. Code §§ 14027* and *14028* is alleged may file an action pursuant to those sections in the superior court of the county in which the political subdivision is located [*Elec. Code § 14032*].

The CVRA has been upheld as race-neutral as it does not favor any race over others or allocate burdens or benefits to any groups on the basis of race. It simply gives a cause of action to members of any racial or ethnic group that can establish that its members' votes were diluted through the combination of racially polarized voting and an at-large election system. Curing vote dilution is a legitimate government interest, and creation of a private right of action like that in the CVRA is rationally related to it. The CVRA does not deny anyone standing on the basis of membership in any group, is not an affirmative action law, and does not burden the fundamental right to vote [*Sanchez v. City of Modesto (2006) 145 Cal. App. 4th 660, 680-685, 51 Cal. Rptr. 3d 821]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawVoting RightsRacial DiscriminationCivil Rights LawVoting RightsVote DilutionGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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[Reserved]

§§ 243.20[Reserved]

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§ 243.30 Scope

This part discusses the statutory remedy of a writ of mandate to compel either the correction of an error or omission contained in any ballot or other official election material, or the performance of any official duty, the neglect of which is a violation of the Elections Code or the Constitution under *Elec. Code § 13314*. It also discusses the remedies of a writ of mandate or injunction under *Elec. Code § 13313* to amend or delete material in a voter's pamphlet that is false, misleading or inconsistent with the requirements of *Elec. Code § 13300 et seq.*

This part also discusses the steps that are prerequisite to becoming a candidate and the duties of election officials in connection with candidacies. Because of the unique procedure involved, steps prerequisite to becoming a nominee and candidate for a presidential primary election are not discussed. For a general form for a petition for a writ of mandate to compel correction of an error or omission or to enjoin the neglect of official duty, see § 243. For additional forms that may be useful in a proceeding in mandate, see Ch. 358, *Mandate and Prohibition* .

For a discussion of measures submitted to the voters and the statutory provision for writ of mandate with regard to measures set out in ballot pamphlets [*Gov. Code § 88006*], see Ch. 302, *Initiative, Referendum, and Recall,* and *Gov. Code §§ 88000-88007* (preparation, contents, and examination of state ballot pamphlet).

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 243.31 Governing Statutes

[1] Correcting Error or Neglect of Duty Generally

The general right to seek a writ of mandate to correct an error or omission that has occurred or is about to occur in the placing of any name on, or in the printing of, a ballot, sample ballot, voter pamphlet, or other official matter, or to correct any neglect of duty that has occurred or is about to occur, is governed by *Elec. Code § 13314*. By its terms, the section applies to compel the correction of any legal duty concerning the right of any person to become a candidate or to appear and be properly designated on astatewide or local ballot [*see Elec. Code § 13314*]. The provisions set out below govern the various aspects of this right in both statewide and local elections. For discussion of a petition for writ of mandate or injunction under *Elec. Code § 13313* to amend or delete material in a voter's pamphlet that is false, misleading or inconsistent with the requirements of *Elec. Code § 13300 et seq.*, see *§ 243.39*.

[2] Presidential Primaries

Provisions pertaining to candidacy and nomination in presidential primary elections are contained in *Elec. Code § 6000 et seq.* (Democratic Party), *Elec. Code § 6300 et seq.* (Republican Party and any other qualified political parties for which presidential primary provisions are not expressly provided [*see Elec. Code § 6300(a)*]), *Elec. Code § 6620 et seq.* (American Independent Party), *Elec. Code § 6700 et seq.* (Peace and Freedom Party), and *Elec. Code § 8300 et seq.* (independent nominations).

[3] Direct Primaries

Provisions governing qualification of parties, candidacy, and nomination in direct primary elections are contained in *Elec. Code § 8000 et seq.*

[4] Special Elections

Nomination of candidates for legislative and congressional offices at special elections are set out in *Elec. Code § 10700 et seq.*

[5] Municipal Elections

Municipal elections are governed by *Elec. Code § 10100 et seq.* (general regulations); *Elec. Code § 12101 et seq.* (publication, notice of election), *Elec. Code § 10220 et seq.* (nominations), *Elec. Code § 10300 et seq.* (emergency elections in cities), and *Elec. Code § 10400 et seq.* (consolidation of municipal elections).

[6] District Elections

District elections are governed by the Uniform District Election Law, set forth in *Elec. Code § 10500 et seq.* Its provisions apply to all districts and agencies whose principal acts so provide. The provisions of *Elec. Code § 10500 et seq.* requiring the clerk to conduct elections apply to all resident voting districts and agencies and, at the discretion of the clerk, may apply to landowner voting districts [*Elec. Code § 10502(a)*]. However, the clerk is required to conduct an election on behalf of a landowner voting district if the governing body of that district, by specified resolution, makes such a request and agrees to reimburse the county [*Elec. Code § 10502(b)*].

[7] Elections for Particular Office

Provisions governing candidacy and elections for particular offices are set out in *Elec. Code §§ 324, 10720, 15503* (members of congress), *Elec. Code § 6900 et seq.* (presidential electors), *Elec. Code § 8200 et seq.* (judicial officers), and *Elec. Code § 8022* (members of state assembly and senate, state constitutional officers, and Insurance Commissioner).

[8] Independent Nominations

Provisions governing independent nominations for all types of elections are set out in *Elec. Code § 8300 et seq.*

[9] Write-in Candidacy

Write-in candidacy for all elections except those for presidential electors is governed by *Elec. Code § 8600 et seq.* Write-in candidacy for elections for presidential electors is governed by *Elec. Code § 8650 et seq.*

[10] Ballots

Preparation and distribution of ballots is governed by *Elec. Code § 13000 et seq.* Provisions governing ballot format, contents and related matters are set out in *Elec. Code § 13100 et seq.* Additional special provisions regarding ballots are contained in *Elec. Code §§ 6240* (Democratic Party presidential primary ballot), *6480* (Republican Party presidential primary ballot), *6501* (American Independent Party presidential primary ballot), and *6821* (Peace and Freedom Party presidential primary ballot).

[11] Related Matters

Provisions governing Recall Elections [*Elec. Code § 11000 et seq.*] and proposed state measures [*Elec. Code § 9000 et seq.*; *Gov. Code § 88001 et seq.*] are discussed in Ch. 302, *Initiative, Referendum, and Recall* .

[12] Death of Candidate Soon Before Election

Several statutes prescribe procedures to be followed when a candidate dies within a short period before the scheduled election in which his or her name would be on the ballot. The general statute is *Elec. Code § 15402*, pursuant to which the election would proceed in spite of the death of the candidate if the candidate died after the 68th day before the election. If the deceased candidate is elected, the resulting vacancy in the office is to be filled in the same manner as if the candidate had died after taking office for the term in question.

Elec. Code § 8026 states an exception for a comparatively rare situation, which is the death of either candidate, after 12:01 a.m. of the 68th day before the election, in a two-candidate contest for a nonpartisan, nonjudicial office, when one of the candidates is the incumbent. In that case, the scheduled election is not to proceed (as to the office in question); instead the contest is to be concluded by a special election, to be held within a specified time frame [*Faulder v. Mendocino County Bd. of Supervisors (2007) 144 Cal. App. 4th 1362, 1373, 51 Cal. Rptr. 3d 251*]. When the death of either candidate in such a two-candidate contest occurs after the 88th day but before the 68th day before the election, no special election is to be held, but the filing period is to be reopened so that additional candidates can enter the race [*Elec. Code § 8027*].

Elec. Code § 8025 covers the case in which only one candidate has declared a candidacy for a partisan nomination at the direct primary election for a party qualified to participate at that election, and that candidate dies after the last day prescribed for the delivery of nomination documents to the elections official, but not less than 83 days before the election. Any qualified person [*see Elec. Code § 8001*] may circulate nomination documents for the office and deliver the documents to the elections official, up to 5:00 p.m. on the 74th day before the election. In that case, the elections official must, immediately after receipt of those nomination documents, certify and transmit them to the Secretary of State.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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§ 243.32 Public Notice of Election and Offices Open for Nomination

The public must be provided with notice of any upcoming election and the offices open for the nomination in the election. Provisions covering the time, form, manner and responsible elections for publishing such notice are contained in *Elec. Code § 12101 et seq.* Provisions governing election dates for all types of elections are set out in *Elec. Code § 1000 et seq.* [*see also Elec. Code §§ 10703, 10704*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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20-243 California Forms of Pleading and Practice--Annotated § 243.33

§ 243.33 Candidacy

[1] Eligibility

Unless otherwise specifically provided, no person is eligible to be elected or appointed to an elective office unless he or she is a registered voter and otherwise qualified to vote for that office at the time that nomination papers are issued to the person or at the time of his or her appointment [*Elec. Code § 201*].

[2] Independent Nominations

A candidate for any public office, including that of presidential elector, for which no nonpartisan candidate has been nominated or elected at any primary election, may be nominated subsequent to or in lieu of a primary election [*Elec. Code § 8300*].

[3] Qualification

[a] Generally

In order to be considered a legally qualified candidate for any office or party nomination for a partisan office under California law, a person must either: (1) file a declaration of candidacy or declaration of acceptance of nomination with the proper election official for the particular election or primary; or (2) be entitled to have his or her name placed on a general election ballot by reason of having been nominated at a primary election or having been selected to fill a vacancy on the general election ballot as provided in *Elec. Code § 8806* or having been selected as an independent candidate pursuant to *Elec. Code § 8504* [*Elec. Code § 13(a)*].

These requirements do not prohibit any California voter from casting a ballot for any person by writing in that person's name, or from having that ballot counted or tabulated. They also do not prevent or prohibit any person from standing or campaigning for any elective office by means of a "write-in" campaign [*Elec. Code § 13(b)*]. However, Section 13 does not operate as an exception to the requirements that are prerequisites to having votes for a write-in candidate counted, including filing a statement of write-in candidacy and nomination papers [*Elec. Code § 13(b)*; *see Elec. Code §§ 8600 et*

seq., 15341].

Candidates for specified county offices (for example, district attorney, sheriff, superintendent of schools, county treasurer, county tax collector, county treasurer-tax collector, and judges of the municipal and superior courts) must satisfy additional documentation requirements [*see Elec. Code § 13.5*].

A political party that has participated in a primary election for a partisan office has the right to participate in the general election for that office and shall not be denied the ability to place on the general election ballot the candidate who received, at the primary election, the highest vote among that party's candidates [*Cal. Const., art. II, § 5(b)*].

[b] District Elections

Qualifications of a candidate for elective office and of an elective officer of a district are determined by the principal act of that district [*Elec. Code § 10514*].

[c] Affiliation With Political Party

No declaration of candidacy for a partisan office or for membership on a county central committee is to be filed by a candidate unless at the time the declaration is presented and continuously for not less than three months immediately prior thereto, or for as long as the candidate has been eligible to register to vote in the state, the candidate is shown by his or her affidavit of registration to be affiliated with the political party, the nomination of which he or she seeks [*Elec. Code § 8001(a)(1)*].

Additionally, the candidate must not have been registered as affiliated with a qualified political party other than that political party the nomination of which he or she seeks within 12 months, or in the case of an election to fill a vacancy, three months, immediately before the filing of the declaration of candidacy [*Elec. Code § 8001(a)(2)*].

The provisions of *Elec. Code § 8001* do not apply to: (1) declarations of candidacy filed by a candidate of a political party participating in its first direct primary subsequent to its qualification under *Elec. Code § 5100* [*Elec. Code § 8001(b)*]; and (2) the independent nomination of candidates for any public office, including that of presidential elector, subsequent to or in lieu of a primary election as provided in *Elec. Code § 8300 et seq.* [*see Elec. Code § 8003* (also providing that independent nomination is not available to party candidate defeated for nomination at direct primary)].

[d] Independent Nomination

A candidate for whom a nomination paper has been filed as a partisan candidate at a primary election, and who is defeated for his or her party nomination at the primary election is ineligible for nomination as an independent candidate [*Elec. Code § 8301*].

[4] Declaration of Candidacy

Declaration of candidacy is made by a personal declaration of the candidate [*Elec. Code §§ 8040* (direct primary), *10511* (district election)] or by sponsors who sign a nomination paper on behalf of the candidate [*Elec. Code §§ 8041* (direct primary), *8400* (independent nomination), *10220* (municipal election)]. The Elections Code prescribes the form for a declaration of candidacy [*see Elec. Code §§ 8040* (direct primary), *10511* (district election)] and a nomination paper [*see Elec. Code §§ 8041* (direct primary), *8409* (independent nomination), *10226* (municipal election)]. The number of signatures required for a nomination paper is set out in *Elec. Code §§ 8062, 8067* (direct primary), *8400, 8402* (independent nomination), and *Elec. Code § 10220* (municipal election). Qualifications of the signers for a nomination paper are set out in *Elec. Code §§ 8068, 8069* (direct primary), *8401* (independent nomination), and *10221* (municipal election).

[5] Declaration of Write-in Candidacy

A person desiring to be a write-in candidate and have his or her name as written on the ballot counted for a particular office must file a statement of write-in candidacy in the manner prescribed by *Elec. Code § 8600*. The statement must be accompanied by the required number of signatures on the nomination papers, if any, required by *Elec. Code §§ 8062* (direct primary), *10220* (municipal election), or in the case of a special district not subject to the Uniform District Election Law [*Elec. Code § 10500 et seq.*], the number of signatures required by the principal act of the district [*Elec. Code § 8600*]. Nomination papers for a write-in candidate must be in substantially the form set forth in *Elec. Code § 8041* [*Elec. Code § 8602*]. Write-in candidacies for the office of presidential elector are specifically governed by *Elec. Code § 8650 et seq.*

[6] Delivery of Nomination Documents

[a] Generally

Declarations of candidacy [*see Elec. Code §§ 8040* (direct primary), *8350* (independent nomination), *8600* (write-in candidate for any election), *10511* (district election)] and nomination papers [*see Elec. Code §§ 8041* (direct primary), *8602* (write-in candidate for any election), *10226* (municipal elections)] in the form prescribed by the Elections Code must be delivered to the proper public official within the time prescribed by the code [*see Elec. Code §§ 8020, 8021* (direct primary), *8403* (independent nomination), *8601* (write-in candidate for any election), *10226* (municipal election), *10510* (district election)].

Nomination papers must be accompanied by an affidavit of the circulator of the papers [*Elec. Code §§ 8041* (direct primary), *8409* (independent nomination), *10226* (municipal election)]. Additionally, all candidates must deliver an affidavit of acceptance of nomination [*see Elec. Code §§ 8040* (direct primary), *8550* (independent nomination), *10223, 10226* (municipal election), *10511* (district election)].

[b] Statements by Candidates

[i] Nonpartisan Local Office Candidate

Each candidate for nonpartisan elective office in any local agency may prepare and submit to the proper public official a personal statement of the candidate's qualifications for the office. The statement is to be filed in the form and manner prescribed by the Elections Code [*see Elec. Code §§ 13307, 13309*; *see also Elec. Code § 10540* (statement of candidate in district election)]. The word "qualifications" as used in *Elec. Code § 13307* does not encompass attacks on one's opponents, but does encompass a candidates's ideas or platform [*Hammond v. Agran (1999) 76 Cal. App. 4th 1181, 1183, 1192-1193, 90 Cal. Rptr. 2d 876* (candidate's views on issues, that contains no direct criticism of another candidate, does not constitute attack on opponent)].

[ii] Candidate for Congress

A candidate for U.S. Senator may purchase the space to place a statement in the state ballot pamphlet that does not exceed 250 words. The statement may not make any reference to any opponent of the candidate. The statement must be submitted in accordance with time frames and procedures set forth by the Secretary of State for the preparation of the state ballot pamphlet [*Elec. Code § 9084(i)*; *Gov. Code § 88001(i)*].

A candidate for U.S. Representative may purchase the space to place a statement in the voter information portion of the sample ballot that does not exceed 250 words. The statement may not make reference to any opponent of the candidate. The statement must be submitted in accordance with the time frames and procedures set forth in the Elections Code for the preparation of the voter information portion of the sample ballot [*Elec. Code § 13307.5*].

[c] Declaration of Intention of Candidate for State Senator, Member of Assembly, Insurance Commissioner, or Any State Constitutional Office

In the case of candidates for a party nomination for the office of State Senator or Member of the Assembly, any state constitutional office, or Insurance Commissioner, the candidate must file nomination documents to become a candidate for his or her party's nomination for that office [*Elec. Code § 8022*]. The declaration of intention must be filed in the form and manner prescribed by the Elections Code [*see Elec. Code § 8022*].

[d] Extension of Time for Delivery of Documents

The time of delivery is extended if an incumbent fails to deliver his or her nomination documents or declaration of candidacy [*Elec. Code §§ 8024* (direct primary), *10225* (municipal election), *10516* (district election)] or in the event of the death of a sole candidate [*Elec. Code § 8204* (direct primary)]. In any event, all nomination documents that are delivered for filing to the elections official in compliance with *Elec. Code § 8020* and that are not required to be filed in the Secretary of State's office [*see* [9], *below*] must be filed with the elections official by the eighty-third day before the election in the case of a direct primary [*Elec. Code § 8021*].

[7] Filing Fees or Petition in Lieu Thereof

The payment of filing fees for declaration of candidacy is governed by *Elec. Code §§ 8103 et seq.* (direct primary), *10228* (municipal election), and *10503* (applying general election laws to district election). An alternative means of access to the ballot is provided by *Elec. Code § 8106*, which allows a candidate for any elective office to submit a petition containing a specified number of signatures of registered voters in lieu of a filing fee. No fee or charge is required of a write-in candidate, except in the case of a candidate for city office pursuant to *Elec. Code § 10228* [*Elec. Code § 8604*].

[8] In-Lieu-Filing-Fee Petition

Notwithstanding any other contrary provision of law, if a candidate informs the elections official that he or she intends to submit an in-lieu-filing-fee petition pursuant to *Elec. Code § 8106*, the elections official must issue the candidate a special in-lieu-filing-fee petition, which must contain in substantially the same form the text of *Elec. Code § 8041(b)* [*see Elec. Code § 8106(b)*]. The candidate must also receive the in-lieu-filing-fee petition prescribed in *Elec. Code § 8106* [*Elec. Code § 8061*].

All valid signatures appearing on the special in-lieu-filing-fee petition must be counted towards the number of signatures required to be submitted pursuant to *Elec. Code §§ 8062* and *8106*. If the candidate obtains the required number of valid signatures on the special in-lieu-filing-fee petition required under the provisions of *Elec. Code § 8062*, the candidate is not required to execute a nomination paper as set forth in *Elec. Code § 8041* [*Elec. Code § 8061*].

If the number of signatures affixed to an in-lieu-filing-fee petition filed pursuant to *Elec. Code § 8106* is 100 or more, the clerk may use a random sampling technique for verification of the signatures. If a random sampling technique is used and the number of signatures on a petition is 100 or more but less than 2,000, the random sampling must include an examination of 100 signatures. If the number of signatures on a petition is 2,000 or more, the random sampling must include an examination of 5 percent of the signatures. On completion of the verification of signatures in the sample, the percentage of signatures that are valid must be applied and projected to the total number of signatures submitted [*Elec. Code § 8084*].

If a special in-lieu-filing-fee petition does not contain the required number of valid signatures as set forth in *Elec. Code § 8062*, the candidate is entitled to file, within the time period allowed for filing nomination papers, a nomination paper, in order to obtain the number of valid signatures required to be submitted to the county clerk on a nomination paper. A

candidate who submits a nomination paper pursuant to this provision is required to obtain only the number of signatures needed thereon to supplement the special in-lieu-filing-fee petition so that the combination of signatures appearing on the special in-lieu-filing-fee petition and the nomination paper equals or exceeds the required number of signatures set forth in *Elec. Code § 8062* [*Elec. Code § 8061*].

[9] Verification and Transmittal to Secretary of State

In a direct primary election certain nomination documents [*see Elec. Code §§ 8100(a), 8504* (independent nomination)] must be transmitted by the county clerk to the office of the Secretary of State [*Elec. Code §§ 8082, 8100(a), 8504*; *see Elec. Code § 8022*]. All other nomination documents are to be filed in the county elections official's office [*Elec. Code § 8100(b)*].

All nomination documents must be verified by the county elections official, and documents to be filed with the Secretary of State must be forwarded within the prescribed time [*see Elec. Code § 8082*] and accompanied by a statement of verification by the county elections official [*see Elec. Code § 8083*].

The place of filing, pursuant to *Elec. Code §§ 8100* and *8504* (independent nominations), is important in determining the proper defendants in an action to compel the performance of any official preelection duty [*see* § 243, form for petition for writ of mandate to compel correction of error and/or enjoin neglect of duty].

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20-243 California Forms of Pleading and Practice--Annotated § 243.34

§ 243.34 Public Notice of Eligible Candidates

Within a prescribed time, the appropriate public official must publish a list of the eligible candidates for any upcoming election [*see Elec. Code §§ 8120* (direct primary), *12110* (municipal election)] in a format prescribed by the Elections Code [*see Elec. Code §§ 8125* (direct primary), *12112* (municipal election)].

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§ 243.35 Notice to Candidate

In the case of offices that require filing of nomination documents with the office of the Secretary of State [*see Elec. Code § 8100(a)*], the Secretary of State must notify each candidate for partisan office of the names, addresses, offices, occupations, and party affiliations of all other persons who have filed for the same office [*Elec. Code § 8121*].

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20-243 California Forms of Pleading and Practice--Annotated § 243.36

§ 243.36 Proceeding to Compel Correction of Error or Omission on Ballot or Performance of Duty

Any elector may seek a writ of mandate alleging that an error or omission has occurred or is about to occur in the placing of any name on, or in the printing of, a ballot, sample ballot, voter pamphlet or other official matter, or that any neglect of duty has occurred or is about to occur [*Elec. Code § 13314(a)(1)*; *see § 243.150* (petition for writ of mandate)].

A peremptory writ of mandate issues only on proof that the error, omission, or neglect is in violation of the Elections Code or the Constitution and that issuance of the writ will not substantially interfere with the conduct of the election [*Elec. Code § 13314(a)(2)*; *see Cal. Const., art. II, §§ 1-20* (voting, initiative, referendum, and recall)].

The Secretary of State must be named as a respondent or a real party in interest in the proceeding if it concerns a measure or a candidate described in *Elec. Code § 15375* (requiring local officials to send certain election results to the Secretary of State), except for a candidate for judge of the superior court [*Elec. Code § 13314(a)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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20-243 California Forms of Pleading and Practice--Annotated § 243.37

§ 243.37 Time for Filing Petition for Writ of Mandate

Elec. Code § 13314 is intended to provide for correction of errors and omissions in official voting materials before their use in elections and not after the elections have been held. It does not give a court the power to invalidate an election already conducted and to order another election [*Kilbourne v. City of Carpinteria (1976) 56 Cal. App. 3d 11, 16, 128 Cal. Rptr. 133]* . Accordingly, it would appear that the proceeding should be commenced sufficiently in advance of the election so as not to interfere with the election [*see Elec. Code § 13314*].

For discussion of the time to seek a writ of mandate or injunction under *Elec. Code § 13313* to amend or delete material in a voter's pamphlet that is false, misleading or inconsistent with the requirements of *Elec. Code § 13300 et seq.*, see *§ 243.39*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 243.38 Priority Over Other Civil Matters

An action or appeal for the correction of an error or omission that has occurred or is about to occur on a ballot has priority over all other civil matters [*Elec. Code § 13314(a)(3)*].

Legal Topics:

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20-243 California Forms of Pleading and Practice--Annotated § 243.39

§ 243.39 Proceedings to Amend or Delete Material In Voter's Pamphlet

Not less than 10 calendar days before the election official submits the official voter's pamphlet referred to in *Elec. Code § 13307* for printing, the elections officer must make a copy of the voter's pamphlet available for public examination in the elections official's office [*Elec. Code § 13313(a)*].

During this examination period, any voter of the jurisdiction in which the election is being held, or the elections official himself or herself, may seek a writ of mandate, or an injunction requiring any and all of the materials in the voter's pamphlet to be amended or deleted [*Elec. Code § 13313(b)(1)*]. A peremptory writ of mandate or an injunction can issue only on clear and convincing proof of both of the following [*Elec. Code § 13313(b)(1)(A), (B)*]:

- The material in question is false, misleading, or inconsistent with the requirements of *Elec. Code § 13300 et seq.*

- Issuance of the writ or injunction will not substantially interfere with the printing or distribution of official election material provided by law.

For example, *Elec. Code § 13307* delineates the contents of a statement by a candidate for a nonpartisan local office [*see § 243.33[6][b][i]*], and a candidate who is the subject of impermissible comments in his or her opponent's statement may use *Elec. Code § 13313* to petition for a writ of mandate directing the registrar of voters to delete the improper material from the voter's pamphlet [*Dean v. Superior Court (1998) 62 Cal. App. 4th 638, 640-642, 73 Cal. Rptr. 2d 70]* .

Elec. Code § 13313(b)(2) specifies who should be named as respondent and real party in interest depending on who seeks the writ of mandate or injunction.

Legal Topics:

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[Reserved]

§§ 243.40[Reserved]

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20-243 California Forms of Pleading and Practice--Annotated § 243.50

§ 243.50 Scope

This part discusses a voter's statutory right to request a recount of votes cast for a candidate, slate of electors, or position on a ballot measure [*Elec. Code §§ 15620, 15621*]. For a form for making a request for such recount [*see § 243.160*]. For forms for use in an action to contest an election, see § 243.170 et seq. (contesting general elections) and § 243.190 et seq. (contesting primary elections).

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20-243 California Forms of Pleading and Practice--Annotated § 243.51

§ 243.51 Governing Law

The procedure for recounting votes in elections is set forth in *Elec. Code § 15600 et seq.* These provisions apply to all elections, both final and primary, for which no other provision is made by law [*Elec. Code § 15600*], and are made specifically applicable to municipal election recounts by *Elec. Code § 10266* and district election recounts by *Elec. Code § 10546*. However, *Elec. Code § 15600 et seq.* do not authorize the opening or recounting of ballots for any precinct except for the purposes specified therein nor limit other provisions of law regarding an election contest or recount [*Elec. Code § 15634*].

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§ 243.52 Definitions

[1] Voting System

The term "voting system" means any mechanical, electromechanical, or electronic system and its software, or any combination of such systems used to cast or tabulate votes or both [*Elec. Code § 362*].

[2] Precinct Board

The term "precinct board" means the board appointed by the elections official [*see Elec. Code § 320* (defining "elections official")] to serve at a single precinct or a consolidated precinct. When used in relation to proceedings taking place after the polls have closed, the term includes any substitutive canvassing and counting board that may have been appointed to take the place of the board theretofore serving [*Elec. Code § 339*].

[3] Completion of Canvass

For the purposes of *Elec. Code §§ 15620, 15621*, which provide for a voter-requested recount, the term "completion of the canvass" is presumed to be that time when the elections official signs the certified statement of the results of the election. However, in the case of a city election, if a city council canvasses the returns itself and does not order the elections official to conduct the canvass as permitted by *Elec. Code § 10263*, the term is presumed to be that time when the governing body declares the persons elected or the measures approved of defeated [*Elec. Code § 15620*; *see Elec. Code § 15621*].

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§ 243.53 Persons Entitled to Obtain Recount

A recount of the ballots in a precinct may be ordered by the elections official under certain circumstances [*see Elec. Code § 15610*], requested by any voter on behalf of a candidate, slate of electors, or position on a measure (affirmative or negative) [*see Elec. Code §§ 15620, 15621*], or ordered by the superior court on the petition of a district attorney after a request by the board of supervisors or the grand jury [*see Elec. Code § 15640(a)*].

Recount is also a remedy available to an elector contesting an election held in a county, city, or political subdivision of either [*see Elec. Code § 16100* (grounds for contest)], as well as to a candidate at a primary election in contesting the right of another candidate to nomination to the same office as that for which the contest is a candidate [*see Elec. Code § 16101* (grounds for contest by candidate)]. For a discussion of recount in both such cases, see *§§ 243.60 et seq., 243.80* et seq.

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20-243 California Forms of Pleading and Practice--Annotated § 243.54

§ 243.54 Voter-Requested Recount

[1] Generally

In elections not voted-on statewide, any voter may request a recount of votes cast for candidates for any office, for slates of presidential electors, or for or against any measure by filing a written request with the elections official responsible for conducting an election in the county in which the recount is sought within five days following the completion of the official canvass. In elections conducted in more than one county, the recount request may be filed with the appropriate elections official of any or all of the affected counties. The request must specify on behalf of which candidate, slate of electors, or position on a measure (affirmative or negative) it is filed [*Elec. Code § 15620*].

Any voter may request a recount of votes cast for candidates for any statewide office or for or against any measure voted-on statewide by filing a written request within five days beginning on the twenty-ninth day after a statewide election with the secretary of state, who in turn sends a copy to the elections official of each county affected by the request. The request must specify in which county or counties the recount is sought and on behalf of which candidate, slate of electors, or position on a measure (affirmative or negative) it is filed [*Elec. Code § 15621*].

The request may specify the order in which the precincts are to be recounted [*Elec. Code § 15622*].

[2] Additional Voter Requests

Any time during the conduct of a recount and for 24 hours thereafter, any other voter may request the recount of any precincts in an election for the same office, slate of presidential electors, or measure not recounted as a result of the original request [*Elec. Code § 15623*].

[3] Deposit Required

The voter filing the request seeking the recount must, before the recount is commenced and at the beginning of each day following, deposit with the elections official such sum as the elections official requires to cover the cost of the recount for that day. This money will be returned to the depositor if, on completion of the recount, the candidate, slate of

presidential electors, or the position on the measure for which the declaration was filed is found to have received the plurality of votes cast that it had not received according to the official canvass or, when there are two or more candidates in an election, the recount results in the appearance on the ballot in a subsequent runoff election or general election, of the candidate who would not have so appeared in the absence of the recount [*Elec. Code § 15624*].

The depositor is entitled to the return of any money deposited in excess of the cost of the recount if the candidate, slate, or position on the measure has not received the plurality of the votes cast or, when there are two or more candidates in an election, the recount does not result in the candidate for whom the recount was requested appearing on the ballot in a subsequent runoff or general election as a result of the recount [*Elec. Code § 15624*].

[4] Commencement and Duration of Recount

The recount must be commenced not more than seven days following the request for recount under *Elec. Code § 15620* or *15621*, and must be continued daily, Saturdays, Sundays, and holidays excepted, for not less than six hours each day until completed. The recount shall not be commenced until the first day following notification of the individuals specified in *Elec. Code § 15628* [*Elec. Code § 15626*].

[5] Determining Method of Recount

If in an election subject to recount the votes were recorded by means of a punch card voting system [*see Elec. Code § 344* (defining "punch card")] or by electronic or electromechanical vote tabulating devices, the voter who filed the request for recount may select whether the recount will be conducted manually, or by means of the voting system used originally, or both [*Elec. Code § 15627(a)*]. For purposes of direct recording electronic voting systems, "conducted manually" means that either the paper record copies or the voter verified paper audit trail of the electronically recorded vote are counted manually, as selected by the voter who requests the recount [*Elec. Code § 15627(b)*].

[6] Notice and Public Recount

At least one day before commencement of the recount, the elections official must post a notice as to the date and place of the recount and notify all persons for whom separate notice is prescribed by *Elec. Code § 15628*. The recount must be conducted publicly [*Elec. Code § 15629*].

[7] Examination and Challenge of Ballots

All ballots, whether voted or not, and any other relevant material may be examined as part of any recount if the voter requesting the recount so requests [*Elec. Code § 15630*; *e.g., Americans for Safe Access v. County of Alameda (2009) 174 Cal. App. 4th 1287, 1292, 95 Cal. Rptr. 3d 246* (request for examination of four kinds of "other relevant material" was improperly denied by registrar of voters, whose ground for denial was his conclusion that those materials were not relevant)]. No examination of any ballot can include touching or handling the ballot without the express consent of the elections official or election officer supervising the special recount board. No ballot may be touched or handled during the examination unless the elections official or election officer supervising the special recount is present to observe the examination. Apart from the foregoing, no ballot can be touched or handled by any person during the recount unless that person is the elections official, a person acting at the direction of the elections official, a member of the special recount board, or by order of the superior court [*Elec. Code § 15630*]. On recount, ballots may be challenged for incompleteness, ambiguity, or other defects in accordance with the following procedure: (1) the person challenging the ballot must state the reason for the challenge; (2) the official counting the ballot must count it as he or she believes proper and then set it aside with a notation as to how it was counted; and (3) the elections official, must, before the recount is completed, determine if the challenge is to be allowed. The decision of the elections official is final [*Elec. Code § 15631*].

[8] Entry of Result of Recount

If on completion of the recount a different election result is found, that result is entered in each precinct affected thereby, and for all purposes thereafter constitutes the official returns of those precincts for the office, slate, or measure involved in the recount [*Elec. Code § 15632*].

If the office, measure, or slates of presidential electors are not voted-on statewide, the results of any recount that is not completed by counting the votes in each and every precinct in the jurisdiction within which the votes were cast on the candidates for the office, on the slates of electors, or on the measure in question will be declared null and void. If the office, measure, or slates of presidential electors are voted-on statewide, the results of any recount will be declared null and void if each vote cast for the office, slates, or measure in any county specified in the request for recount filed with the secretary of state is not recounted [*Elec. Code § 15632*].

[9] Posting Results

A copy of the results of any recount must be posted conspicuously in the office of the elections official [*Elec. Code § 15633*].

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[Reserved]

§§ 243.55[Reserved]

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1. Contests of General Elections

20-243 California Forms of Pleading and Practice--Annotated § 243.60

§ 243.60 Scope

This subpart discusses proceedings to contest the declared results of general elections and to contest the actual election, as opposed to the nomination [*see § 243.80* et seq.], of a candidate at a primary election.

Related forms:

- General form for a statement of contest of election, see *§ 243.170*.
- Forms of allegations of malconduct of a precinct board, election bribery and other offenses against the elective franchise, of illegal votes cast, and of error in conducting election and canvass of returns, see *§§ 243.171 -243.174*.
- Form for submitting a list of illegal votes, see *§ 243.175*.
- Form of judgment annulling and setting aside an election, see *§ 243.176*.

For discussion and forms involving ballot measures, see Ch. 302, *Initiative, Referendum, and Recall* .

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1. Contests of General Elections

20-243 California Forms of Pleading and Practice--Annotated § 243.61

§ 243.61 Governing Law

Contests of general elections are governed by *Elec. Code § 16200 et seq.* These provisions relate to election to office and not to nomination. *Elec. Code § 16300 et seq.* govern contests of nomination at a primary election [*see § 243.80* et seq.]. When a candidate is actually elected to a nonpartisan office at a primary election [*see Elec. Code § 8140*], any contest thereof is brought under the provisions for contest of a general election [*Elec. Code § 16200 et seq.*] rather than those relating to primary elections [*see Doran v. Biscailuz (1954) 128 Cal. App. 2d 55, 60, 274 P.2d 691* (decided under a constitutional provision that was repealed in 1972 and replaced by *Elec. Code § 8142*)]. The procedure to be followed by the contestant is set forth in *Elec. Code § 16400 et seq.* and that to be followed by the clerk of the superior court and court is set forth in *Elec. Code § 16500 et seq.*

Elec. Code § 16200 specifically provides that statutory election contests do not apply to elections of members of the California Legislature. Election contests regarding official general or special elections to choose a Representative to the United States Congress are governed by *2 U.S.C. § 381 et seq.* and are outside the scope of this chapter.

In the case of a contest of the election of members of a party central committee, who are elected at a "direct primary" election [*Elec. § 316*], the governing law is that which applies to contests of general elections, not the law applicable to contests of primary elections, because in spite of the designation of the election as a "direct primary" election, it is a final election insofar as it concerns members of a party central committee, just as a general election is final concerning the candidates who are on the general election ballot [*Cummings v. Stanley, 177 Cal. App. 4th 493, 514, 99 Cal. Rptr. 3d 284* (complaint to contest election of members of party central committee must be filed within 30 days pursuant to Elec. Code §§ 16400 and 16401, which apply to contest of "any election"; five-day period mandated by *Elec. Code §§ 16421* for contest of primary election does not apply because election of committee members in "direct primary" election is final and thus does not conform to definition of "primary election" in *Elec. Code § 341*)].

Legal Topics:

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20-243 California Forms of Pleading and Practice--Annotated § 243.62

§ 243.62 Contestant and Defendant Defined

When used with regard to elections, the term "contestant" means any person initiating an election contest and "defendant" means that person whose nomination is contested [*see Elec. Code § 16002*].

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20-243 California Forms of Pleading and Practice--Annotated § 243.63

§ 243.63 Nature of Election Contest Proceedings

An election contest is a special proceeding [*Dorsey v. Barry (1864) 24 Cal. 449, 451-452]* , although the proceeding is considered under the rules of law and evidence governing the determination of law and fact, so far as they are applicable [*Elec. Code § 16602*; *see Elec. Code § 16620* (court's powers to determine issues in primary election contests)]. If the Code of Civil Procedure is incompatible with the Elections Code, then the Elections Code governs. For example, *Code Civ. Proc. § 437c*, which prohibits a summary judgment motion until 60 days from the date of a general appearance, has been held to be incompatible with Elections Code provisions requiring that an election contest trial commence no later than 45 days from the time notice of the contest is filed [*Anderson v. County of Santa Barbara (1977) 56 Cal. App. 3d 780, 786-787, 128 Cal. Rptr. 707* (decided under former Elections Code requiring filing with county clerk unlike now under *Elec. Code § 16400* requiring filing with clerk of superior court having jurisdiction); *see Elec. Code §§ 16401, 16500, 16600, 16603, 16900* (provisions governing general election contests); *16443, 16520, 16920* (provisions governing primary election contests); *16462, 16464, 16540, 16741* (provisions governing simple recount)]. Accordingly, by the time a summary judgment motion can be made, the trial of the election contest must have been commenced and often will have been concluded [*see Anderson v. County of Santa Barbara (1976) 56 Cal. App. 3d 780, 783, 786-787, 128 Cal. Rptr. 707* ; *see § 243.80* et seq., for further discussion of primary election contests and recount contests].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentTime LimitationsGovernmentsCourtsClerks of CourtGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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20-243 California Forms of Pleading and Practice--Annotated § 243.64

§ 243.64 Initiation of Contest

An election contest is initiated when any elector of a county, city, or any political subdivision of a city or county files with the clerk of the superior court having jurisdiction a verified [*Elec. Code § 16401*], written statement of contest in compliance with the provisions of *Elec. Code § 16400*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsClerks of CourtGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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§ 243.65 Grounds of Contest

The possible grounds of contest of a general election are that [*Elec. Code § 16100*]:

- The precinct board or any member of the board was guilty of malconduct;
- The person declared elected to an office was not, at the time of the election, eligible to that office;
- The defendant has given to any elector or member of a precinct board any bribe or reward, or has offered any bribe or reward for the purpose of procuring his or her election, or has committed any other offense against the elective franchise;
- Illegal votes were cast;
- Eligible voters who attempted to vote in accordance with the laws of the state were denied their right to vote;
- The precinct board, in conducting the election or in canvassing the returns, made errors sufficient to change the result of the election as to any person declared elected; or
- There was an error in the vote-counting programs or summation of ballot counts.

Elec. Code §§ 16201-16203 prescribe the showing that must be made at the trial on these grounds for a successful contest and are outlined in the Procedural Checklist, *§ 243.120[1]*.

The bases for an election contest enumerated in *Gov. Code § 16100* are exclusive. However, an election may be set aside if a nonenumerated act of malconduct affects the electoral machinery itself and thus renders the result unconstitutional [*McKinney v. Superior Court (2004) 124 Cal. App. 4th 951, 959-960, 21 Cal. Rptr. 3d 773* (city

clerk's qualification of third-person as write-in candidate and space on the ballot for write-in candidates was insufficient to find interference with electoral machinery)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawVoting RightsVoting Rights ActFailure to Allow VotingCivil Rights LawVoting RightsVoting Rights ActPayment for VotesGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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20-243 California Forms of Pleading and Practice--Annotated § 243.66

§ 243.66 Special Session to Hear Contest

Within five days after the end of the time allowed for filing statements [*see Elec. Code § 16401* (time for filing)] the clerk of the superior court must notify the superior court of the county of all statements filed. The presiding judge must immediately designate the time and place of hearing, which time cannot be less than 10 nor more than 20 days from the date of the judge's order [*Elec. Code § 16500*]. The court must continue in special session to hear and determine all issues arising in contested elections [*Elec. Code § 16603*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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20-243 California Forms of Pleading and Practice--Annotated § 243.67

§ 243.67 Remedies

[1] When Available

After hearing the evidence of the parties and within 10 days after the submission thereof the court must file its findings of fact and conclusions of law. Immediately thereafter the court must pronounce judgment in the premises, either confirming or annulling and setting aside the election [*Elec. Code § 16603*], or if it appears that a person other than the defendant has the highest number of legal votes, the court must declare that person to be elected [*Elec. Code § 16703*; *see Stebbins v. Gonzales (1992) 3 Cal. App. 4th 1138, 1142-1145, 5 Cal. Rptr. 2d 88* (when it can be determined with certainty which candidate received highest number of legal votes elected, trial court has no authority under former *Elec. Code § 20087* [*now see Elec. Code § 16703*] but to declare that candidate elected); *Snibley v. Palmtag (1900) 128 Cal. 283, 284, 60 P. 860* (tie is insufficient to change result)].

[2] When Election Will Be Set Aside

[a] Illegal Votes

An election cannot be set aside on account of illegal votes, unless it appears that a number of illegal votes have been given to the person whose right to the office is contested or who has been certified as having tied for first place, which, if taken from him or her, would reduce the number of his or her legal votes below the number of votes given to some other person for the same office, after deducting therefrom the illegal votes which may be shown to have been given to that other person [*Elec. Code § 16203*].

[b] Candidate's Commission of Offense Against Elective Franchise

An elector may contest the election of a candidate who has given any bribe or reward to any elector or member of a precinct board, who has offered any bribe or reward for the purpose of procuring his or her election, or who has committed any other offense against the elective franchise as defined in *Elec. Code § 18000 et seq.* [*Elec. Code § 16100(c)*]. The successful candidate need not have been convicted of the offense before the contest is commenced, but

if no conviction has been obtained, the elector must establish that the candidate in fact committed the offense. For the purposes of the contest proceeding, the commission of the offense must be proven by a preponderance of the evidence [*Pierce v. Harrold (1982) 138 Cal. App. 3d 415, 426-427, 188 Cal. Rptr. 458* ; *but see Stebbins v. White (1987) 190 Cal. App. 3d 769, 779 n.3, 784 n.11, 235 Cal. Rptr. 656* (noting that standard of proof is unclear and that trial court applied clear and convincing standard of proof)]. The commission of bribery or any other offense against the elective franchise committed by a candidate invalidates that candidate's election [*Stebbins v. White (1987) 190 Cal. App. 3d 769, 772-773, 235 Cal. Rptr. 656]* .

For forms of allegations for use in an election contest based on *Elec. Code §§ 16100(c)* and *18000 et seq.*, see *§ 243.172*.

[c] Interference With Election Process

When an election is contested on the ground that it was illegal, unless it was plainly illegal, the court must validate the election [*Rideout v. City of Los Angeles (1921) 185 Cal. 426, 430, 197 P. 74* ; *Hardeman v. Thomas (1989) 208 Cal. App. 3d 153, 166, 256 Cal. Rptr. 158]* . A finding that the fairness, purity, or freedom of an election has been materially interfered with so as to change the election result, however, will give rise to invalidation of an election [*Williams v. Venneman (1941) 42 Cal. App. 2d 618, 620-621, 109 P.2d 757* (violence and intimidation of voters at polls); *see People v. Prewett (1899) 124 Cal. 7, 11-12, 56 P. 619* (threat made that no one would be allowed to vote unless he or she was reregistered did not invalidate election since no one was in fact challenged for failure to reregister)].

[d] Noncompliance With Laws Governing Conduct of Election

Election violations with regard to the official conduct of elections may also constitute a basis for invalidating an election. However, a distinction is made between provisions that are mandatory and those that are merely directory. Absent an express statutory declaration, the determination of whether an election law provision is mandatory or directory depends on the character of the act prescribed. If the act enjoined goes to the substance or necessarily affects the merits or results of the election, it is mandatory; otherwise it is directory [*Rideout v. City of Los Angeles (1921) 185 Cal. 426, 430-431, 197 P. 74* ; *Hardeman v. Thomas (1989) 208 Cal. App. 3d 153, 166, 256 Cal. Rptr. 158]* .

A violation of mandatory provision vitiates the election. A departure from a directory provision does not render the election void if there is a substantial observance of the law and no showing that the election has been changed or the rights of the voters injuriously affected by the deviation [*Rideout v. City of Los Angeles (1921) 185 Cal. 426, 430, 197 P. 74* (deviation in ballot printing requirements not sufficient basis for invalidation of election absent proof of fraudulent intent on the part of election officials); *see Davis v. County of Los Angeles (1938) 12 Cal. 2d 412, 426, 84 P.2d 1034* (technical errors and irregularities in carrying out directory provisions that did not mislead voters held to be immaterial and have no effect on the election result)]. If the violations of directory provisions are not so gross or radical as to give rise to a presumption of unfairness, the burden is on the contestant to prove that unfairness resulted from the violation [*Rideout v. City of Los Angeles (1921) 185 Cal. 426, 432-433, 197 P. 74]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawVoting RightsVoting Rights ActFailure to Allow VotingCivil Rights LawVoting RightsVoting Rights ActInterferenceCivil Rights LawVoting RightsVoting Rights ActPayment for VotesGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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[Reserved]

§§ 243.68[Reserved]

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20-243 California Forms of Pleading and Practice--Annotated § 243.80

§ 243.80 Scope

This subpart discusses proceedings to contest the declared results of a primary election in which no candidate was actually elected. For a procedural checklist outlining the procedures to be followed in a primary election contest, see § 243.130 et seq. For forms of declarations contesting the right to nomination for partisan office and nonpartisan office, see *§§ 243.190, 243.191*. For a form of an answer and cross declaration contesting the declared results, see *§ 243.192*. For a form of answering declaration in a contest involving a simple recount, see *§ 243.193*.

As noted in the previous subpart on contests of general elections [*see § 243.60* et seq.], when a candidate for a nonpartisan office is elected to office, as distinguished from nomination therefor, the code provision relating to contests of primary elections do not apply. Rather, the contest is brought under the provisions governing contests of general elections [*Doran v. Biscailuz (1954) 128 Cal. App. 2d 55, 60, 274 P.2d 691* (decided under a constitutional provision that was repealed in 1972 and replaced by *Elec. Code § 8142*); *McClintock v. Abel (1937) 21 Cal. App. 2d 11, 16-17, 68 P.2d 273* ; *see § 243.60* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
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20-243 California Forms of Pleading and Practice--Annotated § 243.81

§ 243.81 Governing Law

The procedure for contesting a primary election is governed by applicable provisions throughout *Elec. Code § 16000 et seq.* The grounds for contest are set out in *Elec. Code § 16101*.

In the case of a contest of the election of members of a party central committee, who are elected at a "direct primary" election [*Elec. § 316*], the governing law is that which applies to contests of general elections, not the law applicable to contests of primary elections, because in spite of the designation of the election as a "direct primary" election, it is a final election insofar as it concerns members of a party central committee, just as a general election is final concerning the candidates who are on the general election ballot [*Cummings v. Stanley, 177 Cal. App. 4th 493, 514, 99 Cal. Rptr. 3d 284* (complaint to contest election of members of party central committee must be filed within 30 days pursuant to Elec. Code '§ 16400 and 16401, which apply to contest of "any election"; five-day period mandated by *Elec. Code §§ 16421* for contest of primary election does not apply because election of committee members in "direct primary" election is final and thus does not conform to definition of "primary election" in *Elec. Code § 341*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 243.82 Initiation of Contest

Any candidate at a primary election may contest the right of another candidate to nomination to the same office by filing an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) [*Elec. Code § 16101*] pursuant to *Elec. Code §§ 16101* and *16421*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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20-243 California Forms of Pleading and Practice--Annotated § 243.83

§ 243.83 Time and Place for Filing Affidavit

The affidavit or declaration must be filed in the office of the clerk of the superior court having jurisdiction. The filing must take place within five days after the completion of the official canvass by the board of supervisors of the county making the declarations [*Elec. Code § 16421*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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20-243 California Forms of Pleading and Practice--Annotated § 243.84

§ 243.84 Jurisdiction and Venue

[1] Contest Other Than Simple Recount

If the nomination contested is for an office including a political subdivision of more than one county, the superior court of any county within the political subdivision has jurisdiction, and the contestant may file in any county within the political subdivision. There may be no change of venue therefrom to any other county within the political subdivision [*Elec. Code § 16441*].

[2] Contest Involving Simple Recount

When a contestant demands only a simple recount in a precinct, jurisdiction belongs to the superior court of the county in which that precinct is located [*Elec. Code § 16461*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureVenueGeneral OverviewGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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20-243 California Forms of Pleading and Practice--Annotated § 243.85

§ 243.85 Possible Grounds of Contest

Grounds for contesting a primary election are that [*Elec. Code § 16101*]:

- The defendant is not eligible to the office in dispute;

- The defendant has committed an offense in violation of the Elections Code [*see Elec. Code § 18000 et seq.* (penal provisions)];

- A sufficient number of votes were illegal, fraudulent, forged, or otherwise improper, and that had such votes not been counted, defendant would not have received as many votes as contestant;

- A sufficient number of eligible voters who attempted to vote in accordance with the laws of the state were denied their right to vote, and that had those voters been permitted to vote, the defendant would not have received as many votes as the contestant; and

- Due to mistake, error, or misconduct the votes in any precinct were so incorrectly counted as the change the result of the election.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawVoting RightsVoting Rights ActFailure to Allow VotingGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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20-243 California Forms of Pleading and Practice--Annotated § 243.86

§ 243.86 Answer and Cross Contest

When the contest is based on any one of the first three grounds set forth in *Elec. Code § 16101(a)-(c)* [*see § 243.65*], the defendant may, within five days after receipt of the copy of the contestant's affidavit or declaration, file an answer or cross contest contesting the contestant's right to nomination [*Elec. Code § 16443*]. No special appearance, demurrer or objection may be taken other than by the affidavits, or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*] which are to be considered a general appearance in the contest [*Elec. Code § 16444*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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§ 243.87 Contest Involving Simple Recount

When the contest calls for a simple recount on the ground that due to mistake, error, or malconduct the votes counted in a precinct were so incorrectly counted as to change the result [*Elec. Code §§ 16101(e), 16460*], the defendant may also file an affidavit or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*], stating his or her desire for a recount of votes in those precincts which were not designated in the contestant's affidavit. The defendant must designate these additional precincts and set up the grounds therefor [*Elec. Code § 16464*]. In turn, the contestant may file answering affidavits or declarations to defendant's designation of additional precincts for recount [*Elec. Code § 16464*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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§ 243.88 Citation to Both Parties

By contrast to a general election contest, in which the only required issuance of citation is to the defendant [*Elec. Code § 16501*], in a primary election contest a citation to appear is issued to both parties regardless of the ground of contest [*Elec. Code § 16521*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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20-243 California Forms of Pleading and Practice--Annotated § 243.89

§ 243.89 Effect of Irregularity or Improper Conduct

Irregularity or improper conduct will annul or set aside a nomination only if it appears that illegal votes in the precinct have been given to the defendant, which if taken from the defendant, would reduce the number of his or her legal votes below the number of votes of the contestant [*Elec. Code § 16300*].

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[Reserved]

§§ 243.90[Reserved]

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§ 243.100 Related Matthew Bender Publications

For forms of memoranda of points and authorities for use in supporting and opposing the issuance of writs of mandate, see California Points and Authorities, Ch. 150, *Mandate and Prohibition*

For memoranda of points and authorities in support of and in opposition to a petition for writ of mandate to compel an administration official to perform a ministerial act, see California Points and Authorities, Ch. 150, *Mandate and Prohibition*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamus

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§ 243.101 Federal Constitution

Minimum voting age of 18 years. *U.S. Const., amend. XXVI*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawElections, Terms & VotingVoting Age

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20-243 California Forms of Pleading and Practice--Annotated § 243.102

§ 243.102 State Constitution

Right to vote; citizenship, age, and residence requirements. *Cal. Const., art. II, §§ 1-3*

Right of a voter who casts a vote in an election in accordance with the laws of this state to have that vote counted. *Cal. Const., art. II, § 2.5* (enacted by Proposition 43, March 5, 2002)

United States citizen 18 years of age and resident in this state may vote. *Cal. Const., art. II, § 2*

Duty of legislature to define residence and provide for registration and free elections. *Cal. Const., art. II, § 3*

Duty of legislature to prohibit improper practices and to provide that certain persons not exercise privileges of elector. *Cal. Const., art. II, § 4*

Duty of legislature to provide for primary elections, including open presidential primary. *Cal. Const., art. II, § 5(a)*

Right of political party that participated in primary election for a partisan office to participate in general election for that office. *Cal. Const., art. II, § 5(b)*

Judicial, school, county, and city officers must be nonpartisan. *Cal. Const., art. II, § 6*

Voting is secret. *Cal. Const., art. II, § 7*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 243.103 Federal Statutes

Age requirement to vote is 18 years or older. *42 U.S.C. § 1973bb-2*

Help America Vote Act of 2002. *42 U.S.C. § 15301 et seq* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawVoting RightsGeneral OverviewCivil Rights LawVoting RightsVoting Rights ActGeneral OverviewGovernmentsFederal GovernmentElections

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§ 243.104 State Statutes

[1] Definitions

Types of elections. Elec. Code §§ 233, 234, *316*, *328*, *330*, *340*, *341*, *348*, *356*, *357*

Ballot. *Elec. Code § 301*

Election board. *Elec. Code § 319*

Elector. *Elec. Code § 321*

General election. *Elec. Code § 324*

Nomination documents *Elec. Code § 333*

Nonpartisan office. *Elec. Code § 334*

Official canvass. *Elec. Code § 335.5*

Partisan office. *Elec. Code § 337*

Party. *Elec. Code § 338*

Precinct board. *Elec. Code § 339*

Primary election. *Elec. Code § 341*

Semifinal official canvass. *Elec. Code § 353.5*

[2] Voting Registration

Confidentiality and disclosure of voter registration information. *Elec. Code §§ 2166, 2188, 2194, 18109*; *Gov. Code § 6254.4*

No negligence action may be maintained against government entity, officer, or employee as result of improper disclosure of information from registration affidavit without showing of gross negligence or willfulness. *Elec. § 2166(c)*

Voting by new residents and new citizens. *Elec. Code §§ 3400 et seq., 3500 et seq.*

[3] Ballot Format

Ballot format in general. *Elec. Code § 13000 et seq.*

Democratic Party presidential primary. *Elec. Code §§ 6041, 6042*

Republican Party presidential primary. *Elec. Code § 6480*

American Independent Party presidential primary. *Elec. Code § 6620*

Peace and Freedom Party presidential primary. *Elec. Code § 6820*

Municipal elections. *Elec. Code § 10102*

District election. *Elec. Code §§ 10526, 10528*

[4] Correction of Ballot Error

Correction of state ballot pamphlet. *Elec. Code § 9092*

Writ of mandate to compel correction. *Elec. Code § 13314*

[5] Write-in Candidacy

Statement of write-in candidacy. *Elec. Code § 8600*

Nomination papers. *Elec. Code § 8602*

Qualifications of signers. *Elec. Code § 8603*

Write-in candidacy for presidential electors. *Elec. Code § 8650 et seq.*

[6] Direct Primary

[a] General Provisions

Elections excluded. *Elec. Code § 8000*

Political party affiliation. *Elec. Code § 8001*

Certificate of nomination or election. *Elec. Code §§ 8145-8150*

[b] Determination of Nominees

Independent nominees. *Elec. Code §§ 8003, 8300-8550*

Partisan nominees. *Elec. Code § 15451*

[7] Elections in General

Vote by mail voter status. *Elec. Code § 3000 et seq.*

Permanent vote by mail voter status. *Elec. Code § 3200 et seq.*

Special, municipal, and school board elections. *Elec. Code § 10000 et seq.*

Conduct of elections. *Elec. Code § 14000 et seq.*

Unused ballot procedure. *Elec. Code § 14403 et seq.*

Retention of election documents. *Elec. Code § 17000 et seq.*

Voting systems. *Elec. Code § 19001 et seq.*

Action to challenge at-large elections where minority's voting rights abridged or diluted. *Elec. Code § 14025 et seq.*

Provisional ballot status for votes cast during the time that closing of polls is extended pursuant to court order. *Elec. Code § 14402.5*

Conduct of election in small city, or eligible entity, wholly as all-mail ballot election. *Elec. Code § 4004*

[8] Contest of Primary Elections

Affidavit and grounds for contesting nomination in primary election. *Elec. Code §§ 16101, 16404, 16420, 16300*

Place of filing of affidavit. *Elec. Code § 16421*

Procedure for contesting nomination when (1) defendant is ineligible for disputed office, (2) defendant has committed offense against elective franchise, or (3) illegal votes were counted. *Elec. Code §§ 16440 et seq., 16520, 16521, 16620, 16720, 16920*

Procedure for contesting nomination on ground that votes were incorrectly counted due to mistake, error, or misconduct. *Elec. Code §§ 16460 et seq., 16540, 16640 et seq., 16740 et seq., 16940*

Costs. *Elec. Code § 16803*

[9] Contest of General Elections

Grounds for contest of general election. *Elec. Code § 16100*

Contest of general elections. *Elec. Code § 16200 et seq.*

Time for filing statement of contest. *Elec. Code § 16401*

Want of form not ground for dismissal. *Elec. Code § 16403*

Procedure after filing statement of contest. *Elec. Code § 16500 et seq.*

Procedure after judgment. *Elec. Code § 16700 et seq.*

Action to challenge at-large elections where minority's voting rights abridged or diluted. *Elec. Code § 14025 et seq.*

[10] Recounts

Clerk-ordered recounts. *Elec. Code § 15610*

Voter-requested recounts. *Elec. Code § 15620 et seq.*

Municipal election recount governed by *Elec. Code §§ 15600 et seq., 10266*

District election recount governed by *Elec. Code §§ 15600 et seq., 10546*

[11] Calendaring of Elections Proceedings

Precedence in cases involving elections proceedings. *Code Civ. Proc. § 35*

Calendar preference to appeals of contested election cases. *Code Civ. Proc. § 44*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusCivil Rights LawVoting RightsVote DilutionCivil Rights LawVoting RightsVoting Rights ActPayment for VotesGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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§ 243.105 State Regulations

Voter registration. *2 Cal. Code Reg. § 19001 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 243.106 California Rules of Court

Format requirements for petitions and other papers filed in Supreme Court and courts of appeal. *Cal. Rules of Ct., Rules 8.40, 8.204*

Memorandum to accompany petition filed in reviewing court. *Cal. Rules of Ct., Rule 8.486(a)(5)*

Legal Topics:

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

[1] Definitions

Direct primary is regular election for purposes of former *Elec. Code § 22807* [*now see Elec. Code § 10201*], providing that proposition may be submitted at regular election, or special election may be called, by ordinance or resolution, for purpose of voting on proposition. *O'Connor v. Superior Court (1979) 90 Cal. App. 3d 107, 112-113, 153 Cal. Rptr. 306*

[2] Preelection Procedure

State political party rule permitting independent voters (registered voters not affiliated with any political party) to vote in party primaries for federal and statewide offices is valid, despite state statute requiring voters in any party primary to be registered members of that party, because statute impermissibly burdens party's and its members' *First Amendment* and *Fourteenth Amendment* rights to enter into political association with individuals of their own choosing. *Tashjian v. Republican Party of Connecticut (1986) 479 U.S. 208, 210-211, 229, 107 S. Ct. 544, 93 L. Ed. 2d 514*

States are permitted to condition minor-party or independent candidate's access to general election ballot on showing of a modicum of support among potential voters without violating either *First Amendment* rights of individuals to associate for political purposes or *Fourteenth Amendment* rights of voters to cast votes effectively; states are not required to show voter confusion, ballot overcrowding, or presence of frivolous candidacies before imposition of reasonable restrictions on ballot access. *Munro v. Socialist Workers Party (1986) 479 U.S. 189, 193-195, 107 S. Ct. 533, 93 L. Ed. 2d 499*

State may legitimately allow political parties to close primaries to nonmembers, given state's interest in protecting associational rights of party members and preserving integrity of electoral process. *Ziskis v. Symington (9th Cir. 1995) 47 F.3d 1004, 1006*

A charter provision prohibiting write-in voting in runoff elections for municipal offices does not violate the free speech clause of *Cal. Const. art. I, § 2(a)*; and *Canaan v. Abdelnour (1985) 40 Cal. 3d 703, 221 Cal. Rptr. 468* is overruled to

the extent it holds that a total ban on write-in voting in a city election is prohibited by the free speech clause of *Cal. Const. art. I, § 2(a)*. *Edelstein v. City and County of San Francisco (2002) 29 Cal. 4th 164, 172-183, 126 Cal. Rptr. 2d 727*

California City's decision to restrict the vote on a local measure to city residents was rationally based and did not violate the *equal protection clause* of the federal or state constitutions, as the city could have determined that the residents are most knowledgeable and interested in all aspects of local affairs, on both the revenue and expenditure side of its ledger. *Neilson v. City of California City (2005) 133 Cal. App. 4th 1296, 1317, 35 Cal. Rptr. 3d 453*

The Legislature's decision to exclude voters on the inactive file of registered voters from the calculation to determine whether a political party qualifies to participate in a primary election pursuant to *Elec. Code § 5100(b)* passes constitutional muster. Because information in the inactive file is unreliable and often duplicative of information in the file of active voters, the exclusion is a reasonable, nondiscriminatory restriction that furthers the state's compelling interest in protecting the integrity and stability of the electoral process in California. *Peace & Freedom Party v. Shelley (2004) 114 Cal. App. 4th 1237, 1247, 8 Cal. Rptr. 3d 497*

Elections Code §§ 13112 and *13113* do not require a city clerk to request the Secretary of State to conduct a new randomized alphabet draw for the second round of voting in a single election (*e.g.*, a runoff election following a primary election). A new randomized alphabet is not required for a runoff election with no new filing period or new candidates. *Bradley v. Perrodin (2003) 106 Cal. App. 4th 1153, 1161-1165, 131 Cal. Rptr. 2d 402*

Declarations of candidacy for would-be elected state officials do not have to include an affirmation that the candidate is not, nor has been for the last five years, a member of an organization advocating the overthrow of the government by force or violence. *Jesson v. Davis (2002) 97 Cal. App. 4th 1032, 1035-1038, 118 Cal. Rptr. 2d 839*

Trial court correctly issued peremptory writ of mandate ordering Registrar to accept plaintiff's ballot designation of her occupation as "administrative law judge"; ballot designation reflects a title authorized by statute, accurately describes plaintiff's occupation and does not mislead voters; such designation not impermissible under former *Elec. Code § 10211* (*now Elec. Code § 13107*); professional title authorized by statute provides objective standard that election official may use as basis for approving a ballot designation; in contrast (citing *Luke v. Superior Court (1988) 199 Cal. App. 3d 1360, 1363, 245 Cal. Rptr. 594*), neither court commissioner nor any other individual not a judge, as that term is defined in the Constitution and state statutes, may use ballot designation containing word "judge" or derivative thereof. *Andrews v. Valdez (1995) 40 Cal. App. 4th 492, 46 Cal. Rptr. 2d 744*

Ballot access statutes are not subject to strict scrutiny standard of review unless restriction on candidate's access to ballot has real and appreciable impact on fundamental right to vote. *Bullock v. Carter (1972) 405 U.S. 134, 92 S. Ct. 849, 31 L. Ed. 2d 92* ; *Fridley v. Eu (1982) 131 Cal. App. 3d 100, 104, 182 Cal. Rptr. 232*

Former *Elec. Code §§ 6653* and *6661* [*now see Elec. Code §§ 8605* and *8803*], regarding the nomination of candidates by direct primary and by write-in votes, respectively, place only minimal burden on Libertarian Party's access to ballot; state has power to regulate method by which political parties nominate candidates. *Lightfoot v. Eu (9th Cir. 1992) 964 F.2d 865, 868-873 , cert. denied, 507 U.S. 919*

Former *Elec. Code § 6555* [*now see Elec. Code § 8106*], allowing candidate for elective office to submit petition containing specified number of signatures of registered voters in lieu of filing fee, is constitutional. *Andress v. Reed (9th Cir. 1989) 880 F.2d 239, 242*

Charter city's broad power to regulate municipal elections is not relevant to constitutional challenge to city's election ordinances, because city may not regulate municipal election in manner that violates guarantees of state or federal constitutions. *Canaan v. Abdelnour (1985) 40 Cal. 3d 703, 710, 221 Cal. Rptr. 468, 710 P.2d 268 , overruled in part*

by Edelstein v. City and County of San Francisco (2002) 29 Cal. 4th 164, 126 Cal. Rptr. 2d 727

Former *Elec. Code § 6402* [*now see Elec. Code § 8003*], pertaining to independent nomination of candidates and prohibiting dual candidacy in same election, does not apply to selection of party county central committee members. *Moore v. Panish (1982) 32 Cal. 3d 535, 538, 186 Cal. Rptr. 475, 652 P.2d 32*

Former *Elec. Code § 10212* [*now see Elec. Code § 13105*], requiring independent nominees to be listed on ballot as independents and not by their political parties, does not violate *equal protection clause* of state or federal constitutions. *Libertarian Party v. Eu (1980) 28 Cal. 3d 535, 542-547, 170 Cal. Rptr. 25, 620 P.2d 612*

Person desiring to be candidate for board of supervisors who has been elector in supervisorial district but who will be made nonresident thereof by redistricting is permitted to apply his or her previous place of residence to his or her new, or former, district, to end of becoming candidate of either; mandamus to compel registrar of voters to accept nomination papers. *Wenke v. Hitchcock (1972) 6 Cal. 3d 746, 755, 100 Cal. Rptr. 290, 493 P.2d 1154*

Alleged preference arising out of placement of incumbent's name first on ballot is not subject to judicial notice. *Mexican-American Political Association v. Brown (1973) 8 Cal. 3d 733, 734, 106 Cal. Rptr. 12, 505 P.2d 204* ; *Diamond v. Allison (1973) 8 Cal. 3d 736, 737, 106 Cal. Rptr. 13, 505 P.2d 205*

Word "qualifications" as used in *Elec. Code § 13307* does not encompass attacks on one's opponents, but does encompass candidates's ideas or platform; candidate's views on issues, that contains no direct criticism of another candidate, does not constitute attack on opponent; pursuant to petition for writ of mandate, trial court erred in striking candidates view on issues from candidate's statement. *Hammond v. Agran (1999) 76 Cal. App. 4th 1181, 1183, 1192-1193, 90 Cal. Rptr. 2d 876*

Under *Elec. Code § 13307*, candidate's statement for local office may comment on his or her own qualifications, but not on opponent's qualifications; when candidate sought to unseat incumbent in local election, but candidate's statement contained impermissible comments about incumbent, incumbent was entitled to writ of mandate under *Elec. Code § 13313* directing registrar of voters to delete impermissible material in candidate's statement from voter's pamphlet. *Dean v. Superior Court (1998) 62 Cal. App. 4th 638, 640-642, 73 Cal. Rptr. 2d 70*

Candidate for city council who met burden of proof that he had intent before election to change his domicile to city where he ran for council seat overcome challenger's demonstration that candidate was domiciled in nonqualifying electoral jurisdiction. *DeMiglio v. Mashore (1992) 4 Cal. App. 4th 1260, 1267-1271, 6 Cal. Rptr. 2d 267* (reversal of trial court's order annulling election)

Disputes concerning election procedures are properly reviewable by appellate court even though election in question has occurred, if contentions raised are of general public interest and are likely to occur in future elections in a manner evasive of timely appellate review. *Huening v. Eu (1991) 231 Cal. App. 3d 766, 770, 282 Cal. Rptr. 664* ; *Gebert v. Patterson (1986) 186 Cal. App. 3d 868, 872, 231 Cal. Rptr. 150*

Court commissioner or any other individual who is not a "judge" as defined in state constitution and statutes is not permitted to use ballot designation containing word "judge" or any derivative thereof. *Luke v. Superior Court (1988) 199 Cal. App. 3d 1360, 1363, 245 Cal. Rptr. 594*

Former *Elec. Code § 10015* [*now see Elec. Code § 13314*] is intended to correct preelection ballot errors rather than to invalidate election that has already been conducted. *Salazar v. City of Montebello (1987) 190 Cal. App. 3d 953, 956, 235 Cal. Rptr. 708*

Former *Elec. Code § 17113.5*, which cancelled June 3, 1986, election for sheriff in San Mateo County, was

unconstitutional special legislation prohibited by *Cal. Const., art. IV, § 16*, because of applicability of then existing general legislation, former *Elec. Code § 17113* [*now see Elec. Code § 15402*], to that election. *White v. Church (1986) 185 Cal. App. 3d 627, 630-631, 231 Cal. Rptr. 565*

Former *Elec. Code § 6661(a)* [*now see Elec. Code § 8605*], requiring write-in candidate in primary election to receive at least 1 percent of votes cast for office sought at last preceding general election when office was filled, does not have appreciable impact on right to vote so as to require application of strict scrutiny standard of review. *Fridley v. Eu (1982) 131 Cal. App. 3d 100, 104, 182 Cal. Rptr. 232*

Former *Elec. Code § 6661* [*now see Elec. Code § 8605*] is constitutionally valid because it is rationally related to legitimate state interests of avoiding confusion and deception at general election and fostering efficient operation of primary system. *Fridley v. Eu (1982) 131 Cal. App. 3d 100, 104-106, 182 Cal. Rptr. 232*

Proceeding in mandate is required to be filed before date of subject election. *Kilbourne v. City of Carpinteria (1976) 56 Cal. App. 3d 11, 16, 128 Cal. Rptr. 133*

[3] Right to Vote

Plaintiff's not barred by *Legislature v. Eu (1991) 54 Cal. 3d 492, 286 Cal. Rptr. 283, 816 P.2d 1309* , from bringing action attacking constitutionality of Proposition 140's lifetime term limits because California would apply its public interest exception to res judicata doctrine and thus would reexamine merits of constitutional issue; Proposition 140's lifetime term limits held not to violate plaintiff's *First* and *Fourteenth Amendment* rights. *Bates v. Jones (9th Cir. 1997) 131 F.3d 843, 845-847*

Proposition 140, imposing term limits on state legislators, does not violate voter's right to vote for candidate of choice, because burden on voter is outweighed by state's strong interest in incumbency reform, and because less drastic alternatives to term limits are inadequate to achieve reform; any burden on voters is mitigated by continued right to vote for any qualified candidate and by fact that it is not clear whether and to what extent voters retain federal constitutional right to vote for any particular candidate such as incumbent state legislator affected by term limit. *Legislature v. Eu (1991) 54 Cal. 3d 492, 518-525, 286 Cal. Rptr. 283, 816 P. 2d 1309 , cert. denied, 503 U.S. 919*

Right to seek public office and right to unrestricted exercise of franchise are fundamental rights protected by *U.S. Const., amends. I* and *XIV*, and *Cal. Const., art. I, § 2*. *Canaan v. Abdelnour (1985) 40 Cal. 3d 703, 715, 727, 221 Cal. Rptr. 468, 710 P.2d 268 , overruled in part by Edelstein v. City and County of San Francisco (2002) 29 Cal. 4th 164, 126 Cal. Rptr. 2d 727*

Right to vote is fundamental, and reasonable legislative efforts to increase its exercise are required to be upheld; special city election conducted entirely by mail ballot are therefore valid and not in violation of constitutional requirement that voting be in secret. *Peterson v. City of San Diego (1983) 34 Cal. 3d 225, 229-231, 193 Cal. Rptr. 533, 666 P.2d 975*

Requirement of local election law that candidate make irrevocable choice between paying filing fee or submitting petition containing specified number of signatures in addition to signatures on nominating petition is unconstitutional. *Green v. Layton (1975) 14 Cal. 3d 922, 928, 123 Cal. Rptr. 97, 538 P.2d 225*

Provisions of Cal. Const., art. II, and former *art. XX, § 11* (*now see* Cal. Const., art. VII, *8(b)*) denying right of suffrage to persons convicted of crime, together with sections of Elections Code implementing these provisions, do not violate *equal protection clause* of *U.S. Const., amend. XIV*. *Richardson v. Ramirez (1975) 418 U.S. 24, 56, 94 S. Ct. 2655 , reversing Ramirez v. Brown (1973) 9 Cal. 3d 199, 216-217, 107 Cal. Rptr. 137, 507 P.2d 1345*

Provision of city charter prescribing two-year durational residence requirement for candidates to office of city councilman unconstitutional. *Thompson v. Mellon (1973) 9 Cal. 3d 96, 97, 107 Cal. Rptr. 20, 507 P.2d 628*

Four-year residence requirement for office of city council violates *equal protection clause* of *U.S. Const., amend. XIV. Martinez v. Newton (1973) 8 Cal. 3d 756, 757, 106 Cal. Rptr. 105, 505 P.2d 529*

Ninety-day residence requirement of former *Cal. Const, art. II, § 1* (repealed) unconstitutional; 54-day residence requirement of *Cal. Const., art. II, § 1* and parallel closing date for registration prescribed by (former) *Elec. Code § 203* violate *equal protection clause* of *U.S. Const., amend. XIV*; no durational residence requirement in excess of 30 days may be constitutionally imposed, and general voter registration must remain open at all times except during 29 days immediately preceding election. *Young v. Gnoss (1972) 7 Cal. 3d 18, 23-28, 101 Cal. Rptr. 533, 496 P.2d 445*

Residence requirements of charter for election to office is illegal. *Zeilenga v. Nelson (1971) 4 Cal. 3d 716, 722-723, 94 Cal. Rptr. 602, 484 P.2d 578* ; *Camara v. Mellon (1971) 4 Cal. 3d 714, 715, 94 Cal. Rptr. 601, 484 P.2d 577*

Cal. Const., art. II, § 4, does not disenfranchise person who by plea or verdict has been adjudicated guilty of felony but either (1) is on probation under jurisdiction of court after court has suspended imposition or execution of sentence, or (2) was sentenced under *Penal Code § 18* to punishment other than imprisonment in state prison. *League of Women Voters v. McPherson (2006) 145 Cal. App. 4th 1469, 1484-1485, 52 Cal. Rptr. 3d 585*

Where city's municipal code prohibits persons from being elected as a member of the city council for more than two four-year terms, the term "four-year term" cannot reasonably be construed to mean less than a four-year term or a term of up to four years' duration. *Pope v. Superior Court (2006) 136 Cal. App. 4th 871, 876-877, 39 Cal. Rptr. 3d 183*

City charter provision permitting council member to serve continually in the same district for two four-year terms is not violated by a council member's election to a third term, because he did not contest the district seat immediately after his two consecutive four-year terms ended. *Conde v. City of San Diego (2005) 134 Cal. App. 4th 346, 350, 36 Cal. Rptr. 3d 54*

Supermajority requirement of Cal. Const., art. XIIIA, § 4 in election seeking imposition of special tax in special library district does not unconstitutionally deny voters equal protection of laws because it does not discriminate against, or otherwise debase vote of, definite, identifiable class of individuals. *Altadena Library Dist. v. Bloodgood (1987) 192 Cal. App. 3d 585, 589-592, 237 Cal. Rptr. 649*

Strict standard of judicial review is applicable to state action that excludes certain potential voters from participation; for legislative classification relating to elective process to avoid strict scrutiny test of equal protection, classification is required to have only minimal, if any, effect on fundamental right to vote. *San Dieguito Union High School Dist. v. Rosander (1985) 171 Cal. App. 3d 968, 978, 217 Cal. Rptr. 737*

In election regarding proposed removal of portion of junior high school program from high school district to elementary school district, restriction of franchise to voters residing in elementary school district is denial of equal protection of the law because elementary school district cannot claim compelling interest in excluding concededly interested voters because of how they may vote. *San Dieguito Union High School Dist. v. Rosander (1985) 171 Cal. App. 3d 968, 979-981, 217 Cal. Rptr. 737*

One-year residency requirement of former *Cal. Const, art. II, § 1* (repealed) for voting is unconstitutional violation of *equal protection clause* of *U.S. Const., amend. XIV*, in absence of necessity to enforce compelling state interest. *Keane v. Mihaly (1970) 11 Cal. App. 3d 1037, 1045-1046, 90 Cal. Rptr. 263*

[4] Voter Registration

National Voter Registration Act (*42 U.S.C. § 1973gg et seq.*) requirement for states to provide simplified systems to vote in federal elections. *Young v. Fordice (1997) 520 U.S. 273, 117 S. Ct. 1228, 1231-1232, 137 L. Ed. 2d 448, 453*

U.S. Postal Service Guideline excluding county central committee from registering voters on Post Office property does not deprive committee of *First Amendment* right of free expression or *Fifth Amendment* equal protection guarantee if property constitutes neither traditional nor limited public forum and if Guideline rationally furthers legitimate Post Office purpose of maintaining public neutrality toward partisan associations. *Monterey Cty. Dem. Cent. Comm. v. U.S. Postal Serv. (9th Cir. 1987) 812 F.2d 1194, 1197-1200*

Private action by citizen to enforce provisions of former *Elec. Code § 304* (county voter outreach programs) [*now see Elec. Code § 2105*] is authorized; Attorney General's enforcement power is nonexclusive. *Common Cause v. Board of Supervisors (1989) 49 Cal. 3d 432, 440-441, 261 Cal. Rptr. 574, 777 P.2d 610*

Former *Elec. Code §§ 302, 304* [*now see Elec. Code §§ 2103, 2105*] does not require counties to deputize county employees as voting registrars, even if deputization would substantially further statutory goal of maximum registration; court-ordered deputization is unavailable as remedial device. *Common Cause v. Board of Supervisors (1989) 49 Cal. 3d 432, 443-444, 261 Cal. Rptr. 574, 777 P.2d 610*

Voter who leaves domicile with intention of abandoning it and currently resides in place where he or she does not intend to remain is entitled to vote in precinct of former domicile until new domicile is acquired. *Walters v. Weed (1988) 45 Cal. 3d 1, 14, 246 Cal. Rptr. 5, 752 P.2d 443*

Former *Elec. Code § 200(b)* [*now see Elec. Code § 349(b)*] must be read in light of statutory scheme that deems every person as domiciled somewhere, for voting purposes, and that one domicile is not lost until another is acquired. *Walters v. Weed (1988) 45 Cal. 3d 1, 7, 11, 246 Cal. Rptr. 5, 752 P.2d 443*

"Residence" as used in *Gov. Code §§ 243* and *244* (setting forth rules for determining voter's domicile) construed to mean "legal residence" or "domicile." *Walters v. Weed (1988) 45 Cal. 3d 1, 7, 246 Cal. Rptr. 5, 752 P.2d 443*

Location of domicile of minor 18 years of age or older is not questionable on account of age or occupational status. *Jolicoeur v. Mihaly (1971) 5 Cal. 3d 565, 582, 96 Cal. Rptr. 697, 488 P.2d 1*

On moving from one precinct to another more than 28 days before election, voter is required to either reregister or execute address change to preserve eligibility to vote; if voter does neither, voter is not properly registered to vote in either old or new precinct. *Escalante v. City of Hermosa Beach (1987) 195 Cal. App. 3d 1009, 1023, 241 Cal. Rptr. 199*

Designation of public park as residence for voting purposes qualifies as place of fixed habitation within meaning of former *Elec. Code § 207* [*now see Elec. Code § 2027*], even though camping and sleeping in park are prohibited. *Collier v. Menzel (1985) 176 Cal. App. 3d 24, 31, 221 Cal. Rptr. 110*

Even though person may be qualified to vote under state constitutional standards, person is not entitled to vote if he or she does not comply with state registration laws because proper registration is condition precedent to exercise of right to vote. *Collier v. Menzel (1985) 176 Cal. App. 3d 24, 30, 221 Cal. Rptr. 110*

Even though registration laws are valid if reasonable, these laws and their interpretation receive strict scrutiny if they deny certain classes of residents right to vote; government entity may not exclude otherwise qualified voters who have no way of making themselves eligible to vote. *Collier v. Menzel (1985) 176 Cal. App. 3d 24, 33, 221 Cal. Rptr. 110*

Equal protection clause of *U.S. Const., amend. XIV* prohibits use of voter's affluence as electoral standard because voter qualifications bear no relation to wealth; denial to resident of opportunity to vote merely because resident cannot afford housing is denial of citizen's right to vote on basis of economic status and impermissible basis for determining entitlement to vote. *Collier v. Menzel (1985) 176 Cal. App. 3d 24, 37, 221 Cal. Rptr. 110*

Designation of elector or his or her voting precinct not essential to registration as a voter. *Ferreira v. Keller (1970) 4 Cal. App. 3d 292, 296, 84 Cal. Rptr. 253*

Declaratory relief is proper means to determine genuine controversy as to voter's right to register. *Ferreira v. Keller (1970) 4 Cal. App. 3d 292, 296, 84 Cal. Rptr. 253*

[5] Writ of Mandate to Compel Registration

Petition for writ of mandate to compel registrar of voters to register petitioners is not rendered moot by passing of registration deadline when petitioners attempted to register approximately two months before deadline but were not permitted to do so by respondent. *Keane v. Mihaly (1970) 11 Cal. App. 3d 1037, 1040-1041, 90 Cal. Rptr. 263*

Issuance of peremptory writ of mandate directing registrar of voters to register an elector as proper. *Truchon v. Toomey (1953) 116 Cal. App. 2d 736, 745, 254 P.2d 638* ; *see* *Collier v. Menzel (1985) 176 Cal. App. 3d 24, 29, 37, 221 Cal. Rptr. 110*

[6] Cancellation of Registration

In action to cancel registration, registered voter is indispensable party in proceeding. *Ash v. Superior Court (1917) 33 Cal. App. 800, 801-802, 166 P. 841*

[7] Voters' Pamphlet

Voters' pamphlet is limited public forum for *First Amendment* purposes, and is therefore required to provide equal access to all competing positions. *Gebert v. Patterson (1986) 186 Cal. App. 3d 868, 874-875, 231 Cal. Rptr. 150*

Charter city's required prepayment of estimated printing cost by individuals submitting ballot arguments for publication in voters' pamphlet is unconstitutional denial of equal access to political arena in violation of state and federal guarantees of equal protection and impediment to free expression in violation of *U.S. Const., amend. I.* *Gebert v. Patterson (1986) 186 Cal. App. 3d 868, 872, 873, 876-877, 231 Cal. Rptr. 150*

Cost of printing election pamphlet containing candidate qualification statements is not "tax, impost, assessment, toll, or municipal fine" within meaning of *Code Civ. Proc. § 86(a)(1)*; action to recover such costs and bar collection of additional cost, by candidate for seat on board of transit district who advanced such cost pursuant to board resolution, is not maintainable in superior court under *Code Civ. Proc. § 86(a)(1)* exception to municipal court subject-matter jurisdiction. *Crawford v. Herringer (1978) 85 Cal. App. 3d 544, 546-551, 149 Cal. Rptr. 578*

[8] Fair Political Practices Act

Requirement of former *Elec. Code § 6552* [*now see Elec. Code § 8103*] that filing fee be paid in order to be placed on ballot in primary election, and providing no alternative means of access to ballot, is denial to indigent person of equal protection of *U.S. Const., amend. XIV* and rights of expressionand association guaranteed by *U.S. Const., amend. I.*

Lubin v. Panish (1974) 415 U.S. 709, 710-719, 94 S. Ct. 1315, 39 L. Ed. 2d 702

Former *Elec. Code § 10012.5* [*now see Elec. Code § 13307*] compels local agency to include in voters' pamphlet each candidate's statement of qualifications and as permitting agency to bill, at its option, each candidate for his or her pro rata share of costs after pamphlet has been printed and distributed; requirement of payment as condition of having statement included in pamphlet is invalid. *Knoll v. Davidson (1974) 12 Cal. 3d 335, 352-353, 116 Cal. Rptr. 97, 525 P.2d 1273*

Former *Elec. Code §§ 6551-6555* [*now see Elec. Code §§ 8101-8105*] (filing fee system) which do not provide reasonable alternative means of access to ballot violates *equal protection clause* of *U.S. Const., amend. XIV* and therefore is null and void. *Knoll v. Davidson (1974) 12 Cal. 3d 335, 349, 116 Cal. Rptr. 97, 525 P.2d 1273* (*but see Elec. Code § 8106* and *Gov. Code § 16100.6*, providing that candidate may submit specified number of signatures in lieu of filing fee)

Former *Elec. Code § 10012* [*now see Elec. Code § 13307*], permitting local agencies to recover costs from candidates publishing statements in voter's pamphlet, is constitutional under *U.S. Const., amends. I, XIV*. *Kaplan v. County of Los Angeles (9th Cir. 1990) 894 F.2d 1076, 1079-1082 , cert. denied, 496 U.S. 907*

When election results were nullified due to misconduct of winning candidate and new election was ordered between defeated candidates, latter entitled under former *Elec. Code § 10012* [*now see Elec. Code § 13307*] to have registrar print and distribute candidate statements for new election without having to pay costs twice. *Dutcher v. Olson (1984) 153 Cal. App. 3d 1189, 1191-1193, 200 Cal. Rptr. 847*

Former *Elec. Code § 10012* [*now see Elec. Code § 13307*], permitting registrar of voters to refuse to print candidate's statement unless candidate has prepaid $17,000, is constitutional. *Mackey v. Panish (1980) 106 Cal. App. 3d 7, 13-14, 164 Cal. Rptr. 771*

Former *Elec. Code § 10012* [*now see Elec. Code § 13307*] which permitted candidate's statement to include information regarding qualifications beyond mere personal data respecting name, age, occupation and education; portion of statute deleted in 1983 which gave clerk authority to reject libelous or obscene language was invalid as violating right to freedom of expression under federal and state constitutions. *Loza v. Panish (1980) 102 Cal. App. 3d 821, 824, 826, 162 Cal. Rptr. 596*

[9] Action to Compel Correction of Error or Omission on Voting Materials

Action challenging charter city's prohibition of write-in voting in municipal primary and general elections was not moot, even though election giving rise to action was over; court decided recurrent election issues even though particular elections initially in question had long been completed. *Canaan v. Abdelnour (1985) 40 Cal. 3d 703, 709, 221 Cal. Rptr. 468, 710 P.2d 268 , overruled in part by Edelstein v. City and County of San Francisco (2002) 29 Cal. 4th 164, 126 Cal. Rptr. 2d 727*

In light of the fact that the Legislature has determined in the Elections Code that an election cannot be undone on the basis of alleged deficiencies in a measure's impartial analysis, trying to achieve the same result under the rubric of constitutional due process requires a showing that the impartial analysis profoundly misled the electorate, and not just that it failed to educate the electorate as to all the legal nuances of the measure. *People ex rel. Kerr v. County of Orange (2003) 106 Cal. App. 4th 914, 934, 131 Cal. Rptr. 2d 274*

Registrar of voters has no ministerial duty to accept (and writ of mandate will not lie to compel registrar to accept) ballot arguments filed after deadline, when ordinance provides that arguments "must be submitted" not later than certain

time and date; doctrine of substantial compliance does not apply to statutory deadlines for election filings couched in language requiring documents to be filed "not less" than or "not later" than given number of days before designated time. *Barnes v. Wong (1995) 33 Cal. App. 4th 390, 395-396, 39 Cal. Rptr. 2d 417*

Ballot designation of candidate's "principal" profession, vocation, or occupation, under former *Elec. Code § 10211(a)(3)* (*now see Elec. Code § 13107(a)(3)*), connotes substantial involvement of time and effort such that activity is one of primary, main, or leading professional, vocational, or occupational endeavors of candidate; term precludes activity that does not entail significant involvement on candidate's part, and involvement that is only nominal, pro forma, or titular in character does not meet requirements of statute. *Andal v. Miller (1994) 28 Cal. App. 4th 358, 366-367, 34 Cal. Rptr. 2d 88*

Presence of candidate's name on ballot, after candidate announced withdrawal of candidacy from school district governing board election, is not error, omission, or evidence of neglect of duty by county registrar of voters under former *Elec. Code § 10015* [*now see Elec. Code § 13314*], in light of prohibition in former *Educ. Code § 5012* [*now see Elec. Code § 10603*] against candidate's withdrawal from election after 88th day before election. *Mann v. Superior Court (1986) 181 Cal. App. 3d 372, 375-376, 226 Cal. Rptr. 263* (action by voter to compel registrar to remove candidate's name from ballot)

Even though election mooted dispute between voter and county registrar of voters, decision on merits in registrar's mandate proceeding to stay enforcement of trial court's judgment in voter's underlying action under former *Elec. Code § 10015* [*now see Elec. Code § 13314*] was warranted by trial court's erroneous judgment, public interest in proper conduct of elections, and probability that issue would arise again. *Mann v. Superior Court (1986) 181 Cal. App. 3d 372, 374-375, 226 Cal. Rptr. 263*

[10] Reapportionment

Political gerrymandering cases are justiciable under *equal protection clause* of *U.S. Const., amend. XIV*, but require threshold showing of discriminatory vote dilution for prima facie case of equal protection violation. *Davis v. Bandemer (1986) 478 U.S. 109, 143, 106 S. Ct. 2797, 92 L. Ed. 2d 85*

In vote dilution suit under Section 2 of Voting Rights Act of 1965 (*42 U.S.C. § 1973*), plaintiffs not required to demonstrate that challenged state legislative redistricting scheme was designed or maintained for discriminatory purpose, but only that redistricting scheme results in denying plaintiffs equal opportunity to participate in political process and elect candidates of their choice. *Thornburg v. Gingles (1986) 478 U.S. 30, 43-46, 106 S. Ct. 2752, 92 L. Ed. 2d 25*

At-large voting scheme in multimember district that dilutes minority's voting power violate *U.S. Const., amend. XIV*, if maintained for racially discriminatory purpose even if based on racially neutral policy. *Rogers v. Lodge (1982) 458 U.S. 613, 626-628, 102 S. Ct. 3272, 73 L. Ed. 2d 1012 , reh'g denied, 459 U.S. 899, 103 S. Ct. 198, 74 L. Ed. 2d 160*

Single-member reapportionment plan preferred absent special circumstances dictating use of multi-member districts. *East Carroll Parish School Bd. v. Marshall (1976) 424 U.S. 636, 639, 96 S. Ct. 1083, 47 L. Ed. 2d 296*

Population variation among county legislative districts not violative of *Equal Protection Clause of federal constitution* in absence of built-in bias. *Abate v. Mundt (1971) 403 U.S. 182, 186, 91 S. Ct. 1904, 29 L. Ed. 2d 399*

Disproportionately low number of legislators in ghetto district compared to county-wide distribution is insufficient proof of invidious discrimination within meaning of *Equal Protection Clause*. *Whitcomb v. Chavis (1971) 403 U.S. 124, 149-150, 91 S. Ct. 1858, 29 L. Ed. 2d 363*

Challenge under *42 U.S.C. § 1973* to change from district to at-large voting not sustainable without showing that minority voters had pattern of cohesive voting. *Badillo v. City of Stockton, Cal. (9th Cir. 1992) 956 F.2d 884, 886-891*

California Supreme Court adopts, with minor exceptions, recommendations of Special Masters for reapportionment plan on basis that Masters had complied to greatest possible extent with requirements of Voting Rights Act (*42 U.S.C. § 1973 et seq.*) and other applicable reapportionment standards and criteria in drafting recommended plan. *Wilson v. Eu (1992) 1 Cal. 4th 707, 712-730, 4 Cal. Rptr. 2d 379, 823 P.2d 545* (*Wilson III*)

In accordance with goal of implementing reapportionment plans pursuant to timetable specified in *Wilson I* (*infra*), California Supreme Court approves procedure proposed by Secretary of State to avoid postponing or bifurcating June 2, 1992, primary election. *Wilson v. Eu (1991) 54 Cal. 3d 546, 548-550, 286 Cal. Rptr. 625, 817 P.2d 890* (*Wilson II*)

California Supreme Court, in exercise of its original jurisdiction, appoints Special Masters to hold public hearings, file report, and make recommendations according to specified timetable for adoption of reapportionment plans for state's legislative, congressional, and Board of Equalization districts because of Legislature's failure to pass reapportionment bills acceptable to Governor in time for upcoming 1992 primary and general elections. *Wilson v. Eu (1991) 54 Cal. 3d 471, 472-474, 286 Cal. Rptr. 280, 816 P.2d 1306* (*Wilson I*)

Initiative measure to reapportion legislative districts is unconstitutional attempt to reapportion more than once during decade following federal decennial census. *Legislature v. Deukmejian (1983) 34 Cal. 3d 658, 674-676, 194 Cal. Rptr. 781, 669 P.2d 17*

2 U.S.C. § 2c (each state required to create number of congressional districts equal to number of representatives to which state is entitled) requires single member districts and forbids using statewide elections to fill congressional positions. *Assembly v. Deukmejian (1982) 30 Cal. 3d 638, 662, 664, 180 Cal. Rptr. 297, 639 P.2d 939*

In adopting temporary reapportionment plan pending voter approval of plan drawn by Legislature, court is required to adopt plan that most effectively assures equal protection of law and most closely adheres to one-person, one-vote rule while minimizing disruption of electoral process. *Assembly v. Deukmejian (1982) 30 Cal. 3d 638, 665, 180 Cal. Rptr. 297, 639 P.2d 939*

New reapportionment plans for elections of 1974 through 1980; no violation of equal protection requirements in staggered terms in state Senate elections; establishment of residency of district where new district lines made as result of reapportionment. *Legislature v. Reinecke (1973) 10 Cal. 3d 396, 405-407, 110 Cal. Rptr. 718, 516 P.2d 6*

Provisions of Palo Verde Irrigation District Act [Stats. 1923, ch. 452, p. 1067, amended by Stats. 1927, ch. 583, § 1, p. 974; West's Water Code, app. § 33] granting voting rights to landowners in proportion to assessed value of their land holdings meets constitutional standards. *Schindler v. Palo Verde Irrigation Dist. (1969) 1 Cal. App. 3d 831, 838-839, 82 Cal. Rptr. 61* ; *cf.* protest procedure of *Gov. Code § 34311*, granting to owner of land, as such, special power to prevent incorporation election and distributing voting power on basis of assessed value of land alone as unconstitutional under equal protection provisions of *U.S. Const., amend. XIV* and those of *Cal. Const., art. I, §§ 11, 21*; propriety of exercise of original jurisdiction by appellate court to issue mandate. *Curtis v. Board of Supervisors (1972) 7 Cal. 3d 942, 950-963, 104 Cal. Rptr. 297, 501 P.2d 537*

California Supreme Court, in performance of its duty to ensure electorate equal protection of laws, is proceeding well in advance of 1974 elections to draft its own reapportionment plans based on 1970 census, unless, by end of 1972 regular legislative session or at a special session called for that purpose, Legislature has enacted valid statutes reapportioning legislative and congressional districts. *Legislature v. Reinecke (1972) 6 Cal. 3d 595, 598, 99 Cal. Rptr. 481, 492 P.2d 385* ; *7 Cal. 3d 92, 93, 101 Cal. Rptr. 552, 496 P.2d 464*

Equal representation for equal numbers of people is principle designed to prevent debasement of voting power and diminution of access to elected representatives. *Calderon v. City of Los Angeles (1971) 4 Cal. 3d 251, 259, 93 Cal. Rptr. 361, 481 P.2d 489*

Court may reapportion voting districts only if appropriate legislative body, given opportunity, fails to do so. *Visnich v. Sacramento County Bd. of Education (1974) 37 Cal. App. 3d 684, 687, 112 Cal. Rptr. 469*

Mere fact that otherwise rationally based county supervisorial redistricting ordinance makes substantial changes in existing district lines thereby deferring franchise of more voters than another plan does not demonstrate violation of equal protection requirements. *Griswold v. County of San Diego (1973) 32 Cal. App. 3d 56, 60-64, 107 Cal. Rptr. 845*

Absence of unfair discrimination in election system does not justify failure to equally apportion on basis of population; no adoption of plan of apportionment based on any criteria other than population, unless effect of plan will be to create districts containing roughly equal numbers of people; system of election districts containing equal numbers of voters resulting in districtsof varying populations as illegal. *D'Adamo v. Cobb (1972) 27 Cal. App. 3d 448, 450-451, 103 Cal. Rptr. 813*

[11] Candidates

Law prohibiting multiple party, or fusion, candidacies for elected office, i.e., prohibiting a candidate from appearing on the ballot as the candidate of more than one party, held not to violate *U.S. Const., amends. I* and *XIV*. *Timmons v. Twin Cities Area New Party (1997) 520 U.S. 351, 369-370, 117 S. Ct. 1364, 1367, 137 L. Ed. 2d 589*

Former *Elec. Code § 6830(d)* [*now see Elec. Code § 8550(f)*], forbidding ballot position to independent candidate for elective public office if he had registered affiliation with qualified political party at any time within one year prior to immediately preceding primary election, is constitutional. *Storer v. Brown (1974) 415 U.S. 724, 736-737, 94 S. Ct. 1274, 39 L. Ed. 2d 714*

Federal preliminary injunction as appropriate to allow candidate to file nomination papers since, absent some relief, candidate would be foreclosed by time element. *Brown v. Chote (1973) 411 U.S. 452, 456-457, 93 S. Ct. 1732, 36 L. Ed. 2d 420* (action by candidate to file without paying filing fee)

Plaintiff's not barred by *Legislature v. Eu (1991) 54 Cal. 3d 492, 286 Cal. Rptr. 283, 816 P.2d 1309* from bring action attacking constitutionality of Proposition 140's lifetime term limits because California would apply its public interest exception to res judicata doctrine and thus would reexamine merits of constitutional issue; Proposition 140's lifetime term limits held not to violate plaintiff's *first* and *fourteenth amendment* rights. *Bates v. Jones (9th Cir. 1997) 131 F.3d 843, 845-847*

Proposition 140, imposing term limits on state legislators, does not violate person's right to candidacy for public office, because burden on persons thereby precluded from running for office is outweighed by state's strong interest in incumbency reform and because less drastic alternatives to term limits are inadequate to achieve reform; burden on persons precluded from running for office as mitigated by facts that these persons have enjoyed significant period in office before ban applies, ban is prospective only, and these persons may seek other public offices. *Legislature v. Eu (1991) 54 Cal. 3d 492, 517-525, 286 Cal. Rptr. 283, 816 P.2d 1309 , cert. denied, 503 U.S. 919*

Gov. Code § 24004.3, which requires candidates for the office of county sheriff to have law enforcement experience, is even-handed, politically neutral, and does not significantly impair access to the ballot, nor does it stifle speech or dictate electoral outcome in any sense. California's important regulatory interest in the qualifications of its sheriffs justifies the

less-than-severe restrictions on *First* and *Fourteenth Amendment* freedoms imposed by Section 24004.3. *Rawls v. Zamora (2003) 107 Cal. App. 4th 1110, 1117, 132 Cal. Rptr. 2d 675*

Three-term limit for members of Assembly under *Cal. Const., art. IV, § 2(a)* (part of Proposition 140, the Political Reform Act of 1990) is lifetime limitation; service of any part of term counts as service of full term; however, service of more than three terms permitted in one limited instance as specified in *Cal. Const., art. XX, § 7* which provides that limitations do not apply to anyunexpired term to which person elected or appointed if remainder of term is less than half of full term; canon of construction calling for narrow restrictions on rights of voters does not allow rewriting of language and does not compel adopting interpretation that is absurd or contrary to will of people. *Schweisinger v. Jones (1998) 68 Cal. App. 4th 1320, 1324-1326, 1329, 81 Cal. Rptr. 2d 183*

Fact that independent candidate for office of state assemblyman must secure 500 valid signatures of registered voters from affected district, to be included on ballot in special primary [*Elec. Code § 8400*] whereas qualified party candidate is required to secure not less than 40 such signatures [*Elec. Code § 8062*], as not violating *equal protection clause* of state or federal constitution. *Kellam v. Eu (1978) 83 Cal. App. 3d 463, 468-469, 147 Cal. Rptr. 884*

Former *Elec. Code § 7203* [*now see Elec. Code § 10706*], providing that if no candidate receives majority of votes cast, name of that candidate of each qualified political party who receives most votes cast for all candidates of that party shall be placed on special general election ballot as candidate of that party, as preventing independent candidate in special election from participating in runoff election when no candidate receives majority vote in primary election and as unconstitutional under both "strict scrutiny" and "rational basis" tests in that it violates both voters' and independent candidates' rights to equal protection. *Libertarian Party v. Eu (1978) 83 Cal. App. 3d 470, 472-474, 147 Cal. Rptr. 888*

Candidate for supervisor whose residence was placed outside district pursuant to ordinance changing boundaries of districts in periodic redistricting was not entitled to declaratory judgment that he was entitled to be candidate from former district. *Gage v. Allison (1971) 22 Cal. App. 3d 85, 87, 99 Cal. Rptr. 95* ; *overruled on other grounds in Johnson v. Hamilton (1975) 15 Cal. 3d 461, 472, 125 Cal. Rptr. 129, 541 P.2d 881*

[12] Vacancy

When, from circumstances attending disappearance of office holder, it reasonably appears more likely than not that incumbent is deceased, official in whom constitutional or statutory authority to appoint successor reposes is not required to rely on seven-year presumption of death [*Evid. Code § 667*] as such presumption is not exclusive; finding that death occurred in period shorter than seven years warranted when there is evidence of specific peril. *Pollack v. Hamm (1970) 3 Cal. 3d 264, 90 Cal. Rptr. 181, 475 P.2d 213*

Term "vacancy" in *Cal. Const., art. VI, § 16(c)* (judges) refers to vacancy that arises on death or surrender of office by elected incumbent and exists until accession to office of elected successor, although office may be temporarily filled by succession of appointees; only circumstances in which election may be postponed beyond sixth year of elected incumbent's term as those in which it is impossible to carry out full elective process. *Pollack v. Hamm (1970) 3 Cal. 3d 264, 273, 90 Cal. Rptr. 181, 475 P.2d 213*

[13] Central Committees and Delegates

Former Elections Code provisions that regulated selection of state central committee members and limited terms of office of committee chairs, that prohibited state and county central committees from endorsing, supporting, or opposing candidates in party primary elections, and that prohibited candidates in primaries from claiming official party endorsement, were unconstitutional as violating *First Amendment*. *Eu v. San Francisco County Democratic Cent.*

Comm. (1989) 489 U.S. 214, 109 S. Ct. 1013, 103 L. Ed. 2d 271

In determining qualifications and eligibility of delegates to national party conventions, rules of party prevail over laws of state. *Cousins v. Wigoda (1975) 419 U.S. 477, 490-491, 95 S. Ct. 541, 42 L. Ed. 2d 595*

[14] Judges

Cal. Const., art. VI, § 17, providing that judge may become eligible for election to other public office by taking leave of absence without pay before filing declaration of candidacy does not violate *U.S. Const., amend. XIV* (equal protection of laws), is not impermissibly vague, uncertain, and overly broad, and does not impose additional or different eligibility requirements for federal elective office rendering it unconstitutional. *Alex v. County of Los Angeles (1973) 35 Cal. App. 3d 994, 1000-1008, 111 Cal. Rptr. 285* (complaint for declaratory relief and petition for writ of mandate by municipal court judge seeking back payment of salary for period for which he took leave of absence for purpose of running for Congress; relief denied)

[15] Conduct of Elections

Associational rights of political parties were unconstitutionally burdened by California's former blanket-primary law (former *Elec. Code § 2001* as added by Proposition 198, adopted in 1996) because it forced them to associate with voters who did not share their beliefs. *California Democratic Party v. Jones (2000) 530 U.S. 567, 581-582, 586, 120 S. Ct. 2402, 147 L. Ed. 2d 502* ; *but cf. Washington State Grange v. Washington State Republican Party (2008) 552 U.S. 442, 128 S. Ct. 1184, 1195-1196, 170 L. Ed. 2d 151* (similar Washington law was not unconstitutional on its face)

U.S. Const., art. I, § 4, the Election clause, grants Congress power to override state regulations by establishing uniform rules of federal elections binding on the states; under *2 U.S.C. §§ 1* and *7*, Tuesday after first Monday in November in even numbered year is established as date for federal congressional elections; Louisiana's open primary statute that provided opportunity to fill office of United States Senator and Representative during previous month, without any action to be taken on federal election day, held to violate federal law. *Foster v. Love (1997) 522 U.S. 67, 118 S. Ct. 464, 139 L. Ed. 2d 369, 373*

State law mandating primary election as method of selecting political party's candidates for partisan offices on general election ballot, thus preventing party leaders from selecting candidates by another method such as caucus or convention, did not unlawfully infringe party's constitutional right of association. *Alaska Independence Party v. Alaska (9th Cir. 2008) 545 F.3d 1173, 1175-1180* (construing Alaska statute; pertinent in California because *Elec. Code § 13* and related sections similarly mandate primary election for nomination of partisan-office candidates)

Election conducted entirely by mail does not violate *Cal. Const., art. II, § 7*, requiring secret ballot. *Peterson v. City of San Diego (1983) 34 Cal. 3d 225, 230-231, 193 Cal. Rptr. 533, 666 P.2d 975*

Former *Elec. Code § 6403* [*now see Elec. Code § 13314*] authorizes relief in the nature of mandate and permits courts to compel primary election officials to perform their duties correctly. *Knoll v. Davidson (1974) 12 Cal. 3d 335, 341, 116 Cal. Rptr. 97, 525 P.2d 1273*

Secretary of State had authority to impose comprehensive system of post-election manual ballot tallying on local elections officials, in connection with Secretary of State conditionally approving use of electronic voting systems, but proceeded improperly by not following Administrative Procedure Act for issuance of regulations. *County of San Diego v. Bowen (2008) 166 Cal. App. 4th 501, 505, 82 Cal. Rptr. 3d 818*

California Legislature could authorize voting by facsimile for citizens outside the country, and could require fax voters

to waive their right to a secret ballot under *Elec. Code § 3103.5*, without violating the secret ballot guarantee of *Cal. Const., art. II, § 7*, because voting by facsimile was a reasonable measure to facilitate voting. *Bridgeman v. McPherson (2006) 141 Cal. App. 4th 277, 283-286, 45 Cal. Rptr. 3d 813*

[16] "One Man, One Vote" Rule

State can require more than simple majority to enact tax or revenue measure is constitutional as long as it does not discriminate against any identifiable class. *Gordon v. Lance (1971) 403 U.S. 1, 7, 8, 91 S. Ct. 1889, 29 L. Ed. 2d 273*

Petition brought by 12 persons residing in California on behalf of themselves and all other citizens of United States for alternative writ of mandate tocompel registrar of voters in places of their residence to refrain from enforcing one-year residency requirement of former *Cal. Const, art. II, § 11/2* (repealed), is properly denied because: (1) it cannot be ascertained which of few named petitioners attempted to register and which did not; (2) petitioners failed to follow procedure set out in Elections Code to compel registration [*Elec. Code § 2142*]; (3) court cannot assume that large number of unnamed persons who might be affected would all have attempted to register; and (4) problem of conducting registration process including distribution of required ballot pamphlets [*Elec. Code § 9080 et seq.*] would be, and was at the time of filing of petition, so vast as probably to create a condition of chaos. *Anderson v. Sullivan (1970) 11 Cal. App. 3d 1047, 1048-1049, 90 Cal. Rptr. 478*

Land value voting scheme of improvement district is unconstitutional; extraordinarily more voting strength assigned based on extent of landownership and nonlandowning residents precluded from voting at all. *Burrey v. Embarcadero Mun. Improvement Dist. (1971) 5 Cal. 3d 671, 673-679, 97 Cal. Rptr. 203, 488 P.2d 395*

Contention of property owners that provisions for landowner protest of Municipal Improvement Act of 1913 [*Sts. & Hy. Code §§ 10000-10610*] and Special Assessment Investigation, Limitation and Majority Protest Act of 1931 [*Sts. & Hy. Code §§ 2800-3124*] violated "one person, one vote" principle rejected; majority protest schemes do not constitute elections in fact and so not offend *equal protection clause*. *County of Riverside v. Whitlock (1972) 22 Cal. App. 3d 863, 869-876, 99 Cal. Rptr. 710*

"One man, one vote" rule applicable only to elective officials; not applicable to sanitation district board of directors. *O'Keefe v. Atascadero County Sanitation Dist. (1971) 21 Cal. App. 3d 719, 724-726, 98 Cal. Rptr. 878*

Application of "one man, one vote" rule to boundaries of divisions within irrigation district. *Girth v. Thompson (1970) 11 Cal. App. 3d 325, 329-331, 89 Cal. Rptr. 823*

[17] Election Contests

Duty of court in election contests is to validate election if possible; court is required to hold election valid unless plainly illegal. *Wilks v. Mouton (1986) 42 Cal. 3d 400, 404, 229 Cal. Rptr. 1, 722 P.2d 187 , cert. denied, 479 U.S. 1066*

Bar of former *Elec. Code § 1013* [*now see Elec. Code § 3017*] to third party delivery of absentee ballots is not so fundamental to preservation of integrity of elections to require, in election contest proceeding, invalidation of absentee ballot delivered by third party in face of trial court determination that there was no fraud or tampering with ballot. *Wilks v. Mouton (1986) 42 Cal. 3d 400, 411, 229 Cal. Rptr. 1, 722 P.2d 187 , cert. denied, 479 U.S. 1066* (distinguishing *Fair v. Hernandez (1982) 138 Cal. App. 3d 578, 582, 188 Cal. Rptr. 45* ; holding of *Wilks* limited to its parties by 1987 amendment of former *Elec. Code § 1013* [*now see Elec. Code § 3017*])

In appeal from contest of election for office of superior court judge, Supreme Court, on its independent review of

ballots, is required to consider write-in votes for one of candidates for district attorney, when votes cast doubt on voters' choice of judge; primary election transmuted into general election for purposes of appeal. *Keane v. Smith (1971) 4 Cal. 3d 932, 937-941, 95 Cal. Rptr. 197, 485 P.2d 261*

Finding on election of tie vote at general election; judgment confirming election of defendant. *Snibley v. Palmtag (1900) 128 Cal. 283, 284, 60 P. 860*

Review of trial court's decision in election contest could not be had by petition for writ of mandate because review by appeal [*see Elec. Code § 16900*; *see also Code Civ. Proc. § 44* (priority on docket in court of appeal)] was adequate remedy at law. *Nguyen v. Superior Court (Nguyen) (2007) 150 Cal. App. 4th 1006, 1009-1010, 58 Cal. Rptr. 3d 802*

The bases for an election contest enumerated in *Gov. Code § 16100* are exclusive; however, an election may be set aside if a nonenumerated act of malconduct affects the electoral machinery itself and thus renders the result unconstitutional. [*McKinney v. Superior Court (2004) 124 Cal. App. 4th 951, 959-960, 21 Cal. Rptr. 3d 773]* .

In election contest proceedings, court may properly refuse to count absentee ballot delivered to clerk's office by person other than voter in violation of former *Elec. Code § 1013* [*now see Elec. Code § 3017*]; *Elec. Code § 1013* as amended in 1986 is retroactively applicable to 1985 election contest because amendment merely clarified existing law. *Escalante v. City of Hermosa Beach (1987) 195 Cal. App. 3d 1009, 1019-1020, 241 Cal. Rptr. 199*

On review of election contest, interpretation of ballots is governed by same rules applied to construction of all other written instruments, unless interpretation turns on credibility of extrinsic evidence; accordingly, reviewing court is not bound by interpretation given to ballot based solely on ballot without aid of evidence, when there is no conflict in evidence, or when interpretation was made on incompetent evidence. *Escalante v. City of Hermosa Beach (1987) 195 Cal. App. 3d 1009, 1014-1015, 241 Cal. Rptr. 199*

Post-election relief is governed either by quo warranto proceedings or by former *Elec. Code § 20021* [*now see Elec. Code § 16100*] *Salazar v. City of Montebello (1987) 190 Cal. App. 3d 953, 957, 235 Cal. Rptr. 708*

Evidence in election contest proceeding sufficient to show candidate's violation of penal provisions of Elections Code, when several absentee ballots cast were result of election bribery, election fraud, and voter coercion. *Stebbins v. White (1987) 190 Cal. App. 3d 769, 784-788, 235 Cal. Rptr. 656*

Actions seeking court disqualification of assemblyman from holding public office and injunction to prohibit Attorney General, Secretary of State, or County Registrar-Recorder from certifying election results of, swearing in, or disbursing money to assemblyman because of alleged violation of *Cal. Const., art. VII, § 9* (prohibiting person who advocates support of foreign government against United States in the event of hostilities from holding state office), properly dismissed for lack of subject matter jurisdiction because, under *Cal. Const., art. IV, § 5*, Legislature has sole jurisdiction to determine qualifications of members and sole right to expel members. *California War Veterans for Justice v. Hayden (1986) 176 Cal. App. 3d 982, 986, 989, 222 Cal. Rptr. 512*

Delivery of absentee ballots to clerk by campaign worker is improper under former *Elec. Code § 1013* [*now see Elec. Code § 3017*] and is sufficient to sustain challenge to those ballots. *Fair v. Hernandez (1982) 138 Cal. App. 3d 578, 582, 188 Cal. Rptr. 45*

Evidence that candidate committed offense against elective franchise by falsely declaring residence in declaration of candidacy [*Elec. Code § 18203*] was sufficient to contest election without showing of conviction. *Pierce v. Harrold (1982) 138 Cal. App. 3d 415, 426, 188 Cal. Rptr. 458*

Candidate's commission of offense warranting contest of election required to be proven only by preponderance of

evidence. *Pierce v. Harrold (1982) 138 Cal. App. 3d 415, 427, 188 Cal. Rptr. 458*

Absentee voters' disclosure of marked ballots to candidate's representatives, and return of marked ballots from voters to election officials by those representatives, were not sufficient to vitiate election. *Beatie v. Davila (1982) 132 Cal. App. 3d 424, 430-431, 183 Cal. Rptr. 179*

Election contest on grounds of candidate's ineligibility for office subject to abatement rather than dismissal when preelection suit on same grounds is pending. *Hale v. Farrell (1981) 115 Cal. App. 3d 164, 166, 166-167 n.1, 171 Cal. Rptr. 228*

Inviting members of precinct board to reception and giving them certificates of merit does not constitute bribe or reward in violation of former *Elec. Code § 20021(c)* [*now see Elec. Code § 16100(c)*]. *Hale v. Farrell (1981) 115 Cal. App. 3d 164, 167, 171 Cal. Rptr. 228*

Summary judgment procedure is unavailable in election contests due to incompatibility of summary procedure under *Code Civ. Proc. § 437c* with statutory scheme governing election contests under former *Elec. Code § 20020 et seq.* [*now see Elec. Code § 16200 et seq.*]. *Anderson v. County of Santa Barbara (1976) 56 Cal. App. 3d 780, 786-787, 128 Cal. Rptr. 707*

[18] Annulment of Election

When an otherwise successful candidate is subsequently found to have committed an offense or offenses against the elective franchise, her election may be annulled even if the number of unqualified voters she fraudulently registered or the number of votes she unlawfully solicited were too few to have changed the outcome of the election. *Bradley v. Perrodin (2003) 106 Cal. App. 4th 1153, 1167, 131 Cal. Rptr. 2d 402*

Elections Code does not permit the trial court to annul the election of a winning candidate, based on offenses that did not change the result of the election, and then declare another candidate elected by shifting legal votes between the two candidates under the primacy effect theory. Having annulled the winning candidate's election for misdeeds that did not change the election results, the court should annul and set aside the runoff election under *Elec. Code § 16603*. *Bradley v. Perrodin (2003) 106 Cal. App. 4th 1153, 1173-1174, 131 Cal. Rptr. 2d 402*

Violation of former *Elec. Code § 20021(c)* [*now see Elec. Code § 16100(c)*] (election bribery and other offenses against elective franchise) by candidate whose election is contested is grounds for annulling candidate's election. *Stebbins v. White (1987) 190 Cal. App. 3d 769, 790, 235 Cal. Rptr. 656*

[19] Illegal Votes Cast

Votes cast by persons not privileged to vote, votes not entitled to be counted because not cast in manner provided by law, votes cast in violation of criminal provisions of Elections Code, and votes cast by persons who received their absentee ballots in improper manner are illegal votes. *Hardeman v. Thomas (1989) 208 Cal. App. 3d 153, 168, 256 Cal. Rptr. 158*

[20] List of Illegal Votes

Former *Elec. Code § 20052* [*now see Elec. Code § 16402*] does not require list of illegal voters to identify legal basis for claiming that each listed voter cast illegal vote. *Hardeman v. Thomas (1989) 208 Cal. App. 3d 153, 171-172, 256 Cal. Rptr. 158*

Purpose of requiring list of illegal votes. *Benson v. Superior Court (1963) 214 Cal. App. 2d 551, 560-561, 29 Cal. Rptr. 760*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityPolitical QuestionsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawBill of RightsFundamental FreedomsFreedom of AssociationGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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§ 243.108 Attorney General Opinions

Requirements for redistricting plans under section 2 of Voting Rights Act and California Constitution. 74 Ops. Cal. Atty. Gen. 136 (1991)

Former *Elec. Code § 1017* [*now see Elec. Code § 3021*] applicable to conditions arising after normal deadline for applying for absentee ballot, as well as to preexisting, ongoing conditions. *66 Ops. Cal. Atty. Gen. 9, 13 (1983)*

Defeated candidate in primary election for office of district attorney is capable of running as write-in candidate for that office in November general election. *65 Ops. Cal. Atty. Gen. 482, 489 (1982)*

Candidate for judge of superior court is not entitled to refund of filing fee when Secretary of State, subsequent to payment of fee, has cancelled election, concluding vacancy should be filled by appointment rather than by election [former *Elec. Code § 6554*; *now see Elec. Code § 8105*]. *63 Ops. Cal. Atty. Gen. 621 (1980)*

Provisions of *Cal. Const., art. III, § 3.5* (powers of administrative agencies), applicable to decision of Fair Political Practices Commission not to review Legislature's Conflict of Interest Code and its amendments on ground that such action would be unconstitutional. *62 Ops. Cal. Atty. Gen. 809 (1979)*

Minority presidential party or any other political party ai qualified to participate in presidential primary elections in California pursuant to former *Elec. Code 6430* [*now see Elec. Code § 5100*]. *62 Ops. Cal. Atty. Gen. 386 (1979)*

County Board of Education is not required to return difference in filing fees based on salary reduction. *62 Ops. Cal. Atty. Gen. 356 (1979)*

Dates for circulating petitions in lieu of filing fees [*Elec. Code § 8106*]. *60 Ops. Cal. Atty. Gen. 114 (1977)*

Candidate for own party's nomination for partisan office is permitted to cross-file as write-in candidate for another party's nomination for same office. *59 Ops. Cal. Atty. Gen. 414 (1976)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawVoting RightsVote DilutionGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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§ 243.109 Law Reviews

Inbody, *Of Sneetches and Snakes: Race and Redistricting After Shaw v. Reno, 35 Santa Clara L. Rev. 273 (1994)*

Sutro, *Interpretation of Initiatives by Reference to Similar Statutes: Canons of Construction Do Not Adequately Measure Voter Intent, 34 Santa Clara L.Rev. 945 (1994)*

Butler and Murray, *Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a "Rainbow Coalition" Claim the Protection of the Voting Rights Act? 21 Pac. L.J. 619 (1990)*

Note, *Defining the Minority Preferred Candidate Under Section 2, 99 Yale L.J. 1651 (1990)*

Note, *Casting a Meaningful Ballot: Applying One-Person, One-Vote to Judicial Elections Involving Racial Discrimination, 98 Yale L.J. 1193 (1989)*

Note, *A Vote on Th' Talleysheet is Worth Two in the Box: Peterson v. City of San Diego, 18 U.S.F. L.Rev. 635 (1984)*

Note, *Getting Results Under Section 5 of the Voting Rights Act, 94 Yale L.J. 139 (1984)*

Note, *The Constitutional Imperative of Proportional Representation, 94 Yale L.J. 163 (1984)*

Note, *Geometry and Geography: Racial Gerrymandering and the Voting Rights Act, 94 Yale L.J. 189 (1984)*

Adamany, *Political Finance and the American Political Parties, 10 Hastings Const. L.Q. 497 (1983)*

Alexander, *The Future of Election Reform, 10 Hastings Const. L.Q. 721 (1983)*

Girard, *Campaign Finance Reform in California, 10 Hastings Const. L.Q. 567 (1983)*

Oldaker and Picard, *Broadcasters' Rights: Whether to Air Independent Political Action Committee Advertisements, 10 Hastings Const. L.Q. 649 (1983)*

Packwood, *Campaign Finance, Communications, and the First Amendment, 10* Hastings Const. L.Q. 745 (1983)

Symposium, *Money in Politics, 10 Hastings Const. L.Q. 463 (1983)*

Note, *The Constitutional Significance of the Discriminatory Effects of At-Large Elections*, 91 Yale L.J. 974 (1982)

Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems, 92 Yale L.J. 144 (1982)*

Note, *State Restrictions on Municipal Elections: An Equal Protection Analysis, 93 Harv. L. Rev. 1491 (1980)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawVoting RightsRacial DiscriminationCivil Rights LawVoting RightsVote DilutionCivil Rights LawVoting RightsVoting Rights ActGeneral OverviewGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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[Reserved]

§§ 243.110[Reserved]

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PART IV. PROCEDURAL CHECKLIST

20-243 California Forms of Pleading and Practice--Annotated § 243.120

§ 243.120 Contestant's Checklist for Contest of General Election

NOTE:

Scope of Checklist. This checklist is intended to be illustrative only of procedures commonly used in contests of elections, other than that of state senators and assemblypersons [*Elec. Code § 16200*], as opposed to nominations, and is not exhaustive. A particular case may require procedures not set out here. For contests of nominations at primary elections, see § 243.130.

[1] Ascertain Facts

☐ Facts relating to contestant:

☐ Name, address, and telephone number of contestant.

☐ County or city, or political subdivision of either, in which contestant is an elector [*see Elec. Code § 16100*; *see also Elec. Code § 321* (defining "elector")].

☐ Additional facts, as desired, relating to contestant's stability and financial solvency (such as employment status, prior residences, credit, bank, and personal references, etc.).

☐ Facts relating to election:

☐ Type of election held.

☐ Name of county, or city, or political subdivision thereof, in which election was held.

☐ Elective office contested.

☐ Names and addresses of all candidates for office contested.

☐ Date of election.

☐ Date of declaration of result of election by body canvassing returns.

NOTE:
Period of Limitation. This date commences the running of statute of limitations applicable to elections contests [*Elec. Code § 16401(a)-(d)*; *see* [3], *below*].

☐ Name of candidate declared elected.

☐ Number of votes declared cast for each candidate for office contested.

☐ Facts relating to grounds of contest:

NOTE:
Change in Result of Election Required. The errors must be sufficient to change the result of the election as to any person who has been declared elected [*Elec. Code § 16100(f)*].

☐ Precinct and/or member thereof guilty of malconduct [*Elec. Code § 16100(a)*]:

NOTE:
Malconduct Defined. Although the term "malconduct" is not defined by the Elections Code, it has been held to mean bad conduct or dishonesty in managing public affairs [*Willburn v. Wixson (1974) 37 Cal. App. 3d 730, 735, 112 Cal. Rptr. 620]* . In addition, because the Elections Code provides for contest based on errors in conducting an election or in canvassing returns [*Elec. Code § 16100(f)*] or in vote-counting programs or summation of ballot counts [*Elec. Code § 16100(g)*], the term "malconduct" would appear to refer to willful acts of misconduct rather than merely erroneous acts.

☐ Name of precinct or board member(s) guilty of malconduct

☐ Nature and effect of malconduct [*see* *Willburn v. Wixson (1974) 37 Cal. App. 3d 730, 735, 112 Cal. Rptr. 620* (although election boards were lax in not giving verbal warnings prescribed to voters by former Elec. Code § 14409 [repealed by Cal. Stats. 1976 ch. 220, § 7], such omissions did not constitute malconduct)].

NOTE:
Change in Result of Election Required. Malconduct must be such as to procure the defendant to be declared either elected or one of those receiving an equal and highest number of votes [*Elec. Code § 16201*]. An election is not set aside because of malconduct on the part of a precinct board unless the rejection of the vote of that precinct would change the result as to that office in the remaining vote of the

county [*Elec. Code § 16202*].

☐ Date malconduct occurred.

☐ Ineligibility to office of person declared elected [*Elec. Code § 16100(b)*; *see § 243.33*; *see also Shinn v. Heusner (1949) 91 Cal. App. 2d 248, 250, 204 P.2d 886* (term "ineligible" means lacking in legal qualification prescribed for the particular office)].

☐ Bribery or other election crime by candidate as provided in *Elec. Code § 18000 et seq.* [*Elec. Code § 16100(c)*]:

☐ If bribe was given to elector or member of precinct board or offered for purpose of procuring election:

☐ Name and title of person to whom bribe or reward was offered.

☐ Where, when, and how bribe was offered [*Elec. Code § 18520*].

☐ Purpose of bribe [*Elec. Code § 18522*].

☐ Action taken by person to whom bribe was offered.

☐ If bribe was delivered, when, where, and how.

☐ If other election crime [*see § 243.03* (setting out specific statutes relating to election crimes)]:

☐ Names and titles of persons involved in illegal activity.

☐ Purpose of illegal activity.

☐ Time and place at which illegal activity occurred.

☐ Manner in which illegal activity was attempted or accomplished.

☐ Illegal votes cast for candidate [*Elec. Code § 16100(d)*]:

☐ Number of illegal votes for candidate declared elected.

NOTE:

Change in Result of Election Required. An election is not set aside on account of illegal votes cast unless it appears that a number of illegal votes have been given to the person whose right to the office is contested which, if taken from him or her, would

reduce the number of his or her legal votes below the number of legal votes given to some other candidate [*Elec. Code § 16203*].

☐ Number of illegal votes cast for other candidates for same office.

☐ Reason for illegality of each vote claimed to be illegal [*see Garrison v. Rourke (1948) 32 Cal. 2d 430, 441, 196 P.2d 884* (votes cast by nonresident of an election precinct properly disallowed as illegal in election contest)].

☐ Eligible voters who attempted to vote in accordance with the laws of the state were denied their right to vote [*Elec. Code § 16100(e)*]:

☐ Number of voters involved.

☐ Identity of voters involved.

☐ Details of how and when denial occurred.

NOTE:

Sufficient Number of Voters Must Be Denied Right to Vote. An election may not be set aside on account of eligible voters being denied the right to vote unless it appears that a sufficient number of voters were denied the right to vote as to change the result [*Elec. Code § 16204*].

☐ Errors by precinct board in conducting election or canvassing returns sufficient to change the result of the election as to any person who has been declared elected [*Elec. Code § 16100(f)*].

☐ Number of precincts involved.

☐ Details of how and when error was made.

☐ Effect of error on declaration of election.

☐ Error in vote-counting programs or summation of ballot counts [*Elec. Code § 16100(g)*]:

☐ Number of precincts involved.

☐ Details of how and when error occurred.

[2] Obtain Documents

Obtain documents to be used to prove the particular grounds of the contest based on the ascertained facts [*see* [1], *above*]; for example, the records of the conviction of an election crime by the candidate declared elected [*Elec. Code §*

16100(c)].

[3] Make Preliminary Investigations and Determinations

☐ Capacity of contestant to file contest.

NOTE:
Standing. An election may be contested only by an elector of the county, city, or any political subdivision of either in which the election is held [*Elec. Code § 16100*].

☐ Investigation and interviews.

☐ Venue (county).

☐ County in which the election was held [*see Elec. Code §§ 16100, 16400*].

☐ Jurisdiction.

☐ Superior court [*Elec. Code § 16500*].

☐ Statute of limitations [*Elec. Code § 16401*].

☐ In cases other than a tie, if grounds for contest is that defendant has given or offered to give to any elector or member of a precinct board any bribe or reward for the purpose of procuring defendant's election or has committed any other offense against the elective franchise [*see Elec. Code § 18000 et seq.*], six months [*Elec. Code § 16401(a)*].

☐ In all cases of tie, 20 days [*Elec. Code § 16401(b)*].

☐ If case involves presidential electors, 10 days [*Elec. Code § 16401(c)*].

☐ In all other cases, 30 days [*Elec. Code § 16401(d)*].

[4] Prepare Statement of Contest

☐ Essential allegations [*Elec. Code § 16400*]:

☐ Contestant's name and status as an elector of the district or county, as the case may be, in which the contested election was held [*Elec. Code § 16400(a)*].

☐ The defendant's name [*Elec. Code § 16400(b)*].

☐ The office contested [*Elec. Code § 16400(c)*].

☐ The particular grounds of the contest and the Elections Code section under which the statement of contest is filed [*Elec. Code § 16400(d)*].

☐ If the reception of illegal votes is alleged, a general statement that in one or more specified voting precincts illegal votes were given to defendant, which, if taken from him or her, will reduce the number of the defendant's legal votes below the number of legal votes given to some other candidate.

☐ Draft statement [for a form, *see § 243.170*]:

☐ For form, typing, paper, and style requirements for the California Rules of Court, see Ch. 123, *Complaints and Cross Complaints* .

☐ Copies to be prepared:

☐ Original for filing.

☐ Copy for service on each defendant.

☐ Additional copies for office file, client, etc., if desired.

☐ Sign statement [*Code Civ. Proc. § 446* (signing pleadings)].

☐ Have contestant verify statement [*Elec. Code § 16401*].

[5] File Statement

☐ Statement of contest is filed with the clerk of the superior court having jurisdiction [*Elec. Code § 16400*].

NOTE:

Precedence. Proceedings in cases involving election contests must be placed on the calendar in the order of their date of filing and must be given precedence [*Code Civ. Proc. § 34*]. Within five days after the end of the time allowed for filing statements of contest, the clerk of the superior court notifies the superior court of all statements filed. The presiding judge designates a time and place of hearing not less than 10 nor more than 20, days from the date of the order [*Elec. Code § 16500*].

☐ Determine from the clerk, at the time of filing the statement, how to obtain notice of the hearing date and what action is needed to obtain the defendant's citation from the clerk and delivering it to the sheriff [*see* [6], *below*].

[6] Citation and Service

The clerk issues a citation for the defendant to appear at the time and place specified in the order. The citation is delivered to the sheriff who serves the citation on the defendant at least five days before the time specified, either:

☐ Personally [*Elec. Code § 16501(a)*]; or

☐ If party cannot be found, by leaving copy at house where he or she last resided [*Elec. Code § 16501(b)*].

[7] Provide List of Illegal Votes

If the contest involves illegal votes:

☐ Deliver to the defendant, at least three days before the trial, a written list of the number of illegal votes [for a form, *see § 243.175*], and by whom given, which the contestant intends to prove [*Elec. Code § 16402*; *see Benson v. Superior Court (1963) 214 Cal. App. 2d 551, 562, 29 Cal. Rptr. 760* (attachment of list of illegal voters to the door of defendant's residence constitutes sufficient delivery)].

NOTE:
List Limits Issues. No testimony may be received regarding any illegal vote except those specified in the list [*Elec. Code § 16402*]. The list applies only to ballots made illegal because cast by an illegal voter. It does not apply to votes cast by a legal voter but made illegal because of distinguishing marks, since such fact can only be ascertained by a recount [*Bass v. Leavitt (1909) 11 Cal. App. 582, 587-588, 105 P. 771* (interpreting former Code Civ. Proc. § 1116, the provisions of which are now contained in *Elec. Code § 16402*)].

[8] Subpoena Witnesses

☐ Request issuance of subpoenas [*see Elec. Code § 16502*].

☐ For a procedural checklist for serving subpoenas, see Ch. 535, *Subpoena*].

[9] Dismissal of Contest

The court may dismiss the proceedings if the statement of the cause of the contest is insufficient or for want of prosecution [*Elec. Code § 16602*].

[10] Trial

☐ Obtain continuance, if desired, on a declaration showing good cause [*Code Civ. Proc. § 2015.5*; *Elec. Code § 16600*].

NOTE:
Limits and Costs. The court may grant a continuance not exceeding 20 days; it will be at the costs of the party applying for it [*Elec. Code § 16600*].

☐ Attend trial.

NOTE:

Trial. If a continuance is not granted, the trial takes place at the time and place designated [*see Elec. Code § 16600*]. The court continues in session to hear and determine all issues [*Elec. Code § 16603*]. The court has all powers necessary to the determination of the contested election [*Elec. Code § 16600*].

☐ Recount of ballots.

At trial the ballots must be opened and a recounted, if it appears from the statements filed that a recount is necessary for the proper determination of the contest. The opening and recounting must be in the presence of all parties to the trial [*Elec. Code § 16601*]. A recount is required by *Elec. Code § 16601* whenever the grounds alleged in the statement of contest are such that a recount would be required if the allegations were true [*Enterprise Residents etc. Committee v. Brennan (1978) 22 Cal. 3d 767, 771, 151 Cal. Rptr. 1, 587 P.2d 658* (contestants alleged that more than 2,000 ballots were misplaced in an election in which the announced margin of victory was less than 600)].

☐ Expenses of recount.

NOTE:

Contestant Pays Daily. The contestant pays into court each day a sum the judge determines to be sufficient to pay all expenses of recounting that will have accrued by the end of that day. The sums paid are part of the costs [*Elec. Code § 16503*].

☐ Adhere to regular rules of evidence [*see Elec. Code § 16602*].

☐ Findings, conclusion, and judgment.

NOTE:

Timing. Within 10 days after the submission of the parties' proofs and allegations, the court files its findings of fact and conclusions of law, and immediately thereafter pronounces judgment either confirming or annulling and setting aside the election. The judgment is entered immediately thereafter [*Elec. Code § 16603*; *see § 243.176*]. In any election contest in which it appears that another person than the defendant has the highest number of legal votes, the court declares that person elected [*Elec. Code § 16703*].

☐ Certificate of election.

NOTE:

Certificate. The person declared elected by the superior court is entitled to a certificate of election [*Elec. Code § 16700*]. If a certificate has been issued to another person for the same office, that certificate is annulled by the judgment [*Elec. Code § 16701*]. When an election is annulled or set aside by the judgment, and no appeal is taken within 10 days thereafter, [*see* Paragraph 2] the commission, if any has issued, is void and the office vacant [*Elec. Code § 16702*].

☐ Costs.

☐ Primarily, each party is liable for the costs created by himself or herself to the officers and witnesses entitled thereto [*Elec. Code § 16802*].

☐ Awarded against county or city where election was held if election is annulled or set aside on the ground of precinct board's errors in conducting the election or in canvassing the returns [*Elec. Code § 16800*].

☐ Awarded against contestant and in favor of defendant if proceedings are dismissed for insufficiency or lack of prosecution, or if the court confirms the election [*Elec. Code § 16800*].

☐ Awarded against defendant and in favor of contestant if the election is annulled or set aside for any reason other than for errors by the precinct board [*Elec. Code § 16800*].

☐ Apportioned among the parties at the court's discretion if two or more contested elections are joined for the purpose of recounting votes [*Elec. Code § 16801*].

[11] Appeal

☐ If aggrieved by the judgment, appeal to the court of appeal as in other cases of appeal from the superior court [*Elec. Code § 16900*; *see* Ch. 40, *Appeal: An Overview* , et seq.].

NOTE:
Preference. Appeals in election cases must be given preference of hearing in the courts of appeal, and in the Supreme Court [*see Code Civ. Proc. § 44*].

☐ While appeal is pending, the person declared elected by the superior court is entitled to the office [*see Elec. Code § 16900*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawVoting RightsRemediesCivil Rights LawVoting RightsVoting Rights ActPayment for VotesGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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20-243 California Forms of Pleading and Practice--Annotated § 143.130

§ 143.130 Contestant's Checklist for General Procedure in Primary Contest

NOTE:
This checklist is intended to be illustrative only of those procedures commonly used and is not exhaustive. A particular case may require procedures not set forth here.

[1] Facts to Be Ascertained

☐ Facts relating to contestant:

☐ Name, address, and telephone number of contestant.

☐ Office, including county or district, for which contestant is a candidate.

☐ Additional facts, as desired, relating to contestant's stability and financial solvency (such as employment status, prior residences, credit, bank, and personal references, etc.).

☐ Facts relating to election:

☐ Type of election held.

☐ Name of district or county where election was held.

☐ Names of all counties in district, if contest is other than for recount and if district includes more than one county.

☐ Number of precincts in which recount is sought and county in which precinct is located, if contest is for recount.

☐ Names and addresses of other candidates for contested nomination.

NOTE:
Residence Address. The address used for service on the defendant candidate is the place of residence named in his or her affidavit of registration [*Elec. Code § 16442*].

☐ Date of election.

☐ Date of declaration of election results.

NOTE:
Time for Filing Affidavit. The affidavit of contest must be filed in the office of the clerk of the superior court within five days after the completion of the official canvass by the board of supervisors of the county last making the declaration [*Elec. Code § 16421*].

☐ Name of candidate declared nominated.

☐ Number of votes declared cast for each candidate.

☐ Facts relating to grounds of contest:

☐ Defendant is not eligible for office in dispute [*Elec. Code § 16101(a)*]:

☐ Qualifications for office.

☐ Ineligibility of defendant.

☐ Defendant is guilty of offense against elective franchise [*Elec. Code § 16101(b)*; *see Elec. Code § 18000 et seq.* (offenses described)]:

☐ Date of commission of offense.

☐ Other persons involved in illegal activity.

☐ Section of Elections Code violated.

☐ Additional details of offense.

☐ Title of court and cause if defendant was prosecuted for offense and result of

prosecution.

☐ Illegal, fraudulent, forged, or otherwise improper voting [*Elec. Code § 16101(c)*].

☐ Sufficient number of eligible voters who attempted to vote in accordance with the laws of the state were denied their right to vote, and that had those voters been permitted to vote, the defendant would not have received as many votes as the contestant [*Elec. Code § 16100(d)*].

☐ Mistake, error, or misconduct resulting in incorrect count of votes in any precinct so as to change the results of the election [*Elec. Code § 16101(e)*].

[2] Documents to Be Obtained

In a primary election contest, the documents to be obtained are those to be used to prove the particular grounds of contest [*Elec. Code § 16101*; *see* [1], *above*]. For example, a birth certificate may be used to prove that a voter is under age, making his or her vote illegal.

[3] Make Preliminary Investigations and Determinations

☐ Contestant's capacity to file contest.

NOTE:
Standing. Any candidate at a primary election may contest the right of another candidate to nomination to the same office [*Elec. Code § 16101*].

☐ Investigation and interviews.

☐ Venue (county):

☐ Recount contest.

☐ County in which the precinct in which the contestant demands a recount is located [*Elec. Code § 16461*].

☐ Other contests

☐ Any county within the political subdivision, if the nomination contested is for an office including a political subdivision of more than one county. The contestant may file in any county within the political subdivision and there may be no change of venue from that county to another within the political subdivision [*Elec. Code § 16441*].

☐ Jurisdiction.

☐ Superior court [*Elec. Code §§ 16441, 16461, 16462*].

NOTE:
Period of Limitation. An affidavit of contest of a primary election must be filed in the office of the clerk of the superior court having jurisdiction within five days after completion of the official canvass by the board of supervisors of the county last making the declaration [*Elec. Code §§ 16421, 16462*].

[4] Prepare Affidavit or Declaration of Contest

☐ Essential allegations [*Elec. Code §§ 16101, 16404, 16420*]:

☐ Contestant's name and status as candidate for the contested nomination [*Elec. Code § 16101*].

☐ Defendant's name [*Elec. Code § 16420*].

☐ Date of completion of official canvass of board of supervisors of county last making declaration [*Elec. Code § 16404*].

☐ Each precinct, separately specified, in which any irregularity or improper conduct took place, or in which recount is demanded [*Elec. Code § 16404*].

NOTE:
Change in Result of Election Required. Irregularity or improper conduct will annul or set aside a nomination only if it appears that illegal votes in the precinct have been given to the defendant which if taken from the defendant would reduce the number of his or her legal votes below the number of votes given to the contestant or any other candidate [*Elec. Code § 16300*].

☐ Nature of mistake, error, malconduct, or other cause of contest, separately specified [*Elec. Code § 16404*; *see Elec. Code § 16101* and *[1], above*].

☐ Draft declaration [for forms, *see §§ 243.190, 243.191*]:

☐ For form, typing, paper, and style requirements of the California Rules of Court, see Ch. 123, *Complaints and Cross Complaints* .

☐ Copies to be prepared:

☐ Original for filing.

☐ Copy for service on each defendant.

☐ If contest is based on recount, one copy for posting by county clerk [*Elec. Code § 16462*].

☐ Additional copies for office file, client, etc., as desired.

☐ Execution.

[5] File Affidavit or Declaration of Contest

☐ File in the office of the clerk of the superior court having jurisdiction within five days after completion of the official canvass by the board of supervisors of the county last making the declaration [*Elec. Code § 16421*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawVoting RightsRemediesCivil Rights LawVoting RightsVoting Rights ActPayment for VotesGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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Chapter 243 ELECTIONS
PART IV. PROCEDURAL CHECKLIST

20-243 California Forms of Pleading and Practice--Annotated § 243.131

§ 243.131 Contestant's Checklist for Procedure Involving Contests Other Than Recounts

NOTE:

The procedure below applies only to contests of primary elections on the following grounds [*Elec. Code § 16440*]:

- The defendant is not eligible to the office in dispute;
- The defendant has committed an offense against the elective franchise; or
- A sufficient number of votes were illegal, fraudulent, forged, or otherwise improper, that had such votes not been counted, the defendant would not have received as many votes as the contestant.

For the procedure applicable to contests based on simple recounting of votes, see *§ 243.132*.

[1] Preparation of Affidavit or Declaration

Prepare and file contestant's affidavit or declaration of contest [*Elec. Code § 16404*]. See § 243.130[4], [5].

[2] Serve on Defendant

☐ As soon as the affidavit or declaration is filed with the clerk of the superior court, serve a copy on the defendant [*Elec. Code § 16442*].

☐ Serve on defendant by [*Elec. Code § 16442*]:

☐ Personal service, or

☐ Registered mail in a sealed envelope with postage prepaid, addressed to the defendant at the place of residence named in his or her affidavit of registration.

☐ Prepare and file proof of service by affidavit or declaration of mailing if service is by mail; file it with the county clerk on the day of mailing [*Elec. Code § 16442*]; for forms, *see* Ch. 518, *Service of Summons and Papers* .

[3] Defendant's Cross Contest Affidavit

☐ Defendant may file an answer and a cross affidavit (or declaration under *Code Civ. Proc. § 2015.5*) within five days after receipt of the copy of the contestant's affidavit of contest [*Elec. Code § 16443*].

☐ No special appearance, demurrer, or objection may be taken other than by affidavits which are considered a general appearance in the contest [*Elec. Code § 16444*].

[4] Time and Place of Hearing

☐ Within five days after the end of the time for filing affidavits, the clerk of the superior court presents all the affidavits to the presiding judge of the superior court [*Elec. Code § 16520*].

☐ The presiding judge then designates the time and place of hearing, which is to be not less than 10, nor more than 20, days from the date of the order [*Elec. Code § 16520*].

[5] Citation of Parties

☐ The clerk of the superior court must issue a citation to both parties containing a copy of the order setting the contest for trial and deliver it to the sheriff [*Elec. Code § 16521*].

☐ The sheriff must then either serve the citiations on the parties or leave them at the residences named in the affidavits of registration of the parties [*Elec. Code § 16521*].

[6] Trial

☐ The court meets at the time and place designated in the order setting the contest for trial and has all powers necessary to determine the issues [*Elec. Code § 16620*].

☐ After the court hears the proofs and allegations of the parties, it files findings of fact and conclusions of law and immediately pronounces judgment [*Elec. Code § 16720*].

[7] Judgment

☐ The judgment either [*Elec. Code § 16720*]:

☐ Confirms the nomination as declared or

☐ Sets aside the declared nomination and decrees the contestant nominated.

[8] Costs

☐ The provisions relating to costs in general election contests [*Elec. Code § 16800 et seq.*] apply to primary election contests [*Elec. Code § 16803*]. See *§ 243.120[10]*].

[9] Appeal

☐ Either party to a contest of a primary election may appeal to the court of appeal of the district where the contest is brought, if the appeal is perfected by the appellant within 10 days after judgment of the superior court is pronounced.

NOTE:

Precedence. The appeal has precedence over all other appeals and must be acted on by the court of appeal within 10 days after the appeal is filed [*Elec. Code § 16920*; *see Code Civ. Proc. § 44* (preference for contested election cases in the courts of appeal and in the Supreme Court when transferred thereto)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawVoting RightsGeneral OverviewCivil Rights LawVoting RightsVoting Rights ActGeneral OverviewCivil Rights LawVoting RightsVoting Rights ActPayment for VotesGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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20-243 California Forms of Pleading and Practice--Annotated § 243.132

§ 243.132 Contestant's Checklist for Procedure Involving Recount Contests

NOTE:
Scope of Checklist. The procedure below applies only to contests of primary elections on grounds that due to mistake, error, or malconduct, the votes in any precinct were so incorrectly counted as to change the result of the election [*Elec. Code § 16460*]. For procedure applicable to contests based on other grounds see *§ 243.131*.

[1] Service on Defendant

☐ Manner and time of service:

☐ As soon as the affidavit is filed, the county clerk posts a copy of the affidavit in a conspicuous place in his or her office [*Elec. Code § 16462*].

☐ In addition, on the date of filing, the contestant sends a copy of the affidavit to the defendant by registered mail in a sealed envelope with postage prepaid addressed to the place of residence named in defendant's affidavit of registration [*Elec. Code § 16462*].

NOTE:
Jurisdiction. All candidates at a primary election are permitted to be candidates under the Elections Code only on the condition that jurisdiction for all the purposes of a proceeding involving simple recount shall exist in the manner and under the conditions provided for by *Elec. Code § 16462* (prescribing type of service, time for filing affidavit, posting affidavit, jurisdiction of the court, and mailing of copy of affidavit to defendant) [*Elec. Code § 16463*].

☐ Proof of service.

NOTE:

Form. The contestant makes and files an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of mailing, which becomes part of the record of the contest [*Elec. Code § 16462*]. For forms of declarations of service of papers by mail, see Ch. 518, *Service of Summons and Papers* .

☐ Proof of posting.

NOTE:

Time for Proof. On the fifth day after the end of the time for filing contestant's affidavit, the clerk of the superior court must present, along with the affidavits of the contestant and the defendant, proof of posting of contestant's affidavit to the presiding judge of the superior court [*Elec. Code § 16540*].

[2] Answers and Defendant's Affidavits

NOTE:

No demurrer or objection may be taken by the parties in any other manner than by answer, and all the objections must be contained in the answer [*Elec. Code § 16466*].

☐ Defendant's answer:

☐ If defendant appears, court will require the answer to be made within three days from the time and place set for hearing. If defendant does not appear, the court will note the default and determine the contest [*Elec. Code § 16467*].

☐ Defendant's affidavit.

NOTE:

Time Limit. The defendant may file an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) with the clerk of the superior court at any time within three days after the filing of the contestant's affidavit of mailing [*see* [1], *above*]. The affidavit, filed on the defendant's own behalf, designates any precincts, in addition to those in contestant's affidavit, in which the defendant desires a recount of votes. Such an affidavit must include the grounds for defendant's request [*Elec. Code § 16464*].

☐ Contestant's answer:

☐ Time of filing.

NOTE:

The contestant may file an answer to defendant's affidavit not later than the first day of the trial of the contest [*Elec. Code § 16464*].

☐ Content.

NOTE:

The contestant has the same right to answer the defendant's affidavit as given to the defendant with reference to the contestant's affidavit [*Elec. Code § 16464*].

[3] Trial

☐ Time and place of hearing:

☐ Setting.

NOTE:
On the fifth day after the end of the time for filing contestant's affidavit, the clerk of the superior court must present all affidavits to the presiding judge, or anyone acting in his or her stead, who designates the time and place of hearing. Hearing is to be not less than 10 days nor more than 20 days from the date of the order [*Elec. Code § 16540*].

☐ Appearance.

NOTE:
Duty to Determine Time and Place of Hearing. The defendant must take notice of the order fixing the time and place of hearing from the records of the court without service and must appear at the hearing either in person or by attorney [*Elec. Code § 16465*].

Any appearance of the defendant or any request to the court by the defendant or his or her attorney will be entered as a general appearance in the contest [*Elec. Code § 16466*]. If the defendant does not appear, the court must note his or her default and proceed to hear and determine the contest with all convenient speed [*Elec. Code § 16467*].

☐ Number of judges.

NOTE:
Assignment of Additional Judges. Additional judges may be assigned to participate in the contest [*Elec. Code § 16640, 16641*], and clerks and assistants may be appointed [*Elec. Code § 16643*].

☐ Expenses of recount.

NOTE:
Daily Payment. The contestant must pay the expenses of the recount into court each day under the same provisions that apply to contests of general elections [*Elec. Code § 16643*; *see § 243.120[10]*].

☐ Recounting:

☐ All precincts named in the affidavits of the contestant and the defendant must be considered and a recount had in all those precincts [*Elec. Code § 16464*].

☐ The judges designated to hear the contest, including the judge to whom the contest was originally assigned, must convene and agree on the precincts which each one of them, sitting separately, will recount. The recounting then proceeds so that ballots opened before one judge need not be opened before another [*Elec. Code § 16642*].

[4] Judgment

☐ Decision.

NOTE:
When the recount has been completed, all the judges who took part assemble and make the court's decision. If there is any difference of opinion, a majority of the judges determines all questions. A majority of the judges gives a separate opinion in each contest [*Elec. Code § 16740*].

☐ Service of certified copy of judgment:

☐ On elections official [*Elec. Code § 16741*].

☐ On Secretary of State, if the contest proceeds in more than one county, and the nominee is to be certified by the Secretary of State [*Elec. Code § 16742* (service of judgment from each county)].

[5] Appeal

☐ Judgment is final in every respect; no party may appeal [*Elec. Code § 16940*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawVoting RightsVoting Rights ActImproper TabulationGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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[Reserved]

§§ 243.133[Reserved]

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PART V. FORMS
A. Proceedings Relating to Registration of Electors

20-243 California Forms of Pleading and Practice--Annotated § 243.140

§ 243.140 Complaint by Elector Against County Clerk or Registrar of Voters to Compel Registration as Voter and for Costs [Elec. Code §§ 2142(a), 2143]

[1] FORM Complaint by Elector Against County Clerk or Registrar of Voters to Compel Registration as Voter and for Costs [Elec. Code §§ 2142(a), 2143]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], as	)	COMPLAINT TO COMPEL REGISTRATION OF
_____ [County Clerk *or* Registrar of	)	ELECTOR
Voters] of the County of _____	)	
[*name*],	)	
Defendant.		

_____

Plaintiff alleges:

1. Petitioner is a United States citizen [more than] 18 years of age, and resides at _____ [*address*], _____ [*city*], _____ County, California.

2. Defendant is now, and at all times mentioned herein was the duly appointed, qualified, and acting _____ [County Clerk *or* Registrar of Voters] of the County of _____.

3. On _____ [*date*], plaintiff _____ [delivered in person *or* mailed] to defendant his/her affidavit of registration as required by *Elections Code Section 2102* and complying with *Elections Code Sections 2150* and *2153*. [A copy of the affidavit is attached as Exhibit A and made a part hereof.]

4. Thereafter, defendant refused, and continues to refuse to register plaintiff as a voter although plaintiff has repeatedly requested that defendant do so.

[5. Defendant has knowingly and willfully violated his/her duty in determining that plaintiff is not qualified to register as a voter.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. That defendant be ordered to register plaintiff immediately as a voter in _____ County;

[2. For costs of suit herein incurred;] and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The complaint in [1], *above*, is for use by a qualified elector in an action to compel his or her voter registration. The action is brought in superior court against the county clerk [*see Elec. Code § 2142*; *see also Elec. Code §§ 311* (defining county clerk), *320* (defining elections official)]. When there is insufficient time before an election to file a complaint under *Elec. Code § 2142*, a proceeding in mandate may be appropriate to compel registration [*Truchon v. Toomey (1953) 116 Cal. App. 2d 736, 745, 254 P.2d 638* ; *but see § 243.141[5]*]. For a form for a petition for writ of mandate see *§ 243.141*.

The form may be revised for use to compel registration by a qualified elector who claims that he or she has registered to

vote through the Department of Motor Vehicles or any other public agency designated as a voter registration agency pursuant to the National Registration Act of 1993 (*42 U.S.C. § 1973gg*) and the county elections official has refused registration [*see Elec. Code § 2142(b)*]. Paragraph 3, in particular, should be modified to reflect source of the registration.

The clerk of court may not charge a fee for services rendered in an action under *Elec. Code § 2142* [*Elec. Code § 2142(c)*].

[3] Allegations

Every person who qualifies under *Cal. Const., art. II, § 2*, and who complies with the provisions of the Elections Code governing the registration of electors is entitled to vote at any election held within the territory within which he or she resides [*Elec. Code § 2000(a)*]. Any person who will be at least 18 years of age at the time of the next election is eligible to register and vote in that election [*Elec. Code § 2000(b)*].

This complaint alleges:

- Plaintiff's residence and citizenship (Paragraph 1) [*Cal. Const., art. II, § 2*].
- Defendant's capacity as county clerk or registrar or voters (Paragraph 2) [*Elec. Code §§ 2100-2123*].
- Plaintiff's presentation of his or her affidavit of registration to vote, either by mail or in person (Paragraph 3) [*see Elec. Code §§ 2102, 2150, 2153*; *see* discussion in *§ 243.13[1]*] a copy of which should be attached to the petition and incorporated by reference.
- The defendant's continued refusal to perform his or her duty (Paragraph 4).

[4] Costs

Costs are not recoverable in any action under *Elec. Code §§ 2142* and *2143* against the county clerk unless the plaintiff alleges in the complaint and establishes at trial that the county clerk or registrar or voters knowingly and willfully violated his or her duty to register the plaintiff to vote (Optional Paragraph 5) [*Elec. Code § 2143*].

[5] Verification

Verification is not required, and the filing of a verified complaint does not compel a defendant who is a public official being sued in his or her official capacity to file a verified answer [*see Code Civ. Proc. § 446*]. However, the verification of a complaint against a public official does preclude a general denial [*see Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 572, *Verification* .

[6] Jurisdiction and Venue

Jurisdiction of an action to compel voter registration is conferred on the superior court by *Elec. Code § 2142*.

Subject to the court's power to transfer actions and proceedings, the county in which the plaintiff seeks registration as a voter is the proper county for the trial against the county clerk or registrar of voters [*see Code Civ. Proc. § 393(b)*].

[7] Effect of Judgment

If the judgment directs registration, plaintiff may proceed to register to vote on the filing of a certified copy of the judgment [*see Elec. Code § 2100*]. For forms for judgments, see Ch. 318, *Judgments* .

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20-243 California Forms of Pleading and Practice--Annotated § 243.141

§ 243.141 Petition for Writ of Mandate by Elector Against County Clerk or Registrar to Compel Registration of Elector as Voter [Code Civ. Proc. § 1086; Elec. Code § 2142]

[1] FORM Petition for Writ of Mandate by Elector Against County Clerk or Registrar to Compel Registration of Elector as Voter [Code Civ. Proc. § 1086; Elec. Code § 2142]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Petitioner,	)	
vs.	)	NO. _____
_____ [*name*], as	)	PETITION FOR WRIT OF MANDATE
_____ [County Clerk *or* Registrar of	)	
Voters] of the County of _____	)	
[*name*],	)	
Respondent.		
_____		

Petitioner alleges:

1. [*Allegations showing petitioner is qualified elector of county. See § 243.140[1], Paragraph 1.*]

2. [*Allegation of defendant's capacity. See § 243.140[1], Paragraph 2.*]

3. [*Allegation showing petitioner's attempt to register to vote. See, e.g., § 243.140[1], Paragraph 3.*]

4. Respondent refused, and continues to refuse, to register petitioner as a voter on the purported ground that petitioner is not a qualified elector and not entitled to be registered as a voter for the reasons set forth below.

[*ALLEGE reasons for respondent's refusal to register petitioner, for example*]

5. On _____ [*date*], in the Superior court of the State of California for the County of _____, in an action entitled "the People of the State of California, Plaintiff v. _____ [*name*], Defendant," numbered _____, petitioner pleaded guilty to a violation of Section _____ and was placed on probation for a period of _____ years on condition that he/she be confined in the county jail for a period of _____ [*specify length of time*]. A copy of the judgment is attached as Exhibit A and made a part hereof.

6. Petitioner was accordingly confined in the county jail for the stated period, and satisfactorily completed the period of probation.

7. Thereafter, on _____ [*date*], in the Superior Court a motion was duly made under the provisions of *Penal Code Section 1203.4* that petitioner withdraw his/her plea of guilty in the action and enter a new and different plea of not guilty, which motion was granted, and thereupon, in accordance with that section, the Superior Court ordered the plea of guilty withdrawn, a new and different plea of not guilty entered, the record expunged, and the cause dismissed.

8. Petitioner is not imprisoned or on parole for the conviction of a felony within the meaning of *Article II, Section 4, of the California Constitution*, and is not disqualified as an elector by the provisions thereof.

[*CONTINUE*]

[9. *Add, if appropriate, (for discussion, see [4], below):* Respondent knew of the facts alleged in paragraphs 5 through 8 but nevertheless unlawfully refused to register petitioner.]

10. There are regularly scheduled elections held in which petitioner will not be permitted to participate, to his/her irreparable injury, unless this court acts to compel respondent to register petitioner as a voter.

11. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law other than the relief sought in this petition, in that _____ [*specify, e.g.*, the next election in said county will be held on _____ (*date*), 24 days from the date of the filing of this petition. The statutory remedy provided by *Election Code Section 2142* is inadequate in that is would allow the respondent 30 days in which to file an answer, thereby defeating petitioner's chance to vote in this election].

WHEREFORE, petitioner prays judgment:

1. That the court issue a writ of mandate commanding respondent _____ [*name*], as _____ [County Clerk *or* Registrar of Voters] of the County of _____, to register petitioner as a voter in the county or to show cause before this court at a time specified by court order why he or she has not done so and why a writ should not issue;

[2. For costs of this proceeding;] and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

[*Verification. See § 243.140[1].*]

[2] Source of Form

The form in [1], *above*, was adapted from the petition in *Truchon v. Toomey (1953) 116 Cal. App. 2d 736, 254 P.2d 638* , in which the court of appeal granted the writ under *Code Civ. Proc. § 1085*.

[3] Use of Form

The petition in [1], *above*, is for use by an elector for filing a writ of mandate [*Code Civ. Proc. § 1086*] in superior court to compel his or her right to register as a voter. Because the petition may be summarily denied, care must be taken to ensure that no essential allegations are inadvertently omitted.

The form may be modified for use by a qualified elector who claims that he or she has registered to vote through the Department of Motor Vehicles or any other public agency designated as a voter registration agency pursuant to the National Registration Act of 1993 (*42 U.S.C. § 1973gg*) and the county elections official has refused registration [*see Elec. Code § 2142(b)*].

The clerk of court may not charge a fee for services rendered in an action under *Elec. Code § 2142* [*Elec. Code § 2142(c)*].

[4] Allegations

A petition for writ of mandate should allege:

- Petitioner's residence and citizenship (Paragraph 1).
- Defendant's capacity as county clerk or registrar of voters (Paragraph 2) [*Elec. Code §§ 2100-2123*].
- Petitioner's attempt to register to vote, either by mail or in person (Paragraph 3) [*see Elec. Code § 2102*].
- Defendant's continued refusal to perform his or her duty to register the petitioner to vote (Paragraph 4) and, if known, the reasons for the refusal (Paragraphs 5-8).
- The harm that will result to petitioner unless the court compels the respondent to perform his or her duty (Paragraph 10).
- Petitioner's lack of an adequate legal remedy (Paragraph 11).

If the petitioner seeks costs in the proceeding, he or she should also allege that the county clerk's refusal to register petitioner was knowing and willful (Paragraph 9), because, although *Elec. Code § 2143* specifically applies to actions

under *Elec. Code §§ 2100-2123*, it may also apply to mandate proceedings to compel registration.

If the petition might lawfully have been made to a lower court in the first instance, it must set forth the circumstances that, in the opinion of the petitioner, render it proper that the writ should issue originally from the reviewing court [*Cal. Rules of Ct., Rule 8.486(a)(1)*].

[5] Verification Required

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*; *Cal. Rules of Ct., Rule 8.486(a)(4)*] and proof of service of a copy of the petition must accompany the petition when it is offered for filing unless the court allows the writ to issue without notice [*Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.486(e)*; for discussion of methods of serving the petition, *see* Ch. 358, *Mandate and Prohibition*].

When the petition is filed in a court of appeal or in the Supreme Court, it must be accompanied by a memorandum [*Cal. Rules of Ct., Rule 8.486(a)(5)*]. There is no statute or rule specifically requiring the filing of a memorandum with a petition for writ of mandate addressed to a superior court. However, local rules of court might require it. For further discussion, see Ch. 358, *Mandate and Prohibition* .

[6] Cross References

For a form and discussion of a complaint by an elector against county clerk or registrar to compel registration as a voter, see *§ 243.140*

For a discussion and a checklist of procedures involved in mandate proceedings, and forms of notice of motion for peremptory writ of mandate [*Code Civ. Proc. § 1088*], order to show cause why writ should not issue, and peremptory writ of mandate [*Code Civ. Proc. § 1087*], see Ch. 358, *Mandate and Prohibition*

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20-243 California Forms of Pleading and Practice--Annotated § 243.142

§ 243.142 Complaint by Private Individual Against County Clerk or Registrar of Voters and Registered Voter to Compel Cancellation of Registration [Code Civ. Proc. § 425.10; Elec. Code § 2213]

[1] FORM Complaint by Private Individual Against County Clerk or Registrar of Voters and Registered Voter to Compel Cancellation of Registration [Code Civ. Proc. § 425.10; Elec. Code § 2213]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ [*name*],

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	
_____ [*name*],	)	
as _____ [County Clerk	)	NO. _____
or Registrar of Voters] of the County of	)	COMPLAINT TO COMPEL CANCELLATION OF
_____ [*name*],	)	REGISTRATION
and _____ [*name*	)	
of registered voter],	)	
Defendants.	)	
	)	

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence*].

2. [*Allegation of capacity and duty of defendant registrar of voters or county clerk. See § 243.140[1], Paragraph 2.*]

3. Defendant _____ [*name*] is registered as a voter in the register of voters for the County of _____ [*name*].

4. The registration of defendant _____ [*name*] _____ [was made illegally in that *or* should be canceled by reason of facts that have occurred subsequent to the registration as follows:] _____ [*specify facts showing defendant is not a qualified voter*].

5. Defendant _____ [*name*], _____ [County Clerk *or* Registrar of Voters], has refused and continues to refuse, to cancel the registration of defendant _____ [*name*] as a voter.

[6. Defendant has knowingly and willfully violated his/her duty in failing to cancel that registration.]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. Declaring the registration of defendant _____ [*name*] as a voter in _____County [was made illegally *or* should be canceled by reason of facts that have occurred subsequent to the registration];

2. Directing defendant _____ [*name*], as _____ [County Clerk *or* Registrar of Voters] of the County of _____ [*name*], to immediately cancel the registration of defendant _____ [*name*] as a voter in this county;

[3. For costs of suit herein incurred;] and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 243.140[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action to compel cancellation of a voter registration that was made illegally or that should be canceled by reason of facts that have occurred subsequent to the registration. The action is brought in superior court [*Elec. Code § 2213*]. The action may be brought by any person [*Elec. Code § 2213*]. The term "any person" has apparently never been construed, except in a case holding that the action may be brought by the Attorney General [*Pierce v. Superior Court of Los Angeles County (1934) 1 Cal. 2d 759, 762, 37 P.2d 460]* .

[3] Allegations

A complaint to compel cancellation of a voter's registration should allege facts showing:

- The plaintiff's capacity and citizenship (Paragraph 1).

- The capacity and duty of defendant registrar of voters or county clerk (Paragraph 2).
- The fact that defendant voter is registered (Paragraph 3).
- The grounds for cancellation of defendant voter's registration (Paragraph 4) [*see Elec. Code § 2201*].
- The refusal of defendant county clerk or registrar of voters to perform his or her official duty (Paragraph 5).

To recover costs in the action from the county clerk or registrar of voters, the plaintiff must allege a knowing and willful violation of the clerk's or registrar's official duty (Optional Paragraph 6) [*see Elec. Code § 2143*].

[4] Cross References

For discussion of the procedures involved in bringing a complaint against county clerk or registrar of voters to compel registration, see *§ 243.140*

For a general form for use in preparing a judgment directing cancellation of registration, see Ch. 318, *Judgments*

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PART V. FORMS
A. Proceedings Relating to Registration of Electors

20-243 California Forms of Pleading and Practice--Annotated §§ 243.143-243.149

[Reserved]

§§ 243.143[Reserved]

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B. Preelection Duties and Correction of Ballot Errors

20-243 California Forms of Pleading and Practice--Annotated § 243.150

§ 243.150 Petition for Writ of Mandate to Compel Correction of Error or Omission on Ballot, Sample Ballot, Voter Pamphlet or Other Official Matter and/or Enjoin Neglect of Duty [Elec. Code § 13314]

[1] FORM Petition for Writ of Mandate to Compel Correction of Error or Omission on Ballot, Sample Ballot, Voter Pamphlet or Other Official Matter and/or Enjoin Neglect of Duty [Elec. Code § 13314]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	
_____ [*name*],	)	
as _____ [Secretary	)	NO. _____
of State *or* County Clerk *or* Registrar of Voters *or*	)	PETITION FOR WRIT OF MANDATE
City Clerk *or* Elections Official *or other officer or*	)	
board charged with duty of conducting election], of	)	
_____	)	
[the State of California *or* the County of	)	
_____ (*name*)],	)	
Respondent[,]	)	
_____ [(*name*),		
Real Party in Interest].		

_____

Petitioner alleges:

1. Petitioner is a United States citizen [more than] 18 years of age, a resident in this state, and a resident of election Precinct No. _____ in _____ County, California, since _____[*date*

], which is at least 15 days prior to the election.

2. Petitioner hereby applies for the issuance of a writ of mandate under *Elections Code Section 13314* based on the allegations set forth below.

3. [*Capacity of respondent. See § 243.140[1], Paragraph 2*].

[4. Real party in interest is _____ (*name*) and he/she has an interest that is directly affected by this proceeding in that _____ (*specify reasons making person real party in interest*).]

[*EITHER*]

5. An _____ [error *or* omission] _____ [has occurred *or* is about to occur], in the printing of the _____ [ballot *or* sample ballot *or* voter pamphlet *or other official matter*], regarding the _____ [primary *or* general *or specify other*] election that is to be held on _____ [*date*], in that _____ [*set forth with specificity facts demonstrating error or omission, e.g.,* Petitioner's name and candidacy for Mayor of _____ (*name of city*) has not been placed on the ballot, even though he has fulfilled all procedural requirements for nomination in that _____ (*specify necessary steps to qualify for candidacy*)].

[*OR*]

5. A neglect of duty _____ [has occurred *or* is about to occur] in that _____ [*set forth with specificity facts demonstrating that neglect of duty has occurred or is about to occur, e.g., Elections Code Section 12101* requires that not earlier than the 127th nor later than the 113th day before any municipal election to fill offices, the city elections official must publish a notice of the election in the city pursuant to *Government Code Section 6061*. The next municipal election of _____ (*name of entity*) is to be held on _____ [*date*], a date that is 64 days from the date of filing of this petition. As of this date notice of that election has not been published].

[*CONTINUE*]

[6. A copy of the _____ (ballot *or* sample ballot *or* voter pamphlet *or other official matter*) in which the _____ (error *or* omission) _____ (has occurred *or* is about to occur) is attached as Exhibit A and made a part hereof.]

7. The _____ [error *or* omission *or* neglect of duty] is in violation of _____ [*specify Elections Code or constitutional violation*].

8. The issuance of a peremptory writ of mandate will not substantially interfere with the conduct of the election.

9. The issuance of the writ is indispensable to the enforcement of the petitioner's rights in that petitioner has no plain, speedy, or adequate remedy in the ordinary course of law whereby his/her rights can be upheld or whereby respondent _____ [*name*] can be compelled to comply with the Elections Code. If the relief sought by this petition is not granted, great and irreparable injury will be caused petitioner.

WHEREFORE, petitioner prays judgment as follows:

1. That the court issue a writ of mandate, a copy of which is attached hereto, compelling respondent to _____ [correct the _____ (error *or* omission) alleged herein, *or* perform his/her duty, the neglect of such duty being a violation of the _____ (Elections Code *or* Constitution)] or to show cause before this court at a time specified by court order why respondent has not done so and why a writ should not issue;

[2. For costs of this proceeding;] and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

[*Verification. See § 243.140[1].*]

[2] Use of Form

The form in [1], *above*, is for use to petition for a writ of mandate [*Code Civ. Proc. § 1086*] to obtain relief from an error or omission on any ballot, sample ballot, voter pamphlet, or other official material that has occurred or is about to occur, or from a neglect of duty has occurred or is about to occur [*Elec. Code § 13314*].

The form may be modified for use when an elector is seeking a writ of mandate requiring an amendment to or deletion of material, regarding measures submitted to the voters, contained in the state ballot pamphlet that is false, misleading, or inconsistent with the Elections Code or *Gov. Code § 88000 et seq.* [*see Elec. Code § 9092*]. For discussion of matters involving measure submitted to the voters, see Ch. 302, *Initiative, Referendum, and Recall* .

[3] Other Possible Uses of Form

By its terms, *Elec. Code § 13314* appears to apply to all elections. Thus, the form may be used, for example, to seek relief regarding the following errors:

- The failure to place a candidate's name on a ballot although he or she has fulfilled all procedural requirements for nomination [*see § 243.33[3][a]*].

- The failure of a public official to provide public notice of offices open for nomination or notice of qualified candidates for an upcoming election [*see §§ 243.32, 243.34*].

- The wrongful refusal by a public official to accept properly executed nomination documents [*see § 243.33[3][a]*].

- The failure of the Secretary of State to provide candidates for partisan office with information regarding other candidates for the same office [*see Elec. Code § 8121*; *see § 243.35*].

- The failure to remove a candidate's name from a ballot when the candidate has formally withdrawn from an election [*see Bordwell v. Williams (1916) 173 Cal. 283, 287, 159 P. 869* (mandate proceeding under Cal. Stats. 1913 ch. 690, § 27, relating to primary election ballots); *see Mann v. Superior Court (1986) 181 Cal. App. 3d 372, 375-376, 226 Cal. Rptr. 263* (dictum)].

[4] Essential Allegations

Because the petition may be summarily denied, care must be taken to make certain that no essential allegations are inadvertently omitted. The form alleges:

- The petitioner's citizenship, residency, and capacity as an elector (Paragraph 1) [*see Elec. Code § 321* defining "elector")].

- The statute on which the petitioner's application is based (Paragraph 2) [*Elec. Code § 13314*].

- The capacity of the respondent (Paragraph 3).

- The identity of the real party in interest, if any (Paragraph 4).

- That an error or omission has occurred or is about to occur, or a neglect of duty with regard to the election (Paragraph 5).

- The specific statutory and/or constitutional violation by respondent (Paragraph 7).

- That the remedy sought will not substantially interfere with the conduct of the election (Paragraph 8).

- The petitioner's lack of an adequate legal remedy and the harm that will result unless the court compels the correction of the error or omission or the performance of duty (Paragraph 9).

A copy of the voting material containing alleged errors or omissions may be attached as an exhibit and incorporated by reference (Optional Paragraph 6).

[5] Parties to Action

Any elector may seek a writ of mandate under *Elec. Code § 13314* [*see Elec. Code § 321* (defining "elector" as any person who is a United States citizen, 18 years of age or older, and a resident of an election precinct at least 15 days prior to an election); *compare Elec. Code § 321 with Elec. Code § 359* (defining "voter"); *see also § 243.04[6]*]. Thus, it would appear that the beneficial interest requirement for a proceeding in mandate (Paragraph 1 of the form) is met by anyone who is an elector as defined in *Elec. Code § 321* [*see Code Civ. Proc. § 1086*; *Elec. Code § 13314*].

The Secretary of State must be named as a respondent or a real party in interest in the proceeding if it concerns a measure or a candidate described in *Elec. Code § 15375* (requiring local officials to send certain election results to the Secretary of State), except for a candidate for judge of the superior court [*Elec. Code § 13314(a)(4)*]. In any other case, there is no authority regarding who must be made a respondent in a petition for writ of mandate pursuant to *Elec. Code § 13314*. The accepted practice is that the person with whom the nomination papers for the particular office sought are to be filed should be the respondent [*see Elec. Code §§ 8100* (place of filing for direct primary), 10224 (place of filing for municipal election), 10510 (place of filing for district election)]. Thus, if the nomination papers are to be filed with the Secretary of State, then he or she, not the county clerk, should be the named respondent. In that instance, the county

clerk's office has served merely as a repository for the nomination documents, which are processed by the county clerk and forwarded to the Secretary of State [*see Elec. Code § 8082* (transmittal of nomination documents)]. If the nomination documents are to be filed with the city or county clerk, then he or she should be the named respondent.

In a petition under *Elec. Code § 9092* (seeking writ to amend or delete ballot pamphlet copy that is false, misleading, or inconsistent with specified sections of the Elections and Government Codes), the Secretary of State is named as the respondent, and the State Printer and the person or official who authored the copy in question are named as real parties in interest. However, if the Secretary of State initiates the proceeding, the State Printer is named as the respondent [*Elec. Code § 9092*].

[6] Jurisdiction

The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus [*Cal. Const., art. VI, § 10*]. However, the Supreme Court exercises its original jurisdiction only in cases in which the issues presented are of great importance and require prompt resolution [*Wenke v. Hitchcock (1972) 6 Cal. 3d 746, 750, 100 Cal. Rptr. 290, 493 P.2d 1154]* . For discussion of the jurisdiction of superior and appellate courts to issue writs of mandate, see Ch. 358, *Mandate and Prohibition* .

[7] Venue

Venue for a proceeding under *Elec. Code § 13314* is exclusively in Sacramento County in any of the following cases [*Elec. Code § 13314(b)*]:

- The Secretary of State is named as a real party in interest or as a respondent;
- A candidate for statewide elective office is named as a party; or
- A statewide measure that is to be placed on the ballot is the subject of the proceeding.

Venue in all other instances of proceeding under *Elec. Code § 13314* would appear to be governed by *Code Civ. Proc. § 393(b)*. This section provides that the county in which the cause, or some part of the cause, arose, is the proper county for the trial of an action against a public officer, or person especially appointed to execute the duties of a public officer, for an act he or she did in virtue of the office, or against a person who, by the officer's command or in the officer's aid, does anything touching the duties of the officer. For example, if an Oakland City Council candidate whose nomination papers must be filed with the Oakland City elections official [*see Elec. Code § 10224*] has been given an incorrect or improper designation on the ballot, the proper county for the trial of the proceeding under *Elec. Code § 13314* would appear to be Alameda County.

Venue for a proceeding under *Elec. Code § 9092* is exclusively in Sacramento County [*Elec. Code § 9092*].

[8] Verification Required

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*; *Cal Rules of Ct., Rule 8.486(a)(4)*] and proof of service of a copy of the petition must accompany the petition when it is offered for filing unless the court allows the writ to issue without notice [*Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.486(e)*; for discussion of methods of serving petition, *see* Ch. 358, *Mandate and Prohibition*].

[9] Memorandum

When the petition is filed in a court of appeal or in the Supreme Court, it must be accompanied by a memorandum [*Cal. Rules of Ct., Rule 8.486(a)(5)*]. There is no statute or rule specifically requiring the filing of a memorandum with a

petition for writ of mandate addressed to a superior court. However, local rules of court might require it. For extensive discussion, *see* Ch. 358, *Mandate and Prohibition* .

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B. Preelection Duties and Correction of Ballot Errors

20-243 California Forms of Pleading and Practice--Annotated §§ 243.151-243.159

[Reserved]

§§ 243.151[Reserved]

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C. Proceedings Relating to Canvass of Returns

20-243 California Forms of Pleading and Practice--Annotated § 243.160

§ 243.160 Request for Recount of Votes

[1] FORM Request for Recount of Votes

To _____ [*name of elections official responsible for conducting election or name of secretary of state*]:

IT IS HEREBY REQUESTED that a recount of the votes cast in the election held on _____ [*date*], be conducted.

1. This request is made on behalf of _____ [*specify candidate, slate of electors, or position on measure (affirmative or negative*)].

[2. It is requested that this recount be conducted in _____ (*specify the county or counties in which a recount is requested if the request is made on behalf of a candidate for statewide office or for or against a measure voted on statewide*).]

[3. The precincts should be recounted in the following order: _____ (*specify order of recount*).]

[4. All ballots, whether voted or not, and any other relevant material should be examined.]

[5. _____ (If the votes were recorded by means of a punch card voting system or by electronic or electromechanical vote tabulating devices, specify whether the recount should be conducted manually, or by means of the voting system used originally, or both).]
Dated: _____.

_____ [*signature of requestor*]

[2] Use of Form

The form of request in [1], *above*, is for use by a voter when requesting a recount of votes cast for candidates for any office, for slates of presidential electors, or for or against any measure [*see Elec. Code §§ 15620, 15621*].

In a non-statewide election, the request is directed to the elections official responsible for conducting the election in each county in which the recount is sought [*Elec. Code § 15620*]. In a statewide election, the request is directed to the Secretary of State [*Elec. Code § 15621*].

[3] Contents of Request

The request must specify on behalf of which candidate, slate of electors, or position on a measure it is filed (Paragraph 1) [*Elec. Code §§ 15620, 15621*]. In a statewide election, it must also specify the county or counties in which the recount is sought (Paragraph 2) [*Elec. Code § 15621*].

If desired, the request may (1) prescribe the order in which the precincts are to be counted (Paragraph 3) [*Elec. Code § 15622*]; (2) state that all ballots, whether voted or not, and any other relevant material should be examined at the recount (Paragraph 4) [*Elec. Code § 15630*]; and (3) depending on the type of voting system used, prescribe the means by which the recount is to be conducted (Paragraph 5) [*Elec. Code § 15627*].

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[Reserved]

§§ 243.161[Reserved]

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D. Proceedings Relating to Election Contests
1. Contests of General Elections

20-243 California Forms of Pleading and Practice--Annotated § 243.170

§ 243.170 Statement of Contest of Election [Elec. Code §§ 16100, 16400, 16401, 16403]--General Form

[1] FORM Statement of Contest of Election [Elec. Code §§ 16100, 16400, 16401, 16403]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Contested Election of	)	
_____ [*name*], For the Office of	)	NO. _____
_____ [*title of office*],	)	ELECTION CONTEST
_____ [*name*], Contestant,	)	
vs.	)	
_____ [*name*], Defendant.		

_____

Contestant alleges:

1. _____ [*Name*], contestant is, and at all times mentioned herein was, an elector of _____ [*name*] _____ [District *or* County], State of California.

2. The name of the defendant is _____ [*name*].

3. This contest relates to the defendant's right to hold and fill the office of _____ [*specify title of office*].

4. This statement is filed pursuant to *Elections Code Section 16400* on the ground(s) that _____ [*specify ground(s) set forth in Elec. Code § 16100*] in that: _____ [*specify particular facts constituting grounds(s)*].

5. The date of declaration of the result of the election by the body canvassing the returns thereof, namely the _____ [*specify name of body*], was _____ [*date*].

_____ [*signature*]

Contestant

[Verification. *See § 243.140[1].*]

[2] Use of Form

The form in [1], *above*, is for use by an elector in contesting the results of an election contest [*see Elec. Code § 16400*]. Any elector of a county, city, or of a political subdivision of a county or city may contest any election held therein based on any ground set out in *Elec. Code § 16100* [*see Elec. Code § 321* (defining "elector")]. The contestant need not be a candidate for the office in question [*see, e.g., Warden v. Brown (1960) 185 Cal. App. 2d 626, 8 Cal. Rptr. 518]* .

For forms alleging specific grounds for contesting an election, see *§§ 243.171 -243.174*.

[3] Designation of Parties

The person instituting the contest is termed the "contestant." The term "defendant" is used to indicate that person whose election or nomination is contested, or those persons receiving an equal and highest number of votes, other than the contestant, when, in other than primary elections, the body canvassing the returns declares that no one person has received the highest number of votes for the office [*Elec. Code § 16002*].

[4] Contents of Form

The statement of contest include the following [*Elec. Code § 16400*]:

- The contestant's name and status as an elector of the district or county in which the contested election was held (Paragraph 1).
- The defendant's name (Paragraph 2).
- The office subject to contest (Paragraph 3).
- The grounds of contest [*Elec. Code § 16100*] and the section of the Elections Code under which the statement is filed (Paragraph 4) [*see §§ 243.171 -243.174* (forms of allegation of grounds)].
- The date of declaration of the result of the election contested (Paragraph 5).

It is sufficient for the contestant to allege that he or she is a qualified elector at the time the statement of contest is filed. An allegation that he or she was a qualified elector at the time of election being contested is not required [*Minor v. Kidder (1872) 43 Cal. 229, 231]* .

The statement will not be rejected nor proceedings dismissed for want of form if the grounds of contest are alleged with sufficient certainty to advise the defendant of the particular proceeding or cause for which the election is contested [*Elec. Code § 16403*; *Hardeman v. Thomas (1989) 208 Cal. App. 3d 153, 171, 256 Cal. Rptr. 158]* .

Neither an introductory clause nor a prayer is required in a statement of contest [*see Norwood v. Kenfield (1866) 30 Cal. 393]* .

[5] Verification

The statement of contest must be verified by the contestant pursuant to *Code Civ. Proc. § 446* [*Elec. Code § 16401*].

[6] Jurisdiction and Venue

Jurisdiction of an election contest is in the superior court [*Elec. Code § 16500*]. Venue is in the county in which the election was held [*see Elec. Code §§ 16100, 16400*].

[7] Times for Filing and Placement on Calendar

The times for filing are set out in *Elec. Code § 16401*. Proceedings in election contests must be placed on the calendar in the order of their date of filing and must be given precedence [*Code Civ. Proc. § 35*; *see § 243.120*].

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20-243 California Forms of Pleading and Practice--Annotated § 243.171

§ 243.171 Allegation of Malconduct of Precinct Board for Use in Statement of Contest of Election [Elec. Code §§ 339, 16100(a), 16400(d)]

[1] FORM Allegation of Malconduct of Precinct Board for Use in Statement of Contest of Election [Elec. Code §§ 339, 16100(a), 16400(d)]

The _____ [precinct board members *or* election officials] responsible for supervision of the election were guilty of malconduct in that on _____ [*date(s) of act(s) constituting malconduct*] they _____ [*allege malconduct, e.g.*, (1) caused over 2,000 ballots to be misplaced; (2) were under the influence of alcohol while counting votes; and (3) permitted unauthorized persons in the area where the ballots were being counted]. These irregularities were sufficient to change the election result.

[2] Source of Form

The form of allegation in [1], *above*, is adapted from the allegation in *Enterprise Residents etc. Committee v. Brennan (1978) 22 Cal. 3d 767, 151 Cal. Rptr. 1, 587 P.2d 658* .

[3] Use of Form

The form of allegation in [1], *above*, is for use in a statement of contest of election to allege the grounds of malconduct by a precinct board or any member thereof [*Elec. Code § 16100(a)*; *see Elec. Code § 339* (defining "precinct board")].

The particular act or acts constituting malconduct are set out [*see Elec. Code § 16400(d)*], and although not specifically required by the Elections Code, the contestant is advised to state the date or dates on which the malconduct occurred [*see* Procedural Guide, § 243.120 subparagraph (3)].

For a form of statement of contest in which this allegation may be used and further discussion of the procedures involved in filing a statement of contest, see *§ 243.170*.

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20-243 California Forms of Pleading and Practice--Annotated § 243.172

§ 243.172 Allegation of Election Bribery and Other Offenses Against Elective Franchise for Use in Statement of Contest of Election [Elec. Code §§ 16100(c), 16400, 18000 et seq.]

[1] FORM Allegation of Election Bribery and Other Offenses Against Elective Franchise for Use in Statement of Contest of Election [Elec. Code §§ 16100(c), 16400, 18000 et seq.]

[*EITHER*]

On or about _____ [*date*], defendant committed election bribery in violation of *Elections Code Sections 16100(c)* and *18522* by _____ [*allege facts constituting election bribery, e.g.,* promising _____ (*name of elector or precinct board member to whom bribe was offered*) that defendant would use his/her influence as a member of the city council to obtain the release from prison of _____ (*name*), the brother of _____ (*name of elector or precinct board member to whom bribe was offered*). Defendant made this promise in direct exchange for _____'s (*name of elector or precinct board member to whom bribe was offered*) vote in the election contested herein].

[*AND/OR*]

On or about _____ [*date*], defendant committed election fraud in violation of *Elections Code Sections 16100(c)* and *18500* by _____ [*allege facts constituting election fraud, e.g.,* going to the homes of _____ (*names of elector*) and, in the guise of showing them how to vote with a vote by mail ballot, told them to punch numbers _____ and _____ on their vote by mail ballots. Defendant did so, knowing that none of the above-named electors knew how to vote with the vote by mail ballot and knowing that the numbers on the ballot that defendant directed _____ (*name of elector*) to punch constituted a vote for defendant]. These irregularities were sufficient to change the election result.

[*AND/OR*]

On or about _____ [*date*], defendant committed voter coercion in violation of *Elections Code Sections 16100(c)* and *18540* by _____ [*allege facts constituting voter coercion, e.g.,* intruding on _____ (*names of elector*) in their homes, telling them to punch numbers _____ and _____ on their vote by mail ballots, and remaining in their presence while they voted. Defendant engaged in these activities even though none of the above-named electors requested any assistance from defendant in voting their vote by mail ballot. None of the above-named electors wanted to vote for defendant, but each did so as a result of being intimidated by the presence of defendant in his or her home]. These irregularities were sufficient to change the election result.

[2] Use of Form

The allegation in [1], *above*, is for use in a statement of contest of election to allege the grounds that the defendant committed election bribery or other offenses against the elective franchise specified in *Elec. Code § 18000 et seq.* [*Elec. Code § 16100(c)*].

For a form of statement of contest in which this allegation may be used and further discussion of the procedures involved in filing a statement of contest, see *§ 243.170*.

[3] Election Bribery

Under *Elec. Code § 16100(c)*, any elector of a county, city, or any political subdivision of either, may contest any election held therein on the ground that the defendant has given to any elector or member of a precinct board any bribe or reward, has offered any bribe or reward for the purpose of procuring his or her election, or has committed any other offense against the elective franchise defined in *Elec. Code § 18000 et seq.* [*Elec. Code § 16100(c)*]. Under *Elec. Code § 18522*, a person cannot, directly or through any other person, pay, lend, or contribute, or offer or promise to pay, lend, or contribute, any money or other valuable consideration to or for any voter or to or for any other person, to either induce the voter to vote, or reward the voter for having voted, at an election for any particular person or measure [*see Elec. Code § 18522*].

A candidate's promise to perform a valuable service that does not involve the proper administration of the office sought, that is made for the express purpose of inducing a voter to vote for him or her, and that directly benefits the voter, constitutes a promise to pay, lend, or contribute a valuable consideration within the meaning of *Elec. Code § 18522* [*Stebbins v. White (1987) 190 Cal. App. 3d 769, 785, 235 Cal. Rptr. 656]* . The fact that the promise may not be fulfilled is immaterial to whether the promise is forbidden by *Elec. Code § 18522*, as long as the promise in exchange for the vote is something of value to the elector at the time the elector votes [*Stebbins v. White (1987) 190 Cal. App. 3d 769, 785, 235 Cal. Rptr. 656]* .

[4] Election Fraud

Any person who commits fraud or attempts to commit fraud, and any person who aids or abets fraud, or attempts to aid or abet fraud, in connection with any vote cast, to be cast, or attempted to be cast, is guilty of a felony [*Elec. Code § 18500*; *see also Elec. Code § 16100(c)*, under [3], *above*]. Fraud in connection with a vote to be cast can arise when a candidate for office, purportedly showing someone how to vote a vote by mail ballot, only tells the person how to vote the ballot for that candidate [*see Stebbins v. White (1987) 190 Cal. App. 3d 769, 788, 235 Cal. Rptr. 656]* .

[5] Voter Coercion

Every person who uses or threatens to use force, violence, or any tactic of coercion or intimidation to induce or compel any other person to vote, or to vote for any particular person or measure, at any election, or because any person voted,

or voted for any particular person or measure, at any election, and every person who hires or arranges for another person to engage in these activities, is punishable by imprisonment in the state prison [*see Elec. Code § 18540*; *see also Elec. Code § 16100(c)*, discussed in [3], *above*]. Voter coercion can arise in connection with the casting of a vote by mail ballot when a voter does not want to vote for a particular candidate but does so because of the intimidating presence of the candidate when the candidate intrudes on the voter in his or her home, does not ask if the voter desires assistance in voting, and tells the voter what numbers to punch on the voter's vote by mail ballot [*see Stebbins v. White (1987) 190 Cal. App. 3d 769, 788, 235 Cal. Rptr. 656* ; *see also Hardeman v. Thomas (1989) 208 Cal. App. 3d 153, 169-170, 256 Cal. Rptr. 158]* .

[6] Allegation That Misconduct Affected Election Results

In a ballot measure election contest based on the bribery ground of *Elec. Code § 16100(c)*, the contestant must plead and prove that the alleged bribery affected the result of the election [*Canales v. City of Alviso (1970) 3 Cal. 3d 118, 130, 130 n.5, 89 Cal. Rptr. 601, 474 P.2d 417]* .

However, in a candidate election contest based on the bribery ground of *Elec. Code § 16100(c)*, the contestant need neither plead nor prove that the alleged bribery affected the election result [*Salazar v. City of Montebello (1987) 190 Cal. App. 3d 953, 958-960, 235 Cal. Rptr. 708* ; *Stebbins v. White (1987) 190 Cal. App. 3d 769, 790-791, 235 Cal. Rptr. 656]* . In a candidate election contest under *Elec. Code § 16100(c)*, based on grounds other than bribery, it appears that the contestant must plead and prove that the alleged misconduct affected the election result [*see Salazar v. City of Montebello (1987) 190 Cal. App. 3d 953, 960, 235 Cal. Rptr. 708* (contest on "other offense" grounds of former *Elec. Code § 20021(c)* [*now see Elec. Code § 16100(c)*], in which contestant was expressly required to plead and prove alleged misconduct affected election result when bribery not involved); *but see Stebbins v. White (1987) 190 Cal. App. 3d 769, 790-791, 235 Cal. Rptr. 656* (contest on both bribery and "other offense" grounds of former *Elec. Code § 20021(c)* [*now see Elec. Code § 16100(c)*], in which contestants were not required to plead or prove alleged misconduct affected election result)].

[7] Burden of Proof

In election contests based on *Elec. Code § 18000 et seq.*, it is not definitively established whether the contestant bears the burden of proof by clear and convincing evidence or by a preponderance of the evidence [*Stebbins v. White (1987) 190 Cal. App. 3d 769, 784 n.11, 235 Cal. Rptr. 656* (trial court applied clear and convincing proof standard); *see Canales v. City of Alviso (1970) 3 Cal. 3d 118, 130 n.5, 89 Cal. Rptr. 601, 474 P.2d 417* (question left open); *Pierce v. Harrold (1982) 138 Cal. App. 3d 415, 428, 188 Cal. Rptr. 458* (applicable standard held to be preponderance of the evidence)].

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20-243 California Forms of Pleading and Practice--Annotated § 243.173

§ 243.173 Allegation of Illegal Votes Cast for Use in Statement of Contest of Election [Elec. Code §§ 16100(d), 16400, 16402]

[1] FORM Allegation of Illegal Votes Cast for Use in Statement of Contest of Election [Elec. Code §§ 16100(d), 16400, 16402]

Illegal votes were given to defendant in the following voting precincts, which votes, if taken from him/her, will reduce the number of his/her legal votes below the number of legal votes given to _____ [contestant *or some other person*] for the same office: _____ [*specify precincts*].

[2] Use of Form

The form of allegation in [1], *above*, is for use in a statement of contest of election to allege the grounds that illegal votes were cast [*Elec. Code § 16100(d)*]. The allegation is appropriate for use as the basis of a ballot measure contest as well as a candidate contest [*Canales v. City of Alviso (1970) 3 Cal. 3d 118, 129-130, 89 Cal. Rptr. 601, 474 P.2d 417]* .

For a form of statement of contest in which this allegation may be used and further discussion of the procedures involved in filing a statement of contest, see *§ 243.170*.

[3] Allegation

When the reception of illegal votes is alleged as a cause of contest, it is sufficient to state generally that in one or more specified voting precincts illegal votes were given to the defendant which, if taken from him or her, will reduce the number of his or her legal votes below the number of legal votes given to some other person for the same office [*Elec. Code § 16402*].

[4] Service of List of Illegal Votes

When the reception of illegal votes cast is a ground of contest, the contestant must deliver to defendant, at least three days before trial, a written list of alleged illegal votes [*Elec. Code § 16402*; for a form of list, *see § 243.176*]. Similarly, if the defendant claims that illegal votes were received for the contestant, he or she must furnish a list to the latter [*Garrison v. Rourke (1948) 32 Cal. 2d 430, 442, 196 P.2d 884* (overruled on other grounds in *Keane v. Smith (1971) 4 Cal. 3d 932, 939, 95 Cal. Rptr. 197, 485 P.2d 261*)].

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20-243 California Forms of Pleading and Practice--Annotated § 243.174

§ 243.174 Allegation of Error in Conducting Election and Canvass of Returns for Use in Statement of Contest of Election [Elec. Code §§ 16100(f), 16400]

[1] FORM Allegation of Error in Conducting Election and Canvass of Returns for Use in Statement of Contest of Election [Elec. Code §§ 16100(e), 16400]

The _____ [precinct board *or* election officials] responsible for conducting the election and canvassing the returns made errors sufficient to change the result of the election in which the defendant has been declared elected in that _____ [*describe error and set out Elections Code Section violated, e.g.,* in the counting of the ballots they erroneously rejected all ballots which (1) were soiled or defaced; or (2) contained two or more impressions of the voting stamp in one voting square. The rejection of ballots is in violation of *Elections Code Section 15154* and was sufficient to change the election result].

[2] Use of Form

The form of allegation in [1], *above*, is for use in a statement of contest of election to allege the grounds that an error was made in conducting the election or in canvassing the returns [*Elec. Code § 16100(f)*].

For a form of statement of contest in which this alleagation may be used and further discussion of the procedures involved in filing a statement of contest, see *§ 243.170*.

[3] Allegations

The form of allegation in [1], *above*, describes the errors made and sets out the particular Elections Code section under which the error is alleged [*Elec. Code § 16400(d)*].

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20-243 California Forms of Pleading and Practice--Annotated § 243.174A

§ 243.174A Allegation That Eligible Voters who Attempted to Vote in Accordance with the Laws of the State Were Denied their Right to Vote [Elec. Code §§ 16100(e), 16101(d)]

[1] FORM Allegation That Eligible Voters who Attempted to Vote in Accordance with the Laws of the State Were Denied their Right to Vote [Elec. Code §§ 16100(e), 16101(d)]

A sufficient number of eligible voters who attempted to vote in accordance with the laws of the state were denied their right to vote, and that had those voters been permitted to vote, the defendant would not have received as many votes as _____ [*name of contestant*].

[2] Use of Form

The form of allegation in [1], *above*, is for use in a statement of contest of election to allege that eligible voters who attempted to vote in accordance with the laws of the state of California were denied their right to vote [*Elec. Code § 16100(e)*].

For a form of statement of contest in which this allegation may be used, and further discussion of the procedures involved in filing a statement of contest, see *§ 243.170*.

[3] Sufficient Number of Eligible Voters Must Be Involved

An election may not be set aside on account of eligible voters being denied the right to vote unless it appears that a sufficient number of voters were denied the right to vote as to change the result [*Elec. Code § 16204*].

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20-243 California Forms of Pleading and Practice--Annotated § 243.175

§ 243.175 List of Illegal Votes [Elec. Code § 16402]

[1] FORM List of Illegal Votes [Elec. Code § 16402]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Contested Election of	)	
_____ [*name*], For the Office of	)	NO. _____
_____ [*title of office*],	)	LIST OF ILLEGAL VOTES
_____ [*name*], Contestant,	)	
vs.	)	
_____ [*name*], Defendant.		

_____

TO the defendant and to _____ [*name*], his/her attorney:

Pursuant to *Elections Code Section 16402*, contestant delivers to defendant a written list of the number of illegal votes cast at the contested election, and the names of the voters who cast them, which contestant intends to prove at the trial.

This list is as follows: _____ [*specify number of illegal votes, names of voters casting such votes, and pertinent precincts*].
Dated: _____.

_____ [*signature*]

Contestant

[2] Use of Form

The form in [1], *above*, is for use when an election contest is based on grounds that illegal votes were cast. The object of the list is to notify the opposing party of the number of illegal votes allegedly cast within sufficient time for him or her to prepare a defense to the allegation [*Benson v. Superior Court of Napa County (1963) 214 Cal. App. 2d 551, 560, 29 Cal. Rptr. 760]* .

For a form alleging illegal votes as a ground of contest, see *§ 243.174*.

[3] Content of List

The list sets out the specific number of illegal votes and by whom given, which the contestant intends to prove [*Elec. Code § 16402*].

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20-243 California Forms of Pleading and Practice--Annotated § 243.176

§ 243.176 Judgment Annulling and Setting Aside Election [Elec. Code § 16603]

[1] FORM Judgment Annulling and Setting Aside Election [Elec. Code § 16603]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Contested Election of	)	
_____ [*name*], For the Office of	)	NO. _____
_____ [*title of office*],	)	JUDGMENT
_____ [*name*], Contestant,	)	
vs.	)	
_____ [*name*], Defendant.		

This cause came on regularly for trial on _____ [*date*], in [_____ (Department *or* Division) _____ of] the above-entitled court, the Honorable _____ [*name*], Judge, presiding, sitting without a jury. Contestant appeared by his/her attorney _____ [*name*] and defendant appeared by his/her attorney _____ [*name*].

Evidence, both oral and documentary, was introduced on behalf of both parties and the cause was argued and submitted for decision. The court having caused to be made and filed herein its written statement of decision,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that:

1. _____ [*Name of contestant or candidate if contest filed by noncandidate*] received a plurality of the votes cast for all candidates for the office _____ [*specify title of office contested e.g.*, assessor] of the County of _____ at the election held on _____ [*date*], and was duly elected to this

office.

2. The County Clerk, _____ [*name*], immediately make out and deliver to _____ [*name of contestant or candidate declared elected if contest filed by noncandidate*] a certificate of election to this office, duly signed and authenticated with the seal of the Superior Court.

3. The declaration of election of defendant _____ [*name*] to this office heretofore made and any certificate of election issued to defendant are annulled and set aside.

[*EITHER*]

4. Costs shall be a charge against the county and are taxed at $_____.

[*OR*]

4. Contestant have and recover from defendant costs taxed at $_____.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form of judgment in [1], *above*, is for use by counsel in preparing a judgment for the designated party after trial of an election contest. For additional discussion and alternative forms, see Ch. 318, *Judgments* .

[3] Findings of Fact and Conclusions of Law

In an election contest the trial court is required to file its findings of fact and conclusions of law [*Elec. Code § 16603*; *see also Code Civ. Proc. § 632* (statement of decision, which replaces findings of fact and conclusions of law)].

[4] Cross References

For forms relating to statements of decision, see Ch. 529, *Statement of Decision*

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[Reserved]

§§ 243.177[Reserved]

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20-243 California Forms of Pleading and Practice--Annotated § 243.190

§ 243.190 Declaration Contesting Right to Nomination for Partisan Office [Elec. Code §§ 16101, 16404, 16420]

[1] FORM Declaration Contesting Right to Nomination for Partisan Office [Elec. Code §§ 16101, 16404, 16420]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the Contested Election of	)	NO. _____
_____ [*name*], For the Office of	)	DECLARATION
_____ [*title of office*],	)	CONTESTING RIGHT TO NOMINATION FOR
_____ [*name*], Contestant,	)	PARTISAN OFFICE OF _____
vs.	)	[*name*]
_____ [*name*], Defendant.		
_____		

I, _____ [*name of contestant*] say:

1. I am the contestant herein.

2. This declaration is made to contest the right of defendant to nomination as the nominee of the _____ [*name of party*, *e.g.*, Democratic] Party for the partisan office of _____ [*title of office*, *e.g.*, Governor of the State of California] at the primary election held on _____ [*date*].

3. Contestant is a candidate for this office and _____ [his/her name appeared in print on the ballots as such a candidate *or* he/she was a write-in candidate] at the primary election.

4. The defendant's name is _____ [*name*]. Defendant is a candidate for the same party nomination for

the same office as contestant and _____ [his/her name appeared in print on the ballots as such a candidate *or* he/she was a write-in candidate] at the primary election.

5. Following the official canvass of returns of the primary election, defendant was declared nominated as the candidate of the _____ [*name of party, e.g.,* Democratic] Party for this office at the ensuing general election.

6. The date of completion of the official canvass of the Board of Supervisors of the county last making the declaration was _____ [*date*].

7. The right of defendant to the nomination as nominee of the _____ [*name of party, e.g.,* Democratic] Party for the office of _____ [*name of office, e.g.,* Governor of the State of California] is contested on the ground that _____ [*specify ground pursuant to Elec. Code § 16101, e.g.,* defendant has committed an offense in violation of the Elections Code,] in that _____ [*specify nature of offense, e.g.,* with intent to mislead the voters in connection with his/her campaign for election to a public office, defendant implied by his/her statements that he/she has been acting in the capacity of a public officer when in fact that is not the case. Defendant's conduct was in violation of *Elections Code Section 18350,* which forbids such misleading statements. A copy of the campaign literature is attached as Exhibit A and made a part hereof].

8. _____ [*Specify each precinct in which irregularity or improper conduct took place*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

Contestant

[2] Use of Form

The form of declaration in [1], *above,* is for use by a candidate to contest the nomination of another candidate in a primary election [*see Elec. Code § 16101*].

[3] Contents

After stating the name and identity of the declarant as the contestant (Paragraph 1), the declaration sets out the following information [*see Elec. Code § 16404*]:

- The purpose of the declaration (Paragraph 2).
- The office for which the contestant is a candidate (Paragraph 3).
- The defendant's name [*Elec. Code § 16420*] and the office for which the defendant is a candidate (Paragraph 4).
- A declaration that defendant as a nominee for general election (Paragraph 5).
- The date of completion of the official canvass of returns (Paragraph 6).
- The grounds for contestant's declaration (Paragraph 7).

- Those precincts in which irregularity or improper conduct took place (Paragraph 8) [*Elec. Code § 16404*].

[4] Jurisdiction and Venue

Jurisdiction is in the superior court [*Elec. Code § 16421*]. If the nomination contested is for an office including a political subdivision of more than one county, the superior court of any county within the political subdivision has jurisdiction, and the contestant may file in any county within the political subdivision. There may be no change of venue therefrom to any other county within the political subdivision [*Elec. Code § 16441*].

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20-243 California Forms of Pleading and Practice--Annotated § 243.191

§ 243.191 Declaration Contesting Right to Nomination for Nonpartisan Office [Elec. Code §§ 16101, 16404, 16420]

[1] FORM Declaration Contesting Right to Nomination for Nonpartisan Office [Elec. Code §§ 16101, 16404, 16420]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Contested Election of	)	NO. _____
_____ [*name*], For the Office of	)	DECLARATION
_____ [*title of office*],	)	CONTESTING RIGHT TO NOMINATION FOR
_____ [*name*], Contestant,	)	NONPARTISAN OFFICE
vs.	)	OF _____ [*name*]
_____ [*name*], Defendant.	)	

I, _____ [*name of contestant*], say:

1. I am the contestant herein.

2. This declaration is made to contest the right of defendant to nomination for the nonpartisan office of _____ [*specify office, e.g.,* Superintendent of Schools, District Number 10] at the primary election held on _____ [*date*].

3. Contestant is a candidate for nomination for this office and _____ [his/her name appeared in print on the ballots *or* he/she was a write-in candidate] at the primary election.

4. The defendant's name is _____ [*name*]. Defendant is a candidate for nomination for the same office as contestant and _____ [his/her name appeared in print on the ballots *or* he/she was a write-in candidate] at the primary election.

5. _____ [*Allege other candidates for nonpartisan office, e.g.*, There were two additional candidates on the ballots at the primary election for nomination to the office of Superintendent of Schools, District 10, namely _____ (*name of candidate*), and _____ (*name of candidate*)].

6. Following official canvass of the returns of election, the Board of Supervisors of _____ [*name*] County has declared that no candidate received votes on a majority of all ballots cast for candidates for the office for which such candidates sought nomination and no candidate was elected to office pursuant to law and that _____ [contestant *or* _____ (*name of other candidate(s)*] and defendant received the highest number of votes cast on all the ballots and have been nominated as opposing candidates for _____ [*specify office, e.g.*, Superintendent of Schools, District Number 10] at the ensuing general election.

7. [*State date of completion of official canvass of returns. See § 243.190[1], Paragraph 6*].

8. The right of defendant to nomination for the office of [*specify*] is contested on the ground that _____ [*specify ground pursuant to Elec. Code § 16101, e.g.*, a sufficient number of votes were illegal, fraudulent, forged, or otherwise improper, and had such votes not been counted, the defendant would not have received as many votes as contestant], in that _____ [*specify particulars separately as to each precinct in which any irregularity or improper conduct took place, or in which a recount is demanded, and the nature of the mistake, error, malconduct, or other cause of contest*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

Contestant

[2] Use of Form

The form of declaration in [1], *above*, is for use by a nonpartisan candidate to contest the nomination of another candidate in a primary election [*see Elec. Code § 16101*]. The contesting candidate may be either one of the successful nominees or a losing candidate for nomination [*Elec. Code § 16101*].

If the defendant was elected to the contested nonpartisan office [*see Elec. Code § 8140*], any contest is to be brought under the provisions for contest of a general election [*Elec. Code §§ 16100, 16200 et seq.*] in which case any elector, including the losing candidate, may file a statement of contest of election [for a form of statement of contest of election, *see § 243.170*].

For discussion of a declaration contesting the right to nomination for a partisan office, see *§ 243.190*. For discussion of answering declarations in contests involving simple or other recounts, see *§§ 243.192, 243.193*.

[3] Content of Declaration

After stating the declarant's name, the declaration must state [*Elec. Code § 16404*]:

- That the declarant is the contestant (Paragraph 1).
- The purpose of the declaration, specifying the elective office involved (Paragraph 2).
- The contestant's candidacy for nomination to that office by appearance on printed ballots or as a write-in candidate (Paragraph 3) [*see Elec. Code § 8600 et seq.* (write-in candidacy requirements); *see also Elec. Code § 8650 et seq.* (write-in candidacy for presidential electors)].
- The defendant's name (Paragraph 4) [*Elec. Code § 16420*].
- The defendant's candidacy for nomination to the contested office by appearance on printed ballots or as a write-in candidate (Paragraph 4).
- The name of any other candidate for nomination to that office (Paragraph 5).
- The declaration following official canvass of returns (Paragraph 6).
- The date of completion of official canvass of returns (Paragraph 7).
- The specific ground for contest (Paragraph 8).

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20-243 California Forms of Pleading and Practice--Annotated § 243.192

§ 243.192 Answer and Cross Contest Declaration in Contest Involving Other Than Simple Recount [Elec. Code § 16443]

[1] FORM Answer and Cross Contest Declaration in Contest Involving Other Than Simple Recount [Elec. Code § 16443]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the Contested Election of	)	NO. _____
_____ [*name*], For the Office of	)	ANSWER AND CROSS CONTEST DECLARA-
_____ [*title of office*],	)	TION
_____ [*name*], Contestant,	)	OF _____ [*name*]
vs.	)	DEFENDANT
_____ [*name*], Defendant.		
_____		

I, _____ [*name of defendant*], say:

1. I am the defendant and cross contestant herein.

2. This declaration is made in answer to the declaration of contest filed by contestant _____ [*name*] contesting the defendant's right to nomination for the nonpartisan office of _____ [*specify office, e.g.*, District Supervisor, District Number 18] at the primary election held on _____ [*date*], and is also made to contest the right of contestant to nomination for this office.

3. Defendant and cross contestant is a candidate for nomination for this office, and following official canvass of the

returns of election, has been declared nominated as one of two opposing candidates for the office at the ensuing general election.

4. The name of cross defendant, who is also contestant herein, is _____ [*name*]. Contestant and cross defendant is a candidate for nomination for the same office and has been declared nominated as the other opposing candidate for the office at the ensuing general election.

5. [*Date of completion of official canvass of returns. See § 243.190[1], Paragraph 6*].

6. Defendant received a copy of contestant's affidavit of contest on _____ [*date*].

7. The right of contestant and cross defendant to nomination for the office of [*specify*] is contested on the ground that _____ [*specify ground pursuant to Elec. Code § 16101, e.g.,* cross defendant is not an eligible candidate to the office in dispute] in that _____ [*specify particulars, e.g.,* he/she was not a legally qualified candidate in the primary election as required by *Elections Code Section 13* for the reason that his/her declaration of candidacy was not filed within the time prescribed by the Elections Code].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

Defendant/Cross Contestant

[2] Use of Form

The form in [1], *above*, is for use when a defendant in a contest other than a contest involving a simple recount elects to file an answer and cross contest. Defendant, after receiving a copy of contestant's affidavit or declaration of contest, may file an answer and cross contest affidavit or declaration within five days [*Elec. Code § 16443*]. Any affidavit or declaration of cross contest must meet the same requirements as the affidavit or declaration of an original contestant [*Elec. Code §§ 16101, 16404, 16420*].

For discussion of declarations contesting the right to nomination for partisan and nonpartisan offices, see *§§ 243.190, 243.191*.

[3] Content of Declaration

After stating the name of the declarant, the declaration must state the following [*Elec. Code § 16404*]:

- That the declarant is the defendant and cross contestant (Paragraph 1).
- The purpose of the declaration and the elective office involved (Paragraph 2).
- The candidacy of defendant and cross contestant for nomination at the primary and his or her election as a nominee at the ensuing general election (Paragraph 3).
- The candidacy of contestant and cross defendant for nomination at a primary election and his or her election as nominee at the ensuing general election (Paragraph 4).

- The date of completion of official canvass of returns (Paragraph 5).
- The date on which declarant received contestant's affidavit of contest.
- The specific ground for contesting the nomination of contestant and cross defendant (Paragraph 7).

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PART V. FORMS
D. Proceedings Relating to Election Contests
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20-243 California Forms of Pleading and Practice--Annotated § 243.193

§ 243.193 Answering Declaration in Contest Involving Simple Recount [Elec. Code § 16466]

[1] FORM Answering Declaration in Contest Involving Simple Recount [Elec. Code § 16466]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the Contested Election of	)	NO. _____
_____ [*name*], For the Office of	)	ANSWERING
_____ [*title of office*],	)	DECLARATION WITH REQUEST FOR RE-
_____ [*name*], Contestant,	)	COUNT
vs.	)	IN ADDITIONAL
_____ [*name*], Defendant.	)	PRECINCTS
_____		

I, _____ [*name of defendant*], say:

1. I am the defendant herein.

2. This declaration is made in answer to the declaration filed by contestant _____ [*name*] contesting the defendant's right to nomination at the primary election held on _____ [*date*], as _____ [*if partisan office, specify, e.g.*, Democratic Party candidate *or, if nonpartisan office*, as one of the successful candidates] for the _____ [partisan office *or* nonpartisan office] of _____ [*specify office for which nomination is contested*] at the ensuing general election.

3. The date on which contestant filed with the County Clerk his/her _____ [affidavit *or* declaration] of mailing of a copy of contestant's _____ [affidavit *or* declaration] to defendant was

_____ [*date*].

4. There was no mistake, error, or malconduct whereby the votes in any precinct designated were so incorrectly counted as to change the result, as alleged by contestant, or at all, and good ground for contest by contestant does not exist in that: _____ [*set forth evidentiary statements refuting contestant's statements*].

[5. If a recount is nevertheless ordered, defendant requests a recount of votes in the following precincts and on the following grounds: _____ (*designate precincts and set up grounds therefor as required by Elec. Code §§ 16101(e), 16404, 16464*).]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

Defendant

[2] Use of Form

The form of answering declaration and request for recount in additional precincts in [1], *above*, is intended for use when the ground of contestant's contest is that due to mistake, error, or malconduct, the votes in any precinct were so incorrectly counted as to change the result of the election [*Elec. Code § 16101(e)*].

For a discussion of an answer and cross contest declaration in a contest involving other than a simple recount, see *§ 243.192*.

[3] Time for Filing

The defendant must file an answering affidavit or declaration and request for recount within three days after the contestant files his or her affidavit that he or she has sent a copy of the affidavit of contest to the defendant [*Elec. Code § 16464*]. Note the different time period for filing an answer and cross contest affidavit or declaration from that provided for a procedure other than simple recount [*see Elec. Code § 16443*].

[4] Contestant's Reply

At any time up to and including the first day of trial, the contestant may file an affidavit or declaration in reply to defendant's request for a recount in additional precincts [*Elec. Code § 16464*]. The affidavit or declaration should consist of evidentiary statements used to refute the defendant's grounds.

[5] Content of Form

After stating the name of the affiant or declarant, the form must specify:

- That the declarant is the defendant in the contest for recount (Paragraph 1).
- The purpose of the declaration, and the elective office involved (Paragraph 2).
- The date on which the contestant filed his or her affidavit of mailing with the county clerk (Paragraph 3) [*see Elec. Code § 16462*].

- Evidentiary statements refuting the contestant's statements (Paragraph 4) [*see Elec. Code § 16466* (all objections to contest involving simple recount must be contained in the answer)].

- The defendant's request for recount in additional precincts, and grounds for that recount (Paragraph 5) [*see Elec. Code § 16101(e)*].

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20-243 California Forms of Pleading and Practice--Annotated §§ 243.194-243.199

[Reserved]

§§ 243.194[Reserved]

California Forms of Pleading and Practice--Annotated

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PART VI. APPENDIX

20-243 California Forms of Pleading and Practice--Annotated § 243.200

§ 243.200 California Elections Code 1994 Repeal and Reenactment Disposition Table

[1] Repeal and Reenactment of Elections Code

The Elections Code was repealed, and a new Elections Code was enacted in 1994 [1994 Stats., ch. 920]. The new code reorganized and clarified the Elections Code to facilitate its administration. These changes were intended to have only technical and nonsubstantive effect [1994 Stats., ch. 920, Legislative Counsel's Digest].

This chapter is based on the new code, but for your convenience when dealing with case law that construes repealed code sections, the disposition table in [2], *below*, shows the correlation of sections from the old Elections Code to the reenacted Elections Code.

[2] Table

```
CALIFORNIA ELECTIONS CODE 1994 REPEAL AND REENACTMENT DISPOSI-
                          TION TABLE
The following key provides repeal date and operative date in-
formation for marked statutes containing the same key number:
 *1 Repeal operative January 1, 1998.
```

Old Elections Code Section	New Elections Code Section	Old Elections Code Section	New Elections Code Section
1	1	29	326
2	2	30	325
3	3	31	352
4	4	32	351
5	5	33	314

6 6
7 7
8 353
9 8
10 310
11 354
12 335
13 311
14 307
15 320
16 347
17 321
18 359
19 318
20 324
21 341
22 ..... 340 *1
22 ..... 340 *2
23 ..... 316 *1
23 ..... 316 *2
24 357
25 328
26 348
27 356
28 327
100 2000
200 ..... 34 9
201 2020
202 2021
203 2022
204 2023
205 2024
206 2025
206.5 2026
207 2027
208 2028
209 2029
210 2030
34 313
35 338
36 337
37 334
38 329
39 339
40 319
41 100
41.5 101
42 102
43 103
44 104
45 105
47 9
49 12
50 14
51 21000
52 13
53 106
54 15450
55 10
58 11
60 15
70 200
75 201
405 2140
406 2141
407 2142
408 2143
500 2150
501 2151
502 2152
503 2153
503.5 2154
504 2155
505 2156
506 2157
507 2158

211 2031
212 2032
214 346
215 2033
216 2034
217 2035
225 2050
226 2051
227 2052
228 2053
300 2100
300.5 2101
301 2102
302 2103
303 2104
304 2105
304.5 2106
305 2107
306 2108
307 2109
308 2110
309 2111
309.5 2112
310 2113
311 2114
311.5 2115
311.6 2116
312 2117
313 2118
315 2119
316 2120
318 2121
319 2122
320 2123
400 2135
401 2136
402 2137
403 2138
507.5 2159
508 2160
509 2161
509.1 2162
509.3 2163
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511 2165
511.5 2166
512 2167
600 2180
601 2181
602 2182
603 2183
604 2184
604.5 305
605 2185
606 2186
607 2187
608 2188
609 2189
611 2190
611.1 2191
612 2192
613 2193
615 2194
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704 2205
704.5 2206
705 2207
707.5 2208
707.6 2209
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707.8 2211
708 2212

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800.3 2223
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803 2226
804 2227
805 2228
825 2240
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827 2130
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1002.5 3002
1003 3003
1004 3004
1005 3005
1006 3006
1006.1 3007
1006.3 3008
1007 3009
1008 3010
1009 3011
1009.5 3012
1010 3013
1011 3014
1012 3015
1012.5 3016
1013 3017
1014 3018
1015 3019
1016 3020
1017 3021
1018 3022
1019 3023
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1206.5 3110
1207 3111
1208 3112
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1305.5 3306
1306 3307
1307 3308
1308 3309
1309 3310
1310 3311
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1351 4101
1352 4102
1353 4103
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1401 15001
1402 15002
1403 15003

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1107 3407
1109 3408
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1129 3502
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1508.5 12240
1509 12227
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1511 12221
1513 12222
1513.1 12262
1514 12261
1515 12325
1630 12301
1631 12304
1632 12305
1633 12302
1634 12308
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1409 15008
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2551 ..... 1201 *2
2552 ..... 1202 *1
2552 ..... 1202 *2
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2603 1303
2604 1500
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2652 10701
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3501 9001
3502 9002

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6005 ..... 6320 *2
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6008 ..... 6323 *2
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California Forms of Pleading and Practice--Annotated

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

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[3] Cross References

§ 244.61 Allegations in Complaint for Damages Sustained While Passenger in Elevator or on Escalator--Existence of Statute, Ordinance, or Regulation and Resulting Duty Owed Plaintiff

[1] FORM

[2] Use of Form

[3] Cross References

§ 244.62 Cross Complaint [Code Civ. Proc. § 428.10] for Declaratory Relief [Code Civ. Proc. § 1060] for Implied Contractual Indemnity in Personal Injury Action--By Building Owner Against Person Who Contracted to Install and Maintain or Inspect Elevator or Escalator

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 244.63 Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)], and Permanent Injunction [Civ. Code § 3422]--Restraining Operation of Elevator Having no Permit and in Unsafe Condition [Lab. Code § 7303]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Notice and Certification

[6] Cross References

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Chapter 244 ELEVATORS AND ESCALATORS
PART I. SCOPE

20-244 California Forms of Pleading and Practice--Annotated § 244.01

§ 244.01 Scope of Chapter

This chapter discusses the duty and care required of elevator and escalator owners, operators, manufacturers, lessors and lessees of premises housing such appliances, lessors and lessees of construction elevators, and maintenance and inspection companies. The chapter includes forms of complaints [*see §§ 244.50, 244.59, 244.60*] and allegations [*see §§ 244.51 -244.58, 244.61*] for use in actions against elevator and escalator owners, maintenance and inspection companies, or their agents and employees, for (1) personal injuries, and (2) wrongful death, caused by the negligent operation or maintenance of elevator or escalator equipment. The chapter also contains a cross complaint [*see § 244.62*] for declaratory relief to determine the question of liability with regard to one of two or more defendants, and a complaint to enjoin the operation of an unsafe elevator [*see § 244.63*].

For a more detailed discussion of actions arising from injuries sustained in the use of property, see Ch. 421, *Premises Liability* , Ch. 109, *Carriers* , Ch. 297, *Hotels and Motels* , Ch. 334, *Landlord and Tenant: Claims for Damages* , Ch. 460, *Products Liability* . For related topics, see Ch. 181, *Death and Survival Actions* , Ch. 300, *Indemnity and Contribution* , and Ch. 380, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyGeneral Premises LiabilityPremisesElevators & Escalators

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20-244 California Forms of Pleading and Practice--Annotated § 244.02

§ 244.02 Cross References

For a detailed discussion of the duty of carriers of passengers for reward, see Ch. 106, *Buses and Streetcars*

For a discussion of elevators and escalators as common carriers, see Ch. 109, *Carriers*

For forms for use by hotel guests in actions involving elevators, see Ch. 297, *Hotels and Motels*

For a discussion of related issues, see Ch. 177, *Damages* , Ch. 181, *Death and Survival Actions* , Ch. 123, *Complaints and Cross Complaints* , Ch. 300, *Indemnity and Contribution* , Ch. 334, *Landlord and Tenant: Claims for Damages* , Ch. 380, *Negligence* , Ch. 421, *Premises Liability* , Ch. 460, *Products Liability* , and Ch. 525, *Slip and Fall*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesElevators & EscalatorsTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesHotelsTortsWrongful Death & Survival ActionsGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral Overview

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[Reserved]

§§ 244.03[Reserved]

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§ 244.10 Governing Law

[1] Duties and Liabilities

The duties and liabilities imposed on elevator and escalator owners and operators are governed by case law, as supplemented by *Civ. Code § 1714(a)*, defining negligence, and *Civ. Code §§ 2096, 2100*, and *2168*, specifying the duties and liabilities imposed on common carriers.

[2] Employment Safety Laws

Elevators and escalators are extensively regulated under the provisions of *Lab. Code §§ 7200-7205* (construction elevators), *7300-7319* (elevators), *7340-7357* (aerial passenger tramways), and *8 Cal. Code Reg. §§ 3000-3113* (elevator and escalator safety orders promulgated by the Division of Industrial Safety [*see 8 Cal. Code Reg. § 3000(c)*]). These statewide provisions apply to all places of employment as that term is defined in *Lab. Code § 6303* [*see Lab. Code § 6303*; *8 Cal. Code Reg. § 3000(a)*]. Although these provisions, with the exception of *Lab. Code §§ 7300-7319* [*see § 244.16*], are particularly designed for the purposes of industrial safety and the protection of employees, they have also been interpreted, in certain instances, to be safeguards for the public generally against injury or loss of life [*see Pierson v. Holly Sugar Corp. (1951) 107 Cal. App. 2d 298, 302, 237 P.2d 28]* .

Under *Lab. Code § 6304.5* prior to its amendment in 1999, evidence of Cal-OSHA regulations was inadmissible in actions against parties other than the employer [*see, e.g., Widson v. Int'l Harvester Co. (1984) 153 Cal. App. 3d 45, 52, 200 Cal. Rptr. 136]* . However, the 1999 amendments have removed that limitation for injuries occurring after 1999. Under the current version of that statute, if a plaintiff can meet the requirements of *Evid. Code § 669*, the plaintiff may introduce such evidence to establish a non-employer's negligence, except to impose liability on the State for failure to comply with a mandatory duty [*Elsner v. Uveges (2004) 34 Cal. 4th 915, 935-939, 22 Cal. Rptr. 3d 530, 102 P.3d 915* ; *see Lab. Code § 6304.5*]. To meet the requirements of the negligence *per se* doctrine codified in *Evid. Code § 669*, a plaintiff must establish: (1) a violation of a safety order, (2) that the plaintiff is a member of the class designed to be protected by the order, and (3) that the violation was a cause of the plaintiff's injury [*see, e.g., Longway v. McCall (1960) 181 Cal. App. 2d 723, 732, 5 Cal. Rptr. 818]* . In addition, under amended *Lab. Code § 6304.5*, safety regulations may be admissible in actions brought by employees of subcontractors against general contractors that retain control of safety conditions only if the general contractor affirmatively contributed to the employee's injuries [*Millard*

v. Biosources, Inc. (2007) 156 Cal. App. 4th 1338, 1352, 68 Cal. Rptr. 3d 177]. Third-party liability for injuries to employees of subcontractors is discussed in greater detail in Ch. 248, *Employer's Liability for Employee's Torts.*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsPolice PowerTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesElevators & Escalators

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§ 244.11 Owner's or Possessor's Liability

[1] In General

Those in possession or control of elevators and the premises in which they are located may be liable for personal injuries and death sustained as a result of their negligent operation or maintenance [*Ramirez v. Redevelopment Agency (1970) 4 Cal. App. 3d 397, 400, 84 Cal. Rptr. 356* ; *Benussi v. Hannah (1921) 53 Cal. App. 243, 247-248, 199 P. 1063]* . This rule also applies to those in possession or control of escalators [*Vandagriff v. J. C. Penney Co. (1964) 228 Cal. App. 2d 579, 582, 39 Cal. Rptr. 671* ; *Hendershott v. Macy's (1958) 158 Cal. App. 2d 324, 327-328, 322 P.2d 596]* . The duty is not dependent on legal possession of the premises [*Benussi v. Hannah (1921) 53 Cal. App. 243, 247-248, 199 P. 1063]* . This duty extends to those who are on the premises even though they may not use the elevator or escalator [*see* *Kataoka v. May Dep't Stores Co. (1943) 60 Cal. App. 2d 177, 181-182, 140 P.2d 467* (child playing at foot of escalator)].

[2] Duty as Nondelegable

The duty of care of an owner or possessor who has control of the premises is, in respect to the maintenance of elevators (and escalators), nondelegable [*see* *Brown v. George Pepperdine Found. (1943) 23 Cal. 2d 256, 259-260, 143 P.2d 929* ; *Ramirez v. Redevelopment Agency (1970) 4 Cal. App. 3d 397, 400, 84 Cal. Rptr. 356]* . Such an owner or possessor is bound to use the utmost care and diligence in the maintenance of elevators and escalators, and in the fulfillment of this obligation, more than regular and frequent inspections is required. The owner or possessor must use due care in servicing, inspecting, and maintaining the elevator and all the appliances appurtenant thereto [*Brown v. George Pepperdine Found. (1943) 23 Cal. 2d 256, 261, 143 P.2d 929]* . *Lab. Code § 7324.1* makes clear that *Lab. Code § 7300 et seq.* does not relieve or lessen the liability of one owning, maintaining, or repairing an elevator for personal injury caused by an elevator that is defective. By its own terms, *Lab. Code § 7324.1* assumes an elevator may be rendered defective due to maintenance or repair and preserves liability for that defect [*Koepnick v. Kashiwa Fudosan America, Inc. (2008) 173 Cal. App. 4th 32, 40, 92 Cal. Rptr. 3d 453]* .

If a lessor has relinquished sole control and management of an elevator in a leased building to his or her lessee, the lessee, and not the lessor, must give warning and look out for the safety of the persons using the elevator and is liable for injuries occurring by reason of any negligent maintenance or operation of the elevator [*Pfingst v. Mayer (1949) 93*

Cal. App. 2d 265, 273, 208 P.2d 1002] . However, if the owner knowingly permits the lessee to violate the law in constructing or altering the premises, the owner may be liable for injuries resulting from violation in allowing the lessee to create a defective condition [*Longway v. McCall (1960) 181 Cal. App. 2d 723, 729-731, 5 Cal. Rptr. 818]* .

Even when the owner leases the premises, thereby relinquishing possession and control, he or she may be liable in certain cases if the use of the premises is to be public [*Goodman v. Harris (1953) 40 Cal. 2d 254, 261, 253 P.2d 447]* . However, the lessor's duty with respect to the safety of leased premises does not extend to matters having to do merely with the lessee's management or operation of the premises, which would be safe but for such management or operation, at least if the lessee is in sole actual control [*Goodman v. Harris (1953) 40 Cal. 2d 254, 265, 253 P.2d 447]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesElevators & EscalatorsTortsWrongful Death & Survival ActionsGeneral Overview

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§ 244.12 Liability for Defect in Manufacturing

The manufacturer of an elevator or escalator may be liable in negligence to an ultimate user for injuries caused by defective design or construction of the appliance if such defect can be disclosed by reasonable inspection or tests [*Bateman v. Doughnut Corp. of Am. (1944) 63 Cal. App. 2d 711, 718, 147 P.2d 404]* . However, when an elevator is properly installed it is not a dangerous article [*Dahms v. General Elevator Co. (1932) 214 Cal. 733, 741, 7 P.2d 1013]* unless it is improperly repaired [*Dahms v. General Elevator Co. (1932) 214 Cal. 733, 741-742, 7 P.2d 1013]* or improperly managed [*McCall v. Otis Elevator Co. (1963) 219 Cal. App. 2d 22, 31, 33 Cal. Rptr. 44]* . The manufacturer is liable to third persons when, at the time of the injury complained of, he or she retains some control over the appliance causing injury [*Dahms v. General Elevator Co. (1932) 214 Cal. 733, 738, 7 P.2d 1013]* .

The principles of strict liability which apply when the manufacturer of an article places the article on the market, knowing that it is to be used without inspection for defects, and the article proves to have a defect that causes injury to human beings [*see* *Greenman v. Yuba Power Prods., Inc. (1963) 59 Cal. 2d 57, 62-63, 27 Cal. Rptr. 697, 377 P.2d 897]* , has not been applied in California with respect to elevators or escalators. However, there is no reason why these principles should not apply in California. The doctrine of strict liability has been extended to a manufacturer-repairer of a product when the defect resulted from the repair of the product [*see* *Young v. Aro Corp. (1973) 36 Cal. App. 3d 240, 246, 111 Cal. Rptr. 535]* . An analogous situation might arise regarding elevators or escalators if the manufacturer of such an appliance also contracts, on sale of the appliance, to install and service it. For an extensive discussion of strict liability, see Ch. 460, *Products Liability* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyGeneral Premises LiabilityPremisesElevators & EscalatorsTortsProducts LiabilityDesign DefectsTortsProducts LiabilityStrict Liability

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§ 244.13 Liability of Serviceperson or Service Company

Those persons with whom the one in possession of the premises contracts for the servicing of elevators or escalators may also be liable to one who is injured as a result of a negligent act or omission in regard to inspection or servicing[*Dahms v. General Elevator Co. (1932) 214 Cal. 733, 738-739, 7 P.2d 1013]* . The basis of liability is that an independent contractor who engages to supply and keep in repair articles which are reasonably certain to place life and limb in peril if they are negligently prepared or constructed has a duty of care to those who are placed in such peril[*Dahms v. General Elevator Co. (1932) 214 Cal. 733, 738-739, 7 P.2d 1013* ; *Vandagriff v. J. C. Penney Co. (1964) 228 Cal. App. 2d 579, 583, 39 Cal. Rptr. 671*]. A similar duty arises on the part of an inspection company and a certified elevator inspector employed by the company if the company though its inspector fails to discover defects which the company was under an obligation to discover by reason of its contract with the owner or other possessor of the premises and under which it assumed owner's or possessor's duty to keep the elevator or escalator safe for use by persons on the premises [*see* *Barbaria v. Independent Elevator Co. (1956) 139 Cal. App. 2d 474, 483-484, 293 P.2d 855* (holding, however, that because plaintiff failed to allege any contract between the owner and inspection company, or otherwise to present any evidence showing that the company had agreed to assume owner's duty to keep the equipment safe, inspection company and inspector were not liable)]. Thus, in cases where the injury is caused by a defective elevator or escalator, the possessor or the owner of the building, or both, if premises which are to be used by the public are leased, as well as the service person or service company, should be joined as defendants[*Brown v. George Pepperdine Found. (1943) 23 Cal. 2d 256, 259-260, 143 P.2d 929* ; *Longway v. McCall (1960) 181 Cal. App. 2d 723, 729-730, 5 Cal. Rptr. 818]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 244.14 Liability of Lessor of Chattel

A bailor for hire of a chattel must use reasonable care to make such chattel safe for its intended use or disclose its actual condition to the bailee [*McNeal v. Greenberg (1953) 40 Cal. 2d 740, 742, 255 P.2d 810]* . Accordingly, one who leases a construction elevator may be liable for injuries caused by such elevator even if the lessee has total possession, operation, and control of the elevator if the injury occurs due to the negligence of the lessor in leasing an elevator without an inspection certificate and without providing proper safety devices, contrary to safety ordinances [*Rae v. California Equip. Co. (1939) 12 Cal. 2d 563, 569, 86 P.2d 352]* . For a further discussion of the leasing of construction equipment, including elevators, see Ch. 93, *Bailments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsGeneral OverviewTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsVicarious LiabilityBailees

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§ 244.15 Duty of Care

[1] In General

The general duty of care that one in possession or control of an elevator owes to a person on the premises is that contained in *Civ. Code § 1714(a)*. This section states that everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except insofar as the latter has, willfully or by want of ordinary care, brought the injury on himself or herself. This duty is owed to anyone on the premises regardless of whether the person would have been classified as a guest, invitee, or trespasser, as those classifications were used prior to 1968 [*see Rowland v. Christian (1968) 69 Cal. 2d 108, 112-120, 70 Cal. Rptr. 97, 443 P.2d 561* (abolishing these common law classifications)]. For a discussion of the principles of negligence generally and the application of those principles to business premises, see Ch. 380, *Negligence* , and Ch. 421, *Premises Liability* , respectively.

[2] Standard of Common Carrier as Applicable

Everyone who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he or she offers to carry [*Civ. Code § 2168*]. Both elevators and escalators are considered common carriers [*see Champagne v. A. Hamburger & Sons (1915) 169 Cal. 683, 690, 147 P. 954* (elevators); *Hendershott v. Macy's (1958) 158 Cal. App. 2d 324, 327, 322 P.2d 596* (escalators)].

A carrier of persons without reward must use ordinary care and diligence for their safe carriage [*Civ. Code § 2096*]. A carrier of persons for reward must use the utmost care and diligence for their safe carriage, and must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill [*Civ. Code § 2100*]. A carrier of persons for reward is bound to provide vehicles safe and fit for the purposes to which they are put, and is not excused for default in this respect by any degree of care [*Civ. Code § 2101*]. A carrier of persons for reward must not overcrowd or overload his or her vehicle [*Civ. Code § 2102*].

Generally, elevators and escalators are carriers of persons for reward. At least when operated in an office building, apartment house, or hotel for the use of tenants and their visitors, the rental paid by the tenants and their visitors is a compensation or reward for which the owner undertakes to carry them and their visitors by elevators [*Champagne v.*

A. Hamburger & Sons (1915) 169 Cal. 683, 693, 147 P. 954] . Similarly, the reward for use of an elevator operated in a department store is the benefit, advantage, and profit derived from purchasers or prospective purchasers using the elevator in dealing with the store [*Champagne v. A. Hamburger & Sons (1915) 169 Cal. 683, 693, 147 P. 954]* . For a further discussion of carrier law, see Ch. 106, *Buses and Streetcars* , and Ch. 109, *Carriers* .

Thus, an owner of a department store in which an escalator is operating has the duty of a common carrier not only to those patrons who are alert and nimble and adult, but to all of its patrons, with the possible exception of those whose age and infirmity would make any use of moving stairs hazardous. Under the standard of utmost care required of a carrier, the owner must exercise a reasonable degree of skill in making sure that the escalator is constructed, maintained, and operated with the purpose and design to prevent injury to those who are passengers. Inspections and measurements necessary to meet this standard of care should be known to the owner or possessor [*see Vandagriff v. J.C. Penney Co. (1964) 228 Cal. App. 2d 579, 582-583, 39 Cal. Rptr. 671]* . The common carrierstandard of care is imposed, however, only if the plaintiff was a passenger of the elevator or escalator. If the plaintiff was not using the escalator as a means of transportation when he or she was injured, the duty of care is that which exists in any case of one using business premises, which is to use ordinary care to keep the premises reasonably safe for those whom the owner or possessor should reasonably foresee as using the premises [*see Kataoka v. May Dep't Stores Co. (1943) 60 Cal. App. 2d 177, 182, 140 P.2d 467]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceStandards of CareSpecial CareCommon CarriersTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesElevators & Escalators

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§ 244.16 Injunction to Restrain Operation of Elevator

Whenever any elevator (or escalator, since for the purposes of elevator safety orders regulated by *8 Cal. Code Reg §§ 3000-3113*, the term "elevator" includes escalators [*see 8 Cal. Code Reg § 3000(c)(8)*]) is being operated without a permit as required by *Lab. Code § 7301*, and is in such condition that its use is dangerous to the life or safety of any person, the Division of Industrial Safety or any person affected thereby may apply for an injunction restraining the operation of the elevator until the condition is corrected.

The proceeding must be brought in the superior court of the county in which the elevator is located. A temporary restraining order may also be granted on proof by certification made by the division that a permit has not been issued, together with the affidavit (or declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) of any safety inspector of the division that the operation of the elevator is dangerous to the life or safety of any person. No bond is required from the division in the proceeding [*Lab. Code § 7303*; *see Code Civ. Proc. § 995.220*].

Lab. Code §§ 7300-7319 do not apply to elevators under the jurisdiction of the United States government, elevators located in a single-unit private home and not accessible to the public, or elevators located in a multiunit residential building serving not more than two dwelling units and not accessible to the public [*Lab. Code § 7317*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesGovernmentsState & Territorial GovernmentsPolice Power

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20-244 California Forms of Pleading and Practice--Annotated § 244.17

§ 244.17 Pleading and Proof; Res Ipsa Loquitur

A general allegation of negligence in the operation or maintenance of an elevator or escalator is sufficient [*Champagne v. A. Hamburger & Sons (1915) 169 Cal. 683, 685, 147 P. 954]* if facts are alleged which show the acts or omissions which are alleged to have been negligently performed [*Guilliams v. Hollywood Hosp. (1941) 18 Cal. 2d 97, 101, 114 P.2d 1]* .

The doctrine of res ipsa loquitur is frequently applied in elevator and escalator cases where there is no direct evidence to show the cause of the accident [*Worden v. Central Fireproof Bldg. Co. (1916) 172 Cal. 94, 96, 155 P. 839* (applying doctrine in action involving passenger elevator which fell four floors without warning, stating that plaintiff was required to show only that he was injured by the rapid descent and sudden stopping and that the elevator was under defendant's management and control); *Vandagriff v. J.C. Penney Co. (1964) 228 Cal. App. 2d 579, 583-584, 39 Cal. Rptr. 671* (applying doctrine in action, involving minor who was sitting down on moving escalator and whose little finger became caught between the steps, to both department store owner and escalator manufacturer which had on-going service contract with store)]. *Evid. Code § 646* defines res ipsa loquitur as a presumption affecting the burden of producing evidence [*Evid. Code § 646(b)*] and sets forth jury instructions relating thereto [*Evid. Code § 646(c)*]. For a discussion of the statute, see Ch. 380, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsGeneral OverviewTortsNegligenceProofRes Ipsa LoquiturGeneral OverviewTortsNegligenceProofRes Ipsa LoquiturEvidentiary EffectTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesElevators & Escalators

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§ 244.18 Negligence of Plaintiff

Negligence of the plaintiff occurs if the plaintiff willfully or by want of ordinary care causes injury to himself or herself [*see Civ. Code § 1714(a)*]. Such negligence operates to diminish a plaintiff's recovery by the amount the negligence is attributed to the injuries sustained [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226]* . What constitutes the negligence of a plaintiff in any particular situation depends on the relevant facts [*Gregg v. Manufacturers Bldg. Corp. (1933) 134 Cal. App. 147, 154, 25 P.2d 1014* ; *McKeon v. Lissner (1927) 87 Cal. App. 371, 373, 262 P. 459]* . However, the mere fact that the person using an elevator may be as familiar with its operation as is the person in control of the premises does not necessarily diminish plaintiff's recovery if the elevator is operating defectively [*see Miller v. Schell (1957) 149 Cal. App. 2d 346, 350, 308 P.2d 445]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesElevators & Escalators

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[Reserved]

§§ 244.19[Reserved]

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20-244 California Forms of Pleading and Practice--Annotated § 244.30

§ 244.30 Forms of Discovery

For forms of interrogatories for use in actions involving negligence on the part of owners of premises, see Bender's Forms Of Discovery, Vol. 7, *Negligence* ; Vol. 10, *Unsafe Working Conditions*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesFormTortsPremises Liability & PropertyGeneral Premises LiabilityGeneral Overview

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20-244 California Forms of Pleading and Practice--Annotated § 244.31

§ 244.31 State Statutes

[1] Agents

Torts of agents. *Civ. Code § 2338*

[2] Common Carriers

Common carriers. *Civ. Code §§ 2085-2178*

[3] Declaratory Relief

Cross complaint for declaratory relief. *Code Civ. Proc. §§ 86(a)(7), 1060-1062a*

[4] Elevators

Construction elevators. *Lab. Code §§ 7200-7205*

Operation, inspection, and maintenance of elevators. *Lab. Code § 7300 et seq.*

Aerial passenger tramways. *Lab. Code §§ 7340-7357*

[5] Limitations Period

Two-year limitations period for action for injury caused by another's wrongful act or neglect. *Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)* (one-year period prior to 2003)

Four-year limitations period for action on contract or obligation founded on written instrument. *Code Civ. Proc. § 337(1)*

Two-year limitations period for action on contract or obligation not founded on written instrument. *Code Civ. Proc. § 339(1)*

[6] Negligence

Negligence defined. *Civ. Code § 1714(a)*

Res ipsa loquitur. *Evid. Code § 646*

[7] Ordinances

Pleading ordinances. *Code Civ. Proc. § 459*

[8] Public Employees

Filing of claim is prerequisite to action against public employees. *Gov. Code § 950*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsNegligenceProofRes Ipsa LoquiturGeneral OverviewTortsNegligenceStandards of CareSpecial CareCommon Carriers

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20-244 California Forms of Pleading and Practice--Annotated § 244.32

§ 244.32 Administrative Regulations

Elevator safety orders. *8 Cal. Code Reg. § 3000 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsPolice Power

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20-244 California Forms of Pleading and Practice--Annotated § 244.33

§ 244.33 Decisions

[1] Care in Servicing Elevators

Care required in servicing, inspecting, and maintaining elevator and appurtenant appliances. *Brown v. George Pepperdine Found. (1943) 23 Cal. 2d 256, 261, 143 P.2d 929*

Elevator company was not entitled to indemnity from club following escalator accident resulting in a personal injury judgment against both parties to indemnity contract, if judgment against club was based on its nondelegable duty to see that escalator was maintained in good order, whereas judgment against company was based on its own negligence, thus bringing into operation exclusionary clause of indemnity agreement in service contract between the two parties, which freed elevator company from liability for damages except those directly due to its own negligence. *Hollywood Turf Club v. Montgomery Elevator Co. (1976) 58 Cal. App. 3d 580, 586-587, 130 Cal. Rptr. 81*

Right to file cross complaint for declaratory relief as to indemnity against installer of escalator. *J. C. Penney Co. v. Westinghouse Elec. Corp. (1963) 217 Cal. App. 2d 834, 836-838, 32 Cal. Rptr. 172*

[2] Doctrine of Res Ipsa Loquitur

Application of doctrine of res ipsa loquitur to accidents involving passenger elevators. *Worden v. Central Fireproof Bldg. Co. (1916) 172 Cal. 94, 96, 155 P. 839* ; *Rodin v. American Can Co. (1955) 133 Cal. App. 2d 524, 531, 284 P.2d 530*

Application of doctrine of res ipsa loquitur to accidents involving escalators. *Vandagriff v. J.C. Penney Co. (1964) 228 Cal. App. 2d 579, 583-584, 39 Cal. Rptr. 671* ; *Hendershott v. Macy's (1958) 158 Cal. App. 2d 324, 326-328, 322 P.2d 596*

[3] Elevator and Escalator Operators' Standard of Care

Requirement that elevator and escalator operators be held to standard of care required of common carriers. *Champagne v. A. Hamburger & Sons (1915) 169 Cal. 683, 690, 147 P. 954* ; *Wilmarth v. Pacific Mut. Life Ins. Co. (1914) 168 Cal. 536, 542, 143 P. 780* ; *Hendershott v. Macy's (1958) 158 Cal. App. 2d 324, 327, 322 P.2d 596*

[4] Elevators Defined

Freight elevator. *Wilmarth v. Pacific Mut. Life Ins. Co. (1914) 168 Cal. 536, 541, 143 P. 780*

Passenger elevator. *Wilmarth v. Pacific Mut. Life Ins. Co. (1914) 168 Cal. 536, 541, 143 P. 780*

[5] Inspection of Elevators

Application of statute to certified elevator inspectors, even though employed by insurance or elevator company. *Barbaria v. Independent Elevator Co. (1956) 139 Cal. App. 2d 474, 484, 293 P.2d 855*

Liability of elevator inspection company to one injured due to defective condition of elevator. *Barbaria v. Independent Elevator Co. (1956) 139 Cal. App. 2d 474, 483, 293 P.2d 855*

[6] Liability of Lessor

Liability of lessor of construction elevator. *Rae v. California Equip. Co. (1939) 12 Cal. 2d 563, 569, 86 P.2d 352*

[7] Liability of Owner

Duty to warn business invitee unacquainted with operation of freight elevator as to manner in which elevator operates. *United States v. Trubow (9th Cir. 1954) 214 F.2d 192, 194-195*

Employee of tenant of building as business invitee. *DeGraf v. Anglo Cal. Nat'l Bank (1939) 14 Cal. 2d 87, 92 P.2d 899*

Duty of owner of sidewalk elevator to exercise due care for safety of one coming to premises. *Barbieri v. Law (1930) 209 Cal. 429, 432-433, 287 P. 464*

Lab. Code § 7324.1 makes clear that *Lab. Code § 7300 et seq.* does not relieve or lessen the liability of one owning, maintaining, or repairing an elevator for personal injury caused by an elevator that is defective. By its own terms, *Lab. Code § 7324.1* assumes an elevator may be rendered defective due to maintenance or repair and preserves liability for that defect. *Koepnick v. Kashiwa Fudosan America, Inc. (2008) 173 Cal. App. 4th 32, 40, 92 Cal. Rptr. 3d 453*

Liability of owner under *Civ. Code § 2338* for negligence of agent in inspection of elevator. *Cragg v. Los Angeles Trust Co. (1908) 154 Cal. 663, 666-667, 98 P. 1063* ; *McKeon v. Lissner (1927) 87 Cal. App. 371, 373-374, 262 P. 459*

Liability for fall into open freight elevator well. *Sheyer v. Lowell (1901) 134 Cal. 357, 358-359, 66 P. 307*

Plaintiff's general allegations charging all defendants, including owner and lessee of building, and servicing agency, in general terms, and even charging that all three "owned" elevator, were not determinative of interests of defendants.

Ramirez v. Redevelopment Agency (1970) 4 Cal. App. 3d 397, 402, 84 Cal. Rptr. 356

Liability for injuries caused by falling elevator. *Longway v. McCall (1960) 181 Cal. App. 2d 723, 733-735, 5 Cal. Rptr. 818*

Landlord's duty to use utmost care in maintenance of elevator is not avoided merely because user is as familiar with condition of elevator as is landlord. *Miller v. Schell (1957) 149 Cal. App. 2d 346, 350, 308 P.2d 445*

Nonliability of landlord for injuries sustained by operation of elevator if landlord has surrendered possession and control of elevator to tenant. *Pfingst v. Mayer (1949) 93 Cal. App. 2d 265, 272, 208 P.2d 1002*

Duty to maintain sidewalk elevator with due regard to safety of public, irrespective of ordinance. *Clarke v. Foster's, Inc. (1942) 51 Cal. App. 2d 411, 125 P.2d 60*

Rule imposing duty on landlord to use care extends to prospective tenant in apartment house who enters elevator for purpose of inspecting apartment. *Harris v. Smith (1941) 44 Cal. App. 2d 694, 696-697, 112 P.2d 907*

Recovery for fall into open shaft of sidewalk elevator. *Osrowitz v. Market Inv. Co. (1940) 40 Cal. App. 2d 179, 182, 104 P.2d 681*

Service contract between owner and elevator company did not relieve owner from liability for negligence. *Parker v. Manchester Hotel Co. (1938) 29 Cal. App. 2d 446, 454, 85 P.2d 152*

Whether plaintiff who had knowledge that elevator did not always stop at floor level exercised ordinary care for own safety was question for jury. *Parker v. Manchester Hotel Co. (1938) 29 Cal. App. 2d 446, 455, 85 P.2d 152*

Liability for negligence in maintenance of elevator that permits doors to be opened while elevator is on another floor. *Gregg v. Manufacturers Bldg. Corp. (1933) 134 Cal. App. 147, 153, 25 P.2d 1014*

Landlord who is actually in possession and control of apartment house is liable for negligence in operation of elevator even though landlord may not be legally entitled to possession and control of premises. *Benussi v. Hannah (1921) 53 Cal. App. 243, 247-248, 199 P. 1063*

Owner of property who maintains sidewalk elevator is liable for injuries to pedestrians caused by owner's negligence in operation of elevator. *Du Val v. Boos Bros. Cafeteria Co. (1919) 45 Cal. App. 377, 382, 187 P. 767*

Duty of pedestrian to exercise ordinary care for own safety. *Du Val v. Boos Bros. Cafeteria Co. (1919) 45 Cal. App. 377, 380, 187 P. 767*

Liability for negligence of servant in operation of elevator. *Lucas v. Walker (1913) 22 Cal. App. 296, 300-302, 134 P. 374*

Duty to use more than ordinary care towards pedestrians in operation of sidewalk elevator. *Bowley v. Mangrum & Otter (1906) 3 Cal. App. 229, 232, 84 P. 996*

[8] Obligations Under Statutes and Ordinances

Initial responsibility is that of owner if statute or ordinance prescribing safety feature of building fails to designate persons charged with duty of compliance. *Finnegan v. Royal Realty Co. (1950) 35 Cal. 2d 409, 432, 218 P.2d 17*

Failure to plead ordinance requiring examination and licensing of elevator operators does not preclude introduction of ordinance in evidence if complaint pleads negligence independently of violation of ordinance. *Cragg v. Los Angeles Trust Co. (1908) 154 Cal. 663, 669, 98 P. 1063*

Entitlement of public to benefit of safety requirements. *Longway v. McCall (1960) 181 Cal. App. 2d 723, 727, 5 Cal. Rptr. 818*

One for whose protection safety regulations have been enacted does not assume risks of dangerous condition resulting from another's violation thereof. *Guerrero v. Westgate Lumber Co. (1958) 164 Cal. App. 2d 612, 617-618, 331 P.2d 107*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsPolice PowerTortsNegligenceActionsGeneral OverviewTortsNegligenceProofRes Ipsa LoquiturGeneral OverviewTortsNegligenceStandards of CareSpecial CareCommon CarriersTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesElevators & Escalators

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§ 244.34 Text References

Personal Injury: Actions, Defenses, Damages, Vol. 13, *Elevators and Escalators*, and Vol. 17, *Indemnity* (Matthew Bender)

Witkin, California Procedure, vol. 1, *Attorneys*, §§ 349-351 (4th ed. 2005)

Witkin, Summary of California Law, vol. 2, *Insurance, § 104*; vol. 5, *Torts*, §§ 50, 70-86, 88-103, 105-109; 112-121, 125, 474, 488-491, 493-496, 498-504; vol. 13, *Equity*, §§ 178-182, 185 (10th ed. 2005)

29 Cal. Jur. 3d, *Elevators and Escalators*, §§ 1-22

14 Cal. Jur. 3d, *Contribution and Indemnification*

13 C.J.S., *Carriers*, § 533

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsGeneral OverviewTortsNegligenceStandards of CareSpecial CareCommon CarriersTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesElevators & EscalatorsTortsProcedureMultiple DefendantsContributionGeneral OverviewTortsProcedureMultiple DefendantsIndemnityGeneral Overview

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[Reserved]

§§ 244.35[Reserved]

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PART IV. FORMS

20-244 California Forms of Pleading and Practice--Annotated § 244.50

§ 244.50 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100] in Operation, Servicing, or Maintenance of Elevator or Escalator--By Passenger Against Building Owner, Building Lessee, Service Company, and Inspection Company--General Form

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 2100] in Operation, Servicing, or Maintenance of Elevator or Escalator--By Passenger Against Building Owner, Building Lessee, Service Company, and Inspection Company--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR
vs.	)	DAMAGES
_____ [*name*],	)	(Negligence)
Defendants.	)	[Amount demanded _____ (exceeds *or* does not
	)	exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

FIRST COUNT (Liability of Owner and Lessee)

Plaintiff alleges:

1. Defendant _____ [*owner of building*] is, and at all times herein mentioned was, a resident of _____ County, California [*or specify other capacity and basis for venue*].

2. At all times herein mentioned, defendant _____ [*name*] owned, [possessed, maintained, and

controlled] those certain premises, located at _____ [*street address and city*], _____ County, California, commonly known and described as _____, California, [and on which defendant _____ (*name*) carried on the business of _____ (*describe*) (*or specify other business purpose for which premises were used*)].

[*EITHER, if owner does not possess or control premises, allege* :]

3. At all times herein mentioned, defendant knew or was aware of sufficient facts to put defendant on inquiry that the above-described premises were for use by the public.

[*OR, if owner leased premises to tenant who made structural changes which caused plaintiff's injuries, allege* :]

3. Defendant _____ [*name of owner*] knew or was aware of facts sufficient to put defendant on inquiry of the violations of law constitutingthe negligent acts herein alleged in Paragraph 10 which were the proximate cause of plaintiff's injuries.

[4. Defendant _____ [*lessee or other person in possession or control of building*] is, and at all times herein mentioned was, a resident of _____ County, California.]

[5. At all times herein mentioned, defendant _____ [*name of lessee or other person in possession or control*] _____ (leased, possessed, maintained and controlled *or specify other capacity in which defendant possessed or controlled premises*) the above-described premises (on which defendant (*name*) carried on the business of _____ (*specify*) (*or specify other business purpose for which premises were used*).]

6. At all times herein mentioned, there was a certain _____ [elevator *or* escalator] on the premises. The _____ [elevator *or* escalator] was provided by defendant _____ [*state purpose, e.g.*, for his/her own use and for the use of his/her customers and business invitees *or* for the purpose of transporting and carrying all types of freight and merchandise from one floor to another in the building *or* for the convenience and use of its patrons in traveling from one floor of the store to another].

7. At all times herein mentioned, defendant _____ [*name of operator*] was the agent and employee of defendant _____ [*name of owner or possessor of premises*], and in such capacity was responsible for the operation of the above-described _____ (elevator *or* escalator). In doing the things hereinafter alleged, he/she was acting within the course and scope of such agency and employment.]

[8. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes that [each] fictitiously named defendant is negligently responsible in some manner for the occurrence herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by said negligence.]

9. On or about _____ [*date*], plaintiff was on the above-described premises as a _____ [*specify, e.g.*, business visitor] [and for the mutual benefit of himself/herself and defendant (*name of owner or lessee*)] for the purpose of _____ [*show plaintiff's purpose to be related to defendant's business or occupation on, or use of, the property*].

10. At this time and place, while plaintiff was a passenger on the _____ [elevator *or* escalator],

defendant(s) _____ [*name(s) of owner or lessee and, if appropriate, operator*] [, and each of them,] so negligently and carelessly operated, supervised, cared for, inspected, and maintained the _____ [elevator *or* escalator] that _____ [*describe accident*].

11. As a proximate result of the negligence of defendant [s, and each of them], plaintiff was _____ [*specify applicable general damages, e.g.*, hurt and injured in his/her health, strength, and activity, sustaining injury in his/her body and shock and injury to his/her nervous system and person, all of which injuries have caused and continue to cause plaintiff great mental, physical, and nervous pain and suffering. The full nature and extent of these injuries are not now known to plaintiff, and leave is requested to amend this complaint to conform to proof at the time of trial. Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to himself/herself. As a result of such injuries, plaintiff has suffered general damages according to proof].

12. As a further proximate result of the negligence of defendant [s, and each of them], plaintiff has incurred and will incur obligations and expenses for _____ [*specify special damages, e.g.*, medical and hospital and related expenses].

13. As a further proximate result of the negligence of defendant [s, and each of them], plaintiff has incurred a loss of income and wages. Such loss of income and wages in continuing and plaintiff is informed, believes, and then thereon alleges that such loss will continue for an indefinite time in the future.

SECOND COUNT

(Liability of Defendant Inspection, Service, or Maintenance Company)

1. Plaintiff incorporates herein by reference all of the allegations contained in Paragraphs 1-10, in his/her First Count as though fully set forth at length.

2. Defendant _____ [*name of company*] is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of _____ [California *or other*] [and qualified to do business in California] with its principal place of business in this state situated in the [City and] County of _____.

3. At the time of the accident referred to herein and for many years prior thereto, defendant _____ Company was engaged in the business of _____ [inspecting *or* repairing *or* servicing] the _____ [elevator *or* escalator] and was employed and engaged by _____ [*name(s) of owner, lessee, and/or other possessor*], defendant(s) herein, to _____ [inspect *or* service *or* repair] the _____ [elevator *or* escalator] _____ [in *or* on] which plaintiff was a passenger as alleged in Paragraph 10 of the First Count. [The defendant _____ Company likewise undertook, with defendant(s) _____ (*name(s) of owner, lessee, and/or possessor*] to maintain the _____ (elevator *or* escalator) in good repair and to make necessary repairs to it as required and to keep and maintain the same in a safe condition for and on behalf of defendant(s) and for the use and benefit and protection of persons, including plaintiff, lawfully entitled to use the same.]

4. At all times herein mentioned, the defendant _____ [*name*] was a certified elevator inspector and was employed in such capacity bydefendant _____ Company and at all times herein mentioned acted in the course and scope of the employment [*or specify other employee or agent who was responsible for inspection of elevator or escalator or for servicing, maintaining, or repairing elevator or escalator under defendant company's contract with owner or possessor*].

5. _____ [*Specify negligent acts in inspection, service, maintenance, or repair of elevator or escalator, e.g.*, Plaintiff is informed and on such information and belief alleges that on or about _____ [*date*], defendant _____ [*name*], in the course and scope of his/her employment, inspected the _____ [*specify, e.g.*, elevator, and doors, locks, shafts, and other appurtenances thereto]. For some time prior thereto, defendant _____ Company had inspected the _____ [elevator *or* escalator] and its appurtenances through other agents, servants, and employees. Defendants _____ Company and _____ [*name of elevator or escalator inspector*] negligently failed to ascertain the defects in the _____ [elevator *or* escalator] alleged in Paragraph 10 of the First Count at the time of the inspection prior thereto, and at all times negligently failed to report the defects in the _____ [elevator *or* escalator] to defendant _____ [*name of owner or other possessor*].

6. Defendants _____ Company and _____ [*name of elevator or escalator inspector*] knew, or in the exercise of reasonable care should have known, that by reason of their negligence in failing to _____ [*specify negligent acts, e.g.*, ascertain and report these defects to the defendant _____ (*name of person contracting with company*)], persons lawfully on the premises of the defendant, including the plaintiff, would be placed in great peril.

7. As a proximate result of the negligence of defendants _____ Company and _____ [*name of elevator or escalator inspector or other employee or agent*], the plaintiff sustained the injuries alleged in Paragraphs 11-13 of the First Count.

[8. On or about _____ [*date*], plaintiff presented to the State of California his/her claim. A copy of this claim is attached hereto as Exhibit A and made a part hereof. On or about _____ [*date*], this claim was _____ (rejected in its entirety *or* allowed in the amount of $_____ and rejected as to the remainder).]

THIRD COUNT

(Liability of Manufacturer)

1. Plaintiff incorporates herein by reference all of the allegations contained in Paragraphs 1-13, inclusive, of his/her First Count as though fully set forth at length.

2. Defendant _____ [*name of corporation*] is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of _____ [California *or other*] [and qualified to do business in California] with its principal place of business in this state situated in the [City and] County of _____.

3. Defendant is, and at all times here mentioned was, engaged in the business of _____ [*specify business, e.g.*, manufacturing and installing elevators] for sale to and use by the general public, and as part of its business defendant _____ [*name*] [designed and] manufactured the _____ [elevator *or* escalator] _____ [on *or* in] which plaintiff was a passenger as alleged in Paragraph 9 of the First Count.

4. At all times herein mentioned, defendant knew [and intended] that this particular _____ [elevator *or* escalator] would be used by members of the public without inspection for defects.

5. The _____ [elevator *or* escalator] was, at the time plaintiff was using it, defective and unsafe for its in tended purpose in that _____ [*specify defect in manufacture or design*].

6. As a proximate result of the defect, plaintiff sustained the injuries described in Paragraphs 11-13 of the First Count in the manner described in Paragraph 10 of that count.

WHEREFORE, plaintiff prays judgment against defendant [s, and each of them,] as follows:

1. For general damages in a sum according to proof;

[2. For special damages for medical and related expenses according to proof;]

[3. For loss of income and wages according to proof;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This is a general skeletal form of complaint for damages for personal injuries resulting from negligence in the operation, servicing, or maintenance of an elevator or escalator. It contains three counts based on three separate theories of liability: (1) a breach of the nondelegable, common carrier duty of care owed a passenger in an elevator or escalator by one who possessed or controlled the elevator or escalator and the premises in which it was located [*see § 244.11*]; (2) a breach of the duty of care owed by an independent contractor who has contracted to inspect, service, or repair an elevator or escalator, thereby assuming the owner's or possessor's duty of care to a passenger, as well as its own independent duty of care based on the foreseeability of any risk of harm to third persons if it negligently inspects, services, or repairs an elevator or escalator; and (3) a breach of the duty of care owed by a manufacturer of a defective

elevator or escalator to a passenger. For alternative forms of complaints, see *§§ 244.51* through *244.58*.

[3] Allegations

This complaint alleges the capacity and residence of the owners, lessees, or any other persons in possession or control of the premises in which the elevator or escalator is located (Paragraphs 1-5, First Count). Such persons have a nondelegable duty to assure the safety of the appliance with regard to its operation, care, and maintenance [*Brown v. George Pepperdine Found. (1943) 23 Cal. 2d 256, 260, 143 P.2d 929]* .

If the owner was not in actual possession or control, then the owner should still be named as a defendant if: (1) the provisions of a statute or ordinance impose liability on property owners for dangerous conditions [*see Longway v. McCall (1960) 181 Cal. App. 2d 723, 729-731, 5 Cal. Rptr. 818]* , (2) the use of the elevator or escalator was open to the public [*Goodman v. Harris (1953) 40 Cal. 2d 254, 261, 253 P.2d 447]* , or (3) the owner knew or was aware of sufficient facts to put the owner inquiry of the actual possessor's negligence (Paragraph 3, First Count).

The First Count of the complaint then alleges the existence of the elevator or escalator (Paragraph 6) and, if appropriate, the defendant who was responsible for its operation (Paragraph 7). A fictitious name allegation should be included (Paragraph 8), if plaintiff is ignorant of the true names of other possible defendants, such as service or inspection company employees [*see Code Civ. Proc. § 474*].

The First Count sets forth plaintiff's status (Paragraph 9) and, if appropriate, the fact that he or she was a passenger on the elevator or escalator (Paragraph 10). It is essential that plaintiff allege sufficient facts to show that defendant(s) owed him or her a duty of care, but it is no longer essential that plaintiff's status be alleged as a business visitor, licensee, or trespasser [*see Rowland v. Christian (1968) 69 Cal. 2d 108, 119-120,443 P.2d 561]* . Nevertheless, an allegation and proof that plaintiff was a business visitor and a passenger on the elevator or escalator imposes on defendant owner or possessor the duty of care of a common carrier [*see Champagne v. A. Hamburger & Sons (1915) 169 Cal. 683, 690, 147 P. 954* (elevators); *Hendershott v. Macy's (1958) 158 Cal. App. 2d 324, 327, 322 P.2d 596* (escalators)].

Finally, the First Count alleges the negligent breach of the defendant's duty to safely operate, service, and maintain the elevator or escalator (Paragraph 10), including the manner in which the plaintiff's injury occurred and the fact that defendant's negligence proximately caused injury to the plaintiff (Paragraph 10), and plaintiff's damages (Paragraphs 11-13) [*see Champagne v. A. Hamburger & Sons (1915) 169 Cal. 683, 685, 147 P. 954* ; *see Guilliams v. Hollywood Hosp. (1941) 18 Cal. 2d 97, 101, 114 P.2d 1]* .

The Second Count of the complaint alleges in pertinent part the capacity and residence of defendant's inspection, service, or maintenance corporation (Paragraphs 2, 3) and its employee defendant elevator or other employee or agent (Paragraph 4); defendants' negligence in inspecting, servicing, or repairing the elevator or escalator (Paragraph 5); the duty of care owed to plaintiff (Paragraph 6); and the fact that the defendants' negligence was a proximate cause of plaintiff's injuries (Paragraph 7) [*see Dahms v. General Elevator Co. (1932) 214 Cal. 733, 738-739, 7 P.2d 1013* ; *Vandagriff v. J.C. Penney Co. (1964) 228 Cal. App. 2d 579, 583, 39 Cal. Rptr. 671* ; *Barbaria v. Independent Elevator Co. (1956) 139 Cal. App. 2d 474, 483-484, 293 P.2d 855]* . An allegation of the filing and rejection of a claim against the state based on the negligence of the certified elevator inspector (Paragraph 8) should be included only if a claim is required to be filed under the provisions of *Gov. Code § 950.4*.

The Third Count of the complaint alleges the capacity and residence of defendant manufacturer (Paragraph 2); its business of manufacturing elevators or escalators (Paragraph 3); the fact that it defectively manufactured the elevator or escalator in or on which plaintiff was foreseeably a passenger (Paragraphs 3-5); and the fact that the defect was a proximate cause of plaintiff's injuries (Paragraph 6) [*see Greenman v. Yuba Power Prods., Inc. (1963) 59 Cal. 2d 57, 62-63, 27 Cal. Rptr. 697, 377 P.2d 897]* . For a complete discussion of products liability in general and alternative

forms for use in alleging the strict liability of a manufacturer, see Ch. 460, *Products Liability* .

[4] Specifying Amounts of Damages

For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by the Civil Code, is the amount that will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not [*Civ. Code § 3333*].In an action for damages for personal injury or wrongful death, the amount of actual or punitive damages must not be stated [*Code Civ. Proc. § 425.10(b)*; *see Code Civ. Proc. § 425.11* (obtaining statement of damages in wrongful death case)].

[5] Limitation of Action

Because an action for injuries caused by a defective elevator or escalator is an action for the neglect of another, it must be brought within two years (one year, prior to January 1, 2003) after the date of the injury [*Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)*; Ch. 345, *Limitation of Actions,* § 345.14].

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[7] Costs and Attorney's Fees

The award of costs is governed by *Code Civ. Proc. § 1021 et seq.* For when costs must or may be award to the prevailing party, see *Code Civ. Proc. § 1032(b)*. Costs may be awarded against the state or public entity or agency or any officer thereof in his or her official capacity on the same basis as against any other party [*Code Civ. Proc. §§ 1028, 1029*; see generally Ch. 174, *Costs and Attorney's Fees*].

[8] Cross References

For alternative allegations as to capacity and residence of parties, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For forms for use in ascertaining damages sought in personal injury or wrongful death actions, see Ch. 177, *Damages*

For discussion and alternative forms for use in negligence actions, see Ch. 380, *Negligence*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively

For memoranda of points and authorities in support of and in opposition to a demurrer to a complaint based on negligence, see *California Points and Authorities, Ch. 165, Negligence, §§ 165.10, 165.20* (Matthew Bender)

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20-244 California Forms of Pleading and Practice--Annotated § 244.51

§ 244.51 Allegations for Use in Complaint for Damages for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Guest of Tenant Caught Between Elevator Doors

[1] FORM Allegations for Use in Complaint for Damages for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Guest of Tenant Caught Between Elevator Doors

1. At all times herein mentioned, defendant _____ [*name of owner*] was, and now is, the owner and in full control of the premises located at _____, California. The owner has at all times herein mentioned, and is now, operating the premises as an apartment house, and rents apartments therein to tenants for consideration.

2. At all times herein mentioned, defendant _____ [*name of owner*] maintained and controlled an automatic, self-operating elevator in the premises for the use of the tenants and guests of the tenants in the apartment building.

3. On or about _____ [*date*], plaintiff was in the above-described premises as _____ [a guest *or other*] of _____ [*name of tenant*], a tenant in the apartment house, and in such capacity was a passenger in the elevator.

4. Defendant[s, and each of them], at this time and place, so negligently and carelessly operated, supervised, cared for, inspected, and maintained the premises and elevator and elevator equipment therein within their control, as to cause plaintiff to be caught between the inner and outer doors of the elevator.

[2] Use of Form

These allegations may be substituted for Paragraphs 3-10 of the First Count of § 244.50, with the remaining allegations renumbered appropriately, to state a cause of action by the guest of a tenant for injuries sustained while riding in an elevator in an apartment house. The guest of a tenant is entitled to the standard care required of common carriers of persons for hire [*Civ. Code § 2100*], the rental paid by the tenants being the compensation or reward for which the owner undertakes to carry them and their visitors by elevators [*Champagne v. A. Hamburger & Sons (1915) 169 Cal. 683, 692, 147 P. 954]* .

[3] Cross References

See also Comments and References to § 244.50

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20-244 California Forms of Pleading and Practice--Annotated § 244.52

§ 244.52 Allegations for Use in Complaint for Damages for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Tenant Against Apartment House Owner for Injuries Sustained in Fall Into Elevator Shaft When Door Opened While Elevator on Another Floor

[1] FORM Allegations for Use in Complaint for Damages for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Tenant Against Apartment House Owner for Injuries Sustained in Fall Into Elevator Shaft When Door Opened While Elevator on Another Floor

1. [*Allegations of possession, control, and operation of premises by defendant owner. See § 244.51, Paragraphs 1, 2.*]

2. [*Allegation of type and purpose of elevator. See § 244.51, Paragraph 2.*]

3. On _____ [*date*], and prior thereto, plaintiff resided in the above-described premises as a tenant. On this date, while lawfully on the premises as a tenant, plaintiff approached the elevator door located on the _____ floor of the premises, opened the door without difficulty, and stepped into what he/she believed to be the elevator. The elevator was in fact located on another floor and plaintiff stepped into the elevator shaft and fell to the basement of said building, sustaining the injuries hereinafter described.

4. These injuries were the proximate result of the negligence and carelessness of the defendants in the operation, supervision, care, inspection, and maintenance of the premises and the elevator and elevator appurtenances, including the doors.

[2] Use of Form

These allegations may be substituted for Paragraphs 3-10 of the First Count of § 244.50, with the remaining allegations renumbered appropriately, to state a cause of action by a tenant against an apartment house owner for damages for injuries sustained while trying to use an elevator in the apartment house.

[3] Cross References

See also Comments and References to *§§ 244.50* and *244.51*

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20-244 California Forms of Pleading and Practice--Annotated § 244.53

§ 244.53 Allegations for Use in Complaint for Damages for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Business Invitee Against Office Building Owner for Injuries Sustained When Elevator Failed to Stop at Floor Level

[1] FORM Allegations for Use in Complaint for Damages for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Business Invitee Against Office Building Owner for Injuries Sustained When Elevator Failed to Stop at Floor Level

1. At all times herein mentioned, defendant _____ [*name*] owned, possessed, maintained, controlled, and operated a certain office building located at _____, California [, generally known as the _____ Building]. This building contains a self-service elevator for the use of tenants thereof, and their guests and invitees.

2. Defendant _____ [*name of owner*] negligently, carelessly, and improperly failed to maintain the elevator in safe working order. On the contrary, he/she permitted and caused it to become out of repair and dangerous to anyone using it in that the elevator did not stop with its floor level, or nearly level, with the adjacent floor on which a person would alight.

3. On or about _____ [*date*], plaintiff was a business invitee, lawfully on the premises as _____ [*specify, e.g.*, an employee of a tenant of the building, to wit, _____ (*state nature of employment*)], at which time he/she was riding as a passenger in the elevator from the _____ floor to the _____ floor of the building.

4. At this time and place, and as a proximate result of the condition, plaintiff attempted to alight from the elevator and was caused to, and did, [trip and] fall violently on the _____ floor, because the elevator floor had come to rest at a point approximately _____ feet _____ [above *or* below] the level of the floor to which plaintiff was attempting to alight.

[2] Use of Form

These allegations may be substituted for Paragraphs 3-10 of the First Count of § 244.50, with the remaining allegations

renumbered accordingly, to state a cause of action by a business invitee against a building owner for damages for injuries sustained while riding in an elevator in a public building.

[3] Cross Reference

See also Comments and References to *§ 244.50*

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20-244 California Forms of Pleading and Practice--Annotated § 244.54

§ 244.54 Allegation for Use in Complaint for Damages for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Business Invitee Against Office Building Owner for Injuries Sustained in Elevator Fall Between Floors

[1] FORM Allegation for Use in Complaint for Damages for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Business Invitee Against Office Building Owner for Injuries Sustained in Elevator Fall Between Floors

On the aforementioned date, and while plaintiff was lawfully on the premises as a business invitee and riding the above-described elevator, this defendant _____ [*name of building owner*] so carelessly and negligently maintained and operated the elevator as to cause the same to, and it did, fall freely from the _____ floor to the _____ floor of the building, where it stopped abruptly, throwing plaintiff to the floor of the elevator and causing the injuries hereinafter alleged.

[2] Use of Form

This allegation may be substituted for Paragraph 10 of the First Count in *see § 244.50* to state a cause of action by a business invitee against a building owner for damages based on injuries sustained while riding in a passenger elevator which had abruptly fallen between floors.

[3] Cross References

See also Comments and References to *§ 244.50*

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20-244 California Forms of Pleading and Practice--Annotated § 244.55

§ 244.55 Allegations for Use in Complaint for Damages for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Injured Business Invitee Against Building Owner for Injuries Caused Due to Lack of Proper Instructions for Operation of Freight Elevator

[1] FORM Allegations for Use in Complaint for Damages for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Injured Business Invitee Against Building Owner for Injuries Caused Due to Lack of Proper Instructions for Operation of Freight Elevator

1. On _____ [*date*], plaintiff was lawfully on the premises as a business invitee of defendant for the purpose of _____ [*specify business purpose*], and in such capacity was authorized by defendant to use the above-described freight elevator to move certain _____ [*describe freight*] from the _____ floor to the _____ floor of the building.

2. Defendant knew or should have known that, unless the freight elevator had instructions for its use plainly posted therein, and all operating _____ [*specify implements for operating elevator, e.g.*, handles, levers, and cords] therein plainly marked, persons such as plaintiff might be subject to severe personal injury or death.

3. Defendant negligently and carelessly failed to post plainly in the freight elevator instructions for its use and further negligently and carelessly failed to mark plainly _____ [*specify implements for operating elevator, e.g.*, the operating handles, levers, and cords therein].

4. On _____ [*date*], in attempting to move the elevator from the _____ floor to the _____ floor of the building, plaintiff _____ [*specify attempts to use elevator*]; as a result thereof _____ [*describe accident resulting from plaintiff's act*], causing plaintiff to be injured in the manner hereinafter described.

[2] Use of Form

These allegations may be substituted for Paragraphs 7-10 of the First Count of § 244.50 to state a cause of action by a business invitee against a building owner for damages for injuries sustained due to lack of proper instructions for the operation of a freight elevator.

[3] Cross References

See also Comments and References to *§ 244.50*

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20-244 California Forms of Pleading and Practice--Annotated § 244.56

§ 244.56 Allegations for Use in Complaint for Damages for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Injured Patron Against Department Store and Escalator Company for Injuries Caused by Sudden Jerking of Escalator

[1] FORM Allegations for Use in Complaint for Damages for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Injured Patron Against Department Store and Escalator Company for Injuries Caused by Sudden Jerking of Escalator

1. On or about _____ [*date*], plaintiff was in the above-described department store for the purpose of purchasing articles offered for sale by defendant _____ [*name of department store owner*]; at this time and place defendant _____ [*name of owner or other possessor*] so negligently and carelessly [owned,] operated, maintained, and controlled the escalator that it gave a sudden jerk, causing plaintiff, who was using the escalator at the time, to fall and sustain the injuries hereinafter alleged.

[2. (Plaintiff is informed and believes, and on such information and belief, alleges that) [P]rior to the happening of the injuries herein complained of, defendant _____ (*name of owner or other passenger*) had actual or constructive knowledge that the escalator was maintained and controlled in a hazardous and unsafe manner.]

[2] Use of Form

These allegations may be substituted for Paragraphs 9 and 10 of the First Count of § 244.50 to state a cause of action by a business invitee against a department store for damages for injuries sustained while riding on a department store escalator.

[3] Cross References

See also Comments and References to *§ 244.50*

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20-244 California Forms of Pleading and Practice--Annotated § 244.57

§ 244.57 Allegations for Use in Complaint for Damages for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Injured Patron Against Department Store for Injuries Caused by Protruding Metal Strip on Escalator Side

[1] FORM Allegations for Use in Complaint for Damages for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Injured Patron Against Department Store for Injuries Caused by Protruding Metal Strip on Escalator Side

1. At all times herein mentioned, defendant in his/her/its department store operated, maintained and controlled power-driven escalators designed and operated for carrying passengers from floor to floor for the convenience of patrons of the store; the construction of these escalators was such that metal strips were placed to cover connections between panels which were installed in either side of the stairs of the escalators; these metal strips were installed at a perpendicular angle to the stairs and are described as extending from the stair of the escalator to the area of the handrail, being approximately _____ inches wide and _____ inches thick; these metal strips are uniformly spaced on either side of the stairs of the escalators on or about every _____ [*specify, e.g.*, third] stair.

2. Plaintiff is informed and believes, and based on such information and belief, alleges that on _____ [*date of injury*], and for a long time prior thereto, the metal strip, of the nature and type herein described, located on the _____ [descending *or* ascending] escalator from the _____ floor to the _____ floor of the department store, and on the _____ [*specify*] side and adjacent to the _____ stair of the escalator, protruded out and was not installed flush to the above-described panels and the defendant knew, or should have known, of the dangerous and defective position of the metal strip on the escalator.

3. On _____ [*date of injury*], at a time during the business hours of the department store and when plaintiff was therein for the purpose of purchasing goods from defendant, plaintiff was thrust and fell to the stairs of the escalator which _____ [descends *or* ascends] from the _____ floor to the _____ floor thereof when bundles and parcels which plaintiff was carrying hooked and caught on the protruding metal strip.

4. As a proximate result of the careless and negligent failure of defendant to properly remedy, maintain, and control the dangerously protruding metal strip, though defendant knew or should have known of the dangerous defect, plaintiff suffered grave and serious injury to his/her person.

[2] Use of Form

These allegations may be substituted for Paragraphs 6-10 of the First Count of § 244.50, with the remaining allegations renumbered accordingly, to state a cause of cause of action by a department store patron against a department store owner for damages for injuries sustained due to defendant's failure to remedy a dangerous defect on an escalator.

[3] Cross References

See also Comments and References to *§ 244.50*

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20-244 California Forms of Pleading and Practice--Annotated § 244.58

§ 244.58 Allegation for Use in Complaint for Damages for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Injured Patron Against Department Store for Injuries Caused by Fall on Escalator Due to Slippery Substance

[1] FORM Allegation for Use in Complaint for Damages for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Injured Patron Against Department Store for Injuries Caused by Fall on Escalator Due to Slippery Substance

At the above-described time and place, defendant negligently [owned,] possessed, maintained, operated, supervised, managed, and controlled the store premises and the escalator in that a quantity of wet, slippery substance, the exact nature of which is unknown to plaintiff, was permitted to be placed on the escalator where patrons normally walk, and to remain there, although defendant knew, or in the exercise of reasonable care should have known, that the substance was present on the escalator. As a proximate result of defendant's negligence, plaintiff _____ [*describe accident*].

[2] Use of Form

This allegation may be substituted for Paragraph 10 of the First Count in *see § 244.50* to state a cause of action by a department store patron against a department store owner for damages because of injuries sustained by a fall on an escalator due to a slippery substance on the escalator.

[3] Cross References

See also Comments and References to *§ 244.50*

For alternative allegations of slipping and falling on business premises, see Ch. 525, *Slip and Fall*

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§ 244.59 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Injured Party Against Owner of Building and Elevator Operator [Civ. Code § 2338] for Injuries Sustained From Negligent Operation of Sidewalk Elevator

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Injured Party Against Owner of Building and Elevator Operator [Civ. Code § 2338] for Injuries Sustained From Negligent Operation of Sidewalk Elevator

[*Caption, introduction. See § 244.50.*]

1. [*Capacity and residence of defendants. See § 244.50, Paragraph 1 of First Count*].

2. [*Allegation(s) showing defendants' ownership and possession or control of business premises. See § 244.50, Paragraphs 2-5 of First Count*].

3. At all times herein mentioned, defendant _____ [*name of operator*], individually, and as an employee and agent of defendant _____ [*name*], was engaged in operating a certain elevator in the above-described building, located underneath the public sidewalk in front of the building, and opening onto the sidewalk.

[4. At all times herein mentioned, defendants DOES 1- _____, inclusive, were the servants, agents and employees of defendant _____ (*name*), and did the things hereinafter described within the course and scope of their employment.]

5. At all times herein mentioned, there was appended to the opening of the elevator shaft on the sidewalk, swinging doors leading to the platform of the elevator.

6. On _____ [*date*], while plaintiff was walking on the sidewalk immediately in front of the above-described building, _____ [*describe negligent acts, e.g., either* he/she stepped on the closed

sidewalk doors of the elevator when the elevator, which was then and there being operated by defendant(s) _____ [*name(s) of operator(s) or* and each of them) in a careless and negligent manner, suddenly forced the sidewalk doors up, throwing plaintiff into the air and onto the paved portion of the sidewalk *or* defendant(s) _____ (*name(s) of operator(s) or* and each of them) caused and permitted the elevator car to be operated from the sidewalk to the basement and left the doors, leading to the elevator shaft on the sidewalk, open (, and unprotected by any stationary guard or watchperson and without leaving any warning signal or other device to notify people lawfully on the sidewalk that there was an opening)].

7. As a proximate result of the negligence of defendant(s) _____ [*name(s) of operator(s)* or and each of them] [plaintiff fell into the elevator shaft whereby] _____ [plaintiff *or* he/she] sustained injuries hereinafter described.

8. [*Allegation of general damages proximately caused by negligence of defendants and each of them. See § 244.50, Paragraph 11 of First Count.*]

9. [*Allegations of specific damages. See § 244.50, Paragraphs 12, 13 of First Count.*]

[*Prayer. See § 244.50.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 244.50.*]

[2] Use of Form

This complaint is for use by a plaintiff against a building owner and elevator operator to recover damages for injuries sustained from the negligent operation of a sidewalk elevator, such as by a sudden raising of the elevator or leaving the elevator shaft unattended.

[3] Cross References

See also Comments and References to *§ 244.50*

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§ 244.60 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Injured Employee of Lessee Against Lessor of Construction Elevator for Injuries Caused by Fall of Unsafe Leased Elevator

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Injured Employee of Lessee Against Lessor of Construction Elevator for Injuries Caused by Fall of Unsafe Leased Elevator

[*Caption, introduction. See § 244.50.*]

1. [*Capacity and residence of defendant. See § 244.50, Paragraph 1 of First Count*].

2. On _____ [*date*], and for some time prior thereto, plaintiff was an employee of defendant _____ Company.

3. On this date, and for some time prior thereto, defendant was in the business of leasing and supplying _____ [*specify*] equipment and tools.

4. On or prior to _____ [*date of accident*], defendant leased to plaintiff's employer an elevator for the purpose of lifting _____ [*specify*]; defendant knew that plaintiff's employer was leasing the elevator for the purpose of lifting _____ [*specify*], and furnished and leased the elevator to plaintiff's employer for that purpose and with the knowledge that the elevator would be so used; in so leasing and furnishing the elevator to plaintiff's employer, defendant carelessly and negligently furnished an elevator which was unsafe for the purpose for which it was leased in that _____ [*specify*].

5. On this date certain employees of defendant _____ Company were using the elevator for the purpose of lifting a _____ [*describe load carried in elevator*]. While the elevator was being so used, _____ [*describe how plaintiff was injured, e.g.*, the load was caused to and did become detached and released from the elevator, and as a result thereof, fell and struck plaintiff. The load was caused to become detached and

released from the elevator and to fall and strike plaintiff as a proximate result of said carelessness and negligence in so leasing, furnishing, and supplying to plaintiff's employer an elevator that was dangerous and unsafe to be used for the purpose for which it was leased].

6. [*Allegation of general damages proximately caused by negligence of defendant. See § 244.50, Paragraph 11 of First Count*].

7. [*Allegations of special damages. See § 244.50, Paragraphs 12, 13, of First Count*].

[*Prayer. See § 244.50.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 244.50.*]

[2] Use of Form

This form of complaint is for use by an employee of a lessee against a lessor of a construction elevator for damages for injuries caused by that elevator.

[3] Cross References

See also Comments and References to *§ 244.50*

For alternative allegations as to liability of lessors of chattels, see Ch. 93, *Bailments*

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§ 244.61 Allegations in Complaint for Damages Sustained While Passenger in Elevator or on Escalator--Existence of Statute, Ordinance, or Regulation and Resulting Duty Owed Plaintiff

[1] FORM Allegations in Complaint for Damages Sustained While Passenger in Elevator or on Escalator--Existence of Statute, Ordinance, or Regulation and Resulting Duty Owed Plaintiff

1. At all times herein mentioned, _____ [*specify statute or ordinance or regulation*] was in full force and effect and provided that _____ [*specify substance or quote statute, ordinance, or regulation in full*]. Pursuant to this _____ [statute *or* ordinance *or* regulation] defendant owed to plaintiff the duty to _____ [*specify, e.g.*, operate and maintain the _____ (elevator *or* escalator) in conformity with the _____ (statute *or* ordinance *or* regulation) by _____ [*specify, e.g.*, not permitting its operation except by a licensed operator)].

2. On _____ [*date plaintiff was injured*], and prior thereto, defendant negligently, carelessly, recklessly, and unlawfully, and in violation of the _____ [statute *or* ordinance *or* regulation], _____ [*specify, e.g.*, permitted an unlicensed person to operate the elevator].

[2] Use of Form

These allegations are for use in a complaint based on negligence in the operation, care, and maintenance of an escalator or elevator. As discussed in *§ 244.10[2]*, this form cannot be used to allege a violation of the state employment laws contained in *Lab. Code §§ 7200-7205* (construction elevators) and the regulations [*8 Cal. Code Reg §§ 3000-3113*] promulgated thereunder, because no part of these laws has any application to, nor may be considered in, nor may be admissible into, evidence in any personal injury or wrongful death action, except as between an employee and his or her own employer [*Lab. Code § 6304.5*].

These allegations should also be used only if the statute, ordinance, or regulation requires one to exercise a higher degree of care in regard to a particular matter than would be required at common law. If the statute, ordinance, or regulation merely restates the common law duty to use due care it need not be pleaded. It is, in such cases, merely evidentiary.

[3] Cross References

See also Comments and References to *§ 244.50*

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20-244 California Forms of Pleading and Practice--Annotated § 244.62

§ 244.62 Cross Complaint [Code Civ. Proc. § 428.10] for Declaratory Relief [Code Civ. Proc. § 1060] for Implied Contractual Indemnity in Personal Injury Action--By Building Owner Against Person Who Contracted to Install and Maintain or Inspect Elevator or Escalator

[1] FORM Cross Complaint [Code Civ. Proc. § 428.10] for Declaratory Relief [Code Civ. Proc. § 1060] for Implied Contractual Indemnity in Personal Injury Action--By Building Owner Against Person Who Contracted to Install and Maintain or Inspect Elevator or Escalator

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*names*],	)	
Defendant and Cross Complainant,	)	NO. _____
vs.	)	CROSS COMPLAINT
_____ [*name(s)*],	)	FOR
[Defendant and] Cross Defendant.	)	DECLARATORY
	)	RELIEF
	)	

_____

1. [*Allegations as to capacity, residence, and agency of parties. See § 244.50, Paragraph 1 of First Count and Paragraph 2 of Second Count*].

2. [*Fictitious name allegation. See § 244.50, Paragraph 8 of First Count*].

3. On _____ [*date*], in _____ [*city*], _____ County, California, defendant cross complainant and [defendant and] cross defendant entered into a written agreement whereby _____ [*specify terms of agreement, e.g.*, cross defendant (designated as "Seller" in the agreement) agreed to install, inspect, service, and maintain an _____ (escalator *or* elevator) in a building owned by cross complainant, known as the _____ building, located at _____ Street,

_____ [*city*], _____ County, California. A copy of this agreement is attached hereto as Exhibit A and made a part hereof].

4. By the terms of this agreement in Paragraphs _____ thereof, cross defendant agreed to _____ [*specify, e.g.*, manufacture and install the _____ (escalator *or* elevator) in the building in such a manner that it would be safe for use by the general public and to regularly and systematically examine, adjust, clean, lubricate, and repair it.].

5. On _____ [*date*], plaintiff filed a complaint herein against cross complainant [and cross defendant] for damages for personal injuries allegedly sustained by plaintiff while riding the _____ [escalator *or* elevator], wherein it is alleged that the _____ [escalator *or* elevator] was so negligently and carelessly maintained that it _____ [*specify*] causing plaintiff to sustain the injuries complained of.

6. If plaintiff was, as alleged in his/her complaint, injured as a proximate result of any carelessness, negligent act, or omission in connection with the _____ [escalator *or* elevator], other than as a proximate result of plaintiff's own negligence, the [sole and] proximate cause of such injury was cross defendant's _____ [breach *or* improper performance] of the written agreement with cross complainant in that _____ [*specify nature of defendant's breach*]. [Any negligent acts of cross complainant that may be adjudged to be a proximate cause of plaintiff's injuries were solely passive in nature.]

7. On _____ [*date*], cross complainant made written demand on cross defendant to defend the action brought by plaintiff and hold cross complainant harmless from any and all expenses, costs of suit, legal fees, damages, judgments, or other claims or awards which may be claimed or obtained against cross complainant by plaintiff. Nevertheless, cross defendant has refused to do so, and continue to refuse to do so, making it necessary for cross complainant to defend this action, and he/she/it is defending this action at his/her/its own expense.

8. Cross complainant has incurred reasonable expenses for investigation and defense costs herein, including filing fees, attorney's fees, process service, and other related expenses, and will incur further defense costs and expenses in the future. The full amount of such costs and expenses is not known to cross complainant at this time, and cross complainant will move to amend this cross complaint to state such amount when the same becomes known to cross complainant, or on proof thereof.

9. An actual controversy has arisen and now exists between cross complainant and cross defendant in that:

a. Cross complainant contends that, by virtue of the written agreement, cross defendant is obligated to undertake the defense of the pending action on behalf of cross complainant, represent cross complainant's interests in this action and to hold cross complainant harmless from expenses, cost of suit, legal fees, damages, judgments, or other claims or awards that plaintiff may claim or obtain in this action, and to reimburse cross complainant for the expenses and costs previously incurred.

b. Cross defendant contends that he/she/it is not obligated to defend or to represent cross complainant's interest in this action, to hold cross complainant harmless from any and all expenses, costs of suit, legal fees, damages, judgments, or other claims or awards which may be claimed or obtained in this action against cross complainant by plaintiff, or to reimburse cross complainant for defense costs previously incurred.

10. A judicial declaration is necessary and appropriate at this time under the circumstances in order that cross complainant may ascertain his/her/its rights to indemnity against cross defendant. A declaration of such rights in this action will prevent a multiplicity of actions. [_____ (*Allege any other burden being caused cross complainant*).]

WHEREFORE, cross complainant prays judgment as follows:

1. For a declaration that cross defendant is obligated to defend this action for cross complainant, represent cross complainant's interests herein, and hold cross complainant harmless from any and all expenses and costs of suit as a result of injuries incurred by plaintiff;

2. For costs and legal fees incurred to date by cross complainant in defense of plaintiff's action against cross complainant;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Cross Complainant _____ [*name*]

[*Verification, if desired. See § 244.50.*]

[2] Use of Form

This form of complaint is for use in a declaratory relief action by a defendant and cross complainant against a cross defendant who had contracted with cross complainant to inspect, maintain, or repair the elevator or escalator in or on which plaintiff was injured. The basis of the declaratory relief action is cross complainant's claim that any damages he or she is required to pay to plaintiff at the conclusion of plaintiff's pending action was a result of cross complainant's passive negligence and cross defendant's active negligence in breaching the contract to inspect, maintain, or repair the elevator or escalator.

This form is for use when plaintiff's action is pending against the cross complainant and the right to indemnity is not expressly provided for in the contract [*see Roylance v. Doelger (1962) 57 Cal. 2d 255, 259-262, 19 Cal. Rptr. 7, 368 P.2d 535* (right to indemnity as permitted to be adjudicated in declaratory relief action prior to actual loss)]. For a discussion of express and implied indemnity, forms of complaints for express indemnity, and a form of complaint for implied contractual indemnity for use when plaintiff's action is no longer pending, see Ch. 300, *Indemnity and Contribution* .

[3] Allegations

This cross complaint alleges: (1) a contract for installation, inspection, servicing, or repairing an elevator or escalator (Paragraphs 3, 4); (2) the filing of plaintiff's action against cross complainant, and, if appropriate, cross defendant (Paragraph 5); (3) defendant's breach or improper performance of the contract (Paragraph 6); (4) the fact that such breach or performance was the sole or active, proximate cause of any damages plaintiff may recover from cross complainant (Paragraphs 6, 9); (5) cross complainant's demand and cross defendant's refusal to defend plaintiff's action and hold cross complainant harmless from any damages plaintiff may recover (Paragraph 7); and (6) the amount of cross complainant's damages (Paragraph 8). A written demand that is not essential to cross complainant's cause of action, but, if included, lessens plaintiff's burden of proof [*see Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal. 2d*

834, 844, 36 Cal. Rptr. 741, 389 P.2d 133 ; *see also* Ch. 300, *Indemnity and Contribution*].

In addition, the cross complaint must allege facts showing that the subject of the action is a proper matter for declaratory relief under the provisions of *Code Civ. Proc. § 1060*, or of some special statue authorizing declaratory relief, or that declaratory relief in the particular fact situation has been held proper by case law. The fact situation suggested in this cross complaint (Paragraph 3) involves a written contract, and hence brings the action within the express provisions of *Code Civ. Proc. § 1060*. *Code Civ. Proc. § 1060* does not, however, require that the contract be written, and thus, an action may be brought to determine a controversy based on an oral contract as well [*Zimmer v. Gorelnik (1941) 42 Cal. App. 2d 440, 445, 109 P.2d 34]* .

An allegation that cross complainant seeks a declaration of his, her, or its rights under the circumstances should be included, as well as an allegation that such declaration is necessary and appropriate at the time (Paragraph 10) under all circumstances to enable cross complainant to ascertain his, her, or its legal position in the premises [*see Code Civ. Proc. § 1060, 1061*].

The cross complaint must allege the existence of an actual controversy between the parties (Paragraph 9) [*see Code Civ. Proc. § 1060* (declaratory relief to ascertain status or construe writing); *Alturas v. Gloster (1940) 16 Cal. 2d 46, 48, 104 P.2d 810* ; *Escondido Mut. Water Co. v. George A. Hillebrecht, Inc. (1966) 241 Cal. App. 2d 410, 412-413, 50 Cal. Rptr. 495]* . The pleading requirement may be satisfied by alleging that an actual controversy exists between the parties and setting forth the parties' conflicting contentions (Paragraph 9) showing that an actual justiciable controversy exists. [*Code Civ. Proc. § 1060*].

[4] Cross References

See also Comments and References to *§ 244.50*

For discussion and forms involving indemnity, see Ch. 300, *Indemnity and Contribution*

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Chapter 244 ELEVATORS AND ESCALATORS
PART IV. FORMS

20-244 California Forms of Pleading and Practice--Annotated § 244.63

§ 244.63 Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)], and Permanent Injunction [Civ. Code § 3422]--Restraining Operation of Elevator Having no Permit and in Unsafe Condition [Lab. Code § 7303]

[1] FORM Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)], and Permanent Injunction [Civ. Code § 3422]--Restraining Operation of Elevator Having no Permit and in Unsafe Condition [Lab. Code § 7303]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	No. _____
Plaintiff(s),	)	COMPLAINT FOR
vs.	)	TEMPORARY
_____ [*name(s)*] [and DOES 1	)	RESTRAINING ORDER, PRELIMINARY AND
through _____],	)	PERMANENT
Defendant(s).	)	INJUNCTION
	)	

Plaintiff alleges:

1. [*Capacity of defendant. See § 244.50, Paragraph 1 of First Count.*]

2. [*Possession, ownership, and control of elevator by defendant. See § 244.50, Paragraph 2 of First Count.*]

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by their conduct.)]

4. At all times herein mentioned, defendant(s) wrongfully and unlawfully allowed the elevator belonging to and under the possession and control of defendant(s) to be operated without the permit required by *Section 7301 of the Labor Code* and to be in a condition making the elevator dangerous to the life or safety of persons using it.

5. Plaintiff is affected by the dangerous condition of the elevator because _____ [*specify, e.g.,* for purposes of plaintiff's business, plaintiff must routinely use the elevator to reach destinations within the building in which the elevator is operated].

6. Plaintiff has no adequate remedy at law to secure relief to enforce the permit and safety requirements to maintain the safety of the elevator, and plaintiff will be irreparably injured in having to expose himself/herself to the unsafe conditions herein alleged if the court does not restrain defendant(s) from operation of the elevator until the dangerous condition is corrected.

7. Certified proof that no permit for the operation of the elevator has been issued by the California Division of Occupational Safety and Health and an affidavit by a safety inspector stating that the operation of the elevator is dangerous to the life or safety of persons using it are attached to this complaint.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For an order requiring defendants to show cause, if they have any, why they should not be enjoined as hereafter set forth, during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendants, and each of them, and their agents, servants, and employees, and all persons acting under, in concert with, or for them to obtain the necessary permit for operation of the elevator and to restrain the operation of the elevator until the unsafe conditions have been corrected.

3. For costs of suit herein incurred; and

4. For such other and further relief as the court deems proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 244.50.*]

CERTIFICATION RE NOTICE

I hereby certify that _____ [on _____ (*date*), I informed _____ [defendant's attorney _____ (*list name, address, and telephone number of defendant's attorney, if known*) *or* defendant _____ (*list name, address, and telephone number of defendant, if known*)] of what time and where the foregoing application for a temporary restraining order would be made *or* in good faith, I attempted to inform defendant of what time and where the foregoing application for a temporary restraining order would be made, by _____ (*specify efforts*), but I was unable to do so *or* notice to defendant of the foregoing application for a temporary restraining order should not be required for the reason that _____ (*specify*)]. _____ [Based on _____ (*name*)'s response, opposition _____ (is *or* is not) expected *or* _____ (*name*) did not respond to the notice.]

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

Attorney for Plaintiff

[2] Use of Form

This form of complaint for injunctive relief is for use by an individual who is affected by an elevator being operated without a permit and in a dangerous condition, to restrain the operation of the elevator until the dangerous condition is corrected [*see Lab. Code § 7303*].

To obtain a temporary restraining order from the court, the plaintiff must provide proof by certification of the California Division of Occupational Safety and Health that no permit has been issued for the elevator and an affidavit by a safety inspector that the operation of the elevator is dangerous to the life or safety of any person [*see Lab. Code § 7303*].

For discussion of the procedure, checklists, and forms for obtaining temporary restraining orders and preliminary injunctive relief, as well as discussion of permanent injunctive relief, see Ch. 303, *Injunctions* .

[3] Allegations

The complaint alleges: (1) the capacity of the defendant (Paragraph 1); (2) the possession, ownership, and control of the elevator by the defendant (Paragraph 2); (3) an optional allegation as to fictitiously named defendants (Paragraph 3); (4) a statement that the elevator was operated without a permit and in a condition dangerous to the life or safety of persons using it (Paragraph 4) [*see Lab. Code § 7303*]; (5) facts showing that the plaintiff is affected by the unsafe condition of the elevator (Paragraph 5) [*see Lab. Code § 7303*]; (6) facts showing that the plaintiff has no adequate remedy at law and that the plaintiff will suffer irreparable harm thereby (Paragraph 6) [*see Civ. Code § 3422(1), (2)*; *Code Civ. Proc. § 526(a)(2), (4)-(6)*]; and (7) a statement that proof of certification that no elevator permit has been issued and an affidavit by a safety inspector that the elevator is in a dangerous condition are attached to the complaint (Paragraph 7) [*see Lab. Code § 7303*].

[4] Verification

Verification [*see Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit or declaration under *Code Civ. Proc. § 2015.5* [*see Code Civ. Proc. §*

527(a)]. For discussion of the effect of verification of a complaint, see Ch. 26, *Answers* .

[5] Notice and Certification

A party seeking an ex parte order must notify all parties no later than 10:00 a.m. on the court day before the ex parte appearance, absent a showing of exceptional circumstances that justify a shorter time for notice [*Cal. Rules of Ct., Rule 3.1203(a)*]. The notice must specify the nature of the relief to be requested and the date, time, and place for the presentation of the application. The person giving notice must attempt to determine whether the opposing party will appear to oppose the application [*Cal. Rules of Ct., Rule 3.1204(a)*].

An ex parte application must be accompanied by a declaration regarding notice that states one of the following [*Cal. Rules of Ct., Rule 3.1204(b)*; *see Code Civ. Proc. § 527(c)(2)*]:

- The notice given, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected, and that within the applicable time under *Cal. Rules of Ct., Rule 3.1203*, the applicant informed the opposing party where and when the application would be made;

- That the applicant in good faith attempted to inform the opposing party but was unable to do so, specifying the efforts made to inform the opposing party; or

- That, for reasons specified, the applicant should not be required to inform the opposing party.

An ex parte application must state the name, address, and telephone number of any attorney known to the applicant to be an attorney for any party or, if no such attorney is known, the name, address, and telephone number of the party, if known to the applicant [*Cal. Rules of Ct., Rule 3.1202(a)*].

For discussion of the procedure and additional forms for obtaining a temporary restraining order, see Ch. 303, *Injunctions* .

[6] Cross References

See also Comments and References to *§ 244.50*

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Chapter 245 EMANCIPATION OF MINORS

20-245 California Forms of Pleading and Practice--Annotated 245.syn

§ 245.syn Synopsis to Chapter 245: EMANCIPATION OF MINORS

§ 245.01 Scope of Chapter

§ 245.02 Cross References

§§ 245.03 through 245.09 [Reserved]

§ 245.10 Governing Statutes

§ 245.11 Meaning of Emancipation of Minor

§ 245.12 Nonstatutory and Statutory Emancipation

§ 245.13 Total or Partial Emancipation

§ 245.14 Emancipation for Various Purposes

[1] Relinquishment of Parental Authority

[2] Termination of Parental Duty of Support

[3] Child's Right to Earnings

[4] Child's Residence

[5] Medical Emancipation

§ 245.15 Emancipation of Minors Law

[1] Objectives

[2] Statutory Emancipated Status

[3] Minors Entitled to Petition for Emancipation

[4] Notice and Other Procedures

[5] Purposes for Which Minor Is Considered as Adult

[6] Insurance Contracts

[7] Corporate Ownership Interests and Other Property Interests

[8] Receipt of Public Benefits

[9] Issuance of Declaration of Emancipation; Standards and Effect

[10] Review by Writ of Mandate

[11] Identification Cards and Information

[12] Voiding or Rescinding of Declaration

§§ 245.16-245.29 [Reserved]

§ 245.30 State Statutes

§ 245.31 Decisions

§ 245.32 Law Reviews

§ 245.33 Text References

§§ 245.34-245.49 [Reserved]

§ 245.50 Petition for Declaration of Emancipation of Minor, Order Prescribing Notice, Declaration of Emancipation, and Order Denying Petition [Fam. Code § 7120]--Judicial Council Form MC-300

[1] FORM

[2] Use of Form

[3] Jurisdiction and Venue

[4] Contents

[5] Filing Fee

§ 245.51 Emancipation of Minor Notice of Hearing [Fam. Code § 7133]--Judicial Council Form MC-305

[1] FORM

[2] Use of Form

[3] Contents

§ 245.52 Emancipation of Minor Income and Expense Declaration--Judicial Council Form MC-306

[1] FORM

[2] Use of Form

§ 245.53 Declaration of Emancipation of Minor After Hearing [Fam. Code § 7122]--Judicial Council Form MC-310

[1] FORM

[2] Use of Form

§ 245.54 Emancipated Minor's Application to California Department of Motor Vehicles [Fam. Code § 7140]--Judicial Council Form MC-315

[1] FORM

[2] Use of Form

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Chapter 245 EMANCIPATION OF MINORS
PART I. SCOPE

20-245 California Forms of Pleading and Practice--Annotated § 245.01

§ 245.01 Scope of Chapter

This chapter discusses the circumstances under which a minor may become emancipated by statute, operation of law, conduct, or agreement. It includes discussion of the definition of emancipation and the effect of emancipation on the rights of the child and the legal duties of the parent. The procedure for filing the petition for emancipation, the grounds for granting or denying the petition, and the procedure for petitioning for rescission of the declaration also are covered. Examples of the Judicial Council forms for the petition for declaration of emancipation [*see § 245.50*], Notice of Hearing [*see § 245.51*], Income and Expense Declaration *see § 245.52*], Declaration of Emancipation of Minor After Hearing [*see § 245.53*], and Emancipated Minor's Application to California Department of Motor Vehicles [*see § 245.54*] are provided.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsTerminationEmancipation of ChildFamily LawParental Duties & RightsDutiesGeneral OverviewFamily LawParental Duties & RightsEmancipation of Minors

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§ 245.02 Cross References

For discussion of the effect of emancipation of a minor on the parent-child relation, see Ch. 364, *Minors: Claims and Property of Minors* through Ch. 367A, *Minors: Tort Actions*

For discussion of the duty of child support, see Ch. 394, *Parent and Child*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsTerminationEmancipation of ChildFamily LawParental Duties & RightsEmancipation of Minors

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[Reserved]

§§ 245.03[Reserved]

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20-245 California Forms of Pleading and Practice--Annotated § 245.10

§ 245.10 Governing Statutes

Statutory emancipation of minors is governed by *Fam. Code § 7000 et seq.*, the Emancipation of Minors Law. It was enacted to provide a clear statement defining emancipation and its consequences, and to permit an emancipated minor to obtain a court declaration of his or her status [*Fam. Code § 7001*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawParental Duties & RightsEmancipation of Minors

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20-245 California Forms of Pleading and Practice--Annotated § 245.11

§ 245.11 Meaning of Emancipation of Minor

Emancipation of a minor is a legal status that results in the termination of some of the rights and obligations that inure to the parent-child relationship. To the extent that a child is emancipated, he or she becomes *sui juris*, with the same independence as though he or she had reached the age of majority [*Jolicoeur v. Mihaly (1971) 5 Cal. 3d 565, 580, 96 Cal. Rptr. 697, 488 P.2d 1* ; *see Fam. Code § 7050*]. Unlike proceedings that terminate parental rights (*see* Ch. 12A, *Adoptions: Termination of Parental Rights*), emancipation leaves the parent-child relationship intact, but terminates those rights and obligations that arise from the relationship only because of the minority of the child.

Many of the kinds of disputes that have brought the question of a minor's emancipation before the court have disappeared with the change of the age of majority from 21 to 18 in 1972 [*see Fam. Code §§ 6500, 6502*]. Before that time, there was a significant class of children between the ages of 18 and 21 who were, at least to some extent, no longer dependent on parental support nor subject to parental authority. Now that these persons are adults by law, many former emancipation issues have become moot.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsTerminationEmancipation of ChildFamily LawParental Duties & RightsDutiesGeneral OverviewFamily LawParental Duties & RightsEmancipation of Minors

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20-245 California Forms of Pleading and Practice--Annotated § 245.12

§ 245.12 Nonstatutory and Statutory Emancipation

Under California case law before 1978, whether a minor was emancipated for a particular purpose depended largely on the particular circumstances of each case, and was ordinarily a question of fact [*Martinez v. Southern Pacific Co. (1955) 45 Cal. 2d 244, 253-254, 288 P.2d 868]* . Among the ways that emancipation could be proved were the following:

(1) By operation of law on the minor's attaining the age of majority or on the marriage of the minor [*see In re Marriage of Phillips (1974) 39 Cal. App. 3d 723, 727, 114 Cal. Rptr. 362* (overruled on other grounds in *Ganschow v. Ganschow (1975) 14 Cal. 3d 150, 157 n.7, 120 Cal. Rptr. 865, 534 P.2d 705*); *see Fam. Code § 7505(b), (c)*];

(2) By express agreement of the parents and child [*see In re Marriage of Whitney (1977) 71 Cal. App. 3d 179, 183, 139 Cal. Rptr. 324* ; *Perkins v. Robertson (1956) 140 Cal. App. 2d 536, 540, 295 P.2d 972]* ; or

(3) By implication from the conduct of parents and child having the effect of cutting the parental ties [*see In re Marriage of Whitney (1977) 71 Cal. App. 3d 179, 183, 139 Cal. Rptr. 324* ; *Perkins v. Robertson (1956) 140 Cal. App. 2d 536, 540, 295 P.2d 972]* .

In 1978, the legislature enacted the Emancipation of Minors Act [*see* Stats. 1978, ch. 1059; former *Civ. Code § 60 et seq.*], now called the Emancipation of Minors Law [*see Fam. Code § 7000*]. The legislative purpose of the law is to provide a clear statement of emancipation and its consequences and to permit an emancipated minor to obtain a court declaration of emancipated status [*Fam. Code § 7001*]. The Emancipation of Minors Law is discussed further under Emancipation of Minors Law, *below*.

However, the Law was not intended to affect the status of minors who might become emancipated under the case law that was in effect before its enactment [*Fam. Code § 7001*]. Therefore, even if a minor has no judicial declaration of emancipation, emancipation may still be proved under any of the principles established in the case law. In these cases, the minor may be held emancipated for the purpose or purposes at issue [*see* Emancipation for Various Purposes, *below*], which may not necessarily be identical to those specified in the Law. In any case, the minor bears the burden of showing that he or she has in fact been emancipated, whether under statute or the case law, for the purpose at issue [

Evid. Code § 500; *Smith v. Smith (1918) 38 Cal. App. 388, 397, 176 P. 382]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 245.13 Total or Partial Emancipation

Nonstatutory emancipation of a minor may be complete or partial, conditional or absolute [*Jolicoeur v. Mihaly (1971) 5 Cal. 3d 565, 580, 96 Cal. Rptr. 697, 488 P.2d 1* ; *Perkins v. Robertson (1956) 140 Cal. App. 2d 536, 540, 295 P.2d 972]* . If emancipation is implied from the conduct of the parties, it is not necessarily total. For example, a minor child may maintain a separate residence from his or her parents but not manage his or her own financial affairs [*see Jolicoeur v. Mihaly (1971) 5 Cal. 3d 565, 580, 96 Cal. Rptr. 697, 488 P.2d 1]* . Conversely, a minor may still reside with his or her parents but control his or her own earnings and contribute his or her share of family expenses in the same manner as an adult member of the family [*see Martinez v. Southern Pacific Co. (1955) 45 Cal. 2d 244, 253-254, 288 P.2d 868]* . In these cases, emancipation is not an all-or-nothing proposition, and a minor may be emancipated for some, but not all, purposes (*see § 245.14*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsTerminationEmancipation of ChildFamily LawParental Duties & RightsEmancipation of Minors

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§ 245.14 Emancipation for Various Purposes

[1] Relinquishment of Parental Authority

A parent may relinquish the right to control his or her child [*Fam. Code § 7504*; *see Fam. Code § 7505(b)* (parental authority ceases on marriage of child)]. Such a relinquishment may be express or implied, and may constitute partial or complete, or conditional or absolute emancipation. After consenting to the emancipation of a child old enough to work and care for himself or herself, a parent no longer has the right to custody or control of the minor [*Jolicoeur v. Mihaly (1971) 5 Cal. 3d. 565, 580, 96 Cal. Rptr. 697, 488 P.2d 1]* .

[2] Termination of Parental Duty of Support

In general, when a child attains the age of majority, the parental duty of support terminates [*see Fam. Code § 3900*]. Circumstances under which the duty of support continues as to an adult child [*see, e.g., Fam. Code § 3901*], are discussed in Ch. 224, *Dissolution of Marriage: Child Support* .

However, parents are obligated to support even an adult child who is incapacitated from earning a living and without sufficient means [*Fam. Code § 3910(a)*]. By analogy, it has been found that the parental duty of support extends to an otherwise emancipated minor who is unable to support himself or herself [*see Bryant v. Swoap (1975) 48 Cal. App. 3d 431, 436-439, 121 Cal. Rptr. 867* (divorced minor who was emancipated by marriage can be dependent child for purposes of AFDC eligibility)].

Further, if emancipation occurs through express agreement or by implication, it has been argued that the parents' relinquishment of custody and control over the child is effective insofar as parental rights are concerned, but is not effective to relieve the parents of the burden of legal duties. Thus, emancipation by an express agreement or implied from conduct should not terminate the minor's right to support from his or her parents [*see County of Alameda v. Kaiser (1965) 238 Cal. App. 2d 815, 816-817, 48 Cal. Rptr. 343]* .

Whether emancipation is total or partial, a parent may reassume or continue the obligation to support a child through the execution of a binding contractual agreement [*see Fam. Code § 3901(b)*]. If the agreement is based on sufficient consideration, the contractual obligation will be enforced regardless of the legal duties that would otherwise be imposed

on the parent [*Kamper v. Waldon (1941) 17 Cal. 2d 718, 720-721, 112 P.2d 1* ; *see* *Bryant v. Swoap (1975) 48 Cal. App. 3d 431, 439, 121 Cal. Rptr. 867]* .

[3] Child's Right to Earnings

The parents of an unemancipated minor are entitled to his or her earnings [*Fam. Code § 7500(a)*]. However, a parent may relinquish that right to the minor [*Fam. Code § 7504*]. and partial or complete emancipation effects a relinquishment [*Slater v. California State Auto. Asso. (1962) 200 Cal. App. 2d 375, 376-377, 19 Cal. Rptr. 290]* .

Even if a minor child is living with his or her parents, he or she may be emancipated to the extent of having a right to his or her own earnings. Facts such as the minor's contributing to the support of the household and occupying a position equal to the parents in the family unit imply that the minor is at least partially emancipated [*see* *Martinez v. Southern Pacific Co. (1955) 45 Cal. 2d 244, 253-254, 288 P.2d 868]* .

[4] Child's Residence

In general, a parent entitled to the custody of a child has the right to determine the child's residence [*Fam. Code § 7501*; *Gov. Code § 244(d), (e)*]. However, a fully emancipated minor has the right to determine his or her own residence, and a child may be partially emancipated for the purpose of acquiring a separate residence or domicile from a parent [*Jolicoeur v. Mihaly (1971) 5 Cal. 3d 565, 579-581, 96 Cal. Rptr. 697, 488 P.2d 1* (minors living apart from parents entitled to register to vote in jurisdiction of residence); *see* *Lev v. College of Marin (1971) 22 Cal. App. 3d 488, 490-491, 99 Cal. Rptr. 476* (emancipated minors entitled to attend community college where they reside)].

Whether a minor has been emancipated for residential purposes is ordinarily a question of fact. Establishment of a separate abode, with the express or implied consent of the parent, is evidence of such emancipation [*Jolicoeur v. Mihaly (1971) 5 Cal. 3d 565, 581, 96 Cal. Rptr. 697, 488 P.2d 1]* .

[5] Medical Emancipation

The Legislature has enacted a number of so-called "medical emancipation" statutes, each of which has designated a general category of minors who, although not legally emancipated for all purposes, nonetheless are authorized to obtain medical, surgical, or hospital care in all contexts, without parental consent [*Am. Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 315, 66 Cal. Rptr. 2d 210]* . Under a "general medical emancipation statute" [*Am. Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 316, 66 Cal. Rptr. 2d 210]* , a minor 15 years of age or older who is living separate and apart from his or her parents or legal guardian, whether with or without the consent of a parent or guardian and regardless of the duration of such separate residence, and who is managing his or her own financial affairs, regardless of the source of his or her income, may consent to any hospital, medical, or surgical care without parental approval [*Fam. Code § 6922* (formerly *Civ. Code § 34.6*)].

California has also enacted a variety of "limited medical emancipation" statutes [*Am. Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 316, 66 Cal. Rptr. 2d 210]* . Thus, an unmarried pregnant minor, without parental consent, may obtain hospital, medical, and surgical care related to pregnancy [*Fam. Code § 6925* (formerly *Civ. Code § 34.5*)]. Furthermore, a minor, 12 years of age or older, may obtain, without parental consent, medical care related to the diagnosis or treatment of any infectious, contagious, or communicable disease, including a sexually transmitted disease [*Fam. Code § 6926* (formerly *Civ. Code § 34.7*)]. Likewise, a minor, 12 years of age or older, may obtain, without parental consent, medical care related to the diagnosis and treatment of rape [*Fam. Code § 6927* (formerly *Civ. Code § 34.8*)]. A minor of any age may obtain, without parental consent, medical care relating to sexual assault [*Fam. Code § 6928* (formerly *Civ. Code § 34.9*)]. A minor, 12 years old or older, without parental consent, may obtain medical care and counseling relating to the diagnosis and treatment of a drug or alcohol related problem [*Fam. Code § 6929* (formerly *Civ. Code § 34.10*)]. Finally, a minor, 12 years of age or older, may obtain, without parental consent, mental

health treatment or counseling on an outpatient basis [*Fam. Code § 6924* (formerly *Civ. Code § 25.9*)].

For discussion of minor's capacity to consent, see Ch. 365, *Minors: Contract Actions* . For discussion of abortion, see Ch. 4, *Abortion and Birth Control Methods* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsTerminationEmancipation of ChildFamily LawParental Duties & RightsDutiesCare & Control of ChildrenFamily LawParental Duties & RightsEmancipation of Minors

California Forms of Pleading and Practice--Annotated

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Volume 20: Easements thru Eminent Domain-Chs. 240-247
Chapter 245 EMANCIPATION OF MINORS
PART II. LEGAL BACKGROUND

20-245 California Forms of Pleading and Practice--Annotated § 245.15

§ 245.15 Emancipation of Minors Law

[1] Objectives

The Emancipation of Minors Law [*Fam. Code § 7000 et seq.*] addresses three major aspects of emancipation [*see Fam. Code § 7001*]. First, it provides a clear statement of who is an emancipated minor [*see Fam. Code § 7002*, discussed under *§ 245.15[3] below*]. Second, it delineates the legal significance of this statutory emancipated status [*see Fam. Code § 7050*, discussed under *§ 245.15[6] below*]. Third, it provides for a procedure by which a minor may obtain a declaration of emancipation [*see Fam. Code § 7120 et seq.*, discussed under *§ 245.15[9] below*].

[2] Statutory Emancipated Status

Any person under the age of 18 years who comes within the following description is emancipated [*Fam. Code § 7002*]:

(1) The person has entered into a valid marriage, whether or not the marriage has been dissolved;

(2) The person is on active duty with any of the armed forces of the United States; or

(3) The person has received a declaration of emancipation under *Fam. Code § 7122*.

The first two categories simply confirm emancipated status to persons previously recognized as emancipated for all purposes [*see Fam. Code §§ 6950, 7505(b)*]. The third category incorporates some of the factors that might establish partial or complete emancipation under prior case law [*see Fam. Code § 7120(b)*, discussed under *§ 245.15[3] below*].

[3] Minors Entitled to Petition for Emancipation

Only a minor seeking emancipation may file a petition for a declaration of emancipation [*Fam. Code § 7120(a)*; *Cal. Rules of Ct., Rule 3.1370(a)*]. The minor must allege and prove all of the following facts [*Fam. Code § 7120(b)*]:

(1) The minor is at least 14 years of age;

(2) The minor willingly lives separate and apart from the minor's parents or guardian with the consent or acquiescence of the minor's parents or guardian [*Bonnie P. v. Superior Court (2005) 134 Cal. App. 4th 1249, 1260, 37 Cal. Rptr. 3d 77* (arguable parental failure to adequately provide for minor does not constitute parental consent or acquiescence to minor's living apart from parents; parental neglect may be basis for invoking jurisdiction of juvenile court with respect to dependency proceeding, but is not statutory basis for emancipation under *Fam. Code § 7120*];

(3) The minor is managing his or her own financial affairs [*Bonnie P. v. Superior Court (2005) 134 Cal. App. 4th 1249, 1258 n.6, 37 Cal. Rptr. 3d 77* (unclear whether minor must be independently managing his or her finances, *i.e.*, personally earning salary or wages, or whether minor may be sufficiently supported by others to satisfy this criterion)]; and

(4) The source of the minor's income is not derived from any activity declared to be a crime by California law or the laws of the United States.

For an example of the Judicial Council form for use as a petition for emancipation, see *§ 245.50*.

To prove management of financial affairs, the minor must complete and attach an income and expense declaration [*Fam. Code § 7120(b)(3)* (as amended effective Jan. 1, 2005, requires income and expense declaration as provided in Cal. Judicial Council Form FL-150); *Cal. Rules of Ct., Rule 3.1370(a)* (requires income and expense declaration specially designed for use in emancipation matters, as provided in Cal. Judicial Council Form MC-306); see comments to *see § 245.52, below*].

It does not appear that the minor must be financially independent; all that is required is that the minor manage his or her own financial affairs [*Fam. Code § 7120(b)(3)*; *see Cal. Rules of Ct., Rule 3.1370(d)* (inability to pay filing fee is not proof of statutory standard)]. The source of the minor's support precludes emancipation only if it is from criminal activity [*see Fam. Code § 7120(b)(4)*] or public assistance [*see Fam. Code § 7130(b)*]. It would seem that the minor may receive support from any other source, including parental contributions, trust fund payments, or the assistance of friends or relatives.

[4] Notice and Other Procedures

Before a petition for a declaration of emancipation is heard, such notice as the court determines is reasonable must be given to the minor's parents,guardian, or other person entitled to the custody of the minor, or proof must be made to the court that their addresses are unknown or that for other reasons the notice cannot be given [*Fam. Code § 7121(a)*]. The clerk of the court must also give notice of the proceeding to the local child support agency of the county in which the matter is to be heard. If the minor is a ward of the court, notice must be given to the probation department, and if the child is a dependent child of the court, notice must be given to the county welfare department [*Fam. Code § 7121(b)*].

The notice must include a form whereby the minor's parents, guardian, or other person entitled to the custody of the minor may consent in writing to the petitioner's emancipation [*Fam. Code § 7121(c)*]. The notice must also include a warning that a court may void or rescind the declaration of emancipation and the parents may become liable for support and medical insurance coverage for the child [*Fam. Code § 7121(c)*; *see Fam. Code §§ 4000 et seq., 17400, 17402, 17404, 17422*]. The Judicial Council form for use to give notice of a petition for emancipation is set forth in *see § 245.51*.

If the court finds that all notice and consent requirements have been met or waived, and that emancipation is not contrary to the best interests of the minor, the court may grant the petition without a hearing. The presiding judge of each superior court must develop a protocol for the screening, evaluation, or investigation of petitions [*Cal. Rules of Ct., Rule 3.1370(e)*].

Within 30 days from the filing of the petition, the court must either grant the petition, deny the petition, or set a hearing to be conducted within 30 days thereafter. The clerk must immediately provide the minor with an endorsed-filed copy of the court's order [*Cal. Rules of Ct., Rule 3.1370(f)*]. If the court orders the matter set for hearing, the clerk must notify the district attorney of the time and date of the hearing. The minor is responsible for giving notice to all other persons to whom the court requires notice [*Cal. Rules of Ct., Rule 3.1370(g)*].

At the hearing on the petition, any witnesses must be sworn [*Bonnie P. v. Superior Court (2005) 134 Cal. App. 4th 1249, 1254-1258, 37 Cal. Rptr. 3d 77]* .

[5] Purposes for Which Minor Is Considered as Adult

Emancipation under the provisions of the Law terminates the parental right to control the minor and the minor's earnings and the parental duty of support [*Fam. Code § 7050(a), (b)*]. An emancipated minor is also considered an adult and no longer subject to juvenile court dependency law [*Fam. Code § 7050(c)*; *see Welf. & Inst. Code §§ 300, 601*]. However, an emancipated minor may still be treated as a minor and subjected to the jurisdiction of the juvenile court with regard to criminal conduct [*see Welf. & Inst. Code § 602*].

Emancipation ends all vicarious or imputed liability of the minor's parents or guardian for the minor's acts. It does not terminate any vicarious liability arising under the Vehicle Code or from an agency relationship [*Fam. Code § 7050(d)*].

An emancipated minor is also considered an adult with regard to the capacity to do any of the following [*Fam. Code § 7050(e)*]:

(1) To consent to medical, dental, or psychiatric care, without parental consent, knowledge, or liability [*Fam. Code § 7050(e)(1)*]. This provision terminates parental responsibility for the costs of the care [*see 57 Ops. Cal. Atty. Gen. 28, 29-30 (1974)]* ;

(2) To enter into a binding contract and to give a delegation of power [*Fam. Code § 7050(e)(2)*]. Emancipation therefore terminates the minor's right to disaffirm contracts on any ground not available to other adults. Minors' contracts are discussed in Ch. 365, *Minors: Contract Actions* ;

(3) To buy, sell, lease, encumber, exchange, or transfer any interest in real or personal property, including, but not limited to, shares of stock in a domestic or foreign corporation or a membership in a nonprofit corporation [*Fam. Code § 7050(e)(3)*; *see Fam. Code § 6701*];

(4) To sue and be sued in his or her own name [*Fam. Code § 7050(e)(4)*]. Thus, appointment of a guardian ad litem or guardian of the estate [*see Code Civ. Proc. §§ 372, 373*] is not required to prosecute or defend a law suit on behalf of or against an emancipated minor; however, upon emancipation, a minor loses the benefit of tolling of statutes of limitation for minors [*W. Shield Investigations & Sec. Consultants v. Superior Court (2000) 82 Cal. App. 4th 935, 949-950, 98 Cal. Rptr. 2d 612]* ;

(5) To compromise, settle, arbitrate, or otherwise adjust a claim, action, or proceeding by or against the minor [*Fam. Code § 7050(e)(5)*];

(6) To make or revoke a will [*Fam. Code § 7050(e)(6)*];

(7) To make a gift, outright or in trust [*Fam. Code § 7050(e)(7)*];

(8) To convey or release contingent or expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy, and consent to a transfer, encumbrance, or gift of marital property [*Fam. Code §*

7050(e)(8)];

(9) To exercise or release his or her powers as donee of a power of appointment unless the creating instrument otherwise provides [*Fam. Code § 7050(e)(9)*];

(10) To create for his or her benefit or for the benefit of others a revocable or irrevocable trust [*Fam. Code § 7050(e)(10)*];

(11) To revoke a revocable trust [*Fam. Code § 7050(e)(11)*];

(12) To elect to take under or against a will [*Fam. Code § 7050(e)(12)*];

(13) To renounce or disclaim any interest acquired by testate or intestate succession or by inter vivos transfer, including exercising the right to surrender the right to revoke a revocable trust [*Fam. Code § 7050(e)(13)*];

(14) To make an election or election and agreement referred to in *Prob Code §§ 13502* and *13503*, regarding a surviving spouse's right to community or quasi-community property [*see Fam. Code § 7050(e)(14)*];

(15) To establish his or her own residence [*Fam. Code § 7050(e)(15)*];

(16) To apply for a work permit under *Section 49110 of the Education Code* without the request of the parents [*Fam. Code § 7050(e)(16)*];

(17) To enroll in any school or college [*Fam. Code § 7050(e)(17)*].

[6] Insurance Contracts

An insurance contract entered into by an emancipated minor has the same effect as if it were entered into by an adult. With respect to such a contract, the minor has the same rights, duties, and liabilities as an adult [*Fam. Code § 7051*].

[7] Corporate Ownership Interests and Other Property Interests

With respect to any shares of stock in a domestic or foreign corporation held by an emancipated minor, any membership in a nonprofit corporation held by an emancipated minor, or any other property held by an emancipated minor, the minor may do all of the following [*Fam. Code § 7052*]:

(1) Vote in person, and give proxies to exercise any voting rights, with respect to such shares or memberships or property;

(2) Waive notice of any meeting or give consent to the holding of any meeting; and

(3) Authorize, ratify, approve or confirm any action that could be taken by shareholders, members, or property owners.

[8] Receipt of Public Benefits

The issuance of a declaration of emancipation does not entitle the minor to any benefits under Division 9 of the Welfare and Institutions Code [*Welf. & Inst. Code § 10000 et seq.*] that would not otherwise accrue to an emancipated minor [*Fam. Code § 7111*]. However, even if an emancipated minor is otherwise entitled, receipt of public benefits may be evidence that a minor is indigent and has no means of support, thereby constituting grounds for rescission of the declaration of emancipation [*see Fam. Code § 7130(b)*, discussed under *§ 245.15[12] below*].

[9] Issuance of Declaration of Emancipation; Standards and Effect

The court must grant a declaration of emancipation if it finds that the required allegations in the petition are true and that emancipation would not be contrary to the minor's best interests [*Fam. Code § 7122(a)*]. A declaration is considered conclusive evidence that the minor is emancipated [*Fam. Code § 7122(c)*].

The Judicial Council form of Petition for Declaration of Emancipation [*see see § 245.50*] includes a section in which the court may issue its declaration on determining that no notice is required and that the matter may proceed without hearing [*see Cal. Rules of Ct., Rule 3.1370(e)* (court maygrant petition without hearing)]. It also contains a section for a court order denying the petition if it can be determined from the face of the petition that the petitioner fails to meet the statutory requirements. The Judicial Council form for use as a Declaration of Emancipation after hearing is set forth in *see § 245.53*.

[10] Review by Writ of Mandate

If the minor's petition for a declaration of emancipation is denied, the minor may seek review of the denial by filing a petition for a writ of mandate [*Fam. Code § 7123(a)*]. If the petition is sustained, the parents or guardian have the right to file a petition for writ of mandate if they have appeared in the proceeding and opposed the granting of the petition [*Fam. Code § 7123(b)*].

[11] Identification Cards and Information

On application of a minor declared emancipated by the court, the Department of Motor Vehicles must enter identifying information in its law enforcement computer network. The fact of emancipation must be stated on the department's identification card issued to the emancipated minor [*Fam. Code § 7140*]. A person who, in good faith, has examined a minor's identification card and relies on a minor's representation that the minor is emancipated, has the same rights and obligations as if the minor were in fact emancipated at the time of the representation [*Fam. Code § 7141*]. No public entity or employee is liable for any loss or injury resulting directly or indirectly from false or inaccurate information contained in the Department of Motor Vehicles records system or identification cards [*Fam. Code § 7142*].

For an example of the Judicial Council form of application to the Department of Motor Vehicles, see *§ 245.54*.

[12] Voiding or Rescinding of Declaration

A declaration of emancipation obtained by fraud or by the withholding of material information is voidable [*Fam. Code § 7130(a)*]. A declaration of emancipation may be rescinded on the ground that the minor is indigent and has no means of support [*Fam. Code § 7132(a)*]. The minor may be considered indigent if his or her only source of income is from public assistance benefits [*Fam. Code § 7132(b)*].

A petition to void a declaration of emancipation may be filed in the court that made the declaration by any person or by any public or private agency [*Fam. Code § 7131*]. A petition for rescission may be filed by the minor declared emancipated, by the minor's conservator, or by the district attorney of the county in which the minor resides. The petition must be filed in the county in which the minor or the conservator resides [*Fam. Code § 7132(a)*].

Reasonable notice of a petition to void or rescind a declaration of emancipation must be given to the minor's parents or guardian, or proof made to the court that their addresses are unknown, or that for other reason notice cannot be given [*Fam. Code § 7133(a)*]. The notice to parents must state that if the declaration of emancipation is voided or rescinded, the parents may be liable to provide support and medical insurance coverage for the child [*Fam. Code § 7133(b)*; *see Fam. Code § 4000 et seq.*; *see also Welf. & Inst. Code §§ 11350, 11350.1, 11475.1, 11490*]. No liability will accrue to any parent or guardian until the parent or guardian is given actual notice [*Fam. Code § 7133(c)*]. From the statutory

language, it is not clear if a parent who does not receive actual notice of the effect of rescission until after rescission is then liable for the support of the minor.

In ruling on a petition to rescind, the court must consider the impact of the rescission on the minor. Before granting rescission, the court must find that it will not be contrary to the best interests of the minor [*Fam. Code § 7132(b)*].

If the petition is sustained, the court must issue an order voiding or rescinding the declaration of emancipation, which must be filed by the clerk of the court [*Fam. Code § 7134*]. If the minor's residence has changed since the declaration was issued, so that the court of a different county has jurisdiction over a petition for rescission, the order of rescission should also be filed in the county where the declaration was issued and filed. Also, notice of the rescission must be sent immediately to the Department of Motor Vehicles, which must remove the information in its law enforcement computer network and invalidate any identification card issued showing the fact of emancipation [*Fam. Code § 7143*; *see Fam. Code § 7140*, discussed under *§ 245.15[11] above*].

Voiding or rescinding a declaration of emancipation does not alter any contractual obligations or rights or any property rights or interests that arose during the period when the declaration was in effect [*Fam. Code § 7135*]. It also cannot affect the status of the minor under decisional case law any more than the original declaration of emancipation could have that effect [*see Fam. Code § 7001*]. That is, if the statutory declaration of emancipation is no longer effective, the minor may nonetheless be emancipated for some purposes under the prior nonstatutory standards [*see* discussion in *§ 245.14*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesGeneral OverviewCriminal Law & ProcedureJuvenile OffendersGeneral OverviewFamily LawFamily Relationships & TortsTort LiabilityChild TortsFamily LawParental Duties & RightsEmancipation of MinorsHealthcare LawTreatmentPatient ConsentInformed Consent

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[Reserved]

§§ 245.16[Reserved]

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§ 245.30 State Statutes

General purpose and intent of Emancipation of Minors Law. *Fam. Code §§ 7000-7002*

Effect of emancipation. *Fam. Code §§ 7050-7052*

Court declarations of emancipation. *Fam. Code §§ 7110-7123*

Voiding or rescinding declarations of emancipation. *Fam. Code §§ 7130-7135*

Department of Motor Vehicles information and identification cards. *Fam. Code §§ 7140-7143*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsTerminationEmancipation of ChildFamily LawParental Duties & RightsEmancipation of Minors

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§ 245.31 Decisions

Arguable parental failure to adequately provide for minor does not constitute parental consent or acquiescence to minor's living apart from parents. *Bonnie P. v. Superior Court (2005) 134 Cal. App. 4th 1249, 1260, 37 Cal. Rptr. 3d 77*

Emancipation as resulting from express agreement of parents and child. *In re Marriage of Whitney (1977) 71 Cal. App. 3d 179, 183, 139 Cal. Rptr. 324* ; *Perkins v. Robertson (1956) 140 Cal. App. 2d 536, 540, 295 P.2d 972]*

Emancipation as resulting by implication from conduct of parents and child having effect of cutting parental ties. *In re Marriage of Whitney (1977) 71 Cal. App. 3d 179, 183, 139 Cal. Rptr. 324* ; *Perkins v. Robertson (1956) 140 Cal. App. 2d 536, 540, 295 P.2d 972*

At least partial emancipation as provable as question of fact under principles established in case law. *Martinez v. Southern Pacific Co. (1955) 45 Cal. 2d 244, 253-254, 288 P.2d 868*

Minor as being deemed emancipated for purposes of establishing his or her own residence. *Jolicoeur v. Mihaly (1971) 5 Cal. 3d 565, 579-581, 96 Cal. Rptr. 697, 488 P.2d 1* ; *Lev v. College of Marin (1971) 22 Cal. App. 3d 488, 491, 99 Cal. Rptr. 476*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawParental Duties & RightsDutiesCare & Control of ChildrenFamily LawParental Duties & RightsEmancipation of Minors

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§ 245.32 Law Reviews

Barnett & Spradlin, *Enslavement in the Twentieth Century: The Right of Parents to Retain Their Children's Earnings, 5 Pepperdine L. Rev. 673 (1978)*

Geiser, *The Rights of Children, 28 Hastings L.J. 1027 (1977)*

Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings, 11 Harv. C.R.-C.L. L. Rev. 565 (1976)*

Ellis, *Volunteering Children: Parental Commitment of Minors to Mental Institutions, 62 Cal. L. Rev. 840 (1974)*

Comment, *A Minor's Right to Contraceptives, 7 U.C. Davis L. Rev. 270 (1974)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentFamily LawGuardiansGeneral OverviewFamily LawParental Duties & RightsDutiesCare & Control of Children

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§ 245.33 Text References

California Legal Forms, Ch. 100, *Minors and Parents* (Matthew Bender)

Kirkland, Lurvey Richmond & Wagner, California Family Law Practice and Procedure, 2d ed., Ch. 30, *The Parent-Child Relationship* (Matthew Bender)

Legal Topics:

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

§§ 245.34[Reserved]

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20-245 California Forms of Pleading and Practice--Annotated § 245.50

§ 245.50 Petition for Declaration of Emancipation of Minor, Order Prescribing Notice, Declaration of Emancipation, and Order Denying Petition [Fam. Code § 7120]--Judicial Council Form MC-300

[1] FORM Petition for Declaration of Emancipation of Minor, Order Prescribing Notice, Declaration of Emancipation, and Order Denying Petition [Fam. Code § 7120]--Judicial Council Form MC-300

Click here to view image.

[2] Use of Form

This form is the Judicial Council form (MC-300) for use by a minor to commence proceedings for a declaration of emancipation. Because this form is "adopted" rather than "approved" by the Judicial Council, its use is mandatory [*see Cal. Rules of Ct., Rule 3.1370(a)*; *see also* Introductory Statement to California Rules of Court; *Gov. Code § 68511*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The Judicial Council has promulgated these forms to be suitable for use by minors acting as their own counsel [*see Fam. Code § 7110*]. Evidently the Legislature contemplated that the minor does not have to appear through a guardian ad litem [*see Code Civ. Proc. § 372*].

[3] Jurisdiction and Venue

The petition is to be filed in the superior court of the county in which the minor resides or is temporarily domiciled [*Fam. Code § 7120(a)*]. The minor must be able to provide a verifiable residence address [*Cal. Rules of Ct., Rule 3.1370(a)*]. The petition must be filed and heard in the juvenile court, or other superior court department so designated by local rule or by order of the presiding judge [*Cal. Rules of Ct., Rule 3.1370(b)* (petition to emancipate child who is dependent or ward of juvenile court must be filed in juvenile court)].

[4] Contents

This form contains the required allegations [*see Fam. Code § 7120*, discussed in *§ 245.15[3] above*]; an order prescribing notice [*see Fam. Code § 7120*, discussed in *§ 245.15[4], above*]; a declaration of emancipation if no notice is required; an order denying the petition if the court determines from the face of the petition that the petitioner is not entitled to emancipation; and a clerk's certification. A completed income and expense declaration must be attached [*Fam. Code § 7120(b)(3)*; *Cal. Rules of Ct., Rule 3.1370(a)* (requires income and expense declaration specially designed for use in emancipation matters, as provided in Cal. Judicial Council Form MC-306); see comments to *see § 245.52, below*].

[5] Filing Fee

Unless waived, the petitioning minor must pay the filing fee. However, the ability or inability to pay the fee is not in and of itself evidence of the financial responsibility of the minor as required for emancipation [*Cal. Rules of Ct., Rule 3.1370(d)*].

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Volume 20: Easements thru Eminent Domain-Chs. 240-247
Chapter 245 EMANCIPATION OF MINORS
PART IV. FORMS

20-245 California Forms of Pleading and Practice--Annotated § 245.51

§ 245.51 Emancipation of Minor Notice of Hearing [Fam. Code § 7133]--Judicial Council Form MC-305

[1] FORM Emancipation of Minor Notice of Hearing [Fam. Code § 7133]--Judicial Council Form MC-305

Click here to view image.

[2] Use of Form

This form is the Judicial Council form (MC-305) for use to give notice of a hearing on a petition for a declaration of emancipation of a minor [*see Fam. Code § 7133*, discussed in *§ 245.15[4], above*]. Because this form is "adopted" rather than "approved" by the Judicial Council, its use is mandatory [*see* Introductory Statement to California Rules of Court; *see also Gov. Code § 68511*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents

This form contains a warning to parents, required by statute [*see Fam. Code § 7133(b)*] that the declaration may be rescinded. In this case, the parental duty of support will be reimposed. The form also contains a section in which any person entitled to notice may waive notice and consent to a declaration of emancipation without a hearing.

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20-245 California Forms of Pleading and Practice--Annotated § 245.52

§ 245.52 Emancipation of Minor Income and Expense Declaration--Judicial Council Form MC-306

[1] FORM Emancipation of Minor Income and Expense Declaration--Judicial Council Form MC-306

Click here to view image.

[2] Use of Form

This form is the Judicial Council form of Income and Expense Declaration for use in emancipation proceedings [Cal. Judicial Council Form MC-306]. It is a mandatory form, adopted for use by all courts, that is specially designed to be completed and attached to the petition in an emancipation proceeding[Cal. Judicial Council Form MC-306; *Cal. Rules of Ct., Rule 3.1370*]. *Fam. Code § 7120(b)(3)* requires an income and expense declaration to be attached to the emancipation petition. Counsel should attach this specialized income and expense form (Cal. Judicial Council Form MC-306) to the petition, instead of the more elaborate, dissolution-oriented, family law income and expense form (Cal. Judicial Council Form FL-150).

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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20-245 California Forms of Pleading and Practice--Annotated § 245.53

§ 245.53 Declaration of Emancipation of Minor After Hearing [Fam. Code § 7122]--Judicial Council Form MC-310

[1] FORM Declaration of Emancipation of Minor After Hearing [Fam. Code § 7122]--Judicial Council Form MC-310

Click here to view image.

[2] Use of Form

The foregoing form is the Judicial Council form (MC-310) for use as a declaration of emancipation if the matter was contested and determined after hearing. If the petition is sustained, the court must forthwith issue a declaration of emancipation, which must be filed by the clerk of the court [*Fam. Code § 7122(b)*].

Because this form is "adopted" rather than "approved" by the Judicial Council, its use is mandatory [*see* Introductory Statement to California Rules of Court; *see also Gov. Code § 68511*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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20-245 California Forms of Pleading and Practice--Annotated § 245.54

§ 245.54 Emancipated Minor's Application to California Department of Motor Vehicles [Fam. Code § 7140]--Judicial Council Form MC-315

[1] FORM Emancipated Minor's Application to California Department of Motor Vehicles [Fam. Code § 7140]--Judicial Council Form MC-315

Click here to view image.

[2] Use of Form

This form is the optional Judicial Council form of Emancipated Minor's Application to California Department of Motor Vehicles [Cal. Judicial Council Form MC-315]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form calls for the emancipated minor to identify the date of his declaration of emancipation and the name and court of the judge who issued it. A copy of the declaration must be attached.

On receipt of the application, the Department of Motor Vehicles will enter identifying information in its law enforcement computer network and will state the fact of emancipation on the identification card issued to the minor [*Fam. Code § 7140*].

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Chapter 246 EMERGENCY VEHICLES

20-246 California Forms of Pleading and Practice--Annotated 246.syn

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[3] Police Officers and Vehicles

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§ 246.33 Attorney General Opinions

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§ 246.35 Text References

§§ 246.36-246.49 [Reserved]

§ 246.50 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Caused by Negligence [Civ. Code § 1714(a)] in Operation of Emergency Vehicle Responding to Emergency Call--By Driver of [or Passenger in] Private Vehicle Against Public Entity

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction

[5] Venue

[6] Verification

[7] Specifying Amount of Damages

[8] Filing Claim With Public Entity

[9] Cross References

§ 246.51 Complaint for Damages [Civ. Code § 3333] for Damage to Building Caused by Negligence [Civ. Code § 1714(a)] in Operation of Emergency Vehicle--By Owner of Premises Against Public Entity

[1] FORM

[2] Use of Form

[3] Venue

[4] Cross References

§ 246.52 Complaint for Damages for Wrongful Death of Driver of or Passenger in Private Vehicle [Code Civ. Proc. § 377.60] Caused by Negligence [Civ. Code § 1714(a)] in Operation of Emergency Vehicle--By Entitled Person(s)

Against Public Entity

[1] FORM

[2] Use of Form

[3] Plaintiffs

[4] Award of Damages

[5] Survival Action

[6] Cross References

§ 246.53 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Caused by Negligence [Civ. Code § 1714(a)] in Operation of Private Vehicle--By Driver of or Passenger in Emergency Vehicle Against Driver and Employer of Driver of Private Vehicle

[1] FORM

[2] Use of Form

[3] Verification

[4] Joinder of Employer

[5] Cross References

§ 246.54 Complaint for Damages [Civ. Code § 3333] for Injury to Emergency Vehicle Caused by Negligence [Civ. Code § 1714(a)] in Operation of Private Vehicle--By Owner of Emergency Vehicle Against Owner and Operator of Negligent Vehicle

[1] FORM

[2] Use of Form

[3] Cross References

§ 246.55 Complaint for Damages for Wrongful Death of Passenger in Emergency Vehicle [Code Civ. Proc. § 377.60] Caused by Negligence [Civ. Code § 1714(a)]--Delay of Private Ambulance Transporting Decedent to Hospital--By Entitled Person(s) Against Ambulance Service

[1] FORM

[2] Use of Form

[3] Cross References

§ 246.56 Allegation for Use in Complaint Against Private Ambulance Service for Injuries Arising out of Negligent Transporting of Plaintiff--Injury From Fall of Ambulance Gurney (Wheeled Stretcher)

[1] FORM

[2] Use of Form

[3] Cross References

§ 246.57 Allegations for Use in Complaint Against Private Ambulance Service for Injuries Arising out of Negligent Transporting of Plaintiff--Passenger in Ambulance Injured by Collision Caused by Ambulance Service

[1] FORM

[2] Use of Form

[3] Cross References

§ 246.58 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Exemption From Vehicle Code Provisions by Reason of Response to Emergency Call [Veh. Code § 21055]

[1] FORM

[2] Use of Form

[3] Cross References

§ 246.59 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Immunity of Public Employee by Reason of Response to Emergency Call [Veh. Code § 17004]

[1] FORM

[2] Use of Form

[3] Cross References

§ 246.60 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Immunity of Public Employee or Public Entity for Injury to Fleeing Suspect [Gov. Code § 845.8]

[1] FORM

[2] Use of Form

[3] Immunity for Injury to Fleeing Suspect

[4] Cross References

§ 246.61 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Immunity of Public Entity by Reason of Having Policy for Safe Police Pursuit [Veh. Code § 17004.7]

[1] FORM

[2] Use of Form

[3] Cross References

§ 246.62 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Exemption of Physician From Speed Limitations by Reason of Response to Emergency Call [Veh. Code § 21058]

[1] FORM

[2] Use of Form

[3] Cross References

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Volume 20: Easements thru Eminent Domain-Chs. 240-247
Chapter 246 EMERGENCY VEHICLES
PART I. SCOPE

20-246 California Forms of Pleading and Practice--Annotated § 246.01

§ 246.01 Scope of Chapter

This chapter discusses and contains forms for use in (1) actions by private individuals against public or private entities and their employees for damages arising from the negligent operation of emergency vehicles, and (2) actions by the owners, operators, and passengers of emergency vehicles against private individuals for negligence resulting in damage to such vehicles and their owners, operators, and passengers. The forms include:

- Complaints against public entities [*see §§ 246.50 -246.52*].
- Complaints against owners or operators of private vehicles [*see §§ 246.53 -246.55*].
- Allegations for use in actions against an ambulance service by private individuals [*see §§ 246.56 -246.57*].
- Specific defenses available to the owner or operator of an emergency vehicle [*see §§ 246.58 -246.62*].

For discussion or and forms for use in actions against public entities generally, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawGood Samaritan LawsTortsNegligenceGeneral OverviewTortsTransportation TortsMotor VehiclesMotor Carriers

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PART I. SCOPE

20-246 California Forms of Pleading and Practice--Annotated § 246.02

§ 246.02 Cross References

For discussion and forms for use in actions involving automobile accident claims generally, see Ch. 83, *Automobiles: Bringing the Action*

For discussion and forms for use in actions involving negligence generally, see Ch. 380, *Negligence*

For discussion and forms for use in actions involving public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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20-246 California Forms of Pleading and Practice--Annotated §§ 246.03-246.09

[Reserved]

§§ 246.03[Reserved]

California Forms of Pleading and Practice--Annotated

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Chapter 246 EMERGENCY VEHICLES
PART II. LEGAL BACKGROUND

20-246 California Forms of Pleading and Practice--Annotated § 246.10

§ 246.10 Governing Law

The law governing the liability of private owners and their employees for negligent operation of authorized emergency vehicles is set forth in *Veh. Code §§ 17150-17159*; the law governing the liability of public entities and public employees is set forth in *Veh. Code §§ 17000-17004.7*. The law governing the liability of rescue teams is contained in *Veh. Code § 165.5*. *Veh. Code §§ 21052*, *21055*, *21056*, and *21058* pertain to exemptions from traffic laws for emergency vehicles and the standard of care required of the operators of such vehicles, and *Veh. Code §§ 21806* and *21807* relate to the right-of-way afforded emergency vehicles.

Provisions for the licensing of emergency vehicles and ambulances are set out in *Veh. Code §§ 2416* and *2510-2512*, respectively. Regulations that have been promulgated in connection with these provisions are contained in *13 Cal. Code Reg. §§ 1100-1109* (ambulances), and *1120-1124* (emergency vehicles).

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawGood Samaritan LawsTortsNegligenceGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral OverviewTortsTransportation TortsMotor VehiclesMotor Carriers

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PART II. LEGAL BACKGROUND

20-246 California Forms of Pleading and Practice--Annotated § 246.11

§ 246.11 Definitions

The more important types of authorized emergency vehicles, as defined in *Veh. Code § 165*, include:

- Publicly owned and operated ambulances, lifeguard or lifesaving equipment, or privately owned or operated ambulances licensed by the Commissioner of the California Highway Patrol to operate in response to emergency calls.

- Publicly owned vehicles operated by forestry, fire, or police departments.

- State and federal vehicles used in law enforcement or in response to emergency calls.

- Any other vehicles for which an authorized emergency vehicle permit has been issued by the Commissioner of the California Highway Patrol.

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCommercial VehiclesGeneral OverviewTransportation LawCommercial VehiclesLicensing & RegistrationTransportation LawCommercial VehiclesTraffic Regulation

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PART II. LEGAL BACKGROUND

20-246 California Forms of Pleading and Practice--Annotated § 246.12

§ 246.12 Liability for Negligent Operation of Emergency Vehicles

[1] Public Entities Generally

A public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his or her employment [*Veh. Code § 17001*; *see also Veh. Code § 17000* (defining "employee," "employment," and "public entity")]. The public entity can be liable under *Veh. Code § 17001* even if the public employee is immune; neither *Gov. Code § 815.2(b)* nor *Gov. Code § 845.8* apply to immunize entities from liability under § 17001 [*Thomas v. City of Richmond (1995) 9 Cal. 4th 1154, 1158-1159, 40 Cal. Rptr. 2d 442, 892 P.2d 1185* (*Gov. Code § 845.8* inapplicable); *Brummett v. County of Sacramento (1978) 21 Cal. 3d 880, 883-885, 148 Cal. Rptr. 361, 582 P.2d 952* (*Gov. Code § 815.2(b)* inapplicable)].

Under *Veh. Code §§ 17001*, it is not sufficient that a motor vehicle somehow be involved in the series of events that results in the injury; instead, the vehicle must be in a state of being at work or in the exercise of some specific function by performing work or producing effects at the time and place the injury is inflicted. Accordingly, where police shot and killed a suspect well after a police vehicular pursuit concluded (after the police stopped and exited their cars and chased the suspect on foot), neither the individual officers nor the public entity may be held civilly liable for the suspect's death based on the manner in which the officers conducted the vehicular pursuit [*Hernandez v. City of Pomona (2009) 46 Cal. 4th 501, 517, 94 Cal. Rptr. 3d 1, 207 P.3d 506]* .

A public entity is also liable for death or injury to person or property to the same extent as a private person under the provisions of the Vehicle Code imposing liability on owners of vehicles for injury or damage caused by permissive users [*Veh. Code § 17002*; *see Veh. Code § 17150 et seq.* (concerning liability of vehicle owners for injuries caused by permissive users)]. If the liability is based solely on the ownership of the vehicle, and not on the act or omission of a public employee acting in the scope of his or her employment, the liability is limited to the amount provided in *Veh. Code § 17151* [*see* Cal. L. Revision Comm'n Comment to *Veh. Code § 17002*]. In addition, the provisions of *Gov. Code §§ 825-825.6* take precedence over the subrogation rights given to private owners by *Veh. Code § 17153* [*see Veh. Code § 17002*; Cal. L. Revision Comm'n Comment to *Veh. Code § 17002*].

For discussion of liabilities and immunities of public entities generally, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* ; for discussion of vicarious liabilities of vehicle owners generally, see *Ch. 82, Automobiles: Causes of Action § 82.16*.

[2] Emergency Rescue Personnel Immunity

In contrast to *Veh. Code § 17001*, to encourage public entities and emergency rescue personnel to provide emergency services, *Health & Safety Code § 1799.107* provides that neither a public entity nor emergency rescue personnel shall be liable for any injury caused by an action taken by the emergency rescue personnel acting within the scope of their employment to provide emergency services, unless the action taken was performed in bad faith or in a grossly negligent manner [*Health & Safety Code § 1799.107(b)*]. An action taken when providing emergency services is presumed to have been performed in good faith and without gross negligence, and that presumption affects the burden of proof [*Health & Safety Code § 1799.107(c)*].

Health & Safety Code § 1799.107 states that its provisions apply except as provided in *Veh. Code §§ 17000-17004.5* [*Health & Safety Code § 1799.107(b)*]. The relationship between *Health & Safety Code § 1799.107(b)* and the Vehicle Code sections imposing liability on public entities is unclear. One possible rationale could be that *Veh. Code § 17001* applies when the wrongful act or omission occurs when an emergency vehicle is being operated, while *Health & Safety Code § 1799.107* provides a qualified immunity when other emergency services are being provided. This distinction seems inconsistent with the definition of "emergency services" in *Health & Safety Code § 1799.107*, however, which includes rescue procedures and transportation [*Health & Safety Code § 1799.107(e)*]. On the other hand, transportation in this context might be construed as meaning transportation in other than a motor vehicle, for example in a helicopter, so that *Veh. Code § 17001* could still apply to emergency vehicle operation]. This section provides that a public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his or her employment. The section follows the provisions of the California Tort Claims Act [*Gov. Code §§ 810-996.6*] by imposing liability on a public entity regardless of whether the tort was a negligent or intentional tort and, to the extent that the term "servant" describes a narrower classification of persons than the term "agent," by resticting liability to the former class of persons [Cal. L. Revision Comm'n Comment to *Veh. Code § 17001*].

Health & Safety Code § 1799.107 unambiguously applies to 911 emergency dispatching [*Eastburn v. Regional Fire Protection Authority (2003) 31 Cal. 4th 1175, 1184, 7 Cal. Rptr. 3d 552, 80 P.3d 656]* .

[3] Public Entity's Immunity for Police Pursuits

[a] In General

Neither a public entity nor a public employee is liable for any injury caused by an escaping or escaped prisoner, an escaping or escaped arrested person, or a person resisting arrest [*Gov. Code § 845.8(b)*]. Although this provision is stated broadly, courts have interpreted the scope of this immunity to be limited by *Veh. Code § 17001* (discussed in *§ 246.12[1]*) [*Thomas v. City of Richmond (1995) 9 Cal. 4th 1154, 1159, 40 Cal. Rptr. 2d 442, 892 P.2d 1185]* . Thus, *Gov. Code § 845.8* does not provide immunity to public entities for liability that is predicated on *Veh. Code § 17001* [*Thomas v. City of Richmond (1995) 9 Cal. 4th 1154, 1165, 40 Cal. Rptr. 2d 442, 892 P.2d 1185* ; *see § 246.60*].

[b] Written Pursuit Policy Immunity

A much broader immunity is available to public entities under *Veh. Code § 17004.7*, which was enacted with the intent of encouraging public employers of peace officers to adopt express safe pursuit guidelines [*see Weiner v. City of San Diego (1991) 229 Cal. App. 3d 1203, 1209, 280 Cal. Rptr. 818]* . Effective July 1, 2007, a public agency that adopts and promulgates a written policy on vehicular pursuits that meets specified criteria, and provides regular and periodic training on vehicular pursuits on an annual basis, is immune from liability for civil damages for personal injury, death,

or property damage resulting from the collision of a vehicle being operated by an actual or suspected violator of the law who is being, has been, or believes he or she is being or has been, pursued in a motor vehicle by a peace officer employed by the public agency [*Veh. Code § 17004.7(b)(1), (g)*]. The adoption of a vehicle pursuit policy is discretionary, and if adopted, the immunity provided is in addition to any other immunity that may be provided by law [*Veh. Code § 17004.7(a)*].

Similar statutory immunity was provided prior to July 1, 2007, although the earlier version of the statute did not impose either a promulgation or training requirement on the public agency, and it imposed less detailed substantive criteria on the adopted policy [*see* former *Veh. Code § 17004.7(b), (c)*; *see also Ketchum v. State of Cal. (1998) 62 Cal. App. 4th 957, 966-970, 73 Cal. Rptr. 2d 152* (policy adopted by CHP held to provide adequate pursuit guidelines under prior statute)].

"Promulgation" of a written policy under the 2007 provisions includes, but is not limited to, a requirement that all peace officers employed by the public agency certify in writing that they have received, read, and understand the policy [*Veh. Code § 17004.7(b)(2)*]. The failure of an individual officer to sign a certification, however, may not be used to impose liability on an individual officer or a public entity [*Veh. Code § 17004.7(b)(2)*]. "Regular and periodic training" means annual training that includes, at a minimum, coverage of each of the subjects and policy elements set forth below, and that complies, at a minimum, with the training guidelines established pursuant to *Pen. Code § 13519.8* [*Veh. Code § 17004.7(d)*].

To be entitled to immunity under the 2007 statute, the pursuit policy must meet the following minimum standards [*Veh. Code § 17004.7(c)*]:

- The policy must determine under what circumstances to initiate a pursuit. The policy must define a "pursuit," articulate the reasons for which a pursuit is authorized, and identify the issues that should be considered in reaching the decision to pursue. It should also address the importance of protecting the public and balancing the known or reasonably suspected offense, and the apparent need for immediate capture against the risks to peace officers, innocent motorists, and others to protect the public.

- The policy must determine the total number of law enforcement vehicles authorized to participate in a pursuit. It must establish the authorized number of law enforcement units and supervisors who may be involved in a pursuit, describe the responsibility of each authorized unit and the role of each peace officer and supervisor, and specify if and when additional units are authorized.

- The policy must determine the communication procedures to be followed during a pursuit. It must specify pursuit coordination and control procedures and determine assignment of communications responsibility by unit and organizational entity.

- The policy must determine the role of the supervisor in managing and controlling a pursuit. Supervisory responsibility must include management and control of a pursuit, assessment of risk factors associated with a pursuit, and when to terminate a pursuit.

- The policy must determine driving tactics and the circumstances under which the tactics may be appropriate.

- The policy must determine authorized pursuit intervention tactics. Pursuit intervention tactics include, but are not limited to, blocking, ramming, boxing, and roadblock procedures. The policy must specify under what circumstances and conditions each approved tactic is authorized to be used.

- The policy must determine the factors to be considered by a peace officer and supervisor in

determining speeds throughout a pursuit. Evaluation must take into consideration public safety, peace officer safety, and safety of the occupants in a fleeing vehicle.

- The policy must determine the role of air support, where available. Air support must include coordinating the activities of resources on the ground, reporting on the progress of a pursuit, and providing peace officers and supervisors with information to evaluate whether or not to continue the pursuit.

- The policy must determine when to terminate or discontinue a pursuit. Factors to be considered include, but are not limited to, all of the following: (1) Ongoing evaluation of risk to the public or pursuing peace officer; (2) The protection of the public, given the known or reasonably suspected offense and apparent need for immediate capture against the risks to the public and peace officers; (3) Vehicular or pedestrian traffic safety and volume; (4) Weather conditions; (5) Traffic conditions; (6) Speeds; (7) Availability of air support; (8) Procedures when an offender is identified and may be apprehended at a later time or when the location of the pursuit vehicle is no longer known.

- The policy must determine procedures for apprehending an offender following a pursuit. Safety of the public and peace officers during the law enforcement effort to capture an offender shall be an important factor.

- The policy must determine effective coordination, management, and control of interjurisdictional pursuits. The policy must include, but not be limited to, all of the following: (1) Supervisory control and management of a pursuit that enters another jurisdiction; (2) Communications and notifications among the agencies involved; (3) Involvement in another jurisdiction's pursuit; (4) Roles and responsibilities of units and coordination, management, and control at the termination of an interjurisdictional pursuit.

- The policy must provide for reporting and postpursuit analysis as required by *Vehicle Code Section 14602.1*. It must establish the level and procedures of postpursuit analysis, review, and feedback and establish procedures for written postpursuit review and followup.

These pursuit policy requirements are minimum policy standards and do not limit an agency from adopting additional policy requirements [*Veh. Code § 17004.7(e)*]. These provisions do not preclude the adoption of a policy that limits or restricts pursuits [*Veh. Code § 17004.7(e)*]. At trial, the determination of whether a public agency has complied with these pursuit policy requirements, or with the training requirements, is a question of law for the court [*Veh. Code § 17004.7(f)*].

This immunity provision is not limited to situations in which the police officer chases a suspect in a car. Despite statutory language in *Veh. Code § 17004.7* protecting police officers who chase suspects "in" rather than "on" motor vehicles, immunity is also available to police officers who used a motorcycle in the chase [*McGee v. City of Laguna Beach (1997) 56 Cal. App. 4th 537, 543, 65 Cal. Rptr. 2d 506]* .

The statute uses the terms "public entity" and "public agency" interchangeably, and both terms include a city [*Alcala v. City of Corcoran (2007) 147 Cal. App. 4th 666, 671, 53 Cal. Rptr. 3d 908]* . A written policy on police pursuits that is promulgated by a city's police chief qualifies under *Veh. Code § 17004.7*, since a police department is a public agency and a public entity. The policy need not be approved by the police commissioner or the city council. A pursuit policy ordered into effect by a city's chief of police is, within the meaning of *Veh. Code § 17004.7*, a policy adopted by the city [*Brumer v. City of Los Angeles (1994) 24 Cal. App. 4th 983, 987, 29 Cal. Rptr. 2d 515; see also Alcala v. City of Corcoran (2007) 147 Cal. App. 4th 666, 674, 53 Cal. Rptr. 3d 908 (police chief's conduct was sufficient to establish that policy was formally adopted)]* .

The extent to which a public agency's policy on police pursuits was followed in the particular pursuit is irrelevant. If the policy meets the statutory requirements of *Veh. Code § 17004.7*, immunity results [*Nguyen v. City of Westminster (2002) 103 Cal. App. 4th 1161, 1167, 127 Cal. Rptr. 2d 388* ; *Brumer v. City of Los Angeles (1994) 24 Cal. App. 4th 983, 987, 29 Cal. Rptr. 2d 515]* . The public entity need not prove that during a particular chase its policy was actually practiced by the pursuing officer [*Kishida v. State of California (1991) 229 Cal. App. 3d 329, 335-337, 280 Cal. Rptr. 62* (legislature's use of "adopt" shows that focus is on entity's conduct, rather than officer's); *see also Weiner v. City of San Diego (1991) 229 Cal. App. 3d 1203, 1210-1211, 280 Cal. Rptr. 818* (reaching same result, and analyzing whether particular policy complied with statute)].

The immunity of *Veh. Code § 17004.7* applies even when the injury is sustained when the pursuing officer deliberately rams his or her car into the pursued vehicle in an attempt to disable it [*Weaver v. State of California (1998) 63 Cal. App. 4th 188, 200, 73 Cal. Rptr. 2d 571]* .

Immunity under *Veh. Code § 17004.7* applied in a case in which a suspect's motorcycle crashed to the ground while fleeing from police, resulting in the death of a passenger on the motorcycle, who jumped or was thrown off the crashing motorcycle and was immediately struck by the pursuing police vehicle. Under these circumstances, the passenger's act of jumping or falling off the crashing motorcycle resulted from the collision of the motorcycle with the ground, as did the passenger's immediate impact with the pursuing police vehicle [*Lewis v. County of Sacramento (2001) 93 Cal. App. 4th 107, 120-121, 113 Cal. Rptr. 2d 90]* . Immunity also applied under the statute in a case in which a vehicle being pursued struck a trash dumpster, which in turn struck a bystander, causing serious injury and eventually death [*Nguyen v. City of Westminster (2002) 103 Cal. App. 4th 1161, 1168, 127 Cal. Rptr. 2d 388]* .

[4] Private Owner's Liability

A private owner's liability for the operation of an emergency vehicle is determined in a manner similar to that used in determining a public entity's liability. Liability may arise by virtue of the fact that the vehicle was driven with the express or implied permission of the owner, as provided in *Veh. Code § 17150*. That section provides that a private owner of a motor vehicle, including an ambulance or other emergency vehicle, is liable for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the vehicle by any person using it with the permission, express or implied, of the owner [*see Veh. Code § 17150*]. The owner has a right of subrogation against the operator of the vehicle [*Veh. Code § 17153*]. Liability may also arise because the operator was the agent or ostensible agent of the owner [*see Civ. Code §§ 2334, 2338*; *see also* Ch. 427, *Principal and Agent*].

An owner of a private emergency vehicle is immune from liability for civil damages resulting from training programs in emergency medical services, regardless of whether or not an actual emergency is involved. *Health & Safety Code § 1799.100* provides immunity from liability for civil damages to public or private organizations that sponsor, authorize, support, finance, or supervise the training or certification of people in emergency medical services [*Duckett v. Pistoresi Ambulance Service, Inc. (1993) 19 Cal. App. 4th 1525, 1534-1539, 24 Cal. Rptr. 2d 304]* . Effective January 1, 2009, *Health & Safety Code § 1799.100* also provides similar civil immunity from liability for improper training for local agencies, state or local government entities, and private businesses or nonprofit organizations included on the statewide emergency services registry established under *Gov. Code § 8588.2* that voluntarily and without expectation and receipt of compensation donate services, goods, labor, equipment, resources, or dispensaries or other facilities in compliance with *Gov. Code § 8588.2* [*Health & Safety Code § 1799.100*].

[5] Immunity of Privately Maintained Fire Departments

One exception to the general rule of liability of a private owner of a negligently driven emergency vehicle is made for certain private firms or corporations which maintain fire departments and are accorded immunity similar to that given public employees under *Veh. Code § 17004* [*Veh. Code § 17004.5*; *see also* Health & Safety Code §§ 13636(b), *14095*, *14455.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawGood Samaritan LawsTortsNegligenceGeneral OverviewTortsNegligenceDefensesComparative NegligenceIntentional & Reckless ConductTortsNegligenceDefensesPrivate ImmunitiesGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From Liability

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§ 246.13 Determination of Standard of Care

[1] Exemption Generally

With respect to emergency vehicles, a public entity's and private person's liability under *Veh. Code § 17001, 17002,* and *17150* is subject to the provisions of *Veh. Code §§ 21055* and *21056*. Thus, although the provisions of the Vehicle Code applicable to other drivers on the highways apply to the drivers of authorized emergency vehicles [*see Veh. Code § 21052*], the driver of an authorized emergency vehicle is exempted from compliance with many of these provisions while responding to an emergencey call under the conditions set forth in *Veh. Code § 21055* [*see discussion under § 246.13[3]*].

[2] Conditions of Exemption

The conditions for the application of an exemption from the rules of the road *discussed under § 246.13[3]* require that [*Veh. Code § 21055*]:

- The vehicle be driven in response to an emergency call, engaged in rescue operations, used in the immediate pursuit of an actual or suspected violator of the law or be responding to, but not returning from, a fire alarm; and

- The driver of the vehicle sound a siren as may be reasonably necessary and the vehicle display a lighted red lamp visible from the front as a warning to other drivers and pedestrians.

The exemptions will apply even if an emergency did not in fact exist at the time, if the driver reasonably believed that an emergency existed [*Gallup v. Sparks-Mundo Engineering Co. (1954) 43 Cal. 2d 1, 5, 271 P.2d 34]* .

[3] Enumerated Exemptions

Under the conditions *set out in § 246.13[2], Veh. Code § 21055* exempts the driver of an authorized emergency vehicle from compliance with the Vehicle Code provisions relating to the following subjects:

- Traffic signs, signals, and markings [*Veh. Code § 21350 et seq.*].
- Driving on right side of road, overtaking, and passing [*Veh. Code § 21650 et seq.*].
- Right-of-way [*Veh. Code § 21800 et seq.*; *see Veh. Code § 21406* (duty of drivers and pedestrians to yield right-of-way to emergency vehicles sounding siren and exhibiting visible red light in front of vehicle)].
- Pedestrians' rights and duties [*Veh. Code § 21950 et seq.*].
- Turning, stopping, and use of signals [*Veh. Code § 22100 et seq.*].
- Speed laws [*Veh. Code § 22348 et seq.*].
- Special stop requirements [*Veh. Code § 22450 et seq.*].
- Stopping, standing, and parking [*Veh. Code § 22500 et seq.*].
- Removal of parked and abandoned vehicles [*Veh. Code § 22650 et seq.*].
- Speed laws for off-highway vehicles [*Veh. Code § 38305 et seq.*].
- Turning and starting of off-highway vehicles [*Veh. Code § 38312 et seq.*].

[4] Standard of Care if Exemption Applies

If an exemption under *Veh. Code § 21055* does apply, it does not relieve the driver of an emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor does it protect the driver from the consequences of an arbitrary exercise of the privileges granted in that section [*Veh. Code § 21056*; *see Veh. Code § 21807* (duty of drivers and pedestrians to yield right-of-way under *Veh. Code § 21806* as not relieving emergency vehicle driver from duty of driving with due regard for safety of persons and property)].

A public entity or private owner is thus liable under *Veh. Code § 21056* despite the fact that the operator of the vehicle was exempted from compliance with a particular provision of the Vehicle Code, and in the case of a public entity, despite the fact that the operator was immune from liabliity under *Veh. Code § 17004* [*see* discussion under *§ 246.13[6]*], if the operator drove in such a manner as to impose on others an unreasonable risk of harm [*Brummett v. Sacramento County (1978) 21 Cal. 3d 880, 886, 148 Cal. Rptr. 361, 582 P.2d 952]* .

This standard of care applies, however, only if the action of driving the emergency vehicle is deemed a ministerial act and not discretionary. For example, in the case of a police car, the initial decision to pursue another vehicle is considered the result of a discretionary act and, as such, is entitled to immunity under the provisions of *Gov. Code § 820.2*. That is, the trial court cannot inquire into the police officer's judgment and exercise of discretion in pursuing the other vehicle. However, the actual pursuit is the implementation of this discretionary decision and, as such, is ministerial, imposing on the police officers a duty of care to the general public [*Gibson v. Pasadena (1978) 83 Cal. App. 3d 651, 659-663, 148 Cal. Rptr. 68* ; (holding that plaintiff's complaint had sufficiently alleged that conduct complained of was ministerial act); *see Bratt v. City & County of San Francisco (1975) 50 Cal. App. 3d 550, 554, 123 Cal. Rptr. 774* (affirming judgment of nonsuit in action where negligence was alleged in police officer's decision to give high speed chase rather than in officer's execution of that decision); *see also Reenders v. Ontario (1977) 68 Cal. App. 3d 1045, 1054, 137 Cal. Rptr. 736* (not clearly considering ministerial-discretionary distinction, but affirming motion for summary judgment and holding that police officers were not negligent as a matter of law when police officers were

pursuing suspect who was already operating vehicle on public streets in reckless and dangerous manner); *but see Brummett v. Sacramento County (1978) 21 Cal. 3d 880, 887, 148 Cal. Rptr. 361, 582 P.2d 952* (failing to mention ministerial-discretionary distinction in reversing summary judgment for defendant county and holding that evidence of extreme speed of police vehicles, officer's lack of awareness of color of light at itersection, and instructions on when to discontinue pursuit were sufficient to require jury to weigh facts)].

[5] Standard of Care if Exemption Does Not Apply

Other than the limitation on liability of emergency vehicle operators in connection with the acts or omissions of a rescue team under *Veh. Code § 165.5* [*see* discussion under *§ 246.13[7]*], there is no blanket exemption of emergency vehicles from the rules of the road other than those specifically enumerated in *Veh. Code § 21055*.

If an exemption does not apply because it is not specifically enumerated, the degree of care which is imposed is that which is consistent with the exercise of ordinary prudence in all the prevailing circumstances, including that of the emergency [*Torres v. Los Angeles (1962) 58 Cal. 2d 35, 51, 22 Cal. Rptr. 866, 372 P.2d 906]* .

If an exemption does not apply because the conditions for the application of an exemption were not satisfied under *Veh. Code § 21055* [*see* discussion under *§ 246.13[2]*], then the exemptions are forfeited [*Sparks v. Compton (1976) 64 Cal. App. 3d 592, 596, 134 Cal. Rptr. 684]* . In such a case, the common law standard of care determines the liability of the operation. The fact that the driver was responding to an emergency call in an authorized emergency vehicle may not be considered [*Grant v. Petronella (1975) 50 Cal. App. 3d 281, 289, 123 Cal. Rptr. 399]* . Police officers engaged in a pursuit are under a general duty to exercise due care for the safety of others, and a trier of fact may conclude that the failure to flash red lights or sound a siren to alert innocent parties to the approaching danger violated that duty [*City of Sacramento v. Superior Court (1982) 131 Cal. App. 3d 395, 403-406, 182 Cal. Rptr. 443]* .

[6] Public Entity's Liability Unaffected by Employee's Immunity

The public entity's liability is not affected by the fact that the driver of the emergency vehicle is immune from civil liability as provided in *Veh. Code § 17004* [*see* discussion under *§ 246.14*]. *Gov. Code § 815.2*, providing generally for the immunity of a public entity from liability for the torts of its employee within the scope of employment when the employee is immune, is subject to the provisions of *Veh. Code § 17001*, and does not affect the liability imposed by that section [*Brummett v. County of Sacramento (1978) 21 Cal. 3d 880, 885, 148 Cal. Rptr. 361, 582 P.2d 952* ; *see also Gibson v. Pasadena (1978) 83 Cal. App. 3d 651, 656, 659, 148 Cal. Rptr. 68]* .

Furthermore, *Gov. Code § 845.8*, which provides, in part, that neither a public entity nor a public employee is liable for injury caused by a person resisting arrest, does not immunize a public entity from liability under *Veh. Code § 17001* for the negligent operation of an emergency vehicle. Therefore, although the public employee is not liable under *Veh. Code § 17004* or *Gov. Code § 845.8* for damages resulting from operation of an authorized emergency vehicle in the immediate pursuit of an actual or suspected law violator, the employing entity may be liable under *Veh. Code § 17001* if the entity has adopted a written policy on vehicular pursuits as required by *Veh. Code § 17004.7* [*Thomas v. City of Richmond (1995) 9 Cal. 4th 1154, 1158-1159, 1162, 40 Cal. Rptr. 2d 442, 892 P.2d 1185]* .

The public entity's liability under *Veh. Code § 17001* extends to actions brought by a fleeing suspect based on the pursuers' alleged negligence, as well as to action by innocent third parties [*Thomas v. City of Richmond (1995) 9 Cal. 4th 1154, 1164-1165, 40 Cal. Rptr. 2d 442, 892 P.2d 1185* (suspect fleeing on foot struck by pursuing police car; disapproving *Hooper v. City of Chula Vista (1989) 212 Cal. App. 3d 442, 454-457, 260 Cal. Rptr. 495* , to extent *Hooper* distinguished between third parties and suspect); *cf. Veh. Code § 17004.7* (immunizing public entities from liability to third parties injured by pursued vehicle under certain circumstances); for further discussion of public entity immunity for police pursuits, see *§ 246.12[3]*].

[7] Public Entity's Liability for Acts or Omissions of Rescue Teams

No act or omission of any rescue team operating in conjunction with an authorized emergency vehicle, while attempting in good faith to resuscitate any person who is in immediate danger of loss of life, will impose any liability on the rescue team or the owners or operators of the emergency vehicle. Such a rescue team is defined as a special group of doctors, nurses, volunteers, or employees of the owners or operators of the emergency vehicle who have been trained in cardiopulmonary resuscitation and have been designated by the owners or operators of the vehicle to attempt to resuscitate persons in case of emergency. The owners or operators are not relieved of any duty to train the rescue team or to maintain the equipment used by such a team [*Veh. Code § 165.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawGood Samaritan LawsTortsNegligenceActionsGeneral OverviewTortsNegligenceDefensesContributory NegligenceLimits on ApplicationRescuesTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From LiabilityTortsTransportation TortsMotor VehiclesMotor Carriers

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§ 246.14 Liability of Operators of Emergency Vehicles

[1] Employees of Public Entities

A public employee is not liable for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation in the line of duty of an authorized emergency vehicle in the following instances [*Veh. Code § 17004*]:

- While responding to an emergency call,
- When in the immediate pursuit of an actual or suspected violator of the law, or
- When responding to, but not on returning from, a fire alarm or other emergency call.

In applying this immunity to police pursuit cases, the language of *Veh. Code § 17004* is clear and unambiguous and immunizes the public employee even if negligence in the course of the pursuit is alleged [*Cruz v. Briseno (2000) 22 Cal. 4th 568, 572, 93 Cal. Rptr. 2d 715, 994 P.2d 986* (sheriff's deputy was immune despite failing to turn on lights and siren while pursuing speeding vehicle)]. Also, an emergency is not required to exist in fact if the driver reasonably believed in the existence of an emergency [*see Gallup v. Sparks-Mundo Eng'g Co. (1954) 43 Cal. 2d 1, 5, 271 P.2d 34]* .

There is also a qualified immunity from liability for the provision of emergency services by emergency rescue personnel acting within the scope of their employment [*Health & Safety Code § 1799.107(b)*; *see § 246.12[1]*]. "Emergency rescue personnel" means any person who is an officer, employee, or member of a fire department or fire protection or firefighting agency of the federal government, the State of California, a city, county, city and county, district, or other public or municipal corporation or political subdivision of California, whether the person is a volunteer or partly paid or fully paid, while he or she is actually engaged in providing emergency services [*Health & Safety Code § 1799.107(d)*].

As discussed above, the immunity of a public employee under *Veh. Code § 17004* does not affect the liability of a

public entity. Even though the driver was exempted from a rule of the road, if he or she injured someone in violation of his or her duty to have due regard for the safety of that person under *Veh. Code § 21056*, the employee would be immune, but the public entity would not. The immunity from liability provided in *Health & Safety Code § 1799.107*, however, expressly applies to the public entity, as well as to emergency rescue personnel [*Health & Safety Code § 1799.107(b)*].

[2] Employees of Private Owners

An employee of an authorized, privately owned emergency vehicle, not being a public employee, is not entitled to the immunity from liability provided public employees under *Veh. Code § 17004*. Therefore, it appears that the employee's liability for the negligent operation of an emergency vehicle is the same as that of a public entity [*see* discussion under *§ 246.12*]. In any action against a private owner of an ambulance or other emergency vehicle, the operator of the vehicle must be made a party defendant if personal jurisdiction over him or her can be obtained in any manner [*Veh. Code § 17152*]. The owner of the vehicle may recover from the operator the total of any judgment and costs recovered against the owner [*Veh. Code § 17153*].

An employee of a privately owned emergency vehicle service is immune from liability for civil damages resulting from training programs in emergency medical services, regardless of whether or not an actual emergency is involved. *Health & Safety Code § 1799.100* provides immunity from liability for civil damages to public or private organizations that sponsor, authorize, support, finance, or supervise the training or certification of people in emergency medical services [*Duckett v. Pistoresi Ambulance Service, Inc. (1993) 19 Cal. App. 4th 1525, 1534-1539, 24 Cal. Rptr. 2d 304]* . Effective January 1, 2009, *Health & Safety Code § 1799.100* also provides similar civil immunity from liability for improper training for local agencies, state or local government entities, and private businesses or nonprofit organizations included on the statewide emergency services registry established under *Gov. Code § 8588.2* that voluntarily and without expectation and receipt of compensation donate services, goods, labor, equipment, resources, or dispensaries or other facilities in compliance with *Gov. Code § 8588.2* [*Health & Safety Code § 1799.100*].

[3] Exemption of Physician From Speed Laws

Of course, if the vehicle is an authorized emergency vehicle as defined in *Veh. Code § 165.5* [*see* discussion under *§ 246.30[2]*], the operator, and hence the owner, is entitled to the provisions exempting the operation of the vehicle from the rules of the road as enumerated in *Veh. Code § 21055* [*see* discussions under *§ 246.13[2], [3]*]. In addition, a private physician who is not driving an emergency vehicle is exempt from certain speed laws provided in *Veh. Code §§ 22351* and *22352* if he or she is traveling in response to an emergency call and the vehicle he or she is using displays an insignia approved by the Department of the California Highway Patrol indicating that the vehicle is owned by licensed physician. As is the case with opera tors of emergency vehicles, the physician still has a duty to drive with due regard for the safety of others [*Veh. Code § 21058*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawGood Samaritan LawsTortsNegligenceGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployeesTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From LiabilityTransportation LawPrivate VehiclesTraffic RegulationGeneral Overview

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§ 246.15 Liability for Costs of Emergency Response

Pursuant to legislation passed in 2004, any person who intentionally, knowingly, and willfully enters into any area that is closed or has been closed to the public by competent authority for any reason, or an area that a reasonable person under the circumstances should have known was closed to the public, is liable for the expenses of an emergency response required to search for or rescue that person, or, if the person was operating a vehicle, any of the person's passengers, plus the expenses for the removal of any inoperable vehicle [*Gov. Code § 53159(b)*]. Posting a sign, placing a barricade or a restraining or retaining wall, roping off an area, or any other device is deemed to be a sufficient indication that an area is closed to the public due to a danger of injury, for the public's safety, or for any other reason [*Gov. Code § 53159(b)*].

In addition, a person who drives a vehicle on a public street or highway that is temporarily covered by a rise in water level, including groundwater or overflow of water because of flooding, and that is barricaded by any of the means already described above, is liable for the expenses of any emergency response required to remove the driver, any passenger in an inoperable vehicle, or the vehicle itself [*Gov. Code § 53159(c)*].

The expenses that may be recovered from a person are capped at $12,000 per incident [*Gov. Code § 53155*]. Costs that may be recovered include reasonable and necessary costs directly incurred by a public agency, for-profit entity, or not-for-profit entity making an appropriate emergency response to an incident. These costs may include the cost of providing police, firefighting, search and rescue, and emergency medical services at the scene of an incident, as well as salaries of the persons who respond to the incident, but do not include charges assessed by an ambulance service [*Gov. Code § 53159(a)(1)*].

Unless otherwise provided by law, these reimbursement provisions apply to all persons, regardless of whether they are on foot, skis or snowshoes, or operating a motor vehicle, bicycle, vessel, watercraft, raft, snowmobile, all-terrain vehicle, or any other boat or vehicle of any description [*Gov. Code § 53159(d)*]. However, these provisions do not apply to: (1) a person who is authorized to be in the closed area by the landowner, lessor, or manager of the closed area; (2) any federal, state, or local government official who is in the closed area as part of his or her official duty; (3) any public utility performing services consistent with its public purpose; (4) any person acting in concert with a government authorized search or rescue; or (5) a person who was attempting to rescue another person or an animal [*Gov. Code §*

53159(e)].

A debt for reimbursement under these provisions may be collected proportionately by the public agencies, for-profit entities, and not-for-profit entities that incur the expenses. Liability imposed under these provisions is in addition to, and not in limitation of, any other liability, fines, or fees that are imposed by law [*Gov. Code § 53159(g)*]. Although the parent or parents of a minor child who has violated these provisions may be responsible for the debt, the liability may not otherwise be imposed on the family, heirs, or assigns of the person who has intentionally, knowingly, and willfully entered the closed area [*Gov. Code § 53159(f)*].

In addition, beginning in 2007, any person 18 years old or older who is convicted of making a false police report in violation of *Pen. Code § 148.3* can be held liable for the expense of any appropriate emergency response that proximately results from the false report [*Gov. Code § 53153.5(a)*]. A public agency is entitled to satisfaction of any judgment for expenses under this provision after any victims or other persons injured by the incident are compensated for their injuries and after any medical provider liens are satisfied [*Gov. Code § 53153.5(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & Against

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§ 246.16 Application of MICRA to Emergency Medical Technicians

Although the issue was not always clear [*see Canister v. Emergency Ambulance Service, Inc. (2008) 160 Cal. App. 4th 388, 396-402, 72 Cal. Rptr. 3d 792*], the court of appeal has held that the Medical Injury Compensation Reform Act of 1975 (MICRA) applies to actions against paramedics and other emergency medical technicians licensed under *Health & Safety Code § 1797 et seq.* if the cause of action is based on professional negligence [*Canister v. Emergency Ambulance Service, Inc. (2008) 160 Cal. App. 4th 388, 400-403, 72 Cal. Rptr. 3d 792*]. For these purposes, negligence in the operation of an ambulance when transporting a patient to or from a medical facility is included under the term "professional negligence" [*Canister v. Emergency Ambulance Service, Inc. (2008) 160 Cal. App. 4th 388, 404, 72 Cal. Rptr. 3d 792*].

MICRA is codified in a series of statutes affecting the introduction of evidence at trial [*see Civ. Code § 3333.1*; *Canister v. Emergency Ambulance Service, Inc. (2008) 160 Cal. App. 4th 388, 408, 72 Cal. Rptr. 3d 792*], the amount of noneconomic damages that may be recovered [*see Civ. Code § 3333.2*], the limitations period for bringing suit [*see Code Civ. Proc. § 340.5*], pre-filing notice [*see Code Civ. Proc. § 364*], periodic payment of damages [*see Code Civ. Proc. § 667.7*], arbitration agreements [*see Code Civ. Proc. § 1295*], and attorney contingency fee agreements [*see Bus. & Prof. Code § 6146*].

Application of these MICRA provisions in actions against health care providers is discussed generally in Ch. 295, *Hospitals*, and Ch. 415, *Physicians: Medical Malpractice.*

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[Reserved]

§§ 246.17[Reserved]

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§ 246.30 State Statutes

[1] Applicability of Traffic Regulations

Applicability of Vehicle Code provisions to public employees. *Veh. Code § 21052*

Exemption from traffic laws for emergency vehicles. *Veh. Code § 21055*

Standard of care for operator of emergency vehicle. *Veh. Code § 21056*

Exemption from speed laws for vehicles owned by physicians. *Veh. Code § 21058*

Restriction on following emergency vehicles. *Veh. Code § 21706*

Right-of-way for emergency vehicles. *Veh. Code §§ 21806, 21807*

[2] Definitions

Authorized emergency vehicles. *Veh. Code § 165*

Rescue team. *Veh. Code § 165.5*

Employee. *Veh. Code § 17000(a)*

Employment. *Veh. Code § 17000(b)*

Public entity. *Veh. Code § 17000(c)*

[3] Drivers' Records

Employer or prospective employer of ambulance driver required to ascertain driver's public driving record on periodic basis. *Veh. Code § 1808.1(a), (b), (k)*

[4] Equipment

Operator of authorized emergency vehicle, as defined, not permitted to operate vehicle unless passengers six years of age or older or weighing 60 pounds or more in front seat are properly restrained by safety belt. *Veh. Code § 27315(d)(2)*

[5] Liability of Private Owners and Operators

Liability for costs of emergency response to rescue persons on closed public streets and other areas. *Gov. Code § 53159*

Liability for rescue team. *Veh. Code § 165.5*

Qualified immunity from liability for damages caused by collision during police pursuit. *Veh. Code § 17004.7*

Liability of private owner for negligent operation of vehicle. *Veh. Code § 17150*

Limitation on liability of owner. *Veh. Code § 17151*

Liability of operator. *Veh. Code § 17152*

Subrogation of owner. *Veh. Code § 17153*

[6] Liability of Public Owners and Operators

Liability of public entities and public employees generally. *Gov. Code §§ 815, 815.2, 820, 820.2*

Public entity or public employee not liable for injury caused by escaping prisoner or arrested person, or by person resisting arrest. *Gov. Code § 845.8*

Liability for rescue team. *Veh. Code §§ 165.5, 25259.5*

Liability of public entity for negligent operation of vehicle. *Veh. Code § 17001*

Extent of liability of public entity. *Veh. Code § 17002*

Civil immunity of public employee operation emergency vehicle. *Veh. Code § 17004*

Civil immunity of certain private firms maintaining fire departments. *Veh. Code § 17004.5*

Liability of bailee. *Veh. Code § 17154*

Settlement of claims. *Veh. Code § 17155*

Liability of vendee under contract of conditional sale. *Veh. Code § 17156*

Liability of school district bailee. *Veh. Code § 17157*

Liability of driver to guest. *Veh. Code § 17158*

Liability of personal representative of decedent for vehicle subject to administration. *Veh. Code §§ 17159, 25258.1*

[7] Licensing of Emergency Vehicles

Issuance, suspension, and revocation of authorized emergency vehicle permits for specified vehicles. *Veh. Code §§ 2416, 2417*

Licensing for operation of ambulances. *Veh. Code §§ 2510, 2511*

Provisions for regulations for operation, equipment, and certification of drivers of all ambulances used for emergency services. *Veh. Code § 2512(a)*

Regulations adopted as not precluding more restrictive local regulations and as not relieving owner or driver from complying with *Veh. Code § 21055*. *Veh. Code § 2512(a)*

[8] Lights on Emergency Vehicles

Nonliability of public entity and employee for injury due to traffic signals under control of emergency vehicle. *Gov. Code § 830.9*

Warning lights on emergency vehicles. *Veh. Code §§ 25252, 25252.5, 25259*

Traffic control lights on emergency vehicles. *Veh. Code § 25258*

[9] Report on Vehicle Pursuit

State and local law enforcement agencies must report to Department of Highway Patrol specified information on each vehicle pursuit conducted. *Veh. Code § 14602.1*

[10] Statute of Limitations

Limitation of time within which action against public entity must be commenced. *Code Civ. Proc. § 342*; *Gov. Code § 945.6*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawGood Samaritan LawsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployeesTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From LiabilityTransportation LawCommercial VehiclesLicensing & RegistrationTransportation LawPrivate VehiclesTraffic RegulationGeneral Overview

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§ 246.31 Administrative Regulations

Regulations respecting all privately and publicly owned ambulances, unless exempted under *13 Cal. Code Reg. § 1108*. *13 Cal. Code Reg. §§ 1100-1109*

Required ambulance safety equipment. *13 Cal. Code Reg. § 1103*

Ambulance dispatching responsibilities. *13 Cal. Code Reg. § 1104*

Ambulance driver's responsibilities. *13 Cal. Code Reg. § 1105*

Regulation of emergency ambulance service operations. *13 Cal. Code Reg. § 1105*

Restrictions on use of red light and siren on ambulance. *13 Cal. Code Reg. § 1105*

Licensing requirements of ambulances. *13 Cal. Code Reg. §§ 1107, 1108*

Grounds for suspension or revocation of license. *13 Cal. Code Reg. § 1109*

Regulation of authorized emergency vehicles operating under permits issued persuant to *Veh. Code § 2416*. *13 Cal. Code Reg. §§ 1120-1124*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawGood Samaritan LawsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From LiabilityTransportation LawCommercial VehiclesLicensing & RegistrationTransportation LawPrivate VehiclesTraffic RegulationGeneral Overview

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§ 246.32 Decisions

[1] Evidence

In wrongful death action, police department bulletins giving advice on operation of vehicle under emergency conditions were admissible on issues of standard of care applicable to police officer, officer's negligence, and decendent's lack of contributory negligence. *Dillenbeck v. Los Angeles (1968) 69 Cal. 2d 472, 477-484, 72 Cal. Rptr. 321, 446 P.2d 129*

In action against ambulance company by patient injured when gurney was dropped, ordinance requiring that certificated attendants accompany ambulance was not admissible to show negligence because ordinance not intended to protect against complained of injury. *Boie-Hansen v. Sisters of Charity (1957) 152 Cal. App. 2d 845, 847-848, 314 P.2d 189*

[2] Liability of Public Entity

Veh. Code § 17001 provides public entity liability for employee negligence in operation of vehicle despite immunity of employee under *Veh. Code § 17004* and general policy of derivative immunity under *Gov. Code § 815.2*. *Brummett v. County of Sacramento (1978) 21 Cal. 3d 880, 883-885, 148 Cal. Rptr. 361, 582 P.2d 952*

Failure of driver of emergency vehicle to give warning by red light and siren was forfeiture of exemptions. *Sparks v. Compton (1976) 64 Cal. App. 3d 592, 596, 134 Cal. Rptr. 684*

Employer was exempt from liability for negligence of driver attributable to failure to comply with specified traffic laws, but not exempt from liabilty for negligence attributable to driver's failure to maintain standard of care imposed by common law. *Torres v. Los Angeles (1962) 58 Cal. 2d 35, 45, 22 Cal. Rptr. 866, 372 P.2d 906*

Public entity not liable for delay in transporting decedent to hospital. *Greenberg v. County of Los Angeles (1952) 113 Cal. App. 2d 389, 391-392, 248 P.2d 74*

Collision of emergency vehicle with building, caused by defective brakes and driver's relaxation of vigilance, was outside scope of statutory exemptions and rendered public employer liable for damages. *Peerless Laundry Serv. v. City of Los Angeles (1952) 109 Cal. App. 2d 703, 706-707, 241 P.2d 269*

[3] Police Officers and Vehicles

In applying *Veh. Code § 17004* to police pursuit cases, statutory language is clear and unambiguous and immunizes public employee even if negligence in course of pursuit is alleged; sheriff's deputy was immune despite failing to turn on lights and siren while pursuing speeding vehicle. *Cruz v. Briseno (2000) 22 Cal. 4th 568, 572, 93 Cal. Rptr. 2d 715, 994 P.2d 986*

Negligent or reckless conduct by defendant was no basis for recovery by police officer who is presumably adequately compensated for knowingly and voluntarily confronting hazard created by defendant's conduct. *Hubbard v. Boelt (1980) 28 Cal. 3d 480, 484-485, 169 Cal. Rptr. 706, 620 P.2d 156* ; *Ries v. Lee (1981) 115 Cal. App. 3d 332, 334-335, 171 Cal. Rptr. 296*

Police officers in patrol cars in active pursuit of suspected bank robber as immunized from liability for accident resulting from high speed chase. *Brummett v. County of Sacramento (1978) 21 Cal. 3d 880, 883, 148 Cal. Rptr. 361, 582 P.2d 952*

Police officer who was passenger in police vehicle struck while in line of duty was not barred from recovery of damages due to contributory negligence of driver of police vehicle. *Witt v. Jackson (1961) 57 Cal. 2d 57, 67-68, 17 Cal. Rptr. 369, 366 P.2d 641*

Whether or not a vehicle is driven in response to emergency call as depending on nature of call received and situation presented to mind of driver and not depending on whether or not there is emergency in fact. *Gallup v. Sparks-Mundo Eng'g Co. (1954) 43 Cal. 2d 1, 5, 271 P.2d 34*

Veh. Code § 21055 was inapplicable when defendant's pre-trial admissions established that officer was not responding to emergency that exempted officer from obeying traffic laws at time of collision. *Monroy v. City of Los Angeles (2008) 164 Cal. App. 4th 248, 258-261, 78 Cal. Rptr. 3d 738*

Although immunity under *Veh. Code § 17004.7* requires that adopted police pursuit policy control and channel officer's discretion by providing objective standards by which to evaluate whether pursuit should be initiated or terminated, policy adopted by CHP provided adequate guidelines for justification, initiation, and termination of pursuit. *Ketchum v. State of California (1998) 62 Cal. App. 4th 957, 966-970, 73 Cal. Rptr. 2d 152*

Written policy on police pursuits promulgated by city's police chief qualified under *Veh. Code § 17004.7*, because police department is public agency and public entity; extent to which policy on police pursuits was implemented in general and was followed in particular pursuit is irrelevant; policy that contained guidelines for determining when vehicular pursuit is justified did not require list of manifest perils. *Brumer v. City of Los Angeles (1994) 24 Cal. App. 4th 983, 987-988, 29 Cal. Rptr. 2d 515*

Police officers in patrol vehicles in active pursuit of speeding motorist in residential neighborhood are immune from liability under *Veh. Code § 17004* and *Gov. Code § 845.8* for injuries to third persons caused by pursued vehicle despite liability of employing police agency under *Veh. Code § 17001*. *City of San Jose v. Superior Court (1985) 166 Cal. App. 3d 695, 698, 701*

Issue of liability of owner and operator of private vehicle in collision with police vehicle responding to emergency call presented factual question as to whether police officer operated vehicle in manner giving rise to exemptions granted by *Veh. Code § 21055* and imposing on defendant driver duty to yield right-of-way. *Mulligan v. West Coast Fast Freight (1957) 151 Cal. App. 2d 791, 795, 312 P.2d 59*

[4] Standard of Care

Manner of pursuit by immigration officers did not expose third parties to unreasonable risk of harm, as defined by California law, if pursuit was initiated on flat stretch of freeway rather than on surface streets, freeway traffic was light, road was dry, suspect did not make sudden lane changes prior to crash, and officers had duty to attempt to apprehend suspected smuggler of aliens. *Cimo v. I.N.S. (9th Cir. 1994) 16 F. 3d 1039, 1041-1042*

Fire department permitted to recover for damages to fire truck resulting from collision with automobile while responding to call from another district to assist in extinguishing fire. *Fruitridge Fire Dist. v. Judge (1966) 64 Cal. 2d 423, 425-426, 50 Cal. Rptr. 457, 412 P.2d 801*

Whether vehicle is driven in response to emergency call depends on nature of call received and situation presented to mind of driver and not on whether emergency in fact exists. *Gallup v. Sparks-Mundo Eng'g Co. (1954) 43 Cal. 2d 1, 5, 271 P.2d 34*

If driver of emergency vehicle does not activate red light and siren, common law standard of care governs conduct, and determination of negligence does not include consideration of fact that driver was responding to emergency call in authorized emergency vehicle. *Grant v. Petronella (1975) 50 Cal. App. 3d 281, 289, 123 Cal. Rptr. 399*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsClaims By & AgainstHealthcare LawGood Samaritan LawsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployeesTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEntities CoveredTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From Liability

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§ 246.33 Attorney General Opinions

Rotating red lamp, rather than fixed type, does not entitle emergency vehicle to exemptions. *17 Ops. Cal. Att'y Gen. 121*

Chiropractor not entitled to emergency call automobile insignia. *7 Ops. Cal. Att'y Gen. 356*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawGood Samaritan LawsTransportation LawCommercial VehiclesTraffic Regulation

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§ 246.34 Law Reviews

Nelson and Avnaim, *Claims Against a California Governmental Entity or Employee, 6 Sw. U. L. Rev. 550 (1974)*

Tennenhouse, *An Introduction to Health Care Litigation in California, 8 U.S.F. L. Rev. 229 (1973)*

Comment, *A Policeman's Duty of Care, 8 Stan. L. Rev. 722 (1956)*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstHealthcare LawActions Against FacilitiesGeneral OverviewHealthcare LawActions Against Healthcare WorkersGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployeesTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEntities Covered

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§ 246.35 Text References

Personal Injury: Actions, Defenses, Damages, Vol. 2, Ambulances, §§ 1.02, 1.03

Personal Injury: Actions, Defenses, Damages, Vol. 4, Automobiles, § 3.08

Personal Injury: Actions, Defenses, Damages, Vol. 20, Motorcycles, § 1.09; *Municipal Corporations, § 1.03*

Personal Injury: Actions, Defenses, Damages, Vol. 24, Public Officers and Employees, §§ 1.01, 1.02, 1.05

California Government Tort Liability Practice, Ch. 11, *Liabilities and Immunities in Specific Functional Areas*, §§ 11.56, 11.61, 11.140 et seq. (4th ed. Cal. CEB 2000)

Witkin, Summary of California Law, Vol. 5, *Torts*, § 226 et seq. (9th ed. 1988)

Legal Topics:

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

§§ 246.36[Reserved]

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§ 246.50 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Caused by Negligence [Civ. Code § 1714(a)] in Operation of Emergency Vehicle Responding to Emergency Call--By Driver of [or Passenger in] Private Vehicle Against Public Entity

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Caused by Negligence [Civ. Code § 1714(a)] in Operation of Emergency Vehicle Responding to Emergency Call--By Driver of [or Passenger in] Private Vehicle Against Public Entity

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*] Plaintiff,	)	COMPLAINT
vs.	)	FOR DAMAGES
_____ [*names*], Defendants.	)	(Negligence)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. At all times herein mentioned, defendant _____ [*name*] was, and now is, a _____ [*type of public entity, e.g.*, municipal corporation *or* county *or* district and political subdivision of the state], organized and existing under the laws of California [and situated in _____ County].

[*EITHER*]

2. At all times herein mentioned, defendant _____ [*name of employee*] was a _____ [*allege facts showing employment with public entity, e.g.*, duly appointed, qualified, and regularly employed member of the _____ (*specify, e.g.*, Police Department) of defendant], and in doing the things hereinafter described, acted within the scope of his/her employment.

[*OR*]

2. At all times herein mentioned, defendant _____ [*name*] was driving and operating the vehicle described in Paragraph 4 with the consent, permission, and knowledge of _____ [*name of public entity*].

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of such fictitiously named defendants is negligently responsible in some manner for the occurances herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by such negligence.)]

4. At all times herein mentioned, defendant _____ [*name of public entity*] was the owner of following motor vehicle: _____ [*describe emergency vehicle, e.g.*, a police patrol vehicle bearing the license number _____].

5. _____ [*Desribe street*] [and _____ (*street*)] _____ [was *or* were] at all times herein mentioned and now _____ [is a *or* are public street[s] and highway[s] in _____ [*city*], _____ County, California, running in a _____ [*specify compass point, e.g.*, westerly] direction [and a _____ (*specify compass point*) direction, respectively, and intersecting each other].

6. On _____ [*date*], at approximately _____ [*time*], plaintiff _____ owned and operated *or* was a passenger in] a certain _____ [*specify year, make, model*] automobile, [California] license number _____, traveling in a general _____ [*specify compass point*] direction on _____ [at or near its intersection with _____ (*street*)].

7. At that time and place, defendant _____ [*name of operator*] was operating the emergency vehicle described in Paragraph 4 in the performance of his/her duties as a _____ [*state occupation*] of defendant _____ [*name of public entity*] and was proceeding in a general _____ [*specify compass point*] direction on _____ [*street*] [at or near its junction with _____ (*street*)].

[8. Plaintiff is informed and believes and thereon alleges that at this time and place, defendant _____ [*name*] was _____ (*describe emergency, e.g.*, responding to an emergency _____ (*specify type of call, e.g.*, fire *or* police *or* ambulance) call at _____ (*specify location*) *or* pursuing a suspect who _____ (*describe reason for pursuit*))].

9. At the above-stated time and place, defendants, and each of them, so negligently [, carelessly, recklessly, and unlawfully]. entrusted, managed, maintained, drove, operated, and controlled the emergency vehicle described herein [without sounding a siren and/or without displaying a lighted red lamp], in an arbitrary manner, so as to proximately cause it to collide forcefully with plaintiff's automobile.

10. As a proximate result of the negligence [, carelessness, recklessness, and unlawfulness] of defendants, and each of them, and the resulting collision, as herein alleged, plaintiff was injured in his/her health, strength, and activity, sustaining bodily injuries and shock and injury to his/her nervous system, which have caused, and will cause, him/her great mental and physical pain and suffering, all to plaintiff's general damage. [Plaintiff is informed and believes, and on such information and belief alleges, that such injuries will result in some permanent disability to him/her.]

11. As a further proximate result of the negligence of defendants, and each of them, herein alleged, plaintiff has incurred [and in the future will incur] certain medical expenses, including expenses for hospitalization, physicians, surgeons, nurses, X rays, medicines, and other medical sundries.

12. As a further proximate result of the negligence of defendants, and each of them, herein alleged, plaintiff was unable to attend to his/her usual occupation as a _____ [*state occupation*] [for a period of _____ (*specify*) *or* to the date of the filing of this complaint] and thereby lost earnings.

13. On or about _____ [*date*], plaintiff presented to defendant _____ [*name of public entity*] a claim for the injuries, losses, and damages suffered and incurred by him/her by reason of the negligence of this defendant and the resulting collision, as herein alleged. A copy of the claim is attached hereto as Exhibit A and made a part hereof. On or about _____ [*date*], defendant _____ [rejected the claim in its entirety *or* deemed to have rejected the claim, having failed to act on it within 45 days as required by *Section 911.6 of the Government Code or* allowed the claim in the amount of $_____ and rejected it as to the remainder].

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages according to proof;

2. For medical and incidental expenses according to proof;

3. For loss of earnings according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read this complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].

_____ [*signature*]

[2] Use of Form

This form of complaint is for use in an action by a driver or passenger in a private vehicle against a public entity and its employees or other persons for personal injuries sustained in a collision with an authorized emergency vehicle negligently operated by either an employee of the public entity or a driver operating with the public entity's consent. The public employee should be named only if there is a factual question concerning whether or not the employee was responding to an emergency call, since if the employee was, he or she would be immune from liability [*see Veh. Code § 17004*; *see § 246.59*].

[3] Allegations

This complaint alleges (1) facts giving rise to defendants' duty of care (Paragraphs 5-8); (2) breach of such duty by defendants (Paragraph 9) [*Civ. Code § 1714(a)*; *see* Ch. 380, *Negligence*]; (3) general damages (Paragraph 10) and special damages (Paragraphs 11, 12) [*see Code Civ. Proc. § 425.10(b)*; *see* Ch. 177, *Damages*]; and (4) filing and rejection of plaintiff's claim (Paragraph 13) [*Gov. Code § 945.4*; *see* Ch. 464, *Public Entities and Officers: California Tort Claims Act*]. Paragraph 9 contains bracketed language for use in alleging that the defendant's emergency vehicle was not sounding its siren or adequately displaying its red light. Such allegations may be added, but the public entity would appear to have the burden of raising the conditions for the application of an exemption under *Veh. Code § 21055* [*see § 246.58*].

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[5] Venue

Generally, in an action involving death or injury to person or personal property, either the county where the injury occurred or the county in which all or some of the defendants reside is a proper venue [*Code Civ. Proc. § 395(a)*]. An action against a local public entity to recover for injury to person or property caused by the negligence of the entity or its employees must be tried in the county in which the entity is situated if the injury occurred there [*Code Civ. Proc. § 394(a)*]. If the defendant is the state, the proper court for trial of the action is a court of competent jurisdiction in the county where the injury occurred [*Gov. Code § 955.2*].

[6] Verification

A public entity need not verify its answer even though the complaint is verified [*see Code Civ. Proc. § 446*]. The verification of a complaint against a public entity does, however, preclude a general denial in an unlimited civil case and in some limited civil cases [*see Code Civ. Proc. § 431.30(d)*].

[7] Specifying Amount of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[8] Filing Claim With Public Entity

By the provisions of *Gov. Code §§ 905* and *945.4*, no suit for damages may be brought against a public entity in any action, except a specified few, until a written claim is presented to the governing board of the entity (or to the State Board of Control if the state is the defendant) and the board has acted on it or is deemed by the operation of law to have rejected it. Generally, such a claim must be presented no later than six months after accrual of the cause of action [*Gov. Code § 911.2*; *but see Gov. Code § 911.4*]. The statute of limitations depends on whether the public entity gives notice of rejection of plaintiff's claim. If notice is given, the statute of limitations is six months; if not, the statute of limitations is two years from the accrual of the cause of action [*Gov. Code § 945.6*; *see Glorietta Foods, Inc. v. City of San Jose (1983) 147 Cal. App. 3d 835, 836, 195 Cal. Rptr. 355]* .

For a discussion and forms for use in filing such a claim, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[9] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used* .

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions* .

For alternative allegations of damages, see Ch. 177, *Damages* .

For forms of complaints for use in negligence actions generally, see Ch. 380, *Negligence* .

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively.

For forms of claims and complaints for use in actions involving public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

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20-246 California Forms of Pleading and Practice--Annotated § 246.51

§ 246.51 Complaint for Damages [Civ. Code § 3333] for Damage to Building Caused by Negligence [Civ. Code § 1714(a)] in Operation of Emergency Vehicle--By Owner of Premises Against Public Entity

[1] FORM Complaint for Damages [Civ. Code § 3333] for Damage to Building Caused by Negligence [Civ. Code § 1714(a)] in Operation of Emergency Vehicle--By Owner of Premises Against Public Entity

[*Caption. See § 246.50[1].*]

1. [*Capacity and residence of defendant. See § 246.50[1], Paragraph 1.*]

2. [*Defendant's employment or permissive use. See § 246.50[1], Paragraph 2.*]

3. [*Fictitious name allegation, if appropriate. See § 246.50[1], Paragraph 3.*]

4. [*Allegation showing street location of accident. See § 246.50[1], Paragraph 5.*]

5. At all times herein mentioned, plaintiff was the owner of a certain building located at _____ [*state street address*] [on the corner of the intersection of _____ (*street*) and _____ (*street*)], in _____ [*city*], _____ County, California.

6. At all times herein mentioned, defendant _____ [*name of public entity*] was the owner of a certain motor vehicle, to wit, _____ [*describe emergency vehicle, e.g.*, a fire truck bearing the license number _____], which was being driven and operated by _____ [*name*] in the performance of his/her duties as a _____ [*state occupation of operator, e.g.*, member of Fire Department] of defendant.

7. On or about _____ [*date*], at approximately _____ [*time*], defendant _____ [*name of public entity and driver*], and each of them, negligently drove and operated the above-described emergency vehicle [in that _____ (*specify, e.g.*, the fire truck was driven and operated

_____ (with inadequate or defective brakes which would not bring the truck to a stop when applied at the speed at which the truck was traveling, on a dry asphalt or concrete surface where the grade does not exceed one percent, within the distance specified by law *or* without management or control thereof and without regard for the safety of persons or property))].

8. As a proximate result of the negligent and careless operation of the vehicle alleged above, such vehicle [as it was turning at the intersection of _____ and _____ Streets] went over and beyond the curb and sidewalk and with great force and violence struck the building belonging to plaintiff, causing great damage to the building.

9. As a further proximate result of the negligence of defendants, and each of them, the damage to plaintiff's building has necessitated [and will in the future necessitate] the making of repairs and replacements to the building and the supplying of materials necessary for such repairs and replacement, all to the damage of plaintiff in the reasonable sum of $_____.

10. [*Filing and rejection of claim. See § 246.50[1], Paragraph 13.*]

WHEREFORE, the plaintiff prays judgment against defendants, and each of them, as follows:

1. For the sum of $_____ for damages to plaintiff's real property;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 246.50[1].*]

[2] Use of Form

This form of complaint is for use in an action by the owner of premises damaged by an emergency vehicle against the public entity owning the emergency vehicle and operators of the vehicle.

[3] Venue

In an action to recover for damage to real property, the proper court is one in which the county in which the real property is located [*Code Civ. Proc. § 392(a)(1)*; *see also Code Civ. Proc. § 394*].

[4] Cross References

See also *§ 246.50*.

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20-246 California Forms of Pleading and Practice--Annotated § 246.52

§ 246.52 Complaint for Damages for Wrongful Death of Driver of or Passenger in Private Vehicle [Code Civ. Proc. § 377.60] Caused by Negligence [Civ. Code § 1714(a)] in Operation of Emergency Vehicle--By Entitled Person(s) Against Public Entity

[1] FORM Complaint for Damages for Wrongful Death of Driver of or Passenger in Private Vehicle [Code Civ. Proc. § 377.60] Caused by Negligence [Civ. Code § 1714(a)] in Operation of Emergency Vehicle--By Entitled Person(s) Against Public Entity

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff(s),	)	NO. _____
vs.	)	COMPLAINT FOR
_____ [*name*], [and Does 1	)	DAMAGES
through _____] Defendant(s).	)	(Wrongful Death)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff(s) allege(s):

1. _____ [Plaintiff(s) *or* The person(s) listed below] is/are entitled to bring an action for the wrongful death of _____ [*name of decedent*] (hereinafter "decedent") pursuant to *Code of Civil Procedure Section 377.60*, based on his/her/their relationship to decedent, as follows:

Name(s)	Relationship(s) to Decedent

_____ _____
_____
_____ _____
_____
_____ _____
_____

[_____ (*If one or more persons are required to establish additional facts, such as that there is no surviving spouse, domestic partner, child, or issue of deceased child, or that the person was dependent on decedent, in order to be entitled to bring a wrongful death action under Code Civ. Proc. § 377.60, specify facts that satisfy applicable requirement.*)]

[*ADD, if decedent's personal representative is maintaining action on behalf of one or more entitled persons*]

Plaintiff _____ [*name*] is the duly appointed, qualified, and acting personal representative of the estate of decedent, and brings this action on behalf of _____ [all of the above-listed persons entitled to bring a cause of action for the wrongful death of decedent *or* the following person(s) entitled to bring an action for the wrongful death of decedent: _____ (*specify person(s) on whose behalf personal representative is maintaining action*)].

[*CONTINUE*]

2. [*Capacity of defendant public entity. See § 246.50[1], Paragraph 1.*]

3. [*Defendant operator's employment or permissive use. See § 246.50[1], Paragraph 2.*]

4. [*Fictitious name allegation, if appropriate. See § 246.50[1], Paragraph 3.*]

5. [*Public entity's ownership of emergency vehicle. See § 246.50[1], Paragraph 4 or § 246.51[1], Paragraph 6.*]

6. [*Allegation showing street location of accident. See § 246.50[1], Paragraph 5.*]

7. On or about _____ [*date*], at approximately _____ [*time*], the decedent, _____ [*name*], _____ [owned and o perated *or* was a passenger in] a certain _____ [*specify year, make, model*] automobile, [California] license number _____, which was then and there _____ [*state facts regarding automobile's location, e.g.*, stopped on _____ (*street*) near its intersection with _____ (*street*) to allow a southbound fire engine to pass].

8. At that time and place, defendant _____ [*name*] was operating the above-described vehicle in response to an emergency _____ [*specify type of call, e.g.*, fire *or* police *or* ambulance] call at _____ [*specify location*] and proceeding in a _____ [*specify compass point, e.g.*, southerly] direction on _____ [*street*]. Defendant's employees negligently and recklessly drove, operated, and controlled the vehicle as to proximately cause it to _____ [*state facts regarding*

accident, e.g., collide with another vehicle and careen into and strike the stationary vehicle of decedent], causing decedent serious bodily injuries, from which he/she died on _____ [*date*].

[9. At the time of his/her death, decedent was _____ years of age, was in good health, and for many years prior thereto had been in good health.]

10. As a proximate result of the negligence of defendants, and each of them, plaintiff(s) has/have been deprived of the services, society, and comfort of decedent, all to his/her/their great loss and damage.

11. As a further proximate result of the negligence of defendants and, each of them, and of the death of decedent, plaintiff(s) has/have incurred funeral and burial expenses.

12. [*Filing and rejection of claim. See § 246.50[1], Paragraph 13.*]

WHEREFORE, plaintiff(s) pray(s) judgment against defendants and each of them, as follows:

1. For general damages according to proof;

2. For funeral and burial expenses according to proof;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff(s) _____ [*name(s)*]

[*Verification, if desired. See § 246.50[1].*]

[2] Use of Form

This form of complaint is for use in an action by entitled persons against a public entity to recover damages for the wrongful death of the driver of or passenger in a private vehicle involved in a collision with an emergency vehicle owned by the public entity.

[3] Plaintiffs

When the death of a person is caused by the wrongful act of negligence of another, certain persons, or the decedent's personal representative on their behalf, may bring an action for damages against the person causing the death and any other person responsible (or the personal representatives of such persons) [*Code Civ. Proc. § 377.60*]. *Code Civ. Proc. § 377.60* permits the decedent's surviving spouse, domestic partner, children, and issue of deceased children to bring a wrongful death action without qualification, and permits others to bring an action under specified circumstances. For forms of allegations establishing that specific classes of persons are entitled to bring a wrongful death action, including allegations that are required of plaintiffs who are not the decedent's surviving spouse, domestic partner, children, or issue of deceased children, see Ch. 181, *Death and Survival Actions* .

If the plaintiff is a minor, a guardian ad litem must be appointed for the purposes of the action, unless the minor already has a guardian [*see Code Civ. Proc. § 372*]. For discussion and forms relating to appointment of a guardian ad litem

generally, see Ch. 291, *Guardians ad Litem* .

[4] Award of Damages

The damages given are those that are just under all the circumstances, except that the award may not include damages recoverable under *Code Civ. Proc. § 377.34* [*see § 246.52[5]*]. The respective rights of the heirs in any award are determined by the court [*Code Civ. Proc. § 377.61*].

[5] Survival Action

If the decedent was not killed at the time of the crash but subsequently died of injuries sustained in the crash, and in the meantime had incurred medical or other expenses or had lost wages, an action may be brought by the personal representative of his or her estate to recover such damages [*see Code Civ. Proc. §§ 377.20, 377.30*; *Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 76, 38 Cal. Rptr. 490* (involving death resulting from automobile accident and subsequent medical malpractice)]. An action that survives the death of the person entitled to commence the action under *Code Civ. Proc. § 377.30* may be joined with a wrongful death actions brought under *Code Civ. Proc. § 377.60* if the actions arise out of the same wrongful act or neglect [*Code Civ. Proc. § 377.62(a)*]. An action under *Code Civ. Proc. § 377.60* (wrongful death) and an action under *Code Civ. Proc. § 377.31* (survival of pending actions) arising out of the same wrongful act or neglect may be consolidated for trial as provided in *Code Civ. Proc. § 1048* [*Code Civ. Proc. § 377.62(b)*]. For further discussion, forms, and procedures, see Ch. 181, *Death and Survival Actions* .

[6] Cross References

See also *§ 246.50*.

For discussion and alternative forms of allegations for use in wrongful death actions, see Ch. 181, *Death and Survival Actions* .

For discussion of survival of actions, see Ch. 181, *Death and Survival Actions* .

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20-246 California Forms of Pleading and Practice--Annotated § 246.53

§ 246.53 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Caused by Negligence [Civ. Code § 1714(a)] in Operation of Private Vehicle--By Driver of or Passenger in Emergency Vehicle Against Driver and Employer of Driver of Private Vehicle

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Caused by Negligence [Civ. Code § 1714(a)] in Operation of Private Vehicle--By Driver of or Passenger in Emergency Vehicle Against Driver and Employer of Driver of Private Vehicle

[*Caption. See § 246.50[1].*]

1. Defendant _____ [*name of operator of private vehicle*] is, and at all times herein mentioned was, a resident of _____ County, California.

[2. Defendant _____ (*name of employer*) is, and at all times herein mentioned was, the employer of _____ (*name*) and the owner of a certain _____ (*specify year, make, model*) automobile, (California) license number _____, and a resident of _____, County, California.]

[3. *Fictitious name allegations, if appropriate. See § 246.50[1], Paragraph 3.*]

4. _____ [*Allegation showing street location of accident. See § 246.50[1], Paragraph 5.*]

5. On or about _____ [*date*], at approximately _____ [*time*], plaintiff was _____ [driving *or* was a passenger in] a certain _____ [*describe authorized emergency vehicle, e.g.,* ambulance bearing license number _____ and operated under license issued by the Commissioner of the Highway Patrol] being driven and operated in a _____ [*specify compass point, e.g.,* westerly] direction on _____ [*street*] on _____ [an emergency call with its red lights and siren in operation *or state other facts giving rise to exemption under Veh. Code § 21055*].

6. At that time and place, a certain _____ [*specify year, make, model*] automobile [owned by defendant _____ (*name*) and] operated by defendant _____ [*name*] in a general _____ [*specify compass point*] direction on _____ [*street*], was then and there carelessly, negligently, and without due caution, driven by the defendant _____ [*name of driver*] [into the path of the emergency vehicle] and as a result of such carelessness and negligence the emergency vehicle collided with defendant's automobile.

7. As a proximate result of the negligence of defendant and the resulting collision, plaintiff ws _____ [*state facts regarding injury e.g.*, thrown onto the pavement of the street] and sustained severe personal injuries, including _____ [*specify injuries*], and was rendered sick, sore, and lame and suffered great mental and physical pain and nervous shock, to his/her general damage.

8. [*Medical expenses. See § 246.50[1], Paragraph 11.*]

9. [*Loss of earnings. See § 246.50[1], Paragraph 12.*]

[*Prayer. See § 246.50.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 246.50[1].*]

[2] Use of Form

This form of complaint is for use in an action by the driver or passenger in an authorized emergency vehicle responding to an emergency call against the driver and/or owner of a private vehicle for personal injuries sustained in a collision caused by the negligence of defendant.

[3] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[4] Joinder of Employer

All persons may be joined in one action as defendants if plaintiff asserts a right to relief jointly, severally, or alternatively in respect to or arising out of the same occurrence and if any question of law or fact common to all these persons will arise in the action [*Code Civ. Proc. § 379*].

[5] Cross References

See also *§ 246.50*.

See generally Ch. 82, *Automobiles: Causes of Action* .

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§ 246.54 Complaint for Damages [Civ. Code § 3333] for Injury to Emergency Vehicle Caused by Negligence [Civ. Code § 1714(a)] in Operation of Private Vehicle--By Owner of Emergency Vehicle Against Owner and Operator of Negligent Vehicle

[1] FORM Complaint for Damages [Civ. Code § 3333] for Injury to Emergency Vehicle Caused by Negligence [Civ. Code § 1714(a)] in Operation of Private Vehicle--By Owner of Emergency Vehicle Against Owner and Operator of Negligent Vehicle

[*Caption. See § 246.50[1].*]

[*EITHER*]

1. Plaintiff is now, and at all times herein mentioned was, doing business under the fictitious firm name and style of _____ [*state name of business*], located in _____ County, California; plaintiff has filed the statement and published the notice required by *Sections 17910, 17915,* and *17917 of the Business and Professions Code*.

[*OR*]

1. Plaintiff is now, and at all times herein mentioned was, a _____ [*type of public entity, e.g.,* municipal corporation *or* county *or* district and political subdivision of the state], organized and existing under the laws of California [and situated in _____ County].

2. Defendant _____ [*name of owner of private vehicle*] is now, and at all times herein mentioned was, a resident of _____ County, California [doing business under the fictitious firm name and style of _____ (*state name of business*)].

3. Defendant _____ [*name of driver of private vehi cle*] is now, and at all times herein mentioned was, a resident of _____ County, California.

[4. *Fictitious name allegation, if appropriate. See § 246.50[1], Paragraph 3.*]

5. At all times herein mentioned, plaintiff was the owner of a certain _____ [*specify type of authorized emergency vehicle*] California license number _____ [*specify*].

6. At all times herein mentioned, defendant _____ [*name*] was the owner of a certain _____ [*specify year, make, model*] automobile. At the time of the accident alleged hereinafter, this vehicle was being operated by defendant _____ [*name of driver*] with the permission and consent of defendant _____ [*name of owner*] [and as his/her agent, servant, and employee, acting within the course and scope of that employment and agency].

7. On or about _____ [*date*], at approximately _____ [*time*], plaintiff's _____ [*specify emergency vehicle*] was being operated by plaintiff's employee in a general _____ [*specify compass point, e.g.*, northerly] direction on _____ [*street*] [at or near its intersection with _____ (*street*)], such street[s] being public street[s] and highway[s] in _____ County, California. At this time, plaintiff's employee was responding to an _____ [emergency call *or specify other condition for exemption under Veh. Code § 21055*] [and was (sounding a siren) and displaying a lighted red lamp visible from the front].

8. At the time and place, defendant _____ [*name of driver*] was driving the automobile of defendant _____ [*name of owner*] in a general _____ [*specify compass point*] direction on _____ [*street*] [*at or near its intersection* with _____ (*street*)]. Defendant _____ [*name of driver*] there and then so negligently, carelessly, and unlawfully drove, operated, and controlled the automobile of his/her codefendant herein as to cause it to collide with plaintiff's _____ [*specify type of vehicle*] resulting in great damage to such vehicle.

9. Immediately prior to the collision, plaintiff's herein described _____ [*specify type of vehicle*] had a reasonable market value of $_____. After the collision and as a proximate result thereof, that vehicle had a reasonable market value of only $_____, to plaintiff's damages in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendants as follows:

1. For the sum of $_____ for damages to personal property;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 246.50[1].*]

[2] Use of Form

This form of complaint is for use by the private or public owner of an emergency vehicle against the owner and operator of a private vehicle to recover for damages to the emergency vehicle resulting from a collision caused by the negligent operation of the private vehicle, while the emergency vehicle was responding to an emergency call.

[3] Cross References

See also *§§ 246.50* and *246.53*.

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§ 246.55 Complaint for Damages for Wrongful Death of Passenger in Emergency Vehicle [Code Civ. Proc. § 377.60] Caused by Negligence [Civ. Code § 1714(a)]--Delay of Private Ambulance Transporting Decedent to Hospital--By Entitled Person(s) Against Ambulance Service

[1] FORM Complaint for Damages for Wrongful Death of Passenger in Emergency Vehicle [Code Civ. Proc. § 377.60] Caused by Negligence [Civ. Code § 1714(a)]--Delay of Private Ambulance Transporting Decedent to Hospital--By Entitled Person(s) Against Ambulance Service

[*Caption. See § 246.52[1].*]

1. [*Capacity of plaintiffs. See § 246.52[1], Paragraph 1.*]

2. At all times herein mentioned, defendant _____ [*name*] owned and operated an emergency, on-call ambulance service under the fictitious name _____ [*specify*] and maintained a principal place of business in _____ [*city*], _____ County, California. This defendant is sued herein individually and under this fictitious name.

[3. *Fictitious name allegation, if appropriate. See § 246.50[1], Paragraph 3.*]

4. At all times herein mentioned defendants _____ [*name*], _____ [*name*], and _____ [*name*], in doing the things herein alleged, were agents and employees of defendant _____ [*name of owner of ambulance*] and were acting within the course and scope of such agency and employment, and with the permission and consent of defendant _____ [*name of owner of ambulance*].

5. On or about _____ [*date*], at approximately _____ [*time*], in _____ County, California, decedent _____ [was *or* became] seriously ill and required emergency medical treatment, including [emergency oxygen and] immediate carriage by ambulance to a hospital for further and appropriate medical care and treatment for a _____ [*specify condition*]. As a result thereof, an emergency call was placed for these services, and defendant _____ [*name of owner of ambulance*],

by its defendant agents and employees, responded to the call and undertook to render aid [, to furnish oxygen to decedent,] and to transport him/her to _____ Hospital in _____ [*city*].

6. At such time and place, defendants negligently failed in their undertaking in that defendants _____ [*names*] negligently _____ [*specify defendants' negligent act or omission e.g.*, upset a tank of oxygen and in so doing broke a connection which cut off all oxygen flow from the tank to decedent and rendered the oxygen equipment inoperative. Thereafter, although defendants knew that decedent was in distress and knew that decedent required oxygen and the immediate care of a physician, they expended valuable time in _____ (*specify defendants' actions, e.g.*, an abortive effort to repair the equipment) and unreasonably delayed decedent's carriage to the hospital. (Defendants negligently failed to carry space or extra parts, and they were unable and negligently failed to effect a repair to or to reactivate the flow of oxygen from the tank.)]

7. As a proximate result of the negligence of defendants, and each of them, decedent received no medical care, treatment, or medication, and he/she died in the ambulance at or about the time of its arrival at _____ Hospital in _____ [*city*], _____ County, California, on _____ [*date*].

8. [*Allegations of damages. See § 246.52[1], Paragraphs 10, 11.*]

[*Prayer. See § 246.52[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 246.50[1].*]

[2] Use of Form

This form of complaint is for use in a wrongful death action based on negligent delay by a private ambulance service in transporting decedent to a hospital.

[3] Cross References

See also *§§ 246.50, 246.52*- 246, 54.

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20-246 California Forms of Pleading and Practice--Annotated § 246.56

§ 246.56 Allegation for Use in Complaint Against Private Ambulance Service for Injuries Arising out of Negligent Transporting of Plaintiff--Injury From Fall of Ambulance Gurney (Wheeled Stretcher)

[1] FORM Allegation for Use in Complaint Against Private Ambulance Service for Injuries Arising out of Negligent Transporting of Plaintiff--Injury From Fall of Ambulance Gurney (Wheeled Stretcher)

1. On or about _____ [*date*], at approximately _____ [*time*], when plaintiff was moved by defendants from _____ [*specify location*], plaintiff's _____ [*specify body part, e.g.,* right eye] was in extremely delicate condition by reason of _____ [*specify, e.g.,* the surgery which had been performed thereon]. It was highly important that plaintiff be kept from making any sudden or violent movements in order to protect _____ [*specify body part*] from serious damage, all of which was known or, in the exercise of reasonable care should have been known, to defendants.

2. At that time and place, plaintiff was carried between _____ [*specify building, e.g.,* hospital] and the ambulance used to transport him/her by means of a gurney lifted, carried, and operated by defendants, their agents and employees. In so transporting plaintiff, defendants negligently, carelessly, and recklessly lifted, carried, and operated the gurney so that it dropped and fell to the ground with great force and violence and thereby caused plaintiff to sus tain severe shock and serious and permanent injury [to his/her _____ (*specify body parts injured*)].

[2] Use of Form

This form of allegation is for use in a complaint to recover for injuries based on negligence of an ambulance service in dropping a gurney on which plaintiff was being transported.

[3] Cross References

See also *§§ 246.50* and *246.55*.

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20-246 California Forms of Pleading and Practice--Annotated § 246.57

§ 246.57 Allegations for Use in Complaint Against Private Ambulance Service for Injuries Arising out of Negligent Transporting of Plaintiff--Passenger in Ambulance Injured by Collision Caused by Ambulance Service

[1] FORM Allegations for Use in Complaint Against Private Ambulance Service for Injuries Arising out of Negligent Transporting of Plaintiff--Passenger in Ambulance Injured by Collision Caused by Ambulance Service

1. On or about _____ [*date*], at approximately _____ [*time*], for compensation to be paid to defendants, plaintiff became a passenger in defendants' ambulance for the purpose of being carried to _____ Hospital in _____ [*city*], _____ County, California.

2. At this time and while the ambulance was _____ [*state facts relating to location of ambulance at time of accident, e.g.,* turning into the entranceway of the hospital], defendants, each of them, did so negligently, carelessly, and recklessly entrust, maintain, control, and operate the ambulance that it was caused to, and did, run into and collide with _____ [*specify, e.g.,* the entranceway of the hospital], thereby causing plaintiff to be violently thrown about in the interior of the ambulance.

3. By reason of such accident, plaintiff has ever since been sick, sore, lame, and disabled and has suffered, and for an indefinite future time will continue to suffer, much pain.

[2] Use of Form

This form of allegation is for use by a passenger in an ambulance in a complaint to recover for injuries caused by the negligence of the ambulance service in colliding with an object or vehicle thereby causing or aggravating plaintiff's injuries.

[3] Cross References

See also *§§ 246.50* and *246.55*.

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20-246 California Forms of Pleading and Practice--Annotated § 246.58

§ 246.58 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Exemption From Vehicle Code Provisions by Reason of Response to Emergency Call [Veh. Code § 21055]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Exemption From Vehicle Code Provisions by Reason of Response to Emergency Call [Veh. Code § 21055]

At the time of the accident mentioned in plaintiff's complaint, defendant's vehicle was an authorized emergency vehicle being driven and operated by _____ [*name of employee*] _____ [in response to an emergency call *or* while engaged in rescue operations *or* in the immediate pursuit of a(n) _____ (actual *or* suspected) violator of the law *or* in response to a fire alarm]. A [siren on the vehicle was being loudly and continuously sounded by its driver, a] lighted red lamp was being displayed on the vehicle[,] and such lamp was visible from the front of the vehicle.

[2] Use of Form

This form of defense is for use by a public or private employer in an answer when the complaint alleges negligence of an employee based on a violation of traffic regulations and the accident complained of occurred while the employee was operating an authorized emergency vehicle in response to an emergency, with the siren sounding, if it was resonably necesary, and the red light on the vehicle operating.

[3] Cross References

See also *§ 246.50*.

For discussion and forms of answers and affirmative defenses, see Ch. 26, *Answers* , and Ch. 84, *Automobiles: Responding to the Action* .

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§ 246.59 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Immunity of Public Employee by Reason of Response to Emergency Call [Veh. Code § 17004]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Immunity of Public Employee by Reason of Response to Emergency Call [Veh. Code § 17004]

At the time of the accident mentioned in plaintiff's com plaint, defendant was an employee of _____ [*name of public entity employing defendant*]. The vehicle alleged in plaintiff's complaint to have been driven by defendant at that time was an authorized emergency vehicle that was being operated by defendant in the line of duty while _____ [he/she was responding to an emergency call *or* he/she was in immediate pursuit of a(n) _____ (actual *or* suspected) violator of the law *or* he/she was responding to a fire alarm *or* he/she was engaged in rescue operations]. The alleged accident and whatever damage, if any, was sustained by plaintiff by reason thereof, resulted from defendant's operation of such emergency vehicle.

[2] Use of Form

This form of defense is for use by a public employee in an answer when the accident complained of occurred while the employee was operating an authorized emergency vehicle in the line of duty while responding to an emergency call, pursuing an actual or suspected violator of the law, responding to a fire alarm or engaging in rescue operations. When these facts are apparent on the face of plaintiff's complaint or from any matter of which the court may or must take judicial notice, defendant may generally demur to the complaint. For a discussion, procedures, and forms of general demurrer, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Cross References

See also *§§ 246.50* and *246.58*.

For discussion and forms of answers and affirmative defenses, see Ch. 26, *Answers* .

California Forms of Pleading and Practice--Annotated

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Volume 20: Easements thru Eminent Domain-Chs. 240-247
Chapter 246 EMERGENCY VEHICLES
PART IV. FORMS

20-246 California Forms of Pleading and Practice--Annotated § 246.60

§ 246.60 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Immunity of Public Employee or Public Entity for Injury to Fleeing Suspect [Gov. Code § 845.8]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Immunity of Public Employee or Public Entity for Injury to Fleeing Suspect [Gov. Code § 845.8]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. Defendant _____ (name of public entity) is a _____ [public entity *or* public employee] within the meaning of *Section 845.8 of the Government Code*.

2. At the time of the accident mentioned in plaintiff's complaint, _____ [plaintiff *or* plaintiff's decedent] was a suspected violator of the law, and was resisting _____ [arrest *or* detention] by fleeing from the pursuit of _____ [defendant *or* _____ (*name of employee(s)*), (a) police officer(s)].

3. Whatever injury, if any, sustained by _____ [plaintiff *or* plaintiff's decedent] as a result of the accident, was caused by _____ [plaintiff *or* plaintiff's decedent] resisting _____ [arrest *or* detention].

[2] Use of Form

This form of defense is for use by a public employee or public entity when the complaint alleges personal injury or death resulting from a police pursuit, and the plaintiff or the plaintiff's decedent was the subject of the police pursuit. If the public agency has adopted a written policy on vehicular pursuits that complies with the provisions of *Veh. Code § 17004.7*, counsel may, as an alternative, use the affirmative defense provided in *see § 246.61*.

[3] Immunity for Injury to Fleeing Suspect

Gov. Code § 845.8(b) provides that neither a public entity nor a public employee is liable for any injury caused by an escaping or escaped prisoner, an escaping or escaped arrested person, or a person resisting arrest. *Veh. Code § 17001*, however, provides that a public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his or her employment. The California Supreme Court has held that *Gov. Code § 845.8* does not provide immunity to public entities for liability that is predicated on *Veh. Code § 17001* [*Thomas v. City of Richmond (1995) 9 Cal. 4th 1154, 1165, 40 Cal. Rptr. 2d 442, 892 P.2d 1185]* . The Court rejected the distinction, relied on in at least one court of appeal opinion, between actions by injured third parties on the one hand and persons injured while fleeing on the other hand, on the ground that nothing in the statute permits such a distinction [*Thomas v. City of Richmond (1995) 9 Cal. 4th 1154, 1165, 40 Cal. Rptr. 2d 442, 892 P.2d 1185* (disapproving *Hooper v. City of Chula Vista (1989) 212 Cal. App. 3d 442, 260 Cal. Rptr. 495* to extent of inconsistency)].

[4] Cross References

See also *§ 246.58*.

For discussion and forms of answers and affirmative defenses, see Ch. 26, *Answers* .

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Chapter 246 EMERGENCY VEHICLES
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20-246 California Forms of Pleading and Practice--Annotated § 246.61

§ 246.61 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Immunity of Public Entity by Reason of Having Policy for Safe Police Pursuit [Veh. Code § 17004.7]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Immunity of Public Entity by Reason of Having Policy for Safe Police Pursuit [Veh. Code § 17004.7]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. Defendant _____ (*name of driver of vehicle that caused damage to plaintiff*), at the time of the accident mentioned in plaintiff's complaint, was suspected of having violated the law and _____ [was *or* believed he/she was *or* had been] under pursuit by peace officers employed by defendant _____ [*name of public agency*] in a motor vehicle.

2. Prior to the time of the accident mentioned in plaintiff's complaint, defendant _____ [*name of public agency*] had adopted a written policy on vehicular pursuits in compliance with *Vehicle Code Section 17004.7(c)*. A copy of the policy is attached hereto as Exhibit "_____" and made a part hereof.

[2] Use of Form

This form of defense is for use by a public agency in an answer when the complaint alleges that personal injuries, death, or property damage resulted from the collision of a vehicle under police pursuit, and the collision occurred on or after January 1, 1988. The immunity applies if the driver of the vehicle under pursuit was an actual or suspected violator of the law who was, or believed he or she was, being pursued by a peace officer in a motor vehicle [*Veh. Code § 17004.7*].

[3] Cross References

See also *§ 246.58*.

For discussion of answers and affirmative defenses, and forms for drafting complete answers, see Ch. 26, *Answers* .

California Forms of Pleading and Practice--Annotated

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20-246 California Forms of Pleading and Practice--Annotated § 246.62

§ 246.62 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Exemption of Physician From Speed Limitations by Reason of Response to Emergency Call [Veh. Code § 21058]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Exemption of Physician From Speed Limitations by Reason of Response to Emergency Call [Veh. Code § 21058]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that at the time of the accident, defendant was a physician [and surgeon] duly licensed to practice his or her profession in the state of California and, as such, was traveling in response to an emergency call in a vehicle displaying an insignia approved by the Department of the California Highway Patrol indicating that such vehicle was owned by a licensed physician.

[2] Use of Form

This form of defense is for use by a physician in an answer when the complaint alleges negligence premised on violation by the physician of certain speed laws.

[3] Cross References

See also *§ 246.58*

For discussion and forms of answers and affirmative defenses, see Ch. 26, *Answers*

California Forms of Pleading and Practice--Annotated

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Volume 20: Easements thru Eminent Domain-Chs. 240-247
Chapter 247 EMINENT DOMAIN AND INVERSE CONDEMNATION

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[2] Use of Form

[3] Cross References

§ 247.292 Notice of Abandonment [Code Civ. Proc. § 1268.510(a)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

§ 247.293 Proceedings to Set Aside Abandonment [Code Civ. Proc. § 1268.510(b)]--Notice of Motion

[1] FORM

[2] Use of Form

[3] State Statutes

[4] California Points and Authorities

§ 247.294 Proceedings to Set Aside Abandonment [Code Civ. Proc. § 1268.510(b)]--Order Granting Motion to Set Aside

[1] FORM

[2] Use of Form

[3] Cross References

§ 247.295 Proceedings to Dismiss Action After Abandonment [Code Civ. Proc. § 1268.510(c)]--Notice of Motion [Code Civ. Proc. § 1010]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 247.296 Proceedings to Dismiss Action After Abandonment [Code Civ. Proc. § 1268.510(c)]--Supporting Declaration

[1] FORM

[2] Use of Form

§ 247.297 Proceedings to Dismiss Action After Abandonment [Code Civ. Proc. § 1268.510(c)]--Order of Dismissal

[1] FORM

[2] Use of Form

§ 247.298 Demand for Exchange of Lists of Expert Witnesses and Statements of Valuation Date [Code Civ. Proc. § 1258.210(b)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Los Angeles County Rules of Court

[5] Text References

[6] Cross References

§ 247.299 Notice of Motion and Motion for Order Resolving Issue Affecting Determination of Compensation [Code Civ. Proc. § 1260.040]

[1] FORM

[2] Use of Form

[3] Accompanying Papers

[4] State Statutes

[5] Text References

§ 247.300 Notice of Deposit [Code Civ. Proc. § 1255.020]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 247.301 Notice by Defendant Homeowner or Lessor Demanding Deposit of Probable Compensation [Code Civ. Proc. §§ 1255.040(a), 1255.050]

[1] FORM

[2] Use of Form

[3] Waiver of Claims and Defenses

[4] State Statutes

[5] Cross References

§ 247.302 Proceedings for Withdrawal of Deposit of Probable Compensation [Code Civ. Proc. § 1255.210]--Application

[1] FORM

[2] Use of Form

[3] State Statutes

§ 247.303 Proceedings for Withdrawal of Deposit of Probable Compensation [Code Civ. Proc. § 125.210]--Notice of Withdrawal to Other Interested Parties [Code Civ. Proc. § 1255.230(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 247.304 Proceedings for Withdrawal of Deposit of Probable Compensation [Code Civ. Proc. § 1255.210]--Objections by Plaintiff [Code Civ. Proc. § 1255.230]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 247.305 Proceedings for Withdrawal of Deposit of Probable Compensation [Code Civ. Proc. § 1255.210]--Order [Code Civ. Proc. §§ 1003, 1255.220]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 247.306 Plaintiff's Final Offer [Code Civ. Proc. § 1250.410(a)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 247.307 Defendant's Final Demand [Code Civ. Proc. § 1250.410]

[1] FORM

[2] Use of Form

[3] Cross References

§ 247.308 Proceedings to Obtain Order for Possession [Code Civ. Proc. § 1255.410]--Notice of Motion

[1] FORM

[2] Use of Form

[3] State Statutes

§ 247.308A Proceedings to Obtain Order for Possession [Code Civ. Proc. § 1255.410]--Opposition to Motion for Order for Possession

[1] FORM

[2] Use of Form

§ 247.309 Proceedings to Obtain Order for Possession--Order [Code Civ. Proc. §§ 1255.410, 1255.460]

[1] FORM

[2] Use of Form

[3] Contents of Order

[4] Cross References

§ 247.310 Proceedings to Vacate Order for Possession [Code Civ. Proc. § 1255.440]--Notice of Motion

[1] FORM

[2] Use of Form

[3] State Statutes

§ 247.311 Proceedings to Vacate Order for Possession [Code Civ. Proc. § 1255.440]--Order

[1] FORM

[2] Use of Form

[3] Cross References

§ 247.312 Judgment in Condemnation After Jury Trial [Code Civ. Proc. §§ 1235.130, 1260.220, 1260.230, 1268.010]--No Apportionment

[1] FORM

[2] Use of Form

[3] Award of Taxes in Judgment

[4] State Statutes

[5] Cross References

§ 247.313 Judgment in Condemnation After Jury Trial [Code Civ. Proc. §§ 1235.130, 1260.220, 1260.230, 1268.010]--Apportionment

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 247.314 Order for Possession [Code Civ. Proc. § 1268.210]

[1] FORM

[2] Use of Form

§ 247.315 Application for Order for Payment From Plaintiff's Deposit After Judgment [Code Civ. Proc. § 1268.140]--By Defendant

[1] FORM

[2] Use of Form

[3] Notice of Application

§ 247.316 Receipt for Money and Abandonment of Defenses [Code Civ. Proc. § 1268.140(a)(2)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

§ 247.317 Order for Payment From Deposit [Code Civ. Proc. § 1268.140]

[1] FORM

[2] Use of Form

§ 247.318 Notice by Defendant of Plaintiff's Failure to Pay Judgment Within Time Required [Code Civ. Proc. § 1268.020(b)(2)]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 247.319 Proceedings for Dismissal of Eminent Domain Proceeding for Failure of Plaintiff to Pay Judgment [Code Civ. Proc. § 1268.020(b)] and Award of Litigation Expenses [Code Civ. Proc. § 1268.610] and Costs [Code Civ. Proc. § 1268.710]--Notice of Motion

[1] FORM

[2] Use of Form

[3] Litigation Expenses and Costs

[4] State Statutes

§ 247.320 Proceedings for Dismissal of Eminent Domain Proceeding for Failure of Plaintiff to Pay Judgment [Code Civ. Proc. § 1268.020(b)] and Award of Litigation Expenses [Code Civ. Proc. § 1268.610] and Costs [Code Civ. Proc. § 1268.710]--Supporting Declaration

[1] FORM

[2] Use of Form

§ 247.321 Proceedings for Dismissal of Eminent Domain Proceeding for Failure of Plaintiff to Pay Judgment [Code Civ. Proc. § 1268.020(b)] and Award of Litigation Expenses [Code Civ. Proc. § 1268.610] and Costs [Code Civ. Proc. § 1268.710]--Order of Dismissal

[1] FORM

[2] Use of Form

§ 247.322 Proceedings for Restoration of Property and for Damages [Code Civ. Proc. § 1268.620] and Award of Litigation Expenses [Code Civ. Proc. § 1268.610] and Costs [Code Civ. Proc. § 1268.710] to Defendant--Notice of Motion

[1] FORM

[2] Use of Form

[3] State Statutes

§ 247.323 Proceedings for Restoration of Property and for Damages [Code Civ. Proc. § 1268.620] and Award of Litigation Expenses [Code Civ. Proc. § 1268.610] and Costs [Code Civ. Proc. § 1268.710] to Defendant--Supporting Declaration

[1] FORM

[2] Use of Form

§ 247.324 Proceedings for Restoration of Property and for Damages [Code Civ. Proc. § 1268.620] and Award of Litigation Expenses [Code Civ. Proc. § 1268.610] and Costs [Code Civ. Proc. § 1268.710] to Defendant--Order

[1] FORM

[2] Use of Form

§ 247.325 Proceedings to Recover Litigation Expenses After Unreasonable Offer by Plaintiff [Code Civ. Proc. § 1250.410(b)]--Notice of Motion [Code Civ. Proc. § 1010]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 247.326 Proceedings to Recover Litigation Expenses After Unreasonable Offer by Plaintiff [Code Civ. Proc. § 1250.410(b)]--Supporting Declaration

[1] FORM

[2] Use of Form

§ 247.327 Proceedings to Recover Litigation Expenses After Unreasonable Offer by Plaintiff [Code Civ. Proc. § 1250.410(b)]--Order Granting Litigation Expenses as Costs

[1] FORM

[2] Use of Form

§ 247.328 Final Order of Condemnation [Code Civ. Proc. § 1268.030]

[1] FORM

[2] Use of Form

§§ 247.329-247.339 [Reserved]

§ 247.340 Complaint in Inverse Condemnation [Cal. Const., art. I, § 19]--General Form--Example of Taking by Water Damage

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction and Venue

[5] Statute of Limitations

[a] Applicable Statute Is Three or Five Years

[b] Accrual of Cause of Action

[6] Service of Process

[7] No Claim Requirement

[8] Right to Jury Trial

[9] Costs

[10] Verification

[11] State Constitution

[12] State Statutes

[13] Decisions

[14] Cross References

§ 247.341 Complaint in Inverse Condemnation [Cal. Const., art. I, § 19]--Taking by Airport Noise

[1] FORM

[2] Use of Form

[3] Allegations

[4] Decisions

§ 247.342 Complaint in Inverse Condemnation [Cal. Const., art. I, § 19]--Taking by Substantial Impairment of Access

[1] FORM

[2] Use of Form

[3] Allegations

[4] Decisions

[5] Cross References

§ 247.343 Complaint in Inverse Condemnation [Cal. Const., art. I, § 19]--Taking by Precondemnation Delay

[1] FORM

[2] Use of Form

[3] Allegations

[4] Decisions

[5] Cross References

§ 247.344 Complaint in Inverse Condemnation for Damages and/or to Require Taking of Property and Payment of Compensation--Failure of Public Entity to Commence Condemnation Proceeding or Serve Summons Within Six Months After Adoption of Resolution of Necessity [Code Civ. Proc. § 1245.260(a)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Statute of Limitations

[5] Attorney's, Appraisal, and Engineering Fees

[6] State Statutes

[7] Cross References

§ 247.345 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Public Entity to Rescind Resolution of Necessity or to Commence Eminent Domain Proceeding [Code Civ. Proc. § 1245.260(f)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Cross References

§ 247.346 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Inverse Condemnation--Failure to Exhaust Administrative Remedies

[1] FORM

[2] Use of Form

[3] Decisions

§ 247.347 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Inverse Condemnation--Estoppel by Judgment or Deed

[1] FORM

[2] Use of Form

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§ 247.01 Scope of Chapter

This chapter discusses and contains forms relating to the acquisition of property by eminent domain. It contains forms relating to precondemnation activities [*see §§ 247.270 -247.277*]; a complaint in eminent domain [*see § 247.279*] and related forms and allegations [*see §§ 247.278*, 247.280-247.285]; a notice of lis pendens [*see § 247.286*]; and forms for use by a defendant whose property is sought to be condemned in disclaiming any or a partial interest in the property [*see § 247.287*] or in answering the complaint [*see § 247.288*]. The chapter also includes forms for use in proceeding before trial [*see §§ 247.289 -247.311*] and after trial [*see §§ 247.312 -247.327*], including forms of judgment [*see §§ 247.312*, *247.313*] and a form of final order of condemnation [*see § 247.328*].

For discussion of the use of contingent fee agreements in condemnation proceedings, see Ch. 72, *Attorney Practice* .

This chapter also discusses and contains forms for use in inverse condemnation actions. Included are forms of complaint based on inverse condemnation [*see §§ 247.340 -247.345*] and forms of affirmative defense for use in inverse condemnation actions [*see §§ 247.346*, *247.347*].

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§ 247.02 Cross References

For a form of complaint in inverse condemnation for taking of lateral or subjacent support of land, see Ch. 11, *Adjoining Landowners* .

For discussion of compensation for removal of billboards pursuant to regulation of outdoor advertising, see Ch. 14, *Advertising* .

For discussion of taking by eminent domain by public entities authorized to operate airports, see Ch. 16, *Airplanes and Airports* .

For discussion and forms relating to actions to abate nuisances, see Ch. 391, *Nuisance* .

For a discussion of tort claims against public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

For discussion and forms relating to the resolution of conflicting claims of ownership to property through an action to quiet title, see Ch. 482, *Quieting Title* .

For discussion and forms relating to zoning and land use planning, see Ch. 579, *Zoning and Planning* .

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[Reserved]

§§ 247.03[Reserved]

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§ 247.10 Eminent Domain Law, Generally

[1] Governing Statutes

Provisions governing exercise of the right of eminent domain are set forth in the Eminent Domain Law [*Code Civ. Proc. § 1230.010 et seq.*]. Except as otherwise provided by statute, the power of eminent domain may be exercised only as provided in that law [*Code Civ. Proc. § 1230.020*].

[2] Rules of Practice

The rules of practice that govern civil actions generally apply to eminent domain proceedings except as otherwise provided in the Eminent Domain Law [*Code Civ. Proc. § 1230.040*]. These general rules of practice mainly are found in *Code Civ. Proc. § 307 et seq.* However, additional provisions in other portions of the Code of Civil Procedure and many nonstatutory rules of procedure that apply to civil actions generally also may apply to eminent domain proceedings [Assembly Legislative Committee Comment to *Code Civ. Proc. § 1230.040*].

According to the Assembly Legislative Committee Comment to *Code Civ. Proc. § 1230.040*, although an eminent domain proceeding is a special proceeding of a civil nature and not a civil action, the fact that a provision of the Code of Civil Procedure utilizes the term "action" rather than "proceeding," or the fact that a provision has not been applied to other special proceedings, does not preclude its applicability in eminent domain proceedings [*see Harrington v. Superior Court (1924) 194 Cal. 185, 191, 228 P. 15* (condemnation proceeding as special proceeding)].

[3] Jurisdiction of Public Utilities Commission

The Eminent Domain Law does not affect any other statute granting jurisdiction over any issue in eminent domain proceedings to the Public Utilities Commission (hereinafter referred to as the "PUC") [*Code Civ. Proc. § 1230.060*]. The PUC has concurrent jurisdiction over certain eminent domain proceedings [*see, e.g., Pub. Util. Code § 1403* (local public entities permitted to petition PUC to acquire public utility property under eminent domain proceedings)] and exclusive jurisdiction over other areas [*see, e.g., Pub. Util. Code § 1201* (railroad crossings); *see also Northwestern*

Pac. R.R. Co. v. Superior Court (1949) 34 Cal. 2d 454, 458, 211 P.2d 571] . In addition, the Legislature may give specific grants of jurisdiction to the PUC over certain issues involved in particular eminent domain acquisitions [*see, e.g., Pub. Util. Code § 30503* (PUC is required to review acquisitions of railroad property by So. Cal. Rapid Transit Dist.); *see also* Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1230.060*].

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§ 247.11 Definitions

[1] "Person"

The term "person" includes any public entity, individual, association, organization, partnership, trust, limited liability company, or corporation [*Code Civ. Proc. § 1235.160*].

[2] "State"

The term "state" means the State of California and includes the Regents of the University of California [*Code Civ. Proc. § 1235.200*].

[3] "Public Entity"

The term "public entity" includes the state, a county, city, district, public authority, public agency, and any other political subdivision of the state [*Code Civ. Proc. § 1235.190*].

[4] "Local Public Entity"

The term "local public entity" means any public entity other than the state [*Code Civ. Proc. § 1235.150*].

[5] "Property"

The term "property" includes real and personal property and any interest in it [*Code Civ. Proc. § 1235.170*].

[6] "Property Appropriated to Public Use"

The term "property appropriated to public use" is property either already in use for a public purpose or set aside for a specific public purpose with the intention of using it for that purpose within a reasonable time [*Code Civ. Proc. §*

1235.180].

[7] "Interest"

The term "interest," when used with reference to property, includes any right, title, or estate in property [*Code Civ. Proc. § 1235.125*].

[8] "Statute"

The term "statute" means a constitutional provision or statute, but does not include a charter provision or ordinance [*Code Civ. Proc. § 1235.210*].

[9] "Resolution"

The term "resolution" includes an ordinance [*Code Civ. Proc. § 1235.195*].

[10] "Proceeding"

The term "proceeding" means an eminent domain proceeding under the Eminent Domain Law [*Code Civ. Proc. § 1235.165*].

[11] "Condemnor" and "Condemnee"

The term "condemnor" is used in this chapter to indicate a person having the authority to acquire property for a particular use by eminent domain. The term "condemnee" refers to the person whose land is sought to be acquired by eminent domain.

[12] Eminent Domain and Inverse Condemnation Distinguished

As used in this chapter, "direct condemnation" refers to a condemnation proceeding brought by a person or public entity empowered to exercise the right to condemn property, and "inverse condemnation" refers to a proceeding brought by the owner of a property interest taken or damaged by such a person or public entity that has failed to initiate condemnation proceedings against the owner [*see Klopping v. Whittier (1972) 8 Cal. 3d 39, 43, 104 Cal. Rptr. 1, 500 P.2d 1345]* .

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§ 247.12 Nature and Source of Eminent Domain Power

Eminent domain is the power of government to take private property for public use. Because the power is inherent in the sovereignty of the state [*County of San Diego v. Miller (1975) 13 Cal. 3d 684, 687, 119 Cal. Rptr. 491, 532 P.2d 139*], state and federal constitutional provisions merely place limitations on its exercise [*People v. Chevalier (1959) 52 Cal. 2d 299, 304, 340 P.2d 598*]. The California Constitution vests exercise of the power in the legislature, which can take private property against the will of the owner only for public use and only after just compensation to the owner has been paid or secured [*Cal. Const., art. I, § 19(a)*; *University of So. Cal. v. Robbins (1934) 1 Cal. App. 2d 523, 525, 37 P.2d 163* , *cert. denied, 295 U.S. 738* ; *see U.S. Const., amends. V, XIV* (property may not be taken without just compensation and due process); *see also CACI No. 3500* (California Judicial Council jury instruction on right of eminent domain)].

In 2008, *Cal. Const., art. I, § 19* was amended through the initiative process [Proposition 99 (effective June 4, 2008)] to expressly prohibit government agencies from using eminent domain to take an owner-occupied home to transfer it to another private owner or developer [*Cal. Const., Art. 1, § 19(b)* ("The State and local governments are prohibited from acquiring by eminent domain an owner-occupied residence for the purpose of conveying it to a private person"); *see Cal. Const., Art. 1, § 19(e)* ("conveyance," "local government," "owner-occupied residence," "person," "public work or improvement" and "state" defined)]. Proposition 99 was enacted in response to *Kelo v. City of New London (2005) 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439* , which held that it was permissible for a city to use eminent domain to take a private residence in Connecticut for the purpose of economic development [*see* Proposition 99, § 1(c) (effective June 4, 2008)]. However, the prohibition adopted in Proposition 99 does not apply when state or local government exercises the power of eminent domain for the purpose of protecting public health and safety; preventing serious, repeated criminal activity; responding to an emergency; or remedying environmental contamination that poses a threat to public health and safety. Furthermore, it does not apply when state or local government exercises the power of eminent domain for the purpose of acquiring private property for a public work or improvement [*Cal. Const., art I, § 19(c)* and *(d)* (as amended by Proposition 99, June 4, 2008)]. The amendments made by Proposition 99 do not apply to the acquisition of real property if the initial written offer to purchase the property was made on or before the date on which this initiative becomes effective, and a resolution of necessity to acquire the real property by eminent domain was

adopted on or before 180 days after that date [Proposition 99, § 7 (effective June 4, 2008)].

Except as restricted and controlled by these requirements, the power of the legislature to take private property is unlimited, and its determination to do so is conclusive. Whether the use is public and whether proper compensation has been made are judicial questions, the final determination of which rests with the courts. All other questions involved in the taking of private property are of a legislative nature [*People v. Chevalier (1959) 52 Cal. 2d 299, 304, 340 P.2d 598*].

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§ 247.13 Acquisition of Property by Other Means

[1] Discretion in Exercise of Power

Nothing in the Eminent Domain Law requires that the eminent domain power be exercised to acquire property necessary for public use. The decision as to the means of acquisition is left to the discretion of the person acquiring the property [*Code Civ. Proc. § 1230.030*; *see Code Civ. Proc. § 1235.160* (defining person authorized to acquire property)]. Any public entity authorized to acquire property for a particular use by eminent domain may also acquire the property for such use by grant, subject, however, to any other statute relating to the acquisition of property [*Code Civ. Proc. § 1240.130*; *see, e.g., Gov. Code § 15854* (acquisition of property under Property Acquisition Law may be by condemnation)].

[2] Use of Police Power

Damages inflicted on property by administrative or legislative regulation are generally noncompensable under the police power doctrine. When private property is directly taken or damaged, the police power doctrine of noncompensable loss applies only in emergency situations when damage to property is inflicted by the government due to public necessity and to avert impending peril [*Holtz v. Superior Court (1970) 3 Cal. 3d 296, 305, 90 Cal. Rptr. 345, 475 P.2d 441]* .

An "emergency" is an unforeseen situation calling for immediate action; it is not synonymous with expediency, convenience, or best interests, and it imports more than merely a general public need. "Emergency" comprehends a situation of grave character and serious moment, and is evidenced by an imminent and substantial threat to public health or safety [*Los Osos Valley Associates v. City of San Luis Obispo (1994) 30 Cal. App. 4th 1670, 1681, 36 Cal. Rptr. 2d 758 , citing Sonoma County Organization etc. Employees v. County of Sonoma (1991) 1 Cal. App. 4th 267, 276-277, 1 Cal. Rptr. 2d 850]* . Examples of emergency situations are the demolition of all or parts of buildings to prevent the spread of a fire, or the destruction of diseased animals, rotten fruit, or infected trees when life or health is jeopardized [*Holtz v. Superior Court (1970) 3 Cal. 3d 296, 305 n.10, 90 Cal. Rptr. 345, 475 P.2d 441* ; *Hunter v. Adams (1960) 180 Cal. App. 2d 511, 524, 4 Cal. Rptr. 776]* .

Police power must be exercised properly and reasonably [*People v. K. Sakai Co. (1976) 56 Cal. App. 3d 531, 538, 128 Cal. Rptr. 536]* . In determining whether the doctrine of eminent domain or police power is applicable in a particular situation, the facts must be examined to determine whether or not the action was essential or reasonably necessary to safeguard the public health, safety, or morals. If the injury was the result of legitimate governmental action, reasonably taken for the public good and for no other purpose, and reasonably necessary to serve a public purpose for the general welfare, the action is a proper exercise of police power. If, however, the taking or damaging is not essential to the general welfare, or is not prompted by so great a necessity, it comes within the doctrine of eminent domain and cannot be justified without proper compensation to the owner [*Hunter v. Adams (1960) 180 Cal. App. 2d 511, 523, 4 Cal. Rptr. 776]* .

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§ 247.14 Judicial Council of California Civil Jury Instructions (CACI)

In 2003, the California Judicial Council released a comprehensive set of civil jury instructions--the Judicial Council of California Civil Jury Instructions ("CACI") (LexisNexis Matthew Bender, Official Publisher). CACI includes jury instructions on many areas of law, including eminent domain. The eminent domain instructions address a variety of topics, for example, fair market value, severance damages, and precondemnation damages [*see CACI, 3500* Series]. CACI is approved by the Judicial Council as the "official instructions for use" in California [*Cal. Rules of Ct., Rule 2.1050(a)*]. Their use is strongly encouraged [*Cal. Rules of Ct., Rule 2.1050(e)*].

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[Reserved]

§§ 247.15[Reserved]

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20-247 California Forms of Pleading and Practice--Annotated § 247.30

§ 247.30 Parties Authorized to Exercise Power

[1] Statutory Grant of Power, in General

Only persons authorized by statute may exercise the power of eminent domain to acquire property for a particular use [*Code Civ. Proc. § 1240.020*; for definition of person, *see § 247.11[1]*].

A local public entity may use eminent domain only to acquire property within its territorial limits except when the eminent domain power is expressly granted to the entity by statute or necessarily implied as an incident of one of its other statutory powers [*Code Civ. Proc. § 1240.050*; *see § 247.52*].

A statutory grant of the eminent domain power must be indicated by express terms or by clear implication from the powers expressly given. Any reasonable doubt concerning the existence of the power is resolved against the entity. However, a statute granting the power of eminent domain should be construed so as to effectuate, not to defeat, the purpose for which it was enacted [*Golden Gate Bridge etc. Dist. v. Muzzi (1978) 83 Cal. App. 3d 707, 712, 148 Cal. Rptr. 197* ; *Skreden v. Superior Court (1975) 54 Cal. App. 3d 114, 117, 126 Cal. Rptr. 411* ; *see People ex rel. Dept. of Transportation v. Sullivan (1978) 78 Cal. App. 3d 120, 122, 144 Cal. Rptr. 100* (condemnation of land adjoining state highway is permitted when property was sought to provide secure slope adjoining highway predictably subject to future slides and to provide access for repair work)]. Whether or not an entity has the power to condemn is a jurisdictional issue that may be raised by writ of prohibition [*Skreden v. Superior Court (1975) 54 Cal. App. 3d 114, 116 n. 1, 126 Cal. Rptr. 411]* .

[2] State Agencies

With a few exceptions, the State Public Works Board is the only state agency that may exercise the power of eminent domain to acquire property needed by any state agency for any state purpose or function [*Gov. Code § 15855(a)*; *see Gov. Code § 15850 et seq.* (Property Acquisition Law) (authorizes State Public Works Board to exercise power of eminent domain)]. Other state agencies having their own independent right to exercise the power of eminent domain are the following:

- Department of Transportation (authority to acquire property for aeronautics, state highways, and toll bridge purposes) [*Pub. Util. Code § 21633*; *Sts. & Hy. Code §§ 102, 30100*];

- Department of Water Resources (authority to acquire property for state dam and water projects) [*Water Code §§ 250, 11575*];

- State Lands Commission (authority to acquire property for access to public land and for oil and gas production) [*Pub. Res. Code §§ 6210.9, 6808*];

- State Reclamation Board (condemnation for Sacramento and San Joaquin Drainage Districts) [*Water Code § 8593*];

- Regents of the University of California [*Educ. Code § 92040*; *Cal. Const., art. XI, § 9*]; and

- Department of Fish and Game (authority to acquire property for access roads and rights-of-way to coastal waters used for fishing, subject to Wildlife Conservation Board authorization; actual acquisition made by State Public Works Board) [*Fish & Game Code § 1348*; *Gov. Code § 15855(b)*].

[3] Special Districts

The majority of California's more than 2,000 special districts consisting of over 160 different types are authorized to exercise the power of eminent domain to acquire property necessary for their purposes and objectives. Because there are so many special districts, it is not practical to include a summary of the condemnation powers of each. An attorney dealing with a particular special district should refer to the specific statute governing that district. These statutes were amended to conform to the Eminent Domain Law, thus eliminating provisions that would have duplicated or been inconsistent with the general provisions of the Eminent Domain Law.

[4] Cities and Counties

Gov. Code § 25350.5 permits the board of supervisors of any county to acquire by eminent domain any property necessary to carry out any of the county's powers or functions. However, this broad grant of power may be subject to specific limitations [*see, e.g., Penal Code § 4106* (land may not be acquired for industrial farm outside county without consent of affected county)]. On the other hand, a statute authorizing the acquisition of property by means not specifically including eminent domain does not preclude the use of eminent domain under *Gov. Code § 25350.5* [*see, e.g., Pub. Res. Code § 5157* (county may acquire land for recreational purposes); Cal. L. Rev. Comm'n Comment to *Gov. Code § 25350.5*].

Similarly, *Gov. Code § 37350.5* permits a city to use eminent domain to acquire any property necessary to carry out its powers or functions. Because these powers and functions may be determined by city charter as well as by statute, an attorney dealing with condemnation at the city level should consult any charter as well as any relevant statutes to determine if the city is authorized to condemn property for the stated purpose [*see* Cal. L. Rev. Comm'n Comment to *Gov. Code § 37350.5*].

Under some circumstances, specific limitations may be imposed on the exercise of a city's power of eminent domain [*see Gov. Code § 37353(c)* (existing golf courses may not be acquired by eminent domain for golf course purposes)]. However, according to the Cal. L. Rev. Comm'n Comment to *Gov. Code § 37350.5*, a statute specifically authorizing a city to acquire property by means not specifically including eminent domain does not preclude the use of eminent domain under *Gov. Code § 37350.5*.

[5] School Districts

The governing board of any school district and community college district may acquire by eminent domain any property necessary to carry out its powers or functions [*Educ. Code § 35270.5*].

[6] Private Persons and Quasi-Public Entities

Some types of quasi-public entities have the authority to condemn for certain public uses. Quasi-public entities include [*Code Civ. Proc. § 1245.320*]:

- Educational institutions of collegiate grade not conducted for profit [Educ. Code § 94500];
- Nonprofit hospitals [*Health & Safety Code § 127050*];
- Cemetery authorities [*Health & Safety Code § 8501*];
- Land chest corporations [*Health & Safety Code § 35167*; *see* 1998 Stats., ch. 173, § 2 (repealer of Community Land Chest Law [*Health & Safety Code § 35100 et seq.*] effective January 1, 1999, but former provisions continue to apply to land chest corporations formed before that date)]; and
- Mutual water companies [*Pub. Util. Code § 2729*].

A quasi-public entity may also be a real property owner who seeks to acquire an appurtenant easement for utility service [*Code Civ. Proc. § 1245.325(a)*]. This provision allowing a private person to condemn an easement for utility purposes is constitutional because the standard is not vague and there is a public use requirement [*L & M Professional Consultants, Inc. v. Ferreira (1983) 146 Cal. App. 3d 1038, 1048-1053, 194 Cal. Rptr. 695]* . A quasi-public entity may also be an owner of real property who needs access to adjacent or nearby property to repair or reconstruct land or improvements [*Code Civ. Proc. § 1245.326(a)*; *see Civ. Code § 1002*; *see also § 247.280*].

Private persons have no authority to condemn property for any purpose, except in specified situations. For example, private persons may not condemn property for sewer easements but they may request the appropriate public entity to undertake condemnation on their behalf for a sewer [*Health & Safety Code § 4967*].

[7] Joint Exercise of Power

Two or more public agencies may agree to exercise their respective powers to eminent domain jointly, whether or not possessed in common, for the acquisition of property as a single parcel [*Code Civ. Proc. § 1240.140(b)*]. A public agency, in this context, is the federal government or any federal department or agency, the State of California, an adjoining state or any state department or agency, a county, county board of education, city, public corporation, public district, regional transportation commission of California or another state, or any joint powers authority formed by any of these agencies [*Code Civ. Proc. § 1240.140(a)*; *Gov. Code § 6500*]. The power may be exercised not only when the particular parcel is needed for a joint project but also when each of the agencies requires a portion of the parcel for its own purposes [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1240.140*]. The agreement must be entered into and performed pursuant to *Gov. Code § 6500 et seq.* (joint exercise of powers) [*Code Civ. Proc. § 1240.140(b)*].

Cities may create a separate "joint powers agency" and delegate their eminent domain powers to that agency [*Gov. Code § 6502*; *Burbank-Glendale-Pasadena Airport Authority v. Hensler (2000) 83 Cal. App. 4th 556, 564, 99 Cal. Rptr. 2d 729]* . For example, the cities of Burbank, Glendale, and Pasadena were able to form a joint airport authority and delegate their individual eminent domain powers to acquire property for an airport to the airport authority through a Joint Powers Agreement [*see Burbank-Glendale-Pasadena Airport Authority v. Hensler (2000) 83 Cal. App. 4th 556,*

564, 99 Cal. Rptr. 2d 729] .

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§ 247.31 Public Use

[1] Requirement of Public Use

Property may be acquired by eminent domain only for a public use [*Cal. Const., art. I, § 19*; *Code Civ. Proc. § 1240.010*; *People v. Chevalier (1959) 52 Cal. 2d 299, 304, 340 P.2d 598]* . A public use is one that concerns the whole community as distinguished from a particular individual or particular number of individuals or that promotes the general interest in its relation to any legitimate object of government. A public use is not limited to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation, and enjoyment [*Housing Authority v. Dockweiler (1939) 14 Cal. 2d 437, 450, 94 P.2d 794]* . It is not necessary that each and every individual member of society have the same degree of interest in the use, or be personally or directly affected by it [*Gilmer v. A Certain Tract of Land (1861) 18 Cal. 229, 251* ; *Frustuck v. City of Fairfax (1963) 212 Cal. App. 2d 345, 358, 28 Cal. Rptr. 357* ; *see Bauer v. County of Ventura (1955) 45 Cal. 2d 276, 284, 289 P.2d 1]* .

Thus, the character of the use and not its extent, determines the question of public use [*Stratford Irrigation Dist. v. Empire Water Co. (1941) 44 Cal. App. 2d 61, 67, 111 P.2d 957* ; *see Unocal California Pipeline Co. v. Conway (1994) 23 Cal. App. 4th 331, 335, 28 Cal. Rptr. 2d 429* (holding that pipeline corporation that had as its only customer its parent company was public utility and thus had power of eminent domain; determinative issue is not number or type of customers, but whether property has been dedicated to public use)]. That is, a use may be public even though all persons within the area cannot enjoy it, if all who are capable of enjoying it have an equal right to do so [*San Joaquin & Kings River Canal & Irrigation Co. v. Stevinson (1912) 164 Cal. 221, 229, 128 P. 924]* .

The acquisition of a football franchise may be an appropriate municipal function and thus such acquisition is not, as a matter of law, a non-public use; the issue is a factual one for the trial court [*City of Oakland v. Oakland Raiders (1982) 32 Cal. 3d 60, 70-74, 183 Cal. Rptr. 673, 646 P.2d 835]* .

In the absence of a legislative declaration [*see § 247.31[2]*], whether, in any individual case, the use is a public use is determined from the facts and circumstances of that case [*University of Southern California v. Robbins (1934) 1 Cal.*

App. 2d 523, 526, 37 P.2d 163] .

The United States Supreme Court has held that economic development constitutes a "public use" within the meaning of the *Takings Clause of the Fifth Amendment* [*Kelo v. City of New London (2005) 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439*]. However, states may impose "public use" requirements that are stricter than the federal baseline. In 2008, *Cal. Const., art. I, § 19*, which gives state and local government the power of eminent domain, was amended through the initiative process [Proposition 99 (effective June 4, 2008)] to expressly prohibit government agencies from using eminent domain to take an owner-occupied home to transfer it to another private owner or developer [Proposition 99, § 1 (effective June 4, 2008); *see § 247.12*]. Proposition 99 was enacted in response to *Kelo v. City of New London (2005) 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439* [*see* Proposition 99, §§ 1(b), 2 (effective June 4, 2008)]. Furthermore, under California's redevelopment law, a governmental entity may take land for economic development purposes only in blighted areas [*Health & Safety Code § 33030 et seq.*; *see Redevelopment Agency of Chula Vista v. Rados Bros. (2002) 95 Cal. App. 4th 309, 314, 115 Cal. Rptr. 2d 234*].

[2] Legislative Declaration of Public Use

When the Legislature provides by statute that a use, purpose, object, or function is one for which the power of eminent domain may be exercised, this action is a legislative declaration that the use, purpose, object, or function is public [*Code Civ. Proc. § 1240.010*].

Thus, ordinarily a taking by a public entity or public utility does not present a public use issue since the property sought to be taken is usually devoted to a purpose that is declared to be a public use by statute and history indicates that there is little likelihood that a court will declare the use not to be a public one [*see* California Real Estate Law & Practice, Ch. 501, *The Power to Take*, § 501.40 (Matthew Bender); *see also Code Civ. Proc. § 1250.360(b)* (stated purpose is not public use as grounds for objection to right to take); *People v. Chevalier (1959) 52 Cal. 2d 299, 304, 340 P.2d 598* ; *University of Southern California v. Robbins (1934) 1 Cal. App. 2d 523, 526, 37 P.2d 163]* . A court will interfere with this declaration only if it clearly appears to be erroneous and without reasonable foundation [*Housing Authority v. Dockweiler (1939) 14 Cal. 2d 437, 449-450, 94 P.2d 794* ; *Pacific Tel. & Tel. Co. v. Redevelopment Agency (1977) 75 Cal. App. 3d 957, 969-970, 142 Cal. Rptr. 584* ; *see People ex rel. Dep't Public Works v. Superior Court (1968) 68 Cal. 2d 206, 210, 65 Cal. Rptr. 342, 436 P.2d 342]* .

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§ 247.32 Public Necessity Required

[1] Elements

A condemnor may not exercise the power of eminent domain unless he or she establishes that (1) the public interest and necessity require the project; (2) the project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury; and (3) the property sought to be acquired is necessary for the project [*Code Civ. Proc. § 1240.030*]. The word "project" is intended to apply to any type of public use regardless of whether the use is active (requiring construction of an improvement) or passive (requiring appropriation of property in unimproved condition). The term "public interest and necessity" encompasses all aspects of the public good, including, but not limited to, social, economic, environmental, and aesthetic considerations [Senate Legislative Committee Comment of *Code Civ. Proc. § 1240.030*].

[2] Resolution of Necessity

[a] Adoption of Resolution

A public entity may establish a public necessity for the taking of property by the adoption of a resolution of necessity. The governing body of a public entity must adopt such a resolution by a vote of two thirds of its members, or by a greater vote as required by statute, charter, or ordinance, in order to exercise the power of eminent domain [*Code Civ. Proc. §§ 1240.040, 1245.220, 1245.240*; *see Code Civ. Proc. §§ 1245.210-1245.270* (laws governing resolutions of necessity); *Gov. Code § 67542* (unanimous vote required of board of San Francisco Bay Area Transportation Terminal Authority)]. The governing body of a local public entity is the entity's legislative body as specified by statute [*Code Civ. Proc. § 1245.310(a)*; Assembly Legislative Committee Comment to *Code Civ. Proc. § 1245.310*; *see, e.g., Gov. Code § 23005* (board of supervisors governs county)]. When a separate redevelopment agency has been established by the local legislative body, the members of the redevelopment agency constitute the governing body and legislative body of the redevelopment agency [*Long Beach Community Redevelopment Agency v. Morgan (1993) 14 Cal. App. 4th 1047, 1053-1056, 18 Cal. Rptr. 2d 100]* . For the definition of "governing body" when the taking is by other districts, departments, and bodies, see *Code Civ. Proc. § 1245.210*.

The resolution of necessity cannot be adopted unless the public entity's governing body has given notice and a reasonable opportunity to appear and be heard on the matters referred to in *Code Civ. Proc. § 1240.030* (requirement of public necessity) to specified persons whose property is to be acquired [*Code Civ. Proc. § 1245.235(a)*].

Before adopting a resolution of necessity and initiating negotiations, a public entity must establish an amount it believes to be fair compensation, make an offer based on that amount to the property owner, and provide the owner with a written statement of, and summary of the basis for, the amount [*Gov. Code § 7267.1*]. Failure to provide the written statement is a basis for dismissal of an eminent domain proceeding [*City of San Jose v. Great Oaks Water Co. (1987) 192 Cal. App. 3d 1005, 1011-1013, 237 Cal. Rptr. 845]* .

[b] Contents of Resolution

The resolution of necessity is an administrative determination that the statutory prerequisites for taking particular property have been met. It must (1) generally state the public use for which the property is to be taken; (2) refer to the statute authorizing the public entity to acquire the property by eminent domain; (3) describe the general location and extent of the property to be taken in sufficient detail for reasonable identification; (4) state that either the offer required by *Gov. Code § 7267.2* has been made to the owner or owners of record or the offer has not been made because the owner cannot be located with reasonable diligence [*Code Civ. Proc. § 1245.230(a), (b)*]; and (5) include a declaration that the governing body of the public entity has found and determined the matters required by *Code Civ. Proc. § 1240.030* [*Code Civ. Proc. § 1245.230*].

The resolution of necessity must contain additional statements if the property is (1) sought for a future use [*see Code Civ. Proc. §§ 1240.220(b)*,1240.250(b)]; (2) substitute property to be exchanged for necessary property [*see Code Civ. Proc. §§ 1240.320(b), 1240.330(b), 1240.350(b)*]; (3) excess property [*Code Civ. Proc. § 1240.420*]; (4) sought for a more compatible use [*Code Civ. Proc. § 1240.510*]; or (5) sought for a more necessary public use [*Code Civ. Proc. § 1240.610*]. For discussions of these types of property, see *§§ 247.50 -247.58*.

The Eminent Domain Law requires that the local governing entity identify a "project" with a public purpose before it undertakes to condemn private property. The proposed project must be described in the resolution of necessity, which is the fundamental predicate to the entire condemnation process [*Code Civ. Proc. §§ 1240.010, 1240.030*; *City of Stockton v. Marina Towers LLC (2009) 171 Cal. App. 4th 93, 107, 88 Cal. Rptr. 3d 909*]. In one case, the project description in resolutions of necessity adopted by a city for the acquisitions of two parcels was so vague, uncertain, and sweeping in scope that it failed to specify the "public use" for which the city sought acquisition of the property. This crucial defect fatally flawed the condemnation process and the city had no right to take the property [*City of Stockton v. Marina Towers LLC (2009) 171 Cal. App. 4th 93, 114-115, 88 Cal. Rptr. 3d 909*].

[c] Effect of Resolution

Except as otherwise provided by statute, the resolution of necessity conclusively establishes the matters referred to in *Code Civ. Proc. § 1240.030* (element of public necessity) in all takings (1) by local public entities where the property taken is entirely within the boundaries of the condemning entity, and (2) by state entities regardless of the location of the property taken [*Code Civ. Proc. § 1245.250(a)*; Senate Legislative Committee Comment to *Code Civ. Proc. § 1245.250*]. However, if the taking is by a local public entity and the property is not located entirely within the entity's boundaries, the resolution only creates a presumption affecting the burden of producing evidence that the matters referred to in *Code Civ. Proc. § 1240.030* are true [*Code Civ. Proc. § 1245.250(b)*]. Consequently, when the property is outside the territorial limits of a local public entity, since the resolution is not conclusive, necessity and location are justiciable issues [*Carlsbad v. Wight (1963) 221 Cal. App. 2d 756, 761, 34 Cal. Rptr. 820* ; *see Los Angeles v. Keck (1971) 14 Cal. App. 3d 920, 925, 92 Cal. Rptr. 599]* . Also, if the taking is by a local public entity other than a sanitary district exercising the powers of a county water district and the property is electric, gas, or water public utility property,

the resolution of necessity creates a rebuttable presumption affecting the burden of proof that the matters referred to in *Code Civ. Proc. § 1240.030* are true [*Code Civ. Proc. § 1245.250(b)*].

If the resolution was adopted or its contents were influenced by a gross abuse of discretion by the governing body, the evidentiary effect given the resolution by *Code Civ. Proc. § 1245.250*, but not the validity of the resolution, may be attacked [*Code Civ. Proc. § 1245.255(b)*; Senate Legislative Committee Comment to *Code Civ. Proc. § 1245.255*]. If the defendant establishes that the resolution of necessity was invalidly adopted and, thus, is not entitled to its ordinary conclusive effect, the burden of proving the elements for a particular taking rests on the governmental agency [*Redevelopment Agency v. Norm's Slauson (1985) 173 Cal. App. 3d 1121, 1127-1129, 219 Cal. Rptr. 365]* .

A resolution of necessity does not meet the necessary requirements of *Code Civ. Proc. § 1245.210 et seq.* if the defendant establishes by a preponderance of the evidence that a member of the governing body who voted in favor of the resolution received or agreed to receive a bribe involving adoption of the resolution and, but for the vote of the bribed member of the governing body, the resolution would not otherwise have been adopted [*Code Civ. Proc. § 1245.270(a)*; *see Code Civ. Proc. § 1245.270(b)* (establishing fact of receipt or agreement to receive bribe)].

[3] Judicial Review

[a] Methods

Any person having an interest in the property described in a resolution of necessity may obtain judicial review of the resolution's validity by either (1) petition for writ of mandate pursuant to *Code Civ. Proc. § 1085* before the commencement of the eminent domain proceeding or (2) objection to the right to take pursuant to the Eminent Domain Law after commencement of the proceeding [*Code Civ. Proc. § 1245.255(a)*]. A court having jurisdiction of a mandate proceeding must order the proceeding to be dismissed without prejudice, on motion of any party, when an eminent domain proceeding is commenced, unless it determines that dismissal is not in the interest of justice [*Code Civ. Proc. § 1245.255(a)*].

According to the Senate Legislative Committee Comment to *Code Civ. Proc. § 1245.255*, the validity of a resolution of necessity may be challenged by other means and is subject to review under other principles of law such as declaratory relief and injunction. In the case of a conflict of interest, the resolution's validity is also subject to attack under the Political Reform Act of 1974, which extends standing to seek injunctive relief from a resolution of necessity to any person residing in the jurisdiction [*Gov. Code § 91003(b)*; *see Kunec v. Brea Redevelopment Agency (1997) 55 Cal. App. 4th 511, 517, 64 Cal. Rptr. 2d 143]* . At least one court has expressed doubt whether the Political Reform Act actually requires condemnees to be residents of the jurisdiction where the affected property is located as a prerequisite to challenging the validity of a resolution [*see Kunec v. Brea Redevelopment Agency (1997) 55 Cal. App. 4th 511, 517, 64 Cal. Rptr. 2d 143* (*dicta*)].

[b] Scope of Review

A valid resolution precludes or limits judicial review only of the matters relating to public necessity specified in *Code Civ. Proc. § 1240.030* [*see § 247.32[2][c]*], but does not affect the right of a condemnee to challenge a taking on the ground that the project is not an authorized public use or on the ground that the condemnor does not intend to put the property to its declared public purpose [*see Code Civ. Proc. §§ 1240.010, 1250.360*; *see also Santa Cruz County Redevelopment Agency v. Izant (1995) 37 Cal. App. 4th 141, 152, 43 Cal. Rptr. 2d 366* (property owner's right to trial on allegations that stated purpose was not public use, that primary purpose of taking was for private benefit of adjacent bank, and that agency did not intend to devote property to stated purpose)]. Similarly, the resolution does not affect the right of a defendant to contest the right to take his or her property on specific statutory grounds provided in the Eminent Domain Law [*see, e.g., Code Civ. Proc. §§ 1240.230* (taking for future use), 1240.420 (excess condemnation), 1240.520 (taking for compatible use), 1240.620 (taking for more necessary public use)]. The property owner also may

attack the validity of the resolution itself [*see Code Civ. Proc. § 1245.270* (resolution adopted as result of bribe)]. Finally, the condemnor must demonstrate its compliance with any other requirements and regulations governing the institution of public projects [*see, e.g., Code Civ. Proc. § 1245.235* (requirement of notice and opportunity to be heard); Senate Legislative Review Committee Comment to *Code Civ. Proc. § 1245.250*].

The proper standard of review is the *Code Civ. Proc. § 1085* "gross abuse of discretion" standard. Therefore, the agency is not required to make specific findings of fact. A statement that the property is being acquired to eliminate blight and for redevelopment is sufficient [*Anaheim Redevelopment Agency v. Dusek (1987) 193 Cal. App. 3d 249, 258-264, 239 Cal. Rptr. 319]* .

Judicial review of the resolution of necessity by ordinary mandamus on the ground of abuse of discretion is limited to examining the proceedings to determine whether adoption of the resolution by the public entity's governing body was arbitrary, capricious, or entirely lacking in evidentiary support and whether the governing body failed to follow the procedure and to give the required notice [Senate Legislative Committee Comment to *Code Civ. Proc. § 1245.255*; *see Pitts v. Perluss (1962) 58 Cal. 2d 824, 833, 27 Cal. Rptr. 19, 377 P.2d 83* ; *Brock v. Superior Court (1952) 109 Cal. App. 2d 594, 605, 241 P.2d 283]* . The burden of proof as to the invalidity of the resolution of necessity is on the defendant, and, on appeal, the scope of review is whether or not there is substantial evidence to support the resolution [*Huntington Park Redevelopment Agency v. Duncan (1983) 142 Cal. App. 3d 17, 25-27, 190 Cal. Rptr. 744]* .

[4] Rescission of Resolution and Adoption of New Resolution

When the defendant establishes either (1) that the resolution was adopted or its contents were influenced or affected by a gross abuse of discretion of the governing body, or (2) that, by a preponderance of the evidence, a member of the governing body whose vote was essential to the passage of the resolution agreed to receive a bribe, the governing body may rescind the resolution and adopt a new one as to the same property subject to the same consequences as a conditional dismissal of the proceeding under *Code Civ. Proc. § 1260.120* (objections to right to take) [*Code Civ. Proc. §§ 1245.255(c), 1245.270(c)*; *see § 247.32[2]*].

[4A] When New Resolution or Resolution Reauthorizing Original Use Is Required

A public entity is prohibited from using property that is subject to a resolution of necessity for any use other than the public use stated in the resolution, unless the entity first adopts a new resolution finding that the public interest and necessity support using the property for a new stated public use when the property was acquired after January 1, 2007, and the property was acquired [*Code Civ. Proc. § 1245.245(a), (e)*]:

- Pursuant to eminent domain;
- Following adoption of a resolution of necessity for the property; or
- Before adoption of a resolution of necessity for the property, but after written notice that the public entity may take the property by eminent domain.

In addition, property acquired by a public entity that is subject to a resolution of necessity and is not used for the public use stated in the resolution within 10 years of the resolution's adoption must be sold unless the governing body adopts another resolution that either (1) authorizes another, different, public use, or (2) reauthorizes the existing stated public use [*Code Civ. Proc. § 1245.245(b)*].

In either case, the new or reauthorized resolution, unless a greater vote is required by statute, charter, or ordinance, must be adopted by a vote of two-thirds of all the members of the public entity's governing body, not just a majority of those present [*Code Civ. Proc. § 1245.245(a), (b)*].

[5] Resolution by Quasi-Public Entity

A quasi-public entity may not commence an eminent domain proceeding unless the legislative body has adopted, by two-thirds vote of its members, a resolution consenting to it [*Code Civ. Proc. §§ 1245.330, 1245.360*]. The quasi-public entity must obtain the consent of the legislative body of each city or county in which it seeks to condemn property [Senate Legislative Committee Comment to *Code Civ. Proc. § 1245.330*]. "Legislative body" means both (1) the legislative body of each city within whose boundaries the property sought to be taken is located, and (2) if the property is not within city boundaries, the legislative body of each county within whose boundaries the property is located [*Code Civ. Proc. § 1245.310*].

The adoption of the resolution does not relieve the quasi-public entity from satisfying the requirements of *Code Civ. Proc. § 1240.030* or any other legal requirements, such as environmental impact reports [*Code Civ. Proc. § 1245.380*].

[6] Contents of Resolution of Consent

The resolution of consent must (1) state generally the public use for which the property is to be taken and refer to the statute authorizing the quasi-public entity to acquire the property by eminent domain; (2) describe the general location and extent of the property to enable reasonable identification; and (3) declare both that the legislative body has found and determined the public necessity for the proposed project as required by *Code Civ. Proc. § 1245.340* and that the hardship to the quasi-public entity if the taking were not permitted outweighs any hardship to the owners of such property [*Code Civ. Proc. § 1245.340*].

If an owner of real property wants to acquire an appurtenant easement pursuant to *Civ. Code § 1001* (utility service easement), the resolution must contain a declaration that the legislative body has found and determined that (1) there is a great necessity for the taking; (2) the location of the easement gives the most reasonable service to the property to which it is appurtenant, with the least damage to the burdened property; and (3) the hardship to the owner of the appurtenant property, if the taking is not permitted, clearly outweighs any hardship to the owner of the burdened property [*Code Civ. Proc. § 1245.325(b)*].

If an owner of real property wants to acquire the temporary right of access to adjoining or adjacent property to repair or reconstruct land or improvements, the resolution must contain a declaration that (1) there is a necessity to do the repair or reconstruction work and there is a great necessity to enter on the adjacent or nearby property to do the work because it cannot be done safely without entry, or the cost of performing the work without entry would be substantially higher and the property without repair or reconstruction adversely affects the surrounding community; (2) the right to enter on the adjacent or nearby land will be exercised in a manner that provides the least damage to the property and the least inconvenience or annoyance to the occupants or owners of the property, consistent with satisfactory completion of the repair or reconstruction work; and (3) the hardship to the person seeking to exercise the power of eminent domain, if that power is not exercised, clearly outweighs any hardship to the owner or occupant of the adjacent or nearby property [*Civ. Code § 1002(a)*; *Code Civ. Proc. § 1245.326(b)*].

[7] Hearing

The legislative body may refuse to consent to the acquisition with or without a hearing, but it may adopt the resolution only after it has held a hearing at which persons whose property is to be acquired have had a reasonable opportunity to appear and be heard [*Code Civ. Proc. § 1245.350(a)*; *see Code Civ. Proc. § 1245.350(b)* (notice requirements)].

[8] Adoption Does Not Affect City or County's Liability

The adoption of the resolution of consent does not make the city or county liable for any damages caused by the acquisition of the property or by the project for which it is acquired [*Code Civ. Proc. § 1245.390*].

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§ 247.33 Owner's Right to Leaseback Property Taken But Not Developed Within Two Years

A public entity must offer a one-year leaseback agreement to the owner of any property acquired after January 1, 2007, when the property is acquired (1) pursuant to eminent domain; (2) following adoption of a resolution of necessity for the property [*see § 247.32[2]*]; or (3) before adoption of a resolution of necessity, but after written notice that the public entity could take the property by eminent domain, unless the entity states in writing that development or redevelopment of the property is scheduled to begin within two years of its acquisition. The leaseback offer is not required if the public entity states in writing that a leaseback would create or allow the continuation of a public nuisance to the surrounding community [*Code Civ. Proc. § 1263.615(a), (b)*; *see* 2006 Stats., ch 602, § 4 (effective date)]. The leaseback is subject to the property owner's compliance with specified conditions, including payment of fair market rents [*Code Civ. Proc. § 1263.615(a), (c)*].

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[Reserved]

§§ 247.34[Reserved]

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§ 247.50 Interest That May Be Acquired

Except as limited by statute, any person authorized to use eminent domain to acquire property for a particular use may acquire any interest in the property necessary for that use [*Code Civ. Proc. § 1240.110(a)*; for definitions of "interest" and "property," *see § 247.11[5], [7]*]. Acquirable interests include submerged lands, rights of any nature in water, subsurface rights, airspace rights, flowage or flooding easements, aircraft noise or operation easements, right of temporary occupancy, public utility facilities and franchises, and franchises to collect tolls on a bridge or highway [*Code Civ. Proc. § 1240.110(a)*]. A public entity's resolution of necessity [*see § 247.32[2]*] may be conclusive evidence of the necessity for the acquisition of the particular interest in the property [*see Code Civ. Proc. § 1245.250*].

Since personal property may be acquired by eminent domain [*Code Civ. Proc. § 1235.170*], a public entity is not precluded from acquiring a sports franchise if it can establish that the acquisition is for a public use [*City of Oakland v. Oakland Raiders (1982) 32 Cal. 3d 60, 64-70, 183 Cal. Rptr. 673, 646 P.2d 835]* .

If a statute authorizes the acquisition of specific interests in or types of property, *Code Civ. Proc. § 1240.110* does not expand the scope or the authority granted [*Code Civ. Proc. § 1240.110(b)*]. Thus, if an interest in property authorized to be taken is limited by the statutory grant, such as a statute that authorizes acquisition of an easement only, an attempt to take an interest in the property other than that permitted by the statute is precluded [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1240.110*].

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§ 247.51 Requirement That Property Be Necessary and Effective for Proposed Purpose

The power of eminent domain may be exercised to acquire property necessary to carry out and make effective the principal purpose involved. Consequently, a condemnor may protect the attractiveness, safety, or usefulness of a public work or improvement from deleterious conditions or uses by condemning a fee or any lesser interest necessary for protective purposes. A taking for this purpose is a public use [*Code Civ. Proc. § 1240.120(a)*; Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1240.120*; *see People ex rel. Dep't Public Works v. Lagiss (1963) 223 Cal. App. 2d 23, 43, 35 Cal. Rptr. 554]* .

A condemnation for protective purposes may be challenged on the ground that the condemnor does not actually intend to use the property for protective purposes whether or not a resolution of necessity has been adopted [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 1240.120*; *see People ex rel. Dep't Public Works v. Lagiss (1963) 223 Cal. App. 2d 23, 39, 35 Cal. Rptr. 554]* .

Subject to any applicable procedures governing the disposition of property and to any reservations or restrictions that are necessary to protect or preserve the attractiveness, safety, and usefulness of the project, the property may be acquired with the intent to sell, lease, exchange, or otherwise dispose of it or an interest in it [*Code Civ. Proc. § 1240.120(b)*]. Thus, to protect a public work or improvement from detrimental uses on adjoining property, the condemnor may acquire the fee or some other interest and then, if the condemnor desires, lease, sell, exchange, or otherwise dispose of the property to some other public entity or a private person subject to carefully specified permitted uses [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1240.120*].

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§ 247.52 Extraterritorial Condemnation

A local public entity may acquire property outside its limits by eminent domain when the power is expressly granted by statute or necessarily implied as an incident of one of its other statutory powers [*Code Civ. Proc. § 1240.050*; *North Sacramento v. Citizens Util. Co. (1961) 192 Cal. App. 2d 482, 486, 13 Cal. Rptr. 538* (plaintiff impliedly authorized to condemn portion of defendant's water system outside plaintiff's territorial limits when plaintiff had power to provide water service to persons both within and without its boundaries)].

Purposes for which extraterritorial condemnation is expressly authorized include water, gas, or electric supply purposes, or airport, drainage, or sewer purposes if the entity can acquire property for the purposes for which the property is to be acquired [*Code Civ. Proc. § 1240.125*]. The authority to acquire for extraterritorial purposes does not apply if a statute restricts a particular local public entity's condemnation power to property within its boundaries [*see, e.g., Pub. Util. Code § 30503* (So. Cal. Rapid Transit Dist. permitted to acquire property only within its boundaries)]. Some statutes authorizing extraterritorial condemnation require the consent of the governing body of the jurisdiction in which the property to be taken is located [*see, e.g., Health & Safety Code §§ 6514* (sanitary districts), 7147 (small craft harbor districts)].

The exercise of extraterritorial condemnation is significantly limited in that the resolution of necessity of a local public entity is not conclusive where the property to be taken is outside its boundaries [*Code Civ. Proc. § 1245.250(b)*]. Consequently, the question of whether the proposed project is necessary is a justiciable issue in the condemnation proceeding [Legislative Committee Comment to *Code Civ. Proc. § 1245.250*; *see Los Angeles v. Keck (1971) 14 Cal. App. 3d 920, 925, 92 Cal. Rptr. 599* (court is required to determine necessity of taking particular land when city seeks to condemn land outside its corporate limits); *see also § 247.32[2]*].

Although the final determination is for the trial court, the Supreme Court has indicated that the territorial restriction may not apply to personal property such as a football franchise and that, even if it is applicable, a football franchise is within the territory of the city where it plays [*City of Oakland v. Oakland Raiders (1982) 32 Cal. 3d 60, 74-75, 183 Cal. Rptr. 673, 646 P.2d 835]* .

Extraterritorial condemnation for environmental mitigation purposes is not impliedly necessary when, under the California Environmental Quality Act [*Pub. Res. Code § 21000 et seq.*], the project can be completed without condemnation by a finding that the mitigation is not feasible [*Kenneth Mebane Ranches v. Superior Court (1992) 10 Cal. App. 4th 276, 12 Cal. Rptr. 2d 562]* .

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§ 247.53 Acquisition of Remnants

[1] "Remnant" Defined

Whenever a public entity's acquisition of part of a larger parcel of property will leave a remnant, the public entity may acquire the remnant by eminent domain in accordance with the provisions of *Code Civ. Proc. §§ 1240.410-1240.430* [*Code Civ. Proc. § 1240.410(b)*]. A "remnant" is a remainder or portion thereof that will be left in such size, shape, or condition as to be of little market value [*Code Civ. Proc. § 1240.410(a)*]. It may be physical [*see Kern County High School Dist, v. McDonald (1919) 180 Cal. 7, 16, 179 P. 180]* or financial [*People ex rel. Department of Public Works v. Superior Court of Merced County (1968) 68 Cal. 2d 206, 212-213, 65 Cal. Rptr. 342, 436 P.2d 342* (54-acre landlocked parcel is financial remnant since severance damages might equal its value as landlocked parcel)].

[2] Determination of "Little Market Value"

The "little market value" concept contained in the definition of "remnant" is flexible, and whether the excess property may be taken depends on the circumstances of each case. Examples of situations in which the project results in the excess property having relatively little market value include where: (1) it will be totally landlocked and no physical solution will be practical; (2) it will be reduced below the minimum zoning limits for building purposes and it is not reasonably probable that there will be a zoning change; (3) it will be of significant value to only one or a few persons such as adjoining landowners; or (4) it will be landlocked and have primarily a speculative value dependent on access being provided when adjacent land is developed and the time when the adjacent land will be developed is unclear. Consequently, the test the court applies in determining whether a remainder or portion thereof is a remnant is an objective one of marketability and market value, generally of the excess property [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1240.410*; *see People ex rel. Dep't Public Works v. Superior Court (1968) 68 Cal. 2d 206, 212-213, 65 Cal. Rptr. 342, 436 P.2d 342* ; *see also Gov. Code § 7267.7* (acquisition of entire property to avoid uneconomic remnant by public entity involved in relocation assistance)].

A usable and generally salable piece of property is neither a physical nor financial remnant even though its highest and best use has been downgraded by its severance or a serious controversy exists as to its best use and value after severance

[*see, e.g., La Mesa v. Tweed & Gambrell Mill (1956) 146 Cal. App. 2d 762, 778-779, 304 P.2d 803]* . In addition, a public entity cannot take excess property to (1) avoid the cost and inconvenience of litigating the issue of damages, (2) preclude the payment of damages, (3) coerce the condemnee to accept whatever price the condemnor offers for the property actually needed for the public project, or (4) recoup damages or unrecognized benefits by speculating as to the future market for the property not actually devoted to the public project [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1240.410*; *see People ex rel. Dep't Public Works v. Superior Court (1968) 68 Cal. 2d 206, 213-214, 65 Cal. Rptr. 342, 436 P.2d 342]* .

[3] Remnant Not Acquirable if Means to Prevent Remnant Exist

Property may not be acquired as a remnant if the defendant proves that the public entity has a reasonable, practicable, and economically sound means to prevent the remnant [*Code Civ. Proc. § 1240.410(c)*]. For example, if the condemnee can demonstrate that the public entity can provide substitute access or take other steps to prevent a remnant, the condemnee can prevent the public entity's acquisition of the excess property. To be economically sound, the proposed solution must reduce the overall cost to the condemnor of the taking so that the total of the cost of the solution, the compensation paid for the part taken, and the damages to the remainder is less than the amount that would be required to be paid if the entire parcel were taken. Moreover, the court should consider questions of maintenance, hardship to third persons, potential dangers, risk of tort liability, and similar matters in determining if the solution is reasonable and practicable. If the physical solution might interfere with or impair the public project, it is not reasonable. If the proposed solution is reasonable, practicable, and economically sound, the damages to the remainder must be computed, taking into account the extent to which the solution will avoid or reduce them [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1240.410*; *see Code Civ. Proc. § 1263.450* (compensation for injury to remainder)].

[4] Burden of Proof

The adoption of a resolution of necessity gives rise to the presumption that the taking of the property as a remnant is authorized under *Code Civ. Proc. § 1240.410*. This presumption affects the burden of producing evidence [*Code Civ. Proc. § 1240.420*]. However, the burden of proving the facts that bring the case within *Code Civ. Proc. § 1240.410* is on the plaintiff [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1240.420*].

[5] Disposition of Property Taken

On taking a remnant, the public entity may sell, lease, exchange, or otherwise dispose of it and credit the money rescued to the funds available for acquiring the property for the public work or improvement [*Code Civ. Proc. § 1240.430*].

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§ 247.54 Acquisition of Remainders With Owner's Consent

A public entity that acquires part of a larger parcel, leaving the remainder or a portion of the remainder in such size, shape, or condition as to be of little value to its owner or so as to give rise to a claim for severance or other damages, may acquire the remainder, or a portion of the remainder, by any means, including eminent domain, expressly consented to by the owner [*Code Civ. Proc. § 1240.150*]. Since exercise of the authority depends on the consent and concurrence of the property owner, acquisition is authorized whenever the remainder would have little value to its owner rather than having little market value to another owner [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1240.150*].

For authority to condemn a structure located in part on property that is not sought to be taken when the parties are unable to agree, see *Code Civ. Proc. § 1263.270* (court order on motion of any party that entire improvement be acquired).

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§ 247.55 Acquisition for Future Use

[1] By Owner's Consent

Any public entity authorized to acquire property for a particular use by eminent domain may acquire property to be put to that use in the future by any means expressly consented to by its owner, including by eminent domain [*Code Civ. Proc. § 1240.240*].

[2] By Eminent Domain

Property may be acquired by eminent domain for a particular future use provided there is a reasonable probability that its date of use will be within seven years from the date the complaint is filed or within a reasonably longer period [*Code Civ. Proc. § 1240.220(a)*]. When property is taken pursuant to the Federal Aid Highway Act of 1973 [*23 U.S.C. § 101 et seq.*], a date of use within 10 years from the date the complaint is filed is reasonable [*Code Civ. Proc. § 1240.250(a)*]. The date of use is the date when the property is devoted to the use or when construction is started on the project for which the property is taken with the intent to complete the project within a reasonable time. Periods of delay caused by extraordinary litigation or by failure to obtain a necessary permit or agreement from a public entity are not included in determining the date [*Code Civ. Proc. § 1240.210*]. The power to condemn for future use may also be granted in other specific statutes, subject to the general provisions of *Code Civ. Proc. § 1240.220* [*see, e.g., Sts. & Hy. Code § 104.6* (future highway needs); *Water Code § 258* (future state dam and water purposes)].

[3] Burden of Proof

If the defendant objects to the taking, he or she has the burden of proving there is no reasonable probability that the date of use will be within seven years (10 years if taking is pursuant to Federal Aid Highway Act of 1973 [*23 U.S.C. § 101 et seq.*]) from the date the complaint was filed unless the complaint states an estimated date of use that is more than seven years from the filing date [*Code Civ. Proc. §§ 1240.230(a), (b), 1240.250(c)*]. If the complaint states an estimated date of use of more than seven years or if the defendant proves that there is no reasonable probability that the date of use will be within seven years (or 10 years), the plaintiff has the burden of proving that there is a reasonable probability that the

property will be used within a reasonable time [*Code Civ. Proc. §§ 1240.230(c), 1240.250(c)*; *see Code Civ. Proc. § 1240.220(a)*].

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§ 247.56 Substitute Condemnation

[1] Conditions on Acquiring and Exchanging Substitute Property

A condemnor authorized to acquire property for a particular use may acquire other "substitute" property and exchange the substitute property for the property that is needed (necessary property) if: (1) the owner of the necessary property agrees in writing to the exchange; (2) the necessary property (property that is wanted by condemnor) is devoted to or held for some public use and the property owner will devote the substitute property to the same public use; and (3) the owner of the necessary property is authorized to exercise the power of eminent domain to acquire property for the use to which the substitute property will be put [*Code Civ. Proc. § 1240.320(a)*].

Since a public entity can condemn property to be exchanged only when the person with whom the property is to be exchanged has agreed in writing to the exchange and could himself or herself have condemned the property, the same end can be reached no matter which party to the exchange exercises the power of condemnation. When the owner of the property that is needed by the public entity does not have the power to condemn the substitute property for the use contemplated, the public entity must rely on the authority granted by another statute [*see, e.g., Code Civ. Proc. § 1240.330* (relocation of public use); *Code Civ. Proc. § 1240.350* (acquisition of additional property); Assembly Legislative Committee Comment to *Code Civ. Proc. § 1240.320*].

[2] Relocation of Public Use

If necessary property is devoted to public use, a condemnor may acquire substitute property in its own name, relocate on the substitute property the public use to which the necessary property is devoted, and then convey the substitute property to the owner of the necessary property if: (1) a court order or judgment in an eminent domain proceeding, or an agreement with the necessary property owner, requires the entity to relocate the public use to which the necessary property is devoted and thereafter to convey the property on which the public use has been relocated to the owner of the necessary property; (2) the substitute property is necessary for compliance with the court order, judgment, or agreement; and (3) the owner of the necessary property will devote the substitute property to the public use being displaced from the necessary property [*Code Civ. Proc. § 1240.330(a)*; *see Pub. Util. Code § 861* (granting PUC jurisdiction in certain

controversies arising under *Code Civ. Proc. § 1240.330* when public entity is special law water district)]. Property also may be acquired for relocation of a public use by gift, purchase, or other means [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1240.330*; *see Code Civ. Proc. § 1240.130*].

[3] Additional Property for Utility Service or Access

To restore property deprived of utility service or access to a public road due to condemnation of surrounding property and to avoid claims of substantial severance damage, a condemnor is authorized to condemn additional property that is reasonably necessary and appropriate (after taking into account any hardship to the owner of the additional property) to provide utility service or road access to the noncondemned and deprived property [*Code Civ. Proc. § 1240.350*].

Since the condemnors' authority to provide utility service or access is discretionary, when the condemnor does not use its authority, a property owner has no right to force the condemnor to do so but instead is limited to the recovery of damages except as provided by *Code Civ. Proc. § 1240.410(c)* (circumstances under which remnant may not be acquired) [Assembly Legislative Committee Comment to *Code Civ. Proc. § 1240.350*].

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§ 247.57 Condemnation for Compatible Use

[1] Acquisition May Not Unreasonably Interfere With Public Use

An authorized person may condemn property already appropriated to public use if the proposed use will not unreasonably interfere with or impair the present public use as it then exists or may reasonably be expected to exist in the future [*Code Civ. Proc. § 1240.510*; *see Code Civ. Proc. § 1235.180* (property appropriated for public use means property either already in use for public purpose or set aside for specific public purpose with intent to use it for such purpose within reasonable time)]. The existing use is not displaced by the second proposed use, but instead the property is jointly used when the second use does not unreasonably interfere with the existing use. Property that is statutorily exempt from condemnation cannot be condemned for compatible use [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1240.510*].

The authority to condemn for compatible use is independent of the authority to condemn property for a more necessary public use [*see Code Civ. Proc. §§ 1240.610-1240.700*; *see § 247.58*]. If the plaintiff is uncertain of its authority to condemn for a more necessary public use, it may proceed under both *Code Civ. Proc. §§ 1240.610-1240.700* (more necessary public use) and *Code Civ. Proc. § 1240.510* (compatible use). According to the Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1240.510*, inconsistent allegations in this situation are proper.

According to the Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1240.510*, condemnation for compatible use has no effect on the respective rights of the owner of the underlying fee and any easement holders to compensation for the additional burdens imposed by a condemnor exercising the authority to acquire the property for compatible use. In such a situation, if the plaintiff does not make the owner of the underlying fee or easement holder a party to the eminent domain proceeding, the owner or easement holder may either appear as a defendant in the eminent domain proceeding or bring a separate inverse condemnation action [*see Code Civ. Proc. § 1250.230* (appearance of person with legal or equitable interest as defendant); *People ex rel. Dep't Public Works v. Schultz Co. (1954) 123 Cal. App. 2d 925, 935, 268 P.2d 117* (damages not necessarily included in issues of condemnation action are recoverable in subsequent action)].

[2] Burden of Proof

If the defendant objects to a taking for compatible use, he or she has the burden of proving that his or her property is appropriated to public use. If the defendant so proves, the plaintiff then has the burden of proving that its proposed use will not unreasonably interfere with or impair the public use as it then exists or may reasonably be expected to exist in the future [*Code Civ. Proc. § 1240.520*; *see Code Civ. Proc. § 1240.510*; *Los Angeles v. Los Angeles Pac. Co. (1916) 31 Cal. App. 100, 115, 159 P. 992]* .

[3] Terms and Conditions

When property is taken for compatible use, the parties must make an agreement determining the terms and conditions on which the property is taken and the manner and extent of its use by each of the parties. Unless otherwise provided by statute, if the parties are unable to agree, the court fixes the terms and conditions and the manner and extent of its use [*Code Civ. Proc. § 1240.530(a)*; *see Pub. Util. Code §§ 1201, 1202* (PUC has exclusive jurisdiction to determine and regulate railroad crossings)]. According to the Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1240.530*, the terms and conditions should include a provision specifying how any liability arising out of the compatible use is to be borne.

If the court finds that the use in the manner proposed by plaintiff would not satisfy the statutory requirements, the court must further determine whether these requirements could be satisfied by fixing terms and conditions on which the property may be taken. If the court determines that the requirements could be so satisfied, it will permit the plaintiff to take the property on those terms and conditions and prescribe the manner and extent of its use by each of the parties [*Code Civ. Proc. § 1240.530(b)*]. In its Comment to *Code Civ. Proc. § 1240.530*, the Cal. L. Rev. Comm'n stated that, if the court refuses to approve the joint use as proposed because of a particular feature, the court must specify in what respect the proposed joint use fails to satisfy the statutory requirements, and, when possible, specify any modifications that are necessary to satisfy the requirements.

When property is taken for compatible use, the court may order any necessary removal or relocation of structures or improvements if no significant alteration of the use to which the property is appropriated is required. Unless otherwise provided by statute, all costs and damages that result from the relocation or removal must be paid by the plaintiff [*Code Civ. Proc. § 1240.530(c)*].

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§ 247.58 Condemnation for More Necessary Public Use

[1] Availability

Any person authorized to condemn property may acquire property appropriated to public use if the property is sought for a more necessary public use than that to which it already is appropriated [*Code Civ. Proc. § 1240.610*].

[2] Burden of Proof

If the defendant objects to the taking, he or she has the burden of proving that his or her property is appropriated to public use. If the defendant does so, the plaintiff then has the burden of proving that its use is a more necessary public use [*Code Civ. Proc. § 1240.620*; *see Code Civ. Proc. § 1240.610*].

[3] State Use as More Necessary Public Use

Subject to several qualifications, when property has been appropriated to public use by any person other than the state, the use by the state for the same or any other public use is presumed to be more necessary than that to which the property already is appropriated. Furthermore, if the property has been appropriated to public use by the state, this use is more necessary than any use to which the property might be put by any other person. These presumptions affect the burden of proof [*Code Civ. Proc. § 1240.640*; *see Evid. Code §§ 605, 606*]. This rule of state supremacy includes not only state acquisitions under the Property Acquisition Law (*Gov. Code § 15853 et seq.*) but also acquisitions under any other authority such as by the Department of Water Resources and the Department of Transportation [Senate Legislative Committee Comment to *Code Civ. Proc. § 1240.640*].

Specific exemptions and qualifications to the rule of state supremacy include the presumption that park use is more necessary than highway use and the requirement that the Department of Transportation obtain county consent before taking property for memorials [*Code Civ. Proc. § 1240.680*; *Sts. & Hy. Code § 155*]. Additionally, property appropriated to public use by the state may be taken for common use when compatible with the appropriated use, and the prior user, under appropriate circumstances, may be permitted to continue his or her use jointly with the more

necessary state use [*see Code Civ. Proc. §§ 1240.510, 1240.630*].

[4] Public Entity's Use as More Necessary Use

When property has been appropriated to public use by any person other than a public entity, the same or any other use by a public entity is more necessary than that to which the property has already been appropriated. Moreover, when a public entity has appropriated property to public use, that use is more necessary than any use to which the property may be put by any person other than a public entity. Nevertheless, when property appropriated to a public use is electric, gas, or water public utility property that the public entity intends to put to the same use, the presumption of a more necessary use is a rebuttable presumption affecting the burden of proof, unless the acquiring public entity is a sanitary district exercising the powers of a county water district [*Code Civ. Proc. § 1240.650*]. Property taken for public use by a public entity may be taken for common use by another person if the use is compatible with the appropriated public use [*see Code Civ. Proc. § 1240.510*; *see also § 247.57*].

The preference for use by public entities is not merely one of public ownership over private ownership for the same use, but includes any use. For example, a public entity may condemn the easement of a privately owned public utility not merely to perpetuate the utility use in public ownership but also to provide some separate and distinct use. Specific exceptions to the rule of public supremacy may be provided by statute [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1240.650*].

[5] Use by Local Public Entity

A local public entity's public use of property appropriated by it is presumed to be more necessary than any use to which the property might be put by any other local public entity [*Code Civ. Proc. § 1240.660*]. This presumption affects the burden of producing evidence and is only for purposes of displacement of one user by another. Any local public entity may take property of any other public entity for joint use when the uses are compatible [Senate Legislative Committee Comment to *Code Civ. Proc. § 1240.660*; *see San Diego v. Cuyamaca Water Co. (1930) 209 Cal. 152, 162-163, 287 P. 496 , cert. denied, 282 U.S. 863* ; *see also Code Civ. Proc. § 1240.510*].

[6] Property Preserved in Natural Condition or Appropriated for Parks or Similar Uses

Property that has been appropriated and used exclusively for the preservation of native plants or animals under the conditions specified in *Code Civ. Proc. § 1240.670(b)* is presumed to have been appropriated for the best and most necessary public use, subject to the possibility that it may be appropriated for a state highway [*Code Civ. Proc. § 1240.670(a)*]. This presumption affects the burden of proof [*Code Civ. Proc. § 1240.670(b)*]. A similar presumption arises under *Code Civ. Proc. § 1240.680*, subject to the possibility of appropriation for state highway, or city or county road, street, or highway purposes, if property is appropriated to public use as (1) a state or local park, open space, or recreation area; (2) a wildlife or waterfowl management area as provided in *Fish & Game Code § 1525*; (3) a registered historic site; or (4) an ecological reserve as provided in *Fish & Game Code §§ 1580-1584*. When such property is sought to be acquired for state highway purposes within 120 days after the California Highway Commission or other appropriating entity has published in a newspaper of general circulation pursuant to *Gov. Code § 6061* and delivered to the owner of the property a written notice that a proposed route or an adopted route includes such property, the owner must file and serve a declaratory relief action to determine the question of which public use is the best and most necessary one [*Code Civ. Proc. §§ 1240.690(a), (b), 1240.700*]. Otherwise, the right to bring the action is waived and the presumptions arising under these sections do not apply [*Code Civ. Proc. §§ 1240.690(d)(1), 1240.700(c)(1)*]. In addition, if the action is brought, any resolution of necessity of the highway commission is not conclusive evidence of the matters relating to public necessity in *Code Civ. Proc. § 1240.030* which must be established to acquire property in eminent domain [*Code Civ. Proc. § 1240.690(c)*].

[7] Continuation of Prior Public Use

A defendant is entitled to continue the public use to which the property is appropriated if it will not unreasonably interfere with, impair, or require a significant alteration of the more necessary public use as it is then planned, exists, or may reasonably be expected to exist in the future [*Code Civ. Proc. § 1240.630(a)*]. This test is comparable to that for compatible public uses [*see Code Civ. Proc. § 1240.510*; *see also § 247.57*].

If the defendant objects to the taking on the ground that he or she is entitled to continue the public use to which the property is appropriated, on motion of either party, the court must determine whether he or she is entitled to do so. If the court determines that the defendant is so entitled, the parties must make an agreement determining the terms and conditions on which the use may continue and on which the property taken by plaintiff is acquired, and the manner and extent of the property's use by each of the parties. If the parties cannot agree, the court will fix the terms and conditions and the manner and extent of the property's use by the parties, except as otherwise provided by statute [*Code Civ. Proc. § 1240.630(b)*].

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[Reserved]

§§ 247.59[Reserved]

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§ 247.70 Preliminary Survey and Tests

Subject to certain requirements discussed below, any person authorized to condemn property for a particular use may enter on property to make photographs, studies, surveys, examinations, tests, soundings, borings, samplings, or appraisals, or to engage in similar activities reasonably related to acquisition or use of the property for that particular use [*Code Civ. Proc. § 1245.010*]. There is no time limitation on entry and, although appraisal and suitability studies generally precede the commencement of an eminent domain proceeding, they may be performed after the proceeding starts [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1245.010*].

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§ 247.71 Prerequisites to Entry

If entry on property and preliminary activities will subject the condemnor to liability for damages or interference with the possession or use of the property, the person, before making entry and undertaking these activities, should secure either (1) the written consent of the owner to enter on the latter's property, and to undertake the activities, or (2) an order for entry from the superior court [*Code Civ. Proc. § 1245.020*]. According to the Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1245.020*, if the entry and activities on the property will involve only trivial injuries to the property and inconsequential interference with the owner's possession and use, neither the owner's permission nor a court order is required.

The condemnor may obtain an order for entry by petitioning the superior court [*see § 247.270*], and by giving to the owner of the property the prior notice [*see § 247.271*] required by the court [*Code Civ. Proc. § 1245.030(a)*]. After notice has been given, the court will determine the purpose for the entry, the nature and scope of the activities reasonably necessary to accomplish the purpose and order the deposit of the probable amount of compensation to be paid to the property owner for the actual damage to the property and interference with its possession and use [*Code Civ. Proc. § 1245.030(b), (c)*; *see Code Civ. Proc. § 1245.040* (modification of order)].

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§ 247.72 Action for Damages or for Interference With Use or Possession

[1] Recovery for "Actual" Damages

If the entry and activities on the property cause "actual damage" to or substantial interference with the possession or use of the property, whether or not a claim has been presented in compliance with *Gov. Code §§ 900-935.6* (claims against public entities), the owner may recover for the damage or interference in a civil action or by application to the court under *Code Civ. Proc. § 1245.060(c)* [*Code Civ. Proc. § 1245.060(a)*; *see § 247.275*]. According to the Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1245.060*, the term "actual damages" is intended to preclude recovery of merely nominal or constructive damages not based on physical injury to property. Similarly, the term "substantial interference" excludes liability for minimal annoyance or interference that does not seriously impinge on or impair possession and use of the property [*see Jacobsen v. Superior Ct. (1923) 192 Cal. 319, 329, 219 P. 986]* .

If funds are on deposit, the owner may apply to the court for a determination and award of the amount the owner is entitled to recover and an order that the amount be paid out of the funds on deposit. If the deposit is insufficient to pay the full amount of the award, the court will enter judgment for the unpaid portion [*Code Civ. Proc. § 1245.060(c)*; *see §§ 247.275 -247.277*].

The prevailing claimant in an action or proceeding for damages or interference with use and possession of property is awarded costs and, if the court finds that any of the following occurred, the litigation expenses the claimant incurred in the proceedings involving precondemnation activities [*Code Civ. Proc. § 1245.060(b)*; *see Code Civ. Proc. §§ 1245.010-1245.060*]:

- The entry was unlawful;

- The entry was lawful but the activities on the property were abusive or lacking in due regard for the owner's interests;

- There was a substantial failure to comply with the terms of an order made under *Code Civ. Proc. § 1245.030* or *1245.040* (*see §§ 247.71, 247.270 -247.274*).

[2] Effect of Filing Eminent Domain Proceeding

The property owner probably will bring an action for damage to or interference with the possession or use of his or her property arising from precondemnation activities only when no eminent domain proceeding is filed and no taking has occurred so that the only injury to the owner was the damage to or interference with the use or possession of the property directly arising from the precondemnation activities. According to the Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1245.060*, if an eminent domain proceeding eventually is filed to take the property to which the damage occurred, or a portion of that property, the claim for damage must be made by cross complaint in the eminent domain proceeding, or it will be barred [*see Klopping v. Whittier (1972) 8 Cal. 3d 39, 58, 104 Cal. Rptr. 1, 500 P.2d 1345* ; *Code Civ. Proc. § 426.70*] unless damages were obtained earlier by application to the court under *Code Civ. Proc. § 1245.060(c)*.

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[Reserved]

§§ 247.73[Reserved]

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§ 247.90 Commencement of Proceeding

An eminent domain proceeding is commenced by filing a complaint with the court, which thereby confers subject matter jurisdiction on that court [*Code Civ. Proc. § 1250.110*; Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1250.110*; *see Bayle-Lacoste & Co. v. Superior Court (1941) 46 Cal. App. 2d 636, 642, 116 P.2d 458]* . For a general form of complaint in eminent domain, see *§ 247.279*.

All eminent domain proceedings must be commenced and prosecuted in the superior court, except as otherwise provided by *Code Civ. Proc. §§ 1230.060* (eminent domain proceedings by PUC) and 1273.010-1273.050 (arbitration) [*Code Civ. Proc. § 1250.010*; *see also Cal. Const., art. VI, § 10*]. The court in which the proceeding is brought has the exclusive power to determine the right to possession of the property involved, as between the plaintiff and the defendant [*Code Civ. Proc. § 1230.050*].

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§ 247.91 Parties

Each person seeking to take property by eminent domain must be named as plaintiff in the complaint [*Code Civ. Proc. § 1250.210*].

The plaintiff must name in the complaint as defendants, by their real names, all persons who appear of record or are known by the plaintiff to have or claim an interest in the property described in the complaint [*Code Civ. Proc. § 1250.220(a)*]. Additionally, the plaintiff may name as defendants "all persons unknown claiming an interest in the property" [*Code Civ. Proc. § 1250.220(c)*]. For a general form of complaint and discussion of persons to be named as defendants, see *§ 247.279*.

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§ 247.92 Issuance of Summons

After filing the complaint and paying all applicable fees, the plaintiff may have the clerk issue one or more summons [*Code Civ. Proc. § 412.10*]. Except where process is served by publication, the form and content of the summons are the same as in civil actions generally [*Code Civ. Proc. § 1250.120*; for discussion of process served by publication, *see § 247.93[2]*]. For forms of summons for use in civil actions, see Ch. 518, *Service of Summons and Papers* .

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§ 247.93 Service of Process

[1] General Provisions Apply

The general provisions for service of process apply to eminent domain proceedings [*Code Civ. Proc. § 1230.040*]. When the state is a defendant, the summons and complaint must be served on the Attorney General [*Code Civ. Proc. § 1250.140*]. A property owner may bring an action in inverse condemnation against the plaintiff condemnor if it has not diligently attempted to serve the complaint and summons on the owners within six months of filing suit [*Code Civ. Proc. § 1245.260(a)*]. For discussion and forms relating to service of process, see Ch. 518, *Service of Summons and Papers* .

[2] Service by Publication

The general rules for service by publication in *Code Civ. Proc. § 415.50* (service by publication permitted when party to be served cannot be served with reasonable diligence in another manner) apply in an eminent domain proceeding [*Code Civ. Proc. § 1230.040*]. When process in an eminent domain proceeding is to be served by publication, the publication must describe the property sought to be taken in a manner reasonably calculated to give persons with an interest in the property actual notice of the pending proceeding. However, the publication may name only the defendants to be served by it and describe only the property in which the defendants to be served have or claim interests [*Code Civ. Proc. §§ 1250.120(b), 1250.125*]. When the court orders service by publication, it also must order the plaintiff (1) to post a copy of the summons and complaint on the property sought to be taken, and (2) if not already recorded, to record a notice of the proceeding's pendency in the manner provided by *Code Civ. Proc. § 1250.150* [*see § 247.94*]. According to the Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1250.130*, the court should give appropriate directions as to the manner of posting, such as the location and the number of copies [*see Code Civ. Proc. § 413.30*]. The posting and recording must be done within 10 days after the date of the order [*Code Civ. Proc. § 1250.130*].

When service of the summons is by publication, a judgment based on failure to appear and answer is conclusive against the named defendants only with respect to the property described in the publication [*Code Civ. Proc. § 1250.125(b)*]. Notwithstanding *Code Civ. Proc. § 1250.125(b)*, a defendant who did not receive the offer because the owner could not

be located with reasonable diligence, who was served by publication, and who failed to appear, may contest the amount of compensation within one year of the judgment and for good cause shown, in which case that issue must be litigated [*Code Civ. Proc. § 1250.125(c)*].

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§ 247.94 Recording Lis Pendens

At the time the proceeding is commenced, that is, when the complaint is filed, the plaintiff must record a notice of the pendency of the proceeding in the county recorder's office of any county in which property described in the complaint is located [*Code Civ. Proc. § 1250.150*; *see § 247.286*]. When the notice is recorded, it provides constructive notice of the pendency of the action to all subsequent transferees from a named defendant who are thus bound by any judgment in the eminent domain proceeding [*Code Civ. Proc. § 405.24*; *Civ. Code § 1214*; *Albertson v. Raboff (1956) 46 Cal. 2d 375, 379, 295 P.2d 405* ; *Drinkhouse v. Spring Valley Water Works (1890) 87 Cal. 253, 255-256, 25 P. 420* ; Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1250.150*]. Failure to file a lis pendens does not deprive the court of subject matter jurisdiction, but a transferee of the property is not bound by the judgment unless he or she is made a party to the proceeding [Assembly Legislative Committee Comment to *Code Civ. Proc. § 1250.150*; *see Bensley v. Mountain Lake Water Co. (1859) 13 Cal. 306* ; *Patten-Blinn Lumber Co. v. Francis (1958) 166 Cal. App. 2d 196, 200-201, 333 P.2d 255]* .

For additional coverage of lis pendens, see Chapter 348, *Lis Pendens* .

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§ 247.95 Appearance of Person Claiming Interest in Property

An eminent domain proceeding is in the nature of an action in rem. Therefore, any person not named in the complaint who claims a legal or equitable interest in the property described in the complaint may appear in the proceeding as a defendant by filing an answer [*Code Civ. Proc. § 1250.230*; *Harrington v. Superior Court (1924) 194 Cal. 185, 189, 228 P. 15* ; *San Bernardino etc. Water Dist. v. Gage Canal Co. (1964) 226 Cal. App. 2d 206, 210, 37 Cal. Rptr. 856]* . Any person who does participate by making a general appearance is bound by the judgment [*Harrington v. Superior Court (1924) 194 Cal. 185, 188-189, 228 P. 15]* .

Lessees, holders of deeds of trust, and assignees of the proceeds of the award are permitted to intervene [*see*, respectively, *Bayle-Lacoste & Co. v. Superior Court (1941) 46 Cal. App. 2d 636, 640-641, 116 P.2d 458* ; *City of Vallejo v. Superior Court (1926) 199 Cal. 408, 416-417, 249 P. 1084* ; *Los Angeles v. Dawson (1934) 139 Cal. App. 480, 482-483, 34 P.2d 236]* . The beneficiaries of a naked trust are persons interested in the property and are entitled to intervene [*Anderson v. Superior Court (1983) 142 Cal. App. 3d 112, 115-116, 190 Cal. Rptr. 646]* . Third parties who would not be affected by the adjudication of either title or compensation in the proceeding, however, do not have the right to participate [*see* *Alhambra v. Jacob Bean Realty Co. (1934) 138 Cal. App. 251, 252, 31 P.2d 1052* (owners of adjacent land); *San Joaquin & Kings River Canal & Irrigation Co., Inc. v. Stevinson (1912) 164 Cal. 221, 235-237, 240-242, 128 P. 924* (owners of upstream land); *Riverside v. Malloch (1964) 226 Cal. App. 2d 204, 205, 37 Cal. Rptr. 862* (stockholders in company from which property sought to be acquired)]. Similarly, a condemnor seeking to acquire property already the subject of a proceeding by another person should not be allowed to intervene. Instead, the condemnor should file a separate proceeding and move to consolidate the actions [Senate Legislative Committee Comment to *Code Civ. Proc. § 1250.230*; *but see* *San Bernardino etc. Water Dist. v. Gage Canal Co. (1964) 226 Cal. App. 2d 206, 213, 37 Cal. Rptr. 856* (decided under former law)].

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§ 247.96 Objections to Right to Take

[1] Grounds May Be Inconsistent; Waiver

A defendant may object to the plaintiff condemnor's right to take by demurrer or answer on one or more of the grounds authorized by *Code Civ. Proc. § 1250.360* or *1250.370*. The grounds may be inconsistent [*Code Civ. Proc. § 1250.350*]. Objections not raised by demurrer or answer are waived [*Code Civ. Proc. § 1250.345*; *see* Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1250.350*]. The demurrer or answer must state the specific ground on which the objection is taken and, if the objection is made by answer, the specific facts on which the objection is based [*Code Civ. Proc. § 1250.350*].

An objection to the right to take that is not encompassed in *Code Civ. Proc. §§ 1250.360, 1250.370*, such as a challenge based on the Political Reform Act (*Gov. Code § 81000 et seq.*), may not be made by demurrer or answer; it must be made by cross-complaint [*San Bernardino County Flood Control Dist. v. Grabowski (1988) 205 Cal. App. 3d 885, 894-896, 252 Cal. Rptr. 676]* .

[2] General Grounds

Pursuant to *Code Civ. Proc. § 1250.360*, a condemnee, regardless of whether the plaintiff has adopted a resolution of necessity may object to the right to take on the following grounds:

- The plaintiff is not authorized by statute to exercise the power of eminent domain for the purpose stated in the complaint;
- The stated purpose is not a public use;
- The plaintiff does not intend to devote the property described in the complaint to the stated purpose;
- There is no reasonable probability that the plaintiff will devote the described property to the stated

purpose within seven years, or 10 years when the property is taken pursuant to the Federal Aid Highway Act of 1973 [*23 U.S.C. § 101 et seq.*] or any longer period that is reasonable;

- The described property is not subject to acquisition by the power of eminent domain for the stated purpose;

- Plaintiff seeks to acquire the described property pursuant to *Code Civ. Proc. § 1240.410* (excess condemnation), *1240.510* (condemnation for compatible use), or *1240.610* (condemnation for more necessary public use), but the acquisition does not satisfy the requirements of those provisions;

- Plaintiff seeks to acquire the described property pursuant to *Code Civ. Proc. § 1240.610* (condemnation for more necessary public use), but the defendant has the right under *Code Civ. Proc. § 1240.630* to continue the public use to which the property is appropriated as a joint use; or

- Any other ground provided by law, such as when federal or state constitutional grounds for objection exist or when prerequisites to condemnation are located in other codes and therefore not contained in the Eminent Domain Law [*see* Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1250.360*; *see, e.g., Health & Safety Code § 127050* (certain requirements are required to be satisfied before nonprofit hospital may exercise right of eminent domain)].

Failure to comply with CEQA before adopting the resolution of necessity may be raised as a defense by either answer or cross complaint [*Burbank-Glendale-Pasadena Airport Authority v. Hensler (1991) 233 Cal. App. 3d 577, 591-594, 284 Cal. Rptr. 498]* .

[3] Additional Grounds if Resolution Not Adopted

In addition to the general grounds listed in *Code Civ. Proc. § 1250.360* when the plaintiff is not a public entity or when the plaintiff is a public entity but has not adopted a resolution of necessity or the resolution is not conclusive, the defendant may object to plaintiff's right to take on the following grounds [*Code Civ. Proc. § 1250.370*]:

- The plaintiff is a public entity and has not adopted a resolution of necessity satisfying the requirements of *Code Civ. Proc. §§ 1245.210-1245.270*;

- The public interest and necessity do not require the proposed project;

- The proposed project is not planned or located in the manner that will be most compatible with the greatest public good and the least private injury;

- The property described in the complaint is not necessary for the proposed project; or

- he plaintiff is a quasi-public entity within the meaning of *Code Civ. Proc. § 1245.320* and has not satisfied the requirements of *Code Civ. Proc. §§ 1245.310-1245.390* (consent of relevant local public entities required).

[4] Determination of Right to Take

When objections to the right to take are raised, unless the court orders otherwise, they must be heard and determined before the determination of the issue of compensation [*Code Civ. Proc. § 1260.110(a)*]. On motion of any party, after notice and hearing, the court may specially set objections for trial [*Code Civ. Proc. § 1260.110(b)*]. Thus, disposition of the right to take is generally a prerequisite to trial of the issue of just compensation. However, according to the Cal. L.

Rev. Comm'n Comment to *Code Civ. Proc. § 1260.110*, activities such as depositions and other discovery are not thereby precluded. Additionally, the court may order a different order of trial [*see Code Civ. Proc. § 1048*; *see also Los Angeles v. Keck (1971) 14 Cal. App. 3d 920, 923-924, 92 Cal. Rptr. 599* (parties stipulated as to compensation and limited trial to issues of public use and necessity)].

[5] Hearing and Order on Objections

After hearing and determining all objections to the right to take, the court must order that the plaintiff has the right to condemn the property described in the complaint if it so determines [*Code Civ. Proc. § 1260.120(a), (b)*]. If it determines that the plaintiff does not have the right to take, it must order either immediate dismissal of the proceeding as to that property or conditional dismissal unless the plaintiff takes the corrective and remedial action prescribed by the court. The order may impose any limitations and conditions that the court determines to be just, including requiring that plaintiff pay defendant all or part of the reasonable litigation expenses necessarily incurred by the defendant because of the plaintiff's failure or omission which constitutes the basis of the objection to the right to take [*Code Civ. Proc. § 1260.120(c)*]. If the complaint alleges alternative grounds for condemnation, a finding requiring dismissal as to one ground does not preclude a finding of a right to take on another ground, and the proceeding may continue to be prosecuted on that basis [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1260.120*].

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§ 247.97 Cross Complaints

The provisions of *Code Civ. Proc. §§ 426.10-426.70*, which govern compulsory cross complaints in civil actions, apply to eminent domain proceedings [*Code Civ. Proc. § 426.70(a)*]. Consequently, a defendant must assert a related cause of action as a cross complaint against the plaintiff in the eminent domain action or it is barred [*Klopping v. Whittier (1972) 8 Cal. 3d 39, 58, 104 Cal. Rptr. 1, 500 P.2d 1345* ; *see* Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 426.70*; *see also Code Civ. Proc. § 426.30* (related cause of action waived if not alleged in cross complaint); for the manner in which to assert precondemnation damages, see *§ 247.288* (sample allegations in answer to complaint in eminent domain)]. The party asserting the related cause of action in a cross complaint does not need to have presented a claim in compliance with *Gov. Code §§ 900-935.6* (claims against public entities) to the plaintiff in the original eminent domain proceeding [*Code Civ. Proc. § 426.70(b)*]. Actions against third parties are not affected by this provision, however, and neither are any relevant statutes of limitations [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 426.70*].

Permissive cross complaints are not authorized in eminent domain actions [*Code Civ. Proc. § 428.10(a)*]; but a defendant may file a cross complaint for any cause of action against any person who asserts a claim, right, or interest in the property sought to be taken [*Code Civ. Proc. § 428.10(b)*; *see People v. Buellton Dev. Co. (1943) 58 Cal. App. 2d 178, 189-190, 136 P.2d 793* (cross complaint related to easement owned by other defendant in property to be condemned was proper)].

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§ 247.98 Disclaimer

A defendant, whether or not in default, may file a disclaimer at any time stating that the defendant claims no interest in the property or in the compensation that may be awarded [*Code Civ. Proc. § 1250.325(a)*; *see § 247.287*]. A defendant who has filed a disclaimer has no right to participate in further proceedings or to share in the compensation awarded [*Code Civ. Proc. § 1250.325(b)*]. The disclaimer, in effect, removes the defendant from the proceeding and may result in a dismissal as to him or her [*Code Civ. Proc. § 1250.325(c)*].

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§ 247.99 Amended and Supplemental Pleadings

Subject to *Code Civ. Proc. § 1250.340(b), (c), below*, the court may allow an amendment or supplement to any pleading on such terms and conditions as the court may impose, including a change in the applicable date of evaluation for the proceeding and an award of costs and litigation expenses that would not have been made if the pleading had not been amended [*Code Civ. Proc. § 1250.340(a)*].

However, a public entity may add to the complaint additional property sought to be taken in the proceeding only if it has adopted a resolution of necessity for the new property [*Code Civ. Proc. § 1250.340(b)*; *see § 247.32[2]*]. Similarly, property previously sought to be taken may be deleted from the complaint only if the plaintiff has followed the procedure for partial abandonment of the proceeding as to that property [*Code Civ. Proc. § 1250.340(c)*; *see Code Civ. Proc. § 1268.510*; *see also § 247.101* (abandonment)].

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§ 247.100 Consolidation of Proceedings

If proceedings to acquire the same property are consolidated, the court first must determine if the public uses for which the property is sought are compatible. If they are compatible, the court must permit the proceeding to continue with the plaintiffs acting jointly and must apportion the obligation to pay any award in the proceeding in proportion to the use, damage and benefits attributable to each plaintiff [*Code Civ. Proc. § 1260.020*].

If the uses are not all compatible, the court must determine which use is the more necessary public use and permit the plaintiff alleging that use, along with any other plaintiffs alleging compatible public uses, to continue the proceeding. The court must dismiss the proceeding as to the other plaintiffs [*Code Civ. Proc. § 1260.020(b)*].

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§ 247.101 Abandonment

[1] Service of Written Notice

The plaintiff may wholly or partially abandon the proceedings at any time after the complaint is filed or during the 30 days after final judgment by serving on the defendant and filing in court a written notice of abandonment [*Code Civ. Proc. § 1268.510(a)*; *see § 247.292* (sample notice); *see also § 247.148[4]* (arbitration)].

If the proceeding is abandoned after judgment, the defendant is not entitled to interest on the judgment until the date of the dismissal [*People ex rel. Dept. of Transportation v. Union Pacific Land Resources Corp. (1986) 179 Cal. App. 3d 307, 313-316, 224 Cal. Rptr. 487]* .

[2] Setting Aside Abandonment

The court, on motion made within 30 days after filing of the notice to abandon, may set aside the abandonment if (1) the moving party's position has been substantially changed to his or her detriment in justifiable reliance on the proceeding and (2) the party cannot be restored to substantially the same position as if the proceeding had not been commenced [*Code Civ. Proc. § 1268.510(b)*; *see §§ 247.293* (notice of motion), *247.294* (order); *see also Torrance v. Superior Court (1976) 16 Cal. 3d 195, 206-207, 127 Cal. Rptr. 609, 545 P.2d 1313* (abandonment set aside when condemnee had purchased and begun development of land in reliance on condemnation action and city's repeated representations concerning its integrity and when sole reason for abandonment was to require condemnee to donate land)].

If the court denies the motion to set aside the abandonment, or no motion to set aside is filed, on the expiration of the time for filing such a motion, the court, on motion of any party, must enter judgment wholly or partially dismissing the proceeding [*Code Civ. Proc. § 1268.510(c)*].

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§ 247.102 Implied Abandonment

In addition to express abandonment under the provisions of *Code Civ. Proc. § 1268.510*, an abandonment may be implied when the express written notice is not given but the condemnor decides to give up the intended taking for any reason or when the condemnor declines to carry the proceeding through to its conclusion [*Alta Bates Hosp. v. Mertle (1973) 31 Cal. App. 3d 349, 351, 107 Cal. Rptr. 277]* .

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§ 247.103 Discovery

[1] In General

The Eminent Domain Law contains provisions relating to discovery and exchange of valuation data [*Code Civ. Proc. §§ 1258.010-1258.300*]. These provisions supplement and do not replace, restrict, or prevent the use of general discovery procedures, nor do they limit the matters that are discoverable in eminent domain proceedings [*Code Civ. Proc. § 1258.010*]. Additionally, these provisions do not make admissible any evidence that is not otherwise admissible, nor do they permit a witness to base an opinion on any matter that is not a proper basis for such an opinion [*Code Civ. Proc. § 1258.030*]. For discussion and forms for use in proceedings under the general pretrial discovery statutes [*Code Civ. Proc. § 2016.010 et seq.*], see Ch. 190, *Depositions and Discovery* .

Notwithstanding any other statute or any court rule relating to discovery, proceedings under *Code Civ. Proc. § 1258.020(b)*, regarding the exchange of expert witness lists and statements of valuation data, may take place without a court order and may continue until 20 days before the day set for trial of the issue of compensation [*Code Civ. Proc. § 1258.020(a)*; *see § 247.103[2]*]. For additional discussion of discovery in eminent domain proceedings, see *California Real Estate Law & Practice, Ch. 506, Trial Preparation and Discovery, §§ 506.30 -506.50* (Matthew Bender).

[2] Exchange of Valuation Data

The provisions of the Eminent Domain Law governing exchange of valuation data [*Code Civ. Proc. §§ 1258.210-1258.300*] apply only when invoked by a party and do not apply in any county that has provided an adequate substitute procedure [*Code Civ. Proc. § 1258.300*; *see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 16.0].

[3] Procedure

Not later than the 10th day after the trial date has been selected, or later by court order made on noticed motion and a showing of good cause, any party may file and serve on any other party to the proceeding a demand to exchange lists of expert witnesses and statements of valuation data [*Code Civ. Proc. § 1258.210(a)*; *see § 247.298*]. The demand must

describe the property to which it relates by reference to the complaint or otherwise. It also must include a statement requiring the lists and statements to be served and deposited with the court clerk not later than the specified date of exchange and explaining that failure to do so constitutes a waiver of the party's right in its case in chief to call unlisted expert witnesses or to introduce any matter required to be, but not, set forth in the statements of valuation data [*Code Civ. Proc. § 1258.210(b)*].

For these purposes, the specified "date of exchange" is one of the following [*Code Civ. Proc. § 1258.220*]:

- The date to which the party who served the demand and the party on whom the demand was served agree;

- In the absence of an agreed date, a date not earlier than nine months after commencement of the proceeding and not later than 90 days before commencement of trial on the compensation issue; or

- A date set by the court on noticed motion of either party establishing good cause.

When the lists and statements are deposited with the court clerk, an entry is made in the register of actions for each list and statement, but the lists and statements themselves are not filed [*Code Civ. Proc. § 1258.230(b)*; *see Gov. Code § 69845* (maintenance of register)]. The clerk, however, will make them available to the court when the trial commences and return them to the parties or counsel when the trial concludes, unless the court orders otherwise. If the court orders that they be retained, they may be destroyed later, or otherwise disposed of, in accordance with the provisions governing the destruction or disposition of exhibits introduced in the trial [*Code Civ. Proc. § 1258.230(b)*; *see Code Civ. Proc. §§ 1952-1952.3* (destruction or disposition of exhibits in civil cases)].

[4] Discovery From Party to Exchange

A party to an exchange of lists of expert witnesses and statements of valuation data, after the time of the exchange, may obtain discovery from the other party to the exchange and from any person listed by that party as an expert witness. However, the court, on noticed motion by the person subject to discovery, may make any order that justice requires to protect that person from annoyance, embarrassment, or oppression [*Code Civ. Proc. § 1258.020(c)*]. For a discussion of protective orders generally, see Ch. 190, *Depositions and Discovery* .

[5] List of Expert Witnesses

The list of expert witnesses must include the name, business or residence address, and business, occupation, or profession of each person intended to be called by the party as an expert witness and a statement of the subject matter to which his or her testimony relates [*Code Civ. Proc. § 1258.240*]. According to the Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1258.240*, only the subject matter of the testimony is to be stated and not its particulars, and statements such as "valuation testimony," and "existence of oil on subject property" are sufficient. Normal discovery techniques can be used to obtain more information about the opinion and the supporting factual data [*see Code Civ. Proc. §§ 1258.010* (use of discovery procedures), *1258.020* (further discovery after exchange); *Gov. Code § 68092.5* (costs of deposition of expert witness)].

[6] Valuation Statements

A statement of valuation data must be exchanged for each person the party intends to call as a witness to testify to his or her opinion as to any of the following matters: (1) the value of the property being taken; (2) the amount of the damage to the remainder of the larger parcel from which the property is taken; (3) the amount of the benefit to the remainder; and (4) the amount of any other compensation required to be paid [*Code Civ. Proc. § 1258.250*]. Parties must exchange statements of property owners who will testify as to value as well as statements of experts, such as appraisers, who will

testify as expert witnesses [*Padre Dam Municipal Water Dist. v. Burkhardt (1995) 38 Cal. App. 4th 988, 992, 45 Cal. Rptr. 2d 506]* , including experts who will testify on the issue of the value of lost goodwill [*City of Fresno v. Harrison (1984) 154 Cal. App. 3d 296, 301-303, 201 Cal. Rptr. 219]* .

The statement must give the name and business or residence address of the witness and include a statement of whether the witness will testify to an opinion as to any of the matters specified in *Code Civ. Proc. § 1258.250* (*see above*). As to each matter on which the witness will give an opinion, the statement must set forth what the opinion is and the extent to which it is based on any of the following items [*Code Civ. Proc. § 1258.260(a), (b)*]:

- The interest being valued;
- The date of valuation used by the witness;
- The highest and best use of the property;
- The applicable zoning and the witness's opinion as to the possibility of zoning change;
- The sales, contracts to sell and purchase, and leases supporting the opinion;
- The cost of reproduction or replacement of the existing improvements on the property, the depreciation or obsolescence the improvements have suffered, and the method of calculation used to determine depreciation;
- The gross income from the property, the deductions from gross income, and the resulting net income; the reasonable net rental value attributable to the land and existing improvements thereon, and the estimated gross rental income and deductions therefrom on which the reasonable net rental value is computed; the rate of capitalization used; and the value indicated by the capitalization;
- If the property is part of a larger parcel, a description of the larger parcel and its value; and
- If the opinion concerns loss of goodwill, the method used to determine the loss and a summary of the supporting data.

When the witness's opinion is based on sales, contracts to sell and purchase, and leases, the statement must give the following information with respect to each sale, contract, or lease [*Code Civ. Proc. § 1258.260(b)*]:

- The names and business or residence addresses, if known, of the parties to the transaction;
- The location of the property involved;
- The date of the transaction;
- If recorded, the date of recording and the volume and page or other identification of the transaction's record;
- The price and other terms and circumstances of the transaction or, if the document is available for inspection by the adverse party, a statement of the place where and the times when it is available for inspection; and
- The total area and shape of the property subject to the transaction.

If the witness's opinion is based entirely or mainly on another person's opinion, the statement must include (1) the name and business or residence address of the other person, (2) that person's business, occupation, or profession, and (3) a statement of the subject matter of the opinion [*Code Civ. Proc. § 1258.260(c)*]. It must also include a statement signed by the witness that the witness has read the statement and that it fairly and correctly states his or her opinions and knowledge as to the matters stated in it [*Code Civ. Proc. § 1258.260(d)*]. This signed statement does not need to be included when an appraisal report prepared by the witness and including the information required to be included in a statement of valuation data is used as a statement of valuation data [*Code Civ. Proc. § 1258.260(e)*].

[7] Omission of Witness's Name or Data

A party who is required to exchange lists of expert witnesses and statements of valuation data must give written notice to the parties on whom the lists and statements were served if, after service, that party (1) decides to call an expert witness not included in the list to testify on direct examination during his or her case in chief; (2) decides to have a witness during the case in chief testify as to any opinion or data required to be listed in the statement of valuation data for that witness but that was not listed; and (3) discovers that any data required to be listed in a statement of valuation data was not listed [*Code Civ. Proc. § 1258.270(a), (b)*; *see Code Civ. Proc. § 1258.270(b)* (notice required to include information specified in *Code Civ. Proc. §§ 1258.240, 1258.260*)]. If the notice is given after the trial has started, it need not be in writing [*Code Civ. Proc. § 1258.270(b)*].

Generally, if a party who has served a list of expert witnesses and statements of valuation data objects, the serving party cannot call an expert to testify if the information required to be included in the list was not included. Additionally, such a party cannot call a witness to testify to his or her opinion on any matter listed in *Code Civ. Proc. § 1258.250* unless a statement of valuation for that witness was served. Finally, a witness called by a party required to serve statements of valuation data on the objecting party cannot testify as to any opinion or data required to be, but not, listed in the valuation statement unless the testimony is merely an explanation or elaboration of data so listed [*Code Civ. Proc. § 1258.280*]. This limitation applies only to the calling of a witness, or the presentation of testimony during the case in chief of the party calling the witness or presenting the testimony. Thus, a party is not precluded from calling a witness in rebuttal or having a witness give rebuttal testimony that is otherwise proper [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1258.280*].

The court may permit a party to call a witness or permit a witness to testify to an opinion or data on direct examination during a party's case in chief although the witness, opinion, or data was required to be but was not included in the party's list of expert witnesses or statements of valuation data. This permission may be granted only if the court finds that (1) the party made a good-faith effort to comply with the statutory requirements of *Code Civ. Proc. §§ 1258.210-1258.260, (2)* the party complied with *Code Civ. Proc. § 1258.270* (additional witnesses and data), and (3) by the date of exchange the party (a) would not have decided to call the witness or have discovered or listed the opinion or data in the exercise of reasonable diligence, or (b) failed to decide to call the witness or to discover or list the opinion or data through mistake, inadvertence, surprise, or excusable neglect [*Code Civ. Proc. § 1258.290(a)*]. The court may impose terms as may be just, such as continuing the trial for a reasonable period of time and awarding costs and litigation expenses [*Code Civ. Proc. § 1258.290(b)*]. The court should take into account the extent to which the opposing party has relied on the list of expert witnesses and statements of valuation data and will be prejudiced if the witness is called or the testimony of the opinion or data is given [*Code Civ. Proc. § 1258.290(b)*; *Padre Dam Municipal Water Dist. v. Burkhardt (1995) 38 Cal. App. 4th 988, 994-995, 45 Cal. Rptr. 2d 506]* .

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§ 247.104 Early Resolution of Legal Issues Affecting Valuation

If there is a dispute between the plaintiff and defendant over an evidentiary or other legal issue affecting the determination of compensation, either party may move the court for a ruling on the issue. The motion must be made not later than 60 days before commencement of trial on the compensation issue. It must be heard by the assigned trial judge. If necessitated by the court's ruling on the motion, the court may postpone the date for the parties' final offer and demand, and the date of trial for a period that is sufficient to enable the parties to engage in further proceedings before trial [*Code Civ. Proc. § 1260.040*].

Use of this procedure is limited to resolution of legal issues that may affect compensation, such as what constitutes the larger parcel, or the probability of a zoning change; it may not be used to ascertain just compensation. The procedure does not preclude the use of other procedures that may be utilized for the same purpose, including bifurcation of issues and control of the order of proof pursuant to statute, or other pretrial procedures pursuant to court rule [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1260.040*].

In *Dina v. People ex rel. Dept. of Transportation (2007) 151 Cal. App. 4th 1029, 60 Cal. Rptr. 3d 559* , an inverse condemnation action, the court of appeal held that the trial court may determine the legal issue of liability pursuant to the motion procedure set forth in *Code Civ. Proc. § 1260.040* [*Dina v. People ex rel. Dept. of Transportation (2007) 151 Cal. App. 4th 1029, 1043, 60 Cal. Rptr. 3d 559]* . The court construed *Code Civ. Proc. § 1260.040* as authorizing the Department of Transportation to move for a ruling on liability in that case because it was a legal issue affecting the determination of compensation. The court reasoned that construing Section 1260.040 broadly to permit the court to determine the legal issue of liability in an inverse condemnation action comported with the purpose of the bill in which Section 1260.040 was enacted [Stats. 2001, ch. 248, § 9] to "facilitate resolution of condemnation cases without trial" [*Dina v. People ex rel. Dept. of Transportation (2007) 151 Cal. App. 4th 1029, 1043, 60 Cal. App. 3d 559]* .

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§ 247.105 Alternative Dispute Resolution Encouraged

The parties have the option to seek to resolve any dispute related to an eminent domain proceeding by agreeing to any of the following forms of alternative dispute resolution (ADR) [*Code Civ. Proc. § 1250.420*]:

- Mediation using any mediation technique [*see* Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1250.420*];

- Binding arbitration pursuant to the statutory provisions governing arbitration of compensation in acquisitions of property for public use [*see Code Civ. Proc. § 1273.010 et seq.*; *see also § 247.148*]; or

- Nonbinding arbitration.

If the parties agree to nonbinding arbitration, the arbitrator's decision will be final unless, within 30 days after the decision has been served, a party files a motion for trial. If the ensuing judgment is not more favorable to the moving party, the court must order that party to pay to the other parties the following nonrefundable costs and fees, unless the court makes a written finding that imposing costs and fees would create a substantial economic hardship to the extent that the imposition would not be in the interest of justice [*Code Civ. Proc. § 1250.420(c)(1)-(3)*]:

- All costs specified in *Code Civ. Proc. § 1033.5* incurred from the time the moving party elected to go to trial;

- The reasonable costs of the services of expert witnesses who are not regular employees of any party, incurred from the time the moving party elected to go to trial; and

- The arbitrator's costs.

If the parties agree to pursue a form of ADR, either party may move the court to postpone the date of trial for a period

that appears to be adequate to resolve the dispute by ADR. The court should grant the motion if [*Code Civ. Proc. § 1250.430(a)-(c)*]:

- The parties are actively engaged in ADR;
- The parties appear to be making progress toward resolving the dispute without need for trial; and
- The parties agree that additional time is desirable for purposes of ADR.

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§ 247.106 Settlement Offers

[1] Final Offer and Demand

At least 20 days before the date of trial, the plaintiff must file with the court and serve on the defendant its final offer of compensation in the proceeding and the defendant must file and serve on the plaintiff his or her final demand for compensation. The offer and demand must include all compensation in the proceeding, including any compensation for loss of goodwill, and must state whether interest and costs are included. This offer and demand will be the only ones considered by the court in determining any entitlement to litigation expenses. The offer and demand must be served in the manner prescribed by *Code Civ. Proc. §§ 1010-1020* [*Code Civ. Proc. § 1250.410(a)*; *see §§ 247.306* (plaintiff's final offer), 247.307 (defendant's final demand)]. The demand is timely made if it is made more than 30 days before the actual date of trial, not before the original trial date [*Community Redevelopment Agency v. Matkin (1990) 220 Cal. App. 3d 1087, 1094-1097, 272 Cal. Rptr. 1]* .

The term "compensation" means compensation for the property taken, severance damage, and any other consequential damage, but does not include ordinary costs or interest on the award for prejudgment possession by the condemnor [*Coachella Valley County Water Dist. v. Dreyfuss (1979) 91 Cal. App. 3d 949, 953-954, 154 Cal. Rptr. 467* ; *see Code Civ. Proc. §§ 1268.310, 1268.710*].

To encourage settlement, the "final offer" is not limited to an offer made in the final pretrial and settlement conference order, but is the last written offer made at least 30 days before trial even if an earlier offer was labeled the final offer or demand [*Los Angeles Unified Sch. Dist. v. C.F. Bolster Co. (1978) 81 Cal. App. 3d 906, 912, 146 Cal. Rptr. 789* (decided under former law comparable to *Code Civ. Proc. § 1250.410*)].

A final demand made without time limitation and being unrevised, unrevoked, and not superseded by any other final demand is subject to acceptance at any time before commencement of trial [*San Diego Gas & Electric Co. v. Moreland Investment Co. (1986) 186 Cal. App. 3d 1151, 1156-1157, 231 Cal. Rptr. 274]* .

[2] Unreasonable Offer by Plaintiff

If the court, on motion of the defendant made within 30 days after entry of judgment, finds that the plaintiff's offer was unreasonable and that defendant's demand was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding, the costs allowed pursuant to *Code Civ. Proc. § 1268.710* must include the defendant's litigation expenses [*Code Civ. Proc. § 1250.410(b)*; *see People ex rel. Dept. of Transportation v. Societa Di Unione E Beneficenza Italiana (1978) 87 Cal. App. 3d 14, 23, 150 Cal. Rptr. 706* (reasonableness depending on good faith, care, and accuracy in determining amounts of offer and demand, and on monetary amounts or percentage of difference)]. The 30-day period to file the motion to include litigation expenses begins on entry of judgment, not on the date notice of entry of judgment is mailed or served. A court may grant relief for late filing, however, if there is substantial compliance with the 30-day requirement and the opposing party is not prejudiced [*Poway Unified School Dist. v. Chow (1995) 39 Cal. App. 4th 1478, 1483-1485, 46 Cal. Rptr. 2d 651]* .

Litigation expenses are the party's reasonable attorneys' fees and costs, including reasonable expert witness and appraiser fees [*Code Civ. Proc. § 1250.410(e)*]. In determining the amount of litigation expenses, the court must consider all of the following [*Code Civ. Proc. § 1250.410(c)*; *see, e.g., §§ 247.325* (notice of motion), *247.326* (supporting declaration)]:

- The offer required to be made before adopting the resolution of necessity [*see Gov. Code § 7267.2*];
- Any deposit made by the plaintiff; and
- Any other written offers and demands filed and served before or during trial.

A formal, timely demand for compensation is a prerequisite to recovery of litigation expenses unless the parties stipulate to a less formal communication or waive the 30-day period [*City of San Leandro v. Highsmith (1981) 123 Cal. App. 3d 146, 153-155, 176 Cal. Rptr. 412]* .

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§ 247.107 Deposit of Probable Compensation

[1] In General

At any time before entry of judgment, the plaintiff may deposit with the State Treasury the probable amount of compensation that will be awarded in the proceeding, based on an appraisal [*Code Civ. Proc. § 1255.010(a)*]. The deposit may be made whether or not the plaintiff applies for an order for possession or intends to do so [*Code Civ. Proc. § 1255.010(a)*; *see also § 247.110*]. When there are several properties joined in the proceeding, the plaintiff may make a deposit as to any of the properties, but need not make a deposit as to all of them [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1255.010*].

By making a deposit, the plaintiff does not waive his or her right to appeal from the judgment, move to abandon, or request a new trial [*Code Civ. Proc. § 1255.080*].

On entry of judgment, a deposit of probable compensation is deemed to be a deposit made pursuant to *Code Civ. Proc. § 1268.110* (postjudgment deposit of award) [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1255.010*].

[2] Prerequisites to Making Deposit

Before making the deposit, the plaintiff must have an expert qualified to express an opinion as to the value of the property (1) make an appraisal of the property, and (2) prepare a written statement of, or summary of the basis for, the appraisal [*Code Civ. Proc. § 1255.010(b)*]. The statement or summary must be sufficiently detailed to indicate clearly the basis for the appraisal, including, but not limited to, the following [*Code Civ. Proc. § 1255.010(b)(2)(A)-(C)*]:

- The highest and best use on which the appraisal is based;
- If the appraisal is based on market data, the principal transactions supporting the appraisal; and
- If the appraisal includes compensation for damages to the remainder, the compensation for the

property and for damages to the remainder separately stated, and the calculations and a narrative explanation supporting the compensation, including any offsetting benefits.

The last requirement that the statement or summary include details relating to damages to the remainder applies equally in a situation when no compensation for damages to the remainder is provided due to a complete offset by benefits to the remainder. The expert may be either a member of the condemnor's appraisal staff or an independent appraiser [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1255.010*].

On noticed motion, or on ex parte application in an emergency, a court may permit the plaintiff to make a deposit without prior compliance with the expert appraisal requirement if the plaintiff presents facts by affidavit showing that (1) good cause exists for permitting an immediate deposit to be made, (2) an adequate appraisal has not been completed and cannot reasonably be prepared before making the deposit, and (3) the amount of the deposit to be made is not less than the probable amount of compensation that the plaintiff, in good faith, estimates will be awarded in the proceeding. In its order, the court must require the plaintiff to comply with the appraisal requirements within a reasonable time, to be specified in the order, and also must require that any additional amount of compensation shown by the appraisal be deposited within that time [*Code Civ. Proc. § 1255.010(c)*].

[3] Notice of Deposit

The notice of deposit must state that a deposit has been made and the date and the amount of deposit. The plaintiff must serve a notice of deposit on all parties who have appeared in the proceedings and file with the court a proof of service together with the notice of deposit. The notice of deposit must also be served on all parties who appear thereafter on their appearance [*Code Civ. Proc. § 1255.020(a)*; *see § 247.300* (form of notice)]. Service must be made in the manner provided in *Code Civ. Proc. § 1255.450* for service of an order for possession [*Code Civ. Proc. § 1255.020(a)*; *see § 247.113[2][b]*].

The notice of deposit must be accompanied by the written statement or summary of the basis for the appraisal [*see § 247.107[2]*]. However, if the plaintiff obtained a court order deferring completion of the written statement or summary, the plaintiff must include with the notice of deposit a copy of all affidavits on which the order was based, and on completion of the written statement or summary, must serve the statement or summary on all the parties [*Code Civ. Proc. § 1255.020(c)*].

[4] Redetermination of Amount of Deposit

At any time after a deposit has been made, the court, on motion of the plaintiff or of any party having an interest in the property for which the deposit was made, must determine or redetermine whether the amount deposited is the probable amount of compensation that will be awarded in the proceeding [*Code Civ. Proc. § 1255.030(a)*]. The motion must be supported with detail that is sufficient to indicate clearly the basis for the motion, including, but not limited to, the following [*Code Civ. Proc. § 1255.030(a)(1)-(3)*]:

- The date of valuation, highest and best use, and applicable zoning of the property;

- The principal transactions, reproduction or replacement cost analysis, or capitalization analysis, supporting the motion; and

- The compensation for the property and for damages to the remainder separately stated, and the calculations and a narrative explanation supporting the compensation, including any offsetting benefits.

From the property owner's point of view, however, making a motion for an increase in the amount of the deposit is not usually worth the time and expense of the hearing unless the property owner has an urgent need for additional funds and

it can be demonstrated that the deposit is grossly inadequate [*see California Real Estate Law & Practice, Ch. 505, Prejudgment Possession, § 505.03* (Matthew Bender)].

The plaintiff, at any time, may increase the amount deposited without making a motion to do so. In such a case, notice of the increase must be served as provided in *Code Civ. Proc. § 1255.020(a)* [*Code Civ. Proc. § 1255.030(f)*; *see § 247.163[2]*].

If the plaintiff has not taken possession of the property and the court determines that the probable amount of compensation exceeds the amount deposited, the court may order the plaintiff to increase the deposit or may deny the plaintiff possession of the property until the amount deposited has been increased to the amount specified in the order [*Code Civ. Proc. § 1255.030(b)*].

If the plaintiff has taken possession of the property and the court determines that the probable amount of compensation exceeds the amount deposited, the court must order the amount deposited to be increased to the amount determined to be the probable amount. If the deposit is not increased within 30 days from the date of the court's order, or a longer time as the court may have allowed at the time it made the order, the defendant may serve on the plaintiff a notice of election to treat such failure as an abandonment of the proceeding. If the plaintiff does not cure its failure within 10 days after receipt of the notice, the court, on the defendant's motion, must enter judgment dismissing the proceeding and awarding the defendant litigation expenses and damages as provided in *Code Civ. Proc. §§ 1268.610* and *1268.620* [*Code Civ. Proc. § 1255.030(c)*; for further discussion of abandonment, *see § 247.101*].

A trial court has jurisdiction under *Code Civ. Proc. § 1255.030* to order an increase in deposit after the filing of a notice of appeal. The phrase "at any time" as used in the statute is not limited to "any time before judgment." In addition, the trial court must require an increase in deposit when a plaintiff who has obtained prejudgment possession appeals a judgment in excess of its deposit of probable compensation. However, the trial court must provide the plaintiff with an opportunity to request a period longer than 30 days to increase the deposit [*Whittier Redevelopment Agency v. Oceanic Arts (1995) 33 Cal. App. 4th 1052, 1058-1060, 39 Cal. Rptr. 2d 396]* .

The *Whittier* court agreed with the result but not the reasoning of *People ex rel. Dept. of Transportation v. Zivelonghi (1986) 181 Cal. App. 3d 1035, 1045-1046, 226 Cal. Rptr. 748* , which held that *Code Civ. Proc. § 1255.030* only applies to deposits for purposes of acquiring and retaining possession before judgment is entered, but that the trial court may require an increase in deposit on appeal pursuant to its inherent powers [*Whittier Redevelopment Agency v. Oceanic Arts (1995) 33 Cal. App. 4th 1052, 1058, 39 Cal. Rptr. 2d 396]* . The *Zivelonghi* court also held that the deposit may not include a probable award of litigation expenses [*People ex rel. Dept. of Transportation v. Zivelonghi (1986) 181 Cal. App. 3d 1035, 1044-1046, 226 Cal. Rptr. 748]* .

If the defendant has withdrawn any amount of the deposit, the court may not determine or redetermine the probable amount of compensation to be less than the total amount already withdrawn although it may determine that the probable compensation is greater than the amount withdrawn [*Code Civ. Proc. § 1255.030(d)*]. After final determination of the amounts to be awarded in the proceeding, any excessive withdrawal may be recovered [*Code Civ. Proc. § 1255.280*].

If the court determines that the amount deposited is greater than the probable amount of compensation, it may permit the plaintiff to withdraw the excess not already withdrawn by the defendant [*Code Civ. Proc. § 1255.030(e)*].

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§ 247.108 Deposit Required on Demand of Homeowner

[1] In General

When the plaintiff has not made a prejudgment deposit and the property to be taken includes a dwelling containing not more than two residential units and the dwelling or one of its units is occupied by the defendant as his or her residence, that defendant may serve notice on the plaintiff requiring a deposit of the probable amount of compensation that will be awarded in the proceeding [*Code Civ. Proc. § 1255.040(a)*; *see § 247.301*]. The notice must be served as provided in *Code Civ. Proc. § 1255.020(a)* [*see § 247.163[1]*] and must specify a date (not earlier than 30 days after the date the notice is served) by which the defendant wants the deposit to be made [*Code Civ. Proc. § 1255.040(a), (f)*]. Service of the notice constitutes a waiver by operation of law, conditioned on the plaintiff's subsequent deposit, of all claims and defenses in favor of the defendant except his or her claim for greater compensation [*Code Civ. Proc. § 1255.040(e)*]. The notice may not be served after entry of judgment, unless the judgment is reversed, vacated, or set aside and no other judgment has been entered at the time the notice is served [*Code Civ. Proc. § 1255.040(g)*].

The defendant may withdraw the deposit as provided in *Code Civ. Proc. §§ 1255.210-1255.280* [*Code Civ. Proc. § 1255.040(f)*; *see §§ 247.302 -247.305*; for a discussion of recovery of interest on the deposit, *see* § *247.171[3]*].

[2] Order for Possession

If the plaintiff deposits the probable amount of compensation, pursuant to a homeowner's demand, on or before the date specified by the defendant, the plaintiff may obtain an order for possession authorizing the plaintiff to take possession of the property 30 days after the deposit date specified by the defendant or any later date that the plaintiff may request [*Code Civ. Proc. § 1255.040(b)*; *see §§ 247.308*, 247.308A, *247.309*].

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§ 247.109 Deposit Required on Demand by Lessor

If property is to be taken subject to a leasehold interest and the plaintiff has not made a deposit of probable compensation, the lessor may serve notice on the plaintiff requiring a deposit of the probable amount of compensation that will be awarded in the proceeding in the same manner and subject to the same procedures and conditions as a motion made by a homeowner pursuant to *Code Civ. Proc. § 1255.040*. However, if the plaintiff fails to make the deposit, the interest awarded must be offset by the lessor's net rental profits on the property [*Code Civ. Proc. § 1255.050*; *see § 247.301*; for a discussion of the procedures and conditions, which are the same as those for deposits required by a homeowner's demand, *see § 247.108*].

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§ 247.110 Deposit in Treasury

In lieu of depositing the money with the State Treasury as provided in *Code Civ. Proc. § 1255.010* [*see § 247.107*], on written request of the plaintiff, the court must order the money be deposited in the county treasury [*Code Civ. Proc. § 1255.070*]. Money deposited in the State Treasury must be held, invested, deposited, and disbursed in the manner specified in *Gov. Code § 16429*, and interest earned or other increment derived from its investment must be apportioned and disbursed in the manner specified by that code section. As between the parties to the proceeding, money deposited remains at the risk of the plaintiff until paid or made payable to the defendant by order of the court [*Code Civ. Proc. § 1255.070*].

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§ 247.111 Motion to Invest

[1] In General

Before entry of judgment, a defendant who has an interest in the property for which a deposit has been made, on notice to the other parties to theproceeding, may move the court to have all of the deposit invested for the benefit of the defendants [*Code Civ. Proc. § 1255.075(a)*]. At the hearing on the motion, the court must consider the interest of the parties and the effect that investment would have on them, including whether any of the parties would be prejudiced by the investment. A factor that might be taken into consideration is the interest of a defendant who has a bona fide objection to the right to take that would be waived under *Code Civ. Proc. § 1255.260* (withdrawal of deposit waives most claims and defenses) [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1255.075*].

If the court, in its discretion, finds that the interests of justice will be served, it may grant the motion, subject to appropriate terms and conditions [*Code Civ. Proc. § 1255.075(b)*]. In making an order for investment, the court should consider the length of commitment of investment or provision for withdrawal by individual defendants from the lump-sum investment when necessary for relocation. Similarly, the court may impose the risk of loss on the defendant requesting the investment in an appropriate case [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1255.070*].

The court must specify the method of investment, and it must be limited to United States government obligations or interest-bearing accounts in an institution whose accounts are insured by an agency of the federal government [*Code Civ. Proc. § 1255.075(c)*]. However, the lump sum may be invested in an amount greater than is insured by an agency of the federal government if the institution in which it is invested carries such insured accounts [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1255.075*].

The investment of the deposit has the same consequences as if the deposit has been withdrawn under *Code Civ. Proc. §§ 1255.010-1255.480* [*see § 247.112*], including waiver of defenses, subjection to possession by the condemnor, and cessation of the condemnor's liability for interest [*Code Civ. Proc. § 1255.075(d)*; *see Code Civ. Proc. §§ 1255.260, 1268.320*, respectively].

[2] Evidence

The amount deposited or withdrawn may not be given in evidence or referred to in the trial on the issue of compensation [*Code Civ. Proc. § 1255.060(a)*].

At trial, an appraisal report, written statement and summary of an appraisal, or other statement made in connection with a deposit or withdrawal may not be considered to be an admission of any party [*Code Civ. Proc. § 1255.060(b)*]. The person who made the report, written statement and summary, or other statement may not be called by any other party to give an opinion as to compensation at the trial on that issue over the objection of the party at whose request the report or statement was made. If the person who prepared the report or statement is called as a witness to give an opinion as to compensation, the report, statement and summary, or other statement may be used for impeachment purposes [*Code Civ. Proc. § 1255.060(c)*].

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§ 247.112 Withdrawal of Deposit of Probable Compensation

[1] Application for Withdrawal

Before entry of judgment, any defendant may apply to the court for the withdrawal of all or any portion of the amount deposited by plaintiff [*Code Civ. Proc. § 1255.210*; *see § 247.302*]. After entry of judgment, deposits may be withdrawn pursuant to *Code Civ. Proc. § 1268.140* [*see §§ 247.163[5], 247.317*]. Unless objections to the withdrawal are made [*see § 247.112[2]*], the court must order the amount requested in the application, or the portion of that amount to which the applicant is entitled paid to the applicant [*Code Civ. Proc. § 1255.220*]. No withdrawal may be ordered until 20 days have elapsed from the date the application was served on plaintiff or such longer time as may be required for the expiration of all objections [*Code Civ. Proc. § 1255.230(a)*].

[2] Objections to Withdrawal

[a] Grounds for Withdrawal, Generally

Within 20 days after an application was served on it, plaintiff may file objections to the withdrawal on any one or more of the following grounds [*Code Civ. Proc. § 1255.230(b)*; *see § 247.304*]:

- Other parties to the proceeding are known or believed to have interests in the property;
- An undertaking should be filed by the applicant as provided in *Code Civ. Proc. § 1255.240* or *1255.250* [*see § 247.112[3], [4]*]; or
- The amount of the undertaking filed by the applicant or his or her sureties is insufficient.

If any party objects to the withdrawal, or if the plaintiff so requests, the court must determine, after a hearing, the amounts to be withdrawn, if any, and by whom [*Code Civ. Proc. § 1255.230(d)*].

[b] Objection on Ground of Other Interested Parties

If an objection is filed on the ground that other parties are known to or believed to have interests in the property, the plaintiff must serve or attempt to serve on the other parties a notice that they may appear within 10 days after service and object to the withdrawal. The notice must advise those parties that their failure to object will result in a waiver of any rights against the plaintiff to the extent of the amount withdrawn and it must be served in the manner provided in *Code Civ. Proc. § 1255.450* for service of an order for possession [*Code Civ. Proc. § 1255.230(c)*; *see § 247.303*].

The plaintiff must also file, and serve on the applicant, a report setting forth (1) the names of the parties on whom the notice was served and the dates of service, and (2) the names and last known addresses of the other parties who are known or believed to have interests in the property but who were not so served [*Code Civ. Proc. § 1255.230(c)*].

The applicant may serve any parties whom the plaintiff is unable to serve [*Code Civ. Proc. § 1255.230(c)*].

[c] Effect of Service

Parties served in the manner provided in *Code Civ. Proc. § 1255.450* have no claim against the plaintiff for compensation to the extent of the amount withdrawn by all applicants. However, plaintiff remains liable to parties having an interest of record who were not served, but, if such liability is enforced, the plaintiff is subrogated to the rights of the parties under *Code Civ. Proc. § 1255.280* (excess amount withdrawn) [*Code Civ. Proc. § 1255.230(c)*].

[3] Security When Conflicting Claims

If the court determines that an applicant is entitled to withdraw any portion of a deposit that another party claims or to which another person may be entitled, the court may require the applicant to file an undertaking before withdrawing such portion. The undertaking must secure payment to the party or person of any amount withdrawn that exceeds the amount to which the applicant is entitled as finally determined in the proceeding, together with interest as provided in *Code Civ. Proc. § 1255.280*. If withdrawal is permitted, notwithstanding the lack of personal service of the application for withdrawal on any party to the proceeding, the court may also require that the undertaking indemnify the plaintiff against any liability it may incur under *Code Civ. Proc. § 1255.230*. The undertaking must be in the amount fixed by the court, but if it is executed by an admitted surety insurer, this amount should not exceed the portion claimed by the adverse claimant or appearing to belong to another person. If the undertaking is executed by two or more sufficient sureties, the amount must not exceed double such portion [*Code Civ. Proc. § 1255.240(a)*].

The undertaking must be executed by two or more sufficient personal sureties, by one admitted surety insurer, or by any combination of sufficient personal sureties and admitted surety insurers [*see Code Civ. Proc. § 995.310*]. For further discussion of bonds and undertakings and related forms, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

If the undertaking is required primarily because of an issue as to title between the applicant and another party or person, the applicant filing the undertaking is not entitled to recover the premium reasonably paid for the undertaking as a part of the recoverable costs in the eminent domain proceeding [*Code Civ. Proc. § 1255.240(b)*; *see Code Civ. Proc. § 995.250*].

[4] Security When Amount Withdrawn Exceeds Original Deposit

If the amount originally deposited is increased pursuant to *Code Civ. Proc. § 1255.030* and the total amount sought to be withdrawn exceeds the amount of the original deposit, the applicant, or each applicant if there are two or more, must file an undertaking. The undertaking must be in the plaintiff's favor and must secure repayment of any amount withdrawn that exceeds the amount to which the applicant is entitled as finally determined in the eminent domain proceeding, together with interest as provided in *Code Civ. Proc. § 1255.280* [*Code Civ. Proc. § 1255.250(a)*].

If executed by an admitted surety insurer, the undertaking must be in the amount by which the total amount to be withdrawn exceeds the amount originally deposited. If the undertaking is executed by two or more sufficient sureties, the undertaking must be in double that amount, but the maximum amount that may be recovered from the sureties is the amount by which the total amount to be withdrawn exceeds the amount originally deposited [*Code Civ. Proc. § 1255.250(a)*].

The undertaking must be executed by two or more sufficient personal sureties, by one admitted surety insurer, or by any combination of sufficient personal sureties and admitted surety insurers [*see Code Civ. Proc. § 995.310*]. For further discussion of bonds and undertakings and related forms, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

If there are two or more applicants, the applicants, instead of filing separate undertakings, may jointly file a single undertaking [*Code Civ. Proc. § 1255.250(b)*].

The applicant filing the undertaking may recover the premium reasonably paid for the undertaking [*see Code Civ. Proc. § 995.250*]. The plaintiff may waive the undertaking or may, in writing, consent to an undertaking in an amount less than the amount required by *Code Civ. Proc. § 1255.250(a)* [*see Code Civ. Proc. § 995.230*].

[5] Effect of Withdrawal

The receipt of any money withdrawn pursuant to *Code Civ. Proc. §§ 1255.010-1255.480* constitutes a waiver by operation of law of all claims and defenses in favor of the persons receiving the payment, except a claim for greater compensation [*Code Civ. Proc. § 1255.260*].

In addition to the defendant's waiver of claims and defenses other than the claim to greater compensation, withdrawal of the deposit also entitles the plaintiff to an order for possession [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1255.260*; *see People ex rel. Dep't of Public Works v. Gutierrez (1962) 207 Cal. App. 2d 759, 764, 24 Cal. Rptr. 781]* .

Any amount withdrawn is credited on the judgment in the eminent domain proceeding [*see Code Civ. Proc. § 1268.010*].

[6] Liability for Excess Payment

Any amount withdrawn in excess of the amount to which the party is entitled as finally determined in the eminent domain proceeding must be paid to the parties entitled to it, and the court will enter judgment accordingly [*Code Civ. Proc. § 1255.280(a)*].

The judgment will not include interest except in the following cases: (1) if the amount is to be paid to another defendant, the judgment will include interest from the date it was withdrawn by the defendant; (2) if the amount originally deposited by the plaintiff was increased pursuant to *Code Civ. Proc. § 1255.030* on motion of the party obligated to repay, the judgment will include interest from the date of withdrawal of any amount that is attributable to the increase and that is to be repaid to the plaintiff [*Code Civ. Proc. § 1255.280(b)*].

If the judgment is not paid within 30 days after its entry, the court, on motion, may enter judgment against the sureties, if any, for the amount of the judgment [*Code Civ. Proc. § 1255.280(c)*].

The court, in its discretion and with such security as it deems appropriate, may grant a party obligated to repay an excess payment a stay of execution for any amount to be paid to a plaintiff [*Code Civ. Proc. § 1255.280(d)*]. Appropriate security may be simply recordation of an abstract of judgment [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1255.280*]. The stay cannot be for longer than one year following entry of judgment for repayment of an

excess withdrawal [*Code Civ. Proc. § 1255.280(d)*]. The stay is available only as against amounts to be repaid to a plaintiff. Moreover, because execution has been stayed, interest will accrue during the period of the stay regardless of the means by which the excess was obtained [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1255.280*; *see Bellflower City School Dist. v. Skaggs (1959) 52 Cal. 2d 278, 282, 339 P.2d 848]* .

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§ 247.113 Possession Before Judgment

[1] Motion for Order

[a] Contents of Motion

When the complaint has been filed, or any time thereafter, and before entry of judgment, the plaintiff may move the court for an order for possession, demonstrating that (1) it is entitled to take the property by eminent domain, and (2) it has made a deposit of probable compensation [*Code Civ. Proc. § 1255.410(a)*; *see Code Civ. Proc. § 1255.010 et seq.*; *see also § 247.308* (notice of motion form)].

[b] Service of Motion and Hearing Date

The plaintiff must serve a copy of the motion on the record owner of the property as well as on any occupants. If the property is unoccupied, the hearing may be held not less than 60 days after service on the record owner. If the property is lawfully occupied by a person living there, or by a farm or business operation, the hearing may be held not less than 90 days after service [*Code Civ. Proc. § 1255.410(b)*].

[c] Procedure When Notice Is Opposed

Any defendant or occupant who opposes the motion must serve written opposition on the plaintiff and file the opposition with the court within 30 days after the plaintiff's motion was served [*Code Civ. Proc. § 1255.410(c)*; *see § 247.308A* (form of opposition to motion)]. If the written opposition asserts a hardship, it must be supported by a declaration signed under penalty of perjury stating facts supporting the hardship [*Code Civ. Proc. § 1255.410(c)*].

Once the hearing has been held and after considering the relevant facts and the opposition, the court may make an order for possession only if it finds that [*Code Civ. Proc. § 1255.410(d)(2)*]:

- The plaintiff is entitled to take the property by eminent domain;

- The plaintiff has deposited an amount with the court that meets the statutory just compensation requirements [*see Code Civ. Proc. § 1255.010 et seq.*];

- There is an overriding need for the plaintiff to possess the property before final judgment is issued, and the plaintiff will suffer a substantial hardship if the motion is denied; and

- The hardship to the plaintiff if possession is denied outweighs the hardship to the defendant or occupant if possession is granted.

[d] Procedure When Notice Is Unopposed

If no opposition to the plaintiff's motion for possession is filed within 30 days after service on each defendant and occupant, the court will issue an order of possession if it finds that [*Code Civ. Proc. § 1255.410(d)(1)*]:

- The plaintiff is entitled to take the property by eminent domain; and

- The plaintiff has deposited an amount with the court that meets the statutory just compensation requirements [*see Code Civ. Proc. § 1255.010 et seq.*].

[2] Order of Possession

[a] Contents of Order

The court's order of possession must [*Code Civ. Proc. § 1255.460*; *see § 247.309* (sample order)]:

- Recite that it has been made under *Code Civ. Proc. § 1255.460*;

- Describe the property to be acquired, which may be by reference to the description in the complaint; and

- State the date after which the plaintiff is authorized to take possession.

[b] Service of Order

A copy of the order for possession must be served on the record owner of the property and on any occupants [*Code Civ. Proc. § 1255.450(b)*]. The "record owner" is the owner of the legal or equitable title to the fee or any lesser interest in property as shown by recorded deeds or other recorded instruments [*Code Civ. Proc. § 1255.450(a)*].

If the property is lawfully occupied by a person dwelling on it or by a farm or business operation, service must be made not less than 30 days before the time possession is to be taken. In all other cases, service must be made not less than 10 days before the time of taking possession. Service may be made with or following service of summons [*Code Civ. Proc. § 1255.450(b)*]. However, when the record owner cannot be located, the court may, for good cause shown on ex parte application, authorize the plaintiff to take possession of unoccupied property without serving a copy of the order for possession on the record owner [*Code Civ. Proc. § 1255.450(e)*].

Service of the order for possession must be made by personal service except that [*Code Civ. Proc. § 1255.450(d)*]:

- If the person to be served has previously appeared or been served with summons in the proceeding, the order may be served on that person and his or her attorney of record, if any, by mail; or

- If the person to be served resides out of the state, or has departed from the state, or cannot with due diligence be found within the state, the order may be served by registered or certified mail addressed to the person at his or her last known address.

A single service on, or mailing to, one of several persons having a common business or residence address is sufficient [*Code Civ. Proc. § 1255.450(f)*]. In this context, "address" refers to a single residential unit or place of business rather than to several such units or places that may happen to have the same street or post office address. For example, each apartment is regarded as having a separate address although the entire apartment house may have a single street address [Assembly Legislative Committee Comment to *Code Civ. Proc. § 1255.450*].

[c] Vacating Order

If an order for possession before judgment has been made under *Code Civ. Proc. § 1255.410* and the court subsequently determines that the statutory conditions for issuance of the order have not been satisfied, the court must vacate the order [*Code Civ. Proc. § 1255.440*].

[3] Ex Parte Application by Utility for Emergency Order of Possession

A court may issue an order of possession on the ex parte application by a water, wastewater, gas, electric, or telephone utility if the court finds that [*Code Civ. Proc. § 1255.410(e)(1)*]:

- An emergency exists and as a consequence the utility has an urgent need for possession of the property; and

- An emergency order of possession will not displace or unreasonably affect any person in actual and lawful possession of the property to be taken or the larger parcel of which it is a part.

The requisite urgent need includes, but is not limited to, a need to protect public health and safety, or a need affecting reliability of the utility's service [*Code Civ. Proc. § 1255.410(e)(1)*].

Any defendant or occupant of the property may move for relief from an emergency order of possession within 30 days after the order was served. The court may then modify, stay, or vacate the order after considering the relevant facts, any objections raised, and on completion of any requested hearing [*Code Civ. Proc. § 1255.410(e)(2)*].

[4] Effects of Order for Possession

The most important effect of an order for possession before judgment is that it entitles the plaintiff to take possession of the property on a specified date [*see Code Civ. Proc. § 1255.410*]. However, the compensation awarded in the proceeding begins to draw interest from the date after which the plaintiff is authorized to take possession of the property as stated in the order for possession [*Code Civ. Proc. § 1268.310(c)*; *see People ex rel. DOT v. Southern California Edison Co. (2000) 22 Cal. 4th 791, 94 Cal. Rptr. 2d 609, 996 P.2d 711]* . When theplaintiff obtains an order of possession but the deposit of probable compensation is less than the final judgment, the plaintiff is liable for market rate interest on the difference [*Redevelopment Agency v. Gilmore (1985) 38 Cal. 3d 790, 798-802, 214 Cal. Rptr. 904, 700 P.2d 794* ; for discussion of the constitutional basis and definition of market rate interest, *see § 247.171[2]*; for discussion of offsets against interest, *see § 247.171[5]*].

By taking possession of the property, the plaintiff does not waive the right to appeal from the judgment, the right to move to abandon, or the right to request a new trial [*Code Civ. Proc. § 1255.470*].

[5] Enforcement of Order

The court has the power to enforce an order for possession by appropriate process and the plaintiff is entitled to such enforcement as a matter of right [*Code Civ. Proc. § 1230.050*; *see Code Civ. Proc. §§ 1255.410-1255.480* (orders for possession before judgment)].

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[Reserved]

§§ 247.114[Reserved]

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§ 247.130 Constitutional Requirement of Just Compensation

Both the United States and California Constitutions require the payment of just compensation for a taking of private property for public use [*U.S. Const., Amend. V*; *Cal. Const., art. I, § 19*; *see U.S. Const., Amend. XIV* (prohibition against state's deprivation of property without due process of law)], and the Eminent Domain Law provides that the owner of property acquired by eminent domain is entitled to compensation under the provisions of *Code Civ. Proc. §§ 1263.010-1263.770* [*Code Civ. Proc. § 1263.010(a)*].

The Eminent Domain Law provisions do not affect any rights the owner of property acquired by eminent domain may have under any other statute [*Code Civ. Proc. § 1263.010(b)*; *see, e.g., Gov. Code § 7260 et seq.* (relocation assistance)], and they do not limit any compensation that may be required by *Cal. Const., art. I, § 19* (" *just compensation" clause*). Conversely, the " *just compensation" clause* of the state constitution does not limit the compensation required by the Eminent Domain Law. Compensation under the law of inverse condemnation is determined by judicial development and not by these statutes [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1263.010*].

The California Constitution requires that compensation be paid before the taking; therefore, an injunction that is in effect a temporary transfer of personal property to a city is improper [*Griswold v. City of Needles (1992) 6 Cal. App. 4th 1881, 1891-1896, 8 Cal. Rptr. 2d 753]* .

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§ 247.131 Purpose of Just Compensation

The purpose of just compensation is to reimburse the owner for the property interest taken and to place the owner in as good a position pecuniarily as if the property had not been taken. Consequently, it is measured by what the owner has lost, rather than what the condemnor has gained [*People ex rel. Dept. of Transportation v. Southern Pac. Transportation Co. (1978) 84 Cal. App. 3d 315, 324, 148 Cal. Rptr. 535]* .

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§ 247.132 Prohibition Against Double Recovery

When two or more statutes provide compensation for the same loss, the person entitled to compensation may be paid only once for that loss [*Code Civ. Proc. § 1263.010(b)*]. Thus, a person who suffers a business loss is not entitled to compensation for the loss under both *Code Civ. Proc. § 1263.510* (loss of goodwill) and *Gov. Code § 7262(c)* (relocation or in lieu payment). The prohibition against double recovery does not limit compensation under different statutes for separate and distinct losses such as the fair market value of property taken, injury to the remainder, moving expenses, and court costs [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1263.010*].

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§ 247.133 Accrual of Right to Compensation

The right to compensation generally accrues at the date of filing the complaint [*Code Civ. Proc. § 1263.020*]. However, exceptions to this rule have been created by case law.

A person whose lease expires after the commencement of the action but before the trial of the proceeding and whose possession during the term of the lease is not disturbed is not entitled to participate in a condemnation award [*People ex rel. Dep't of Public Works v. Hartley (1963) 214 Cal. App. 2d 378, 379-380, 29 Cal. Rptr. 502* (holding that tenant did not suffer any loss due to eminent domain proceedings since he enjoyed full term of lease without disturbance from condemnor)]. However, if the condemnor takes possession of the property before trial, the fact that a lease expires beforethe judgment is entered does not affect the tenant's right to compensation for the taking of the leasehold interest [*People ex rel. Dept. of Water Resources v. Gianni (1972) 29 Cal. App. 3d 151, 155-156, 105 Cal. Rptr. 248]* .

A right to compensation may accrue even though an eminent domain proceeding is never filed, such as in the situation when a condemnor acquires property by negotiation and terminates a lease [*Concrete Serv. Co. v. California ex rel. Dep't of Public Works (1969) 274 Cal. App. 2d 142, 148-149, 78 Cal. Rptr. 923* ; *see Redevelopment Agency v. Diamond Properties (1969) 271 Cal. App. 2d 315, 319-320, 76 Cal. Rptr. 269* (tenant originally occupying property under lease permitting tenant to remove trade fixtures at end of lease but after expiration of lease was occupying premises under month-to-month tenancy when summons was issued as condemnee with respect to trade fixtures)].

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§ 247.134 Date of Valuation

[1] In General

The date of valuation is (1) the date of deposit of probable compensation [*Code Civ. Proc. § 1263.110*]; (2) the date of commencement of the proceeding [*Code Civ. Proc. § 1263.120*]; or (3) the commencement of the trial [*Code Civ. Proc. § 1263.130*; *see CACI Nos. 3501, 3502, 3505* (California Judicial Council jury instructions on "fair market value," "highest and best use," and "date of valuation," respectively)].

[2] Determined by Deposit

Unless an earlier date of valuation applies, the date of valuation is the date on which the plaintiff deposited with the court the amount of probable compensation or the amount of the award [*Code Civ. Proc. § 1263.110(a)*; *see Code Civ. Proc. §§ 1255.010-1255.080, 1268.110-1268.170*]. However, if the plaintiff fails to deposit an additional amount of probable compensation within the time period allowed when the court determines an increase is necessary, no deposit is deemed to have been made for the purpose of determining the date of valuation [*Code Civ. Proc. § 1263.110(b)*; *see Code Civ. Proc. § 1255.030*].

Consequently, the plaintiff may establish a date of valuation no later than the date it makes an adequate deposit. Although the date of valuation may be earlier than the date of deposit or an earlier date of valuation may be shifted to the date of deposit [*see § 247.134[3] -[5]*], a valuation date established by a deposit cannot be shifted to a later date [Assembly Legislative Committee Comment to *Code Civ. Proc. § 1263.110*].

When a deposit of probable compensation is made in a "quick take" proceeding, in which the condemnor applies for a prejudgment order for possession on a deposit of probable compensation for the owner [*Code Civ. Proc. § 1255.410 et seq.*], and the trial court determines that the deposit equals or exceeds the probable amount of the owner's just compensation, the property must be valued on the date of the deposit [*Code Civ. Proc. § 1263.110*; *Mt. San Jacinto Comm. College Dist. v. Superior Court (2007) 40 Cal. 4th 648, 666, 54 Cal. Rptr. 3d 752, 151 P.3d 1166]* . The waiver rule of *Code Civ. Proc. § 1255.260* [*see § 247.112[5]*], which requires a condemnee to waive its statutory right to

litigate the issue of the condemnor's right to take in the event the condemnee withdraws the deposited funds, does not deprive a condemnee of just compensation. As long as a probable compensation deposit based on such valuation remains available to the property owner for "prompt release," the imposition of a waiver of the right to challenge the validity of the taking if the owner elects to withdraw the deposit does not undermine the constitutionality of the statutory scheme nor the Legislature's chosen method of valuation [*Mt. San Jacinto Comm. College Dist. v. Superior Court (2007) 40 Cal. 4th 648, 666, 54 Cal. Rptr. 3d 752, 151 P.3d 1166]* .

The date of valuation is the date of deposit despite the lack of a judicial determination that the deposit was adequate. Once the agency has deposited its estimate of probable compensation and supported that estimate with expert appraisals and a written summary of the basis for the appraisal, it is not required to make any further motion seeking a determination that deposit was adequate [*Redevelopment Agency of the City of San Diego v. Mesdaq (2007) 154 Cal. App. 4th 1111, 1124-1125, 65 Cal. Rptr. 3d 372]* .

[3] Determined by Commencement of Proceedings

If the issue of compensation is brought to trial within one year after the proceeding is commenced, the date of valuation is the date of commencement of the proceeding, that is, the date the complaint is filed [*Code Civ. Proc. § 1263.120*; *see Code Civ. Proc. § 1250.110*].

[4] Determined by Commencement of Trial

Subject to *Code Civ. Proc. § 1263.110* [*see § 247.134[1]*], if the issue of compensation is not brought to trial within one year after commencement of the proceeding, the date of valuation is the date of the commencement of trial [*Code Civ. Proc. § 1263.130*; *see Evid. Code § 12(b)* (trial is commenced when first witness is sworn or first exhibit is admitted into evidence)].

However, when the delay in bringing the issue of compensation to trial is caused by the defendant, the valuation date remains the date the proceeding commenced [*Code Civ. Proc. § 1263.130*], except when the delay is caused by the court in ruling on a defendant's motion [*see Santa Maria v. Alco-Pacific Enterprises, Inc. (1968) 266 Cal. App. 2d 477, 481, 72 Cal. Rptr. 204* (change of venue)].

[5] When Mistrial Declared or New Trial Ordered

Subject to *Code Civ. Proc. § 1263.110* [*see § 247.134[1]*], if a mistrial is declared, or a new trial is ordered by the trial or appellate court, and the retrial or new trial is not commenced within one year after the complaint is filed, the date of valuation is the date that the new trial or retrial is commenced, unless the court, declaring the mistrial or ordering the new trial, orders a different valuation date [*Code Civ. Proc. §§ 1263.140* (new trial), 1263.180 (mistrial)]. The plaintiff, however, may make a postjudgment deposit thus precluding a valuation date later than the date of the deposit [*see Code Civ. Proc. § 1263.110*].

[6] Stipulation

The parties may stipulate to a valuation date that is different than that provided by the Code of Civil Procedure [*State of California ex rel. Dept. of Water Resources v. Clark (1973) 33 Cal. App. 3d 463, 468, 109 Cal. Rptr. 39]* .

[7] Trial Court Discretion to Set Date of Valuation

A trial court has inherent power to set a valuation date other than the date specified by statute [*Saratoga Fire Protection Dist. v. Hackett (2002) 97 Cal. App. 4th 895, 906, 118 Cal. Rptr. 2d 696]* . The constitutional requirement of "just compensation" requires the payment of fair market value to the defendant in an eminent domain action [*see § 247.135[1]*]. Thus, when the parties agreed that the value of the property increased substantially between the date of

valuation (the filing of the complaint, because the action came to trial within one year) and the date of trial, the trial court erred in excluding evidence as to the increase in the property's value [*Saratoga Fire Protection Dist. v. Hackett (2002) 97 Cal. App. 4th 895, 905-906, 118 Cal. Rptr. 2d 696]* .

In another case, the trial court did not err in changing the date of valuation from the date probable compensation was deposited [*Code Civ. Proc. § 1263.110*] to the date of trial [*San Diego Metropolitan Transit Development Board v. RV Communities (2007) 158 Cal. App. 4th 313, 327, 69 Cal. Rptr. 3d 705*]. The condemnor's own appraiser testified that the amount deposited should have been $300,300 rather than the $79,357 that was deposited. Thus, the change in valuation date did not contravene the statutory scheme because the amount deposited fell short of "probable compensation" [*San Diego Metropolitan Transit Development Board v. RV Communities (2007) 158 Cal. App. 4th 313, 331-332, 69 Cal. Rptr. 3d 705*]. Furthermore, the court properly changed the date of valuation to the date of trial to satisfy the constitutional requirement of just compensation. Because a landowner is permanently deprived of all rights in condemned property when the condemnor deposits probable compensation and obtains early possession of the property, a constitutional taking occurs at that time. A motion to increase the amount of the deposit pursuant to *Code Civ. Proc. § 1255.030* would not provide an adequate remedy. A delay in the payment of the correct amount of probable compensation after the condemnor obtains possession of condemned property in a rapidly inflating real estate market denies the condemnee the full equivalent of the property's value paid contemporaneously with the taking and, thus, the ability to invest the money paid in other property of equal value in the same market. A delayed increase of the deposit with no change in the date of valuation would not have satisfied the constitutional requirement of just compensation because the amount of the increased deposit would have been insufficient to buy comparable other property in the current market [*San Diego Metropolitan Transit Development Board v. RV Communities (2007) 158 Cal. App. 4th 313, 332, 69 Cal. Rptr. 3d 705*].

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§ 247.135 Measure of Compensation

[1] Fair Market Value

The measure of the compensation to be awarded is the fair market value of the property taken [*Code Civ. Proc. § 1263.310*]. Fair market value is defined as the highest price on the date of valuation that would be agreed to by a seller who is willing to sell but under no necessity or obligation to do so and by a buyer who is ready, willing, and able to buy but under no particular necessity for doing so, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available [*Code Civ. Proc. § 1263.320(a)*; *see Merced Irrigation Dist. v. Woolstenhulme (1971) 4 Cal. 3d 478, 488, 93 Cal. Rptr. 833, 483 P.2d 1* ; *Sacramento S. R. Co. v. Heilbron (1909) 156 Cal. 408, 409, 104 P. 979* ; *Evid. Code §§ 810-824* (evidence admissible to prove fair market value); *see also CACI No. 3501* (California Judicial Council jury instruction on "fair market value")]. In determining the market value the evidence need not show the existence of an actual seller and buyer or an actual market, but instead may show potential sellers and buyers in a potential market [*South Bay Irr. Dist. v. California-American Water Co. (1976) 61 Cal. App. 3d 944, 970* .

In determining the amount of compensation due a property owner, a jury must consider facts discovered between the date of valuation and the date of trial that tend to reduce the property's fair market value [*San Diego County Water Authority v. Mireiter (1993) 18 Cal. App. 4th 1808, 23 Cal. Rptr. 2d 455]* . In this case, the court held that *Code Civ. Proc. § 1263.320*, which defines "fair market value" as "the highest price on the date of valuation that would be agreed to by a seller ... and a buyer ... each dealing with the other with full knowledge of all uses and purposes for which the property is reasonably adaptable and available," necessarily implies that such information must be taken into account.

If there is no relevant, comparable market for property taken, such as in the case of special use properties including schools, churches, and cemeteries, the fair market value is its value on the date of valuation as determined by any just and equitable method of valuation [*Code Civ. Proc. § 1263.320(b)*; *see Evid. Code § 823*; *People ex rel. Dept. of Transportation v. Southern Pac. Transportation Co. (1978) 84 Cal. App. 3d 315, 325, 148 Cal. Rptr. 535* (rules for determining just compensation are procedural so that, if rigid application produces injustice, court is required to deviate

from rule)].

Valuation evidence based on a use that is uniquely governmental, such as a detention facility, is not admissible; valuation must be based on the value of the property in the private marketplace [*County of San Diego v. Rancho Vista Del Mar (1993) 16 Cal. App. 4th 1046, 1060-1065, 20 Cal. Rptr. 2d 675]* . However, the value of underground aggregate could be considered in establishing the market value of property condemned for a flood control project. Unlike a prison, mining and use of aggregate are not uniquely governmental uses. The fact that the aggregate was extracted to provide a basin for the flood control project did not change its intrinsic value to the private sector for building material [*Ventura County Flood Control Dist. v. Campbell (1999) 71 Cal. App. 4th 211, 221, 83 Cal. Rptr. 2d 725]* .

[2] Nonprofit Special Use Property

A just and equitable method for determining the value of nonprofit special use property for which there is no relevant, comparable market is the cost of purchasing land and the reasonable cost of making it suitable for the conduct of the same nonprofit special use, together with the costs of constructing similar improvements [*Evid. Code § 824(a)*]. "Nonprofit special use property" is property that is operated for a special, nonprofit, tax-exempt use, such as a school, church, cemetery, hospital, or similar property but is not public utility property [*Code Civ. Proc. § 1235.155*].

A witness providing opinion testimony on the value of nonprofit special use property for which there is no relevant, comparable market must base his or her opinion on the value of reproducing the improvements without taking into consideration any depreciation or obsolescence of the improvements [*Code Civ. Proc. § 1263.321*; *Evid. Code § 824(b)*].

This method of valuation does not apply to proceedings commenced by a public entity or public utility to acquire real property for the use of water, sewer, electricity, telephone, natural gas, or flood control facilities or for rights of way, when those acquisitions neither require removal or destruction of existing improvements nor render the property unfit for the owner's present or proposed use [*Evid. Code § 824(c)*].

[3] Exclusions From Fair Market Value

The fair market value of the property taken does not include any increase or decrease in the value of the property that is attributable to any of the following [*Code Civ. Proc. § 1263.330*]:

- The project for which the property is taken;
- The eminent domain proceeding in which the property is taken; and
- Any preliminary actions of the plaintiff relating to the taking of the property [*see Gov. Code § 7267.2* and *42 U.S.C. § 4651(3)* for state and federal provisions applicable to offers for voluntary acquisition of property; *see also CACI Nos. 3504, 3505* (related California Judicial Council jury instructions)].

Changes in value caused by a project other than the one for which the property is taken, however, even though the two projects may be related, must be taken into account in valuing the property [*People ex rel. Dep'tof Public Works v. Cramer (1971) 14 Cal. App. 3d 513, 520, 92 Cal. Rptr. 401* (property taken for building second freeway is permitted to be enhanced in value by construction of original freeway because it was not probable that property would be included in original freeway condemnation)]. Moreover, if property is affected by a project and subsequently the project's scope is changed or expanded to include that property, the property should be valued as affected by the original project up to the time it became reasonably probable that the land would be included [*Merced Irrigation Dist. v. Woolstenhulme*

(1971) 4 Cal. 3d 478, 489, 93 Cal. Rptr. 833, 483 P.2d 1] .

Additionally, benefits of government activities, reflected in market value, compose part of just compensation for land, including activities paid for or instituted by the government [*Merced Irrigation Dist. v. Woolstenhulme (1971) 4 Cal. 3d 478, 493, 93 Cal. Rptr. 833, 483 P.2d 1* ; *see, e.g., People ex rel. Dep't of Public Works v. Donovan (1962) 57 Cal. 2d 346, 352-354, 19 Cal. Rptr. 473, 369 P.2d 1* (reasonable probability of zoning change is factor in compensation)].

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§ 247.136 Compensation for Improvements

[1] Determining Value Generally

All improvements pertaining to realty must be taken into account in determining compensation despite the right or obligation of a tenant to remove the improvement at the expiration of his or her term [*Code Civ. Proc. § 1263.210*; *see CACI No. 3506* (related California Judicial Council jury instruction)]. Thus, property enhanced by improvements receives the enhanced value and property decreased in value by improvements suffers the decreased value [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1263.210*]. For a discussion of and forms relating to fixtures and improvements, see Ch. 332, *Landlord and Tenant: The Tenancy* .

Losses on personal property that is not an improvement pertaining to the realty may be recoverable under the relocation assistance provisions [*see, e.g., Gov. Code § 7262*].

If the condemnation directly causes a reduction in value of personal property on the premises, the loss is recoverable in the eminent domain action. An example of such a loss is the condemnation of a yard containing a number of used cars to be used for parts. Because the cars could not be moved, they had to be sold as scrap rather than for parts and, thus, were worth substantially less. The owner was entitled to the difference in value [*Baldwin Park Redevelopment Agency v. Irving (1984) 156 Cal. App. 3d 428, 434-438, 202 Cal. Rptr. 792]* .

[2] Machinery and Equipment as Improvements

The term "improvements pertaining to the realty" includes any machinery or equipment installed for use on property taken by eminent domain, or on the remainder if the property is part of a larger parcel, that cannot be removed without a substantial economic loss or without substantial damage to the property on which it is installed, regardless of the method of installation [*Code Civ. Proc. § 1263.205(a)*]. In determining whether or not particular property can be removed "without a substantial economic loss," the value of the property in place considered as part of the realty should be compared with its value if it were removed and sold [*Code Civ. Proc. § 1263.205(b)*; *see BAJI No. 11.72.5* (compensation for machinery or equipment)].

[3] Disagreement Over Character of Improvements on Property

If there is a dispute between plaintiff and defendant as to whether or not particular property is an improvement pertaining to the realty, either party, not later than 30 days before the date specified in an order for possession of the property, may move the court for a determination of whether the property is an improvement pertaining to the realty [*Code Civ. Proc. § 1260.030(a)*]. The motion must be heard not sooner than 10 days and not later than 20 days after service of notice of the motion. At the hearing, the court may consider any relevant evidence, including a view of the premises and property, in making its determinations [*Code Civ. Proc. § 1260.030(b)*].

[4] Condemnor Aquires Title to Improvement

If property is classifed as an improvement pertaining to the realty, and if it is located on the property taken, it must be taken and paid for by the condemnor of the realty. Consequently, the condemnor acquires title to the improvements rather than merely paying for loss of value on removal and has the right to realize any salvage value the improvements may have and must bear the resultant burden. When improvements are located on the remainder, severance damages may be recovered [Senate Legislative Committee Comment to *Code Civ. Proc. § 1263.205*].

[5] Removed or Destroyed Improvements

[a] Removal or Destruction by Specified Date

Improvements pertaining to the realty are not a factor in determining compensation when they are removed or destroyed before the earliest of the following dates [*Code Civ. Proc. § 1263.230(a)*]:

- The date the plaintiff takes title to the property;
- The date the plaintiff takes possession of the property; or
- If the defendant moves from the property pursuant to an order for possession, the date specified in the order, except that if the defendant moves before that date and gives the plaintiff written notice, the date 24 hours after notice is received by the plaintiff.

If removal or destruction of improvements before any of these dates decreases the property's value below its improved condition, the property is valued accordingly. Conversely, if removal or destruction increases the value over the property's improved condition, the property receives the increased value [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1263.230*].

[b] Removal or Destruction by Defendant

Improvements that are removed or destroyed by the defendant at any time are not taken into account in determining compensation. Even when the defendant removes or destroys them after the risk of loss has shifted to the plaintiff. Damage resulting to remaining property from the removal or destruction must be considered to the extent that it reduces the value of the remaining property [*Code Civ. Proc. § 1263.230(b)*].

A plaintiff may bring an independent action against the defendant for conversion when removal or destruction occurs after valuation of the property. However, according to the Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1263.230*, a defendant may be able to remove improvements pursuant to *Code Civ. Proc. § 1263.260* without being responsible for the damage to the structure caused by the removal [*see § 247.136[7]*].

[6] Improvements Made After Service of Summons

Improvements pertaining to the realty made after the date of service of summons are not taken into account in determining compensation unless (1) the improvement is one required to be made by a public utility to its utility system [*see Citizens Utilities Co. v. Superior Court of Santa Cruz County (1963) 59 Cal. 2d 805, 811, 31 Cal. Rptr. 316, 382 P.2d 356]* ; (2) the improvement is one made with the plaintiff's written consent; or (3) the improvement is one authorized to be made by a court order issued after a noticed hearing and on a finding by the court that the hardship to the defendant of not permitting the improvement outweighs the hardship to the plaintiff of permitting the improvement. In its order, the court may limit the extent to which the improvement must be taken into account in determining compensation [*Code Civ. Proc. § 1263.240*; *see CACI No. 3506* (related California Judicial Council Jury Instruction) (improvements made after service of summons); *see also Mt. San Jacinto Community College Dist. v. Superior Court (2004) 117 Cal. App. 4th 98, 11 Cal. Rptr. 3d 465* (property owner who made improvements to property after it was served with summons in eminent domain action and who failed to seek advance court approval for improvements could not sue condemning public entity in inverse condemnation for value of improvements)].

Additionally, if subsequent improvements are necessary to protect the public from risk of injury or to protect partially installed machinery or equipment from damage, their cost may be recoverable as a separate item of compensation [*see Code Civ. Proc. § 1263.620*; *see also § 247.136[10]*].

[7] Removal of Improvements

The owner of improvements pertaining to realty has the option of converting them to personalty and receiving the moving costs for them instead of receiving compensation for the improvements themselves. If the owner exercises this option, he or she must serve written notice of the election on the plaintiff within 60 days after service of summons [*see Gov. Code § 7262* (moving expenses for personal property)]. If the plaintiff, in response, does not serve on the owner written notice of refusal to allow removal of the improvements within 30 days after receiving the owner's notice, the owner may remove the improvements and must be compensated for their reasonable removal and relocation cost not exceeding the market value of the improvements. When removal will damage the structure in which the improvements are located, the defendant must cause no more damage than is reasonably necessary and the structure must be valued as if the removal had not damaged it [*Code Civ. Proc. § 1263.260*].

[8] Improvements Located Partially on Property Taken

When an improvement pertaining to the realty is located in part on property taken and in part on property not taken, the court, on motion of any party and a determination that justice so requires, may direct the plaintiff to acquire the entire improvement together with an easement or other interest reasonably necessary for the demolition, removal, or relocation of the improvement [*Code Civ. Proc. § 1263.270*].

[9] Harvesting and Marketing of Crops

The acquisition of property by eminent domain does not prevent the defendant from harvesting and marketing crops planted before or after the service of summons. If the plaintiff takes possession of the property at a time that prevents the defendant from harvesting and marketing, the fair market value of the crops in place when the plaintiff is authorized to take possession of the property is included in the compensation awarded for the property taken [*Code Civ. Proc. § 1263.250(a)*]. The plaintiff, however, may obtain a court order precluding the defendant from planting crops after service of summons, in which case compensation must include an amount for the loss caused by limiting the defendant's right to use the property [*Code Civ. Proc. § 1263.250(b)*].

[10] Partially Constructed or Installed Improvement

When the summons is served during the construction of an improvement or the installation of machinery or equipment and the property owner thereby ceases construction or installation, the owner must be compensated for expenses reasonably incurred for work necessary for either of the following purposes: (1) to protect against the risk of injury to

persons or to other property created by the uncompleted improvement; or (2) to protect the partially installed machinery or equipment from damage, deterioration, or vandalism [*Code Civ. Proc. § 1263.620(a)*]. Except in the case of an emergency, this compensation is not recoverable unless the work was preceded by notice to the plaintiff [*Code Civ. Proc. § 1263.620(b)*].

The plaintiff and the property owner may agree to the amount of compensation payable or that the plaintiff will perform the necessary work [*Code Civ. Proc. § 1263.620(b)*].

The court, in determining the amount of compensation to be awarded, should consider if the plaintiff, after receiving notice, objected to the necessity or reasonablness of the expenses to be incurred. However, plaintiff's failure to object does not prejudice its right subsequently to show that the work was not necessary or that the expense was not reasonable [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1263.620*].

[11] Relocation of Structure or Work on Property Not Taken

A public entity and the condemnee may agree that the entity will (1) relocate any structure for the condemnee if relocation is likely to reduce the amount of compensation otherwise payable to the condemnee by an amount equal to or greater than the cost of relocation; or (2) carry out any work for the condemnee on property not taken, including work on any structure, if that work is likely to reduce the amount of compensation otherwise payable by an amount equal to or greater than the cost of the work [*Code Civ. Proc. § 1263.610*].

[12] Loss of Goodwill

[a] Required Elements and Burden of Proof

A defendant who is the owner of a business conducted on the property taken, or on the remainder if the property is part of a larger parcel, must be compensated for loss of goodwill if he or she proves all of the following [*Code Civ. Proc. § 1263.510(a)*; *see CACI No. 3513* (California Judicial Council jury instruction on "goodwill")]:

- The loss is caused by the taking of the property or the injury to the remainder;

- The loss cannot reasonably be prevented by a relocation of the business or by taking steps and adopting procedures that a reasonably prudent person would take and adopt in preserving the goodwill;

- Compensation for the loss will not be included in payments under *Gov. Code § 7262* (compensation for displaced persons) [*see, e.g., Redevelopment Agency v. Arvey Corp. (1992) 3 Cal. App. 4th 1357, 1362-1364, 5 Cal. Rptr. 2d 161* (defendant must establish that moving expenses are not compensable under *Gov. Code § 7262*, not that expenses have not yet been paid)]; and

- Compensation for the loss will not be duplicated in the compensation otherwise awarded to the owner.

The term "goodwill" consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality, and any other circumstances resulting in probable retention of old or acquisition of new patronage [*Code Civ. Proc. § 1263.510(b)*].

If a public entity and property owner enter into a leaseback agreement pursuant to *Code Civ. Proc. § 1263.615* [*see § 247.33*], the leaseback may not be a factor in determining goodwill, and no additional goodwill can accrue during the lease [*Code Civ. Proc. § 1263.510(c)*; *see Code Civ. Proc. § 1263.615(c)(5)*].

Lack of a written lease does not mean that the business owner does not have a legal interest in the property entitling it to compensation for goodwill. The statute provides for goodwill compensation to "the owner of a business conducted on the property taken ..." [*Code Civ. Proc. § 1263.510(a)*]. The statute contains no requirement that the real property interest be taken from the business owner for the business owner to be entitled to compensation, just that the taking cause a loss to the owner of a business conducted on the property that was taken. Thus, business owners who occupied property under a month-to-month lease were not precluded from asserting a claim for loss of goodwill based on a school district's acquisition of the property by eminent domain [*Los Angeles Unified School District v. Pulgarin (2009) 175 Cal. App. 4th 101, 106, 95 Cal. Rptr. 3d 527*].

Loss of goodwill includes loss of lower rent at the condemned location. This liberal interpretation of the statute is required by its remedial nature [*People ex rel. Dep't of Transp. v. Muller (1984) 36 Cal. 3d 263, 270, 203 Cal. Rptr. 772, 681 P.2d 1340]* .

Because the determination of loss of goodwill is governed by the general rules of evidence and not by the special rules relating to valuation in eminent domain, the provisions of *Evid. Code §§ 817* and *819* restricting admissibility of business income for the determination of value, damage, and benefit do not limit admissibility of income from a business for the determination of loss of goodwill [*see* Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1263.510*; *see also Code Civ. Proc. § 1263.520* (condemnee required to make state tax returns available to court)]. Contrary to the general rule set forth in *Code Civ. Proc. § 1260.210* governing burden of proof relating to compensation, the owner of a business has the burden of proof on the issue of whether he or she is entitled to compensation for loss of goodwill [*Code Civ. Proc. § 1263.510(a)*].

Because the owner has the burden of proof as to the existence of goodwill, the agency can argue that there is no competent evidence to support a finding of goodwill in the absence of expert testimony [*Redevelopment Agency v. Thrifty Oil Co. (1992) 4 Cal. App. 4th 469, 474-476, 5 Cal. Rptr. 2d 687]* .

A restaurant franchisor who was the subtenant of the premises and who owned trade secrets and the trade name, but who was expressly not engaged in a partnership, joint venture, or agency relationship with the franchisee, was not the owner of the business and therefore was not entitled to compensation for loss of goodwill [*Redevelopment Agency v. International House of Pancakes, Inc. (1992) 9 Cal. App. 4th 1343, 1350-1352, 12 Cal. Rptr. 2d 358]* .

Although the owner must establish the elements described above to obtain compensation for loss of goodwill, neither party has the burden of proof as to the *amount* of compensation [*Code Civ. Proc. § 1260.210(b)*; *Redevelopment Agency v. Metropolitan Theatres Corp. (1989) 215 Cal. App. 3d 808, 811-812, 263 Cal. Rptr. 637]* . In fact, an instruction that the owner has the burden of proof as to the amount of goodwill is error [*People ex rel. Dept. of Transportation v. Salami (1991) 2 Cal. App. 4th 37, 44-46, 2 Cal. Rptr. 2d 833]* .

[b] Methods for Valuing Goodwill

There is no single method required for valuing goodwill. Valuation methods differ with the nature of the business and the purpose for which the evaluation is conducted. Goodwill may be measured by the capitalized value of the net income or profits of a business or some similar method of calculating present value of anticipated profits [*People ex rel. Dept. of Transportation v. Leslie (1997) 55 Cal. App. 4th 918, 922-923, 64 Cal. Rptr. 2d 252 ; see People ex rel. Dep't of Transportation v. Muller (1984) 36 Cal. 3d 263, 271, 681 P.2d 1340]* . One permissible method is "excess income" valuation [*People ex rel. Dep't of Transp. v. Muller (1984) 36 Cal. 3d 263, 272, 203 Cal. Rptr. 772, 681 P.2d 1340]* . When a taking causes a defendant to relocate his or her business to a location with a higher rent, the excess income method is a proper measure of damages for loss of goodwill, capitalizing the value of profits lost as a result of the higher rent [*People ex rel. Dep't of Transp. v. Muller (1984) 36 Cal. 3d 263, 268-272, 203 Cal. Rptr. 772, 681 P.2d 1340]* . *Muller* did not address the question of recovery of a leasehold bonus value. This issue was addressed in another case in which the court concluded that a clause in a commercial lease mandated a conclusion that leasehold

bonus value be deducted from the award of goodwill [*New Haven Unified School Dist. v. Taco Bell Corp. (1994) 24 Cal. App. 4th 1473, 1480-1483, 30 Cal. Rptr. 2d 469]* .

The excess income method is also appropriate when the taking causes loss of income from a business located in a blighted area. In that case, a proper measure of damages for loss of goodwill is capitalization of the excess income of the business using a capitalization rate derived from a fair market value analysis [*Community Development Com. v. Asaro (1989) 212 Cal. App. 3d 1297, 1303-1306, 261 Cal. Rptr. 231]* .

A "cost to create" approach is a permissible means by which to value goodwill when a nascent business has not yet experienced excess profits, but clearly has goodwill within the meaning of the statute and experiences a total loss of goodwill due to condemnation of the property on which the business is operated [*Inglewood Redevelopment Agency v. Aklilu (2007) 153 Cal. App. 4th 1095, 1102, 64 Cal. Rptr. 3d 519* (valuing lost goodwill as amount owner had spent to build up business)].

Although no single method exists to value goodwill and the courts have not prescribed rigid and unvarying rules for determining that value, the evidence must legitimately establish *some* value. Calculating isolated increased expenses without establishing the existence of actual pre-taking goodwill and comparing its value with post-taking goodwill is an inappropriate methodology for evaluating loss of goodwill [*City of San Diego v. Sobke (1998) 65 Cal. App. 4th 379, 396, 398-399, 76 Cal. Rptr. 2d 9]* .

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§ 247.137 Precondemnation Damages

A condemnee may recover for damages resulting from an unreasonable delay by a condemnor in bringing an eminent domain action if the condemnor acted improperly either by unreasonably delaying the action following an announcement of intent to condemn or by other unreasonable conduct before condemnation resulting in a diminution of the property's market value [*Klopping v. City of Whittier (1972) 8 Cal. 3d 39, 51-52, 104 Cal. Rptr. 1, 500 P.2d 1345* ; *see* *People ex rel. Dept. Pub. Wks. v. Peninsula Enterprises, Inc. (1979) 91 Cal. App. 3d 332, 357, 153 Cal. Rptr. 895* (recovery of precondemnation damages requires showing of unreasonable delay or other unreasonable conduct but not both); *see also CACI No. 3509* (California Judicial Council jury instruction on precondemnation damages)]. These damages compensate the condemnee for his or her loss of use or enjoyment of his or her adversely affected property during the precondemnation period [*City of Los Angeles v. Monahan (1976) 55 Cal. App. 3d 846, 852, 127 Cal. Rptr. 763* ; *see* *Stone v. City of Los Angeles (1975) 51 Cal. App. 3d 987, 993, 124 Cal. Rptr. 822* (condemnees recovered rents lost during period of unreasonable delay because of knowledge of pending project)]. However, when a condemnor takes possession prematurely, the owner may not recover damages for lost rental value up to the time the property was actually needed [*County of Los Angeles v. Smith (1976) 55 Cal. App. 3d 749, 756, 127 Cal. Rptr. 666]* .

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§ 247.138 Effect of Condemnation on Holders of Lesser Property Interests

[1] Leases

The parties to a lease may provide in the lease for the effect of condemnation of the property subject to the lease [*Code Civ. Proc. § 1265.160*; *see, e.g., United States v. 1,377 Acres of Land (9th Cir. 2003) 352 F.3d 1259* (analyzing results of contractual provisions in two different restaurant leases)]. If no provision is made, the following rules apply.

When all the property subject to a lease is acquired for public use, the lease terminates [*Code Civ. Proc. § 1265.110*; *see City of Pasadena v. Porter (1927) 201 Cal. 381, 387, 257 P. 526]* . This rule does not apply when property is acquired by a public entity by purchase unless the conduct of the acquiring entity is the substantial equivalent of condemnation and fairness requires applying the section to the purchase [*Peter Kiewit Sons' Co. v. Richmond Redevelopment Agency (1986) 178 Cal. App. 3d 435, 441-442, 223 Cal. Rptr. 728]* . If only part of the property is acquired for public use, the lease terminates as to the part taken but remains in force as to the remainder, and the rent reserved in the lease that is allocable to the part taken is extinguished [*Code Civ. Proc. § 1265.120*]. However, the court, on petition of any party to the lease, may terminate it if the court determines that an essential part of the property subject to the lease is taken or that the remainder of the property is no longer suitable for the purposes of the lease [*Code Civ. Proc. § 1265.130*].

A lease provision that declares that the lease will terminate if all the property subject to the lease is acquired for public use does not deprive the tenant of any right it may have to compensation for the taking of the leasehold or other property because such a provision is merely declarative of the generally applicable rules of the Eminent Domain Law described above [*City of Vista v. Fielder (1996) 13 Cal. 4th 612, 618, 54 Cal. Rptr. 2d 861, 919 P.2d 151]* .

[2] Time of Termination

[a] In General

The lease terminates entirely or partially at the earlier of (1) the time title to the property is taken by the person putting it to the public use, or (2) the time the plaintiff is authorized to take possession as stated in an order for possession [

Code Civ. Proc. § 1265.140].

[b] Remedies of Tenant Not Affected

Despite partial or total termination of a lease, a tenant may recover compensation for the value of the leasehold interest and for any of his or her property taken in the eminent domain proceeding [*Code Civ. Proc. § 1265.150*; Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1265.150*].

[3] Liens

A lien is a mortgage, deed of trust, or other security interest in property, whether arising from contract, statute, common law, or equity [*Code Civ. Proc. § 1265.210*]. If property acquired by eminent domain is encumbered by a lien and the indebtedness secured by it is not due when judgment is entered, the amount of the indebtedness, at plaintiff's option, may be deducted from the judgment and the lien continued until the indebtedness is paid [*Code Civ. Proc. § 1265.220*]. The indebtedness may be deducted from the judgment even after the amount of the judgment has been deposited in court but before it has been withdrawn by the defendant [*People v. Cheda (1957) 154 Cal. App. 2d 531, 533-534, 317 P.2d 145]* . However, the amount of property taxes for which the plaintiff is liable as between plaintiff and defendant may not be deducted from the judgment [*Code Civ. Proc. § 1265.220*].

When the condemned property is being purchased on a land sales contract and the seller subsequently executes a promissory note secured by a trust deed on the property, the beneficiary under the trust deed is entitled only to an amount representing the seller's interest in the contract. The purchaser is entitled to the balance of the condemnation proceeds [*Alhambra Redevelopment Agency v. Transamerica Financial Services (1989) 212 Cal. App. 3d 1370, 1375-1379, 261 Cal. Rptr. 248]* .

The amount payable to the lienholder must not include any penalty for prepayment [*Code Civ. Proc. § 1265.240*; *see* Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1265.240* (code section is applicable to all penalties, including, but not limited to, those under mortgages, deeds of trust, contracts of sale, and redemption premiums under *Sts. & Hy. Code §§ 6447, 6464*)].

If property acquired by eminent domain is encumbered by the lien of a fixed lien special assessment or of a bond representing such an assessment, the lien amount must be paid to the lienholder from the award orwithheld from the award for payment pursuant to *Code Civ. Proc. § 1265.220* [*Code Civ. Proc. § 1265.250(b)(1)*; *see Code Civ. Proc. § 1265.250(a)(1)* (fixed lien special assessment defined)]. When there is a partial taking of the property, the amount of the lien prescribed in *Code Civ. Proc. § 1265.225* must be paid to the lienholder from the award, or at the lienholder's option, any applicable statutory procedure for segregation and apportionment of the lien may be invoked and the amount apportioned to the part taken must be paid to the lienholder from the award [*Code Civ. Proc. § 1265.250(b)(2)*].

If property acquired by eminent domain is encumbered by the lien of a special annual assessment, the amount of the lien prorated to but not including the date of apportionment determined pursuant to *Rev. & Tax. Code § 5082* (date of apportionment), must be paid to the lienholder from the award [*Code Civ. Proc. § 1265.250(c)(1)*; *see Code Civ. Proc. § 1265.250(a)(2)* (special annual assessment defined)]. When there is a partial taking, the lien amount, reduced by the amount for which the plaintiff is liable, must be paid to the lienholder from the award. As between plaintiff and defendant, the plaintiff is liable for the amount of the lien allocable to the part taken for the current assessment year, determined in the same manner and by the same method as the assessment amount on the property for the current assessment year was determined, prorated from and including the date of apportionment determined pursuant to *Rev. & Tax. Code § 5082* [*Code Civ. Proc. § 1265.250(c)(2)*].

A note secured by a deed of trust on the condemned property must be paid from the award even though an action on the note is barred by the statute of limitations [*Carson Redevelopment Agency v. Adam (1982) 136 Cal. App. 3d 608,*

611-613, 186 Cal. Rptr. 615] .

For a discussion of and forms relating to liens generally, see Ch. 342, *Liens and Wage Preferences* .

[4] Allocation Between Lienholder and Owner in Partial Taking

When there is a partial taking of property encumbered by a lien, the lienholder shares in the award only to the extent the court finds necessary to prevent the impairment of its security despite any contrary agreement entered into when the indebtedness on which the lien is based was created [*see Code Civ. Proc. § 1265.225(a)*; *People ex rel. Dept. of Transportation v. Redwood Baseline, Ltd. (1978) 84 Cal. App. 3d 662, 670-671, 149 Cal. Rptr. 11]* . The lien continues on the part of the property not taken as security for the unpaid portion of the indebtedness [*Code Civ. Proc. § 1265.225(a)*].

The parties, however, may subsequently agree at any time after the proceeding commences that some or all of the award is to be apportioned to the lienholder [*Code Civ. Proc. § 1265.225(b)*], such as when the award will be sufficient to discharge the indebtedness on which the lien is based [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1265.225*].

[5] Allocation Among Lienholders in Partial Taking

When property encumbered by a lien is partially taken and that part or some of it is also encumbered by a junior lien extending to only a portion of the property encumbered by the senior lien, the part of the condemnation award available to the lienholders may be adjusted so that both the senior and junior lienholders will retain security interests proportionate to those existing before the taking. If both liens cannot be paid in full from the award, it will be allocated initially to pay the full amount of the senior lien with any balance to the junior lien. At that time the court will determine the adequacy of the remaining property to secure the junior lien. If it determines that the junior lienholder's security is disproportionately low, the court may make adjustments to the initial allocation to place the junior lienholder in the same relative position as before the taking if the adjustment preserves the proportional security of the senior lienholder [*see Code Civ. Proc. § 1265.230(a), (c), (d)*; Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1265.230*; *see also Code Civ. Proc. § 1265.230(b)* (security is impaired when lienholder's security remaining after taking is of less value proportionately to remaining indebtedness than security's value before taking was in proportion to indebtedness secured thereby)].

The amounts allocated to the senior and junior lienholders are the amounts of indebtedness owing to them that are secured by their respective liens on the property taken. Any other indebtedness owing to them is not considered as secured by the property taken. If the plaintiff elects to have the amount of indebtedness deducted from the judgment, the amount that is deducted is determined to be the amount of the indebtedness and the lien continues until that amount is paid [*Code Civ. Proc. § 1265.230(e)*].

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§ 247.139 Future Interests

[1] Compensation for Violation of Use Restriction

Contingent future interests based on the use restriction may be compensated for when the acquisition of property violates the restriction. If violation of the restriction was reasonably imminent, the owner of the contingent future interest is entitled to compensation for the interest's value [*Code Civ. Proc. § 1265.410(a)(1)*; *see* Rest. Prop., § 53, comment c (reasonably imminent test)]. If violation of the restriction was not reasonably imminent but the benefit of the restriction was appurtenant to other property, the owner of the future interest may be compensated to the extent that the failure to comply with the use restriction damages the dominant premises to which the restriction was appurtenant and which he or she owned [*Code Civ. Proc. § 1265.410(a)(2)*]. Consideration of the effect of the condemnation proceedings is precluded when determining whether a violation of a use restriction is reasonably imminent, except when (1) the condemnor is also the grantee of the present interest, (2) the condemnationof the future interest will not divest the condemnor of its present interest in the land, and (3) it is not the fact of the condemnation that prevents the grantee/condemnor from continuing to use the land in conformance with the use restriction, but rather the grantee/condemnor's own voluntary choice [*City of Palm Springs v. Living Desert Reserve (1999) 70 Cal. App. 4th 613, 626-627, 82 Cal. Rptr. 2d 859]* .

If the acquisition violates a use restriction coupled with a contingent future interest granting a right to possession of the property on violation of the use restriction but the contingent future interest is not compensable under *Code Civ. Proc. § 1265.410(a)* (*see above*), and if the restriction requires that the property be devoted to a particular charitable or public use, the compensation for the property must be devoted to the same or a similar use coupled with the same contingent future interest [*Code Civ. Proc. § 1265.410(b)*]. The term "public use" includes all uses, including public utility purposes, for which the power of eminent domain might be exercised [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1265.410*].

Because the value of the fee owner's interest in the property is diminished to the extent of the value of the contingent future interest, the award for the value of the property must be so apportioned [Cal. L. Rev. Comm'n Comment to *Code*

Civ. Proc. § 1265.410; *see also Code Civ. Proc. § 1260.220* (procedure when there are divided interests)].

If a fee simple determinable has reverted automatically because the event creating the possibility of reverter has already occurred before commencement of eminent domain proceedings, the holders of the reversionary interest are entitled to the entire compensation for the taking of the property because they are the owners of the property [*see McDougall v. Palo Alto etc. School Dist. (1963) 212 Cal. App. 2d 422, 431-440, 28 Cal. Rptr. 37]* .

[2] Property Subject to Life Tenancy

If property acquired for public use is subject to a life tenancy, the life tenant or any other person having an interest in the property may petition the court, which may provide an equitable solution by ordering any of the following [*Code Civ. Proc. § 1265.420*]:

- An apportionment and distribution of the award based on the value of the interest of the life tenant and remainderman;

- The compensation to be used to purchase comparable property to be held subject to the life tenancy;

- The compensation to be held in trust and invested and the income (and principal to the extent permitted by the instrument creating the life tenancy) to be distributed to the life tenant for the remainder of the tenancy; or

- Any other arrangement that is equitable under the circumstances.

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§ 247.140 Compensation for Injury to Remainder

[1] Determination of Injury

When the property taken is part of a larger parcel, compensation or severance damages must be awarded for any injury to the remainder [*Code Civ. Proc. § 1263.410(a)*; *see CACI Nos. 3511, 3512* (California Judicial Council jury instructions on severance damages)]. This compensation consists of the amount of the damage less the amount of the benefit to the remainder. If the amount of the benefit equals or exceeds the amount of the damage, no compensation is awarded. Any excess amount must be deducted from the compensation awarded for the loss of goodwill, if any, but cannot be deducted from any other compensation required to be awarded by the Eminent Domain Law [*Code Civ. Proc. § 1263.410(b)*].

The term "severance damages" is simply a shorthand term describing the diminution in the market value of the remaining property as a result of a taking and, hence, of describing the compensation for the property owner's loss [*Metropolitan Water Dist. v. Campus Crusade for Christ, Inc. (2007) 41 Cal. 4th 954, 973, 62 Cal. Rptr. 3d 623, 161 P.3d 1175]* . The property owner bears the burden of producing evidence tending to show the diminution in market value but the jury then decides what effect (if any) the evidence, taken "as a whole," may have on the value of the property [*Metropolitan Water Dist. v. Campus Crusade for Christ, Inc. (2007) 41 Cal. 4th 954, 973, 62 Cal. Rptr. 3d 623, 161 P.3d 1175* ; *Code Civ. Proc. § 1260.210(a)*]. The fact finder must then ascertain the value of the property before and after the taking and fix the amount of compensation without assigning a burden of persuasion to either party [*Metropolitan Water Dist. v. Campus Crusade for Christ, Inc. (2007) 41 Cal. 4th 954, 974, 62 Cal. Rptr. 3d 623* P.3d; *Code Civ. Proc. § 1260.210(b)*].

[2] Damage and Benefit Defined

Damage to the remainder is any damage caused to the remainder by either or both of the following [*Code Civ. Proc. § 1263.420*]:

- The severance of the remainder from the part taken; and/or

- The construction and use of plaintiff's project in the manner proposed, whether or not the damage is caused by a portion of the project located on the part taken.

Thus, damages to the remainder caused by the project may be recovered regardless of the precise location of the damage-causing portion of the project if the damages are otherwise compensable [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1263.420*].

Severance damages are not required to be paid for every diminution in value of property caused by a public improvement. They must be based on real physical disturbance of a property right and a decrease in market value of the property rather than on remote possibilities that are highly speculative and conjectural [*Ventura County Flood Control Dist. v. Security First Nat. Bank (1971) 15 Cal. App. 3d 996, 1002, 93 Cal. Rptr. 653]* . Thus, mere infringement of a property owner's personal pleasure or enjoyment, or damage causing only inconvenience of rendering private property less desirable for certain purposes, is not compensable [*Eachus v. Los Angeles etc. Ry. Co. (1894) 103 Cal. 614, 617, 37 P. 750* ; *see BAJI No. 11.86* (elements not included in severance damages)]. When a city condemned portions of properties used for plant nurseries, damages for economic loss to business assets based on accelerated residential development resulting from the project were not recoverable; such damages were not caused by the construction or use of the project nor were they the result of the condemnatory act in and of itself [*City of Carlsbad v. Rudvalis (2003) 109 Cal. App. 4th 667, 680-686, 135 Cal. Rptr. 2d 194]* .

Severance damages have been recovered for (1) loss of access, ingress, or egress [*People v. Ricciardi (1943) 23 Cal. 2d 390, 403, 144 P.2d 799* ; *Rose v. State of California (1942) 19 Cal. 2d 713, 727-729, 123 P.2d 505* (impairment of access from building of subway)]; (2) impaired visibility to and from a highway [*People v. Ricciardi (1943) 23 Cal. 2d 390, 404, 144 P.2d 799* (underpass obstructing highway traveler's view of defendants' property)]; and (3) loss of view [*Pierpont Inn, Inc. v. State of California (1969) 70 Cal. 2d 282, 294-295, 74 Cal. Rptr. 521, 449 P.2d 737* (overruled on other grounds in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp. (1997) 16 Cal. 4th 694, 698-699, 66 Cal. Rptr. 2d 630, 941 P.2d 809*)]. Severance damages also have been recovered for (1) the limited use of the property remaining after condemnation [*San Bernardino County Flood Control Dist. v. Sweet (1967) 255 Cal. App. 2d 889, 902, 63 Cal. Rptr. 640]* ; (2) increased danger of flooding [*Colusa & Hamilton R. Co. v. Leonard (1917) 176 Cal. 109, 114, 167 P. 878]* ; (3) loss of a windbreak [*Ventura County Flood Control Dist. v. Security First Nat. Bank (1971) 15 Cal. App. 3d 996, 1001, 93 Cal. Rptr. 653]* ; and (4) noise resulting from acquisition of an air easement for use by aircraft [*City of Oakland v. Nutter (1970) 13 Cal. App. 3d 752, 758, 764, 92 Cal. Rptr. 347]* .

Severance damages were also recoverable when the market value of the remainder was lowered because the state had the right to use the adjacent strip taken for purposes other than those involved in a street widening [*City of Salinas v. Homer (1980) 106 Cal. App. 3d 307, 310-314, 165 Cal. Rptr. 65]* . In another case, severance damages were properly awarded for the diminution of the value of the remainder based on people's fears of the effects of electromagnetic projections that would emanate from an easement for an electromagnetic power line. The truth or lack of truth of the basis for the fears was held to be irrelevant [*San Diego Gas & Electric Co. v. Daley (1988) 205 Cal. App. 3d 1334, 1346-1348, 253 Cal. Rptr. 144]* .

Benefit to the remainder is any benefit caused by the construction and use of the project for which the property is taken in the manner proposed by the plaintiff, whether or not the benefit is caused by the part of the project located on the property taken [*Code Civ. Proc. § 1263.430*]. All reasonably certain, immediate, and nonspeculative benefits may be offset against severance damages. The long-standing distinction between general and special benefits, pursuant to which only special benefits could be offset against severance damages, has been overruled. Thus, in determining a defendant's entitlement to severance damages, the jury must consider competent evidence that is relevant to any conditions caused by the project that affect the remainder property's fair market value, provided that evidence is neither conjectural nor speculative [*Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp. (1997) 16*

Cal. 4th 694, 699, 66 Cal. Rptr. 2d 630, 941 P.2d 809 (*overruling Beveridge v. Lewis (1902) 137 Cal. 619, 623-624, 70 P. 1083*)]. For further discussion of evidence of benefits that may offset severance damages, see the condemnation practice handbook in *California Real Estate Law and Practice, Ch. 508, Evidence: General, § 508.27* (Matthew Bender).

[3] Computing Damage and Benefits to Remainder

[a] Amount Must Reflect Delays

The value of the remainder on the date of valuation, excluding prior changes in value as prescribed by *Code Civ. Proc. § 1263.330* (exclusions from fair market value), is the base from which the amount of any damage and any benefit to the remainder is determined [*Code Civ. Proc. § 1263.440(b)*].

The amount of any damage and any benefit to the remainder must reflect any delay in the time when the damage or benefit caused by the construction and use of the project in the manner proposed by the plaintiff will actually be realized [*Code Civ. Proc. § 1263.440(a)*; *see Metropolitan Water Dist. v. Campus Crusade for Christ, Inc. (2007) 41 Cal. 4th 954, 975, 62 Cal. Rptr. 3d 623, 161 P.3d 1175* (mere fact of delay associated with construction of water pipeline on condemned portion of property did not, without more, entitle property owner to temporary severance damages relating to the financing or marketing of the property; however, on remand owner would have opportunity to create appropriate record to support claim for damages from actual injury suffered during construction)]. If there is a subsequent change in plans so that the damage and benefit do not occur in the manner the plaintiff proposed, the property owner may recover any additional damage in a subsequent action [*People v. Adamson (1953) 118 Cal. App. 2d 714, 722, 258 P.2d 1020* ; *see People ex rel. Department of Public Works v. Ayon (1960) 54 Cal. 2d 217, 229, 5 Cal. Rptr. 151, 352 P.2d 519]* . Similarly, a defendant cannot avoid benefits accruing to his or her property from the project by selling the benefited parcel after the proceeding has commenced [*People ex rel. Dept. Pub. Wks. v. Simon Newman Co. (1974) 37 Cal. App. 3d 398, 404, 112 Cal. Rptr. 298* (benefits are required to be offset against severance damage even though condemnee had agreed with federal agency before commencement of action to dispose of lands benefited and did not own those lands on date of trial, which was also valuation date)].

[b] Compensation Based on Project as Proposed

Compensation for injury to the remainder must be based on the project as proposed. Any features of the project that mitigate the damage or provide benefit to the remainder, including, but not limited to, easements, crossings, underpasses, access roads, fencing, drainage facilities, and cattle guards, must be taken into account in determining the compensation for injury to the remainder [*Code Civ. Proc. § 1263.450*]. The cost of fencing, cattle guards, and crossings is an element of damage only if lack of them would damage the remainder. If the fencing, cattle guards, or crossings are to be supplied by the plaintiff as part of its proposed project, this fact should be taken into consideration in determining any damage to the remainder [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1263.450*].

If the plaintiff has no specific proposal for the manner of construction and use of the project, damages will be assessed on the basis of the most injurious lawful use reasonably possible [*People ex rel. Dep't Pub. Wks. v. Silveira (1965) 236 Cal. App. 2d 604, 622, 46 Cal. Rptr. 260]* .

[4] Larger Parcel Required

[a] Unity of Property Generally

Severance damages may not be awarded unless the property taken is part of a larger parcel. What constitutes a larger parcel is a question of law for determination by the court [*People ex rel. Dept. Pub. Wks. v. International Tel. & Tel. Corp. (1972) 22 Cal. App. 3d 829, 833, 99 Cal. Rptr. 836]* .

To be part of a larger parcel, unity of the property must be shown, and three elements are necessary for unity of property: (1) unity of title, (2) unity of use, and (3) usually, contiguity [*City of Los Angeles v. Wolfe (1971) 6 Cal. 3d 326, 330, 99 Cal. Rptr. 21, 491 P.2d 813]* . The three unities must exist on the date the complaint is filed [*see Code Civ. Proc. § 1263.020*; *People ex rel. Dept. Pub. Wks. v. Simon Newman Co. (1974) 37 Cal. App. 3d 398, 403-406, 112 Cal. Rptr. 298* (under previous law providing that right to compensation accrued at date summons was issued, issue of larger parcel also determined on that date)].

[b] Unity of Title

Unity of title exists if the property taken and the remainder are owned by the same party. It also exists between parcels when the defendant owns one parcel and is the equitable owner of the others through exercise of an option to purchase [*County of Santa Clara v. Curtner (1966) 245 Cal. App. 2d 730, 737, 54 Cal. Rptr. 257]* . It can be created by separate owners of contiguous parcels through contractual agreement [*see People ex rel. Dep't Pub. Wks. v. Nyrin (1967) 256 Cal. App. 2d 288, 295, 63 Cal. Rptr. 905]* .

Unity of title also exists if the property is owned by a partnership although record title of different portions of the parcel are in the names of the partners [*Stockton v. Ellingwood (1929) 96 Cal. App. 708, 744-745, 275 P. 228]* . However, the fact that property is used for partnership purposes does not create unity of title when different tracts are held in the names of individual partners [*People ex rel. Dep't Pub. Wks. v. Dickinson (1964) 230 Cal. App. 2d 932, 934, 41 Cal. Rptr. 427]* .

[c] Unity of Use

Unity of use is a connection or relation of adaptation, convenience, and actual and permanent use that makes the enjoyment of the parcel taken reasonably and substantially necessary to the remaining parcels, in the most advantageous and profitable manner in the business for which they are used. It does not exist when the condemned parcel and the remaining parcel are used separately, but it may exist even though some of the property is not used [*People ex rel. Dep't Pub. Wks. v. Nyrin (1967) 256 Cal. App. 2d 288, 294-295, 63 Cal. Rptr. 905* ; *see People v. Thompson (1954) 43 Cal. 2d 13, 26, 271 P.2d 507]* .

The unity of use generally must be presently existing and not merely possible [*People v. Ocean Shore Railroad (1948) 32 Cal. 2d 406, 424, 196 P.2d 570]* . For example, while it did not exist between three commonly owned adjacent parcels each containing a separate dwelling, although all three lots could probably have been developed jointly for commercial purposes [*City of Menlo Park v. Artino (1957) 151 Cal. App. 2d 261, 269-270, 311 P.2d 135]* , the Supreme Court has relaxed this requirement. Unity of use may be prospective if a property owner establishes that there is a reasonable probability that all of the contiguous commonly owned lots are or will be available for development or use as an integrated economic unit in the reasonably foreseeable future [*City of San Diego v. Neumann (1993) 6 Cal. 4th 738, 756, 25 Cal. Rptr. 2d 480, 863 P.2d 725]* . The Supreme Court stated that "... as a matter of economic reality, the development potential of contiguous properties in common ownership endowed them with a value, considered as a whole, greater than the sum of their parts" [*City of San Diego v. Neumann (1993) 6 Cal. 4th 738, 753-754, 25 Cal. Rptr. 2d 480, 863 P.2d 725]* . Based on the assumption that severance damages compensate owners for the government's impairment of the integrity of his or her property, and the acknowledgement of the economic fact that contiguous property held in common ownership but devoted to separate uses may nonetheless be valued by the market for an integrated use, the Supreme Court concluded that owners must be given an opportunity to demonstrate the injury that will result from the loss of a development opportunity [*City of San Diego v. Neumann (1993) 6 Cal. 4th 738, 755-756, 25 Cal. Rptr. 2d 480, 863 P.2d 725]* .

[d] Contiguity

Physical contiguity or contact is generally essential for unity of property. However, there may be constructive or legal

contiguity when the parcels are physically separate if there is unity of ownership, reasonable physical proximity of the parcels, and strong unity of use with lawful means of access [*City of Los Angeles v. Wolfe (1971) 6 Cal. 3d 326, 335, 338, 99 Cal. Rptr. 21, 491 P.2d 813* (constructive contiguity as existing between two parcels when one was being used for required parking for other parcel although parcels were separated by private property)].

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§ 247.141 Proof of Compensation

The defendant presents his or her evidence on the issue of compensation first [*Code Civ. Proc. § 1260.210(a)*]. Except as otherwise provided by statute, neither the plaintiff nor the defendant has the burden of proof on the issue of compensation [*Code Civ. Proc. § 1260.210(b)*; *see Code Civ. Proc. § 1263.510(a)* (person claiming damages for loss of goodwill has burden of proof), discussed in *§ 247.136[12][a]*; *see also CACI No. 3514* (California Judicial Council jury instruction on burden of proof)].

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§ 247.142 Total Amount Permitted to Be Determined First

[1] Determining Respective Rights of Defendants

The plaintiff may require that the amount of compensation be determined first as between plaintiff and all defendants claiming an interest in the property. Afterwards, in the same proceeding, the trier of fact must determine the respective rights of the defendants in and to the amount of compensation awarded and must apportion the award accordingly. However, a defendant's right to present, during the first stage of the proceeding, evidence of the value of, or injury to, the property or the defendant's interest in the property is not limited by this provision. In addition, the right of a defendant to present evidence during the second stage of the proceeding is not affected by the failure to exercise the right to present evidence during the first stage of the proceeding [*Code Civ. Proc. § 1260.220(b)*; *see generally §§ 247.312*, *247.313*].

[2] Separate Assessments

The trier of fact, as far as practicable, should make separate assessments of the following [*Code Civ. Proc. § 1260.230*; *see CACI No. 3512*; *BAJI No. 11.96* (separate assessment of elements of compensation)]:

- The compensation for the property taken as required by *Code Civ. Proc. §§ 1263.310-1263.330*;

- When the property acquired is part of a larger parcel, the amount of the damage, if any, and the benefit, if any, to the remainder as required by *Code Civ. Proc. §§ 1263.410-1263.450* [*see § 247.140*]; and

- The compensation for loss of goodwill, if any, as required by *Code Civ. Proc. §§ 1263.510-1263.530* [*see § 247.136[12][a]*].

[3] Unknown or Deceased Defendants

When any unknown or deceased persons or their heirs and devisees have been properly joined as defendants but have not appeared either personally or by a personal representative, the court must determine (1) the extent of these defendants' interests in the property taken or in the remainder if the property taken is part of a larger parcel, and (2) the compensation to be awarded for these interests. The court may determine the extent and value of the interests of all these defendants in the aggregate without apportionment among them. In the case of deceased persons, the court must determine only the extent and value of the decedent's interest and not the extent and value of the separate interests of the heirs and devisees in the decedent's interest [*Code Civ. Proc. § 1260.240*].

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§ 247.143 Divided Interests--Separate Assessment

Except when the plaintiff elects to have the amount of the award determined first and then apportioned among the defendants, if there are divided interests in property acquired by eminent domain, the value of each interest and the injury, if any, to the remainder of this interest must be separately assessed and compensation awarded therefor [*Code Civ. Proc. § 1260.220(a)*; *see Code Civ. Proc. § 1235.125* (interest includes any right, title, or estate in property)].

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§ 247.144 Proof of Value

The fair market value of property can be proven only by opinion evidence of valuation witnesses [*Evid. Code § 813(a)*; *People ex rel. Dept. Pub. Wks. v. Peninsula Enterprises, Inc. (1979) 91 Cal. App. 3d 332, 348, 153 Cal. Rptr. 895* ; *see CACI No. 3515* (opinion of witnesses as to value)]. These witnesses are (1) witnesses qualified to express these opinions; (2) the owner or the spouse of the owner of the property or property interest being valued including, but not limited to, the person entitled to possession of the property and either party in an action or proceeding to determine the ownership of the property between the parties if the court determines that it would not be in the interest of efficient administration of justice to determine the issue of ownership before the admission of the party's opinion; and (3) an officer, regular employee, or partner designated by a corporation, partnership, or unincorporated association that owns the property or property interest being valued if the designee is knowledgeable as to the value of the property or property interest [*Evid. Code § 813(a), (c)*].

The property being valued may be viewed or other admissible evidence may be admitted, including that concerning the nature and condition of the property and the character of the improvement proposed to be constructed by the plaintiff, for the limited purpose of enabling the court, jury, or referee to understand and weigh the testimony given by the valuation witnesses [*Evid. Code § 813(b)*].

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§ 247.145 Basis for Opinion

A witness may base his or her opinion as to the value of property only on matter perceived by or personally known to the witness or made known to him or her at or before the hearing, whether or not admissible. The matter must be of a type that reasonably may be relied on by an expert in forming an opinion as to the value of property unless a witness is precluded by law from using this material as an opinion base [*Evid. Code § 814*; *see Evid. Code §§ 815-821* (matters on which witness may base opinion); *BAJI No. 11.82* (evidence of matters relied on)].

In *County Sanitation Dist. v. Watson Land Co. (1993) 17 Cal. App. 4th 1268, 22 Cal. Rptr. 2d 117* , the trial court excluded the valuation opinion testimony of defendant's expert witness because the witness "did not follow the well-established methodology for valuing easements in condemnation proceedings" [*County Sanitation Dist. v. Watson Land Co. (1993) 17 Cal. App. 4th 1268, 1281, 22 Cal. Rptr. 2d 117]* . The court of appeal held that, because defendant's witness "valued the easement based on a hypothetical income stream from unrelated license agreements and not based on the diminution in value of the fee" and "derived his severance damages by arbitrarily apportioning to severance a percentage (50 percent) of the total value of the easement determined by capitalizing the income from the six unrelated license agreements," the trial court did not abuse its discretion by granting plaintiff's motions *in limine* to exclude the opinion testimony [*County Sanitation Dist. v. Watson Land Co. (1993) 17 Cal. App. 4th 1268, 1281-1283, 22 Cal. Rptr. 2d 117]* .

PRACTICE TIP:

Counsel should be certain that retained experts are using readily accepted methods of valuation. The failure to do so could result in proceeding to trial without any expert witnesses!

In *County Sanitation*, the trial court denied plaintiff's request for a trial continuance so that a new valuation opinion could be obtained. The appellate court upheld this decision, noting the following: (1) the delay associated with defendant's search for a new expert, production of a new valuation opinion, and related discovery would be significant; (2) defendant was on notice that plaintiff would seek to exclude the opinion of defendant's expert; (3) deposition testimony indicated that defendant's expert relied on "improper considerations"; and (4) defendant could have employed

another expert to offer additional valuation testimony [*County Sanitation Dist. v. Watson Land Co. (1993) 17 Cal. App. 4th 1268, 1283, 22 Cal. Rptr. 2d 117]* .

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§ 247.146 Inadmissible Matters

The following matters are inadmissible as evidence and must not be taken into account as bases for an opinion as to the value of property [*Evid. Code § 822(a)*]:

- The price or other terms and circumstances of a property acquisition if the acquisition was for a public use for which the property could have been taken by eminent domain; except the price or other terms or circumstances are not excluded if they relate to the valuation of all or part of a water system [*see Pub. Util. Code § 240* ("water system" defined)].

- The price at which an offer or option to purchase or lease the property being valued or any other property was made, or the price at which the property was optioned, offered, or listed for sale and lease, except that an option, offer, or listing may be introduced by a party as an admission of another party to the proceeding.

- The value of any property as assessed for taxation purposes or the amount of taxes that may be due on the property but actual or estimated taxes may be considered in determining the reasonable net rental value attributable to the property being valued.

- An opinion as to the value of any property other than that being valued.

- The influence on the value of the property being valued of any noncompensable items of value, damage, or injury.

- The capitalized value of the income or rental from any property other than that being valued.

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§ 247.147 Methods of Determining Market Value

Appraisers of property generally use a combination of three methods to reach the market value of real estate. These methods are (1) the "reproduction cost" or "replacement cost" approach based on the current cost of reproducing or replacing the property less depreciation from all sources [*Evid. Code § 820*]; (2) the "market data" or "comparable sales" approach or value indicated by recent sales of comparable properties in the market [*Evid. Code §§ 815, 816*]; and (3) the "income" or "capitalization" approach, or the value which the property's net earning power will support based on the capitalization of net income [*Evid. Code §§ 817-819*; *State ex rel. State Public Works Board v. Stevenson (1970) 5 Cal. App. 3d 60, 63, 84 Cal. Rptr. 742* ; *see South Bay Irr. Dist. v. California-American Water Co. (1976) 61 Cal. App. 3d 944, 975, 979, 133 Cal. Rptr. 166 , cert. dismissed, 434 U.S. 801 (1977)* ; *see also Evid. Code §§ 818-820*].

For a detailed discussion of these methods of valuing real property, see California Real Estate Law & Practice, Ch. 508, *Evidence: General* (Matthew Bender).

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§ 247.148 Arbitration of Compensation

[1] Agreement to Arbitrate

The public entity and the property owner may agree to arbitrate rather than litigate compensation issues whether or not an eminent domain proceeding has been commenced to acquire the property [*Code Civ. Proc. §§ 1273.010(a), 1273.030(b)*]. The effect and enforceability of such an agreement is not impaired or defeated by the contention or by proof of any party to the agreement that the party acquiring the property lacks the power or capacity to take property by eminent domain [*Code Civ. Proc. § 1273.030(d)*]. The procedure is voluntary and the parties are not precluded from entering into an arbitration agreement under *Code Civ. Proc. § 1280 et seq.*, the general arbitration statutes [*Code Civ. Proc. §§ 1273.010-1273.050*; for discussion and forms relating to the general arbitration statutes, *see* Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*].

When property has already been appropriated to a public use, the person authorized to compromise or settle the claim arising from a taking or damaging of the property for another public use has the authority to enter into an arbitration agreement [*Code Civ. Proc. § 1273.010(b)*; *see Code Civ. Proc. § 1273.010(c)* ("person" means governing body authorized to acquire property for public entity or to compromise or settle claims for taking or damaging entity's property)].

[2] Payment of Expenses

The condemnor must pay all the expenses and fees of the neutral arbitrator and the statutory fees and mileage of all witnesses subpoenaed in the arbitration, plus any other expenses incurred or approved by the arbitrator. However, the condemnor is not required to pay attorney's fees, expert witness fees, or other expenses incurred by other parties for their own benefit [*Code Civ. Proc. § 1273.020(a)*], unless the arbitration agreement requires the payment of these fees, in which case the amount is determined in the arbitration proceeding unless the agreement prescribes otherwise [*Code Civ. Proc. § 1273.020(b)*]. These expenses and fees may be paid from funds available for the acquisition of the property or from other funds for this purpose [*Code Civ. Proc. § 1273.020(c)*].

[3] Exceptions to General Arbitration Statutes

Except as specifically provided by the Eminent Domain Law, the general arbitration statutes contained in *Code Civ. Proc. § 1280 et seq.* govern arbitration agreements to determine compensation [*Code Civ. Proc. § 1273.030(a)*]. One exception is that, if an eminent domain proceeding to acquire the property has been commenced, any petition or response relating to the arbitration must be filed and determined in the proceeding in the superior court in the county in which all or any part of the property is located [*Code Civ. Proc. § 1273.030(b), (e)*].

An agreement to arbitrate compensation does not waive or restrict any persons' power to commence and prosecute an eminent domain proceeding, including the taking of possession before judgment, except that, on motion of a party, the court must stay the determination of compensation until any petition for an order to arbitrate is determined and if arbitration is ordered, until arbitration is completed [*Code Civ. Proc. § 1273.030(c)*]. The parties may agree that the condemnor will not take possession of the property before the award in the arbitration proceeding [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1273.030*].

[4] Abandonment of Proceeding

The arbitration agreement may specify the terms and conditions under which the condemnor may abandon the acquisition, the arbitration proceeding, and any eminent domain proceeding that has been, or might be, filed. Unless the agreement states that the acquisition cannot be abandoned, the acquisition, arbitration proceeding, and eminent domain proceeding may be abandoned at any time before the time for filing and serving a petition or response to vacate an arbitration award under *Code Civ. Proc. §§ 1288, 1288.2,* and *1290.6* (generally 100 days after service of award) [*Code Civ. Proc. § 1273.040(a)*].

If the proceeding is abandoned after the arbitration agreement has been executed, the condemnee is entitled to recover (1) all expenses reasonably and necessarily incurred in preparing for, and during, the arbitration and any judicial proceedings relating to the property's acquisition, and in any subsequent judicial proceedings relating to the acquisition; and (2) reasonable attorney's fees, appraisal fees, and fees for the services of other experts when the fees were reasonably and necessarily incurred to protect the condemnee's interests in connection with the acquisition of the property. Unless the agreement provides otherwise, the amount of these expenses and fees are determined by arbitration in accordance with the agreement [*Code Civ. Proc. § 1273.040(b)*].

[5] Recording Arbitration Agreement

To provide constructive notice to subsequent purchasers and lienors, an agreement to arbitrate compensation may be acknowledged and recorded, and rerecorded, in the same manner and with the same effect as a conveyance of real property except that two years after the date the agreement is recorded, or rerecorded, the record ceases to be notice to any person for any purpose [*Code Civ. Proc. § 1273.050(a)*].

Instead of recording the agreement, a memorandum of the agreement that has been executed by the parties to the agreement may be recorded. The memorandum must contain at least (1) the names of the parties to the agreement, (2) a description of the property, and (3) a statement that an arbitration agreement affecting the property has been entered. When the memorandum has been acknowledged and recorded in the same manner as a conveyance of real property, it has the same effect as if the agreement itself were recorded [*Code Civ. Proc. § 1273.050(b)*].

A recorded agreement or memorandum makes the filing of an eminent domain proceeding solely to obtain the effect of a lis pendens unnecessary [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1273.050*].

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[Reserved]

§§ 247.149[Reserved]

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§ 247.160 Judgment Defined

"Judgment," as used in the Eminent Domain Law, is the judgment determining the right to take property by eminent domain and fixing the amount of compensation to be paid by the plaintiff [*Code Civ. Proc. § 1235.130*].

A judgment becomes final when all possibility of direct attack by appeal, motion for a new trial, or motion under *Code Civ. Proc. § 663* to vacate the judgment has been exhausted [*Code Civ. Proc. § 1235.120*].

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§ 247.161 Effect of Judgment

A judgment rendered in an eminent domain proceeding is binding and conclusive on all persons properly named and properly served [*Code Civ. Proc. § 1250.220(d)*]. Unknown persons who were named as defendants and properly served by publication are bound by the judgment [*see § 247.93[2]*].

The judgment bars all claims for past, present, or future damages that are reasonably foreseeable at the time the judgment was entered [*Ellena v. State of California (1977) 69 Cal. App. 3d 245, 254, 138 Cal. Rptr. 110]* .

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§ 247.162 Payment of Judgment

The plaintiff in a condemnation proceeding must pay the full amount required by the judgment not later than 30 days after final judgment, or 30 days after the conclusion of any other court proceedings, including any federal court proceedings, commenced by the defendant challenging the judgment or any of the condemnation proceedings, whichever date is later. Payment must be made by either or both of the following methods: (1) paying the defendant directly, with any amount previously withdrawn by defendant from the deposit of probable compensation being credited; and/or (2) by depositing the money with the court [*Code Civ. Proc. § 1268.010(a), (b)(1)*; for discussion of deposit, *see § 247.163*].

On entry of judgment, a deposit of probable compensation made before judgment is deemed a deposit made after judgment pursuant to *Code Civ. Proc. § 1268.110* if the full amount required by the judgment is deposited or paid [*Code Civ. Proc. § 1268.010(b)(2)*].

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§ 247.163 Deposit of Award After Judgment

[1] Time and Amount of Deposit

At any time after entry of judgment, the plaintiff may deposit with the court the full amount of the condemnation award with any interest then due, less any amounts previously paid directly to the defendants or deposited before judgment [*Code Civ. Proc. § 1268.110(a)*].

A deposit may be made regardless of whether or not an appeal has been taken or a motion to vacate or set aside the judgment has been made. However, a deposit may not be made after the judgment has been reversed, vacated, or set aside [*Code Civ. Proc. § 1268.110(b)*]. Any amount deposited on a judgment that is later reversed, vacated, or set aside is deemed to be made before judgment and is governed by *Code Civ. Proc. §§ 1255.010-1255.080* [*Code Civ. Proc. § 1268.110(c)*].

If after entry of judgment but before apportionment of the award, the defendants are unable to agree as to the withdrawal of all or a portion of any amount deposited, the court, on motion of any defendant, must order that the amount deposited be invested in United States government obligations or interest-bearing accounts in an institution whose accounts are insured by an agency of the federal government for the benefit of the defendants. The defendants are entitled to the interest earned in proportion to the amount of the award they receive when the award is apportioned [*Code Civ. Proc. § 1268.150(b)*; *see Code Civ. Proc. § 1268.320* (interest ceases to accrue on judgment when deposit made)].

[2] Notice of Deposit

If the deposit is made before apportionment of the award, the plaintiff must serve notice to all parties who have appeared in the proceeding. If the deposit is made after apportionment, the plaintiff must serve notice to all of the parties to the proceeding having an interest in the deposit as determined by the order apportioning the award [*Code Civ. Proc. § 1268.120*]. The notice of deposit must state that a deposit has been made and the date and the amount of the deposit. Service must be made in the same manner as an order for possession and service of an order for possession

under *Code Civ. Proc. § 1268.220* can be considered as a notice of deposit [*Code Civ. Proc. § 1268.120*].

[3] Deposit of Award in State or County Treasury

When money is deposited after judgment, the court must order it to be deposited in the State Treasury, or, if the plaintiff files a written request with the deposit, in the county treasury. The money deposited remains at the plaintiff's risk until paid or made payable to the defendant by court order [*Code Civ. Proc. § 1268.150(a)*].

Money deposited in the State Treasury is held in the Condemnation Deposits Fund, which also includes all interest earned or other increment derived from the money's investment [*Gov. Code § 16429(a)*]. The money should be invested according to the provisions of *Gov. Code §§ 16470-16476* (special fund investments) [*Gov. Code § 16429(b)*; *see Gov. Code § 16429(c)* (apportionment of interest)].

[4] Increase in Deposit

The court, on motion of any defendant, may order the plaintiff to deposit an additonal amount if it determines that more money is necessary to secure payment of any further compensation, costs, or interest recoverable in the proceeding, including enhanced damages that a defendant may recover on reversal and order for a new trial [*Code Civ. Proc. § 1268.130*; *People ex rel. Dep't Public Wks. v. Loop (1958) 161 Cal. App. 2d 466, 473, 326 P.2d 902]* . After the court has made such an order, any party may move for an order increasing or decreasing the additional amount. A defendant cannot withdraw any of the additional amount unless it is determined that he or she is entitled to recover that amount in the proceeding [*Code Civ. Proc. § 1268.130*].

[5] Withdrawal of Deposit

After entry of judgment, whether or not the plaintiff has applied for an order for possession, any defendant having an interest in the property for which the deposit was made may obtain a court order entitling the defendant to be paid after he or she files either a satisfaction of the judgment or a receipt for the money that constitutes a waiver of all claims and defenses except a claim for greater compensation [*Code Civ. Proc. § 1268.140(a)*; *see § 247.315*].

If the award has not been apportioned when the application is made, the applicant for withdrawal must give notice of the application to all other defendants who have appeared in the proceeding and who have an interest in the property. If the award had been apportioned, the applicant must give notice to the other defendants as required by the court [*Code Civ. Proc. § 1268.140(b)*].

If a party objects to a proposed withdrawal, the court, in its discretion, may require the applicant for withdrawal to file an undertaking similar to those required for withdrawal of a deposit before entry of judgment [*Code Civ. Proc. § 1268.140(c)*; *see Code Civ. Proc. § 1255.240*].

If the judgment is reversed, vacated, or set aside, a defendant may withdraw a deposit only by following the procedures provided for withdrawing deposits before entry of judgment [*Code Civ. Proc. § 1268.140(d)*; *see Code Civ. Proc. §§ 1255.210-1255.280*; *see also § 247.112*].

[6] Repayment of Excess Withdrawal

If a party withdraws more than the amount to which he or she is entitled as finally determined in the proceeding, including any determination on retrial [*see City of Downey v. Johnson (1978) 79 Cal. App. 3d 970, 974, 145 Cal. Rptr. 298* (construing former Code Civ. Proc. § 1254(g), *now Code Civ. Proc. § 1268.160*)], he or she must pay the excess amount to the parties entitled to it, and the court must enter judgment accordingly [Code *Civ. Proc. § 1268.160(a)*]. The repayment does not include interest if it is paid to the plaintiff, but any amount paid to a defendant includes legal interest from the date of its withdrawal [*Code Civ. Proc. § 1268.160(b)*].

If the excess amount withdrawn is not paid to the party entitled to it within 30 days after entry of the judgment to do so, the court may enter judgment against the sureties for the amount of the judgment [*Code Civ. Proc. § 1268.160(c)*].

The court, in its discretion and with appropriate security, may grant a party obligated to repay an excess withdrawal a stay of execution for any amount to be paid to a plaintiff for not more than one year following entry of judgment ordering the repayment [*Code Civ. Proc. § 1268.160(d)*]. Interest accrues during the stay [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1268.160(d)*].

[7] No Waiver by Deposit

By making a deposit after judgment, the plaintiff does not waive the right to appeal from the judgment, the right to move to abandon, or the right to request a new trial [*Code Civ. Proc. § 1268.170*].

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§ 247.164 Failure to Pay Judgment

If a plaintiff who is a public entity does not pay the judgment within 30 days after final judgment, the defendant may enforce the judgment as provided in *Gov. Code § 810 et seq.* (claims and actions against public entities and public employees) [*Code Civ. Proc. § 1268.020(a)(1)*; *see Code Civ. Proc. § 1268.020(d)* (public entity does not include Regents of University of California)]. If a plaintiff who is not a public entity does not pay the judgment within 30 days after final judgment, the defendant may enforce the judgment as in a civil case [*Code Civ. Proc. § 1268.020(a)(2)*; for discussion and forms relating to execution, *see* Ch. 254, *Executions and Enforcement of Judgments*]. Alternatively, the defendant, without attempting to use the remedy provided by *Code Civ. Proc. § 1268.020(a)*, may elect to obtain a dismissal of the condemnation proceeding [*Code Civ. Proc. § 1268.020(b), (c)*; *see §§ 247.319 -247.321*]. Before obtaining a dismissal, the defendant must show that the plaintiff failed to pay the judgment as required, that the defendant has filed in court and served on the plaintiff a written notice of the plaintiff's failure to pay as required, and that the plaintiff has failed for 20 days after service of the notice to pay the judgment [*Code Civ. Proc. § 1268.020(b)*].

As described *above*, when the plaintiff fails to pay the judgment within the 30-day period, the defendant has the choice of enforcing the judgment or obtaining a dismissal of the proceeding. When the plaintiff's failure to pay the judgment is due to its insolvency, the plaintiff may not preempt the defendant's right to elect to dismiss by seeking a motion to pay the judgment in installments under *Gov. Code § 970.6*, which provides general procedures for payment of claims for money or damages against local public entities and specifically allows for spreading payments over a 10-year period [*see Community Redevelopment Agency v. Force Electronics (1997) 55 Cal. App. 4th 622, 630-632, 64 Cal. Rptr. 2d 209]* .

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§ 247.165 Possession After Judgment

[1] Order for Possession

The plaintiff, if not in possession of the property to be taken when judgment is entered, may apply ex parte to the court for an order for possession. The court must authorize the plaintiff to take possession of the property pending the litigation's conclusion if the judgment determines that the plaintiff is entitled to take the property and the plaintiff has paid to or deposited for the defendants at least the amount of the award together with the interest then due on the award [*Code Civ. Proc. § 1268.210(a)*; *see § 247.314*; *see also City of Los Angeles v. Decker (1976) 61 Cal. App. 3d 444, 449, 132 Cal. Rptr. 188* (prerequisites to issuance of writ of execution for immediate occupancy pursuant to former Code Civ. Proc. § 1254 (*now Code Civ. Proc. § 1268.210*), as not altered by passage of Relocation Assistance Act (*Gov. Code § 7260 et seq.*))]. The plaintiff is entitled to enforcement of this order as a matter of right [*Code Civ. Proc. § 1230.050(b)*]. This order for possession is appealable [*S.F. Unified School Dist. v. Hong Mow (1954) 123 Cal. App. 2d 668, 670, 267 P.2d 349*]. Plaintiff does not need to have paid or deposited the amount of the award, plus interest, if the parties have stipulated otherwise [*Southern Cal. Gas Co. v. Joseph W. Wolfskill Co. (1963) 212 Cal. App. 2d 882, 889, 28 Cal. Rptr. 345]* .

The court's order must state the date after which the plaintiff is authorized to take possession of the property. When a deposit has been made, the order must so state and give the date and amount of the deposit [*Code Civ. Proc. § 1268.210(b)*].

If the judgment has been reversed, vacated, or set aside, the plaintiff may obtain possession only by using procedures for obtaining possession before entry of judgment [*Code Civ. Proc. § 1268.210(c)*]. However, possession can be obtained despite a pending appeal because an order for possession can be obtained any time after judgment has been entered [*see Code Civ. Proc. § 1268.210(a)*].

[2] Service of Order for Possession

The plaintiff must serve a copy of the order for possession on each defendant and his or her attorney either personally or

by mail, at least 10 days before the date possession is to be taken. If the property is lawfully occupied by a person living on it, or by a farm or business operation, service must be 30 days before the date possession is to be taken [*Code Civ. Proc § 1268.220(a)*]. However, under the relocation assistance laws, no person lawfully occupying real property can be required to move from a dwelling or move a business or farm operation without at least 90 days' written notice from the condemnor of the date by which the move is required [*Gov. Code § 7267.3*].

A single service or mailing to one of several persons having a common business or residence address is sufficient [*Code Civ. Proc. § 1268.220(b)*; *see* discussion of the term "address" in § 247.113[2][b]].

[3] No Waiver of Rights

By taking possession pursuant to an order for possession, the plaintiff does not waive the right to appeal from the judgment, the right to move to abandon, or the right to request a new trial [*Code Civ. Proc. § 1268.230*].

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§ 247.166 Final Order of Condemnation

The court, on application of any party, will make a final order of condemnation if the full amount of the judgment has been paid as required by *Code Civ. Proc. § 1268.010* or has been satisfied pursuant to *Code Civ. Proc. § 1268.020* (execution of judgment or dismissal of proceedings) [*Code Civ. Proc. § 1268.030(a)*]. The order must describe the property taken and identify the judgment authorizing the taking [*Code Civ. Proc. § 1268.030(b)*].

The party who applied for the order must serve notice on all other parties affected by it. After the order has been granted, any party affected by it may record a certified copy in the office of the recorder of the county in which the property is located and must serve notice of recordation on all other parties affected by the order. Title to the property vests in the plaintiff on the date of recordation [*Code Civ. Proc. § 1268.030(c)*].

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§ 247.167 Dispossession of Defendant Where Property Not Condemned

If the condemnation is dismissed with regard to defendant's property for any reason or the final judgment states that plaintiff cannot acquire the property after the defendant moved from the property in compliance with an order or agreement for possession or in reasonable contemplation of its taking by the plaintiff, the court must order the plaintiff to deliver possession of the property to the persons entitled to it and pay all damages proximately caused by the proceeding and its dismissal as to that property [*Code Civ. Proc. § 1268.620*]. These damages include damages for temporary interference with the operation of a business [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1268.620*; *see Heimann v. City of Los Angeles (1947) 30 Cal. 2d 746, 755-756, 185 P.2d 597* (temporary damage caused by delay and loss of use of property due to obstructions) (overruled on other grounds in *County of Los Angeles v. Faus (1957) 48 Cal. 2d 672, 679, 312 P.2d 680*)]. Damages are only available when the defendant has been physically dispossessed of its property. Damages are not available when throughout a proceeding the defendant continues to exercise control over the property and derives substantial income from it [*see Los Angeles Unified Sch. Dist. v. Trump Wilshire Assocs. (1996) 42 Cal. App. 4th 1682, 50 Cal. Rptr. 2d 229]* .

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§ 247.168 Property Taxes

[1] Liability and Collection

As between the plaintiff and the defendant, the plaintiff is liable for any property taxes, prorated from and including the date of apportionment defined below, whether or not the property becomes exempt from taxation [*Code Civ. Proc. § 1268.410*; *see* Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1268.410*]. The "date of apportionment" is the earliest of the following dates: (1) the date the conveyance to the acquiring entity or the final order of condemnation is recorded; (2) the date of actual possession by the acquiring entity; or (3) the date on or after which the acquiring entity may take possession as authorized by an order for possession or by a declaration of taking [*Rev. & Tax. Code § 5082*].

The property taxes are not collectible if it appears that the property is being acquired by a public entity [*Code Civ. Proc. § 1268.420(a)(1)*; *Rev. & Tax. Code § 5081*]. If acquisition of the property will not make it exempt, the taxes are collectible from the plaintiff from the date of apportionment [*Code Civ. Proc. § 1268.420(a)(2)*]. However, if the proceeding is later dismissed or abandoned, any unpaid taxes are awarded to the defendant and are collected from the award or, if unpaid for any reason, from the defendant [*Code Civ. Proc. § 1268.420(b)*; Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1268.420*].

For further discussion of property taxes, see *California Real Estate Law & Practice, Ch. 510, Judgment and Postjudgment, §§ 510.15 -510.17* (Matthew Bender).

[2] Refund of Taxes Paid by Condemnee

If the condemnor took possession of the property before judgment, and the condemnee has paid any property taxes for which the condemnor is liable, the condemnee should claim reimbursement on his or her cost bill. If the condemnor did not take possession before judgment, the condemnee should claim the taxes from the condemnor not later than 30 days after the condemnor took title to the property [*Code Civ. Proc. § 1268.430(a), (b)*].

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§ 247.169 Litigation Expenses

[1] Defined

Litigation expenses include all expenses reasonably and necessarily incurred in the proceeding in preparing for trial, during trial, and in any subsequent judicial proceedings [*Code Civ. Proc. § 1268.610(a)*]. They include reasonable attorney's fees, appraisal fees, and fees for the service of other experts, whether the fees were incurred for services rendered before or after the complaint was filed [*Code Civ. Proc. § 1235.140(b)*; *see § 247.170* (distinguishing between "costs" and "fees")]. However, litigation expenses do not include time and expenses of the owner in preparing to testify, even if the owner qualifies as an expert [*County of Madera v. Forrester (1981) 115 Cal. App. 3d 57, 60-62, 170 Cal. Rptr. 896]* . For further discussion of attorney's fees, see Chapter 174, *Costs and Attorney's Fees* . For discussion of the use of contingent fee agreements in condemnation proceedings, see Ch. 72, *Attorney Practice and Ethics* .

[2] When Defendant May Recover

Because the constitutional requirement for just compensation does not compel a condemnor to pay a condemnee's litigation expenses, these expenses are recoverable only when required by statute [*County of Los Angeles v. Ortiz (1971) 6 Cal. 3d 141, 145, 98 Cal. Rptr. 454, 490 P.2d 1142* ; *Los Angeles County v. Kranz (1977) 65 Cal. App. 3d 656, 658, 135 Cal. Rptr. 473* (interpreting former Code Civ. Proc. § 1249.3, *now Code Civ. Proc. § 1250.410*)].

The Eminent Domain Law provides for the recovery of litigation expenses in the following situations:

- When plaintiff entered the property to perform tests or expenses but the entry was unlawful; when the entry was lawful but the activities on the property were abusive or lacking in due regard for the owner's interests; or when the plaintiff failed substantially to comply with the terms of an order made under *Code Civ. Proc. § 1245.030* or *1245.040* [*Code Civ. Proc. § 1245.060(b)*].

- To implement a disclaimer by the defendant [*Code Civ. Proc. § 1250.325*].

- When the complaint has been amended or supplemented and the expenses would not have been incurred if the proceeding as originally commenced had been the same as the proceeding following the amendment or supplement [*Code Civ. Proc. § 1250.340(a)*].

- When the plaintiff's settlement offer was unreasonable and the defendant's offer was reasonable [*Code Civ. Proc. § 1250.410(b)*; *Coachella Valley County Water Dist. v. Dreyfuss (1979) 91 Cal. App. 3d 949, 956-957, 154 Cal. Rptr. 467* (condemnee was entitled to litigation expenses when condemnor did not accept defendant's final demanduntil trial started because right to recover does not depend on compensation being determined at trial); *County of Los Angeles v. Kranz (1977) 65 Cal. App. 3d 656, 660, 135 Cal. Rptr. 473* (condemnees were entitled to award of litigation expenses and attorney's and appraiser's fees when condemnor's final offer was less than 80 percent of jury verdict; and offer ignored condemnee's expert's appraisal); *see Glendale Redevelopment Agency v. Parks (1993) 18 Cal. App. 4th 1409, 23 Cal. Rptr. 2d 14* (trial court properly refused to award litigation expenses when final offer was 89 percent of award, and evidence showed that redevelopment agency considered defendant's appraisal, raised its initial offer, and acted reasonably)].

- If the plaintiff does not increase its prejudgment deposit as ordered by the court and the defendant elects to treat the failure as an abandonment of the proceeding [*Code Civ. Proc. § 1255.030(c)*].

- As a term or condition on which a party may call a witness or permit a witness to testify to an opinion or data on direct examination when the witness, opinion, or data was not included in the party's list of expert witnesses or statements of valuation data as required by statute [*Code Civ. Proc. § 1258.290(a)*].

- As a condition to the plaintiff being permitted to take corrective and remedial action so that it has the right to take the property sought [*Code Civ. Proc. § 1260.120(c)*].

- When the proceeding is wholly or partly dismissed for any reason [*Code Civ. Proc. § 1268.610(a)(1)*; *see Temple City Redevelopment Agency v. Bayside Drive Limited Partnership (2007) 146 Cal. App. 4th 1555, 1559-1560, 53 Cal. Rptr. 3d 728* (defendant in eminent domain proceeding who was dismissed because it sold the property while action was pending was entitled to litigation expenses under *Code Civ. Proc. § 1268.610(a)(1)*)].

- When, according to the final judgment, plaintiff is not permitted to acquire the property sought to be taken [*Code Civ. Proc. § 1268.610(a)(2)*].

When there is a partial dismissal or a final judgment that the plaintiff cannot take part of the property originally sought to be acquired, or a dismissal of one or more plaintiffs pursuant to *Code Civ. Proc. § 1260.020* (determination of more necessary public use when proceedings to acquire same property are consolidated), the court must award to the defendant only those litigation expenses that would not have been incurred if the property sought to be acquired following the dismissal or judgment had been the property originally sought to be acquired [*Code Civ. Proc. § 1268.610(b)*]. If the plaintiff files a notice of abandonment or request for dismissal as to a particular defendant, and the court determines that the defendant did not own or have any interest in the property that the plaintiff sought to acquire, the litigation expenses awarded to that defendant are limited to those expenses incurred up to the time the notice of abandonment or request for dismissal was filed [*Code Civ. Proc. § 1268.610(c)*].

Litigation expenses awarded when the proceeding is wholly or partly dismissed or when the final judgment is that the plaintiff cannot take the property sought by it must be claimed in and by a cost bill to be prepared, served, filed, and taxed as in a civil action. If the proceeding is dismissed on motion of the plaintiff, the cost bill must be filed within 30 days after notice of entry of judgment [*Code Civ. Proc. § 1268.610(d)*; for discussion of cost bills, *see* Ch. 174, *Costs*

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§ 247.170 Costs

Requiring the defendant to pay any of his or her reasonable costs, including those on appeal, would reduce the just compensation constitutionally required to be awarded by a sum equal to that paid by defendant for the costs [*City of Los Angeles v. Ricards (1973) 10 Cal. 3d 385, 390, 110 Cal. Rptr. 489, 515 P.2d 585]* . Consequently, a defendant is allowed his or her costs, including the costs of determining the apportionment of the award made pursuant to *Code Civ. Proc. § 1260.220(b)* [*Code Civ. Proc. § 1268.710*]. The defendant is also allowed costs on appeal whether or not he or she is the prevailing party, unless either the court otherwise orders or the appeal involves issues between defendants [*Code Civ. Proc. § 1268.720*; *see Pacific Gas & Electric Co. v. Zuckerman (1987) 189 Cal. App. 3d 1113, 1147-1148, 234 Cal. Rptr. 630* (in absence of special circumstances, costs must be awarded to defendant on appeal)]. The costs of determining any issue as to title between two or more defendants is borne by the defendants in the proportion directed by the court [*Code Civ. Proc. § 1268.710*]. Additionally, defendants with a single, unified interest may be allowed only a single cost bill [Assembly Legislative Committee Comment to *Code Civ. Proc. § 1268.710*; *see City of Downey v. Gonzales (1968) 262 Cal. App. 2d 563, 568-569, 69 Cal. Rptr. 34]* .

The term "costs" as used in the eminent domain statutes refers only to ordinary costs of suit, such as sheriff's and jury fees, and not to the fees of experts or attorneys. Consequently, fees for daily court attendance and mileage of expert witnesses called by the prevailing party are allowed as costs, but fees paid to witnesses as experts and expenses incurred in preparing maps and making surveys before trial are not allowed [*County of Los Angeles v. Ortiz (1971) 6 Cal. 3d 141, 144, 98 Cal. Rptr. 454, 490 P.2d 1142* ; *People v. Bowman (1959) 173 Cal. App. 2d 416, 418, 343 P.2d 267* ; *see* Assembly Legislative Committee Comment to *Code Civ. Proc. § 1268.710*]. This rule regarding payment of fees of an expert witness does not apply when the trial court has appointed the expert, an order has been secured from the court before trial, or the fees are recoverable as litigation expenses [*People v. Bowman (1959) 173 Cal. App. 2d 416, 418, 343 P.2d 267* ; *see § 247.169[1]*].

For a discussion of costs, including forms of cost bills, see Ch. 174, *Costs and Attorney's Fees* .

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§ 247.171 Interest

[1] Accrual

The compensation awarded in an eminent domain proceeding draws interest from the earliest of the following dates: (1) the date of entry of judgment; (2) the date the plaintiff takes possession of the property; or (3) the date after which the plaintiff is authorized to take possession of the property as stated in an order for possession [*Code Civ. Proc. § 1268.310*; *see People ex rel. DOT v. Southern California Edison Co. (2000) 22 Cal. 4th 791, 797-798, 94 Cal. Rptr. 2d 609, 996 P.2d 711]* . The amount of interest is assessed by the court, not the jury [*Code Civ. Proc. § 1268.340*]. Interest from the date of possession may include interest from the date of constructive taking when the owner establishes that precondemnation activities amounted to a constructive taking before the condemnation proceeding [*People ex rel. Dept. of Transportation v. Gardella Square (1988) 200 Cal. App. 3d 559, 572-574, 246 Cal. Rptr. 139]* .

The California Supreme Court declined to apply *Code Civ. Proc. § 1268.310* to a case in which an eminent domain proceeding was filed 25 years after the Department of Transportation, pursuant to agreement between the parties, took possession of the property on which a freeway was built. The Court declined to apply § 1268.310 because (1) an interest award accrued since the date of possession would greatly exceed the amount required for just compensation, (2) the agreement between the parties indefinitely postponed the determination of compensation, and (3) Southern California Edison, the property owner, was familiar with condemnation law and did not act diligently to request the Department of Transportation to institute eminent domain proceedings [*People ex rel. DOT v. Southern California Edison Co. (2000) 22 Cal. 4th 791, 798-804, 94 Cal. Rptr. 2d 609, 996 P.2d 711]* .

The term "judgment" refers to the judgment determining the right to take the property by eminent domain and fixing the amount of compensation to be paid by the plaintiff, sometimes referred to as the interlocutory judgment. The judgment does not need to be final before interest commences to accrue because the interlocutory judgment gives the plaintiff the right to take the property and fixes defendant's right to compensation for the taking [*Bellflower City School Dist. v. Skaggs (1959) 52 Cal. 2d 278, 280-281, 339 P.2d 848]* .

[2] Rate of Interest

The rate of interest payable for each six-month period, or fraction thereof, for which interest is due, is the apportionment rate for the immediately preceding six-month period [*Code Civ. Proc. § 1268.350(b)*]. The "apportionment rate" means the apportionment rate calculated by the Controller as the rate of earnings by the Surplus Money Investment Fund for each calendar quarter [*Code Civ. Proc. § 1268.350(a)*]. The interest payable for each calendar quarter draws interest computed as described above, in each succeeding calendar quarter for which interest is due [*Code Civ. Proc. § 1268.360*]. Each district office of the Department of Transportation must quote the apportionment rate to any person on request [*Code Civ. Proc. § 1268.350(c)*].

This provision was added in 1986 in response to the California Supreme Court's holding that the state and federal constitution require that interest be paid at the market rate rather than at the legal rate [*see Redevelopment Agency v. Gilmore (1985) 38 Cal. 3d 790, 798-802, 214 Cal. Rptr. 904, 700 P.2d 794]* .

If a public agency makes a deposit of probable compensation and it is not immediately withdrawn by the landowner, the landowner is only entitled to the statutory rate of interest on the deposit, not to the market rate [*Redevelopment Agency v. Erganian (1989) 211 Cal. App. 3d 166, 170-172, 259 Cal. Rptr. 213]* .

[3] Exceptions to Accrual

If the plaintiff makes a deposit of probable compensation pursuant to a demand by a homeowner under the provisions of *Code Civ. Proc. § 1255.040*, interest on the amount deposited does not accrue if the deposit is made on or before the date specified by defendant. However, on motion and good cause shown by the plaintiff, if the deposit is not made on or before that date or the date specified by the court, interest accrues from the date specified by the defendant or the court [*Code Civ. Proc. § 1255.040(c)*]. If the plaintiff makes a deposit after that date, interest stops accruing on the date that the amount is withdrawn by the person entitled to it [*Code Civ. Proc. § 1268.320(a)*].

If the plaintiff abandons the proceeding after a homeowner has made a demand for deposit, the interest may be recovered as costs in the manner provided for the recovery of litigation expenses under *Code Civ. Proc. § 1268.610*. If, in the proceeding, the court or a jury verdict eventually determines the compensation that would have been awarded to the defendant, the interest is computed on the amount of the award. If no such determination is ever made, interest is computed on the probable amount of compensation as determined by the court [*Code Civ. Proc. § 1255.040(d)*].

If the lessor of property subject to a leasehold interest demands that plaintiff make a deposit of probable compensation but plaintiff fails to make the deposit, interest on the award accrues from the date the deposit should have been made, but it is offset by the lessor's net rental profits [*Code Civ. Proc. § 1255.050*].

[4] Date Interest Ceases to Accrue

Compensation awarded in the proceeding stops drawing interest at the earliest of the following dates [*Code Civ. Proc. § 1268.320*]:

- As to any amount of probable compensation deposited before judgment pursuant to *Code Civ. Proc. §§ 1255.010-1255.080*, the date the amount is withdrawn by the person entitled to it;

- As to the amount of the award deposited after judgment pursuant to *Code Civ. Proc. §§ 1268.110-1268.710*, the date of the deposit; or

- As to any amount paid to the person entitled to it, the date of the payment.

If a prejudgment deposit has been made and the deposit is not withdrawn, interest continues to accrue on entry of

judgment unless the amount of the deposit is in the full amount awarded in the judgment [*Code Civ. Proc. § 1268.320(b)*; *see Code Civ. Proc. § 1268.010(b)(2)* (prejudgment deposit deemed postjudgment deposit on entry of award); Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1268.320*]. If the prejudgment deposit is not in the full amount required by the judgment, interest ceases to accrue when an amount sufficient to bring it up to the full amount of the judgment is added [*Code Civ. Proc. §§ 1268.110(a)* (postjudgment deposit required to be full amount of judgment less amounts previously deposited), *1268.320(b)*; *see* Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1268.320*]. When a postjudgment deposit for the full amount of the judgment is made, interest stops accruing only if the deposit was made in accordance with statutory requirements, was made for the defendant, and is withdrawable by defendant [*Burbank v. Nordahl (1962) 199 Cal. App. 2d 311, 321, 18 Cal. Rptr. 710* (decided under former Code Civ. Proc. § 1254)].

Although a defendant may not withdraw a postjudgment deposit without waiving his or her right to appeal on any grounds other than the adequacy of compensation, the provision that interest ceases to accrue on an award when a postjudgment deposit is made is constitutional. However, when the postjudgment deposit is deposited with the county treasurer who puts it in an interest-bearing account, the defendant in entitled to the interest earned on the amount during his or her appeal [*Redevelopment Agency v. Goodman (1975) 53 Cal. App. 3d 424, 430-431, 434-435, 125 Cal. Rptr. 818* ; *Code Civ. Proc. § 1268.140(a)*].

[5] Offsets Against Interest

If the defendant continues in actual possession of the property after interest begins to accrue, the value of the defendant's possession that is presumed to be the legal rate of interest on the compensation awarded is offset against the interest. This presumption affects the burden of proof [*Code Civ. Proc. § 1268.330(a)*]. Similarly, if the defendant, receives rents or other income from the property attributable to the period after interest begins to accrue, the net amount of the rents and other income is offset against the interest [*Code Civ. Proc. § 1268.330(b)*]. However, these offsets are not made when a demand for a prejudgment deposit has been made by a homeowner [*Code Civ. Proc. § 1255.040(c)*].

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[Reserved]

§§ 247.172[Reserved]

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§ 247.190 Inverse Condemnation Defined; Differences Between Inverse Condemnation and Eminent Domain

Inverse condemnation is an invasion or appropriation by a public entity of some valuable property right that a landowner possesses that directly and specially affects the landowner to his or her injury [*Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 119-120, 109 Cal. Rptr. 799, 514 P.2d 111]* .

Inverse condemnation is one of the two basic procedural devices for enforcing the rule of *Cal. Const., art. I, § 19*, that private property may not be taken or damaged for public use without just compensation having first been made to the owner. The other procedural device is eminent domain, which is discussed in Part A. One significant difference between the two procedures is that in eminent domain, the public authority takes the initiative, whereas in inverse condemnation, the property owner commences the litigation [*Klopping v. City of Whittier (1972) 8 Cal. 3d 39, 43, 104 Cal. Rptr. 1, 500 P.2d 1345]* . Another important difference is that in eminent domain litigation, the focus is usually limited to the amount of compensation owed the property owner; in an inverse condemnation action, before the compensation issue is even reached, the property owner must establish that the public entity has, in fact, taken or damaged his or her property [*San Diego Gas & Electric Co. v. Superior Court (1996) 13 Cal. 4th 893, 939-940, 55 Cal. Rptr. 2d 724, 920 P.2d 669* ; *Beaty v. Imperial Irrigation Dist. (1986) 186 Cal. App. 3d 897, 903*].

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§ 247.191 Relationship to Tort

A public entity's liability in inverse condemnation does not depend on or derive from statutory or common law tort doctrines. Liability is based on the construction, as a matter of interpretation and policy, of the constitutional provision requiring just compensation for taking or damaging property [*Holtz v. Superior Court (1970) 3 Cal. 3d 296, 303, 90 Cal. Rptr. 345, 475 P.2d 441]* . Conduct that amounts to negligence, however, can support inverse condemnation liability [*Barham v. Southern California Edison Co. (1999) 74 Cal. App. 4th 744, 755, 88 Cal. Rptr. 2d 424* ; *see Marshall v. Department of Water & Power (1990) 219 Cal. App. 3d 1124, 268 Cal. Rptr. 559* (recovery for property consumed by brush fire resulting from downed power cables); *Aetna Life & Casualty Co. v. City of Los Angeles (1985) 170 Cal. App. 3d 865, 216 Cal. Rptr. 831* (recovery for property consumed by brush fire resulting from arching power cables)].

To avoid application of the bar of the Tort Claims Act [*Gov. Code § 810 et seq.*], however, the inverse condemnation claim must be based on damage caused by dangers inherent in the functioning of the public improvement as deliberately conceived, altered, and maintained. If the claim is for an injury caused by an exercise of the police power, or by negligence in the routine operation of the improvement that is not related to its function as conceived, it will be barred [*Pacific Bell v. City of San Diego (2000) 81 Cal. App. 4th 596, 602-607, 96 Cal. Rptr. 2d 897* ; *see Customer Co. v. City of Sacramento (1995) 10 Cal. 4th 368, 381-382, 41 Cal. Rptr. 2d 658, 895 P.2d 900* ; *Barham v. Southern Cal. Edison Co. (1999) 74 Cal. App. 4th 744, 755, 88 Cal. Rptr. 2d 424]* . For discussion of the Tort Claims Act, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

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§ 247.192 Power to Take Not Required

Because inverse condemnation actions are grounded in the constitutional proscription against taking or damaging without just compensation, such an action may be maintained even though the defendant does not have statutory authority to exercise affirmative eminent domain powers to accomplish the same result as the relief sought [*Baker v. Burbank-Glendale-Pasadena Airport Authority (1985) 39 Cal. 3d 862, 867-868, 218 Cal. Rptr. 293, 705 P.2d 866 , cert. denied, 475 U.S. 1017 (1986)* ; *see U.S. Const., amend. V*; *Cal. Const., art. I, § 19*].

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§ 247.193 Elements of Cause of Action for Inverse Condemnation

[1] Taking or Damaging

Compensation is required when property has been taken or damaged [*Cal. Const., art. I, § 19*]. Taking or damaging is the invasion or appropriation of a valuable property right [*Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 119, 109 Cal. Rptr. 799, 514 P.2d 111]* . The determination of whether or not there has been a compensable taking or damaging depends on whether or not the owner of the damaged property, if uncompensated, would contribute more than a proper share to the public undertaking. In other words, the underlying purpose of the constitutional provision requiring compensation is to distribute evenly throughout the community the loss inflicted on the individual. A contrary policy consideration is that compensation too freely allowed will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost [*Varjabedian v. City of Madera (1977) 20 Cal. 3d 285, 296, 142 Cal. Rptr. 429, 572 P.2d 43]* .

In *Border Business Park, Inc. v. City of San Diego*, the court of appeal reversed an inverse condemnation award of $63.5 million to a business park [*Border Business Park, Inc. v. City of San Diego (2006) 142 Cal. App. 4th 1538, 1548, 49 Cal. Rptr. 3d 259]* . The court held that the evidence was insufficient as a matter of law to support a finding of inverse condemnation on the basis that the city's failed plans to construct an airport in the vicinity substantially interfered with sales of property within the business park and diminished the value of the property. Although the trial court had awarded damages under a *Klopping* theory [*see* *Klopping v. Whittier (1972) 8 Cal. 3d 39, 43, 104 Cal. Rptr. 1, 500 P.2d 1345* (condemnee may recover damages resulting from unreasonable delay by condemnor in bringing eminent domain action), discussed in § 243.137], the court of appeal concluded that it did not have to decide whether the city's conduct was unreasonable or oppressive within the meaning of *Klopping*, because the plaintiff failed to adduce any evidence that the city's announcements concerning the proposed airport subjected it to direct and special injury [*Border Business Park, Inc. v. City of San Diego (2006) 142 Cal. App. 4th 1538, 1548, 49 Cal. Rptr. 3d 259* ; *see* *Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 119-120, 109 Cal. Rptr. 799, 514 P.2d 111* (to prevail on claim of inverse condemnation "there must be an invasion or an appropriation of some valuable property right which the landowner possesses and the invasion or appropriation must directly and specially affect the landowner to his injury")].

An interesting, but unsuccessful, argument in support of an alleged taking was advanced in *Moerman v. State of California (1993) 17 Cal. App. 4th 452, 21 Cal. Rptr. 2d 329* . Plaintiff alleged that the state had relocated tule elk that had damaged his property. It was uncontested that, in accordance with legislative directive, the State Department of Fish and Game had instituted a program of relocating tule elk to their native ranges. The majority of the tule elk were released approximately 14 miles from plaintiff's property between four and six years before plaintiff observed approximately 50 elk on his property damaging fences and eating crops meant for his livestock [*Moerman v. State of California (1993) 17 Cal. App. 4th 452, 455, 21 Cal. Rptr. 2d 329]* .

Plaintiff conceded that courts have generally held that government agencies are not responsible for damages caused by wild animals, but contended that the state had exhibited control or possession of the tule elk and was, therefore, responsible for the presence of tule elk on his property and the damage caused by the elk. Plaintiff argued that the state's alleged interference with the use and enjoyment of his property amounted to a taking entitling him to compensation of approximately $100,000 [*Moerman v. State of California (1993) 17 Cal. App. 4th 452, 455-456, 21 Cal. Rptr. 2d 329]* .

The trial court granted defendants' motion for summary judgment and concluded that tule elk were wild animals, that the state had exercised no control over them since their relocation, and that the relocation did not change their status as wild animals [*Moerman v. State of California (1993) 17 Cal. App. 4th 452, 456, 21 Cal. Rptr. 2d 329]* . The appellate court affirmed the trial court, finding that "there has been no physical taking of [plaintiff's] property as the tule elk are not instrumentalities of the state nor are they controlled by the state." The court further noted that the state's relocation plan allowed some hunting of the elk. While the court acknowledged that it would be difficult for plaintiff to exclude the elk without harming them, plaintiff did have opportunities to mitigate the damage to his property [*Moerman v. State of California (1993) 17 Cal. App. 4th 452, 459, 21 Cal. Rptr. 2d 329]* .

When a public entity's conduct results in an intangible intrusion onto the plaintiff's property that does not physically damage the property, the question whether there has been a "taking or damaging" of the property sufficient to support an inverse condemnation action is more difficult. In these circumstances, the plaintiff must allege that the intrusion has resulted in a burden on the property that is direct, substantial, and peculiar to the property itself [*San Diego Gas & Electric Co. v. Superior Court (1996) 13 Cal. 4th 893, 940, 55 Cal. Rptr. 2d 724, 920 P.2d 669* ; *Varjabedian v. City of Madera (1977) 20 Cal. 3d 285, 298, 142 Cal. Rptr. 429, 572 P.2d 43]* . This test has been applied by various courts in inverse condemnation actions based on such intangible intrusions as (1) nauseous gases from a sewage treatment facility flowing directly onto a plaintiff's land [*see Varjabedian v. City of Madera (1977) 20 Cal. 3d 285, 298, 142 Cal. Rptr. 429, 572 P.2d 43]* ; (2) electric and magnetic fields emitted from electric power lines adjacent to the plaintiffs' property [*see San Diego Gas & Electric Co. v. Superior Court (1996) 13 Cal. 4th 893, 942-943, 55 Cal. Rptr. 2d 724, 920 P.2d 669]* ; (3) jet aircraft noise from a nearby municipal airport [*see Aaron v. City of Los Angeles (1974) 40 Cal. App. 3d 471, 493, 115 Cal. Rptr. 162* ; *see § 247.256[10]*]; and (4) traffic noise, dust, and loss of air and light due to freeway construction [*see Harding v. State ex rel. Dep't of Transportation (1984) 159 Cal. App. 3d 359, 367, 205 Cal. Rptr. 561]* .

[2] Protectable Property Interests

For inverse condemnation purposes, the term "property" has a broad definition. It is not used in the nontechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. Instead, it denotes the group of rights inherent in the citizen's relation to the physical thing, such as the right to possess, use, and dispose of it [*Agins v. Tiburon (1979) 24 Cal. 3d 266, 273, 157 Cal. Rptr. 372, 598 P.2d 25* , *aff'd, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)]* . Thus, the taking of a building restriction in a deed by condemning the burdened land requires compensation to the owner of the adjacent land in whose favor the building restriction runs [*Southern Cal. Edison Co. v. Bourgerie (1973) 9 Cal. 3d 169, 172-175, 107 Cal. Rptr. 76, 507 P.2d 964]* . Also, the taking of tangible personal property, as well as real property, requires compensation [*Eli v. California (1975) 46 Cal. App. 3d 233, 235, 120 Cal. Rptr. 63]* .

However, to be a protectable property interest and therefore compensable in an inverse condemnation proceeding, the interest must be more substantial than a mere unilateral expectation of continued rights or benefits, such as the hope that a 50-year lease to operate a golf course, which had expired naturally, would be renewed. Without a vested, legally enforceable property interest, there is no basis for compensation in an inverse condemnation proceeding for loss of future business [*San Diego Metro. Transit Dev. Bd. v. Handlery Hotel, Inc. (1999) 73 Cal. App. 4th 517, 532, 86 Cal. Rptr. 2d 473]* . Similarly, the taking of a license or privilege that is unenforceable against the owner of the property does not require compensation [*Belmont County Water Dist. v. State of California (1976) 65 Cal. App. 3d 13, 19, 135 Cal. Rptr. 163]* . Nor is freedom from competition a compensable property right; therefore, a public entity's commencement of a bus line competing with plaintiff's bus line did not require compensation [*Peerless Stages Inc. v. Santa Cruz Met. Transit Dist. (1977) 67 Cal. App. 3d 343, 347, 136 Cal. Rptr. 567]* .

[3] Public Use

A taking is not compensable unless it is for a public use [*Cal. Const., art. I, § 19*]. Inverse condemnation is a remedy only for an injury to private property resulting from a deliberate act undertaken to fulfill the public objects of a project as a whole. Neither negligent acts committed during the routine day-to-day operation of a public improvement, nor negligence in the routine operations having no relation to the function of the project as conceived, gives rise to an inverse condemnation claim [*Bauer v. County of Ventura (1955) 45 Cal. 2d 276, 286-287, 289 P.2d 1]* . However, the property damaged or destroyed need not be devoted to a public use; the damage need only be caused by a public project. Thus, when the state's flood control project caused water to discharge and destroy plaintiff's vehicles, the state was held liable in inverse condemnation [*Sutfin v. State of California (1968) 261 Cal. App. 2d 50, 54-57, 67 Cal. Rptr. 665]* .

A taking may be held to be for public use, even though the improvement was not constructed by a public entity, if the improvement was approved or accepted by the public entity, such as streets or drains constructed by a private developer but accepted or approved by the public entity [*Heimann v. Los Angeles (1947) 30 Cal. 2d 746, 756-757, 185 P.2d 597* ; *see Marin v. City of San Rafael (1980) 111 Cal. App. 3d 591, 595, 168 Cal. Rptr. 750* (storm drain constructed by developer caused damage) (overruled on other grounds in *County of Los Angeles v. Faus [1957] 48 Cal. 2d 672, 679, 312 P.2d 680*)].

[4] Substantial Causation Test

To establish the required causal connection between a public improvement and a plaintiff's damages, there must be a showing of a substantial cause-and-effect relationship excluding the possibility that other forces alone produced the injury [*Belair v. Riverside County Flood Control Dist. (1988) 47 Cal. 3d 550, 559, 253 Cal. Rptr. 693, 764 P.2d 1070]* . When independently generated forces not induced by the public improvement, such as a rainstorm, contribute to the injury, proximate cause is established if the public improvement constitutes a substantial concurring cause of the injury (i.e., if the injury occurred in substantial part because the improvement failed to function as it was intended) [*Belair v. Riverside County Flood Control Dist. (1988) 47 Cal. 3d 550, 559-560, 253 Cal. Rptr. 693, 764 P.2d 1070]* .

The public improvement would cease to be a substantial contributing factor, however, if it could be shown that the damage would have occurred even if the project had operated perfectly (i.e., if a storm exceeds a flood control project's design capacity). Such an extraordinary cause would constitute an intervening cause that supersedes the public improvement in the chain of causation [*Belair v. Riverside County Flood Control Dist. (1988) 47 Cal. 3d 550, 560, 253 Cal. Rptr. 693, 764 P.2d 1070]* .

This substantial cause requirement was set forth in 1988 by the California Supreme Court. The original rule had been that recovery could be had when physical injuries had proximately caused the damage [*Albers v. County of Los Angeles (1965) 62 Cal. 2d 250, 263-264, 42 Cal. Rptr. 89, 398 P.2d 129]* . The Court had subsequently recognized that greater precision came from stating the test in terms of substantial cause [*Holtz v. Superior Court (1970) 3 Cal. 3d*

296, 304, 90 Cal. Rptr. 345, 475 P.2d 441] . The substantial causation test had been adopted by several courts of appeal [*Blau v. City of Los Angeles (1973) 32 Cal. App. 3d 77, 84-85, 107 Cal. Rptr. 727* ; *Ingram v. Redondo Beach (1973) 45 Cal. App. 3d 628, 633-634, 119 Cal. Rptr. 688]* .

[5] Damages

If the taking or damaging by the public entity did not cause any economic injury, the owner is only entitled to nominal damages. This rule was applied when a temporary impairment of access did not damage the owner because the property was being held for sale and was not sold during the period in which the access was impaired [*see* *City of Los Angeles v. Ricards (1973) 10 Cal. 3d 385, 389-390, 110 Cal. Rptr. 489, 515 P.2d 585]* . For a discussion of the measure of damages in an action for inverse condemnation, see *§ 247.202*.

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§ 247.194 Rights of Subrogee

An insurer who is subrogated to the rights of its insured can join in an inverse condemnation action with its insured [*McMahan's of Santa Monica v. City of Santa Monica (1983) 146 Cal. App. 3d 683, 690-691, 194 Cal. Rptr. 582]* . An insurer can also file a separate action for subrogation after the insured has recovered in inverse condemnation to recover payments made under the policy [*Travelers Indem. Co. v. Ingebretsen (1974) 38 Cal. App. 3d 858, 864-865, 113 Cal. Rptr. 679]* .

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§ 247.195 Liability for Impairment of Lateral or Subjacent Support

When the activities of a public entity damage plaintiff's real property by taking away or impairing its lateral or subjacent support, the entity is liable regardless of the foreseeability of the damage, even if a private person would not be liable for the same activities. Thus, a public entity was held liable when its excavation adjacent to plaintiff's property caused damage by impairing its lateral support, even though a private party might have had a statutory defense in similar circumstances [*Holtz v. Superior Court (1970) 3 Cal. 3d 296, 300-304, 90 Cal. Rptr. 345, 475 P.2d 441]* . Similarly, a public entity was held liable when its road-building activities caused a major landslide that damaged plaintiff's property, even though the landslide was not foreseeable [*Albers v. County of Los Angeles (1965) 62 Cal. 2d 250, 262-264, 42 Cal. Rptr. 89, 398 P.2d 129]* .

In another case, plaintiff brought an action for inverse condemnation against the city, alleging that the city's groundwater extraction program had caused subsidence, resulting in damage to plaintiff's property. The trial court rejected the city's affirmative defense that it was immune from liability for inverse condemnation under its police powers due to an emergency created by a drought. The court of appeal affirmed, holding that the city's removal of subjacent support worked a physical taking for which compensation was required. In so holding, the court found that the exception to compensation for damages inflicted in accordance with the proper exercise of the emergency police power was inapplicable. The court found that the city had chosen to use a combination of mild conservation measures and the damaging groundwater pumping over a period of years. Further, the city never declared an emergency under the Emergency Services Act, nor did it require more stringent conservation measures of its citizens [*Los Osos Valley Associates v. City of San Luis Obispo (1994) 30 Cal. App. 4th. 1670, 1680-1681, 36 Cal. Rptr. 2d 758]* .

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§ 247.196 Liability for Airport Noise

A public entity that owns and operates an airport is liable for a taking or damaging of property if the owner of property in the vicinity of the airport can show a measurable reduction in market value resulting from the operation of the airport in such manner that the noise from aircraft using the airport causes a substantial interference with the use and enjoyment of the property. The interference must be sufficiently direct and peculiar that the owner, if uncompensated, would pay more than a fair share to the public undertaking. The public entity is liable even though the airspace above the property has not been invaded [*Aaron v. City of Los Angeles (1974) 40 Cal. App. 3d 471, 484, 115 Cal. Rptr. 162 , cert. denied, 419 U.S. 1122 (1975)]* .

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§ 247.197 Liability for Unreasonable Precondemnation Delay

[1] Common Law Liability

A property owner is entitled to damages in inverse condemnation if the public authority acted improperly either by unreasonably delaying an eminent domain action following an announcement of intent to condemn or by other unreasonable conduct before the condemnation, if such action caused the property to suffer a diminution in market value [*Klopping v. Whittier (1972) 8 Cal. 3d 39, 52-54, 104 Cal. Rptr. 1, 500 P.2d 1345]* . Damages have been recovered when a city delayed commencing a condemnation proceeding for 29 months after it had announced an intent to condemn [*Stone v. City of Los Angeles (1975) 51 Cal. App. 3d 987, 993, 124 Cal. Rptr. 822]* , and when the public entity did not pass a resolution to condemn until three years after first indicating to plaintiff that his property would be acquired [*People ex rel. Dep't Pub. Wks. v. Peninsula Enterprises, Inc. (1979) 91 Cal. App. 3d 332, 353-357, 153 Cal. Rptr. 895]* . Similarly, an award of damages for the entire value of certain property was upheld when (1) the defendant redevelopment agency's plan contemplated taking the property; (2) the agency entered into an option contract with a developer to develop the property; (3) the existence of the plan and the option caused diminution in the value of the property, loss of tenants, and impaired its salability; and (4) the agency subsequently decided not to take the property. The court awarded the owner the entire value of the property and ordered that the property be deeded to the agency on payment [*Richmond Elks Hall Ass'n v. Richmond Redevelopment (9th Cir. 1977) 561 F.2d 1327, 1329-1331]* .

A city was held liable for unreasonable precondemnation delay for doing the following after having decided to purchase the property: unreasonably dragging out the negotiations, progressively reducing its offers, and unreasonably delaying commencement of the eminent domain action. However, the city was not liable for the entire value of the property because the city's activities did not amount to a complete taking; the city was only liable for the loss of market value, which may be measured by the loss of the reasonable value of the use of the property [*Taper v. City of Long Beach (1982) 129 Cal. App. 3d 590, 610-614, 181 Cal. Rptr. 169]* .

A business owner was not entitled to recover as *Klopping* damages the expenses incurred in purchasing and maintaining a new location for an ongoing business for the purpose of mitigating an anticipated loss of goodwill when the existing location was to be condemned [*see* *Barthelemy v. Orange County Flood Control (1998) 65 Cal. App. 4th 558, 561,*

568-572, 76 Cal. Rptr. 2d 575] .

[2] Statutory Liability for Failure to Commence Eminent Domain Proceeding After Resolution of Necessity Adopted

If a public entity has adopted a resolution of necessity but has not commenced an eminent domain proceeding to acquire the property within six months after the date the resolution was adopted, or has commenced a proceeding but has not attempted diligently to serve the complaint and the summons within six months after the proceeding was commenced, the property owner, by an action in inverse condemnation, may (1) require the public entity to take the property and pay compensation for it, and/or (2) recover damages from the public entity for any interference with the possession and use of the property resulting from the resolution's adoption [*Code Civ. Proc. § 1245.260(a)*; *see § 247.344*]. Service by mail pursuant to *Code Civ. Proc. § 415.30* constitutes a diligent attempt at service [*Code Civ. Proc. § 1245.260(a)*]. One attempted service by mail is sufficient to constitute a diligent attempt [*State of California v. Western Natural Rubber, Inc. (1991) 235 Cal. App. 3d 1495, 1500-1502, 1 Cal. Rptr. 2d 495]* .

Presenting a claim against the public entity under *Gov. Code § 900 et seq.* is not a prerequisite to commencement or maintenance of the action [*Code Civ. Proc. § 1245.260(b)*].

If the public entity commences an eminent domain proceeding or rescinds the resolution before the property owner brings suit, the property owner is precluded from bringing an action under *Code Civ. Proc. § 1245.260*, but still has the right to bring an inverse condemnation action based on *Cal. Const., art. I, § 19* [*Code Civ. Proc. § 1245.260(c)*; Cal. L. Revision Comm'n Comment to *Code Civ. Proc. § 1245.260*; *San Diego Metropolitan Transit Development Board v. RV Communities (2007) 158 Cal. App. 4th 313, 338, 69 Cal. Rptr. 3d 705*].

After the property owner has commenced the action, the public entity may rescind the resolution and abandon the taking of the property only under the same circumstances and subject to the same conditions and consequences as abandonment of an eminent domain proceeding [*Code Civ. Proc. § 1245.260(d)*; *see § 247.101*]. However, commencement of the action does not affect any authority the public entity has to commence an eminent domain proceeding, take possession of the property pursuant to *Code Civ. Proc. § 1255.410 et seq.*, or abandon the eminent domain proceeding [*Code Civ. Proc. § 1245.260(e)*].

Instead of bringing an action under *Code Civ. Proc. § 1245.260(a)*, or if a period of more than one year and six months has passed since the resolution of necessity was adopted, the property owner may obtain a writ of mandate to compel the public entity to rescind the resolution of necessity or to commence an eminent domain proceeding to acquire the property within such time as the court deems appropriate [*Code Civ. Proc. § 1245.260(f)*; *see Code Civ. Proc. § 1245.260(b)* (period of limitation); *see also § 247.345*].

[3] Limitations on Right to Recover

Planning designations of property, such as including property in proposed streets or proposed parks in a general plan, are not sufficient to support a cause of action for inverse condemnation. If such a cause of action were to be recognized, the process of planning would either grind to a halt or result in meaningless generalizations [*Selby Realty Co. v. San Buenaventura (1973) 10 Cal. 3d 110, 119-121, 109 Cal. Rptr. 799, 514 P.2d 111* , *514 P.2d 111* (streets); *Rancho La Costa v. County of San Diego (1980) 111 Cal. App. 3d 54, 60-66, 168 Cal. Rptr. 491* (parks)].

Precondemnation delay damages are also not authorized if the delay is reasonable, such as a delay required to obtain funding, to follow statutory procedures, and to hold a required bond election, or a delay for a public hearing and special election [*Briggs v. State of California (1979) 98 Cal. App. 3d 190, 204-207, 159 Cal. Rptr. 390* (funding and election); *Toso v. City of Santa Barbara (1980) 101 Cal. App. 3d 934, 952-953, 162 Cal. Rptr. 210* (hearing and election)].

An owner of undeveloped land is not damaged by a delay if the property could not have been rented [*City of Los Angeles v. Lowensohn (1976) 54 Cal. App. 3d 625, 636, 127 Cal. Rptr. 417]* . Nor is such a landowner damaged by delay if the undeveloped property was being held for speculative purposes and not for immediate sale [*Los Angeles v. Waller (1979) 90 Cal. App. 3d 766, 779-780, 154 Cal. Rptr. 12]* . Finally, a landowner may not recover for precondemnation delay when the value of the property increased during the delay period [*City and County of San Francisco v. Golden Gate Heights Investments (1993) 14 Cal. App. 4th 1203, 1212-1213, 18 Cal. Rptr. 2d 467]* .

[4] Procedure for Seeking Precondemnation Delay Damages

If an eminent domain action is brought by the public entity, precondemnation delay damages should be sought in that action as part of the condemnation award. A judgment in the eminent domain action bars a later action for delay damages [*Klopping v. City of Whittier (1972) 8 Cal. 3d 39, 58, 104 Cal. Rptr. 1, 500 P.2d 1345*].

Before revision of the Eminent Domain Law, cases held that inverse condemnation damages had to be sought in the answer to the eminent domain action [*Richmond Redevelopment Agency v. Western Title Guaranty Co. (1975) 48 Cal. App. 3d 343, 350, 122 Cal. Rptr. 434* ; *see People ex rel. Dept. Pub. Wks. v. Peninsula Enterprises, Inc. (1979) 91 Cal. App. 3d 332, 353, 153 Cal. Rptr. 895*]. However, such damages now must be sought by cross-complaint. Under the current statutory scheme, the only requirement that damages be specifically claimed by answer to an eminent domain complaint is that when the defendant seeks compensation for loss of goodwill, the answer must specifically state that the defendant claims compensation under *Code Civ. Proc. § 1263.510*, but the amount of such damage does not have to be alleged [*Code Civ. Proc. § 1250.320*; *San Diego Metropolitan Transit Development Board v. RV Communities (2007) 158 Cal. App. 4th 313, 335, 69 Cal. Rptr. 3d 705*].

A claim for damages for delay may not be raised as a part of the cost bill after the public entity has abandoned the action; it must be raised by separate action or by answer in the eminent domain action [*State of California v. Meyer (1985) 174 Cal. App. 3d 1061, 1068-1072, 220 Cal. Rptr. 884]* .

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§ 247.198 Liability for Impairment of Right of Access to Public Streets

[1] Interference Must Be Substantial

A property owner has a cause of action in inverse condemnation if the public entity's activities impair access to the general system of public streets. However, not every interference with access to the street on which his or her property abuts is compensable; the interference must be substantial [*Breidert v. Southern Pac. Co. (1964) 61 Cal. 2d 659, 663-664, 39 Cal. Rptr. 903, 394 P.2d 719]* . If the basic right of direct access to the adjacent street and the through traffic on it is not affected, a public agency may enact and enforce reasonable and proper traffic regulation without payment of compensation, even though such regulation may impede the convenience with which ingress and egress may be accomplished and may necessitate circuity of travel to reach a given destination. In the proper exercise of police power, a public entity may do many things that are not compensable, such as constructing a traffic island, installing permanent dividing strips, painting double lines, or making a street one-way [*People v. Ayon (1960) 54 Cal. 2d 217, 223-224, 5 Cal. Rptr. 151, 352 P.2d 519]* .

Indirect impairment of access by cutting off access to the general street system at one of the next intersecting streets may require compensation, but only if the resulting impairment is substantial [*Breidert v. Southern Pac. Co. (1964) 61 Cal. 2d 659, 664-667, 39 Cal. Rptr. 903, 394 P.2d 719]* .

Major changes to streets involving the addition of public rail lines and corresponding changes and improvements may not constitute inverse condemnation. When a public transportation agency installed rail lines directly in front of commercial property and the rail lines (1) made curbside traffic and parking no longer available, (2) turned the street in front of a previously two-way street into a one-way street, and (3) with the corresponding installation of a pedestrian guard rail and raised concrete traffic separators, made the future construction of a driveway onto the plaintiffs' property impossible, there was no substantial impairment of access [*Brumer v. Los Angeles County Metropolitan Transportation Authority (1995) 36 Cal. App. 4th 1738, 1748-1750, 43 Cal. Rptr. 2d 314]* . The court of appeal noted that an abutting owner does not have the right to insist that a street be left in its original condition, and, therefore, substantial impairment will only be found when construction built directly on a portion of a road cuts off a direct access from an abutting property; or when a major change in the grade of the road, such as construction of highway

underpasses, overpasses, and freeway off ramps, prevents direct access to a property abutting the new construction [*Brumer v. Los Angeles County Metropolitan Transportation Authority (1995) 36 Cal. App. 4th 1738, 1746, 43 Cal. Rptr. 2d 314]* .

In another case, a transit line was constructed in the center of the street on which plaintiff's property was located. The project included the related installation of concrete berms adjacent and parallel to the rail line. As a result, direct vehicular access to and from the plaintiff's land was made unavailable from and to the southbound traffic lanes of the street. Existing direct vehicular access to and from the plaintiff's property remained available from and to the northbound traffic lanes of the street, from making left or U-turns on the street, and from a nearby avenue. The trial court found that there was no compensable impairment of access. The court of appeal affirmed, noting that, under current law, the conclusion drawn from the many cases is that compensable access impairment exists if there is a "substantial" impairment of access to the abutting street and from there to the general system of public streets. To determine that issue, the trial court is required to compare the access available to the particular property before and after the impairment and then decide if the impairment is substantial. Because of the factual nature of the inquiry, which is unique to each property, the trial court's determination of substantial impairment is a determination to be sustained if supported by substantial evidence [*San Diego Metropolitan Transit Development Bd. v. Price Co. (1995) 37 Cal. App. 4th 1541, 1546-1548, 44 Cal. Rptr. 2d 705]* .

[2] Examples of Impairment of Access

When direct access from a parcel of property to a street is impaired, the owner is entitled to compensation. Examples of impairment of direct access include the following:

- Substantial reduction in frontage on the road [*People v. Loop (1954) 127 Cal. App. 2d 786, 802-804, 274 P.2d 885]* .

- Change in grade that impairs access [*Anderson v. State (1943) 61 Cal. App. 2d 140, 143, 142 P.2d 88]* .

- Construction of a freeway, underpass, or overpass that cuts off direct access to the road [*People v. Ricciardi (1943) 23 Cal. 2d 390, 403, 144 P.2d 799* (underpass); *Goycoolea v. Los Angeles (1962) 207 Cal. App. 2d 729, 733-735, 24 Cal. Rptr. 719* (overpass); *Blumenstein v. Long Beach (1956) 143 Cal. App. 2d 264, 267-269, 299 P.2d 347* (freeway)].

[3] No Substantial Impairment of Access

The following situations have been held not to constitute a substantial impairment of direct access:

- Traffic congestion caused by the rerouting of truck traffic to the Mexico border that never completely prevented ingress or egress to plaintiff's business park; interference with access that merely requires greater "circuity of travel" is not compensable [*Border Business Park, Inc. v. City of San Diego (2006) 142 Cal. App. 4th 1538, 1556-1557, 49 Cal. Rptr. 3d 259]* .

- Installation of rail lines by a public transportation agency, when the project made the street one-way, caused the loss of one curbside parking space, and made the future construction of a driveway onto the plaintiffs' property impossible [*Brumer v. Los Angeles County Metropolitan Transportation Authority (1995) 36 Cal. App. 4th 1738, 1748-1750, 43 Cal. Rptr. 2d 314* ; *see Perrin v. Los Angeles County Transportation Com. (1996) 42 Cal. App. 4th 1807, 1812-1815, 50 Cal. Rptr. 2d 488* ; *San Diego Metropolitan Transit Development Bd. v. Price Co. (1995) 37 Cal. App. 4th 1541, 1546-1548, 44 Cal. Rptr. 2d 705]* .

- Change of the adjoining road from a highway to frontage road because of the construction of a freeway [*People ex rel. Dep't of Pub. Wks. v. Becker (1968) 262 Cal. App. 2d 634, 638-642, 69 Cal. Rptr. 110]* .

- Diversion of traffic from the highway running past plaintiff's business by construction of a freeway [*Holloway v. Purcell (1950) 35 Cal. 2d 220, 230, 217 P.2d 665]* .

- Increase in flow of traffic on the street abutting plaintiff's property [*City of Berkeley v. Von Adelung (1963) 214 Cal. App. 2d 791, 792-793, 29 Cal. Rptr. 802]* .

- Closing of three streets that required plaintiff to travel one third of a mile further to reach the general street system [*People ex rel. Dep't of Public Works v. Wasserman (1966) 240 Cal. App. 2d 716, 728-730, 50 Cal. Rptr. 95]* .

- Lack of access to a freeway when the property did not have access to the road before it was made into a freeway [*Schnider v. State of California (1952) 38 Cal. 2d 439, 442-443, 241 P.2d 1]* .

[4] Temporary Loss of Access

Substantial temporary impairment of access by a public entity entitles a property owner to compensation for the reduction in use or rental value of the property for the period of impairment [*Jones v. People ex rel. Dep't of Transp. (1978) 22 Cal. 3d 144, 154-156, 148 Cal. Rptr. 640, 583 P.2d 165]* . However, temporary loss of access is not compensable if it causes no damage, for instance, if the property was being held for sale and was not sold during the period in which access was impaired [*City of Los Angeles v. Ricards (1973) 10 Cal. 3d 385, 388-390, 110 Cal. Rptr. 489, 515 P.2d 585]* .

Although temporary impairment by construction work has been held to be noncompensable [*Orpheum Building Co. v. San Francisco Bay Area Rapid Transit Dist. (1978) 80 Cal. App. 3d 863, 869-870, 146 Cal. Rptr. 5]* , the law does allow recovery for interference with access when the interference is both substantial and unnecessary [*Liontos v. County Sanitation Dists. (1998) 61 Cal. App. 4th 726, 732-733, 72 Cal. Rptr. 2d 107* (triable issues of fact concerning actual extent, necessity of, and substantiality of impairment of access to plaintiff's restaurant when road construction was halted but barriers and heavy equipment remained in place for nine-month period)].

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§ 247.199 Liability for Impairment of View and Access to Light and Air

The owner of property abutting on a public road has a right to light and air from the road and is entitled to compensation if that right is taken [*People v. Symons (1960) 54 Cal. 2d 855, 860, 9 Cal. Rptr. 363, 357 P.2d 451* (superseded by statute on another point; *see* Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1263.420*)]. The owner also has an easement of reasonable view of the property from the road and must be compensated for its loss [*People v. Ricciardi (1943) 23 Cal. 2d 390, 404, 144 P.2d 799]* .

If there is unique damage to plaintiff's property from dust, debris, and highway noise from the construction of an adjacent freeway, plaintiff can recover whether or not the property abuts the property taken [*Harding v. State ex rel. Dep't of Transportation (1984) 159 Cal. App. 3d 359, 364-368, 205 Cal. Rptr. 561]* .

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§ 247.200 Liability for Water Damage

[1] Diversion From Natural Watercourses or Artificial Channels

Diversion of water from its natural course resulting in damage to adjacent property may subject a public entity to liability for inverse condemnation [*Bauer v. County of Ventura (1955) 45 Cal. 2d 276, 283, 289 P.2d 1]* . A public agency also may be liable for diversion from a channel artificially made by private persons, when the channel has existed for a long time and has been relied on by adjacent landowners [*Clement v. State Reclamation Board (1950) 35 Cal. 2d 628, 638-639, 220 P.2d 897]* .

[2] Flood Waters

[a] Requirement of Unreasonable Conduct

A public entity that undertakes construction or operation of a flood control project is liable only for unreasonable conduct. Thus, when the public entity's design, construction, or maintenance of a flood control project is shown to have posed an unreasonable risk of harm to the plaintiffs, and the unreasonable design, construction, or maintenance constituted a substantial cause of the damage, plaintiffs may recover regardless of the fact that the project's purpose is to contain the "common enemy" of floodwaters. Because the standard is unreasonable conduct, the fact that a flood control measure fails is not sufficient, standing alone, to impose liability [*Belair v. Riverside County Flood Control Dist. (1988) 47 Cal. 3d 550, 559-560, 253 Cal. Rptr. 693, 764 P.2d 1070* ; *see Bunch v. Coachella Valley Water Dist. (1997) 15 Cal. 4th 432, 447-454, 63 Cal. Rptr. 2d 89, 935 P.2d 796* (relying on *Belair*); *Arreola v. Monterey County (2002) 99 Cal. App. 4th 722, 738-739, 122 Cal. Rptr. 2d 38* ; *Paterno v. State (1999) 74 Cal. App. 4th 68, 82-83, 87 Cal. Rptr. 2d 754]* .

In the case of alleged shoddy maintenance, it is the plan of maintenance that must be unreasonable to establish liability. Poor execution of a maintenance plan does not result in a taking [*Paterno v. State (1999) 74 Cal. App. 4th 68, 86-87, 87 Cal. Rptr. 2d 754* ; *see Paterno v. State (2003) 113 Cal. App. 4th 998, 1012-1015, 6 Cal. Rptr. 3d 854* (state liable for damage resulting from failure of levee in Sacramento River Delta, based on unreasonable plan within Sacramento River Flood Control Project, which accepted levee as built without any measures to ensure it met design standards);

compare Tilton v. Reclamation Dist. No. 800 (2006) 142 Cal. App. 4th 848, 859, 48 Cal. Rptr. 3d 366 (owners of homes situated on top of "urban levee" failed to state inverse condemnation cause of action against reclamation district based on levee's failure, because owners failed to show that levee failures were integrally connected with flawed plan for those levees and/or flawed construction, rather than negligent or inadequate operation and maintenance)].

This requirement of unreasonable conduct was established in 1988 by the California Supreme Court. It refused to apply the "common enemy" doctrine applicable to private flood control measures to public entities. The common enemy doctrine provides that a private upper land owner may take measures to protect his or her land from the common enemy of flood waters and not be liable for damage to downstream owners [*Clement v. State Reclamation Board (1950) 35 Cal. 2d 628, 635-636, 220 P.2d 897]* .

[b] Factors Governing Determination Regarding Reasonableness

Factors to be applied in determining the reasonableness of the public entity's conduct are [*Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 368-369, 27 Cal. Rptr. 2d 613, 867 P.2d 724* ; *see Bunch v. Coachella Valley Water Dist. (1997) 15 Cal. 4th 432, 446, 63 Cal. Rptr. 2d 89, 935 P.2d 796* (relying on these factors)]:

- The overall public purpose being served by the improvement project.
- The degree to which the plaintiff's loss is offset by reciprocal benefits.
- The availability to the public entity of feasible alternatives with lower risks.
- The severity of the plaintiff's damage in relation to risk-bearing capabilities.
- The extent to which damage of the kind sustained by plaintiff is generally considered as a normal risk of land ownership.
- The degree to which similar damage is distributed at large over other beneficiaries of the project or is peculiar only to the plaintiff.

When applying these factors, a trial court is reviewing executive and legislative choices, and can impose liability as provided by the California Constitution. The power to impose liability must be wielded with respect for the coordinate branches of government, however, and the trial court must defer to debatable choices made by those other branches [*Paterno v. State (1999) 74 Cal. App. 4th 68, 83-84, 87 Cal. Rptr. 2d 754]* . The above factors contemplate that the inquiry into "reasonable" design, construction, operation, and maintenance is not limited to whether the system's technical specifications, intended capacities, materials, workmanship, and repairs were adequate under all the circumstances, but also includes a determination whether, all things considered, the system should not have diverted, and thus reallocated, the risks of periodic or sudden flooding as it was designed to do [*Bunch v. Coachella Valley Water Dist. (1997) 15 Cal. 4th 432, 446 n.3, 63 Cal. Rptr. 2d 89, 935 P.2d 796]* . Fiscal constraints on the public entity are a relevant consideration in the overall balancing test and reasonableness determination [*Bunch v. Coachella Valley Water Dist. (1997) 15 Cal. 4th 432, 452, 63 Cal. Rptr. 2d 89, 935 P.2d 796]* . These factors for determining reasonableness apply retroactively to cases on appeal when *Bunch* and *Locklin* were decided [*Paterno v. State (1999) 74 Cal. App. 4th 68, 84, 87 Cal. Rptr. 2d 754]* .

[c] Scope and Applicability of Reasonableness Rule

The reasonableness rule was developed in the context of flood control improvements along natural watercourses, but the California Supreme Court has determined that it should also apply to a case in which a public entity has diverted and rechanneled water using a flood control system of dikes and levees, and the dikes and levees fail in a rainstorm, causing

damage to properties historically subject to flooding [*Bunch v. Coachella Valley Water Dist. (1997) 15 Cal. 4th 432, 447, 63 Cal. Rptr. 2d 89, 935 P.2d 796* ; *see also Paterno v. State (2003) 113 Cal. App. 4th 998, 1003-1004, 6 Cal. Rptr. 3d 854* (state liable for damage resulting from failure of levee in Sacramento River Delta)]. In so holding, the Court derived from *Belair*, and from the above *Locklin* factors, "the principle that compensation in cases involving the failure of flood control improvements to protect property adequately against historic peridoic flooding should rest not on antiquated notions of fault, or common law labels defining the type of waters requiring flood control measures, but rather on the balancing of interests" required by *Cal. Const., art. I, § 19*, and reflected in the *Belair/Locklin* test [*Bunch v. Coachella Valley Water Dist. (1997) 15 Cal. 4th 432, 451, 63 Cal. Rptr. 2d 89, 935 P.2d 796]* .

The reasonableness rule does not apply if governmental flood control works cause flooding by intentionally diverting water to upstream private property that was not historically subject to flooding, in order to protect lower-lying land. The use of private property not historically subject to flooding as a retention basin to provide flood protection to other property exacts from the owners whose property was flooded a contribution in excess of their proper share to the public undertaking, and there is no reason to put these property owners to the task of proving the governmental entity acted unreasonably to recover in inverse condemnation [*Akins v. State of California (1998) 61 Cal. App. 4th 1, 28-29, 71 Cal. Rptr. 2d 314* ; *see Arreola v. Monterey County (2002) 99 Cal. App. 4th 722, 753, 122 Cal. Rptr. 2d 38* (state strictly liable when design of highway overpass caused obstruction of floodwaters); *Odello Brothers v. County of Monterey (1998) 63 Cal. App. 4th 778, 791-792, 73 Cal. Rptr. 2d 903* (reasonableness rule inapplicable when county deliberately flooded plaintiffs' property to save other property from flooding; emergency exception did not bar liability when county had prior knowledge of flood threat and would have had to condemn plaintiffs' property if it had implemented flood control plan)].

[d] Additional Limitations on Liability

A public entity has no duty to protect private persons from flood waters and is not liable if its efforts to do so are insufficient [*Tri-Chem, Inc. v. Los Angeles County Flood Control Dist. (1976) 60 Cal. App. 3d 306, 310-312, 132 Cal. Rptr. 142]* . Thus, if flood control improvements do not subject property to any flooding in addition to that which would have occurred without the improvement, the entity is not liable for flood damage. Furthermore, an entity is not liable because flood control improvements do not provide the same degree of protection to all property owners in the area [*Shaeffer v. State of California (1972) 22 Cal. App. 3d 1017, 1020-1021, 99 Cal. Rptr. 861* (overruled on other grounds in *County of San Diego v. Miller (1975) 13 Cal. 3d 684, 693, 119 Cal. Rptr. 491, 532 P.2d 139*)].

In addition, a reclamation district that cut breaches in a levee during an emergency caused by torrential rains, resulting in the flooding of plaintiffs' property, was immune from liability under the Emergency Services Act. The district's actions in cutting the levee appeared both reasonable and focused on the primary goal of ensuring public safety in a time of crisis [*Thousand Trails, Inc. v. California Reclamation Dist. Number 17 (2004) 124 Cal. App. 4th 450, 461, 21 Cal. Rptr. 3d 196* ; *see Gov. Code § 8550 et seq.*].

[3] Surface Water

Surface water is water diffused over the surface of land, or contained in depressions therein, resulting from rain, snow, or that which rises to the surface in springs. It is distinguished from water flowing in a fixed channel or a river or in a lake. An owner of an upper or dominant estate is entitled to discharge surface waters from his or her land as the water naturally flows. However, the landowner's conduct in using or altering the property in a manner that affects the discharge of surface waters is subject to a test of reasonableness. In addition, the lower landowner has a duty to take reasonable precautions to avoid or reduce any actual or potential injury from the flow of surface waters. If the actions of both upper and lower landowners are reasonable and necessary, liability must be borne by the upper landowner who changes a natural system of drainage, in accordance with the traditional civil law rule applicable to damage from surface water runoff [*Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 351-352, 27 Cal. Rptr. 2d 613, 867 P.2d 724* ; *Keys v. Romley (1966) 64 Cal. 2d 396, 405-409, 50 Cal. Rptr. 273, 412 P.2d 529]* .

This rule applies to public entities in tort actions [*Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 337-338, 367, 27 Cal. Rptr. 2d 613, 867 P.2d 724]* . The reasonableness rule has also been applied by courts of appeal in inverse condemnation actions [*see Burrows v. State of California (1968) 260 Cal. App. 2d 29, 32-33, 66 Cal. Rptr. 868* ; *Yue v. City of Auburn (1992) 3 Cal. App. 4th 751, 760-761, 4 Cal. Rptr. 2d 653]* . Although the Supreme Court has held that the reasonableness rule applies in inverse condemnation actions involving the drainage of surface waters to natural watercourses, and that it also applies in all cases involving damage from flood control facilities, it has not directly addressed whether the reasonableness rule or strict liability applies in inverse condemnation actions for damage from the discharge of surface waters from upper to lower property when a flood control project is not involved [*see Bunch v. Coachella Valley Water Dist. (1997) 15 Cal. 4th 432, 454, 63 Cal. Rptr. 2d 89, 935 P.2d 796* ; *Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 367, 27 Cal. Rptr. 2d 613, 867 P.2d 724]* . One court of appeal has suggested that a rule of strict liability for a public entity's physical damage to private property should be applied to surface water damage cases, regardless of the reasonableness of the entity's actions. The court, however, decided the case without ruling on the point [*see Sheffet v. County of Los Angeles (1970) 3 Cal. App. 3d 720, 732-734, 84 Cal. Rptr. 11]* .

[4] Drainage of Surface Waters to Natural Watercourse

A public entity may be liable in tort and inverse condemnation for damage to private property caused by the manner in which surface water runoff from its property is discharged into a natural watercourse [*Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 337-338, 27 Cal. Rptr. 2d 613, 867 P.2d 724]* . A reasonableness test applies to determine liability. A public entity may be liable in inverse condemnation only if its conduct posed an unreasonable risk of harm to the plaintiff and that unreasonable conduct was a substantial cause of the damage to the plaintiff's property. Reasonableness is to be determined by balancing the public benefit and the private damage in each case [*Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 367, 27 Cal. Rptr. 2d 613, 867 P.2d 724]* . Only damage caused by the public agency's improvements may be compensated. Thus, when the cause of damage is claimed to be the addition of surface water runoff from public improvements to a streamflow, the public entity is liable only for the proportionate amount of damage caused by its actions [*Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 368, 27 Cal. Rptr. 2d 613, 867 P.2d 724]* .

A public entity may also be liable in inverse condemnation for damage caused by public improvements constructed in or on a natural watercourse for the purpose of improving surface water drainage, subject to the reasonableness test [*Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 367, 27 Cal. Rptr. 2d 613, 867 P.2d 724]* .

[5] Seepage From Irrigation Ditches

A public entity is strictly liable in inverse condemnation for damage to land caused by seepage of water from canals of an irrigation district that was constructed and maintained to supply water for public use [*Powers Farms v. Consolidated Irr. Dist. (1941) 19 Cal. 2d 123, 126, 119 P.2d 717]* .

[6] Water Delivery System Failure

Ordinarily, an inverse condemnation plaintiff, whose claim is based on flood damage caused by a public improvement, is required to show that the public entity acted unreasonably [*see § 247.200[2][a]*]. This requirement does not apply, however, if damage was caused by a burst pipe or some other failure of a water delivery system when the system, as designed and constructed, presented inherent risks of damage to private property, and the inherent risks materialized and caused damage [*Pacific Bell v. City of San Diego (2000) 81 Cal. App. 4th 596, 607-609, 96 Cal. Rptr. 2d 897* ; *see House v. L.A. County Flood Control Dist. (1944) 25 Cal. 2d 384, 396, 153 P.2d 950]* . In *Pacific Bell v. City of San Diego*, a city's water delivery system was deliberately designed, constructed, and maintained without any method or program for monitoring the inevitable deterioration of cast iron pipes. When a pipe burst because of corrosion and caused damage to a Pacific Bell facility, the court determined that the city, rather than Pacific Bell, should bear the costs

of flooding damage from the burst pipe because the city had no method or program for monitoring the inevitable deterioration of its cast iron pipes other than waiting for a pipe to break. The court found that the city's decision to install a system without monitoring capabilities and to use a "wait until it breaks" method for detecting deterioration may have been reasonable because the costs of a prophylactic approach may have outweighed its benefits. However, because the undertaking of the water delivery system project at a lower cost created some risk, however slight, of damage to Pacific Bell's property, it was proper to require the city to bear the loss when damage did occur. Consistent with the fundamental policy underlying inverse condemnation, the court found that the burden associated with the city's cost-saving approach should be spread to the community benefitting from lower water rates rather than imposing the entire cost on those property owners placed in harm's way by the city's program [*Pacific Bell v. City of San Diego (2000) 81 Cal. App. 4th 596, 607-610, 96 Cal. Rptr. 2d 897* ; *see Holtz v. Superior Court (1970) 3 Cal. 3d 296, 303, 311, 90 Cal. Rptr. 345, 475 P.2d 441* ; *McMahan's of Santa Monica v. City of Santa Monica (1983) 146 Cal. App. 3d 683, 696-698, 194 Cal. Rptr. 582]* .

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§ 247.201 Liability for Land Use Regulation

[1] Regulatory Actions Requiring Compensation

The United States Supreme Court has held that there are two categories of regulatory action requiring compensation [*see generally Lingle v. Chevron U.S.A. Inc. (2005) 544 U.S. 528, 125 S. Ct. 2074, 2081, 161 L. Ed. 2d 876]* :

- Regulations that compel the property owner to suffer a physical invasion of property [*see Loretto v. Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419, 434-435, 441, 102 S. Ct. 3164, 73 L. Ed. 2d 868]* ; and

- Regulations that deny all economically beneficial or productive use of the property [*see Agins v. Tiburon (1980) 447 U.S. 255, 260-263, 100 S. Ct. 2138, 65 L. Ed. 2d 106]* .

There is ample justification for finding a taking when all economic use is taken from the property. In such an extraordinary case, it is hard to justify the argument that the Legislature is simply adjusting economic burdens. In addition, regulations requiring that land be left in a natural state carry a risk that private property is being pressed into public service under the guise of mitigating public harm. But, requiring compensation for a taking of all economic use does not preclude less restrictive government regulation [*Lucas v. S.C. Coastal Council (1992) 505 U.S. 1003, 1015-1020, 112 S. Ct. 2886, 120 L. Ed. 2d 798]* .

[2] No Compensation if Limitations on Title

If a state seeks to sustain regulation that deprives land of all economically beneficial use, it must resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use was not a part of the title to begin with. Limitations that deprive the owner of all economic use without compensation must inhere in the title itself, in the restrictions that background principles of the state's law of property and nuisance already place on land ownership. The regulation must do no more than duplicate the result that could have been achieved in the courts by adjacent landowners under the law of private nuisance or by the state under the law of public nuisance. As an example, the owner of a lake bed would not be entitled to compensation if he or she is denied a permit to engage in landfill that

would flood adjacent land [*Lucas v. S.C. Coastal Council (1992) 505 U.S. 1003, 1027-1029, 112 S. Ct. 2886, 120 L. Ed. 2d 798]* .

Nevertheless, when a regulation goes beyond what the relevant background principles would dictate, compensation must be paid. The inquiry will entail analysis of the degree of harm to public lands, the social value of the claimant's activities, and the relative ease with which the harm can be avoided. To justify no compensation, the state must do as it would in a common law action for public nuisance--that is, identify background principles of nuisance and property law that prohibit the uses that it seeks to proscribe. Only on such a showing may the state claim that, in proscribing all beneficial uses, the regulation takes nothing [*Lucas v. S.C. Coastal Council (1992) 505 U.S. 1003, 1028-1029, 112 S. Ct. 2886, 120 L. Ed. 2d 798]* .

A regulation that otherwise would be unconstitutional absent compensation is not transformed into a "background principle of state law" merely because title to the property has passed to a new owner. Thus, the fact that regulations prohibiting development of wetlands existed at the time plaintiff took title to the property did not bar plaintiff's takings claim based on the state's denial of a development permit for wetlands on the property [*Palazzolo v. Rhode Island (2001) 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592]* .

[3] Compensation for Temporary Taking That Deprives All Use

Compensation must be paid for a temporary taking by regulation that deprived the landowner of all use of the land during the period the regulation was in effect. For example, the United States Supreme Court has held that invalidation of an interim flood control regulation that denied the owner of all use of its property without payment of fair value for the use of the property during the period the regulation was in effect would be a constitutionally insufficient remedy. The Court limited its holding to the facts presented, and expressly stated that it was not dealing with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like. It also stressed that, once a court determines that a taking has occurred, the government retains the whole range of options already available, that is, to amend the regulation, to withdraw it, or to exercise eminent domain [*First Lutheran Church v. Los Angeles County (1987) 482 U.S. 304, 310-311, 314-322, 107 S. Ct. 2378, 96 L. Ed. 2d 250]* .

On remand in *First English Evangelical Lutheran Church*, however, the appellate court held that the interim ordinance did not constitute a taking, because it was passed to protect the public interest in saving lives from future floods and because it did not deprive the owner of all use of the property in that it only prohibited the reconstruction of destroyed buildings, but allowed camping and agricultural uses. The interim ordinance was not an unconstitutional temporary taking because it was necessary to preserve the status quo for a reasonable time to determine the proper measures to be taken to protect public safety [*First English Evangelical Lutheran Church v. County of Los Angeles (1989) 210 Cal. App. 3d 1353, 1365-1373, 258 Cal. Rptr. 893* ; *see also Moore v. City of Costa Mesa (9th Cir. 1989) 886 F.2d 260, 264* (temporary taking resulting from invalid condition that 10 percent of property be dedicated was not compensable in inverse condemnation, because only small portion of property was temporarily taken and remainder was always in use by landowner)].

A legally erroneous decision of a government agency during the development approval process resulting in delay does not necessarily amount to a temporary taking of property [*Landgate, Inc. v. California Coastal Com. (1998) 17 Cal. 4th 1006, 1020, 1021, 73 Cal. Rptr. 2d 841, 953 P.2d 1188]* . If the error is of a particular constitutional type--the passage and enforcement of a law or regulation that deprives property of all value--then such an error is a compensable taking. However, government land use regulations and decisions that, despite their ultimately determined statutory defects, are part of a reasonable regulatory process designed to advance legitimate governmental interests are not takings of property [*Landgate, Inc. v. California Coastal Com. (1998) 17 Cal. 4th 1006, 1021, 73 Cal. Rptr. 2d 841, 953 P.2d 1188]* . In *Landgate Inc. v. California Coastal Com.*, the plaintiff failed to show that the Coastal Commission's delay in approving its development application was due to anything other than a bona fide dispute over the legality of a

lot line adjustment and the Coastal Commission's jurisdictional authority over the adjustment. The California Supreme Court held that the delay was an incident of property ownership and not a taking of property [*Landgate, Inc. v. California Coastal Com. (1998) 17 Cal. 4th 1006, 1020, 1031, 73 Cal. Rptr. 2d 841, 953 P.2d 1188]* .

The Fourth Appellate District distinguished *Landgate* in a case in which it held that a delay in issuing a demolition permit for a fire-damaged hotel constituted a temporary regulatory taking, when the delay was caused by the city's enforcement of restrictions in its residential hotel ordinance despite the prohibitions of the Ellis Act [*Gov. Code § 7060 et seq.* (allowing landlords to go out of business by withdrawing their rental units from the market, provided the landlords comply with the Act's requirements)]. The city's attempt to enforce its residential hotel ordinance in violation of the Ellis Act was so unreasonable from a legal standpoint as to be arbitrary, was not in furtherance of any legitimate governmental objective, and was for no other purpose than to delay any development other than for a single-room-occupancy hotel [*Ali v. City of Los Angeles (1999) 77 Cal. App. 4th 246, 254-255, 91 Cal. Rptr. 2d 458]* .

City of Monterey v. Del Monte Dunes at Monterey, Inc., was the first published decision in which a California local government was actually ordered to pay money damages for a temporary regulatory taking. The *Del Monte Dunes* Court affirmed a federal court jury award of $1.45 million against the City of Monterey as damages from a temporary regulatory taking [*City of Monterey v. Del Monte Dunes at Monterey, Inc. (1999) 526 U.S. 687, 720-723, 119 S. Ct. 1624, 143 L. Ed. 2d 882* (action filed under federal Civil Rights Act [*42 U.S.C. § 1983*])]. The unique circumstances of the case, however, may not necessarily foreshadow a dramatic increase in these verdicts. The landowners in the case had sought approval for the development of a 37-acre, ocean-front parcel, which was zoned for multi-family residential development. The city imposed more rigorous demands each of the five times it rejected the owners' proposals. Based on these facts, the U.S. Supreme Court (1) rejected the city's claim that the Ninth Circuit had erroneously adopted a legal standard for regulatory takings liability that allows juries to second-guess public land use policy [*City of Monterey v. Del Monte Dunes at Monterey, Inc. (1999) 526 U.S. 687, 704-707, 119 S. Ct. 1624, 143 L. Ed. 2d 882]* , and (2) held it was proper to submit the issue of the city's liability to a jury [*City of Monterey v. Del Monte Dunes at Monterey, Inc. (1999) 526 U.S. 687, 721, 119 S. Ct. 1624, 143 L. Ed. 2d 882]* .

[4] Nexus Required Between Restriction and Public Purpose

Although a development permit under a zoning ordinance may include conditions that would be considered a public taking of private property if not attached to the permit, there must be a nexus between the prohibition or restriction on the landowner and the public purpose advanced as a justification for the prohibition. In *Nollan v. California Coastal Comm'n (1987) 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677* , the U.S. Supreme Court held that the government may demand an easement as a condition for granting a development permit that the government would be entitled to deny, so long as the exaction would substantially advance the same government interest that would furnish a valid ground for denial of the permit. Thus, in *Nollan* it was an unconstitutional taking for the California Coastal Commission to condition a coastal permit on the applicants' giving an easement for public access along the beach between their sea wall and the mean high tide mark because that easement would not reduce obstacles to public access to or viewing of the beach, which was the interest advanced by the Commission [*Nollan v. California Coastal Comm'n (1987) 483 U.S. 825, 834-837, 107 S. Ct. 3141, 97 L. Ed. 2d 677* (suggesting that requiring an easement from the street to the beach or for a view point might have been so related to the stated governmental interest as to have been a valid condition)]. The *Nollan* nexus requirement, however, is only applicable to possessory takings, not to regulatory takings [*Blue Jeans Equities West v. City and County of San Francisco (1992) 3 Cal. App. 4th 164, 168-171, 4 Cal. Rptr. 2d 114* (distinguished in *Ehrlich v. City of Culver City (1996) 12 Cal. 4th 854, 875-876, 50 Cal. Rptr. 2d 242, 911 P.2d 429*); *see Lingle v. Chevron U.S.A. Inc. (2005) 544 U.S. 528, 125 S. Ct. 2074, 2086, 161 L. Ed. 2d 876* ; *Monterey v. Del Monte Dunes at Monterey, Ltd. (1999) 526 U.S. 687, 702, 119 S. Ct. 1624, 143 L. Ed. 2d 882* (heightened standard has not been extended beyond context of exactions)].

The *Nollan* decision was clarified by the *Supreme Court in Dolan v. City of Tigard (1994) 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304* , a case in which the Court explained that in determining whether a regulatory condition on a

building permit operates as an unconstitutional taking, trial courts must first determine whether there is an "essential nexus" between a legitimate state interest and the permit conditions. The second step is to determine whether the degree of exactions demanded by the permit bears a sufficient relationship to the proposed development's impact. The adequacy of the relationship was defined by the court as a "rough proportionality" test. No precise mathematical calculation is required, but there must be some type of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development [*Dolan v. City of Tigard (1994) 512 U.S. 374, 386-391, 114 S. Ct. 2309, 129 L. Ed. 2d 304]* .

In *Lingle v. Chevron U.S.A. Inc. (2005) 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876* , the Supreme Court explained that the rule articulated in *Nollan* and *Dolan* is not whether the exaction would substantially advance *some* legitimate state interest but rather whether the exaction would substantially advance the same interests that land use authorities asserted would allow them to deny the permit altogether. The Supreme Court reiterated that *Nollan* and *Dolan* involved a special application of the "doctrine of unconstitutional conditions," under which "the government may not require a person to give up a constitutional right--here the right to receive just compensation when property is taken for a public use--in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property" [*Lingle v. Chevron U.S.A. Inc. (2005) 544 U.S. 528, 125 S. Ct. 2074, 2086-2087, 161 L. Ed. 2d 876* , citing *Dolan v. City of Tigard (1994) 512 U.S. 374, 385, 114 S. Ct. 2309, 129 L. Ed. 2d 304]* . It noted that the Supreme Court has not applied this standard outside the context of exactions [*Lingle v. Chevron U.S.A. Inc. (2005) 544 U.S. 538, 125 S. Ct. 2074, 2086, 161 L. Ed. 2d 876* , citing *Monterey v. Del Monte Dunes at Monterey, Ltd. (1999) 526 U.S. 687, 709, 119 S. Ct. 1624, 143 L. Ed. 2d 882* ; *see also Action Apartment Association v. City of Santa Monica (2008) 166 Cal. App. 4th 456, 471, 82 Cal. Rptr. 3d 722* (*Lingle* did not abrogate rule that *Nollan*/*Dolan* nexus and rough proportionality test applies only in context of judicial review of individual adjudicative land use decisions)].

[5] Development Fees Imposed on Individual and Discretionary Basis

A clear majority of the California Supreme Court has determined that the heightened scrutiny of development conditions required by the U.S. Supreme Court's *Nollan* and *Dolan* opinions [*see Nollan v. California Coastal Comm'n (1987) 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677* and *Dolan v. City of Tigard (1994) 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304* , discussed in *§ 247.201[4]*] applies to development conditions that require payment of a monetary fee (rather than requiring possessory dedication), at least in cases where the governmental conditions requiring monetary exactions are imposed on an individual and discretionary basis, rather than generally or ministerially [*Ehrlich v. City of Culver City (1996) 12 Cal. 4th 854, 875-876, 50 Cal. Rptr. 2d 242, 911 P.2d 429 , cert. denied, 519 U.S. 929]* . A plurality of the Court reached its conclusion within the statutory framework of the Mitigation Fee Act [*Gov. Code § 66000 et seq.*], which requires a local regulatory authority to demonstrate a "reasonable relationship" between the proposed use of a development fee, or other monetary exaction, and both the type of development project and the need for the public facility and the type of development project on which the fee is imposed [*Gov. Code § 66001(a)(3), (4)*]. The local agency must also determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed [*Gov. Code § 66001(b)*]. The plurality interpreted the "reasonable relationship" standard of the Mitigation Fee Act as embodying the *Nollan/Dolan* test, which requires the local permitting authority to prove (1) an essential nexus or relationship between the permit condition, i.e., payment of the development fee, and the public impact of the proposed development, and (2) a "rough proportionality" between the magnitude of the development fee and the effects of the proposed development [*Ehrlich v. City of Culver City (1996) 12 Cal. 4th 854, 881-885, 50 Cal. Rptr. 2d 242, 911 P.2d 429 , cert. denied, 519 U.S. 929]* .

Since *Ehrlich*, the California Supreme Court has held that a provision in a hotel conversion ordinance requiring payment of an in lieu fee as a condition of converting residential hotel rooms to tourist use was not subject to the heightened scrutiny standard. The fee was "generally applicable" because it applied to every residential hotel in the city, and the responsible city agency had no discretion with regard to the fee's imposition or size [*San Remo Hotel LP v.*

City and County of San Francisco (2002) 27 Cal. 4th 643, 668-669, 117 Cal. Rptr. 2d 269, 41 P.3d 87] . In another case, the court of appeal determined that school development fees, which may be levied by school districts to fund school facilities when a development project will have an impact on the capacity of local schools, fall within the category of development fees that are imposed generally or ministerially and therefore are not subject to the heightened scrutiny standards [*see Loyola Marymount University v. Los Angeles Unified School Dist. (1996) 45 Cal. App. 4th 1256, 1270-1271, 53 Cal. Rptr. 2d 424]* .

[6] Development Moratoria

A temporary development moratorium does not constitute a per se taking of property requiring compensation under the *Takings Clause* [*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency (2002) 535 U.S. 302, 122 S. Ct. 1465, 1476, 152 L. Ed. 2d 517* ; *see Lucas v. South Carolina Coastal Council (1992) 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L. Ed. 2d 798* (compensation is required when regulation deprives owner of virtually "all economically beneficial uses" of his or her land); *Monks v. City of Rancho Palos Verdes (2008) 167 Cal. App. 4th 263, 309, 84 Cal. Rptr. 3d 75* (city resolution implementing moratorium on construction in ancient landslide area deprived plaintiffs' property in that area of all economically beneficial use and therefore effected permanent taking)]. A fee simple estate may not be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted [*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency (2002) 535 U.S. 302, 122 S. Ct. 1465, 1484, 152 L. Ed. 2d 517]* . Thus, the factors set forth in *Penn Central Transp. Co. v. City of New York* [*Penn Central Transp. Co. v. City of New York (1978) 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631]* provide the proper framework for determining whether a taking has occurred [*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency (2002) 535 U.S. 302, 122 S. Ct. 1465, 1483-1484, 152 L. Ed. 2d 517]* . The *Penn Central* factors to be considered in determining whether a regulation effects a taking are the following [*Penn Central Transp. Co. v. City of New York (1978) 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631]* :

- The economic impact of a regulation on the claimant;
- The extent to which the regulation has interfered with distinct investment-backed expectations; and
- The character of the governmental action.

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§ 247.202 Measure of Damages

[1] Market Value

The basic measure of damages in an inverse condemnation action is the fair market value of the property taken [*Federal Oil Co. v. City of Culver City (1960) 179 Cal. App. 2d 93, 97, 3 Cal. Rptr. 519]* . If property is damaged rather than taken, the owner is entitled to recover the decrease in market value of the damaged property [*Olson v. County of Shasta (1970) 5 Cal. App. 3d 336, 340-342, 85 Cal. Rptr. 77]* . The measure of damage for a store's damaged merchandise is the wholesale value of the merchandise, not the retail value. An award of retail value would result in a windfall to the store [*McMahan's of Santa Monica v. City of Santa Monica (1983) 146 Cal. App. 3d 683, 699-701, 194 Cal. Rptr. 582]* . Other measures of damages, however, may also be proper in inverse condemnation actions, as discussed *below*.

[2] Cost of Cure Damages

Cost of cure evidence is relevant in determining reduction of market value, but cost of cure damages are generally not recoverable separately and are only admissible as evidence of reduction in market value [*Olson v. County of Shasta (1970) 5 Cal. App. 3d 336, 342, 85 Cal. Rptr. 77]* . However, diminution of value is not to be applied as inflexibly as a measure of recovery in inverse condemnation actions. For example, an award of cost of cure damages was held to be proper when defendant's action increased the flow of water on plaintiff's property, which increased the cost of plaintiff's required flood control measures, because the increased costs had to be expended to develop the property and evidence of decrease in market value would have been of little value in assessing plaintiff's damages [*Amador Valley Investors v. City of Livermore (1974) 43 Cal. App. 3d 483, 494, 117 Cal. Rptr. 749]* .

[3] Costs of Mitigating Damage

Because an owner whose property is being taken or damaged by a public entity must take reasonable steps to mitigate the loss, the owner is entitled to recover expenses that were incurred reasonably and in good faith in an effort to minimize the loss [*Albers v. County of Los Angeles (1965) 62 Cal. 2d 250, 269-272, 42 Cal. Rptr. 89, 398 P.2d 129]* . To establish that mitigation efforts were reasonable and in good faith, a property owner need not prove that "but for" its

efforts the property would have been damaged [*CUNA Mutual Life Ins. Co. v. Los Angeles County Metropolitan Transp. Auth. (2003) 108 Cal. App. 4th 382, 395, 133 Cal. Rptr. 2d 470]* . Thus, the owner of a historic theater building who took action to underpin the front porch of the building to avoid anticipated damage from construction of an underground metro station located just beyond the building's northeast corner was not required to prove actual or prospective damage to recover mitigation costs in an inverse condemnation action [*CUNA Mutual Life Ins. Co. v. Los Angeles County Metropolitan Transp. Auth. (2003) 108 Cal. App. 4th 382, 395, 133 Cal. Rptr. 2d 470]* .

[4] Goodwill

When the California Legislature enacted the statute allowing recovery for loss of goodwill in eminent domain actions [*Code Civ. Proc. § 1263.510*; Stats. 1975, ch. 1275], it also enacted *Code Civ. Proc. § 1263.530*, which provides that the statute allowing recovery for loss of business goodwill in eminent domain proceedings is not intended to deal with compensation for inverse condemnation claims for temporary interference with or interruption of business [*see Code Civ. Proc. § 1263.530*]. The matter of recovery for these business losses was left to continuing case law [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1263.530*]. Noting that *Code Civ. Proc. § 1263.510* states that it is not intended to deal with goodwill in inverse condemnation actions, the Court of Appeal in a subsequent case further noted that the Legislature did not intend to deny an inverse condemnee the compensation that could be recovered by any other business owner whose business is taken for a public purpose. In light of the Legislature's express provision for direct condemnees, the court concluded, as a matter of "judicial development of the law," that goodwill is compensable in an inverse condemnation action to the same extent and with the same limitations as recovery based on § 1263.510 [*Chhour v. Community Redevelopment Agency (1996) 46 Cal. App. 4th 273, 282, 53 Cal. Rptr. 2d 585]* .

Whether a proceeding is in eminent domain or inverse condemnation, only an owner of a business conducted on the real property taken may claim compensation for loss of goodwill. In an inverse condemnation proceeding, the holder of a long-term lease to operate a golf course that had expired by its own terms could not sustain a claim for loss of goodwill because when the lease expired the business of operating the golf course ceased. Successive short-term lease extensions culminating with a month-to-month tenancy terminable on seven days' notice merely operated to define the length of time the leaseholder could reasonably expect to remain in the business of operating the golf course [*see San Diego Metro. Transit Dev. Bd. v. Handlery Hotel, Inc. (1999) 73 Cal. App. 4th 517, 537-538, 86 Cal. Rptr. 2d 473]* .

[5] Loss of Rentals

When a public entity is liable for unreasonable precondemnation delay, one measure of these damages is the loss of rental value during the period of delay [*Klopping v. Whittier (1972) 8 Cal. 3d 39, 53-54, 104 Cal. Rptr. 1, 500 P.2d 1345]* .

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§ 247.203 Date of Valuation

When property is taken by inverse condemnation, the valuation of the property taken is at the date of the trial, not the date of the taking. The owner is entitled to any increase in value between the date of taking and the time of trial [*Mehl v. People ex rel. Dep't of Pub. Wks. (1975) 13 Cal. 3d 710, 719-720, 119 Cal. Rptr. 625, 532 P.2d 489* ; *Pierpont Inn, Inc. v. State of California (1969) 70 Cal. 2d 282, 296-298, 74 Cal. Rptr. 521, 449 P.2d 737* (overruled on other grounds in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp. (1997) 16 Cal. 4th 694, 698-699, 66 Cal. Rptr. 2d 630, 941 P.2d 809*)].

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§ 247.204 Jury Trial

[1] Eminent Domain Actions in General

The right to a jury trial on the issue of just compensation is guaranteed by *Cal. Const., art. I, § 19*. All other issues must be tried by the court. Therefore, even when liability is a completely factual issue, it will be determined by the court [*Marshall v. Department of Water & Power (1990) 219 Cal. App. 3d 1124, 1139-1141, 268 Cal. Rptr. 559]* .

[2] Proceedings Under 42 U.S.C. § 1983 (Federal Civil Rights Act)

In an inverse condemnation proceeding brought under *42 U.S.C. § 1983* against a city for deprivation of civil rights resulting from a refusal to allow land to be developed, the United States Supreme Court found there was a right to a jury trial on the issues of liability and whether the challenged land use decision substantially advanced public interests [*City of Monterey v. Del Monte Dunes at Monterey, Inc. (1999) 526 U.S. 687, 715-721, 119 S. Ct. 1624, 143 L. Ed. 2d 882]* . The case involved a 37.6-acre, ocean-front parcel in Monterey. After the city imposed more rigorous demands each of the five times it rejected applications to develop the land, the owners commenced suit under *§ 1983*. The Court found it was proper to submit to the jury the questions of liability regarding the regulatory takings claim. Although *§ 1983* does not itself confer the jury right, the *Seventh Amendment* does, and the owners' *§ 1983* suit was an action at law under the *Seventh Amendment* [*City of Monterey v. Del Monte Dunes at Monterey, Inc. (1999) 526 U.S. 687, 716, 119 S. Ct. 1624, 143 L. Ed. 2d 882]* . It then determined that the particular liability issue under consideration--whether the city's decision to reject the development plan bore a reasonable relationship to the city's proffered justifications--was proper for the jury to determine [*City of Monterey v. Del Monte Dunes at Monterey, Inc. (1999) 526 U.S. 687, 721, 119 S. Ct. 1624, 143 L. Ed. 2d 882]* .

The *Del Monte Dunes* Court noted the limitations of its holding. It did not address the jury's role in an ordinary inverse condemnation suit. Further, a federal court cannot entertain a takings claim under *§ 1983* unless the complaining owner has been denied an adequate post-deprivation remedy. At the time of the city's actions, California did not provide a compensatory remedy for temporary regulatory takings, but California now provides a facially adequate procedure for obtaining just compensation for temporary takings such as the one at issue [*City of Monterey v. Del Monte Dunes at Monterey, Inc. (1999) 526 U.S. 687, 721, 119 S. Ct. 1624, 143 L. Ed. 2d 882]* .

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§ 247.205 Costs and Attorney's Fees

[1] Right to Reimbursement

The recovery of litigation expenses in inverse condemnation cases was broadened by the amendment in 1995 of *Code Civ. Proc. § 1036*. Under the revised provision, in any inverse condemnation proceeding, the court in rendering judgment for the plaintiff by awarding compensation, or the attorney representing the public entity who effects a settlement of the proceeding, must determine and award or allow to the plaintiff, as a part of the judgment or settlement, a sum that will, in the opinion of the court, reimburse the plaintiff for reasonable costs, disbursements, and expenses, including reasonable attorney's, appraisal, and engineering fees actually incurred because of the proceeding in the trial court or in any appellate proceeding in which the plaintiff prevails on any issue in the proceeding [*Code Civ. Proc. § 1036*].

By providing that attorney's fees are recoverable on appeal if the plaintiff prevails on any issue in the appellate proceeding, the revised statutory provision abrogated the contrary ruling in *Holtz v. San Francisco Bay Area Rapid Transit Dist. (1976) 17 Cal. 3d 648, 658-659* [*see* Stats. 1995, ch. 181, § 2]. The 1995 amendment also expressly provided for the first time that the plaintiff may recover litigation expenses in any inverse condemnation proceeding when the plaintiff is successful. This changed the rule of some cases decided under the earlier version of § 1036, which held that litigation expenses were recoverable only when the taking was of an interest in real property. Thus, damages could not be awarded for unreasonable precondemnation delay [*see, e.g., Stone v. City of Los Angeles (1975) 51 Cal. App. 3d 987, 997-998, 124 Cal. Rptr. 822]* .

The right to litigation expenses under *Code Civ. Proc. § 1036* includes the right to recover for support services, such as secretarial and paralegal [*Salton Bay Marina, Inc. v. Imperial Irrigation Dist. (1985) 172 Cal. App. 3d 914, 950-951, 218 Cal. Rptr. 839]* . It also includes the right to litigation expenses incurred in recovering damages to personal property when incident to an inverse action for real property damage [*Imperial Cattle Co. v. Imperial Irrigation Dist. (1985) 167 Cal. App. 3d 263, 277, 213 Cal. Rptr. 622]* .

The phrase in *Code Civ. Proc. § 1036* allowing recovery of litigation expenses "because of that proceeding" authorizes

litigation expenses in the inverse condemnation action and in any proceeding arising from the inverse condemnation action. Thus, inverse condemnees may recover their litigation expenses when the public agency's conduct requires them to bring a proceeding to enforce the underlying inverse condemnation judgment [*Downen's, Inc. v. City of Hawaiian Gardens Redevelopment Agency (2001) 86 Cal. App. 4th 856, 862, 103 Cal. Rptr. 2d 644]* . However, the Legislature's inclusion of the words "disbursements" and "expenses" in *Code Civ. Proc. § 1036* did not expand the range of recoverable costs, disbursements, and expenses beyond the ordinary costs recoverable under *Code Civ. Proc. § 1033.5*. The words "disbursements" and "expenses" have meanings that are the same as, or at least substantially similar to, the word "costs." Therefore the phrase "costs, disbursements, and expenses" in *Code Civ. Proc. § 1036* does not have a broader meaning than the word "costs" [*Ferrell v. County of San Diego (2001) 90 Cal. App. 4th 537, 543, 108 Cal. Rptr. 2d 681* (no recovery of postage, telephone charges, or photocopying expenses)].

When a person brings an action in inverse condemnation and loses, he or she is not constitutionally entitled to costs [*City of Los Angeles v. Ricards (1973) 10 Cal. 3d 385, 391, 110 Cal. Rptr. 489, 515 P.2d 585]* , and the public entity may recover its costs [*Smith v. County of Los Angeles (1989) 214 Cal. App. 3d 266, 296-297, 262 Cal. Rptr. 754]* .

Although *Code Civ. Proc. § 998*, dealing with statutory settlement offers in ordinary civil litigation [*see* Ch. 520, *Settlement and Release*], does not apply to eminent domain proceedings [*Code Civ. Proc. § 998(g)*], one court has held that inverse condemnation actions are not the equivalent of eminent domain proceedings and that litigation expenses may be awarded the defendant under *Code Civ. Proc. § 998* in inverse condemnation cases when the plaintiff is unsuccessful [*Goebel v. City of Santa Barbara (2001) 92 Cal. App. 4th 549, 558-559, 111 Cal. Rptr. 2d 901]* .

[2] Calculation of Attorney's Fees

In calculating the attorney's fees, the starting point must be a calculation of the attorney's services in terms of the time he or she has expended on the case [*Salton Bay Marina, Inc. v. Imperial Irrigation Dist. (1985) 172 Cal. App. 3d 914, 953-954, 218 Cal. Rptr. 839* ; *Aetna Life & Casualty Co. v. City of Los Angeles (1985) 170 Cal. App. 3d 865, 881, 216 Cal. Rptr. 831]* . Additional factors to consider are the nature of the litigation, contingent nature of the award, difficulty, amount involved, skill required in its handling, skill employed, attention given, success or failure of attorneys' efforts, attorneys' skill and learning, including experience in the particular type of work demanded, and novelty of the theories presented. Factors enumerated in cases dealing with a fee award under the private attorney general theory may also be considered [*Salton Bay Marina, Inc. v. Imperial Irrigation Dist. (1985) 172 Cal. App. 3d 914, 957-958, 218 Cal. Rptr. 839* ; *see Aetna Life & Casualty Co. v. City of Los Angeles (1985) 170 Cal. App. 3d 865, 880-881, 216 Cal. Rptr. 831]* .

Some cases have regarded the existence of a contingent fee contract as either irrelevant or as only one factor to consider when determining a reasonable attorney's fee [*Salton Bay Marina, Inc. v. Imperial Irrigation Dist. (1985) 172 Cal. App. 3d 914, 953, 218 Cal. Rptr. 839* (criticizing *Glendora Community Redevelopment Agency v. Demeter (1984) 155 Cal. App. 3d 465, 202 Cal. Rptr. 389* , which awarded attorney's fees based on contingency fee arrangement found reasonable in light of other factors considered); *see Aetna Life & Casualty Co. v. City of Los Angeles (1985) 170 Cal. App. 3d 865, 880-881, 216 Cal. Rptr. 831* (award of 20 percent based on contingency fee agreement and calculated on top of gross award already including an amount for attorney's fees also figured at 20 percent was excessive and improper)]. However, in a later case the court reversed an award of fees and remanded the action for the plaintiff to present evidence of the amount of fees she was actually obligated to pay under her contingency fee agreement [*Andre v. City of West Sacramento (2001) 92 Cal. App. 4th 532, 538, 111 Cal. Rptr. 2d 891]* . The court explained that under the reasoning of *Salton Bay Marina*, the court must first determine what fees were actually incurred, and then must assess whether these fees were reasonable. In other words, the fees actually incurred are a ceiling to any fee award. Fees may be reduced because they are unreasonable and pose an unnecessary burden on public funds, but they cannot be increased beyond what was "actually incurred" [*Andre v. City of West Sacramento (2001) 92 Cal. App. 4th 532, 537, 111 Cal. Rptr. 2d 891]* .

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§ 247.206 Interest

A plaintiff in an inverse condemnation action is entitled to interest on the judgment from the date of the taking rather than from the date of the judgment. Without this interest, plaintiff would not receive full compensation for the taking [*Youngblood v. Los Angeles County Flood Control Dist. (1961) 56 Cal. 2d 603, 611-612, 15 Cal. Rptr. 904, 364 P.2d 840]* . However, when the taking occurs over a period of time, interest should be awarded from the date that the taking became appreciable, not from the date of the first incursion on plaintiff's property. Thus, when freeway construction caused drainage onto plaintiff's land but the damage was not appreciable until four years later, interest should have been awarded from the date the damage became appreciable, not from the date of construction [*Mehl v. People ex rel. Dep't of Public Works (1975) 13 Cal. 3d 710, 720, 119 Cal. Rptr. 625, 532 P.2d 489]* .

When the damages are measured by costs of repair and the property has been valued at the date of trial, interest should only be awarded from the date of trial; the plaintiff is not entitled to interest on money not yet spent [*Leaf v. City of San Mateo (1984) 150 Cal. App. 3d 1184, 1191-1193, 198 Cal. Rptr. 447]* .

Interest must be computed at the apportionment rate for the immediately preceding six-month period [*Code Civ. Proc. §§ 1268.311, 1268.350(b)*]. The "apportionment rate" means the apportionment rate calculated by the Controller as the rate of earnings by the Surplus Money Investment Fund for each calendar quarter [*Code Civ. Proc. § 1268.350(a)*]. The interest payable for each calendar quarter draws interest computed as described above, in each succeeding calendar quarter for which interest is due [*Code Civ. Proc. § 1268.360*]. Each district office of the Department of Transportation must quote the apportionment rate to any person on request [*Code Civ. Proc. § 1268.350(c)*].

The "floating" apportionment interest rate formula defined and established in *Code Civ. Proc. § 1268.350* establishes a "floor" for postjudgment interest. In a condemnation case, the trial court must independently determine the extant market rate of interest and then apply the higher of (1) that market rate of interest, or (2) the legislatively created apportionment interest rate set forth in *Code Civ. Proc. § 1268.350*. The apportionment interest rate earned by the state on its Surplus Money Investment Fund is itself independent evidence of market rates of interest upon which a trial court may rely in independently determining extant market rates of interest [*People ex rel. Dep't of Transp. v. Diversified Properties Co. III (1993) 14 Cal. App. 4th 429, 448-451, 17 Cal. Rptr. 2d 676]* .

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§ 247.207 When Separate Action Required

When an eminent domain action has been dismissed by the public entity, a separate action for unreasonable precondemnation delay damages must be brought [*Redevelopment Agency v. Heller (1988) 200 Cal. App. 3d 517, 521-522, 246 Cal. Rptr. 160*]. If the condemnation proceeding goes to final judgment, precondemnation delay damages should be sought as a part of the eminent domain award. A judgment in the eminent domain action bars a later action for delay damages [*Klopping v. City of Whittier (1972) 8 Cal. 3d 39, 58, 104 Cal. Rptr. 1, 500 P.2d 1345* ; *Redevelopment Agency v. Contra Costa Theatre, Inc. (1982) 135 Cal. App. 3d 73, 79, 185 Cal. Rptr. 159*].

Before revision of the Eminent Domain Law, cases held that inverse condemnation damages had to be sought in the answer to the eminent domain action [*see* *Richmond Redevelopment Agency v. Western Title Guaranty Co. (1975) 48 Cal. App. 3d 343, 350, 122 Cal. Rptr. 434* ; *People ex rel. Dept. Pub. Wks. v. Peninsula Enterprises, Inc. (1979) 91 Cal. App. 3d 332, 353, 153 Cal. Rptr. 895*]. However, such damages now may be sought by cross-complaint. Under the current statutory scheme, the only requirement that damages be specifically claimed by answer to an eminent domain complaint is that when the defendant seeks compensation for loss of goodwill, the answer must specifically state that the defendant claims compensation under *Code Civ. Proc. § 1263.510*, but the amount of such damage does not have to be alleged [*Code Civ. Proc. § 1250.320*; *San Diego Metropolitan Transit Development Board v. RV Communities (2007) 158 Cal. App. 4th 313, 335, 69 Cal. Rptr. 3d 705* ; *see also* *Red Mountain LLC v. Fallbrook (2006) 143 Cal. App. 4th 333, 355-356, 48 Cal. Rptr. 3d 875* (eminent domain action did not preclude defendant from pursing inverse condemnation action seeking damages for diminution in value of its land that occurred before agency decided to directly condemn property)].

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§ 247.208 Defenses

[1] Police Power

A public entity's exercise of the police power [*Cal. Const., art. XI, § 7*] can be a defense to an inverse condemnation action. First, the enactment of zoning and other land use regulation is based on the police power, and thus the defense of the validity of this regulation is based on the police power.

Second, when private property is directly taken or damaged in an emergency situation by the government due to public necessity and to avert impending peril, the damages are noncompensable [*Holtz v. Superior Court (1970) 3 Cal. 3d 296, 305, 90 Cal. Rptr. 345, 475 P.2d 441]* . For these purposes, an "emergency" is an unforeseen situation calling for immediate action; the term comprehends a situation of grave character and serious moment, and is evidenced by an imminent and substantial threat to public health or safety [*Los Osos Valley Associates v. City of San Luis Obispo (1994) 30 Cal. App. 4th 1670, 1681, 36 Cal. Rptr. 2d 758* , citing *Sonoma County Organization etc. Employees v. County of Sonoma (1991) 1 Cal. App. 4th 267, 276-277, 1 Cal. Rptr. 2d 850]* . Examples of emergency situations include the demolition of all or parts of buildings to prevent the spread of fire or the destruction of diseased animals or vegetation that jeopardize life or health [*Holtz v. Superior Court (1970) 3 Cal. 3d 296, 305 n.10, 90 Cal. Rptr. 345, 475 P.2d 441* ; *Hunter v. Adams (1960) 180 Cal. App. 2d 511, 524, 4 Cal. Rptr. 776]* .

Third, exercise of the police power defense also applies when a public entity destroys property inadvertently incident to its attempt to protect the public safety. For example, the defense protected the state from liability for damage done to automobiles caused by the state's widespread aerial spraying of harsh chemicals in an attempt to eradicate the medfly [*see Farmers Ins. Exchange v. State of California (1985) 175 Cal. App. 3d 494, 501-502, 221 Cal. Rptr. 225]* . The exercise of police power defense also protected a reclamation district that cut breaches in a levee in an effort to divert flood water during torrential rains, resulting in the flooding of the plaintiffs' property. The police power exception applied because the district had no prior knowledge that the levee system might fail, and there was no evidence that actions taken by the district before the flooding caused the failure [Thousand Trails, Inc. v. California Reclamation Dist. Number 17 *(2004) 124 Cal. App. 4th 450, 463-464, 21 Cal. Rptr. 3d 196* ; *compare Odello Bros. v. County of Monterey (1998) 63 Cal. App. 4th 778, 791, 73 Cal. Rptr. 2d 903* (police power exception inapplicable when county had

prior knowledge of flood threat)].

Even though a city can summarily destroy an imminently dangerous building, it is, however, liable for the value of the building if it fails to establish at the trial of the inverse condemnation action that the building was imminently dangerous [*Leppo v. City of Petaluma (1971) 20 Cal. App. 3d 711, 716-718, 97 Cal. Rptr. 840]* .

[2] Estoppel

When a public entity acquires property by a condemnation action or by accepting a deed from the owner, it is assumed that the owner has received compensation for all reasonably foreseeable damage resulting from the taking. The owner is therefore estopped from claiming damages for any such reasonably foreseeable damages in a later action for inverse condemnation [*Reinking v. Orange County (1970) 9 Cal. App. 3d 1024, 1030, 88 Cal. Rptr. 695]* . Thus, when the defense of estoppel is raised, the issue becomes whether or not the damages sought in the inverse condemnation action were foreseeable when the property was acquired. On this issue, it has been held that a landslide was not foreseeable [*Albers v. County of Los Angeles (1965) 62 Cal. 2d 250, 265-266, 42 Cal. Rptr. 89, 398 P.2d 129]* , but that flood damage to property located in a flood-plain zone was foreseeable [*Ellena v. State of California (1977) 69 Cal. App. 3d 245, 255-257, 138 Cal. Rptr. 110]* . The foreseeability rule is only applicable when the damage to plaintiff's remaining property is caused by a public project undertaken on land taken from the plaintiff. If the damage to plaintiff's property is caused by a project undertaken on land taken from others, the defense of estoppel is not available [*Cox v. State of California (1970) 3 Cal. App. 3d 301, 308-309, 82 Cal. Rptr. 896]* .

[3] Failure to Exhaust Administrative Remedies

Failure to exhaust administrative remedies may be a defense to an action for inverse condemnation when, for instance, the property owner fails to seek a variance from the ordinance in question [*Pan Pacific Properties, Inc. v. County of Santa Cruz (1978) 81 Cal. App. 3d 244, 249-253, 146 Cal. Rptr. 428]* , or fails to seek a building permit to develop allegedly undevelopable property [*People ex rel. State Public Works Bd. v. Superior Court (1979) 91 Cal. App. 3d 95, 101-105, 154 Cal. Rptr. 54]* .

In an inverse condemnation action, whether or not joined with an action in administrative mandamus [*see Code Civ. Proc. § 1094.5*] challenging an ordinance or its application to the plaintiff's property, the 90-day statute of limitations period set forth in *Gov. Code § 66499.37* is controlling. Therefore, unless the action alleges the existence of a final judgment establishing that there has been a compensable taking of the plaintiff's land, any action to attack, review, set aside, void, or annul the decision of an advisory agency, appeal board, or legislative body concerning a subdivision must be commenced and service of summons effected within 90 days [*see Hensler v. City of Glendale (1994) 8 Cal. 4th 1, 7, 32 Cal. Rptr. 2d 244, 876 P.2d 1043]* .

Administrative remedies need not be exhausted when the challenge is to the constitutionality of the act creating the agency involved, because the agency would be unlikely to hold that its creation was unconstitutional [*State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 250-251, 115 Cal. Rptr. 497, 524 P.2d 1281]* . Also, administrative remedies need not be exhausted when this action would clearly be futile [*Ogo Associates v. Torrance (1974) 37 Cal. App. 3d 830, 834, 112 Cal. Rptr. 761* (no need to seek variance when ordinance passed to stop project)].

[4] Prematurity of Claim

An essential prerequisite to a claim for regulatory taking is that the claim must be "ripe" for adjudication. This so-called "ripeness doctrine" requires a plaintiff to demonstrate that he or she has both (1) received a final decision regarding the application of the challenged regulations to the subject property from the government entity charged with implementing the regulations, and (2) sought compensation through the administrative procedures provided for doing so [*Suitum v. Tahoe Regional Planning Agency (1997) 520 U.S. 725, 733-734, 117 S. Ct. 1659, 137 L. Ed. 2d 980 , citing*

Williamson County Regional Planning Comm'n v. Hamilton Bank (1985) 473 U.S. 172, 186, 194, 105 S. Ct. 3108, 87 L. Ed. 2d 126] .

The first requirement follows from the principle that only a regulation that goes too far results in a taking under the *Fifth Amendment* [*see, e.g.,* *MacDonald, Sommer & Frates v. Yolo County (1986) 477 U.S. 340, 348, 106 S. Ct. 2561, 91 L. Ed. 2d 285* ; *Lucas v. S.C. Coastal Council (1992) 505 U.S. 1003, 1014-1019, 112 S. Ct. 2886, 120 L. Ed. 2d 798]* . For example, a taking claim was not ripe when the defendant had disapproved the plaintiff's revised preliminary plat, but the plaintiff had not sought variances that could have resolved at least some of the defendant's underlying objections to the plat [*Williamson County Regional Planning Comm'n v. Hamilton Bank (1985) 473 U.S. 172, 186-191, 105 S. Ct. 3108, 87 L. Ed. 2d 126]* . Denial of an informal request for development is not a final adjudication and thus a taking claim was premature [*Lake Nacimiento Ranch Co. v. County of San Luis Obispo (9th Cir. 1987) 841 F.2d 872]* . However, a takings claim was ripe when it was clear that the plaintiff was barred from engaging in any filling or development activity on wetlands located on the property and an estimate of the value of the uplands portion of the property was undisputed. The ripeness doctrine required the plaintiff to explore development possibilities on the upland parcel only if there was uncertainty as to the land's permitted use, and there was no ambiguity as to the extent of permitted development on the property, either on the wetlands or the uplands [*Palazzolo v. Rhode Island (2001) 533 U.S. 606, 632, 121 S. Ct. 2448, 150 L. Ed. 2d 592]* .

The second requirement stems from the *Fifth Amendment's* proviso that only takings without just compensation infringe that Amendment. If an adequate procedure is provided for seeking just compensation, the property owner cannot claim a violation of the *Just Compensation Clause* until it has used the procedure and been denied just compensation [*Suitum v. Tahoe Regional Planning Agency (1997) 520 U.S. 725, 734, 117 S. Ct. 1659, 137 L. Ed. 2d 980* ; *see* *Williamson County Regional Planning Comm'n v. Hamilton Bank (1985) 473 U.S. 172, 186, 194-196, 105 S. Ct. 3108, 87 L. Ed. 2d 126]* .

Under the "futility exception," the requirement that a development plan be submitted is excused if it would be an idle and futile act. However, at least one meaningful application must have been made before judicial review is appropriate [*Kinzli v. City of Santa Cruz (9th Cir. 1987) 818 F.2d 1449* (holding that plaintiff could not rely on futility exception because its application, abandoned at an early stage, was not meaningful)]. There is a factual issue as to futility when the county acts peremptorily to rezone property to open space in response to a lot-split application [*Twain Harte Associates, Ltd. v. County of Tuolumne (1990) 217 Cal. App. 3d 71, 90-92, 265 Cal. Rptr. 737]* .

In *Palazzolo v. Rhode Island (2001) 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592* , the U.S. Supreme Court addressed the scope of *Williamson County*, discussed *above*. The Supreme Court explained in *Palazzolo* that the ripeness holding of *Williamson County* is not an exhaustion requirement per se. Rather, it is a requirement only that the "land-use authority [be given] an opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation" [*Palazzolo v. Rhode Island (2001) 533 U.S. 606, 620, 121 S. Ct. 2448, 150 L. Ed. 2d 592]* . The Court stated that "once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened" [*Palazzolo v. Rhode Island (2001) 533 U.S. 606, 620, 121 S. Ct. 2448, 150 L. Ed. 2d 592]* . *Palazzolo* distinguished *Williamson County* on the ground that case involved the denial of a large project, leaving the question whether a scaled-back submission or an application for a variance would be accepted. In contrast, it was clear that the land use authority had interpreted its regulations to bar the plaintiff in *Palazzolo* from engaging in any development activity [*Palazzolo v. Rhode Island (2001) 533 U.S. 606, 620, 121 S. Ct. 2448, 150 L. Ed. 2d 592]* .

The U.S. Supreme Court has declined to create an exception to the full faith and credit statute [*28 U.S.C. § 1738*] in order to provide a federal forum for litigants who are precluded from advancing takings claims in federal court until the entry of a final state judgment denying just compensation. Thus, the full faith and credit rule bars relitigation in federal court of issues decided by the state court that are dispositive of the federal takings claims [*San Remo Hotel, L.P. v. City and County of San Francisco (2005) 545 U.S. 323, 125 S. Ct. 2491, 2505, 162 L. Ed. 2d 315]* . However, plaintiffs

are not precluded from raising facial challenges requesting relief other than the provision of "just compensation" directly in federal court, or may reserve their facial claims while pursuing their as-applied claims along with their petition for writ of administrative mandamus in state court [*San Remo Hotel, L.P. v. City and County of San Francisco (2005) 545 U.S. 323, 125 S. Ct. 2491, 2506, 162 L. Ed. 2d 315]* .

If the claim is based on a federal taking, the property owner must have availed himself or herself of remedies under the Tucker Act [*see 28 U.S.C. § 1491(a)*] before filing an eminent domain action or the action is premature [*Preseault v. ICC (1990) 494 U.S. 1, 11-17, 110 S. Ct. 914, 108 L. Ed. 2d 1]* .

[5] Statute of Limitations

The statute of limitations for an action to recover for physical damage to private property under *Cal. Const., art. I, § 19*, is three years [*Code Civ. Proc. § 338(j)*]. If the cause of action is not based on physical damage, there is authority that the five-year period required to obtain title by adverse possession [*Code Civ. Proc. § 318*] is applicable [*Frustuck v. City of Fairfax(1963) 212 Cal. App. 2d 345, 373-374, 28 Cal. Rptr. 357]* . When an inverse condemnation action is based on continuous and repeated damage to real property, the cause of action does not accrue, and thus the statute of limitations does not begin to run, until the situation has stabilized [*Lee v. Los Angeles County Metro. Transit Auth. (2003) 107 Cal. App. 4th 848, 858, 132 Cal. Rptr. 2d 444]* .

If the challenge is to the facial validity of a regulation or ordinance, the statute of limitations runs from the date the regulation or ordinance becomes effective. If the challenge is to the application of the regulation to a specific piece of property, the statute of limitations runs from the date the administrative decision became final [*see Hensler v. City of Glendale (1994) 8 Cal. 4th 1, 22, 32 Cal. Rptr. 2d 244, 876 P.2d 1043]* .

When the cause of action is based on a regulatory taking, the limitations period is the time for challenging the regulatory action. When the Coastal Commission granted a permit conditioned on an easement for access and the landowner did not challenge the condition by a petition for a writ within the 60-day period for challenging Commission action, a later action in inverse condemnation was barred on res judicata grounds. The administrative decision was final and the permittee's failure to challenge it barred any later action. There is no futility exception to res judicata principles [*California Coastal Com. v. Superior Court (1989) 210 Cal. App. 3d 1488, 1495-1499, 258 Cal. Rptr. 567]* . When the claim is that the Coastal Commission's regulatory action was a taking of billboards, the claim must be brought by a petition in administrative mandamus within the time limit for such a petition. A later action is barred by the res judicata doctrine [*Patrick Media Group, Inc. v. California Coastal Com. (1992) 9 Cal. App. 4th 592, 606-613, 11 Cal. Rptr. 2d 824]* .

When the action is based on a latent construction defect, the 10-year limitations period of *Code Civ. Proc. § 337.15* is applicable [*Magnuson-Hoyt v. County of Contra Costa (1991) 228 Cal. App. 3d 139, 142-144, 278 Cal. Rptr. 770]* .

[6] Res Judicata

When a property owner brings an action seeking to invalidate interim development regulations and damages and the trial court invalidates the regulations but does not award damages, a second inverse condemnation action for damages is barred by res judicata because the damages could have been awarded in the prior action, which was based on the same primary right [*Tensor Group v. City of Glendale (1993) 14 Cal. App. 4th 154, 160, 17 Cal. Rptr. 2d 639]* .

[7] Sovereign Immunity Not a Defense

An action in inverse condemnation is based on constitutional provisions forbidding takings without just compensation [*U.S. Const., Amend. V*; Cal. *Const., art. I, § 19*]. Therefore, inverse condemnation actions are not subject to the defense of sovereign immunity or to the other provisions of the Tort Claims Act [*Barbaccia v. Santa Clara County (N.D. Cal.*

1978) 451 F. Supp. 260, 267 ; *see Bacich v. Board of Control (1943) 23 Cal. 2d 343, 346, 144 P.2d 818]* .

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[Reserved]

§§ 247.209[Reserved]

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§ 247.220 California Points and Authorities

For forms of points and authorities relating to eminent domain, see California Points and Authorities, Ch. 95, *Eminent Domain* (Matthew Bender)

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20-247 California Forms of Pleading and Practice--Annotated § 247.221

§ 247.221 Forms of Discovery

For forms of interrogatories for use in eminent domain proceedings, see Bender's Forms of Discovery, *Eminent Domain* (Matthew Bender)

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20-247 California Forms of Pleading and Practice--Annotated § 247.222

§ 247.222 California Legal Forms

For legal forms relating to condemnation of property, see California Legal Forms, Ch. 22, *Options to Purchase Real Property*; Ch. 23, *Real Property Sales Agreements*; Ch. 28A, *Easements and Licenses*; Ch. 28C, *Covenants, Restrictions, and Conditions*; Ch. 86, *Agreements for Professional Services* (Matthew Bender)

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§ 247.223 California Real Estate

For discussion of eminent domain, see California Real Estate Law & Practice, Ch. 500, *Introduction to the Eminent Domain Law* , et seq. (Matthew Bender)

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20-247 California Forms of Pleading and Practice--Annotated § 247.224

§ 247.224 California Environmental Law and Land Use Practice

For discussion of takings issues, see California Environmental Law and Land Use Practice, Ch. 65, *Takings and Other Constitutional Controls* (Matthew Bender)

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20-247 California Forms of Pleading and Practice--Annotated § 247.225

§ 247.225 Judicial Council of California Civil Jury Instructions (CACI)

For jury instructions regarding eminent domain, including instructions on, for example, "fair market value," precondemnation damages, and severance damages, see Judicial Council of California Civil Jury Instructions (CACI), Series 3500 (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions

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20-247 California Forms of Pleading and Practice--Annotated § 247.226

§ 247.226 Federal Constitution

Requirement of just compensation for private property taken for public use. *U.S. Const., Amend. V*

Prohibition against state's deprivation of property without due process of law. *U.S. Const., Amend. XIV, § 1*

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§ 247.227 State Constitution

Acquiring, possessing, and protecting property is inalienable right. *Cal. Const., art. I, § 1*

Prohibition against deprivation of property without due process of law. *Cal. Const., art. I, § 15*

Private property is not permitted to be taken or damaged for public use without just compensation. *Cal. Const., art. I, § 19*

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20-247 California Forms of Pleading and Practice--Annotated § 247.228

§ 247.228 State Statutes

[1] Public Utility Service

Acquisition of appurtenant easement by eminent domain to provide utility service to private person's property. *Civ. Code § 1001*

[2] Eminent Domain Law

General provisions. *Code Civ. Proc. §§ 1230.010-1230.070*

Principles of construction. *Code Civ. Proc. §§ 1235.010-1235.070*

Definitions. *Code Civ. Proc. §§ 1235.110-1235.210*

Provisions governing right to take. *Code Civ. Proc. §§ 1240.010-1240.700*

Precondemnation entry and tests. *Code Civ. Proc. §§ 1245.010-1245.060*

Resolutions of necessity and consent. *Code Civ. Proc. §§ 1245.210-1245.390*

General procedural provisions governing eminent domain proceedings, *e.g.*, jurisdiction, venue, parties, and pleadings. *Code Civ. Proc. §§ 1250.010-1250.345*

Objections to right to take. *Code Civ. Proc. §§ 1250.350-1250.370*

Settlement offers. *Code Civ. Proc. § 1250.410*

Alternative Dispute Resolution encouraged. *Code Civ. Proc. §§ 1250.420, 1250.430*

Deposit and withdrawal of probable compensation. *Code Civ. Proc. §§ 1255.010-1255.280*

Possession before judgment. *Code Civ. Proc. §§ 1255.410-1255.480*

Discovery and exchange of valuation data. *Code Civ. Proc. §§ 1258.010-1258.300*

Procedures for determining right to take and compensation. *Code Civ. Proc. §§ 1260.010-1263.250*

Provisions governing determination of compensation. *Code Civ. Proc. §§ 1263.010-1263.770*

Provisions governing determination of compensation for divided interests. *Code Civ. Proc. §§ 1265.010-1265.420*

Postjudgment procedures. *Code Civ. Proc. §§ 1268.010-1268.720*

Arbitration of compensation when property acquired for public use. *Code Civ. Proc. §§ 1273.010-1273.050*

Rules of evidence applicable to eminent domain proceedings. *Evid. Code §§ 810-824*

Provisions governing relocation assistance. *Gov. Code § 7260 et seq.*

Property Acquisition Law (property acquisition by State Public Works Board). *Gov. Code § 15850 et seq.*

Cancellation of taxes on exempt property. *Rev. & Tax. Code §§ 5081-5091*

[3] Real Estate Contract Arbitration

Nothing in *Code Civ. Proc. § 1298* (governing arbitration provisions in real estate contracts) is to be construed to diminish authority of court with regard to real property transactions involving court supervision or jurisdiction, including, but not limited to, eminent domain. *Code Civ. Proc. § 1298(d)*

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§ 247.229 Decisions

[1] Abandonment

Statutory provision authorizing trial court to set aside abandonment was not unconstitutional delegation of municipal functions to judiciary and private person. *Torrance v. Superior Court (1976) 16 Cal. 3d 195, 209, 127 Cal. Rptr. 609, 545 P.2d 1313*

Condemnee's motion to set aside abandonment filed pursuant to *Code Civ. Proc. § 1268.510(b)* was properly denied when there was no evidence that condemnee had substantially changed its position to its detriment in justifiable reliance on condemnation proceeding. *Los Angeles Unified Sch. Dist. v. Trump Wilshire Assocs. (1996) 42 Cal. App. 4th 1682, 1690-1691, 50 Cal. Rptr. 2d 229*

Measure of damages on abandonment by public entity is loss of use of property during period public entity was in possession. *County of Madera v. Forrester (1981) 115 Cal. App. 3d 57, 62-64, 170 Cal. Rptr. 896*

[2] Attorney's Fees and Litigation Expenses

Mathematical relationship between condemnor's highest offer and award is only one factor that should enter into determination whether to award litigation expenses; trial courts should not find unreasonableness as a matter of law based solely on numerical figures, but should also consider good faith, care, and accuracy in how offer and amount of demand were determined. *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp. (1997) 16 Cal. 4th 694, 720-721, 66 Cal. Rptr. 2d 630, 941 P.2d 809*

Award of attorney's fees on ground plaintiff, by amending complaint, had abandoned its demand for grazing and water rights on land was improper when amendment enlarged original demand in that it sought to acquire fee simple estate in parcel. *Merced Irrigation Dist. v. Woolstenhulme (1971) 4 Cal. 3d 478, 505, 93 Cal. Rptr. 833, 483 P.2d 1*

Award of litigation expenses was unreasonable when owner demanded amount that was $800,000 more, and five times greater, than amount awarded at trial. *County of Contra Costa v. Pinole Point Properties, Inc. (1994) 27 Cal. App. 4th 1105, 1115, 33 Cal. Rptr. 2d 38*

Award of attorney's fees is not limited to fee based on hourly rate; court is allowed to increase fee based on other factors, including complexity and novelty of litigation, need to act quickly, critical importance of litigation, and result obtained. *City of Oakland v. Oakland Raiders (1988) 203 Cal. App. 3d 78, 83-85, 249 Cal. Rptr. 606*

Trial court is not required to set attorney's fees by multiplying the fee based on hours spent by a multiplier of four; fee set based only on hours spent is reasonable. *State of California v. Meyer (1985) 174 Cal. App. 3d 1061, 1072-1075, 220 Cal. Rptr. 884*

Award of attorney fees under *Code Civ. Proc. § 1268.610*, based on contingent fee contract, will be upheld if trial court has also considered other factors necessary to determination of reasonable attorney fees. *Glendora Community Development Agency v. Demeter (1984) 155 Cal. App. 3d 465, 472-473, 202 Cal. Rptr. 389*

Attorney is not entitled to fees under contingent fee contract if condemnation is abandoned but when there is novation of contract before abandonment, attorney is entitled to payment for services performed before abandonment. *People ex rel. Dep't Public Works v. Metcalf (1978) 79 Cal. App. 3d 1, 8-9, 144 Cal. Rptr. 657*

Defendant was entitled to award of reasonable attorney's fees after abandonment of condemnation action when motions filed by attorney were filed in good-faith belief that they were reasonable and necessary to protect defendant's interest. *People ex rel. Dep't Public Works v. Metcalf (1978) 79 Cal. App. 3d 1, 12, 144 Cal. Rptr. 657*

[3] Authority to Condemn

Exercise of eminent domain power is appropriate when rationally related to conceivable public purpose. *Hawaii Housing Authority v. Midkiff (1984) 467 U.S. 229, 239-244, 104 S. Ct. 2321, 81 L. Ed. 2d 186* (regulation of oligopoly legitimate exercise of state police powers)

Finding that special assessment district for improving private road before dedication to city did not confer "general benefit" on public for assessment purposes did not detract from inherently public nature of project; thus, city properly adopted resolution of necessity condemning easement over portion of defendant's property. *City of Saratoga v. Hinz (2004) 115 Cal. App. 4th 1202, 1224, 9 Cal. Rptr. 3d 791*

Redevelopment agency did not abuse discretion in adopting resolution of necessity for taking of parcel to be transferred to business to be relocated as part of redevelopment plan; involvement of business did not render proposed taking without a public purpose. *Redevelopment Agency v. Rados (2002) 95 Cal. App. 4th 309, 315, 115 Cal. Rptr. 2d 234*

Airport authority had power to condemn property when cities delegated eminent domain power to authority through joint powers agreement. *Burbank-Glendale-Pasadena Airport Authority v. Hensler (2000) 83 Cal. App. 4th 556, 564, 99 Cal. Rptr. 2d 729*

Oil company acquired benefit of right to condemn on transferring ownership of its pipeline system to public utility company regulated by California Public *Utilities Commission. Shell Cal. Pipeline Co. v. City of Compton (1995) 35 Cal. App. 4th 1116, 1124, 41 Cal. Rptr. 2d 753*

City was precluded from condemning professional football franchise because of burden on interstate commerce. *City of Oakland v. Oakland Raiders (1985) 174 Cal. App. 3d 414, 417-422, 220 Cal. Rptr. 153*

Railroad acquiring right-of-way pursuant to Stats. 1853, ch. 72, § 28, providing for railroad's acquisition of land by condemnation, was permitted to use property acquired for any purpose railroad deems beneficial. *People ex rel. Dept. of Transportation v. Southern Pac. Transportation Co. (1978) 84 Cal. App. 3d 315, 321, 148 Cal. Rptr. 535*

Transit authority was permitted to acquire property for disposal of dredged spoils from ferry channel used in its transportation system; fact that subject property did not border on channel did not preclude transit authority's power to condemn. *Golden Gate Bridge etc. Dist. v. Muzzi (1978) 83 Cal. App. 3d 707, 713-714, 148 Cal. Rptr. 197*

Transit district's power to condemn property for water transportation system implicitly includes power to condemn for mitigation of resulting environmental effects necessitated by authorized activity. *Golden Gate Bridge etc. Dist. v. Muzzi (1978) 83 Cal. App. 3d 707, 713, 148 Cal. Rptr. 197*

State was permitted to condemn property adjoining state highway where highway was in area subject to earth slides and purpose of condemnation was to provide means of access for future repair work. *People ex rel. Dept. of Transportation v. Sullivan (1978) 78 Cal. App. 3d 120, 121-122, 144 Cal. Rptr. 100*

Mosquito abatement district had authority to purchase or condemn lands for office and corporation yard purposes. *Skreden v. Superior Court (1975) 54 Cal. App. 3d 114, 117, 126 Cal. Rptr. 411*

[4] Compensation

[a] Burden of Proof

Under *Code Civ. Proc. § 1260.210* stating that neither party bears burden of proof on issue of compensation, standard jury instruction that defendant bears burden of proof on compensation issue is no longer appropriate. *City of Los Angeles v. Decker (1977) 18 Cal. 3d 860, 872, 135 Cal. Rptr. 647, 558 P.2d 545*

Defendant in condemnation proceeding by city redevelopment agency was not permitted to contend taking of property was not for use authorized by law when public use for which property was sought was community redevelopment and no attack had been made on community redevelopment plan within 60 days of plan's adoption as required by *Health & Safety Code § 33500*. *Redevelopment Agency v. Del-Camp Inv., Inc. (1974) 38 Cal. App. 3d 836, 840-841, 113 Cal. Rptr. 762*

[b] Easements

Compensation for taking of easement is measured by loss of value to dominant estate, rather than by benefit to condemnor; if no loss of value, no compensation may be awarded. *Redevelopment Agency v. Tobriner (1989) 215 Cal. App. 3d 1087, 1098-1102, 264 Cal. Rptr. 481*

[c] Evidence

If trial court determines there is sufficient evidence of reasonable probability of rezoning to submit issue to jury, it is for the jury to determine whether there was a reasonable probability of rezoning and, if so, its effect on the market value of the property. *Metropolitan Water Dist. v. Campus Crusade for Christ, Inc. (2007) 41 Cal. 4th 954, 967, 62 Cal. Rptr. 3d 623, 161 P.3d 1175* Although city's contemplated use of property for airport parking could not be used as basis of valuation, evidence that city had present need for airport parking and that defendant's property was in area suitable for such use was admissible to show highest and best use of property by defendant. *City of Los Angeles v. Decker*

(1977) 18 Cal. 3d 860, 869, 135 Cal. Rptr. 647, 558 P.2d 545

Admission of evidence of comparable sales of property 30 to 50 miles from condemned property was proper where factors of comparability were considered and property similar to that condemned was scarce in immediate vicinity of property. *San Luis Obispo County v. Bailey (1971) 4 Cal. 3d 518, 526, 93 Cal. Rptr. 859, 483 P.2d 27*

Trial court properly excluded city's theory that proper method for disregarding influence of freeway project on value of taken property pursuant to *Code Civ. Proc. § 1263.330* was to assume project was abandoned on valuation date, and properly admitted property owners' alternative methods of valuation, which (1) disregarded influence of project on value of taken property by assuming project had never been contemplated, and (2) concluded that taken property was enhanced in value by proposed project up until date city adopted project alignment that required condemning taken property. *City of San Diego v. Barratt American, Inc. (2005) 128 Cal. App. 4th 917, 938-939, 944-945, 27 Cal. Rptr. 3d 527*

Conceptual drawings showing multiple residential development that could be built on property and testimony by expert witnesses concerning such use of property was admissible to show that highest and best use of property was multiple residential development. *San Diego Metropolitan Transit Development Board v. RV Communities (2007) 158 Cal. App. 4th 313, 347, 69 Cal. Rptr. 3d 705*

Valuation expert's failure to use "zones of value" methodology did not require exclusion of evidence; expert laid proper foundation for methodology of valuing property as a whole for multiple residential use by taking into consideration physical characteristics of dissimilar parts of property but not assigning different values to different parts. *San Diego Metropolitan Transit Development Board v. RV Communities (2007) 158 Cal. App. 4th 313, 352-353, 69 Cal. Rptr. 3d 705*

Trial court properly excluded evidence of zoning restriction precluding upzoning or development of defendant's property absent approval of highway construction project; zoning and condemning agencies were the same and restriction discriminated against defendant's property to depress its value for a future taking. *City of San Diego v. Rancho Penasquitos Partnership (2003) 105 Cal. App. 4th 1013, 1022-1023, 130 Cal. Rptr. 2d 108*

Condemnee's construction plans for condemned property are not admissible to show specific land use because fair market value is based on all reasonable available uses; but construction plans may be admissible when offered to show that plan is feasible and therefore should be considered in fixing market value. *People v. Tanczos (1996) 42 Cal. App. 4th 1215, 1218-1220, 50 Cal. Rptr. 2d 70*

Code Civ. Proc. § 1258.250, which requires parties to exchange valuation statements for each person to be called as valuation witness, applies both to expert appraisers retained by parties and to property owners who will testify as to value. *Padre Dam Municipal Water Dist. v. Burkhardt (1995) 38 Cal. App. 4th 988, 992, 45 Cal. Rptr. 2d 506*

In eminent domain proceeding brought to condemn portion of railroad's right-of-way, former *Evid. Code § 822(d)* (*now see Evid. Code § 822(a)(4)*), providing that opinion of value of property may not be based on opinion of value of other property, did not preclude use of cost of reproduction less depreciation method of valuation when other acceptable standards of valuation could not rationally be applied or would not put owner in as good a position as if property had not been taken. *People ex rel. Dept. of Transportation v. Southern Pac. Transportation Co. (1978) 84 Cal. App. 3d 315, 325-326, 148 Cal. Rptr. 535*

Information discovered after valuation date that decreased value of property must be considered by jury in determining fair market value. *San Diego County Water Authority v. Mireiter (1993) 18 Cal. App. 4th 1808, 1811-1818, 23 Cal. Rptr. 2d 455*

Valuation of easement taken by capitalization of income from other license agreement was improper; proper method was difference between before and after value of land from which easement was taken. *County Sanitation Dist. v. Watson Land Co. (1993) 17 Cal. App. 4th 1268, 1279-1282, 22 Cal. Rptr. 2d 117*

Bankruptcy sale was evidence of value when court determined that sale was freely made. *San Diego Gas & Electric Co. v. 3250 Corp. (1988) 205 Cal. App. 3d 1075, 1083, 252 Cal. Rptr. 853*

Use of evidence of rental value was proper when property had been used as quarry, which was only economic use of property, although property was not leased for quarry when taking occurred. *People ex rel. Dep't of Water Resources v. Andresen (1987) 193 Cal. App. 3d 1144, 1160-1164, 238 Cal. Rptr. 826*

Compensation is measured by loss to owner and not benefit to taker; award based on appraiser's evidence that relied on adjustments to temporally remote comparable and gave no consideration to more comparable transactions was not just and equitable. *Pacific Gas & Electric Co. v. Zuckerman (1987) 189 Cal. App. 3d 1113, 1127-1136, 234 Cal. Rptr. 630*

On issue of value of property in "before condition," when any buyer would have known that any development of the property would be contingent on some flood control project, evidence was not limited to assumption that the project built by the condemnor agency would have to be build, but was admissible on assumption that drainage measures less expensive than those actually installed by condemnor agency could have been build. *Coachella Valley Water Dist. v. Western Allied Properties, Inc. (1987) 190 Cal. App. 3d 969, 974-977, 235 Cal. Rptr. 725*

Evidence that access to property remainder was not required by resolution of necessity was admissible in support of severance damages. *Coachella Valley Water Dist. v. Western Allied Properties, Inc. (1987) 190 Cal. App. 3d 969, 978-979, 235 Cal. Rptr. 725*

Evidence of probable use that contradicts resolution of necessity is not admissible, such as evidence that jumbo jets may not use airport when resolution would permit them; plaintiff is able to introduce evidence of number of jumbo jets that may use airport. *County of San Diego v. Bressi (1986) 184 Cal. App. 3d 112, 119-120, 229 Cal. Rptr. 44*

When easements are taken, compensation is based on reduction in value of dominant estate, not on value of servient estate. *Redevelopment Agency v. Tobriner (1984) 153 Cal. App. 3d 367, 370-374, 200 Cal. Rptr. 364*

[d] Withdrawal of Deposited Funds

Defendant's consent to mortgage lender's withdraw of deposited funds to pay off his indebtedness waived defendant's objection to right to take. *Redevelopment Agency of the City of San Diego v. Mesdaq (2007) 154 Cal. App. 4th 1111, 1140, 65 Cal. Rptr. 3d 372*

Withdrawal of deposited funds is not waiver of right to seek greater compensation through inverse condemnation cross-complaint. *San Diego Metropolitan Transit Development Board v. RV Communities (2007) 158 Cal. App. 4th 313, 339, 69 Cal. Rptr. 3d 705*

[5] Generally

[a] Valuation

Partial loss of access was compensable where parcel, although not used for paved portion of freeway, constituted dirt strip or shoulder paralleling traffic lanes, it was taken as part of freeway right-of-way, and fence was placed on it to act as physical barrier to limited access freeway. *People ex rel. Dep't Public Works v. Ramos (1969) 1 Cal. 3d 261, 264,*

81 Cal. Rptr. 792, 460 P.2d 992

In quick-take eminent domain proceeding, trial court properly changed date of valuation from date governmental plaintiff deposited probable compensation to date of trial, because it was undisputed that amount of deposit was substantially less than probable amount of just compensation for condemned property. *San Diego Metropolitan Transit Development Board v. RV Communities (2007) 158 Cal. App. 4th 313, 327, 69 Cal. Rptr. 3d 705*

When water district sought to acquire easement in quick-take eminent domain proceeding, trial court erred in changing date of valuation to date of trial because property owners had adequate remedy for any deficiency in initial deposit of compensation by moving for increase. *Eastern Municipal Water District v. Superior Court (2007) 157 Cal. App. 4th 1245, 1254, 69 Cal. Rptr. 3d 314*

Closure of freeway offramp resulting in elimination of special benefit for which $20,000 had been deducted from plaintiffs' severance damages did not mean that plaintiffs were now subject to compensation, because rerouting of traffic that originally constituted a special benefit did not result in loss of proprietary right and did not entitle property owner to further compensation. *Leonard v. People ex rel. Dept. of Transportation (1998) 62 Cal. App. 4th 1296, 1300-1301, 73 Cal. Rptr. 2d 328*

When part of parcel would have to be dedicated to be developed, compensation for taking should reflect value in undeveloped state. Contra *Costa County Flood Control v. Lone Tree Investments (1992) 7 Cal. App. 4th 930, 934-936, 9 Cal. Rptr. 2d 326*

Property suitable for subdivision was not properly valued by estimating what would be market value after subdividing then subtracting construction costs, even if tentative subdivision map was approved. Contra *Costa Water Dist. v. Bar-C Properties (1992) 5 Cal. App. 4th 652, 7 Cal. Rptr. 2d 91*

Property was properly valued as existing agricultural use, when change to commercial zoning would have required dedication of exact part of property that was being condemned. *City of Porterville v. Young (1987) 195 Cal. App. 3d 1260, 1265-1268, 241 Cal. Rptr. 349*

Property properly valued as quarry when quarry used had been dormant until rock needed for use in dam repair and need for rock was basis for state's acquisition; property owner's expectation that rock would be purchased was not expectation of taking and thus valuation as quarry as proper. *People ex rel. Dep't of Water Resources v. Andresen (1987) 193 Cal. App. 3d 1144, 1153-1157, 238 Cal. Rptr. 826*

Application of reproduction less depreciation method of valuing condemned property in action brought by state to condemn portion of railroad's right-of-way was not speculative where market data and income approach to valuation were inappropriate because of nature of property taken. *People ex rel. Dept. of Transportation v. Southern Pac. Transportation Co. (1978) 84 Cal. App. 3d 315, 326, 148 Cal. Rptr. 535*

In eminent domain proceedings brought by state to condemn railroad's right-of-way, just compensation for taking was required to be based on use of property as "transportation corridor" rather than on limited use as double track railroad; fact that railroad did not make full use of right-of-way at time of condemnation action did not preclude it from recovery of compensation based on full use. *People ex rel. Dept. of Transportation v. Southern Pac. Transportation Co. (1978) 84 Cal. App. 3d 315, 323, 324, 148 Cal. Rptr. 535*

Taking of business's right to enforce payment of accounts receivable was compensable item of damage. *South Bay Irr. Dist. v. California-American Water Co. (1976) 61 Cal. App. 3d 944, 1001, 133 Cal. Rptr. 166*

Because defendant was entitled to interest on compensation award from date of possession of property, defendant was

not entitled, in addition, to damages for loss of reasonable rental value of property up to time property was actually taken because such damages would give defendant double compensation. *Los Angeles County v. Smith (1976) 55 Cal. App. 3d 749, 756, 127 Cal. Rptr. 666*

When nature of easement taken by condemnation necessitates physical removal of material from dominant estate, value of material taken is included in considering damage to dominant estate. *Yuba County Water Agency v. Ingersoll (1975) 45 Cal. App. 3d 452, 455, 119 Cal. Rptr. 444*

[b] Precondemnation Damages

Evidence of city's allegedly unreasonable precondemnation activity not admissible at jury trial to show effect activity had on "highest and best use" of property; argument was simply that precondemnation conduct decreased property's market value, which is traditional *Klopping* claim, and question of whether city acted unreasonably could not be shifted from judge to jury by use of this device. *City of Ripon v. Sweetin (2002) 100 Cal. App. 4th 887, 899, 122 Cal. Rptr. 2d 802*

Litigation delay arising from condemnor's use of procedural devices available to it as litigant does not subject condemnor to liability for precondemnation damages. *People ex rel. Dept. Pub. Wks. v. Peninsula Enterprises, Inc. (1979) 91 Cal. App. 3d 332, 359, 153 Cal. Rptr. 895*

Property owner's ability to collect damages for unreasonable precondemnation delay depended on whether conduct of public agency had evolved to point where announcements resulted in special and direct interference with property; type of direct and special interference required for precondemnation damages may occur even in absence of formal resolution of condemnation. *People ex rel. Dept. Pub. Wks. v. Peninsula Enterprises, Inc. (1979) 91 Cal. App. 3d 332, 355-356, 153 Cal. Rptr. 895*

Developer who permitted option to purchase condemned land to expire was not entitiled to recover "Klopping" precondemnation damages. *City of Walnut Creek v. Leadership Housing Systems, Inc. (1977) 73 Cal. App. 3d 611, 619, 140 Cal. Rptr. 690*

Fact that plaintiff took possession of defendant's property and destroyed improvements thereon far in advance of plaintiff's construction of planned improvement did not entitle defendant to compensation for rental value up to time property was actually needed. *Los Angeles County v. Smith (1976) 55 Cal. App. 3d 749, 756, 127 Cal. Rptr. 666*

Announcement that state tentatively planned to construct freeway along route subject to many contingencies and conditions which route bisected property in question did not announce intent to condemn and consequently was not basis for delay damages. *Smith v. California (1975) 50 Cal. App. 3d 529, 535-537, 123 Cal. Rptr. 745*

[c] Severance Damages

All reasonably certain, immediate, and non-speculative benefits may be offset from severance damages. *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp. (1997) 16 Cal. 4th 694, 717-718, 66 Cal. Rptr. 2d 630, 941 P.2d 809*

Special assessment lien imposed on property to assist in financing construction of public improvement was not to be considered in determining severance damages when imposition of lien was not direct result of taking or of improvement's construction. *Baldwin Park v. Stoskus (1972) 8 Cal. 3d 563, 566, 105 Cal. Rptr. 325, 503 P.2d 1333*

Trial court abused discretion in permitting property owners to present evidence of hypothetical use to show entitlement

to temporary severance damages from construction easement; property owners failed to meet burden of producing evidence that temporary easement substantially interfered with or impaired actual intended use of the property. *City of Fremont v. Fisher (2008) 160 Cal. App. 4th 666, 684-685, 73 Cal. Rptr. 3d 54*

Severance damages were limited to those caused by project and did not include expenses in compelling agency to act lawfully. *Placer County Water Agency v. Hofman (1985) 165 Cal. App. 3d 890, 896-897, 211 Cal. Rptr. 894*

In determining severance damages, evidence as to defendant's loss from accelerated depreciation of fixtures and reduction in expansion possibilities from severance was admissible. *City of Commerce v. National Starch & Chem. Corp. (1981) 118 Cal. App. 3d 1, 13-17, 173 Cal. Rptr. 176*

Recovery of temporary severance damages in amount of fair rental value of property was improper when there was no physical taking of remainder or impairment for any permissible use other than highest and best use of property for which condemnee received compensation. *Orange County Flood Control Dist. v. Sunny Crest Dairy, Inc. (1978) 77 Cal. App. 3d 742, 761-762, 143 Cal. Rptr. 803*

No unity of use or contiguity existed when public utility owned two separate systems with separate rate structures in different geographic areas. *South Bay Irr. Dist. v. California-American Water Co. (1976) 61 Cal. App. 3d 944, 1002-1003, 133 Cal. Rptr. 166*

Severance damages caused by freeway construction and benefits caused by aqueduct construction were not permitted to be offset although condemning agency joined both projects in one action since projects were separate and distinct. *People ex rel. Dept. Pub. Wks. v. Simon Newman Co. (1974) 37 Cal. App. 3d 398, 408, 112 Cal. Rptr. 298*

No severance damages as occurred when power lines were to be built since highest and best use of property was cattle ranch and power lines do not affect market value of remainder of that kind of property. *Pacific Gas & Elec. Co. v. Parachini (1971) 29 Cal. App. 3d 159, 167, 105 Cal. Rptr. 477*

Two parcels did not constitute single larger parcel so as to permit allowance of severance damages where two parcels were used for different purposes, long-standing chain link fence separated properties, and parcels were zoned differently. *People ex rel. Dept. Pub. Wks. v. International Tel. & Tel. Corp. (1972) 22 Cal. App. 3d 829, 833-837, 99 Cal. Rptr. 836*

Severance damages for impairment or diminution of easement of access were not recoverable when caused by construction or maintenance of improvement located on lands of other persons. *People ex rel. Dep't Public Works v. Romano (1971) 18 Cal. App. 3d 63, 69-70, 94 Cal. Rptr. 839*

Possibility of joinder of remaining land with other land was relevant to determining amount of severance damages. *People ex rel. Dep't Public Works v. Tevelde (1970) 13 Cal. App. 3d 450, 454, 91 Cal. Rptr. 556*

Special benefits resulting from entire scheme of improvement were offsetting severance damages. *People ex rel. Dep't Public Works v. Home Trust Inv. Co. (1970) 8 Cal. App. 3d 1022, 1028-1029, 87 Cal. Rptr. 722*

[6] Interest

No basis for limiting amount of condemnor's right to offset against interest under *Code Civ. Proc. § 1268.330* to defendant's actual return from crops grown on land (less than zero) when defendant remained in possession of land; this improperly tied condemnor's right to offset to defendant's ability to make productive use of asset. *City of Stockton v. Albert Brocchini Farms, Inc. (2001) 92 Cal. App. 4th 193, 203, 111 Cal. Rptr. 2d 662*

Interest does not run on judgment when proceeding later abandoned. *People ex rel. Dept. of Transportation v. Union Pacific Land Resources Corp. (1986) 179 Cal. App. 3d 307, 313-316, 224 Cal. Rptr. 487*

Defendant was not entitled to prejudgment interest under former Code Civ. Proc. § 1255b(a) (now *Code Civ. Proc. § 1268.310*) when no taking of possession occurred or was authorized. *Los Angeles v. Monahan (1976) 55 Cal. App. 3d 846, 853-854, 127 Cal. Rptr. 763*

Where condemnation award was based on condemnor's acceptance of property owner's final demand made under *Code Civ. Proc. § 1250.410*, property owner was entitiled to recover ordinary costs and interest on award for period of condemnor's prejudgment possession. *Coachella Valley County Water Dist. v. Dreyfuss (1979) 91 Cal. App. 3d 949, 955, 154 Cal. Rptr. 467*

Order denying interest on condemnation award is appealable. *Redevelopment Agency v. Goodman (1975) 53 Cal. App. 3d 424, 429-430, 125 Cal. Rptr. 818*

Where parties to condemnation proceeding stipulated that entry agreement was equivalent of order for immediate possession, interest was due from date of entry and defendant was not required to file claim to recover prejudgment interest. *People ex rel. Dep't Public Works v. Williams (1973) 30 Cal. App. 3d 980, 981, 106 Cal. Rptr. 795*

[7] Notice

Public entity not required under *Code Civ. Proc. § 1245.235* to give 15 days' written notice before public hearing on necessity to condemn; notice is adequate if public entity used another procedure that gave reasonable written personal notice and reasonable opportunity to appear and be heard. *City of Lincoln v. Barringer (2002) 102 Cal. App. 4th 1211, 1223-1224, 126 Cal. Rptr. 2d 178*

Owner of land to be condemned is entitled to notice of hearing granting permission for condemnation even though such notice is not required by statute. *Conejo Recreation & Park Dist. v. Armstrong (1981) 114 Cal. App. 3d 1016, 1020-1022, 170 Cal. Rptr. 891*

[8] Objections to Right to Take

Right of first refusal may not be asserted as objection to right to take; condemnation of land for public purpose does not trigger private party's right of first refusal to purchase property. *Campbell v. Alger (1999) 71 Cal. App. 4th 200, 208, 83 Cal. Rptr. 2d 696*

[9] Property Interests

Claimant is customarily required to show he or she owned property interest taken by state to be constitutionally entitled to compensation. *County of San Diego v. Miller (1975) 13 Cal. 3d 684, 687, 119 Cal. Rptr. 491, 532 P.2d 139*

Interest held to constitute property for condemnation compensation purposes includes fee interests, leaseholds, easements, rights-of-way, building restrictions, and unexercised options to purchase real property. *County of San Diego v. Miller (1975) 13 Cal. 3d 684, 693, 119 Cal. Rptr. 491, 532 P.2d 139*

Federal Petroleum Marketing Practices Act did not preempt California law requiring CalTrans to pay gas station franchisee for lost goodwill. *People ex rel. Dept. of Transportation v. Acosta (2009) 178 Cal. App. 4th 762, 771, 100*

Cal. Rptr. 3d 669

Owners of undeveloped parcel taken by city in eminent domain could not recover for loss of goodwill based on plans to build and sell condominiums because there was no ongoing business on property. *City and County of San Francisco v. Coyne (2008) 168 Cal. App. 4th 1515, 1523-1534, 86 Cal. Rptr. 3d 255*

Trial court erred by striking testimony of defendants' expert goodwill valuation witness on grounds that as a matter of law expectation of lease renewal is speculative and cannot provide a foundation for goodwill award; jury should have been allowed to determine whether there was a reasonable probability lease would be renewed. *Redevelopment Agency of the City of San Diego v. Attisha (2005) 128 Cal. App. 4th 357, 372-373, 27 Cal. Rptr. 3d 126*

Operator of golf course on property condemned for light rail project was not entitled to compensation for loss of business and goodwill when its lease on the property was not renewed because operator lacked legally protectible property interest; reasonable expectation of lease renewal may not be considered as element of value in condemnation proceedings. *San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc. (1999) 73 Cal. App. 4th 517, 532-533, 86 Cal. Rptr. 2d 473*

Broker was not entitled to commission on property for which broker had contract for commission if escrow closed, but that was acquired by eminent domain before escrow closed. *City of Turlock v. Paul M. Zagaris, Inc. (1989) 209 Cal. App. 3d 189, 192-194, 256 Cal. Rptr. 902*

[10] Relocation Assistance

Claim for relocation benefits filed eight years after claimant moved from original location and over four years from date agency satisfied inverse condemnation judgment, but within 18 months of when claimant moved into new location, was untimely under *25 Cal. Code. Reg. § 6088* (claims for relocation payments must be submitted within 18 months of date on which claimant receives final payment for the property or date on which claimant moves, whichever is later). *Bi-Rite Meat & Provisions Co. v. Redevelopment Agency of the City of Hawaiian Gardens (2007) 156 Cal. App. 4th 1419, 1431, 68 Cal. Rptr. 3d 81*

Expiration of lease from public entity to mobilehome park was not acquisition of property by public entity so as to entitle residents to relocation assistance. *Stephens v. Perry (1982) 134 Cal. App. 3d 748, 754-757, 184 Cal. Rptr. 701*

Relocation benefits provided in *Gov. Code § 7262* apply to persons displaced as result of acquisition who are either preacquisition tenants or postacquisition tenants who entered their tenancy without knowledge of acquisition. *Cavanaugh v. California (1978) 85 Cal. App. 3d 354, 357, 149 Cal. Rptr. 453*

Public entity that permitted tenant to seek relocation damages by complaint for breach of duty and damages and having thereby allowed statute of limitations for filing complaint in administrative mandamus under *Code Civ. Proc. § 1094.5* to run was not permitted to complain that tenant used wrong procedure. *Superior Strut & Hanger Co. v. Port of Oakland (1977) 72 Cal. App. 3d 987, 1001, 140 Cal. Rptr. 515*

Trial court properly denying writ of mandate seeking statutory relocation benefits where petitioner never filed written claim for benefits, never requested review by public entity of his eligibility for benefits, and never claimed damages against public agency. *Baiza v. Southgate Recreation & Park Dist. (1976) 59 Cal. App. 3d 669, 673-674, 130 Cal. Rptr. 836*

[11] Sanctions

Code Civ. Proc. § 575.2 requires that sanctions for failure to comply with local rules, such as exchange of appraisals, be imposed on counsel and not on client when client not at fault. *State of California ex rel. Public Works Bd. v. Bragg (1986) 183 Cal. App. 3d 1018, 1023-1028, 228 Cal. Rptr. 576*

[12] Settlement Offers

[a] In General

Owner's settlement offer did not include prejudgment interest for constructive taking before actual taking, and thus did not preclude additional judgment for interest. *People ex rel. Dept. of Transportation v. Gardella Square (1988) 200 Cal. App. 3d 559, 564-569, 246 Cal. Rptr. 139*

Failure to make settlement offer was not excused by conflict of interest and precluded award of attorney's fees. *Santa Clara Valley Dist. v. Gross (1988) 200 Cal. App. 3d 1363, 1367-1373, 246 Cal. Rptr. 580*

Offer served 33 days before trial but filed 28 days before trial was timely for purposes of *Code Civ. Proc. § 1250.410*. *Community Redevelopment Agency v. Krause (1984) 162 Cal. App. 3d 860, 864-865, 209 Cal. Rptr. 1*

Former Code Civ. Proc. § 1249.3 (*now Code Civ. Proc. § 1250.410*), entitling defendant in condemnation proceeding to ligitation costs on condemnor's rejection of reasonable settlement demand, did not make award conditional on demand being kept open through trial. *People ex rel. Dept. of Transportation v. Sunshine Canyon, Inc. (1979) 94 Cal. App. 3d 599, 603-604, 156 Cal. Rptr. 552*

Code Civ. Proc. § 1250.410 authorized award of litigation expenses where condemnor accepted defendants' demand after trial had commenced but before amount of compensation was determined by trial. *Coachella Valley County Water Dist. v. Dreyfuss (1979) 91 Cal. App. 3d 949, 956-957, 154 Cal. Rptr. 467*

Purpose of *Code Civ. Proc. § 1250.410* is promoting settlement of valuation disputes in eminent domain proceedings and guaranteeing full recompense to landowner in case of unnecessary litigation. *California ex rel. Public Works Bd. v. Turner (1979) 90 Cal. App. 3d 33, 38, 153 Cal. Rptr. 156*

Offers and demands subsequent to final ones affect only amount of litigation fees and not condemnees's entitlement thereto. *Lake County Sanitation Dist. v. Schultz (1978) 85 Cal. App. 3d 658, 666, 149 Cal. Rptr. 717* (decided under prior law comparable to *Code Civ. Proc. § 1250.410*)

Trial court had discretion to deny attorney's fees although jury awarded amount demanded by property owner and city had refused to pay that amount. *Los Angeles v. Canon (1976) 57 Cal. App. 3d 559, 561, 127 Cal. Rptr. 709*

[b] Determining Reasonableness and Unreasonableness

Award of litigation expenses to defendant was improper when trial court mistakenly calculated actual and percentage difference between offer and compensation awarded, and improperly focused on conduct of agency's appraiser, rather than on conduct of agency, in evaluating agency's good faith, care and accuracy in formulating its final offer. *City of Long Beach Redevelopment Agency v. Morales (2007) 157 Cal. App. 4th 287, 295, 68 Cal. Rptr. 3d 604*

Final offer was unreasonable because it was based on nonconforming use required by zoning ordinance to be terminated and was only 74 percent of jury's award. *People ex rel. Dept. of Transportation v. Woodson (2001) 93 Cal. App. 4th 954, 961, 113 Cal. Rptr. 2d 559*

Court of appeal's survey of results in other cases showed final offers that were 60 percent or less of jury's verdict were generally found to be unreasonable, while offers that are above 85 percent were generally considered to be reasonable per se; final offers that came within the middle range fell within either group depending on other factors, particularly whether government agency was unyielding and extent of good faith, care, and accuracy in method of determining offer and demand. *People ex rel. Dept. of Transportation v. Yuki (1995) 31 Cal. App. 4th 1754, 1764, 37 Cal. Rptr. 2d 616*

Trial court was well within its discretion in finding final offer that was 77 percent of jury's verdict was unreasonable because offer (1) was based on unwavering reliance on appraisal that was over $2 million low in its valuation of acquired land, and (2) was incorrect in its evaluation of both severance damages and special benefits. *People ex rel. Dept. of Transportation v. Yuki (1995) 31 Cal. App. 4th 1754, 1764, 37 Cal. Rptr. 2d 616*

Award of litigation expenses was unreasonable when owner demanded amount that was $800,000 more, and five times greater, than amount awarded at trial. *County of Contra Costa v. Pinole Point Properties, Inc. (1994) 27 Cal. App. 4th 1105, 1115, 33 Cal. Rptr. 2d 38*

Offer of 89 percent of award coupled with evidence that defendant's appraisal was considered constituted reasonable offer and supported no award of litigation expenses. *Glendale Redevelopment Agency v. Parks (1993) 18 Cal. App. 4th 1409, 1415-1418, 23 Cal. Rptr. 2d 14*

Offer of less than 30 percent of eventual award was unreasonable as a matter of law; agency's failure to consider owner's appraisal when appraisals were far apart was evidence of failure to act in good faith. *San Diego Gas & Electric Co. v. Daley (1988) 205 Cal. App. 3d 1334, 1352-1353, 253 Cal. Rptr. 144*

Even though jury verdict was much higher than appraisal, plaintiff's offer was reasonable when based on credible appraisal and defendant had not offered independent appraisal but only his own testimony of value. *County of San Diego v. Woodward (1986) 186 Cal. App. 3d 82, 90-92, 230 Cal. Rptr. 406*

Offer that is conditioned on land being in certain condition after improvements is reasonable. *Placer County Water Agency v. Hofman (1985) 165 Cal. App. 3d 890, 898-900, 211 Cal. Rptr. 894*

Failure of defendant to have supported demand by reasoned appraiser's report was one basis for concluding that condemnor's offer was reasonable despite verdict substantially larger than offer. *City of El Monte v. Ramirez (1982) 128 Cal. App. 3d 1005, 1009-1013, 180 Cal. Rptr. 690*

Even though, mathematically, offer was unreasonably low, declaration of plaintiff's attorney established that offer was made in good faith and arrived at with care and accuracy. *City of San Leandro v. Highsmith (1981) 123 Cal. App. 3d 146, 156-159, 176 Cal. Rptr. 412*

Reasonableness of final offer and demand present factual issues depending not only on percentage of difference in monetary amounts of offer and demand but also on good faith, care, and accuracy in determination of those amounts. *Coachella Valley County Water Dist. v. Dreyfuss (1979) 91 Cal. App. 3d 949, 958, 154 Cal. Rptr. 467*

Code Civ. Proc. § 1250.410 authorizing litigation costs in eminent domain proceedings does not contain specific criteria permitting single mathematical analysis to determine when settlement offer is either reasonable or unreasonable; general guidelines to be used include (1) amount of difference between offer and compensation awarded, (2) percentage of difference between offer and award, and (3) good faith, care, and accuracy in how amount of offer and amount of demand were determined. *California ex rel. Public Works Bd. v. Turner (1979) 90 Cal. App. 3d 33, 37, 153 Cal. Rptr. 156*

Trial court properly refused to award litigation expenses under *Code Civ. Proc. § 1250.410* where state clearly

determined amount of offer with good faith, care, and accuracy although comparison of offer and compensation awarded and percentage differential between offer and award might cast doubt on reasonableness of offer. *California ex rel. Public Works Bd. v. Turner (1979) 90 Cal. App. 3d 33, 37, 153 Cal. Rptr. 156*

Demand was unreasonable where condemnor had only one day to evaluate it, consider appraisals, and respond with revised written offer. *People ex rel. Dept. of Transportation v. Patton Mission Properties (1979) 89 Cal. App. 3d 204, 212-213, 152 Cal. Rptr. 485* (interpreting language of former Code Civ. Proc. § 1249.3 comparable to present *Code Civ. Proc. § 1250.410*)

[c] Examples of Unreasonable Offers

Settlement offer by public entity was unreasonable when it reserved right to appeal the amount of taking. *People v. Zivelonghi (1986) 183 Cal. App. 3d 187, 191-193, 228 Cal. Rptr. 72*

Use of noncomparable properties and refusal to negotiate were evidence of unreasonableness sufficient to award fees even when offer was over 80 percent of judgment. *Community Redevelopment Agency v. Krause (1984) 162 Cal. App. 3d 860, 866-867, 209 Cal. Rptr. 1*

Offer was unreasonable when less than 50 percent of jury verdict and plaintiff gave little or no weight to theories and findings of defendant's experts in making offer. *Redevelopment Agency v. First Christian Church (1983) 140 Cal. App. 3d 690, 706-707, 189 Cal. Rptr. 749*

City's settlement offer was unreasonable where it was less than 60 percent of the value awarded by the jury, was substantially lower in absolute terms ($21,756.50) than the award, and condemnor firmly adhered to its appraisal with no spirit of compromise in contrast to defendants whose demand was considerably below their expert's appraisal. *Gardena v. Camp (1977) 70 Cal. App. 3d 252, 257, 138 Cal. Rptr. 656*

Condemnor's final offer was unreasonable as matter of law where offer was significantly disproportionate to jury's verdict (approximately 80 percent of verdict), offer was significantly lower than verdict in absolute terms ($16,000), and offer did not take into account substantial difference between opinion of value made by agency's appraisal expert and opinion of value made by property owner's appraisal expert. *County of Los Angeles v. Kranz (1977) 65 Cal. App. 3d 656, 659-660, 135 Cal. Rptr. 473*

[d] Time Requirement

Thirty-day time limit for filing motion for litigation expenses under *Code Civ. Proc. § 1250.410(b)* was construed as requiring motion to be made within 30 days after entry of judgment, not 30 days from date notice of entry of judgment is mailed or served. *Poway Unified School Dist. v. Chow (1995) 39 Cal. App. 4th 1478, 1483, 46 Cal. Rptr. 2d 651*

Thirty-day time limit for filing motion for litigation expenses under *Code Civ. Proc. § 1250.410(b)* does not preclude court from granting relief for late filing if there is substantial compliance with statute and opposing party is not prejudiced. *Poway Unified School Dist. v. Chow (1995) 39 Cal. App. 4th 1478, 1485, 46 Cal. Rptr. 2d 651*

Last offer from condemnor before 30 days before trial constitutes final offer; offers and demands made within 30 days of and during trial merely affect amount of litigation expenses that may be awarded under *Code Civ. Proc. § 1250.410(b)*. *People ex rel. Dept. of Transportation v. Patton Mission Properties (1979) 89 Cal. App. 3d 204, 212, 152 Cal. Rptr. 485*

Thirty-day period in former Code Civ. Proc. § 1249.3 (now *Code Civ. Proc. § 1250.410*) determined entitlement to

litigation expenses and was not intended to cut off all litigation expenses incurred more than 30 days before trial. *Lake County Sanitation Dist. v. Schultz (1978) 85 Cal. App. 3d 658, 669, 149 Cal. Rptr. 717* (decided under prior law comparable to *Code Civ. Proc. § 1250.410*)

Condemnee substantially complied with requirement that demand be filed 30 days before trial where demand was filed on next court day following 30th day before trial and condemnor made no objection to late filing and was, itself, tardy in filing its final offer. *Lake County Sanitation Dist. v. Schultz (1978) 85 Cal. App. 3d 658, 662, 149 Cal. Rptr. 717* (decided under prior law comparable to *Code Civ. Proc. § 1250.410*)

Where both condemnor and condemnee filed final offer and final demand during trial rather than 30 days or more before trial, neither party was capable of obtaining benefits under former Code Civ. Proc. § 1249.3 (now *Code Civ. Proc. § 1250.410*) and trial court properly denied condemnee costs and expenses. *People ex rel. Dept. of Transportation v. Callahan Bros. (1977) 69 Cal. App. 3d 541, 543-544, 138 Cal. Rptr. 239*

[e] Trial Court's Findings

Trial court was not required to make express findings as to whether condemnor's settlement offer was unreasonable and defendant's demand was reasonable when ruling on condemnee's motion for litigation costs pursuant to former Code Civ. Proc. § 1249.3 (now *Code Civ. Proc. § 1250.410*). *People ex rel. Dept. of Transportation v. Sunshine Canyon, Inc. (1979) 94 Cal. App. 3d 599, 604, 156 Cal. Rptr. 552*

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Department of Transportation is not authorized by statute or constitution to perform appraisal and acquisition services for nontransportation purposes. *60 Ops. Cal. Att'y Gen. 148, 152 (1977)*

Contiguous parcels of land held by one owner and recorded under Subdivision Map Act, each with portion condemned, are permitted to be sold individually only if new parcel map is filed under *Gov. Code § 66428* unless local ordinance waives such map. *58 Ops. Cal. Att'y Gen. 593 (1975)*

Payment of relocation benefits by public entity to displace person or eligible property owner is mandatory but person or property owner is capable of knowingly waiving right to receive relocation benefits. *57 Ops. Cal. Att'y Gen. 70, 71 (1974)*

Relocation benefits are payable under *Gov. Code §§ 7262-7264* to property owner whether sale of property to city was voluntary or involuntary. *57 Ops. Cal. Att'y Gen. 70, 71-72 (1974)*

Relocation benefits are payable under *Gov. Code §§ 7262-7264* to property owner after city acquires his or her property whether property owner vacates property voluntarily or involuntarily. *57 Ops. Cal. Att'y Gen. 70, 71-72 (1974)*

Transfer affected by deed under threat of eminent domain is taxable under Documentary Stamp Act [*Rev. & Tax Code §§ 11901-11934*]. *51 Ops. Cal. Att'y Gen. 50, 51 (1968)*

Interest earned on pooled investment in Condemnation Deposits Fund which was apportionable and payable to plaintiff having deposit in fund must be put into fund from which money was appropriated for acquisition of property where plaintiff is state agency. *44 Ops. Cal. Att'y Gen. 73, 78 (1964)*

Method by which county acquires property owned by member of board of supervisors. *26 Ops. Cal. Att'y Gen. 5, 6 (1955)*

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[Reserved]

§§ 247.233[Reserved]

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§ 247.250 California Points and Authorities

For forms of points and authorities relating to inverse condemnation, see California Points and Authorities, Ch. 95, *Eminent Domain* (Matthew Bender)

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§ 247.251 California Real Estate

For a discussion of inverse condemnation, see California Real Estate Law & Practice, Ch. 513, *Inverse Condemnation* (Matthew Bender)

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§ 247.252 California Environmental Law and Land Use Practice

For discussion of takings issues, see California Environmental Law and Land Use Practice, Ch. 65, *Takings and Other Constitutional Controls* (Matthew Bender)

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§ 247.253 Federal Constitution

Prohibition against taking private property for public use without just compensation. *U.S. Const., amend. V*

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Volume 20: Easements thru Eminent Domain-Chs. 240-247
Chapter 247 EMINENT DOMAIN AND INVERSE CONDEMNATION
PART III. RESEARCH GUIDE
B. Inverse Condemnation

20-247 California Forms of Pleading and Practice--Annotated § 247.254

§ 247.254 State Constitution

Private property is protected from taking or damaging for public use without just compensation. *Cal. Const., art. I, § 19*

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20-247 California Forms of Pleading and Practice--Annotated § 247.255

§ 247.255 State Statutes

Statute of limitations for action to recover for physical damage to private property under *Cal. Const., art. I, § 19*, is three years. *Code Civ. Proc. § 338(j)*

Service of process in action against local public entities. *Code Civ. Proc. § 416.50*

Successful plaintiff in inverse condemnation action is entitled to costs, including attorney's, appraisal, and engineering fees incurred because of proceeding in trial court or in any appellate proceeding in which the plaintiff prevails on any issue in that proceeding. *Code Civ. Proc. § 1036*

Landowner's rights if public entity has not commenced condemnation action or served process within six months of adopting resolution of necessity. *Code Civ. Proc. § 1245.260(a)*

Statute allowing recovery for goodwill in eminent domain actions does not apply to recovery in inverse condemnation for temporary interference with business. *Code Civ. Proc. § 1263.530*

No claim requirement in inverse condemnation actions. *Gov. Code § 905.1*

Service of process in actions against state. *Gov. Code §§ 955.4, 955.6*

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§ 247.256 Decisions

[1] Class Actions

Class action in inverse condemnation is not proper in action for damages from airport noise because of insufficient community of interest. *San Jose v. Superior Court (1974) 12 Cal. 3d 447, 458-463, 115 Cal. Rptr. 797, 525 P.2d 701*

[2] Date of Valuation

When valuation of property has increased, value of property taken is determined at date of trial. *Leaf v. City of San Mateo (1984) 150 Cal. App. 3d 1184, 1190-1192, 198 Cal. Rptr. 447*

[3] Defenses

[a] Estoppel

State's building of drainage system was not foreseeable so as to estop person from whom property was acquired for freeway from bringing later action for damage to remaining property caused by drainage. *Mehl v. People (1975) 13 Cal. 3d 710, 716, 119 Cal. Rptr. 625*

Landowner was not estopped from bringing inverse condemnation action for subsidence damage to property caused by landfill operations when such subsidence was not foreseeable, despite fact that public entity had earlier acquired right to use property for landfill operations. *Reinking v. Orange County (1970) 9 Cal. App. 3d 1024, 1030-1031, 88 Cal. Rptr. 695*

[b] Failure to Exhaust Administrative Remedies

Purchasers of beachfront property subject to offers to dedicate pedestrian and bicycle easement to county could not assert takings claim based on county's decision to accept offers to dedicate; claim was ripe when county exacted offers to dedicate from purchasers' predecessors and predecessors had not pursued state administrative remedies. *Daniel v. County of Santa Barbara (9th Cir. 2002) 288 F.3d 375, 381-384*

Failure to exhaust administrative remedies was defense when plaintiff did not seek a vested rights exemption from regulatory act. *South Coast Regional Com. v. Gordon (1977) 18 Cal. 3d 832, 836-838, 135 Cal. Rptr. 781, 558 P.2d 867*

Regulatory taking claim was ripe for adjudication because county issued what amounted to a final decision that it lacked discretion to grant subdivision of plaintiff's property due to presence of wetlands, and permissible use of the property was known to reasonable degree of certainty. *Dunn v. County of Santa Barbara (2006) 135 Cal. App. 4th 1281, 1299-1300, 38 Cal. Rptr. 3d 316*

Owners of property on which former quarry was located could not state as-applied takings claim based on rezoning of property by county land use initiative, because owners had not made any applications to develop the property. *County of Alameda v. Superior Court (2005) 133 Cal. App. 4th 558, 569-571, 34 Cal. Rptr. 3d 895*

Takings claim was not ripe when plaintiffs never sought approval for any specific project; fact that city delayed over very lengthy period of time in adopting new plan and zoning for area did not create futility needed to establish ripe takings claim. *Calprop Corp. v. City of San Diego (2000) 77 Cal. App. 4th 582, 599-600, 91 Cal. Rptr. 2d 792*

Taking claim by developers whose subdivision application was denied was not ripe, and futility exception to exhaustion requirement was not applicable, when zoning ordinance allowed up to three lots on property and developers never submitted application for lower-density project. *Toigo v. Town of Ross (1999) 70 Cal. App. 4th 309, 330-331, 82 Cal. Rptr. 2d 649*

When county required annexation to city for development, failure to apply for annexation precluded inverse condemnation claim. *Long Beach Equities, Inc. v. County of Ventura (1991) 231 Cal. App. 3d 1016, 1032-1036, 282 Cal. Rptr. 877*

Issues not raised at administrative hearing were not permitted to be raised in action for inverse condemnation. *Walnut Creek v. Contra Costa County (1980) 101 Cal. App. 3d 1012, 1019-1022, 162 Cal. Rptr. 224*

Failure to exhaust administrative remedies was defense in inverse condemnation action. *People ex rel. State Public Works Bd. v. Superior Court (1979) 91 Cal. App. 3d 95, 99, 101-105, 154 Cal. Rptr. 54*

[c] Police Power

Valid regulation of price of cheese was not taking of cheese-making business. *Golden Cheese Co. v. Voss (1991) 230 Cal. App. 3d 727, 736-739, 281 Cal. Rptr. 602*

When property owner was given notice of nuisance but failed to correct it, demolition to abate nuisance was not considered to be taking. Duffy v. City of Long Beach *(1988) 201 Cal. App. 3d 1352, 1358, 247 Cal. Rptr. 715*

[d] Statute of Limitations

Cause of action in inverse condemnation for damage from project not on plaintiff's land but causing damage to plaintiff's land accrues when damage is appreciable to reasonable person. *Mehl v. People ex rel. Dep't of Public*

Works (1975) 13 Cal. 3d 710, 717, 119 Cal. Rptr. 625, 532 P.2d 489

Action for inverse condemnation based on flooding caused by highway culvert was barred by statute of limitations where property owners knew about damage at time it happened, accepted assertion of the state, county and others that damage was caused by "act of God," and did not make further investigation. *Lyles v. State of California (2007) 153 Cal. App. 4th 281, 286, 62 Cal. Rptr. 3d 696*

Inverse condemnation action by purchasers of former county landfill whose property was damaged by subsidence barred by statute of limitations forlatent construction defects [*Code Civ. Proc. § 337.15*]; county's construction and operation of landfill constituted "improvement" within meaning of statute. *Gaggero v. County of San Diego (2004) 124 Cal. App. 4th 609, 617, 21 Cal. Rptr. 3d 388*

Where redevelopment agency purchased property on which store was located and transferred title to third party who negotiated new lease and allowed store to remain until he was ready to develop property, taking occurred when redevelopment agency acquired title, but statute of limitations on store owner's inverse condemnation claim did not begin to run until date new owner took possession of premises. *Kong v. City of Hawaiian Gardens Redevelopment Agency (2003) 108 Cal. App. 4th 1028, 134 Cal. Rptr. 2d 260*

Applicable statute of limitations in inverse condemnation actions. *Williams v. Southern P. R. Co. (1907) 150 Cal. 624, 626-628, 89 P. 599* (three-year statue for injury to real property); *Frustuck v. Fairfax (1963) 212 Cal. App. 2d 345, 373-374, 28 Cal. Rptr. 357* (five-year adverse possession statute applicable)

Cause of action for airport noise accrues when noise causes substantial interference with use and enjoyment of property. *Aaron v. City of Los Angeles (1974) 40 Cal. App. 3d 471, 492, 115 Cal. Rptr. 162*

Cause of action for inverse condemnation accrues when construction complete, not when first trespass occurs. *Mosesian v. County of Fresno (1972) 28 Cal. App. 3d 493, 500-502, 104 Cal. Rptr. 655*

Cause of action for diverting water onto plaintiff's land accrues when diversion causes damage. *Frustuck v. Fairfax (1963) 212 Cal. App. 2d 345, 375, 28 Cal. Rptr. 357*

[e] Right to Inflict Damage

Reasonableness test, rather than common law "right to inflict damage" doctrine, is applicable in surface water damage cases. *Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 366-367, 27 Cal. Rptr. 2d 613, 867 P.2d 724 , overruling Archer v. City of Los Angeles (1941) 19 Cal. 2d 19, 23-25, 119 P.2d 1*

[4] Elements of Cause of Action

[a] Taking or Damaging

Relocation of tule elk to public property adjacent to private property was not taking of private property when elk came onto private property; state did not have control of elk. *Moerman v. State of California (1993) 17 Cal. App. 4th 452, 457-459, 21 Cal. Rptr. 2d 329*

Local mobilehome park rent control ordinance coupled with state statutory restriction on eviction of mobilehome park residents did not constitute physical taking of property of mobilehome park owner because government did not require owner to submit to government's physical occupation of park property. *Yee v. City of Escondido (1992) 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153*

Statute providing that small fractional interests in Indian lands could not descend by intestacy or devise was taking because right to pass property to heirs is essential element of property rights. *Hodel v. Irving (1987) 481 U.S. 704, 716-718, 107 S. Ct. 2076, 95 L. Ed. 2d 668*

Statute allowing Federal Communications Commission to determine whether utility was overcharging for permission to attach cable television cables to utility poles was not taking for inverse condemnation purposes. *FCC v. Florida Power Corp. (1987) 480 U.S. 245, 253-254, 107 S. Ct. 1107, 94 L. Ed. 2d 282*

Permanent physical occupation of property authorized by government always constitutes taking, regardless of public interest to be served, size of area permanently occupied, or whether state itself or party authorized by state is occupant. *Loretto v. Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419, 434-435, 102 S. Ct. 3164, 73 L. Ed. 2d 868*

Determination that governmental action constitutes taking is determination that public at large, rather than property owner, must bear burden of exercise of state power. *Penn. Cent. Transp. Co. v. New York City (1978) 438 U.S. 104, 123-124, 98 S. Ct. 2646, 57 L. Ed. 2d 631*

Principle of inverse condemnation does not subject public entity to general tort liability; inverse condemnation is remedy only for that injury to private property resulting from deliberate act carrying with it purpose of fulfilling public object of project as whole. *Yee v. City of Sausalito (1983) 141 Cal. App. 3d 917, 920, 190 Cal. Rptr. 595*

Personal injury or death is not basis for action in inverse condemnation because no taking is involved. *Brandenburg v. Los Angeles Flood Control Dist. (1941) 45 Cal. App. 2d 306, 309-310, 114 P.2d 14*

[b] Property

Property for inverse condemnation purposes is broadly defined as group of rights inherent to citizen's relation to physical thing, such as right to possess, use, and dispose of it. *Agins v. Tiburon (1979) 24 Cal. 3d 266, 273, 157 Cal. Rptr. 372, 598 P.2d 25 , aff'd, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)*

Owner of expired option on property was not entitled to compensation for taking or damaging of property. *City of Walnut Creek v. Leadership Housing Systems, Inc. (1977) 73 Cal. App. 3d 611, 619, 140 Cal. Rptr. 690*

Taking of personal property is compensable in action for inverse condemnation. *Sutfin v. State of California (1968) 261 Cal. App. 2d 50, 53, 67 Cal. Rptr. 665*

[c] Public Use

Economic development constitutes "public use" within meaning of United States Constitution *Fifth Amendment Takings Clause*. *Kelo v. City of New London (2005) 545 U.S. 469, 125 S. Ct. 2655, 2665, 162 L. Ed. 2d 439*

City of Santa Monica's desire to control rising rents and remedy housing shortages constituted legitimate public purpose for amendments to rent control ordinance, and therefore amendments did not violate public use component of *Fifth Amendment Takings Clause*. *Action Apt. Ass'n Inc. v. Santa Monica Rent Control Opinion B'd (9th Cir. 2007) 509 F.2d 1020, 1024*

No inverse condemnation liability for storm drain running under plaintiffs' property when there was no evidence that city or county substantially participated in planning, construction, or maintenance of drain pipe, that either public agency accepted dedication of drain pipe, or that either agency ever exercised dominion and control over pipeline.

DiMartino v. City of Orinda (2000) 80 Cal. App. 4th 329, 343, 95 Cal. Rptr. 2d 16

Public use and necessity of project is construed liberally in favor of condemnor; testimony establishing public utility oil company's pipeline easements to allow company to provide lower priced gasoline to public and to transport oil products by subsurface pipeline rather than tanker trucks, supported court's finding that easements were required by public interest and necessity. *Shell Cal. Pipeline Co. v. City of Compton (1995) 35 Cal. App. 4th 1116, 1125-1126, 41 Cal. Rptr. 2d 753*

Implied acceptance of natural watercourse is public use, as established when public entity exerts control over and assumes responsibility for maintenance of watercourse. *Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 370, 27 Cal. Rptr. 2d 613, 867 P.2d 724*

No public use of watercourse was established when county had expressly refused to accept dedication of watercourse on private land into which sewers drained and had taken no steps to improve watercourse. *Ullery v. County of Contra Costa (1988) 202 Cal. App. 3d 562, 568-569, 248 Cal. Rptr. 727*

Approval of subdivision map for development of private project on private land does not subject public entity to liability for damage caused by improvements; such improvements are not public or for public use. *Ullery v. County of Contra Costa (1988) 202 Cal. App. 3d 562, 570-572, 248 Cal. Rptr. 727*

Public utility was not liable in inverse condemnation when it did not acquire easement through legislative action or eminent domain and when utility did not act jointly with a government entity. *Cantu v. Pacific Gas & Electric Co. (1987) 189 Cal. App. 3d 160, 163-165, 234 Cal. Rptr. 365*

Public entity was not liable for damage from leaking culvert under property when public entity had neither built, accepted, approved, nor maintained the culvert. *Chatman v. Alameda County Flood Control etc. Dist. (1986) 183 Cal. App. 3d 424, 431-432, 228 Cal. Rptr. 257*

Public entity was not liable for damage from water running off private street that was not dedicated to public or accepted by city; approval of subdivision map was not acceptance by public entity. *Yox v. City of Whittier (1986) 182 Cal. App. 3d 347, 352-354, 227 Cal. Rptr. 311*

Cause of action in inverse condemnation was not stated by allegations that prison authorities lost or stole plaintiff's property. *Eli v. California (1975) 46 Cal. App. 3d 233, 236, 120 Cal. Rptr. 63*

City was liable in inverse condemnation when city approved street design and construction by private contractor that caused landslide. *Blau v. Los Angeles (1973) 32 Cal. App. 3d 77, 87, 107 Cal. Rptr. 727*

County was liable in inverse condemnation when county approved plans and accepted streets, whose design caused surface waters to run onto plaintiff's land. *Sheffet v. County of Los Angeles (1970) 3 Cal. App. 3d 720, 734-735, 84 Cal. Rptr. 11*

Cause of action in inverse condemnation was not stated by allegations of negligence in letting fire get out of control. *Miller v. Palo Alto (1929) 208 Cal. 74, 77, 280 P. 108*

[d] Causation

Proof that some kind of blockage in city's sewer caused a backup of raw sewage into residence established claim for inverse condemnation; homeowner was not required to prove how and why blockage occurred. *California State*

Automobile Assn. v. City of Palo Alto (2006) 138 Cal. App. 4th 474, 483-484, 41 Cal. Rptr. 3d 503

Public entity was not liable for landslide in natural creek bank used as part of drainage system when drainage system added only minimal flow to creek. *Souza v. Silver Development Co. (1985) 164 Cal. App. 3d 165, 171-172, 210 Cal. Rptr. 146*

Jury instructions on causation by improvement approved by public entity. *Barnhouse v. City of Pinole (1982) 133 Cal. App. 3d 171, 197-198, 183 Cal. Rptr. 881*

Increased use of property owner's ditch for diversion of surface waters as result of public improvement is inverse condemnation; increasing servitude is not prohibited if that increase is without unreasonable damage to owner of servient estate and compensation for any diminution in property value is paid. *Sheffet v. County of Los Angeles (1970) 3 Cal. App. 3d 720, 731, 84 Cal. Rptr. 11*

Allegedly inadequate storm drain system was not substantial cause of damage that occurred during storm that would occur once in 25 years. *Olson v. County of Shasta (1970) 5 Cal. App. 3d 336, 340-342, 85 Cal. Rptr. 77*

Public entity was liable for physical damage substantialy caused by taking even if there were other substantial causes of damage. *Blau v. Los Angeles (1973) 32 Cal. App. 3d 77, 83-86, 107 Cal. Rptr. 727*

[e] Damages

If taking by public entity did not cause economic damage, plaintiff was only entitled to nominal damages. *City of Los Angeles v. Ricards (1973) 10 Cal. 3d 385, 390 n. 4, 110 Cal. Rptr. 489, 515 P.2d 585*

[5] Emergency Action

Property damage resulting from police pursuit of suspected felon was noncompensable action based on police power; recovery under theory of inverse condemnation is generally not available for damage to property resulting from efforts of law enforcement officers to enforce criminal laws. *Customer Co. v. City of Sacramento (1995) 10 Cal. 4th 368, 377-378, 41 Cal. Rptr. 2d 658, 895 P.2d 900*

Inverse condemnation claim rejected because efforts of law enforcement officers to apprehend suspect could not be likened to exercise of power of eminent domain. *Customer Co. v. City of Sacramento (1995) 10 Cal. 4th 368, 388, 41 Cal. Rptr. 2d 658, 895 P.2d 900*

Emergency exception did not bar liability of county that deliberately flooded plaintiffs' property to save other property from flooding, when county had prior knowledge of flood threat and would have had to condemn plaintiffs' property if it had implemented flood control plan. *Odello Brothers v. County of Monterey (1998) 63 Cal. App. 4th 778, 791-792, 73 Cal. Rptr. 2d 903*

Property damage inflicted as valid exercise of police power to avoid public peril, such as medfly epidemic, is exception to requirement of compensation for taking for public purpose. *Teresi v. State of California (1986) 180 Cal. App. 3d 239, 244, 225 Cal. Rptr. 517*

[6] Evidence

Evidence of economic impact is inadmissible in facial takings challenge to general and specific plan amendments that

limited development of plaintiff's property. *NJD Ltd. v. City of San Dimas (2003) 110 Cal. App. 4th 1428, 1440-1449, 2 Cal. Rptr. 3d 818*

[7] Indemnity

Public entity was entitled to indemnity against developers who constructed public improvements, which contained defects that were basis for inverse condemnation action against entity. *County of San Mateo v. Berney (1988) 199 Cal. App. 3d 1489, 1492-1494, 245 Cal. Rptr. 738*

[8] Inverse Condemnation Defined

Definition of inverse condemnation is manner in which landowner recovers just compensation for a taking of property without eminent domain proceedings. *United States v. Clarke (1980) 445 U.S. 253, 257, 100 S. Ct. 1127, 63 L. Ed. 2d 373*

Definition of inverse condemnation is appropriation or invasion of property right by public entity. *Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 119-120, 109 Cal. Rptr. 799, 514 P.2d 111*

[9] Jury Trial

Right to jury trial on issue of compensation. *Highland Realty Co. v. City of San Rafael (1956) 46 Cal. 2d 669, 683-684, 298 P.2d 15*

Issue of whether noise from airport causes substantial interference with property is for court to decide. *Aaron v. City of Los Angeles (1974) 40 Cal. App. 3d 471, 493, 115 Cal. Rptr. 162*

Bifurcation of trial by having court decide issue of liability before jury decides damages issues is proper. *Orpheum Bldg. Co. v. San Francisco Bay Area Rapid Transit Dist. (1978) 80 Cal. App. 3d 863, 869, 146 Cal. Rptr. 5*

[10] Liability for Airport Noise

Substantial evidence of no reduction in value supported finding of no damage from airport noise. *Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 925-928, 101 Cal. Rptr. 568, 496 P.2d 480*

County was not liable for precondemnation delay for airport noise when county never attempted to acquire property and thus never engaged in precondemnation activity, whether unreasonable or not. *Andrews v. County of Orange (1982) 130 Cal. App. 3d 944, 960-962, 182 Cal. Rptr. 176 , overruled on other grounds, People v. Nesler (1997) 16 Cal. 4th 561, 582 n.5, 66 Cal. Rptr. 2d 454, 941 P.2d 87*

Award of damages for reduction in value of property caused by airport noise. *Parker v. Los Angeles 44 Cal. App. 3d 556, 562-563, 118 Cal. Rptr. 687*

[11] Liability for Fire Damage

City was liable for fire damage when design and maintenance of wires caused risk of fire in high winds. *Aetna Life & Casualty Co. v. City of Los Angeles (1985) 170 Cal. App. 3d 865, 873-874, 216 Cal. Rptr. 831*

[12] Liability for Impairment of Lateral or Subjacent Support

Public entity liability for impairing lateral or subjacent support of plaintiff's adjoining land. *Holtz v. Superior Court (1970) 3 Cal. 3d 296, 300-303, 90 Cal. Rptr. 345, 475 P.2d 441*

Public entity is liable when groundwater extraction program causes subsidence, resulting in damage to plaintiff's property. *Los Osos Valley Associates v. City of San Luis Obispo (1994) 30 Cal. App. 4th. 1670, 1680-1681, 36 Cal. Rptr. 2d 758*

Public ownership of raw land adjacent to private property that had landslides onto public land did not constitute inverse condemnation; mere ownership of land did not constitute public project or undertaking. *Wildensten v. East Bay Regional Park Dist. (1991) 231 Cal. App. 3d 976, 980-982, 283 Cal. Rptr. 13*

Public entity is liable when its refuse disposal activities on plaintiff's land later cause unforeseen subsidence damage. *Reinking v. Orange County (1970) 9 Cal. App. 3d 1024, 1030-1032, 88 Cal. Rptr. 695*

[13] Liability for Land Use Regulation

Delay in issuing demolition permit for fire-damaged hotel constituted temporary regulatory taking, when delay was caused by city's enforcement of restrictions in its residential hotel ordinance despite prohibitions of Ellis Act [*Gov. Code § 7060 et seq.* (allowing landlords to go out of business by withdrawing their rental units from market provided landlords comply with Act's requirements)]. *Ali v. City of Los Angeles (1999) 77 Cal. App. 4th 246, 254-255, 91 Cal. Rptr. 2d 458*

[14] Liability for Substantial Impairment of Access

Substantial temporary impairment of access is compensable in inverse condemnation action. *Jones v. People ex rel. Dep't of Transp. (1978) 22 Cal. 3d 144, 154-156, 148 Cal. Rptr. 640, 583 P.2d 165*

Recovery for temporary loss of access allowable when unsuccessful attempts to sell property were made. *Jones v. People ex rel. Dep't of Transp. (1978) 22 Cal. 3d 144, 155, 148 Cal. Rptr. 640, 583 P.2d 165*

Cause of action in inverse condemnation for substantial impairment of access to plaintiff's property. *Breidert v. Southern Pac. Co. (1964) 61 Cal. 2d 659, 663-664, 39 Cal. Rptr. 903, 394 P.2d 719*

As long as basic right of access is preserved, public entity is entitled to enact and enforce reasonable traffic regulation without paying compensation. *People v. Ayon (1960) 54 Cal. 2d 217, 223-224, 5 Cal. Rptr. 151, 352 P.2d 519*

Right of access of abutting landowners extends to all types of public thoroughfares, including plazas or malls. *Short Line Associates v. City & County of San Francisco (1978) 78 Cal. App. 3d 50, 55-59, 143 Cal. Rptr. 921*

Taking of substantial part of subdivision for freeway did not require compensation to owner of shopping center who lost access to potential customers. *Hecton v. People ex rel. Dept. of Transportation (1976) 58 Cal. App. 3d 653, 657, 130 Cal. Rptr. 230*

No substantial impairment of access when freeway construction required property owner to travel two or three blocks further to reach property. *Wagner v. California ex rel. Dep't of Public Works (1975) 51 Cal. App. 3d 472, 478, 124 Cal. Rptr. 224*

Owner of property abutting on public road has right to light and air from road and right to compensation if such right is taken. *People ex rel. Dep't of Public Works v. Symons (1960) 54 Cal. 2d 855, 860, 9 Cal. Rptr. 363, 357 P.2d 451*

Lowering of street, separation from sidewalk by guardrail, and closing of another abutting street was substantial impairment of access. *United Cal. Bank v. People ex rel. Dep't of Public Works (1969) 1 Cal. App. 3d 1, 8, 81 Cal. Rptr. 405*

Erection of center divider in street abutting plaintiff's property was not substantial impairment of access. *Holman v. State of California (1950) 97 Cal. App. 2d 237, 239-244, 217 P.2d 448*

[15] Liability for Unreasonable Precondemnation Delay

Planning activities do not give rise to cause of action in inverse condemnation for precondemnation delay. *Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 120-121, 109 Cal. Rptr. 799, 514 P.2d 111*

Judgment in eminent domain action bars later action in inverse condemnation for precondemnation delay. *Klopping v. Whittier (1972) 8 Cal. 3d 39, 58, 104 Cal. Rptr. 1, 500 P.2d 1345*

When state knew that city had restricted property owner's right to develop property based on state's plan to use property for freeway, and state delayed acquisition process after city notification that state should acquire property for freeway, state was liable for unreasonable precondemnation delay. *People ex rel. Dep't of Transportation v. Diversified Properties Co. III (1993) 14 Cal. App. 4th 429, 441-444 .*

Designation of property as potential park site was not announced intention to condemn and thus was not basis for liability for precondemnation delay. *Guinnane v. San Francisco (1987) 197 Cal. App. 3d 862, 866-867, 241 Cal. Rptr. 787*

Adoption of redevelopment plan, recordation of plan, sale of bonds, and application for federal funds was not sufficient announcement of intention to condemn on which to base cause of action for unreasonable condemnation delay. *Cambria Spring Co. v. Pico Rivera (1985) 171 Cal. App. 3d 1080, 1092-1098, 217 Cal. Rptr. 772*

City was liable for precondemnation delay when its proposal to acquire strip for road widening made undeveloped parcel undevelopable for three years and impaired marketability of developed parcel. *Los Angeles v. Tilem (1983) 142 Cal. App. 3d 694, 702-705, 191 Cal. Rptr. 229*

No liability for precondemnation delay when property was being held for investment and market value was not affected. *Los Angeles v. Property Owners (1982) 138 Cal. App. 3d 114, 120-121, 187 Cal. Rptr. 667*

City was not liable for damages for unreasonable precondemnation delay when there was no evidence of loss of rental income because owner occupied house during period of delay. *City of Fresno v. Shewmake (1982) 129 Cal. App. 3d 907, 911-913, 181 Cal. Rptr. 451*

Damages for delay in trial of condemnation case was not allowed because plaintiff entitled to interest on judgment during delay. *Monterey County v. W. W. Leasing Unlimited (1980) 109 Cal. App. 3d 636, 646-647, 167 Cal. Rptr. 12 , cert. denied, 450 U.S. 915 (1981)*

Precondemnation delay of 22 months was not unreasonable when substantial part of time was spent obtaining matching funds and determining boundaries of proposed park. *Elgin Capital Corp. v. Santa Clara County (1975) 57 Cal. App.*

3d 687, 690-692, 129 Cal. Rptr. 376

No damages allowed for premature taking of property because plaintiff entitled to interest on judgment for that period. *Los Angeles County v. Smith (1976) 55 Cal. App. 3d 749, 756, 127 Cal. Rptr. 666*

Public entity not liable for adoption of freeway plan that shows freeway running through plaintiff's land. *Johnson v. State of California (1979) 90 Cal. App. 3d 195, 198-199, 153 Cal. Rptr. 185* ; *Smith v. California (1975) 50 Cal. App. 3d 529, 534-537, 123 Cal. Rptr. 745*

Precondemnation delay was not unreasonable when necessary for bond election, appraisal of the property, and negotiations with owner. *City of Walnut Creek v. Leadership Housing Systems Inc. (1977) 73 Cal. App. 3d 611, 623, 140 Cal. Rptr. 690*

[16] Liability for Water Damage

[a] Diversion From Natural Watercourses

Diversion of water from natural watercourse causing damage to plaintiff's property gave rise to cause of action for inverse condemnation. *Bauer v. County of Ventura (1955) 45 Cal. 2d 276, 283, 289 P.2d 1*

Public entity was liable for flood control measures that diverted water from natural watercourse onto plaintiff's property. *Youngblood v. Los Angeles (1958) 160 Cal. App. 2d 481, 489-490, 325 P.2d 587*

Public entity was liable for installation of storm drain that clogged and diverted natural flow of waters onto plaintiff's property. *Ward Concrete Co. v. Los Angeles Flood Control Dist. (1957) 149 Cal. App. 2d 840, 847-848, 309 P.2d 546*

[b] Flood Waters

Flood control agency was not liable to downstream owner for damages from floodwaters that overtopped its dikes because its flood control measures to divert waters from natural watercourses were reasonable. *Bunch v. Coachella Valley Water Dist. (1997) 15 Cal. 4th 432, 447, 63 Cal. Rptr. 2d 89, 935 P.2d 796*

Public entity was liable for unreasonable conduct in taking flood control measures. *Belair v. Riverside County Flood Control Dist. (1988) 47 Cal. 3d 550, 563-565, 253 Cal. Rptr. 693, 764 P.2d 1070*

Public entity was liable for faulty design of flood control devices allowing blockage by debris, which diverted water onto plaintiff's land. *Bauer v. County of Ventura (1955) 45 Cal. 2d 276, 285-287, 289 P.2d 1*

Reasonableness rule applied in action alleging damage to property from county's flood control activities; county's actions in approving housing developments north of slough on plaintiff's property, constructing new bridge over slough, and approving restoration project at bifurcation of slough were not individually, or in combination, unreasonable conduct that would impose liability on county. *Hauselt v. County of Butte (2009) 172 Cal. App. 4th 550, 561-562, 91 Cal. Rptr. 3d 343*

Inadequate maintenance of flood control project supports liability for inverse condemnation; it is enough to show that entity was aware of risk posed by its public improvement and deliberately chose course of action or inaction in face of that known risk. *Arreola v. Monterey County (2002) 99 Cal. App. 4th 722, 743-744, 122 Cal. Rptr. 2d 38*

Reasonableness rule does not apply if governmental flood control works cause flooding by intentionally diverting water

to upstream private property that was not historically subject to flooding, in order to protect lower-lying land. *Akins v. State of California (1998) 61 Cal. App. 4th 1, 28-29, 71 Cal. Rptr. 2d 314*

Public entity was liable for flooding caused by inadequate drain. *Imperial Cattle Co. v. Imperial Irrigation Dist. (1985) 167 Cal. App. 3d 263, 269-270, 213 Cal. Rptr. 622*

When public agency causes injury to property by subterranean or surface flooding, even though flooding is only temporary, taking of property within meaning of *Code Civ. Proc. § 1036* occurs and litigation costs are recoverable. *Orme v. State of California ex rel. Dept. Water Resources (1978) 83 Cal. App. 3d 178, 185, 147 Cal. Rptr. 735*

[c] Surface Water

Governmental entity will be liable under principles of inverse condemnation for downstream damage caused by an increased volume or velocity of surface waters discharged into natural watercourse from improvements on publicly owned land if it fails to use reasonably available, less injurious alternatives, or if it has incorporated watercourse into public drainage system or otherwise converted watercourse into public work. *Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 362-367, 27 Cal. Rptr. 2d 613, 867 P.2d 724*

Upper landowner was liable for diversion of naturally flowing surface water, but both upper and lower landowner had duty to act reasonably with respect to surface water. *Keys v. Romley (1966) 64 Cal. 2d 396, 405-409, 50 Cal. Rptr. 273, 412 P.2d 529*

City could be liable on inverse condemnation theory for damage caused by discharge of surface water based on its ownership of portion of drainage system; as matter of law, city's ownership and control of portion of drainage system made it potentially liable for damage substantially caused by its unreasonable diversion of water through city-owned portions of system. *Skoumbas v. City of Orinda (2008) 165 Cal. App. 4th 783, 791, 81 Cal. Rptr. 3d 242*

Landowners could not recover on cause of action for inverse condemnation against public entity for discharging effluents into river from sewage treatment facilities, which allegedly caused excessive growth of vegetation in river channel causing potential flood problems, when landowners failed to prove that public entity acted unreasonably, and substantial evidence supported contention that landowners' property values were not diminished due to any actions by public entity and that landowners suffered no actual harm or interference with use of their properties. *Jordan v. City of Santa Barbara (1996) 46 Cal. App. 4th 1245, 1261, 54 Cal. Rptr. 2d 340*

[d] Seepage From Irrigation Ditches

Public entity is liable in inverse condemnation when seepage of water from irrigation ditch damages adjacent land. *Powers Farms v. Consolidated Irr. Dist. (1941) 19 Cal. 2d 123, 126, 119 P.2d 717*

[17] Liability to Public Entity

City was liable to water district for physical damage to district's property for failure to properly maintain road. *Marin Mun. Water Dist. v. City of Mill Valley (1988) 202 Cal. App. 3d 1161, 1164-1166, 249 Cal. Rptr. 469*

[18] Measure of Damages

In inverse condemnation action by landowner whose access to land was affected by building of dam, damages were

recoverable as monetary measure of diminution in value of property caused by invasion of property rights; evidence of costs of establishing new methods of access was admissible on issue of diminution of value. *Dunbar v. Humboldt Bay Mun. Wat. Dist. (1967) 254 Cal. App. 2d 480, 488-489, 62 Cal. Rptr. 358*

Cost of moving gas line was measure of damage in inverse condemnation action when defendant's placement of 12 feet of fill over it made it unsafe. *Pacific Gas & Elec. Co. v. San Mateo County (1965) 233 Cal. App. 2d 268, 273-275, 43 Cal. Rptr. 450*

[19] No Liability for Land Use Regulation

Regulation that prohibited subsurface mining that caused subsistence did not constitute taking when regulation did not deprive landowner of economically viable use of land. *Keystone Bituminous Coal Association v. DeBenedictis (1987) 480 U.S. 470, 493-497, 107 S. Ct. 1232, 94 L. Ed. 2d 472*

City's conditioning of nonresidential building permits on payment of fee for low-income housing was not taking because it was based on study showing impact of permits on need for low-income housing. *Commercial Builders of Northern California v. City of Sacramento (9th Cir. 1991) 941 F.2d 872*

No showing that rent control ordinance failed to advance "substantial governmental interest" and therefore effected a taking when landlord alleged that ordinance failed to advance its stated goal of providing affordable housing for the poor, the elderly, and young families, but did not allege that ordinance failed to advance legitimate purpose of preventing unreasonable and excessive rent increases. *Santa Monica Beach, Ltd. v. Superior Court (1999) 19 Cal. 4th 952, 971, 81 Cal. Rptr. 2d 93, 968 P.2d 993*

Government agency's legally erroneous decision during development approval process resulting in delay does not amount to temporary taking of property unless error constitutes passage and enforcement of law or regulation that deprives property of all value. *Landgate Inc. v. California Coastal Com. (1998) 17 Cal. 4th 1006, 1020, 1021, 73 Cal. Rptr. 2d 841, 953 P.2d 1188*

Rent control ordinance that prohibited demolition of rental property unless certain conditions were met was not taking of property because owner could receive reasonable return on investment. *Nash v. City of Santa Monica (1984) 37 Cal. 3d 97, 103-106, 207 Cal. Rptr. 285, 688 P.2d 894*

Public entity was not liable in inverse condemnation for zoning land for open space with limitation on number of houses that could be constructed. *Agins v. Tiburon (1979) 24 Cal. 3d 266, 277-278, 157 Cal. Rptr. 372, 598 P.2d 25 , aff'd, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)*

Change in zoning that results in diminution in value of property is valid and not basis of cause of action in inverse condemnation. *HFH, Ltd. v. Superior Court (1975) 15 Cal. 3d 508, 513-518, 125 Cal. Rptr. 365, 542 P.2d 237*

Property owners who sought to establish native plant landscape on undeveloped property did not state regulatory takings claim based on county's action in denying permit for electrical connection for well or for delay until owners were granted relief by way of petition for writ of mandate. *Shaw v. County of Santa Cruz (2009) 170 Cal. App. 4th 229, 271, 275, 278, 88 Cal. Rptr. 3d 186*

Two-year delay in development precipitated by city's erroneous action in denying application for lot line adjustment not unlawful temporary taking; city's action was not objectively unreasonable because it was in furtherance of substantial governmental interest and was not taken solely to delay proposed project. *Loewenstein v. City of Lafayette (2002) 103 Cal. App. 4th 718, 729, 127 Cal. Rptr. 2d 79*

Inclusionary zoning ordinance requiring 10 percent of all newly constructed residential units in city to be "affordable" did not effect regulatory taking on its face because it allowed city to waive requirements. *Home Builders Assn. v. City of Napa (2001) 90 Cal. App. 4th 188, 194, 108 Cal. Rptr. 2d 60*

Delay resulting from factual or legal uncertainties that temporarily cloud respective limits of regulatory jurisdiction of two public entities does not constitute regulatory taking of any property. *Littoral Development Co. v. San Francisco Bay Conservation Etc. Com. (1995) 33 Cal. App. 4th 211, 221, 39 Cal. Rptr. 2d 266*

Cause of action for regulatory taking was not stated when complaint alleged that property retained significant value. *Smith v. City and County of San Francisco (1990) 225 Cal. App. 3d 38, 45-46, 275 Cal. Rptr. 17*

Redevelopment plan preventing demolition of building and construction of modern building was not a taking when owner still using old building and therefore not deprived of all use. *Terminals Equipment Co. v. City and County of San Francisco (1990) 221 Cal. App. 3d 234, 241-244, 270 Cal. Rptr. 329*

State was not liable in inverse condemnation for refusal to allow local water district with no new water sources to serve property that did not have preexisting rights to water. *Gilbert v. State of California (1990) 218 Cal. App. 3d 234, 252-257, 266 Cal. Rptr. 891*

Coastal Commission was not liable in inverse condemnation for adoption of general plan that allowed some development. *Pier Gherini v. California Coastal Com. (1988) 204 Cal. App. 3d 699, 713-714, 251 Cal. Rptr. 426*

Temporary suspension of land use during normal governmental decision making about status of land, absent extraordinary delay, is not considered to be taking. *Guinnane v. San Francisco (1987) 197 Cal. App. 3d 862, 867-870, 241 Cal. Rptr. 787*

Government power to regulate land is so important that no vested right to particular use by landowner vests until government has approved that specific use; absent vested right to use land as contemplated, landowner is unable to bring inverse condemnation action. *Rutherford v. State of California (1987) 188 Cal. App. 3d 1267, 1286, 233 Cal. Rptr. 781*

Requirement of irrevocable offer to dedicate for lateral beach access imposed on permit to construct house was not taking because owner was not deprived of all use of property. *Grupe v. California Coastal Com. (1985) 166 Cal. App. 3d 148, 159-184, 212 Cal. Rptr. 578*

Cause of action was stated based on allegations that land use regulation precluded only economic use of property. *Mario Saikhon, Inc. v. Agricultural Labor Relations Bd. (1983) 140 Cal. App. 3d 581, 189 Cal. Rptr. 632*

Question was one of fact as to whether or not two adjacent parcels owned by same person but zoned differently were separate parcels for purposes of deciding taking issue. *Aptos Seascape Corp. v. County of Santa Cruz (1982) 138 Cal. App. 3d 484, 495-497, 188 Cal. Rptr. 191* ; *see American Sav. & Loan Ass'n v. County of Marin (9th Cir. 1981) 653 F.2d 364, 368-369*

Public entity was not liable for refusal to rezone plaintiff's property in manner that would increase its value. *Gilliland v. County of Los Angeles (1982) 126 Cal. App. 3d 610, 614-617, 179 Cal. Rptr. 73*

Adoption of general plan proposing acquisition of plaintiff's land for park did not create liability for inverse condemnation. *Helix Land Co. v. City of San Diego (1978) 82 Cal. App. 3d 932, 945-948, 147 Cal. Rptr. 683*

Freeze on permits for bay fill pending adoption of plan by regulatory commission is valid and not basis for action in inverse condemnation. *Candlestick Properties Inc. v. San Francisco Bay Conservation etc. Com. (1970) 11 Cal. App. 3d 557, 570-573, 89 Cal. Rptr. 897*

[20] Other Bases of Liability

Liability in inverse condemnation for mobilehome rent control law that resulted in tenant being given permanent transferable right of occupancy. *Hall v. City of Santa Barbara (9th Cir. 1986) 833 F.2d 1270, 1282*

When impairment of visibility of billboard is sole harm alleged from municipal landscaping project on city-owned property, eminent domain and inverse condemnation principles do not require payment of compensation. *Regency Outdoor Adver., Inc. v. City of Los Angeles (2006) 39 Cal. 4th 507, 523, 46 Cal. Rptr. 3d 742*

Public entity was liable in inverse condemnation for odor from sewage treatment plant adjacent to plaintiff's property. *Varjabedian v. City of Madera (1977) 20 Cal. 3d 285, 296-298, 142 Cal. Rptr. 429, 572 P.2d 43*

Application of Santa Monica Rent Control Law to nonresident tenants does not effect unconstitutional taking of landlords' property. *Borten v. Santa Monica Rent Control Bd. (2006) 141 Cal. App. 4th 1485, 1490, 47 Cal. Rptr. 3d 178*

Eviction control ordinance restricting ability of owners of residential rental property to evict tenants to enable owner or owner's relatives to move into rental unit effected physical and regulatory taking of owners' property. *Cwynar v. City and County of San Francisco (2001) 90 Cal. App. 4th 637, 109 Cal. Rptr. 2d 233*

Tenants whose commercial leases were terminated by their landlord so that leased properties could be included in large scale commercial development partly funded by redevelopment agency were not entitled to compensation for loss of improvements and business goodwill; facts did not establish "substantial equivalent" to condemnation because landlord contributed property to joint venture with a developer, and there was no evidence redevelopment agency intended to condemn properties. *Langer v. Redevelopment Agency (1999) 71 Cal. App. 4th 998, 1006, 84 Cal. Rptr. 2d 19*

City was liable in inverse condemnation for destroying plaintiff's property in absence of emergency and compelling necessity and without affording owner due process. *Rose v. City of Coalinga (1987) 190 Cal. App. 3d 1627, 1634, 236 Cal. Rptr. 124*

Liability in inverse condemnation exists for purchasing property under threat of condemnation and not compensating lessee for loss of improvements on property, even when lease is for a short term. *Lanning v. City of Monterey (1986) 181 Cal. App. 3d 352, 357-359, 226 Cal. Rptr. 258*

Public entity was liable in inverse condemnation for discharge of treated sewage effluent through watercourses on plaintiff's property. *Amador Valley Investors v. City of Livermore (1974) 43 Cal. App. 3d 483, 491-493, 117 Cal. Rptr. 749*

Public entity was liable for taking avigation easement by imposing severe height limitations on property in airport flight path. *Sneed v. County of Riverside (1963) 218 Cal. App. 2d 205, 209-210, 32 Cal. Rptr. 318*

Public entity was liable in inverse condemnation for leaving pipe on surface of subsurface easement for 10 months. *O'Dea v. County of San Mateo (1956) 139 Cal. App. 2d 659, 661-662, 294 P.2d 171*

[21] Relocation Assistance

When inverse condemnation action is substitute for direct condemnation action because public entity should have brought action to acquire property, inverse condemnee is entitled to relocation assistance benefits. *Beaty v. Imperial Irrigation Dist. (1986) 186 Cal. App. 3d 897, 902-915, 231 Cal. Rptr. 128*

[22] Ripeness for Review

Full faith and credit rule [*28 U.S.C. § 1738*] bars relitigation in federal court of issues decided by state court that are dispositive of federal takings claims. *San Remo Hotel, L.P. v. City and County of San Francisco (2005) 545 U.S. 323, 125 S. Ct. 2491, 2505, 162 L. Ed. 2d 315*

Once it becomes clear that agency lacks discretion to permit any development, or property's permissible uses are known to a reasonable degree of certainty, takings claim is likely to have ripened. *Palazzolo v. Rhode Island (2001) 533 U.S. 606, 620, 121 S. Ct. 2448, 150 L. Ed. 2d 592*

Taking claim is ripe for adjudication when city rejected development application after having specified conditions for development that were met by application. *Del Monte Dunes Monterey, Inc. v. City of Monterey (9th Cir. 1990) 920 F.2d 1496*

Taking claim is not ripe when landowners had not applied for amendment to Tahoe plan to allow development. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency (9th Cir. 1990) 911 F.2d 1331*

Inverse condemnation action is ripe for review when county had made final decision because it rezoned land so as not to allow the project and otherwise made it clear that the project would not be allowed. *Hoehne v. County of San Benito (9th Cir. 1989) 870 F.2d 529*

Inverse condemnation action is not ripe for review when state remedies have not been pursued; state remedies for physical invasion are adequate. *Sinaloa Lake Owners Association v. City of Simi Valley (9th Cir. 1989) 864 F.2d 1475*

Developer's application to city to amend general plan and electorate's rejection of that amendment in referendum vote did not satisfy developer's obligation to obtain final definitive position from city as to how it would apply applicable regulations to developer's property, and therefore developer's inverse condemnation action was not ripe for adjudication. *Milagra Ridge Partners, Ltd. v. City of Pacifica (1998) 62 Cal. App. 4th 108, 119, 72 Cal. Rptr. 2d 394*

Inverse condemnation action is not ripe for review when landowner had not sought waste discharge permit under challenged *Water Quality Plan. Tahoe Sierra Preservation Council v. State Water Resources Control Bd. (1989) 210 Cal. App. 3d 1421, 1439-1442, 259 Cal. Rptr. 132*

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[Reserved]

§§ 247.259[Reserved]

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§ 247.270 Proceedings for Order Permitting Entry--Petition [Code Civ. Proc. § 1245.030(a)]

[1] FORM Proceedings for Order Permitting Entry--Petition [Code Civ. Proc. § 1245.030(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR ORDER PERMITTING ENTRY
	)	ON PROPERTY
In the Matter of the Petition of	)	Date: _____
_____ [*name of*	)	Time: _____
condemning party].	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

Petitioner alleges:

1. Petitioner is _____ [*allege identity and capacity*].

2. Petitioner is by law authorized to exercise the power of eminent domain to acquire proeprty for _____ [*state particular use for which property may be acquired e.g.*, state highway construction] pursuant to _____ [*cite statute*].

3. _____ [*Name(s)*] _____ is/are the owner(s) of the following-described real property: _____ [*describe property*].

4. Petitioner seeks to enter on the above-described property to make _____ [*specify, e.g.*, photographs, studies, surveys, examinations, tests, soundings, borings, samplings, and appraisals *or any one or combination of these*] and to engage in similar activities reasonably related to acquisition or use of the property for _____ [*state particular use for which property is sought, e.g.*, state highway purposes].

5. The entry and activities described in Paragraph 4 may result in actual damage to the property and interference with its possession and use in an amount not exceeding the sum of $_____.

WHEREFORE, petitioner prays for an order of the court permitting entry on the property for the activities hereinabove described [and ordering the deposit of the probable amount of damages in a sum not exceeding $_____ in the _____ (*specify county treasury*)].

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Use of Form

This form of petition is for use by the condemnor in obtaining an order for entry on the property to be condemned to engage in activities reasonably related to the purpose for which the property is sought [*see Code Civ. Proc. § 1245.020*]. The form is not required if the petitioner has obtained the owner's written consent to enter on his or her land or according to the Cal. L. Rev. Comm'n Comments to *Code Civ. Proc. § 1245.020*, if the activities conducted on it will involve only trivial injuries to the property and inconsequential interference with the owner's possession and use.

[3] State Statutes

Authority to enter property for certain activities. *Code Civ. Proc. § 1245.010*

Prerequisites to entry and activities. *Code Civ. Proc. § 1245.020*

Petition for order permitting entry. *Code Civ. Proc. § 1245.030(a)*

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§ 247.271 Proceedings for Order Permitting Entry--Order for Hearing and Directing Notice Be Given [Code Civ. Proc. § 1245.030]

[1] FORM Proceedings for Order Permitting Entry--Order for Hearing and Directing Notice Be Given [Code Civ. Proc. § 1245.030]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER
	)	Date: _____
In the Matter of the Petition of	)	Time: _____
_____ [*name of condemning*	)	Location: _____
party]	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	
_____		

The petition of _____ [*name of petitioning party*] for an order of entry on the property of _____ [*name(s) of owner(s) of property*] having been filed and good cause appearing therefore,

IT IS ORDERED that the petition be heard on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____[*city*].

IT IS FURTHER ORDERED that notice of the hearing be given to _____ [*name(s) of property*

owner(s) to be notified of hearing] _____ [*set forth method by which notice of the hearing is to be given, e.g.*, by personal service of a copy of the petition and a copy of this order] at least _____ days before the hearing.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use by the court in appointing a time and place for a hearing on a petition for an order permitting entry [*see § 247.270*] and directing the method by which prior notice of the hearing is to be given to the owner or owners of the property on which the petitioner seeks to enter.

[3] State Statutes

Petitioner is required to give owner such prior notice as court determined appropriate under circumstances. *Code Civ. Proc. § 1245.030(a)*

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20-247 California Forms of Pleading and Practice--Annotated § 247.272

§ 247.272 Proceedings for Order Permitting Entry--Order [Code Civ. Proc. § 1245.030(b), (c)]

[1] FORM Proceedings for Order Permitting Entry--Order [Code Civ. Proc. § 1245.030(b), (c)]

[Caption. See *§ 247.271[1]*.]

The petition of _____ [*name of petitioner*] for an order permitting entry on the real property of _____ [*name(s) of property owner(s)*] for the purposes and activities described herein came on regularly for hearing by the court this date after notice was duly and properly given. Petitioner appeared by counsel _____ [*name*]; respondent appeared by counsel _____ [*name*].

Upon proof made to the satisfaction of the court that the motion ought to be granted, the court finds, determines, and orders that:

1. Petitioner is a _____ [*specify, e.g.*, public entity authorized by law to exercise the power of eminent domain to acquire property for the purpose of _____ [*specify*].

2. Petitioner seeks to enter on property owned by _____ [*name(s)*] and described as follows: _____ [*give legal description of property*].

3. Petitioner seeks entry on the above-described of property for the purpose of _____ [*state purpose, e.g.*, determining if the land is suitable for a state highway right-of-way].

4. The nature and scope of the activities that are reasonably necessary to accomplish the above-stated purpose are _____ [*set forth court determination of the nature and scope of activities necessary for purpose for which entry is sought*].

5. The entry and activities described above may result in actual damage to the property and/or substantial interference

with its possession and use.

6. The probable compensation for any actual damage and/or substantial interference with possession and use of the property does not exceed $_____.

NOW, THEREFORE, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that on depositing the amount of $_____ in the _____ [*specify county treasury or* Condemnation Deposits Fund in the State Treasury] pursuant to *Section 1245.050(b) of the Code of Civil Procedure*, the petitioner is, and shall forthwith be, authorized and empowered to enter on the above-described property for the purpose of _____ [*specify*] and is, and shall forthwith be, authorized and empowered to undertake the following activities on the property: _____ [*specify*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use by the court in issuing an order permitting petitioner to enter property which it seeks to acquire by eminent domain. The order must prescribe the purpose for the entry and the nature and scope of the activities to be undertaken. It also must require the petitioner to deposit with the court the probable amount of compensation for any damage and/or interference with possession or use which may occur [*Code Civ. Proc. § 1245.030(c)*]. The deposit is retained for six months following the entry's termination, unless it is sooner disbursed by court order or the court extends the period for good cause [*Code Civ. Proc. § 1245.050*; *see Code Civ. Proc. § 1240.050(b)* (requirement relating to retention of deposit)]. The order should provide suitable limitations of time, area, and type of activity striking a balance between the needs of the condemnor and the interests of the property owner [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1245.030*].

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§ 247.273 Proceedings for Order Modifying Order of Entry [Code Civ. Proc. § 1245.040]--Notice of Motion

[1] FORM Proceedings for Order Modifying Order of Entry [Code Civ. Proc. § 1245.040]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MOTION AND NOTICE OF MOTION
	)	TO MODIFY ORDER OF ENTRY
	)	[Telephone Appearance]
In the Matter of the Petition of	)	Date: _____
_____ [*name of condemning*	)	Time: _____
party].	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

To _____ [*identify party, e.g.*, petitioner _____ (*name*)] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify moving party, e.g.*, respondent] _____ [*name*] will, and hereby does, move for an order modifying the order dated _____ [*date*], by which petitioner was permitted to enter on the lands of

_____ [*name of property owner*] for the purpose of _____ [*specify*]. The motion will be made on the grounds that _____ [*specify legal grounds, e.g.,* the amount deposited will not reasonably compensate the owner(s) of the property for the damages and interference with possession and use resulting from the entry].

The motion will be based on this notice of motion, on the _____ declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

CAUTION:
A supporting memorandum must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form of notice is for use by the condemnor or the party owning the property on which the condemnor has entered to move for an order modifying an order of entry made under *Code Civ. Proc. § 1245.030*. The property owner or the condemnor may apply for such an order if it appears, after an order of entry has been made, that the activities must be extended to accomplish the purpose or curtailed to prevent unwarranted damage or interference, or that greater or lesser damage to the property will occur [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1245.040*].

[3] State Statutes

Court is permitted to modify provisions of order of entry. *Code Civ. Proc. § 1245.040(a)*

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20-247 California Forms of Pleading and Practice--Annotated § 247.274

§ 247.274 Proceedings for Order Modifying Order of Entry [Code Civ. Proc. § 1245.040]--Order Granting Motion

[1] FORM Proceedings for Order Modifying Order of Entry [Code Civ. Proc. § 1245.040]--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER
	)	Date: _____
	)	Time: _____
In the Matter of the Petition of	)	Location: _____
_____ [*name of the condemning*	)	Judge: _____
party]	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*name of moving party*] for an order modifying the previous order of the court dated _____ [*date*], came on regularly for hearing by the court this date on notice duly and regularly given. Petitioner appeared by counsel _____ [*name*]; respondent appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that the motion be, and it hereby is, granted and the order

of this court dated _____ [*date*], is modified in that _____ [*specify manner in which order is to be modified*].

[IT IS FURTHER ORDERED that _____ (*specify, e.g.*, any further entry on the property) be stayed until the further amount is deposited.]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use by the court in modifying a prior order of entry. After notice and hearing, a court may modify any of the provisions of an order of entry [*Code Civ. Proc. § 1245.040(a)*].

If an order of modification increases the amount required to be deposited, the court must specify the time within which the additional amount must be deposited and in its discretion may direct that any further entry or that specified activities be stayed until the additional amount has been deposited [*Code Civ. Proc. § 1245.040(b)*; Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1245.040*].

Under some circumstances, a modification order may decrease the amount of the required deposit. In this situation, the court, pursuant to *Code Civ. Proc. § 1245.050(a)*, can order that the excess be disbursed at once to the person who made the deposit [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1245.040*].

[3] State Statutes

Proceedings are permitted to be stayed if amount deposited is increased by order of modification. *Code Civ. Proc. § 1245.040(b)*

[4] Cross References

[See *§ 247.273*.]

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20-247 California Forms of Pleading and Practice--Annotated § 247.275

§ 247.275 Proceedings for Recovery for Damages to or Interference With Use or Possession of Property [Code Civ. Proc. § 1245.060]--Notice of Motion

[1] FORM Proceedings for Recovery for Damages to or Interference With Use or Possession of Property [Code Civ. Proc. § 1245.060]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MOTION AND NOTICE OF MOTION FOR OR-
	)	DER DETERMINING DAMAGES [,] [AND]
	)	COSTS [, AND ATTORNEY'S FEES]
In the Matter of the Petition of	)	[Telephone Appearance]
_____ [*name of condemning*	)	Date: _____
party].	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____
_____		

To _____ [*name*], petitioner, and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*name(s) of property owner(s)*] owner(s) of the property described in the petition on file herein, will and hereby do,

move the court for an order determining and awarding _____ [damages and costs *or* damages, costs, and litigation expenses] resulting from petitioner's entry on the above-mentioned property [, pursuant to the order of this court and entered on _____ (*date*)]. The motion will be made on the grounds that the moving party sustained actual damages as a result of petitioner's entry and activities on the property [and is entitled to his/her/its litigation expenses since _____ (the entry was unlawful *or* petitioner's activities on the property were abusive and lacking in due regard of the interests of the moving party *or* petitioner failed to comply substantially with the terms of _____ (the above-described order *or* this court's order entered on _____ (*date*), modifying the terms of the above-described order))].

The motion will be based on this notice of motion, on the _____ declaration of _____ [*name(s*)] and the supporting memorandum served and filed herewith, on the records and file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

CAUTION:
A supporting memorandum must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form of notice of motion is for use by the owner of the property on which the condemnor entered and performed activities in moving for an order determining damages arising from that entry when funds are on deposit [*see Code Civ. Proc. § 1245.060(c)*].

If the entry and activities on property cause actual damage to or substantial interference with the possession or use of the property, whether or not a claim has been presented in compliance with *Gov. Code §§ 900-935.6* (claims against public entities), the owner may recover from the damage or interference by application to the court [*Code Civ. Proc. § 1245.060(a)*]. The owner may also use any other available remedy to recover for the damage to his or her property [*Code Civ. Proc. § 1245.060(d)*]. Consequently, the property owner could bring an action for nuisance or trespass, depending on the specific factual situation [*see generally*, Ch. 391, *Nuisance* , and Ch. 550, *Trespass*].

[3] Costs and Litigation Expenses

The prevailing claimant must be awarded costs and his or her litigation expenses incurred in the proceedings if the court finds that (1) the entry was unlawful; (2) the entry was lawful but the activities on the property were abusive or lacking in due regard for the interests of the owner; or (3) there was a failure to comply substantially with the terms of an order made under *Code Civ. Proc. § 1245.030* (order of entry) or *1245.040* (order modifying order of entry) [*Code Civ. Proc. § 1245.060(b)*].

[4] State Statutes

Recovery for damages caused during entry and activities on property. *Code Civ. Proc. § 1245.060(a)*

Application to court for damages when funds are on deposit. *Code Civ. Proc. § 1245.060(c)*

Recovery of costs and litigation expenses. *Code Civ. Proc. § 1245.060(b)*

Availability of other remedies. *Code Civ. Proc. § 1245.060(d)*

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20-247 California Forms of Pleading and Practice--Annotated § 247.276

§ 247.276 Proceedings for Recovery for Damages to or Interference With Use or Possession of Property [Code Civ. Proc. § 1245.060]--Supporting Declaration

[1] FORM Proceedings for Recovery for Damages to or Interference With Use or Possession of Property [Code Civ. Proc. § 1245.060]--Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	DECLARATION OF _____ IN
	)	SUPPORT
	)	OF MOTION FOR ORDER
	)	DETERMINING DAMAGES[,] [AND] COSTS[,
In the Matter of the Petition of	)	AND ATTORNEY'S FEES]
_____ [*name of condemning*	)	Date: _____
party].	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

I, _____ [*name*], declare:

I am an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for the moving party in the above-entitled proceeding.

The petitioner entered on the property of the moving party on _____ [*date*][, pursuant to an order for entry dated _____ (*date*)] to _____ [*specify purpose and extent of petitioner's activities*].

My client(s) _____ [has *or* have] suffered damages arising out of petitioner's entry on the property, as shown in the attached Declaration(s) of _____ [*name(s) of declarant(s) with knowledge of the damages suffered*] in the amount of $_____.

[Court costs have been incurred in the necessary amount of $_____ consisting of _____ (*specify*).]

[Petitioner failed substantially to comply with the terms of the order of this court made under *Section 1245.030 of the Code of Civil Procedure* and entered on _____ [*date*], in that _____ (*specify facts showing substantial failure to comply or state other ground specified in Code Civ. Proc. § 1245.060(b)*). My client is therefore entitled to recover litigation expenses, as the term is defined in *Section 1235.140 of the Code of Civil Procedure*. These expenses are as follows: _____ (*specify*).]

The amount which _____ [*name of moving party*] is entitled to recover under the provisions of *Section 1245.060 of the Code of Civil Procedure* is $_____ [*specify total of damages, costs, and litigation expenses, if any*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

CAUTION:
This form should be accompanied by declarations of persons with personal knowledge of the damages suffered by the moving party.

[2] Use of Form

This form of declaration is for use in supporting a motion for an order determining damages, court costs, and reasonable attorney's fees.

[3] Cross References

See *§ 247.275*.

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20-247 California Forms of Pleading and Practice--Annotated § 247.277

§ 247.277 Proceedings for Recovery for Damages to or Interference With Use or Possession of Property [Code Civ. Proc. § 1245.060]--Order Granting Motion

[1] FORM Proceedings for Recovery for Damages to or Interference With Use or Possession of Property [Code Civ. Proc. § 1245.060]--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER DETERMINING DAMAGES[,] [AND]
	)	COSTS [, AND ATTORNEY'S FEES]
In the Matter of the Petition of	)	Date: _____
_____ [*name of condemning*	)	Time: _____
party].	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
_____		

The motion of _____ [*name of property owner making motion*] for an order determining _____ [damages and costs *or* damages, costs, and litigation expenses] on the ground(s) that the moving party sustained actual damages as a result of petitioner's entry and activities on his/her property [_____ (*if attorney's fees are sought specify one or more of grounds under Code Civ. Proc. § 1245.060(b), e.g.,* and that petitioner failed substantially to comply with the terms of the court's order made under *Section 1245.030 of the Code of Civil Procedure* permitting the entry and specified activities)] came on regularly for hearing on _____ [*date*]. Petitioner appeared by counsel _____ [*name*]; _____ [*name of moving party*] appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED, that _____ [*name of moving party*] is entitled to damages in the amount of $_____ as a result of petitioner's entry on his/her property on _____ [*date*], to court costs in the amount of $_____ [, and to litigation expenses, consisting of _____ (*specify, e.g.*, attorney's fees) making a total amount of $_____].

IT IS FURTHER ORDERED that the sum of $_____ be paid to _____ [*name of moving party*] by or for the petitioner and that _____ [*insert appropriate order pertaining to money on deposit, e.g.*, the State Treasurer be and hereby is authorized and directed to pay the amount of $_____ on deposit to the moving party (*if the amount on deposit is insufficient add:* and the petitioner be and hereby is ordered to pay the additional amount of $_____ to the moving party)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use by the court in granting a party's motion for recovery for damages to or interference with the use or possession of the moving party's property.

If funds are on deposit pursuant to *Code Civ. Proc. §§ 1245.010-1245.060*, on application of the owner, the court must determine and award the amount the owner is entitled to recover and must order the amount paid out of the funds on deposit. If the funds on deposit are not sufficient to pay the full amount of the award, the court must enter judgment for the unpaid portion [*Code Civ. Proc. § 1245.060(c)*].

[3] Cross References

See *§ 247.275*.

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20-247 California Forms of Pleading and Practice--Annotated § 247.278

§ 247.278 Caption for Use in Eminent Domain Proceedings [Code Civ. Proc. § 1250.310]

[1] FORM Caption for Use in Eminent Domain Proceedings [Code Civ. Proc. § 1250.310]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	_____ [*specify, e.g.,* COMPLAINT
[_____ (*name*), as	)	IN EMINENT DOMAIN]
_____ (Executor of the Will *or* Ad-	)	
ministrator of the Estate with the Will Annexed *or*	)	
Administrator of the Estate) of		
_____ (*name*), deceased, the heirs		
and devisees of _____ (*name*), de-		
ceased, and all persons claiming by, through, or under		
said decedent;] DOES I-_____, in-		
clusive; and all persons unknown claiming an interest		
in the property described in the complaint,		
Defendant(s).		

_____

[2] Use of Form

This form of caption is for use by a plaintiff or a defendant in eminent domain proceedings. For discussion and other forms of captions, see Ch. 108, *Captions and Introductions* .

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20-247 California Forms of Pleading and Practice--Annotated § 247.279

§ 247.279 Complaint in Eminent Domain [Code Civ. Proc. § 1250.310]--General Form

[1] FORM Complaint in Eminent Domain [Code Civ. Proc. § 1250.310]--General Form

[*Caption. See § 247.278.*]

Plaintiff alleges:

1. Plaintiff, _____ [*name*], is, and at all times herein mentioned was, _____ [*specify, e.g.*, the duly authorized body in charge of state highways] and is vested by law with authority to exercise the power of eminent domain to acquire private property for public use.

2. Plaintiff seeks to acquire by eminent domain the following-described property, hereinafter referred to as "the property" in _____ County, California: _____ [*set forth sufficiently detailed and certain description of property to enable parties, and any ministerial officer who may be called on to enforce the judgment, to know precisely what property is to be taken*]. Plaintiff seeks a _____ [*specify interest in property that plaintiff wants to acquire, e.g.*, fee simple interest] in the above-described property.

3. A _____ [map *or* diagram] portraying as far as practicable the property and showing its location in relation to the project for which it is sought to be taken is attached to this complaint as Exhibit A and made a part of this complaint.

4. The individually named defendants are record owners or are known to plaintiff to have an interest in the property. For the convenience of the court and the parties, and not as allegations by which plaintiff is bound, their possible interest in the property is set forth below [*set forth names of defendants and opposite each name give statement of respective interest of that defendant in the property*]:

Name of Property Interest

	Defendant	
1.	_____	_____
2.	_____	_____
3.	etc.	etc.

5. Defendants DOES I-_____, inclusive, have, or claim to have, an interest in the property, the exact nature of which is unknown to plaintiff. The true names or capacities, whether individual, corporate, associate, or otherwise, of defendants DOES I-_____, are unknown to plaintiff, who therefore sues these defendants by such fictitious names. Plaintiff will ask leave to amend this complaint to show their true names and capacities and state of incorporation when ascertained.

[6. *If there is an executor or an administrator for a deceased person whose estate holds an interest in the property, allege:* Defendant _____ (*name*) was at all times herein mentioned, and now is, the duly appointed, qualified, and acting _____ (administrator *or* executor) of the estate of _____ (*name*), deceased, under Probate Case No. _____, of the Superior Court of the State of California, in and for the County of _____. At the time of _____'s (*name of deceased*) death, he/she _____ (was a record owner of *or* claimed an interest in) the property.]

[7. *If the record owner of the property is dead or plaintiff believes he or she is dead but there is no known executor or administrator, allege*: _____ (*Name of decedent or person believed to be dead who has no personal representative*) _____ (is a record owner of *or* claimed an interest in) the property. _____ (That person died on or about _____ (*date*) *or* Plaintiff believes that person has died), and plaintiff, as more fully shown by the declaration under penalty of perjury filed herewith, knows of no duly qualified and acting personal representative of the estate of that person. The heirs and devisees of _____ (*name of decedent or person believed dead*), deceased, and all persons claiming by, through, or under said decedent, are made defendants herein (, as well as _____ (*name*), the person named above whom plaintiff believes to be dead).]

[8. *If the United States has a deed of trust against the property, allege*: The interest of the defendant United States of America is as a beneficiary under a deed of trust. The deed of trust was executed by _____ (*name*) to _____ (*name*), dated _____ (*date*). It was recorded on _____ (*date*), in the Official Records of the County of _____, Book _____, page _____.]

[9. *If the United States has a tax lien against the property, allege*: The interest of the defendant United States of America is a tax lien arising under the Internal Revenue laws. The liability of _____ (*name and address of taxpayer*) created the tax lien. The _____ (*specify*) Office of the Internal Revenue Service filed a notice of the tax lien on _____ [*date*], in the Office of the County Recorder in _____ County, California.]

10. Plaintiff also names as defendants all persons unknown claiming an interest in the property.

11. Plaintiff claims _____ [no *or* a] preexisting interest in the property sought to be taken [, the nature and extent of which are as follows: _____ (*specify*)].

12. Plaintiff is authorized by the provisions of _____ [*specify statutory authority*] to acquire property for public use for _____ [*specify particular use for which the property is to be taken*]. The project for

which the property is sought to be acquired is _____ [*specify*].

[*EITHER, if plaintiff is a public entity*]

13. On or about _____ [*date*], by a two-thirds vote of all of its members and after due notice and opportunity to be heard, plaintiff governing body adopted a resolution of necessity authorizing plaintiff to acquire the property by eminent domain. A copy of the resolution is attached to this complaint as Exhibit B and made a part of this complaint. As established by the resolution, the public interest and necessity require the project; the project is _____ [planned *or* located *or* planned and located] in the manner that will be most compatible with the greatest public good and the least private injury; and the property sought to be acquired is necessary for the project.

[*OR, if plaintiff is a quasi-public entity*]

13. The legislative body of the _____ [City *or* County] of _____, within whose boundaries the property is located, on or about _____ [*date*], by a two-thirds vote of all of its members, after due notice and opportunity to be heard, adopted a resolution consenting to plaintiff's acquisition of the property by eminent domain. A copy of the resolution is attached to this complaint as Exhibit B and made a part of this complaint. As established by the resolution, the public interest and necessity require the project; the project is _____ [planned *or* located *or* planned and located] in the manner that will be most compatible with the greatest public good and the least private injury; and the property sought to be acquired is necessary for the project.

[*OR, if plaintiff is a nonprofit hospital*]

13. After a public hearing conducted by a hearing officer on _____ [*date*], following due notice and opportunity to be heard, the State Director of Health Services certified that the acquisition of the property sought to be condemned is necessary for the _____ [establishment, operation, *and/or* expansion] of the nonprofit hospital; the public interest and necessity require the proposed project; and the proposed project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury. The property to be acquired is adjacent to other property _____ [used *or* to be used] for the _____ [establishment, operation, *and/or* expansion] of the nonprofit hospital.

WHEREFORE, plaintiff prays judgment as follows:

1. That the property herein described be condemned to plaintiff's use _____ [*specify, e.g.*, in fee simple absolute *or* for the purposes set forth in this complaint *or* for the purposes set forth in the resolution of necessity attached to this complaint as Exhibit B *or other as appropriate*];

2. That just compensation be ascertained, assessed, and awarded as provided by law;

3. That all liens and encumbrances against the property be deducted from the judgment; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Plaintiff

[2] Use of Form

This form of complaint is for use in a condemnation proceeding by a person authorized to acquire property for a particular use by eminent domain. The filing of the complaint rather than the issuance of the summons commences the condemnation proceeding [*Code Civ. Proc. § 1250.110*].

[3] Allegations

[a] Statutory Requirements Generally

A complaint in eminent domain is required by *Code Civ. Proc. § 1250.310* to allege all of the following:

(1) The names of all plaintiffs and defendants (Paragraphs 1, 4-10);

(2) A description of the property sought to be taken (Paragraph 2);

(3) The nature and extent of any interest the plaintiff claims in the property (Paragraph 11) [*see People ex rel. Dep't Pub. Wks. v. Shasta Pipe etc. Co. (1968) 264 Cal. App. 2d 520, 528-529, 70 Cal. Rptr. 618 , disapproved on other grounds in Merced Irrigation Dist. v. Woolstenhulme (1971) 4 Cal. 3d 478, 495, 93 Cal. Rptr. 833, 483 P.2d 1]* ;

(4) A statement of the right of the plaintiff to take by eminent domain the property described in the complaint (Paragraphs 12, 13). The statement must include:

(a) A general statement of the public use for which the property is to be taken (Paragraph 12);

(b) An allegation of the necessity of the taking as required by *Code Civ. Proc. § 1240.030* (Paragraph 13); if the plaintiff is a public entity, a reference to its resolution of necessity; if the plaintiff is a quasi-public entity within the meaning of *Code Civ. Proc. § 1245.320*, a reference to the resolution adopted pursuant to *Code Civ. Proc. §§ 1245.310-1245.390*; if the plaintiff is a nonprofit hospital, a reference to the certificate required by *Health & Safety Code § 127050*; if the plaintiff is a public utility and relies on a certification of the State Energy Resources Conservation and Development Commission or on a requirement of that commission that development rights be acquired, a reference to that certification or requirement; and

(c) A reference to the statute that authorizes the plaintiff to acquire the property by eminent domain (Paragraph 12). Specification of the statutory authority may be in the alternative and may be inconsistent; and

(5) A map or diagram portraying as far as practicable the property described in the complaint and showing its location in relation to the project for which it is to be taken (Paragraph 3).

[b] Parties

[i] Plaintiffs

Each person seeking to take property by eminent domain must be named as a plaintiff in the complaint [*Code Civ. Proc. § 1250.210*]. For example, if a joint and cooperative eminent domain proceeding is brought by agreement between different agencies, each condemnor must be named as a plaintiff unless the proceeding is brought by a separate legal entity created pursuant to a joint powers agreement [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1250.210*; *see*

Gov. Code § 6508].

The plaintiff must be a person authorized by statute to exercise the power of eminent domain to acquire the property sought for the purpose listed in the complaint. A proceeding may not be maintained in the name of any other person [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1250.210*; *see People v. Superior Court (1937) 10 Cal. 2d 288, 296, 73 P.2d 1221* ; *Sierra Madre v. Superior Court (1961) 191 Cal. App. 2d 587, 590-591, 12 Cal. Rptr. 836* (corporation is not permitted to maintain cause of action to acquire property in city's name)].

[ii] Defendants

The plaintiff must name in the complaint as defendants, by their real names, those persons appearing of record or who are known by the plaintiff to have or claim an interest in the property described in the complaint [*Code Civ. Proc. § 1250.220(a)*]. Failure to join a proper party to the proceeding leaves his or her interest unimpaired. However, a person not named as a defendant who claims an interest in the property sought to be acquired may participate in the proceeding and voluntarily appear [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1250.220*; *see Wilson v. Beville (1957) 47 Cal. 2d 852, 855-856, 306 P.2d 789]* . As a practical matter, the plaintiff should name as defendants all persons shown as having an interest in the property by an up-to-date title report. When the complaint is filed some time after the title report was issued, it must be updated when the complaint is filed to ensure that all proper parties are named and served.

If a person who must be named as defendant is dead and the plaintiff knows of a duly qualified and acting personal representative of the estate of that person, the plaintiff must name the personal representative as a defendant. If a person is dead or believed by the plaintiff to be dead and if the plaintiff knows of no personal representative of the estate of that person and states these facts in an affidavit (or declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) filed with the complaint, plaintiff may name as defendants "the heirs and devisees of the deceased person and all persons claiming by, through, or under the decedent." If the affidavit states that the person is believed by the plaintiff to be dead, the deceased also may be named as a defendant [*Code Civ. Proc. § 1250.220(b)*].

The plaintiff may name as defendants "all persons unknown claiming an interest in the property" naming them in that manner [*Code Civ. Proc. § 1250.220(c)*]. Additionally, the plaintiff may name fictitious defendants who claim an interest, but whose names are not known, pursuant to *Code Civ. Proc. § 474* [*Code Civ. Proc. § 474*; for forms of allegations of fictitious defendants, see Ch. 20, *Allegations Commonly Used*].

When the only interest of the county or any other taxing agency in the property being condemned is a lien for ad valorem taxes, the county or other agency need not be named as a party in the eminent domain proceeding [*Code Civ. Proc. § 1250.250*].

The holder of a lien that secures a special assessment or a bond representing the special assessment must be named as a defendant, regardless of the nature of the special assessment and the manner of its collection [*Code Civ. Proc. § 1250.250(b)*; for discussion of lienholder's certification of information to court instead of answer, *see § 247.288*].

Although the complaint does not need to identify the nature of the defendants' interests in the property, other than the plaintiff's interest, since specification of the defendants' interest is the defendants' responsibility, as a convenience to the court and to the parties, this complaint contains an allegation of the property interests of the defendants (Paragraph 4) [*see Code Civ. Proc. § 1250.320* (requirements of answer)].

[c] Description of Property

The complaint must contain a description of the property sought to be taken which may, but is not required to, indicate the nature or extent of the defendant's interest in the property. The property described may consist of anything from a fee interest in land to water rights, noise easements, or franchises [*see Code Civ. Proc. §§ 1235.125* (defining

"interest"), 1235.170 (defining "property")]. The description of the property should be sufficiently certain to enable the parties, and any ministerial officer who may be called on to enforce the judgment, to know precisely what land is to be taken and paid for [*see California Cent. R. Co. v. Hooper (1888) 76 Cal. 404, 413, 18 P. 599* (description of property in judgment must be so certain that parties and ministerial officers may know what land is to be taken); *see also Code Civ. Proc. § 455* (description of land in action to recover real property)]. According to the Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1250.310*, the complaint does not need to indicate if the property taken is part of a larger parcel.

[d] Statement of Right and Purpose of Acquisition

The requirement of a statement of plaintiff's right to take the property described in the complaint by eminent domain is intended to provide the owner of the property sought to be taken with an understanding of the purpose for which the property is being taken and the authority for the taking. According to the Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1250.310*, the pleading requirements may be satisfied in any way convenient to the plaintiff as long as they are indicated in the complaint. For example, the resolution of necessity may be summarized or it may be attached to the complaint and incorporated by reference.

The Cal. L. Rev. Comm'n in its comment to *Code Civ. Proc. § 1250.310*, stated that, since a public entity must adopt a resolution of necessity before it may condemn property [*Code Civ. Proc. §§ 1240.040, 1245.220*], the requirement of *Code Civ. Proc. § 1250.310(d)(2)* necessitating an extensive statement of the necessity for the acquisition, may be satisfied by incorporation of the resolution containing appropriate findings and declarations. If the resolution is not incorporated, a reference to it should be included which is adequate to identify it so that a copy may be obtained.

When the condemnor is a nonprofit hospital, college, or cemetery, or a limited dividend housing corporation, a land chest corporation, or mutual water company, a reference must be made to the resolution of the local public entity consenting to the acquisition [*see Code Civ. Proc. § 1245.330*]. Similarly, a reference to the certificate required by *Health & Safety Code § 127050* (requirements for exercise of right of eminent domain by nonprofit hospital) must be included when applicable. A reference to the certification or to the requirement that development rights be acquired must be included if the plaintiff is a utility relying on a certification, or on requirement by the State Energy Resources Conservation and Development Commission that development rights be acquired [*see Code Civ. Proc. §§ 1240.030* (requirements for exercise of eminent domain) and *1240.220* (future use is required to be within seven years from date complaint is filed)].

The eminent domain power may be exercised only by persons authorized by statute for purposes designated by statute and a reference must be made in the complaint to the authorizing statute [*Code Civ. Proc. § 1240.020*]. These statutes may be of several types. For example, the state, the University of California, cities, counties, and school districts, may condemn any property necessary to carry out any of their powers or functions [*see, e.g., Educ. Code §§ 35270.5* (school districts), *72300.5* (community college districts), *92040* (Regents of University of California); *Gov. Code §§ 15853* (Public Works Board), 25350.5 (counties), *37350.5* (cities)]. Many special districts have similar broad authority, but some may condemn only for limited or special purposes. Additionally, if the condemnor is acquiring property under authority of certain general public uses, it must specify that authority [*see, e.g., Code Civ. Proc. §§ 1240.220* (taking for future use), *1240.320-1240.350* (condemnation for exchange purposes), *1240.410* (excess condemnation), *1240.510* (taking for compatible use), *1240.610* (taking for more necessary public use)]. According to the Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1250.310*, when the plaintiff may be authorized to take the property on different and inconsistent grounds, the plaintiff may allege the authority in the alternative.

[e] Map or Diagram

The map or diagram that must be attached to the complaint should be sufficiently detailed and accurate to enable the parties to identify the property and its relation to the project. When the taking is for a right-of-way, the map should

show its location, general route, and termini with respect to the property sought to be taken. The map does not need to indicate whether the property sought is a part of a larger parcel but it may show such information, and any other information that the plaintiff wants to show [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1250.310*; *see Pub. Util. Code § 7557* (requiring map when complaint seeks relocation or removal of railroad tracks)].

[4] Allegations Required in Special Circumstances

When special types of condemnation are authorized, there are specific requirements stating that the complaint must refer to the code section under which the acquisition is sought to be made. This allegation must be made in the following situations:

(1) The property to be taken is for a future use more than seven years from the date the complaint is filed. The complaint also must state the estimated date of use [*Code Civ. Proc. § 1240.220(b)*; *see § 247.281*];

(2) The property is to be taken pursuant to the Federal Highway Act of 1972 [*23 U.S.C. § 101 et seq.*]. The complaint also must state the estimated date of use [*Code Civ. Proc. § 1240.250(b)*];

(3) The property is to be taken as substitute property to exchange for necessary property. The complaint also must state that the property is necessary for the purpose for which it is being taken [*Code Civ. Proc. §§ 1240.320(b), 1240.330(b), 1240.350(b)*; *see § 247.282*];

(4) The property is to be taken as a remnant [*Code Civ. Proc. § 1240.420*; *see § 247.283*];

(5) The property to be taken is for a compatible use [*Code Civ. Proc. § 1240.510*; *see § 247.284*]; and

(6) The property to be taken is for a more necessary public use [*Code Civ. Proc. § 1240.610*; *see § 247.285*].

Failure to specifically make reference to *Code Civ. Proc. § 1240.610* when the property is to be acquired for a more necessary public use makes the complaint subject to demurrer [*Pacific Gas & Electric Co. v. Superior Court (1986) 180 Cal. App. 3d 770, 773-774, 225 Cal. Rptr. 768]* .

[5] Verification and Signing of Complaint

If a plaintiff is represented by an attorney, the complaint need not be verified but it must be signed by the plaintiff's attorney. The attorney's signature constitutes a certificate by the attorney that he or she has read the complaint and that to the best of his or her knowledge, information, and belief there is ground to support it. If the complaint is not signed or is signed with intent to defeat the above purposes, it may be stricken [*Code Civ. Proc. § 1250.330*; *see also Code Civ. Proc. § 128.7* (sanctions)].

Under *Code Civ. Proc. § 1250.330*, the plaintiff may verify the complaint if it chooses to do so, but this verification will not require verification by the defendant if he or she is represented by an attorney or if defendant is a public entity or officer [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1250.330*; *see generally Code Civ. Proc. §§ 446* (verification by defendant generally required if plaintiff is public entity or if complaint is verified unless defendant is public entity or officer), *1230.040*]. When the defendant is not represented by an attorney and is not a public entity or officer, the answer must be verified [*Code Civ. Proc. §§ 446, 1230.040*].

[6] Joinder of Property

The plaintiff may join in one complaint all property located within the same county which is sought to be acquired for the same project [*Code Civ. Proc. § 1250.240*]. The court, however, has the authority to order separate trials where

appropriate [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1250.240*]. As a practical matter, the plaintiff should carefully consider whether to join a number of different pieces of property in the same action since joinder may make the case extremely complicated and may encourage the various property owners to join together in a common defense.

[7] Jurisdiction

Except as otherwise provided by *Code Civ. Proc. §§ 1230.060* (eminent domain proceedings by Public Utilities Commission) and 1273.010-1273.050 (arbitration), all eminent domain proceedings must be commenced and prosecuted in the superior court [*Code Civ. Proc. § 1250.010*; *see Cal. Const., art VI, § 10*]. The proceeding is not a limited civil case [*see Code Civ. Proc. §§ 85, 86, 580(b)(3)*].

[8] Venue

The proceeding must be brought in the county in which the property sought to be taken is located. When the property is located in more than one county, the plaintiff may bring the proceeding in any one of these counties [*Code Civ. Proc. § 1250.020*]. The county in which the proceeding is commenced is the proper county for trial unless the proceeding is transferred to another county in which case that county is the proper county for trial [*Code Civ. Proc. § 1250.030*]. The Code of Civil Procedure provisions for changing the place of trial of actions apply to eminent domain proceedings [*Code Civ. Proc. § 1250.040*; *see Code Civ. Proc. § 394* (action against county, city, or local agency); *Code Civ. Proc. §§ 396, 396b, 397* (changing place of trial); for discussion of and forms relating to venue, see Ch. 518, *Service of Summons and Papers*].

[9] Summons

Except in the case of service by publication, the form and contents of the summons is as in civil actions generally [*Code Civ. Proc. § 1250.120*]. For forms of summonses for use in civil actions, see Ch. 518, *Service of Summons and Papers* .

[10] Failure to Commence Eminent Domain Proceeding

If, after adopting a resolution of necessity, a public entity has not commenced an eminent domain proceeding within six months after the date the resolution was adopted, or has commenced a proceeding but has not attempted diligently to serve the complaint and summons within six months after commencement, the property owner may bring an action in inverse condemnation to require the public entity to take the property and pay compensation for it, or to recover damages from the public entity for any interference with the possession and use of the property resulting from adoption of the resolution, or both [*Code Civ. Proc. § 1245.260(a)* (service by mail pursuant to *Code Civ. Proc. § 415.30* constitutes diligent attempt at service)].

[11] State Statutes

Procedure for making state agency defendant when it has non-property tax lien on property. *Civ. Code § 2931a*

Rules of practice governing civil actions are generally applicable to eminent domain proceedings. *Code Civ. Proc. § 1230.040*

Contents of complaint. *Code Civ. Proc. § 1250.310*

Signing of pleading. *Code Civ. Proc. § 1250.330*

Requirements for exercise of right of eminent domain by non-profit hospital. *Health & Safety Code § 127050*

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20-247 California Forms of Pleading and Practice--Annotated § 247.280

§ 247.280 Allegations--Temporary Right of Access to Adjoining or Adjacent Property to Repair or Reconstruct [Civ. Code § 1002; Code Civ. Proc. § 1245.326]

[1] FORM Allegations--Temporary Right of Access to Adjoining or Adjacent Property to Repair or Reconstruct [Civ. Code § 1002; Code Civ. Proc. § 1245.326]

1. Plaintiff, _____ [*name*], is, and at all times herein mentioned was, an owner of real property _____ [adjacent to *or* nearby] defendant's property and is authorized to take temporary access to repair and reconstruct by *Civil Code Section 1002*.

2. Plaintiff is authorized by the provisions of *Civil Code Section 1002* to acquire a temporary right to enter on the above-described property to repair or reconstruct plaintiff's property.

3. On or about _____ [*date*], the legislative body of the _____ [City *or* County] of _____, within whose boundaries the property is located, by a two-thirds vote of all its members, after due notice and opportunity to be heard, adopted a resolution consenting to plaintiff's acquisition of the property by eminent domain. A copy of the resolution is attached to this complaint as Exhibit B and made a part of this complaint. As established by the resolution, temporary access to the property is required because _____ [the repair and reconstruction cannot be safely done without entry *or* the cost of performing the repair and reconstruction without entry would be much higher] and the property without repair or reconstruction adversely affects the surrounding community. The right to enter will be exercised in a manner that provides the least damage and inconvenience to defendant(s). The hardship to plaintiff, if the power of eminent domain is not exercised, clearly outweighs the hardship to defendant(s).

[2] Use of Form

These allegations are for use in the general form of eminent domain complaint [*see § 247.279*] to bring an action to gain temporary access to adjoining or adjacent land to repair and reconstruct plaintiff's property [*see Civ. Code § 1002*; *Code Civ. Proc. § 1245.326*]. The allegations should replace Paragraphs 1, 12, and 13, respectively, in *§ 247.279[1]*. The prayer in *§ 247.279[1]* would also have to be adapted to request a temporary right to enter.

[3] When Access Can be Obtained

The power of eminent domain may be exercised by an owner of real property to acquire a temporary right to enter on adjacent or nearby property to repair or reconstruct land or improvements if all of the following conditions are met: (1) there is a necessity to do the repair or reconstruction work and there is a great necessity to enter on the adjacent or nearby property to do the repair or reconstruction work because the work cannot be done safely without entry, or the cost of performing the repair or reconstruction work without entry would be substantially higher and the property without repair or reconstruction adversely affects the surrounding community; (2) the right to enter on the adjacent or nearby land will be exercised in a manner that provides the least damage to the property and the least inconvenience or annoyance to the occupants or owners of this complaint, consistent with satisfactory completion of the repair or reconstruction work; and (3) the hardship to the person seeking to exercise the power of eminent domain, if that power is not exercised, clearly outweighs any hardship to the owner or occupant of the adjacent or nearby property [*Civ. Code § 1002(a)*; *Code Civ. Proc. § 1245.326(b)*].

"Adjacent" or "nearby" mean land contiguous with the property needing repair or reconstruction, or land through which the party granted temporary access must pass to reach adjacent land [*Civ. Code § 1002(d)*].

No entry may be made on property to be condemned until an eminent domain proceeding has been commenced and then only after a court order permitting entry is issued or after judgment is entered for the plaintiff [*Civ. Code § 1002(b)*].

The right to obtain temporary access does not apply to lands used primarily for the commercial production of agricultural commodities and forest products [*Civ. Code § 1002(e)*].

[4] Resolution of Necessity Required

The person seeking to acquire a temporary right of entry is deemed a quasi-public entity. Before bringing the proceeding, a resolution of necessity must be obtained from the legislative body governing the property. The resolution must contain a declaration that the legislative body has found and determined that each of the necessary conditions, set forth in *§ 247.280[3]*, appear to exist [*Code Civ. Proc. §§ 1245.310-1245.390*; *see* Paragraph 3 of form, *above*].

[5] Security and Rent

A deposit of security, in the form of cash or bond, must be made to the court in an amount that the court determines is necessary to permit the owner of the adjacent or nearby property to restore the property to the condition it was in before the entry, if the person exercising the power of eminent domain does not restore the property within a reasonable period of time as determined by the court [*Civ. Code § 1002(b)*].

The court may order the person acquiring the temporary right to enter the land of another to pay the owner of the land subject to that temporary right a reasonable amount of rent for the use of the land [*Civ. Code § 1002(c)*].

[6] State Statutes

Right to obtain temporary access and conditions on right. *Civ. Code § 1002*

Person seeking temporary access as quasi-public entity. *Code Civ. Proc. § 1245.326*

[7] Cross References

See *§ 247.279*.

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20-247 California Forms of Pleading and Practice--Annotated § 247.281

§ 247.281 Allegation--Future Use More Than Seven Years From Date Complaint Filed [Code Civ. Proc. § 1240.220(b)]

[1] FORM Allegation--Future Use More Than Seven Years From Date Complaint Filed [Code Civ. Proc. § 1240.220(b)]

Under *Code of Civil Procedure Section 1240.220*, the estimated date of use of the property to be acquired is _____ [*date*].

[2] Use of Form

This form of allegation is for use in a complaint in eminent domain when the property is sought to be taken for a future use which the plaintiff does not expect to be within seven years from the date the complaint is filed. In this situation, the complaint must refer specifically to *Code Civ. Proc. § 1240.220* and state the estimated date of use [*Code Civ. Proc. § 1240.220(b)*].

[3] State Statutes

Condemnation for future use. *Code Civ. Proc. §§ 1240.210-1240.250*

[4] Cross References

See *§ 247.279*.

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20-247 California Forms of Pleading and Practice--Annotated § 247.282

§ 247.282 Allegation--Substitute Condemnation [Code Civ. Proc. §§ 1240.320(b), 1240.330(b), 1240.350(b)]

[1] FORM Allegation--Substitute Condemnation [Code Civ. Proc. §§ 1240.320(b), 1240.330(b), 1240.350(b)]

Parcel No. _____ is taken pursuant to the provisions of Section _____ [1240.320 of the Code of Civil Procedure in that it is necessary to exchange the property for property which is devoted to or held for a public use *or 1240.330 of the Code of Civil Procedure* in that it is necessary to relocate a public use on it *or 1240.350 of the Code of Civil Procedure* in that it is necessary to provide utility service or road access to other private property].

[2] Use of Form

This form of allegation is for use in a complaint in eminent domain when a public entity seeks to acquire substitute property to be exchanged for necessary property or when it seeks to acquire substitute property to provide utility service or road access to private property cut off as a result of its acquisition of property [*Code Civ. Proc. §§ 1240.320(b), 1240.330(b), 1240.350(b)*].

[3] State Statutes

Necessary and substitute property defined. *Code Civ. Proc. § 1240.310*

Substitute property to be exchanged for necessary property held for public use. *Code Civ. Proc. § 1240.320*

Substitute property to be used for relocation of existing public use. *Code Civ. Proc. § 1240.330*

Additional property necessary to provide utility service or road access to private property. *Code Civ. Proc. § 1240.350*

[4] Cross References

See *§ 247.279*.

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20-247 California Forms of Pleading and Practice--Annotated § 247.283

§ 247.283 Allegation--Excess Condemnation [Code Civ. Proc. § 1240.420]

[1] FORM Allegation--Excess Condemnation [Code Civ. Proc. § 1240.420]

Parcel No. _____ is a remnant and is being acquired pursuant to *Section 1240.410 of the Code of Civil Procedure.*

[2] Use of Form

This form of allegation is for use in a complaint in eminent domain when a public entity seeks to acquire excess property because acquisition of only part of a larger parcel would leave a remnant [*Code Civ. Proc. §§ 1240.410, 1240.420*]. Excess property may not be acquired if the property does not have "little market value" as a result of the condemnation [*see Code Civ. Proc. § 1240.410(a)*] or if the defendant proves that the public entity has a reasonable, practicable, and economically sound means to prevent the property from becoming a remnant [*Code Civ. Proc. § 1240.410(c)*].

[3] State Statutes

Authority to acquire remnants. *Code Civ. Proc. § 1240.410*

Required statements in complaint. *Code Civ. Proc. § 1240.420*

[4] Cross References

See *§ 247.279*.

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20-247 California Forms of Pleading and Practice--Annotated § 247.284

§ 247.284 Allegation--Condemnation for More Compatible Use
[Code Civ. Proc. § 1240.510]

[1] FORM Allegation--Condemnation for More Compatible Use
[Code Civ. Proc. § 1240.510]

Parcel No. _____ is being acquired for a compatible joint use pursuant to *Section 1240.510 of the Code of Civil Procedure.*

[2] Use of Form

This form of allegation is for use in a complaint in eminent domain by a person authorized to condemn property by eminent domain when that person seeks to acquire property already appropriated to public use but the proposed use will not unreasonably interfere with or impair the continuance of the public use as it presently exists or may be expected to exist in the future [*Code Civ. Proc. § 1240.510*].

[3] State Statutes

Condemnation for compatible use. *Code Civ. Proc. § 1240.510*

[4] Cross References

See *§ 247.279*.

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20-247 California Forms of Pleading and Practice--Annotated § 247.285

§ 247.285 Allegation--Condemnation for More Necessary Public Use
[Code Civ. Proc. § 1240.610]

[1] FORM Allegation--Condemnation for More Necessary Public Use
[Code Civ. Proc. § 1240.610]

Parcel No. _____ is being acquired for a more necessary public use pursuant to *Section 1240.610 of the Code of Civil Procedure.*

[2] Use of Form

This form of allegation is for use in a complaint in eminent domain by a person authorized to condemn property for a particular use when the person seeks to acquire property for a public use more necessary than that for which the property already is appropriated [*Code Civ. Proc. § 1240.610*].

[3] State Statutes

Required statements in complaint. *Code Civ. Proc. § 1240.610*

Condemnation for more necessary public use. *Code Civ. Proc. §§ 1240.610-1240.700*

[4] Decisions

Complaint in eminent domain proceeding seeking to take property for more necessary use that fails to make specific reference to *Code Civ. Proc. § 1240.610* is subject to demurrer. *Pacific Gas & Electric Co. v. Superior Court (1986) 180 Cal. App. 3d 770, 773-774, 225 Cal. Rptr. 768*

[5] Cross References

See *§ 247.279*.

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20-247 California Forms of Pleading and Practice--Annotated § 247.286

§ 247.286 Notice of Lis Pendens [Code Civ. Proc. § 1250.150]

[1] FORM Notice of Lis Pendens [Code Civ. Proc. § 1250.150]

[*Caption. See § 247.278.*]

NOTICE IS HEREBY GIVEN that _____ [*name*], plaintiff, has commenced a proceeding in the above-named court against the above-named defendants.

The purpose of the proceeding is the condemnation and taking of [_____ (*specify interest*) in] the real property hereinafter described for the public purpose of _____ [*specify*].

The real property which is subject to and affected by this action is situated in _____ County, California and described as follows: _____ [*give legal description*].

The names of the parties who may have an interest in the real property are: _____ [*specify names and their respective interests*].

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

This form of notice is for use by a plaintiff in filing a notice of the pendency of the eminent domain proceeding in the county recorder's office. A notice of lis pendens must be filed in any county in which property described in the complaint is located [*Code Civ. Proc. § 1250.150*]. For a discussion of the effect of lis pendens, see *§ 247.94*.

[3] Service of Notice on Adverse Parties

A copy of the notice of lis pendens must be served with the summons and complaint [*Code Civ. Proc. § 1250.150*]. If service is by publication, the court must order recording of a lis pendens [*Code Civ. Proc. § 1250.130*].

[4] State Statutes

Recording of lis pendens when service is by publication in eminent domain proceeding. *Code Civ. Proc. § 1250.130*

Recording and service of lis pendens in eminent domain proceeding. *Code Civ. Proc. § 1250.150*

[5] Cross References

For discussion and forms of notices of lis pendens, see Ch. 348, *Lis Pendens*

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20-247 California Forms of Pleading and Practice--Annotated § 247.287

§ 247.287 Disclaimer by Defendant [Code Civ. Proc. § 1250.325]

[1] FORM Disclaimer by Defendant [Code Civ. Proc. § 1250.325]

[*Caption. See § 247.278.*]

Pursuant to *Section 1250.325 of the Code of Civil Procedure*, _____ [*name*], defendant in the above-entitled proceeding, hereby disclaims any interest in the property described in plaintiff's complaint. _____ [*Name*] defendant, further disclaims any interest in the compensation that may be awarded in the above-entitled proceeding.

[Defendant understands that he/she has no right to participate in further proceedings or to share in the compensation awarded after filing this disclaimer.]
Dated: _____.

_____ [*signature*]
Defendant

[2] Use of Form

This form of disclaimer is for use by a defendant in an eminent domain proceeding in disclaiming any interest in the property or in the compensation that may be awarded. The disclaimer may be an informal document, but it must state that defendant claims no interest in either the property or the award and must be signed by the defendant [*Code Civ. Proc. § 1250.325(a)*; Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1250.325*].

The disclaimer may be filed at any time, whether or not the defendant is in default. It supersedes any answer previously filed [*Code Civ. Proc. § 1250.325(a)*].

According to Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1250.325*, a defendant may make only a partial

disclaimer by filing an answer describing only the limited interest claimed by him or her [*see Code Civ. Proc. § 1250.320* (answer)].

[3] Implementation of Disclaimer

The court may implement the disclaimer by appropriate orders including, where justified, awarding costs and litigation expenses [*Code Civ. Proc. § 1250.325(c)*].

[4] State Statutes

Disclaimer by defendant. *Code Civ. Proc. § 1250.325*

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20-247 California Forms of Pleading and Practice--Annotated § 247.288

§ 247.288 Answer [Code Civ. Proc. §§ 1250.320, 1250.350-1250.370]

[1] FORM Answer [Code Civ. Proc. §§ 1250.320, 1250.350-1250.370]

[*Caption. See § 247.278.*]

Defendant _____ [*name*], in answer to the complaint herein, admits, denies, and alleges as follows:

1. Admits each and every allegation in Paragraph(s) _____.

2. Denies each and every allegation in Paragraph(s) _____.

3. Defendant has no information or belief as to the matters stated in Paragraph(s) _____ and basing his/her answer on this lack of knowledge, denies each and every allegation of this complaint.

4. Answering Paragraph _____, defendant admits that _____ [*specify e.g.*, he/she is a record owner of the property described in the complaint] and affirmatively alleges that he/she is _____ [*describe nature and extent of interest claimed*].

[5. *If defendant admits plaintiff is a public entity but denies that plaintiff has the right to take the property, allege:* Answering Paragraph _____ of the complaint, defendant admits that plaintiff is a _____ (public entity *or* quasi-public entity) but denies each and every other allegation of this complaint.]

6. _____ [*If the defendant is the owner of a business conducted on the property to be taken or on a remainder, allege:* In addition to compensation for the taking of the property, defendant claims compensation under *Section 1263.510 of the Code of Civil Procedure* for the loss of goodwill of his/her business which is conducted on the _____ (property to be taken *or if the property is part of a larger parcel* remainder of the property to be

taken)].

[7. Defendant claims precondemnation damages of _____ (*specify, e.g.*, loss of rental income) resulting from _____ (*specify unreasonable conduct, e.g.*, unreasonable delay in commencing the present complaint in eminent domain after announcement of intent to condemn the property described in the complaint).]

AS SEPARATE AND AFFIRMATIVE DEFENSE(S) AND OBJECTION(S) TO PLAINTIFF'S RIGHT TO TAKE, defendant alleges [*select appropriate objections, if any, from those listed below*]:

1. Plaintiff is not authorized by statute to exercise the power of eminent domain for the purpose specified in the complaint in that _____ [*specify*].

2. The stated purpose for which the property is to be used is not a public use in that _____ [*specify*].

3. _____ Plaintiff does not intend to devote the property described to the purpose stated in Paragraph _____ of the complaint, but, instead intends to devote it to the following use: _____ [*specify*].

4. There is no reasonable probability that plaintiff will devote the described property to the purpose stated in Paragraph _____ of the complaint within _____ [seven years *or where the property is taken pursuant to the Federal Aid Highway Act of 1973* 10 years] after the complaint was filed or within such longer period as is reasonable in that _____ [*specify*].

5. The described property is not subject to acquisition by the power of eminent domain for the purpose stated in Paragraph _____ of the complaint in that _____ [*specify*].

6. The described property is sought to be acquired pursuant to Section _____ [1240.410 (excess condemnation) *or* 1240.510 (condemnation for compatible use) *or* 1240.610 (condemnation for more necessary public use)] of the Code of Civil Procedure, but the acquisition does not satisfy the requirements of that provision in that _____ [*specify*].

7. The described property is sought to be acquired pursuant to *Section 1240.610 of the Code of Civil Procedure* (condemnation for more necessary public use), but defendant has the right under *Section 1240.630 of the Code of Civil Procedure* to continue the public use to which the property is appropriated, which is _____ [*describe use*], as a joint use in that _____ [*specify*].

8. The resolution of necessity referred to in Paragraph _____ of the complaint does not satisfy the requirements of *Sections 1245.210-1245.270 of the Code of Civil Procedure* in that _____ [*specify*].

9. The public interest and necessity do not require the proposed project in that _____ [*specify*].

10. The proposed project is not planned or located in the manner that will be most compatible with the greatest public good and the least private injury in that _____ [*specify*].

11. The property described in the complaint is not necessary for the proposed project in that _____ [*specify*].

12. The resolution of consent referred to in Paragraph _____ of the complaint does not satisfy the requirements of *Sections 1245.310-1245.390 of the Code of Civil Procedure* in that _____ [*specify*].

[*If any additional objections provided by law are appropriate, continue to set them forth, each in a separate paragraph.*]

WHEREFORE, defendant prays judgment as follows:

1. That plaintiff take nothing by its complaint against this answering defendant; or

2. If the court determines that plaintiff is entitled to take the property described in the complaint by eminent domain that this answering defendant be awarded the fair market value of [his/her interest in] the property [, together with compensation for loss of goodwill and severance damages];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

This form of answer is for use by a defendant in an eminent domain proceeding. The answer must include a statement of the nature and extent of the interest the defendant claims in the property described in the complaint (Paragraph 4) [*Code Civ. Proc. § 1250.320(a)*]. A defendant seeking compensation for loss of goodwill must allege that he or she claims compensation under *Code Civ. Proc. § 1263.510* but does not need to specify the amount of the compensation (Paragraph 6) [*Code Civ. Proc. § 1250.320(b)*]. Defendant also probably should claim any damages for precondemnation activities [Paragraph 7; *see § 247.288[4]*].

[3] Objections to Right to Take

Objections to the right to take may be made by demurrer or by answer and are waived if not so raised [*Code Civ. Proc. § 1250.350*]. Those objections appearing on the face of the complaint or from matter of which the court is required to or may take judicial notice may be taken by demurrer. Objections based on grounds not appearing on the face of the complaint may be made by answer [*Code Civ. Proc. § 430.30*].

The demurrer or answer must state the specific ground on which the objection is taken and, if the objection is taken by answer, the specific facts on which the objection is based [*Code Civ. Proc. § 1250.350*; *San Mateo County v. Bartole (1960) 184 Cal. App. 2d 422, 433, 7 Cal. Rptr. 569* (defendant was required to allege specific facts showing basis of objection where he objects to right to take by answer because defense is not on face of complaint); *see People v. Chevalier (1959) 52 Cal. 2d 299, 304, 340 P.2d 598]* . Objection may be taken on more than one ground, and the grounds may be inconsistent [*Code Civ. Proc. § 1250.350*]. The grounds on which defendant may object are enumerated in *Code Civ. Proc. §§ 1250.360* and *1250.370* [*see § 247.96[2], [3]*].

In this answer, Paragraphs 1-7 of the affirmative defenses and objections to the right to take are based on *Code Civ. Proc. § 1250.360* listing grounds for objection to the right to take regardless of whether plaintiff has adopted a resolution of necessity satisfying the requirements of *Code Civ. Proc. §§ 1245.210-1245.270*. Paragraphs 8-12 of the affirmative defenses and objections to the right to take are based on *Code Civ. Proc. § 1250.370* giving the grounds for objection to the right to take when plaintiff has not adopted a resolution of necessity.

[4] Precondemnation Damages

When an eminent domain action has been dismissed by the public entity, a separate action for unreasonable precondemnation delay damages must be brought [*Redevelopment Agency v. Heller (1988) 200 Cal. App. 3d 517, 521-522, 246 Cal. Rptr. 160* ; *see* Cal. L. Revision Comm'n Comment to *Code Civ. Proc. § 1245.260*]. If the condemnation proceeding proceeds to final judgment, precondemnation delay damages should be sought as a part of the eminent domain award. A judgment in the eminent domain action bars a later action for delay damages [*Klopping v. City of Whittier (1972) 8 Cal. 3d 39, 58, 104 Cal. Rptr. 1, 500 P.2d 1345* ; *Redevelopment Agency v. Contra Costa Theatre, Inc. (1982) 135 Cal. App. 3d 73, 79, 185 Cal. Rptr. 159*].

Before revision of the Eminent Domain Law, cases held that inverse condemnation damages had to be sought in the answer to the eminent domain action [*see Richmond Redevelopment Agency v. Western Title Guaranty Co. (1975) 48 Cal. App. 3d 343, 350, 122 Cal. Rptr. 434* ; *People ex rel. Dept. Pub. Wks. v. Peninsula Enterprises, Inc. (1979) 91 Cal. App. 3d 332, 353, 153 Cal. Rptr. 895*]. However, such damages now may be sought by cross-complaint. Under the current statutory scheme, the only requirement that damages be specifically claimed by answer to an eminent domain complaint is that when the defendant seeks compensation for loss of goodwill, the answer must specifically state that the defendant claims compensation under *Code Civ. Proc. § 1263.510*, but the amount of such damage does not have to be alleged [*Code Civ. Proc. § 1250.320*; *San Diego Metropolitan Transit Development Board v. RV Communities (2007) 158 Cal. App. 4th 313, 335, 69 Cal. Rptr. 3d 705* ; *see also Red Mountain LLC v. Fallbrook (2006) 143 Cal. App. 4th 333, 355-356, 48 Cal. Rptr. 3d 875* (eminent domain action did not preclude defendant from pursing inverse condemnation action seeking damages for diminution in value of its land that occurred before agency decided to directly condemn property)].

[5] Lienholder's Certification to Court in Lieu of Answer

The holder of a lien that secures a special assessment or a bond representing the special assessment, instead of an answer, may certify to the court within 30 days after service of the summons and complaint on the holder all of the following information [*Code Civ. Proc. § 1250.250(b)*]:

- A complete description of the lien;
- A description of the property encumbered by the lien;
- The amount remaining due on the lien as of the date of the certificate; and
- The date on which each installment payable on the lien is due and the amount of each installment.

A copy of the certification must be sent by first-class mail to all parties to the proceeding at the time it is provided to the court. The filing of the certification or answer is considered a general appearance [*Code Civ. Proc. § 1250.250(c)*].

[6] Verification and Signing of Answer

The answer of a defendant represented by an attorney need not be verified but must be signed by the attorney. The signature constitutes a certificate by the attorney that he or she has read the answer and that to the best of his or her knowledge, information, and belief there is ground to support it. If the answer is not signed or is signed with intent to defeat these purposes, it may be stricken [*Code Civ. Proc. § 1250.330*].

Although plaintiff may verify the complaint if it chooses to do so, defendant is not required to verify the answer if he or she is represented by an attorney or if defendant is a public agency or officer [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1250.330*; *see Code Civ. Proc. §§ 446* (verification by defendant generally required when plaintiff is public

entity or complaint is verified unless defendant is public entity or officer), 1230.040]. However, if the defendant is not represented by an attorney and is not a public entity or officer, the answer must be verified [*Code Civ. Proc. §§ 446, 1230.040*].

[7] State Statutes

Contents of answer. *Code Civ. Proc. § 1250.320*

Objections to right to take is permitted to be made by answer or demurrer. *Code Civ. Proc. § 1250.350*

Grounds for objections to right to take. *Code Civ. Proc. §§ 1250.360, 1250.370*

[8] Decisions

Defendant's denial that acquisition of property was in public interest or convenience constituted denial of lawful public use and consequently, defendant did not admit public use. *Redevelopment Agency v. Herrold (1978) 86 Cal. App. 3d 1024, 1030-1031, 150 Cal. Rptr. 621*

[9] Cross References

For discussion of and forms for answers, see Ch. 26, *Answers*

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20-247 California Forms of Pleading and Practice--Annotated § 247.289

§ 247.289 Proceedings for Determination of Right to Take [Code Civ. Proc. § 1260.120]--Notice of Motion for Order to Specially Set Objections to Right to Take [Code Civ. Proc. § 1260.110(b)]

[1] FORM Proceedings for Determination of Right to Take [Code Civ. Proc. § 1260.120]--Notice of Motion for Order to Specially Set Objections to Right to Take [Code Civ. Proc. § 1260.110(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MOTION AND NOTICE OF MOTION FOR OR-
Plaintiff,	)	DER TO SPECIFICALLY SET OBJECTIONS TO
vs.	)	RIGHT TO TAKE
_____ [*name*],	)	[Telephone Appearance]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*name*] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*name of moving party*] will, and hereby does, move for an order specially setting for trial the objections of defendant

_____ [*name*] to plaintiff's right to take by eminent domain the property described in the complaint. This motion will be made on the grounds that defendant [_____ (*name*)] has objected to plaintiff's right to take in his/her _____ [answer *or* demurrer] on file herein and that therefore this court may, on motion of any party, specially set such objection(s) for trial before the determination of the issue of compensation.

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s*)] and the supporting memorandum served and filed herewith, on the records and file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

CAUTION:
A supporting memorandum must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form of notice is for use by a plaintiff or defendant in an eminent domain proceeding to move for an order specially setting objections to the right to take for trial before the determination of the issue of compensation [*see Code Civ. Proc. § 1260.110(a)*; for discussion, *see § 247.96*].

[3] State Statutes

Objections to right to take may be determined before issue of compensation. *Code Civ. Proc. § 1260.110*

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20-247 California Forms of Pleading and Practice--Annotated § 247.290

§ 247.290 Proceedings for Order Determining Right to Take [Code Civ. Proc. § 1260.120]--Order Specially Setting Objections to Right to Take for Trial [Code Civ. Proc. § 1260.110(b)]

[1] FORM Proceedings for Order Determining Right to Take [Code Civ. Proc. § 1260.120]--Order Specially Setting Objections to Right to Take for Trial [Code Civ. Proc. § 1260.110(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*name of moving party*] for an order specially setting for trial the objection(s) of defendant [_____ (*name*)] to plaintiff's right to take the property described in the complaint by eminent domain on file herein came on regularly for hearing on _____ [*date*], in [_____ (Department *or* Division) _____ of] this court, the Honorable _____ [*name*], Judge, presiding. Plaintiff appeared by counsel _____ [*name*], and defendant(s) [_____ (*name(s)*)] appeared by counsel _____ [*name(s)*].

On proof made to the satisfaction of the court and good cause appearing therefor,

IT IS HEREBY ORDERED that the motion is granted and that the objections to plaintiff's taking [set forth in Paragraph(s) _____ of the answer of defendant _____ (*name*) *or otherwise describe or refer to objections*] is specially set on the civil active list and set for trial on _____ [*date*], at _____ [*time*]

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use when the court has granted a motion for an order specially setting a defendant's objection to the right to take for trial before the determination of the issue of compensation.

[3] Cross References

[See *§ 247.289*.]

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20-247 California Forms of Pleading and Practice--Annotated § 247.291

§ 247.291 Proceedings for Order Determining Right to Take [Code Civ. Proc. § 1260.120]--Order

[1] FORM Proceedings for Order Determining Right to Take [Code Civ. Proc. § 1260.120]--Order

[*Caption. See § 247.290.*]

The motion of _____ [*name of defendant*] for an order that plaintiff does not have the right to take the property described in the complaint on file herein came on regularly for hearing by the court this date on notice duly and regularly given. Plaintiff _____ [*name*] appeared by counsel _____ [*name*]; defendant _____ [*name*] appeared by counsel _____ [*name*].

Proof having been made to the satisfaction of the court, and good cause appearing therefor,

[*EITHER*]

IT IS HEREBY ORDERED that plaintiff has the right to take the property described in the complaint on file herein.

[*OR*]

IT IS HEREBY ORDERED that plaintiff does not have the right to take the property described in the complaint on file herein for the reason(s) that _____ [*specify, e.g.*, the described property is not subject to acquisition by the power of eminent domain for the stated purpose] and, therefore, defendant _____ [*name*] is entitled to a dismissal of the action as to that property. Judgment of this complaint shall be entered and defendant is entitled to costs and reasonable litigation expenses to be claimed in a cost bill filed not later than _____ [*date*].

[*OR*]

IT IS HEREBY ORDERED that plaintiff is entitled to take the property described in the complaint on the condition that on or before _____ [*date*], _____ [*specify corrective and remedial action the court may prescribe that plaintiff take*]. If not so remedied by such date, then defendant is entitled to a dismissal of the action as to the property described in the complaint and judgment of this complaint will be entered. Defendant is entitled to costs and all reasonable litigation expenses necessarily incurred by defendant because of plaintiff's failure or omission which constituted the basis of the objection of the right to take, to be claimed in a cost bill filed not later than _____ [*date*].

[*CONTINUE*]

Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use in a proceeding to determine the right to take before determining the issue of compensation. The court may not create a right to take when none exists, but it may grant leave to the plaintiff to amend pleadings or take other corrective action enabling the plaintiff to continue with the proceeding. For example, if the resolution of necessity was not properly adopted, the court may order that a resolution be adopted within a specified time limit. Although the plaintiff is not required to comply with such an order, failure to do so results in a dismissal of the proceeding as to the property which the court has determined the plaintiff has no right to take [*see Code Civ. Proc. § 1260.120*; Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1260.120*].

When the complaint alleges alternative grounds for condemnation, a finding requiring dismissal as to one ground does not preclude a finding of a right to take on another ground and the proceeding may continue, based on the latter ground [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1260.120*].

[3] Cross References

See *§ 247.289*.

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20-247 California Forms of Pleading and Practice--Annotated § 247.292

§ 247.292 Notice of Abandonment [Code Civ. Proc. § 1268.510(a)]

[1] FORM Notice of Abandonment [Code Civ. Proc. § 1268.510(a)]

[Caption. See *§ 247.278[1]*.]

To _____ [*name*], defendant, and to _____ [*name*], his/her attorney:

NOTICE IS HEREBY GIVEN that plaintiff abandons the _____ [above-entitled proceeding *or* portion of the above-entitled proceeding] for the condemnation of defendant's property, described in plaintiff's complaint as follows: _____ [*give legal description of property as contained in plaintiff's complaint*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

This form of notice is for use by the condemnor in notifying the defendant that it is abandoning the condemnation proceeding either entirely or partially. The condemnor may abandon the proceeding at any time after the complaint is filed and before the expiration of 30 days after the final judgment. The notice of abandonment must be filed with the court and must be served on the defendant [*Code Civ. Proc. § 1268.510(a)*].

[3] State Statutes

Abandonment of proceeding by plaintiff on written notice. *Code Civ. Proc. § 1268.510(a)*

[4] Decisions

Trial court has jurisdiction to enter notice of abandonment within 30 days of final judgment even if appeals have been filed before entry of order. *Community Development Com. v. Shuffler (1988) 198 Cal. App. 3d 450, 457-459, 243 Cal. Rptr. 719*

Findings are not required to make order of abandonment. *Community Development Com. v. Shuffler (1988) 198 Cal. App. 3d 450, 460, 243 Cal. Rptr. 719*

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20-247 California Forms of Pleading and Practice--Annotated § 247.293

§ 247.293 Proceedings to Set Aside Abandonment [Code Civ. Proc. § 1268.510(b)]--Notice of Motion

[1] FORM Proceedings to Set Aside Abandonment [Code Civ. Proc. § 1268.510(b)--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MOTION AND NOTICE OF MOTION FOR OR-
Plaintiff,	)	DER SETTING ASIDE ABANDONMENT OF AC-
vs.	)	TION
_____ [*name*],	)	[Telephone Appearance]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*name of plaintiff*], and to _____ [*name*], his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [*name of defendant*] will, and hereby does, move for an order setting aside the abandonment by plaintiff of the above-entitled proceeding with respect to the following-described property: _____ [*give description of property*]. The motion will be made on the ground that the position of defendant _____ [*name*] has been substantially

changed to his/her detriment in justifiable reliance on the proceeding and that defendant _____ [*name*] cannot be restored to substantially the same position as if the proceeding had not been commenced.

The motion will be based on this notice, on the declaration of _____ [*name*] and the supporting memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant

CAUTION:
A supporting memorandum must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form of notice of motion is for use by a defendant condemnee in moving to set aside an abandonment of an eminent domain proceeding by a plaintiff. It must be made within 30 days after the filing of the notice to abandon by plaintiff [*Code Civ. Proc. § 1268.510(b)*].

[3] State Statutes

Setting aside of abandonment of eminent domain proceeding. *Code Civ. Proc. § 1268.510(b)*

[4] California Points and Authorities

For a memorandum in support of defendant's motion to set aside abandonment of eminent domain proceedings, see California Points and Authorities, Ch. 95, *Eminent Domain* (Matthew Bender)

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20-247 California Forms of Pleading and Practice--Annotated § 247.294

§ 247.294 Proceedings to Set Aside Abandonment [Code Civ. Proc. § 1268.510(b)]--Order Granting Motion to Set Aside

[1] FORM Proceedings to Set Aside Abandonment [Code Civ. Proc. § 1268.510(b)]--Order Granting Motion to Set Aside

[Caption. See *§ 247.290[1]*.]

The motion of _____ [*name of defendant*] for the order hereinafter made came on regularly for hearing by the court this date on notice duly and regularly given. Plaintiff appeared by counsel _____ [*name*]; defendant _____ [*name*] appeared by counsel _____ [*name*].

Proof having been made to the satisfaction of the court, the court determines that the position of _____ [*name of defendant*] has been substantially changed to his/her detriment in justifiable reliance on the above-entitled proceeding and that he/she cannot be restored to substantially the same position as if the proceeding had not been commenced.

Good cause appearing therefor,

IT IS HEREBY ORDERED that the abandonment by plaintiff of the above-entitled proceeding as to the following-described property _____ [*give description of property*], is set aside and vacated.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use when the court grants a defendant's motion to set aside an abandonment by the plaintiff of

an eminent domain proceeding.

[3] Cross References

See *§ 247.293*.

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20-247 California Forms of Pleading and Practice--Annotated § 247.295

§ 247.295 Proceedings to Dismiss Action After Abandonment [Code Civ. Proc. § 1268.510(c)]--Notice of Motion [Code Civ. Proc. § 1010]

[1] FORM Proceedings to Dismiss Action After Abandonment [Code Civ. Proc. § 1268.510(c)]--Notice of Motion [Code Civ. Proc. § 1010]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MOTION AND NOTICE OF MOTION FOR OR-
Plaintiff,	)	DER TO DISMISS ACTION AFTER ABANDON-
vs.	)	MENT
_____ [*name*],	)	[Telephone Appearance]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.*, plaintiff _____ (*name*)] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____

[*identify party, e.g.,* defendant] _____ [*name*] will, and hereby does, move for an order dismissing the above-entitled proceeding and directing that a judgment of dismissal be entered herein, together with an award to the _____ [plaintiff *or* defendant] of litigation expenses and costs. The motion will be made on the grounds that plaintiff served on defendant and filed with the clerk of the above-entitled court a notice of abandonment on _____ (*date*) and that _____ [defendant has not moved to set aside the abandonment within 30 days after the filing of the notice to abandon *or* defendant's motion to set aside the abandonment was denied].

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s*)] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

CAUTION:
A supporting memorandum must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form of notice of motion is for use by any party to a condemnation proceeding in making a motion for entry of judgment dismissing the proceeding after the plaintiff has given notice that it is abandoning the action. The motions may be made after denial of a motion to set aside the abandonment or, if such motion is not filed, 30 days after the notice to abandon was filed [*Code Civ. Proc. § 1268.510(c)*]. For a form of order to be used with this form, see *§ 247.297*.

[3] State Statutes

Motion to enter judgment dismissing proceeding after abandonment by plaintiff. *Code Civ. Proc. § 1268.510(c)*

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20-247 California Forms of Pleading and Practice--Annotated § 247.296

§ 247.296 Proceedings to Dismiss Action After Abandonment [Code Civ. Proc. § 1268.510(c)]--Supporting Declaration

[1] FORM Proceedings to Dismiss Action After Abandonment [Code Civ. Proc. § 1268.510(c)]--Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____
vs.	)	[*name*] IN SUPPORT OF MOTION FOR ORDER
_____ [*name*],	)	TO DISMISS ACTION AFTER ABANDONMENT
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

I am the attorney for _____ [plaintiff *or* defendant] in the above-entitled proceeding.

Plaintiff served on defendant and filed with the clerk of the above-entitled court a notice of abandonment on _____ [*date*]. _____ [Defendant has not moved to set aside the abandonment within 30 days after service on him/her of the notice of abandonment *or* Defendant filed a motion to set aside the abandonment

within 30 days after the notice to abandon was filed but the above-entitled court denied the motion on _____ [*date*]].

I declare under penalty of perjury under the laws of the State of California that this is true and correct.

_____ [*date*].

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This form of declaration is for use by an attorney for a defendant or a plaintiff in supporting a motion for entry of judgment dismissing a condemnation proceeding after the plaintiff has filed a notice to abandon. For a form of order, see *§ 247.297*.

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20-247 California Forms of Pleading and Practice--Annotated § 247.297

§ 247.297 Proceedings to Dismiss Action After Abandonment [Code Civ. Proc. § 1268.510(c)]--Order of Dismissal

[1] FORM Proceedings to Dismiss Action After Abandonment [Code Civ. Proc. § 1268.510(c)]--Order of Dismissal

[Caption. See *§ 247.290[1]*.]

The motion of _____ [*name of defendant*] for the order hereinafter made came on regularly for hearing by the court this date on notice duly and regularly given. Plaintiff appeared by counsel _____ [*name*]; defendant _____ [*name*] appeared by counsel _____ [*name*].

Proof having been made to the satisfaction of the court, and good cause appearing therefor,

IT IS HEREBY ORDERED that the proceeding be and hereby is dismissed and that the clerk be and hereby is directed to enter judgment of dismissal, and that the defendant be and hereby is awarded litigation expenses and costs, which costs may be claimed in a cost bill filed not later than 30 days after notice of entry of judgment.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use by the court in dismissing the condemnation proceeding after abandonment by the plaintiff.

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20-247 California Forms of Pleading and Practice--Annotated § 247.298

§ 247.298 Demand for Exchange of Lists of Expert Witnesses and Statements of Valuation Date [Code Civ. Proc. § 1258.210(b)]

[1] FORM Demand for Exchange of Lists of Expert Witnesses and Statements of Valuation Date [Code Civ. Proc. § 1258.210(b)]

[Caption. See *§ 247.278[1]*.]

To _____ [*name of party*] and to _____ [*name of attorney for party*]:

In connection with the above-entitled proceeding for the condemnation of the property described in the complaint, you are required to serve and deposit with the clerk of the court a list of expert witnesses and statements of valuation data in compliance with Article 2 (commencing with *Section 1258.210) of Chapter 7 of Title 7 of Part 3 of the Code of Civil Procedure* not later than the date of exchange to be set in accordance with that article. Except as otherwise provided in that article, your failure to do so will constitute waiver of your right to call unlisted expert witnesses during your case in chief and waiver of your right to introduce on direct examination during your case in chief any matter that is required to be, but is not, set forth in your statements of valuation data.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This form of demand is for use by a party demanding an exchange of lists of expert witnesses and statements of valuation data. The demand must be made not later than the 10th day after the trial date is selected or, if later, on noticed motion and a showing of good cause [*Code Civ. Proc. § 1258.210(a)*; *see § 247.103*].

[3] State Statutes

Demand for exchange of lists of expert witnesses and statements of valuation data. *Code Civ. Proc. § 1258.210*

[4] Los Angeles County Rules of Court

Pretrial discovery. Los Angeles Co. Super. Ct. Rules, Rules 16.3-16.12

[5] Text References

California Real Estate Law & Practice, Ch. 506, Trial Preparation and Discovery, §§ 506.30 -506.50 (Matthew Bender)

[6] Cross References

For discussion and forms relating to discovery in civil actions generally, see Ch. 190, *Depositions and Discovery*

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20-247 California Forms of Pleading and Practice--Annotated § 247.299

§ 247.299 Notice of Motion and Motion for Order Resolving Issue Affecting Determination of Compensation [Code Civ. Proc. § 1260.040]

[1] FORM Notice of Motion and Motion for Order Resolving Issue Affecting Determination of Compensation [Code Civ. Proc. § 1260.040]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER RESOLVING ISSUE AFFECTING DETERM-
vs.	)	INATION OF COMPENSATION [, SUPPORTING
_____ [*name*],	)	DECLARATION OF _____ (*name*),
Defendant.	)	AND SUPPORTING MEMORANDUM]
	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff _____ (*name*)] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] _____ [*name*] will, and hereby does, move for an order pursuant to *Code of Civil Procedure Section 1260.040(a)* [*state nature of compensation issue to be resolved by court, e.g.,* determining what constitutes the larger parcel a portion of which plaintiff is seeking to take in this eminent domain proceeding]. The motion will be made on the grounds that the parties cannot reach agreement on the extent of the larger parcel.

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s*)] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This form is for use by either a plaintiff or defendant when there is a dispute over an evidentiary or other legal issue affecting the determination of compensation. The motion must be made not later than 60 days before commencement of trial on the compensation issue. It must be heard by the assigned trial judge. If necessitated by the court's ruling on the motion, the court may postpone the date for the parties' final offer and demand, and the date of trial for a period that is sufficient to enable the parties to engage in further proceedings before trial [*Code Civ. Proc. § 1260.040*].

Use of this procedure is limited to resolution of legal issues that may affect compensation, such as what constitutes the larger parcel, or the probability of a zoning change; it may not be used to ascertain just compensation. The procedure does not preclude the use of other procedures that may be utilized for the same purpose, including bifurcation of issues and control of the order of proof pursuant to statute, or other pretrial procedure pursuant to court rule [Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1260.040*].

[3] Accompanying Papers

A supporting memorandum must be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For general discussion and forms, see Ch. 417, *Points and Authorities* .

[4] State Statutes

Resolution of legal issues affecting valuation. *Code Civ. Proc. § 1260.040*

[5] Text References

California Real Estate Law and Practice, Ch. 506, Trial Preparation and Discovery, § 506.06A (Matthew Bender)

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20-247 California Forms of Pleading and Practice--Annotated § 247.300

§ 247.300 Notice of Deposit [Code Civ. Proc. § 1255.020]

[1] FORM Notice of Deposit [Code Civ. Proc. § 1255.020]

[Caption. See *§ 247.278[1]*.]

To _____ [*names of all parties who have appeared in proceeding*]:

You are hereby notified that, pursuant to the provisions of *Section 1255.010 of the Code of Civil Procedure*, plaintiff deposited $_____ with the State Treasury in the above-entitled proceeding on _____ [*date*]. This sum is the amount of the probable compensation that will be awarded for the property sought to be condemned by the plaintiff in the above-entitled proceeding.

[*EITHER, if appraisal of property has been made*]

The probable amount of compensation deposited with the State Treasury is based on the appraisal of the property made by _____ [*name of expert who appraised property*]. A written _____ [statement *or* summary] of the basis for the appraisal is attached to this notice.

[*OR, if plaintiff is permitted to make deposit before appraisal being completed*]

The probable amount of compensation deposited with the State Treasury is based on plaintiff's good-faith estimate of the amount of compensation that will be awarded in the proceeding. A copy of all _____ [affidavits *and/or* declarations under penalty of perjury] on which the court order permitting plaintiff to make the deposit is based are attached to this notice. The appraisal and a written statement or summary of the basis for the appraisal is to be

completed by _____ [*date*]. The written statement or summary of the basis for the appraisal will be sent to you at that time. If any additional amount of compensation is required to be deposited after completion of the appraisal, that amount will be deposited by _____ [*date*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

This form of notice of deposit is for use by a plaintiff in informing all parties in the proceeding of plaintiff's deposit of probable compensation. The notice of deposit is to be served on all parties who have appeared in the proceeding and must be filed with the court together with a proof of service. The notice of deposit must also be served on all parties who appear thereafter on their appearance [*Code Civ. Proc. § 1255.020(a)*]. It must state that a deposit has been made, the date it was made, and the amountof the deposit. Service of the notice is to be made in the manner provided in *Code Civ. Proc. § 1255.450* for service of an order for possession [*Code Civ. Proc. § 1255.020(a)*; for a discussion of *Code Civ. Proc. § 1255.450, see § 247.113[2][b]*].

[3] State Statutes

Notice of deposit required. *Code Civ. Proc. § 1255.020*

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20-247 California Forms of Pleading and Practice--Annotated § 247.301

§ 247.301 Notice by Defendant Homeowner or Lessor Demanding Deposit of Probable Compensation [Code Civ. Proc. §§ 1255.040(a), 1255.050]

[1] FORM Notice by Defendant Homeowner or Lessor Demanding Deposit of Probable Compensation [Code Civ. Proc. §§ 1255.040(a), 1255.050]

[*Caption. See § 247.278.*]

To _____ [*name*], plaintiff, and to _____ [*name*], its attorney:

Defendant _____ [*name*], hereby demands, pursuant to Section _____ [1255.040(a) *or* 1255.050] of the Code of Civil Procedure, that plaintiff deposit with the State Treasury the probable amount of compensation that will be awarded in the above-entitled proceeding for the taking of defendant's property. Defendant desires that the deposit be made on or before _____ [*specify date not earlier than 30 days after date of service of notice*].

[*EITHER, if defendant is a homeowner*]

Defendant's property includes a dwelling containing _____ [*specify number of residential units not exceeding two*] and _____ [the dwelling *or* one of the dwelling units] is occupied by defendant as his/her residence.

[*OR, if defendant is a lessor*]

Defendant's property is subject to the following leasehold interest: _____ [*specify type of leasehold interest and name of lessee*].

Dated: _____.

_____ [*signature*]
Attorney for Defendant

[2] Use of Form

This form of notice is for use by a homeowner or lessor of property which plaintiff is seeking to take, in demanding that plaintiff make a deposit of the probable compensation that will be awarded in the proceeding. The notice must specify the date by which the defendant desires the deposit to be made. The date cannot be earlier than 30 days after the date of service of the notice but may be later [*Code Civ. Proc. §§ 1255.040(a), 1255.050*].

[3] Waiver of Claims and Defenses

The serving of a notice pursuant to *Code Civ. Proc. §§ 1255.040* and *1255.050* constitutes a waiver by operation of law, conditioned on the subsequent deposit by the plaintiff of the probable amount of compensation, of all claims and defenses in favor of the defendant except his or her claim for greater compensation [*Code Civ. Proc. § 1255.040(e)*; *see Code Civ. Proc. § 1255.050*].

[4] State Statutes

Demand by homeowner for deposit of probable compensation. *Code Civ. Proc. § 1255.040*

Demand by lessor for deposit of probable compensation. *Code Civ. Proc. § 1255.050*

[5] Cross References

See *§ 247.300*.

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20-247 California Forms of Pleading and Practice--Annotated § 247.302

§ 247.302 Proceedings for Withdrawal of Deposit of Probable Compensation [Code Civ. Proc. § 1255.210]--Application

[1] FORM Proceedings for Withdrawal of Deposit of Probable Compensation [Code Civ. Proc. § 1255.210]--Application

[*Caption. See § 247.278.*]

Pursuant to *Section 1255.210 of the Code of Civil Procedure*, the undersigned hereby applies for an order directing payment to him/her of _____ [the sum of $_____ from *or* $_____ which is the entire sum of] the deposit described below, and in support of this application declares:

1. Applicant, the/a defendant in the above-entitled proceeding, is the _____ [*describe interest in property sought to be taken, e.g.*, record owner in fee] of the following-described property: _____ [*describe property or refer to description in complaint*].

2. _____ [No other persons have any interest in or right to the property *or* The names of persons holding interests in the property and their respective interests are as follows: _____ (*specify*)].

[*EITHER, if deposited in the State Treasury*]

3. Pursuant to the provisions of *Section 1255.010 of the Code of Civil Procedure*, on or about _____ [*date*], [pursuant to an order of the above-entitled court made and entered herein on _____ (*date*),] plaintiff deposited with the State Treasury the sum of $_____ as the probable amount of compensation that will be awarded in the above-entitled proceeding.

[*OR, if deposit made in a county treasury*]

3. Pursuant to an order of the above-entitled court made and entered herein on _____ [*date*], plaintiff deposited with the county treasury the sum of $_____ as the probable amount of compensation that will be awarded in the above-entitled proceeding. By order of the court, this sum was deposited in the Treasury of the County of _____.

VERIFICATION

I, _____ [*name*], am the party making this application. I have read this application and know the contents of this complaint. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that this is true and correct.
Dated: _____.

_____ [*signature of defendant*]

[2] Use of Form

This form of application is for use by a defendant applying for withdrawal of all or part of the deposit of probable compensation made by the plaintiff. The application must be verified, set forth the applicant's interest in the property, and request withdrawal of a stated amount. The applicant must serve a copy of the application on the plaintiff [*Code Civ. Proc. § 1255.210*].

For a form for withdrawal of deposit after entry of judgment pursuant to *Code Civ. Proc. § 1268.140*, see *§ 247.315*.

[3] State Statutes

Application for withdrawal of deposit. *Code Civ. Proc. § 1255.210*

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20-247 California Forms of Pleading and Practice--Annotated § 247.303

§ 247.303 Proceedings for Withdrawal of Deposit of Probable Compensation [Code Civ. Proc. § 125.210]--Notice of Withdrawal to Other Interested Parties [Code Civ. Proc. § 1255.230(c)]

[1] FORM Proceedings for Withdrawal of Deposit of Probable Compensation [Code Civ. Proc. § 125.210]--Notice of Withdrawal to Other Interested Parties [Code Civ. Proc. § 1255.230(c)]

[*Caption. See § 247.278.*]

To _____ [*names of parties known or believed to have interests in the property*]:

You are hereby notified, pursuant to *Section 1255.230(c) of the Code of Civil Procedure*, that:

Defendant _____ [*name*] in the above-entitled proceedings for the condemnation by plaintiff of certain property described below has applied for withdrawal of the sum of $_____ from the funds deposited by plaintiff with the State Treasury for payment to the owners of the property to be taken. The property involved in the proceeding is described as follows: _____ [*give description*].

Plaintiff has objected to the withdrawal on the ground that he/she/it _____ [knows *or* believes] that other parties have interests in the property. Plaintiff _____ [knows *or* believes] that you have an interest in that property.

You may appear within 10 days of service on you of this notice and object to the withdrawal of the funds by defendant _____ [*name*]. If you do not appear and object you will waive any rights against the plaintiff to the extent of the amount withdrawn.
Dated: _____.

_____ [*signature*]
Attorney for _____
[Plaintiff *or* Defendant]

[2] Use of Form

This form of notice is to be used either by a plaintiff or a defendant applicant in notifying parties known or believed to have interests in the property to be condemned that defendant has applied for withdrawal of funds on deposit. The notice is to be served in the manner provided in *Code Civ. Proc. § 1255.450* for service of an order for possession. Parties served in this manner have no claim against the plaintiff to the extent of the amount of compensation withdrawn by the defendant. The plaintiff remains liable to parties having an interest of record who are not served but if this liability is enforced the plaintiff is subrogated to the rights of the parties under *Code Civ. Proc. § 1255.280* (refund of excess withdrawal) [*Code Civ. Proc. § 1255.230(c)*].

[3] State Statutes

Notice of withdrawal to other interested parties. *Code Civ. Proc. § 1255.230(c)*

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20-247 California Forms of Pleading and Practice--Annotated § 247.304

§ 247.304 Proceedings for Withdrawal of Deposit of Probable Compensation [Code Civ. Proc. § 1255.210]--Objections by Plaintiff [Code Civ. Proc. § 1255.230]

[1] FORM Proceedings for Withdrawal of Deposit of Probable Compensation [Code Civ. Proc. § 1255.210]--Objections by Plaintiff [Code Civ. Proc. § 1255.230]

[*Caption. See § 247.278.*]

Plaintiff hereby objects to the application of _____ [*name*] for withdrawal of $_____ from the amount deposited by plaintiff as the amount of probable compensation for property described as _____ [*give description of property*] in the complaint on file herein.

This objection is made on the grounds that _____ [*specify one or more of the following grounds*:

1. Other parties are known or believed to have interests in the property. The names and last known addresses of these parties are: _____ (*specify*);

2. An undertaking should be filed by the defendant as provided in Section _____ (*1255.240 or* 1255.250) of the Code of Civil Procedure;

3. The amount of the undertaking filed by defendant _____ (*name*) is insufficient in that _____ (*specify*); and

4. The sureties on the undertaking filed by the defendant are insufficient in that _____ (*specify*)].

[*If ground for objection is that other parties are known or believed to have interests in the property, add*: On _____ [*date*], the other parties to the proceeding known or believed to have interests in the property, except as provided below, were served with notice that they may appear within 10 days after service of notice and

object to the withdrawal and that failure to object constitutes a waiver of any right to the amount withdrawn or further rights against the plaintiff to the extent of the amount withdrawn. (Plaintiff has attempted to serve personally _____ (*name and last known address of party*) but has been unable to locate and serve that party and will be unable to locate the party within the 20-day period required by *Section 1255.230 of the Code of Civil Procedure*.)]

WHEREFORE, plaintiff prays that the court hold a hearing, after notice of this complaint to all parties, and determine the amounts, if any, to be withdrawn and by whom for a total amount not exceeding the amount deposited by plaintiff as security for taking immediate possession of the property.
Dated: _____.

_____ [*signature*]
Attorney for Plaintiff

[2] Use of Form

This form of objection is for use by a plaintiff in setting forth plaintiff's objections to a defendant's application for withdrawal of funds from plaintiff's deposit of probable compensation. The plaintiff may file these objections within 20 days after service on the plaintiff of a copy of the application [*Code Civ. Proc. § 1255.230(b)*].

[3] State Statutes

Plaintiff's objections to withdrawal of deposit. *Code Civ. Proc. § 1255.230*

[4] Cross References

See *§ 247.302*.

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20-247 California Forms of Pleading and Practice--Annotated § 247.305

§ 247.305 Proceedings for Withdrawal of Deposit of Probable Compensation [Code Civ. Proc. § 1255.210]--Order [Code Civ. Proc. §§ 1003, 1255.220]

[1] FORM Proceedings for Withdrawal of Deposit of Probable Compensation [Code Civ. Proc. § 1255.210]--Order [Code Civ. Proc. §§ 1003, 1255.220]

[*Caption. See § 247.278.*]

Application having been made to this court for withdrawal of funds in the amount of $_____, deposited by plaintiff pursuant to the requirements of *Section 1255.010 of the Code of Civil Procedure* as the probable amount of compensation that will be awarded in the above-entitled proceeding for the taking of the property described in the complaint on file herein[, the matter was heard on _____ (*date*), notice having been regularly served. Applicant _____ (*name*) appeared by counsel _____ (*name*); plaintiff _____ (*name*) appeared by counsel _____ (*name*)].

The court has found that a copy of the application for withdrawal of funds has been served on plaintiff, that more than 20 days have elapsed since the filing and service of the application, that the time for filing objections to withdrawal of the funds has expired, that _____ [no objection to the withdrawal has been made *or* plaintiff has entered the following objections to the withdrawal which the court has considered _____ (*specify objections*)], and that defendant is the only person having an interest in the parcel and is entitled to the funds in the above-stated amount.

IT IS ORDERED that defendant's application be, and hereby is, granted, and that the _____ [State Treasurer *or* Treasurer of _____ County] is hereby authorized and directed to pay to defendant the sum of $_____ from the deposit made by the plaintiff [on the condition that he/she file an undertaking in the sum of $_____ to secure the return of any excess payment which may later be determined].

IT IS FURTHER ORDERED that the withdrawal as herein above provided constitutes a waiver of all defenses of defendant except his/her claim for greater compensation. The amount so paid shall be credited on the judgment rendered in the proceeding.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use by the court in approving the application of a defendant for withdrawal of funds from plaintiff's deposit of probable compensation.

[3] State Statutes

Court order approving application for withdrawal of deposit. *Code Civ. Proc. § 1255.220*

[4] Cross References

See *§ 247.302*.

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20-247 California Forms of Pleading and Practice--Annotated § 247.306

§ 247.306 Plaintiff's Final Offer [Code Civ. Proc. § 1250.410(a)]

[1] FORM Plaintiff's Final Offer [Code Civ. Proc. § 1250.410(a)]

[*Caption. See § 247.278[1].*]

To _____ [*name of defendant*] and to _____ [*name*], his/her/its attorney:

Plaintiff, pursuant to *Section 1250.410 of the Code of Civil Procedure*, hereby makes its final offer of compensation for the property described in the complaint on file in the above-entitled proceeding and of which defendant _____ [*name*] is the owner.

The offer is for the sum of $_____ [for the taking of the real property *or* and is comprised of $_____ for the taking of real property (and the structures thereon) and $_____ as severance damages to defendant's remaining property and $_____ for goodwill]. The offer [includes *or* does not include] interest and costs.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

This form of settlement offer is for use by the plaintiff in making its final offer of compensation in the proceeding. Plaintiff must make the offer at least 30 days before the date of trial, file it with the court, and serve it on the defendant [*Code Civ. Proc. § 1250.410(a)*].

The offer must include all of the compensation in the proceeding, including any compensation for loss of goodwill, and must state whether interest and costs are included. This offer will be the only one considered by the court (in conjunction with the defendant's final demand) in determining any entitlement to litigation expenses [*Code Civ. Proc. § 1250.410(a)*].

If the court finds that plaintiff's offer was unreasonable but defendant's demand was reasonable, the court must award defendant his or her litigation expenses as part of the cost allowed pursuant to *Code Civ. Proc. § 1268.710* [*Code Civ. Proc. § 1250.410(b)*; *see §§ 247.325 -247.327*]. "Litigation expenses" are the party's reasonable attorney's fees and costs, including reasonable expert witness and appraiser fees [*Code Civ. Proc. § 1250.410(e)*].

[3] State Statutes

Final settlement offer. *Code Civ. Proc. § 1250.410(a)*

Litigation expenses awarded if offer unreasonable. *Code Civ. Proc. § 1250.410(b)*

"Litigation expenses" defined. *Code Civ. Proc. § 1250.410(e)*

[4] Cross References

For discussion of and forms relating to settlement, see Ch. 520, *Settlement and Release*

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20-247 California Forms of Pleading and Practice--Annotated § 247.307

§ 247.307 Defendant's Final Demand [Code Civ. Proc. § 1250.410]

[1] FORM Defendant's Final Demand [Code Civ. Proc. § 1250.410]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	FINAL DEMAND FOR COMPENSATION
Defendant.	)	
	)	
	)	

To _____ [*name of plaintiff*] and to _____ [*name*], its attorney:

Defendant _____ [*name*], pursuant to *Section 1250.410 of the Code of Civil Procedure*, hereby makes his/her final demand for compensation for his/her property described in the complaint on file in the above-entitled proceeding. The demand is for the sum of $_____ [for the taking of the real property *or* and is comprised of $_____ for the taking of real property (and the structures thereon) and $_____ as severance damages to defendant's remaining property, and $_____ for goodwill]. The demand [includes *or* does not include] interest and costs.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Use of Form

This form of demand is for use by a defendant in making his or her final demand for compensation. Defendant must file and serve its final demand at least 20 days before the date of trial on issues related to compensation. The demand must include all of the compensation in the proceeding, including any compensation for loss of goodwill, and must state whether interest and costs are included. This demand will be the only one considered by the court (in conjunction with the plaintiff's final offer) in determining any entitlement to litigation expenses [*Code Civ. Proc. § 1250.410(a)*].

For forms of recovery of litigation expenses if plaintiff's offer was unreasonable and defendant's demand was reasonable, see *§§ 247.325 -247.327*.

[3] Cross References

See *§ 247.306*.

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20-247 California Forms of Pleading and Practice--Annotated § 247.308

§ 247.308 Proceedings to Obtain Order for Possession [Code Civ. Proc. § 1255.410]--Notice of Motion

[1] FORM Proceedings to Obtain Order for Possession [Code Civ. Proc. § 1255.410]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION FOR ORDER FOR POS-
Plaintiff,	)	SESSION
vs.	)	[Telephone Appearance]
_____ [*name*],	)	Date: _____
Defendant,	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*name*], defendant, and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*name of plaintiff making motion*] will, and hereby does, move for an order for possession of the property described in the complaint by eminent domain on file herein, such possession to commence on or about _____ [*date*]. The motion will be made on the grounds that plaintiff is entitled to take the property by eminent domain, and has deposited with the court the probable compensation for the property as determined in accordance with *Code of Civil Procedure Section 1255.010*.

You have the right to oppose this motion for an order of possession of your property. If you oppose this motion you must serve the plaintiff and file with the court a written opposition to the motion within 30 days from the date you were served with this motion.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*names*] and the supporting memorandum served and filed herewith, on the records on file herein, and on such evidence as may be presented at the hearing on the motion.
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Use of Form

This form is a notice of motion for use by a plaintiff seeking an order for possession before judgment. The form may be used under *Code Civ. Proc. § 1255.410* if the plaintiff can establish its right to take the property by eminent domain and has deposited the amount of probable compensation in accordance with *Code Civ. Proc. § 1255.010*. For discussion of obtaining an order for possession before judgment, see *§ 247.113*.

[3] State Statutes

Motion and notice of motion for order for possession before judgment. *Code Civ. Proc. § 1255.410*

Determination of probable compensation. *Code Civ. Proc. § 1255.010*

Service of order for possession. *Code Civ. Proc. § 1255.450*

Contents of order for possession. *Code Civ. Proc. § 1255.460*

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20-247 California Forms of Pleading and Practice--Annotated § 247.308A

§ 247.308A Proceedings to Obtain Order for Possession [Code Civ. Proc. § 1255.410]--Opposition to Motion for Order for Possession

[1] FORM Proceedings to Obtain Order for Possession [Code Civ. Proc. § 1255.410]--Opposition to Motion for Order for Possession

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ _____

	)	
	)	NO. _____
_____ [*name*],	)	OPPOSITION TO MOTION FOR ORDER FOR
Plaintiff,	)	POSSESSION
vs.	)	[Telephone Appearance]
_____ [*name*],	)	Date: _____
Defendant,	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*name*], plaintiff, and to _____ [*name*], his/her attorney of record:

Having been served on _____ [*date*] with a notice of motion for an order of possession of the property described [*either* as _____ (*description of property*) *or* in the complaint for this proceeding], defendant hereby opposes the motion. This opposition is based on the ground that an award of possession to plaintiff before judgment in this proceeding _____ [*state ground(s) for opposition, e.g.*, will cause defendant great hardship]. [*If opposition to motion is based on hardship to defendant, include:*]

The opposition to motion will be based on this notice of opposition to motion, on the hardship declaration(s) of _____ [*name(s)*], and the supporting memorandum served and filed herewith, on the records on file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for [Defendant *or* Occupant]
_____ [*name*]

VERIFICATION

I _____ [*name*] am [the defendant *or* an occupant of the property involved] in the above-entitled proceeding. I have read the foregoing opposition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing it true and correct.
Dated: _____

_____ [*signature*]

[2] Use of Form

This form is for use by a defendant or occupant of property to register opposition to a plaintiff's motion for an order for possession of the property before judgment. Written opposition to such a motion must be filed with the court and served on the plaintiff within 30 days from the date the defendant or occupant was served with notice of the plaintiff's motion for order of possession. If the written opposition asserts a hardship, it must be supported by a declaration signed under penalty of perjury stating facts supporting the hardship [*Code Civ. Proc. § 1255.410(c)*]. For further coverage of obtaining and opposing a motion for order of possession before judgment, see *§ 247.113*.

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20-247 California Forms of Pleading and Practice--Annotated § 247.309

§ 247.309 Proceedings to Obtain Order for Possession--Order [Code Civ. Proc. §§ 1255.410, 1255.460]

[1] FORM Proceedings to Obtain Order for Possession--Order [Code Civ. Proc. §§ 1255.410, 1255.460]

[Caption. See *§ 247.290[1]*.]

The motion of _____ [*name of plaintiff*] for an order for possession of the property described in the complaint by eminent domain on file herein came on regularly for hearing on _____ [*date*], in [_____ (Department *or* Division) _____ of] this court, the Honorable _____ [*name*], Judge, presiding. Plaintiff appeared by counsel _____ [*name*], and defendant(s) [_____ (*name(s)*)] appeared by counsel _____ [*name(s)*].

On proof made to the satisfaction of the court, the court finds that:

1. Plaintiff is entitled to take the property by eminent domain.

2. Plaintiff has deposited, pursuant to *Code of Civil Procedure Sections 1255.010 to 1255.080*, an amount equal to the probable compensation due for said property.

[*If motion is opposed by defendant or occupant, include:*]

3. There is an overriding need for plaintiff to possess the property before the issuance of final judgment, and plaintiff will suffer substantial hardship if the motion for possession is denied or limited.

4. The hardship that the plaintiff will suffer if possession is denied or limited outweighs any hardship on the [defendant *or* occupant] that would be caused by the granting of plaintiff's motion.

UNDER THE PROVISIONS OF CODE OF CIVIL PROCEDURE SECTION 1255.460, IT IS ORDERED that plaintiff be and hereby is authorized to take possession of the property described above and to fully possess and use the property on or after _____ [*date*].

[*If appropriate (see Code Civ. Proc. § 1255.450(e)), add:*] IT IS FURTHER ORDERED that, good cause appearing therefor, plaintiff be and hereby is authorized to take possession of the property, which is unoccupied, without serving a copy of this order on _____ [*name*], who is a record owner but cannot be located.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use by the court to grant an order for possession before judgment. It is designed to be used when the order is sought in accordance with a motion for possession filed under *Code Civ. Proc. § 1255.410* [*see Code Civ. Proc. § 1255.460*].

[3] Contents of Order

An order for possession issued in accordance with a motion made under *Code Civ. Proc. § 1255.410* must [*Code Civ. Proc. § 1255.460*]:

- Recite that is has been made under *Code Civ. Proc. § 1255.460*;
- Describe the property to be acquired, which description may be by reference to the complaint; and
- State the date after which the plaintiff is authorized to take possession of the property.

[4] Cross References

See *§§ 247.308, 247.308A.*

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20-247 California Forms of Pleading and Practice--Annotated § 247.310

§ 247.310 Proceedings to Vacate Order for Possession [Code Civ. Proc. § 1255.440]--Notice of Motion

[1] FORM Proceedings to Vacate Order for Possession [Code Civ. Proc. § 1255.440]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MOTION AND NOTICE OF MOTION FOR OR-
Plaintiff,	)	DER TO VACATE ORDER FOR POSSESSION
vs.	)	[Telephone Appearance]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*name*], plaintiff, and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*name of defendant making motion*] will, and hereby does, move for an order vacating the order of possession entered by this court on _____ [*date*], authorizing the plaintiff to take possession of the property. The motion will be made on the ground that the requirements of *Code of Civil Procedure Section 1255.410* have not been satisfied in that _____ [*specify, e.g.,* the plaintiff has not deposited the amount of probable compensation with

the court].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s*)] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

CAUTION:
A supporting memorandum must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form of notice of motion is for use by a defendant in moving to vacate the order for possession authorizing a plaintiff to take possession of the property.

[3] State Statutes

Vacation of order for possession for noncompliance with *Code Civ. Proc. § 1255.410*. *Code Civ. Proc. § 1255.440*

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20-247 California Forms of Pleading and Practice--Annotated § 247.311

§ 247.311 Proceedings to Vacate Order for Possession [Code Civ. Proc. § 1255.440]--Order

[1] FORM Proceedings to Vacate Order for Possession [Code Civ. Proc. § 1255.440]--Order

[*Caption. See § 247.290[1].*]

The motion of _____ [*name of defendant*] for an order vacating the order for possession entered by the court in this proceeding on _____ [*date*], came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

Proof having been made to the satisfaction of the court that plaintiff has not satisfied the conditions specified in *Section 1255.410 of the Code of Civil Procedure* in that _____ [*specify, e.g.*, plaintiff has not deposited the amount of probable compensation with this court],

IT IS ORDERED that the order for possession entered by this court on _____ [*date*], be vacated.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use by the court in granting an order to vacate the order for possession authorizing plaintiff to take possession of the property before judgment.

[3] Cross References

See *§ 247.310*.

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20-247 California Forms of Pleading and Practice--Annotated § 247.312

§ 247.312 Judgment in Condemnation After Jury Trial [Code Civ. Proc. §§ 1235.130, 1260.220, 1260.230, 1268.010]--No Apportionment

[1] FORM Judgment in Condemnation After Jury Trial [Code Civ. Proc. §§ 1235.130, 1260.220, 1260.230, 1268.010]--No Apportionment

[*Caption. See § 247.278.*]

This cause came on regularly for trial on _____ [*date*], in [_____ (Department *or* Division) _____ of] the above entitled court, the Honorable _____ [*name*], Judge, presiding. Plaintiff appeared by _____ [*name*], his/her/its attorney and defendant appeared by _____ [*name*], his/her/its attorney.

A jury was impaneled and sworn to assess the value of the real property sought to be condemned and described as Parcel No. _____ in Paragraph _____ of the complaint herein, together with all improvements thereon pertaining to the realty. Witnesses on the part of both plaintiff and defendant were sworn and examined. Both oral and documentary evidence was introduced on behalf of the respective parties and the evidence having been duly taken and heard, the cause was argued by counsel for the respective parties.

After being instructed by the court as to the law of the case, the jury retired to consider their verdict, subsequently returned to court, and being called, answered to their names and duly rendered their verdict in writing, in words and figures as follows:

_____ [*Set forth verdict, e.g.*, "We, the jury in the above-entitled action, find and assess that:

The fair market value of the property described as Parcel No. _____ in the complaint herein, constituting the real property sought to be acquired from defendant _____ (*name*) in the above-entitled action, and all improvements thereon pertaining to the realty, as of _____ (*date*), to be

$_____"].
Dated: _____.

_____ [*name*]
Foreperson

The court having made its findings of fact and conclusions of law as to all other matters, questions, and issues involved in the proceeding, and it further appearing to the court that the use to which the property sought to be condemned and taken is a public use authorized by law, and that the taking of the property is necessary for that use.

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid,

IT IS ADJUDGED, ORDERED, AND DECREED that:

1. Defendant _____ [*name*] is the owner of real property including all improvements thereon pertaining to the realty in _____ County, California legally described in Paragraph _____ of the complaint as _____ [*set forth description*].

2. The value of the property described as Parcel No. _____ herein, together will all improvements thereon pertaining to the realty, as fixed by the jury, was the sum of $_____ on _____ [*date*], the date of valuation.

[3. *If appropriate, add*: The real property taken by condemnation is part of a larger parcel and, in addition to the fair market value of the property taken, defendant _____ [*name*] is entitled to damages for injury to the remainder of the parcel in the sum of $_____, computed as follows: _____ (*show amount of severance damages and amount of benefit to remainder offsetting the amount of damages recoverable*).]

[4. *If appropriate, add*: In addition to the fair market value of the property taken, defendant _____ [*name*] is entitled to the sum of $_____ as compensation for loss of goodwill.]

5. _____ [On payment being made by plaintiff to defendant of the sum of $_____, the sum of $_____, having already been withdrawn by defendant from plaintiff's deposit of probable compensation, *or* On deposit by plaintiff with the court, within 30 days of the final judgment, of the sum of $_____ and costs of suit as set forth below, *or* The deposit by plaintiff of the amount of probable compensation pursuant to *Sections 1255.010-1255.080 of the Code of Civil Procedure* having been made on _____ (*date*), and this sum now being deemed a deposit made pursuant to *Section 1268.110*,] the above-described property is [hereby] taken and condemned _____ [*describe interest condemned, e.g.*, in fee simple absolute] for public use by plaintiff for the use and purposes described in the complaint.

6. The amount of taxes certified by the tax collector of _____ County pursuant to *Section 1260.250 of the Code of Civil Procedure* is $_____. This amount shall be paid to the tax collector from the award. [*If the certified amount was not prorated to the date of trial, add*: In addition to this amount, the sum of $_____, which is an amount equal to the applicable daily prorate multiplied by the number of days starting on the date of trial and ending on and including the day before the date of apportionment, shall be paid to the tax collector from the award.]

IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that the payment of the sum specified above is in full payment for all interests in the land taken and for all damages of every kind and nature suffered or to be suffered by defendants because of the taking of the property and the construction of the improvement in the manner proposed by

plaintiff.

[*EITHER*]

IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that on payment or deposit of the sum set forth above, plaintiff shall be entitled to, and the court shall make, a final order of condemnation in the manner provided by law, which final order of condemnation shall describe the property condemned and identify the judgment authorizing the taking.

[*OR*]

IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that, plaintiff having deposited in court for the defendant the sum of $_____, the following property _____ [*set forth legal description and interest condemned*] is taken for and condemned to plaintiff for the public purpose of _____ [*specify*]. Such interest will vest in plaintiff on the date that a certified copy of this judgment and final order of condemnation is recorded in the office of the recorder of _____ County, California.

[*CONTINUE*]

IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that defendant _____ [*name*] have and recover from the plaintiff costs in this proceeding in the amount of $_____ [which includes the sum of $_____ for the recovery of litigation expenses pursuant to *Section 1250.410(b) of the Code of Civil Procedure*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is for use as a judgment in condemnation after a jury trial when the award is not apportioned. For a form for use when the award is apportioned, see *§ 247.313*.

[3] Award of Taxes in Judgment

As part of the judgment, the court must separately state the amount certified by the tax collector pursuant to *Code Civ. Proc. § 1260.250* and order that amount be paid to the tax collector from the award. If the amount so certified is prorated to the date of trial, the order must include, in addition to the amount so certified, an amount equal to the applicable daily prorate multiplied by the number of days from the date of trial to and including the day before the date of apportionment determined pursuant to *Rev. & Tax. Code § 5082* [*Code Civ. Proc. § 1260.250(e)*].

[4] State Statutes

Final judgment defined. *Code Civ. Proc. § 1235.120*

Judgment defined. *Code Civ. Proc. § 1235.130*

Assessment of compensation. *Code Civ. Proc. § 1260.230*

Proration of property taxes. *Code Civ. Proc. §§ 1268.410-1268.430*

[5] Cross References

For discussion of and forms relating to judgments generally, see Ch. 318, *Judgments*

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20-247 California Forms of Pleading and Practice--Annotated § 247.313

§ 247.313 Judgment in Condemnation After Jury Trial [Code Civ. Proc. §§ 1235.130, 1260.220, 1260.230, 1268.010]--Apportionment

[1] FORM Judgment in Condemnation After Jury Trial [Code Civ. Proc. §§ 1235.130, 1260.220, 1260.230, 1268.010]--Apportionment

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	JUDGMENT IN CONDEMNATION
Defendant.	)	
	)	
	)	

_____

[*Introductory paragraph and paragraphs setting forth jury's impanelment, deliberation, and verdict. See § 247.312.*]

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid,

IF IS HEREBY ADJUDGED, ORDERED, AND DECREED that:

1. The total compensation to be paid for the taking of the property described in plaintiff's complaint on file herein is $_____, as fixed by the jury.

2. The total compensation to be paid should be apportioned among the defendants as follows:

Defendant _____ [*name*], $_____;

Defendant _____ [*name*], $_____;

Defendant _____ [*name*], $_____.

[*Specify further names and amounts as necessary*.]

3. [*Judgment relating to property taxes. See § 247.312, Paragraph 6.*]

4. On timely payment of the award as set forth above, the property described in plaintiff's complaint on file herein shall be condemned in fee simple absolute, unless a lesser interest is described, for _____ [*specify use for which property is to be taken, e.g.*, state highway purposes].

5. The use for which the property is sought to be taken is authorized by law, is a public use, and the taking by condemation by plaintiff is necessary for this public use.

6. The payment of the sum specified above is in full payment for all interests in the land taken and for all damages of every kind and nature suffered or to be suffered by defendants because of the taking of the property and the construction of the improvement in the manner proposed by plaintiff.

7. The following defendants shall recover from plaintiff their costs of suit herein incurred in the following sums:

Defendant _____ [*name*], $_____;

Defendant _____ [*name*], $_____;

Defendant _____ [*name*], $_____.

[*Specify further names and sums as necessary*.]

Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is for use as a judgment in condemnation after a jury trial when the award is apportioned among the defendants having interests in the property. For a form for use when the award is not apportioned, see *§ 247.312*.

[3] State Statutes

Separate assessments of divided interests. *Code Civ. Proc. § 1260.220*

[4] Cross References

See *§ 247.312*.

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§ 247.314 Order for Possession [Code Civ. Proc. § 1268.210]

[1] FORM Order for Possession [Code Civ. Proc. § 1268.210]

[*Caption. See § 247.290.*]

The application of _____ [*name of plaintiff*] for an order for possession of the property described below having been received, and proof having been made to the satisfaction of the court, the court determines that a judgment of condemnation has been made and entered on _____ [*date*], determining that plaintiff is entitled to take the following-described property: _____ [*set forth description of property*].

The court further determines that, on _____ [*date*], plaintiff _____ [paid to *or* deposited for] defendant the sum of $_____, which is the amount of the award together with the interest then due thereon.

Good cause appearing therefor,

IT IS HEREBY ORDERED that plaintiff is authorized to take possession of the above-described property on _____ [*date*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order may be presented to the court for the judge's signature after he or she has granted an ex parte, oral application by the plaintiff for an order for possession after judgment. The order must state the date after which the plaintiff is authorized to take possession of the property and, if a deposit has been made, the fact of the deposit and its

date and amount [*Code Civ. Proc. § 1268.210(b)*].

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20-247 California Forms of Pleading and Practice--Annotated § 247.315

§ 247.315 Application for Order for Payment From Plaintiff's Deposit After Judgment [Code Civ. Proc. § 1268.140]--By Defendant

[1] FORM Application for Order for Payment From Plaintiff's Deposit After Judgment [Code Civ. Proc. § 1268.140]--By Defendant

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	APPLICATION FOR ORDER FOR PAYMENT
Plaintiff,	)	FROM DEPOSIT AFTER JUDGMENT
vs.	)	[Telephone Appearance]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

Defendant, _____ [*name*], pursuant to *Section 1268.140 of the Code of Civil Procedure*, hereby applies for an order that he/she be paid the sum of $_____ from the amount to this complaintfore deposited with the above-entitled court by plaintiff, to which defendant is entitled under the judgment entered in this proceeding on _____ [*date*].

Attached to this application is a _____ [satisfaction of judgment *or* receipt for the money which constitutes a waiver by operation of law of all claims and defenses except a claim for greater compensation].

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

This form of application is for the defendant to use in obtaining an order for payment from a plaintiff's deposit made after judgment. Defendant cannot withdraw any amount from the deposit unless he or she files either a satisfaction of the judgment or a receipt for the money which constitutes a waiver by operation of law of all claims and defenses except a claim for greater compensation [*Code Civ. Proc. § 1268.140(a)*; *see § 247.316*].

If the judgment has been reversed, vacated, or set aside, the defendant may withdraw a deposit only pursuant to the provisions set forth in Code *Civ. Proc. §§ 1255.210-1255.280* (withdrawal of deposit of probable compensation) [*Code Civ. Proc. § 1268.140(d)*].

[3] Notice of Application

The applicant for withdrawal from the deposit must give notice of the application to all other defendants who have appeared in the proceeding and who have an interest in the property when the award has not been apportioned at the time the application is made. When the award has been apportioned, the applicant must give notice of it to the other defendants to whom the court requires notice be given [*Code Civ. Proc. § 1268.140(b)*].

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20-247 California Forms of Pleading and Practice--Annotated § 247.316

§ 247.316 Receipt for Money and Abandonment of Defenses [Code Civ. Proc. § 1268.140(a)(2)]

[1] FORM Receipt for Money and Abandonment of Defenses [Code Civ. Proc. § 1268.140(a)(2)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	RECEIPT FOR MONEY AND ABANDONMENT
Plaintiff,	)	OF DEFENSES
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

Defendant, _____ [*name*], hereby states:

1. He/She hereby acknowledges receipt of the sum of $_____ which sum was deposited into court by plaintiff _____ [*name*] after judgment and to which defendant is entitled.

2. He/She hereby abandons all claims and defenses in this proceeding, except a claim for greater compensation.
Dated: _____.

_____ [*signature*]
Defendant

[2] Use of Form

This form of receipt for money and abandonment of defenses is for use by defendant in applying for withdrawal of the amount to which he or she is entitled from the amount that plaintiff deposited after judgment.

[3] State Statutes

Receipt for money constituting waiver of claims and defenses except claim for greater compensation. *Code Civ. Proc. § 1268.140(a)(2)*

[4] Decisions

Withdrawal of deposit constitutes waiver of all defenses except claim for greater compensation. *San Diego Gas & Electric Co. v. 3250 Corp. (1988) 205 Cal. App. 3d 1075, 1081-1082, 252 Cal. Rptr. 853*

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20-247 California Forms of Pleading and Practice--Annotated § 247.317

§ 247.317 Order for Payment From Deposit [Code Civ. Proc. § 1268.140]

[1] FORM Order for Payment From Deposit [Code Civ. Proc. § 1268.140]

[*Caption. See § 247.290.*]

The application of _____ [*name of defendant*] for an order permitting withdrawal from plaintiff's deposit having been received,

It appears to the court that defendant is entitled to payment of the sum of $_____, that defendant has filed a _____ [satisfaction of judgment *or* receipt for the money which constitutes a waiver by operation of law of all claims and defenses except a claim for greater compensation], and that _____ [no objection to the withdrawal has been received after proper notice of this complaint *or* the objections of _____ (*name*), defendant have been received and duly considered].

IT IS HEREBY ORDERED that defendant _____ [*name*], be and hereby is entitled to withdraw the sum of $_____ from the deposit made by the plaintiff [on the condition that an undertaking in the sum of $_____ be filed with the court]. The _____ [State Treasurer *or* Treasurer of _____ County, California] is hereby directed and authorized to pay the sum of $_____ to _____ [*name*] from the _____ [Condemnation Deposits Fund of the State Treasury *or* County Treasury].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use by the court in permitting the defendant to withdraw the amount to which he or she is

entitled from the deposit made by plaintiff after judgment. On objection to the withdrawal made by any party to the proceeding, the court, in its discretion, may require the applicant to file an undertaking in the manner and on the conditions prescribed in *Code Civ. Proc. § 1255.240* for withdrawal of a deposit before entry of judgment [*Code Civ. Proc. § 1268.140(c)*].

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20-247 California Forms of Pleading and Practice--Annotated § 247.318

§ 247.318 Notice by Defendant of Plaintiff's Failure to Pay Judgment Within Time Required [Code Civ. Proc. § 1268.020(b)(2)]

[1] FORM Notice by Defendant of Plaintiff's Failure to Pay Judgment Within Time Required [Code Civ. Proc. § 1268.020(b)(2)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF PLAINTIFF'S FAILURE TO PAY
Plaintiff,	)	JUDGMENT
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*name of plaintiff*], and to _____ [*name*], his/her/its attorney of record:

You are hereby notified that the full amount of the judgment entered in the above-entitled proceeding on _____ [*date*], has not been paid to defendant or deposited within the time specified by *Section 1268.010 of the Code of Civil Procedure.*

You are further notified that, if the total amount required to be paid is not paid to defendant or deposited with the above-entitled court within 20 days after service of this notice, defendant will move the court for an order dismissing

the proceeding and entering a judgment for defendant and for all of his/her litigation expenses and costs as provided by *Section 1268.020 of the Code of Civil Procedure*.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant

[2] Use of Form

This form of notice is for use by the defendant in notifying the plaintiff that plaintiff has not paid the full amount of the judgment within the time specified by *Code Civ. Proc. § 1268.010*. The notice must be filed in court and served on the plaintiff by certified or registered mail [*Code Civ. Proc. § 1268.020(b)(2)*].

[3] State Statutes

Notice to plaintiff of failure to pay judgment within time required. *Code Civ. Proc. § 1268.020(b)(2)*

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20-247 California Forms of Pleading and Practice--Annotated § 247.319

§ 247.319 Proceedings for Dismissal of Eminent Domain Proceeding for Failure of Plaintiff to Pay Judgment [Code Civ. Proc. § 1268.020(b)] and Award of Litigation Expenses [Code Civ. Proc. § 1268.610] and Costs [Code Civ. Proc. § 1268.710]--Notice of Motion

[1] FORM Proceedings for Dismissal of Eminent Domain Proceeding for Failure of Plaintiff to Pay Judgment [Code Civ. Proc. § 1268.020(b)] and Award of Litigation Expenses [Code Civ. Proc. § 1268.610] and Costs [Code Civ. Proc. § 1268.710]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MOTION AND NOTICE OF MOTION FOR OR-
Plaintiff,	)	DER DISMISSING EMINENT DOMAIN PRO-
vs.	)	CEEDING FOR FAILURE OF PLAINTIFF TO PAY
_____ [*name*],	)	JUDGMENT
Defendant.	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*name*] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*name of defendant*] will, and hereby does, move for an order dismissing the above-entitled proceeding and directing that a judgment of dismissal be entered herein, together with an award to _____ [*name of defendant*] of his/her litigation expenses and costs. The motion will be made on the grounds (1) that plaintiff failed to pay the full amount of the judgment within 30 days after final judgment as required by *Section 1268.010 of the Code of Civil Procedure*; (2) that defendant filed in court on _____ [*date*], and served on plaintiff by _____ [registered *or* certified] mail a written notice of the plaintiff's failure to pay the judgment within the required time period; and (3) that a plaintiff has failed to pay the judgment within 20 days following service of the above-referenced notice. A copy of the notice and proof of service is attached to this notice of motion as Exhibit A and made a part of this notice of motion.

The motion will be based on this notice of motion, on the declaration of _____ [*name(s*)] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

CAUTION:
A supporting memorandum must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form of notice of motion is for use by a defendant in obtaining an order of dismissal and award of litigation expenses and costs when, after the plaintiff failed to pay the judgment within 30 days after final judgment and defendant served written notice on plaintiff of the latter's failure to pay, plaintiff still did not pay within 20 days after service of such notice [*see Code Civ. Proc. § 1268.020(b)*].

[3] Litigation Expenses and Costs

When an eminent domain proceeding is wholly or partly dismissed for any reason, the court will award the defendant his or her litigation expenses [*Code Civ. Proc. § 1268.610(a)*]. A defendant is also allowed his or her ordinary court costs [*Code Civ. Proc. § 1268.710*].

[4] State Statutes

Dismissal for failure to pay judgment. *Code Civ. Proc. § 1268.020(b)*

Award of litigation expenses to defendant on dismissal. *Code Civ. Proc. § 1268.610*

Award of costs to defendant. *Code Civ. Proc. § 1268.710*

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20-247 California Forms of Pleading and Practice--Annotated § 247.320

§ 247.320 Proceedings for Dismissal of Eminent Domain Proceeding for Failure of Plaintiff to Pay Judgment [Code Civ. Proc. § 1268.020(b)] and Award of Litigation Expenses [Code Civ. Proc. § 1268.610] and Costs [Code Civ. Proc. § 1268.710]--Supporting Declaration

[1] FORM Proceedings for Dismissal of Eminent Domain Proceeding for Failure of Plaintiff to Pay Judgment [Code Civ. Proc. § 1268.020(b)] and Award of Litigation Expenses [Code Civ. Proc. § 1268.610] and Costs [Code Civ. Proc. § 1268.710]--Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____
vs.	)	[*name*] IN SUPPORT OF MOTION FOR ORDER
_____ [*name*],	)	DISMISSING EMINENT DOMAIN PROCEEDING
Defendant.	)	FOR FAILURE OF PLAINTIFF TO PAY JUDG-
	)	MENT
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

I am the attorney for defendant in the above-entitled proceeding. On _____ [*date*], the court entered

its judgment herein condemning the property described in the complaint to plaintiff's use and requiring plaintiff to pay defendant the sum of $_____ therefor. This sum has not been paid, and the time within which the judgment is required to be paid pursuant to *Section 1268.010 of the Code of Civil Procedure* has expired.

On _____ [*date*], I filed in the above-entitled court in this proceeding a notice of the plaintiff's failure to pay the judgment within the time limit required by *Section 1268.010 of the Code of Civil Procedure* and, as shown by the file herein, I served a copy of the notice on the plaintiff by _____ [certified *or* registered] mail on the same day.

More than 20 days have passed since the date on which such service was made, and plaintiff still has failed to pay the full amount required to be paid by the above-referenced judgment.

Defendant has incurred litigation expenses within the meaning of *Section 1235.140 of the Code of Civil Procedure* and costs herein as follows: _____ [*specify*].

I declare under penalty or perjury that this is true and correct and that this declaration was executed on _____ [*date*], at _____ [*city*], California.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

This form of supporting declaration is for use by the defendant's attorney in support of a motion for an order dismissing the eminent domain proceeding and awarding litigation expenses and costs because the plaintiff has not paid the judgment in the time required.

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20-247 California Forms of Pleading and Practice--Annotated § 247.321

§ 247.321 Proceedings for Dismissal of Eminent Domain Proceeding for Failure of Plaintiff to Pay Judgment [Code Civ. Proc. § 1268.020(b)] and Award of Litigation Expenses [Code Civ. Proc. § 1268.610] and Costs [Code Civ. Proc. § 1268.710]--Order of Dismissal

[1] FORM Proceedings for Dismissal of Eminent Domain Proceeding for Failure of Plaintiff to Pay Judgment [Code Civ. Proc. § 1268.020(b)] and Award of Litigation Expenses [Code Civ. Proc. § 1268.610] and Costs [Code Civ. Proc. § 1268.710]--Order of Dismissal

[Caption. See *§ 247.290[1]*.]

The motion of _____ [*name of defendant*] for the order hereinafter made came on regularly for hearing by the court this date on notice duly and regularly given. Plaintiff _____ [*name*] appeared by counsel _____ [*name*]; defendant _____ [*name*] appeared by counsel _____ [*name*].

Proof having been made to the satisfaction of the court, and good cause appearing therefor,

IT IS HEREBY ORDERED that the judgment of condemnation on file herein be and hereby is set aside and vacated, that the clerk be and is hereby directed to enter judgment of dismissal of the above-entitled proceeding, and that the defendant be and is hereby awarded his/her litigation expenses and costs in the sum of $_____.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use when the court orders a dismissal of the proceeding on motion of the defendant on the ground that the plaintiff did not pay the award within the time required [*Code Civ. Proc. § 1268.010*].

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20-247 California Forms of Pleading and Practice--Annotated § 247.322

§ 247.322 Proceedings for Restoration of Property and for Damages [Code Civ. Proc. § 1268.620] and Award of Litigation Expenses [Code Civ. Proc. § 1268.610] and Costs [Code Civ. Proc. § 1268.710] to Defendant--Notice of Motion

[1] FORM Proceedings for Restoration of Property and for Damages [Code Civ. Proc. § 1268.620] and Award of Litigation Expenses [Code Civ. Proc. § 1268.610] and Costs [Code Civ. Proc. § 1268.710] to Defendant--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MOTION AND NOTICE OF MOTION FOR OR-
Plaintiff,	)	DER FOR RESTORATION OF PROPERTY AND
vs.	)	FOR DAMAGES AND AWARD OF LITIGATION
_____ [*name*],	)	EXPENSES AND COSTS TO DEFENDANT
Defendant.	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*name*] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*name of defendant*] will, and hereby does, move for an order [setting aside the _____ (order *or* agreement) for possession;] for an order that plaintiff deliver possession of the property described in the complaint on file herein to the defendant; and for all damages proximately caused by this condemnation proceeding and the dismissal of the proceeding as to defendant's property together with an award of litigation expenses and costs. The motion will be made on the grounds that _____ [the above-entitled proceeding was dismissed on _____ (*date*) *or* a final judgment adjudicating that plaintiff cannot acquire the property was entered herein on _____ (*date*)].

The motion will be based on this notice of motion, on the _____ declaration(s) of _____ [*name(s*)] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

CAUTION:
A supporting memorandum must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form of notice is for use by a defendant in obtaining an order that the plaintiff deliver possession of the defendant's property to defendant and that plaintiff pay the damages proximately caused by the condemnation proceeding when, after defendant moves from the property, the proceeding is dismissed with regard to his or her property or there is a final judgment that the plaintiff cannot acquire the property [*see Code Civ. Proc. § 1268.620*].

[3] State Statutes

Delivery of possession and damages to defendant after dismissal of proceeding or final judgment that plaintiff cannot take property. *Code Civ. Proc. § 1268.620*

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20-247 California Forms of Pleading and Practice--Annotated § 247.323

§ 247.323 Proceedings for Restoration of Property and for Damages [Code Civ. Proc. § 1268.620] and Award of Litigation Expenses [Code Civ. Proc. § 1268.610] and Costs [Code Civ. Proc. § 1268.710] to Defendant--Supporting Declaration

[1] FORM Proceedings for Restoration of Property and for Damages [Code Civ. Proc. § 1268.620] and Award of Litigation Expenses [Code Civ. Proc. § 1268.610] and Costs [Code Civ. Proc. § 1268.710] to Defendant--Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____
vs.	)	[*name*] IN SUPPORT OF MOTION FOR ORDER
_____ [*name*],	)	FOR RESTORATION OF PROPERTY AND FOR
Defendant.	)	DAMAGES AND AWARD OF LITIGATION EX-
	)	PENSES AND COSTS TO DEFENDANT
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

I am the attorney for defendant, _____ [*name*], in the above-entitled proceeding.

Defendant moved from his/her property on _____ [*date*], _____ [in compliance with an order for possession *or* in compliance with an agreement with plaintiff *or* in reasonable contemplation of its taking by the plaintiff]. On _____ [*date*], the _____ [above-entitled proceeding was dismissed *or* final judgment was entered finding that plaintiff cannot acquire defendant's property].

Defendant has sustained damages proximately caused by the condemnation proceeding [and its dismissal as to defendant's property] as shown in the attached declaration(s) of _____ [*name(s) of person(s) having knowledge of the damage sustained*].

I declare under penalty or perjury under the laws of the State of California that this is true and correct.

_____ [*date*].

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

This form of declaration is for use in support of a motion by defendant for delivery of possession of defendant's property by plaintiff to defendant and for payment of all damages proximately caused by the condemnation proceeding when the proceeding is dismissed or the final judgment states that plaintiff cannot acquire the property.

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20-247 California Forms of Pleading and Practice--Annotated § 247.324

§ 247.324 Proceedings for Restoration of Property and for Damages [Code Civ. Proc. § 1268.620] and Award of Litigation Expenses [Code Civ. Proc. § 1268.610] and Costs [Code Civ. Proc. § 1268.710] to Defendant--Order

[1] FORM Proceedings for Restoration of Property and for Damages [Code Civ. Proc. § 1268.620] and Award of Litigation Expenses [Code Civ. Proc. § 1268.610] and Costs [Code Civ. Proc. § 1268.710] to Defendant--Order

[Caption. See *§ 247.290[1]*.]

The motion of _____ [*name of defendant*] for the order hereinafter made came on regularly for hearing by the court this date on notice duly and regularly given. Plaintiff _____ [*name*] appeared by counsel _____ [*name*]; defendant _____ [*name*] appeared by counsel _____ [*name*].

Proof having been made to the satisfaction of the court, and good cause appearing therefor,

IT IS HEREBY ORDERED that [the order of possession entered on _____ [*date*], is set aside and vacated and that] plaintiff deliver possession of the property described in the complaint on file herein to the defendant and that plaintiff pay to defendant the sum of $_____ for all damages proximately caused to defendant's property by the condemnation proceeding and its dismissal.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use by the court in ordering that plaintiff deliver possession of defendant's property to defendant and that plaintiff pay defendant for the damage proximately caused by the condemnation proceeding and its dismissal.

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20-247 California Forms of Pleading and Practice--Annotated § 247.325

§ 247.325 Proceedings to Recover Litigation Expenses After Unreasonable Offer by Plaintiff [Code Civ. Proc. § 1250.410(b)]--Notice of Motion [Code Civ. Proc. § 1010]

[1] FORM Proceedings to Recover Litigation Expenses After Unreasonable Offer by Plaintiff [Code Civ. Proc. § 1250.410(b)]--Notice of Motion [Code Civ. Proc. § 1010]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MOTION AND NOTICE OF MOTION FOR OR-
Plaintiff,	)	DER TO RECOVER LITIGATION EXPENSES
vs.	)	AFTER UNREASONABLE OFFER BY PLAINTIFF
_____ [*name*],	)	[Telephone Appearance]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*name*] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*name of defendant*] will, and hereby does, move for an order awarding as costs pursuant to *Section 1268.710 of the*

Code of Civil Procedure the following litigation expenses:

$_____ for _____ (*specify item*);

$_____ for _____ (*specify item*).

The motion will be made on the ground that the offer of plaintiff for the property condemned was unreasonable and the demand of defendant was reasonable, viewed in the light of the evidence admitted and the compensation awarded in the proceeding and that these expenses were reasonably and necessarily incurred in preparing for and in conducting the condemnation trial in the above-entitled proceeding.

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

CAUTION:
A supporting memorandum must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This notice of motion is for use by a defendant in recovering litigation expenses. The motion must be made within 30 days after entry of judgment. If the court finds that plaintiff's final settlement offer was unreasonable and that defendant's final demand was reasonable viewed in the light of the evidence admitted and the compensation awarded in the proceeding, the costs allowed pursuant to *Code Civ. Proc. § 1268.710* must also include the defendant's litigation expenses [*Code Civ. Proc. § 1250.410(b)*].

"Litigation expenses" are the party's reasonable attorney's fees and costs, including reasonable expert witness and appraiser fees [*Code Civ. Proc. § 1250.410(e)*]. In determining the amount of litigation expenses, the court must consider all of the following [*Code Civ. Proc. § 1250.410(c)*]:

- The offer required to be made before adopting the resolution of necessity [*see Gov. Code § 7267.2*];
- Any deposit made by the plaintiff; and
- Any other written offers and demands filed and served before or during trial.

[3] State Statutes

Recovery of litigation expenses as cost after unreasonable offer by plaintiff. *Code Civ. Proc. § 1250.410(b), (c)*

"Litigation expenses" defined. *Code Civ. Proc. § 1250.410(e)*

Costs in condemnation proceedings generally. *Code Civ. Proc. §§ 1268.710*, 1267.720

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20-247 California Forms of Pleading and Practice--Annotated § 247.326

§ 247.326 Proceedings to Recover Litigation Expenses After Unreasonable Offer by Plaintiff [Code Civ. Proc. § 1250.410(b)]--Supporting Declaration

[1] FORM Proceedings to Recover Litigation Expenses After Unreasonable Offer by Plaintiff [Code Civ. Proc. § 1250.410(b)]--Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____
vs.	)	[*name*] IN SUPPORT MOTION FOR ORDER TO
_____ [*name*],	)	RECOVER LITIGATION EXPENSES AFTER UN-
Defendant.	)	REASONABLE OFFER BY PLAINTIFF
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

I am the attorney for defendant, _____ [*name*], in the above-entitled proceeding.

The following offers and demands were made by the plaintiff and the defendant respectively in the above-entitled proceeding: _____ [*set forth offers and demands, including plaintiff's offer made before adoption of*

resolution of necessity, and any other written offers and demands filed and served before or during trial].

The plaintiff's deposit of probable compensation pursuant to *Code of Civil Procedure Section 1255.010 et seq.* was $_____.

On _____ [*date*], judgment was entered in this proceeding wherein the amount of just compensation for the taking of the property sought to be condemned was determined to be $_____.

_____ [*Set forth reasons why plaintiff's offer was unreasonable and defendant's demand was reasonable, viewed in light of the evidence admitted and the compensation awarded in the proceeding, e.g.*, Plaintiff's final offer was 80 percent of the jury's verdict and was $16,000 less than the verdict, whereas the defendant's final demand was $2,000 more than the jury's verdict. Additionally, the opinion of value made by the plaintiff's appraisal expert and the opinion of value made by the defendant's appraisal expert differed substantially in that the defendant's expert valued the property at $20,000 more than the plaintiff's expert].

The costs itemized in the notice of motion filed in this proceeding are correct and have been necessarily incurred in preparing for and in conducting the condemnation trial.

I declare under penalty of perjury that this is true and correct and that this declaration was executed on _____ [*date*], at _____ [*city*], California.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

This form of declaration is for use in supporting a notice of motion to recover litigation expenses when the plaintiff's final offer was unreasonable and the defendant's demand was reasonable in the light of the evidence admitted and the compensation awarded in the proceeding.

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20-247 California Forms of Pleading and Practice--Annotated § 247.327

§ 247.327 Proceedings to Recover Litigation Expenses After Unreasonable Offer by Plaintiff [Code Civ. Proc. § 1250.410(b)]--Order Granting Litigation Expenses as Costs

[1] FORM Proceedings to Recover Litigation Expenses After Unreasonable Offer by Plaintiff [Code Civ. Proc. § 1250.410(b)]--Order Granting Litigation Expenses as Costs

[Caption. See *§ 247.290[1]*.]

The motion of _____ [*name of defendant*] for an order including defendant's litigation expenses in the costs allowed to him/her due to the unreasonableness of the plaintiff's final offer came on regularly for hearing by the court this date. Plaintiff _____ [*name*] appeared by counsel _____ [*name*]; defendant _____ [*name*] appeared by counsel _____ [*name*].

Proof having been made to the satisfaction of the court that the motion ought to be granted,

IT IS HEREBY ORDERED that the motion be, and hereby is, granted and that plaintiff is required to pay the sum of $_____ to defendant in payment of defendant's litigation expenses.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use by the court in granting defendant's motion for litigation expenses when plaintiff's final offer was unreasonable and defendant's final demand was reasonable.

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PART IV. FORMS
A. Eminent Domain

20-247 California Forms of Pleading and Practice--Annotated § 247.328

§ 247.328 Final Order of Condemnation [Code Civ. Proc. § 1268.030]

[1] FORM Final Order of Condemnation [Code Civ. Proc. § 1268.030]

[Caption. See *§ 247.290[1]*.]

Judgment in condemnation having been entered in the above-entitled action on _____ [*date*], in _____ County, California, adjudging that plaintiff is entitled to take by condemnation the property described in plaintiff's complaint on file herein and more fully described hereafter; and

In accordance with this judgment, plaintiff _____ [having deposited in court for the defendant *or* having paid to the defendant] the sum of $_____;

IT IS hereby ORDERED, ADJUDGED, AND DECREED THAT:

The property described below is taken for and condemned to plaintiff for the public purpose of _____ [*specify, e.g.,* a state highway]. _____ [*Specify interest to be taken in property, e.g.,* Title in fee simple] will vest in plaintiff on the date that a certified copy of this final order of condemnation is recorded in the office of the recorder of _____ County, California.

The real property referred to in this order and the _____ [*specify interest to be taken in property, e.g.,* title to which] shall vest in plaintiff is described as follows:

_____ [*give legal description of property*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is for use as a final order of condemnation. Any party may make application for a final order if the full amount of judgment has been paid or satisfied [*Code Civ. Proc. § 1268.030(a)*]. The order must describe the property taken and identify the judgment authorizing the taking [*Code Civ. Proc. § 1268.030(b)*]. Title to the property vest in the plaintiff on the date that the final order of condemnation is recorded in the office of the recorder of the county in which the property is located [*Code Civ. Proc. § 1268.030(c)*]._____

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20-247 California Forms of Pleading and Practice--Annotated §§ 247.329-247.339

[Reserved]

§§ 247.329[Reserved]

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20-247 California Forms of Pleading and Practice--Annotated § 247.340

§ 247.340 Complaint in Inverse Condemnation [Cal. Const., art. I, § 19]--General Form--Example of Taking by Water Damage

[1] FORM Complaint in Inverse Condemnation [Cal. Const., art. I, § 19]--General Form--Example of Taking by Water Damage

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name of property owner*],	)	NO. _____
Plaintiff,	)	COMPLAINT IN INVERSE CONDEMNATION
vs.	)	
_____ [*name of public entity*],	)	[Amount demanded _____
Defendant.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. _____ [*Allege capacity of defendant, e.g.*, Defendant _____ (*name*) is a public entity organized and existing under the laws of the State of California].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is in some manner responsible for the injury and damage to plaintiff alleged herein.]

[3. (Plaintiff is informed and believes and thereon alleges that) (A)t all times herein mentioned defendants _____ (*specify, e.g.,* DOE I, DOE II, and DOE III), were the agents, servants, and employees of their codefendants and (in doing the things hereinafter mentioned) were acting within the course and scope of their authority as such agents, servants, and employees with the permission and consent of their codefendants.]

4. On _____ [*date*], and at all times herein mentioned, plaintiff was the owner _____ [*describe plaintiff's interest in property, e.g.,* in fee of] the following described real property in the City of _____, _____ County, California: _____ [*give legal description of property*].

5. _____ [*Allege defendant's planning, approval, construction, operation of, or substantial participation in activity for public use or benefit, e.g.,* On _____ [*date*], defendant commenced construction of a public highway located _____ (*specify, e.g.,* along the southern border of plaintiff's above-described property)].

6. _____ [*Allege with specificity defendant's taking or damaging of plaintiff's property, e.g.,* As a direct and necessary result of the plan, design, maintenance, and operation of the highway, plaintiff's property was flooded from February 1 through February 17, 2005, and again from March 20 through March 28, 2005. Plaintiff is informed and believes and thereon alleges that, due to the construction of the highway by defendant, plaintiff's property will continue to be flooded at various times].

7. The above-described damage to plaintiff's property was _____ [proximately *or* substantially] caused by defendant's _____ [actions *or* failure to act] in that _____ [*specify facts showing that defendant's actions or failure to act proximately or substantially caused plaintiff's injury or damage, e.g.,* defendant's plan, design, and maintenance of the highway was faulty in that no provision was made for controlling the flow of water onto the surrounding land].

8. As a result of the above-described damage to plaintiff's property, plaintiff has been damaged in the amount of $_____.

9. Plaintiff has received no compensation for the damage to his/her property.

10. Plaintiff has incurred and will incur attorney's, appraisal, and engineering fees because of this proceeding, in amounts that cannot yet be ascertained, which are recoverable in this action under the provisions of *Code of Civil Procedure Section 1036*.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the amount of $_____ with interest thereon at the legal rate from the date of the damages;

2. For reasonable attorney's, appraisal, and engineering fees according to proof;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for _____ [*party's status and name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read this complaint and know the contents of this complaint. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that this is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

This complaint is a general form for use when there has been a taking or damaging of plaintiff's property without just compensation [*see Cal. Const., art. I, § 19*]. The sample allegations state a cause of action for a taking by water damage. A complaint in inverse condemnation may include several other causes of action, such as one for damages for nuisance [*Civ. Code §§ 3479-3503*; *Code Civ. Proc. § 731*; for discussion and forms relating to nuisance, *see* Ch. 391, *Nuisance*] or for injuries caused by a dangerous condition of a public entity's property [*Gov. Code § 835*; for discussion and forms relating to actions against public entities, *see* Ch. 464, *Public Entities and Officers: California Tort Claims Act*].

[3] Allegations

This complaint alleges the following:

- Defendant's capacity (Paragraph 1).
- The liability of fictitiously named defendants (Paragraphs 2 and 3).
- Plaintiff's interest in and a description of the property (Paragraph 4).
- Defendant's planning, approval, construction, operation of, or substantial participation in an activity for public use or benefit (Paragraph 5).
- Defendant's taking or damaging of plaintiff's property (Paragraph 6).
- That defendant's action was a proximate or substantial cause of the damage to plaintiff's property (Paragraph 7).
- Plaintiff's damages (Paragraph 8).
- That plaintiff has not been compensated for the damages (Paragraph 9).
- Attorney's, appraisal, and engineering fees incurred by plaintiff (Paragraph 10).

[4] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases the caption must state whether the demand exceeds or does not exceed $10,000. The caption must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

In an action for injury to property based on inverse condemnation against the state, the county in which the property is located is the proper place for the trial of the action [*Gov. Code § 955*]. In an action for injury to property based on inverse condemnation against a county, city and county, city, or local agency, the court in the county, or city and county, or the county in which the city or local agency is located, is the proper court for trial of the action [*Code Civ. Proc. § 394(a)*].

[5] Statute of Limitations

[a] Applicable Statute Is Three or Five Years

Both the three-year statute of limitations relating to trespass actions [*Code Civ. Proc. § 338(b)*] and the five-year statute of limitations relating to possessory actions and actions arising out of title to real property [*Code Civ. Proc. §§ 318, 319*] have been applied to inverse condemnation actions [*Williams v. Southern P. R. Co. (1907) 150 Cal. 624, 625-626, 89 P. 599* (three-year period); *Frustuck v. City of Fairfax (1963) 212 Cal. App. 2d 345, 374, 28 Cal. Rptr. 357* (five-year period)]. The five-year period has been applied based on a distinction between trespass and the taking or damaging of private property under the power of eminent domain. The rationale for the application is that the owner's right of recovery is founded on and grows out of the owner's title to land and until the title is lost by adverse possession, the owner should have the right to maintain an action to recover that which represents the property itself [*Frustuck v. City of Fairfax (1963) 212 Cal. App. 2d 345, 374 28 Cal. Rptr. 357]* . The Supreme Court has declined to discuss the question of whether or not the five-year period of limitation is proper [*Mehl v. People ex rel. Dep't of Pub. Wks. (1975) 13 Cal. 3d 710, 717 n. 3, 119 Cal. Rptr. 625, 532 P.2d 489* ; *see* *Wilson v. Beville (1957) 47 Cal. 2d 852, 861, 306 P.2d 789]* . The decisive consideration as to which period to apply may be whether there was a taking (in which case the five-year statute applies), or simply a trespass on real property causing an injury (in which case the three-year period applies) [*Garden Water Corp. v. Fambrough (1966) 245 Cal. App. 2d 324, 328, 53 Cal. Rptr. 862]* .

[b] Accrual of Cause of Action

If the basis of the cause of action for inverse condemnation is a taking by construction of a public improvement on plaintiff's land, the cause of action accrues when the construction is complete, not when the original trespass took place [*Mosesian v. County of Fresno (1972) 28 Cal. App. 3d 493, 502, 104 Cal. Rptr. 655* ; *see* *Pierpont Inn, Inc. v. State of California (1969) 70 Cal. 2d 282, 286-294, 74 Cal. Rptr. 521, 449 P.2d 737* (overruled on other grounds in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp. (1997) 16 Cal. 4th 694, 698-699, 66 Cal. Rptr. 2d 630, 941 P.2d 809*)]. If the damage is caused by a public improvement not on plaintiff's land but that causes damages on plaintiff's land, the cause of action accrues when the damage occurs, not when the improvement was made [*Frustuck v. City of Fairfax (1963) 212 Cal. App. 2d 345, 375, 28 Cal. Rptr. 357]* . In such a case, the cause of action does not accrue until the damage would be sufficiently appreciable to a reasonable person [*Mehl v. People ex rel. Dep't of Pub. Wks. (1975) 13 Cal. 3d 710, 717, 119 Cal. Rptr. 625, 532 P.2d 489]* . If the damage is continuing, plaintiff can recover for all damages incurred within the limitation period, even though earlier damage may be barred by the statute [*Bellman v. County of Contra Costa (1960) 54 Cal. 2d 363, 369, 5 Cal. Rptr. 692, 353 P.2d 300* ; *Amador Valley Investors v. City of Livermore (1974) 43 Cal. App. 3d 483, 489-490, 117 Cal. Rptr. 749]* .

[6] Service of Process

Service of summons in actions against the state must be made on the Attorney General. However, on claims arising out of work done by the Department of Transportation, or the Department of Water Resources, service can also be made on the relevant Director [*Gov. Code §§ 955.4(a), 955.6, 955.8*]. Service on other public entities may be made on the clerk, secretary, president, presiding officer, or other head of its governing body [*Code Civ. Proc. § 416.50*]. Information about the proper person to serve can be obtained from the Roster of Public Agencies [*see Gov. Code § 53051*] on file with the county clerk.

[7] No Claim Requirement

No claim is required to be filed to maintain an action under *Cal. Const., art. I, § 19* against a public entity for taking of or damage to private property [*Gov. Code § 905.1*].

[8] Right to Jury Trial

The constitutionally mandated right to jury trial in eminent domain actions [*Cal. Const., art. I, § 19*] applies to inverse condemnation actions [*Highland Realty Co. v. City of San Rafael (1956) 46 Cal. 2d 669, 683-684, 298 P.2d 15]* . However, the right to jury trial extends only to the issue of compensation, not to the issue of whether or not there has been a taking for which the entity is liable [*People v. Ricciardi (1943) 23 Cal. 2d 390, 402, 144 P.2d 799]* . Thus, the issue of whether or not there has been a substantial impairment of access must be affirmatively decided by the court before the issue of damages is presented to the jury [*Orpheum Bldg. Co. v. San Francisco Bay Area Rapid Transit Dist. (1978) 80 Cal. App. 3d 863, 868, 869, 146 Cal. Rptr. 5]* .

[9] Costs

In any inverse condemnation proceeding, the court in rendering judgment for the plaintiff by awarding compensation, or the attorney representing the public entity who effects a settlement of the proceeding, must determine and award or allow to the plaintiff, as a part of the judgment or settlement, a sum that will, in the opinion of the court, reimburse the plaintiff for reasonable costs, disbursements, and expenses, including reasonable attorney's, appraisal, and engineering fees actually incurred because of the proceeding in the trial court or in any appellate proceeding in which the plaintiff prevails on any issue in the proceeding [*Code Civ. Proc. § 1036*]. For additional discussion, see *§ 247.205[1]*.

[10] Verification

A public entity need not verify its answer even if the complaint is verified [*see Code Civ. Proc. § 446*]. The verification of a complaint against a public entity does, however, preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*see Code Civ. Proc. § 431.30(d)*].

[11] State Constitution

No taking or damaging of private property by public entity without compensation. *Cal. Const., art. I, § 19*

[12] State Statutes

Costs, including litigation costs, in inverse condemnation proceedings in trial court or in any appellate proceeding in which plaintiff prevails on any issue in that proceeding. *Code Civ. Proc. § 1036*

No claim requirement in inverse condemnation actions. *Gov. Code § 905.1*

[13] Decisions

Liability of public entity in inverse condemnation for damages caused by water. *Bauer v. County of Ventura (1955) 45 Cal. 2d 276, 283, 289 P.2d 1*

[14] Cross References

For a form of complaint for use in an action in inverse condemnation involving a taking of lateral or subjacent support, see Ch. 11, *Adjoining Landowners*

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20-247 California Forms of Pleading and Practice--Annotated § 247.341

§ 247.341 Complaint in Inverse Condemnation [Cal. Const., art. I, § 19]--Taking by Airport Noise

[1] FORM Complaint in Inverse Condemnation [Cal. Const., art. I, § 19]--Taking by Airport Noise

[*Caption. See § 247.340.*]

1. [*Capacity of defendant. See § 247.340, Paragraph 1.*]

2. [*Fictitious name allegations, if desired. See § 247.340, Paragraphs 2 and 3.*]

3. [*Plaintiff's interest in and description of property. See § 247.340, Paragraph 4.*]

4. Defendant owns and operates _____ [*name of airport*], a municipal airport, in the vicinity of plaintiff's above-described property.

5. The noise from the operation of the airport causes a substantial interference with the use and enjoyment of plaintiff's above-described property, which amounts to a taking and damaging of the property for which defendant has not compensated plaintiff.

6. The noise from the airport has caused a reduction in the market value of plaintiff's property in the amount of $_____.

7. [*Attorney's, appraisal, and engineering fees allegation. See § 247.340, Paragraph 10.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the amount of $_____, with interest thereon at the legal rate from the date of the damages;

2. For reasonable attorney's, appraisal, and engineering fees, according to proof;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 247.340.*]

[2] Use of Form

This form of complaint is for use in an inverse condemnation action based on diminution of market value due to airport noise from an adjacent airport.

[3] Allegations

The complaint alleges the following:

- Defendant's operation of the airport (Paragraph 4).
- Noise from the airport causing a substantial interference with the use and enjoyment of the plaintiff's property (Paragraph 5).
- Plaintiff's damages (Paragraph 6).

The complaint also contains cross references for the following allegations:

- Defendant's capacity (Paragraph 1).
- Liability of fictitiously named defendants (Paragraph 2).
- Plaintiff's interest in and a description of the property (Paragraph 3).
- Attorney's, appraisal, and engineering fees incurred by plaintiff (Paragraph 7).

[4] Decisions

Owner and operator of municipal airport is liable in inverse condemnation when property owner in vicinity of airport can show measurable reduction in market value as result of noise from operation of airport causing substantial interference with use and enjoyment of property. *Aaron v. City of Los Angeles (1974) 40 Cal. App. 3d 471, 483-484, 115 Cal. Rptr. 162 , cert. denied, 419 U.S. 1122*

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20-247 California Forms of Pleading and Practice--Annotated § 247.342

§ 247.342 Complaint in Inverse Condemnation [Cal. Const., art. I, § 19]--Taking by Substantial Impairment of Access

[1] FORM Complaint in Inverse Condemnation [Cal. Const., art. I, § 19]--Taking by Substantial Impairment of Access

[*Caption. See § 247.340.*]

1. [*Capacity of defendant. See § 247.340, Paragraph 1.*]

2. [*Fictitious name allegations, if desired. See § 247.340, Paragraphs 2 and 3.*]

3. [*Plaintiff's interest in and description of property. See § 247.340, Paragraph 4.*]

4. _____ [*Allege defendant's planning, approval, construction, operation of, or substantial participation in activity for public use or benefit, e.g.,* On _____ [*date*], defendants commenced construction of a drainage ditch on the eastern border of plaintiff's above-described property between plaintiff's property and the adjacent road].

5. Defendant's above-described construction caused a substantial impairment of access to plaintiff's above-described property in that _____ [*allege how access was impaired, e.g.,* plaintiff can no longer gain access from his/her property to the road along the eastern border of his/her property].

6. This substantial impairment of access constitutes a taking and damaging of plaintiff's above-described property for which defendant has not compensated plaintiff.

7. The substantial impairment of access to plaintiff's above-described property caused by defendant reduced the market value of plaintiff's property in the amount of $_____.

8. [*Attorney's, appraisal, and engineering fees allegation. See § 247.340, Paragraph 10.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the amount of $_____ with interest thereon at the legal rate from the date of the damages;

2. For reasonable attorney's, appraisal, and engineering fees according to proof;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 247.340.*]

[2] Use of Form

This form of complaint is for use in an inverse condemnation action to recover damages for substantial impairment of access.

[3] Allegations

The complaint alleges the following:

- Defendant's activities causing impairment of access (Paragraph 4).
- The impairment of access (Paragraph 5).
- A taking from the impairment of access (Paragraph 6).
- Damages resulting from the impairment of access (Paragraph 7).

The complaint also contains cross references for the following allegations:

- Defendant's capacity (Paragraph 1).
- Liability of fictitiously named defendants (Paragraph 2).
- Plaintiff's interest in and a description of the property (Paragraph 3).
- Attorney's, appraisal, and engineering fees incurred by plaintiff (Paragraph 8).

[4] Decisions

Liability in inverse condemnation for substantial impairment of access. *Breidert v. Southern Pac. Co. (1964) 61 Cal. 2d 659, 663-664, 39 Cal. Rptr. 903, 394 P.2d 719*

[5] Cross References

See *§ 247.340*.

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20-247 California Forms of Pleading and Practice--Annotated § 247.343

§ 247.343 Complaint in Inverse Condemnation [Cal. Const., art. I, § 19]--Taking by Precondemnation Delay

[1] FORM Complaint in Inverse Condemnation [Cal. Const., art. I, § 19]--Taking by Precondemnation Delay

[*Caption. See § 247.340.*]

1. [*Capacity of defendant. See § 247.340, Paragraph 1.*]

2. [*Fictitious name allegations, if desired. See § 247.340, Paragraphs 2 and 3.*]

3. [*Plaintiff's interest in and description of property. See § 247.340, Paragraph 4.*]

4. _____ [*Allege defendant's unreasonable conduct in precondemnation activities, e.g.,* On _____ [*date*], defendant held a press conference and released a press release that described a proposed park that included plaintiff's above-described property and stated that the property would be acquired. However, defendant never adopted a resolution of necessity and on _____ [*date*], announced that it had abandoned the project].

5. The conduct described in Paragraph 4 was unreasonable and caused a taking and damaging of plaintiff's above-described property for which defendant has not compensated plaintiff.

6. _____ [*Allege manner in which precomdemnation activities damaged plaintiff's property by causing a diminution in value, e.g.,* Defendant's above-described activities caused a diminution in the value of plaintiff's property in that they rendered it unmarketable and unleaseable for _____ months. The reasonable rental value of the property for this period was $_____].

7. [*Attorney's, appraisal, and engineering fees allegation. See § 247.340, Paragraph 10.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the amount of $_____ with interest thereon at the legal rate from the date of the damages;

2. For reasonable attorney's, appraisal, and engineering fees according to proof;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 247.340.*]

[2] Use of Form

This form of complaint is for use in an inverse condemnation action for damages caused by precondemnation delay. It may be used when the statutory cause of action for precondemnation delay [*Code Civ. Proc. § 1245.260(a)*; *see § 247.344*] is not available because, for example, no resolution of necessity was passed.

[3] Allegations

The complaint alleges the following:

- Defendant's unreasonable precondemnation activities (Paragraph 4).
- That the unreasonable conduct constitutes a taking (Paragraph 5).
- Plaintiff's damages (Paragraph 6).

The complaint also contains cross references for the following allegations:

- Defendant's capacity (Paragraph 1).
- Liability of fictitiously named defendants (Paragraph 2).
- Plaintiff's interest in and a description of the property (Paragraph 3).
- Attorney's, appraisal, and engineering fees incurred by plaintiff (Paragraph 7).

[4] Decisions

Liability in inverse condemnation for unreasonable precondemnation delay or other unreasonable conduct; loss of rental value is one measure of damages. *Klopping v. Whittier (1972) 8 Cal. 3d 39, 44-54, 104 Cal. Rptr. 1, 500 P.2d*

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[5] Cross References

See *§§ 247.340* and *247.344*.

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§ 247.344 Complaint in Inverse Condemnation for Damages and/or to Require Taking of Property and Payment of Compensation--Failure of Public Entity to Commence Condemnation Proceeding or Serve Summons Within Six Months After Adoption of Resolution of Necessity [Code Civ. Proc. § 1245.260(a)]

[1] FORM Complaint in Inverse Condemnation for Damages and/or to Require Taking of Property and Payment of Compensation--Failure of Public Entity to Commence Condemnation Proceeding or Serve Summons Within Six Months After Adoption of Resolution of Necessity [Code Civ. Proc. § 1245.260(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name of property owner*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT IN INVERSE CONDEMNATION
_____ [*name of public entity*],	)	[Amount demanded _____
Defendant.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. (*Capacity of defendant. See § 247.340, Paragraph 1.*]

2. [*Fictitious name allegations, if desired. See § 247.340, Paragraphs 2 and 3.*]

3. [*Plaintiff's interest in and description of property. See § 247.340, Paragraph 4.*]

4. On _____ [*date*], defendant adopted a resolution of necessity determining that the above-described

property was necessary and should be acquired for public use for the purpose of _____ [*specify*]. A copy of the resolution of necessity is attached to this complaint as Exhibit A and made a part of this complaint.

[*EITHER*]

5. A period of more than six months has passed since the adoption of the above-described resolution of necessity, but defendant has not commenced an eminent domain proceeding to acquire the property.

[*OR*]

5. Defendant commenced an eminent domain proceeding on _____ [*date*], but has not diligently attempted to serve the complaint and the summons relating to the proceeding within six months after the proceeding's commencement.

6. Due to the adoption of the resolution of necessity and the _____ [failure to commence eminent domain proceedings *or* defendant's failure to serve the summons and complaint after commencement of the eminent domain proceeding], plaintiff has been damaged in that _____ [*specify damages, e.g.,* plaintiff has been unable to sell the property and its market value has decreased in the amount of $_____].

7. [*Attorney's, appraisal, and engineering fees allegations. See § 247.340, Paragraph 10.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an order requiring the defendant to take plaintiff's property and pay plaintiff the market value;

2. For damages for interference with the possession and use of the property resulting from adoption of the resolution of necessity with interest thereon at the legal rate from the date of damages;

3. For reasonable attorney's, appraisal, and engineering fees, according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 247.340.*]

[2] Use of Form

This form of complaint is for use in bringing an action in inverse condemnation when a public entity has adopted a resolution of necessity but (1) has not commenced an eminent domain proceeding to acquire the property within six months after the resolution's adoption or (2) has commenced a proceeding but has not attempted diligently to serve the

complaint and the summons within six months after the proceeding was commenced [*see Code Civ. Proc. § 1245.260(a)*].

[3] Allegations

The complaint alleges the following [*Code Civ. Proc. § 1245.260(a)*]:

- Defendant's adoption of a resolution of necessity regarding plaintiff's property (Paragraph 4).
- Defendant's failure to commence an eminent domain proceeding within six months of adopting the resolution or if defendant did commence a proceeding, its failure to serve the complaint and summons on plaintiff within six months of the proceeding's commencement (Paragraph 5).
- Damages (Paragraph 6).

The complaint also contains cross references for the following allegations:

- Defendant's capacity (Paragraph 1).
- Liability of fictitiously named defendants (Paragraph 2).
- Plaintiff's interest in and a description of the property (Paragraph 3).
- Attorney's, appraisal, and engineering fees incurred by plaintiff (Paragraph 7).

[4] Statute of Limitations

An action against a public entity under *Code Civ. Proc. § 1245.260(a)* must be commenced within one year and six months after the resolution of necessity was adopted [*Code Civ. Proc. § 1245.260(b)*]. This period of limitation does not apply if the property owner petitions for a writ of mandate under *Code Civ. Proc. § 1245.260(f)* [*see Code Civ. Proc. § 1245.260(f)*; Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 1245.260*].

[5] Attorney's, Appraisal, and Engineering Fees

In any inverse condemnation proceeding, the court in rendering judgment for the plaintiff by awarding compensation, or the attorney representing the public entity who effects a settlement of the proceeding, must determine and award or allow to the plaintiff, as a part of the judgment or settlement, a sum that will, in the opinion of the court, reimburse the plaintiff for reasonable costs, disbursements, and expenses, including reasonable attorney's, appraisal, and engineering fees actually incurred because of the proceeding in the trial court or in any appellate proceeding in which the plaintiff prevails on any issue in the proceeding [*Code Civ. Proc. § 1036*]. For additional discussion, see *§ 247.205[1]*.

[6] State Statutes

Statutory right to force public entity to take property, pay damages, or both, if eminent domain action is not brought or summons served within six months of adoption of resolution of necessity. *Code Civ. Proc. § 1245.260*.

[7] Cross References

See *§ 247.340*.

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Chapter 247 EMINENT DOMAIN AND INVERSE CONDEMNATION
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20-247 California Forms of Pleading and Practice--Annotated § 247.345

§ 247.345 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Public Entity to Rescind Resolution of Necessity or to Commence Eminent Domain Proceeding [Code Civ. Proc. § 1245.260(f)]

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Public Entity to Rescind Resolution of Necessity or to Commence Eminent Domain Proceeding [Code Civ. Proc. § 1245.260(f)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	PETITION OF _____ [*name*] FOR
Petitioner,	)	WRIT
vs.	)	OF MANDATE
_____ [*name of public entity*],	)	Date: _____
Respondent.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

Petitioner alleges:

1. Petitioner is the owner _____ [*describe petitioner's interest in property, e.g.,* in fee of] the following described real property in the City of _____, _____ County, California: _____ [*give legal description of property*].

2. Respondent _____ [*name*] is a public entity organized and existing under the laws of the State of

California.

3. On _____ [*date*], respondent adopted a resolution of necessity determining that the above-described property was necessary and should be acquired for public use for the purpose of _____ [*specify*]. A copy of the resolution of necessity is attached to this petition as Exhibit A and made a part of this petition.

4. Respondent has a clear and present duty to _____ [commence an eminent domain proceeding to acquire petitioner's property *or* serve the complaint and the summons in the eminent domain proceeding it has commenced to acquire petitioner's property *or* rescind the resolution of necessity].

5. Petitioner has a clear, present, and substantial right to the performance of respondent's duty in that petitioner _____ [*specify petitioner's interest in property, e.g.*, is the owner in fee of] the property for which respondent has adopted the resolution of necessity.

6. Petitioner is beneficially interested in the issuance of the writ by virtue of the fact that _____ [*specify facts demonstrating that petitioner is beneficially interested in the issuance of the writ of mandate, e.g.*, the market value of his/her property has declined since respondent adopted the resolution of necessity and the market value will remain at this reduced value until respondent rescinds the resolution].

7. At all times herein mentioned, respondent has been able to perform the duty mentioned above. Notwithstanding such ability, respondent continues to fail [and refuse] to perform such duty.

[*EITHER*]

8. Pursuant to *Section 1245.260(f) of the Code of Civil Procedure*, petitioner may obtain a writ of mandate to compel respondent to _____ [rescind the resolution of necessity *or* commence the eminent domain proceeding to acquire petitioner's property].

[*OR*]

8. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition, in that a period of more than one year and six months has passed since the adoption of the resolution of necessity.

[9. Respondent's failure to perform the duty herein mentioned has damaged petitioner in the sum of $_____ in that _____ (*describe facts showing petitioner's damages*).]

WHEREFORE, petitioner prays:

1. That the court issue an alternative writ of mandate commanding respondent to _____ [rescind the resolution of necessity *or* commence an eminent domain proceeding to acquire petitioner's property] or to show cause before this court at a time specified by court order why it has not done so and why a peremptory writ should not issue;

2. That on the return of the alternative writ and the hearing of this petition, this court issue its peremptory writ of mandate commanding respondent to _____ [rescind the resolution of necessity *or* commence an eminent domain proceeding to acquire petitioner's property];

[3. For damages in the sum of $_____;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in this proceeding. I have read this petition and know the contents of this complaint. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true,

I declare under penalty of perjury under the laws of the State of California that this is true and correct.

_____ [*date and place*]
_____ [*signature*]

CAUTION:

A petition for writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Proof of service of a copy of a petition that seeks an alternative writ on each respondent and real party in interest must accompany the petition when it is offered for filing (except when, in its discretion and for good cause, the court has granted the application for the writ ex parte) [*Code Civ. Proc. § 1107*]; for a discussion of the method of serving the petition, see Ch. 358, *Mandate and Prohibition* . Points and authorities also customarily accompany a petition filed in a superior court, although they do not appear to be expressly required by statute [*but see Code Civ. Proc. § 1090*, referring to the proceeding as a "motion" and *Cal. Rules of Ct., Rule 3.1113(a)*, requiring a memorandum in support of a noticed motion]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This petition is for use in obtaining a writ of mandate to compel a public entity to rescind a resolution of necessity or to commence an eminent domain proceeding to acquire petitioner's property when the public entity has adopted a resolution of necessity but has not commenced a condemnation proceeding within six months after the resolution was adopted, or has commenced a proceeding but has not attempted diligently to serve the complaint and the summons within six months after the proceeding was commenced [*Code Civ. Proc. § 1245.260(f)*]. The petition also may be used when the limitations period provided by *Code Civ. Proc. § 1245.260(b)* (18 months) has expired [*see Code Civ. Proc. § 1245.260(f)*; for discussion, *see § 247.197[2]*]. Therefore, the first alternative Paragraph 8 should be used when the mandate proceeding is brought as an alternative to bringing an action to require a taking or recover damages under *Code Civ. Proc. § 1245.260(a)* (*see § 247.344*). The second alternative Paragraph 8 should be used when such action cannot be brought because the 18-month statute of limitations [*Code Civ. Proc. § 1245.260(b)*] for such action has expired [*Code Civ. Proc. § 1245.260(f)*].

[3] Allegations

This petition alleges the following:

- Petitioner's interest in and a description of the property involved (Paragraph 1);
- Respondent's identity (Paragraph 2);
- Respondent's adoption of a resolution of necessity (Paragraph 3);
- Respondent's duty (Paragraph 4);
- Petitioner's right (Paragraph 5);
- The beneficial interest of petitioner (Paragraph 6);
- The ability of respondent to perform the duty (Paragraph 7);
- The statutory authority authorizing petitioner to obtain a writ of mandate or petitioner's lack of a legal remedy (Paragraph 8); and
- Any damages that have occurred (Paragraph 9).

[4] State Statutes

Property owner is permitted to obtain writ of mandate compelling public entity to rescind resolution of necessity or commence eminent domain proceeding. *Code Civ. Proc. § 1245.260(f)*

[5] Cross References

See *§ 247.344*.

For discussion and forms relating to writs of mandate generally, see Ch. 358, *Mandate and Prohibition*

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20-247 California Forms of Pleading and Practice--Annotated § 247.346

§ 247.346 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Inverse Condemnation--Failure to Exhaust Administrative Remedies

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Inverse Condemnation--Failure to Exhaust Administrative Remedies

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

Plaintiff failed to exhaust his/her administrative remedies in that he/she _____ [*describe remedy that was not exhausted, e.g.,* failed to seek a variance from the zoning ordinance that is alleged to constitute a taking of his/her property].

[2] Use of Form

This form of affirmative defense is for use in an answer to a complaint for inverse condemnation when the plaintiff has failed to exhaust applicable administrative remedies. For a discussion of the failure to exhaust administrative remedies as a defense to an action for inverse condemnation, see *§ 247.208[3]*.

[3] Decisions

Failure to exhaust administrative remedies by failing to seek variance from zoning ordinance alleged to constitute taking is defense in inverse condemnation action. *Pan Pacific Properties, Inc. v. County of Santa Cruz (1978) 81 Cal. App. 3d 244, 249-253, 146 Cal. Rptr. 428*

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PART IV. FORMS
B. Inverse Condemnation

20-247 California Forms of Pleading and Practice--Annotated § 247.347

§ 247.347 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Inverse Condemnation--Estoppel by Judgment or Deed

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Inverse Condemnation--Estoppel by Judgment or Deed

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

1. On _____ [*date*], defendant acquired by _____ [eminent domain *or* deed] the following-described real property located in the City of _____, _____ County, California from plaintiff: _____ [*give legal description of property*].

2. The above-described property is adjacent to plaintiff's property which the complaint herein alleges was damaged by defendant's use of the above-described property.

3. The damage to plaintiff's property alleged in the complaint herein was reasonably foreseeable by plaintiff when the above-described property was acquired by defendant. Therefore, plaintiff was compensated for the alleged damage when the above-described property was acquired and is now estopped from recovering the alleged damage in this action.

[2] Use of Form

This form of affirmative defense is for use in an answer to a complaint for inverse condemnation when the plaintiff is estopped by judgment or deed from recovering damages. This estoppel defense applies when plaintiff claims damages caused by defendant's use of adjacent property that was acquired by defendant from plaintiff by judgment or deed. Under such circumstances, plaintiff is presumed to have been compensated for all damages resulting from defendant's use of the adjacent property that were reasonably foreseeable when defendant acquired the property [*Reinking v. Orange County (1970) 9 Cal. App. 3d 1024, 1030, 88 Cal. Rptr. 695]* . For a further discussion of the defense of estoppel, see *§ 247.208[3]*.

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 248 EMPLOYER'S LIABILITY FOR EMPLOYEE'S TORTS

21-248 California Forms of Pleading and Practice--Annotated 248.syn

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§ 248.syn Synopsis to Chapter 248: EMPLOYER'S LIABILITY FOR EMPLOYEE'S TORTS

§ 248.01 Scope of Chapter

§ 248.02 Cross References

§§ 248.03-248.09 [Reserved]

§ 248.10 Governing Law

§ 248.11 Theories of Direct and Vicarious Employer Liability

§ 248.12 Employer's Own Negligence or Fault as Basis for Liability

[1] Direct Employer Liability

[2] Negligent Hiring or Retention of Unsuitable Employee

[3] Negligent Supervision or Training of Employee

§ 248.13 Employer Ratification of Employee Conduct

§ 248.14 Vicarious Liability of Employer Based on Respondeat Superior

§ 248.15 Who Is an Employee for Purposes of Employer Liability

[1] In General

[2] Employer's Right of Control

[3] Employees and Agents Distinguished

[4] Employees and Independent Contractors Distinguished

[a] Employer Generally Not Liable for Independent Contractor's Torts

[b] Relevant Factors

[c] Rebuttable Presumption in Case of Building Contractors

[5] Borrowed Employees: Special and Dual Employments

§ 248.16 Employee Conduct Within the Scope of Employment

[1] Determination a Question of Fact

[2] Tests Applied to Determine Whether Conduct Was Within Scope of Employment

[3] Applicability of Workers' Compensation Cases in Defining Scope of Employment

[4] Going-and-Coming Rule

[a] Scope and Application

[b] Exception: Special Errand

[c] Exception: Travel Required by Job Duties

[d] Exception: Employer Pays for Employee's Commute Time

[e] Exception: Special Risk Created by Employment

[5] Social Functions

[6] Off-Duty and Break Time

[7] On-Duty Employee Conduct Unrelated to Employment

[a] Personally Motivated Acts

[b] Personal Errands

[c] Effect of Employee Violation of Employer's Rules or Instructions

§ 248.17 Employer Liability for Intentional Torts

[1] In General

[2] Assault and Battery

[3] Sexual Harassment

[4] Other Intentional Torts

§ 248.18 Employer Liability for Punitive Damages

[1] General Requirements

[2] Additional Requirements for Holding Corporate Employers Liable for Punitive Damages

[3] What Constitutes Authorization or Ratification

§ 248.19 Defenses to Respondeat Superior Actions

[1] In General

[2] Collateral Estoppel

§ 248.20 Indemnity Issues

[1] Employer's Right to Indemnity

[2] Employee's Right to Indemnity

§ 248.21 Respondeat Superior and Proposition 51

§ 248.22 Liability for Actions of Independent Contractors

[1] General Rule of Nonliability

[2] Exceptions to Rule of Nonliability

[a] In General

[b] Peculiar-Risk Doctrine

[i] In General

[ii] Factors in Determining "Special Danger"

[iii] Limitation on Recovery for Employees of Independent Contractors

[iv] Peculiar Risk Cases Not Based on Vicarious Liability

[c] Nondelegable Duty

[d] Vicarious Liability for Nuisance or Trespass

[3] Intentional Torts

[4] Collateral Negligence

§§ 248.23-248.29 [Reserved]

§ 248.30 Related Matthew Bender Publications

[1] California Employment Law

[2] California Torts

§ 248.31 State Statutes

§ 248.32 Decisions

[1] Borrowed Employees

[2] Employer Liability

[a] For Intentional Torts

[b] For Own Negligence or Fault

[c] For Punitive Damages

[3] Independent Contractors

[a] Generally

[b] Nondelegable Duty Exception

[c] Peculiar Risk Doctrine

[4] Negligent Hiring

[5] Respondeat Superior

[6] Scope of Employment

[a] Generally

[b] Going-and-Coming Rule

[c] Social Functions

[7] Respondeat Superior and Proposition 51

§ 248.33 Law Reviews

§ 248.34 Text References

§§ 248.35-248.39 [Reserved]

§ 248.40 Complaint for Compensatory Damages Based on Negligence--By Third Party Against Employer and Employee--Injury Caused by Employee Acting Within Scope of Employment [Civ. Code § 2338]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Respondeat Superior Count

[5] Specification of Damages

[6] Verification

[7] Cross References

§ 248.41 Complaint for Compensatory and Punitive Damages--By Third Party Against Employer and Employee--Battery by Employee Acting Within Scope of Employment--Employer Had Advanced Knowledge That Employee Was Unfit

[1] FORM

[2] Use of Form

[3] Allegations

[4] Count for Direct Employer Liability

§ 248.42 Complaint for Compensatory Damages--By Third Party Against Independent Contractor and Hirer of Independent Contractor--Failure to Take Precautions Against Peculiar Risk

[1] FORM

[2] Use of Form

[3] Allegations

[4] Peculiar-Risk Doctrine

§ 248.43 Complaint for Compensatory Damages--By Third Party Against Independent Contractor and Employer of Independent Contractor--Nondelegable Duty

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 248.44 Allegations--Employer Liability for Punitive Damages [Civ. Code § 3294(b)]

[1] FORM

[2] Use of Form

§ 248.45 Allegation--Count for Direct Employer Liability--Employee Acted Pursuant to Employer's Express Instructions and Authority

[1] FORM

[2] Use of Form

§ 248.46 Allegation--Count for Direct Employer Liability--Negligent Training or Supervision

[1] FORM

[2] Use of Form

[3] Negligent Training or Supervision

[4] Punitive Damages

§§ 248.47-248.49 [Reserved]

§ 248.50 Demurrer to Complaint--Failure to State Cause of Action--By Employer Sued Under Respondeat Superior--Employee Not Acting Within Scope of Employment

[1] FORM

[2] Use of Form

[3] Objection by Demurrer

[4] Burden of Proof and Raising Issue

[5] Cross References

§ 248.51 Controverting Allegation in Answer--By Employer Sued Under Respondeat Superior--No Employment or Agency Relationship Between Tortfeasor and Employer

[1] FORM

[2] Use of Form

[3] Burden of Proof and Raising Issue

[4] Cross References

Richard P. Hill
Editorial Consultant n*

FOOTNOTES:
(n47)Footnote *.
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Chapter 248 EMPLOYER'S LIABILITY FOR EMPLOYEE'S TORTS
PART I. SCOPE

21-248 California Forms of Pleading and Practice--Annotated § 248.01

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§ 248.01 Scope of Chapter

This chapter discusses an employer's tort liability to third parties, that is, persons other than the employer or its employees, based on the conduct of its employees. The chapter discusses tort theories involving fault on the part of the employer, such as negligent hiring or retention and negligent supervision or training, as well as vicarious liability under the doctrine of respondeat superior. The chapter also briefly discusses the interrelationship of the rules of respondeat superior based on an employment relationship, the rules of liability of a principal for the acts of an agent, and the liability of persons determined to be independent contractors. Finally, the part covers employer defenses to third-party actions and indemnity issues.

This chapter includes the following forms:

- Complaints alleging employer liability under the doctrine of respondeat superior and employer liability for the torts of independent contractors [§§ 248.40-248.43].

- Complaints alleging employer liability based on the employer's own negligence or fault [§§ 248.45 and 248.46], as well as allegations of liability for punitive damages for use against an employer [§ 248.44].

- Defensive forms for use by employers, alleging that the employee was not acting within the scope of employment [§ 248.50], and that no employment or agency relationship existed [§ 248.51].

Legal Topics:

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

TortsDamagesPunitive DamagesAvailabilityEmployersTortsIntentional TortsAssault & BatteryGeneral OverviewTortsNegligenceDefensesComparative NegligenceMultiple PartiesContributionTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployeesTortsVicarious LiabilityEmployersGeneral Overview

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PART I. SCOPE

21-248 California Forms of Pleading and Practice--Annotated § 248.02

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§ 248.02 Cross References

For further discussion of the liability of an employer under respondeat superior for assault and battery committed by an employee, see Ch. 58, *Assault and Battery*

For further discussion of employer liability for punitive damages based on the acts of an employee, see Ch. 177, *Damages*

For further discussion of the indemnity rights between employers and employees, see Ch. 300, *Indemnity and Contribution*

For discussion of vicarious liability based on agency other than that arising from the employer-employee relationship, see Ch. 427, *Principal and Agent*

For further consideration of the liability of a public entity for the acts of its employees, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

For discussion of the employment relationship under workers' compensation laws, see Ch. 577, *Workers' Compensation*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesPunitive DamagesAvailabilityEmployersTortsIntentional TortsAssault & BatteryGeneral OverviewTortsNegligenceDefensesComparative NegligenceMultiple PartiesContributionTortsPublic Entity

LiabilityLiabilityState Tort Claims ActsEmployeesTortsVicarious LiabilityEmployersGeneral Overview

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Chapter 248 EMPLOYER'S LIABILITY FOR EMPLOYEE'S TORTS
PART I. SCOPE

21-248 California Forms of Pleading and Practice--Annotated §§ 248.03-248.09

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[Reserved]

§§ 248.03[Reserved]

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Chapter 248 EMPLOYER'S LIABILITY FOR EMPLOYEE'S TORTS
PART II. LEGAL BACKGROUND

21-248 California Forms of Pleading and Practice--Annotated § 248.10

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§ 248.10 Governing Law

The basic principle of respondeat superior is set forth in *Civ. Code §§ 2338* and *2339*. The liability of an employer for punitive damages for the acts of an employee is limited by *Civ. Code § 3294(b)*. Otherwise, respondeat superior has been shaped primarily by case law.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesPunitive DamagesAvailabilityEmployersTortsVicarious LiabilityEmployersGeneral Overview

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PART II. LEGAL BACKGROUND

21-248 California Forms of Pleading and Practice--Annotated § 248.11

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§ 248.11 Theories of Direct and Vicarious Employer Liability

An employer may be liable in tort to third persons for the conduct of employees under either (or both) of two theories. First, an employer is liable if the employer's own conduct constitutes a tort. For example, an employer may have been negligent in its selection, training, or supervision of employees and agents, or in its promulgation of work rules and business procedures that created a risk of harm to others [*see, e.g., Underwriters Ins. Co. v. Purdie (1983) 145 Cal. App. 3d 57, 69, 193 Cal. Rptr. 248* (negligent hiring); *see also §§ 248.12[2]* and *248.12[3]*].

Second, even if the employer is not directly at fault, the employer may be vicariously liable under the doctrine of respondeat superior for the torts of his or her employees or agents committed within the scope of the employment or agency [*see, e.g., Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 967, 227 Cal. Rptr. 106, 719 P.2d 676* ; *Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 617-618, 124 Cal. Rptr. 143]* .

For discussion of vicarious liability generally, see *§ 248.14*. For discussion of when an employee's acts are within the scope of employment, see *§ 248.16*.

Direct liability and vicarious liability under the doctrine of respondeat superior are not mutually exclusive. Depending on the facts in a particular case, the third-party plaintiff may be able to recover under either or both theories [*see Golden W. Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 950-951, 171 Cal. Rptr. 95]* . However, if liability is predicated solely on respondeat superior, a determination of the nonliability of the employee exonerates the employer also [*Shaw v. Hughes Aircraft Co. (2000) 83 Cal. App. 4th 1336, 1347, 100 Cal. Rptr. 2d 446* (employer not vicariously liable for defamation if employee charged with uttering defamatory statements found not liable); *Roberts v. Ford Aerospace & Commc'ns Corp. (1990) 224 Cal. App. 3d 793, 800, 274 Cal. Rptr. 139]* . In contrast, an employer may be directly liable even if vicarious liability is precluded by the nonliability of the employee [*Lehmuth v. Long Beach Unified Sch. Dist. (1960) 53 Cal. 2d 544, 550-553, 2 Cal. Rptr. 279, 348 P.2d 887]* .

PRACTICE TIP:

Search for Direct Link to Breach of Statutory Duty for Extreme or Aberrational Conduct. Recent decisions of the California Supreme Court, rendered specifically in the sexual harassment context, indicate that plaintiff's counsel seeking to attach liability to an employer for employee acts that are in any way extreme or aberrational would be well advised to pay close attention to pleading and proving a breach of statutory duty or tortious conduct based upon the employer's own acts or omissions. See, *Farmers Ins. Group v. City of Santa Clara (1996)11 Cal. 4th 992, 47 Cal. Rptr. 2d 478, 906 P.2d 440* , and *Lisa M. v. Henry Mayo Newhall Mem'l Hosp. (1996) 12 Cal. 4th 291, 48 Cal. Rptr. 2d 510, 907 P. 2d 358* , for statements of respondeat superior policy analysis that seem to strengthen an employer's defense to such liability in cases other than those brought under the California Fair Employment and Housing Act. *By Richard P. Hill*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsLiability of PrincipalTortsBusiness TortsNegligent Hiring & SupervisionGeneral OverviewTortsDamagesPunitive DamagesAvailabilityEmployersTortsVicarious LiabilityAgentsGeneral OverviewTortsVicarious LiabilityEmployersGeneral Overview

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Chapter 248 EMPLOYER'S LIABILITY FOR EMPLOYEE'S TORTS
PART II. LEGAL BACKGROUND

21-248 California Forms of Pleading and Practice--Annotated § 248.12

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§ 248.12 Employer's Own Negligence or Fault as Basis for Liability

[1] Direct Employer Liability

An employer may be directly liable for its own acts of negligence, separately and independently from any particular act or omission of an employee that is the alleged direct cause of an injury. For example, particular employer policies or procedures may be insufficient or inadequate. In such a case, the employer may be directly liable as a result of its policy or procedure, whether or not a particular employee is negligent in its implementation [*see Coffee v. McDonnell-Douglas Corp. (1972) 8 Cal. 3d 551, 560-562, 105 Cal. Rptr. 358, 503 P.2d 1366* (employee doctor relied on inadequate employer procedure regarding blood test results in authorizing employment of plaintiff who had significant blood test abnormality; jury absolved doctor, but found employer directly liable); *McGuigan v. Southern Pac. Co. (1952) 112 Cal. App. 2d 704, 715-716, 247 P.2d 415* (employer misrepresented job duties in obtaining doctor's termination of employee's sick leave; whether doctor was employee was irrelevant because employer was directly liable because of incorrect job description)].

An employer may also be directly liable if the employee is acting according to the express directions of the employer [*Roberts v. Ford Aerospace & Commc'ns Corp. (1990) 224 Cal. App. 3d 793, 800, 274 Cal. Rptr. 139]* . Under these circumstances, it is possible for a jury to absolve the employee of liability, thereby precluding the imposition of vicarious liability on the employer, without exonerating the employer for its own independent negligence [*Jensen v. Southern Pac. Co. (1954) 129 Cal App. 2d 67, 70-71, 276 P.2d 703 , overruled on other grounds, Alarid v. Vanier (1958) 50 Cal. 2d 617, 623, 327 P.2d 897*) (train was being operated by employee engineer at speed and on schedule determined by employer railroad)].

[2] Negligent Hiring or Retention of Unsuitable Employee

An employer may be liable to a third party for the employer's negligence in hiring or retaining an employee who is

incompetent or unfit if the employee tortiously injures the third party [*see Underwriters Ins. Co. v. Purdie (1983) 145 Cal. App. 3d 57, 69, 193 Cal. Rptr. 248* (citing Restatement (Second) of Agency § 213; criticized for its analysis of concurrent cause doctrine in *Century Transit Sys., Inc. v. American Empire Surplus Lines Ins. Co. (1996) 42 Cal. App. 4th 121, 128-129 n.6, 49 Cal. Rptr. 2d 567*)]. Negligent hiring may form the basis of a claim for punitive damages against the employer [*see Civ. Code § 3294(b)*; *see also § 248.18[1]*]. However, the employer is not an insurer of the safety of every person with whom its employees come into contact, and there must be a connection between the employment and the injury to the third party to hold the employer liable [*Mendoza v. City of Los Angeles (1998) 66 Cal. App. 4th 1333, 1341, 78 Cal. Rptr. 2d 525* (employer not liable for off-duty police officer's shooting and killing fiance with personal firearm while intoxicated, even though employer may have had reason to know of police officer's excessive drinking)].

Liability under this theory requires more than just the existence of an employer-employee relationship. In the case of negligent hiring, the employer must, prior to the hiring, have had reason to believe that an undue risk of harm to others would exist because of the employment [*see Roman Catholic Bishop v. Superior Court (1996) 42 Cal. App. 4th 1556, 1566-1567, 50 Cal. Rptr. 2d 399* (Church not liable for sexual abuse of minor by priest in the absence of any history of abuse and priest's right to privacy prevented Church from investigating priest's sexual behavior); *Underwriters Ins. Co. v. Purdie (1983) 145 Cal. App. 3d 57, 69, 193 Cal. Rptr. 248* (quoting from Restatement (Second) of Agency § 213, cmt. d); *see also Golden W. Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 954, 171 Cal. Rptr. 95* (burden on plaintiff to present facts to refute employer's contention of lack of prior knowledge of any propensity for violence)]. To state a claim for negligent hiring, a plaintiff must allege facts showing that the employer knew or should have known that an employee would act in a certain manner, and that the employee did in fact act in that manner [*Doe v. Capital Cities (1996) 50 Cal. App. 4th 1038, 1055, 58 Cal. Rptr. 2d 122]* .

Liability for negligent hiring can be imposed only when the employer knows, or should know, that the employee, because of past behavior or other factors, is unfit for the specific tasks to be performed [*Federico v. Superior Court (1997) 59 Cal. App. 4th 1207, 1215, 69 Cal. Rptr. 2d 370* ; *see, e.g., Hawkins v. Wilton (2006) 144 Cal. App. 4th 936, 943-944, 51 Cal. Rptr. 3d 1* (security guard at apartment building was known to be unfit and dangerous)]. For example, even if an employer is aware of an employee's prior convictions for sexually molesting juvenile males, and could have foreseen that the employee's duties at a hair-styling school would entail some degree of contact with young males, the employer's actions in hiring the employee to manage and supervise the training of hair-styling students will not be construed as unreasonable. The employee's position required him only to supervise adult students and perform administrative tasks for the hair-styling college; his prior convictions did not involve students or customers of the hairdressing establishments in which he was employed at the time the offenses were committed; there was no connection between the employee's abnormal sexual interest in children and his profession, and nothing in the employee's history would have indicated to the employer that the employee posed a threat of harm to minors he might encounter in the course of his work [*Federico v. Superior Court (1997) 59 Cal. App. 4th 1207, 1215, 69 Cal. Rptr. 2d 370]* .

An employer cannot be held directly liable for negligence in hiring or retaining an employee who commits an assault or battery unless the employer has violated a legal duty owed to the victim. In one case, for example, the victim of a battery by an employee argued that the employer was negligent in failing to conduct a background check that was thorough enough to discover the employee's prior juvenile delinquency record. Plaintiff did not prove, however, that the employer had a legal duty to conduct that thorough an investigation before hiring or retaining the employee, nor that the employer was otherwise on notice of the employee's propensity for violence. In rejecting plaintiff's claim of negligent hiring or retention, the court also noted that juvenile records are made confidential by statute and imposing a duty to uncover these records would be inconsistent with that confidentiality [*Flores v. AutoZone West, Inc. (2008) 161 Cal. App. 4th 373, 384, 74 Cal. Rptr. 3d 178*].

The negligent-hiring theory of liability applies to the selection of independent contractors, as well as to the hiring of employees [*see Holman v. State of California (1975) 53 Cal. App. 3d 317, 336, 124 Cal. Rptr. 773* ; *see also Risley v.*

Lenwell (1954) 129 Cal. App. 2d 608, 622-625, 277 P.2d 897 ; Restatement (Second) of Torts § 411)]. For discussion of the potential liability of the hirer of an independent contractor, see *§ 248.22*.

Because the employer-employee relationship ends on the termination of employment, an employer cannot be held liable for the negligent hiring and retention of an unfit employee for harm inflicted by the employee after his or her employment has been terminated, even if the former employee initially met the plaintiff while working for the employer [*Phillips v. TLC Plumbing, Inc. (2009) 172 Cal. App. 4th 1133, 1144-1145, 91 Cal. Rptr. 3d 864* (employer not liable for injury caused by former employee two years after employment was terminated, even though victim met former employee while latter was working for employer)].

When a plaintiff seeks to impose on an employer both vicarious liability for the tort of an employee and direct liability for negligent hiring and retention of that employee, the trial court does not err when allowing the plaintiff to introduce evidence of the employee's unfitness in order to establish the negligent hiring and retention claim, even if that evidence would be inadmissible as proof that the employee was negligent on the occasion that forms the basis for plaintiff's suit. However, the court should instruct the jury to limit its use of the evidence to only those claims for which it may properly be used [*Diaz v. Carcamo (2010) 182 Cal. App. 4th 339, 349-351, 106 Cal. Rptr. 3d 306]* . The evidence may be admitted for this limited purpose even if the employer concedes it would be vicariously liable if the employee is found liable, as the direct liability of the employer is separate from the employer's vicarious liability. Evidence of the employer's separate tortious conduct, if present, is necessary to establish the proper percentage of fault of each party when apportioning liability for noneconomic damages under *Civ. Code § 1431.1* [*Diaz v. Carcamo (2010) 182 Cal. App. 4th 339, 351, 106 Cal. Rptr. 3d 306]* . The apportioning of fault under the Civil Code is described briefly in § 248.21, and more fully in Ch. 300, *Indemnity and Contribution.*

For a form of complaint that includes an allegation that the employer should be held directly liable based on negligent hiring or retention, see *§ 248.41*.

[3] Negligent Supervision or Training of Employee

An employer may be liable for a negligent failure to supervise its employees adequately [*City of Los Angeles v. Superior Court (1973) 33 Cal App. 3d 778, 783, 109 P.2d 365* ; *see* Restatement (Second) of Agency § 213; *see also Federico v. Superior Court (1997) 59 Cal. App. 4th 1207, 1216, 69 Cal. Rptr. 2d 370* ; *Underwriters Ins. Co. v. Purdie (1983) 145 Cal. App. 3d 57, 62, 69, 193 Cal. Rptr. 248* (criticized for its analysis of concurrent cause doctrine in *Century Transit Sys., Inc. v. American Empire Surplus Lines Ins. Co. (1996) 42 Cal. App. 4th 121, 128-129 n.6, 49 Cal. Rptr. 2d 567*)]. One court has suggested that such a theory of action must be based on knowledge by the employer that the employee is a person who cannot be trusted to act properly without being supervised and, as such, adds little, if anything, to the concept of liability for negligent hiring [*Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 663-664, 109 Cal. Rptr. 269* (involving nonemployee agents)]. This view does not account for the otherwise qualified and responsible employee who is assigned a task that he or she is unqualified to perform [*cf.* *Lehmuth v. Long Beach Unified Sch. Dist. (1960) 53 Cal. 2d 544, 550-553, 2 Cal. Rptr. 279, 348 P.2d 887* (school district independently liable for injuries caused by failure to supervise students properly)]. However, in a wrongful termination action the employer may not be liable to the plaintiff for negligent supervision. One court of appeal held, following *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 698 n.39, 254 Cal. Rptr. 211, 765 P. 2d 373* , that no tort damages were available for negligent supervision that resulted in an employee's missing a meeting, but that was only a contributing cause of a termination decision [*Hine v. Dittrich (1991) 228 Cal. App. 3d 59, 64, 278 Cal. Rptr. 330* ; *but compare* *Lazar v. Superior Court (1996) 12 Cal. 4th 631, 647-648, 49 Cal. Rptr. 2d 377, 909 P. 2d 981* (narrowing application of *Hine* holding)].

PRACTICE TIP:

Liability to Third Parties for Negligent Supervision of Employee. A negligent retention/supervision theory would appear to be available under *Hart v. National Mortgage & Land Co. (1987) 189 Cal. App.*

3d 1420, 235 Cal. Rptr. 68 , where the plaintiff contended that defendants were negligent because of a supervisor's failure to act to restrain or remove a co-worker who had been reported by the plaintiff for harassing the plaintiff. Individuals or business entities providing the types of services listed in *Civil Code § 51.9* would seemingly be liable to third parties for retaining or failing to control or supervise an employee who engages in sexual harassment. *By Richard P. Hill*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsNegligent Hiring & SupervisionGeneral OverviewTortsBusiness TortsNegligent Hiring & SupervisionElementsTortsNegligenceActionsGeneral Overview

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Chapter 248 EMPLOYER'S LIABILITY FOR EMPLOYEE'S TORTS
PART II. LEGAL BACKGROUND

21-248 California Forms of Pleading and Practice--Annotated § 248.13

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§ 248.13 Employer Ratification of Employee Conduct

An employer who subsequently ratifies the act of an employee is liable for the act, even if the act might otherwise be considered as outside the scope of employment [*Jameson v. Gavett (1937) 22 Cal. App. 2d 646, 652, 71 P. 2d 937* ; *see Civ. Code § 2339*]. Courts that have found liability through ratification have not been called on to distinguish whether that liability is direct or only an extension of vicarious liability through respondeat superior [*see Alhino v. Starr (1980) 112 Cal. App. 3d 158, 174-175, 169 Cal. Rptr. 136* ; Coats v. Construction & Gen. Laborers Local No. 185 *(1971) 15 Cal. App. 3d 908, 914, 93 Cal. Rptr. 639* ; *Weber v. Leuschner (1966) 240 Cal. App. 2d 829, 838-839, 50 Cal. Rptr. 86* ; *McChristian v. Popkin (1946) 75 Cal. App. 2d 249, 256-257, 171 P.2d 85* ; *Kalkruth v. Resort Props. Ltd. (1943) 57 Cal. App. 2d 146, 152, 134 P.2d 513* ; *Jameson v. Gavett (1937) 22 Cal. App. 2d 646, 651-652, 71 P.2d 937]* . Regardless of the nature of the liability, punitive damages may be recovered if ratification is established [*Civ. Code § 3294(b)*; *see § 248.18[1]*]. For discussion of what constitutes authorization or ratification, see *§ 248.18[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesPunitive DamagesTortsBusiness TortsNegligent Hiring & SupervisionGeneral OverviewTortsBusiness TortsNegligent Hiring & SupervisionElementsTortsNegligenceActionsGeneral OverviewTortsVicarious LiabilityEmployersScope of EmploymentGeneral Overview

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21-248 California Forms of Pleading and Practice--Annotated § 248.14

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§ 248.14 Vicarious Liability of Employer Based on Respondeat Superior

The doctrine of respondeat superior, literally "let the master answer," provides that an employer or principal is vicariously liable for the wrongful conduct of his or her employees or agents committed within the scope of the employment or agency [*see, e.g., Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 967, 227 Cal. Rptr. 106, 719 P.2d 676* ; *Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 617-618, 124 Cal. Rptr. 143* ; *see also Civ. Code § 2338* (liability of principal for torts of agent); *Garton v. Title Ins. & Trust Co. (1980) 106 Cal. App. 3d 365, 375-376, 165 Cal. Rptr. 449* (discussing applicability of vicarious liability principles to tortfeasors working for several employers in varying capacities)]. The rationale for the doctrine is that, because the use of employees or agents benefits the employer or principal, the torts of employees or agents are imputed to their hirers for purposes of assigning liability. The liability is "vicarious" because the employer or principal is held liable even if the employer or principal has not personally engaged in wrongful conduct [*see Roberts v. Craig (1954) 124 Cal. App. 2d 202, 208, 268 P.2d 500]* . Respondeat superior applies to public and private employers alike [*Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 209-210, 285 Cal. Rptr. 99, 814 P.2d 1341* ; *see Gov. Code § 815.2(a)* (stating rule for liability of public entity)].

Although earlier authorities sought to justify the respondeat superior doctrine on theories such as "control" by the master of the servant, the master's "privilege" in being permitted to employ another, the third party's innocence in comparison to the master's selection of the servant, or the master's "deep pocket" to pay for the loss, the modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees are placed on the employer as a cost of doing business. The rule of respondeat superior is based in part on the rationale that, between the employer who has voluntarily engaged in an enterprise that may pose some risk of harm to others and the injured third party, fairness supports requiring the employer to bear the loss [*see Hinman v. Westinghouse Elec. Co. (1970) 2 Cal. 3d 956, 959-960, 88 Cal. Rptr. 188, 471 P.2d 988]* . Respondeat superior also applies to a household that employs domestic help. Although not a business enterprise, a household is better equipped

than its domestic help to absorb the risk by purchasing adequate insurance [*Miller v. Stouffer (1992) 9 Cal. App. 4th 70, 80, 11 Cal. Rptr. 2d 454]* . Courts have also justified the rule on the ground that the employer is better able to absorb the losses and distribute them, through prices, rates, or liability insurance, to the public [*Hinman v. Westinghouse Elec. Co. (1970) 2 Cal. 3d 956, 959-960, 88 Cal. Rptr. 188, 471 P.2d 988]* . California courts have long recognized that an employer's responsibility for the torts of its employees extends beyond its actual or possible control of the servant to injuries that are the "risks of the enterprise" [*see* *Hinman v. Westinghouse Elec. Co. (1970) 2 Cal. 3d 956, 960, 88 Cal. Rptr. 188, 471 P.2d 988* (citing *Carr. v. Wm. C. Crowell Co. (1946) 28 Cal. 2d 652, 655-656, 171 P.2d 5* , among other cases)].

Recent California Supreme Court decisions have articulated three reasons for applying the doctrine of respondeat superior [*Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 209, 285 Cal. Rptr. 99, 814 P.2d 1341* ; *Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 967, 227 Cal. Rptr. 106, 719 P.2d 676]* :

- To prevent recurrence of tortious conduct;
- To give greater assurance of compensation for the victim; and
- To ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury.

The Court has given great weight to these policy factors in determining whether to attach vicarious liability in different situations [*see* *Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 214-216, 285 Cal. Rptr. 99, 814 P.2d 1341* (city liable for sexual assault by on-duty police officer); *John R. v. Oakland Unified Sch. Dist. (1989) 48 Cal. 3d 438, 447-452, 256 Cal. Rptr. 766, 769 P.2d 948* (school district not liable for sexual assault by teacher); *Miller v. Stouffer (1992) 9 Cal. App. 4th 70, 77, 81, 11 Cal. Rptr. 2d 454* ; *see also § 248.17* for discussion of employer liability for intentional torts].

To recover from an employer under respondeat superior, a plaintiff must establish both that an employment relationship exists between the tortfeasor and the defendant and that the tort was committed within the scope of the tortfeasor's employment [*see, e.g.,* *Alma W. v. Oakland Unified Sch. Dist. (1981) 123 Cal. App. 3d 133, 139, 176 Cal. Rptr. 287* ; *Golden W. Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 955, 171 Cal. Rptr. 95]* . For discussion of rules governing the determination of whether an employment relationship exists, see *§ 248.15*. For discussion of the criteria for determining the scope of employment, see *§ 248.16*. For a form of a complaint for damages arising from the acts of an employee and alleging employer liability under respondeat superior, see *§ 248.40[1]*.

In addition, an employer cannot be vicariously liable for the negligence of an employee if there is no causal connection between that negligence and the plaintiff's injuries [*Dixon v. City of Livermore (2005) 127 Cal. App. 4th 32, 42-47, 25 Cal. Rptr. 3d 50]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsVicarious LiabilityEmployersGeneral OverviewTortsVicarious LiabilityEmployersScope of EmploymentGeneral Overview

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§ 248.15 Who Is an Employee for Purposes of Employer Liability

[1] In General

An employee is one who is subject to his or her employer's right of control with respect to any act, labor, or work to be done in the course and scope of the employment [*see Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d 190, 205, 30 Cal. Rptr. 253* ; *see also Lab. Code § 2750* ("contract of employment" defined)]. The term "servant" is synonymous with the term "employee" [*Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d 190, 205, 30 Cal. Rptr. 253]* .

Evidence that a person who hires another withholds income taxes or social security taxes, pays unemployment taxes, or carries workers' compensation insurance may support a finding of an employment relationship [*see Corrigan v. Cox (1967) 254 Cal. App. 2d 919, 924, 62 Cal. Rptr. 733]* . The converse, however, is of no significance in establishing a nonemployment relationship. An employer cannot change the status of an employee to one of independent contractor by illegally requiring the employee to assume the burdens that the law imposes directly on the employer [*Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal. App. 3d 864, 877, 269 Cal. Rptr. 647]* .

Although most employees work for monetary compensation such as salaries, hourly wages, or commissions, monetary compensation is not an essential element of an employer-employee relationship [*see Eye v. Kafer, Inc. (1962) 202 Cal. App. 2d 449, 453, 20 Cal. Rptr. 841]* . Thus, an employment relationship may exist between spouses [*see Workman v. City of San Diego (1968) 267 Cal. App. 2d 36, 39, 72 Cal. Rptr. 509]* or between parent and child [*see Hughes v. Quackenbush (1934) 1 Cal. App. 2d 349, 357, 37 P.2d 99]* .

However, unpaid volunteers of public agencies are excluded from the definition of "employee" for workers' compensation purposes, and this exclusion has been used to prevent a city from being liable under the doctrine of respondeat superior for the alleged tort of an unpaid volunteer [*Munoz v. City of Palmdale (1999) 75 Cal. App. 4th*

367, 368-369, 89 Cal. Rptr. 2d 229 (alleged tortfeasor was volunteer at city's senior center); *see Lab. Code § 3352(i)*]. The court in that case rejected the argument that the city's right to control the volunteer's actions, normally an indication of an employer-employee relationship [*see § 248.15[2]*] was sufficient to overcome the unpaid volunteer exclusion [*Munoz v. City of Palmdale (1999) 75 Cal. App. 4th 367, 372, 89 Cal. Rptr. 2d 229]* .

If a person is performing work and labor for another, a prima facie showing of an employer-employee relationship is established, and the person is presumed to be an employee in the absence of evidence to the contrary [*Pierson v. Holly Sugar Corp. (1951) 107 Cal. App. 2d 298, 301, 237 P.2d 28]* . Additionally, *Lab. Code § 2750.5*, which provides a rebuttable presumption that a worker providing services for which a license is required is an employee rather than an independent contractor, and denies independent contractor status to a person who does not have a license if one is required for the work, applies to tort cases as well as to workers' compensation cases [*Foss v. Anthony Indus. (1983) 139 Cal. App. 3d 794, 797-799, 189 Cal. Rptr. 31]* . The court of appeal has held that this Labor Code provision may subject a homeowner who employs an unlicensed worker to tort liability for injuries that the worker sustains while performing a job for which a license is required [*Mendoza v. Brodeur (2006) 142 Cal. App. 4th 72, 80-81, 47 Cal. Rptr. 3d 310* ; *Rosas v. Dishong (1998) 67 Cal. App. 4th 815, 821-823, 79 Cal. Rptr. 2d 339]* .

In addition, even assuming that a homeowner who employs an unlicensed worker may be deemed the worker's employer for purposes of tort liability for the worker's injury, California courts have thus far rejected attempts to impose on homeowners a duty to comply with OSHA safety regulations, at least when the homeowner can show that the worker was hired to perform "household domestic service" within the meaning of a statutory OSHA exclusion provision [*see Lab. Code § 6303(b)*]. While that phrase is not defined in the statute, the courts have held that it includes tree trimming [*Fernandez v. Lawson (2003) 31 Cal. 4th 31, 36-38, 1 Cal. Rptr. 3d 422, 71 P.3d 779*]. In concluding that tree trimming was a "household domestic service," the California Supreme Court noted that the phrase likely refers to the performance of tasks in and outside a private residence and implies duties that are personal to the homeowner. The Court also noted that homeowners would be ill-equipped to understand or comply with OSHA requirements, suggesting that the regulations were probably intended to apply only to commercial businesses, although the Court stopped short of holding that the regulations could never be applied to a homeowner [*see Fernandez v. Lawson (2003) 31 Cal. 4th 31, 36-38, 1 Cal. Rptr. 3d 422, 71 P.3d 779*].

For discussion of the right to control as a criterion for the existence of an employment relationship, see *§ 248.15[2]*. For discussion of the distinctions between employment relationships and agency relationships, see *§ 248.15[3]*. For discussion of the distinctions between employment relationships and independent contractor relationships, see *§ 248.15[4]*. For a form for use in an answer denying the existence of an employment relationship, see *§ 248.51*.

[2] Employer's Right of Control

The key factor in determining whether an employment relationship exists is whether the employer has the right to exercise control over the employee, regardless of whether or not that potential control is actually exercised with respect to all of the employee's duties [*City of Los Angeles v. Vaughn (1961) 55 Cal. 2d 198, 201, 10 Cal. Rptr. 457, 358 P.2d 913* ; *see Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 946-947, 949-950, 88 Cal. Rptr. 175, 471 P.2d 975]* . If the defendant has such a right of control over the tortfeasor, an employment relationship exists even if control was not being exercised at the time of plaintiff's injury [*see Eye v. Kafer, Inc. (1962) 202 Cal. App. 2d 449, 453, 20 Cal. Rptr. 841* (defendant bar owner held liable for assault on patron by temporary employee)]. The right to discharge an employee at will without cause is evidence of the employer's right to control [*City of Los Angeles v. Vaughn (1961) 55 Cal. 2d 198, 201,10 Cal. Rptr. 457, 358 P.2d 913* ; *Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal. App. 3d 864, 875, 269 Cal. Rptr. 647]* .

The control must encompass both the means and manner of performance of the work. If control pertains only to the result of the work and not to the means by which it is accomplished, the relationship is one of independent contractor rather than employee [*Millsap v. Federal Express Corp. (1991) 227 Cal. App. 3d 425, 431, 277 Cal. Rptr. 807* ; *see*

Societa per *Azioni de Navigazione Italia v. City of Los Angeles (1982) 31 Cal. 3d 446, 458, 183 Cal. Rptr. 51, 645 P.2d 102* ; *see also Tieberg v. Unemployment Ins. Appeals Bd. (1970) 2 Cal. 3d 943, 946-947, 88 Cal. Rptr. 175, 471 P.2d 975* (freelance television writers held to be employees for unemployment insurance purposes); *Rogers v. Whitson (1964) 228 Cal. App. 2d 662, 671, 39 Cal. Rptr. 849]* .

A scholarship sponsor that exercises control by providing that the scholarship will terminate if the student's grades fall below a designated level is not an employer for purposes of imposing vicarious liablity for the torts of the beneficiaries even if the scholarship program will improve the labor pool from which the sponsor may hire employees [*Randolph v. Budget Rent-A-Car (9th Cir. 1996) 97 F.3d 319, 326* (applying *Lab. Code § 2750*; recognizing that situations might exist in which a student trainee could be considered an employee)].

[3] Employees and Agents Distinguished

An agent is one who represents another in dealings with third parties [*Civ. Code § 2295*; *see Store of Happiness v. Carmona & Allen (1957) 152 Cal. App. 2d 266, 269, 312 P.2d 1104]* . An agency may be specific (created for a particular act or transaction) or general [*see Civ. Code § 2297*].

PRACTICE TIP:

Attend to Doctrine of Ostensible Agency. In pleading and seeking proof on agency relationships, it should be remembered that the doctrine of ostensible agency and authority (*Civil Code §§ 2300, 2317*) can be a potent litigation tool with respect to tort theories such as fraud, negligent misrepresentation, intentional interference with contract, intentional interference with prospective business advantage, etc.
By Richard P. Hill

A single individual may be both an employee and an agent, but the terms "employee" and "agent" are not synonymous [*Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d 190, 205, 30 Cal. Rptr. 253]* . One may be an agent although not an employee if the person has been authorized to represent the principal with regard to a particular transaction or to accomplish a particular purpose [*see, e.g., Garton v. Title Ins. & Trust Co. (1980) 106 Cal. App. 3d 365, 376, 165 Cal. Rptr. 449* (employee of real estate broker may be agent of title company with regard to preparation of documents for escrow)]. In other words, an agent is distinguished from an employee by the agent's "representative" powers and "derivative authority" [*Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d 190, 206, 30 Cal. Rptr. 253]* . A principal cannot be vicariously liable on the basis of respondeat superior for the acts of an agent who is not an employee, if the conduct on which the suit is based is not within the apparent or actual authority of the agent while acting for the principal [*see Asplund v. Selected Invs. in Fin. Equities, Inc. (2000) 86 Cal. App. 4th 26, 45-49, 103 Cal. Rptr. 2d 34* (mutual fund brokerage not vicariously liable for acts of independent contractor representative in selling investment product not affiliated with brokerage)]. For further discussion of the liability of a principal for the acts of a nonemployee agent, see Ch. 427, *Principal and Agent* .

[4] Employees and Independent Contractors Distinguished

[a] Employer Generally Not Liable for Independent Contractor's Torts

Although employers and principals are subject to vicarious liability under the doctrine of respondeat superior for the torts of their employees and agents, the general rule is that a person who employs an independent contractor is not vicariously liable for the torts of the contractor [*Schmidlin v. Alta Planing Mill Co. (1915) 170 Cal. 589, 591, 150 P. 983* ; *Anderson v. Chancellor W. Oil Dev. Corp. (1975) 53 Cal. App. 3d 235, 239, 125 Cal. Rptr. 640]* . However, there are many exceptions to this general rule of nonliability. For discussion of the application of respondeat superior liability for conduct of independent contractors, see *§ 248.22*.

[b] Relevant Factors

The categories of employee and independent contractor are in general mutually exclusive; an individual's status does not vary depending of the nature of the function the individual was performing at the time of the accident [*see Briggs v. Lawrence (1991) 230 Cal. App. 3d 605, 614-615, 281 Cal. Rptr. 578]* . In determining whether an individual is an employee or an independent contractor, the most important factor is the right of control [*Flores v. Brown (1952) 39 Cal. 2d 622, 628, 248 P.2d 922* ; *Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal. App. 3d 864, 875, 269 Cal. Rptr. 647* (characterizing all other factors as secondary elements); *see § 248.15[2]*]. Other factors to be taken into consideration are (1) whether or not the one performing the services is engaged in a distinct occupation or business; (2) whether, in the locality, the kind of occupation or business is one in which the work is usually done under the direction of a principal or by a specialist without supervision; (3) the skill required in the particular occupation or business; (4) whether the principal or worker supplies the instrumentalities, tools, and place of work; (5) the length of time for which the services are to be performed; (6) the method of payment, whether based on time or by the job; (7) whether or not the work is part of the regular business of the alleged principal; and (8) whether or not the parties believe that they are creating an employment relationship [*Malloy v. Fong (1951) 37 Cal. 2d 356, 370-372, 231 P.2d 241* ; *Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal. App. 3d 864, 874-875, 269 Cal. Rptr. 647* ; *Wickham v. Southland Corp. (1985) 168 Cal. App. 3d 49, 57-58 n.4, 213 Cal. Rptr. 825* ; *see BAJI No. 13.20* (8th ed.); Restatement (Second) of Agency § 220].

Whereas the presence of complete or absolute control will support a finding that the relationship is one of employment, the converse is not necessarily true, that is, that the lack of absolute control means there is no employment relationship. It does not follow that, because there is a certain amount of freedom inherent in the nature of the work that one is called on to do, one becomes an independent contractor [*Briggs v. Lawrence (1991) 230 Cal. App. 3d 605, 618, 281 Cal. Rptr. 578]* .

It is also important to differentiate between general rights of supervision or review for the purpose of determining a contractor's progress, which are normally exercised by a hirer of an independent contractor, and the immediate, detailed supervision that an employer normally exercises with respect to an employee. Reservation or exercise of the former type of rights alone is not likely to result in a court determination that one who is nominally an independent contractor is in fact an employee [*McDonald v. Shell Oil Co. (1955) 44 Cal. 2d 785, 790 Millsap v. Federal Express Corp. (1991) 227 Cal. App. 3d 425, 433, 277 Cal. Rptr. 807]* .

The fact that an agreement or writing designates the relationship of the parties as hirer-independent contractor is not controlling [*Anderson v. Badger (1948) 84 Cal. App. 2d 736, 742-743, 191 P.2d 768]* . The parties' characterization will be ignored if the parties, by their actual conduct, act like employer-employee. Indeed, the attempt to conceal employment by formal documents purporting to create other relationships have led the courts to disregard the terms whenever the acts and declarations of the parties are inconsistent with the labels [*Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal. App. 3d 864, 877, 269 Cal. Rptr. 647]* .

Whether an individual is an employee or an independent contractor is a question of fact if it is dependent on resolution of disputed evidence or inferences [*Fisher v. San Pedro Peninsula Hosp. (1989) 214 Cal. App. 3d 590, 608-609 n.6, 262 Cal. Rptr. 842]* . It becomes one of law, however, if only one inference can be drawn from the evidence [*Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal. App. 3d 864, 872, 269 Cal. Rptr. 647* ; *see S.G. Borello & Sons, Inc. v. Department of Indus. Relations (1989) 48 Cal. 3d 341, 349, 256 Cal. Rptr. 543, 769 P.2d 399* (workers' compensation case)]. Ultimately, the determination must be made in the context of the purpose behind the particular application of vicarious liability at issue in the case [*see Fisher v. San Pedro Peninsula Hosp. (1989) 214 Cal. App. 3d 590, 608-609 n.6, 262 Cal. Rptr. 842* (expressing "grave doubts" as to whether staff doctors are independent contractors with hospital for purposes of sexual harassment cause of action under Fair Employment and Housing Act, *Gov. Code § 12900 et seq.*); *see also Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal. App. 3d 864, 878 n.10, 269 Cal. Rptr. 647* (placing respondeat superior liability on pizza franchisee for torts of driver while making delivery is consistent with rationale behind doctrine, that business enterprise should be liable for risks inherent in, or created by, operation of enterprise)].

Although not necessarily controlling, standards under workers' compensation, unemployment insurance, and other statutes can all be considered by the courts as "useful" in determining the tortfeasor's employment status in a third-party tort claim lodged against the tortfeasor's alleged employer [*see Fleming v. Foothill-Montrose Ledger (1977) 71 Cal. App. 3d 681, 688-689, 139 Cal. Rptr. 579* (news carrier-vendor held to be independent contractor)]. For discussion of the applicability of workers compensation authority in determining scope of employment issues in tort cases, see *§ 248.16[3]*.

[c] Rebuttable Presumption in Case of Building Contractors

There is a rebuttable presumption affecting the burden of proof that a worker who performs services for which a license is required under *Bus. & Prof'l Code § 7000 et seq.*, governing building contractors, or who performs services for a person who is required to obtain such a license, is an employee rather than an independent contractor [*Lab. Code § 2750.5*]. Proof of independent contractor status, which may rebut the presumption, includes satisfactory proof of the following:

(1) The individual has the right to control, and discretion in the manner of, performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for [*Lab. Code § 2750.5(a)*];

(2) The individual is customarily engaged in an independently established business [*Lab. Code § 2750.5(b)*]; and

(3) The individual's independent contractor status is bona fide and not a subterfuge [*Lab. Code § 2750.5(c)*].

A bona fide independent contractor status is evidenced by the presence of the following cumulative factors [*Lab. Code § 2750.5(c)*]:

(1) Substantial investment other than personal services in the business;

(2) Holding out that one is in business for oneself;

(3) Bargaining for a contract to complete a specific project for compensation by project rather than by time;

(4) Control over the time and place in which the work is performed;

(5) Supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees;

(6) Hiring employees;

(7) Performing work that is not ordinarily in the course of the principal's business;

(8) Performing work that requires a particular skill;

(9) Holding a license pursuant to the Business and Professions Code;

(10) The parties' intent that the work relationship is that of independent contractor; or

(11) The fact that the relationship is not severable or terminable at will by the principal, but gives rise to an action for breach of contract.

The history and terminology of Lab. Code § 2750.5 indicates that the statute was intended to apply to third-party tort claims as well as to workers' compensation proceedings. The statute codifies the general tort standard for independent-contractor status, in that Labor Code provisions concerning employment status have long been cited by California courts in tort cases involving injuries to third parties [*Foss v. Anthony Indus. (1983) 139 Cal. App. 3d 794, 797-799, 189 Cal. Rptr. 31]* .

A worker may be estopped from asserting the presumption created by *Lab. Code § 2750.5* if the worker affirmatively lies about having a license, or initially informs the hirer that he or she has a license but then loses the license while the work is being performed and does not inform the hirer of the change in status [*see, e.g.,* *Chin v. Namvar (2008) 166 Cal. App. 4th 994, 1006-1007, 83 Cal. Rptr. 3d 294*].

[5] Borrowed Employees: Special and Dual Employments

If one employer (the "general" employer) lends an employee to another employer and relinquishes its right of control over the employee's activities to the borrowing employer, a "special-employment" relationship is created between the borrowed employee and the borrowing employer [*Marsh v. Tilley Steel Co. (1980) 26 Cal. 3d 486, 492, 162 Cal. Rptr. 320, 606 P.2d 355]* . For the duration of this relationship, the special or borrowing employer is solely liable in tort under the doctrine of respondeat superior for the special employee's job-related torts [Societa per *Azioni de Navigazione Italia v. City of Los Angeles (1982) 31 Cal. 3d 446, 456, 183 Cal. Rptr. 51, 645 P.2d 102* ; *Marsh v. Tilley Steel Co. (1980) 26 Cal. 3d 486, 492, 162 Cal. Rptr. 320, 606 P.2d 355]* .

A special employment relationship may be negated, and the general employer remains liable, by proof that the general employer has not relinquished its right to control the employee [*see* *Marsh v. Tilley Steel Co. (1980) 26 Cal. 3d 486, 492, 162 Cal. Rptr. 320, 606 P.2d 355]* . Courts have held that evidence of the following factors tends to negate the existence of a special employment [*Marsh v. Tilley Steel Co. (1980) 26 Cal. 3d 486, 492, 162 Cal. Rptr. 320, 606 P.2d 355* ; *Von Beltz v. Stuntman, Inc. (1989) 207 Cal. App. 3d 1467, 1487, 255 Cal. Rptr. 755]* :

- The employee is not paid by and cannot be discharged by the borrowing employer;
- The employee is skilled and has substantial control over the operational details of his or her work;
- The employee is not engaged in the borrowing employer's usual business;
- The employee is borrowed for only a brief period of time;
- The employee continues to use tools and equipment furnished by the lending employer while working for the borrowing employer.

If both the borrowing and lending employers share control of an employee's work, a "dual employment" arises, and the general employer remains concurrently and simultaneously, jointly and severally liable for the employee's torts committed within the scope of the employment [Societa per *Azioni de Navigazione Italia v. City of Los Angeles (1982) 31 Cal. 3d 446, 460, 183 Cal. Rptr. 51, 645 P.2d 102* ; *Marsh v. Tilley Steel Co. (1980) 26 Cal. 3d 486, 494-495, 162 Cal. Rptr. 320, 606 P.2d 355* ; *see also* *Stevens v. Roman Catholic Bishop of Fresno (1975) 49 Cal. App. 3d 877, 889-891, 123 Cal. Rptr. 171* (priest was dual employee of both local and regional church authorities)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsEvidenceInferences & PresumptionsRebuttal of

PresumptionsTortsVicarious LiabilityEmployersGeneral OverviewTortsVicarious LiabilityIndependent ContractorsGeneral OverviewWorkers' Compensation & SSDICoverageEmployment RelationshipsBorrowed Employees

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 248 EMPLOYER'S LIABILITY FOR EMPLOYEE'S TORTS
PART II. LEGAL BACKGROUND

21-248 California Forms of Pleading and Practice--Annotated § 248.16

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§ 248.16 Employee Conduct Within the Scope of Employment

[1] Determination a Question of Fact

Under the doctrine of respondeat superior, an employer is vicariously liable for the torts of his or her employees if those torts are committed within the scope of the tortfeasor's employment [*Munyon v. Ole's, Inc. (1982) 136 Cal. App. 3d 697, 701, 186 Cal. Rptr. 424]* . The plaintiff has the burden of proving that the employee's tort occurred within the scope of employment [*Ducey v. Argo Sales Co. (1979) 25 Cal. 3d 707, 721, 159 Cal. Rptr. 835, 602 P.2d 755* ; *Jeffrey E. v. Central Baptist Church (1988) 197 Cal. App. 3d 718, 722, 243 Cal. Rptr. 128* ; *Munyon v. Ole's, Inc. (1982) 136 Cal. App. 3d 697, 701, 186 Cal. Rptr. 424]* .

Whether an employee's tort occurred within the scope of his or her employment is generally a question of fact. However, if the facts are undisputed and no conflicting inferences can be drawn from the facts presented, resolution of the issue becomes a question of law [*Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 213, 285 Cal. Rptr. 99, 814 P.2d 1341* ; *Hinman v. Westinghouse Elec. Co. (1970) 2 Cal. 3d 956, 963, 88 Cal. Rptr. 188, 471 P.2d 988* ; *Tryer v. Ojai Valley Sch. (1992) 9 Cal. App. 4th 1476, 1480 Jeffrey E. v. Central Baptist Church (1988) 197 Cal. App. 3d 718, 722, 243 Cal. Rptr. 128* ; *Munyon v. Ole's, Inc. (1982) 136 Cal. App. 3d 697, 701, 186 Cal. Rptr. 424* ; *Golden W. Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 956, 171 Cal. Rptr. 95]* . Summary judgment may be granted on the basis of the employee's uncontroverted declaration that he or she was acting in the course of employment unless the opposing party at least asserts some theory to the contrary [*see Golden W. Baseball Co. v. Talley (1991) 232 Cal. App. 3d 1294, 1305, 284 Cal. Rptr. 53]* .

For a form for a demurrer by an employer on the ground that the employee was acting outside the scope of employment in causing injury, see *§ 248.50*.

[2] Tests Applied to Determine Whether Conduct Was Within Scope of Employment

Courts have utilized various tests to determine whether or not specific conduct by an employee is within the scope of his or her employment. Older cases focused on the relationship between the employee's conduct and the duties of his or her employment. For example, in one case, the scope-of-employment test was articulated as follows [*Jameson v. Gavett (1937) 22 Cal. App. 2d 646, 650-651, 71 P.2d 937]* :

1. What are the employee's express duties and was the employee doing them at the time of the tort?

2. Did the tort occur while the employee was pursuing the employer's business interests?

3. Did the employee have express or implied employer authority to do the acts causing plaintiff's injuries?

Under this test, if the answer to any of these questions is affirmative, the employee's conduct is deemed to be within the scope of employment and the employer is liable for plaintiff's injuries [*Jameson v. Gavett (1937) 22 Cal. App. 2d 646, 650-651, 71 P.2d 937* ; *see also* Coats v. Construction & Gen. Laborers Local No. 185 *(1971) 15 Cal. App. 3d 908, 913, 93 Cal. Rptr. 639* (employee acting within scope of employment if employee's conduct was authorized by employer, arose out of employee's performance of services for the employer, was for employer's benefit, or was incidental to the employee's work)].

More recently, courts appear to have taken a broader approach, relying not only on the relationship between the conduct and the employment, but also on the "foreseeability" of the conduct [*see* *Lazar v. Thermal Equip. Corp. (1983) 148 Cal. App. 3d 458, 464-465, 195 Cal. Rptr. 890]* . Thus, the determination of the nexus between the conduct and the duties of employment has been viewed as only one part of the test. Even if the conduct is deemed to lie outside the scope of employment under the "nexus" test, the employer may nevertheless be liable if the conduct is "foreseeable," meaning that it is not so unusual or startling that it would seem unfair to include the resultant loss among the other costs of the employer's business [*Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 209, 285 Cal. Rptr. 99, 814 P.2d 1341* ; *Miller v. Stouffer (1992) 9 Cal. App. 4th 70, 78, 11 Cal. Rptr. 2d 454* ; *Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 968, 227 Cal. Rptr. 106, 719 P.2d 676* ; *Alma W. v. Oakland Unified Sch. Dist. (1981) 123 Cal. App. 3d 133, 141-142, 176 Cal. Rptr. 287* ; *Golden W. Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 958, 171 Cal. Rptr. 95* ; *see* *Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 619, 124 Cal. Rptr. 143]* . The inquiry should be whether the risk is one that may fairly be regarded as typical of or broadly incidental to the enterprise undertaken by the employer [*Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 209, 285 Cal. Rptr. 99, 814 P.2d 1341* ; *Miller v. Stouffer (1992) 9 Cal. App. 4th 70, 78, 11 Cal. Rptr. 2d 454]* .

The trend is toward application of a dual test under which a tort is deemed to be committed within the scope of employment if either (1) the employee's act or conduct was "foreseeable" in the above sense; or (2) the employee's act or conduct was required by or incident to his or her duties, regardless of whether it could be foreseen by the employer [*Jeffrey E. v. Central Baptist Church (1988) 197 Cal. App. 3d 718, 722, 243 Cal. Rptr. 128* ; *Alma W. v. Oakland Unified Sch. Dist. (1981) 123 Cal. App. 3d 133, 141-142, 176 Cal. Rptr. 287* ; *Golden W. Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 956-957, 171 Cal. Rptr. 95]* . Thus, tortious conduct that violates an employee's official duties or disregards the employer's express orders may nonetheless be within the scope of employment. So may be acts that provide no benefit to the employer or that are willful or malicious in nature [*Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 209, 285 Cal. Rptr. 99, 814 P.2d 1341]* .

In determining whether or not an employee's tort was incidental to his or her job duties, courts have held that an employee's duties, and the purpose of his or her employment, are to be broadly construed [*Lazar v. Thermal Equip. Corp. (1983) 148 Cal. App. 3d 458, 465, 195 Cal. Rptr. 890* ; *Alma W. v. Oakland Unified Sch. Dist. (1981) 123 Cal. App. 3d 133, 139, 176 Cal. Rptr. 287* ; *but see* *Hoblitzell v. City of Ione (2003) 110 Cal. App. 4th 675, 682-684, 2 Cal. Rptr. 3d 8* (city not vicariously liable if building inspector and off-duty police officer posing as building inspector went to work site outside city jurisdiction and harassed contractor for personal reasons unrelated to city employment)]. A

corollary to this principle is that, even if an employee was engaged in a specific activity or function that he or she was not hired to perform, the employee may still be found to be acting within the scope of employment if the activity in question is related to the employment or provides an indirect benefit to the employer [*Robbins v. Hewlett-Packard Corp. (1972) 26 Cal. App. 3d 489, 494, 103 Cal. Rptr. 184]* . For discussion of the "special errand rule," and the effect on employer's liability of torts occurring during social events, see *§ 248.16[4], [5]*.

[3] Applicability of Workers' Compensation Cases in Defining Scope of Employment

Under workers' compensation law, an applicant for benefits must establish that the applicant's injury arose out of and in the course of the employment [*see Lab. Code § 3600(a)*]. Some California courts have held that consideration of workers' compensation case authority is appropriate in tort cases involving the doctrine of respondeat superior, not only in determining the threshold scope of employment issues, but also in the application of corollary rules and exceptions to the scope of employment rule [*see Alma W. v. Oakland Unified Sch. Dist. (1981) 123 Cal. App. 3d 133, 143, 176 Cal. Rptr. 287* (risk allocation); *Huntsinger v. Glass Containers Corp. (1972) 22 Cal. App. 3d 803, 807, 99 Cal. Rptr. 666* (going and coming rule and exceptions to it in the tort field have strongly parallel rules and exceptions in the workers' compensation system); *see also Tryer v. Ojai Valley Sch. (1992) 9 Cal. App. 4th 1476, 1482, 12 Cal. Rptr. 2d 114]* . However, courts have also held that workers'-compensation case authority is not controlling in tort cases, because of the differences in the purposes and policies behind the workers' compensation law and the doctrine of respondeat superior [*see Blackman v. Great Am. First Sav. Bank (1991) 233 Cal. App. 3d 598, 604-605, 284 Cal. Rptr. 491* ; *Golden W. Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 958-959, 171 Cal. Rptr. 95* ; *see Munyon v. Ole's, Inc. (1982) 136 Cal. App. 3d 697, 702, 186 Cal. Rptr. 424* ; *Alma W. v. Oakland Unified Sch. Dist. (1981) 123 Cal. App. 3d 133, 143, 176 Cal. Rptr. 287* ; *Castro v. State of California (1977) 70 Cal. App. 3d 156, 159, 138 Cal. Rptr. 572]* .

In one case, for example, the court of appeal refused to apply the "commercial traveler rule," under which a workers' compensation claimant can be acting in the course and scope of employment during the entire period of travel on an employer's business, to a respondeat superior case. An employee who worked as a field service representative for an airplane manufacturer was in an automobile accident while getting food at a fast-food restaurant, hours after he stopped working for the day. The employee was not acting in the scope of employment, even though he was only in that particular city because he had been assigned there temporarily by his employer. The court noted that the activity of getting dinner at a restaurant was purely personal in nature and did not create a risk typical of or broadly incidental to the employee's employment [*Sunderland v. Lockheed Martin Aeronautical Sys. Support Co. (2005) 130 Cal. App. 4th 1, 10-12, 29 Cal. Rptr. 3d 665]* .

In another case, the court of appeal refused to apply the "premises line rule" in the respondeat superior context and held that an employer could not be vicariously liable for an employee's automobile accident that occurred while she was turning into the parking lot on the employer's premises. Under the premises line rule as applied in workers' compensation cases, the employment relationship begins when the employee enters the employer's premises, and injuries sustained in close proximity to the employer's premises may arise out of the employment if sustained in a parking lot used by employees or on public property immediately adjacent to the workplace. In rejecting application of the rule to respondeat superior cases, the court concluded that it would be an arbitrary expansion of employer liability to impose vicarious liability for events that happen to occur in public areas on or near their premises, if those events were neither typical of nor broadly incidental to the employer's particular enterprise [*Hartline v. Kaiser Found. Hosps. (2005) 132 Cal. App. 4th 458, 469-470, 33 Cal. Rptr. 3d 713]* .

[4] Going-and-Coming Rule

[a] Scope and Application

The "going-and-coming rule" is applied by courts to determine whether torts committed while an employee is

commuting or traveling constitute employee conduct within the scope of employment. Under the going-and-coming rule, an employee is outside the scope of employment while commuting to and from work, and the employer is not liable for the employee's torts committed during those times [*Ducey v. Argo Sales Co. (1979) 25 Cal. 3d 707, 722, 159 Cal. Rptr. 835, 602 P.2d 755* ; *Anderson v. Pacific Gas & Elec. Co. (1993) 14 Cal. App. 4th 254, 259, 17 Cal. Rptr. 2d 534* ; *Blackman v. Great American First Savings Bank (1991) 233 Cal. App. 3d 598, 602, 284 Cal. Rptr. 491* ; *Munyon v. Ole's, Inc. (1982) 136 Cal. App. 3d 697, 703, 186 Cal. Rptr. 424* ; *Castro v. State of California (1977) 70 Cal. App. 3d 156, 161, 138 Cal. Rptr. 572* ; *Robbins v. Hewlett-Packard Corp. (1972) 26 Cal. App. 3d 489, 493-494, 103 Cal. Rptr. 184* ; *Harris v. Oro-Dam Constructors (1969) 269 Cal. App. 2d 911, 912, 75 Cal. Rptr. 544]* . The rule does not apply when an employee is returning to, rather than commuting, to his or her place of employment [*Miller v. Stouffer (1992) 9 Cal. App. 4th 70, 80-81, 11 Cal. Rptr. 2d 454]* .

The going-and-coming rule also generally applies to an employee while he or she is traveling to or from lunch (or other meal periods), even if the employee is driving a vehicle owned by the employer, unless he or she is also performing an errand for the employer [*Peccolo v. City of Los Angeles (1937) 8 Cal. 2d 532, 539, 66 P.2d 651* ; *Tryer v. Ojai Valley Sch. (1992) 9 Cal. App. 4th 1476, 1482, 12 Cal. Rptr. 2d 114* ; *Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d 190, 209-210, 30 Cal. Rptr. 253* ; *see §§ 248.16[4][b]* and *248.16[6]* regarding the special errand exception to the going-and-coming rule and off duty employee and break time, respectively].

[b] Exception: Special Errand

If an employee pursues the employer's business during his or her commute time, the going-and-coming rule does not apply, and the employee is viewed as within the scope of employment during his or her entire commute period [*Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d 190, 210, 30 Cal. Rptr. 253]* . If an employee is not simply on the way from home to his or her normal place of work or returning from that place to home for his or her own purpose, but is coming from home or returning to it on a special errand either as part of regular duties or at the specific order or request of the employer, the employee is in the scope of employment from the start of the errand until he or she has returned or deviated from the scope of employment for personal reasons [*Boynton v. McKales (1956) 139 Cal. App. 2d 777, 789, 294 P.2d 733* ; *Anderson v. Pacific Gas & Elec. Co. (1993) 14 Cal. App. 4th 254, 259, 17 Cal. Rptr. 2d 534* (driving coworker to park and ride lot does not come within special errand exception even when employer encourages carpooling); *Blackman v. Great Am. First Sav. Bank (1991) 233 Cal. App. 3d 598, 602-603, 284 Cal. Rptr. 491* (travel to nonrequired but employer-compensated college classes not special errand)].

The special-errand exception applies both to employees who regularly perform work for their employer during commute periods, and to employees who only occasionally do so [*Boynton v. McKales (1956) 139 Cal. App. 2d 777, 789, 294 P.2d 733]* . Just as the going-and-coming rule applies to employees while commuting and during lunch hour break travel, the special-errand exception applies whether the employer's errands are performed during commute periods or during the employee's lunch period [*see Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d 190, 209-210, 30 Cal. Rptr. 253]* . For discussion of an employer's liability for torts committed while the employee is engaged in a social function, see *§ 248.16[5]*.

Even if the special-errand exception to the going-and-coming rule is found to be applicable, the employee may yet be found to be outside of the scope of employment if, at the time of the injury, the employee has completely abandoned the employer's business for personal reasons. To constitute an abandonment, however, the departure from the employer's business to pursue a personal errand must be substantial and complete. A mere deviation for personal reasons is insufficient. An employee who is pursuing a business errand and a personal objective simultaneously is still acting within the scope of employment [*Felix v. Asai (1987) 192 Cal. App. 3d 926, 932, 237 Cal. Rptr. 718* ; *see O'Connor v. McDonald's Rests. (1990) 220 Cal. App. 3d 25, 29 n.4, 269 Cal. Rptr. 101]* .

Whether there has been a deviation so material as to constitute a complete departure by the employee from the course of employment is usually a question of fact. If the evidence clearly shows a complete abandonment, however, the court

may make the determination that the employee is outside the scope of employment as a matter of law [*Loper v. Morrison (1944) 23 Cal. 2d 600, 605, 145 P.2d 1* ; *O'Connor v. McDonald's Rests. (1990) 220 Cal. App. 3d 25, 30, 269 Cal. Rptr. 101]* . Similarly, a court may find as a matter of law that a deviation is insufficiently material to relieve the employer of respondeat superior liability [*see* *Lazar v. Thermal Equip. Corp. (1983) 148 Cal. App. 3d 458, 462-467, 195 Cal. Rptr. 890* (court granted judgment notwithstanding verdict, finding employee within scope of employment)].

In making the determination, a variety of relevant circumstances should be considered and weighed. These factors may include (1) the intent of the employee; (2) the nature, time, and place of the employee's conduct; (3) the work that the employee was hired to do; (4) the incidental acts that the employer should reasonably have expected the employee to do; (5) the amount of freedom allowed the employee in performing his or her duties; and (6) the amount of time consumed in the personal activity [*Loper v. Morrison (1944) 23 Cal. 2d 600, 605-606, 145 P.2d 1* ; *O'Connor v. McDonald's Rests. (1990) 220 Cal. App. 3d 25, 30, 269 Cal. Rptr. 101* ; *Felix v. Asai (1987) 192 Cal. App. 3d 926, 932-933, 237 Cal. Rptr. 718]* . One court has cast the question as whether the employee's deviation was both minor and foreseeable [*see* *Lazar v. Thermal Equip. Corp. (1983) 148 Cal. App. 3d 458, 462-467, 195 Cal. Rptr. 890]* .

An employee's attendance at an out-of-town business conference authorized and paid for by the employer can be a special errand for the benefit of the employer under the special errand rule [*Jeewarat v. Warner Bros. Entertainment Inc. (2009) 177 Cal. App. 4th 427, 436, 98 Cal. Rptr. 3d 837*]. In such cases, the employee is in the course and scope of employment until the trip is completed. Thus, if the employee intends to drive from the airport to his or her residence at the end of the trip, in the absence of any intervening personal deviations, the special errand continues until the employee arrives at home. The fact that the employee may coincidentally pass his or her place of employment, without stopping, on the way home from the airport, and continue on from there by way of his or her normal commute path, does not change the result that the employee is considered in the course of employment until arriving at his or her residence [*Jeewarat v. Warner Bros. Entertainment Inc. (2009) 177 Cal. App. 4th 427, 438, 98 Cal. Rptr. 3d 837*].

[c] Exception: Travel Required by Job Duties

The going-and-coming rule was primarily intended to apply to employees with a single, fixed work location whose job duties do not include driving [*see* *Huntsinger v. Glass Containers Corp. (1972) 22 Cal. App. 3d 803, 809, 99 Cal. Rptr. 666* ; *Harris v. Oro-Dam Constructors (1969) 269 Cal. App. 2d 911, 916-917, 75 Cal. Rptr. 544]* . Therefore, there is an exception to the rule, apart from the special-errand exception, if the employer requires the employee to furnish a vehicle for use on the job [*Ducey v. Argo Sales Co. (1979) 25 Cal. 3d 707, 723, 159 Cal. Rptr. 835, 602 P.2d 755]* .

If a business enterprise requires an employee to drive to and from its office in order to have a vehicle available for company business during the day, the risk of accidents during commute time are risks incident to the business [*Singh v. Board of Ret. (1996) 41 Cal. App. 4th 1180, 1188, 49 Cal. Rptr. 2d 220* ; *State Farm Mut. Auto. Ins. Co. v. Haight (1988) 205 Cal. App. 3d 223, 242, 252 Cal. Rptr. 162* ; *Huntsinger v. Glass Containers Corp. (1972) 22 Cal. App. 3d 803, 810, 99 Cal. Rptr. 666]* . Courts have held that an employee whose regular job duties require frequent field work, customer contact, or travel between various locations of the employer is not subject to automatic application of the going-and-coming rule [*see* *Richards v. Metropolitan Life Ins. Co. (1941) 19 Cal. 2d 236, 241-242, 120 P.2d 650* (insurance salesperson not within going-and-coming rule as a matter of law); *Huntsinger v. Glass Containers Corp. (1972) 22 Cal. App. 3d 803, 806, 99 Cal. Rptr. 666* (employee who was required to perform service duties daily, meet customers at their offices, and appear daily at employer's main office for office work and staff meetings, and in addition frequently performed job assignments during commute hours and/or ran special errands for employer while commuting was within scope of employment); *see also* *Ducey v. Argo Sales Co. (1979) 25 Cal. 3d 707, 723, 159 Cal. Rptr. 835, 602 P.2d 755* (house cleaner who traveled from home to one of several employer properties each day, but was not required to go from one place to another during day nor to transport cleaning equipment between job locations was not within exception to going-and-coming rule because travel by personal auto was not inherent in employee's job)].

One court of appeal opinion has suggested that this required-vehicle exception to the coming-and-going rule applies only if the employer requires the use of a vehicle as an integral part of performing the job at disparate locations throughout the course of work hours [*Tryer v. Ojai Valley Sch. (1992) 9 Cal. App. 4th 1476, 1481-1482, 12 Cal. Rptr. 2d 114]* . However, that suggestion was rejected in a subsequent court of appeal decision in which the court concluded that if the employer requires or reasonably relies upon the employee to make his or her personal vehicle available for use for the employer's benefit, the fact that the employer only rarely makes use of the employee's personal vehicle should not, in and of itself, defeat application of the required-vehicle exception [*Lobo v. Tamco (2010) 182 Cal. App. 4th 297, 303, 105 Cal. Rptr. 3d 718]* . In that particular case, the court of appeal, when reversing a summary judgment that had been granted in favor of the employer, noted that the fact that the personal vehicle was needed only rarely when the employee performed his work duties was one of the reasons that the employer required the employee to use his own car and a company car was not provided [*Lobo v. Tamco (2010) 182 Cal. App. 4th 297, 303, 105 Cal. Rptr. 3d 718]* .

[d] Exception: Employer Pays for Employee's Commute Time

The going-and-coming rule may be inapplicable in some instances if the employer compensates the employee for his or her work time. If the commute period is made part of the employee's paid workday, the employee remains within the scope of employment during commute periods, and the employer is therefore liable for its employee's torts as long as the employee was using the commute portion of his or her paid workday for its designated purpose. Employer liability is supported by the rationale that the employer chooses to compensate its employees for commute time because the arrangement benefits the employer by geographically expanding the size of the employer's employee-selection pool [*Hinman v. Westinghouse Elec. Co. (1970) 2 Cal. 3d 956, 962, 88 Cal. Rptr. 188, 471 P.2d 988]* .

The California Supreme Court has expressly reserved the question of whether the mere payment of travel expenses, without additional payment for the employee's travel time, reflects a sufficient benefit for the employer so that the employer should bear responsibility to innocent third parties for the risks inherent in the travel. The Court did cite a workers' compensation case that had suggested that the payment of travel expenses must be a substantial inducement to accept the employment, and the place of employment must be an extensive distance from the employee's home, for the going-and-coming rule to be held inapplicable [*Hinman v. Westinghouse Elec. Co. (1970) 2 Cal. 3d 956, 962-963, 88 Cal. Rptr. 188, 471 P.2d 988* ; *see Zenith Nat'l Ins. Co. v. Workmen's Comp. Appeals Bd. (1967) 66 Cal. 2d 944, 947-948, 59 Cal. Rptr. 622, 428 P.2d 606* (payment of $10 per day to induce employee to commute 130 miles sufficient to hold injury during commute within scope of employment for purposes of workers' compensation benefits); *cf. Anderson v. Pacific Gas & Elec. Co. (1993) 14 Cal. App. 4th 254, 259, 17 Cal. Rptr. 2d 534* (employer's payment of travel expenses did not bring employee's commute time within scope of employment under tort law even though it allowed employee to receive workers' compensation benefits); *see also Harris v. Oro-Dam Constructors (1969) 269 Cal. App. 2d 911, 917-918, 75 Cal. Rptr. 544* (obtaining of travel-expense benefit in by collective bargaining, standing alone, does not automatically make commuting employees within scope of employment)].

[e] Exception: Special Risk Created by Employment

Under another exception to the going-and-coming rule, one that originated in the workers' compensation context, an employer may be liable for injuries arising from a special risk related to the employment, if the employee would not have been at the scene of the injury but for the employment and if the risk is distinctive in nature or qualitatively greater than risks common to the general public [*see Depew v. Crocodile Enters., Inc. (1998) 63 Cal. App. 4th 480, 487, 73 Cal. Rptr. 2d 673]* . The key inquiry, assuming the link to employment is established, is whether the risk of injury from the employee's conduct was foreseeable. The risk is foreseeable if, in the context of the particular enterprise, the employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from the conduct among other costs of the employer's business [*Bussard v. Minimed, Inc. (2003) 105 Cal. App. 4th 798, 804, 129 Cal. Rptr. 2d 675]* .

In one case, for example, an employee who left work complaining of illness after being exposed to pesticide fumes for several hours caused an automobile accident, allegedly because she was feeling dizzy and lightheaded. The trial court granted summary judgment for the employer under the going-and-coming rule, but the court of appeal reversed. The court of appeal concluded that the work site pesticide exposure caused a special risk of danger, it was foreseeable that an employee might not be fit to drive after such exposure, and the occurrence of a car accident under those circumstances was not so startling or unusual as to be unforeseeable [*Bussard v. Minimed, Inc. (2003) 105 Cal. App. 4th 798, 806, 129 Cal. Rptr. 2d 675]* . The fact that the employer inquired whether the employee was able to drive safely was not relevant to the imposition of liability under a theory of respondeat superior, because foreseeability of risk arising from or connected to work required no more than a causal connection between a work-related event and the employee's subsequent injury-causing act [*Bussard v. Minimed, Inc. (2003) 105 Cal. App. 4th 798, 806, 129 Cal. Rptr. 2d 675]* .

In another case, by contrast, the court of appeal held that an insufficient link existed between the employment and a death caused by a fatigued employee driving home after working a six-hour shift. In that case, the employee had worked a double shift on the day before the accident, but he had 16 hours off work prior to working the last six-hour shift [*Depew v. Crocodile Enters., Inc. (1998) 63 Cal. App. 4th 480, 488-489, 73 Cal. Rptr. 2d 673]* .

[5] Social Functions

California appellate courts have held that attendance at social events, although not part of an employee's normal job duties, may in some instances come under the "special-errand" exception to the going-and-coming rule [*see* *Robbins v. Hewlett-Packard Corp. (1972) 26 Cal. App. 3d 489, 494, 103 Cal. Rptr. 184* ; *Boynton v. McKales (1956) 139 Cal. App. 2d 777, 789, 294 P.2d 733]* . For a social event to qualify as a special errand, the event must be related to the employee's employment and provide an intended direct or indirect benefit to the employer [*Robbins v. Hewlett-Packard Corp. (1972) 26 Cal. App. 3d 489, 495, 103 Cal. Rptr. 184]* . Whether or not a particular social event is within the scope of employment is generally a question of fact [*Robbins v. Hewlett-Packard Corp. (1972) 26 Cal. App. 3d 489, 495, 103 Cal. Rptr. 184* (employee returning from employer-sponsored annual summer picnic not within scope of employment in that attendance at picnic was voluntary, picnic lacked educational or awards presentations, and bore no relationship to employees' continued employment, performance evaluation, or promotional opportunities); *Boynton v. McKales (1956) 139 Cal. App. 2d 777, 790, 294 P.2d 733* (annual employer-sponsored banquet at which employee became intoxicated held to have benefited employer by promoting sales program and continuity of employment)].

Informal social activity at the workplace may also raise the potential for employer liability. Employers have been held liable to injured employees or third parties if after-hours socializing and the furnishing of alcohol occurs with the express or implied permission of the employer, and accidents or physical altercations occur. The foreseeability of fights and other injuries resulting from drinking may support the imposition of liability on the employer if injuries do occur, especially if the employees are encouraged to remain near the jobsite so that the employer may more readily recall them to work [*see* *Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 619-621, 124 Cal. Rptr. 143]* ; *see also Harris v. Trojan Fireworks Co. (1981) 120 Cal. App. 3d 157, 164-165, 174 Cal. Rptr. 452* (allegations that employer encouraged consumption of alcohol at on-premises social function during normal work hours sufficient to survive demurrer in case involving decedent killed by drunken employee driving home afterwards)].

It has been held, however, that a plaintiff must show more than employee drinking on the employer's premises with the tacit acquiescence of the employer. There must be some endorsement of the drinking as a company activity that is viewed as of some benefit to the employer or as a customary incident of the employment relationship [*Harris v. Trojan Fireworks Co. (1984) 155 Cal. App. 3d 830, 836-837, 202 Cal. Rptr. 440* (employer not liable for death caused by drunken employee after leaving on-premises, alcohol-free luncheon hosted by employer because employee purchased alcohol off-site and consumed it in employer's parking lot); *Calrow v. Appliance Indus., Inc. (1975) 49 Cal. App. 3d 556, 570-571, 122 Cal. Rptr. 636* (employee was off-duty and on employer's premises for wholly personal

reasons and was supplied with liquor by another off-duty employee); *see McCarty v. Workmen's Comp. Appeals Bd. (1974) 12 Cal. 3d 677, 681-682, 117 Cal. Rptr. 65, 527 P.2d 617* (workers' compensation case establishing when on-site drinking is within scope of employment)].

[6] Off-Duty and Break Time

Generally, the going-and-coming rule encompasses the time that an employee takes away from work for meals. Under the "lunch-break" rule, the employer is not vicariously liable for the negligence of an employee who is not in the service of his or her employer while taking time away from work for meals [*Peccolo v. City of Los Angeles (1937) 8 Cal. 2d 532, 539, 66 P.2d 651* ; *Tryer v. Ojai Valley Sch. (1992) 9 Cal. App. 4th 1476, 1482, 12 Cal. Rptr. 2d 114]* . However, in some instances, an employee may be found to be acting within the scope of employment for purposes of respondeat superior even during the employee's lunch hour or off-duty hours [*see Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d 190, 209-210, 30 Cal. Rptr. 253]* . If the employee combines his or her break time with accomplishment of employer business, the employee remains within the scope of employment for the duration of the relevant break period. Thus, meal and break periods are treated similarly to commute time [*see § 248.16[1], [4]*]. The employee remains within the scope of employment in both situations unless the employee totally departs from the employment-related purposes of his or her multipurpose mission [*Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d 190, 210-213, 30 Cal. Rptr. 253]* .

Employer liability for the torts of employees may also apply, under appropriate circumstances, to employee conduct occurring during employees' off-duty hours. Employees who are off-duty at home, but also "on call" for employer business, are acting within the scope of employment while going to, performing, and returning home from a service call for the employer [*Robinson v. George (1940) 16 Cal. 2d 238, 245, 105 P.2d 914]* . A public entity may be vicariously liable for the conduct of an off-duty law enforcement officer in the course of making an arrest [*Inouye v. County of Los Angeles (1994) 30 Cal. App. 4th 278, 282-284, 35 Cal. Rptr. 2d 367* ; *cf. Henriksen v. City of Rialto (1993) 20 Cal. App. 4th 1612, 1617-1622, 25 Cal. Rptr. 2d 308* (city not liable for negligent handling of service revolver by off duty officer not then engaged in any law enforcement activity)].

However, an employee who has been furnished with a company vehicle and is on call while at home does not bring 24-hour employer liability [*Le Elder v. Rice (1994) 21 Cal. App. 4th 1604, 1609-1610, 26 Cal. Rptr. 2d 749]* . The focus is strictly on the employee's purpose at the time of the injury-producing accident, and there is no employer liablity if the employee's use of the vehicle at that time was purely personal [*Le Elder v. Rice (1994) 21 Cal. App. 4th 1604, 1609-1610, 26 Cal. Rptr. 2d 749* (involving employee' use of company vehicle for personal errand from and back to home); *but see Lazar v. Thermal Equip. Corp. (1983) 148 Cal. App. 3d 458, 462-467, 195 Cal. Rptr. 890* (involving employee on way home from work in company vehicle, which was for his use for emergency after-hour calls; court determined that employee's purpose at time of accident was "minor deviation" rather than "substantial departure" from employer's business based on foreseeability)].

An employee may be in the course and scope of employment while making a business call on his or her cell phone while driving his or her personal vehicle. For example, respondeat superior liability will probably attach if the driver causes an accident while talking on the cell phone for the employer [*see Miller v. American Greetings Corp. (2008) 161 Cal. App. 4th 1055, 1063, 74 Cal. Rptr. 3d 776*]. However, the mere fact that the employee made a work-related call during a trip that is otherwise a personal trip will not necessarily support a finding of employer liability. In one case, for example, the court held as a matter of law that an employer could not be held vicariously liable when the evidence indicated that an employee accidentally hit plaintiff with his car approximately eight minutes after engaging in a brief work-related cell phone call from his vehicle. Despite the fact that the employee regularly used his own vehicle and cell phone to conduct his business for his employer, the employee's uncontradicted testimony was that he was on his way to see an attorney for personal reasons at the time of the accident and was distracted when he looked down to find the attorney's address [*Miller v. American Greetings Corp. (2008) 161 Cal. App. 4th 1055, 1062-1063, 74 Cal. Rptr. 3d 776*].

Respondeat superior liability may arise for conduct committed by an employee on the work premises, but after work hours have ended. The employer may be liable if the employee's presence is endorsed by the express or implied permission of the employer, and the employer either receives a benefit from the employee's presence or the employee's presence is a customary incident of the employment relationship [*Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 620, 124 Cal. Rptr 143* (employer liable for assault committed by employee who remained on job site after hours to drink and socialize)]. However, an off-duty employee who travels to his or her employer's premises for his or her own purposes, and in the course of doing so commits a tort, remains outside of the scope of employment [*Munyon v. Ole's, Inc. (1982) 136 Cal. App. 3d 697, 700-701, 706, 186 Cal. Rptr. 424]* .

As with scope-of-employment questions generally, the determination of whether a tort committed during an employee's off-duty time is within the scope of employment is ordinarily a question of fact [*Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d 190, 210-211, 30 Cal. Rptr 253]* . However, it becomes a question of law if the undisputed facts will not support an inference that the employee was acting within the scope of employment [*Henriksen v. City of Rialto (1993) 20 Cal. App. 4th 1612, 1617, 25 Cal. Rptr. 2d 308* ; *see also* *Le Elder v. Rice (1994) 21 Cal. App. 4th 1604, 1607-1608, 26 Cal. Rptr. 2d 749]* .

[7] On-Duty Employee Conduct Unrelated to Employment

[a] Personally Motivated Acts

Employers are not automatically vicariously liable for employee torts simply because the tort occurs on the employer's premises and while the employee is on duty. If the employee's acts are motivated by personal concerns and conduct unrelated to the employee's employment, the employee may be found to have acted outside of the scope of employment [*see* Lisa M. v. Henry Mayo Newhall Mem'l Hosp. (Dec. 26, 1995, No. S043581) *12 Cal. 4th 291, 299-302, 48 Cal. Rptr. 2d 510, 907 P.2d 358* (molestation by hospital technician); *Jeffrey E. v. Central Baptist Church (1988) 197 Cal. App. 3d 718, 721, 243 Cal. Rptr. 128* (molestation by church worker); *Alma W. v. Oakland Unified Sch. Dist. (1981) 123 Cal. App. 3d 133, 140, 176 Cal. Rptr. 287* (molestation by janitor); *Golden W. Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 957, 171 Cal. Rptr. 95* (personal quarrel and assault unrelated to employment or employment-related dispute)]. For further discussion of employer liability for intentional torts, see *§ 248.17*.

[b] Personal Errands

A substantial deviation or departure by an employee from the employer's business takes the employee outside the scope of employment. If the main purpose of the activity is the employer's business, it does not cease to be within the scope of employment by reason of incidental personal acts, slight delays, or deflections from the most direct route. A personal errand during employment hours continues to be within the scope of employment as long as it is a foreseeable and minor deviation from the employer's business. A decision to stop at a party or a bar, or to begin a vacation, may not be foreseeable. However, a stop at a store to purchase a few items is a foreseeable deviation, which is insufficient to defeat respondeat superior liability [*Miller v. Stouffer (1992) 9 Cal. App. 4th 70, 78-79, 11 Cal. Rptr. 2d 454* ; *State Farm Mut. Auto. Ins. Co. v. Haight (1988) 205 Cal. App. 3d 223, 242-243, 252 Cal. Rptr. 162* ; *Lazar v. Thermal Equip. Corp. (1983) 148 Cal. App. 3d 458, 466, 195 Cal. Rptr. 890]* .

[c] Effect of Employee Violation of Employer's Rules or Instructions

Respondeat superior liability does not depend on the employee's specific authority to perform the act that results in the plaintiff's injury [*Foss v. Anthony Indus. (1983) 139 Cal. App. 3d 794, 801-802, 189 Cal. Rptr. 31* (citing *De Mirjian v. Ideal Heating Corp. (1954) 129 Cal. App. 2d 758, 765, 278 P.2d 114*)]. Even the fact that the employee's conduct is contrary to the employer's instructions, alone, does not take the employee outside the scope of employment for purposes of respondeat superior liability [*Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 968-971, 227 Cal. Rptr. 106, 719 P.2d 676* ; *Foss v. Anthony Indus. (1983) 139 Cal. App. 3d 794, 802, 189 Cal. Rptr. 31* ; *see* *Ingle v. Bay*

Cities Transit Co. (1945) 72 Cal. App. 2d 283, 286-287, 164 P.2d 508 (employee insubordination is insufficient to sever employment relationship absent showing that employee was validly terminated prior to doing act that caused injury)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 248 EMPLOYER'S LIABILITY FOR EMPLOYEE'S TORTS
PART II. LEGAL BACKGROUND

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§ 248.17 Employer Liability for Intentional Torts

[1] In General

Generally, an employer is vicariously liable for employee torts committed within the scope of employment, regardless of whether the employee's conduct is characterized as negligent or as intentionally tortious [*see Golden W. Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 956-957, 171 Cal. Rptr. 95* ; *Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 621, 124 Cal. Rptr. 143]* . The basic standard to be applied in cases of intentional torts is the same as in cases of unintentional torts [*see § 248.16*, for discussion of employee conduct within the scope of employment].

As in the case of a unintentional tort, in order to prevail in an action seeking to impose vicarious liability on the employer for an employee's intentional tort, the plaintiff must first establish the existence of an employer-employee relationship between the tortfeasor and the person or entity alleged to be vicariously liable [*see Garton v. Title Ins. & Trust Co. (1980) 106 Cal. App. 3d 365, 375, 165 Cal. Rptr. 449]* . For discussion of the factors involved in establishing such a relationship, see *§ 248.15*.

If a statute governs the liability of a specific employer, that employer cannot be held strictly liable for the intentional torts of an employee that are committed outside the scope of employment, unless the statute clearly demonstrates a legislative intent to abrogate the common law rule that an employer is vicariously liable only if the employee's conduct was within the scope of employment [*see Borg-Warner Protective Servs. Corp. v. Superior Court (1999) 75 Cal. App. 4th 1203, 1207-1212, 89 Cal. Rptr. 2d 687]* . In one case, for example, the plaintiff had contracted for security guards to be provided by the defendant and sought to hold the defendant strictly liable for arson committed by one of the guards, even though the arson was outside the scope of the guard's employment. The plaintiff relied on a statute that made a licensed security guard company "at all times ... legally responsible for the good conduct in the business of each of his

or her employees or agents" [*see Bus. & Prof'l Code § 7582.15*], arguing that the statute made the defendant strictly liable for all actionable conduct regardless of whether the defendant's employee was acting within the scope of employment. The court of appeal disagreed, however, concluding that the legislature was merely codifying the common law rule as to these particular employees and did not intend to abolish the requirement that the actionable conduct occur in the scope of employment in order to impose vicarious liability [*Borg-Warner Protective Servs. Corp. v. Superior Court (1999) 75 Cal. App. 4th 1203, 1207-1210, 89 Cal. Rptr. 2d 687]* .

[2] Assault and Battery

In determining whether an assault or battery was committed within the scope of employment, the courts have generally focused on two factors: (1) the nature of the employee's duties, and (2) the source of any dispute that led to the assault or battery. If the employee's job duties involve the possibility of force being used against others, the employer may be held vicariously liable for the employee's wrongful or excessive use of force in carrying out his or her duties [*see Golden W. Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 957, 171 Cal. Rptr. 95* ; *Monty v. Orlandi (1959) 169 Cal. App. 2d 620, 624, 337 P.2d 861* ; *Haworth v. Elliott (1944) 67 Cal. App. 2d 77, 81, 153 P.2d 804* ; *see also Jameson v. Gavett (1937) 22 Cal. App. 2d 646, 651, 71 P.2d 937* (employer who encouraged workers to expel trespassers held vicariously liable to trespasser-plaintiff; although security and trespasser control were not within tortfeasor's express job duties, employer encouraged employees to perform such tasks and tortfeasor acted in prosecution of employer's business when he assaulted plaintiff)]. For example, an employer who operates a bar may be vicariously liable for the excessive use of force by a "bouncer" in ejecting a patron from the employer's premises [*see, e.g., Johnson v. Monson (1920) 183 Cal. 149, 151, 190 P. 635* ; *Haworth v. Elliott (1944) 67 Cal. App. 2d 77, 81-82, 153 P.2d 804]* .

Even if the employee's job duties do not require or contemplate the use of force, however, a battery may be held to be committed within the scope of employment if it arose out of a dispute that was work-related or that arose in the course of the performance of the employee's job duties [*see, e.g., Fields v. Sanders (1947) 29 Cal. 2d 834, 841-842, 180 P.2d 684* (employee truck driver assaulted another person during dispute over traffic mishap); *Carr v. Wm. C. Crowell Co. (1946) 28 Cal. 2d 652, 657, 171 P.2d 5* (employer vicariously liable for employee throwing hammer at employee of another contractor after dispute related to job performance); *Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 621-624, 124 Cal. Rptr.143* (battery on jobsite after hours arose in part because of dispute over rights and duties of employees); *Stansell v. Safeway Stores, Inc. (1941) 44 Cal. App. 2d 822, 825-826, 113 P.2d 264* (dispute between store employee and customer over customer's order); *Hiroshima v. Pacific Gas & Elec. Co. (1936) 18 Cal. App. 2d 24, 27-32, 63 P.2d 340* (dispute over collection by employee of employer's bill)].

An employee who commits an assault or battery while working will not be deemed to be acting within the scope of employment if the conduct is not incidental to the employee's duties or is the result of personal malice not engendered by the employment [*see, e.g., Golden W. Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 957-958, 171 Cal. Rptr. 95* (broadcast employee who engaged in fistfight not related to employment while off duty and drinking in bar was not acting within scope of employment, even though employment brought employee to area and employer furnished employee with company car and per diem payment); *Monty v. Orlandi (1959) 169 Cal. App. 2d 620, 624, 337 P.2d 861* (although ejecting disorderly patrons was within bartender's duties, when he ejected his wife over personal dispute and injured bystander, employer was not vicariously liable for bystander's injuries)].

Numerous cases have addressed whether a sexual assault committed by an employee can be within the scope of employment. In *John R. v. Oakland Unified Sch. Dist. (1989) 48 Cal. 3d 438, 256 Cal. Rptr. 766, 769 P.2d 948* , the California Supreme Court held that a sexual assault committed by a public school teacher is not within the scope of employment because the act is in no way incident to any duties that a teacher is engaged to perform and may not fairly be said to be a foreseeable risk inherent in the teacher's activities [*John R. v. Oakland Unified Sch. Dist. (1989) 48 Cal. 3d 438, 447-452, 256 Cal. Rptr. 766, 769 P.2d 948* (molestation of 14-year-old student participating in school-approved program conducted at teacher's residence)]. Appellate courts have reached the same conclusion in

several different situations [*see John Y. v. Chaparral Treatment Ctr., Inc. (2002) 101 Cal. App. 4th 565, 575-576, 124 Cal. Rptr. 2d 330* (sexual molestation of boy by counselor at residential facility for emotionally disturbed children); *Juarez v. Boy Scouts of Am., Inc. (2000) 81 Cal. App. 4th 377, 394-395, 97 Cal. Rptr. 2d 12* (sexual assault of boy scout by adult troop leader); *Debbie Reynolds Prof'l Rehearsal Studios v. Superior Court (1994) 25 Cal. App. 4th 222, 226-229, 30 Cal. Rptr. 2d 514* (sexual assault on minor dance student by instructor in trailer provided by employer); *Kimberly M. v. Los Angeles Unified Sch. Dist. (1989) 215 Cal. App. 3d 545, 547-549, 263 Cal. Rptr. 612* (molestation of five-year-old student by teacher on school premises); *Jeffrey E. v. Central Baptist Church (1988) 197 Cal. App. 3d 718, 722-724, 243 Cal. Rptr. 128* (molestation of child by volunteer Sunday school teacher during church-sponsored home visitations)].

In *John R.*, the Court rejected the view that the inherent authority exercised by a teacher over his or her students should make the employer liable for acts done during the exercise of that authority. Instead, the Court found that the public policies behind the doctrine of respondeat superior--incentive for accident prevention, assurance of compensation for victims, and distribution of loss--would not be advanced by holding school districts liable for sexual assault by teachers [*John R. v. Oakland Unified Sch. Dist. (1989) 48 Cal. 3d 438, 451-452, 256 Cal. Rptr. 766, 769 P.2d 948* ; *see Kimberly M. v. Los Angeles Unified Sch. Dist. (1989) 215 Cal. App. 3d 545, 547-549, 263 Cal. Rptr. 612* (refusing to find any distinction based on youth of victim or whether molestation was on or off employer's premises)].

However, in *Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 285 Cal. Rptr. 99, 814 P.2d 1341* , the Court reached the opposite conclusion in the case of a sexual assault by an on-duty police officer following a traffic stop. The Court observed that a police officer who detains an individual is acting as the official representative of the state, with all of its coercive power. Inherent in that power is the potential for abuse [*Mary M. v. City of L.A. (1991) 54 Cal. 3d 202, 216-217, 285 Cal. Rptr. 99, 814 P.2d 1341]* . In view of the considerable power and authority that police officers possess, it is neither startling nor unexpected that, on occasion, an officer will misuse that authority by engaging in assaultive conduct. The risk of such tortious conduct is broadly incidental to the enterprise of law enforcement, and, thus, liability for such acts may be imposed on the employing public entity [*Mary M. v. City of L.A. (1991) 54 Cal. 3d 202, 217-218, 285 Cal. Rptr. 99, 814 P.2d 1341* ; *accord, White v. County of Orange (1985) 166 Cal. App. 3d 566, 571-572, 212 Cal. Rptr. 493* ; *cf. K. G. v. County of Riverside (2003) 106 Cal. App. 4th 1374, 1382-1383, 131 Cal. Rptr. 2d 762* (county not vicariously liable for off-duty deputy's sexual assaults on own stepdaughter, even though deputy used authority as officer to intimidate stepdaughter); *Thorn v. City of Glendale (1994) 28 Cal. App. 4th 1379, 1382-1384, 35 Cal. Rptr. 2d 1* (refusing to extend rule of *Mary M.* to city fire marshall who allegedly committed arson while on premises under color of authority to conduct fire inspection)]. The Court found that imposition of liability would encourage the employer to take preventive measure and would provide compensation for victims of police misconduct, and that the cost resulting from the misuse of police power should be borne by the community at large because of the substantial benefits that the community derives from the lawful exercise of police power [*Mary M. v. City of L.A. (1991) 54 Cal. 3d 202, 216-217, 285 Cal. Rptr. 99, 14 P.2d 1341]* .

By contrast, the court of appeal has held that the private employer of an on-duty security guard was not liable for a sexual assault committed by the uniformed and armed guard after he pulled over the victim while she was driving down the highway. In that case, although the assault may not have occurred but for the employment, the guard's decision to assault the victim was strictly personal and did not arise out of the guard's duties [*Maria D. v. Westec Residential Sec., Inc. (2000) 85 Cal. App. 4th 125, 146-147, 102 Cal. Rptr. 2d 326]* . The court ruled that the Supreme Court's decision in *Mary M.* did not support a finding of vicarious liability, because the assault in this case did not arise from the misuse of authority uniquely conferred on a public law enforcement officer and because the guard was not acting as an official representative of the state at the time of the assault [*Maria D. v. Westec Residential Security, Inc. (2000) 85 Cal. App. 4th 125, 146, 102 Cal. Rptr. 2d 326]* .

In a case that questions whether the *Mary M.* holding would still receive the support of a majority of the Supreme Court, the court of appeal has also rejected an attempt to extend that holding to a sexual assault committed by firefighters, even if the firefighters were on duty at the time of the assault, noting that the firefighters had no coercive authority over the

victim and did not purport to detain the victim in the course of any investigation or even while performing any official duties [*M.P. v. City of Sacramento (2009) 177 Cal. App. 4th 121, 130-133, 98 Cal. Rptr. 3d 812*].

The court of appeal also held that a city was not vicariously liable for an on-duty police officer's engaging in consensual sexual activities with two female minors who were on patrol with the officer as part of a program designed to encourage teenagers to consider careers in law enforcement. The court in that case concluded that because the officer was engaged in supervising and training the two young women when the sexual conduct occurred, making the relationship akin to that of supervisor and employee, and because the officer did not exert police authority over the young women to coerce them to take part in the sexual conduct, the conduct was not within the course of the officer's employment, and the city therefore could not be vicariously liable [Doe 1 v. *City of Murrieta (2002) 102 Cal. App. 4th 899, 908-910, 126 Cal. Rptr. 2d 213]* .

[3] Sexual Harassment

Employer liability for sexual harassment is addressed by statute. Under the Fair Employment and Housing Act (FEHA), harassment of an employee, an applicant, or a person providing services pursuant to a contract, by an employee other than an agent or supervisor, is unlawful if the employer, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action [*Gov. Code § 12940(j)(1)*]. This language has been construed as imposing a rule of strict employer liability for harassing conduct by a supervisor. The fact that the employer may have a rule prohibiting such conduct is of no import [*Kelly-Zurian v. Wohl Shoe Co. (1994) 22 Cal. App. 4th 397, 414-417, 27 Cal. Rptr. 2d 457]* .

The liability imposed by the FEHA is direct employer liability [*see Farmers Ins. Group v. County of Santa Clara (1995) 11 Cal. 4th 992, 1014, n.12, 47 Cal. Rptr. 2d 478, 906 P.2d 440]* . If the statutory standard does not apply, the California Supreme Court has held that there is no common law vicarious liability on the employer for sexual harassment by an employee. For the purposes of respondeat superior, employees do not act within the scope of employment when they abuse job-created authority over others for purely personal reasons [*Farmers Ins. Group v. County of Santa Clara (1995) 11 Cal. 4th 992, 1014, n.12, 47 Cal. Rptr. 2d 478, 906 P.2d 440* (construing *Gov. Code § 825.2* (imposing duty on employer to indemnify employee for any liability incurred within scope of employment))].

Civ. Code § 51.9 provides a remedy for sexual harassment that is not limited to conduct between employees. It addresses sexual harassment in business, service, and professional relationships [*see Civ. Code § 51.9(a)*].

PRACTICE TIP:

Employer May Have Defense to Imputed Liability for Sexual Harassment of Third Parties. *Civil Code § 51.9* provides a remedy for sexual harassment that is not confined to conduct between employees. However, it would appear that the exculpatory rationale of *Farmers Ins. Group v. County of Santa Clara (1996)11 Cal. 4th 992, 47 Cal. Rptr. 2d 478, 906 P.2d 440* , and *Lisa M. v. Henry Mayo Newhall Mem'l Hosp. (1996) 12 Cal. 4th 291, 48 Cal. Rptr. 2d 510, 907 P. 2d 358* , would also apply to respondeat superior claims brought pursuant to *Civil Code § 51.9. By Richard P. Hill*

For extensive discussion of California and federal law relating to sexual harassment, together with related forms, see Ch. 116, *Civil Rights: Discrimination in Business Establishments* ,.

[4] Other Intentional Torts

Employers have been found liable under respondeat superior for an employee's fraud [*see Alhino v. Starr (1980) 112 Cal. App. 3d 158, 173-174, 169 Cal. Rptr. 136]* , intentional infliction of emotional distress [*see Agarwal v. Johnson (1979) 25 Cal. 3d 932, 945-947, 160 Cal. Rptr. 141, 603 P.2d 58* ; *see also Fisher v. San Pedro Peninsula Hosp. (1989) 214 Cal. App. 3d 590, 618, 262 Cal. Rptr. 842* (hostile work environment that constitutes sexual harassment in

violation of Fair Employment and Housing Act, *Gov. Code § 12900 et seq.*, also constitutes intentional infliction of emotional distress)], malicious prosecution [*see Shoopman v. Pacific Greyhound Lines (1959) 169 Cal. App. 2d 848, 855-856, 338 P.2d 3]* , inducement of breach of contract [*see* Pratt v. Local 683, *Film Technicians (1968) 260 Cal. App. 2d 545, 563, 67 Cal. Rptr. 483]* , defamation [*see Di Giorgio Fruit Corp. v. AFL-CIO (1963) 215 Cal. App. 2d 560, 576, 30 Cal. Rptr. 350]* , and false imprisonment [*see Hanna v. Raphael Weill & Co. (1949) 90 Cal. App. 2d 461, 463-464, 203 P.2d 564]* .

PRACTICE TIP:

Evaluate Whether Plaintiff Suing Co-employee Should Allege Respondeat Superior. There will be times when plaintiff's counsel will want to be careful to plead and prove that an employee was *not* acting within the course and scope of his or her employment, and *not* for the employer's business purposes, when engaging in certain conduct. For instance, a plaintiff employee may seek to impose liability on another employee for intentionally interfering with the plaintiff's contract of employment with the employer. For such a claim to be viable, the defendant individual employee has to have been acting for his or her own selfish and improper purposes independent of the employer's business interests. *By Richard P. Hill*

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationHarassmentSexual HarassmentEmployer LiabilityCoworkersLabor & Employment LawDiscriminationHarassmentSexual HarassmentEmployer LiabilitySupervisorsTortsVicarious LiabilityEmployersActivities & ConditionsCriminal ActsTortsVicarious LiabilityEmployersActivities & ConditionsIntentional TortsTortsVicarious LiabilityEmployersScope of EmploymentPersonal Activities

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 248 EMPLOYER'S LIABILITY FOR EMPLOYEE'S TORTS
PART II. LEGAL BACKGROUND

21-248 California Forms of Pleading and Practice--Annotated § 248.18

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§ 248.18 Employer Liability for Punitive Damages

[1] General Requirements

The purpose of compensatory damages is to indemnify plaintiff for losses caused by another's tortious conduct [*see Civ. Code § 3333*; *Mozzetti v. City of Brisbane (1977) 67 Cal. App. 3d 565, 576, 136 Cal. Rptr. 751* ; *see generally* Levy, Golden & Sacks, California Torts, Ch. 50, pt. A (Matthew Bender)]. In contrast, the purpose of punitive or exemplary damages is to punish the defendant and to deter the recurrence of similar conduct by the defendant or others [*see Civ. Code § 3294(a)*; *Neal v. Farmers Ins. Exch. (1978) 21 Cal. 3d 910, 928 n.13, 148 Cal. Rptr. 389, 582 P.2d 980* ; *see generally* Levy, Golden & Sacks, California Torts, Ch. 54 (Matthew Bender)].

Liability for punitive damages is based on the defendant's having been found guilty of oppression, fraud, or malice [*see Civ. Code § 3294(a)*]. Although an employer may be held vicariously liable (that is, without having personally committed any tort) for compensatory damages caused by an employee's torts committed within the scope of employment, courts have traditionally been reluctant to impose punitive damages on an employer on the basis of an employee's conduct if there is no evidence of the employer's own participation in the tort [*see, e.g., Ebaugh v. Rabkin (1972) 22 Cal. App. 3d 891, 894-895, 99 Cal. Rptr. 706* (no employer liability for punitive damages absent direction or ratification of wrongful act)].

An employer may not be held liable for punitive damages based on acts of an employee unless the employer (1) had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard for the rights or safety of others; (2) authorized or ratified the employee's wrongful conduct for which the punitive damages are awarded; or (3) was personally guilty of oppression, fraud, or malice [*Civ. Code § 3294(b)*]. Unless one of the above criteria is satisfied, an employer cannot be liable for punitive damages based solely on the conduct of its employee, no matter how malicious or oppressive its employee's conduct may have been [*see Foley v. Martin (1904) 142 Cal. 256,*

261-262, 71 P. 165 ; *Hale v. Farmers Ins. Exch. (1974) 42 Cal. App. 3d 681, 690, 117 Cal. Rptr. 146 , disapproved on other grounds, Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822 n.5, 157 Cal. Rptr. 482, 598 P.2d 452*)]. If, however, the employee is determined to be acting under the direction of the employer, then the employer participates in the act; and the employer's liability is based not on the acts of the employee, but on its own separate culpability. In such a case, punitive damages may be awarded against the employer even if none are assessed against the employee [*Roberts v. Ford Aerospace & Commc'ns Corp. (1990) 224 Cal. App. 3d 793, 800-802, 274 Cal. Rptr. 139]* .

For forms of allegations to recover punitive damages from an employer based on the acts of an employee, see *§ 248.44*.

[2] Additional Requirements for Holding Corporate Employers Liable for Punitive Damages

If punitive damages are sought against a corporate employer, the plaintiff must prove that an officer, director, or "managing agent" of the corporation (1) had advance knowledge of the unfitness of the employee and acted with the requisite conscious disregard for the rights or safety of others; (2) authorized or ratified the employee's conduct; or (3) personally committed an act of oppression, fraud, or malice [*Civ. Code § 3294(b)*; *see Kelly-Zurian v. Wohl Shoe Co. (1994) 22 Cal. App. 4th 397, 420-421, 27 Cal. Rptr. 2d 457* (noting that ratification need not be shown if conduct is of officer, director, or managing agent, and criticizing *BAJI No. 14.73.1*)].

A "managing agent" of a corporation, for purposes of establishing an entitlement to punitive damages under these provisions, includes only those corporate employees who exercise substantial independent authority and judgment in their corporate decision-making so that their decisions ultimately determine corporate policy [*White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 566-567, 88 Cal. Rptr. 2d 19, 981 P.2d 944* ; *see also Kelly-Zurian v. Wohl Shoe Co. (1994) 22 Cal. App. 4th 397, 421-422, 27 Cal. Rptr. 2d 457]* . Determining whether a corporate employee is a managing agent under this standard is a question of fact to be determined on a case-by-case basis [*White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 567, 88 Cal. Rptr. 2d 19, 981 P.2d 944]* .

A supervisory employee is not necessarily a managing agent under this standard. Equating the two would effectively render a corporate employer liable for punitive damages in most employment cases [*White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 575, 88 Cal. Rptr. 2d 19, 981 P.2d 944]* . Moreover, the ability of a supervisory employee to hire and fire employees does not, by itself, render a corporate employer liable for punitive damages [*White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 566, 88 Cal. Rptr. 2d 19, 981 P.2d 944]* .

However, the Supreme Court, in establishing this standard, held that a supervisory employee with responsibility for managing eight stores and at least 65 employees, which was a significant amount of the employing corporation's business, was a managing agent for these purposes [*White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 577, 88 Cal. Rptr. 2d 19, 981 P.2d 944]* . By contrast, the court of appeal held that a supervisory employee overseeing security at a single outlet of a multi-store chain was not a managing agent of the corporate chain as a matter of law [*Cruz v. HomeBase (2000) 83 Cal. App. 4th 160, 168, 99 Cal. Rptr. 2d 435]* .

Further, a corporate employer cannot be held liable for punitive damages based on the conduct of a managerial employee unless the individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred [*College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 722-724, 34 Cal. Rptr. 2d 898, 882 P.2d 894]* . In other words, there is a scope-of-employment threshold test that must be met in determining corporate liability for punitive damages based on the conduct of its officers, directors, or managing agents.

The standard applicable to a corporation has been found to apply as well to an unincorporated association [J. R. Norton Co. v. General Teamsters, Warehousemen & Helpers Union, Local 890 *(1989) 208 Cal. App. 3d 430, 445, 256 Cal. Rptr. 246* (labor union)].

[3] What Constitutes Authorization or Ratification

An employer may be held liable for punitive damages if it authorizes or ratifies the employee's act of malice, oppression, or fraud [*see Civ. Code § 3294(b)*]. Corporate ratification in the punitive damages context requires actual knowledge of the conduct of the employee and its outrageous nature [*College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 726, 34 Cal. Rptr. 2d 898, 882 P.2d 894* ; *Cruz v. HomeBase (2000) 83 Cal. App. 4th 160, 168, 99 Cal. Rptr. 2d 435]* .

Nevertheless, authorization and ratification are questions of fact that may be proved by any circumstantial or direct evidence demonstrating adoption or approval of the employee's actions by the corporate agent [*Roberts v. Ford Aerospace & Commc'ns Corp. (1990) 224 Cal. App. 3d 793, 801, 274 Cal. Rptr. 139* ; *Hartman v. Shell Oil Co. (1977) 68 Cal. App. 3d 240, 249-250, 137 Cal. Rptr. 244* ; *see Storage Servs. v. Oosterbaan (1989) 214 Cal. App. 3d 498, 516, 262 Cal. Rptr. 689* (ratification or approval inferred from employer's close supervision of employee, its familiarity with transaction, its awareness of meetings between parties, and its subsequent discussions with employee about acts giving rise to tort)]. Authorization or direction (employer action taken prior to the tortious act) of an employee's tortious conduct can be given in the form of written or oral consent or encouragement [*see Jameson v. Gavett (1937) 22 Cal. App. 2d 646, 650-652, 71 P.2d 937* (employer encouraged and gave oral express and implied consent to his employees' use of any means, including physical force, to deter trespassing or to remove trespassers from employer's business premises)]. The issue commonly arises if the employer fails to intercede in a known pattern of workplace abuse [*College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 726, 34 Cal. Rptr. 2d 898, 882 P.2d 894]* .

Ratification may be inferred from the fact that the employer, after being informed of the employee's actions, does not fully investigate and fails to repudiate the employee's conduct by redressing the harm done [*Roberts v. Ford Aerospace & Commc'ns Corp. (1990) 224 Cal. App. 3d 793, 801, 274 Cal. Rptr. 139* ; *see Alhino v. Starr (1980) 112 Cal. App. 3d 158, 173-174, 169 Cal. Rptr. 136* (employer was advised by its employee of employee's irregular conduct in representing plaintiff-real estate seller; employer let transaction proceed nonetheless)]. An employer's retention of the tortfeasor in employment, after the employer is advised of the employee's wrongful conduct, may also be a factor that establishes ratification [*see Clark Equip. Co. v. Wheat (1979) 92 Cal. App. 3d 503, 519, 523-524, 154 Cal. Rptr. 874* (defendant hired collection counsel to pursue action against plaintiff; after employer was advised that attorney was misusing court procedures and pursuing legal remedies against party no longer liable for debt, employer did not discharge attorney or take any steps to limit attorney's discretion or latitude to act; court held that ratification of conduct had been established); Coats v. Construction & Gen. Laborers Local No. 185 *(1971) 15 Cal. App. 3d 908, 914, 93 Cal. Rptr. 639* (union staff business agent retained after business agent's assaults on members of union became known to employer; employer's argument on appeal that retention of the tortfeasor was compelled because of tortfeasor's special or irreplaceable skills rejected by appellate court)].

However, the mere act of providing a defense for the employee at trial, through the payment of the employee's attorney's fees, does not constitute a ratification of the employee's allegedly tortious conduct. The employer has an interest in protecting itself from vicarious liability by providing the employee with the best possible defense against claims that the employee committed tortious acts [*Plancarte v. Guardsmark (2004) 118 Cal. App. 4th 640, 647, 13 Cal. Rptr. 3d 315]* . In addition, *Lab. Code § 2802* obligates an employer to pay any judgment against an employee for conduct arising out of the employment and to provide a defense against charges brought by a third party against an employee for that conduct [*Plancarte v. Guardsmark (2004) 118 Cal. App. 4th 640, 647-648, 13 Cal. Rptr. 3d 315* ; *see Lab. Code § 2802*].

For further discussion of ratification in the context of vicarious and direct liability generally, see *§ 248.13*.

Legal Topics:

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

TortsDamagesPunitive DamagesAvailabilityCorporationsTortsDamagesPunitive DamagesAvailabilityEmployersTortsVicarious LiabilityEmployersGeneral Overview

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§ 248.19 Defenses to Respondeat Superior Actions

[1] In General

Because respondeat superior is based on the tortious conduct of another, employer liability will not attach vicariously if the employee is absolved from liability [*see Campbell v. Security Pac. Nat'l Bank (1976) 62 Cal. App. 3d 379, 386, 133 Cal. Rptr. 77* ; *Davis v. Pine Mountain Lumber Co. (1969) 273 Cal. App. 2d 218, 227, 77 Cal. Rptr. 825]* . Even if a default judgment is entered against the employer, there is no liability under respondeat superior if the employee is subsequently found to have been free from fault [*Plott v. York (1939) 33 Cal. App. 2d 460, 463-464, 91 P.2d 924]* . However, it is not necessary to name or join any specific employees as defendants. The plaintiff's inability to identify which employee committed the wrongful act is not fatal to the employer's liability if the evidence establishes that some employee, in the scope of employment, committed the wrongful act. Even if the plaintiff names a particular employee and the judgment is for that employee, a judgment against the employer is valid if the evidence supports the conclusion that other unnamed employees committed the acts [*Perez v. City of Huntington Park (1992) 7 Cal. App. 4th 817, 820-821, 9 Cal. Rptr. 2d 258* (defense judgments for four police officers upheld because plaintiff could not identify which one of them battered him; judgment against employer city affirmed because evidence supported court's finding that at least one of them did)].

The employer may raise defenses such as comparative negligence, assumption of the risk, privilege on the part of the active tortfeasor, statute of limitations, and any other defense going to the merits of the cause of action [*see Freeman v. Churchill (1947) 30 Cal. 2d 453, 461, 183 P.2d 4* ; *Atchison, Topeka & Santa Fe Ry. Co. v. Superior Oil Co. (1966) 243 Cal. App. 2d 289, 297, 52 Cal. Rptr. 53* (both cases decided prior to advent of comparative fault and holding that contributory negligence of plaintiff was defense available to employer); *Plott v. York (1939) 33 Cal. App. 2d 460, 463, 91 P.2d 924]* . However, the employer may not raise certain defenses that would negate the right to recover against the particular employee-tortfeasor, such as infancy and bankruptcy, but that do not relate to the merits of the cause of action

[*see* *Plott v. York (1939) 33 Cal. App. 2d 460, 463, 91 P.2d 924* ; *see also* Restatement (Second) of Agency § 217(b)(ii) (employer may be liable under respondeat superior even though employee has immunity from civil liability)].

A plaintiff seeking to hold an employer liable for the torts of an employee must name the employer as a defendant prior to the running of the applicable statute of limitations, even if the claim against the employee is not barred by the statute of limitations [*Boyer v. Jensen (2005) 129 Cal. App. 4th 62, 70-71, 28 Cal. Rptr. 3d 124]* . In addition, if the employee's debts have been discharged by bankruptcy, shielding the employee from suit, and the plaintiff neglected to name the employer as a defendant prior to expiration of the statute of limitations, the plaintiff may not pursue the action against the employee in order to obtain a judgment that might be enforced against the employer [*Boyer v. Jensen (2005) 129 Cal. App. 4th 62, 77-78, 28 Cal. Rptr. 3d 124]* .

[2] Collateral Estoppel

A prior judgment in favor of an employee bars an action against his or her employer if the employer's liability could only be predicated on a theory of respondeat superior [*Ponce v. Tractor Supply Co. (1972) 29 Cal. App. 3d 500, 505, 105 Cal. Rptr. 628* ; *Davison v. Diamond Match Co. (1935) 10 Cal. App. 2d 218, 222-224, 51 P.2d 452]* . The rule is the same whether the actions are separate or the employer and employee are joined in the same action [*Freeman v. Churchill (1947) 30 Cal. 2d 453, 461, 183 P.2d 4]* . A dismissal of the allegedly active tortfeasor from the action with prejudice has the same effect as an adjudication on the merits that the alleged tortfeasor was not at fault, and a finding of vicarious liability is thus precluded by the doctrine of collateral estoppel [*Campbell v. Security Pac. Nat'l Bank (1976) 62 Cal. App. 3d 379, 385-386, 133 Cal. Rptr. 77]* .

The employer may also take advantage of any prior judgment against the employee as an upper limit of damages for which it may be held liable in a separate subsequent action against the employer based on the doctrine of respondeat superior. Thus, if a default judgment was entered against the employee, the employer is entitled to prevent the injured third party from relitigating the issue of damages. However, the employer may relitigate the issue of damages if it wishes [*Ponce v. Tractor Supply Co. (1972) 29 Cal. App. 3d 500, 505-507, 105 Cal. Rptr. 628]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsNegligenceDefensesAssumption of RiskGeneral OverviewTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsVicarious LiabilityEmployersGeneral Overview

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§ 248.20 Indemnity Issues

[1] Employer's Right to Indemnity

A party who is liable solely under principles of vicarious liability generally has a right to indemnity from the person who was actually at fault [*Popejoy v. Hannon (1951) 37 Cal. 2d 159, 173, 231 P.2d 484* ; *Atchison, Topeka & Santa Fe Ry. Co. v. Superior Oil Co. (1966) 243 Cal. App. 2d 289, 299, 52 Cal. Rptr. 53* ; *Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 77, 38 Cal. Rptr. 490* ; *see also Code Civ. Proc. § 876(b)*]. Thus, an employer who is subjected to liability on the grounds of respondeat superior may look to the tortfeasor-employee for satisfaction for any liability it might incur as a result of the employee's tort [*see Continental Cas. Co. v. Phoenix Constr. Co. (1956) 46 Cal. 2d 423, 428, 296 P.2d 801* ; *but see Lab. Code § 2802*; *Holt v. Booth (1991) 1 Cal. App. 4th 1074, 1080 n.6, 2 Cal. Rptr. 2d 727]* . Total indemnity from the employee to the employer is appropriate because, under principles of comparative indemnity, the tortfeasor-employee is 100 percent responsible for the damages, and the vicariously liable employer is 0 percent responsible [*see E. L. White, Inc. v. City of Huntington Beach (1982) 138 Cal. App. 3d 366, 373-377, 187 Cal. Rptr. 879* (cited with approval in *Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 808, 251 Cal. Rptr. 202, 760 P.2d 399*)].

A vicariously liable employer's indemnity rights may be defeated, however, by a good faith settlement entered into between the employee and the injured party [*Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 817, 251 Cal. Rptr. 202, 760 P.2d 399* ; *see Code Civ. Proc. § 877.6*]. The parameters of what constitutes a good faith settlement between an employee and an injured party so as to foreclose the employer's indemnity rights have not yet been set by the courts. However, it appears that a token settlement, entered into primarily to defeat indemnity, will be insufficient [*see Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 815, 251 Cal. Rptr. 202, 760 P.2d 399]* .

If an employer has been actively at fault and is directly liable for a tort for which an employee is also directly liable,

normal principles of comparative indemnity apply [*see American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 591, 598, 146 Cal. Rptr. 182, 578 P.2d 899]* . The comparison would be made between the negligence of the employer and that of the employee, for example, by comparing the relative culpability of the employer's negligent hiring or training with the employee's tortious conduct. The employer would then be directly liable for its own comparative share, and vicariously liable for the employee's share [*see Miller v. Stouffer (1992) 9 Cal. App. 4th 70, 84, 11 Cal. Rptr. 2d. 454]* . The employer might then be entitled to indemnity from the employee for any amount paid in satisfaction of its vicarious liability, but not of its direct liability. For a complete discussion of indemnity and the effects of a good faith settlement on a nonsettling defendant's right to indemnity, see Levy, Golden & Sacks, California Torts, Ch. 74 (Matthew Bender).

[2] Employee's Right to Indemnity

Lab. Code § 2802 provides that an employer must indemnify an employee for all that the employee necessarily expends or loses in direct consequence of the discharge of the employee's duties as such, or of the employee's obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful. All such awards for reimbursement of necessary expenditures carry interest at the same rate as judgments in civil actions [*Lab. Code § 2802(b)*].

The indemnity rights of *Lab. Code § 2802* are nonwaivable and any contract that purports to waive an employee's statutory indemnity rights is unlawful to that extent [*Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 951-952, 81 Cal. Rptr. 3d 282, 189 P. 3d 285* ; *see Lab. Code § 2804*]. A contract provision releasing "any and all" claims generally does not encompass the nonwaivable statutory protections afforded by *Lab. Code § 2802* and does not implicitly apply to an employee's right to indemnification from an employer [*Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 953, 81 Cal. Rptr. 3d 282, 189 P. 3d 285*].

Lab. Code § 2802 requires the employer to defend an employee who is sued for acts done within the scope of employment [*Los Angeles Police Protective League v. City of Los Angeles (1994) 27 Cal. App. 4th 168, 177, 32 Cal. Rptr. 2d 574* ; *Grissom v. Vons Cos., Inc. (1991) 1 Cal. App. 4th 52, 57, 1 Cal. Rptr. 2d 808* (employer may be required to pay for employee's independent counsel, depending on facts); *but see Cassady v. Morgan, Lewis & Bockius LLP (2006) 145 Cal. App. 4th 220, 237-238, 51 Cal. Rptr. 3d 527* (questioning whether duty to defend exists)]. This statute also probably requires an employer to indemnify the employee for any liability incurred by the employee for acts done at the direction of the employer unless the employee knew that the directions were unlawful [*see Bradley v. Rosenthal (1908) 154 Cal. 420, 424, 97 P. 875]* . Whether this statute has any effect on the common-law right of indemnity in favor of a vicariously liable employer from a negligent employee [*see Continental Cas. Co. v. Phoenix Constr. Co. (1956) 46 Cal. 2d 423, 429, 296 P.2d 801* ; *see also § 248.20[1]*] has never been determined by a California appellate court [*but see Holt v. Booth (1991) 1 Cal. App. 4th 1074, 1080 n.6, 2 Cal. Rptr. 2d 727* (dicta in footnote suggesting that statute may require vicariously liable employer to indemnify negligent employee for liability to third party arising from conduct within scope of employment)].

If an employer chooses not to defend an employee who is sued, the employee may seek indemnification under *Lab. Code § 2802* for costs incurred in defending the lawsuit, if it is determined that the employee's allegedly actionable conduct was within the course and scope of employment, even though the employee is found not to be liable. For example, one court of appeal opinion has held that an employee who was found not to be liable in a sexual harassment suit brought by a co-worker had a right under *Lab. Code § 2802* to indemnification from his employer for the legal costs incurred in defending the suit [*Jacobus v. Krambo Corp. (2000) 78 Cal. App. 4th 1096, 1098, 93 Cal. Rptr. 2d 425]* . The court noted that even though sexual misconduct falls outside the course and scope of employment, the employee's acts were found not to constitute sexual misconduct, the allegedly actionable behavior was simply part of the social intercourse that occasionally occurs in the office setting, and the co-worker's suit was apparently a response to an adverse employment evaluation. Thus, under the facts, the employee could recover the expenses incurred in defending the suit from the employer [*Jacobus v. Krambo Corp. (2000) 78 Cal. App. 4th 1096, 1104, 93 Cal. Rptr. 2d 425]* .

When seeking indemnification of defense costs, the employee bears the burden of proving which costs were incurred in defense of claims arising from employment with the employer, even if apportionment of costs is required because the underlying claims arose from employment with multiple employers [*Cassady v. Morgan, Lewis & Bockius LLP (2006) 145 Cal. App. 4th 220, 233-234, 51 Cal. Rptr. 3d 527]* .

An employee's right to indemnity is defeated if the employer enters into a good faith settlement with the injured person [*Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 817, 251 Cal. Rptr. 202, 760 P.2d 399* ; *see 248.20[1]*]. For a complete discussion of comparative indemnity, see Levy, Golden & Sacks, California Torts, Ch. 74 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewTortsVicarious LiabilityEmployersGeneral OverviewTortsVicarious LiabilityEmployersIndemnity

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§ 248.21 Respondeat Superior and Proposition 51

Proposition 51, the so-called "Deep Pockets" initiative passed by the voters in June 1986, limits the doctrine of joint and several liability. Under Proposition 51, in any action for personal injury, property damage, or wrongful death based on principles of comparative fault, the liablity of each defendant for "noneconomic damages" is several only and not joint. Thus, each defendant is liable only for the percentage of the plaintiff's noneconomic damages that corresponds to the defendant's comparative share of fault [*Civ. Code § 1431.2(a)*]. Noneconomic damages are subjective nonmonetary losses, such as general damages for pain and suffering [*see Civ. Code § 1431.2(b)(2)*].

Proposition 51, however, does not eliminate liability for noneconomic damages of a defendant whose liability is vicarious only under respondeat superior (and who, therefore, is technically without fault). The vicariously liable employer stands in the shoes of the employee for purposes of determining the employer's comparative share of fault and noneconomic damages. If there are no other tortfeasors, the employer and employee remain jointly and severally liable for 100 percent of the plaintiff's damages, including noneconomic damages. If there are other tortfeasors, then the employer is liable only for the percentage of the plaintiff's noneconomic damages that corresponds to the employee's percentage of comparative fault [*Miller v. Stouffer (1992) 9 Cal. App. 4th 70, 81-86, 11 Cal. Rptr. 2d 454* ; *see also Rashtian v. BRAC-BH, Inc. (1992) 9 Cal. App. 4th 1847, 1854, 12 Cal. Rptr. 2d 411* (Proposition 51 does not apply to eliminate liability for noneconomic damages of defendant held vicariously liable under Vehicle Code)].

Moreover, because Proposition 51 does not apply to limit the liability of an intentional tortfeasor, an employer's vicarious liability for the intentional tort of one of its employees is not subject to reduction under Proposition 51 based on a finding that another defendant's negligence also contributed to the plaintiff's injuries [*Thomas v. Duggins Construction Co., Inc. (2006) 44 Cal. Rptr. 3d 66*].

For more detailed discussion of Proposition 51, see Ch. 300, *Indemnity and Contribution* , and Levy, Golden & Sacks,

California Torts, Ch. 74 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesPain & SufferingGeneral OverviewTortsProcedureMultiple DefendantsJoint & Several LiabilityTortsVicarious LiabilityEmployersGeneral OverviewTortsVicarious LiabilityEmployersActivities & ConditionsIntentional Torts

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§ 248.22 Liability for Actions of Independent Contractors

[1] General Rule of Nonliability

The general rule is that a person who hires an independent contractor, as distinguished from an employee, is not liable for the torts of the contractor or for the torts of the employees of the contractor [*Torres v. Reardon (1992) 3 Cal. App. 4th 831, 838, 5 Cal. Rptr. 2d 52* ; *Johnson v. Tosco Corp. (1991) 1 Cal. App. 4th 123, 131, 1 Cal. Rptr. 2d 747]* . However, there are many exceptions to the rule [*see Van Arsdale v. Hollinger (1968) 68 Cal. 2d 245, 252-253, 66 Cal. Rptr. 20, 437 P.2d 508 , overruled on other grounds, Privette v. Superior Court (1993) 5 Cal. 4th 689, 696, 702, 21 Cal. Rptr. 2d 72, 854 P.2d 721]* .

For discussion of the definition of an independent contractor, and the distinction between employees and independent contractors, see *§ 248.15[4]*.

[2] Exceptions to Rule of Nonliability

[a] In General

A person may not insulate himself or herself from liability to others in all cases by hiring an independent contractor [*Anderson v. Chancellor W. Oil Dev. Corp. (1975) 53 Cal. App. 3d 235, 239, 125 Cal. Rptr. 640]* . Courts have articulated a number of theories under which a person may be held vicariously liable for the torts of an independent contractor.

In addition, one who hires an independent contractor may be liable for the acts of the contractor in the same way that an employer may be directly liable for the acts of an employee. For example, the hirer may be liable for the acts of an independent contractor acting under orders or directions negligently given by the hirer [*see Widman v. Rossmoor*

Sanitation, Inc. (1971) 19 Cal. App. 3d 734, 743, 97 Cal. Rptr. 52] , for negligent selection of an independent contractor [*see Golden v. Conway (1976) 55 Cal. App. 3d 948, 957, 128 Cal. Rptr. 69]* , for negligent failure to inspect the work of a contractor [*see McCordic v. Crawford (1943) 23 Cal. 2d 1, 6-7, 142 P.2d 7]* , or for negligently exercising retained control over work entrusted to the contractor [*see Grahn v. Tosco Corp. (1997) 58 Cal. App. 4th 1373, 1393-1395, 67 Cal. Rptr. 2d 159* (the control necessary to give rise to a duty of care is control exercised by the hirer over the methods of work or manner in which the contractor's employee's perform the operative details of their tasks, not simply general control over the premises); *Johnson v. Tosco Corp. (1991) 1 Cal. App. 4th 123, 137-140, 1 Cal. Rptr. 2d 747]* .

The determination that a defendant is not vicariously liable for the acts of an independent contractor may be made on summary judgment as a matter of law if the person asserting it cannot allege any facts or identify any relevant policy considerations that would warrant imposition of vicarious liability [*see Yanez v. United States (9th Cir. 1995) 63 F.3d 870, 874-875* ; *Weiss v. Chevron (1988) 204 Cal. App. 3d 1094, 1100, 251 Cal. Rptr. 727* (oil company's supply of products to service station insufficient to impose vicarious liability for acts of station's employee)].

[b] Peculiar-Risk Doctrine

[i] In General

The "peculiar risk" doctrine, as stated by the Restatement (Second) of Torts §§ 413 and 416, has been adopted in California [*see LaCount v. Hensel Phelps Constr. Co. (1978) 79 Cal. App. 3d 754, 763, 145 Cal. Rptr. 244]* . Thus, one who hires an independent contractor to do work that the hirer should recognize as likely to create, during its progress, a peculiar risk of physical harm to others unless special precautions are taken, is subject to liability for physical harm caused by the failure of the contractor to exercise reasonable care to take the precautions, even if the hirer has provided for the precautions in the contract or otherwise [*Torres v. Reardon (1992) 3 Cal. App. 4th 831, 839, 5 Cal. Rptr. 2d 52* ; *Johnson v. Tosco Corp. (1991) 1 Cal. App. 4th 123, 132, 1 Cal. Rptr. 2d 747* ; *Henderson Bros. Stores, Inc. v. Smiley (1981) 120 Cal. App. 3d 903, 911, 174 Cal. Rptr. 875* ; *see* Restatement (Second) of Torts § 416].

A peculiar risk is something other than the ordinary and customary dangers that may arise in the course of the work or of normal human activity [*Griesel v. Dart Indus., Inc. (1979) 23 Cal. 3d 578, 586, 153 Cal. Rptr. 213, 591 P.2d 619* , *overruled on other grounds, Privette v. Superior Court (1993) 5 Cal. 4th 689, 696, 702, 21 Cal. Rptr. 2d 72, 854 P.2d 721* ; *Johnson v. Tosco Corp. (1991) 1 Cal. App. 4th 123, 132, 1 Cal. Rptr. 2d 747]* . It is a risk that is peculiar to the work to be done that arises from the character of the work or from the place where the work is to be done, against which a reasonable person would recognize the necessity of taking special precautions [*Johnson v. Tosco Corp. (1991) 1 Cal. App. 4th 123, 132, 1 Cal. Rptr. 2d 747]* .

A peculiar risk does not mean that the risk must be one that is abnormal to the type of work done, or that it is an abnormally great risk, but rather refers to a special, recognizable danger arising out of the work itself [*Aceves v. Regal Pale Brewing Co. (1979) 24 Cal. 3d 502, 509, 156 Cal. Rptr. 41, 595 P.2d 619* , *overruled on other grounds, Privette v. Superior Court (1993) 5 Cal. 4th 689, 696, 702, 21 Cal. Rptr. 2d 72, 854 P.2d 721* (in determining whether danger is recognizable, hirer's knowledge and experience in field of work to be done are relevant); *Henderson Bros. Stores, Inc. v. Smiley (1981) 120 Cal. App. 3d 903, 915-916, 174 Cal. Rptr. 875* (quoting from Restatement (Second) of Torts § 413, cmt. b)].

[ii] Factors in Determining "Special Danger"

Factors that are important in determining whether a particular danger is recognizable as a "special" danger include (1) the foreseeability of the specific risk or set of risks arising in connection with the work as planned, (2) whether the risk is "intimately connected with the work" or "accidental," (3) the degree of risk, and (4) the possibility of anticipating and prescribing definite precautions to avert the anticipated risk or risks [*Henderson Bros. Stores, Inc. v. Smiley (1981)*

120 Cal. App. 3d 903, 916-917, 174 Cal. Rptr. 875] .

The fact that a special risk is foreseeable justifies the imposition of liability [*Holman v. State of California (1975) 53 Cal. App. 3d 317, 330, 124 Cal. Rptr. 773]* . As a general rule, the foreseeability of special risks is determined by the parties' knowledge at the time when they entered into the contract [*see* *McDonald v. City of Oakland (1967) 255 Cal. App. 2d 816, 823, 63 Cal. Rptr. 593]* . However, liability may be imposed on one who hires an independent contractor and who, at the time of entering into the contract, had no reason to anticipate that conditions requiring special precautions would arise, if conditions subsequently arise of which the hirer knows or should know [*Mackey v. Campbell Constr. Co. (1980) 101 Cal. App. 3d 774, 784, 162 Cal. Rptr. 64]* .

However, the possibility of routine negligence in the performance of work cannot provide a basis for liability as a peculiar risk [*Johnson v. Tosco Corp. (1991) 1 Cal. App. 4th 123, 132-133, 1 Cal. Rptr. 2d 747* ; *Hughes v. Atlantic Pac. Constr. Co. (1987) 194 Cal. App. 3d 987, 1000-1001, 240 Cal. Rptr. 200]* . Although the hirer of an independent contractor might always foresee that the contractor may in some way be negligent toward third persons, the doctrine has no reference to such a general anticipation [*Johnson v. Tosco Corp. (1991) 1 Cal. App. 4th 123, 133, 1 Cal. Rptr. 2d 747]* . Thus, a contractor's use of defective equipment or misuse of equipment is not within the peculiar risk doctrine [*Johnson v. Tosco Corp. (1991) 1 Cal. App. 4th 123, 133, 1 Cal. Rptr. 2d 747* (defective scaffolding on job site not peculiar risk); *see* *Stark v. Weeks Real Estate (1979) 94 Cal. App. 3d 965, 972, 156 Cal. Rptr. 701* (misuse of hand-held circular power saw)]. For example, if a contractor is hired to transport goods, the hirer would have no liability for the contractor's failure to inspect the brakes or for negligent driving. But if the goods are logs weighing several tons, the hirer is liable for the contractor's failure to take special precautions to secure the logs to the truck [*Holman v. State of California (1975) 53 Cal. App. 3d 317, 328, 124 Cal. Rptr. 773* (citing examples from Restatement (Second) of Torts § 416, cmt. d)].

The peculiar risk doctrine is strictly a rule of third-party liability. It imposes no liability on the hirer for injuries to the independent contractor [*Torres v. Reardon (1992) 3 Cal. App. 4th 831, 839-841, 5 Cal. Rptr. 2d 52]* .

[iii] Limitation on Recovery for Employees of Independent Contractors

Formerly, California was one of a minority of jurisdictions that expanded the traditional peculiar risk doctrine to permit an employee of the independent contractor to seek recovery from the nonnegligent hirer for injuries caused by the negligence of the contractor [*Privette v. Superior Court (1993) 5 Cal. 4th 689, 696, 21 Cal. Rptr. 2d 72, 854 P.2d 721* (citing and overruling, in part, *Woolen v. Aerojet Gen. Corp. (1962) 57 Cal. 2d 407, 410-411, 20 Cal. Rptr. 12, 369 P.2d 708* , as case that initially expanded doctrine)]. However, in *Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721* , the California Supreme Court reexamined this extension of the doctrine in light of the policies advanced by the workers' compensation laws, and concluded that those policies precluded employees of negligent independent contractors from recovering damages from the hirer under the peculiar risk doctrine [Privette v. Superior Court *(1993) 5 Cal. 4th 689, 701-702, 21 Cal. Rptr. 2d 72, 854 P.2d 721]* . The *Privette* decision has been applied retroactively [*see* *Whitford v. Swinerton & Walberg Co. (1995) 34 Cal. App. 4th 1054, 1059-1060, 40 Cal. Rptr. 2d 688* ; *Smith v. ACandS, Inc. (1994) 31 Cal. App. 4th 77, 94-95, 37 Cal. Rptr. 2d 457]* .

The California Supreme Court has held that *Privette* precludes application of the peculiar risk doctrine to employees of independent contractors who are injured through the negligence of the contractor even when the hirer fails to provide in the contract, or in some other manner, that special precautions be taken to avert the peculiar risks of the work [*Toland v. Sunland Hous. Group, Inc. (1998) 18 Cal. 4th 253, 267, 74 Cal. Rptr. 898, 955 P.2d 475]* .

The limitation of *Privette* has been extended to the situation in which the negligence of one independent contractor injures the employee of another. In this case also, the hirer has no vicarious liability to the injured employee [*Smith v. ACandS, Inc. (1994) 31 Cal. App. 4th 77, 95-97, 37 Cal. Rptr. 2d 457]* . The *Privette* holding even applies where there is an express indemnity agreement between the independent contractor and the person who hired the contractor [

Redfeather v. Chevron USA, Inc. (1997) 57 Cal. App. 4th 702, 705, 67 Cal. Rptr. 2d 159] .

The court of appeal has also held that an injured employee of an independent contractor cannot sue the hirer of the contractor, even if the contractor fails to provide workers' compensation coverage, because the hirer should not be punished for the contractor's failure. Moreover, the court noted that the Uninsured Employers Fund provides coverage if an employer fails to do so [*Lopez v. C.G.M. Dev., Inc. (2002) 101 Cal. App. 4th 430, 444-445, 124 Cal. Rptr. 2d 227* ; *see also Bell v. Greg Agee Constr., Inc. (2004) 125 Cal. App. 4th 453, 466-467, 23 Cal. Rptr. 3d 33]* .

The court of appeal has further held that the *Privette* doctrine applies even if the injured party is an independent contractor, rather than actually an employee, of another contractor [*Michael v. Denbeste Transp., Inc. (2006) 137 Cal. App. 4th 1082, 1093, 40 Cal. Rptr. 3d 777]* . The court, concluding that this result was consistent with the policy concerns underlying the *Privette* doctrine, noted that the lack of workers' compensation coverage for independent contractors was not dispositive and recognized that it was reasonable for hirers to anticipate that an independent contractor will insure against the risk of injury associated with the work and factor the cost of this insurance into the price of the hiring contract [*Michael v. Denbeste Transp., Inc. (2006) 137 Cal. App. 4th 1082, 1094-1095, 40 Cal. Rptr. 3d 777]* . The court also concluded that the liability of a hirer of an independent contractor for an injury sustained by a person hired by the independent contractor should not depend on whether the injured person was hired as an actual employee or hired as an independent contractor [*Michael v. Denbeste Transp., Inc. (2006) 137 Cal. App. 4th 1082, 1095-1096, 40 Cal. Rptr. 3d 777]* .

The doctrine of peculiar risk shields the person who hired an independent contractor from peculiar risk liability and "the person who hired the contractor" can be an owner, a lessee or a general contractor [*Lopez v. University Partners (1997) 54 Cal. App. 4th 1117, 1123, 63 Cal. Rptr. 2d 359* (*Privette* bars recovery against lessee of construction site)].

For a form of complaint under the peculiar-risk doctrine against an independent contractor and the person who hired the contractor to do a particular job, see *§ 248.42*.

[iv] Peculiar Risk Cases Not Based on Vicarious Liability

Although the scope of a hirer's liability to the employee of an independent contractor for the hirer's own negligence is still being defined by the courts, the California Supreme Court has held that an employee of an independent contractor who is injured on the job cannot sue the hirer of the contractor for negligence in hiring the contractor [*Camargo v. Tjaarda Dairy (2001) 25 Cal. 4th 1235, 1244-1245, 108 Cal. Rptr. 2d 617, 25 P.3d 1096* (rejecting claim of liability based on Restatement (Second) of Torts § 411)]. Although in some sense the hirer is being sued for the hirer's own negligence, the Court concluded that imposing liability under those circumstances would really be a form of vicarious liability, because the injury to the employee is actually caused by the negligent act or omission of the contractor primarily responsible for the details of the employee's work. Because the contractor would be shielded from tort liability by the exclusivity of workers' compensation, the hirer of the contractor should not be exposed to any greater liability [*Camargo v. Tjaarda Dairy (2001) 25 Cal. 4th 1235, 1244, 108 Cal. Rptr. 2d 617, 25 P.3d 1096]* . Moreover, allowing the injured employee to recover tort damages for what is essentially the failure to provide a safe workplace would provide a windfall to the employees of an independent contractor that is unavailable to the injured employees of other types of employers [*Camargo v. Tjaarda Dairy (2001) 25 Cal. 4th 1235, 1245, 108 Cal. Rptr. 2d 617, 25 P.3d 1096]* .

If an employee of an independent contractor is injured, imposition of direct liability on the hirer of the independent contractor may arguably be based on the hirer's breach of a duty of care, which the hirer owes by virtue of having retained control over operative details of the work being done [*see Zamudio v. City & County of San Francisco (1999) 70 Cal. App. 4th 445, 452-453, 82 Cal. Rptr. 2d 664* (premises owner and general contractor exercised insufficient control of work of concrete subcontractor to impose liability for injury to subcontractor's employee)].

In addition, a hirer who is also the owner or possessor of property may be liable under a premises liability theory for an injury to the employee of an independent contractor if: (1) the hirer knows or reasonably should know of a concealed, preexisting hazardous condition on the premises; (2) the contractor does not know and could not reasonably have discovered the hazardous condition; and (3) the hirer fails to warn the contractor about the hazard [*Kinsman v. Unocal Corp. (2005) 37 Cal. 4th 659, 675, 36 Cal. Rptr. 3d 495, 123 P.3d 931]* .

However, the California Supreme Court has held that the hirer of an independent contractor is not liable for an injury to an employee of that independent contractor merely because the hirer retained control over safety conditions at a work site [*Hooker v. Department of Transp. (2002) 27 Cal. 4th 198, 202, 115 Cal. Rptr. 2d 853, 38 P.3d 1081* (rejecting claim that liability could be imposed under Restatement (Second) of Torts § 414); *see, e.g.,* *Madden v. Summit View, Inc. (2008) 165 Cal. App. 4th 1267, 1276-1278, 81 Cal. Rptr. 3d 601*]. Instead, the hirer may be liable only if the hirer's exercise of retained control over safety affirmatively contributed to the employee's injury [*Hooker v. Department of Transp. (2002) 27 Cal. 4th 198, 202, 115 Cal. Rptr. 2d 853, 38 P.3d 1081* (hirer's failure to exercise control over safety at work site did not affirmatively contribute to employee's death); *see, e.g.,* *Browne v. Turner Constr. Co. (2005) 127 Cal. App. 4th 1334, 1345-1346, 26 Cal. Rptr. 3d 433* (summary judgment reversed because evidence showed that hirer and general contractor provided safety equipment for use by subcontractors, but withdrew equipment before construction was complete, resulting in injury to subcontractor's employee); *see also* *Sheeler v. Greystone Homes, Inc. (2003) 113 Cal. App. 4th 908, 920-921, 6 Cal. Rptr. 3d 683]* .

Under the appropriate circumstances, an omission on the part of the hirer may constitute an affirmative contribution--for example, if the hirer promises to undertake a particular safety measure, but fails to do so, and an employee is injured due to that failure [*see* *Hooker v. Department of Transp. (2002) 27 Cal. 4th 198, 212 n.3, 115 Cal. Rptr. 2d 853, 38 P.3d 1081* ; *see, e.g.,* *Ray v. Silverado Constructors (2002) 98 Cal. App. 4th 1120, 1129, 1132-1133, 120 Cal. Rptr. 2d 251* (triable issue existed as to whether failure of project owners and general contractor to control traffic at highway construction site, despite legal and contractual obligations to do so, was sufficient to impose liability for death of subcontractor's employee)].

In addition, the Supreme Court held in a companion case that a hirer of an independent contractor may be liable for an injury to an employee of the contractor if the hirer's negligent provision of unsafe equipment to the contractor affirmatively contributes to the injury [*McKown v. Wal-Mart Stores, Inc. (2002) 27 Cal. 4th 219, 222, 115 Cal. Rptr. 2d 868, 38 P.3d 1094]* .

The court of appeal has concluded that these principles governing the liability of a hirer apply equally to a claim against an agent of the hirer who has been delegated the responsibility to oversee safety for the hirer [*Ruiz v. Herman Weissker, Inc. (2005) 130 Cal. App. 4th 52, 61-62, 29 Cal. Rptr. 3d 641]* .

Although a public entity cannot be held liable under general negligence principles without a statutory basis, the court of appeal has held that *Gov. Code § 815.4* can provide a statutory basis for imposing liability on a public entity hirer of an independent contractor based on retention of control over safety at the worksite when negligent exercise of that retained control affirmatively contributes to an injury to an employee of the independent contractor [*McCarty v. Department of Transportation (2008) 164 Cal. App. 4th 955, 977-979, 79 Cal. Rptr. 3d 777*]. Under *Gov. Code § 815.4*, a public entity is liable for an injury proximately caused by the tortious act or omission of an independent contractor to the same extent that the public entity would be subject to such liability if it were a private person [*Gov. Code § 815.4*]. Thus, if an employee's injury was proximately caused by a tortious act or omission of the independent contractor, and, as with a private person hirer, the public entity's negligent exercise of retained control over safety affirmatively contributed to the injury, then a public entity may be held liable under the statute [*McCarty v. Department of Transportation (2008) 164 Cal. App. 4th 955, 978, 79 Cal. Rptr. 3d 777*]. A public entity can be liable under these circumstances even if no particular public employee is liable [*McCarty v. Department of Transportation (2008) 164 Cal. App. 4th 955, 979, 79 Cal. Rptr. 3d 777*].

The court of appeal has held that a hirer may be liable to an employee of an independent contractor, if the hirer breaches a duty imposed on the hirer by regulation and if the breach affirmatively contributes to the employee's injury. In one case, there were triable issues of fact on the plaintiff's claim that the defendant breached its duty, imposed by the Fire Code, to provide fire extinguishers within 75 feet of likely fire areas, and that this failure contributed to the injuries that the plaintiff sustained in a fire [*Barclay v. Jesse M. Lange Distrib., Inc. (2005) 129 Cal. App. 4th 281, 298-301, 28 Cal. Rptr. 3d 242]* . However, safety regulations are only admissible in actions by employees of subcontractors brought against a general contractor if the evidence establishes that the general contractor affirmatively contributed to the employee's injuries [*Padilla v. Pomona College (2008) 166 Cal. App. 4th 661, 673, 82 Cal. Rptr. 3d 869* ; *Madden v. Summit View, Inc. (2008) 165 Cal. App. 4th 1267, 1280, 81 Cal. Rptr. 3d 601*].

[c] Nondelegable Duty

A person who hires an independent contractor is liable for the misconduct of the contractor in regard to a duty of the hirer that is deemed "nondelegable" [*Dow v. Holly Mfg. Co. (1958) 49 Cal. 2d 720, 728, 321 P.2d 736* (duty of a general contractor to construct building safely may not be delegated)]. Thus, if the law imposes a definite affirmative duty on one by reason of his or her relationship with others, whether as an owner or proprietor of land [*see* *Snyder v. Southern Cal. Edison Co. (1955) 44 Cal. 2d 793, 797, 285 P.2d 912* (possessor of land as liable for negligence of independent contractor in building or maintaining structures on premises); *Golden v. Conway (1976) 55 Cal. App. 3d 948, 958-959, 128 Cal. Rptr. 69* (landlord may be vicariously liable for negligent installation of heater by independent contractor)] or chattels, or in some other capacity, such a person cannot escape liability for a failure to perform the duty thus imposed by entrusting it to an independent contractor [*Van Arsdale v. Hollinger (1968) 68 Cal. 2d 245, 251, 66 Cal. Rptr. 20, 437 P.2d 508 , overruled on other grounds,* *Privette v. Superior Court (1993) 5 Cal. 4th 689, 696, 702, 21 Cal. Rptr. 2d 72, 854 P.2d 721]* . A nondelegable duty may be imposed by statute, by charter, or by common law [*Van Arsdale v. Hollinger (1968) 68 Cal. 2d 245, 251, 66 Cal. Rptr. 20, 437 P.2d 508 , overruled on other grounds, Privette v. Superior Court (1993) 5 Cal. 4th 689, 696, 702, 21 Cal. Rptr. 2d 72, 854 P.2d 721]* .

For example, certain statutory safety provisions such as those found in the Vehicle Code create duties that may not be delegated, so that the owner of a vehicle is liable for the harm caused by the negligence of his or her mechanic in servicing a vehicle, even though the mechanic is an independent contractor [*Maloney v. Rath (1968) 69 Cal. 2d 442, 446-448, 71 Cal. Rptr. 897, 445 P.2d 513]* . A nondelegable duty imposed by statute depends on statutory language and legislative purpose [*Jordy v. County of Humboldt (1992) 11 Cal. App. 4th 735, 742-744, 14 Cal. Rptr. 2d 553* (refusing to impose liability on county for acts of foster parents; construing *Welf. & Inst. Code § 202*); *see also* *J.L. v. Children's Institute, Inc. (2009) 177 Cal. App. 4th 388, 400-403, 99 Cal. Rptr. 3d 5* (nonprofit home daycare referral organization did not have nondelegable duty under Child Care and Development Services Act, *Ed. Code § 8200 et seq.*, to prevent sexual assault of minor occurring at independent contractor daycare provider to whom victim's mother had been referred)].

A nondelegable duty may also be imposed by ordinances, regulations, or other public safety rules and orders. However, the duty imposed must involve specific safeguards; a general requirement that a safe workplace must be provided is insufficient to create a nondelegable duty [*see* *Felmlee v. Falcon Cable TV (1995) 36 Cal. App. 4th 1032, 1038-1039, 43 Cal. Rptr. 2d 158]* .

A nondelegable duty may also be created by contract. A promisor may not escape liability to the promisee by delegating performance of a contractual obligation to an independent contractor. Nevertheless, under this exception, no liability is incurred with regard to a nonparty to the contract who is injured by the independent contractor [*Millsap v. Federal Express Corp. (1991) 227 Cal. App. 3d 425, 433, 277 Cal. Rptr. 807]* . However, not every contractual duty will be deemed nondelegable. For example, a mortuary that contracts to provide funeral services and arrange for the cremation of a decedent has a duty of due care to perform its services nonnegligently [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 886-888, 890-891, 2 Cal. Rptr. 2d 79, 820 P.2d 181]* , including a duty to use due care in selecting a crematory. However, once that duty is fulfilled, the mortuary may delegate the duty to carry out the cremation in a

respectful and dignified manner and is not vicariously liable for the wrongful cremation practices of the subcontractor crematory [*Hansell v. Santos Robinson Mortuary (1998) 64 Cal. App. 4th 608, 612-617, 75 Cal. Rptr. 2d 361* (mortuary has no statutory right to perform or oversee cremations)].

"Nondelegable duties" may also be imposed in connection with an activity done under license of public authority [*see Anderson v. Chancellor W. Oil Dev. Corp. (1975) 53 Cal. App. 3d 235, 239, 125 Cal. Rptr. 640]* . Thus, cases have stated that one engaged in an activity that can be lawfully performed only under a franchise granted by public authority and that involves an unreasonable risk of harm to others is subject to liability for personal injury caused by the negligence of a contractor hired to work on the activity [*Millsap v. Federal Express Corp. (1991) 227 Cal. App. 3d 425, 433-434, 277 Cal. Rptr. 807* ; *Klein v. Leatherman (1969) 270 Cal. App. 2d 792, 794-796, 76 Cal. Rptr. 190* ; *see* Restatement (Second) of Torts § 428]. This rule imposes liability on common carriers operating under a public franchise for the acts of independent-contractor drivers [*see Eli v. Murphy (1952) 39 Cal. 2d 598, 599-600, 248 P.2d 756* ; *Gamboa v. Conti Trucking, Inc. (1993) 19 Cal. App. 4th 663, 666, 23 Cal. Rptr. 2d 564]* , and it has also been applied to nonfranchised highway contract carriers [*see Gamboa v. Conti Trucking, Inc. (1993) 19 Cal. App. 4th 663, 666, 23 Cal. Rptr. 2d 564* ; *Klein v. Leatherman (1969) 270 Cal. App. 2d 792, 794-796, 76 Cal. Rptr 190* ; *cf. Gaskill v. Calaveras Cement Co. (1951) 102 Cal. App. 2d 120, 226 P.2d 633* (no liability based on nondelegable duty as between two contract carriers that stood on equal footing with regard to Public Utilities Commission regulation)]. So long as a carrier, at the time of the injury-causing conduct, was carrying on an activity that could only have been conducted lawfully under a public franchise or authority, the fact that the carrier's particular cargo at that time may have been exempt from certain regulations (such as registration and permit requirements) does not relieve the carrier from vicarious liability for the acts of independent contractors if the carrier remains otherwise regulated by safety and financial responsibility laws [*Serna v. Pettey Leach Trucking, Inc. (2003) 110 Cal. App. 4th 1475, 1486-1487, 2 Cal. Rptr. 3d 835]* . By contrast, businesses that are classified as "private carriers"--that is, businesses that use the highways only to transport their own products incidental to carrying on their business--are not vicariously liable for the acts of drivers who are independent contractors [*Hill Bros. Chem. Co. v. Superior Court (2004) 123 Cal. App. 4th 1001, 1010, 20 Cal. Rptr. 3d 530]* .

If the injured party is an employee of the independent contractor, the existence of a nondelegable duty imposed on the hirer of the independent contractor does not establish the liability of the hirer. Under the rule of *Privette v. Superior Court* and its progeny [*see Privette v. Superior Court (1993) 5 Cal. 4th 659, 21 Cal. Rptr. 2d 72, 854 P.2d 721* ; *see also 248.22[2][b][iii], [iv]*], even in the presence of a nondelegable duty, the hirer is not liable to the injured employee of the independent contractor unless the hirer's conduct affirmatively contributed to the employee's injury [*Park v. Burlington N. Santa Fe Ry. Co. (2003) 108 Cal. App. 4th 595, 610-611, 133 Cal. Rptr. 2d 757* (despite railroad's nondelegable duty to properly dispose of hazardous waste, actions of railroad were not cause of employee's injury); *see also Ruiz v. Herman Weissker, Inc. (2005) 130 Cal. App. 4th 52, 64, 29 Cal. Rptr. 3d 641* (hirer's attempt to delegate duty to agent, in and of itself, does not subject agent to liability)].

However, a hirer may be liable for breach of a regulatory duty that is imposed on the hirer if this breach affirmatively contributes to an injury [*Evard v. Southern California Edison (2007) 153 Cal. App. 4th 137, 147-148, 62 Cal. Rptr. 3d 479* (triable issue as to whether billboard owner's breach of nondelegable regulatory duty to provide safety features for workers on billboard affirmatively contributed to injury to employee of independent contractor); *Barclay v. Jesse M. Lange Distrib., Inc. (2005) 129 Cal. App. 4th 281, 298-301, 28 Cal. Rptr. 3d 242* (nondelegable duty imposed by Fire Code to provide fire extinguishers within 75 feet of likely fire areas)]. However, the language of the regulation determines whether a nondelegable duty is imposed and on whom the duty is imposed [*Padilla v. Pomona College (2008) 166 Cal. App. 4th 661, 673, 82 Cal. Rptr. 3d 869* (Cal-OSHA regulation found at *8 Cal. Code Regs. § 1735(a)* did not impose nondelegable duty on any particular party)].

In addition, a hirer who is also the owner or possessor of property cannot effectively delegate to an independent contractor the responsibility for the safety of the contractor's own employees, if the hirer fails to disclose critical information necessary to fulfill that responsibility. Therefore, a hirer who is also the owner or possessor of property may

be liable under a premises liability theory for an injury to the employee of an independent contractor if: (1) the hirer knows or reasonably should know of a concealed, preexisting hazardous condition on the premises; (2) the contractor does not know and could not reasonably have discovered the hazardous condition, and (3) the hirer fails to warn the contractor about the hazard [*Kinsman v. Unocal Corp. (2005) 37 Cal. 4th 659, 675, 36 Cal. Rptr. 3d 495, 123 P.3d 931]* .

For a form of a complaint against an independent contractor and the person who hired the contractor to perform a nondelegable duty, see *§ 248.43*.

[d] Vicarious Liability for Nuisance or Trespass

One who hired an independent contractor may be held liable for injuries resulting from acts of the contractor that constitute a nuisance if the hirer had knowledge of or should have known of the nuisance [*Henderson Bros. Stores, Inc. v. Smiley (1981) 120 Cal. App. 3d 903, 909 n.2, 174 Cal. Rptr. 875* ; *see* Restatement (Second) of Torts § 427B].

[3] Intentional Torts

As a general rule, the vicarious liability of one who hired an independent contractor for the torts of the contractor does not extend to intentional torts committed by the contractor [*Campbell v. Security Pac. Nat'l Bank (1976) 62 Cal. App. 3d 379, 386-387, 133 Cal. Rptr. 77]* . However, in those instances in which the independent contractor is also deemed the agent of the hirer, the latter may be liable for the agent's intentional torts [*see Draper v. Hellman Commercial Trust & Sav. Bank (1928) 203 Cal. 26, 38-39, 263 P. 240* ; *Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 661-663, 109 Cal. Rptr. 269]* . For discussion of the liability of the hirer of an independent contractor for the acts of the contractor under agency theories, see Ch. 427, *Principal and Agent* .

[4] Collateral Negligence

Under the collateral-negligence doctrine, one who might otherwise be liable for acts of an independent contractor that he or she hired, or of the contractor's employees, is not liable for acts that are deemed "collateral" [*see Privette v. Superior Court (1993) 5 Cal. 4th 689, 696, 21 Cal. Rptr. 2d 72, 854 P. 2d 721* ; *Van Arsdale v. Hollinger (1968) 68 Cal. 2d 245, 252, 66 Cal. Rptr. 20, 437 P.2d 508* (overruled on other grounds in *Privette*)]. Negligence is collateral if [*see LaCount v. Hensel Phelps Constr. Co. (1978) 79 Cal. App. 3d 754, 764-765, 145 Cal. Rptr. 244]* :

- The contractor's negligence consists solely of the improper manner in which he or she does the work;
- The negligence creates a risk of harm that is not inherent in or normal to the work; and
- The person who contracted for the work had no reason to contemplate the contractor's negligence when the contract was made and was not otherwise negligent.

The negligence for which one who hired an independent contractor is liable must be of a type that is intimately connected with the work authorized and that is reasonably likely from its nature. Negligence in the performance of ordinary acts, that are not necessarily incidental, but only accidentally connected with the work, does not fall within the policy of the law that imposes the extraordinary liability on the hirer [*Snyder v. Southern Cal. Edison Co. (1955) 44 Cal. 2d 793, 801, 285 P.2d 912]* .

The doctrine of collateral negligence is based on the premise that, if harm results from a risk other than the one that makes the hirer liable for the acts of the independent contractor, the reason for applying vicarious liability no longer applies. Thus, if an independent contractor is hired to take down a heavy sign, the hirer would be liable for harm caused in lowering the sign to the ground but not liable for harm caused after the sign has been lowered [*Smith v. Lucky*

Stores (1976) 61 Cal. App. 3d 826, 829-831, 132 Cal. Rptr. 628] .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsVicarious LiabilityIndependent ContractorsGeneral OverviewTortsVicarious LiabilityIndependent ContractorsAbnormally Dangerous ActivitiesTortsVicarious LiabilityIndependent ContractorsCollateral NegligenceTortsVicarious LiabilityIndependent ContractorsNondelegable DutiesTortsVicarious LiabilityIndependent ContractorsNuisance & Trespass

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Chapter 248 EMPLOYER'S LIABILITY FOR EMPLOYEE'S TORTS
PART II. LEGAL BACKGROUND

21-248 California Forms of Pleading and Practice--Annotated §§ 248.23-248.29

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[Reserved]

§§ 248.23[Reserved]

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PART III. RESEARCH GUIDE

21-248 California Forms of Pleading and Practice--Annotated § 248.30

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§ 248.30 Related Matthew Bender Publications

[1] California Employment Law

For discussion of employer' liability to third parties for the torts of employees, see Wilcox, California Employment Law, Ch. 30 (Matthew Bender)

[2] California Torts

For discussion of vicarious liability under the doctrine of respondeat superior, see Levy, Golden, and Sacks, California Torts, Ch. 8 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsVicarious LiabilityGeneral OverviewTortsVicarious LiabilityEmployersGeneral Overview

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21-248 California Forms of Pleading and Practice--Annotated § 248.31

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§ 248.31 State Statutes

Definition of agent. *Civ. Code § 2295*

Statutory general rules of agency. *Civ. Code §§ 2295-2357*

General and special agents. *Civ. Code § 2297*

Liability of principal for torts of agent. *Civ. Code § 2338*

Employer liability for punitive damages for torts of employee. *Civ. Code § 3294(b)*

Right of indemnity of vicariously liable party against active tortfeasor. *Code Civ. Proc. § 876(b)*

Defendant who enters into good-faith settlement with injured party as protected from claim for indemnity from other defendant. *Code Civ. Proc. § 877.6(c)*

Rebuttable presumption that worker who provides service for which license is required is employee rather than independent contractor. *Lab. Code § 2750.5*

Worker who provides service for which license is required, but who does not have license, may not be independent contractor. *Lab. Code § 2750.5*

Right of employee to be indemnified by employer for liability arising from obedience to employer's directions. *Lab.*

Code § 2802

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsLiability of PrincipalContracts LawTypes of ContractsConstruction ContractsTortsDamagesPunitive DamagesAvailabilityEmployersTortsVicarious LiabilityEmployersIndemnityTortsVicarious LiabilityIndependent ContractorsGeneral Overview

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 248 EMPLOYER'S LIABILITY FOR EMPLOYEE'S TORTS
PART III. RESEARCH GUIDE

21-248 California Forms of Pleading and Practice--Annotated § 248.32

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§ 248.32 Decisions

[1] Borrowed Employees

General employer as remaining concurrently and simultaneously liable in dual employment situation when general and special employers share control of employee's work. Societa per *Azioni de Navigazione Italia v. City of Los Angeles (1982) 31 Cal. 3d 446, 460, 183 Cal. Rptr. 51, 645 P.2d 102* ; *Marsh v. Tilley Steel Co. (1980) 26 Cal. 3d 486, 494-495, 162 Cal. Rptr. 320, 606 P.2d 355*

Surgeon as not solely liable for negligence of operating room nurses under borrowed servant doctrine. *Truhitte v. French Hosp. (1982) 128 Cal. App. 3d 332, 343-350, 180 Cal. Rptr. 152*

[2] Employer Liability

[a] For Intentional Torts

Employer as liable for intentional torts of employee when employment involves risk of force being used by employee except when tort is committed for employee's own purposes, or as the result of a personal quarrel. *Golden W. Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 957, 171 Cal. Rptr. 95*

[b] For Own Negligence or Fault

Municipality as liable for willfully continuing to employ police officer of known violent propensities. *City of Los Angeles v. Superior Court (1973) 33 Cal. App. 3d 778, 782-783, 109 Cal. Rptr. 365*

[c] For Punitive Damages

"Managing agent" of corporation for purposes of establishing entitlement to punitive damages under *Civ. Code § 3294(b)* includes only those corporate employees who exercise substantial independent authority and judgment in their corporate decision-making so that their decisions ultimately determine corporate policy. *White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 566-567, 88 Cal. Rptr. 2d 19, 981 P.2d 944*

Punitive damages under Civ. Code § 3294as available in judicial action for sex harassment pleaded under Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*). *Bihun v. AT&T Info. Sys., Inc. (1993) 13 Cal. App. 4th 976, 996, 16 Cal. Rptr. 2d 787*

Punitive damages as against corporate defendant require showing that corporation either itself committed acts of oppression, fraud, or malice, or that it authorized or ratified such acts by its employees. *Pusateri v. E.F. Hutton & Co. (1986) 180 Cal. App. 3d 247, 253, 225 Cal. Rptr. 526*

Standards for determining whether corporation is liable for punitive damages based on act of person other than officer or director. *Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822-823, 157 Cal. Rptr. 482, 598 P.2d 452* (decided before 1980 addition of *Civ. Code § 3294(b)*)

Employer liable for employee's tort under doctrine of respondeat superior as not responsible for punitive damages when employer neither directed nor ratified the tortious act. *Hale v. Farmers Ins. Exch. (1974) 42 Cal. App. 3d 681, 690, 117 Cal. Rptr. 146* ; (disapproved in *Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822-823, 157 Cal. Rptr. 482, 598 P.2d 452* (decided before 1980 addition of *Civ. Code § 3294(b)*)); *Ebaugh v. Rabkin (1972) 22 Cal. App. 3d 891, 895, 99 Cal. Rptr. 706*

[3] Independent Contractors

[a] Generally

Person with no regular work space or hours of employment, no training or benefits and who was paid on a strictly commission basis with no taxes withheld, found to be independent contractor and not "employee" within the meaning of *Welf. & Inst. Code section 14107.2*. *People v. Palma (1995) 40 Cal. App. 4th 1559, 1565, 48 Cal. Rptr. 2d 334*

Person is independent contractor if control by hirer may be exercised only as to result of the work and not as to means by which it is accomplished. Societa per *Azioni de Navigazione Italia v. City of Los Angeles (1982) 31 Cal. 3d 446, 457-458, 183 Cal. Rptr. 51, 645 P.2d 102*

Employer of independent contractor is generally not vicariously liable for torts committed by independent contractor. *Henderson Bros. Stores, Inc. v. Smiley (1981) 120 Cal. App. 3d 903, 910, 174 Cal. Rptr. 875* ; *Anderson v. Chancellor W. Oil Dev. Corp. (1975) 53 Cal. App. 3d 235, 239, 125 Cal. Rptr. 640*

[b] Nondelegable Duty Exception

In action by ward against county for injuries sustained when he drove away in off-road vehicle owned by foster parents, trial court erred in instructing jury that county's duty of care to ward was nondelegable. *Jordy v. County of Humboldt (1992) 11 Cal. App. 4th 735, 742, 14 Cal. Rptr. 2d 553*

Activity involving possible danger to public carried on under public franchise or authority is duty that may not be

delegated to independent contractor, whether duty is imposed by statute, charter, or common law. *Snyder v. Southern Cal. Edison Co. (1955) 44 Cal. 2d 793, 799, 800, 285 P.2d 912*

Business involving considerable risk of harm to others operating under governmental authority is nondelegable duty exception to rule of general nonliability for independent contractors. *Eli v. Murphy (1952) 39 Cal. 2d 598, 599-601, 248 P.2d 756*

[c] Peculiar Risk Doctrine

When injuries resulting form independnet contractor's performance of inherently dangerous work are to an employee of the contractor, and thus subject to workers' compensation coverage, peculiar risk doctrine does not provide basis for employee to recover tort damages from person who hired the contractor, but did not cause the injuries. *Privette v. Superior Court (1993) 5 Cal. 4th 689, 702, 21 Cal. Rptr. 2d 72, 854 P.2d 721* (overruling *Woolen v. Aerojet Gen. Corp. (1962) 57 Cal. 2d 407, 20 Cal. Rptr. 12, 369 P.2d 708* , and its progeny)

Homeowner's association was not liable for injury to security guard employed by security firm hired by association, based on alleged failure of association to exercise control over association's property by restricting or controlling youth parties on premises. *Tilley v. CZ Master Ass'n (2005) 131 Cal. App. 4th 464, 484-486, 32 Cal. Rptr. 3d 151*

Peculiar risk doctrine was not applicable in action by ward against county for injuries sustained when he drove away in off-road vehicle owned by foster parents. *Jordy v. County of Humboldt (1992) 11 Cal. App. 4th 735, 746-747, 14 Cal. Rptr. 2d 553*

Plans and procedures used in construction of seismic joints in tall buildings did not create a peculiar risk of danger to workmen. *Hughes v. Atlantic Pac. Constr. Co. (1987) 194 Cal. App. 3d 987, 996-1001, 240 Cal. Rptr. 200*

Peculiar risk doctrine exception to rule of nonliability for actions of independent contractors applies on finding of two elements: (1) work was likely to create peculiar risk of harm unless special precautions were taken, and (2) employer should have recognized that work was likely to create such a risk. *Jimenez v. Pacific W. Constr. Co. (1986) 185 Cal. App. 3d 102, 110, 229 Cal. Rptr. 575*

Peculiar risk doctrine exception to rule of nonliability for actions of independent contractors did not apply when truck driven by independent contractor collided with bicycle rider while attempting to enter hiring corporation's property. *A. Teichert & Son, Inc. v. Superior Court (1986) 179 Cal. App. 3d 657, 661-662, 225 Cal. Rptr. 10*

Peculiar risk doctrine applies if negligence was not unusual or foreign to normal risks of doing work, or if employer was fully aware of independent contractor's contemplated unsafe method of doing work. *Mackey v. Campbell Constr. Co. (1980) 101 Cal. App. 3d 774, 785, 786, 162 Cal. Rptr. 64*

[4] Negligent Hiring

Church not liable for negligent hiring, retaining and supervising priest who sexually abused minor parishioner, in the absence of any record of abuse and where Church was precluded from investigating priest's sexual behavior by right of privacy. *Roman Catholic Bishop v. Superior Court (1996) 42 Cal. App. 4th 1556, 1565, 1567, 50 Cal. Rptr. 2d 399* (granting writ of mandamus ordering superior court to enter summary judgment for defendant church)

Church as subject to liability for negligent hiring of pastor who sexually molested child parishioner, based on church's reason to know of pastor's history of pedophilia. *Evan F. v. Hughson United Methodist Church (1992) 8 Cal. App. 4th 828, 841-844, 10 Cal. Rptr. 2d 748* (reversing summary judgment for defendant church)

[5] Respondeat Superior

Respondeat superior as applicable to all risks inherent in or created by enterprise. *Miller v. Stouffer (1992) 9 Cal. App. 4th 70, 78, 11 Cal. Rptr. 2d 454*

Respondeat superior as applicable to household that employs domestic help; although not business enterprise, household is better equipped than its domestic help to absorb risk by purchasing adequate insurance. *Miller v. Stouffer (1992) 9 Cal. App. 4th 70, 80, 11 Cal. Rptr. 2d 454* (homeowner liable for negligent driving of housekeeper)

Civ. Code § 2338 as reflecting common law doctrine of respondeat superior. *Spradlin v. Cox (1988) 201 Cal. App. 3d 799, 808-809, 247 Cal. Rptr. 347*

Rule of respondeat superior as applicable to unpaid volunteers as well as paid employees. *Jeffrey E. v. Central Baptist Church (1988) 197 Cal. App. 3d 718, 722 n. 6, 243 Cal. Rptr. 128*

[6] Scope of Employment

[a] Generally

Proof of an employer's authorization of employee's act as not necessary to show that act was within scope of employment. *Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 969, 227 Cal. Rptr. 106, 719 P.2d 676* ; *Foss v. Anthony Indus. (1983) 139 Cal. App. 3d 794, 801-802, 189 Cal. Rptr. 31*

Acceptance of unauthorized tractor passenger by employee as within scope of employment. *Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 967-970, 227 Cal. Rptr. 106, 719 P.2d 676*

Burden of proof as on plaintiff to demonstrate that negligent act was committed within scope of employment. *Ducey v. Argo Sales Co. (1979) 25 Cal. 3d 707, 721, 159 Cal. Rptr. 835, 602 P.2d 755*

Reasonable jury could conclude that law firm partner acted within scope of authority when removing money from client's residence in effort to post client's bail and ensure that firm's fees were paid. *PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP (2007) 150 Cal. App. 4th 384, 394, 58 Cal. Rptr. 3d 516*

When employer had no knowledge of conduct, employer could not be liable for employee's use of employer's computer systems to send threatening e-mails that were unrelated to his employment. *Delfino v. Agilent Technologies, Inc. (2006) 145 Cal. App. 4th 790, 813-814, 52 Cal. Rptr. 3d 376*

Off-duty winery employee's misuse of grape bin for personal winemaking, without employer's knowledge or consent, could not support vicarious liability of employer for traffic accident caused when bin fell from employee's truck; employee was not acting within scope of employment at time of accident. *Baptist v. Robinson (2006) 143 Cal. App. 4th 151, 164, 49 Cal. Rptr. 3d 153*

Driver who committed intentional assault with personal vehicle for personal reasons was not acting in scope of employment, even though he was taking car to airport several hours later for business trip. *Kephart v. Genuity, Inc. (2006) 136 Cal. App. 4th 280, 294-295, 38 Cal. Rptr. 3d 845*

Question of fact for jury as to whether employee's act of throwing hot oil on police officer while attacking other employee was within scope of employment, because reasonable inferences could be made either way. *Yamaguchi v. Harnsmut (2003) 106 Cal. App. 4th 472, 482-485, 130 Cal. Rptr. 2d 706*

Evidence supported jury's verdict that employee involved in auto accident was not acting within scope of employment for school district, although accident occurred after being fingerprinted as required to work for district; fingerprinting was mandated by state, not school district, employee had discretion to decide when, where, and how to fulfill requirement, and task was performed on employee's day off at location chosen by employee. *Tognazzini v. San Luis Coastal Unified Sch. Dist. (2001) 86 Cal. App. 4th 1053, 1058-1060, 103 Cal. Rptr. 2d 790*

Triable issue of fact existed as to whether real estate agent was acting within scope of employment when submitting fraudulent loan transaction to mortgage loan broker such that employer could be vicariously liable. *Inter Mountain Mortgage, Inc. v. Sulimen (2000) 78 Cal. App. 4th 1434, 1441, 93 Cal. Rptr. 2d 798*

Negligent driving of employee on paid break, driving to obtain cookies to take back to work, as act of comfort and convenience that had no nexus to employment andtherefore outside scope of employment. *Bailey v. Filco, Inc. (1996) 48 Cal. App. 4th 1552, 1565, 56 Cal. Rptr. 2d 333*

Scope of employment test for purpose of respondeat superior is not the same as test under workers' compensation law to determine whether injuries sustained by employee arose out of and in course of employment. *Anderson v. Pacific Gas & Elec. Co. (1993) 14 Cal. App. 4th 254, 259, 17 Cal. Rptr. 2d 534*

Payment of worker's compensation benefits for injuries suffered in accident that occurred on way home from work as not requiring finding that employer was vicariously liable for employee's tortious conduct in that accident. *Anderson v. Pacific Gas & Elec. Co. (1993) 14 Cal. App. 4th 254, 259, 17 Cal. Rptr. 2d 534*

Whether an act is within scope of employment as question of law when facts are undisputed and no conflicting inferences are possible. *Tryer v. Ojai Valley Sch. (1992) 9 Cal. App. 4th 1476, 1480, 12 Cal. Rptr. 2d 114*

Employee's conduct as coming within scope of employment when typical or broadly incidental to enterprise and not so unusual or startling that it would seem unfair to include resulting loss in risk of doing business. *Miller v. Stouffer (1992) 9 Cal. App. 4th 70, 78, 11 Cal. Rptr. 2d 454*

Combined purposes doctrine as attaching respondeat superior liability to incidental deviations from strict course of employer's duties unless it appears that employee could not have been serving employer either directly or indirectly. *Miller v. Stouffer (1992) 9 Cal. App. 4th 70, 78-79, 11 Cal. Rptr. 2d 454*

Housekeeper's negligent driving of employee's vehicle as coming within scope of employment when housekeeper was practicing driving and returning from errands for her employer. *Miller v. Stouffer (1992) 9 Cal. App. 4th 70, 78, 11 Cal. Rptr. 2d 454*

Child molestation by Sunday school teacher as not within scope of employment. *Jeffrey E. v. Central Baptist Church (1988) 197 Cal. App. 3d 718, 722-724, 243 Cal. Rptr. 128*

Respondeat superior liability as properly applied when employee undertakes activities within his or her scope of employment that cause employee to become instrumentality of danger to others, even if danger may manifest itself at times and locations remote from workplace. *Childers v. Shasta Livestock Auction Yard, Inc. (1987) 190 Cal. App. 3d 792, 804-805, 235 Cal. Rptr. 641*

Sexual assault committed by police officer after making traffic stop as within scope of employment due to fact that police officer carries authority of law. *White v. County of Orange (1985) 166 Cal. App. 3d 566, 570-571, 212 Cal. Rptr. 493*

Employee's wrongful acts as within scope of employment on showing that (1) the act was either required or incident to his or her duties, or (2) employee's misconduct could be reasonably foreseen by employer. *Alma W. v. Oakland Unified Sch. Dist. (1981) 123 Cal. App. 3d 133, 139, 176 Cal. Rptr. 287* ; *Clark Equip. Co. v. Wheat (1979) 92 Cal. App. 3d 503, 520, 154 Cal. Rptr. 874*

Battery on job site after hours as within scope of employment when altercation arose out of employment situation. *Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 621-624, 124 Cal. Rptr. 143*

[b] Going-and-Coming Rule

Employee injured while driving own vehicle to work considered within the scope of employment because employee often used personal vehicle to travel to job sites for work purposes, thereby incidentally benefitting the employer. *Singh v. Board of Ret. (1996) 41 Cal. App. 4th 1180, 1186-1188, 49 Cal. Rptr. 2d 220*

Per diem travel allowance as not changing general rule that employee is outside scope of employment while commuting to and from work. *Anderson v. Pacific Gas & Elec. Co. (1993) 14 Cal. App. 4th 254, 259, 17 Cal. Rptr. 2d 534*

Special errand exception to going-and-coming rule as not applicable when employee is driving coworker to park and ride lot. *Anderson v. Pacific Gas & Elec. Co. (1993) 14 Cal. App. 4th 254, 262, 17 Cal. Rptr. 2d 534*

Activities of employee on lunch break as not coming within required-vehicle exception to going-and-coming rule. *Tryer v. Ojai Valley Sch. (1992) 9 Cal. App. 4th 1476, 1482, 12 Cal. Rptr. 2d 114*

Combined purposes doctrine as not applying if employee's activities that fall outside his or her scope of employment under going-and-coming rule. *Tryer v. Ojai Valley Sch. (1992) 9 Cal. App. 4th 1476, 1483, 12 Cal. Rptr. 2d 114*

Going-and-coming rule as inapplicable as applied by either workers' compensation or tort cases. *Tryer v. Ojai Valley Sch. (1992) 9 Cal. App. 4th 1476, 1481-1482, 12 Cal. Rptr. 2d 114*

Required-vehicle exception to going-and-coming rule as applying only when employer requires use of vehicle as integral part of performing job at disparate locations throughout course of work hours. *Tryer v. Ojai Valley Sch. (1992) 9 Cal. App. 4th 1476, 1481-1482, 12 Cal. Rptr. 2d 114*

Special errand exception to going-and-coming rule as not applicable when employee's act constitutes a complete abandonment of employer's business. *Felix v. Asai (1987) 192 Cal. App. 3d 926, 931-934, 237 Cal. Rptr. 718*

Temporary employment agency employee as within going-and-coming rule while driving to temporary work assignment. *Henderson v. Adia Servs., Inc. (1986) 182 Cal. App. 3d 1069, 1076-1078, 227 Cal. Rptr. 745*

Employee sent home early due to heavy rains as within going-and-coming rule. *Caldwell v. A.R.B., Inc. (1986) 176 Cal. App. 3d 1028, 1035-1042, 222 Cal. Rptr. 494*

Employee's voluntary trip to place of employment to pick up paycheck as within going-and-coming exception to invocation of doctrine of respondeat superior. *Munyon v. Ole's, Inc. (1982) 136 Cal. App. 3d 697, 703-706, 186 Cal. Rptr. 424*

[c] Social Functions

Employee consumption of beer with employer's permission as within scope of employment if such activity benefited employer and was a customary incident of employment. *Childers v. Shasta Livestock Auction Yard, Inc. (1987) 190 Cal. App. 3d 792, 803-806, 235 Cal. Rptr. 641*

Company sponsored nonmandatory holiday luncheon at which company employees consumed alcoholic beverages in employer's parking lot at their own expense as not within scope of employment. *Harris v. Trojan Fireworks Co. (1984) 155 Cal. App. 3d 830, 835-837, 202 Cal. Rptr. 440*

[7] Respondeat Superior and Proposition 51

Proposition 51 as not eliminating liability for noneconomic damages of defendant whose liability is vicarious only under respondeat superior (and who, therefore, is technically without fault); vicariously liable employer as standing in shoes of employee for purposes of determining employer's comparative share of fault and noneconomic damages. *Miller v. Stouffer (1992) 9 Cal. App. 4th 70, 81-86, 11 Cal. Rptr. 2d 454*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesPunitive DamagesAvailabilityEmployersTortsVicarious LiabilityEmployersActivities & ConditionsIntentional TortsTortsVicarious LiabilityEmployersScope of EmploymentGeneral OverviewTortsVicarious LiabilityIndependent ContractorsGeneral OverviewTortsVicarious LiabilityIndependent ContractorsNondelegable Duties

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Chapter 248 EMPLOYER'S LIABILITY FOR EMPLOYEE'S TORTS
PART III. RESEARCH GUIDE

21-248 California Forms of Pleading and Practice--Annotated § 248.33

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§ 248.33 Law Reviews

Comment, *Employer Liability for a Drunken Employee's Actions Following an Office Party: A Cause of Action Under Respondeat Superior, 19 Cal. W.L. Rev. 107 (1982)*

Legal Topics:

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

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21-248 California Forms of Pleading and Practice--Annotated § 248.34

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§ 248.34 Text References

Witkin, Summary of California Law, vol. 3, *Agency and Employment*, §§ 165-194, vol. 6, *Torts*, §§ 1220-1279 (10th ed. 2005)

Legal Topics:

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21-248 California Forms of Pleading and Practice--Annotated §§ 248.35-248.39

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[Reserved]

§§ 248.35[Reserved]

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PART IV. FORMS

21-248 California Forms of Pleading and Practice--Annotated § 248.40

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§ 248.40 Complaint for Compensatory Damages Based on Negligence--By Third Party Against Employer and Employee--Injury Caused by Employee Acting Within Scope of Employment [Civ. Code § 2338]

[1] FORM Complaint for Compensatory Damages Based on Negligence--By Third Party Against Employer and Employee--Injury Caused by Employee Acting Within Scope of Employment [Civ. Code § 2338]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name of employer*],	)	(Negligence)
_____ [*name of employee*],	)	[Amount demanded
and DOES 1 through_____,	)	_____(exceeds *or* does not exceed)
Defendants.	)	$10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

FIRST COUNT (Negligence)

1. Defendant _____[*name of employee tortfeasor*] is an individual, and at all times herein mentioned was a resident of _____County, California.

2. Defendant _____[*name of employer*] is, and all times herein mentioned was, _____[*specify capacity, e.g.,* a corporation organized and existing under the laws of the State of California].

3. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants. Each reference in this complaint to "defendant," "defendants," or a specifically named defendant refers also to all defendants sued under fictitious names.

4. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned each of the defendants, including all defendants sued under fictitious names, was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of this agency or employment.

5. On or about _____[*date*] at _____[*location*] in _____[*city*], California, plaintiff _____[*allege plaintiff's conduct at time of injury, e.g.,* was driving her car northbound on Main Street at the point where Main Street intersects with First Avenue].

6. At that time and place, _____[*name of employee defendant*] _____[*state negligent act or omission of employee, e.g.,* while operating an automobile belonging to defendant _____ (*name of employer*) negligently and carelessly operated this vehicle so as to cause it to strike the rear of plaintiff's vehicle].

[*Allege that damages resulted from conduct of employee, using one or more of Paragraphs 7- 10, or other allegation of damages*]

[7. _____ (*Allege any specific physical injuries suffered by plaintiff, e.g.,* As a proximate result of the acts of defendant as alleged, plaintiff's head struck the windshield or her car, causing an 8-inch laceration across her forehead).]

[8. As a proximate result of the acts of defendant, plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervous system and person, all of which have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. (Plaintiff is informed and believes and thereon alleges that these injuries will result in some permanent disability to him/her.) As a result of these injuries, plaintiff has suffered general damages.]

[*EITHER*]

[9. As a further proximate result of defendant's acts, plaintiff has been damaged in that he/she has been required to expend money and incur obligations for medical services, x rays, drugs, and sundries reasonably required in the treatment and relief of the injuries herein alleged.]

[*OR*]

[9. As a further proximate result of the acts of defendant, plaintiff has incurred, and will continue to incur, medical and related expenses.]

[*EITHER*]

[10. As a further proximate result of the acts of defendant, plaintiff was prevented from attending to his/her usual occupation as a _____(*state occupation*) for a period of _____(*specify, e.g.,* 2 months) and thereby lost earnings to his/her damage.]

[*OR*]

[10. As a further proximate result of the acts of defendant, plaintiff was prevented from attending to his/her usual occupation as a _____(*state occupation*) for a period of _____(*specify, e.g.,* 2 months) as of the date of this complaint and continuing for an as yet undetermined period. Plaintiff thereby has lost and will lose earnings in an as yet unascertained amount. (As a further proximate result of the acts of defendant, plaintiff's present and future earning capacity has been greatly impaired.)]

[*CONTINUE*]

SECOND COUNT
(Respondeat Superior)

11. At all times herein mentioned, defendant _____[*name of employee*] was the agent and employee of defendant _____[*name of employer*] and, in doing the acts herein described and referred to, was acting in the course and within the scope of his/her authority as agent and employee, and in the transaction of the business of the employment or agency. Defendant _____[*name of employer*] is, therefore, liable to plaintiff for the acts of _____[*name of employee*] as heretofore alleged.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For lost earnings, past and future, according to proof;

4. For interest as allowed by law;

5. For costs of suit incurred herein; and

6. For such other and further relief as the court may deem proper.

_____[*firm name, if any*]

By:_____[*signature*]

_____ [*typed name*]

Attorney for Plaintiff [*name*]

[*Add, if desired.*]

VERIFICATION

I, _____[*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____[*signature*]

_____ [*typed name*]

[2] Use of Form

This form, is a general form of complaint for use to allege negligence against an employee and the liability of an employer for the acts of the employee under the doctrine of respondeat superior [*see Civ. Code § 2338*].

[3] Allegations

In addition to the allegations commonly used for capacity, fictitiously named defendants, and agency (Paragraphs 1-4), this form of complaint alleges the negligence of the employee (Paragraphs 5-6). For more detailed consideration of pleading negligence and forms for use in pleading negligence, see Ch. 380, *Negligence* .

This form also contains various optional alternatives to allege that damage resulted from the defendants' conduct, including:

- An allegation of specific physical injury (Paragraph 7);
- Allegations of general damages (Paragraph 8);
- Special damages for medical expenses (Alternative Paragraphs 9); and
- Special damages for lost earnings (Alternative Paragraphs 10).

The first alternative Paragraph 9 alleges a fixed and known amount of medical expenses. The second alternative is for use if the amount of medical expenses is not known at the time when the complaint is filed.

The first alternative Paragraph 10 alleges a fixed and known amount of lost earnings. The second alternative is for use if the total amount of lost earnings cannot yet be ascertained and the plaintiff's future earning capacity has been impaired.

Depending on the particular case, any or all of Paragraphs 7-10 may be used as appropriate. Additional alternatives may be found in Ch. 177, *Damages* , and Ch. 380, *Negligence* .

[4] Respondeat Superior Count

In addition to the allegations of negligence on the part of the defendant employee, this form contains a count alleging the employer's vicarious liability under respondeat superior (Paragraph 11). Generally, if recovery is sought for invasion of the same primary right, it is sought under the same cause of action, even if sought on a different legal ground or theory [*see Mattson v. City of Costa Mesa (1980) 106 Cal. App. 3d 441, 448-449, 164 Cal. Rptr. 913]* . Different legal grounds or theories for recovery for invasion of the same right are commonly denominated as "counts." Thus, theories such as respondeat superior that impose vicarious liability are not causes of action but counts.

Respondeat superior is commonly pleaded without reference to a separate count, but by use of either a general or specific allegation of agency in the preliminary allegations of the complaint. However, inclusion of a separate count helps clarify the nature of the liability alleged against the employer [*see § 248.11* for a general discussion of theories of direct and vicarious employer liability]. This count should be used in addition to, and not instead of, the universal agency allegation set forth in Paragraph 4 because of the need to allege agency involving fictitiously named defendants.

[5] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints* .

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* , and Ch. 324, *Jurisdiction: Subject Matter Jurisdiction*

For forms of complaint to recover damages for intentional infliction of emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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21-248 California Forms of Pleading and Practice--Annotated § 248.41

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§ 248.41 Complaint for Compensatory and Punitive Damages--By Third Party Against Employer and Employee--Battery by Employee Acting Within Scope of Employment--Employer Had Advanced Knowledge That Employee Was Unfit

[1] FORM Complaint for Compensatory and Punitive Damages--By Third Party Against Employer and Employee--Battery by Employee Acting Within Scope of Employment--Employer Had Advanced Knowledge That Employee Was Unfit

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name of employer*],	)	COMPLAINT FOR DAMAGES (Battery)
_____ [*name of employee*],	)	[Amount demanded _____(exceeds
and DOES 1 through _____,	)	*or* does not exceed) $10,000]
Defendants.	)	[LIMITED CIVIL CASE]form:center>
	)	
	)	

_____

Plaintiff alleges:

FIRST COUNT

(Battery)

1. [*Allegation identifying employee defendant. See § 248.40[1], Paragraph 1.*]

2. [*Allegation identifying employer defendant. See § 248.40[1], Paragraph 2.*]

3. [*Fictitious name allegation. See § 248.40[1], Paragraph 3.*]

4. [*General and universal agency allegation. See § 248.40[1], Paragraph 4.*]

5. On or about _____[*date*] at _____[*location*] in _____[*city*], California, plaintiff _____[*state what plaintiff was doing immediately prior to battery, e.g.,* was lawfully on the premises of _____(*name of employer defendant*) for the purpose of purchasing groceries].

6. At that time and place, defendant _____[*name of employee*] _____[*state all acts of defendant that constituted a harmful or offensive contact with plaintiff, e.g.,* removed a firearm from a drawer and, without warning, fired a shot at plaintiff, striking him in the chest with a bullet].

7. In doing the acts as alleged above, defendant acted with the intent to make a harmful contact with plaintiff's person.

8. At no time did plaintiff consent to any of the acts of defendant alleged in Paragraphs 5 through 7, above.

[9. _____ (*Allege any specific physical injuries suffered by plaintiff, e.g.,* As a proximate result of the acts of defendants, plaintiff suffered a punctured lung).]

10. [*General damages allegation. See § 248.40[1], Paragraph 8.*]

11. [*Medical expenses allegation. See § 248.40[1], Alternative Paragraphs 9.*]

12. [*Lost earnings allegation. See § 248.40[1], Alternative Paragraphs 10.*]

[13. The aforementioned conduct of defendant _____ (*name of employee*) was willful and malicious and was intended to oppress and cause injury to plaintiff, thereby warranting the assessment of punitive damages against defendant _____ (*name of employee*).]

SECOND COUNT
(Respondeat Superior)

14. At all times herein mentioned, defendant _____ [*name of employee*] was the agent and employee of defendant _____ [*name of employer*] and, in doing the acts herein described and referred to, was acting in the course and within the scope of his/her authority as agent and employee, and in the transaction of the business of the employment or agency. Defendant _____ [*name of employer*] is, therefore, liable to plaintiff for the acts of _____ [*name of employee*] as heretofore alleged.

THIRD COUNT
(Employer's Negligent Hiring, Training, and/or Retention of Unfit Employee)

15. [Plaintiff is informed and believes and thereon alleges that,] [I]n doing the acts as heretofore alleged, defendant _____ [*name of employer*] knew, or in the exercise of reasonable diligence should have known, that defendant _____ [*name of employee*] was incompetent and unfit to perform the duties for which he/she was employed, and that an undue risk to persons such as plaintiff would exist because of the employment. [*Add any specific facts to support allegation of employer's advance knowledge of employee's propensity for violence*.]

[16. Despite this advance knowledge, defendant _____ (*name of employer*) retained defendant _____ (*name of employee*) as an employee in conscious disregard of the rights and safety of others. As a result of this conscious disregard of the rights of plaintiff, plaintiff is entitled to an award of punitive damages from defendant _____ (*name of employer*).]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages;

2. For medical and related expenses according to proof;

3. For lost earnings, past and future, _____ according to proof;

[4. For punitive damages;]

5. For interest as allowed by law;

6. For costs of suit incurred herein; and

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See 248.40[1]*.]

[2] Use of Form

This form is a general form of complaint for use to allege a battery committed by an employee, the vicarious liability of the employer for the acts of the employee under the doctrine of respondeat superior [*see Civ. Code § 2338*], and the direct liability of the employer for the employee's acts based on the employer's negligent hiring or retention of the employee [*see Underwriters Ins. Co. v. Purdie (1983) 145 Cal. App. 3d 57, 68-69, 193 Cal. Rptr. 248* ; *see also § 248.12* for discussion of employer's own negligence or fault as basis for liability]. This form may be adapted for use in the case of any other intentional tort committed by an employee in the scope of employment by substituting the appropriate allegations for Paragraphs 5 through 8.

PRACTICE TIP:

Specifically Plead Scope of Employment. Given the holdings of *Farmers Insurance Group v. City of*

Santa Clara (1996) 11 Cal.4th 992, 47 Cal. Rptr. 2d 478, 906 P. 2d 440 , and *Lisa M. v. Henry Mayo-Newhall Mem'l Hosp. (1996) 12 Cal. 4th 291, 48 Cal. Rptr. 2d 510, 907 P. 2d 358* , and the likely increased use of demurrers such as that suggested in § 248.50[1], plaintiff's counsel will be well advised to more specifically plead why the employee conduct that caused the injury in question was an "outgrowth" of the employment, "inherent in the working environment," and a "foreseeable consequence" of the work. Such pleading, as specific as hard information and "information and belief" can make it, should, at the very least keep the "scope of employment" issue from being disposed of on demurrer and left open to discovery. *By Richard P. Hill*

[3] Allegations

In addition to the allegations commonly used for capacity, fictitiously named defendants, and agency (Paragraphs 1-4), this form of complaint alleges a battery (Paragraphs 5-8). For more detailed consideration of pleading assault and battery and for additional forms of allegations of assault and battery, see Ch. 58, *Assault and Battery* .

This form also contains an optional allegation of specific physical injury (Paragraph 9), allegations of general damages (Paragraph 10), special damages for medical expenses (Alternative Paragraphs 11), special damages for lost earnings (Alternative Paragraphs 12), and a claim for punitive damages from the employee (Optional Paragraph 13). For discussion of the advisability of pleading for punitive damages, § see *248.41[4]*. For discussion of the use of the alternative paragraphs, see *§ 248.40[4]*.

This form next contains a count for the vicarious liability of the employer under the respondeat superior doctrine (Paragraph 14). For discussion of this count, see *§ 248.41[4]*.

[4] Count for Direct Employer Liability

This form contains a count alleging the employer's direct liability for the employee's acts as a result of the employer's negligent hiring and retention of an employee with a known propensity for violence (Paragraph 15) [*see Underwriters Ins. Co. v. Purdie (1983) 145 Cal. App. 3d 57, 68-69, 193 Cal. Rptr. 248]* . The complaint must allege facts showing that the employer knew or should have known of the risk that an employee would act in a certain manner, and that the employee did in fact act in that particular manner [*see Doe v. Capital Cities (1996) 50 Cal. App. 4th 1038, 1054-1055, 58 Cal. Rptr. 2d 122* (upholding trial court's sustaining of demurrer to inadequately alleged negligent hiring, training, and/or supervision cause of action)]. If that does not appear from the face of other allegations in the complaint, facts showing that specific connection should be alleged in this paragraph.

An employer is liable for punitive damages if the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others (optional Paragraph 16) [*see Civ. Code § 3294(b)*; *see also § 248.18[1]*]. Use of this optional paragraph is recommended in that discovery may establish the employer's actual knowledge of the employee's unfitness, which would support the prayer for punitive damages.

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21-248 California Forms of Pleading and Practice--Annotated § 248.42

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§ 248.42 Complaint for Compensatory Damages--By Third Party Against Independent Contractor and Hirer of Independent Contractor--Failure to Take Precautions Against Peculiar Risk

[1] FORM Complaint for Compensatory Damages--By Third Party Against Independent Contractor and Hirer of Independent Contractor--Failure to Take Precautions Against Peculiar Risk

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name of person hiring independent contractor*],	)	COMPLAINT FOR DAMAGES (Negligence)
_____ [*name of independent contractor*],	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
and DOES 1 through _____,	)	[LIMITED CIVIL CASE]
Defendants.	)	

_____

Plaintiff alleges:

FIRST COUNT
(Negligence)

1. [*Allegation identifying independent contractor defendant. See § 248.40[1], Paragraph 1.*]

2. [*Allegation identifying defendant that hired independent contractor. See § 248.40[1], Paragraph 2.*]

3. [*Fictitious name allegation. See § 248.40[1], Paragraph 3.*]

4. [*General and universal agency allegation. See § 248.40[1], Paragraph 4.*]

5. On or about _____ [*date*], defendant _____ [*name of person or entity that hired independent contractor*] agreed to hire, and did hire, _____ [*name of independent contractor*] to serve defendant as an independent contractor for the purpose of _____ [*type of contracted work, e.g.,* painting the inside surface of a certain steel tank owned by defendant _____ (*name of person or entity that hired independent contractor*) for which work defendant specified and required the use of a paint known as _____ (*identify*)]. Pursuant to the agreement, _____ [*name of independent contractor*] undertook to perform the work.

6. On or about _____ [*date*], plaintiff _____ [*allege facts showing status and activity of plaintiff placing him/her in class of persons to whom defendant owed duty, e.g.,* was on the premises of the property of defendant _____ (*name of person or entity that hired independent contractor*) located at _____ (*address*)].

7. At that time and place, defendant _____ [*name of independent contractor*] _____ [*allege facts establishing defendant independent contractor's control over instrumentality of injury, e.g.,* in fulfillment of the abovementioned contract, was engaged in painting the steel tank].

8. At that time and place, defendant _____ [*name of independent contractor*] negligently _____ [*allege acts or omissions of defendant independent contractor, e.g.,* allowed flammable fumes from the paint to accumulate inside the tank, where they were ignited by a spark so as to cause an explosion and fire inside of the tank and spreading throughout the premises] and that negligence was the proximate cause of the injuries and damages described below.

[9. _____ (*Allege any specific physical injuries suffered by plaintiff, e.g.,* As a proximate result of the acts of defendants, plaintiff suffered third-degree burns over 30 percent of his/her body).]

10. [*General damages allegation. See § 248.40[1], Paragraph 8.*]

11. [*Medical expenses allegation. See § 248.40[1], Alternative Paragraphs 9.*]

12. [*Lost earnings allegation. See § 248.40[1], Alternative Paragraphs 10.*]

SECOND COUNT
(Liability for Injuries Resulting From Work by Independent Contractor Involving Peculiar Risk of Harm)

13. In employing _____ [*name of independent contractor*] to do the work, defendant _____ [*name of employer*] recognized or should have recognized that the work would be likely to create, during its progress, a peculiar unreasonable risk of physical harm to persons on the premises unless special precautions were taken, in that defendant _____ [*name of person or entity that hired independent contractor*] then knew or should have known _____ [*specify, e.g.,* that the paint specified and required

in the contract contained volatile and flammable solvents that, in a confined space, would accumulate in sufficient concentration as to be subject to explosion if ignited by, for example, a spark from a cigarette ash].

[14. Defendant _____ (*name of person or entity that hired independent contractor*) neither provided in the contract that defendant _____ (*name of independent contractor*) must take special precautions nor exercised reasonable care to provide in some other manner for the taking of the precautions in order to avoid the peculiar unreasonable risk of physical harm likely to be created during the progress of the work.]

[*Prayer. See § 248.40[1].*]

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff [*name*]

[*Add, if desired.*]

[*Verification, if desired. See § 248.40[1].*]

[2] Use of Form

This form of complaint is for use to allege negligence against an independent contractor and the liability of the person who hired the contractor under the peculiar-risk doctrine [*Henderson Bros. Stores, Inc. v. Smiley (1981) 120 Cal. App. 3d 903, 911-912, 174 Cal. Rptr. 875]* . For general considerations about complaints for negligence, see *§ 248.40[2]* et seq.

[3] Allegations

In addition to the allegations commonly used for capacity, fictitiously named defendants, and agency (Paragraphs 1-4), this form of complaint alleges the negligence of the independent contractor (Paragraphs 5-8). For more detailed consideration of pleading negligence and for additional forms of allegations of negligence, see Ch. 380, *Negligence* .

This form also contains an optional allegation of specific physical injury (Paragraph 9), allegations of general damages (Paragraph 10), special damages for medical expenses (Alternative Paragraphs 11), and special damages for lost earnings (Alternative Paragraphs 12). For discussion of the use of the alternative paragraphs, see *§ 248.40[3]*.

[4] Peculiar-Risk Doctrine

This form contains a count for the liability of the person who hired the independent contractor under the "peculiar-risk" doctrine (Paragraphs 13 and 14). The peculiar risk doctrine is stated in Restatement (Second) of Torts §§ 413 and 416. § 416, on which Paragraph 13 of the form is based, is described as imposing vicarious liability on one who hired an independent contractor, regardless of any contractual provisions, for the contractor's negligent failure to take the proper special precautions against a peculiar risk. § 413, on which optional paragraph 14 of the form is based, is described as imposing direct liability on the contractor for failing to provide in the contract for the taking of appropriate precautions or for failure to provide for them in some other manner [*Henderson Bros. Stores, Inc. v. Smiley (1981) 120 Cal. App.*

3d 903, 911, 174 Cal. Rptr. 875] . Paragraph 14 may be used if, in addition to vicarious liability, direct liability may be based on the employer's failure to meet the requirements of Restatement (Second) of Torts § 413.

The California Supreme Court has precluded employees of negligent independent contractors from recovering damages from the hirer of the independent contractor under the peculiar risk doctrine [*Privette v. Superior Court (1993) 5 Cal. 4th 689, 701-702, 21 Cal. Rptr. 2d 72, 854 P.2d 721]* . This limitation applies even when the hirer fails to provide in the contract, or in some other manner, that special precautions be taken to avert the peculiar risks of the work [*Toland v. Sunland Hous. Group, Inc. (1998) 18 Cal. 4th 253, 267, 74 Cal. Rptr. 898, 955 P.2d 475]* .

In addition, an employee of an independent contractor who is injured on the job cannot sue the hirer of the contractor for negligence in hiring the contractor [*Camargo v. Tjaarda Dairy (2001) 25 Cal. 4th 1235, 1244-1245, 108 Cal. Rptr. 2d 617, 25 P.3d 1096]* , nor can suit be based merely on the fact that the hirer retained control over safety conditions at a work site [*Hooker v. Department of Transp. (2002) 27 Cal. 4th 198, 202, 115 Cal. Rptr. 2d 853, 38 P.3d 1081]* . However, the hirer may be liable for an injury to an employee of an independent contractor if the hirer's exercise of retained control over safety affirmatively contributed to the employee's injury [*Hooker v. Department of Transp. (2002) 27 Cal. 4th 198, 202, 115 Cal. Rptr. 2d 853, 38 P.3d 1081]* or if the hirer negligently provides unsafe equipment to the contractor that affirmatively contributes to the injury [*McKown v. Wal-Mart Stores, Inc. (2002) 27 Cal. 4th 219, 222, 115 Cal. Rptr. 2d 868, 38 P.3d 1094]* .

For further discussion of the peculiar-risk doctrine, see *§ 248.22[2][b]*.

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21-248 California Forms of Pleading and Practice--Annotated § 248.43

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§ 248.43 Complaint for Compensatory Damages--By Third Party Against Independent Contractor and Employer of Independent Contractor--Nondelegable Duty

[1] FORM Complaint for Compensatory Damages--By Third Party Against Independent Contractor and Employer of Independent Contractor--Nondelegable Duty

[*Caption. See § 248.42[1].*]

Plaintiff alleges:

FIRST COUNT
(Negligence)

1. [*Allegation identifying independent contractor defendant. See § 248.40[1], Paragraph 1.*]

2. [*Allegation identifying employer defendant. See § 248.40[1], Paragraph 2.*]

3. [*Fictitious name allegation. See § 248.40[1], Paragraph 3.*]

4. [*General and universal agency allegation. See § 248.40[1], Paragraph 4.*]

5. On or about _____[*date*], defendant _____ agreed to hire, and did hire, _____[*name of independent contractor*] to serve defendant as an independent contractor for the

purpose of _____[*type of contracted work, e.g.,* repairing and constructing power lines for defendant _____(*name of defendant who hired independent contractor*) on its premises and on rights-of-way held by defendant _____(*name of defendant who hired independent contractor*)]. Pursuant to the agreement, _____[*name of independent contractor*] began performance of the contract on _____[*date*].

6. On or about _____[*date*], plaintiff _____[*allege facts showing status and activity of plaintiff placing him/her in class of persons to whom defendant owed duty, e.g.,* was walking on the public sidewalk in front of the premises located at _____(*address*)].

7. At that place and sometime prior to that time, defendant _____[*name of independent contractor*] _____[*allege facts establishing defendant independent contractor's control over instrumentality of injury, e.g.,* in fulfillment of the abovementioned contract, had installed a public-utility pole on a right-of-way of defendant _____(*name of defendant who hired independent contractor*) located immediately adjacent to the place where plaintiff was walking].

8. Defendant _____[*name of independent contractor*] negligently _____[*allege acts or omissions of defendant independent contractor, e.g.,* had installed the pole at a depth of _____feet, an insufficient depth to properly secure it in the ground, so as to cause the pole to fall against a power line, breaking the line, and causing one end of it to fall to the ground, where it came in contact with plaintiff] and to proximately cause the injuries and damages described below.

[9. _____(*Allege any specific physical injuries suffered by plaintiff, e.g.,* As a proximate result of the acts of defendants, plaintiff suffered severe electrical shock requiring the amputation of his/her left arm).]

10. [*General damages allegation. See § 248.40[1], Paragraph 8.*]

11. [*Medical expenses allegation. See § 248.40[1], Alternative Paragraphs 9.*]

12. [*Lost earnings allegation. See § 248.40[1], Alternative Paragraphs 10.*]

SECOND COUNT
(Hirer's Vicarious Liability for Negligent Performance
of Nondelegable Duty by Independent Contractor)

13. [Pursuant to _____(*statute, regulation, or other source of duty, e.g.,* the rules, regulations, and orders of the Public Utility Commission of the State of California], defendant _____[*name of defendant who hired independent contractor*] has a duty _____[*specify, e.g.,* to ensure that its public-utility poles are installed at a depth of _____feet], which duty may not be delegated to any other person pursuant to contract or otherwise. Defendant _____[*name of defendant who hired independent contractor*] is, therefore, liable for the acts of _____[*name of independent contractor*] and plaintiff's injuries as herein alleged.

[*Prayer. See § 248.40[1].*]

_____[*firm name, if any*]

By:_____[*signature*]

_____ [*typed name*]

Attorney for Plaintiff [*name*]

[*Verification, if desired. See § 248.40[1].*]

[2] Use of Form

This form of complaint is for use to allege negligence against an independent contractor and the liability of the person who hired the contractor because the injury resulted in the performance of an act that involved a nondelegable duty [*see Van Arsdale v. Hollinger (1968) 68 Cal. 2d 245, 251, 66 Cal. Rptr. 20, 437 P.2d 508]* . For general considerations about complaints for negligence, see *§ 248.40[2]* et seq.

[3] Allegations

In addition to the allegations commonly used for capacity, fictitiously named defendants, and agency (Paragraphs 1-4), this form of complaint alleges the negligence of the independent contractor (Paragraphs 5-8). For more detailed consideration of pleading negligence and for additional forms of allegations of negligence, see Ch. 380, *Negligence* .

This form also contains an optional allegation of specific physical injury (Paragraph 9), allegations of general damages (Paragraph 10), special damages for medical expenses (Alternative Paragraphs 11), and special damages for lost earnings (Alternative Paragraphs 12). For discussion of the use of the alternative paragraphs, *see § 248.40[3]*.

The form then sets forth a count alleging the hirer's vicarious liability based on the independent contractor's negligent performance of a nondelegable duty. For discussion of the liability of one who has hired an independent contractor for a nondelegable duty, *see § 248.22[2][c]*.

[4] Cross References

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 1245-1295 (10th ed. 2005)

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21-248 California Forms of Pleading and Practice--Annotated § 248.44

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§ 248.44 Allegations--Employer Liability for Punitive Damages [Civ. Code § 3294(b)]

[1] FORM Allegations--Employer Liability for Punitive Damages [Civ. Code § 3294(b)]

[*EITHER*]

1. In doing the acts as herein alleged, defendant _____[*name of employee*] was acting pursuant to the authorization of defendant _____[*name of employer*][*add in case of corporate employer:*, as given by _____(*name*), who was at all relevant times _____(an officer *or* a director *or* a managing agent) of _____(*name of defendant corporation*)]. An award of punitive damages against defendant _____[*name of employer*] is therefore warranted.

[*OR*]

1. Subsequent to the acts of _____[*name of employee*] as herein alleged, _____[*name of employer*][*add in case of corporate employer:*, acting through _____(*name*), who was at all relevant times _____(an officer *or* a director *or* a managing agent) of _____(*name of defendant corporation*),] ratified and adopted these acts as his/her/its own. An award of punitive damages against defendant _____[*name of employer*] is therefore warranted.

[*OR*]

1. In doing the acts as herein alleged, defendant _____[*name of employer*] [*add in case of corporate employer:*, acting through _____(*name*), who was at all relevant times _____(an officer *or* a director *or* a managing agent) of _____(*name of defendant corporation*),] was personally guilty of oppression, fraud, or malice. An award of punitive damages against defendant _____[*name of employer*] is therefore warranted.

[2] Use of Form

This form is for use as an allegation for the recovery of punitive damages from an employer for the acts of an employee [*see Civ. Code § 3294(b)*]. The first alternative paragraph alleges that the employer authorized the employee's act that caused the injury. The second alternative paragraph alleges that the employer subsequently ratified the employee's acts [*see* Coats v. Construction & Gen. Laborers Local No. 185 *(1971) 15 Cal. App. 3d 908, 914, 93 Cal. Rptr. 639]* . The third alternative paragraph alleges that the employer was personally guilty of oppression, fraud, or malice. Each alternative paragraph contains optional language to allege that a corporate defendant acted through an officer, director, or managing agent of the corporation [*see Civ. Code § 3294(b)*]. For a fourth alternative paragraph alleging a right to punitive damages from the employer based on the employer's advance knowledge of the unfitness of the employee, see *§ 248.41[1]* (Paragraphs 15-16). For further discussion of employer liability for punitive damages, see *§ 248.18*.

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21-248 California Forms of Pleading and Practice--Annotated § 248.45

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§ 248.45 Allegation--Count for Direct Employer Liability--Employee Acted Pursuant to Employer's Express Instructions and Authority

[1] FORM Allegation--Count for Direct Employer Liability--Employee Acted Pursuant to Employer's Express Instructions and Authority

_____[*Specify number, e.g.,* SECOND] COUNT
(Employer Authorization of Employee's Wrongful Conduct)

1. [Plaintiff is informed and believes and thereon alleges that,] [I]n doing the acts as heretofore alleged, defendant _____ [*name of employee*] was acting pursuant to the express authority and instructions and following the express directions of defendant _____[*name of employer*] [in that _____(*specify any facts to support allegation of employer's express instructions, e.g.,* it is the business policy of defendant _____(*name of employer*) that all deliveries are to be completed within 10 minutes from the time of loading regardless of the speed at which the driver must travel in order to complete the delivery at that time. Therefore, the negligence as to speed of defendant _____(*name of employee*) was expressly authorized and directed by defendant _____(*name of employer*))].

2. [*Punitive damages allegation against employer, if employee's conduct would support claim for punitive damages. See § 248.44[1], first alternative.*]

[2] Use of Form

This form of allegation is for use to allege that the defendant employer authorized the defendant employee's tortious act and is thus directly liable to the third-party plaintiff [*see Jensen v. Southern Pac. Co. (1954) 129 Cal App. 2d 67,*

69-71, 276 P.2d 703 , overruled on other grounds, Alarid v. Vanier (1958) 50 Cal. 2d 617, 327 P.2d 897] . This count may be added to a complaint for damages against an employee and employer in which the employer is alleged to be vicariously liable for the employee's torts under the doctrine of respondeat superior. For further discussion of direct employer liability, see *§ 248.12[1]*.

If the employee's liability is based on negligence, this count may be added to § 248.40[1]. If the employee's liability is based on an intentional tort, this count may be substituted for the second count in § 248.41[1] (Paragraphs 15-16).

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21-248 California Forms of Pleading and Practice--Annotated § 248.46

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§ 248.46 Allegation--Count for Direct Employer Liability--Negligent Training or Supervision

[1] FORM Allegation--Count for Direct Employer Liability--Negligent Training or Supervision

_____[*Specify number, e.g.,* SECOND] COUNT
(Negligent Training and/or Supervision)

1. [Plaintiff is informed and believes and thereon alleges that,] [I]n doing the acts as heretofore alleged, defendant _____[*name of employer*] knew, or in the exercise of reasonable diligence should have known, that defendant _____[*name of employee*] was neither qualified nor able to _____[*specify particular acts of employee that gave rise to injury, e.g.,* safely operate the employer's delivery van] and that an undue risk to persons such as plaintiff would exist because of this lack of ability unless defendant _____[*name of employer*] adequately trained and supervised defendant _____[*name of employee*] in the exercise of the tasks of his/her employment. [*Add any specific facts to support allegation of employer's advance knowledge of employee's lack of ability, e.g.,* The van was equipped with a standard transmission, and _____(*name of employee*) informed _____(*name of employer*) that he/she did not know how to drive a vehicle with a standard transmission.]

2. Notwithstanding the knowledge that defendant _____[*name of employee*] was neither qualified nor able to _____[*specify particular acts of employee that gave rise to injury, e.g.,* safely operate the employer's delivery van], defendant _____[*name of employer*] did not [adequately] train or supervise _____[*name of employee*] in his/her performance of _____[*specify task(s)*].

3. The failure of defendant _____[*name of employer*] to [adequately] train and supervise defendant

_____[*name of employee*] was the proximate cause of plaintiff's injury, as _____[*specify facts leading to inference of causation, e.g.,* had _____(*name of employer*) trained defendant _____(*name of employee*) in the proper operation of a vehicle with a stickshift, the accident that injured plaintiff would not have occurred].

[4. Despite this advance knowledge, defendant _____(*name of employer*) allowed defendant _____(*name of employee*) to _____(*specify, e.g.,* drive the van) in conscious disregard of the rights and safety of others. As a result of this conscious disregard of the rights of plaintiff, an award of punitive damages against defendant _____(*name of employer*) is warranted.

[2] Use of Form

This form of allegation is for use to allege that the defendant employer negligently failed to train or supervise the defendant employee in the proper performance of his or her duties, thus resulting in injury. This count may be added to a complaint for damages against an employee and employer in which the employer is alleged to be vicariously liable for the employee's torts under the doctrine of respondeat superior. For further discussion of direct employer liability, *see § 248.12[1]*.

If the employee's liability is based on negligence, this count may be added to § 248.40[1]. If the employee's liability is based on an intentional tort, this count may be substituted for the second count in § 248.41[1] (Paragraphs 15-16).

[3] Negligent Training or Supervision

Direct employer liability for negligent training or supervision is not a conclusively established theory of action in California. The right of action for negligent supervision is recognized in the Restatement [*see* Restatement (Second) of Agency § 213] and has been applied in other similar contexts [*see Lehmuth v. Long Beach Unified Sch. Dist. (1960) 53 Cal. 2d 544, 550-553, 2 Cal. Rptr. 279, 348 P.2d 887* (school district independently liable for injuries caused by failure to properly supervise students)]. However, one court has failed to find a significant distinction between negligent hiring and negligent supervision [*see Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 663-664, 109 Cal. Rptr. 269]* . Nevertheless, there would seem to be a clear distinction between the hiring and retention of an employee who is wholly unqualified for the job that he or she is hired to perform, and the assigning of a specific task to an otherwise-qualified employee who has not been trained to perform that task and is unable to do it without representing a risk to others. For further discussion of direct employer liability, see *§ 248.12[3]*.

[4] Punitive Damages

Punitive damages are recoverable from an employer who had advance knowledge of the unfitness of an employee and employed him or her with a conscious disregard of the rights or safety of others [*Civ. Code § 3294(b)*]. It has not been determined whether the use of the term "employed" in the statute is limited to the general act of hiring a particular unfit individual, or whether it may be construed to extend to the assignment of a particular task that the employer knows, or reasonably should know, that the employee is incapable of performing safely. Even under these circumstances, however, an employer is only liable for punitive damages if the employee's conduct itself constitutes oppression, fraud, or malice [*see Civ. Code § 3294(a),(b)*].

It is somewhat difficult to postulate a circumstance under which an employee would so act as a result of the employer's failure to train the employee to perform a particular task to which the employee has been assigned. Perhaps an employee who has been given no training in dealing with the public and handling customer complaints might commit an intentional tort in the course of performing these duties. Based on such a possibility, this form is drafted to include an optional allegation for punitive damages.

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 248 EMPLOYER'S LIABILITY FOR EMPLOYEE'S TORTS
PART IV. FORMS

21-248 California Forms of Pleading and Practice--Annotated §§ 248.47-248.49

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[Reserved]

§§ 248.47[Reserved]

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21-248 California Forms of Pleading and Practice--Annotated § 248.50

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§ 248.50 Demurrer to Complaint--Failure to State Cause of Action--By Employer Sued Under Respondeat Superior--Employee Not Acting Within Scope of Employment

[1] FORM Demurrer to Complaint--Failure to State Cause of Action--By Employer Sued Under Respondeat Superior--Employee Not Acting Within Scope of Employment

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	NO. _____
Plaintiff,	)	DEMURRER OF DEFENDANT
vs.	)	_____[*name of employer*] TO COM-
_____ [*name*],	)	PLAINT OF _____[*name*], NO-
and DOES 1 through_____,	)	TICE OF HEARING, AND MEMORANDUM OF
Defendants.	)	POINTS AND AUTHORITIES
	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Trial Date: _____]
		[Amount demanded _____(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Defendant _____[*name of employer*] demurs to the complaint herein on the following ground:

The complaint fails to state facts sufficient to constitute a cause of action against defendant _____[*name of employer*], in that it appears on the face of the complaint, in Paragraphs _____through _____on pages _____through _____that plaintiff is asserting the liability of defendant _____[*name of employer*], under the doctrine of respondeat superior, for the acts of defendant _____[*name of employee*]. It further appears on the face of the complaint that the acts of defendant _____[*name of employee*] complained of were not committed within the course and scope of his/her employment with defendant _____[*name of employer*].

[WHEREFORE, defendant prays that this demurrer be sustained without leave to amend, that plaintiff take nothing by his/her complaint, that defendant have judgment for his/her costs, and for all other proper relief.]

_____[*firm name, if any*]

By:_____[*signature*]

_____ [*typed name*]

Attorney for Defendant [*name*]

NOTICE IS HEREBY GIVEN that this demurrer has been set for hearing on _____[*date*] at _____[*time*], or as soon thereafter as the matter may be heard, in [_____(Department *or* Division) _____of] the above-entitled court, located at _____[*address*], _____[*city*], California.
Dated: _____.

_____[*firm name, if any*]

By:_____[*signature*]

_____ [*typed name*]

Attorney for Defendant [*name*]

NOTICE OF HEARING
MEMORANDUM OF POINTS AND AUTHORITIES
[*Add memorandum of points and authorities supporting demurrer*]

[2] Use of Form

This form of demurrer is for use to object by demurrer to a complaint in which the alleged liability of a defendant employer is predicated on vicarious liability for the acts of an employee under the doctrine of respondeat superior. The ground of the objection is that the employee was not acting within the course and scope of employment in doing the acts complained of. A notice of hearing is also included.

A demurrer must be accompanied by a notice of hearing [*Cal. Rules of Ct., Rule 3.1320(c)*]. It must also be

accompanied by a memorandum of points and authorities in support of each ground thereof [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* . This form contains an optional prayer; a prayer to a demurrer is not required but is frequently included.

[3] Objection by Demurrer

If any ground for objection to a complaint appears on the face of the complaint, or from any matter of which the court is required to or may take judicial notice, objection to the complaint on that ground may be taken by demurrer [*Code Civ. Proc. § 430.30(a)*]. Objection may also be taken by answer if the ground does not appear on the face of the complaint, or by both demurrer and answer [*Code Civ. Proc. § 430.30(b), (c)*]. Objection may bemade on the ground that the complaint does not state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*].

[4] Burden of Proof and Raising Issue

To establish an employer's vicarious liability under respondeat superior, the plaintiff bears the burden of proving that an employee was acting within the scope of employment in doing the acts that give rise to liability [*McChristian v. Popkin (1946) 75 Cal App. 2d 249, 258, 171 P.2d 85]* . It is often said that whether or not a defendant acted in the course of employment is primarily a question of fact [*McChristian v. Popkin (1946) 75 Cal App. 2d 249, 255, 171 P.2d 85]* . However, at least one court has noted that the cases so holding almost uniformly involve factual situations in which conflicting inferences may be drawn from the same extrinsic facts. If no conflicting inferences are possible and if there is no dispute over the operable overt, observable facts, the question becomes one of law [*Golden W. Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 956, 171 Cal. Rptr. 95* ; *see also Tryer v. Ojai Valley Sch. (1992) 9 Cal. App. 4th 1476, 1480, 12 Cal. Rptr. 2d 114]* .

Therefore, acting outside of the scope of employment may be raised in a number of different ways depending on the circumstances. If there are no conflicting facts or inferences and all the necessary facts appear on the face of the complaint, demurrer is appropriate. If it is necessary to go beyond the face of the complaint and establish uncontradicted facts by declaration, a motion for summary judgment is the proper vehicle [*see, e.g., Golden W. Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 951, 171 Cal. Rptr. 95]* . If resolution requires deciding between conflicting facts or inferences, an appropriate denial in the answer of the allegation of respondeat superior is required [*see § 248.51[1]*].

[5] Cross References

For forms for use to deny allegations in a complaint, see Ch. 26, *Answers*

For further discussion of demurrer procedures and sample forms, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

For forms for use in moving for summary judgment or summary adjudication of issues, see Ch. 537, *Summary Judgment*

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21-248 California Forms of Pleading and Practice--Annotated § 248.51

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§ 248.51 Controverting Allegation in Answer--By Employer Sued Under Respondeat Superior--No Employment or Agency Relationship Between Tortfeasor and Employer

[1] FORM Controverting Allegation in Answer--By Employer Sued Under Respondeat Superior--No Employment or Agency Relationship Between Tortfeasor and Employer

1. Defendant _____[*name of alleged employer*] denies, generally and specifically, each and every allegation contained in Paragraph _____, and in this connection, defendant affirmatively alleges that, at all times mentioned in the complaint, defendant _____[*name of alleged employee*] was not the employee or agent of defendant _____[*name of alleged employer*], [*add if applicable*: but was, in fact, an independent contractor,] and in doing the things therein mentioned, was not acting pursuant to any agency or employment relationship between defendant _____[*name of alleged employee*] and defendant _____[*name of alleged employer*].

[2] Use of Form

This form is for use in an answer to deny an allegation in a complaint that one defendant is vicariously liable for the acts of another defendant under the doctrine of respondeat superior. The basis of the denial is that the actual tortfeasor was, in fact, not the agent or employee of the denying defendant. Optional language is included to set forth the defendant's assertion that the actual tortfeasor was an independent contractor. For general requirements regarding the form and content of an answer, see *Code Civ. Proc. § 431.30*

[3] Burden of Proof and Raising Issue

Plaintiff bears the burden of proving vicarious liability under respondeat superior [*see McChristian v. Popkin (1946) 75 Cal App. 2d 249, 258, 171 P.2d 85]* . The determination as to whether an employer-employee relationship exists is

one of fact unless the evidence is susceptible of only one inference, in which case the question becomes one of law [*Sparks v. L.D. Folsom Co. (1963) 217 Cal App. 2d 279, 285-286, 31 P.2d 640]* .

Therefore, the nonexistence of an employer-employee relationship may be raised in a number of different ways depending on the circumstances. If there are no conflicting facts or inferences and all the necessary facts appear on the face of the complaint, a demurrer is appropriate [*see § 248.50*]. If it is necessary to go beyond the face of the complaint and establish uncontradicted facts by declaration, a motion for summary judgment is the proper vehicle [*see, e.g., Golden W. Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 951, 171 Cal. Rptr. 95]* . If resolution requires deciding between conflicting facts or inferences, the answer must contain an appropriate denial of the allegation of respondeat superior.

[4] Cross References

For forms for use to deny allegations in a complaint, see Ch. 26, *Answers*

For further discussion of demurrer procedures and sample forms, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

For forms for use in moving for summary judgment or summary adjudication of issues, see Ch. 537, *Summary Judgment*

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Chapter 249 EMPLOYMENT LAW: TERMINATION AND DISCIPLINE

21-249 California Forms of Pleading and Practice--Annotated 249.syn

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.syn Synopsis to Chapter 249: EMPLOYMENT LAW: TERMINATION AND DISCIPLINE

§ 249.01 Scope of Chapter

§ 249.02 Cross References

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§ 249.10 Governing Law

§ 249.11 Common-Law Action

[1] At Will Employment

[2] Statutory Limitations on Employer's Right to Discipline and Terminate

[3] Concurrent Administrative Remedies

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[1] Basis and Elements of Cause of Action

[2] Action Sounds in Tort

[3] Tests for Determining if a Public Policy Protecting Employee Exists

[a] Overview

[b] Policy Supported by Constitution or Statute

[i] Requirement as Stated by Supreme Court

[ii] Extent of Requirement

[c] Policy Inures to Benefit of Public

[d] Policy Has Been Articulated at Time of Discharge

[e] Policy is Fundamental and Substantial

[f] Policy Covers Alleged Violation and Applies to Employer or Other Defendants

[4] Causal Relationship Must Exist Between Discharge and Public Policy Violation

[5] Exclusivity Vel Non of Statutory Remedies

[6] Special Rules Applicable to In-House Counsel

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§ 249.13 Breach of Express or Implied-in-Fact Promise Not to Terminate Except for Cause

[1] Existence of Covenant

[2] Effect of Handbooks, Letters, and Other Writings

[3] Statute of Frauds Not a Defense to Action Based on Oral or Implied Promise

§ 249.14 Breach of Implied Covenant of Good Faith and Fair Dealing

§ 249.15 Employer Actions Short of Actual Discharge

[1] Constructive Discharge

[a] Effect of Constructive Discharge

[b] Essential Elements

[i] Employee's Burden of Proof

[ii] Intolerable Conditions

[iii] Intolerability Determined by Objective Standard

[iv] Employer Knowledge or Intent Required

[v] Effect of Delay Before Resignation

[2] Wrongful Discipline or Other Adverse Employment Action

[3] Express or Implied-in-Fact Contract Not to Demote Except for Cause

[4] Refusal to Renew Contract for Specified Term of Employment

§ 249.16 Remedies in Tort Actions

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[2] Special Damages

[3] Future Earnings in Tort Actions

[4] Prejudgment Interest in Tort Actions

[a] Nature of Interest Awards

[b] Damages Certain in Amount

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[d] Awarded Under Civ. Code § 3291

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§ 249.17 Remedies in Contract Action

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[2] Future Earnings in Contract Actions

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[4] Prejudgment Interest in Contract Actions

§ 249.18 Mitigation of Damages

§ 249.19 Deduction of Collateral Compensation

§ 249.20 Equitable Remedies

§ 249.21 Defenses to Wrongful Discharge Action

[1] Preemption by Federal Labor Law Generally

[2] Federal Preemption Regarding Rights Protected by National Labor Relations Act

[3] Federal Preemption Under Labor Management Relations Act

[4] Preemption by Federal Labor-Management Reporting and Disclosure Act

[5] Preemption by Federal Railway Labor Act

[6] Preemption by Federal Banking Laws

[7] Preemption by Federal Law Governing Pension Benefits

[8] Preemption by Federal Nuclear Regulatory Law

[9] Removal of Cases Preempted by Federal Law

[10] Preemption by California Workers' Compensation Law

[11] Preemption by California Law Governing Discrimination

[12] Parol Evidence Rule

[13] Statute of Limitations

[14] Termination for Cause

[a] In General

[b] Order and Burden of Proof

[c] Good Cause Defined

[15] Employee's Breach of Duty Under Contract for Specified Term

[16] Arbitration Required Under Employment Contract

[17] Lack of Employment Relationship

[17A] Prospective Modification of At Will Contract

[18] At-Will Employment of Corporate Officers

[19] After-Acquired Evidence Justifying Termination

[20] Failure to Exhaust Administrative Remedy

§ 249.22 Related Causes of Action

[1] In General

[2] Assault and Battery

[3] Defamation

[a] Elements Generally

[b] Absolute and Qualified Privileges

[c] Availability of Defense of Preemption

[d] Remedies Regarding Defamation Actions

[4] False Imprisonment

[5] Intentional Infliction of Emotional Distress

[6] Interference With Contract and Interference With Prospective Economic Advantage

[7] Fraud or Deceit

[8] Statutory Causes of Action

[9] Invasion of Privacy

§§ 249.23-249.29 [Reserved]

§ 249.30 Misrepresentation Inducing Employee to Change Residence

§ 249.31 Misrepresentation Preventing Subsequent Employment

§ 249.32 Things Acquired by Employee by Virtue of Employment

§ 249.33 Competition With Employer or Diversion of Employer's Business

§ 249.34 Employee Negligence

[1] Generally

[2] Employee's Duty of Care

[3] Liability of Employee to Employer

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§ 249.35 Breach of Personal Service Contract

[1] General Limitation on Enforcement

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[5] Accounting by Employee

§§ 249.36-249.39 [Reserved]

§ 249.40 Related Matthew Bender Publications

[1] California Points and Authorities

[2] California Employment Law

[3] California Torts

[4] Other Matthew Bender Publications

§ 249.41 Federal Statutes

§ 249.42 State Statutes

§ 249.43 Decisions

[1] At Will Employment

[2] Constructive Discharge

[3] Damages

[4] Discovery

[5] Employment Contracts

[6] Good Cause for Termination

[7] Implied Covenant of Good Faith and Fair Dealing

[8] Implied Promise to Terminate Only for Good Cause

[9] Limitations Period

[10] Parol Evidence Rule

[11] Preemption of Common-Law Actions

[a] California Fair Housing and Employment Act (FEHA)

[b] California Occupational Safety and Health Act (OSHA)

[c] California Workers' Compensation Law

[d] Employee Retirement Income Security Act (ERISA)

[e] Federal Banking Laws

[f] Labor Management Relations Act (LMRA)

[g] National Labor Relations Act (NLRA)

[h] Railway Labor Act (RLA)

[12] Related Causes of Action

[13] Religious Organizations

[14] Statutory Prohibitions Against Wrongful Discharge

[15] Theories of Liability

[16] Tortious Discharge in Violation of Public Policy

[17] Employer Misrepresentations

§ 249.44 Law Reviews

§ 249.45 Text References

§§ 249.46-249.49 [Reserved]

§ 249.50 Complaint for Damages--Wrongful Discharge or Wrongful Discipline in Breach of Express or Implied-in-Fact Employment Contract [Lab. Code § 2922], Tortious Violation of Public Policy, and Breach of Covenant of Good Faith and Fair Dealing--By Present or Former Employee Against Employer

[1] FORM

[2] Use of Form

[3] Allegations

[4] Preemption

[5] Cause of Action for Violation of Public Policy

[a] Pleading Source of Public Policy

[b] Pleading Proximate Cause

[c] Exhaustion of Administrative Remedies

[d] Alleging Emotional Distress Damages

[6] Cause of Action for Implied-in-Fact Contract Not to Terminate Except for Cause

[7] Cause of Action for Breach of Implied Covenant of Good Faith and Fair Dealing

[8] Related Causes of Action

[9] Statute of Limitations

[10] Venue

[11] Verification

[12] Cross References

§ 249.51 Allegations for Use in Complaint for Damages for Wrongful Termination or Demotion or Discipline--Retaliation for Employee's Political Activity [Lab. Code §§ 1101, 1105]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Action Based on Discharge or Discipline or Demotion Because of Political Activity

§ 249.52 Allegations for Use in Complaint for Damages for Wrongful Termination or Discipline or Demotion--Retaliation for Employee's Protesting Unsafe or Unhealthy Working Conditions

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cause of Action for Retaliatory Dismissal Based on Activity to Insure Safe Working Place

§ 249.53 Allegations for Use in Complaint for Damages for Wrongful Termination or Discipline--Fraud Cause of Action Based on Misrepresentation Independent of Termination

[1] FORM

[2] Use of Form

[3] Allegations

§ 249.54 Allegations for Use in Complaint for Damages for Wrongful Termination or Discipline--Defendant's Termination of Plaintiff's Employment as In-House Counsel Violated Public Policy--Termination Was Based on Plaintiff's Refusal to Violate Mandatory Ethical Provision

[1] FORM

[2] Use of Form

§ 249.55 Allegations for Use in Complaint for Damages for Wrongful Termination or Discipline--Defendant's Termination of Plaintiff's Employment as In-House Counsel Violated Public Policy--Action Available to Non-Attorney Does Not Violate Attorney-Client Confidences

[1] FORM

[2] Use of Form

§§ 249.56-249.59 [Reserved]

§ 249.60 Affirmative Defense Allegation--Discharge of Employee Under Specified Term of Employment--Willful Breach of Duty [Lab. Code § 2924]

[1] FORM

[2] Use of Form

[3] Cross References

§ 249.61 Affirmative Defense Allegation--Discharge of Employee Under Specified Term of Employment--Habitual Neglect of Duty [Lab. Code § 2924]

[1] FORM

[2] Use of Form

[3] Cross References

§ 249.62 Affirmative Defense Allegation--Discharge of Employee Under Specified Term of Employment--Continued Incapacity to Perform Duty [Lab. Code § 2924]

[1] FORM

[2] Use of Form

[3] Cross References

§ 249.63 Affirmative Defense Allegation--Employee Terminated for Good Cause

[1] FORM

[2] Use of Form

§ 249.64 Affirmative Defense Allegation--Arbitration Required Under Employment Contract

[1] FORM

[2] Use of Form

§ 249.65 Affirmative Defense Allegation--Plaintiff's Failure to Mitigate Damages

[1] FORM

[2] Use of Form

[3] Requirement That Defendant Plead and Prove Failure to Mitigate

[4] Cross References

§ 249.66 Affirmative Defense Allegation--Wrongful Discharge Claim Under State Law Preempted by Federal Labor Management Relations Act (29 U.S.C. § 141 et seq.) [29 U.S.C. § 185(a)]--Employment Relationship Governed by Collective Bargaining Agreement

[1] FORM

[2] Use of Form

§ 249.67 Affirmative Defense Allegation--Wrongful Discharge Claim Under State Law Preempted by Federal Labor-Management Reporting and Disclosure Act (29 U.S.C. § 401 et seq.)--Plaintiff Is Policymaking or Confidential Union Employee

[1] FORM

[2] Use of Form

§ 249.68 Affirmative Defense Allegation--Employee's Tort Claim Against Railroad or Airline Employer Preempted by Railway Labor Act (45 U.S.C. § 151 et seq.) [45 U.S.C. §§ 153-155, 183-185]--Claim Involves Minor Dispute

[1] FORM

[2] Use of Form

§ 249.69 Affirmative Defense Allegation--Wrongful Discharge Claim Under State Law Preempted by National Bank Act (12 U.S.C. § 24 P 5)--Plaintiff Is Bank Officer

[1] FORM

[2] Use of Form

§ 249.70 Affirmative Defense Allegation--Wrongful Discharge Claim Under State Law Preempted by Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001 et seq.)--Action Relates to Employee Benefit Plan Under ERISA and Is Not Exempt From Its Provisions

[1] FORM

[2] Use of Form

§§ 249.71-249.79 [Reserved]

§ 249.80 Complaint for Double Damages [Civ. Code § 3333; Lab. Code § 972] by Former Employee Against Employer--Inducing Change of Residence by Misrepresenting Conditions of Employment [Lab. Code §§ 970, 972]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Double Damages

[5] Punitive and Exemplary Damages

[6] Class Action

[7] Cross References

§ 249.81 Complaint for Treble Damages [Civ. Code § 3333; Lab. Code § 1054] by Former Employee Against Employer--Unlawfully Preventing Employment by Misrepresentation [Lab. Code §§ 1050, 1054]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§§ 249.82-249.89 [Reserved]

§ 249.90 Complaint for Damages [Civ. Code § 3300] Based on Breach of Employment Contract--By Employer Against Former Employee--Refusal to Perform Services

[1] FORM

[2] Use of Form

[3] Specific Enforcement

§§ 249.91-249.99 [Reserved]

§ 249.100 Interrogatories for Employment Law Litigation [Cal. Judicial Council Form No. DISC-002]

[1] FORM

[2] Use of Form

[3] Cross References

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 249 EMPLOYMENT LAW: TERMINATION AND DISCIPLINE
PART I. SCOPE

21-249 California Forms of Pleading and Practice--Annotated § 249.01

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.01 Scope of Chapter

This chapter discusses and contains forms for use in actions seeking damages based on various theories of liability for an employer's wrongful discharge or wrongful discipline of an employee, and discusses the remedies available under each of those theories. The theories of recovery discussed include a common law action for wrongful discharge [*§ 249.11*], violation of public policy [*§ 249.12*], breach of an express or implied-in-fact promise not to discharge except for good cause [*§ 249.13*], and breach of the implied covenant of good faith and fair dealing in the context of employment contracts [*§ 249.14*].

This chapter also discusses causes of action that are commonly related to wrongful discharge or discipline, such as intentional infliction of emotional distress [*§ 249.22*]. In addition, the chapter discusses an employer's defenses to a cause of action for wrongful discharge or discipline [*§ 249.21*], including the employee's breach of a contractual duty, preemption by various federal and state statutes, the parol evidence rule, the statute of limitations, termination for cause, mandatory arbitration, and lack of an employment relationship.

This chapter contains forms for use in actions against an employer by an employee seeking damages for wrongful discharge or discipline. The forms include:

- A complaint seeking damages for wrongful discharge or discipline based on violation of public policy, breach of contract, breach of the covenant of good faith and fair dealing, and intentional infliction of emotional distress [*§ 249.50*].

- An allegation that the discharge was in retaliation against the employee's political activities [*§ 249.51*].

- An allegation that the discharge was in retaliation against the employee's protest of unsafe working conditions [*§ 249.52*].

- An allegation that a fraud cause of action exists independent of the termination of employment [*§ 249.53*].

- Allegations for use if the terminated employee was employed as in-house counsel [*§ 249.54* and *§ 249.55*].

The chapter also contains forms of affirmative defense allegations that:

- The employee willfully breached a contractual duty [*§ 249.60*].

- The employee was habitually neglectful of employment duties [*§ 249.61*].

- The employee was under a continued incapacity to perform employment duties [*§ 249.62*].

- The employee was terminated for cause [*§ 249.63*].

- The cause of action is precluded by an arbitration agreement [*§ 249.64*].

- The employee failed to mitigate damages after having an opportunity to do so [*§ 249.65*].

- The cause of action is preempted by:

  - The Labor Management Relations Act (*29 U.S.C. § 185(a)*) [*§ 249.66*].

  - The Railway Labor Act (*45 U.S.C. §§ 151-188*) [*§ 249.68*].

  - The Employee Retirement Income Security Act of 1974 (*29 U.S.C. § 1001 et seq.*) [*§ 249.70*].

This chapter also discusses miscellaneous actions that arise from the employment relationship [*§ 249.30 et seq.*]. Related forms include:

- A complaint for double damages resulting from an employer's misrepresentations concerning employment conditions that induced the employee to change his or her residence [*§ 249.80*].

- A complaint for treble damages against an employer who has unlawfully prevented a employment of a former employee by misrepresentation [*§ 249.81*].

The chapter also includes forms of complaints by an employer against a former employee for breach of an employment contract based on failure to perform services [*§ 249.90*]. Finally, this chapter includes an illustrative copy of the Judicial Council Form Interrogatories for use in employment law litigation [*see § 249.100*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 249 EMPLOYMENT LAW: TERMINATION AND DISCIPLINE
PART I. SCOPE

21-249 California Forms of Pleading and Practice--Annotated § 249.02

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.02 Cross References

For other discussions and forms related to actions arising from, based on, or concerning the relationship of employer and employee, see Ch. 7, *Accounting, Action for* , Ch. 115, *Civil Rights: Employment Discrimination* , Ch. 118, *Civil Service,* Ch. 270, *Fraudulent Conveyances,* Ch. 276, *Garnishment,* Ch. 303, *Injunctions,* Ch. 307, *Insolvency,* Ch. 427, *Principal and Agent,* Ch. 528, *Specific Performance,* Ch. 564, *Unemployment and Disability Insurance,* Ch. 565, *Unfair Competition,* and Ch. 577, *Workers' Compensation* .

For discussion and forms regarding assault and battery generally, see Ch. 58, *Assault and Battery* .

For discussion and forms regarding libel and slander actions generally, see Ch. 340, *Libel and Slander* .

For discussion and forms regarding emotional distress generally, see Ch. 362, *Mental Suffering and Emotional Distress* .

For discussion and forms regarding negligence generally, see Ch. 380, *Negligence* .

For discussion relating to an employee's rights regarding polygraph examinations, see Ch. 429, *Privacy* .

For discussion of drug testing in employment, see Ch. 429, *Privacy* .

For discussion of invasion of privacy in employment, see Ch. 429, *Privacy* .

For discussion and forms relating to Employee Retirement Income Security Act (ERISA) (*29 U.S.C. §§ 1001-1461*), see the article D. Bacon, S. Prater, & D. Tucker, Employee Benefits Guide (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesProvisional RemediesGarnishmentsContracts LawRemediesSpecific PerformanceWorkers' Compensation & SSDICoverageEmployment RelationshipsGeneral Overview

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Chapter 249 EMPLOYMENT LAW: TERMINATION AND DISCIPLINE
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21-249 California Forms of Pleading and Practice--Annotated §§ 249.03-249.09

AUTHOR: Richard P. Hill Editorial Consultant

[Reserved]

§§ 249.03[Reserved]

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A. Wrongful Discharge and Discipline

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AUTHOR: Richard P. Hill Editorial Consultant

§ 249.10 Governing Law

The at will employment doctrine is codified in *Lab. Code § 2922*. However, numerous cases have set forth judicial limitations on the at will employment doctrine. Among the leading cases in this area are *Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 4 Cal. Rptr. 2d 874, 824 P.2d 680* ; *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373* ; and *Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330* .

Numerous federal and state statutes limit an employer's right to terminate or discipline employees. For a full list of those statutes, see the *Research Guide, § 249.40 et seq.*

In addition, statutes governing an employer's solicitation of an employee by misrepresentation are found in *Lab. Code §§ 970-977*. Statutes governing the prevention of the employment of a former employee are found in *Lab. Code §§ 1050-1054*. Statutes governing the obligations of an employee, generally, are found in *Lab. Code §§ 2850-2866*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral Overview

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21-249 California Forms of Pleading and Practice--Annotated § 249.11

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.11 Common-Law Action

[1] At Will Employment

Under the traditional common-law rule, codified in *Lab. Code § 2922*, an employment contract having no specified term may be terminated at the will of either party on notice to the other [*see Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 172, 164 Cal. Rptr. 839, 610 P.2d 1330* ; *see also Corp. Code § 312(b)* (similar at will provision for corporate officers)]. That rule controls in the absence of some other agreement by the parties [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 665, 671-675, 254 Cal. Rptr. 211, 765 P.2d 373* ; *see § 249.13[1]*].

Generally, when an employer is permitted to discharge an employee at any time with or without cause, it makes no difference if the employer had a bad motive in doing so. Just as the employee may resign for whatever reason, the employer may discharge the employee for any reason--good, bad, or indifferent [*Mallard v. Boring (1960) 182 Cal. App. 2d 390, 394, 6 Cal. Rptr. 171]* . This general rule is, however, subject to judicially created and statutory exceptions, discussed in *§§ 249.12 -249.15*.

For discussion of the at will doctrine generally, see Wilcox, California Employment Law, Ch. 60 (Matthew Bender); and Larson and Borowsky, Unjust Dismissal, Ch. 2 (Matthew Bender).

[2] Statutory Limitations on Employer's Right to Discipline and Terminate

There are a number of statutes under both federal and California law that limit an employer's right to discipline, terminate, or discriminate against employees under various circumstances. Some of these statutes act as exceptions to the at will doctrine in that they allow a cause of action for termination based on the employer's violation of the statute, regardless of whether the employment was at will. For example, an employee may bring an action for damages against an employer based on the employer's violation of *Lab. Code § 1101*, which prohibits an employer's attempt to control an employee's political activities. For a form of allegation regarding wrongful discharge based on *Lab. Code § 1101*, see *§ 249.51*. For enumeration of federal and state statutes limiting the employer's right to discipline, terminate, or

discriminate against an employee, see the Research Guide, §§ *249.41- 249.42*. For full discussion of those statutes, see Wilcox, California Employment Law, Ch. 60 (Matthew Bender); and Larson and Borowsky, Unjust Dismissal, Ch. 5 (Matthew Bender).

The existence of a statutory remedy can also form the basis of a common law remedy under the tort of wrongful discharge in violation of public policy [*see* discussion in *§ 249.12*].

[3] Concurrent Administrative Remedies

Some statutes that limit an employer's right to terminate provide administrative remedies that are not exclusive and do not preclude a civil action based on violation of statute. For example, *Lab. Code § 98.6* prohibits discharge or any other form of discrimination against an employee because he or she has filed a bona fide complaint or instituted any proceeding with the Labor Commissioner, or has testified or will testify in any such proceeding [*Lab. Code § 98.6(a)*]. Reinstatement and reimbursement of lost wages and benefits are remedies for a violation of the statute [*Lab. Code § 98.6(b)*]. It is also a misdemeanor for the employer to refuse to so remedy a violation on a finding of entitlement for the employee [*Lab. Code § 98.6(b)*]. *Lab. Code § 98.7* provides an administrative remedy before the Labor Commissioner for employees who have been discharged or discriminated against in violation of *Lab. Code § 98.6* or any other law under the jurisdiction of the Labor Commissioner. However, *Lab. Code § 98.7* expressly provides that its rights and remedies are not exclusive [*Lab. Code § 98.7(f)*; *Lloyd v. County of Los Angeles (2009) 172 Cal. App. 4th 320, 331-332, 90 Cal. Rptr. 3d 872* (*Lab. Code § 98.7* provides additional remedy employee may pursue, and there is no requirement that employee exhaust that remedy before suing for violation of Labor Code provisions)].

If a statute such as the Fair Employment and Housing Act [*see Gov. Code § 12900 et seq.*] provides an administrative process for the resolution of grievances, exhaustion of those administrative remedies is a precondition to a civil suit on a statutory cause of action. But it is not a precondition of seeking judicial relief on a common-law tort claim for wrongful discharge in violation of public policy [*Palmer v. Regents of Univ. of Cal. (2003) 107 Cal. App. 4th 899, 904, 132 Cal. Rptr. 2d 567* ; *see also* *Boston v. Penny Lane Ctrs., Inc. (2009) 170 Cal. App. 4th 936, 947, 88 Cal. Rptr. 3d 707* (when statutory remedy is provided for enforcement of preexisting common-law right, that statutory remedy will be considered only cumulative unless statute expressly extinguishes common-law right)]. However, if an employer establishes an *internal* grievance mechanism, a failure to exhaust its remedies precludes any subsequent private civil action [*Palmer v. Regents of Univ. of Cal. (2003) 107 Cal. App. 4th 899, 903-906, 132 Cal. Rptr. 2d 567]* . For further discussion, see *§ 249.21[20]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsAt-Will EmploymentEmployeesLabor & Employment LawEmployment RelationshipsAt-Will EmploymentExceptionsGeneral OverviewLabor & Employment LawWrongful TerminationWhistleblower Protection ActGeneral Overview

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PART II. LEGAL BACKGROUND
A. Wrongful Discharge and Discipline

21-249 California Forms of Pleading and Practice--Annotated § 249.12

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§ 249.12 Wrongful Discharge in Violation of Public Policy

[1] Basis and Elements of Cause of Action

Pursuant to *Lab. Code § 2922*, unless otherwise agreed on by the parties, an employment contract of indefinite duration is generally terminable at the will of either party [*see Jennings v. Marralle (1994) 8 Cal. 4th 121, 129, 32 Cal. Rptr. 2d 275, 876 P.2d 1074]* . However, the employer's right to terminate an employee may be limited by statute or by public policy [*Petermann v. International Brotherhood of Teamsters (1959) 174 Cal. App. 2d 184, 188, 344 P.2d 25]* .

Some statutes contain provisions that prohibit discharge or other disciplinary actions or limit the employer's right to discharge or discipline employees [*see, e.g., Lab. Code § 2929(b)* (forbidding discharge based on garnishment of wages)]. For example, an employee may not be discharged or disciplined for refusing to engage in illegal activity or for reporting matters such as illegal activity [*see, e.g., Lab. Code § 1102.5* (reporting, or refusing to participate in, regulatory violations); *Gov. Code § 12940(h)* (discriminatory conduct); *see also Gardenhire v. Housing Auth. (2000) 85 Cal. App. 4th 236, 241-243, 101 Cal. Rptr. 2d 893* (protection under *Lab Code § 1102.5* extends to employees who report illegal activity to public agency, so public employee who reports illegal activity to his or her employer is protected by statute and need not make report to outside agency)] or industrial injuries [*Lab. Code § 132a*]. Similarly, a statute may expressly provide that the termination of an employee under certain conditions is a violation of public policy [*see, e.g., Bus. & Prof. Code § 2056(c)* (to terminate employment or otherwise penalize physician "principally for advocating for medically appropriate health care ... violates the public policy of this state")]. For a discussion of these statutes, see Wilcox, California Employment Law, Ch. 60 (Matthew Bender). The statutory scheme may preempt the field, eliminating common law claims. Often, however, it provides a public-policy basis for common law claims as well, leaving the plaintiff free to proceed even if prerequisites to the statutory cause of action have not been met [*see* discussion in *[3][b]* and *[5], below*].

A common-law cause of action for wrongful discharge in violation of public policy can also be stated under some circumstances where there is no provision expressly protecting the employee from discharge or discipline. For example,

an at will employee who is discharged for refusing to lie to a legislative committee at the direction of the employer has an action against the employer for wrongfuldischarge [*Petermann v. International Brotherhood of Teamsters (1959) 174 Cal. App. 2d 184, 188-189, 344 P.2d 25]* . Inasmuch as the penal statutes make perjury and its solicitation unlawful, public policy would be offended by permitting an employer to fire an employee because the employee refused to commit an unlawful act [*Petermann v. International Brotherhood of Teamsters (1959) 174 Cal. App.2d 184, 188-189, 344 P.2d 25* ; *see Penal Code §§ 118* (perjury), *653f* (solicitation to commit felony)].

These claims typically arise when an employer allegedly retaliates against an employee for [*Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1091-1092, 4 Cal. Rptr. 2d 874, 824 P.2d 680]* :

- Refusing to violate a statute;
- Performing a statutory obligation;
- Exercising a statutory right or privilege; or
- Reporting an alleged violation of a statute of public importance.

Employees have also brought this claim where the discharge violated an anti-discrimination policy codified in a California statute or the California Constitution [*see Pettus v. Cole (1996) 49 Cal. App. 4th 402, 454, n.38, 57 Cal. Rptr. 2d 46]* . For instance, in *Badih v. Myers (1995) 36 Cal. App. 4th 1289, 1296, 43 Cal. Rptr. 2d 229* , the court upheld a jury verdict in favor of an employee discharged by a small employer because of her pregnancy, on the ground that the discharge violated the public policy against sex discrimination embodied in the California Constitution. Similarly, the court in *Leibert v. Transworld Systems, Inc. (1995) 32 Cal. App. 4th 1693, 1706, 39 Cal. Rptr. 2d 65* , allowed the plaintiff to proceed on a claim of wrongful termination in violation of public policy against sexual orientation discrimination based on the public policy embodied in former Labor Code §§ *1101*, 1102, and 1102.1 [*now see Gov. Code § 12940(a)* (Fair Employment and Housing Act)]. On the other hand, if the circumstances of the discharge do not establish a violation of a statute that embodies public policy, the employee cannot maintain an action for wrongful discharge in violation of that public policy [*Hobson v. Raychem Corp. (1999) 73 Cal. App. 4th 614, 631, 86 Cal. Rptr. 2d 497* (in absence of any evidence of qualifying disability or of employer's refusal of accommodation under Fair Employment and Housing Act, plaintiff had no basis to claim violation of public policy against discrimination based on disability)].

Public policy is violated when an employer retaliates against an employee for exercising a statutory right or privilege. For example, terminating an employee for refusing to sign an employment agreement that contains an illegal noncompete covenant violates public policy, even if the agreement includes a severability provision that would preserve the enforceability of the remainder of the agreement [*D'Sa v. Playhut, Inc. (2000) 85 Cal. App. 4th 927, 929-935, 102 Cal. Rptr. 2d 495* ; *see Bus. & Prof. Code § 16600* (except as provided by statute, any contract that restrains anyone from engaging in any lawful profession, trade, or business is to that extent void); *Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 945-950, 955, 81 Cal. Rptr. 3d 282, 288-292, 296, 189 P.3d 285* (noncompetition agreement is invalid under *Bus. & Prof. Code § 16600*, even if narrowly drawn, unless it falls within one of statutory exceptions provided by *Bus. & Prof. Code §§ 16601, 16602, 16602.5*); *but see Thompson v. Impaxx, Inc. (2003) 113 Cal. App. 4th 1425, 1429-1430, 7 Cal. Rptr. 3d 427* (antisolicitation covenant may be enforceable if designed to protect employer's confidential, proprietary, or trade-secret customer information); *Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 946 n.4, 81 Cal. Rptr. 3d 282, 189 P.3d 285* ("[W]e do not here address the applicability of the so-called trade secret exception to [*Bus. & Prof. Code § 16600*], as Edwards does not dispute that portion of his agreement or contend that the provision of the noncompetition agreement prohibiting him from recruiting Andersen's employees violated [*Bus. & Prof. Code § 16600*].")]. In *Phillips v. Gemini Moving Specialists (1998) 63 Cal. App. 4th 563, 571-574, 74 Cal. Rptr. 2d 29* , the court found that there is a fundamental public policy against an employer's retaliation for its employee having asserted a right to prompt payment of wages, free from the employer's withholding of pay, based on

Lab. Code §§ 201, 202, 216, 221, 222, 223, 224, and *1175,* and *Code Civ. Proc. § 487.020*.

"Public policy" has been defined broadly to mean "that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good" [*Petermann v. International Brotherhood of Teamsters (1959) 174 Cal. App. 2d 184, 188, 344 P.2d 25]* . However, the California Supreme Court has noted the caution that courts should exercise in defining public policy, especially absent some prior legislative expression on the subject, and asserted that, *in wrongful discharge actions,* courts may not declare public policy without a basis in either constitutional or statutory provisions [*Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1094-1095, 4 Cal. Rptr. 2d 874, 824 P.2d 680* (dictum)].

To state a cause of action for violation of public policy, the complaint must allege the following [*see Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 178, 164 Cal. Rptr. 839, 610 P.2d 1330* ; *see also CACI 2430-2433*]:

- An adverse employment action that violates public policy, such as a termination in retaliation for statutorily protected activity or for refusal to engage in illegal activity; and

- Damages resulting from the adverse employment action. For a form of complaint against an employer that incorporates a cause of action for violation of public policy, see *§ 249.50*.

Public entities are subject to liability only as provided by statute [*Gov. Code § 815(a)*]. Therefore, the common-law cause of action for wrongful discharge in violation of public policy is not available against a public entity [*Miklosy v. Regents of Univ. of Cal. (2008) 44 Cal. 4th 876, 899-900, 80 Cal. Rptr. 3d 690, 188 P.3d 629*].

An individual who is not an employer cannot commit the tort of wrongful discharge in violation of public policy; such an individual can only be the agent by which an employer commits the tort. But the cause of action for wrongful discharge in violation of public policy lies only against the employer [*Miklosy v. Regents of Univ. of Cal. (2008) 44 Cal. 4th 876, 901, 80 Cal. Rptr. 3d 690, 188 P.3d 629*]. Therefore, the doctrine of respondeat superior cannot be applied to impose liability for the tort on a public entity, which is subject to liability only as provided by statute [*Lloyd v. County of Los Angeles (2009) 172 Cal. App. 4th 320, 330, 90 Cal. Rptr. 3d 872* ; *see Gov. Code § 815(a)*].

For additional discussion of wrongful termination actions based on the employer's violation of public policy, see Wilcox, California Employment Law, Ch. 60(Matthew Bender), and Larson and Borowsky, Unjust Dismissal, Ch. 6, Ch. 7 (Matthew Bender).

[2] Action Sounds in Tort

The cause of action for wrongful discharge in violation of public policy sounds in tort, and entitles a successful plaintiff to recover the full range of compensatory and punitive damages [*see Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 176-178, 164 Cal. Rptr. 839, 610 P.2d 1330]* . The California Supreme Court stated that when the defendant has breached a duty imposed by law because of the contractual relationship, rather than merely a promise set forth in the contract, the plaintiff is entitled to tort relief [*Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 175-176, 164 Cal. Rptr. 839, 610 P.2d 1330* ; *see Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 665-671, 254 Cal. Rptr. 211, 765 P.2d 373* (reaffirming existence of public-policy tort)].

[3] Tests for Determining if a Public Policy Protecting Employee Exists

[a] Overview

California law regarding the wrongful-discharge tort has been evolving since its inception in the seminal case of *Petermann v. International Brotherhood of Teamsters (1959) 174 Cal. App. 2d 184, 344 P.2d 25* . The refinements

developed to date have created five requirements for a public policy to be recognized as such in the wrongful-termination context. In a review of its own case law on the subject, the California Supreme Court enumerated four of these factors: the policy must (1) be supported by either constitutional or statutory provisions, (2) inure to the benefit of the public at large rather than serving merely the interests of the individual, (3) have been articulated at the time of the discharge, and (4) be fundamental and substantial [*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 889-890, 66 Cal. Rptr. 2d 888, 941 P.2d 1157]* .

The *Stevenson* Court also stated that when a plaintiff relies on a statutory prohibition to support a common-law tort action for wrongful termination in violation of public policy, the common-law claim is subject to statutory limitations affecting the nature and scope of the statutory prohibition [*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 66 Cal. Rptr. 2d 888, 941 P.2d 1157]* . In addition, then, to the four factors listed by the Court when it articulated its test, the public policy must be one framed to include, rather than exempt, the employer and the particular conduct against which it is sought to be applied. The remainder of this subsection discusses each of these requirements.

[b] Policy Supported by Constitution or Statute

[i] Requirement as Stated by Supreme Court

In *Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 4 Cal. Rptr. 2d 874, 824 P.2d 680* , the California Supreme Court stated that in wrongful termination actions based on violation of public policy, the public policy must derive from constitutional or statutory authority; reliance on judicial or other nonlegislative sources is insufficient to support this cause of action [*Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1095, 4 Cal. Rptr. 2d 874, 824 P.2d 680]* . The opinion in *Gantt* resolved the previous conflict among courts of appeal regarding whether the public policy sufficient to support a tort cause of action for wrongful termination may be based solely on decisional law [*see Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1090-1095, 4 Cal. Rptr. 2d 874, 824 P.2d 680* ; *compare, e.g., Dabbs v. Cardiopulmonary Management Services (1987) 188 Cal. App. 3d 1437, 1443, 234 Cal. Rptr. 129* (dictum suggesting that action may be based on judicial definition) *with Gray v. Superior Court (1986) 181 Cal. App. 3d 813, 819, 226 Cal. Rptr. 570* (public policy must derive from statute)].

In support of its position, the Court stated that a public-policy exception to the at will doctrine, carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions, strikes the proper balance among the interests of employers, employees, and the public. The employer is bound, at a minimum, to know the fundamental public policies of the state and nation as expressed in their constitutions and statutes; so limited, the public-policy exception presents no impediment to employers that operate within the bounds of law. Employees are protected against employer actions that contravene fundamental state policy, and society's interests are served through a more stable job market, in which its most important policies are safeguarded [*Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1095, 4 Cal. Rptr. 2d 874, 824 P.2d 680]* .

In some instances, a statutory provision may expressly provide that the termination of an employee under certain conditions is a violation of public policy [*see, e.g., Bus. & Prof. Code § 2056(c)* (to terminate employment or otherwise penalize physician "principally for advocating for medically appropriate health care ... violates the public policy of this state")]. However, the constitutional or statutory provision need not be framed to directly protect the plaintiff or prohibit his or her termination. A public policy against termination can in some instances be deduced from statutes condemning or protecting certain types of conduct. For example, the cause of action may be based on the employee's refusal to commit an act made illegal by statute [*see, e.g., Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 179, 164 Cal. Rptr. 839, 610 P.2d 1330* (refusal to participate in price-fixing scheme); *Petermann v. International Brotherhood of Teamsters (1959) 174 Cal. App. 2d 184, 189-190, 344 P.2d 25* (refusal to commit perjury)]. Similarly, by prohibiting the employment of undocumented aliens, the Immigration Reform and Control Act of 1986 [*8 U.S.C. § 1101 et seq.*] establishes a public policy that protects an employee who complains to the authorities that the employer has hired undocumented aliens [*Jiev. Liang Tai Knitwear Co., Ltd. (2001) 89 Cal. App. 4th 654, 661-662, 107 Cal. Rptr. 2d 682*

; *see 8 U.S.C. § 1324a*].

In *Gantt* itself the Court held that an employer's attempt to induce or coerce an employee to lie to an investigator from the Department of Fair Employment and Housing (DFEH) plainly contravenes the public policy of the state, and consequently supports a claim for wrongful discharge based on violation of public policy. Specifically, *Gov. Code § 12975* (providing that willful interference with a DFEH investigation constitutes misdemeanor), which is a provision of the Fair Employment and Housing Act (FEHA) [*see Gov. Code § 12900 et seq.*], enjoins any obstruction of a DFEH investigation [*Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1096-1097, 4 Cal. Rptr. 2d 874, 824 P.2d 680]* . The Court stated that the facts of *Gantt* fit squarely within the rubric of *Petermann* and *Tameny* [*Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1096, 4 Cal. Rptr. 2d 874, 824 P.2d 680]* . In *Gantt*, the plaintiff testified at a DFEH hearing on behalf of a coworker who asserted sex discrimination claims against the employer; he did so despite the employer's indirect threats of retaliation. Consequently, he was demoted and ultimately resigned under stressful circumstances. The Supreme Court held that the plaintiff in *Gantt* therefore established a valid claim for wrongful discharge (that is, wrongful constructive discharge) based on violation of public policy, because the employer retaliated against him for his refusal to withhold information or to provide false information to the DFEH [*Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1097, 4 Cal. Rptr. 2d 874, 824 P.2d 680]* . For a discussion of FEHA, see Ch. 115, *Civil Rights: Employment Discrimination* .

In addition, some appellate court cases have founded public-policy violation torts not on policy supported directly by statute or other law, but rather on more attenuated connections to statutory principles. In one case, for example, an employer that discharged a health-care worker for that worker's refusal to work the night shift because of patient-safety and staff-adequacy factors, was held to be subject to wrongful termination liability based in part on public policy embodied in a series of statutes regulating the health-care professions in general [*Dabbs v. Cardiopulmonary Management Services (1987) 188 Cal. App. 3d 1437, 1443, 234 Cal. Rptr. 129* (disapproved in *Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1093, 4 Cal. Rptr. 2d 874, 824 P.2d 680* , for dictum that public policy need not be rooted in statutory provision)]. In another case, the court held that a nurse had a right of action for retaliatory discharge for protesting unsafe and unhealthy working conditions [*Jenkins v. Family Health Program (1989) 214 Cal. App. 3d 440, 448-449, 262 Cal. Rptr. 798]* . In another case, the court held that terminating an employee in retaliation for the employee's designation of an attorney to conduct individual negotiations with the employer violates the public policy embodied in *Lab. Code § 923*, which protects the right of workers to organize and bargain collectively [*Gelini v. Tishgart (1999) 77 Cal. App. 4th 219, 223-228, 91 Cal. Rptr. 2d 447]* .

On the other hand, a statutory provision that is limited in scope to matters outside the employment context ordinarily will not be deemed to establish a fundamental public policy that supports a claim of wrongful termination. For example, the California Supreme Court has held that the Compassionate Use Act of 1996 (Proposition 215) [*Health & Safety Code § 11362.5*] does not establish a public policy against terminating employees who use marijuana for medical purposes. The Act does provide an exemption from criminal liability under two specific California statutes for a person who possesses or cultivates marijuana for medical purposes on the recommendation or approval of a physician [*Health & Safety Code § 11362.5(d)* (providing defense against prosecution under *Health & Safety Code §§ 11357, 11358* for person who possesses or cultivates marijuana for medical purposes on recommendation or approval of physician)]. However, marijuana possession remains illegal under federal law, even for medical use [*21 U.S.C. §§ 812, 844(a)*; *Gonzales v. Raich (2005) 545 U.S. 1, 26-29, 125 S. Ct. 2195, 162 L. Ed. 2d 1*]. Moreover, the Compassionate Use Act is limited in scope: it merely exempts medical users and their primary caregivers from criminal liability under two specified state statutes. Nothing in the Act's text or history indicates that the electorate intended the Act to articulate any policy concerning marijuana in the employment context, let alone a fundamental public policy requiring employers to accommodate marijuana use by employees [*Ross v. RagingWire Telecommunications, Inc. (2008) 42 Cal. 4th 920, 932-933, 174 P.3d 200*].

Similarly, a court of appeal has held that a statutory provision authorizing the Labor Commissioner to pursue constitutional claims on behalf of employees does not set forth an independent public policy that provides employees

with any substantive rights [*Barbee v. Household Auto. Fin. Corp. (2003) 113 Cal. App. 4th 525, 533-536, 6 Cal. Rptr. 3d 406* ; *see Lab. Code § 96(k)*]. A statute authorizing school districts to establish programs allowing senior employees to work part-time [*see Educ. Code § 44922*] is another example of a provision that does not create a sufficiently fundamental and substantial public policy. Thus, an employee whose request for a reduced workload under such a program has been denied may not use that denial as the basis of an action for wrongful constructive discharge in violation of public policy [*Sinatra v. Chico Unified Sch. Dist. (2004) 119 Cal. App. 4th 701, 706-708, 14 Cal. Rptr. 3d 661* (although *Educ. Code § 44922* enables school districts to bestow valuable right on select segment of their employees, it does not embody kind of universal and important right recognized as fundamental to public good)].

[ii] Extent of Requirement

The statements in *Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 4 Cal. Rptr. 2d 874, 824 P.2d 680* , regarding a need for the public policy relied on by a wrongful-termination plaintiff to be grounded in statute or constitution, were dictum. Neither party raised the issue until the Court requested briefing on the subject, and the Court had no difficulty finding statutes embodying the public policy on which the *Gantt* plaintiff relied [*Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1086, 1096-1097, 4 Cal. Rptr. 2d 874, 824 P.2d 680]* . Thus, as the dissenters pointed out, there was no factual situation presenting the question of whether violation of a nonstatutory, nonconstitutional public policy could ever form the basis of a wrongful-discharge suit [*Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1102-1104, 4 Cal. Rptr. 2d 874, 824 P.2d 680* (dissenting opinion)]. However, the fact that the Court did reach out to proclaim the new requirement and did so in an extended analysis makes it unlikely thatthe statutory/constitutional-basis-requirement can be seriously questioned, at least by a plaintiff without a truly egregious fact situation. Moreover, the Supreme Court characterized its *Gantt* discussion as a holding in a subsequent case in which it arguably applied the requirement [*Jennings v. Marralle (1994) 8 Cal. 4th 121, 130, 32 Cal. Rptr. 2d 275, 876 P.2d 1074* (holding that employer exempt from age-discrimination statute not subject to public-policy prohibition on discharge)]. Finally, in its later discussions of the development of wrongful-discharge law, the Court listed the need for support in a constitutional or statutory provision as among the requirements for a qualifying public policy [*Green v. Ralee Engineering Company (1998) 19 Cal. 4th 66, 76, 90, 78 Cal. Rptr. 2d 16, 960 P.2d 1046* ; *Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 890, 66 Cal. Rptr. 2d 888* ; *941 P.2d 1157* (dictum; plaintiff directly protected by statute)].

In *Green v. Ralee Engineering Company (1998) 19 Cal. 4th 66, 80-81, 90, 78 Cal. Rptr. 2d 16, 960 P.2d 1046* , the Supreme Court squarely held that public policy supporting a wrongful-discharge claim may be based on administrative regulations. In *Green*, the plaintiff alleged that he had been discharged from his job as an inspector of airplane components in retaliation for complaining to his employer that the employer's inspection practices violated regulations issued by the Federal Aviation Administration (FAA). The Supreme Court noted that in the Federal Aviation Act [*49 U.S.C. § 40101 et seq.*], Congress declared the public interest in commercial air safety and then delegated regulatory power to the FAA, which established an intricate regulatory scheme to ensure that aircraft design meets safety standards and that aircraft manufacture conforms to the design. Thus, the regulations were clearly "tethered" to their statutory basis and promoted a most important and fundamental public policy goal: air safety. Since the plaintiff's job was to perform inspections of aircraft components to further that fundamental public policy, that policy could serve as the basis for the plaintiff's wrongful-discharge claim [*Green v. Ralee Engineering Company (1998) 19 Cal. 4th 66, 80-90, 78 Cal. Rptr. 2d 16, 960 P.2d 1046]* . In so holding, the Supreme Court expressly declined to address whether any other potential sources of public policy may serve as the basis of such an action [*Green v. Ralee Engineering Company (1998) 19 Cal. 4th 66, 80 n.6, 78 Cal. Rptr. 2d 16, 960 P.2d 1046]* .

[c] Policy Inures to Benefit of Public

The wrongful-discharge plaintiff must establish that the dismissal violated a policy that inures to the benefit of the public at large rather than to a particular employer or employee [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 669, 254 Cal. Rptr. 211, 765 P.2d 373]* .

In determining the nature of the public policy involved, the California Supreme Court held in *Foley* that the violation of an asserted policy supporting an employee's duty to disclose information to his or her employer was not sufficiently public to support a cause of action, but instead served only the private interest of the employer [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 669-671, 254 Cal. Rptr. 211, 765 P.2d 373]* . A court of appeal reached a similar result in a case involving an employee who was terminated because he reported to his employer that some persons were receiving consulting fees without performing work. The court held that, because only the employer was the victim of the alleged wrongdoing, no public benefit was involved [*American Computer Corp. v. Superior Court (1989) 213 Cal. App. 3d 664, 668-669, 261 Cal. Rptr. 796]* .

On the other hand, the reporting of criminal behavior to one's employer has been held to have a sufficiently public benefit to support a cause of action, because the public interest in a workplace free from crime would be impaired if an employee could be terminated for reporting criminal conduct [*see* *Collier v. Superior Court (1991) 228 Cal. App. 3d 1117, 1126-1127, 279 Cal. Rptr. 453* ; *Gould v. Industries, Inc. (1995) 31 Cal. App. 4th 1137, 1149-1150, 37 Cal. Rptr. 2d 718* (cause of action stated by former employee terminated for reporting to supervisors current failure to pay overtime wages); *see also* *Rojo v. Kliger (1990) 52 Cal. 3d 65, 90-91, 276 Cal. Rptr. 130, 801 P.2d 373* (cause of action stated by former employee terminated for reporting sexual harassment)].

The Court has also stated that the tort of wrongful discharge is not a vehicle for enforcement of an employer's internal policies or the provisions of its agreements with others [*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1257, 32 Cal. Rptr. 2d 223, 876 P.2d 1022]* . Not only are these "policies" not based on statute, they also do not implicate the public interest.

[d] Policy Has Been Articulated at Time of Discharge

The California Supreme Court has stated clearly that the purported public policy on which a wrongful-discharge claim is grounded must have been articulated at the time of the discharge [*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 889-890, 66 Cal. Rptr. 2d 888, 941 P.2d 1157]* . This is not a point that has been elaborated in case law, and in fact it has been developed only in a series of dicta, but it seems uncontroversial. In the case in which the California Supreme Court first recognized the tort of wrongful discharge in violation of public policy, the court noted "a series of cases arising out of a variety of factual settings in which a discharge clearly violated an express statutory objective *or undermined a firmly established principle of public policy*" [*Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 175-176, 164 Cal. Rptr. 839, 610 P.2d 1330* (emphasis added)]. A footnote in a later case cited this language for the proposition that in *Tameny* the Court "insist[ed]" that the policy be one that is firmly established [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 670 n.11, 254 Cal. Rptr. 211, 765 P.2d 373]* . Soon the Court was to characterize the footnote as one of several "guidelines" which it had provided in *Foley* [*Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1090, 4 Cal. Rptr. 2d 874, 824 P.2d 680]* , and the *Stevenson* opinion cited *Gantt* for the proposition that the Court's wrongful-discharge jurisprudence included the requirement of the policy's having been articulated at the time of the discharge [*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 889-890, 66 Cal. Rptr. 2d 888, 941 P.2d 1157]* .

Applying these principles, the California Supreme Court has held that a wrongful discharge claim cannot be based on a fundamental public policy created by a statute that was enacted after the plaintiff's termination [*Silo v. CHW Med. Found. (2002) 27 Cal. 4th 1097, 1110, 119 Cal. Rptr. 2d 698, 45 P.3d 1162* (employer cannot be held liable for violating public policy that was not manifest at time alleged tort was committed); *see* *Phillips v. St. Mary Reg'l Med. Ctr. (2002) 96 Cal. App. 4th 218, 229, 116 Cal. Rptr. 2d 770* (legislation enacted afterplaintiff's termination was obviously not well established at pertinent time)]. However, a long-established general public policy can be sufficient to support a wrongful discharge claim even though a statute enacted after the plaintiff's termination addresses the specific kind of conduct involved in the plaintiff's case [*Casella v. Southwest Dealer Servs., Inc. (2007) 157 Cal. App. 4th 1127, 1138-1143, 69 Cal. Rptr. 3d 445* (claim that plaintiff was terminated because he reported employer's participation in car dealers' fraudulent scheme was viable because scheme violated long-established policy of *Penal Code § 487*, which prohibits theft by misrepresentation, even though another statute specifically proscribing car dealers' scheme was

enacted after plaintiff's termination)].

[e] Policy is Fundamental and Substantial

The express requirement that a public policy be fundamental and substantial in order to form the basis for a wrongful-discharge claim has the identical dicta-as-guidelines history as the requirement that it be articulated at the time of discharge [*see* [d], *above*], culminating in its being in the *Stevenson* enumeration of requirements [*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 889-890, 66 Cal. Rptr. 2d 888, 941 P.2d 1157]* . In *Stevenson* the Court considered the question whether California's policy against age discrimination in employment was substantial and fundamental. The Court first noted that its precedents had made no distinction between *substantial* and *fundamental* in this context, so it was treating them as one requirement [*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 890 n. 4, 66 Cal. Rptr. 2d 888, 941 P.2d 1157]* . Observing that age discrimination is ethically comparable to race and sex discrimination and that it is prohibited in the same statute with them, that prohibitions on age discrimination had been California law for more than 35 years and take multiple forms, and that Congress and 45 other states have enacted similar bans, the Court concluded that the Fair Employment and Housing Act's policy against age discrimination in employment is sufficiently substantial and fundamental to support a tort claim for wrongful discharge [*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 895-897, 66 Cal. Rptr. 2d 888, 941 P.2d 1157]* .

In determining whether an employee discharge for exercise of a right violates a fundamental public policy, the focus is not simply on the importance of the right that was exercised. The issue is whether permitting an employer to discharge an employee for exercising that right would undermine a "clearly mandated public policy" embodied in the provision from which that right emanates. Thus, it must be clear from the provision itself or from some other legislative or regulatory enactment that employers are not free to disregard or limit that right. For example, an employer may terminate an at-will employee for refusing to drop a lawsuit against the employer's customer, even though access to courts is guaranteed by the federal and state Constitutions, because there is no clearly mandated policy against such a termination [*Jersey v. John Muir Med. Ctr. (2002) 97 Cal. App. 4th 814, 820-829, 118 Cal. Rptr. 2d 807]* . Similarly, neither *Education Code § 49423* (which authorizes school personnel to assist students in taking prescribed medication) nor *Labor Code § 1102.5* (which prohibits termination of employees for reporting illegal activity) establishes any fundamental public policy that would support a wrongful-termination claim by a teacher who reports that another teacher recommended a legal nutritional supplement to a student [*Carter v. Escondido Union High Sch. Dist. (2007) 148 Cal. App. 4th 922, 930-935, 56 Cal. Rptr. 3d 262]* .

In some cases, a fundamental public policy is counterbalanced by another fundamental public policy so as to shield the employer from liability for discharging the employee. For example, the California Supreme Court has held that the public policy against religious discrimination in employment [*see Cal. Const., art. I, § 8*] must be qualified by the public policy of permitting religious employers considerable discretion to choose employees who will not interfere with their religious mission or message [*see U.S. Const., Amend. I*; *Cal. Const., art. I, § 4*]. Construing the two policies together, along with the FEHA's formerly unqualified general exemption for religious employers [*see Gov. Code § 12926(d)*; *now see Gov. Code § 12926.2(c)* (effective January 2000, FEHA exemption for religious employers generally does not apply to persons employed to perform nonreligious duties at health-care facilities that are not restricted to adherents of religion that established employer)], the Court stated that it could not find a fundamental and substantial public policy prohibiting a religious employer from terminating an employee because of the employee's objectionable religious speech in the workplace [*Silo v. CHW Med. Found. (2002) 27 Cal. 4th 1097, 1108-1109, 119 Cal. Rptr. 2d 698, 45 P.3d 1162]* .

[f] Policy Covers Alleged Violation and Applies to Employer or Other Defendants

The California Supreme Court has held that when a plaintiff relies on a statutory prohibition to support a common-law tort action for wrongful termination in violation of public policy, the common-law claim is subject to statutory limitations affecting the nature and scope of the statutory prohibition [*Stevenson v. Superior Court (1997) 16 Cal. 4th*

880, 66 Cal. Rptr. 2d 888, 941 P.2d 1157] . Thus, for example, a statutory provision cannot establish the existence of a fundamental public policy if an inseparable part of the legislative statement of policy exempts the defendant from the statutory provision [*Jennings v. Marralle (1994) 8 Cal. 4th 121, 135, 32 Cal. Rptr. 2d 275, 876 P.2d 1074]* . Absent some other statutory or constitutional basis for the policy alleged to have been contravened by the termination of plaintiff's employment, a cause of action for wrongful discharge in violation of public policy will not lie if the defendant is exempt from the statute [*Jennings v. Marralle (1994) 8 Cal. 4th 121, 134-136, 32 Cal. Rptr. 2d 275, 876 P.2d 1074* (age discrimination prohibition of FEHA, *Gov. Code § 12941*, which does not apply to those who employ fewer than five employees, cannot be basis of wrongful discharge action against exempt employer)]. For example, although the Fair Employment and Housing Act (FEHA) embodies a general public policy of accommodating disabled workers, that policy is not applicable to the California National Guard, in the absence of express statutory language extending FEHA remedies to military personnel [*Estes v. Monroe (2004) 120 Cal. App. 4th 1347, 1355-1360, 16 Cal. Rptr. 3d 616* (applying deferential analysis of statutory language pursuant to *Feres v. United States (1950) 340 U.S. 135, 146, 71 S. Ct. 153, 95 L. Ed. 152*)]. Similar reasoning applies if the purported source of public policy is a constitutional provision. Thus, because the *First Amendment* applies onlyto government actions and expresses no public policy regarding terminations by private employers, its free speech provision fails to establish a public policy against terminations by private employers for speech-related activities [*Grinzi v. San Diego Hospice Corp. (2004) 120 Cal. App. 4th 72, 80-84, 14 Cal. Rptr. 3d 893]* .

Similarly, individual defendants may be exempt from liability under a particular public policy. A supervisor generally cannot be individually liable for the tort of wrongful termination in violation of public policy because that tort has its basis in the employer-employee relationship, a relationship to which the supervisor in his or her individual capacity is a third party [*Phillips v. Gemini Moving Specialists (1998) 63 Cal. App. 4th 563, 575-577, 74 Cal. Rptr. 2d 29]* . For example, under the Fair Employment and Housing Act (FEHA), a supervisor may not be sued individually for discriminatory conduct made unlawful under FEHA, unless the conduct constitutes harassment [*Jones v. Lodge at Torrey Pines P'ship (2008) 42 Cal. 4th 1158, 1162-1173, 72 Cal. Rptr. 3d 624, 177 P.3d 232* (reference to "person" in *Gov. Code § 12940(h)* does not subject nonemployer individuals to liability for retaliation under FEHA); *Reno v. Baird (1998) 18 Cal. 4th 640, 645-647, 76 Cal. Rptr. 2d 499, 957 P.2d 1333* ; *see Gov. Code § 12940(a), (h)*; *cf. Gov. Code § 12940(j)(3)*]. Thus, the public policy against discriminatory conduct other than harassment does not apply to supervisors in their individual capacities; therefore, they may not be sued individually in common-law actions based on non-harassment discrimination that violates the public policy contained in FEHA [*Reno v. Baird (1998) 18 Cal. 4th 640, 643, 76 Cal. Rptr. 2d 499, 957 P.2d 1333*].

If a statutory exemption or limitation prevents a particular statute from serving as the basis for a claim of wrongful discharge in violation of public policy, the plaintiff may rely on alternative sources of fundamental public policy in support of the claim [*see, e.g.,* *Badih v. Myers (1995) 36 Cal. App. 4th 1289, 1293-1296, 43 Cal. Rptr. 2d 229* (employer with fewer than five employees and therefore exempt from FEHA was still subject to action for wrongful discharge in violation of public policy for firing employee because of pregnancy, based on independent proscription against sex discrimination, including pregnancy discrimination, contained in *Cal. Const., art. I, § 8*)]. For example, a FEHA express exemption for religious employers prevented the act from serving as a public-policy basis for the plaintiff's wrongful-discharge claim against a religious employer [*see Gov. Code § 12926(d)* (FEHA's formerly unqualified general exemption for religious employers); *now see Gov. Code § 12926.2(c)* (effective January 2000, FEHA exemption for religious employers generally does not apply to persons employed to perform nonreligious duties at health-care facilities that are not restricted to adherents of religion that established employer)]. The court of appeal held, however, that the plaintiff could pursue a wrongful discharge claim on the basis of a violation of public policy derived from the California Constitution and from Title VII of Civil Rights Act of 1964 *[Phillips v. St. Mary Reg'l Med. Ctr. (2002) 96 Cal. App. 4th 218, 230-238, 116 Cal. Rptr. 2d 770* ; *see 42 U.S.C. § 2000e et seq.* (Civil Rights Act of 1964); *Cal. Const., art. I, § 8*].

[4] Causal Relationship Must Exist Between Discharge and Public Policy Violation

Even assuming that plaintiff can establish a fundamental policy expressed in a statute or constitutional provision, he or she must establish a nexus between the allegedly protected conduct and the employer's adverse treatment [*see Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1258, 32 Cal. Rptr. 2d 223, 876 P.2d 1022]* . Thus, in a case in which the plaintiff alleged that he had been constructively discharged because he reported illegal activity to his employer, the California Supreme Court found that the length of time between the reports and the alleged retaliatory conduct, as well as the evidence regarding the employer's response to the reports, supported the conclusion that the plaintiff had failed to prove any causal link between the alleged policy violations and his (constructive) discharge [*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1258-1259, 32 Cal. Rptr. 2d 223, 876 P.2d 1022]* .

In an action for wrongful discharge based on alleged retaliation for an employee's whistleblowing activity [*see Lab. Code § 1102.5* ("whistleblower" statute prohibiting retaliation against employees who report or refuse to participate in illegal activity)], the employer may defend by proving that the employee would have been discharged anyway. However, to establish this affirmative defense, once it has been demonstrated by a preponderance of the evidence that a protected activity was a contributing factor in the alleged retaliatory discharge, the employer has the burden of proof to demonstrate by clear and convincing evidence that the alleged discharge would have occurred for legitimate, independent reasons even if the employee had not engaged in protected activities [*see Lab. Code § 1102.6*].

Similarly, although public policy prohibits the termination of a physician "principally for advocating for medically appropriate health care" [*see Bus. & Prof. Code § 2056(c)*], a physician who claims that he or she was terminated in violation of this policy must establish a causal relationship between the termination and his or her advocacy for patients. In such a case, for example, the employer may successfully defend on the basis that the physician was terminated not for advocating for medically appropriate health care, but rather for refusing to comply with the employer's directives that were themselves medically appropriate [*see Sarka v. Regents of Univ. of Cal. (2006) 146 Cal. App. 4th 261, 271-275, 52 Cal. Rptr. 3d 810]* .

[5] Exclusivity *Vel Non* of Statutory Remedies

Where there is a statute prohibiting the discharge which is claimed to be in violation of public policy, the statute--with any associated administrative or judicial procedures and remedial provisions--may or may not provide the exclusive remedy available to the plaintiff. For example, *Lab. Code § 132a* provides the exclusive remedy for discharge in retaliation for filing a workers' compensation claim [*Portillo v. G.T. Price Products, Inc. (1982) 131 Cal. App. 3d 285, 287-290, 182 Cal. Rptr. 291]* . On the other hand, statutes protecting workers who protest unhealthy or unsafe working conditions do not occupy the field and and do not preclude a common law wrongful-discharge action [*Jenkins v. Family Health Program (1989) 214 Cal. App. 3d 440, 449, 262 Cal. Rptr. 798* ; *Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 300-301, 188 Cal. Rptr. 159* ; *see also Boston v. Penny Lane Ctrs., Inc. (2009) 170 Cal. App. 4th 936, 944-947, 88 Cal. Rptr. 3d 707* (*Health & Safety Code § 1596.882*, which provides exclusive administrative remedy for employee who suffers retaliation for complaining about employer's violation of California Child Day Care Act, does not bar employee's common-law claim of wrongful discharge in retaliation for complaining about unsafe working conditions)]. Nor do those protecting an employee from discharge based on sexual orientationor political beliefs [*Leibert v. Transworld Systems, Inc. (1995) 32 Cal. App. 4th 1693, 1704-1706, 39 Cal. Rptr. 2d 65]* . Nor does the Fair Employment and Housing Act, which protects employees against discrimination based on membership in a variety of protected groups [*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 898-905, 66 Cal. Rptr. 2d 888, 941 P.2d 1157* ; *Rojo v. Kliger (1990) 52 Cal. 3d 65, 88, 276 Cal. Rptr. 130, 801 P.2d 373* ; for discussion of the FEHA, *see* Ch. 115, *Civil Rights: Employment Discrimination*].

Sometimes the determination of whether the legislature intended to occupy the field can require extensive analysis [*see, e.g., Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 898-905, 66 Cal. Rptr. 2d 888, 941 P.2d 1157* ; *Rojo v. Kliger (1990) 52 Cal. 3d 65, 72-88, 276 Cal. Rptr. 130, 801 P.2d 373]* .

Note that since the statute involved may be the only basis for claiming that there is a fundamental public policy

protecting the plaintiff, it is possible for the enactment of new employee protections to create not only the remedies explicitly contained in the statute, but also the remedies available under a common law tort theory [*see Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 898-905, 66 Cal. Rptr. 2d 888, 941 P.2d 1157]* . Of course, preemption defenses available for wrongful discharge actions generally may also be available in public-policy-violation cases. These defenses are discussed in *§ 249.21*.

[6] Special Rules Applicable to In-House Counsel

The California Supreme Court has held that an attorney's status as "in-house" counsel does not preclude a tort cause of action for discharge in violation of public policy, but that an action may be stated only if (1) the reasons for discharge contravene an attorney's mandatory ethical obligations, or (2) the reasons would support a claim by a non-attorney employee and a statutory or ethical code provision permits the attorney to depart from the usual rule that client matters remain confidential [*General Dynamics Corp. v. San Bernardino County Superior Court (1994) 7 Cal. 4th 1164, 1170, 1189, 32 Cal. Rptr. 2d 1, 876 P.2d 487]* .

The Court fashioned a rule designed to support in-house counsel in remaining faithful to the fundamental public policies reflected in the governing ethical code when carrying out professional assignments [*General Dynamics Corp. v. San Bernardino County Superior Court (1994) 7 Cal. 4th 1164, 1181-1182, 1188-1189, 32 Cal. Rptr. 2d 1, 876 P.2d 487]* . The Court held that the fiduciary values of mutual trust and confidence can be protected from the threat of damages by limiting judicial access to those claims grounded in explicit and unequivocal ethical norms embodied in the Rules of Professional Conduct and statutes, and claims that are maintainable by the non-attorney employee [for discussion of requirements, *see [3], above*], under circumstances in which the Legislature has manifested a judgment that the principle of professional confidentiality does not apply [*General Dynamics Corp. v. San Bernardino County Superior Court (1994) 7 Cal. 4th 1164, 1189, 32 Cal. Rptr. 2d 1, 876 P.2d 487]* .

If, for reasons peculiar to the particular case, the elements of a claim for wrongful discharge in violation of public policy cannotbe fully established without breaching the attorney-client privilege, the suit must be dismissed in the interest of preserving the privilege [*General Dynamics Corp. v. San Bernardino County Superior Court (1994) 7 Cal. 4th 1164, 1190, 32 Cal. Rptr. 2d 1, 876 P.2d 487]* . However, this rule prohibits only *public* disclosure of the employer's confidential information. Thus, a former in-house counsel's suit for wrongful termination is not barred by the plaintiff's disclosure *to his or her own attorney* of employer confidences obtained during the course of employment, if they are relevant to the wrongful termination suit [*Fox Searchlight Pictures, Inc. v. Paladino (2001) 89 Cal. App. 4th 294, 308-315, 106 Cal. Rptr. 2d 906]* .

Ordinarily, the question of whether the attorney-client privilege precludes a plaintiff's recovery will not be susceptible to resolution at the demurrer stage. Rather, in the usual case, whether the privilege serves as a bar to the plaintiff's recovery will be litigated and determined in the context of motions for protective orders or to compel further discovery responses, as well as at the time of summary judgment [*General Dynamics Corp. v. San Bernardino County Superior Court (1994) 7 Cal. 4th 1164, 1190, 32 Cal. Rptr. 2d 1, 876 P.2d 487]* . In making this determination, the trial court can and should apply an array of ad hoc measures within its equitable powers in order to permit the attorney plaintiff to attempt to make the necessary proof while protecting from disclosure client confidences subject to the privilege [*General Dynamics Corp. v. San Bernardino County Superior Court (1994) 7 Cal. 4th 1164, 1191, 32 Cal. Rptr. 2d 1, 876 P.2d 487]* . The Court rejected any suggestion that the scope of the attorney-client privilege should be diluted in the context of in-house counsel and their corporate clients [*General Dynamics Corp. v. San Bernardino County Superior Court (1994) 7 Cal. 4th 1164, 1190, 32 Cal. Rptr. 2d 1, 876 P.2d 487]* .

The Court also set forth subsidiary rules that will deter the incidence of strike suits or claims filed in bad faith. The contested ethical requirement must be clearly established by the ethics code or statutory provision; disagreements over policy are not actionable. The plaintiff bears the burden of establishing the unequivocal requirements of the ethical norm at issue, and that the employer's conduct was motivated by impermissible considerations under a "but for"

standard of causation. The ethical norm at issue must be one that is intended for the protection of the public at large; measures designed solely for the benefit of the attorney or the client will not suffice to support a wrongful discharge claim [*General Dynamics Corp. v. San Bernardino County Superior Court (1994) 7 Cal. 4th 1164, 1191, 32 Cal. Rptr. 2d 1, 876 P.2d 487]* .

[7] Action Against Subsequent Employers

Although the California courts have not decided the issue, the Ninth Circuit, applying California law, has held that a California employee could bring an action for discharge in violation of public policy against a subsequent employer for retaliation by the subsequent employer against the employee for whistleblowing against a previous employer [*Skillsky v. Lucky Stores, Inc. (9th Cir. 1990) 893 F.2d 1088, 1092-1094* (employee claimed previous employer had informed subsequent employer of employee's health and safety complaints to OSHA, leading to retaliatory discharge by subsequent employer)].

PRACTICE TIP:

Termination Against Public Policy is Rapidly Evolving Area of Law. Read your advance sheets! There is perhaps no area of employment law that continues to evolve as quickly as the tort claim for wrongful retaliatory termination in violation of public policy. The Courts of Appeal continue to actively decide these cases on a regular basis, and the California Supreme Court continues to scrutinize the Court of Appeal decisions in a pro-active fashion. For example, the Supreme Court ordered depublication of *Nagy v. Whittlesey Automotive Group* (California Court of Appeal, 4th District, Division 3, December 7, 1995), where it had been held that an employee stated a cause of action for wrongful termination in violation of public policy against an employer that had violated the employee's privacy rights under *Penal Code §§ 631* and *632* (recording of telephone conversations without consent).

This is still the most fluid battle field in the California common-law regarding employment. *By Richard P. Hill*

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWrongful TerminationPublic PolicyLabor & Employment LawWrongful TerminationWhistleblower Protection ActGeneral OverviewLegal EthicsGeneral OverviewTortsNegligenceCausationProximate CauseGeneral Overview

California Forms of Pleading and Practice--Annotated

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PART II. LEGAL BACKGROUND
A. Wrongful Discharge and Discipline

21-249 California Forms of Pleading and Practice--Annotated § 249.13

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§ 249.13 Breach of Express or Implied-in-Fact Promise Not to Terminate Except for Cause

[1] Existence of Covenant

An employer is precluded from dismissing an employee at will when the discharge is contrary to the terms of an express or implied agreement between the parties [Pugh v. See's *Candies, Inc. (1981) 116 Cal. App. 3d 311, 322, 171 Cal. Rptr. 917* (*Pugh I*)]. The presumption that an employment contract is intended to be terminable at will is subject, like any presumption, to contrary evidence, which may take the form of an express or implied agreement that the relationship will continue for some fixed period of time, or will continue indefinitely, pending the occurrence of some event [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 677, 680, 254 Cal. Rptr. 211, 765 P.2d 373* ; *Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 324-325, 171 Cal. Rptr. 917* (*Pugh I*)].

A court may decide as a matter of law, however, that there was no agreement to terminate for good cause if no facts exist to show the existence of such an agreement [*see, e.g.,* *Kelly v. Stamps.com, Inc. (2005) 135 Cal. App. 4th 1088, 1102-1103, 38 Cal. Rptr. 3d 240* (as matter of law, employer's grant of two-stage bonus was not implied promise of continued employment until second stage of bonus came due); *Lenk v. Total-Western, Inc. (2001) 89 Cal. App. 4th 959, 969-970, 108 Cal. Rptr. 2d 34* (contractual provision that performance review will be completed after 12 months' employment not sufficient to overcome presumption of at-will employment, especially because employee signed employment application confirming that employment would be at will and acknowledged receipt of employee manual with express at-will provision); *Horn v. Cushman & Wakefield W., Inc. (1999) 72 Cal. App. 4th 798, 817-819, 85 Cal. Rptr. 2d 459* (favorable performance evaluations, merit-based salary increases, and general assurances of employee's future with employer are insufficient to overcome statutory presumption under *Lab. Code § 2922* and express statement of at-will employment in employee handbook); *Kovatch v. California Casualty Management Co. (1998) 65 Cal. App. 4th 1256, 1267, 77 Cal. Rptr. 2d 217* (positive performance reviews, commendations, salary increases, and vague assurances of advancement in company were insufficient to create triable issue of fact as to whether there was implicit agreement to terminate only for cause); *Miller v. Pepsi-Cola Bottling Co. (1989) 210 Cal. App. 3d 1554, 1558-1559, 259 Cal. Rptr. 56* (no agreement existed when employer had established no policy governing plaintiff's termination and

made no oral assurances of job security to plaintiff)].

An employment contract stating that the employment is "at will" and terminable "at any time" unambiguously creates an at-will employment relationship, even if it does not also state that termination can be without cause. Because there is no ambiguity about the at-will nature of the employment, additional provisions in that contract regarding a probationary period and annual reviews ordinarily will not expressly or impliedly create a right to be terminated only for cause [*Dore v. Arnold Worldwide, Inc. (2006) 39 Cal. 4th 384, 389-393, 46 Cal. Rptr. 3d 668]* . Similarly, a contractual provision that gives an employee the right to request management review of the employee's termination does not change an at-will employment relationship into one that can be terminated only for cause [*Bernard v. State Farm Mut. Auto. Ins. Co. (2007) 158 Cal. App. 4th 304, 310-311, 69 Cal. Rptr. 3d 700*].

There is some conflict among courts of appeal regarding whether an implied-in-fact agreement to discharge only for cause supersedes an express at will provision in a previous contract [*compare, e.g.,* *Agosta v. Astor (2004) 120 Cal. App. 4th 596, 603-605, 15 Cal. Rptr. 3d 565* (express contractual provision that employer "is an 'at will' employer" establishes at-will employment and cannot be overcome by proof of implied contrary understanding); *Tomlinson v. Qualcomm, Inc. (2002) 97 Cal. App. 4th 934, 943-947, 118 Cal. Rptr. 2d 822* (express contractual provision forat-will employment precludes existence of implied agreement to contrary); *Starzynski v. Capital Pub. Radio, Inc. (2001) 88 Cal. App. 4th 33, 37-39, 105 Cal. Rptr. 2d 525* (at-will provision in express written agreement, signed by employee, cannot be overcome by proof of implied contrary understanding); *Haggard v. Kimberly Quality Care, Inc. (1995) 39 Cal. App. 4th 508, 519, 522, 46 Cal. Rptr. 2d 16* (employee unable to establish that relationship was not at will, when she had signed two agreements setting forth her at will status); *Anderson v. Savin Corp. (1988) 206 Cal. App. 3d 356, 364, 254 Cal. Rptr. 627* ; *Shapiro v. Wells Fargo Realty Advisors (1984) 152 Cal. App. 3d 467, 482, 199 Cal. Rptr. 613* ; *Gerdlund v. Electronic Dispensers International (1987) 190 Cal. App. 3d 263, 277-278, 235 Cal. Rptr. 279* (employee cannot reasonably rely on implied promise of continued employment that contradicts express provisions of at will agreement) *with* *McLain v. Great American Ins. Companies (1989) 208 Cal. App. 3d 1476, 1483-1487, 256 Cal. Rptr. 863* (implied promise may supersede previous at willagreement embodied in nonintegrated document that was subject to parol-evidence interpretation)]. The California Supreme Court in *Foley* (discussed in *§ 249.12[3][b][i]*), expressly left this issue open [*see* *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 680 n.23, 254 Cal. Rptr. 211, 765 P.2d 373]* .

PRACTICE TIP:

At Will Agreements May Displace an Implied Covenant. The "cutting edge" of this issue--the effectiveness of "at will agreements" to foreclose implied in fact contract claims--is addressed in *Haggard v. Kimberly Quality Care, Inc. (1995) 39 Cal. App. 4th 508, 46 Cal. Rptr. 2d 16* . The Court of Appeal in *Haggard* holds that it will not inquire into the adequacy of consideration supporting a purported at will agreement entered into by an employee who has already been employed for some period of time. The consideration identified is continuation of at will employment and the continued payment of wages and benefits. The facts of *Haggard* keep it from being a clear general authority for the proposition that implied contract rights can be wiped out by a subsequently imposed at will agreement supported by no additional consideration, but that isalmost certainly the position that employers' counsel will take. *By Richard P. Hill*

An agreement that the relationship will continue indefinitely is characterized as a contract for "permanent" employment. That characterization has been held to mean that the employment is to continue indefinitely, until one of the parties wishes, *for some good reason,* to sever the relation. A contract that limits the power of the employer with respect to the reasons for termination is no less enforceable because it places no equivalent limits on the power of the employee to quit the employment [*Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 325, 171 Cal. Rptr. 917]* .

A promise for continued employment subject to limitation on the employer's power of termination need not be supported by "independent consideration," that is, consideration other than the services to be rendered [*Pugh v. See's*

Candies, Inc. (1981) 116 Cal. App. 3d 311, 325, 171 Cal. Rptr. 917 (*Pugh I*); *accord Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 679, 254 Cal. Rptr. 211, 765 P.2d 373* ; *but see Comeaux v. Brown & Williamson Tobacco Co. (9th Cir. 1990) 915 F.2d 1264, 1271-1272, 1272 n.8* (plaintiff failed to establish agreement to terminate for cause only on the basis of "independent consideration," even though he resigned from prior job and relocated as condition of new job)]. There is no analytical reason why an employee's promise to render services or actual rendition of services over time may not support an employer's promise both to pay a particular wage and to refrain from arbitrary dismissal [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 679, 254 Cal. Rptr. 211, 765 P.2d 373]* . Consequently, the independent consideration factor serves only an evidentiary function in the essential determination of whether there was an agreementto terminate only for cause. Independent consideration would show that it is more probable that the parties intended a continuing relationship, with limitations on the employer's dismissal authority, when the employee has provided some benefit to the employer, or suffers some detriment, beyond the usual rendition of service [Pugh v. See's *Candies, Inc. (1981) 116 Cal. App. 3d 311, 326, 171 Cal. Rptr. 917* (*Pugh I*)].

In determining whether an implied-in-fact promise exists for some form of continued employment, courts have considered a variety of factors in addition to the existence of independent consideration. These have included, for example, the personnel policies or practices of the employer, the employee's longevity of service, actions, or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged [Pugh v. See's *Candies, Inc. (1981) 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917* (*Pugh I*); *see* discussion at *[2], below*; *see also Robards v. Gaylord Bros., Inc. (9th Cir. 1988) 854 F.2d 1152, 1156-1157* (longevity of employment may, in itself, support inference that employment could be terminated only for cause); *Knights v. Hewlett Packard (1991) 230 Cal. App. 3d 775, 780, 281 Cal. Rptr. 295* (no triable issue as to whether employer promised to terminate only for good cause, in part because plaintiff had no longevity of service); *but see Gould v. Maryland Sound Industries, Inc. (1995) 31 Cal. App. 4th 1137, 1151-1153, 37 Cal. Rptr. 2d 718* (insufficient showing of implied contract, in part because plaintiff had no longevity of service (three years))].

However, an employee's mere passage of time in the employer's service, even when marked with tangible indications that the employer approves the employee's work, cannot alone form an implied-in-fact contract to be terminated only for good cause. Absent other evidence of the employer's intent, longevity, raises, and promotions are their own rewards for the employee's continuing valued service; they do not, in and of themselves, additionally constitute a contractual guarantee of future employment security [*Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 341-343, 100 Cal. Rptr. 2d 352, 8 P.3d 1089]* . On the other hand, long and successful service is not necessarily irrelevant to the existence of an implied agreement to terminate only for good cause. Whether the employer's words or conduct over the period of the employee's tenure have created a specific understanding that the employee has rights against termination at will must be determined by the trier of fact [*Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 342, 100 Cal. Rptr. 2d 352, 8 P.3d 1089* ; *Haycock v. Hughes Aircraft Co. (1994) 22 Cal. App. 4th 1473, 1489-1495, 28 Cal. Rptr. 2d 248* (employer's failure to present substantial evidence that employment was at will did not permit court to rule that longevity created implied agreement to terminate only for cause)].

A related doctrinal development exists in the application to the employment relationship of the "implied-in-law covenant of good faith and fair dealing inherent in every contract" [*Pugh v. See's Candies, Inc. (1981) 171 Cal. Rptr. 917* (*Pugh I*)]. However, since the implied covenant of good faith and fair dealing cannot impose substantive duties or limits on the parties beyond those incorporated in the specific terms of their agreement, a claim asserting a breach of an implied covenant in the employment context often is either invalid (because it seeks to impose limits on the employer's conduct beyond what the parties agreed to) or superfluous (because it involves conduct that breached the contract terms the parties did agree to) [*Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 348-352, 100 Cal. Rptr. 2d 352, 8 P.3d 1089]* . For further discussion, see *§ 249.14*.

The employer and employee may expressly define what constitutes good cause for termination, or they may agree to refer questions regarding the existence of good cause to arbitration. In the latter instance, so long as the arbitrator's award draws its essence from the employment contract and does not simply reflect the arbitrator's own notions of

industrial justice, the courts will not set aside the arbitrator's interpretation of the contract. Thus, unless there is a contention that the arbitrator has acted outside the scope of the contractually delegated authority,the courts will be bound to treat the arbitrator's award as if it represented an agreement between employer and the union as to the proper meaning of "good cause" under the contract [*Eastern Associated Coal Corp. v. United Mine Workers of Am. (2000) 531 U.S. 57, 121 S. Ct. 462, 148 L. Ed. 2d 354, 360-361* (public policy does not require district court to refuse to enforce arbitration award ordering employer to reinstate employee who tested positive for marijuana use)]. For further discussion of what constitutes "good cause," see *§ 249.21[14][c]*.

For discussion of what constitutes "good cause," see *§ 249.21[14][c]*.

For additional discussion of breach of the express or implied-in-fact promise not to terminate except for cause, see Wilcox, California Employment Law, Ch. 60 (Matthew Bender); and Larson and Borowsky, Unjust Dismissal, Ch. 3 (Matthew Bender).

[2] Effect of Handbooks, Letters, and Other Writings

Documents such as personnel policies, bylaws, and letters of understanding that include language limiting the employer's prerogative to terminate an employee at will may be treated as agreements not to terminate without good cause [*see, e.g.,* *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 681-682, 254 Cal. Rptr. 211, 765 P.2d 373* ; *Rochlis v. Walt Disney Co. (1993) 19 Cal. App. 4th 201, 211, 23 Cal. Rptr. 2d 793* (language in stock option agreement sufficient to define relationship as at will); *Burton v. Security Pacific Nat. Bank (1988) 197 Cal. App. 3d 972, 978, 243 Cal. Rptr. 277]* .

An agreement to limit the grounds for termination may be inferred from the employer's personnel manual or policies [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 681-682, 254 Cal. Rptr. 211, 765 P.2d 373]* . For example, an implied-in-fact agreement may be evidenced by a handbook that indicates that if an employee's performance is unsatisfactory, he or she could be terminated at any time within the probationary period, and further states that a nonprobationary employee is eligible for all benefits, presumably including the grievance procedures outlined elsewhere in the handbook. A plaintiff who shows the foregoing facts is entitled to a jury determination whether the language allowing termination at any time during probation implied that termination after probation was to be for good cause only [*Walker v. Northern San Diego County Hospital Dist. (1982) 135 Cal. App. 3d 896, 903-905, 185 Cal. Rptr. 617]* . By contrast, a personnel policy that is only a guideline, and not mandatory, does not imply an agreement to terminate only for good cause [*Knights v. Hewlett Packard (1991) 230 Cal. App. 3d 775, 780, 281 Cal. Rptr. 295* (policy stating that it was "guide for supervisors" when dealing with termination); *Davis v. Consolidated Freightways (1994) 29 Cal. App. 4th 354, 367, 34 Cal. Rptr. 2d 438* (existence of a progressive discipline system does not negate at will status)].

An employer's no-layoff policy, unilaterally adopted by the employer, may become part of the employment contract. Such a policy is effectively an offer for a unilateral contract not to terminate except for good cause, and the offer is accepted by employees who continue in employment after the policy is adopted. However, the no-layoff policy may also be unilaterally discontinued, so long as the employer does so after a reasonable time, on reasonable notice, and without interfering with employees' vested benefits. Once the no-layoff policy is discontinued, the statutory presumption of at-will employment becomes applicable [*Asmus v. Pacific Bell (2000) 23 Cal. 4th 1, 9-18, 96 Cal. Rptr. 2d 179, 999 P.2d 71* ; *see Lab. Code § 2922* (presumption of at-will employment)].

Although a letter of understanding may form the basis for an implied-in-fact agreement, the language of the letter must be analyzed for the existence of the employer's promise of termination only for cause. For example, language in a letter of understanding stating that termination of the letter could be accomplished on thirty days' notice, without additional language stating possible causes for termination, failed to evidence either a promise of termination for cause only, or a reservation of the right to terminate at will [*see* *Hillsman v. Sutter Community Hospitals (1984) 153 Cal. App. 3d 743, 748, 750-751, 200 Cal. Rptr. 605]* .

An employer's bylaws may constitute a contract with its employees in certain circumstances. Bylaws, like other written rules and procedures, may form part of the employment contract "if the employer and employee had a mutual understanding that the rules or procedures would apply to the employee" [*Hillsman v. Sutter Community Hospitals (1984) 153 Cal.App. 3d 743, 748, 753, 755, 200 Cal. Rptr. 605* (citing *Walker v. Northern San Diego County Hospital Dist. (1982) 135 Cal. App. 3d 896, 902-905, 185 Cal. Rptr. 617*)].

Standardized employment applications that state that an individual's employment is for no definite period and can be terminated at any time do not in themselves negate the existence of an implied-in-fact contract, unless they are integrated into the employment agreement [*see* *McLain v. Great American Ins. Companies (1989) 208 Cal. App. 3d 1476, 1484-1487, 256 Cal. Rptr. 863* (application was not complete and integrated contract between parties, parol evidence was admissible to show application susceptible to other meanings, and evidence, including personnel manual, showed implied contract to terminate only for cause)]. Such an application is not a contract at all, but rather is a solicitation of an offer of employment, and is merely evidence concerning the ultimate agreement entered into by the parties [*Harden v. Maybelline Sales Corp. (1991) 230 Cal. App. 3d 1550, 1555, 282 Cal. Rptr. 96]* . Such an application, however, does indicate an at will relationship if it so provides and also states that it constitutes the terms of the employment contract, because the application is thencompletely integrated [*see* *Comeaux v. Brown & Williamson Tobacco Co. (9th Cir. 1990) 915 F.2d 1264, 1271 n.7*]. However, a writing need not be an employment agreement, per se, to be integrated with respect to the at will provisions. In *Haggard v. Kimberly Quality Care, Inc. (1995) 39 Cal. App. 4th 508, 523, 46 Cal. Rptr. 2d 16* , the court found that a confidentiality agreement with an at will termination clause which expressly stated that it could only be modified by the president of the company in writing, whether or not is was considered an "employment agreement," was a complete and integrated expression of the parties' intent with respect to termination.

For discussion of the enforceability of employer handbooks and related written matter, see Wilcox, California Employment Law, Chs. 60, 62 (Matthew Bender); and Larson and Borowsky, Unjust Dismissal, Ch. 8 (Matthew Bender).

PRACTICE TIP:

Closely Examine All Employer Practices. Plaintiff's counsel should plead, and pursue in discovery and proof, established employer practices (which may or may not appear in written policies) that support an implied in fact promise not to terminate employment arbitrarily. Such practices can be quite prevalent in smaller, less legally sophisticated noninstitutional employers. *By Richard P. Hill*

[3] Statute of Frauds Not a Defense to Action Based on Oral or Implied Promise

The statute of frauds does not bar wrongful termination claims based on breach of an oral or implied-in-fact contract not to terminate except for cause [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 673-675, 675 n.19, 254 Cal. Rptr. 211, 765 P.2d 373* (disapproving *Newfield v. Insurance Co. of the West (1984) 156 Cal. App. 3d 440, 446-447, 203 Cal. Rptr. 9*)]. That holding applies retroactively [*Newman v. Emerson Radio Corp. (1989) 48 Cal. 3d 973, 993, 258 Cal. Rptr. 592, 772 P.2d 1059]* .

The employer had argued in *Foley* that plaintiff's contract claims were barred by the predecessor of *Civ. Code § 1624(a)(1)*, which invalidates any unwritten agreement that "by its terms is not to be performed within a year from [its making]." The Court held that the statute was inapplicable because it refers only to contracts that, by their terms, cannot possibly be performed within a year [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 675, 254 Cal. Rptr. 211, 765 P.2d 373* (citing *White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 343 n.2, 66 Cal. Rptr. 697, 438 P.2d 345*)]. The Court reasoned that an employment agreement with a good-cause limitation can be performed within one year, because an employee could quit or the employer could discharge the employee for cause within that time [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 675, 254 Cal. Rptr. 211, 765 P.2d 373]* .

A court of appeal has rejected the contention that the reasoning used in *Foley* is limited to contracts of indefinite duration and did not apply to contracts for a specific term exceeding one year. The court held that, as long as there is the possibility that the contract could be terminated in less than a year--for example, if the oral contract permitted termination for cause during the first year--the statute of frauds does not require that the contract be in writing [*Abeyta v. Superior Court (1993) 17 Cal. App. 4th 1037, 1043-1045, 21 Cal. Rptr. 2d 680]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawStatutes of FraudsGeneral OverviewLabor & Employment LawWrongful TerminationBreach of ContractEmployer HandbooksLabor & Employment LawWrongful TerminationBreach of ContractExpress & Implied Conditions & CovenantsLabor & Employment LawWrongful TerminationBreach of ContractFor Cause StandardLabor & Employment LawWrongful TerminationBreach of ContractImplied Contracts

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 249 EMPLOYMENT LAW: TERMINATION AND DISCIPLINE
PART II. LEGAL BACKGROUND
A. Wrongful Discharge and Discipline

21-249 California Forms of Pleading and Practice--Annotated § 249.14

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.14 Breach of Implied Covenant of Good Faith and Fair Dealing

Every contract contains an implied-in-law covenant of good faith and fair dealing [*Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 768, 206 Cal. Rptr. 354, 686 P.2d 1158]* . Prior to 1989, a number of court of appeal cases held that an employee who was terminated in violation of this implied covenant had a tort cause of action against the employer by analogy to the rule applied in insurance claims cases [*see, e.g.,* *Gray v. Superior Court (1986) 181 Cal. App. 3d 813, 820-821, 226 Cal. Rptr. 570* ; *Rulon-Miller v. International Business Machines Corp. (1984) 162 Cal. App. 3d 241, 252-253, 208 Cal. Rptr. 524* ; *Cleary v. American Airlines, Inc. (1980) 111 Cal. App. 3d 443, 453-456, 168 Cal. Rptr. 722]* .

In *Foley v. Interactive Data Corp.*, the California Supreme Court rejected the analogy between the insurance cases and cases involving termination of employment, and held that employees terminated in violation of the covenant of good faith and fair dealing can recover only contract damages [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 682-700, 254 Cal. Rptr. 211, 765 P.2d 373]* . The *Foley* decision is retroactive [*Newman v. Emerson Radio Corp. (1989) 48 Cal. 3d 973, 988-993, 258 Cal. Rptr. 592, 772 P.2d 1059* (*Foley* applicable to cases not final on January 30, 1989)].

In *Guz v. Bechtel Nat'l, Inc.*, the California Supreme Court reaffirmed *Foley* and clearly stated that there is no tort of bad-faith breach of an employment contract [*Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 351, 100 Cal. Rptr. 2d 352, 8 P.3d 1089]* . The Court in *Guz* went on to explain that the implied covenant of good faith and fair dealing cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement. Thus, unless an express or implied-in-fact contract term provides otherwise, the employer may terminate an at-will employee for any reason or no reason and in any manner. In such a case, the unfairness of the manner of termination (for example, if the termination violates the employer's own established personnel policies) ordinarily does not set forth a cause of action for breach of the covenant of good faith and fair dealing [*Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 348-351, 100 Cal. Rptr. 2d 352, 8 P.3d 1089]* . The *Guz* Court expressly disapproved of prior court of appeal cases holding to the contrary [*Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 351, 100 Cal. Rptr. 2d*

352, 8 P.3d 1089] . Accordingly, in the employment context, a claim asserting a breach of the implied covenant of good faith and fair dealing often is either invalid (because it seeks to impose limits on the employer's conduct beyond what the parties agreed to) or superfluous (because it involves conduct that breached contract terms the parties did agree to) [*Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 352, 100 Cal. Rptr. 2d 352, 8 P.3d 1089]* . However, a valid, discrete claim for breach of the implied covenant of good faith and fair dealing may exist if an employer performs an act that does not otherwise breach the contract (for example, by terminating an at-will employee) as a mere pretext to cheat the employee out of a contract benefit to which the employee was clearly entitled (such as compensation already earned) [*Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 353 n.18, 100 Cal. Rptr. 2d 352, 8 P.3d 1089]* .

For additional discussion of breach of the implied covenant of good faith and fair dealing, see Wilcox, California Employment Law, Ch. 60 (Matthew Bender); and Larson & Borowsky, Unjust Dismissal, Ch. 3 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWrongful TerminationBreach of ContractExpress & Implied Conditions & Covenants

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Chapter 249 EMPLOYMENT LAW: TERMINATION AND DISCIPLINE
PART II. LEGAL BACKGROUND
A. Wrongful Discharge and Discipline

21-249 California Forms of Pleading and Practice--Annotated § 249.15

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.15 Employer Actions Short of Actual Discharge

[1] Constructive Discharge

[a] Effect of Constructive Discharge

Normally, in order to establish liability under a wrongful discharge theory, the plaintiff will need to establish that the employer terminated the plaintiff's employment. However, the fact that the plaintiff resigned from his or her employment will not preclude recovery for wrongful termination if he or she can prove that the employer's conduct forced him or her to resign, and thus amounted to a "constructive discharge" [*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1244-1245, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* .

Standing alone, constructive discharge is neither a tort nor a breach of contract; it is a doctrine that transforms what is ostensibly a resignation into a firing. Even after establishing constructive discharge, an employee must independently prove a breach of contract or tort in connection with the termination of employment in order to obtain damages for wrongful termination [*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* ; *Soules v. Cadam, Inc. (1991) 2 Cal. App. 4th 390, 399-400, 3 Cal. Rptr. 2d 6]* . Thus, an employee who has resigned may maintain an action against the employer for wrongful "termination" in violation of public policy if, for example, the employee can establish that the intolerable conditions that gave rise to the resignation were the result of the employer's unlawful discriminatory practices [*see* *Kovatch v. California Casualty Management Co. (1998) 65 Cal. App. 4th 1256, 1267, 77 Cal. Rptr. 2d 217* ; *see also § 249.12* (wrongful discharge in violation of public policy)].

[b] Essential Elements

[i] Employee's Burden of Proof

In order to establish a constructive discharge, an employee must plead and prove, by the usual preponderance of the evidence standard, that the employer either intentionally created or knowingly permitted working conditions that were

so intolerable or aggravated that a reasonable person in the employee's position would be compelled to resign [*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022]* .

It is not necessary that the employee have completely resigned from the job. It is sufficient if the employee establishes that, because of intolerable conditions, he or she needed to remove himself or herself from the job, thus causing an *effectively* constructive discharge. For example, assuming thatthe other elements of a wrongful-discharge claim are established, an employer will not be relieved of liability by the fact that the employee did not actually quit his or her job, but rather took a disability retirement [*Colores v. Board of Trustees (2003) 105 Cal. App. 4th 1293, 1316-1318, 130 Cal. Rptr. 2d 347]* .

[ii] Intolerable Conditions

In order to support a claim of constructive discharge, the conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to earn a livelihood and serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee [*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1246, 32 Cal. Rptr. 2d 223, 876 P.2d 1022]* .

The adverse working conditions must be unusually aggravated or amount to a continuous pattern before the situation will be deemed intolerable [*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1247, 32 Cal. Rptr. 2d 223, 876 P.2d 1022]* . A series of separate incidents may establish such a continuous pattern if they amount to a campaign of harassment against the employee, even if each incident considered separately might be viewed as trivial [*Thompson v. Tracor Flight Sys., Inc. (2001) 86 Cal. App. 4th 1156, 1171-1172, 104 Cal. Rptr. 2d 95]* . In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge [*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1247 n.3, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* (noting that case before it involved no such allegations)]. Generally, though, single, trivial, or isolated acts of misconduct are insufficient to support a constructive discharge claim. Moreover, a poor performance rating or a demotion, even if accompanied by a reduction in pay, does not by itself trigger a constructive discharge [*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1247, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* (citing *Valdez v. City of Los Angeles (1991) 231 Cal. App. 3d 1043, 1056, 282 Cal. Rptr. 726* , and *Soules v. Cadam, Inc. (1991) 2 Cal. App. 4th 390, 401, 3 Cal. Rptr. 2d 6*)]. Similarly, a lack of a promotion, even if it is the result of gender discrimination, does not establish such intolerable working conditions as to support a claim of constructive discharge [*Cloud v. Casey (2000) 76 Cal. App. 4th 895, 902-905, 90 Cal. Rptr. 2d 757* (employee's willingness to continue working for supervisor who discriminated against her strongly supported inference that working conditions were not intolerable)].

[iii] Intolerability Determined by Objective Standard

A constructive discharge can only exist if, under an objective standard, a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative but to quit [*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1248, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* (citing *Rochlis v. Walt Disney Co. (1993) 19 Cal. App. 4th 201, 212, 23 Cal. Rptr. 2d 793*); *see Pennsylvania State Police v. Suders (2004) 542 U.S. 129, 124 S. Ct. 2342, 159 L. Ed. 2d 204, 216-220* (Title VII plaintiff who advances hostile-environment constructive-discharge claim must show working conditions so intolerable that reasonable person would have felt compelled to resign); *Huskey v. City of San Jose (2000) 204 F.3d 893, 901-902* (civil-rights action; deputy city attorney's subjective discomfort or ethical dilemma over how to proceed with future cases after supervisor's criticism of deputy's "crippling fear" of losing such cases, is not sufficient to support finding of constructive discharge)]. Thus, courts will examine the circumstances surrounding an employee's resignation and determine whether those conditions were sufficiently egregious [*see Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1254-1255, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* (holding that allegations of illegality at workplace were insufficient to support claim of constructive

discharge)].

PRACTICE TIP:

Constructive Discharge May Often Be Determined at Summary Judgment Stage. The evolving case law on what it takes factually to constitute a constructive discharge makes this an issue ripe for summary judgment practice by defendants. *See, Gibson v. Aro Corp. (1995) 32 Cal. App. 4th 1628, 38 Cal. Rptr. 2d 882* ; *King v. AC&R Advertising (9th Cir. 1995) 65 F.3d 764* . It is now possible, reading the case law in the aggregate, to put together an extremely extensive list of actions or conditions that do *not* amount to constructive termination as a matter of law. *By Richard P. Hill*

[iv] Employer Knowledge or Intent Required

The California Supreme Court has declined to require a showing that the employer intended to cause the employee to resign, but instead requires proof that the employer either deliberately created the intolerable conditions that triggered the discharge or, at a minimum, knew about the conditions and failed to remedy the situation in order to force the employee to resign [*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1249-1250, 32 Cal. Rptr. 2d 223, 876 P.2d 1022]* . For purposes of this standard, the requisite knowledge or intent must exist on the part of either the employer or those persons who effectively represent the employer, that is, its officers, directors, managing agents, or supervisory employees [*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022]* .

The Court rejected the line of cases that had permitted a constructive discharge to be established based on the employer's *constructive* knowledge of the intolerable conditions [*see 7 Cal. 4th 1238, 1248, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* (disapproving cases following *Brady v. Elixir Industries (1987) 196 Cal. App. 3d 1299, 1306, 242 Cal. Rptr. 324* , to the extent that they required only constructive knowledge)]. The Court stated that requiring employees to notify someone in a position of authority of their plight permits employers unaware of any wrongdoing to correct a potentially destructive situation [*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1250, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* ; *see also Gibson v. Aro Corp. (1995) 32 Cal. App. 4th 1628, 1640, 38 Cal. Rptr. 2d 882* (employer must also be aware of the impact of events on employee, not merely fact events occurred; demotion and decrease in pay which was "embarrassing" not enough to establish constructive discharge)].

Some language in the Court's discussion of the knowledge requirement suggests that an element of the proof is the employer's intent to force the employee to resign [*see Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1249-1250, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* (employer must "know about [the intolerable working conditions] and fail to remedy the situation in order to force the employee to resign")]. However, the Court also stated that it was not imposing an express intent requirement [*see Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1248, 1249, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* (noting that majority of courts have declined to require express intent, and that express intent requirement might unduly focus trier of fact's attention on presence or absence of direct evidence)], so it may be that an intent will be inferred from the employer's failure to remedy the situation once it has knowledge.

[v] Effect of Delay Before Resignation

An issue that has arisen in regard to constructive discharge claims is the effect of a delay between the onset of the allegedly intolerable working conditions and the employee's resignation. The California Supreme Court made clear in *Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* , that the "reasonable employee" standard (discussed in [b][iii], *above*) makes the length of time one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable employee, but that it is not the dispositive factor [*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1254, 32 Cal. Rptr. 2d 223, 876 P.2d 1022]* . The Court disapproved a court of appeal opinion to the extent that it held that a delay greater than the applicable statute of limitations period precluded a constructive discharge claim [*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238,*

1254, 32 Cal. Rptr. 2d 223, 876 P.2d 1022 (disapproving *Panopulos v. Westinghouse Electric Corp. (1989) 216 Cal. App. 3d 660, 264 Cal. Rptr. 810*)]. However, in the case before it the Court held that the delay between the allegedly illegal activities of the employer and the employee's resignation supported a conclusion that a reasonable employee would not have found the working conditions intolerable [*Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1254-1255, 32 Cal. Rptr. 2d 223, 876 P.2d 1022]* . In *Gibson v. Aro Corp. (1995) 32 Cal. App. 4th 1628, 1637, 38 Cal. Rptr. 2d 882* , a four-month delay between the demotion and the employee's resignation was one of the factors considered by the court in ruling that there was no constructive discharge.

When a constructive discharge arises from intolerable working conditions which occur over an extended period, the statute of limitations begins to run only upon actual termination [*Mullins v. Rockwell Internat. Corp. (1997) 15 Cal. 4th 731, 733-734, 63 Cal. Rptr. 2d 636, 936 P.2d 1246* ; *see Draper v. ECR Coeur Rochester, Inc. (9th Cir. 1998) 147 F.3d 1104, 1110-1111* (date of termination, i.e., resignation, triggers limitation period in constructive discharge case just as it does in other cases of wrongful discharge)]. In rejecting the argument that the statute beings to run when the employee has notice of the intolerable conditions, the Court applied the same reasoning it had in an earlier contract action [*see Romano v. Rockwell Internat., Inc. (1996) 14 Cal. 4th 479, 489-491, 59 Cal. Rptr. 2d 20, 926 P.2d 1114* (statute of limitations in breach of employment contract action begins to run on actual termination, not upon employer's unequivocal notice that termination will occur in future)]. The Court explained that during the period of ongoing intolerable conditions, the employee has an election of remedies: either to continue to perform the contract and await termination to bring an action for breaches of contract, or to resign and sue for termination [*Mullins v. Rockwell Internat. Corp. (1997) 15 Cal. 4th 731, 739-740, 63 Cal. Rptr. 2d 636, 936 P.2d 1246]* .

The Court criticized a court of appeal case that held the statute of limitations in a constructive discharge case begins to run when the adverse employment decision is communicated to the employee [*Mullins v. Rockwell Internat. Corp. (1997) 15 Cal. 4th 731, 739-740, 63 Cal. Rptr. 2d 636, 936 P.2d 1246* ; *see Regents of University of California v. Superior Court (1995) 33 Cal. App. 4th 1710, 1720-1722, 39 Cal. Rptr. 2d 919]* . In rejecting this approach, the Court noted that a rule "requiring a lawsuit to be filed as soon as intolerable conditions begin would interfere with informal conciliation in the workplace" and promote "premature legal proceedings" [*Mullins v. Rockwell Internat. Corp. (1997) 15 Cal. 4th 731, 741, 63 Cal. Rptr. 2d 636, 936 P.2d 1246]* .

[2] Wrongful Discipline or Other Adverse Employment Action

The doctrine of wrongful termination in violation of public policy has been interpreted to embrace wrongful discipline [*Garcia v. Rockwell International Corp. (1986) 187 Cal. App. 3d 1556, 1560-1562, 232 Cal. Rptr. 490]* . For example, a cause of action for wrongful discipline was stated by an employee who alleged that the employer ordered him to mischarge the amount of time he and other workers spent on certain government projects, that the employer then suspended him without pay, and that after he filed suit, the employer reinstatedhim [*Garcia v. Rockwell International Corp. (1986) 187 Cal. App. 3d 1556, 1561-1562, 232 Cal. Rptr. 490* (finding that public policy under *Lab. Code § 1102.5*, protecting whistleblowing, prohibited employer's conduct)]. The rationale underlying the prohibition is that there is no logical reason to disallow a cause of action for wrongful discipline when one exists for wrongful termination because the same wrongful conduct is involved whether the wrong inflicted (that is, the retaliation) is a suspension without pay or a discharge [*Garcia v. Rockwell International Corp. (1986) 187 Cal. App. 3d 1556, 1562, 232 Cal. Rptr. 490]* .

Similarly, an employee who has been subjected to an adverse employment action because he or she reported a violation of law may have a cause of action for retaliation under the "whistleblower" statute. That statute provides that an employer may not retaliate against an employee for disclosing information to a government or law-enforcement agency, if the employee has reasonable cause to believe that the information discloses a violation of or noncompliance with state or federal law [*Lab. Code § 1102.5(b)*]. To establish a prima facie case of retaliation under the whistleblower statute, an employee must show (1) he or she engaged in a protected activity, (2) the employer subjected the employee to an adverse employment action, and (3) there was a causal link between the two. To qualify as an "adverse employment

action" for this purpose, an employer's act must have a material effect on the terms, conditions, or privileges of employment; it is not sufficient that the act deter the plaintiff or other employees from engaging in protected activities [*Patten v. Grant Joint Union High School Dist. (2005) 134 Cal. App. 4th 1378, 1384, 1386-1388, 37 Cal. Rptr. 3d 113* ("materiality" test for "adverse employment action" adopted by *Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal. 4th 1028, 1050-1055, 32 Cal. Rptr. 3d 436, 116 P.3d 1123* in context of Fair Employment and Housing Act also applies in context of *Lab. Code § 1102.5(b)*)]. Also, an assignment to a less-preferred position by itself--with no change in pay, benefits, or promotional opportunities, and with no hostile environment--does not constitute an adverse employment action [*Malais v. Los Angeles City Fire Dept., 150 Cal. App. 4th 350, 357-358, 58 Cal. Rptr. 3d 444]* .

[3] Express or Implied-in-Fact Contract Not to Demote Except for Cause

The California Supreme Court has held that an employee may, in an appropriate case, bring an action for breach of an express or implied-in-fact contract to demote employees only for cause [*Scott v. Pacific Gas & Electric Co. (1995) 11 Cal. 4th 454, 473-474, 46 Cal. Rptr. 2d 427, 904 P.2d 834]* . The Court could perceive no reason why the principles set forth in *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 681-682, 254 Cal. Rptr. 211, 765 P.2d 373* , pertaining to implied-in-fact contracts not to discharge except for cause [*see* discussion in *§ 249.13[1]*] should not also apply to limit an employer's power of demotion [*Scott v. Pacific Gas & Electric Co. (1995) 11 Cal. 4th 454, 464, 46 Cal. Rptr. 2d 427, 904 P.2d 834]* . In so holding, the Court rejected the employer's arguments that allowing such actions would violate public policy and lead to excessive involvement of the courts in the workplace [*see* *Scott v. Pacific Gas & Electric Co. (1995) 11 Cal. 4th 454, 468-473, 46 Cal. Rptr. 2d 427, 904 P.2d 834]* .

PRACTICE TIP:

Carefully Analyze Damages in Wrongful Demotion Cases. In many cases, the damages in a wrongful demotion claim may not be obvious. Plaintiff's counsel investigating such a claim should look to long-term elements. For example, does the structure of the potential plaintiff's retirement benefits mean that the employee's demotion to a lower pay grade towards the end of a career will have an inordinate impact on the amount of retirement benefits expected over the employee's life. *By Richard P. Hill*

[4] Refusal to Renew Contract for Specified Term of Employment

Circumstances that might give rise to a wrongful termination claim cannot do so if the allegedly terminated employment agreement has lapsed by its own terms. Thus an employee failed to state a claim when she alleged that she worked under successive one-year contracts, renewable at the employer's option, and that the contract was allowed to lapse without further renewal because she engaged in activity that--in a true termination context--would be protected [*Daly v. Exxon Corp. (1997) 55 Cal. App. 4th 39, 45-46, 63 Cal. Rptr. 2d 727* (nonrenewal after being warned to stop reporting Cal-OSHA violations); *see also* *Motevalli v. Los Angeles Unified Sch. Dist. (2004) 122 Cal. App. 4th 97, 112-113, 18 Cal. Rptr. 3d 562* (probationary schoolteacher has no cause of action for nonrenewal of employment contract, since law does not recognize claim of tortious nonrenewal of employment contract in violation of public policy absent termination); *Tollefson v. Roman Catholic Bishop (1990) 219 Cal. App. 3d 843, 853-857, 268 Cal. Rptr. 550* (neither implied covenant of good faith and fair dealing nor circumstances that might create implied-in-fact agreement to renew absent good cause can transmute express written contract for limited term into one limiting the employer's right of nonrenewal)]. Note, however, that there may still be statutory protections for the employee [*see, e.g.,* *Daly v. Exxon Corp. (1997) 55 Cal. App. 4th 39, 43-44, 63 Cal. Rptr. 2d 727* (no tort remedy, but failure to renew contract could be "discrimination" under *Lab. Code § 6310(b)*, providing reinstatement and recovery of lost wages and benefits for one terminated or discriminated against for complaining of unsafe working conditions)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationRetaliationGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsDuration of EmploymentGeneral OverviewLabor &

Employment LawWrongful TerminationBreach of ContractExpress & Implied Conditions & CovenantsLabor & Employment LawWrongful TerminationConstructive DischargeGeneral OverviewLabor & Employment LawWrongful TerminationConstructive DischargeBurdens of ProofLabor & Employment LawWrongful TerminationWhistleblower Protection ActGeneral Overview

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PART II. LEGAL BACKGROUND
A. Wrongful Discharge and Discipline

21-249 California Forms of Pleading and Practice--Annotated § 249.16

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.16 Remedies in Tort Actions

[1] General Damages

In tort actions generally, a plaintiff may obtain compensation for all harm proximately caused by the defendant's wrongful conduct [*Civ. Code § 3333*]. Thus, general damages for pain, suffering, and emotional distress may be recovered [*see, e.g., Phillips v. Gemini Moving Specialists (1998) 63 Cal. App. 4th 563, 577, 74 Cal. Rptr. 2d 29]* . However, emotional distress claims that arise out of demotions, transfers, discipline, termination, or any other actions that constitute a "normal part of the employment relationship" may be preempted under the exclusive remedy rule of the workers' compensation law [*see Miklosy v. Regents of Univ. of Cal. (2008) 44 Cal. 4th 876, 902, 80 Cal. Rptr. 3d 690, 188 P.3d 629* ("The alleged wrongful conduct, however, occurred at the worksite, in the normal course of the employer-employeerelationship, and therefore workers' compensation is plaintiffs' exclusive remedy for any injury that may have resulted." (citations omitted)); *Shoemaker v. Myers (1990) 52 Cal. 3d 1, 18, 20, 25, 276 Cal. Rptr. 303, 801 P.2d 1054* ; *Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 159, 233 Cal. Rptr. 308, 729 P.2d 743]* . For discussion of preemption by workers' compensation laws, see *§ 249.21[10]*.

PRACTICE TIP:

Not All Workers Comp Damages Are Excepted. Excepted from this aspect of the *Shoemaker* holding are discharges occurring as the result of an express or implied statutory exception to workers compensation law, or terminations that result from risks or events not within "the compensation bargain." As a practical matter, this would seemingly include all terminations based on discrimination and violations of fundamental public policy, as well as employer conduct such as assault, false imprisonment, and invasion of privacy [*see Phillips v. Gemini Moving Specialists (1998) 63 Cal. App. 4th 563, 577, 74 Cal. Rptr. 2d 29* (in action for wrongful termination in violation of public policy or in violation of express statutory provision, damages for emotional distress are recoverable component of compensatory damages and are not preempted by workers' compensation); *Shoemaker v. Myers (Shoemaker III) (1992) 2 Cal. App. 4th 1407, 1419, 4 Cal. Rptr. 2d 203* ; *Fermino v. Fedco, Inc. (1994) 7 Cal. 4th 701, 714-715, 30 Cal. Rptr. 2d 18]* . *By Richard P. Hill*

To the extent that they are not precluded by workers' compensation law, tort damages are available in an action for wrongful termination in violation of public policy [*Shoemaker v. Myers (Shoemaker III) (1992) 2 Cal. App. 4th 1407, 1414-1418, 4 Cal. Rptr. 2d 203* ; *Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 176-178, 164 Cal. Rptr. 839, 610 P.2d 1330]* .

In *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 663, 700, 254 Cal. Rptr. 211, 765 P.2d 373* , the California Supreme Court held that tort remedies are not available for the breach of the implied covenant of good faith and fair dealing in the employment context [*see* *Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 351, 100 Cal. Rptr. 2d 352, 8 P.3d 1089* (there is no tort of bad-faith breach of an employment contract; reaffirming *Foley*); *see also* discussion in *§ 249.14*].

[2] Special Damages

The plaintiff can obtain damages for lost wages and benefits, including health insurance and life insurance, which should be calculated at the replacement cost for plaintiff, not at the cost to the employer [*Wise v. Southern Pac. Co. (1970) 1 Cal. 3d 600, 608, 83 Cal Rptr. 202, 463 P.2d 426]* . In most cases, the trier of fact must determine the period of time that plaintiff would have worked for defendant, and then calculate the monetary value of all the compensation that plaintiff would have received during that time, subtracting any amounts obtained or obtainable through reasonable efforts at mitigation [*Smith v. Brown-Forman Distillers Corp. (1987) 196 Cal. App. 3d 503, 518, 241 Cal. Rptr. 916* ; *see* discussion in *§ 249.18*].

If the plaintiff would have received raises absent defendant's tortious conduct, damages should include amounts representing the raises [*see* *Smith v. Brown-Forman Distillers Corp. (1987) 196 Cal. App. 3d 503, 518-519, 241 Cal. Rptr. 916* (upholding award of compensatory damages that may have included increases and benefits that might have been received)]. Although these damages may to some degree be speculative, by analogy to the employment discrimination context it can be argued that "unrealistic exactitude" is not required, and that any uncertainties in the calculation of damages should be resolved against an employer who has wrongfully terminated an employee [*cf.* Holloway & Leech, Employment Termination: Rights and Remedies, Ch. 11, pp. 402-403 (BNA 1985)].

[3] Future Earnings in Tort Actions

Compensation for wages and benefits from the date of judgment forward are referred to as "front pay." Front pay based on future earnings is available to a plaintiff in a wrongful discharge action [*see* *Petermann v. International Brotherhood of Teamsters (1963) 214 Cal. App. 2d 155, 159, 29 Cal. Rptr. 399]* . In cases brought under Title VII of the Civil Rights Act of 1964 (*42 U.S.C. § 2000e et seq.*), front pay is generally awarded as an alternative to reinstatement if reinstatement appears inappropriate [*see* *Ackerman v. Western Elec. Co., Inc. (N.D. Cal. 1986) 643 F. Supp. 836, 856]* . Consequently, it may be wise for plaintiff's counsel to include a request for reinstatement when requesting front pay as an element of damages [*see* *Whittlesey v. Union Carbide Corp. (2d Cir. 1984) 742 F.2d 724, 727-728* ; *Cancellier v. Federated Dep't Stores (9th Cir. 1982) 672 F.2d 1312, 1319 , cert. denied, 459 U.S. 859]* . Front pay is generally awarded only for a limited period of time [*see* *Rabago-Alvarez v. Dart Industries, Inc. (1976) 55 Cal. App. 3d 91, 97, 127 Cal. Rptr. 222* (4 years); *Drzewiecki v. H & R Block, Inc. (1972) 24 Cal. App. 3d 695, 705, 101 Cal. Rptr. 169* (10 years)].

PRACTICE TIP:

Carefully Analyze Time Period of Lost Front Pay. The issue of what is a reasonable period of time for the assessment of front pay is an "under-litigated" issue in most wrongful termination cases. Many plaintiffs assume that they would have stayed employed until retirement age, and many defendants seem strangely reluctant to challenge that assumption. Evidence should be developed and analyzed on all of the factors pertaining to just how long the subject employment is likely to have lasted, absent the

termination in question. *By Richard P. Hill*

In general, that portion of a compensatory damages award that represents future wages and benefits must be reduced "to a present lump sum which, when invested to yield the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the times, in the amounts and for the period such future benefits would have been received" [*see Canavin v. Pacific Southwest Airlines (1983) 148 Cal. App. 3d 512, 521, 196 Cal. Rptr. 82* , citing *BAJI No. 14.70* (*now see CACI 3904*)]. Competent evidence on any or all of the following factors should be considered by the trier of fact: (1) the amount the plaintiff would have earned during each period of lost compensation; (2) the discount rate that properly produces a present lump sum, which by way of safe investments might yield the appropriate future sums; and (3) the effects of inflation [*cf. Jones & Laughlin Steel Corp. v. Pfeifer (1983) 462 U.S. 523, 537-538, 103 S. Ct. 2541, 76 L. Ed. 2d 768* (ascertaining future damages ofinjured worker under *Longshoremen's and Harbor Workers Compensation Act); United States v. English (9th Cir. 1975) 521 F.2d 63, 75* (wrongful death action under *Federal Tort Claims Act); Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 662, 151 Cal. Rptr. 399* (personal injury action by employee against contractors and subcontractors)].

PRACTICE TIP:

Review All Lost Benefits. It is very important to analyze the value of each component of compensation lost in a wrongful termination. Many benefits packages are quite complex in their elements and structure, and expert guidance is often, if not always, necessary in doing a proper damage analysis. *By Richard P. Hill*

[4] Prejudgment Interest in Tort Actions

[a] Nature of Interest Awards

Prejudgment interest is an element of compensatory damages that provides plaintiff with "the accretion of wealth which money or particular property could have produced during a period of loss" [*Berns v. PanAmerican World Airways, Inc. (9th Cir. 1982) 667 F.2d 826, 829-830* ; *In re Pago Pago Aircrash of Jan. 30, 1974 (C.D. Cal. 1981) 525 F. Supp. 1007, 1013* ; *Greater Westchester Homeowners Asso. v. Los Angeles (1979) 26 Cal. 3d 86, 102-103, 160 Cal. Rptr. 733, 603 P.2d 1329* , *cert. denied, 449 U.S. 820]* . Prejudgment interest can be awarded in a tort case pursuant to three separate statutes, depending on the facts of the case [*see Civ. Code § 3287(a)* (discussed at *[b], below*), *Civ. Code § 3288* (discussed at *[c], below*), and *Civ. Code § 3291* (discussed at *[d], below*)].

[b] Damages Certain in Amount

Civ. Code § 3287(a) states that interest must be awarded if damages are certain or capable of being made certain by calculation on a particular day prior to judgment [*Civ. Code § 3287(a)*; *see E.L. White, Inc. v. City of Huntington Beach (1982) 138 Cal. App. 3d 366, 377, 187 Cal. Rptr. 879]* . *Civ. Code § 3287(a)* has been interpreted to apply to tort as well as contract causes of action [*Levy-Zentner Co. v. Southern Pac. Transportation Co. (1977) 74 Cal. App. 3d 762, 796-798, 142 Cal. Rptr. 1]* . However, the statute applies only if the dispute concerns a question of liability alone and not the basis on which damages are computed [*National Farm Workers Service Center, Inc. v. M. Caratan, Inc. (1983) 146 Cal. App. 3d 796, 810, 194 Cal. Rptr. 617]* . Thus, it may have limited utility with regard to damages other than those representing lost wages in wrongful termination cases because the amount of such damages is usually disputed.

[c] Discretionary Interest Awards

Prejudgment interest also may be obtained in a wrongful discharge case sounding in tort under *Civ. Code § 3288*, which permits interest to be awarded at the discretion of the trier of fact in any case of a breach of a noncontractual obligation or in any case of malice, fraud, or oppression [*Civ. Code § 3288*; *Harsany v. Cessna Aircraft Co. (1983) 148 Cal. App. 3d 1139, 1142, 196 Cal. Rptr. 374]* . Prejudgment interest under *Civ. Code § 3288* does not apply to the portion of the

judgment representing emotional distress damages [*Berns v. Pan American World Airways, Inc. (9th Cir. 1982) 667 F.2d 826, 830* ; *Greater Westchester Homeowners Asso. v. Los Angeles (1979) 26 Cal. 3d 86, 103, 160 Cal. Rptr. 733, 603 P.2d 1329 , cert. denied, 449 U.S. 820]* .

[d] Awarded Under Civ. Code § 3291

The third statute providing for prejudgment interest in a tort action is *Civ. Code § 3291*. *Civ. Code § 3291* provides that if the plaintiff in a "personal injury" action makes a written pretrial settlement offer pursuant to *Code Civ. Proc. § 998*, which defendant declines, and plaintiff later achieves a more favorable result at trial, he or she will receive interest at the legal rate of 10 percent from the date of the unaccepted offer [*Civ. Code § 3291*]. However, one court of appeal has held that a wrongful discharge action primarily involves the infringement of property rights, not personal injury, and so is not an action to recover personal injury damages within the meaning of the statute [*Holmes v. General Dynamics Corp. (1993) 17 Cal. App. 4th 1418, 1436, 22 Cal. Rptr. 2d 172]* . The court relied on the California Supreme Court's holding that an insurance bad faith action was not an action to recover personal injury damages in which interest could be awarded under *Civ. Code § 3291*, even if emotional distress damages are alleged, because the action is primarily to recover financial damages [*see* *Gourley v. State Farm Mut. Auto. Ins. Co. (1991) 53 Cal. 3d 121, 127-129, 3 Cal. Rptr. 2d 666, 822 P.2d 374]* . The court of appeal held that a wrongful discharge action was comparable to an insurance bad faith action in that it affects plaintiff's economic rights, with personal injury incidental to that economic loss [*Holmes v. General Dynamics Corp. (1993) 17 Cal. App. 4th 1418, 1436-1437, 22 Cal. Rptr. 2d 172* (noting that focus is on nature of tort, rather than type or extent of damages suffered in particular case)].

The court also distinguished actions based on sexual harassment under the Fair Employment and Housing Act (*Gov. Code § 12940 et seq.*), which have been held to be within the meaning of *Civ. Code § 3291* [*see* *Bihun v. AT&T Information Systems, Inc. (1993) 13 Cal. App. 4th 976, 1004-1005, 16 Cal. Rptr. 2d 787* (disapproved on other grounds by *Lakin v. Watkins Associated Industries (1993) 6 Cal. 4th 644, 664, 25 Cal. Rptr. 2d 109, 863 P.2d 179*)]. The court stated that actions for sexual harassment vindicate personal rights, while actions for wrongful discharge in violation of public policy involve the loss of a tangible economic benefit (a job) rather than the invasion of a personal freedom interest [*Holmes v. General Dynamics Corp. (1993) 17 Cal. App. 4th 1418, 1437 n.15, 22 Cal. Rptr. 2d 172]* .

It is not clear whether an action that alleges a violation of public policy could also serve to vindicate a personal freedom interest, and therefore be an action in which interest under *Civ. Code § 3291* is proper. For example, if the public policy involved were the constitutional prohibition against discrimination based on sex, violated by an employer's sexual harassment that led to plaintiff's discharge, it is not clear whether *Gourley* and *Holmes* would preclude an award of prejudgment interest.

[5] Punitive Damages

Punitive damages generally are available in tort actions in which it is proved by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice [*Civ. Code § 3294(a)*]; *see* *Smith v. Brown-Forman Distillers Corp. (1987) 196 Cal. App. 3d 503, 516, 241 Cal. Rptr. 916* ; *see also Civ. Code § 3294(c)* (definitions of "malice," "oppression," and "fraud")].

An employer will be liable for punitive damages based on the wrongful conduct of an employee if the employer [*Civ. Code § 3294(b)*]:

- Had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others,

- Authorized or ratified the wrongful conduct of the employee, or

- Was personally guilty of oppression, fraud, or malice [*see Scott v. Phoenix Sch., Inc. (2009) 175 Cal. App. 4th 702, 717, 96 Cal. Rptr. 3d 159* (wrongful termination, without more, will not sustain finding of malice or oppression)].

To subject a corporate employer to liability for punitive damages, the advance knowledge and conscious disregard, authorization, ratification, or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation [*Civ. Code § 3294(b)*]. In this context, a "managing agent" is a corporate employee who exercises substantial independent authority and judgment in making decisions that ultimately determine corporate policy; the mere power to hire and fire employees is not sufficient to establish such authority [*White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 567, 573-577, 88 Cal. Rptr. 2d 19, 981 P.2d 944* (determination of managing-agent status is factual determination that must be made on case-by-case basis); *see Roby v. McKesson Corp. (Nov. 30, 2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, at *53-*54* (supervisor in charge of four of corporation's 20,000 employees did not have kind of discretionary authority over formal corporate policies affecting substantial portion of corporation that would justify awarding punitive damages against corporation for that supervisor's conduct)]. For full discussion of general rules regarding punitive damage awards in tort actions, see *Ch. 177, Damages, § 177.40* et seq.

Punitive damages may be obtained in a wrongful discharge action that sounds in tort, that is, an action based on violation of public policy [*see Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 176-178, 164 Cal. Rptr. 839, 610 P.2d 1330]* . For example, an employee who sued for tortious "constructive discharge" after he resigned following his refusal to participate in illegal activities was awarded punitive damages on the ground that the employer consciously disregarded his rights by willfully failing to ensure that employees were informed of the law relevant to their duties or to ensure that employees would not be required to participate in illegal conduct [*Smith v. Brown-Forman Distillers Corp. (1987) 196 Cal. App. 3d 503, 516, 241 Cal. Rptr. 916]* .

Further, although not available for breach of contract actions, punitive damages may be awarded where defendant fraudulently induced the plaintiff to enter into the contract [*Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal. App. 3d 1220, 1238-1239, 1 Cal. Rptr. 2d 301]* .

The *Due Process Clause of the Fourteenth Amendment to the United States Constitution* places constraints on state-court awards of punitive damages [*State Farm Mut. Auto Ins. Co. v. Campbell (2003) 538 U.S. 408, 416-418, 123 S. Ct. 1513, 155 L. Ed. 2d 585* ; *BMW of N. Am. v. Gore (1996) 517 U.S. 559, 568, 116 S. Ct. 1589, 134 L. Ed. 2d 809* ; *Roby v. McKesson Corp. (Nov. 30, 2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, at *48* ; *Simon v. San Paolo U.S. Holding Co., Inc. (2005) 35 Cal. 4th 1159, 1171, 29 Cal. Rptr. 3d 379, 113 P.3d 63]* . The United States Supreme Court has articulated three "guideposts" for courts reviewing punitive damages: (1) the degree of reprehensibility of the defendant's misconduct, (2) the disparity between and the punitive damages award and the actual or potential harm suffered by the plaintiff, (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases [*State Farm Mut. Auto Ins. Co. v. Campbell (2003) 538 U.S. 408, 418, 123 S. Ct. 1513, 155 L. Ed. 2d 585* ; *Roby v. McKesson Corp. (Nov. 30, 2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, at *49]* . The most important of these guideposts is the degree of reprehensibility of the defendant's conduct. On this question, courts must consider whether (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident [*State Farm Mut. Auto Ins. Co. v. Campbell (2003) 538 U.S. 408, 419, 123 S. Ct. 1513, 155 L. Ed. 2d 585* ; *Roby v. McKesson Corp. (Nov. 30, 2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, at *49, *63-*64* (one-to-one ratio between compensatory and punitive damages was federal constitutional limit in FEHA discrimination and harassment case involving relatively low degree of reprehensibility of defendant's conduct and substantial compensatory damages award, which included

substantial amount of noneconomic damages, which itself may have included punitive component)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWrongful TerminationRemediesCompensatory DamagesLabor & Employment LawWrongful TerminationRemediesFrontpayLabor & Employment LawWrongful TerminationRemediesPunitive DamagesTortsDamagesCompensatory DamagesPain & SufferingGeneral OverviewWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityEmployees & Employers

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21-249 California Forms of Pleading and Practice--Annotated § 249.17

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.17 Remedies in Contract Action

[1] Wages and Benefits

Pursuant to *Civ. Code § 3300*, the proper measure of damages for breach of a contract is the amount that will compensate the party aggrieved for all the detriment proximately caused thereby, or that in the ordinary course of things would be likely to result therefrom. The general rule is that the measure of recovery by a wrongfully discharged employee in a contract action is the amount of salary agreed on for the period of service, less the amount that the employer proves the employee has earned or with reasonable effort might have earned from other employment [*Parker v. Twentieth Century-Fox Film Corp. (1970) 3 Cal. 3d 176, 181-182* ; *Rabago-Alvarez v. Dart Industries, Inc. (1976) 55 Cal. App. 3d 91, 98, 127 Cal. Rptr. 222]* . Benefits, such as health and life insurance provided by the employer, are included as part of the compensation to which wrongfully discharged employees are entitled [*Wise v. Southern Pac. Co. (1970) 1 Cal. 3d 600, 607, 83 Cal. Rptr. 202, 463 P.2d 426* ; *see* discussion in *§ 249.16[2]*].

[2] Future Earnings in Contract Actions

Awards of future lost earnings, or front pay, are available in a wrongful discharge action based on contract [*see Rabago-Alvarez v. Dart Industries, Inc. (1976) 55 Cal. App. 3d 91, 97-98, 127 Cal. Rptr. 222* (4 years); *Drzewiecki v. H & R Block, Inc. (1972) 24 Cal. App. 3d 695, 705, 101 Cal. Rptr. 169* (10 years)]. For discussion of determination of future earnings, see *§ 249.16[3]*.

[3] Reliance Damages

In most wrongful discharge cases based on breach of an employment contract, the damages suffered by plaintiff are based on the loss of the benefit of the bargain agreed to by plaintiff and defendant. In some cases, plaintiff may suffer additional damages because he or she acted in reliance on the existence of the contract. For example, a plaintiff may have moved a substantial distance to begin employment. "Reliance" damages are properly included in plaintiff's recovery [*see Lazar v. Superior Court (1996) 12 Cal. 4th 631, 649, 49 Cal. Rptr. 2d 377, 909 P.2d 981* (plaintiff may

properlyseek as damages the cost of uprooting family, expenses incurred in relocation and loss of security and income associated with former employment); *Thomas v. Olin Mathieson Chem. Corp. (1967) 255 Cal. App. 2d 806, 811-812, 63 Cal. Rptr. 454* ; *see also Lab. Code §§ 970-972* (liability for inducing employee to change location as result of false representations concerning employment), discussed in *§ 249.30*]. However, any overlap between damages received in tort and damages in contract is limited by the rule against double recovery [*Tavaglione v. Billings (1993) 4 Cal. 4th 1150, 1159, 17 Cal. Rptr. 2d 608]* .

[4] Prejudgment Interest in Contract Actions

In a contract cause of action, prejudgment interest may be available under *Civ. Code § 3287*, which allows interest on damages that are certain, or able to be made certain by calculation, and that are vested in the plaintiff on a particular day [*see* discussion in *§ 249.16[4]*].

Prejudgment interest may also be available in a contract case under *Civ. Code § 3287(b)*, which permits an award of interest in a contract action when the amount of damages is not liquidated. Every person who is entitled under any judgment to receive damages based on a cause of action in contract when the claim was unliquidated may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed [*Civ. Code § 3287(b)*]. The award of interest is not for determination by the jury [*George v. Double-D Foods, Inc. (1984) 155 Cal. App. 3d 36, 47, 201 Cal. Rptr. 870]* .

The delay involved in the litigation appears to be an important factor in determining whether to award interest under *Civ. Code § 3287(b)* [*A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473, 496, 186 Cal. Rptr. 114* ; *Moreno v. Jessup Buena Vista Dairy (1975) 50 Cal. App. 3d 438, 448, 123 Cal. Rptr. 393]* . The good or bad faith of defendant in opposing plaintiff's claim may affect the decision to award interest [*Zalk v. General Exploration Co. (1980) 105 Cal. App. 3d 786, 795, 164 Cal. Rptr. 647]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestPrejudgment InterestLabor & Employment LawWrongful TerminationRemediesCompensatory DamagesLabor & Employment LawWrongful TerminationRemediesFrontpay

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§ 249.18 Mitigation of Damages

Plaintiffs in tort and contract actions generally have a duty to make a reasonable effort to minimize the damage caused by defendant's actions [*see Ash v. Soo Sing Lung (1918) 177 Cal. 356, 361-362, 170 P. 843* ; *Ortiz v. Bank of America Nat. Trust and Sav. Ass'n (9th Cir. 1987) 852 F.2d 383, 387]* . In the case of the wrongfully discharged employee, mitigation means seeking other employment [*Meyer v. Byron Jackson, Inc. (1984) 161 Cal. App. 3d 402, 416-417, 207 Cal. Rptr. 663]* and making a reasonable effort to retain any employment that is secured [*see Stanchfield v. Hamer Toyota, Inc. (1995) 37 Cal. App. 4th 1495, 1502-1503, 44 Cal. Rptr. 2d 565]* . Defendant may show that compensation earned by the plaintiff after termination, or the amount that could have been earned with reasonable diligence, should be deducted from plaintiff's damages [*Parker v. Twentieth Century-Fox Film Corp. (1970) 3 Cal. 3d 176, 181-182, 89 Cal. Rptr. 737, 474 P.2d 689* ; *cf. Ford Motor Co. v. EEOC (1982) 458 U.S. 219, 231 n.14, 102 S.Ct. 3057, 73 L. Ed. 2d 721* (case brought under Title VII of the Civil Rights Act of 1964 (*42 U.S.C. §§ 2000e-2000e-17*))]. For a form of affirmative defense alleging that plaintiff failed to mitigate damages, see *§ 249.65*.

Defendant must prove plaintiff's failure to mitigate by showing that comparable positions were available for which plaintiff was qualified, and that plaintiff did not make reasonable efforts to obtain them [*Parker v. Twentieth Century-Fox Film Corp. (1970) 3 Cal. 3d 176, 182, 89 Cal. Rptr. 737, 474 P.2d 689]* . Included in the defendant's burden of proof is a demonstration of the amount of money that the plaintiff could have earned [*Mayer v. Multistate Legal Studies, Inc. (1997) 52 Cal. App. 4th 1428, 1436-1437, 61 Cal. Rptr. 2d 336]* . If plaintiff found but failed to retain comparable employment, defendant may prove failure to mitigate by showing that plaintiff did not make reasonable efforts to retain such employment [*Stanchfield v. Hamer Toyota, Inc. (1995) 37 Cal. App. 4th 1495, 1502, 44 Cal. Rptr. 2d 565]* . For example, if plaintiff is fired from the newly-obtained employment for cause, any amount the employee could have earned by retaining that employment should be deducted from plaintiff's damages [*see Stanchfield v. Hamer Toyota, Inc. (1995) 37 Cal. App. 4th 1495, 1502-1503, 44 Cal. Rptr. 2d 565]* . The reasonableness of plaintiff's efforts is a question of fact for the jury [*Ortiz v. Bank of America Nat. Trust and Sav. Ass'n (9th Cir. 1987) 852 F.2d 383, 387]* .

Plaintiff is not required to bear undue risk, burden, or humiliation in order to fulfill the duty to mitigate; only reasonable diligence is demanded [*see Rest. 2d, Contracts, § 350 (1979)*]. Thus, plaintiff need not accept inferior employment or work of a different kind [*Parker v. Twentieth Century-Fox Film Corp. (1970) 3 Cal. 3d 176, 182, 89 Cal. Rptr. 737, 474 P.2d 689* ; *Rabago-Alvarez v. Dart Industries, Inc. (1976) 55 Cal. App. 3d 91, 99, 127 Cal. Rptr. 222]* . Similarly, plaintiff generally need not relocate to find a job [*Hegler v. Board of Ed. of Bearden Sch. Dist., Bearden, Ark. (8th Cir. 1971) 447 F.2d 1078, 1081]* . For example, a discharged employee need not accept similar employment offering the same wages and benefits as the original position, if accepting the position requires him or her to relocate and incur other expenses [*Cunningham v. Retail Clerks Union (1983) 149 Cal. App. 3d 296, 307, 196 Cal. Rptr. 769]* . Plaintiff's damages should include any sums expended in his or reasonable efforts at mitigation [*see W.C. Cook & Co. v. White Truck etc. Co. (1932) 124 Cal. App. 721, 727, 13 P.2d 549]* .

A unique opportunity to mitigate damages may arise if the defendant employer offers the terminated employee his or her job back. In *Ford Motor Co. v. EEOC (1982) 458 U.S. 219, 102 S. Ct. 3057, 73 L. Ed. 2d 721* , a case arising under Title VII of the Civil Rights Act of 1964 (*42 U.S.C. § 2000e et seq.*), the United States Supreme Court held that an ex-employee's refusal of the employer's unconditional offer of reinstatement to the same or substantially equivalent position operates to cut off the back pay period at the date of refusal. The holding does not affect plaintiff's right to back pay for the period predating the effective date of the reinstatement offer [*Ford Motor Co. v. EEOC (1982) 458 U.S. 219, 238, 102 S. Ct. 3057, 73 L. Ed. 2d 721]* . In applying this rule to a wrongful termination action arising under California law, the Ninth Circuit has held that an offer of reinstatement does not, as a matter of law, automatically terminate the employer's liability for back pay; a jury question may remain as to whether or not the plaintiff's refusal of the reinstatement offer was reasonable under the circumstances [*Ortiz v. Bank of America Nat. Trust and Sav. Ass'n (9th Cir. 1987) 852 F.2d 383, 387]* .

PRACTICE TIP:

Mitigation of Damages is Defendant's Burden of Proof. An important, but sometimes overlooked, aspect of a defendant's burden of proof on mitigation of damages is the necessity of showing that earnings sought to be credited against damages must be inconsistent with the performance of the contract proven to have been breached. If the earnings in question still would have been available to the plaintiff in the "but for" world of an unbreached contract, they are not properly subtracted from damages in mitigation. See *Mass v. Board of Education (1964) 61 Cal. 2d 612, 629 n.12, 39 Cal. Rptr. 739* . Plaintiff should be aggressive in proposing instructions which make the defendant's burden of proof on mitigation of damages clear and explicit. *By Richard P. Hill*

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWrongful TerminationRemediesBackpayLabor & Employment LawWrongful TerminationRemediesCompensatory DamagesTortsDamagesMitigation

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AUTHOR: Richard P. Hill Editorial Consultant

§ 249.19 Deduction of Collateral Compensation

A damages award may be reduced by the amounts earned or earnable by the plaintiff through reasonable diligence [*see* discussion in *§ 249.18*]. Under the collateral source rule, other types of compensation received by the plaintiff from sources other than the defendant generally are not deducted from the award [*Helfend v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 1, 6, 84 Cal. Rptr. 173, 465 P.2d 61]* . The rule applies only to sources other than the defendant. Therefore, severance pay paid by defendant may be deducted from damages [*cf. E.E.O.C. v. Sandia Corp. (10th Cir. 1980) 639 F.2d 600, 626* ; *E.E.O.C. (U.S.A.) v. Pacific Press Pub. Ass'n (N.D. Cal. 1979) 482 F. Supp. 1291, 1317-1318 (Title VII cases)]* . Workers' compensation payments relating to a wrongful termination may also be deducted [*Pichon v. Pacific Gas & Electric Co. (1989) 212 Cal. App. 3d 488, 499-501, 260 Cal. Rptr. 677* ; *accord, Panopulos v. Westinghouse Electric Corp. (1989) 216 Cal. App. 3d 660, 668, 264 Cal. Rptr. 810* ; *see also Mayer v. Multistate Legal Studies, Inc. (1997) 52 Cal. App. 4th 1428, 1432-1434* & n.2, *61 Cal. Rptr. 2d 336* (plaintiff conceded deductibility of disability benefits, and court seemed to assume their deductibility)].

Collateral benefits that are not deducted include the following:

- Unemployment benefits [*Monroe v. Oakland Unified School Dist. (1981) 114 Cal. App. 3d 804, 810-812, 170 Cal. Rptr. 867]* ;

- Retirement benefits [*Hume v. Lacey (1952) 112 Cal. App. 2d 147, 152, 245 P.2d 672]* ; and

- Medical benefits [*Helfend v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 1, 6, 84 Cal. Rptr. 173, 465 P.2d 61]* .

Legal Topics:

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

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AUTHOR: Richard P. Hill Editorial Consultant

§ 249.20 Equitable Remedies

One court has held that specific performance (that is, reinstatement) is not available as a remedy in a wrongful termination action because of the long-established rule that a contract for personal services cannot be specifically enforced [*Barndt v. County of Los Angeles (1989) 211 Cal. App. 3d 397, 403-406, 259 Cal. Rptr. 372* ; *see Civ. Code § 3390*]. This rule may be inapplicable, however, if an employee is discharged in violation of a statute that expressly provides for reinstatement as a remedy [*see, e.g., Lab. Code § 132a(1)* (employee discharged for filing workers' compensation claim or testifying in workers' compensation proceeding is, among other things, entitled to reinstatement)].

In the wake of the terrorist attacks of September 11, 2001, the Legislature acted to protect the rights of military reservists who are called to active duty. Among the protections enacted was an extension of reemployment rights to reservists who are called to active duty [2002 Stats., Ch. 60 (effective June 21, 2002)]. The California military leave law now provides that an officer or enlisted member of the California National Guard, or a member of the United States Military Reserve, who leaves a full- or part-time position in private employment to perform full-time active California or federal military service may obtain a certificate of satisfactory service, which entitles him or her to apply within 40 days after the completion of such service for reemployment with the same employer [*Mil. & Vet. Code § 395.06(a), (b)*; *see Mil. & Vet. Code § 400*; *see also 86 Ops. Cal. Atty. Gen. 12 (2003)* (employment-related benefits granted in *Mil. & Vet. Code §§ 389-395.8* are not available to employee who seeks leave of absence for service in militia of another state)]. The employer must restore the returning employee to the former position or to a position of similar seniority, status, and pay without loss of retirement or other benefits, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so [*Mil. & Vet. Code § 395.06(a), (b)*]. The returning employee may not be terminated without cause within one year after being restored to the position [*Mil. & Vet. Code § 395.06(a), (b)*]. In addition, any employee of the state called up during time of war or national emergency has the right "to return and reenter upon the office or position within six months after the termination of his or her active service with the armed forces" [*Mil. & Vet. Code § 395.1(a)*].

If a private employer fails to provide reemployment benefits as required by the California military leave law, the person entitled to reemployment may obtain relief by filing a motion, petition, or similar pleading in the superior court for the county where the employer maintains a place of business. The court may grant specific relief by requiring the employer to comply with the reemployment law and compensate the person for any loss of wages or benefits caused by the employer's unlawful action [*Mil. & Vet. Code § 395.06(c)* (superior court to order speedy hearing and advance matter on calendar)]. The district attorney or city prosecutor of the county or city in which the employer maintains a place of business is authorized to appear and act as attorney for the person entitled to reemployment benefits, and no fees or court costs are required to be paid by the person applying for those benefits [*Mil. & Vet. Code § 395.06(c), (d)*].

Similar benefits are mandated for a volunteer member of the California Wing of the Civil Air Patrol (the civilian auxiliary of the United States Air Force) who has been employed for at least 90 days by an employer that has more than 15 employees [*Gov. Code § 1501 et seq.*; *see Gov. Code § 1501(a),(b),(d)* ("Civil Air Patrol leave," "employee," and "employer" defined)]. The employer generally must provide not less than 10 days per calendar year of unpaid leave to an employee responding to an emergency operational mission of the Civil Air Patrol [*Gov. Code § 1503(a)(1)*; *see also Gov. Code § 1503(d)* (employer may opt to provide paid leave); *Gov. Code § 1504(b)* (employer and employee may negotiate for employer to maintain employee's benefits at employer's expense during leave)]. Such leave for a single emergency operational mission must not exceed three days, unless an extension of time is granted by the governmental entity that authorized the emergency operational mission, and the extension of the leave is approved by the employer [*Gov. Code § 1503(a)(1)*; *but see Gov. Code § 1503(a)(2)* (employer is not required to grant such leave to employee who is required to respond to same or simultaneous emergency operational mission as first responder or disaster-service worker for local, state, or federal agency)]. The employee must give the employer as much notice as possible of the intended dates on which the leave will begin and end, and the employer may require certification from the Civil Air Patrol to verify the employee's eligibility for leave [*Gov. Code § 1503(b)*]. The employer may not require the employee to exhaust accrued vacation leave, personal leave, compensatory leave, sick leave, disability leave, or any other leave that may be available to the employee in order to take Civil Air Patrol leave [*Gov. Code § 1503(c)*]. On the expiration of the leave, the employer must restore an employee to the position held by him or her when the leave began or to a position with equivalent seniority status, employee benefits, pay, and other terms and conditions of employment [*Gov. Code § 1504(a)* (employer may decline to restore employee because of conditions unrelated to employee's exercise of leave rights)]. The employer must not discriminate against or discharge the employee because of his or her membership in the Civil Air Patrol and may not hinder or prevent the employee from performing service as part of the Civil Air Patrol during an emergency operational mission for which the employee is entitled to leave [*Gov. Code § 1502*; *see* Gov. Code § 1506; *see also Gov. Code § 1505(a)* (taking Civil Air Patrol leave must not result in loss of any employee benefit accrued before beginning of leave)].

Federal law provides similar reemployment benefits for service members. The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") [*38 U.S.C. § 4301 et seq.*] requires employers to provide leaves of absence to employees serving in the uniformed services and grants reemployment and job protection rights to such employees [*38 U.S.C. §§ 4304, 4312, 4313, 4316(c)*]. Affected employees generally are entitled to reemployment if they (1) give proper advance verbal or written notice of such service to their employer; (2) are not on leave for more than five years, except in limited circumstances, such as when the service is required for a national emergency; and (3) apply for reemployment within the periods prescribed by USERRA [*38 U.S.C. § 4312(a)(1)-(3)*]. An employee's release of rights in a severance agreement is not enforceable to bar a claim for wrongful termination based on a violation of USERRA rights [*Perez v. Uline, Inc. (2007) 157 Cal. App. 4th 953, 957-958, 68 Cal. Rptr. 3d 872*]. For detailed coverage of the USERRA, *see* Wilcox, California Employment Law, Ch. 40 (Matthew Bender) [*see also* Tyler M. Paetkau, *Emerging Employment Law Considerations as a Result of the September 11th Terrorist Attacks*, California Employment Law Reporter, Dec. 2001 (Matthew Bender)].

Legal Topics:

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

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AUTHOR: Richard P. Hill Editorial Consultant

§ 249.21 Defenses to Wrongful Discharge Action

[1] Preemption by Federal Labor Law Generally

Common law wrongful discharge actions may be preempted by federal labor laws in several ways. First, if the gravamen of a plaintiff's complaint is that he or she was discharged or disciplined because of his or her exercise of rights protected by the National Labor Relations Act (NLRA; *29 U.S.C. §§ 151-169*), the plaintiff's exclusive remedy is through the National Labor Relations Board (NLRB) [*Henry v. Intercontinental Radio, Inc. (1984) 155 Cal. App. 3d 707, 713-715, 202 Cal. Rptr. 328* ; *see* discussion at *[2], below*]. Some wrongful-discharge claims may also be preempted by *§ 301 of the Labor* Management Relations Act (LMRA; *29 U.S.C. § 185(a)*), which provides the exclusive remedy for challenging a breach of a collective bargaining agreement [*see* *Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202, 221, 105 S. Ct. 1904, 85 L. Ed. 2d 206* ; *see* discussion at *[3], below*]. The Railway Labor Act (RLA; *45 U.S.C. §§ 151-188*), which governs collective bargaining agreements regarding employees of railroads and airlines engaged in interstate or foreign commerce, may also preempt some wrongful termination actions [*see* discussion at *[5], below*].

[2] Federal Preemption Regarding Rights Protected by National Labor Relations Act

The NLRA preempts common law wrongful discharge actions if the gravamen of plaintiff's complaint is that he or she was discharged or disciplined because of that statute [*Henry v. Intercontinental Radio, Inc. (1984) 155 Cal. App. 3d 707, 713-715, 202 Cal. Rptr. 328]* . For example, in one case, a complaint alleging that an employer fired the plaintiff for working to increase wages, to improve working conditions, and to unionize employees was subject to demurrer, because discharge or discrimination based on union-related factors is arguably within the jurisdiction of the NLRB [*Henry v. Intercontinental Radio, Inc. (1984) 155 Cal. App. 3d 707, 713, 202 Cal. Rptr. 328]* . In another case, the court held that the NLRA preempted a wrongful termination action by a union cab driver who was fired in retaliation for testifying against his employer at a Public Utilities Commission hearing [*Rodriguez v. Yellow Cab Cooperative, Inc. (1988) 206 Cal. App. 3d 668, 674-679, 253 Cal. Rptr. 779* ; *see also* *Kelecheva v. Multivision Cable T.V. Corp. (1993) 18 Cal. App. 4th 521, 528, 22 Cal. Rptr. 2d 453* (discharge from supervisory position, allegedly due to plaintiff's refusal

to participate in employer's campaign of antiunion harassment, preempted)]. Similarly, a wrongful termination action brought by a supervisor is preempted by the NLRA if the supervisor's discharge interfered with the right of employees to exercise their rights under the NLRA, such as a supervisor's testimony adverse to the employer's interest at an NLRB proceeding or during the processing of an employee's grievance under a collective bargaining agreement [*Ruscigno v. American Nat'l Can Co. (2000) 84 Cal. App. 4th 112, 119-128, 100 Cal. Rptr. 2d 585]* .

Although the NLRB generally has exclusive jurisdiction over the adjudication of unfair labor practices, there is an exception to that exclusive jurisdiction for certain matters of local concern. This exception applies to matters that touch interests that are so deeply rooted in local feeling and responsibility, that the courts will not find that the NLRB has exclusive jurisdiction in the absence of a plain expression of congressional intent to preempt state regulation. One such area is the regulation of occupational health and safety [*Inter-Modal Rail Employees Ass'n v. Burlington N. & Santa Fe Ry. Co. (1999) 73 Cal. App. 4th 918, 924-928, 87 Cal. Rptr. 2d 60]* . Thus, for example, when an employer discharges employees because they have formed an association to complain about hazardous work conditions, the employees' cause of action for retaliatory discharge in violation of the California Occupational Safety and Health Act [*Lab. Code § 6300 et seq.*] is not preempted by the NLRA [*Inter-Modal Rail Employees Ass'n v. Burlington N. & Santa Fe Ry. Co. (1999) 73 Cal. App. 4th 918, 925-929, 87 Cal. Rptr. 2d 60]* .

At least one case has held that, if an action alleges mixed motivations for the wrongful discharge, which include the employee's refusal to commit an unfair labor practice, the action is not preempted by the NLRA, and the employee may recover for the wrongful discharge based on the other reasons [*Balog v. LRJV, Inc. (1988) 204 Cal. App. 3d 1295, 1311, 250 Cal. Rptr. 766* ; *cf.* *Kelecheva v. Multivision Cable T.V. Corp. (1993) 18 Cal. App. 4th 521, 528-529, 22 Cal. Rptr. 2d 453* (plaintiff's admission that defendant's sole unlawful motivation for termination involved "unionbusting" precluded reliance on "mixed motive" exception to preemption)].

An action for breach of an implied contract of employment, or an action for breach of the implied covenant of good faith and fair dealing, is not preempted by the National Labor Relations Act unless the controversy presented to the court is identical to that which would be presented to the NLRB [*see* *Kelecheva v. Multivision Cable T.V. Corp. (1993) 18 Cal. App. 4th 521, 529-532, 22 Cal. Rptr. 2d 453]* . In the case of an employee not covered by a collective bargaining agreement (such as a supervisory employee), the interest of the state in providing contract remedies outweighs any marginal effect the adjudication of those employees' contract claims might have on the administration of national labor policies [*Kelecheva v. Multivision Cable T.V. Corp. (1993) 18 Cal. App. 4th 521, 532, 22 Cal. Rptr. 2d 453]* .

Because the NLRB has primary jurisdiction over substantive NLRA issues, a case subject to NLRA preemption may not be removed to federal court, even for the limited purpose of dismissing it to protect the NLRB's jurisdiction. State courts must determine NLRA preemption issues with respect to wrongful termination claims [*Ethridge v. Harbor House Restaurant (9th Cir. 1988) 861 F.2d 1389, 1396-1402]* . For general discussion and forms relating to federal removal jurisdiction, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

[3] Federal Preemption Under Labor Management Relations Act

The Labor Management Relations Act (LMRA; *29 U.S.C. § 185(a)*), which provides the exclusive remedy for challenging a breach of a collective bargaining agreement, preempts state-law wrongful discharge claims that require interpretation of the terms of a collective bargaining agreement [*Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202, 211, 105 S. Ct. 1904, 85 L. Ed. 2d 206* ; *Hansen v. Aerospace Related Indus. Dist. Lodge 725 of Int'l Ass'n of Machinists & Aerospace Workers (2001) 90 Cal. App. 4th 977, 984-985, 109 Cal. Rptr. 2d 482* (adjudication of employee's claim that she had been terminated for pretextual reasons necessarily involved determination of whether she had been laid off out of seniority order under collective bargaining agreement)]. Therefore, because a collective bargaining agreement generally governs the employment relationship between an employer and a unionized employee, the employee's common law action for breach of contract or breach of the covenant of good faith and fair dealing is

likely to fail [*see Cook v. Lindsay Olive Growers (9th Cir. 1990) 911 F.2d 233, 238-239* ; *Newberry v. Pacific Racing Ass'n (9th Cir. 1988) 854 F.2d1142, 1147-1148* (action for breach of implied covenant and good faith); *Young v. Anthony's Fish Grottos, Inc. (9th Cir. 1987) 830 F.2d 993, 997-1001* (claims for breach of contract and breach of implied covenant of good faith and fair dealing); *Paige v. Henry J. Kaiser Co. (9th Cir. 1987) 826 F.2d 857, 861-862 , cert. denied, 486 U.S. 1054 (1988)* ; *see also Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202, 221, 105 S. Ct. 1904, 85 L. Ed. 2d 206* (cause of action for breach of implied covenant of good faith and fair dealing based on denial of group-insurance benefits provided under collective bargaining agreement)]. Of course, the LMRA does not preempt a wrongful termination action by an employee who is not actually covered by a collective bargaining agreement [*see Wanland v. Los Gatos Lodge, Inc. (1991) 230 Cal. App. 3d 1507, 1515, 281 Cal. Rptr. 890]* .

The LMRA may preempt a cause of action for breach of the implied covenant of good faith and fair dealing even if the collective bargaining agreement provides no comparable protection against discharge at will, because a labor union may waive any requirement of good cause for termination that otherwise may be implied under California common law [*see Young v. Anthony's Fish Grottos, Inc. (9th Cir. 1987) 830 F.2d 993, 999-1001]* .

The LMRA does not preempt an employee's wrongful termination action merely because a court must scrutinize a collective bargaining agreement to determine whether the employee is covered by the agreement [*Wanland v. Los Gatos Lodge, Inc. (1991) 230 Cal. App. 3d 1507, 1517, 281 Cal. Rptr. 890]* . Likewise, the LMRA does not preempt a state-law wrongful termination claim solely because dispute resolution under a collective bargaining agreement and judicial analysis of a state-law claim would require analysis of the same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself [*see Lingle v. Norge Division, Magic Chef (1988) 486 U.S. 399, 411-413, 108 S. Ct. 1877, 100 L. Ed. 2d 410]* . Thus, the United States Supreme Court has held that the LMRA did not preempt a cause of action under Illinois law for retaliatory discharge for filing a workers' compensation claim, because none of the factual questions regarding the state-law claim required interpretation of the collective-bargaining agreement in that case [*Lingle v. Norge Division, Magic Chef (1988) 486 U.S. 399, 407, 108 S. Ct. 1877, 100 L. Ed. 2d 410* ; *see also Detabali v. St. Luke's Hosp. (9th Cir. 2007) 482 F.3d 1199, 1203* (LMRA did not preempt FEHA claim that employer applied terms of collective bargaining agreement in discriminatory manner, even though court would have to refer to agreement, because resolution of FEHA claim did not depend on *interpretation* of agreement)].

Several Ninth Circuit cases have held that the LMRA does not preempt wrongful discharge claims based on violation of public policy [*see, e.g., Paige v. Henry J. Kaiser Co. (9th Cir. 1987) 826 F.2d 857, 863 , cert. denied, 486 U.S. 1054 (1988)* (wrongful termination in violation of public policy embodied in occupational health and safety statutes); *Garibaldi v. Lucky Food Stores, Inc. (9th Cir. 1984) 726 F.2d 1367, 1373-1374 , cert. denied, 471 U.S. 1099 (1985)* (wrongful termination action based on retaliation for "whistleblowing"); *see also Miller v. AT&T Network Systems (9th Cir. 1988) 850 F.2d 543, 548-550* (Oregon employment discrimination statute)]. These decisions were based in part on the fact that the claims involved did not require interpretation of the collective bargaining agreement [*see Miller v. AT&T Network Systems (9th Cir. 1988) 850 F.2d 543, 548-550* ; *Paige v. Henry J. Kaiser Co. (9th Cir. 1987) 826 F.2d 857, 863 , cert. denied, 486 U.S. 1054]* . Other factors the cases considered, however, include whether the purpose of the state law was to "regulate the employment relationship" [*see Paige v. Henry J. Kaiser Co. (9th Cir. 1987) 826 F.2d 857, 863* ; *Garibaldi v. Lucky Food Stores, Inc. (9th Cir. 1984) 726 F.2d 1367, 1374, 1375 , cert. denied, 471 U.S. 1099 (1985)]* ; whether the state law applies to "all employees as individual workers" and not just to union members [*see Paige v. Henry J. Kaiser Co. (9th Cir. 1987) 826 F.2d 857, 863 , cert. denied, 486 U.S. 1054]* ; and whether the rights provided by state law are "non-negotiable" [*see Miller v. AT&T Network Systems (9th Cir. 1988) 850 F.2d 543, 548-550* ; *but see Lingle v. Norge Division, Magic Chef (1988) 486 U.S. 399, 407, 108 S. Ct. 1877, 100 L. Ed. 2d 410* (dictum; neither fact that state law remedy is "non-negotiable" nor fact that it applies uniformly to all employees ensures that it will not be preempted)].

For a form of affirmative defense that plaintiff's claim is preempted by the LMRA, see *§ 249.66*.

[4] Preemption by Federal Labor-Management Reporting and Disclosure Act

The Labor-Management Reporting and Disclosure Act (LMRDA; *29 U.S.C. § 401 et seq.*) preempts claims of wrongful discharge based on contract breach brought against unions or their officials by former policymaking or confidential employees [*Screen Extras Guild, Inc. v. Superior Court (1990) 51 Cal. 3d 1017, 1024, 1032, 275 Cal. Rptr. 395, 800 P.2d 873]* . Allowing such claims would frustrate the LMRDA's goal of ensuring union democracy [*see Finnegan v. Leu (1982) 456 U.S. 431, 435-436, 102 S. Ct. 1867, 72 L. Ed. 2d 239]* because they would interfere with the ability of elected union officials to implement, by selecting their own administrators, the will of the union members they represent [*Screen Extras Guild, Inc. v. Superior Court (1990) 51 Cal. 3d 1017, 1030, 275 Cal. Rptr. 395, 800 P.2d 873]* . Thus, a union business agent with significant decision-making responsibility for the implementation of union policies and their application to individual cases is a policymaking or confidential employee covered by the LMRDA and may not bring a state-law action for wrongful termination based on breach of contract [*Screen Extras Guild, Inc. v. Superior Court (1990) 51 Cal. 3d 1017, 1031-1032, 275 Cal. Rptr. 395, 800 P.2d 873]* .Similarly, "confidential" employees include secretaries who do not have policymaking responsibilities, but who have access to confidential union information that--if disclosed--could thwart union policies and objectives [*Thunderburk v. United Food & Commercial Workers' Union, Local 324 (2001) 92 Cal. App. 4th 1332, 1341-1343, 112 Cal. Rptr. 2d 609]* .

The LMRDA does not preempt a wrongful-discharge claim by an *elected* union official, however. Allowing such an action to proceed furthers the LMRDA's goal of ensuring union democracy [*Sheet Metal Workers' Int'l Ass'n v. Lynn (1989) 488 U.S. 347, 355, 109 S. Ct. 639, 102 L. Ed. 2d 700* ; *see Hansen v. Aerospace Related Indus. Dist. Lodge 725 of Int'l Ass'n of Machinists& Aerospace Workers (2001) 90 Cal. App. 4th 977, 982-983, 109 Cal. Rptr. 2d 482* (union official's wrongful-termination action preempted by LMRDA; although originally elected to his position, by time of alleged wrongful termination union had reorganized and plaintiff was serving at will of union president)].

LMRDA preemption does not extend to wrongful-discharge claims based on violations of the public policy against age discrimination and disability discrimination. California law imposes a responsibility on employers to refrain from discriminating on the basis of age and disability and to accommodate disabled employees [*see Gov. Code § 12940(a), (m)*]. The LMRDA does not explicitly provide to the contrary or reduce or limit those responsibilities [*see 29 U.S.C. § 523(a)*], and the California public policy against discrimination does not directly conflict with the federal policy underlying the LMRDA. Therefore, the LMRDA does not preempt an action against a union by a union employee arising out of job discrimination based on age or disability [*Smith v. IBEW, Local Union 11 (2003) 109 Cal. App. 4th 1637, 1648-1654* ; *see Screen Extras Guild, Inc. v. Superior Court (1990) 51 Cal. 3d 1017, 1025 n.5, 275 Cal. Rptr. 395, 800 P.2d 873]* .

For a form of affirmative defense alleging that the LMRDA preempts a wrongful discharge cause of action, see *§ 249.67*.

[5] Preemption by Federal Railway Labor Act

The Railway Labor Act (RLA; *45 U.S.C. § 151 et seq.*) governs labor relations and collective bargaining agreements involving employees of railroads and airlines engaged in interstate or foreign commerce. Among other things, the RLA is intended to provide for prompt and orderly settlement of disputes growing out of grievances or arising out of the interpretation or application of collective bargaining agreements relating to rates of pay, rules, and working conditions known as "minor disputes" [*see 45 U.S.C. § 151a(5)*; *DeTomaso v. Pan American World Airways, Inc. (1987) 43 Cal. 3d 517, 525, 525 n.7, 235 Cal. Rptr. 292, 733 P.2d 614 , cert. denied, 484 U.S. 829]* . "Minor disputes" are within the exclusive jurisdiction of the particular adjustment board created to hear and decide them, and are not subject to state court jurisdiction [*45 U.S.C. §§ 151a(5), 153* first subd. *(i)*; *see Hawaiian Airlines, Inc. v. Norris (1994) 512 U.S. 246, 253, 114 S. Ct. 2239, 129 L. Ed. 2d 203* ; *Conrail v. Railway Labor Executives' Ass'n (1989) 491 U.S. 299, 310, 109 S. Ct. 2477, 105 L. Ed. 2d 250* ; *DeTomaso v. Pan American World Airways, Inc. (1987) 43 Cal. 3d 517, 525-526, 235 Cal. Rptr. 292, 733 P.2d 614 , cert. denied, 484 U.S. 829]* .

Some courts have held that the RLA preempts wrongful discharge claims premised on activity that is arguably governed by a collective bargaining agreement [*see, e.g., Grote v. Trans World Airlines, Inc. (9th Cir. 1990) 905 F.2d 1307, 1309 , cert. denied, 498 U.S. 958* ; *Lewy v. Southern PacificTransp. Co. (9th Cir. 1986) 799 F.2d 1281, 1290* ; *Magnuson v. Burlington Northern, Inc. (9th Cir. 1978) 576 F.2d 1367, 1369-1370 , cert. denied, 439 U.S. 930]* . According to the California Supreme Court, the RLA preempts a wrongful discharge action that is premised on facts inextricably intertwined with matters subject to a collective bargaining agreement's grievance procedures [*DeTomaso v. Pan American World Airways, Inc. (1987) 43 Cal. 3d 517, 525-526, 235 Cal. Rptr. 292, 733 P.2d 614 , cert. denied, 484 U.S. 829]* . Thus, the Court held that the RLA preempted claims for, among other things, defamation and intentional infliction of emotional distress arising out of an alleged wrongful discharge [*DeTomaso v. Pan American World Airways, Inc. (1987) 43 Cal. 3d 517, 529, 235 Cal. Rptr. 292, 733 P.2d 614 , cert. denied, 484 U.S. 829]* . However, a claim for retaliatory discharge is a private right of action not preempted by the RLA [*see Fennessy v. Southwest Airlines (9th Cir. 1996) 91 F.3d 1359, 1362* (following *Hawaiian Airlines, Inc. v. Norris (1994) 512 U.S. 246, 114 S. Ct. 2239, 129 L. Ed. 2d 203*)]. In *Hawaiian Airlines*, the Supreme Court addressed this issue in the context of wrongful termination in breach of public policy and claims under the state whistleblower statute and determined that the RLA did not preempt these claims [*Hawaiian Airlines, Inc. v. Norris (1994) 512 U.S. 246, 266, 114 S. Ct. 2239, 2251, 129 L. Ed. 2d 203]* .

For a form of affirmative defense asserting that the RLA preempts a wrongful termination or other tort action, see *§ 249.68*.

[6] Preemption by Federal Banking Laws

The federal interest in the regulation of banking employment may result in preemption of state wrongful termination actions [*see Hall v. Great Western Bank (1991) 231 Cal. App. 3d 713, 720, 282 Cal. Rptr. 640* ; *Aalgaard v. Merchants Nat. Bank, Inc. (1990) 224 Cal. App. 3d 674, 692, 274 Cal. Rptr. 81 , cert. denied, 502 U.S. 901 (1991)]* . For example, some courts have held that the National Bank Act (Bank Act), which gives national banks the power to dismiss bank officers "at pleasure" [*see 12 U.S.C. § 24* P 5], preempts wrongful discharge claims by those officers [*Wells Fargo Bank v. Superior Court (1991) 53 Cal. 3d 1082, 1088, 282 Cal. Rptr. 841, 811 P.2d 1025* ; *Aalgaard v. Merchants Nat. Bank, Inc. (1990) 224 Cal. App. 3d 674, 692, 274 Cal. Rptr. 81 , cert. denied, 502 U.S. 901 (1991)* ; *Walleri v. Federal Home Loan Bank of Seattle (1996) 83 F.3d 1575, 1582* (the laws which govern Federal Home Loan Banks contain analogous language upon which preemption of state wrongful termination claims is based)]. The rationale is that the Bank Act's "at pleasure" provision ensures fiscal integrity and instills public confidence, and wrongful discharge claims that inhibit or reduce that power frustrate the statute's effectiveness [*see Aalgaard v. Merchants National Bank, Inc. (1990) 224 Cal. App. 3d 674, 677, 692, 274 Cal. Rptr. 81* ; *but see Mardula v. Rancho Dominguez Bank (1996) 43 Cal. App. 4th 790, 51 Cal. Rptr. 2d 63* (terminated bank president's severance pay agreement did not violate "at pleasure" provision of National Bank Act)].

The Bank Act's "at pleasure" provision is inapplicable, however, unless theterminated employee is a bank "officer" meeting all of the following criteria: (1) he or she holds an office created by the board of directors and listed in the bank's bylaws; (2) he or she is appointed by the board of directors, either directly or pursuant to a delegation of board authority set forth in the bylaws; (3) he or she has express legal authority to bind the bank in its transactions with borrowers, depositors, customers, or other third parties by executing contracts or other legal instruments on the bank's behalf; and (4) his or her decision-making authority, however it might be limited by bank rule or policy, relates to fundamental banking operations in such a manner as to affect potentially the public's trust in the banking institution [*Wells Fargo Bank v. Superior Court (1991) 53 Cal. 3d 1082, 1091, 282 Cal. Rptr. 841, 811 P.2d 1025* (setting forth criteria); *Ramanathan v. Bank of America (2007) 155 Cal. App. 4th 1017, 66 Cal. Rptr. 3d 471* (employee designated "vice president" by bank's board of directors does not qualify as "officer" for purposes of *12 U.S.C. § 24* P 5 unless he or she meets all four criteria)].

Banking laws or regulations, however, that do not contain "at pleasure" language may not preempt wrongful termination

claims. For example, one case involved a federal regulation that allows savings associations to discharge employees "at any time," but preserves the contract rights of employees who are not fired "for cause" [*see Hall v. Great Western Bank (1991) 231 Cal. App. 3d 713, 282 Cal. Rptr. 640* (construing *12 C.F.R. § 563.39*)]. The court held that the regulation does not preempt a cause of action for wrongful termination in violation of public policy because the regulation does not contain "atpleasure" language and there is no conflict with federal law [*see Hall v. Great Western Bank (1991) 231 Cal. App. 3d 713, 721-722, 282 Cal. Rptr. 640]* .

The California Supreme Court has held that the National Bank Act provision that grants the power to dismiss bank officers "at pleasure" [*12 U.S.C. § 24* P 5] preempts the Fair Employment and Housing Act (FEHA) to the extent the two laws are in conflict. However, the Court also held that the actual scope of the National Bank Act provision has been limited since its original enactment in 1864. Reading federal law as a whole, the Court found that the National Bank Act has been impliedly amended by subsequently enacted federal civil-rights laws. Thus, as impliedly amended by Title VII and the ADEA, the National Bank Act provision actually grants a national bank a limited power to dismiss its officers, not extending to dismissal on the ground of race, color, religion, sex, national origin, or age. As so amended, the National Bank Act provision preempts the FEHA, but only to the extent that the FEHA confers on officers of a national bank a right against dismissal on grounds not mentioned in Title VII and the ADEA (for example, physical disability, mental disability, medical condition, or marital status) [*Peatros v. Bank of America (2000) 22 Cal. 4th 147, 173-175, 91 Cal. Rptr. 2d 659, 990 P.2d 539* ; *see Gov. Code § 12940(a)*; *see also Kroske v. US Bank Corp. (9th Cir. 2005) 432 F.3d 976, 981-989* (*12 U.S.C. § 24* does not preempt age-discrimination claims asserted under state laws that substantively mirror provisions of ADEA)]. Presumably, the Court's reasoning would apply to prevent preemption of a claim of wrongful discharge in violation of public policy, if the public policy is embodied in a provision of the FEHA that is not preempted by the National Bank Act.

For a form of affirmative defense asserting that the National Bank Act preempts a wrongful discharge action, see *§ 249.69*.

[7] Preemption by Federal Law Governing Pension Benefits

The Employee Retirement Income Security Act of 1974 (ERISA; *29 U.S.C. §§ 1001-1461*) is broadly preemptive, superseding any state law that "relates to" employee benefit plans [*29 U.S.C. § 1144(a)*], as long as the relationship is not "too tenuous, remote, or peripheral" [*Nevill v. Shell Oil Co. (9th Cir. 1987) 835 F.2d 209, 212* (citing *Shaw v. Delta Air Lines, Inc. (1983) 463 U.S. 85, 97, 100 n.21, 103 S. Ct. 2890, 77 L. Ed. 2d 490*)]. A cause of action "relates to" a benefit plan if it has "a connection with or reference to such a plan" [*Shaw v. Delta Air Lines, Inc. (1983) 463 U.S. 85, 97, 103 S. Ct. 2890, 77 L. Ed. 2d 490* ; *Sorosky v. Burroughs Corp. (9th Cir. 1987) 826 F.2d 794, 799-800* ; *see also Stone v. Travelers Corp. (9th Cir. 1995) 58 F.3d 434, 437* (California Fair Employment and Housing Act claim founded on denial of benefits relates to an ERISA plan)]. A claim need not actually seek benefits to trigger ERISA preemption. For example, ERISA preempts a cause of action alleging discharge to avoid pension contributions, even if the claim seeks only tort and contract damages [*Ingersoll-Rand v. McClendon (1990) 498 U.S. 133, 139-141, 111 S. Ct. 478, 112 L. Ed. 2d 474* (cause of action "related to" covered plan because it specifically referred to, and was premised on, existence of plan); *see also Sorosky v. Burroughs Corp. (9th Cir. 1987) 826 F.2d 794, 799-800* (ERISA preempted breach of contract claim alleging that defendant promised monthly retirement benefits, but then denied them)]. In addition, ERISA expressly provides a civil cause of action for, among other things, interfering with the attainment of covered benefits [*see 29 U.S.C. §§ 1132(a)(3), 1140*]. Therefore, since ERISA, by its terms, prohibits firing an employee to prevent the vesting of pension benefits, it is the exclusive remedy for such an action [*see Ingersoll-Rand v. McClendon (1990) 498 U.S. 133, 142-145, 111 S. Ct. 478, 112 L. Ed. 2d 474* (relying on *Pilot Life Ins. Co. v. Dedeaux (1987) 481 U.S. 41, 54, 107 S. Ct. 1549, 95 L. Ed. 2d 39*)].

However, the United States Supreme Court has emphasized that--despite broad language in its earlier decisions--(1) it will presume that Congress did not intend ERISA to supersede historic police powers of the states, absent evidence of a contrary intention in a particular sphere of regulation; (2) important factors to consider are the actual concerns of

ERISA (reporting, disclosure, fiduciary responsibility and the like) and the purpose of its preemption clause (allowing a benefit plan to operate interstate with uniformity in benefit structures and administrative practices); and (3) state law's merely having an effect on the economic environment in which a plan operates is too tenuous a relation to make it "related to" a plan under ERISA [*Cal. Div. of Labor Stds. v. Dillingham (1997) 519 U.S. 316, 324-325, 331-332, 117 S. Ct. 832, 136 L. Ed. 2d 791* (no preemption of scheme penalizing ERISA-covered apprenticeship program for not meeting state standards)]. ERISA does not, for example, preempt independent causes of action for termination without "good cause" or breach of the implied covenant of good faith and fair dealing [*Sorosky v. Burroughs Corp. (9th Cir. 1987)826 F.2d 794, 800]* . Furthermore, ERISA does not preempt claims that incidentally include benefits as an element of damages. The claim must actually "relate to" the administration of a benefit plan [*Ethridge v. Harbor House Restaurant (9th Cir. 1988) 861 F.2d1389, 1404* (plaintiff asserted damages including "loss of employment and benefits"--no preemption)].

For a form of affirmative defense alleging that ERISA preempts a wrongful discharge cause of action, see *§ 249.70*.

[8] Preemption by Federal Nuclear Regulatory Law

Federal nuclear regulatory law did not preempt a state law claim for infliction of emotional distress arising from a wrongful termination in a case involving actions allegedly taken by a nuclear fuels production facility to retaliate against a technician for her nuclear safety complaints [*English v. General Electric Co. (1990) 496 U.S. 72, 84, 110 S. Ct. 2270, 110 L. Ed. 2d 65* ; *see 42 U.S.C. § 5851(a)* (Energy Reorganization Act of 1974)]. Although, generally, federal law is preemptive in the field of nuclear safety, the state tort action was neither within the field of safety nor motivated by safety concerns, nor would it have a substantial affect on nuclear safety concerns [*English v. General Electric Co. (1990) 496 U.S. 72, 84-86, 110 S. Ct. 2270, 110 L. Ed. 2d 65* (also holding that state claim did not conflict with particular aspects of federal statute)].

[9] Removal of Cases Preempted by Federal Law

Although federal preemption does not ordinarily render an action subject to the removal jurisdiction of federal courts, courts deem that certain federal laws preempt state law so "completely" as to be removable. Federal laws that so "completely preempt" state law include ERISA (*29 U.S.C. § 1001 et seq.*) [*see 29 U.S.C. § 1144(a)* (stating broad preemption policy); *see also Nevill v. Shell Oil Co. (9th Cir. 1987) 835 F.2d 209, 212* (state claims "relating to" ERISA preempted)], and the LMRA (*29 U.S.C. § 185(a)*) [*Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202, 211, 105 S. Ct. 1904, 85 L. Ed. 2d 206]* . Thus, for example, a state-law claim against the fiduciary of an ERISA-regulated benefit plan is completely preempted by ERISA, and therefore removable, if interpretation of the terms of the plan forms an essential part of the claim and the plaintiff is in essence suing only to rectify a wrongful denial of benefits promised under the plan [*Aetna Health Inc. v. Davila (2004) 542 U.S. 200, 124 S. Ct. 2488, 159 L. Ed. 2d 312, 330]* .

The RLA (*45 U.S.C. § 151 et seq.*), however, does not preempt wrongful termination claims based on statute or breach of public policy [*Hawaiian Airlines, Inc. v. Norris (1994) 512 U.S. 246, 114 S. Ct. 2239, 2251, 129 L. Ed. 2d 203* ; *Price v. PSA, Inc. (9th Cir. 1987) 829 F.2d 871, 876 , cert. denied, 486 U.S. 1006*].

For full discussion and forms relating to federal removal jurisdiction, see Ch. 265, *Federal Courts: Jurisdiction and Removal* ,.

[10] Preemption by California Workers' Compensation Law

Labor Code § 132a provides, among other things, civil remedies and criminal penalties against, "Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file a claim for [workers'] compensation with his or her employer or an application for adjudication, or ... [a]ny employer who discharges, or threatens to discharge, or in any manner

discriminates against any employee because the employee testified or made known his or her intentions to testify in another employee's case ..." [*Lab. Code § 132a(1), (3)*]. In 1978, the California Supreme Court held that *Lab. Code 132a* remedies likewise apply if an employee suffers "discrimination incurred as the result of his injury," including discrimination based on disability [*Judson Steel Corp. v. Workers' Comp. Appeals Bd. (1978) 150 Cal. Rptr. 250, 586 P.2d 564]* . Thereafter, several court of appeal decisions held that *Lab. Code § 132a* provides the exclusive remedy for discrimination based on a work-related disability, precluding both FEHA and common law wrongful discharge claims [*see City of Moorpark v. Superior Court of Ventura County (1998) 18 Cal. 4th 1143, 1148, 77 Cal. Rptr. 2d 445, 959 P.2d 752]* .

However, the California Supreme Court has now disapproved the reasoning of the earlier court of appeal cases and held that, in most instances, *Lab. Code § 132a* does not provide the exclusive remedy for disability discrimination cases based either in FEHA or in common law wrongful discharge claims [*City of Moorpark v. Superior Court of Ventura County (1998) 18 Cal. 4th 1143, 1148, 1150-1158, 77 Cal. Rptr. 2d 445, 959 P.2d 752]* . Finding the policy against disability discrimination to be "substantial and fundamental," the Court held that violation of this public policy can form the basis of a common law wrongful discharge claim [*City of Moorpark v. Superior Court of Ventura County (1998) 18 Cal. 4th 1143, 1158-1161, 77 Cal. Rptr. 2d 445, 959 P.2d 752]* . However, the *Moorpark* court also stated, "Nevertheless, we emphasize that not every instance of disability discrimination in violation of section 132a gives rise to a valid FEHA claim"; presumably, this same caveat pertains to certain common law wrongful discharge claims [*City of Moorpark v. Superior Court of Ventura County (1998) 18 Cal. 4th 1143, 1158, 77 Cal. Rptr. 2d 445, 959 P.2d 752]* .

For further discussion and forms regarding preemption by workers' compensation laws, see Ch. 577, *Workers' Compensation* . For additional discussion of preemption of wrongful termination claims under workers' compensation law, see Wilcox, California Employment Law, Chs. 20, 60 (Matthew Bender); L. Larson & P. Borowsky, Unjust Dismissal, Ch. 9 (Matthew Bender).

[11] Preemption by California Law Governing Discrimination

The Fair Employment and Housing Act (FEHA) [*Gov. Code § 12900 et seq.*], which prohibits employment discrimination based on race, religion, sex, age, national origin, physical and mental disability, and various other personal characteristics, does not preempt other state laws, including thecommon law, that prohibit or restrict such discrimination [*Rojo v. Kliger (1990) 52 Cal. 3d 65, 73-82, 276 Cal. Rptr. 130, 801 P.2d 373* ; *Blom v. N.G.K. Spark Plugs (U.S.A.), Inc. (1992) 3 Cal. App. 4th 382, 386, 4 Cal. Rptr. 2d 139* ; *see Gov. Code § 12993(a)*]. Furthermore, although an employee must exhaust the FEHA administrative remedy before bringing a civil action under the FEHA or seeking any remedies provided by the FEHA, exhaustion of the administrative remedy is not required before filing a civil action for damages alleging nonstatutory causes of action [*Rojo v. Kliger (1990) 52 Cal. 3d 65, 88, 276 Cal. Rptr. 130, 801 P.2d 373]* .

In *Rojo*, the California Supreme Court found that *Cal. Const., art. I, § 8*, which provides that no person may be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin, sets forth a fundamental public policy against employment discrimination on any of those grounds and may be the basis for a tort cause of action for wrongful termination in violation of public policy, independent of the FEHA [*Rojo v. Kliger (1990) 52 Cal. 3d 65, 89-91, 276 Cal. Rptr. 130, 801 P.2d 373* ; *see also Badih v. Myers (1995) 36 Cal. App. 4th 1289, 1293-1296, 43 Cal. Rptr. 2d 229* (employer who was exempt from the FEHA because he had fewer than five employees was still subject to action for wrongful discharge in violation of public policy for firing employee because of pregnancy, based on independent proscription against sex discrimination, including pregnancy discrimination, contained in *Cal. Const., art. I, § 8*)]. The FEHA, however, prohibits discrimination on several other grounds not mentioned in *Cal. Const., art. I, § 8*, including age, physical and mental disability, and marital status [*see Gov. Code §§ 12940, 12941*].

Rojo left as an open question whether a plaintiff can state a common-law wrongful termination claim for discrimination based on one of these other grounds, or whether such a plaintiff must pursue the remedies provided by the FEHA. This question was answered in two later cases. In an age discrimination case, the Supreme Court ruled that even if the public-policy basis of the wrongful-discharge tort claim lies only in the FEHA, the statute neither preempts the claim nor requires exhaustion of the administrative remedies which it provides [*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 901-904, 66 Cal. Rptr. 2d 888* ; *941 P.2d 1157]* . While cautioning that whether a particular form of discrimination will support a common law wrongful-discharge claim at all must be analyzed separately for each form of discrimination, the Court emphasized that its *preemption* analysis applied to any common law claim which could be grounded in the FEHA [*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 902, 66 Cal. Rptr. 2d 888* ; *941 P.2d 1157]* . In a disability discrimination case, the Court ruled that public policy against disability discrimination is "substantial and fundamental" and therefore can provide a basis for common law wrongful discharge claims [*City of Moorpark v. Superior Court of Ventura County (1998) 18 Cal. 4th 1143, 1158, 77 Cal. Rptr. 2d 445, 959 P.2d 752* ; *see* [10], *above*].

For discussion of state and federal statutes regarding discrimination in employment, see Wilcox, California Employment Law, Chs. 40-44 (Matthew Bender). For additional discussion and forms relating to discrimination in employment under California and federal law, see Ch. 115, *Civil Rights: Employment Discrimination* .

[12] Parol Evidence Rule

In some cases, the plaintiff-employee has signed an employment contract that provides for at will employment, but the employee alleges that the employer has made oral promises stating that termination will be for cause only. Pursuant to the parol evidence rule, terms set forth in a writing intended by the parties as a final expression of their agreement with respect to the terms included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement [*Code Civ. Proc. § 1856(a)*].

Therefore, the first issue is to determine whether the written at will contract is integrated, that is, one that is meant to be the complete and final embodiment of the agreement, because the parol evidence rule generally prohibits the introduction of any extrinsic evidence that would vary or contradict the terms of an integrated written agreement [*Anderson v. Savin Corp. (1988) 206 Cal. App. 3d 356, 364, 254 Cal. Rptr. 627* ; *Gerdlund v. Electronic Dispensers International (1987) 190 Cal. App. 3d 263, 270, 235 Cal. Rptr. 279* ; *Malmstrom v. Kaiser Aluminum & Chemical Corp. (1986) 187 Cal. App. 3d 299, 314, 231 Cal. Rptr. 820]* . For example, a contract that stated that employment would continue so long as it was "mutually agreeable to both parties" was found to have created an at will employment contract. Consequently, evidence of an implied agreement contradicting those terms was held not admissible [*Malmstrom v. Kaiser Aluminum & Chemical Corp. (1986) 187 Cal. App. 3d 299, 315-316, 231 Cal. Rptr. 820* ; *see also Anderson v. Savin Corp. (1988) 206 Cal. App. 3d 356, 363-364, 254 Cal. Rptr. 627* (relying on *Malmstrom*; holding that oral promises of termination only for cause were superseded by express employment agreement providing that either party could terminate agreement "in its discretion" on 5 days' notice); *Gerdlund v. Electronic Dispensers International (1987) 190 Cal. App. 3d 263, 273, 235 Cal. Rptr. 279* (citing *Malmstrom* and obtaining same result, interpreting contract terms stating notice of termination could be given "for any reason")].

However, an employment application, signed by employee and stating that employment can be terminated with or without cause, was found not to be an integrated instrument, and was subject to interpretation by parol evidence showing that contract had been modified to require good cause for termination. The court noted that the particular instrument did not contain provisions regarding salary, was preprinted and short, and was drafted by the employer [*McLain v. Great American Ins. Companies (1989) 208 Cal. App. 3d 1476, 1483-1487, 256 Cal. Rptr. 863]* .

If the contract is integrated, parol evidence may nevertheless be admitted to explain the meaning of the written contractual language, if the relevant language is reasonably susceptible to the interpretation advanced by the parol evidence. However, if the contract terms are clear and not susceptible of other meanings, parol evidence is inadmissible

[*see, e.g.,* *Gerdlund v. Electronic Dispensers International (1987) 190 Cal. App. 3d 263, 272-273, 235 Cal. Rptr. 279* ; *Malmstrom v. Kaiser Aluminum & Chemical Corp. (1986) 187 Cal. App. 3d 299, 314, 231 Cal. Rptr. 820]* .

[13] Statute of Limitations

There are several statutes of limitations set out in the Code of Civil Procedure that are potentially relevant to various causes of action in a wrongful termination suit. *Code Civ. Proc. § 337(1)* establishes a four-year period for an action based on a written contract. *Code Civ. Proc. § 338(a)* prescribes a three-year statute for an action on a liability created by statute, other than a penalty or forfeiture. *Code Civ. Proc. § 339* provides a two-year limitations period for an action based on a contract not in writing. Additionally, *Code Civ. Proc. § 335.1* provides a two-year limitation period for injury caused by the wrongful act or neglect of another. Finally, *Code Civ. Proc. § 340(c)* sets out a one-year statute for an action for libel or slander.

Although there are no cases directly on point, a wrongful termination action styled as a breach of contract case would appear to be governed by either the four-year statute for written contracts, pursuant to *Code Civ. Proc. § 337(1)*, or the two-year statute for oral or implied contracts, pursuant to *Code Civ. Proc. § 339*.

The two-year limitations period of *Code Civ. Proc. § 335.1* for personal-injury claims applies to actions for wrongful termination in violation of public policy [*see* *Mathieu v. Norrell Corp. (2004) 115 Cal. App. 4th 1174, 1189 n.14, 10 Cal. Rptr. 3d 52* (effective January 1, 2003, two-year limitations period under *Code Civ. Proc. § 335.1* replaced one-year period of *former Code Civ. Proc. § 340(3)*); *see also* *Barton v. New United Motor Manufacturing, Inc. (1996) 43 Cal. App. 4th 1200, 1205-1209, 51 Cal. Rptr. 2d 328* (actions for wrongful termination in violation of public policy are tort actions subject to limitations period applicable to personal-injury claims)]. The one-year limitations period under the Fair Employment and Housing Act (FEHA) [*see Gov. Code § 12965(b)*] does not apply to bar a wrongful-discharge action that alleges discrimination based on common-law claims that are independent of the FEHA [*Carmichael v. Alfano Temporary Personnel (1991) 233 Cal. App. 3d 1126, 1131-1132, 285 Cal. Rptr. 143]* . Moreover, an employee's pursuit of an administrative remedy under the FEHA does not toll the limitations period on a common-law claim of wrongful termination in violation of public policy [*Mathieu v. Norrell Corp. (2004) 115 Cal. App. 4th 1174, 1189-1190, 10 Cal. Rptr. 3d 52]* . For discussion of the FEHA generally, see Ch. 115, *Civil Rights: Employment Discrimination*].

The Ninth Circuit has held that the two-year limitations period under *Code Civ. Proc. § 339* is applicable to a claim for breach of the implied covenant of good faith and fair dealing in an employment contract [*Eisenberg v. Insurance Co. of North America (9th Cir. 1987) 815 F.2d 1285, 1291]* . However, the court's holding was based in part on its assumption that breach of the covenant in an employment contract constitutes a tort. The holding may therefore be questionable in light of *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 663, 700, 254 Cal. Rptr. 211, 765 P.2d 373* , in which the California Supreme Court held that breach of the implied covenant based on termination of an employment contract sounds in contract only [*see* *Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 348-352, 100 Cal. Rptr. 2d 352, 8 P.3d 1089* (reaffirming *Foley* and explaining that claims asserting breach of implied covenant of good faith and fair dealing often are either invalid or superfluous in employment context); *see also* discussion in *§ 249.14*].

In *Romano v. Rockwell Internat., Inc. (1996) 14 Cal. 4th 479, 490-493, 501, 59 Cal. Rptr. 2d 20, 926 P. 2d 1114* , the California Supreme Court held that the statute of limitations for wrongful termination begins to run at the time of termination for purposes of causes of action (1) for breach of an implied contract not to terminate except for good cause, (2) for discharge in violation of the Fair Employment and Housing Act, and (3) for discharge in violation of public policy. The Court rejected Rockwell's argument that these actions accrue upon the employer's earlier unequivocal notification of termination at a future date. In cases of implied contracts not to terminate except for good cause, the Court found no difference from other cases of contract repudiations, which give the promisee an election of remedies at the time of repudiation; he or she may immediately sue for breach or elect to await the time of performance when the threatened termination occurs [*Romano v. Rockwell Internat., Inc. (1996) 14 Cal. 4th 479, 490-491, 59 Cal. Rptr. 2d*

20, 926 P.2d 1114] . In cases of discharge in violation of the Fair Employment and Housing Act, the Court examined the statutory language of *Gov. Code §§ 12940, 12941*, and *12960* and found that actions for unlawful practices under the act, including discharge, accrue when the unlawful practice occurs, that is, when actual termination occurs [*Romano v. Rockwell Internat., Inc. (1996) 14 Cal. 4th 479, 492-493, 59 Cal. Rptr. 2d 20, 926 P. 2d 1114]* . In cases of termination in violation of public policy, the Court reiterated that the tort cause of action recognized in *Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330* is one for dismissal on improper grounds; accordingly, the employer breaches its duty to the employee when dismissal occurs [*Romano v. Rockwell Internat., Inc. (1996) 14 Cal. 4th 479, 501, 59 Cal. Rptr. 2d 20, 926 P. 2d 1114]* .

A contractual provision that shortens the statute of limitations for a wrongful-termination action is not unconscionable and will be enforced if it provides for a reasonable limitations period, even if it is a nonnegotiable adhesive provision [*Soltani v. Western & S. Life Ins. Co. (9th Cir. 2001) 258 F.3d 1038, 1042-1045* (contractual six-month limitation reasonable under standard of unconscionability used by California Supreme Court in analyzing mandatory arbitration clause in *Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669*); *but see Martinez v. Master Protection Corp. (2004) 118 Cal. App. 4th 107, 117-118, 12 Cal. Rptr. 3d 663* (arbitration agreement imposing six-month period for asserting any statutory or common-law claim was unconscionable under *Armendariz* standard)]. However, a nonmutual contractual provision requiring that an employee give the employer 10 days' notice before filing suit is unconscionable and will not be enforced to bar an employee's action, at least if the provision is unaccompanied by a corresponding requirement to exhaust intra-company grievance procedures [*Soltani v. Western & S. Life Ins. Co. (9th Cir. 2001) 258 F.3d 1038, 1045-1047* (10-day period unjustified because too short to allow employer to investigate or attempt to resolve claim, and does not prevent stale claims, since 10-day period not measured from accrual of claim)].

For general discussion and forms relating to the statute of limitations, see Ch. 345, *Limitation of Actions* .

[14] Termination for Cause

[a] In General

In most wrongful termination cases, the plaintiff claims that he or she was protected from the dismissal at will, normally permissible under *Lab. Code § 2922*, by a contract or covenant, express or implied, requiring that there be good cause for termination. If that type of contract or covenant exists in a given case, the plaintiff may not recover if the employer had good cause for termination [*see, e.g., Fowler v. Varian Associates, Inc. (1987) 196 Cal. App. 3d 34, 41-43, 241 Cal. Rptr. 539* (employee breached duty of loyalty by actively advancing interests of competitor with whom employee considered accepting employment)]. For a form of affirmative defense allegation that the employee was terminated for cause, see *§ 249.63*.

[b] Order and Burden of Proof

The order and burden of proof for wrongful termination cases involving breach of a covenant to terminate for cause only was set forth in Pugh v. See's *Candies, Inc. (1981) 116 Cal. App. 3d 311, 171 Cal. Rptr. 917* (*Pugh I*). The court in *Pugh* stated that the plaintiff carries the ultimate burden of proving that he or she was terminated wrongfully. First, plaintiff must demonstrate a prima facie case that he or she was terminated despite adequate job performance. The employer must then produce evidence of good cause for the termination. The plaintiff may then attack the defendant's proffered reason for termination, either on the ground that it is pretextual and that the real reason is one prohibited by contract or public policy; or on the ground that it is insufficient to meet the employer's obligations under contract or other applicable legal principles [*Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 329-330, 171 Cal. Rptr. 917* (*Pugh I*); *see Crosier v. United Parcel Service, Inc. (1983) 150 Cal. App. 3d 1132, 1137-1138, 198 Cal. Rptr. 361* ; *Huber v. Standard Ins. Co. (9th Cir. 1988) 841 F.2d 980, 985-986* (genuine issue of fact regarding good cause for termination was sufficient to avoid employer's motion for summary judgment)].

When the plaintiff denies the misconduct that was the basis for defendant's decision to terminate for good cause, the proper standard to be applied to the evidence by the trier of fact is not whether the misconduct actually happened, but rather whether the defendant, acting in good faith and following an investigation appropriate, had reasonable grounds for believing that it happened [*Cotran v. Rollins Hudig Hall International, Inc. (1998) 17 Cal. 4th 93, 109, 69 Cal. Rptr. 2d 900, 948 P.2d 412]* . Coupling good faith with objective reasonableness in intended to place the trier of fact in the position of a reasonable employer, in deciding whether the employer in a wrongful termination action acted responsibly and in conformity with prevailing social norms in deciding to terminate an employee for misconduct [*Cotran v. Rollins Hudig Hall International, Inc. (1998) 17 Cal. 4th 93, 106-107 n.3, 69 Cal. Rptr. 2d 900, 948 P.2d 412]* . A standard allowing the trier of fact simply to determine whether there was sufficient cause for dismissal would be too intrusive, and would be at odds with the underlying policy of finding a balance between the interests of employer and employee. The objective good faith standard, by contast, strikes a fair balance between theses interests [*Cotran v. Rollins Hudig Hall International, Inc. (1998) 17 Cal. 4th 93, 100-108, 69 Cal. Rptr. 2d 900, 948 P.2d 412* (citing, for policy considerations requiring a balance of employer and employee interests, *Walker v. Blue Cross of California (1992) 4 Cal. App. 4th 985, 994* ; *Pugh v. See's Candies, Inc. (1988) 203 Cal. App. 3d 743, 769, 250 Cal. Rptr. 195* (*Pugh II*); *Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917* (*Pugh I*))].

When the plaintiff alleges that the termination violated the implied covenant of good faith and fair dealing, the plaintiff must show that the employer acted in bad faith and lacked probable cause to believe that it had cause to terminate the employee [*see* *Burton v. Security Pacific Nat. Bank (1988) 197 Cal. App. 3d 972, 979, 243 Cal. Rptr. 277]* . In the absenceof facts showing that the employer lacked a reasonable belief in the existence of cause for discharge, the employee cannot prevail merely by showing that the employer was mistaken and that, in fact, no good cause existed for the discharge [*see* *Burton v. Security Pacific Nat. Bank (1988) 197 Cal. App. 3d 972, 979, 243 Cal. Rptr. 277* (upholding summary judgment for employer when plaintiff failed to contradict facts showing that employer lacked good faith in investigating charges of employee's misconduct)].

[c] Good Cause Defined

Good cause for termination may be specified in an employment contract or may appear in written or unwritten company policies [*see* discussion in *§ 249.13[2]*]. If the employer has never defined good cause for the dismissal of its employees, the operative definition is supplied under the *Scott-Pugh* standard: fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary, or capricious, unrelated to business needs or goals, or pretextual; in short, a reasoned conclusion supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond [*Cotran v. Rollins Hudig Hall International, Inc. (1998) 17 Cal. 4th 93, 107-108, 69 Cal. Rptr. 2d 900, 948 P.2d 412* , citing *Scott v. Pacific Gas & Electric Co. (1995) 11 Cal. 4th 454, 467, 46 Cal. Rptr. 2d 427, 904 P.2d 834* and Pugh v. See's *Candies, Inc. (1981) 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917* (*Pugh I*)].

Employers have prevailed by showing good cause for termination in two ways. In one type of case, the termination was prompted by legitimate business reasons that had nothing to do with the employee's job performance. For example, reorganization of a company's business to respond to changing economic conditions was held to be good cause for termination [*see* *Gianaculas v. Trans World Airlines, Inc. (9th Cir. 1985) 761 F.2d 1391, 1394-1395* (termination pursuant to reduction in work force); *Clutterham v. Coachmen Industries, Inc. (1985) 169 Cal. App. 3d 1223, 1227, 215 Cal. Rptr. 795* (termination due to depressed market conditions and concomitant reorganization of business)]. Put another way, an implied agreement to terminate only for good cause does not ordinarily include a restriction on the employer's right to reduce its workforce. Thus, an implied agreement not to terminate an employee except for good cause does not prevent the employer from legitimately terminat ing an employee on the basis of the need to eliminate the employee's work unit, in the absence of evidence of an agreement restricting that right. This is so even if the employer's decision is influenced by dissatisfaction with the eliminated unit's performance and even if individual employees are entitled to progressive discipline procedures before being fired for poor performance [*Guz v. Bechtel*

Nat., Inc. (2000) 24 Cal. 4th 317, 338, 100 Cal. Rptr. 2d 352, 8 P.3d 1089] . However, an employer's freedom to consolidate or reduce its work force, and to eliminate positions in the process, does not permit the employer to use the occasion as a convenient opportunity to get rid of workers who are protected by antidiscrimination laws [*see Kelly v. Stamps.com, Inc. (2005) 135 Cal. App. 4th 1088, 1098, 38 Cal. Rptr. 3d 240* (employer's invocation of right to downsize does not resolve whether employer violated Fair Employment and Housing Act by having discriminatory motive for cutting back its work force or by engaging in intentional discrimination when deciding which individual workers to retain and which to release)].

In the other type of case, the employer acted in good faith by terminating an employee whom it reasonably believed had violated company policy. For example, in a case where an employee contested his termination for sexually harassing other employees, the employer could establish good cause if it acted reasonably and in good faith in making the determination that the harassment occurred, and the employer need only prove its good faith belief, and not that the harassment actually occurred [*Cotran v. Rollins Hudig Hall International, Inc. (1998) 17 Cal. 4th 93, 109, 69 Cal. Rptr. 2d 900, 948 P.2d 412]* . Summary judgment in favor of the employer was also upheld on facts showing that the employee was terminated because he violated an unwritten company rule forbidding management personnel to fraternize with nonmanagement employees, when the plaintiff's allegations regarding improper motives were insufficiently supported [*see Crosier v. United Parcel Service, Inc. (1983) 150 Cal. App. 3d 1132, 1138-1139, 198 Cal. Rptr. 361* ; *but see Breitman v. May Co. California (9th Cir. 1994) 37 F.3d 562, 564-565* (despite employer contention that employee was terminated pursuant to written policy prohibiting falsification of timecards, genuine issue of material fact existed as to whether policy was followed and uniformly enforced)].

An employee's involvement in organizing a competing business may constitute a violation of the employee's duty of loyalty and good cause for dismissal [*see Stokes v. Dole Nut Co. (1995) 41 Cal. App. 4th 285, 293-295, 48 Cal. Rptr. 2d 673* ; *Fowler v. Varian Associates, Inc. (1987) 196 Cal. App. 3d 34, 41-43, 241 Cal. Rptr. 539]* .

In discussing what constitutes good cause for dismissal, courts have stated that care must be taken not to interfere with the legitimate exercise of managerial discretion, particularly with regard to an employee in a sensitive managerial or confidential position [*Cotran v. Rollins Hudig Hall International, Inc. (1998) 17 Cal. 4th 93, 100-101, 69 Cal. Rptr. 2d 900, 948 P.2d 412* ; *Scott v. Pacific Gas & Electric Co. (1995) 11 Cal. 4th 454, 467, 46 Cal. Rptr. 2d 427, 904 P.2d 834* ; *Crosier v. United Parcel Service, Inc. (1983) 150 Cal. App. 3d 1132, 1139-1140, 198 Cal. Rptr. 361* ; Pugh v. See's *Candies, Inc. (1981) 116 Cal. App. 3d 311, 330, 171 Cal. Rptr. 917* (*Pugh I*)].

If good cause for termination is in issue, character evidence may be admissible to support the employer's allegations that defendant was terminated for goodcause. For example, a managerial employee's ability to work well with peers and persons of higher authority is relevant to the issue of good-cause termination of that employee. Moreover, specific acts of misconduct are admissible to show that an employee is unfit or incompetent for the job [*see* Pugh v. See's *Candies, Inc. (1988) 203 Cal. App. 3d 743, 756-757, 250 Cal. Rptr. 195* (*Pugh II*)] (affirming judgment for employer, and affirming use of character evidence against plaintiff admitted without objection at trial)].

[15] Employee's Breach of Duty Under Contract for Specified Term

An employment for a specified term may be terminated at any time by the employer in case of any willful breach of duty by the employee in the course of the employment or in case of the employee's habitual neglect of duty or continued incapacity to perform it [*Lab. Code § 2924*]. For forms of affirmative defense alleging willful breach, habitual neglect, and incapacity, see *§§ 249.60, 249.61, 249.62*, respectively.

Employment for a specified term means employment for a period greater than one month [*Lab. Code § 2922*]. An employment can be for the equivalent of a specified term even though the term is not actually specified. For example, the facts of a case might imply that the employer and the employee understood that the employment would continue for a reasonable time, and a discharge before a reasonable time has elapsed amounts to a breach of contract [*see Brown v.*

National Electric Works (1914) 168 Cal. 336, 337-338, 143 P. 606 (defendant agreed to employ plaintiff at stated salary, without specifying duration of employment, in exchange for plaintiff's purchase of stock in defendant corporation at fixed price)].

[16] Arbitration Required Under Employment Contract

An employee who signs an agreement to arbitrate employment disputes may be precluded from bringing an action for wrongful discharge in lieu of arbitrating the claim [*see Martinez v. Scott Specialty Gases, Inc. (2000) 83 Cal. App. 4th 1236, 1246-1248, 100 Cal. Rptr. 2d 403* ; *see also Alliance Title Co. v. Boucher (2005) 127 Cal. App. 4th 262, 267-273, 25 Cal. Rptr. 3d 440* (after employee was transferred from one subsidiary to another subsidiary of parent corporation, equitable principles required employee's claims against transferee company to be submitted to arbitration, even though transferee company was not party to arbitration agreement between employee and transferor company); *Buckhorn v. St. Jude Heritage Med. Group (2004) 121 Cal. App. 4th 1401, 1406-1408, 18 Cal. Rptr. 3d 215* (employment agreement providing for mandatory arbitration of disputes "concerning the enforcement or the interpretation of any provisions of this Agreement" encompasses all claims rooted in contractual relationship, including tort claims that arise from employment relationship, whether based on conduct occurring before or after termination of that relationship)]. While written arbitration agreements are generally enforceable under California law [*see Code Civ. Proc. § 1281*], there are some exceptions under state law to the general enforceability of such agreements. For example, some state statutes preclude mandatory arbitration of certain types of disputes [*see, e.g., Lab. Code § 229* (wage claims); *but see Perry v. Thomas (1987) 482 U.S. 483, 490-491, 107 S. Ct. 2520, 96 L. Ed. 2d 426* (*Lab. Code § 229* preempted by Federal Arbitration Act with regard to contracts covered by the Act)].

The California Supreme Court has held that a mandatory arbitration agreement in an employment contract that encompasses unwaivable statutory rights (such as the employee's rights under the Fair Employment and Housing Act (FEHA) [*Gov. Code § 12900 et seq.*]), or that encompasses unwaivable claims of wrongful termination in violation of public policy, is invalid unless it effectively permits the employee to vindicate such rights or claims in the arbitral forum [*Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83, 99-113, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *see Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1076-1081, 130 Cal. Rptr. 2d 892, 63 P.3d 979* (*Armendariz* standards apply to arbitration of claims of wrongful termination in violation of public policy, as well as to unwaivable statutory claims); *Gentry v. Superior Court (2007) 42 Cal. 4th 443, 463, 64 Cal. Rptr. 3d 773* (waiver of class arbitration in employment arbitration agreement is not enforceable to preclude class arbitration by employees asserting unwaivable statutory rights to overtime pay under *Lab. Code §§ 500 et seq., 1194*, if trial court determines that class arbitration would be significantly more effective way of vindicating employees' rights than individual arbitration); *see also* Ch. 115, *Civil Rights: Employment Discrimination*]. Generally, statutory rights are "unwaivable" if they arise under a statute enacted "for a public reason," that is, for a public purpose [*Mercuro v. Superior Court (2002) 96 Cal. App. 4th 167, 180, 116 Cal. Rptr. 2d 671* (*Armendariz*'s "particular scrutiny" applies to agreements to arbitrate claims arising under *Lab. Code § 230.8*, which prohibits discrimination against employee for time off to participate in child's school activities, or *Lab. Code § 970*, which prohibits employers from misrepresenting terms and conditions of employment to induce person to change residences to take job); *Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 716, 129 Cal. Rptr. 2d 659]* . Also, even if an arbitration agreement covering unwaivable statutory rights is enforceable, a court must vacate an arbitration award made pursuant to the provision if a legal error in the award prevents the employee from obtaining a hearing on his or her FEHA claim or other claim based on unwaivable statutory rights [*Pearson Dental Supplies, Inc. v. Superior Court (2010) 48 Cal. 4th 665, 675-680, 108 Cal. Rptr. 3d 171, 229 P.3d 83* (arbitrator erred in concluding that arbitration was time-barred, based on erroneous interpretation of *Code Civ. Proc. § 1281.12* tolling provision)].

Even as to claims other than unwaivable causes of action, the California Supreme Court has held that an arbitration provision is unconscionable and unenforceable if it is (1) procedurally unconscionable, that is, adhesive (imposed as a condition of employment with no opportunity for the employee to negotiate); and (2) substantively unconscionable, that is, lacking basic fairness and mutuality. For example, an arbitration provision imposed in an adhesive context lacks

fairness and mutuality if it requires the employee, but not the employer, to arbitrate all claims arising out of the same transaction or occurrence. Also, an arbitration agreement is unconscionably one-sided if it restricts the full recoveryof damages by the employee, while placing no such restriction on the employer [*Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83, 113-121, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *see Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1539-1540, 60 Cal. Rptr. 2d 138]* . Also unconscionable in a contract of adhesion is a provision giving the arbitrator exclusive authority to decide questions of enforceability, including questions of unconscionability [*Ontiveros v. DHL Express (USA), Inc. (2008) 164 Cal. App. 4th 494, 505, 79 Cal. Rptr. 3d 471* (when one party is "repeat player" in arbitration, arbitrator has self-interest in deciding that any given dispute is arbitrable)].

Similarly unconscionable and one-sided in an employment context is a provision authorizing an appeal to a second arbitrator from an award of $50,000 or more. Even if the provision makes such appeals available to both parties, the $50,000 threshold inordinately favors the employer (usually the defendant) by giving it an opportunity to overturn a sizable arbitration award [*Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1071-1074, 130 Cal. Rptr. 2d 892, 63 P.3d 979* ; *but see Cummings v. Future Nissan (2005) 128 Cal. App. 4th 321, 329 n.9, 27 Cal. Rptr. 3d 10* (provision for second-level "appellate" arbitrator "is not invalid so long as there is no dollar-amount threshold for invoking it (which would make it almost exclusively an employer remedy)")]. Likewise, a provision is unconscionable if it requires that the employee pay costs of arbitration beyond any expense that the employee would be required to bear were the claim asserted in court [*Circuit City Stores, Inc. v. Mantor (9th Cir. 2003) 335 F.3d 1101, 1107-1108* (requirement that employee pay employer $75 filing fee to initiate arbitration is substantively unconscionable, even if agreement gives employer discretion to waive fee); *McManus v. CIBC World Mkts. Corp. (2003) 109 Cal. App. 4th 76, 93, 134 Cal. Rptr. 2d 446* (employee required to pay $500 deposit plus $1,200 per arbitration hearing session)]. Also unconscionable is a provision for a vastly shortened limitations period for presenting the employee's claims [*Martinez v. Master Protection Corp. (2004) 118 Cal. App. 4th 107, 117-118, 12 Cal. Rptr. 3d 663* (arbitration agreement imposing six-month period for asserting any statutory or common-law claim was unconscionable)].

Procedural and substantive unconscionability must both be present for a court to exercise its discretion to refuse to enforce an arbitration provision because of unconscionability [*see Gentry v. Superior Court (2007) 42 Cal. 4th 443, 469, 64 Cal. Rptr. 3d 773, 165 P.3d 556* (if there truly is no element of procedural unconscionability in arbitration agreement, agreement will not be deemed unconscionable, no matter how one-sided terms appear to be)]. However, they need not be present in the same degree. In effect, a "sliding scale" applies: the more substantively oppressive the provision, the less evidence of procedural unconscionability is required to justify the conclusion that the provision is unenforceable. Conversely, a high degree of procedural unconscionability means that less evidence is necessary to support a holding of unenforceability [*Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83, 114, 99 Cal. Rptr. 2d 745, 6 P.3d 669]* . In one case, for example, a court of appeal held an arbitration provision unenforceable despite a low quantum of procedural unconscionability, given the presence of a high degree of substantive unconscionability. In that case, the court conceded that the nonnegotiable nature of the arbitration provision yielded a low quantum of procedural unconscionability because the provision was conspicuously printed in all capital letters (alerting the reader that it might be significant) and because the employee's attorney had reviewed the provision before the employee signed it. At the same time, there was a high degree of substantive unconscionability, given a complete lack of mutuality (only the employee's claims were required to be arbitrated), the provision's requirement of a prearbitration dispute-resolution procedure controlled by the employer, and a severe limitation on the time for the employee to assert claims. Under the sliding-scale approach, the court of appeal concluded that the agreement was unconscionable and unenforceable [*Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal. App. 4th 1267, 1286-1288, 16 Cal. Rptr. 3d 296]* .

If an arbitration contains only one unconscionable provision and it can be severed from the rest of the arbitration agreement, a court may delete the unconscionable provision and enforce the remainder of the agreement [*Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1074-1076, 130 Cal. Rptr. 2d 892, 63 P.3d 979* ; *McManus v. CIBC World Mkts. Corp. (2003) 109 Cal. App. 4th 76, 101-102, 134 Cal. Rptr. 2d 446* (provision that would require employee to pay

arbitration costs severed, but remainder of arbitration agreement enforced); *Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 726-727, 129 Cal. Rptr. 2d 659]* .

On the other hand, if the arbitration agreement is "permeated" by unconscionability--for example, if it contains more than one unlawful provision, or if there is no discrete unlawful provision that can be severed from the agreement--then the entire arbitration agreement is void and cannot be partially enforced [*Armendariz v. Foundation Health Psychcare Servs. (2000) 24 Cal. 4th 83, 121-127, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *see, e.g.,* *Franco v. Athens Disposal Co. (2009) 171 Cal. App. 4th 1277, 1304, 90 Cal. Rptr. 3d 539* (because arbitration agreement contained two unlawful provisions--class arbitration waiver, and provision precluding employee from seeking civil penalties on behalf of other employees under *Lab. Code § 2698 et seq.*--agreement as whole was tainted with illegality and was therefore unenforceable); *Sanchez v. Western Pizza Enters., Inc. (2009) 172 Cal. App. 4th 154, 181, 90 Cal. Rptr. 3d 818* (arbitration agreement containing more than one unlawful provision--class arbitration waiver and unconscionable arbitrator-selection clause--was permeated by unlawful purpose and was therefore unenforceable)]. Thus, if an arbitration agreement (1) addresses the kinds of claims that normally would be brought by the employee but not those that would be brought by the employer, (2) limits the employee's recovery to the amount of wages paid during the employee's last six months of work, (3) precludes recovery by the employee for statutory claims, (4) specifies a venue for arbitration that is convenient for the employer but not necessarily for the employee, and (5) requires that the employee initially pay all costs of arbitration, the agreement is unconscionable and so one-sided as to be unenforceable [*Pinedo v. Premium Tobacco Stores, Inc. (2000) 85 Cal. App. 4th 774, 781, 102 Cal. Rptr. 2d 435* (such arbitration agreement "is at least equally unconscionable to the one presented in *Armendariz*")]. Similarly, an arbitration agreement is "permeated by an unlawful purpose," and therefore unenforceable in its entirety, if the terms of the agreement and the surrounding circumstances indicate a systematic effort to impose arbitration on an employee as an inferior forum that works to the employer's advantage [*Mercuro v. Superior Court (2002) 96 Cal. App. 4th 167, 184-186, 116 Cal. Rptr. 2d 671* (systematic effort to impose arbitration on employee as inferior forum was established by employer's threats and cajoling toget employee to sign agreement, lack of mutuality as to arbitrable claims, provision that unlawfully required employee to share burden of arbitrator's fee, and disadvantages to employee in using designated arbitrator); *O'Hare v. Municipal Res. Consultants (2003) 107 Cal. App. 4th 267, 282, 132 Cal. Rptr. 2d 116* (completely one-sided agreement, compelling arbitration all of employee's claims but allowing employer to file lawsuit on any claim against employee); *see* *Ferguson v. Countrywide Credit Indus., Inc. (9th Cir. 2002) 298 F.3d 778, 784-788* (following *Mercuro,* lack of mutuality as to arbitrable claims, provision requiring employee to share arbitration costs after first day, and discovery limitations favoring employer so permeated agreement that severance was not possible)].

If the employer has afforded the employee a meaningful opportunity to opt out of an arbitration agreement, the agreement will not be deemed unconscionable [*Circuit City Stores, Inc. v. Ahmed (9th Cir. 2002) 283 F.3d 1198, 1199-1200* (arbitration agreement is not adhesive, and thus lacks procedural unconscionability, if employee is given opportunity to opt out)]. However, if the employee's failure to opt out is not an authentic informed choice, the agreement does have an element of unconscionability and faces judicial scrutiny to determine whether its terms are so one-sided or oppressive as to be substantively unconscionable [*Gentry v. Superior Court (2007), 42 Cal. 4th 443, 470-472, 64 Cal. Rptr. 3d 773* (employer's failure to provide employees with material information about disadvantageous terms of arbitration agreement, combined with likelihood that employees felt pressure not to opt out of agreement, meant that agreement was not free from procedural unconscionability); *Circuit City Stores, Inc. v. Mantor (9th Cir. 2003) 335 F.3d 1101, 1106-1107* (arbitration agreement is procedurally unconscionable if employee's opportunity to opt out is not meaningful, such as when employer pressures employee and threatens employee's job if he or she does not accept arbitration agreement)].

If an arbitration agreement contains a clause in which the parties expressly agree to allow a court or arbitrator to sever or modify any "unreasonable or unenforceable" provisions, the agreement as so modified may be enforceable [*Blake v. Ecker (2001) 93 Cal. App. 4th 728, 743-746, 113 Cal. Rptr. 2d 422* ; *see Civ. Code §§ 1599, 1670.5(a)*].

State law, however, does not always govern the enforceability of arbitration agreements. If the agreement is covered by

the Federal Arbitration Act (FAA) (*9 U.S.C. § 1 et seq.*), state-law exceptions to the enforceability of arbitration agreements are not applicable [*see, e.g., Heily v. Superior Court (1988) 202 Cal. App. 3d 255, 260, 248 Cal. Rptr. 673 , cert. denied, 489 U.S. 1013 (1989)* (California doctrine of unconscionability not available to avoid arbitration clause in securities dealer's employment contract); *but cf. Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1543-1552* (one-sided arbitration clause in contract of adhesion unenforceable as unconscionable; Federal Arbitration Act does not reach state contract principles which apply neutrally to arbitration clauses, only law representing a bias against arbitration)]. The FAA generally reaches to the limits of Congress' Commerce Clause power [*Allied-Bruce Terminix Cos. v. Dobson (1995) 513 U.S. 265, 277, 115 S. Ct. 834, 130 L. Ed. 2d 753]* . When the FAA applies, the states must treat arbitration clauses the same as any other contract clause under state law. General contract principles apply and may provide a defense to enforcement of an arbitration clause on grounds that would be available to a party seeking to avoid the enforcement of any contract [*see Brown v. Dillard's, Inc. (9th Cir. 2005) 430 F.3d 1004, 1010* (generally applicable rule that party who breaches contract cannot enforce it is available as defense against attempt to enforce arbitration agreement)]. However, states cannot place arbitration clauses on a footing unequal to other contract clauses [*Allied-Bruce Terminix Cos. v. Dobson (1995) 513 U.S. 265, 281, 115 S. Ct. 834, 130 L. Ed. 2d 753]* .

The United States Supreme Court has held that the FAA applies to arbitration clauses in employment contracts, except contracts for the employment of transportation workers [*Circuit City Stores, Inc. v. Adams (2001) 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234, 250-251]* . Although the FAA excludes from its application "contracts of employment of seamen, railroad workers, or any other class of workers engaged in foreign or interstate commerce" [*9 U.S.C. § 1*], the Court construed this exclusion narrowly, holding that an employment contract is not excluded unless the employee is directly involved in the transportation industry [*Circuit City Stores, Inc. v. Adams (2001) 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234, 251]* .

An arbitration agreement covering employment disputes may be enforceable even if it is not contained in an employment agreement as such. For example, the United States Supreme Court has held that an arbitration agreement contained in a securities registration application, and not in the plaintiff's employment contract, precluded an employment-discrimination action under the federal Age Discrimination in Employment Act (*29 U.S.C. § 621 et seq.*) [*Gilmer v. Interstate/Johnson Lane Corp. (1991) 500 U.S. 20, 25 n.2, 25-32, 111 S. Ct. 1647, 114 L. Ed. 2d 26* ; *see Spellman v. Securities, Annuities & Ins. Servs., Inc. (1992) 8 Cal. App. 4th 452, 465, 10 Cal. Rptr. 2d 427* (employment contract that incorporated rules of National Association of Securities Dealers, Inc., together with application for securities industry registration that expressly required arbitration of any dispute, claim or controversy between employee and employer, constituted enforceable compulsory arbitration agreement); *Hall v. Nomura Secs. Int'l (1990) 219 Cal. App. 3d 43, 48-51, 268 Cal. Rptr. 45]* . However, if the arbitration provision is a discrete document, rather than a part of a fully integrated employment contract, the separate arbitration provision may be unenforceable if it is not signed by the employer and employee and the circumstances do not otherwise establish an actual agreement to arbitrate. In one case, for example, an employee's signing ofan "acknowledgement" at the end of an employee handbook did not establish assent to a "mutual agreement to arbitrate," which was presented as a separate section of the handbook, with separate signature lines that were never signed by the parties [*Romo v. Y-3 Holdings, Inc. (2001) 87 Cal. App. 4th 1153, 1158-1160, 105 Cal. Rptr. 2d 208* ; *see* also *Mitri v. Arnel Mgmt. Co. (2007) 157 Cal. App. 4th 1164, 1170-1173, 69 Cal. Rptr. 3d 223* (employee handbook statement that "employees are required to sign an arbitration agreement" does not itself constitute arbitration agreement)].

To be enforceable, an agreement to arbitrate federal statutory employment-discrimination claims must include a clear and unmistakable waiver of a judicial forum for such claims [*Wright v. Universal Maritime Serv. Corp. (1998) 525 U.S. 70, 119 S. Ct. 391, 396-397, 142 L. Ed. 2d 361* ; *see Prudential Ins. Co. of America v. Lai (9th Cir. 1994) 42 F.3d 1299, 1304 , cert. denied, 516 U.S. 812 (1995)* (agreement to arbitrate statutory employment discrimination claims not enforceable unless there is "knowing agreement to arbitrate" and thereby waive judicial remedies afforded by Title VII and related state statutes); *but see Kuehner v. Dickinson & Co. (9th Cir. 1996) 84 F.3d 316, 319-320* ("knowing waiver" requirement not applicable to arbitration of claims under Fair Labor Standards Act, *29 U.S.C. § 201 et seq.*); *Brookwood v. Bank of Am. (1996) 45 Cal. App. 4th 1667, 1673-1674, 53 Cal. Rptr. 2d 515* (rescission is only permitted

for unilateral mistake when that mistake is known to the other party and is encouraged or fostered by that party; ignorance of a contractual provision is not a proper basis for avoidance of that provision)]. Thus, a provision for the arbitration of "matters under dispute," which could be understood to be restricted to matters in dispute *under the contract*, is insufficient to waive the employee's right to a judicial forum for statutory employment-discrimination claims [*see* *Wright v. Universal Maritime Serv. Corp. (1998) 525 U.S. 70, 119 S. Ct. 391, 396-397, 142 L. Ed. 2d 361* ; *Gilmer v. Interstate/Johnson Lane Corp. (1991) 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26, 35-43* (individual employee can make agreement that waives right to judicial forum for employment-discrimination claim); *see also Kummetz v. Tech Mold, Inc. (9th Cir. 1998) 152 F.3d 1153, 1154-1156* (no waiver of judicial remedy where employee signed document acknowledging receipt of "information booklet" that included arbitration clause, but acknowledgment of receipt did not explicitly mention arbitration clause or waiver of right to sue)].

A collective bargaining agreement provision that clearly and unmistakably requires union members to arbitrate statutory claims is enforceable [*14 Penn Plaza LLC v. Pyett (2009) -- U.S. --, 129 S. Ct. 1456, 173 L. Ed. 2d 398, 408-414* (enforcing collective bargaining agreement that expressly mandated grievance and arbitration procedure as "sole and exclusive remedy" for union members' claims of employment discrimination under state and federal statutes, including Age Discrimination in Employment Act, *29 U.S.C. § 621 et seq.*); *see* *Taylor v. Lockheed Martin Corp. (2003) 113 Cal. App. 4th 380, 385-387, 6 Cal. Rptr. 3d 358* (labor arbitration decision not entitled to collateral estoppel effect in subsequent litigation of statutory claim of retaliatory discharge under *Lab. Code § 6310*, unless collective bargaining agreement clearly and unmistakably waived employee's right to sue); *Camargo v. California Portland Cement Co. (2001) 86 Cal. App. 4th 995, 1018-1021, 103 Cal. Rptr. 2d 841* (arbitration award not entitled to collateral estoppel effect in subsequent FEHA litigation because arbitration had been conducted under collective bargaining agreement that did not clearly and unmistakably provide for arbitration of FEHA claims, and arbitration procedures did not allow for full litigation and fair adjudication of FEHA claims); *Vasquez v. Superior Ct. (2000) 80 Cal. App. 4th 430, 433-436, 95 Cal. Rptr. 2d 294* (collective bargaining agreement did not specifically refer to ADA or FEHA, so there was no clear and unmistakable waiver)].

For a form of affirmative defense allegation that a cause of action for wrongful discharge is precluded by an arbitration agreement, see *§ 249.64*.

[17] Lack of Employment Relationship

Tort liability for violation of public policy is inapplicable if the relationship terminated is one of independent contractors rather than of employer and employee [*Abrahamson v. NME Hospitals, Inc. (1987) 195 Cal. App. 3d 1325, 1329-1330, 241 Cal. Rptr. 396]* . For discussion of the definition of an employee for purposes of determining vicarious liability, see Ch. 248, *Employer's Liability for Employee's Torts* .

[17A] Prospective Modification of At Will Contract

Employment at will includes the right to impose a prospective modification of the at-will agreement as a condition of continued employment. As a matter of law, an at-will employee who continues to work after the employer has given notice of changed terms or conditions of employment has accepted the changed terms and conditions. Under these circumstances, the employer's modification has expressly and impliedly terminated the old contract and stated an offer of a new contract. The employee's continuing to work under the modified terms and conditions, even if grudging and protest-filled, constitutes the employee's acceptance of the new offer [*DiGiacinto v. Ameriko-Omserv Corp. (1997) 59 Cal. App. 4th 629, 637-638, 69 Cal. Rptr. 2d 300]* .

Thus, for example, an employer's unilaterally adopted policy not to lay off employees except under specified circumstances may become part of the employment agreement for employees who continue in employment after the policy is adopted. However, the no-layoff policy may be unilaterally discontinued, so long as the employer does so after a reasonable time, on reasonable notice, and without interfering with employees' vested benefits. Once the no-layoff

policy is discontinued, the statutory presumption of at-will employment becomes applicable [*Asmus v. Pacific Bell (2000) 23 Cal. 4th 1, 9-18, 96 Cal. Rptr. 2d 179, 999 P.2d 71* ; *see Lab. Code § 2922* (presumption of at-will employment)].

[18] At-Will Employment of Corporate Officers

Corp. Code § 312(b) states in part that, "[e]xcept as otherwise provided by the articles or bylaws, officers shall be chosen by the board and serve at the pleasure of the board, subject to the rights, if any, of an officer under any contract of employment." This provision essentially corresponds to the at-will presumption of *Lab. Code § 2922* applicable to employees generally, and it creates a comparable presumption [*Bell v. Superior Court (1989) 215 Cal. App. 3d 1103, 1108-1109, 263 Cal. Rptr. 787]* . Asnoted in the above-quoted language, however, the terms of "any contract of employment" may overcome the assumption of otherwise at will status. In one case, the court held that, in a wrongful termination action based on breach of implied contract, allegations that the corporation impliedly agreed the officer would not be terminated except for good cause based on the officer's longevity of service, promotions, praise of her work, regular pay raises and bonuses, and the corporation's express personnel practices and policies indicating its obligation to deal fairly and in good faith were sufficient, if proved, to overcome the presumption of at will employment created by *Corp. Code § 312(b)* [*Bell v. Superior Court (1989) 215 Cal. App. 3d 1103, 1110-1111, 263 Cal. Rptr. 787]* .

[19] After-Acquired Evidence Justifying Termination

Some conflict exists regarding the extent to which evidence of employee misconduct that would have justified an employer's adverse employment action, but which was not discovered by the employer until *after* it took an allegedly wrongful employment action (so-called "after-acquired evidence"), may act as a defense to a wrongful discharge cause of action. One common factual context in which this issue has arisen has involved an employer's discovery, typically after the commencement of litigation, that the employee had falsified his or her resume or employment application. In a case involving common-law wrongful termination and age discrimination claims, a California court of appeal refused to adopt a blanket rule that after-acquired evidence of falsification of an employment application is a complete defense to a wrongful termination or employment discrimination claim [*Cooper v. Rykoff-Sexton, Inc. (1994) 24 Cal. App. 4th 614, 617-618, 29 Cal. Rptr. 2d 642]* . The court reasoned that an automatic forfeiture of all employment rights, regardless of circumstances, was too harsh a penalty in many cases. The court further reasoned that in cases in which an employer has fired a worker in violation of the statutory ban on discrimination, the purpose and effect of the discrimination statutes would be unacceptably undermined by a principle that would allow a fact that played no part in the firing decision to bar any recovery [*Cooper v. Rykoff-Sexton, Inc. (1994) 24 Cal. App. 4th 614, 618-619, 29 Cal. Rptr. 2d 642]* . The court did not discuss the potential effect of such after-acquired evidence on the amount of damages, as the issue was not before the court [*see Cooper v. Rykoff-Sexton, Inc. (1994) 24 Cal. App. 4th 614, 619 n.1, 29 Cal. Rptr. 2d 642]* .

Another California court of appeal has held that even if the employer presents after-acquired evidence that would have justified termination of the employee, it remains a question of fact whether the employer would have *actually* terminated the employee on the basis of the after-acquired evidence. Thus, depending on the circumstances of the particular case, a jury might reasonably find that the employee would have been subjected to a less harsh disciplinary action, or no adverse action at all. In such a case the trial court would be justified in refusing to bar or reduce the plaintiff's recovery of damages for the wrongful termination [*Thompson v. Tracor Flight Sys., Inc. (2001) 86 Cal. App. 4th 1156, 1172-1174, 104 Cal. Rptr. 2d 95* (record, including after-acquired evidence, supported jury's finding that employee had not engaged in wrongdoing that would have resulted in termination)].

In the context of federal employment discrimination law, the United States Supreme Court has held that after-acquired evidence that would have caused the employer to terminate the employment does not bar the action, but does preclude a reinstatement order or awards for pay lost after the evidence was discovered [*see McKennon v. Nashville Banner Publ. Co. (1995) 513 U.S. 352, 115 S. Ct. 879, 130 L. Ed. 2d 852, 861-864]* . In an age discrimination case, in which the

employer produced after-acquired evidence of misconduct, the Ninth Circuit held that an employer can avoid back pay and other damages only if it can prove by a preponderance of evidence that it would have fired the employee for the misconduct [*O'Day v. McDonnell Douglas Helicopter Company (9th Cir. 1996) 79 F.3d 756, 761]* . However, in another case, the Ninth Circuit held that although after-acquired evidence may reduce available remedies, it cannot form the basis for granting summary judgment with regard to the entire matter [*Schnidrig v. Columbia Machine, Inc. (9th Cir. 1996) 80 F.3d 1406, 1412]* . The federal employment discrimination decisions are, of course, only persuasive authority and are not binding on California courts in analyzing common-law wrongful termination claims.

In a more recent case, a California court of appeal, relying on language in *Cooper* suggesting that after-acquired evidence might limit or bar an employee's claims in some situations, held that two employees' public policy wrongful discharge claims were barred by after-acquired evidence of the plaintiffs' prior felony convictions [*Camp v. Jeffer, Mangels, Butler & Marmaro (1995) 35 Cal. App. 4th 620, 639, 41 Cal. Rptr. 2d 329* ; *see Cooper v. Rykoff-Sexton, Inc. (1994) 24 Cal. App. 4th 614, 616-617, 29 Cal. Rptr. 2d 642* (commenting that many of the decisions granting summary judgment based on job application misrepresentations had "probably reached the correct result on their facts," but "declin[ing] to adopt a blanket rule that material falsification of an employment application is a complete defense to [an employee/s claim]")]. In *Camp,* the employer, a federal contractor, was required by law to certify that none of its employees had been convicted of a felony. The plaintiffs lied on their employment applications by denying any prior felony convictions, and one plaintiff also signed a post-employment form stating that she had never been convicted of a felony. The court of appeal found that after-acquired evidence could bar liability altogether where, as in the present case, the misrepresentations relate directly to the wrongful termination claims and would have disqualified the plaintiff from employment [*Camp v. Jeffer, Mangels, Butler & Marmaro (1995) 35 Cal. App. 4th 620, 638-639, 41 Cal. Rptr. 2d 329]* . The court also found significant the fact that the employees misrepresented a job qualification that was required by law, such that they were not lawfully qualified for the job [*Camp v. Jeffer, Mangels, Butler & Marmaro (1995) 35 Cal. App. 4th 620, 636, 41 Cal. Rptr. 2d 329* (distinguishing the case before it from *Cooper* and *McKennon* on the grounds that the employer policies involved in those cases were self-imposed)].

After-acquired evidence of the employee's immigration status may have limited value in an action to enforce employment rights. The Legislature has declared that all protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have beenemployed, in California [*Civ. Code § 3339(a)*; *Gov. Code § 7285(a)*; *Lab. Code § 1171.5(a)*]. Accordingly, for purposes of enforcing state labor, employment, and civil-rights laws, a person's immigration status is irrelevant to the issue of liability; in proceedings or discovery undertaken to enforce those state laws no inquiry may be made into a person's immigration status unless the person seeking to make the inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law [*Civ. Code § 3339(b)*; *Gov. Code § 7285(b)*; *Lab. Code § 1171.5(b)*].

The Ninth Circuit has ruled that the foregoing provisions of California law are not preempted by the federal Immigration Reform and Control Act (IRCA), at least not when the employer can comply with the IRCA without creating a conflict with California law. The IRCA forbids employers from knowingly employing unauthorized aliens [*8 U.S.C. § 1324a(a)(2)*]. There is clearly no conflict between California law and IRCA--and therefore no preemption--when an employer is required to terminate an employee by IRCA and does so in order to comply withthat statute. Under those circumstances, the employer can obey both laws because compliance with IRCA provides good cause, as defined by California law, for terminating unauthorized aliens [*see Incalza v. Fendi N. Am., Inc. (9th Cir. 2007) 479 F.3d 1005, 1010]* .

Similarly, California law may impose liability on an employer for discharging an employee, even when the employer claims the discharge is required by the IRCA, when remedies short of discharge are permissible under the IRCA and its implementing regulations [*Incalza v. Fendi N. Am., Inc. (9th Cir. 2007) 479 F.3d 1005, 1010-1013* (IRCA and regulations authorized employer to place employee on unpaid leave without pay while employee obtained change in work visa to which employee was entitled under federal law)]. It remains an open question, however, whether

California law and the IRCA conflict when an employer that is required by federal law to terminate an unlawful alien does so, but for reasons that are unlawful under California law [*see Incalza v. Fendi N. Am., Inc. (9th Cir. 2007) 479 F.3d 1005, 1010* (identifying issue but resolving case on other grounds)].

[20] Failure to Exhaust Administrative Remedy

If a statute such as the Fair Employment and Housing Act [*see Gov. Code § 12900 et seq.*] provides an administrative process for the resolution of grievances, exhaustion of those administrative remedies is a precondition to bringing a civil suit on a statutory cause of action, but it is not a precondition of seeking judicial relief on a common-law tort claim for wrongful discharge in violation of public policy [*Palmer v. Regents of Univ.of Cal. (2003) 107 Cal. App. 4th 899, 904, 132 Cal. Rptr. 2d 567]* . However, if an employer establishes an *internal* grievance mechanism, a failure to exhaust its remedies precludes any subsequent private civil action [*Palmer v. Regents of Univ. of Cal. (2003) 107 Cal. App. 4th 899, 903-906, 132 Cal. Rptr. 2d 567]* . Similarly, an employer's internal remedy generally must be exhausted before the employee sues under a statutory provision that does not contain its own administrative remedy [*see Campbell v. Regents of Univ. of Cal. (2005) 35 Cal. 4th 311, 329-330, 25 Cal. Rptr. 3d 320, 333-335* (public employee must exhaust employer's internal remedy before suing for retaliation for statutorily protected "whistleblowing" activity under *Lab. Code § 1102.5*, which is silent on administrative remedy or exhaustion requirement)]. The exhaustion of internal grievance procedures is required not because of any contractual obligation, but because of compelling policy considerations. If an employer has the opportunity quickly to determine through the operation of its internal procedures that it has committed error, it may be able to minimize, and sometimes eliminate, any monetary injury to the employee by immediately reversing its initial action. An employee should not be permitted to increase damages by forgoing available internal remedies. Moreover, an exhaustion requirement reflects the courts' recognition of the "expertise" of the employer's quasi-judicial tribunal, permitting it to adjudicate the merits of the plaintiffs' claims in the first instance [*Campbell v. Regents of Univ. of Cal. (2005) 35 Cal. 4th 311, 322, 25 Cal. Rptr. 3d 320, 327-328* (requirement that internal remedy be exhausted serves salutary function of mitigating damages, recognizes quasi-judicial tribunal's expertise, and promotes judicial economy by unearthing relevant evidence and providing record should there be judicial review of case); *Palmer v. Regents of Univ. of Cal. (2003) 107 Cal. App. 4th 899, 905, 132 Cal. Rptr. 2d 567]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsLabor & Employment LawCollective Bargaining & Labor RelationsFederal PreemptionLabor & Employment LawWrongful TerminationDefensesGeneral OverviewPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)Federal PreemptionGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
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PART II. LEGAL BACKGROUND
A. Wrongful Discharge and Discipline

21-249 California Forms of Pleading and Practice--Annotated § 249.22

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§ 249.22 Related Causes of Action

[1] In General

Depending on the factual situation, certain other tort causes of action may arise out of termination of an employment relationship. Generally, an employee or former employee may not assert such other causes of action against his or her coworkers for their conduct relating to personnel actions [*Sheppard v. Freeman (1998) 67 Cal. App. 4th 339, 343-347, 79 Cal. Rptr. 2d 13* (whether coworker's personnel action is technically within scope of employment is irrelevant)]. However, an action against a coworker may be brought [*Sheppard v. Freeman (1998) 67 Cal. App. 4th 339, 343 n.4, 348-349, 79 Cal. Rptr. 2d 13]* :

- For a tort involving physical injury, or
- If the cause of action against a coworker is permitted by statutory provisions, such as those governing defamation actions [*see Civ. Code §§ 43-48.5* (defamation actions)].

For additional discussion of related causes of action, see Wilcox, California Employment Law, Ch. 63 (Matthew Bender); L. Larson & P. Borowsky, Unjust Dismissal, Ch. 4 (Matthew Bender).

[2] Assault and Battery

In cases in which the employee is terminated as a result of a physical altercation with the employer or with a fellow employee, or in which the employee's dismissal is accompanied by physical force applied by the employer or a supervisor, the employee may have a cause of action for assault or battery as well as a cause of action for wrongful termination.

Generally, an employee who sustains an injury arising out of and in the course of his or her employment, including an injury inflicted by a coworker, is limited to recovery under the workers' compensation system [*Lab. Code § 3600(a)*; *see*

Ch. 577, *Workers' Compensation*]. However, if the employee is injured in the course of employment by the willful and unprovoked physical act of aggression by a coworker, the injured employee may sue the coworker for damages [*Lab. Code § 3601(a)(1)*]. To establish a "willful and unprovoked physical act ofaggression" for this purpose, the injured employee must prove that the coworker had an intent to convey an actual, present, and apparent threat of bodily injury [*Torres v. Parkhouse Tire Serv., Inc. (2001) 26 Cal. 4th 995, 1004, 111 Cal. Rptr. 2d 564, 30 P.3d 57]* .

If the employer commits a willful physical assault on the employee, the employee may sue the employer for damages at law, as an alternative to seeking workers' compensation relief [*Lab. Code § 3602(b)(1)*]. However, the employer ordinarily cannot be held liable in a civil action for one employee's assault and battery committed against another employee. In such a case, the injured employee's sole remedy against the employer is a workers' compensation claim, unless the employer has engaged in some positive misconduct [*Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1486-1489, 82 Cal. Rptr. 2d 359* ; *see Lab. Code § 3601(a)(1)*]. Thus, an employer cannot be vicariously liable for civil damages caused by the coworker's assault on a theory of respondeat superior, but the employer may be held liable as a "joint participant" in the assault if it ratified the assaultive conduct of the coworker [*Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1489-1491, 82 Cal. Rptr. 2d 359]* .

If an employee is injured or killed by a third party in the course of the employee's employment solely because of the third party's personal beliefs relating to his or her perception of the employee's race, religious creed, color, national origin, age, gender, disability, sex, or sexual orientation, workers' compensation benefits may be available in addition to any action the employee or his or her survivors may have against the third party [*see Lab. Code § 3600(c)* (for purposes of determining whether to grant or deny workers' compensation claim, if employee is injured or killed by third party in course of employee's employment, no personal relationship or personal connection shall be deemed to exist between employee and third party based only on determination that third party injured or killed employee solely because of third party's personal beliefs relating to his or her perception of employee's race, religious creed, color, national origin, age, gender, disability, sex, or sexual orientation)].

Although the torts of assault and battery often occur in conjunction with one another, they are separate torts, as a comparison of their elements indicates. The elements of the tort of battery consist of an intentional, unlawful, and harmful or offensive contact by one person with the person of another [*see Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 375, 193 Cal. Rptr. 422]* . An act is "intentional" if the actor acted with the intention of touching the injured party, regardless of whether he or she intended to hurt the injured party, or if the actor intended to put the injured party in apprehension of a harmful or offensive touching [*see Weisbart v. Flohr (1968) 260 Cal. App. 2d 281, 284-285, 67 Cal. Rptr. 114* (dicta)]. Case law has not clearly defined the term "unlawful" as it relates to the definition of a battery. However, one case has held that lack of consent is an essential element of battery [*see Rains v. Superior Court (1984) 150 Cal. App. 3d 933, 938, 198 Cal. Rptr. 249]* . A contact is "harmful or offensive" not only in cases of physical beatings, but also in cases in which the contact was not harmful but offended a reasonable sense of personal dignity [*see Boyes v. Evans (1936) 14 Cal. App. 2d 472, 479, 58 P.2d 922* ; *see also Restatement (Second) of Torts § 19*].

Although California cases have not always been consistent in setting forth the elements of the tort of assault, it appears that those elements are the demonstration of an unlawful intent by one person to inflict immediate injury on the person of another who is then present, and apprehension of the injury by the person present [*see Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 6-7, 146 P.2d 57* ; *see also Restatement (Second) of Torts § 21(1)* (requiring apprehension of harmful or offensive contact rather than apprehension of injury); *but see Fraguglia v. Sala (1936) 17 Cal. App. 2d 738, 742, 62 P.2d 783* (utilizing definition of assault found in *Penal Code § 240*, which defines assault as an unlawful attempt to commit violent injury on another)]. It is immaterial that the tortfeasor did not have the present ability to inflict injury as long as the party bringing the action had a reasonable apprehension of injury [*see Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 7, 146 P.2d 57* (defendant's act of pointing unloaded gun at plaintiff as assault)].

In an action for assault and battery, a successful plaintiff is entitled to compensation for all harm proximately caused by the assault and battery, including damages for pain and suffering, fear, anxiety, and other types of emotional distress, as

well as damages for lost wages and earning capacity and medical expenses [*see Delia S. v. Torres (1982) 134 Cal. App. 3d 471, 482, 184 Cal. Rptr. 787* ; *McChristian v. Popkin (1946) 75 Cal. App. 2d 249, 262-263, 171 P.2d 85]* . In addition, punitive damages are also available in actions for assault and battery, assuming that plaintiff is able to prove the requisite malice, oppression, or fraud on the part of the defendant [*see Civ. Code § 3294*; *Scruggs v. Haynes (1967) 252 Cal. App. 2d 256, 269, 60 Cal. Rptr. 355]* .

For further discussion and pleading forms, see Ch. 58, *Assault and Battery* . For a full discussion of the elements of and defenses to the torts of assault and battery, see Levy, Golden & Sacks, California Torts, Ch. 41.

[3] Defamation

[a] Elements Generally

In cases in which an employee is terminated as a result of a false statement made about the employee that injures the employee's reputation, or in which false statements are made about plaintiff in the connection with the termination, the employee may have a cause of action for defamation, that is, for libel or slander, as well as a cause of action for wrongful termination. In addition, an employee who has left an employer for any reason may in some instances have a cause of action for defamation against the former employer if the employer publishes any defamatory falsehoods about the employee [*see, e.g., Prevost v. First Western Bank (1987) 193 Cal. App. 3d 1492, 1497-1500, 239 Cal. Rptr. 161]* . This may occur when the employee searches for new employment, and a prospective employer contacts the former employer concerning the employee's fitness for employment. For discussion of actions under *Lab. Code §§ 1050-1054* regarding a former employer's misrepresentations concerning a former employee that impede that person from obtaining subsequent employment, see *§ 249.31*.

Under the doctrine of respondeat superior, an employer may be vicariously liable for a defamatory statement made by one of its employees [*Kelly v. General Telephone Co. (1982) 136 Cal. App. 3d 278, 284, 186 Cal. Rptr. 184]* . For further discussion of the doctrine of respondeat superior, see *Ch. 248, Employer's Liability for Employee's Torts, § 248.14*.

With minor exceptions, the torts of libel and slander have essentially the same elements. The primary difference between them is that libel involves a defamatory statement by writing or other "fixed representation to the eye" [*see Civ. Code § 45*], while slander involves a defamatory statement uttered orally [*see Civ. Code § 46*]. The elements of a claim for libel or slander are the following:

- A false and defamatory statement [*see Civ. Code §§ 45* (libel), *46* (slander); *see also MacLeod v. Tribune Publishing Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36* (defamatory aspect); *Gantry Constr. Co. v. American Pipe & Constr. Co. (1975) 49 Cal. App. 3d 186, 194-196, 122 Cal. Rptr. 834* (falsity aspect)];

- Publication of the statement by the employer [*see Kelly v. General Telephone Co. (1982) 136 Cal. App. 3d 278, 284, 186 Cal. Rptr. 184]* or compelled self-publication [Lin v. Circuit City, Inc. (C.D. Cal. 1995) 11 IER Cases 140 (court rejected plaintiff's defamation claim based on lack of evidence that the self-publication was compelled)];

- Identification of the plaintiff in the statement [*see Noral v. Hearst Publications, Inc. (1940) 40 Cal. App. 2d 348, 350, 104 P.2d 860]* ;

- Intent, in that if a qualified privilege applies, plaintiff is required to show malice [*see* discussion at [b], *below*]; and

- Resulting damages [*see Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 806-807, 163 Cal. Rptr. 628, 608 P.2d 716* ("special damages" as element of defamation claim unless statement is defamatory per se); *Civ. Code § 45a*].

For discussion and forms regarding defamation generally, see Ch. 340, *Libel and Slander* . For full discussion of the tort of defamation, see Levy, Golden, and Sacks, California Torts, Ch. 45. For additional discussion of the tort of defamation in the context of wrongful termination, see Wilcox, California Employment Law, Ch. 63.

[b] Absolute and Qualified Privileges

Unless a constitutional privilege or a qualified privilege under state law applies, a person may be liable for publishing a defamatory statement regardless of whether he or she intended to make a false statement that would injure the reputation of the plaintiff or had reason to know that the plaintiff would be so harmed [*see Davis v. Hearst (1911) 160 Cal. 143, 154-155, 116 P. 530]* . However, in the employment context, a qualified privilege often applies, which requires a showing of malice on the part of the defendant before liability may attach.

Under state law, there are two types of privileges that are available in defamation actions--absolute privileges and qualified privileges. An absolute privilege is a privilege that cannot be defeated by malice on the part of the publisher [*see Kilgore v. Younger (1982) 30 Cal. 3d 770, 778, 180 Cal. Rptr. 657, 640 P.2d 793]* . An absolute privilege is available for statements made by specified high-ranking public officials, statements made by legislators, statements made in judicial proceedings and other official or unofficial proceedings authorized by law, and fair and true reports of official proceedings and public meetings [*see Civ. Code § 47(a), (b), (d), (e)*; *but see Prevost v. First Western Bank (1987) 193 Cal. App. 3d 1492, 1498-1499, 239 Cal. Rptr. 161* (privilege for statements made in "other official proceedings authorized by law" was inapplicable to statement made about former employee in proof of loss statement by employer-bank to bonding company, even though proof of loss statement was required by law)]. This absolute privilege protects an employer who provides information about a current or former employee in the course of a law enforcement agency's investigation of the employee's application for employment with the agency [*Bardin v. Lockheed Aeronautical Sys. Co. (1999) 70 Cal. App. 4th 494, 499-504, 82 Cal. Rptr. 2d 726* (in these circumstances, absolute privilege of *Civ. Code § 47(b)* controls over qualified privilege of *Gov. Code § 1031.1(b)*)]. In other cases, however, statements made by a current or former employer during the background inspection of an applicant by a potential employer are privileged if made without malice and based on credible evidence [*Civ. Code § 47(c)(3)*]. For example, a current or former employer, or the employer's agent, is privileged to answer whether the employer would rehire a current or former employee [*Civ. Code § 47(c)*]. The privilege may also apply to statements made during the course of a grievance procedure established by a collective-bargaining agreement and reviewable by mandate [*see Wallin v. Vienna Sausage Manufacturing Co. (1984) 156 Cal. App. 3d 1051, 1054-1055, 203 Cal. Rptr. 375]* .

A qualified privilege acts as a bar to liability when the statement was published without malice [*see Saroyan v. Burkett (1962) 57 Cal. 2d 706, 708, 21 Cal. Rptr. 557, 371 P.2d 293]* . Qualified privileges exist for statements made by persons with a common interest, persons in special relationships, and persons responding to a request for information [*see Civ. Code § 47(c)*]. In the employment context, the qualified privilege available to interested parties often applies [*see Civ. Code § 47(c)*]. This privilege exists when the communicator and the recipient have a common interest and the communication is reasonably calculated to further that interest. Therefore, an employer's performance evaluation cannot support a cause of action for libel even if the employer's perceptions were wrong and unsupportable, unless the evaluation falsely accuses an employee of criminal conduct, lack of integrity, dishonesty, incompetence, or reprehensible personal characteristics or behavior [*Jensen v. Hewlett-Packard Co. (1993) 14 Cal. App. 4th 958, 965, 18 Cal. Rptr. 2d 83* (only remedy for feigned negative evaluation is contract action for breach of the implied covenant of good faith and fair dealing)]. Performance evaluations are inherently subjective and "courts should be extremely cautious before allowing such comments to be the basis of a libel action" [*Campanelli v. Regents of the University of California (1996) 44 Cal. App. 4th 572, 581, 51 Cal. Rptr. 2d 891]* . Communication among a company's employees concerning the conduct of an employee fall squarely within this privilege [*Cuenca v. Safeway San Francisco*

Employees Fed. Credit Union (1986) 180 Cal. App. 3d 985, 995-996, 225 Cal. Rptr. 852 ; *see also Kelly v. General Telephone Co. (1982) 136 Cal. App. 3d 278, 285, 186 Cal. Rptr. 184* (communication designed to insure accurate company records as privileged)]. Thus, for example, an employer who publishes to its employees the reasons for the termination of another employee is protected by this qualified privilege [*see Deaile v. General Telephone Co. of California (1974) 40 Cal. App. 3d 841, 847, 115 Cal. Rptr. 582]* .

Malice sufficient to overcome a qualified privilege is a state of mind arising from hatred or ill will evidencing a willingness to vex, annoy, or injure another person [*Agarwal v. Johnson (1979) 25 Cal. 3d 932, 944, 160 Cal. Rptr. 141, 603 P.2d 58* ; *see also Cuenca v. Safeway San Francisco Employees Fed. Credit Union (1986) 180 Cal. App. 3d 985, 997, 225 Cal. Rptr. 852* (malice established by showing that publisher lacked reasonable grounds to believe statement was true and thus acted in reckless disregard for rights of plaintiff)]. The privilege is lost if the publication is motivated by any cause other than to protect the interest for which the protection of the privilege was granted [*Agarwal v. Johnson (1979) 25 Cal. 3d 932, 944-945, 160 Cal. Rptr. 141, 603 P.2d 58* (privilege overcome whenstatements concerning employee's competence were maliciously motivated for purpose of terminating employee)].

For discussion and forms regarding absolute and qualified privileges, see *Ch. 340, Libel and Slander, § 340.50* et seq. For full discussion of the absolute and qualified privileges, see Levy, Golden, and Sacks, California Torts, Ch. 45, Pt. B.

[c] Availability of Defense of Preemption

A cause of action for defamation brought by an employee against an employer is not subject to the exclusivity provision of the Workers' Compensation Act (*Lab. Code § 3201 et seq.*) for the reasons discussed below.

Defamatory statements that have no other purpose than to damage an employee's reputation are neither a normal part of the employment relationship nor a risk of employment within the exclusivity provision of the Workers' Compensation Act [*Davaris v. Cubaleski (1993) 12 Cal. App. 4th 1583, 1591, 16 Cal. Rptr. 2d 330* (defendant's accusations that plaintiff stole money from the company were not within scope of employment context, and harm did not constitute personal injury); *Howland v. Balma (1983) 143 Cal. App. 3d 899, 905, 192 Cal. Rptr. 286]* .

Moreover, appellate courts have stated that the gravamen of an action for libel or slander is damage to reputation, a proprietary as distinct from a physical or mental injury. Consequently, defamation does not lie within the purview of the workers' compensation law [*see, e.g., Howland v. Balma (1983) 143 Cal. App. 3d 899, 192 Cal. Rptr. 286* (cited in dictum in *Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 757, 7 Cal. Rptr. 2d 808, 828 P.2d 1195*)].

In an employment context involving a collective-bargaining agreement, an employee's action for defamation may in some cases be preempted by federal labor law [*see, e.g., 29 U.S.C. § 185(a)* (LMRA), discussed in *§ 249.21[3]*]. If the claim is inextricably intertwined with considerations covered by the labor contract, the claim is preempted [*DeTomaso v. Pan American World Airways, Inc. (1987) 43 Cal. 3d 517, 530, 235 Cal. Rptr. 292, 733 P.2d 614 , cert. denied, 484 U.S. 829* ; *see Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202, 213, 105 S. Ct. 1904, 85 L. Ed. 2d 206]* . For example, when the claim is based on defamatory statements made in an investigation required by collective-bargaining agreement, the claim may be preempted, at least in instances in which the conduct of the investigation is subject to the collective-bargaining agreement's grievance adjustment procedure [*see DeTomaso v. Pan American World Airways, Inc. (1987) 43 Cal. 3d 517, 530-533, 235 Cal. Rptr. 292, 733 P.2d 614 , cert. denied, 484 U.S. 829* ; *cf. Tellez v. Pacific Gas and Elec. Co., Inc. (9th Cir. 1987) 817 F.2d 536, 538-539 , cert. denied, 98 L. Ed. 2d 209* (defamation action based on statements that were neither required by collective-bargaining agreement nor part of grievance process was not preempted by federal labor law)].

However, a defamation claim is not preempted if it is based on facts either "unrelated to matters expressly or impliedly governed by the collective bargaining agreement" or that "so far exceed the scope of reasonable conduct in the context

of such matters that reference to the collective bargaining agreement is unnecessary to resolve the claim" [*see DeTomaso v. Pan American World Airways, Inc. (1987) 43 Cal. 3d 517, 529, 235 Cal. Rptr. 292, 733 P.2d 614 , cert. denied, 484 U.S. 829* ; *see also Tellez v. Pacific Gas and Elec. Co., Inc. (9th Cir. 1987) 817 F.2d 536, 538 , cert. denied, 484 U.S. 908* (state defamation claim neither asserted rights derived from the collective-bargaining agreement nor required interpretation of agreement; California defamation law establishes nonnegotiable rights and obligations independent of any labor agreement)].

For discussion of preemption under the LMRA, see *§ 249.21[3]*. For additional discussion of preemption of wrongful termination claims under federal labor law, see Wilcox, California Employment Law, Ch. 60; and Larson and Borowsky, Unjust Dismissal, Ch. 9.

[d] Remedies Regarding Defamation Actions

In a defamation action, a successful plaintiff may be entitled to both general and special damages. Special damages are actual economic losses proximately caused by the defamation, including out-of-pocket expenses and amounts lost in one's occupation [*see Civ. Code §§ 45a, 48a(4)(b)*; *Gomes v. Fried (1982) 136 Cal. App. 3d 924, 939-940, 186 Cal. Rptr. 605]* . General damages compensate for loss of reputation, shame, mortification, and hurt feelings in any context, including the plaintiff's business or occupation [*see Civ. Code § 48a(4)(a)*; *Gomes v. Fried (1982) 136 Cal. App. 3d 924, 939, 186 Cal. Rptr. 605]* . In addition, punitive damages are available on the proper showing of malice [*see Civ. Code § 3294*; *see also McCoy v. Hearst Corp. (1986) 42 Cal. 3d 835, 872-873, 231 Cal. Rptr. 518, 727 P.2d 711 , cert. denied, 481 U.S. 1041]* . For discussion and forms relating to recoverable damages, see *Ch. 340, Libel and Slander, § 340.10* et seq.

[4] False Imprisonment

In cases in which an employee brings an action against an employer for wrongful termination, the employee may, in limited circumstances, have an additional cause of action against an employer for false imprisonment. That situation might arise, for example, when an employee is wrongfully detained by the employer under the mistaken belief that the employee has stolen company property and the employee is also terminated as a result.

The essence of a claim for false imprisonment is the restraint of a person's liberty so that a person is compelled to remain in a place where he or she does not wish to remain [*Onick v. Long (1957) 154 Cal. App. 2d 381, 386, 316 P.2d 427* ; *Parrott v. Bank of America (1950) 97 Cal. App. 2d 14, 23, 217 P.2d 89]* . An allegation of temporary restraint is sufficientto state a cause of action, and the plaintiff need not allege the use of actual physical force [*Parrott v. Bank of America (1950) 97 Cal. App. 2d 14, 23, 217 P.2d 89]* .

In one case, a bank employee was detained at a supervisor's desk for interrogation with respect to bank shortages and was threatened with federal prosecution if she did not sign a confession. In upholding a jury verdict for the plaintiff, the court found that the fact that the employee did agree to sign the confession, even though she was absolutely innocent of any wrongdoing, was sufficient to support a finding that a threat of force was used to detain the employee [*Parrott v. Bank of America (1950) 97 Cal. App. 2d 14, 23, 217 P.2d 89]* . There is no false imprisonment, however, if the restraint is lawful [*see Singleton v. Perry (1955) 45 Cal. 2d 489, 494, 289 P.2d 794]* . Thus, for example, if a merchant has probable cause to believe that a person has unlawfully taken his or her property, the merchant is entitled to detain the person for a reasonable time for the purpose of conducting a reasonable investigation [*see Penal Code § 490.5(f)*]. A property owner may similarly take reasonable steps to protect his or her property from theft or injury [*see Collyer v. S.H. Kress & Co. (1936) 5 Cal. 2d 175, 180-181, 54 P.2d 20]* . Whether an employer's actions were reasonable, justifiable, or privileged, so as to preclude liability for false imprisonment is a question of fact. [*Fermino v. Fedco, Inc. (1994) 7 Cal. 4th 701, 723, 30 Cal. Rptr. 2d 18, 872 P.2d 559]* .

In *Fermino* the California Supreme Court concluded that false imprisonment is not a normal aspect of the employment

relationship, however legitimate its initial justification. Accordingly, a false imprisonment committed by an employer on an employee is outside the scope of the "compensation bargain," and an action brought by an employee based on that act is not preempted by the exclusive remedy doctrine of workers compensation [*Fermino v. Fedco, Inc. (1994) 7 Cal. 4th 701, 723, 30 Cal. Rptr. 2d 18, 872 P.2d 559]* .

For discussion and forms regarding false imprisonment generally, see Ch. 257, *False Imprisonment* . For a complete discussion of the tort of false imprisonment, see Levy, Golden & Sacks, California Torts, Ch. 42.

[5] Intentional Infliction of Emotional Distress

In cases in which an employee brings an action against an employer for wrongful termination, the employee may theoretically have an additional cause of action against the employer for intentional infliction of emotional distress based on the manner in which the termination was carried out [*see, e.g.,* *Rulon-Miller v. International Business Machines Corp. (1984) 162 Cal. App. 3d 241, 254-255, 208 Cal. Rptr. 524]* . However, it appears that the availability of such an action is extremely limited because most civil actions against employers seeking damages for emotional distress are barred by the exclusive remedy provisions of workers' compensation law [*see Lab. Code §§ 3601, 3602*]. *The California Supreme Court in Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743* , held that, if the misconduct attributed to the employer involves actions that are a normal part of the employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances, workers' compensation is the exclusive remedy. Characterization of the employer's conduct as outrageous, unfair, or intended to cause mental disability is not sufficient to avoid the exclusive remedy provisions of the Labor Code [*Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743]* . However, a cause of action may be available notwithstanding the exclusive remedy doctrine if the conduct of the employer constituted a willful physical assault by the employer, within the meaning of *Lab. Code § 3602(b)(1)* [*Herrick v. Quality Hotels, Inns & Resorts, Inc. (1993) 19 Cal. App. 4th 1608, 1616-1618, 24 Cal. Rptr. 2d 203* (also finding sufficient evidence of employer ratification of supervisor's threat to "blow [plaintiff's] head off" during termination)]. In a subsequent case, the Court held that termination of employment is a "normal part of the employment" for purposes of the workers' compensation exclusive-remedy doctrine and that a civil action for intentional infliction of emotional distress to recover damages for emotional injuries caused by termination of employment is therefore preempted [*Shoemaker v. Myers (1990) 52 Cal. 3d 1, 25, 276 Cal. Rptr. 303, 801 P.2d 1054* ; *see also* *Miklosy v. Regents of Univ. of Cal. (2008) 44 Cal. 4th 876, 902, 80 Cal. Rptr. 3d 690, 188 P.3d 629* ("The alleged wrongful conduct, however, occurred at the worksite, in the normal course of the employer-employee relationship, and therefore workers' compensation is plaintiffs' exclusive remedy for any injury that may have resulted." (citations omitted)); *Panopulos v. Westinghouse Electric Corp. (1989) 216 Cal. App. 3d 660, 666, 264 Cal. Rptr. 810* ; *Jenkinsv. Family Health Program (1989) 214 Cal. App. 3d 440, 449-450, 262 Cal. Rptr. 798* ; *Pichon v. Pacific Gas & Electric Co. (1989) 212 Cal. App. 3d 488, 495-497, 260 Cal. Rptr. 677]* .

However, if the employer's conduct implicates considerations of substantial public policy, interests beyond those of the employer and employee are involved. "Those interests are not protected by workers' compensation law and therefore must be accommodated outside the compensation bargain" [*Shoemaker v. Myers (1992) 2 Cal. App. 4th 1407, 1418-1419, 4 Cal. Rptr. 2d 203* ; *see* *Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1486-1492, 82 Cal. Rptr. 2d 359* (emotional distress caused by work-related injury discrimination is not normal risk of compensation bargain)]. Thus, for example, the workers' compensation law does not bar an employee's claim of infliction of emotional distress that arises out of conduct that is also the basis for a claim of wrongful termination in violation of public policy [*Kovatch v. California Casualty Management Co. (1998) 65 Cal. App. 4th 1256, 1277, 77 Cal. Rptr. 2d 217* ; *see Murray v. Oceanside Unified Sch. Dist. (2000) 79 Cal. App. 4th 1338, 1362-1363, 95 Cal. Rptr. 2d 28* (cause of action for intentional infliction of emotional distress founded on sexual-orientation harassment in violation of public policy embodied in FEHA is not barred by exclusivity provisions of workers' compensation law, since such harassment is outside normal scope of employment relationship); *see also § 249.12* (wrongful discharge in violation of public policy)].

A claim for intentional infliction of emotional distress is preempted by the exclusive remedy doctrine even if no physical injury or disability is alleged, as long as the basic conditions of compensation are otherwise satisfied and the employer's conduct neither contravenes a fundamental public policy nor exceeds the risks inherent in the employment relationship [*Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 754-755, 7 Cal. Rptr. 2d 808, 828 P.2d 1195]* . For example, if an employee asserts a claim of intentional infliction of emotional distress caused by the employer's denial ofstatutory medical leave, but the jury finds no violation of the relevant statutory medical leave provisions, then the employee's exclusive remedy is under the Workers' Compensation Act [*Gibbs v. American Airlines, Inc. (1990) 74 Cal. App. 4th 1, 9-10, 87 Cal. Rptr. 2d 554* (employer's denial of medical leave did not violate public policy because jury found no violation of California Family Rights Act, *Gov. Code § 12945.2*)]. On the other hand, an employer's false statements about the company's financial stability, future plans, and a job applicant's prospects for promotion--all designed to induce the applicant to accept employment--are not a normal part of the employment relationship or a risk reasonably encompassed within the compensation bargain. Therefore, a fraud cause of action seeking emotional distress damages for such false statements is not barred by the workers' compensation exclusivity rule [*Lenk v. Total-Western, Inc. (2001) 89 Cal. App. 4th 959, 970-973, 108 Cal. Rptr. 2d 34]* .

For discussion and forms relating to actions for intentional infliction of emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress* . For a complete discussion of the elements of and defenses to a cause of action for intentional infliction of emotional distress, see Levy, Golden & Sacks, California Torts, Ch. 44 (Matthew Bender). For discussion and forms relating to preemption of actions by workers' compensation laws generally, see Ch. 577, *Workers' Compensation* . For additional discussion of the exclusive-remedy provision of workers' compensation law, see Wilcox, California Employment Law, Ch. 20 (Matthew Bender); Levy, Golden & Sacks, California Torts, Ch. 10 (Matthew Bender). For discussion of the exclusive-remedy provision in the context of actions for wrongful termination, see Wilcox, California Employment Law, Ch. 60 (Matthew Bender).

[6] Interference With Contract and Interference With Prospective Economic Advantage

As a general rule, an employee has no cause of action for inducing the breach of an employment contract or for interference with prospective economic advantage (which encompasses the tort of inducing breach of contract) [*see Buckaloo v. Johnson (1975) 14 Cal. 3d 815, 823, 122 Cal. Rptr. 745, 537 P.2d 865]* . Generally, an employee cannot assert those claims against either the employer or coemployees who were acting within the scope of their employment [*see Shoemaker v. Myers (1990) 276 Cal. Rptr. 303, 801 P.2d 1054* ; *Mallard v. Boring (1960) 182 Cal. App. 2d 390, 393-394, 6 Cal. Rptr. 171]* .

A California court of appeal has held that third parties who are not the plaintiff's employer cannot be liable for conspiracy to effect wrongful termination [*Weinbaum v. Goldfarb, Whitman & Cohen (1996) 46 Cal. App. 4th 1310, 1314-1315, 54 Cal. Rptr. 2d 462* (plaintiff auditors)]. The *Weinbaum* court reasoned that,"Because tort liability arising from conspiracy presupposes that the coconspirator *is legally capable of committing the tort* ... a third party who is *not* (and never was) the plaintiff's employer cannot be liable for conspiracy to terminate the plaintiff's employment in violation of public policy."

However, the United States Supreme Court has since held that a terminated employee may state a claim for interference with an at-will employment relationship against third parties who conspire to deter plaintiff from testifying in any court of the United States by threatening his or her person or property in violation of *42 U.S.C. § 1985(2)* [*Haddle v. Garrison (1998) 525 U.S. 121, 119 S. Ct. 489, 491-492, 142 L. Ed. 2d 502]* . Although the *Haddle* court noted that the harm alleged by plaintiff was essentially the same as one that "has long been a compensable injury under tort law," it also noted that it "is merely a species of the traditional torts of intentional interference with contractual relations and intentional interference with prospective contractual relations" [*Haddle v. Garrison (1998) 525 U.S. 121, 119 S. Ct. 489, 492, 142 L. Ed. 2d 502* ; *see* Restatement (Second) of Torts 766, Comment *g*; *see also Kozlowsky v. Westminster Nat. Bank (1970) 6 Cal. App. 3d 593, 598-600, 86 Cal. Rptr. 52* (third persons, including shareholders or directors, may

be liable for inducing termination of at-will employment contract)].

The elements of a cause of action for interference with prospective economic advantage are (1) an economic relationship between the plaintiff and a third person containing the probability of future economic benefit to the plaintiff (such as an existing employment agreement), (2) knowledge by the defendant of the existence of the relationship, (3) intentional acts on the part of the defendant designed to disrupt the relationship, (4) actual disruption of the relationship, and (5) damages to the plaintiff proximately caused by the acts of the defendant [*Blank v. Kirwan (1985) 39 Cal. 3d 311, 330, 216 Cal. Rptr. 718, 703 P.2d 58]* . Moreover, in certain circumstances, negligent interference with prospective economic advantage is also actionable [*see J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 805-806, 157 Cal. Rptr. 407, 598 P.2d 60]* .

The California Supreme Court has applied these principles to hold that an employer may recover damages for intentional interference with an at-will employment relationship. Although a third party generally incurs no liability for soliciting or hiring an at-will employee of the employer, liability may be imposed if the third party engaged in an independently wrongful act that induced the at-will employee to leave the employer. In this context, an "independently wrongful act" is one that is proscribed by some constitutional, statutory, regulatory, common-law, or other ascertainable legal standard [*Reeves v. Hanlon (2004) 33 Cal. 4th 1140, 1148-1156, 17 Cal. Rptr. 3d 289, 95 P.3d 513* (employer may recover damages for intentional interference with at-will employment relation under same standard applicable to claims for intentional interference with prospective economic advantage)]. At least one court of appeal has extended this reasoning to hold that an employee may recover damages under the equitable theory of promissory estoppel against a third party who induces the employee to terminate at-will employment in reliance on an unfulfilled job offer [*Toscano v. Greene Music (2004) 124 Cal. App. 4th 685, 694-695, 21 Cal. Rptr. 3d 732* (for employee to recover, fact and extent of lost future earnings with former employer must be proven with reasonable certainty)].

For discussion and forms relating to elements of and defenses to actions for interference with economic relations generally, see *Ch. 565, Unfair Competition, § 565.130* et seq. For a complete discussion of the tort of interference with prospectiveeconomic advantage and applicable defenses, see Levy, Golden & Sacks, California Torts, Ch. 40, pt. D (Matthew Bender).

[7] Fraud or Deceit

Wrongful termination of employment ordinarily does not give rise to a cause of action for fraud or deceit, even if some misrepresentation is made in the course of the employee's dismissal. Tort recovery is available only if the plaintiff can establish all of the elements of fraud with respect to a misrepresentation that is separate from the termination of the employment contract, that is, when the plaintiff's fraud damages cannot be said to result from termination itself [*Hunter v. Up-Right, Inc. (1993) 6 Cal. 4th 1174, 1178, 26 Cal. Rptr. 2d 8, 864 P.2d 88]* . The policy considerations that supported the holding in *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 700, 254 Cal. Rptr. 211, 765 P.2d 373* , making tort remedies unavailable for a breach of the implied covenant of good faith and fair dealing in the employment context, also support the holding that tort remedies are not available for a wrongful termination merely because the employer arguably made a misrepresentation in the course of the termination [*Hunter v. Up-Right, Inc. (1993) 6 Cal. 4th 1174, 1180-1185, 26 Cal. Rptr. 2d 8, 864 P.2d 88]* . Given the essentially contractual nature of the employment relationship, tort remedies are not recoverable merely because an employer used a misrepresentation to end the relationship, thereby transforming what otherwise would have been a resignation into a constructive discharge. Because an employer may terminate an employee without any subterfuge, and be liable only for contractual damages in mostcircumstances, the Court held that the use of a misrepresentation to achieve the same result should not give rise to tort damages [*Hunter v. Up-Right, Inc. (1993) 6 Cal. 4th 1174, 1182-1185, 26 Cal. Rptr. 2d 8, 864 P.2d 88]* .

A misrepresentation that is *not* aimed at effecting termination of employment, but designed instead to induce the employee to alter detrimentally his or her position in some other respect, can be the basis of a valid fraud claim, even in the context of a wrongful termination [*see Lazar v. Superior Court (1996) 12 Cal. 4th 631, 638, 49 Cal. Rptr. 2d 377,*

909 P. 2d 981 (claim for fraudulent inducement of employment contract does not depend upon whether defendant employer's promise is ultimately enforceable as a contract, although the harm alleged must be separate and distinct from the harm caused by termination of the employment agreement); *cf. Hunter v. Up-Right, Inc. (1993) 6 Cal. 4th 1174, 1185-1186, 26 Cal. Rptr. 2d 8, 864 P.2d 88* (citing *Miller v. Fairchild Industries, Inc. (9th Cir. 1989) 885 F.2d 498, 509-510* , *cert. denied, 494 U.S. 1056 (1990)* , as example of case in which a cause of action was based on fraud because misrepresentation concerned plaintiff's settlement of civil rights action rather than termination of employment relationship)].

For discussion and forms relating to a cause of action in tort for deceit, see Ch. 269, *Fraud and Deceit* . For a further discussion of the tort of deceit, see Levy, Golden & Sacks, California Torts, Ch. 40, pt. A (Matthew Bender).

[8] Statutory Causes of Action

An employee may have related statutory causes of action against the employer. For example, under *Lab. Code § 970*, an employee may sue for double damages resulting from an employer's misrepresentation that induces the employee to change residence [*see Lab. Code § 972*], and, under *Lab. Code § 1050*, an employee may sue for treble damages caused by an employer's misrepresentation that prevents the employee from obtaining subsequent employment [*see Lab. Code § 1054*]. These causes of action are discussed in *§§ 249.30 -249.31*.

In addition, a number of California statutes impose liability on an employer for discharging or discriminating against employees under various specified circumstances. For example, *Lab. Code § 132a* provides remedies for an employee who is penalized by an employer for asserting rights under the workers' compensation system [*see* discussion in *§ 249.21[10]*]. For full discussion of those statutes, see Wilcox, California Employment Law, Ch. 60.

[9] Invasion of Privacy

The right of privacy protects the rights of employees and job applicants from intrusions by the employer. For example, an employer may be prohibited from posting on an open bulletin board the reasons for an employee's dismissal [*Payton v. City of Santa Clara (1982) 132 Cal. App. 3d 152, 154, 183 Cal. Rptr. 17*].

One context in which privacy rights are implicated is drug testing. Under California law, an employer may require preemployment drug tests and take illegal drug use into consideration in making employment decisions [*Loder v. City of Glendale (1997) 14 Cal. 4th 846, 882-883, 59 Cal. Rptr. 2d 696, 927 P.2d 1200*]. However, suspicionless drug testing of current employees who apply for and are offered promotions, without regard to the nature of the position sought, violates the prohibition against unreasonable searches under the *Fourth Amendment of the U.S. Constitution* [*Loder v. City of Glendale (1997) 14 Cal. 4th 846, 878-881, 900, 918 n.1, 59 Cal. Rptr. 2d 696, 927 P.2d 1200* (leaving open possibility that employer may constitutionally require current employee to submit to drug test as condition to employment when testing is justified by nature of particular position to which promotion is sought)]. It is not settled whether a termination based on a refusal to submit to a random drug test may form the basis of a cause of action for wrongful termination in violation of public policy [*compare Semore v. Pool (1990) 217 Cal. App. 3d 1087, 1096-1098, 266 Cal. Rptr. 280* (assertion of the constitutional right of privacy is an assertion of a fundamental principle of public policy that is sufficient to state a cause of action for wrongful termination), *with Luck v. Southern Pac. Transp. Co. (1990) 218 Cal. App. 3d 1, 17-19, 267 Cal. Rptr. 618* (termination based on a refusal to submit to urinalysis does not violate public policy)].

Privacy rights may also be implicated when an employer conducts surveillance of employees. It is an infraction for an employer, other than the federal government, to make audio or videotape recordings of employees in restrooms, locker rooms, or other rooms designated by employers for changing clothes [*Lab. Code § 435*].

In one case involving an employer's video surveillance of an office used by employees, the California Supreme Court

found that the employees had a reasonable expectation under widely held social norms that their employer would not install video equipment capable of monitoring and recording their activities--personal and work-related--behind closed doors without their knowledge or consent. Under the circumstances of that case, however, the intrusion was not sufficiently serious to constitute a privacy violation. Any actual surveillance was drastically limited in nature and scope (no audio, not operated during business hours), exempting plaintiffs from its reach, and the defendants were motivated by strong countervailing concerns, which included providing a wholesome environment for the abused children in their care and avoiding legal liability [*Hernandez v. Hillsides, Inc. (2009) 47 Cal. 4th 272, 286-300, 97 Cal. Rptr. 3d 274, 211 P.3d 1063*].

For further discussion of the right of privacy under the California Constitution as it relates to drug and alcohol testing of employees and job applicants, see Ch. 429, *Privacy* ; see also Wilcox, California Employment Law, Ch. 50 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsCommercial InterferenceContractsGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressGeneral Overview

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A. Wrongful Discharge and Discipline

21-249 California Forms of Pleading and Practice--Annotated §§ 249.23-249.29

AUTHOR: Richard P. Hill Editorial Consultant

[Reserved]

§§ 249.23[Reserved]

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21-249 California Forms of Pleading and Practice--Annotated § 249.30

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.30 Misrepresentation Inducing Employee to Change Residence

No person, agent, or officer thereof shall, directly or indirectly, influence, persuade or engage any person to move from one place to another within California or from any place outside California to any place within the state, or from any place within California to any place outside the state, for the purposes of working in any branch of labor, through or by means of knowingly false representation, whether spoken, written, or advertised in written form, concerning any of the following matters [*Lab. Code § 970*]:

- The kind, character, or existence of such work;
- The length of time such work will last, or the compensation for the work;
- The sanitary or housing conditions relating to or surrounding the work; or
- The existence or nonexistence of any strike, lockout, or other labor dispute affecting the work and pending between the proposed employer and the persons then or last engaged in the performance of the labor for which the employee is sought.

In order to allege facts sufficient to state a cause of action under *Lab. Code § 970*, the complaint must allege that the representations made were knowingly false [*Tyco Industries, Inc. v. Superior Court (1985) 164 Cal. App. 3d 148, 157, 211 Cal. Rptr. 540.]* .

The words "to change from one place to another" in *Lab. Code § 970* import temporary as well as permanent change of residence, as contrasted with a mere change in the site of employment. The quantitative fact that the change of residence might be for only a short period of time would not affect the qualitative misrepresentations and would not render *Lab. Code § 970* inapplicable [*Collins v. Rocha (1972) 7 Cal. 3d 232, 239-240, 102 Cal. Rptr. 1, 497 P.2d 225]* . However, if an employment contract expressly provides for at-will employment, an action for fraudulent inducement of

the employment contract may not be maintained on the basis of an alleged false representation regarding the duration of employment; in such a case the employee willbe unable to show justifiable reliance on the false representation [*Dore v. Arnold Worldwide, Inc. (2006) 39 Cal. 4th 384, 393-394, 46 Cal. Rptr. 3d 668]* . Still, the employee may have a cause of action for fraudulent inducement to accept employment based on false representations about other aspects of the employment, such as compensation terms [*Agosta v. Astor (2004) 120 Cal. App. 4th 596, 606, 15 Cal. Rptr. 3d 565]* .

A person who violates *Lab. Code § 970* is liable to the aggrieved person for double damages resulting from the misrepresentations. The action may be brought by the aggrieved person or by his or her assigns or successors in interest, without first establishing criminal liability [*Lab. Code § 972*; *see Lab. Code § 971* (violation of *Lab. Code § 970* constituting misdemeanor, punishable by fine and/or imprisonment)]. For a form of complaint based on an employer's misrepresentation to induce an employee to change residence, see *§ 249.80*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsFraud & MisrepresentationGeneral Overview

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AUTHOR: Richard P. Hill Editorial Consultant

§ 249.31 Misrepresentation Preventing Subsequent Employment

Any person, or agent or officer thereof, who, after having discharged an employee from the person's service or after an employee has voluntarily left such service, by any misrepresentation prevents or attempts to prevent the former employee from obtaining employment, is liable in a civil action to the party aggrieved for treble damages [*Lab. Code §§ 1050, 1054*]. Additionally, any person who knowingly causes, suffers, or permits an agent, superintendent, manager, or employee to do so or who fails to take all reasonable steps within his or her power to prevent such acts is also liable in a civil action for treble damages [*Lab. Code §§ 1052, 1054*]. Criminal penalties also apply to violations of these provisions [*see Lab. Code §§ 1050, 1052*].

An action under *Lab. Code § 1050* applies only to misrepresentations made to prospective employers other than defendant. It does not apply to misrepresentations made by the defendant's employees to other employees of the defendant [*Kelly v. General Telephone Co. (1982) 136 Cal. App. 3d 278, 288-289, 186 Cal. Rptr. 184]* . By its literal terms, *Lab. Code § 1050* does not apply if the employee is still employed by the defendant at the time the misrepresentation was made [*Lab. Code § 1050*].

Lab. Code § 1050 refers to misrepresentation that "prevents or attempts to prevent the former employee from obtaining employment." It is not clear whether this language encompasses misrepresentation causing discharge from subsequent employment. Inasmuch as a discharge prevents obtaining continuance of the employment, the misrepresentation is arguably encompassed by the language in question. For a case involving an employer's wrongful interference with his or her former employee's subsequent employment, see *Blender v. Superior Court (1942) 55 Cal. App. 2d 24, 26, 130 P.2d 179* .

Nothing in *Lab. Code §§ 1050-1057* prevents an employer, or an agent, employee, superintendent, or manager of an employer, from furnishing a truthful statement concerning the reason for the discharge of an employee or of the reason why the employee voluntarily left the service of the employer, on special request for such a statement [*Lab. Code § 1053*]. However, a statement that furnishes any mark, sign, or other means conveying information different from that

expressed by the words therein, or that was given without a special request therefor is prima facie evidence of a violation of *Lab. Code §§ 1050* and *1052* [*Lab. Code § 1053*].

The privileges of *Civ. Code § 47* that are available to a defendant in a defamation action also apply in actions for violation of *Lab. Code §§ 1050* or *1052* [*see O'Shea v. General Telephone Co. (1987) 193 Cal. App. 3d 1040, 1047, 238 Cal. Rptr. 715]* . For a discussion of privileges in the context of a defamation action, see *§ 249.22[3][b]* and *Ch. 340, Libel and Slander, § 340.50* et seq.

In addition to the treble damages granted under *Lab. Code § 1054*, if malice is established, punitive damages may be awarded under *Civ. Code § 3294*]. The plaintiff may not, however, recover both punitive damages and treble damages and is limited to either treble damages or untrebled damages plus punitive damages [*Marshall v. Brown (1983) 141 Cal. App. 3d 408, 418-419, 190 Cal. Rptr. 392]* .

The civil relief granted by *Lab. Code § 1054* is provided in addition to and apart from the criminal penalties applying to violations of *Lab. Code 1050-1052*, and the actions may be brought without first establishing any criminal liability under *Lab. Code §§ 1050-1057* [*Lab. Code § 1054*]. For a form of complaint based on a former employer preventing a former employee from obtaining employment by the employer's misrepresentation, see *§ 249.81*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Richard P. Hill Editorial Consultant

§ 249.32 Things Acquired by Employee by Virtue of Employment

Everything that an employee acquires by virtue of his or her employment, except the compensation that is due him or her from the employment, belongs to the employer. This is true whether the thing was acquired lawfully or unlawfully, or during or after the expiration of the term of his employment [*Lab. Code § 2860*]. An employer who has been injured under this statute may obtain compensatory and injunctive relief from the offending employee [*see Reid v. Mass Co., Inc. (1957) 155 Cal. App. 2d 293, 305, 308, 318 P.2d 54]* . *Lab. Code § 2860* has been applied principally, though not exclusively, to unfair competition carried on by former employees with the use of trade secrets and the like. Even in this context it has been narrowly employed [*Williams v. Weisser (1969) 273 Cal. App. 2d 726, 734, 78 Cal. Rptr. 542]* . Additionally, the section must be interpreted in conformity with the established rule that business information acquired by an employee that is not confidential in fact, or by agreement, is not protectable property of the employer [*King v. Pacific Vitamin Corp. (1967) 256 Cal. App. 2d 841, 849, 64 Cal. Rptr. 486]* . For a discussion relating to and a form of complaint alleging the misappropriation of a trade secret by a former employee, see *Ch. 565, Unfair Competition, § 565.100* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 249.33 Competition With Employer or Diversion of Employer's Business

Courts have recognized that an employee owes "a duty of loyalty" toward his or her employer during the term of employment [*see Fowler v. Varian Associates, Inc. (1987) 196 Cal. App. 3d 34, 41, 241 Cal. Rptr. 539]* . For example, an employee has a duty tofaithfully serve the employer during working hours and not to engage in a competing business even outside of working hours [*Charles T. Powner Co. v. Smith (1928) 91 Cal. App. 101, 102, 266 P. 833]* . When an employee engages in a business that makes him or her a competitor of the employer, no matter how much or how little time is devoted to it, there is an interest against this duty and therefore a violation of the employment contract, even if the agreement does not contain a noncompetition provision [*Puritas Laundry Co. v. Green (1911) 15 Cal. App. 654, 660, 115 P. 660]* .

Corporate officers stand in a fiduciary relationship with the corporation and are not permitted to use their position of trust to further their own objectives [*Bancroft-Whitney Co. v. Glen (1966) 64 Cal. 2d 327, 345, 49 Cal. Rptr. 825, 411 P.2d 921]* . Thus, when a corporate officer competes with the corporation prior to terminating his or her relationship with the corporation, without disclosing this fact to the corporation, he or she may be liable for breach of fiduciary duty [*see Sequoia Vacuum Systems v. Stransky (1964) 229 Cal. App. 2d 281, 287-288, 40 Cal. Rptr. 203]* . For discussion relating to a corporate officer's duty to avoid competing with his or her corporation and a form of complaint for breach of fiduciary duty see Ch. 167, *Corporations: Directors and Management* .

By statute, an employee who has any business to transact on his or her own account that is similar to that entrusted to the employee by his or her employer must give preference to the business of the employer [*Lab. Code § 2863*]. Thus, if an employee transacts the business of the employer for his or her own profit, the employer is entitled to those profits [*Sumner v. Nevin (1906) 4 Cal. App. 347, 350, 87 P. 1105]* .

In the absence of an enforceable noncompetition agreement or any actual or threatened misappropriation of trade secrets, a California court will not apply the so-called doctrine of inevitable disclosure to enjoin a former employee from working for a competing employer. As applied in some jurisdictions, the "doctrine of inevitable disclosure" allows

a plaintiff to establish a claim of trade-secret misappropriation by demonstrating that the defendant's new employment will inevitably lead him or her to rely on the plaintiff's trade secrets [*see, e.g., PepsiCo, Inc. v. Redmond (7th Cir. 1995) 54 F.3d 1262, 1269]* . In such a case, the result is not merely an injunction against the use of trade secrets, but an injunction restricting employment. However, the doctrine of inevitable disclosure has been rejected in California because it creates a de facto covenant not to compete and runs counter to the strong California public policy favoring employee mobility [*Whyte v. Schlage Lock Co. (2002) 101 Cal. App. 4th 1443, 1458-1464, 125 Cal. Rptr. 2d 277* ; *see Bus. & Prof. Code § 16600* (general prohibition against noncompetition agreements); *Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 945-950, 955, 81 Cal. Rptr. 3d 282, 189 P.3d 285* (noncompetition agreement is invalid under *Bus. & Prof. Code § 16600*, even if narrowly drawn, unless it falls within one of statutory exceptions provided by *Bus. & Prof. Code §§ 16601, 16602, 16602.5*); *but see Thompson v. Impaxx, Inc. (2003) 113 Cal. App. 4th 1425, 1429-1430, 7 Cal. Rptr. 3d 427* (antisolicitation covenant may be enforceable if designed to protect employer's confidential, proprietary, or trade-secret customer information); *Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 946 n.4, 81 Cal. Rptr. 3d 282, 289 n.4, 189 P.3d 285* ("[W]e do not here address the applicability of the so-called trade secret exception to [*Bus. & Prof. Code § 16600*], as Edwards does not dispute that portion of his agreement or contend that the provision of the noncompetition agreement prohibiting him from recruiting Andersen's employees violated [*Bus. & Prof. Code § 16600*].")].

Generally, a former employee or other competitor of the employer incurs no liability to the employer for soliciting or hiring an at-will employee of the employer. However, liability may be imposed if the former employee or other competitor engaged in an independently wrongful act that induced the at-will employee to leave the employer. In this context, an "independently wrongful act" is one that is proscribed by some constitutional, statutory, regulatory, common-law, or other determinable legal standard [*Reeves v. Hanlon (2004) 33 Cal. 4th 1140, 1148-1156, 17 Cal. Rptr. 3d 289, 95 P.3d 513* (employer may recover damages for intentional interference with at-will employment relation under same standard applicable to claims for intentional interference with prospective economic advantage)].

For discussion of contractual provisions restraining an employee from competing with his or her employer, see *Ch. 565, Unfair Competition, § 565.70* et seq. For discussion and forms relating to actions against former employees for misappropriating confidential information regarding an employer's customers, see *Ch. 565, Unfair Competition, § 565.100* et seq. For further related discussion, see Wilcox, California Employment Law, Ch. 70.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesFiduciary ResponsibilitiesGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewTortsBusiness TortsCommercial InterferenceBusiness RelationshipsGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsGeneral OverviewTortsIntentional TortsBreach of Fiduciary DutyGeneral Overview

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B. Other Actions Arising From Employment Relationship

21-249 California Forms of Pleading and Practice--Annotated § 249.34

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.34 Employee Negligence

[1] Generally

An employee who is negligent in the course of employment may be liable to the employer [*Division of Labor Law Enforcement v. Barnes (1962) 205 Cal. App. 2d 337, 348-349, 23 Cal. Rptr. 55]* . For a discussion and forms relating to an action for negligence generally, see Ch. 380, *Negligence* .

[2] Employee's Duty of Care

One who is employed at his or her own request to do that which is more for that person's own advantage than for that of his or her employer shall use great care and diligence therein to protect the interest of the employer [*Lab. Code § 2853*]. One who, for a good consideration, agrees to serve another shall perform the service and shall use ordinary care and diligence therein as long as he or she is thus employed [*Lab. Code § 2854*]. An employee is bound to exercise a reasonable degree of skill unless that person's employer has notice, before employing him or her, of his or her want of skill [*Lab. Code § 2858*]. An employee is always bound to use such skill as he or she possesses, to the extent that the same is required, for the service specified [*Lab. Code § 2859*].

An employee who is expressly authorized to employ a substitute is liable to his principal only for want of ordinary care in his or her selection, and the substitute is directly responsible to the principal employer [*Lab. Code § 2864*].

[3] Liability of Employee to Employer

An employee who is guilty of a culpable degree of negligence is liable to his or heremployer for the damage thereby caused to the employer [*Lab. Code § 2865*; *see Civ. Code § 3333* (measure of damages for breach of obligation not arising from contract)]. "Culpable degree of negligence," as that term is used in *Lab. Code § 2865*, has been interpreted to mean the violation or disregard of the duty that an employee owes to his or her employer pursuant to the obligations imposed by *Lab. Code §§ 2850-2865*. Thus, in the case of a gratuitous employee, he or she is guilty of a culpable degree

of negligence when he or she is guilty of gross negligence [*Dahl-Beck Electric Co. v. Rogge (1969) 275 Cal. App. 2d 893, 907, 80 Cal. Rptr. 440* ; *see Lab. Code § 2850*]. In the case of an employee for consideration, he or she is guilty of a culpable degree of negligence when he or she fails to use ordinary care, consistent with the degree of skill required and to be used as provided in *Lab. Code § 2858* (duty to exercise reasonable degree of skill) and *Lab. Code § 2859* (duty to use skill possessed) [*Dahl-Beck Electric Co. v. Rogge (1969) 275 Cal. App. 2d 893, 907, 80 Cal. Rptr. 440* ; *see also* discussion at [2], *above*].

No employer is permitted to make any deduction from the wage of an employee for any cash shortage, breakage, or loss of equipment, notwithstanding any contract or arrangement to the contrary, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee [*8 Cal. Code Reg. § 11010-11150*, P 8 (Cal. Wage Orders); *see Kerr's Catering Service v. Department of Industrial Relations (1962) 57 Cal. 2d 319, 329, 19 Cal. Rptr. 492, 369 P.2d 20* (upholding substantially similar provision of former wage orders); *but see Barnhill v. Robert Saunders & Co. (1981) 125 Cal. App. 3d 1, 6, 177 Cal. Rptr. 803* (holding that employer may not deduct debt owed by employee from employee's final paycheck)]. For a discussion of deductions by an employer from an employee's wages, see *Ch. 250, Employment Law: Wage and Hour Disputes, § 250.20*.

For further discussion relating to the measure of damages in an action for negligence, see *Ch. 177, Damages, § 177.40* et seq.

[4] Gratuitous Employee

One who, without consideration, undertakes to do a service for another is not bound to perform the same, but if he or she actually enters on the performance of it, he or she shall use at least slight care and diligence therein [*Lab. Code § 2850*]. One who, by his or her own special request, induces another to entrust him or her with the performance of a service shall perform the same fully; in other cases, one who undertakes a gratuitous service may relinquish it at any time [*Lab. Code § 2851*].

A "gratuitous employee" who accepts a written power of attorney shall act under it as long as it remains in force, or until he or she gives notice to his "employer" that he or she will not do so [*Lab. Code § 2852*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsGeneral OverviewTortsNegligenceStandards of CareAppropriate StandardGeneral Overview

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21-249 California Forms of Pleading and Practice--Annotated § 249.35

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.35 Breach of Personal Service Contract

[1] General Limitation on Enforcement

A contract to render personal service, other than a contract of apprenticeship as provided in *Lab. Code §§ 3070-3098*, may not be enforced against the employee beyond seven years from the commencement of service under the contract [*Lab. Code § 2855(a)*].

Any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value and the loss of which can not be reasonable or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render the service, for a term not to exceed seven years from the commencement of service under the contract. If the employee voluntarily continues to serve beyond that time, the contract may be referred to as affording a presumptive measure of the compensation [*Lab. Code § 2855(a)*; *Porporato v. Devincenzi (1968) 261 Cal. App. 2d 670, 676-677, 68 Cal. Rptr. 210* (complaint for quasi-specific performance to devise property based on consideration of peculiar personal services as sufficient to withstand demurrer)].

[2] Exception for Phonorecord Contracts

Notwithstanding *Lab. Code § 2855(a)*, discussed at *[1], above*, if the contract is to render personal service in the production of phonorecords in which sounds are first fixed as defined in *17 U.S.C. § 101*, special rules apply. Specifically, before an employee who is a party to the phonorecord contract may invoke *Lab. Code § 2855(a)*, he or she must first give written notice to the employer in accordance with *Code Civ. Proc. § 1020*, specifying that the employee from and after a future date will no longer render service under the contract by reason of *Lab. Code § 2855(a)*. Any party to the contract has the right to recover damages for breach of contract, including damages from the failure to render all of the required personal service in the production of a specified quantity of phonorecords [*Lab. Code § 2855(b)*].

[3] Specific Performance

Generally, an obligation to render personal service or to employ another in personal service cannot be specifically enforced [*Civ. Code § 3390(1), (2)*; *Lyon v. Goss (1942) 19 Cal. 2d 659, 674-675, 123 P. 2d 11]* . Courts have reasoned that enforcement of these contracts may conflict with constitutional prohibitions against involuntary servitude and that they may be inconvenient or impossible to enforce [*Poultry Producers etc. v. Barlow (1922) 189 Cal. 278, 288-289, 208 P. 93]* .

For further discussion and a form of affirmative defense for use in an answer to a complaint for specific performance, see Ch. 528, *Specific Performance* .

[4] Injunction

As discussed at *§ [3], above,* an obligation to render personal services cannot be specifically enforced [*Civ. Code § 3390(1)*], and ordinarily an injunction cannot be granted to prevent the breach of a contract that is not specifically enforceable [*see Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(b)(5)*]. However, an injunction may be granted to prevent the breach of a contract in writing for the rendition of personal services from one to another if the promised service is of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law, and if the compensation for the personal services is as follows [*Civ. Code § 3423(e)*]:

(1) Regarding contracts entered into on or before December 31, 1993, the minimum compensation provided in the contract for the personal services is at the rate of six thousand dollars ($6,000) per annum.

(2) Regarding contracts entered into on or after January 1, 1994, the criteria of either (A) or (B), below, are satisfied:

(A) The compensation is as follows:

(i) The minimum compensation provided in the contract is at the rate of nine thousand dollars ($9,000) per annum for the first year of the contract, twelve thousand dollars ($12,000) per annum for the second year of the contract, and fifteen thousand dollars ($15,000) per annum for the third to seventh years, inclusive, of the contract.

(ii) In addition, after the third year of the contract, there has actually been paid for the services through and including the contract year during which the injunctive relief is sought, over and above the minimum contractual compensation specified in clause (i), the amount of fifteen thousand dollars ($15,000) per annum during the fourth and fifth years of the contract, and thirty thousand dollars ($30,000) per annum during the sixth and seventh years of the contract. As a condition to petitioning for an injunction, amounts payable under this clause may be paid at any time prior to seeking injunctive relief.

(B) The aggregate compensation actually received for the services provided, under a contract that does not meet the criteria of subparagraph (A), is at least 10 times the applicable aggregate minimum amount specified in clauses (i) and (ii) of subparagraph (A) through and including the contract year during which the injunctive relief is sought. As a condition to petitioning for an injunction, amounts payable under this subparagraph may be paid at any time prior to seeking injunctive relief.

Compensation paid in any contract year in excess of the minimums specified by *Civ. Code § 3423(e)(2)(A)* or *(B)* reduces the compensationotherwise required to be paid under those provisions in any subsequent contract years [*Civ. Code § 3423(e)(3)*]. For further discussion and a complaint enjoining

a breach of a personal services contract, see Ch. 528, *Specific Performance* . For a discussion and forms relating to injunctions generally, see Ch. 303, *Injunctions* .

[5] Accounting by Employee

An employee is required to render just accounts of all transactions in the course of his or her service, as often as is reasonable. The employee must also give prompt notice, without demand, of everything that the employee receives for the account of the employer [*Lab. Code § 2861*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesEquitable AccountingsGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewContracts LawRemediesSpecific PerformanceContracts LawTypes of ContractsPersonal Service AgreementsLabor & Employment LawEmployment RelationshipsAt-Will EmploymentDuration of Employment

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AUTHOR: Richard P. Hill Editorial Consultant

[Reserved]

§§ 249.36[Reserved]

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21-249 California Forms of Pleading and Practice--Annotated § 249.40

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.40 Related Matthew Bender Publications

[1] California Points and Authorities

For memoranda of points and authorities relating to amended and supplemental pleadings, see California Points and Authorities, Ch. 16, *Amended and Supplemental Pleadings*

For memoranda of points and authorities relating to contracts generally, see California Points and Authorities, Ch. 50, *Contracts*

For memoranda of points and authorities relating to damages generally, see California Points and Authorities, Ch. 65, *Damages*

For memoranda of points and authorities relating to demurrers and motions for judgment on the pleadings, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*

For memoranda of points and authorities relating to wrongful discharge, see California Points and Authorities, Ch. 100, *Employer and Employee* , pt. 1

For memoranda of points and authorities relating to fictitious defendants generally, see California Points and Authorities, Ch. 104, *Fictitiously Named Defendants (Does*)

For memoranda of points and authorities relating to jurisdiction generally, see California Points and Authorities, Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* and Ch. 133, *Jurisdiction: Subject Matter Jurisdiction*

For memoranda of points and authorities relating to venue generally, see California Points and Authorities, Ch. 238, *Venue*

For memoranda of points and authorities relating to assault and battery generally, see California Points and Authorities, Ch. 21, *Assault and Battery*

For memoranda of points and authorities relating to constitutional guarantees of equal protection, see California Points and Authorities, Ch. 35, *Civil Rights* , pt. II

For memoranda of points and authorities relating to fraud actions generally, see California Points and Authorities, Ch. 105, *Fraud and Deceit*

For memoranda of points and authorities relating to libel and slander actions generally, see California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*

For memoranda of points and authorities relating to intentional infliction of emotional distress, see California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress*

For memoranda of points and authorities relating to principal and agent issues, see California Points and Authorities, Ch. 182, *Principal and Agent*

[2] California Employment Law

For discussion of liability for wrongful termination and discharge, see Wilcox, California Employment Law, Ch. 60

For discussion of bringing and defending wrongful termination claims, including a form of complaint for use in actions for wrongful discharge or discipline, see Wilcox, California Employment Law, Ch. 61

For discussion of procedures for an employer to avoid wrongful termination and discipline claims, see Wilcox, California Employment Law, Ch. 62

For discussion of causes of action related to wrongful termination, see Wilcox, California Employment Law, Ch. 63

For discussion relating to actions against employers under *Lab. Code §§ 970* and *1050*, see Wilcox, California Employment Law, Ch. 63

For further discussion and forms relating to employee competition with his or her employer, see Wilcox, California Employment Law, Ch. 70

[3] California Torts

For general discussion of fraud and deceit, see Levy, Golden, and Sacks, California Torts, Ch. 40, pt. A

For discussion of wrongful termination, see Levy, Golden, and Sacks, California Torts, Ch. 40, pt. E

For discussion of breach of the implied covenant of good faith and fair dealing, see Levy, Golden, and Sacks, California Torts, Ch. 40, pt. F

For general discussion of assault and battery, see Levy, Golden, and Sacks, California Torts, Ch. 41

For general discussion of intentional infliction of emotional distress, see Levy, Golden, and Sacks, California Torts,

Ch. 44

For general discussion of defamation, see Levy, Golden, and Sacks, California Torts, Ch. 45

For general discussion of prejudgment interest in tort actions, see Levy, Golden, and Sacks, California Torts, Ch. 50, pt. D

For general discussion of tort damages, see Levy, Golden, and Sacks, California Torts, Chs. 50, pt. A, and 51

For discussion of discounting of future damage awards generally, see Levy, Golden, and Sacks, California Torts, Ch. 52, pt. C.

For complete discussion of punitive damages, see Levy, Golden, and Sacks, California Torts, Ch. 54

For discussion of mitigation of damages and collateral source rule generally, see Levy, Golden, and Sacks, California Torts, Ch. 53

[4] Other Matthew Bender Publications

Larson & Borowsky, Unjust Dismissal

California Employers' Guide to Employee Handbooks and Personnel Policy Manuals

Tyler M. Paetkau, *Emerging Employment Law Considerations as a Result of the September 11th Terrorist Attacks*, California Employment Law Reporter, Dec. 2001 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWrongful TerminationGeneral OverviewLabor & Employment LawWrongful TerminationBreach of ContractGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressGeneral Overview

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21-249 California Forms of Pleading and Practice--Annotated § 249.41

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.41 Federal Statutes

Prohibition against discharge of employee based on garnishment of wages to satisfy any one indebtedness. *15 U.S.C. § 1674*

Prohibition against discharge or discrimination based on employee participation in proceedings under Toxic Substances Control Act (*15 U.S.C. §§ 2601-2654*). *15 U.S.C. § 2622*

Prohibition against discharge of permanent employees because of actual or scheduled federal jury service. *28 U.S.C. § 1875*

Jurisdiction of courts in matters affecting employer and employee. *29 U.S.C. §§ 101-115*

Labor-management relations. *29 U.S.C. §§ 141-187*

Prohibition against discharge based on union activity or other concerted activity relating to employees' common interests, or exercise of any rights under National Labor Relations Act (*29 U.S.C. §§ 151-169*). *29 U.S.C. § 158*

Prohibition against discharge or other discrimination based on employee's participation in proceedings under the Fair Labor Standards Act (*29 U.S.C. §§ 201-219*). *29 U.S.C. §§ 215* (prohibition), 216 (remedies)

Labor-management reporting and disclosure procedure. *29 U.S.C. §§ 401-531*

Age discrimination in employment. *29 U.S.C. §§ 621-634*

Discharge or discrimination based on participation in proceedings under Occupational Safety and Health Act (*29 U.S.C. §§ 651-678*). *29 U.S.C. § 660(c)*

Employee Retirement Income Security Act (ERISA; *29 U.S.C. §§ 1001-1461*) prohibits employer from discharging, fining, suspending, expelling, disciplining, or otherwise discriminating against anyone based on exercise of rights or testimony in proceeding related to ERISA. *29 U.S.C. § 1140*

Employee Retirement Income Security Act (*29 U.S.C. §§ 1001-1461*) preempts state-law actions insofar as they relate to employee benefit plan as defined under ERISA. *29 U.S.C. § 1144*

Prohibition against discharge, discipline, or other discrimination in violation of employee's rights under Employee Polygraph Protection Act of 1988 (*29 U.S.C. §§ 2001-2009*). *29 U.S.C. § 2002*

Notification requirements for "plant closings" and "mass layoffs" regarding certain employees. *29 U.S.C. §§ 2101-2109*

Prohibition against retaliation by employer against employee for furthering false-claims action. *31 U.S.C. § 3730(h)*

Prohibition against discharge or discrimination based on employee's participation in proceedings to administer or enforce Federal Water Pollution Control Act (*33U.S.C. § 1251 et seq.*). *33 U.S.C. § 1367*

Prohibition against discharge or other discrimination based on employee's commencing, testifying in, or assisting or participating in proceedings under Safe Drinking Water Act (*42 U.S.C. §§ 300f-300j-11*) or comparable state regulations. *42 U.S.C. § 300j-9(i)(1)*

Prohibition against discharge or other discrimination against employee with disability recognized under Americans With Disabilities Act. *42 U.S.C. § 12101 et seq.*

Person who under color of law deprives citizen or other person within jurisdiction of United States of any right, privilege, or immunity under Constitution or statute injures party. *42 U.S.C. § 1983*

Prohibition against discrimination, including discharge, based on race, color, sex, religion, or national origin. *42 U.S.C. § 2000e-2(a)*

Prohibition against retaliation against employee who opposes any practice prohibited by Title VII of Civil Rights Act of 1964 (*42 U.S.C. §§ 2000e-2000e-17*) or who participates in proceedings under Title VII. *42 U.S.C. § 2000e-3(a)*

Remedies under Title VII of Civil Rights Act of 1964 (*42 U.S.C. §§ 2000e-2000e-17*). *42 U.S.C. § 2000e-5(g), (k)*

Prohibition against discrimination against employee who participates in proceeding under Energy Reorganization Act (*42 U.S.C. §§ 5801-5891*) or Atomic Energy Act of 1954 (*42 U.S.C. § 2011 et seq.*). *42 U.S.C. § 5851*

Prohibition against discharge or other discrimination based on employee's filing, instituting, or testifying in proceedings under Solid Waste Disposal Act (*42 U.S.C. § 6901 et seq.*). *42 U.S.C. § 6971*

Prohibition against discharge or other discrimination based on employee's participation in any proceedings related to Clean Air Act (*42 U.S.C. §§ 7401-7642*). *42 U.S.C. § 7622*

Prohibition against discharge or other discrimination based on employee's providing information, instituting proceeding, or testifying in any proceeding under Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund Act) (*42 U.S.C. §§ 9601-9657*). *42 U.S.C. § 9610*

Prohibition against discharge or other discrimination based on employee's participation in proceedings under Federal

Railroad Safety Act (*45 U.S.C. §§ 421-444*). *45 U.S.C. § 441*

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-249 California Forms of Pleading and Practice--Annotated § 249.42

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.42 State Statutes

Prohibition against discharging or taking disciplinary action against employee because of judicially ordered wage assignment for child, spousal, or family support. *Fam. Code § 5290*

Discharge or discipline because of wage assignment for health insurance coverage of supported child. *Fam. Code § 3769*

Discharge or other discrimination against employee based on absence from work caused by required attendance in school class from which employee's child was suspended. *Educ. Code § 48900.1*; *Lab. Code § 230.7*

Suspension or termination of employee because of absence to serve as election officer on election day. *Elec. Code § 12312*

Discrimination against employee for membership in, or performance of service as part of, Civil Air Patrol. Gov. Code § *Gov. Code § 1502*.

Retaliatory discharge or discrimination based on disclosure of information or other cooperation with prosecution of violation of laws prohibiting filing of false claims against government entity. *Gov. Code § 12653*

Discrimination, including termination, based on ancestry, color, marital status, medical condition, national origin, physical and mental disability, race, religion, sex, age, sexual orientation. *Gov. Code § 12940(a)*

Discrimination, including termination, against certain health-care workers because of compliance with report requirements under *Penal Code § 11161.8*regarding abuse or neglect of patient. *Gov. Code § 12940(g)*; *Penal Code § 11161.8*

Age discrimination through use of salary as criterion for terminating employees, if use of that criterion adversely impacts older workers. *Gov. Code § 12941*

Employer's duty to provide leave and to reasonably accommodate female employee disabled by pregnancy, childbirth, or related medical condition. *Gov. Code § 12945*

Remedies for violations of Fair Employment and Housing Act (*Gov. Code §§ 12900-12996*). *Gov. Code § 12965(b)*

Penalizing health-care workers because of refusal to participate in performance of abortions. *Health & Safety Code § 123420(a)*

Discrimination against health-care employee with staff privileges because of participation in performance of abortions elsewhere. *Health & Safety Code § 25955(a)* (operative until January 1, 1991)

Discharge or other discrimination based on employee's filing of bona fide complaint or institution of proceeding with Labor Commissioner, or testifying in Labor Commission proceeding. *Lab. Code §§ 98.6* (prohibition), *98.7* (remedies)

Discrimination, including discharge or threats of discharge, regarding worker's compensation claim. *Lab. Code § 132a*

Prohibition of discrimination or other retaliation against employee based on absence from work to serve as juror, to attend court as witness, or to attend court in attempt to obtain relief from domestic violence or sexual assault. *Lab. Code § 230*

Prohibition, if employer has at least 25 employees, of discharge or discrimination against employee who is victim of domestic violence or sexual assault for taking time off from work to seek medical attention and other services, or to take actions to increase safety from future domestic violence or sexual assault. *Lab. Code § 230.1(a)*

Prohibition against discharge of or discrimination against employee for taking time off from work to attend judicial proceedings related to certain felonies perpetrated against employee, member of employee's immediate family, employee's domestic partner, or domestic partner's child. *Lab. Code § 230.2*

Prohibition against discharge of or discrimination against employee for taking time off to perform emergency duty as volunteer firefighter, reserve peace officer, or emergency rescue personnel. *Lab. Code § 230.3*

Prohibition against discharging or discriminating against employee for taking time off, as specified, to visit child's school or day-care center. *Lab. Code § 230.8*

Discharge, discipline, or other discrimination based on employee's disclosure of amount of compensation. *Lab. Code § 232*

Prohibition against requiring polygraph tests as condition of employment or continued employment. *Lab. Code § 432.2(a)*

Use of records regarding arrest or detention not resulting in conviction to determine any condition of employment, including termination. *Lab. Code § 432.7(a)*

Coercing employee or applicant to patronize employer or any other person, in purchase of anything of value, or to pay fee in connection with application for employment. *Lab. Code §§ 450* (prohibition), 451 (misdemeanor offense)

Prohibition against termination because of disclosure of illiteracy. *Lab. Code § 1044*

Making or enforcing policy that prevents employees from engaging in political activities or from running for public office, or that controls employees' political activities. *Lab. Code § 1101*

Attempting to coerce or influence employees' political activities by means of threat of discharge. *Lab. Code § 1102*

Preventing disclosure, or retaliating against employee for disclosing, information to government or law enforcement agency, when information concerns employer's violation of law. *Lab. Code § 1102.5*

Notice requirements for mass layoffs, relocations, and terminations. *Lab. Code § 1400 et seq.*

Termination because of employee's refusal to enter into agreement assigning rights to invention as condition of employment or continued employment, in violation of *Lab. Code § 2870*. *Lab. Code § 2871*

Events terminating employment. *Lab. Code § 2920*

At will employment; definition of specified employment term. *Lab. Code § 2922*

Termination of employment for specified term based on willful breach of duty, habitual neglect, or continued incapacity of employee. *Lab. Code § 2924*

At will employee is entitled to compensation for service rendered up to time of dismissal. *Lab. Code § 2926*

Termination based on threatened garnishment of wages or actual garnishment for any one indebtedness. *Lab. Code § 2929(b)*

Employer who disciplines or fires employee based on report of shopping investigator (person employed to shop in order to test integrity of store employees) required to provide employee with copy of report prior to discipline or termination. *Lab. Code § 2930(a)*

Discrimination against employee who makes complaints about workplace safety, who participates in an occupational safety and health committee established under *Lab. Code § 6401.7*, or who institutes or testifies in proceedings under California Occupational Safety and Health Act (*Lab. Code §§ 6300-6711*). *Lab. Code § 6310*

Termination or layoff based on refusal to work in conditions that violate provisions of California Occupational Safety and Health Act (*Lab. Code §§ 6300-6711*). *Lab. Code § 6311*

Employee claiming violation of *Lab. Code § 6310* or *6311* (prohibiting discrimination based on assertion of rights under Cal OSHA) is entitled to file complaint with California Labor Commissioner, pursuant to procedures set out in *Lab. Code § 98.7*. *Lab. Code § 6312*

Discrimination against military officers because of performance of any ordered military duty or training. *Mil. & Vet. Code § 394*

Discharge or other discrimination based on person's having sought information concerning legal rights from Employment Development Department, cooperated with a departmental investigation, or testified in any proceedingbrought pursuant to Unemployment Insurance Code or Labor Code. *Unemp. Ins. Code § 1237*

Specific performance and injunctive relief. *Civ. Code §§ 3390, 3423*

Misrepresentation by former employer to prevent former employee from obtaining employment as unlawful. *Lab. Code § 1050*

Liability for knowingly causing, suffering, or permitting agent, superintendent, manager, or employee to violate *Lab. Code § 1050*, or failing to take all reasonable steps to prevent the violation. *Lab. Code § 1052*

Truthful statements about employee's discharge or reason for leaving service not prohibited by *Lab. Code §§ 1050* and *1052*. *Lab. Code § 1053*

Liability for treble damages resulting from misrepresentation in violation of *Lab. Code § 1050*. *Lab. Code § 1054*

Obligation to render personal service not specifically enforceable. *Civ. Code § 3390(1)*

Injunction not to be granted to prevent breach of contract except in case of certain contracts to render personal service. *Civ. Code § 3423*

Contract to render personal service not enforceable against employee beyond seven years after commencement of service. *Lab. Code § 2855(a)*

Enforceability of contract to render personal service in production of phonorecords; action for damages for breach of contract. *Lab. Code § 2855(b)*

Employment contract. *Lab. Code §§ 2750-2752*

Employer's obligations. *Lab. Code §§ 2800-2805*

Employee's obligations. *Lab. Code §§ 2850-2866*

Attorney's fees. *Civ. Code § 1717*

Interest as damages. *Civ. Code §§ 3287-3291*

Measure of damages based on breach of contract. *Civ. Code §§ 3300-3318*

Measure of damages based on cause of action in tort. *Civ. Code §§ 3333-3343.5*

Punitive damages. *Civ. Code § 3294*

Damages recoverable for deceit. *Civ. Code § 1709*

Elements of actionable fraud. *Civ. Code § 1710*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewContracts LawRemediesSpecific PerformanceLabor & Employment LawDiscriminationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationGeneral OverviewWorkers' Compensation & SSDICoverageActions Against EmployersRetaliatory Discharge

California Forms of Pleading and Practice--Annotated

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 249 EMPLOYMENT LAW: TERMINATION AND DISCIPLINE
PART III. RESEARCH GUIDE

21-249 California Forms of Pleading and Practice--Annotated § 249.43

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§ 249.43 Decisions

[1] At Will Employment

Summary judgment for employer proper in wrongful discharge action based on breach of employment contract, when plaintiff conceded that defendant never told her she could be terminated only for cause, discharge was conducted as part of legitimate reduction in work force, and plaintiff had received unfavorable performance evaluations. *Schneider v. TRW, Inc. (9th Cir. 1991) 938 F.2d 986, 993*

Application of at will rule depends on actual existence of employment relationship; employer cannot defend breach of contract action by prospective employee by demonstrating that employment would have been "at will." *Comeaux v. Brown & Williamson Tobacco Co. (9th Cir. 1990) 915 F.2d 1264, 1270*

Employment contract stating that employment is "at will" and terminable "at any time" unambiguously creates at-will employment relationship, even if it does not also state that termination can be without cause. *Dore v. Arnold Worldwide, Inc. (2006) 39 Cal. 4th 384, 389-393, 46 Cal. Rptr. 3d 668*

Unless otherwise agreed to by the parties, a contract of indefinite duration is generally terminable at will. *Jennings v. Marralle (1994) 8 Cal. 4th 121, 129, 32 Cal. Rptr. 2d 275, 876 P.2d 1074*

Integrated at will agreement precludes implied contract for termination for cause. *Haggard v. Kimberly Quality Care, Inc. (1995) 39 Cal. App. 4th 508, 521, 46 Cal. Rptr. 2d 16*

Signed acknowledgment that employment is at will can be basis for summary judgment against plaintiff on implied contract claim. *Camp v. Jeffer, Mangels, Butler & Marmaro (1995) 35 Cal. App. 4th 620, 629-630, 41 Cal. Rptr. 2d 329*

Employer's rejection of specific term of employment during negotiations, and stock option agreement reserving

employer's right to terminate with or without good cause, establishes at will employment as matter of law. *Rochlis v. Walt Disney Co. (1993) 19 Cal. App. 4th 201, 211-212, 23 Cal. Rptr. 2d 793*

Implied promise may supersede previous at will agreement embodied in non-integrated document. *McLain v. Great American Ins. Companies (1989) 208 Cal. App. 3d 1476, 1483-1487, 256 Cal. Rptr. 863*

Exercise of *First Amendment* rights are not dependent on one's tenure or status as at will officer or employee. *Young v. County of Marin (1987) 195 Cal. App. 3d 863, 869, 241 Cal. Rptr. 169* (reversing dismissal of public employee's complaint for wrongful termination, because dismissal arose from her exercise of constitutional rights of free speech)

Public employer as prohibited from disciplining or discharging public employee for expressive conduct protected by *U.S. Const., amends. I* and *XIV*; however, speech that results in disruption, materially interferes with employment activities, or impairs discipline as not protected by constitutional prohibition. *Franklin v. Leland Stanford Junior University (1985) 172 Cal. App. 3d 322, 336, 342, 218 Cal. Rptr. 228*

Written employment contract under which employee could be terminated at will precludes, as matter of law, contradictory implied promise to retain him until retirement. *Malmstrom v. Kaiser Aluminum & Chemical Corp. (1986) 187 Cal. App. 3d 299, 231 Cal. Rptr. 820*

Language in letter of understanding, in which employer stated, "We look forward to a long, pleasant, and mutually satisfactory relationship with you," purported by employee to establish promise of termination only for cause, constitutes merely hopeful and polite salutation. *Hillsman v. Sutter Community Hospitals (1984) 153 Cal. App. 3d 743, 748, 750, 200 Cal. Rptr. 605*

Application of *Lab. Code § 2922* (employment contract terminable at will) to plaintiff's termination is not unconstitutional denial of property right in continued employment. *Shapiro v. Wells Fargo Realty Advisors (1984) 152 Cal. App. 3d 467, 483, 199 Cal. Rptr. 613*

Written employment policy may be basis to rebut presumption of at will employment. *Shapiro v. Wells Fargo Realty Advisors (1984) 152 Cal. App. 3d 467, 481-482, 199 Cal. Rptr. 613* (finding, however, that under facts of case plaintiff did not produce any written document showing any status other than at will employment)

Employment-at will presumption may be rebutted by evidence of promise by employer that employee could be terminated only for cause. *Rabago-Alvarez v. Dart Industries, Inc. (1976) 55 Cal. App. 3d 91, 96-97, 127 Cal. Rptr. 222* ; *Drzewiecki v. H & R Block, Inc. (1972) 24 Cal. App. 3d 695, 703-704, 101 Cal. Rptr. 169*

[2] Constructive Discharge

Replacing employee with younger worker, moving to smaller office, excluding from meetings and decisions did not constitute constructive termination under federal age discrimination law. *Schnidrig v. Columbia Machine, Inc. (9th Cir. 1996) 80 F.3d 1406, 1411-1412*

Demotion in job level, even when accompanied by reduction in pay does not constitute constructive discharge. *King v. AC&R Advertising (9th Cir. 1995) 65 F.3d 764, 767*

Lack of promotion, even if it is result of gender discrimination, does not by itself establish such intolerable working conditions as to support claim of constructive discharge. *Cloud v. Casey (2000) 76 Cal. App. 4th 895, 902-905, 90 Cal. Rptr. 2d 757*

Denial of training and demotion not sufficiently intolerable to avoid summary judgment on constructive discharge claim. *Addy v. Bliss & Glennon (1996) 44 Cal. App. 4th 205, 218-219*

Statute of limitations on constructive discharge action began to run when adverse employment decision was communicated to plaintiff, and not when she resigned over one year later; no intolerable acts occurred during limitations period. *Regents of University of California v. Superior Court (1995) 33 Cal. App. 4th 1710, 1720-1723, 39 Cal. Rptr. 2d 919*

Employee failed to establish constructive discharge; demotion, as a matter of law, not enough to compel reasonable person to resign, and working conditions were not intolerable; embarrassment about working in lower position did not convert demotion to constructive discharge, as proper focus is on working conditions and not on subjective reaction to working conditions; employer must deliberately create intolerable working conditions or must know about them and fail to remedy the situation so as to force employee to resign. *Gibson v. Aro Corp. (1995) 32 Cal. App. 4th 1628, 1634-1640, 38 Cal. Rptr. 2d 882*

Constructive discharge required plaintiff to plead and prove that employer either intentionally created or knowingly permitted working conditions so intolerable or aggravated at time of employee's resignation that reasonable employer would recognize that reasonable person in employee's position would be compelled to resign. *Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022*

Tortious constructive discharge is established by proof that: (1) actions and conditions that caused employee to resign were violative of public policy, (2) actions and conditions were so intolerable or aggravated at time of employee's resignation that reasonable person in employee's position would have resigned, and (3) facts and circumstances show that employer had actual or constructive knowledge of intolerable actions and conditions and of their impact on employee and could have remedied situation. *Brady v. Elixir Industries (1987) 196 Cal. App. 3d 1299, 1306, 242 Cal. Rptr. 324* (modified by *Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1248-1252)*

Constructive discharge occurs when employer deliberately causes or allows employee's working conditions to become so intolerable that employee is forced into involuntary resignation; coerced resignation is tantamount todischarge. *Smith v. Brown-Forman Distillers Corp. (1987) 196 Cal. App. 3d 503, 513, 241 Cal. Rptr. 916*

[3] Damages

One-to-one ratio between compensatory and punitive damages was federal constitutional limit in FEHA discrimination and harassment case involving relatively low degree of reprehensibility of defendant's conduct and substantial compensatory damages award, which included substantial amount of noneconomic damages, which itself may have included punitive component. *Roby v. McKesson Corp. (Nov. 30, 2009) 47 Cal. 4th 686, 101 Cal. Rptr. 3d 773, 219 P.3d 749, 2009 Cal. LEXIS 12374, at *49, *63-*64*

For purposes of imposing punitive-damages liability on corporation for conduct of its managing agent under *Civ. Code § 3294(b)*, "managing agent" is corporate employee who exercises substantial independent authority and judgment in making decisions that ultimately determine corporate policy; mere power to hire and fire employees is not sufficient to establish such authority. *White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 567, 573-577, 88 Cal. Rptr. 2d 19, 981 P.2d 944*

In deciding reasonableness of plaintiff's effort to mitigate damages, jury may consider employee's failure to retain comparable employment once it has been secured. *Stanchfield v. Hamer Toyota, Inc. (1995) 37 Cal. App. 4th 1495, 1502, 44 Cal. Rptr. 2d 565*

Court generally will not reverse factfinder's damages determination, even when there is disparity between opposing experts' estimates and there are methodological disagreements. *Wanland v. Los Gatos Lodge, Inc. (1991) 230 Cal. App. 3d 1507, 1518-1519, 281 Cal. Rptr. 890*

In action for wrongful termination in violation of public policy based on racial harassment under California Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*), employer's failure to act on employee's complaints about harassment by coworkers and retaliation for such complaints constitutes ratification, subjecting employer to punitive damages. *Roberts v. Ford Aerospace & Communications Corp. (1990) 224 Cal. App. 3d 793, 801, 274 Cal. Rptr. 139*

Award of tort damages in wrongful termination action based on breach of covenant of good faith and fair dealing is required to be reversed based on holding in *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 663, 700, 254 Cal. Rptr. 211, 765 P.2d 373* , that such awards are improper. *Carpiaux v. Peralta Community College Dist. (1989) 215 Cal. App. 3d 1220, 1224-1225, 264 Cal. Rptr. 208*

Under California law, wrongfully discharged employee has duty to act reasonably to minimize damages flowing from wrongful discharge, and question whether injured party acted reasonably as one of fact; however, fact that former employee refused former employer-defendant's unconditional offer to reemploy as not defeating employee's right to recover damages for any period after offer was made, when there was substantial evidence to support jury's finding that reinstatement was not reasonable alternative mandated by duty to mitigate damages. *Ortiz v. Bank of America Nat. Trust and Sav. Ass'n (9th Cir. 1987) 824 F.2d 692, 695*

Compensatory and punitive damages are not available under Age Discrimination in Employment Act of 1967 (*29 U.S.C. §§ 621-634*), but are recoverable in pendent state claim alleging breach of covenant of good faith and fair dealing. *Cancellier v. Federated Dep't Stores (9th Cir. 1982) 672 F.2d 1312, 1318 , cert. denied, 459 U.S. 859 (1982)*

Holding in Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 663, 700, 254 Cal. Rptr. 211, 765 P.2d 373 , that tort remedies are not available in employment actions for breach of implied covenant of good faith and fair dealing, is retroactive in application. *Newman v. Emerson Radio Corp. (1989) 48 Cal. 3d 973, 993, 258 Cal. Rptr. 592, 772 P.2d 1059*

Tort remedies are unavailable for breach of implied covenant of good faith and fair dealing in employment contracts; plaintiff is limited to recovery of contract remedies only with regard to that cause of action. *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 663, 700, 254 Cal. Rptr. 211, 765 P.2d 373*

Former employee discharged in violation of implied employment contract is not required to mitigate damages by accepting alternative position that offered same wage and pension rates as original position, but was located far from her home, requiring her to rent extra apartment and incur other expenses. *Cunningham v. Retail Clerks Union (1983) 149 Cal. App. 3d 296, 307, 196 Cal. Rptr. 769*

Measure of recovery in employee's action for damages based on wrongful discharge. *Carroll v. Civil Service Com. (1973) 31 Cal. App. 3d 561, 565, 107 Cal. Rptr. 557*

Mitigation of damages by wrongfully discharged employee. *Parker v. Twentieth Century-Fox Film Corp. (1970) 3 Cal. 3d 176, 181-182, 182 n.5, 184, 89 Cal. Rptr. 737, 474 P.2d 689*

Employee terminated in violation of *Lab. Code § 923* (rights regarding labor-organization membership) is entitled to tort damages as well as injunctive relief. *Wetherton v. Growers Farm Labor Ass'n (1969) 275 Cal. App. 2d 168, 175, 79 Cal. Rptr. 543* ; *Glenn v. Clearman's Golden Cock Inn (1961) 48 L.R.R.M. (BNA) 2779, 192 Cal. App. 2d 793, 797, 13 Cal. Rptr. 769*

Plaintiff seeking damages required to mitigate. *Ash v. Soo Sing Lung (1918) 177 Cal. 356, 361-362, 170 P. 843*

[4] Discovery

Plaintiff's right to production of personnel files of former coemployees is restricted by those employees' right to privacy under *Cal. Const., art. I, § 1*; plaintiff is required to show compelling public need for discovery of particular documents and inability to obtain documents through less intrusive means or from nonconfidential sources. *Harding Lawson Associates v. Superior Court (1992) 10 Cal. App. 4th 7, 10, 12 Cal. Rptr. 2d 538* ; *El Dorado Savings & Loan Assn. v. Superior Court (1987) 190 Cal. App. 3d 342, 345-346, 235 Cal. Rptr. 303*

[5] Employment Contracts

Employee handbook and service and operations manual provisions regarding at will employment are not tantamount to express integrated agreement foreclosing evidence of contrary agreement to discharge for cause only; those provisions are factors to be considered in determining existence and content of employment agreement. *Wilkerson v. Wells Fargo Bank (1989) 212 Cal. App. 3d 1217, 1226-1228, 261 Cal. Rptr. 185* (disapproved on other grounds in *Cotran v. Rollins Hudig Hall International, Inc. (1998) 17 Cal. 4th 93, 102-103, 69 Cal. Rptr. 2d 900, 948 P.2d 412*)

Summary judgment for employer was proper in employee's action for breach of contract because, even if employer's personnel policies became part of employment contract, plaintiff failed to show connection between employer's violation of personnel policy requiring written reprimand for absenteeism, and plaintiff's termination for unauthorized entry into restricted area to read confidential personnel materials. *Burton v. Security Pacific Nat. Bank (1988) 197 Cal. App. 3d 972, 977-978, 243 Cal. Rptr. 277*

Although covenant of good faith and fair dealing may supply requirement of good cause for termination when contract is silent or ambiguous on that subject, there is no implied covenant when written contract expressly provides that it may be terminated at will or for any reason on notice. *Gerdlund v. Electronic Dispensers International (1987) 190 Cal. App. 3d 263, 277-278, 235 Cal. Rptr. 279* (agreement with nonemployee sales representative)

Contract of employment made in light of, and incorporating, provisions of *Lab. Code §§ 1101-1105*; if employer violates *Lab. Code § 1101*, employee has right of action for damages for breach of employment contract. *Lockheed Aircraft Corp. v. Superior Court (1946) 28 Cal. 2d 481, 486, 171 P.2d 21*

Enforcement of employment contract against professional athlete. *Lemat Corp. v. Barry (1969) 275 Cal. App. 2d 671, 678-680, 80 Cal. Rptr. 240*

Enforcement of employment contract against recording artist. *Foxx v. Williams (1966) 244 Cal. App. 2d 223, 235-237, 52 Cal. Rptr. 896*

Time limit in *Lab. Code § 2855* is seven calendar years and not seven years of service. *De Haviland v. Warner Bros. Pictures (1944) 67 Cal. App. 2d 225, 232, 153 P.2d 983*

Words "may not" in *Lab. Code § 2855* are mandatory. *De Haviland v. Warner Bros. Pictures (1944) 67 Cal. App. 2d 225, 232, 153 P.2d 983*

[6] Good Cause for Termination

When employee discharged for cause denies misconduct that was basis for decision to terminate, proper standard to be

applied by trier of fact is not whether alleged misconduct actually happened, but rather whether employer had reasonable grounds for believing that it happened, thoroughly investigated, and otherwise acted fairly. *Cotran v. Rollins Hudig Hall International, Inc. (1998) 17 Cal. 4th 93, 109, 69 Cal. Rptr. 2d 900, 948 P.2d 412*

Point at which employee's outside activities give rise to conflict of interest, creating good cause for termination, is dependent upon particular circumstances of case, with appropriate deference to legitimate exercise of managerial discretion. *Stokes v. Dole Nut Co. (1995) 41 Cal. App. 4th 285, 48 Cal. Rptr. 2d 673*

Genuine issue of material fact existed regarding good cause for discharge, where although employer had written policy prohibiting falsification of time cards, employee presented evidence questioning whether policy was followed and uniformly applied and that it was common practice to pay employees for their expenses by adding hours to timecards. *Breitman v. May Co. California (9th Cir. 1994) 37 F.3d 562, 564-565*

In wrongful termination action brought by employee of 191/2 years, triable issue of material fact as existing based on whether termination for violating medical-leave policy constituted good cause, when defendant had discretion to apply exceptions to that particular policy. *Walker v. Blue Cross of California (1992) 4 Cal. App. 4th 985, 994-995, 6 Cal. Rptr. 2d 184*

Whether employee's performance was unacceptable and whether good cause for discharge existed as issues that may be determined on summary judgment motion. *Knights v. Hewlett Packard (1991) 230 Cal. App. 3d 775, 780, 281 Cal. Rptr. 295*

Diocese has no duty to apply good cause standard regarding renewal of school administrator's contract because of administrator's years of service or failure to receive negative evaluations since employment contract expressly provided one-year term without obligation to renew. *Tollefson v. Roman Catholic Bishop (1990) 219 Cal. App. 3d 843, 855-857, 268 Cal. Rptr. 550*

Summary judgment for defendant employer is improper when issue of good cause for termination of employee who was to move from California to Tennessee and was terminated prior to starting job was disputed; declarations that employee had made disparaging and demeaning remarks concerning employer as conclusions rather than evidentiary facts, and declarations that employee was inappropriately dressed on employer's premises as involving instances prior to starting date and as not set forth as reason for termination. *Sheppard v. Morgan Keegan & Co. (1990) 218 Cal. App. 3d 61, 66-67, 266 Cal. Rptr. 784*

Court as committing reversible error for excluding evidence by former bank vice president concerning bank's termination policy with regard to employee misconduct and his opinion as to whether termination of plaintiff for misconduct was consistent with such policy. *Wilkerson v. Wells Fargo Bank (1989) 212 Cal. App. 3d 1217, 1229, 1231, 261 Cal. Rptr. 185* (disapproved on other grounds in *Cotran v. Rollins Hudig Hall International, Inc. (1998) 17 Cal. 4th 93, 102-103, 69 Cal. Rptr. 2d 900, 948 P.2d 412*)

Evidence showing that employee was fired because he objected to union contract on ground of illegality is relevant in establishing employer's lack of good cause regarding causes of action for breach of implied-in-fact contract, and breach of implied covenant of good faith and fair dealing; however, such evidence is irrelevant absent showing that employee communicated objection to employer, pursuant to preliminary-fact requirement under *Evid. Code § 403*. *Pugh v. See's Candies, Inc. (1988) 203 Cal. App. 3d 743, 757-758, 250 Cal. Rptr. 195* (*Pugh II*)

Depressed market conditions and corporate reorganization involving transfer of marketing operations to another state are good cause for termination of independent sales representative; courts should not interfere with legitimate exercise of managerial discretion. *Clutterham v. Coachmen Industries, Inc. (1985) 169 Cal. App. 3d 1223, 1226-1227, 215 Cal. Rptr. 795*

Articulation of just cause for discharge requires balance of employer's interest in operating business efficiently and profitably against employee's interest in maintaining employment and public's interest in maintaining proper balance between them. *Crosier v. United Parcel Service, Inc. (1983) 150 Cal. App. 3d 1132, 1139, 198 Cal. Rptr. 361*

Discharged managerial employee failed to meet burden of proof in showing that violation of unwritten policy against fraternization between managerial and nonmanagerial employees by cohabiting with nonmanagerial employeewas not proper cause for dismissal. *Crosier v. United Parcel Service, Inc. (1983) 150 Cal. App. 3d 1132, 1139, 198 Cal. Rptr. 361*

[7] Implied Covenant of Good Faith and Fair Dealing

Cause of action for breach of implied covenant of good faith and fair dealing as available, even if employment relationship is "at will," when plaintiff alleges that conduct other than discharge violated covenant. *Comeaux v. Brown & Williamson Tobacco Co. (9th Cir. 1990) 915 F.2d 1264, 1272*

Express employment agreement stating that contract is terminable at will as preventing invoking of implied covenant of good faith and fair dealing to prevent enforcement of agreement. *DeHorney v. Bank of America Nat. Trust and Sav. (9th Cir. 1989) 879 F.2d 459, 466-467*

There is no tort of bad-faith breach of employment contract; moreover, since implied covenant of good faith and fair dealing cannot impose substantive duties or limits on parties beyond those incorporated in specific terms of their agreement, claim asserting breach of implied covenant in employment context often is either invalid (because it seeks to impose limits on employer's conduct beyond what parties agreed to) or superfluous (because it involves conduct that breached contract terms parties did agree to). *Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 348-352, 100 Cal. Rptr. 2d 352, 8 P.3d 1089*

Since tort damages are no longer available for breach of implied covenant of good faith and fair dealing, such cause of action adds nothing to claim that also alleged breach of contract not to terminate except for good cause. *Aragon-Haas v. Family Security Ins. Services, Inc. (1991) 231 Cal. App. 3d 232, 240, 282 Cal. Rptr. 233*

Implied covenant of good faith and fair dealing does not change unequivocal agreement obligating parties only for one year and not requiring renewal to agreement terminable only on finding of good cause. *Tollefson v. Roman Catholic Bishop (1990) 219 Cal. App. 3d 843, 855-857, 268 Cal. Rptr. 550*

Triable issue of fact exists as to whether employer breached covenant of good faith and fair dealing in terminating employee before job began when employee had quit California job to move to Tennessee to take job with defendant employer. *Sheppard v. Morgan Keegan & Co. (1990) 218 Cal. App. 3d 61, 66-67, 266 Cal. Rptr. 784*

Employer commits contractual breach of implied covenant of good faith and fair dealing by terminating employee for refusing to submit to drug test. *Luck v. Southern Pacific Transportation Co. (1990) 218 Cal. App. 3d 1, 26, 267 Cal. Rptr. 618 , cert. denied, 498 U.S. 939*

Holding in Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 663, 700, 254 Cal. Rptr. 211, 765 P.2d 373 , that tort remedies are not available in employment actions for breach of implied covenant of good faith and fair dealing, is retroactive in application. *Newman v. Emerson Radio Corp. (1989) 48 Cal. 3d 973, 993, 258 Cal. Rptr. 592, 772 P.2d 1059*

Tort remedies are unavailable for breach of implied covenant of good faith and fair dealing in employment contracts;

plaintiff is limited to recovery of contract remedies only with regard to that cause of action. *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 663, 700, 254 Cal. Rptr. 211, 765 P.2d 373*

Jury instructions defining "good faith" and "bad faith," which conformed to generally accepted meanings and gave jury some standards, albeit not only ones, by which to assess employer's state of mind, were not erroneous statements of law. *Pugh v. See's Candies, Inc. (1988) 203 Cal. App. 3d 743, 763-765, 250 Cal. Rptr. 195* (*Pugh II*)

Elements of action for breach of implied covenant are: (1) employee's expectation of benefit from contract, (2) expectation of benefit not dependent on continuous employment relationship that can be terminated for good cause, and (3) bad faith termination coupled with wrongful intent of employer to deprive employee of that benefit of agreement. *Hejmadi v. AMFAC, Inc. (1988) 202 Cal. App. 3d 525, 551, 249 Cal. Rptr. 5*

Summary judgment for employer was proper in employee's action for breach of implied covenant of good faith and fair dealing when undisputed facts showed that employer investigated charge of employee's misconduct and made determination in good faith that misconduct had occurred; ability of employee to prove subsequently that employer's factual finding of misconduct was mistaken did not demonstrate that defendant lacked probable cause to believe employee committed misconduct or lacked good faith belief in truth of charge. *Burton v. Security Pacific Nat. Bank (1988) 197 Cal. App. 3d 972, 979, 243 Cal. Rptr. 277*

In private sector, covenant of good faith and fair dealing is implied in contracts of employment. *Valenzuela v. State of California (1987) 194 Cal. App. 3d 916, 920, 240 Cal. Rptr. 45*

Under special facts of case, public employee, claiming wrongful discharge, stated cause of action for breach of contract and for breach of covenant of good faith and fair dealing. *Green v. City of Oceanside (1987) 194 Cal. App. 3d 212, 225 n.5, 239 Cal. Rptr. 470* (cautioning that as matter of law public employees do not have identical rights and remedies for wrongful termination as private employees)

Although longevity of satisfactory service is helpful to discharged employee to establish cause of action for breach of duty of fairness, that factor as not essential; breach of implied covenant of good faith and fair dealing in employment contracts is established if employer engages in bad-faith action extraneous to contract, combined with employer's intent to frustrate employee's enjoyment of contractual rights. *Prevost v. First Western Bank (1987) 193 Cal. App. 3d 1492, 1502, 239 Cal. Rptr. 161*

Company policies are not construed as defining standards of good faith and fair dealing. *Malmstrom v. Kaiser Aluminum & Chemical Corp. (1986) 187 Cal. App. 3d 299, 321, 231 Cal. Rptr. 820*

Concept of breach of implied covenant of good faith and fair dealing was not extended into field of racial discrimination in employment, which has been entirely occupied by California Legislature in *Gov C §§ 12900-12996*. *Robinson v. Hewlett-Packard Corp. (1986) 183 Cal. App. 3d 1108, 1124-1125, 228 Cal. Rptr. 591*

Discharge of participant under group medical program for exercising right to which that beneficiary is entitled under employee benefit plan was violation of self-insured company's duty of good faith and fair dealing. *Wayte v. Rollins International, Inc. (1985) 169 Cal. App. 3d 1, 17-18, 215 Cal. Rptr. 59*

Covenant of good faith and fair dealing is implied in employment contracts; duty of fair dealing requires application of employer's rules and regulations for employee's benefit. *Rulon-Miller v. International Business Machines Corp. (1984) 162 Cal. App. 3d 241, 247-248, 208 Cal. Rptr. 524* (disapproved by *Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 351, 100 Cal. Rptr. 2d 352, 8 P.3d 1089* for suggestion that implied covenant of good faith and fair dealing may impose limits on employer's termination rights beyond those expressed or implied in fact in employment contract itself; disapproved by *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 663, 254 Cal. Rptr. 211, 765 P.2d 373*

for holding that tort remedies available for breach of implied covenant)

Fellow employees are not accountable for employer's breach of implied-in-law covenant of good faith and fair dealing, but are possibly liable for wrongful interference with business relationship and wrongful inducement of breach of contract in termination of at will employee. *Cleary v. American Airlines, Inc. (1980) 111 Cal. App. 3d 443, 456, 168 Cal. Rptr. 722* (disapproved by *Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 351, 100 Cal. Rptr. 2d 352, 8 P.3d 1089* for suggestion that implied covenant of good faith and fair dealing may impose limits on employer's termination rights beyond those expressed or implied in fact in employment contract itself; disapproved by *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 685-700, 254 Cal. Rptr. 211, 765 P.2d 373* for holding that tort remedies available for breach of implied covenant)

Employment contracts contain implied covenant of good faith and fair dealing that neither party will do anything that will injure right of other to receive benefits of agreement. *Cleary v. American Airlines, Inc. (1980) 111 Cal. App. 3d 443, 453, 168 Cal. Rptr. 722* (disapproved by *Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 351, 100 Cal. Rptr. 2d 352, 8 P.3d 1089* for suggestion that implied covenant of good faith and fair dealing may impose limits on employer's termination rights beyond those expressed or implied in fact in employment contract itself; disapproved by *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 685-700, 254 Cal. Rptr. 211, 765 P.2d 373* for holding that tort remedies available for breach of implied covenant)

[8] Implied Promise to Terminate Only for Good Cause

Employee as not converting at will employment relationship into one allowing termination only for cause by showing that he or she left attractive prior employment to take new job, unless employee shows that he or she gave up prior employment only after *explicitly* bargaining with employer to do so in exchange for promise of termination-only-for-cause contract. *Comeaux v. Brown & Williamson Tobacco Co. (9th Cir. 1990) 915 F.2d 1264, 1272 n.8*

Employer as impliedly promised by actions that employee would be treated fairly and not be laid off except in accordance with personnel policies and procedures. *Kern v. Levolor Lorentzen, Inc. (9th Cir. 1990) 899 F.2d 772, 776*

Employee's mere passage of time in employer's service, even when marked with tangible indications that employer approves employee's work, cannot alone form an implied-in-fact contract to be terminated only for good cause. *Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 341-343, 100 Cal. Rptr. 2d 352, 8 P.3d 1089*

Implied agreement not to terminate employee except for good cause does not prevent employer from legitimately terminating employee on basis of need to eliminate employee's work unit, in absence of evidence of agreement restricting that right. *Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 338, 100 Cal. Rptr. 2d 352, 8 P.3d 1089*

No-layoff policy, unilaterally adopted by employer, may be unilaterally discontinued, so long as employer does so after reasonable time, on reasonable notice, and without interfering with employees' vested benefits; once policy is discontinued, statutory presumption of at-will employment is applicable. *Asmus v. Pacific Bell (2000) 23 Cal. 4th 1, 9-18, 96 Cal. Rptr. 2d 179, 999 P.2d 71*

Favorable performance evaluations, merit-based salary increases, and general assurances of employee's future with employer are insufficient to create a triable issue of fact as to whether there is an implicit agreement to change the at-will nature of employment; such evidence cannot overcome statutory presumption under *Lab. Code § 2922* and express statement of at-will employment in employee handbook. *Horn v. Cushman & Wakefield W., Inc. (1999) 72 Cal. App. 4th 798, 817-819, 85 Cal. Rptr. 2d 459*

Damages for breach of implied-in-fact employment contract were upheld when at will language in "Sales Regulations" was inserted shortly before plaintiff's termination and without plaintiff's knowledge, employment agreement was not integrated, and defendant's asserted reason for termination did not constitute good cause; principles of *Pugh* are applicable under facts, which included trial evidence of express and implied promises not to terminate except for good cause. *Thomka v. Financial Corp. (1993) 15 Cal. App. 4th 877, 882-885, 19 Cal. Rptr. 2d 382*

In wrongful termination action brought by employee of 191/2 years, existence of implied-in-fact agreement not to terminate except for good cause was triable issue of material fact; handbook language that relationship is "voluntary employment at will" does not negate plaintiff's cause of action for breach of contract, or providing complete defense to it. *Walker v. Blue Cross of California (1992) 4 Cal. App. 4th 985, 994, 6 Cal. Rptr. 2d 184*

Triable issue of fact existed as to whether, in terminating baseball coach, university had adhered to disciplinary procedures dictated by its policies set forth in personnel manual limiting its ability to terminate at will. *Wood v. Loyola Marymount University (1990) 218 Cal. App. 3d 661, 671, 267 Cal. Rptr. 230*

Absent written employment contract and absent evidence of implied-in-fact covenant not to terminate without good cause, plaintiff in wrongful discharge action was unable to establish covenant when plaintiff failed toproduce evidence showing longevity of employment and produced only weak and ineffective showing of employer policies indicating existence of covenant. *McCabe v. General Foods Corp. (9th Cir. 1987) 811 F.2d 1336, 1339-1340*

Holding in Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 673-675, 254 Cal. Rptr. 211, 765 P.2d 373 , that statute of frauds does not bar wrongful-termination claims based on breach of oral or implied-in-fact contract not to terminate except for cause, was applicable retroactively. *Newman v. Emerson Radio Corp. (1989) 48 Cal. 3d 973, 993, 258 Cal. Rptr. 592, 772 P.2d 1059*

Implied-in-fact promise not to terminate except for cause was stated when (1) employee had worked for employer for over six years; (2) employer had given oral assurances of job security; (3) employer had given consistent promotions, salary increases, and bonuses; (4) employer had placed self-imposed limitations on its power to discharge at will in form of written termination guidelines; and (5) employee had signed noncompetition agreement, which was probative of intent to create continuing employment relationship. *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 681-682, 254 Cal. Rptr. 211, 765 P.2d 373*

Statute of frauds does not bar wrongful-termination claims based on breach of oral or implied-in-fact contract not to terminate except for cause. *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 673-675, 254 Cal. Rptr. 211, 765 P.2d 373*

Implied contract to terminate only for good cause was supported by personnel manual provisions stating that new employees could be terminated for good cause with written warning, and that employees could be terminated for excessive absence with proper warnings or for misconduct without warning. *McLain v. Great American Ins. Companies (1989) 208 Cal. App. 3d 1476, 1486-1487, 256 Cal. Rptr. 863*

Documents such as personnel policies, bylaws, and letters of understanding that include language limiting the employer's prerogative to terminate an employee at will were properly treated as agreements not to terminate without good cause. *Prevost v. First Western Bank (1987) 193 Cal. App. 3d 1492, 1501-1502, 239 Cal. Rptr. 161* ; *Walker v. Northern San Diego County Hospital Dist. (1982) 135 Cal. App. 3d 896, 903, 185 Cal. Rptr. 617*

Implied-in-fact promise not to terminate employees without good cause was reflected in personnel policies and guidelines, performance evaluations, warnings, and instructions given to employees. *Robinson v. Hewlett-Packard Corp. (1986) 183 Cal. App. 3d 1108, 1123, 228 Cal. Rptr. 591*

Allegation that defendant promised plaintiff "permanent career" but later discharged him without cause, was insufficient to state cause of action for wrongful discharge based on breach of contract because, inter alia, there were no other allegations that defendant made express or implied promise not to discharge plaintiff without just cause. *Newfield v. Insurance Co. of the West (1984) 156 Cal. App. 3d 440, 444-446, 203 Cal. Rptr. 9*

Employee who had been employed for only three and one-half years before discharge, had signed stock option agreement defining job as at will employment, and who made conclusory allegations regarding employer's implied suggestions of continued employment and practice of discharging employees without cause, failed as matter of law to sustain burden of showing wrongful discharge on either covenant of good faith or implied contract theories. *Shapiro v. Wells Fargo Realty Advisors (1984) 152 Cal. App. 3d 467, 479, 482, 199 Cal. Rptr. 613*

Discharge without notice by union of union employee who, although not covered by collective-bargaining agreement negotiated by union for its members, had been told that terms of her employment would track collective-bargaining agreement, breach violated implied employment contract. *Cunningham v. Retail Clerks Union (1983) 149 Cal. App. 3d 296, 304, 196 Cal. Rptr. 769*

Jury in wrongful discharge case had duty to determine whether or not there is express or implied-in-fact promise for continued employment absent cause for firing; factors to be considered as including employment documents, provisions regarding grievance processes, personnel practices or policies, employee's length of service, and practice of industry in which employee is engaged. *Walker v. Northern San Diego County Hospital Dist. (1982) 135 Cal. App. 3d 896, 905, 185 Cal. Rptr. 617*

Directed verdict in action for wrongful discharge was error when question of fact for jury is presented as to existence or nonexistence of express or implied-in-fact promise to continue employment absent cause for firing. *Walker v. Northern San Diego County Hospital Dist. (1982) 135 Cal. App. 3d 896, 900, 905, 185 Cal. Rptr. 617*

Appellant, fired without explanation after 32 years of service, demonstrated prima facie case of wrongful termination in violation of contract of employment, and burden of producing evidence as shifting to employer to show reason for termination. *Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 324-331, 171 Cal. Rptr. 917* (*Pugh I*)

Employer precluded from dismissing employee at will when discharge is contrary to terms of express or implied agreement between parties. *Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 322, 171 Cal. Rptr. 917* (*Pugh I*)

[9] Limitations Period

One year statute of limitations for personal injuries applied to action for wrongful discharge in violation of public policy. *Barton v. New United Motor Manufacturing, Inc. (1996) 43 Cal. App. 4th 1200, 51 Cal. Rptr. 2d 328*

Action for wrongful discharge in violation of public policy, governed by *Code Civ. Proc. § 340*, and accrued no later than time employee stopped working for employer. *Funk v. Sperry Corp. (9th Cir. 1988) 842 F.2d 1129, 1133*

[10] Parol Evidence Rule

Employment application and employment contract that each used language setting forth employment at will constituted integrated agreement, and employer, therefore, did not have to show good cause for termination or justify its business judgment in terminating employee as part of reduction in force. *Slivinsky v. Watkins-Johnson Co. (1990) 221 Cal. App. 3d 799, 804-806, 270 Cal. Rptr. 585*

Parol evidence admissible when agreement as whole was not integrated, but part relating to termination was integrated,

and language used wassusceptible to both meanings proposed by the employer and employee; examination of parol evidence by court led to affirmance of lower court's finding that there was implied-in-fact requirement of good cause for termination. *Wallis v. Farmers Group, Inc. (1990) 220 Cal. App. 3d 718, 730-731, 269 Cal. Rptr. 299*

Parol evidence of acknowledgment form attached to employee handbook and signed by employee, stating that policies within handbook were subject to change, was inadmissible because it was not integrated agreement, since it was missing key elements of an employment agreement and merely restated term of employment agreement as it then existed, subject only to future change. *Wagner v. Glendale Adventist Medical Center (1989) 216 Cal. App. 3d 1379, 1388-1390, 265 Cal. Rptr. 412*

[11] Preemption of Common-Law Actions

[a] California Fair Housing and Employment Act (FEHA)

Supervisor, who cannot be sued individually under the FEHA, also cannot be sued individually for violation of public policy articulated in the *FEHA. Reno v. Baird (1998) 18 Cal. 4th 640, 643, 663-664, 76 Cal. Rptr. 2d 499, 957 P.2d 1333*

Older worker discharged on basis of age has common law claim for tortious wrongful discharge by employer with five or more employees. *Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 885, 66 Cal. Rptr. 2d 888* ; *941 P.2d 1157*

FEHA preempts common law claims of age discrimination against small employers. *Jennings v. Marralle (1994) 8 Cal. 4th 121, 125, 32 Cal. Rptr. 2d 275, 876 P.2d 1074*

Claim for pregnancy discrimination not barred because employer too small to be subject to *FEHA. Badih v. Myers (1995) 36 Cal. App. 4th 1289, 1291, 43 Cal. Rptr. 2d 229*

Fair Employment and Housing Act (FEHA; *Gov. Code § 12900 et seq.*) did not preempt other state laws, including the common law, that prohibit or restrict such discrimination. *Rojo v. Kliger (1990) 52 Cal. 3d 65, 73-82, 276 Cal. Rptr. 130, 801 P.2d 373* ; *see Gov. Code § 12993(a)*

Although employee must exhaust FEHA administrative remedy before bringing civil action under FEHA or seeking any remedies provided by FEHA, exhaustion of administrative remedy was not required before filing civil action for damages alleging nonstatutory causes of action. *Rojo v. Kliger (1990) 52 Cal. 3d 65, 88, 276 Cal. Rptr. 130, 801 P.2d 373*

[b] California Occupational Safety and Health Act (OSHA)

Administrative remedy available to terminated employee under *Lab. Code § 6312* (regarding discrimination based on assertion of rights under Cal OSHA) was not exclusive, and did not preclude common-law wrongful discharge action. *Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 303-304, 188 Cal. Rptr. 159*

[c] California Workers' Compensation Law

Workers' compensation act did not preempt claims for intentional and negligent infliction of emotional distress where such claims arose out of conduct implicating fundamental public policies. *Maynard v. City of San Jose (9th Cir. 1994) 37 F.3d 1396, 1405-1406*

Plaintiff's allegations that defendant perpetrated fraud by virtue of supervisor's treatment of plaintiff leading to termination, did not exempt action for wrongful termination from purview of workers' compensation exclusivity. *Kacludis v. GTE Sprint Communications Corp. (N.D. Cal. 1992) 806 F. Supp. 866, 871* (noting also that plaintiff failed to plead fraud properly)

Standard language of mandatory preprinted form used in settling workers' compensation claims-- *see 8 Cal. Code Reg. § 10874*--releases only those claims that are within scope of workers' compensation system, and extrinsic evidence is not admissible to show that parties intended preprinted release form to encompass claims outside scope of workers' compensation system. *Claxton v. Waters (2004) 34 Cal. 4th 367, 376-377, 18 Cal. Rptr. 3d 246, 96 P.3d 496*

When employee in workers' compensation proceeding has knowledge of potential FEHA claim against employer at time of executing general release that purports to settle all claims, including those outside scope of workers' compensation system, but employee has not yet initiated litigation of FEHA claim, employee has burden of expressly excepting that claim from release; in absence of such exception, and absent contrary extrinsic evidence, general language releasing all claims will bar employee from pursuing FEHA claim. *Jefferson v. Cal. Dep't of Youth Auth. (2002) 28 Cal. 4th 299, 302-311, 121 Cal. Rptr. 2d 391, 48 P.3d 423*

Employee claim for false imprisonment not preempted by worker's compensation act. *Fermino v. Fedco, Inc. (1994) 7 Cal. 4th 701, 723, 30 Cal. Rptr. 2d 18, 872 P.2d 559*

Claim for intentional or negligent infliction of emotional distress was within exclusive remedy provisions of workers' compensation act, even when no physical injury or disability is alleged, so long as basic conditions of compensation are otherwise satisfied and employer's conduct neither contravenes any fundamental public policy nor exceeds risks inherent in employment relationship. *Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 754-755, 7 Cal. Rptr. 2d 808, 828 P.2d 1195*

Cause of action for tortious discharge in violation of public policy is not preempted by workers' compensation law. *Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1101, 4 Cal. Rptr. 2d 874, 824 P.2d 680*

Termination of employment is "normal part of the employment" for purposes of workers' compensation exclusive remedy doctrine; civil action to recover damages for emotional injuries caused by termination of employment was preempted by workers' compensation unless injury caused by conduct not reasonably within compensation bargain. *Shoemaker v. Myers (1990) 52 Cal. 3d 1, 18-20, 276 Cal. Rptr. 303, 801 P.2d 1054*

Workers' compensation exclusivity rule does not bar fraud cause of action seeking emotional distress damages based on employer's false statements about company's financial stability, future plans, and job applicant'sprospects for promotion, all designed to induce applicant to accept employment. Such misrepresentations are not normal part of employment relationship or risk reasonably encompassed within compensation bargain. *Lenk v. Total-Western, Inc. (2001) 89 Cal. App. 4th 959, 970-973, 108 Cal. Rptr. 2d 34*

Cause of action for intentional infliction of emotional distress founded on sexual-orientation harassment in violation of public policy embodied in FEHA is not barred by exclusivity provisions of workers' compensation law, since such harassment is outside normal scope of employment relationship. *Murray v. Oceanside Unified Sch. Dist. (2000) 79 Cal. App. 4th 1338, 1362-1363, 95 Cal. Rptr. 2d 28*

Exclusivity of workers' compensation extends to intentional infliction of emotional distress by employer's work-related conduct so long as that conduct does not contravene public policy. *Gibbs v. American Airlines, Inc. (1990) 74 Cal. App. 4th 1, 9-10, 87 Cal. Rptr. 2d 554*

Labor Code § 132a provides the exclusive remedy for a claim alleging disability discrimination. *Jimeno v. Mobil Oil*

Corp. (9th Cir. 1995) 66 F.3d 1514, 1530 ; *Langridge v. Oakland Unified School Dist. (1994) 25 Cal. App. 4th 664, 666, 31 Cal. Rptr. 2d 34*

In wrongful termination and discrimination action based on plaintiff's termination allegedly because he was homosexual, issue whether compromise and release form disposing of his workers' compensation claim barred cause of action for intentional infliction of emotional distress was question of fact, because release was preprinted form and did not specifically enumerate those issues, and intent of parties was unclear. *Delaney v. Superior Fast Freight (1993) 14 Cal. App. 4th 590, 599-600, 18 Cal. Rptr. 2d 33*

Emotional distress injuries caused by termination of the plaintiff's employment are within course and scope of employment and thus civil action to recover damages for such injuries was preempted by workers' compensation. *Panopulos v. Westinghouse Electric Corp. (1989) 216 Cal. App. 3d 660, 666, 264 Cal. Rptr. 810* ; *Jenkins v. Family Health Program (1989) 214 Cal. App. 3d 440, 449-450, 262 Cal. Rptr. 798* ; *Pichon v. Pacific Gas & Electric Co. (1989) 212 Cal. App. 3d 488, 495-497, 260 Cal. Rptr. 677*

Employee who suffers emotional distress causing disability as result of employer's intentional conduct that is normal part of employment relationship, such as demotions, promotions, criticisms of work practices, and frictions in negotiation of grievances, was unable to avoid exclusivity of workers' compensation remedy for injuries arising out of and in course of employment (*Lab. Code §§ 3600, 3601*), by characterizing employer's decisions as manifestly unfair, outrageous, harassing, or intended to cause emotional disturbance resulting in disability. *Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743*

In action for damages for wrongful termination of employment and breach of covenant of good faith and fair dealing, defendant's failure to plead bar of exclusive remedy provisions (*Lab. Code § 3600*) of workers' compensation law as affirmative defense (or failure to raise objection by demurrer if complaint affirmatively establishes applicability of workers' compensation remedy) constituted waiver of objection. *Green v. City of Oceanside (1987) 194 Cal. App. 3d 212, 224, 239 Cal. Rptr. 470*

Award of damages for intentional infliction of emotional distress in action by employee against city for wrongful discharge and breach of covenant of good faith and fair dealing was not barred by exclusive remedy provisions (*Lab. Code § 3602*) of workers' compensation law when: (1) city neither demurred to complaint on that ground nor pleaded the bar as an affirmative defense, (2) applicability of workers' compensation remedy was not established on face of complaint, and (3) trial court found there was sufficient evidence on issue to go to jury. *Green v. City of Oceanside (1987) 194 Cal. App. 3d 212, 223-225, 224 n.4, 239 Cal. Rptr. 470*

Action by employee against employer for fraudulent inducement to enter into employment contract and tortious breach of covenant of good faith and fair dealing, arising from alleged unsafe working conditions, was barred by exclusivity provisions of workers' compensation act. *Spratley v. Winchell Donut House, Inc. (1987) 188 Cal. App. 3d 1408, 1417, 234 Cal. Rptr. 121*

Workers' Compensation Appeals Board has exclusive authority to award relief in action under *Lab. Code § 132a* for wrongful discharge from employment because plaintiff sought workers' compensation for injuries received in employment; cause of action in tort for wrongful discharge was not authorized. *Portillo v. G.T. Price Products, Inc. (1982) 131 Cal. App. 3d 285, 287-290, 182 Cal. Rptr. 291*

[d] Employee Retirement Income Security Act (ERISA)

State-law claim against fiduciary of ERISA-regulated benefit plan is completely preempted by ERISA, and therefore removable to federal court, if interpretation of terms of plan forms essential part of claim, and plaintiff is in essence

suing only to rectify wrongful denial of benefits promised under plan. *Aetna Health Inc. v. Davila (2004) 542 U.S. 200, 124 S. Ct. 2488, 159 L. Ed. 2d 312, 330*

Former employee's claims for breach of contract, breach of covenant of good faith and fair dealing, and fraud, are preempted by ERISA (*29 U.S.C. §§ 1001-1461*), because they relate to enforcement of employee's benefit plan, and represent his attempt to force former employer to provide severance benefits. *Nevill v. Shell Oil Co. (9th Cir. 1987) 835 F.2d 209, 212*

Common-law wrongful termination action relating to ERISA (*29 U.S.C. §§ 1001-1461*) benefits are preempted by *ERISA. Sorosky v. Burroughs Corp. (9th Cir. 1987) 826 F.2d 794, 799*

Common-law action for wrongful discharge against employer who terminated employee solely for purpose of depriving employee of employee benefits are federally preempted to extent that benefits in question come within purview of *ERISA. Johnson v. Trans World Airlines, Inc. (1983) 149 Cal. App. 3d 518, 526-528, 196 Cal. Rptr. 896*

ERISA preempts claims that are based on misconduct that is identical to conduct on which ERISA claim is based. *Dytrt v. Mountain State Tel. & Tel. Co. (9th Cir. 1990) 921 F.2d 889, 897*

[e] Federal Banking Laws

Terminated bank president's severance pay agreement held not to violate provision of National Bank Act (*12 U.S.C. § 24*) providing all bank officersserve "at pleasure" of board of directors. *Mardula v. Rancho Dominguez Bank (1996) 43 Cal. App. 4th 790, 51 Cal. Rptr. 2d 63*

" *D'Oench, Duhme* doctrine" (partially codified common-law rule of estoppel that precludes borrower from asserting against FDIC defenses based on secret or unrecorded side-agreement that alters terms of facially unqualified obligations) was inapplicable factually to defense of breach of an implied-in-fact employment contract claim, when plaintiff did not impede or hinder any bank examiner to evaluate the bank's assets, nor relied on any unrecorded documents or arrangements. *Thomka v. Financial Corp. (1993) 15 Cal. App. 4th 877, 889, 19 Cal. Rptr. 2d 382* (citing *D'Oench, Duhme & Co. v. FDIC (1942) 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956* and *12 U.S.C. § 1823(e)*)

California courts have subject matter jurisdiction over wrongful discharge action brought by savings association employee; *12 C.F.R. § 563.39*, which covers employment contracts for savings associations, does not preempt state cause of action for wrongful discharge. *Thomka v. Financial Corp. (1993) 15 Cal. App. 4th 877, 885-887, 19 Cal. Rptr. 2d 382* ; *Honig v. Financial Corp. of America (1992) 6 Cal. App. 4th 960, 964-965, 7 Cal. Rptr. 2d 922*

[f] Labor Management Relations Act (LMRA)

LMRA does not preempt union members' claims for fraud, misrepresentation, suppression of facts, and related claim of intentional infliction of emotional distress based on employer's allegedly deliberate plan to liquidate company's assets while assuring union employees of job security and obtaining union concessions on threat to shut down otherwise, followed by liquidation of all assets and termination of employees; however, claims for breach of the implied covenant of good faith and fair dealing, interference with contractual relations, and interference with prospective economic advantage were preempted. *Milne Employees Ass'n v. Sun Carriers (9th Cir. 1991) 960 F.2d 1401, 1405, 1418 , cert. denied, 124 L. Ed. 2d 678*

Employee's wrongful termination claim based on rule deeming three-day unauthorized absence as voluntary termination was clearly dependent on terms of collective bargaining agreement, which expressly provided for employee to express grievance against any discharge or application of work rules, and was thus preempted by Section 301 of

LMRA. Harris v. Alumax Mill Products, Inc. (9th Cir. 1990) 897 F.2d 400, 402-403 , cert. denied, 498 U.S. 835

Section 301 of LMRA does not preempt wrongful termination action in which collective bargaining agreement had expired previous to employee's discharge. *Overby v. Chevron USA, Inc. (9th Cir. 1989) 884 F.2d 470, 473-474*

Section 301 of LMRA preempts claim in which collective bargaining agreement covered in detail conduct that would give rise to dismissal for cause. *Jackson v. Southern California Gas Co. (9th Cir. 1989) 881 F.2d 638, 644-645*

Wrongful termination action based on constructive discharge of employee after he was entrapped into selling drugs in the workplace was preempted by LMRA because (1) no state nonnegotiable right was involved since California has not articulated a public policy preventing parties from negotiating means by which drug problems may be dealt with in workplace, and (2) even if there had been a nonnegotiable right involved, resort to collective bargaining agreement was necessary to resolve wrongful discharge actions involved. *Moreau v. San Diego Transit Corp. (1989) 210 Cal. App. 3d 614, 628, 258 Cal. Rptr. 647*

Test for preemption of state-law claims under Labor Management Relations Act (*29 U.S.C. §§ 141-187*) § 301 was whether application of state law requires interpretation of collective-bargaining agreement. *Lingle v. Norge Division, Magic Chef (1988) 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410, 423*

Labor Management Relations Act § 301 (*29 U.S.C. § 185(a)*) preempted former employee's cause of action for intentional infliction of emotional distress, when claim arose out of her discharge for theft and gross dereliction and duty, and employer's conduct in investigation leading up to it; determination of validity of claim required determination whether discharge was justified under terms of collective-bargaining agreement. *Newberry v. Pacific Racing Ass'n (9th Cir. 1988) 854 F.2d 1142, 1149-1150*

Labor Management Relations Act § 301 (*29 U.S.C. § 185(a)*) preempted former employee's cause of action for breach of implied covenant of good faith and fair dealing, arising out of her discharge for theft and dereliction of duty, because her employment contract was collective-bargaining agreement, and action required interpretation of specific language of agreement's terms. *Newberry v. Pacific Racing Ass'n (9th Cir. 1988) 854 F.2d 1142, 1147-1148*

Former employee's claims for conspiracy and infliction of emotional distress, based on defendants' alleged failure to process grievance claim, filing of false reports regarding work infractions, removal of employee as union delegate, and termination without cause, was preempted by Labor Management Relations Act § 301 (*29 U.S.C. § 185(a)*), because they were not based on non-negotiable state-law rights, and were inextricably intertwined with consideration of terms of collective-bargaining agreement. *Hyles v. Mensing (9th Cir. 1988) 849 F.2d 1213, 1215-1216*

[g] National Labor Relations Act (NLRA)

National Labor Relations Act does not preempt state-law causes of action on matters of local concern, such as regulation of occupational health and safety. *Inter-Modal Rail Employees Ass'n v. Burlington N. & Santa Fe Ry. Co. (1999) 73 Cal. App. 4th 918, 924-928, 87 Cal. Rptr. 2d 60*

National Labor Relations Act preempted employer's state court action seeking injunctive relief setting conditions upon how union representatives could contact employees on the job because the state court action created a risk of interference with National Labor Relations Board's jurisdiction. *Hillhaven Oakland Nursing and Rehabilitation Center (1996) 41 Cal. App. 4th 846, 49 Cal. Rptr. 2d 11*

Causes of action for breach of contract and bad faith denial of existence of contract based on denial of tenure were preempted by NLRA because plaintiff was in effect seeking to enforce expired collective bargaining agreement in

bringing action. *McGough v. University of San Francisco (1989) 214 Cal. App. 3d 1577, 1586, 263 Cal. Rptr. 404*

NLRB had exclusive jurisdiction over wrongful discharge claim, filed in state court, that alleged federal labor law violations. *Bassett v. Attebery (1986) 180 Cal. App. 3d 288, 290, 225 Cal. Rptr. 399*

NLRB did not have exclusive jurisdiction over employee's claim of retaliatory discharge for filing worker's compensation claim because there was no evidence that plaintiff acted with or on authority of other employees in pursuing worker's compensation claim, and thus there was no "concerted action" necessary to bring claim within NLRB jurisdiction. *Meyer v. Byron Jackson, Inc. (1984) 161 Cal. App. 3d 402, 410-412, 207 Cal. Rptr. 663*

Wrongful termination action based on *Lab. Code §§ 921* and *923* is preempted by National Labor Relations Act (*29 U.S.C. §§ 151-169*), which gives exclusive jurisdiction to NLRB when covered employer wrongfully terminates employee because of union-related activities, unless NLRB declines to issue complaint. *Henry v. Intercontinental Radio, Inc. (1984) 155 Cal. App. 3d 707, 711-715, 202 Cal. Rptr. 328*

[h] Railway Labor Act (RLA)

RLA does not preempt wrongful termination action brought by nonunion employee who is not subject to collective bargaining agreement. *Luck v. Southern Pacific Transportation Co. (1990) 218 Cal. App. 3d 1, 11-12, 267 Cal. Rptr. 618 , cert. denied, 498 U.S. 939*

Claims for wrongful termination in breach of public policy and claims brought under the state whistleblower statute are not preempted by *RLA. Hawaiian Airlines, Inc. v. Norris (1994) 512 U.S. 246, 114 S. Ct. 2239, 2251, 129 L. Ed. 2d 203*

Claim for retaliatory discharge is a private right of action not preempted by RLA. *Fennessey v. Southwest Airlines (9th Cir. 1996) 91 F.3d 1359, 1362*

[12] Related Causes of Action

Employees have reasonable expectation under widely held social norms that their employer will not install video equipment capable of monitoring and recording their activities--personal and work-related--behind closed doors without their knowledge or consent; in this case, however, intrusion was not highly offensive or sufficiently serious to constitute privacy violation, since actual surveillance was drastically limited in nature and scope (no audio, and no surveillance during business hours), exempting plaintiffs from its reach, and defendants were motivated by strong countervailing concerns that included providing wholesome environment for abused children in their care. *Hernandez v. Hillsides, Inc. (2009) 47 Cal. 4th 272, 286-300, 97 Cal. Rptr. 3d 274, 211 P.3d 1063*

If employment contract expressly provides for at-will employment, action for fraudulent inducement of employment contract may not be maintained on basis of alleged false representation regarding duration of employment; in such case employee will be unable to show justifiable reliance on false representation. *Dore v. Arnold Worldwide, Inc. (2006) 39 Cal. 4th 384, 393-394, 46 Cal. Rptr. 3d 668 .*

Employer may recover damages from third party who intentionally engages in independently wrongful act--one that is proscribed by some constitutional, statutory, regulatory, common-law, or other ascertainable legal standard--that induces at-will employee to leave employer. *Reeves v. Hanlon (2004) 33 Cal. 4th 1140, 1152-1153, 17 Cal. Rptr. 3d 289, 95 P.3d 513*

To establish "willful and unprovoked physical act of aggression" by coworker under *Lab. Code § 3601(a)(1)* so as to

avoid exclusivity of workers' compensation remedy, injured employee must prove that coworker acted with intent to injure. *Torres v. Parkhouse Tire Serv., Inc. (2001) 26 Cal. 4th 995, 1004, 111 Cal. Rptr. 2d 564, 30 P.3d 57]*

Tort damages available where action based on allegation that defendant employer fraudulently induced employee to enter employment contract, and claim does not depend on whether defendant's promise is ultimately enforceable as a contract. *Lazar v. Superior Court (1996) 12 Cal. 4th 631, 49 Cal. Rptr. 2d 377*

Tort damages for fraud in context of wrongful termination action are recoverable only if misrepresentation was independent of termination of plaintiff's employment. *Hunter v. Up-Right, Inc. (1993) 6 Cal. 4th 1174, 1184-1186, 26 Cal. Rptr. 2d 8, 864 P.2d 88*

In complaint for breach of employment contract, cause of action for slander per se, based on disparaging remarks made by supervisors about plaintiff's qualifications, was subject to defenses of privilege under *Civ. Code § 47(c)* as well as common-law "manager's privilege" (usually asserted in action for interference with prospective economic advantage). *Kacludis v. GTE Sprint Communications Corp. (N.D. Cal. 1992) 806 F. Supp. 866, 872*

In defamation action based on performance evaluation, nonsuit affirmed because statements were not actionable, i.e., did not accuse employee of criminal conduct, lack of integrity, dishonesty, incompetence, or reprehensible personal characteristics or behavior; libel suits based on communications in employment performance reviews as judicially disfavored, particularly when plaintiff attempts to avoid *Foley*. *Jensen v. Hewlett-Packard Co. (1993) 14 Cal. App. 4th 958, 964, 969-971, 18 Cal. Rptr. 2d 83*

Damages for emotional distress are ordinarily not recoverable in action for negligent misrepresentation when injury other than emotional distress is only economic. *Branch v. Homefed Bank (1992) 6 Cal. App. 4th 793, 798, 8 Cal. Rptr. 2d 182*

Cause of action for fraudulent concealment was based on employer's fraudulent representation inducing currently employed independent sales representatives to sign agreements providing for termination without cause, purportedly as mere formality of company reorganization, when employer intended to, and did in fact subsequently terminate them. *Marketing West, Inc. v. Sanyo Fisher (USA) Corp. (1992) 6 Cal. App. 4th 603, 612-614, 7 Cal. Rptr. 2d 859*

If a plaintiff's cause of action for wrongful constructive discharge in breach of employment contract or the implied covenant of good faith and fair dealing fails, plaintiff is precluded from recovering tort damages based on related causes of action (intentional and negligent infliction of emotional distress, defamation, intentional interference with contractual relations, conspiracy)that are founded on same conduct of defendant that formed basis for wrongful constructive discharge claim. *Soules v. Cadam, Inc. (1991) 2 Cal. App. 4th 390, 404, 3 Cal. Rptr. 2d 6*

Allegations that employer acted unreasonably or "should have" acted differently during precursor events to termination, such as allegation that employer negligently supervised harassing employee, did not establish tort of negligence independent of discharge itself, and does not turn contractual wrongful discharge action into tort claim. *Hine v. Dittrich (1991) 228 Cal. App. 3d 59, 64-65, 278 Cal. Rptr. 330*

Plaintiffs were entitled to recover damages incurred as result of defendant employer'smisrepresentation that plaintiffs would receive training opportunities if they waived right to sue for alleged racial discrimination; evidence as supporting inference that representation, made with undisclosed knowledge that plaintiffs were likely to be laid off, was made without intention to perform. *Miller v. Fairchild Industries, Inc. (9th Cir. 1989) 885 F.2d 498, 509-510 , cert. denied, 494 U.S. 1056*

Summary judgment for employer was properly granted on cause of action for libel when court found no evidence to support claim; claim of libel was defeated when undisputed facts show that substance of alleged statement was true.

Newberry v. Pacific Racing Ass'n (9th Cir. 1988) 854 F.2d 1142, 1150-1151

Comments made by representative of employer to newspaper reporter after employee's discharge, stating that former employee had had problems handling money, and that some employees had been discharged because of "sloppy bookkeeping," did not constitute outrageous conduct in support of cause of action for intentional infliction of emotional distress. *Newberry v. Pacific Racing Ass'n (9th Cir. 1988) 854 F.2d 1142, 1150* (also finding that evidence supported truth of comments)

Former employee's cause of action for defamation, arising from employer's alleged filing of false work-infraction reports and testimony during grievance proceeding concerning collective-bargaining agreement, as privileged; statements made in grievance proceedings arising under collective-bargaining agreement to persons having legitimate interests in them are privileged as matter of law, and do not support state tort claim. *Hyles v. Mensing (9th Cir. 1988) 849 F.2d 1213, 1217*

Former employee's claim for intentional infliction of emotional distress was not supported by allegations that her supervisor repeatedly told her she was over forty, senile, and a liar; mere insulting language, without more, does not ordinarily constitute outrageous conduct. *Yurick v. Superior Court (1989) 209 Cal. App. 3d 1116, 1123-1130, 257 Cal. Rptr. 665*

Employer's conduct was not "outrageous" to support cause of action for intentional infliction of emotional distress when conduct consisted of (1) presenting employee with termination package that she accepted, (2) withdrawing that offer and retaining her as employee, (3) telling her a week later that she would be terminated, (4) providing her with less favorable terminationpackage, and (5) assigning her "menial work" prior to her termination. *Trerice v. Blue Cross of California (1989) 209 Cal. App. 3d 878, 883-885, 257 Cal. Rptr. 338*

Wrongful discharge supports action for intentional infliction of emotional distress when employer's behavior was extreme and outrageous, going beyond all possible bounds of decency; extreme, outrageous, and atrocious conduct was evidenced by employer's deception, flagrant disregard of company policies, and denial of employee's choice, resulting in humiliation and degradation of employee. *Rulon-Miller v. International Business Machines Corp. (1984) 162 Cal. App. 3d 241, 254-255, 208 Cal. Rptr. 524*

[13] Religious Organizations

Wrongful termination actions pertaining to actions taken by a legally constituted church or religious organization as within authority of that church or religious organization and civil courts as not exercising jurisdiction over such transaction actions that are peculiarly within inner workings of such religious organization. *Higgins v. Maher (1989) 210 Cal. App. 3d 1168, 1173-1176, 258 Cal. Rptr. 757 , cert. denied, 493 U.S. 1080*

[14] Statutory Prohibitions Against Wrongful Discharge

Title VII anti-retaliation provision, *42 U.S.C. § 2000e-3(a)*, protects employee who opposes unlawful discrimination by speaking out about it in answering questions during employer's internal investigation, even if that employee did not report discrimination on his or her own initiative. *Crawford v. Metropolitan Gov't (2009) -- U.S. --, 129 S. Ct. 846, 172 L. Ed. 2d 650, 656-659*

42 U.S.C. § 1981 encompasses claims of retaliation on basis of race, including retaliation against person for complaining about violation of another person's rights under § 1981. *CBOCS W., Inc. v. Humphries (2008) 553 U.S. 442, 128 S. Ct. 1951, 1954-1955, 1961, 170 L. Ed. 2d 864, 869, 877*

29 U.S.C. § 633a(a), which prohibits "discrimination based on age" in federal employment, includes prohibition of retaliation based on filing of age-discrimination complaint. *Gomez-Perez v. Potter (2008) 553 U.S. 474, 128 S. Ct. 1931, 1935-1936, 1943, 170 L. Ed. 2d 887, 893-894, 902*

California's whistleblower protection laws, *e.g., Lab. Code § 1102.5*, are not preempted by Friendship, Commerce, and Navigation treaties, which confer on foreign employers right to choose nationality of executive employees but do not confer immunity from domestic employment laws that do not interfere with that right. *Ventress v. Japan Airlines (9th Cir. 2007) 486 F.3d 1111, 1115-1118*

Plaintiff who was fired in retaliation for attempting to report environmental violations while working as civilian hazardous waste overseer in naval shipyard, stated cause of action for wrongful discharge based on retaliation for whistleblowing, under *42 U.S.C. § 9610*; under "dual motive" test, once employee shows that illegal motives played some part in the discharge, employer that asserts that discharge was justified must prove that it would have discharged employee even if he or she had not engaged in protected conduct. *Pogue v. United States Dep't of Labor (9th Cir. 1991) 940 F.2d 1287, 1289-1291*

Federal court judgment in Title VII claim for employment discrimination is res judicata bar to subsequent state-law wrongful termination claim based on same facts. *Gamble v. General Foods Corp. (1991) 229 Cal. App. 3d 893, 896, 280 Cal. Rptr. 457*

Individual discharged in violation of Railway Labor Act (*45 U.S.C. §§ 151-188*) is entitled to bring private civil action for damages and reinstatement. *Burke v. Compania Mexicana de Aviacion, S.A. (9th Cir. 1970) 433 F.2d 1031, 1033-1034*

Discharge of employee, allegedly for requesting presence of attorney at performance evaluations, was not violative of *Lab. Code § 923* (granting rights regarding labor-organization membership). *Robinson v. Hewlett-Packard Corp. (1986) 183 Cal. App. 3d 1108, 1130-1131, 228 Cal. Rptr. 591*

Protections under California Occupational Safety and Health Act (*Lab. Code §§ 6300-6711*) are not dependent on whether Cal OSHA standard ultimately is found to have been violated; protection is afforded when employee complains in good faith about working conditions reasonably believed to be unsafe. *Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 299, 188 Cal. Rptr. 159*

Termination in violation of *Lab. Code § 923* (granting rights regarding labor-organization membership) is actionable if it was "primarily" due to employee's union affiliation; union affiliation is not required to be sole motive for termination in order for liability to attach. *Escamilla v. Marshburn Brothers (1975) 48 Cal. App. 3d 472, 483, 121 Cal. Rptr. 891*

Lab. Code § 923 allows individual employee to designate attorney or other individual to represent him or her in negotiating terms and conditions of employment; discharge based on exercise of that right is a violation of *Lab. Code § 923*. *Montalvo v. Zamora (1970) 7 Cal. App. 3d 69, 75, 86 Cal. Rptr. 401*

Lab. Code § 923, granting workers freedom regarding labor-organization membership, prohibits employer from terminating employee solely because of unionmembership or activity. *Glenn v. Clearman's Golden Cock Inn (1961) 48 L.R.R.M. (BNA) 2779, 192 Cal. App. 2d 793, 798, 13 Cal. Rptr. 769*

Former Elec. Code § 695 (*now see Elec. Code § 12312*), prohibiting suspension or termination of employee because of absence from work while serving as election officer on election day, is basis for common-law wrongful termination action. *Kouff v. Bethlehem-Alameda Shipyard (1949) 90 Cal. App. 2d 322, 324-325, 202 P.2d 1059*

[15] Theories of Liability

Three distinct theories of liability have developed from wrongful discharge of employee: (1) tort cause of action for wrongful discharge in violation of public policy; (2) cause of action for employer's breach of implied covenant of good faith and fair dealing; and (3) cause of action for employer's breach of implied-in-fact covenant to terminate only for good cause. *Robinson v. Hewlett-Packard Corp. (1986) 183 Cal. App. 3d 1108, 1120-1121, 228 Cal. Rptr. 591*

Causes of action for termination in violation of fundamental principles of public policy and termination in breach of implied covenant of good faith and fair dealing are available to both at will employees and employees hired for specified term. *Koehrer v. Superior Court (1986) 181 Cal. App. 3d 1155, 1166, 1172, 226 Cal. Rptr. 820* (disapproved in *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 688-700, 254 Cal. Rptr. 211, 765 P.2d 373* for its holding that tortious breach of implied covenant lies for *breach of contract term* as opposed to denial of existence of contract, and for supporting recovery of tort damages for breach of employment contract)

Grounds for cause of action for wrongful discipline. *Garcia v. Rockwell International Corp. (1986) 187 Cal. App. 3d 1556, 1561, 232 Cal. Rptr. 490* (disapproved in *Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1093, 4 Cal. Rptr. 2d 874, 824 P.2d 680* , for stating that public policy underlying wrongful discharge claim need not be rooted in statutory or constitutional provision)

[16] Tortious Discharge in Violation of Public Policy

Truck driver who was discharged for refusing to operate trailer under erroneous impression that it was not legally registered, did not state cause of action for wrongful discharge based on refusal to violate law, because it would have been legal to drive trailer and no fundamental public policy concern was involved. *DeSoto v. Yellow Freight Systems, Inc. (9th Cir. 1992) 957 F.2d 655, 657-659*

In wrongful termination actions based on violation of public policy, public policy must derive from constitutional or statutory authority; reliance on judicial or other nonlegislative sources as insufficient. *Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1095, 4 Cal. Rptr. 2d 874, 824 P.2d 680*

Employer's attempt to induce or coerce an employee to lie to investigator from Department of Fair Employment and Housing plainly contravened public policy of California. *Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1096-1097, 4 Cal. Rptr. 2d 874, 824 P.2d 680*

Cal. Const., art. I, § 8, which provides that no person may be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin, sets forth fundamental public policy against employment discrimination on any of those grounds and provides basis for tort cause of action for wrongful termination in violation of public policy. *Rojo v. Kliger (1990) 52 Cal. 3d 65, 89-91, 276 Cal. Rptr. 130, 801 P.2d 373*

Public policy in favor of employer's duty to pay overtime wages protects employee from termination for making good-faith but mistaken claim to overtime pay. *Barbosa v. IMPCO Techs. (2009) 179 Cal. App. 4th 1116, 1121-1123, 101 Cal. Rptr. 3d 923*

Lab. Code § 6400 et seq. and *Code Civ. Proc. § 527.8* establish explicit public policy requiring employers to provide safe and secure workplace, including requirement that employer take reasonable steps to address credible threats of violence in workplace. *Franklin v. Monadnock Co. (2007) 151 Cal. App. 4th 252, 259, 59 Cal. Rptr. 3d 692*

By prohibiting employment of undocumented aliens, Immigration Reform and Control Act of 1986, *8 U.S.C. § 1101 et seq.*, establishes public policy that protects employee who complains to authorities that employer has hired

undocumented aliens. *Jie v. Liang Tai Knitwear Co., Ltd. (2001) 89 Cal. App. 4th 654, 661-662, 107 Cal. Rptr. 2d 682* ; *see 8 U.S.C. § 1324a*

Public policy is violated by termination of employee for refusing to sign employment agreement that contains illegal noncompete covenant [*see Bus. & Prof. Code § 16600*], even if agreement includes severability provision that would preserve enforceability of remainder of agreement. *D'Sa v. Playhut, Inc. (2000) 85 Cal. App. 4th 927, 929-935, 102 Cal. Rptr. 2d 495*

Whistle-blower protection under *Lab Code § 1102.5* extends to public employees who report illegal activity to public agency; public employee who reports illegal activity to his or her employer is protected by statute and need not make report to outside agency. *Gardenhire v. Housing Auth. (2000) 85 Cal. App. 4th 236, 241-243, 101 Cal. Rptr. 2d 893*

Terminating employee in retaliation for employee's designation of attorney to conduct individual negotiations with employer violates public policy embodied in *Lab. Code § 923*, which protects right of workers to organize and bargain collectively. *Gelini v. Tishgart (1999) 77 Cal. App. 4th 219, 223-228, 91 Cal. Rptr. 2d 447*

Employee cannot maintain action for wrongful discharge in violation of public policy against discrimination based on disability if discharge did not violate Fair Employment and Housing Act, which embodies that public policy. *Hobson v. Raychem Corp. (1999) 73 Cal. App. 4th 614, 631, 86 Cal. Rptr. 2d 497*

Public policy protects employee against discharge or discrimination for complaining in good faith about working conditions or practices employee reasonably believes to be unsafe, whether or not they actually are unsafe. *Cabesuela v. Browning-Ferris Indus. of Cal., Inc. (1998) 68 Cal. App. 4th 101, 109, 80 Cal. Rptr. 2d 60*

Employee's periodic acquiescence in employer's illegal conduct because of fear of discharge as not creating *in pari delicto* defense, even though employee received commissions from illegal transactions. *Jacobs v. Universal Development Corp. (1997) 53 Cal. App. 4th 120, 53 Cal. App. 4th 692, 702-703, 62 Cal. Rptr. 2d 446*

Cause of action for wrongful termination in violation of public policy exists against employer exempt from the Fair Employment and Housing Act (FEHA) who terminated employee because of pregnancy; *Cal. Const., art. I, § 8*, contains proscription against sex discrimination, including pregnancy discrimination, that is independent of *FEHA. Badih v. Myers (1995) 36 Cal. App. 4th 1289, 1293-1296, 43 Cal. Rptr. 2d 229*

In action for wrongful termination in violation of public policy, plaintiff terminated on basis of sexual orientation stated public policy based on former *Labor Code § 1102.1* [*now see Gov. Code § 12940(a)* (*FEHA). Leibert v. Transworld Systems, Inc. (1995) 32 Cal. App. 4th 1693, 1703-1704, 39 Cal. Rptr. 2d 65]*

Plaintiff stated cause of action for wrongful termination in violation of public policy based on allegations that termination was for purpose of avoiding payment of commissions and vacation pay and in retaliation for reporting to management the ongoing failure to pay overtime. *Gould v. Maryland Sound Industries, Inc. (1995) 31 Cal. App. 4th 1137, 1146-1150, 37 Cal. Rptr. 2d 718*

_____ **PRACTICE TIP: Potentially Broad Application of *Gould.*** The *Gould* case's recognition of a public policy claim inherent in an employer's motivation to avoid paying wages or commissions due by terminating an employee is seemingly applicable to a great many wrongful termination situations. Many prospective plaintiffs have the sense that the "real" reason they were fired was because the employer was seeking to avoid payment of some form of compensation or another. *By Richard P. Hill* _____

Tameny cause of action does not exist for breach of commercial contract in violation of public policy; case law does not recognize cause of action outside employment relationship. *Harris v. Atlantic Richfield Co. (1993) 14 Cal. App.*

4th 70, 75-77, 17 Cal. Rptr. 2d 649

In action for wrongful termination based on violation of public policy, plaintiff terminated for allegedly disagreeing with employer insurance company's practice of inflating policy reserves in apparent circumvention of Proposition 103 failed to state public policy delineated in any constitutional or statutory provision; issue of excessive case reserves was not addressed in Proposition 103 or any other source required under *Gantt. Sequoia Ins. Co. v. Superior Court (1993) 13 Cal. App. 4th 1472, 1480, 16 Cal. Rptr. 2d 888*

In action for wrongful termination based on violation of public policy, plaintiff terminated for taking lengthy medical leave after operation failed to state public policy based on *Lab. Code §§ 6401, 6403*, which merely require employer to maintain safe and healthful workplace, without encouraging employer to provide proper medical care to employees. *Davaris v. Cubaleski (1993) 12 Cal. App. 4th 1583, 1589, 16 Cal. Rptr. 2d 330*

State employee stated *Tameny* claim based on employer's violation of public policy as expressed in statute that protects state employees from retaliation for whistleblowing (former *Gov. Code § 19683*; *now see* Gov. Code § 8457 et seq.) as well as Officers Rights Act (*Gov. Code § 3300 et seq.*), which gives public safety officers certain political rights; but *Tameny* claim was subject to immunity under Government Claims Act (*Gov. Code § 810 et seq.*). *Shoemaker v. Myers (1992) 2 Cal. App. 4th 1407, 1419-1421, 4 Cal. Rptr. 2d 203*

Employee had cause of action for wrongful discharge in violation of public policy because he was fired for reporting to his employer suspected illegal conduct by coemployees, including violations of antitrust laws and laws against bribery and kickbacks, embezzlement, tax evasion, and possible drug trafficking and money laundering. *Collier v. Superior Court (1991) 228 Cal. App. 3d 1117, 1119-1120, 279 Cal. Rptr. 453*

Wrongful termination based on race discrimination was violation of public policy under Fair Employment & Housing Act, *Gov. Code §§ 12920, 12940*, and was basis for tort action. *Roberts v. Ford Aerospace & Communications Corp. (1990) 224 Cal. App. 3d 793, 798, 274 Cal. Rptr. 139*

Nurse was allowed to bring action for tortious discharge in retaliation for complaining about unsafe and unhealthy work conditions; *Lab. Code §§ 6310-6312* do not provide exclusive remedy, nor is exhaustion of those sections a requisite to bringing private cause of action. *Jenkins v. Family Health Program (1989) 214 Cal. App. 3d 440, 449, 262 Cal. Rptr. 798*

Allegation that employee was discharged for reporting false payments of consulting fees to former employees was not public policy violation because interest was not public but private interest of employer only. *American Computer Corp. v. Superior Court (1989) 213 Cal. App. 3d 664, 667-669, 261 Cal. Rptr. 796*

Termination in retaliation for failure to violate Insurance Department guideline was contrary to public policy. *Eisenberg v. Insurance Co. of North America (9th Cir. 1987) 815 F.2d 1285, 1289*

Summary judgment for employer was proper in employee's wrongful-discharge action when employee claimed tortious discharge in violation of public policy but failed to produce evidence that reason for discharge was in breach of California public policy. *McCabe v. General Foods Corp. (9th Cir. 1987) 811 F.2d 1336, 1340*

Public policy asserted as basis for tort of violation of public policy must inure to benefit of public at large, rather than to particular employer or employee. *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 669, 254 Cal. Rptr. 211, 765 P.2d 373*

Discrimination against whistleblowing employees is contrary to public policy. *Sanchez v. Unemployment Ins. Appeals Bd. (1984) 36 Cal. 3d 575, 588, 205 Cal. Rptr. 501, 685 P.2d 61*

Employee who was discharged for refusal to commit unlawful act was entitled to sue employer in tort for wrongful discharge. *Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 178, 164 Cal. Rptr. 839, 610 P.2d 1330*

Cause of action for wrongful termination in violation of public policy, based on former employee's complaining to management that employer's acts violated public policy, was stated when plaintiff pleads (1) employer's policy to contravene statutory proscription affecting matters relating to employer's business, (2) employee's protest to company management regarding unlawful policy, and (3) retaliatory termination of employment resulting from protest. *Hejmadi v. AMFAC, Inc. (1988) 202 Cal. App. 3d 525, 551, 249 Cal. Rptr. 5*

Employee who had no viable alternative to risking arrest for conduct required by his employer, other than resigning his position, was constructively discharged for failure to perform unlawful act. *Smith v. Brown-Forman Distillers Corp. (1987) 196 Cal. App. 3d 503, 513, 241 Cal. Rptr. 916*

Action for wrongful discharge was proper when employees were required to violate state and federal regulations regarding pricing and trade practices as condition of employment, even though employer paid lip service to policy of following laws and regulations. *Smith v. Brown-Forman Distillers Corp. (1987) 196 Cal. App. 3d 503, 512-514, 516, 241 Cal. Rptr. 916*

Theory of action based on discharge for refusal to perform unlawful act is limited to employer-employee relationship, and does not bar termination of contract with independent contractor pursuant to contract provision allowing either party right to unilaterally terminate contract. *Abrahamson v. NME Hospitals, Inc. (1987) 195 Cal. App. 3d 1325, 1329-1330, 241 Cal. Rptr. 396*

Purported public policy to promote job security and community stability is not sufficient basis to establish cause of action for discharge in violation of substantial public policy principle. *Shapiro v. Wells Fargo Realty Advisors (1984) 152 Cal. App. 3d 467, 477, 199 Cal. Rptr. 613*

[17] Employer Misrepresentations

Misrepresentation that induces employee to alter detrimentally his or her circumstances can be the basis of a valid fraud claim. *Lazar v. Superior Court (1996) 12 Cal. 4th 631, 639, 49 Cal. Rptr. 2d 377, 909 P.2d 981* .

Plaintiff can only establish misrepresentation if it is separate from the termination of the employment contract. *Hunter v. Up-Right, Inc. (1993) 6 Cal. 4th 1174, 1178, 26 Cal. Rptr. 2d 8, 864 P.2d 88*

If employment contract expressly provides for at-will employment, action for fraudulent inducement of employment contract may not be maintained on basis of alleged false representation regarding duration of employment; in such case employee will be unable to show justifiable reliance on false representation. *Dore v. Arnold Worldwide, Inc. (2006) 39 Cal. 4th 384, 393-394, 46 Cal. Rptr. 3d 668*

Lab. Code § 970 is based on deceit and scienter requirement, and requires that representations by employer be knowingly false; no cause of action under *Lab. Code § 970* established when employee fails to produce evidence tending to show that employer withheld information from employee with intent to deceive. *Funk v. Sperry Corp. (9th Cir. 1988) 842 F.2d 1129, 1133-1134*

"Change from one place to another" as used in *Lab. Code § 970* encompasses temporary as well as permanent change of residence. *Collins v. Rocha (1972) 7 Cal. 3d 232, 239-240, 102 Cal. Rptr. 1, 497 P.2d 225*

Class action is appropriate remedy for violation of *Lab. Code § 970*. *Collins v. Rocha (1972) 7 Cal. 3d 232, 234-240, 102 Cal. Rptr. 1, 497 P.2d 225*

Cause of action was not stated for violation of *Lab. Code § 970* or for wrongful discharge based on violation of *Lab. Code § 970*, because plaintiff failed to allege that defendant employer made knowingly false representations. *Tyco Industries, Inc. v. Superior Court (1985) 164 Cal. App. 3d 148, 155-156, 211 Cal. Rptr. 540*

Application of *Lab. Code §§ 970, 972* is not restricted to farm labor or other mass hiring situations; actions asserting oral misrepresentation under *Lab. Code § 970* are limited to those that can be performed within one year. *Munoz v. Kaiser Steel Corp. (1984) 156 Cal. App. 3d 965, 980-981, 203 Cal. Rptr. 345*

Employee's union was without standing to bring action under *Lab. Code § 1054*. *Service Employees International Union v. Hollywood Park, Inc. (1983) 149 Cal. App. 3d 745, 765, 197 Cal. Rptr. 316*

Liability under *Lab. Code § 1050* applies only to misrepresentations made to prospective employers and not to misrepresentations made by employees of former employer to other employees of former employer. *Kelly v. General Telephone Co. (1982) 136 Cal. App. 3d 278, 288, 186 Cal. Rptr. 184*

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California Forms of Pleading and Practice--Annotated

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Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsLabor & Employment LawCollective Bargaining & Labor RelationsFederal PreemptionLabor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawWrongful TerminationGeneral OverviewTortsVicarious LiabilityEmployersGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 249 EMPLOYMENT LAW: TERMINATION AND DISCIPLINE
PART III. RESEARCH GUIDE

21-249 California Forms of Pleading and Practice--Annotated § 249.45

AUTHOR: Richard P. Hill Editorial Consultant

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Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWrongful TerminationGeneral OverviewLabor & Employment LawWrongful TerminationRemediesGeneral OverviewLabor & Employment LawWrongful TerminationRemediesPunitive Damages

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PART III. RESEARCH GUIDE

21-249 California Forms of Pleading and Practice--Annotated §§ 249.46-249.49

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[Reserved]

§§ 249.46[Reserved]

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 249 EMPLOYMENT LAW: TERMINATION AND DISCIPLINE
PART IV. FORMS

21-249 California Forms of Pleading and Practice--Annotated § 249.50

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.50 Complaint for Damages--Wrongful Discharge or Wrongful Discipline in Breach of Express or Implied-in-Fact Employment Contract [Lab. Code § 2922], Tortious Violation of Public Policy, and Breach of Covenant of Good Faith and Fair Dealing--By Present or Former Employee Against Employer

[1] FORM Complaint for Damages--Wrongful Discharge or Wrongful Discipline in Breach of Express or Implied-in-Fact Employment Contract [Lab. Code § 2922], Tortious Violation of Public Policy, and Breach of Covenant of Good Faith and Fair Dealing--By Present or Former Employee Against Employer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR TORTIOUS
_____ [*name*],	)	_____ [DISCHARGE, DISCIP-
[and DOES I through_____,]	)	LINE, *or* DEMOTION] IN VIOLATION OF PUB-
Defendant(s).	)	LIC POLICY; BREACH OF CONTRACT;
	)	BREACH OF THE COVENANT OF GOOD FAITH
	)	AND FAIR DEALING[; AND
		_____ (*specify other causes of action, if included, e.g.,* DEFAMATION)]
		[Amount demanded _____
		(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. _____ [*Allege capacity and residence of defendant(s), for purposes of venue, e.g.,* Defendant _____ (*name*) is, and at all times mentioned herein was, a corporation organized and existing under the laws of the State of California with its principal place of business in _____County, California].

[2. _____ (*Set forth Doe allegations, e.g.,* Defendants DOES I through _____ were at all times relevant herein _____ (*specify capacity, e.g.,* employees, agents, and/or members of the Board of Directors of defendant _____ (*name*)). Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I through _____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will pray leave of this court to amend this complaint to allege the true names and capacities when ascertained.]

[3. Plaintiff is informed and believes, and thereon alleges, that each of the defendants herein was, at all times relevant to this action, the agent, employee, representing partner, or joint venturer of the remaining defendants and was acting within the course and scope of that relationship. Plaintiff is further informed and believes, and thereon alleges, that each of the defendants herein gave consent to, ratified, and authorized the acts alleged herein to each of the remaining defendants.]

FIRST CAUSE OF ACTION
(_____ [Termination, Discipline, *or* Demotion] in Violation of Public Policy)

4. From _____ to _____ [*dates*], plaintiff was employed by defendant as a _____ [*describe position and duties, e.g.,* regional sales manager with responsibility for distribution of defendant's products to retailers].

5. _____ [*Allege conduct by the employer in violation of public policy, such as facts showing that the employer retaliated against plaintiff for exercising rights protected by public policy or for refusing to act contrary to public policy as ordered by the employer, e.g.,* On or about _____ (*date*), defendant's directors, officers, and management proposed that defendant enter into a secret agreement with its competitors, whereby defendant and its competitors would fix the price of certain products distributed to retailers. On or about _____ (*date*), defendant's vice president of sales and marketing _____ (*name*), acting within the course and scope of his/her employment, approached plaintiff and asked him/her to contact _____ (*name*), the sales director for _____ (*name*), a competing firm, for the purpose of implementing the price-fixing plan. At that time and on subsequent occasions, plaintiff refused to participate in any manner in the plan to engage in price fixing with competitors.]

6. _____ [*Allege specific public policy involved with any applicable citations, e.g.,* The actions defendant ordered plaintiff to engage in would have violated the Sherman Antitrust Act, Title *15 of the United States Code, Sections 1* through 7, and the California Cartwright Act, *Business and Professions Code Sections 16700 through 16770*.]

[*EITHER*]

7. As a proximate result of plaintiff's conduct as described in Paragraph 5, above, and in violation of public policy as set forth in Paragraph 6, above, defendant _____ [*name*] terminated plaintiff's employment on _____ [*date*].

[*OR*]

7. As a proximate result of plaintiff's conduct as described in Paragraph 5 above, and in violation of public policy as set forth in Paragraph 6, above, defendant _____ [*name*] demoted plaintiff by [*specify demotion made, e.g.* assigning plaintiff a position three grades lower than plaintiff's previous position].

[*OR*]

7. As a proximate result of plaintiff's conduct as described in Paragraph 5, above, and in violation of public policy as set forth in Paragraph 6, above, defendant _____ [*name*] disciplined plaintiff by _____ [*specify discipline imposed, e.g.,* suspending plaintiff without pay for a period of two weeks from _____ until _____ (*dates*)].

[*OR*]

7. As a proximate result of plaintiff's conduct as described in Paragraph 5, above, and in violation of public policy as set forth in Paragraph 6, above, defendant _____ [*name*] _____ [*specify defendant's conduct toward plaintiff, e.g.,* verbally harassed plaintiff, changed plaintiff's territory so that far less compensation could be earned, and threatened to terminate plaintiff's employment unless he/she cooperated in defendant's price-fixing plan], and as a result of this treatment plaintiff reasonably concluded that the conditions of employment were intolerable, and resigned. At al l times relevant hereto, defendant _____ [*name of employer*] [deliberately created the working conditions that led plaintiff to resign *or* knew about the working conditions that led plaintiff to resign, and failed to remedy the situation]. [The knowledge of defendant _____ (*name of employer*) is based on the knowledge of _____ (*name*), in his/her capacity as (officer *or* director *or* managing agent or supervisory employee) of defendant _____ (*name of employer*)].

[*CONTINUE*]

8. As a proximate result of defendant's conduct, plaintiff has suffered harm, including lost earnings and other employment benefits[, humiliation, embarrassment, and mental anguish], all to his/her damage _____ [in the sum of $_____ *or* in an amount to be established at trial].

[9. In doing the acts set forth above, defendants knew that _____ (*specify defendants' knowledge of plaintiff's rights, e.g.,* the conduct that they would have required of plaintiff was unlawful, and required plaintiff to choose between violating the law and losing his/her job). Notwithstanding this knowledge, defendant despicably subjected plaintiff to cruel and unjust hardship in conscious disregard of plaintiff's rights by _____ (*specify facts showing oppressive or cruel and unjust treatment by defendant, e.g.,* insisting that plaintiff violate the law, and terminating plaintiff's employment when plaintiff refused to do so, and castigating plaintiff in front of plaintiff's coworkers). _____ (*When employer is a corporation, add when appropriate:* This oppressive conduct was committed by _____ (*name of officer, director, or managing agent of corporation*), a managing agent of the defendant.) Defendant's conduct warrants the assessment of punitive damages.]

[*EITHER*]

[10. Defendant _____ (*name of employer*) employed _____ (*name of employee who personally committed act(s) complained of*) with advance knowledge of his/her unfitness, and employed him/her with a conscious disregard of the rights and safety of others. _____ (*If employer is a corporation, add:* The

advance knowledge and conscious disregard was by _____ (*name of officer, director, or managing agent of corporation*), a managing agent of the defendant.)]

[*AND/OR*]

[10. Defendant _____ (*name of employer*) _____ (authorized *or* ratified) the conduct of _____ (*name of employee who personally committed act(s) complained of*) specified in Paragraph 9 by _____ (*specify facts supporting inference of ratification or authorization, e.g.,* retaining the employee after learning of his/her conduct toward plaintiff and failing and refusing to discipline or reprimand him/her). _____ (*If employer is a corporation, add:* The (authorization *or* ratification) was by _____ (*name of officer, director, or managing agent of corporation*).)]

[*CONTINUE*]

SECOND CAUSE OF ACTION
(Breach of _____ [Implied *and/or* Express] Contract of Continued Employment)

11. Plaintiff incorporates herein by reference Paragraphs _____ (*specify paragraph numbers of relevant allegations in previous cause of action*).

12. _____ [*Allege facts establishing written, oral, implied-by-conduct contract not to terminate, or discipline, or demote without cause, e.g.,* Plaintiff was employed by defendant for 15 years, consistently received either good or excellent performance evaluations and merit raises, was assured on numerous occasions that he/she would not be terminated arbitrarily, and relied on the provisions of the personnel manual (, a copy of which is appended as Exhibit _____,) regarding the causes for which employees could be discharged, to conclude that plaintiff and defendant had entered into an implied contract that plaintiff would not be discharged unless there was good cause to do so.]

13. Based on the _____ [_____ (written contract *or* oral representations and promises) *and/or* conduct of defen dant], as set forth in Paragraph[s] _____, above, plaintiff had an employment contract with defendant that he/she would be employed by defendant so long as his/her performance was satisfactory, and that defendant would not discharge him/her without good and just cause.

[14. The terms of the employment contract included, but were not limited to, the following: _____ (*specify terms, e.g.,* defendant would not demote or discharge plaintiff without good cause and fair warning, based on objective, reasonable job evaluations of plaintiff).]

15. Plaintiff at all times fulfilled his/her duties and conditions under the contract and has been ready, willing, and able to continue performing them in a competent and satisfactory manner.

[*EITHER*]

16. Notwithstanding the _____ [express *or* implied] promise to terminate the employment contract only for good cause, on or about _____ [*date*], defendant terminated plaintiff's employment _____ [*specify facts supporting inference that good cause to terminate did not exist, e.g.,* without specifying any cause for the termination *or* on the alleged ground of poor performance, even though plaintiff had received consistently good performance evaluations and had received a merit raise only two months before his/her

termination].

[*OR*]

16. Notwithstanding the _____ [express *or* implied] promise not to_____ [demote *or* discipline] plaintiff without good cause, on or about _____ [*date*], defendant _____ [demoted *or* disciplined] plaintiff _____ [*specify facts supporting inference that good cause to discipline or demote did not exist, e.g.,* without specifying the ground for the demotion].

[*CONTINUE*]

17. As a proximate result of defendant's breach of the employment contract, plaintiff has suffered and continues to suffer losses in earnings and other employment benefits, to his/her damage _____ [in the sum of $_____ *or* in an amount to be established at trial].

THIRD CAUSE OF ACTION
(Breach of Implied Covenant of Good Faith and Fair Dealing)

18. Plaintiff incorporates by reference and realleges Paragraphs _____ [*specify paragraph numbers of relevant allegations in previous cause(s) of action*].

19. The employment agreement referred to above contained an implied covenant of good faith and fair dealing, which obligated defendant[s] to perform the terms and conditions of the agreement fairly and in good faith and to refrain from doing any act that would prevent or impede plaintiff from performing any or all of the conditions of the contract that he/she agreed to perform, or any act that would deprive plaintiff of the benefits of the contract.

[20. _____ (*Allege facts showing long service to employer and existence of employer policies that the employer failed to follow, especially policies or practices providing the employee with prior notice of intended termination, or demotion, or discipline and an opportunity to appeal those actions, e.g.,* Plaintiff was employed by defendant for 15 years, and reasonably relied on the provisions of the personnel manual (, a copy of which is appended as Exhibit _____,) regarding the causes for which employees could be discharged or demoted and the procedures set forth for such discharges for the expectation that defendant would apply its policies even-handedly to afford plaintiff the protections of those procedures if defendant believed there was cause to discharge plaintiff.)]

[21. Plaintiff performed all the duties and conditions of the employment agreement.]

[22. Defendant knew that plaintiff had fulfilled all his/her duties and conditions under the contract.]

23. Defendant breached the implied covenant of good faith and fair dealing under the employment agreement by _____ [discharging *or* _____ (*allege other adverse employment actions or facts giving rise to constructive discharge*)] plaintiff intentionally, maliciously, and without probable cause, in bad faith and for reasons extraneous to the contract. _____ [*Allege facts showing ill motivation and/or non-job-related reasons for discharge or demotion or discipline, e.g.,* In fact, defendant discharged plaintiff, not because of alleged poor performance, but because plaintiff, in good faith and in a reasonable, appropriate, and businesslike manner, had attempted to secure payment of commissions due under the employment agreement. Such motives were retaliatory in nature and extraneous to the employment relationship and were intended to deprive plaintiff of the benefits thereof].

[24. Defendant further breached the implied covenant of good faith and fair dealing by violating and failing to follow its own personnel policies by _____ (*allege facts showing defendant did not comply with personnel policies, e.g.,* not providing plaintiff with the written warning of performance deficiency required by its personnel policy before discharge).]

[25. Defendant further breached the implied covenant of good faith and fair dealing by depriving plaintiff of _____ (*allege facts establishing that the termination deprived the employee of benefits about to accrue, e.g.,* commissions earned by plaintiff on sales completed before his/her termination and due as soon as the merchandise ordered was delivered).]

26. As a proximate result of defendant's breach of the implied covenant of good faith and fair dealing, plaintiff has suffered, and continues to suffer, losses _____ [*describe nature of damages, e.g.,* in earning and other employment benefits], to his/her damage _____ [in the sum of $_____ *or* in an amount to be established at trial]. As a further proximate result of defendant's breach of the implied covenant of good faith and fair dealing, plaintiff has incurred reasonable attorney's fees in attempting to secure the benefits owed him/her under the employment contract.

[*Insert additional causes of action as appropriate.*]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For damages for breach of contract according to proof, including lost earnings and other employee benefits, past and future;

2. For compensatory damages according to proof, including lost earnings and other employee benefits[, costs of seeking other employment][, and damages for emotional distress, humiliation, and mental anguish];

3. For interest on lost earnings and benefits at the prevailing legal rate from _____ [*date*];

[4. For punitive damages in an amount appropriate to punish defendant and deter others from engaging in similar misconduct;]

[5. For reasonable attorney's fees incurred by plaintiff in obtaining the benefits due him/her under the employment contract with defendant;]

6. For costs of suit incurred by plaintiff; and

7. For such other and further relief as the court deems proper.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____[*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form of complaint in *[1], above*, is for use by an employee in an action for wrongful discipline against the employer, or by a former employee in action for wrongful termination against the former employer, to seek damages based on defendant's violation of public policy, breach of contract, and breach of the implied covenant of good faith and fair dealing, as appropriate [*see, e.g.,* *Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 164 Cal. Rptr. 839, 610 P.2d 1330* (wrongful termination); *Garcia v. Rockwell International Corp. (1986) 187 Cal. App. 3d 1556, 232 Cal. Rptr. 490* (wrongful discipline; disapproved in *Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1093, 4 Cal. Rptr. 2d 874, 824 P.2d 680* , for stating that public policy underlying of wrongful discharge action need not be rooted in statutory or constitutional provision); *Scott v. Pacific Gas & Electric Co. (1995) 11 Cal. 4th 454, 466, 46 Cal. Rptr. 2d 427, 904 P.2d 834* (wrongful demotion in violation of public policy)].

[3] Allegations

The complaint contains allegations supporting the following causes of actions:

- Wrongful discharge, or other adverse action, in violation of public policy (Paragraphs 4-10) [*see Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 665-671, 669, 254 Cal. Rptr. 211, 765 P.2d 373* (public policy must inure to benefit of public in general); *Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 174, 178, 164 Cal. Rptr. 839, 610 P.2d 1330* (establishing cause of action for wrongful discharge); *Koehrer v. Superior Court (1986) 181 Cal. App. 3d 1155, 1163, 226 Cal. Rptr. 820* (cause of action for "tortious discharge"; disapproved in *Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1093, 4 Cal. Rptr. 2d 874, 824 P.2d 680* , for stating that public policy underlying wrongful discharge action need not be rooted in statutory or constitutional provision); *Scott v. Pacific Gas & Electric Co. (1995) 11 Cal. 4th 454, 466, 46 Cal. Rptr. 2d 427, 904 P.2d 834* (wrongful demotion in violation of public policy); *see also discussion under § 249.12*];

- Breach of an express or implied-in-fact contract (Paragraphs 11-17) [*see Code Civ. Proc. § 430.10(g)* (complaint must state whether contract is written, oral, or implied by conduct); *Lab. Code § 2922* (at will employment generally); *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 680, 254 Cal. Rptr. 211, 765 P.2d 373* (allegation of facts sufficient to overcome statutory presumption of at will employment); Pugh v. See's *Candies, Inc. (1981) 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917* (*Pugh I*); *but see* *Shapiro v. Wells Fargo Realty Advisors (1984) 152 Cal. App. 3d 467, 481-482, 199 Cal. Rptr. 613* (noting factors to be considered in determining whether or not implied contract exists, but holding that existence of express contract of employment providing for at will status precludes existence of implied contract with different terms); *see also* discussion in [6], *below*]; and

- Breach of the implied covenant of good faith and fair dealing (Paragraphs 18-26) [*compare* *Cleary v. American Airlines, Inc. (1980) 111 Cal. App. 3d 443, 456, 168 Cal. Rptr. 722* (employee's long

service, and existence of employer's procedures for terminating employees, as sufficient to give rise to cause of action for breach of the implied covenant when plaintiff was terminated without cause and without protection of the employer's procedures), *with Koehrer v. Superior Court (1986) 181 Cal. App. 3d 1155, 1171, 226 Cal. Rptr. 820* (breach of implied covenant established if employerasserted existence of good cause to discharge employee without good-faith belief in cause to discharge; disapproved on other grounds in *Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1093, 4 Cal. Rptr. 2d 874, 824 P.2d 680*), and *Khanna v. Microdata Corp. (1985) 170 Cal. App. 3d 250, 262-263, 215 Cal. Rptr. 860* (breach of implied covenant established by proof of employer's bad faith conduct extraneous to contract coupled with intent to frustrate employee's contract rights); *see also § 249.14* for additional discussion].

Alternative Paragraphs 7 are for use in support of a cause of action based on the employer's violation of public policy in the following circumstances: (1) if plaintiff was terminated (Option 1) [*see Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 174, 178, 164 Cal. Rptr. 839, 610 P.2d 1330]* ; (2) if plaintiff was demoted rather than discharged (Option 2) [*Scott v. Pacific Gas & Electric Co. (1995) 11 Cal. 4th 454, 466, 46 Cal. Rptr. 2d 427, 904 P.2d 834]* ; (3) if plaintiff was disciplined rather than discharged (Option 3) [*see Garcia v. Rockwell International Corp. (1986) 187 Cal. App. 3d 1556, 1561, 232 Cal. Rptr. 490* (disapproved on other grounds in *Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1093, 4 Cal. Rptr. 2d 874, 824 P.2d 680*)]; or (4) if plaintiff resigned (Option 4) [*see Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022]* .

It also contains allegations in support of an award of punitive damages for the tort causes of action (Paragraphs 9, 10) [*see Civ. Code § 3294*].

Because public entities are subject to liability only as provided by statute [*Gov. Code § 815(a)*], the common-law cause of action for wrongful discharge in violation of public policy is not available against a public entity [*see Miklosy v. Regents of Univ. of Cal. (2008) 44 Cal. 4th 876, 899-900, 80 Cal. Rptr. 3d 690, 188 P.3d 629* ; *Lloyd v. County of Los Angeles (2009) 172 Cal. App. 4th 320, 330, 90 Cal. Rptr. 3d 872* (doctrine of respondeat superior cannot be applied to hold public entity liable for common-law tort of wrongful discharge in violation of public policy)]. Therefore, if the defendant employer is a public entity, the first cause of action set forth in this form should not be used.

If the defendant is a public entity, the complaint should include an allegation that a written notice of claim was timely presented to the public entity pursuant to the Government Claims Act [*see Gov. Code §§ 905, 910, 912.4, 945.4*; *see also City of Stockton v. Superior Court (2007) 42 Cal. 4th 730, 741, 68 Cal. Rptr. 3d 295, 171 P.3d 20* ("Henceforth, we will refer to [*Gov. Code § 810 et seq.*] as the Government Claims Act," rather than "Tort Claims Act," because it applies to contract claims as well as tort claims)]. The complaint may assert additional wrongful discharge theories not set forth in the notice of claim, so long as the notice of claim informed the public entity of the employment termination cause of action giving rise to the claim and provided sufficient detail for investigation by the public entity. Thus, a notice of claim is sufficient if it notifies the public entity of its act (wrongful termination) that caused the plaintiff's injury (e.g., loss of earnings) and names the public entity's agents the plaintiff believes responsible. In such a case, the plaintiff's subsequent complaint may assert additional theories of liability so long as it does not shift liability to other parties or premise liability on acts committed at times or places different from those identified in the notice of claim [*Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Auth. (2004) 34 Cal. 4th 441, 445-450, 20 Cal. Rptr. 3d 176, 99 P.3d 500]* . For detailed coverage of notice of claim requirements and related procedures under the Tort Claims Act, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[4] Preemption

The foregoing complaint should not contain allegations that will subject it to removal to federal district court. Generally, the existence of a federal defense to a state-law cause of action renders the action subject to the removal jurisdiction of federal courts only if the federal law "completely" preempts state law. For example, a state-law claim against the fiduciary of an ERISA-regulated benefit plan is completely preempted by ERISA (and therefore removable)

if interpretation of the terms of the plan forms an essential part of the claim, and the plaintiff is in essence suing only to rectify a wrongful denial of benefits promised under the plan [*Aetna Health Inc. v. Davila (2004) 542 U.S. 200, 124 S. Ct. 2488, 159 L. Ed. 2d 312, 330* ; *see 29 U.S.C. § 1144(a)* (broad preemption policy of ERISA, *29 U.S.C. § 1001 et seq.*].

Unless state law is completely preempted, if both a state and a federal remedy are available to an employee based on the facts alleged, an employee may choose the state remedy and avoid removal to federal court [*Caterpillar, Inc. v. Williams (1987) 482 U.S. 386, 398-399, 107 S. Ct. 2425, 96 L. Ed. 2d 318* ; *see Garibaldi v. Lucky Food Stores, Inc. (9th Cir. 1984) 726 F.2d 1367, 1370 , cert. denied, 471 U.S. 1099 (1985)]* . For discussion and forms relating to federal removal jurisdiction, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

Similarly, the complaint should not contain allegations that will subject it to preemption by state law. Termination of employment, and the events culminating in termination, are deemed a normal part of the employment relationship, and the exclusive remedy doctrine bars a civil damages action for personal injury caused by termination unless the injury is the result of conduct that does not reasonably come within the compensation bargain [*Shoemaker v. Myers (1990) 52 Cal. 3d 1, 17-20, 276 Cal. Rptr. 303, 801 P.2d 1054* ; *Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 159-160, 233 Cal. Rptr. 308, 729 P.2d 743]* . The California Supreme Court has held that even when no physical injury or disability is alleged, a claim for intentional or negligent infliction of emotional distress is within the exclusive remedy provisions of the workers' compensation act, so long as the basic conditions of compensation are otherwise satisfied and the employer's conduct neither contravenes a fundamental public policy nor exceeds the risks inherent in the employment relationship [*Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 754-755, 7 Cal. Rptr. 2d 808, 828 P.2d 1195* ; *see Gibbs v. American Airlines, Inc. (1990) 74 Cal. App. 4th 1, 9-10, 87 Cal. Rptr. 2d 554* (exclusivity of workers' compensation extends to intentional infliction of emotional distress by employer's work-related conduct so long as that conduct does not contravene public policy)]. The Court has also held that a cause of action for tortious discharge in violation of public policy is not preempted by workers' compensation law [*Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1101, 4 Cal. Rptr. 2d 874, 824 P.2d 680]* . On the other hand, a pattern of continuing violations of the public policy against workplace harassment is outside the normal scope of employment. Therefore, a cause of action for the infliction of emotional distress resulting from such harassment will not be barred by the exclusivity provisions of the workers' compensation law [*Murray v. Oceanside Unified Sch. Dist. (2000) 79 Cal. App. 4th 1338, 1362-1363, 95 Cal. Rptr. 2d 28* (sexual-orientation harassment in violation ofFair Employment and Housing Act, *Gov. Code § 12940(j)*)]. For additional discussion preemption by California Workers' Compensation law, see *§ 249.21[10]*.

[5] Cause of Action for Violation of Public Policy

[a] Pleading Source of Public Policy

To state a cause of action for violation of public policy, the complaint must allege the following: (1) a public policy; (2) adverse employment in violation of public policy, such as defendant's termination of plaintiff's employment in retaliation for plaintiff's statutorily protected activity or for plaintiff's refusal to engage in illegal conduct; and (3) damages resulting from the adverse employment action [*see Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 174, 178, 164 Cal. Rptr. 839, 610 P.2d 1330* ; *see also CACI 2430-2433*].

The public policy asserted in a wrongful discharge action based on the employer's violation of public policy must derive from either statutory or constitutional authority. Therefore, for example, public policy embodied in decisional law alone is insufficient to support this cause of action [*see Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1090-1095, 4 Cal. Rptr. 2d 874, 824 P.2d 680]* . However, public policy embodied in administrative regulations adopted pursuant to statutory authority may serve as the basis of a wrongful-discharge claim [*Green v. Ralee Engineering Company (1998) 19 Cal. 4th 66, 80-90, 78 Cal. Rptr. 2d 16, 960 P.2d 1046]* . In addition, the statutory or constitutional basis for the asserted public policy must be a fundamental public policy applicable to the defendant's conduct. For example, the statutory policy prohibiting employment discrimination on the basis of age could not be the basis for a wrongful

discharge action against an employer expressly exempt from the substantive provisions of the statutory scheme [*Jennings v. Marralle (1994) 8 Cal. 4th 121, 130, 32 Cal. Rptr. 2d 275, 876 P.2d 1074* (defendant was not "employer" subject to FEHA because he employed fewer than five employees); *but see Phillips v. St. Mary Reg'l Med. Ctr. (2002) 96 Cal. App. 4th 218, 230-238, 116 Cal. Rptr. 2d 770* (although employer was expressly exempt from FEHA, plaintiff alleging race and sex discrimination could rely on Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.* , and on *Cal. Const., art. I, § 8*, as sources of public policy to support claim of wrongful discharge in violation of public policy); *Badih v. Myers (1995) 36 Cal. App. 4th 1289, 1291, 43 Cal. Rptr. 2d 229* (plaintiff brought claim for wrongful termination in violation of policy against pregnancy discrimination based on proscription against sex discrimination embodied in California Constitution even though her employer was not subject to FEHA)]. For additional discussion see *§ 249.12[3]*.

[b] Pleading Proximate Cause

Counsel should specifically allege that the stated public policy violation was the proximate cause of the discharge or other adverse action [*see Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 171 n.3, 164 Cal. Rptr. 839, 610 P.2d 1330* (allegations that sole reason for discharge was employee's refusal to commit illegal acts sufficiently alleged proximate cause)]. If the defendant did not actually terminate plaintiff's employment, but plaintiff resigned as a result of the employer's violation of public policy, the complaint should use the alternative allegations in Paragraph 7 of the form to allege either the action (such as discipline or demotion) taken by the employer, or facts that will support a conclusion that the conditions were so intolerable that a reasonable person would feel compelled to resign, and that the employer knew of those conditions [*see Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022* ; *see also* discussion in *§ 249.15[1][a]*].

[c] Exhaustion of Administrative Remedies

If the statute that embodies the public policy also provides a private right of action, the statutory cause of action may in some cases be the exclusive remedy and may require exhaustion of administrative remedies. Therefore, if plaintiff can comply with the statutory requirements, such as the shorter limitation period and requirements of exhaustion of administrative remedies, counsel should consider foregoing a common law public-policy claim in favor of pleading the statute exclusively. That choice may provide counsel with advantages such as less jury confusion, better-developed law, and statutory attorney's fees. For additional discussion, see *§ 249.12[5]*.

[d] Alleging Emotional Distress Damages

If plaintiff is seeking emotional distress damages for tortious breach of public policy, the distress should be alleged. However, allegations that the termination caused emotional distress, especially allegations that the plaintiff continues to suffer from symptoms of mental distress, put the plaintiff's mental condition in controversy and may result in a psychological examination by defendant's expert [*see Code Civ. Proc. § 2032(d)* (*Code Civ. Proc. §§ 2032.310, 2032.320* operative July 1, 2005); *see also Vinson v. Superior Court (1987) 43 Cal. 3d 833, 840-841, 239 Cal. Rptr. 292, 740 P.2d 404]* . For discussion of the examination of plaintiff during discovery, see Ch. 190, *Depositions and Discovery* .

In addition, plaintiff's counsel should be wary of potential workers' compensation preemption issues. For discussion, see *[4], above*. In addition, see discussion in *§ 249.21[10]*.

[6] Cause of Action for Implied-in-Fact Contract Not to Terminate Except for Cause

If the contract is oral or implied by conduct, the complaint should allege the specific conduct or representations that the plaintiff alleges are the basis for the existence of a contract. If the action is not based on an express contract providing that termination must be for cause, plaintiff should allege in Paragraph 12 of the form facts sufficient to overcome the presumption of at will employment embodied in *Lab. Code § 2922*, including as many of the following as possible:

specific oral or written assurances of continued employment absent good cause for termination; longevity of service; commendations, promotions, and lack of criticism; the employer's personnel policies or practices (especially those governing discipline and termination); and industry practices regarding job security [*see Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 680, 254 Cal. Rptr. 211, 765 P.2d 373* ; *see also* discussion in *§ 249.13*].

If the employer caused the employee to change location by intentional misrepresentations about aspects of the work set forth in *Lab. Code § 970*, the complaintshould also allege a cause of action for double damages pursuant to *Lab. Code § 972*. For discussion of those provisions, see *§ 249.30*. For a form of complaint against an employer to seek double damages on the ground that the employer's misrepresentations induced the employee to change residences, see *§ 249.80*.

[7] Cause of Action for Breach of Implied Covenant of Good Faith and Fair Dealing

A complaint for a breach of the implied covenant of good faith and fair dealing in the context of an employment contract must allege at least the following: (1) the existence of an employment contract, whether written, oral, or implied by conduct, one term of which is the implied covenant of good faith and fair dealing (*see* Paragraph 19 of form); (2) defendant's breach of the covenant (*see* Paragraph 23 and optional Paragraphs 24 and 25 of form); and (3) plaintiff's resultant damages (*see* Paragraph 26 of form) [*see Code Civ. Proc. § 430.10(g)* (complaint must state whether contract is written, oral, or implied by conduct); *see also Koehrer v. Superior Court (1986) 181 Cal. App. 3d 1155, 1167, 226 Cal. Rptr. 820* (complaint must state breach of covenant and resultant damages)]. If it cannot be shown that the employment contract was not at will, the complaint must allege that the employer's conduct deprived the plaintiff of a benefit of the agreement other than just continued employment (*e.g.*, already-earned commissions) [*see Camp v. Jeffer, Mangels, Butler & Marmaro (1995) 35 Cal. App. 4th 620, 631, 41 Cal. Rptr. 2d 329]* .

If applicable to the particular facts involved, the complaint should allege that the employee was treated differently from similarly situated employees, that the employer denied the employee the benefit of personnel policies or practices that it afforded to other employees, and any particularly abusive conduct involved in the way plaintiff was terminated [*see Rulon-Miller v. International Business Machines Corp. (1984) 162 Cal. App. 3d 241, 248, 255, 208 Cal. Rptr. 524]* .

[8] Related Causes of Action

A number of additional tort theories of recovery may be available, depending on the facts of the particular case, such as assault, battery, defamation, invasion of privacy, and interference with prospective business advantage. The foregoing form may include additional allegations regarding those causes of action. For further discussion, see *§ 249.22*.

[9] Statute of Limitations

There are several statutes of limitations set out in the Code of Civil Procedure that are potentially relevant to various causes of action in a wrongful termination suit. *Code Civ. Proc. § 337(1)* establishes a four-year period for an action based on a written contract. *Code Civ. Proc. § 338(a)* prescribes a three-year statute for an action on a liability created by statute, other than a penalty or forfeiture. *Code Civ. Proc. § 339* provides a two-year limitation period for an action based on a contract not in writing. Additionally, *Code Civ. Proc. § 335.1* provides a two-year limitation period for injury caused by the wrongful act or neglect of another. Finally, *Code Civ. Proc. § 340(c)* sets out a one-year statute for an action for libel or slander.

A claim of wrongful termination in violation of public policy sets forth a claim for violation of a personal right. Accordingly, the appropriate limitations period is the two-year period set forth in *Code Civ. Proc. § 335.1* [*see Mathieu v. Norrell Corp. (2004) 115 Cal. App. 4th 1174, 1189 n.14, 10 Cal. Rptr. 3d 52* (effective January 1, 2003, two-year limitations period under *Code Civ. Proc. § 335.1* replaced one-year period of *former Code Civ. Proc. § 340(3)*); *see also Barton v. New United Motor Manufacturing, Inc. (1996) 43 Cal. App. 4th 1200, 1205-1209, 51 Cal. Rptr. 2d 328* (actions for wrongful termination in violation of public policy are tort actions subject to limitations period

applicable to personal-injury claims)].

Although there are no cases directly on point, a wrongful termination action styled as a breach of contract case would appear to be governed either by the four-year statute for written contracts, pursuant to *Code Civ. Proc. § 337(1)*, or by the two-year statute for oral or implied contracts, pursuant to *Code Civ. Proc. § 339*.

For additional discussion of limitation periods for causes of action for violation of public policy and breach of the implied covenant of good faith and fair dealing, see *§ 249.21[13]*.

[10] Venue

In a breach of contract action, the proper venue is either in the county where the defendant resides, where the contract was to be performed, or where the contract was entered into [*Code Civ. Proc. § 395(a)*]. If the defendant is a corporation, the county where the corporation's principal place of business is located is also a proper place to institute the action [*Code Civ. Proc. § 395.5*]. An unincorporated association may similarly be sued in the county in which the association's principal office is located [*Code Civ. Proc. § 395.2*]. If a basis for venue other than the residence of the defendant is relied on for venue purposes, it is unnecessary to allege defendant's residence. The fact relied on to establish venue, such as the place that the contract was entered into, must be alleged, however, because the county in which defendant resides is the proper county for trial except as otherwise provided by law [*see Code Civ. Proc. § 395(a)*; *see also* Ch. 571, *Venue*].

In an action for injury to person or personal property or for death from wrongful act or negligence, either the county in which the injury occurs or the county in which the defendants, or some of them, reside at the commencement of the action is a proper county for the trial of the action [*Code Civ. Proc. § 395(a)*; *see also* Ch. 571, *Venue*]. If venue is based on the situs of the wrongful act or negligence, then the allegation of defendant's residence is not needed.

[11] Verification

Verification of this complaint is not required, but verification of the complaint requires the defendant to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446(a)*] and precludes a general denial in superior court and in some limited civil cases [*Code Civ.Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[12] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For complaints based on assault and battery regarding servants, agents, employees, and employers, see Ch. 58, *Assault and Battery*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For a form of class-action complaint for use in an action by employees against an employer for damages based on misrepresentation, see the Ch. 120, *Class Actions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For an allegation of an oral contract of employment for use in a complaint based on breach of the contract, and for forms for use to bring an action for wrongful discharge arising from a breach of the covenant of good faith and fair

dealing or from bad faith denial of the existence of a contractual relationship, see Ch. 140, *Contracts*

For discussion and forms relating to damages, see Ch. 177, *Damages*

For discussion and forms relating to federal jurisdiction and removal, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For discussion and forms regarding emotional distress generally, see Ch. 362, *Mental Suffering and Emotional Distress*

For discussion and forms regarding negligence generally, see Ch. 380, *Negligence*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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21-249 California Forms of Pleading and Practice--Annotated § 249.51

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.51 Allegations for Use in Complaint for Damages for Wrongful Termination or Demotion or Discipline--Retaliation for Employee's Political Activity [Lab. Code §§ 1101, 1105]

[1] FORM Allegations for Use in Complaint for Damages for Wrongful Termination or Demotion or Discipline--Retaliation for Employee's Political Activity [Lab. Code §§ 1101, 1105]

1. _____ [*Allege facts showing that plaintiff exercised protected rights to engage in political activity or political affiliation, e.g.,* On or about _____ (*date*), plaintiff became a candidate for election to the City Counsel for the city of _____].

2. At some time prior to _____ [*date*], defendant made and adopted a _____ [rule *or* regulation *or* policy] that _____ [*specify e.g.,* any employee who became a candidate for election to a public office would be suspended or discharged]. On that date, by way of enforcing that _____ [rule *or* regulation *or* policy], defendant discharged plaintiff from employment because _____ [*specify e.g.,* plaintiff had become a candidate for election to the City Counsel for the city of _____].

3. Defendant's _____ [discharge *or* discipline *or* demotion] of plaintiff violated the provisions of *Labor Code section 1101* and the public policy of the State of California as expressed in that statute.

4. Defendant's _____ [discharge *or* discipline *or* demotion] of plaintiff was in violation of the implied covenant in the employment contract incorporating the provisions of California law, including *Labor Code section 1101*.

[2] Use of Form

The allegations in [1], *above*, may be included in a complaint for wrongful discharge or discipline or demotion to allege that defendant discharged or disciplined plaintiff in violation of *Lab. Code § 1101*, which prohibits an employer from making, adopting, or enforcing any rule, regulation, or policy interfering with an employee's rights of political activity or affiliation. These allegations may be incorporated into the form of complaint in § 249.50. To assert that defendant's

conduct constituted violation of public policy, Paragraphs 1 and 2 of the allegation may be substituted for Paragraphs 5 and 7 of that form, and Paragraph 3 may be substituted for Paragraph 6 of that form. To assert that defendant breached the employment contract because the contract impliedly incorporated the provisions of *Lab. Code § 1101*, Paragraphs 1, 2, and 4 of the allegation may be substituted for Paragraphs 13-16 of the *form in § 249.50*.

[3] Allegations

The form of allegations includes:

- Facts regarding plaintiff's exercise of rights to engage in political activity or affiliation (Paragraph 1) [*see Lab. Code § 1101*].

- Facts regarding defendant's making, adopting, or enforcing a rule, regulation, or policy in derogation of those rights, and plaintiff's discharge or discipline because of that conduct (Paragraph 2) [*see Lab. Code § 1101*].

- A statement that defendant's conduct violates *Lab. Code § 1101* (Paragraph 3).

- A statement that defendant's conduct constitutes a breach of the employment contract (Paragraph 4).

[4] Action Based on Discharge or Discipline or Demotion Because of Political Activity

No employer shall make, adopt, or enforce any rule, regulation, or policy forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office; or controlling or directing, or tending to control or direct, the political activities or affiliations of employees [*Lab. Code § 1101*]. Violation of this provision is a misdemeanor [*Lab. Code § 1103*]. Nothing in *Lab. Code §§ 1101-1104*, however, prevents the injured employee from recovering damages from the employer for injury suffered through a violation [*Lab. Code § 1105*].

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21-249 California Forms of Pleading and Practice--Annotated § 249.52

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.52 Allegations for Use in Complaint for Damages for Wrongful Termination or Discipline or Demotion--Retaliation for Employee's Protesting Unsafe or Unhealthy Working Conditions

[1] FORM Allegations for Use in Complaint for Damages for Wrongful Termination or Discipline or Demotion--Retaliation for Employee's Protesting Unsafe or Unhealthy Working Conditions

1. On or about _____ [*date*], [and again on _____ (*date(s)*),] plaintiff protested about the _____ [unsafe *and/or* unhealthy] working conditions at his/her place of employment by _____ [*specify, e.g.,* attempting to obtain a reasonably smoke-free environment, because the presence of cigarette smoke in a closed environment creates a significant health hazard to those who are present in the environment].

2. On or about _____ [*date*], defendant _____ [discharged *or* disciplined *or* demoted] plaintiff by _____ [*allege facts showing communication of discharge or discipline to plaintiff by word or act, e.g.,* a written notice given to plaintiff stating that his/her services were no longer required. (A copy of this notice is attached hereto as Exhibit A and made a part hereof.)]

3. Defendant's _____ [discharge *or* discipline *or* demotion] of plaintiff violated the public policy of the State of California, as expressed in the provisions of *Labor Code section 6310*, which prohibits discrimination against employees who make oral or written complaints about workplace safety to either their employer or a governmental agency.

[2] Use of Form

The allegations in *[1], above*, may be included in a complaint for wrongful discharge or discipline or demotion, to allege that defendant discharged or disciplined plaintiff in violation of the public policy underlying *Lab. Code § 6310*, which prohibits discrimination against employees who make oral or written complaints about workplace safety to either their employer or a governmental agency [*see Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 295-304, 188 Cal. Rptr. 159]* . The allegation may be incorporated into the form of complaint in *§ 249.50*. To assert that defendant's

conduct constituted violation of public policy, Paragraph 1 of this form may be substituted for Paragraph 5 of the *form in § 249.50*, Paragraph 2 may be substituted for Paragraph 7, and Paragraph 3 may be substituted for Paragraph 6.

[3] Allegations

This form alleges:

- Facts regarding plaintiff's protest of unsafe or unhealthy working conditions (Paragraph 1) [*see Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 295-304, 188 Cal. Rptr. 159]* ;

- Defendant's discharge or discipline of plaintiff because of plaintiff's protest (Paragraph 2) [*see Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 295-304, 188 Cal. Rptr. 159]* ; and

- A statement that defendant's conduct violated the public policy underlying *Lab. Code § 6310* (Paragraph 3).

[4] Cause of Action for Retaliatory Dismissal Based on Activity to Insure Safe Working Place

The California Occupational Safety and Health Act (*Lab. Code § 6300 et seq.*) prohibits discrimination against employees who make oral or written complaints about workplace safety to either their employer or a governmental agency, who participate in occupational safety and health committees established under *Lab. Code § 6401.7*, or who institute or testify in proceedings under the Act [*Lab. Code § 6310*; *see Lab. Code § 6312* (action by Labor Commissioner)]. The administrative remedy provided a terminated employee by *Lab. Code § 6312* is not, however, exclusive and does not preclude a common-law wrongful discharge action [*Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 302-304, 188 Cal. Rptr. 159* ; *see* discussion in *§ 249.12[5]*].

For an employee to maintain a cause of action for wrongful discharge in this context, it is not necessary to allege or prove that there was a violation of the Occupational Health and Safety Act or that the workplace actually was unsafe. Rather, the employee is protected against discharge or discrimination so long as the complaint was made in good faith about working conditions or practices the employee reasonably believed to be unsafe, whether or not they actually are unsafe [*Cabesuela v. Browning-Ferris Indus. of Cal., Inc. (1998) 68 Cal. App. 4th 101, 109, 80 Cal. Rptr. 2d 60* (plaintiff had complained to employer about extended working hours, which plaintiff believed posed health and safety hazard)].

The statutory protection against retaliatory discharge in this context [*see Lab. Code § 6310*] extends not only to employees who make workplace safety complaints, but also to those who are fired because their employers fear they will make workplace safety complaints [*Lujan v. Minagar (2004) 124 Cal. App. 4th 1040, 1044-1046, 21 Cal. Rptr. 3d 861]* .

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21-249 California Forms of Pleading and Practice--Annotated § 249.53

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.53 Allegations for Use in Complaint for Damages for Wrongful Termination or Discipline--Fraud Cause of Action Based on Misrepresentation Independent of Termination

[1] FORM Allegations for Use in Complaint for Damages for Wrongful Termination or Discipline--Fraud Cause of Action Based on Misrepresentation Independent of Termination

1. On or about _____ [*date*], defendant _____ [*name*][, through his/her/its agent _____ (*name of agent*)] represented to plaintiff that _____ [*specify misrepresentation, e.g.,* if plaintiff withdrew the complaint filed with the Equal Employment Opportunity Commission and waived the right to sue based on the facts alleged in that complaint, defendant _____ (*name*) would provide plaintiff with training opportunities that could lead to promotion and increased compensation]. Defendant _____ [*name*] knew at the time this representation was made that it was false, in that _____ [*specify reason for falsity, e.g.,* defendant _____ (*name*) had a plan to reduce its staff, and plaintiff was among those slated to be laid off]. The misrepresentation was made with the intent to induce plaintiff to _____ [*specify, e.g.,* withdraw the complaint and waive the right to sue based on the facts set forth in that complaint]. Plaintiff's reliance on that misrepresentation was reasonable, in that _____ [*specify facts supporting reasonableness of reliance, e.g.,* plaintiff had no knowledge of any impending layoffs, and intended to use the promised opportunities to improve his/her career]. As a result of plaintiff's reliance on the misrepresentation, he/she suffered damages in that _____ [*specify resulting damage, e.g.,* plaintiff's waiver of the right to sue based on the facts alleged in the complaint filed with the Equal Employment Opportunity Commission precluded any later reinstatement of that cause of action, which would have resulted in an award of damages].

2. The misrepresentation alleged in Paragraph 1 was independent of the termination of plaintiff's employment, and the damages suffered by plaintiff resulted not from that termination but from _____ [*specify cause of damages suffered, e.g.,* plaintiff's waiver of the right to sue].

[2] Use of Form

The allegations in *[1], above*, may be included in a complaint for wrongful discharge or discipline to allege that defendant's conduct constituted fraud, permitting recovery of tort damages that resulted from plaintiff's reliance on defendant's misrepresentation. The allegations may be added as an additional cause of action in the form of complaint in *§ 249.50*, before the prayer.

[3] Allegations

This form includes:

- Allegations sufficient to state a cause of action for fraud or deceit (Paragraph 1) [*Civ. Code §§ 1709, 1710*; *see Lazar v. Superior Court (1996) 12 Cal. 4th 631, 639, 49 Cal. Rptr. 2d 377, 909 P.2d 981* ; *Hunter v. Up-Right, Inc. (1993) 6 Cal. 4th 1174, 1184, 26 Cal. Rptr. 2d 8, 864 P.2d 88]* ; and

- Facts supporting the contention that the misrepresentation at issue was independent of the termination of plaintiff's employment, permitting a tort cause of action to recover those damages that did not result from the termination itself [*see Lazar v. Superior Court (1996) 12 Cal. 4th 631, 638-639, 49 Cal. Rptr. 2d 377, 909 P.2d 981* (fraud claim was proper because it occurred when plaintiff was induced to give up other opportunities and relocate to take job with defendant); *Hunter v. Up-Right, Inc. (1993) 6 Cal. 4th 1174, 1185-1186, 26 Cal. Rptr. 2d 8, 864 P.2d 88* (citing *Miller v. Fairchild Industries, Inc. (9th Cir. 1989) 885 F.2d 498, 509-510 , cert. denied, 494 U.S. 1056* as example of case in which fraud cause of action was proper because misrepresentation concerned plaintiff's settlement of civil rights action rather than termination of employment relationship)].

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21-249 California Forms of Pleading and Practice--Annotated § 249.54

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.54 Allegations for Use in Complaint for Damages for Wrongful Termination or Discipline--Defendant's Termination of Plaintiff's Employment as In-House Counsel Violated Public Policy--Termination Was Based on Plaintiff's Refusal to Violate Mandatory Ethical Provision

[1] FORM Allegations for Use in Complaint for Damages for Wrongful Termination or Discipline--Defendant's Termination of Plaintiff's Employment as In-House Counsel Violated Public Policy--Termination Was Based on Plaintiff's Refusal to Violate Mandatory Ethical Provision

1. On or about _____ [*date*], defendant _____ [*name*][, through his/her/its agent _____ (*name of agent*)] informed plaintiff that he/she must, in his/her capacity as in-house counsel for _____ [*name of defendant*], _____ [*specify conduct violative of ethical rule of conduct, e.g.,* commit perjury by lying in sworn testimony]. This conduct would have violated _____ [*specify mandatory ethical rule prohibiting the conduct, e.g., Business and Professions Code Section 6106*], and plaintiff refused to do so. As a proximate result of that refusal, defendant _____ [*name*] terminated plaintiff's employment as in-house counsel.

[2] Use of Form

The allegations in *[1], above*, may be used in a complaint for wrongful discharge in violation of public policy to allege that plaintiff's discharge from his or her employment as in-house counsel was in retaliation for his or her compliance with mandatory ethical obligations [*see General Dynamics Corp. v. San Bernardino County Superior Court (1994) 7 Cal. 4th 1164, 1188-1189, 32 Cal. Rptr. 2d 1, 876 P.2d 487]* . To state a cause of action, the claim must be based on explicit and unequivocal ethical norms embodied in the Rules of Professional Conduct and statutes [*General Dynamics Corp. v. San Bernardino County Superior Court (1994) 7 Cal. 4th 1164, 1189, 32 Cal. Rptr. 2d 1, 876 P.2d 487]* . Other claims by in-house counsel must be maintainable by the nonattorney employee under *Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1091-1092, 4 Cal. Rptr. 2d 874, 824 P.2d 680* , under circumstances in which the Legislature has manifested a judgment that the principle of professional confidentiality does not apply [*General Dynamics Corp. v. San Bernardino County Superior Court (1994) 7 Cal. 4th 1164, 1189, 32 Cal. Rptr. 2d 1, 876 P.2d 487]* . For a form of allegation that may be used in the latter situation, see *§ 249.55*.

This allegation may be used in place of the allegations set forth in Paragraphs 5 and 6 of the form of complaint in *§ 249.50*; the allegations in *§ 249.55* may also be added if appropriate under the factual circumstances.

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21-249 California Forms of Pleading and Practice--Annotated § 249.55

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.55 Allegations for Use in Complaint for Damages for Wrongful Termination or Discipline--Defendant's Termination of Plaintiff's Employment as In-House Counsel Violated Public Policy--Action Available to Non-Attorney Does Not Violate Attorney-Client Confidences

[1] FORM Allegations for Use in Complaint for Damages for Wrongful Termination or Discipline--Defendant's Termination of Plaintiff's Employment as In-House Counsel Violated Public Policy--Action Available to Non-Attorney Does Not Violate Attorney-Client Confidences

1. Plaintiff's cause of action for wrongful discharge in violation of public policy is not precluded because of his/her former capacity as in-house counsel to defendant _____ [*name*], because establishing the wrongful nature of the termination will not require plaintiff to violate the attorney-client privilege.

[2] Use of Form

The allegation in *[1], above*, may be used in a complaint for wrongful discharge in violation of public policy to allege that the principles of professional confidentiality do not preclude plaintiff's cause of action, based on his or her discharge from employment as in-house counsel [*see General Dynamics Corp. v. San Bernardino County Superior Court (1994) 7 Cal. 4th 1164, 1189, 32 Cal. Rptr. 2d 1, 876 P.2d 487]* . This allegation should be used in conjunction with allegations (such as those in Paragraphs 5 and 6 of the form of complaint in *§ 249.50*) that plaintiff's discharge violated public policy and therefore gave rise to a cause of action under *Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1091-1092, 4 Cal. Rptr. 2d 874, 824 P.2d 680* [*see General Dynamics Corp. v. San Bernardino County Superior Court (1994) 7 Cal. 4th 1164, 1189, 32 Cal. Rptr. 2d 1, 876 P.2d 487]* .

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21-249 California Forms of Pleading and Practice--Annotated §§ 249.56-249.59

AUTHOR: Richard P. Hill Editorial Consultant

[Reserved]

§§ 249.56[Reserved]

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21-249 California Forms of Pleading and Practice--Annotated § 249.60

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.60 Affirmative Defense Allegation--Discharge of Employee Under Specified Term of Employment--Willful Breach of Duty [Lab. Code § 2924]

[1] FORM Affirmative Defense Allegation--Discharge of Employee Under Specified Term of Employment--Willful Breach of Duty [Lab. Code § 2924]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that defendant discharged plaintiff because plaintiff willfully breached his/her duty in the course of his/her employment, in that _____ [*specify*].

[2] Use of Form

The form of affirmative defense in *[1], above*, is for use in an answer to a complaint seeking damages based on a cause of action for wrongful discharge. It is for use by a defendant-employer, when the plaintiff had been employed for a specified term, and defendant wishes to allege that the discharge was due to plaintiff's willful breach of a duty of employment in the course of the employment [*see Lab. Code § 2924*; for discussion, *see § 249.21[15]*]. For a form of complaint seeking damages for wrongful discharge, see *§ 249.50*.

[3] Cross References

For discussion and forms relating to answers generall y, see Ch. 26, *Answers*

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21-249 California Forms of Pleading and Practice--Annotated § 249.61

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.61 Affirmative Defense Allegation--Discharge of Employee Under Specified Term of Employment--Habitual Neglect of Duty [Lab. Code § 2924]

[1] FORM Affirmative Defense Allegation--Discharge of Employee Under Specified Term of Employment--Habitual Neglect of Duty [Lab. Code § 2924]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that defendant discharged plaintiff because of his/her habitual neglect of his/her duty as an employee, in that _____ [*specify*].

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer to a complaint seeking damages based on a cause of action for wrongful discharge. It is for use by a defendant-employer when the plaintiff had been employed for a specified term, and defendant wishes to allege that the discharge was due to plaintiff's habitual neglect of his or her duty of employment [*see Lab. Code § 2924*; for discussion, *see § 249.21[15]*]. For a form of complaint seeking damages for wrongful discharge, see *§ 249.50*.

[3] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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21-249 California Forms of Pleading and Practice--Annotated § 249.62

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.62 Affirmative Defense Allegation--Discharge of Employee Under Specified Term of Employment--Continued Incapacity to Perform Duty [Lab. Code § 2924]

[1] FORM Affirmative Defense Allegation--Discharge of Employee Under Specified Term of Employment--Continued Incapacity to Perform Duty [Lab. Code § 2924]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that defendant discharged plaintiff because of plaintiff's continued incapacity to perform his/her duty as an employee, in that _____ [*specify*].

[2] Use of Form

The form of affirmative defense in *[1], above*, is for use in an answer to a complaint seeking damages based on a cause of action for wrongful discharge. It is for use by a defendant-employer when the plaintiff had been employed for a specified term, and defendant wishes to allege that the plaintiff had a continued incapacity to perform his or her duty as an employee [*see Lab. Code § 2924*; for discussion, *see § 249.21[15]*]. For a form of complaint seeking damages for wrongful discharge, see *§ 249.50*.

[3] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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21-249 California Forms of Pleading and Practice--Annotated § 249.63

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.63 Affirmative Defense Allegation--Employee Terminated for Good Cause

[1] FORM Affirmative Defense Allegation--Employee Terminated for Good Cause

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff was terminated for good cause[, that is, _____ (*specify, e.g.,* plaintiff was terminated pursuant to a reduction in work force necessitated by depressed economic conditions)].

[2] Use of Form

The form of affirmative defense in *[1], above,* is for use in an answer to a complaint seeking damages based on a cause of action for wrongful discharge when plaintiff is party to an employment agreement requiring good cause for termination [*see, e.g., Gianaculas v. Trans World Airlines, Inc. (9th Cir. 1985) 761 F.2d 1391, 1394-1395* (termination pursuant to reduction in work force)].

For discussion of examples of valid causes for dismissal, see *§ 249.21[14][c]*.

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21-249 California Forms of Pleading and Practice--Annotated § 249.64

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.64 Affirmative Defense Allegation--Arbitration Required Under Employment Contract

[1] FORM Affirmative Defense Allegation--Arbitration Required Under Employment Contract

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that arbitration of the dispute is required under the employment contract [referred to in the complaint *or* attached hereto as Exhibit _____], and that plaintiff failed to submit the dispute to arbitration and is therefore precluded from bringing a wrongful discharge action in lieu of arbitration.

[2] Use of Form

The form of affirmative defense in *[1], above,* is for use in an answer to a complaint seeking damages based on a cause of action for wrongful discharge when there is an employment contract requiring arbitration, and plaintiff has filed the action in lieu of seeking arbitration [*see Heily v. Superior Court (1988) 202 Cal. App. 3d 255, 257-263, 248 Cal. Rptr. 673 , cert. denied, 489 U.S. 1013* (finding arbitration procedures neither adhesive nor unconscionable, on ground that SEC approved them)].

For discussion of the defense that a wrongful discharge action is precluded by an enforceable agreement to arbitrate, see *§ 249.21[16]*.

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21-249 California Forms of Pleading and Practice--Annotated § 249.65

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.65 Affirmative Defense Allegation--Plaintiff's Failure to Mitigate Damages

[1] FORM Affirmative Defense Allegation--Plaintiff's Failure to Mitigate Damages

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that by the exercise of reasonable effort, plaintiff could have obtained and retained employment substantially similar to his/her employment with defendant promptly after termination of his/her employment with defendant. However, plaintiff failed and refused, and continues to fail and refuse, to exercise a reasonable effort to obtain other employment. Plaintiff also has failed and refused, and continues to fail and refuse, to exercise a reasonable effort to retain any employment that plaintiff has secured.

[2] Use of Form

The form of affirmative defense in *[1], above*, is for use in an answer to a complaint seeking damages based on a cause of action for wrongful discharge. It is for use by a defendant-employer, when the defendant wishes to allege that plaintiff failed to mitigate his or her damages after having an opportunity to do so [*see Ash v. Soo Sing Lung (1918) 177 Cal. 356, 361-362, 170 P. 843* (duty to mitigate generally); *see also Meyer v. Byron Jackson, Inc. (1984) 161 Cal. App. 3d 402, 416-417, 207 Cal. Rptr. 663* (mitigation in wrongful-discharge action means seeking other employment)]. For a form of complaint seeking damages for wrongful discharge, see *§ 249.50*.

[3] Requirement That Defendant Plead and Prove Failure to Mitigate

Plaintiff's failure to mitigate damages is an affirmative defense that must be pleaded and proved by the defendant [*Mayes v. Sturdy Northern Sales, Inc. (1979) 91 Cal. App. 3d 69, 86, 154 Cal. Rptr. 43]* . The burden of proof on the issue of mitigation of damages is on the party asserting the failure to mitigate [*Steelduct Co. v. Henger-Seltzer Co. (1945) 26 Cal. 2d 634, 654, 160 P.2d 804]* . For discussion of mitigation of damages, see *§ 249.18*.

[4] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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21-249 California Forms of Pleading and Practice--Annotated § 249.66

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.66 Affirmative Defense Allegation--Wrongful Discharge Claim Under State Law Preempted by Federal Labor Management Relations Act (29 U.S.C. § 141 et seq.) [29 U.S.C. § 185(a)]--Employment Relationship Governed by Collective Bargaining Agreement

[1] FORM Affirmative Defense Allegation--Wrongful Discharge Claim Under State Law Preempted by Federal Labor Management Relations Act (29 U.S.C. § 141 et seq.) [29 U.S.C. § 185(a)]--Employment Relationship Governed by Collective Bargaining Agreement

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that resolution of plaintiff's state-law wrongful discharge claim is substantially dependent on analysis of the terms and conditions of the collective bargaining agreement that governs plaintiff's employment and is therefore preempted by *Section 301 of the Labor* Management Relations Act (*29 U.S.C. § 185(a)*).

[2] Use of Form

The affirmative defense in *[1], above*, may be pleaded in an answer to a complaint for damages based on the alleged wrongful discharge of an employee whose terms and conditions of employment are covered by a collective bargaining agreement when the action is preempted by Section 301 of the federal Labor Management Relations Act (*29 U.S.C. § 185(a)*) [*see Friday v. Hughes Aircraft Co. (1986) 188 Cal. App. 3d 117, 123, 236 Cal. Rptr. 291]* .

For discussion of the scope of preemption under the LMRA, see *§ 249.21[3]*.

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21-249 California Forms of Pleading and Practice--Annotated § 249.67

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.67 Affirmative Defense Allegation--Wrongful Discharge Claim Under State Law Preempted by Federal Labor-Management Reporting and Disclosure Act (29 U.S.C. § 401 et seq.)--Plaintiff Is Policymaking or Confidential Union Employee

[1] FORM Affirmative Defense Allegation--Wrongful Discharge Claim Under State Law Preempted by Federal Labor-Management Reporting and Disclosure Act (29 U.S.C. § 401 et seq.)--Plaintiff Is Policymaking or Confidential Union Employee

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the Labor-Management Reporting and Disclosure Act (*29 U.S.C. § 401 et seq.*) preempts plaintiff's state-law wrongful discharge claim because plaintiff was a _____ [policymaking *or* confidential *or* policymaking and confidential] employee for defendant.

[2] Use of Form

The affirmative defense in *[1], above*, may be used in an answer to a complaint for damages based on the alleged wrongful discharge in breach of an employment contract of a plaintiff employed by a labor union as a policymaking or confidential employee. The Labor-Management Reporting and Disclosure Act (LMRDA; *29 U.S.C. § 401 et seq.*) preempts such an action [*Screen Extras Guild, Inc. v. Superior Court (1990) 51 Cal. 3d 1017, 1024, 1032, 275 Cal. Rptr. 395, 800 P.2d 873]* . This preemption defense is not applicable, however, if the plaintiff was an *elected* union official [*Sheet Metal Workers' Int'l Ass'n v. Lynn (1989) 488 U.S. 347, 355, 109 S. Ct. 639, 102 L. Ed. 2d 700* (allowing elected union official's wrongful-termination action to proceed furthers LMRDA's goal of ensuring union democracy); *see Hansen v. Aerospace Related Indus. Dist. Lodge 725 of Int'l Ass'n of Machinists & Aerospace Workers (2001) 90 Cal. App. 4th 977, 982-983, 109 Cal. Rptr. 2d 482* (union official's wrongful-termination action preempted by LMRDA; although originally elected to his position, by time of alleged wrongful termination union had reorganized and plaintiff was serving at will of union president)]. Also, LMRDA preemption does not apply to a wrongful-discharge claim based on a violation of the public policy against age discrimination and disability discrimination [*Smith v. IBEW, Local Union 11 (2003) 109 Cal. App. 4th 1637, 1648-1654]* .

For a more detailed discussion of LMRDA preemption, see *§ 249.21[4]*.

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21-249 California Forms of Pleading and Practice--Annotated § 249.68

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.68 Affirmative Defense Allegation--Employee's Tort Claim Against Railroad or Airline Employer Preempted by Railway Labor Act (45 U.S.C. § 151 et seq.) [45 U.S.C. §§ 153-155, 183-185]--Claim Involves Minor Dispute

[1] FORM Affirmative Defense Allegation--Employee's Tort Claim Against Railroad or Airline Employer Preempted by Railway Labor Act (45 U.S.C. § 151 et seq.) [45 U.S.C. §§ 153-155, 183-185]--Claim Involves Minor Dispute

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that this action is preempted by the Railway Labor Act and that plaintiff's exclusive remedy is in the grievance adjustment procedures designated by the collective bargaining agreement for resolution of disputes _____ [*specify basis of dispute, e.g.,* stemming from plaintiff's belief that he/she had been unjustly dealt with or that any provision of the agreement was not properly applied or interpreted], for the following reasons:

1. The claim set forth in the complaint _____ [*specify basis of action, e.g.,* is based on conduct that occurred in defendant's investigation of charges against plaintiff to determine whether plaintiff should be disciplined or discharged, and the investigation was made pursuant to the requirements of the collective bargaining agreement in effect at the time, which expressly required that an investigation and hearing take place before an employee could be discharged or disciplined]; and

2. Defendant's alleged conduct does not so far exceed the scope of reasonable conduct in the context of those matters that reference to the collective bargaining agreement is unnecessary to resolve the claim.

[2] Use of Form

The affirmative defense in *[1], above*, may be pleaded in an answer to a complaint for damages based on an alleged wrongful discharge or other tort when the substance of plaintiff's claim is properly classified as a minor dispute under

the Railway Labor Act (*45 U.S.C. § 151 et seq.*); that is, the claim is arguably governed by a collective-bargaining agreement or has a relationship to the labor contract that is not obviously insubstantial [*see Hawaiian Airlines, Inc. v. Norris (1994) 512 U.S. 246, 114 S. Ct. 2239, 2251, 129 L. Ed. 2d 203* (no preemption for wrongful termination in breach of public policy); *Fennessey v. Southwest Airlines (9th Cir. 1996) 91 F.3d 1359, 1362* (no preemption for retaliatory discharge); *DeTomaso v. Pan American World Airways, Inc.(1987) 43 Cal. 3d 517, 525, 527 n.7, 235 Cal. Rptr. 292, 733 P.2d 614]* . Although preemption under the RLA may be raised by affirmative defense, such preemption is a question of subject matter jurisdiction and, hence, is not waived by a failure to plead it as an affirmative defense [*see Code Civ. Proc. §§ 430.10(a), 430.80(a)*; *DeTomaso v. Pan American World Airways, Inc. (1987) 43 Cal. 3d 517, 520 n.1, 235 Cal. Rptr. 292, 733 P.2d 614 , cert. denied, 484 U.S. 829]* . For further discussion, see *§ 249.21[5]*.

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21-249 California Forms of Pleading and Practice--Annotated § 249.69

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.69 Affirmative Defense Allegation--Wrongful Discharge Claim Under State Law Preempted by National Bank Act (12 U.S.C. § 24 P 5)--Plaintiff Is Bank Officer

[1] FORM Affirmative Defense Allegation--Wrongful Discharge Claim Under State Law Preempted by National Bank Act (12 U.S.C. § 24 P 5)--Plaintiff Is Bank Officer

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the National Bank Act (*12 U.S.C. § 24* P 5) preempts plaintiff's state-law wrongful discharge claim because plaintiff was a _____ [*specify, e.g.,* president *or* vice-president *or* cashier *or other bank officer*] of defendant and may be discharged at plaintiff's pleasure.

[2] Use of Form

The affirmative defense in *[1], above*, may be used in an answer to a complaint for damages based on the alleged wrongful discharge of a plaintiff employed as a bank officer at a national bank. The National Bank Act (*12 U.S.C. § 24* P 5) preempts such actions [*Wells Fargo Bank v. Superior Court (1991) 53 Cal. 3d 1082, 1088, 282 Cal. Rptr. 841, 811 P.2d 1025* ; *Aalgaard v. Merchants Nat. Bank, Inc. (1990) 224 Cal. App. 3d 674, 677, 692, 274 Cal. Rptr. 81 , cert. denied, 502 U.S. 901 (1991)]* . Preemption does not apply, however, unless the terminated employee is a bank "officer" meeting all of the following criteria: (1) he or she holds an office created by the board of directors and listed in the bank's bylaws; (2) he or she is appointed by the board of directors, either directly or pursuant to a delegation of board authority set forth in the bylaws; (3) he or she has express legal authority to bind the bank in its transactions with borrowers, depositors, customers, or other third parties by executing contracts or other legal instruments on the bank's behalf; and (4) his or her decision-making authority, however it might be limited by bank rule or policy, relates to fundamental banking operations in such a manner as to affect potentially the public's trust in the banking institution [*Wells Fargo Bank v. Superior Court (1991) 53 Cal. 3d 1082, 1091, 282 Cal. Rptr. 841, 811 P.2d 1025* (setting forth criteria); *Ramanathan v. Bank of America (2007) 155 Cal. App. 4th 1017, 66 Cal. Rptr. 3d 471* (employee designated "vice president" by bank's board of directors does not qualify as "officer" for purposes of *12 U.S.C. § 24* P 5 unless he or she meets all four criteria)].

The California Supreme Court has held that the National Bank Act provision that grants the power to dismiss bank officers "at pleasure" [*12 U.S.C. § 24* P 5] preempts the Fair Employment and Housing Act (FEHA) to the extent the two laws are in conflict. However, the Court also held that the actual scope of the National Bank Act provision has been limited since its original enactment in 1864. Reading federal law as a whole, the Court found that the National Bank Act has been impliedly amended by subsequently enacted federal civil-rights laws. Thus, as impliedly amended by Title VII and the ADEA, the National Bank Act provision actually grants a national bank a limited power to dismiss its officers, not extending to dismissal on the ground of race, color, religion, sex, national origin, or age. As so amended, the National Bank Act provision preempts the FEHA, but only to the extent that the FEHA confers on officers of a national bank a right against dismissal on grounds not mentioned in Title VII and the ADEA (for example, physical disability, mental disability, medical condition, or marital status) [*Peatros v. Bank of America (2000) 22 Cal. 4th 147, 173-175, 91 Cal. Rptr. 2d 659, 990 P.2d 539* ; *see Gov. Code § 12940(a)*]. Presumably, the Court's reasoning would apply to prevent preemption of a claim of wrongful discharge in violation of public policy, if the public policy is embodied in a provision of the FEHA that is not preempted by the National Bank Act.

For further discussion of preemption under the National Bank Act, see *§ 249.21[6]*.

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21-249 California Forms of Pleading and Practice--Annotated § 249.70

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.70 Affirmative Defense Allegation--Wrongful Discharge Claim Under State Law Preempted by Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001 et seq.)--Action Relates to Employee Benefit Plan Under ERISA and Is Not Exempt From Its Provisions

[1] FORM Affirmative Defense Allegation--Wrongful Discharge Claim Under State Law Preempted by Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001 et seq.)--Action Relates to Employee Benefit Plan Under ERISA and Is Not Exempt From Its Provisions

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff's state-law wrongful discharge claim relates to an employee benefit plan as defined under Section 4(a) of the Employee Retirement Income Security Act of 1974 (*29 U.S.C. § 1001 et seq.*), and is not exempt under Section 4(b) of that act. The action is therefore preempted, pursuant to Title *29 of the United States Code, Section 1144(a).*

[2] Use of Form

The affirmative defense in *[1], above*, may be pleaded in an answer to a complaint for damages based on the alleged wrongful discharge of an employee when the action relates to an employee benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA; *29 U.S.C. § 1001 et seq.*), to allege that the action is preempted by ERISA [*see 29 U.S.C. § 1144(a)*].

For discussion of preemption under ERISA, see *§ 249.21[7]*.

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AUTHOR: Richard P. Hill Editorial Consultant

[Reserved]

§§ 249.71[Reserved]

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 249 EMPLOYMENT LAW: TERMINATION AND DISCIPLINE
PART IV. FORMS

21-249 California Forms of Pleading and Practice--Annotated § 249.80

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.80 Complaint for Double Damages [Civ. Code § 3333; Lab. Code § 972] by Former Employee Against Employer--Inducing Change of Residence by Misrepresenting Conditions of Employment [Lab. Code §§ 970, 972]

[1] FORM Complaint for Double Damages [Civ. Code § 3333; Lab. Code § 972] by Former Employee Against Employer--Inducing Change of Residence by Misrepresenting Conditions of Employment [Lab. Code §§ 970, 972]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DOUBLE DAMAGES FOR
_____ [*name*],	)	STATUTORY VIOLATION
[and DOES I through_____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of parties. See § 249.50[1], Paragraph 1.*]

[2. *Fictitious name allegations. See § 249.50[1], Paragraph 2.*]

[3. *Agency allegations. See § 249.50[1], Paragraph 3.*]

4. On or about _____ [*date*], by means of _____ [oral communication *or* written communication *or* printed advertisement], defendant represented to plaintiff _____ [*allege representation(s) concerning working conditions as specified in Lab. Code § 970, e.g.*, that defendant would hire workers to do general farm labor in the environs of _____ (*place*) from _____ (*date*) through _____ (*date*), for a compensation of $_____ per hour, with lodging furnished and morning and midday meals furnished six days per week].

5. Defendant knew that the representation(s) was/were false in that _____ [*specify, e.g.*, defendant did not have, and he/she did not intend to provide, adequate housing for any number of workers].

6. In reliance on the representation(s) and in ignorance of the falsity thereof, plaintiff changed his/her place of residence by _____ [*specify change of place by plaintiff, e.g.*, moving with his/her family from _____ County to _____ County] for the purpose of working for defendant as a _____ [*specify nature of employment, e.g.* general farm laborer].

7. On or about _____ [*date*], plaintiff was hired by defendant in accordance with the said representation(s). On or about _____ [*date*], plaintiff discovered the said representation(s) to be false in that _____ [*specify, e.g.*, defendant provided no adequate housing for workers, and defendant stated that he did not intend to provide any housing].

8. As a proximate result of the representation(s), plaintiff was _____ [influenced *and/or* persuaded *and/or* engaged to change from one place to another _____ (*specify, e.g.*, within California) for the purpose of working thereby incurring expenses for _____ [*specify, e.g.*, transporting plaintiff's family, moving the personal belongings of plaintiff and his/her family, and finding adequate housing in _____ County], to plaintiff's damage in the sum of $_____.

[9. The aforementioned conduct of defendant was an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of depriving plaintiff of property or legal rights or otherwise causing injury, and was despicable conduct that subjected plaintiff to a cruel and unjust hardship in conscious disregard of plaintiff's rights so as to justify an award of exemplary and punitive damages.]

WHEREFORE, plaintiff prays for judgment as follows:

1. For damages in the sum of $_____;

2. That the damages be doubled as provided in *Section 972 of the Labor Code* [or, in the alternative, that punitive damages be assessed against defendant];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court deems proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 249.50[1].*]

[2] Use of Form

The form of complaint in *[1], above*, is for use in an action for damages against a person who, by knowing misrepresentation, influenced, persuaded, or engaged the plaintiff to change from one place to another for the purpose of working in any branch of labor [*see Lab. Code §§ 970, 972*]. For further discussion, see *§ 249.30*.

The cause of action alleged in the form may augment other theories, such as wrongful discharge or intentional infliction of emotional distress. For forms relating to wrongful discharge, see *§ 249.50* et seq. For discussion and forms relating to intentional infliction of emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress* .

[3] Allegations

The form of complaint in *[1], above*, contains the elements for stating a cause of action for violation of *Lab. Code § 970*, as follows:

- Paragraph 4 of the form alleges that the defendant made false representations concerning the following conditions of employment [*Lab. Code § 970*; *see Lab. Code §§ 973-974* (requiring plain and explicit mention in advertising or other communications that labor disturbance exists; criminal sanctions)]:

  - The kind, character, or existence of work in any branch of labor;

  - The length of time such work will last, or the compensation therefor;

  - The sanitary or housing conditions relating to or surrounding the work; or

  - The existence or nonexistence of any strike, lockout, or other labor dispute affecting it and pending between the proposed employer and the persons then or last engaged in the performance of the labor for which the employee is sought.

- Paragraph 5 of the form alleges that defendant's representations were knowingly false [*Lab. Code § 970*]. A complaint fails to state a cause of action if this essential element is not alleged [*Tyco Industries, Inc. v. Superior Court (1985) 164 Cal. App. 3d 148, 156-157, 211 Cal. Rptr. 540]* .

- Paragraph 6 of the form alleges that plaintiff, without knowledge of the falsity, relied on the defendant's misrepresentations and changed his or her residence for the purpose of working in some branch of labor [*see Lab. Code § 970*].

- Paragraph 7 of the form alleges the circumstances of plaintiff's discovery that the representations were false.

- Paragraph 8 of the form alleges that as a proximate result of defendant's misrepresentations, plaintiff was influenced, persuaded, or engaged to change his or her place of residence for the purpose of working and suffered damage therefrom [*Lab. Code § 970*].

- Optional Paragraph 9 of the form alleges grounds for punitive damages under *Civ. Code § 3294*. Plaintiff may, however, have to elect between double damages and punitive damages. For further discussion, see *[5], below*.

[4] Double Damages

Any person or agent or officer thereof who violates any provision of *Lab. Code § 970* is liable to the party aggrieved, in a civil action, for double damages resulting from the misrepresentations. The civil action may be brought by an aggrieved person or by his or her assigns or successors in interest without first establishing any criminal liability [*Lab. Code § 972*].

[5] Punitive and Exemplary Damages

Although no case has so held, by analogy to cases decided under similar statutes that provided for enhanced damages, it is arguable that if malice is established in such a cause of action, the plaintiff may be entitled to punitive damages. If punitive damages are allowed, however, the plaintiff may have to elect between double damages and punitive damages [*see Marshall v. Brown (1983) 141 Cal. App. 3d 408, 418-419, 190 Cal. Rptr. 392* (construing *Lab. Code § 1054*); *see also* discussion in *§ 249.31*]. For this reason, the form sets forth an allegation and prayer for punitive damages as optional.

[6] Class Action

It appears that damages may be sought under *Lab. Code § 972* in a class action on behalf of a number of persons who are aggrieved by the same misrepresentations [*see Collins v. Rocha (1972) 7 Cal. 3d 232, 234, 240, 102 Cal. Rptr. 1, 497 P.2d 225* (reversing order sustaining demurrer to complaint asserting class action)].

[7] Cross References

Witkin, Summary of California Law, vol. 3, *Agency and Employment*, §§ 447, 449-451 (10th ed. 2005)

For cross references relating to complaints in general, see *§ 249.50[12]*

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Chapter 249 EMPLOYMENT LAW: TERMINATION AND DISCIPLINE
PART IV. FORMS

21-249 California Forms of Pleading and Practice--Annotated § 249.81

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.81 Complaint for Treble Damages [Civ. Code § 3333; Lab. Code § 1054] by Former Employee Against Employer--Unlawfully Preventing Employment by Misrepresentation [Lab. Code §§ 1050, 1054]

[1] FORM Complaint for Treble Damages [Civ. Code § 3333; Lab. Code § 1054] by Former Employee Against Employer--Unlawfully Preventing Employment by Misrepresentation [Lab. Code §§ 1050, 1054]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR TREBLE DAMAGES FOR
_____ [*name*],	)	STATUTORY VIOLATION
[and DOES I through_____,]	)	[Amount demanded (exceeds *or* does not exceed)
Defendant(s).	)	$10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of parties. See § 249.50[1], Paragraph 1.*]

[2. *Fictitious name allegations. See § 249.50[1], Paragraph 2.*]

[3. *Agency allegations. See § 249.50[1], Paragraph 3.*]

4. On or about _____ [*date*], defendant hired plaintiff, and plaintiff entered into employment, as

defendant's employee.

5. On or about _____ [*date*], _____ [defendant discharged plaintiff from employment *or* plaintiff voluntarily left defendant's service.]

6. On or about _____ [*date*], defendant falsely informed _____ [*name*], to whom plaintiff had applied for employment, that _____ [*set forth the misrepresentation, e.g.,* plaintiff had been discharged because plaintiff had pilfered goods from defendant's inventory].

7. As a proximate result of defendant's intentional misrepresentation(s), plaintiff was prevented from obtaining employment with _____ [*name*], to plaintiff's damage in the sum of $_____.

[8. The above-described misrepresentation(s) was made by the defendant with _____ [malice *and/or* oppression *and/or* fraud] in that _____ [*specify circumstances*]. Defendant's conduct therefore warrants the assessment of punitive damages.]

WHEREFORE, plaintiff prays for judgment as follows:

1. For damages in the sum of $_____;

2. That the damages be trebled as provided in *Labor Code Section 1054*;

[3. As an alternative to the treble damages prayed for herein, for punitive damages in an amount appropriate to punish defendant and deter others from engaging in similar wrongful conduct;]

4. For costs of suit herein incurred;

5. For such other and further relief as the court deems proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 249.50[1].*]

[2] Use of Form

The form of complaint in *[1], above*, is for use in an action for damages against a person who, by misrepresentation, prevented or attempted to prevent the plaintiff from obtaining other employment after discharging the plaintiff or after the plaintiff voluntarily left the defendant's service [*Lab. Code §§ 1050, 1054*; *see also Lab. Code § 1053* (protection for truthful statement of reason for employee's discharge or voluntary departure)]. For further discussion, see *§ 249.31*.

The cause of action for prevention of employment may augment other theories, such as wrongful discharge, defamation, and intentional infliction of emotional distress. For forms relating to wrongful discharge, see *§ 249.50* et seq. For discussion and forms relating to defamation and intentional infliction of emotional distress, see Ch. 340, *Libel and Slander* , and Ch. 362, *Mental Suffering and Emotional Distress* , respectively.

[3] Allegations

The form of complaint in *[1], above*, sets forth the elements of a cause of action for unlawful prevention of employment [*Lab. Code §§ 1050, 1054*]:

- Defendant either discharged plaintiff or plaintiff voluntarily left defendant's service (Paragraph 5).
- Defendant made a misrepresentation (Paragraph 6).
- Defendant, by making the misrepresentation, prevented or attempted to prevent the plaintiff from obtaining employment (Paragraph 7).

The prayer requests that the damages be trebled pursuant to *Lab. Code § 1054*.

If malice is established, punitive damages may be awarded under *Civ. Code § 3294*. The plaintiff may not, however, recover both punitive damages and treble damages and is limited to either treble damages or untrebled damages [Marshall v. Brown (1983) 190Cal. Rptr. 392]. Hence, the form sets forth optional allegations and prayer that may be used when the plaintiff is seeking punitive damages (Paragraph 8 and Prayer, Paragraph 3).

The form may also be modified to allege liability under *Lab. Code § 1052* when the defendant has knowingly caused, suffered, or permitted an agent, superintendent, manager, or employee in his or her employ to commit a violation of *Lab. Code § 1050*, or who fails to take all reasonable steps within his or her power to prevent such violation [*see Lab. Code §§ 1052, 1054*].

[4] Cross References

See also *comments in § 249.50*

Witkin, Summary of California Law, vol. 3, *Agency and Employment*, §§ 253, 255, 284, 336-359, 413, 417, 420-423 (10th ed. 2005)

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21-249 California Forms of Pleading and Practice--Annotated §§ 249.82-249.89

AUTHOR: Richard P. Hill Editorial Consultant

[Reserved]

§§ 249.82[Reserved]

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21-249 California Forms of Pleading and Practice--Annotated § 249.90

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.90 Complaint for Damages [Civ. Code § 3300] Based on Breach of Employment Contract--By Employer Against Former Employee--Refusal to Perform Services

[1] FORM Complaint for Damages [Civ. Code § 3300] Based on Breach of Employment Contract--By Employer Against Former Employee--Refusal to Perform Services

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Breach of Contract)
Defendants.	)	[Amount demanded _____ (exceeds *or* does not ex-
	)	ceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. _____ [*Allege capacity and residence of defendant, e.g.*, Defendant is, and at all times mentioned herein was, a resident of _____ County, California].

2. On or about _____ [*date*], at _____ [*city*], _____ County, California, plaintiff and defendant entered into _____ [a written *or* an oral] agreement for the employment of defendant by plaintiff to _____ [*set forth general nature of work, e.g.*, perform as an actor in a production of the play "Macbeth"]. The terms of the agreement were _____ [as follows: _____ (set out terms) *or* as stated in the copy attached hereto as Exhibit A and made a part hereof].

3. Plaintiff has performed all conditions, covenants, and promises required by him/her on his/her part to be performed in accordance with the terms and conditions of the contract[, except _____ (*specify conditions(s) not performed*). The reason that plaintiff did not perform _____ (this *or* these) condition(s) is that _____ (*specify facts showing excuse for nonperformance, e.g.*, plaintiff's performance was prevented by defendant's actions in contravention of the agreement as hereinafter described)].

4. _____ [At all times mentioned herein *or* Until plaintiff took steps to mitigate plaintiff's loss resulting from defendant'sactions in contravention of the agreement, as hereinafter alleged], plaintiff was [and now is] ready, able, and willing to perform, and [has] offered to perform, all of the terms of the agreement to be performed on plaintiff's part.

5. _____ [*Allege defendant's actions in contravention of agreement, e.g.*, Pursuant to the agreement, defendant began rehearsals on or about _____ (*date*), and continued to perform until _____ (*date*). On that date defendant failed to appear for rehearsals. Thereafter, for a period of _____ (*e.g.*, one week), defendant failed and refused to appear for rehearsals].

6. _____ [*Allege facts tending to show nature and extent of plaintiff's injury, e.g.*, Defendant is a well-known Shakespearean actor whose performances in other productions have drawn record numbers of spectators. This fact was known to both plaintiff and defendant when the agreement was entered into, and it was, and defendant knew that it was, the principal reason why plaintiff employed defendant. Defendant's absence from the cast of plaintiff's production could have been expected to, and did, substantially reduce the number of spectators at every performance below the number that was reasonably anticipated when the agreement was entered into. As a result, plaintiff could have been expected to, and did, receive substantially less revenue from the production than was reasonably anticipated when the agreement was entered into].

7. _____ [*Allege facts tending to show the measure of plaintiff's damages, including facts in mitigation, e.g.*, If defendant had fully performed the terms of the agreement on his part to be performed, plaintiff would have received a net profit from the production of at least $_____. When defendant failed and refused to continue with rehearsals, as hereinabove alleged, plaintiff engaged another actor, who was less well known and less highly respected as a Shakespearean actor, to play the role that defendant had been engaged to play. Plaintiff thereafter produced the number of performances anticipated by the agreement. Plaintiff received from those performances a total net profit of $_____].

8. As a proximate result of defendant's breach of the agreement as hereinabove alleged, plaintiff has been damaged in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the sum of $_____;

2. For interest on the sum of $_____ from and after _____ [*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 249.50[1].*]

[2] Use of Form

The form of complaint in *[1], above*, is for use in an action for damages against a person who has breached a contract for personal services [*see generally Civ. Code § 3300*].

[3] Specific Enforcement

An obligation to render personal service cannot be specifically enforced [*see Civ. Code § 3390(1)*]. Since an employee's obligation under a contract of employment is principally to render personal service, specific enforcement is not a remedy that is available to the employer if the employee refuses or fails to render the service; however, there are a few exceptional cases in which the employer may obtain an injunction against breach of a personal services contract [*see Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(b)(5)*]. For further discussion, see *§ 249.35[4]*, Ch. 528, *Specific Performance* , and Ch. 303, *Injunctions* .

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21-249 California Forms of Pleading and Practice--Annotated §§ 249.91-249.99

AUTHOR: Richard P. Hill Editorial Consultant

[Reserved]

§§ 249.91[Reserved]

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21-249 California Forms of Pleading and Practice--Annotated § 249.100

AUTHOR: Richard P. Hill Editorial Consultant

§ 249.100 Interrogatories for Employment Law Litigation [Cal. Judicial Council Form No. DISC-002]

[1] FORM Interrogatories for Employment Law Litigation [Cal. Judicial Council Form No. DISC-002]

Click here to view image.

[2] Use of Form

This form of interrogatories is an illustrative reproduction of Cal. Judicial Council Form No. DISC-002 adopted by the Judicial Council for optional use in employment litigation, including wrongful termination cases [*Code Civ. Proc. §§ 2033.710*, *2033.740(a)*; *Cal. Rules of Ct., Rule 1.35*].].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Cross References

For discussion, a procedural checklist, and related forms, see Ch. 190, *Depositions and Discovery*

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Chapter 250 EMPLOYMENT LAW: WAGE AND HOUR DISPUTES

21-250 California Forms of Pleading and Practice--Annotated 250.syn

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§ 250.30 Available Remedies

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[a] Acceptance and Investigation of Complaints

[b] Administrative Rulings

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[3] Civil Action by Employee

[a] Right of Action

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[a] In General

[b] Jurisdiction

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§ 250.60 Appeal of Order, Decision, or Award of Labor Commissioner [Lab. Code § 98.2]--DLSE Form 537

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[1] FORM

[2] Use of Form

[3] Allegations

[a] In General

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Action for Minimum Wage or Overtime Compensation

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§ 250.63 Complaint for Damages and Penalties Based on Breach of Statutory Obligation--By Employee Against Employer--Failure to Pay Wages Due Striking Employee [Lab. Code §§ 209, 218, 218.5, 218.6]

[1] FORM

[2] Use of Form

[3] Cross References

§ 250.64 Complaint for Damages and Penalties Based on Breach of Statutory Obligation--By Employee Against Employer--Unlawful Wage Rate Discrimination Based on Sex [Lab. Code § 1197.5]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 250.65 Complaint for Damages and Penalties Based on Breach of Statutory Obligation--By Assignee of Employee Against Employer [Lab. Code § 300]--Failure to Pay Wages [Lab. Code §§ 201, 202, 218, 218.5, 218.6]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 250.66 Complaint for Damages and Penalties Based on Breach of Employment Contract--By Former Employee Against Employer With No Permanent and Fixed Place of Business--Failure to Pay Commissions [Lab. Code §§ 2751, 2752]

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[2] Use of Form

[3] Cross References

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[2] Use of Form

[3] Cross References

§ 250.71 Affirmative Defense--Exemption From Applicable Provisions of Labor Code--Parties Not Subject to Minimum Wage/Overtime Provisions

[1] FORM

[2] Use of Form

[3] Cross References

§ 250.72 Affirmative Defense--Exemption From Applicable Provisions of Labor Code--Defendant Not Liable for Waiting Time Penalties Due to Plaintiff's Avoidance or Refusal of Payment [Lab. Code § 203]

[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

§ 250.75 Affirmative Defense--Good Faith Action or Omission and Reasonable Belief of No Minimum Wage Violation [Lab. Code § 1194.2(b)]

[1] FORM

[2] Use of Form

[3] Cross References

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FOOTNOTES:
(n51)Footnote *.
Richard P. Hill maintains his civil litigation practice as a partner in Moody & Hill in San Francisco. Mr. Hill is a 1971 graduate of Boalt Hall School of Law at the University of California, Berkeley, and is a long-time continuing legal education lecturer for CEB and Hastings School of Law/CLE in the field of employment law.

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Chapter 250 EMPLOYMENT LAW: WAGE AND HOUR DISPUTES
PART I. SCOPE

21-250 California Forms of Pleading and Practice--Annotated § 250.01

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§ 250.01 Scope of Chapter

This chapter discusses pleading and practice in actions involving wage and hour laws. It contains forms of appeal of an award of the Labor Commissioner [*see § 250.60*]; complaints for use on behalf of an employee, a former employee, or an assignee of an employee or a former employee for failure to pay wages or other required compensation [*see §§ 250.61 -250.66*]; and affirmative defenses available to an employer [*see §§ 250.70 -250.74*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsGeneral Overview

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21-250 California Forms of Pleading and Practice--Annotated § 250.02

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§ 250.02 Cross References

For a discussion and forms for use in cases of employment discrimination, see Ch. 115, *Civil Rights: Employment Discrimination*

For a discussion and forms for use in removing actions to federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For a discussion and forms relating to garnishment of an employee's wages, see Ch. 276, *Garnishment*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureRemediesProvisional RemediesGarnishmentsLabor & Employment LawDiscriminationGeneral Overview

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Chapter 250 EMPLOYMENT LAW: WAGE AND HOUR DISPUTES
PART I. SCOPE

21-250 California Forms of Pleading and Practice--Annotated §§ 250.03-250.09

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[Reserved]

§§ 250.03[Reserved]

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Chapter 250 EMPLOYMENT LAW: WAGE AND HOUR DISPUTES
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A. Overview of Wage and Hour Laws

21-250 California Forms of Pleading and Practice--Annotated § 250.10

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§ 250.10 Governing Law

Both the federal government and California have enacted comprehensive wage and hour laws establishing minimum wages, overtime compensation requirements, standards for working conditions, and restrictions on child labor to protect employees from oppressive working conditions [*see 29 U.S.C. § 202(b)*; *Lab. Code § 90.5(a)*]. State law is codified mainly in the Labor Code and Title 8 of the California Code of Regulations. The principal federal law is contained in Title 29 of the United States Code and Title 29 of the Code of Federal Regulations. Employers covered by federal and state wage and hour laws must comply with both and, to the extent that federal and state requirements conflict, must follow the law that provides the most protection for the employee [*see 29 U.S.C. § 218(a)*].

The principal federal wage and hour legislation for most employers is the Fair Labor Standards Act (FLSA) [*see 29 U.S.C. §§ 201-219*]. The FLSA is supplemented by the Portal-to-Portal Act, which contains certain limitations on liability imposed under the FLSA [*see 29 U.S.C. §§ 251-262*].

In California, pursuant to constitutional and statutory authority [*see Cal. Const., art. XIV, § 1*; *Lab. Code § 1173*], the Industrial Welfare Commission (IWC) has promulgated codified administrative regulations ("wage orders"). Industry and occupation wage orders set forth labor standards (including minimum wage and overtime compensation requirements) that must be complied with by employers in specific industries or employing workers in specific occupations, and a general minimum wage order sets forth the minimum wage that must be paid to employees regardless of the industry or occupation in which they work [*see 8 Cal. Code Reg. § 11000 et seq.*]. For further discussion of wage orders, see *§ 250.14[2]*.

In addition to state and federal laws, some cities have enacted "living wage" ordinances that require certain employers to pay wages approximating the real cost of living in the locality, which is often significantly higher than the applicable

state or federal minimum wage [*see RUI One Corp. v. City of Berkeley (9th Cir. 2004) 371 F.3d 1137, 1141, 1147-1157 , cert. denied, 160 L. Ed. 2d 825 (2005)* (upholding constitutionality of city's ordinance mandating minimum wage and employee benefits for certain employers that received some form of financial benefit from city); *Amaral v. Cintas Corp. No. 2 (2008) 163 Cal. App. 4th 1157, 1174-1183, 78 Cal. Rptr. 3d 572* (upholding constitutionality of city's living wage ordinance incorporated into municipal contracts, even though ordinance had extraterritorial effects when contractors were required to pay living wage to employees who lived or worked outside of city)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsGeneral Overview

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A. Overview of Wage and Hour Laws

21-250 California Forms of Pleading and Practice--Annotated § 250.11

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§ 250.11 Applicable Standards of Construction When More Than One Law Addresses the Same Subject

Nothing in the FLSA excuses noncompliance with any federal or state law or municipal ordinance establishing a higher minimum wage, a lower maximum workweek, or a higher standard relating to the employment of minors than that established under the FLSA. Thus, the FLSA does not preempt any state law that establishes a higher minimum wage or a shorter workweek for covered employees than federal law [*see 29 U.S.C. § 218(a)*; *29 C.F.R. § 778.5*; *see also Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 566-568, 59 Cal. Rptr. 2d 186, 927 P. 2d 296 , cert. denied, 520 U.S. 1248 (1997)* (FLSA exemption of seamen from regulation does not create affirmative bar to state regulation); *Industrial Welfare Com. v. Superior Court (1980) 27 Cal. 3d 690, 727, 166 Cal. Rptr. 331 , appeal dismissed and cert. denied sub nom., California Manufacturers Association v. Industrial Welfare Commission, 449 U.S.1029* (state's authority to go beyond federal legislation in adopting more protective regulations for benefit of employees expressly recognized by FLSA)].

In cases of conflict between federal and California definitions of state boundaries, federal law does not preclude California from regulating employment conduct outside federal boundaries but within broader state law territorial boundaries [*Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 564-565, 59 Cal. Rptr. 2d 186, 927 P. 2d 296 , cert. denied, 520 U.S. 1248 (1997)]* . Nor does federal law preclude California from regulating its citizens' conduct beyond California territorial borders [*Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 565-566, 59 Cal. Rptr. 2d 186, 927 P. 2d 296 , cert. denied, 520 U.S. 1248 (1997)]* .

In California, the state minimum wage may exceed the federal minimum wage, but may not fall below it [*see Lab. Code § 1182(b)*; *compare Cal. Lab. Code § 1182.12* (California minimum wage) *with 29 U.S.C. § 206(a)* (federal minimum wage)]. In addition, the employer is subject to stricter standards under California law in such areas as, for example, overtime compensation [*see, e.g., Ramirez v. Yosemite Water Co., Inc. (1999) 20 Cal. 4th 785, 797, 85 Cal. Rptr. 2d*

844, 978 P.2d 2 (California defines "outside salespersons" who are exempt from overtime pay in way that provides, at least in some cases, greater protection for employees than under federal law)]. For example, an employer may use an "averaging" method to establish compliance with the minimum wage imposed by the FLSA. Under that method, an employer may compensate some hours at less than the minimum rate so long as the average compensation for the relevant pay period equals or exceeds the minimum rate [*see Medrano v. D'Arrigo Bros. Co. (N.D. Cal. 2004) 336 F. Supp. 2d 1053, 1057]* . California's minimum wage law, in contrast, requires that an employee be paid at the statutory rate (or, if higher, the applicable contractual rate) for *every* hour worked [see *Lab. Code §§ 221, 222, 223, 1194(a)*]. Thus, an employer may not use the "averaging" method to establish compliance with California's minimum wage law, because it would effectively reduce employees' contractual hourly rate and would contravene the clear legislative intent that every hour be paid at the statutory or contractual rate [*Armenta v. Osmose, Inc. (2005) 135 Cal. App. 4th 314, 321-324, 37 Cal. Rptr. 3d 460]* .

In those instances when California law imposes stricter standards, the employer subject to both the FLSA and California law must follow California law [*see 29 U.S.C. § 218(a)*; *Morillion v. Royal Packing Co. (2000) 22 Cal. 4th 575, 582-594, 94 Cal. Rptr. 2d 3, 995 P.2d 139* (time employees are required to spend traveling on employer's bus is compensable under *8 Cal. Code Reg. § 11140*, P 2(G); because of substantial differences between California and federal definitions of "hours worked," FLSA, as amended by Portal-to-Portal Act, *29 U.S.C. § 251 et seq.*, does not provide persuasive guidance on this issue)].

In an area in which federal and California requirements do not conflict, federal authorities may provide useful guidance in applying state law. For example, in applying California requirements for overtime pay, an employee's "regular rate" of pay is determined by reference to federal law, since California law does not define that term [*Huntington Mem'l Hosp. v. Superior Court (2005) 131 Cal. App. 4th 893, 903, 32 Cal. Rptr. 3d 373* (federal authorities still provide useful guidance in applying state law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsGeneral OverviewLabor & Employment LawWage & Hour LawsStatutory ApplicationGeneral Overview

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A. Overview of Wage and Hour Laws

21-250 California Forms of Pleading and Practice--Annotated § 250.12

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§ 250.12 Effect of Contractual Provisions

[1] Employment Contracts Generally

An individual employee's right to a minimum wage and to overtime pay under the FLSA is nonwaivable [*Barrentine v. Arkansas-Best Freight System (1981) 450 U.S. 728, 740, 101 S. Ct. 1437, 67 L. Ed. 2d 641* ; *see, e.g., Brooklyn Savings Bank v. O'Neil (1945) 324 U.S. 697, 706-707, 65 S. Ct. 895, 89 L. Ed. 1296* (nonwaivability of statutory liquidated damages for nonpayment of minimum wage under FLSA); *see also Zavala v. Scott Bros. Dairy, Inc. (2006) 143 Cal. App. 4th 585, 594, 49 Cal. Rptr. 3d 503* (union cannot waive individual employees' statutory rights under *Lab. Code §§ 226(a)* and *226.7(b)* to receive rest breaks and wage-stub itemization)]. Contracts falling short of the level of guaranteed minimum compensation for all work or employment engaged in by covered employees must be set aside [*see, e.g., Martino v. Michigan Window Cleaning Co. (1946) 327 U.S. 173, 177-178, 66 S. Ct. 379, 90 L. Ed. 603]* . However, as long as they comply with the provisions of the FLSA, employers and employees covered under the FLSA may contract for any terms they choose, including higher wages and shorter workweeks than required by statute, in which case nothing in the FLSA will justify the employer in reducing that wage or increasing the workweek [*see 29 U.S.C. § 218(a)*; *cf. Lab. Code § 511* (employees in readily identifiable work unit may adopt employer's proposal for regularly scheduled alternative workweek or menu of work-schedule options)].

With regard to California statutory law relating to overtime claims, a provision in a contract covered by the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*) that requires arbitration of employment disputes takes precedence over California wage and hour law because of the strong federal policy favoring enforcement of such arbitration agreements [*see 9 U.S.C. § 2*; *see also Circuit City Stores, Inc. v. Adams (2001) 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234* (Federal Arbitration Act generally applies to arbitration provisions contained in employment contracts, except contracts of employment of transportation workers)]. Thus, the Labor Commissioner does not have jurisdiction to adjudicate a

complaint brought by an employee for overtime if the employee has signed an employment contract agreeing to arbitration of employment-related controversies [*Baker v. Aubry (1989) 216 Cal. App. 3d 1259, 1266, 265 Cal. Rptr. 381]* . Furthermore, an employee who has signed such an arbitration agreement may not bring a civil action for wage and hour violations under either California or federal law [*see Perry v. Thomas (1987) 482 U.S. 483, 489-491, 107 S. Ct. 2520, 96 L. Ed. 2d 426* (*Lab. Code § 229*, which provides that employee may bring civil action to recover wages notwithstanding any private agreement to arbitrate, is preempted by Federal Arbitration Act with regard to agreements covered by Act); *see Kuehner v. Dickinson & Co. (9th Cir. 1996) 84 F.3d 316, 318* (suit for violation of FLSA stayed pending arbitration of employment disputes); *but see Gentry v. Superior Court (2007) 42 Cal. 4th 443, 465* at n.8, *64 Cal. Rptr. 3d 773* (under *9 U.S.C. § 2,* court may refuse to enforce arbitration agreement that significantly undermines ability of employees to vindicate their statutory right to overtime pay)]. However, a clause in a collective bargaining agreement (CBA) requiring arbitration of all grievances arising under the agreement does not waive individual employees' right to bring statutory labor rights claims in court. Such claims arise from the applicable statutory provisions, not from the CBA [*Zavala v. Scott Bros. Dairy, Inc. (2006) 143 Cal. App. 4th 585, 592-595, 49 Cal. Rptr. 3d 503]* .

PRACTICE TIP:

Scope of FAA Enforcement. The Federal Arbitration Act (FAA) provides for enforcement of arbitration provisions in any contract "evidencing a transaction involving commerce" [*9 U.S.C. § 2*]. In general, this language has been construed to mean that the FAA governs if the underlying contract facilitates interstate commercial transactions, or if it directly or indirectly affects commerce between states. The FAA specifically excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" [*9 U.S.C. § 1*]. The United States Supreme Court has construed this exclusion narrowly, holding that an employment contract is not excluded unless the employee is directly involved in the transportation industry [*Circuit City Stores, Inc. v. Adams (2001) 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234]* . California had earlier adopted this narrow construction of the exclusion, which is consistent with the strong national policy favoring arbitration [*see Spellman v. Securities, Annuities & Ins. Servs., Inc. (1992) 8 Cal. App.4th 452, 460, 10 Cal. Rptr. 2d 427, 432*]. *By Richard P. Hill.*

[2] Collective Bargaining Agreements

The fact that wages, hours, and other conditions of labor may also constitute the objects of collective bargaining does not preclude the state from adopting minimum standards to protect the welfare of workers who may not enjoy sufficient bargaining strength to obtain adequate protection from their employers at the bargaining table [*Industrial Welfare Com. v. Superior Court (1980) 27 Cal. 3d 690, 727-728, 166 Cal. Rptr. 331, 613 P.2d 579 , appeal dismissed and cert. denied sub nom. California Manufacturers Association v. Industrial Welfare Commission, 449 U.S. 1029]* . In a few instances, however, the wage orders and the Labor Code expressly defer to the provisions of applicable collective bargaining agreements [*see, e.g., Lujan v. Southern Cal. Gas Co. (2002) 96 Cal. App. 4th 1200, 1211-1212, 117 Cal. Rptr. 2d 828]* . Thus, for example, many of the Labor Code provisions relating to the time for payment of wages during the course of employment are inapplicable if the terms of a collective bargaining agreement provide for a different pay arrangement [*see Lab. Code §§ 204, 204.1, 204.2*]. Furthermore, even in those instances in which state law would otherwise be applicable to employees covered by a collective bargaining agreement, state wage and hour laws may be preempted by the federal Labor Management Relations Act [*29 U.S.C. § 141 et seq.*] in cases in which resolution of the wage controversy requires interpretation of the collective bargaining agreement [*see Firestone v. Southern Cal. Gas Co. (9th Cir. 2000) 219 F.3d 1063, 1066-1068*]. However, the Labor Management Relations Act does not preempt a state-law claim for unpaid wages if the court is required simply to apply the terms of a collective bargaining agreement; it is preempted only if the court must interpret the terms of the collective bargaining agreement [*Soremekun v. Thrifty Payless Inc. (9th Cir. 2007) 509 F.3d 978, 990-991* ; *Lujan v. Southern Cal. Gas Co. (2002) 96 Cal. App. 4th 1200, 1206-1211, 117 Cal. Rptr. 2d 828* (LMRA does not preempt state-law wage claim merely because collective bargaining agreement will be consulted in course of state-law litigation, if interpretation of agreement is not in dispute)]. For

general discussion of preemption by the Act, see Ch. 248, *Employer's Liability for Employee's Torts* .

Under federal law, the requirements of the FLSA take precedence over provisions of collective bargaining agreements that are in conflict with congressionally granted rights under the FLSA [*see, e.g.,* *Martino v. Michigan Window Cleaning Co. (1946) 327 U.S. 173, 177-178, 66 S. Ct. 379, 90 L. Ed. 603]* . Nevertheless, the FLSA also provides for partial exemptions or exceptions to its general requirements on the basis of the provisions of collective bargaining agreements [*see, e.g., 29 U.S.C. § 207(b)(1), (2), (e)(7)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsFederal Common LawPreemptionLabor & Employment LawCollective Bargaining & Labor RelationsSubjects of BargainingLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsCompensationLabor & Employment LawWage & Hour LawsStatutory ApplicationGeneral Overview

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§ 250.13 Requirement of Employment Relationship

[1] State Law Generally

[a] Operative Definitions

An employment relationship must exist for the California wage orders or the provisions of the Labor Code governing wages, hours, and working conditions to be applicable [*see Lab. Code § 1171*; *8 Cal. Code Reg. §§ 11010-11150*, P 1 (Cal. Wage Order Nos. 1-2001-15-2001); proposed Cal. Wage Order Nos. 16-2001, 17-2001 (http://www.dir.ca.gov/IWC/WageOrderIndustries.htm)]. "Employ," as used in the wage orders, means to engage, suffer, or permit to work. An "employer" is any person [*see Lab. Code § 18*] who employs or exercises control over the wages, hours, or working conditions of any person [*8 Cal. Code Reg. §§ 11010-11150*, P 2 (Cal. Wage Order Nos. 1-2001-15-2001); proposed Cal. Wage Order Nos. 16-2001, 17-2001 (http://www.dir.ca.gov/IWC/WageOrderIndustries.htm)]. An "employee" generally is any person employed by an employer [*8 Cal. Code Reg. §§ 11010-11150*, P 2 (Cal. Wage Order Nos. 1-2001-15-2001); proposed Cal. Wage Order No. 16-2001 (http://www.dir.ca.gov/IWC/WageOrderIndustries.htm)], but special definitions apply in the personal services, public housekeeping, and mercantile industries [*8 Cal. Code Reg. §§ 11020, 11050, 11070*, P 2 (Cal. Wage Order Nos. 2-2001, 5-2001, 7-2001)]. A large volume of case authority exists defining the employment relationship for purposes of tort law [*see, e.g., Johnson v. Banducci (1963) 212 Cal. App. 2d 254, 262, 27 Cal. Rptr. 764]* and workers' compensation [*see, e.g., S.G. Borello & Sons, Inc. v. Department of Indus. Relations (1989) 48 Cal. 3d 341, 351-356, 256 Cal. Rptr. 543, 769 P.2d 399* (hiree's status in workers' compensation context is to be determined in light of history and purposes of Workers' Compensation Act, thereby lessening common-law emphasis on hirer's degree of control over details of hiree's work in determining whether employment relationship exists); *Laeng v. Workmen's Comp. Appeals Bd. (1972) 6 Cal. 3d 771, 774, 100 Cal. Rptr. 377, 494 P.2d 1* ; *Baugh v. Rogers (1944) 24 Cal. 2d 200, 205-207, 148 P.2d 633* ; *JKH Enters., Inc. v. Department of Indus. Relations (2006) 142 Cal. App. 4th 1046, 1062-1066, 48 Cal.*

Rptr. 3d 563] . However, relatively few cases have addressed the definitions of "employer" and "employee" for purposes of state wage and hour law [*see, e.g.,* *Grubb & Ellis Co. v. Spengler (1983) 143 Cal. App. 3d 890, 895-897, 192 Cal. Rptr. 637* (real estate salesperson is broker's employee for purposes of real estate, workers' compensation, and tort law, but is not an employee under wage and hour laws); *see also* *Estrada v. FedEx Ground Package System, Inc. (2007) 154 Cal. App. 4th 1, 10, 64 Cal. Rptr. 3d 327* ("Because the Labor Code does not expressly define 'employee' for purposes of *Lab. Code § 2802*, which makes employer liable for business expenses incurred by employee, the common law test of employment applies."); *People v. Palma (1995) 40 Cal. App. 4th 1559, 1565, 48 Cal. Rptr. 2d 334* (neither federal or state law defines the term "employee," as a general rule when the term "employee" is used in a statute without a definition, the term is given its common law meaning)].

[b] Independent Contractors

No employment relationship exists if the individual performing services for a principal is an independent contractor. The critical legal distinction between employees and independent contractors is the right to control the manner and means by which the work is performed. A bona fide independent contractor is customarily engaged in an independently established business and retains the right to control the manner in which he or she performs the contract. An employee, on the other hand, is subject to the absolute control and direction of the employer [*see Lab. Code §§ 2700, 2750.5*; *see, e.g.,* *People v. Palma (1995) 40 Cal. App 4th 1559, 1566, 48 Cal. Rptr. 2d 334* ; *Grubb & Ellis Co. v. Spengler (1983) 143 Cal. App. 3d 890, 897-898, 192 Cal. Rptr. 637]* .

An individual hired to perform services that require a building contractor's license is presumed to be an employee, unless independent contractor status is established by proof that the individual holds a valid contractor's license and that the following factors exist [*Lab. Code § 2750.5*; *see* *Cedillo v. Workers' Comp. Appeals Bd. (2003) 106 Cal. App. 4th 227, 233, 130 Cal. Rptr. 2d 581* (if statutory presumption is not rebutted, property owner who hires unlicensed building contractor will be presumptive employer not only of contractor, but also of workers hired by building contractor)]:

- The individual has the right to control and has discretion to determine the manner of performance of the contract for services, thus reflecting the fact that the result of the work and not the means of accomplishing it as the primary factor bargained for;

- The individual is customarily engaged in an independently established business; and

- The individual's independent contractor status is bona fide and not a subterfuge to avoid employee status. Good faith in this context is evidenced by the presence of cumulative factors such as the following:

    - Substantial investment other than personal services in the business;

    - Holding oneself out to be in business for oneself;

    - Bargaining for a contract to complete a specific project for compensation by project rather than by time;

    - Supplying the tools used in the work (other than tools normally provided by employees);

    - Hiring employees;

    - Performing work that is not ordinarily in the course of the principal's work;

- Performing work that requires a particular skill;

- Holding a license under the Business and Professions Code; and

- The intent of the parties that an independent contractor relationship exists or that the relationship is not terminable at will but gives rise to an action for breach of contract if terminated. However, the parties' label for their relationship will be ignored if their actual conduct establishes a different relationship [*Estrada v. FedEx Ground Package System, Inc. (2007) 154 Cal. App. 4th 1, 11-13, 64 Cal. Rptr. 3d 327* (employer's control over every detail of workers' performance supported trial court's conclusion that workers were employees, not independent contractors, despite contractual recitations that manner and means of performing work were within workers' discretion)].

Applying the foregoing statutory presumption, the California Supreme Court has held that an unlicensed worker hired to remodel a homeowner's house, who became injured on the job, cannot be an independent contractor in the eyes of the law and is instead deemed the homeowner's employee at law for purposes of rendering him or her eligible for workers' compensation benefits under the homeowner's insurance policy [*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1985) 40 Cal. 3d 5, 15, 219 Cal. Rptr. 13, 706 P.2d 1146*]. It remains an open question, however, whether an unlicensed worker will be deemed a homeowner-hirer's employee under *Lab. Code § 2750.5* so as to impose vicarious tort liability on the homeowner for the worker's conduct that results in the worker's own injury [*Ramirez v. Nelson (2008) 44 Cal. 4th 908, 920, 80 Cal. Rptr. 3d 728, 188 P.3d 659* (because no applicable statute created special duty owed by employer to employee, it was unnecessary to decide whether unlicensed worker was homeowner-hirer's employee at law under *Lab. Code § 2750.5* so as to impose vicarious liability on homeowner for worker's death caused by worker's own conduct)].

[c] Other Relationships

The "employee" status of a number of other individuals presents difficult coverage questions, the resolution of which depend on the specific facts of each case. The Division of Labor Standards Enforcement (DLSE), which enforces the wage and hour provisions of the Labor Code and the wage orders, has drafted internal guidelines dealing with the status of individuals in the following categories:

- Nominal lessees [*see 8 Cal. Code Reg. §§ 11020, 11070*, P 2(E) (Cal. Wage Order Nos. 2-2001, 7-2001) (personal service and mercantile industries), *8 Cal. Code Reg. § 11050*, P 2(F) (Cal. Wage Order No. 5-2001) (public housekeeping industry)];

- Volunteers;

- Students [*see 5 Cal. Code Reg. § 10071*; *see also Lab. Code §§ 1191-1193*; *8 Cal. Code Reg. §§ 11010-11150*, P 6 (Cal. Wage Order Nos. 1-2001-15-2001 (occupational training for disabled students); *8 Cal. Code Reg. § 11050*, P 1(A) (student nurses)];

- Trainees [*see Lab. Code § 1192*; *8 Cal. Code Reg. §§ 11010-11150*, P 4(A)(1) (Cal. Wage Order Nos. 1-2001-15-2001)];

- Joint venturers, partners, and shareholders;

- Apprentices [*see 8 Cal. Code Reg. §§ 11010-11150*, P 4(D) (Cal. Wage Order Nos. 1-2001-15-2001); *see also Lab. Code §§ 3070-3098* (State Division of Apprenticeship Standards)];

- Members of religious orders; and
- Spouses.

For a discussion of factors to consider in determining the employee status of these individuals, *see* Wilcox, California Employment Law, Ch. 1 (Matthew Bender).

[2] Federal Law

An employment relationship must also exist in order for the FLSA to be applicable, and one who is not an employee will not be covered even if he or she is engaged in covered activities [*see 29 U.S.C. §§ 206(a), 207(a)*; *Tony & Susan Alamo Foundation v. Sec. of Labor (1985) 471 U.S. 290, 295, 105 S. Ct. 1953, 85 L. Ed. 2d 278* ; *Walling v. Portland Terminal Co. (1947) 330 U.S. 148, 152-153, 67 S. Ct. 639, 91 L. Ed. 809]* . The FLSA defines "employer" as including any person acting directly or indirectly in the interest of an employer in relation to an employee [*29 U.S.C. § 203(d)*; *see Lambert v. Ackerley (1999) 180 F.3d 997, 1011-1012* (en banc) ("employer" is to be given expansive interpretation in order to effectuate FLSA's broad remedial purposes; individual who exercises control over corporate employer may thus be treated as employer for FLSA purposes)]. The term "employee" means any individual employed by an employer, including most individuals employed by public agencies [*see 29 U.S.C. § 203(d), (e), (x)*]. To "employ" means to suffer or permit to work [*29 U.S.C. § 203(g)*].

The FLSA applies to *all* persons employed by an employer, although certain employees may be wholly or partially exempt from some or all of its provisions. Thus, for example, the FLSA covers piece workers, trainees, beginners, apprentices, or learners if they are employed to work for an employer for compensation, but does not cover individuals who "work" in activities carried on by other persons solely for their own personal purposes or pleasure without the promise or expectation of compensation [*see 29 U.S.C. §§ 213, 214*; *United States v. Rosenwasser (1945) 323 U.S. 360, 362-364, 65 S. Ct. 295, 89 L. Ed. 301* ; *Walling v. Portland Terminal Co. (1947) 330 U.S. 148, 151-153, 67 S. Ct. 639, 91 L. Ed. 809]* . Also, although the FLSA covers most "domestic service" employees [*29 U.S.C. § 206(f)*], it provides an exemption for those who are employed to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves [*29 U.S.C. § 213(a)(15)*; *see Long Island Care at Home, Ltd. v. Coke (2007) 551 U.S. 158, 127 S. Ct. 2339, 2344-2352, 168 L. Ed. 2d 54, 61-70* (upholding exemption under *29 C.F.R. § 552.109(a)*, which applies *29 U.S.C. § 213(a)(15)* exemption to persons providing companionship services who are employed by employers or agencies other than families or households using their services)]. As another example, a person employed by a public agency is not covered by the FLSA if that person is exempt from civil service laws and serves as a member of an elected official's personal staff [*29 U.S.C. § 203(e)(2)(C)*; *Renna v. County of Fresno (2000) 78 Cal. App. 4th 1, 5-6, 92 Cal. Rptr. 2d 586* (board member assistant to county supervisor)]. Also, independent contractors are not deemed "employees" under the FLSA [*see Real v. Driscoll Strawberry Associates, Inc. (9th Cir. 1979) 603 F.2d 748, 754]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedIndependent Contractors, Masters & ServantsGeneral OverviewBusiness & Corporate LawAgency RelationshipsAgents DistinguishedIndependent Contractors, Masters & ServantsIndependent ContractorsLabor & Employment LawEmployment RelationshipsIndependent ContractorsLabor & Employment LawEmployment RelationshipsIndependent ContractorsLabor & Employment LawWage & Hour LawsCoverage & DefinitionsEmployees

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 250 EMPLOYMENT LAW: WAGE AND HOUR DISPUTES
PART II. LEGAL BACKGROUND
A. Overview of Wage and Hour Laws

21-250 California Forms of Pleading and Practice--Annotated § 250.14

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§ 250.14 State Law Governing Wages and Hours

[1] Labor Code

[a] General Provisions

Wages, hours, and working conditions are generally governed by *Lab. Code § 1171 et seq.* These provisions apply to men, women, and minors employed in any occupation, trade, or industry, whether their compensation is measured by time, piece, or otherwise, but do not include any individual employed in outside sales or in a national service program such as AmeriCorps that is carried out with federal assistance under *42 U.S.C. § 12571* [*Lab. Code § 1171*; *see Ramirez v. Yosemite Water Co., Inc. (1999) 20 Cal. 4th 785, 796-798, 85 Cal. Rptr. 2d 844, 978 P.2d 2* (California definition of "outside salesperson" differs from definition of that term under federal law; California definition depends on how much time employee spends on outside selling, whereas federal definition depends on employee's primary job function); *see also* [2][e], *below*]. Among other things, these provisions do all of the following:

- Establish procedures for promulgation, review, and interpretation of wage orders [*see Lab. Code §§ 517(a), 1173-1182.1, 1182.7, 1183, 1184, 1187-1190, 1198.4, 1204*; *see also* [2], *below*, for discussion of Industrial Welfare Commission wage orders].

- Establish a standard eight-hour workday and a standard 40-hour workweek (specifying circumstances in which alternative workweek schedules may be adopted), with overtime pay required for any hours worked in excess of an employee's applicable workday or workweek [*Lab. Code §§ 510-558*; *see Advanced-Tech Sec. Servs., Inc. v. Superior Court (2008) 163 Cal. App. 4th 700, 706-710, 77 Cal. Rptr. 3d 757* (if employment contract specifies premium pay for holiday work, employer is entitled to credit that premium against otherwise earned overtime pay under *Lab. Code § 510(a)*, which requires

one and a half times regular rate of pay for overtime work); *Huntington Mem'l Hosp. v. Superior Court (2005) 131 Cal. App. 4th 893, 902-911, 32 Cal. Rptr. 3d 373* (employer may not engage in subterfuge or artifice designed to evade overtime requirements, such as manipulation or reduction of pay for regular hours to make up for overtime rate that will have to be paid)].

- Authorize the Industrial Wage Commission to issue wage orders governing wages, hours, and working conditions for particular industries and employees, including the ski industry, the commercial fishing industry, the health care industry, stable employees in the horse racing industry, licensed pharmacists, and outside salespersons [*Lab. Code § 517(b)-(d)*].

- Authorize the IWC to establish special subminimum wages for certain types of employees [*see Lab. Code §§ 1191-1193*].

- Set forth various administrative and judicial remedies for violation of the wage and hour laws [*see Lab. Code §§ 1193.5-1197.1, 1199, 1199.5, 1200*].

For discussion of other statutory provisions governing payment of wages, see *§ 250.16[1]*. For discussion of other statutory provisions governing deductions from wages, see *§ 250.20*.

[b] Equal Pay Act

Lab. Code § 1197.5, popularly known as the California Equal Pay Act, prohibits any employer from paying any individual in the employer's employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs performed under similar working conditions that require equal skill, effort, and responsibility. An exception exists for payments made pursuant to a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex [*Lab. Code § 1197.5(a)*]. In addition, it is a misdemeanor to pay, or to cause to be paid, any employee of one sex a wage less than the rate paid to an employee of the opposite sex as required by *Lab. Code § 1197.5*, or to reduce the wages of any employee to comply with that section [*Lab. Code § 1199.5*].

Any employer who discriminates in wage rates on the basis of sex alone is liable to the employee affected in the amount of the wages, plus interest, of which the employee is deprived by reason of the violation, plus an additional equal amount as liquidated damages [*Lab. Code § 1197.5(b)*]. Any employee receiving less than the wage to which he or she is entitled under *Lab. Code § 1197.5* may recover the balance of the wages, including interest, an equal amount as liquidated damages, and costs of suit and reasonable attorney's fees, notwithstanding any agreement to work for a lesser wage [*Lab. Code § 1197.5(g)*]. For a form of complaint for use in cases in which unlawful discrimination based on sex in violation of the Equal Pay Act is alleged, see *§ 250.64*.

In an action under the Equal Pay Act, the employee must make a prima facie showing that the employer pays workers of one sex more than workers of the opposite sex for substantially similar work performed under substantially similar conditions [*see Hall v. County of Los Angeles (2007) 148 Cal. App. 4th 318, 323-325, 55 Cal. Rptr. 3d 732* (plaintiff cannot compare male employees of one work unit and female employees of another unit, if each unit employs substantial number of men and women, and both sexes in plaintiff's unit are paid same)]. After the employee makes the prima facie showing, the employer then has the burden of showing that one of the statutory exceptions [*see Lab. Code § 1197.5(a)*] is applicable. If the employer does so, the employee may show that the employer's stated reasons are pretextual [*Green v. Par Pools Inc. (2003) 111 Cal. App. 4th 620, 624-626, 3 Cal. Rptr. 3d 844]* .

Alternatively, the Division of Labor Standards Enforcement (DLSE) of the Department of Industrial Relations (DIR) may commence and prosecute, unless otherwise requested by the employee or affected group of employees, a civil action on behalf of the employee and on behalf of a similarly affected group of employees to recover unpaid wages

under *Lab. Code § 1197.5(a)*. The division is entitled to recover costs of suit in addition to the wages. The consent of any employee to the bringing of such an action constitutes a waiver of his or her cause of action under *Lab. Code § 1197.5(g)* unless the action is dismissed without prejudice by the division. The employee may intervene in the suit or may initiate independent action, however, if the suit has not been determined within 180 days from the date of the filing of the complaint [*Lab. Code § 1197.5(f)*].

Any affected employee may file a complaint with the DLSE that the wages he or she has been paid are less than the wages to which he or she is entitled under *Lab. Code § 1197.5(a)*. These complaints are investigated as provided in *Lab. Code § 98.7(b)*. The name of any employee who submits a complaint to the division regarding an alleged violation of *Lab. Code § 1197.5(a)* must be kept confidential by the division until it establishes the complaint's validity, or unless the confidentiality must be abridged by the division to investigate the complaint. The name of the complaining employee must remain confidential if the complaint is withdrawn before confidentiality is abridged by the division. The division must take all proceedings necessary to enforce the payment of any sums found to be due and unpaid to the employee [*Lab. Code § 1197.5(e)*; *see Lab. Code § 1197.5(c)*].

A civil action to recover wages under *Lab. Code § 1197.5(a)* generally may be commenced no later than two years after the cause of action occurs. A cause of action arising out of a willful violation, however, may be commenced no later than three years after the cause of action occurs [*Lab. Code § 1197.5(h)*].

Federal law provides similar restrictions regarding wage discrimination on the basis of sex [*see 29 U.S.C. § 206(d)*; *Green v. Par Pools Inc. (2003) 111 Cal. App. 4th 620, 623, 3 Cal. Rptr. 3d 844* (because California Equal Pay Act is nearly identical to federal Equal Pay Act, courts may, in absence of California authority, rely on federal authorities construing federal statute); *see also § 250.15[3]*].

For a detailed discussion of the state and federal equal pay statutes and related employment discrimination laws, see Wilcox, California Employment Law, Chs. 40-43 (Matthew Bender). For further discussion and forms relating to employment discrimination laws, see Ch. 115, *Civil Rights: Employment Discrimination* .

[c] Public Works

Special provisions govern the payment of wages to workers employed by a contractor for a public works project of more than $1,000 [*see Lab. Code §§ 1770-1780, 1815*; *see also Lab. Code §§ 1720-1720.4* ("public works" defined); *City of Long Beach v. Department of Indus. Relations (2004) 34 Cal. 4th 942, 950-954, 22 Cal. Rptr. 3d 518, 102 P.3d 904* (January 1, 2001, expansion of definition of "public works" to include design and preconstruction phases of construction was not retroactive)]. These workers must be paid no less than the general prevailing rate, determined by the Director of the Department of Industrial Relations, of per diem wages for work of a similar character in the locality in which the public work is performed, and no less than the general prevailing rate of per diem wages for holiday and overtime work [*Lab. Code § 1771*; *see Lab. Code §§ 1770, 1773, 1773.4-1773.9*; *International Brotherhood of Electrical Workers Locals v. Aubry (1996) 41 Cal. App. 4th 1632, 1636-1637 49 Cal. Rptr. 2d 759* (courts will accord substantial deference to Director of DIR's determination of "actually prevailing" wage for public works projects)]. Where a public-works project is a joint enterprise of the federal government and California governmental units, but the federal agency awards the construction contracts and exerts overall control, California defers to federal prevailing-wage standards [*Southern Cal. Lab. Management Etc. Committee v. Aubry (1997) 54 Cal. App. 4th 873, 886, 63 Cal. Rptr. 2d 106]* . On the other hand, contentions that the Employee Retirement Income Security Act and the National Labor Relations Act preempt California's prevailing-wage scheme have been rejected [*Cal. Div. of Labor Stds. v. Dillingham (1997) 519 U.S. 316, 117 S. Ct. 832, 136 L. Ed. 2d 791, 802-805* (California prevailing-wage law is not preempted by ERISA and may be enforced against subcontractor employing apprentices in unapproved apprenticeship program, though program is ERISA "benefit plan"); *Dillingham Constr. N.A., Inc. v. County of Sonoma (9th Cir. 1999) 190 F.3d 1034, 1040* (NLRA does not preempt California prevailing-wage law); *WSB Elec., Inc. v. Curry (9th Cir. 1996) 88 F.3d 788, 794* (prevailing-wage scheme not preempted, though it takes into account sums paid into benefit

plans); *Department of Industrial Relations v. Nielsen Construction Co. (1996) 51 Cal. App. 4th 1016, 1028-1030, 59 Cal. Rptr. 2d 785* (no preemption where state seeks recovery of funds contractor withheld from benefit plan, when withholding was means of avoiding prevailing-wage obligations); *see Associated Builders & Contractors of S. Cal., Inc. v. Nunn (9th Cir. 2004) 356 F.3d 979, 986-991* (NLRA does not preempt California prevailing-wage regulation governing apprenticeships on private projects)].

During any Division of Labor Standards Enforcement (DLSE) investigation of an alleged violation of the California prevailing-wage law, the division must keep confidential the name of any employee who reported the violation, as well as any other information that might identify the employee [*Lab. Code § 1736*].

The Labor Code provides for the withholding of contract payments from public works contractors or subcontractors that fail to pay prevailing wages to their workers [*Lab. Code § 1727*]. An affected contractor or subcontractor may obtain an administrative hearing to review the correctness of the withholding of contract payments, followed by mandamus review in superior court [*Lab. Code § 1742*; *see Lujan v. G & G Fire Sprinklers, Inc. (2001) 532 U.S.189, 195-197, 121 S. Ct. 1446, 149 L. Ed. 2d 391* (lack of administrative review before *Lab. Code § 1742* took effect on July 1, 2001, did not violate constitutional due process requirements because contractor's right to payment could be fully protected in ordinary breach-of-contract action); *see also Mobley v. Los Angeles Unified Sch. Dist. (2001) 90 Cal. App. 4th 1221, 1238, 1241, 1245, 109 Cal. Rptr. 2d 591* (*Lab. Code § 1742* requires postdeprivation hearing to determine whether withholding of contract payments is correct)].

In addition, a worker on a public works project has a private statutory cause of action to recover the prevailing wage from the contractor or subcontractor that employs the worker [*Lab. Code § 1194*; Road Sprinkler Fitters Local Union No. 669 v. *G & G Fire Sprinklers, Inc. (2002) 102 Cal. App. 4th 765, 777-779, 125 Cal. Rptr. 2d 804]* . However, a subcontractor's employee on a public works project does not have a statutory or contractual right to sue the prime or general contractor for the nonpayment of prevailing wages by the subcontractor (the employee's direct employer) [*Violante v. Communities S.W. Dev. & Constr. Co (2006) 138 Cal. App. 4th 972, 978-982, 41 Cal. Rptr. 3d 673]* .

For a discussion of the payment of the general prevailing rate to public works employees, as distinguished from payment of the minimum wage, see Wilcox, California Employment Law, Ch. 2 (Matthew Bender).

[2] Industrial Welfare Commission Wage Orders

[a] Generally

The California wage orders, promulgated by the IWC [*see Lab. Code §§ 1173, 1182*] and codified in Title 8 of the California Code of Regulations [*see* Cal. Wage Order No. MW-2007 (http://www.dir.ca.gov/IWC/Minwage2007.pdf) (implementing *Lab. Code § 1182.12*); *8 Cal. Code Reg. §§ 11010*-11170 (Cal. Wage Order Nos. 1-2001-17-2001)], are administrative regulations that set forth requirements for minimum wages, overtime compensation, and working conditions in various industries and occupations in California. Wage orders may be adopted, amended, or rescinded by the IWC pursuant to procedures set forth in the Labor Code [*see Lab. Code §§ 1173, 1176-1182.1, 1182.5, 1182.7, 1184-1190*], and are expressly exempted from the usual procedures for adopting administrative regulations set forth under *Gov. Code § 11346 et seq.* [*Lab. Code § 1185*].

The provisions of the various wage orders differ in many respects. Of the wage orders promulgated by the IWC, twelve are "industry" orders, each of which applies to persons employed in the industry specified in the particular order [*see 8 Cal. Code Reg. §§ 11010-11030, 11050-11130* (Cal. Wage Order Nos. 1-2001-3-2001, 5-2001-13-2001)]; four are "occupation" orders that apply to persons employed in specified types of occupations [*see 8 Cal. Code Reg. §§ 11040, 11140-11160* (Cal. Wage Order Nos. 4-2001, 14-2001-16-2001)]; and one is a general minimum wage order applicable to all California employers [*see* Cal. Wage Order No. MW-2007 (http://www.dir.ca.gov/IWC/Minwage2007.pdf) (implementing *Lab. Code § 1182.12*)]. There is also a catchall order, Miscellaneous Employees, covering "[a]ny

industry or occupation not previously covered by, and all employees not specifically exempted in, the Commission's wage orders in effect in 1997, or otherwise exempted by law" [*see 8 Cal. Code Reg. § 11170* (Cal. Wage Order No. 17-2001); *see also* Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999, 1999 Stats., ch. 134 (A.B. 60)].

For detailed discussion of the industries and occupations covered by the wage orders, see Wilcox, California Employment Law, Ch. 1 (Matthew Bender).

[b] Industry Wage Orders

The 12 specific industries covered under the wage orders are the following:

- Amusement and recreation (Wage Order No. 10-2001) [*see 8 Cal. Code Reg. § 11100*].
- Broadcasting (Wage Order No. 11-2001) [*see 8 Cal. Code Reg. § 11110*].
- Canning, freezing, and preserving (Wage Order No. 3-2001) [*see 8 Cal. Code Reg. § 11030*].
- Handling products after harvest (Wage Order No. 8-2001) [*see 8 Cal. Code Reg. § 11080*].
- Laundry, linen supply, dry cleaning, and dyeing (Wage Order No. 6-2001) [*see 8 Cal. Code Reg. § 11060*].
- Manufacturing (Wage Order No. 1-2001) [*see 8 Cal. Code Reg. § 11010*].
- Mercantile (Wage Order No. 7-2001) [*see 8 Cal. Code Reg. § 11070*].
- Motion picture (Wage Order No. 12-2001) [*see 8 Cal. Code Reg. § 11120*].
- Personal service (Wage Order No. 2-2001) [*see 8 Cal. Code Reg. § 11020*].
- Preparing agricultural products on the farm for market (Wage Order No. 13-2001) [*see 8 Cal. Code Reg. § 11130*].
- Public housekeeping (Wage Order No. 5-2001) [*see 8 Cal. Code Reg. § 11050*].
- Transportation (Wage Order No. 9-2001) [*see 8 Cal. Code Reg. § 11090*].

[c] Occupation Wage Orders

The occupation wage orders are the following:

- Professional, technical, clerical, mechanical, and similar occupations (Cal. Wage Order No. 4-2001 [*see 8 Cal. Code Reg. § 11040*].
- Agricultural occupations (Wage Order No. 14-80) [*see 8 Cal. Code Reg. § 11140*].
- Household occupations (Cal. Wage Order No. 15-2001 [*see 8 Cal. Code Reg. § 11150*].
- Certain on-site occupations in the construction, drilling, logging, and mining industries (Wage Order No. 16-2001) [*see 8 Cal. Code Reg. § 11160*].

[d] General Minimum Wage Order

In addition to the industry and occupation wage orders, the IWC has promulgated a general minimum wage order requiring that every employer pay to each employee, excluding public employees and outside salespersons, no less than the current minimum wage for all hours worked. The general minimum wage order applies to employees not otherwise covered by an industry or occupation wage order, but does not apply to employees who are expressly exempt from all provisions, or from the minimum wage provisions, of a wage order otherwise covering those employees [*see* Cal. Wage Order No. MW-2007 (http://www.dir.ca.gov/IWC/Minwage2007.pdf) (implementing *Lab. Code § 1182.12*)].

[e] Exempt Employees

Certain categories of employees, including outside salespersons, government employees [*see* Cal. Wage Order No. MW-2007 (http://www.dir.ca.gov/IWC/Minwage2007.pdf) (implementing *Lab. Code § 1182.12*); *8 Cal. Code Reg. §§ 11010*-11130, P 1 (Cal. Wage Order Nos. 1-2001-13-2001)], and members of the employer's immediate family are exempt from all provisions of all of the wage orders. Under the applicable wage orders, an "outside salesperson" is an employee who works more than half of his or her working time selling or obtaining orders or contracts for the employer [*see, e.g.,* Cal. Wage Order No. 7-2001; *see Ramirez v. Yosemite Water Co., Inc. (1999) 20 Cal. 4th 785, 802, 85 Cal. Rptr. 2d 844, 978 P.2d 2* (determination of time spent by employee in selling activity must be made by considering realistic job requirements as well as how employee actually spends his or her time)]. This definition of "outside salesperson" differs from the definition of that term under federal law; the federal definition focuses on whether the employee's primary duty is selling [*see 29 C.F.R. § 541.500*], rather than on how much time is spent selling [*see Ramirez v. Yosemite Water Co., Inc. (1999) 20 Cal. 4th 785, 796-800, 85 Cal. Rptr. 2d 844, 978 P.2d 2* (nothing in *Lab. Code § 1171* or legislative history indicates legislative intent to prevent IWC from departing from federal definition of "outside salesperson")].

Persons employed in administrative, executive, and professional capacities are exempt from most of the provisions of the wage orders, including the minimum wage and overtime compensation requirements and the provisions requiring rest and meal periods [*see* Cal. Wage Order No. MW-2007 (http://www.dir.ca.gov/IWC/Minwage2007.pdf) (implementing *Lab. Code § 1182.12*); *8 Cal. Code Reg. §§ 11010*-11150, P 1 (Cal. Wage Order Nos. 1-2001-15-2001); *see also Cal. Sch. of Culinary Arts v. Lujan (2003) 112 Cal. App. 4th 16, 22-29, 4 Cal. Rptr. 3d 785* (exemption for teaching at accredited college under *8 Cal. Code Reg. § 11040* [Cal. Wage Order No. No. 4-2001] not limited to teachers at institutions that award bachelor's or higher degrees); *Bell v. Farmers Ins. Exch. (2001) 87 Cal. App. 4th 805, 819-829, 105 Cal. Rptr. 2d 59* (insurance claim representatives who perform "routine and unimportant" duties are nonexempt production workers, rather than exempt administrators)]. In addition, the participants, director, and staff of a live-in alternative to incarceration rehabilitation program with special focus on substance abusers are exempt from wage and hour provisions when participating in programs owned and operated by the program under certain circumstances [*see Penal Code § 8002*]. For a discussion of employees exempt from the minimum wage and overtime compensation provisions of the state wage orders, see Wilcox, California Employment Law, Chs. 2, 3 (Matthew Bender).

[f] Validity of Wage Orders

State regulation of minimum wages, maximum hours, and working conditions carries with it a strong presumption of regularity [*see Industrial Welfare Com. v. Superior Court (1980) 27 Cal. 3d 690, 731-732, 166 Cal. Rptr. 331, 613 P.2d 579* , *appeal dismissed and cert. denied sub nom. California Manufacturers Association v. Industrial Welfare Commission, 449 U.S. 1029]* . Orders of the IWC fixing minimum wages, maximum hours, and standard conditions of labor for all employees, when promulgated in accordance with the applicable provisions of the Labor Code, are presumed to be reasonable and lawful [*see Cal. Labor Federation, AFL-CIO v. Industrial Welfare Com. (1998) 63 Cal. App. 4th 982, 990-1000, 74 Cal. Rptr. 2d 397* (IWC amendment of wage order to eliminate requirement that overtime be paid after 8 hours of work in one day was within IWC's power, even though Legislature had refused to enact similar change in overtime rules); *see also Lab. Code § 1173*]. Similarly, findings of fact made by the IWC in promulgating,

amending, or rescinding wage orders are, in the absence of fraud, conclusive [*Lab. Code §§ 1185, 1187*]. The California Supreme Court has rejected challenges to the 1980 wage orders on the basis of procedural and constitutional defects, and has expressly ruled Wage Order Nos. 1-80 (*now see* 1-2001), 3-80 (*now see* 3-2001), 4-80 (*now see* 4-2001), 5-89 (*now see* 5-2001), 8-80 (*now see* 8-2001), 9-80 (*now see* 9-2001), 10-80 (*now see* 10-2001), 13-80 (*now see* 13-2001), and 14-80 (*now see* 14-2001) to be valid [*see Industrial Welfare Com. v. Superior Court (1980) 27 Cal. 3d 690, 698 n. 2, 735, 166 Cal. Rptr. 331, 613 P.2d 579 , appeal dismissed and cert. denied sub nom. California Manufacturers Association v. Industrial Welfare Commission, 449 U.S. 1029]* . A California Court of Appeal rejected a challenge to the California minimum wage law brought on the ground that the law infringed *First Amendment* rights [*Association of Community Organizations for Reform Now v. Department of Industrial Relations (1995) 41 Cal. App. 4th 298, 301]* .

The presumption that IWC wage orders are lawful does not apply, however, to a wage order that directly conflicts with statutory provisions [*see, e.g., Lab. Code § 516* (except as provided in *Lab. Code § 512*, IWC may adopt or amend working condition orders with respect to break periods, meal periods, and days of rest)]. For example, because the statute requiring employers to provide meal periods specifies certain exemptions from the meal-period requirements [*see Lab. Code § 512(a), (c), (d)* (exemptions for waivers of certain meal period by employees and for wholesale baking industry, motion picture industry, and broadcasting industry)], the IWC lacked authority to enact a wage order creating an additional exemption [*Bearden v. U.S. Borax, Inc. (2006) 138 Cal. App. 4th 429, 434-440* (Wage Order No. 16-2001, *8 Cal. Code Reg. § 11160*, P 10(E), exceeded IWC's authority because it created a new exemption for certain collective bargaining agreements that was inconsistent with exemptions expressly included in *Lab. Code § 512*)].

[3] Enforcement and Remedies

The DLSE is responsible for administering and enforcing the provisions of *Lab. Code § 1171 et seq.*, governing wages, hours, and working conditions; interpreting the intent of the IWC in promulgating specific orders [*see Lab. Code 1198.4*; *Aguilar v. Association for Retarded Citizens (1991) 234 Cal. App. 3d 21, 26-28, 285 Cal. Rptr. 515* ; *Keyes Motors, Inc. v. Division of Labor Standards Enforcement (1987) 197 Cal. App. 3d 557, 561-562, 242 Cal. Rptr. 873]* ; and enforcing wage orders promulgated by the IWC [*see Lab. Code §§ 61, 74, 1193.5*]. The DLSE also may enforce other provisions of the Labor Code and all labor laws of the state not otherwise specifically vested in another officer, board, or commission [*Lab. Code § 95(a)*]. In addition, aggrieved employees may maintain civil actions to collect unpaid wages or otherwise enforce their rights [*see Lab. Code §§ 218, 229, 1194*]. For a detailed discussion of enforcement of wage and hour laws and administrative and judicial remedies, see Subpart B, § 250.30 et seq., and Wilcox, California Employment Law, Ch. 5 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Forms of Pleading and Practice--Annotated

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 250 EMPLOYMENT LAW: WAGE AND HOUR DISPUTES
PART II. LEGAL BACKGROUND
A. Overview of Wage and Hour Laws

21-250 California Forms of Pleading and Practice--Annotated § 250.15

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§ 250.15 Federal Law Governing Wages and Hours

[1] Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) [*see 29 U.S.C. §§ 201-219*], as limited by the Portal-to-Portal Act [*see 29 U.S.C. §§ 251-262*], is the primary federal statute governing wages and hours of employment. The FLSA establishes minimum wages to be paid employees covered by its provisions and maximum hours of employment, beyond which overtime compensation must be paid [*see 29 U.S.C. §§ 206, 207*].

For employees expressly exempted from the provisions of the FLSA, federal law does not conflict with state regulation of overtime pay [*Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 566-567, 577-579, 59 Cal. Rptr. 2d 186, 927 P. 2d 296 , cert. denied, 520 U.S. 1248 (1997)* (seamen working outside territorial boundaries, as defined by federal law, subject to overtime pay provisions of California wage orders)]. Moreover, despite the use of similar terminology, FLSA exemptions are not necessarily coextensive with state-law exemptions from regulation of overtime pay [*see, e.g., Ramirez v. Yosemite Water Co., Inc. (1999) 20 Cal.4th 785, 797, 85 Cal. Rptr. 2d 844, 978 P.2d 2* (California defines "outside salespersons" who are exempt from overtime pay in way that provides, at least in some cases, greater protection for employees than under federal law)].

The FLSA also regulates the employment of minors in activities related to interstate commerce [*see 29 U.S.C. § 212*], prohibits wage discrimination based on sex [*see 29 U.S.C. § 206(d)*], and imposes recordkeeping requirements [*see 29 U.S.C. § 211(c)*].

For a detailed discussion of the coverage of the FLSA, see Wilcox, California Employment Law, Ch. 1 (Matthew Bender).

[2] Portal-to-Portal Act

Among other things, the Portal-to-Portal Act [*see 29 U.S.C. §§ 251-262*] (1) sets forth the statute of limitations for actions brought under the FLSA [*see 29 U.S.C. § 255*]; (2) provides certain "good faith" defenses to FLSA actions [*see 29 U.S.C. §§ 259, 260*]; and (3) relieves employers from liability under the FLSA for minimum wages or overtime compensation resulting from the failure to compensate employees for certain specified activities unless, at the time the activity was engaged in, it was made compensable by the terms of an express contractual provision, or by custom or practice not inconsistent with a contractual provision [*see 29 U.S.C. §§ 252(a), 254(a), (b)*].

For a discussion of the Portal-to-Portal Act as it affects the computation of work hours for purposes of determining overtime compensation and minimum wages, see Wilcox, California Employment Law, Ch. 3 (Matthew Bender). For a discussion of the Portal-to-Portal Act's statute of limitations and good faith defense provisions, see Wilcox, California Employment Law, Ch. 5 (Matthew Bender).

[3] Equal Pay Act

The Equal Pay Act [*29 U.S.C. § 206(d)*], which is included in the FLSA, prohibits employers from discriminating among employees on the basis of sex by paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex in the same establishment on jobs requiring equal skill, effort, and responsibility, and performed under similar working conditions, unless the unequal payment is made pursuant to a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential based on any other factor other than sex. The Act also prohibits labor organizations from causing or attempting to cause an employer to discriminate against an employee on the basis of sex by paying lower wages to that employee.

For a detailed discussion of the state and federal equal pay statutes and related employment discrimination laws, see Wilcox, California Employment Law, Chs. 40-43 (Matthew Bender). For further discussion and forms relating to employment discrimination laws and equal pay statutes, see Ch. 115, *Civil Rights: Employment Discrimination* .

[4] Enforcement and Remedies

The FLSA provides the following five exclusive remedies for unlawful discrimination, retaliation, and failure to pay federally required minimum wages and overtime compensation [*see Lerwill v. Inflight Motion Pictures, Inc. (N.D. Cal. 1972) 343 F. Supp. 1027, 1029]* :

- Voluntary payment of unpaid minimum wages and overtime payments may be sought under the aegis of the Secretary of Labor through the Wage and Hour Division [*see 29 U.S.C. § 216(c)*];

- The Secretary of Labor may bring a civil action to recover unpaid minimum wages or overtime compensation in any court of competent jurisdiction [*see 29 U.S.C. § 216(c)*];

- The Secretary of Labor may seek injunctive relief in federal court against an employer violating the minimum wage, overtime, discrimination, and other provisions of the FLSA [*see 29 U.S.C. § 217*];

- An employee or group of employees may bring a civil action in any court of competent jurisdiction for violation of the minimum wage and overtime rules or alleged discrimination or retaliation [*see 29 U.S.C. §§ 215(a)(3), 216(b)*; *see Breuer v. Jim's Concrete of Brevard, Inc. (2003) 538 U.S. 691, 694-699, 123 S. Ct. 1882, 155 L. Ed. 2d 923* (employee's state-court suit under FLSA may be removed to federal court)]; other employees may "opt in" and join the action as additional plaintiffs [*29 U.S.C. § 216(b)*; *see Haro v. City of Rosemead (2009) 174 Cal. App. 4th 1067, 1074-1077, 94 Cal. Rptr. 3d 874* (FLSA actions, which are predicated on additional plaintiffs opting in, are properly termed "collective

actions," not class actions and, in California courts, are not governed by class-action procedures under *Code Civ. Proc. § 382* and *Cal. Rules of Ct., Rule 3.760 et seq.*)];

- Criminal proceedings may be brought against an employer who willfully violates the FLSA [*see 29 U.S.C. § 216(a)*].

Although the FLSA purports to authorize private actions against states in their own courts without regard to their consent [*see 29 U.S.C. §§ 203(x), 216(b)*], the Supreme Court has held that sovereign immunity bars an individual suit against a state to enforce a federal statutory right under the FLSA, when brought in a state court over the state's objections [*Alden v. Maine (1999) 527 U.S. 706, 745, 753-760, 119 S. Ct. 2240, 144 L. Ed. 2d 636* (state employees could not sue state of Maine for overtime wages due under the FLSA, absent state's waiver of its sovereign immunity)].

Repeated or willful violations [*see 29 C.F.R. § 578.3* (defining repeated and willful)] of the federal minimum wage and overtime laws may also result in the imposition of a civil penalty not exceeding $1,100 on the employer [*29 U.S.C. § 216(e)(2)*; *29 C.F.R. § 578.3*]. The amount of the penalty is determined with consideration for the appropriateness of the penalty in relation to the size of the business of the person charged and the gravity of the violation [*29 U.S.C. § 216(e)(3)*; *see 29 C.F.R. § 578.4* (other factors that may be considered)]. If the penalty assessed is unpaid, it may be collected by the Secretary of Labor through any of the following methods:

- Withholding the amount from funds due to the person in arrears from any sums owed to that person by another United States agency [*29 C.F.R. § 580.18(b)(1)*];

- Instituting a civil action in any court of competent jurisdiction [*29 C.F.R. § 580.18(b)(2)*]; or

- If the penalty was imposed by court order in a civil or criminal proceeding [*see 29 U.S.C. §§ 215(a)(2), (4), 216(a)*], requesting that the noncomplying person be held in contempt [*29 C.F.R. § 580.18(b)(3)*].

For a detailed discussion of remedies available under the FLSA, see Wilcox, California Employment Law, Ch. 5 (Matthew Bender).

[5] Federal Contractors

Certain employers working under contract with the federal government, including employers not otherwise subject to the FLSA, generally are subject to the following special wage and hour legislation:

- The Walsh-Healey Act [*41 U.S.C. §§ 35-45*] (contracts for manufacture or furnishing of materials, supplies, articles, or equipment in any amount over $10,000);

- The Davis-Bacon Act [*40 U.S.C. §§ 276a-276a-7*] (contracts in excess of $2,000 for construction, alteration, and/or repair of federal public buildings or public works);

- The Service Contract Act [*41 U.S.C. §§ 351-358*] (contracts in excess of $2,500 to furnish services) [*see Naranjo v. Spectrum Sec. Servs., Inc. (2009) 172 Cal. App. 4th 654, 663-669, 91 Cal. Rptr. 3d 393* (although Service Contract Act does not provide right of action for employees to enforce Act, it does not preempt suits for wages claimed under California Labor Code or other state or local laws that are consistent with Act)];

- Provisions governing wages and hours under public works contracts [*40 U.S.C. §§ 3141 et seq.* , 3701 *et seq.*] (contracts involving employment of laborers or mechanics on federal public works, and to

the employment of laborers under a contract to which the United States or any federal agency is a party, or that is made on behalf of the United States or a federal agency, or that is financed by federal loans or grants under a federal statute providing wage standards);

- The Copeland ("Anti-Kickback") Act [*see 18 U.S.C. § 874*] (prohibiting inducing an employee on federal public work project to give up wages to which he or she is entitled); and

- The Miller Act [*see 40 U.S.C. §§ 270a-270d-1*] and waivers set forth in *40 U.S.C. § 3134* (wage payment bond posting requirement for public building/works contracts in excess of $25,000).

An employer subject to both the FLSA and a special government-contract statute must comply with the requirements of both statutes; to the extent that they conflict, the employee must be paid according to the statute that requires the greatest pay [*see 29 U.S.C. § 218(a)*; *29 C.F.R. § 778.5*].

For a detailed discussion of special government-contract statutes, see Wilcox, California Employment Law, Ch. 1 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEqual PayEqual Pay ActGeneral OverviewLabor & Employment LawWage & Hour LawsAdministrative Proceedings & RemediesEnforcementLabor & Employment LawWage & Hour LawsCoverage & DefinitionsPrevailing WagesLabor & Employment LawWage & Hour LawsRemediesPrivate SuitsLabor & Employment LawWage & Hour LawsStatutes of Limitations

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21-250 California Forms of Pleading and Practice--Annotated § 250.16

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§ 250.16 Time and Place of Wage Payments

[1] During Course of Employment

During the course of employment, wages for most employees generally must be paid at least twice each month on dates designated in advance by the employer as regular paydays and published in a payday notice [*see Lab. Code §§ 204, 207*; *see also Lab. Code § 210* (civil penalty for nonpayment)]. Different rules are prescribed for the following types of employees, however:

- Discharged and seasonal employees; employees who quit [*see Lab. Code §§ 201-202*];
- Employees of temporary service employers [*see Lab. Code § 201.3*];
- Salaried executive, administrative, and professional employees [*see Lab. Code §§ 204, 204c, 204.2*];
- Agricultural and domestic employees [*see Lab. Code §§ 205, 205.5, 1696.5*]; and
- Commissioned employees of motor vehicle dealers [*see Lab. Code § 204.1*].

Employees who are subject to a collective bargaining agreement containing provisions regarding the time for payment of wages that differ from the Labor Code provisions are governed by the terms of the agreement [*see Lab. Code §§ 204, 204.1, 204.2*]. In addition, *Lab. Code §§ 200-211* and *Lab. Code §§ 215-219*, inclusive, do not apply to the payment of wages of employees directly employed by any county, incorporated city or town, or other municipal corporation [*Lab. Code § 220(b)*]. However, these provisions are applicable to the payment of wages of employees directly employed by

the state, except for *Lab. Code §§ 201.3, 201.5, 201.7, 203.1, 203.5, 204, 204a, 204b, 204c, 204.1, 205,* and *205.5* [*Lab. Code § 220(a)*].

For detailed discussion of the rules governing the time and place of wage payments during the course of employment, see Wilcox, California Employment Law, Ch. 4 (Matthew Bender).

[2] On Discharge, Layoff, or Resignation

[a] Time Frame

Generally speaking, all of a discharged or laid-off employee's earned and unpaid wages are due and payable at the time of the discharge or layoff, and must be paid at the place of discharge [*Lab. Code §§ 201(a), 208*]. "Discharge," in this context, occurs not only when an employee is involuntarily terminated from an ongoing employment relationship, but also when an employee is released after completing the particular job assignment or time duration for which he or she was hired [*Smith v. Superior Court (2006) 39 Cal. 4th 77, 45 Cal. Rptr. 3d 394, 137 P.3d 218]* .

The wages of an employee who resigns are due and payable no later than 72 hours after the resignation unless the employee has given at least 72 hours' notice of his or her intention to quit, in which case the final payment of all wages is due at the time of quitting [*Lab. Code § 202*]. An employee who quits without providing a 72-hour notice is entitled to receive payment of wages by mail if he or she so requests and designates a mailing address. The date of mailing is deemed the date of payment for purposes of the requirement that wages be paid within 72 hours after notice of quitting [*Lab. Code § 202*]. An employee who quits must be paid at the office or agency of the employer in the county where the employee worked [*Lab. Code § 208*]. Special rules govern the time within which wages must be paid to the following classes of employees:

- Employees who are laid off because of the termination of seasonal employment in the curing, canning, or drying of any variety of perishable fruit, fish, or vegetables [*see Lab. Code § 201(a)*];

- State employees [*Lab. Code §§ 201(b), (c), 202(b), (c)*];

- Employees of temporary services employers [*see Lab. Code § 201.3*];

- Motion picture employees whose unusual or uncertain terms of employ ment require special computation of the amount due [*see Lab. Code § 201.5*];

- Oil drilling employees [*see Lab. Code § 201.7*]; and

- Employees engaged in an employment that normally involves working for several employers in the same industry interchangeably who are paid at a central place [*Lab. Code § 204a*].

For further discussion of the payment of wages on discharge, lay off, or resignation, see Wilcox, California Employment Law, Ch. 4 (Matthew Bender).

PRACTICE TIP:

Look for Unconscionability in Method of Computing Wages Due on Termination. The way in which an employer computes an employee's wages upon termination of employment is deserving of careful scrutiny. In *Ellis v. McKinnon Broadcasting Co. (1993) 18 Cal. App. 4th 1796, 23 Cal. Rptr. 2d 80* , the Court of Appeal applied the contract "unconscionability" doctrine of *California Civil Code § 1670.5* to invalidate an employer method for reducing commissions due at the time of termination.

As a general observation, California courts seem very willing to import contract, tort, and statutory principles such as "unconscionability," "unfair business practice," and "tortious discharge in violation of public policy" into employee/employer disputes centered on wage and hour protections for the employee. *By Richard P. Hill*

[b] Severance Pay

No state or federal law requires employers to pay severance pay to discharged employees in the absence of an agreement to do so. Although the Labor Commissioner is statutorily authorized to enforce, and take assignment of, severance pay claims pursuant to the general statutory procedure for enforcement of wage and supplemental compensation claims [*see Lab. Code §§ 96(h), 96.7, 98-98.3*], several federal court decisions have held that state regulation of severance pay benefits is preempted by the enforcement provisions of ERISA [*see, e.g., Scott v. Gulf Oil Corp. (9th Cir. 1985) 754 F.2d 1499, 1503-1505* ; *California Chamber of Commerce v. Simpson (C.D. Cal. 1985) 601 F. Supp. 104, 107-109* (Labor Commissioner and DLSE enjoined from enforcing severance pay claims against employers in or affecting commerce)].

PRACTICE TIP:

ERISA Claim Provides Ground for Removal to Federal Court. Unsuspecting plaintiff's counsel attempting to plead a claim for breach of express or implied contract for severance pay have often found themselves faced with removal to federal court based on the federal question resulting from ERISA preemption of severance pay claims. While there is no right to a jury trial in ERISA litigation, there is an entitlement to attorneys fees for a prevailing party. *By Richard P. Hill*

[c] Vacation Pay

Unless otherwise provided by a collective bargaining agreement, whenever an employment contract or employer policy provides for paid vacations, and an employee is terminated without having used his or her vested vacation time, all vested vacation must be paid to the employee as wages at his or her final rate in accordance with the provisions of the employment contract or employer policy regarding eligibility or time served [*Lab. Code § 227.3*; *see Owen v. Macy's, Inc. (2009) 175 Cal. App. 4th 462, 468, 96 Cal. Rptr. 3d 70* (Lab. Code § section 227.3 does not require that employer provide its employees with any paid vacation at all; rather, statute imposes certain requirements "whenever" employer provides vacation benefits)]. Furthermore, an employment contract or employer policy may not provide for forfeiture of vested vacation time on termination of employment [*Lab. Code § 227.3*; D.L.S.E. Interpretive Bulletin No. 86-3, P 3 (Sept. 30, 1986); *see Henry v. Amrol, Inc. (1990) 222 Cal. App. 3d Supp. 1, 4-7 , 272 Cal. Rptr. 134* (*Lab. Code § 227.3* prohibits "use it or lose it" vacation policy by preventing forfeiture of vacation time once it has vested)]. Paid vacation time, when granted, is deemed a form of additional compensation for the employee's services that vests as it is earned and that must be paid in a pro rata share on termination of employment [*Suastez v. Plastic Dress-Up Co. (1982) 31 Cal. 3d. 774, 781, 784, 183 Cal. Rptr. 846, 647 P.2d 122]* .

Although an employer may not establish a "use it or lose it" vacation policy that would result in the forfeiture of vested vacation time, an employer may expressly limit the vesting of vacation time by establishing a "no additional accrual" vacation policy. Such a policy prevents an employee from earning vacation time over a designated limit. Once the employee has accrued vacation time to the limit, the employee cannot earn more time until the employee takes some of the accrued time. This type of vacation policy is permissible because it does not involve a forfeiture of vested vacation time, but merely limits the amount of time that vests. However, the policy must be explicitly provided in the employment agreement; in the absence of an express provision, vacation time will accumulate without limit [*Boothby v. Atlas Mechanical, Inc. (1992) 6 Cal. App. 4th 1595, 1601-1602, 8 Cal. Rptr. 2d 600]* .

It is an open question whether a terminated employee's action to recover compensation for vested but unused vacation time is subject to the statute of limitations for claims based on statutory liability, or the statutes of limitations for

contract claims [*Church v. Jamison (2006) 143 Cal. App. 4th 1568, 1577, 50 Cal. Rptr. 3d 166* (finding it unnecessary to decide which statute of limitations applied, because complaint in case at bar had been filed within all potentially applicable limitation periods); see *Code Civ. Proc. §§ 337(1)* (written contracts--four years), 338(a) (liability created by statute--three years), 339(1) (oral contracts--two years); *but see Sequeira v. Rincon-Vitova Insectaries, Inc. (1995) 32 Cal. App. 4th 632, 634, 38 Cal. Rptr. 2d 264* (applying four-year limitation for actions based on written contract, *Code Civ. Proc. § 337(1)*, to bar employee from recovering unused vacation that had vested more than four years before termination of employment)].

Whichever statute of limitations governs the time for filing a lawsuit, the courts of appeal are split on the question of whether the statute should also be applied to limit the years for which vested vacation must be paid upon termination. The Second District has held that if the employment relationship was governed by a written contract, the four-year statute of limitations [*see Code Civ. Proc. § 337(1)*] would limit the right to vacation pay to that which vested within four years prior to the termination of the employment relationship [*Sequeira v. Rincon-Vitova Insectaries, Inc. (1995) 32 Cal. App. 4th 632, 637, 38 Cal. Rptr. 2d 264]* . The Fifth District, in contrast, has held that the statute of limitations only limits the time for filing suit after accrual of the terminated employee's cause of action (i.e., the employer's failure to pay vested vacation upon termination). Under this view, the limitations period should not also be applied "in reverse" to limit the years for which vested vacation may be claimed. Rather, because "all vested vacation shall be paid to [a terminated employee] as wages" [*Lab. Code § 227.3*], the Fifth District holds that there is no limit on the years of vested, unused vacation time that a terminated employee may claim [*Church v. Jamison (2006) 143 Cal. App. 4th 1568, 1577-1583, 50 Cal. Rptr. 3d 166]* . The Fifth District's analysis seems preferable. The First District's view--that claims for vacation time vested more than four years prior to the date of termination are barred as "stale" claims [*see Sequeira v. Rincon-Vitova Insectaries, Inc. (1995) 32 Cal. App. 4th 632, 637, 38 Cal. Rptr. 2d 264]* --ignores the general principle that a statute of limitations does not begin to run until the cause of action accrues (which, in this context, could not happen before the termination of employment) [*see Church v. Jamison (2006) 143 Cal. App. 4th 1568, 1582-1583, 50 Cal. Rptr. 3d 166]* .

For detailed discussion regarding payment of unused vacation benefits on termination of employment, see Wilcox, California Employment Law, Ch. 4 (Matthew Bender).

[d] Penalty for Nonpayment on Discharge or Quitting

If an employer willfully fails to pay wages without abatement or reduction in accordance with *Lab. Code §§ 201* (payment on discharge generally), 201.3 (payment when employee of temporary services employer is discharged or quits), 201.5 (payment of movie production employee on discharge), 202 (payment on quitting generally), or 205.5 (payment of agricultural employee), the employee's daily wages will continue as a penalty from the date that the wages were due until they are paid or an action is commenced, but for no more than 30 days [*Lab. Code § 203*; *see also Lab. Code § 203.1* (payment with bad check, draft, or voucher)]. The word "willful," as used in *Lab. Code § 203*, does not mean that the refusal to pay wages must necessarily be based on a deliberate evil purpose to defraud workers of wages the employer knows to be due in order to subject the employer to the penalty [*Davis v. Morris (1940) 37 Cal. App. 2d 269, 274, 99 P.2d 345* ; *see 8 Cal. Code Reg. § 13520*]. Rather, "willful" merely means that the employer intentionally failed or refused to perform an act that was required to be done; however, a good-faith belief in a legal defense will preclude a finding of willfulness [*Armenta v. Osmose, Inc. (2005) 135 Cal. App. 4th 314, 325, 37 Cal. Rptr. 3d 460]* . The phrase "without abatement or reduction" as used in *Lab. Code § 203* means without discount on account of the payment of wages before the time when they are payable according to the terms of the contract of employment [*Sayre v. Western Bowl (1946) 76 Cal. App. 2d 793, 797-798, 174 P.2d 466* (*overruled on other grounds in Reid v. Overland Machined Products, 55 Cal. 2d 203*)].

This "waiting time" penalty is computed by calculating the employee's daily wage rate, which is then multiplied by the number of days of nonpayment, up to 30 days. Thus, the penalty can exceed one month's wages, because the unpaid wages continue to accrue not only on days that the employee might have worked, but also on nonworkdays. This

method of calculating the penalty furthers public policy by providing a strong disincentive to employers who are reluctant to make timely payment of wages due on termination of employment [*Mamika v. Barca (1998) 68 Cal. App. 4th 487, 491-494, 80 Cal. Rptr. 2d 175* (although limited to 30 days, penalty can exceed one month's wages; targeted wrong is delay in payment, which continues on nonworkdays as well as workdays throughout period payment is not made)].

The waiting time penalty does not apply to any period during which the employee hides, otherwise absents himself or herself in order to avoid payment, or refuses to receive full payment, including penalties, tendered to him or her [*Lab. Code § 203*; *see Oppenheimer v. Sunkist Growers (1957) 153 Cal. App. 2d Supp. 897, 898-899 , 315 P.2d 116]* . Furthermore, employers of boarded agricultural workers are not subject to this provision [*Lab. Code §§ 205, 257*].

An employee incentive compensation plan under which employees can elect to receive, in lieu of a portion of their compensation, shares of company stock with restricted rights during a vesting period, with forfeiture of the restricted stock on an employee's resignation or termination for cause before the stock fully vests, does not violate *Lab. Code § 201* or *202* [*Schachter v. Citigroup, Inc. (2009) 47 Cal. 4th 610, 618-623, 101 Cal. Rptr. 3d 2, 218 P.3d 262* (because restricted stock had value--immediately exercisable voting and dividend rights, and contingent rights of full ownership--employee's bargained-for wages had been paid in full, and forfeiture of unvested shares did not constitute denial of compensation)].

[3] Payment of Striking Employees

Striking employees must be paid all unpaid wages without abatement or reduction by the next regular payday following the beginning of the strike. In addition, the employer must return to each striking employee any deposits, money, or other guaranty required of the employee to secure faithful performance of the employee's duties [*Lab. Code § 209*]. Employers of seasonal labor, however, are not subject to this requirement [*Lab. Code § 257*].

Any person (or any agent, manager, superintendent, or officer of that person) who violates any provision of *Lab. Code § 209* is guilty of a misdemeanor [*Lab. Code § 215*].

[4] Payment by Commission From Employers With No Permanent and Fixed Place of Business

Whenever an employer with no permanent and fixed place of business in California enters into a contract for employment with an employee for services to be rendered in California and the contemplated method of payment of the employee involves commissions, the contract must be in writing and must set forth the method by which the commissions will be computed and paid. The employer must give a signed copy of the contract to every employee who is a party to it, and must obtain a signed receipt for the contract from each employee. For this purpose, the term "commissions" does not include short term productivity bonuses of the type paid to retail clerks; nor does it include bonus and profit-sharing plans, unless the employer has offered to pay a fixed percentage of sales or profits as compensation for work to be performed [*Lab. Code § 2751*]. An employer who does not employ an employee pursuant to a written contract as required by *Lab. Code § 2751* is liable to the employee in a civil action for triple damages [*Lab. Code § 2752*].

There is a split of authority on whether contract terms which limit commissions after termination are unconscionable [*compare Ellis v. McKinnon Broadcasting Co. (1993) 18 Cal. App. 4th 1796, 1803-1807, 23 Cal. Rptr. 2d 80* (term was unconscionable), *with American Software, Inc. v. Ali (1996) 46 Cal. App. 4th 1386, 1394-1395 54 Cal. Rptr. 2d 477* (term was not unconscionable)].

For a form of complaint for use in cases in which the provisions of *Lab. Code § 2751* have been violated, see *§ 250.66*.

[5] Payday Notice

Every employer must conspicuously post a notice stating the employer's regular pay days and the time and place of payment. The notice must be posted at the place of work, if practicable. Otherwise, it must be posted where it can be seen by employees as they come and go to work, or at the office or nearest agency for payment kept by the employer [*Lab. Code § 207*]. Violation of Section 207 is a misdemeanor [*Lab. Code § 215*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawCollective Bargaining & Labor RelationsStrikes & Work StoppagesLabor & Employment LawWage & Hour LawsCoverage & DefinitionsHoliday, Sick & Vacation PayLabor & Employment LawWage & Hour LawsStatutes of LimitationsLabor & Employment LawWage & Hour LawsWage Payments

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§ 250.17 Form of Payment

[1] State Law

No employer, agent, or officer may issue any order, check, draft, note, memorandum, or other acknowledgment of indebtedness as payment of wages due, or to become due, or as an advance on wages to be earned, unless theinstrument meets all of the following requirements [*Lab. Code § 212(a)*]:

- It is negotiable and payable in cash, on demand, without discount;
- It is payable at some established place of business in California, the name and address of which must appear on the instrument; and
- At the time of its issuance and for a reasonable time thereafter, which must be at least 30 days, the maker or drawer of the instrument must have sufficient funds in, or credit, arrangement, or understanding with the drawee for payment of the instrument.

The requirement that the address where the instrument is payable appear on it does not apply if the drawee is a bank and the instrument is payable at any of the bank's places of business.

An employer who violates the provisions of Lab. Code. § 212 is guilty of a misdemeanor [*see Lab. Code § 215*] and may be subject to a variety of civil penalties [*see Lab. Code § 225.5*; *see also Civ. Code § 1719* (payment with bad check); *Lab. Code § 203.1* (payment of wages with bad check)].

For a detailed discussion of restrictions on the form of payment of wages under state law, see Wilcox, California Employment Law, Ch. 4 (Matthew Bender).

[2] Federal Law

Minimum wage and overtime compensation payments mandated by the FLSA must be made in cash or a negotiable instrument payable at par. Under specified circumstances, the "reasonable cost" or "fair value," as determined by the Secretary of Labor, of food, lodging, and "other facilities" furnished by the employer may be credited toward wage payments required by the FLSA [*see 29 U.S.C. § 203(m)*; *29 C.F.R. § 531.27*]. In addition, employers may use tokens or scrip for the limited purpose of determining the amount of cash wages due at the end of the pay period [*see 29 C.F.R. § 531.34*].

The FLSA provides that, if agreed to by its employees, a public employer may compensate the employees for overtime work by granting them compensatory time at a rate of 1.5 hours for every overtime hour worked, up to a maximum of 240 or 480 hours of compensatory time, depending on the nature of the job [*29 U.S.C. § 207*(*o*)(1); *see 29 U.S.C. § 207*(*o*)(3)(A) (maximum compensatory time that may be accrued)]. The employer must honor an employee's request to use compensatory time within a reasonable period after the request, so long as the use of compensatory time would not unduly disrupt the employer's operations [*29 U.S.C. § 207*(*o*)(5); *29 C.F.R. § 553.25*; *Mortensen v. County of Sacramento (9th Cir. 2004) 368 F.3d 1082, 1086-1090* (*29 U.S.C. § 207*(*o*)(5) requires only that compensatory time off be granted within reasonable time after employee's request, rather than on specific date chosen by employee; unambiguous statutory language overrides any contrary implication in regulation)]. The FLSA does not restrict the employer's authority to adopt policies to compel employees' use of compensatory time [*Christensen v. Harris County (2000) 529 U.S. 576, 581-588, 120 S. Ct. 1655, 1660-1662, 146 L. Ed. 2d 621]* . If an employee accumulates the maximum amount of compensatory time allowed under the FLSA, the employer must pay cash compensation for additional overtime work [*29 U.S.C. § 207*(*o*)(3)(A)]. Also, the employer must pay an employee cash for any unused compensatory time remaining at the termination of employment [*29 U.S.C. § 207*(*o*)(4)].

For a detailed discussion of restrictions on the form of payment of wages under federal law, see Wilcox, California Employment Law, Ch. 4 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsCoverage & DefinitionsOvertime & Work PeriodLabor & Employment LawWage & Hour LawsWage Payments

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PART II. LEGAL BACKGROUND
A. Overview of Wage and Hour Laws

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§ 250.18 Itemized Statement of Wages and Deductions

[1] Employer Obligations

Every employer is required to furnish his or her employees with an accurate itemized statement of wages and deductions, either semi-monthly or at the time of each payment of wages, containing the following information [*Lab. Code § 226(a)*; *see 8 Cal. Code Reg. §§ 11010-11150*, P 7(B) (Cal. Wage Order Nos. 1-2001-15-2001)]:

- Gross wages earned by the employee;
- Total hours worked by the employee, if the employee is paid based on an hourly wage or if the employee is salaried but eligible for overtime pay;
- The number of piece-rate units earned and any applicable piece rate, if the employee is paid on a piece-rate basis;
- A separate list of deductions, except that deductions made on written orders of the employee may be aggregated and shown as one item;
- A separate listing of all deductions made from the gross wages, except that at the written request of the employee, all deductions made may be aggregated and shown as a separate item;
- Net wages earned;

- The dates of the beginning and the end of the period for which the employee is being paid;

- The name of the employee and the employee's social security number, except that by January 1, 2008, only the last four digits of the social security number or an existing employee identification number other than a social security number may be shown on the check;

- The employer's name and address; and

- All applicable hourly rates in effect during the pay period and the corresponding number of hours worked by the employee at each hourly rate.

A copy of either the itemized statement or a record of the deductions must be kept on file by the employer for at least three years at either the place of employment or a central location within California. The employer must afford a current or former employee the right to inspect and copy records of this information pertaining to that current or former employee, on reasonable request to the employer [*Lab. Code § 226(a)*].

[2] Penalties for Failure to Provide Statement

An employer who violates the itemized statement provisions may face a civil penalty of $250 per employee per violation in an initial citation and $1,000 per employee for each violation in a subsequent citation. In enforcing this provision, the Labor Commissioner has discretion not to penalize the employer for a first violation if the violation was due to a clerical error or inadvertent mistake [*Lab. Code § 226.3*]. If an employer knowingly and intentionally fails to provide the required statement, an employee suffering an injury as a result of the failure may recover the greater of the employee's actual damages or $50 for the initial pay period in which the violation occurs, plus $100 for each subsequent pay period in which the violation occurs, up to a maximum of $4000, plus costs and reasonable attorneys' fees [*Lab. Code § 226(e)*]. In addition, an employer who knowingly and intentionally fails to provide itemized statements of wages and deductions as required by statute is guilty of a misdemeanor, as is any officer, agent, employee, fiduciary of the employer, or any other person who is in control, receipt, custody, or disposal of the wages due to an employee who knowingly or intentionally participates or aids in the violation of the statement requirements [*Lab. Code § 226.6*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsWage Payments

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§ 250.19 Wage Disputes

[1] Procedure for Resolution

When there is a dispute about the amount of wages due, the employer must pay, without any condition, any part of the employee's wages that the employer concedes is due within the time limits set by law [*Lab. Code § 206(a)*; *see Watkins v. Wachovia Corp. (2009) 172 Cal. App. 4th 1576, 1586-1587, 92 Cal. Rptr. 3d 409* (*Lab. Code § 206.5(a)*, which prohibits employer from requiring release of wage claim unless claimed wages have been paid, does not prevent compromise of bona fide wage dispute, but simply prevents employer from coercing settlement of dispute by withholding wages that are concededly due)]. As to any remaining balance claimed to be due, the employee may pursue any remedies available to him or her [*Lab. Code § 206(a)*]. For a discussion of remedies available for an employer's failure to pay wages, see Subparts B (§ 250.30 et seq.) and C (§ 250.40 et seq.).

[2] Penalties for Willful Failure to Pay Wages

In addition to being subject to the penalties applicable to violations of specific provisions of the Labor Code governing wage payment [*see, e.g., Lab. Code §§ 203, 210*], it is a misdemeanor for an employer who has the ability to pay wages to willfully refuse to pay wages that are due and payable after a demand has been made, or to falsely deny the amount or validity of a wage claim, or that wages are due, with the intent to secure any discount of the wages due or to annoy, harass, oppress, hinder, delay, or defraud the person to whom the wages are due [*Lab. Code § 216(a), (b)*]. Violations of *Lab. Code § 216* may also result in the imposition of civil penalties [*Lab. Code § 225.5(a)*], and employers who fail to make timely payment of wages may be required to furnish a bond to secure future compliance [*see Lab. Code § 240(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsRemediesGeneral OverviewLabor & Employment LawWage & Hour LawsWage Payments

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§ 250.20 Wage Deductions, Assignments, and Garnishments

[1] Authorized Deductions

Among the deductions expressly required by law are those for state and federal income taxes, social security taxes, and state disability insurance taxes. Deductions also may be made pursuant to the statutory procedures for wage garnishment [*see Code Civ. Proc. §§ 706.010-706.154*; *see also* [3], *below*]. Federal regulations bar deductions that have the effect of lowering the employee's wages below the rates required by the minimum wage and overtime provisions of the FLSA [*see 29 C.F.R. §§ 531.35-531.37, 778.307*].

Employers may deduct the following items from wages if authorized in advance by the employee in writing [*see Lab. Code §§ 224, 300* (wage assignments); *8 Cal. Code Reg. §§ 11010-11150*, P 9(C) (Cal. Wage Order Nos. 1-2001-15-2001; *but see Social Services Union v. Board of Supervisors (1990) 222 Cal. App. 3d 279, 286-288, 271 Cal. Rptr. 494* (county could recoup increase in health and insurance premiums that was not approved in advance because prospective salary deductions were subsequently authorized during collective bargaining, even though bargaining was concluded over one year after increase became effective)]:

- Premiums for life, health, or disability insurance;

- Deductions made pursuant to voluntary wage assignments complying with the requirements of the Labor Code;

- Contributions to pension or retirement plans;

- Deductions from final pay check to recoup the cost of uniforms and equipment that are provided by the employer and that are not returned by the employee on completion of the job; and

- Periodic deductions from wages authorized by employee to repay certain types of indebtedness owed to the employer.

Although no provision of the Labor Code specifically regulates the use of wage deductions to recover debts owed to an employer by an employee, case law limits the employer's right to recoup an employee's debt by deducting the full amount owed from the employee's wages on his or her final paycheck [*see Barnhill v. Robert Saunders & Co. (1981) 125 Cal. App. 3d 1, 6, 177 Cal. Rptr. 803* ; *see also* D.L.S.E. Interpretive Bulletin No. 85-3 (Feb. 6, 1985) (interpreting effect of *Barnhill*)]. Similarly, an employer generally may not make any deduction from an employee's wage, or require any reimbursement from the employee, because of a cash shortage, breakage, or loss of equipment that results from simple negligence [*see Kerr's Catering Service v. Department of Industrial Relations (1962) 57 Cal. 2d 319, 329-330, 19 Cal. Rptr. 492, 369 P.2d 20 , cert. denied, 371 U.S. 818* ; *8 Cal. Code Reg. §§ 11010-11150*, P 8 (Cal. Wage Order Nos. 1-2001-15-2001)]. In addition, it is a violation of *Lab. Code § 221* (prohibiting employers from receiving back any part of wages previously paid by the employer to the employee) for a retail employer to deduct a proportionate amount of "unidentified returns" (i.e., returns of merchandise for which it was not possible to identify the specific salesperson who had sold the merchandise) from the earned commissions of all sales employees [*Hudgins v. Neiman Marcus Group, Inc. (1995) 34 Cal. App. 4th 1109, 1117-1124, 41 Cal. Rptr. 2d 46]* . On the other hand, *Lab. Code § 221* is not violated by an employer's contract with its sales employees to pay a commission on a sale immediately, subject to a chargeback if the sale later falls through or does not generate an agreed-upon level of revenue [*Koehl v. Verio, Inc. (2006) 142 Cal. App. 4th 1313, 1329-1337, 48 Cal. Rptr. 3d 749* (sales of Internet access services); *Steinhebel v. Los Angeles Times Communications (2005) 126 Cal. App. 4th 696, 704-710, 24 Cal. Rptr. 3d 351* (newspaper subscription sales); *cf. Schachter v. Citigroup, Inc. (2009) 47 Cal. 4th 610, 618-623, 101 Cal. Rptr. 3d 2, 218 P.3d 262* (incentive compensation plan providing for forfeiture of restricted shares of company stock on employee's resignation or termination for cause before shares fully vested did not violate *Lab. Code §§ 201* and *202*, which require payment of earned, unpaid wages on termination or resignation)].

The statutory and regulatory prohibitions against deducting or recapturing unauthorized amounts from wages [*see Lab. Code §§ 221-224, 400-410, 3751(a)*; *8* Cal. Code Reg. § 11070(8)] also apply to employee bonuses, which are within the scope of the statutory definition of "wages" [*see Lab. Code § 200*]. However, deducting the employer's expenses from its gross receipts to calculate net profits for purposes of a supplemental profit-sharing program does not run afoul of these prohibitions, so long as the employees' *regular* wages are not subject to any unauthorized deductions for the employer's operating expenses [*Prachasaisoradej v. Ralphs Grocery Co. (2007) 42 Cal. 4th 217, 237, 64 Cal. Rptr. 3d 407, 165 P.3d 133* (no improper deductions were made by employer after calculating each employee's percentage of net profits)].

For detailed discussion of permissible wage deductions, see Wilcox, California Employment Law, Ch. 4 (Matthew Bender).

PRACTICE TIP:

Wage Policy May Constitute an *Unfair Business Practice.* *The Hudgins v. Neiman Marcus Group, Inc. (1995) 34 Cal. App. 4th 1109, 1117-1124, 41 Cal. Rptr. 2d 46* opinion also recognizes the applicability of *Business and Professions Code § 17200* (prohibiting all business practices that are "unlawful, unfair, or fraudulent") to wage policies that violate the Labor Code. The remedies available under *Business & Professions Code § 17200* are cumulative and supplementary to those provided in the Labor Code. *See People v. Los Angeles Palm, Inc. (1981) 121 Cal. App. 3d 25, 32-33 . By Richard P. Hill*

[2] Assignment of Wages

[a] General Requirements

Assignments of wages are generally required to be in writing and to conform to the requirements of *Lab. Code § 300*. However, the rules regarding assignments set forth in *Lab. Code § 300* are not applicable to orders or wage assignments made pursuant to *Fam. Code § 5200 et seq.* (assignment of wages for child or spousal support) or *Prob. Code § 3088* (wage assignment for payment of support of conservatee from community property of conservatee's spouse) [*Lab. Code § 300(a)*]. In addition, the rules governing wage assignments do not apply to deductions authorized by the employee for the following purposes [*Lab. Code § 300(g)*]:

- Payment for life, retirement, disability, or unemployment insurance premiums.
- Payment of taxes owed by the employee.
- Contributions to funds, plans, or systems providing for death, retirement, disability, unemployment, or other benefits.
- Payment for goods or services furnished by the employer to the employee or the employee's family at the employee's request.
- Contributions for charitable, educational, patriotic, or similar purposes.

In all other cases, a wage assignment is not valid unless the wages to be assigned have been earned at the time the assignment is made, unless the assignment (1) is for the necessities of life, (2) is made directly to the person furnishing those necessities, and (3) does not exceed the amount needed to furnish those necessities [*Lab. Code § 300(h)*]. Assignments are not allowed if the employee is paid under a plan for payment by several different employers at a central place as provided for in *Lab. Code § 204a*, and no more than half of the assignor's wages may be withheld at the time of each payment of wages [*Lab. Code § 300(c), (f)*].

No assignment of wages, earned or to be earned, is valid unless all of the following conditions are satisfied [*Lab. Code § 300(b)*]:

- It is contained in a separate written instrument, signed by the person by whom the wages or salary have been earned or are to be earned, and identifying specifically the transaction to which the assignment relates.
- If made by a married person, the written consent of the spouse of the person making the assignment is attached to the assignment. However, written consent is needed if (1) judgment of legal separation, or (2) if couple are living apart and after interlocutory judgment of dissolution.
- If made by a minor, the written consent of a parent or guardian of the minor is attached to the assignment.
- If made by a person who is unmarried or who is an adult or who is both unmarried and an adult, a written statement by the person making the assignment, setting forth these facts, is attached to or included in the assignment.
- No other assignment exists in connection with the same transaction or series of transactions and a written statement by the person making the assignment to that effect is attached to or included in the assignment.

- A copy of the assignment and of the written statement provided for in *Lab. Code § 300(b)(2), (4), (5)*, authenticated by a notary public, is filed with the employer, accompanied by an itemized statement of the amount then due.

- At the time it is filed with the employer, no other assignment of wages of the employee is subject to payment and no earnings withholding order is in force against the employee's wages.

The employer may rely on the statements of fact in the written statement provided for in *Lab. Code § 300(b)(2), (4), (5)*, without having to inquire into the statement's truth, and the employer incurs no liability whatsoever by reason of any payments made by him or her to an assignee under any assignment or order, in reliance on the facts so stated [*Lab. Code § 300(d)*].

For detailed discussion of wage assignments and the *Lab. Code § 300* requirements, see Wilcox, California Employment Law, Ch. 4 (Matthew Bender). For discussion of assignments of wage claims to the Labor Commissioner pursuant to *Lab. Code § 96*, which are not subject to technical rules governing the validity of assignments such as those set out in *Lab. Code § 300* [*see Lab. Code § 97*], see *§ 250.33[4]*.

[b] By Public Employees

For considerations of public policy, a public official is not permitted to make an assignment of wages or salary until the time arrives when he or she is entitled to collect them, or at least not until they have been completely earned. Furthermore, a public official cannot split his or her earnings into parts smaller than the unit of pay (for example, a monthly salary cannot be split into daily earned portions) for the purpose of assigning them from day to day as earned [*Trow v. Moody (1915) 27 Cal. App. 403, 405-406, 150 P. 77]* .

This rule does not apply to all public employees, however, but only to public officers. Thus, for example, a teacher may assign unearned salary, although the teacher is a public employee [*Kimball v. Ledford (1936) 13 Cal. App. 2d 602, 604-605, 57 P.2d 163]* . As to who is a public officer and who is not, it has been observed by one court that there must first be, at least, a public office created by the Constitution, the Legislature, or some legislative body with delegated authority--an office that exists independently of the person in it [*Pacific Finance Corp. v. City of Lynwood (1931) 114 Cal. App. 509, 514, 300 P. 50]* .

Gov. Code §§ 1150-1153, 1157-1157.8 provide for salary and wage deductions for officers and employees of public agencies for certain specified purposes, such as the purchase of savings bonds, insurance premiums, and the like. It is specifically provided that no provision of law prohibiting, restricting, or limiting the assignment or order for wages or salaries in any way prohibits, restricts, or limits *Gov. Code §§ 1150-1157.8* [*Gov. Code § 1158*]. This apparently refers to *Lab. Code § 300.*

[3] Wage Garnishment

Except for proceedings by the state to collect a state tax liability [*see Code Civ. Proc. § 706.072(d)*] and certain support proceedings [*see Fam. Code § 5200 et seq.* (formerly *Civ. Code § 4390 et seq.*); *Prob. Code § 3088(e)*], California law only permits garnishment of wages to enforce a judgment [*see Code Civ. Proc. § 706.102*]. Wages are exempt from prejudgment attachment [*see Code Civ. Proc. §§ 487.020(c), 706.011(a)*]. If more than one order is served on an employer with respect to the same employee, California statutory law sets forth the rules governing priority of orders based on the type of order, date of service, and date of judgment [*see Code Civ. Proc. §§ 706.023, 706.030, 706.031, 706.077*]. Statutory limitations are also imposed on the amount of wages per workweek that may be subject to garnishment [*see Code Civ. Proc. §§ 706.050-706.051*].

Federal law also contains restrictions on garnishment of wages as part of the Consumer Credit Protection Act [*see 15*

U.S.C. §§ 1671-1677]. In general, the federal provisions limit the amount of wages that may be garnished per week to a specified percentage of an employee's disposable earnings [*see 15 U.S.C. § 1673(a)*]. The Consumer Credit Protection Act does not limit the amounts that may be withheld under a federal court order pursuant to Chapter 13 of the federal bankruptcy laws, however, or for any debt for state or federal taxes [*15 U.S.C. § 1673(b)(1)(B), (C)*]. The Consumer Credit Protection Act is superseded by state laws that prohibit wage garnishment or that provide for more limited garnishment than is permitted under the Act [*see 15 U.S.C. § 1677(1)*].

Service of an earnings withholding order creates a lien, not only on the earnings of the judgment debtor-employee that must be withheld, but also on all property of the *employer* that is subject to enforcement of a money judgment, in an amount equal to the amount required to be withheld under the order. The lien continues for a period of one year from the date the earnings become payable to the employee unless the amount that must be withheld pursuant to the order is paid as required by law [*Code Civ. Proc. § 706.029*].

The Judicial Council has promulgated official forms for all required applications, notices, claims, claims of exemption, orders, and other documents, the use of which is mandatory [*Code Civ. Proc. § 706.120*; *Cal. Rules of Ct., Rule 1.31(a)*]. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. For a detailed discussion of garnishment procedures, see Ch. 276, *Garnishment* , and Wilcox, California Employment Law, Ch. 4 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsAssignments, Deductions & GarnishmentsLabor & Employment LawWage & Hour LawsWage Payments

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§ 250.21 Employer's Obligation to Indemnify Employee's Losses and Expenses

[1] General Liability of Employer for Losses and Expenses

An employer is liable for the losses of an employee that are caused by the employer's lack of ordinary care [*Lab. Code § 2800*]. The employer cannot assert assumption of risk or the fellow servant rule in defending any action for those losses, and the employee's contributory negligence cannot bar recovery although it can diminish the amount of the employee's recovery [*Lab. Code § 2801*]. The personal representative of an employee whose death results from the lack of ordinary or reasonable care of the employer or any of its employees can bring an action for wrongful death [*Lab. Code § 2803*].

An employer must indemnify its employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties or obedience to the directions of the employer. This obligation to indemnify applies even if the directions of the employer are unlawful, unless the employee at the time of obeying the directions believed them to be unlawful [*Lab. Code § 2802(a)*]. However, the duty to indemnify does not arise when the employee's conduct, though alleged to be in the scope of employment, is so unusual or startling that it would be unfair to include indemnification in the employer's cost of doing business [*Devereaux v. Latham & Watkins (1995) 32 Cal. App. 4th 1571, 1583, 38 Cal. Rptr. 2d 849* (*overruled on other grounds in Moran v. Murtaugh Miller Meyer & Nelson, LLP (2007) 40 Cal. 4th 780*); *Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 619, 124 Cal. Rptr. 143]* .

Expenses subject to indemnification include attorney's fees incurred by the employee not only in defending against claims arising from the employee's discharge of duties, but also in proceedings against the employer to enforce the employee's right to indemnification [*Lab. Code § 2802(c)*; O'Hara v. Teamsters Union Local #856 *(9th Cir. 1998) 151 F.3d 1152, 1157, 1160-1161]* . For this purpose, a claim against an employee arises from the employee's discharge of duties if (1) the employee's actions giving rise to the claim are within the scope of employment; and (2) the claim is

proven to be unfounded, that is, without merit [O'Hara v. Teamsters Union Local #856 *(9th Cir. 1998) 151 F.3d 1152, 1158-1160]* (third party's claim against employee is unfounded as matter of law if third party dismisses claim with prejudice; that dismissal was part of settlement did not mean claim had merit, since settlement did not include any admission of liability by employee)].

If the employee brings an action against the employer to enforce the employee's right to indemnification, an award for the reimbursement of the employee's expenditures or losses must carry interest at the same rate as judgments in civil actions, accruing from the date on which the employee incurred the expenditures or losses [*Lab. Code § 2802(b)*].

These statutory obligations cannot be waived by the parties [*Lab. Code § 2804*]. Thus, for example, an agreement between an employer and employee for reimbursement of recurring business expenses by a method that approximates the employee's actual expenses (e.g., a mileage reimbursement or a lump-sum reimbursement) does not relieve the employer of the statutory obligation to pay full reimbursement, and such an agreement does not preclude the employee from suing to recover full reimbursement [*Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal. 4th 554, 569571, 67 Cal. Rptr. 3d 468, 169 P.3d 889]* . A contract provision in which an employee releases "any and all" claims against the employer does not encompass nonwaivable statutory protections such as the employee indemnity protection described above [*Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 950-955, 81 Cal. Rptr. 3d 282, 189 P.3d 285* (because provision releasing "any and all" claims does not waive employee's right to indemnity under *Lab. Code § 2802(a)*, it is not void under *Lab. Code § 2804*)].

[2] Reimbursement of Recurring Expenses

When an employee has recurring business expenses subject to reimbursement [*see Lab. Code § 2802(a)*], several methods of reimbursement are permissible. Under the "actual expense method," the employee maintains records of actual expenses necessarily incurred in the performance of employment tasks, and the employer issues a reimbursement separate from the employee's regular compensation. This is the most accurate method, but it can be burdensome for both the employer and the employee. For example, if the employee is required to use his or her own automobile for business purposes, under the actual expense method the employee must keep detailed records of expenditures for fuel, maintenance, repairs, insurance, registration, and depreciation, and must apportion those expenses between personal and business uses of the automobile; then, the employer must make a determination of whether each of those expenses was reasonably necessary [*see Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal. 4th 554, 567-568, 67 Cal. Rptr. 3d 468, 169 P.3d 889]* . For this reason, few employers use the actual expense method to determine reimbursement for work-required use of employees' own automobiles. Instead, many employers use the "mileage reimbursement method"; under that method, the employee need only keep a record of the miles driven to perform job duties, and the employer reimburses the employee a predetermined amount per mile. Many employers use the mileage rate calculated by the Internal Revenue Service based on national average expenses for fuel, maintenance, repairs, depreciation, and insurance [*see Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal. 4th 554, 569, 67 Cal. Rptr. 3d 468, 169 P.3d 889]* . The mileage reimbursement method is inherently less accurate than the actual expense method, and if the employee can show that the reimbursement amount paid as a mileage reimbursement is less than the actual expenses necessarily incurred, the employer must make up the difference [*Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal. 4th 554, 569-570, 67 Cal. Rptr. 3d 468, 169 P.3d 889]* .

Another method of reimbursement is to use a lump-sum payment. Under this method, the employee need not submit any information; the employer simply pays a fixed amount as reimbursement for the employee's recurring automobile expenses (or other expenses subject to reimbursement). A lump-sum reimbursement may take various forms and have various labels, such as "per diem" or (in the automobile-reimbursement context) "car allowance" or "gas stipend." Lump-sum reimbursement is permissible so long as the amount paid is sufficient to provide full reimbursement for actual expenses necessarily incurred. Thus, if the employee can show that the lump sum is less than the actual expenses necessarily incurred, the employer must make up the difference [*Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal. 4th 554, 570-571, 67 Cal. Rptr. 3d 468, 169 P.3d 889]* . A lump-sum reimbursement need not be segregated from

the employee's other compensation and may take the form of an increase to the employee's base salary or commissions, so long as the employer provides a method or formula to identify what part of the combined compensation amount is intended to provide expense reimbursement [*Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal. 4th 554, 572-575, 67 Cal. Rptr. 3d 468, 169 P.3d 889]* .

Like a mileage reimbursement, a lump-sum reimbursement is inherently less accurate than the actual expense method, and if the employee can show that the lump sum paid is less than the actual expenses necessarily incurred, the employer must make up the difference [*Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal. 4th 554, 571, 67 Cal. Rptr. 3d 468, 169 P.3d 889]* .

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 250 EMPLOYMENT LAW: WAGE AND HOUR DISPUTES
PART II. LEGAL BACKGROUND
A. Overview of Wage and Hour Laws

21-250 California Forms of Pleading and Practice--Annotated §§ 250.22-250.29

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[Reserved]

§§ 250.22[Reserved]

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PART II. LEGAL BACKGROUND
B. Remedies for Failure to Pay Wages--In General

21-250 California Forms of Pleading and Practice--Annotated § 250.30

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§ 250.30 Available Remedies

If an employer fails to pay contractually or statutorily required wages, or fails to pay wages in the manner or at the time required by law, California law provides a number of remedial procedures. The two most commonly used lie within the California Labor Commissioner's jurisdiction. The first is known as the "Berman hearing" procedure [*Lab. Code §§ 98-98.2*; *see § 250.32*]. The second procedure authorizes the Labor Commissioner to bring a civil action on behalf of an aggrieved employee for recovery of unpaid wages and penalties [*Lab. Code § 98.3*; *see § 250.33[1]*].

State and federal law provide the following additional procedures to remedy violations of wage and hour laws:

- The Labor Commissioner is empowered by *Lab. Code §§ 210* and *225.5* to bring a civil action to recover statutory penalties for failure to pay wages due [*see § 250.33[2]*];

- *Lab. Code § 218* authorizes any individual wage claimant to file a civil action to recover wages due, either directly or through an assignee [*see § 250.34[1][a]*];

- Under the Labor Code Private Attorneys General Act of 2004 [*see Lab. Code § 2698*], a civil penalty to be assessed and collected for a violation of the Labor Code [*see Lab. Code § 2699.5*] may be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees [*Lab. Code § 2699(a)*; *see Lab. Code § 2699.3* (procedures for employee's civil action); *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court (2009) 46 Cal. 4th 993, 1001-1005, 95 Cal. Rptr. 3d 605, 209 P.3d 937* (plaintiff has standing to bring action under Labor Code Private Attorneys General Act of 2004 only if plaintiff suffered injury from unlawful action, so labor union lacks standing to sue as assignee or association of injured members); *see also*

Arias v. Superior Court (2009) 46 Cal. 4th 969, 975, 980-988, 95 Cal. Rptr. 3d 588, 209 P.3d 923 (employee's representative action under Labor Code Private Attorneys General Act of 2004 need not satisfy class-action requirements)]. Any employee who prevails in such an action will be entitled to an award of reasonable attorney's fees and costs, and the employee will ordinarily be entitled to retain 25 percent of any civil penalties recovered [*Lab. Code § 2699(g)*, (*i*), (j)]. An enforcement action under this provision may be combined with other remedies the employee may have under state or federal law [*Lab. Code § 2699(g)*];

- *Lab. Code §§ 98.6* and *98.7*, as well as provisions of the FLSA [*see 29 U.S.C. §§ 215(a)(3), 216(b)*], provide administrative remedies for unlawful discrimination or retaliation against an employee for filing a wage claim or testifying against an employer on a wage claim [*see § 250.35*];

- Numerous sections of the Labor Code provide for the imposition of criminal penalties [*see § 250.36*] and bond requirements [*see § 250.37*] on employers who violate the wage and hour laws; and

- State and federal law provide administrative and civil procedures specifically intended to remedy failure to pay mandated minimum wages or overtime compensation that overlap with, but are narrower in scope than, the procedures set forth above [*see 29 U.S.C. §§ 209, 211, 215*-217; *Lab. Code §§ 1193.5-1197.1*; *see also § 250.40* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsAdministrative Proceedings & RemediesGeneral OverviewLabor & Employment LawWage & Hour LawsRemediesGeneral OverviewLabor & Employment LawWage & Hour LawsRemediesPrivate SuitsLabor & Employment LawWage & Hour LawsWage Payments

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21-250 California Forms of Pleading and Practice--Annotated § 250.31

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§ 250.31 Jurisdiction of Labor Commissioner Over Administrative Claims

[1] Scope of Authority

The California Labor Commissioner is the Chief of the DLSE [*see Lab. Code §§ 21, 79*]. The DLSE is responsible for enforcement of all provisions of the Labor Code unless jurisdiction is specifically vested in another officer, board, or commission [*Lab. Code § 95(a)*], including all laws and penalties relating to the payment of minimum wages and overtime compensation [*Lab. Code §§ 61, 1193.5*; *see Lab. Code §§ 1193.6-1197.1*], the time and manner of payment of wages [*Lab. Code § 217*; *see Lab. Code §§ 206, 210, 226.4-226.5, 253-256, 355, 410*], collection of unpaid wages and benefits [*see Lab. Code §§ 96, 96.7*] and discrimination against wage claimants and witnesses in wage claim proceedings [*see Lab. Code §§ 98.6, 98.7*]. The DLSE also enforces child labor restrictions under the Labor Code [*Lab. Code §§ 1311, 1398*]. The Labor Commissioner's jurisdiction does not limit the authority of prosecuting attorneys of the cities and/or counties and affected employees or their assignees to prosecute civil and/or criminal actions for violations of *Labor Code Section 200 et seq.*, governing payment of wages [*see Lab. Code § 218*].

The Labor Commissioner does not have jurisdiction, however, over wage disputes involving the interpretation or application of collective bargaining agreements that provide for arbitration [*see Lab. Code § 229*; *Plumbing, Heating etc. Council v. Howard (1975) 53 Cal. App. 3d 828, 834-835, 126 Cal. Rptr. 406]* . The Labor Commissioner has in the past interpreted this rule as precluding its adjudication of such wage disputes [D.L.S.E. Policy and Procedure Memo. No. 76-6 (Mar. 22, 1976)], and has adopted a policy of declining to enforce any state-law claims by employees covered by such agreements if those claims involve relief based on the employee's wage rate [*see Livadas v. Bradshaw (1994) 512 U.S. 107, 112-113 n.6, 114 S. Ct. 2068, 129 L. Ed. 2d 93]* . However, the United States Supreme Court has held that this policy contravenes federal law because it penalizes the right to collectively bargain granted by the National Labor Relations Act by depriving employees who exercise that right of their ability to have their rights under state wage and

hour laws enforced [*Livadas v. Bradshaw(1994) 512 U.S. 107, 124, 132-134, 114 S. Ct. 2068, 129 L. Ed. 2d 93* (commissioner must adjudicate claim that employer owed penalty to employee under *Lab. Code § 203* for failing to pay employee wages due on discharge as required by *Lab. Code § 201*)].

According to the Labor Commissioner, the Court in *Livadas* did not open the door to unlimited adjudication by the DLSE of claims filed by employees covered by collective bargaining agreements containing arbitration clauses, but the Court also did not offer any guidelines in determining whether adjudication by the DLSE is precluded [D.L.S.E. Interpretive Bulletin No. 94-4 (Aug. 5, 1994)]. However, following a more recent United States Supreme Court decision regarding whether an employee's claim is independent of a collective bargaining agreement and can be resolved or enforced without interpretation of the agreement [*see Hawaiian Airlines, Inc. v. Norris (1994), 512 U.S. 246, 114 S. Ct. 2239, 129 L. Ed. 2d. 203, 216-218, 220* (involving wrongful discharge, not wage and hour issues)], the Labor Commissioner has issued interim guidelines to be used by all DLSE personnel until new written directives are issued [D.L.S.E. Interpretive Bulletin No. 94-4 (Aug. 5, 1994)]. Under these guidelines, the DLSE will not reject any claim solely because the claimant's employment was covered by the terms of a collective bargaining agreement [D.L.S.E. Interpretive Bulletin No. 94-4 (Aug. 5, 1994)]. The guidelines outline the procedures for handling (1) claims that clearly indicate that a collective bargaining agreement covers the employment, (2) situations in which the existence of a collective bargaining agreement is not initially clear, and (3) situations in which the resolution of the meaning of the agreement's terms is the subject of dispute [D.L.S.E. Interpretive Bulletin No. 94-4 (Aug. 5, 1994)]. The guidelines also prescribe the role of DLSE attorneys in reviewing this type of case, and require DLSE legal staff to address the following issues: (1) whether the claim is based on a state law right; (2) whether the state law right is a minimum standard that cannot be bargained away; (3) whether the state law claim is independent of the collective bargaining agreement; and (4) whether the collective bargaining agreement is the only source of the claimant's right [D.L.S.E. Interpretive Bulletin No. 94-4 (Aug. 5, 1994)].

[2] Types of Proceedings

The DLSE may pursue either the Berman hearing procedure or institute a civil action to adjudicate wage claims filed pursuant to *Lab. Code §§ 96* (assignment of claims for wages and other benefits), 96.7 (unassigned wage and benefit claims), 98 (complaints for recovery of wages, penalties, and other demands for compensation), and 1195.5 (nonpayment of wages in excess of the minimum wage). Separate procedures are provided for the imposition of penalties paid to the State of California [*see Lab. Code §§ 210, 226.4, 226.5, 408-410, 1175*] and to govern claims of discrimination under various provisions of the Labor Code [*see Lab. Code §§ 98.6, 98.7*].

Berman proceedings are authorized in cases of complaints for wages, penalties, and other demands for compensation, and also may be used when a claim is filed by the holder of a payroll check or other instrument returned for insufficient funds [*see Lab. Code §§ 98-98.2*; *8 Cal. Code Reg. §§ 13501-13520*]. They may not be used in the case of claims involving bankruptcies or probate; mechanics', loggers', or miners' claims; preferred wage claims under *Code Civ. Proc. §§ 1204, 1205* or *1206*; discrimination and retaliation complaints under *Lab. Code § 98.6* and for engaging in certain other protected activities under *Lab. Code §§ 132a, 432.2, 6310-6312*; other nonwage matters when criminal or civil citations are used (such as violations of child labor laws, itemized wage and deduction statement violations, matters involving unlicensed contractors, health and welfare benefits, and payday violations); and anonymous or confidential complaints of Industrial Welfare Commission wage order violations [*see* D.L.S.E. Div. Management Memo. No. 84-3 (Feb. 14, 1984)]. For further discussion of Berman hearings, see *§ 250.32*.

A civil action may be brought by the Labor Commissioner on behalf of the claimant under *Lab. Code § 98.3* following an investigation and/or "hearing" conducted by an assigned Deputy Labor Commissioner. Generally, the Labor Commissioner is authorized to bring suit under Section 98.3 when the employee has a valid claim and cannot afford to employ counsel. For further discussion of civil suits brought under *Lab. Code § 98.3*, see *§ 250.33[1]*.

[3] Investigatory Powers

The Labor Commissioner, together with his or her deputies and agents, has free access to all places of labor to conduct investigations. Refusal of admission or a willful failure to furnish the Labor Commissioner with statistics or information is a misdemeanor. The Labor Commissioner also may issue subpoenas to compel the attendance of witnesses or production of records; administer oaths; examine witnesses under oath; take verifications, acknowledgments, or proofs of written instruments; and take depositions and affidavits [*Lab. Code §§ 90, 92, 1174(b)*; *see Lab. Code § 74*; *but see California Restaurant Assn. v. Henning (1985) 173 Cal. App. 3d 1069, 1075-1077, 219 Cal. Rptr. 630* (limiting Labor Commissioner's power to enforce subpoenas)]. An employer who willfully fails to maintain records required by *Lab. Code § 1174(c)* or accurate and complete records required by *Lab. Code § 1174(d)*, or to allow access to any IWC member or DLSE employee to inspect records pursuant to *Lab. Code § 1174(b)* is subject to a civil penalty [*see Lab. Code § 1174.5*]. In addition, officers and employees of the DLSE may be designated as peace officers with the authority to make arrests, serve processes and notices throughout the state, and (in some instances) carry firearms [*see Lab. Code § 95*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsAdministrative Proceedings & RemediesGeneral OverviewLabor & Employment LawWage & Hour LawsAdministrative Proceedings & RemediesEnforcementLabor & Employment LawWage & Hour LawsAdministrative Proceedings & RemediesInvestigative AuthorityLabor & Employment LawWage & Hour LawsWage Payments

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§ 250.32 Berman Hearings

[1] Procedures in General

The Labor Commissioner is authorized to investigate employee complaints for unpaid wages, penalties, and other compensation. After receipt of the initial claim, the DLSE may attempt to encourage the parties to settle the claim without the need for further investigation, and may hold an informal settlement conference. If settlement is not possible, within 30 days after the complaint is filed, the DLSE must decide to conduct a Berman hearing within 90 days, pursue a civil action pursuant to *Lab. Code § 98.3*, or take no further action on the complaint [*Lab. Code § 98(a)*; *see* D.L.S.E. Div. Management Memo. No. 86-4 (Oct. 6, 1986) (settlement conferences)]. If a Berman hearing date is set, the DLSE must serve a notice of the time and place of the hearing, together with a copy of the complaint, on all parties [*Lab. Code § 98(b)*].

The hearing officer, a deputy labor commissioner, has the authority to:

- Issue subpoenas;
- Grant or deny requests for continuances or changes of venue; and
- Control the conduct of the hearing, including limiting the number of witnesses for corroboration and/or to establish a fact, excluding evidence, excusing witnesses, and determining the order of the presentation of evidence [*see 8 Cal. Code Reg. §§ 13506, 13508*]. The hearing need not be conducted according to technical rules of evidence [*see 8 Cal. Code Reg. §§ 13502, 13505*]. All parties have a right, but are not required, to be represented by counsel [*8 Cal. Code Reg. § 13507*].

No default can be entered against an employer for failure to answer the complaint and/or appear at the Berman hearing. Instead, the Labor Commissioner must hear the available evidence and render a decision. A defendant employer who fails to answer or appear because of lack of notice of the pendency of the proceedings may apply to the Labor Commissioner for relief from the Commissioner's decision or award [*Lab. Code § 98(f)*]. Once the 10-day time to appeal the Commissioner's award has expired [*see Lab. Code § 98.2(a)*; *see also* [4], *below*], an employer who failed to answer or appear at the Berman hearing has no right to any judicial relief unless it has first applied to the Commissioner for relief [*Gonzalez v. Beck (2007) 158 Cal. App. 4th 598, 605-606, 69 Cal. Rptr. 3d 843*].

For detailed discussion of Berman hearing procedures and examples of required preprinted pleadings promulgated by the Labor Commissioner, see Wilcox, California Employment Law, Ch. 5, pt. A, subpt. 2 (Matthew Bender).

PRACTICE TIP:

Employer Has Risks and Benefits in Deciding Not to Appear. In the absence of an employer at the Berman hearing, the Labor Commissioner might determine, after listening to the employee's evidence, that the complaint should be dismissed. That is, the employee might fail to make out a prima facie case. Accordingly, the employer has a decision to make about when to commit to substantive involvement, and possible related legal expense, in the defense of the matter. It should be noted, however, that rote reliance on the right of de novo hearing can expose the employer to an award of attorneys fees to the employee if the contested "appeal" is also decided in favor of the employee. *By Richard P. Hill*

[1A] Statute of Limitations and Accrual

Labor Code § 98 is silent as to time limitations: it does not provide (1) for commencement of proceedings within certain limitations periods, or (2) the lengths of those periods, or (3) the triggering event, or (4) the date on which the proceedings are deemed to have commenced [*Cuadra v. Millan (1998) 17 Cal. 4th 855, 859, 72 Cal. Rptr. 2d 687, 952 P.2d 704]* . Historically, the commissioner provided for all four of those factors as policy matters. For the first three the commissioner adopted the procedures that govern civil actions for unpaid wages [*see § 250.34[1][b]*]. But for the fourth factor, the commissioner's policy provided in effect that for statute of limitations purposes a wage claim proceeding commenced not when the claim was filed, but when it was heard. In *Cuadra*, noting the frequently appreciable delay between the dates of filing claims for back pay and the dates of the hearings on such claims, the Supreme Court held that the Commissioner's policy constituted an abuse of discretion because it penalized employees who exercised their right to a Berman hearing and frustrated the remedial purpose of legislation entitling employees to all back wages due. The Court therefore held that the legislature's intent is best served by calculating back pay from the filing date of the claim itself. [*Cuadra v. Millan (1998) 17 Cal. 4th 855, 867, 870, 72 Cal. Rptr. 2d 687, 952 P.2d 704]* .

[2] Order, Decision, or Award by Labor Commissioner

Within 15 days after the hearing is concluded, the hearing officer must file his or her order, decision, or award. The order, decision, or award must include a summary of the hearing and the reasons for the decision, a statement of any sums due either as proven damages or as penalties, as well as notice of the parties' right to appeal and of the consequences of failure to do so in a timely manner [*see Lab. Code § 98.1(a), (b)*]. Interest at the legal rate [*see Civ. Code § 3289(b)*] accrues on all due and unpaid wages awarded, from the date the wages were due and payable [*Lab. Code § 98.1(c)*]. The Labor Commissioner must serve a copy of the filed decision personally, or by first-class mail or "combination service" [*see Code Civ. Proc. § 415.20*], on all of the parties [*Lab. Code § 98.1(a)*; *see REO Broadcasting Consultants v. Martin (1999) 69 Cal. App. 4th 489, 497 n.6, 81 Cal. Rptr. 2d 639* (service of Labor Commissio ner's decision after hearing under Talent Agencies Act, *Lab. Code § 1700 et seq.* , need not be made by registered or certified mail; first-class mail as permitted under *Lab. Code § 98.1(a)* is sufficient)].

Within 10 days after the order, decision, or award becomes final, the Labor Commissioner must file a certified copy with the clerk of the superior court of the appropriate county, unless a settlement has been reached by the parties and approved by the Labor Commissioner, or unless the DLSE receives full payment of the award or ascertains that the defendant-employer has made direct payment of the award to the claimant within that period. On filing, judgment is entered immediately by the court clerk in conformity with the order, decision, or award. The judgment has the same force and effect as, and is subject to all provisions of law relating to, a judgment in a civil action [*Lab. Code § 98.2(e)*].

Lab. Code § 206(b) imposes a penalty on an employer having the ability to pay who, after investigation and hearing by the Labor Commissioner, does not take a timely appeal and willfully fails to pay wages found to be due within 10 days of receipt of notice of wages due from the Labor Commissioner. That employer is subject to a penalty of treble the amount of any damages accruing to the employee as a direct and foreseeable consequence of the failure to pay, in addition to any other applicable penalty [*Lab. Code § 206(b)*; *Triad Data Services, Inc. v. Jackson (1984) 153 Cal. App. 3d Supp. 1, 5, 7-8 , 200 Cal. Rptr. 418]* .

If a claim is filed under *Lab. Code §§ 98-98.2* against a person operating or doing business under a fictitious business name, as defined in *Bus. & Prof. Code § 17900*, the DLSE is required to inquire at the time of the hearing whether the name of the person is the legal name under which the business or person has been licensed, registered, incorporated, or otherwise authorized to do business. The DLSE may amend an order, decision, or award to conform to the legal name of the business or the person who is the defendant to a wage claim, provided it can be shown that proper service was made on the defendant or his or her agent, unless a judgment has been entered on the award under *Lab. Code § 98.2*. In that event, the Labor Commissioner may apply to the clerk of the court that entered the judgment pursuant to the Commissioner's final order, decision, or award to conform the judgment to the defendant's legal name, provided that it can be shown that proper service was made on the defendant or on his or her agent [*Lab. Code § 98(h)*].

[3] Enforcement of Labor Commissioner's Award

Enforcement of judgments entered pursuant to *Lab. Code § 98.2*, which have court priority, may be accomplished in the same manner as any other judgment of the court in which they are entered [*Lab. Code § 98.2(e)*]. For general discussion of procedures for enforcement of judgments, see Ch. 254, *Executions and Enforcement of Judgments* . The Labor Commissioner is required by statute to make "every reasonable effort" to assure that judgments resulting from wage hearings are satisfied, including taking all appropriate legal action and requiring the employer to deposit a bond as provided in *Lab. Code § 240* [*Lab. Code § 98.2*(*i*)]. If all collection attempts prove futile, the DLSE will, at the end of six months, close its files and reassign the judgment to the claimant [*see* D.L.S.E. Div. Management Memo. No. 87-4 (Sept. 4, 1987) (Labor Commissioner's collection guidelines)].

To ensure that judgments are satisfied, the Labor Commissioner may serve on the judgment debtor a form similar to, and requiring reporting of the same information as, the form approved or adopted by the Judicial Council for the purposes of former *Code Civ. Proc. § 117.19(b)* [repealed; *now see Code Civ. Proc. § 116.830* (form to be completed by judgment debtor in small claims court)] to assist in identifying the nature and location of any assets of the judgment debtor. The Labor Commissioner may serve this form personally or by first-class mail at the judgment debtor's last known address listed with the DLSE. The judgment debtor must complete the form and deliver it to the DLSE at the address listed on the form within 35 days after the form has been served on the judgment debtor, unless the judgment has been satisfied. In the case of willful failure by the judgment debtor to comply with this provision, the DLSE or judgment creditor may request the court to apply the sanctions provided by *Code Civ. Proc. § 708.170* (sanctions for failure to appear at judgment debtor's examination) [*Lab. Code § 98.2(f)*].

On good cause, the Labor Commissioner may stay execution of any judgment entered on a final order, decision, or award [*Lab. Code § 98.2(g)*].

If the judgment is satisfied, other than by execution, the Labor Commissioner may order entry of satisfaction of

judgment. If a certified copy of such an order is filed with the clerk of the appropriate court, the clerk must enter a satisfaction of the judgment in its records [*Lab. Code § 98.2(h)*].

The judgment creditor, or the Labor Commissioner as assignee of the judgment creditor, is entitled to court costs and reasonable attorney's fees for enforcing the judgment [*Lab. Code § 98.2(j)*].

[4] Appeal of Labor Commissioner's Award

[a] Right to Appeal and Time Limit

Either party has the right to appeal the Labor Commissioner's order, decision, or award to the court with appropriate subject matter jurisdiction [*Lab. Code § 98.2(a)*; *see* Ch. 324, *Jurisdiction: Subject Matter* for discussion of rules governing subject matter jurisdiction in state courts]. The defendant need not have participated in the proceedings before the Labor Commissioner to prosecute an appeal [*Jones v. Basich (1986) 176 Cal. App. 3d 513, 518-519, 222 Cal. Rptr. 26]* . For a form to use in appealing an order, decision, or award of the Labor Commissioner, see *§ 250.60*.

A wage claimant's right to appeal and obtain a de novo trial applies whenever the Labor Commissioner has conducted a Berman hearing, even if the commissioner's award consists of a dismissal of the wage claim for lack of jurisdiction, based on a finding that the claimant is not an employee. Under the statutory scheme, the commissioner's refusal to accept a wage claim in the first instance would not be subject to appeal, and the claimant's remedy in such a case would be to file a civil lawsuit rather than an appeal. However, such a summary dismissal can be made by the commissioner only within 30 days after the filing of the wage claim; thereafter, the commissioner must conduct a Berman hearing and issue an order, decision or award that will be subject to de novo appeal [*Post v. Palo/Haklar & Assocs. (2000) 23 Cal. 4th 942, 948-951, 98 Cal. Rptr. 2d 671, 4 P.3d 928* ; *see Lab. Code §§ 98, 98.1, 98.2(a)*].

Any appeal must be filed within 10 days after service of notice of the order, decision, or award [*Lab. Code § 98.2(a)*]. If the order is served by mail, service is deemed complete at the time of deposit, but the 10-day period for filing the appeal is extended by 5 calendar days if the place of address and the place of mailing are within California, 10 calendar days if either the place of address or the place of mailing is outside California but within the United States, and 20 calendar days if either the place of address or the place of mailing is outside the United States [*Lab. Code § 98.2(a)*; *see Code Civ. Proc. § 1013(a)*; *Clavell v. North Coast Business Park (1991) 232 Cal. App. 3d 328, 332, 283 Cal. Rptr. 419* (provision of *Code Civ. Proc. § 1013* that exempts "notices of appeal" inapplicable to notices seeking de novo judicial review of Labor Commissioner decisions)]. The 10-day period is increased by two court days if service is by fax, Express Mail, or other overnight delivery method [*see Code Civ. Proc. § 1013(c), (e)*]. This requirement is considered jurisdictional and mandatory, and it is strictly enforced. Relief from this time limit will not be afforded on the grounds of mistake, inadvertence, or excusable neglect [*Pressler v. Donald L. Bren Co. (1982) 32 Cal. 3d 831, 837, 187 Cal. Rptr. 449, 654 P.2d 219* ; *REO Broadcasting Consultants v. Martin (1999) 69 Cal. App. 4th 489, 496, 81 Cal. Rptr. 2d 639* (rule of *Pressler*--that court cannot consider late appeal from Labor Commissioner's decision even if lateness results from mistake, inadvertence, or other excuse -- applies to any kind of administrative proceeding held before Labor Commissioner, including proceedings under Talent Agencies Act, *Lab. Code § 1700 et seq.*)]. In addition, *Lab. Code § 98.2(a)* requires the appellant to serve a copy of the appeal request on the Labor Commissioner.

An employer that files an appeal must post an undertaking with the reviewing court in the amount of the order, decision, or award. The undertaking must consist of an appeal bond issued by a licensed surety or a cash deposit with the court in the amount of the order, decision, or award. The employer must provide written notification to the other parties and the Labor Commissioner of the posting of the undertaking. The undertaking must be on the condition that, if any judgment is entered in favor of the employee, the employer will pay the amount owed pursuant to the judgment, and if the appeal is withdrawn or dismissed without entry of judgment, the employer will pay the amount owed pursuant to the order, decision, or award, unless the parties have executed a settlement agreement for the payment of some other amount, in which case the employer must pay that agreed amount. If the employer fails to pay the amount owed within 10 days of

the entry of judgment, dismissal, or withdrawal of the appeal, or the execution of a settlement agreement, a portion of the undertaking equal to the amount owed, or the entire undertaking if the amount owed exceeds the undertaking, will be forfeited to the employee [*Lab. Code § 98.2(b)*]. The failure to post the undertaking does not deprive the trial court of jurisdiction over the appeal, but the court may issue an order requiring the appealing employer to post an undertaking in a certain amount by a certain date or be subject to sanctions, including dismissal of the employer's appeal [*Progressive Concrete, Inc. v. Parker (2006) 136 Cal. App. 4th 540, 546-553, 38 Cal. Rptr. 3d 939]* .

No statutes or rules provide procedures for withdrawing an appeal under *Lab. Code § 98.2*. Thus, a party dissatisfied with an award can reasonably expect that it need take no action, such as a cross appeal, to preserve its rights once the adverse party has filed a notice of appeal. Therefore, once a party has filed an appeal, that party does not have the unilateral right to withdraw its appeal by filing a request for dismissal, because this action affects the rights of the other party [*Miller v. Foremost Motors, Inc. (1993) 16 Cal. App. 4th 1271, 1274-1275, 20 Cal. Rptr. 2d 503]* . For example, an employer that files an appeal may ostensibly have been the losing party before the Labor Commissioner because its employee obtained an award. However, the employer cannot file an appeal and then request its dismissal because the dismissal could deprive the employee from receiving a much higher award in the appeal proceedings [*see Miller v. Foremost Motors, Inc. (1993) 16 Cal. App. 4th 1271, 1274-1275, 20 Cal. Rptr. 2d 503]* .

[b] Nature of Proceeding

Although a proceeding under *Lab. Code § 98.2(a)* to review the Labor Commissioner's decision is referred to in the statute as an "appeal," the reviewing court hears the case de novo; that is, the parties literally receive a new trial. In the de novo hearing, the court may hear testimony, including entirely new evidence, and the decision of the Labor Commissioner is entitled to no weight [*Pressler v. Donald L. Bren Co. (1982) 32 Cal. 3d 831, 835-836, 187 Cal. Rptr. 449, 654 P.2d 219* ; *Nordquist v. McGraw-Hill Broadcasting Co. (1995) 32 Cal. App. 4th 555, 561, 38 Cal. Rptr. 2d 221* ; *Hernandez v. Mendoza (1988) 199 Cal. App. 3d 721, 725, 245 Cal. Rptr. 36* ; *Sales Dimensions v. Superior Court (1979) 90 Cal. App. 3d 757, 762-763, 153 Cal. Rptr. 690* ; *Triad Data Services, Inc. v. Jackson (1984) 153 Cal. App. 3d Supp. 1, 14, 200 Cal. Rptr. 418]* . Accordingly, at the de novo hearing the court has discretion to allow the employee to raise new wage claims not raised in the Berman hearing. In deciding whether to allow such new claims, the trial court will weigh considerations such as whether the new claims are sufficiently related to the claims raised before the Labor Commissioner, whether the interests of judicial economy will be served, and whether the employer will be prejudiced [*Murphy v. Kenneth Cole Prods., Inc. (2007) 40 Cal. 4th 1094, 1118]* . Similarly, the employer is not bound by the defenses it raised in the Berman hearing, and it may abandon, change, or add defenses not raised before the Labor Commissioner [*Murphy v. Kenneth Cole Prods., Inc. (2007) 40 Cal. 4th 1094, 1118* ; *Jones v. Basich (1986) 176 Cal. App. 3d 513, 518-519, 222 Cal. Rptr. 26]* .

[c] Award of Attorney's Fees and Costs Against Unsuccessful Appellant

If the party seeking the de novo appeal is unsuccessful, the court is required by statute to determine the costs and reasonable attorney's fees incurred by any respondents and to assess that amount as a cost on the appellant [*Lab. Code § 98.2(c)*]. A "successful" appellant is not, however, entitled to recover costs and attorney's fees from the respondent in a de novo proceeding under *Lab. Code § 98.2* [*Dawson v. Westerly Investigations, Inc. (1988) 204 Cal. App. 3d Supp. 20, 23-24* , *251 Cal. Rptr. 633]* . Thus, if the employer appeals and is unsuccessful, the employee will be awarded attorney's fees under *Lab. Code § 98.2(c)*. However, if the *employee* is the appellant and is successful, he or she will not be able to recover fees under *Lab. Code § 98.2(c)*. In such a case, at least one court has held that the employee may recover attorney's fees under *Lab. Code § 1194(a)*, which authorizes an award of attorney's fees incurred in a "civil action" for unpaid minimum wages or legal overtime compensation [*Eicher v. Advanced Bus. Integrators, Inc. (2007) 151 Cal. App. 4th 1363, 1378-1384, 61 Cal. Rptr. 3d 114* (de novo appeal from decision in Berman hearing qualifies as "action" for purposes of *Lab. Code § 1194(a)*); *but see Sampson v. Parking Serv. 2000 Com, Inc. (2004) 117 Cal. App. 4th 212, 217-230* (*Lab. Code § 1194(a)* does not apply in context of administrative Berman hearing, which is not "civil action")].

An employee is "successful" in the de novo hearing, for purposes of an award of costs and attorney's fees, if the court awards an amount greater than zero [*Lab. Code § 98.2(c)* (legislative intent to overrule *Smith v. Rae-Venter Law Group (2002) 29 Cal. 4th 345, 370, 127 Cal. Rptr. 2d 516, 58 P.3d 367* , holding that "successful" appellant must obtain judgment more favorable than administrative award)].

The California Supreme Court has held that under this provision the superior court may assess attorney's fees against an employer who unsuccessfully appeals an administrative order to pay wages, even if the employee could not afford counsel and was represented without charge by the Labor Commissioner [*Lolley v. Campbell (2002) 28 Cal. 4th 367, 372-373, 121 Cal. Rptr. 2d 571, 48 P.3d 1128* (indigent employee represented without charge by Labor Commissioner has nevertheless "incurred" fees within meaning of *Lab. Code § 98.2(c)*)].

The standards for determining a reasonable attorney's fee appear to be the same as in any other action [*cf. Sales Dimensions v. Superior Court (1979) 90 Cal. App. 3d 757, 761, 153 Cal. Rptr. 690* (de novo hearing under *Lab. Code § 98.2(a)* subject to usual procedural rules of reviewing court)]. For a general discussion of the standards for determining the reasonableness of an award of attorney's fees, see Ch. 174, *Costs and Attorney's Fees* .

[d] Offsets of Unsatisfied Judgments

An employer must satisfy a judgment in proceedings under *Lab. Code § 98.2* within 90 days after issuance of a final judgment or face having the unpaid amount of the judgment offset against various amounts due from the State. These amounts include refunds of personal income, bank and corporation, and sales and use tax, as well as winnings in the California State Lottery [*Gov. Code § 12419.11(a)*]. To enforce these provisions, employers must provide the Labor Commissioner with identifying numbers at the time the judgment becomes final. A corporate employer must provide the corporation's identification number issued by the Secretary of State, and an employer who is an individual must provide his or her Social Security number [*Gov. Code § 12419.11(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewLabor & Employment LawWage & Hour LawsAdministrative Proceedings & RemediesEnforcementLabor & Employment LawWage & Hour LawsAdministrative Proceedings & RemediesInvestigative AuthorityLabor & Employment LawWage & Hour LawsRemediesCosts & Attorney FeesLabor & Employment LawWage & Hour LawsStatutes of Limitations

California Forms of Pleading and Practice--Annotated

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 250 EMPLOYMENT LAW: WAGE AND HOUR DISPUTES
PART II. LEGAL BACKGROUND
B. Remedies for Failure to Pay Wages--In General

21-250 California Forms of Pleading and Practice--Annotated § 250.33

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§ 250.33 Other Actions by Labor Commissioner to Collect Wages

[1] In General

As an alternative to conducting a Berman hearing, the Labor Commissioner and DLSE may prosecute civil actions for the following:

- Collection of wages, penalties, and demands of persons who, in the opinion of the Commissioner, have valid claims and are financially unable to employ counsel;

- Return of worker's tools that are illegally in the possession of another [*Lab. Code § 98.3(a)*];

- Collection of wages and other moneys payable to employees *or* to the State of California arising out of the employment relationship or an order of the Industrial Welfare Commission [*Lab. Code § 98.3(b)*]; and

- Recovery of wages or other monetary benefits that are owed to the Industrial Relations Unpaid Wage Fund [*Lab. Code § 98.3(c)*].

The Labor Commissioner and the DLSE also have authority to investigate and enforce claims for wages, conceded to be above the minimum set by law, that have not been computed or paid correctly [*Lab. Code § 1195.5*].

The Labor Code provides that no court costs are payable by the DLSE in any civil action to which the DLSE is a party *Lab. Code § 101*]. This provision, however, applies only to filing fees and other fees payable to the court; it does not

prevent the court from ordering the DLSE to pay costs to a prevailing party [*Department of Indus. Relations v. Lee (1999) 73 Cal. App. 4th 763, 766-770, 86 Cal. Rptr. 2d 710* (nothing in language or legislative history of *Lab. Code § 101* indicates intent to exempt DLSE from paying costs to prevailing party in litigation); *see Code Civ. Proc. § 1028* (costs may be awarded against state on same basis as against any other party)].

[2] Actions by Labor Commissioner to Collect Civil Penalties

Lab. Code §§ 210 and *225.5* provide civil penalties for violations of various Labor Code provisions relating to the time, manner, and place for payment of wages. If penalties are sought, the Labor Commissioner must take the necessary civil action to collect the penalties; the action is brought in the name of the people of the State of California and the Commissioner is authorized to act on the people's behalf [*Lab. Code §§ 210, 225.5*]. Alternatively, the Labor Commissioner may include a claim for penalties in a Berman hearing to recover unpaid wages if there is at least one underlying wage claim related to the penalty claim [*see Lab. Code § 98(a)*], or may file a civil action pursuant to *Lab. Code § 98.3* [*see Lab. Code §§ 210, 225.5*].

The Labor Code also provides civil penalties for violation of *Lab. Code § 226*, which requires employers to provide employees with itemized statements of wages earned, hours worked, pay periods, and deductions from wages, and other specified information [*see Lab. Code §§ 226(e), 226.3-226.5*]. An employer who receives a citation may contest the citation or the proposed penalty assessment by notifying the office of the Labor Commissioner listed on the citation that an informal hearing is desired within 15 business days after service of the citation [*Lab. Code § 226.5(a)*].

Special rules apply to penalties imposed for violation of provisions requiring payment of prevailing rates to public works employees [*see Lab. Code §§ 98.9, 1770-1775, 1810-1815*].

Under the Labor Code Private Attorneys General Act of 2004 [*see Lab. Code § 2698*], any civil penalty to be assessed and collected for a violation of the Labor Code [*see Lab. Code § 2699.5*] may be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees [*Lab. Code § 2699(a)*; *see Lab. Code § 2699.3* (procedures for employee's civil action); *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court (2009) 46 Cal. 4th 993, 1001-1005, 95 Cal. Rptr. 3d 605, 209 P.3d 937* (plaintiff has standing to bring action under Labor Code Private Attorneys General Act of 2004 only if plaintiff suffered injury from unlawful action, so labor union lacks standing to sue as assignee or association of injured members); *see also Arias v. Superior Court (2009) 46 Cal. 4th 969, 975, 980-988, 95 Cal. Rptr. 3d 588, 209 P.3d 923* (employee's representative action under Labor Code Private Attorneys General Act of 2004 need not satisfy class-action requirements)]. Any employee who prevails in such an action will be entitled to an award of reasonable attorney's fees and costs, and the employee will ordinarily be entitled to retain 25 percent of any civil penalties recovered [*Lab. Code § 2699(g)*, (*i*), (j)]. An enforcement action under this provision may be combined with other remedies the employee may have under state or federal law [*Lab. Code § 2699(g)*].

For a detailed discussion of civil penalties, see Wilcox, California Employment Law, Ch. 5 (Matthew Bender).

[3] Disputes Regarding Seasonal Laborers

The Labor Commissioner must hear and decide all wage disputes involving seasonal laborers, as defined in *Lab. Code § 253*. These procedures apply to persons hired in California to perform out-of-state work who are paid in California at the end of the employment, but not to seamen and other persons whose payment is regulated by federal statute [*see Lab. Code §§ 250, 251*]. When wages for "seasonal employees" are not paid when due, the Labor Commissioner must impose a civil penalty of no more than 30 days' pay as a waiting time penalty consistent with the terms of *Lab. Code § 203* (penalty for failure to pay wages due on termination of employment) [*Lab. Code § 256*]. The procedures for assessing and contesting those penalties are the same as those used for penalties imposed pursuant to *Lab. Code §§ 210* and *225.5* [*see* D.L.S.E. Div. Management Memo. No. 84-4 (Feb. 22, 1984)].

[4] Labor Commissioner as Assignee of Wage Claims

Lab. Code § 96 authorizes the Labor Commissioner and his or her deputies and representatives to take assignments of the following wage claims and certain other employee claims for purposes of enforcement:

- Wage claims and incidental expense accounts and advances;
- Mechanics' and other liens of employees;
- Claims based on "stop orders" for wages and on bonds for labor;
- Claims for damages for misrepresentations of conditions of employment;
- Claims for unreturned bond money of employees;
- Claims for penalties for nonpayment of wages;
- Claims for return of workers' tools in the illegal possession of another person;
- Claims for vacation pay, severance pay, or other compensation supplemental to a wage agreement [*but see California Chamber of Commerce v. Simpson (C.D. Cal. 1985) 601 F. Supp. 104, 109* (enjoining enforcement of severance pay claims)];
- Awards for workers' compensation benefits in which the Worker's Compensation Appeals Board has found that the employer has failed to secure payment of compensation and the award remains unpaid for more than 10 days after having become final;
- Claims for loss of wages as the result of discharge from employment for the garnishment of wages; and
- Claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises [*see 83 Ops. Cal. Att'y Gen. 226 (2000)* (Labor Commissioner's authority to take assignments of such wage claims does not abrogate existing law that permits disciplining of peace officers for off-duty conduct occurring away from place of employment that is otherwise lawful but that conflicts with their duties as police officers)].

Assignments to the Labor Commissioner can only be made on behalf of employees, not independent contractors [*Fitch v. Pacific Fid. Life Ins. Co. (1975) 54 Cal. App. 3d 140, 146-148, 126 Cal. Rptr. 445]* . However, if the employee is covered by a collective bargaining agreement, the employee's collective bargaining representative may act as assignee of wage claims for enforcement by the Labor Commissioner, subject to the employee's option to reject this representation [*Lab. Code § 96.3*].

Wage assignments to the Labor Commissioner pursuant to *Lab. Code § 96* are not subject to technical rules governing validity of assignments, such as those set out in *Lab. Code § 300* [*see Lab. Code § 97*; *see also § 250.20[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsAdministrative Proceedings & RemediesEnforcementLabor &

Employment LawWage & Hour LawsAssignments, Deductions & GarnishmentsLabor & Employment LawWage & Hour LawsCoverage & DefinitionsEmployLabor & Employment LawWage & Hour LawsRemediesGeneral OverviewLabor & Employment LawWage & Hour LawsRemediesPrivate Suits

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21-250 California Forms of Pleading and Practice--Annotated § 250.34

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§ 250.34 Civil Action by Employee or Assignee to Recover Wages

[1] Action by Employee or Former Employee

[a] Right of Action

Although many wage claimants use the administrative remedies described above to pursue wage claims, they are not statutorily required to pursue their remedies through the Labor Commissioner. Rather, a wage claimant may bring a civil action, directly or through an assignee, to recover any wages or penalties due under *Lab. Code § 200 et seq.* [*Lab. Code § 218*]. In addition, causes of action for breach of contract, an accounting, or declaratory relief may be added when wages and/or benefits are not paid consistent with the employment agreement [*see, e.g., Nelson v. Abraham (1947) 29 Cal. 2d 745, 751, 177 P.2d 931* ; *Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1972) 24 Cal. App. 3d 35, 43-45, 100 Cal. Rptr. 791 , aff'd 414 U.S. 117 (1973)* ; *Montalvo v. Zamora (1970) 7 Cal. App. 3d 69, 76, 86 Cal. Rptr. 401]* . However, breach of contract and other state-law claims related to most employee benefit agreements are preempted by the remedies of the Employee Retirement Income Security Act (ERISA) [*see, e.g., Scott v. Gulf Oil Corp. (9th Cir. 1985) 754 F.2d 1499, 1503-1505]* .

Lab. Code § 229 provides that an employee's right to maintain a civil action to recover due and unpaid wages is unaffected by the existence of a private agreement to arbitrate. However, the United States Supreme Court has held *Lab. Code § 229* is preempted by the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*) with respect to agreements that are subject to that Act [*see Perry v. Thomas (1987) 482 U.S. 483, 490-491, 107 S. Ct. 2520, 96 L. Ed. 2d 426]* . The Act generally applies to all employment contracts, except contracts of employment of transportation workers [*Circuit City Stores, Inc. v. Adams (2001) 532 U.S. 105, 109, 121 S. Ct. 1302, 149 L. Ed. 2d 234* ; *see 9 U.S.C. § 1* (excluded from coverage of Act are contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce)]. Thus, agreements to arbitrate wage disputes appear to be generally enforceable, notwithstanding

Lab. Code § 229. However, a court may refuse to enforce an arbitration agreement that significantly undermines the ability of employees to vindicate their statutory right to overtime pay [*Gentry v. Superior Court (2007) 42 Cal. 4th 443, 465 n.8, 64 Cal. Rptr. 3d 773* (under *9 U.S.C. § 2*, states may apply arbitration-neutral rules to limit enforcement of specific provisions of arbitration agreements on public policy grounds)]. For related discussion of the effect of arbitration agreements on civil actions for wrongful termination, see *Ch. 249, Employment Law: Termination and Discipline, § 249.21[16]*.

Lab. Code §§ 200-211 and *Lab. Code §§ 215-219*, inclusive, do not apply to the payment of wages of employees directly employed by any county, incorporated city or town, or other municipal corporation [*Lab. Code § 220(b)*]. However, these provisions are applicable to the payment of wages of employees directly employed by the state, except for *Lab. Code §§ 201.3, 201.5, 201.7, 203.1, 203.5, 204, 204a, 204b, 204c, 204.1, 205*, and *205.5* [*Lab. Code § 220(a)*].

For a form of complaint for use in a civil action by an employee or assignee to recover wages, see *§ 250.61*.

PRACTICE TIP:

Failure to Pay Proper Amount on Discharge May Be Wrongful Termination in Violation of Public Policy. The arsenal of theories available to counsel for employees with wage disputes has been fortified by the Court of Appeal. In *Gould v. Maryland Sound Industries, Inc. (1995) 31 Cal. App. 4th 1137, 1148-1149, 37 Cal. Rptr. 2d 718* , it was held that a plaintiff's claim that he was discharged so that the employer could avoid paying him accrued commissions supported a cause of action for tortious discharge in violation of public policy. A wage/commission dispute that ends in actual or constructive termination now gives a plaintiff a truly potent array of remedies. Joining a tortious discharge claim with a breach of contract and/or breach of statutory obligation claim can result in a defendant's exposure to special consequential damages, general damages, punitive damages, prejudgment interest, and statutory attorney's fees [*see Brewer v. Premier Golf Props. (2008) 168 Cal. App. 4th 1243, 1252, 86 Cal. Rptr. 3d 225* ("[P]unitive damages are not recoverable when liability is premised solely on the employer's violation of the Labor Code statutes that regulate meal and rest breaks, pay stubs, and minimum wage laws.")]. In this writer's experience, many potential wrongful termination scenarios involve a motivation to deprive an employee of some form of wages or compensation. It should be noted that the statute of limitations on the *Gould* public policy claim will be one year, a shorter period than the statutory or contract-based approaches to wage collection. *By Richard P. Hill*

[b] Statute of Limitations

The general rules contained in the Code of Civil Procedure govern the time for institution of an action to recover unpaid wages after the claim has accrued [*see Code Civ. Proc. § 312*]. Thus, a claim based on an oral contract must be brought within two years after accrual of the cause of action [*see Code Civ. Proc. § 339(1)*; *see also Tostevin v. Douglas (1958) 160 Cal. App. 2d 321, 328-329, 325 P.2d 130* (despite request for "accounting" in complaint, action for breach of oral employment contract barred by two-year statute of limitations)]. Actions based on a written agreement must be commenced within four years after accrual of the cause of action [*see Code Civ. Proc. § 337(1)*]. An action to recover a statutory penalty or forfeiture must be brought within one year of the accrual of the cause of action [*see Code Civ. Proc. § 340(a)*]. However, if a claim for waiting time penalties allowed under *Lab. Code § 203* is joined with a claim for unpaid wages, the action may be brought within the time allowed for bringing the underlying claim for wages rather than within the one-year period set forth in *Code Civ. Proc. § 340* [*see Lab. Code § 203*]. On the other hand, if the only claim in an action is for the waiting-time penalty, the one-year period of *Code Civ. Proc. § 340(a)* governs [*McCoy v. Superior Court (2007) 157 Cal. App. 4th 225, 229-233, 68 Cal. Rptr. 3d 483*].

In addition, *Code Civ. Proc. § 338(a)* provides a three-year limitations period for actions based on a liability created by statute, other than a penalty or forfeiture. One court of appeal has held that this three-year limitations period, rather than the two-year limitations period applicable to actions based on oral contracts, applies to an action to recover unpaid

overtime compensation [*Aubry v. Goldhor (1988) 201 Cal. App. 3d 399, 404, 247 Cal. Rptr. 205]* . Also, the Supreme Court has held that the three-year limitations period, rather than the one-year period for actions to collect statutory penalties or forfeitures [*see Code Civ. Proc. § 340(a)*], applies to an employee's claim for additional pay based on the employer's failure to provide meal periods or rest periods required by the applicable IWC wage order [*Murphy v. Kenneth Cole Prods., Inc. (2007) 40 Cal. 4th 1094, 1103* ("additional hour of pay," required by *Lab. Code § 226.7(b)* when employer fails to provide required meal period or rest period, constitutes wage rather than penalty)].

A cause of action for recovery of unpaid wages accrues from each payday or date when the required compensation was not paid [*Shuler v. Corl (1918) 39 Cal. App. 195, 198, 178 P. 535* ; *see Calvao v. Superior Court (1988) 201 Cal. App. 3d 921, 923, 247 Cal. Rptr. 470* (unpaid salary); *Aubry v. Goldhor (1988) 201 Cal. App. 3d 399, 406, 247 Cal. Rptr. 205* (unpaid overtime compensation)].

It is an open question whether a terminated employee's action to recover compensation for vested but unused vacation time [*Lab. Code § 227.3*; *see § 250.16[2][c]*] is subject to the statute of limitations for claims based on statutory liability, or the statutes of limitations for contract claims [*Church v. Jamison (2006) 143 Cal. App. 4th 1568, 1577, 50 Cal. Rptr. 3d 166* (finding it unnecessary to decide which statute of limitations applied, because complaint in case at bar had been filed within all potentially applicable limitation periods); *see Code Civ. Proc. §§ 337(1)* (written contracts--four years), 338(a) (liability created by statute--three years), 339(1) (oral contracts--two years); *but see Sequeira v. Rincon-Vitova Insectaries, Inc. (1995) 32 Cal. App. 4th 632, 634, 38 Cal. Rptr. 2d 264* (applying four-year limitation for actions based on written contract, *Code Civ. Proc. § 337(1)*, to bar employee from recovering unused vacation that had vested more than four years before termination of employment)]. Whichever statute of limitations governs the time for suing to recover vested vacation, the courts of appeal are split on the question of whether the statute should also be applied to limit the years for which vested vacation must be paid upon termination. The Second District has held that if the employment relationship was governed by a written contract, the four-year statute of limitations [*see Code Civ. Proc. § 337(1)*] would limit the right to vacation pay to that which vested within four years prior to the termination of the employment relationship [*Sequeira v. Rincon-Vitova Insectaries, Inc. (1995) 32 Cal. App. 4th 632, 637, 38 Cal. Rptr. 2d 264]* . The Fifth District, in contrast, has held that the statute of limitations only limits the time for filing suit after accrual of the terminated employee's cause of action (i.e., the employer's failure to pay vested vacation upon termination). Under this view, the limitations period should not also be applied "in reverse" to limit the years for which vested vacation may be claimed. Rather, because "all vested vacation shall be paid to [a terminated employee] as wages" [*Lab. Code § 227.3*], the Fifth District holds that there is no limit on the years of vested, unused vacation time that a terminated employee may claim [*Church v. Jamison (2006) 143 Cal. App. 4th 1568, 1577-1583, 50 Cal. Rptr. 3d 166]* . The Fifth District's analysis seems preferable. The First District's view--that claims for vacation time vested more than four years prior to the date of termination are barred as "stale" claims [*see Sequeira v. Rincon-Vitova Insectaries, Inc. (1995) 32 Cal. App. 4th 632, 637, 38 Cal. Rptr. 2d 264]* --ignores the general principle that a statute of limitations does not begin to run until the cause of action accrues (which, in this context, could not happen before the termination of employment) [*see Church v. Jamison (2006) 143 Cal. App. 4th 1568, 1582-1583, 50 Cal. Rptr. 3d 166]* .

An action to recover compensation for labor performed as a Second World War slave labor victim or forced labor victim may be commenced in superior court on or before December 31, 2010, regardless of whether the action would otherwise be barred under the applicable statute of limitation [*Code Civ. Proc. § 354.6(c)*; *see Code Civ. Proc. § 354.6(b)* (action may be brought by victim or heir against entity for which work was performed, or against successor entity); *see also Code Civ. Proc. § 354.6(a)* ("Second World War slave labor victim" and "Second World War forced labor victim" defined as persons forced to perform work without pay from 1929 to 1945 by Nazi regime, its allies and sympathizers, or enterprises transacting business in areas occupied by or under control of Nazi regime or its allies and sympathizers)]. This provision does not apply to claims against Japan or its nationals because it conflicts with the federal policy (embodied in the 1951 Treaty of Peace with Japan) that such claims are to be resolved diplomatically [*Taiheiyo Cement Corp. v. Superior Court (2004) 117 Cal. App. 4th 380, 390-398, 12 Cal. Rptr. 3d 32]* .

For additional discussion of the statute of limitations applicable to wage claims, see Wilcox, California Employment Law, Ch. 5 (Matthew Bender).

[c] Jurisdiction

The principal determinant of wage claim subject matter jurisdiction in state courts is the amount in controversy [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1), 116.220*; *see also* Ch. 324, *Jurisdiction: Subject Matter*]. The type of relief sought is another consideration. Actions seeking equitable relief (e.g., injunctions, declaratory relief, or an accounting) must be brought in the superior court and are not limited civil cases [*see Code Civ. Proc. §§ 85-86(a)(1), 580(b)*; *see, e.g., Silverman v. Greenberg (1938) 12 Cal. 2d 252, 254, 83 P.2d 293]* .

State-law claims for failure to pay wages provided under a collective bargaining agreement or to provide employment benefits may be preempted by the Labor Management Relations Act (LMRA) and/or ERISA, respectively, and these actions must be brought in the United States District Court [*see generally 29 U.S.C. §§ 185(a), 1001* et seq.]. However, the LMRA does not preempt a state-law wage claim merely because the collective bargaining agreement will be consulted in the course of state-law litigation, if the interpretation of the agreement is not in dispute [*Soremekun v. Thrifty Payless Inc. (9th Cir. 2007) 509 F.3d 978, 990-991* ; *Lujan v. Southern Cal. Gas Co. (2002) 96 Cal. App. 4th 1200, 1206-1211, 117 Cal. Rptr. 2d 828]* . For example, when a union member brings a claim under a wage order that allows a collective bargaining agreement to waive the protection of that wage order [*see, e.g., 8 Cal. Code Reg. § 11160(5)(D)*], the mere possibility of waiver does not trigger preemption by the LMRA, and the fact that the collective bargaining agreement must be consulted to determine whether it contains a waiver does not trigger preemption [*Burnside v. Kiewit Pac. Corp. (9th Cir. 2007) 491 F.3d 1053, 1064-1073*].

[c.1] Governing Law

The California Supreme Court has held that the DLSE's interpretations and constructions of IWC wage orders are void because they have not been promulgated in conformity with the Administrative Procedure Act [*Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 568-577, 59 Cal. Rptr. 2d 186, 927 P. 2d 296 , cert. denied, 520 U.S. 1248 (1997)* ; *see Gov. Code § 11340 et seq.*]. In *Tidewater*, the court reasoned that because the DLSE formulated its interpretations of wage orders without any public participation or procedural safeguards, its interpretations could be given no weight or deference by the court and are void for failure to comply with the APA [*Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 570-571, 577, 59 Cal. Rptr. 2d 186, 927 P. 2d 296 , cert. denied, 520 U.S. 1248 (1997)* ; *see Gov. Code § 11340 et seq.*].

[d] Recovery of Attorney's Fees and Costs

The court must award reasonable costs and attorney's fees to the prevailing party if any party to an action brought for the nonpayment of wages and other employment benefits requests attorney's fees and costs on initiation of the action [*see Lab. Code § 218.5*; *On-Line Power, Inc. v. Mazur (2007) 149 Cal. App. 4th 1079, 1085-1086, 57 Cal. Rptr. 3d 698* (award of attorney's fees under *Lab. Code § 218.5* is available not just to employees who sue to recover unpaid hourly wages, but also to those who sue to recover unpaid salary); *see also Code Civ. Proc. § 1031* (awards in cases with demands less than $300)]. This rule does not apply, however, to actions brought by the Labor Commissioner, to sureties issuing a bond under Business and Professions Code provisions regulating licensed contractors, to actions to enforce mechanics' liens under *Civ. Code § 3109 et seq.*, or to an action to recover the unpaid balance of the legal minimum wage or overtime compensation. In an action for minimum wages or overtime pay, a prevailing employee is entitled to attorneys' fees and costs, but if the employer prevails, the employer has no right to recover fees or costs [*Lab. Code §§ 218.5, 1194(a)*; *Earley v. Superior Court (2000) 79 Cal. App. 4th 1420, 1426-1431, 95 Cal. Rptr. 2d 57* ; *see Bell v. Farmers Ins. Exch. (2001) 87 Cal. App. 4th 805, 829-833, 105 Cal. Rptr. 2d 59* (*Lab. Code § 1194(a)* authorizes attorneys' fee award following judgment, but does not authorize interim fee award prior to judgment); *see also Sampson v. Parking Service 2000 Com., Inc. (2004) 117 Cal. App. 4th 212, 217-230* (*Lab. Code § 1194(a)* applies only

in civil actions filed in court, not in administrative "Berman hearings" to resolve wage claims under *Lab. Code §§ 98-98.2*)].

[d.1] Recovery of Prejudgment Interest

In any action brought for the nonpayment of wages, the court must award interest on all due and unpaid wages at the legal rate [*see Civ. Code § 3289(b)*], with such interest accruing from the date the wages were due and payable [*Lab. Code § 218.6*]. The statute imposing this interest requirement is to be applied retroactively; thus, interest must be awarded at the statutory rate even as to unpaid wages that became payable before the statute was enacted [*Bell v. Farmers Ins. Exch. (2006) 135 Cal. App. 4th 1138, 1146-1150, 38 Cal. Rptr. 3d 306* ; *see Lab. Code § 218.6* (eff. Jan. 1, 2001)].

[e] Defenses

In addition to making the appropriate admissions and denials, the employer's answer should separately allege any new facts not included in the complaint constituting defenses to the causes of action alleged in the complaint [*see Code Civ. Proc. §§ 431.20(a), 431.30(b), (f), (g)*]. Examples of affirmative defenses to an action for failure to pay wages or benefits as required by the Labor Code include the following:

- The party is an independent contractor rather than an employee subject to the provisions of the Labor Code [*see, e.g., Fitch v. Pacific Fid. Life Ins. Co. (1975) 54 Cal. App. 3d 140, 145-146, 126 Cal. Rptr. 445* ; *but cf. Zaremba v. Miller (1980) 113 Cal. App. 3d Supp. 1, 5-6 , 169 Cal. Rptr. 688* (although an independent contractor may have a cause of action for breach of contract against the defendant); for a form of affirmative defense, *see § 250.70*].

- The defendant-employer and/or plaintiff-wage claimant are exempt from the applicable provision(s) of the Labor Code [*see, e.g., Division of Labor Law Enforcement v. El Camino Hosp. Dist. (1970) 8 Cal. App. 3d Supp. 30, 33 , 87 Cal. Rptr. 476* (employer a "municipal corporation" exempt from wage payment provisions of Labor Code); for a form of affirmative defense, *see § 250.71*].

- The cause of action is based on an interpretation and/or application of a collective bargaining agreement and is barred by *Lab. Code § 229*.

- The cause of action is preempted by the LMRA [*see 29 U.S.C. § 185(a)* (federal law governs suits for violation of contract between employer and labor organization representing employees in industry affecting interstate commerce); *but see Soremekun v. Thrifty Payless Inc. (9th Cir. 2007) 509 F.3d 978, 990-991* (LMRA does not preempt state-law claim for unpaid wages if court is required simply to apply terms of collective bargaining agreement; it is preempted only if court must interpret terms of collective bargaining agreement); *Burnside v. Kiewit Pac. Corp. (9th Cir. 2007) 491 F.3d 1053, 1064-1073* (mere possibility that collective bargaining agreement may waive protection of state law does not trigger preemption, and fact that collective bargaining agreement must be consulted to determine whether it contains waiver does not trigger preemption); *Lujan v. Southern Cal. Gas Co. (2002) 96 Cal. App. 4th 1200, 1206-1211, 117 Cal. Rptr. 2d 828* (LMRA does not preempt state-law wage claim merely because collective bargaining agreement will be consulted in course of state-law litigation, if interpretation of agreement is not in dispute); for a form of affirmative defense, *see § 250.74*].

- The cause of action is preempted by ERISA [*29 U.S.C. § 1144(a)*; *see, e.g., Scott v. Gulf Oil Corp. (9th Cir. 1985) 754 F.2d 1499, 1503-1506]* .

- The defendant and/or plaintiff are not proper parties to the action [*see Code Civ. Proc. § 430.10(d)*;

see Oppenheimer v. Robinson (1957) 150 Cal. App. 2d 420, 424, 309 P.2d 887] .

- Plaintiff secreted or absented himself or herself to avoid payment of wages or refused to receive the payment fully tendered to him or her, thereby relieving defendant of liability for waiting time penalties [*see Lab. Code § 203*; for a form of affirmative defense, *see § 250.72*].

Other potential defenses include lack of subject matter jurisdiction [*see Code Civ. Proc. § 430.10(a)*], failure to state a cause of action [*see Code Civ. Proc. § 430.10(e)*], and failure to commence the action within the applicable statute of limitations [*see, e.g., Tostevin v. Douglas (1958) 160 Cal. App. 2d 321, 328-329, 325 P.2d 130]* .

If the grounds for objecting to the complaint appear on the face of the complaint (or from any matter of which the court is required or permitted to take judicial notice), the objection should be made by demurrer rather than by answer [*see Code Civ. Proc. § 430.30(a), (b)*].

[2] Action by Assignee

An employee's assignee may bring an action to collect wages that are due [*Lab. Code § 218*]. Except in the case of an assignment to the Labor Commissioner [*see Lab. Code § 96*], the assignment must meet the requirements of *Lab. Code § 300*. If the assignment is valid, the assignee has the same enforcement rights and is subject to the same defenses as the employee assigning the wages [*see Teater v. Good Hope Dev. Corp. (1942) 55 Cal. App. 2d 459, 462, 130 P.2d 812]* . A claim for penalties by an assignee appears to be limited, however, to the portion of the penalty that accrued prior to the assignment [*see Martin v. Going (1922) 57 Cal. App. 631, 636, 207 P. 935]* . For a form of complaint for use by an employee's assignee against an employer for failure to pay wage, see *§ 250.65*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsAssignments, Deductions & GarnishmentsLabor & Employment LawWage & Hour LawsRemediesCosts & Attorney FeesLabor & Employment LawWage & Hour LawsRemediesJudgment InterestLabor & Employment LawWage & Hour LawsRemediesPrivate SuitsLabor & Employment LawWage & Hour LawsStatutes of Limitations

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PART II. LEGAL BACKGROUND
B. Remedies for Failure to Pay Wages--In General

21-250 California Forms of Pleading and Practice--Annotated § 250.35

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§ 250.35 Protection of Employee or Claimant Against Retaliation

[1] Discrimination and Retaliation Forbidden

An employer may not discharge or in any manner discriminate against an employee for filing a bona fide complaint or claim or instituting any proceeding relating to his or her rights under the jurisdiction of the Labor Commissioner, or for testifying in such a proceeding [*see Lab. Code § 98.6(a)*]. Employers are also prohibited from discriminating or retaliating against employees for exercising any right given to them on their own behalf or on the behalf of others [*Lab. Code § 98.6(a)*]. Similar protection is afforded job applicants [*Lab. Code § 98.6(a)*]. Acts of discrimination and retaliation include discharge, threats of discharge, demotion, suspension, and any other discrimination in the terms and conditions of employment [*see Lab. Code § 98.6(b)*].

An employee who suffers discrimination or retaliation for having made a bona fide complaint is entitled to reinstatement and/or reimbursement for wages and benefits lost as a result. An employer who *willfully* refuses to hire, promote, or otherwise restore such an employee following a decision by a grievance procedure, arbitration, or other hearing authorized by law is guilty of a misdemeanor [*Lab. Code § 98.6(b)*].

[2] Procedure in Case of Complaint of Discrimination or Retaliation

Lab. Code § 98.7 provides a specific statutory administrative investigation and hearing procedure before the Labor Commissioner to address alleged cases of discrimination under any provision of the Labor Code enforced by the Labor Commissioner [*Lab. Code § 98.7(a)*]. A person who believes that he or she has been discharged or otherwise discriminated against in violation of these provisions may initiate the administrative process by filing a complaint with the Division of Labor Standards Enforcement (DLSE) within six months after the violation. The six-month period may be extended for good cause [*Lab. Code § 98.7(a)*]. This administrative mechanism is not an exclusive remedy and the

provisions of *Lab. Code § 98.7* do not preclude any other remedies provided by law such as, for example, common law suits for wrongful discharge [*Lab. Code § 98.7(f)*; *see, e.g., Montalvo v. Zamora (1970) 7 Cal. App. 3d 69, 76, 86 Cal. Rptr. 401* (civil action for wrongful discharge); *Lloyd v. County of Los Angeles (2009) 172 Cal. App. 4th 320, 331-332, 90 Cal. Rptr. 3d 872* (*Lab. Code § 98.7* provides additional remedy employee may choose to pursue, and there is no requirement that employee exhaust that remedy before suing for violation of Labor Code provisions)]. For discussion of common-law actions for wrongful termination, see *Ch. 249 Employment Law: Termination and Discipline, § 249.11*.

Appropriate relief under *Lab. Code § 98.7* can include rehiring or reinstatement of the complainant, reimbursement of lost wages with interest, reasonable attorney's fees, and other appropriate compensation or equitable relief. If the respondent fails to comply within a specified time after notification of the Labor Commissioner's determination, the Commissioner must initiate an action in the appropriate court to secure the remedy, and must seek appropriate temporary relief or restraining orders. The complainant may intervene in any action filed by the Labor Commissioner [*Lab. Code § 98.7(c)*].

If the Labor Commissioner finds no violation and dismisses the complaint, he or she must notify the complainant of the right to seek full relief by bringing an action in the appropriate court and, when appropriate under *Lab. Code §§ 6310* or *6311*, filing a claim with the United States Department of Labor against a state program [*Lab. Code § 98.7(d)(1)*]. If a timely complaint against a state program under *Lab. Code §§ 6310* or *6311* is filed with the United States Department of Labor, the Labor Commissioner's dismissal of the division complaint will be stayed until the United States Secretary of Labor makes a determination regarding the alleged violation. Within 15 days of receipt of that determination, the Labor Commissioner must notify the parties whether he or she will reopen the complaint filed with the division or whether he or she will reaffirm the dismissal [*Lab. Code § 98.7(d)(2)*]. In dismissing any complaint, the Labor Commissioner may assess reasonable attorney's fees associated with any investigatory hearing against the complainant if the Commissioner finds that the complaint was frivolous, unreasonable, groundless, and brought in bad faith [*Lab. Code § 98.7(d)*].

For a detailed discussion of administrative hearing procedures under *Lab. Code § 98.7*, see Wilcox, California Employment Law, Ch. 5 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsAdministrative Proceedings & RemediesEnforcementLabor & Employment LawWage & Hour LawsRemediesGeneral OverviewLabor & Employment LawWage & Hour LawsRemediesBackpayLabor & Employment LawWage & Hour LawsRemediesCosts & Attorney FeesLabor & Employment LawWage & Hour LawsWage Payments

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21-250 California Forms of Pleading and Practice--Annotated § 250.36

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§ 250.36 Criminal Sanctions

The Labor Code is replete with criminal sanctions for violations of its requirements. Unless a different punishment is expressly prescribed by the particular statute, every offense declared by the Labor Code to be a misdemeanor is punishable by imprisonment in the county jail for a term not exceeding 6 months, or by a fine not exceeding $1,000, or by both [*Lab. Code § 23*]. Courts have rejected constitutional challenges to the imposition of criminal sanctions for failure to pay wages based on the prohibition against imprisonment for debt [*see Cal. Const. art. I, § 10*] on the ground that the imposition of a criminal penalty requires "willfulness," and that purposeful failure to pay wages owed when there is no claim of inability to pay is a fraud constituting an exception to the prohibition against imprisonment for debt [*see, e.g., In re Trombley (1948) 31 Cal. 2d 801, 805-806, 193 P.2d 734* ; *People v. Bishopp (1976) 56 Cal. App. 3d Supp. 8, 12-13 , 128 Cal. Rptr. 923* ; *People v. Hampton (1965) 236 Cal. App. 2d 795, 804-805, 46 Cal. Rptr. 338* (payment by check with insufficient funds enough to demonstrate willfullness)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewLabor & Employment LawWage & Hour LawsGeneral Overview

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§ 250.37 Bond Requirements

[1] Penalty Bonds

The Labor Commissioner may, in addition to all other penalties, require an employer who has been convicted of a violation of any provision of *Lab. Code § 200 et seq.* or who has not paid a judgment for nonpayment of wages within 10 days after expiration of the appeal period, to post a bond to secure future compliance with payment requirements. The bond, the amount of which is in the Labor Commissioner's discretion, is payable to the Labor Commissioner and is conditioned on payment of any judgment for nonpayment of wages and on the payment, for a definite period not exceeding 6 months, of wages in accordance with the law [*Lab. Code § 240*].

In addition, under certain circumstances set forth in *Lab. Code § 243*, a current or former employee may bring an action for a temporary restraining order prohibiting an employer from doing business in California unless it deposits with the court a bond to secure compliance with the wage payment provisions of *Lab. Code § 240 et seq.* or to satisfy any outstanding judgment for nonpayment of wages. Such an action may be brought by a current employee or his or her legal representative if the employer has, for the second time in 10 years, violated the provisions of *Lab. Code § 240 et seq.* or failed to satisfy a judgment for nonpayment of wages [*see Lab. Code § 243(a)-(c)*]. A former employee who has obtained a judgment in a previous action against an employer for nonpayment of wages may also petition for such a restraining order if the employer fails to satisfy the judgment [*see Lab. Code § 243(e)*].

[2] Wage Security Bonds

Employers in the mining, logging and saw mill, door-to-door selling or telephone solicitation, and theatrical industries must maintain a bond, cash deposit, or other salable surety, sufficient to assure their ability to make payroll obligations [*see Lab. Code §§ 270-272*; *8 Cal. Code Reg. §§ 13300-13302*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersLabor & Employment LawWage & Hour LawsAdministrative Proceedings & RemediesEnforcementLabor & Employment LawWage & Hour LawsRemediesInjunctions

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B. Remedies for Failure to Pay Wages--In General

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[Reserved]

§§ 250.38[Reserved]

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C. Additional Remedies for Failure to Pay Minimum Wages or Overtime Compensation

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§ 250.40 California Law

[1] Available Remedies

An employee who receives less than the required minimum wage or overtime compensation may pursue the *Lab. Code § 98* general administrative procedures for resolving wage claims. For a discussion of *Lab. Code § 98* general administrative procedures for resolving wage claims, see Subpart B, § 250.30 et seq. Alternatively, *Lab. Code §§ 1193.5* and *1195-1197.1* provide additional administrative remedies specifically designed to remedy unlawful failure to pay minimum wages. Civil actions for violation of the minimum wage and overtime compensation provisions of the wage orders also may be brought by the DLSE [*see Lab. Code §§ 1193.6, 1194.5*] or by the employee [*see Lab. Code § 1194*].

[2] Role of Division of Labor Standards Enforcement

[a] Acceptance and Investigation of Complaints

Any person may register a complaint with the DLSE that an employee has been paid less than the minimum wage. The DLSE must investigate all such complaints and "take all proceedings necessary to enforce payment of a wage not less than the minimum wage" [*Lab. Code § 1195*; *see Lab. Code § 1193.5*]. An employee who accepts payment of sums found to be due on demand of the DLSE waives his or her right to sue the employer directly under *Lab. Code § 1194* [*Lab. Code § 1193.5(b)*].

[b] Administrative Rulings

The Labor Commissioner and DLSE are authorized to administer and enforce *Lab. Code § 1171 et seq.* and wage orders

promulgated thereunder [*see Lab. Code §§ 61, 1193.5*]. Consistent with that authority, the Labor Commissioner issues interpretations of the minimum wage and overtime rules, which serve as guidelines for employers. However, DLSE interpretations of wage orders are to be given no weight as precedent because under the Administrative Procedure Act, they fall within the definition of regulations which are void because they have not been promulgated in compliance with the APA. Such interpretations are not entitled to deference even if it represents a longstanding DLSE policy [*Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 568-577, 59 Cal. Rptr. 2d 186, 927 P. 2d 296 , cert. denied, 520 U.S. 1248 (1997)]* . For further discussion of DLSE interpretations, see *§ 250.34[1]*[c.1].

[c] Examination of Employer's Records

Employers must give representatives of the DLSE and members of the Industrial Welfare Commission (IWC) access to places of business to secure information or make any authorized investigation; allow inspection and/or make excerpts from books, reports, contracts, payrolls, documents or papers relating to the employment of employees; maintain certain records; and furnish the IWC with requested reports and information [*Lab. Code § 1174*]. Refusal to comply is a misdemeanor [*Lab. Code § 1175*] and also subjects the employer to a civil penalty [*see Lab. Code § 1174.5*].

[d] Penalties

The Labor Commissioner may issue a penalty citation at the conclusion of a Berman hearing or if, after an investigation, he or she determines that an employee has been paid wages that are less than the minimum allowed [*Lab. Code § 1197.1(b)*; *see Gov. Code § 11505(c)* (manner of sending notice of penalty)]. Generally, penalties are not pyramided, but multiple penalties may be assessed for separate violations applicable to different employees [D.L.S.E. Div. Management Memo. No. 84-1 (Jan. 24, 1984)].

An employer or other person acting either individually or as an officer, agent, or employee of another person, who pays or causes to be paid to any employee a wage less than the minimum wage fixed by an order of the IWC is subject to a civil penalty of $100 for each underpaid employee for each pay period for which the employee is underpaid for each initial, intentional violation. For each subsequent violation for the same specific violation, the penalty is $250 for each underpaid employee for each pay period for which the employee is underpaid, with no requirement that the violation be intentional [*Lab. Code § 1197.1(a)*]. This civil penalty is not applicable to any order of the Commission relating to household occupations and is in addition to any other penalty provided by law [*Lab. Code § 1197.1(h)*, (*i*)].

A penalty citation must be contested within 15 business days after service of the citation, and a hearing on the contested citation must be held within 30 days thereafter. A writ of mandate to the appropriate superior court may be taken from a hearing decision assessing civil penalties [*Lab. Code § 1197.1(c)*].

An employer who does not contest the citation must pay the penalty within 15 business days after issuance of the citation [*Lab. Code § 1197.1(d)*]. In addition, the Labor Commissioner may file a certified copy of the uncontested citation or proposed assessment in the appropriate superior court, and the court clerk must enter judgment for the state against the employer in the amount shown on the citation or the proposed assessment [*Lab. Code § 1197.1(e)*].

For a detailed discussion of penalty procedures under *Lab. Code § 1197.1*, see Wilcox, California Employment Law, Ch. 5 (Matthew Bender).

[e] Injunction

Lab. Code § 1194.5 authorizes the DLSE to seek injunctions to bar further violations in cases of willful violation of any law, regulation, or order governing employee wages, hours of work, or working conditions [*see generally Lab. Code §§ 101-102*; *Civ. Code §§ 3420-3423*; *Code Civ. Proc. §§ 526, 527*].

[f] Civil Action by Agency on Behalf of Employee

The DLSE or the Department of Industrial Relations (DIR) may institute civil actions on behalf of employees who have been paid less than the minimum wage or who did not receive the required overtime compensation. In addition to recovering the unpaid wages or compensation, the DLSE or DIR is entitled to an award of the costs of suit. Unless the action is dismissed without prejudice, an employee's consent to institution of a civil action by the DLSE or DIR waives the employee's right to institute a civil action against the employer pursuant to *Lab. Code § 1194* [*Lab. Code § 1193.6(a)*].

The DLSE or DIR may commence and prosecute the civil action with or without the consent of the employee. The DLSE or DIR may also recover interest on the unpaid wages or compensation. In addition to the wages, compensation, and interest awarded, the court must award costs of suit plus reasonable attorney's fees [*Lab. Code § 1193.6*]. If the action is brought to recover amounts unpaid in violation of the minimum wage fixed by an order of the commission, the court may also award liquidated damages equal to the amount of wages unlawfully unpaid plus interest. Liquidated damages are not recoverable for failure to pay overtime compensation [*Lab. Code § 1194.2(a), (c)*].

The Labor Code provides that no court costs are payable by the DLSE in any civil action to which the DLSE is a party *Lab. Code § 101*]. This provision, however, applies only to filing fees and other fees payable to the court; it does not prevent the court from ordering the DLSE to pay costs to a prevailing party [*Department of Indus. Relations v. Lee (1999) 73 Cal. App. 4th 763, 766-770, 86 Cal. Rptr. 2d 710* (nothing in language or legislative history of *Lab. Code § 101* indicates intent to exempt DLSE from paying costs to prevailing party in litigation); *see Code Civ. Proc. § 1028* (costs may be awarded against state on same basis as against any other party)].

[3] Civil Action by Employee

[a] Right of Action

Any employee who has been paid less than the required minimum wage or overtime compensation may institute a civil action to recover any sums that are due and the costs of suit [*Lab. Code § 1194(a)*]. This right cannot be waived by the employee's agreement to work at a rate less than the minimum wage or without overtime compensation, or by acquiescence in payment of less than the statutorily required amounts [*see Lab. Code § 1194(a)*; *Bartholomew v. Heyman Properties (1955) 132 Cal. App. 2d Supp. 889, 893-895 , 281 P.2d 921]* . The employee is also entitled to recover interest on the unpaid wages or compensation, plus reasonable attorney's fees [*Lab. Code § 1194(a)*; *see Bell v. Farmers Ins. Exch. (2001) 87 Cal. App. 4th 805, 829-833, 105 Cal. Rptr. 2d 59* (*Lab. Code § 1194(a)* authorizes attorneys' fee award following judgment, but does not authorize interim fee award prior to judgment)]. If the action is brought to recover amounts unpaid in violation of the minimum wage fixed by an order of the IWC, the court may also award liquidated damages equal to the amount of wages unlawfully unpaid plus interest. An employee may not recover liquidated damages for failure to pay overtime compensation [*Lab. Code § 1194.2(a), (c)*].

An action to recover the minimum wage or overtime compensation must be brought against the plaintiff's employer, as defined by the applicable Industrial Welfare Commission wage order (*see § 250.14[2]*) [*Martinez v. Combs (May 20, 2010) 49 Cal. 4th 35, -- Cal. Rptr. 3d --, -- P.3d --, 2010 Cal. LEXIS 4660, at *52-*61* ("[A] claim under [*Lab. Code § 1194*] is in reality a claim under the applicable wage order and thus subject to the order's definitional provisions.")]. The wage orders' broad regulatory definition of "employer" encompasses not just the common-law employment relationship; it also includes any person that exercises control over the plaintiff's wages, hours, or working conditions or that suffers or permits the plaintiff to work [*Martinez v. Combs (May 20, 2010) 49 Cal. 4th 35, -- Cal. Rptr. 3d --, -- P.3d --, 2010 Cal. LEXIS 4660, at *56-*57* (applying *8 Cal. Code Reg. § 11140(2)(C),(F)* (Cal. Wage order No. 14-2001))]. Also, the action must be brought directly against the employer; thus, it may not be maintained against shareholders, officers, directors, or other agents of a corporate employer. Although the common law makes "control" a key factor in establishing an employer-employee relationship, an individual corporate agent who exercises control over the wages, hours, or working conditions of a corporate employee does not thereby become an "employer" who is personally liable

for unpaid wages. It is settled that corporate agents and employees acting for and on behalf of a corporation cannot be held liable for a breach of the corporation's contractual or statutory duty to pay wages [*Reynolds v. Bement (2005) 36 Cal. 4th 1075, 1085-1089, 32 Cal. Rptr. 3d 483* ; *Jones v. Gregory (2006) 137 Cal. App. 4th 798, 803-805, 40 Cal. Rptr. 3d 581*].

If the employee in such an action proves that he or she performed work for which he or she did not receive the proper minimum wage or overtime compensation and produces sufficient evidence to permit a reasonable inference as to the amount and extent of that work, the burden shifts to the employer to come forward with evidence of the precise amount of work performed or to negate the inference drawn from the employee's evidence. If the employer fails to produce such evidence because it has failed to keep proper records, the court may award damages based on the employee's evidence, even if the damages only approximate the actual hours worked [*see Hernandez v. Mendoza (1988) 199 Cal. App. 3d 721, 727, 245 Cal. Rptr. 36* (citing *Anderson v. Mt. Clemens Pottery Co. (1945) 328 U.S. 680, 687-688, 66 S. Ct. 1187, 90 L. Ed. 1515*); *see also Bell v. Farmers Ins. Exch. (2004) 115 Cal. App. 4th 715, 746-751, 9 Cal. Rptr. 3d 544* (reliable statistical inference may be basis for determining class damages for unpaid overtime compensation)].

An action for recovery of unpaid overtime compensation must be brought within the three-year limitation period provided by *Code Civ. Proc. § 338(a)* for actions based on a liability created by statute, other than a penalty or forfeiture. A separate cause of action for overtime compensation accrues on each regular pay day immediately following the work period during which the services were performed and for which overtime compensation is claimed [*see Aubry v. Goldhor (1988) 201 Cal. App. 3d 399, 406, 247 Cal. Rptr. 205]* .

For a form of complaint for use in cases in which the employer has failed to pay minimum wages and/or overtime compensation, see *§ 250.62*.

[b] Defenses

In addition to admitting or denying the allegations of the complaint (for example, denying that an employment relationship existed or that the wages paid to the plaintiff violated the applicable minimum wage or overtime requirements), the employer's answer should set forth any of the following applicable affirmative defenses [*see Code Civ. Proc. § 431.30(b)*]:

- The employer and/or employee is exempt from the minimum wage and/or overtime compensation requirements of the wage orders [for a form of affirmative defense, *see § 250.71*].

- The hours claimed are not "hours worked" within the meaning of the wage orders, so that minimum wage and overtime compensation need not be paid for those hours [*see, e.g., 8 Cal. Code Reg. §§ 11020-11150*, PP 4-6 (Cal. Wage Order Nos. 2-2001-15-2001); *Aguilar v. Association for Retarded Citizens (1991) 234 Cal. App. 3d 21, 24-25, 285 Cal. Rptr. 515]* .

- The employee was properly paid a subminimum wage [*see, e.g., 8 Cal. Code Reg. §§ 11020-11150*, PP 4-6 (Cal. Wage Order Nos. 1-2001-15-2001); for a form of affirmative defense, *see § 250.71*].

- Liquidated damages should be denied or reduced because the employer's act or omission was in good faith and the employer had reasonable grounds for believing that the act or omission did not violate any Labor Code provision relating to minimum wage or any order of the IWC [*see Lab. Code § 1194.2(b)*; for a form of affirmative defense, *see § 250.75*].

For a detailed discussion of possible affirmative defenses, see Wilcox, California Employment Law, Chs. 2 and 3 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewLabor & Employment LawWage & Hour LawsAdministrative Proceedings & RemediesEnforcementLabor & Employment LawWage & Hour LawsCoverage & DefinitionsEmployersLabor & Employment LawWage & Hour LawsRemediesLiquidated DamagesLabor & Employment LawWage & Hour LawsRemediesPrivate Suits

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 250 EMPLOYMENT LAW: WAGE AND HOUR DISPUTES
PART II. LEGAL BACKGROUND
C. Additional Remedies for Failure to Pay Minimum Wages or Overtime Compensation

21-250 California Forms of Pleading and Practice--Annotated § 250.41

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§ 250.41 Federal Law

[1] Remedies Available Under Fair Labor Standards Act

[a] In General

The Fair Labor Standards Act (FLSA) provides a remedial scheme for failure to pay federally required minimum wages and overtime compensation. The following six remedies are available for FLSA violations [*see 29 U.S.C. §§ 215-217*; *Lerwill v. Inflight Motion Pictures, Inc. (N.D. Cal. 1972) 343 F. Supp. 1027, 1029]* :

- Voluntary payment of unpaid minimum wages and overtime payments under the aegis of the Secretary of Labor through the Wage and Hour Division.

- A civil action brought by the Secretary of Labor to recover unpaid minimum wages or overtime compensation.

- A federal court action for injunctive relief brought by the Secretary of Labor for violations of minimum wage, overtime, discrimination, and other provisions of the FLSA.

- A civil action brought by an employee or group of employees for violation of the minimum wage and overtime rules or alleged discrimination or retaliation.

- Civil penalties for repeated or willful violations of the minimum wage, overtime, and child labor provisions of the FLSA.

- Criminal proceedings for willful violations of the FLSA.

Although the FLSA purports to authorize private actions against states in their own courts without regard to their consent [*see 29 U.S.C. §§ 203(x), 216(b)*], the Supreme Court has held that the Constitution bars an individual suit against a state to enforce a federal statutory right under the FLSA, when brought in a state court over the state's objections [*Alden v. Maine (1999) 527 U.S. 706, 745, 753-760, 119 S. Ct. 2240, 144 L. Ed. 2d 636* (state employees could not sue state of Maine for overtime wages due under the FLSA, absent state's waiver of its sovereign immunity)].

For further discussion of the remedies available under the FLSA and an example of a complaint for wages, liquidated damages, attorney's fees, and costs that may be filed in federal district court, see Wilcox, California Employment Law, Ch. 5, Pt. B, Subpt. 2 (Matthew Bender).

[b] Jurisdiction

Both the federal and state courts of general jurisdiction can entertain actions by employees to recover unpaid minimum wages and/or overtime compensation under the FLSA [*see 29 U.S.C. § 216(b)*]. The federal courts may also exercise pendent jurisdiction over related state claims [*see Marchak v. Observer Publications, Inc. (D.R.I. 1980) 493 F. Supp. 278, 282]* . There is a dispute among the federal appellate circuits with regard to the right to remove cases originally brought in the state courts; however, it appears that most cases favor removal [*see, e.g., Ramos v. H.E. Butt Grocery Company (S.D. Tex. 1986) 632 F. Supp. 342, 343* ; *Anthony v. West Coast Drug Company (W.D. Wash. 1971) 331 F. Supp. 1279, 1280* ; *Aaker v. Kaiser Co. (D. Or. 1947) 74 F. Supp. 55, 56]* .

[c] Amounts Recoverable

In an action under *29 U.S.C. § 216(b)*, the employer is liable to the plaintiff-employees for any unpaid minimum wages and/or overtime compensation found to be due under the terms of the FLSA. In addition, the successful plaintiff is entitled to an award of liquidated damages equal to the amount of minimum wages or overtime compensation found to be due, unless the employer can show that the act or omission was in good faith and that the employer had reasonable grounds for believing that there was no violation of the FLSA [*29 U.S.C. §§ 216(b), 260*; *see, e.g.,* SEIU, Local 102 v. *County of San Diego (9th Cir. 1995) 60 F.3d 1346, 1355-1356* ; *Craig v. Far West Engineering Company (9th Cir. 1959) 265 F.2d 251, 261 , cert. denied, 361 U.S. 816* ; *Kelly v. Ballard (S.D. Cal. 1969) 298 F. Supp. 1301, 1309]* . It appears that punitive damages are also recoverable under the FLSA [*see Travis v. Gary Community Mental Health Ctr., 921 F.2d 108, 112 (7th Cir. 1990) , cert. denied, 502 U.S. 812 (1991)* ; *see also Lambert v. Ackerley (1999) 180 F.3d 997, 1011* (en banc) (not reaching issue because it had been waived by appellants, but stating that Seventh Circuit's reasoning in *Travis* was persuasive)].

Interest on the judgment may also be awarded. The Ninth Circuit awards prejudgment interest on the grounds that compensation should be provided for the loss of the use of the money that was owed [*see, e.g., Ford v. Alfaro (9th Cir. 1986) 785 F.2d 835, 842]* . Awards of postjudgment interest are made as a matter of course [*see 28 U.S.C. § 1961*].

Finally, plaintiff-employees are entitled to recover attorney's fees and costs if successful [*29 U.S.C. § 216(b)*; *see Kerr v. Screen Extras Guild, Inc. (9th Cir. 1975) 526 F.2d 67, 69-70 , cert. denied sub nom. Perkins v. Screen Extras Guild, Inc., 425 U.S. 951 (1976)* (factors considered in making award); *see also Haworth v. State of Nev. (9th Cir. 1995) 56 F.3d 1048, 1051-1052* (when Rule 68 offer of judgment is rejected in FLSA case, and the judgment is for less than the offer, this must be taken into account in determining what attorney's fee is reasonable)].

[d] Defenses

Potential defenses to an action under the FLSA to recover unpaid minimum wages and/or overtime compensation, plus liquidated damages, include the following:

- The employer or employee is statutorily exempt from the minimum wage and/or overtime compensation requirements of the FLSA [*see 29 U.S.C. §§ 207(b), (f), (g),* (*i*)-(k), (m), (o), (p), 213].

- The hours for which the employee claims compensation are not considered working time under the FLSA and Portal-to-Portal Act [*see 29 U.S.C. §§ 206(a), 207(a), (n), 254*].

- The action is barred by the statute of limitations (generally two years from the accrual of the cause of action; three years in the case of willful violations) [*see 29 U.S.C. § 255(a)*; *see also McLaughlin v. Richland Shoe Co. (1988) 486 U.S. 128, 132-133, 108 S. Ct. 1677, 100 L. Ed. 2d 115* (violation is "willful" for purposes of FLSA if employer knew its conduct was prohibited by FLSA or showed reckless disregard as to whether its conduct was prohibited)].

- The plaintiff-employee accepted payment of back wages under the supervision of the Secretary of Labor as payment in full [*see 29 U.S.C. § 216(c)*; *see Dent v. Cox Commc'ns Las Vegas, Inc. (9th Cir. 2007) 502 F.3d 1141, 1145* (employee's acceptance of back wages for specified period under *29 U.S.C. § 216(c)* does not waive claims for back wages owed for periods not specified in settlement)].

- The employer is a state that has not consented to be sued in its own courts [*Alden v. Maine (1999) 527 U.S. 706, 745, 753-760, 119 S. Ct. 2240, 144 L. Ed. 2d 636* (state employees could not sue state of Maine for overtime wages due under the FLSA, absent state's waiver of its sovereign immunity)].

In addition, the Portal-to-Portal Act provides two separate defenses based on the employer's good faith belief in the legality of its actions [*see 29 U.S.C. §§ 259, 260*]. First, an employer is not subject to *any* liability or punishment for failure to pay minimum wages or overtime compensation under the FLSA if the employer acted in good-faith conformity with, and reliance on, any written administrative regulation, order, ruling, approval, or interpretation of the Administrator of the Wage and Hour Division or any administrative practice or enforcement policy of that agency with respect to the class of employers to which it belongs [*29 U.S.C. § 259(a)*; *see 29 C.F.R. §§ 790.13-790.19*]. An objective test is used to determine whether reliance on rulings was in good faith; that is, the test is whether the employer acted as a reasonably prudent person in taking the particular action [*see 29 C.F.R. § 790.15(a)*]. An affirmative writing by the agency must exist. Thus, for example, the failure of the agency to respond to an employer's request for a ruling is not considered an interpretation or ruling of the agency [*see 29 U.S.C. § 259(a)*; *29 C.F.R. § 790.17(f)*]. Also, a position taken by the agency in litigation does not constitute an administrative ruling or interpretation for this purpose [*Alvarez v. IBP, Inc. (9th Cir. 2003) 339 F.3d 894, 907-908 , aff'd on other grounds, 546 U.S. 21, 126 S. Ct. 514, 163 L. Ed. 2d 288 (2005)]* . Furthermore, the administrative regulation, order, ruling, approval, or interpretation must be in effect at the time of the reliance [*see 29 C.F.R. § 790.17(h)*].

Second, the recovery of *liquidated damages* under the FLSA is barred if the employer proves that the act or omission complained of was in good faith *and* that the employer had reasonable grounds for believing that its act or omission was not a violation of the FLSA. This defense, if established, permits the court to exercise its discretion as to whether to award liquidated damages and, if so, whether to award an amount less than the amount to which the plaintiff would otherwise be entitled under *29 U.S.C. § 216* [*29 U.S.C. § 260*].

Generally, an employee is entitled to compensation only for the period that starts when an employee commences the principal activities of the job and ends when the employee ceases performance of the last principal activity of the job [*29 U.S.C. § 254(a)*; *29 C.F.R. § 790.6(a)*]. Thus, time spent traveling to the place where the first principal activity is performed is not part of the compensable workday, but time spent walking to a production area after performing the first principal activity and before the end of the last principal activity is part of the compensable workday [*IBP, Inc. v. Alvarez (2005) 546 U.S. 21, 126 S. Ct. 514, 523-525, 163 L. Ed. 2d 288, 299-302* ("principal activities" include activities that are integral and indispensable to employee's work, such as donning and doffing required protective gear)].

[2] Protection of Employee for Filing Claim or Testifying Against Employer

The FLSA makes it unlawful to discharge or discriminate against any employee because that employee has (1) filed any complaint or instituted or caused to be instituted any proceeding under or related to the FLSA, or (2) has testified or is about to testify in any such proceeding [*29 U.S.C. § 215(a)(3); see, e.g., Ford v. Alfaro (9th Cir. 1986) 785 F.2d 835, 841-842]* . An employer who unlawfully discriminates against a claimant or witness in a proceeding under the FLSA is liable for legal or equitable relief as appropriate under the circumstances, including employment, reinstatement, promotion, back pay, and an additional equal amount as liquidated damages [*29 U.S.C. § 216(b)*; *Mitchell v. De Mario Jewelry (1960) 361 U.S. 288, 295-296, 80 S. Ct. 332, 4 L. Ed. 2d 323]* .

The Ninth Circuit has held that this anti-retaliation provision also protects employees who complain about FLSA violations to their employers, even in the absence of formal FLSA proceedings. The court held that such a broad construction of the anti-retaliation provision is necessary to ensure that employees are not compelled to risk their jobs in order to assert their rights under the FLSA [*Lambert v. Ackerley (1999) 180 F.3d 997, 1002-1004* (en banc) (noting that First, Third, Sixth, Eighth, Tenth, and Eleventh Circuits have issued similar holdings, with only Second Circuit holding to contrary)]. However, the protection of the anti-retaliation provision will not attach to mere amorphous expressions of discontent related to wages and hours. The Ninth Circuit stated that for the statutory protection to apply, an employee must have communicated the substance of his or her allegations to the employer (for example, that the employer failed to pay adequate overtime or failed to pay the minimum wage). The employee may communicate such allegations orally or in writing, and need not refer to the FLSA by name [*Lambert v. Ackerley (1999) 180 F.3d 997, 1007-1008* (en banc) (minimum specificity with which employee must assert FLSA violation to find protection under anti-retaliation provision must be decided on case-by-case basis)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsAdministrative Proceedings & RemediesEnforcementLabor & Employment LawWage & Hour LawsCoverage & DefinitionsMinimum WageLabor & Employment LawWage & Hour LawsRemediesClass ActionsLabor & Employment LawWage & Hour LawsRemediesLiquidated DamagesLabor & Employment LawWage & Hour LawsRemediesPrivate Suits

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PART II. LEGAL BACKGROUND
C. Additional Remedies for Failure to Pay Minimum Wages or Overtime Compensation

21-250 California Forms of Pleading and Practice--Annotated §§ 250.42-250.49

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[Reserved]

§§ 250.42[Reserved]

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21-250 California Forms of Pleading and Practice--Annotated § 250.50

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§ 250.50 Related Matthew Bender Publications

For an overview of the scope and applicability of state and federal wage and hour laws, see Wilcox, California Employment Law, Ch. 1 (Matthew Bender)

For discussion of minimum wage requirements and exemptions, see Wilcox, California Employment Law, Ch. 2 (Matthew Bender)

For discussion of overtime compensation requirements and exemptions, see Wilcox, California Employment Law, Ch. 3 (Matthew Bender)

For discussion of rules governing payment and assignment of wages, and permissible deductions from wage payments, see Wilcox, California Employment Law, Ch. 4 (Matthew Bender)

For discussion of administrative and judicial remedies for failure to pay wages and other violations of the wage and hour laws, see Wilcox, California Employment Law, Ch. 5 (Matthew Bender)

For discussion of state and federal laws governing wages, hours, and working conditions of minors, see Wilcox, California Employment Law, Ch. 6 (Matthew Bender)

For discussion of employers' posting and recordkeeping requirements under state and federal wage and hour laws, see Wilcox, California Employment Law, Ch. 7 (Matthew Bender)

For discussion of laws prohibiting discrimination in employment, including matters relating to compensation, see

Wilcox, California Employment Law, Chs. 40-43 (Matthew Bender)

Kheel, Labor Law, §§ 48.01-48.09, §§ 49.01-49.04 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEqual PayGeneral OverviewLabor & Employment LawWage & Hour LawsGeneral OverviewLabor & Employment LawWage & Hour LawsCoverage & DefinitionsMinimum WageLabor & Employment LawWage & Hour LawsCoverage & DefinitionsOvertime & Work PeriodLabor & Employment LawWage & Hour LawsDefenses & ExemptionsGeneral Overview

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§ 250.51 Federal Statutes

[1] Fair Labor Standards Act

Definitions. *29 U.S.C. § 203*

Administration of FLSA. *29 U.S.C. § 204*

Minimum wage provisions. *29 U.S.C. § 206*

Overtime and maximum hour requirements. *29 U.S.C. § 207*

Data collection and powers of investigation. *29 U.S.C. § 211*

Child labor provisions. *29 U.S.C. § 212*

Exemptions. *29 U.S.C. § 213*

Special certificate employment for learners, apprentices, messengers, students, and handicapped workers, and employment by schools. *29 U.S.C. § 214*

Enforcement and remedies. *29 U.S.C. §§ 215-217*

[2] Federal Contractors

Copeland ("Anti-Kickback") Act. *18 U.S.C. § 874*

Miller Act. *40 U.S.C. §§ 270a-270d-1*

Davis-Bacon Act. *40 U.S.C. §§ 276a-276a-7*

Wages and hours under public works contracts. *40 U.S.C. §§ 3141 et seq.* , 3701 *et seq.*

Walsh-Healey Act. *41 U.S.C. §§ 35-45*

Service Contract Act. *41 U.S.C. §§ 351-358*

[3] Interest

Interest on money judgments. *28 U.S.C. § 1961*

[4] Portal-To-Portal Act

Statute of limitations and determination of commencement of future actions under FLSA. *29 U.S.C. §§ 255, 256*

Reliance on administrative rulings as defense to actions under FLSA. *29 U.S.C. §§ 258, 259*

Liquidated damages. *29 U.S.C. § 260*

Definitions. *29 U.S.C. § 262*

[5] Preemption of State Laws

Preemption of state law claims for failure to pay wages provided under collective bargaining agreements. *29 U.S.C. § 185*

FLSA does not preempt state laws or municipal ordinances providing for higher minimum wages, lower maximum workweek, and/or higher standard applicable to child labor. *29 U.S.C. § 219*

Preemption of state laws under ERISA. *29 U.S.C. § 1144*

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsCoverage & DefinitionsMinimum WageLabor & Employment LawWage & Hour LawsCoverage & DefinitionsOvertime & Work PeriodLabor & Employment LawWage & Hour LawsDefenses & ExemptionsGeneral OverviewLabor & Employment LawWage & Hour LawsStatutory ApplicationDavis-Bacon ActLabor & Employment LawWage & Hour LawsStatutory ApplicationPortal-to-Portal Act

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§ 250.52 State Statutes

[1] Administrative Regulation of Employment

Powers and duties of DIR and its subsidiary agencies. *Lab. Code §§ 50-106*

Requirement that Industrial Welfare Commission adopt wage orders consistent with Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999. *Lab Code § 517(a)*

Procedures for promulgation, review, and interpretation of wage orders. *Lab. Code §§ 1173-1182.1, 1182.7, 1183, 1184, 1187-1190, 1198.4, 1204*

Exemption of certain industries and employees from various provisions of wage orders. *Lab. Code §§ 1182.2-1182.4*

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Violation of provisions relating to time and manner of payment of wages and pay day notices. *Lab. Code § 215*

Willful failure to pay wages by one with ability to do so; false denial of amount or validity of wage claim. *Lab. Code § 216*

Violation of prohibition against improper withholding or reduction of wages. *Lab. Code § 225*

Violation of requirements for itemized wage and deduction statements. *Lab. Code § 226.6*

Violation of wage security requirements for certain occupations. *Lab. Code §§ 270-272*

Violation of provisions relating to employee tips. *Lab. Code § 354*

Punishment of violations as misdemeanor; disposition of fines. *Lab. Code § 408-410, 1175*

Violation of prohibition against coerced patronage of employer by employee. *Lab. Code § 451*

Violation of statutory provisions limiting maximum hours of work. *Lab. Code §§ 553, 605, 606, 801, 853*

Violation of state minimum wage laws. *Lab. Code § 1197*

Violation of minimum wage, maximum hour, and other provisions of wage orders, and of statutory equal pay requirements. *Lab. Code §§ 1199, 1199.5*

Violation of restrictions on employment of minors. *Lab. Code §§ 1303, 1308, 1308.1, 1308.2, 1308.3, 1308.7, 1309, 1309.5, 1391, 1392*

Violation of various requirements relating to farm labor contractors. *Lab. Code § 1697(a)*

Violation of provisions requiring payment of prevailing wages to certain laborers on public works projects. *Lab. Code § 1777*

[3] Discrimination

Prohibition against discrimination against employee or job applicant for filing complaint or claim, instituting proceeding, testifying in action relating to his or her rights, or engaging in protected political activity or any protected conduct within the jurisdiction of the Division of Labor Standards Enforcement. *Lab. Code § 98.6*

Procedures governing complaint by employee subjected to discrimination. *Lab. Code § 98.7*

California Equal Pay Act. *Lab. Code § 1197.5*

[4] Employee Gratuities

Definitions. *Lab. Code § 350*

Collection and disposition of gratuities. *Lab. Code § 351*

Recordkeeping requirements and enforcement. *Lab. Code §§ 353-355*

[5] Employee Purchases

Prohibitions against coercing employees to patronize employers. *Lab. Code §§ 450-452*

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Action by current or former employee for temporary restraining order prohibiting employer from doing business in California until employer posts bond securing compliance with wage payment laws or satisfaction of judgments for nonpayment of wages. *Lab. Code § 243*

Authority of claimants, district and prosecuting attorneys, and Division of Labor Law Enforcement to institute enforcement actions. *Lab. Code §§ 217-218*

Maintenance of action despite private agreement to arbitrate. *Lab. Code § 229*

Deposit of bond on nonpayment of wages. *Lab. Code § 240*

Administrative and judicial remedies for violation of wage and hour laws. *Lab. Code §§ 1193.5-1197.1, 1199-1200*

[7] Hours and Conditions of Employment

Restrictions on working hours of selected employees. *Lab. Code §§ 510-856*

Wages, hours, and working conditions. *Lab. Code § 1171 et seq.*

Minor employees. *Lab. Code §§ 1285-1311, 1390-1398*

Wage and hour provisions applicable to employees on public works. *Lab. Code §§ 1720-1815*

[8] Payment of Wages

Definitions. *Lab. Code § 200*

Minimum wage. *Lab. Code § 1182.12*

Time and place for payment on termination of employment. *Lab. Code §§ 201, 201.5, 201.7, 202, 204b, 208*

Right of motion picture employees to wages on layoff or discharge. *Lab. Code § 201.5*

Right of employees engaged in oil drilling to wages on layoff or discharge. *Lab. Code § 201.7*

Willful failure to pay discharged or quitting employee. *Lab. Code § 203*

Penalty wages for willful failure to pay wages due. *Lab. Code §§ 203, 203.1, 203.5*

Payment of wages to discharged employee working for several employers at same time. *Lab. Code § 204a*

Payment of wages conceded by employer to be due, even if dispute exists as to balance. *Lab. Code § 206*

Time for payment of wages during course of employment. *Lab. Code §§ 201.3, 204, 204a, 204c, 204.1, 204.2, 205, 205.5*

Compensating time off in lieu of overtime pay permitted. *Lab. Code § 204.3*

Penalty for willful failure by bonding company or surety on wage security bond to pay verified wage claim. *Lab. Code § 203.5(a)*

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Deductions from wages for tardiness. *Lab. Code § 2928*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewLabor & Employment LawEqual PayGeneral OverviewLabor & Employment LawWage & Hour LawsAdministrative Proceedings & RemediesEnforcementLabor & Employment LawWage & Hour LawsStatutory ApplicationDavis-Bacon ActLabor & Employment LawWage & Hour LawsWage Payments

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Chapter 250 EMPLOYMENT LAW: WAGE AND HOUR DISPUTES
PART III. RESEARCH GUIDE

21-250 California Forms of Pleading and Practice--Annotated § 250.53

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§ 250.53 Administrative Regulations

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Computing overtime pay. 29 C.F.R. Part 548

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Hearings on actions to recover wages, penalties, and other demands for compensation and on claims from holders of dishonored payroll checks or drafts. *8 Cal. Code Reg. §§ 13501-13520*

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsAdministrative Proceedings & RemediesInvestigative AuthorityLabor & Employment LawWage & Hour LawsChild LaborLabor & Employment LawWage & Hour LawsCoverage & DefinitionsOvertime & Work PeriodLabor & Employment LawWage & Hour LawsRecordkeeping RequirementsLabor & Employment LawWage & Hour LawsWage Payments

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§ 250.54 Decisions

[1] Action for Recovery of Wages

[a] In General

For purposes of action to recover minimum wage or overtime compensation under *Lab. Code § 1194*, "employer" is defined by applicable Industrial Welfare Commission wage order. *Martinez v. Combs (May 20, 2010) 49 Cal. 4th 35, -- Cal. Rptr. 3d --, -- P.3d --, 2010 Cal. LEXIS 4660, at *52-*61*

Action by employee to recover statutory minimum wage or overtime compensation under *Lab. Code § 1194* must be brought directly against employer and may not be maintained against shareholders, officers, directors, or other agents of corporate employer. *Reynolds v. Bement (2005) 36 Cal. 4th 1075, 1085-1089, 32 Cal. Rptr. 3d 483*

Cause of action for recovery of unpaid wages accrues from each payday or date when required compensation was not paid. *Calvao v. Superior Court (1988) 201 Cal. App. 3d 921, 923, 247 Cal. Rptr. 470*

Employee has burden of proving performance of work for which he or she was not compensated; burden is carried by employee's proof that he or she in fact performed work for which he or she was improperly compensated and producing sufficient evidence to show amount and extent of that work as matter of just and reasonable inference; burden then shifting to employer to come forward with evidence of precise amount of work performed or with evidence to negative reasonableness of inference to be drawn from employee's evidence; if employer fails to produce such evidence, court is then permitted to award damages to employee, even though result is only approximate; trier of fact may draw whatever reasonable inferences it can from employee's evidence when employer cannot provide accurate information. *Hernandez v. Mendoza (1988) 199 Cal. App. 3d 721, 727, 245 Cal. Rptr. 36*

[b] Affirmative Defenses

Fact that cause of action is preempted by ERISA constitutes affirmative defense to action for failure to pay wages or benefits as required by Labor Code. *California Chamber of Commerce v. Simpson (C.D. Cal. 1985) 601 F. Supp. 104, 109*

Party not subject to provisions of Labor Code by virtue of his or her status as independent contractor rather than employee has cause of action for breach of contract against defendant. *Zaremba v. Miller (1980) 113 Cal. App. 3d Supp. 1, 5-6 , 169 Cal. Rptr. 688*

Fact that party is independent contractor rather than employee subject to provisions of Labor Code constitutes affirmative defense in action for failure to pay wages or benefits. *Fitch v. Pacific Fid. Life Ins. Co. (1975) 54 Cal. App. 3d 140, 145-146, 126 Cal. Rptr. 445*

Fact that employer or employee is exempt from Labor Code constitutes affirmative defense in action for violation of Labor Code provisions relating to payment of wages. *Division of Labor Law Enforcement v. El Camino Hosp. Dist. (1970) 8 Cal. App. 3d Supp. 30, 32, 33, 36 , 87 Cal. Rptr. 476*

[c] Pleading

Employee's rate of pay must be alleged to support claim for penalty wages. *Oppenheimer v. Moebius (1957) 151 Cal. App. 2d 818, 820, 312 P.2d 314*

Issues in statutory action under *Lab. Code § 201* for damages because of nonpayment of wages are (1) whether employer failed to pay wages accrued when employer-employee relationship terminated, and (2) what is amount of accrued wages. *Oppenheimer v. Robinson (1957) 150 Cal. App. 2d 420, 422, 309 P.2d 887*

[d] Statute of Limitations

Three-year limitations period of *Code Civ. Proc. 338(a)* for actions based on liability created by statute, rather than one-year period of *Code Civ. Proc. § 340(a)* for actions to collect statutory penalties or forfeitures, applies to employee's claim under *Lab. Code § 226.7(b)* for additional pay based on employer's failure to provide requisite meal periods or rest periods. *Murphy v. Kenneth Cole Prods., Inc. (2007) 40 Cal. 4th 1094, 1103*

Code Civ. Proc. § 354.6(c), which provides special limitations period for actions to recover compensation for labor performed as a Second World War slave labor victim or forced labor victim, does not apply to claims against Japan or its nationals because it conflicts with the federal policy (embodied in the 1951 Treaty of Peace with Japan) that such claims are to be resolved diplomatically. *Taiheiyo Cement Corp. v. Superior Court (2004) 117 Cal. App. 4th 380, 390-398, 12 Cal. Rptr. 3d 32*

Code Civ. Proc. § 338(a) three-year limitations period for actions based on liability created by statute other than penalty or forfeiture applies to action to recover unpaid overtime compensation, rather than two-year limitations period applicable to actions based on oral contracts. *Aubry v. Goldhor (1988) 201 Cal. App. 3d 399, 404, 247 Cal. Rptr. 205*

[e] Costs

Lab. Code § 101, which provides that no court costs are payable by DLSE in any civil action to which DLSE is party,

applies only to filing fees and other fees payable to court; it does not prevent court from ordering DLSE to pay costs to prevailing party. *Department of Indus. Relations v. Lee (1999) 73 Cal. App. 4th 763, 766-770, 86 Cal. Rptr. 2d 710*

[2] Appeal of Labor Commissioner's Decision

At de novo hearing on appeal from Labor Commissioner's decision, court has discretion to allow employee to raise new wage claims, after weighing considerations such as whether new claims are sufficiently related to claims raised before Labor Commissioner, whether interests of judicial economy will be served, and whether employer will be prejudiced. *Murphy v. Kenneth Cole Prods., Inc. (2007) 40 Cal. 4th 1094, 1118*

Wage claimant's right to appeal and obtain de novo trial applies whenever Labor Commissioner has conducted Berman hearing, even if commissioner's award consists of dismissal of wage claim for lack of jurisdiction, based on finding that claimant is not employee. *Post v. Palo/Haklar & Associates (2000) 23 Cal. 4th 942, 948-951, 98 Cal. Rptr. 2d 671, 4 P.3d 928*

Statutory requirement that appeal from Labor Commissioner's decision be filed within 10 days is mandatory and jurisdictional; therefore, court cannot consider late appeal even if lateness results from mistake, inadvertence, or other excuse. *Pressler v. Donald L. Bren Co. (1982) 32 Cal. 3d 831, 837, 187 Cal. Rptr. 449, 654 P.2d 219* ; *REO Broadcasting Consultants v. Martin (1999) 69 Cal. App. 4th 489, 496, 81 Cal. Rptr. 2d 639*

Timely filing of notice of appeal from Labor Commissioner's decision forestalls finality of that decision, terminates Labor Commissioner's jurisdiction, and vests jurisdiction to conduct trial de novo in appropriate court. *Pressler v. Donald L. Bren Co. (1982) 32 Cal. 3d 831, 836, 187 Cal. Rptr. 449, 654 P.2d 219* ; *Rogers v. Municipal Court (1988) 197 Cal. App. 3d 1314, 1318, 243 Cal. Rptr. 530*

Provision of *Code Civ. Proc. § 1013* that exempts "notices of appeal" from extensions of time limits for responding to papers served by mail is inapplicable to notices seeking de novo judicial review of Labor Commissioner decisions. *Clavell v. North Coast Business Park (1991) 232 Cal. App. 3d 328, 332, 283 Cal. Rptr. 419*

Lab. Code § 98.2 provides for de novo trial in superior court on appeal from Labor Commissioner's order or decision; superior court proceedings constitutes new trial in fullest sense and parties are permitted to introduce any relevant evidence not presented at administrative hearing; review as accorded to facts presented to superior court and not to commissioner's decision. *Hernandez v. Mendoza (1988) 199 Cal. App. 3d 721, 725, 245 Cal. Rptr. 36*

Notice of appeal from Labor Commissioner's decision that was filed by nonattorney president of corporation was valid; although notice constitutes initial trial "pleading," such notice does not having any other similarity to civil complaint so as to require that it be signed by attorney on corporation's behalf. *Rogers v. Municipal Court (1988) 197 Cal. App. 3d 1314, 1318-1319, 243 Cal. Rptr. 530*

Defendant who did not participate in proceedings before Labor Commissioner was permitted to prosecute appeal to appropriate court within 10 days after service of notice of order, decision, or award. *Jones v. Basich (1986) 176 Cal. App. 3d 513, 518-519, 222 Cal. Rptr. 26*

Employer who sought review of adverse order by Labor Commissioner was properly required to pay employee's attorney's fees and costs pursuant to *Lab. Code § 98.2(b)* [*now see Lab. Code § 98.2(c)*], even though trial court reduced commissioner's award to employee. *Triad Data Services, Inc. v. Jackson (1984) 153 Cal. App. 3d Supp 1, 13-15 , 200 Cal. Rptr. 418*

On superior court's review of order, decision, or award of Labor Commissioner pursuant to *Lab. Code § 98.2*, findings

of Labor Commissioner are entitled to no weight whatsoever and proceedings as trial anew in fullest sense; review as accorded not to decision of Labor Commissioner, but to underlying facts on which merits of dispute depend. *Hill v. Kaiser Aetna (1982) 130 Cal. App. 3d 188, 190 n. 1, 181 Cal. Rptr. 564*

Appeal as new trial in which findings of Labor Commissioner are entitled to no weight. *Sales Dimensions v. Superior Court (1979) 90 Cal. App. 3d 757, 762-763, 153 Cal. Rptr. 690*

[3] Assignments of Wages

Meaning of terms "assignment" and "order" in *Lab. Code § 300*. *Lande v. Jurisich (1943) 59 Cal. App. 2d 613, 619, 139 P.2d 657*

Assignee of valid assignment has same enforcement rights and is subject to same defenses as employee assigning wages. *Teater v. Good Hope Dev. Corp. (1942) 55 Cal. App. 2d 459, 462, 130 P.2d 812*

"Wages" and "salary" as used in *Lab. Code § 300* mean compensation for services rendered, whether limited to fixed sum or payable in "fees." *Reynolds v. Reynolds (1936) 14 Cal. App. 2d 481, 484, 58 P.2d 660* (construing former *Civ. Code § 955, now see Lab. Code § 300*)

Elements of valid assignment mentioned in *Lab. Code § 300* must be alleged. *Berg v. Standard Light Co. of Cal. (1928) 89 Cal. App 542, 544, 265 P. 369* (decided under former *Civ. Code § 955, now see Lab. Code § 300*)

Claim for penalties by assignee are limited to portion of penalty that accrued prior to assignment. *Martin v. Going (1922) 57 Cal. App. 631, 636, 207 P. 935*

Public official was not permitted, by policy, to assign wages or salary until time entitled to collect or until wages or salary completely earned. *Trow v. Moody (1915) 27 Cal. App. 403, 405-406, 150 P. 77*

Assignment of wages to be earned in future, if there is no existing contract of employment, is invalid because assignor has no present interest. *Cox v. Hughes (1909) 10 Cal. App. 553, 557-558, 102 P. 956*

[4] Criminal Sanctions

Court recognized purposeful failure to pay wages owed when there is no claim of inability to pay as fraud constituting exception to constitutional prohibition against imprisonment for debt. *In re Trombley (1948) 31 Cal. 2d 801, 805-806, 193 P.2d 734*

Rejecting constitutional challenges to imposition of criminal sanctions for failure to pay wages based on prohibition against imprisonment for debt. *People v. Bishopp (1976) 56 Cal. App. 3d Supp. 8, 12-13 , 128 Cal. Rptr. 923*

Employer's payment of wages by check with insufficient funds was sufficient to demonstrate willfulness for purposes of coming within exception to constitutional prohibition against imprisonment for debt. *People v. Hampton (1965) 236 Cal. App. 2d 795, 804-805, 46 Cal. Rptr. 338*

[5] Definitions

Under FLSA, as amended by Portal-to-Portal Act, *29 U.S.C. § 201 et seq.*, employee is entitled to compensation for time spent walking to production area after donning required protective gear and for time spent walking to changing

area to doff protective gear; "principal activities" that delineate compensable workday include activities that are integral and indispensable to employee's work, such as donning and doffing required protective gear. *IBP, Inc. v. Alvarez (2005) 546 U.S. 21, 126 S. Ct. 514, 523-525, 163 L. Ed. 2d 288, 299-302*

California definition of compensable "hours worked" under *8 Cal. Code Reg. § 11160(2)(J)* includes time spent by employees in employer-mandated travel. *Burnside v. Kiewit Pac. Corp. (9th Cir. 2007) 491 F.3d 1053, 1062*

California definition of compensable "hours worked" under *8 Cal. Code Reg. § 11140(2)(G)* includes time employees are required to spend traveling on employer's bus; because of substantial differences between California and federal definitions of "hours worked," FLSA, as amended by Portal-to-Portal Act, *29 U.S.C. § 251 et seq.*, does not provide persuasive guidance on this issue. *Morillion v. Royal Packing Co. (2000) 22 Cal. 4th 575, 582-594, 94 Cal. Rptr. 2d 3, 995 P.2d 139*

California definition of "outside salespersons" who are exempt from overtime pay differs from definition of that term under federal law; California definition depends on how much time employee spends on outside selling, whereas federal definition depends on employee's primary job function. *Ramirez v. Yosemite Water Co., Inc. (1999) 20 Cal. 4th 785, 796-798, 85 Cal. Rptr. 2d 844, 978 P.2d 2*

Employer's policy of deducting from salaried employee's vacation-leave bank whenever employee takes four hours off work on any workday does not remove employee from exempt classification; leave policy does no more than regulate timing of exempt employee's use of vacation time. *Conley v. Pacific Gas & Electric Co. (2005) 131 Cal. App. 4th 260, 269-270, 31 Cal. Rptr. 3d 719*

If statute contains no definition of "employee" court should rely on common law usage. *People v. Palma (1995) 40 Cal. App. 4th 1559, 1565, 48 Cal. Rptr. 2d 334*

Definitions of "employer" and "employee" for purposes of state wage and hour law. *Grubb & Ellis Co. v. Spengler (1983) 143 Cal. App. 3d 890, 895-897, 192 Cal. Rptr. 637*

"Wages" include not only periodic monetary earnings of employee but also other benefits to which he or she is entitled as part of compensation. *Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1972) 24 Cal. App. 3d 35, 44, 100 Cal. Rptr. 791 , aff'd sub nom., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware 414 U.S. 117 (1973) 140, 94 S. Ct. 383, 38 L. Ed. 2d 348*

[6] Discrimination

Employer who unlawfully discriminates against claimant or witness in proceeding under FLSA may be liable for legal or equitable relief as appropriate under circumstances, including employment, reinstatement, promotion, back pay, and additional equal amount as liquidated damages. *Mitchell v. De Mario Jewelry (1960) 361 U.S. 288, 295-296, 80 S. Ct. 332, 4 L. Ed. 2d 323*

Recovery of back wages under *Lab. Code § 1197.5* was limited to two years preceding filing of complaint for wage discrimination by statute of limitations. *Jones v. Tracy School Dist. (1980) 27 Cal. 3d 99, 107-109, 111, 165 Cal. Rptr. 100, 611 P.2d 441* (trial court erred in limiting recovery without regard to possible equitable tolling of statute of limitations by filing wage discrimination claim in earlier federal administrative proceeding)

[7] Employment Contracts

Fact that wages, hours, and other conditions of labor may constitute objects of collective bargaining does not preclude

state from adopting minimum standards to protect welfare of workers who may not enjoy sufficient bargaining strength to obtain adequate protection from their employers at bargaining table. *Industrial Welfare Com. v. Superior Court (1980) 27 Cal. 3d 690, 727-728, 166 Cal. Rptr. 331, 613 P.2d 579 , appeal dismissed and cert. denied sub nom. California Manufacturers Association v. Industrial Welfare Commission, 449 U.S. 1029*

Although considered nonforfeitable "wages" within meaning of *Lab. Code § 200,* bonus is not earned or payable unless employee has completed required service as specified under the terms of applicable employment contract. *Neisendorf v. Levi Strauss & Co. (2006) 143 Cal. App. 4th 509, 522-524, 49 Cal. Rptr. 3d 216*

Right of employee who has been paid less than required minimum wage or overtime compensation to institute civil action to recover any sums that are due is not waivable by employee's agreement to work at rate less than minimum wage or without overtime compensation, or by acquiescence in payment of less than statutorily required amounts. *Bartholomew v. Heyman Properties (1955) 132 Cal. App. 2d Supp. 889, 893-895 , 281 P.2d 921*

Existence of collectively bargained agreement to arbitrate affects employee's right to maintain civil action to recover due and unpaid wages. *Griggs v. Transocean Air Lines (1960) 176 Cal. App. 2d 843, 847, 1 Cal. Rptr. 803*

Despite request for "accounting" in complaint, action for breach of oral employment contract was barred by 2-year statute of limitations. *Tostevin v. Douglas (1958) 160 Cal. App. 2d 321, 328-329, 325 P.2d 130*

[8] Federal Actions

Employee's state-court suit to recover wages and related items under FLSA may be removed to federal court. *Breuer v. Jim's Concrete of Brevard, Inc. (2003) 538 U.S. 691, 123 S. Ct. 1882, 1884-1887, 155 L. Ed. 2d 923, 929-932*

Sovereign immunity bars individual suit against state to enforce federal statutory right under FLSA, when suit brought in state court over state's objections. *Alden v. Maine (1999) 527 U.S. 706, 745, 753-760, 119 S. Ct. 2240, 144 L. Ed. 2d. 636* (state employees could not sue state of Maine for overtime wages due under FLSA, absent state's waiver of sovereign immunity)

FLSA requires employment relationship to be applicable. *Tony & Susan Alamo v. Sec. of Labor (1985) 471 U.S. 290, 295, 105 S. Ct. 1953, 85 L. Ed. 2d 278*

Nonwaivable FLSA right to minimum wage and overtime pay. *Barrentine v. Arkansas-Best Freight System (1981) 450 U.S. 728, 740, 101 S. Ct. 1437, 67 L. Ed. 2d 641*

FLSA requirements take precedence over provisions of conflicting collective bargaining agreements. *Martino v. Michigan Window Cleaning Co. (1946) 327 U.S. 173, 177-178, 66 S. Ct. 379, 90 L. Ed. 603*

Nonwaivability of statutory liquidated damages for nonpayment of minimum wage under *FLSA. Brooklyn Savings Bank v. O'Neil (1945) 324 U.S. 697, 706-707, 65 S. Ct. 895, 89 L. Ed. 1296*

FLSA covers individuals who perform piece work. *United States v. Rosenwasser (1945) 323 U.S. 360, 362-363, 65 S. Ct. 295, 89 L. Ed. 301*

FLSA exemption for executive, professional, and administrative employees is inapplicable to group of employees paid on salary basis because employer has established practice of subjecting employees to partial-week disciplinary deductions from pay (i.e., suspensions). *Block v. City of Los Angeles (9th Cir. 2001) 253 F.3d 410, 415-416*

Salaried administrative employee qualifies for FLSA exemption if employee's salary is not subject to reduction for partial-day absences, even though employer has policy of reducing employee's paid leave allowance for such absences, and even though employee's unused leave allowance is convertible to cash. *Webster v. Public Sch. Employees of Wash, Inc. (9th Cir. 2001) 247 F.3d 910, 917*

Anti-retaliation provision of FLSA (29 U.S.C. § 513(a)(3)) protects employee who complains to employer about FLSA violations, even in absence of formal FLSA proceeding. *Lambert v. Ackerley (1999) 180 F.3d 997, 1002-1004* (en banc)

Employee does not fall within FLSA exemption for executive and administrative employees who are paid on salary basis if there is significant likelihood that employee's pay would be reduced for disciplinary reasons or because of variations in quality or quantity of work performed. *McGuire v. City of Portland (9th Cir. 1998) 159 F.3d 460, 462-464*

Judgment for employer proper on FLSA retaliation claim in light of employee's lack of cooperation and disobedience. *Knickerbocker v. City of Stockton (9th Cir. 1996) 81 F.3d 907, 911-912*

Participant in Salvation Army rehabilitation program was not an employee for purposes of FLSA minimum wage law. *Williams v. Strickland (9th Cir. 1996) 87 F.3d 1064, 1067*

Prisoner working for prison-run program, and who was statutorily required to work as term of confinement, not employee for purposes of *FLSA. Morgan v. MacDonald (9th Cir. 1994) 41 F.3d 1291, 1292-1293*

FLSA exemption for executives inapplicable if employer's general policy is to deduct from wages for absences of less than one day even if no deduction is actually made. *Abshire v. County of Kern (9th Cir. 1990) 908 F.2d 483, 486-489 , cert. denied, 498 U.S. 1068 (1991)*

Regulations under FLSA defining salaries for executive exemption applicable to public employees because *Cal. Const., art. XVI, § 6*, which prohibits gifts of public funds to individuals, does not mandate reductions in state employees' pay for absences from work. *Abshire v. County of Kern (9th Cir. 1990) 908 F.2d 483, 486-489 , cert. denied, 498 U.S. 1068 (1991)*

In action to recover unpaid minimum wages and overtime under FLSA, if employer has failed to maintain accurate payroll records, employee has satisfied burden of proof if employee shows that he or she performed work for which he or she was improperly compensated and produces some evidence to show the amount and extent of the work; court may then award damages to employee, even if the result only approximates actual amount due under FLSA. *McLauglin v. Ho Fat Seto (9th Cir. 1988) 850 F.2d 586, 589, cert. denied, 488 U.S. 1040, 109 S. Ct. 864, 102 L. Ed. 2d 988 (1989)*

Breach of contract and other state-law claims related to most employee benefit agreements are preempted by ERISA remedies. *Scott v. Gulf Oil Corp. (9th Cir. 1985) 754 F.2d 1499, 1503-1506*

Independent contractors are not "employees" within meaning of *FLSA. Real v. Driscoll Strawberry Associates, Inc. (9th Cir. 1979) 603 F.2d 748, 754*

Plaintiff-employees are entitled to recover attorney's fees and costs if successful. *Kerr v. Screen Extras Guild, Inc. (9th Cir. 1975) 526 F.2d 67, 69-70 , cert. denied sub nom. Perkins v. Screen Extras Guild, Inc., 425 U.S. 951 (1976)*

Employer in action under *29 U.S.C. § 216(b)* is liable to plaintiff-employees for any unpaid minimum wages and/or overtime compensation found to be due under terms of FLSA, as well as award of liquidated damages equal to amount of minimum wages or overtime compensation found to be due, unless employer can show that act or omission was in

good faith and that employer had reasonable grounds for believing that there was no violationof FLSA. Craig v. Far West Engineering Company (9th Cir. 1959) 265 F.2d 251, 261, *cert. denied* 361 U.S. 816, 80 S. Ct. 57, 4 L. Ed. 2d 63

FLSA provides remedial scheme for failure to pay federally required minimum wages and overtime compensation. *Lerwill v. Inflight Motion Pictures, Inc. (N.D. Cal. 1972) 343 F. Supp. 1027, 1029*

[9] Interest

Award of prejudgment interest is proper in action under FLSA on ground that compensation should be provided for loss of use of money that was owed. *Ford v. Alfaro (9th Cir. 1986) 785 F.2d 835, 842*

Prejudgment interest awarded from date of termination is an amount due and payable as of date capable of being made certain by calculation. *Marc Bellaire, Inc. v. Fleischman (1960) 185 Cal. App. 2d 591, 598, 8 Cal. Rptr. 650*

In absence of express contract covering matter, law awards interest on money from time it becomes due and payable if such time is certain or can be made certain by calculation. *Budget Financial Plan v. Sav-On Food Club (1955) 44 Cal. 2d 565, 572 n.6, 283 P.2d 694* (citing *Civ. Code §§ 3287, 3302*)

[10] Labor Commissioner's Powers

Labor commissioner's declining to enforce state wage claims of employees covered by collective bargaining agreement penalizes employee's right to bargain collectively under National Labor Relations Act; union employee was entitled to have commissioner decide whether employer owed penalty under *Lab. Code § 203* for failure to pay wages due at discharge because dispute did not require interpretation or application of collective bargaining agreement. *Livadas v. Bradshaw (1994), 512 U.S. 107, 124, 132-134, 114 S. Ct. 2068, 129 L. Ed. 2d 93*

Judicial enforcement of administrative subpoenas issued by Labor Commissioner under *Lab. Code § 74* that order employers to produce wage and hour records required to be maintained under *Lab. Code § 1174* does not violate either *Fourth Amendment* proscription against unreasonable searches and seizures or *Fifth Amendment* privilege against self-incrimination. *Craib v. Bulmash (1989) 49 Cal. 3d 475, 485-486, 489-490, 261 Cal. Rptr. 686, 777 P.2d 1120*

Interpretations by Labor Commissioner of minimum wage and overtime rules, which serve as guidelines for employers, are generally upheld by courts and entitled to great weight. *Keyes Motors, Inc. v. Division of Labor Standards Enforcement (1987) 197 Cal. App. 3d 557, 564, 242 Cal. Rptr. 873*

Lab. Code § 93, providing for strict criminal liability in event subpoenaed party refuses to surrender his or her rights against unreasonable searches and seizures without prior judicial validation of subpoena, is unconstitutional under *Fourth Amendment*. *California Restaurant Assn. v. Henning (1985) 173 Cal. App. 3d 1069, 1074, 1077, 219 Cal. Rptr. 630*

Entry into nonpublic areas of employer's premises by Labor Commissioner, whether for inspection of records or other inspections, requires voluntary consent of authorized person. *People v. Los Angeles Palm, Inc. (1981) 121 Cal. App. 3d 25, 29, 175 Cal. Rptr. 257*

Withholding of consent or refusal of permission to inspect on Labor Commissioner's request requires administrative search warrant before actual inspection of premises may be conducted. *People v. Los Angeles Palm, Inc. (1981) 121 Cal. App. 3d 25, 28-29, 175 Cal. Rptr. 257*

Labor Commissioner does not have jurisdiction over wage disputes involving interpretation or application of collective

bargaining agreements that provide for arbitration. *Plumbing, Heating etc. Council v. Howard (1975) 53 Cal. App. 3d 828, 834-835, 126 Cal. Rptr. 406*

[11] Minimum Wage

Any incidental infringement on *First Amendment* freedoms of low income advocacy group, by requiring workers to be paid minimum wage, was justified by compelling state interest *Association of Community Organizations for Reform Now v. Department of Industrial Relations (1995) 41 Cal. App. 4th 298, 301-302, 48 Cal. Rptr. 2d 486*

Deduction of meal credits from minimum wage pursuant to collective bargaining agreement did not violate *Lab. Code § 450*. *Porter v. Quillin (1981) 123 Cal. App. 3d 869, 876, 177 Cal. Rptr. 45*

Employer's practice of applying credit for value of meals furnished against minimum wage without employee's consent violated *Lab. Code § 450*, which prohibits employer from compelling employee to patronize employer in purchase of anything of value. *California State Restaurant Assn. v. Whitlow (1976) 58 Cal. App. 3d 340, 346-347, 129 Cal. Rptr. 824*

[12] Overtime Compensation

Overtime provisions of California law apply to work performed in California by residents of Colorado and Arizona, and that application of California law does not violate *United States Constitution. Sullivan v. Oracle Corp. (9th Cir. 2008) 547 F.3d 1177, 1181-1186*

Pursuant to *29 C.F.R. § 541.203*, insurance claims adjusters, regardless of type or size of claims they handle, are exempt from overtime requirements of Fair Labor Standards Act. *Corralez v. Farmers Ins. Exch. (In re Farmers Ins. Exch.) (9th Cir. 2006) 466 F.3d 853, 858-864*

California definition of "outside salespersons" who are exempt from overtime pay differs from definition of that term under federal law; California definition depends on how much time employee spends on outside selling, whereas federal definition depends on employee's primary job function. *Ramirez v. Yosemite Water Co., Inc. (1999) 20 Cal. 4th 785, 796-798, 85 Cal. Rptr. 2d 844, 978 P.2d 2*

Public policy in favor of employer's duty to pay overtime wages protects employee from termination for making good-faith but mistaken claim to overtime pay. *Barbosa v. IMPCO Techs. (2009) 179 Cal. App. 4th 1116, 1121-1123, 101 Cal. Rptr. 3d 923*

For healthcare workers on three-day, 12-hour alternative workweek schedule, Wage Order No. 5-2001 [*8 Cal. Code Reg. § 11050*] provides that overtime pay begins only after 40 hours. *Singh v. Superior Court (2006) 140 Cal. App. 4th 387, 397-400, 44 Cal. Rptr. 3d 348*

"24-hour agreement" between emergency medical employees and employer was valid under Wage Order No. 9-80, which allows employers to avoid paying daily overtime if employer and employees agree to 24-hour shifts that exclude three 1-hour meal periods and an 8-hour sleep period from hours worked, even if employer voluntarily elects to pay employees regular rate of pay for such sleep and meal periods. *Auchmoody v. 911 Emergency Services (1989) 214 Cal. App. 3d 1510, 1519, 263 Cal. Rptr. 278*

Fixed salary for irregular workweek does not compensate employee for overtime work unless parties have entered into explicit, mutual wage agreement. *Ghory v. Al-Lahham (1989) 209 Cal. App. 3d 1487, 1491-1492, 257 Cal. Rptr. 924*

[13] Tips

Lab. Code § 351 does not prohibit shift supervisor from keeping gratuities undisputedly given to him or her for his or her customer services, and employer may allow shift supervisor to retain his or her portion of a collective tip that was intended for entire team of service employees. *Chau v. Starbucks Corp. (2009) 174 Cal. App. 4th 688, 696-706, 94 Cal. Rptr. 3d 593*

Under *Lab. Code § 351*, tip pool mandated by employer may include all employees who participate in chain of service, not just those who render direct table service. *Etheridge v. Reins Int'l Cal., Inc. (2009) 172 Cal. App. 4th 908, 914-924, 91 Cal. Rptr. 3d 816*

Neither *Lab. Code § 351* nor precedent mandates that tip pools be restricted to those employees who provide customers with "direct" table service; thus, employer may require that bartenders participate in tip pool. *Budrow v. Dave & Buster's of California, Inc. (2009) 171 Cal. App. 4th 875, 878-884, 90 Cal. Rptr. 3d 239*

Floor managers who have authority to hire or discharge, or to supervise, direct, or control other employees' acts are agents of employer under *Lab. Code § 350(d)*; therefore, such floor managers are prohibited by *Lab. Code § 351* from sharing in tip pooling among employees. *Jameson v. Five Feet Rest., Inc. (2003) 107 Cal. App. 4th 138, 143-145, 131 Cal. Rptr. 2d 771*

Lab. Code § 351, which makes gratuity sole property of employee or employees for whom it was left, does not prohibit employer-mandated pooling of tips among employees who directly provided service to tipping patron. *Leighton v. Old Heidelberg, Ltd. (1990) 219 Cal. App. 3d 1062, 1068, 1071, 268 Cal. Rptr. 647*

[14] Wage Deductions

Deducting employer's expenses from its gross receipts to calculate net profits for purposes of supplemental profit-sharing program does not run afoul of statutory and regulatory prohibitions against deducting or recapturing unauthorized amounts from wages [*see Lab. Code §§ 221-224, 400-410, 3751(a)*; *8* Cal. Code Reg. § 11070(8)], so long as employees' *regular* wages are not subject to any unauthorized deductions for employer's operating expenses. *Prachasaisoradej v. Ralphs Grocery Co. (2007) 42 Cal. 4th 217, 237, 64 Cal. Rptr. 3d 407, 165 P.3d 133*

Employer generally not allowed to make any deduction from employee's wage, or require any reimbursement from employee, because of cash shortage, breakage, or loss of equipment that results from simple negligence. *Kerr's Catering Service v. Department of Industrial Relations (1962) 57 Cal. 2d 319, 329, 19 Cal. Rptr. 492, 369 P.2d 20 , cert. denied, 371 U.S. 818*

[15] Wages Due on Termination of Employment

[a] In General

Employee incentive compensation plan under which employee can elect to receive, in lieu of portion of compensation, shares of company stock with restricted rights during two-year vesting period, with forfeiture of restricted stock on employee's resignation or termination for cause before stock fully vests, does not violate *Lab. Code §§ 201* and *202*, which require payment of earned, unpaid wages on termination or resignation. *Schachter v. Citigroup, Inc. (2009) 47 Cal. 4th 610, 618-623, 101 Cal. Rptr. 3d 2, 218 P.3d 262*

For purposes of statutes requiring prompt payment of wages on discharge [*Lab. Code §§ 201, 203*], "discharge" occurs

not only when employee is involuntarily terminated from ongoing employment relationship, but also when employee is released after completing particular job assignment or time duration for which he or she was hired. *Smith v. Superior Court (2006) 39 Cal. 4th 77, 45 Cal. Rptr. 3d 394, 137 P.3d 218, 2006 Cal. LEXIS 8354*

Employee who has worked for part of year was entitled to pro rata share of vacation pay on termination, even though company policy states that employee is not eligible for vacation pay until anniversary date of his or her employment. *Suastez v. Plastic Dress-Up Co. (1982) 31 Cal. 3d 774, 784, 183 Cal. Rptr. 846, 647 P.2d 122*

There is no limit on years of vested, unused vacation time that terminated employee may claim under *Lab. Code § 227.3*, under which "all vested vacation shall be paid to [terminated employee] as wages"; statute of limitations only limits time in which employee may file suit after termination of employment. *Church v. Jamison (2006) 143 Cal. App. 4th 1568, 1577-1583, 50 Cal. Rptr. 3d 166*

Statute of limitations on right to sue for payment of unused vacation begins to run as vacation is earned or at point when employee becomes eligible to take the vacation; employee could claim payment only for unused vacation accrued under written contract during four-year period preceding termination, even though employee had 12 years of accrued vacation. *Sequeira v. Rincon-Vitova Insectaries, Inc. (1995) 32 Cal. App. 4th 632, 636, 38 Cal. Rptr. 2d 264*

Employer is not entitled to recoup employee's debt by deducting full amount owed from employee's wages on his or her final paycheck. *Barnhill v. Robert Saunders & Co. (1981) 125 Cal. App. 3d 1, 4-6, 177 Cal. Rptr. 803*

Lab. Code §§ 200-204 expresses strong public policy for prompt payment of wages on discharge despite industry habit, custom, or agreement to contrary. *Zaremba v. Miller (1980) 113 Cal. App. 3d Supp. 1, 6 , 169 Cal. Rptr. 688*

[b] Payment of Wages After Labor Commissioner Determination

Lab. Code § 206(b), authorizing award of treble damages against employer who willfully fails to pay employee wages within 10 days after determination by Labor Commissioner of validity of employee's claim for wages, is inapplicable when employer has filed for trial de novo under *Lab. Code § 98.2(a)* within 10 days of order of *Labor Commissioner. Triad Data Services, Inc. v. Jackson (1984) 153 Cal. App. 3d Supp. 1, 7-8 , 200 Cal. Rptr. 418*

[c] Penalty Wages

Waiting time penalty is computed by calculating employee's daily wage rate, which is then multiplied by number of days of nonpayment, including nonworkdays as well as workdays; thus, although penalty is limited to 30 days, it can exceed one month's wages. *Mamika v. Barca (1998) 68 Cal. App. 4th 487, 491-494, 80 Cal. Rptr. 2d 175*

Employee is entitled to penalty wages under *Lab. Code § 203* for willful failure of employer to pay overtime wages after termination of employee. *Ghory v. Al-Lahham (1989) 209 Cal. App. 3d 1487, 1492-1493, 257 Cal. Rptr. 924*

Employee entitled to have wages continue as penalty award for "waiting time" under *Lab. Code § 203* until action is commenced in competent court; penalty award is not terminated by commencement of proceedings in administrative agency. *Triad Data Services, Inc. v. Jackson (1984) 153 Cal. App. 3d Supp. 1, 13 , 200 Cal. Rptr. 418*

Phrase "without reduction or abatement" in *Lab. Code § 203* means without discount on account of payment of wages before time when wages payable according to terms of employment contract. *Sayre v. Western Bowl (1946) 76 Cal. App. 2d 793, 797-798, 174 P.2d 466 , overruled on other grounds, Reid v. Overland Machined Products, 55 Cal. 2d 203*

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsDefenses & ExemptionsGeneral OverviewLabor & Employment LawWage & Hour LawsRemediesCosts & Attorney FeesLabor & Employment LawWage & Hour LawsRemediesPrivate SuitsLabor & Employment LawWage & Hour LawsStatutes of LimitationsLabor & Employment LawWage & Hour LawsWage Payments

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Chapter 250 EMPLOYMENT LAW: WAGE AND HOUR DISPUTES
PART III. RESEARCH GUIDE

21-250 California Forms of Pleading and Practice--Annotated § 250.55

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§ 250.55 Law Reviews

Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth, 99 Harv. L. Rev. 1728 (1986)*

Comment, *Comparable Worth and the Market Defense: A National Debate, 16 Golden Gate U. L. Rev. 475 (1986)*

Note, *At Last, Federal Wage and Overtime Protection for State and Municipal Employees: The F.L.S.A. After Garcia v. San Antonio Metropolitan Transit Authority, 23 Cal. W.L. Rev. 105 (1986)*

Brock, *The Applicability of the Fair Labor Standards Act to State and Local Governments*, 36 Lab. L.J. 739 (1985)

Mesnier, *California Rejects Federal Method of Determining Overtime for Salaried Employees Working a Fluctuating Work week*, 6 Cal. Bus. L. Rep. (Cal. C.E.B.) 259 (1985)

Comment, *Employee Vacation Pay Regulation Under the Employee Retirement Income Security Act of 1974, 24 Santa Clara L. Rev. 401 (1984)*

Note, *Employee Rights: Enforcement of the Public Works Prevailing Wage Obligation, 14 Loy. L.A. L. Rev. 311 (1981)*

Note, *Equal Pay, Comparable Work, and Job Evaluation, 90 Yale L.J. 657 (1981)*

Weiner, *Compensable Working Time According to the Fair Labor Standards Act*, 23(4) Prac. Law. 31 (1977)

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-250 California Forms of Pleading and Practice--Annotated § 250.56

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§ 250.56 Text References

Advising the California Employer §§ 1.27, 1.63-1.72, 4.1-4.60 (Cal. C.E.B. 1981)

Debt Collection Practice in California, §§ 7.63-7.84, 9.32-9.47 (Cal. C.E.B. 1987)

Witkin, California Procedure, vol. 8, *Enforcement of Judgments*, § 232 et seq. (4th ed. 1997)

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 723-726 (10th ed. 2005)

Simmons, Wage and Hour Manual for California Employers (Castle 3d ed. 1986)

Legal Topics:

For related research and practice materials, see the following legal topics:
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PART III. RESEARCH GUIDE

21-250 California Forms of Pleading and Practice--Annotated §§ 250.57-250.59

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[Reserved]

§§ 250.57[Reserved]

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Chapter 250 EMPLOYMENT LAW: WAGE AND HOUR DISPUTES
PART IV. FORMS

21-250 California Forms of Pleading and Practice--Annotated § 250.60

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§ 250.60 Appeal of Order, Decision, or Award of Labor Commissioner [Lab. Code § 98.2]--DLSE Form 537

[1] FORM

Click here to view image.

[2] Use of Form

The form of notice of appeal in [1], *above*, is for use in seeking review of the Labor Commissioner's order, decision, or award. The appeal is filed with the superior court, in accordance with the appropriate rules of jurisdiction, within 10 days of service of notice of the Labor Commissioner's order, decision, or award. The court will hear the case de novo [*Lab. Code § 98.2(a)*]. If the party seeking review is unsuccessful in the appeal, the court will determine the costs and reasonable attorney's fees incurred by the other parties to the appeal, and assess this amount as a cost on the party filing the appeal [*Lab. Code § 98.2(c)* (employee is "successful" if court awards amount greater than zero); *Lolley v. Campbell (2002) 28 Cal. 4th 367, 378, 121 Cal. Rptr. 2d 571, 48 P.3d 1128* (superior court may assess attorney's fees against employer who unsuccessfully appeals administrative order to pay wages, even if employee could not afford counsel and was represented without charge by Labor Commissioner)].

CAUTION:
Check Local Practice. Because no statute or provision of the California Rules of Court specifies the contents of a notice of "appeal" under *Lab. Code § 98.2(a)*, procedures may vary from court to court. Some courts may not accept this form. Counsel should check local court rules and contact the clerk of the court to determine the nature and contents of the document necessary to initiate a de novo proceeding under *Lab. Code § 98.2(a)* in that particular court.

For discussion of procedures relating to appeals under *Lab. Code § 98.2*, see *§ 250.32[4]*. For discussion of Labor

Commissioner's order, decision, or award under *Lab. Code § 98.1*, see *§ 250.32[2]*.

[3] Contents

The Labor Code, Code of Civil Procedure, and California Rules of Court provide no guidance regarding the nature of the pleading, notice, or other document necessary to initiate an "appeal" under *Lab. Code § 98.2(a)*. In practice, the procedures vary from court to court. Some courts may require filing of a formal civil complaint, others may accept a copy of the complaint before the Labor Commissioner, while others may require a "notice of appeal" accompanied by a copy of the Labor Commissioner's decision (and possibly a brief). Counsel is therefore well-advised to check the local court rules and contact the clerk of the court to determine the nature of the document necessary to initiate a de novo proceeding under *Lab. Code § 98.2(a)* in that particular court.

The Labor Commissioner has promulgated a form of Notice of Appeal (DLSE 537), set forth above, suggested for use in appealing a decision of the Labor Commissioner under *Lab. Code § 98.2(a)*. The form is modeled after the notice of appeal used in conventional civil appeals [*cf. Cal. Rules of Ct., Rules 8.100(a)*, 8.821(a) (governing notices of appeal in civil actions)]. The form requests the clerk of the court to give notice of the date, time, and place of the de novo hearing before the court. A copy of the Labor Commissioner's order, decision, or award should be attached to the notice of appeal, if used.

Counsel should check with the particular court in which the appeal is to be filed before using this form, however, because the rules of that court will govern the format of the papers to be filed [*cf. Sales Dimensions v. Superior Court (1979) 90 Cal. App. 3d 757, 761-763, 153 Cal. Rptr. 690]* , and some courts may not accept the DLSE form or may require additional supporting papers.

One court of appeal has held that a notice of appeal in a de novo proceeding under *Lab. Code § 98.2(a)* is not considered to be an initial pleading. Thus, the court held that the notice may be signed by an officer of a corporate party and need not be signed by an attorney [*see Rogers v. Municipal Court (1988) 197 Cal. App. 3d 1314, 1318-1319, 243 Cal. Rptr. 530]* . Note, however, that a subsequently enacted statute provides that if the appealing party is represented by an attorney, the attorney of record may be required to sign the notice of appeal [*see Code Civ. Proc. § 128.7(a)* (attorney of record required to sign pleading, petition, written notice of motion, or other similar paper)].

[4] Service

A copy of the appeal request must be served on the Labor Commissioner by the appellant [*Lab. Code § 98.2(a)*].

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21-250 California Forms of Pleading and Practice--Annotated § 250.61

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§ 250.61 Complaint for Damages and Penalties [Lab. Code § 203] Based on Breach of Statutory Obligation--By Former Employee Against Employer--Failure to Pay Wages [Lab. Code §§ 201, 202, 218, 218.5, 218.6]

[1] FORM Complaint for Damages and Penalties [Lab. Code § 203] Based on Breach of Statutory Obligation--By Former Employee Against Employer--Failure to Pay Wages [Lab. Code §§ 201, 202, 218, 218.5, 218.6]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AND PENALTIES
_____ [*name*],	)	(Recovery of Unpaid Wages)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Nonpayment of Wages)

1. _____ [*Allege capacity and residence of defendant, if a venue allegation is desired, e.g.,* Defendant

is, and at all times relevant herein was, a corporation organized under the laws of the State of _____, which maintains its headquarters and principal place of business in the City of _____, County of _____, California].

2. Beginning on or about _____[*date*] and continuing until _____[*date*], plaintiff was employed by defendant as a _____ [*state job title or describe the nature of the work, e.g.,* keypunch operator] at defendant's facility located in _____[*city*], California, in the County of _____.

3. Plaintiff's employment was pursuant to _____ [a written *or* an oral] employment agreement. The terms of that agreement were _____ [*state pertinent terms of the agreement, including wage rate and any changes in that rate, contractual right to any benefits claimed, and term, or refer to and incorporate written agreement, e.g.,* as stated in the agreement entered into on _____ (*date*). A true and correct copy of that agreement is attached to this complaint as Exhibit _____ and is incorporated herein by reference].

4. Effective _____ [*date*], _____ [plaintiff resigned from *or* defendant terminated] that employment. [*If a resignation add:* Plaintiff gave notice of his/her intent to resign on or about _____ (*date*)].

5. On _____ [*date*], at the time that _____ [plaintiff resigned *or* defendant terminated plaintiff's employment], plaintiff had last been paid accrued wages on _____ [*date*] and was owed wages for _____ [*number*] _____[hours *or* days *or* weeks] in the amount of $_____ based on a wage rate of $_____ per _____ [*specify, e.g.,* hour], as provided for in the employment agreement referred to in Paragraph 3.

[6. In addition, as of _____ (*date*), plaintiff had accrued _____ days of paid time off pursuant to the policies of defendant at the rate of $_____ per day, of which plaintiff had not taken _____days, and was therefore owed the amount of $_____ for accrued paid time off.]

7. At the time of termination, defendant _____[failed to pay plaintiff any of the amounts due, as set forth in Paragraph(s) 5 (and 6) *or* paid plaintiff only the sum of $_____]. Defendant's failure to pay the full amount due plaintiff on termination violates the provisions of Labor Code Section _____ [*specify applicable statute, e.g.,* 201]. There is now due and owing to plaintiff the sum of $_____. Defendant has failed and refused, and continues to fail and refuse, to pay the amount due.

8. Pursuant to *Labor Code Section 218.5*, plaintiff requests that the court award plaintiff reasonable attorney's fees and costs incurred by him/her in this action.

9. Pursuant to [*Labor Code Section 218.6*], plaintiff requests that the court award plaintiff interest on all due and unpaid wages, at the legal rate specified by *Civil Code Section 3289(b),* accruing from the date the wages were due and payable.

WHEREFORE plaintiff prays judgment as set forth below.

SECOND CAUSE OF ACTION
(Waiting Time Penalties Under *Labor Code Section 203*)

10. Plaintiff hereby incorporates by reference and realleges all of the allegations contained in paragraphs 1 through 9, above.

11. The defendant's failure to pay wages, as alleged in Paragraph 7, was willful in that _____ [*specify*], thus entitling plaintiff to penalties under *Labor Code Section 203*, which provides that an employee's wages shall continue as a penalty until paid or for a period of up to 30 days from the time they were due, whichever period is shorter.

12. Defendant failed to pay plaintiff the sum of $_____ at the time of termination and has failed to pay those sums for _____ [*days*] thereafter. Pursuant to the provisions of *Labor Code Section 203*, plaintiff is entitled to a penalty in the amount of $_____, which is his/her daily rate multiplied by _____ [*number*] days.

WHEREFORE plaintiff prays judgment against defendant as follows:

1. For compensatory damages in the amount of $_____, representing wages and other compensation owed to plaintiff on _____ [*date*];

2. For interest on the amount of $_____ from _____ [*date that compensation was due*];

3. For penalties in the amount of $_____pursuant to *Labor Code Section 203*;

4. For reasonable attorney's fees pursuant to *Labor Code Section 218.5*;

5. For costs of suit incurred herein; and

6. For such other and further relief as the court may deem appropriate.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION
[*Code Civ. Proc. §§ 446, 2015.5*]

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form of complaint in [1], *above*, may be used by a former employee seeking recovery of wages and penalties [*see*

Lab. Code § 218.5; *see also Lab. Code §§ 201* (discharged employee), 202 (employee who quit), 203 (penalties for willful failure to pay wages due on termination of employment)]. Causes of action for breach of contract, an accounting, or declaratory relief may also be included when appropriate.

For discussion of civil actions to recover wages and/or penalties, see *§ 250.34*.

[3] Allegations

[a] In General

The complaint sets forth the following allegations:

- The existence of an employment relationship, including the dates of employment, position(s) held, and the relevant terms of any employment agreement (Paragraphs 2 through 4) [*see § 250.13* for discussion of the requirement of an employment relationship];

- The amount of wages (and, if appropriate, unused vested vacation pay [*see Lab. Code § 227.3*; *Suastez v. Plastic Dress-Up Co. (1982) 31 Cal. 3d 774, 781, 784, 183 Cal. Rptr. 846, 647 P.2d 122]* due at discharge, or to date, or facts from which that amount can be readily ascertained (Paragraphs 5 and 6);

- The fact of nonpayment of wages when due (Paragraph 7) [*see Lab. Code §§ 201, 201.5, 201.7, 202* (time for payment of wages on termination of employment); *see also § 250.16[2][a]*];

- The employee's entitlement to prejudgment interest (Paragraph 9) [*see Labor Code Section 218.6*]; and

- If appropriate, facts showing plaintiff's entitlement to waiting time penalties under *Lab. Code § 203* (Paragraph 12) [*see § 250.16[2][d]*, for discussion of penalties, generally].

The complaint is brought against the employing entity; it is improper to name a supervisor or agent who is not a party to the agreement [*see Oppenheimer v. Robinson (1957) 150 Cal. App. 2d 420, 424, 309 P.2d 887]* .

If attorney's fees are sought under *Lab. Code § 218.5*, a request for fees must be included in the complaint (Paragraph 8) [*see Lab. Code § 218.5*].

For discussion of civil actions to recover wages and/or penalties, see *§ 250.34*.

[b] When Penalty Wages Claimed

Penalty wages are calculated on the basis of the employee's rate of pay and this fact must, therefore, be alleged to support a claim for penalty wages [*see Oppenheimer v. Moebius (1957) 151 Cal. App. 2d 818, 820, 312 P.2d 314]* . An allegation of the terms of an oral contract, or the incorporation by reference of a copy of a written contract attached as an exhibit, should be sufficient; but if neither of these methods reveals the plaintiff's rate of pay, it should be specially alleged.

The allegations and prayer pertaining to the waiting time penalty should compute the penalty by multiplying the plaintiff's daily wage rate by the number of days of nonpayment, up to 30 days, including not only days that the employee might have worked, but also nonworkdays. Although this method of calculating the penalty can result in a penalty greater than one month's wages, it furthers public policy by providing a strong disincentive to employers who are reluctant to make timely payment of wages due on termination of employment [*Mamika v. Barca (1998) 68 Cal.*

App. 4th 487, 491-494, 80 Cal. Rptr. 2d 175 (although limited to 30 days, penalty can exceed one month's wages; targeted wrong is delay in payment, which continues on nonworkdays as well as workdays so long as payment is not made)].

There appears to be no decision on what constitutes a sufficient allegation of a willful failure to pay earned wages. The willfulness in question amounts to nothing more than that the employer intentionally did not pay the wages [*see Davis v. Morris (1940) 37 Cal. App. 2d 269, 274, 99 P.2d 345]* . An allegation of intent, although unquestionably a conclusion, appears to be permissible as an allegation of fact [*see, e.g., Rosin v. Superior Court (1960) 181 Cal. App. 2d 486, 490, 5 Cal. Rptr. 421]* .

For discussion of penalty wages, see *§ 250.16[2][d]*.

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[5] Cross References

For procedure to be followed in drafting a complaint, see Ch. 2, *Procedural Guide for Civil Actions*

For discussion and forms for use in actions for an accounting, see Ch. 7, *Accounting, Action for*

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For forms of captions for use in pleadings, see Ch. 108, *Captions and Introductions*

For discussion of the general requirements and skeletal forms of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to remedies for breach of contract, see Ch. 140, *Contracts*

For discussion of service of the summons and complaint and proof of service, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For discussion and alternative forms of verifications, see Ch. 572, *Verification*

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Chapter 250 EMPLOYMENT LAW: WAGE AND HOUR DISPUTES
PART IV. FORMS

21-250 California Forms of Pleading and Practice--Annotated § 250.62

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§ 250.62 Complaint for Damages and Penalties Based on Breach of Statutory Obligation--By Employee Against Employer--Failure to Pay Minimum Wages and/or Overtime Compensation [Lab. Code §§ 1194, 1197, 1198]

[1] FORM Complaint for Damages and Penalties Based on Breach of Statutory Obligation--By Employee Against Employer--Failure to Pay Minimum Wages and/or Overtime Compensation [Lab. Code §§ 1194, 1197, 1198]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES (Failure to Pay
_____ [*name*],	)	_____ [Minimum Wages *and/or*
Defendant(s).	)	Overtime Compensation])
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity, residence of defendant. See § 250.61[1], Paragraph 1.*]

2. [*Employment relationship between plaintiff and defendant. See § 250.61[1], Paragraph 2.*]

3. [*Terms of employment and, if appropriate, the terms (incorporated by reference) of any written employment agreement. See § 250.61[1], Paragraph 3.*]

4. During the period from _____[*date*], to _____ [*date*], plaintiff worked a total of _____ hours and received a total compensation for that period of $_____. A detailed statement of the days worked, the hours worked each day, and the payment received therefor is attached hereto as Exhibit _____and incorporated herein by reference.

5. Labor Code Section(s) _____ [*identify appropriate provisions, e.g.,* 1197 *and/or* 1198] provide(s) that it is unlawful to _____ [*set forth terms of the applicable statute, e.g.,* pay less than the minimum wage established by law or to employ persons for longer than the hours set by the Industrial Welfare Commission or under conditions prohibited by the applicable wage orders].

6. At all times relevant herein, Industrial Welfare Commission Wage Order No. _____ [*state number and/or give citation to the California Code of Regulations provision, e.g.,* 2-2001 (*8 Cal. Code Reg. § 11020*)], which applies to plaintiff's employment by defendant, provided for payment of a minimum wage of $_____ [*state applicable minimum wage*] per hour and that employees employed for more than _____ [*state relevant portions of the regulations governing overtime work, e.g.,* 8 hours in one day are entitled to payment at the rate of time and one half for hours in excess of 8 in one day].

7. Under the provisions of the Wage Order referred to in Paragraph 6, plaintiff should have received a total of $_____ for hours worked during the period referred to in Paragraph 4. Defendant therefore owes plaintiff the sum of $_____, representing the difference between the amount of wages owed pursuant to the Wage Order and the amount actually paid to plaintiff. Defendant has failed and refused and continues to fail and refuse to pay plaintiff the amount owed.

8. Defendant's failure to pay plaintiff the sum of $_____, as required by the applicable Wage Order, violates the provision of Labor Code Section(s) _____ [*state applicable code provision, e.g.,* 1197 *and/or* 1198] and is therefore unlawful.

9. Pursuant to *Labor Code Section 1194(a),* plaintiff requests that the court award plaintiff reasonable attorney's fees and costs incurred by him/her in this action.

WHEREFORE plaintiff prays judgment against defendant as follows:

1. For compensatory damages in the amount of $_____, representing the amount of unpaid _____[minimum wages *and/or* overtime compensation] owed on _____ [*date*];

2. For interest on any _____ [minimum wages *and/or* overtime compensation] due from the day such amounts were due;

[3. For liquidated damages pursuant to *Labor Code Section 1194.2(a)* in the amount of $_____, which amount equals the minimum wages unpaid and interest on that amount;]

4. For reasonable attorney's fees pursuant to *Labor Code Section 1194(a)*;

5. For costs of suit incurred herein; and

6. For such other and further relief as the court may deem appropriate.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 250.61[1].*]

[2] Use of Form

The form of complaint in [1], *above*, may be used in an action under *Lab. Code § 1194* to obtain damages on behalf of an employee whose employer has failed to pay minimum wages and/or overtime compensation as required under the California wage orders [*see 8 Cal. Code Reg. § 11000 et seq.* (Cal. Wage Orders)].

[3] Allegations

The complaint includes the following allegations:

- The existence of an employment relationship [*Martinez v. Combs (May 20, 2010) 49 Cal. 4th 35, -- Cal. Rptr. 3d --, -- P.3d --, 2010 Cal. LEXIS 4660, at *61* ("employer" for this purpose is defined by applicable IWC wage order); *Reynolds v. Bement (2005) 36 Cal. 4th 1075, 1085-1089, 32 Cal. Rptr. 3d 483* (action by employee to recover statutory minimum wage or overtime compensation under *Lab. Code § 1194* must be brought directly against employer and may not be maintained against shareholders, officers, directors, or other agents of corporate employer)], including the dates of employment, position held, and the agreed-on wage rate and hours (Paragraphs 2 and 3) [*see, e.g., 8 Cal. Code Reg. §§ 11010-11150*, PP 1, 3, 4, (Cal. Wage Order Nos. 1-2001-15-2001)];

- Facts showing the actual hourly rate received and hours worked by the employee (Paragraph 4);

- References to the applicable portions of the relevant wage orders and/or statutory provisions with respect to minimum wage rates and overtime hours (Paragraphs 5 and 6); and

- The fact of nonpayment of the required minimum wage and/or overtime compensation (Paragraphs 7 and 8).

If plaintiff seeks attorney's fees pursuant to *Lab. Code § 1194(a)*, a request for fees must be included in the complaint.

A request for liquidated damages may be included in the complaint only if (1) the action is commenced on or after January 1, 1992; and (2) the action is brought to recover amounts unpaid in violation of the minimum wage fixed by an IWC wage order. An employee may not recover liquidated damages for failure to pay overtime compensation [*Lab. Code § 1194.2(a), (c)*].

Violations of minimum wage and/or overtime compensation laws and orders may also involve violations of the provisions of the Labor Code governing payment of wages [*see Lab. Code § 200 et seq.*] and causes of action under those provisions or for breach of contract [*see Anders v. State Board of Equalization (1947) 82 Cal. App. 2d 88, 94, 185 P.2d 883* (IWC wage order provisions are part of contract between employer and employee)] may also be included, when appropriate. For a form of complaint for use in cases alleging failure to pay wages on discharge or resignation, see *§ 250.61[1]*.

[4] Action for Minimum Wage or Overtime Compensation

Any employee receiving less than the legal minimum wage or applicable overtime compensation is entitled to recover the unpaid balance of the full amount of that minimum wage or overtime compensation, together with costs of suit, notwithstanding any agreement to work for a lesser wage [*Lab. Code § 1194(a)*]. If the action is commenced on or after January 1, 1992, the employee is additionally entitled to recover interest [*Lab. Code § 1194*], reasonable attorney's fees [*Lab. Code § 1194*], and, if the action is for minimum wage violations, liquidated damages [*Lab. Code § 1194.2(a), (c)*].

[5] Alternative Procedures

Alternative remedies to a civil action by the employee are available through the Department of Industrial Relations (DIR) or the DLSE. These remedies include investigations of minimum wage violations [*Lab. Code § 1195*], proceedings to enjoin violations of wage and hour laws [*Lab. Code § 1194.5*], and civil actions on behalf of the employee to recover unpaid minimum wages or overtime compensation [*see Lab. Code § 1193.6*]. For discussion of alternative remedies, see *§ 250.40[2]*.

[6] Cross References

For cross references relating to complaints in general, see *§ 250.61[5]*

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Chapter 250 EMPLOYMENT LAW: WAGE AND HOUR DISPUTES
PART IV. FORMS

21-250 California Forms of Pleading and Practice--Annotated § 250.63

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§ 250.63 Complaint for Damages and Penalties Based on Breach of Statutory Obligation--By Employee Against Employer--Failure to Pay Wages Due Striking Employee [Lab. Code §§ 209, 218, 218.5, 218.6]

[1] FORM Complaint for Damages and Penalties Based on Breach of Statutory Obligation--By Employee Against Employer--Failure to Pay Wages Due Striking Employee [Lab. Code §§ 209, 218, 218.5, 218.6]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Breach of Statutory Obligation)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity, residence of defendant. See § 250.61[1], Paragraph 1.*]

2. [*Employment relationship between plaintiff and defendant. See § 250.61[1], Paragraph 2.*]

3. [*Terms of employment and, if appropriate, the terms (incorporated by reference) of any written employment*

agreement. See § 250.61[1], Paragraph 3.]

4. Plaintiff entered into employment pursuant to the above-described agreement. On _____ [*date*], plaintiff joined a number of other persons also employed by defendant in a strike, which continued until _____ [*date*]. On _____ [*next regular payday after strike*] there was due and payable to plaintiff as wages for services performed during the period from _____ [*date*], to _____ [*date*], inclusive, the sum of $_____.

5. On _____ [*next regular payday after strike*], defendant _____ [failed to pay plaintiff any of the amounts due, as set forth in Paragraph 4 *or* paid plaintiff only the sum of $_____]. Defendant's failure to pay the full amount due plaintiff on _____ [*next regular payday after strike*] violates the provisions of *Labor Code Section 209*. There is now due and owing to plaintiff the sum of $_____. Defendant has failed and refused, and continues to fail and refuse, to pay the amount due.

6. Pursuant to *Labor Code Section 218.5*, plaintiff requests that the court award plaintiff reasonable attorney's fees and costs incurred by him/her in this action.

7. Pursuant to [*Labor Code Section 218.6*], plaintiff requests that the court award plaintiff interest on all due and unpaid wages, at the legal rate specified by *Civil Code Section 3289(b)*, accruing from the date the wages were due and payable.

WHEREFORE plaintiff prays judgment against defendant as follows:

1. For compensatory damages in the amount of $_____, representing wages and other compensation owed to plaintiff on _____ [*date*];

2. For interest on the amount of $_____ from _____ [*next regular payday after strike*];

3. For reasonable attorney's fees pursuant to *Labor Code Section 218.5*;

4. For costs of suit incurred herein; and

5. For such other and further relief as the court may deem appropriate.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 250.61[1].*]

[2] Use of Form

The form of complaint in [1], *above*, may be used to obtain damages on behalf of an employee who participated in a strike and was not paid wages that became due on the next regular payday after the strike, in violation of *Lab. Code § 209*. For discussion of the right of striking employees to unpaid wages, see *§ 250.16[3]*.

[3] Cross References

For cross references relating to complaints in general, see *§ 250.61[5]*

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§ 250.64 Complaint for Damages and Penalties Based on Breach of Statutory Obligation--By Employee Against Employer--Unlawful Wage Rate Discrimination Based on Sex [Lab. Code § 1197.5]

[1] FORM Complaint for Damages and Penalties Based on Breach of Statutory Obligation--By Employee Against Employer--Unlawful Wage Rate Discrimination Based on Sex [Lab. Code § 1197.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Breach of Statutory Obligation)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff _____ [*name*] is an adult person and a resident of the County of _____, State of California.

2. Plaintiff is a _____ [female *or* male]. From _____ [*date of commencement of employment*], to _____ [*date of termination of employment, if any, or current date*], plaintiff [was *or*

has been] employed by defendant _____ [*name*].

[*EITHER*]

3. Defendant is a(n) _____ [*specify nature of defendant/employer, e.g.,* bank] employing approximately _____ [*number*] of employees of both sexes. Defendant's establishment is located at _____ [*address*], _____ [*city*], California.

[*OR*]

3. Defendant is a(n) _____ [*specify nature of defendant/employer, e.g.,* bank]. Defendant employs plaintiff and at least one person of the _____ [*state sex of employee(s) alleged to be paid more*] sex. Defendant's establishment is located at _____ [*address*], _____[*city*], California.

[*CONTINUE*]

[4. Plaintiff has filed a complaint with the Division of Labor Standards Enforcement pursuant to *Labor Code Section 98.7* based on his/her claim of discrimination in payment of wages because of sex. The Labor Commissioner took the following actions with regard to the complaint: _____ (*describe actions taken by Labor Commissioner, including investigations and hearings, if any*). The outcome of the investigation of charges by the Labor Commissioner is as follows: _____ (*specify outcome of action by Labor Commissioner*).]

5. Plaintiff is/was employed by defendant in the position of _____ [*job title*] in defendant's business establishment identified in Paragraph 3, above. In this capacity plaintiff's responsibilities include(d): _____ [*describe nature of plaintiff's job; indicate duties performed and general nature of skill, effort, and responsibility required of plaintiff*].

6. [On the basis of plaintiff's information and belief, plaintiff alleges that] [F]rom _____ [*identify first date of unequal pay*], until _____ [*allege date, if any, on which employer ceased paying plaintiff less, due to sex, or, if the practice is continuing, allege current date and state that violation is continuing*], defendant [has] paid to plaintiff a lower [rate of] _____ [wage *or* salary *or* bonus *or* commission *or* draw *or* allowance for _____ (*specify, e.g.,* travel) *or* _____ (*specify type of benefit, e.g.,* health insurance) benefit] than that paid to one or more of the employees of defendant of the _____[*specify the sex favored by discrimination*] sex. [The amount of the difference between the _____ (*specify type of compensation as in previous sentence*) paid to plaintiff and that paid to members of the _____ (*specify sex favored by discriminatory act of employer*) sex is $_____ per _____ (*specify unit if time, e.g.,* hour).]

7. Plaintiff and the other employee(s) of defendant who is/are paid more than plaintiff (1) work in the same establishment; (2) perform equal work; (3) perform work that requires equal skill, effort, and responsibility; and (4) perform their jobs under similar working conditions.

8. [On the basis of plaintiff's information and belief, plaintiff alleges that] [D]efendant has failed or refused to pay to plaintiff the sum of $_____, which is the difference between the amount plaintiff has earned in the position and the amount paid to the other employee(s) of the _____[*sex favored by the discrimination*] sex over the period of time alleged in Paragraph 6, above. Pursuant to the California Equal Pay Act, *Labor Code Section 1197.5*, defendant owes plaintiff that sum as and for back pay, a sum equal to that amount as and for "liquidated

damages," interest on the back pay amount, and attorney's fees and costs of suit.

[9. Defendant employer's violation of plaintiff's rights under the California Equal Pay Act is and has been willful in that _____ (*set forth knowledge or information and belief regarding facts giving rise to characterization of willful violation*).]

WHEREFORE, plaintiff prays for judgment as follows:

1. For wages owed to plaintiff because of defendant's violation of the Equal Pay Act, in the amount of $_____ [*specify amount or approximate amount based on information and belief*], with interest on that amount from _____ [*date*];

2. For liquidated damages equal to the sum of wages owed to plaintiff because of defendant's violation of the Equal Pay Act, in the amount of $_____ [*specify same amount as that listed in Paragraph 1 of prayer*];

3. For reasonable attorney's fees pursuant to *Labor Code Section 1197.5(g)*;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court deems proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 250.61[1].*]

[2] Use of Form

The form of complaint in [1], *above*, may be used to obtain damages on behalf of an employee whose wage rate or other compensation was lower than that of employees of the opposite sex in the same establishment for the same quantity and quality of the same classification of work, in violation of *Lab. Code § 1197.5*.

[3] Allegations

The complaint contains all of the following allegations:

- The capacity and residence of the plaintiff (Paragraph 1);

- The sex of the plaintiff and the fact that the plaintiff was or is an employee of the defendant (Paragraph 2);

- That the employer employs persons of both sexes and the location of the employer's business (Paragraph 3);

- That the plaintiff filed an administrative complaint with Division of Labor Standards Enforcement for investigation and action by the Labor Commissioner, if the plaintiff has filed such a complaint (Optional Paragraph 4) [*see Bass v. Great Western Sav. & Loan Assn. (1976) 58 Cal. App. 3d 770, 772-773, 130 Cal. Rptr. 123* (not necessary to show that administrative remedies have been exhausted

under California Equal Pay Act)];

- A description of the plaintiff's employment position with the defendant and his or her responsibilities in the defendant's business (Paragraph 5);

- That the defendant has paid the plaintiff at a lower rate than another employee or other employees of the opposite sex, or has otherwise compensated the plaintiff at a lower rate (Paragraph 6) [*see Lab. Code § 1197.5(a)*];

- That the plaintiff and the higher-paid employee or employees of the opposite sex (a) work in the same establishment; (b) perform equal work; (c) perform work requiring equal skill, effort, and responsibilities; and (d) perform their jobs under the same working conditions (Paragraph 7) [*see Lab. Code § 1197.5(a)*];

- That the plaintiff is entitled to back pay plus interest, liquidated damages, attorney's fees, and costs for violation of the Equal Pay Act (Paragraph 8) [*Lab. Code § 1197.5(b), (g)*]; and

- If appropriate, that the defendant's violation of the Equal Pay Act was willful, thereby extending the limitations period for filing the action (Optional Paragraph 9) [*see Lab. Code § 1197.5(h)*].

For discussion of the California Equal Pay Act, see *§ 250.14[1][b]*.

[4] Cross References

For cross references relating to complaints in general, see *§ 250.61[5]*

For discussion and forms relating to sex discrimination under other equal employment opportunity laws, see Ch. 115, *Civil Rights: Employment Discrimination*

For additional discussion and forms relating to the California Equal Pay Act and related equal employment opportunity laws, see Wilcox, California Employment Law, Chs. 40-43 (Matthew Bender)

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§ 250.65 Complaint for Damages and Penalties Based on Breach of Statutory Obligation--By Assignee of Employee Against Employer [Lab. Code § 300]--Failure to Pay Wages [Lab. Code §§ 201, 202, 218, 218.5, 218.6]

[1] FORM Complaint for Damages and Penalties Based on Breach of Statutory Obligation--By Assignee of Employee Against Employer [Lab. Code § 300]--Failure to Pay Wages [Lab. Code §§ 201, 202, 218, 218.5, 218.6]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AND PENALTIES
_____ [*name*],	)	(Recovery of Unpaid Wages)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Nonpayment of Wages)

1. _____ [*Capacity, residence of defendant. See § 250.61[1], Paragraph 1.*]

2. Beginning on or about _____[*date*] and continuing until _____[*date*], _____ [*name of assignor-employee*] was employed by defendant as a _____ [*state job title or describe the nature of the work, e.g.,* keypunch operator] at defendant's facility located in _____ [*city*], California, in the County of _____.

3. _____'s [*Name of assignor-employee*] employment was pursuant to _____ [a written *or* an oral] employment agreement. The terms of that agreement were _____ [*state pertinent terms of the agreement, including wage rate and any changes in that rate, contractual right to any benefits claimed, and term, or refer to and incorporate written agreement, e.g.,* as stated in the agreement entered into on _____ (*date*). A true and correct copy of that agreement is attached to this complaint as Exhibit _____ and is incorporated herein by reference].

4. Effective _____ [*date*], _____ [_____ (*name of assignor-employee*) resigned from *or* defendant terminated] that employment. [*If a resignation add:* (*Name of assignor-employee*) gave notice of his/her intent to resign on or about _____ (*date*)].

5. On _____ [*date*], at the time that _____ [_____ (*name of assignor-employee*) resigned *or* defendant terminated _____'s (*name of assignor-employee*) employment], _____ [*name of assignor-employee*] had last been paid accrued wages on _____ [*date*] and was owed wages for _____ [*number*] _____[days *or* weeks] in the amount of $_____ based on a wage rate of $_____ per _____ [*specify, e.g.,* hour], as provided in the employment agreement referred to in Paragraph 3.

[6. In addition, as of _____[*date*], _____ (*name of assignor-employee*) had accrued _____ days of paid time off pursuant to the policies of defendant at the rate of $_____ per day, of which _____ (*name of assignor-employee*) had not taken _____ days, and was therefore owed the amount of $_____ for accrued paid time off].

7. At the time of termination, defendant _____[failed to pay _____ (*name of assignor-employee*) any of the amounts due, as set forth in Paragraph(s) 5 (and 6) *or* paid _____ (*name of assignor-employee*) only the sum of $_____]. Defendant's failure to pay the full amount due _____[*name of assignor-employee*] on termination violates the provisions of Labor Code Section _____ [*specify applicable statute, e.g.,* 201]. There is now due and owing to _____ [*name of assignor-employee*] the sum of $_____. Defendant has failed and refused, and continues to fail and refuse, to pay the amount due.

[*EITHER*]
[*if assignment represents wages earned at time of assignment*]

8. On or about _____ [*specify date after the wages were earned*], _____ [*name of assignor-employee*] properly assigned to plaintiff, pursuant to *Labor Code Section 300*, the sum of $_____, which represents the wages and salary then owed to him/her, as set forth in Paragraph 7, above.

[*OR*]
[*if assignment represents wages not yet earned, in whole or in part, at time of assignment*]

8. _____ [*Allege facts showing that assignment was made as consideration for provision of necessities of life, as required by Labor Code Section 300(h), e.g.*, On or about _____ (*date*), plaintiff furnished _____ (*name of assignor-employee*) with the following necessities of life, at the latter's request: _____ (*specify, e.g.*, food and necessary medications for _____ (*name of assignor-employee*) and his/her family). The reasonable cost and value of these items is $_____. In consideration and as security for reimbursement of plaintiff for the cost of these necessities, _____ (*name of assignor-employee*) agreed to assign all wages then due and owing to him/her and to be earned by him/her thereafter, up to the maximum amount of $_____ (*cost of necessities*), to plaintiff. On or about _____ (*date*), _____ (*name of assignor-employee*) executed a separate written assignment of such wages, in compliance with the requirements of *Labor Code Section 300*].

[*CONTINUE*]

9. A copy of the written assignment referred to in Paragraph 8 was filed with defendant on _____ [*date*] [along with the statements required by *Labor Code Section 300*]. A true and correct copy of that written assignment [and supporting documents] is/are attached to this complaint as Exhibit _____ and is/are incorporated herein by reference.

10. On or about _____[*date*], plaintiff demanded payment of $_____, the amount of wages currently due to _____[*name of assignor-employee*], pursuant to the terms of the written assignment, but defendant has failed and refused to pay the sums owed.

11. Pursuant to *Labor Code Section 218.5*, plaintiff requests that the court award plaintiff reasonable attorney's fees and costs incurred by him/her in this action.

12. Pursuant to [*Labor Code Section 218.6*], plaintiff requests that the court award plaintiff interest on all due and unpaid wages, at the legal rate specified by *Civil Code Section 3289(b)*, accruing from the date the wages were due and payable.

SECOND CAUSE OF ACTION
(Waiting Time Penalties Under *Lab. Code § 203*)

13. Plaintiff hereby incorporates by reference and realleges all of the allegations contained in paragraphs 1 through 12, above.

14. The defendant's failure to pay wages, as alleged in Paragraph 7, was willful in that _____ [*specify*]. Thus, at the time of the assignment herein alleged, _____ [*name of assignor-employee*] was entitled, and plaintiff as his/her assignee is entitled, to penalties under *Labor Code Section 203*, which provides that an employee's wages shall continue as a penalty until paid or for a period of up to 30 days from the time they were due, whichever period is shorter.

15. Defendant failed to pay _____ [*name of assignor-employee*] the sum of $_____ at the time of termination and has failed to pay those sums for _____ [*days*] thereafter [up to the time of the assignment]. Pursuant to the provisions of *Labor Code Section 203*, plaintiff is entitled to a penalty in the amount of $_____, which is _____'s [*name of assignor-employee*] daily rate multiplied by _____ [*number*] days.

WHEREFORE plaintiff prays judgment against defendant as follows:

1. For compensatory damages in the amount of $_____, representing wages and other compensation owed to plaintiff, pursuant to the written assignment of _____ [*name of assignor-employee*], on _____ [*date*];

2. For interest on the amount of $_____ from _____ [*date that compensation was due*];

3. For penalties in the amount of $_____ pursuant to *Labor Code Section 203*;

4. For reasonable attorney's fees pursuant to *Labor Code Section 218.5*;

5. For costs of suit incurred herein; and

6. For such other and further relief as the court may deem appropriate.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 250.61.*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by an assignee to recover an employee's wages who has assigned earned or unearned wages or salary when the employer has not paid the assigned amounts according to the assignment [*see Lab. Code § 300*].

[3] Allegations

The plaintiff-assignee must allege facts showing the assignor's entitlement to the wages [*see* discussion of allegations in § 250.61[3][a]]. In addition, the assignee should also plead facts showing that a proper assignment has been made; however, any defect in the assignment under *Lab. Code § 300* is an affirmative defense, which must be pleaded and proved by the defendant [*see Mathewson v. Alderman (1930) 107 Cal. App. 272, 275-276, 290 P. 317]* . For a form of allegation for use as an affirmative defense in cases in which the assignment was defective, see *§ 250.73*.

For a discussion of wage assignments, see *§ 250.20[2]*.

The allegations and prayer pertaining to the waiting time penalty under *Lab. Code § 203* should compute the penalty by multiplying the plaintiff's daily wage rate by the number of days of nonpayment, up to 30 days, including not only days that the employee might have worked, but also nonworkdays. Although this method of calculating the penalty can result in a penalty greater than one month's wages, it furthers public policy by providing a strong disincentive to employers who are reluctant to make timely payment of wages due on termination of employment [*Mamika v. Barca (1998) 68 Cal. App. 4th 487, 491-494, 80 Cal. Rptr. 2d 175* (although limited to 30 days, penalty can exceed one month's wages; targeted wrong is delay in payment, which continues on nonworkdays as well as workdays so long as payment is not made)]. For detailed discussion of the waiting time penalty, see *§ 250.16[2][d]*.

[4] Cross References

For cross references relating to complaints in general, see *§ 250.61[5]*

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Chapter 250 EMPLOYMENT LAW: WAGE AND HOUR DISPUTES
PART IV. FORMS

21-250 California Forms of Pleading and Practice--Annotated § 250.66

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§ 250.66 Complaint for Damages and Penalties Based on Breach of Employment Contract--By Former Employee Against Employer With No Permanent and Fixed Place of Business--Failure to Pay Commissions [Lab. Code §§ 2751, 2752]

[1] FORM Complaint for Damages and Penalties Based on Breach of Employment Contract--By Former Employee Against Employer With No Permanent and Fixed Place of Business--Failure to Pay Commissions [Lab. Code §§ 2751, 2752]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Breach of Contract)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. _____ [*Capacity, residence of defendant. See § 250.61[1], Paragraph 1.*]

2. Defendant is engaged in the business of _____ [*specify facts indicating that defendant has no*

permanent and fixed place of business in California].

3. On or about _____ [*date*], at _____ [*city*], _____ County, California, plaintiff and defendant entered into _____ [a written *or* an oral] agreement for the employment of plaintiff by defendant to _____ [*general nature of work*]. The terms of the agreement were _____[as follows: _____ (*set out terms*) *or* as stated in the copy of the agreement attached hereto as Exhibit A and made a part hereof].

4. Plaintiff entered upon the employment and duly performed all of the conditions to be performed on his/her part [except _____ (*specify*), the performance of which is excused in that _____ (*specify*)].

5. On or about _____ [*date*], defendant failed and refused, and continues to fail and refuse, to pay to plaintiff the commissions that plaintiff had earned and that were then due, in the amount of $_____.

6. Defendant [has paid plaintiff a total of $_____ and] has not paid any part of [the balance of] the total sum due under the contract, to plaintiff's damage in the sum of $_____.

[7. Defendant violated the provisions of *Labor Code Section 2751* in that _____ (*specify violation, e.g.,* defendant did not give plaintiff a signed copy of the contract and did not ask for or obtain from plaintiff a signed receipt therefor).]

WHEREFORE, plaintiff prays for judgment against defendant as follows:

1. For damages in the sum of $_____;

[2. For treble damages pursuant to *Labor Code Section 2752*];

3. For interest on the sum of $_____ from and after _____ [*date commissions were due*];

4. For reasonable attorneys' fees and costs of suit incurred herein pursuant to *Labor Code Section 218.5*; and

5. For such other and further relief as the court deems proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 250.61[1]* .]

[2] Use of Form

The form of complaint in [1], *above*, may be used in an action by an employee or former employee to recover unpaid commissions. The complaint is specifically drafted for use in an action involving an employer that has no permanent and fixed place of employment when the employer has violated *Lab. Code § 2751*.

For a discussion of commission contracts entered into by employers with no permanent and fixed place of business in

California, see *§ 250.16[4]*.

[3] Cross References

For cross references relating to complaints in general, see *§ 250.61[5]*

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Chapter 250 EMPLOYMENT LAW: WAGE AND HOUR DISPUTES
PART IV. FORMS

21-250 California Forms of Pleading and Practice--Annotated §§ 250.67-250.69

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[Reserved]

§§ 250.67[Reserved]

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PART IV. FORMS

21-250 California Forms of Pleading and Practice--Annotated § 250.70

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§ 250.70 Affirmative Defense--Exemption From Applicable Provisions of Labor Code--Plaintiff Was Independent Contractor

[1] FORM Affirmative Defense--Exemption From Applicable Provisions of Labor Code--Plaintiff Was Independent Contractor

AS A [*if more than one, specify number, e.g.,* FIRST] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged in complaint, specify, e.g.,* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that at all times mentioned in the complaint, plaintiff was an independent contractor and defendant is therefore not subject to any of the wage payment provisions or penalties set forth in *Labor Code Section 200 et seq.*

[2] Use of Form

The form of affirmative defense in [1], *above*, may be pleaded in answer to a complaint for failure to pay wages or benefits as required by *Lab. Code § 200 et seq.* Parties who are classifiable as independent contractors rather than employees are exempt from the wage payment provisions of the Labor Code by virtue of their status [*Fitch v. Pacific Fid. Life Ins. Co. (1975) 54 Cal. App. 3d 140, 145-146, 126 Cal. Rptr. 445* ; *see Zaremba v. Miller (1980) 113 Cal. App. 3d Supp. 1, 5-6 , 169 Cal. Rptr. 688* (photographer-model relationship not independent contracting relationship)].

For discussion of independent contractors and their exemption from the wage payment provisions of the Labor Code, see *§ 250.13[1][a]*.

[3] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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21-250 California Forms of Pleading and Practice--Annotated § 250.71

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§ 250.71 Affirmative Defense--Exemption From Applicable Provisions of Labor Code--Parties Not Subject to Minimum Wage/Overtime Provisions

[1] FORM Affirmative Defense--Exemption From Applicable Provisions of Labor Code--Parties Not Subject to Minimum Wage/Overtime Provisions

AS A [*if more than one, specify number, e.g.,* FIRST] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged in complaint, specify, e.g.,* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that at all times mentioned in the complaint, the parties to this action were exempt from the _____ [minimum wage *and/or* overtime compensation] requirements contained in the Labor Code and in the wage orders of the Industrial Welfare Commission, in that _____ [*specify, e.g.,* plaintiff was employed in an administrative, executive, or professional capacity as a _____ (*specify*)].

[2] Use of Form

The affirmative defense in [1], *above*, may be pleaded in answer to a complaint alleging that the wages paid to the plaintiff violated the applicable minimum wage or overtime requirements. For a form of complaint alleging that wages paid to the plaintiff violated applicable minimum wage or overtime requirements, see *§ 250.62*.

Both state and federal law contain numerous exemptions to classifications of employees subject to statutory minimum wage and overtime provisions. Despite the use of similar terminology, however, federal exemptions are not necessarily coextensive with state-law exemptions. For example, the California definition of "outside salespersons" who are exempt from overtime pay differs from the definition of that term under federal law. The California definition depends on how much time the employee spends on outside selling, whereas the federal definition depends on the employee's primary duty [*compare, e.g., 8 Cal. Code Reg. § 11070*, P 2(J) (Cal. Wage Order No. 7-2001) *with 29 C.F.R. § 541.500*]. Thus, in at least some cases, California law provides greater protection for employees than does federal law [*Ramirez v.*

Yosemite Water Co., Inc. (1999) 20 Cal. 4th 785, 796-800, 85 Cal. Rptr. 2d 844, 978 P.2d 2 (nothing in *Lab. Code § 1171* or legislative history indicates legislative intent to prevent IWC from departing from federal definition of "outside salesperson")].

Pursuant to the Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999 [1999 Stats., ch. 134 (A.B. 60); *see Lab. Code § 517*], the IWC amended its wage orders, effective January 1, 2001 [*see 8 Cal. Code Reg. §§ 11010*-11170]. The amended wage orders contain several new exemptions. For example, the minimum wage requirements do not apply to certain employees in the computer software field who earn an hourly rate of pay that is not less than $41, who are engaged primarily in work that is intellectual or creative, that requires the exercise of discretion and independent judgment, and who are highly skilled and proficient in the theoretical and practical application of highly specialized information to computer systems analysis, programming, and software engineering [*see 8 Cal. Code Reg. §§ 11010-11130, 11150*, P 1(A)(3) (Cal. Wage Order Nos. 1-2001-13-2001, 15-2001)]. Also, effective January 1, 2001, the provisions of all wage orders do not apply to individuals participating in national service programs, such as AmeriCorps, carried out using assistance provided under *42 U.S.C. § 12571* [*8 Cal. Code Reg. §§ 11010-11040, 11060-11080, 11130, 11150*, P 1(D) (Cal. Wage Order Nos. 1-2001-4-2001, 6-2001-8-2001, 13-2001, 15-2001); *8 Cal. Code Reg. §§ 11050, 11090-11120*, P 1(F) (Cal. Wage Order Nos. 5-2001, 9-2001-12-2001); *8 Cal. Code Reg. § 11140*, P 1(E) (Cal Wage Order No. 14-80)].

For an overview of minimum wage and overtime requirements, as well as exempt employees, see *§ 250.14*. For a detailed discussion of complete and partial exemptions from the minimum wage and overtime provisions under state law and the FLSA [*29 U.S.C. § 213*], see Wilcox, California Employment Law, Chs. 2 and 3 (Matthew Bender).

[3] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers* .

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21-250 California Forms of Pleading and Practice--Annotated § 250.72

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§ 250.72 Affirmative Defense--Exemption From Applicable Provisions of Labor Code--Defendant Not Liable for Waiting Time Penalties Due to Plaintiff's Avoidance or Refusal of Payment [Lab. Code § 203]

[1] FORM Affirmative Defense--Exemption From Applicable Provisions of Labor Code--Defendant Not Liable for Waiting Time Penalties Due to Plaintiff's Avoidance or Refusal of Payment [Lab. Code § 203]

AS A [*if more than one, specify number, e.g.,* FIRST] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged in complaint, specify, e.g.,* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff _____[secreted or absented himself/herself to avoid payment of wages *and/or* refused to receive the payment fully tendered to him/her by defendant], thereby relieving defendant of liability for waiting time penalties under *Labor Code section 203*.

[2] Use of Form

The form of affirmative defense in [1], *above*, may be pleaded in answer to a request for waiting time penalties pursuant to *Lab. Code § 203* [*see §§ 250.61, 250.65*] when the employee secretes or absents himself or herself to avoid payment, or refuses to receive the payment when fully tendered. Any employee who secretes or absents himself or herself to avoid payment, or who refuses to receive the payment when fully tendered, is not entitled to any benefit for the time during which he or she so avoids payment [*Lab. Code § 203*].

For discussion of waiting time penalties, see *§ 250.16[2][d]*.

[3] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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21-250 California Forms of Pleading and Practice--Annotated § 250.73

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§ 250.73 Affirmative Defense--Defective Assignment of Wages [Lab. Code § 300]

[1] FORM Affirmative Defense--Defective Assignment of Wages [Lab. Code § 300]

AS A [*if more than one, specify number, e.g.,* FIRST] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged in complaint, specify, e.g.,* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges the alleged assignment of wages from the assignor-employee to plaintiff is defective under the provisions of *Labor Code Section 300*, in that _____ [*specify, e.g.,* it was made by a minor without the written consent of a parent or guardian being attached to the alleged assignment].

[2] Use of Form

The form of affirmative defense in [1], *above*, may be pleaded in answer to a complaint for wages by an assignee to recover wages owed to the assignor-employee or former employee when the assignment is defective [*Lab. Code § 300*; *see § 250.20[2]* for discussion of assignment of wages generally].

[3] Cross References

For additional discussion of elements of assignee's complaint, see *§ 250.65[3]*

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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21-250 California Forms of Pleading and Practice--Annotated § 250.74

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§ 250.74 Affirmative Defense--Cause of Action Preempted by Federal Law

[1] FORM Affirmative Defense--Cause of Action Preempted by Federal Law

AS A [*if more than one, specify number, e.g.,* FIRST] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged in complaint, specify, e.g.,* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges plaintiff's action is preempted by _____ [*specify federal law, e.g.,* the Labor Management Relations Act (LMRA) (*29 U.S.C. § 185(a)*) *or* the Employee Retirement Income Security Act of 1974 (ERISA) (*29 U.S.C. § 1144(a)*)] in that plaintiff has alleged _____ [*specify, e.g.,* a violation of a contract between an employer and a labor organization representing employees in an industry affecting commerce, and resolution of the controversy will require an interpretation of the collective bargaining agreement].

[2] Use of Form

The form of affirmative defense in [1], *above*, may be pleaded in answer to a cause of action that is preempted by federal law such as the Labor Management Relations Act (LMRA) [*see 29 U.S.C. § 185(a)*] or by the Employee Retirement Income Security Act of 1974 (ERISA) [*see 29 U.S.C. § 1144(a)*]. For example, several courts have held that state law enforcement of severance benefit claims are preempted by ERISA [*see, e.g., Scott v. Gulf Oil Corp. (9th Cir. 1985) 754 F.2d 1499, 1503-1506* ; *California Chamber of Commerce v. Simpson (C.D. Cal. 1985) 601 F. Supp. 104, 109]* .

For a discussion of affirmative defenses, including causes of action preempted by federal law, see *§§ 250.34[1][e], 250.40[3][b], 250.41[1][d]*.

[3] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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21-250 California Forms of Pleading and Practice--Annotated § 250.75

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§ 250.75 Affirmative Defense--Good Faith Action or Omission and Reasonable Belief of No Minimum Wage Violation [Lab. Code § 1194.2(b)]

[1] FORM Affirmative Defense--Good Faith Action or Omission and Reasonable Belief of No Minimum Wage Violation [Lab. Code § 1194.2(b)]

AS A [*if more than one, specify number, e.g.,* FIRST] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged in complaint, specify, e.g.,* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff is not entitled to liquidated damages because any alleged act or omission by defendant was in good faith and defendant had reasonable grounds for believing that his/her conduct did not violate any provision of the Labor Code or Industrial Welfare Commission order relating to the minimum wage.

[2] Use of Form

The form of affirmative defense in [1], *above*, may be pleaded in answer to a cause of action to recover liquidated damages based on a violation of minimum wage laws [*Lab. Code § 1194.2(b)*]. The defense may be raised by the employer in a civil action brought against it by the employee or on behalf of the employee by the DLSE or the Department of Industrial Relations (DIR) [*Lab. Code § 1194.2(a), (b)*; *see Lab. Code §§ 1193.6, 1194*]. If the employer demonstrates to the court's satisfaction that the alleged act or omission was in good faith and was based on a reasonable belief of compliance with the law, the court has discretion to refuse to award liquidated damages or to award a smaller amount than requested by the plaintiff [*Lab. Code § 1194.2(b)*].

For a discussion of affirmative defenses, see *§§ 250.40[3][b], 250.41[1][d]*. For a discussion of the recovery of liquidated damages in civil actions, see *§§ 250.40[2][f], 250.40[3][a]*.

[3] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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Chapter 251 EQUITY

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§ 251.syn Synopsis to Chapter 251: EQUITY

§ 251.01 Scope of Chapter

§ 251.02 Cross References

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§ 251.10 Definition of Equity

§ 251.11 Purpose of Equitable Power

§ 251.12 The Breadth of Equitable Power

§ 251.13 Equitable Power to Resolve Unique Situations With Unique Solutions

§ 251.14 Discretion of Court to Exercise Equitable Power

§ 251.15 General Limitations on Equitable Power

§ 251.16 Enforcement of Judgments in Equity

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§ 251.17 Appeal of Equitable Decrees

§§ 251.18-251.29 [Reserved]

§ 251.30 In General

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§ 251.31 No Jurisdiction Where Law Provides Adequate Remedy

[1] Plain, Complete, Speedy, and Adequate Remedy at Law Bars Equity

[2] Determining Whether Available Legal Relief Is Plain, Complete, Speedy, and Adequate

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[a] Statute Must Be Intended to Supplant

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§ 251.32 Statutory Additions to Equitable Jurisdiction

§ 251.33 Limitation on Power to Alter Legislative Acts or Policy

[1] Equity Follows Positive Statutes

[2] Law at Time of Decision, Including on Appeal, Applies

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§ 251.34 Power and Duty to Dispose of Complete Controversy

[1] Power to Dispose of Complete Controversy

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§ 251.35 Scope of Relief

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§ 251.37 Jurisdiction to Modify Equitable Decree

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§ 251.38-251.49 [Reserved]

§ 251.50 Maxims Aid in Just Application of Civil Code

§ 251.51 For Every Wrong There Is a Remedy

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§ 251.52A One Who Seeks Equity Must Be Willing to Do Equity

§ 251.53 Equity Is Equality

§ 251.54 Equity Respects Form Less Than Substance

§ 251.55 Between Rights Otherwise Equal, the Earliest Is Preferred

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§ 251.59 One Who Takes the Benefit Must Bear the Burden

§ 251.60 Loss Falls on One Who Made Wrongdoer's Act Possible

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§§ 251.63-251.69 [Reserved]

§ 251.70 Cancellation of Instruments

[1] Elements of Cause of Action

[2] Types of Instruments That May Be Cancelled

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[b] Types of Injunctive Relief and Their Purposes

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[2] Elements of Mandate and Prohibition

§ 251.92 Bill of Peace

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§ 251.94 Estoppel

[1] Equitable Estoppel

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[b] Elements

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[c] Generally a Question of Fact

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[a] The Nature of Judicial Estoppel

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§§ 251.95-251.99 [Reserved]

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§ 251.01 Scope of Chapter

This chapter examines the topic of equity in civil matters. Equity for criminal matter are not covered in this chapter. Actions, defenses, and remedies in equity are addressed in multiple chapters throughout this publication for specific topics and areas of law. This chapter provides a comprehensive review of these issues, with extensive cross referencing to specific topics and chapters to locate discussion and forms for precise application to the matter that is being researched.

This chapter reviews the nature of equity, in general [*see § 251.10* et seq.], equitable jurisdiction [*see § 251.30* et seq.], and equitable maxims for obtaining relief on claims in equity [*see § 251.50* et seq.].

This chapter further addresses equitable causes of action [*see § 251.70* et seq.], equitable remedies [*see § 251.90* et seq.], defenses to actions in equity [*see § 251.140* et seq.], equitable defenses of general application [*see § 251.150* et seq.], specific equitable relief against particular wrongs [*see § 251.180* et seq.], and proceedings for relief in equity [*see § 251.220* et seq.]

This chapter also include a sample complaint in equity: specifically, a general form of complaint in equity to set aside judgment or order obtained by extrinsic fraud or mistake [*see § 251.270*]. This form is illustrative of one type of assertion of equitable relief. Cross references throughout this chapter highlight various forms across the wide spectrum of actions that assert actions, defenses, and grounds for equity relief. Refer to the specific discussions in this chapter to locate applicable forms in other chapters.

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For discussion and forms of the right to and taking of accounting, see Ch. 7, *Accounting, Action for*.

For discussion and forms on grounds for cancellation of instruments, including by consent of the parties, see Ch. 107, *Cancellation of Instruments* .

For discussion of implied or quasi contract, see Ch. 140, *Contracts* .

For discussion and forms on actions for conversion, see Ch. 150, *Conversion* .

For discussion of equitable servitudes, see Ch. 184, *Deeds* .

For discussion and forms on equitable redemption and execution sales, see Ch. 254, *Executions and Enforcement of Judgments* .

For discussion and forms of fraudulent conveyances, see Ch. 270, *Fraudulent Conveyances* .

For discussion and forms of contribution by joint nontort obligors, see Ch. 300, *Indemnity and Contribution* .

For discussion and forms on injunctive relief, see Ch. 303, *Injunctions* .

For discussion and forms of interpleader and related defenses and procedure, see Ch. 314, *Interpleader* .

For discussion of equitable liens, see Ch. 342, *Liens and Wage Preferences* .

For a discussion of the nature of the defense of laches to an action in equity, extrinsic mistake, and equitable estoppel relative to limitation of actions, see Ch. 345, *Limitation of Actions* .

For discussion and forms on obtaining writs of mandate and prohibition, see Ch. 358, *Mandate and Prohibition* .

For discussion and forms for enforcing implied cohabitation agreements, see Ch. 387, *Nonmarital Cohabitation* .

For discussion of standing to bring an action to abate a nuisance, see Ch. 391, *Nuisance* .

For discussion and forms on partition of property, see Ch. 397, *Partition* .

For discussion and forms on actions to prevent waste of municipal assets, see Ch. 466, *Public Entities and Officers: Taxpayers' Actions* .

For discussion and forms of the nature of quiet title actions, see Ch. 482, *Quieting Title* .

For discussion and forms for seeking imposition of receivership in an action, see Ch. 486, *Receivers* .

For discussion and forms on rescission, see Ch. 490, *Rescission and Restitution* .

For forms for seeking equitable relief from judgments and orders, see Ch. 489, *Relief from Judgments and Orders* .

For a discussion and forms of the definition and nature of reformation of instruments, see Ch. 488, *Reformation of Instruments* .

For discussion of the elements of legal subrogation actions and related defenses and procedure, see Ch. 536, *Subrogation* .

For discussion of bill quia timet, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

For discussion and forms on actions for infringement of trademark or trade name, see Ch. 549, *Trademarks and Trade Names* .

For discussion and forms on actions to establish equitable mortgages, see Ch. 555, *Trust Deeds and Real Estate Mortgages* .

For discussion and forms on constructive trusts, see Ch. 561, *Trusts: Constructive Trusts* .

For discussion and forms on resulting trusts, see Ch. 562, *Trusts: Resulting Trusts* .

For discussion and forms on restraints of trade, misappropriation of trade secrets, and equitable relief under *Bus. & Prof. § 17200*, see Ch. 565, *Unfair Competition* .

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[Reserved]

§§ 251.03[Reserved]

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1. Nature of Equity

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§ 251.10 Definition of Equity

Equity consists of a set of rules that permit the contriving of remedies that "correspond both to the primary right of the injured party, and to the wrong by which that right has been violated" [*Bertero v. National General Corp. (1967) 254 Cal. App. 2d 126, 145, 62 Cal. Rptr. 714* ; *Wuest v. Wuest (1942) 53 Cal. App. 2d 339, 346, 127 P.2d 934]* .

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§ 251.11 Purpose of Equitable Power

The object of equity is to do right and justice. [*Hirshfield v. Schwartz (2001) 91 Cal. App. 4th 749, 770, 110 Cal. Rptr. 2d 861]* . When a court exercises its equity powers, its principal concern is to promote justice, acting through its conscience and good faith [*Hirshfield v. Schwartz (2001) 91 Cal. App. 4th 749, 769, 110 Cal. Rptr. 2d 861]* .

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§ 251.12 The Breadth of Equitable Power

A court called upon to afford relief historically or analytically equitable in its nature has broad powers to fashion a remedy [*Shapiro v. Sutherland (1998) 64 Cal. App. 4th 1534, 1552, 76 Cal. Rptr. 2d 101* ; *Dawson v. East Side Union High School Dist. (1994) 28 Cal. App. 4th 998, 1040, 34 Cal. Rptr. 2d 108]* . In exercising its power, the court is not strictly limited to the particular relief requested in the prayer of the complaint [*Redke v. Silvertrust (1971) 6 Cal. 3d 94, 108, 98 Cal. Rptr. 293, 490 P.2d 805* ; *Sears v. Rule (1945) 27 Cal. 2d 131, 148-149, 163 P.2d 443* , *Dawson v. East Side Union High School Dist. (1994) 28 Cal. App. 4th 998, 1040, 34 Cal. Rptr. 2d 108* ; *Oceanside Community Assn. v. Oceanside Land Co. (1983) 147 Cal. App. 3d 166, 177, 195 Cal. Rptr. 14]* .

A court cannot properly exercise an equitable power without consideration of the equities on both sides of a dispute. This principle of equity jurisprudence has been applied in a variety of contexts in which the court is called upon to exercise equitable power [*Cortez v. Purolator Air Filtration Prods. Co. (2000) 23 Cal. 4th 163, 180, 96 Cal. Rptr. 2d 518* ; *999 P.2d 706]* . In so doing, the court must consider any unjust or harsh results, and adopt means to avoid them [*Shapiro v. Sutherland (1998) 64 Cal. App. 4th 1534, 1552, 76 Cal. Rptr. 2d 101]* .

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§ 251.13 Equitable Power to Resolve Unique Situations With Unique Solutions

Equity or chancery law has its origin in the necessity for exceptions to the application of rules of law in those cases where the law, by reason of its universality, would create injustice [*Hirshfield v. Schwartz (2001) 91 Cal. App. 4th 749, 770, 110 Cal. Rptr. 2d 861* ; *Estate of Vargas (1974) 36 Cal. App. 3d 714, 718, 111 Cal. Rptr. 779]* . Accordingly, equity does not wait upon precedent that exactly squares with the facts in controversy, but asserts itself in those situations where right and justice would be defeated but for its intervention [*Times-Mirror Co. v. Superior Court (1935) 3 Cal. 2d 309, 331, 44 P.2d 547* ; *Hirshfield v. Schwartz (2001) 91 Cal. App. 4th 749, 770, 110 Cal. Rptr. 2d 861]* . Courts exercising equitable jurisdiction will so mold and adjust their decrees as to award substantial justice according to the requirements of the varying complications that may be presented to them for adjudication [*Toscano v. Greene Music (2004) 124 Cal. App. 4th 685, 693-694, 21 Cal. Rptr. 3d 732* ; *Hirshfield v. Schwartz (2001) 91 Cal. App. 4th 749, 770-771, 110 Cal. Rptr. 2d 861]* .

The powers of a court of equity, dealing with the subject-matters within its jurisdiction, are not cribbed or confined by the rigid rules of law. From the very nature of equity, a wide play is left to the conscience of the court in formulating decrees. It is of the very essence of equity that its powers should be so broad as to be capable of dealing with novel conditions [*Bechtel v. Wier (1907) 152 Cal. 443, 446, 93 P. 75* ; *Hirshfield v. Schwartz (2001) 91 Cal. App. 4th 749, 770-771, 110 Cal. Rptr. 2d 861* ; *accord*, *MacFarlane v. Peters (1980) 103 Cal. App. 3d 627, 631, 163 Cal. Rptr. 655* (court sitting in equity has powers broad, flexible, and capable of being expanded to deal with novel cases and conditions)]. Thus, lack of precedent is no hindrance to application of equitable relief [*Cassinos v. Union Oil Co. (1993) 14 Cal. App. 4th 1770, 18 Cal. Rptr. 2d 574* ; *MacFarlane v. Peters (1980) 103 Cal. App. 3d 627, 632, 163 Cal. Rptr. 655* ; *Roman v. Ries (1968) 259 Cal. App. 2d 65, 70, 66 Cal. Rptr. 120]* .

For Example:

- In many cases, in order that the owner of the lost document may fully enjoy the benefits of ownership, it is necessary that the document be physically restored. In such a case, a court possesses full

equity power physically to restore the document [*Atkins Corp. v. Tourny (1936) 6 Cal. 2d 206, 216, 57 P.2d 480]* .

The maxim that every wrong has a remedy underlies the power of equity to invent new methods of relief for new types of wrongs [*Shapiro v. Sutherland (1998) 64 Cal. App. 4th 1534, 1552, 76 Cal. Rptr. 2d 101* ; *see Civ. Code § 3523*].

For discussion of the maxim that every wrong has a remedy, see *§ 251.51*.

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§ 251.14 Discretion of Court to Exercise Equitable Power

A trial court's rulings granting or denying equitable relief are matters for the exercise of the court's sound discretion [*Fairchild v. Raines (1944) 24 Cal. 2d 818, 826, 151 P.2d 260* ; *De Anza Enterprises v. Johnson (2002) 104 Cal. App. 4th 1307, 1315, 128 Cal. Rptr. 2d 749]* . That discretion is not an arbitrary one, but should be exercised in accord with the principles and precedents of equity jurisprudence. Sound discretion is not based upon whimsy [*Hicks v. Clayton (1977) 67 Cal. App. 3d 251, 265, 136 Cal. Rptr. 512* ; *Jewett v. Albin (1928) 90 Cal. App. 535, 546, 266 P. 329]* .

However, judicial discretion to grant relief becomes judicial duty to grant it under some circumstances, and the grace that equity should bestow then becomes a matter of right [*Hicks v. Clayton (1977) 67 Cal. App. 3d 251, 265, 136 Cal. Rptr. 512* ; *California Pine Box & Lumber Co. v. Superior Court (1910) 13 Cal. App. 65, 69-71, 108 P. 882]* .

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§ 251.15 General Limitations on Equitable Power

Although the judicial power of equity is broad, courts with that power may not create totally new substantive rights under the guise of doing equity Thus, an equitable remedy must be supported by "some recognized underlying obligation in law or equity" [*Friedman v. Friedman (1993) 20 Cal. App. 4th 876, 886, 24 Cal. Rptr. 2d 892* ; *Marvin v. Marvin (1981) 122 Cal. App. 3d 871, 876, 176 Cal. Rptr. 555* (findings that plaintiff needed the award for "rehabilitation" and that defendant had the ability to respond to the need was not enough)].

Furthermore, even if the complainant has established a right to the protection of equity, and its aid in enforcing and protecting his or her rights, the court may not, in providing relief to that party, inflict a wrong and injury upon another entirely innocent in the transaction by invading and disregarding the rights of the innocent party [*Owens v. McNally (1896) 113 Cal. 444, 452-453, 45 P. 710]* .

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21-251 California Forms of Pleading and Practice--Annotated § 251.16

§ 251.16 Enforcement of Judgments in Equity

[1] Domestic Judgments

The jurisdiction of a court of equity to enforce its decrees is coextensive with its jurisdiction to determine the rights of the parties, and it has power to enforce its decrees as a necessary incident to its jurisdiction [*Dawson v. East Side Union High School Dist. (1994) 28 Cal. App. 4th 998, 1044, 34 Cal. Rptr. 2d 108* ; *Day v. Sharp (1975) 50 Cal. App. 3d 904, 912, 123 Cal. Rptr. 918* ; *Beeler v. Beeler (1961) 193 Cal. App. 2d 548, 550, 14 Cal. Rptr. 460* ; *Mills v. Mills (1956) 147 Cal. App. 2d 107, 116, 305 P.2d 61* ; *Klinker v. Klinker (1955) 132 Cal. App. 2d 687, 694, 283 P.2d 83]* . A court with "jurisdiction of the person may enforce a decree in personam although it could not enforce it in rem" [*Taylor v. Taylor (1923) 192 Cal. 71, 76, 218 P. 756* ; *Beeler v. Beeler (1961) 193 Cal. App. 2d 548, 550, 14 Cal. Rptr. 460]* .

For discussion and forms on enforcement of domestic judgments, see *Ch. 254, Executions and Enforcement of Judgments, § 254.10* et seq.

[2] Foreign Judgments

There is no sound reason for denying a proper decree of another state's court of equity the same full faith and credit accorded any other kind of judgment [*Rozan v. Rozan (1957) 49 Cal. 2d 322, 331, 317 P.2d 11]* .

For discussion and forms on enforcement of foreign judgments, see Ch. 254, *Executions and Enforcement of Judgments* .

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§ 251.17 Appeal of Equitable Decrees

Appellate courts review a judgment based in equity under the abuse of discretion standard [*City of Barstow v. Mojave Water Agency (2000) 23 Cal. 4th 1224, 1256, 99 Cal. Rptr. 2d 294, 5 P.3d 853* ; *De Anza Enterprises v. Johnson (2002) 104 Cal. App. 4th 1307, 1315, 128 Cal. Rptr. 2d 749]* . Under that standard, courts resolve all evidentiary conflicts in favor of the judgment and determine whether the court's decision falls within the permissible range of options set by the legal criteria. [*Hirshfield v. Schwartz (2001) 91 Cal. App. 4th 749, 771, 110 Cal. Rptr. 2d 861* ; *Dorman v. DWLC Corp. (1995) 35 Cal. App. 4th 1808, 1815, 42 Cal. Rptr. 2d 459]* .

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§§ 251.18[Reserved]

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2. Equitable Jurisdiction

21-251 California Forms of Pleading and Practice--Annotated § 251.30

§ 251.30 In General

[1] Jurisdiction Is Generally In Personam

The decrees of courts sitting in equity primarily and properly act in personam, and at most collaterally only, in rem [*Smith v. Davis (1891) 90 Cal. 25, 32, 27 P. 26* ; *Mills v. Mills (1956) 147 Cal. App. 2d 107, 117, 305 P.2d 61* ; *accord, Curtin v. Dep't of Motor Vehicles (1981) 123 Cal. App. 3d 481, 485, 176 Cal. Rptr. 690]* .

A trial court cannot exercise its equitable powers if it does not have subject matter jurisdiction or jurisdiction over the parties in the case [*In re Marriage of Ryall (1984) 154 Cal. App. 3d 743, 754, 201 Cal. Rptr. 504* (disapproved on other grounds as stated in *In re Marriage of Comer (1996) 14 Cal. 4th 504, 515 n.4, 59 Cal. Rptr. 2d 155, 927 P.2d 265*)].

[2] Extraterritorial Jurisdiction

In accordance with the court's in personam jurisdiction, the general rule is that a court exercising equity jurisdiction having jurisdiction of the person of a party may render any appropriate decree acting directly on the party, even though the subject matter affected is outside the in rem jurisdiction of the court [*Promis v. Duke (1929) 208 Cal. 420, 428, 281 P. 613* ; *Pines v. Tomson (1984) 160 Cal. App. 3d 370, 399-400, 206 Cal. Rptr. 866]* .

A court having jurisdiction of the parties may grant and enforce an injunction, although the subject matter affected is beyond its territorial jurisdiction, or requires defendant to do or refrain from doing anything beyond its territorial jurisdiction which it could require him to do or refrain from doing within the jurisdiction [*Pines v. Tomson (1984) 160 Cal. App. 3d 370, 399-400, 206 Cal. Rptr. 866* ; *Allied Artists Pictures Corp. v. Friedman (1977) 68 Cal. App. 3d 127, 137, 137 Cal. Rptr. 94]* .

A California court having jurisdiction of the parties may adjudicate their rights to land located in another state [*Barber v. Barber (1958) 51 Cal. 2d 244, 247, 331 P.2d 628* ; *In re Marriage of Economou (1990) 224 Cal. App. 3d 1466, 1479, 274 Cal. Rptr. 473* ; *but see Fam. Code § 2660*]. It is well settled that a California court with the parties before it

can compel the execution of a conveyance in the form required by the law of the situs and that such a conveyance will be recognized there [*Rozan v. Rozan (1957) 49 Cal. 2d 322, 330, 317 P.2d 11* ; *accord, In re Marriage of Economou (1990) 224 Cal. App. 3d 1466, 1479-1480, 274 Cal. Rptr. 473]* .

By means of its power over the person of the parties before it, a court exercising equitable jurisdiction may compel them to act in relation to property not within the jurisdiction, but its decrees do not operate directly upon the property nor affect the title. They are only made effectual through the coercion of the parties by directing some action on their part, such as the execution of conveyances or the cancellation of instruments [*Taylor v. Taylor (1923) 192 Cal. 71, 76, 218 P. 756]* .

A California court having in personam equitable jurisdiction over the parties can require them to execute conveyances to foreign land to insure a complete determination of the controversy before the court, even though the court does not have in rem jurisdiction over the land itself [*Tomaier v. Tomaier (1944) 23 Cal. 2d 754, 760, 146 P.2d 905* (court ordered husband to execute deed conveying property to wife in action enforcing divorce decree)]. Examples include:

- Trust property [*Hardy v. Hardy (1960) 181 Cal. App. 2d 317, 319, 5 Cal. Rptr. 110]* ;

- Conveyance by court clerk [*Phelps v. Kozakar (1983) 146 Cal. App. 3d 1078, 1085, 194 Cal. Rptr. 872]* ;

- Appoint a commissioner of the court to cancel deeds and execute waivers of California defendants' claims to extraterritorial real property [*Tully v. Bailey (1941) 46 Cal. App. 2d 195, 199, 115 P.2d 542]* ;

- List of fact situations pre-1956 *[Mills v. Mills (1956) 147 Cal. App. 2d 107, 116, 305 P.2d 61]* .

[3] Equitable Jurisdiction of Probate Court

While a probate court has no general equity jurisdiction, it has the power to apply equitable and legal principles in aid of its functions as a probate court [*Security First Nat. Bank v. Superior Court, 1 Cal. 2d 749, 757, 37 P.2d 69* ; *Marsh v. Edelstein (1970) 9 Cal. App. 3d 132, 141, 88 Cal. Rptr. 26]* .

[4] Equitable Jurisdiction of Arbitrators

Arbitrators may apply both legal and equitable principles in deciding the ultimate issue submitted to them [*Morris v. Zuckerman (1968) 69 Cal. 2d 686, 691, 72 Cal. Rptr. 880, 446 P.2d 1000]* .

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§ 251.31 No Jurisdiction Where Law Provides Adequate Remedy

[1] Plain, Complete, Speedy, and Adequate Remedy at Law Bars Equity

Civ. Code § 22.2, which decrees English common law as the law of California to the extent that it does not conflict with the federal or state Constitution and statutes, includes equitable principles within its scope [*Martin v. Superior Court (1917) 176 Cal 289, 293, 168 P 135]* .

Equitable relief will not be granted if there is a plain, complete, speedy, and adequate remedy at law [*Andal v. City of Stockton (2006) 137 Cal. App. 4th 86, 91, 40 Cal. Rptr. 3d 34* ; *see Bond v. Bulgheroni (1932) 215 Cal. 7, 10, 8 P. 2d 130* ("plain, speedy, and adequate")]. Where the primary right of a party is legal in its nature, as distinguished from equitable, and one for which the law affords some remedy, a proper exercise of the equitable jurisdiction will not give equitable relief in any case where the legal remedy is full and adequate and does complete justice. No principle of equitable jurisprudence is more firmly established than this [*Morrison v. Land (1915) 169 Cal. 580, 586, 147 P. 259* ; *Wilkison v. Wiederkehr (2002) 101 Cal. App. 4th 822, 830*].

Accordingly, equitable relief will not be denied where the available legal relief is not plain, complete, speedy, or adequate [*see Thayer Plymouth Center, Inc. v. Chrysler Motors Corp. (1967) 255 Cal. App. 2d 300, 306, 63 Cal. Rptr. 148* (action for injunctive relief); *San Pedro Lumber Co. v. Reynolds (1896) 111 Cal. 588, 596-597, 44 P. 309* (action for accounting)].

For Example:

- Plaintiff's cause of action for equitable declaration that settlement and payment on settlement satisfied obligation failed because plaintiff could make motion under Civ. Code § 675 to compel defendant-creditor to acknowledge satisfaction [*Taliaferro v. Taliaferro (1956) 144 Cal. App. 2d 109, 111, 300 P.2d 726]* .

[2] Determining Whether Available Legal Relief Is Plain, Complete, Speedy, and Adequate

The mere fact that there may be a remedy at law does not oust the jurisdiction of a court of equity. To have this effect, the remedy must also be speedy, adequate, and efficacious to the end in view. It must reach the whole mischief and secure the whole right of the party in a perfect manner at the present time and not in the future. Otherwise, equity will give such relief and aid as the exigencies of the case may require [*Quist v. Empire Water Co. (1928) 204 Cal. 646, 652-653, 269 P. 533* ; *Hicks v. Clayton (1977) 67 Cal. App. 3d 251, 264, 136 Cal. Rptr. 512]* .

Whether the given remedy at law is adequate is, in the first instance, a question of fact for the trial court [*Hicks v. Clayton (1977) 67 Cal. App. 3d 251, 264, 136 Cal. Rptr. 512* (uncollectible damage award would be inadequate)].

PRACTICE TIP:

Under *CCP § 634*, the trial court's decision must resolve the question of the plainness, completeness, speediness, and adequacy of the legal remedy in order for the trial court's determination on that point to receive the deference on review afforded to explicitly decided issues on appeal [*Hicks v. Clayton (1977) 67 Cal. App. 3d 251, 264, 136 Cal. Rptr. 512* (appellate court gave no favorable inference to trial court's choice of damages where trial court decision did not resolve issue)].

For Example:

- The fact that a party against whom a damage award might be sought at law is insolvent supports the inference that an award would be uncollectible and the remedy would be inadequate [*Hicks v. Clayton (1977) 67 Cal. App. 3d 251, 264-265, 136 Cal. Rptr. 512* (damage award reversed as inadequate)].

- Repurchase of goods sold under contract with provision protecting seller from liability to third party would not provide present remedy for buyer's failure to comply with protective provision of sale [*Nadell & Co. v. Grasso (1959) 175 Cal. App. 2d 420, 426, 346 P.2d 505]* .

- The legal remedy of claim and delivery would be inadequate to prevent the destruction of a business by failure to provide personal property essential to the continuation of the business [*Dingley v. Buckner (1909) 11 Cal. App. 181, 185, 104 P. 478]* .

[3] Equity Supplanted by Statute

[a] Statute Must Be Intended to Supplant

The Legislature may supplant common law such as equity by enacting a statute that intends to do so [*see In re Marriage of Plescia (1997) 59 Cal. App. 4th 252, 261, 69 Cal. Rptr. 2d 120]* . Accordingly, as a matter of law, equitable principles are not applicable when the relevant statutory scheme is unambiguous and comprehensive [*Foster v. Snyder (1999) 76 Cal. App. 4th 264, 267, 90 Cal. Rptr. 2d 207* ; *Lass v. Eliassen (1928) 94 Cal. App. 175, 179, 270 P. 745]* .

For Example:

- Equitable defenses of duress and necessity do not apply to determination of whether to suspend under *Veh. Code § 13353.2(a)*, or uphold the suspension under *Veh. Code § 13557(b)(2)*, of an individual's driver's license, because statutory scheme is unambiguous and comprehensive [*Foster v. Snyder (1999) 76 Cal. App. 4th 264, 273, 90 Cal. Rptr. 2d 207]* .

[b] Discerning Legislative Intent to Supplant Equity

Absent any indication that the Legislature intends a statute to supplant equitable principles, the courts should not give it that effect [*In re Marriage of Plescia (1997) 59 Cal. App. 4th 252, 261, 69 Cal. Rptr. 2d 120* (former statute did not supplant laches defense to action for support); *Lacher v. Superior Court (1991) 230 Cal. App. 3d 1038, 1050, 281 Cal. Rptr. 640]* . The courts have applied the rules concerning the supplanting of common law rules to whether statutes supplant equitable jurisdiction [*see* *Martin v. Superior Court (1917) 176 Cal 289, 293, 168 P 135* ("common law" includes "equity")].

Under those rules, the general rule is that statutes do not supplant the equity unless it appears that the Legislature intended to cover the entire subject or, in other words, to "occupy the field" [*Lacher v. Superior Court (1991) 230 Cal. App. 3d 1038, 1050, 281 Cal. Rptr. 640* ; *see* *Pacific Scene, Inc. v. Penasquitos, Inc. (1988) 46 Cal. 3d 407, 413-414, 250 Cal. Rptr. 651, 758 P.2d 1182]* . General and comprehensive legislation, where course of conduct, parties, things affected, limitations and exceptions are minutely described, indicates a legislative intent that the statute should totally supersede and replace the application of equitable principles dealing with the subject matter [*Pacific Scene, Inc. v. Penasquitos, Inc. (1988) 46 Cal. 3d 407, 411, 250 Cal. Rptr. 651, 758 P.2d 1182* ; *Lacher v. Superior Court (1991) 230 Cal. App. 3d 1038, 1050, 281 Cal. Rptr. 640]* .

Statutes are not presumed to alter the application of equity otherwise than the act expressly provides. Where the code is silent, the principles of equity govern as applicable. Equitable jurisdiction is not repealed by implication or otherwise, if there is no repugnancy between it and the statute, and it does not appear that the legislature intended to cover the whole subject [*Lacher v. Superior Court (1991) 230 Cal. App. 3d 1038, 1050, 281 Cal. Rptr. 640]* .

Examples Include:

- *Gov. Code § 12960* supplants equitable principles applicable to the timeliness of the filing of administrative complaints alleging employment discrimination [*Williams v. City of Belvedere (1999) 72 Cal. App. 4th 84, 92-93, 84 Cal. Rptr. 2d 658]* .

- Doctrine of unclean hands does not protect corporation suspended under *Rev. & Tax Code § 23301*, providing for suspension of corporate charter for failure to pay franchise tax, from resulting disability to renew judgment against defendant for breach of contract [*Timberline, Inc. v. Jaisinghani (1997) 54 Cal. App. 4th 1361, 1368 n.5, 64 Cal. Rptr. 2d 4]* .

- Estoppel does not apply to nonstatutory attempt to dissolve governmental entity under statutes providing complete scheme for dissolving that type of entity [*Las Tunas Beach Geologic Hazard Abatement Dist. v. Superior Court (1995) 38 Cal. App. 4th 1002, 1014, 45 Cal. Rptr. 2d 529]* .

- Equitable action by neighboring landowners for developer's fraud and deceit was not supplanted by statutes covering governmental approval of real estate development [*Lacher v. Superior Court (1991) 230 Cal. App. 3d 1038, 1050-1051, 281 Cal. Rptr. 640]* .

- Statutes on relief against former shareholders in receipt of assets of dissolved corporation supplant former equitable doctrine of trust fund theory [*Pacific Scene, Inc. v. Penasquitos, Inc. (1988) 46 Cal. 3d 407, 413-414, 250 Cal. Rptr. 651, 758 P.2d 1182]* .

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§ 251.32 Statutory Additions to Equitable Jurisdiction

The Legislature may establish new areas of equitable jurisdiction [*see Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1144, 131 Cal. Rptr. 2d 29, 63 P.3d 937]* , and may limit the extent of equitable power in those areas [*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1147, 131 Cal. Rptr. 2d 29, 63 P.3d 937* ; *Alch v. Superior Court (2004) 122 Cal. App. 4th 339, 403-404, 19 Cal. Rptr. 3d 29]* .

PRACTICE TIP:

Statutes expanding statutory provisions concerning equitable jurisdiction must be examined to determine whether they actually expand equitable jurisdiction from that in the common law, or merely codify existing common law jurisdictional precedents [*see Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1147, 131 Cal. Rptr. 2d 29, 63 P.3d 937]* .

Except where legislative action impinges on the exercise of fundamental judicial powers and thus violates the separation of powers doctrine [*see Cal. Const., art. III, § 3*], a statute may specify the remedy and/or relief available for violation of the statute and thereby limit the extent of equitable relief a court may grant [*Kraus v. Trinity Management Services, Inc. (2000) 23 Cal. 4th 116, 131 n.14, 96 Cal. Rptr. 2d 485, 999 P.2d 718* ; *Alch v. Superior Court (2004) 122 Cal. App. 4th 339, 405 n.73, 19 Cal. Rptr. 3d 29]* . The court's jurisdiction extends to the limits of the jurisdiction intended by the Legislature [*Kraus v. Trinity Management Services, Inc. (2000) 23 Cal. 4th 116, 131 n. 14, 96 Cal. Rptr. 2d 485, 999 P.2d 718* ; *Alch v. Superior Court (2004) 122 Cal. App. 4th 339, 403, 19 Cal. Rptr. 3d 29]* .

For Example:

- *Bus. & Prof. Code § 17203* does not grant the court equitable power to grant nonrestitutionary monetary relief for unfair business practices [*Kraus v. Trinity Management Services, Inc. (2000) 23 Cal. 4th 116, 137, 96 Cal. Rptr. 2d 485, 999 P.2d 718* ; *Alch v. Superior Court (2004) 122 Cal. App. 4th 339, 408, 19 Cal. Rptr. 3d 29]* .

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§ 251.33 Limitation on Power to Alter Legislative Acts or Policy

[1] Equity Follows Positive Statutes

Equitable power does not intrude into matters that are plain and fully covered by positive statute. In this way, equity does not lend its aid to accomplish by indirection what the law or its clearly defined policy forbids to be done directly [*Timberline, Inc. v. Jiasinghani (1997) 54 Cal. App. 4th 1361, 1368 n.5, 64 Cal. Rptr. 2d 4* ; *Marsh v. Edelstein (1970) 9 Cal. App.3d 132, 140-141, 88 Cal. Rptr. 26]* .

Examples include:

- No court may assign an interest rate above 7 percent, the legal rate of interest under *Cal. Const., Art. XV, § 1*, on an implied loan agreement, even if in hearing the case it sits as a court of equity [*Armstrong v. Picquelle (1984) 157 Cal. App. 3d 122, 129, 203 Cal. Rptr. 552]* .

- Executor's claim of equitable conversion, based upon his payment of taxes, did not entitle him to the property because it was contrary to the law of requiring the probate of estates of deceased persons [*Marsh v. Edelstein (1970) 9 Cal. App.3d 132, 140-141, 88 Cal. Rptr. 26]* .

[2] Law at Time of Decision, Including on Appeal, Applies

The rights of the parties in an action in equity will be determined on the basis of the law as it exists at the time of the determination, rather than at the time the complaint was filed, and this rule applies to judgments on appeal as well as to judgments in the trial court [*City of Whittier v. Walnut Properties, Inc. (1983) 149 Cal. App. 3d 633, 640, 197 Cal. Rptr. 127* ; *see Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal. 3d 294, 306 n. 6, 138 Cal. Rptr. 53, 562 P.2d 1302* (appeal)].

Examples include:

- Injunctions [*Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal. 3d 294, 306 n. 6, 138 Cal. Rptr. 53, 562 P.2d 1302* ; *White v. Davis (1975) 13 Cal. 3d 757, 773* & n. 8, *120 Cal. Rptr. 94, 533 P.2d 222* (new constitutional provision applied on appeal)].

- Action for declaratory relief on siting of adult theatre [*City of Whittier v. Walnut Properties, Inc. (1983) 149 Cal. App. 3d 633, 640, 197 Cal. Rptr. 127]* .

[3] Limitation on Interfering With Legislative Acts of Municipality

Courts of equity may, and sometimes do, interfere and enjoin the action of a municipal corporation acting or proposing to act in excess of jurisdiction and without authority. It has no authority to interfere with the legislative or governmental acts within the scope of the city's authority [*Muchenberger v. City of Santa Monica (1929) 206 Cal. 635, 646, 275 P. 803* ; *Glide v. Superior Court, 147 Cal. 21, 23-24, 81 P. 225* ; *City Council of Santa Barbara v. Superior Court of Santa Barbara County (1960) 179 Cal. App. 2d 389, 397, 3 Cal. Rptr. 796]* .

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§ 251.34 Power and Duty to Dispose of Complete Controversy

[1] Power to Dispose of Complete Controversy

In effecting a complete disposition of the litigation before it, a court sitting in equity can extend its jurisdiction to matters that ordinarily are subject to legal cognizance only [*In re Marriage of Plescia (1997) 59 Cal. App. 4th 252, 258, 69 Cal. Rptr. 2d 120* ; *St. Sava Mission Corp. v. Serbian Eastern Orthodox Diocese (1990) 223 Cal. App. 3d 1354, 1367, 273 Cal. Rptr. 340]* . Where a court has taken jurisdiction of a suit in equity it may determine all legal as well as equitable issues in order to completely dispose of the matters in controversy [*Day v. Sharp (1975) 50 Cal. App. 3d 904, 913, 123 Cal. Rptr. 918]* . A court sitting in equity may exercise its full range of powers to accomplish complete justice between the parties, restoring if necessary the status quo ante as nearly as may be achieved [*Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal. 4th 163, 177, 96 Cal. Rptr. 2d 518, 999 P.2d 706* ; *Fletcher v. Security Pacific Nat. Bank (1979) 23 Cal. 3d 442, 452, 153 Cal. Rptr. 28, 591 P.2d 51]* . The purpose of the rule is to avoid multiple litigation and to do full and complete justice [*St. Sava Mission Corp. v. Serbian Eastern Orthodox Diocese (1990) 223 Cal. App. 3d 1354, 1367, 273 Cal. Rptr. 340* ; *see Sears v. Rule (1945) 27 Cal. 2d 131, 149, 163 P.2d 443]* .

Examples include:

- Court with jurisdiction to decide divorce proceedings has jurisdiction to quiet title of marital property in another county over which it would otherwise not have jurisdiction in a quiet title action [*McClenny v. Superior Court of Los Angeles Cty. (1964) 62 Cal. 2d 140, 147-148, 41 Cal. Rptr. 460, 396 P.2d 916]* .

- Even in the absence of the specific authorization contained in *Bus. & Prof. Code § 17535*, a trial court has the inherent power to order restitution as a form of ancillary relief [*Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal. 4th 163, 177, 96 Cal. Rptr. 2d 518, 999 P.2d 706]* .

The rule only applies, of course, when the court otherwise has jurisdiction, and therefore, this rule of judicial efficiency does not excuse a fundamental lack of personal or in rem jurisdiction [*St. Sava Mission Corp. v. Serbian Eastern Orthodox Diocese (1990) 223 Cal. App. 3d 1354, 1367, 273 Cal. Rptr. 340* (trial court's exercise of subject-matter jurisdiction failed for lack of personal jurisdiction)].

PRACTICE TIP:

The fact that a court may grant even equitable relief that is not sought by a party [*see § 251.12*] presents an issue regarding the lack of inclusion of the relief in the pretrial order. At least where the parties received adequate notice and tried the issue of such relief, no party may question the lack of inclusion of the issue in the pretrial order on appeal [*Citizens Suburban Co. v. Rosemont Development Co. (1966) 244 Cal. App. 2d 666, 684, 53 Cal. Rptr. 551]* .

Furthermore, the equitable jurisdiction must not be limited by statute [*People v. Superior Court (1973) 9 Cal. 3d 283, 286, 107 Cal. Rptr. 192, 507 P.2d 1400]* .

Examples include:

- Nothing in the quiet title statute limits any authority the court may have to grant such equitable relief as may be proper under the circumstances of the case [*Code Civ. Proc. § 760.040(c)*].

- The right to demand contribution provided by *Code Civ. Proc. § 883* is not the only remedy available to a nontort judgment debtor who has paid more than his or her share of a judgment. *Code Civ. Proc. § 883* does not limit any other remedy that a judgment debtor entitled to contribution or repayment may have [*Code Civ. Proc. § 883(c)*].

For discussion of the effect of statutes on equitable jurisdiction, see *§§ 251.31 -251.33*.

[2] Duty to Dispose of Complete Controversy

The trial court has a fundamental duty to provide equity to all parties, and fully dispose of the issues between the parties [*In re Marriage of Dancy (2000) 82 Cal. App. 4th 1142* ; 1149, *98 Cal. Rptr. 2d 775* ; *In re Marriage of Plescia (1997) 59 Cal. App. 4th 252, 258, 69 Cal. Rptr. 2d 120* ; *accord*, *Swan v. Talbot (1907) 152 Cal. 142, 147, 94 P. 238]* .

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§ 251.35 Scope of Relief

[1] Award of Any Legal or Equitable Relief Appropriate Under the Pleadings and Proof

A party is entitled to any and all relief that may be appropriate under the scope of the pleadings and within the facts alleged and proved, irrespective of the theory upon which the facts were pleaded, the title of the pleading, or what relief was sought by the prayer [*Potrero Homes v. Western Orbis Co. (1972) 28 Cal. App. 3d 450, 456, 104 Cal. Rptr. 633* ; *accord, Estrin v. Superior Court (1939) 14 Cal. 2d 670, 678, 96 P.2d 340]* . Thus, a plaintiff may recover if the complaint states any cause of action entitling the plaintiff to any relief either at law or in equity [*Estrin v. Superior Court (1939) 14 Cal. 2d 670, 677, 96 P.2d 340]* .

The fact that a complaint seeks equitable relief is not a bar to a judgment for damages. Where the complaint and prayer are drawn in the form of an equitable action, but equitable relief is for some reason not available, damages may be awarded if the facts pleaded otherwise justify legal relief [*Potrero Homes v. Western Orbis Co. (1972) 28 Cal. App. 3d 450, 456, 104 Cal. Rptr. 633* ; *Walsh v. Macaire (1951) 102 Cal. App. 2d 435, 438-440, 227 P.2d 517* (trial court erred by failing to determine damages after specific performance proved unavailable as remedy)]. This rule also allows the court to replace part of the requested equitable relief with appropriate legal relief [*see Swan v. Talbot (1907) 152 Cal. 142, 147, 94 P. 238]* .

[2] Action and Judgment May Combine Legal and Equitable Relief

A suit in equity may request both legal and equitable relief. Where legal and equitable remedies are sought in the same action, each remedy is governed by the law that would apply to it if the other remedy had not been requested [*Crouser v. Boice (1942) 51 Cal. App. 2d 198, 200, 124 P.2d 358]* .

Thus, a judgment may award both a money judgment at law and:

- Injunctive relief [*Lenard v. Edmonds (1957) 151 Cal. App. 2d 764, 769, 312 P.2d 308* (preliminary injunction); *St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 361, 287 P.2d 387]* .

- Imposition of a constructive trust [*Day v. Sharp (1975) 50 Cal. App. 3d 904, 911-912, 123 Cal. Rptr. 918]* .

- Restitution after rescission [*Runyan v. Pacific Air Industries, Inc. (1970) 2 Cal. 3d 304, 318-319, 85 Cal. Rptr. 138, 466 P.2d 682* ; *see Civ. Code § 1692*].

- An accounting [*Sears v. Rule (1945) 27 Cal. 2d 131, 148-149, 163 P.2d 443]* .

- Injunction and civil penalties [*People v. Superior Court (1973) 9 Cal. 3d 283, 288-289, 107 Cal. Rptr. 192, 507 P.2d 1400]* .

For discussion of the effect of combining equitable and legal remedies on the right to a trial by jury, see *§ 251.222*.

[3] Relief for Future Harm

While some older Court of Appeals cases suggested that *Civ. Code § 3283* providing that "[d]amages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future does not apply to actions in equity" [*see, e.g.,* *Hutcherson v. Alexander (1968) 264 Cal. App. 2d 126, 134, 70 Cal. Rptr. 366* ("No statute or decision authorizes a court to abate a nuisance that is injurious to the plaintiff and then to defer judgment on the issue of past damages to a later date in order to consider evidence accumulated after the nuisance has been abated"], others have approved a court's determination of damages at such time as other proceedings established the necessary facts upon which to base a determination [*see, e.g.,* *Day v. Sharp (1975) 50 Cal. App. 3d 904, 911-912, 123 Cal. Rptr. 918* (constructive trust action)].

Furthermore, the California Supreme Court has allowed an award of future damages and indemnification from their satisfaction. The Court stated that the power to do so is included in the exercise of equitable jurisdiction to "complete justice and prevent further litigation" [*Redke v. Silvertrust (1971) 6 Cal. 3d 94, 107-108, 98 Cal. Rptr. 293, 490 P.2d 805]* .

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§ 251.36 Retention of Equity Jurisdiction

A trial court rendering an equitable decree may reserve jurisdiction to take steps to carry it into effect [*Hewlett v. Squaw Valley Ski Corp. (1997) 54 Cal. App. 4th 499, 541, 63 Cal. Rptr. 2d 118* ; *Estes v. Rowland (1993) 14 Cal. App. 4th 508, 536, 17 Cal. Rptr. 2d 901]* . "There is nothing particularly unusual or contrary to good practice for the court in the exercise of its equity powers to retain jurisdiction of the parties and the subject matter of the action, when the circumstances of the case warrant the same, until the appropriate remedy may be finally accorded by the judgment in the action" [*Universal Consol. Oil Co. v. Byram (1944) 25 Cal. 2d 353, 363, 153 P.2d 746* ; *Hutcherson v. Alexander (1968) 264 Cal. App. 2d 126, 134, 70 Cal. Rptr. 366]* . Jurisdiction over a cause or parties after a final judgment, order or decree is exceptional and limited to special situations, such as where the judgment reserves power to modify [*Day v. Sharp (1975) 50 Cal. App. 3d 904, 911, 123 Cal. Rptr. 918]* .

Examples include:

- A court possesses the inherent power to reserve jurisdiction to ensure that its injunctive orders are carried out [*Estes v. Rowland (1993) 14 Cal. App. 4th 508, 536, 17 Cal. Rptr. 2d 901]* .

- Order for specific performance [*Hewlett v. Squaw Valley Ski Corp. (1997) 54 Cal. App. 4th 499, 541, 63 Cal. Rptr. 2d 118]* .

- Judgment expressly retained jurisdiction "to make such other and further orders and decrees as it may deem necessary or proper to carry out the provisions of this judgment" [*Day v. Sharp (1975) 50 Cal. App. 3d 904, 911, 123 Cal. Rptr. 918]* .

- Judgment expressly reserved continuing jurisdiction "to amend the judgment to insert the amount of the additional sums ... when the amounts were determined" [*United States Liab. Ins. Co. v. Haidinger-Hayes, Inc. (1970) 1 Cal. 3d 586, 591, 83 Cal. Rptr. 418, 463 P.2d 770]* .

"The retention of jurisdiction to meet future problems is regarded as an appropriate exercise of equitable jurisdiction in litigation over water rights, particularly when the adjustment of substantial public interests is involved" [*Los Angeles v. City of Glendale (1943) 23 Cal. 2d 68, 81, 142 P.2d 289* ; *Central and West Basin Water Replenishment Dist. v. Southern Cal. Water Co. (2003) 109 Cal. App. 4th 891, 903, 135 Cal. Rptr. 2d 486]* .

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§ 251.37 Jurisdiction to Modify Equitable Decree

[1] Whether Modification Is Limited to Mode or Procedure

[a] The General Rule

Courts of equity are recognized as having the inherent power to change the mode or procedure in executing its decrees although the decree itself specifies a particular method [*Lesser & Son v. Seymour(1950) 35 Cal. 2d 494, 500, 218 P.2d 536]* . Such a power to change or modify an equitable decree is limited, however, to matters of procedure only. It may not be exercised in such a fashion as to materially change a substantial adjudicated portion of the judgment [*Orban Lumber Co. v. Fearrien (1966) 240 Cal. App. 2d 853, 858-859, 50 Cal. Rptr. 41]* .

By contrast, jurisdiction may not be retained to materially change the adjudication of substantial issues [*Bernardi v. City Council (1997) 54 Cal. App. 4th 426, 439 n. 12, 63 Cal. Rptr. 2d 347* ; *Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist. (1976) 65 Cal. App. 3d 121, 130, 135 Cal. Rptr. 192* ; *Orban Lumber Co. v. Fearrien (1966) 240 Cal. App. 2d 853, 855-856, 50 Cal. Rptr. 41]* .

[b] Exception for Changed Circumstances

Changed circumstances occurring after judgment may justify modifying an equitable decree [*Union Oil Co. of Cal. v. Greka Energy Corp. (2008) 165 Cal. App. 4th 129, 137, 80 Cal. Rptr. 3d 738]* . Instances in which the court has properly modified an equitable judgment based on change of circumstances include:

- When it can be shown that circumstances have so changed that an injunction is no longer necessary or desirable, the trial court has power to amend it in the interest of providing justice for all parties in interest [*Union Interchange, Inc. v. Savage (1959) 52 Cal. 2d 601, 604, 342 P.2d 249* ; *Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist. (1976) 65 Cal. App. 3d 121, 130, 135 Cal. Rptr. 192* ; *accord Estes v. Rowland (1993) 14 Cal. App. 4th 508, 536, 17 Cal. Rptr. 2d 901]* .

- Trial court has discretion to consider whether changed circumstances following its judgment require modification of its order on specific performance [*Union Oil Co. of Cal. v. Greka Energy Corp. (2008) 165 Cal. App. 4th 129, 137, 80 Cal. Rptr. 3d 738* ; *Barnes v. Chamberlain (1983) 147 Cal. App. 3d 762, 767-768, 195 Cal. Rptr. 417]* .

Modification of an order for equitable relief may only be done in accordance with requirements of due process [*City of Oakland v. Superior Court (1982) 136 Cal. App. 3d 565, 186 Cal. Rptr. 326* (injunction)].

For discussion and forms on modification of injunctive relief, see *Ch. 303, Injunctions, § 303.80* et seq.

[c] Exception for Extension of Time to Perform in Order to Prevent Forfeiture

Civ. Code § 3275, which provides generally for avoidance of forfeiture by tendering payment in full, and *Civ. Code § 3369*, which provides that neither specific nor preventive relief can be granted to enforce a forfeiture, allow a court to modify a decree in equity to extend the time for payment, in order to avoid a forfeiture on the part of the obligor, whether the court has reserved judgment to do so or not [*Leslie v. Federal Finance Co., Inc. (1939) 14 Cal. 2d 73, 78-81, 92 P.2d 906]* .

For discussion of equitable remedies preventing forfeiture, see *§ 251.101*.

[d] Exception for Mode of Court-Ordered Sale of Property

A trial court may modify an order for the sale of property with [*Lesser & Son v. Seymour (1950) 35 Cal. 2d 494, 499, 218 P.2d 536]* or without [*Bechtel v. Wier (1907) 152 Cal. 443, 445-446, 93 P. 75]* an express reservation in the judgment of jurisdiction to do so.

For discussion and forms on execution sales, see *Ch. 254, Executions and Enforcement of Judgments, § 254.80* et seq.

[2] Whether Reservation of Jurisdiction Is Necessary for Modification of Mode or Procedure

[a] Differences Among Courts

In instances not involving the exceptions discussed in *§§ 251.37[1][b] -[d]*, whether the trial court must expressly reserve in its judgment the jurisdiction to modify the mode or procedure in the judgment in order for it to modify the judgment in that manner has been a point of contention among California courts [*Barnes v. Chamberlain (1983) 147 Cal. App. 3d 762, 768, 195 Cal. Rptr. 417]* .

Courts of Appeal have ruled that a court sitting in equity has inherent power to make its decree effective by additional orders affecting the details of performance, irrespective of reservation of power in the decree [*see, e.g.,* *Barnes v. Chamberlain (4th Dist., 1983) 147 Cal. App. 3d 762, 767, 768, 195 Cal. Rptr. 417* ; *Hercules Glue Co., Ltd. v. Littooy (1st Dist., 1941) 45 Cal. App. 2d 42, 45, 113 P.2d 490]* . The California Supreme Court has stated that courts exercising equitable jurisdiction have the inherent power, with or without an express reservation of such right in the judgment, to change the mode or procedure in executing its decrees generally when the principles and compelling necessities of a case require it [*see* *Lesser & Son v. Seymour(1950) 35 Cal. 2d 494, 500, 218 P.2d 536]* . However, that statement qualifies as dictum, because the case decided involved a decision modified in accordance with a reservation of jurisdiction to do so [*Lesser & Son v. Seymour (1950) 35 Cal. 2d 494, 497-498, 218 P.2d 536]* .

Other recent Court of Appeals decisions have called for the reservation of the jurisdiction to implement a decree with respect to procedural details or mode of relief [*Bernardi v. City Council (2nd Dist., 1997) 54 Cal. App. 4th 426, 439 n. 12, 63 Cal. Rptr. 2d 347* ; *Orban Lumber Co. v. Fearrien (1st Dist., 1966) 240 Cal. App. 2d 853, 855-856, 50 Cal. Rptr. 41]* .

[b] Examples

Examples of modifications that are only procedural in character and were allowed without a reservation of jurisdiction include:

- Whether to appoint receiver [*Gold v. Gold (2003) 114 Cal. App. 4th 791, 806-809, 8 Cal. Rptr. 3d 118]* .

- Orders to ensure performance of complex mutually interrelated escrow terms and conditions of decree of sale of property [*Barnes v. Chamberlain (1983) 147 Cal. App. 3d 762, 768-769, 195 Cal. Rptr. 417]* .

- Payment of additional expenses incurred pending appeal from the decree [*Hercules Glue Co., Ltd. v. Littooy (1941) 45 Cal. App. 2d 42, 45, 113 P.2d 490]* .

Examples of modifications that are only procedural in character and were allowed under a reservation of jurisdiction include:

- Changing the mode of judicially ordered sale of real property [*Lesser & Son v. Seymour, 35 Cal. 2d 494, 218 P.2d 536 (1950)]* .

- Time for execution [*Gibson v. River Farms, Co. (1942) 49 Cal. App. 2d 278, 286, 121 P.2d 504* ("equity abhors forfeitures")].

Examples of modifications that are not procedural, but are substantive in character include:

- The fiscal cap and debt deadline of validating judgment on a business district redevelopment plan under *Health & Saf. Code § 33503* [*Bernardi v. City Council (1997) 54 Cal. App. 4th 426, 439 n. 12, 63 Cal. Rptr. 2d 347]* .

- Modification of community property distribution by applying the same percentage division of newly discovered pension assets as applied to partial pension benefits covered by the original judgment [*In re Marriage of Melton (1994) 28 Cal. App. 4th 931, 938-939, 33 Cal. Rptr. 2d 761]* .

- Extension of contract term by amount of time preliminary injunction preventing performance is in effect [*Orban Lumber Co. v. Fearrien (1966) 240 Cal. App. 2d 853, 858-859, 50 Cal. Rptr. 41]* .

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[Reserved]

§ 251.38[Reserved]

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§ 251.50 Maxims Aid in Just Application of Civil Code

The equitable maxims set forth in Part 4, Div. 4 of the Civil Code are intended not to qualify the other provisions of the Civil Code, but to aid in their just application [*Civ Code § 3509*]. To aid in the just application of the Civil Code, the maxims may be applied to provide a remedy once a court determines that a plaintiff is entitled to relief under another Code provision [*Halperin v. Raville (1986) 176 Cal. App. 3d 765, 772 n. 3, 222 Cal. Rptr. 350]* . A resulting principle is that a maxim may not nullify a statute [*Lass v. Eliassen (1928) 94 Cal. App. 175, 179, 270 P. 745* ; *Timberline, Inc. v. Jaisinghani (1997) 54 Cal. App. 4th 1361, 1368 n.5, 64 Cal. Rptr. 2d 4]* .

The most common maxims of jurisprudence are discussed in the following sections, supported by either statute or case law. The codified maxims below are found in *Civil Code § 3509, et seq.*, and all were enacted in 1872, except the last four which were added in 1966:

- The maxims of jurisprudence hereinafter set forth are intended not to qualify any of the foregoing provisions of this code, but to aid in their just application [*Civ. Code § 3509*].

- When the reason of a rule ceases, so should the rule itself [*Civ. Code § 3510*].

- Where the reason is the same, the rule should be the same [*Civ. Code § 3511*].

- One must not change his purpose to the injury of another [*Civ. Code § 3512*].

- Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement [*Civ. Code § 3513*].

- One must so use his own rights as not to infringe upon the rights of another [*Civ. Code § 3514*].

- He who consents to an act is not wronged by it [*Civ. Code § 3515*].

- Acquiescence in error takes away the right of objecting to it [*Civ. Code § 3516*].

- No one can take advantage of his own wrong [*Civ. Code § 3517*].

- He who has fraudulently dispossessed himself of a thing may be treated as if he still had possession [*Civ. Code § 3518*].

- He who can and does not forbid that which is done on his behalf, is deemed to have bidden it [*Civ. Code § 3519*].

- No one should suffer by the act of another [*Civ. Code § 3520*].

- He who takes the benefit must bear the burden [*Civ. Code § 3521*].

- One who grants a thing is presumed to grant also whatever is essential to its use [*Civ. Code § 3522*].

- For every wrong there is a remedy [*Civ. Code § 3523*].

- Between those who are equally in the right, or equally in the wrong, the law does not interpose [*Civ. Code § 3524*].

- Between rights otherwise equal, the earliest is preferred [*Civ. Code § 3525*].

- No man is responsible for that which no man can control [*Civ. Code § 3526*].

- The law helps the vigilant, before those who sleep on their rights [*Civ. Code § 3527*].

- The law respects form less than substance [*Civ. Code § 3528*].

- That which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due [*Civ. Code § 3529*].

- That which does not appear to exist is to be regarded as if it did not exist [*Civ. Code § 3530*].

- The law never requires impossibilities [*Civ. Code § 3531*].

- The law neither does nor requires idle acts [*Civ. Code § 3532*].

- The law disregards trifles [*Civ. Code § 3533*].

- Particular expressions qualify those which are general [*Civ. Code § 3534*].

- Contemporaneous exposition is in general the best [*Civ. Code § 3535*].

- The greater contains the less [*Civ. Code § 3536*].

- Superfluity does not vitiate [*Civ. Code § 3537*].

- That is certain which can be made certain [*Civ. Code § 3538*].

- Time does not confirm a void act [*Civ. Code § 3539*].

- The incident follows the principal, and not the principal the incident [*Civ. Code § 3540*].

- An interpretation which gives effect is preferred to one which makes void [*Civ. Code § 3541*].

- Interpretation must be reasonable [*Civ. Code § 3542*].

- Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer [*Civ. Code § 3543*].

- Private transactions are fair and regular [*Civ. Code § 3545*].

- Things happen according to the ordinary course of nature and the ordinary habits of life [*Civ. Code § 3546*].

- A thing continues to exist as long as is usual with things of that nature [*Civ. Code § 3547*].

- The law has been obeyed [*Civ. Code § 3548*].

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§ 251.51 For Every Wrong There Is a Remedy

For every wrong there is a remedy [*Civ Code § 3523*]. Where persons are subjected to certain conduct by others that is unfair and contrary to public policy, courts have full power to afford necessary protection in absence of a statutory remedy [*Williams v International Brotherhood of Boilermakers (1946) 27 Cal. 2d 586, 590, 165 P.2d 903]* . For these purposes, a remedy must in some degree be commensurate with the injury inflicted [*Siminoff v Jas. H. Goodman & Co. Bank (1912) 18 Cal. App. 5, 14, 121 P 939]* .

This maxim underlies the power of equity to invent new methods of relief for new types of wrongs [*Shapiro v. Sutherland (1998) 64 Cal. App. 4th 1534, 1552, 76 Cal. Rptr. 2d 101]* . Accordingly, equity acts in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed [*Hirshfield v. Schwartz (2001) 91 Cal. App. 4th 749, 771, 110 Cal. Rptr. 2d 861* ; *Estate of Vargas (1974) 36 Cal. App. 3d 714, 718, 111 Cal. Rptr. 779]* .

For example:

- The "doctrine of relation," by which an act done at one time is considered, by a fiction of law, to have been done at some antecedent period, is a doctrine of both equitable and legal cognizance, and may be promulgated for the purpose of promoting justice or preventing injustice and is applicable where several proceedings are essential to complete a particular transaction. When it is invoked the doctrine must be based on some antecedent lawful right, and when there is otherwise no remedy. The doctrine may be used to place an initiative on the ballot past the cut off date when the proponent has satisfied all election requirements, but the initiative is declared ineligible due to government clerical error. *MHC Financing Ltd. Partnership Two v. City of Santee (2005) 125 Cal. App. 4th 1372, 23 Cal. Rptr. 3d 622*

For discussion of equitable power to fashion unique remedies, see *§ 251.13*.

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§ 251.52 That Which Ought to Have Been Done Is to Be Regarded as Done

That which ought to have been done is to be regarded as done, in favor of the person to whom, and against the person from whom, performance is due [*Civ. Code § 3529*; *Beckwith v. Sheldon (1914) 168 Cal. 742, 746, 145 P. 97* ; *Palos Verdes Properties v. County Sanitation Dist. Number 5 (1960) 177 Cal. App. 2d 679, 691, 2 Cal. Rptr. 537]* . Under this maxim, equity looks upon things agreed to be done as actually performed, and will treat the subject matter as to collateral consequences and incidents in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been [*Poultry Producers of Central Cal. v Nilsson (1925) 197 Cal. 245, 254, 239 P. 1086* ; *Beverly v Blackwood (1894) 102 Cal. 83, 91-92, 36 P. 378]* .

Examples include:

- Under this maxim, to complete the purchase of property for which nothing remains to be done excepting the execution and delivery of the necessary document of title and its acceptance and payment therefor by defendant, the court may specifically direct the parties to perform acts and execute documents necessary to fully effectuate a transference of title to the property [*Palos Verdes Properties v. County Sanitation Dist. Number 5 (1960) 177 Cal. App. 2d 679, 690-691, 2 Cal. Rptr. 537]* .

- Under this maxim, where a party agrees to give a mortgage or lien on property, or imperfectly attempts to execute that mortgage or lien, upon a valuable consideration received, a court sitting in equity, upon a proper showing, can create a specific lien on the property intended to be encumbered [*Beckwith v. Sheldon (1914) 168 Cal. 742, 746-747, 145 P. 97]* .

- In dealing with constructive trusts, which are creatures of equity, courts will disregard mere form, and will ascertain and act on the substance of things, regarding that as done which should have been done [*Edwards-Town, Inc. v Dimin (1970) 9 Cal. App. 3d 87, 94, 87 Cal. Rptr. 726]* .

The doctrine of equitable conversion is a mere fiction that rests on this maxim [*Lang v. Klinger (1973) 34 Cal. App. 3d 987, 992, 110 Cal. Rptr. 532* ; *Mamula v McCulloch (1969) 275 Cal. App. 2d 184, 193, 79 Cal. Rptr. 571]* .

For discussion of equitable conversion, see *§ 251.181*. For discussion of equitable mortgages, see *§ 251.212*. For discussion of constructive trusts, see *§ 251.111*. For discussion of specific performance, see *§ 251.201*.

The maxim is not applicable where the party has, for consideration, waived that which is claimed ought to have been done [*Smith v Central & Pac. Improv. Corp. (1919) 45 Cal. App. 384, 394, 187 P. 456]* .

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§ 251.52A One Who Seeks Equity Must Be Willing to Do Equity

One who seeks equity must be willing to do equity [*Cortez v. Purolator Air Filtration Prods. Co. (2000) 23 Cal. 4th 163, 180, 96 Cal. Rptr. 2d 518* ; *999 P.2d 706* ; *Farmers Ins. Exchange v. Zerin (1997) 53 Cal. App. 4th 445, 453, 61 Cal. Rptr. 2d 707]* . This maxim stems from the paramount principle that equity is, peculiarly, a forum of conscience [*Cortez v. Purolator Air Filtration Prods. Co. (2000) 23 Cal. 4th 163, 180, 96 Cal. Rptr. 2d 518* ; *999 P.2d 706* ; *In re Marriage of Plescia (1997) 59 Cal. App. 4th 252, 257-258, 69 Cal. Rptr. 2d 120]* .

This maxim means that a court will not grant equitable relief to one party unless that party acknowledges the equitable claims or defenses of the adverse party that grow out of the same subject matter [*Dickson, Carlson & Campillo v. Pole (2000) 83 Cal. App. 4th 436, 445-446, 99 Cal. Rptr. 2d 678* ; *In re Marriage of Plescia (1997) 59 Cal. App. 4th 252, 258, 69 Cal. Rptr. 2d 120]* . Accordingly, under this maxim, a court can compel a plaintiff seeking equitable relief to accommodate the equities favoring the defendant by conditioning the plaintiff's relief upon the enforcement of those equities [*Dickson, Carlson & Campillo v. Pole (2000) 83 Cal. App. 4th 436, 446, 99 Cal. Rptr. 2d 678]* . At the same time, the application of this maxim does not allow the court to create substantive rights under the guise of doing equity, that is, it does not confer rights when the one who invokes it has none [*Stein v. Simpson (1951) 37 Cal. 2d 79, 83, 230 P.2d 816* ; *In re Marriage of Umphrey (1990) 218 Cal. App. 3d 647, 658, 267 Cal. Rptr. 218]* .

For discussion of failure to do equity as a defense, see *§ 251.150*.

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§ 251.53 Equity Is Equality

Between those who are equally in the right, or equally in the wrong, the law does not interpose [*Civ. Code § 3524*]. Equality is equity [*Crowell v. Gilmore (1861) 18 Cal. 370, 372* (unsecured creditors have equal standing among themselves for debtor's assets)].

Examples include:

- Under this maxim, the governing principle is that where equally innocent persons have dealt with one another under a mistake, the burden of loss resulting from the common error will ordinarily be left where the parties themselves have placed it, and a recovery can only be had where in equity and good conscience a defendant should be called upon to refund [*Frontier Refining Co. v Home Bank (1969) 272 Cal. App. 2d 630, 636, 77 Cal. Rptr. 641]* .

- Equity will not aid one party or another to an illegal transaction where they stand in pari delicto, but will leave them just where it finds them, to settle their differences without aid of the court [*Colby v Title Ins. & Trust Co. (1911) 160 Cal. 632, 640, 117 P. 913]* . Where, however, the party seeking the relief is not a free moral agent, and his or her consent to the illegal transaction is obtained through duress, menace, or undue influence, the party is not regarded as in pari delicto with the person obtaining his or her consent by the employment of such means, and will not be precluded from invoking affirmative relief in equity [*Colby v Title Ins. & Trust Co. (1911) 160 Cal. 632, 640-641, 117 P. 913]* .

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§ 251.54 Equity Respects Form Less Than Substance

The law respects form less than substance [*Civ. Code § 3528*]. Under this maxim, equity looks beyond the form of the transaction, and will grant such relief as is necessary to carry out the true intent of the parties. For the purpose of determining that intent, the court will consider all of the facts and circumstances of the transaction [*Ephraim v. Metropolitan Trust Co. (1946) 28 Cal. 2d 824, 172 P.2d 501]* . Equity deals with the substance of transactions, and treats their forms as of secondary importance [*Lencioni v Fidelity Trust & Sav. Bank (1928) 95 Cal. App. 490, 497-498, 273 P. 103]* . A court sitting in equity is bound to consider substance over form [*In re Marriage of Umphrey (1990) 218 Cal. App. 3d 647, 657, 267 Cal. Rptr. 218]* .

Examples include:

- A court exercising equity jurisdiction may view the conduct of the parties rather than the terms of the written instrument in order to ascertain their true intent [*In re Marriage of Umphrey (1990) 218 Cal. App. 3d 647, 657, 267 Cal. Rptr. 218* ; *McCafferty v. Gilbank (1967) 249 Cal. App. 2d 569, 575, 57 Cal. Rptr. 695]* .

- Acts of individuals will be recognized as being those of corporations to prevent fraud, protect the rights of third persons, and accomplish justice [*Wenban Estate, Inc. v. Hewlett (1924) 193 Cal. 675, 696, 227 P. 723* ; *County of San Mateo v. Consolidated Farms, Inc. (1959) 169 Cal. App. 2d 735, 738, 337 P.2d 840]* .

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§ 251.55 Between Rights Otherwise Equal, the Earliest Is Preferred

Between rights otherwise equal, the earliest is preferred [*Civ. Code § 3525*]. The time of creation, however, is the last element for consideration when determining the priority of equitable claims, and a plaintiff's claim can predominate by reason of antedating intervener's equity only if the two interests are in all other respects equal. Interests are equal in equity when each is entitled to the same recognition and protection by reason of possessing to an equal degree those elements of right and justice which are recognized and aided by courts of equity [*Smitton v. McCullough (1920) 182 Cal. 530, 534, 535, 189 P. 686* ; *Pangborn Plumbing Corp. v. Carruthers & Skiffington (2002) 97 Cal. App. 4th 1039, 1049-1050, 119 Cal. Rptr. 2d 416]* .

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§ 251.56 Equity Helps the Vigilant, Before Those Who Sleep on Their Rights

The law helps the vigilant, before those who sleep on their rights [*Civ. Code § 3527*]. Under this maxim, equity frowns upon stale demands and declines to aid those who have slept on their rights. From this maxim is derived the defense of laches [*Piscioneri v. City of Ontario (2002) 95 Cal. App. 4th 1037, 1046, 116 Cal. Rptr. 2d 38* ; *In re Marriage of Plescia (1997) 59 Cal. App. 4th 252, 256, 69 Cal. Rptr. 2d 120]* . It is also the basis for the rule of equitable estoppel to the effect that estoppel may arise from silence where there is a duty to speak [*see Russell v. Dopp (1995) 36 Cal. App. 4th 765, 781-782, 42 Cal. Rptr. 2d 768]* .

For discussion of the defense of laches, see *§ 251.142*. For discussion of equitable estoppel, see *§§ 251.161, 251.170[2]*.

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§ 251.57 Equity Follows the Law

Equity follows the law. A court of equity cannot grant relief that the law denies [*Abouab v. City and County of San Francisco (2006) 141 Cal. App. 4th 643, 673, 46 Cal. Rptr. 3d 206* ; *Johnson v. Tago, Inc. (1986) 188 Cal. App. 3d 507, 518, 233 Cal. Rptr. 503]* .

Neither a fiction nor a maxim may nullify a statute [*Lass v. Eliassen (1928) 94 Cal. App. 175, 179, 270 P. 745* ; *Timberline, Inc. v. Jaisinghani (1997) 54 Cal. App. 4th 1361, 1368 n.5, 64 Cal. Rptr. 2d 4]* . Principles of equity cannot be used to avoid a statutory mandate [*Jiagbogu v. Mercedes-Benz USA (2004) 118 Cal. App. 4th 1235, 1244, 13 Cal. Rptr. 3d 679* ; *Ghory v. Al-Lahham (1989) 209 Cal. App. 3d 1487, 1492, 257 Cal. Rptr. 924]* .

For discussion of equity and illegal acts, see *§ 251.58[2]*.

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§ 251.58 No One Can Take Advantage of His or Her Own Wrong

[1] Improper Conduct

No one can take advantage of his or her own wrong [*Civ. Code § 3517*]. The prestatutory version of the maxim sets forth that one who comes to court seeking equity must come with clean hands [*see Jay Bharat Developers, Inc. v. Minidis (2008) 167 Cal. App. 4th 437, 445, 84 Cal. Rptr. 3d 267*]. Under this maxim, it is the duty of a court exercising equity jurisdiction, whenever it is suggested that a plaintiff is guilty of fraudulent or otherwise improper conduct with respect to his or her claim, to inquire into the facts of the alleged conduct. This rule necessarily presupposes, however, that the facts indicating improper conduct on the part of the plaintiff are properly before the court [*Moss Estate Co. v. Adler (1953) 41 Cal. 2d 581, 584, 261 P.2d 732]* .

Examples include:

- This maxim is the basis for the equitable doctrine of "clean hands" and the equitable defense of "unclean hands" [*Jay Bharat Developers, Inc. v. Minidis (2008) 167 Cal. App. 4th 437, 445, 84 Cal. Rptr. 3d 267* ; *In re Brandie W. (1984) 157 Cal. App. 3d 110, 113, 203 Cal. Rptr. 537]* .

- The rule that a defendant may be equitably estopped from asserting the statute of limitations when, as a result of intentional concealment, the plaintiff is unable to discover the defendant's actual identity is based on the maxim that one may not profit from one's own wrongdoing [*Bernson v. Browning-Ferris Industries (1994) 7 Cal. 4th 926, 936, 30 Cal. Rptr. 2d 440, 873 P.2d 613]* .

- In nuisance actions, the party causing the alleged nuisance may not avoid damages by offering or even have admitted into evidence an offer to buy the property of the complaining party at its market value, because that would allow the perpetrator to gain the advantage of obtaining the other party's property as a result of having created the nuisance [*McIvor v. Mercer-Fraser Co. (1946) 76 Cal. App. 2d 247, 251-252, 172 P.2d 758]* .

For discussion of defense of unclean hands, see *§ 251.141*. For discussion of equitable estoppel as defense to defense of statute of limitations, see *§ 251.170[2]*.

[2] Illegal Acts

A court sitting in equity will not lend assistance to persons whose claim for relief rests on an illegal transaction [*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc. (2005) 36 Cal.4th 412, 435, 30 Cal. Rptr. 3d 755, 115 P.3d 41* (building contract illegal due to subcontractor's lack of license); *California Phys. Serv. v. Aoki Diabetes Research Inst. (2008) 163 Cal. App. 4th 1506, 1516, 78 Cal. Rptr. 3d 646* (illegal services contract); *see, e.g., Goldstein v. Enoch (1967) 248 Cal. App. 2d 891, 897, 57 Cal. Rptr. 19]* . Where, however, the party seeking the relief is not a free moral agent, and his or her consent to the illegal transaction is obtained through duress, menace, or undue influence, the party is not regarded as in pari delicto with the person obtaining his or her consent by the employment of such means, and will not be precluded from invoking affirmative relief in equity [*Colby v Title Ins. & Trust Co. (1911) 160 Cal. 632, 640-641, 117 P. 913]* . Similarly, the maxim does not apply where the failure to restrain an act because the parties are in pari delicto would result in permitting an act declared by statute to be void or against public policy [*Jomicra, Inc. v. California Mobile Home Dealers Assn. (1970) 12 Cal. App. 3d 396, 402, 90 Cal. Rptr. 696* ; *Kofsky v. Smart & Final Iris Co. (1955) 131 Cal. App. 2d 530, 532, 281 P.2d 5]* .

For discussion of exceptions under which illegal contracts are enforceable despite the illegality, see *Ch. 140, Contracts, §§ 140.24[6]*.

For discussion of illegal contracts and the affirmative defense based on the illegality, see *Ch. 140, Contracts, §§ 140.24, 140.63*. For form of complaint for action in conversion arising from illegal contract, see *Ch. 140, Contracts, § 140.144[5]*. For form of affirmative defense to a building contract of nonlicensed status of subcontractor, see *Ch. 104, Building Contracts, § 104.217*.

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§ 251.59 One Who Takes the Benefit Must Bear the Burden

The one who takes the benefit must bear the burden [*Civ. Code § 3521*]. This maxim has found application in at least three legal contexts:

- Contracts--e.g., no person may adopt that part of an entire transaction that is beneficial to him or her, and then reject its burdens [*Peers v. McLaughlin (1891) 88 Cal. 294, 299, 26 P. 119* ; *Halperin v. Raville (1986) 176 Cal. App. 3d 765, 772, 222 Cal. Rptr. 350* ; *see Jans v Nelson (2000) 83 Cal. App. 4th 848, 857, 100 Cal. Rptr. 2d 106* (maxim underlies requirement of contribution among co-obligors)].

- Liability for tort or fraud of others--e.g., the principal is liable for the fraud of an agent [*Mathews v Wilson (1918) 38 Cal. App. 148, 151-152, 175 P. 647]* , and a fiduciary trust estate may be required to respond in damages for the trustee's tortious acts to the extent that the estate has been enriched thereby [*Alphonzo E. Bell Corp. v Bell View Oil Syndicate (1941) 46 Cal. App. 2d 684, 689, 116 P.2d 786]* .

- Possession and use of property [*Soman Properties, Inc. v. Rikuo Corp. (1994) 24 Cal. App. 4th 471, 486, 29 Cal. Rptr. 2d 427* ; *Bastanchury v. Times-Mirror Co. (1945) 68 Cal. App. 2d 217, 240, 156 P.2d 488]* .

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§ 251.60 Loss Falls on One Who Made Wrongdoer's Act Possible

Where one of two innocent persons must suffer by the act of a third, the one, by whose negligence it happened, must suffer [*Civ. Code § 3543*]. The concept of this maxim is basically an estoppel theory, addressing comparative fault between two innocent victims. It is based upon misplaced confidence by one victim resulting in victimization of the other: Misplaced confidence is negligence within the maxim and has resulted in the estoppel of a true owner from asserting title against an innocent party. The maxim applies to bona fide purchasers for value from those who have been clothed with the indicia of ownership. For although the true owner is guilty of no more than misplaced confidence, such misplaced confidence is negligence within the meaning of the maxim [*South Beverly Wilshire Jewelry & Loan v. Superior Court (2004) 121 Cal. App. 4th 74, 81, 16 Cal. Rptr. 3d 710* ; *Wurzl v. Holloway (1996) 46 Cal. App. 4th 1740, 1752, 54 Cal. Rptr. 2d 512]* .

The equitable maxim that, of two innocent parties injured by the act of a third party, the careless party should bear loss has no application when there is a measure of carelessness on the part of both parties [*Collins v Home Sav. & Loan Asso. (1962) 205 Cal. App. 2d 86, 101, 22 Cal. Rptr. 817]* .

For discussion of estoppel, see *§ 251.161*.

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§ 251.61 Equity Abhors Multiplicity of Action

Equity abhors a multiplicity of actions [*In re Marriage of Davis (1977) 68 Cal. App. 3d 294, 304, 137 Cal. Rptr. 265* ; *Pacific Engine & Machine Works v. Superior Court of State of Cal., In and For Del Norte Cty. (1955) 132 Cal. App. 2d 739, 744, 282 P.2d 937]* . The law reduces to the minimum the number of actions that may subsist between the same parties [*Pacific Engine & Machine Works v. Superior Court of State of Cal., In and For Del Norte Cty. (1955) 132 Cal. App. 2d 739, 744, 282 P.2d 937* ; *Rilcoff v. Superior Court (1942) 50 Cal. App. 2d 503, 506, 123 P.2d 540]* .

Examples:

- There are two general classes of cases in which injunctions are issued to prevent a multiplicity of actions, namely, those in which many claims which have not been adjudicated are brought into equity to be made the subject of a single trial and decree, and those that are enjoined because they are shown to be vexatious suits upon causes of action that have been settled by former adjudication [*Verdier v. Verdier (1962) 203 Cal. App. 2d 724, 735, 22 Cal. Rptr. 93]* .

- Intervenor [*In re Marriage of Davis (1977) 68 Cal. App. 3d 294, 304, 137 Cal. Rptr. 265]* .

- Writ of mandate commanded trial court to recommence California action filed after Oregon action, upon finding that trial court improperly stayed California action, in that California action provided only forum in which final judgment would be had in controversy between the parties [*Pacific Engine & Machine Works v. Superior Court of State of Cal., In and For Del Norte Cty. (1955) 132 Cal. App. 2d 739, 744, 282 P.2d 937]* .

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§ 251.62 Equity Abhors Forfeitures

Just as the law abhors forfeitures [*Enfantino v. Superior Court (1984) 162 Cal. App. 3d 1110* ; 1113, *208 Cal. Rptr. 829]* , so, too, does equity [*Hopkins v. Woodward (1932) 216 Cal. 619, 622, 15 P.2d 499* ; *Peak-Las Positas Partners v. Michael Bollag (2009) 172 Cal. App. 4th 101, 106, 90 Cal. Rptr. 3d 775* ; *Carroll v. Import Motors, Inc. (1995) 33 Cal. App. 4th 1429, 1437, 39 Cal. Rptr. 2d 791]* . By statute, an authorization of forfeiture "must be strictly interpreted against the party for whose benefit it is created" [*Civ. Code § 1442*].

The fact that equity abhors forfeitures does not with nothing more excuse a person from complying with the law [*Martell v. Antelope Valley Hospital Medical Center (2001) 67 Cal. App. 4th 978, 984-985, 79 Cal. Rptr. 2d 329* (statute of limitation not avoided by equity); *Carroll v. Import Motors, Inc. (1995) 33 Cal. App. 4th 1429, 1437, 39 Cal. Rptr. 2d 791* (compulsory cross-complaint not avoided by equity)].

For discussion of preventing forfeitures, see *§ 251.101*.

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[Reserved]

§§ 251.63[Reserved]

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§ 251.70 Cancellation of Instruments

[1] Elements of Cause of Action

To establish a cause of action for cancellation under *Civ. Code § 3412*, a plaintiff must establish [*Wiard v. Brown (1881) 59 Cal. 194, 197]* :

- The existence of a facially valid [*Civ. Code § 3413*] instrument of writing, and
- The instrument:
  - Has been obtained without consideration,
  - Has become a nullity, or
  - If left outstanding, may:
    - Cause serious injury to plaintiff,
    - Be vexatiously used against plaintiff, after the evidence to impeach or invalidate it is lost, or
    - Throw a cloud or suspicion over plaintiff's title.

The statute specifically refers to instruments that are "void or voidable" [*see Civ. Code § 3412*], a distinction that affects the specifics of the available remedy [*see* § 107.C3[4]].

For discussion of grounds for cancellation, including by consent of the parties, see *Ch. 107, Cancellation of Instruments*

, § 107.11. For discussion of establishing the possibility of serious injury to the plaintiff, see *Ch. 107, Cancellation of Instruments, § 107.14*. For discussion of the distinction between void and voidable instruments and its effects, see *Ch. 107, Cancellation of Instruments, § 107.13*. For form of complaint for cancellation of instrument and related forms, see *Ch. 107, Cancellation of Instruments, § 107.60* et seq.

[2] Types of Instruments That May Be Cancelled

Instruments that may be reformed in equity include, among others:

- Applications of a contractual nature [*see Klombies v. Weeks Poultry Community (1932) 121 Cal. App. 175, 8 P.2d 940]* .

- Assignments [*see Lentz v. Hartman (1941) 43 Cal. App. 2d 609, 111 P.2d 404]* .

- Bills of sale for personal property [*see Bland v. Kelley (1945) 69 Cal. App. 2d 116, 158 P.2d 206]* .

- Consent to the marriage of a minor child [*see Turner v. Turner (1959) 167 Cal. App. 2d 636, 334 P.2d 1011]* .

- Deeds [*see Smith v. Williams (1961) 55 Cal. 2d 617, 12 Cal. Rptr. 665, 361 P.2d 241]* .

- Executory contracts for the sale of personal property [*see Matlin v. Crescent Commercial Corp. (1949) 93 Cal. App. 2d 8, 207 P.2d 873]* .

- Leases [*see Oswald v. El Centro (1930) 211 Cal. 45, 292 P. 1073]* .

- Options [*see Bard v. Kent (1942) 19 Cal. 2d 449, 122 P.2d 8]* .

- Promissory notes and security instruments [*see Fleming v. Kagan (1961) 189 Cal. App. 2d 791, 11 Cal. Rptr. 737]* .

- Reconveyances by a trustee under a deed of trust [*see Phelps v. American Mortgage Co. (1936) 6 Cal. 2d 604, 59 P.2d 95]* .

- Releases from liability [*see O'Meara v. Haiden (1928) 204 Cal. 354, 268 P. 334]* .

- Stock certificates [*see Noble v. Learned (1908) 153 Cal. 245, 94 P. 1047]* .

- Written agreements which purport to be contracts but are not because there was no meeting of the minds [*see Patterson v. Clifford F. Reid, Inc. (1933) 132 Cal. App. 454, 23 P.2d 35]* . or

- Written relinquishment of child for adoption if a parent has been induced by fraud, duress, or undue influence (or other means) to sign the relinquishment [*see Brooks v. Los Angeles County Bureau of Adoptions (1963) 218 Cal. App. 2d 732, 32 Cal. Rptr. 466]* .

[3] Defenses to Request for Cancellation

Defenses to a request for the equitable remedy of cancellation of an instrument include:

- Defendant is not connected with fraud, duress, menace, or undue influence rendering the instrument

void or voidable [*see* *Carroll v. Carroll (1940) 16 Cal. 2d 761, 770-771, 108 P.2d 420]* .

- Plaintiff's failure to act promptly to rescind the underlying transaction, after discovering the facts making voidable instrument voidable [*see* *Leeper v. Beltrami (1959) 53 Cal. 2d 195, 215, 1 Cal. Rptr. 12, 347 P.2d 12]* .

- Unclean hands [*see* *Taylor v. Taylor (1944) 66 Cal. App. 2d 390, 399-400, 152 P.2d 480]* .

- Plaintiff's waiver of right to rescind transaction underlying voidable instrument [*see* *Mobley v. Richfield Oil Corp. (1942) 53 Cal. App. 2d 406, 410, 128 P.2d 105]* .

- Instrument is apparently invalid on its face or face of another instrument [*Civ. Code § 3413*].

- Cancellation would cause defendant to suffer forfeiture [*see § 251.70[4][b]*.

For discussion of defenses to a request for cancellation of an instrument, see *Ch. 107, Cancellation of Instruments, § 107.18*.

[4] Cancellation as Remedy

[A] Remedy for Cancellation Dependent on Status of Instrument

If the instrument is void or voidable, the court will declare it so and afford relief by ordering it to be delivered up and cancelled [*Civ. Code § 3412*; *Wiard v. Brown (1881) 59 Cal. 194, 197]* . However, where an instrument is voidable, rather than void [*see* § 251.C3[1]], the plaintiff in an action for cancellation of it must generally offer to restore to the defendant everything of value that the plaintiff has received in the underlying transaction, less damages sustained [*see Fleming v. Kagan (1961) 189 Cal. App. 2d 791, 796-798, 11 Cal. Rptr. 737]* .

A lost instrument that would be subject to cancellation clearly cannot be canceled under the plain language of *Civ. Code § 3412*. However, on proper application, the instrument may be adjudged void [*see Civ. Code § 3412*; *Brown v. Anderson-Cottonwood Irrigation Dist. (1920) 183 Cal. 186, 189, 190 P. 797]* .

Where an instrument is evidence of different rights or obligations, it may be canceled in part and allowed to stand as to the part remaining uncanceled [*Civ. Code § 3414*].

For discussion of void and voidable instruments, lost instruments, and partial cancellation of instruments, see *Ch. 107, Cancellation of Instruments, §§ 107.12, 107.13, 107.15*.

[b] With Other Remedies

Cancellation differs from rescission in that rescission involves the restoration of the parties to their former positions, whereas cancellation of a contract leaves the parties where they are when it is canceled [*see* *Mamula v. McCulloch (1969) 275 Cal. App. 2d 184, 197, 79 Cal. Rptr. 571]* . Accordingly, cancellation of an instrument may be had in an action for restitution [*see, e.g.,* *Millar v. James (1967) 254 Cal. App. 2d 530, 532, 534, 62 Cal. Rptr. 335]* .

If the effect of canceling a contract is that the defendant would suffer a forfeiture, forfeiture must be prevented by requiring restoration as a condition of cancellation, in which case cancellation of the writing that evidences the contract would be in effect a rescission and restitution [*see* *Ebbert v. Mercantile Trust Co. (1931) 213 Cal. 496, 499-501, 2 P.2d 776]* .

For discussion of restitution after rescission, see *§ 251.110*.

For discussion of remedy of cancellation in combination with other remedies, see *Ch. 107, Cancellation of Instruments, § 107.11*.

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§ 251.71 Quieting Title

[1] Grounds for Quieting Title

[a] Under Code Civ. Proc. § 760.010

If one person claims to be the owner of an interest in property, and another person claims to be the owner of an interest in the same property, and the two claims conflict, either may sue the other for a judgment resolving that conflict with the equitable relief [*see Santoro v. Carbone (1972) 22 Cal. App. 3d 721, 731, 99 Cal. Rptr. 488]* of quieting title [*see Code Civ. Proc. § 760.010*]. For these purposes, a "claim" is a legal or equitable right, title, estate, lien, or interest in property or cloud on title [*Code Civ. Proc. § 760.010(a)*], and "property" includes real property and, to the extent applicable, personal property [*Code Civ. Proc. § 760.010(b)*].

PRACTICE TIP:

When a dispute arises as to ownership of the present interest, and one claimant has, while the other claimant (holder of an equitable interest only) lacks, record title, a quiet title action is inappropriate. Instead, the plaintiff should sue for a judgment declaring the defendant to be the owner as a resulting or a constructive trustee only, and directing the defendant to transfer ownership to the plaintiff [*see, e.g., Nevarez v. Nevarez (1962) 202 Cal. App. 2d 596, 21 Cal. Rptr. 70]* .

For discussion of the equitable remedy of constructive trust, see *§ 251.111*.

For discussion of the nature of quiet title actions under *Code Civ. Proc. § 760.010*, see *Ch. 482, Quieting Title, §§ 482.12 -482.14*. For discussion of disposed party's establishment of title in quiet title action, see *Ch. 482, Quieting Title, § 482.23*. For forms of complaint for quieting title under *Code Civ. Proc. § 760.010* and related motions and orders, see *Ch. 482, Quieting Title, §§ 482.80, 482.81, 482.84 -482.85, 482.87*.

[b] Under Other Statutes

Specific statutes provide for quieting title against:

- In the case of tax-defaulted property:
  - The tax default after the defaulting owner redeems [*see Rev. & Tax. Code § 4113*], or
  - The right of redemption after a bona fide purchaser or his or her successor acquires the property at tax sale [*see Rev. & Tax. Code §§ 3727, 3950*].
- Tax lien for canceled state, county, or city taxes [*see Rev. & Tax. Code § 4990.3*].
- Certain improvement assessment liens [*see Code Civ. Proc. § 801.1*].
- The state's claims that land is situated in the former bed of a navigable river or stream [*see Pub. Res. Code § 6461*].
- Questions of the validity of a boundary line agreement entered into between the state and the owner of shoreline property pursuant to *Pub. Res. Code § 6357* [*see Code Civ. Proc. § 760.020(b)*].
- State or private claims in situ oil or gas deposits [*see Pub. Res. Code § 6814*], or
- Claims conflicting with public ownership of an interest in property [*see Marks v. Whitney (1971) 6 Cal. 3d 251, 261-262, 98 Cal. Rptr. 790, 491 P.2d 374]* .

For discussion of actions under any of these statutes, see *Ch. 482, Quieting Title, §§ 482.16 -482.22*.

[2] Defenses to Quiet Title Action

A court will not give equitable relief to a party unless he or she has acknowledged or conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adverse party and growing out of, or necessarily involved in, the subject matter of the controversy [*O'Brien v. O'Brien (1925) 197 Cal. 577, 584-585, 241 P. 861]* .

That the other party is not a bona fide purchaser is not a defense against the other party's claims in an action to quiet title [*see Mix v. Sodd (1981) 126 Cal. App. 3d 386, 389-392, 178 Cal. Rptr. 736]* .

For forms of answer to complaint for quieting title under *Code Civ. Proc. § 760.010*, see *Ch. 482, Quieting Title, §§ 482.82, 482.83*.

[3] The Remedy

A party to a quiet title action will prevail only to the extent he or she proves ownership interest in the disputed property. A party cannot prevail merely by showing that the other party does not own the interest claimed, or appears to have, or by showing that the other party owns no interest [*see, e.g., Kunza v. Gaskell (1979) 91 Cal. App. 3d 201, 207, 154 Cal. Rptr. 101* (plaintiff); *Harmon Enterprises, Inc. v. Vroman (1959) 167 Cal. App. 2d 517, 334 P.2d 628* (defendant)].

For discussion of the presumptions applicable in quiet title action, see *Ch. 482, Quieting Title, § 482.23*.

The remedy provided by *Code Civ. Proc. § 760.010* is cumulative and not exclusive of any other remedy, form, or right

of action or proceeding provided by law for establishing or quieting title to property [*Code Civ. Proc. § 760.030(a)*].

For discussion of the effect of other requested remedies on defendant's entitlement to trial by jury in quiet title action, see *§ 251.222*.

The effect of judgment in a quiet title action is to quiet adverse claimants to the rightful owner's title, because the doctrine of res judicata precludes further litigation and thereby tends to make the rightful owner's title secure [*see Jones v. Sacramento Sav. & L. Ass'n (1967) 248 Cal. App. 2d 522, 530, 56 Cal. Rptr. 741]* .

For discussion of the parties to whom the binding effect of judgment in quiet title action applies, see *Ch. 482, Quieting Title, § 482.24*. For form of judgment quieting title under *Code Civ. Proc. § 760.010*, see *Ch. 482, Quieting Title, § 482.86*.

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§ 251.72 Contribution by Joint Nontort Obligors

If a party to a joint or joint and several obligation satisfies more than his or her share of the obligation, he or she may require a proportionate contribution from all the parties to the obligation [*Civ. Code § 1432*]. Similarly, a surety may also seek contribution from the principal [*Civ. Code § 2848*].

An action for contribution on debt is controlled by the two-year statute of limitations for actions not founded on instruments in writing and thus must be brought within two years from the date of payment [*Code Civ. Proc. § 339*; *Manuel v. Hicks Iron Works (1932) 216 Cal. 459, 461, 14 P.2d 756]* .

For discussion of contribution by joint nontort obligors, see *Ch. 300, Indemnity and Contribution, §§ 300.91, 300.93*. For form of complaint for contribution from joint nontort obligor, see *Ch. 300, Indemnity and Contribution, §§ 300.220*.

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§ 251.73 Accounting

[1] Nature and Elements of Accounting Action

[a] Nature of Accounting Action

An action for accounting lies in equity when the suit is for recovery of an amount that is unliquidated and unascertained and that cannot be determined without an accounting [*St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 359, 287 P.2d 387]* .

For discussion of the nature of accounting actions, including distinguishing them from action for account or account stated, see Ch. 7, *Accounting, Action for*, § 7.11.

[b] Elements of Accounting Action

A complaint sufficiently states a cause of action in equity for an accounting by alleging [*see Kritzer v. Lancaster (1950) 96 Cal. App. 2d 1, 7, 214 P.2d 407]* :

- A relationship between the parties or other circumstances that require an accounting in equity because legal remedies are inadequate, and

- An unknown balance is due that cannot not be ascertained without an accounting, the means of which are within the knowledge of the defendant.

For discussion of elements of accounting actions, see Ch. 7, *Accounting, Action for*, § 7.12[1], [3]. For form of complaint and various allegations for action for accounting, see Ch. 7, *Accounting, Action for*, § 7.60 et seq.

[c] Circumstances Requiring Accounting

Circumstances rendering an accounting equitable include:

- When a fiduciary relationship exists between the parties and the defendant has a duty to render an account [*San Pedro Lumber Co. v. Reynolds (1896) 111 Cal. 588, 596-597, 44 P. 309]* .

- Contractual relationships requiring cost-sharing [*McClain v. Octagon Plaza, LLC (2008) 159 Cal. App. 4th 784, 807, 71 Cal. Rptr. 3d 885*] or payment by one party to another of profits received [*Wolf v. Superior Court (2003) 107 Cal. App.4th 25, 34, 130 Cal. Rptr. 2d 860*].

- When accounts are so complicated that an ordinary legal action demanding a fixed sum is impracticable, and defendant has committed misconduct, violated a fiduciary duty, or otherwise owes money to the plaintiff [*see Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 593-594, 37 Cal. Rptr. 2d 653]* , or

- Fraud [*Swan v. Talbot (1907) 152 Cal. 142, 145, 94 P. 238]* .

For discussion of circumstances requiring an accounting, see Ch. 7, *Accounting, Action for*, §§ 7.12[2], 7.13. For discussion of procedures for prosecuting an accounting action, see Ch. 7, *Accounting, Action for*, §§ 7.15-7.21.

For discussion of right to default judgment after opposing party's default in accounting action, see *§ 251.221[2]*.

[2] Defenses to Accounting Action

An action for accounting may be opposed with the following affirmative defenses:

- Expiration of the four-year statute of limitations [*Code Civ. Proc. § 343*].

- Laches [*see Estate of Peebles (1972) 27 Cal. App. 3d 163, 166, 103 Cal. Rptr. 560]* .

- Unclean hands [*Seymour v. Cariker (1963) 220 Cal. App. 2d 300, 305, 33 Cal. Rptr. 727]* .

- The entire amount owed by defendant is properly agreed on [*Huntoon v. Hurley (1955) 137 Cal. App. 2d 33, 39, 290 P.2d 14]* or shown by defendant without dispute from plaintiff [*Guy Coburn, Inc. v. Tiffany P., Inc. (1940) 37 Cal. App. 2d 410, 414, 99 P.2d 569]* .

- Accord and satisfaction [*see Civ. Code §§ 1521-1525*], or

- Other equitable defenses [*see James v. Kuhn (1932) 121 Cal. App. 69, 71, 8 P.2d 526]* .

For discussion of application of statute of limitation to action for accounting, see Ch. 7, *Accounting, Action for*, § 7.14. For discussion of other affirmative defenses to actions for accounting, see Ch. 7, *Accounting, Action for*, § 7.18. For forms of affirmative defenses to actions for accounting, see Ch. 7, *Accounting, Action for*, § 7.74 et seq.

[3] After Right to Accounting Is Established

After the right to an accounting has been established, the court may proceed to take the accounting from the evidence provided and render final judgment, or order that an accounting be taken by reference under *Code Civ. Proc. §§ 638-645.1* [*Baumann v. Harrison (1941) 46 Cal. App. 2d 84, 90-91, 115 P.2d 530]* . While the plaintiff must first establish that he or she is entitled to an accounting, the court is not required to issue an interlocutory judgment to that effect before the accounting may be taken, although it may do so [*Schefski v. Anker (1932) 216 Cal. 624, 627, 15 P.2d 744]* .

For discussion of the right to and taking of accounting, see Ch. 7, *Accounting, Action for*, §§ 7.22, 7.23. For discussion of final judgments in accounting actions, see Ch. 7, *Accounting, Action for*, §§ 7.24, 7.25. For form relating to reference in action for accounting, see Ch. 7, *Accounting, Action for*, § 7.79 et seq.

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§ 251.74 Interpleader

[1] Nature of Interpleader Action

A suit in interpleader is an equitable proceeding [*Williams v. Gilmore (1942) 51 Cal. App. 2d 684, 689, 125 P.2d 539]* allowing a debtor or obligor to avoid a multiplicity of actions on claims based on a single obligation, by compelling the various claimants to interplead and litigate their claims among themselves. The obligor could thus avoid facing multiple, vexatious litigation with respect to a single obligation [*see City of Morgan Hill v. Brown (1999) 71 Cal. App. 4th 1114, 1122, 84 Cal. Rptr. 2d 361* ; *Code Civ. Proc. § 386*].

[2] Elements of Interpleader Action

An interpleader action can consider all claims by claimants seeking the same thing, debt, or duty [*City of Morgan Hill v. Brown (1999) 71 Cal. App. 4th 1114, 1123, 84 Cal. Rptr. 2d 361]* . This general approach may be used in two types of actions:

- As in the traditional equitable remedy, the first type of interpleader action is generally available to give relief to a debtor who acknowledges owing to someone all or part of a contractual obligation or specified personal property, but who cannot ascertain to which of two or more adverse claimants it should be paid or delivered [*see Code Civ. Proc. § 386(a)*], and

- The second type of interpleader allows any person or entity against whom double or multiple claims have been made, or may be made, which may give rise to double or multiple liability, to compel the claimants to interplead and litigate their claims in a single proceeding without necessarily admitting any liability to any of these claimants [*see Code Civ. Proc. § 386(b)*].

For discussion of interpleader and related defenses and procedure, see *Ch. 314, Interpleader, § 314.10* et seq. For forms of cross-complaints, answers, and related matters in interpleader actions, see *Ch. 314, Interpleader, § 314.60* et seq.

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§ 251.75 Fraudulent Conveyances

[1] Purpose of Fraudulent Conveyance Actions

An important distinction is that fraud that entitles a party to rescind a transfer or seek damages arising out of the transfer is based on false representations inducing reliance, whereas a fraudulent transfer or obligation may be in fraud of creditors because it was a gift by an insolvent donor [*Civ. Code § 3439.05*], was designed to put the property beyond the reach of creditors [*see Civ. Code § 3439.04(a)*], or, in the case of personal property, because it was not followed by immediate delivery [*see Civ. Code § 3440*; *Strong v. Strong (1943) 22 Cal. 2d 540, 547, 140 P.2d 386]* .

For discussion of the definition of fraudulent conveyances, see *Ch. 270, Fraudulent Conveyances, §§ 270.32 -270.38*.

[2] Types of Fraudulent Conveyance Actions

The Uniform Fraudulent Transfer Act prevents debtors from placing property beyond the reach of their creditors when the property should be legitimately made available to satisfy the creditors' demands [*see Chichester v. Mason (1941) 43 Cal. App. 2d 577, 584, 111 P.2d 362* (decided under former *Civ. Code §§ 3439*, 3442)]. *Civ. Code § 3440* allowing the voiding of fraudulent transfers of personal property without delivery and actual change of possession prevents the deception of creditors arising out of the ostensible ownership of the property by the transferor who has made a secret transfer of the property [*see Dersch v. Thomas (1934) 138 Cal. App. 785, 138 Cal. App. Supp. 785, 789, 30 P.2d 630]* . Finally, *Com. Code § 6101 et seq.* prevents merchants who owe debts from selling out their stock in trade for any price and disappearing with the proceeds of the sale [*see* Uniform Commercial Code Comment to former *Com. Code § 6101*].

For discussion of fraudulent conveyances, see Ch. 270, *Fraudulent Conveyances* . For forms of pleadings, allegations, and orders in actions on fraudulent conveyances, see *Ch. 270, Fraudulent Conveyances, § 270.190* et seq.

Examples of fraudulent conveyances from which relief may be had include:

- Transfer made or obligation incurred by a debtor with actual intent to hinder, delay, or defraud any creditor of the debtor [*Civ. Code § 3439.04(a)(1)*].

- Transfer made or obligation incurred without the transferor's or obligor's receiving reasonably equivalent value in exchange for the transfer or obligation and the transferor or obligor intended to incur, or believed, or reasonably should have believed, that he or she would incur debts beyond his or her ability to pay as they became due [*Civ. Code § 3439.04(a)(2)(B)*].

- After creditor's claim arose, transfer made or obligation incurred by a debtor without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor was insolvent at the time or became insolvent as a result of the transfer or obligation [*Civ. Code § 3439.05*], and

- Transfer made or an obligation incurred by a debtor who did not receive reasonably equivalent value in exchange for the transfer or obligation and who was engaged, or was about to engage, in a business or transaction for which his or her remaining assets were unreasonably small in relation to the business or transaction [*Civ. Code § 3439.04(a)(2)(A)*].

For discussion of these types of fraudulent conveyances, see *Ch. 270, Fraudulent Conveyances, §§ 270.39 -270.43*.

[3] Choices of Relief From Fraudulent Conveyances

An action on a fraudulent conveyance is an action in equity [*see Flowers & Sons Development Corp. v. Municipal Court (1978) 86 Cal. App. 3d 818, 825, 150 Cal. Rptr. 555]* , for which the available remedies include:

- Voiding the transfer or obligation to the extent necessary to satisfy the plaintiff's underlying claim [*Civ. Code § 3439.07(a)(1)*].

- Attachment before or after the claim has ripened [*Civ. Code § 3439.07(a)(2)*].

- Injunction before or after the claim has ripened [*Civ. Code § 3439.07(a)(3)(A)*].

- Appointment of a receiver [*Civ. Code § 3439.07(a)(3)(B)*], and

- Any other relief the circumstances may require [*Civ. Code § 3439.07(a)(3)(C)*], including:

  - Accounting [*see Heffernan v. Bennett & Armour (1944) 63 Cal. App. 2d 178, 185, 146 P.2d 482]* , and

  - After judgment, execution on the asset transferred or its proceeds in the hands of the transferee [*Civ. Code § 3439.07(c)*].

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[Reserved]

§§ 251.76[Reserved]

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§ 251.90 Injunction

[1] Nature and Types of Injunctions

[a] Nature of Injunctions

An injunction is an equitable remedy in which the court orders a person to refrain from a particular act [*Tide Water Assoc. Oil Co. v. Superior Court (1955) 43 Cal. 2d 815, 822, 279 P.2d 35, 4 O.&G.R. 588]* or to do an affirmative act [*Comfort v. Comfort (1941) 17 Cal. 2d 736, 741, 112 P.2d 259]* .

For a discussion of the nature and types of injunctive relief, see *Ch. 303, Injunctions, § 303.10*.

For discussion of venue and trial court's jurisdiction to provide injunctive relief, see *Ch. 303, Injunctions, § 303.20* et seq.

[b] Types of Injunctive Relief and Their Purposes

A mandatory injunction compels the performance of a substantive act or a change in the relative positions of the parties. By contrast, a prohibitory injunction seeks to restrain a party from a course of conduct or to halt a particular condition [*Davenport v. Blue Cross of California (1997) 52 Cal. App. 4th 435, 446, 60 Cal. Rptr. 2d 641* ; *People v. Mobile Magic Sales, Inc. (1979) 96 Cal. App. 3d 1, 13, 157 Cal. Rptr. 749]* .

For a discussion of the difference between mandatory and prohibitory injunctions and its significance, see *Ch. 303, Injunctions, § 303.11*.

Whether mandatory or prohibitive, an injunction is either provisional [*see Code Civ. Proc. § 527*] or permanent [*see Civ. Code § 3420*]. A temporary restraining order ("TRO") is a provisional injunction issued by a court pending its determination whether a party is entitled to a preliminary injunction [*San Diego Water Co. v. Pacific Coast S.S. Co. (1894) 101 Cal. 216, 218, 35 P. 651]* . A preliminary injunction ("temporary injunction" or "injunction pendente lite") is

issued to preserve the status quo pending a decision on the merits [*Continental Baking Co. v. Katz (1968) 68 Cal. 2d 512, 528, 67 Cal. Rptr. 761, 439 P. 2d 889* ; *Casmalia Resources, Ltd. v. County of Santa Barbara (1987) 195 Cal. App. 3d 827, 832, 240 Cal. Rptr. 903]* . A permanent ("final") injunction is the ultimate relief in an action after trial on the merits [*San Diego Water Co. v. Pacific Coast S.S. Co. (1894) 101 Cal. 216, 221, 35 P. 651]* .

For a discussion of temporary restraining orders, see *Ch. 303, Injunctions, § 303.30* et seq. For forms of complaint and proceedings for a temporary restraining order, see *Ch. 303, Injunctions, §§ 303.130 -303.133*.

For a discussion of preliminary injunctions, see *Ch. 303, Injunctions, § 303.40* et seq. For form of proceedings on and order granting an application for a preliminary injunction, see *Ch. 303, Injunctions, §§ 303.133, 303.136*.

For a discussion of permanent injunctions, see *Ch. 303, Injunctions, § 303.60* et seq. For a sample complaint for a permanent injunction, see *Ch. 303, Injunctions, § 303.130*.

[2] Availability of Injunctive Relief

[a] As Basis for Equitable Action

A temporary restraining order is permitted in the same situations as a preliminary injunction, as discussed below. However, a court will issue a TRO only for a limited period of time, which is usually pending its consideration whether to order a preliminary injunction [*San Diego Water Co. v. Pacific Coast S.S. Co. (1894) 101 Cal. 216, 218, 35 P. 651* ; *see Code Civ. Proc. § 527*].

For a discussion of grounds for temporary restraining orders, see *Ch. 303, Injunctions, §§ 303.30, 303.31*.

A preliminary injunction may be granted when it appears that the party applying for relief is entitled to the relief demanded, and all or part of the relief consists in restraining the commission or continuance of the act complained of (or commanding certain conduct) either for a limited period or perpetually [*Code Civ. Proc. § 526(a)(1)*]. Situations in which the applying party may be entitled to relief include when [*Code Civ. Proc. § 526(a)*]:

- The injunction will prevent waste or irreparable injury,
- The injunction will prevent action that would violate rights of another party,
- A statute specifically authorizes injunction for violation of the statute.
- Pecuniary compensation would be inadequate or is not ascertainable,
- The injunction would avoid multiplicity of suits,
- The obligation arises from a trust, or

For a discussion of grounds for preliminary injunctions, see *Ch. 303, Injunctions, §§ 303.40, 303.41*.

The last three of the grounds listed for preliminary injunctions are statutory grounds for permanent injunctions [*see Civ. Code § 3422*].

[b] In Actions at Law

Injunctive relief in the form of a preliminary injunction is available in a legal action for damages when it is reasonably

necessary and fair to both sides to maintain the status quo pending the litigation's outcome [*Lenard v. Edmonds (1957) 151 Cal. App. 2d 764, 769, 312 P.2d 308]* .

[3] Defenses

An action or request for injunctive relief can be opposed by defenses showing that:

- Changed circumstances or completed acts render the remedy unnecessary or ineffective [*Paul v. Milk Depots, Inc. (1964) 62 Cal. 2d 129, 133, 41 Cal. Rptr. 468, 396 P.2d 924]* .

- The balancing of conveniences results in a finding that the substance of the right to be enforced does not justify the particular hardship that the relief would cause [*Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 200, 323 P.2d 1001]* .

- The conduct to be restrained is protected under the *First Amendment* [*see, e.g.,* *Saline v. Superior Court (2002) 100 Cal. App. 4th 909, 915-916, 122 Cal. Rptr. 2d 813]* .

- The plaintiff is guilty of laches [*Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 14, 244 Cal. Rptr. 581]* .

- An available legal remedy is adequate [*Thayer Plymouth Center, Inc. v. Chrysler Motors Corp. (1967) 255 Cal. App. 2d 300, 306, 63 Cal. Rptr. 148]* .

- Policy favoring protection of the public interest precludes the relief [*see* *Loma Portal Civic Club v. American Airlines, Inc. (1964) 61 Cal. 2d 582, 588-589, 39 Cal. Rptr. 708, 394 P.2d 548]* .

- The requested relief is contrary to law [*People ex rel. Dept. of Transportation v. Maldonado (2001) 86 Cal. App. 4th 1225, 1233-1234, 104 Cal. Rptr. 2d 66]* .

- The plaintiff has unclean hands [*Nutro Products, Inc. v. Cole Grain Co. (1992) 3 Cal. App. 4th 860, 869, 5 Cal. Rptr. 2d 41]* .

For a discussion of defenses to actions or requests for injunctive relief, see *Ch. 303, Injunctions, §§ 303.70, 303.71*. For a form for demurrer to action for injunctive relief, see *Ch. 303, Injunctions, § 303.135*. For form of declaration opposing and order denying an application for a preliminary injunction, see *Ch. 303, Injunctions, §§ 303.134, 303.137*.

For a discussion of dissolution of injunctions and review of orders on injunctive relief, see *Ch. 303, Injunctions, § 303.80* et seq. For forms for seeking dissolution or modification of injunctive relief, see *Ch. 303, Injunctions, §§ 303.138 -303.139*.

For a discussion of enforcement of injunctions, see *Ch. 303, Injunctions, § 303.90* et seq. For forms for enforcing injunctive relief, see Ch. 303, *Injunctions* , § S 303.140, 303.142.

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§ 251.91 Mandate and Prohibition

[1] Nature of Mandate and Prohibition

Writs of mandate or prohibition [*see, e.g.,* *American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 588, 113 Cal. Rptr. 561* (perogative writs)] are utilized as a means for reviewing judicial, nonjudicial, and administrative rulings [*see Code Civ. Proc. §§ 1085, 1103*]. They are available only in extraordinary circumstances and courts are vested with discretion to accept or reject requests for them [*see* *American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 588-589, 113 Cal. Rptr. 561* ; *Renken v. Compton City School Dist. (1962) 207 Cal. App. 2d 106, 112, 24 Cal. Rptr. 347]* .

Mandamus is an action where equitable principles apply [*Bruce v. Gregory (1967) 65 Cal. 2d 666, 670-671, 56 Cal. Rptr. 265, 423 P.2d 193* ; *McIntosh v. Aubry (1993) 14 Cal. App. 4th 1576, 1592, 18 Cal. Rptr. 2d 680]* .

For discussion and forms on obtaining writs of mandate and prohibition, see Ch. 358, *Mandate and Prohibition* .

[2] Elements of Mandate and Prohibition

To obtain a writ of mandate, the petitioner must generally show a duty on the part of the respondent [*see Code Civ. Proc. § 1085(a)*], the petitioner's beneficial interest in compelling the performance of that duty [*see Code Civ. Proc. § 1086*], and the inadequacy of other legal remedies [*see Code Civ. Proc. § 1086*].

For further discussion of elements of mandate, see *Ch. 358, Mandate and Prohibition, § 358.31*. For discussion of appropriate and inappropriate uses of mandate, see *Ch. 358, Mandate and Prohibition, §§ 358.32, 358.33*.

To obtain a writ of prohibition, the petitioner must generally show the fact of a proceeding of a tribunal, corporation, board, or person exercising judicial functions [*see Code Civ. Proc. § 1102*], the fact that the proceeding is without or in excess of the jurisdiction of the tribunal, corporation, board, or person [*see Code Civ. Proc. § 1102*], the petitioner's beneficial interest in arresting that proceeding [*see Code Civ. Proc. §§ 1102, 1103*], and the inadequacy of other legal

remedies [*see Code Civ. Proc. § 1103*].

For further discussion of elements of prohibition, see *Ch. 358, Mandate and Prohibition, § 358.41*. For discussion of appropriate uses of prohibition, see *Ch. 358, Mandate and Prohibition, § 358.42*.

For discussion of the adequacy of alternative relief, see *Ch. 358, Mandate and Prohibition, § 358.50* et seq. For discussion of defenses to petition for mandate or prohibition, see *Ch. 358, Mandate and Prohibition, § 358.60* et seq.

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§ 251.92 Bill of Peace

The ancient equitable action of bill of peace provides a remedy to prevent duplication of trial effort and expense in situations where a plaintiff asserts a claim against numerous defendants and where the legal remedy of consolidation of cases is not available because the causes of action or parties were not joinable, some of the actions were not yet filed, or those filed were in different courts [*Southern Cal. Edison Co. v. State Farm Mutual Automobile Ins. Co. (1969) 271 Cal. App. 2d 744, 748, 76 Cal. Rptr. 909]* . the prevention of a multiplicity of suits as a ground for the equity jurisdiction does not mean the complete and absolute interdiction or prevention of any litigation concerning the matters in dispute, but the substitution of one equitable suit in place of the other kinds of judicial proceeding, by means of which the entire controversy may be finally decided [*Bartholomew v. Bartholomew (1942) 56 Cal. App. 2d 216, 224-225, 132 P.2d 297]* . To invoke such relief the courts have required a showing that plaintiff's claims have arisen from a common relationship or source [*Schroeter v. Abbott, 185 Cal. 146, 151, 196 P. 39* ; *Southern Cal. Edison Co. v. State Farm Mutual Automobile Ins. Co. (1969) 271 Cal. App. 2d 744, 748, 76 Cal. Rptr. 909]* .

For example:

- Action to quiet title arose from a bill of peace in equity [*Caira v. Offner (2005) 126 Cal. App. 4th 12, 25, 24 Cal. Rptr. 3d 233]* .

- There are two general classes of cases in which injunctions are issued to prevent a multiplicity of actions, namely, (1) those in which many claims that have not been adjudicated are brought into equity to be made the subject of a single trial and decree, and (2) those that are enjoined because they are shown to be vexatious suits upon causes of action that have been settled by former adjudication [*Verdier v. Verdier (1965) 203 Cal. App. 2d 724, 735, 22 Cal. Rptr. 93* ; *Bartholomew v. Bartholomew (1942) 56 Cal. App. 2d 216, 225, 132 P.2d 297]* .

- Equity will enjoin repeated attacks upon a title that has been settled by judgment that is conclusive as

to the parties and as to the issues sought to be retried [*Wellborn v. Wellborn (1945) 67 Cal. App. 2d 540, 545, 155 P.2d 95]* .

- Bill of peace will be denied where consolidation of cases would not reduce issues to be litigated in sum total of litigation [*Southern Cal. Edison Co. v. State Farm Mutual Automobile Ins. Co. (1969) 271 Cal. App. 2d 744, 748, 76 Cal. Rptr. 909* (petition denied)].

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§ 251.93 Bill Quia Timet

No principle in equity is more familiar, or more firmly established, than that a surety, after the debt for which he or she is liable has become due, without paying or being called on to pay it, may file a bill in equity in the nature of a bill quia timet to compel the principal to exonerate the surety from liability by its payment, provided no rights of the creditor are prejudiced thereby. The doctrine is not premised on mere fear of loss or liability prior to an obligation's maturity. Rather, only after the obligation becomes payable, the surety, before he or she pays it, may maintain a suit in equity against the debtor in the nature of a bill quia timet to compel the latter to pay the debt or perform the obligation, provided the creditor could enforce payment or performance but neglects or refuses to do it [*Escrow Agents' Fidelity Corp. v. Superior Court (1992) 4 Cal. App. 4th 491, 495, 5 Cal. Rptr. 2d 698]* .

For additional discussion of bill quia timet, see Ch. 538, *Suretyship, Bonds, and Undertakings* , § 538.21[2].

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§ 251.94 Estoppel

[1] Equitable Estoppel

[a] The Nature of Equitable Estoppel

The doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he or she intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his or her detriment [*Strong v. County of Santa Cruz (1975) 15 Cal. 3d 720, 725, 125 Cal. Rptr. 896, 543 P.2d 264* ; *Aerojet-General Corp. v. Commercial Union Ins. Co. (2007) 155 Cal. App. 4th 132, 147, 65 Cal. Rptr. 3d 803*].

PRACTICE TIP:

Estoppel Versus Waiver. Estoppel effects a forfeiture, i.e., the loss of an otherwise viable right. It is akin to the doctrine of waiver, often invoked in the same breath, and sometimes confused with it. The essence of waiver [for discussion of waiver, *see § 251.151*], however, is the voluntary relinquishment of a known right that may be effective as a matter of law without any demonstration that the other party was caused by the waiver to expose himself or herself to any harm. That causation is essential to estoppel, and where it is present the estoppel may arise involuntarily, and may effect the loss of rights the actor did not know he or she possessed [*City of Hollister v. Monterey Ins. Co. (2008) 165 Cal. App. 4th 455, 487, 81 Cal. Rptr. 3d 72* ; *Oakland Raiders v. Oakland-Alameda County Coliseum, Inc. (2006) 144 Cal.App.4th 1175, 1189-1190, 51 Cal. Rptr. 3d 144*].

The vital principle is that a party who by his or her language or conduct leads another to do what the other would not otherwise have done may not subject the other person to loss or injury by disappointing the expectations upon which he or she acted. Such a change of position is sternly forbidden [*Long Beach v. Mansell (1970) 3 Cal. 3d 462, 488, 91 Cal. Rptr. 23, 476 P.2d 423* (quoting *Seymour v. Oelrichs (1909) 156 Cal. 782, 795, 106 P. 88*)]. Equitable estoppel in the modern sense arises from the conduct of a party, using that word in its broadest meaning as including his or her spoken or written words, positive acts, and silence or negative omission to do anything. Its foundation is justice and

good conscience. Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights that might have existed or been enforceable by other rules of the law, unless prevented by the estoppel. Its practical effect is, from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel [*Long Beach v. Mansell (1970) 3 Cal. 3d 462, 488 n.22, 91 Cal. Rptr. 23, 476 P.2d 423]* .

In order to work an equitable estoppel, a representation must generally be a statement of fact. It can rarely happen that the statement of a proposition of law will conclude the party making it from denying its correctness, except when it is understood to mean nothing but a simple statement of fact [*Steinhart v. Cty. of Los Angeles (2010) 47 Cal. 4th 1298, 1315, 104 Cal. Rptr. 3d 195, 223 P.3d 57]* .

In general, the law particularly disfavors estoppels when the party attempting to raise the estoppel is represented by an attorney at law [*Steinhart v. Cty. of Los Angeles (2010) 47 Cal. 4th 1298, 1316, 104 Cal. Rptr. 3d 195, 223 P.3d 57]* .

Estoppel is codified in *Evid. Code § 623* [*Estate of Bonanno (2008) 165 Cal. App. 4th 7, 22, 80 Cal. Rptr. 3d 560*].

For discussion of estoppel as a defense, see *§ 251.161*.

For discussion of estoppel of signatory to arbitration agreement to refuse arbitration with nonsignatory, see *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21[5][g]*. For discussion of estoppel to enforcement of zoning requirements, see *Ch. 579, Zoning and Planning, § 579.241[2]*.

For forms of affirmative defense of equitable estoppel in boundary disputes, see *Ch. 101, Boundaries, §§ 101.54, 101.56*. For form of affirmative defense of equitable estoppel under *Evid. Code § 623* in action on negotiable instrument, see *Ch. 385, Negotiable Instruments, § 385.118*. For form of affirmative defense of equitable estoppel in action on trade name or mark infringement, see *Ch. 549, Trademarks and Tradenames, § 549.100*.

[b] Elements

[i] Generally

The elements of the doctrine of equitable estoppel are that: (1) the party to be estopped was apprised of the facts, (2) the party intended that his or her conduct would be acted upon, or so acted that the party asserting the estoppel had a right to believe it was so intended, (3) the other party was ignorant of the true state of facts; and (4) the other party relied upon the conduct to his or her injury [*Strong v. County of Santa Cruz (1975) 15 Cal. 3d 720, 725, 125 Cal. Rptr. 896, 543 P.2d 264* ; *Estate of Bonanno (2008) 165 Cal. App. 4th 7, 22, 80 Cal. Rptr. 3d 560* ; *Aerojet-General Corp. v. Commercial Union Ins. Co. (2007) 155 Cal. App. 4th 132, 147, 65 Cal. Rptr. 3d 803* (no intention or action supporting reliance)].

[ii] Special Considerations Involving Real Property

Although generally speaking it is true that the application of the doctrine of equitable estoppel to controversies centered upon title to land involves the same basic factors of the doctrine as are brought into play in other areas of the law, the courts in California and other jurisdictions have proceeded with considerable caution and restraint when the effect of raising an estoppel would be to take the title to land from one person and vest it in another, for such a result would be essentially contrary to the intent and purpose, if not the letter, of the statute of frauds. Thus, the doctrine will not be applied to divest title to land in the absence of actual or constructive fraud on the part of the party to be estopped [*Long Beach v. Mansell (1970) 3 Cal. 3d 462, 489, 91 Cal. Rptr. 23, 476 P.2d 423]* .

[c] Generally a Question of Fact

Equitable estoppel is generally a question of fact. However, if the facts are undisputed and only one reasonable

conclusion can be drawn from them, whether estoppel applies is a question of law [*Estate of Bonanno (2008) 165 Cal. App. 4th 7, 22, 80 Cal. Rptr. 3d 560*].

[2] Promissory Estoppel

[a] The Nature of Promissory Estoppel

Promissory estoppel is a doctrine that employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced [*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority (2000) 23 Cal. 4th 305, 310, 96 Cal. Rptr. 2d 747, 1 P.3d 63* ; *Cooper v. State Farm Mut. Auto. Ins. Co. (2009) 177 Cal. App. 4th 876, 892 n.3, 99 Cal. Rptr. 3d 870* ; *Poway Royal Mobilehome Owners Assn. v. City of Poway (2007) 149 Cal. App. 4th 1460, 1471, 58 Cal. Rptr. 3d 153*]. Under the doctrine of promissory estoppel, a promise that the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and that does induce the action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires [*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority (2000) 23 Cal.4th 305, 310, 96 Cal. Rptr. 2d 747, 1 P.3d 63* ; *Poway Royal Mobilehome Owners Assn. v. City of Poway (2007) 149 Cal. App. 4th 1460, 1470-1471, 58 Cal. Rptr. 3d 153*].

For discussion of promissory estoppel as substitution for consideration on contracts, see *Ch. 140, Contracts, § 140.23[8]*. For discussion of estoppel to assert the statute of frauds, see *Ch. 530, Statute of Frauds, § 530.12[6]*. For form of complaint for damages for breach of contract with promissory estoppel as substitute for consideration, see *Ch. 140, Contracts, § 140.106*.

[b] Elements

The elements of promissory estoppel are: (1) a clear promise, (2) reliance, (3) substantial detriment, and (4) damages measured by the extent of the obligation assumed and not performed [*Poway Royal Mobilehome Owners Assn. v. City of Poway (2007) 149 Cal. App. 4th 1460, 1471, 58 Cal. Rptr. 3d 153* ; *Toscano v. Greene Music (2004) 124 Cal.App.4th 685, 692, 21 Cal. Rptr. 3d 732*].

[c] The Promise

The promise is an indispensable element of the doctrine of promissory estoppel. The doctrine cannot be invoked and must be held inapplicable in the absence of a showing that a promise had been made upon which the complaining party relied to his or her prejudice [*Garcia v. World Savings, FSB (2010) 183 Cal. App. 4th 1031, 1044-1045, 107 Cal. Rptr. 3d 683]* . The promise must be clear and unambiguous in its terms [*Garcia v. World Savings, FSB (2010) 183 Cal. App. 4th 1031, 1044-1045, 107 Cal. Rptr. 3d 683* ; *Advanced Choices, Inc. v. State Department of Health Services (2010) 182 Cal. App. 4th 1661, 1672, 107 Cal. Rptr. 3d 470* (no clear promise given)]. To meet this standard, a promise need only be definite enough that a court can determine the scope of the duty, and the limits of performance must be sufficiently defined to provide a rational basis for the assessment of damages [*Garcia v. World Savings, FSB (2010) 183 Cal. App. 4th 1031, 1044-1045, 107 Cal. Rptr. 3d 683]* .

The fact that a promise is conditional does not render it unenforceable or ambiguous [*Garcia v. World Savings, FSB (2010) 183 Cal. App. 4th 1031, 1045, 107 Cal. Rptr. 3d 683* (conditional promise enforced)].

If extrinsic evidence is needed to interpret a promise, then obviously the promise is not clear and unambiguous. Thus, promissory estoppel cannot be established from preliminary discussions and negotiations [*Garcia v. World Savings, FSB (2010) 183 Cal. App. 4th 1031, 1044-1045, 107 Cal. Rptr. 3d 683]* .

[3] Judicial Estoppel

[a] The Nature of Judicial Estoppel

Judicial estoppel is an equitable doctrine, and its application is discretionary [*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc. (2005) 36 Cal. 4th 412, 422, 30 Cal. Rptr. 3d 755, 115 P.3d 41* ; *Jhaveri v. Teitelbaum (2009) 176 Cal. App. 4th 740, 751, 98 Cal. Rptr. 3d 268]* . The dual purposes of the doctrine are to maintain the integrity of the judicial system and protect parties from unfair strategies of their opponents [*Aguilar v. Lerner (2004) 32 Cal. 4th 974, 986, 12 Cal. Rptr. 3d 287, 88 P.3d 24* ; *Jhaveri v. Teitelbaum (2009) 176 Cal. App. 4th 740, 751, 98 Cal. Rptr. 3d 268]* .

[b] Elements

The judicial estoppel doctrine precludes a party from gaining a litigation advantage by espousing one position and then seeking a second advantage by taking an incompatible position [*Aguilar v. Lerner (2004) 32 Cal. 4th 974, 986, 12 Cal. Rptr. 3d 287, 88 P.3d 24* ; *Jhaveri v. Teitelbaum (2009) 176 Cal. App. 4th 740, 751, 98 Cal. Rptr. 3d 268]* . The doctrine of judicial estoppel applies when the following conditions are met [*Aguilar v. Lerner (2004) 32 Cal.4th 974, 986, 12 Cal. Rptr. 3d 287, 88 P.3d 24]* :

- The same party has taken two positions.
- The positions were taken in judicial or quasi-judicial administrative proceedings.
- The party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true).
- The two positions are totally inconsistent.
- The first position was not taken as a result of ignorance, fraud, or mistake.

For a comprehensive discussion of judicial estoppel, see *Ch. 491, Res Judicata, § 491.21*.

[4] Estoppel May Not Apply to Governmental Entity

Neither a claim for equitable estoppel [*Lusardi Construction Co. v. Aubry (1992) 1 Cal. 4th 976, 994-995, 4 Cal. Rptr. 2d 837, 824 P.2d 643* ; *Feduniak v. California Coastal Com. (2007) 148 Cal. App. 4th 1346, 1359-1360, 56 Cal. Rptr. 3d 591]* nor promissory estoppel [*City of Long Beach v. Mansell (1970) 3 Cal.3d 462, 493, 91 Cal. Rptr. 23, 476 P.2d 423* ; *Poway Royal Mobilehome Owners Assn. v. City of Poway (2007) 149 Cal. App. 4th 1460, 1471, 58 Cal. Rptr. 3d 153* (exception applied)] are applied against the government if to do so would effectively nullify a strong rule of policy adopted for the benefit of the public. The facts upon which such an estoppel must rest go beyond the ordinary principles of estoppel. Each case must be examined carefully and rigidly to be sure that a precedent is not established through which, by favoritism or otherwise, the public interest may be mulcted or public policy defeated [*City of Long Beach v. Mansell (1970) 3 Cal.3d 462, 495 n.30, 91 Cal. Rptr. 23, 476 P.2d 423* ; *Poway Royal Mobilehome Owners Assn. v. City of Poway (2007) 149 Cal. App. 4th 1460, 1471, 58 Cal. Rptr. 3d 153*].

Equitable estoppel only applies to a governmental body when necessary to avoid grave injustice and when the result will not defeat a strong public policy [*Steinhart v. Cty. of Los Angeles (2010) 47 Cal. 4th 1298, 1315, 104 Cal. Rptr. 3d 195, 223 P.3d 57]* . Thus, the government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice that would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy that would result from the raising of an estoppel [*Long Beach v. Mansell (1970) 3 Cal. 3d 462, 496-497, 91 Cal. Rptr. 23, 476 P.2d 423* ; *Feduniak v. California Coastal Com. (2007) 148 Cal.*

App. 4th 1346, 1359-1360, 56 Cal. Rptr. 3d 591] . The extra considerations for equitable estoppel against the government may be stated as requiring the court to find also that both [*Long Beach v. Mansell (1970) 3 Cal. 3d 462, 496-497, 91 Cal. Rptr. 23, 476 P.2d 423* ; *Feduniak v. California Coastal Com. (2007) 148 Cal. App. 4th 1346, 1372, 56 Cal. Rptr. 3d 591]* :

- Estopping the government would not nullify a strong rule of policy adopted for the public's benefit.

- The injustice to the private party without estoppel outweighs, and therefore justifies, any effect upon public interest or policy that results from estopping enforcement of the government's policy.

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[Reserved]

§§ 251.95[Reserved]

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-251 California Forms of Pleading and Practice--Annotated § 251.100

§ 251.100 Reformation of Instruments

[1] Nature and Elements of Reformation

[a] The Nature of Remedy of Reformation

Reformation is an equitable remedy used to reframe a written instrument to express accurately the parties' true agreement when, through fraud, mutual mistake, or unilateral mistake in limited instances, the writing does not embody their agreement [*see Civ. Code § 3399*; *Bailard v. Marden (1951) 36 Cal. 2d 703, 708, 227 P.2d 10]* .

For a discussion of the definition and nature of reformation of instruments, see *Ch. 488, Reformation of Instruments, §§ 488.11 -488.12*.

[b] The Elements of Remedy of Reformation

To obtain reformation of a written instrument, a party must generally allege and show:

- The true intention of the parties for the instrument [*see Civ. Code § 3399*; *American Home Ins. Co. v. Travelers Indemnity Co. (1981) 122 Cal. App. 3d 951, 961, 175 Cal. Rptr. 826]* ,
- The instrument as written differed from the parties' true intention [*see Civ. Code § 3399*; *Holmes v. Anderson (1928) 90 Cal. App. 276, 282, 265 P. 1010]* , and
- The failure of the writing to reflect the true agreement resulted from one of the following:
  - Mutual mistake of fact [*Civ. Code § 3399*],
  - Unilateral mistake of fact when the other party knew of the mistake or suspected it

at the time [*Civ. Code § 3399*],

- Fraud [*Civ. Code § 3399*], or

- Unconscionable conduct [*see MacFarlane v. Peters (1980) 103 Cal. App. 3d 627, 631, 163 Cal. Rptr. 655]* .

For a discussion of scope and grounds for reformation of instruments, see *Ch. 488, Reformation of Instruments, §§ 488.13 -488.14, 488.18*. For a complaint for reformation of a written instrument and allegations of various grounds for reformation, see *Ch. 488, Reformation of Instruments, § 488.60* et seq.

[2] Availability of Reformation as a Remedy

[a] Remedy in Action or as Defense

Reformation requires that the parties to the transaction share a complete and mutual understanding on all essential terms [*Bailard v. Marden (1951) 36 Cal. 2d 703, 708, 227 P.2d 10]* . In addition to being requested as the remedy in an action on the grounds stated in § 251.AR1[1][b], reformation of an instrument may be raised as a defense to an action at law for enforcement of a contract [*Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 18 n.8, 262 Cal. Rptr. 716]* .

PRACTICE TIP:

Although a written instrument that accurately reflects a common intent based on a mistake of fact cannot be reformed, the mistake may be ground for rescission [*White v. Berrenda Mesa Water Dist. (1970) 7 Cal. App. 3d 894, 900-908, 87 Cal. Rptr. 338]* .

For discussion of rescission, see Ch. 490, *Rescission and Restitution* .

For discussion of availability of reformation, see *Ch. 488, Reformation of Instruments, § 488.13*.

[b] Types of Instruments That May Be Reformed

Instruments that may be reformed in equity include, among others:

- Contracts [*Civ. Code § 3399*],

- Deeds [*MacFarlane v. Peters (1980) 103 Cal. App. 3d 627, 631, 163 Cal. Rptr. 655]* ,

- Trusts [*Getty v. Getty (1986) 187 Cal. App. 3d 1159, 1172-1175, 232 Cal. Rptr. 603]* ,

- Substitutions of trustees [*Jones v. First American Title Insurance Company (2003) 107 Cal. App. 4th 381, 390, 131 Cal. Rptr. 2d 859]* ,

- Trust deeds [*San Fernando Valley C. of C. v. Thomas (1954) 123 Cal. App. 2d 348, 350-351, 266 P.2d 891]* ;

- Mortgages [*San Jose Ranch Co. v. San Jose L. & W. Co. (1901) 132 Cal. 582, 583-584, 64 P. 1097]* ,

- Judgments [*Voge, Inc. v. Rose (1962) 205 Cal. App. 2d 534, 538, 23 Cal. Rptr. 87* ; *Douglass v.*

Dahm (1950) 101 Cal. App. 2d 125, 128, 224 P.2d 914] .

For discussion of equitable doctrine of setting aside judgments for extrinsic fraud or mistake, see *§ 251.190*.

On the other hand, wills are not reformable [*Kobus v. San Diego Trust & Savings Bank (1959) 172 Cal. App. 2d 574, 580, 342 P.2d 468]* .

[3] Defenses to Request for Reformation

Defenses to a request for the equitable remedy of reformation of an instrument include:

- Gross negligence in failing to prevent a mistake in the instrument [*Voge, Inc. v. Rose (1962) 205 Cal. App. 2d 534, 539, 23 Cal. Rptr. 87]* .

- Voidness of the instrument [*see, e.g.,* *Ainsworth v. Morrill (1916) 31 Cal. App. 509, 511, 160 P. 1089]* , including under the statute of frauds [*see* *Oatman v. Niemeyer (1929) 207 Cal. 424, 426-427, 278 P. 1043]* .

- Unclean hands [*Seymour v. Cariker (1963) 220 Cal. App. 2d 300, 305, 33 Cal. Rptr. 727]* , or

- Res judicata [*Getty v. Getty (1986) 187 Cal. App. 3d 1159, 1174-1175, 232 Cal. Rptr. 603]* .

- Statute of limitations [*see Code Civ. Proc. 338(d)*],

- Laches [*Getty v. Getty (1986) 187 Cal. App. 3d 1159, 1170-171, 232 Cal. Rptr. 603]* .

- Waiver or ratification [*San Fernando Valley C. of C. v. Thomas (1954) 123 Cal. App. 2d 348, 350-351, 266 P.2d 891]* .

For discussion of defenses to request for reformation, see *Ch. 488, Reformation of Instruments, §§ 488.13[3], [5], 488.15*. For forms of affirmative defenses to request for reformation, see *Ch. 488, Reformation of Instruments, § 488.64* et seq.

[4] Limitation on Extent of Reformation

The actual reformation of an instrument will be limited to the extent that it can be done without prejudice to the "rights acquired by third persons in good faith and for value" [*Civ. Code § 3399*].

For discussion of protection of rights of bona fide purchaser from request for reformation, see *Ch. 488, Reformation of Instruments, § 488.13[2]*. For form of affirmative defense based on the intervening rights of bona fide purchasers, see *Ch. 488, Reformation of Instruments, § 488.67*.

[5] Other Remedies Allowed With Reformation

A court, having first obtained equitable jurisdiction over the subject matter, may award any additional relief incidental to the equitable relief being sought [*Tomas v. Vaughn (1944) 63 Cal. App. 2d 188, 192, 146 P.2d 499]* . Examples of additional relief that may be sought include the following:

- When the cause of action is based on failure to perform the intended agreement, the plaintiff may seek reformation and other forms of relief [*Civ. Code § 3402*; *Landis v. Superior Court (1965) 232 Cal.*

App. 2d 548, 555, 42 Cal. Rptr. 893] .

- A court may award damages if they are purely incidental to the relief of reformation [*Tomas v. Vaughn (1944) 63 Cal. App. 2d 188, 192, 146 P.2d 499]* .

For discussion of pursuing remedies in addition to reformation, see *Ch. 488, Reformation of Instruments, § 488.19*.

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§ 251.101 Preventing Forfeiture

[1] Relief from Forfeitures in General

In accordance with the maxim that equity abhors forfeitures [*see § 251.62*], where the right to a forfeiture is created by contract or by law it has always been considered that it was necessary to restrain it to the most technical limits of the terms and conditions upon which the right is to be exercised [*Palo & Dodini v. Oakland (1947) 79 Cal. App. 2d 739, 747, 180 P.2d 764]* . Equity is particularly reluctant to enforce forfeitures where the default is minor [*Baypoint Mortgage Corp. v. Crest Premium Real Estate etc. Trust (1985) 168 Cal. App. 3d 818, 829, 214 Cal. Rptr. 531]* .

The proclivity of equity to prevent forfeiture can take a myriad of forms involving various other types of equitable remedies, such as:

- Presumption in adverse possession cases in favor of title owner of real property subject to claim [*see, e.g.,* *Marriage v. Keener (1994) 26 Cal. App. 4th 186, 192-193, 31 Cal. Rptr. 2d 511]* .

- Adaptation of rules of court procedure to serve the ends of justice by preventing technical forfeitures from unjustifiably preventing a trial on the merits [*Bollinger v. National Fire Ins. Co. (1944) 25 Cal. 2d 399, 154 P.2d 399* ; *Morris Plan Co. v State (1946) 73 Cal. App. 2d 415, 166 P.2d 627]* .

- No-contest clauses in wills are strictly construed and not extended beyond what was plainly the testator's intent [*Jacobs-Zorne v. Superior Court (1996) 46 Cal. App. 4th 1064, 1073, 54 Cal. Rptr. 2d 385* ; *see also Prob. Code § 21304*].

The discussion of these types of applications of the maxim may be found in the specific topics on the area of law in which the equitable remedy may be used.

[2] Relief from Forfeiture for Nonperformance of Obligation

Unless no other interpretation is reasonably possible, a contract should not be construed so as to effect or provide for a forfeiture [*ABI, Inc. v. City of Los Angeles (1984) 153 Cal. App. 3d 669, 682, 200 Cal. Rptr. 563* ; *see Civ. Code § 1442*].

A party may be relieved from a forfeiture incurred for nonperformance of an obligation upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty [*Civil Code § 3275*]. This statutory injunction codifies the equitable rule that equity considers the payment, or performance, or enjoyment to be the real thing intended by the agreement, and the penalty or forfeiture to be only an accessory. Equity will relieve against the forfeiture by awarding compensation proportionate to the damages actually resulting from the nonpayment, or nonperformance, or nonenjoyment, according to the stipulations of the agreement [*Ascherman v. McKee (1956) 143 Cal. App. 2d 277, 286, 299 P.2d 367]* .

Example:

- Trial court properly determined that a Medi-Cal service provider may rely on *CC § 3275* to excuse its failure to file a timely treatment authorization request (TAR) in order to receive reimbursement for providing medically necessary services. Where the circumstances and equities excuse compliance with the express state regulation requiring the timely submission of a TAR, a trial court may grant relief from the requirement so long as it finds that the medical service provider's omission was not grossly negligent, willful, or fraudulent [*Lauderdale Associates v Department of Health Services (1998) 67 Cal. App. 4th 117, 122-123, 78 Cal. Rptr. 2d 802* , superseded by statute as stated in *Life Care Centers of America v. CalOptima (2005) 133 Cal. App. 4th 1169, 1182, 35 Cal. Rptr. 3d 387]* .

Civ. Code § 3275 is not the exclusive source of the right to relief from forfeiture for breach of obligation. The prohibition of punitive damages for breach of contract in *Civ. Code § 3294*, the strict limitations on the right to provide for liquidated damages in *Civ. Code §§ 1670, 1671*, and the bar of specific nor preventive enforcing a forfeiture in *Civ. Code § 3369* together establish a policy that precludes a forfeiture having no reasonable relation to the damage caused by the vendee's breach of contract even when that breach is willful [*MacFadden v Walker (1971) 5 Cal. 3d 809, 813-814, 97 Cal. Rptr. 537, 488 P.2d 1353]* . The approach is an equitable remedy that is carefully hedged around with protections to the person against whom it is invoked, as follows [*MacFadden v Walker (1971) 5 Cal. 3d 809, 815, 97 Cal. Rptr. 537, 488 P.2d 1353* (breaching party granted specific performance)]:

- The contract must be just and reasonable, and the consideration adequate [*see Civ. Code, § 3391*].

- The vendor must be assured that he or she will also receive the benefit of the bargain [*see Civ. Code, § 3386*].

- The defenses of laches and unclean hands are available to preclude a defaulting vendee from seeking an unfair advantage over an innocent vendor.

Example:

- Equity allows a vendee who has made substantial payments on a land installment sale contract or substantial improvements on a property, and whose defaults, albeit willful, consist solely of failure to pay further amounts due, has an unconditional right to a reasonable opportunity to complete the purchase by paying the entire remaining balance plus damages before the seller is allowed to quiet title [*Petersen v. Hartell (1985) 40 Cal. 3d 102, 219 Cal. Rptr. 170, 707 P.2d 232* (referring to procedure as a redemption)].

[3] Possibility of Exception for Statutorily Authorized Forfeiture

For a statute to effect a forfeiture, its provisions to that effect must be clear and certain [*ABI, Inc. v. City of Los Angeles (1984) 153 Cal. App. 3d 669, 682, 200 Cal. Rptr. 563]* . In determining a party's right to another party's forfeiture, the statute's forfeiture provisions must be strictly construed [*Civ. Code § 1442*], and the party claiming the right must have strictly followed the statutory method [*Castello v. Central Eureka Mining Co. (1948) 85 Cal. App. 2d 772, 774, 193 P.2d 968* ; *Ruck v. Caledonia Silver Min. Co. (1907) 6 Cal. App. 356, 359, 92 P. 194]* .

While Courts of Appeals decisions have stated that if a statute provides a method of forfeiture, and a party has strictly followed that method, equity affords no relief from it [*see, e.g.*, *Castello v. Central Eureka Mining Co. (1948) 85 Cal. App. 2d 772, 774, 193 P.2d 968* ; *Palo & Dodini v. Oakland (1947) 79 Cal. App. 2d 739, 747, 180 P.2d 764* ; *Ruck v. Caledonia Silver Min. Co. (1907) 6 Cal. App. 356, 359, 92 P. 194]* , the California Supreme Court has held that the equitable grounds of mistake allow a party to avoid forfeiture under a statute that does not explicitly require forfeiture in situations where the party has a legal excuse, such as mistake as a basis for equitable relief, for triggering the forfeiture clause [*M. F. Kemper Constr. Co. v. Los Angeles (1951) 37 Cal. 2d 696, 705, 235 P.2d 7]* .

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§ 251.102 Cy Pres or Fluid Recovery

In many class actions, particularly those involving consumer lawsuits, individual damages are too small to make traditional methods of proof worthwhile or feasible. In these situations, courts frequently use the cy pres or "fluid recovery" method to assess and distribute damages. The implementation of fluid recovery involves three steps [*State v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 472-473, 479, 490, 224 Cal. Rptr. 605, 715 P.2d 564]* :

- Payment of the defendant's total damage liability into a class fund,
- An opportunity for individual class members to collect their individual shares by proving their particular damages, usually under a lowered standard of proof; and
- Distribution of the residue.

For discussion of cy pres, see *Ch. 120, Class Actions, § 120.22*.

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§ 251.103 Alter Ego Doctrine

The equitable remedy of the alter ego doctrine [*Troyk v. Farmers Group, Inc.(2008) 168 Cal. App. 4th 1337, 1372, 86 Cal. Rptr. 3d 416* ; *Dow Jones Co. v. Avenel (1984) 151 Cal. App. 3d 144, 147-148, 198 Cal. Rptr. 457*] protects the rights of third persons by disregarding the distinct existence of a corporation and its stockholders and treating them as identical when necessary to circumvent fraud [*Erkenbrecher v. Grant (1921) 187 Cal. 7, 10-11, 200 P. 641* ; *Rowe v. Exline (2007) 153 Cal. App. 4th 1276, 1284, 63 Cal. Rptr. 3d 787*]. Two conditions must be met before the alter ego doctrine will be invoked. First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone [*Troyk v. Farmers Group, Inc. (2008) 168 Cal. App. 4th 1337, 1372, 86 Cal. Rptr. 3d 416*].

For discussion of the alter ego doctrine, see *Ch. 161, Corporations: Alter Ego Liability, § 161.10*.

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[Reserved]

§§ 251.104[Reserved]

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§ 251.110 Restitution

Whether termed unjust enrichment, quasi-contract, or quantum meruit [*see § 251.120*], the equitable remedy of restitution when unjust enrichment has occurred is an obligation (and not a true contract) created by the law without regard to the intention of the parties, and is designed to restore the aggrieved party to his or her former position by return of the thing or its equivalent in money [*Federal Deposit Ins. Corp. v. Dintino (2008) 167 Cal. App. 4th 333, 346, 84 Cal. Rptr. 3d 38*].

Restitution includes not only the restoration or giving back of something to its rightful owner, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury caused to, another [*Dinosaur Development, Inc. v. White (1989) 216 Cal. App. 3d 1310, 1315, 265 Cal. Rptr. 525* ; *Lucky Auto Supply v. Turner (1966) 244 Cal. App. 2d 872, 885, 53 Cal. Rptr. 628]* . To be entitled to restitution, one must confer the benefit by mistake, fraud, coercion, or request [*Dinosaur Development, Inc. v. White (1989) 216 Cal. App. 3d 1310, 1315-1316, 265 Cal. Rptr. 525* ; *Nibbi Brothers, Inc. v. Home Federal Sav. & Loan Assn. (1988) 205 Cal. App. 3d 1415, 1422, 253 Cal. Rptr. 289]* . A benefit is conferred not only when one adds to the property of another, but also when one saves the other from expense or loss [*Federal Deposit Ins. Corp. v. Dintino (2008) 167 Cal. App. 4th 333, 346-347, 84 Cal. Rptr. 3d 38*].

For example:

- The law of restitution may give a supplier a cause of action against a lender for unjust enrichment under a broad range of circumstances distinct from those on which the equitable lien was predicated. In an appropriate case, the lender's fraudulent inducement to the supplier to perform work on the property may give rise to a cause of action distinct from the equitable lien [*Nibbi Brothers, Inc. v. Home Federal Sav. & Loan Assn. (1988) 205 Cal. App. 3d 1415, 1421-1422, 253 Cal. Rptr. 289]* .

The phrase "unjust enrichment" is used to characterize the result or effect of a failure to make restitution of or for

property or benefits received under circumstances that give rise to a legal or equitable obligation to account for them [*Dinosaur Development, Inc. v. White (1989) 216 Cal. App. 3d 1310, 1315, 265 Cal. Rptr. 525* ; *Lucky Auto Supply v. Turner (1966) 244 Cal. App. 2d 872, 885, 53 Cal. Rptr. 628]* .

To some extent, recovery in restitution is premised on the equitable maxim of *Civ. Code § 3521* that one who takes a benefit must bear the burden [*Halperin v. Raville (1986) 176 Cal. App. 3d 765, 771-774, 222 Cal. Rptr. 350]* .

The Unfair Competition Law, *Bus. & Prof. Code § 17203*, allows restitution under the terms of the statute. For a brief discussion of unfair competition, see *§ 251.183*.

For discussion of the maxim that one who takes a benefit must bear the burden, see *§ 251.59*.

For discussion of restitution after rescission or to avoid unjust enrichment, see *Ch. 490, Rescission and Restitution, § 490.27*. For forms of complaints and answers to complaints seeking restitution based on rescission, see *Ch. 490, Rescission and Restitution, § 490.61* et seq. For discussion of restitution work performed on a construction site, see *Ch. 342, Liens and Wage Preferences, § 342.45[2]*.

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§ 251.111 Constructive Trusts

A constructive trust is an involuntary equitable trust created by operation of law as a remedy to compel the transfer of property from a person who is wrongfully holding it to its rightful owner [*Burlesci v. Petersen (1998) 68 Cal. App. 4th 1062, 1067, 80 Cal. Rptr. 2d 704* ; *Communist Party v. 522 Valencia, Inc. (1995) 35 Cal. App. 4th 980, 990, 41 Cal. Rptr. 2d 618* ; for discussion of wrongful acts as basis for obtaining constructive trust, see *Ch. 561, Trusts: Constructive Trusts, § 561.16[4]*]. The purpose of a constructive trust is to prevent unjust enrichment and to prevent a person from taking advantage of his or her own wrongdoing [*Burlesci v. Petersen (1998) 68 Cal. App. 4th 1062, 1067, 80 Cal. Rptr. 2d 704* ; *Communist Party v. 522 Valencia, Inc. (1995) 35 Cal. App. 4th 980, 990, 41 Cal. Rptr. 2d 618]* .

The equitable principles that one who wrongfully acquires or detains property of another holds the property as an involuntary constructive trustee for the owner are codified in *Civ. Code §§ 2223* and *2224* [*Burlesci v. Petersen (1998) 68 Cal. App. 4th 1062, 1067, 80 Cal. Rptr. 2d 704* ; *Communist Party v. 522 Valencia, Inc. (1995) 35 Cal. App. 4th 980, 990, 41 Cal. Rptr. 2d 618]* .

PRACTICE TIP:

The imposition of a constructive trust is an equitable remedy, so the incidents of a constructive trust differ from those of an express or resulting trust [*Haskel Eng'g & Supply Co. v. Hartford Accident & Indem. Co. (1978) 78 Cal. App. 3d 371, 375, 144 Cal. Rptr. 189]* . Express and resulting trusts arise from the intention of the parties (express or implied) to set aside property under the stewardship of a trustee for the benefit of the beneficiary. An express trust establishes a fiduciary relationship, while a constructive trust does not. A constructive trust is imposed by a court of equity, independent of the intention of the parties, to prevent a party in possession of property from being unjustly enriched [*see Del Costello v. State of California (1982) 135 Cal. App. 3d 887, 892, 185 Cal. Rptr. 582]* .

For discussion of resulting trusts, see *§ 251.112*.

For discussion of the nature of express trusts and resulting trusts and related forms, see Ch. 560, *Trusts:*

Express, Public, Charitable, and Totten Trusts .

For discussion and forms on obtaining a constructive trust on property, see Ch. 561, *Trusts: Constructive Trusts* .

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§ 251.112 Resulting Trusts

A resulting trust arises from the transfer of property under circumstances showing that the transferee was not intended to take the beneficial interest in the property [*Lloyds Bank Cal. v. Wells Fargo Bank (1986) 187 Cal. App. 3d 1038, 1042, 232 Cal. Rptr. 339* ; *Martin v. Kehl (1983) 145 Cal. App. 3d 228, 238, 193 Cal. Rptr. 312]* . A resulting trust is a creature of equity [*Calistoga Civic Club v. City of Calistoga (1983) 143 Cal. App. 3d 111, 117, 191 Cal. Rptr. 571]* , an involuntary trust [*Wells Fargo Bank v. Greuner (1964) 226 Cal. App. 2d 454, 460, 38 Cal. Rptr. 132]* created by operation of law [*see* *Lloyds Bank Cal. v. Wells Fargo Bank (1986) 187 Cal. App. 3d 1038, 1042, 232 Cal. Rptr. 339]* when the intention of the parties to create a trust is not expressed [*Wells Fargo Bank v. Greuner (1964) 226 Cal. App. 2d 454, 460, 38 Cal. Rptr. 132]* .

PRACTICE TIP:

A resulting trust has been termed an intention-enforcing trust, to distinguish it from the other type of implied trust, the constructive or fraud-rectifying trust. While the resulting trust carries out the inferred intent of the parties, the constructive trust defeats or prevents the wrongful act of one of the parties [*Martin v. Kehl (1983) 145 Cal. App. 3d 228, 238, 193 Cal. Rptr. 312]* .

For discussion of constructive trusts, see *§ 251.111*.

For discussion and forms on obtaining a resulting trust on property, see Ch. 562, *Trusts: Resulting Trusts* .

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§ 251.113 Equitable Liens

[1] Definition and Grounds for Finding Equitable Lien

[a] Definition of Equitable Lien

An equitable lien is a direct charge or encumbrance on property such that the property itself may be proceeded against in an equitable action and either sold or sequestered and its proceeds applied in favor of the person in whose favor it exists [*Okuda v. Superior Court (1983) 144 Cal. App. 3d 135, 141, 192 Cal. Rptr. 388]* .

For discussion of equitable liens, see *Ch. 342, Liens and Wage Preferences, § 342.40* et seq.

[b] Grounds for Judicial Finding of Equitable Lien

The basic purpose of an equitable lien is identifying and impressing on certain property the beneficial rights that have arisen in an innocent party who in some way contributed to the acquisition, protection, or improvement of the property [*Holder v. Williams (1959) 167 Cal. App. 2d 313, 315, 334 P.2d 291]* . A court may find grounds for imposing an equitable lien on the basis of either:

- Express, executory intent to contractually secure debt or obligation [*Holder v. Williams (1959) 167 Cal. App. 2d 313, 316, 334 P.2d 291]* :
  - With property, or
  - With the conveyance, transfer, or assignment of property.
- Inference from the circumstances surrounding a particular transaction [*see Miller v. Mountain View Sav. & L. Ass'n (1965) 238 Cal. App. 2d 644, 662, 48 Cal. Rptr. 278]* .

For discussion of the grounds for imposing an equitable lien, see *Ch. 342, Liens and Wage Preferences, § 342.42*.

[2] Equitable Lien Recognized After the Fact

Although an equitable lien is not judicially recognized until a judgment is rendered that declares its existence, the lien relates back to the time it was created by the conduct of the parties [*Holder v. Williams (1959) 167 Cal. App. 2d 313, 317, 334 P.2d 291]* .

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§ 251.114 Partition

In an action for partition, the court orders that the property that is the subject of the petition for partition be divided among the parties in accordance with their interests in the property as determined in the interlocutory judgment [*Code Civ. Proc. § 872.810*]. To achieve this, the interest of each person claiming an interest in property may be put in issue by the others; and, if so, such issues are to be first tried and determined, and no partition can be made until the respective interests of all the parties have been ascertained and settled by a trial [*Morenhout v. Higuera (1867) 32 Cal. 289, 295]* . In order to make the determination that the plaintiff has the right to partition, the court must find that the plaintiff has an interest in the property sufficient to maintain the action [for determination of sufficient interest, see *Ch. 397, Partition, § 397.41[2]*]. In addition, the court must find the existence of any special conditions prerequisite to partition of interests in particular types of property [Assembly Legislative Committee Comment to *Code Civ. Proc. § 872.710*].

The partition statutes [*Code Civ. Proc. §§ 872.010-874.240*] govern actions for partition of real property and, except to the extent not applicable [for examples of inapplicable actions for partition of personal property, *see Code Civ. Proc. § 872.020*]. An action for partition is statutory, but the powers conferred on the courts by statute are substantially those formerly exercised by the chancery courts in pursuit of the same object, and the methods employed by the code are, in the main, "a reflex of those pursued under former equity practice." It is equitable practice prescribed by law [*Jameson v. Hayward (1895) 106 Cal. 682, 687-688, 39 P. 1078* ; *Akley v. Bassett (1922) 189 Cal. 625, 647, 209 P. 576]* .

For discussion and forms on obtaining partition of property, see Ch. 397, *Partition* .

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§ 251.115 Equitable Distribution

"Equitable distribution" appears in California law to be a general term referring to a distribution based on either general or statutorily specified equitable principles. The cases do not discuss what an equitable distribution is, and therefore, it may simply fall under the equitable maxim that equity has the power to resolve unique situations with unique solutions [*see § 251.13*]. This approach is supported by the fact that appellate review of equitable distributions applies the standard of abuse of discretion [*see Lesser & Son v. Seymour (1950) 35 Cal. 2d 494, 502, 218 P.2d 536]* . The term may apply to, among other things:

- Apportionment of wrongful death awards under *Code Civ. Proc. § 578* [s *ee, e.g., Corder v. Corder (2007) 41 Cal. 4th 644, 653-654, 61 Cal. Rptr. 3d 660* ; *see also* Ch. 318, *Judgments*].

- Distribution of the proceeds of a judicial sale [*e.g., Lesser & Son v. Seymour (1950) 35 Cal. 2d 494, 218 P.2d 536]* .

- Distribution of proceeds of class action [*e.g., Cruz v. PacifiCare Health Systems, Inc. (2003) 30 Cal. 4th 303, 319, 133 Cal. Rptr. 2d 58, 66 P.3d 1157]* .

- Distribution of Medi-Cal beneficiaries among participating prepaid health plans, or managed care plans under Wel & Inst Code § 14087.305(j) [*e.g., Capri v. L.A. Fitness International, LLC (2006) 136 Cal. App. 4th 1078, 1086* ; *39 Cal. Rptr. 3d 425]* .

- Distribution of tort liability among defendants [*e.g., Doe 1 v. City of Murrieta (2002) 102 Cal. App. 4th 899, 908, 126 Cal. Rptr. 2d 213]* .

- Distribution of debtor's assets to creditors [*Pangborn Plumbing Corp. v. Carruthers & Skiffington (2002) 97 Cal. App. 4th 1039, 1053, 119 Cal. Rptr. 2d 416]* .

- Distribution of community property in divorce proceeding [*Glade v. Glade (1995) 38 Cal. App. 4th 1441, 1451, 45 Cal. Rptr. 2d 695]* .

For discussion of equitable distribution in the context of a particular proceeding, consult the topic addressing the type of claim involved in the proceeding.

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[Reserved]

§§ 251.116[Reserved]

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21-251 California Forms of Pleading and Practice--Annotated § 251.120

§ 251.120 Quantum Meruit

Given that some courts consider quantum meruit to be an action in equity [*see Life Care Centers of America v. CalOptima (2006) 133 Cal. App. 4th 1169, 1182, 35 Cal. Rptr. 3d 387]* , even though others do not [*see Jogani v. Superior Court (2008) 165 Cal. App. 4th 901, 906-907, 81 Cal. Rptr. 3d 503* ("species of assumpsit" which is "an action at law")], the doctrine is included here.

Quantum meruit is a well-established principle to the effect that the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered [*Huskinson & Brown v. Wolf (2004) 32 Cal. 4th 453, 458, 9 Cal. Rptr. 3d 693, 84 P.3d 379* ; *Long v. Rumsey (1938) 12 Cal. 2d 334, 342, 84 P.2d 146]* .

To recover on a claim for the reasonable value of services under a quantum meruit theory, a plaintiff must establish both that [*Ochs v. PacifiCare of California (2004) 115 Cal. App. 4th 782, 794, 9 Cal. Rptr. 3d 734* ; *Day v. Alta Bates Medical Center (2002) 98 Cal. App. 4th 243, 248, 119 Cal. Rptr. 2d 606]* :

- He or she was acting pursuant to either an express or implied request for services from the defendant and

- The services rendered were intended to and did benefit the defendant.

Plaintiff must show the circumstances were such that the services were rendered under some understanding or expectation of both parties that the plaintiff was to be compensated therefor [*Huskinson & Brown v. Wolf (2004) 32 Cal. 4th 453, 458, 9 Cal. Rptr. 3d 693, 84 P.3d 379* ; *Estate of Mumford (1916) 173 Cal. 511, 523, 160 P. 667]* . Either the recipient of services performed requested or acquiesced in them, or, when the services are rendered by the plaintiff to a third person, there was a specific request therefor from the defendant [*Day v. Alta Bates Medical Center (2002) 98 Cal. App. 4th 243, 249, 119 Cal. Rptr. 2d 606]* .

The plaintiff does not need to prove the existence of a contract [*Huskinson & Brown v. Wolf (2004) 32 Cal. 4th 453,*

458, 9 Cal. Rptr. 3d 693, 84 P.3d 379 ; *Maglica v. Maglica (1998) 66 Cal. App. 4th 442, 449, 78 Cal. Rptr. 2d 101]* . The existence of a contract instead precludes recovery on quantum meruit [*Valerio v. Andrew Youngquist Construction (2002) 103 Cal. App. 4th 1264, 1271-1272, 127 Cal. Rptr. 2d 436]* .

Recovery under quantum meruit is inappropriate where it would frustrate the law or public policy [*Ochs v. PacifiCare of California (2004) 115 Cal. App. 4th 782, 794, 9 Cal. Rptr. 3d 734* ; *Dinosaur Development, Inc. v. White (1989) 216 Cal. App. 3d 1310, 1315, 265 Cal. Rptr. 525]* .

Examples include:

- Attorney's expectation of shared attorney fee disallowed under Cal. Rules Prof. Conduct, Rule 2-200 from attorney to whom she referred case on which she nonetheless worked on and paid fees for did not preclude her claim for compensation for time and expenses on basis of quantum meruit [*Huskinson & Brown v. Wolf (2004) 32 Cal. 4th 453, 459-464, 84 P.3d 379* ; *9 Cal. Rptr. 3d 693]* .

- Statutory public bidding requirements generally preclude quantum meruit claims for extra work performed beyond the scope of the contract or for work performed under a contract void for defects in bidding [*Amelco Electric v. City of Thousand Oaks (2002) 27 Cal. 4th 228, 234, 239, 115 Cal. Rptr. 2d 900, 38 P.3d 1120]* .

- A quasi-contract theory such as quantum meruit cannot be asserted against a municipality in a public works context [*North Bay Construction, Inc. v. City of Petaluma (2006) 143 Cal. App. 4th 552, 563, 49 Cal. Rptr. 3d 455]* .

- The passage of *Welf. & Inst. Code § 14081.5* precludes the extension of the equitable principle of quantum meruit to circumvent management controls on Medi-Cal reimbursement [*Life Care Centers of America v. CalOptima (2006) 133 Cal. App. 4th 1169, 1182, 35 Cal. Rptr. 3d 387]* .

- There is nothing in *Health and Safety Code § 1371.4* or in the Knox-Keene Health Care Service Plan Act of 1975, [*see Health and Safety Code § 1340 et seq.*] generally to preclude a private action on a quantum meruit theory [*Bell v. Blue Cross of California (2005) 131 Cal. App. 4th 211, 216, 31 Cal. Rptr. 3d 688]* .

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§ 251.121 Receivership

A receiver pendente lite is a person appointed by the court to take the charge and management of property that is the subject of the litigation before the court to preserve and ultimately dispose of it according to the final judgment in the case [*Kreling v. Kreling (1897) 118 Cal. 421, 422, 50 P. 549* ; *Neider v. Dardi (1955) 130 Cal. App. 2d 646, 650, 279 P.2d 598]* . A receiver may be appointed only in the classes of cases expressly set forth in the statutes [*Turner v. Superior Court (1977) 72 Cal. App. 3d 804, 811, 140 Cal. Rptr. 475]* .

Under the main statute on receivers, a court may appoint a receiver when necessary to preserve the property or rights of any party [*Code Civ. Proc. § 564(b)(9)*]. This provision, formerly *Code Civ. Proc. § 564(b)(8)*, was amended by Stats. 2001, ch. 44, in a manner replacing reference to equity with the standard, "when necessary to preserve the property or rights of any party." Accordingly, this statute may derogate from the common law of equitable jurisdiction to impose receivership.

However, when the purpose of the receivership is to reach property of a judgment debtor which cannot be reached by the ordinary levy of execution, that is, when the receivership is supplementary to or in aid of execution, the receivership is a statutory creation and not an equitable remedy [*Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 349-350, 113 Cal. Rptr. 281]* .

For additional discussion and forms for seeking imposition of receivership in an action, see Ch. 486, *Receivers* .

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§ 251.122 Marshaling Assets

Marshaling of assets is an equitable doctrine that applies where two or more creditors seek satisfaction from one debtor, and one of the creditors can reach two funds held by debtor, whereas other creditor can reach only one of funds. Equity will require the creditor who can reach both funds, if it can be done without prejudice to him or inequity to third parties, to look first to the fund that cannot be reached by the other creditor [*Victor Gruen Associates, Inc. v Glass (1964, CA9 Cal) 338 F2d 826* ; *see also Civ. Code §§ 2899, 3433*].

For discussion of marshalling of assets, see *Ch. 342, Liens and Wage Preferences, § 342.24*. For forms of complaint and affirmative defense to actions for marshalling assets, see *Ch. 342, Liens and Wage Preferences, §§ 342.159, 342.160*.

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[Reserved]

§§ 251.123[Reserved]

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21-251 California Forms of Pleading and Practice--Annotated § 251.130

§ 251.130 Contribution by Joint Nontort Judgment Debtors

If two or more nontort judgment debtors are jointly liable on a money judgment, one of them who has satisfied more than his or her due proportion of the judgment, whether voluntarily or through enforcement procedures, may compel contribution from another judgment debtor who has satisfied less than his or her due proportion of the judgment [*Code Civ. Proc. § 882(a)*]. Similarly, if a judgment is based on an obligation of one judgment debtor as surety for another and the surety satisfies any part of the judgment, the surety may compel repayment from the principal [*Code Civ. Proc. § 882(b)*].

PRACTICE TIP:

As an alternative to contribution, a party satisfying the obligation of a joint nontort judgment debtor may take an assignment of the original obligation from the obligor-judgment creditor. The assignee judgment-debtor thereby acquires equitable rights in the assigned obligation with which to force his or her joint judgment debtors to pay their share of the judgment [*Tucker v. Nicholson (1938) 12 Cal. 2d 427, 430, 84 P.2d 1045]* .

For discussion of assignment, see Ch. 60, *Assignments* .

A judgment debtor may apply on noticed motion to the court that entered the judgment for an order determining liability for contribution or repayment, at any time before the judgment is satisfied in full or within 30 days thereafter [*Code Civ. Proc. § 883(a)*].

For discussion of contribution by joint nontort judgment debtor, see *Ch. 300, Indemnity and Contribution, §§ 300.92, 300.93*. For forms of postjudgment proceedings to determine liability of joint nontort judgment debtor, see Ch. 300, *Indemnity and Contribution*, § 300.211 et seq.

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§ 251.131 Legal Subrogation and Assignment

[1] Definitions

"To subrogate" is to put in the place of another, to substitute. Subrogation is the substitution of another person (the subrogee) in place of the creditor or claimant (the subrogor) to whose rights the other person succeeds in relation to the debt or claim [*Interstate Fire and Casualty Ins. Co. v. Cleveland Wrecking Co. (2010) 182 Cal. App. 4th 23, 31, 105 Cal. Rptr. 3d 606* ; *Reliance Nat'l Indem. Co. v. General Star Indem. Co. (1999) 72 Cal. App. 4th 1063, 1077, 85 Cal. Rptr. 2d 627]* . Subrogation has been said to be of two kinds, "legal" and "conventional." Legal subrogation has its source in equity and arises by operation of law. Conventional subrogation arises by the act of the parties and rests in contract [*Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 638, 7 Cal. Rptr. 377, 354 P.2d 1073]* .

Legal subrogation sometimes may be described as an assignment by operation of law, or a legal assignment, or an equitable assignment [*see, e.g.,* *Bank of California v. Connolly (1973) 36 Cal. App. 3d 350, 366-368, 111 Cal. Rptr. 468]* .

For discussion of the definition of legal subrogation and related terminology, see *Ch. 536, Subrogation, §§ 536.11, 536.12, 536.14*. For discussion of assignments, see Ch. 60, *Assignments* .

[2] Elements of Legal Subrogation

The prerequisites for equitable subrogation generally are [*Caito v. United Cal. Bank (1978) 20 Cal. 3d 694, 704, 144 Cal. Rptr. 751, 576 P.2d 466]* :

- Payment was made by the subrogee to protect his or her own interest,
- The subrogee did not act as a volunteer,
- The debt is one for which the subrogee was not primarily liable,

- The entire debt has been paid, and
- Subrogation does not work any injustice to the rights of others.

For discussion of the elements of legal subrogation actions and related defenses and procedure, see *Ch. 536, Subrogation, § 536.13* et seq. For forms of complaints, allegations, and defenses in subrogation actions, see *Ch. 536, Subrogation, § 536.80* et seq.

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§ 251.132 Comparative Indemnity

[1] Definition and Scope of Comparative Indemnity

Comparative indemnity is a method of apportioning liability among those who are responsible for another's personal injury or property damage [*see American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 599-604, 146 Cal. Rptr. 182, 578 P.2d 899* (using alternate name of "implied equitable indemnity" for the doctrine)].

The doctrine applies to tort liability [*see American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 591, 598, 146 Cal. Rptr. 182, 578 P.2d 899]* or for liability implied by contract language not addressing indemnification [*Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1029, 269 Cal. Rptr. 720, 791 P.2d 290]* .

[2] Elements of Comparative Indemnity

At a minimum, equitable indemnity requires a determination of fault on the part of the alleged indemnitor. In the absence of a contractual agreement between the parties concerning allocation of fault, a court determination that neither party was at fault precludes either from obtaining indemnity against the other [*City of Huntington Beach v. City of Westminster (1997) 57 Cal App. 4th 220, 225, 66 Cal. Rptr. 2d 826]* .

In addition, comparative indemnity is available only among tortfeasors who are jointly and severally liable to the plaintiff [*GEM Developers v. Hallcraft Homes of San Diego, Inc. (1989) 213 Cal. App. 3d 419, 430, 261 Cal. Rptr. 626]* .

For discussion of the comparative indemnity and related defenses and procedure, see *Ch. 300, Indemnity and Contribution, § 300.60* et seq. For forms of complaints, cross-complaints, proceedings for attorney fees, and related matters in comparative indemnity actions, see Ch. 300, *Indemnity and Contribution*, § 300.160 et seq.

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[Reserved]

§§ 251.133[Reserved]

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§ 251.140 Jurisdictional Defenses

Among others, the following are defenses to equitable actions based on limits on a court's equitable jurisdiction:

- Law provides as adequate remedy [*see §§ 251.31[1] -[2]*];
- Law has supplanted equity jurisdiction [*see § 251.31[3]*];
- The requested relief is contrary to positive statute [*see § 251.32[1]*]; and
- Requested equitable relief would interfere with municipal legislative power [*see § 251.32[3]*].

In addition, the court has a duty to exercise jurisdiction to resolve the complete controversy between the parties, so all legal defenses and counterclaims should be raised in the case [*see § 251.34*].

On the other hand, a court exercising equitable jurisdiction need only obtain jurisdiction over the person controlling property, so the defense of lack of subject matter jurisdiction over the rem of a case is not available [*see § 251.30[2]*].

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§ 251.141 Unclean Hands

[1] The Nature of the Defense

[a] In General

In accordance with the maxim that no one can take advantage of his or her own wrong [*see Civ. Code § 3517*; for discussion, *see § 251.58*], those who seek the aid of equity must come to the court in good faith. Any unconscionable conduct that relates to the transaction may give rise to the defense of unclean hands and bar relief [*Samuelson v Ingraham (1969) 272 Cal. App. 2d 804, 77 Cal. Rptr. 750]* . Whether the defense applies in particular circumstances depends on the analogous case law, the nature of the misconduct, and the relationship of the misconduct to the claimed injuries [*Jay Bharat Developers, Inc. v. Minidis (2008) 167 Cal. App. 4th 437, 445-446, 84 Cal. Rptr. 3d 267* ; *Dickson, Carlson & Campillo v. Pole (2000) 83 Cal. App. 4th 436, 447, 99 Cal. Rptr. 2d 678* ; *Blain v. Doctor's Co. (1990) 222 Cal. App. 3d 1048, 1060, 272 Cal. Rptr. 250]* .

The defense of unclean hands has been applied to causes of action and defenses including, but not limited to:

- Declaratory judgment [*Fladeboe v. American Isuzu Motors Inc. (2007) 150 Cal. App. 4th 42, 57, 58 Cal. Rptr. 3d 225*].

- Injunctive relief [*Jay Bharat Developers, Inc. v. Minidis (2008) 167 Cal. App. 4th 437, 445-446, 84 Cal. Rptr. 3d 267* ; *Nutro Products, Inc. v. Cole Grain Co. (1992) 3 Cal. App. 4th 860, 869, 5 Cal. Rptr. 2d 41]* .

- Reformation as an equitable remedy [*Seymour v. Cariker (1963) 220 Cal. App. 2d 300, 305, 33 Cal. Rptr. 727]* .

- Unjust enrichment [*Lundgren v Lundgren (1966) 245 Cal. App. 2d 582, 54 Cal. Rptr. 30]* .

- A party seeking equitable relief on laches must come into court with clean hands [*In re Marriage*

of Dancy (2000) 82 Cal. App. 4th 1142, 1157, 98 Cal. Rptr. 2d 775] .

PRACTICE TIP:

Unclean hands, unlike "do equity" [*see § 251.52A*] requires inequitable conduct by the plaintiff in connection with the matter in controversy and provides a complete defense to the plaintiff's action [*Dickson, Carlson & Campillo v. Pole (2000) 83 Cal. App. 4th 436, 446, 99 Cal. Rptr. 2d 678]* .

The equitable defense of unclean hands is not a defense to an unfair trade or business practices claim based on violation of a statute, such as California's Unfair Competition Law [*Ticconi v. Blue Shield of Cal. Life & Health Ins. Co. (2008) 160 Cal. App. 4th 528, 543, 72 Cal. Rptr. 3d 888*].

As a matter of law, the unclean hands doctrine is not an affirmative defense to a cause of action under the Immigration Consultants Act, *Bus. & Prof. Code, § 22440 et seq.* [*Mendoza v. Ruesga (2008) 169 Cal. App. 4th 270, 282, 86 Cal. Rptr. 3d 610*].

[b] Unconscionable Conduct Must Occur in Litigated Transaction or Subject Matter

The doctrine of unclean hands rule does not call for denial of relief to one guilty of any past improper conduct. It is only misconduct in the particular transaction or connected with the subject matter of the litigation that is a basis for the defense [*Jay Bharat Developers, Inc. v. Minidis (2008) 167 Cal. App. 4th 437, 445, 84 Cal. Rptr. 3d 267* ; *Shaw v. Shaw (1964) 227 Cal. App. 2d 159, 38 Cal. Rptr. 520]* .

[c] Requires Prejudice to Moving Party Warranting No Relief

The act upon which equity may refuse relief to plaintiff because plaintiff does not come into court with clean hands must prejudicially affect the rights of the person against whom relief is sought so that it would be inequitable to grant such relief [*Jay Bharat Developers, Inc. v. Minidis (2008) 167 Cal. App. 4th 437, 445, 84 Cal. Rptr. 3d 267* ; *Wiley v Wiley (1943) 59 Cal. App. 2d 840, 139 P.2d 950]* . The defense of unclean hands does not apply in every instance where the plaintiff has committed some misconduct in connection with the matter in controversy, but applies only where it would be inequitable to grant the plaintiff any relief [*Dickson, Carlson & Campillo v. Pole (2000) 83 Cal. App. 4th 436, 446-447, 99 Cal. Rptr. 2d 678* ; *Martin v. Kehl (1983) 145 Cal. App. 3d 228, 239-240, n. 1, 193 Cal. Rptr. 312]* . The court must consider both the degree of harm caused by the plaintiff's misconduct and the extent of the plaintiff's alleged damages [*Dickson, Carlson & Campillo v. Pole (2000) 83 Cal. App. 4th 436, 447, 99 Cal. Rptr. 2d 678]* .

[d] Must Not Cause Injustice

The doctrine of clean hands must not be applied where to do so would create an injustice. It is neither proper nor necessary to sacrifice justice in order to vindicate the honor of the court [*Hill v Younkin (1969) 274 Cal. App. 2d 880, 79 Cal. Rptr. 509]* .

[2] Burden on Party Asserting Defense

The party asserting the defense of unclean hands must plead it or otherwise call it to the attention of the trial court. Only in cases involving "flagrantly unconscionable" conduct will the court, on its own initiative, apply the doctrine of unclean hands even though it was not raised initially by the parties [*Behm v. Fireside Thrift Co. (1969) 272 Cal. App. 2d 15, 21, 76 Cal. Rptr. 849]* .

[3] Question of Fact

Whether a party has been guilty of unclean hands is a question of fact for the factfinder [*Bennett v. Lew (1984) 151 Cal. App. 3d 1177, 199 Cal. Rptr. 241]* . If requested, factual findings concerning the nature of the misconduct and the

extent of prejudice or damage to the defendant relative to the plaintiff's damages or other requested relief may be necessary to support the court's exercise of discretion and facilitate effective review [*Dickson, Carlson & Campillo v. Pole (2000) 83 Cal. App. 4th 436, 447, 99 Cal. Rptr. 2d 678]* .

[4] Within Discretion of Trial Court

The decision of whether to apply the defense based on the facts is a matter within the trial court's discretion [*Farahani v. San Diego Community College Dist. (2009) 175 Cal. App. 4th 1486, 1495, 96 Cal. Rptr. 3d 900* ; *Dickson, Carlson & Campillo v. Pole (2000) 83 Cal. App. 4th 436, 447, 99 Cal. Rptr. 2d 678* ; *Lovett v. Carrasco (1998) 63 Cal. App. 4th 48, 55, 73 Cal. Rptr. 2d 496]* . However, a court's discretion to grant an equitable defense such as unclean hands is not unlimited. The court must consider the material facts affecting the equities between the parties; the failure to do so is an abuse of discretion [*Dickson, Carlson & Campillo v. Pole (2000) 83 Cal. App. 4th 436, 447, 99 Cal. Rptr. 2d 678]* .

[5] Effect of Defense

The clean hand doctrine operates to deny a suitor the special remedies of equity and leaves the party to his or her remedies at law. It does not deny legal rights, or generally foreclose a defense by a defendant brought into equity [*Behm v Fireside Thrift Co. (1969) 272 Cal. App. 2d 15, 76 Cal. Rptr. 849]* . A party who has acted wrongfully, dishonestly, or unfairly in bringing an action to court is precluded from obtaining equitable relief [*Seymour v. Cariker (1963) 220 Cal. App. 2d 300, 305, 33 Cal. Rptr. 727]* .

In an action for declaratory judgment, the trial court must not merely dismiss the action for unclean hands, but adjudicate the defense with the merits of the declaratory relief cause of action [*Fladeboe v. American Isuzu Motors Inc. (2007) 150 Cal. App. 4th 42, 57-58, 58 Cal. Rptr. 3d 225*].

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§ 251.142 Laches

[1] The Nature of Laches Defense

Laches is a defense to a suit in equity. Under the doctrine of laches the plaintiff will be refused equitable relief because of his or her delay in bringing suit, even though the suit is commenced within the statutory period of limitation [*Trail v. Firth (1921) 186 Cal. 68, 69, 198 P 1033]* . Laches is a question of fact, and it must be determined, on the evidence, by all of the circumstances of each particular case [*see In re Marriage of Plescia (1997) 59 Cal. App. 4th 252, 256, 69 Cal. Rptr. 2d 120]* .

The defense of laches rests on the maxim that "equity aids the vigilant, not those who sleep on their rights" [*Magic Kitchen LLC v. Good Things International, Ltd. (2007) 153 Cal. App. 4th 1144, 1156, 63 Cal. Rptr. 3d 713*].

For a discussion of the maxim that equity aids the vigilant and not those who sleep on their rights, see *§ 251.56*.

For a discussion of the nature of the defense of laches to an action in equity, see *Ch. 345, Limitation of Actions, § 345.40*.

For a discussion of raising the defense of laches in an action in equity, see *Ch. 345, Limitation of Actions, § 345.43*.

[2] Elements and Proof of Laches

The defense of laches requires unreasonable delay plus either acquiescence in the act about which the plaintiff complains or prejudice to the defendant resulting from the delay [*Johnson v. City of Loma Linda (2000) 24 Cal. 4th 61, 68, 99 Cal. Rptr. 2d 316, 5 P.3d 874]* . The elements of unreasonable delay and resulting prejudice may be met in two ways [*Fountain Valley Regional Hospital & Medical Center v. Bonta (1999) 75 Cal. App. 4th 316, 323-325, 89 Cal. Rptr. 2d 139]* :

- They may be demonstrated by the evidence in the case, and the person arguing in favor of a finding of laches has the burden of proof on the laches issue, or

- The element of prejudice may be "presumed" if there exists a statute of limitations that is sufficiently analogous to the facts of the case and the period of limitations has been exceeded by the party bringing the claim.

For a discussion of the elements of the defense of laches to an action in equity, see *Ch. 345, Limitation of Actions, § 345.41*.

[3] Defenses to the Defense of Laches

The equitable doctrines of estoppel [*see Austin v. Hallmark Oil Co. (1943) 21 Cal. 2d 718, 735, 134 P.2d 777]* and unclean hands [*see Magic Kitchen LLC v. Good Things International, Ltd. (2007) 153 Cal. App. 4th 1144, 1165, 63 Cal. Rptr. 3d 713* (unclean hands bars assertion of laches by "willful" or "deliberate" defendant); *In re Marriage of Dancy (2000) 82 Cal. App. 4th 1142, 1157, 98 Cal. Rptr. 2d 775]* apply to a defendant seeking to invoke the equitable defense of laches to a plaintiff's action in equity.

For a discussion of the equitable doctrine of unclean hands, see *§ 251.141*.

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§ 251.143 Statute of Limitations

Whether or not the plaintiff is guilty of laches, an action not brought within the statutory period is barred unless it falls within some exception within the statute or the defense of the statute of limitations is not open to the defendant because of waiver or estoppel [*Trail v. Firth (1921) 186 Cal. 68, 69-70, 198 P. 1033]* .

The statute of limitation applicable to a given equitable cause of action depends on the nature of the underlying cause in the same manner as with actions at law. For discussion of relevant limitation periods, consult the chapter addressing the substantive claim in an action for equity.

For a discussion of statutes of limitation, see Ch. 345, *Limitation of Actions* . For a table of limitation periods organized by type of substantive claim, see *Ch. 345, Table of Limitation Periods, § 345.150* et seq.

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§ 251.150 Failure to Do Equity

[1] Condition on Equity for Plaintiff

As a defense to an equitable action, the maxim to do equity does not assume that the plaintiff has done anything unconscientious or inequitable, much less does it refuse to him or her all relief. On the contrary, it ordinarily grants the plaintiff the remedy to which he or she is entitled, but upon condition that the defendant's equitable rights are protected by means of the remedy to which the defendant is entitled [*Dickson, Carlson & Campillo v. Pole (2000) 83 Cal. App. 4th 436, 446 n.7, 99 Cal. Rptr. 2d 678]* .

Strategic Point:

The doctrine to do equity differs from that of unclean hands [*see § 251.141*]. Unclean hands, unlike do equity, requires inequitable conduct by the plaintiff in connection with the matter in controversy and provides a complete defense to the plaintiff's action. More specifically, the doctrine of unclean hands differs from the maxim to do equity, in that the latter assumes that different equitable rights have arisen from the same subject matter or transaction, some in favor of plaintiff and some in favor of the defendant, so that the plaintiff is required to recognize and provide for defendant's rights, and plaintiff's relief is granted only upon a showing that defendant's rights are protected [*DeGarmo v. Goldman (1942) 19 Cal. 2d 755, 765, 123 P.2d 1* ; *Dickson, Carlson & Campillo v. Pole (2000) 83 Cal. App. 4th 436, 446, 99 Cal. Rptr. 2d 678]* .

Examples of conditions properly placed on judgments in equity include:

- Conditioning injunctive relief upon payment of costs [*Collester v. Oftedahl (1941) 48 Cal. App. 2d 756, 760-761, 120 P.2d 710]* .

- The trial court could not quiet appellant's title to the property without protecting the interests of respondent therein [*District Bond Co. V. Pollack (1942) 19 Cal. 2d 304, 307, 121 P.2d 7]* .

Examples of conditions considered inequitable to place on a judgment in equity include:

- Order the easement owner to contribute all or part of the cost of relocating or reconstructing an encroaching building [*Warsaw v. Chicago Metallic Ceilings, Inc. (1984) 35 Cal. 3d 564, 575-576, 199 Cal. Rptr. 773]* .

[2] Limited Application as Complete Defense

The obligation to do equity is only a complete defense to an action if either [*Dickson, Carlson & Campillo v. Pole (2000) 83 Cal. App. 4th 436, 446, 99 Cal. Rptr. 2d 678]* :

- The plaintiff fails to comply with the conditions imposed to afford relief to the defendant on the equities favoring the defendant, or

- The court cannot accommodate the equities favoring the defendant in granting the relief, and to grant relief to the plaintiff without affording relief to the defendant would be inequitable.

For discussion of the maxim to do equity, see *§ 251.52A.*

[3] Applicable to Actions at Law and in Equity

The rule that one who seeks equity must do equity is not confined to cases that were formerly cognizable only in equity. It applies as well to actions authorized by statute, and a plaintiff may be forced to do equity, as a condition of claiming rights fixed by statute and established law [*Richman v. Bank of Perris (1929) 102 Cal. App. 71, 83, 282 P. 801]* .

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§ 251.151 Waiver

Waiver is an intentional relinquishment of a known right after knowledge of the facts [*Waller v. Truck Ins. Exchange, Inc. (1995) 11 Cal. 4th 1, 31-32, 44 Cal. Rptr. 2d 370, 900 P.2d 619* ; *Supervalu, Inc. v. Wexford Underwriting Managers, Inc. (2009) 175 Cal. App. 4th 64, 76, 96 Cal. Rptr. 3d 316]* or such conduct as warrants an inference of the relinquishment of such right [*Waller v. Truck Ins. Exchange, Inc. (1995) 11 Cal. 4th 1, 31, 44 Cal. Rptr. 2d 370, 900 P.2d 619* ; *Bastanchury v. Times-Mirror Co. (1945) 68 Cal. App. 2d 217, 240, 156 P.2d 488]* . A waiver may be expressed or implied [*Waller v. Truck Ins. Exchange, Inc. (1995) 11 Cal. 4th 1, 31, 44 Cal. Rptr. 2d 370, 900 P.2d 619* ; *Salton Community Services Dist. v. Southard (1967) 256 Cal. App. 2d 526, 532, 64 Cal. Rptr. 246]* . Waiver may be implied from conduct inferentially manifesting an intention to waive [*Johnson v. Kaeser (1925) 196 Cal. 686, 698, 239 P. 324* ; *Salton Community Services Dist. v. Southard (1967) 256 Cal. App. 2d 526, 532-533, 64 Cal. Rptr. 246]* .

When a party's statement or conduct intentionally leads a second party to believe a particular thing and reasonably rely on that belief, the second party cannot take a contrary position during litigation [*Supervalu, Inc. v. Wexford Underwriting Managers, Inc. (2009) 175 Cal. App. 4th 64, 77, 96 Cal. Rptr. 3d 316* ; *Westoil Terminals Co., Inc. v. Industrial Indemnity Co. (2003) 110 Cal. App.4th 139, 152, 1 Cal. Rptr. 3d 516]* . The doctrine of waiver operates defensively only. In other words, it protects a party from unfair advantage sought by another. It is not designed to permit a person, offensively, to thereby obtain unfair advantage [*Supervalu, Inc. v. Wexford Underwriting Managers, Inc. (2009) 175 Cal. App. 4th 64, 77, 96 Cal. Rptr. 3d 316* ; *Peskin v. Phinney (1960) 182 Cal. App. 2d 632, 636, 6 Cal. Rptr. 389]* . Waiver must generally be pleaded affirmatively in order to be considered by the court [*San Fernando Valley C. of C. v. Thomas (1954) 123 Cal. App. 2d 348, 350-351, 266 P.2d 891* (reformation of instrument)].

The burden is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation. Doubtful cases will be decided against a waiver [*Waller v. Truck Ins. Exchange, Inc. (1995) 11 Cal. 4th 1, 31, 44 Cal. Rptr. 2d 370, 900 P.2d 619]* .

For discussion and forms concerning waiver with respect to a particular right or claim, consult the topic covering the type of right or claim.

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§ 251.152 Bona Fide Purchase

The doctrine of bona fide purchase gives a bona fide purchaser priority over earlier-arising unrecorded interests of which the bona fide purchaser had no notice [*Bank of America, N.A. v. La Jolla Group II (2005) 129 Cal. App. 4th 706, 715, 28 Cal. Rptr. 3d 825]* . A bona fide purchaser might generally be described as one who [*Melendrez v. D & I Investment, Inc. (2005) 127 Cal. App. 4th 1238, 1251, 26 Cal. Rptr. 3d 413* (context of real property recording and sale statutes)]:

- Purchases the property in good faith for value, and
- Has no knowledge or notice of the asserted rights of another.

The doctrine of bona fide purchase is an equitable one [*Bryce v. O'Brien (1936) 5 Cal. 2d 615, 616, 55 P.2d 488]* . For example, A deed of real property passes conclusive title from grantor and all claiming under the grantor except a bona fide encumbrancer for value without notice [*Fallon v. Triangle Management Services, Inc. (1985) 169 Cal. App. 3d 1103, 1106, 215 Cal. Rptr. 748]* .

Some rules of bona fide purchase have been altered by statute. Thus, for example, under *Civ. Code § 2924*, there is a conclusive presumption created in favor of a bona fide purchaser who receives a deed that contains a recital that the grantor has fulfilled its statutory notice requirements [*Melendrez v. D & I Investment, Inc. (2005) 127 Cal. App. 4th 1238, 1250, 26 Cal. Rptr. 3d 413]* . The exact definition of bona fide purchaser may vary in the context of a statute as well. Again in the context of *Civ. Code § 2924*, for example, a bona fide purchaser is one who pays value for the property without notice of any adverse interest or of any irregularity in the sale proceedings [*Melendrez v. D & I Investment, Inc. (2005) 127 Cal. App. 4th 1238, 1250, 26 Cal. Rptr. 3d 413]* .

Furthermore, an instrument wholly void, such as a deed in blank, cannot be made the foundation of a good title under the doctrine of bona fide purchase [*Bryce v. O'Brien (1936) 5 Cal. 2d 615, 616, 55 P.2d 488* ; *Green v. MacAdam (1959) 175 Cal. App. 2d 481, 486, 346 P.2d 474]* .

An innocent purchaser taking a void instrument for whom the doctrine of bona fide purchase offers no relief may be able to find protection in the doctrine of estoppel, if circumstances establish negligence or some other misconduct by the other party contributed to the loss [*Green v. MacAdam (1959) 175 Cal. App. 2d 481, 486, 346 P.2d 474]* .

For discussion and forms on the doctrine of bona fide purchase to a transaction, consult the topic covering the type of transaction involved. For an exception to the bona fide purchase doctrine where the purchaser has been negligent, see *§ 251.161[2]*.

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§ 251.153 Terminating Sanction as Equitable Defense

The exercise of the inherent power to dismiss, like all inherent authority, derives in part from the court's historic powers in equity [*Stephen Slesinger, Inc. v. The Walt Disney Co. (2007) 155 Cal. App. 4th 736, 763, 66 Cal. Rptr. 3d 268*]. The decision whether to exercise the inherent power to dismiss as an equitable defense to plaintiff's misconduct requires consideration of all relevant circumstances, including the nature of the misconduct, the strong preference for adjudicating claims on the merits, the integrity of the court as an institution of justice, the effect of the misconduct on a fair resolution of the case, and the availability of other sanctions to cure the harm [*Stephen Slesinger, Inc. v. The Walt Disney Co. (2007) 155 Cal. App. 4th 736, 764, 66 Cal. Rptr. 3d 268*].

For a discussion of the equitable sanction of dismissal as a defense generally, see Ch. 510, *Sanctions* . For a discussion of the equitable sanction of dismissal based on discovery misconduct, see *Ch. 192, Discovery: Sanctions for Discovery Misuse, § 192.13*.

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§§ 251.154[Reserved]

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§ 251.160 Reformation as Defense in Action at Law

Reformation of an instrument may be raised as a defense to an action at law for enforcement of a contract [*Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 18 n.8, 262 Cal. Rptr. 716]* .

For discussion of reformation, see *§ 251.100*.

For a form of pleading equitable estoppel as an affirmative defense to a negotiated instrument, see *Ch. 385, Negotiable Instruments, § 385.118*.

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§ 251.161 Estoppel

[1] Estoppel as Affirmative Defense in General

Equitable estoppel [for discussion, *see § 251.94[1]*] may be raised as an affirmative defense, so long as the rules for raising and affirmative defense [see] are properly followed [*see Oldcastle Precast, Inc. v. Lumbermens Mut. Casualty Co. (2009) 170 Cal. App. 4th 554, 571-572, 88 Cal. Rptr. 3d 363* (responsive statement of material facts failed to raise affirmative defense of equitable estoppel)].

Estoppel is codified in *Evid. Code § 623* [*Estate of Bonanno (2008) 165 Cal. App. 4th 7, 22, 80 Cal. Rptr. 3d 560*].

[2] Estoppel Against Other Party Negligent in Making Third Party Cause Both Parties to Suffer

[a] General Rule

The maxim that where one of two innocent persons must suffer by the act of a third, one of them by whose negligence it happened must be the sufferer [*see Civ. Code § 3543*; for discussion, *see § 251.60*], creates an estoppel based upon misplaced confidence by one victim of fraud, resulting in victimization of the other [*Federal Deposit Ins. Corp. v Superior Court (1997) 54 Cal. App. 4th 337, 349, 62 Cal. Rptr. 2d 713* ; *Wurzl v. Holloway (1996) 46 Cal. App. 4th 1740, 1752, 54 Cal. Rptr. 2d 512]* . It must appear that negligence of one of the parties was the cause of the loss [*Medak v. Cox (1970) 12 Cal. App. 3d 70, 77, 90 Cal. Rptr. 452]* . The question of the other party's negligence is a question of fact [*Federal Deposit Ins. Corp. v Superior Court (1997) 54 Cal. App. 4th 337, 349-350, 62 Cal. Rptr. 2d 713]* . Accordingly, the party seeking the protection of this defense must plead, substantiate, and request that the court making a finding on the negligence of the other otherwise innocent party [*Medak v. Cox (1970) 12 Cal. App. 3d 70, 77-78, 90 Cal. Rptr. 452* (failure to allege, show, or obtain finding of negligence waived defense)].

[b] Exception for Principal Using Unscrupulous Agent

It is settled that *Civ. Code § 3543* ordinarily cannot be relied on by a principal who has utilized the services of an unscrupulous agent [*Clifton Cattle Co. v. Thompson (1974) 43 Cal. App. 3d 11, 19, 117 Cal. Rptr. 500]* . As between two innocent persons, one of whom must suffer, the loss should fall on the principal who has appointed the agent rather than on the third person who trades or deals with the agent [*Clifton Cattle Co. v. Thompson (1974) 43 Cal. App. 3d 11, 19, 117 Cal. Rptr. 500* ; *Monteleone v. Southern California Vending Corp. (1968) 264 Cal. App. 2d 798, 808, 70 Cal. Rptr. 703]* .

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[Reserved]

§§ 251.162[Reserved]

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21-251 California Forms of Pleading and Practice--Annotated § 251.170

§ 251.170 Equitable Defenses to Statute of Limitations

[1] Equitable Tolling of Limitations Period in Actions at Law

A period of limitation may be equitably tolled as to one action when plaintiff has sought an alternative form of relief, if [*Addison v. State of California (1978) 21 Cal. 3d 313, 319, 146 Cal. Rptr. 224, 578 P.2d 941]* :

- Defendant has received timely notice of the first claim,
- Defendant has not been prejudiced in gathering evidence to defend against the second claim, and
- Plaintiff has acted reasonably and in good faith in filing the second action.

For a discussion of equitable tolling of statutes of limitations in actions at law, see *Ch. 345, Limitation of Actions, § 345.21*. For a form of allegation of circumstances raising the equitable tolling of statutes of limitations, see *Ch. 345, Limitation of Actions, § 345.82*.

[2] Equitable Estoppel Against Use of Limitations Bar in Actions at Law

The equitable estoppel doctrine applies to a defendant's raising of the bar of statute of limitations if the plaintiff establishes that [*Kleinecke v. Montecito Water Dist. (1983) 147 Cal. App. 3d 240, 245-247, 195 Cal. Rptr. 58]* :

- The defendant was aware of the limitation period,
- The defendant intended that the plaintiff should rely on his or her conduct or statements,
- The plaintiff was ignorant of the true facts, and

- The plaintiff relied on the defendant's conduct or statements to his or her detriment.

Under this rule, the act or omission must constitute a misrepresentation or nondisclosure of a material fact, rather than law. The defendant need not intend to deceive the plaintiff to give rise to an equitable estoppel. That is, an estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. It is enough if the party has been induced to refrain from using means or taking action that is within his or her power, by which the party might have retrieved his or her position and prevented his or her loss. Where the delay in commencing action is induced by the conduct of the defendant, the defendant may not assert the expiration of the statute of limitation as a defense [*Superior Dispatch, Inc. v. Ins. Corp. of N.Y. (2010) 181 Cal. App. 4th 175, 186-187, 104 Cal. Rptr. 3d 508]* .

A defendant is also estopped from raising the limitations bar to a claim when [*see Hernandez v. Garcetti (1998) 68 Cal. App. 4th 675, 680-681, 80 Cal. Rptr. 2d 443* ; *Parsons v. Tickner (1995) 31 Cal App 4th 1513, 1525-1529, 37 Cal. Rptr. 2d 810]* :

- The defendant fraudulently concealed the facts on which a cause of action depends,

- The plaintiff exercised due diligence, but did not discover the cause of action before the expiration of the limitation period on the cause of action because of the defendant's fraudulent concealment of it.

Finally, a defendant is estopped from raising the limitations bar to a claim when [*Bernson v. Browning-Ferris Industries (1994) 7 Cal. 4th 926, 936, 30 Cal. Rptr. 2d 440, 873 P.2d 613]* :

- The defendant fraudulently concealed his or her identity as the person against whom the plaintiff has a right of action,

- The plaintiff exercised due diligence, but did not discover the identity of the defendant before the expiration of the limitation period on the cause of action because of the defendant's fraudulent concealment of his or her identity.

For a discussion of equitable estoppel against a defense of the bar of statute of limitations, see *Ch. 345, Limitation of Actions, § 345.22*. For a form of allegation that defendant is estopped from raising the bar of the statute of limitations, see *Ch. 345, Limitation of Actions, § 345.81*.

[3] Relief From Bar of Statute Based on Extrinsic Mistake Caused by Court Clerk

Representations made by a court clerk may be construed as extrinsic mistake giving rise to equitable relief so as to preclude application of a statute of limitation [*see Mirvis v. Crowder (1995) 32 Cal. App. 4th 1684, 1686-1688, 38 Cal. Rptr. 2d 644]* .

For a discussion of relief from a defense of the bar of statute of limitations based on the extrinsic mistake of court clerk, see *Ch. 345, Limitation of Actions, § 345.29*.

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[Reserved]

§§ 251.171[Reserved]

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§ 251.180 Abatement of Continuing Nuisance

[1] Cause of Action in Tort

The term "nuisance" is applied to a multiplicity of wrongful acts that may arise out of numerous types of tortious conduct, whether negligent, intentional, or involving ultrahazardous activities [*Sturges v. Charles L. Harney, Inc. (1958) 165 Cal. App. 2d 306, 317-318, 331 P.2d 1072]* .

For additional discussion of definitions of nuisance, see *Ch. 391, Nuisance, §§ 391.11-* 39113. For general discussion and forms concerning abatement of nuisance, see Ch. 391, *Nuisance* .

[2] Injunctive Relief to Abate Continuing Nuisance

If a nuisance is permanent, the plaintiff is entitled to bring only one action in which he or she may recover all damages accrued as well as anticipated future damages. However, if the nuisance is continuing and can be abated, the plaintiff is entitled to an injunction to have the nuisance abated as well as a judgment for all damages having accrued until the commencement of the action and damages for the temporary decrease in the value of the use of the property while the nuisance continues [*Spaulding v. Cameron (1952) 38 Cal. 2d 265, 267-269, 239 P.2d 625]* .

For additional discussion of injunctive relief to abate a nuisance, see *Ch. 391, Nuisance, §§ 391.19, 391.26 -391.29.*

The continuing nature of a nuisance refers to the continuing damage caused by the offensive condition, not the acts causing the offensive conduct. Thus, a nuisance may be continuing even if the defendant's offensive conduct has ended years earlier [*Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1147, 281 Cal. Rptr. 827]* . In addition, a salient feature of a continuing trespass or nuisance is that its impact may vary over time [*see Field-Escandon v. DeMann (1988) 204 Cal. App. 3d 228, 234, 251 Cal. Rptr. 49]* .

For additional discussion of the distinction between permanent and continuing nuisances, see *Ch. 391, Nuisance, §§ 391.15 -391.17.*

[3] Standing to Bring Civil Action to Abate Nuisance

Any person whose property is injuriously affected or whose personal enjoyment is lessened by a nuisance, as defined in *Civ. Code § 3479*, may bring an action to abate a private nuisance [*Code Civ. Proc. § 731*].

For additional discussion of standing to bring an action to abate a nuisance, see *Ch. 391, Nuisance, §§ 391.27, 391.28*.

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§ 251.181 Equitable Conversion

The doctrine of equitable conversion is "a mere fiction" based on the principle that equity regards things that are directed to be done as having actually been performed where nothing has intervened that ought to prevent performance [*Parr-Richmond Industrial Corp. v. Boyd (1954) 43 Cal. 2d 157, 165-166, 272 P.2d 16]* . The question of conversion is a question of intention [*McCaughna v. Bilhorn (1935) 10 Cal. App. 2d 674, 679, 52 P.2d 1025]* .

Examples include:

- An unconditional contract for the sale of land, of which specific performance would be decreed, grants the purchaser equitable title, and equity considers him the owner [*Parr-Richmond Industrial Corp. v. Boyd (1954) 43 Cal. 2d 157, 166, 272 P.2d 16* ; *Estate of Dwyer, 159 Cal. 664, 675, 115 P. 235]* . But there is no equitable conversion where the contracting parties demonstrate an intention to the contrary [*Parr-Richmond Industrial Corp. v. Boyd (1954) 43 Cal. 2d 157, 166, 272 P.2d 16]* .

- Fraudulently conveyed asset which has been sold at trustee's sale is subject to being followed into whatever form it has been converted either on theory of following res into hands of constructive trustee or by applying kind of equitable conversion [*Ahmanson Bank & Trust Co. v. Tepper (1969) 269 Cal. App. 2d 333, 344-345, 74 Cal. Rptr. 774]* .

- A contract for the sale of land cannot be taken out of the statute of limitations governing contract actions by converting the action into one for the recovery of real property through the application of the doctrine of equitable conversion. Thus the five-year period of limitation provided by *Code Civ. Proc. § 318* for the recovery of real property can not be made applicable by the theory that under a contract for sale, the purchaser is deemed to be the equitable owner of the property and the seller is considered the owner of the purchase price [*Reiner v. Hermann (1947) 79 Cal. App. 2d 543, 546, 180 P.2d 385]* .

- A settlor who is a beneficiary of a revocable trust has the power, under the doctrine of equitable conversion, to convey property to which the trust holds title and over which the beneficiary has complete control [*Walgren v. Dolan (1990) 226 Cal. App. 3d 572, 576-579, 276 Cal. Rptr. 554]* .

- A defense of impossibility with regard to specific performance was rejected by the court in a case in which a foreclosure sale resulted in the property being conveyed to bona fide third-party purchasers after the plaintiffs had entered into an oral contract for the purchase of the property. The court reasoned that a decree of specific performance need not be absolute in form, and the performance that it requires need not be identical with that promised in the contract; it may be so drawn as to best effectuate the purposes for which the contract was made, and it may be granted on such terms and conditions as justice requires [*Rogers v. Davis (1994) 28 Cal. App. 4th 1215, 1221-1222, 34 Cal. Rptr. 2d 716]* . The court held that, as the equitable owners of the property at the time of the foreclosure sale, the plaintiffs were entitled in equity to the proceeds of the sale under the doctrine of equitable conversion [*Rogers v. Davis (1994) 28 Cal. App. 4th 1215, 1223, 34 Cal. Rptr. 2d 716]* .

- On the basis of equitable conversion, unlawfully withheld wages are property of the employee within the contemplation of the UCL [*Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal. 4th 163, 178, 96 Cal. Rptr. 2d 518, 999 P.2d 706]* .

- In an action in which the trial court ordered specific performance of a term in a joint venture agreement allowing plaintiff to purchase defendant's interest in the property owned by them as part of their joint venture, the trial court properly found that no equitable conversion of title in plaintiff's favor resulted from defendant's failure to appoint an appraiser, thus delaying the fixing of fair market value, where defendant was not the sole obstacle to the appraisal [*De Anza Enters. v. Johnson (2002) 104 Cal. App. 4th 1307, 1318-1320, 128 Cal. Rptr. 2d 749]* .

- Where it clearly appears from a will that the testatrix intended that real property be sold during administration and the proceeds of the sale be given to an heir and the bequest does not fail, an equitable conversion of the land into money occurs and the will bequeaths personal property and does not devise real estate [*McCaughna v. Bilhorn (1935) 10 Cal. App. 2d 674, 678, 52 P.2d 1025]* .

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§ 251.182 Invasion of Personal Rights

Where relief at law is just as inadequate in cases of personal torts as is such relief in cases of torts to property, there is a strong tendency to extend equitable relief to those cases just as such relief has been extended to protect property rights and rights of substance [*Orloff v. Los Angeles Turf Club, Inc. (1947) 30 Cal. 2d 110, 117, 180 P.2d 321]* . *Code Civ. Proc. § 526*, rather than limiting injunctive relief to property rights, indicates that personal rights as well may be protected [*Orloff v. Los Angeles Turf Club, Inc. (1947) 30 Cal. 2d 110, 118, 180 P.2d 321* ; *Dandini v. Dandini (1948) 86 Cal. App. 2d 478, 487, 195 P.2d 871]* .

Examples include

- Although the Unruh Act, *Civ. Code § 51*, makes no express provision for injunctive relief, that remedy as well as damages may be available to an aggrieved person [*Burks v. Poppy Constr. Co. (1962) 57 Cal. 2d 463, 470, 20 Cal. Rptr. 609, 370 P.2d 313]* .

- A person whose civil rights are invaded as a result of discrimination against a group on the basis of race or ancestry may bring an action for injunctive relief on behalf of all members of the group similarly situated [*Williams v. International etc. of Boilermakers, 27 Cal. 2d 586, 594, 165 P.2d 903* ; *Banks v. Housing Authority, 120 Cal. App. 2d 1, 23, 260 P.2d 668]* .

- Although the Fair Employment and Housing Act does not expressly authorize a court to grant injunctive relief for unlawful discrimination, courts have awarded such relief [*see, e.g.,* *Aguilar v. Avis Rent A Car System (1999) 21 Cal. 4th 121, 133-142, 87 Cal. Rptr. 2d 132, 980 P.2d 846* (restraining speech consisting of racial epithets)].

In addition, the Tom Bane Civil Rights Act, prohibiting interference with the exercise of civil rights, explicitly provides for injunctive relief in that regard [*Civ. Code § 52.1(a), (b)*].

For discussion and forms on actions for civil rights violations, see Ch. 112, *Civil Rights: Government-Funded Programs and Activities* , see Ch. 113, *Civil Rights: Post-Civil War Statutes* , see Ch. 114, *Civil Rights: Prisoners' Rights* , see Ch. 115, *Civil Rights: Employment* , see Ch. 116, *Civil Rights: Business Establishments* , see Ch. 117, *Civil Rights: Housing* , see Ch. 117A, *Civil Rights: Interference* .

Although trade libel, as opposed to defamation, may be enjoined in proper case, injunction is not available to restrain disparagement published in context of public debate to influence government action on matter of public interest. *Leonardini v. Shell Oil Co. (1989) 216 Cal. App. 3d 547, 574-579, 264 Cal. Rptr. 883]* .

For discussion and forms on actions for libel or slander, see Ch. 340, *Libel and Slander* .

A member of an unincorporated association may commence a proceeding to challenge his or her expulsion or suspension, including a claim alleging defective notice, within one year after the effective date of the expulsion or suspension [*Corp. Code § 18320(e)*]. The court may order any relief, including reinstatement, it determines is equitable under the circumstances [*Corp. Code § 18320(e)*].

For discussion and forms concerning unincorporated associations, see Ch. 61, *Associations and Clubs* .

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§ 251.183 Unfair Competition

[1] Unfair Business Practices

California's unfair competition law [*Bus. & Prof. Code § 17200 et seq.*] defines unfair competition to consist of three types of business-related activities [*Bus. & Prof. Code § 17200*]:

- Any unlawful, unfair, or fraudulent business act or practice;
- Unfair, deceptive, untrue, or misleading advertising; and
- Any act prohibited by *Bus. & Prof. Code § 17500 et seq.* (governing advertising).

A person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in a court of competent jurisdiction [*Bus. & Prof. Code § 17203*; *see also Madrid v. Perot Sys. Corp. (2005) 130 Cal. App. 4th 440, 465, 30 Cal. Rptr. 3d 210]* . The court may make such orders or judgments, as may be necessary to prevent the use or employment by a person of a practice that constitutes unfair competition under *Bus. & Prof. Code § 17200*, or as may be necessary to restore to any person in interest any money or property, real or personal, that may have been acquired by means of unfair competition [*Bus. & Prof. Code § 17203*].

In exercising its discretion to fashion an appropriate equitable remedy for unfair business practices, the court may consider any equitable defenses pleaded by the defendant [*Cortez v. Purolator Air Filtration Prods. Co. (2000) 23 Cal. 4th 163, 179-180, 96 Cal. Rptr. 2d 518, 999 P.2d 706]* .

For additional discussion of unfair business practices, see *Ch. 565, Unfair Competition, § 565.30* et seq. For forms for actions on unfair business practices, see *Ch. 565, Unfair Competition, § 565.230* et seq.

[2] Restraints of Trade

Injunctive relief against improper restraints of trade is available under general equitable principles [*Kold Kist, Inc. v. Amalgamated Meat Cutters & Butchers Workmen (1950) 99 Cal. App. 2d 191, 203-204, 21 P.2d 724* ; *O'Shea v. Tile Layers Union (1957) 155 Cal. App. 2d 373, 375* ; *see Civ. Code § 3422*].

For additional discussion of restraints of trade, see *Ch. 565, Unfair Competition, § 565.70* et seq. For forms for actions on restraints of trade, see *Ch. 565, Unfair Competition, § 565.250* et seq.

[3] Misappropriation of Trade Secrets

Actual or threatened misappropriation of a trade secret may be enjoined. On application to the court, an injunction will be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional period of time in order to eliminate commercial advantage that would otherwise be derived from the misappropriation [*Civ. Code § 3426.2(a)*; *see also Morlife, Inc. v. Perry (1997) 56 Cal. App. 4th 1514, 1528, 66 Cal. Rptr. 2d 731]* .

For additional discussion of misappropriation of trade secrets, see *Ch. 565, Unfair Competition, § 565.100* et seq. For forms for actions on misappropriation of trade secrets, see *Ch. 565, Unfair Competition, § 565.270* et seq.

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§ 251.184 Misuse of Trademark or Trade Name

In addition to legal relief, equitable relief is available in trademark and trade name infringement suits. Accordingly, a plaintiff may obtain injunctive relief in the following instances:

- An owner of a mark registered under the California Trademark Law may proceed by suit to enjoin, as may be deemed just and reasonable, the manufacture, use, display, or sale of counterfeits of the mark [*Bus. & Prof. Code § 14340(a)*].

- An owner of a mark registered under the California Trademark Law or valid at common law, or an owner of a trade name valid at common law, may obtain injunctive relief when there is a likelihood of injury to the owner's business reputation or likelihood of dilution of the distinctive quality of the mark or name [*Bus. & Prof. Code § 14330*].

- An owner of a mark registered under either the California Trademark Law or the Lanham Act, or both, may obtain injunctive relief to prevent the unauthorized or infringing use of that mark by another to enhance the commercial value of the unauthorized user's or infringer's products or services [*Bus. & Prof. Code § 14335(a)*].

If a court finds a mark is counterfeit, the court may order the destruction, transfer, or seizure of all offending matter, or order after obliteration of the counterfeit mark, the transfer of these materials to the State of California, a civil claimant, an eleemosynary institution, or any appropriate private person other than the person from whom the materials were obtained [*Bus. & Prof. Code § 14340(a), (b)*].

In addition, the equitable doctrine of secondary meaning protects any trade name or design that may not be exclusively appropriated as a trademark, but that has nonetheless become associated in the public mind with one person's business as the source of goods or services [*see Ball v. American Trial Lawyers Assn. (1971) 14 Cal. App. 3d 289, 300-304, 92 Cal. Rptr. 228* ; *Family Record Plan, Inc. v. Mitchell (1959) 172 Cal. App. 2d 235, 242-243, 342 P.2d 10]* .

For additional discussion and forms on suits for infringement of trademark or trade name, see Ch. 549, *Trademarks and Trade Names* . For discussion of actions for misuse of name of unincorporated association, see *Ch. 61, Associations and Clubs, § 61.43*.

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[Reserved]

§§ 251.185[Reserved]

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§ 251.190 Relief from Judgments and Orders

Superior courts have inherent equitable jurisdiction in unlimited civil cases to relieve a party from a judgment or order resulting from extrinsic fraud or mistake [*see Baske v. Burke (1981) 125 Cal. App. 3d 38, 43-44, 177 Cal. Rptr. 794]* . The equitable power of a superior court may be invoked by either a motion in the original action or by a separate independent action [*see, e.g., Weitz v. Yankosky (1966) 63 Cal. 2d 849, 855, 48 Cal. Rptr. 620, 409 P.2d 700* ; *In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 81, 260 Cal. Rptr. 403]* .

In limited civil cases, courts are granted equitable jurisdiction to vacate a judgment or order rendered by the court from which relief is sought if the judgment or order was obtained through extrinsic fraud, mistake, inadvertence, or excusable neglect [*Code Civ. Proc. § 86(b)(3)*].

For a sample general form of a complaint in equity to set aside a judgment or order obtained by extrinsic fraud or mistake, see *§ 251.270*. For additional discussion of equitable relief from judgments and orders, see *Ch. 489, Relief from Judgments and Orders, § 489.220* et seq. For forms for seeking equitable relief from judgments and orders, see *Ch. 489, Relief from Judgments and Orders, § 489.430* et seq.

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§ 251.191 Action to Prevent Waste of Municipal Assets

A citizen resident in a county, town, city, or city and county, or a corporation, that is assessed for and is liable to pay, or within one year before the commencement of the action has paid, a tax in that county, town, city, or city and county may bring an action to obtain a judgment restraining and preventing an illegal expenditure of, waste of, or injury to the estate, funds, or other property of a county, town, city, or city and county in California [*Code Civ. Proc. § 526a*].

For additional discussion and forms on actions to prevent waste of municipal assets, see Ch. 466, *Public Entities and Officers: Taxpayers' Actions* .

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§§ 251.192[Reserved]

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§ 251.200 Quasi or Implied Contracts

"An implied contract is one, the existence and terms of which are manifested by conduct" [*Civ. Code § 1621*]. The principle of unjust enrichment forms the basis for the right to restitution upon a quasi-contractual theory of recovery. Accordingly, where one obtains a benefit that he or she may not justly retain, that person is unjustly enriched, and the law creates an obligation, irrespective of the intention of the parties, that that person must restore the aggrieved party to his or her former position by return of the thing or its equivalent in money [*Holmes v. Steele (1969) 269 Cal. App. 2d 675, 75 Cal. Rptr. 216]* . Courts recognize "implied-by-law" or "quasi-contracts" to prevent the unjust enrichment of a party who has no intent, either express or implied, to pay or to make reimbursement for something of value received by the other party. Equity imposes an obligation to pay or reimburse because good conscience dictates that the party benefited make the payment reimbursement [*Santa Clara County v. Robbiano (1960) 180 Cal. App. 2d 845, 848, 5 Cal. Rptr. 19* ; *see Halperin v. Raville (1986) 176 Cal. App. 3d 765, 774, 222 Cal. Rptr. 350]* .

An implied contract must be founded upon an ascertained agreement of the parties to perform it. The substantial difference between the two being the mere mode of proof by which they are to be respectively established. It is thus an actual agreement between the parties. Although an implied in fact contract may be inferred from the conduct, situation, or mutual relation of the parties, the very heart of this kind of agreement is an intent to promise [*Truck Ins. Exchange v. Amoco Corp. (1995) 35 Cal. App. 4th 814, 41 Cal. Rptr. 2d 551]* .

Examples include:

- One wrongfully occupying the real property of another is liable to the owner for damages in tort. That owner may waive the tort and sue on the contract implied in law as resulting from the tort. This implied contract obligates the wrongful occupant of real property to pay to the owner thereof the reasonable value of the use thereof during the period of occupancy [*Samuels v. Singer (1936) 1 Cal. App. 2d 545, 554, 36 P.2d 1098]* .

- Quasi-contract is the proper measure of damages for the benefit of storage in a continuing trespass where the cross-defendant refused to remove trade fixtures upon termination of a lease. If the tort claim is waived, the action is in implied assumpsit to recover the value of the use taken, i.e., the benefit to the trespasser for the use had [*Herond v. Bonsall (1943) 60 Cal. App. 2d 152, 155-156, 140 P.2d 121]* .

- The trial court arrived at a reasonable quasi-contractual measure of damages--the fair market cost to dispose of the wastewater, which was injected into oil well damaging oil field, at available sites in the area during the pertinent period. This is the amount of money the defendant would have had to pay to others to dispose of the excess water, and therefore the amount of the defendant's unjust enrichment [*Cassinos v. Union Oil Co. (1993) 14 Cal. App. 4th 1770, 1788, 18 Cal. Rptr. 2d 574]* .

For discussion of the definition of implied or quasi contract, see *Ch. 140, Contracts, § 140.10[5]*. For form of allegation of contract implied in fact, see *Ch. 140, Contracts, § 140.110*.

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21-251 California Forms of Pleading and Practice--Annotated § 251.201

§ 251.201 Specific Performance

[1] The Nature of the Remedy of Specific Performance

Specific performance is an equitable action [*Schaefer v. United Bank & Trust Co. (1930) 104 Cal. App. 635, 641, 286 P. 723]* to procure the performance of a contract by the defendant [*Patterson v. Reddish (1922) 56 Cal. App. 197, 202, 204 P. 565]* . Specific performance of a contract may be decreed whenever: (1) its terms are sufficiently definite; (2) consideration is adequate; (3) there is substantial similarity of the requested performance to the contractual terms; (4) there is mutuality of remedies; and (5) plaintiff's legal remedy is inadequate [*Union Oil Co. of Cal. v. Greka Energy Corp. (2008) 165 Cal. App. 4th 129, 134, 80 Cal. Rptr. 3d 738*]. Specific performance is generally granted to compel the performance of an affirmative obligation in a contract. When the obligation is negative, i.e., an agreement not to do something, an injunction may be granted [*see* *Long Beach Drug Co. v. United Drug Co. (1939) 13 Cal. 2d 158, 170-171, 89 P.2d 386* ; *Smith v. Mendonsa (1952) 108 Cal. App. 2d 540, 542-544, 238 P.2d 1039]* .

An agreement for the sale of property cannot be specifically enforced in favor of a seller who cannot give to the buyer a title free from reasonable doubt [*Civ. Code § 3394*; *King v. Stanley (1948) 32 Cal. 2d 584, 589-590, 197 P.2d 321]* .

For discussion of specific performance, see Ch. 528, *Specific Performance* .

[2] Defenses to Action Peculiar to Action for Specific Performance

The plaintiff in an action for specific performance generally may not obtain relief if any of the following is found:

- The terms of the contract are not sufficiently certain to make the precise act that is to be performed clearly ascertainable [*Civ. Code § 3390(5)*; *Crail v. Blakely (1973) 8 Cal. 3d 744, 753-754, 106 Cal. Rptr. 187, 505 P.2d 1027]* , which is a standard significantly more certain than when a plaintiff seeks the traditional legal remedy of damages [*Larwin-Southern Cal., Inc. v. JGB Inv. Co. (1980) 101 Cal. App. 3d 626, 636, 162 Cal. Rptr. 52]* .

- The contract to be performed is not just and reasonable as to defendant [*Civ. Code § 3391(2)*; *Berkeley Lawn Bowling Club v. City of Berkeley (1974) 42 Cal. App. 3d 280, 290, 116 Cal. Rptr. 762]* .

- Adequate consideration has not been given to the defendant for the contract [*Civ. Code § 3391(1)*; [*Drullinger v. Erskine (1945) 71 Cal. App. 2d 492, 495, 163 P.2d 48]* .

- The assent of the party against whom the contract is to be enforced was obtained by the misrepresentation, concealment, circumvention, or unfair practices of a party to whom performance would become due under the contract or by a promise of that party that has not been substantially fulfilled [*Civ. Code § 3391(3)*; *Cornblith v. Valentine (1930) 211 Cal. 243, 247, 294 P. 1065]* .

- The assent of the party against whom the contract is to be enforced was given under the influence of mistake, misapprehension, or surprise, except that when the contract provides for compensation in case of mistake, in which case a mistake within the scope of the provision may be compensated for, and the contract specifically enforced in other respects, if such enforcement is proper [*Civ. Code § 3391(4)*; *Loeb v. Wilson (1967) 253 Cal. App. 2d 383, 389, 61 Cal. Rptr. 377]* .

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§ 251.202 Cohabitation Agreements

A nonmarital partner may seek to enforce an implied agreement that may be evidenced by the conduct of the parties [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 684, 134 Cal. Rptr. 815, 557 P.2d 106]* . California courts have granted relief to a nonmarital partner to vindicate his or her property rights in a dispute between the parties or when the other partner dies, in actions on implied contracts under the following theories, among others:

- An action on an implied contract of the parties to pool efforts and earnings and share accumulations [*see Alderson v. Alderson (1986) 180 Cal. App. 3d 450, 463, 225 Cal. Rptr. 610]* ;

- An action to enforce an implied partnership or joint venture agreement [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 684, 134 Cal. Rptr. 815, 557 P.2d 106]* ;

- An action to enforce an implied agreement to own property jointly [*see, e.g., Hill v. Estate of Westbrook (1950) 95 Cal. App. 2d 599, 603, 213 P.2d 727]* ;

- An action in quantum meruit for the reasonable value of services rendered [*Maglica v. Maglica (1998) 66 Cal. App. 4th 442, 449, 78 Cal. Rptr. 2d 101]* ;

- An action seeking the imposition of a constructive or resulting trust or an equitable lien [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 684 n.25, 134 Cal. Rptr. 815, 557 P.2d 106* ; *Nelson v. Nevel (1984) 154 Cal. App. 3d 132, 139, 201 Cal. Rptr. 93]* .

In addition, it may be possible for a nonmarital partner to seek support on the basis of an implied agreement [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 684, 134 Cal. Rptr. 815, 557 P.2d 106* ; *Friedman v. Friedman (1993) 20 Cal. App. 4th 876, 886, 24 Cal. Rptr. 2d 892]* , if there is specific conduct from which it can be concluded that the parties agreed that they would be bound by the obligations of support that would have inured to their benefit had they been married [*Friedman v. Friedman (1993) 20 Cal. App. 4th 876, 887-888, 24 Cal. Rptr. 2d 892]* .

For additional discussion and forms for enforcing implied cohabitation agreements, see Ch. 387, *Nonmarital Cohabitation* .

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21-251 California Forms of Pleading and Practice--Annotated § 251.203

§ 251.203 Equitable Adoption

The doctrine of equitable adoption allows a person who was accepted and treated as a natural or adopted child, and as to whom adoption was promised or contemplated but never performed, to share in inheriting the property of the equitable parent [*Estate of Ford (2004) 32 Cal. 4th 160, 165, 8 Cal. Rptr. 3d 541, 82 P.3d 747]* . Equitable adoption requires some form of agreement to adopt, coupled with subsequent objective conduct indicating mutual recognition of an adoptive parent and child relationship to such an extent that in equity and good conscience an adoption should be deemed to have taken place [*Bauer Estate (1980) 111 Cal. App. 3d 554, 560, 168 Cal. Rptr. 743]* .

For discussion and forms on the doctrine of equitable adoption, see *Ch. 12, Adoptions: Nature and Effect, § 12.15*.

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[Reserved]

§§ 251.204[Reserved]

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21-251 California Forms of Pleading and Practice--Annotated § 251.210

§ 251.210 Miscellaneous and General Relief Concerning Real Estate

A life estate may be created by implication when the grant in the deed is in fee simple, but the deed is delivered to another person besides the grantee and is to be delivered to the grantee on the grantor's death [*see Wilhoit v. Salmon (1905) 146 Cal. 444, 448, 80 P. 705* (deed unconditionally delivered in escrow vested title but not use and possession in grantees, and impliedly reserved life estate in grantor)]. For further discussion of creating life estates, see *Ch. 344, Life Estates and Remainders, § 344.13*.

An equitable lien is a direct charge or encumbrance on property such that the property itself may be proceeded against in an equitable action and either sold or sequestered and its proceeds applied in favor of the person in whose favor it exists [*Okuda v. Superior Court (1983) 144 Cal. App. 3d 135, 141, 192 Cal. Rptr. 388]* . For further discussion of equitable liens, see *Ch. 342, Liens and Wage Preferences, § 342.40* et seq.

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21-251 California Forms of Pleading and Practice--Annotated § 251.211

§ 251.211 Equitable Servitudes

An equitable servitude restricts the use of one parcel of land for the benefit of another parcel, not merely between the original parties to a covenant, but also between their respective grantees [*see Werner v. Graham (1919) 181 Cal. 174, 180, 183 P. 945]* . A burdensome covenant on land does not run with the land, and is therefore not binding at law upon the transferees of the grantee. Nevertheless, it may be enforced as an equitable servitude against a transferee who takes with knowledge of its terms and under circumstances that would make avoidance of the restriction inequitable [*Marra v. Aetna Constr. Co., 15 Cal. 2d 375, 378, 101 P.2d 490* ; *Ross v. Harootunian (1967) 257 Cal. App. 2d 292, 295, 64 Cal. Rptr. 537]* .

The doctrine of equitable servitudes, however, does not rest on the technical form of the covenant but on the equitable notion that one who takes property with notice of a valid agreement concerning it cannot refuse to be bound by that agreement [*Richardson v. Callahan (1931) 213 Cal. 683, 687, 3 P.2d 927]* .

Example:

- A servitude such as a building restriction is enforceable in equity only if the deed restriction contains language indicating it as part of a general plan for the common benefit of a designated larger tract [*Riley v. Bear Creek Planning Committee (1976) 17 Cal. 3d 500, 505, 131 Cal. Rptr. 381, 551 P.2d 1213* ; *Werner v. Graham, 181 Cal. 174, 183 P. 945]* . The larger tract must be designated by a map or other appropriate description [*Wing v. Forest Lawn Cemetery Asso., 15 Cal. 2d 472, 480, 101 P.2d 1099* ; *Ross v. Harootunian (1967) 257 Cal. App. 2d 292, 295, 64 Cal. Rptr. 537]* .

For additional discussion of equitable servitudes, see *Ch. 184, Deeds, § 184.63*. For form of complaint to, among other things, enforce equitable servitude, see *Ch. 184, Deeds, § 184.190*.

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21-251 California Forms of Pleading and Practice--Annotated § 251.212

§ 251.212 Equitable Mortgages

An executory agreement in writing, in which a debtor sufficiently indicates an intent to make certain real property security for the debt, is in equity deemed to create a mortgage on that property, enforceable as any other mortgage except against good faith purchasers or lienholders [*Coast Bank v. Minderhout (1964) 61 Cal. 2d 311, 313-314, 38 Cal. Rptr. 505, 392 P.2d 265* (overruled on other grounds, *Wellenkamp v. Bank of America (1978) 21 Cal. 3d 943, 953, 148 Cal. Rptr. 379, 582 P.2d 970*); *Higgins v. Manson (1899) 126 Cal. 467, 469-470, 58 P. 907]* .

For discussion of actions to establish equitable mortgages, see *Ch. 555, Trust Deeds and Real Estate Mortgages, § 555.23*. For forms for actions to establish equitable mortgages, see *Ch. 555, Trust Deeds and Real Estate Mortgages, § 555.125* et seq.

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§ 251.213 Equitable Redemption

Equitable redemption is the right of a judgment debtor to redeem property sold at an execution sale for a grossly inadequate price when the purchaser is guilty of unfairness or has taken undue advantage [*Gonzalez v. Toews (2003) 111 Cal. App. 4th 977, 982, 4 Cal. Rptr. 3d 434]* . While the Enforcement of Judgments Law, *Code Civ. Proc. § 680.010 et seq.*, does not retain the right to redemption after judicial sales [*see Code Civ. Proc. § 701.680*], the Law does not affect the doctrine of equitable redemption [16 Cal. Law Revision Com. Rep. (1982) pp. 1119-1120].

For additional discussion of equitable redemption, see *Ch. 254, Executions and Enforcement of Judgments, § 254.93[2]*.

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§ 251.214 Waste

Besides recovering damages, a remainder beneficiary may seek an injunction against threatened waste [*Code Civ. Proc. 526(a)(2)*]. For example, an injunction was obtained when the life tenant wanted to tear up drain pipes on the subject property and would thereby have injured the inheritance [*see Taft v. Washington (1915) 29 Cal. App. 197, 199, 154 P. 1073]* .

For further discussion of waste by a life tenant, see *Ch. 344, Life Estates and Remainders, § 314.15[3]*.

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[Reserved]

§§ 251.215[Reserved]

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21-251 California Forms of Pleading and Practice--Annotated § 251.220

§ 251.220 Procedure Otherwise Conforms to Action at Law

Generally, procedure for an action in equity is the same as procedure for an action at law. Thus:

- A complaint may raise both equitable and legal issues [*Crouser v. Boice (1942) 51 Cal. App. 2d 198, 200, 124 P.2d 358]* .

- A cross-complaint in an action in equity may bring in legal issues [*Crouser v. Boice (1942) 51 Cal. App. 2d 198, 200, 124 P.2d 358]* .

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§ 251.221 No Default Judgment Immediately After Entry of Default

[1] Code Civ. Proc. § 585(a) Does Not Apply to Equitable Relief

The provisions of *Code Civ. Proc. § 585(a)*, authorizing the clerk to enter judgment immediately after entering the defendant's default in an action arising on a contract for the recovery of money or damages only, do not authorize the clerk to enter judgment after the defendant's default in an equitable action [*see Farrar v. Steenbergh (1916) 173 Cal. 94, 97, 159 P. 707* (construing statutory language substantially the same as present *Code Civ. Proc. § 585(a)*)]. This rule has been applied to equitable actions seeking, among other things:

- Cancellation of an instrument [*Farrar v. Steenbergh (1916) 173 Cal. 94, 97, 159 P. 707* (construing statutory language substantially the same as present *Code Civ. Proc. § 585(a)*)].

- Quieting title [*Code Civ. Proc. § 764.010*].

Such a default judgment, if entered, is void [*Farrar v. Steenbergh (1916) 173 Cal. 94, 97, 159 P. 707* (construing statutory language substantially the same as present *Code Civ. Proc. § 585(a)*)].

For discussion of and forms for setting aside void default judgments, see Ch. 489, *Relief from Judgments and Orders* .

[2] Code Civ. Proc. § 580 as Applied to Accounting Actions

The requirement of *Code Civ. Proc. § 580* that a plaintiff cannot obtain a default judgment for a specific amount of damages unless the defendant has been notified of the amount of damages sought conflicts with the principles of an accounting action. If a sum is specified in the complaint, then the plaintiff is not due any accounting but a default judgment is not available unless a sum is specified [*see Ely v. Gray (1990) 224 Cal. App. 3d 1257, 1262, 274 Cal. Rptr. 536]* . The courts have taken two approaches to this dilemma:

- Plaintiff in an accounting action must give a postcomplaint and predefault notice to the defendant of the amount plaintiff will seek to prove due him or her if the defendant defaults [*Finney v. Gomez*

(2003) 111 Cal. App. 4th 527, 543-544, 3 Cal. Rptr. 3d 604 ; *Ely v. Gray (1990) 224 Cal. App. 3d 1257, 1263, 274 Cal. Rptr. 536]* .

- Notice of the specific amount claimed is not necessary if the partnership agreement gives the defendants the information necessary to calculate precisely their potential exposure on default *[Cassel v. Sullivan, Roche & Johnson (1999) 76 Cal. App. 4th 1157, 1163-1164, 90 Cal. Rptr. 2d 899]* .

For discussion of this issue, see Ch. 7, *Accounting, Action for*, § 7.17.

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21-251 California Forms of Pleading and Practice--Annotated § 251.222

§ 251.222 No Right to Jury Trial in Equitable Actions

[1] When Only Equitable Relief Is Sought

As a general rule a party is not entitled to a jury trial in an equitable action [*Interactive Multimedia Artists, Inc. v. Superior Court (1998) 62 Cal. App. 4th 1546, 1551, 73 Cal. Rptr. 2d 462* ; *Strauss v. Summerhays (1984) 157 Cal. App. 3d 806, 812, 204 Cal. Rptr. 227*]. The right to trial by jury guaranteed by the Constitution is the right as it existed at common law at the time the state Constitution was adopted in 1850. In determining whether a common law court before 1850 could have entertained a plaintiff's action and granted the requested relief, a court must look past the form or label attached to the plaintiff's claim and discern its substance, i.e., gist. If the claim is, in substance, one that was cognizable at law before 1850 and seeks relief that could have been obtained at law before 1850, then the action is legal and the right to jury trial attaches, regardless of the extent to which the claim requires the application of equitable doctrines [*Jogani v. Superior Court (2008) 165 Cal. App. 4th 901, 905* & n.3, *81 Cal. Rptr. 3d 503*]. Thus, a jury trial has been properly denied in an action for only equitable relief consisting of:

- Rescission, seeking to recover something other than the consideration paid [*NMSBPCSLDHB v. County Of Fresno (2007) 152 Cal. App. 4th 954, 963, 61 Cal. Rptr. 3d 425*].

- Injunction [*People v. Bhakta (2008) 162 Cal. App. 4th 973, 979, 76 Cal. Rptr. 3d 421* (under Unfair Competition Law); *People v. Englebrecht (2001) 88 Cal. App. 4th 1236, 1245, 106 Cal. Rptr. 2d 738* (action to abate public nuisance and for injunctive relief was equitable)].

- Quieting title [*Hartman v. Burford (1966) 242 Cal. App. 2d 268, 270, 51 Cal. Rptr. 309]* .

- Accounting [*Hillman v. Stults (1968) 263 Cal. App. 2d 848, 877, 70 Cal. Rptr. 295]* .

However, the right to trial by jury in fraudulent conveyance actions that existed prior to the enactment of the 1851 Constitution is preserved in those actions under the present Constitution of California [*see* *Wisden v. Superior Court (2004) 124 Cal. App. 4th 750, 756-757, 760, 21 Cal. Rptr. 3d 523]* .

For full discussion of trial by jury in fraudulent conveyance actions, see *Ch. 270, Fraudulent Conveyances, §§ 270.12, 270.31*.

Likewise, at least one court has determined that an action in quantum meruit [*see § 251.120*] is an action at law, not equity, engendering a right to jury trial on the cause [*Jogani v. Superior Court (2008) 165 Cal. App. 4th 901, 906-907, 81 Cal. Rptr. 3d 503* (finding right to jury trial)].

[2] When Both Legal and Equitable Relief Is Sought

[a] Relief Sought in Complaint

When legal and equitable issues are joined in the same action, the parties usually are entitled to a jury trial on separable legal issues [*Frahm v. Briggs (1970) 12 Cal. App. 3d 441, 445, 90 Cal. Rptr. 725*].

However, when legal and equitable issues cannot be severed, whether a case must be tried by the court or a jury depends on whether the relief sought is essentially equitable or legal in nature [*People v. Bestline Prod., Inc. (1976) 61 Cal. App. 3d 879, 916, 132 Cal. Rptr. 767*]. If the "gist of an action," as framed by the pleadings, raises issues that would have been triable at law in 1850 [*Interactive Multimedia Artists, Inc. v. Superior Court (1998) 62 Cal. App. 4th 1546, 1551, 73 Cal. Rptr. 2d 462* ; *Ripling v. Superior Court (1952) 112 Cal. App. 2d 399, 402, 247 P.2d 117*] or that did not exist in 1850 [*Martin v. Los Angeles County (1996) 51 Cal. App. 4th 688, 694-696, 59 Cal. Rptr. 2d 303*], a trial by jury is a matter of right. The "gist of the action" refers to the nature of the rights involved and the facts of the particular case [*see C & K Eng'g Contractors v. Amber Steel Co. (1978) 23 Cal. 3d 1, 9, 151 Cal. Rptr. 323, 587 P.2d 1136*].

For these purposes, an action for damages is generally legal in nature [*Mendoza v. Ruesga (2008) 169 Cal. App. 4th 270, 284, 86 Cal. Rptr. 3d 610* (finding right to jury trial)].

For general discussion of the right to jury trial in mixed legal and equitable actions, see *Ch. 322, Juries and Jury Selection, § 322.13*.

[b] When Legal Relief Is First Sought by Amended Complaint or Cross-Complaint in Equitable Action

Upon amendment of the pleadings in an equitable action so as to include a legal cause of action for damages, the parties were entitled to a jury trial on the legal issue [*Farnsworth v. Hunter, 11 Cal. 2d 27, 77 P.2d 840* (action for specific performance)].

The Supreme Court has held that where the complaint pleads a purely equitable cause of action and the defendant cross-complains for legal relief, the parties are entitled to a jury trial on the legal issue, and that the order granting a new trial in such action is appealable [*Connell v. Bowes (1942) 19 Cal. 2d 870, 123 P.2d 456* (action for specific performance)].

For discussion and forms on juries and jury selection, see Ch. 322, *Juries and Jury Selection* .

[3] When Both Equitable Relief and Legal Relief of Recovery of Specific Real or Personal Property Are Sought

[a] General Rule

When the plaintiff seeks not only a declaration of his or her rights but also recovery of possession, the rule is different because *Code Civ. Proc. § 592* generally requires an issue of fact concerning the recovery of property, a legal remedy,

to be tried by a jury, unless a jury trial is waived, or a reference is ordered. Therefore, when the plaintiff seeks both a declaration of rights and recovery of possession, trial by jury is a matter of right with respect to the legal issues (i.e., the right to recover possession), but not with respect to the equitable issues [*see, e.g.,* *Robinson v. Puls (1946) 28 Cal. 2d 664, 665-666, 171 P.2d 430]* .

For discussion and forms on juries and jury selection, see Ch. 322, *Juries and Jury Selection* .

[b] Application to Quiet Title Actions

Regarding the question of a jury trial, the courts have distinguished three kinds of quiet title actions:

- When the plaintiff is out of possession and seeks to establish his or her title primarily for the purpose of recovering possession, the action is regarded as a legal action for the recovery of property, and a jury trial is a matter of right [*see, e.g.,* *Medeiros v. Medeiros (1960) 177 Cal. App. 2d 69, 73, 1 Cal. Rptr. 696]* ,

- When the plaintiff is in possession and the defendant seeks to recover possession, the action is partly equitable (on the plaintiff's side) and partly legal (on the defendant's side), and a jury trial is a matter of right for the defendant if he or she alleges that he or she was recently dispossessed [*see, e.g.,* *Donahue v. Meister (1891) 88 Cal. 121, 128-129, 25 P. 1096]* , and

- When the plaintiff is in possession and the defendant does not seek to recover possession, the action is purely equitable, and a jury trial is not a matter of right, even if the plaintiff alleges a right to possession [*Thomson v. Thomson (1936) 7 Cal. 2d 671, 681-683, 62 P.2d 358]* .

For discussion and forms on juries and jury selection, see Ch. 322, *Juries and Jury Selection* .

[4] No Jury Trial for Legal Defense to Equitable Action

Given that the right to trial pertains to an action at law, there is no right to trial by jury on an affirmative defense at law to an equitable action that can be tried separately and first, because the defense does not constitute an action [*DiPirro v. Bondo Corporation (2007) 153 Cal. App. 4th 150, 186, 62 Cal. Rptr. 3d 722* (affirmative defense of warning exemption under *Health & Safety Code § 25249.10(c)* not subject to jury trial of right)].

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§ 251.223 Equitable Issues Tried Before Legal Issues

When a case involves **both legal and equitable issues,** the trial court may proceed to try the equitable issue first, without a jury or with an advisory jury [*Raedeke v. Gibraltar Sav. & Loan Ass'n (1974) 10 Cal. 3d 665, 671, 111 Cal. Rptr. 693, 517 P.2d 1157*]. However, the court is not required to hear equitable issues before legal ones, and in fact may hear issues in the opposite order [*Bate v. Marsteller (1965) 232 Cal. App. 2d 605, 617, 43 Cal. Rptr. 149*].

If the court's determination as to equitable issues also is dispositive of the legal issues, nothing remains to be tried by jury [*Raedeke v. Gibraltar Sav. & Loan Ass'n (1974) 10 Cal. 3d 665, 671, 111 Cal. Rptr. 693, 517 P.2d 1157* ; *Jaffe v. Albertson Co. (1966) 243 Cal. App. 2d 592, 609, 53 Cal. Rptr. 25*]. If not, the jury trial on the remaining issues will follow [*Jaffe v. Albertson Co. (1966) 243 Cal. App. 2d 592, 609, 53 Cal. Rptr. 25*].

Disposition of an action by trial of equitable issues first does not unconstitutionally deny the right to jury trial on the obviated legal issues [*Stephen Slesinger, Inc. v. The Walt Disney Co. (2007) 155 Cal. App. 4th 736, 764, 66 Cal. Rptr. 3d 268* (dismissal as terminating sanction for plaintiff misconduct in a legal action)].

For general discussion of trying equitable issues first, see *Ch. 322, Juries and Jury Selection, § 322.13*.

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§ 251.224 Equitable Power to Award Attorney Fees

Courts have inherent equitable power in limited situations to award attorney's fees when it was warranted by the equities of the case [*Rudnick v. Rudnick (2009) 179 Cal. App. 4th 1328, 1335, 102 Cal. Rptr. 3d 493]* . Attorney fees may be granted in equity under the following bases;

- The "common fund" principle [*Serrano v. Priest (1977) 20 Cal. 3d 25, 34, 35, 141 Cal. Rptr. 315, 569 P.2d 1303* ; *Quinn v. State of California (1975) 15 Cal. 3d 162, 167-171, 124 Cal. Rptr. 1, 539 P.2d 761]* .

- The "substantial benefit" theory [*Serrano v. Priest (1977) 20 Cal. 3d 25, 38, 141 Cal. Rptr. 315, 569 P.2d 1303]* .

- The "private attorney general" theory [*Serrano v. Priest (1977) 20 Cal. 3d 25, 43, 141 Cal. Rptr. 315, 569 P.2d 1303* ; *D'Amico v. Board of Medical Examiners (1974) 11 Cal. 3d 1, 27, 112 Cal. Rptr. 786, 520 P.2d 10]* .

For discussion of award of attorney fees under the court's equity powers, see *Ch. 174, Costs and Attorney's Fees, § 174.55*.

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21-251 California Forms of Pleading and Practice--Annotated § 251.230

§ 251.230 Nature of Equity and Equitable Maxims

[1] That Which Ought to Have Been Done Is to Be Regarded as Done

Equity will consider as done that which ought to have been done [*Lencioni v Fidelity Trust & Sav. Bank (1928) 95 Cal. App. 490, 498, 273 P. 103]*

[2] One Who Seeks Equity Must Be Willing to Do Equity

This maxim means that whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid, unless that party has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims and demands justly belonging to the adverse party, and growing out of or necessarily involved in the subject matter of the controversy [*Dool v. First Nat. Bank (1929) 207 Cal. 347, 352, 278 P. 233* ; *Richman v. Bank of Perris (1929) 102 Cal. App. 71, 83, 282 P. 801]*

A party who requests equitable relief must satisfy the equitable claims interposed by the opposing party [*District Bond Co. v. Pollack (1942) 19 Cal. 2d 304, 307, 121 P.2d 7]*

[3] No One Can Take Advantage of His or Her Own Wrong

It is the duty of a trial court upon the discovery that a transaction is tainted with fraud or lack of good faith to inquire into the facts in regard thereto [*Rosenfeld v. Zimmer (1953) 116 Cal. App. 2d 719, 722, 254 P.2d 137]*

It is the duty of a court of equity upon any suggestion that a plaintiff has not acted in good faith concerning the matters upon which he bases his suit, to inquire into the facts in that regard [*Fansler v. Fansler (1988) 206 Cal. App. 3d 81, 87, 253 Cal. Rptr. 186* ; *Howe v. Brock, 86 Cal. App. 2d 271, 276, 194 P.2d 762]*

It is not only fraud or illegality which will prevent a suitor from obtaining equitable relief. Any unconscientious conduct upon his part which is connected with the controversy will repel him from the forum whose very foundation is good conscience [*Howe v. Brock, 86 Cal. App. 2d 271, 276, 194 P.2d 762]*

In an action to quiet title to property which defendant had purchased at an execution sale, the trial court did not err in quieting plaintiffs' title as against the objection that plaintiffs were guilty of inequitable conduct in not informing defendant of their homestead on the property at the execution sale. Plaintiffs had no fiduciary duty to advise their judgment creditor as to the method that would best enable him to reach their property, their attendance and silence at the execution sale were proper, and the parties, who had engaged in prior litigation, were dealing at arm's length, and no equities or duties had arisen between them [*Viotti v. Giomi (1964) 230 Cal. App. 2d 730, 737-738, 41 Cal. Rptr. 345]*

For research guide on illegal contracts, see Ch. 140, *Contracts*, § 140.180 et seq.

For research guide on illegal building contracts, see *Ch. 104, Building Contracts, § 104.170* et seq.

[4] One Who Takes the Benefit Must Bear the Burden

In an action against a father and son to recover sums plaintiff had lent to defendant father over a period of years for use in the father's business, the trial court properly awarded plaintiff a judgment against defendant son under a contractual right theory [*Civ. Code § 1428*] and on the equitable basis that the son had received the benefit of the transactions between defendant father and plaintiff [*Civ. Code § 3521*]. where the evidence showed that, although the loans had been made to defendant father, the father's business had the utmost personal significance to the son, the son had actively participated in the company's affairs and considered the company to be partially his own, and the son had aggressively worked to secure business funds from plaintiff through the sale of plaintiff's assets and had participated in the arrangements for such sales [*Halperin v. Raville (1986) 176 Cal. App. 3d 765, 772-773, 222 Cal. Rptr. 350]*

A showing that a person had the use and benefit of money raises the obligation to pay for the value received [*Brown v. Brown (1930) 104 Cal. App. 480, 489, 285 P. 1086]*

The courts prohibit an offeree who remains silent from reaping the benefits of a contract in which the offeror deemed silence as the mode of acceptance, if the offeree could have later successfully resisted any contractual obligations imposed in such a manner [*Durgin v. Kaplan (1968) 68 Cal. 2d 81, 90, 65 Cal. Rptr. 158, 436 P.2d 70]*

[5] Equity Respects Form Less than Substance

Equity regards substance rather than form [*County of San Mateo v. Consolidated Farms, Inc. (1959) 169 Cal. App. 2d 735, 738, 337 P.2d 840]*

Equity looks beyond the form of a transaction and shapes its judgments in such a way as to carry out the purposes of the parties to the agreement, and to protect each of them against any unconscionable advantage to be derived from the apparent form in which their transaction has taken place [*Campbell v. Freeman (1893) 99 Cal. 546, 548, 34 P. 113]*

[6] Equity Abhors Forfeitures

Seller of land for subdivision did not have good cause to refuse an escrow extension because the buyer delayed the lot line adjustment, given that the buyer was diligent and went to great lengths to obtain approval of the lot line adjustment. The court properly extended the escrow to prevent forfeiture where the seller did not care how long the project took. *Peak-Las Positas Partners v. Michael Bollag (2009) 172 Cal. App. 4th 101, 106, 90 Cal. Rptr. 3d 775*

Proceedings for the foreclosure of a mechanics' lien under *Civ. Code § 3082 et seq.* are proceedings in equity in which the court will apply equitable principles, such as that equity abhors forfeiture. *T.O. IX, LLC v. Superior Court (2008) 165 Cal. App. 4th 140, 146, 80 Cal. Rptr. 3d 602*

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§ 251.231 Equitable Causes of Action

[1] Cancellation of Instruments

For research guide on reformation of instruments, see *Ch. 107, Cancellation of Instruments, § 107.40* et seq.

[2] Quieting Title

For research guide on quieting title, see *Ch. 482, Quieting Title, § 482.40* et seq.

[3] Contribution from Joint Nontort Obligors

For research guide on contribution from joint nontort obligors, see *Ch. 300, Indemnity and Contribution, § 300.150* et seq.

[4] Accounting

For research guide on action for accounting, see Ch. 7, *Accounting, Action for*, § 7.40 et seq.

[5] Interpleader

For research guide on interpleader, see *Ch. 314, Interpleader, § 314.40* et seq.

[6] Fraudulent Conveyances

For research guide on fraudulent conveyances, see *Ch. 270, Fraudulent Conveyances, § 270.130* et seq.

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§ 251.232 Equitable Remedies

[1] Compelling an Act or Omission

[a] Injunctive Relief

For research guide on injunctive relief, see *Ch. 303, Injunctions, § 303.100* et seq.

[b] Mandate and Prohibition

For research guide on prohibition, see *Ch. 358, Mandate and Prohibition, § 358.100* et seq.

[c] Equitable Estoppel

Plaintiff could not raise equitable estoppel because she knew all the salient facts underlying the municipality's action. Her ignorance of the law was insufficient, because any injustice was not induced by the municipality's action, but by plaintiff's action. *Steinhart v. Cty. of Los Angeles (2010) 47 Cal. 4th 1298, 1315-1317, 104 Cal. Rptr. 3d 195, 223 P.3d 57*

Equitable estoppel did not prevent defendant from invoking mediation confidentiality, because she herself used and did not object to plaintiffs' use of evidence describing the events of mediation. *Simmons v. Ghaderi (2008) 44 Cal. 4th 570, 584-585, 80 Cal. Rptr. 3d 83, 187 P.3d 934*

Plaintiff failed to even establish elements of equitable estoppel against a private party in an action against a city, because the city made no representation that it would approve the proposed subdivision map upon which plaintiff claimed to have relied to its detriment. *City of Goleta v. Superior Court (2006) 40 Cal. 4th 270, 279-281, 52 Cal. Rptr. 3d 114, 147 P.3d 1037*

District director of industrial relations was not subject to equitable estoppel where enforcement of law did not require

construction company's assent. Rather, the company may be entitled to indemnification if it reasonably relied on the district's representations that the project was not a public project. *Lusardi Construction Co. v. Aubry (1992) 1 Cal. 4th 976, 996-997, 4 Cal. Rptr. 2d 837, 824 P.2d 643*

The trial court appropriately rejected the doctrine of equitable estoppel since plaintiffs were aware of when the five-year period in which to bring their case to trial under *Code Civ. Proc. § 583.310* ran, and it was not reasonable for plaintiffs to assume defendants were willing to waive the deadline. *Jordan v. Superstar Sandcars (2010) 182 Cal. App. 4th 1416, 1422-1423, 107 Cal. Rptr. 3d 5*

To prove equitable estoppel, one must show: (1) a representation or concealment of material facts; (2) made with knowledge, actual or virtual, of the facts; (3) to a party ignorant, actually and permissibly, of the truth; (4) with the intention, actual or virtual, that the ignorant party acted on it; and (5) the ignorant party relied on it. *Oldcastle Precast, Inc. v. Lumbermens Mut. Casualty Co. (2009) 170 Cal. App. 4th 554, 571, 88 Cal. Rptr. 3d 363*

A more accurate description of the elements of equitable estoppel would appear to be: (1) The party to be estopped has engaged in blameworthy or inequitable conduct, (2) that conduct caused or induced the other party to suffer some disadvantage, and (3) equitable considerations warrant the conclusion that the first party should not be permitted to exploit the disadvantage he or she has thus inflicted upon the second party. *City of Hollister v. Monterey Ins. Co. (2008) 165 Cal. App. 4th 455, 488, 81 Cal. Rptr. 3d 72*

Estoppel can be invoked in the land use context in only the most extraordinary case where the injustice is great and the precedent set by the estoppel is narrow. *Golden Gate Water Ski Club v. Cty. of Contra Costa (2008) 165 Cal. App. 4th 249, 259, 80 Cal. Rptr. 3d 876*

The rule of law is clear that where one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces the other to act on that belief, so as to alter his or her own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time. *Esate of Bonanno (2008) 165 Cal. App. 4th 7, 22, 80 Cal. Rptr. 3d 560*

Grant of equitable estoppel against California Coastal Commission was reversed because, among other things, injustice to the owners without estoppel was not of sufficient dimension to justify the effect upon public interest and policy. *Feduniak v. California Coastal Com. (2007) 148 Cal. App. 4th 1346, 1380, 56 Cal. Rptr. 3d 591*

For research guide on estoppel of signatory to arbitration agreement to refuse arbitration with nonsignatory, see *Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.63[12]*.

For research guide on estoppel in insurance actions, see *Ch. 308, Insurance, §§ 308.223[6][k], [24], 308.241[7]*.

For research guides on estoppel in respect to subject-matter jurisdiction, see *Ch. 324, Jurisdiction: Subject Matter Jurisdiction, § 324.84[14]*.

For research guides on estoppel to relief from void judgments and orders, see *Ch. 489, Relief from Judgments and Orders, § 489.321[6][b]*.

For research guides on estoppel to enforce zoning requirement, see *Ch. 579, Zoning and Planning, § 579.317[7][d]*.

[c1] Judicial Estoppel

For research guide on judicial estoppel, see *Ch. 491, Res Judicata, § 491.42[7]*.

[d] Promissory Estoppel

Lender's representative's statement that foreclosure sale could be postponed a day, and borrower's subsequent communication to the representative that the borrower would need the extra day, showed a conditional promise sufficiently definite to support promissory estoppel. *Garcia v. World Savings, FSB (2010) 183 Cal. App. 4th 1031, 1044-1046, 107 Cal. Rptr. 3d 683*

Substantial evidence supported the administrative law judge's determination that pharmacy buyer knew it could not use the pharmacy seller's provider number; no evidence indicated the state knew the buyer was submitting claims using an invalid provider number; and no evidence suggested the state misled the buyer or intended that it rely on its tacit approval of the claims it had improperly submitted. *Advanced Choices, Inc. v. State Department of Health Services (2010) 182 Cal. App. 4th 1661, 1672, 107 Cal. Rptr. 3d 470*

Whether based on a contract principle of promissory estoppel or a tort theory of a voluntary assumption of a duty, plaintiff relied to his detriment on insurer's promise to preserve evidence of defective tire. As a result, insurer owed a duty to plaintiff. *Cooper v. State Farm Mut. Auto. Ins. Co. (2009) 177 Cal. App. 4th 876, 892, 99 Cal. Rptr. 3d 870*

For research guide on estoppel to assert statute of frauds, see *Ch. 530, Statute of Frauds, § 530.32[4]*.

[2] Altering Rights, Liabilities, or Title

[a] Reformation of Instruments

For research guide on reformation of instruments, see *Ch. 488, Reformation of Instruments, § 488.40* et seq.

[b] Legal Subrogation and Assignment

For research guide on legal subrogation, see *Ch. 536, Subrogation, § 536.40* et seq.

[c] Cy Pres

For research guide on cy pres, see *Ch. 120, Class Actions, § 120.33[7]*.

[d] Alter Ego

For research guide on alter ego, see *Ch. 161, Corporations: Alter Ego Liability, § 161.33*.

[3] Converting Beneficial Interest in Property into Title and Possession

[a] Restitution

For research guide on restitution, see *Ch. 490, Rescission and Restitution, § 490.40* et seq.

[b] Constructive Trusts

For research guide on obtaining imposition of constructive trusts, see *Ch. 561, Trusts: Constructive Trusts, § 561.40* et

seq.

[c] Resulting Trusts

For research guide on resulting trusts, see *Ch. 562, Trusts: Resulting Trusts, § 562.40* et seq.

[d] Equitable Liens

For research guide on equitable liens, see *Ch. 342, Liens and Wage Preferences, § 342.110* et seq.

[e] Partition

For research guide on partition of property, see *Ch. 397, Partition, § 397.130* et seq.

[4] Exercising Possession of Property

[a] Quantum Meruit

Law firm's evidence was sufficient to raise a factual question on a claim of quantum meruit as to whether the firm reasonably expected to be paid for its services by the client personally, rather than the estate involved. *Miller v. Campbell, Warburton, Fitzsimmons, Smith, Mendel & Pastore (2008) 162 Cal. App. 4th 1331, 1346, 76 Cal. Rptr. 3d 649*

The theory of quasi-contractual recovery is that one party has accepted and retained a benefit with full appreciation of the facts, under circumstances making it inequitable for him to retain the benefit without payment of its reasonable value. *Day v. Alta Bates Medical Center (2002) 98 Cal. App. 4th 243, 248, 119 Cal. Rptr. 2d 606* ; *Truestone, Inc. v. Simi West Industrial Park II (1984) 163 Cal. App. 3d 715, 724, 209 Cal. Rptr. 757*

The measure of recovery in quantum meruit is the reasonable value of the services rendered provided they were of direct benefit to the defendant. The idea that one must be benefited by the goods and services bestowed is thus integral to recovery in quantum meruit; hence courts have always required that the plaintiff have bestowed some benefit on the defendant as a prerequisite to recovery. *Day v. Alta Bates Medical Center (2002) 98 Cal. App. 4th 243, 249, 119 Cal. Rptr. 2d 606*

[b] Receivership

For research guide on receivership, see *Ch. 486, Receivers, § 486.60* et seq.

[c] Marshalling Assets

For research guide on marshalling assets, see *Ch. 342, Liens and Wage Preferences, §§ 342.94, 342.95*.

[5] Remedies Against Adverse Judicial Actions

[a] Contribution by Joint Nontort Judgment Debtors

For research guide on contribution from joint nontort judgment debtors, see *Ch. 300, Indemnity and Contribution, § 300.150* et seq.

[b] Legal Subrogation and Assignment

For research guide on subrogation, see *Ch. 536 Subrogation, § 536.40* et seq.

[c] Comparative Indemnity

For research guide on comparative indemnity, see *Ch. 300, Indemnity and Contribution, § 300.130* et seq.

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§ 251.233 Defenses to Actions in Equity

[1] Failure to Do Equity

The principle of doing equity is applicable to an action to quiet title. A familiar instance of its application is when the court precludes a mortgagor from quieting his or her title against an outlawed mortgage payment of the mortgage debt. In such a case, when the debt is not paid or not required to be paid, the court does not decree that the plaintiff has no interest in the property, but dismisses the action for want of equity in the plaintiff's cause. *O'Brien v. O'Brien (1925) 197 Cal. 577, 584-585, 241 P. 861*

[2] Laches

For research guide on laches, see *Ch. 345, Limitation of Actions, § 345.100* et seq.

[3] Unclean Hands

Contractor could not prevail on its unclean hands defense because *Bus. & Prof. Code § 7031 (b)* allowed reimbursement for amounts paid to an unlicensed contractor even if the party seeking such reimbursement knew that the contractor was unlicensed. *Alatriste v. Cesar's Exterior Designs, Inc. (2010) 183 Cal. App. 4th 656, 673, 108 Cal. Rptr. 3d 277*

Signing an illegal contract does not give the signer unclean hands. *Farahani v. San Diego Community College Dist. (2009) 175 Cal. App. 4th 1486, 1496, 96 Cal. Rptr. 3d 900*

A member of the class protected under the Immigration Consultants Act, *Bus. & Prof. Code, § 22440 et seq.* can maintain an action notwithstanding that he or she has shared in the illegal transaction. *Mendoza v. Ruesga (2008) 169 Cal. App. 4th 270, 279, 86 Cal. Rptr. 3d 610*

The unclean hands doctrine did not preclude injunctive relief because analogous case law supported the imposition of injunction, the alleged misconduct did not affect the equitable relations between the parties. *Jay Bharat Developers, Inc. v. Minidis (2008) 167 Cal. App. 4th 437, 446, 84 Cal. Rptr. 3d 267*

The doctrine demands that a plaintiff act fairly in the matter for which he seeks a remedy. Plaintiff must come into court with clean hands, and keep them clean, or plaintiff will be denied relief, regardless of the merits of his or her claim. *Kendall-Jackson Winery, Ltd. v. Superior Court (1999) 76 Cal. App. 4th 970, 978, 90 Cal. Rptr. 2d 743*

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§ 251.234 Equitable Defenses

[1] Statutes of Limitation

[a] Equitable Tolling

For research guide on equitable tolling of statutes of limitation in actions at law, see *Ch. 345, Limitation of Actions, § 345.53[23][i]*

[b] Equitable Estoppel Against Use of Limitations Bar in Actions at Law

For research guide on equitable estoppel against use of statutes of limitation in actions at law, see *Ch. 345, Limitation of Actions, § 345.53[13]*

[2] Estoppel as Affirmative Defense

Contractor could not prevail on its equitable estoppel defense because *Bus. & Prof. Code § 7031 (b)* allowed reimbursement for amounts paid to an unlicensed contractor even if the party seeking such reimbursement knew that the contractor was unlicensed. *Alatriste v. Cesar's Exterior Designs, Inc. (2010) 183 Cal. App. 4th 656, 673, 108 Cal. Rptr. 3d 277*

If the responsive separate statement of material facts does not identify equitable estoppel as a defense raised in opposition to plaintiff's motion for summary judgment or the elements of that defense, the defendant is not entitled to have his or her evidence in support of the defense considered by the trial court. *Oldcastle Precast, Inc. v. Lumbermens Mut. Casualty Co. (2009) 170 Cal. App. 4th 554, 571-572, 88 Cal. Rptr. 3d 363*

For research guide on estoppel as defense in insurance actions, see *Ch. 308, Insurance, § 308.331[9]*.

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§ 251.235 Specific Equitable Relief Against Particular Wrongs

[1] Relief Against Torts and Other Affronts

[a] Abatement of Continuing Nuisance

For research guide on actions for nuisance, see *Ch. 391, Nuisance, § 391.50* et seq.

[b] Equitable Conversion

For research guide on actions for conversion, see Ch. 159, *Conversion*, § 159.30 et seq.

[c] Unfair Competition

For research guide for actions on unfair competition, see *Ch. 565, Unfair Competition, § 565.150* et seq.

[d] Misuse of Trademark or Trade Name

For research guide on actions for infringement of trademark or trade name, see *Ch. 549, Trademarks and Trade Names, § 549.80* et seq.

[2] Relief Against Fraud, Mistake, or Government Waste

[a] Relief from Judgments and Orders

For research guide on equitable relief from judgments and orders, see *Ch. 489, Relief from Judgments and Orders, § 489.320* et seq.

[b] Action to Prevent Waste of Municipal Assets

For research guide on actions to prevent waste of municipal assets, see *Ch. 466, Public Entities and Officers: Taxpayers' Actions, § 466.40* et seq.

[3] Relief on Contract

[a] Cohabitation Agreements

For research guide on actions for enforcing implied cohabitation agreements, see *Ch. 387, Nonmarital Cohabitation, § 387.140* et seq.

[4] Relief Concerning Real Property

[a] Equitable Servitudes

For research guide on actions for enforcing equitable servitudes, see *Ch. 184, Deeds, § 184.130* et seq.

[b] Equitable Mortgages

For research guide on actions to establish equitable mortgages, see *Ch. 555, Trust Deeds and Real Estate Mortgages, § 555.100* et seq.

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§ 251.236 Proceedings for Relief in Equity

[1] Equitable Power to Award Attorney Fees

For research guide on equitable power to award attorney fees, see *Ch. 174, Costs and Attorney's Fees, § 174.165*.

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§§ 251.237[Reserved]

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§ 251.250 Equitable Causes of Action

[1] Quieting Title

For procedural checklists on quieting title, see *Ch. 482, Quieting Title, § 482.60* et seq.

[2] Contribution

For procedural checklists on contribution, see *Ch. 300, Contribution, § 300.150* et seq.

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§ 251.251 Equitable Remedies

[1] Injunctive Relief

For procedural checklists on injunctive relief, see *Ch. 303, Injunctions, § 303.120* et seq.

[2] Mandate and Prohibition

For procedural checklists on prohibition, see *Ch. 358, Mandate and Prohibition, § 358.120* et seq.

[3] Legal Subrogation and Assignment

For procedural checklists on legal subrogation, see *Ch. 536, Subrogation, § 536.60* et seq.

[4] Partition

For procedural checklists on partition of property, see *Ch. 397, Partition, § 397.190* et seq.

[5] Receivership

For procedural checklists on receivership, see *Ch. 486, Receivers, § 486.90* et seq.

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§ 251.252 Specific Equitable Relief Against Particular Wrongs

[1] Abatement of Continuing Nuisance

For procedural checklists on actions for nuisance, see *Ch. 391, Nuisance, § 391.70* et seq.

[2] Equitable Conversion

For procedural checklists on actions for conversion, see Ch. 159, *Conversion*, § 159.40 et seq.

[3] Relief from Judgments and Orders

For procedural checklists on motions or actions for equitable relief from judgments and orders, see *Ch. 489, Relief from Judgments and Orders, § 489.343*.

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Chapter 251 EQUITY
PART IV. PROCEDURAL CHECKLISTS

21-251 California Forms of Pleading and Practice--Annotated §§ 251.253-251.269

[Reserved]

§§ 251.253[Reserved]

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 251 EQUITY
PART V. FORMS

21-251 California Forms of Pleading and Practice--Annotated § 251.270

§ 251.270 Complaint in Equity to Set Aside Judgment or Order Obtained by Extrinsic Fraud or Mistake--General Form

[1] FORM Complaint in Equity to Set Aside Judgment or Order Obtained by Extrinsic Fraud or Mistake--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO SET
_____ [*name*],	)	ASIDE JUDGMENT
Defendant.	)	
	)	
	)	

_____

Plaintiff alleges:

1. _____ [*Allege capacity, residence, and/or agency of plaintiff:* Plaintiff is, and at all times herein mentioned was a corporation, organized and existing under the laws of California)].

2. _____ [*Allege capacity if other than an individual and principal place of business or residence, and/or agency of defendant, e.g.:* Defendant _____ (*name*) is, and at all times herein mentioned was, a California corporation with its principal place of business in _____ (*city*), California].

3. _____ [*Identify action or proceeding in which judgment or order under attack was entered, e.g.:* On _____ (*date*) the defendant, as plaintiff, filed in _____ (this court *or* the Superior

Court, County of _____), against plaintiff, as defendant, a complaint entitled _____ (*specify, e.g.,,* _____ [*name*], Plaintiff, vs. _____ [*name*], Defendant), Case No. _____, in which defendant herein sought _____ (*specify, e.g.,* damages for an alleged breach of contract) against plaintiff herein. The court is hereby requested to take judicial notice of _____ (*specify, e.g.,* the complaint and answer therein filed), a copy of each of which is attached hereto as Exhibits A and B, respectively, and made a part hereof)].

4. _____ [*Identify judgment or order under attack, e.g.:* As shown by the records of _____ (this court *or* the Superior Court, County of _____) in the case referred to in Paragraph 3, a judgment against plaintiff herein was entered on _____ (*date*) in _____ (*specify, e.g.,* Vol. _____ of the Judgment Book, page _____)]. The court is hereby requested to take judicial notice of the judgment, a copy of which is attached hereto as Exhibit C and made a part hereof.

5. _____ [*Allege grounds on which judgment or order is sought to be set aside, e.g.,* Defendant herein obtained the entry of the judgment through extrinsic _____ (fraud *and/or* mistake) in that _____ (*specify facts showing the fraud or mistake and how it occurred*)].

6. _____ [*Allege how and when plaintiff learned of the judgment or order and any facts showing good cause for any failure to have discovered the facts sooner, and plaintiff's freedom from any contributory fault in the entry of the judgment*].

[7. _____ (*Allege any facts showing that plaintiff was diligent in seeking relief after discovering the facts if any delay between the time plaintiff discovered the facts and the commencement of this action would be prejudicial to the defendant*).]

8. _____ [*Allege meritorious case, e.g.,* At all times herein mentioned plaintiff herein had, and continues to have, a meritorious defense to the prior action in that _____ (*specify facts showing the existence of a valid claim or defense to the action in whole or in part*)].

[*EITHER*]

9. Plaintiff has no adequate remedy at law in that, through no fault of his/her own, he/she did not discover the _____ [fraud *and/or* mistake] herein alleged until after the time had expired for appeal, seeking a new trial, or seeking relief under *Code of Civil Procedure Section 473(b)* or *(d)*, for the reasons hereinabove alleged.

[*OR*]

9. Plaintiff's motion for relief under *Code of Civil Procedure Section 473* _____ [(b) *or* (d)] paragraph, was denied by the court on _____ [*date*] _____ [*specify reason for denial, e.g.,* as untimely *or* without a full hearing of the merits of plaintiff's claim, in that _____ (*set forth facts showing that issues raised in this action were not considered or adjudicated by the court in the statutory motion and any reasons for the failure to raise or consider them*)].

[*CONTINUE*]

WHEREFORE, plaintiff prays judgment as follows:

1. That _____ [the default and default judgment entered in the prior action be vacated and set aside (and leave granted to plaintiff herein to file an answer to the complaint therein) *or* the judgment entered against plaintiff herein in the prior action be declared null and void *or* defendant be declared a constructive trustee for the benefit of the plaintiff of all funds it received as a result of the prior _____ (judgment *or* order) *or specify other relief sought*].

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a party seeking relief in equity from a prior judgment or order entered against the plaintiff. The grounds of relief are extrinsic fraud or mistake. Alternatively, relief may be sought by a motion on the same grounds in the court in which the judgment or order was entered [*see Ch. 489, Relief From Judgments and Orders, § 489.430[1]*]. For discussion of trial court's equitable jurisdiction, see *Ch. 489, Relief From Judgments and Orders, § 489.227*. For matters of which a court may take judicial notice and the manner of requesting it to do so, see *Evid. Code 452(d), 453*.

For a form of complaint for use when relief is sought from a default judgment on the ground of lack of personal jurisdiction, see *Ch. 489, Relief From Judgments and Orders, § 489.441*.

For discussion of when an action as opposed to a motion should be used to set aside a judgment or order, see *Ch. 489, Relief From Judgments and Orders, § 489.266*. For discussion of the statute of limitations that apply to the action, see *Ch. 489, Relief From Judgments and Orders, § 489.261*.

[3] Venue

An action in equity to set aside the judgment of a court is transitory and, under the general rule that a defendant is entitled to have transitory actions tried in the county of his or her residence (*see Code Civ. Proc. 395(a)*), the proper county for trial is the county in which the defendant or some of the defendants reside at the commencement of the action [*Brown v. Happy Valley Fruit Growers (1929) 206 Cal. 515, 523-524, 274 P. 977* (reversing order denying motion to change venue to county in which defendants resided and judgment was entered); *Deas v. Lido Lumber Co. (1955) 132 Cal. App. 2d 402, 404-407, 282 P.2d 90* (explaining apparently contrary dictum in *Brown* and reversing order denying motion to change venue from county in which judgment was entered to defendant's county of residence)].

[4] Allegations

The complaint identifies the judgment or order from which relief is sought and requests that the court take appropriate judicial notice [*see Evid. Code 452(d), 453*] (Paragraphs 3, 4). The complaint then alleges [*see, e.g., Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 559, 305 P.2d 20* ; *Turner v. Allen (1961) 189 Cal. App. 2d 753, 758-759, 11 Cal. Rptr. 630]* :

The grounds for relief (the fraud or mistake must be specifically pleaded) (Paragraph 5);

Plaintiff's discovery of the fraud or mistake, which normally starts the running of the statute of limitations [discussion, see *§ 489.261[1]*], and if it was not promptly discovered after entry of the judgment, the reason for failure to discover it earlier, and plaintiff's freedom from fault in the entry of the judgment or order [*see Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 470-473, 82 Cal. Rptr. 489, 462 P.2d 17], (Paragraph 6)* ;

Plaintiff's diligence in seeking relief if there is any delay between the time plaintiff discovered the facts constituting the fraud or mistake and the filing of the present action, anticipating the defense of laches [*see* discussion in *489.261[4]*] (Paragraph 7);

That plaintiff has a meritorious claim or defense with respect to the prior judgment [*see* discussion in *489.264*] (Paragraph 8); and

The absence of any remedy at law, either because the time for relief by appeal or by motion under *Code Civ. Proc. 473(b)* or *(d)* or any other remedy at law, expired before plaintiff was aware of the judgment [*see Parsons v. Weis (1904) 144 Cal. 410, 421, 77 P. 1007* ; *see also Weitz v. Yankosky (1966) 63 Cal. 2d 849, 855, 48 Cal. Rptr. 620, 409 P.2d 700]* , or because the plaintiff's earlier motion under *Code Civ. Proc. 473(b)* or *(d)* was denied without a full hearing of the issues [*see Rose v. Fuqua (1962) 200 Cal. App. 2d 719, 724, 19 Cal. Rptr. 634]* (alternative Paragraphs 9).

Allegations for use in declarations supporting motions for relief are contained 489.430 and 489.431. With appropriate modifications as to parties and grounds relied on, these averments may be used to describe the particular extrinsic fraud or mistake in Paragraph 5 of the form in [1], *above*.

[5] Prayer

The prayer should request the precise relief sought. Paragraph 1 of the prayer in the form in [1], *above*, illustrates three possibilities:

Plaintiff seeks relief from a default and default judgment with leave to answer;

Plaintiff seeks to have declared null and void a judgment procured by extrinsic fraud or mistake, for example, a

judgment quieting the defendant's title to real property owned by plaintiff; and

Plaintiff seeks to have the defendant declared to be a constructive trustee of property for the plaintiff's benefit, as, for example, when the judgment attacked is one in probate distributing to another property that, but for the extrinsic fraud or mistake, would have been distributed to plaintiff, and the property has been distributed in accordance with the judgment.

[6] No Jury Trial

Being an action in equity, there is no right to a jury trial [*see Holt v. Parmer (1951) 106 Cal. App. 2d 329, 331-332, 235 P.2d 43]* .

[7] Cross References

For a discussion and forms of common allegations, see Ch. 20, *Allegations Commonly Used*

For a discussion of the form and format and general forms of complaints and answers, see Chs. 123, *Complaints and Cross Complaints* , and 26, *Answers* , respectively

For a discussion of judicial jurisdiction and appearances, see Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances*

For a discussion of the manners of serving a complaint and summons, see Ch. 518, *Service of Summons and Papers*

For a general discussion of venue and forms for use in securing a change of venue, see Ch. 571, *Venue*

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Chapter 252 ESCHEAT (UNCLAIMED PROPERTY)

21-252 California Forms of Pleading and Practice--Annotated 252.syn

§ 252.syn Synopsis to Chapter 252: ESCHEAT (UNCLAIMED PROPERTY)

§ 252.01 Scope

§ 252.02 Cross References

§ 252.03 Governing Law

§§ 252.04-252.09 [Reserved]

§ 252.10 Definitions

[1] Property

[2] Unclaimed Property

[3] Escheat

[4] Permanent Escheat

§ 252.11 Purpose of Escheat and Unclaimed Property Statutes

§§ 252.12-252.19 [Reserved]

§ 252.20 Property Subject to Escheat

§ 252.21 Escheat of Nonabandoned Property

[1] Property Considered Nonabandoned Property

[2] Delivery to State Pending Expiration of Time for Escheat

§ 252.22 Escheat of Decedents' Property

[1] When Escheat Is Required

[2] Particular Classes of Property

[a] Real Property

[b] Personal Property

[c] Intangible Property

[d] Trust Benefits

[3] Distribution of Undistributed Property to State

[a] Order for Distribution

[b] Delivery of Property to State

[c] Five-Year Holding Period

§ 252.23 Escheat Proceedings by State

[1] In General

[2] Property Valued at $1,000 or Less

[3] Property in Decedents' Estates

[4] When Property Is Permanently Escheated

§ 252.24 Claim to Recover Escheated Property in Possession of State

[1] Persons Entitled to Make Claim

[2] Property Valued at Under $60,000 or Assigned to Distributee

[3] Proceeding to Recover Other Property Before Escheat Proceeding by State

[4] Proceeding to Recover Property After Escheat Proceeding by State

[a] Petition

[b] Service of Petition and Notice of Hearing

[c] Hearing and Court Order

[d] Distribution of Property In Escheated Estate

[e] Fail to File Petition Within Five-Year Period

[f] Appeal

§§ 252.25-252.39 [Reserved]

§ 252.40 Purpose of "Unclaimed Property Law"

§ 252.41 Property Subject to Unclaimed Property Law

[1] Demand, Savings, or Mature Time Deposits

[2] Individual Retirement Accounts and Retirement Plans for Self-Employed Persons

[3] Other Property

§ 252.42 Property Not Subject to Unclaimed Property Law

§ 252.43 Property Loaned to Museum Subject to Law at Museum's Option

§ 252.44 Notice to Apparent Owner

[1] In General

[2] Financial Institutions

[3] Business Associations

[4] Tangible Personal Property and Property Held in Ordinary Course of Holder's Business

§ 252.45 Report to State Controller by Holder of Escheated Property

§ 252.46 Procedure to Recover Escheated Property Under Unclaimed Property Law

§ 252.47 Failure to Deliver Property Under Unclaimed Property Law

§ 252.48 Time Limits

§§ 252.49-252.59 [Reserved]

§ 252.60 Related Matthew Bender Publications

§ 252.61 State Statutes

§ 252.62 Decisions

§ 252.63 Attorney General Opinions

§ 252.64 Law Reviews

§ 252.65 Text References

§§ 252.66-252.79 [Reserved]

§ 252.80 Present Claim When Appropriate

[1] Make Preliminary Determinations

[2] File Claim

[3] Commence Action on Adverse Decision

§ 252.81 Petitioner's Checklist

[1] Ascertain Facts

[a] Facts Relating to Petitioner

[b] Facts Relating to Defendants

[c] Facts Relating to Escheated Property Generally

[d] Facts relating to escheated property of decedent [Code Civ. Proc. § 1355]

[e] Facts relating to abandoned property transferred to state under Unclaimed Property Law [Code Civ. Proc. § 1541].

[2] Obtain Documents

[a] Documents Relating to Judgments and Orders

[b] Documents Relating to Claims

[c] Documents Evidencing Right to Property

[3] Conduct Preliminary Investigation

[4] Make Preliminary Determinations

[5] Take Deposition to Perpetuate Testimony

[6] Prepare of Petition

[a] Draft Petition

[b] Set Forth Essential Allegations

[c] Execute Petition and Verification

[d] Prepare Copies

[7] Prepare Summons

[8] Initiate Ancillary Proceedings on Filing of Complaint

[9] Filing

[a] File Petition

[b] File for ancillary proceedings

[10] Cause Issuance of Summons and Service of Summons and Petition

[11] Prepare and Serve Notice of Hearing

[12] Answer

[13] Conduct Pretrial Procedures, Motions, and Preparations for Trial

[14] Jury Trial

§ 252.82 Post-Trial Proceedings

[1] Judgment

[2] Proceedings Other Than Judgment

[3] Appeal

[4] Enforcement of Judgment

§§ 252.83-252.90 [Reserved]

§ 252.91 Petition by Heirs to Recover Proceeds of Estate Escheated to State [Code Civ. Proc. § 1355]

[1] Petition--General Form

[a] FORM

[b] Use of Form

[c] Contents of Petition

[d] Claims to Real Property

[e] Service of Petition

[f] Cross References

[2] Notice of Hearing [Code Civ. Proc. § 1355]

[a] FORM

[b] Use of Form

[c] Cross References

[3] Judgment Directing Payment of Escheated Property to Heirs [Code Civ. Proc. § 1355]

[a] FORM

[b] Use of Form

[c] Cross References

§ 252.92 Petition by Party for Whom Property Is Held to Recover Property Escheated to State [Code Civ. Proc. §§ 1353, 1355]--General Form

[1] FORM

[2] Use of Form

[3] Escheat Proceedings

[4] Service of Petition

[5] Cross References

§ 252.93 Complaint to Recover Escheated Property Deposited With State Treasurer or Controller Under Unclaimed Property Law [Code Civ. Proc. § 1541]

[1] FORM

[2] Use of Form

[3] Time Periods

[4] Cross References

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Chapter 252 ESCHEAT (UNCLAIMED PROPERTY)
PART I. SCOPE

21-252 California Forms of Pleading and Practice--Annotated § 252.01

§ 252.01 Scope

This chapter discusses the procedure and forms used in securing the return of unclaimed and abandoned property that has escheated to the state. The chapter contains the following forms:

- Form for an affidavit to support the claim [*see* § 252.90[2]].
- Forms for petitions for a return of property escheated to the state [*see §§ 252.91[1], 252.92*].
- Form for notice of hearing on the petition [*see § 252.91[2]*].
- Form for judgment directing a return or payment of escheated property [*see § 252.91[3]*].
- Form for complaint to compel the return of property or payment of funds held by the state if the Controller denies or does not process the claim [*see § 252.93[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawIntestacyEscheatReal Property LawOwnership & TransferDeath & IncapacityEscheat

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21-252 California Forms of Pleading and Practice--Annotated § 252.02

§ 252.02 Cross References

For procedure and forms relating to lis pendens actions, see Ch. 348, *Lis Pendens*

For discussion, procedure, and forms for a return of lost property, see Ch. 355, *Lost and Unclaimed Property*

For procedure and forms relating to the management and administration of estates of missing persons and decedents, see Ch. 368, *Missing Persons* , and Ch. 440, *Probate* , respectively

For a form for a complaint to contest the validity of a tax sale and deed to the state, see Ch. 540, *Taxes and Assessments*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewReal Property LawPriorities & RecordingLis PendensTax LawState & Local TaxesReal Property TaxCollectionTax Deeds & Tax Sales

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21-252 California Forms of Pleading and Practice--Annotated § 252.03

§ 252.03 Governing Law

Provisions relating to abandoned and unclaimed property are covered in Part III, Title 10, of the Code of Civil Procedure (*Code Civ. Proc. § 1300 et seq.*). Proceedings relating to claims against the state for a return of escheated property are governed by *Code Civ. Proc. §§ 1350-1476*. Proceedings relating to claims against the state for a return of abandoned or unclaimed property transferred to it are governed by *Code Civ. Proc. §§ 1540-1582*. Escheat of property in the estate of a decedent is governed by *Prob. Code §§ 6800 et seq.* and *11900 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawIntestacyEscheatReal Property LawOwnership & TransferDeath & IncapacityEscheat

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[Reserved]

§§ 252.04[Reserved]

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Chapter 252 ESCHEAT (UNCLAIMED PROPERTY)
PART II. LEGAL BACKGROUND
A. General Considerations

21-252 California Forms of Pleading and Practice--Annotated § 252.10

§ 252.10 Definitions

[1] Property

The term "property," unless specifically qualified by statute, includes all classes of property, real, personal, and mixed [*Code Civ. Proc. § 1300(a)*].

[2] Unclaimed Property

The term "unclaimed property" means all property that is unclaimed, abandoned, escheated, permanently escheated, or distributed to the state, or that, under any provision of law, will become unclaimed, abandoned, escheated, permanently escheated, or distributed to the state. It includes all property the possession of which the state is or will become entitled to if not claimed by the person or persons entitled to the property within the time allowed by law, whether or not there has been a judicial determination that the property is unclaimed, abandoned, escheated, permanently escheated, or distributed to the state [*Code Civ. Proc. § 1300(b)*].

[3] Escheat

The term "escheat" means the vesting in the state of title to property the whereabouts of whose owner is unknown, or whose owner is unknown, or that a known owner has refused to accept. Vesting may be by judicial determination or by operation of law, subject to the right of claimants to appear and claim all or any portion of the escheated property. When used in reference to the law of another state, "escheat" includes the transfer to the state of the right to the custody of such property [*Code Civ. Proc. § 1300(c)*].

[4] Permanent Escheat

The term "permanent escheat" means the absolute vesting in the state of title to property the whereabouts of whose owner is unknown, whose owner is unknown, or that a known owner has refused to accept, pursuant to judicial determination, a proceeding of escheat as provided by *Code Civ. Proc. §§ 1410-1431* [*see § 252.23*], or by operation of law, and the barring of all claims to the property by the former owner or his or her successors [*Code Civ. Proc. §*

1300(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawIntestacyEscheatReal Property LawOwnership & TransferDeath & IncapacityEscheat

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§ 252.11 Purpose of Escheat and Unclaimed Property Statutes

The purpose of the unclaimed property statutes is to provide for the receipt, custody, investment, management disposal, escheat, and permanent escheat of various classes of unclaimed property to the possession of which the state is, or may become, entitled pursuant to statutes or other provisions of law [*Code Civ. Proc. § 1305*]. The escheat statutes are not penal in nature and do not contemplate a forfeiture of the property [*see Estate of Eugene (2002) 104 Cal. App. 4th 907, 914 fn.5, 128 Cal. Rptr. 2d 622* (escheats are disfavored and should be avoided if at all possible)].

One objective of the statutes behind the process is that unclaimed property should be claimed by the state for the benefit of the public at large. Even after the property has escheated to the state, the rightful owner or claimant may recover the property if he or she can establish a right to the property prior to the passage of the time period designated by statute [*see § 252.24*]. If the property cannot be restored to the owners, a second objective of the escheat laws is to give benefit of the use of the property to the state rather than to its holders [*Douglas Aircraft Co. v. Cranston (1962) 58 Cal. 2d 462, 463, 24 Cal. Rptr. 851, 374 P.2d 819]* . Thus, a business association cannot by internal rule establish a procedure whereby unclaimed property whose owners' whereabouts are unknown becomes the property of the association. Such a procedure, even though not expressly prohibited by statute, is a private escheat law and contrary to the policy of express law [*Screen Actors Guild, Inc. v. Cory (1979) 91 Cal. App. 3d 111, 115-116, 154 Cal. Rptr. 77* ; *see Blue Cross of N. Cal. v. Cory (1981) 120 Cal. App. 3d 723, 739-740, 174 Cal. Rptr. 901* (claims withdrawal provision in medical insurance contracts was void and unenforceable because it constituted a private escheat law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawIntestacyEscheatReal Property LawOwnership & TransferDeath & IncapacityEscheat

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[Reserved]

§§ 252.12[Reserved]

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B. Recovery of Escheated Property

21-252 California Forms of Pleading and Practice--Annotated § 252.20

§ 252.20 Property Subject to Escheat

Property subject to escheat generally consists of estate assets or unclaimed property with miscellaneous types of property subject to escheat as designated by statute. Lost property does not escheat, even though unclaimed. The finder is entitled to retain it if he or she complies with the provisions of *Civ. Code §§ 2080-2082*, dealing with lost and unclaimed property. For discussion and forms relating to lost property, see Ch. 355, *Lost and Unclaimed Property* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawIntestacyEscheatReal Property LawOwnership & TransferDeath & IncapacityEscheat

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21-252 California Forms of Pleading and Practice--Annotated § 252.21

§ 252.21 Escheat of Nonabandoned Property

[1] Property Considered Nonabandoned Property

Unclaimed property, other than abandoned property, in general includes:

- Assets remaining in the hands of the personal representative of a decedent's estate because there are no known heirs or the assets are to be distributed to heirs, devisees, or legatees whose whereabouts are unknown [*see Prob. Code §§ 6800 et seq., 11900 et seq.*, discussed in *§ 252.22*].

- Assets remaining in the hands of a receiver belonging to persons who cannot be located [*Code Civ. Proc. § 570*].

- Assets of a liquidated bank [*see Fin. Code § 3121*].

[2] Delivery to State Pending Expiration of Time for Escheat

Nonabandoned, unclaimed property must be delivered to the State Treasurer if it is cash or to the State Controller if it is personal property other than cash [*Code Civ. Proc. § 1310*]. Thereafter, the property is held subject to the claims of those entitled to it for a period of five years, after which it permanently escheats to the state, subject to claims of minors or incompetent persons within one year after the removal of their incapacity [*see Code Civ. Proc. §§ 1351, 1355, 1430*].

Unclaimed money or other property in a decedent's estate, or any unclaimed amount payable on an allowed and approved claim against the estate, received by the state and deposited in the State Treasury, must be recorded on the Controller's books to the credit or in the name of the estate, for the benefit of the person entitled to it or that person's successors in interest [*Code Civ. Proc. § 1315*]. Unclaimed money or other property received by the state and deposited in the State Treasury for the benefit of known heirs, devisees, legatees, or creditors of a decedent's estate, or for the benefit of known claimants, payees, or other persons entitled thereto, must be recorded on the Controller's books to the credit or in the name of the heirs, devisees, legatees, creditors, claimants, payees, or other persons entitled to it [*Code Civ. Proc. § 1316*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawIntestacyEscheatReal Property LawOwnership & TransferDeath & IncapacityEscheat

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Chapter 252 ESCHEAT (UNCLAIMED PROPERTY)
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B. Recovery of Escheated Property

21-252 California Forms of Pleading and Practice--Annotated § 252.22

§ 252.22 Escheat of Decedents' Property

[1] When Escheat Is Required

If a decedent, whether or not domiciled in California, leaves no one to take his or her estate or any portion of it by testate succession, and no one other than a government or governmental subdivision or agency to take the estate or a portion of it by intestate succession, under the laws of California or any other jurisdiction, the estate or portion escheats at the time of the decedent's death [*Prob. Code § 6800(a)*].

Although the possibility of escheat may arise at the death of a decedent without heirs, the state's interest does not vest until the end of five years from the date of distribution. Until then, the state's interest is conditional or provisional, and the Controller is a mere stakeholder for possible claimants [*Mannheim v. Superior Court (1970) 3 Cal. 3d 678, 690, 91 Cal. Rptr. 585, 478 P.2d 17]* .

Property that escheats to the state, whether held by the state or its officers, is subject to the same charges and trusts to which it would have been subject if it had passed by succession. It is also subject to *Code Civ. Proc. § 1300 et seq.*, relating to escheated estates [*Prob. Code § 6800(b)*].

[2] Particular Classes of Property

[a] Real Property

Real property situated in California escheats to the state in accordance with *Prob. Code § 6800* [*Prob. Code § 6801*; *see § 252.22*].

[b] Personal Property

All tangible personal property owned by the decedent, wherever located at the decedent's death, that was customarily kept in California prior to the decedent's death escheats to the state in accordance with *Prob. Code § 6800* [*Prob. Code § 6802*; *see § 252.22*]. All tangible personal property owned by the decedent that is subject to the control of a California

superior court for purposes of estate administration also escheats [*Prob. Code § 6803(a)*]. Personal property subject to court control, however, does not escheat to California but goes to another jurisdiction if the other jurisdiction claims the property and establishes all of the following [*Prob. Code § 6803(b)*]:

- The other jurisdiction is entitled to the property under its law;
- The decedent customarily kept the property in that jurisdiction prior to his or her death; and
- California has the right to escheat and take tangible personal property being administered as part of a decedent's estate in that jurisdiction if the decedent customarily kept the property in this state prior to his or her death.

[c] Intangible Property

All intangible property owned by the decedent escheats to California in accordance with *Prob. Code § 6800* if the decedent was domiciled in California at the time of death [*Prob. Code § 6804*; *see § 252.22*]. All intangible property owned by the decedent that is subject to the control of a California superior court for purposes of estate administration escheats to the state, whether or not the decedent was domiciled in California at the time of his or her death [*Prob. Code § 6805(a)*]. Intangible property subject to court control, however, does not escheat to California but goes to another jurisdiction if the other jurisdiction claims the property and establishes all of the following [*Prob. Code § 6805(b)*]:

- The other jurisdiction is entitled to the property under its laws;
- The decedent was domiciled in that jurisdiction at the time of his or her death; and
- California has the right to escheat and take intangible property being administered as part of a decedent's estate in that jurisdiction if the decedent was domiciled in California at the time of his or her death.

[d] Trust Benefits

Notwithstanding any other provision of law, a benefit consisting of money or other property distributable from a trust established under a plan providing health and welfare, pension, vacation, severance, retirement benefit, death benefit, unemployment insurance, or similar benefits does not pass to or escheat to California, but goes to the trust or fund from which it is distributable, subject to the provisions of *Code Civ. Proc. § 1521* (rules for escheat of employee benefit plan distributions under Unclaimed Property Law). If the plan has terminated and the trust or fund has been distributed to its beneficiaries prior to distribution of the benefit from the estate, however, the benefit passes to the state and escheats to the state [*Prob. Code § 6806*].

[3] Distribution of Undistributed Property to State

[a] Order for Distribution

The court in a proceeding for administration of a decedent's estate must order property that is not ordered distributed to known beneficiaries to be distributed to the state [*Prob. Code § 11900(a)*]. Real property or tangible personal property must generally be converted to money before distribution to the state [*Prob. Code § 11900(b)*]. If the court's order includes words that otherwise create a trust in favor of unknown or unidentified persons as a class, the distribution vests in the state both legal and equitable title to the property [*Prob. Code § 11901*].

[b] Delivery of Property to State

When the court orders distribution to the state, the personal representative of the estate must promptly deliver any money to the State Treasurer, deliver any personal property other than money to the Controller, and record a certified copy of the order in the office of the county recorder of each county in which real property is located [*Prob. Code § 11902(a)*]. The personal representative must deliver to the Controller a certified copy of the order for distribution and a statement of the date and place of each recording and other appropriate recording information [*Prob. Code § 11902(b)*].

[c] Five-Year Holding Period

The State Treasurer must hold property distributed to the state for a period of five years from the date of the order for distribution. Within this five-year period, any person may claim the property in the manner provided by *Code Civ. Proc. § 1300* [*Prob. Code § 11903(a)*; *see § 252.24*]. Title to property distributed to the state does not vest absolutely and unconditionally in the state, nor is the escheat complete, until the lapse of the five-year period without the appearance of any claimants. Before this time, the state's title is conditional and subject to divestment by the appearance of legitimate claimants [*Estate of McGuigan (2000) 83 Cal. App. 4th 639, 644, 99 Cal. Rptr. 2d 887]* . Any property that is not claimed within this five-year period is permanently escheated to the state without any further proceeding, except that minors or mentally disabled persons have until one year after their disabilities cease within which to make a claim [*Code Civ. Proc. § 1441*].

Legal Topics:

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21-252 California Forms of Pleading and Practice--Annotated § 252.23

§ 252.23 Escheat Proceedings by State

[1] In General

The Attorney General may file actions on behalf of the state for the purpose of obtaining an adjudication that title to unclaimed property to which the state has become entitled by escheat has vested in the state, and for the purpose of obtaining an adjudication that property has been actually abandoned or that the owner of the property has died and there is no person entitled to it so that it has escheated and vested in the state. The action must be filed in the superior court for Sacramento County, except that any action concerning real property must be filed in the superior court for the county in which the property is situated. The Attorney General must record a notice of the pendency of the petition in the office of the county recorder of the county in which the real property is situated [*Code Civ. Proc. § 1410*].

The court must order all persons interested in the property or estate that is the subject of the proceeding to appear and show cause why title to the property should not vest in the state. Service of process must be made by delivery of a copy of the order and the petition to each person who claims title to the property and is known to the Attorney General or Controller, or who has filed with the Controller a written request for service of process. The order must also be published at least once a week for two consecutive weeks in a newspaper published in the county in which the action is filed. On completion of this service of process, the court has full jurisdiction over the estate, the property, and the person of everyone having or claiming an interest in the property, and has full jurisdiction to hear and determine the issues in the proceeding and to render judgment [*Code Civ. Proc. § 1410*].

If it appears from the facts found or admitted that the state is entitled to the property, the court must render judgment that title to the property has vested in the state by escheat [*Code Civ. Proc. § 1410*].

[2] Property Valued at $1,000 or Less

If the escheated property is valued at $1,000 or less, the Controller may prepare a return listing the property and publish notice of the return once each week for two consecutive weeks. Within five years after notice by publication is completed, any person entitled to the property may claim it. Persons who fail to make a claim within this time limit are forever barred from making a claim, except that minors and mentally disabled persons have until one year after their

disability ceases to make a claim [*Code Civ. Proc. § 1415*].

[3] Property in Decedents' Estates

At any time after two years of the death of a decedent who leaves property to which the state is entitled because the property has escheated to the state, the Attorney General must commence a proceeding on behalf of the state in the superior court for Sacramento County to obtain an adjudication of the state's entitlement to the property [*Code Civ. Proc. § 1420(a)*]. The petition must set forth a description of the property, the name of the person last in possession of the property, the name of any person claiming any portion of the property, and the facts and circumstances showing that the property has escheated [*Code Civ. Proc. § 1420(b)*].

The court must order all persons interested in the estate to appear and show cause, within 60 days of the order, why the estate should not vest in the state. The order must be published at least once a week for four consecutive weeks in a newspaper published in Sacramento County. When this publication is complete, the court has full jurisdiction over the estate, the property, and the person of everyone having or claiming any interest in the property, and has full jurisdiction to hear and determine the issues in the action and to render an appropriate judgment [Code Civ. Proc. § 14208].

If a proceeding for the administration of the estate has been instituted, a copy of the order must be filed in this proceeding. If none of the persons entitled to succeed to the estate have appeared and made a claim to estate property before the decree of final distribution is made or before the commencement of a proceeding by the Attorney General, or if the court finds that the persons who have appeared are not entitled to estate property, the court must, on final settlement of the proceeding for the administration of the estate, distribute all moneys and other property remaining to the state after the payment of all debts and expenses of administration [*Code Civ. Proc. § 1420(d)*]. If a proceeding for the administration of any estate as not been commenced within six months from the decedent's death, the Attorney General may direct the public administrator to commence such a proceeding [*Code Civ. Proc. § 1420(e)*].

All persons named in the petition filed by the Attorney General may appear and answer; any other person claiming an interest in the estate may appear and be made a defendant by filing a motion for that purpose within the time allowed to answer. If no person appears and answers, judgment must be rendered for the state. If any person appears and denies the state's entitlement to estate property, then the issues of fact in the case must be tried as issues of fact are tried in civil actions. If it appears from the facts found or admitted that the state has good title to the property, the court must render judgment that the state is the owner of and entitled to possession of the property, and is entitled to recover costs of suit against the defendants who have appeared and answered [*Code Civ. Proc. § 1423*].

The Attorney General may also intervene on behalf of the state in any action or special proceeding affecting an estate that has escheated or is about to escheat to the state, to contest the rights of any claimants to the estate [*Code Civ. Proc. § 1421*].

[4] When Property Is Permanently Escheated

Property covered by an escheat proceeding permanently escheats to the state five years after the date of entry of judgment in the proceeding [*Code Civ. Proc. § 1430(a)*; *see Estate of McGuigan (2000) 83 Cal. App. 4th 639, 645, 99 Cal. Rptr. 2d 887* (purpose of five-year statute is to protect previously unknown heirs from a permanent escheat)]. An exception to this general rule applies to a claim by a minor or mentally disabled person [*see Code Civ. Proc. § 1430(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawIntestacyEscheatReal Property LawOwnership & TransferDeath & IncapacityEscheat

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21-252 California Forms of Pleading and Practice--Annotated § 252.24

§ 252.24 Claim to Recover Escheated Property in Possession of State

[1] Persons Entitled to Make Claim

Any person or entity entitled to property subject to escheat may make a claim for recovery of the property at any time before the property becomes permanently escheated to the state (generally five years after the date of entry of judgment in any escheat proceeding under *Code Civ. Proc. §§ 1410-1431*) [*Code Civ. Proc. §§ 1350, 1430*; *see § 252.23[4]*]. Persons entitled to make claims include distributees, assignees, conservatees, wards, named beneficiaries, and blood relatives of named beneficiaries [*see Code Civ. Proc. § 1352(b)* (assignees, distributees, conservatees, wards); *see also Code Civ. Proc. § 1430(c)* (named beneficiaries and blood relatives) and discussion in [3][c], *below*].

[2] Property Valued at Under $60,000 or Assigned to Distributee

A claim for recovery of escheated property valued at less than $60,000 may be made to the Controller [*Code Civ. Proc. § 1352(a)*], Property assigned or distributed to a named distributee of an estate may be claimed by the distributee himself or herself, or by his or her legal guardian or conservator, regardless of the amount. This provision does not apply to the heirs or estate of a distributee, or to property distributed to the state for lack of known heirs [*Code Civ. Proc. § 1352(b)*]. Any person aggrieved by a decision of the Controller may bring an action against the Controller to establish the person's claim. The action may be filed in the superior court in any county in which the Attorney General has an office [*Code Civ. Proc. § 1352(c)*].

[3] Proceeding to Recover Other Property Before Escheat Proceeding by State

A person claiming entitlement to property other than as provided in [2], *above* [*see Code Civ. Proc. § 1352*], must make any such claim by filing a verified petition in the superior court of Sacramento County or in the superior court of any county in which the Attorney General has an office. The petition must show the person's claim or right to the money or other property [*Code Civ. Proc. § 1353*].

[4] Proceeding to Recover Property After Escheat Proceeding by State

[a] Petition

Within five years after the date of entry of judgment in any escheat proceeding by the state under *Code Civ. Proc. §§ 1410-1431* [*see § 252.23*], any person not a party or privy to the proceeding, if not otherwise barred, may file a verified petition in the superior court of Sacramento County or in the superior court of any county in which the Attorney General has an office [*Code Civ. Proc. § 1355*; *Estate of McGuigan (2000) 83 Cal. App. 4th 639, 642, 99 Cal. Rptr. 2d 887* (potential heir has five years from state's initial receipt of escheated estate to make claim to recover estate by filing a petition)]. The petition must show the person's claim or right to the money or other property. If the petitioner seeks recovery as an heir, devisee, or legatee (or the successor in interest of an heir, devisee, or legatee), of money or other property received by the state from a decedent's estate, the petition must set forth specified information about the decedent and his or her descendants or a statement of reasons why the petitioner is unable to do so [*Code Civ. Proc. § 1355*; *Estate of McGuigan (2000) 83 Cal. App. 4th 639, 642-643, 645, 649, 99 Cal. Rptr. 2d 887* (judgment based on petition that deliberately fails to identify known and closer heirs may be set aside for extrinsic fraud when compliance with disclosure requirements of *Code Civ. Proc. § 1355* would have likely resulted in timely claim by closer heir)].

[b] Service of Petition and Notice of Hearing

A copy of the petition and notice of hearing must be served on the Attorney General and the Controller at least 20 days before the hearing on the petition [*Code Civ. Proc. § 1355*]. In a case involving estate property, the statute does not require the petitioner to give notice of the proceeding to other heirs, because they have already been given notice of the estate administration proceeding; however, the statute does not discourage an effort to give such notice when another heir who may be more deserving is brought to the court's attention [*Estate of McGuigan (2000) 83 Cal. App. 4th 639, 647-648, 99 Cal. Rptr. 2d 887* (there would appear to be no other purpose for statutory requirement that petitioner specify names and addresses of each of decedent's heirs in petition); *but see Parage v. Couedel (1997) 60 Cal. App. 4th 1037, 1043-1044, 70 Cal. Rptr. 2d 671* (because other heir is not entitled to actual notice of *Code Civ. Proc. § 1355* proceeding, failure to receive actual notice does not constitute mistake, inadvertence, surprise, or excusable neglect within meaning of *Code Civ. Proc. § 473(b)* or extrinsic fraud)].

If the claim includes a claim to an interest in real property, the petitioner also must record a notice of the pendency of the petition in the office of the county recorder of the county in which the property is situated [*Code Civ. Proc. § 1355*].

[c] Hearing and Court Order

The court must try the issue as issues are tried in civil actions. If the court determines that the petitioner is entitled to the money or other property, it must order the property delivered to the petitioner or, if the property has been sold, delivery of the proceeds of sale to the petitioner [*Code Civ. Proc. § 1355*]. Although *Code Civ. Proc. § 1355* permits any "person" to file a claim for funds escheated to the state, it allows distribution only to those "entitled to" the funds. Therefore, a person who claims entitlement by virtue of descent must establish that he or she is an heir of the person in whose name the funds are held. If the funds were distributed to the state because the heirs were unknown, the funds are held in the name of the estate, and the petitioner is entitled to distribution on proving that he or she is an heir of the decedent. However, if the funds were distributed to the state because the named distributee could not be found, the funds are held in the distributee's name, and only the distributee or his or her heirs are entitled to distribution [*Bogert v. Davis (1989) 214 Cal. App. 3d 774, 777, 263 Cal. Rptr. 129* (result is different if named distributee predeceased decedent; then escheated funds would be held in name of estate)].

[d] Distribution of Property In Escheated Estate

With respect to an escheated estate, once the court determines that the petitioner is the decedent's heir, the petitioner is entitled to immediate distribution of the estate, regardless of whether there might be other unknown heirs who are closer in line to the decedent who will be forever divested of their interest in the estate [*Estate of McGuigan (2000) 83 Cal.*

App. 4th 639, 647, 99 Cal. Rptr. 2d 887] . Obviously, this "first come, first served" policy can lead to harsh results, but delaying distribution of an escheated estate is not required because unknown heirs do not have a vested interest in the estate during the five-year waiting period. The five-year period delaying final escheat to the estate does not vest all heirs with an absolute right to state claims during that time. This delay is merely a final attempt to prevent escheat. When there is a mechanism to distribute the estate and prevent the escheat, there is no reason to provide the extra five-year period [*Estate of McGuigan (2000) 83 Cal. App. 4th 639, 647, 99 Cal. Rptr. 2d 887* ; *see Parage v. Couedel (1997) 60 Cal. App. 4th 1037, 1042, 70 Cal. Rptr. 2d 671* (when statutory escheat procedures are followed, unknown heirs who fail to come forward cannot later complaint of distribution to other known heirs after distribution has become final); *Estate of Supeck (1990) 225 Cal. App. 3d 360, 369, 274 Cal. Rptr. 706* (in escheat, unlike probate, status of "prior heir" in itself conveys no entitlement to claim estate; entitlement belongs only to heirs who file timely *Code Civ. Proc. § 1355* petitions, whatever their degree of kinship to decedent)].

[e] Fail to File Petition Within Five-Year Period

All persons who fail to appear and file their petitions within the five-year period are forever barred from making a claim, except that minors and mentally disabled persons have one year after their disabilities cease within which to file a petition [*Code Civ. Proc. § 1355*; *see Code Civ. Proc. § 1430(b)*]. Under *Code Civ. Proc. § 1355*, the right to escheated property belongs only to heirs who file timely petitions, whatever their degree of kinship to the decedent. If a closer heir who could file a timely claim fails to do so, this heir is barred by the express terms of *Code Civ. Proc. § 1355* from making a claim to the estate thereafter [*Estate of McGuigan (2000) 83 Cal. App. 4th 639, 646, 99 Cal. Rptr. 2d 887]* .

[f] Appeal

Because a petition to recover an escheated estate is a civil action [*Code Civ. Proc. § 1355*], review of a court's denial of the petition is permitted under the rules governing appeals in civil actions [*Code Civ. Proc. § 904.1(a)*; *Bogert v. Davis (1989) 214 Cal. App. 3d 774, 776 fn. 5, 263 Cal. Rptr. 129]* .

Legal Topics:

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

§§ 252.25[Reserved]

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21-252 California Forms of Pleading and Practice--Annotated § 252.40

§ 252.40 Purpose of "Unclaimed Property Law"

The Unclaimed Property Law [*Code Civ. Proc. § 1500 et seq.*] dealing with abandoned property determines abandonment in certain situations if the owner of the property does not take affirmative action to evidence his or her title. The purposes of the law are to protect unknown owners by locating them and restoring their property and to give the state, rather than the holder, the benefit of using unclaimed funds or property [*Cory v. Public Utilities Comm'n (1983) 33 Cal. 3d 522, 528, 189 Cal. Rptr. 386, 658 P.2d 749* ; *Bank of America v. Cory (1985) 164 Cal. App. 3d 66, 74, 210 Cal. Rptr. 351* (Unclaimed Property Law is not true escheat statute because of these dual objectives)]. Property the state receives under the Unclaimed Property Law does not permanently escheat to the state [*Code Civ. Proc. § 1501.5(a)*].

Generally, the law applies to the unclaimed property of banking organizations [*see Code Civ. Proc. § 1501(b)*], business associations [*see Code Civ. Proc. § 1501(c)* (defining term to include any association for business purposes of two or more individuals whether or not for profit)] and financial organizations [*see Code Civ. Proc. § 1501(d)*], if the owner's last known address, as it appears on the record of the holder of the property, or as otherwise specified in *Code Civ. Proc. § 1510*, is in California, the holder is domiciled or a public entity in California and has not paid the property to the state of the owner's last known address, or the last known address of the holder is in a state or foreign country that does not provide by law for the escheat of property and the holder is domiciled or a public entity in California [*Code Civ. Proc. § 1510*].

The Controller's rights under the Unclaimed Property Law are derivative, i.e., the Controller only succeeds to whatever rights the owner of the unclaimed property may have, and no more [*Blue Cross of N. Cal. v. Cory (1981) 120 Cal. App. 3d 723, 737, 174 Cal. Rptr. 901]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-252 California Forms of Pleading and Practice--Annotated § 252.41

§ 252.41 Property Subject to Unclaimed Property Law

[1] Demand, Savings, or Mature Time Deposits

Any demand, savings, or matured time deposit made with a banking organization, together with any interest or dividends on the deposit (excluding, from demand deposits only, any reasonable service charges that lawfully may be withheld), that has been dormant for more than three years escheats to the state [*Code Civ. Proc. § 1513(a)(1)(A)*].

Dormancy exists if the owner has not done any of the following [*Code Civ. Proc. § 1513(a)(1)(A)*]:

- Increased or decreased the amount of the deposit, cashed an interest check, or presented a passbook or other similar evidence of the deposit for the crediting of interest;

- Corresponded electronically or in writing with the banking organization concerning the deposit;

- Otherwise indicated an interest in the deposit as evidenced by a memorandum or other record on file with the banking organization.

A deposit or account will not escheat to the state if, within the previous three years, the owner owned another deposit or account with the banking organization, or the owner owned an individual retirement account or funds held by the banking organization under a retirement plan for self-employed individuals or a similar account or plan established as provided in *Code Civ. Proc. § 1513(a)(6)*, and with respect to that deposit, account or plan, the owner conducted one of the above listed activities with respect to the other deposit or account, and the banking organization communicated electronically or in writing with the owner at the address for that deposit or account regarding the deposit or account otherwise subject to escheat [*Code Civ. Proc. § 1513(a)(1)(B)*]. For these purposes, "communications" refers to account statements or statements of interest paid for federal and state income tax purposes [*Code Civ. Proc. § 1513(a)(1)(B)*].

[2] Individual Retirement Accounts and Retirement Plans for Self-Employed Persons

In the case of an individual retirement account, a retirement plan for a self-employed individual, or a similar account or

plan established under the internal revenue laws of the United States or California, dormancy exists if, for more than three years after the funds become payable or distributable, the owner has not done any of the following: (1) increased or decreased the principal; (2) accepted payment of principal or income; or (3) corresponded in writing concerning the property or otherwise indicated an interest in it [*Code Civ. Proc. § 1513(a)(6)(A)*]. Funds held by a business association in an individual retirement account or under similar retirement plan for self-employed individuals or a similar account established under U.S. or California law, will not escheat to the state if, within the previous three years, the owner has owned another such account or plan with the business association, and the owner has conducted one of the activities listed in *Code Civ. Proc. § 1513(a)(1)(A)(i)-(iii)* (*see § 252.41[1]*) and the business association has communicated electronically or in writing with the owner [*Code Civ. Proc. § 1513 (a)(6)(B)*]. The funds are not payable or distributable unless, under the terms of the account or plan, distribution of all or a part of the funds would then be mandatory [*Code Civ. Proc. § 1513 (a)(6)(C)*].

[3] Other Property

Other property that escheats to the state after a period of dormancy as indicated by express statutory requirements includes the following:

- Any demand, savings, or matured time deposit, or matured investment certificate, or account subject to a negotiable order of withdrawal, or other interest in a financial organization (after three years) [*Code Civ. Proc. § 1513(a)(2)(A)*].

- Any sum payable on a travelers check (after 15 years) [*Code Civ. Proc. § 1513(a)(3)*].

- Any sum payable on any other written instrument on which a banking or financial institution is directly liable (after three years) [*Code Civ. Proc. § 1513(a)(4)*].

- Any sum payable on a money order issued by a business association (after seven years) [*Code Civ. Proc. § 1513(a)(5)*].

- Any wages or salaries that remain unclaimed by the owner for more than one year after they became payable [*Code Civ. Proc. § 1513(a)(7)*].

- The contents of any safe deposit box or other safekeeping repository (after three years) [*Code Civ. Proc. § 1514*].

- Funds held or owing by a life insurance corporation under any life or endowment insurance policy or annuity contract that has matured or terminated (after three years) [*Code Civ. Proc. § 1515*].

- Property that is distributable in the course of a demutualization or related reorganization of an insurance company (either on the date of the demutualization or reorganization, or two or three years after that date, as specified) [*Code Civ. Proc. § 1515.5*].

- Any dividend, profit, distribution, interest, payment on principal, or other sum held or owing by a business association for or to its shareholder, certificate holder, member, bondholder, or other security holder, or a participating patron of a cooperative (after three years) [*Code Civ. Proc. § 1516(a)*].

- Property that is distributable in the course of a voluntary or involuntary dissolution or liquidation of a business association (six months) [*Code Civ. Proc. § 1517(a)*].

- Property that is distributable in the course of voluntary or involuntary dissolution or liquidation of an

insurer (six months; transferred to Department of Insurance for deposit in Insurance Fund) [*Code Civ. Proc. § 1517(b)*].

- Property held in a fiduciary capacity (after three years) [*Code Civ. Proc. § 1518*].

- Property held by any government or governmental subdivision or agency (after three years) [*Code Civ. Proc. § 1519*].

- Funds held by a business association that have been ordered to be refunded by a court or an administrative agency, including the Public Utilities Commission (after one year) [*Code Civ. Proc. § 1519.5*; *see Assembly v. Public Utilities Comm'n (1995) 12 Cal. 4th 87, 103-104, 48 Cal. Rptr. 2d 54, 906 P.2d 1209* (legislature has expressly barred PUC from retaining ratepayer refunds by mandating reimbursement of these funds either to ratepayers or by escheat to general fund under *Code Civ. Proc. § 1519.5*)].

- Other property that is held or owing in the ordinary course of the holder's business (after three years) [*Code Civ. Proc. § 1520(a)*; *see Cory v. Public Utilities Com. (1983) 33 Cal. 3d 522, 526, 189 Cal. Rptr. 386, 658 P.2d 749* (unclaimed public utilities refunds are within this "catchall" category); *Blue Cross of N. Cal. v. Cory (1981) 120 Cal. App. 3d 723, 736, 174 Cal. Rptr. 901* (amount of any benefit checks that have not been negotiated and paid is within this category)].

- Employee benefit plan distributions (after three years) [*Code Civ. Proc. § 1521*; *see Simon Levi Co., Ltd. v. Dun & Bradstreet Pension Servs., Inc. (1997) 55 Cal. App. 4th 496, 502, 64 Cal. Rptr. 2d 159* (state escheat law is not preempted by ERISA (*29 U.S.C. § 1001 et seq.*))].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsGeneral OverviewEstate, Gift & Trust LawIntestacyEscheatPensions & Benefits LawEmployee Benefit PlansIndividual Retirement AccountsReal Property LawOwnership & TransferDeath & IncapacityEscheat

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21-252 California Forms of Pleading and Practice--Annotated § 252.42

§ 252.42 Property Not Subject to Unclaimed Property Law

The Unclaimed Property Law does not apply to property in the official custody of a municipal utility district [*Code Civ. Proc. § 1502(a)(1)*] or of a local agency if the property may be transferred to the General Fund of the agency under *Gov. Code § 50050 et seq.* [*Code Civ. Proc. § 1502(a)(2)*].

The Unclaimed Property Law also does not include employee benefit plan distributions (generally funds distributable to beneficiaries under health, welfare, and pension plans and residuals payable under a collective bargaining agreement [*see Code Civ. Proc. § 1501(i), (j)*]) if the plan expressly provides for a forfeiture of any distribution to a beneficiary who cannot be found in the time prescribed in the plan [*see Code Civ. Proc. § 1521(b)*]. In addition, it does not apply to any proprietary interest in an agricultural cooperative if the conditions set forth in *Food & Agric. Code § 54041* are met; that interest would become the property of the association rather than escheating to the state [*see Food & Agric. Code § 54041*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawIntestacyEscheatReal Property LawOwnership & TransferDeath & IncapacityEscheat

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21-252 California Forms of Pleading and Practice--Annotated § 252.43

§ 252.43 Property Loaned to Museum Subject to Law at Museum's Option

In the case of unclaimed property loaned to a museum, the Unclaimed Property Law is superseded by *Civ. Code §§ 1899-1899.11* [*see Civ. Code § 1899.11(a)*; for discussion of *Civ. Code §§ 1899-1899.11*, *see* Ch. 57, *Art*]. However, a museum may employ the Unclaimed Property Law at its option, provided the property has been unclaimed for more than seven years. If the museum elects to proceed under the Unclaimed Property Law, it must mail notice to the lender of its intent not less than six months or more than 12 months before reporting the property to the controller pursuant to the Unclaimed Property Law [*Civ. Code § 1899.11(b)*]. The requirements for the notice are set forth in *Civ. Code § 1899.11(b)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawMuseumsEstate, Gift & Trust LawIntestacyEscheatReal Property LawOwnership & TransferDeath & IncapacityEscheat

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21-252 California Forms of Pleading and Practice--Annotated § 252.44

§ 252.44 Notice to Apparent Owner

[1] In General

In specific circumstances, the holder of abandoned property must give notice to the apparent owner of the property before it will escheat. As discussed under *[2]* et seq., *below*, the notice requirements depend on the type and value of the property, and the identity of the property holder.

[2] Financial Institutions

If a deposit, account, shares, or other interest of $50 or more held by a banking or financial organization is subject to escheat, and if the apparent owner of the property is one of the organization's customers, the organization is subject to the requirements of *Code Civ. Proc. § 1513.5*. Under that section, if the banking or financial organization has in its records an address for the apparent owner, and if the organization's records do not disclose the address to be inaccurate, the organization must make reasonable efforts to notify the customer by mail, or, if the owner has consented to electronic notice, electronically, that the deposit, account, shares, or other interest will escheat to the state pursuant to *Code Civ. Proc. § 1513(a)(1), (a)(2)* [*Code Civ. Proc. § 1513.5(a)*; *see Code Civ. Proc. § 1513.5(c)* (notice not required for interests less than $50)].

The banking or financial organization must give the customer notice that the deposit, account, shares, or other interest will escheat and the effects of escheat, including the necessity for filing a claim for the return of the deposit, account, shares, or other interest. It must also include a form prescribed by the State Controller by which the customer may declare an intention to maintain the deposit, account, shares, or other interest. If that form is filled out, signed by the customer, and returned to the banking or financial organization, the deposit, account, shares, or other interest will not be subject to escheat [*Code Civ. Proc. §§ 1513(a)(1), (a)(2), 1513.5(b)*].

The notice must comply with the statutory format and content requirements [*see Code Civ. Proc. § 1513.5(b)*] and must be given either [*Code Civ. Proc. § 1513.5(a)(1), (2)*]:

- Not less than two nor more than two and one-half years after the date of last activity by or

communication with the customer with respect to the account, deposit, shares, or other interest; or

- Not less than six nor more than 12 months before the time the account, deposit, shares, or other interest becomes reportable to the State Controller.

[3] Business Associations

If a business association holds a dividend, profit, distribution, interest, payment on principal, or other sum for one of its shareholders, certificate holders, members, bondholders, or other security holders, it must give notice under *Code Civ. Proc. § 1516(d)* before the property is subject to escheat. *Code Civ. Proc. § 1516(d)* requires that the notice be given not less than six nor more than twelve months before the time the interest in the business association becomes reportable to the State Controller, and that the notice specify the time that the interest will escheat and the effects of escheat, including the necessity of filing a claim for the return of the interest [*Code Civ. Proc. § 1516(d)*]. The notice must also comply with the statutory format and content requirements [*see Code Civ. Proc. § 1516(d)*].

Code Civ. Proc. § 1516(d) also requires that a form prescribed by the State Controller be included with the notice, by which the owner may confirm his or her current address [*Code Civ. Proc. § 1516(d)*].

[4] Tangible Personal Property and Property Held in Ordinary Course of Holder's Business

If the property subject to escheat is tangible personal property located in California, or certain types of intangible personal property [*see Code Civ. Proc. § 1520(a)*; *see also Code Civ. Proc. §§ 1510, 1511, 1513-1519, 1521*], that is held or owing in the ordinary course of the holder's business, notice must be given as specified in *Code Civ. Proc. § 1520* [*Code Civ. Proc. § 1520(b)*].

If the property is valued at $50 or more, and if the holder has in its records an address for the apparent owner of the property which the holder's records do not disclose to be inaccurate, *Code Civ. Proc. § 1520(b)* requires the holder to make reasonable efforts to notify the owner by mail, or, if the owner has consented to electronic notice, electronically, that the owner's property is subject to escheat.

The notice must be mailed not less than six nor more than twelve months before the time the owner's property becomes transferable to the State Controller. The notice must specify the time when the property will escheat and the effects of escheat, including the need to file a claim in order for the owner's property to be returned to the owner and must also comply with statutory format and content requirements [*see Code Civ. Proc. § 1520(b)*]. It must also include a form prescribed by the State Controller by which the owner may confirm his or her current address. If that form is filled out, signed by the owner, and returned to the holder, it will be deemed that the account or other device in which the owner's property is being held remains current active, and the escheat period will recommence [*Code Civ. Proc. § 1520(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsGeneral OverviewBusiness & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesRight to DividendsEstate, Gift & Trust LawIntestacyEscheatReal Property LawOwnership & TransferDeath & IncapacityEscheat

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§ 252.45 Report to State Controller by Holder of Escheated Property

If property has escheated to the state under the Unclaimed Property Law, the holder is required to report to the State Controller, on a form prescribed by *Code Civ. Proc. § 1530*, facts showing the existence of the escheated property [*see Code Civ. Proc. § 1530*]. A notice concerning the escheated property is published as provided in *Code Civ. Proc. § 1531*. If an account paid or delivered to the Controller includes a social security number, the Controller must request the Franchise Tax Board to provide a current address for the apparent owner on the basis of that number. The Controller must mail a notice to the apparent owner for whom a current address is obtained if this address is different than the address previously reported to the Controller [*Code Civ. Proc. § 1531(d)*].

Except for contents of a safe deposit box escheating to the state under *Code Civ. Proc. § 1514* [*see Code Civ. Proc. § 1532.1*], every reporting holder must pay or deliver to the Controller all escheated property specified in the report no sooner than seven months and no later than seven months and 15 days after the final date for filing the report [*Code Civ. Proc. § 1532(a)*]. The controller may postpone the date for payment or delivery of the property, and the date for any report required by *Code Civ. Proc. § 1532(b)*, upon his or her own motion or upon written request by any person required to pay or delivery the property or file a report [*Code Civ. Proc. § 1532(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawIntestacyEscheatReal Property LawOwnership & TransferDeath & IncapacityEscheat

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21-252 California Forms of Pleading and Practice--Annotated § 252.46

§ 252.46 Procedure to Recover Escheated Property Under Unclaimed Property Law

Claims to property escheated to the state under the Unclaimed Property Law [*Code Civ. Proc. § 1500 et seq.*] are initiated by filing a verified claim with the Controller [*Code Civ. Proc. § 1540(a)*; *see § 252.80[2]*]. The Controller must consider each claim within 180 days after it is filed, and may hold a hearing and receive evidence. The Controller must give written notice to the claimant of the denial of the claim, in whole or in part, by mailing notice to the claimant's address as stated in the claim [*Code Civ. Proc. § 1540(b)*]. No interest is payable on the claim [*Code Civ. Proc. § 1540(c)*].

When the Controller denies a claim or fails to make a decision on a claim within 180 days after it is filed, the claimant may file an action against the Controller to establish his or her claim in the superior court of any county in which the Attorney General has an office. The action must be filed within 90 days after the Controller's decision or within 270 days from the date the claim was filed if the Controller fails to make a decision [*Code Civ. Proc. § 1541*]. The claimant must serve a summons and a copy of the complaint on the Controller and the Attorney General. The Controller has 60 days to respond by answer. The action must be tried without a jury [*Code Civ. Proc. § 1541*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-252 California Forms of Pleading and Practice--Annotated § 252.47

§ 252.47 Failure to Deliver Property Under Unclaimed Property Law

Any person who willfully fails to report, pay or deliver escheated property to the controller under the Unclaimed Property Law, within a reasonable time after notification by the controller, must pay a fine [*Code Civ. Proc. § 1576*]. In addition to any other damages, penalties, or fines, a person who fails to report, pay, or deliver unclaimed property within the time prescribed by the Unclaimed Property Law, unless the failure is due to reasonable cause, will be liable to the controller for interest at the rate of 12 percent per annum on the property or the value of the property from the date when it should have been reported, paid, or delivered [*Code Civ. Proc. § 1577*]. If a holder pays or delivers unclaimed property in a timely manner, but files a report that is not in substantial compliance with the requirements of *Code Civ. Proc. § 1530*, the interest payable must not exceed $10,000 [*Code Civ. Proc. § 1577*]. The holder will not be subject to any interest payment if the holder's failure to report in substantial compliance with the requirements of *Code Civ. Proc. § 1530* is due to reasonable cause [*Code Civ. Proc. § 1577*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-252 California Forms of Pleading and Practice--Annotated § 252.48

§ 252.48 Time Limits

The expiration of any time period specified by statute or court order during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or recovery of property from the holder does not prevent the money or property from being escheated. It also does not affect any duty to file a report required by the Unclaimed Property Law, or to pay or deliver escheated property to the Controller [*Code Civ. Proc. § 1570*; *see Bank of America v. Cory (1985) 164 Cal. App. 3d 66, 74-76, 210 Cal. Rptr. 351* (rejecting contention that action to enforce provisions of Unclaimed Property Law is an action on a liability created by statute within meaning of *Code Civ. Proc. § 338(a)* and must be brought within three years as specified by that statute; *Code Civ. Proc. § 1570* is legislatively created exception to that statute)]. Under *Code Civ. Proc. § 1570*, a holder of unclaimed property has a continuing duty to report and deliver this property to the state, and there is no limitation on the time in which the Controller may bring an action to enforce the provisions of the Unclaimed Property Law [*Bank of America v. Cory (1985) 164 Cal. App. 3d 66, 76-77, 210 Cal. Rptr. 351]* .

Legal Topics:

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

§§ 252.49[Reserved]

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21-252 California Forms of Pleading and Practice--Annotated § 252.60

§ 252.60 Related Matthew Bender Publications

For memoranda of points and authorities related to use of deposition to perpetuate testimony of witness, see California Points and Authorities, Ch. 80, *Discovery* (Matthew Bender)

For memoranda of points and authorities relating to appointment of guardian ad litem, see California Points and Authorities, Ch. 106, *Guardianship and Conservatorship* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsPerpetuation of TestimonyEstate, Gift & Trust LawConservators & GuardiansGuardians for Missing & Undetermined HeirsFamily LawGuardiansAppointment

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21-252 California Forms of Pleading and Practice--Annotated § 252.61

§ 252.61 State Statutes

Procedures established for unclaimed property loaned to museum. *Civ. Code § 1899 et seq.*

Unclaimed Property Law superseded by *Civ. Code §§ 1899-1899.11* for unclaimed property loaned to museum. *Civ. Code § 1899.11(a)*

Venue of action to recover property escheated to state. *Code Civ. Proc. §§ 401, 1353, 1355*

Escheat of unclaimed property other than abandoned property. *Code Civ. Proc. § 1300 et seq.*

Time limit for making claim to escheated property. *Code Civ. Proc. §§ 1350, 1351, 1355, 1430, 1441*

Court action for recovery of escheated property before escheat proceedings by state. *Code Civ. Proc. § 1353*

Court action for recovery of escheated property after escheat proceedings by state. *Code Civ. Proc. § 1355*

Permanent escheat of property five years after entry of judgment or completion of notice by publication. *Code Civ. Proc. § 1430(a)*

Disposition of abandoned and unclaimed property [Unclaimed Property Law]. *Code Civ. Proc. § 1500 et seq.*

Procedures for unclaimed proprietary interest in consumer cooperative corporation. *Corp. Code § 12446*

Exemption from Unclaimed Property Law (*Code Civ. Proc. § 1500 et seq.*) for proprietary interest in agricultural cooperative. *Food & Agric. Code § 54041*

Appointment of receiver in action by Attorney General in name of people of State of *California. Gov. Code § 12527*

Escheat of property to cities and counties. *Gov. Code §§ 50050-50053*

Transfer of items of less than $10 (or any amount if depositor's name is unknown) to General Fund without necessity of publication of notice. *Gov. Code § 50055*

Deposit of unclaimed money from criminal proceeding by county attorney with county treasury. *Penal Code §§ 1420-1422*

120-hour survival requirement for purpose of intestate succession not applicable if application of requirement would result in escheat of property to state. *Prob. Code § 6403(a)*

Escheat of decedent's property. *Prob. Code § 6800 et seq.*

Distribution of unclaimed property in estates. *Prob. Code § 11900*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewEducation LawMuseumsEstate, Gift & Trust LawIntestacyEscheatGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawOwnership & TransferDeath & IncapacityEscheat

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21-252 California Forms of Pleading and Practice--Annotated § 252.62

§ 252.62 Decisions

State in which debtor is incorporated is entitled to escheat abandoned intangible personal property when property cannot be traced to any identifiable beneficial owner; but when last known address of property owner can be established, state in which owner last lived is entitled to escheat the property. *Delaware v. New York (1993) 507 U.S. 490, 113 S. Ct. 1550, 123 L. Ed. 2d 211, 222-225*

Unclaimed refunds payable by public utility to customers are subject to Unclaimed Property Law (*Code Civ. Proc. § 1500 et seq.*). *Cory v. Public Utilities Com. (1983) 33 Cal. 3d 522, 528, 189 Cal. Rptr. 386, 658 P.2d 749*

Statute of limitations in escheat proceedings. *Ebert v. State of California (1949) 33 Cal. 2d 502, 505, 202 P.2d 1022*

State acquires possession and title to decedent's estate by escheat, not succession. *Estate of Miner (1904) 143 Cal. 194, 198-199, 76 P. 968*

Third-party "whistleblower" plaintiff failed to state reverse false claims action against banks for failing to report reconveyance fees as escheated property because alleged false reports occurred before enactment of reconveyance fee refund statute; disputed reconveyance fees were not "escheatable property" under Unclaimed Property Law, because they did not represent liquidated or certain obligations. *State ex rel. Bowen v. Bank of America Corp. (2005) 126 Cal. App. 4th 225, 234-239, 23 Cal. Rptr. 3d 746*

Failure of decedent's niece to identify known and closer heir in petition to claim escheated estate was extrinsic fraud, which was basis for vacating order distributing estate to decedent's niece. *Estate of McGuigan (2000) 83 Cal. App. 4th 639, 642-643 99 Cal. Rptr. 2d 887*

Escheat proceedings are in rem, that is, they seek to affect the interests of all persons in certain property. In these proceedings, constructive notice authorized by statute satisfies due process requirements. *Parage v. Couedel (1997) 60 Cal. App. 4th 1037, 1042, 70 Cal. Rptr. 2d 671*

State escheat law is not preempted by Employee Retirement Income Security Act (ERISA) (*29 U.S.C. § 1001 et seq.*). *Simon Levi Co., Ltd. v. Dun & Bradstreet Pension Servs., Inc. (1997) 55 Cal. App. 4th 496, 502, 64 Cal. Rptr. 2d 159*

Existence of decedent's daughter who failed to file timely *Code Civ. Proc. § 1355* petition did not foreclose claim of entitlement by decedent's brother and nephew who filed timely petition; permanent escheat is to be avoided if possible, and petitioners' heirship was not in dispute, regardless of existence of prior heir. *Estate of Supeck (1990) 225 Cal. App. 3d 360, 368-369, 274 Cal. Rptr. 706*

Five-year period delaying final escheat to state does not vest absolute right in all heirs to state claims during that time; this delay is merely final attempt to prevent escheat and only occurs when there is possibility of escheat. *Estate of Cruz (1989) 215 Cal. App. 3d 1416, 1419, 264 Cal. Rptr. 492*

Immediate distribution is proper when court finds an heir is entitled to escheated estate during five-year period. *Estate of Cruz (1989) 215 Cal. App. 3d 1416, 1419, 264 Cal. Rptr. 492*

Denial of petition for distribution of escheated funds sought by next-of-kin of decedent who devised funds to individual whose whereabouts were unknown is proper; named legatee's failure to file claim within statutory period does not entitle decedent's next-of-kin to funds. *Bogert v. Davis (1989) 214 Cal. App. 3d 774, 777-778, 263 Cal. Rptr. 129*

State Controller, in action against bank to recover funds deposited in dormant accounts subject to Unclaimed Property Law (*Code Civ. Proc. §§ 1500-1582*), is not subject to limitation period of former *Code Civ. Proc. § 338(1)* (*now see Code Civ. Proc. § 338(a)*), but is entitled to protection of both *Code Civ. Proc. § 348* (no limitation on action to recover deposited money) and *Code Civ. Proc. § 1570* (lapse of statutory period does not affect Controller's right to recover escheated property). *Bank of America v. Cory (1985) 164 Cal. App. 3d 66, 74-77, 210 Cal. Rptr. 351*

Gov. Code § 12419 (relating to stating account for money belonging to state) is not applicable in action by State Controller against bank to recover funds deposited in dormant accounts subject to Unclaimed Property Law (*Code Civ. Proc. §§ 1500-1582*); Unclaimed Property Law is complete legislative scheme in itself. *Bank of America v. Cory (1985) 164 Cal. App. 3d 66, 78-80, 210 Cal. Rptr. 351*

Medical insurance contract provision that claims will be deemed withdrawn if benefit checks are not cashed within specified period is invalid private escheat law designed to circumvent Unclaimed Property Law (*Code Civ. Proc. §§ 1500-1582*). *Blue Cross of Northern California v. Cory (1981) 120 Cal. App. 3d 723, 739-740, 174 Cal. Rptr. 901*

Three-year limitations period of former *Code Civ. Proc. § 338(1)* (*now see Code Civ. Proc. § 338(a)*) (action on liability created by statute, other than penalty or forfeiture) is applicable to action by State Controller to recover property escheated to state; however, period does not begin to run until 6 months after holder has reported this property to State Controller as required by *Code Civ. Proc. § 1530*. *Blue Cross of Northern California v. Cory (1981) 120 Cal. App. 3d 723, 742-743, 174 Cal. Rptr. 901*

Withholding of service charges by bank under *Code Civ. Proc. § 1513(d)* from sum claimed by state under Unclaimed Property Law is improper. *Cory v. Golden State Bank (1979) 95 Cal. App. 3d 360, 368, 157 Cal. Rptr. 538*

State's claim in intervention in action for voluntary dissolution of corporation is not in compliance with escheat statutes [*Code Civ. Proc. §§ 1500-1527*]. *In re Mercantile Guaranty Co. (1968) 263 Cal. App. 2d 346, 352-353, 69 Cal. Rptr. 361*

Wages owed to seaman by California corporation are subject to escheat statutes [*Code Civ. Proc. §§ 1500-1527*]. *State of California v. Pacific Far East Line, Inc. (1968) 261 Cal. App. 2d 609, 610-612, 68 Cal. Rptr. 67*

Right of aliens to maintain action to recover escheated funds. *Estate of Nepogodin (1955) 134 Cal. App. 2d 161, 172-173, 285 P.2d 672*

Power of state over disposition of money deposited in treasury. *Estate of Costa (1952) 109 Cal. App. 2d 735, 739-741, 241 P.2d 621*

Final decree of distribution determining that no heirs exist is not res judicata. *Estate of Williams (1940) 37 Cal. App. 2d 181, 185, 99 P.2d 349*

Jurisdiction of superior court to hear actions to recover escheated funds. *State v. Superior Court of San Diego County (1933) 133 Cal. App. 65, 70-71, 23 P.2d 1076*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsGeneral OverviewEstate, Gift & Trust LawIntestacyEscheatGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawOwnership & TransferDeath & IncapacityEscheatTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral Overview

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21-252 California Forms of Pleading and Practice--Annotated § 252.63

§ 252.63 Attorney General Opinions

Under Unclaimed Property Law [*Code Civ. Proc. §§ 1500-1582*], statutory period for reporting unclaimed apportioned stock is 20 years and for unclaimed cash deposited in owner's account in place of apportionment is 15 years. *58 Ops. Cal. Att'y Gen. 60 (1975)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 252.64 Law Reviews

George, "Escheat and a Constitutional Dilemma: Mannheim v. Superior Court," *22 Hastings L.J. 413 (1971)*

Note, "Conflict of Laws--Escheat--Situs of Shares of Stock and Dividends of a Domestic Corporation--Jurisdiction of a State to Escheat Abandoned Property," *26 So. Cal. L. Rev. 319 (1953)*

Comment, "State Escheats Life Insurance Obligation," *1 Stan. L. Rev. 342 (1949)*

Note, "Community Property--Intestate Succession--Escheat," *22 So. Cal. L. Rev. 176 (1949)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewEstate, Gift & Trust LawIntestacyEscheatInsurance LawLife InsuranceGeneral OverviewReal Property LawOwnership & TransferDeath & IncapacityEscheat

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§ 252.65 Text References

Witkin, Summary of California Law, Vol. 13, *Personal Property*, §§ 36-45; Vol. 14, *Wills and Probate, §§ 53*, 98, 99, 334 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawIntestacyEscheatReal Property LawOwnership & TransferDeath & IncapacityEscheat

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[Reserved]

§§ 252.66[Reserved]

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21-252 California Forms of Pleading and Practice--Annotated § 252.80

§ 252.80 Present Claim When Appropriate

[1] Make Preliminary Determinations

☐ Is filing of claim mandatory before legal action can be commenced [*see § 252.46* (Unclaimed Property Law claim)]?

☐ If not mandatory, may claim be filed [*see § 252.24[1], [2]* (escheat)]? If action is to be brought and claim not filed, continue as *set forth in § 252.81*. If claim is to be filed, see *§ 252.81[1]* and *[2]* for facts to be ascertained and documents to be obtained.

☐ Is filing of claim prohibited [*see § 252.24[3], [4]* (escheat)]? If action is to be brought and claim not filed, continue as *set forth in § 252.81*. If claim is to be filed, see *§ 252.81[1]* and *[2]* for facts to be ascertained and documents to be obtained.

[2] File Claim

☐ Complete claim form.

NOTE:
A claim is made by completing an Affirmation form which may be obtained from the State Controller at www.sco.ca.gov or State Controller, Bureau of Unclaimed Property, P.O. Box 942850, Sacramento, California 94250-5873.

☐ Have each claimant sign the form.

NOTE:
The claim must be notarized if claiming securities or any property over $1,000.

☐ Obtain other required documents that must be filed with claim:

☐ Copy of current photo identification for each claimant (e.g., driver's license or passport).

☐ Proof of social security number for each claimant (e.g., copy of claimant's social security card or other document sowing claimant's social security number such as a tax return or pay stub).

☐ Original instrument, if applicable, such as passbook or stock certificate. If original instrument has been lost, stolen, or destroyed, claimant must furnish proof (e.g., a utility or tax bill) showing that he or she once resided at address shown on the account as reported to the Controller.

☐ If claimant is an heir of the deceased owner, death certificate of deceased owner, plus one of the following:

☐ Copy of current certified letters testamentary, dated within past six months, and decedent's estate tax identification number;

☐ Complete copy of court ordered distribution of decedent's estate;

☐ Complete copy of decedent's will and/or trust agreement and a completed Controller's Form 13101, Declaration Under *Probate Code 13101*, if distribution of the estate was not ordered by the court; or

☐ Completed Form 13101 and completed Controller's form, Table of Heirship, if there is no will or trust agreement.

☐ Mail completed claim form/affirmation and all required supporting documents to State Controller, Bureau of Unclaimed Property, P.O. Box 942850, Sacramento, California 94250-5873.

[3] Commence Action on Adverse Decision

☐ Controller may:

☐ Deny claim in whole.

☐ Deny claim in part.

☐ Make no decision on claim.

☐ If Controller holds hearing and receives evidence on Unclaimed Property Law claim [*Code Civ. Proc. § 1500 et seq.*], he or she must give notice of any decision to deny claim [*Code Civ. Proc. § 1540(b)*].

☐ If Controller's decision on Unclaimed Property Law claim is adverse or is not made within 180 days [*Code Civ. Proc. § 1541*], petition may be filed in superior court to establish claimant's right to recover property [*Code Civ. Proc. § 1541*; *see § 252.81*].

☐ If Controller's decision under *Code Civ. Proc. § 1352* is adverse, any person aggrieved may commence action, naming Controller as defendant, to establish claim in superior court in any county or city and county in which Attorney General has office pursuant to *Code Civ. Proc. § 1541* [*Code Civ. Proc. § 1352(c)*]. For procedure, see *§ 252.81*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawIntestacyEscheatReal Property LawOwnership & TransferDeath & IncapacityEscheat

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§ 252.81 Petitioner's Checklist

[1] Ascertain Facts

NOTE:
Not all of the following facts will be ascertainable from the client in the initial interview. Subsequent interviews may be required or it may be necessary to ascertain the facts from others, including the potential state defendant, by use of discovery proceedings. Notes following facts listed below indicate sources from which the facts required might be obtained. The following facts, although not necessarily in the order indicated, are required to enable counsel to prepare a petition to recover escheated property from the state.

[a] Facts Relating to Petitioner

☐ Obtain general information: name, address (including zip code), telephone number of petitioner.

☐ Ascertain capacity of petitioner, for example: minor, adult, trustee, conservator, guardian, executor, partnership, domestic corporation, foreign corporation.

☐ Ascertain additional facts, as desired, relating to petitioner's stability and financial solvency, such as: employment status, prior residences, credit, bank, personal references.

[b] Facts Relating to Defendants

☐ Obtain names of California Attorney General and Controller.

☐ State of California is respondent in petitions for escheated property under *Code Civ. Proc. § 1355* and State Controller is added respondent in petition under Unclaimed

Property Law [*Code Civ. Proc. § 1541*]. Attorney General must be served in both actions.

☐ Obtain addresses of California Attorney General and Controller.

☐ Petitions in both actions may be brought in Superior Court of County of Sacramento or in any city or city and county in which Attorney General has office [*see Code Civ. Proc. §§ 401, 1353, 1355, 1541*]. The address to be used for Attorney General should be address of his or her office in county in which action will be brought. Address of Controller is P.O. Box 942850, Sacramento, California 94250-5873.

[c] Facts Relating to Escheated Property Generally

☐ Obtain general descriptive information: description of property claimed, location of property claimed, controller's account number.

☐ If real property is involved, obtain street address, city, county, legal description.

☐ Record title holder of property [for procedure and forms relating to examination of title, see California Legal Forms, Ch. 26, *Title Insurance* (Matthew Bender)].

☐ Identify person or entity from whom state acquired property, as, for example, from dissolved corporation or from decedent's estate.

☐ Ascertain steps, if any, taken by state with respect to property.

NOTE:
The state may take court action [*Code Civ. Proc. §§ 1410, 1420-1431*] or proceed by notice and publication [*Code Civ. Proc. § 1415*] to establish that the property has permanently escheated.

☐ If court action has been filed, identify title of court, cause, number, parties, present status of action or date judgment was entered.

☐ If notice and publication procedure has been initiated [*see Code Civ. Proc. § 1415*], dates of notice and publication.

☐ Ascertain date by which claimant's petition must be filed [*see § 252.24[4]*].

☐ Ascertain relationship of petitioner to any party named in prior action or notice, if any, and any appearance, or other action, taken by petitioner with respect thereto.

☐ Determine exact nature of petitioner's claim or right to property held by state.

☐ Identify any further material facts necessary to establish prima facie right or title to property in petitioner.

[d] Facts relating to escheated property of decedent [Code Civ. Proc. § 1355]

☐ Ascertain all of facts listed in *[a], above*.

☐ If probate proceedings were commenced, determine title of court and cause, number, name of executor or administrator, and present status of proceeding or date of entry of decree of distribution.

☐ Determine full name, and place and date of birth, of decedent whose estate, or any part thereof, is claimed.

☐ Ascertain full name of decedent's father and maiden name of his or her mother, places and dates of their respective births, place and date of their marriage, full names of all children, issue of that marriage, with date of birth of each, and place and date of death of all children of that marriage who have died unmarried and without issue.

☐ Determine whether or not decedent was ever married, and if so, where, when, and to whom.

☐ Determine how, where, and when the marriages, if any, were dissolved.

☐ Determine whether or not decedent was ever remarried, and, if so, where, when, and to whom.

☐ Ascertain full names, and dates and places of birth of all lineal descendants, if any, of decedent; dates and places of death of any lineal descendants who died before filing of this petition; and places of residence of all who are now surviving, with degree of relationship of each of the survivors to decedent.

☐ Determine whether or not decedent, if of foreign birth, ever became naturalized citizen of United States and, if so, when, where, and by what court citizenship was conferred.

☐ Determine post office names of cities, towns, or other places, each in its appropriate connection, where records of births, marriages, and deaths enumerated above are preserved, and, if known, title of public official or other person having custody of the records.

☐ Ascertain nationality of each of decedent's heirs.

☐ Determine street address (including zip code) of each of deceden's heirs.

☐ If petitioner is unable to state any of above matters, determine reason for that inability [*Code Civ. Proc. § 1355*].

NOTE:

For a discussion of the rights of aliens to inherit from the estates of United States citizens, *see Estate of Chichernea (1967) 66 Cal. 2d 83, 85-86, 57 Cal. Rptr. 135, 424 P.2d 687* ; *Estate of Larkin (1966) 65 Cal. 2d 60, 64, 52 Cal. Rptr. 441, 416 P.2d 473* .

[e] Facts relating to abandoned property transferred to state under Unclaimed Property Law [Code Civ. Proc. § 1541].

☐ Obtain facts requested on form prescribed by State Controller for filing of claim under *Code Civ. Proc. § 1540(a)* [*see* § 252.90[1]].

☐ Determine date on which claim was filed with Controller.

☐ Determine date of Controller's decision.

☐ Determine date by which petition must be filed [*see § 252.46*].

[2] Obtain Documents

[a] Documents Relating to Judgments and Orders

☐ Copy of final judgment in any action commenced by state to obtain possession of claimed property [*Code Civ. Proc. §§ 1410, 1420-1431*] and copies of any other documents showing notice or lack of notice to petitioner.

☐ Copy of notice and publication by Controller in proceedings on escheated property [*Code Civ. Proc. § 1415*].

☐ Copies of any order or judgment under which property of estate was transferred to state and any other documents from the proceedings showing notice or lack of notice to petitioner of those proceedings.

☐ Copies of any other order or judgment under which property was transferred to state and any other documents from the proceedings showing notice or lack of notice to petitioner of those proceedings.

[b] Documents Relating to Claims

☐ Copy of claim, if any against Controller under Unclaimed Property Law [*Code Civ. Proc. § 1540*] and Controller's notice of decision on claim.

☐ Copy of notice by Controller of his or her decision on claim [*Code Civ. Proc. § 1540(b)*].

[c] Documents Evidencing Right to Property

☐ Litigation title report if real property is claimed [*see* California Legal Forms, Ch. 26, *Title*

Insurance (Matthew Bender)].

☐ Other documents evidencing petitioner's title or right to property claimed, such as bank account passbook, check, money order, stock certificate, etc.

☐ When property belonged to decedent or when claimant must prove heirship, or absence of other heirs, certified copies of birth, marriage, and death certificates and decrees of adoption, dissolution of marriage, divorce, annulment, etc.

[3] Conduct Preliminary Investigation

☐ Investigation and interviews. If facts or documents obtained indicate that possible cause of action exists, interview witnesses and conduct whatever preliminary investigation facts require.

[4] Make Preliminary Determinations

☐ Determine whether petitioner has capacity to sue.

NOTE:
For statutes governing the capacity of executors, administrators, and trustees to sue without joining persons for whose benefit the action is prosecuted, *see Code Civ. Proc. §§ 369* and *1354*. For statutes governing the capacity of married person to sue, *see Code Civ. Proc. § 370*. If petitioner is a competent adult individual, he or she has capacity to sue. If petitioner is a minor, or an insane or incompetent person, he or she lacks capacity to sue and must appear either by a guardian of his or her estate or by a guardian ad litem [*Code Civ. Proc. § 372*]. If a guardian ad litem is to be appointed [*see* [8], *below*], counsel should ascertain his or her identity.

☐ Determine whether cause of action is to recover escheated property [*Code Civ. Proc. §§ 1300-1476*] or to recover abandoned or unclaimed property turned over to state under Unclaimed Property Law [*Code Civ. Proc. §§ 1500-1582*].

NOTE:
Property that has escheated is recovered by filing a petition in the superior court [*Code Civ. Proc. §§ 1353, 1355*]. If the action to recover property is brought before the state has taken action on the escheated property [*Code Civ. Proc. §§ 1410-1424*], it is brought under *Code Civ. Proc. § 1353*. If the action to recover property is brought after the state has acted [*Code Civ. Proc. §§ 1410-1424*], it is brought under *Code Civ. Proc. § 1355*.

Claims for property under the Unclaimed Property Law are made against the State Controller on a form prescribed by the Controller [*see § 252.80[2*] and if the Controller denies the claim or a part of it, a petition is filed in the superior court to establish the claim [*Code Civ. Proc. § 1541*; see *§§ 252.91[1], 252.92*].

☐ Determine jurisdiction [*Code Civ. Proc. §§ 1355, 1541*].

☐ Determine county in which to file action [*see §§ 252.24[3], [4], 252.46*].

[5] Take Deposition to Perpetuate Testimony

☐ Obtain depositions to perpetuate testimony before action, if petitioner is presently unable to bring action or cause it to be brought [*Code Civ. Proc. § 2035*]. For procedure, forms, and points and authorities, see Ch. 190, *Depositions and Discovery* and California Points and Authorities, Ch. 80, *Discovery* (Matthew Bender).

[6] Prepare of Petition

[a] Draft Petition

☐ Petitions contained in this chapter are for recovery of escheated or unclaimed property in possession of state [*see §§ 252.91[1], 252.92*].

☐ For form, typing, paper, and style requirements of California Rules of Court, see Ch. 123, *Complaints and Cross Complaints* .

[b] Set Forth Essential Allegations

☐ Set forth essential allegations of petition for recovery of escheated property under *Code Civ. Proc. §§ 1300-1476* [*Code Civ. Proc. § 1353* or *1355*], which are:

☐ Capacity or residence of petitioner (generally optional, unless petitioner is suing in representative capacity [*Code Civ. Proc. § 1354*] or it is necessary to establish petitioner's right to maintain action, but frequently included).

NOTE:
When the petition is filed by the representative of an estate, it must affirmatively appear that there are heirs or legatees who will receive the property or creditors of the deceased owner of the claim whose claims are valid and are not barred and whose claims were in existence prior to the death of the deceased owner of the claim [*Code Civ. Proc. § 1354*].

☐ If action is not brought in Sacramento County, whether Attorney General maintains office in county in which action is brought and city in which office is located.

☐ Description of property sought to be recovered, including Controller's account number, location of property, and if real property, legal description.

☐ Transaction under which property was deposited with state, including complete description of transferor to state, date of deposit, and if transfer was made pursuant to court proceedings, title of court and cause, number, names of parties, and date of entry of decree or judgment.

☐ If action was commenced by Attorney General [*Code Civ. Proc. §§ 1410, 1420-1431*], title of court and cause, number, date of commencement, names of parties, present status of action, or date of entry of final judgment.

☐ If proceedings were commenced by Controller by notice and publication [*Code Civ. Proc. § 1415*], dates of notices and publications, present status of proceedings, or date of completion of publication.

☐ If any escheat proceedings have been commenced, statement that petitioner was not party or privy to proceedings or actions [*Code Civ. Proc. § 1355*].

☐ If money or other property claimed did not come into possession of state in connection with estates of deceased persons, any material facts necessary to establish prima facie right or title in petitioner [*Code Civ. Proc. § 1353*].

☐ Set forth essential allegations of petition for recovery of escheated property by heirs or estate of party for whom property is held by state [*Code Civ. Proc. §§ 1353* or *1355*], which are:

☐ All of applicable allegations set forth, *above*.

☐ Full name, and place and date of birth of decedent whose estate, or any part thereof, is claimed.

☐ Full name of decedent's father and maiden name of his or her mother, places and dates of their respective births, place and date of their marriage, full names of all children, issue of marriage, with date of birth of each, and place and date of death of all children of marriage who have died unmarried and without issue.

☐ Statement whether or not decedent was ever married, and if so, where, when, and to whom and:

☐ How, when, and where those marriages, if any, were dissolved.

☐ Whether or not decedent was ever remarried, and, if so, where, when, and to whom.

☐ Full names, and dates and places of birth of all lineal descendants, if any, of decedent; dates and places of death of any lineal descendants who died before filing of this petition; and places of residence of all who are now surviving, with degree of relationship of each survivor to decedent.

☐ Whether any of brothers or sisters of decedent ever married, and, if so, where, when, and to whom.

☐ Full names, and places and dates of birth of all children who are issue of marriage of any such brother or sister of decedent, and date and place of death of all deceased nephews and nieces of decedent.

☐ Whether or not decedent, if of foreign birth, ever became naturalized citizen of United States and, if so, when, where, and by what court citizenship was conferred.

☐ Post office names of cities, towns, or other places, each in its appropriate connection, in which

records of births, marriages, and deaths described above, are preserved, and, if known, title of public official or other person having custody of those records.

☐ Nationality of each heir of decedent.

☐ Street address (including zip code) of each heir of decedent.

☐ If petitioner is unable to set forth any of above allegations, reason for inability.

☐ Essential allegations of petition for recovery of abandoned property [*Code Civ. Proc. § 1541*], which are:

☐ Allegations required in form prescribed by Controller for filing claims for abandoned property [*Code Civ. Proc. § 1540*; *see § 252.80[2]*]. See also allegations set forth *above*, and include as applicable.

☐ Date on which claim was filed with Controller [*see Code Civ. Proc. § 1540*].

☐ Date of Controller's decision on claim [*see § 252.46*].

[c] Execute Petition and Verification

☐ Complaint must be signed by at least one attorney of record in attorney's individual name (or by party if not represented). It must also state signer's address and telephone number [*Code Civ. Proc. § 128.7(a)*; *see also § 252.91[1*], for form for verification under penalty of perjury executed by individual plaintiff; for forms for other kinds of verifications, *see* Ch. 572, *Verification*].

☐ Prepare verification for execution by:

☐ Petitioner, if individual. Petitions for recovery of escheated property must be verified [*Code Civ. Proc. §§ 1353, 1355*]. Petitions for recovery of unclaimed property under *Code Civ. Proc. § 1541* are not required to be verified, but claims against Controller, which must be filed before filing petition, must be verified by claimant [*Code Civ. Proc. § 1540(a)*].

☐ By counsel if plaintiff is out of county in which counsel has his or her office or for some reason is unable to verify it or when facts are within attorney's knowledge.

☐ If petitioner is corporation, by officer.

☐ Have verification executed (signed) by person making it.

[d] Prepare Copies

☐ Prepare following required copies:

☐ Original for filing.

☐ One copy for service on Attorney General.

☐ One copy for service on Controller.

☐ Copy for office file.

☐ Copy for client, if desired.

☐ Additional copies as desired.

[7] Prepare Summons

NOTE:
A notice of hearing is used in petitions under *Code Civ. Proc. §§ 1353* or *1355* instead of a summons [*see [11], below*], but a summons is used in petitions under *Code Civ. Proc. § 1541*. The summons should provide that the Controller has 60 days in which to answer [*Code Civ. Proc. § 1541*].

☐ For forms for summons, *see* Ch. 518, *Service of Summons and Papers* . Counsel may also obtain printed summons forms from clerk of appropriate court.

☐ The following copies should be prepared:

☐ One or more originals for filing.

☐ One copy for service on Attorney General.

☐ One copy for service on Controller.

[8] Initiate Ancillary Proceedings on Filing of Complaint

☐ Apply for appointment of guardian ad litem if petitioner is minor or insane or incompetent person [*Code Civ. Proc. § 372*; for procedure and forms, *see* Ch. 291, *Guardians ad Litem* , and for points and authorities, *see* California Points and Authorities, Ch. 106, *Guardianship and Conservatorship* (Matthew Bender)].

☐ Draft and record notice of pendency of action [*Code Civ. Proc. §§ 405.20, 1353, 1355*; for procedure and forms for giving notice, *see* Ch. 348, *Lis Pendens*].

[9] Filing

[a] File Petition

☐ Petition in action to recover escheated property must be filed within five years after date of entry of judgment in any proceeding brought by Attorney General under *Code Civ. Proc. §§ 1410, 1420*-1424 or within five years after completion of notice by publication in escheat action taken under provisions of *Code Civ. Proc. § 1415* [*Code Civ. Proc. § 1355*].

☐ Petition to establish claim to unclaimed property must be filed within 90 days after decision on claim [*see Code Civ. Proc. § 1540*] by Controller or within 270 days from filing of claim if Controller fails to make decision [*Code Civ. Proc. § 1541*].

☐ Petitions in both actions are filed in superior court. For procedure, *see* Ch. 518, *Service of Summons and Papers* .

[b] File for ancillary proceedings

☐ File appointment of guardian ad litem of petitioner. For procedure and forms, *see* Ch. 291, *Guardians ad Litem* , and for points and authorities, *see* California Points and Authorities, Ch. 106, *Guardianship and Conservatorship* (Matthew Bender).

☐ Record notice of pendency of action in office of county recorder of county in which real property is situated.

☐ Pay basic recording fee and any additional fees that may apply [*see Gov. Code §§ 27361(a), 27361.4, 27361.5*].

[10] Cause Issuance of Summons and Service of Summons and Petition

☐ Have summons issued by clerk of court in which petition is filed. For procedure and forms, *see* Ch. 518, *Service of Summons and Papers* .

☐ Serve copy of summons and copy of petition on Attorney General and Controller within three years of commencement of action, and make return on summons within 60 days thereafter [*Code Civ. Proc. §§ 583.210-583.250*; *see also Code Civ. Proc. §§ 583.410, 583.420(a)(1)* (discretionary dismissal for failure to complete service within two years)]. For procedure and forms, *see* Ch. 518, *Service of Summons* .

[11] Prepare and Serve Notice of Hearing

☐ Prepare notice of hearing [*see § 252.91[2]*] in following number of copies:

☐ Original for filing.

☐ One copy for service on Attorney General.

☐ One copy for service on Controller.

☐ Office copy.

☐ Additional copies as desired.

NOTE:
The Attorney General answers the petition on behalf of the Controller and time is required to determine whether or not the claim in the petition will be resisted. If the petition and notice of hearing are served together with a hearing date slightly more than the 20 days allowed by *Code Civ. Proc. § 1355*, the Attorney General may need additional time to investigate the claim and may request that the matter be taken off calendar or continued. To avoid this procedure, a practice has developed in which the petition is served without a notice of hearing and the notice of hearing is served at a later time when it appears that the matter is ready for the hearing.

☐ Serve notice of hearing and petition on Attorney General and Controller at least 20 days before hearing of petition [*Code Civ. Proc. § 1355*].

☐ Ascertain from clerk of court in which petition is filed department in which hearing will be held and date on which it can be calendared, allowing sufficient time for service of notice at least 20 days before hearing date.

☐ Have hearing calendared by clerk.

☐ Return proof of service of notice of hearing [*see* [10], *above*].

[12] Answer

☐ In action to recover escheated property [*Code Civ. Proc. §§ 1353, 1355*], Attorney General may answer petition and notice of hearing at his or her discretion [*Code Civ. Proc. § 1355*].

☐ In action to recover unclaimed property, Controller has 60 days within which to respond by answer [*Code Civ. Proc. § 1541*].

[13] Conduct Pretrial Procedures, Motions, and Preparations for Trial

NOTE:
The pretrial proceedings, motions, and preparations for trial in an action for the recovery of property from the state are the same as in civil actions. Such proceedings on the part of the petitioner may include a response to defendant's demurrer, answer, and motions; petitioner's demurrer to answer, motions, depositions, written interrogatories, and other discovery procedures; and request for settlement conference. For a checklist generally outlining those procedures, see Ch. 460, *Products Liability* .

[14] Jury Trial

☐ An action for recovery of property under Unclaimed Property Law is tried without jury [*Code Civ. Proc. § 1541*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawIntestacyEscheatGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawOwnership & TransferDeath & IncapacityEscheat

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§ 252.82 Post-Trial Proceedings

[1] Judgment

☐ Prepare judgment showing total amount allowed to petitioner and Controller's account number to facilitate payment of judgment by Controller [*see § 252.91[3]*].

[2] Proceedings Other Than Judgment

☐ In actions for recovery of escheated property, proceedings at conclusion of trial are same as in other civil cases.

[3] Appeal

☐ Either party aggrieved by judgment, or both parties if both are aggrieved, may appeal from judgment [*Code Civ. Proc. § 902*]. For discussion, procedure, and forms, *see* Ch. 40, *Appeal: An Overview* , et seq..

[4] Enforcement of Judgment

☐ Obtain certified copy of judgment and forward it to State Controller, Bureau of Unclaimed Property, P.O. Box 94250-5873, Sacramento, California 942850, with request that Conroller issue warrant for amount of judgment. The Controller's warrant is returned to claimant and is negotiated as a check.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawIntestacyEscheatReal Property LawOwnership & TransferDeath & IncapacityEscheat

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§§ 252.83[Reserved]

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PART V. FORMS

21-252 California Forms of Pleading and Practice--Annotated § 252.91

§ 252.91 Petition by Heirs to Recover Proceeds of Estate Escheated to State [Code Civ. Proc. § 1355]

[1] Petition--General Form

[a] FORM Petition by Heirs to Recover Proceeds of Estate Escheated to State [Code Civ. Proc. § 1355]--Petition--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
The State of California,	)	PETITION TO RECOVER ESCHEATED PROP-
Respondent.	)	ERTY
	)	
	)	

_____

Petitioner alleges:

1. _____[*Name*] is the Attorney General of the State of California and has an office in _____ State of California and has an office in _____[*city*], _____[*specify county where action is brought under Code Civ. Proc. §§ 401, 1355*], California.

2. Petitioner and _____ [*name(s) of any other heir(s)*] are the sole heirs at law of _____[*name*], deceased.

3. _____[*Name*], deceased, was born in _____[*city and state*] on _____[*date*], and _____ died on or about _____[*date*], in

_____[*city*], California.

4. _____[*Set forth the full name of decedent's father and the maiden name of his/her mother, the places and dates of their respective births, the place and date of their marriage, the full names of all children, the issue of the marriage, with the date of birth of each, and the place and date of death of all children of the marriage who have died unmarried and without issue*].

5. The decedent was married on _____[*date*] to _____[*name of spouse*] at _____[*city and state*]. [*If not married, so state; delete Paragraphs 6 and 7 and renumber succeeding paragraphs accordingly*.]

6. _____[*State when, how, and where such marriage, if any, was dissolved and whether or not decedent was ever remarried. Repeat information relating to subsequent marriages, if any*.]

7. The full names, dates, and places of birth of the lineal descendants of decedent are as follows: _____. _____[*Name of lineal descendant*] died on or about _____[*date*], in _____[*city and state*] and left the following survivors: _____. These survivors reside at _____[*address, city, state, and zip code*] and are _____[*specify relationship and degree*] of decedent.

8. _____[*Set forth marital history of the brothers or sisters of decedent*].

9. _____[*Set forth the full names, and the places and dates of birth, of all children who are the issue of the marriage of any brother or sister of decedent, and the date and place of death of all deceased nephews and nieces of decedent*].

10. The decedent was _____ a natural born citizen of the United States *or* naturalized by order of the U.S. District Court for the District of _____, on or about _____[*date*].

11. _____[*Set forth the post office names of the cities, towns, or other places, each in its appropriate connection, where the records of the births, marriages, and deaths alleged above are preserved, and, if known, the title of the public official or other person having custody of those records*].

12. _____[*Set forth the nationality and present street address of each of the heirs of decedent*].

[13. _____ (*If any of the foregoing information is not available to petitioner, that fact must be set forth and the reason stated*).]

14. The decedent died intestate and his/her estate was administered by _____[*name*]. A judicial proceeding was held in the Superior Court of the State of California, for the [City and] County of _____, NO. _____. A decree of distribution and order approving first and final account was signed on _____[*date*]. This decree ordered the balance of the estate, after costs, attorney's fees, and expenses of administration, paid to the Treasurer of the State of California. The Treasurer of the State of California has at present in his/her possession the sum of $_____ distributed from the estate and identified on the records of the Controller as Account No. _____.

15. Petitioner and _____[*name(s) of other heir(s) from Paragraphs 2 and 7*] had no notice of the institution or pendency of this probate proceeding by citation, publication, or otherwise, and they did not appear in that proceeding, either in person or by attorney.

WHEREFORE, petitioner prays judgment as follows:

1. That petitioner and _____ [*name(s) of other heir(s) from Paragraphs 2 and 7*] be declared the rightful owners in equal share of the funds now in the possession of the State of California;

2. That the court make an order directing the Controller of the State of California to draw his/her warrant on the State Treasurer in the sum of $_____, this warrant to be payable to petitioner and _____[*name*], as the heirs at law of _____[*name*], deceased; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____[*name*], am the petitioner in the above-entitled action. I have read the foregoing petition and know the contents of it. The same is true of my own knowledge, except as to those matters which are alleged in it on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[b] Use of Form

The form in *[a], above*, is a petition to be used to secure property in the possession of the state that escheated to the state at the close of probate proceedings in which the petitioner was neither a party nor had notice.

The action must be brought any time within five years after the date of entry of the probate court decree under *Prob. Code §§ 7660-7666*, and *11900* distributing the property to the state [*see Code Civ. Proc. §§ 1355, 1441*; *Prob. Code §§ 7660-7666, 11900*; *see also § 252.81[1][c]* (Procedural Checklist)]. If the person is a minor or of unsound mind who was born before expiration of the five-year period, the time limit for filing this petition is extended to one year after the disability ceases [*Code Civ. Proc. §§ 1430(b), 1441*; *see Code Civ. Proc. § 1430(a)*].

The form in *[a], above*, can also be used in a proceeding to recover property deposited with the County Treasurer before the time it is forwarded to the State Treasurer [*Prob. Code § 11854*]. Such an action may be maintained in the superior court of the county in which the property is located. The only difference in the form, aside from the designation of the parties, is that the petitioner prays the court to grant a certificate showing his or her right to the property deposited with

the Treasurer.

[c] Contents of Petition

The contents of the form are prescribed by *Code Civ. Proc. § 1355* [*see § 252.81[6]* (Procedural Checklist)]. If for any reason the petitioner is unable to set forth any of the matters or things required by statute, the petitioner must clearly state the reason for this omission in the petition. The petition must also be verified [*Code Civ. Proc. § 1355*].

[d] Claims to Real Property

If the petition includes a claim to real property or any interest in real estate, the petitioner must record a notice of lis pendens [*see Code Civ. Proc. § 1355*; *§ 252.81[6]* (Procedural Checklist)].

[e] Service of Petition

A copy of this form and a notice of hearing [*see § 252.91[2]*] must be served on the Attorney General and the Controller at least 20 days prior to the date of the hearing and the Attorney General may answer the petition at his or her discretion [*Code Civ. Proc. § 1355*].

[f] Cross References

For procedure and forms relating to the recording of a notice of pendency of an action affecting real estate, see Ch. 348, *Lis Pendens*

For alternative verification forms, see Ch. 572, *Verification*

[2] Notice of Hearing [Code Civ. Proc. § 1355]

[a] FORM Petition by Heirs to Recover Proceeds of Estate Escheated to State [Code Civ. Proc. § 1355]--Notice of Hearing [Code Civ. Proc. § 1355]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
The State of California,	)	NOTICE OF HEARING
Respondent.	)	
	)	
	)	
_____		

To: _____[*name*], State Controller and _____[*name*], Attorney General of the State of California.

NOTICE IS HEREBY GIVEN that the petition of _____[*name*] to recover certain property deposited _____ [in the State Treasury *or* with the State Controller] will be heard in the above-entitled court on _____, the _____ day of _____[*date*], in Department _____ thereof, at the courthouse in _____, California at _____[*time*

], and you are hereby notified to attend this hearing at this time and place and to take such part in the proceedings as you see fit.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

[b] Use of Form

The notice in *[a], above*, must be served on the Attorney General and the Controller, along with a copy of the petition in the action [*see §§ 252.91[1], 252.92*], at least 20 days prior to the date of hearing [*Code Civ. Proc. §§ 1353, 1355*].

[c] Cross References

For discussion of service of notice of hearing and petition, see *[1], above*, and *§ 252.92*.

[3] Judgment Directing Payment of Escheated Property to Heirs [Code Civ. Proc. § 1355]

[a] FORM Petition by Heirs to Recover Proceeds of Estate Escheated to State [Code Civ. Proc. § 1355]--Judgment Directing Payment of Escheated Property to Heirs [Code Civ. Proc. § 1355]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	JUDGMENT
The State of California,	)	(Ordering Payment of Escheated Property)
Respondent.	)	
	)	
	)	

This cause having come on regularly for hearing on _____[*date*], and proof being made to the satisfaction of the court, the court finds due notice of the hearing has been given in the manner required by law, and that all the allegations of the petition filed on _____[*date*], are true; that _____[*name*] as State Controller under Account No. _____ and _____[*name*] as State Treasurer, have in their possession property belonging to the estate of _____[*name*], deceased, in the sum of $_____.

IT IS HEREBY ORDERED that _____[*name*], the Controller of the State of California, draw his/her warrant on _____[*name*], the Treasurer of the State of California, for the payment of the sum of $_____, payable to _____[*name*], attorney for petitioner and heirs of the deceased, so that the estate can be distributed to the petitioner and other heirs after all the expenses of administration have been satisfied.

Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[b] Use of Form

The form in *[a]*, *above*, is a judgment directing that payment of escheated property be made to heirs resulting from an action to recover possession of property from the state brought under *Code Civ. Proc. §§ 1353* and *1355*.

[c] Cross References

For forms for the petition and notice of hearing, see [1], [2], *above*, and § 252.92.

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 252 ESCHEAT (UNCLAIMED PROPERTY)
PART V. FORMS

21-252 California Forms of Pleading and Practice--Annotated § 252.92

§ 252.92 Petition by Party for Whom Property Is Held to Recover Property Escheated to State [Code Civ. Proc. §§ 1353, 1355]--General Form

[1] FORM Petition by Party for Whom Property Is Held to Recover Property Escheated to State [Code Civ. Proc. §§ 1353, 1355]--General Form

[*Caption, introduction. See § 252.91[1][a]*.]

1. Petitioner is a resident of _____ County, California and is the person named in the records of the State Controller as the person for whom property is held under the Controller's Account No. _____.

2. _____[*Name*] is the Attorney General of the State of California and has an office in _____[*city*], _____ County [*specify county where action is brought under Code Civ. Proc. §§ 401, 1353, 1355*], California.

3. The property that is the subject of this petition is the sum of $_____ which is held by the State Treasurer. [_____ (*If the property is not money, describe it, its location, and its legal description*).]

4. _____ [*Allege the transaction under which the property was deposited with the state, including a complete description of the transfer to the state, the date of deposit, and if the transfer was made pursuant to court proceedings, the title of the court and cause, number, names of parties, and date of entry of decree or judgment*].

5. No escheat proceedings have been commenced by the State of California with respect to the property. [_____ (*If proceedings have been commenced by the Attorney General (Code Civ. Proc. § 1410), allege the title of the court and cause, number, date of commencement, names of parties, present status of the action, or date of entry of final judgment. If proceedings were commenced by the Controller by notice and publication (Code Civ. Proc. § 1415), allege the dates of notice and publication, the present status of the proceedings, or the date of completion of publication).*]

6. Petitioner was not a party or privy to any proceedings concerning the transfer of the property to the State of California or any proceedings thereafter and had no notice of any such proceedings.

7. _____[*Allege all material facts necessary to establish a prima facie right or title to the property in petitioner*].

WHEREFORE, petitioner prays judgment as follows:

1. The Controller be ordered to _____ [draw his/her warrant on the State Treasurer in the sum of $_____ *or* deliver the above-described property to petitioner] subject to charges authorized by law; and

2. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

[*Verification. See § 252.91[1][a]*.]

[2] Use of Form

The form in *[1], above*, is for use by a petitioner who claims possession or title to property in the possession of the state which was transferred to the state other than through probate proceedings. If the petitioner is an heir or successor in interest of an heir of property received by the state from the estate of a decedent, the *form in § 252.91[1][a]* should be used. For additional comments regarding contents and use of petition, see *§ 252.91[1]*.

[3] Escheat Proceedings

If the state has commenced escheat proceedings under *Code Civ. Proc. §§ 1410* and *1415*, the petition is brought under *Code Civ. Proc. § 1355* and is subject to the five-year statute of limitations provided in those statutes. If the state has not commenced such proceedings, the petition is brought under *Code Civ. Proc. § 1353*, which requires that certain procedures set forth in *Code Civ. Proc. § 1355* be followed [*see § 252.91[1][a]*].

[4] Service of Petition

A copy of the form and a notice of hearing [*see § 252.91[2][a]*] must be served on the Attorney General and the Controller at least 20 days prior to the date of the hearing [*Code Civ. Proc. §§ 1353, 1355*].

[5] Cross References

For procedure and forms relating to the recording of a notice of pendency of an action affecting real estate, see Ch. 348, *Lis Pendens*

For alternative verification forms, see Ch. 572, *Verification*

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 252 ESCHEAT (UNCLAIMED PROPERTY)
PART V. FORMS

21-252 California Forms of Pleading and Practice--Annotated § 252.93

§ 252.93 Complaint to Recover Escheated Property Deposited With State Treasurer or Controller Under Unclaimed Property Law [Code Civ. Proc. § 1541]

[1] FORM Complaint to Recover Escheated Property Deposited With State Treasurer or Controller Under Unclaimed Property Law [Code Civ. Proc. § 1541]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	COMPLAINT TO RECOVER
The State of California,	)	(Under the Unclaimed Property Law)
Respondent.	)	
	)	
	)	

_____

1. Defendant _____[*name*] is the duly elected and acting Controller of the State of California, and defendant _____[*name*] is the duly elected and acting Attorney General of the State of California with an office in _____[*city*], _____ County [*specify county where action is brought under Code Civ. Proc. §§ 401, 1541*], California.

2. Plaintiff is a resident of _____ County, California, and is the person named in the records of the State Controller as the person for whom property is held under the Controller's Account No. _____, which is the subject of this complaint, totals $_____, and is held by the State Treasurer.

3. _____ [*Allege the transaction under which the property was transferred to the state, including a complete description of the transfer to the state and the date of deposit*].

4. On _____[*date*], plaintiff filed a verified claim a copy of which is attached as Exhibit A and incorporated by reference with defendant _____[*name*], the State Controller, under *Code of Civil Procedure Section 1540*, in which plaintiff sought to recover the above-described property deposited in the State Treasury.

5. On _____[*date*], defendant _____[*name*], the State Controller _____ [denied plaintiff's claim *or* failed to act on plaintiff's claim within 180 days from its filing and this action is brought under *Code of Civil Procedure Section 1541* within 270 days from the filing of the claim].

WHEREFORE, plaintiff prays judgment as follows:

1. The State Controller be ordered to draw a warrant on the Treasurer in the sum of $_____, subject to charges authorized by law; and

2. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 252.91[1][a]*.]

[2] Use of Form

The form in *[1], above*, is for use in recovering abandoned property that has escheated to the state under the Unclaimed Property Law [*Code Civ. Proc. §§ 1500-1582*] and is in the Controller's possession. The form is used after a claim has been filed with the Controller for return of the property [*see* § 252.90[1]]. The action may also be brought under *Code Civ. Proc. § 1352(c)*.

[3] Time Periods

The action may be brought by a person aggrieved by a decision of the Controller or as to whose claim the Controller has failed to make a decision within 180 days after the claim is filed. The complaint may be brought within 90 days after the decision of the Controller or within 270 days from the filing of the claim if the Controller fails to make a decision in the superior court in any county or city and county in which the Attorney General has an office. The form must be served on both the Controller and the Attorney General, and the Controller has 60 days within which to respond [*Code Civ. Proc. § 1541*].

[4] Cross References

For discussion of claims for return of property under the Unclaimed Property Law, see § 252.90[1]

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 253 ESCROWS

21-253 California Forms of Pleading and Practice--Annotated 253.syn

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[2] "Escrow"

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§ 253.40 Related Matthew Bender Publications

[1] California Points and Authorities

[2] California Legal Forms

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§ 253.41 State Statutes

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[1] Closing of Escrow

[2] Defaulting Party

[3] Escrow Holder's Liability

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[5] Escrow Instructions

[6] Exemptions From Provisions of Escrow Law

[7] Forfeiture Provisions

[8] Middleman Escrow

[9] Requisites of Valid Escrow

[10] Statute of Limitations

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§ 253.43 Attorney General Opinions

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§ 253.60 Complaint by Escrow Holder--For Interpleader [Code Civ. Proc. § 386]--Of Buyer and Seller After Notice of Rescission [Civ. Code § 1691] by Buyer

[1] FORM

[2] Use of Form

[3] Deposit of Amount in Dispute

[4] Allowance of Attorney's Fees

[5] Verification

[6] Jurisdiction

[7] State Statutes

[8] Decisions

[9] Cross References

§ 253.61 Complaint by Escrow Holder--For Interpleader [Code Civ. Proc. § 386]--To Determine Status of Property Held in Escrow as Between Buyer and Seller

[1] FORM

[2] Use of Form

[3] Cross References

§ 253.62 Complaint by Escrow Holder--For Interpleader [Code Civ. Proc. § 386]--By Attorney Escrow Holder of Liquor License Transfer [Bus. & Prof. Code § 24074]--Against Seller and Creditors

[1] FORM

[2] Use of Form

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[4] Notice to Creditors

[5] State Statutes

[6] Decisions

[7] Cross References

§ 253.63 Notice of Motion for Order Dismissing Defendant Escrow Holder as Mere Stakeholder [Code Civ. Proc. § 386.5] and for Costs and Attorney's Fees [Code Civ. Proc. § 386.6(a)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 253.64 Declaration in Support of Motion for Order to Dismiss Defendant Escrow Holder as Mere Stakeholder [Code Civ. Proc. § 386.5] and for Costs and Attorney's Fees [Code Civ. Proc. § 386.6(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 253.65 Order Dismissing Defendant Escrow Holder From Action as Mere Stakeholder [Code Civ. Proc. § 386.5] and for Costs and Attorney's Fees [Code Civ. Proc. § 386.6(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 253.66 Complaint for Damages for Conversion [Civ. Code § 3336]--Action by Buyer Against Escrow Holder and Seller--Misappropriation of Funds Held in Escrow on Rescinded Sale [Civ. Code § 1692]

[1] FORM

[2] Use of Form

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[8] Cross References

§ 253.67 Complaint by Buyer Against Seller--For Specific Performance [Civ. Code § 3384] of Escrow Agreement and Damages [Civ. Code § 3306, 3307] on Failure of Seller to Comply With Escrow Instructions

[1] FORM

[2] Use of Form

[3] Measure of Relief

[4] State Statutes

[5] Decisions

[6] Cross References

§ 253.68 Complaint by Seller Against Escrow Holder and Buyer--For Declaratory Relief [Code Civ. Proc. § 1060]--That Seller Is Entitled to Return of Corporate Stock Held in Escrow on Failure of Buyer to Perform

[1] FORM

[2] Use of Form

[3] Declaratory Relief

[4] Verification

[5] State Statutes

[6] Cross References

§ 253.69 Complaint [Code Civ. Proc. § 425.10] by Seller Against Escrow Holder and Buyer--For Declaratory Relief [Code Civ. Proc. § 1060]--That Separate Instructions of Buyer and Seller Did Not Constitute a Contract

[1] FORM

[2] Use of Form

[3] Cross References

§ 253.70 Allegation of Negligence Against Escrow Holder for Misdelivery of Money Held in Escrow

[1] FORM

[2] Use of Form

§ 253.71 Complaint [Code Civ. Proc. § 425.10] for Actual Damages and Statutory Treble Damages [Civ. Code § 1057.3(b)]--Failure to Return Funds Deposited in Escrow After Failure of Escrow to Close [Civ. Code § 1057.3]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Deposit of Funds With Court

[5] Treble Damages and Attorney's Fees

[6] Cross References

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 253 ESCROWS
PART I. SCOPE

21-253 California Forms of Pleading and Practice--Annotated § 253.01

§ 253.01 Scope of Chapter

This chapter discusses and contains forms for use in actions involving escrows and the parties to escrow agreements. It contains forms of complaints in interpleader brought by an escrow holder after notice of rescission of the escrow agreement by a party to the escrow [*see § 253.60*], to determine the status of property held in escrow [*see § 253.61*], and in a liquor license transfer [*see § 253.62*].

It also contains forms of notice of motion [*see § 253.63*] with a supporting declaration [*see § 253.64*] and order thereon [*see § 253.65*] when the escrow holder wishes to deposit the property in escrow with the court and be dismissed as a mere stakeholder.

In addition, the forms include complaints for damages and conversion for misappropriation of funds held in escrow [*see § 253.66*], for specific performance and damages when a party fails to comply with escrow instructions [*see § 253.67*], and for declaratory relief in the sale of corporate stocks [*see § 253.68*] and real estate [*see § 253.69*] when the buyer has failed to perform pursuant to the escrow instructions; and allegations of negligence against the escrow holder for misdelivery of property held in escrow [*see § 253.70*]. It also contains a form of complaint for actual and treble damages for failure to return funds after an escrow has failed to close [*see § 253.71*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsReal Property LawPurchase & SaleEscrow

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Chapter 253 ESCROWS
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21-253 California Forms of Pleading and Practice--Annotated § 253.02

§ 253.02 Cross References

For forms relating to actions by real estate brokers to recover commissions arising out of escrows, see Ch. 103, *Brokers* .

For discussion and forms of complaint in conversion actions, see Ch. 150, *Conversion* .

For discussion and forms of declaratory relief, see Ch. 182, *Declaratory Relief* .

For discussion and forms of temporary restraining orders and orders to show cause enjoining the prosecution of actions to recover property deposited with the court, see Ch. 303, *Injunctions* .

For discussion and forms of complaint in interpleader, see Ch. 314, *Interpleader* .

For discussion and forms for the specific performance of land sale contracts, see Ch. 528, *Specific Performance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewReal Property LawBrokersGeneral OverviewReal Property LawPurchase & SaleRemediesSpecific PerformanceTortsIntentional TortsConversionGeneral Overview

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21-253 California Forms of Pleading and Practice--Annotated §§ 253.03through 253.09

[Reserved]

§§ 253.03[Reserved]

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Chapter 253 ESCROWS
PART II. LEGAL BACKGROUND

21-253 California Forms of Pleading and Practice--Annotated § 253.10

§ 253.10 Governing Statutes

Escrows are defined in *Civ. Code § 1057* and *Fin. Code § 17003*. The regulation of escrow agents generally is governed by *Fin. Code § 17000 et seq.* Restrictions on real estate developers who require escrows in real estate purchases are contained in *Civ. Code § 2995*. Proceedings for the dismissal of escrow holders, who are mere stakeholders, from legal actions are contained in *Code Civ. Proc. §§ 386.5, 386.6*. Commencement of accrual of interest on residential mortgage loans is governed by *Civ. Code § 2948.5*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsCivil ProcedurePartiesInterpleadersGeneral OverviewReal Property LawPurchase & SaleEscrow

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§ 253.11 Definitions

[1] "Grant"

The transfer of real or personal property in writing is called a grant, conveyance, or bill of sale, and the term "grant" includes all such instruments, unless it is specially applied to real property transactions [*Civ. Code § 1053*].

[2] "Escrow"

A grant may be deposited by the grantor with a third person, to be delivered on performance of a condition, and, on delivery by the depositary, it will take effect. While in the possession of the third person, and subject to condition, it is called an "escrow" [*Civ. Code § 1057*]. For purposes of regulation of escrow agents, "escrow" means any transaction wherein one person, for the purpose of effecting the sale, transfer, encumbering, or leasing of real or personal property to another person, delivers any written instrument, money, evidence of title to real or personal property, or other thing of a value to a third person to be held by the third person until the happening of a specified event or the performance of a prescribed condition, when it is then to be delivered by the third person to a grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor, or any agent or employee of any of the latter [*Fin. Code § 17003(a)*].

With regard to Internet escrow companies, "escrow" also includes any transaction in which one person, for the purpose of effecting the sale or transfer of personal property or services to another person, delivers money, or its Internet-authorized equivalent, to a third person to be held by that third person until the happening of a specified event or the performance of a prescribed condition, when it is then to be delivered by that third person to a grantee, grantor, promisee, promisor, obligee, obligor, bailee, bailor, or any agent or employee of the latter [*Fin. Code § 17003(b)*].

[3] "Escrow Agent"

The term "escrow agent" denotes any person engaged in the business of receiving escrows for deposit or delivery [*Fin. Code § 17004*]. An escrow agent is also referred to as an "escrow holder."

[4] "Internet Escrow Agent"

An "Internet escrow agent" is any person engaged in the business of receiving escrows for deposit or delivery over the Internet [*Fin. Code § 17004.5*]. Internet escrow agents are subject to the provisions governing all escrow agents [*Fin. Code § 17005.4*]. For discussion of Internet and electronic transactions, and legal requirements applicable to Internet escrow agents and others participating in these transactions, see *§ 253.14*.

[5] "Business Location" and "Business Office Location"

"Business location" and "business office location" mean a facility or other place of business where a person engages in the business of receiving an escrow for deposit or delivery, but does not include a customer contact center [*Fin. Code § 17005.2*].

[6] "Customer Contact Center"

"Customer contact center" means a facility operated by an Internet escrow agent that exists solely for the purpose of responding to customer electronic messages and telephone inquiries; provided, however, that no receipt or disbursements relating to an escrow are made from the facility, and provided further than any documentation or other material generated, transmitted, or otherwise sent from the facility can be reviewed at any time from the business location of the Internet escrow location [*Fin. Code § 17005.3*]. For discussion of laws and regulations applicable to customer contact centers, see *§ 253.14[4]*.

[7] "Within This State"

With regard to escrows, the term "within this state" means any activity of a person relating to receiving escrows for deposit or delivery if the activity [*Fin. Code § 17005.5*]:

- Originates from inside California and is directed to persons outside the state.
- Originates from outside California and is directed to persons inside the state.
- Originates from inside California and is directed to persons inside the state.
- Leads to the formation of a contract and the offer or acceptance of the contract is directed to a person in California, whether from inside or outside the state and whether the offer was made inside or outside the state.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsReal Property LawPurchase & SaleEscrow

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§ 253.12 Terms Used in Escrow Transactions

A business or real estate transaction goes "into escrow" or an "escrow is opened" when a document, such as a deed or written agreement containing "escrow instructions," is deposited with a third party known as an "escrow agent" or "escrow holder." The transaction is "in escrow" thereafter until the transaction is consummated or the "escrow closes." The transaction may also be referred to as being "escrowed," or it may be said that an "escrow is pending."

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 253.13 Property That May Be Subject of Escrow

Although the concept of escrow was originally developed to apply to real estate transactions and originated in statutes pertaining to deeds by way of grant, the term "grant" as used in *Civ. Code §§ 1053* and *1057* is comprehensive enough to cover transactions involving real or personal property, and a single escrow transaction may involve both real and personal property [*Bailey v. Security Trust Co. (1919) 179 Cal. 540, 548, 177 P. 444* ; *see Fitch v. Bunch (1866) 30 Cal. 208, 212* ; *Rockefeller v. Smith (1930) 104 Cal. App. 544, 547, 286 P. 487]* . Therefore, the subject of an escrow may be a deed, certificate of stock, money, or a promissory note, and an escrow may also be used in transactions involving leases, mortgages, subscriptions, and exchanges.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsReal Property LawPurchase & SaleEscrow

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§ 253.14 Internet and Electronic Transactions

[1] Electronic Records and Fund or Wire Transfers

All records required under the escrow laws may be retained by an Internet escrow agent and provided to the Commissioner of Corporations in electronic format [*Fin. Code § 17403.5(a);see § 253.11[4]*]. All transfers by an Internet escrow agent between trust accounts and interest-bearing accounts, and between escrow accounts, may be made electronically [*Fin. Code § 17403.5(b)*], and a statement of account may be delivered by an Internet escrow agent to a customer by electronic mail or via the Internet, unless otherwise requested by the customer [*Fin. Code § 17403.5(c)*]. With regard to Internet escrow companies, transfers to trust accounts by commercial banks, and transfers from operating accounts to cover losses, may be made through wire transfers. Receipts for these transactions may be maintained in electronic form [Fin. Code § 17409.01(b)].

An escrow agent must comply with, at a minimum, the following procedures for wire transfers, which are also known as "electronic fund transfers" [*10 Cal. Code Reg. § 1738(b)*]:

- The instructions of the principals authorizing the wire transfer must contain, at a minimum (1) the amount of the funds to be wire transferred, (2) the name of the financial institution, (3) the account number, and (4) the account name receiving the funds.

- The escrow agent must retain confirmation of the wire transfer from the financial institution that contains, at a minimum (1) the amount of the funds wire transferred, and (2) the account number and name of the account to which the funds were wire transferred.

- If necessary, the escrow books must be properly adjusted to reflect the wire transfer of funds from the escrow account.

- The escrow agent must maintain a property audit trail and adequate controls and safeguards for funds disbursed by wire transfer.

[2] Internet Escrow Agent Special Accounts

All money received by an Internet escrow agent from a credit card or Automated Clearing House (ACH) transfer as part of an escrow transaction must be deposited on receipt in a bank, savings bank, or savings and loan association in a separate account that is designated "trust" or "escrow" account [*10 Cal. Code Reg. § 1737.1(a)*;*see § 253.11[4]*]. No funds other than those received from a credit card or ACH transfer as part of an escrow transaction may be deposited in the account or otherwise commingled with any other escrow money [*10 Cal. Code Reg. § 1737.1(a)*]. An Internet escrow agent may not withdraw, pay out, or transfer monies from a particular escrow for deposits received by credit card or ACH transfer before the deposit of the funds into the trust or escrow bank account [*10 Cal. Code Reg. § 1737.1(b)*].

An Internet escrow agent is required to establish a reserve made up of general account funds for the purpose of covering losses that result from the acceptance of credit cards and ACH deposits, including, but not limited to, charge backs, disputed charges, fraudulent transactions, and other debits [*10 Cal. Code Reg. § 1737.1(c)*]. The reserve must be at least equal to 10 percent of the average monthly credit card and ACH receipts. If actual losses exceed 10 percent of the average monthly credit card and ACH receipts, the Internet escrow agent must immediately increase the reserve to a least equal the percentage of actual losses to the average monthly credit card and ACH receipts. An Internet escrow agent may request the Commissioner's approval to reduce the required reserves, and the Commissioner may approve the request if, in his or her opinion, the Internet escrow agent has submitted sufficient evidence to demonstrate that the lower reserve will be sufficient to cover anticipated losses [*10 Cal. Code Reg. § 1737.1(c)*; *see Fin. Code § 17210* (tangible net worth and liquid assets also required)]. The Internet escrow agent must deposit funds from the required reserves into the escrow trust account to cover any losses that result from credit cards or ACH deposits on or before the close of the next full working day after receiving notification of the debit. This does not apply if the debit is against funds received from a credit card or ACH deposit that remains in the escrow account [*10 Cal. Code Reg. § 1737.1(d)*].

[3] Escrow Instructions Transmitted Over Internet and Electronic Signatures

Internet escrow agents may accept escrow instructions that are created, generated, sent, communicated, received, or stored by electronic means provided that the principals to the transaction agree to conduct the transaction electronically [*10 Cal. Code Reg. § 1738.6(a)*]. The Internet escrow agent must require that the principals to the transaction acknowledge that they are able to electronically receive the escrow instructions, download the escrow instructions, and print the escrow instructions [*10 Cal. Code Reg. § 1738.6(b)*]. If a principal to the transaction is not able to receive the escrow instructions electronically, and download and print the instructions, the Internet escrow agent must mail a true and correct copy of the instructions to the person within 24 hours of executing the document. The Internet escrow agent must maintain a record of the principal's acknowledgment, and a record of each mailing [*10 Cal. Code Reg. § 1738.6(b)*]. The principals to the transaction may execute the escrow instructions and other escrow documents with an electronic signature that complies with the federal Electronic Signatures in Global and National Commerce Act (The E-Sign Act) [*10 Cal. Code Reg. § 1738.6(c)*; *see 15 U.S.C. § 7001 et seq.*].

[4] Customer Contact Center Procedures

An Internet escrow agent must give the Commissioner of Corporations a written notice that specifies the business address of a customer contact center [*see § 253.11[6]*] at least 10 days before commencing business at that location. Similarly, at least 10 days before an intended change in the location of any customer contact center, an Internet escrow agent must give written notification to the Commissioner of the new business address [*10 Cal. Code Reg. § 1709.1*].

[5] Electronic Transmission of Escrow Receipts and Statements

An Internet escrow agent must issue consecutively numbered receipts for all escrow money or checks deposited with or mailed to the Internet escrow agent [*10 Cal. Code Reg. § 1741.1(b)*]. An Internet escrow agent may deliver the receipts electronically over the Internet to the person depositing the funds into escrow. If a person is not able to electronically

receive the receipt, the Internet escrow agent must mail a true and correct copy of the receipt within 24 hours of execution, and may retain the receipt electronically [*10 Cal. Code Reg. § 1741.1(b)*; *see 10 Cal. Code Reg. § 1737.3* (electronic receipts)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesElectronic BankingFund TransfersBusiness & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsComputer & Internet LawInternet BusinessContractsDigital SignaturesReal Property LawPurchase & SaleEscrow

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§ 253.15 Validity of Escrows

[1] Creation

Unless the essential characteristics of an escrow transaction exist, merely designating a transaction as an escrow does not make it an escrow [*Kenney v. Parks (1899) 125 Cal. 146, 149, 57 P. 772* ; *Security-First Nat'l Bank v. Clark (1935) 8 Cal. App. 2d 709, 712-713, 48 P.2d 167]* . A valid escrow will be created when the parties to an otherwise valid transfer deliver the instruments of transfer, for example, deeds, stock certificates, or securities, to a third person, who will act as an escrow holder, with the delivery to the grantee or purchaser of such instruments of transfer to be conditioned on the payment of money or the rendering of further consideration to the grantor or vendor [*Feisthamel v. Campbell (1921) 55 Cal. App. 774, 779, 205 P. 25]* .

[2] Consideration and Contractual Agreement

For a valid escrow to exist, there must be a contractual agreement between the parties to the escrow when the instruments of transfer are delivered to the escrow holder [*Fitch v. Bunch (1866) 30 Cal. 208, 212]* . Otherwise, the escrow will not give the grantor and grantee enforceable rights, since there would be no binding obligation on the grantor not to change the conditions of delivery or not to take back the deed (or other evidence of title) [*see House v. Lala (1960) 180 Cal. App. 2d 412, 417, 4 Cal. Rptr. 366* ; *Security-First Nat'l Bank v. Clark (1935) 8 Cal. App. 2d 709, 712-713, 48 P.2d 167]* .

The creation of the escrow itself does not require a writing. An escrow holder under an oral escrow is liable if he or she does not obey the instructions [*Kelly v. Steinberg (1957) 148 Cal. App. 2d 211, 217, 306 P.2d 955]* . If the instructions are in writing, however, they may be sufficient to constitute a binding agreement between the parties if the writing satisfies the requirements of the statute of frauds [*see Tuso v. Green (1924) 194 Cal. 574, 581, 229 P. 327]* .

[3] Option Agreements

An option agreement for the sale of real or personal property may create a valid escrow if the agreement is supported by consideration and is therefore binding on the optionor [*Caras v. Parker (1957) 149 Cal. App. 2d 621, 626, 309 P.2d 104]* . However, if the option can be revoked by the optionor before it is exercised, it is not sufficient to create a valid

escrow because the agreement is not binding on either party for lack of mutuality and the optionor can revoke the option after it is put into escrow [*Thomas v. Birch (1918) 178 Cal. 483, 489, 173 P. 1102]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 253.16 Escrow for Sale

[1] Creation

Pursuant to *Fin. Code § 17003*, an escrow may be created to effect a gift or property, so as to pass title to the grantee but permit the grantor to retain a life estate [*see* Ch. 184, *Deeds*], or to transfer property on the performance of some condition by, or on behalf of, the grantee, which is referred to as an escrow for sale.

The most common type of escrow for sale is that involving a sale and purchase of real property. That is, the transfer of consideration for the transaction, costs, proration of taxes, recordation of new deeds, etc., is taken care of by a depositary, escrow holder, or agent. To create such an escrow requires the agreement of the grantor and grantee and the acceptance of the position of a depositary, or escrow holder by a third party [*House v. Lala (1960) 180 Cal. App. 2d 412, 417, 4 Cal. Rptr. 366* ; *Security-First Nat'l Bank v. Clark (1935) 8 Cal. App. 2d 709, 712, 48 P.2d 167]* . The agreement is usually contained in written escrow instructions executed by the buyer and seller and delivered to the escrow holder [*see* *Thoroman v. David (1926) 199 Cal. 386, 390, 249 P. 513* ; *Neher v. Kauffman (1925) 197 Cal. 674, 683, 242 P. 713* ; *Tuso v. Green (1924) 194 Cal. 574, 581, 229 P. 327* ; *McKinley v. Lagae (1962) 207 Cal. App. 2d 284, 289, 24 Cal. Rptr. 454]* .

[2] Title to Property

An escrow holder obtains no title to the property deposited in escrow, since the deposit of property in escrow does not alter or change the property's ownership [*People v. Hess (1951) 104 Cal. App. 2d 642, 681, 234 P.2d 65]* . The grantee acquires neither legal title nor the right of possession to the property placed in escrow until the escrow conditions are performed, unless the escrow agreement gives the grantee prior possession to the property [*Los Angeles High School Dist. v. Quinn (1925) 195 Cal. 377, 383, 234 P. 313]* . Once the conditions of the escrow agreement have been fully performed, title to the property in escrow passes to the grantee, although actual delivery of the property may not be made at such time [*Osborn v. Osborn (1954) 42 Cal. 2d 358, 363, 267 P.2d 333* ; *see also* *Todd v. Vestermark (1956) 145 Cal. App. 2d 374, 377, 302 P.2d 347* (buyer bears risk of loss of purchase money which escrow holder embezzled prior to close of escrow, even though deed had not been recorded)]. If the deed is delivered to the buyer before satisfaction of the escrow's conditions, the delivery is of no effect and title remains in the seller [*Los Angeles City High School Dist. v. Quinn (1925) 195 Cal. 377, 383, 234 P. 313]* unless the condition not complied with was for

the benefit of the grantee [*Kish v. Bay Counties Title Guaranty Co. (1967) 254 Cal. App. 2d 725, 728-729, 62 Cal. Rptr. 494]* .

[3] Doctrine of Relation Back

If a valid escrow is created and the conditions of the escrow are met, the title of the grantee relates back to the date of the escrow's creation so as to defeat the claim of an intervening grantee who received his or her deed after the creation of the escrow with knowledge of the escrow [*McDonald v. Huff (1888) 77 Cal. 279, 283, 19 P. 499]* . The doctrine of relation back also applies to the grantor and grantee, if the grantee is in possession of the property during escrow [*see Marr v. Rhodes (1900) 131 Cal. 267, 270, 63 P. 364* (grantee in possession is entitled to prune crop growing on land during escrow); *Miller & Lux, Inc. v. Sparkman (1932) 128 Cal. App. 449, 454-455, 17 P.2d 772* (grantee in possession is liable for property taxes accruing during escrow)]. However, the doctrine does not apply to defeat rights that are acquired during escrow by third persons who had no knowledge of the escrow [*see Koch v. Williams (1961) 193 Cal. App. 2d 537, 542, 14 Cal. Rptr. 429]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsReal Property LawPurchase & SaleEscrowReal Property LawTitle QualityGeneral Overview

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§ 253.17 Rights to Escrow

[1] Performance and Termination, Generally

In the absence of a contrary provision in the escrow agreement, the promises of the parties to the agreement are concurrent; neither party can complain of the other's nonperformance unless the party has performed [*see Rubin v. Fuchs (1969) 1 Cal. 3d 50, 53-54, 81 Cal. Rptr. 373, 459 P.2d 925]* . However, a party is entitled to cancel an escrow before the time for performance has expired, unless the signing of the escrow instructions constituted an irrevocable offer to purchase by the acceptance of consideration prior to the attempted cancellation [*Wood Bldg. Corp. v. Griffitts (1958) 164 Cal. App. 2d 559, 330 P.2d 847]* . In addition, a party who is in default under the terms of an escrow agreement does not have a right either to terminate the authority of the escrow holder or to rescind the escrow agreement [*Gelber v. Cappeller (1958) 161 Cal. App. 2d 113, 119, 326 P.2d 521]* . If the defaulting party does attempt to terminate or rescind, the other party can accept the rescission, treat the offer as a breach of contract and sue for damages, or insist that the defaulting party perform [*Gelber v. Cappeller (1958) 161 Cal. App. 2d 113, 119-122, 326 P.2d 521* ; *see Hastings v. Bank of America (1947) 79 Cal. App. 2d 627, 629, 180 P.2d 358]* .

If the escrow fails because its conditions are not fullfilled, the parties may recover their respective deposits [*Kelly v. Steinberg (1957) 148 Cal. App. 2d 211, 218, 306 P.2d 955* ; *see also Vineland Homes, Inc. v. Barish (1956) 138 Cal. App. 2d 747, 750, 292 P.2d 941]* .

However, if an escrow contract provides for forfeiture of the deposit of a defaulting party, such a provision will be enforced [*Keelan v. Belmont Co. (1946) 73 Cal. App. 2d 6, 10-12, 165 P.2d 930]* . Once the escrow agreement is fully consummated, it is beyond the power of either party to rescind it or to terminate the escrow [*Gelber v. Cappeller (1958) 161 Cal. App. 2d 113, 120, 326 P.2d 521]* .

[2] Forfeiture Clauses Declaring Time Is of Essence

Executory contracts for the sale of land frequently contain a provision to the effect that in case of breach by the purchaser his or her interest or rights under the contract must be forfeited. Such forfeiture may take place automatically, without notice or other affirmative act on the part of the vendor, if it is expressly provided that time is of the essence and that failure of the purchaser to perform must operate as a forfeiture of all his or her rights, leaving installments of

the price previously paid in the possession of the vendor. When time is made essential and payment by the purchaser is to be made not later than a specified date, the forfeiture resulting from not making the payment is complete on that day and may not be undone by any subsequent act of the purchaser [*Keelan v. Belmont Co. (1946) 73 Cal. App. 2d 6, 10, 165 P.2d 930* ; *but see Major-Blakeney Corp. v. Jenkins (1953) 121 Cal. App. 2d 325, 332-335, 263 P.2d 655* ; *Kellogg v. Curry (1951) 101 Cal. App. 2d 856, 859, 226 P.2d 381]* .

Later cases seem reluctant to allow a forfeiture for a relatively minor failure to comply with a time of the essence provision unless the other party is actually damaged [*see Civ. Code § 3275* (relief from forfeiture); *Holiday Inns of America v. Knight (1969) 70 Cal. 2d 327, 329, 74 Cal. Rptr. 722, 450 P.2d 42* ; *Williams Plumbing Co. v. Sinsley (1975) 53 Cal. App. 3d 1027, 1031-1035, 126 Cal. Rptr. 345* ; *see also Baird v. Barton (1958) 163 Cal. App. 2d 502, 505, 329 P.2d 492* (vendor must tender own performance and demand compliance with time provisions to place purchaser in default) and *Ch. 569, Vendor and Purchaser of Real Property, § 569.10 et seq.*]. If the contract at issue is a real property installment sales contract as defined in *Civ. Code § 2985(a)*, the purchaser may also have a right of reinstatement [*Petersen v. Hartell (1985) 40 Cal. 3d 102, 113-117, 219 Cal. Rptr. 170, 707 P.2d 232* , discussed in Ch. 569, *Vendor and Purchaser of Real Property*].

[3] Escrow Holder as Agent of Parties

[a] As Agent of Parties

The escrow holder must be a stranger to the transaction that is the subject of the escrow [*Roberts v. Carter & Potruch (1956) 140 Cal. App. 2d 370, 373, 295 P.2d 515]* and, subject to exemptions enumerated in *Fin. Code § 17006*, escrow holders must be licensed by the Commissioner of Corporations [*Fin. Code § 17200*]. The escrow holder, before fulfillment of the conditions of the escrow, is the agent for both parties, but when the conditions are met, he or she becomes an agent for each party with regard to those things placed in escrow to which each party has become entitled[*Shreeves v. Pearson (1924) 194 Cal. 699, 707, 230 P. 448* ; *see Greenzweight v. Title Guar. & Trust Co. (1934) 1 Cal. 2d 577, 582, 36 P.2d 186* ; *Howard v. Updike (1962) 202 Cal. App. 2d 534, 536, 20 Cal. Rptr. 831]* .

The escrow holder is said to become, on fulfillment of the conditions, the trustee of the property deposited with him or her for the benefit of the person to whom it is to be delivered [*Gelber v. Cappeller (1958) 161 Cal. App. 2d 113, 119, 326 P.2d 521* ; *see Tumansky v. Woodruff (1936) 14 Cal. App. 2d 279, 283, 57 P.2d 1372]* . When the conditions of the escrow are not fulfilled, the escrow holder does not become trustee of the property for the transferee but continues to hold it in trust for the party who deposited it [*Orloff v. Metropolitan Trust Co. (1941) 17 Cal. 2d 484, 488-489, 110 P.2d 396* ; *Hildebrand v. Beck (1925) 196 Cal. 141, 145, 236 P. 301]* .

[4] Duties

The escrow holder bears a fiduciary relationship to each of the parties to the escrow [*Amen v. Merced County Title Co. (1962) 58 Cal. 2d 528, 534, 25 Cal. Rptr. 65, 375 P.2d 33]* , and owes an obligation to each measured by an application of the ordinary principles of agency [*Rianda v. San Benito Title Guar. Co. (1950) 35 Cal. 2d 170, 173, 217 P.2d 25]* . He or she has the duty to strictly comply with the escrow instructions and the duty to exercise reasonable skill and ordinary diligence in the duties being assumed [*Amen v. Merced County Title Co. (1962) 58 Cal. 2d 528, 531-532, 25 Cal. Rptr. 65, 375 P.2d 33* ; *Wade v. Lake County Title Co. (1970) 6 Cal. App. 3d 824, 828, 86 Cal. Rptr. 182]* . Because the escrow holder is only a special agent of the parties, he or she does not have the duty to disclose facts to either party that are outside the scope of the escrow instructions [*see Schaefer v. Manufacturers Bank (1980) 104 Cal. App. 3d 70, 77, 163 Cal. Rptr. 402* ; *Axley v. Transamerica Title Ins. Co. (1978) 88 Cal. App. 3d 1, 8, 151 Cal. Rptr. 570]* . Therefore, an escrow holder will not be liable for allegedly not disclosing certain suspicious facts about the transaction to a purchaser when the escrow holder follows the instructions and there are no instructions requiring such disclosures [*Lee v. Title Ins. & Trust Co. (1968) 264 Cal. App. 2d 160, 162-164, 70 Cal. Rptr. 378]* . Also, the escrow holder will not be liable for failure to disclose to the buyer that the seller is purchasing the property and selling it to the

buyer at a substantial profit in the same escrow [*Blackburn v. McCoy (1934) 1 Cal. App. 2d 648, 654-655, 37 P.2d 153]* . Similarly, a title insurer who has been engaged only to perform basic escrow functions, such as paying out funds, recording documents, and preparing a preliminary title report, and not to perform as an abstractor of title, owes no duty to disclose recorded liens or clouds on title [*Siegel v. Fidelity Nat. Title Ins. Co. (1996) 46 Cal. App. 4th 1181, 1190, 54 Cal. Rptr. 2d 84]* . However, an escrow holder has a fiduciary duty to the parties in escrow to obtain reliable evidence that a real estate broker is regularly licensed before paying the broker a commission, and to communicate facts concerning the broker's license to the parties in escrow [*Kangarlou v. Progressive Title Co. (2005) 128 Cal. App. 4th 1174, 1179, 27 Cal. Rptr. 3d 754* ; *see* Judicial Council Of California Civil Jury Instructions (CACI), *CACI No. 4104*, "Duties of Escrow Holder" (LexisNexis Matthew Bender, Official Publisher)].

An escrow holder does not owe a duty of care to persons who are not parties to the escrow [*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co. (2002) 27 Cal. 4th 705, 712, 117 Cal. Rptr. 2d 541* disapproving of *Kirby v. Palos Verdes Escrow Co. (1986) 183 Cal. App. 3d 57, 227 Cal. Rptr. 785* to the extent *Kirby* held otherwise]. Thus, an escrow holder who paid a note as instructed by issuing a check to the assignor of the note rather than the assignee, neither of whom were parties to the escrow, could not be held liable to the assignor for breach of fiduciary duty or negligence [*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co. (2002) 27 Cal. 4th 705, 712, 117 Cal. Rptr. 2d 541, 41 P.3d 548]* .

[5] Liability

When the escrow holder violates the instructions or acts negligently, he or she will ordinarily be liable for any loss occasioned by any breach of duty [*Amen v. Merced County Title Co. (1962) 58 Cal. 2d 528, 532, 25 Cal. Rptr. 65, 375 P.2d 33* ; *see also Warington Lbr. Co. v. Fullerton Mortgage & Escrow Co. (1963) 222 Cal. App. 2d 706, 710-711, 35 Cal. Rptr. 423* ; *Spaziani v. Millar (1963) 215 Cal. App. 2d 667, 682-683, 30 Cal. Rptr. 658]* . However, no liability attaches to an escrow agent for failure to do something, such as reporting liens against the subject, that was not required by the terms of the escrow instructions [*Siegel v. Fidelity Nat. Title Ins. Co. (1996) 46 Cal. App. 4th 1181, 1194, 54 Cal. Rptr. 2d 84]* .

When the negligence of one of the parties is a factor without which the loss would not have occurred, the loss may fall on that party regardless of whether the conditions have been fulfilled [*Majors v. Butler (1950) 99 Cal. App. 2d 370, 374, 221 P.2d 994]* .

[6] Notification of Enforcement Action Against Escrow Holder

Whenever the Commissioner of Real Estate takes any enforcement or disciplinary action against a licensed escrow holder that is related to escrow services provided in accordance with *Fin. Code § 17006(a)(4)*, the Commissioner must notify the Insurance Commissioner and the Commissioner of Corporations concerning the action or actions taken when they are final. The purpose of this notification is to alert the departments that enforcement or disciplinary action has been taken, in case the licensee seeks or obtains employment regulated by the other departments [*Bus. & Prof. Code § 10176.1(a)(1)*]. In turn, the Commissioners of the Department of Corporations and the Department of Insurance are required to provide information to the Department of Real Estate and the other department concerning persons who have been subject to enforcement or disciplinary action for malfeasance or misconduct related to the escrow industry [*see Fin. Code § 17423.1*; *Ins. Code § 12414.31*].

In addition to the notification, the Commissioner must also provide the other Commissioners with a copy of the written accusation, a statement of issues, or the order issued or filed in the matter, as well as additional requested materials concerning the relevant facts of the enforcement or disciplinary action [*Bus. & Prof. Code § 10176.1(a)(2)*]. This information will also appear on a website established and maintained by the Department of Real Estate, with hyperlinks to the websites to be established by the Department of Corporations and the Department of Insurance [*Bus. & Prof. Code § 10176.1(b)*; *see Bus. & Prof. Code § 10176.1(c)* (no liability for release of false information unless done with

knowledge and malice)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedFiduciary RelationshipsFiduciary ResponsibilitiesBusiness & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsContracts LawPerformanceGeneral OverviewReal Property LawPurchase & SaleEscrowReal Property LawTitle QualityGeneral Overview

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21-253 California Forms of Pleading and Practice--Annotated § 253.18

§ 253.18 Remedies

[1] Damages

[a] Causation

The damages recoverable for an escrow holder's breach of duty are those that are proximately caused by the breach [*see Capell Associates, Inc. v. Central Valley Sec. Co. (1968) 260 Cal. App. 2d 773, 780-786, 67 Cal. Rptr. 463]* . For example, the damages for the failure to execute a security agreement as provided in the instructions so as to provide protection under the antideficiency legislation is the liability resulting from a personal judgment entered against the escrow holder's principal [*see Kish v. Bay Counties Title Guaranty Co. (1967) 254 Cal. App. 2d 725, 732-734, 62 Cal. Rptr. 494]* . When the action of the escrow holder results in the loss of a party's security, the party does not have to try to collect the unsecured debt from the debtor first, but can proceed directly against the escrow holder just as the party could have proceeded directly against the security [*Howe v. City Title Ins. Co. (1967) 255 Cal. App. 2d 85, 87, 63 Cal. Rptr. 119]* . If the escrow holder's negligence requires his or her principal to bring a quiet title action, the damages are the expenses of the action, including attorney's fees [*see Prentice v. North Amer. Title Guar. Corp (1963) 59 Cal. 2d 618, 620, 30 Cal. Rptr. 821, 381 P.2d 645]* .

[b] Actions Against Escrow Holder--Statute of Limitations

If the loss by the escrow holder is based on breach of an actual or implied provision of the written escrow instructions, the four-year statute of limitations for actions on a written contract [*see Code Civ. Proc. § 337*] applies even if the escrow holder did not sign the escrow instructions and only orally accepted them. If the action is for breach of oral escrow instructions, the two-year statute of limitations for oral contracts [*see Code Civ. Proc. § 339*] applies [*see Roberts v. Carter & Potruch (1956) 140 Cal. App. 2d 370, 373, 295 P.2d 515]* . The statute begins to run on the action when the party discovers or should have discovered the injury, not when the original breach occurred [*Amen v. Merced County Title Co. (1962) 58 Cal. 2d 528, 531-535, 25 Cal. Rptr. 65, 375 P.2d 33]* .

[c] Exculpatory Clauses

Any exculpatory clause in the escrow instructions that purports to exculpate the escrow holder from liability resulting

from his or her own negligence is void as contrary to public policy [*Akin v. Business Title Corp. (1968) 264 Cal. App. 2d 153, 155-159, 70 Cal. Rptr. 287* ; *see* *Tunkl v. Regents of University of California (1963) 60 Cal. 2d 92, 98-101, 32 Cal. Rptr. 33, 383 P.2d 441]* .

[2] Specific Performance

Because any person having the possession or control of a particular article of personal property, of which he or she is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession [*Civ. Code § 3380*], if the escrow holder refuses to deliver the instruments after performance of the conditions, the grantee may bring an action for specific delivery of personal property. If the escrow holder wrongfully delivers the property to a third person, the party entitled to the property under the escrow instructions may bring an action against that person without joining the escrow holder or other party to the escrow transaction [*Law v. Title Guar. & Trust Co. (1928) 91 Cal. App. 621, 627, 267 P. 565]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsContracts LawContract Conditions & ProvisionsExculpatory ClausesContracts LawDefensesStatutes of LimitationsContracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleEscrow

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21-253 California Forms of Pleading and Practice--Annotated § 253.19

§ 253.19 Obligation to Return Funds

[1] In General

It is the obligation of a buyer and seller who enter into a contract to purchase and sell real property to ensure that all funds deposited into an escrow account are returned to the person who deposited them or who is otherwise entitled to the funds under the contract, if the purchase of the property is not complete by the date set forth in the contract or any duly executed extension for the close of escrow [*Civ. Code § 1057.3(a)*]. For purposes of *Civ. Code § 1057.3*, the term "property" means real property containing one to four residential units, at least one of which at the time the escrow is created is to be occupied by the buyer [*Civ. Code § 1057.3(f)(3)*]. "Close of escrow" means the date, specified event, or performance of prescribed condition on which the escrow agent is to deliver the subject of the escrow to the person specified in the buyer's instructions [*Civ. Code § 1057.3(f)(1)*].

[2] Remedy

Any buyer or seller who fails to execute any document required by the escrow holder to release funds in an escrow account within 30 days after a written demand for return of funds is liable to the person making the deposit for all of the following [*Civ. Code § 1057.3(b)*]:

- The amount of the funds deposited in escrow not held in good faith to resolve a good faith dispute;
- Damages of treble the amount of the funds deposited in escrow not held to resolve a good faith dispute, but not less than $100 and not more than $1,000; and
- Reasonable attorney's fees.

For discussion of the definition of "good faith dispute," see *§ 253.20[3]*. For a form of complaint for return of a deposit, treble damages, and attorney's fees, see *§ 253.71*.

[3] Good Faith Dispute

There is no cause of action pursuant to *Civ. Code § 1057.3* or liability for failure to return funds if the funds are withheld to resolve a good faith dispute between a buyer and seller. The party who is denied return of the funds is only entitled to damages if he or she proves that there was no good faith dispute as to the right to the funds on deposit [*Civ. Code § 1057.3(c)*]. A "good faith dispute" is a dispute in which the trier of fact finds that the party refusing to return the deposited funds had a reasonable belief of his or her legal entitlement to withhold the deposited funds. The existence of a good faith dispute must be determined by the trier of fact [*Civ. Code § 1057.3(f)(2)*].

[4] Deposit in Court

If an action is filed pursuant to *Civ. Code § 1057.3*, the escrow holder must deposit the sum in dispute, less any cancellation fee and charges incurred, with the court in which the action is filed and be discharged of further responsibility for the funds [*Civ. Code § 1057.3(d)*]. The escrow holder has the option of filing an interpleader action [*Civ. Code § 1057.3(g)*]. For discussion of an escrow holder's right to interpleader, see *§ 253.20*.

[5] Effect on Underlying Contract

Neither any document required by the escrow holder to release funds nor the acceptance of funds by any principal is a cancellation or termination of the underlying contract to purchase and sell unless the cancellation is specifically stated therein. If the escrow instructions constitute the only contract between the parties, no document required by the escrow holder to release funds abrogates a cause of action for breach of any contractual obligation to purchase or sell real property unless the cancellation is stated therein [*Civ. Code § 1057.3(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral OverviewReal Property LawPurchase & SaleEscrow

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§ 253.20 Escrow Holder's Right to Interpleader

If an escrow holder is faced with conflicting demands from the parties to an escrow concerning the property held in escrow, the escrow holder may file an action in interpleader to compel the parties to litigate their claims to the funds or documents [*see §§ 253.60 -253.62*]. The escrow holder may deposit the disputed property with the court and then be discharged from liability. An escrow holder who is sued by one claimant to the property held in escrow may cross complain against the plaintiff and the other claimants in interpleader and again be discharged upon the payment into court [*Code Civ. Proc. § 386*]. The defendant escrow holder may also obtain the discharge after payment into court if it files an affidavit stating that he or she is a mere stakeholder [*Code Civ. Proc. § 386.5*;*see § 253.65*] and may be awarded in the court's discretion costs and reasonable attorney's fees if he or she requests them in his or her pleading [*Code Civ. Proc. § 386.6*].

For discussion and forms for use in interpleader actions, see Ch. 314, *Interpleader* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsCivil ProcedurePartiesInterpleadersGeneral OverviewReal Property LawPurchase & SaleEscrow

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[Reserved]

§§ 253.21[Reserved]

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21-253 California Forms of Pleading and Practice--Annotated § 253.40

§ 253.40 Related Matthew Bender Publications

[1] California Points and Authorities

For memoranda relating to proceedings for declaratory relief, see California Points and Authorities, Ch. 67, *Declaratory Relief* (Matthew Bender)

For memoranda pertaining to interpleader by escrow holders, see California Points and Authorities, Ch. 101, *Escrows* (Matthew Bender)

For memoranda pertaining to interpleader actions generally, see California Points and Authorities, Ch. 123, *Interpleader* (Matthew Bender)

[2] California Legal Forms

For a discussion and legal forms for use in escrow transactions, see California Legal Forms, Ch. 26, *Real Property Escrows* (Matthew Bender)

[3] California Real Estate

For a discussion and forms for use in escrow transactions involving real estate, see California Real Estate Law And Practice, Ch. 91, *Escrows* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-253 California Forms of Pleading and Practice--Annotated § 253.41

§ 253.41 State Statutes

Establishment and procedure of escrows for transfer of liquor license. *Bus. & Prof. Code §§ 24074-24074.4*

Definition of escrows. *Civ. Code § 1057*; *Fin. Code § 17003*

Written escrow instructions and escrow instructions transmitted electronically over Internet executed by buyer or seller must state license name under which agent is operating and identify issuing department. *Civ. Code § 1057.7*; *Fin. Code § 17403.4*

Interest may not accrue on note secured by mortgage or trust deed on residential real property with one to four residential dwelling units for period in excess of one day before recording if loan proceeds are paid into escrow, or if there is no escrow, date on which loan proceeds are made available for withdrawal as matter of right under *Ins. Code § 12413.1(d). Civ. Code § 2948.5*

Prohibitions against real estate developers requiring escrows in real estate purchase from escrow services in which developer has five percent financial interest. *Civ. Code § 2995*

Actions in interpleader. *Code Civ. Proc. §§ 386-386.6*

Allowance of attorney's fees and costs of action in interpleader. *Code Civ. Proc. § 386.6*

Actions for declaratory relief. *Code Civ. Proc. §§ 1060-1062a*

Arbitration provision contained in escrow instruction does not preclude right of escrow holder to institute interpleader action. *Code Civ. Proc. § 1298(e)*

Regulation of escrow agents under Escrow Law. *Fin. Code §§ 17000-17654*

Indemnification of escrow agents against losses due to embezzlement, theft, or mysterious disappearance. *Fin. Code § 17300 et seq.*

Escrow holder must deposit checks and similar items with financial institution no later than next business day after receipt. *Ins. Code § 12413.2*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsCivil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewReal Property LawPurchase & SaleEscrow

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21-253 California Forms of Pleading and Practice--Annotated § 253.42

§ 253.42 Decisions

[1] Closing of Escrow

Closing of escrow generally. *Shreeves v. Pearson (1924) 194 Cal. 699, 708, 230 P. 448* ; *Early v. Owens (1930) 109 Cal. App. 489, 494, 293 P. 136*

Word "fault," as used in provision of real estate contract that in event that escrow does not close within time provided by reason of some fault of sellers, sellers agree to extend escrow for so long as it takes to cure such default, but in no event for longer than 180 days, meant inability to perform rather than wrongdoing. *Millsap v. Spilman (1969) 270 Cal. App. 2d 444, 446, 75 Cal. Rptr. 749*

[2] Defaulting Party

Liability of defaulting party. *Hastings v. Bank of America (1947) 79 Cal. App. 2d 627, 629, 180 P.2d 358* ; *see also Gelber v. Cappeller (1958) 161 Cal. App. 2d 113, 120, 326 P.2d 521*

[3] Escrow Holder's Liability

Escrow holder owes duty only to parties and participants in escrow, and may not be held liable to a stranger to the escrow. *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co. (2002) 27 Cal. 4th 705, 712, 117 Cal. Rptr. 2d 541, 41 P.3d 548* (disapproving of *Kirby v. Palos Verdes Escrow Co. (1986) 183 Cal. App. 3d 57, 227 Cal. Rptr. 785* to extent *Kirby* holds otherwise)

Title company who at request of bank in refinancing of home acted as sub-escrow with regard to borrower's payoff of promissory note secured by second deed of trust, and who failed to ensure that reconveyance was recorded, did not owe fiduciary duty to borrower because only bank and title company were parties to escrow. *Markowitz v. Fidelity*

National Title Co. (2006) 142 Cal. App. 4th 508, 529, 48 Cal. Rptr. 3d 217

Title insurer was not liable for failure of its issuing agent to comply with written instructions requiring issuing agent to provide, prior to close of escrow, copies of any deeds to be recorded that would vest title in anyone other than buyer, when (1) insurer was not party to contract between issuing agent and plaintiff, and (2) agency agreement between insurer and issuing agent specifically excluded sub-escrow services, including "closings of real estate transactions." *Universal Bank v. Lawyers Title Ins. Corp. (1998) 62 Cal. App. 4th 1062, 1066, 73 Cal. Rptr. 2d 196*

Title insurer who has been engaged only to perform basic escrow functions, such as paying out funds, recording documents, and preparing preliminary title report, and not to perform as abstractor of title, owes no duty to disclose recorded liens or clouds on title. *Siegel v. Fidelity Nat. Title Ins. Co. (1996) 46 Cal. App. 4th 1181, 1190, 54 Cal. Rptr. 2d 84*

No liability attaches to escrow holder for failure to do something not required by terms of escrow or for loss incurred while obediently following escrow instructions. *Siegel v. Fidelity Nat. Title Ins. Co. (1996) 46 Cal. App. 4th 1181, 1194, 54 Cal. Rptr. 2d 84*

Escrow holder is not liable for failure to deposit funds in interest-bearing account in absence of instructions to do so. *Hannon v. Western Title Ins. Co. (1989) 211 Cal. App. 3d 1122, 1127-1128, 260 Cal. Rptr. 21*

Escrow holder is liable for failure to verify signature on amendment to escrow instructions. *Lee v. Escrow Consultants Inc. (1989) 210 Cal. App. 3d 915, 924, 259 Cal. Rptr. 117*

When counsel for adverse party delivered unrecorded trust deed to attorney along with letter authorizing attorney to record deed under specific conditions, attorney's failure to prevent and disclose client's unauthorized seizure and recordation of document constituted negligence and constructive fraud; attorney's acceptance of deed gave rise to duty of care as escrow holder. *Wasmann v. Seidenberg (1988) 202 Cal. App. 3d 752, 755-757, 248 Cal. Rptr. 744*

Escrow holder was liable when its negligence or failure to follow instructions was substantial factor in cause of plaintiff's damage; argument that other party to escrow might not have performed anyway was unavailing. *Bruckman v. Parliament Escrow Corp. (1987) 190 Cal. App. 3d 1051, 1062-1063, 235 Cal. Rptr. 813*

Escrow holder was liable when it had notice of assignment to party to escrow and paid another party pursuant to instructions without clarifying who was entitled to be paid. *Kirby v. Palos Verdes Escrow Co. (1986) 183 Cal. App. 3d 57, 64-66, 227 Cal. Rptr. 785*

Cause of action was stated against escrow holder for violation of *Civ. Code § 2995* prohibition against real estate developer requiring use of controlled escrow company by allegations that buyer was orally told that use of escrow company was mandatory even though instructions stated that use of company was not required. *MacManus v. A. E. Realty Partners (1983) 146 Cal. App. 3d 275, 283-284, 194 Cal. Rptr. 567*

Statute of limitations for actions based on *Civ. Code § 2995* for requiring use of controlled escrow holder is three years under *Code Civ. Proc. § 338(a)* because action is remedial. *MacManus v. A. E. Realty Partners (1983) 146 Cal. App.*

3d 275, 282-283, 194 Cal. Rptr. 567

Escrow holder was not liable to broker for accepting revised instructions deleting payment of commission when escrow holder was not on notice of contract providing for commission or assignment to broker. *Contemporary Investments, Inc. v. Safeco Title Ins. Co. (1983) 145 Cal. App. 3d 999, 1004-1006, 193 Cal. Rptr. 822*

Escrow holder was liable for accepting deed of trust and changing its description before recording it. *Garton v. Title Ins. & Trust Co. (1980) 106 Cal. App. 3d 365, 381-382, 165 Cal. Rptr. 449*

Interest on damages [*Civ. Code § 3287*] for negligent breach of escrow instructions and fiduciary duty of escrow holder runs from day escrow closed where the damages are capable of calculation on that date. *Ruth v. Lytton Sav. & L. Ass'n (1969) 272 Cal. App. 2d 24, 26, 76 Cal. Rptr. 926* (questioned in *Abrams v. Motter (1970) 3 Cal. App. 3d 828, 83 Cal. Rptr. 855*)

Vendor is entitled to reasonable attorney's fees from escrow holder when title insurance company acting as paid escrow holder negligently and proximately causes vendor reasonably to protect his or her interest by suing third parties and escrow holder. *Ruth v. Lytton Sav. & Loan Asso. (1968) 266 Cal. App. 2d 831, 844-845, 72 Cal. Rptr. 521*

Escrow holder was liable for disposal of money held in escrow not in compliance with instructions. *Kelly v. Steinberg (1957) 148 Cal. App. 2d 211, 217, 306 P.2d 955*

Purchaser was unable to recover consideration given to seller for extension of time to close escrow. *Morrison v. Frazier (1968) 262 Cal. App. 2d 386, 389-390, 68 Cal. Rptr. 690*

Escrow holder is liable for negligent failure to deposit check of vendee who subsequently becomes bankrupt. *Wade v. Lake County Title Co. (1970) 6 Cal. App. 3d 824, 828-829, 86 Cal. Rptr. 182*

Tort liability of title insurance company acting as escrow holder to party to whom title insurance policy was issued for incorrect statement concerning vesting of title. *Banville v. Schmidt (1974) 37 Cal. App. 3d 92, 106, 112 Cal. Rptr. 126*

[4] Delivery of Property

Action to compel delivery by escrow holder. *Law v. Title Guar. & Trust Co. (1928) 91 Cal. App. 621, 627, 267 P. 565* ; *Feisthamel v. Campbell (1921) 55 Cal. App. 774, 781-782, 205 P. 25*

[5] Escrow Instructions

Escrow intructions constitute contract. *Thoroman v. David (1926) 199 Cal. 386, 390, 249 P. 513* ; *Neher v. Kauffman (1925) 197 Cal. 674, 683, 242 P. 713* ; *Tuso v. Green (1924) 194 Cal. 574, 581, 229 P. 327*

In action between principal and escrow holder to enforce general escrow instructions, escrow holder could not recover

attorneys' fees under standardized clause providing for award of attorneys' fees in litigation arising out of conflicting demands made on escrow holder or any dispute or controversy that arose between principals or with any third person regarding terms of escrow. *Campbell v. Scripps Bank (2000) 78 Cal. App. 4th 1328, 1337, 93 Cal. Rptr. 2d 635*

Oral inquiry by lender as to whether down payment was to be made through escrow was not instruction requiring payment to be so made. *Claussen v. First American Title Guaranty Co. (1986) 186 Cal. App. 3d 429, 435-438, 230 Cal. Rptr. 749*

Escrow holder was liable for breach of oral escrow instruction; *Fin. Code §§ 17403.2, 17403.3* prohibiting blanks in executed escrow instructions and requiring delivery of copy of instructions to person executing them are for protection of party to escrow and do not preclude action on breach of oral instructions. *Zang v. Northwestern Title Co. (1982) 135 Cal. App. 3d 159, 167-168, 185 Cal. Rptr. 176*

Escrow instructions are governed by intent of the parties. *Francis v. Eisenmayer (1959) 171 Cal. App. 2d 221, 227, 340 P.2d 54*

Escrow instructions between purchaser and vendor did not constitute a valid contract when instructions executed by the parties were materially different. *Vineland Homes, Inc. v. Barish (1956) 138 Cal. App. 2d 747, 751 292 P.2d 941*

Although escrow instructions can be so complete as to constitute a final contract that may not be varied, designation "escrow instruction" does not make them such contract per se. *Wolf v. Price (1966) 244 Cal. App. 2d 165, 171, 52 Cal. Rptr. 889*

Effect of transfer of rights in escrow for the purchase of property prior to amendment of the escrow instructions. *Pope v. Allen (1964) 225 Cal. App. 2d 358, 365, 37 Cal. Rptr. 371*

Clause added to escrow instructions that terms and conditions of existing first encumbrance were subject to written approval of buyer invoked standard of objective considerations of reasonable person in determining satisfaction or dissatisfaction with terms of note; reasonable person should not expect promissory note to be free of default-acceleration and prepayment-penalty clauses. *Kadner v. Shields (1971) 20 Cal. App. 3d 251, 258-272, 97 Cal. Rptr. 742*

[6] Exemptions From Provisions of Escrow Law

Constitutionality of *Fin. Code § 17006*, exempting financial institutions, lawyers, title companies, and real estate licensees from provisions of escrow law. *Escrow Inst. of Cal. v. Pierno (1972) 24 Cal. App. 3d 361, 365-370, 100 Cal. Rptr. 880*

[7] Forfeiture Provisions

Purchaser who made payment within reasonable time after it was due was entitled to relief from forfeiture under former *Civ. Code § 2375* (*now see Civ. Code §§ 2079.14-2079.16*). *Holiday Inns of America v. Knight (1969) 70 Cal. 2d 327, 329, 74 Cal. Rptr. 722, 450 P.2d 42*

Purchaser was entitled to specific performance despite late tender of second installment. *Williams Plumbing Co. v. Sinsley (1975) 53 Cal. App. 3d 1027, 1031-1035, 126 Cal. Rptr. 345*

Enforcement of forfeiture provision. *Keelan v. Belmont Co. (1946) 73 Cal. App. 2d 6, 10-12, 165 P.2d 930* ; *but see Major-Blakeney Corp. v. Jenkins (1953) 121 Cal. App. 2d 325, 332-335, 263 P.2d 655* ; *Kellogg v. Curry (1951) 101 Cal. App. 2d 856, 859, 226 P.2d 381*

[8] Middleman Escrow

"Middleman" escrow defined. *Majewsky v. Empire Constr. Co., Ltd. (1970) 2 Cal. 3d 478, 483, 85 Cal. Rptr. 819, 467 P.2d 547*

Real property that is subject of "middleman" escrow is subject to judgment lien against middleman created by filing of abstract of judment against him or her [*Code Civ. Proc. § 674*]; lien attaches to real property during period, however brief, in which title is in middleman. *Majewsky v. Empire Constr. Co., Ltd. (1970) 2 Cal. 3d 478, 483-484, 85 Cal. Rptr. 819, 467 P.2d 547*

When A agrees to sell property to B and B agrees to sell it to C and both sales are executed through single escrow, property is subject to judgment liens against B, notwithstanding fact that B put up no money for property that was paid for entirely by C; neither resulting trust [*Civ. Code § 853*] nor constructive trust [*Civ. Code § 2224*] arises in favor of *C. Majewsky v. Empire Constr. Co., Ltd. (1970) 2 Cal. 3d 478, 483-486, 85 Cal. Rptr. 819, 467 P.2d 547* (decided under former *Civ. Code §§ 853, 2224*; *now see* Prob. Code § 2224)

[9] Requisites of Valid Escrow

Creation of escrow. *House v. Lala (1960) 180 Cal. App. 2d 412, 417, 4 Cal. Rptr. 366* ; *Security-First Nat'l Bank v. Clark (1935) 8 Cal. App. 2d 709, 712, 48 P.2d 167* ; *Feisthamel v. Campbell (1921) 55 Cal. App. 774, 779, 205 P. 25*

Escrow holder as stranger to transaction. *Roberts v. Carter & Potruch (1956) 140 Cal. App. 2d 370, 373, 295 P.2d 515*

Necessity that there be binding contract between parties to have valid escrow. *House v. Lala (1960) 180 Cal. App. 2d 412, 417, 4 Cal. Rptr. 366*

Sufficiency of oral escrow agreements. *Kelly v. Steinberg (1957) 148 Cal. App. 2d 211, 217, 306 P.2d 955*

[10] Statute of Limitations

Limitations period for breach of contract for not obeying escrow instructions commenced when plaintiff discovered or should have discovered breach. *Lee v. Escrow Consultants Inc. (1989) 210 Cal. App. 3d 915, 921-922, 259 Cal. Rptr. 117*

Statute of limitations in action against escrow holder for failure to follow instructions is four-year statute for breach of written contract (*Code Civ. Proc. § 337(1)*). *Bruckman v. Parliament Escrow Corp. (1987) 190 Cal. App. 3d 1051, 1057-1058, 235 Cal. Rptr. 813*

[11] Termination of Escrow

Termination of escrow generally. *Gelber v. Cappeller (1958) 161 Cal. App. 2d 113, 119, 326 P.2d 521* ; *Kelly v. Steinberg (1957) 148 Cal. App. 2d 211, 218, 306 P.2d 955*

Cancellation of escrow and withdrawal of deed authorized when obligation to sell has expired. *Martin v. Chernabaeff (1954) 124 Cal. App. 2d 648, 654, 269 P.2d 25*

Right to unilaterally terminate escrow is dependent on express terms of escrow instructions. *Moss v. Minor Properties, Inc. (1968) 262 Cal. App. 2d 847, 852-855, 69 Cal. Rptr. 341*

[12] Transfer of Title

When title passes. *Osborn v. Osborn (1954) 42 Cal. 2d 358, 363, 267 P.2d 333* ; *Todd v. Vestermark (1956) 145 Cal. App. 2d 374, 377, 302 P.2d 347* ; *Blumenthal v. Liebman (1952) 109 Cal. App. 2d 374, 380, 240 P.2d 699*

Rule that no title passes where escrow holder delivers deed before full performance of escrow's terms does not apply in favor of transferee who has failed to perform because complying party may waive nonperformance. *Kish v. Bay Counties Title Guaranty Co. (1967) 254 Cal. App. 2d 725, 728, 62 Cal. Rptr. 494*

Escrow for transfer of state liquor license is governed by *Bus. & Prof. Code §§ 24070-24082*, not general escrow law; on transfer of license by state, escrow moneys as belonging to seller and his or her timely filing creditors; U.S. government is not entitled to taxes accrued against buyer after transfer. *Doyle v. Coughlin (1974) 37 Cal. App. 3d 911, 916-917, 919, 112 Cal. Rptr. 701*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawPurchase & SaleEscrowReal Property LawTitle QualityGeneral Overview

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§ 253.43 Attorney General Opinions

Payment by title entity to escrow agent of any consideration as inducement to or compensation on any title business is prohibited by *Ins. Code § 12404*. *58 Ops. Cal. Att'y Gen. 316 (1975)*

Exemptions from escrow law of real estate brokers and underwritten title companies. *54 Ops. Cal. Att'y Gen. 13 (1971)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsInsurance LawProperty InsuranceTitle InsuranceReal Property LawBrokersGeneral OverviewReal Property LawPurchase & SaleEscrow

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21-253 California Forms of Pleading and Practice--Annotated § 253.44

§ 253.44 Law Reviews

Note, *A Purchaser's Rights in the Middleman Escrow, 22 Hastings L.J. 1390 (1971)*

Note, *Property Law: Middleman Escrows: A Mecca for Judgment Creditors? Majewsky v. Empire Construction Co., Ltd. (Cal 1970), 11 Santa Clara Lawyer 484 (1971)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsReal Property LawPurchase & SaleEscrow

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21-253 California Forms of Pleading and Practice--Annotated § 253.45

§ 253.45 Text References

California Real Property Sales Transactions, Ch. 13, *Escrow and Closing the Sale* (Cal. CEB 3d ed. 1998)

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsReal Property LawPurchase & SaleEscrow

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21-253 California Forms of Pleading and Practice--Annotated §§ 253.46-253.59

[Reserved]

§§ 253.46[Reserved]

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21-253 California Forms of Pleading and Practice--Annotated § 253.60

§ 253.60 Complaint by Escrow Holder--For Interpleader [Code Civ. Proc. § 386]--Of Buyer and Seller After Notice of Rescission [Civ. Code § 1691] by Buyer

[1] FORM Complaint by Escrow Holder--For Interpleader [Code Civ. Proc. § 386]--Of Buyer and Seller After Notice of Rescission [Civ. Code § 1691] by Buyer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT IN
_____ [*names*],	)	INTERPLEADER
Defendants.	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, a corporation, organized and existing under the laws of California with its principal place of business in _____ County, California. Plaintiff is, and at all times herein mentioned was, an escrow agent duly licensed and authorized to act as an escrow agent by the Escrow Law.

2. Defendant _____ [*buyer who gave notice of recission*] is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence*]. Defendant _____ [*seller of property*] is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence*].

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants is making or has a claim to the _____ (property *or* funds *or* obligation) herein described that is conflicting with the claims of defendants herein and that may subject plaintiff to vexations litigation with respect to the _____ (property *or* funds *or* obligation).)]

4. On or about _____ [*date*], defendants entered into agreements in writing in the form of escrow instructions, under and pursuant to which they employed plaintiff as escrow agent for the purpose of completing andconsummating an agreement of purchase and sale that they, defendants, had previously entered into in writing covering certain real and personal property. The escrow instructions relating to the real property were executed by defendants and were and are designated and numbered Escrow No. _____; a true copy of this numbered escrow is attached to this complaint as Exhibit A and incorporated by reference. Escrow instructions in writing covering the personal property were executed by defendants, numbered Escrow No. _____, and a true copy of this numbered escrow is attached to this complaint as Exhibit B and incorporated by reference.

5. On the execution of the escrow instructions, plaintiff entered on its duties as escrow holder and escrow agent and pursuant to the instructions and the agreements therein contained received $_____ as a deposit in the escrow, $_____ of which was to be paid and used in accordance with the instructions contained in Escrow No. _____, and $_____ of which was to be paid and used in accordance with instructions in Escrow No. _____.

6. In accordance with the escrow instructions given it and particularly the instructions contained in Escrow No. _____, plaintiff paid out of funds on deposit with it and pursuant to the instructions the sum of $_____ to _____ [*name*], a real estate broker.

7. Plaintiff, in accordance with the instructions, obtained a title report and has incurred an indebtedness to _____ [*name of title company*] in the sum of $_____. Plaintiff incurred an indebtedness of $_____ for notarizing a deed, all in accordance with the escrow instructions, and likewise for advertising notice of sale of the personal property, for which plaintiff has incurred an indebtedness of $_____; _____ [*specify any other costs incurred in the escrow*]; defendants each agreed, in accordance with the instructions, to pay to plaintiff the sum of $_____ for plaintiff's services as escrow agent, and a total of $_____, for all other services to be rendered, making a total of $_____ payable to plaintiff from defendants, no part of which has been paid to it.

8. On _____ [*date*], defendant _____ [*name*] served on plaintiff what purports to be a notice of recission in writing, in which defendant purported to rescind his/her agreement of sale and purchase with defendant _____ [*name*], and demanded that plaintiff return to him/her the sum of $_____ which defendant had placed in escrow with plaintiff pursuant to the aforementioned escrow agreement.

9. Thereupon plaintiff notified defendant _____ [*name of nonrescinding defendant*] of receipt of the notice of rescission and defendant _____ [*name of nonrescinding defendant*] of receipt of the notice of rescission and defendant _____ [*name of nonrescinding defendant*] thereupon did notify plaintiff not to return the sum to _____ [*name of rescinding defendant*] or any part thereof. Defendant _____ [*name of nonrescinding defendant*] further notified plaintiff that he/she claimed the money held by plaintiff under the aforementioned escrow agreement.

10. Plaintiff does not know who is the owner of and entitled to receive the money and documents which it has on

deposit in Escrow No. _____; it makes no claim thereto or any part thereof, except for its charges, expenses, and costs, as alleged above and as set forth below, and it hereby offers to hold the money and documents subject to the proper order of this court or to pay such funds as it has on deposit, less its proper charges and expenses, into court for disposal as the court may direct.

11. By the terms of the escrow instructions, defendants agreed that if conflicting demands be made in connection with the escrow, the escrow agent shall have the absolute right to withhold and stop all proceedings; when conflicting demands were made as aforesaid on plaintiff, it elected to and did stop all proceedings and did withhold such funds and documents as it then had on hand, pending the settlement of the controversy between defendants.

12. Further, by the term of the escrow instructions, it is provided that if this plaintiff is required to respond to a legal summons or initiate a legal proceeding that defendants would pay all costs, expenses, and reasonable attorney's fees expended or incurred by plaintiff. [Defendants further agreed to save plaintiff harmless as escrow holder, under the terms of the escrow instructions, from all loss and expense, including such attorney's fees and court costs incurred by reason of any action that might in any way arise out of the escrow.] Plaintiff has incurred and will incur attorney's fees and costs and expenses in this action. Reasonable attorney's fees in this action in the sum of $_____ together with plaintiff's other expenses and costs in the sum of $_____ have been necessarily incurred. Further attorney's fees and costs and expenses will be incurred by plaintiff in this action; plaintiff requests leave to insert the same in this complaint when they are ascertained.

13. Both defendant _____ [*name*] and defendant _____ [*name*] threaten to commence legal action to recover the moneys held by plaintiff pursuant to the aforementioned escrow agreements. Unless both defendants are ordered to interplead and are restrained from instituting other actions against plaintiff for the recovery of the moneys held by plaintiff pursuant to the above mentioned escrow agreements, a multiplicity of suits will result and the moneys held by plaintiff will be unnecessarily reduced by attorney fees pursuant to the aforementioned escrow agreements.

WHEREFORE, plaintiff prays judgment as follows:

1. That defendants be ordered to interplead and litigate their respective rights to the property and moneys held pursuant to the escrow agreements;

2. That plaintiff be ordered to deposit with the Clerk of this Court all property and moneys held by plaintiff pursuant to the escrow agreements;

3. That plaintiff be discharged from any and all liability on account of the claims of both defendants;

4. For all costs and expenses incurred by plaintiff in opening said Escrow No. _____ and in following the escrow instructions given it by defendants;

5. That plaintiff be awarded its costs and reasonable attorney's fees to be determined by the court;

6. That each defendant be restrained from instituting an action against plaintiff for the recovery of any property and moneys heretofore held by plaintiff pursuant to the escrow agreements; and

7. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am _____ [*title of office, e.g.*, president] of _____ [*name of corporation*], the plaintiff in the above-entitled action, and am authorized to make this verification on the corporation's behalf. I have read the foregoing complaint and know the contents thereof. I am informed and believe that the matters stated herein are true, and on that ground I allege that the matters stated therein are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form is a complaint in interpleader by a corporate escrow holder when it has no interest in the money or other property deposited with it pursuant to an escrow agreement or escrow instructions and when the escrow cannot be closed due to the attempted rescission of a party to the escrow and conflicting claims of the parties to the funds and property held in escrow. For forms of complaint in interpleader by an escrow holder to determine the status of property held in escrow, generally, as well as to determine the rights of a seller and creditors in connection with the transfer of a liquor license, see *§§ 253.61* and *253.62*, respectively.

An interpleader action may be brought whenever conflicting claims are or may be made on an escrow holder for personal property or for the performance of an obligation to compel the other parties to interplead and litigate their claims. The order of substitution may be made, the action of interpleader may be maintained, and the applicant or interpleading party may be discharged from liability to all or any of the conflicting claimaints, although their titles or claims have no common origin, or are not identical but are adverse to and independent of one another [*Code Civ. Proc. § 386(a)*].

[3] Deposit of Amount in Dispute

This form states that plaintiff will hold the property in question to the order of the court to be deposited with the court when ordered by the court. A plaintiff or cross complainant may deposit with the court any amount in dispute without receiving a prior court order and, by depositing the amount in dispute, any interest on this amount ceases to accrue after the date of the deposit [*Code Civ. Proc. § 386(c)*].

[4] Allowance of Attorney's Fees

A party to an action under *Code Civ. Proc. § 386* may insert in his or her motion, petition, complaint, or cross complaint a request for allowance of costs and reasonable attorney's fees incurred in the action [*Code Civ. Proc. § 386.6(a)*]. A party will not be denied attorney's fees for the reason that he or she is an attorney, appeared in pro se, and performed his or her own legal services [*Code Civ. Proc. § 386.6(b)*].

[5] Verification

A complaint in interpleader is not required to be verified, but cross-complaints in interpleader must be verified [*Code Civ. Proc. § 386(a)*]. Special requirements exist, however, if a preliminary injunction or a temporary restraining order, or both, is sought. In that case, facts alleged in a *verified* complaint or accompanying affidavit must show (1) that sufficient grounds exist for the issuance of the injunction, or (2) in the case of a temporary restraining order, that great or irreparable injury will result to the applicant before the matter can be heard on notice [*Code Civ. Proc. § 527(a)*]. Verification of the complaint requires the defendant to file a verified answer in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* . For additional discussion of the verification of a complaint in interpleader, see Ch. 314, *Interpleader* .

[6] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*]. When title or right to possession is to be tried, or permanent injunctive relief issought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

In limited civil cases, the first page of the first paper must state that it is a limited civil case and whether the amount demanded exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[7] State Statutes

Actions in interpleader. *Code Civ. Proc. § 386 et seq.*

Allowance of attorney's fees and costs of action in interpleader pursuant to *Code Civ. Proc. § 386. Code Civ. Proc. § 386.6*

Regulation of escrow agents under Escrow Law. *Fin. Code § 17000 et seq.*

"Internet escrow agent" defined. *Fin. Code § 17004.5*

Licensing of escrow holder by Corporations Commissioner to engage in business of being escrow holder. *Fin. Code § 17200*

[8] Decisions

Seller is liable for attorney's fees and damages when he or she renders closure impossible within prescribed time period. *Altadena Escrow Corp. v. Beebe (1960) 181 Cal. App. 2d 743, 745-746, 5 Cal. Rptr. 530*

Attorney's fees are not collectible by escrow holder when not arising as result of escrow agreement. *Francis v. Eisenmayer (1959) 171 Cal. App. 2d 221, 227, 340 P.2d 54*

No right to recover attorney's fees unless procedure set forth in *Code Civ. Proc. § 386* or *386.5* is followed. *Phillips v. Barton (1962) 207 Cal. App. 2d 488, 495-496, 24 Cal. Rptr. 527*

[9] Cross References

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For additional forms of complaints in interpleader, for a form of order to deposit moneys with the clerk of the court, forms for use in law and motion proceedings to discharge an interpleading plaintiff, and forms of temporary restraining order and order to show cause enjoining the prosecution of actions to recover money deposited with the court clerk, see Ch. 314, *Interpleader*

For alternative forms of prayers and verification, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively

For memoranda pertaining to escrows, see California Points and Authorities, Ch. 101, *Escrows* (Matthew Bender)

For memoranda pertaining to interpleader, see California Points and Authorities, Ch. 123, *Interpleader* (Matthew Bender)

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21-253 California Forms of Pleading and Practice--Annotated § 253.61

§ 253.61 Complaint by Escrow Holder--For Interpleader [Code Civ. Proc. § 386]--To Determine Status of Property Held in Escrow as Between Buyer and Seller

[1] FORM Complaint by Escrow Holder--For Interpleader [Code Civ. Proc. § 386]--To Determine Status of Property Held in Escrow as Between Buyer and Seller

[*Caption. See § 253.60[1].*]

1. [*Capacity of plaintiff as corporate escrow holder. See § 253.60[1], Paragraph 1.*]

2. [*Capacity, residence, and agency of defendants. See § 253.60[1], Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 253.60[1], Paragraph 3.*]

4. On _____ [*date*], defendant in interpleader, _____ [*name*], executed to plaintiff certain seller's escrow instructions, a true copy of which is attached to this complaint as Exhibit A and incorporated by reference.

5. On the same date, defendant in interpleader, _____ [*name*], executed buyer's escrow instructions to plaintiff, and a true copy of these instructions is attached to this complaint as Exhibit B and incorporated by reference.

6. By the terms of both the seller's and buyer's escrow instructions, it is provided as follows: _____ [*set out instructions mentioning right to interplead, e.g.*, if conflicting demands are made in connection with this escrow, you shall have absolute right either to withhold and stop all proceedings, or to file suit in interpleader and obtain an order from the court requiring the parties to interplead and liquidate their several claims and rights among themselves. *Continue with agreement to pay costs, attorney's fees, etc.*]

7. On or about _____ [*date*], _____ [*name*], defendant in interpleader, gave notice in writing to plaintiff countermanding previous instructions given to plaintiff and demanding that plaintiff return to

him/her the _____ [*set out property demanded to be returned and previously placed in escrow*].

8. Thereafter, defendant in interpleader, _____ [*name of other party to escrow*], made demand that the escrow instructions be followed and that the property not be returned to defendant _____ [*name*].

9. There have been conflicting demands made on plaintiff in connection with the escrow. _____ [*Set out content of demands made by each defendant*]. Plaintiff is ignorant of the respective rights of defendants; plaintiff has no title to and claims no interest in any of the _____ [documents *or* money *or both*] which have been deposited in the escrow and is indifferent with respect to which claimant is entitled thereto. Plaintiff does not know which of these claimants is entitled thereto and cannot safely determine for itself which claim is right and lawful; plaintiff is ready and willing to deliver the _____ [documents *or* money *or both*] which it holds in the escrow to such persons as the court shall direct.

10. Plaintiff has in its possession _____ [*set out what was delivered to the escrow holder pursuant to the escrow agreement, e.g.*, a grant deed signed by _____ (*name*) to _____ (*name*)]. It also holds in the escrow and has in its possession the following property: _____ [*set out other documents in possession of escrow holder and any money delivered to it pursuant to the escrow agreement*].

11. Plaintiff has incurred the following expenses in connection with its duties as escrow agent, namely: _____ [*set out expenses. See § 253.60[1], Paragraph 7*].

12. It has been necessary for plaintiff to employ attorneys to bring and prosecute this action in interpleader. Plaintiff has employed _____ [*names*], attorneys at law, to bring and prosecute this action. Plaintiff has incurred attorney's fees for such services in the sum of $_____. This sum is a fair and reasonable amount for the services rendered and to be rendered by the attorneys.

13. Both defendant _____ [*name*] and defendant _____ [*name*] threaten to initiate legal action to enforce their conflicting claims to the property held in escrow by plaintiff. Unless both defendants are ordered to interplead and are restrained from instituting other actions against plaintiff for the enforcement of their claims to the property, a multiplicity of suits will result.

WHEREFORE, plaintiff prays judgment as follows:

1. That defendants be ordered to interplead and litigate their respective rights to the property and moneys held pursuant to the escrow agreement;

2. That plaintiff be ordered to deposit with the clerk of this court all property and moneys held by plaintiff pursuant to the escrow agreements;

3. That plaintiff be discharged from any and all liability on account of the claims of both defendants;

4. For all costs and expenses incurred by plaintiff in its duties as escrow agent pursuant to the escrow agreements;

5. That plaintiff be awarded its costs and reasonable attorney's fees to be determined by the court;

6. That each defendant be restrained from instituting action against plaintiff for the recovery of any property and moneys heretofore held by plaintiff pursuant to the escrow agreements; and

7. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 253.60[1].*]

[2] Use of Form

This form may be used as a complaint in interpleader by a corporate escrow holder when it has no interest in the money or other property on deposit in escrow and there are conflicting demands as to the status of the property placed on the escrow holder by both the buyer and the seller. The action is brought pursuant to *Code Civ. Proc. § 386* and with modification may be used as a verified cross complaint in interpleader.

[3] Cross References

See *§ 253.60*

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21-253 California Forms of Pleading and Practice--Annotated § 253.62

§ 253.62 Complaint by Escrow Holder--For Interpleader [Code Civ. Proc. § 386]--By Attorney Escrow Holder of Liquor License Transfer [Bus. & Prof. Code § 24074]--Against Seller and Creditors

[1] FORM Complaint by Escrow Holder--For Interpleader [Code Civ. Proc. § 386]--By Attorney Escrow Holder of Liquor License Transfer [Bus. & Prof. Code § 24074]--Against Seller and Creditors

[*Caption. See § 253.60[1].*]

1. Plaintiff is, and at all times herein mentioned was, an attorney at law, duly licensed to practice in the state of California.

2. On or about _____ [*date*], defendant _____ [*name of seller*] was the owner of certain business operated under the firm name and style of _____ [*name of business*], located at _____ [*full address of business*], and was also the owner and holder of an on-sale general liquor license, number _____, issued to defendant under the provisions of the Alcoholic Beverage Control Act of the State of California.

3. On or about _____ [*date*], defendant _____ [*name of seller*] agreed to sell and transfer his/her business and general on-sale liquor license to _____ [*name of buyer*], and in pursuance of such agreement, a Notice of Intended Sale and Transfer of Liquor License was recorded on _____ [*date*], in the Official Records of the County of _____, Book _____, page _____.

4. Plaintiff is the escrow holder for the intended sale and transfer of the liquor license, under the provisions of *Business and Professions Code Section 24074*, and as such escrow holder, has heretofore received the sum of $_____ as the net purchase price of the business and liquor license.

5. Defendant _____ [*name of creditor, e.g.,* Department of Industrial Relations of the State of California, Division of Labor Law Enforcement] asserts a claim to the above funds, which claim is based on an

indebtedness in the sum of $_____ [from defendant _____ (*name of seller*) _____ (*name of employee*) for wages due].

6. The following defendants, as creditors of defendant _____ [*name of seller*], filed claims against this defendant on the dates set forth herein, for the amounts set forth opposite their respective names: _____ [*list creditors, their full addresses, claims, and dates of filing*].

[7. *Fictitious name allegation, if appropriate. See § 253.60[1], Paragraph 3.*]

8. Plaintiff is ready and willing to deliver the sum held in escrow to the person or persons entitled to the same, but cannot determine, without hazard to himself/herself, to which of the defendants the money belongs; plaintiff is indifferent with respect to which claimant is entitled thereto, and is willing, and hereby offers, to deposit the same in court, or to deliver the same to such persons as the court may direct.

9. This action is brought by plaintiff without any collusion with defendants, or any of them.

10. Plaintiff has expended money in connection with the escrow for the transfer of the liquor license consisting of the following: _____ [*itemize reimbursable costs incurred in escrow; specify total*]. Plaintiff holds presently, as escrow holder, the sum of $_____, less the sum of $_____, and has no beneficial interest therein or claim to the moneys exceeding his/her costs.

WHEREFORE, plaintiff prays judgment as follows:

1. That defendants be restrained from taking any proceeding against plaintiff in relation to the sum of $_____;

2. That the rights of defendants in and to the sum of $_____ be determined; that defendants be required to interplead together concerning their claims to the sum of $_____;

3. That some person be authorized to receive this money pending such litigation;

4. That plaintiff be discharged from any and all liability to any of the defendants on delivery of the sum of $_____ to the person authorized by the court to receive the same pending litigation;

5. For all costs and expenses incurred in connection with the escrow for the transfer of said liquor license;

6. That plaintiff have judgment for his/her costs of suit out of the sum of $_____, and be adjudged free of all costs in this action; and

7. For such other and further relief as the court may deem proper.
Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form may be used as a complaint in interpleader by an attorney acting as an escrow agent in the transfer of a liquor license pursuant to *Bus. & Prof. Code § 24074* when there are claims of employees or creditors of the seller that have been placed against the funds in escrow and when the seller disputes these claims, or the funds are not sufficient to pay the claims.

[3] Priority of Employee Claims Against Escrow Funds

A first priority is granted by *Bus. & Prof. Code § 24074* to specified claims for taxes and for wages, salaries, or fringe benefits of employees of a seller or transferor of an alcoholic beverage license in the distribution of the consideration exchanged for the license when the consideration is not sufficient to pay such claims of the creditors of the seller or transferor in full. The statute specifies that the transfer application must be accompanied by a description of the entire consideration.

[4] Notice to Creditors

Bus. & Prof. Code § 24074 also directs the escrow holder in an alcoholic beverage license transfer involving a purchase price or consideration to notify the transferor's bona fide creditors of the escrow transfer so that they may file claims with the escrow holder in instances when the transferor disputes the claims. Landlords are included in the classification of secured creditors for purposes of collection of past due rent [*Bus. & Prof. Code § 24074*].

[5] State Statutes

Establishment and procedure of escrows for transfer of liquor license. *Bus. & Prof. Code §§ 24074-24074.4*

Allowance of attorney's fees and costs of action in interpleader pursuant to *Code Civ. Proc. § 386. Code Civ. Proc. § 386.6(a)*

Allowance of attorney's fees in interpleader action pursuant to *Code Civ. Proc. § 386* when party is attorney representing self. *Code Civ. Proc. § 386.6(b)*

Attorney is exempt from licensing and regulations of Escrow Law if licensed to practice law in California, has bona

fide client relationship with principal in real estate or personal property transaction, and is not actively engaged in conducting business of escrow agency. *Fin. Code § 17006(b)*

[6] Decisions

Interpleader action by attorney escrow holder of liquor license transfer against seller and creditors of seller. *Golden v. State of California (1955) 133 Cal. App. 2d 640, 285 P.2d 49*

Bus. & Prof. Code § 24074, relating to establishment of escrow for transfer of liquor license, represents mandatory and exclusive scheme for payment of creditors of liquor license transferors, giving creditors who comply with section priority over those who employ any form of levy on proceeds. *Grover Escrow Corp. v. Gole (1969) 71 Cal. 2d 61, 42, 77 Cal. Rptr. 21, 453 P.2d 461*

[7] Cross References

See also *§ 253.60*

For discussion and forms for use in proceedings and actions involving alcoholic beverage licenses, see Ch. 18, *Alcoholic Beverage Licenses*

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21-253 California Forms of Pleading and Practice--Annotated § 253.63

§ 253.63 Notice of Motion for Order Dismissing Defendant Escrow Holder as Mere Stakeholder [Code Civ. Proc. § 386.5] and for Costs and Attorney's Fees [Code Civ. Proc. § 386.6(a)]

[1] FORM Notice of Motion for Order Dismissing Defendant Escrow Holder as Mere Stakeholder [Code Civ. Proc. § 386.5] and for Costs and Attorney's Fees [Code Civ. Proc. § 386.6(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER FOR DISMISSAL OF DEFENDANT
vs.	)	Date: _____
_____ [*names*],	)	Time: _____
Defendants.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

To plaintiff _____ [*name*] and to _____ [*name*], his/her attorney of record:

To defendant _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ [Department *or* Division] _____ of] this court, located at _____ [*address*], _____ [*city*], California,

_____ [*name*] defendant, will, and hereby does, move for an order to discharge him/her from liability and to dismiss him/her from this action on his/her depositing with the clerk of this court the amount in dispute herein, namely the sum of $_____, and to grant defendant his/her costs and attorney's fees as provided by statute. The motion will be made on the grounds that the only relief sought in this action against defendant _____ [*name of moving party*] is the payment of the sum of $_____ which sum plaintiff _____ [*name*] has alleged in his/her complaint herein and defendant _____ [*name of adverse claimant*] claims has been wrongfully withheld from them, and that defendant _____ [*name of moving party*] is a mere stakeholder with no interest in this sum or in any portion thereof.

The motion will be based on this notice of motion, on the declaration of defendant _____ [*name*] and the supporting memorandum served and filed herewith, on the papers and records filed herein, and on such oral and documentary evidence as may be presented at the hearing of this motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party*]

[2] Use of Form

This form is a notice of motion to be used by a defendant escrow holder who is being sued by one of the parties to the escrow. With this form, the defendant escrow holder may apply to the court for an order discharging him or her from liability, and dismissing him or her from the action on the deposit. The form should specify the amount that is in dispute and is being held in escrow, and it should be filed with the clerk of the court.

This proceeding is available if the only relief that is sought against the defendant escrow holder is the payment of the amount that is alleged to be wrongfully withheld and to which conflicting demands have been made on the defendant by parties to the action [*see Code Civ. Proc. § 386.5*]. A defendant who makes this application must accompany the form with either an affidavit (or a declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) stating that the defendant is a mere stakeholder with no interest in the amount or any portion of the amount and that conflicting demands have been made on him or her for the amount in dispute by parties to the action [*see § 253.64*].

For a form of order dismissing the defendant as a mere stakeholder and for costs and attorney's fees, see *§ 253.65*.

CAUTION:
A supporting memorandum must be filed and a copy served with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*; *see also Cal. Rules of Ct., Rule 3.1114(a)* (motions for which memorandum is not required); for discussion and forms, see Ch. 417, *Points and Authorities*].

[3] State Statutes

Application for order to dismiss defendant from action when only relief sought is payment of stated amount of money alleged to be wrongfully withheld. *Code Civ. Proc. § 386.5*

Costs and attorney's fees as allowed in interpleader action and action to dismiss defendant as mere stakeholder. *Code Civ. Proc. § 386.6*

[4] Cross References

See *§ 253.60*

For memoranda pertaining to interpleader by escrow holders, see California Points and Authorities, Ch. 108, *Escrows* (Matthew Bender)

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21-253 California Forms of Pleading and Practice--Annotated § 253.64

§ 253.64 Declaration in Support of Motion for Order to Dismiss Defendant Escrow Holder as Mere Stakeholder [Code Civ. Proc. § 386.5] and for Costs and Attorney's Fees [Code Civ. Proc. § 386.6(a)]

[1] FORM Declaration in Support of Motion for Order to Dismiss Defendant Escrow Holder as Mere Stakeholder [Code Civ. Proc. § 386.5] and for Costs and Attorney's Fees [Code Civ. Proc. § 386.6(a)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF MOTION FOR DISMISSAL OF
_____ [*names*],	)	DEFENDANT AS MERE STAKEHOLDER
Defendants.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

I, _____ [*name of defendant stakeholder*], declare:

I am one of the defendants to the action herein. The only relief sought against me in this action is for the payment of a stated amount of money, namely, the sum of $_____, which is held in escrow by me as an escrow holder at the request of the parties to this action. Plaintiff _____ [*name*] in his/her complaint on file herein has alleged that this sum has been wrongfully withheld from him/her by me. Defendant _____ [

name] has claimed [in writing received by me on or about _____ [*date*], a copy of which demand is attached to this declaration as Exhibit A and made a part of this declaration, *or state other manner in which defendant claimant has demanded sum*] that his/her sum has been wrongfully withheld from him/her by me in that _____ [*state basis for claim*].

I am a mere stakeholder as escrow holder with no interest in this sum of money, or in any portion thereof. These claims are made without any collusion and I am willing and ready to deposit the sum with the clerk of the court to await disposition of these claims to the sum by order of this court.

As a result of this action I have incurred costs and attorney's fees [totaling $_____].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of declaration is for use in support of a defendant escrow holder's application pursuant to *Code Civ. Proc. § 386.5* for an order dismissing the escrow holder from an action on the grounds that the only relief sought is the payment of a stated amount of money that is alleged to be wrongfully withheld and to which conflicting demands have been made on the defendant escrow holder by the parties to the escrow and action.

For a notice of motion to dismiss a defendant escrow holder as a mere stakeholder and an order granting such dismissal along with costs and attorney's fees in the action, see *§§ 253.63* and *253.65*, respectively.

[3] Cross References

See *§ 253.63*

For alternative forms of declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

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21-253 California Forms of Pleading and Practice--Annotated § 253.65

§ 253.65 Order Dismissing Defendant Escrow Holder From Action as Mere Stakeholder [Code Civ. Proc. § 386.5] and for Costs and Attorney's Fees [Code Civ. Proc. § 386.6(a)]

[1] FORM Order Dismissing Defendant Escrow Holder From Action as Mere Stakeholder [Code Civ. Proc. § 386.5] and for Costs and Attorney's Fees [Code Civ. Proc. § 386.6(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	ORDER FOR DISMISSAL OF DEFENDANT
Defendants.	)	
	)	
	)	

The motion of defendant _____ [*name*] for the order hereinafter made came on regularly for hearing by the court on this date. Plaintiff _____ [*name*] appeared by counsel _____ [*name*]; defendant _____ [*name*] appeared by counsel _____ [*name*]; and defendant _____ [*name*] appeared by counsel _____ [*name*].

Upon proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be and it hereby is granted and that defendant _____ [*name*] be and he/she hereby is discharged from all liability in this action to either plaintiff _____ [*name*] or defendant _____ [*name*] and is dismissed from this action on his/her deposit with the clerk of this

court the sum of $_____, which is the sum in dispute in this action and held by defendant _____ [*name*] in escrow as escrow holder.

IT IS ALSO ORDERED that defendant _____ [*name*] be granted the sum of $_____ for costs and attorney's fees to be deducted from the sum of $_____ to be deposited with the clerk of this court.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is an order dismissing a defendant escrow holder from an action on the ground that the escrow holder is a mere stakeholder [*Code Civ. Proc. § 386.5*] and granting the defendant costs and attorney's fees incurred in the action [*Code Civ. Proc. § 386.6*].

For a notice of motion to dimiss a defendant escrow holder as a mere stakeholder and a declaration in support of such motion, see *§§ 253.63* and *253.64*, respectively.

[3] Cross References

See *§ 253.63*

For an alternative form of order of discharge of a defendant stakeholder, see Ch. 314, *Interpleader*

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21-253 California Forms of Pleading and Practice--Annotated § 253.66

§ 253.66 Complaint for Damages for Conversion [Civ. Code § 3336]--Action by Buyer Against Escrow Holder and Seller--Misappropriation of Funds Held in Escrow on Rescinded Sale [Civ. Code § 1692]

[1] FORM Complaint for Damages for Conversion [Civ. Code § 3336]--Action by Buyer Against Escrow Holder and Seller--Misappropriation of Funds Held in Escrow on Rescinded Sale [Civ. Code § 1692]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR CONVER-
_____ [*name(s)*],	)	SION
Defendants.	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. Defendant(s) _____ [*names*] are, and at all times herein mentioned were, residents of _____ County, California [*or allege other capacity and residence*].

[2. *Fictitious name allegation, if appropriate. See § 253.60[1], Paragraph 3.*]

3. On or about _____ [*date*], plaintiff entered into negotiations with [defendant] _____ [*name of seller*] for the purchase from him/her by plaintiff of certain real property located in _____ County, California, and described as follows: _____ [*give legal description of*

property, including street address if applicable].

4. On or about _____ [*date*], at the request of [defendant] _____ [*name of seller*], plaintiff accompanied _____ [this defendant *or* _____ [*name of seller*]] to the office of defendant _____ [*name of escrow holder*] a check in the sum of $_____ to apply to the purchase price of the above-described real property[; a photostatic copy of this check is attached to this complaint as Exhibit A and made a part of this complaint].

5. [Plaintiff is informed and believes, and thereon alleges that] [D]efendant _____ [*escrow holder*], well knowing that the check had been deposited by plaintiff to apply to the purchase price of the above-described real property and for no other purpose, did wrongfully endorse and cash this check on _____ [*date*], and did wrongfully and unlawfully convert the proceeds thereof to his/her own use and benefit [and to the use and benefit of defendant _____ (*name of seller*)].

[6. At all times mentioned herein, defendant _____ (*escrow holder*) was authorized and empowered by defendant _____ (*name of seller*) to act as the agent and employee of defendant _____ (*name of seller*), and each and all of the things herein alleged to have been done by defendant _____ (*escrow holder*) were done in the capacity of and as agent for defendant _____ (*name of seller*), and within the scope of such agency and employment.]

7. [Defendant] _____ [*Name of seller*] was not able to deliver title to plaintiff as provided for by the "Agreement to Purchase Real Property." Plaintiff and [defendant] _____ [*name of seller*] have mutually rescinded the agreement of purchase and sale by _____ [*state means or document of rescission*] [Both] [D]efendant(s) [_____ (*name of escrow holder*)] _____ [has *or* have] failed and refuse to return and pay to plaintiff herein the whole or any part of the sum of $_____ so deposited, delivered, paid into escrow by plaintiff.

8. Plaintiff has demanded payment of the sum of $_____ from [both] defendant(s) [_____ (*name of seller*)], but no part of this sum has been paid. There is now due, owing, and unpaid from defendant(s) [_____ (*name of seller*)] [, and each of them,] to plaintiff herein the sum of $_____, together with interest thereon at the legal rate per annum from and after _____ [*date*].

[9. *Set forth allegations showing the fair compensation for any time and money expended (other than attorney's fees unless provided for by the agreement) in the pursuit of the converted moneys.*]

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

1. For general damages in the sum of $_____;

2. For interest on this sum at the legal rate per annum from _____ [*date*];

3. For special damages in the sum of $_____ [*to be included when plaintiff has alleged expenditures of time and money in pursuit of the converted moneys*];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 253.60[1].*]

[2] Use of Form

This form is a complaint to initiate an action for damages for the conversion of escrowed property to be brought by a seller against the escrow holder and seller, if appropriate, when it is alleged that there has been misappropriation of funds placed in escrow and when the buyer has attempted to rescind the contract of sale [*see Civ. Code § 1692*].

[3] Wrongful Conversion of Personalty

The detriment caused by the wrongful conversion of personal property is presumed to be (1) the value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable, and proximate result of the wrongful act complained of and which a proper degree of prudence on his or her part would not have averted; and (2) a fair compensation for the time and money properly expended in pursuit of the property [*Civ. Code § 3336*;*see* Ch. 150, *Conversion*].

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

In limited civil cases, the first page of the first paper must state that it is a limited civil case and whether the amount demanded exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[5] Venue

For purposes of venue, conversion is not considered an injury to person or personal property as provided in *Code Civ. Proc. § 395(a)*, which would permit trial in the county where the conversion took place, because such an injury is limited to physical or corporeal injury [*Spangenberg v. Spangenberg (1932) 123 Cal. App. 387, 391, 11 P.2d 408]* . Therefore, the county in which defendant resides is the proper county for the trial of an action for conversion [*see Code Civ. Proc. § 395(a)*; *Haurat v. Superior Court (1966) 241 Cal. App. 2d 330, 333, 50 Cal. Rptr. 520]* .

[6] State Statutes

Relief based on rescission of contract. *Civ. Code § 1692*

Exemplary or punitive damages. *Civ. Code § 3294*

Funds held in escrow must be deposited in account separate and distinct from that of escrow holder. *Fin. Code § 17409(a)*

Licensee engaged in business of receiving both escrows for deposit or delivery of type listed under *Fin. Code § 17312(c)* (requiring membership in Fidelity Corporation) and escrows not listed there must maintain separate escrow accounts for both types of escrow business. *Fin. Code § 17409(b)*

Only funds actually held by escrow holder for clients are permitted to be designated "trust funds" or "escrow accounts." *Fin. Code § 17411*

[7] Decisions

Disposal of money in escrow by escrow holder without compliance with escrow instructions entitles owner of money to recover damages from escrow holder. *Kelly v. Steinberg (1957) 148 Cal. App. 2d 211, 217, 306 P.2d 955*

Value of property converted with interest is appropriate measure of damages in conversion action. *Myers v. Stephens (1965) 233 Cal. App. 2d 104, 116, 43 Cal. Rptr. 420 , dictum*

Propriety of awarding plaintiff seven percent interest on value of property converted by defendant. *Murphy v. Wilson (1957) 153 Cal. App. 2d 132, 135-136, 314 P.2d 507*

Sufficiency of alleging embezzlement constituting conversion on information and belief. *Buxton v. International Indemnity Co. (1920) 47 Cal. App. 583, 590-591, 191 P. 84*

Liability of escrow holder for delivering property prior to performance of condition of escrow. *Trask v. Garza (1921) 51 Cal. App. 739, 743, 197 P. 807*

Liability of escrow holder for returning property held in escrow agreement without consent of other party. *Karras v. Title Ins. & Guar. Co. (1953) 118 Cal. App. 2d 659, 665, 258 P.2d 866*

[8] Cross References

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For a discussion and forms of complaint in actions for conversion, see Ch. 150, *Conversion*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively

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21-253 California Forms of Pleading and Practice--Annotated § 253.67

§ 253.67 Complaint by Buyer Against Seller--For Specific Performance [Civ. Code § 3384] of Escrow Agreement and Damages [Civ. Code § 3306, 3307] on Failure of Seller to Comply With Escrow Instructions

[1] FORM Complaint by Buyer Against Seller--For Specific Performance [Civ. Code § 3384] of Escrow Agreement and Damages [Civ. Code §§ 3306, 3307] on Failure of Seller to Comply With Escrow Instructions

[*Caption. See § 253.66[1].*]

1. [*Capacity and residence of defendant. See § 253.66, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 253.60, Paragraph 3.*]

3. _____ [*Allege capacity of escrow holder, e.g.,* _____ (*name*) is, and at all times mentioned herein was, a national banking corporation with its principal office and place of business in the City of _____, _____ County, California, and engaged in the general banking business therein, including the handling of escrows].

4. Defendant is and at all times mentioned herein was, the owner of and in possession of that certain real property, together with all the improvements thereon, situated in the City of _____, _____ County, California, particularly described as follows: _____ [*give legal description of property, including street address if applicable*].

5. On _____ [*date*], plaintiff offered in writing to purchase the property for the sum of $_____, and the offer was, on _____ [*date*], accepted in writing by defendant. A copy of the offer and acceptance is attached to this complaint as Exhibit A and incorporated by reference.

6. On _____ [*date*], plaintiff and defendant designated _____ [*name*] as their escrow holder and made and constituted it their agent and the agent of each of them to do and perform the things and acts required of it by the provisions of certain escrow instructions to carry out the terms and conditions of their agreement.

These escrow instructions were signed and executed by plaintiff and defendant and delivered to _____ [*name*], as escrow agent, on _____ [*date*]. A copy of the escrow instructions is attached to this complaint as Exhibit B and incorporated by reference.

7. The above-mentioned written offer and acceptance, Exhibit A, and escrow instructions, Exhibit B, constitute the whole agreement between plaintiff and defendant.

8. By the terms of the agreement, plaintiff agreed to hand _____ [*name of escrow holder*] the sum of $_____ cash, and accept title to the property [subject to an encumbrance of record in the amount of $_____]. Plaintiff transmitted to _____ [*name of escrow holder*] on _____ [*date*], the sum of $_____. In all other particulars plaintiff has complied with the obligations required of him/her under the terms of the agreement.

9. Defendant has failed, neglected, and refused _____ [*allege breach of agreement to convey real property, e.g.*, to cause instruments to be filed for record entitling the escrow holder to procure a standard coverage policy of title insurance, showing title vested in plaintiff free of all taxes, except general and special taxes for the year of _____ [*date*], as proved in the agreement; has further failed, neglected, and refused to cause the real property to be conveyed to plaintiff; and has failed to furnish a report from a pest control company, all as required by the terms of the agreement]. Defendant continues to and does now fail and refuse to fulfill any of the terms of his/her contract, or to accept any payments thereunder, and has wholly repudiated and continues to wholly repudiate the contract to sell and convey the real property to plaintiff.

10. The consideration named in the agreement of purchase and sale as the total purchase price to be paid by plaintiff for the real property was at the time of the execution of the agreement the fair and reasonable value of the property and the agreement was, as to the defendant, just and reasonable.

11. As a proximate result of defendant's failure to comply with the terms of the escrow agreement as hereinabove alleged, plaintiff has sustained damages in the sum of $_____ as follows: _____ [*state, e.g., the reasonable rental value of the property*]. Unless the court orders specific performance of the contract for the sale of real property, as constituted by Exhibit A and Exhibit B, plaintiff will be damaged in the further sum of $_____ as follows: _____ [*state, e.g., the reasonable rental value of the property*].

12. The agreement provides, among other things, that if action is instituted on the agreement, attorney's fees as fixed by the court would be awarded to the party who prevailed in the action. It has been necessary for plaintiff to retain _____ [*name*], a duly licensed and practicing attorney of _____ County, California, to commence and maintain this action, and plaintiff has incurred attorney's fees in the prosecution of this action in the sum of $_____. [*For alternate form of allegations for attorney's fees, see § 253.60[1], Paragraph 12*].

WHEREFORE, plaintiff prays judgment as follows:

1. That defendant specifically perform his/her agreement of sale, and that he/she make, execute, and deliver to plaintiff his/her grant deed to the real property and a good and sufficient bill of sale to the personal property free and clear of all encumbrances, except a deed of trust in the amount of $_____ as provided in the agreement between the parties;

2. For the sum of $_____ in damages sustained by plaintiff in the event specific performance of the agreement cannot be had;

3. Whether or not specific performance is granted, damages in the further sum of $_____;

4. For attorney's fees in the sum of $_____;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.
Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 253.62[1].*]

[2] Use of Form

This form is a complaint to be used in an action brought by the buyer against the seller for specific performance of a contract for the sale of land and of an escrow agreement and for damages on the failure of the seller to comply with the contract and escrow instructions. The specific performance of a land sale contract may be compelled pursuant to *Civ. Code § 3384* [*see also Civ. Code § 3390*].

[3] Measure of Relief

When specific performance is not granted, the measure of damages resulting from the breach of an agreement to convey an estate in real property is deemed to be the price paid and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon. Damages may also include the difference between the price agreed to be paid and the value of the estate agreed to be conveyed at the time of the breach, the expenses properly incurred in preparing to enter on the land, consequential damages according to proof, and interest [*Civ. Code § 3306*]. The detriment caused by the breach of an agreement to purchase an estate in real property is the excess, if any, of the amount that would have been due to the seller, under the contract, over the value of the property to him or her [*Civ. Code § 3307*].

[4] State Statutes

Measure of damages for breach of land sale contracts. *Civ. Code §§ 3306, 3307*

Specific performance of contracts. *Civ. Code § 3384 et seq.*

[5] Decisions

Buyer was not entitled to specific performance when seller properly canceled escrow for buyer's failure of performance without performing seller's conditions because seller's conditions were not concurrent conditions to buyer's conditions. *Fogarty v. Saathoff (1982) 128 Cal. App. 3d 780, 785-787, 180 Cal. Rptr. 484*

Escrow instructions together with executory agreement considered to be total agreement of parties. *Katemis v. Westerlind (1953) 120 Cal. App. 2d 537, 542, 261 P.2d 553*

[6] Cross References

For discussion of specific performance generally and with respect to land sale contracts and for a general form of complaint for specific performance, see Ch. 528, *Specific Performance*

For discussion of specific performance of land sale contracts and for a form of complaint for specific performance of a land sale contract, see Ch. 569, *Vendor and Purchaser of Real Property*

For memoranda in support of and in opposition to motions for specific performance of land sale contracts and escrow agreements, see California Points and Authorities, Ch. 101, *Escrows* (Matthew Bender)

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21-253 California Forms of Pleading and Practice--Annotated § 253.68

§ 253.68 Complaint by Seller Against Escrow Holder and Buyer--For Declaratory Relief [Code Civ. Proc. § 1060]--That Seller Is Entitled to Return of Corporate Stock Held in Escrow on Failure of Buyer to Perform

[1] FORM Complaint by Seller Against Escrow Holder and Buyer--For Declaratory Relief [Code Civ. Proc. § 1060]--That Seller Is Entitled to Return of Corporate Stock Held in Escrow on Failure of Buyer to Perform

[*Caption. See § 253.66[1].*]

1. [*Capacity and residence of parties. See § 253.66[1], Paragraph 1.*]

2. _____ [*Allege capacity of escrow holder, e.g.*, Defendant _____ is, and at all times mentioned herein was, a national banking corporation with its principal office and place of business in the _____ [*city*], _____ County, California, and engaged in the general banking business therein, including the handling of escrows].

[3. *Fictitious name allegation, if appropriate. See § 253.60[1], Paragraph 3.*]

4. On _____ [*date*], plaintiff was the owner and holder of all of the issued and outstanding certificates of the capital stock of _____ [*corporate name*], a corporation chartered and organized under the laws of the state of _____ [*specify state*] [and authorized to transact business in California].

5. On _____ [*date*], plaintiff entered into an agreement in writing with defendant _____ [*name*], whereby plaintiff agreed to sell and this defendant agreed to purchase all the certificates of the capital stock of _____ [*name of corporation*] owned and held by plaintiff. Defendant agreed to pay to plaintiff for the certificates of capital stock the sum of $_____ in cash. A copy of the agreement between plaintiff and the defendant is attached to this complaint as Exhibit A and incorporated by reference.

6. The agreement further provided that an escrow should be opened by the parties with defendant _____ [*escrow agent*] and for the deposit therein of the certificates of capital stock by plaintiff and for

the deposit therein of the sum of $_____ in cash by defendant _____ [*purchaser*]. The agreement also provided that the closing date of the escrow should be _____ [*date*].

7. On _____ [*date*], plaintiff and defendant _____ [*purchaser*] executed escrow instructions to defendant _____ [*escrow agent*] for the purpose of carrying into effect the agreement of sale and purchase of the certificates of capital stock mentioned and described in this complaint. These instructions provided that plaintiff should deposit his/her certificates of capital stock, endorsed in blank, in escrow with defendant _____ [*escrow agent*]. A copy of the escrow instructions is attached to this complaint as Exhibit B and made a part of this complaint.

8. Within the time provided in the agreement of sale and purchase, plaintiff deposited in the escrow with defendant _____ [*escrow agent*] all stock certificates owned by plaintiff and referred to in Exhibit A.

9. Defendant _____ [*purchaser*] failed and refused to deposit in the escrow within the time provided in the sale and purchase agreement, or at all, cash in the amount of $_____ or in any other amount. Defendant _____ [*purchaser*] is in total and complete default and has not performed any of the obligations imposed on him/her by the agreement of sale and purchase and the closing date for the performance of the escrow agreement has passed.

10. On or about _____ [*date*], plaintiff demanded of defendant _____ [*escrow agent*] the return and delivery to plaintiff of the stock certificates deposited in the escrow; defendant _____ [*escrow agent*] has failed and refused to deliver the same to plaintiff; this defendant bases its failure and refusal to return the property to plaintiff on the ground that defendant _____ [*purchaser*] has threatened to hold it liable in damages if it releases to plaintiff the stock certificates which plaintiff deposited in escrow with defendant.

11. An actual controversy exists between plaintiff and defendants relating to the legal rights and duties of the respective parties arising or growing out of the agreement of sale and purchase and the escrow instructions, since defendants contend that the property deposited in escrow may be held until such time as defendant _____ [*purchaser*] authorizes a release of the same from the escrow to plaintiff and plaintiff contends that on the failure and refusal of defendant _____ [*purchaser*] to deposit in escrow the sum of $_____ in cash, it was and is the legal duty and obligation of _____ [*escrow agent*], after the closing date of the escrow and on demand of plaintiff, to return to plaintiff the property which he/she deposited in the escrow.

12. Defendants, and each of them, have no right, title, or interest in the property deposited in escrow by plaintiff.

13. A judicial declaration is necessary and appropriate at this time under the circumstances in order that plaintiff may ascertain his/her rights and duties under the agreement of sale and escrow instructions. [_____ (*Allege any financial or other burden being caused plaintiff by the unsettled state of affairs*).]

[14. _____ (*Allege detriment and damages incurred if any, to date if damages are sought*).]

WHEREFORE, plaintiff prays judgment as follows:

1. That the court declare that plaintiff is entitled to the possession of the property deposited in escrow with defendant _____ [*escrow agent*];

2. That the court declare that defendant _____ [*escrow agent*] and defendant _____ [*purchaser*] have no right, title, or interest in the above-described capital stock;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 253.62.*]

[2] Use of Form

This form is a complaint for declaratory relief pursuant to *Code Civ. Proc. § 1060* brought by a seller of corporate stock against the buyer and escrow holder when the buyer has failed to perform under the contract for sale of the stock, and the seller wants a court determination that he or she is the sole owner and entitled to a return of the corporate stock held in escrow.

[3] Declaratory Relief

Any person who is interested under a contract or who desires a declaration of his or her rights and duties with respect to another or on property, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action in superior court for a declaration of his or her rights and duties in the contract of property. The action is not a limited civil case. In a limited civil case, declaratory relief may only be sought to the extent allowed pursuant to provisions governing limited civil cases (generally, by way of cross complaint in an action that is otherwise a limited civil case) [*Code Civ. Proc. § 1060*; *see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(7), 580(b)(4)* (restrictions on when declaratory relief may be sought in a limited civil case)]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

The complaint may ask for a declaration of rights and duties, either alone or with other relief. The declaration may be either affirmative or negative in form and effect, and such declaration has the force of a final judgment, and may be had before there has been any breach of the obligation in respect to which the declaration is sought [*Code Civ. Proc. § 1060*]. For a complete discussion and alternative forms of complaint for declaratory relief, see Ch. 182, *Declaratory Relief* .

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in anunlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] State Statutes

Declaratory relief actions, generally. *Code Civ. Proc. §§ 1060-1062.5*

Discretion of court to refuse relief when declaration or determination is not necessary or proper at time under all circumstances. *Code Civ. Proc. § 1061*

Cumulative nature of remedy. *Code Civ. Proc. § 1062*

[6] Cross References

For a discussion and forms of declaratory relief, see Ch. 182, *Declaratory Relief*

For memoranda of points and authorities related to proceedings for declaratory relief, see California Points and Authorities, Ch. 67, *Declaratory Relief*

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 253 ESCROWS
PART IV. FORMS

21-253 California Forms of Pleading and Practice--Annotated § 253.69

§ 253.69 Complaint [Code Civ. Proc. § 425.10] by Seller Against Escrow Holder and Buyer--For Declaratory Relief [Code Civ. Proc. § 1060]--That Separate Instructions of Buyer and Seller Did Not Constitute a Contract

[1] FORM Complaint [Code Civ. Proc. § 425.10] by Seller Against Escrow Holder and Buyer--For Declaratory Relief [Code Civ. Proc. § 1060]--That Separate Instructions of Buyer and Seller Did Not Constitute a Contract

[*Caption. See § 253.66[1].*]

1. [*Capacity, residence, and agency of parties. See § 253.66.*]

[2. *Fictitious name allegation, if appropriate. See § 253.60[1], Paragraph 3.*]

3. Defendant _____ [*name*] is, and at all times mentioned herein was, a corporation duly organized under the laws of the state of _____, doing business in California, [with a branch office in _____ County,] and was at all times herein mentioned duly licensed by California to operate a title insurance business in California with authority to accept and handle escrow accounts.

4. Plaintiff is the owner of that certain real property situated in _____ County, California, described as follows: _____ [*give full legal description and street address, if applicable*]. On _____ [*date*], plaintiff executed and delivered to defendant _____ [*escrow company*] a document entitled "Escrow Instructions," a copy of which is attached hereto as Exhibit A and made a part hereof. This document provided _____ [*set out provisions of plaintiff's instructions, e.g.,* for a grant deed, executed by plaintiff in favor of defendant _____ (*buyer*) to the property above-described, and the instructions provided, inter alia, as follows: "Said deed is to reserve a life estate to the undersigned for the rest of his natural life."].

5. On _____ [*date*], defendant _____ [*buyer*] made, executed, and delivered to defendant _____ [*escrow company*] a document entitled "Escrow Instructions." [Plaintiff is informed, believes, and, on such information and belief, alleges that] [T]hese escrow instructions executed by defendant

_____ [*buyer*] provided _____ [*set out provisions of defendant's instructions, e.g.*, for the payment of the sum of $_____ to plaintiff when defendant _____ (*escrow company*)] recorded a deed from plaintiff to defendant _____ (*buyer*)] to the property reserving to plaintiff "the right to live in the house on the premises for the rest of his natural life"].

6. The sole instruments in writing dealing with the proposed sale of the real property were the escrow instructions signed and delivered by plaintiff, together with the deed prepared in accordance with these instructions and the escrow instructions signed and delivered by defendant _____ [*buyer*] to defendant _____ [*escrow company*].

7. A dispute has arisen, and an actual controversy exists, between plaintiff and defendants in that plaintiff claims _____ [*state plaintiff'scontentions in dispute, e.g.*, the escrow instructions executed by defendant _____ (*buyer*) were not responsive and did not amount to an acceptance of plaintiff's offer as set forth in the escrow instructions executed by plaintiff in that the escrow instructions did not provide for a life estate to be reserved to plaintiff but merely reserved to plaintiff the right to reside in the dwelling on the premises for his natural lifetime]. Defendant _____ [*buyer*] contends _____ [*state defendant's contentions in dispute, e.g.*, that the escrow instructions executed by him constituted an acceptance of plaintiff's offer and as a result thereof a valid, enforceable contract came into existence whereby plaintiff was bound to convey the property]. Defendant _____ [*escrow company*] contends that it does not know whether or not a contract has been made and refuses to take further steps in connection with the escrow.

8. [*Appropriateness of judicial declaration. See § 253.68[1], Paragraph 13.*]

[9. *Damages incurred to date, if appropriate. See § 253.68[1], Paragraph 14.*]

WHEREFORE, plaintiff prays judgment as follows:

1. That the court declare that the escrow instructions delivered by plaintiff to defendant escrow company constituted an offer to sell; that no consideration was given for the offer; and that the offer was and is revocable;

2. That the court declare that escrow instructions of defendant _____ [*buyer*] did not constitute an acceptance of the offer;

3. That the court declare that no contract exists between plaintiff and defendant _____ [*buyer*];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 253.62[1].*]

[2] Use of Form

This form is a complaint for declaratory relief pursuant to *Code Civ. Proc. § 1060* brought by a seller of real estate against the buyer and escrow holder when each of the parties has submitted escrow instructions signed only by the

submitting parties and a dispute and controversy has arisen between the parties arising from the conflicting escrow instructions.

[3] Cross References

See *§ 253.68*

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21-253 California Forms of Pleading and Practice--Annotated § 253.70

§ 253.70 Allegation of Negligence Against Escrow Holder for Misdelivery of Money Held in Escrow

[1] FORM Allegation of Negligence Against Escrow Holder for Misdelivery of Money Held in Escrow

Defendant escrow holder _____ [*name*] negligently and carelessly performed the duties of escrow holder in regard to the sale of _____ [*set out description of property*]; plaintiff _____ [*name*], as the proximate result thereof, has been damaged in the sum of $_____, being the entire amount deposited by plaintiff in the escrow, together with the legal rate of interest thereon per annum from _____ [*date*] in that defendant paid the sum of money to _____ [*vendor*] in breach of the duty established in the written contract of escrow and when none of the conditions to be performed by _____ [*vendor*] were met [*or specify condition not performed*].

[2] Use of Form

This form is an allegation against an escrow holder for negligence in the misdelivery of money held in escrow and may be used in an action brought by either a seller or buyer. The allegation may be inserted in §§ 253.66 through 253.69 as a separate cause of action against the escrow holder in addition to the other relief sought in those forms.

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21-253 California Forms of Pleading and Practice--Annotated § 253.71

§ 253.71 Complaint [Code Civ. Proc. § 425.10] for Actual Damages and Statutory Treble Damages [Civ. Code § 1057.3(b)]--Failure to Return Funds Deposited in Escrow After Failure of Escrow to Close [Civ. Code § 1057.3]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Actual Damages and Statutory Treble Damages [Civ. Code § 1057.3(b)]--Failure to Return Funds Deposited in Escrow After Failure of Escrow to Close [Civ. Code § 1057.3]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name(s)*],	)	NO. _____
Plaintiff(s),	)	COMPLAINT FOR
vs.	)	DAMAGES FOR FAILURE
_____ [*name(s)*], [and DOES I	)	TO RETURN FUNDS DEPOSITED IN ESCROW
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[*EITHER, if plaintiff is buyer*]

1. Defendant(s) _____ [*name of seller(s)*] is/are, and at all times herein alleged was/were (a) resident(s) of _____ County, California [*or allege other capacity and residence*].

[*OR, if plaintiff is seller*]

1. Defendant(s) _____ [*name of buyer(s)*] is/are, and at all times herein alleged was/were (a) resident(s) of _____ County, California [*or allege other capacity and residence*].

[*CONTINUE*]

[2. *Fictitious name allegation, if appropriate. See § 253.60[1], Paragraph 3.*]

3. On or about _____ [*date*], plaintiff and defendant(s) entered into a contract ("the contract") for _____ [plaintiff *or* defendant] to purchase from _____ [plaintiff *or* defendant] certain real property located in _____ County, California, more particularly described as _____ [*street address or legal description*]. A true copy of the contract is attached to this complaint as Exhibit A and made a part of this complaint.

4. Pursuant to the contract, plaintiff deposited $_____ into escrow account _____ [*specify escrow account number*] with _____ [*name of escrow holder*]. _____ [*Name of escrow holder*] is, and at all times mentioned herein was, an escrow agent duly licensed and authorized to act as an escrow agent by the Escrow Law.

5. The contract of sale provided that escrow was to close and the purchase of the property was to be completed by _____ [*date*]. [On _____ (*date*), the parties extended the date of escrow to _____ (*date*). A copy of the executed extension is attached to this complaint as Exhibit B and made a part of this complaint.] The escrow did not close by that date or any time thereafter.

6. On or about _____ [*date*], plaintiff made a written demand on defendant that he/she/it return the $_____ deposited in escrow to plaintiff. A true copy of the demand is attached to this complaint as Exhibit C and made a part of this complaint.

7. More than 30 days have passed since service of the written demand on defendant and defendant has not executed the document required by _____ [*name of escrow holder*] for release of the deposit from escrow. As a result, _____ [*name of escrow holder*] is still holding the deposit of $_____.

8. There is not a good faith dispute as to the rights to the deposit, and plaintiff is entitled to its return under the terms of the contract.

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the amount of $_____, which is the amount of the funds deposited in escrow;

2. For statutory treble damages of $_____;

3. For reasonable attorney's fees;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*signature*]

Attorney for Plaintiff

[2] Use of Form

This form is a complaint for use by one party to a real property purchase and sale contract when the other party fails to execute the documents required by the escrow holder to return funds deposited in an escrow account after the failure of the escrow to close. The action is authorized by *Civ. Code § 1057.3(b)*.

An action under *Civ. Code § 1057.3* is authorized only when the real property that is the subject of the purchase and sale contract consists of one to four residential units, at least one of which at the time the escrow is created is to be occupied by the buyer [*Civ. Code § 1057.3(f)(3)*].

[3] Allegations

This complaint alleges (1) a contract to purchase real property (Paragraph 3), (2) a description of the real property that is the subject of the contract (Paragraph 3), (3) a deposit of funds in escrow (Paragraph 4), (4) the name of the escrow holder and the escrow account number (Paragraph 4), (5) the escrow date (Paragraph 5), (6) the failure of escrow to close (Paragraph 5), (7) a written demand for return of the funds (Paragraph 6) [*see Civ. Code § 1057.3(b)*], (8) failure to return the funds (Paragraph 7), and (9) lack of a good faith dispute over the right to the funds (Paragraph 8) [*see Civ. Code § 1057.3(c)*].

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers where inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*]. However, it is not clear whether "financial account" would include an escrow account.

[4] Deposit of Funds With Court

When the action is filed, the escrow holder must deposit the sum in dispute, less any cancellation fee and charges incurred, with the court in which the action is filed and be discharged of further responsibility for the funds [*Civ. Code § 1057.3(d)*].

[5] Treble Damages and Attorney's Fees

Civ. Code § 1057.3(b) authorizes the recovery of treble damages of not less than $100 nor more than $1,000 and reasonable attorney's fees.

[6] Cross References

See *§ 253.60*

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[a] Creditor's Suit

[b] Third-Party Proceedings

[c] Exemptions

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§ 254.40 Governing Statutes

§§ 254.41-254.59 [Reserved]

§ 254.60 Property Subject to Execution

§ 254.61 Writ of Execution

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[2] Return of Writ

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§ 254.63 Payment by Person Indebted to Judgment Debtor

§ 254.64 Turnover Order

§ 254.65 Execution of Writ

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[2] Levy on Real Property

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[b] Crops, Timber, or Minerals

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[b] Property Located in Private Place

[c] In Possession of Third Party

[d] In Possession of Bailee

[e] In Possession of Levying Officer

[f] Property of Going Business

[g] Personal Property Used as a Dwelling

[h] Vehicle or Vessel

[i] Property of Decedent's Estate

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[b] Instruments and Negotiable Documents of Title

[c] Securities

[d] Deposit Accounts

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[f] Deposit Accounts and Safe Deposit Boxes Not Held Exclusively by Judgment Debtor

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§ 254.83 Request for Notice of Execution Sale

§ 254.84 Effect of Failure to Give Notice

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[2] Expiration of Exemption Period

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[a] Cash or Check

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[2] Rule of Caveat Emptor Applicable

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[1] Time and Procedure

[2] Property Deemed Exempt Without Making Claim

[3] Effect of Failure to Claim Exemption

[4] Notice of Claim

[5] Opposition to Claim

[6] Hearing on Claim

[a] When Held

[b] Evidentiary Basis of Determination

[c] Determination and Findings

[d] Disposition of Property During Pendency of Proceedings

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[3] Exemption Claim

[a] In General

[b] Waiver of Exemption

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[1] Discretion of Court

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[1] FORM

[2] Use of Form

[3] Trial Court's Power to Stay Enforcement

[4] Application for Stay

[5] Required Documents

[6] Contents of Application

[a] In General

[b] Declaration of Notice

[7] Service of Notice

[8] Federal Statutes

[9] State Statutes

[10] California Rules of Court

[11] Text References

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[1] FORM

[2] Use of Form

[3] Supporting Memorandum

[4] References

§§ 254.662-254.679 [Reserved]

§ 254.680 Writ of Execution [Code Civ. Proc. § 699.520]--Judicial Council Form EJ-130

[1] FORM

[2] Use of Form

[3] Filling Out Writ

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[b] Costs After Judgment

[c] Credits

[d] Interest After Judgment

[e] Judgment Against Joint Debtor

[4] Order for Sale of Dwelling

[5] Cross References

[6] State Statutes

§ 254.681 Affidavit of Identity [Code Civ. Proc. § 680.135]

[1] FORM

[2] Use of Form

[3] Contents of Affidavit

[4] State Statutes

§ 254.682 Declaration [Code Civ. Proc. § 2015.5] of Amount of Interest Accrued on Judgment [Code Civ. Proc. § 685.050(a)(2)]

[1] FORM

[2] Use of Form

[3] Interest Rate

[4] State Statutes

§ 254.683 Notice of Levy [Code Civ. Proc. § 699.540]--Judicial Council Form EJ-150

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 254.684 List of Exemptions From Enforcement of Judgments [Code Civ. Proc. §§ 681.030(c), 700.010]--Judicial Council Form EJ-155

[1] FORM

[2] Use of Form

[3] Cross References

§ 254.685 Instructions to Levying Officer [Code Civ. Proc. § 687.010]--To Take Personal Property Into Custody

[1] FORM

[2] Use of Form

[3] Contents of Instructions

[4] Cross References

[5] State Statutes

[6] Fees of Levying Officer

[7] Instructions to Levying Officer

§ 254.686 Instructions to Levying Officer [Code Civ. Proc. § 687.010]--To Levy On Real Property

[1] FORM

[2] Use of Form

[3] Fees

[4] Copies of Legal Description

[5] State Statutes

[6] Fees of Levying Officer

[7] Levy of Execution

[8] Cross References

§ 254.687 Duties of Third Person After Levy [Code Civ. Proc. § 701.010 et seq.]--Garnishee's Memorandum [Code Civ. Proc. § 701.030]--Judicial Council Form AT-167/EJ-152

[1] FORM

[2] Use of Form

[3] When Memorandum Not Required

[4] State Statutes

§ 254.688 Proceedings to Levy on Personal Property Held in Private Place [Code Civ. Proc. § 699.030]--Notice of Motion [Code Civ. Proc. § 699.030(b)]

[1] FORM

[2] Use of Form

[3] Ex Parte Application or Noticed Motion

[4] State Statutes

§ 254.689 Proceedings to Levy on Personal Property Held in Private Place [Code Civ. Proc. § 699.030]--Declaration

[1] FORM

[2] Use of Form

[3] Probable Cause Required

[4] Cross References

§ 254.690 Proceedings to Levy on Personal Property Held in Private Place [Code Civ. Proc. § 699.030]--Order

[1] FORM

[2] Use of Form

[3] Cross References

§ 254.691 Proceedings to Obtain Property or Documentary Evidence of Title or Both [Code Civ. Proc. § 699.040]--Notice of Motion

[1] FORM

[2] Use of Form

[3] State Statutes

§ 254.692 Proceedings to Obtain Property or Documentary Evidence of Title or Both [Code Civ. Proc. § 699.040]--Declaration

[1] FORM

[2] Use of Form

[3] Cross References

§ 254.693 Proceedings to Obtain Property or Documentary Evidence of Title or Both [Code Civ. Proc. § 699.040]--Order

[1] FORM

[2] Use of Form

[3] Service of Order

[4] State Statutes

[5] Cross References

§ 254.694 Proceedings to Remove Occupants From Personal Property Used as Dwelling [Code Civ. Proc. § 700.080(c)]--Notice of Motion

[1] FORM

[2] Use of Form

[3] Service of Notice

[4] Hearing on Motion

[5] State Statutes

§ 254.695 Proceedings to Remove Occupants From Personal Property Used as Dwelling [Code Civ. Proc. § 700.080(c)]--Declaration

[1] FORM

[2] Use of Form

[3] Cross References

§ 254.696 Proceedings to Levy on Property--Removal of Occupants From Personal Property Used as Dwelling [Code Civ. Proc. § 700.080(c)]--Order

[1] FORM

[2] Use of Form

[3] Cross References

§ 254.697 Proceedings for Sale of Collectible Property [Code Civ. Proc. §§ 701.510-701.830]--Notice of Intended Sale [Code Civ. Proc. § 701.520(b)]

[1] FORM

[2] Use of Form

[3] Service and Filing of Notice

[4] Collectible Property

[5] State Statutes

§ 254.698 Proceedings for Sale of Collectible Property [Code Civ. Proc. §§ 701.510-701.830]--Notice of Motion for Collection of Property [Code Civ. Proc. § 701.520(c)]

[1] FORM

[2] Use of Form

[3] Time Period for Making, Serving, and Filing Notice of Motion

[4] State Statutes

[5] Cross References

§ 254.699 Proceedings for Sale of Collectible Property [Code Civ. Proc. §§ 701.510-701.830]--Declaration in Support of Motion for Collection of Property [Code Civ. Proc. § 701.520(c)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 254.700 Proceedings for Sale of Collectible Property [Code Civ. Proc. §§ 701.510-701.830]--Order Granting or Denying Motion for Collection of Property [Code Civ. Proc. § 701.520(d)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 254.701 Request for Notice of Sale of Property Under Writ [Code Civ. Proc. § 701.550]

[1] FORM

[2] Use of Form

[3] Contents

[4] State Statutes

§ 254.702 Notice of Sale of Personal [Code Civ. Proc. §§ 701.530] or Real [Code Civ. Proc. § 701.540] Property

[1] FORM

[2] Use of Form

[3] Service and Posting of Notice

[a] Personal Property

[b] Real Property

[i] Publication of Notice

[ii] Notice to Persons Having Liens on Property

[iii] Waiting Period Before Notice is Given

[4] Cross References

[5] State Statutes

§ 254.703 Certificate [Code Civ. Proc. §§ 701.650, 729.040] or Deed [Code Civ. Proc. § 701.660] of Sale [Code Civ. Proc. § 701.670]

[1] FORM

[2] Use of Form

[3] Certificate of Sale of Personal Property

[4] Deed or Certificate of Sale of Real Property

[5] State Statutes

§ 254.704 Proceedings to Resolve Conflicting Claims to Proceeds of Sale [Code Civ. Proc. § 701.830]--Notice of Motion

[1] FORM

[2] Use of Form

[3] Service of Notice

[4] Response to Motion

[5] State Statutes

§ 254.705 Proceedings to Resolve Conflicting Claims to Proceeds of Sale [Code Civ. Proc. § 701.830]--Declaration [Code Civ. Proc. § 2015.5] in Support of Motion

[1] FORM

[2] Use of Form

[3] Cross References

§ 254.706 Proceedings to Resolve Conflicting Claims to Proceeds of Sale [Code Civ. Proc. § 701.830]--Order

[1] FORM

[2] Use of Form

[3] When Court May Not Determine Distribution

[4] State Statutes

[5] Cross References

§ 254.707 Proceedings to Recall and Quash Execution and Vacate Levy--Notice of Motion

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] Decisions

[5] Burden of Proof on Debtor

[6] Costs to Prevailing Party

[7] Persons Who May Make Motion

[8] Quashing Levy

[9] Recalling and Quashing Writ

§ 254.708 Proceedings to Recall and Quash Execution and Vacate Levy--Declaration

[1] FORM

[2] Use of Form

[3] Cross References

§ 254.709 Proceedings to Recall and Quash Execution and Vacate Levy--Order

[1] FORM

[2] Use of Form

[3] Cross References

§ 254.710 Proceedings to Claim Exemption After Levy [Code Civ. Proc. §§ 703.510-703.610]--Claim of Exemption [Code Civ. Proc. § 703.520]--With Financial Statement [Code Civ. Proc. § 703.530] Attached--Judicial Council Forms EJ-160, EJ-165

[1] FORM

[2] Use of Form

[3] Contents of Claim

[4] Service of Claim and Notice of Claim

[5] Cross References

[6] State Statutes

§ 254.711 Proceedings to Claim Exemption After Levy [Code Civ. Proc. §§ 703.510-703.610]--Notice of Claim of Exemption [Code Civ. Proc. § 703.540(b)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 254.712 Proceedings to Claim Exemption After Levy [Code Civ. Proc. §§ 703.510-703.610]--Notice of Opposition to Claim of Exemption [Code Civ. Proc. §§ 703.550-703.560]--Judicial Council Form EJ-170

[1] FORM

[2] Use of Form

[3] State Statutes

§ 254.713 Proceedings to Claim Exemption After Levy [Code Civ. Proc. §§ 703.510-703.610]--Notice of Motion for Order Determining Claim of Exemption [Code Civ. Proc. § 703.550]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 254.714 Proceedings to Claim Exemption After Levy [Code Civ. Proc. §§ 703.510-703.610]--Notice of Hearing on Claim of Exemption [Code Civ. Proc. §§ 703.550, 703.570]--Judicial Council Form EJ-175

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 254.715 Proceedings to Claim Exemption After Levy [Code Civ. Proc. §§ 703.510-703.610]--Order Determining Claim of Exemption [Code Civ. Proc. § 703.580(d)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§§ 254.716-254.729 [Reserved]

§ 254.730 Writ of Sale [Code Civ. Proc. §§ 712.020, 716.010] or Possession [Code Civ. Proc. §§ 712.020, 714.010, 715.010]--Judicial Council Form EJ-130

[1] FORM

[2] Use of Form

[3] Contents of Writ

[a] Sale of Real or Personal Property

[b] Possession of Personal Property

[c] Possession of Real Property

[d] Money Judgment

[4] Form to Accompany Writ of Possession of Real Property

[5] State Statutes

[6] Cross References

§ 254.731 Proceedings for Transfer of Property or Documentary Evidence of Title or Both in Aid of Writ of Sale [Code Civ. Proc. § 716.030]--Notice of Motion

[1] FORM

[2] Use of Form

[3] State Statutes

§ 254.732 Proceedings for Transfer of Property or Documentary Evidence of Title or Both in Aid of Writ of Sale [Code Civ. Proc. § 716.030]--Declaration

[1] FORM

[2] Use of Form

[3] Cross References

§ 254.733 Proceedings for Transfer of Property or Documentary Evidence of Title or Both in Aid of Writ of Sale [Code Civ. Proc. § 716.030]--Order

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 254.734 Proceedings for Order for Transfer of Possession of Property or Documentary Evidence of Title or Both to Enforce Judgment of Possession [Code Civ. Proc. § 714.030]--Notice of Motion

[1] FORM

[2] Use of Form

[3] State Statutes

§ 254.735 Proceedings for Order for Transfer of Possession of Property or Documentary Evidence of Title or Both to Enforce Judgment of Possession [Code Civ. Proc. § 714.030]--Declaration

[1] FORM

[2] Use of Form

[3] Cross References

§ 254.736 Proceedings for Order for Transfer of Possession of Property or Documentary Evidence of Title or Both to Enforce Judgment of Possession [Code Civ. Proc. § 714.030]--Order

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§§ 254.737-254.749 [Reserved]

§ 254.750 Notice of Right of Redemption--By Levying Officer--to Judgment Debtor [Code Civ. Proc. § 729.050]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 254.751 Redemption Proceedings--Declaration [Code Civ. Proc. § 2015.5] Verifying Copy of Assignment or Other Evidence of Interest in Property--By Judgment Debtor's Successor [Code Civ. Proc. § 729.060(a)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 254.752 Redemption Proceedings--Petition for Order Determining Redemption Dispute [Code Civ. Proc. § 729.070]

[1] FORM

[2] Use of Form

[3] Payment of Amount Not in Dispute

[4] Documents to Be Filed with Petition

[5] Hearing Date

[6] Notice

[7] Verification

[8] State Statutes

§ 254.753 Redemption Proceedings--Notice to Levying Officer or Trustee of Filing of Petition for Order Determining Redemption Dispute [Code Civ. Proc. § 729.070(a)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 254.754 Redemption Proceedings--Notice of Hearing of Petition by Person Seeking to Redeem Property to Determine Redemption Dispute [Code Civ. Proc. § 729.070(d)]

[1] FORM

[2] Use of Form

[3] Service of Petition and Notice

[4] Cross References

§ 254.755 Redemption Proceedings--Order Determining Redemption Dispute [Code Civ. Proc. § 729.070(f)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 254.756 Redemption Proceedings--Certificate of Redemption [Code Civ. Proc. §§ 729.080(b)]

[1] FORM

[2] Use of Form

[3] Recording

[4] State Statutes

[5] Cross References

§ 254.757 Redemption Proceedings--Petition for Order Authorizing Entry on Property by Purchaser at Execution Sale--For Repairs and Maintenance of Premises [Code Civ. Proc. § 729.090(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 254.758 Redemption Proceedings--Order Authorizing Repairs and Maintenance by Purchaser at Execution Sale [Code Civ. Proc. § 729.090(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 254.759 Redemption Proceedings--Petition by Purchaser For Order Restraining Waste [Code Civ. Proc. § 729.090(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 254.760 Redemption Proceedings--Order Restraining Waste [Code Civ. Proc. § 729.090(c)]

[1] FORM

[2] Use of Form

[3] Cross References

§§ 254.761-254.779 [Reserved]

§ 254.780 Examination Proceedings--Application and Order for Appearance and Examination of Judgment Debtor

or Third Person Having Possession or Control of Property in Which Judgment Debtor Has Interest or Who Is Indebted to Judgment Debtor [Code Civ. Proc. §§ 708.110, 708.120]--Judicial Council Form EJ-125

[1] FORM

[2] Use of Form

[3] Application Generally Ex Parte

[4] Filling in Form

[a] Order to Appear for Examination

[b] Application for Order to Appear for Examination

[c] Verification

[d] Required Notices

[5] Service of Order

[a] Judgment Debtor

[b] Third Party

[6] Sanctions for Failure to Appear

[7] Filing Application in County Other Than One in Which Judgment is Entered

[8] Cross References

[9] State Statutes

[10] Rules of Court

[11] Local Court Rules

[12] Decisions

§ 254.781 Examination Proceedings--Notice of Motion for Order for Examination Judgment Debtor Examined Within Last 120 Days [Code Civ. Proc. § 708.110]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 254.782 Examination Proceedings--Declaration in Support of Application or Motion for Order for Examination of Judgment Debtor [Code Civ. Proc. § 708.110]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 254.783 Examination Proceedings--Declaration Supporting Application for Order for Examination of Third Party [Code Civ. Proc. § 708.120(a)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 254.784 Examination Proceedings--Checklist of Information to Be Covered by Judgment Creditor During Examination

[1] FORM

[2] Use of Form

§ 254.785 Examination Proceedings--Order Applying Property to Satisfaction of Money Judgment [Code Civ. Proc. § 708.205]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 254.786 Examination Proceedings--Ex Parte Application for Order Forbidding Transfer of Property or Payment of Debt to Judgment Debtor [Code Civ. Proc. § 708.180(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 254.787 Examination Proceedings--Notice of Motion for Order Forbidding Transfer of Property or Payment of Debt [Code Civ. Proc. § 708.180(d)]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 254.788 Examination Proceedings--Order Forbidding Transfer of Property or Payment of Debt [Code Civ. Proc. § 708.180(c) or 708.180(d)]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 254.789 Creditor's Suit--Complaint [Code Civ. Proc. § 425.10]--By Judgment Creditor--Against Third Person--For Judgment Debtor's Interest in Property or Debt to Satisfy Money Judgment [Code Civ. Proc. § 708.210] and for Temporary Restraining Order and/or Preliminary Injunction [Code Civ. Proc. § 708.240(b)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Venue

[6] Cross References

[7] State Statutes

[8] Decisions

§ 254.790 Creditor's Suit--Ex Parte Application for Order Restraining Transfer of Property to or Payment of Debt--to Judgment Debtor [Code Civ. Proc. § 708.240(a)]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 254.791 Creditor's Suit--Notice of Motion for Order Restraining Transfer of Property to or Payment of Debt--to Judgment Debtor [Code Civ. Proc. § 708.240(a)]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 254.792 Creditor's Suit--Order Restraining Transfer of Property or Payment of Debt [Code Civ. Proc. § 708.240(a)]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 254.793 Notice of Motion for Order Determining Claim of Exemption in Third Party Examination [Code Civ. Proc. § 708.120(d)] or in Creditor's Suit [Code Civ. Proc. § 708.260(a)]

[1] FORM

[2] Use of Form

[3] Waiver of Exemption

[4] State Statutes

§ 254.794 Order Determining Judgment Debtor's Claim of Exemption For Property or Debt [Code Civ. Proc. § 708.120(d) or 708.260(a)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 254.795 Proceedings for Order Applying Franchise Granted by Public Entity to Satisfaction of Money Judgment [Code Civ. Proc. § 708.920]--Notice of Motion

[1] FORM

[2] Use of Form

[3] State Statutes

§ 254.796 Proceedings for Order Applying Franchise Granted by Public Entity to Satisfaction of Money Judgment [Code Civ. Proc. § 708.920(a)]--Declaration

[1] FORM

[2] Use of Form

[3] Cross References

§ 254.797 Proceedings for Order Applying Franchise Granted by Public Entity to Satisfaction of Money Judgment [Code Civ. Proc. § 708.920(a)]--Order

[1] FORM

[2] Use of Form

[3] Methods for Application to Satisfaction of Judgment

[4] Cross References

§ 254.798 Proceedings for Order Applying Nonvested Property Interest to Satisfaction of Money Judgment [Code Civ. Proc. § 709.020]--Notice of Motion

[1] FORM

[2] Use of Form

[3] State Statutes

§ 254.799 Proceedings for Order Applying Nonvested Property Interest to Satisfaction of Money Judgment [Code Civ. Proc. § 709.020]--Declaration

[1] FORM

[2] Use of Form

[3] Cross References

§ 254.800 Proceedings for Order Applying Nonvested Property Interest to Satisfaction of Money Judgment [Code Civ. Proc. § 709.020]--Order

[1] FORM

[2] Use of Form

[3] Cross References

§§ 254.801-254.819 [Reserved]

§ 254.820 Third-Party Claim of Ownership or Right to Possession of Levied Property [Code Civ. Proc. §§ 720.110, 720.130]

[1] FORM

[2] Use of Form

[3] Filing of Claim

[4] Notice and Service

[5] State Statutes

[6] Decisions

§ 254.821 Third-Party Claim of Security Interest in or Lien on Levied Property [Code Civ. Proc. §§ 720.210, 720.230]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 254.822 Declaration in Opposition to Third Party Claim of Security Interest in Levied Property [Code Civ. Proc. § 720.280]

[1] FORM

[2] Use of Form

[3] Contents of Statement

[4] State Statutes

§ 254.823 Demand by Creditor that Secured Party or Lienholder File Third-Party Claim [Code Civ. Proc. §§ 720.510, 720.530]

[1] FORM

[2] Use of Form

[3] Contents of Demand

[4] Service and Notice

[5] State Statutes

§ 254.824 Proceedings on Third-Party Claim [Code Civ. Proc. §§ 720.010-720.800]--Petition for Hearing and Attached Order [Code Civ. Proc. § 720.310]

[1] FORM

[2] Use of Form

[3] Notice and Service

[4] Pleadings

[5] State Statutes

§ 254.825 Proceedings on Third-Party Claim [Code Civ. Proc. §§ 720.010-720.800]--Notice of Hearing [Code Civ.

Proc. § 720.320]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 254.826 Proceedings on Third-Party Claim [Code Civ. Proc. §§ 720.010-720.800]--Judgment Determining Validity of Third Party Claim and Order for Disposition of Property [Code Civ. Proc. § 720.390]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

§ 254.827 Proceedings on Third-Party Claim [Code Civ. Proc. §§ 720.010-720.800]--Notice of Motion for Order to Stay Sale or Enjoin Transfer or Other Disposition of Levied Property Pending Determination of Validity of Third-Party Claim [Code Civ. Proc. § 720.380(b)]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 254.828 Proceedings on Third-Party Claim [Code Civ. Proc. §§ 720.310-720.390]--Declaration in Support of Motion for Order to Stay Sale or Enjoin Transfer or Other Disposition of Levied Property Pending Determination of Validity of Third-Party Claim [Code Civ. Proc. § 720.380(b)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 254.829 Proceedings on Third-Party Claim [Code Civ. Proc. §§ 720.310-720.390]--Order Granting Motion for Order to Stay Sale or Enjoin Transfer or Other Disposition of Levied Property Pending Determination of Validity of Third-Party Claim [Code Civ. Proc. § 720.380(b)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§§ 254.830-254.849 [Reserved]

§ 254.850 Declaration [Code Civ. Proc. § 2015.5] in Support of Issuance of Summons to Joint Debtor [Code Civ. Proc. § 991]

[1] FORM

[2] Use of Form

[3] Contents of Form

[4] State Statutes

§ 254.851 Summons (Joint Debtor) [Code Civ. Proc. § 989]--Judicial Council Form SUM-120

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

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21-254 California Forms of Pleading and Practice--Annotated § 254.01

§ 254.01 Scope of Chapter

This chapter discusses writs of execution and levy on property under such writs [*see § 254.60* et seq.]. It also discusses the notice and conduct of execution sales and the nature of title acquired, the rules governing purchasers at such sales, the distribution of proceeds, the delivery of the property to the purchaser, and the procedures and grounds for setting aside an execution sale [*see § 254.80* et seq.]. Finally, this chapter discusses procedures for claiming and determining exemptions of property from enforcement of a judgment [*see § 254.110* et seq.].

This chapter contains forms of a writ of execution [*see § 254.680*] and notice of levy [*see § 254.683*], the Judicial Council form listing exemptions from execution [*see § 254.684*], forms of instructions to the levying officer [§§ 254.685, 254.686], a form of garnishee's memorandum [*see § 254.687*], and forms relating to obtaining personal property held in a private place [*see §§ 254.688 -254.690*]. It also contains forms for obtaining an order directing the turnover of property or documentary evidence to title [*see §§ 254.691 -254.693*], and forms relating to the removal of occupants from levied-on personal property used as a dwelling [*see §§ 254.694 -254.696*]. It also contains a form of notice of intended sale of collectible property [*see § 254.697*], forms for use in obtaining an order that the property be collected rather than sold [*see §§ 254.698 -254.700*], a form of request for notice of sale under execution [*see § 254.701*], a form of notice of sale [*see § 254.702*], a form of certificate or deed of sale [*see § 254.703*], forms for use in obtaining an order of distribution of proceeds [*see §§ 254.704 -254.706*], and forms for use in quashing execution and vacating a levy [*see §§ 254.707 -254.709*].

Also contained are forms of a claim of exemption [*see § 254.710*], and notice of claim [*see § 254.711*], forms for use by a judgment creditor in opposing the claim and obtaining an order determining the exemption [*see §§ 254.712 -254.713*], and a form of order determining the claim [*see § 254.715*].

For discussion of judgments in foreign currencies under the Uniform Foreign-Money Claims Act (*Code Civ. Proc. § 676 et seq.*), see Ch. 177, *Damages* and Ch. 318, *Judgments* .

For discussion of enforcement of judgments under the Family Code, see Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* , Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* , and Ch. 260, *Family Law Enforcement: Foreign Judgments* . For discussion and forms for use in enforcing a judgment

against a guardianship or conservatorship estate, see Ch. 290C, *Guardianship and Conservatorship: Actions and Disputed Claims*. For discussion of enforcement of judgments against a decedent's estate, see Ch. 454, *Probate: Claims Against Estate* .

This chapter also discusses the issuance and enforcement of writs of possession and writs of sale of real and personal property. It includes a form of writ of possession or sale [*see § 254.730*] and forms for use in obtaining an order that property or documentary evidence of title to property be transferred to the levying officer when a writ of sale has been issued [*see §§ 254.731 -254.733*] or be transferred to the judgment creditor when there is a judgment of possession [*see §§ 254.734 -254.736*].

This chapter also discusses redemption of property after it has been sold in execution of a writ of sale. It contains a form of notice of the right to redeem [*see § 254.750*]; forms of notices [*§§ 254.753, 254.754*], a petition [*see § 254.752*], and an order [*see § 254.755*] relating to the determination of a redemption dispute, and forms of petitions [*§§ 254.757, 254.759*] and orders [*§§ 254.758, 254.760*] relating to the enforcement of the purchaser's rights to enter the property and to restrain waste prior to redemption. It also contains a form of declaration verifying copy of assignment [*see § 254.751*] and a certificate of redemption [*see § 254.756*].

This chapter also discusses and includes forms related to proceedings supplementary to execution under *Code Civ. Proc. §§ 708.010-708.290, 708.510-708.550, 708.910-708.930,* and *709.020*. It includes the following forms:

- The Judicial Council form of application and order for appearance and examination of the judgment debtor or a third person [*see § 254.780*].

- Form for notice of motion and declaration for order for examination of the judgment debtor when the judgment creditor has caused the judgment debtor to be examined within the past 120 days and the court orders or a court rule requires that the application be made by noticed motion [*§§ 254.781, 254.782*].

- Form for a declaration supporting the application for examination of third party with possession or control of property in which the judgment debtor has an interest or who is indebted to the judgment debtor [*see § 254.783*].

- A checklist of questions to ask at an examination [*see § 254.784*].

- Form of order applying property or a debt to satisfy a money judgment during the examination proceedings [*see § 254.785*].

- Forms of applications for order [*§§ 254.786, 254.787,* 111, 112], and orders [*§§ 254.788, 254.792*] restraining transfer of property or payment of debt.

- A complaint for application of the property or debt toward satisfaction of the money judgment and a temporary restraining order [*see § 254.789*].

- Forms of application for an order [*see § 254.793*] and order [*see § 254.794*] determining the judgment debtor's claim of exemption.

- Forms of notice of motion, declaration, and order for enforcement against a franchise by applying the franchise to the satisfaction of a money judgment [*see §§ 254.795 -254.797*].

- Forms of notice of motion, declaration, and order for application of a nonvested property interest to the satisfaction of a money judgment [*see §§ 254.798 -254.800*].

For discussion and forms relating to charging orders under *Code Civ. Proc. §§ 708.310-708.320*, applying a judgment debtor's interest in a partnership toward the satisfaction of a judgment, see *Ch. 402, Partnerships: Actions Between General Partners or Partnership and Third Parties, § 402.20*. For discussion and forms relating to obtaining a lien in a pending action or proceeding under *Code Civ. Proc. §§ 708.410-708.480*, see Ch. 318, *Judgments* . The appointment of a receiver under *Code Civ. Proc. §§ 708.610-708.630* to enforce a judgment is discussed in Ch. 486, *Receivers* . For discussion and forms relating to collection of a money judgment where judgment debtor is creditor of a public entity under *Code Civ. Proc. §§ 708.710-708.795*, see Ch. 276, *Garnishment* .

This chapter also discusses third-party claims and related procedures regarding the claimed interests of a third party in real or personal property that has been levied on as the result of a prejudgment or postjudgment writ, including the procedures relating to filing the claim, and any undertaking for release of the property, the responses to the third-party claim by the judgment creditor, and the rights of the judgment debtor relating to any third-party claim. Also included in the part are a procedural guide and forms for use in proceedings involving third-party claims. Forms are provided in this part for use by a third party to claim ownership or the right of possession of real or personal property that has been levied on [*see § 254.820*], or to claim a secured interest or lien in personal property levied on [*see § 254.821*], a declaration in opposition to a third-party claim by a secured party or lienholder [*see § 254.822*]; a demand by a creditor that a secured party or lienholder of personal property file a third-party claim [*see § 254.823*]; forms for use in proceedings to determine the validity of the third-party claim [*see §§ 254.824 -254.826*]; and forms for use for an order staying a sale of or enjoining disposition of the property under writ [*see §§ 254.827 -254.829*].

For discussion and forms relating to attachments generally, see Ch. 62, *Attachment* .

This chapter also discusses proceedings against defendants jointly liable on an obligation when a judgment in the action has been entered against less than all such defendants. Forms include a declaration to obtain a summons against such a joint debtor [*see § 254.850*] and a joint debtor summons [*see § 254.851*]. For a form of writ of execution against a joint debtor, *see § 254.680*.

This chapter does not discuss the nonstatutory postjudgment procedure for including in a judgment the name of a person who was never named as a defendant in the action but who was the alter ego of a judgment debtor. For a discussion of this procedure, see Ch. 161, *Corporations: Alter Ego* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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§ 254.02 Cross References

For further discussion and forms relating to affidavits and declarations, see Ch. 15, *Affidavits, Certificates and Declarations*

For discussion and forms for use in staying the enforcement of a judgment pending appeal, including forms of petition for, order granting, and writ of supersedeas, see Ch. 43, *Appeal: Stay of Proceedings*

For discussion of auctions in general, see Ch. 77, *Auctions and Auctioneers*

For forms and procedure in entering defaults, see Ch. 205, *Defaults and Default Judgments*

For discussion of enforcement proceedings, including execution, in the context of marital dissolution, see Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* , Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* , and Ch. 260, *Family Law Enforcement: Foreign Judgments*

For discussion and forms relating to collection of a judgment when the judgment debtor is a creditor of a public entity, see Ch. 276, *Garnishment*

For discussion and forms relating to establishing homesteads and claiming a homestead exemption, see Ch. 294, *Homesteads*

For forms and procedure in obtaining contribution among joint nontort obligors and judgment debtors, see Ch. 300, *Indemnity and Contribution*

For discussion and forms relating to temporary restraining orders and injunctions, see Ch. 303, *Injunctions*

For discussion and forms relating to liens in pending actions and proceedings, see Ch. 318, *Judgments*

For discussion and forms relating to obtaining possession of real property in unlawful detainer proceedings, see Ch. 333, *Landlord and Tenant: Eviction Actions*

For discussion and forms relating to charging orders, see *Ch. 402, Partnerships: Actions Between General Partners or Partnership and Third Parties, § 402.20*

For discussion and forms relating to actions to quiet title to real property, see Ch. 482, *Quieting Title*

For discussion and forms relating to the appointment of a receiver, see Ch. 486, *Receivers*

For discussion of recovery of a debt under *Code Civ. Proc. § 726* and antideficiency legislation, see Ch. 500, *Sales and Secured Transactions* ,

For forms and procedure in serving summons generally, see Ch. 518, *Service of Summons and Papers*

For discussion of proceedings for foreclosure of a mortgage or deed of trust on real property, and for discussion of and forms for use in applying for a deficiency judgment, see Ch. 555, *Trust Deeds and Real Property Mortgages*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsTortsNegligenceDefensesComparative NegligenceMultiple PartiesContributionTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnity

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[Reserved]

§§ 254.03[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.10

§ 254.10 Governing Statutes

Enforcement of judgments is governed by *Code Civ. Proc. §§ 680.010-724.260* generally. Pertinent definitions are contained in *Code Civ. Proc. §§ 680.110-680.380*. Statutes governing the period for enforcement, renewal of a judgment, and stay of enforcement are *Code Civ. Proc. §§ 683.010-683.320* and *916-936.1*. Service of writs and other papers is governed by *Code Civ. Proc. §§ 684.010-684.310*. Redemption of real property sold under a writ of sale is governed by *Code Civ. Proc. §§ 725a-730.5*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessGeneral OverviewCivil ProceduresJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProceduresJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of Execution

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§ 254.11 General Provisions for Enforcing Judgments

Except as otherwise provided by statute, a money judgment is enforceable as provided in *Code Civ. Proc. §§ 695.010-709.030*. A judgment for possession of personal property is enforceable pursuant to *Code Civ. Proc. § 714.010 et seq.* A judgment for possession of real property is enforceable under *Code Civ. Proc. § 715.010 et seq.* A judgment for sale of real or personal property is governed by *Code Civ. Proc. § 716.010 et seq.* A judgment requiring performance of an act not provided in the statutes noted above, or requiring forbearance from performing an act, is enforceable as provided in *Code Civ. Proc. § 717.010* [*Code Civ. Proc. § 681.010(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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21-254 California Forms of Pleading and Practice--Annotated § 254.12

§ 254.12 Enforcement by Assignee

An assignee of a judgment is not entitled to enforce the judgment under *Code Civ. Proc. §§ 680.010-724.260* unless an acknowledgment of assignment of judgment to that assignee has been filed under *Code Civ. Proc. § 673* or the assignee has otherwise become an assignee of record [*Code Civ. Proc. § 681.020*]. For discussion and forms relating to the assignment of judgments, see Ch. 318, *Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawPerformanceAssignmentGeneral Overview

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§ 254.13 Filing and Service of Writs, Notices, and Other Papers

[1] Filing With Levying Officer

If a paper is required or permitted to be filed with a levying officer, the paper is considered filed when actually received by the officer [*Code Civ. Proc. § 681.040*].

[2] Service on Attorney of Judgment Creditor

Subject to *Fam. Code § 215* (notice of modification of marriage dissolution orders after final decree) and *Code Civ. Proc. §§ 283-286* (provisions governing representation by attorneys), when a notice, order, or other paper is required to be served on the judgment creditor, it must be served instead on the judgment creditor's attorney of record if the creditor has an attorney [*Code Civ. Proc. § 684.010*].

[3] On Attorney Designated by Judgment Debtor

When a writ, notice, order, or other paper is required to be served on the judgment debtor, it must be served on the debtor instead of the debtor's attorney [*Code Civ. Proc. § 684.020(a)*]. Service must be on an attorney specified by the judgment debtor, however, if the debtor has filed with the court and served on the judgment creditor a request that service be made on a designated attorney. The request must include a consent by the attorney to receive such service on behalf of the judgment debtor. Service of the request on the judgment creditor may be made personally or by mail. If the judgment debtor revokes the request, or the attorney revokes the consent, service must be made on the judgment debtor [*Code Civ. Proc. § 684.020(b)*]. Revocation is made by filing a notice of revocation with the court. The revocation is not binding on the judgment creditor until a copy of the notice is served on him or her, either personally or by mail [*Code Civ. Proc. § 684.020(c)*].

[4] Subpoena or Contempt Papers

Service of a subpoena or other process to require attendance of a party, or of a paper to bring a party into contempt, must be made on the party and not his or her attorney [*Code Civ. Proc. § 684.030*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.14

§ 254.14 Manner of Service

[1] On Attorney

When service is required on an attorney, it must be made either by personal delivery to the attorney, by service in the manner provided by *Code Civ. Proc. § 1011(a)* when the attorney is absent from his or her office, or by mail in the manner provided by *Code Civ. Proc. § 684.120* (*see § 254.14[3]*) [*Code Civ. Proc. § 684.040*]. For discussion of service on an attorney or party pursuant to *Code Civ. Proc. § 1011(a)*, see Ch. 518, *Service of Summons and Papers* . Such service on the attorney constitutes service on the judgment creditor or debtor [*Code Civ. Proc. § 684.050*].

[2] Personal Service

If a writ, notice, order, or other paper is required to be personally served, service must be made in the same manner as a summons is served under *Code Civ. Proc. §§ 413.10-417.40* [*Code Civ. Proc. § 684.110(a)*]. For discussion of personal service of a summons, see Ch. 518, *Service of Summons and Papers* . Personal service on an attorney must be made in the manner set forth in *Code Civ. Proc. § 684.040* [*Code Civ. Proc. § 684.110(b)*]. [*See* discussion in *§ 254.14[1]*]. If the service is on a financial institution, title insurer as defined by *Ins. Code § 12340.4*, an underwritten title company as defined by *Ins. Code § 12340.5*, or an industrial loan company as defined by *Fin. Code § 18003*, service must be made at the office or branch that has actual possession of the property levied on or at which a deposit account levied on is carried, and must be made on the officer, manager, or other person in charge of the office or branch at the time of service [*Code Civ. Proc. § 684.110(c)*]. Subject to *Code Civ. Proc. § 684.110(c)*, if a levy is made by personally serving a copy of the writ and notice of levy on a third person, the service must be made in the same manner as a summons under *Code Civ. Proc. §§ 415.10* or *415.20* [*Code Civ. Proc. § 684.110(d)*].

[3] Service by Mail

[a] Method and Address

Except as otherwise provided by statute, notice by mail of a writ, notice, order, or other paper must be made by first-class mail, deposited in a post office, mailbox, sub-post office, substation, mail chute, or other like facility

regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed as follows [*Code Civ. Proc. § 684.120(a)*]:

- If an attorney is being served in place of a judgment creditor or judgment debtor, to the last address given by the attorney on any paper filed in the proceeding and served on the party making the service.

- If any other person is being served, to that person at his or her current mailing address if known or, if unknown, at the address last given by the person on any paper filed in the proceeding and served on the party making the service.

- If the mailing cannot be made to an attorney or other person as provided above, to the person at the person's last known address.

The writ, notice, order, or other paper served by mail should bear a notation of the date and place of mailing or be accompanied by an unsigned copy of the affidavit or certificate of mailing [*Code Civ. Proc. § 684.120(c)*].

[b] Extension of Prescribed Period

Service by mail is complete at the time of deposit but, unless the court prescribes a shorter period of time, any prescribed period of notice and any right or duty to respond or act within any prescribed period or on a date certain after service by mail is extended as follows [*Code Civ. Proc. § 684.120(b)*]:

- Five days if the place of address is within California.

- Ten days if the place of address is outside California but within the United States.

- Twenty days if the place of address is outside the United States.

[4] Service by Person Authorized by Levying Officer

If an order, notice, or other paper runs in favor of a particular person, the levying officer who normally makes the service may permit personal service to be made instead by such person or by the person's agent. The permission may be evidenced by a certificate signed by the levying officer. If service is made by the person authorized and not the levying officer, the cost of the service is not recoverable. The levying officer may not permit service by another person of a writ or notice of levy. The authority of a registered process server to levy under *Code Civ. Proc. §§ 680.010-724.260* is not affected by *Code Civ. Proc. § 684.140* [*Code Civ. Proc. § 684.140*; also see *Code Civ. Proc. §§ 699.080* (levy by registered process server under writ of execution), *715.040* (execution of writ of possession by registered process server)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProceduresPleading & PracticeService of ProcessMethodsMailCivil ProceduresPleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProceduresJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProceduresRemediesWritsAncillary WritsWrits of Execution

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§ 254.15 Proof of Service

[1] Notice of Hearing

If service of notice of a court hearing is required under *Code Civ. Proc. §§ 680.010-724.260* (Enforcement of Judgments Law), proof of service of notice of the hearing must be made at or before the hearing to the satisfaction of the court [*Code Civ. Proc. § 684.210*].

[2] Proof of Service, Posting, or Publication

Proof of service may be made by, but is not limited to, the following means:

- If service is made in the same manner as a summons under *Code Civ. Proc. §§ 413.10-417.40*, proof of service may be made as provided by *Code Civ. Proc. §§ 417.10-417.40* [*Code Civ. Proc. § 684.220(a)*].

- If service is made in the same manner as a summons under *Code Civ. Proc. § 415.10* or *415.20*, proof of service may be made by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of the person making the service showing the time, place, and manner of service and the facts showing that the service was made in accordance with the applicable statutory provisions. The affidavit must recite or otherwise show the name of the person to whom the papers served were delivered and, if appropriate, the title of that person or the capacity in which he or she was served [*Code Civ. Proc. § 684.220(b)*];

- If service is by mail as provided in *Code Civ. Proc. § 684.120*, proof may be made in the manner provided by *Code Civ. Proc. § 1013a* [*Code Civ. Proc. § 684.220(c)*].

- Proof of service may be made by the written admission of the person served [*Code Civ. Proc. § 684.220(f)*].

Proof of posting may be made by the affidavit of the person who posted the notice, showing the time and place of

posting [*Code Civ. Proc. § 684.220(d)*].

Proof of publication may be made by the affidavit of the publisher or printer, or the publisher's foreman or principal clerk, showing the time and place of publication [*Code Civ. Proc. § 684.220(e)*].

Proof of service, however made, or of posting or publication, may be made by testimonial evidence [*Code Civ. Proc. § 684.220(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.16

§ 254.16 Levying Officers

[1] Instructions

Instructions to levying officers are governed by *Code Civ. Proc. §§ 684.130* and *687.010*. For discussion and forms of instructions, see *§§ 254.685, 254.686*.

[2] Manner of Taking Custody of Property

When a levying officer is required to take custody of property, he or she may do so by either removing the property to a place of safekeeping, installing a keeper, or otherwise obtaining possession or control of the property [*Code Civ. Proc. § 687.030*].

[3] Liability of Officer

The levying officer or registered process server is not liable for actions taken in conformance with *Code Civ. Proc. § 680.010 et seq.*, including actions taken in reliance on information contained in the written instructions of the judgment creditor or on information provided by a registered process server pursuant to *Code Civ. Proc. § 699.080(d)* or *706.101(e)* (repealed; *now see Code Civ. Proc. § 706.108*), or pursuant to *Code Civ. Proc. § 715.040(b)* or to any other provision, except to the extent that the officer or registered process server has actual knowledge that the information is correct. Nothing in *Code Civ. Proc. § 687.040(a)* limits any liability the judgment creditor may have if the levying officer or registered process server acts on the basis of incorrect information given in the written instructions [*Code Civ. Proc. § 687.040(a)*].

Unless the levying officer is negligent in the care or handling of property, he or she is not liable to either the judgment debtor or judgment creditor for loss by fire, theft, injury, or damage of any kind to personal property while (1) in the possession of the levying officer either in a warehouse or other storage place or in the custody of a keeper, or (2) in transit to or from a warehouse or other storage place [*Code Civ. Proc. § 687.040(b)*].

[4] Levying Officer's Lien

The levying officer has a special lien, dependent on possession, on personal property levied on in the amount of the levying officer's costs for which an advance has not been made [*Code Civ. Proc. § 687.050*].

[5] Duty to Compute and Collect Interest and Costs

In a levy under a writ, the levying officer must collect the amount of costs and interest entered on the writ under *Code Civ. Proc. § 685.050(a)(1), (2)* [*Code Civ. Proc. § 685.050(b)(1)*].

The levying officer must also compute and collect the amount of additional interest required to be collected by *Code Civ. Proc. § 685.050(a)(3)* by reference to the daily interest entered on the writ. If amounts collected periodically do not fully satisfy the money judgment, the levying officer may, pursuant to a policy adopted by the office of the levying officer, adjust the amount of daily interest to reflect the partial satisfactions, and make later collections by reference to the adjusted amount of daily interest [*Code Civ. Proc. § 685.050(b)(2)*].

Finally, the levying officer is required to determine and collect the amount of additional costs under *Code Civ. Proc. § 685.050(a)(4)* [*Code Civ. Proc. § 685.050(b)(3)*].

[6] Levying Officer's Costs

Except as otherwise provided by law, as a prerequisite to action by the levying officer to enforce a judgment, the judgment creditor must deposit the costs of performance with the officer [*Code Civ. Proc. § 685.100(a)(1)*]. If the officer is to take property into custody, whether by keeper or otherwise, the judgment creditor must deposit a sum sufficient to pay the costs of taking and keeping the property for a period not to exceed 15 days. If the period is extended, the levying officer will demand orally or in writing the deposit of additional amounts for periods not to exceed 30 days each. A written demand must be delivered or mailed to the judgment creditor. The judgment creditor has not less than three business days after receipt of the demand within which to comply. If deposit is not made within the time specified in the demand, the levying officer will release the property [*Code Civ. Proc. § 685.100(a)(2)*]. The levying officer is not liable for failure to take or hold property unless the judgment creditor has deposited the required sum [*Code Civ. Proc. § 685.100(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawSecured TransactionsPerfection & PriorityPriorityLiensGovernmentsLocal GovernmentsEmployees & OfficialsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployees

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§ 254.17 Severability

If any provision or clause in *Code Civ. Proc. § 680.010 et seq.* or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of *Code Civ. Proc. § 680.010 et seq.* that can be given effect without the invalid provisions or application [*Code Civ. Proc. § 681.050*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsEmployees & OfficialsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployees

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21-254 California Forms of Pleading and Practice--Annotated § 254.18

§ 254.18 Costs and Interest Under Writ

If a writ is issued pursuant to *Code Civ. Proc. §§ 680.010-724.260* to enforce a judgment, the costs and interest to be satisfied in a levy under the writ include the following [*Code Civ. Proc. § 685.050(a)*]:

- The statutory fee for issuance of the writ.

- The amount of interest that has accrued from the date of entry or renewal of the judgment to the date of issuance of the writ, as adjusted for partial satisfactions, if the judgment creditor has filed an affidavit with the court clerk stating such amount.

- The amount of interest that accrues on the principal amount of the judgment remaining unsatisfied from the date of issuance of the writ until the date interest ceases to accrue.

- The levying officer's statutory costs for performing the duties under the writ.

For discussion and statutory provisions relating to a levying officer's costs, see *§ 254.16[6]*; see also *see § 254.685*. For discussion and forms relating to memorandum of costs and motion for costs, see Ch. 174, *Costs and Attorney's Fees* . For discussion of interest in both tort and contract actions, see Ch. 177, *Damages* . For discussion of interest on a judgment generally, see Ch. 318, *Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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§ 254.19 Transitional Provisions for Proceedings Commenced Prior to July 1, 1983

[1] New Law Governs as General Rule

Except as otherwise provided by *Code Civ. Proc. §§ 694.010-694.090*, the Enforcement of Judgments Law [*Code Civ. Proc. §§ 680.010-724.260*] applies to all proceedings commenced prior to the operative date of July 1, 1983, unless in the opinion of the court application of a particular provision would substantially interfere with the effective conduct of the proceedings or the rights of the parties or other interested persons, in which case the particular provision does not apply and prior law applies [*Code Civ. Proc. § 694.020*].

[2] Period of Enforcement

[a] In General

Except for judgments entered under the Family Law Code, or judgments against public entities, the period for enforcement of a money or nonmoney judgment entered prior to July 1, 1983, is the 10-year period set forth in *Code Civ. Proc. §§ 683.010-683.320*[*Code Civ. Proc. § 694.030(a)*; *see Code Civ. Proc. §§ 683.310-683.320*].

Notwithstanding *Code Civ. Proc. § 694.030(a)*, a judgment that is not renewable pursuant to *Code Civ. Proc. §§ 683.010-683.320* because the renewal application period has expired may still be renewed under *Code Civ. Proc. §§ 683.010-683.320* if the court that entered the judgment determines that authority to enforce the judgment after the 10-year period pursuant to former *Code Civ. Proc. § 681* would have been granted if a motion had been made under former *Code Civ. Proc. § 685*, and if the court, in its discretion, makes an order authorizing renewal of the judgment. In order to obtain the order, the judgment creditor must file a noticed motion within two years after July 1, 1983 [*Code Civ. Proc. § 694.030(b)*].

[b] Homestead Declaration

A declaration of homestead made prior to July 1, 1983 pursuant to *Civ. Code §§ 1237-1304* is effective only to the extent provided by *Code Civ. Proc. § 704.910 et seq.* [*Code Civ. Proc. § 694.090*]. For discussion of the law governing

homestead exemptions, see Ch. 294, *Homesteads* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsRevival of JudgmentsReal Property LawHomestead Exemptions

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21-254 California Forms of Pleading and Practice--Annotated § 254.20

§ 254.20 Former Law Governs

[1] Execution and Return of Writs and Orders

The sale or delivery of property levied on or otherwise subject to enforcement of a judgment prior to July 1, 1983, is governed by prior law except that manner of payment at a sale of property pursuant to a writ or order after July 1, 1983, is governed by *Code Civ. Proc. § 701.590* [*Code Civ. Proc. § 694.040(a), (c)*]. For discussion of the manner of payment at an execution sale, see *§ 254.80* et seq.

Similarly, the duties to be performed in the execution of a writ or order for enforcement of a judgment that is served prior to July 1, 1983, are governed by prior law [*Code Civ. Proc. § 694.040(b)*].

[2] Redemption Rights

Property that would have been sold subject to the right of redemption under prior law may be redeemed under prior law if the foreclosure or other proceedings for sale were commenced prior to July 1, 1983 [*Code Civ. Proc. § 694.050(a)*]. If the judgment creditor and judgment debtor agree in writing, however, such property may be sold as provided in *Code Civ. Proc. §§ 680.010-724.260* (Enforcement of Judgments Law) rather than subject to the right of redemption [*Code Civ. Proc. § 694.050(b)*]. If the property has already been sold subject to redemption prior to July 1, 1983, it may be redeemed under prior law [*Code Civ. Proc. § 694.050(c)*].

[a] Creditor's Suit

Despite the limitations provisions of *Code Civ. Proc. § 708.230* (discussed in Part IV), an action may be commenced pursuant to *Code Civ. Proc. § 708.210* until July 1, 1984, if the action could have been commenced under prior law on June 30, 1983 [*Code Civ. Proc. § 694.060*].

[b] Third-Party Proceedings

A third-party claim filed prior to July 1, 1983, is governed by prior law [*Code Civ. Proc. § 694.070(a)*]. A demand for a

third-party claim served on a secured party prior to July 1, 1983, is also governed by prior law [*Code Civ. Proc. § 694.070(b)*].

[c] Exemptions

The exemptions from enforcement of a money judgment provided in *Code Civ. Proc. §§ 680.010-724.260* do not apply to property levied on or otherwise subjected to a lien prior to July 1, 1983. Whether or not such property is exempt is determined by the law in effect at the time the lien was created [*Code Civ. Proc. § 694.080*].

Legal Topics:

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

§§ 254.21[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.40

§ 254.40 Governing Statutes

Execution is governed generally by *Code Civ. Proc. §§ 699.010-701.830*. A stay of enforcement of a money judgment on appeal is governed by *Code Civ. Proc. § 916*. Execution sales are governed by *Code Civ. Proc. §§ 701.510-701.830*. General provisions governing exemptions are set forth in *Code Civ. Proc. §§ 703.010-703.130*. Procedures for claiming exemptions after levy on property are governed by *Code Civ. Proc. §§ 703.510-703.610*. Exempt property is described in *Code Civ. Proc. §§ 704.010-704.210*.

Legal Topics:

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

§§ 254.41[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.60

§ 254.60 Property Subject to Execution

With the exceptions noted below, all of a judgment debtor's property that is subject to enforcement of a money judgment is subject to levy under a writ of execution [*Code Civ. Proc. § 699.710*]. Property subject to enforcement of a money judgment is described by *Code Civ. Proc. §§ 695.010-695.070*.

The following types of property are not subject to execution [*Code Civ. Proc. § 699.720(a)*]:

- An alcoholic beverage license that is transferable under *Bus. & Prof. Code § 24070 et seq.*

- The interest of a partner in a partnership or member in a limited liability company if the partnership or the limited liability company is not a judgment debtor.

- A cause of action that is the subject of a pending action or special proceeding.

- A judgment in favor of the judgment debtor prior to the expiration of the time for appeal from such judgment or, if an appeal is filed, prior to the final determination of the appeal.

- A debt, other than earnings, owing and unpaid by a public entity.

- The loan value of an unmatured life insurance, endowment, or annuity policy.

- A franchise granted by a public entity and all the accompanying rights and privileges of the franchise.

- The interest of a trust beneficiary.

- A contingent remainder, executory interest, or other interest in property that is not vested.

- Property in a guardianship or conservatorship estate. *Code Civ. Proc. § 699.720(a)* does not affect or limit the right of the judgment creditor to apply property to the satisfaction of a money judgment pursuant to any applicable procedure other than execution [*Code Civ. Proc. § 699.720(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.61

§ 254.61 Writ of Execution

[1] Issuance

After entry of a money judgment, the court clerk will issue a writ of execution on application of the judgment creditor [*see § 254.680*]. The writ is directed to the levying officer in the county in which the levy is to be made or to a process server. Separate writs are issued for each county in which a levy is to be made, and may be issued successively until the judgment is satisfied, but 180 days must expire between issuance of successive writs in the same county unless the prior writ is first returned [*Code Civ. Proc. § 699.510(a)*]. The clerk must give priority to the application for and issuance of writs of execution on orders or judgments for child support and spousal support [*Code Civ. Proc. § 699.510(a)*].

The writ must be issued in the name of the judgment debtor as listed on the judgment, and may include additional names by which the judgment debtor is known. The additional names must be set out in an "Affidavit of Identity," as defined in *Code Civ. Proc. § 680.135* [*see § 254.680*.05]. The Affidavit of Identity must be filed by the judgment creditor together with the application for issuance of the writ of execution. Before the clerk of the court issues a writ of execution containing any additional names by which the judgment debtor is known that are not listed on the judgment, the court must approve the Affidavit of Identity. If the court determines, without a hearing or notice, that the Affidavit of Identity states sufficient facts on which the judgment creditor has identified the additional names of the judgment debtor, the court will authorize the issuance of the writ of execution with the additional name or names [*Code Civ. Proc. § 699.510(c)(1)*].

When the writ lists a name other than that listed on the judgment, the person in possession or control of the levied property, if other than the judgment debtor, must not pay the amount or deliver the property being levied on to the levying officer until being notified to do so by the levying officer. The levying officer may not require a person other than the judgment debtor in possession or control of the levied property to pay the amount or deliver the property levied on until the expiration of 15 days after service of notice of levy [*Code Civ. Proc. § 699.510(c)(2)*]. If a person who is not the judgment debtor has property erroneously subject to an enforcement of judgment proceeding based on an Affidavit of Identity, the person is entitled to the recovery of reasonable attorney's fees and costs from the judgment

creditor incurred in releasing the person's property from a writ of execution, in addition to any other damages or penalties to which an aggrieved person may be entitled by law, including *Code Civ. Proc. § 720.010 et seq.* [*Code Civ. Proc. § 699.510(c)(3)*; *see* discussion of *Code Civ. Proc. § 720.010 et seq.* in *§ 254.310* et seq.].

If the writ of execution is sought to enforce a judgment granted under the Family Code (*Fam. Code §§ 290 et seq., 5100 et seq.*), the judgment creditor must satisfy the requirements set forth in the Family Code in addition to the requirements of *Code Civ. Proc. §§ 699.510-699.560* [*Code Civ. Proc. § 699.510(b)*]. For a discussion of the enforcement of judgments in family law proceedings, see Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* , Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* , and Ch. 260, *Family Law Enforcement: Foreign Judgments* .

[2] Return of Writ

The writ of execution, together with a report of the levying officer's actions and an accounting of amounts collected and costs incurred, must be returned to the court by the officer to whom the writ was delivered at the earliest of the following times [*Code Civ. Proc. § 699.560(a)*]:

- Two years from the date of issuance of the writ;
- Promptly after all duties under the writ are performed;
- When return is requested in writing by the judgment creditor;
- If no levy takes place under the writ within 180 days after its issuance, promptly after expiration of the 180-day period; or
- On expiration of the time for enforcement of the money judgment.

If a levy has been made under *Code Civ. Proc. § 700.200* on the interest in the personal property of a decedent's estate, the writ must be returned not later than one year after the date the court decree distributing the interest has become final [*Code Civ. Proc. §§ 699.560(b), 700.200(e)*].

A writ of execution pursuant to which a levy is made on the judgment debtor's right to payment of benefits from an employee benefit plan under *Fam. Code § 5103* must be returned not later than one year after the date the execution lien expires pursuant to the requirements of *Fam. Code §§ 5100, 5103* [*Fam. Code § 5100 et seq.*; *see* Civ. Code § 699.560].

If a levy has been made under the Wage Garnishment Law (*Code Civ. Proc. § 706.010 et seq.*), and the earnings withholding order remains in effect, the writ of execution must be returned as provided in *Code Civ. Proc. § 699.560(a)*, and a supplemental return must be made as provided in *Code Civ. Proc. § 706.033* [*Code Civ. Proc. § 699.560(d)*]. This procedure enables a judgment creditor who has an outstanding writ of execution and a levy by an earnings withholding order to have the writ returned and obtain a successive writ, even though the earnings withholding order remains in effect [*see Code Civ. Proc. § 699.510*; Stats. 1992, Ch. 283, § 19(b)]. Thus, the creditor is not required to choose between continuing a wage garnishment and levying on other property to enforce his or her judgment [*see* Stats. 1992, Ch. 283, § 19(b)]. For further discussion of earnings withholding orders generally, see Ch. 276, *Garnishment* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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§ 254.62 Notice of Levy

A notice of levy must be served along with a copy of the writ of execution whenever property is levied on [*Code Civ. Proc. § 700.010(a)*; *see § 254.683*]. If the judgment debtor is a natural person, a copy of the Judicial Council form listing exemptions from execution must be served with the writ and notice of levy [*Code Civ. Proc. § 700.010(a)*; *see Code Civ. Proc. § 681.030*; *see § 254.684*]. If the writ lists any names of the debtor not listed in the judgment, a copy of the Affidavit of Identity must be served with the writ and notice of levy [*Code Civ. Proc. § 700.010(a)*; *see Code Civ. Proc. § 680.135* (definition of Affidavit); *see § 254.680*.05]. Service and posting requirements vary according to the type of property levied on, and are discussed below in connection with each type of levy [*see Code Civ. Proc. §§ 700.010-700.200*]. A copy of the original notice of levy which has been served on a third party holding the property sought to be levied upon and the Affidavit of Identity [*see Code Civ. Proc. § 680.135*; *see § 254.680*.05], if any, will, if served on the judgment debtor or any other party, suffice as the notice of levy to that person [*Code Civ. Proc. § 699.545*]. For discussion of service of papers and extension of the time for service when service is by mail, see *§ 254.13*. The notice of levy must inform the person notified of the following [*Code Civ. Proc. § 699.540*]:

- The capacity in which the person is notified;
- The property that is levied on;
- The person's rights under the levy, including the right to claim an exemption under *Code Civ. Proc. §§ 703.010-704.995*, and to make a third-party claim under *Code Civ. Proc. §§ 720.010-720.880*; and
- The person's duties under the levy.
- All names listed in the writ of execution pursuant to an Affidavit of Identity as defined in *Code Civ. Proc. § 680.135*, if any.

When property has been levied on and, pursuant to the levy, a copy of the writ of execution and notice of levy are

required by statute to be posted or to be served on or mailed to the judgment debtor or other person, a failure to post, serve, or mail the copy and notice as required does not affect the execution lien created by the levy [*Code Civ. Proc. § 699.550*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.63

§ 254.63 Payment by Person Indebted to Judgment Debtor

At any time after delivery of a writ of execution to a levying officer and before its return, a person indebted to the judgment debtor may pay the amount of the debt, or as much as is necessary to satisfy the money judgment, to the levying officer. The receipt given by the levying officer for the amount paid constitutes a discharge for that amount [*Code Civ. Proc. § 699.020*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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§ 254.64 Turnover Order

If a writ of execution is issued, the judgment creditor may apply for an order directing the judgment debtor to transfer to the levying officer possession of either the property sought to be levied on, if the property is to be levied on by taking it into custody, or documentary evidence of title to property of or a debt owed to the judgment debtor that is sought to be levied on or both. The application may be made ex parte unless a court rule or order requires it to be made on noticed motion [*see §§ 254.691, 254.692*]. The order may be issued on a showing of need [*Code Civ. Proc. § 699.040*; *see § 254.693*].

If a judgment debtor claims that property for which a turnover order is sought is exempt, the judgment debtor must raise the claim of exemption in the examination procedure or prior to the issuance of the turnover order [*Imperial Bank v. Pim Electric, Inc. (1995) 33 Cal. App. 4th 540, 548, 39 Cal. Rptr. 2d 432]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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21-254 California Forms of Pleading and Practice--Annotated § 254.65

§ 254.65 Execution of Writ

[1] Levy by Registered Process Server

When the levying officer to whom the writ of execution is directed receives the writ, along with the written instructions of the judgment creditor, he or she will execute the writ in the manner prescribed by law. The levying officer may not levy on property under the writ after the expiration of 180 days from the date the writ is issued [*Code Civ. Proc. § 699.530*]. However, consecutive writs may be issued within each county where property to be executed on is located [*see Code Civ. Proc. § 699.510(a)*; *see § 254.349*].

The levying officer is the sheriff or marshal [*Code Civ. Proc. § 680.260*]. Registered process servers, however, are authorized to levy on certain types of property, which are listed in *Code Civ. Proc. § 699.080(a)* [*Code Civ. Proc. § 699.080(a)*]. Before levying under the writ of execution, a registered process server must deposit a copy of the writ with the levying officer and pay the fee provided by *Gov. Code § 26721* [*Code Civ. Proc. § 699.080(b)*; *see also Gov. Code § 26720.9* (fee increases)]. The process server must comply with applicable levy, posting, and service provisions of *Code Civ. Proc. §§ 700.010-700.200*, and request any third person served to give a garnishee's memorandum to the levying officer in compliance with *Code Civ. Proc. § 701.030* [*Code Civ. Proc. § 699.080(c)*]. The process server also must file the following documents with the levying officer within five court days after levy [Code. Civ. Proc. § (d)(1)-(4)]:

- The writ of execution;
- A proof of service by the registered process server stating the manner of levy performed;
- Proof of service of the copy of the writ and notice of levy on other persons required by *Code Civ. Proc. §§ 700.010-700.200*; and
- Written instructions, as required by *Code Civ. Proc. § 687.010*.

If the fee provided by *Gov. Code § 26721* (and increased by *Gov. Code § 26720.9*) has been paid, the levying officer must perform all other duties under the writ as if the levying officer had levied under the writ and must return the writ to the court. If the registered process server does not comply with *Code Civ. Proc. § 699.080(b)* and *(d)*, the levy is ineffective and the levying officer is not required to perform any duties under the writ and may issue a release for any property sought to be levied on [*Code Civ. Proc. § 699.080(e)*].

The process server's fees must be allowed as a recoverable cost pursuant to *Code Civ. Proc. § 1033.5* [*Code Civ. Proc. § 699.080(f)*].

A registered process server may levy more than once under the same writ of execution, provided the writ is still valid [*Code Civ. Proc. § 699.080(g)*].

[2] Levy on Real Property

To levy on real property, the levying officer or registered process server records a copy of the writ of execution and notice of levy with the recorder in the county where the property is located. If the judgment debtor's interest in the property is recorded under a third person's name, the notice of levy must identify that third person and the recorder will index the writ and notice of levy under both the third party's and the judgment debtor's names [*Code Civ. Proc. § 700.015(a)*]. At the time of levy or promptly thereafter, the third person in whose name the judgment debtor's interest stands must be served a copy of the writ and notice of levy, either personally or by mail. If by mail, service must be sent either to the address in the county tax assessor's records, or if no such address is shown, to the address used by the county recorder for the return of the instrument creating the interest of the third person in the property [*Code Civ. Proc. § 700.015(b)*].

At the time of levy or promptly thereafter, a copy of the writ and notice of levy must also be served on one occupant of the real property. Service may be made either by leaving the copy and notice with the occupant personally or, in the occupant's absence, with a person of suitable age and discretion found on the property when service is attempted who is either an employee or agent of the occupant or a member of the occupant's household. If service on an occupant is not possible when attempted, the copy and writ must be posted in a conspicuous place on the property. If the property described in the notice consists of more than one distinct lot, parcel, or governmental subdivision and any of them lie with relation to the others so as to form one or more continuous, unbroken tracts, only one service or posting is required as to each tract [*Code Civ. Proc. § 700.015(c)*].

[a] Order for Sale of Dwelling

Generally, a natural person's interest in a real property dwelling may not be sold under a writ of execution to enforce a money judgment unless the judgment creditor obtains a court order for sale pursuant to *Code Civ. Proc. §§ 704.710-704.850*, which provide for a hearing to determine the existence and amount of any homestead exemption in the dwelling [*see Code Civ. Proc. § 704.740(a)*]. A court order is not required, however, for the sale of a dwelling in which the judgment debtor has a leasehold estate with an unexpired term of less than two years at the time of levy or for the sale of a dwelling that is personal property. The homestead exemption pertaining to these types of dwellings is claimed and determined as provided in *Code Civ. Proc. §§ 703.510-703.601* [*Code Civ. Proc. § 704.740(b)*; *see* discussion in *§ 254.150* et seq.]. For discussion and forms related to orders for the sale of a dwelling, see Ch. 294, *Homesteads* .

[b] Crops, Timber, or Minerals

Levy on growing crops, timber to be cut, or minerals or the like (including oil and gas) to be extracted or accounts receivable resulting from sale at the wellhead or minehead may be levied on in the exact manner as real property under

Code Civ. Proc. § 700.015. One additional provision in the case of crops, timber, or minerals, however, requires service of the copy of the writ and notice of levy on any secured party who has filed a financing statement with respect to the property or accounts receivable prior to the date of levy [*see Code Civ. Proc. § 700.020*].

[3] Levy on Tangible Personal Property

[a] In Possession of Judgment Debtor

Unless otherwise provided by *Code Civ. Proc. §§ 700.010-700.200*, the levying officer must levy on tangible personal property in the possession or under the control of the judgment debtor by taking it into custody [*see Code Civ. Proc. § 700.030*]. Registered process servers may not levy on personal property in the possession of the judgment debtor [*see Code Civ. Proc. § 699.080*].

[b] Property Located in Private Place

If the personal property is located in a private place of the judgment debtor, the levying officer must demand delivery of the property by the judgment debtor and must also advise the judgment debtor that he or she will be liable for costs and attorney's fees incurred in any further proceedings to obtain delivery. The levying officer may not make any further attempt to obtain custody, but must promptly notify the judgment creditor of the failure to obtain the property [*Code Civ. Proc. § 699.030(a)*].

The judgment creditor may apply ex parte, or by noticed motion if the court or a court rule so requires, for an order directing the levying officer to seize the property in the private place. The application may be made whether or not a writ has been issued and whether or not a demand has been made by the levying officer for delivery of the property [*Code Civ. Proc. § 699.030(b)*; *see §§ 254.688 -254.690*].

There must be probable cause to believe that the property is located in the place described before the order may issue. The levy ing officer must announce his or her identity, purpose, and authority at the time delivery of the property pursuant to the order is sought. If the property is not voluntarily delivered, the levying officer may break into the building in the manner which he or she believes will cause the least damage, but if the levying officer believes that the entry and seizure will involve a substantial risk of death or serious bodily harm to any person, he or she must refrain from entering and instead return to the court setting forth the reasons for that belief. In such a case, the court will issue such orders as may be appropriate [*Code Civ. Proc. § 699.030(b)*].

[c] In Possession of Third Party

To levy on tangible personal property in the possession or under the control of a third person, the levying officer must personally serve a copy of the writ of execution and notice of levy on the third person [*Code Civ. Proc. § 700.040(a)*; *see Code Civ. Proc. §§ 700.040(b)*, *700.050*, *700.060*, and *700.150-700.160* for exceptions; *see also Code Civ. Proc. § 700.150(b)*]. A registered process server is not permitted to make the levy [*see Code Civ. Proc. § 699.080*].

If the goods are in the possession of a bailee, as defined by *Com. Code § 7102(a)(1)*, who has issued a negotiable document of title for the goods, the negotiable document, but not the goods, may be levied on in the manner provided by *Code Civ. Proc. § 700.120*. If the goods are in the possession of a bailee other than the one who has issued the document, they may be levied on in the manner provided by *Code Civ. Proc. § 700.060* [*Code Civ. Proc. § 700.040(b)*; see *discussion under § 254.65[3][d]*].

[d] In Possession of Bailee

If the property is held by a bailee other than one who has issued a negotiable document of title, the levying officer must personally serve a copy of the writ of execution and notice of levy on the bailee [*Code Civ. Proc. § 700.060(a)*]. If the

goods are subject to a security interest and the judgment creditor so instructs, the secured party must also be served, either personally or by mail, with a copy of the writ and notice of levy [*Code Civ. Proc. § 700.060(b)*]. A registered process server is not permitted to make the levy [*see Code Civ. Proc. § 699.080*].

[e] In Possession of Levying Officer

If the property is in the custody of the levying officer to whom the writ was directed, the judgment creditor must deliver the writ to the levying officer. If the writ is directed to a levying officer other than the officer having custody of the property, the levying officer to whom the writ is directed must serve a copy of the writ and notice of levy on the other officer, either personally or by mail. The levying officer having custody of the property must comply with the writs in the order they are received and is not subject to the requirements of *Code Civ. Proc. § 701.010 et seq.* (duties and liabilities of third persons after levy) [*Code Civ. Proc. § 700.050*].

A registered process server is authorized to levy on personal property in the custody of a levying officer [*Code Civ. Proc. § 699.080(a)(3)*].

[f] Property of Going Business

Tangible personal property of a going business in the possession or under the control of the judgment debtor may be levied on in the same manner as provided by *Code Civ. Proc. § 700.030* for levying on other tangible personal property in possession of the judgment debtor [*Code Civ. Proc. § 700.070*; *see § 254.65[3][a]*]. However, the judgment creditor may vary that manner of levy by instructing the levying officer to place a keeper in charge of the business for a period requested by the judgment creditor, during which the business may continue to operate in an ordinary fashion provided that all sales are final and are for cash or its equivalent [*see Code Civ. Proc. § 700.070(a)*]. If the keeper's purpose is limited to taking into custody money or equivalent proceeds of sales, the levying officer must take the property into exclusive custody at the end of each daily keeper period [*Code Civ. Proc. § 700.070(c)*]. When the keeper's purpose is not limited solely to money or equivalent proceeds of sales, the levying officer must take the tangible personal property into exclusive custody either at any time the judgment debtor objects to the placement of a keeper in charge of the business, or at any time requested by the judgment creditor, or at the end of 10 days from the time the keeper is placed in charge of the business, whichever is earliest [*Code Civ. Proc. § 700.070(b)*].

[g] Personal Property Used as a Dwelling

To levy on personal property used as a dwelling, the levying officer must serve a copy of the writ and notice of levy on one occupant of the property. The copy and notice must be left with the occupant personally or, in the occupant's absence, with a person of suitable age and discretion found on the property when service is attempted who is a member of the occupant's household. If service on an occupant is not possible when attempted, the copy and writ must be posted in a conspicuous place on the property [*Code Civ. Proc. § 700.080(a)*]. Personal property used as a dwelling includes a mobilehome, regardless of whether the mobilehome is occupied at the time of the levy [*Code Civ. Proc. § 700.080(d)*]. If the judgment creditor so instructs, the levying officer must place a keeper in charge for a period requested by the judgment creditor [*Code Civ. Proc. § 700.080(b)*].

The judgment creditor may apply to the court on noticed motion for an order directing the levying officer to remove the occupants [*Code Civ. Proc. § 700.080(c)*; *see §§ 254.694 -254.696*].

The interest of a natural person in a dwelling that is real property may not be sold to enforce a money judgment except pursuant to an order for sale obtained under *Code Civ. Proc. §§ 704.710-704.850* unless the judgment debtor's interest in the property is a leasehold estate with less than two unexpired years [*Code Civ. Proc. § 704.740*]. For a discussion and forms relating to enforcement of a money judgment against a dwelling, see Ch. 294, *Homesteads* .

[h] Vehicle or Vessel

If a certificate of ownership issued by the Department of Motor Vehicles for a vehicle or vessel, or a certificate of title issued by the Department of Housing and Community Development for a mobilehome or commercial coach, is still in effect, the levying officer must determine the name and address of the legal owner from the appropriate department before levying on the property. If the legal owner is not the judgment debtor and is not in possession of the property, the levying officer must serve a copy of the writ and a notice of levy on the legal owner at the time of levy or promptly thereafter, either personally or by mail [*Code Civ. Proc. § 700.090*].

[i] Property of Decedent's Estate

The levying officer or registered process server may levy on a judgment debtor's interest in the personal property of a decedent's estate, whether that interest arises by testate or intestate succession, by personally serving a copy of the writ and a notice of levy on the personal representative of the decedent. The levy does not impair the power of the representative over the property for the purposes of administration [*Code Civ. Proc. § 700.200(a)*].

The representative must report the levy to the court in which the estate is being administered when any petition for distribution is filed. If the court orders distribution to the judgment debtor, it must order the property levied on to be delivered to the levying officer as soon as the decree ordering distribution becomes final. The judgment debtor may keep any property in excess of the amount required to satisfy the judgment [*Code Civ. Proc. § 700.200(b)*]. The levying officer must serve a notice describing the property on the judgment debtor, either personally or by mail, promptly after receiving delivery. Notwithstanding *Code Civ. Proc. § 703.520* (exemption claim procedure), a claim of exemption for the property may be made within 10 days after the notice is served [*Code Civ. Proc. § 700.200(c)*].

An execution lien created under *Code Civ. Proc. § 700.200* continues for one year after the distribution decree becomes final, unless the judgment is satisfied sooner [*Code Civ. Proc. § 700.200(d)*]. The writ under which the levy is made must be returned not later than one year after the distribution decree becomes final [*Code Civ. Proc. § 700.200(e)*].

[4] Levy on Intangible Personal Property

[a] Chattel Paper

If chattel paper is in the possession of the judgment debtor, the levying officer must take the property into custody. If it is in the possession of a third person, the officer must personally serve a copy of the writ and a notice of levy on that person [*Code Civ. Proc. § 700.100(a)*]. If the levying officer obtains custody of the chattel paper or if the judgment debtor is entitled under a security agreement to collect or compromise the paper or to accept the return of goods or make repossessions, the judgment creditor may instruct the levying officer to serve a copy of the writ and notice of levy on the account debtor. Service may be made personally or by mail [*Code Civ. Proc. § 700.100(b)*].

In addition to any other rights created by a levy on chattel paper, the levy creates a lien on the judgment debtor's rights in specific goods subject to the chattel paper [*Code Civ. Proc. § 700.100(c)*].

[b] Instruments and Negotiable Documents of Title

If an instrument, as defined by *Code Civ. Proc. § 680.220*, or a negotiable document of title is in the possession of the judgment debtor, the levying officer must take it into custody. If it is in possession of a third person, the levying officer must personally serve a copy of the writ and a notice of levy on that person [*Code Civ. Proc. §§ 700.110(a), 700.120*]. If the levying officer obtains custody of an instrument, the judgment creditor may instruct the levying officer to serve a copy of the writ and notice of levy on the obligor, either personally or by mail [*Code Civ. Proc. § 700.110(b)*].

[c] Securities

To levy on a certificated security, the levying officer must comply with *Com. Code § 8112* [*Code Civ. Proc. § 700.130*; *see Ho v. Hsieh (2010) 181 Cal. App. 4th 337, 345-347, 105 Cal. Rptr. 3d 17* (describing procedure)]. The provisions of *Com. Code § 8317* are discussed in Ch. 162, *Corporations: Issuance of Shares* and Ch. 163, *Corporations: Transfer of Shares* .

[d] Deposit Accounts

Subject to *Code Civ. Proc. § 700.160*, to levy on a deposit account, the levying officer must personally serve a copy of the writ and notice of levy on the financial institution with which the account is maintained [*Code Civ. Proc. § 700.140(a)*]. Alternatively, the levying officer may personally serve the writ of execution and notice of levy to a centralized location within California designated by the financial institution. If the writ of execution is received at the designated central location, it must apply to all deposit accounts held by the financial institution regardless of the location of that property. However, the financial institution is not required to designate a central location for personal service of the writ of execution and notice of levy [*Code Civ. Proc. § 700.140(a)*].

The execution lien only reaches amounts in the deposit account at the time of service on the financial institution (including any item in the deposit account that is in the process of being collected unless the item is returned unpaid to the financial institution) [*Code Civ. Proc. § 700.140(a)*]. If the account stands in the name of a third person, the copy and notice must be served on that person, either personally or by mail, at the time of levy or promptly thereafter [*Code Civ. Proc. § 700.140(b)*]. For the purposes of *Code Civ. Proc. § 700.140* neither of the following is a third person in whose name the deposit account stands [*Code Civ. Proc. § 700.140(f)*]:

- A person who is only a person named as a beneficiary of a Totten trust account.

- A person who is only a payee designated in a pay-on-death provision in an account pursuant to *Fin. Code § 18318.5, Prob. Code § 5140* or other similar provision.

While the execution lien is in effect, access to the funds is restricted, and the financial institution is shielded from liability for acts pursuant to the execution lien [*see Code Civ. Proc. § 700.140(c), (d)*].

Registered process servers are authorized to levy on deposit accounts [*Code Civ. Proc. § 699.080(a)(5)*].

[e] Safe Deposit Boxes

Subject to *Code Civ. Proc. § 700.160*, to levy on property in a safe deposit box, the levying officer must personally serve a copy of the writ and notice of levy on the financial institution with which the box is maintained [*Code Civ. Proc. § 700.150(a)*]. If the box stands in the name of a third person, that person must also be served with a copy of the writ and a notice of levy, either personally or by mail, at the time of levy or promptly thereafter [*Code Civ. Proc. § 700.150(b)*]. The contents of the box may not be removed during the time the lien is in effect, except pursuant to the levy [*Code Civ. Proc. § 700.150(c)*]. The levying officer may first give the person in whose name the box stands an opportunity to open the box to permit the removal pursuant to the levy of the property levied on. The financial institution may refuse to permit the forcible opening of the box unless the judgment creditor pays in advance the cost of the opening and any necessary repairs [*Code Civ. Proc. § 700.150(d)*].

Registered process servers are authorized to levy on safe deposit boxes [*Code Civ. Proc. § 699.080(a)(6)*].

[f] Deposit Accounts and Safe Deposit Boxes Not Held Exclusively by Judgment Debtor

If a deposit account or safe-deposit box stands in the name of a person other than the judgment debtor, either alone or together with other third persons, except as provided in *Code Civ. Proc. § 700.160(b)*, it is not subject to levy under

Code Civ. Proc. §§ 700.140 or *700.150* unless the levy is authorized by court order. The levying officer must serve a copy of the court order on the third person at the time the copy of the writ of execution and the notice of levy are served on the third person [*Code Civ. Proc. § 700.160(a)*]. A court order is not required to levy on a deposit account or safe-deposit box standing in the name of any of the following [*Code Civ. Proc. § 700.160(b)*]:

- The judgment debtor, whether alone or together with third persons [*Code Civ. Proc. § 700.160(b)(1)*].

- The judgment debtor's spouse, whether alone or together with other third persons [*Code Civ. Proc. § 700.160(b)(2)*].

- A fictitious business name if an unexpired fictitious business name statement filed pursuant to *Bus. & Prof. Code §§ 17900-17930* lists as the persons doing business under the fictitious business name either the judgment debtor, the judgment debtor's spouse, or the judgment debtor and the judgment debtor's spouse, but does not list any other person [*Code Civ. Proc. § 700.160(b)(3)*].

- The additional name of a judgment debtor listed on the writ of execution pursuant to an Affidavit of Identity [*see Code Civ. Proc. § 680.135*], whether alone or together with third persons.

If the deposit account or safe deposit box stands in the name of the judgment debtor's spouse, an affidavit showing that the person in whose name the account stands is the judgment debtor's spouse must be delivered to the financial institution at the time of levy [*Code Civ. Proc. § 700.160(b)(2)*; *see Grover v. Bay View Bank (2001) 87 Cal. App. 4th 452, 104 Cal. Rptr. 2d 677* (judgment creditor's failure to deliver to bank at time of levy affidavit showing marital relationship as required by *Code Civ. Proc. § 700.160(b)(2)* meant bank had no right or duty to freeze accounts of spouse of judgment debtor without proper levy papers)].

If the deposit account or safe deposit box stands in the name of a fictitious business as described by *Code Civ. Proc. § 700.160(b)(3)*, a copy of a fictitious business name statement, certified as provided in *Bus. & Prof. Code § 17926*, that satisfies the requirements of *Code Civ. Proc. § 700.160(b)(3)* must be delivered to the financial institution at the time of levy, and if a person other than the defendant is listed in the statement, an affidavit showing that the other person is the judgment debtor's spouse must also be delivered to the financial institution at the time of levy [*Code Civ. Proc. § 700.160(b)(3)*].

In any case in which a deposit account in the name of a person other than the judgment debtor, whether alone or together with the judgment debtor, is levied on, the financial institution must not pay to the levying officer the amount levied on until being notified to do so by the levying officer. The levying officer may not require the financial institution to pay the amount levied on until the expiration of 15 days after service of notice of levy on the third person [*Code Civ. Proc. § 700.160(c)*].

[g] Accounts Receivable and General Intangibles

Unless *Code Civ. Proc. §§ 700.010-700.200* provide another method of levy, as for example, in the cases of accounts receivable resulting from the sale of minerals, oil, or gas under *Code Civ. Proc. § 700.020*, deposit accounts under *Code Civ. Proc. § 700.140*, or in the case of personal property of a decedent's estate under *Code Civ. Proc. § 700.200*, the levying officer must levy on accounts receivable and general intangibles by personally serving the writ and notice of levy on the account debtor [*see Code Civ. Proc. § 700.170(a)*]. If *Code Civ. Proc. § 700.170* governs the levy procedure and if the payments on the account or general intangible are made to a person other than the judgment debtor, the judgment creditor may levy on those payments by instructing the levying officer to personally serve a copy of the writ and a notice of levy on the third person [*Code Civ. Proc. § 700.170(b)*].

Registered process servers are authorized to levy on accounts receivable and general intangibles [*Code Civ. Proc. § 699.080(a)(7)*].

[h] Final Money Judgments

Code Civ. Proc. § 700.190(a) defines "final money judgment" as a money judgment after the time for appeal from the judgment has expired or, if an appeal is filed, after the appeal has been finally determined.

To levy on a final money judgment, the levying officer must file a copy of the writ and the notice of levy with the clerk of the court that entered the final money judgment. The clerk will endorse on the judgment a statement of the existence of the execution lien and the time it was created. If an abstract of the judgment is issued, it will include a statement of the lien in favor of the judgment creditor [*Code Civ. Proc. § 700.190(b)*]. At the time of levy or promptly thereafter, the levying officer must serve a copy of the writ of execution and a notice of levy on the judgment debtor obligated to pay the final money judgment levied on. Service shall be made personally or by mail [*Code Civ. Proc. § 700.190(c)*].

Registered process servers are authorized to levy on final money judgments [*Code Civ. Proc. § 699.080(a)(8)*].

[i] Interest in Decedent's Estate

To levy on the judgment debtor's interest in personal property in the estate of a decedent, whether the interest arises by testate or intestate succession, the levying officer must personally serve a copy of the writ and a notice of levy on the decedent's personal representative. The levy does not impair the powers of the personal representative over the property for the purposes of administration [*Code Civ. Proc. § 700.200(a)*].

Registered process servers are authorized to levy on the judgment debtor's interest in personal property in a decedent's estate [*Code Civ. Proc. § 699.080(a)(9)*].

[5] Levy on Property Subject to Pending Action or Proceeding

The following property may be levied on even if it is the subject of a pending action or proceeding [*Code Civ. Proc. § 700.180(a)*]:

- Real property.

- Growing crops, timber to be cut, or minerals or the like (including oil and gas) to be extracted or accounts receivable resulting from the sale thereof at the wellhead or minehead.

- Tangible personal property in the possession or under the control of the judgment debtor or in the custody of a levying officer.

- The interest of the judgment debtor in personal property in the estate of a decedent, whether testate or intestate.

A levy on any other type of property that is the subject of a pending proceeding or action is ineffective [*Code Civ. Proc. § 700.180(b)*]. If the levy is ineffective under *Code Civ. Proc. § 700.180(b)*, and the levying officer has requested a garnishee's memorandum under *Code Civ. Proc. § 701.030* in connection with the ineffective levy, the memorandum must include information required by *Code Civ. Proc. § 700.180(c)* [*see Code Civ. Proc. § 700.180(c)*; *see also § 254.687*].

For the purpose of *Code Civ. Proc. § 700.180*, an action or proceeding is pending from the time the action or

proceeding is commenced until judgment has been entered and the time for appeal has expired or, if an appeal is filed, until the appeal has been finally determined [*Code Civ. Proc. § 700.180(d)*]. *Code Civ. Proc. § 700.180* does not affect or limit the right of the judgment creditor to obtain a lien on the judgment debtor's action or proceeding pursuant to *Code Civ. Proc. §§ 708.410-708.480* [*Code Civ. Proc. § 700.180(e)*]. For discussion of liens on a judgment debtor's cause of action, see Ch. 318, *Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionGovernmentsLocal GovernmentsEmployees & Officials

California Forms of Pleading and Practice--Annotated

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 254 EXECUTIONS AND ENFORCEMENT OF JUDGMENTS
PART II. LEGAL BACKGROUND
B. Enforcement Of Money Judgments
2. Writs Of Execution And Levy

21-254 California Forms of Pleading and Practice--Annotated § 254.66

§ 254.66 Execution Lien

[1] Creation and Duration

A levy on property under a writ of execution creates an execution lien on the property from the time of levy until the expiration of two years after the date the writ was issued, unless the judgment is satisfied sooner [*Code Civ. Proc. § 697.710*; *but see Fam. Code § 5101* (exception for execution lien on pension plan benefits enforcing child or spousal support award)].

[2] Effect of Transfer or Encumbrance of Property

An execution lien on any interest in real property, or on tangible personal property in the custody of a levying officer, remains in effect after transfer or encumbrance of the property unless the property was sold at an execution sale [*see Code Civ. Proc. §§ 697.720, 697.730(a)*; *Code Civ. Proc. § 701.630* (liens extinguished by sale)]. If the subject property is tangible or intangible personal property not in custody of a levying officer, the lien remains in effect unless the property is sold at an execution sale or unless the transfer or encumbrance is made to one of the persons described in *Code Civ. Proc. § 697.740(a)-(k)* [*Code Civ. Proc. §§ 697.740, 701.630*; *Com. Code § 9504(1)(c)* (pertaining to satisfaction of execution lien on secured property after sale)]. In addition, if a levy on tangible personal property of a going business is made by the levying officer placing a keeper in charge of the business, a purchaser of property subject to the execution lien takes the property free of the execution lien if he or she is a buyer is the ordinary course of business [*see Com. Code § 1201(b)(9)*] who, under *Com. Code § 9307*, would take free of a security interest created by his or her seller [*Code Civ. Proc. § 697.730(b)*]. A lessee of property subject to the execution lien also takes the property free of the execution lien if he or she is a lessee in the ordinary course of business [*see Com. Code § 10103(a)(15)*] who, under *Com. Code § 10307(c)*, would take free of a security interest created by the lessor [*Code Civ. Proc. § 697.730(b)*].

Code Civ. Proc. § 697.740 notwithstanding, personal property consisting of growing crops, timber to be cut, or minerals or the like, including oil and gas, or accounts receivable resulting from sale thereof at a wellhead or minehead remain subject to the execution lien after transfer or encumbrance, unless sold at an execution sale [*Code Civ. Proc. §§*

697.750, *701.630*; *see also Com. Code § 9504(1)(c)* (pertaining to satisfaction of execution lien on secured property after sale)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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21-254 California Forms of Pleading and Practice--Annotated § 254.67

§ 254.67 Release of Levied Property

[1] When Released

The levying officer will release levied property on receipt of a written direction from the judgment creditor's attorney of record, or the judgment creditor if there is no attorney, to release the property. The property also will be released when the levying officer receives a certified copy of a court order for release or when otherwise required to release the property. The release extinguishes any execution lien or attachment lien in favor of the judgment creditor on the property [*Code Civ. Proc. § 699.060(a)*]. The levying officer is not liable for releasing any property in accordance with *Code Civ. Proc. § 699.060*, nor is any other person liable for acting in conformity with the release [*Code Civ. Proc. § 699.060(e)*].

[2] Property in Custody of Levying Officer

If the property to be released has been taken into custody under the levy, it must be released to the person from whom it was taken unless otherwise ordered by the court. If the person does not claim the property, the levying officer must retain custody and must serve that person, either personally or by mail, with a notice of where possession of the property may be obtained. If the property is not claimed within 30 days after the notice is served, the levying officer must sell the property, other than cash which does not have a value exceeding its face value, as provided by *Code Civ. Proc. §§ 701.510-701.680*, and distribute the proceeds as provided by *Code Civ. Proc. § 699.060(b)* [*see Code Civ. Proc. § 699.060(b)*].

[3] Property Not in Custody

If the property to be released has not been taken into custody, the levying officer will release the property by issuing a written notice of release and serving it, either personally or by mail, on the person who was served with the copy of the writ and notice of levy creating the lien [*Code Civ. Proc. § 699.060(c)*].

[4] Written Notice of Release

If the property to be released was levied on by recording or filing a copy of the writ and a notice of levy, the levying officer must record or file a written notice of release in the same office [*Code Civ. Proc. § 699.060(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.68

§ 254.68 Duties and Liabilities of Third Persons After Levy

[1] Duty of Garnishee

[a] In General

When a levy is made by service of a copy of the writ and notice of levy on a third person, that person must immediately or promptly thereafter deliver to the levying officer any of the property levied on that is in his or her possession or control at the time of levy, unless he or she claims the right to possession of the property or has other good cause not to surrender possession [*Code Civ. Proc. § 701.010(a), (b)(1)*]. "Good cause" includes, but is not limited to, a showing that the third person did not know or have reason to know of the levy [*see Code Civ. Proc. § 701.010(c)*].

To the extent that the third person does not deny an obligation levied on, or claim a priority over the judgment creditor's lien, he or she must pay to the levying officer both the amount of the obligation levied on that is due and payable at the time of levy, and amounts that become due and payable during the period of the execution lien [*Code Civ. Proc. § 701.010(b)(2)*]. If the third person makes a delivery or payment to the levying officer, he or she must also execute and deliver any documents necessary to effect transfer of the property [*Code Civ. Proc. § 701.010(b)(3)*].

[b] Liability for Noncompliance With Levy

If a third person who is required to deliver property or make payments to the levying officer pursuant to levy fails or refuses without good cause to do so, he or she will be liable to the judgment creditor for either (1) the value of the judgment debtor's interest in the property or the amount of the payments required to be made, or (2) the amount required to satisfy the judgment pursuant to which the levy is made, whichever is less [*Code Civ. Proc. § 701.020(a)*]. The liability continues until the earliest of either (1) the time when the property levied on is delivered or the payments are made to the levying officer, (2) the time when the property levied on is released pursuant to *Code Civ. Proc. § 699.060*, or *(3)* the time when the judgment is satisfied or discharged [*Code Civ. Proc. § 701.020(b)*].

[c] Garnishee's Memorandum

At the time the copy of the writ and the notice of levy are served on a third person, the levying officer will request that person to mail or deliver a garnishee's memorandum containing the information required by *Code Civ. Proc. § 701.030(b)* to the levying officer within 10 days after the request is made [*Code Civ. Proc. § 701.030(a)*; *see § 254.687*]. If the memorandum is received, the levying officer must promptly mail or deliver a copy to the judgment creditor and attach the original to the writ when it is returned to the court. If the memorandum is not received, the levying officer will so state in the return [*Code Civ. Proc. § 701.030(c)*].

If the third person fails to give the memorandum within the 10-day period or does not provide complete information, the court may require him or her to pay the costs and reasonable attorney's fees incurred in any proceedings to obtain the information [*Code Civ. Proc. § 701.030(d)*]. A financial institution with which a deposit account or safety deposit box is maintained, however, is not required to provide a memorandum if that institution fully complies with a levy on the account or box, but must only provide information with respect to property that is carried on the records available at the office or branch where the levy is made [*Code Civ. Proc. § 701.030(e)*]. Similarly, a third person is not required to give a memorandum if that person has both (1) delivered to the levying officer all the property sought to be levied on, and (2) paid the amount due at the time of levy on any obligation to the judgment debtor levied on and there is no additional amount that will thereafter become payable [*Code Civ. Proc. § 701.030(f)*].

A third person who gives a garnishee's memorandum is not liable to any person for the disclosure in the garnishee's memorandum of any information contained therein [*Code Civ. Proc. § 701.035*].

[2] Rights and Duties of Secured Party

If levied on property is subject to a security interest that attached prior to the levy, the security interest may be enforced without regard to the levy unless the property is in the custody of a levying officer or except as otherwise ordered by the court. If the execution lien has priority over the security interest, however, the secured party will be liable to the judgment creditor for any proceeds received by the secured party from the property to the extent of the execution lien [*Code Civ. Proc. § 701.040(a)*]. After the security interest is satisfied, the secured party must deliver any excess property and pay any excess payments or proceeds of property remaining in his or her possession to the levying officer for purposes of the levy as provided by *Com. Code §§ 9502* and *9504*, unless otherwise ordered by the court or directed by the levying officer [*Code Civ. Proc. § 701.040(b)*].

[3] Duty of Obligor

If the levying officer obtains custody of a levied-on instrument and serves the obligor under the instrument pursuant to the levy, the obligor must make payments to the levying officer as they become due. Payments made to a person other than the levying officer do not discharge the obligation of the obligor to make payments to the levying officer if such payments are made after the obligor has received notice of the levy [*Code Civ. Proc. § 701.060*].

[4] Duty of Account Debtor

If an account debtor obligated on a levied-on account receivable, chattel paper, or general intangible has been served pursuant to the levy, he or she must make payments under that obligation to the levying officer as they become due. Payments made to the judgment debtor after notice of the levy has been received do not discharge the obligation to make payments to the levying officer [*Code Civ. Proc. § 701.050(a)*]. If the account debtor has been making or is required to make payments to a third person, he or she must continue to make those payments notwithstanding the levy, until notice is received that the obligation to the third person is satisfied or until otherwise directed by the court or the third person. Payments to the levying officer must still be made after the obligation to the third person is satisfied [*Code Civ. Proc. § 701.050(b)*].

If the judgment debtor has liberty to accept the return of goods or make repossessions under the account receivable or chattel paper pursuant to a security agreement, the account debtor must deliver any such returnable property to the levying officer unless otherwise directed by court order or by the levying officer [*Code Civ. Proc. § 701.050(c)*].

Legal Topics:

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

§§ 254.69[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.80

§ 254.80 Sale or Collection of Property

Subject to *Code Civ. Proc. §§ 687.020* (collection of checks and other orders for withdrawal of money from financial institution) and 701.520 (collection of accounts receivable and other property as discussed below), the levying officer must sell all property levied on except tangible personal property, which may not be sold until taken into custody by the levying officer, and cash, which may not be sold unless its value exceeds its face value [*Code Civ. Proc. § 701.510*].

The following property must be collected rather than sold: accounts receivable, chattel paper, general intangibles, final money judgments, instruments that are not customarily transferred in an established market, and instruments that represent an obligation arising out of the sale or lease of property, a license to use property, the furnishing of services, or the loan of money where the property sold, licensed, or leased, the services furnished, or the money loaned was used by an individual primarily for personal, family, or household purposes [*Code Civ. Proc. § 701.520(a)*]. At the time of levy on these types of property or thereafter, the judgment creditor may serve a notice of intended sale of the property on the judgment debtor, either personally or by mail. A copy of the notice and proof of service must be filed with the court and with the levying officer. The notice must describe the property and state that the property will be sold at an execution sale unless, within 10 days after service, the judgment debtor applies to the court on noticed motion for an order that the property be collected rather than sold [*see Code Civ. Proc. § 701.520(b)-(d)*; *see §§ 254.698 -254.700*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.81

§ 254.81 Collection of Money Withdrawal Instruments

If a check, draft, money order, or other order for the withdrawal of money from a financial institution, the United States, any state or public entity within any state, is payable to the judgment debtor on demand and comes into the possession of a levying officer pursuant to the enforcement of a judgment, the levying officer must promptly endorse the instrument in the manner prescribed by *Code Civ. Proc. § 687.020(c)* and present it for payment [*Code Civ. Proc. § 687.020(a), (b)*]. The financial institution or public entity honoring the instrument, and the levying officer, are not liable to any person for the endorsement, presentation, and payment of the instrument [*Code Civ. Proc. § 687.020(c)*].

If it appears from the face of the instrument that it has been tendered to the judgment debtor in satisfaction of a claim or demand and that endorsement is considered a release and satisfaction, the levying officer may not endorse the instrument unless the judgment debtor has first endorsed it to the levying officer. If the judgment debtor does not endorse the instrument, the officer must hold it for 30 days and is not liable to the judgment debtor or to any other person for delay in presentation for payment. At the end of the 30-day period, the levying officer must return the instrument to the maker [*Code Civ. Proc. § 687.020(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.82

§ 254.82 Notice of Sale

The requirements pertaining to the contents and posting of a notice of sale of personal property are contained in *Code Civ. Proc. §§ 701.530* and *701.547*. Similar requirements pertaining to a notice of sale for real property are contained in *Code Civ. Proc. §§ 701.540-701.547* [*see § 254.702*; *Code Civ. Proc. § 729.010(a)* (additional requirements for notice of sale of real property subject to redemption)]. For discussion of service of notice and extension of the time for service when service is by mail, see *§ 254.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.83

§ 254.83 Request for Notice of Execution Sale

In any case in which a judgment has been entered, any person may file a written request that he or she be given notice by mail of any sale under any execution issued on the judgment [*see § 254.701*]. If the request is made prior to issuance of the writ, it must be filed with the clerk of the court where the judgment is entered [*Code Civ. Proc. § 701.550(b)*]. If a person desires notice of sale of particular property that has already been levied on, he or she may file a request for notice of sale with the levying officer who will conduct the sale [*Code Civ. Proc. § 701.550(c)*]. The levying officer will mail the notice of sale at the time the notice is posted pursuant to *Code Civ. Proc. § 701.530* or *701.540* [*Code Civ. Proc. § 701.550(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.84

§ 254.84 Effect of Failure to Give Notice

Failure to give notice of sale does not invalidate the sale [*Code Civ. Proc. § 701.560(a)*].

A levying officer who sells the property without giving the required notice is liable to the judgment creditor and the judgment debtor for actual damages caused by the failure [*Code Civ. Proc. § 701.560(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.85

§ 254.85 Advertisement of Sale

In addition to the required notices of sale, the judgment creditor may advertise the sale in the classified or other advertising section of a newspaper of general circulation or other publication and may recover reasonable costs of such advertising. The judgment debtor may also advertise the sale at his or her own expense [*Code Civ. Proc. § 701.555*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.86

§ 254.86 Conduct of Sale

[1] Place, Time, and Manner

All sales of property under execution must be held at the date, time, and place specified in the notice of sale, between the hours of 9:00 A.M. and 5:00 P.M. in the county where the property or some part of it is situated. Subject to *Code Civ. Proc. § 701.570(d)*, real property consisting of one parcel, or of two or more contiguous parcels, situated in two or more counties may be sold in one county as instructed by the judgment creditor [*Code Civ. Proc. § 701.570(a)*]. *Code Civ. Proc. § 701.570(d)* requires property to be sold separately or in such groups or lots as are likely to bring the highest price. The judgment debtor may request that the property be sold separately or together and also in a particular order. If the judgment debtor is not present at the sale, the request may be made in writing and delivered to the levying officer prior to the sale. The request will be honored if, in the opinion of the levying officer, the requested manner of sale is likely to yield an amount at least equal to any other manner of sale or the amount required to satisify the money judgment. The levying officer is not liable for a decision made in good faith regarding the request [*Code Civ. Proc. § 701.570(d)*].

If personal property that is capable of manual delivery is sold, it must be within view of those who attend the sale unless the court orders otherwise on application of the judgment creditor or judgment debtor [*Code Civ. Proc. § 701.570(c)*].

Sales must be made by auction to the highest bidder [*Code Civ. Proc. § 701.570(b)*]. The levying officer may not be a purchaser or have an interest in any purchase at a sale [*Code Civ. Proc. § 701.610*].

After sufficient property has been sold to satisfy the execution, no more can be sold [*Code Civ. Proc. § 701.570(e)*].

[2] Expiration of Exemption Period

Sales of personal property of an individual may not take place until the period during which the judgment debtor may claim an exemption has expired, which is generally 10 days after the date the notice of levy on the property claimed to be exempt was served on the judgment debtor [*Code Civ. Proc. § 701.530(d)*; *see Code Civ. Proc. § 703.520(a)*]. For

discussion of extension of the 10-day period when notice is given by mail, see the discussion in *§ 254.14[3][b]*.

[3] Postponement of Sale

The judgment creditor and judgment debtor together may request in writing that the sale be delayed to an agreed day and hour. The request is delivered to the levying officer, who must by public declaration at the time and place originally fixed for the sale postpone the sale to the day and hour so fixed in the request. The postponed sale will be held at the place originally fixed for the sale. Notice of any additional postponements must be given by public declaration by the officer at the time and place last appointed for the sale. No other notice of the postponed sale needs to be given [*Code Civ. Proc. § 701.580*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.87

§ 254.87 Bidding and Payment Provisions

[1] Minimum Bid

Property may not be sold unless the amount bid exceeds the total of the following amounts [*Code Civ. Proc. § 701.620(a)*]:

(1) The amount of all preferred labor claims that are required by *Code Civ. Proc. § 1206* to be satisfied from the proceeds;

(2) The amount of any state tax lien, as defined in *Gov. Code § 7162*, that is superior to the judgment creditor's lien; and

(3) If the purchaser is not the judgment creditor, the amount of any deposit made pursuant to *Code Civ. Proc. § 720.260* (deposit by creditor when third party claims property) with interest thereon at the rate on money judgments from the date of the deposit to the date of the sale. For discussion of the provisions of *Code Civ. Proc. § 720.260*, see *§ 254.315*.

Property for which a proceeds exemption is provided by *Code Civ. Proc. §§ 704.010* (motor vehicle), 704.020 (household furnishings and other personal effects), or 704.060 (tools of trade), may not be sold unless the amount bid exceeds the sum of any amount under *Code Civ. Proc. § 701.620(a)* plus the amount of the proceeds exemption [*Code Civ. Proc. § 701.620(b)*].

If the minimum bid is not received, the levying officer must promptly release the property [*Code Civ. Proc. § 701.620(c)*].

[2] Manner of Payment

[a] Cash or Check

Most purchasers at an execution sale must pay in cash or by certified check or cashier's check [*Code Civ. Proc. §*

701.590(a)]. The judgment creditor may bid by giving the levying officer a written receipt crediting all or part of the amount required to satisfy the judgment, although the unsatisfied costs of the levying officer and the amount of preferred labor claims, exempt proceeds, and any other claim statutorily required to be satisfied must be paid in cash or by certified check or cashier's check [*Code Civ. Proc. § 701.590(b)*].

[b] Credit Transactions

If the highest bid for an interest in real property sold exceeds $5,000, or in the case of an item, group, or lot of personal property, $2,500, the highest bidder may elect to treat the sale as a credit transaction. The person making the election must deposit at least $5,000 in the case of real property, or $2,500 in the case of personal property, or 10 percent of the amount bid, whichever is greater, and must pay the balance due plus costs and interest within 10 days after the date of sale [*see Code Civ. Proc. § 701.590(c), (d)*]. The person making such an election is not entitled to possession of the property until the amount bid, plus accruing costs and interest, have been paid [*Code Civ. Proc. § 701.590(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.88

§ 254.88 Default by Bidder

If the highest bidder does not pay the amount bid as prescribed by *Code Civ. Proc. § 701.590*, the levying officer must resell the property. If the default occurs at the sale, the property will be resold either to the next highest bidder at the amount of that bid if such bidder agrees, or to the highest bidder at a new sale held immediately. If the default occurs after sale to a credit bidder, the property will be sold to the highest bidder at a new sale [*Code Civ. Proc. § 701.600(a)*]. The levying officer must apply the amount of any deposit made pursuant to *Code Civ. Proc. § 701.590(c)* (credit transactions) in the manner prescribed by *Code Civ. Proc. § 701.600(b)* [*see Code Civ. Proc. § 701.600(b)*].

If the property must be resold, the defaulting bidder will be held liable in an action by the judgment debtor or creditor for the amount bid, less the amount obtained from resale and the amount of any deposit applied pursuant to *Code Civ. Proc. § 701.600(b)*, plus costs (including those of resale) and interest on the amount bid accruing between the date of sale and date of resale, and costs and attorney's fees incurred in the action [*see Code Civ. Proc. § 701.600(c)*].

The levying officer may in his or her discretion reject any subsequent bid of the defaulting bidder [*Code Civ. Proc. § 701.600(d)*].

Legal Topics:

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21-254 California Forms of Pleading and Practice--Annotated § 254.89

§ 254.89 Interest Acquired at Sale

[1] Generally

The purchaser of property at an execution sale acquires any interest of the judgment debtor in the property sold that is either held on the effective date of the lien under which the property was sold, or that is acquired between the effective date and the date of sale [*Code Civ. Proc. § 701.640*].

[2] Rule of Caveat Emptor Applicable

A purchaser at an execution sale is chargeable with notice that he or she acquires no better title than the judgment debtor had. The rule of caveat emptor applies with all its force to such sales [*Harvey v. Whyte (1958) 158 Cal. App. 2d 685, 689, 323 P.2d 162]* .

[3] General Rules Applicable

A purchaser at an execution sale is governed by the same rules as purchasers generally [*Hansen v. G & G Trucking Co. (1965) 236 Cal App. 2d 481, 499, 46 Cal. Rptr. 186* ; *Manig v. Bachman (1954) 127 Cal. App. 2d 216, 221, 273 P.2d 596]* . For example, the possession of the tenant is notice of his or her landlord's title; such possession is sufficient to put a person dealing with the property on inquiry [*Manig v. Bachman (1954) 127 Cal. App. 2d 216, 221, 273 P.2d 596]* . Also, when a person who is a stranger to the record title of the vendor is in possession, the purchaser is under a duty to make inquiry of such stranger's rights [*Manig v. Bachman (1954) 127 Cal. App. 2d 216, 222, 273 P.2d 596]* .

[4] Judgment Creditor as Bona Fide Purchaser

A judgment creditor is not entitled to protection as a bona fide purchaser for value, but rather stands in the shoes of the judgment debtor and obtains by his judgment lien only that interest in the property which the judgment debtor actually possesses [*City of Torrance v. Castner (1975) 46 Cal. App. 3d 76* ; *Hansen v. G & G Trucking Co. (1965) 236 Cal. App. 2d 481, 496, 46 Cal. Rptr. 186]* . This rule applies to personal property as well as to real property [*Torrance v.*

Castner (1975) 46 Cal. App. 3d 76, 80, 120 Cal. Rptr. 23] . A judgment creditor who purchases real property at his or her own execution sale under appropriate circumstances may, however, be a bona fide purchaser for value. For example, the judgment creditor who purchases at his or her own execution sale is a bona fide purchaser for value as against the trustor of a resulting trust or the beneficiary of a secret trust where the record title to the property involved stands in the name of the trustee alone with no mention of or reference to the existence of such an outstanding equity in another person [*Hansen v. G & G Trucking Co. (1965) 236 Cal. App. 2d 481, 496, 46 Cal. Rptr. 186]* .

It should be noted, however, that this situation involves the sale of real property and is based on the statutory requirement that interests in real property must be recorded. An unrecorded interest in real property represents a secret lien or equity which no purchaser without actual notice would discover, whether he or she was a judgment creditor or another type of purchaser [*Torrance v. Castner (1975) 46 Cal. App. 3d 76, 81, 120 Cal. Rptr. 23]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.90

§ 254.90 Delivery of Property on Payment of Amount Due

[1] Personal Property

If the property is capable of manual delivery, the levying officer must deliver it to the purchaser and, if the purchaser requests, must also execute and deliver a certificate of sale. If the property is not tangible personal property or is otherwise not capable of manual delivery, the levying officer must execute and deliver a certificate of sale to the purchaser [*Code Civ. Proc. § 701.650(a)*; *see § 254.703*]. If property or a certificate is delivered pursuant to *Code Civ. Proc. § 701.650(a)*, the levying officer must also sign or endorse and deliver to the purchaser any document or instrument in his or her possession relating to the title or right to possession of the property [*Code Civ. Proc. § 701.650(b)*].

[2] Real Property

The levying officer must execute and deliver a deed of sale to the purchaser and record a duplicate of the deed in the office of the county recorder [*Code Civ. Proc. § 701.660*]. Contents of the deed of sale are set forth in *Code Civ. Proc. § 701.670* [*see § 254.703*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawDeedsTypesSheriff's Deeds

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21-254 California Forms of Pleading and Practice--Annotated § 254.91

§ 254.91 Distribution of Proceeds

The order and amount of distribution of proceeds from an execution sale or collection is governed by *Code Civ. Proc. § 701.810*. The time schedule for distribution is governed by *Code Civ. Proc. § 701.820*. If there are conflicting claims to all or a portion of the proceeds of the sale or collection, the proceeds will be deposited with the court and any interested person may then apply on noticed motion for an order of distribution [*see Code Civ. Proc. § 701.830*; *see §§ 254.704 -254.706*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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21-254 California Forms of Pleading and Practice--Annotated § 254.92

§ 254.92 Finality of Sale

Unless set aside under *Code Civ. Proc. § 701.680(c)* for irregularities in the proceedings, all execution sales are absolute [*Code Civ. Proc. § 701.680(a)*]. If the judgment is reversed, vacated, or otherwise set aside, the judgment debtor may recover from the judgment creditor the proceeds of a sale under the judgment with interest at the rate on money judgments to the extent the proceeds were applied to the satisfaction of the judgment [*Code Civ. Proc. § 701.680(b)*].

Division 2, Chapter 3 of the Enforcement of Judgments Law [*Code Civ. Proc. § 699.010 et seq.*] is all-encompassing and deals with procedures for enforcement of judgments by writ without exception. Division 2, Chapter 4 of the Enforcement of Judgments Law [*Code Civ. Proc. § 704.710 et seq.*] pertains to exemptions rather than procedures for enforcement. The purpose of the dwelling exemption in *Code Civ. Proc. § 704.740*, which states that the interest of a natural person in a dwelling may not be sold under the Enforcement of Judgments Law to enforce a money judgment except pursuant to a court order for sale, is to provide the exclusive procedure for determining real property dwelling exemptions [18 Cal. Law Revision Com. Rep. (1984) p. 101; *see Wells Fargo Financial Leasing, Inc. v. D & M Cabinets (2009) 177 Cal. App. 4th 59, 67-69, 99 Cal. Rptr. 3d 97* (creditor seeking to sell dwelling to collect on money judgment may not bypass *Code Civ. Proc. § 704.740* because sale is conducted by receiver)]. Division 2, Chapter 4 of the Enforcement of Judgments Law does not have independent procedures for enforcement of judgments by writ against dwellings akin to Division 2, Chapter 3 other than the limited directive set forth in § 704.740. Thus, § 704.740 does not trump or negate *Code Civ. Proc. § 701.680*. It is a companion provision that applies in addition to § 701.680 when a dwelling is to be sold. Given that there is no specified consequence in § 704.740 for failure to obtain a court order, the transgression can only be considered an "irregularity" governed by the all-encompassing remedies in Division 2, Chapter 3, which permit a damages remedy against the judgment creditor or sheriff but forbid setting aside a sale to third party purchasers. [*Gonzalez v. Toews (2003) 111 Cal. App. 4th 977, 981-982, 4 Cal. Rptr. 3d 434]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil

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21-254 California Forms of Pleading and Practice--Annotated § 254.93

§ 254.93 Action to Set Aside Sale and Revive Judgment

[1] In General

If the sale was improper because of irregularities in the proceedings, because the property sold was not subject to execution, or for any other reason, the judgment debtor, or the judgment debtor's successor in interest, may commence an action within 90 days after the date of sale to set aside the sale if the purchaser was the judgment creditor. If the sale is set aside, the judgment will be revived to reflect the amount that was satisfied from the proceeds of the sale and the judgment creditor will be entitled to interest on the amount of the judgment as revived as if the sale had not been made [*Code Civ. Proc. § 701.680(c)(1)*]. Any liens extinguished by the sale of the property are revived and reattached to the property with the same priority and effect as if the sale had not been made [*Code Civ. Proc. § 701.680(c)(1)*].

The judgment debtor, or the judgment debtor's successor in interest, may recover damages caused by impropriety in the sale. If damages are recovered against the judgment creditor, they will be offset against the judgment to the extent the judgment is not satisfied. If damages are recovered against the levying officer, they will be applied to the judgment to the extent the judgment is not satisfied [*Code Civ. Proc. § 701.680(c)(2)*]. For the purposes of *Code Civ. Proc. § 701.680(c)*, the purchaser of the property at the sale is not a successor in interest [*Code Civ. Proc. § 701.680(d)*].

[2] Equitable Suit Also Available

Satisfaction of judgment may also be set aside in equity [*Sullivan v. Wellborn (1948) 32 Cal. 2d 214, 217, 195 P.2d 787* ; *Merguire v. O'Donnell (1903) 139 Cal. 6, 8, 72 P. 337* (discussing former *Code Civ. Proc. § 708*)].

Equitable redemption is the right of a judgment debtor to redeem property sold at an execution sale for a grossly inadequate price when the purchaser is guilty of unfairness or has taken undue advantage. At one time, the right to redeem following an involuntary sale was widespread. However, the doctrine is rooted in case law predating the Enforcement of Judgments Law. In one case, the Court of Appeal questioned whether equitable redemption has survived, at least concerning third party purchasers, given that one of the purposes of the Enforcement of Judgments Law was to repeal the right to redeem property sold at execution sales [*see* *Gonzalez v. Toews (2003) 111 Cal. App.*

4th 977, 983, 4 Cal. Rptr. 3d 434 , citing *Yancey v. Fink (1991) 226 Cal. App. 3d 1334, 1346, 277 Cal. Rptr. 415]* . The Enforcement of Judgments Law states that it governs enforcement of a money judgment by a writ of execution, except as otherwise provided by statute [*Code Civ. Proc. § 699.010*]. There is no exception for equitable doctrines [*Gonzalez v. Toews (2003) 111 Cal. App. 4th 977, 983,4 Cal. Rptr. 3d 434* , citing *Goins v. Board of Pension Commissioners (1979) 96 Cal. App. 3d 1005, 1009, 158 Cal. Rptr. 470* (when statute contains exception to general rule laid down in statute, exception is strictly construed and other exceptions are necessarily excluded)]. *Code Civ. Proc. § 701.680* uses the unequivocal words "absolute" and "may not be set aside for any reason," and specifically protects the judgment debtor in the event of an improper sale by allowing a damages remedy against the judgment creditor or levying officer but not against a third party purchaser [*Gonzalez v. Toews (2003) 111 Cal. App. 4th 977, 983, 4 Cal. Rptr. 3d 434* , *but see* 16 Cal. Law Revision Com. Rep. (1982) pp. 1119-1120 (proposed law eliminates statutory right of redemption but would not affect equitable right of judgment debtor to redeem from sale at grossly inadequate price when purchaser is guilty of unfairness or has taken undue advantage)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.94

§ 254.94 Grounds to Vacate Sale

[1] Inadequate Price Alone Insufficient

Mere inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a legal sale [*Meacham v. Meacham (1968) 262 Cal. App. 2d 248, 253, 68 Cal. Rptr. 746* ; *Pavlovich v. Watts (1941) 46 Cal. App. 2d 103, 107, 115 P.2d 511]* . Where no fraud and no unfairness except as to the amount paid is urged, and testimony was not such as to compel the finding that the price paid rendered the transaction unconscionable, the sale will not be set aside [*McAlvay v. Consumers' Salt Co. (1931) 112 Cal. App. 383, 392, 297 P. 135]* .

[2] Unfairness

Acts of oppression and unfairness which will justify vacating an execution sale need not amount to legal fraud. Unfairness as it relates to conduct in connection with execution sales embraces all types of dishonesty, deception, and oppression which operate to the prejudice of the judgment debtor or others interested in the sale. There are no fixed standards, however, by which the fairness of conduct or the extent of the claimed deception can be measured. Each case must be judged according to its particular facts [*Darden v. Reese (1948) 88 Cal. App. 2d 904, 909-910, 200 P.2d 81]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated §§ 254.95-254.109

[Reserved]

§§ 254.95[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.110

§ 254.110 Application of Exemptions

Except as otherwise provided by statute, as for example, in the case of the provision that the exemption statutes in effect at the time the lien was created govern the existence and amount of an exemption [*see Code Civ. Proc. § 703.050(a)*], the exemptions provided by *Code Civ. Proc. §§ 703.010-704.995* apply to all procedures for the enforcement of money judgments, and to the enforcement of costs and damages under nonmoney judgments [*Code Civ. Proc. § 703.010*; *see Code Civ. Proc. § 712.040*]. The exemptions also apply to judgments for child or spousal support, but the court may apply exempt property to the satisfaction of support judgments unless the property is deemed exempt without making a claim [*see Code Civ. Proc. § 703.070*]. For further discussion of satisfaction of spousal or child support judgments, see Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* , Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* , and Ch. 260, *Family Law Enforcement: Foreign Judgments* . Application of exemptions to marital property is governed by *Code Civ. Proc. § 703.110*. Exemptions in bankruptcy are covered by *Code Civ. Proc. §§ 703.130* and *703.140*.

The exemptions do not apply if the judgment to be enforced is for the foreclosure of a mortgage, deed of trust, or other lien or encumbrance on property other than a lien created pursuant to *Code Civ. Proc. §§ 695.010-709.030* (enforcement of money judgments) or 481.010-493.060 (attachments) [*Code Civ. Proc. § 703.010(b)*].

For discussion and forms relating to the foreclosure of mortgages, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

Exempt property is described in *Code Civ. Proc. §§ 704.010-704.210*. For a listing of exemptions, see *§ 254.371[2]*, and *see § 254.684*, a reproduction of the Judicial Council form listing exemptions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of

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21-254 California Forms of Pleading and Practice--Annotated § 254.111

§ 254.111 Persons Entitled to Exemptions

Exemptions provided under *Code Civ. Proc. §§ 703.010-704.995* apply only to the property of natural persons [*Code Civ. Proc. § 703.020(a)*; *see California Coastal Commission v. Allen (2008) 167 Cal. App. 4th 322, 328-329, 83 Cal. Rptr. 3d 906* (dwelling exemption available only to natural person, not to corporation)]. The following persons may claim exemptions: (1) in all cases, the judgment debtor or a person acting on behalf of the judgment debtor, and (2) in the case of community property, the spouse of the judgment debtor, whether or not the spouse is also a judgment debtor under the judgment [*Code Civ. Proc. § 703.020(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.112

§ 254.112 Law Governing Determination of Exemption

Generally, the determination of whether or not property is exempt must be made by application of the exemption statutes in effect either (1) at the time the judgment creditor's lien was created or (2) at the time the earliest lien was created in a series of overlapping liens in favor of the judgment creditor [*Code Civ. Proc. § 703.050(a)*]. In the case of a levy of execution, however, the procedures governing the levy and the determination of exemption claims are governed by the law in effect at the time the levy is made on the property [*Code Civ. Proc. § 703.050(c)*].

Code Civ. Proc. § 703.050 applies to all judgments, whether based on tort, contract, or other legal theory or cause of action that arose before or after July 1, 1983, and whether the judgment was entered before or after that date [*Code Civ. Proc. § 703.050(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.113

§ 254.113 Amount of Exemption

As noted on the Judicial Council form listing exemptions from enforcement of judgments [JC Form EJ-155], a list of the amounts of exemptions from a judgment under *Code Civ. Proc. § 703.150* is available from the clerk of the court and on the California Courts web site [*see* http://www.courtinfo.ca.gov/forms/documents/exemptions.pdf]. Except as otherwise provided, the dollar amounts of the exemptions will be adjusted thereafter at three-year intervals on April 1, and the adjusted amounts will become effective immediately on that date.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionGovernmentsCourtsClerks of Court

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21-254 California Forms of Pleading and Practice--Annotated § 254.114

§ 254.114 Claiming Exemption After Levy

[1] Time and Procedure

An exemption for property described in *Code Civ. Proc. §§ 703.010-704.995* that has been levied on may be claimed within 10 days after the date the notice of levy on the property was served on the judgment debtor. The claim is made by filing the original and a copy of the claim with the levying officer [*Code Civ. Proc. § 703.520(a)*; *see §§ 254.710, 254.711*].

Except as otherwise provided by statute, property that has been levied on may be claimed to be exempt as provided by *Code Civ. Proc. §§ 703.510-703.610* [*Code Civ. Proc. § 703.510(a)*]. If property that is exempt without making a claim is levied on, it may be released pursuant to the exemption procedure provided by *Code Civ. Proc. §§ 703.510-703.610* [*Code Civ. Proc. § 703.510(b)*]. Special exemption procedures apply in certain cases, for example, deposit accounts consisting of Social Security benefits [*see Code Civ. Proc. § 704.080*], attached property [*see Code Civ. Proc. § 484.070*], garnished wages [*see Code Civ. Proc. §§ 706.010-706.154*], and real property homesteads [*see Code Civ. Proc. §§ 704.710-704.850*]. For a discussion of exemptions governing attached property, garnished wages, and real property homesteads, see Ch. 62, *Attachment* ; Ch. 276, *Garnishment* and Ch. 294, *Homesteads* , respectively.

[2] Property Deemed Exempt Without Making Claim

Except as otherwise provided by statute, as when public retirement benefits are sought for application to a judgment for support (see *Code Civ. Proc. § 704.110(c)*), property deemed exempt without making a claim is not subject to any procedure for enforcement of a money judgment [*Code Civ. Proc. § 703.030(b)* (exception)]. If such property is levied on, however, its release may be obtained through the exemption procedure provided in *Code Civ. Proc. §§ 703.510-703.610*[*Code Civ. Proc. § 703.510(b)*; *see § 254.114[1]*].

[3] Effect of Failure to Claim Exemption

Failure to claim an exemption serves as a waiver of the exemption and the property is rendered subject to enforcement

of the money judgment [*see Code Civ. Proc. § 703.030(a)*].

[4] Notice of Claim

Promptly after the claim of exemption is filed, the levying officer must serve the judgment creditor, either personally or by mail, with both a copy of the claim of exemption and a notice of claim of exemption [*Code Civ. Proc. § 703.540*; *see §§ 254.710 -254.711*]. For discussion of service of papers and extension of the time for service when service is by mail, see *§ 254.13*.

[5] Opposition to Claim

If the judgment creditor opposes the claim of exemption, he or she must file a notice of opposition and a notice of motion for an order determining the claim with the court within 10 days after service of the notice of the claim. Copies of the notice of opposition and notice of motion must be filed with the levying officer within the same time period. When the copies are filed, the levying officer must promptly file the claim of exemption with the court. If copies of the notice of opposition and notice of motion are not filed with the levying officer within the 10-day period, the levying officer must immediately release the property to the extent it is claimed to be exempt [*Code Civ. Proc. § 703.550*; *see §§ 254.712 -254.713*].

[6] Hearing on Claim

[a] When Held

The hearing on the motion to determine the exemption claim must be held no later than 20 days from the date the notice of motion was filed with the court, unless the court continues the hearing for good cause [*Code Civ. Proc. § 703.570(a)*]. Not less than 10 days prior to the hearing, the judgment creditor must serve a notice of the hearing and a copy of the notice of opposition to the claim on the claimant and on the judgment debtor, if other than the claimant. Service must be made personally or by mail [*Code Civ. Proc. § 703.570(b)*; for discussion of service of papers and extension of time for service when service is by mail, see *§ 254.13*].

[b] Evidentiary Basis of Determination

At the hearing, the exemption claim and the notice of opposition constitute the pleadings, subject to the court's power to permit amendments in the interest of justice [*Code Civ. Proc. § 703.580(a)*]. The exemption claimant has the burden of proof [*Code Civ. Proc. § 703.580(b)*]. The court may base its determination on the exemption claim and the notice of opposition alone if it finds the facts sufficient and if no other evidence is offered. If the court is not satisfied, it may continue the hearing for production of other evidence [*Code Civ. Proc. § 703.580(c)*].

[c] Determination and Findings

The court will determine by order whether or not the property is exempt in whole or in part at the end of the hearing. Subject to appeal under *Code Civ. Proc. § 703.600*, the order is determinative of the right of the judgment creditor to apply the property to satisfaction of the judgment. No findings are required in the hearing [*Code Civ. Proc. § 703.580(d)*; *see § 254.715*].

[d] Disposition of Property During Pendency of Proceedings

With certain statutory exceptions, for example, release of property for failure to pay a levying officer's costs under *Code Civ. Proc. § 685.100*, or sale to preserve the property's value under *Code Civ. Proc. § 699.070*, or otherwise ordered by the court, the levying officer may not release, sell, or otherwise dispose of the property for which an exemption is claimed until the final determination of the exemption, an appeal is waived, or the time to file an appeal has expired [

Code Civ. Proc. § 703.610(a)]. At any time during pendency of the proceedings, however, the court may make appropriate orders for disposition of the property on the motion of the judgment creditor or a claimant or on its own motion. Such orders may be modified or vacated by the court at any time during the proceedings on just terms [*Code Civ. Proc. § 703.610(b)*].

If an appeal of the determination is taken, notice of the appeal must be given to the levying officer and the property will be held, released, or disposed of in accordance with *Code Civ. Proc. §§ 916-923* governing enforcement and stays pending appeal [*Code Civ. Proc. § 703.610(c)*].

[e] Disposition of Property After Determination

The court clerk must promptly transmit a certified copy of the order to the levying officer who will then release or apply the property to the satisfaction of the judgment in compliance with the order, subject to *Code Civ. Proc. § 703.610* [*Code Civ. Proc. § 703.580(e)*].

[7] Extension of Time

The court may extend the time for any act to be done under *Code Civ. Proc. §§ 703.510-703.610*. If time is extended, written notice of the extension must be filed with the levying officer and, unless notice is waived, must be served promptly on the opposing party, either personally or by mail [*see Code Civ. Proc. § 703.590*; for discussion of service of papers and extension of time for service when service is by mail, see *§ 254.13*.

[8] Appeal

An appeal lies from any order made under *Code Civ. Proc. §§ 703.510-703.610* and must be taken in the manner provided for appeals in the court in which the proceeding takes place [*Code Civ. Proc. § 703.600*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated §§ 254.115-254.129

[Reserved]

§§ 254.115[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.130

§ 254.130 Governing Statutes

Writs of sale are governed by *Code Civ. Proc. §§ 712.010-712.070* and *716.010-716.030*. Levy and sale of property under a writ of sale are also governed by *Code Civ. Proc. §§ 700.010-700.200* and *701.510-701.680*.

Enforcement of a judgment for possession of personal property is governed by *Code Civ. Proc. §§ 712.010, 714.010-714.030*. Enforcement of a judgment for possession of real property is governed by *Code Civ. Proc. §§ 712.010, 715.010-715.050*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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21-254 California Forms of Pleading and Practice--Annotated § 254.131

§ 254.131 Issuance of Writ of Possession or Sale

A judgment for sale of real or personal property may be enforced by a writ of sale [*Code Civ. Proc. § 716.010(a)*; *see § 254.730*]. A judgment for possession of real or personal property may be enforced by a writ of possession [*Code Civ. Proc. §§ 714.010(a), 715.010(a)*; *see § 254.730*]. After entry of the judgment for possession or sale of property, the court clerk will issue the writ of sale or possession on application of the judgment creditor. The judgment creditor's application must include a declaration stating the daily rental value of the property as of the date the complaint for unlawful detainer was filed. The writ will be directed to the levying officer in the county where the judgment is to be enforced. Separate writs are issued for each county in which the judgment is to be enforced and may be issued successively until the judgment is satisfied, but 180 days must expire between issuance of successive writs in the same county unless the prior writ is first returned [*Code Civ. Proc. § 712.010*].

The writ of sale delivered to the levying officer must be accompanied by a certified copy of the judgment for sale [*Code Civ. Proc. § 716.010(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.132

§ 254.132 Execution of Writ

The levying officer will execute the writ of possession or sale on receipt of the writ together with the written instructions of the judgment creditor [*Code Civ. Proc. § 712.030(a)*]. Property may not be seized under the writ, however, after 180 days from the date the writ was issued [*Code Civ. Proc. § 712.030(b)*]. There are no exemptions from execution of a writ of possession or sale if the judgment to be enforced is the foreclosure of a mortgage, deed of trust, or other lien or encumbrance on the property other than a lien created pursuant to *Code Civ. Proc. §§ 695.010-709.030* (enforcement of money judgments) or *Code Civ. Proc. §§ 481.010-493.060* (attachment) [*see Code Civ. Proc. § 703.010(b)*].

[1] Writ of Sale

To execute the writ, the levying officer must levy on the property in the same manner as under a writ of execution pursuant to *Code Civ. Proc. §§ 700.010-700.200* [*Code Civ. Proc. § 716.020(a)*]. Notice of sale and sale of the property must be carried out in the same manner as under a writ of execution pursuant to *Code Civ. Proc. §§ 701.510-701.680*, unless otherwise ordered by the court [*Code Civ. Proc. § 716.020(b)*]. The proceeds of the sale must be applied in conformance with the judgment for sale [*Code Civ. Proc. § 716.020(c)*]. For a discussion and forms relating to levy and sale under a writ of execution, see *§ 254.60 et seq. and § 254.80* et seq.

[2] Writ of Possession of Personal Property

To execute a writ of possession for personal property, the levying officer must search for the property specified in the writ and, if it is in the possession of the judgment debtor or an agent of the judgment debtor, take custody of the property in the same manner as a levy under a writ of execution. The property taken into custody by the levying officer must be delivered to the judgment creditor in satisfaction of the judgment [*Code Civ. Proc. § 714.020*].

If the property specified in the writ cannot be taken into custody, the levying officer must demand the property from the judgment debtor if the judgment debtor can be located. If custody is not then obtained, the levying officer must state so in the return. Thereafter the judgment for possession may be enforced in the same manner as a money judgment for the value of the property as specified in the judgment or a supplemental order [*Code Civ. Proc. § 714.020(b)*]. Under the

circumstances described by *Code Civ. Proc. § 714.020(b)*, the writ of possession may be treated as a writ of execution [*Code Civ. Proc. § 714.020(c)*]. For a discussion of taking custody of personal property under a writ of execution, see *§ 254.80* et seq.

[3] Writ of Possession of Real Property

To execute a writ of possession for real property, the levying officer must serve a copy of the writ on one occupant of the property. Service must be made either by leaving the copy with the occupant personally or, in the occupant's absence, with a person of suitable age and discretion who is found on the property when service is attempted and who is either an employee or agent of the occupant or a member of the occupant's household [*Code Civ. Proc. § 715.020(a)*]. If the levying officer is unable at the time service is attempted to serve an occupant described by *Code Civ. Proc. § 715.020(a)*, he or she must post a copy of the writ in a conspicuous place on the property and serve a copy on the judgment debtor, either personally or by mail. If the judgment debtor's address is not known, a copy of the writ may be served by mailing it to the address of the property [*Code Civ. Proc. § 715.020(b)*]. For a discussion of taking custody of real property under a writ of execution, see *§§ 254.60* et seq.

A writ of possession issued pursuant to a judgment in an unlawful detainer action is to be enforced without delay, notwithstanding the filing of a bankruptcy proceeding by the defendant [*Code Civ. Proc. § 715.050*; *see Lee v. Baca (1999) 73 Cal. App. 4th 1116, 1119-1122, 86 Cal. Rptr. 2d 913* (holding that *Code Civ. Proc. § 715.050* is not preempted by federal bankruptcy law, and automatic stay of proceedings pursuant to the filing by defendant of a bankruptcy petition *after* judgment in unlawful detainer proceeding does not preclude execution of writ of possession)].

[a] Execution by Registered Process Server

A registered process server may execute a writ of possession of real property as provided by *Code Civ. Proc. § 715.020(a), (b)* if a proper writ is delivered to a levying officer and that officer does not execute the writ as provided by *Code Civ. Proc. § 715.020(a), (b)* within three working days from the day the writ is delivered [*see Code Civ. Proc. § 715.040(a)*]. When the levying officer does not execute the writ within that time, he or she must, on request, give the writ to the judgment creditor or to a registered process server designated by the judgment creditor [*Code Civ. Proc. § 715.040(a)*].

Within five days after executing the writ under *Code Civ. Proc. § 715.040*, all of the following must be filed with the levying officer [*Code Civ. Proc. § 715.040(b)*]:

- The writ of possession of real property.
- An affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of the registered process server stating the manner in which the writ was executed.
- Proof of service of the writ.
- Instructions in writing, as required by *Code Civ. Proc. § 687.010*.

If the writ is executed by a registered process server, the levying officer shall perform all other duties under the writ and shall return the writ to the court [*Code Civ. Proc. § 715.040(c)*]. The fee for services of a registered process server under *Code Civ. Proc. § 715.040* may, in the court's discretion, be allowed as a recoverable cost under *Code Civ. Proc. § 685.080*. If allowed, the amount of the fee is governed by *Code Civ. Proc. § 1033.5* [*Code Civ. Proc. § 715.040(d)*].

[b] Removal of Occupants

If the judgment debtor, members of his or her household, and any other occupants holding under the judgment debtor do not vacate property subject to a writ of possession within five days from the date of service on an occupant pursuant to *Code Civ. Proc. § 715.020(a)* or on the judgment debtor pursuant to *Code Civ. Proc. § 715.020(b)*, the levying officer (not a process server (*see Code Civ. Proc. § 715.040(a)*) must remove the occupants and place the judgment creditor in possession. The provisions for extending time set forth in *Code Civ. Proc. § 684.120* do not apply to calculation of this five-day period [*Code Civ. Proc. § 715.020(c)*].

The levying officer may not remove any person from the property who claims a right to possession accruing before commencement of the unlawful detainer action, or who claims to have been in possession of the property on the date the unlawful detainer action was filed, unless that person is named in the writ [*Code Civ. Proc. § 715.020(d)*]. An exception applies when occupants not named in the complaint were served with a form of prejudgment claim of right to possession in accordance with *Code Civ. Proc. § 415.46* [*see Code Civ. Proc. § 715.020(d)*]. If, at the time the defendants were served with process, a summons, complaint, and prejudgment claim of right to possession were also served on all other persons who might claim to have occupied the premises at the time the action was filed, those other occupants have only a 10-day period after such service within which to file their prejudgment claims and be added as defendants in the action [*see* Code Civ. Proc. §§ 145.46(a), (b) (service of prejudgment claim of right to possession), *1174.25(a), (b)* (filing of prejudgment claim)]. After that period, they cannot object to enforcement of a resulting judgment for possession of the premises [*see Code Civ. Proc. § 715.020(d)*]. Although the occupants will not be named in the writ, the writ will state that it applies to all tenants, subtenants, if any, named claimants, if any, and any other occupants of the premises [*see Code Civ. Proc. § 715.010(b)(7)*; for a form of writ, *see § 254.730*].

If the plaintiff did not have the occupants served with the form of prejudgment claim of right to possession, *Code Civ. Proc. § 1174.3* provides a procedure by which an occupant not named in the judgment may stop his or her eviction by filing or presenting the levying officer with a postjudgment claim of right to possession [*see Code Civ. Proc. § 1174.3(b), (c)*].

For further discussion and forms relating to prejudgment and postjudgment claims of right to possession, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

[c] Disposition of Personal Property Remaining on Premises

The disposition of personal property remaining on the real property after the judgment creditor is placed in possession is governed by *Code Civ. Proc. §§ 1174(e)-(m)* (disposition of property after unlawful detainer proceeding) [*Code Civ. Proc. § 715.030*]. For discussion and forms relating to unlawful detainer actions, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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21-254 California Forms of Pleading and Practice--Annotated § 254.133

§ 254.133 Return of Writ

The return of a writ of possession or sale is governed by *Code Civ. Proc. § 699.560* (return of writ of execution) [*Code Civ. Proc. § 712.050*]. For discussion of the return of writs, see *§ 254.61*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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21-254 California Forms of Pleading and Practice--Annotated § 254.134

§ 254.134 Order for Transfer of Property or Documentary Evidence of Title

[1] In Aid of Judgment for Possession of Personal Property

After entry of a judgment for possession of personal property, and whether or not a writ of possession has been issued, the judgment creditor may apply to the court for an order directing the judgment debtor to transfer possession of the property or documentary evidence of title to the property or both to the judgment creditor. The application must be by noticed motion if required by the court or a court rule; otherwise, it may be ex parte [*Code Civ. Proc. § 714.030(a)*; *see §§ 254.734, 254.735*]. The court will issue the order on a showing of need [*Code Civ. Proc. § 714.030(b)*; *see § 254.736*].

The order must be personally served on the judgment debtor and must contain a notice that failure to comply with the order may subject the judgment debtor to being held in contempt of court [*Code Civ. Proc. § 714.030(c)*; for discussion of service of papers on a judgment debtor, see *§ 254.13*].

[2] In Aid of Writ of Sale

If a writ of sale is issued, the judgment creditor may apply ex parte, or on noticed motion if required by the court or by a court rule, for an order directing the judgment debtor to transfer the following to the levying officer [*Code Civ. Proc. § 716.030(a)*]:

- Possession of the property to be sold, if the prescribed method of levy is by taking the property into custody [*Code Civ. Proc. § 716.030(a)(1)*].

- Possession of any documentary evidence of title to the property to be sold [*Code Civ. Proc. § 716.030(a)(2)*]. An order pursuant to this paragraph may be served either when the property is levied upon or afterward [*Code Civ. Proc. § 716.030(a)(2)* (it is unclear whether this reference is to *Code Civ. Proc. § 716.030(a)(2)* alone, or if it applies to *Code Civ. Proc. § 716.030(a)* as a whole)].

The court may issue an order pursuant to *Code Civ. Proc. § 716.030* on a showing of need for the order [*Code Civ.*

Proc. § 716.030(b)]. The order must be personally served on the judgment debtor and must contain a notice to the debtor that failure to comply with the order may subject him or her to being held in contempt of court [*Code Civ. Proc. § 716.030(c)*; *see § 254.733*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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21-254 California Forms of Pleading and Practice--Annotated § 254.135

§ 254.135 Money Judgment Included in Judgment for Possession or Sale

A writ of possession or sale may be enforced as a writ of execution to satisfy any money judgment included in the judgment for possession or sale. If amounts due under the money judgment are not satisfied pursuant to the writ of possession or sale, the judgment creditor may use a writ of execution to satisfy the money judgment after the writ of possession has been returned or 180 days after its issuance, whichever is earlier. If the judgment creditor does not want a writ of possession or sale to issue, as for example, when possession of property has been voluntarily surrendered, he or she is entitled to a writ of execution instead to satisfy the money judgment portion of the judgment for possession [*Code Civ. Proc. § 712.040(a)*].

Whether or not a writ of possession has been issued, enforced, or returned, the judgment creditor may use the remedies provided by *Code Civ. Proc. §§ 706.010-706.154* (wage garnishment) or *708.010-709.030* (miscellaneous creditor's remedies) to satisfy any money judgment included in the judgment for possession [*Code Civ. Proc. § 712.040(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.136

§ 254.136 Appointment of Receiver

The court may appoint a receiver pursuant to *Code Civ. Proc. §§ 708.610-708.630* to enforce a judgment for possession or sale of property [*Code Civ. Proc. § 712.060*]. For discussion and forms relating to receivers, see Ch. 486, *Receivers* .

Legal Topics:

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

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21-254 California Forms of Pleading and Practice--Annotated § 254.137

§ 254.137 Enforcement Against Public Entity

Unless subject to the provisions of *Gov. Code §§ 965-965.9* or *970-971.2*, a judgment against a public entity is subject to enforcement under *Code Civ. Proc. §§ 712.010-717.010* (enforcement by writ of possession or sale) [*Code Civ. Proc. § 712.070*; *see Code Civ. Proc. § 695.050*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsClaims By & Against

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21-254 California Forms of Pleading and Practice--Annotated §§ 254.138-254.149

[Reserved]

§§ 254.138[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.150

§ 254.150 Redemption of Foreclosed Property

The only property subject to redemption is real property, other than a leasehold estate with an unexpired term of less than two years at the time of levy, sold pursuant to a writ of sale and subject to a deficiency judgment [*see Code Civ. Proc. § 729.010*]. Property is subject to a deficiency judgment when there is no legislation prohibiting a deficiency judgment [*see Code Civ. Proc. §§ 580a-580d*]. The decree for foreclosure on a mortgage or deed of trust on the real property pursuant to *Code Civ. Proc. § 726* must determine the personal liability of any defendant for the payment of the debt secured by the mortgage or deed of trust and name the defendants against whom a deficiency judgment may be ordered [*Code Civ. Proc. §§ 726, 729.010(a)*]. This does not mean that a deficiency judgment will automatically issue. To obtain a deficiency judgment the plaintiff in an action to recover the debt must file an application for deficiency judgment and the court must determine that there is in fact a deficiency and its amount [*Code Civ. Proc. § 726*].

Prior to July 1, 1983, all property sold to enforce a judgment was subject to a right of redemption except sales of personal property, and of real property when the estate therein was a leasehold of less than two year's unexpired term [former *Code Civ. Proc. § 700a(a)*].

If property was sold or foreclosure or other proceedings for sale were begun prior to July 1, 1983, and the property would have been subject to the right of redemption under prior law, the property may be redeemed as provided by prior law unless the judgment creditor and judgment debtor agree in writing that the property may be sold as provided in *Code Civ. Proc. § 680.010-724.260* [*Code Civ. Proc. § 694.050*].

For discussion and forms relating to proceedings for foreclosure and to deficiency judgments, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

For further discussion of *Code Civ. Proc. § 726* and antideficiency legislation, see Ch. 500, *Sales and Secured Transactions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.151

§ 254.151 Notice of Sale Requirements When Sale Subject to Redemption

The sale of property sold subject to the right of redemption is governed by *Code Civ. Proc. § 716.020*, pertaining to writs of sale generally, except that: (1) the notice of sale of the property must state that the property will be sold subject to the right of redemption and must state the amount of the secured indebtedness with interest and costs; (2) notice of sale may be given on entry of the judgment for sale of the property and the provision of *Code Civ. Proc. § 701.545* delaying notice of sale does not apply; (3)notice of sale may be given to persons having liens on the property on entry of the judgment for sale of the property and the provision of *Code Civ. Proc. § 701.540(h)* delaying such notice does not apply [*Code Civ. Proc. § 729.010(b)*; for discussion of writs of sale, see *§ 254.130* et seq.; *see also §§ 254.702, 254.730*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.152

§ 254.152 Persons Entitled to Redeem

Property sold subject to the right of redemption may be redeemed only by the judgment debtor or the judgment debtor's successor in interest. The purchaser of the property at the foreclosure sale is not a successor in interest in this context [*Code Civ. Proc. § 729.020*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.153

§ 254.153 Redemption Period

If the proceeds of the foreclosure sale are sufficient to satisfy the secured indebtedness with interest and costs of action and of sale, the property may be redeemed within three months after the date of sale [*Code Civ. Proc. § 729.030(a)*].

If the proceeds of the foreclosure sale are not sufficient to satisfy the secured indebtedness with interest and costs of action and of sale, the property may be redeemed anytime within one year after the date of sale [*Code Civ. Proc. § 729.030(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.154

§ 254.154 Notice of Right to Redeem

When property is sold subject to the right of redemption, the levying officer who conducts the sale must serve notice of the right of redemption on the judgment debtor promptly after the sale. The notice must indicate the applicable redemption period. Service of the notice may be made personally or by mail [*Code Civ. Proc. § 729.050*; *see § 254.750*]. For discussion of service of papers and extension of the time for service when service is by mail, see *§ 254.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionStatutory Redemption

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§ 254.155 Certificate of Sale

When the purchaser pays the amount due for an interest in real property sold subject to the right of redemption, the levying officer conducting the sale must execute and deliver a certificate of sale to the purchaser and record a duplicate of the certificate in the office of the county recorder, rather than executing, delivering, and recording a deed of sale, as is required by *Code Civ. Proc. § 701.660* when the property is not subect to the right of redemption [*Code Civ. Proc. § 729.040(a)*]. In addition to the information that *Code Civ. Proc. § 701.670* requires to be included in a certificate or deed of sale [*see Code Civ. Proc. § 729.040(b)*], the certificate must contain the price paid for each distinct lot or parcel of real property sold subject to the right of redemption, the total price paid, and a statement that the property is subject to the right of redemption, indicating the applicable redemption period [*Code Civ. Proc. § 729.040(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.156

§ 254.156 Deposit of Redemption Price

A person who seeks to redeem property must deposit the redemption price with the levying officer who conducted the sale before the expiration of the applicable redemption period. If the person seeking to redeem the property is a successor in interest to the judgment debtor, he or she must, at the time the redemption price is deposited, file with the levying officer either (1) a certified copy of a recorded conveyance or (2) a copy of an assignment or any other evidence of the interest verified by an affidavit (declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) of the successor in interest or of a subscribing witness thereto [*Code Civ. Proc. § 729.060(a)*].

The redemption price is the total of all the following [*Code Civ. Proc. § 729.060(b)*]:

(1) The purchase price at the sale.

(2) The amount of any assessments or taxes and reasonable amounts for fire insurance, maintenance, upkeep, and repair of improvements on the property.

(3) Any amount paid by the purchaser on a prior obligation secured by the property to the extent that the payment was necessary for the protection of the purchaser's interest.

(4) Interest on the amounts set out in subparagraphs (1), (2), and (3), *above*, at the rate of interest on money judgments from the time such amount was paid until the date the deposit is made.

(5) The amount of the purchaser's lien, if the purchaser at the sale has any liens subordinate to the lien under which the property was sold, plus interest at the rate of interest on money judgments from the date of the sale until the date the deposit is made.

Rents and profits from the property paid to the purchaser or the value of the use and occupation of the property to the purchaser may be offset against the redemption price [*Code Civ. Proc. § 729.060(c)*].

If the person seeking to redeem the property deposits the redemption price pursuant to *Code Civ. Proc. § 729.060* or *729.070* during the redemption period, the levying officer will tender the deposit to the purchaser. If the purchaser accepts the tender, or if the redemption price determined by court order is tendered, the levying officer or trustee is to promptly execute and deliver a certificate of redemption to the person seeking to redeem and must immediately record a duplicate of the certificate in the office of the recorder of the county where the property is located [*Code Civ. Proc. § 729.080(b)*].

Tender of the redemption price determined by court order or agreed on by the purchaser and the person seeking to redeem the property is equivalent to payment. If the tender is refused, the levying officer deposits the amount tendered with the county treasurer of the county where the property is located, payable to the order of the purchaser. If the amount deposited is not claimed by the purchaser, or the legal representative of the purchaser, within five years after the deposit is made, by making application to the treasurer or other official designated by the county, it will be paid into the general fund of the county [*Code Civ. Proc. § 729.080(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawDeedsTypesSheriff's DeedsReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionStatutory Redemption

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21-254 California Forms of Pleading and Practice--Annotated § 254.157

§ 254.157 Failure to Deposit

If the redemption price is not deposited pursuant to *Code Civ. Proc. § 729.060* before the expiration of the redemption period, or if no additional deposit is made pursuant to *Code Civ. Proc. § 729.070(g)* [*see* discussion of *Code Civ. Proc. § 729.070* under *§ 254.158*] before expiration of the time provided, the levying officer who conducted the sale must promptly execute and deliver to the purchaser a deed of sale that complies with the requirement of *Code Civ. Proc. § 701.670*, or the nonjudicial foreclosure trustee [*see Code Civ. Proc. § 729.035*] must deliver an executed trustee' s deed and comply with the requirements of *Civ. Code § 2924j* [*Code Civ. Proc. § 729.080(a)*; for discussion of *Code Civ. Proc. § 701.670, see § 254.703*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawDeedsTypesSheriff's DeedsReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionStatutory Redemption

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21-254 California Forms of Pleading and Practice--Annotated § 254.158

§ 254.158 Petition to Determine Redemption Disputes

[1] Filing of Petition

If the purchaser and the person seeking to redeem the property disagree on the redemption price, or as to whether or not the person is entitled to redeem the property, or if the purchaser refuses the tender of the redemption price pursuant to *Code Civ. Proc. § 729.080*, the person seeking to redeem may file a petition with the court for an order determining the redemption price or whether or not the person is entitled to redeem the property. The petition must be filed before the expiration of the redemption period [*Code Civ. Proc. § 729.070(a)*; *see § 254.752*].

At the time the petition is filed, the petitioner must deposit the undisputed amount of the redemption price with the levying officer, if deposit has not previously been made, and give written notice to the levying officer or trustee of the filing of the petition [*Code Civ. Proc. § 729.070(a)*; *see § 254.753*].

The petition must be in writing and include the following statements [*Code Civ. Proc. § 729.070(b)*]:

- The amounts demanded to which the person seeking to redeem objects and the reasons for the objection.

- Any amounts offset to which the purchaser objects and the justification for the offset.

- The status of the petitioner that qualifies the petitioner to redeem the property. A copy of the papers required by *Code Civ. Proc. § 729.060(a)* must be filed with the petition.

[2] Hearing and Order

A hearing on the petition must be held not later than 20 days after the date the petition was filed unless continued by the court for good cause [*Code Civ. Proc. § 729.070(c)*]. Not less than 10 days before the hearing, the person seeking to redeem the property must personally serve a copy of the petition together with a notice of the time and place of the hearing on the purchaser [*Code Civ. Proc. § 729.070(d)*; for discussion of service of papers, see *§ 254.13*]. At the

hearing on the petition, the person seeking to redeem the property has the burden of proof [*Code Civ. Proc. § 729.070(e)*]. At the conclusion of the hearing, the court determines by order the amount required to redeem the property. The determination is made on affidavit or evidence satisfactory to the court [*Code Civ. Proc. § 729.070(f)*]. If an amount in addition to that deposited with the levying officer is required to redeem the property, the person seeking to redeem must pay the additional amount to the levying officer within 10 days after the issuance of the order [*Code Civ. Proc. § 729.070(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionStatutory Redemption

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21-254 California Forms of Pleading and Practice--Annotated § 254.159

§ 254.159 Effect of Redemption

On redemption, the effect of the sale is terminated and the person who redeemed the property is restored to the estate therein sold at the sale [*Code Civ. Proc. § 729.080(d)*].

Liens extinguished by the sale do not reattach to the property after redemption, and the property that was subject to the extinguished lien may not be applied to the satisfaction of the claim or judgment under which the lien was created [*Code Civ. Proc. § 729.080(e)*; see *Code Civ. Proc. § 701.630* (liens extinguished; discussed in *§ 254.89*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawSecured TransactionsPerfection & PriorityPriorityLiensReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionStatutory Redemption

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21-254 California Forms of Pleading and Practice--Annotated § 254.160

§ 254.160 Rights of Purchaser Prior to Redemption

[1] Right to Rents and Profits

From the time of the sale until a redemption, the purchaser is entitled to receive from the person in possession of the property the rents and profits from the property or the value of the use and occupation of the property [*Code Civ. Proc. § 729.090(a)*]. The purchaser is, however, liable to the person who redeems the property for any rents or profits that have been received by the purchaser pursuant to *Code Civ. Proc. § 729.090(a)* [*Code Civ. Proc. § 729.090(b)*].

[2] Right to Protect Property

The purchaser, from the time of sale until redemption, is entitled to enter the property during reasonable hours to repair and maintain the premises, and is entitled to an order from the court restraining waste on the property. Such an order may be granted with or without notice in the discretion of the court [*Code Civ. Proc. § 729.090(c)*; *see §§ 254.759, 254.760*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionStatutory Redemption

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21-254 California Forms of Pleading and Practice--Annotated §§ 254.161-254.179

[Reserved]

§§ 254.161[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.180

§ 254.180 Governing Law

Proceedings supplemental to execution are governed generally by *Code Civ. Proc. §§ 708.010-709.030*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureRemediesReceivershipsGeneral Overview

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21-254 California Forms of Pleading and Practice--Annotated § 254.181

§ 254.181 Nature of Supplemental Proceedings

Supplementary proceedings are special proceedings of statutory origin, are summary in character, and are instituted subsequent to a judgment in an action. They are instituted for the purpose of discovering and reaching assets of a judgment debtor and applying them to the satisfaction of the judgment. They are regarded as proceedings in an action, but they are auxiliary and supplementary thereto. Supplementary procedures are intended as a substitute for creditors' suits and provide an easier and less expensive method of reaching the same result [*Smith v. Smith (1942) 51 Cal. App. 2d 29, 31-32, 124 P.2d 117]* .

These proceedings include service of written interrogatories on a judgment debtor [*Code Civ. Proc. §§ 708.010-708.020*]; examinations of judgment debtors and third persons [*Code Civ. Proc. §§ 708.110-708.205*]; creditor's suits against third persons [*Code Civ. Proc. §§ 708.210-708.290*]; orders assigning right of payment [*Code Civ. Proc. §§ 708.510-708.560*]; application of a franchise to satisfy a money judgment [*Code Civ. Proc. §§ 708.910-708.930*]; application of a judgment debtor's interest as a trust beneficiary and a judgment debtor's unvested interest in property to satisfy a money judgment [*Code Civ. Proc. §§ 709.010-709.030*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureRemediesReceivershipsGeneral OverviewContracts LawPerformanceAssignmentGeneral Overview

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21-254 California Forms of Pleading and Practice--Annotated § 254.182

§ 254.182 Receiver to Enforce Judgment

[1] In General

The appointment of a receiver after a judgment to carry the judgment into effect is authorized by *Code Civ. Proc. § 564(b)(3)*. The court may appoint a receiver to enforce the judgment when the judgment creditor shows that considering the interests of both the judgment creditor and the judgment debtor, the appointment of a receiver is a reasonable method to obtain the fair and orderly satisfaction of the judgment [*Code Civ. Proc. § 708.620*].

The appointment, qualifications, powers, rights, and duties of a receiver appointed under *Code Civ. Proc. §§ 708.610-708.630* to enforce a judgment is governed by *Code Civ. Proc. §§ 564-571* [*Code Civ. Proc. § 708.610*]. For a discussion of *Code Civ. Proc. §§ 564-571* and forms relating to the appointment of receivers, the administration and termination of receivership, and actions by and against receivers, see Ch. 486, *Receivers* .

[2] Judgment Against Alcoholic Beverage Licensee

The interest in any alcoholic beverage license of a judgment debtor may be applied to the satisfaction of a money judgment only as provided in *Code Civ. Proc. § 708.630* [*Code Civ. Proc. § 708.630(a)*]. *Code Civ. Proc. § 708.630*, the court may appoint a receiver for the purpose of transferring the judgment debtor's interest in an alcoholic beverage license that is transferable under *Bus. & Prof. Code §§ 24070-24082*, unless the judgment debtor shows in the proceeding to appoint a receiver that the amount of delinquent taxes described in *Bus. & Prof. Code § 24049* (Alcoholic Beverage, Sales and Use, Personal Income, or Bank and Corporation Tax, or on tax unsecured property as defined in *Rev. & Tax Code § 134*) and claims of creditors with priority over the judgment creditor pursuant to *Bus. & Prof. Code § 24074* exceed the probable sale price of the license [*Code Civ. Proc. § 708.630(b)*]. The receiver may exercise the powers of the licensee as necessary and, in exercising such powers, shall comply with the applicable provisions of *Bus. & Prof. Code § 23000 et seq.* (Alcoholic Beverage Control Act) and applicable regulations of the Department of Alcoholic Beverage Control. An application shall be filed to transfer the license to the receiver and a temporary retail permit shall be obtained during the pendency of the transfer [*Code Civ. Proc. § 708.630(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsGovernmentsLocal GovernmentsLicenses

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21-254 California Forms of Pleading and Practice--Annotated §§ 254.183-254.199

[Reserved]

§§ 254.183[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.200

§ 254.200 When Available

Interrogatories may be served on the judgment debtor whenever a money judgment is enforceable except as provided in *Code Civ. Proc. §§ 708.010(b)* and *708.020(b)* [*Code Civ. Proc. § 708.010(a)*; *see* also *Code Civ. Proc. §§ 683.010-683.030*; for discussion of the period for enforcing judgments, see Ch. 318, *Judgments*].

If enforcement of the judgment is stayed, all proceedings for interrogatories will be stayed. The court may, however, permit proceedings for interrogatories despite a stay unless the stay is based on the giving of a sufficient undertaking pursuant to *Code Civ. Proc. §§ 916-936.1* [*Code Civ. Proc. § 708.010(b)*; for discussion of *Code Civ. Proc. § 916-936.1*, *see* Ch. 30, *Appeal: Stay of Proceedings*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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21-254 California Forms of Pleading and Practice--Annotated § 254.201

§ 254.201 Service of Written Interrogatories

The judgment creditor may propound written interrogatories to the judgment debtor in the manner provided in *Code Civ. Proc. § 2030* (Code *Civ. Proc. § 2030.010 et seq.* effective July 1, 2005) requesting information to aid in enforcement of the money judgment. The *Code Civ. Proc. § 2030* (*Code Civ. Proc. § 2030.010 et seq.* effective July 1, 2005) limitation on the number of interrogatories that may be propounded applies to each set of interrogatories propounded from time to time under *Code Civ. Proc. § 708.020*, but does not apply cumulatively to interrogatories propounded by the judgment creditor to the judgment debtor [*Code Civ. Proc. § 708.020(d)*]. The judgment debtor must answer the interrogatories in the manner and within the time provided by *Code Civ. Proc. § 2030* (*Code Civ. Proc. § 2030.010 et seq.* effective July 1, 2005) [*Code Civ. Proc. § 708.020(a)*; for discussion of *Code Civ. Proc. § 2030* (*Code Civ. Proc. § 2030.010 et seq.* effective July 1, 2005), *see* Ch. 194, *Discovery: Interrogatories*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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21-254 California Forms of Pleading and Practice--Annotated § 254.202

§ 254.202 Limitations

The judgment creditor may not serve interrogatories within 120 days after the judgment debtor has responded to previous interrogatories or within 120 days after the judgment debtor has been examined pursuant to *Code Civ. Proc. §§ 708.110-708.205*. The judgment debtor is not required to respond to any interrogatories so served [*Code Civ. Proc. § 708.020(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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21-254 California Forms of Pleading and Practice--Annotated § 254.203

§ 254.203 Enforcement

Interrogatories may be enforced, to the extent practicable, in the same manner as interrogatories in a civil action [*Code Civ. Proc. § 708.020(c)*; for discussion of enforcement of interrogatories in a civil action, see Ch. 194, *Discovery: Interrogatories*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated §§ 254.204-254.219

[Reserved]

§§ 254.204[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.220

§ 254.220 Examination of Judgment Debtor

[1] Governing Law

A judgment creditor may apply to the proper court for an order requiring the judgment debtor to appear before the court, or before a referee appointed by the court, to furnish information to aid in enforcement of a money judgment [*Code Civ. Proc. § 708.110(a)*; for Judicial Council mandatory form of application and order, *see § 254.780*].

[2] Ex Parte Application or Noticed Motion

The court will make the order on ex parte application of the judgment creditor if the judgment creditor has not caused the judgment debtor to be examined during the preceding 120 days [*Code Civ. Proc. § 708.110(b)*]. If, however, the judgment creditor has caused the judgment debtor to be examined under *Code Civ. Proc. § 708.110* during the preceding 120 days, the court will make the order if the judgment creditor by affidavit (or declaration under *Code Civ. Proc. § 2015.5*) or otherwise shows good cause for the order [for form of declaration, *see § 254.782*]. The application must be made on noticed motion if the court so directs or a court rule so requires [*Code Civ. Proc. § 708.110(c)*; *see § 254.781* for form of notice of motion]. Otherwise, it may be made ex parte [*Code Civ. Proc. § 708.110(c)*; *see § 254.780* for mandatory Judicial Council form of ex parte application].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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21-254 California Forms of Pleading and Practice--Annotated § 254.221

§ 254.221 Examination of Third Parties

[1] In General

A judgment creditor who has a money judgment, on ex parte application and proof, by affidavit (or declaration under *Code Civ. Proc. § 2015.5*) or otherwise, to the satisfaction of the proper court that a third person has possession or control of property in which the judgment debtor has an interest or is indebted to the judgment debtor in an amount exceeding $250, may obtain an order directing the third person to appear before the court, or before a referee appointed by the court, to answer concerning such property or debt. The affidavit in support of the judgment creditor's application may be based on the affiant's information and belief [*Code Civ. Proc. § 708.120(a)*; *see §§ 254.780, 254.783*].

A copy of the order must be served personally on the third person and served either personally or by mail on the judgment debtor not less than 10 days prior to the date set for the examination [*Code Civ. Proc. § 708.120(b)*]. If service is made by mail the time for service may be extended [*see Code Civ. Proc. § 684.120*; for discussion of service of papers and extension of time for service when service is by mail, see *§ 254.13*].

An order made pursuant to *Code Civ. Proc. § 708.120(a)* must contain a notice to the person served that failure to appear may subject him or her to arrest and punishment for contempt and payment of reasonable attorneys fees incurred by the judgment creditor. It must also contain notice to the judgment debtor of the examination and his or her right to claim an exemption [*Code Civ. Proc. § 708.120(e)*]. The Judicial Council form of application and order, which is required for use as of July 1, 2000, contains the required notices and warnings [*see § 254.780*].

The person serving the order must tender to the third person fees for the mileage necessary to be traveled from the third person's residence to the place of examination, or the order will not be effective. The fees are the same as those generally provided for witnesses when legally required to attend civil proceedings in the court where the examination proceeding is to be conducted [*Code Civ. Proc. § 708.120(f)*; *see Gov. Code § 68093*].

The third person may not be ordered to appear when the judgment is no longer enforceable [*see Code Civ. Proc. §*

683.020].

[2] Lien on Property

If the property in the third person's possession or control in which the judgment debtor has an interest or if the debt owed by the third person to the judgment debtor is described in the affidavit (or declaration under *Code Civ. Proc. § 2015.5*; *see § 254.783*) or in the application for the order directing the third person to appear in a manner reasonably adequate to permit it to be identified [*see § 254.780*], service of the order on the third person creates a lien on the judgment debtor's interest in the property or on the debt for a period of one year from the date of the order unless extended or sooner terminated by the court [*Code Civ. Proc. § 708.120(c)*].

If the property or debt is described in the judgment creditor's application for an order for examination of a third person and the court ultimately orders the property or debt applied to the satisfaction of the judgment, the priority of the lien under *Code Civ. Proc. § 708.205* will date from the service of the order on the third person pursuant to *Code Civ. Proc. § 708.120(c)* [*Annual Report,* 16 Cal. l Revision Comm'n Reports 2094 (1982)].

[3] Exemption Claim

[a] In General

The judgment debtor may claim that all or any portion of the property or debt is exempt from enforcement of a money judgment by application to the court on noticed motion, filed with the court and personally served on the judgment creditor not later than three days before the date set for the examination. The judgment debtor must execute an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) in support of the application that includes all of the matters set forth in *Code Civ. Proc. § 703.520(b)* (*see § 254.710*). Notice of opposition to a claim of exemption made pursuant to *Code Civ. Proc. § 708.120* is not required. The court must determine any claim of exemption made in examination proceedings [*Code Civ. Proc. § 708.120(d)*; *see §§ 254.793, 254.794*].

For discussion of duty of third person to protect the exemption rights of the debtor and the manner of claiming exemptions, see *§ 254.110* et seq.

[b] Waiver of Exemption

Failure of the judgment debtor to make a claim of exemption does not preclude the judgment debtor from later claiming the exemption unless the property or debt is described in the order in a manner reasonably adequate to permit it to be identified and the judgment debtor receives notice of the examination proceeding at least 10 days before the date set for the examination [*Code Civ. Proc. § 708.120(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsContracts LawSecured TransactionsPerfection & PriorityPriorityLiens

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21-254 California Forms of Pleading and Practice--Annotated § 254.222

§ 254.222 Appearance by Representatives of Organizations

If a corporation, partnership, association, trust, or other organization is served with an order to appear for an examination, it must designate one or more officers, directors, managing agents, or other persons who are familiar with its property and debts, to appear and be examined [*Code Civ. Proc. § 708.150(a)*].

When the order to appear for an examination requires the appearance of a specified individual, that individual must appear for the examination and may be accompanied by one or more officers, directors, managing agents, or other persons familiar with the property and debts of the organization [*Code Civ. Proc. § 708.150(b)*].

If a third party examination is to be conducted and the order to appear for the examination does not require the appearance of a specified individual, the order must advise the organization of its duty to make a designation under *Code Civ. Proc. § 708.150(a)* [*Code Civ. Proc. § 708.150(c)*]. The Judicial Council form of application and order, which as of July 1, 2000, is required for use, contains the required notice to an organization [*see § 254.780*].

A corporation, partnership, association, trust, or other organization, whether or not a party, may appear at an examination through any authorized officer, director, or employee, whether or not the person is an attorney [*Code Civ. Proc. § 708.450(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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21-254 California Forms of Pleading and Practice--Annotated § 254.223

§ 254.223 Powers of Referee; Limitations

The examination proceedings may be conducted by a referee appointed by the court. A referee has the power to issue, modify, or vacate an order authorized by *Code Civ. Proc. § 708.205*, to make a protective order authorized by *Code Civ. Proc. § 708.200*, to issue a warrant authorized by *Code Civ. Proc. § 708.170*, and has the same power as the court to grant adjournments, to preserve order, and to subpoena witnesses to attend the examination [*Code Civ. Proc. § 708.140(a)*].

Only the court that ordered the reference, however, has power to punish for contempt for disobeying an order of the referee, to make an award of attorney's fees pursuant to *Code Civ. Proc. § 708.170*, or to determine a contested claim of exemption or determine a third-party claim under *Code Civ. Proc. § 708.180* [*Code Civ. Proc. § 708.140(a)*]. To be eligible for appointment as a referee, one must be a member of the State Bar of California. However, a person who was duly appointed as a referee prior to July 1, 1983, pursuant to the law in operation at the time of appointment, and who was available to perform the duties of a referee on July 1, 1983, is exempt from the requirement that a referee be a member of the State Bar of California [*Code Civ. Proc. § 708.140(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureJudicial OfficersReferencesCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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21-254 California Forms of Pleading and Practice--Annotated § 254.224

§ 254.224 Liability for Failure to Appear

If an order requiring a person to appear for an examination was served by a sheriff, marshal, a person specially appointed by the court in the order, or a registered process server, and the person fails to appear, the court may do either of the following [*Code Civ. Proc. § 708.170(a)(1)*]:

- Pursuant to a warrant, have the person brought before the court to answer for the failure to appear and punish the person for contempt.

- Issue a warrant for the arrest of the person [*see Code Civ. Proc. § 1993*].

If the person's failure to appear was without good cause, the judgment creditor will be awarded reasonable attorney's fees incurred in the examination proceeding. Attorney's fees awarded against the judgment debtor are added to and become part of the principal amount of the judgment [*Code Civ. Proc. § 708.170(a)(2)*].

A person who willfully makes an improper service of an order for an examination that results in the arrest pursuant to *Code Civ. Proc. § 708.170(a)* of the person who fails to appear is guilty of a misdemeanor [*Code Civ. Proc. § 708.170(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureSanctionsContemptCivil Contempt

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21-254 California Forms of Pleading and Practice--Annotated § 254.225

§ 254.225 Witnesses

Witnesses may be required to appear and testify before the court or referee in an examination proceeding in the same manner as on the trial of an issue [*Code Civ. Proc. § 708.130(a)*].

The privilege of a married person not to testify against his or her spouse does not apply in an examination proceeding [*Code Civ. Proc. § 708.130(b)*; *see also Evid. Code §§ 970-973*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsEvidencePrivilegesMarital PrivilegesAdverse Spousal TestimonyExceptionsEvidenceTestimonyLay WitnessesGeneral Overview

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21-254 California Forms of Pleading and Practice--Annotated § 254.226

§ 254.226 Place for Examinations

Generally, the proper court for examination of a person is the court in which the money judgment is entered [*Code Civ. Proc. § 708.160(a)*]. However, a person may not be required to attend an examination before a court located outside the county in which the person resides or has a place of business unless the distance from the person's place of examination in less than 150 miles [*Code Civ. Proc. § 708.160(b)*].

If a person sought to be examined does not reside or have a place of business in the county where the judgment is entered, the superior court in the county in which the person resides or has a place of business is a proper court for the examination [*Code Civ. Proc. § 708.160(c)*].

For discussion of what must be filed with an application for examination in a county other than the county in which the judgment was entered, *see § 254.780*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueIndividual DefendantsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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21-254 California Forms of Pleading and Practice--Annotated § 254.227

§ 254.227 Order Applying Property Toward Satisfaction of Judgment

Generally, at the conclusion of an examination proceeding, the court may order the judgment debtor's interest in property that is in the possession or under the control of the judgment debtor or the third person or a debt owed by the third person to the judgment debtor to be applied toward the satisfaction of the money judgment if the property is not exempt from enforcement of a money judgment. Such an order creates a lien on the property or debt [*Code Civ. Proc. § 708.205(a)*; *see Palacio Del Mar Homeowners Assn., Inc. v. McMahon (2009) 174 Cal. App. 4th 1386, 1390-1391, 95 Cal. Rptr. 3d 445* (property may be ordered turned over to levying officer or receiver, but not to judgment creditor directly)].

The court may not, however, order the property or debt to be applied toward the satisfaction of the money judgment if a third person examined pursuant to *Code Civ. Proc. § 708.120* claims an interest in the property adverse to the judgment debtor or denies the debt and the court does not determine the matter as provided in *Code Civ. Proc. § 708.180(a)*. The court may in that case make an order pursuant to *Code Civ. Proc. § 708.180(c)* or *(d)* forbidding transfer or payment [*Code Civ. Proc. § 708.205(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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21-254 California Forms of Pleading and Practice--Annotated § 254.228

§ 254.228 Determination of Third Party Claim

[1] Summary Proceeding

Statutes governing the enforcement of judgments authorize the trial court to determine, in summary proceedings rather than by a creditor's suit, the existence of a debt by a third person to a judgment debtor [*Evans v. Paye (1995) 32 Cal. App. 4th 265, 270, 37 Cal. Rptr. 2d 915]* .

If a third person examined pursuant to *Code Civ. Proc. § 708.120* claims an interest in the property adverse to the judgment debtor or denies the debt, the court may make a conclusive determination regarding the parties to the proceeding and the third person. A party may appeal the determination in the manner provided for appeals from the court in which the proceeding takes place [*Code Civ. Proc. § 708.180(a)*].

[2] Continuance to Produce Evidence

The court may grant a continuance for a reasonable time for a reasonable time for discovery proceedings, the production of evidence, or other preparation for the hearing to determine the third party claim [*Code Civ. Proc. § 708.180(a)*].

[3] Limits on Court's Power

[a] Good Faith and Conditions

The court may not make a determination regarding the ownership of property or the existence of a debt if the third person's claim is made in good faith and specified conditions are satisfied [*Code Civ. Proc. § 708.180(b)*; *see § 254.228[3][b]*].

[b] Burden of Proof on Claim of Good Faith

Once the judgment creditor has presented prima facie evidence of the existence of a debt by the third person to the

judgment debtor, the burden shifts to the third person to show by a preponderance of the evidence that his or her denial of the debt is made in good faith [*Evans v. Paye (1995) 32 Cal. App. 4th 265, 270, 37 Cal. Rptr. 2d 915]* .

The third person may not satisfy this burden simply by offering an explanation that, on its face, is not patently frivolous or an obvious sham. Rather, the court must consider the totality of the circumstances in determining whether the third person has established good faith by a preponderance of the evidence [*Evans v. Paye (1995) 32 Cal. App. 4th 265, 270, 37 Cal. Rptr. 2d 915]* .

[c] Restricting Conditions

If the third person has made a showing of good faith that his or her claim is made in good faith (*see § 254.228[3][b]*), the court may not make a determination regarding the ownership of property or the existence of a debt if any of the following conditions is satisfied [*Code Civ. Proc. § 708.180(b)*]:

(1) The court would not be a proper court for the trial of an independent civil action (including a creditor's suit) for the determination of the ownership of the property or the existence of the debt, and the third person objects to the determination;

(2) At the time an order for examination is served on the third person, a civil action (including a creditor's suit) is pending with respect to the ownership of the property or the existence of the debt;

(3) The court determines that the ownership of the property or the existence of the debt should be determined in a creditor's suit.

If the court cannot make such a determination, it cannot order the property or debt to be applied toward the satisfaction of the money judgment [*Code Civ. Proc. § 708.205(b)*].

[4] Restraint on Transfer of Property or Payment of Debt

On ex parte application of the judgment creditor, the court may make an order forbidding transfer of the property to the judgment debtor or payment of the debt to the judgment debtor until the ownership of the property or the existence of the debt is determined pursuant to *Code Civ. Proc. § 708.180(a)* or until a creditor's suit may be commenced and an order obtained pursuant to *Code Civ. Proc. § 708.240*. An undertaking may be required in the discretion of the court. The court may modify or vacate the order at any time with or without a hearing on such terms as are just [*Code Civ. Proc. § 708.180(c)*; *see §§ 254.786, 254.788*].

On application of the judgment creditor on noticed motion, the court may, if it determines that the judgment debtor probably owns an interest in the property or that the debt probably is owed to the judgment debtor, make an order forbidding the transfer or other disposition of the property to any person or forbidding payment of the debt until the ownership of the property or the existence of the debt is determined pursuant to *Code Civ. Proc. § 708.180(a)* or until a creditor's suit may be commenced and an order obtained pursuant to *Code Civ. Proc. § 708.240*. The court must require the judgment creditor to furnish an undertaking as provided in *Code Civ. Proc. § 529* (undertakings relating to preliminary injunctions). The court may modify or vacate the order at any time after notice and hearing on such terms as are just [*Code Civ. Proc. § 708.180(d)*; *see §§ 254.787, 254.788*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of

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21-254 California Forms of Pleading and Practice--Annotated § 254.229

§ 254.229 Intervention

The court may permit a person claiming an interest in the property or debt sought to be applied toward satisfaction of a money judgment in an examination proceeding to intervene in the proceeding and may determine the person's rights in the property or debt pursuant to *Code Civ. Proc. § 708.180* [*Code Civ. Proc. § 708.190*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionRight to InterveneCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsNonpartiesCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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21-254 California Forms of Pleading and Practice--Annotated § 254.230

§ 254.230 Protective Orders

In any examination proceeding, the court may, on motion of the person to be examined or on its own motion, make such protective orders as justice may require [*Code Civ. Proc. § 708.200*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated §§ 254.231-254.249

[Reserved]

§§ 254.231[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.250

§ 254.250 Action Against Third Person

If a third person has possession or control of property in which the judgment debtor has an interest or is indebted to the judgment debtor, the judgment creditor may bring an action against the third person to have the interest or debt applied to the satisfaction of the money judgment [*Code Civ. Proc. § 708.210*; *see § 254.789*].

For discussion of resolution of disputes concerning the interests of a third person and a judgment debtor in personal property through third-party claims procedure pursuant to *Code Civ. Proc. §§ 720.010-720.430*, see *§ 254.310* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsNonparties

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21-254 California Forms of Pleading and Practice--Annotated § 254.251

§ 254.251 Statute of Limitations

An action must be commenced before the expiration of the later of either (1) the time when the judgment debtor may bring an action against the third person concerning the property or debt, or (2) one year after creation of a lien on the property or debt pursuant to *Code Civ. Proc. §§ 680.010-724.260* if the lien is created at the time when the judgment debtor may bring an action against the third person concerning the property or debt [*Code Civ. Proc. § 708.230(a)*].

An action may not be commenced after the period for enforcement of the money judgment has expired [*Code Civ. Proc. § 708.230(b)*; *see Code Civ. Proc. § 683.020, 683.030* (time for enforcing judgments)]. If an action is commenced within the time permitted in *Code Civ. Proc. § 708.230*, however, the action may be prosecuted to judgment after the period for enforcement of the money judgment has expired despite *Code Civ. Proc. § 683.020* [*Code Civ. Proc. § 708.230(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsNonpartiesGovernmentsLegislationStatutes of LimitationsTime Limitations

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21-254 California Forms of Pleading and Practice--Annotated § 254.252

§ 254.252 Joinder of Judgment Debtor

The judgment debtor may be joined in a creditor's suit but is not an indispensable party. The residence of the judgment debtor may not be considered in determining the proper venue unless otherwise provided by contract between the judgment debtor and the third person [*Code Civ. Proc. § 708.220*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefCivil ProcedureVenueIndividual DefendantsCivil ProcedureParties JoinderPermissive JoinderCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsNonparties

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21-254 California Forms of Pleading and Practice--Annotated § 254.253

§ 254.253 Restraint on Transfer to Judgment Debtor

The judgment creditor may apply to the court in which the action is pending for an order restraining the third person from transferring to the judgment debtor the property in which the judgment debtor is claimed to have an interest or from paying to the judgment debtor the alleged debt. The court may direct or a court rule may require that the order be made on noticed motion. Otherwise, the order may be made on ex parte application. The order will remain in effect until judgment is entered in the action or until such earlier time as the court may provide in the order. The court in its discretion may require an undertaking. The court may modify or vacate the order at any time with or without a hearing on such terms as are just [*Code Civ. Proc. § 708.240(a)*; *see §§ 254.790 -254.792*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.254

§ 254.254 Temporary Restraining Order/Preliminary Injunction

The judgment creditor may apply to the court in which the action is pending for a temporary restraining order or a preliminary injunction or both, restraining the third person from transferring to any person or otherwise disposing of the property in which the judgment debtor is claimed to have an interest, pursuant to *Code Civ. Proc. §§ 525-536*. The court may make, dissolve, and modify such orders as provided in *Code Civ. Proc. § 525 et seq.* [*Code Civ. Proc. § 708.240(b)*; *see § 254.789*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsNonpartiesCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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21-254 California Forms of Pleading and Practice--Annotated § 254.255

§ 254.255 Lien on Judgment Debtor's Interest

Service of summons on the third person creates a lien on the interest of the judgment debtor in the property or on the debt owed to the judgment debtor that is the subject of the creditor's suit [*Code Civ. Proc. § 708.250*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsNonpartiesContracts LawSecured TransactionsPerfection & PriorityPriorityLiens

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21-254 California Forms of Pleading and Practice--Annotated § 254.256

§ 254.256 Exemption Claim

[1] In General

The judgment debtor may claim that all or any portion of the property or debt is exempt from enforcement of a money judgment. The claim is to be made by application to the court on noticed motion, filed with the court and served on the judgment creditor personally or by mail not later than 30 days before the date set for trial [*Code Civ. Proc. § 708.260(a)*; *§§ 254.793*, *254.794*; for discussion of service of papers and extension of time for service when service is by mail, see General Introduction under Filing and Service of Writs, Notices, and Other Papers]. The judgment debtor must execute an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) in support of the application that includes all of the matters set forth in *Code Civ. Proc. § 703.520(b)* (*see § 254.710*). No notice of opposition to the claim of exemption is required. If the judgment debtor has not been named as a party to the action, the judgment debtor may obtain an order under *Code Civ. Proc. § 389* that the judgment debtor be made a party.

The court will determine any exemption claim made in a creditor's suit. If the judgment debtor establishes to the satisfaction of the court that the property or debt is exempt from enforcement of a money judgment, the court must so adjudge and may not make the orders referred to in *Code Civ. Proc. § 708.280(b)*, *(c)*, and *(d)* [*Code Civ. Proc. § 708.280(a)*; for discussion of *Code Civ. Proc. § 708.280(b)-(d)*, see *§ 254.257*].

[2] Waiver of Exemption

Failure of the judgment debtor to make a claim of exemption is a waiver of the exemption unless both of the following conditions are satisfied: (1) the judgment debtor has not been served with process in the action that contains a description of the property or debt reasonably adequate to permit it to be identified; (2) the judgment debtor does not have actual notice of the pendency of the ac tion and the identity of the property or the nature of the debt in issue [*Code Civ. Proc. § 708.260*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsNonparties

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21-254 California Forms of Pleading and Practice--Annotated § 254.257

§ 254.257 Judgment

If the judgment creditor establishes that the third person has property in which the judgment debtor has an interest or is indebted to the judgment debtor, the court must render judgment accordingly. The property or debt may be applied to the satisfaction of the judgment creditor's judgment against the judgment debtor as ordered by the court [*Code Civ. Proc. § 708.280(b)*].

In addition, if the court determines that the third person has property in which the judgment debtor has an interest, the court may order the third person not to transfer the property until it can be levied on or otherwise applied to the satisfaction of the judgment [*Code Civ. Proc. § 708.280(c)*; *see § 254.792*].

If the court determines that the third person has transferred property that was subject to a lien in favor of the judgment creditor or, contrary to court order of which the third person has notice, has paid the debt to the judgment debtor or has transferred the property, the court will render judgment against the third person in an amount equal to the lesser of (1) the value of the judgment debtor's interest in the property or the amount of the debt, or (2) the amount of the judgment creditor's judgment against the judgment debtor remaining unsatisfied [*Code Civ. Proc. § 708.280(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.258

§ 254.258 Costs

Costs incurred by or taxed against the judgment creditor may not be recovered from the judgment debtor as a cost of enforcing the judgment [*Code Civ. Proc. § 708.290*].

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21-254 California Forms of Pleading and Practice--Annotated §§ 254.259-254.269

[Reserved]

§§ 254.259[Reserved]

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5. Enforcement Against Franchise

21-254 California Forms of Pleading and Practice--Annotated § 254.270

§ 254.270 Franchise Defined

As used in *Code Civ. Proc. §§ 708.910-708.930*, "franchise" means a franchise granted by a public entity and all the rights and privileges thereof, other than the franchise of being a corporation [*Code Civ. Proc. § 708.910*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicenses

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5. Enforcement Against Franchise

21-254 California Forms of Pleading and Practice--Annotated § 254.271

§ 254.271 Applying Franchise to Satisfy Money Judgment

[1] Discretion of Court

Although a franchise granted by a public entity is not subject to execution [*Code Civ. Proc. § 699.720(a)(7)*], the court may, in its discretion, order a franchise applied to the satisfaction of a money judgment on application by the judgment creditor [*Code Civ. Proc. § 708.920(a)*]. In exercising its discretion, the court shall determine whether application of the franchise to the satisfaction of the judgment is proper, taking into account all the circumstances of the case, including but not limited to the nature of the franchise, whether the franchise is by its terms transferable, and the likelihood that application of the franchise to the satisfaction of the judgment will yield a substantial amount [*Code Civ. Proc. § 708.920(a)*].

[2] Notice and Service Requirements

The application must be made on a noticed motion. The notice of motion must be served personally or by mail on the judgment debtor and on the public entity that granted the franchise [*Code Civ. Proc. § 708.920(a)*].

[3] Order for Application

If the court orders application of the franchise to the satisfaction of the judgment, application shall be by such means as appears proper to the court, including but not limited to sale of the franchise, assignment of the franchise or proceeds of the franchise, or appointment of a receiver [*Code Civ. Proc. § 708.920(b)*].

The court may include in its order, or make additional orders containing, provisions to effectuate the application of the franchise to the satisfaction of the judgment, including but not limited to provisions relating to the place of sale of the franchise, possession of the property of the judgment debtor necessary for the exercise of the franchise, receipt of proceeds of the franchise, recovery of penalties imposed by law and recoverable for injury to the franchise or for damages or other cause, and the judgment debtor's powers, duties, and liability for penalties and forfeitures [*Code Civ. Proc. § 708.920(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.272

§ 254.272 Limitations on Enforcement

Notwithstanding any other provision of *Code Civ. Proc. §§ 708.910-708.930*, an order for application of a franchise to the satisfaction of a money judgment is subject to all applicable laws governing sale, transfer, or other actions concerning the franchise, including but not limited to any necessary approvals by the Public Utilities Commission or local public entities and compliance with statutory or administrative regulations [*Code Civ. Proc. § 708.930*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated §§ 254.273-254.289

[Reserved]

§§ 254.273[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.290

§ 254.290 Application of Nonvested Property Interest to Satisfaction of Money Judgment

Although a contingent remainder, executory interest, or other interest of the judgment debtor in property that is not vested in the judgment debtor is not subject to execution [*Code Civ. Proc. § 699.720(a)(9)*], a judgment creditor may apply to the court on noticed motion for an order applying such an interest to the satisfaction of a money judgment [*Code Civ. Proc. § 709.020*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewReal Property LawEstatesFuture InterestsExecutory InterestsReal Property LawEstatesFuture InterestsExecutory InterestsReal Property LawEstatesFuture InterestsRemainders

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21-254 California Forms of Pleading and Practice--Annotated § 254.291

§ 254.291 Discretion of Court

The interest of the judgment debtor may be applied to the satisfaction of the money judgment by such means as the court, in its discretion, determines are proper to protect the interests of both the judgment debtor and judgment creditor, including but not limited to the imposition of a lien on or the sale of the judgment debtor's interest [*Code Civ. Proc. § 709.020*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated §§ 254.292-254.309

[Reserved]

§§ 254.292[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.310

§ 254.310 Governing Statutes

Third-party claims and related procedures pertaining to property levied on for satisfaction of a judgment debt are governed generally by *Code Civ. Proc. §§ 720.010-720.800*. Third-party claims of ownership and possession of real or personal property are governed by *Code Civ. Proc. §§ 720.110-720.170*. Third-party claims of a security interest or lien in personal property are governed by *Code Civ. Proc. §§ 720.210-720.290*. Judgment creditor's demand that a third party file a claim is governed by *Code Civ. Proc. §§ 720.510-720.550*. Undertakings by a third-party claimant in relation to the release of levied property are governed by *Code Civ. Proc. §§ 720.610-720.660*. Undertakings by a creditor are governed by *Code Civ. Proc. §§ 720.160-720.170* and by *Code Civ. Proc. §§ 720.260-720.280*. Undertakings in relation to third-party claims, generally, are governed by *Code Civ. Proc. §§ 720.760-720.800*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.311

§ 254.311 Third-Party Claims

The term "third-party claims" applies to claims by third persons to the ownership or right to possession of real or personal property, or a claimed security interest or lien on personal property that has been levied on in an action by a creditor either before or after judgment [*Code Civ. Proc. §§ 720.110, 720.210*]. The procedures available for third-party claims regarding personal property that has been levied on [*Code Civ. Proc. §§ 720.210-720.800*] also apply to cases involving claim and delivery [*Code Civ. Proc. § 514.050*; *see also* Ch. 119, *Claim and Delivery* , for discussion, forms, and procedures relating to claim and delivery] and enforcement of state tax liability [*Code Civ. Proc. § 688.110*]. For alternative remedies available to third-party claimants to real or personal property levied on, see the *discussion under § 254.323*.

[1] Claim to Ownership or Right to Possession of Real or Personal Property

A third person claiming ownership or the right to possession of real or personal property that has been levied on may make a third-party claim to that property if the interest claimed is superior to the judgment creditor's lien on the property [*Code Civ. Proc. § 720.110*]. The third person may make this claim concerning real property that has been levied on under a writ of attachment or a writ of execution [*Code Civ. Proc. § 720.110(a)*], and to personal property that has been levied on under a writ of attachment, a writ of execution, a prejudgment or postjudgment writ of possession, or a writ of sale [*Code Civ. Proc. § 720.110(b)*].

[2] Claim by Third Party of Security Interest or Lien on Personal Property

A third person claiming a security interest in or lien on personal property levied on under a writ of attachment, a writ of execution, a prejudgment or postjudgment writ of possession, or a writ of sale, may make a third-party claim as to the property if the security interest or lien claimed is superior to the judgment creditor's lien on the property [*Code Civ. Proc. § 720.210(a)*]. A third-party claiming a security interest in fixtures may also make a third-party claim providing the claimed interest is superior to the creditor's lien on the property [*Code Civ. Proc. § 720.210(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.312

§ 254.312 Filing of Claim

A person making a third-party claim under *Code Civ. Proc. §§ 720.110-720.170* or under *Code Civ. Proc. §§ 720.210-720.290* must file the claim with the levying officer, together with two copies of the claim. The filing must be after the levy, but before the levying officer either sells the property, delivers possession of it to the creditor, or pays the proceeds of collection to the creditor [*Code Civ. Proc. §§ 720.120* (claiming ownership or right to possession of property), *720.220* (claiming secured interest or lien in property)]. The third-party claimant may also file at this time an undertaking for release of the levied property [*Code Civ. Proc. § 720.620*; *see § 254.314*].

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21-254 California Forms of Pleading and Practice--Annotated § 254.313

§ 254.313 Notice and Service of Claim

No later than five days after the third-party claim has been filed with the levying officer, he or she must serve either personally or by mail on the creditor and debtor a copy of the third-party claim and a statement whether or not the third party has filed an undertaking to release the property [*Code Civ. Proc. §§ 720.140(a), (c), 720.240(a), (c)*; for discussion of service of papers and extension of time for service when service is by mail, see *§ 254.13*].

If the third-party claimant has filed an undertaking to release the property, a notice that the property will be released within 10 days after service of the notice unless the creditor objects to the undertaking must also be served on the judgment creditor and judgment debtor [*Code Civ. Proc. §§ 720.140(a)-(c), 720.240(a)-(c)*]. If the third party has not filed an undertaking, a notice must be served on the judgment creditor and judgment debtor that the property will be released within 10 days after service of the notice unless the creditor files with the levying officer either an undertaking that satisfies the requirements of a creditor's undertaking as provided by *Code Civ. Proc. § 720.160* (third-party claims based on ownership or right to possession) or *Code Civ. Proc. § 720.260* (third-party claims based on secured interest or lien) [*Code Civ. Proc. §§ 720.140(a)-(c), 720.240(a)-(c)*].

The levying officer may serve the copy of the third-party claim, statement as to any third party undertaking, and notice of intended release of property regardless of any defect, informality, or insufficiency of the claim [*Code Civ. Proc. §§ 720.140(d)*; *720.240(d)*]. For discussion of third party undertakings, see *§ 254.314*; for discussion of undertakings by creditors, see *§ 254.315*; for discussion of creditor's objection to a third party undertaking, see *§ 254.317*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.314

§ 254.314 Undertaking By Third-Party Claimant

The third-party claimant may give an undertaking to release property in which the party claims an interest [*Code Civ. Proc. § 720.610*]. The undertaking may be given when [*Code Civ. Proc. § 720.610*]:

(1) Real property in which the third-party claims ownership or the right to possession is levied on under either a writ of attachment or execution;

(2) Personal property in which the third-party claims ownership or the right to possession, or a security interest or lien is levied on under either a writ of attachment, execution, or sale.

The undertaking may be filed with the levying officer, together with two copies, at the time the third party filed the third-party claim (*see § 254.820[3]*), or later, but in any event before the levying officer either sells the property, delivers possession of it to the creditor, or pays proceeds of collection to the creditor [*Code Civ. Proc. § 720.620*].

The undertaking must contain a description of the property to be released and describe the interest of the third party in the property and must be made in favor of the creditor [*Code Civ. Proc. § 720.630(a), (b)*]. The undertaking must provide that in the event that the debtor is adjudged to have an interest in the property levied on, the third party will pay to the creditor the lesser of the amount required to satisfy the judgment against the debtor of the creditor, or a sum equal to the market value of the debtor's interest in the property [*Code Civ. Proc. § 720.630(b)*]. The amount of the undertaking may be either twice the market value of the property sought to be released, or twice the amount of the creditor's lien on the property [*Code Civ. Proc. § 720.630(c)*]. If, however, the creditor has given an undertaking in response to the third party's claim [*see § 254.315*], the third party's undertaking must be in the same amount as the creditor's undertaking [*Code Civ. Proc. § 720.630(d)*]. The undertaking is effective as of the date the property is released [*Code Civ. Proc. § 720.650*].

[1] Notice and Service of Undertaking

The levying officer must serve a copy of the undertaking and notice of the filing on both the creditor and the debtor at

the same time as the notice of the third-party claim is served if the third party filed the undertaking at the same time as the claim [*Code Civ. Proc. § 720.640(a)*; *see Code Civ. Proc. §§ 720.140, 720.240*]. If the undertaking is filed subsequent to the filing of the third-party claim, the levying officer must, within five days after the undertaking is filed, serve a copy of the undertaking on the creditor and debtor with a notice that the property will be released unless, within the time allowed as specified in the notice, the creditor objects to the undertaking. Service may be made personally or by mail [*Code Civ. Proc. § 720.640(b)*].

For discussion of service of papers and extension of the time for service when service is by mail, see *§ 254.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.315

§ 254.315 Undertaking by Judgment Creditor

In order to protect his or her rights in the property of the debtor which has been previously levied on, a judgment creditor may file an undertaking with the levying officer in response to the third-party claim [*Code Civ. Proc. § 720.160*].

[1] Requirements

The undertaking must be at least in the amount of $10,500, or twice the amount of the execution lien as of the date of the levy or other enforcement lien as of the date it was created, whichever is lesser [*Code Civ. Proc. §§ 720.160(b), 720.260(b)*]. The court, however, has the power to order the amount of the undertaking decreased below the amount prescribed in *Code Civ. Proc. §§ 720.160(b)* and *720.260(b)* [*Code Civ. Proc. § 720.770*; *see also § 254.317*]. The amount of the undertaking is also subject to the provisions of *Code Civ. Proc. § 996.010* (objection to undertaking for insufficiency) [*Code Civ. Proc. §§ 720.160(b), 720.260(b)*].

The creditor may elect to file an undertaking in an amount larger than required by statute [*Code Civ. Proc. §§ 720.160(b), 720.260(b)*]. The creditor's undertaking must be made in favor of the third-party claimant, and indemnify him or her against any loss, liability, damages, costs, and attorney's fees incurred by reason of the enforcement proceedings, and be conditioned on a final judgment that the third-party claimant owns or has a right to possession of the property, or that his or her security interest or lien has priority over that of the creditor's lien [*Code Civ. Proc. §§ 720.160(c), 720.260(c)*; *see Franke v. BAM Building Co. (2009) 172 Cal. App. 4th 224, 230-236, 91 Cal. Rptr. 3d 212* (analyzing statute)]. A creditor that is a public entity is exempt from giving an undertaking. However, it must file with the levying officer a notice of opposition to the third-party claim [*Code Civ. Proc. §§ 720.160(d), 720.260(d)*].

[a] Deposit in Lieu of Undertaking

The creditor may, instead of filing an undertaking in response to the third-party claim by a secured person or lienholder, make a deposit with the levying officer in the amount of the sums due or to accrue under the security interest or lien, plus the applicable rate of interest on the amount due [*see Code Civ. Proc. § 720.260*; *see also Code Civ. Proc. § 720.230(a)(4)*].

After receiving the deposit, the levying officer, if the deposit is statutorily sufficient, must promptly tender or pay the deposit to the third-party claimant [*Code Civ. Proc. § 720.290(a)*]. If the tender is accepted, the interest of the third-party claimant in the property passes to the creditor, and on distribution of any proceeds under *Code Civ. Proc. § 701.810*, the creditor making the deposit will be entitled to the proceeds to the extent of the deposit in the priority of the secured interest or lien for which the deposit is made [*Code Civ. Proc. § 720.290(b)*]. However, if the deposit is refused, it will be deposited with the county treasurer payable to the order of the third-party claimant [*Code Civ. Proc. § 720.290(c)*]. If the creditor makes a deposit rather than filing an undertaking, there can be no hearing on the issue of the third-party claim [*Code Civ. Proc. § 720.310(b)*].

[b] Statement of Opposition to Claim of Secured Party or Lienholder

When a creditor files an undertaking in response to a third-party claim by a secured party, he or she must file with the levying officer a statement executed under oath that the security interest is invalid, that it is not entitled to priority over the creditor's lien, or that the amount demanded in the claim exceeds the amount to which the secured party is entitled, giving specific reasons for the applicable statement [*Code Civ. Proc. § 720.280(a)*]. The creditor must serve personally or by mail a copy of the statement on the secured party, and the debtor [*Code Civ. Proc. § 720.280(b), (c)*; for discussion of service of papers and extension of time for service when service is by mail, see General Introduction under Filing and Service of Writs, Notices, and Other Papers].

[2] Effect of Filing Undertaking

If the creditor files with the levying officer an undertaking, a deposit in lieu of an undertaking, or a notice of exemption as a public entity, the levying officer must execute the writ unless the third party has also filed a statutorily sufficient undertaking. After sale, payment, or delivery of the levied property pursuant to the writ, the property is free of all claims of the third party for which the creditor has given the undertaking [*Code Civ. Proc. §§ 720.160(a), 720.260(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.316

§ 254.316 Release of Property

[1] No Undertaking Filed by Either Third Party or Creditor

The release of property following the filing of a third-party claim is governed generally by *Code Civ. Proc. § 699.060* [*Code Civ. Proc. §§ 720.170(a), 720.270(a)*]. When the third-party claimant has not filed an undertaking, the levying officer must release the property to the person from whom it was taken (*see Code Civ. Proc. § 699.060*) within 10 days after the service of notice of the third-party claim on the creditor and debtor (*Code Civ. Proc. §§ 720.140(b), 720.240(b)*), unless the creditor has filed an undertaking or notice of exemption or made a deposit in lieu of an undertaking [*Code Civ. Proc. §§ 720.170(a), 720.270(a)*]. If, however, the debtor does not claim the property, the third party who claimed it under a third-party claim is entitled to its possession [*Code Civ. Proc. §§ 720.170(c), 720.270(c)*]. This is an exception to the general release provision that, if the debtor does not claim the property, it is to be sold and the proceeds deposited in the name of the debtor pursuant to *Code Civ. Proc. § 699.060(b)* [*Tentative Recommendation Proposing The Enforcement of Judgments Law,* 15 Cal. L. Rev. Comm. Reports 2562 (1980)]. Release of the property by the levying officer pursuant to *Code Civ. Proc. § 720.170* or *720.270* does not preclude a hearing on the validity of the third-party claim [*Code Civ. Proc. §§ 720.170(d), 720.270(d)*].

[2] Pursuant to Undertaking by Third Party

After the filing of the undertaking by the third party, and after the expiration of the 10 days allowed for the creditor to object to the undertaking (*Code Civ. Proc. §§ 720.140(b), 720.240(b)*), the levying officer must release the property unless the creditor has made a timely objection to the undertaking and filed a copy of the notice of motion objecting to an undertaking with the levying officer pursuant to *Code Civ. Proc. § 720.760* [*Code Civ. Proc. § 720.660*; *see also Code Civ. Proc. §§ 995.910-995.960* (objections to undertakings)]. For discussion of objections to an undertaking, see *§ 254.317*. For discussion, forms, and procedural guide relating to objections to undertakings, generally, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

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

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21-254 California Forms of Pleading and Practice--Annotated § 254.317

§ 254.317 Objection to Undertaking

The beneficiary of an undertaking, whether the third party claimant or the creditor, may object to an undertaking on either or both of the grounds that the sureties are insufficient or that the amount of the undertaking is insufficient [*Code Civ. Proc. §§ 995.920(a), (b), 996.010(a), (b)*; *see Code Civ. Proc. § 720.660*]. The objection is made by noticed motion, a copy of which must be filed with the levying officer [*Code Civ. Proc. §§ 720.760, 995.930*]. The hearing on the objection must be held at least 10 but not more than 15 days after service of the notice of motion unless otherwise agreed by the parties [*Code Civ. Proc. § 720.770*]. For further discussion of objections to undertakings, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

The court may order the amount of the undertaking decreased below the amount prescribed by *Code Civ. Proc. §§ 720.160, 720.260* if the court determines the amount prescribed exceeds the probable recovery of the beneficiary if the beneficiary ultimately prevails in proceedings to enforce the liability on the undertaking [*Code Civ. Proc. § 720.770*]. For discussion relating to statutory requirements as to amount of undertakings, see *§ 254.315[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.318

§ 254.318 Creditor's Demand That Third Party File Claim

Code Civ. Proc. § 720.510 provides that a creditor may make a demand that a secured party or lienholder file a third-party claim to personal property that has been levied on under a writ of attachment or writ of execution. The creditor's demand, together with a copy, must be filed with the levying officer after levy on the personal property, but before the levying officer sells the property, or pays proceeds of collection to the creditor [*Code Civ. Proc. § 720.520(a)*]. The levying officer has the responsibility to promptly and personally serve the demand on the secured party or lienholder. Service must be attested to by the levying officer and the certificate of attestation must be filed in the action promptly after service [*Code Civ. Proc. § 720.520(b)*; for discussion of service of papers and extension of time for service when service is by mail, see *§ 254.13*]. For a form of a creditor's demand that a third party file a claim, *see § 254.823*.

[1] Prohibition Against Disposition of Property

Except as otherwise provided by statute, the levying officer is not to release, sell, or otherwise dispose of the personal property described in the creditor's demand until after the expiration of 30 days from the date of service of the demand on the secured party or lienholder [*Code Civ. Proc. § 720.540*].

[2] Failure of Third Party to File Claim

If the secured party or lienholder does not file a third-party claim with the levying officer within 30 days after service of the demand, the third party will be deemed to have waived any priority the security interest or lien may have had over the creditor's lien in the levied property, and the property may be applied toward the satisfaction of the judgment free of the security interest or lien [*Code Civ. Proc. § 720.550(a)*]. However, if the creditor's lien on the property is released, the security interest or lien on the property is restored to its former position of priority [*Code Civ. Proc. § 720.550(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.319

§ 254.319 Hearing On Third-Party Claim

[1] Application

Either the creditor or the third-party claimant may petition the court for a hearing to determine the validity of the claim and the proper disposition of the property that is the subject of the claim. The petition must be filed with the court no later than 15 days after the third party claim is filed with the levying officer or 15 days after an undertaking is filed [*Code Civ. Proc. § 720.310(a)*]. The hearing must be held within 20 days after the filing of the petition, unless continued by the court for good cause shown [*Code Civ. Proc. § 720.310(c)*]. The hearing may be held regardless of whether or not an undertaking has been filed, but not if a deposit has been made pursuant to *Code Civ. Proc. § 720.260* [*Code Civ. Proc. § 720.310(b)*; *see § 254.315[1][a]*].

[2] Notice

The petitioner must serve, personally or by mail, notice of the time and place of the hearing on the adverse party and on the debtor. In addition, the petitioner must file a copy of the notice of hearing with the levying officer. The notice must be served and filed in the same manner, and at the same times, prescribed by *Code Civ. Proc. § 1005(b)* [*Code Civ. Proc. § 720.320(a)*; *see also Code Civ. Proc. § 1005(a)(7)*]. *Code Civ. Proc. § 1005(b)* provides generally that all moving and supporting papers must be served and filed at least 16 court days before the time appointed for the hearing [*Code Civ. Proc. § 1005(b)*; *see also Cal. Rules of Ct., Rule 3.1300(a)*]. If, however, the notice is served by mail, this period is increased by 5 calendar days if the place of mailing and the place of address are within the State of California, by 10 calendar days if either the place of mailing or the place of address is outside the State of California but within the United States, or by 20 calendar days if either the place of mailing or the place of address is outside the United States; the 16-day period is increased by two calendar days if service is by facsimile transmission, express mail, or other overnight delivery method [*Code Civ. Proc. § 1005(b)*; *see also Cal. Rules of Ct., Rule 3.1300* (proof of service of moving papers)].

The notice must include a statement that the purpose of the hearing is to determine the validity of the third-party claim and the proper disposition of the property that is the subject of the claim [*Code Civ. Proc. § 720.320(b)*].

[3] Filing of Papers

Promptly after receiving the notice of hearing, the levying officer must file the following papers with the court [*Code Civ. Proc. § 720.330*]:

- The third-party claim.

- Any statement filed by the creditor with the levying officer pursuant to *Code Civ. Proc. § 720.280* in opposition to the third-party claim of a secured party.

- Any undertaking of the creditor filed in response to the third-party claim pursuant to *Code Civ. Proc. § 720.160* or *Code Civ. Proc. § 720.260*.

- Any undertaking to release the levied property filed by the third-party claimant pursuant to *Code Civ. Proc. §§ 720.610-720.660*.

- Any notice of exemption to filing of an undertaking by a public entity pursuant to *Code Civ. Proc. § 720.160* or *720.260*.

If the creditor has not previously filed a statement with the levying officer pursuant to *Code Civ. Proc. § 720.280* in opposition to a third-party claim by a secured party, and the creditor petitions for a hearing on the third-party claim, the creditor must file the statement with the court at the time the petition is filed and serve a copy of the statement on the secured party along with the notice of the hearing served pursuant to *Code Civ. Proc. § 720.320* [*Code Civ. Proc. § 720.340(a)*]. If the secured party petitions the court for the hearing, the creditor must file the statement pursuant to *Code Civ. Proc. § 720.280* with the court no later than five days before the date set for the hearing and serve, personally or by mail, a copy of the statement on the secured party [*Code Civ. Proc. § 720.340(b)*].

[4] Stay of Sale Pending Hearing

The court may make an order staying the sale of the property under a writ or enjoining any transfer or other disposition of the property levied on under a writ until the proceedings to determine the rights of a third person can be commenced and completed. The court may require such undertaking as it considers necessary as a condition for making the order [*Code Civ. Proc. § 720.380(a)*; *see § 254.829*]. After a third-party claim has been filed, the creditor, debtor, or third-party claimant may apply to the court for such an order. The application may be made ex parte, unless it is required to be on noticed motion by the court or by local court rule [*Code Civ. Proc. § 720.380(b)*; *see § 254.827*]. Any such order may be modified or vacated by the court any time before the termination of the proceedings on such terms as are just [*Code Civ. Proc. § 720.380(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsNonpartiesCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsMultiple Claims & PartiesContracts LawSecured TransactionsPerfection & PriorityPriorityLiens

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21-254 California Forms of Pleading and Practice--Annotated § 254.320

§ 254.320 Conduct of Hearing

[1] In General

There is no right to a jury trial on the issue of the validity of the third-party claim [*Code Civ. Proc. § 720.410*; *see Misrach v. Liederman (1936) 58 P.2d 746]* . Once the creditor or third party has applied for the hearing, he or she cannot move to dismiss the proceedings without the consent of the other [*Code Civ. Proc. § 720.370*].

The pleadings in the hearing consist of the third-party claim, and in the case of a third-party claim by a secured party, the creditor's statement in opposition. A third-party claim of ownership, right of possession, or a lien is deemed controverted by the creditor [*Code Civ. Proc. § 720.350*]. Regardless of who demands the hearing, the third-party claimant has the burden of proof as to the validity of the claim [*Code Civ. Proc. § 720.360*].

[2] Determination of Claim

At the conclusion of the hearing, the court must determine the validity of the third-party claim, and may order the disposition of the property or its procceds in accordance with the respective interests of the parties. The judgment is conclusive between the parties to the proceeding [*Code Civ. Proc. § 720.390*]. However, an appeal may be taken from the judgment in the manner prescribed for appeals from the court in which the hearing took place [*Code Civ. Proc. § 720.420*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.321

§ 254.321 Satisfaction of Judgment from Released Property

Property released after failure of the creditor to file an undertaking in response to a third-party claim, or to file an exemption to an undertaking as a public entity, or to make a deposit in lieu of an undertaking, or to timely file an objection to the third party undertaking, may be levied on or otherwise sought to be applied to the satisfaction of the judgment in question only if it is determined in the hearing on the third-party claim that the debtor has an interest in the property that may be levied on or otherwise applied to the satisfaction of the judgment [*Code Civ. Proc. § 720.430*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.322

§ 254.322 Rights of Debtor in Third-Party Claim Proceedings

A debtor whose property has been levied on either prejudgment or postjudgment must be notified of any third-party claim to the property that has been filed with the levying officer, as well as of any undertaking filed by the third-party claimant [*see Code Civ. Proc. §§ 720.140(c), 720.240(c), 720.640*]. The debtor must also be given notice of any application for a hearing on the validity of the third-party claim [*Code Civ. Proc. § 720.320(a*); *see § 254.752[6]*] and may move the court for an order staying the sale of the property levied on under a writ, or to enjoin the transfer or other disposition of the property pending the commencement and prosecution to termination of the hearing on the third-party claim [*Code Civ. Proc. § 720.380*; *see § 254.319*]. Personal property of the debtor taken into custody by the levying officer must be released to the debtor if the creditor has not timely filed an undertaking, deposit, or notice of exemption unless the property is to be held under another lien or otherwise ordered by the court [*Code Civ. Proc. §§ 720.170(a), 720.270(a*); *see also Code Civ. Proc. § 699.060*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsNonpartiesCivil ProcedureRemediesBondsGeneral Overview

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21-254 California Forms of Pleading and Practice--Annotated § 254.323

§ 254.323 Other Remedies of Third Parties

In addition to the third-party claim proceeding provided by *Code Civ. Proc. §§ 720.010-720.800*, a third party who claims title to or an interest in property levied on either prejudgment or postjudgment may do any of the following:

- Intervene in the original action (enabling the third party to ultimately establish title, but denying right to immediate possession) [*Code Civ. Proc. § 387*; *see Beshara v. Goldberg (1963) 221 Cal. App. 2d 392, 395, 34 Cal. Rptr. 501* ; *see also* Ch. 395, *Parties*].

- Bring an independent action [*see Retailers' Credit Asso. v. Superior Court of Glenn County (1937) 19 Cal. App. 2d 457, 459, 65 P.2d 937]* .

- Bring an action for damages for conversion when the claim is properly made, but personal property is wrongfully sold or released by the levying officer [*see McCaffey Canning Co. v. Bank of America (1930) 109 Cal. App. 415, 429-435, 294 P. 45* ; *see also* Ch. 150, *Conversion*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionStatutory Right to InterveneCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsNonpartiesTortsIntentional TortsConversionGeneral Overview

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21-254 California Forms of Pleading and Practice--Annotated §§ 254.324-254.339

[Reserved]

§§ 254.324[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.340

§ 254.340 Governing Statutes

Enforcement of judgments against joint debtors is governed by *Code Civ. Proc. §§ 989-994*. Jurisdiction to bring an action against less than all joint debtors is governed by *Code Civ. Proc. § 410.70*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsNonpartiesContracts LawThird PartiesJoint & Several Contracts

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21-254 California Forms of Pleading and Practice--Annotated § 254.341

§ 254.341 Merger Under Common Law

At common law, if one of two or more joint debtors was not served in an action, a judgment against the others could not be enforced against the unserved party nor could any other recourse be had against him or her because the joint obligation was deemed to have been merged in the judgment. The statutory provisions for proceedings against joint debtors [Code *Civ. Proc. §§ 410.70, 989-994*] alleviate the hardship of this rule [*McRae v. Bates (1961) 196 Cal. App. 2d 510, 512, 16 Cal. Rptr. 565]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.342

§ 254.342 Proceeding Against Less Than All Defendants

In action against two or more persons who are jointly, jointly and severally, or severally liable on a contract, the court in which the action is pending has jurisdiction to proceed against such of the defendants as are served as if they were the only defendants [*Code Civ. Proc. § 410.70*].

The remaining defendants, who were not served with summons, subsequently may be bound by the judgment under the joint debtor proceedings of *Code Civ. Proc. § 989 et seq.* [discussed in *§ 254.343*], as long as they were named or joined as parties in the action and a cause of action for joint liability was stated against them [*see Meller & Snyder v. R & T Properties, Inc. (1998) 62 Cal. App. 4th 1303, 1307-1310, 73 Cal. Rptr. 2d 740]* . See also discussion in *§ 254.345* regarding the substitution of a fictitiously named joint debtor.

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.343

§ 254.343 Proceeding Against Remaining Defendant

When a judgment is recovered against one or more of several persons jointly indebted on an obligation, by proceeding as provided in *Code Civ. Proc. § 410.70* [*see § 254.342*] those who named or joined as parties, but were not originally served with summons and did not appear in the action, may be summoned to show cause why they should not be bound by the judgment [*Code Civ. Proc. § 989*]. This is a summary proceeding in which the summons is issued on an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of the plaintiff rather than on a new complaint [*Code Civ. Proc. §§ 990, 991*; *see Vincent v. Grayson (1973) 30 Cal. App. 3d 899, 910 n. 7, 106 Cal. Rptr. 733]* . The joint debtor may then file a responsive pleading or a default may be entered [*Code Civ. Proc. §§ 992-993*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.344

§ 254.344 Original Cause of Action

Liability under the joint debtor statutes may be based only on the original cause of action stated in the complaint. The joint debtor proceedings are in the nature of an action on the judgment and the joint debtor, therefore, can only be held liable for the obligation on which the judgment was rendered. If the original cause of action is changed, the joint debtor proceedings cannot be used [*Cooper v. Burch (1903) 140 Cal. 548, 551-552, 74 P. 37* ; *Vincent v. Grayson (1973) 30 Cal. App. 3d 899, 908, 106 Cal. Rptr. 733]* .

The cause of action must be in contract. Although *Code Civ. Proc. § 989* refers initially to a judgment recovered against one or more of several persons jointly indebted on an obligation, and does not identify the nature of the requisite obligation, it later identifies the judgment proceeded on in joint debtor proceedings as one recovered by the proceedings provided in *Code Civ. Proc. § 410.70*, which refer specifically to an action against two or more persons who are jointly liable on a contract. A contract action requires that the complaint allege that the obligation sued on is consensual in origin. Thus, joint debtor proceedings are not available in an action based on a common count for money had and received when the basis of the action does not appear to be a consensual obligation [*Hillco, Inc. v. Stein (1978) 82 Cal. App. 3d 322, 326-327, 147 Cal. Rptr. 108]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.345

§ 254.345 Amendment of Complaint

In joint debtor proceedings, the parties may amend their pleadings as in other cases [*Code Civ. Proc. § 993*]. This means that the parties may amend their pleadings to cure technical defects or matters of form, such as to allow proof of compliance with the statutory requirement of filing a certificate of doing business under a fictitious name or of substituting the true names of parties sued as fictitious defendants. It does not, however, authorize a plaintiff to amend the complaint to raise new issues of fact giving rise to a different legal obligation. [*Meller & Snyder v. R & T Properties, Inc. (1998) 62 Cal. App. 4th 1303, 1311-1312, 73 Cal. Rptr. 2d 740* ; *Vincent v. Grayson (1973) 30 Cal. App. 3d 899, 910, 106 Cal. Rptr. 733]* .

When an alleged joint debtor was sued under a fictitious name, the complaint must be amended to substitute the debtor's true identity, otherwise a court is without power to enter a judgment against the joint debtor under *Code Civ. Proc. § 989 et seq.* [*Meller & Snyder v. R & T Properties, Inc. (1998) 62 Cal. App. 4th 1303, 1311, 73 Cal. Rptr. 2d 740]* . The trial court must rule on the question whether the plaintiff has complied with *Code Civ. Proc. § 474* before the court may enter judgment against the defendant in joint debtor proceedings [*Meller & Snyder v. R & T Properties, Inc. (1998) 62 Cal. App. 4th 1303, 1311-1312, 73 Cal. Rptr. 2d 740]* . For discussion and forms relating to the allegation and substitution of fictitiously named defendants or "doe" defendants pursuant to *Code Civ. Proc. § 474*, see Ch. 20, *Allegations Commonly Used* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePartiesFictitious NamesCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsNonpartiesContracts LawThird PartiesJoint & Several Contracts

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21-254 California Forms of Pleading and Practice--Annotated § 254.346

§ 254.346 Declaration

The plaintiff must execute an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) stating that the judgment, or some part thereof, remains unsatisfied and specifying the amount due thereon [*Code Civ. Proc. § 991*]. The declaration may also be made by the plaintiff's agent, representative, or attorney [*Code Civ. Proc. § 991*]. The affidavit is presented to the clerk, who issues a summons thereon [*Code Civ. Proc. § 990*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsNonpartiesContracts LawThird PartiesJoint & Several Contracts

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21-254 California Forms of Pleading and Practice--Annotated § 254.347

§ 254.347 Summons

The summons to a joint debtor describes the judgment and requires the person summoned to show cause why he or she should not be bound by it. The joint debtor summons is served with a copy of the declaration in the same manner as an original summons [*Code Civ. Proc. §§ 990-991*].

The joint debtor summons is returnable no later than 90 days after the time specified for the return of the original summons [*Code Civ. Proc. § 990*].

The joint debtor summons [*see § 254.851*] informs the person summoned that a responsive pleading must be filed within 30 days after service or that a default may be entered [*Code Civ. Proc. §§ 990, 992*]. The Judicial Council has adopted a form for a joint debtor summons for mandatory use [Judicial Council Form SUM-120]. For a reproduction of the form, *see § 254.851*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessSummonsContent & FormCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsNonpartiesContracts LawThird PartiesJoint & Several Contracts

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21-254 California Forms of Pleading and Practice--Annotated § 254.348

§ 254.348 Response to Summons

[1] Default

If the joint debtor does not file a response to the summons, his or her default may be entered [for forms and procedure, *see* Ch. 205, *Defaults and Default Judgments*]. The joint debtor would then be bound by the judgment in the same manner as though he or she had been originally served with summons [*Code Civ. Proc. § 989*].

[2] Denying Liability on Original Obligation

The joint debtor may deny liability on the obligation on which the judgment was recovered by reason of any defense existing at the commencement of the action [*Code Civ. Proc. § 992*]. On such denial, a copy of the original complaint and judgment, the joint debtor summons with the declaration annexed, and the answer constitute the written allegations in the case subject to the right of the parties to amend their pleadings as in other cases [*Code Civ. Proc. § 993*].

The issues formed are tried as in other cases. A verdict against such a joint debtor is limited to the amount remaining unsatisfied on the original judgment, with interest thereon [*Code Civ. Proc. § 994*].

[3] Denying Judgment or Asserting Subsequent Defense

The joint debtor may deny the judgment or set up any defense which may have arisen subsequently. On such a denial or defense, the summons with the declaration annexed and the answer constitute the written allegations in the case [*Code Civ. Proc. § 993*]. The issues formed are tried asin other cases [*Code Civ. Proc. § 994*]. If the plaintiff prevails, the joint debtor is bound by the original judgment [*Code Civ. Proc. §§ 989, 990*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.349

§ 254.349 Writ of Execution

If the joint debtor is declared to be bound by the judgment, the judgment creditor may obtain a writ of execution [*see § 254.680*]. This writ is identified on its face as directed to the property of a joint debtor and Paragraph 8 is also checked referring to joint debtor information on the reverse. The reverse shows that the joint debtor was declared bound by the judgment and the date thereof and itemizes additional costs against certain joint debtors [*Cal. Rules of Ct., Rule 1.31*].

Legal Topics:

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

§§ 254.350[Reserved]

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§ 254.370 State Statutes

[1] Costs and Interest

Costs and interest under writ. *Code Civ. Proc. §§ 685.050, 699.520(e)*

Levying officer's or registered process server's costs for serving writ as added to and become part of judgment. *Code Civ. Proc. § 685.095*

Levying officer's costs. *Code Civ. Proc. § 685.100*

[2] Execution

[a] Generally

Payment by person indebted to judgment debtor. *Code Civ. Proc. § 699.020*

Turnover order in aid of execution. *Code Civ. Proc. § 699.040*

Preservation of property subject to execution. *Code Civ. Proc. § 699.070*

[b] Execution Lien

Creation and duration of execution lien. *Code Civ. Proc. § 697.710*

Continuation of lien after transfer of property. *Code Civ. Proc. §§ 697.720-697.750*

Release of property from lien. *Code Civ. Proc. § 699.060*

[c] Execution Writ and Notice of Levy

Issuance of writ of execution. *Code Civ. Proc. § 699.510*

Contents of writ. *Code Civ. Proc. § 699.520*

Delivery and execution of writ. *Code Civ. Proc. § 699.530*

Contents of notice of levy. *Code Civ. Proc. § 699.540*

Effect of failure to give notice of levy. *Code Civ. Proc. § 699.550*

Return of writ of execution. *Code Civ. Proc. § 699.560*

[d] Property Subject to Execution

Property subject to execution. *Code Civ. Proc. § 699.710*

Property not subject to execution. *Code Civ. Proc. § 699.720*

[3] Exemption After Levy

[a] Generally

Application of exemptions. *Code Civ. Proc. § 703.010*

Persons entitled to exemption. *Code Civ. Proc. § 703.020*

Effect of failure to claim exemption. *Code Civ. Proc. § 703.030*

Prior waiver of exemption. *Code Civ. Proc. § 703.040*

Law governing determination of exemption. *Code Civ. Proc. § 703.050*

Power of state to amend exemption law. *Code Civ. Proc. § 703.060*

Exemption from judgment for child or spousal support. *Code Civ. Proc. § 703.070*

Tracing exempt funds. *Code Civ. Proc. § 703.080*

Time for determination of exemption. *Code Civ. Proc. § 703.100*

Application of exemption to marital property. *Code Civ. Proc. § 703.110*

Bankruptcy exemptions. *Code Civ. Proc. §§ 703.130, 703.140*

[b] Determination of Exemption After Levy

Claim of exemption of levied-on property. *Code Civ. Proc. §§ 703.510, 703.520*

Financial statement accompanying claim. *Code Civ. Proc. § 703.530*

Notice of claim. *Code Civ. Proc. § 703.540*

Notice of opposition to exemption claim. *Code Civ. Proc. §§ 703.550, 703.560*

Notice of hearing to determine claim. *Code Civ. Proc. § 703.570*

Hearing and order on claim. *Code Civ. Proc. §§ 703.580, 703.590*

Appeal from determination order. *Code Civ. Proc. § 703.600*

Disposition of property during pendency of determination proceedings. *Code Civ. Proc. § 703.610*

[c] Exempt Property

Motor vehicles. *Code Civ. Proc. § 704.010*

Household furnishings and personal effects. *Code Civ. Proc. § 704.020*

Materials for repair or improvement of residence. *Code Civ. Proc. § 704.030*

Jewelry, heirlooms, and works of art. *Code Civ. Proc. § 704.040*

Health aids. *Code Civ. Proc. § 704.050*

Trade, business, or professional property. *Code Civ. Proc. § 704.060*

Paid earnings. *Code Civ. Proc. § 704.070*

Social security benefits in deposit accounts. *Code Civ. Proc. § 704.080*

Inmate trust account. *Code Civ. Proc. § 704.090*

Life insurance, endowment, and annuity policies. *Code Civ. Proc. § 704.100*

Public retirement benefits and contributions. *Code Civ. Proc. § 704.110*

Public employment vacation credits. *Code Civ. Proc. § 704.113*

Private retirement benefits and contributions. *Code Civ. Proc. § 704.115*

Unemployment benefits and contributions and strike benefits. *Code Civ. Proc. § 704.120*

Disability and health benefits. *Code Civ. Proc. § 704.130*

Personal injury damages. *Code Civ. Proc. § 704.140*

Wrongful death damages. *Code Civ. Proc. § 704.150*

Workers' compensation payments. *Code Civ. Proc. § 704.160*

Welfare benefits. *Code Civ. Proc. § 704.170*

Relocation benefits. *Code Civ. Proc. § 704.180*

Student financial aid. *Code Civ. Proc. § 704.190*

Cemetery plot. *Code Civ. Proc. § 704.200*

Property not subject to enforcement of judgment. *Code Civ. Proc. § 704.210*

Homestead exemption. *Code Civ. Proc. §§ 704.710-704.995*

[4] Levy on Property

[a] Duties, Rights, and Liabilities of Persons After Levy

Liability for levy when judgment debtor is registered or record owner. *Code Civ. Proc. § 699.090*

Duty of garnishee. *Code Civ. Proc. §§ 701.010, 701.030*

Liability for noncompliance with levy. *Code Civ. Proc. § 701.020*

Secured parties. *Code Civ. Proc. § 701.040*

Obligor under instrument. *Code Civ. Proc. § 701.060*

[b] Methods of Levy

Orders for withdrawal of money; endorsement by levying officer. *Code Civ. Proc. § 687.020*

General manner of taking custody. *Code Civ. Proc. § 687.030*

Personal property in private place. *Code Civ. Proc. § 699.030*

Real property. *Code Civ. Proc. § 700.015*

Growing crops, timber, minerals. *Code Civ. Proc. § 700.020*

Personal property in possession of judgment debtor. *Code Civ. Proc. § 700.030*

Personal property in custody of levying officer. *Code Civ. Proc. § 700.050*

Personal property in possession of bailee. *Code Civ. Proc. § 700.060*

Personal property of going business. *Code Civ. Proc. § 700.070*

Personal property used as dwelling. *Code Civ. Proc. § 700.080*

Vehicle, boat, mobilehome or commercial coach. *Code Civ. Proc. § 700.090*

Chattel paper. *Code Civ. Proc. § 700.100*

Instruments. *Code Civ. Proc. § 700.110*

Negotiable documents of title. *Code Civ. Proc. § 700.120*

Deposit accounts. *Code Civ. Proc. § 700.140*

Safe deposit boxes. *Code Civ. Proc. § 700.150*

Court order for levy on deposit accounts and safe deposit boxes in name of third persons. *Code Civ. Proc. § 700.160*

Accounts receivable and general intangibles. *Code Civ. Proc. § 700.170*

Property subject of pending action or proceeding. *Code Civ. Proc. § 700.180*

Final money judgment. *Code Civ. Proc. § 700.190*

Interest in personal property of estate. *Code Civ. Proc. § 700.200*

[c] Persons Performing Levy

Instructions to levying officer. *Code Civ. Proc. §§ 684.130, 687.010*

Liability of levying officer. *Code Civ. Proc. § 687.040*

Levying officer's lien. *Code Civ. Proc. § 687.050*

Levy by registered process server. *Code Civ. Proc. § 699.080*

Fees of levying officer. *Gov. Code §§ 26720.9, 26721*

[5] Sale Under Writ of Execution

Sale of levied-on property. *Code Civ. Proc. § 701.510*

Collection and sale of collectible property. *Code Civ. Proc. § 701.520*

Notice of sale of real or personal property. *Code Civ. Proc. §§ 701.530, 701.540*

Waiting period before notice of sale of real property. *Code Civ. Proc. § 701.545*

Notice to prospective bidders. *Code Civ. Proc. § 701.547*

Request for notice of sale. *Code Civ. Proc. § 701.550*

Advertisment of sale. *Code Civ. Proc. § 701.555*

Effect of failure to notice sale. *Code Civ. Proc. § 701.560*

Place, time, and manner of sale. *Code Civ. Proc. § 701.570*

Manner of payment at execution sale. *Code Civ. Proc. § 701.590*

Default by high bidder. *Code Civ. Proc. § 701.600*

Levying officer as ineligible to purchase at sale. *Code Civ. Proc. § 701.610*

Minimum bid requirements. *Code Civ. Proc. § 701.620*

Lien extinction on sale. *Code Civ. Proc. § 701.630*

Delivery of possession or certificate of sale of personal property. *Code Civ. Proc. § 701.650*

Deed or certificate of sale. *Code Civ. Proc. §§ 701.650-701.670*

Finality of sale. *Code Civ. Proc. § 701.680(a)*

Recovery of proceeds by judgment debtor when judgment set aside. *Code Civ. Proc. § 701.680(b)*

Setting aside sale due to irregularities. *Code Civ. Proc. § 701.680(c)*

Distribution of proceeds of sale or collection. *Code Civ. Proc. §§ 701.810, 701.820*

Resolution of conflicting claims to proceeds. *Code Civ. Proc. § 701.830*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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21-254 California Forms of Pleading and Practice--Annotated § 254.371

§ 254.371 Decisions

[1] Execution Lien

Execution lien is not extinguished by secured creditor's use of strict foreclosure procedure under *Com. Code § 9505(2)* when secured creditor has notice of lien, result is prejudicial to lienholder, and lienholder has not received notice of proposed foreclosure. *Oliver v. Bledsoe (1992) 5 Cal. App. 4th 998, 1001, 1007, 7 Cal. Rptr. 2d 382*

Unless transfer of property encumbered by lien comes within one of enumerated exceptions under *Code Civ. Proc. § 697.740*, lienholder's rights against property are unimpaired by transfer; hence, lienholder's ability to protect and enforce execution lien, including right to renew lien by timely subsequent levy, is unimpaired by secured creditor's retention or strict foreclosure of promissory note. *Oliver v. Bledsoe (1992) 5 Cal. App. 4th 998, 1001, 1007, 7 Cal. Rptr. 2d 382*

[2] Exempt Property

Funds withheld by employer for spousal support at time of levy and not yet paid to supported spouse under wage assignment order are subject to writ of execution on judgment against supported spouse and do not constitute exempt property. *Vineyard v. Sisson (1990) 223 Cal. App. 3d 931, 935, 272 Cal. Rptr. 914*

Exemption statutes are construed in favor of judgment debtor and exceptions to exemption statutes as strictly construed. *Roosevelt v. Roosevelt (1981) 117 Cal. App. 3d 397, 402, 172 Cal. Rptr. 641*

[3] Finality of Sale

Execution sale is final except for irregularities. *Arrow Sand & Gravel, Inc. v. Superior Court (1985) 38 Cal. 3d 884, 888-890, 215 Cal. Rptr. 288, 700 P.2d 1290*

Judgment creditor, seeking to sell an occupied dwelling to collect on a money judgment, may not bypass *Code Civ. Proc. § 704.740* because the sale is conducted by a receiver. *Wells Fargo Financial Leasing, Inc. v. D & M Cabinets (2009) 177 Cal. App. 4th 59, 67-69, 99 Cal. Rptr. 3d 97*

Given that there is no specified consequence in *Code Civ. Proc. § 704.740* for failure to obtain court order, transgression in sheriff's sale of plaintiff's property could only be considered "irregularity" governed by all-encompassing remedies in *Code Civ. Proc. § 699.010 et seq.*, which permit damages remedy against judgment creditor or sheriff but forbid setting aside sale to third party purchasers. Further, sale was not void due to res judicata principles based on prior unlawful detainer judgment against defendants in plaintiff's favor and court's reasoning when it denied defendants' post-trial motions that plaintiff's evidence proved that property was dwelling, when record affirmatively showed defendants did not have fair adversary hearing because unlawful detainer judge, in denying defendants' post-trial motions, specifically pointed out whether property was dwelling was not tried so that defendants never had any adversary hearing, and judge then effectively decided case against defendants on very issue not tried by giving credit to plaintiff's evidence presumably introduced for non-dwelling purposes since there was no dwelling issue while implicitly denying defendants opportunity to offer contrary evidence and argument to jury. Finally, plaintiff could not plead unfairness or undue advantage element of equitable redemption cause of action, because underlying unfairness or undue advantage was predicated on sale of property without court order, which, in turn, presupposed property was dwelling, but pleadings established that property was not dwelling. *Gonzalez v. Toews (2003) 111 Cal. App. 4th 977, 981-984, 4 Cal. Rptr. 3d 434*

[4] Recalling and Quashing Writ of Execution

Writ is quashed when judgment is vacated. *Stegge v. Wilkerson (1961) 189 Cal. App. 2d 1, 5, 10 Cal. Rptr. 867*

Costs of quashing writ are allowed to prevailing party. Van *Denburgh v. Goodfellow (1941) 19 Cal. 2d 217, 225, 120 P.2d 20*

[5] Stay of Execution

When denial of motion for stay would result in considerable loss to debtor, while granting motion would have no present economic effect on creditor, court abused its discretion in denying the motion solely because debtor had not proceeded with dispatch in the matter. *Airfloor Co. of Cal., Inc. v. Regents of University of Cal. (1979) 97 Cal. App. 3d 739, 743, 158 Cal. Rptr. 856*

[6] Vacating Execution Sale

Motion to vacate sale under execution is proper procedure when any irregularities are claimed. *Knapp v. Rose (1948) 32 Cal. 2d 530, 534, 197 P.2d 7*

Discretion of trial court in determining whether or not to set aside execution sale is very broad. *Butterfield v. Tietz (1966) 247 Cal. App. 2d 483, 485-486, 55 Cal. Rptr. 577*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil

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21-254 California Forms of Pleading and Practice--Annotated § 254.372

§ 254.372 Law Reviews

Note, *Enforcing Judgments Against Participants in the Witness Protection Program, 36 Stan. L. Rev. 1017 (1984)*

Comment, *The Contract Clause and the Constitutionality of Retroactive Application of Exemption Statutes: A Reconsideration, 9 Pacific L.J. 889 (1978)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionGovernmentsLegislationEffect & OperationRetrospective Operation

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21-254 California Forms of Pleading and Practice--Annotated §§ 254.373-254.389

[Reserved]

§§ 254.373[Reserved]

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B. Enforcement Of Nonmoney Judgments

21-254 California Forms of Pleading and Practice--Annotated § 254.390

§ 254.390 State Statutes

[1] Costs and Interest

Costs and interest under writ. *Code Civ. Proc. §§ 685.050, 685.090, 699.520(e)*

Levying officer's costs. *Code Civ. Proc. §§ 685.090, 685.100*

[2] Writ of Possession or Sale

[a] In General

Issuance and contents of writs. *Code Civ. Proc. §§ 712.010, 712.020*

Delivery and execution of writ. *Code Civ. Proc. § 712.030*

Enforcement as writ of execution for money amounts in judgment. *Code Civ. Proc. § 712.040*

Return of writ. *Code Civ. Proc. § 712.050*

Appointment of receiver under writ. *Code Civ. Proc. § 712.060*

Enforcement against public entity. *Code Civ. Proc. § 712.070*

[b] Writs of Possession of Personal Property

Issuance and contents of writ. *Code Civ. Proc. § 714.010*

Execution of writ. *Code Civ. Proc. § 714.020*

Order for transfer of property, evidence of title, or both. *Code Civ. Proc. § 714.030*

[c] Writs of Possession of Real Property

Service of prejudgment claim of right of possession under *Code Civ. Proc. § 415.46* as operating to preclude later objection under *Code Civ. Proc. § 1174.3(e)* to writ of possession issued to enforce judgment for possession of real property in unlawful detainer proceeding. *Code Civ. Proc. § 415.46(e)*

Issuance and contents of writ. *Code Civ. Proc. § 715.010*

Execution of writ. *Code Civ. Proc. § 715.020*

Disposition of personal property on premises. *Code Civ. Proc. § 715.030*

Execution by registered process server. *Code Civ. Proc. § 715.040*

[d] Writ of Sale

Issuance and contents of writ. *Code Civ. Proc. § 716.010*

Execution of writ. *Code Civ. Proc. § 716.020*

Turnover order directing transfer of property to levying officer under writ of sale. *Code Civ. Proc. § 716.030*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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21-254 California Forms of Pleading and Practice--Annotated §§ 254.391-254.409

[Reserved]

§§ 254.391[Reserved]

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§ 254.410 California Real Estate

For discussion of antideficiency legislation, see *California Real Estate Law And Practice, Ch 122, Antideficiency Legislation, §§ 122.01* -122.84

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.411

§ 254.411 State Statutes

[1] Right of Redemption

Property subject to redemption. *Code Civ. Proc. § 729.010(a)*

Sale of property subject to redemption. *Code Civ. Proc. § 729.010(b)*

Persons Entitled to Redeem. *Code Civ. Proc. § 729.020*

Notice of Right to Redeem. *Code Civ. Proc. § 729.050*

[2] Redemption Proceedings

[a] In General

Certificate of Sale. *Code Civ. Proc. § 729.040*

Deposit of redemption price. *Code Civ. Proc. § 729.060(a)*

Computation of redemption price. *Code Civ. Proc. § 729.060(b)*

[b] Disputes

Petition for order determining redemption dispute. *Code Civ. Proc. § 729.070(a)-(b)*

Hearing. *Code Civ. Proc. § 729.070(c)-(e)*

Order determining dispute. *Code Civ. Proc. § 729.070(f)*

Payment of amount in excess of deposit. *Code Civ. Proc. § 729.070(g)*

[c] Tender of Redemption Price

Failure to tender redemption price. *Code Civ. Proc. § 729.080(a)*

Deposit of redemption price; issuance of certificate of redemption. *Code Civ. Proc. § 729.080(b)*

Purchaser's refusal of tender. *Code Civ. Proc. § 729.080(c)*

Effect of redemption on sale. *Code Civ. Proc. § 729.080(d)*

Liens extinguished by sale as not reattached and property as not applied to satisfy claim or judgment under which lien created. *Code Civ. Proc. § 729.080(e)*

[d] Rights of Purchaser

Purchaser as entitled to receive rents and profits from property until redemption. *Code Civ. Proc. § 729.090(a)*

Right of entry for repair and maintenance. *Code Civ. Proc. § 729.090(c)*

Right to order restraining waste. *Code Civ. Proc. § 729.090(c)*

[e] Liability of Purchaser

Purchaser as liable to person who redeems for rents and profits from property. *Code Civ. Proc. § 729.090(b)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.412

§ 254.412 Decisions

Redemption by judgment debtor or debtor's successor in interest as terminating effect of sale and restoring debtor to his or her estate. *Kaiser v. Mansfield (1958) 160 Cal. App. 2d 620, 628, 325 P.2d 865*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionStatutory Redemption

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21-254 California Forms of Pleading and Practice--Annotated §§ 254.413-254.429

[Reserved]

§§ 254.413[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.430

§ 254.430 State Statutes

[1] Assignment Order

Order assigning right to payment. *Code Civ. Proc. § 708.510(a)*

Restraint on assignment. *Code Civ. Proc. § 708.520*

Effect and priority of assignment. *Code Civ. Proc. § 708.530*

Effect on obligor's right to payment. *Code Civ. Proc. § 708.540*

Claim of exemption. *Code Civ. Proc. § 708.550*

Order to modify or set aside assignment. *Code Civ. Proc. § 708.560*

[2] Creditor's Actions

Creditor's suit. *Code Civ. Proc. § 708.210*

Joinder of judgment debtor. *Code Civ. Proc. § 708.220*

Time for bringing suit. *Code Civ. Proc. § 708.230*

Restraint of transfer of property or payment of debt. *Code Civ. Proc. § 708.240*

Jury trial. *Code Civ. Proc. § 708.270*

[3] Enforcement Against Franchise

Definition. *Code Civ. Proc. § 708.910*

Order for application of franchise to satisfaction of money judgment. *Code Civ. Proc. § 708.920*

Applicability of other laws. *Code Civ. Proc. § 708.930*

[4] Examination Proceedings

Application for order requiring judgment debtor to appear. *Code Civ. Proc. § 708.110*

Application for order requiring third party to appear. *Code Civ. Proc. § 708.120*

Lien on property held or debt owed by third party. *Code Civ. Proc. § 708.120(c)*

Claim of exemption. *Code Civ. Proc. § 708.120(d)*

Order determining exemption. *Code Civ. Proc. § 708.120(d)*

Appearance of corporation or other organization. *Code Civ. Proc. § 708.150*

Jurisdiction. *Code Civ. Proc. § 708.160*

Sanctions for failure to appear. *Code Civ. Proc. § 708.170(a)*

Improper service. *Code Civ. Proc. § 708.170(b)*

Procedure for determining third party's claim to property or denial of debt. *Code Civ. Proc. § 708.180*

Restraint of transfer of property or payment of debt by third party. *Code Civ. Proc. § 708.180(c)*

Intervention of additional person claiming interest in property or debt. *Code Civ. Proc. § 708.190*

Order applying property or debt toward satisfaction of judgment. *Code Civ. Proc. § 708.205* Interrogatories

Stay of proceedings for interrogatories. *Code Civ. Proc. § 708.010*

Service of written interrogatories on judgment debtor. *Code Civ. Proc. § 708.020*

[5] Other Enforcement Procedures

Petition to apply judgment debtor's beneficiary interest in trust to enforcement of money judgment. *Code Civ. Proc. § 709.010*; *see Prob. Code §§ 17000-17457* (judicial proceedings concerning trusts); *see also Prob. Code §§ 15300-15309* (limitations on enforcement of money judgment)

Order to apply unvested interest of judgment debtor in property to satisfaction of money judgment. *Code Civ. Proc. § 709.020*

Property in guardianship or conservatorship estate as exempt from enforcement of money judgment. *Code Civ. Proc. § 709.030*

Legal Topics:

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

Summary process under *Code Civ. Proc. § 708.180* was inappropriate under *Code Civ. Proc. § 491.170(b)(3)*, because complexity of transactions in actions involving collection of funds from sale of shrimp that importer received on consignment from insolvent exporter required a creditor's suit, and creditor had consented to California's jurisdiction when it brought collection proceedings. *Sea Foods Co., Ltd. v. O.M. Foods Co., Ltd. (2007) 150 Cal. App. 4th 769, 782-787, 58 Cal. Rptr. 3d 700*

Questions concerning postjudgment settlement negotiations are proper during judgment debtor examination and not barred by *Evid. Code §§ 1152* and *1154*, which prohibit introduction of evidence of settlement negotiations on issue of liability at trial. *Young v. Keele (1987) 188 Cal. App. 3d 1090, 1093-1094, 233 Cal. Rptr.850*

Disqualified judge was prohibited from ordering examination of judgment debtor under former *Code Civ. Proc. § 714* (*now see Code Civ. Proc. § 708.110*). *Noorthoek v. Superior Court (1969) 269 Cal. App. 2d 600, 604-607, 75 Cal. Rptr. 61*

Quashing order for appearance and examination of judgment debtor for lack of personal service was reversible error when order was not void on its face and defendant's motion to quash barred by doctrine of laches. *Fidelity Bank v. Kettler (1968) 264 Cal. App. 2d 481, 486-487, 70 Cal. Rptr. 500*

Notice before issuance of an order for the appearance of a judgment debtor under former *Code Civ. Proc. §§ 714, 715* (*now see Code Civ. Proc. § 708.110*) is not required; order is made *ex parte. Lewis v. Neblett (1961) 188 Cal. App. 2d 290, 297, 10 Cal. Rptr. 441*

Nature of examination of judgment debtor. *Coleman v. Galvin (1947) 78 Cal. App. 2d 313, 318, 177 P.2d 606*

Court can order judgment debtor or his or her debtor to apply toward satisfaction of judgment only property within possession or control of person ordered to act; debtor cannot be punished for contempt for failure to deliver possession

of property not within his or her possession or control. *Medical Fin. Ass'n v. Karnes (1938) 84 P.2d 1076*

Second examination of judgment debtor is discretionary with court; judgment creditor must present some new facts of which creditor was not appraised at the former examination. *Watson v. Pryor (1920) 49 Cal. App. 554, 556, 193 P. 797*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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21-254 California Forms of Pleading and Practice--Annotated § 254.432

§ 254.432 Attorney General Opinions

Proceedings supplemental to execution are applicable to judgments rendered in small claims courts; attorney for judgment creditor can take part in such proceedings as assignee of judgment creditor or as judgement creditor's attorney. *28 Ops. Cal. Att'y Gen. 359, 361 (1956)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawPerformanceAssignmentGeneral OverviewGovernmentsCourtsSmall Claims Courts

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D. Proceedings Supplemental To Execution And Creditor's Actions

21-254 California Forms of Pleading and Practice--Annotated §§ 254.433-254.449

[Reserved]

§§ 254.433[Reserved]

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E. Third-Party Claims

21-254 California Forms of Pleading and Practice--Annotated § 254.450

§ 254.450 State Statutes

[1] Definitions

Creditor. *Code Civ. Proc. § 720.020*

Debtor. *Code Civ. Proc. § 720.030*

Security interest. *Com. Code § 1201(b)(35)*

Secured party. *Com. Code § 9105(1)(m)*

[2] Filing of Third-Party Claims

[a] In General

Third-party claims provisions, *Code Civ. Proc. §§ 720.210-720.800*, apply to cases involving claim and delivery. *Code Civ. Proc. § 514.050*

Third-party claims provisions, *Code Civ. Proc. §§ 720.210-720.800*, apply to cases involving enforcement of state tax liability. *Code Civ. Proc. § 688.110*

Third-party claim based on ownership or right to possession of levied property. *Code Civ. Proc. § 720.110*

Procedures for filing third-party claim. *Code Civ. Proc. §§ 720.120-720.150, 720.220-720.250*

Third-party claim based on security interest in or lien on levied property. *Code Civ. Proc. § 720.210*

Prohibition against levying officer disposing of property after timely filing of claim. *Code Civ. Proc. §§ 720.150, 720.250*

Right of third-party claimant to apply for hearing on third-party claim. *Code Civ. Proc. § 720.310*

Right of third-party claimant to move for order staying or enjoining any transfer or other disposition of levied property which is subject of third-party claim. *Code Civ. Proc. § 720.380(a)*

[b] Undertaking to Release Property

Undertaking by third party to release property levied on. *Code Civ. Proc. § 720.610*

Procedures for filing of undertaking. *Code Civ. Proc. §§ 720.620-720.650*

Applicability of Bond and Undertaking Law (*Code Civ. Proc. § 995.010 et seq.*) to Enforcement of Judgments Law (*Code Civ. Proc. § 680.010 et seq.*). *Code Civ. Proc. § 720.710*

Requirements of undertaking. *Code Civ. Proc. §§ 720.760-720.800*

[3] Hearing on Third-Party Claim

Application for hearing. *Code Civ. Proc. §§ 720.310-720.340*

Conduct of hearing. *Code Civ. Proc. §§ 720.350-720.370, 720.400-720.410*

Determination of validity of claim and disposition of property. *Code Civ. Proc. § 720.390*

Appeal. *Code Civ. Proc. § 720.420*

[4] Remedies of Creditors

Undertaking in response to third-party claim. *Code Civ. Proc. §§ 720.160-720.170, 720.260-720.270*

Deposit in lieu of undertaking. *Code Civ. Proc. §§ 720.260(a), 720.290(a)*

Creditor's statement in opposition to third-party claim of secured party or lienholder. *Code Civ. Proc. §§ 720.280, 720.340*

Application for hearing on third-party claim. *Code Civ. Proc. § 720.310*

Stay or injunction of any transfer or other disposition of levied property that is the subject of third-party claim. *Code Civ. Proc. § 720.380(a)*

Creditor's demand that secured party or lienholder file third-party claim. *Code Civ. Proc. §§ 720.510-720.550*

Legal Topics:

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

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21-254 California Forms of Pleading and Practice--Annotated § 254.451

§ 254.451 Decisions

Under either *Code Civ. Proc. § 720.120* or former *Code Civ. Proc. § 689*, third party is required to make claim prior to payment of proceeds of levy to creditors; state is not required to search out potential third-party claimants prior to levying on tax debtor's assets. *Employment Development Dept. v. Union Bank (1986) 182 Cal. App. 3d 542, 545, 227 Cal. Rptr. 159*

Third-party claim under former *Code Civ. Proc. § 689* (*now see Code Civ. Proc. §§ 720.010-720.800*) was appropriate method of determining ownership of interest in decedent's estate. *Fount-Wip, Inc. v. Golstein (1972) 29 Cal. App. 3d 751, 754-757, 105 Cal. Rptr. 780*

Third-party claim must show on face both subject property belonging to third-party claimant and claimant's right to possession of it. *Palmquist v. Palmquist (1964) 228 Cal. App. 2d 789, 793, 39 Cal. Rptr. 871*

Owner of one half interest in property is entitled to file third-party claim on behalf of self and coowner. *Chico Tractor, Inc. v. Coyle (1963) 215 Cal. App. 2d 483, 489, 30 Cal. Rptr. 196*

No right to a jury trial on issue of validity of third-party claim. See *Misrach v. Liederman (1936) 58 P.2d 746*

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated §§ 254.452-254.469

[Reserved]

§§ 254.452[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.470

§ 254.470 State Statutes

Jurisdiction to proceed against less than all named defendants. *Code Civ. Proc. § 410.70*

Proceeding against joint debtor after entry of judgment. *Code Civ. Proc. § 989*

Summons against joint debtor. *Code Civ. Proc. § 990*

Declaration to obtain summons against joint debtor. *Code Civ. Proc. §§ 991, 2015.5*

Response to summons against joint debtor. *Code Civ. Proc. § 992*

Issues and written allegations in proceeding against joint debtor. *Code Civ. Proc. § 993*

Trial of issues in proceedings against joint debtor. *Code Civ. Proc. § 994*

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.471

§ 254.471 Decisions

Liability of joint debtor is based on original cause of action. *Vincent v. Grayson (1973) 30 Cal. App. 3d 899, 908, 106 Cal. Rptr. 733*

Amendment of complaint is permitted only to cure technical defects or matters of form. *Vincent v. Grayson (1973) 30 Cal. App. 3d 899, 910, 106 Cal. Rptr. 733*

Court has jurisdiction to try issue of joint debtor's liability on original judgment in joint debtor proceedings. *Kupfer v. Brawner (1942) 19 Cal. 2d 562, 565, 122 P.2d 268*

Judgment against joint debtor is based only on same cause of action in original complaint on which original judgment was based. *Fried v. Municipal Court (1949) 94 Cal. App. 2d 376, 378, 210 P.2d 883*

Plaintiff is entitled to proceed to judgment against one partner and then to bring in other partner as joint debtor. *Hobgood v. Glass (1958) 161 Cal. App. 2d 208, 211, 326 P.2d 546*

Plaintiff is barred if original complaint does not state cause of action against alleged joint debtor. *McRae v. Bates (1961) 196 Cal. App. 2d 510, 512, 16 Cal. Rptr. 565*

Joint debtor proceeding is unavailable if judgment based on action for money had and received since such action is not based on contract. *Hillco, Inc. v. Stein (1978) 82 Cal. App. 3d 322, 327, 147 Cal. Rptr. 108*

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.472

§ 254.472 Law Reviews

Comment, "Legislation, *Sections 989, 990 of the Code of Civil Procedure*," *9 So. Cal. L. Rev. 255*

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.473

§ 254.473 Text References

Witkin, California Procedure (2d ed), Vol. 2, *Actions*, § 603; Vol. 5, *Enforcement of Judgments*, §§ 186-188A

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated §§ 254.474-254.489

[Reserved]

§§ 254.474[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.490

§ 254.490 Scope

NOTE:
The following is a checklist of the procedures commonly utilized in situations involving writs of execution. Procedures not mentioned in this checklist may be required in a given action.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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21-254 California Forms of Pleading and Practice--Annotated § 254.491

§ 254.491 Obtaining Writ of Execution

1. If not previously done, counsel for judgment creditor prepares, serves, and files a memorandum of costs [*see Code Civ. Proc. § 685.070*]. If a registered process server is being used to levy on property, counsel should also make a motion to recover the process server's fees as costs [*see Code Civ. Proc. § 699.080(f)*]. See generally Ch. 174, *Costs and Attorney's Fees* .

2. Counsel for judgment creditor prepares and files writ of execution and an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) stating the amount of postjudgment interest that has accrued [*see Code Civ. Proc. §§ 685.050(a)(2), 699.510, 699.520*; *see §§ 254.680, 254.680.*1]. If the judgment creditor includes additional names for the judgment debtor in the writ beyond those included in the judgment, counsel for the judgment debtor files an Affidavit of Identity with the writ [*Code Civ. Proc. §§ 680.135, 699.510(c)*; *see* § 254.680.05].

NOTE:
If the property to be levied on is located in a county different from that in which the writ will be issued, counsel should make sure that the writ is directed to the levying officer of the county in which the property is located. Separate writs must be issued for each county in which property to be levied on is located [*Code Civ. Proc. § 699.510(a)*].

3. Clerk issues writ.

NOTE:
Practice varies in the counties with regard to whether counsel may immediately obtain a writ of execution or sale when the memorandum of costs is filed simultaneously with the writ. Some courts will not issue the writ until the adverse party has been allowed a sufficient amount of time within which to file a motion to tax costs under *Cal. Rules of Ct., Rule 3.1700(b)(1)*. At any rate, to enforce the entire judgment including costs, counsel will have to wait for this period to expire before

seeking the writ of execution [*see* *Cal. Rules of Ct., Rule 3.1700(b)(4)* (clerk to enter costs on judgment after time for motion to strike or tax costs or time for determination of that motion has expired)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.492

§ 254.492 Obtaining Writ After 10 Years

If the writ is applied for more than 10 years after the judgment was entered or renewed, counsel for judgment creditor prepares a declaration under oath stating facts showing that issuance of the writ is not barred [*see Code Civ. Proc. § 683.040*]. For discussion and forms relating to renewal of a judgment so that it may be enforced after 10 years, see Ch. 318, *Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsRevival of JudgmentsCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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21-254 California Forms of Pleading and Practice--Annotated § 254.493

§ 254.493 Writ of Execution to Enforce Judgment Under Family Law Act

1. Generally, any judgment or order of the court under the Family Code may be enforced by the court by execution, appointment of a receiver, contempt, or such other order or orders as the court in its discretion may from time to time deem necessary [*Fam. Code § 290*]. However, notwithstanding *Fam. Code § 290*, a child, family, or spousal support order may be enforced by a writ of execution or a notice of levy pursuant to *Code Civ. Proc. § 706.030* or *Fam. Code. § 17522* without prior court approval [*Fam. Code § 5100*]. For discussion and forms relating to enforcement of judgments made or entered under the Family Law Act, see Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* , Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* , and Ch. 260, *Family Law Enforcement: Foreign Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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21-254 California Forms of Pleading and Practice--Annotated § 254.494

§ 254.494 Stay of Enforcement

1. Counsel for judgment debtor may wish to obtain a stay of enforcement under *Code Civ. Proc. § 918(a)*.

NOTE:
The maximum time for a stay of enforcement is 10 days without consent of the adverse party when execution would otherwise be stayed on appeal only by the giving of an undertaking [*Code Civ. Proc. § 918(b)*]. *Code Civ. Proc. § 918* applies whether or not an appeal will be taken from the judgment or order and whether or not a notice of appeal has been filed [*Code Civ. Proc. § 918(c)*].

2. Counsel for judgment debtor and counsel for judgment creditor may execute a stipulation staying enforcement of judgment.

3. If a judgment debtor has another action pending on a disputed claim against the judgment creditor, counsel for the judgment debtor may obtain a stay of enforcement pursuant to *Code Civ. Proc. § 918.5* [*see Code Civ. Proc. § 918.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.495

§ 254.495 Levying on Debtor's Property

NOTE:
A registered process server may levy on certain property under a writ of execution.

1. Counsel for judgment creditor prepares instructions for the sheriff or other levying officer, directing the officer to levy on and, if so instructed, to sell the judgment debtor's property [*Code Civ. Proc. § 687.010*; *see also Code Civ. Proc. § 684.130*]. When permitted by statute, counsel for judgment creditor may wish to instruct the levying officer to place a keeper in charge of the property [*see, e.g., Code Civ. Proc. §§ 700.070* (property of going business), 700.080 (personal property used as dwelling)]. See *§§ 254.685*, *254.686*.

2. Counsel mails or takes the writ and appropriate instructions to the sheriff or other levying officer. At that time counsel pays the fees and any other required deposits.

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.496

§ 254.496 Turnover Order in Aid of Execution of Writ

Counsel for judgment creditor may apply ex parte, or on noticed motion if required by the court or a court rule, for an order directing the judgment debtor to transfer to the levying officer the property or documentary evidence of title to the property or both [*see Code Civ. Proc. § 699.040*]. See *§§ 254.691 -254.693*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.497

§ 254.497 Seizure of Personal Property Held in Private Place

If personal property sought to be levied on is being held by the judgment debtor in a private place, and the debtor has refused to voluntarily surrender custody of the property to the levying officer, counsel for the judgment creditor may wish to obtain an order directing the levying officer to seize the property. The application may be made ex parte unless the court or a court rule requires a noticed motion, and may be made whether or not a writ has been issued and whether or not demand has been made for the property by the levying officer pursuant to *Code Civ. Proc. § 699.030(a)* [*see Code Civ. Proc. § 699.030(b)*]. See *§§ 254.688 -254.690*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.498

§ 254.498 Collectible Property

1. If the property levied on is defined as collectible under *Code Civ. Proc. § 701.520(a)*, it will be collected rather than sold. If sale of the property is desired, counsel for the judgment creditor must prepare a notice of intended sale of the property and serve it on the judgment debtor. The notice may be served at the time of levy or thereafter [*see Code Civ. Proc. § 701.520(b)*]. See *§ 254.697*.

2. In order to have the property collected rather than sold, counsel for the judgment debtor must respond to the notice of intended sale by preparing a notice of motion for an order that the property be collected. A copy of the notice must be filed with the levying officer within 10 days after service of the notice of intended sale [*Code Civ. Proc. § 701.520(c)*]. See *§§ 254.698 -254.700*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.499

§ 254.499 Personal Property Used as Dwelling

1. The levying officer may be instructed to place a keeper in charge of the property for a period set by the judgment creditor [*see Code Civ. Proc. § 700.080(b)*].

2. If the judgment creditor wishes the removal of occupants from the property, counsel for the judgment creditor must prepare a notice of motion for an order directing the removal of the occupants [*see Code Civ. Proc. § 700.080(c)*]. See *§§ 254.694 -254.696*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.500

§ 254.500 Execution Sale

1. Counsel for judgment creditor prepares a notice of sale. The notice is delivered to the levying officer for service and posting [*see Code Civ. Proc. §§ 701.530, 701.540*]. See *§ 254.702*.

2. If advertisement of the sale is desired, counsel for either judgment debtor or judgment creditor should prepare an ad for publication in a newspaper of general circulation or similar publication [*see Code Civ. Proc. § 701.555*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.501

§ 254.501 Setting Aside Execution Sale

Execution sales are considered final unless set aside for irregularities in the sale [*see Code Civ. Proc. § 701.680*]. An action to set aside the sale must be commenced by the judgment debtor, or the judgment debtor's successor in interest, within 90 days after the date of sale [*Code Civ. Proc. § 701.680(c)(1)*]. For a discussion of the substantive law governing the setting aside of execution sales, see *§ 254.93*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated § 254.502

§ 254.502 Claim of Exemption

NOTE:

Property that is exempt from execution is set forth in *Code Civ. Proc. §§ 704.010-704.210*. The various types of exempt property are listed in the Research Guide, State Statutes, under Exempt Property. The homestead exemption is governed by *Code Civ. Proc. §§ 704.710-704.995*. For a discussion of the law governing homestead exemptions, see Ch. 294, *Homesteads* .

1. Counsel for judgment debtor prepares and files the original and one copy of a claim of exemption with the levying officer within 10 days from the date the notice of levy on the property was served on the judgment debtor [*Code Civ. Proc. § 703.520(a)*]. Counsel should also prepare a notice of exemption for service on the judgment creditor by the levying officer [*see Code Civ. Proc. § 703.540*]. See *§§ 254.710 -254.711*.

2. To contest the claim of exemption, counsel for judgment creditor must, within 10 days after service of the notice of the claim of exemption, prepare and file with the court a notice of opposition to the claim of exemption and a notice of motion for an order determining the claim. A copy of both the notice of opposition and notice of motion must also be filed with the levying officer within the 10-day period [*see Code Civ. Proc. § 703.550*]. See *§§ 254.712 -254.713*.

NOTE:

If no opposition is filed, the levying officer will release the property claimed to be exempt [*see Code Civ. Proc. § 703.550*].

3. A hearing on the motion must be held no later than 20 days from the date the notice of motion is filed with the court unless continued for good cause. Counsel for the judgment creditor must serve a notice of the hearing and a copy of the notice of opposition on the judgment debtor no less than 10 days prior to the hearing [*see Code Civ. Proc. § 703.570*].

4. Counsel for both parties attend the hearing on the claim of exemption [*see Code Civ. Proc. § 703.580*].

5. Counsel for the prevailing party prepares the judgment, serves a copy on the opposing party, and files the original with the clerk, who transmits a copy to the levying officer [*see Code Civ. Proc. § 703.580*]. See *§ 254.715*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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A. Enforcement of Money Judgments

21-254 California Forms of Pleading and Practice--Annotated §§ 254.503-254.519

[Reserved]

§§ 254.503[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.520

§ 254.520 Scope

NOTE:
The following is a checklist of the procedures commonly utilized in situations involving writs of sale or possession. Procedures not mentioned in this checklist may be required in a given action.

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21-254 California Forms of Pleading and Practice--Annotated § 254.521

§ 254.521 Obtaining Writ of Sale or Possession

1. If not previously done, counsel for judgment creditor prepares, serves, and files a memorandum of costs [*see Code Civ. Proc. § 685.070*]. If a registered process server is being used to levy on property, counsel should also make a motion to recover the process server's fees as costs [*see Code Civ. Proc. § 699.080(f)*]. See generally Ch. 174, *Costs and Attorney's Fees* .

2. Counsel for judgment creditor prepares application for writ of possession or sale of property. In the case of a writ of possession in unlawful detainer proceedings, the application must include a declaration under penalty of perjury stating the daily rental value of the property as of the date that the complaint was filed [*Code Civ. Proc. § 712.010*], and must also indicate that the writ applies to all tenants, subtenants, if any, named claimants, if any, and any other occupants of the premises [*Code Civ. Proc. § 715.010(a)*].

3. Counsel for judgment creditor prepares and files writ of sale or possession. See *§ 254.730* (writ of sale or possession).

NOTE:
If the property that is the subject of the writ is located in a county different from the county in which the writ will be issued, counsel should make sure that the writ is directed to the levying officer of the county in which the property is located. Separate writs must be issued for each county in which the subject property is located [*see* *Code Civ. Proc. § 712.010*].

4. Clerk issues writ.

NOTE:
Practice varies in the counties with regard to whether counsel may immediately obtain a writ of sale when the memorandum of costs is filed simultaneously with the writ. Some courts will not issue the writ until the adverse party has been allowed a

sufficient amount of time within which to file a motion to tax costs under *Cal. Rules of Ct., Rule 3.1700(b)(1)*. At any rate, to enforce the entire judgment including costs, counsel will have to wait for this period to expire before seeking the writ of execution [***see Cal. Rules of Ct., Rule 3.1700(b)(4)*** **(clerk to enter costs on judgment after time for motion to strike or tax costs or time for determination of that motion has expired)].**

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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21-254 California Forms of Pleading and Practice--Annotated § 254.522

§ 254.522 Obtaining Writ After 10 Years

For discussion of the procedure for obtaining a writ after 10 years from entry of a judgment, see *§ 254.492*. For discussion and forms relating to renewal of a judgment so that it may be enforced after 10 years, see Ch. 318, *Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsRevival of Judgments

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21-254 California Forms of Pleading and Practice--Annotated § 254.523

§ 254.523 Stay of Enforcement

Counsel for judgment debtor may wish to obtain a stay of enforcement under *Code Civ. Proc. § 918(a)*. For discussion relating to stay of enforcement, see *§ 254.494*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral Overview

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21-254 California Forms of Pleading and Practice--Annotated § 254.524

§ 254.524 Turnover Order in Aid of Enforcement of Judgment

To assist in enforcing a judgment for possession of personal property or a judgment for sale of real or personal property, counsel for judgment creditor may apply ex parte, or on noticed motion if required by the court or a court rule, for an order directing the judgment debtor to transfer property or documentary evidence of title to the property or both [*Code Civ. Proc. §§ 712.030, 716.030*]. *Code Civ. Proc. §§ 715.010-715.050* do not authorize such an order to enforce a judgment for possession of real property. In the case of a judgment for possession of personal property, the order may be obtained whether or not a writ has issued on the judgment, and the order will provide for transfer of the property to the judgment creditor [*Code Civ. Proc. § 714.030*]. In the case of a judgment for sale of property, the judgment creditor may apply for the order only if a writ of sale has issued, and the order will provide for transfer of the property to the levying officer [*Code Civ. Proc. § 716.030*; *see §§ 254.731 -254.733*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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21-254 California Forms of Pleading and Practice--Annotated § 254.525

§ 254.525 Execution of Writ of Possession

For discussion of the execution of a writ of possession of real or personal property, see *§ 254.132*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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21-254 California Forms of Pleading and Practice--Annotated § 254.526

§ 254.526 Execution of Writ of Sale

A writ of sale may be executed by levying on and selling the property in the same manner as that prescribed under a writ of execution pursuant to *Code Civ. Proc. §§ 700.010-700.200, 701.510-701.680* [*Code Civ. Proc. § 716.020*]. A registered process server may levy on certain property under a writ of execution [*see Code Civ. Proc. § 699.080*]. For discussion of the procedure for levying on and selling property pursuant to a writ of execution, see *§§ 254.495 -254.501*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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21-254 California Forms of Pleading and Practice--Annotated § 254.527

§ 254.527 Execution of Money Judgment Included in Judgment for Possession or Sale

Counsel may enforce the writ of possession or sale as a writ of execution to satisfy any money judgment included in the judgment for possession or sale [*Code Civ. Proc. § 712.040*]. For discussion of the procedures governing enforcement of money judgments, see *§ 254.490* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated §§ 254.528-254.539

[Reserved]

§§ 254.528[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.540

§ 254.540 Redemption; Deposit.

The person seeking redemption must deposit with the levying officer the redemption price in the amount specified in *Code Civ. Proc. § 729.060(b)* before the expiration of the redemption period [*Code Civ. Proc. § 729.060(a)*]. A successor in interest of the judgment debtor must file evidence of his or her interest along with the deposit [*Code Civ. Proc. § 729.060(a)*].

NOTE:

Redemption period is three months after the date of sale if the proceeds of the sale satisfied the secured indebtedness with interest and costs of action and of sale; otherwise the redemption period is one year [*Code Civ. Proc. § 729.030*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawSecured TransactionsDefaultForeclosure & RepossessionRedemption

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21-254 California Forms of Pleading and Practice--Annotated § 254.541

§ 254.541 Redemption Disputes; Petition

If the redemption price or the right of the redemptioner to seek redemption is disputed, file a petition before the expiration of the redemption period to determine the dispute. Serve notice of the filing on the levying officer or trustee [*Code Civ. Proc. § 729.070(a)*]. If petitioner is a successor in interest to the judgment debtor, file with the petition a certified copy of the recorded conveyance or a copy of the assignment or other evidence of interest together with a declaration verifying it [*Code Civ. Proc. § 729.070(b)(3)*]. Serve a copy of the petition together with a notice of the time and place of the hearing on the purchaser not less than 10 days before the hearing [*Code Civ. Proc. § 729.070(d)*; for discussion of service of papers, see *§ 254.13*].

On determination of the court, pay any additional amount determined to be due as part of the redemption price to the levying officer within 10 days after the issuance of the order [*Code Civ. Proc. § 729.070(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionStatutory Redemption

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21-254 California Forms of Pleading and Practice--Annotated § 254.542

§ 254.542 Certificate of Redemption

Levying officer or trustee executes and delivers certificate of redemption to the person seeking redemption on acceptance of the tender of redemption price by the purchaser or on tender of redemption price determined by court order. After issuance of the certificate, the levying officer or trustee records a duplicate in the office of the recorder in the county where the property is located [*Code Civ. Proc. § 729.080(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionStatutory Redemption

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21-254 California Forms of Pleading and Practice--Annotated §§ 254.543-254.559

[Reserved]

§§ 254.543[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.560

§ 254.560 Scope

NOTE:
Service of papers and extension of the time for service when service is by mail in relation to the procedures listed below is governed by *Code Civ. Proc. §§ 684.010-684.310*. For discussion of these provisions see *§ 254.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of Assets

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21-254 California Forms of Pleading and Practice--Annotated § 254.561

§ 254.561 Judgment Creditor's Checklist

1. Examination of Judgment Debtor

a. Apply to the proper court (*see § 254.226*) for an order to examine the judgment debtor [*Code Civ. Proc. § 708.110(a)*]. The application may be made ex parte, unless the judgment debtor has been examined within the preceding 120 days, in which case the court, or a court rule, may require a noticed motion [*Code Civ. Proc. § 708.110(b), (c)*; *see §§ 254.780, 254.781*].

NOTE:
Prepare and submit with the application an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) showing good cause for the order if the application is made within 120 days of a previous examination of the judgment creditor [*see* *§ 254.782*].

b. Personally serve a copy of the order on the judgment debtor at least 10 days before the date set for the examination [*Code Civ. Proc. § 708.110(d)*].

2. Examining Third Party

a. Apply to the proper court (*see § 254.226*) for an order requiring a third person having possession or control of property in which the judgment debtor has an interest or owing a debt to the judgment debtor to appear and furnish information to aid in the enforcement of the money judgment. The application may be made ex parte [*Code Civ. Proc. § 708.120(a)*; *see § 254.780*].

b. Prepare and submit with the application an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*Code Civ. Proc. § 708.120(a)*; *see § 254.783*].

c. Personally serve a copy of the order on the third person at least 10 days prior to the date set for the

examination [*Code Civ. Proc. § 708.120(b)(1)*].

d. Tender fees for the mileage necessary to be traveled from the third person's residence to the place of examination [*Code Civ. Proc. § 708.120(f)*].

e. Serve a copy of the order, either personally or by mail, on the judgment debtor [*Code Civ. Proc. § 708.120(b)(2)*].

3. Response to Third Party's Adverse Claim

a. Apply to the court for an order forbidding transfer of the property or payment of the debt [*Code Civ. Proc. § 708.180(c)* (transfer or payment to judgment debtor); *Code Civ. Proc. § 708.180(d)* (transfer or payment to any person); *see §§ 254.786, 254.787*]. If the order is to apply only to the judgment debtor, the application may be made ex parte [*Code Civ. Proc. § 708.180(c)*; *see § 254.786*]. Otherwise, it must be made on noticed motion [*Code Civ. Proc. § 708.180(d)*; *see § 254.787*].

b. Pay any undertaking that the court may, in its discretion, require when transfer or payment to only the judgment debtor is forbidden [*Code Civ. Proc. § 708.180(c)*] or if transfer or payment to any person is forbidden, pay the undertaking as provided in *Code Civ. Proc. § 529* [*Code Civ. Proc. § 708.180(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureRemediesBondsGeneral Overview

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21-254 California Forms of Pleading and Practice--Annotated § 254.562

§ 254.562 Judgment Debtor's Checklist

1. Appear at the hearing at the time and place specified in the order [*Code Civ. Proc. § 708.110(a)*].

2. During a third party examination proceeding, claim that all or any portion of the property or debt is exempt from enforcement of the money judgment, if appropriate, by filing a notice of motion and supporting declaration with the court. Personally serve notice of motion on judgment creditor at least three days before date set for examination [*Code Civ. Proc. § 708.120(d)*; *see § 254.793*].

CAUTION:
Failure of the judgment debtor to make a claim of exemption when the property or debt is described in the order in a manner reasonably adequate to permit it to be identified and the judgment debtor receives notice of the examination proceeding at least 10 days before the date set for the examination precludes the judgment debtor from later making the claim [*Code Civ. Proc. § 708.120(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptions

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21-254 California Forms of Pleading and Practice--Annotated § 254.563

§ 254.563 Third Person's Checklist

1. Appear at the hearing at the time and place specified in the order [*Code Civ. Proc. § 708.120*].

2. Make any claim of interest in the property adverse to the judgment debtor or deny the debt, if appropriate. The court may determine the claim if the judgment creditor requests. The determination is conclusive as to the parties to the proceeding and the third person, but an appeal may be taken [*Code Civ. Proc. § 708.180(a)*].

NOTE:
The court may not determine the interests in the property or the existence of the debt if the third person objects and the claim is made in good faith and the court is not a proper court for the trial of the issue as an independent action [*Code Civ. Proc. § 708.180(b)(1)*]. Determination of the claim is automatically barred if the claim is made in good faith and a civil action is pending with respect to the interests in the property or the existence of the debt [*Code Civ. Proc. § 708.180(b)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsNonparties

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21-254 California Forms of Pleading and Practice--Annotated §§ 254.564-254.579

[Reserved]

§§ 254.564[Reserved]

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E. Creditor's Suit

21-254 California Forms of Pleading and Practice--Annotated § 254.580

§ 254.580 Judgment Creditor's Checklist

1. File complaint against third person who has possession or control of property in which the judgment debtor has an interest or is indebted to the judgment debtor to have the interest or debt applied to the satisfaction of the money judgment [*Code Civ. Proc. § 708.210*; for discussion of when to file suit *see § 254.251*]. For a form of summons and procedures for service, see Ch. 518, *Service of Summons and Papers* .

NOTE:
The judgment debtor must be joined in the action but is not an indispensable party [*Code Civ. Proc. § 708.220*].

2. Restrain transfer of property by one of the following two methods, if desired.

a. Transfer to judgment debtor.

Apply for an order, ex parte or on noticed motion, restraining the third person from transferring to the judgment debtor the property in which the judgment debtor is claimed to have an interest or from paying to the judgment debtor the alleged debt [*Code Civ. Proc. § 708.240(a)*; *see §§ 254.790 -254.792*].

b. Transfer to any person.

Apply for a temporary restraining order or a preliminary injunction, or both, to restrain the third party from transferring to any person or otherwise disposing of the property in which judgment debtor is claimed to have an interest [*Code Civ. Proc. § 708.240(a)*; *see § 254.789*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefCivil ProcedureParties JoinderPermissive JoinderCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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21-254 California Forms of Pleading and Practice--Annotated § 254.581

§ 254.581 Judgment Debtor's Checklist

Make a claim on noticed motion that all or any portion of the property or debt is exempt from enforcement of the money judgment, if appropriate. File notice of motion with the court. Serve notice of motion on the judgment creditor at least 30 days before the date set for trial [*Code Civ. Proc. § 708.260(a)*; *see § 254.793*].

CAUTION:

Failure to make a claim of exemption is a waiver of the exemption unless both of the following conditions are satisfied [*Code Civ. Proc. § 708.260*]: (1) the judgment debtor has not been served with process in the action that contains a description of the property or debt reasonably adequate to permit it to be identified; (2) the judgment debtor does not have actual notice of the pendency of the action and the identity of the property or the nature of the debt in issue.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptions

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21-254 California Forms of Pleading and Practice--Annotated §§ 254.582-254.599

[Reserved]

§§ 254.582[Reserved]

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F. Third-Party Claims On Levied Property

21-254 California Forms of Pleading and Practice--Annotated § 254.600

§ 254.600 Third-Party Claim of Ownership or Right to Possession of Levied Property Under Code Civ. Proc. § 720.110

1. Procedures for Making Claim [*see § 254.820*].

a. Prepare the claim in the manner prescribed in *Code Civ. Proc. § 720.130*;

NOTE:
At a hearing on the third-party claim, the court in its discretion may exclude from evidence any writing on which the claim is based, a copy of which was not attached to the third-party claim [*Code Civ. Proc. § 720.130(b)*].

b. File the claim with the levying officer, together with two copies of the claim after the levy, but before the levying officer does any of the following [*Code Civ. Proc. § 720.120*]:

(1) Sells the property.

(2) Delivers possession of it to the creditor.

(3) Pays the proceeds of collection to the creditor.

2. Procedures for Filing Undertaking.

The third-party claimant may, but is not required to, file an undertaking to obtain release of the levied property [*Code Civ. Proc. § 720.610(a)*]. The undertaking must do the following:

a. Describe the interest of the third party in the property [*Code Civ. Proc. § 720.630(a)*].

b. Be made in favor of the creditor [*Code Civ. Proc. § 720.630(b)*].

c. Provide that in the event that the debtor is adjudged to have an interest in the property levied on, the third party will pay to the creditor the amount required to satisfy the judgment against the debtor of the creditor, or a sum equal to the market value of the debtor's interest in the property [*Code Civ. Proc. § 720.630(b)*].

d. Give an undertaking in the amount of either twice the market value of the property sought to be released, or twice the amount of the creditor's lien on the property [*Code Civ. Proc. § 720.630(c)*].

NOTE:
If the creditor has given an undertaking in response to the third party's claim, the third party's undertaking must be in the same amount as the creditor's undertaking [*Code Civ. Proc. § 720.630(d)*]. The undertaking is effective as of the date the property is released [*Code Civ. Proc. § 720.650*].

e. File undertaking with levying officer within time and manner listed in Paragraph 1(b), *above* [*Code Civ. Proc. § 720.620*].

NOTE:
The filing of the undertaking may be made at the same time as the third-party claim, or later, but within the time limits [*Code Civ. Proc. § 720.620*].

3. Objection to Creditor's Undertaking.

The third-party claimant may object to the creditor's undertaking [*see Code Civ. Proc. § 720.660*]. The objection must be made by noticed motion within 10 days after service of a copy of the undertaking [*Code Civ. Proc. § 995.930(b)*]. A copy of the notice of motion must be be filed with the levying officer [*Code Civ. Proc. § 720.760*]. For discussion and forms relating to objections to undertakings, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

4. Application for Hearing on Validity of Third-Party Claim.

For procedures for applying for a hearing on the claim [*see § 254.824*], see *§ 254.626*.

5. Requesting Stay of Sale of Levied Property.

The motion for staying sale of or enjoining any transfer or other disposition of levied property [*see § 254.827*] may be made by either of the following [*Code Civ. Proc. § 720.380(b)*]:

a. Ex parte application.

b. Noticed motion, if required by the court or by local court rules [*see §§ 254.827 -254.829*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsNonpartiesCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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PART IV. PROCEDURAL CHECKLIST
F. Third-Party Claims On Levied Property

21-254 California Forms of Pleading and Practice--Annotated § 254.601

§ 254.601 Third-Party Claim of Security Interest or Lien on Personal Property

1. Procedures for Making Claim [*see § 254.821*].

a. Prepare the claim in the manner prescribed in *Code Civ. Proc. § 720.230* [*see § 254.821*].

NOTE:
At a hearing on the third-party claim, the court in its discretion may exclude from evidence any writing on which the claim is based, a copy of which was not attached to the third-party claim [*Code Civ. Proc. § 720.130(b)*].

b. File the claim with the levying officer in the manner prescribed by *Code Civ. Proc. §§ 720.220*.

For procedures, see *§ 254.600*, Paragraph 1(b).

2. File undertaking in the manner presecribed by *Code Civ. Proc. §§ 720.610-720.640*.

The secured party or lienholder may, but is not required to, file an undertaking to obtain release of the levied property [*Code Civ. Proc. § 720.610(a)*]. For procedures, see *§ 254.600* Paragraph 2.

3. Objection to Creditor's Undertaking.

The secured party or lienholder may object to a creditor's undertaking [*see Code Civ. Proc. § 720.660*]. For procedures for objecting to an undertaking by the creditor, see Paragraph I(A)(3), *above*.

4. Acceptance or Refusal of Tender of Creditor's Deposit.

On tender of a deposit in lieu of an undertaking, the secured party or lienholder may [*Code Civ. Proc. § 720.290*]:

a. Accept the tender, in which case the levied property passes to the creditor; or

b. Refuse the tender, in which case the amount of the deposit is deposited with the county treasurer payable to the third-party claimant.

5. Application for Hearing on Validity of Third-Party Claim.

The secured party or lienholder may apply to the court for a hearing on the validity of the claim (*see § 254.824*) [*Code Civ. Proc. § 720.310*]. For procedures for applying for a hearing on the claim [*see § 254.824*], see *§ 254.626*.

6. Requesting Stay of Sale of Levied Property.

The secured party or lienholder may apply to the court for an order staying the sale or enjoining the transfer or other disposition of the levied property pending commencement and termination of a hearing on the validity of the third-party claim (*see §§ 254.827 -254.829*) [*Code Civ. Proc. § 720.380*]. For procedures relating to staying the sale, see *§ 254.600* Paragraph 5.

Legal Topics:

For related research and practice materials, see the following legal topics:
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21-254 California Forms of Pleading and Practice--Annotated §§ 254.602-254.619

[Reserved]

§§ 254.602[Reserved]

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G. Creditor's Response To Third-Party Claim

21-254 California Forms of Pleading and Practice--Annotated § 254.620

§ 254.620 Creditor's Undertaking

The creditor may file with the levying officer an undertaking [*Code Civ. Proc. §§ 720.160, 720.260*]. The undertaking must do the following:

1. Be made in favor of the third-party claimant [*Code Civ. Proc. §§ 720.160(c)(1), 720.260(c)(1)*].

2. Indemnify the third person against any loss, liability, damages, costs, and attorney's fees, incurred by reason of the enforcement proceedings [*Code Civ. Proc. §§ 720.160(c)(2), 720.260(c)(2)*; *see Franke v. BAM Building Co. (2009) 172 Cal. App. 4th 224, 230-236, 91 Cal. Rptr. 3d 212* (analyzing statute)].

3. Be conditioned on the final judgment that the third party owns or has a right to possession of the levied property [*Code Civ. Proc. § 720.160(c)(3)*], or has a security interest in or lien on the property [*Code Civ. Proc. § 720.260(c)(3)*].

4. Be at least in the amount of $10,000 or twice the amount of the execution lien as of the date of levy or other enforcement lien as of the date it was created, whichever is the lesser amount [*Code Civ. Proc. §§ 720.160(b), 720.260(b)*].

NOTE:
The creditor may elect to file an undertaking in an amount larger than required by statute [*Code Civ. Proc. §§ 720.160(b), 720.260(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsNonpartiesCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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21-254 California Forms of Pleading and Practice--Annotated § 254.621

§ 254.621 Statement of Opposition to Third-Party Claim of Security Interest or Lien

A creditor must file a statement in opposition to a third-party claim filed by a secured party. The creditor must do all of the following [*Code Civ. Proc. § 720.280*]:

1. Prepare the statement in the manner prescribed in *Code Civ. Proc. § 720.280(a)* [*see § 254.822*].

2. File the statement with the levying officer.

3. Serve a copy of the statement, personally or by mail, on the secured party, and on the debtor.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsNonpartiesCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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21-254 California Forms of Pleading and Practice--Annotated § 254.622

§ 254.622 Objection to Third Party's Undertaking

For procedures for objecting to an undertaking by a third party complainant, see *§ 254.600* Paragraph 2, and substitute creditor for third party as applicable.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsNonpartiesCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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21-254 California Forms of Pleading and Practice--Annotated § 254.623

§ 254.623 Deposit in Lieu of Undertaking in Response to Third-Party Claim of Security Interest or Lien

The creditor may make a deposit in lieu of an undertaking. The deposit must do the following [*Code Civ. Proc. § 720.240(a)(4)*]:

1. Be in the amount of the sums due or to accrue under the security interest or lien.

2. Include the applicable rate of interest on the amount due.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsNonpartiesCivil ProcedureRemediesDeposits in CourtCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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21-254 California Forms of Pleading and Practice--Annotated § 254.624

§ 254.624 Notice of Opposition to Third-Party Claim by Public Entity

If the creditor is a public entity that is exempt from giving a statutory undertaking, it must file with the levying officer a notice stating its opposition to the third-party claim [*Code Civ. Proc. § 720.160(d), 720.260(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsNonpartiesCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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21-254 California Forms of Pleading and Practice--Annotated § 254.625

§ 254.625 Demand That Third Party File Claim

The creditor may demand that a secured party or lienholder in property levied on file a claim [*Code Civ. Proc. § 720.510*]. The creditor must do the following:

1. Prepare the demand in the manner prescribed in *Code Civ. Proc. § 720.530* [*see § 254.823*].

2. File the demand, together with a copy, with the levying officer after levy on the personal property but before the levying officer sells the property, or pays proceeds of collection to the creditor [*Code Civ. Proc. § 720.520(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsNonpartiesCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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21-254 California Forms of Pleading and Practice--Annotated § 254.626

§ 254.626 Application for Hearing on Validity of Third-Party Claim

The creditor may apply to the court for a hearing on the validity of the third-party claim. As the petitioner, the creditor must do the following [*Code Civ. Proc. § 720.310*]:

1. Prepare the petition [*see § 254.824*].

2. File the petition no later than 15 days after the third-party claim is filed with the levying officer or 15 days after an undertaking is filed.

NOTE:
The hearing must be held within 20 days after the filing of the petition, unless continued by the court for good cause shown. An undertaking is not required, but if the creditor has made a deposit pursuant to *Code Civ. Proc. § 720.260*, no hearing can be had [*Code Civ. Proc. § 720.310(b)*]. See *discussion under § 254.315[1][a]*].

3. Serve notice [*see § 254.825*] of the time and place of the hearing on the adverse party and on the debtor within the time specified in *Code Civ. Proc. § 1005(b)* (generally 16 court days, plus additional time if notice is served by mail, overnight delivery, etc.) [*Code Civ. Proc. § 720.320(a)(1)*; *see also Code Civ. Proc. § 1005(a)(7)*].

4. File a copy of the notice, including a statement of purpose of the hearing with the levying officer within the time specified in *Code Civ. Proc. § 1005(b)* (generally 16 court days, plus additional time if notice is served by mail, overnight delivery, etc.) [*Code Civ. Proc. § 720.320(a)(2)*].

NOTE:
The levying officer files with the court any statement in opposition to the third-party claim or undertaking that has been previously filed with the officer [*Code Civ. Proc. § 720.330*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsNonpartiesCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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G. Creditor's Response To Third-Party Claim

21-254 California Forms of Pleading and Practice--Annotated § 254.627

§ 254.627 Requesting Stay of Sale of Levied Property

The creditor may apply to the court for an order staying the sale or enjoining the transfer or other disposition of the levied property pending commencement and termination of a hearing on the validity of the third-party claim (*see §§ 254.827 -254.829*) [*Code Civ. Proc. § 720.380*]. For procedures relating to staying the sale, see *§ 254.600* Paragraph 5.

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21-254 California Forms of Pleading and Practice--Annotated §§ 254.628-254.639

[Reserved]

§§ 254.628[Reserved]

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H. Debtor's Right In Third-Party Claim To Move For Stay Of Sale Of Property

21-254 California Forms of Pleading and Practice--Annotated § 254.640

§ 254.640 Scope

NOTE:

The debtor may apply to the court for an order staying the sale or enjoining the transfer or other disposition of the levied property pending commencement and termination of a hearing on the validity of the third-party claim (*see* §§ *254.827 -254.829*) [*Code Civ. Proc. § 720.380*]. For procedures relating to staying the sale, see *§ 254.600*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsNonpartiesCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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H. Debtor's Right In Third-Party Claim To Move For Stay Of Sale Of Property

21-254 California Forms of Pleading and Practice--Annotated §§ 254.641-254.659

[Reserved]

§§ 254.641[Reserved]

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PART V. FORMS
A. General Forms

21-254 California Forms of Pleading and Practice--Annotated § 254.660

§ 254.660 Ex Parte Application for and Order Temporarily Staying Enforcement of Judgment or Order [Code Civ. Proc. §§ 918, 1003]

[1] FORM Ex Parte Application for and Order Temporarily Staying Enforcement of Judgment or Order [Code Civ. Proc. §§ 918, 1003]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	EX PARTE MOTION FOR ORDER STAYING EX-
Plaintiff,	)	ECUTION OF _____
vs.	)	[JUDGMENT *or* ORDER]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____

_____

On behalf of _____ [*identify party, e.g.*, Defendant] _____ [*name*], I, the undersigned, hereby apply for an order pursuant to *Code of Civil Procedure Section 918* staying enforcement of the _____ [judgment *or* order] described below and, in support of this application, declare:

1. I am _____ [*specify, e.g.*, the attorney of record for the defendant herein].

2. On _____ [*date*], _____ [a judgment *or* an order] was _____ [entered *or* made] _____ [*describe briefly, e.g.*, against Defendant in which it was

_____ (adjudged *or* ordered) that Defendant pay Plaintiff the sum of $_____].

3. A stay of enforcement is needed _____ [*state grounds for stay, e.g.,* to allow Defendant time to review the proceedings herein to determine whether there are grounds for a new trial, or for some other postjudgment motion, or for an appeal].

4. I know of the following _____ [attorneys for parties herein *and/or* parties herein]: _____ (*state the name, address, and telephone number of any attorney known to be an attorney for any party; or, if no such attorney is known, the name, address and telephone number of such party if known*)].

[5. _____ (*Fully disclose any prior applications of the same character or for the same relief which have been refused in whole or in part, and the court's actions*).]

[*EITHER, if adverse party notified*]

6. On _____ [*date*], at _____ [*time*], I personally notified _____ [*name*], the attorney of record herein for _____ [*identify opposing party, e.g.,* plaintiff], by _____ [*specify manner of notice, e.g.,* telephone] that this application would be presented on _____ [*date*] at _____ [*time*] in Department/Division _____ [*number*] of this court.

7. _____ [This notice was given at least 24 hours prior to the ex parte appearance *or set forth facts showing exceptional circumstances*].

8. _____ [*Set forth any response and whether opposition is expected, e.g.,* Counsel advised that he/she would be opposing this application at the hearing].

[*OR, if attempt to notify adverse party was unsuccessful*]

6. I have made the following good faith attempts to inform the _____ [*identify opposing party, e.g.,* plaintiff] and his/her attorney of when and where this application for a stay would be made but have been unable to reach either of them: _____ [*specify attempts made*].

[*OR, if seeking to be excused from requirement of notifying party*]

6. Defendant should not be required to inform the opposing party or the opposing party's counsel of this application because _____ (*specify reasons*)].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for _____
[*party's status and name*]

MEMORANDUM

[*Add memorandum supporting motion*]

ORDER

Good cause appearing therefor,

IT IS ORDERED that the application for a stay of enforcement be, and is, granted and that execution on the above-described _____[judgment entered *or* order made] herein is stayed until _____ [10 days after the last date on which a notice of appeal from the _____ (judgment *or* order) can be filed *or specify time not extending beyond 10 days after last date on which notice of appeal can be filed*] [on the following terms: _____ (*specify any terms*)].

_____ [*date*].

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of application and order is for use by a party aggrieved by an appealable judgment or order to apply ex parte for an order temporarily staying its enforcement [*see Code Civ. Proc. § 918*, discussed *below*]. *Code Civ. Proc. § 918* applies whether or not an appeal will be taken from the judgment or order and whether or not a notice of appeal has been filed [*Code Civ. Proc. § 918(c)*].

The form may be used as an alternative to an oral motion in open court or a stipulation of the parties.

[3] Trial Court's Power to Stay Enforcement

The trial court may stay the enforcement of any judgment or order, but if enforcement would be stayed on appeal only by the giving of an undertaking, the court does not have power, without the consent of the adverse party, to stay enforcement for a period that extends for more than 10 days beyond the last date on which a notice of appeal can be filed [*Code Civ. Proc. § 918(a), (b)*]. Unless the court expressly orders otherwise, a stay of enforcement under *Code Civ. Proc. § 918* does not extinguish or prevent the creation of a judgment lien on real property under *Code Civ. Proc. §§ 697.310-697.410* or on personal property under *Code Civ. Proc. §§ 697.510-697.670*. However, unless the court otherwise expressly orders, no other liens may be created or continued under *Code Civ. Proc. §§ 695.010-709.030* (enforcement of money judgments) during the period of the stay of enforcement [*Code Civ. Proc. § 697.040(b)*; *see Code Civ. Proc. § 697.050* (release of property when lien is extinguished)].

A court on its own motion may, and on the motion of a service member or a person acting on the service member's behalf must, stay the execution of any judgment or order entered against a military service member in any action or proceeding against the service member, before or during the period of the service or within 60 days thereafter, unless in the court's opinion the service member's ability to comply with the judgment or order is not materially affected by

reason of the military service [*Mil. & Vet. Code § 403(c)(2)*; for definitions of "service member," *see Mil. & Vet. Code § 400(a)*, and "military service," *see Mil. & Vet. Code § 400(b)*; *see also* Ch. 276, *Garnishment*, § 276.12]. A stay of execution may be ordered for the period of military service and three months thereafter, or any part of that period, and subject to those terms as may be just, including terms with respect to payment in installments of those amounts at those times the court may fix. When the person in military service is a codefendant with others, the plaintiff may nevertheless, by leave of court, proceed against the others [*Mil. & Vet. Code § 403(d)*].

[4] Application for Stay

A party aggrieved by an appealable judgment or order may apply to the trial court for a temporary stay to prevent its enforcement pending, for example, his or her review of the proceedings to determine whether there are grounds for any posttrial motions or an appeal. If the judgment or order is announced in open court, the aggrieved party may apply immediately for the stay by oral motion. If the motion is granted, counsel should prepare a formal order and present it to the judge's courtroom clerk for the judge's signature and filing and send a copy to the adverse party. If counsel fails to apply for the order at that time, or if the judgment or order is not announced in open court, the aggrieved party, on notice of the entry of the judgment or order, may seek a stipulation for a stay from opposing counsel. If the opposing party so stipulates, the written stipulation with an order appended as in the foregoing form, should be presented to the judge's clerk for the judge's signature and filing. If opposing counsel refuses to so stipulate, or if a stipulation is not sought, the party aggrieved by the judgment or order may seek the stay by ex parte application.

[5] Required Documents

Ex parte applications must be in writing and include all of the following [*Cal. Rules of Ct., Rule 3.1201*]:

- An application containing the case caption and stating the relief requested.
- A declaration in support of the application making the factual showing required under *Cal. Rules of Ct., Rule 3.1202(c)*.
- A declaration based on personal knowledge of the notice given under *Cal. Rules of Ct., Rule 3.1204* (*see § 254.660[6][b], below*).
- A memorandum.
- A proposed order.

For discussion of the procedure, a procedural checklist, and general forms relating to ex parte applications, see Ch. 372, *Motions and Orders* .

[6] Contents of Application

[a] In General

An ex parte application must state the name, address, and telephone number of any attorney known to the applicant to be an attorney for any party or, if no such attorney is known, the name, address, and telephone number of the party if known to the applicant [*Cal. Rules of Ct., Rule 3.1202(a)*].

If an ex parte application has been refused in whole or in part, a subsequent application of the same character or for the same relief, although made upon an alleged different state of facts, must include a full disclosure of all previous applications and of the court's actions [*Cal. Rules of Ct., Rule 3.1202(b)*].

An applicant must make an affirmative factual showing in a declaration containing competent testimony based on person knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte [*Cal. Rules of Ct., Rule 3.1202(c)*].

For further discussion and forms of ex parte applications, generally, see Ch. 372, *Motions and Orders* .

[b] Declaration of Notice

An ex parte application must be accompanied by a declaration regarding notice stating one of the following [*Cal. Rules of Ct., Rule 3.1204(b)*]:

- The notice given, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected and that, within the applicable time under *Cal. Rules of Ct., Rule 3.1203*, the applicant informed the opposing party where and when the application would be made.

- That the applicant in good faith attempted to inform the opposing party but was unable to do so, specifying the efforts made to inform the opposing party.

- That, for reasons specified, the applicant should not be required to inform the opposing party.

If notice was provided later than 10:00 a.m. the court day before the ex parte appearance, the declaration regarding notice must explain either one of the following [*Cal. Rules of Ct., Rule 3.1204(c)*]:

- The exceptional circumstances that justify the shorter notice.

- In unlawful detainer proceedings, why the notice given is reasonable.

[7] Service of Notice

When notice of an ex parte application is given, the person giving notice must do each of the following [*Cal. Rules of Ct., Rule 3.1204(a)*]:

- State with specificity the nature of the relief to be requested and the date, time, and place for the presentation of the application.

- Attempt to determine whether the opposing party will appear to oppose the application.

Parties appearing at the ex parte hearing must serve the ex parte application or any written opposition on all other appearing parties at the first reasonable opportunity. Absent exceptional circumstances, a hearing may not be conducted unless service was made [*Cal. Rules of Ct., Rule 3.1206*].

[8] Federal Statutes

Stay or vacation of execution of judgments or attachments against person in United States military service. *50 U.S.C. App. § 524*

[9] State Statutes

When perfecting of appeal stays enforcement of trial court judgment or order. *Code Civ. Proc. § 916*

When perfecting of appeal does not stay enforcement of trial court judgment or order. *Code Civ. Proc. §§ 917.1-917.9*

Undertaking required to stay enforcement of trial court judgment or order pending appeal. *Code Civ. Proc. § 917.9*

Power of court to stay enforcement of any judgment and time limitations. *Code Civ. Proc. § 918*

Stay of enforcement of judgment or order because of action pending on disputed claim between judgment debtor and creditor. *Code Civ. Proc. § 918.5*

[10] California Rules of Court

Extending time to appeal when valid notice of intention to move for new trial, or valid notice of intention to move to vacate judgment or to vacate judgment and enter another and different judgment, or valid notices of intention to move for new trial and to move for entry of judgment notwithstanding verdict, have been served and filed. *Cal. Rules of Ct., Rule 8.108(b), (c), (d)*

Requirements for preparing and filing ex parte applications. *Cal. Rules of Court, Rule 3.1200 et seq.*

[11] Text References

Witkin, California Procedure (4th ed 1997), Vol. 8, *Enforcement of Judgments*, §§ 61, 153; Vol 9, *Appeal*, § 229

California Civil Appellate Practice (3rd ed) (Cal CEB 2000), Ch. 6, *Staying Enforcement During Appeal*

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A. General Forms

21-254 California Forms of Pleading and Practice--Annotated § 254.661

§ 254.661 Application for and Order Staying Enforcement of Judgment Taken Against Party During Period of Military Service [Mil. & Vet. Code § 402(d)]

[1] FORM Application for and Order Staying Enforcement of Judgment Taken Against Party During Period of Military Service [Mil. & Vet. Code § 402(d)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	APPLICATION FOR ORDER STAYING
vs.	)	EXECUTION OF JUDGMENT;
_____ [*name*],	)	DECLARATION
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	

_____

I, the undersigned, _____ [*identify party, e.g.,* Defendant] _____ [*name*], hereby apply for an order pursuant to *Military and Veterans Code Section 402(d)* staying enforcement of the judgment described below and, in support of this application, declare:

1. I am _____ [*identify declarant, e.g.,* the defendant named in this action].

2. As shown by the records of this court, of which the court is requested to take judicial notice, this action was filed on

_____ [*date*], and _____ [*specify proceeding leading to judgment from which relief is sought*, *e.g.*, the summons was served on _____ (*date*), and defendant's default was entered on _____ (*date*), and a default judgment against the defendant was entered on _____ (*date*)].

[*EITHER*]

3. On _____ [*date*], I was called to active _____ [*specify* state *or* federal] military service as _____ [*specify*, *e.g.*, an enlisted member of the National Guard] by the _____ [*specify* Governor of the State of California pursuant to the provisions of Section _____ (*specify* 143 *or* 146) of the Military and Veterans Code *or* the President of the United States of America pursuant to Title _____ (*specify* 10 *or* 12) of the United States Code].

[*OR*]

3. On _____ [*date*], I was called to full-time active duty as a reservist of the United States Military Reserve.

[*CONTINUE*]

4. As shown by the attached certificate, of which the court is requested to take judicial notice, from _____ [*date*] _____ [*date*], I was in full-time active _____ [*specify* state *or* federal] service as defined in *Section 400(b) of the Military and Veterans Code*.

5. As shown by Paragraphs 2 through 4, above, the judgment from which relief is sought was entered during a period of military service governed by *Section 402(d) of the Military and Veterans Code*.

6. A stay of enforcement is needed _____ [*state grounds for stay*, *e.g.*, because I was prejudiced by reason by military service in making my defense to this action, because _____ [*specify facts showing prejudice*], and I have a _____ [*specify* meritorious *or* legal] defense to _____ [*specify* all *or* part] of the action, which is _____ [*specify*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

MEMORANDUM

[*Add memorandum supporting application*]

ORDER

Good cause appearing therefor,

IT IS ORDERED that the application for a stay of enforcement be, and is, granted and that execution on the above-described _____ judgment entered herein is stayed until _____ [*date*] [on the following terms: _____ (*specify any terms*)].

_____ [*date*].

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of notice of application, supporting declaration and order is for use by a party seeking a stay of the enforcement of a judgment taken against him or her during or within 30 days after a period of military service after being called or ordered into active state service as an officer or enlisted member of the National Guard by the Governor pursuant *Mil. & Vet. Code §§ 143* or *146* or into active federal service by the President pursuant to Title 10 or 12 of the United States Code or as a reservist of the United States Military Reserve called to full-time active duty [*Mil. & Vet. Code §§ 400(a), (b), 402(d)*], who was prejudiced by reason of military service in making a defense to the action.

For discussion of relief from judgments obtained during a period of military service, see discussion in Ch. 489, *Relief from Judgments and Orders* .

[3] Supporting Memorandum

A memorandum must be served and filed with the notice of motion if the motion is subject to the Civil Law and Motion Rules [*Cal. Rules of Ct., Rule 3.1113(a)*; for motions subject to the Civil Law and Motion Rules, see *Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(2)*], or if required by local court rule. The better practice is to prepare, serve, and file points and authorities in support of any noticed motion, unless excluded expressly or by implication from the Civil Law and Motion Rules or by local court rule. For discussion and forms relating to memoranda, see Ch. 417, *Points and Authorities* .

[4] References

Relief from judgments entered during period of military service. *Mil. & Vet. Code § 402(d)*

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21-254 California Forms of Pleading and Practice--Annotated §§ 254.662-254.679

[Reserved]

§§ 254.662[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.680

§ 254.680 Writ of Execution [Code Civ. Proc. § 699.520]--Judicial Council Form EJ-130

[1] FORM Writ of Execution [Code Civ. Proc. § 699.520]--Judicial Council Form EJ-130

Click here to view image.

[2] Use of Form

This form is writ of execution for use by a judgment creditor to enforce a money judgment [*see Code Civ. Proc. §§ 699.510, 699.520*]. This is an illustration of official Judicial Council Form EJ-130, approved by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.30 et seq.*].

The writ must be accompanied by an Affidavit of Identity when it includes any additional names of the judgment debtor [*see Code Civ. Proc. § 699.520(j)*; *Code Civ. Proc. § 680.135*; *see § 254.680*].

The writ must be accompanied by a notice of levy when served on the judgment debtor [*see Code Civ. Proc. § 700.010(a)(2)*; *see § 254.683*]. For a discussion of the issuance and enforcement of writs of execution, see *§ 254.60 et seq. and § 254.80* et seq.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Filling Out Writ

[a] Notice of Sale

Any person may request notice of an execution sale by filing a written request with the court clerk prior to issuance of the writ or, if notice of the sale of particular property that has been levied on is desired, with the levying officer [*see Code Civ. Proc. § 701.550*]. If the request is made with the clerk prior to issuance of the writ, it must be noted on the

writ by checking § 254.80 et seq. The information will either be filled in by the court clerk or may be provided to counsel by the clerk in order to complete the writ.

[b] Costs After Judgment

In paragraph or item 12, set forth the total amount of costs incurred after judgment that become part of the judgment under *Code Civ. Proc. § 685.090*:

- On the filing of an order allowing costs under *Code Civ. Proc. § 685.010 et seq.* [*Code Civ. Proc. § 685.090(a)(1)*].

- If a memorandum of costs is filed under *Code Civ. Proc. § 685.070* (costs incurred in enforcing judgment), and no motion to tax is made, on the expriation of the time for making the motion [*Code Civ. Proc. § 685.090(a)(2)*]. A motion to tax costs must be made within 10 days after the memorandum of costs was served on the judgment debtor [*Code Civ. Proc. § 685.070(c)*; *but see Code Civ. Proc. § 685.070(f)* (*Code Civ. Proc. § 1013*, extending the time within which a right may be exercised or an act done, applies)].

- As specified in *Code Civ. Proc. § 685.095* (cost of serving writ) [*Code Civ. Proc. § 685.090(a)(3)*].

If a memorandum of costs for the costs specified in *Code Civ. Proc. § 685.070(a)* is filed at the same time as an application for a writ of execution, these statutory costs not already allowed by the court in an amount not to exceed $100 in the aggregate may be included in the amount specified in the writ of execution, subject to subsequent disallowance as ordered by the court pursuant to a motion to tax if filed by the debtor. The memorandum of costs must contain the statement, "The fees sought under this memorandum may be disallowed by a court upon a motion to tax filed by the debtor notwithstanding the fees having been included in the writ of execution." The inclusion of the above-described costs in the writ of execution or the pendency of the motion to tax on these costs may not be cause for the clerk to delay issuing, or for the levying officer to delay enforcing, the writ of execution [*Code Civ. Proc. § 685.070(e)*].

For a discussion of the procedure and forms for use in securing costs after judgment, see Ch. 174, *Costs and Attorney's Fees* .

[c] Credits

In Paragraph 14, record the amount of any partial satisfactions of the judgment and any amounts that are no longer enforceable [*see Code Civ. Proc. § 699.520(e)*].

[d] Interest After Judgment

To obtain postjudgment interest (Paragraph 16) covering the period from the entry or renewal of the judgment, the judgment creditor must file an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) with the court clerk stating the amount of interest due [*Code Civ. Proc. § 685.050(a)(2)*; *see § 254.680*.1]. The amount established by the declaration is recorded in Paragraph 16 of the form [*see Code Civ. Proc. § 699.520(e)*]. The amount of interest for Paragraph 16 is calculated by applying the statutory interest rate [10 percent per annum per *Code Civ. Proc. § 685.010(a)*] to the principal amount of the money judgment remaining unsatisfied and dividing by 365 days for the year, resulting in a daily-interest figure. This daily figure is then multiplied by the number of days that elapsed from the date of entry or renewal of the judgment to the date of issuance of the writ [*see Code Civ. Proc. §§ 685.010(a), 685.050(a)(2)*; *see also § 254.681[2]*]. For example, if the money judgment remaining unsatisfied is $50,000 and it has been 10 days from the date of entry or renewal of the judgment to the date of issuance of the writ, the daily interest amount would be ($50,000

x 0.10) / 365 = $13.70 (the amount to be entered on Line 19(a)), multiplied by 10 days, for a total of $137.00.

In Paragraph 19, the levying officer fills in the amount of interest that accrues on the principal amount of the judgment remaining unsatisfied from the date of issuance of the writ until the date interest ceases to accrue [*see Code Civ. Proc. § 685.050(a)(3)*; *see also Code Civ. Proc. §§ 685.020* (accrual of interest on judgments), 685.030 (when interest ceases to accrue)].

[e] Judgment Against Joint Debtor

The names and addresses of all judgment debtors on the judgment should be entered in Paragraph 4.

If a joint debtor on a contract is declared to be bound by a money judgment under *Code Civ. Proc. §§ 989-994*, Paragraph 8 on the front of the form is checked, and Paragraph 8 on the back of the form filled in to show the date the joint debtor was declared bound, his or her name and address, and any additional costs against a particular joint debtor.

If the judgment debtors are liable in different amounts, Paragraph 20 is to be checked, and an attachment prepared that repeats Paragraphs 11-19 for each debtor.

[4] Order for Sale of Dwelling

Generally, a natural person's interest in a real property dwelling may not be sold under a writ of execution to enforce a money judgment unless the judgment creditor obtains a court order for sale pursuant to *Code Civ. Proc. §§ 704.710-704.850*, which provide for a hearing to determine the existence and amount of any homestead exemption in the dwelling [*see Code Civ. Proc. § 704.740(a)*; *Wells Fargo Financial Leasing, Inc. v. D & M Cabinets (2009) 177 Cal. App. 4th 59, 67-69, 99 Cal. Rptr. 3d 97* (judgment creditor, seeking to sell occupied dwelling to collect judgment, may not bypass *Code Civ. Proc. § 704.740* because sale is conducted by receiver); for discussion and forms, *see* Ch. 294, *Homesteads*]. A court order is not required, however, for the sale of a dwelling in which the judgment debtor has a leasehold estate with an unexpired term of less than two years at the time of levy or for the sale of a dwelling that is personal property. The homestead exemption pertaining to these types of dwellings is claimed and determined as provided in *Code Civ. Proc. §§ 703.510-703.601* [*Code Civ. Proc. § 704.740(b)*; *see § 254.110* et seq.].

[5] Cross References

For discussion and forms relating to execution of writs by sale of a dwelling house, see Ch. 294, *Homesteads*

[6] State Statutes

Costs and interest on judgment. *Code Civ. Proc. §§ 685.010-685.110*

Issuance of writ. *Code Civ. Proc. § 699.510*

Contents of writ. *Code Civ. Proc. § 699.520*

Delivery and execution of writ. *Code Civ. Proc. § 699.530*

Return of writ. *Code Civ. Proc. § 699.560*

Fee for issuance of writ. *Gov. Code § 70626*

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21-254 California Forms of Pleading and Practice--Annotated § 254.681

§ 254.681 Affidavit of Identity [Code Civ. Proc. § 680.135]

[1] FORM Affidavit of Identity [Code Civ. Proc. § 680.135]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	AFFIDAVIT OF
vs.	)	[*name of judgment*
_____ [*name*],	)	*creditor*] OF IDENTITY OF
Defendant.	)	_____ [*name*
	)	*of judgment debtor*]
	)	

State of California	)	ss.
[City and] County of _____	)	

_____ [*Name of judgment creditor*], being [first] duly sworn [on (his *or* her) oath deposes and] says:

1. I am the judgment creditor in the above entitled and numbered action, which was brought in _____ [*name of court, e.g.:* the Superior Court of the County of Marin], and in which judgment was entered on _____[*date*].

2. The name of the judgment debtor in this action is _____[*name of judgment debtor*]. _____ is also known by the following name[s]: _____ [*State additional name or names by which judgment debtor is known*].

3. _____ [*State the facts upon which judgment creditor relied in obtaining judgment debtor's additional name or names*].

_____ [*signature of judgment debtor*]
Subscribed and sworn to before me on
_____ [*date*].
_____ [*signature of officer*]
_____ [*typed name of officer*]
_____ [*officer, e.g.,* Notary Public]
[*Seal*]

[2] Use of Form

This form is an affidavit of identity to be filed by the judgment creditor with the application for issuance of the writ of execution [*see § 254.680*] when the writ includes additional names by which the judgment debtor is know [*Code Civ. Proc. § 699.510(c)(1)*]. An "Affidavit of Identity" is an affidavit or declaration executed by a judgment creditor, under penalty of perjury, that is filed with the clerk of the court in which the judgment is entered at the time the judgment creditor files for a writ of execution or an abstract of judgment [*Code Civ. Proc. § 680.135*].

Before the clerk of the court issues a writ of execution containing additional names by which the judgment debtor is know that are not listed on the judgment, the court must approve the Affidavit of Identity. If the court determines without a hearing or notice that the Affidavit of Identity states sufficient facts on which the judgment creditor has identified the additional names of the judgment debtor, the court must authorize the issuance of the writ with the additional name or names [*Code Civ. Proc. § 699.510(c)(1)*].

When the writ lists a name other than that listed on the judgment, the person in possession or control of the levied property, if other than the judgment debtor, must not pay the amount or deliver the property being levied on to the levying officer until being notified to do so by the levying officer. The levying officer may not require a person other than the judgment debtor in possession or control of the levied property to pay the amount or deliver the property levied on until the expiration of 15 days after service of notice of levy [*Code Civ. Proc. § 699.510(c)(2)*].

If a person who is not the judgment debtor has property erroneously subject to an enforcement of judgment proceeding based on an Affidavit of Identity, the person is entitled to the recovery of reasonable attorney's fees and costs from the judgment creditor incurred in releasing the person's property from a writ of execution, in addition to any other damages or penalties to which an aggrieved person may be entitled by law, including *Code Civ. Proc. § 720.010 et seq.* [*Code Civ. Proc. § 699.510(c)(3); see* discussion of *Code Civ. Proc. § 720.010 et seq.* under § 254.310 et seq.].

[3] Contents of Affidavit

The affidavit of identity must set forth the following [*Code Civ. Proc. § 680.135*]:

- The case name and number.
- The name of the judgment debtor stated in the judgment.
- The additional name or names by which the judgment debtor is known.
- The facts upon which the judgment creditor has relied in obtaining the judgment debtor's additional name or names.

The affidavit of identity must not include the name or names of persons, including any corporations, partnerships, or any legal entities not separately named in the judgment in which the judgment debtor is a partner, shareholder, or member, other than the judgment debtor [*Code Civ. Proc. § 680.135*].

[4] State Statutes

Issuance of writ of execution. *Code Civ. Proc. § 699.510*

Contents of writ of execution. *Code Civ. Proc. § 699.520*

Delivery and execution of writ. *Code Civ. Proc. § 699.530*

Remedies for creation of judgment lien on real property of person who is not the judgment debtor. *Code Civ. Proc. § 697.410*

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21-254 California Forms of Pleading and Practice--Annotated § 254.682

§ 254.682 Declaration [Code Civ. Proc. § 2015.5] of Amount of Interest Accrued on Judgment [Code Civ. Proc. § 685.050(a)(2)]

[1] FORM Declaration [Code Civ. Proc. § 2015.5] of Amount of Interest Accrued on Judgment [Code Civ. Proc. § 685.050(a)(2)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	DECLARATION OF _____ [*name*]
_____ [*name*],	)	OF AMOUNT OF INTEREST ACCRUED ON
Defendant.	)	JUDGMENT
	)	[*Code Civ. Proc. § 685.050(a)(2)*]
	)	

I, _____ [*name*], declare:

1. I am the [attorney of record for the] judgment creditor herein.

2. The amount of interest that has accrued from the date the judgment herein was _____ [entered *or* renewed] to the date of issuance of the writ of execution[, as adjusted for partial satisfactions,] is $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature*]

[2] Use of Form

This form of declaration under penalty of perjury is for use by a judgment creditor to state the amount of interest that has accrued on the judgment between the time the judgment was entered or renewed and the the date the writ of execution is issued. The amount of interest, as adjusted for partial satisfactions, is to be satisfied in a levy under the writ only if the judgment creditor has filed an affidavit with the court clerk stating such amount [*Code Civ. Proc. § 685.050(a)(2)*]. A declaration under penalty of perjury may be, and normally is, used in lieu of an affidavit [*see Code Civ. Proc. § 2015.5*].

[3] Interest Rate

The rate of interest that accrues on the principal amount of a money judgment remaining unsatisfied was increased from seven to ten percent by the 1982 amendment of *Code Civ. Proc. § 685*.010 [Stats. 1982, ch. 1364]. Although the amended statute purported to be effective January 1, 1982, this was a legislative oversight, and the 10-percent rate went into effect January 1, 1983 *[Hill v. Pacific Tel. & Tel. Co. (1985) 174 Cal. App. 3d 1076, 1078, 220 Cal. Rptr. 144* ; *American National Bank v. Peacock (1985) 165 Cal. App. 3d 1206, 1208-1212, 212 Cal. Rptr. 97* ; both criticizing dicta to the contrary in *Gutierrez v. State Ranch Services (1983) 150 Cal. App. 3d 83, 198 Cal. Rptr. 16]* . The increased rate does, however, apply to outstanding judgments entered prior to January 1, 1983. With respect to such judgments, interest is computed at seven percent through December 31, 1982, and at 10 percent thereafter [*see Code Civ. Proc. § 685.010(b)*; *Hill v. Pacific Tel. & Tel. Co. (1985) 174 Cal. App. 3d 1076, 1077-1078, 220 Cal. Rptr. 144* ; *C. Norman Peterson Co. v. Container Corp. of America (1985) 172 Cal. App. 3d 628, 651, 218 Cal. Rptr. 592]* .

[4] State Statutes

Rate of interest on principal amount of money judgment remaining unsatisfied. *Code Civ. Proc. § 685.010*

Accrual of interest. *Code Civ. Proc. §§ 685.020, 685.030*

Collection of postjudgment interest. *Code Civ. Proc. § 685.050(a)(2), (3)*

Costs added to judgment under *Code Civ. Proc. § 685.090* as included in principal amount of judgment remaining unsatisfied. *Code Civ. Proc. § 685.090(b)*

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21-254 California Forms of Pleading and Practice--Annotated § 254.683

§ 254.683 Notice of Levy [Code Civ. Proc. § 699.540]--Judicial Council Form EJ-150

[1] FORM Notice of Levy [Code Civ. Proc. § 699.540]--Judicial Council Form EJ-150

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of California Judicial Council Form EJ-150, the official form for a notice of levy. It is for use by the levying officer or registered process server in levying on a judgment debtor's property under a writ of execution (*see § 254.680*) or a writ of sale (*see § 254.730*) [*Code Civ. Proc. §§ 700.010, 716.020(a)* (levy under writ of sale to be in manner provided by *Code Civ. Proc. § 700.010 et seq.*); *see Code Civ. Proc. § 699.080* (types of property on which registered process server may levy)]. Form EJ-150, has been approved by the Judicial Council for mandatory use [*see Cal. Rules of Ct., Rule 1.30 et seq.*].

At the time of levy pursuant to *Code Civ. Proc. § 700.010 et seq.*, the levying officer or registered process server must serve on the judgment debtor a copy of the writ of execution or writ of sale and a notice of levy. If the judgment debtor is a natural person, a copy of the Judicial Council form listing exemptions must accompany the writ of execution and notice of levy [*Code Civ. Proc. § 700.010(a)*; *see §§ 254.680* (writ of execution), *254.684* (list of exemptions), *254.730* (writ of sale)]. If the writ lists any names of the debtor not listed in the judgment, a copy of the Affidavit of Identity must be served with the writ and notice of levy [*Code Civ. Proc. § 700.010(a)*; *see also Code Civ. Proc. § 680.135* (definition of Affidavit); *see § 254.681*].

The levying officer will execute the writ on receipt of instructions for execution and the writ of execution [*Code Civ. Proc. § 699.530(a)*; *see §§ 254.685, 254.686*]. If the levy is being performed by a registered process server pursuant to *Code Civ. Proc. § 699.080*, the server must file proof of service of the copy of the writ and notice of levy to the levying officer within 5 court days after levy [*Code Civ. Proc. § 699.080(d)*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in

PDF format also is available at *www.lexisone.com* at no charge.

[3] State Statutes

Instructions to levying officer by judgment creditor. *Code Civ. Proc. §§ 684.130, 687.010*

Delivery of instructions to levying officer. *Code Civ. Proc. § 699.530(a)*

Contents of notice of levy. *Code Civ. Proc. § 699.540*

Effect of failure to give notice of levy. *Code Civ. Proc. § 699.550*

Service of notice of levy with writ. *Code Civ. Proc. § 700.010*

[4] Cross References

For a related form, see *§ 254.680*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.684

§ 254.684 List of Exemptions From Enforcement of Judgments [Code Civ. Proc. §§ 681.030(c), 700.010]--Judicial Council Form EJ-155

[1] FORM List of Exemptions From Enforcement of Judgments [Code Civ. Proc. §§ 681.030(c), 700.010]--Judicial Council Form EJ-155

Click here to view image.

[2] Use of Form

This form listing exemptions from the enforcement of money judgments has been issued by the Judicial Council pursuant to *Code Civ. Proc. § 681.030*. When property is levied on pursuant to *Code Civ. Proc. §§ 700.010-700.200*, a copy of this form must be served on the judgment debtor, along with the writ of execution and the notice of levy, if the judgment debtor is a natural person [*Code Civ. Proc. § 700.010*].

As noted on the form, a list of the amounts of exemptions from a judgment under *Code Civ. Proc. § 703.150* starting April 1, 2004, is available from the clerk of the court and on the California Courts web site at www.courtinfo.ca.gov. Except as otherwise provided, the dollar amounts of the exemptions will be adjusted thereafter at three-year intervals on April 1, and the adjusted amounts will become effective immediately on that date.

[3] Cross References

For related forms, *see §§ 254.680* and *254.683*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.685

§ 254.685 Instructions to Levying Officer [Code Civ. Proc. § 687.010]--To Take Personal Property Into Custody

[1] FORM Instructions to Levying Officer [Code Civ. Proc. § 687.010]--To Take Personal Property Into Custody

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	INSTRUCTIONS TO LEVYING OFFICER
_____ [*name*],	)	[*Code Civ. Proc. § 687.010*]
Defendant.	)	
	)	
	)	

To _____ [*name and title of levying officer*]:

You are hereby instructed by virtue of the accompanying writ of _____ [*specify, e.g.,* execution] in the above-entitled action to levy on and take into custody the following-described property by _____ [placing a keeper in charge of the property *or* storing the property] at judgment creditor's expense. The property _____ [is *or* is not] a dwelling [*if dwelling add*, and is personal property]. The property is in the possession of and belongs to _____ [*name*], the judgment debtor, and is located at _____ [*address*], _____ [*city*], California.

Description of Property: _____ [*describe*].
Dated: _____.

_____ [*signature*]

Attorney for Judgment Creditor

[2] Use of Form

This form of instructions is for use in levying on personal property in the hands of the judgment debtor. Instructions must be submitted to the levying officer along with the writ of execution, sale, or possession [*see Code Civ. Proc. §§ 699.530(a), 712.030(a)*]. This form includes an optional direction to the levying officer to levy on the property by placing a keeper in charge [*see Code Civ. Proc. § 687.030*]. The property that is customarily levied on in such a manner consists of the business assets in the hands of the judgment debtor, such as money and inventory located at the judgment debtor's place of business, and the judgment debtor's automobile.

[3] Contents of Instructions

The instructions must be made in writing and signed by the judgment creditor's attorney of record or by the judgment creditor if there is no attorney. The instructions must contain the information needed or requested by the officer to comply with the provisions of *Code Civ. Proc. §§ 680.010-724.260*, including but not limited to an adequate description of the property to be levied on, a statement whether or not the property is a dwelling, and if it is a dwelling, whether it is real or personal property [*Code Civ. Proc. § 687.010(a)*]. The judgment creditor must also include the correct name and address of the person to be served with any writ, order, notice, or other paper if such service is required. The judgment creditor must use reasonable diligence to ascertain the correct name and address [*Code Civ. Proc. § 684.130(a)*]. Except to the extent that the levying officer has actual knowledge that the information is incorrect, he or she may rely on any information contained in the written instructions [*Code Civ. Proc. §§ 684.130(b), 687.010(c)*].

[4] Cross References

For discussion and forms relating to levying on property under a writ of attachment, see Ch. 62, *Attachment*

For discussion and forms relating to wage garnishment, see Ch. 276, *Garnishment*

For discussion and forms relating to levy on a dwelling house, see Ch. 294, *Homesteads* .

[5] State Statutes

[6] Fees of Levying Officer

Fee for serving or executing any process or notice required by law or by the litigants to be served. *Gov. Code §§ 26720.9, 26721*

Fee for serving, executing, or processing any writ or order when levying officer is required to take immediate possession of property levied on. *Gov. Code § 26722*

Levy on fees for keeping and caring for property under execution. *Gov. Code § 26726*

Fee for preparing and posting initial notice of personal property sale under execution. *Gov. Code § 26728*

Fee for furnishing notice for publication. *Gov. Code § 26729*

Fee for conducting or postponing sale of personal property as required by law or litigant. *Gov. Code § 26730*

Fee for making levy on personal property already in possession of officer who is holding same under attachment in same action. *Gov. Code § 26734*

Fee for cancellation of service or execution of any process or notice prior to its completion. *Gov. Code §§ 26720.9, 26736*

[7] Instructions to Levying Officer

Written instructions to levying officer by judgment creditor. *Code Civ. Proc. § 687.010*

Delivery of instructions to levying officer. *Code Civ. Proc. § 699.530(a)*

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21-254 California Forms of Pleading and Practice--Annotated § 254.686

§ 254.686 Instructions to Levying Officer [Code Civ. Proc. § 687.010]--To Levy On Real Property

[1] FORM Instructions to Levying Officer [Code Civ. Proc. § 687.010]--To Levy On Real Property

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	INSTRUCTIONS TO LEVYING OFFICER
Defendant.	)	
	)	
	)	

To _____ [*name and title of levying officer*]:

You are hereby instructed by virtue of the accompanying writ of _____ [*specify, e.g.,* execution] in the above-entitled action to levy on [and sell] all the right, title, and interest of _____[*name*], the judgment debtor, in and to the following-described real property, located in _____ County, California, and recorded in the Recorder's Office of _____ County, California.

Legal Description of Property: _____ [*give legal description, i.e., metes and bounds description*]

Street Address of Property: _____

Name(s) and Address(es) of Record Owner(s) other than Judgment Debtor:

_____ [*name*]

[_____ (*name*)]

The property _____ [is *or* is not] a dwelling [*if dwelling add*, and is real property].
Dated: _____.

_____[*signature*]
Attorney for Judgment Creditor

[2] Use of Form

This form of instruction is for use in levying on and, if the judgment creditor desires, selling any interest that the judgment debtor holds in the described real property. Instructions must be submitted to the levying officer along with the writ of execution, sale, or possession [*see Code Civ. Proc. §§ 699.530(a), 712.030(a)*]. It should be remembered that a judgment debtor may claim a homestead exemption, and that the judgment creditor is required to comply with the hearing procedure set forth by *Code Civ. Proc. §§ 704.750-704.780* before a dwelling house may be sold at execution sale.

The instructions must be signed by the judgment creditor's attorney or, if the judgment creditor does not have an attorney of record, by the judgment creditor [*Code Civ. Proc. § 687.010(a)*].

[3] Fees

The fees which sheriffs' offices charge vary. Counsel should check with the sheriff's office to ascertain the fee which will be required if the instructions are to be mailed to the sheriff.

[4] Copies of Legal Description

The number of copies of the legal description of the property which sheriffs' offices require varies. Counsel should check with the sheriff's office to ascertain the required number prior to taking or to mailing the instructions to the sheriff's office.

[5] State Statutes

[6] Fees of Levying Officer

Fee for serving or executing writ of execution. *Gov. Code § 26725*

Fee for serving or posting any additionally required notices or orders on other parcels. *Gov. Code § 26725.1*

Fee for conducting or postponing sale of real property as required by law or litigants. *Gov. Code § 26730*

[7] Levy of Execution

Method of levy on real property. *Code Civ. Proc. § 700.015*

[8] Cross References

For a related form, *see § 254.685*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.687

§ 254.687 Duties of Third Person After Levy [Code Civ. Proc. § 701.010 et seq.]--Garnishee's Memorandum [Code Civ. Proc. § 701.030]--Judicial Council Form AT-167/EJ-152

[1] FORM Duties of Third Person After Levy [Code Civ. Proc. § 701.010 et seq.]--Garnishee's Memorandum [Code Civ. Proc. § 701.030]--Judicial Council Form AT-167/EJ-152

Click here to view image.

[2] Use of Form

This form of memorandum of garnishee is an illustrative reproduction of Judicial Council Form AT-167/EJ-152, approved by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.30 et seq.*].

This form of memorandum is for use by a third person who has custody or possession of levied-on property of the judgment debtor. It must be mailed or delivered to the levying officer within 10 days after the request is made for the memorandum [*Code Civ. Proc. § 701.030(a)*].

The form is not for use in connection with wage garnishment [*see Code Civ. Proc. § 706.120*; for discussion and forms relating to wage garnishment, see Ch. 276, *Garnishment*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] When Memorandum Not Required

When levy is made on a deposit account or on property in a safe deposit box, the financial institution with which the account or box is held is not required to submit a memorandum if the institution fully complies with the levy and, if a memorandum is required, it need provide information with respect only to property which is carried on the records available at the office or branch where the levy is made [*Code Civ. Proc. § 701.030(e)*].

A third person is not required to give a memorandum if he or she has both delivered all property sought to be levied on to the levying officer and has paid to the levying officer any amount due at the time of levy on any obligation to the judgment debtor that was levied on and if there is no additional amount that will later become payable on the obligation [*Code Civ. Proc. § 701.030(f)*].

[4] State Statutes

Form of memorandum. Code Civ. Proc. § 693.030

Garnishee's memorandum by third person having custody or possession of levied-on property. *Code Civ. Proc. § 701.030*

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21-254 California Forms of Pleading and Practice--Annotated § 254.688

§ 254.688 Proceedings to Levy on Personal Property Held in Private Place [Code Civ. Proc. § 699.030]--Notice of Motion [Code Civ. Proc. § 699.030(b)]

[1] FORM Proceedings to Levy on Personal Property Held in Private Place [Code Civ. Proc. § 699.030]--Notice of Motion [Code Civ. Proc. § 699.030(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER DIRECTING SEIZURE OF PROPERTY IN PRIVATE PLACE
vs.	)	[Telephone Appearance]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*specify judgment debtor, e.g.,* defendant] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____

[*identify party, e.g.*, plaintiff] _____ [*name*] will, and hereby does, move for an order directing the seizure of certain personal property being held in a private place by _____ [*name of judgment debtor*]. The motion will be made on the grounds that the property is subject to levy under the judgment entered in the above-entitled action and that voluntary delivery of the property by the defendant has been refused.

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*party's status and name*]

CAUTION:

A memorandum is required to be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This notice of motion is for use by a judgment creditor seeking an order directing the seizure of personal property being withheld from levy in a private place by the judgment debtor [*see Code Civ. Proc. § 699.030(b)*].

[3] Ex Parte Application or Noticed Motion

The judgment creditor may apply for the order ex parte unless the court or a court rule requires the application to be made on noticed motion. If the application is made ex parte, it must describe with particularity both the property sought to be levied on and the place where it is to be found, according to the best knowledge, information, and belief of the judgment creditor [*Code Civ. Proc. § 699.030(b)*]. When the noticed motion procedure is required, this information will be contained in the accompanying declaration [*see § 254.689*].

[4] State Statutes

Ex parte application or noticed motion for order directing seizure of property held in private place by judgment debtor. *Code Civ. Proc. § 699.030(b)*

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21-254 California Forms of Pleading and Practice--Annotated § 254.689

§ 254.689 Proceedings to Levy on Personal Property Held in Private Place [Code Civ. Proc. § 699.030]--Declaration

[1] FORM Proceedings to Levy on Personal Property Held in Private Place [Code Civ. Proc. § 699.030]--Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF MOTION FOR ORDER DIRECT-
_____ [*name*],	)	ING SEIZURE OF PROPERTY HELD IN PRIVATE
Defendant.	)	PLACE
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. The property sought to be levied on is being held by the judgment debtor at _____ [*address*] and is described as follows: _____ [*describe property with particularity, e.g.,* One 2006 red Ford Mustang convertible].

3. _____ [*Specify facts establishing probable cause to believe that the property is located in the place described, e.g.,* On _____ (*date*), _____ (*name of judgment creditor*) went to the judgment debtor's home at the above-mentioned address and personally witnessed the property described above being held in a garage on that property].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature*]
_____ [*typed name*]

[2] Use of Form

This form of declaration is for use by a judgment creditor in support of a motion for an order directing the seizure of personal property being withheld from levy in a private place by the judgment debtor [*see Code Civ. Proc. § 699.030(b)*].

[3] Probable Cause Required

The court may not issue the order directing seizure unless the judgment creditor establishes that there is probable cause to believe that the property sought to be levied on is located in the place described [*Code Civ. Proc. § 699.030(b)*].

[4] Cross References

See *§ 254.688*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.690

§ 254.690 Proceedings to Levy on Personal Property Held in Private Place [Code Civ. Proc. § 699.030]--Order

[1] FORM Proceedings to Levy on Personal Property Held in Private Place [Code Civ. Proc. § 699.030]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER GRANTING MOTION TO SEIZE PROP-
Defendant.	)	ERTY HELD IN PRIVATE PLACE
	)	
	)	

_____

The motion of _____ [*specify judgment creditor, e.g.,* plaintiff] for an order directing the seizure of personal property being held in a private place by the judgment debtor came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is granted and the the levying officer is hereby directed to enter and seize custody of the following property, to wit: _____ [*description of property*] being held at _____ [*address*].
Dated: _____.

_____[*signature*]

Judge of the _____ Court

[2] Use of Form

This form of order is for use in directing the seizure of per sonal property being withheld from levy in a private place by the judgment debtor [*see Code Civ. Proc. § 699.030(b)*].

[3] Cross References

For related forms,see *§§ 254.688* and *254.689*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.691

§ 254.691 Proceedings to Obtain Property or Documentary Evidence of Title or Both [Code Civ. Proc. § 699.040]--Notice of Motion

[1] FORM Proceedings to Obtain Property or Documentary Evidence of Title or Both [Code Civ. Proc. § 699.040]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER TO OBTAIN POSSESSION OF _____ [PROPERTY *and/or* DOCUMENTARY EVIDENCE OF TITLE]
vs.	)	
_____ [*name*],	)	
Defendant.	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*specify judgment debtor, e.g.,* defendant] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____

of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify judgment creditor, e.g.,* plaintiff] _____ [*name*] will, and hereby does, move for an order directing the transfer to the levying officer of _____ [the property *and/or* documentary evidence of title to the _____ (property *or* debt)] sought to be levied on. The motion will be made on the grounds that a writ of execution has been issued in the above-mentioned action and the property for which custody is sought is subject to levy under Section _____ [*specify*] of the Code of Civil Procedure, and that the order is necessary to obtain the property or title or both.

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*party's status and name*]

CAUTION:
A memorandum is required to be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This notice of motion is for use by a judgment creditor to seek an order directing the judgment debtor to transfer to the levying officer either or both of (1) possession of property or (2) documentary evidence of title to property of or a debt owed to the judgment debtor that is sought to be levied on. The application for the order must be made by noticed motion if required by the court or a court rule; otherwise, it may be made ex parte [*see Code Civ. Proc. § 699.040(a)*].

The order will be issued on a showing of need [*Code Civ. Proc. § 699.040(b)*].

[3] State Statutes

Proceedings to direct turnover of personal property or documentary evidence of title or debt owed to judgment debtor. *Code Civ. Proc. § 699.040*

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21-254 California Forms of Pleading and Practice--Annotated § 254.692

§ 254.692 Proceedings to Obtain Property or Documentary Evidence of Title or Both [Code Civ. Proc. § 699.040]--Declaration

[1] FORM Proceedings to Obtain Property or Documentary Evidence of Title or Both [Code Civ. Proc. § 699.040]--Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF MOTION TO OBTAIN POSSES-
_____ [*name*],	)	SION OF _____ [PROPERTY *and/ or* DOCUMENTARY EVIDENCE OF TITLE]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. On _____ [*date*], a writ of execution issued in the above-entitled action. _____ [*Set forth facts showing need for the order, e.g.,* On _____ [*date*], the levying officer attempted to levy on property of the judgment debtor, to wit: _____ (*describe property*). The judgment debtor has refused to transfer possession of that property to the levying officer, and stated that he/she would never voluntarily surrender it].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature*]
_____ [*typed name*]

[2] Use of Form

This form of declaration is for use in supporting a motion for an order directing the judgment debtor to transfer possession of property or documentary evidence of title to property or a debt [*see Code Civ. Proc. § 699.040*].

[3] Cross References

For a related form,see *§ 254.691*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.693

§ 254.693 Proceedings to Obtain Property or Documentary Evidence of Title or Both [Code Civ. Proc. § 699.040]--Order

[1] FORM Proceedings to Obtain Property or Documentary Evidence of Title or Both [Code Civ. Proc. § 699.040]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER GRANTING MOTION TO DIRECT
Defendant.	)	TRANSFER OF PROPERTY OR DOCUMENTARY
	)	EVIDENCE OF TITLE OR BOTH
	)	

The motion of _____ [*specify judgment creditor, e.g.,* plaintiff] for an order directing the transfer to the levying officer of _____ [the property *and/or* documentary evidence of title to the _____ (property *or* debt)] sought to be levied on came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is granted and _____ [*name of judgment debtor*] is directed to transfer to the levying officer possession of _____ [the property *and/or* documentary evidence of title to the _____ (property *or* debt owed)] which is described in the writ of execution in

the above-entitled action.

NOTICE:

Failure to comply with this order may subject you to arrest and punishment for contempt of court under *Section 699.040(c) of the Code of Civil Procedure.*

Dated: _____.

_____[*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use in directing the judgment debtor to transfer to the levying officer either or both of (1) possession of property or (2) documentary evidence of title to property or a debt sought to be levied on [*see Code Civ. Proc. § 699.040(a), (b)*; *Palacio Del Mar Homeowners Assn., Inc. v. McMahon (2009) 174 Cal. App. 4th 1386, 1390-1391, 95 Cal. Rptr. 3d 445* (property may be ordered turned over to levying officer or receiver, but not to judgment creditor directly)].

The order may direct the judgment debtor to transfer to the levying officer the following [*see Code Civ. Proc. § 699.040(a)*]:

(1) Possession of the property sought to be levied on if the prescribed method of levy is by taking the property into custody.

(2) Possession of any documentary evidence of title to property or a debt owed to the judgment debtor that is sought to be levied on. An order pursuant to "this paragraph" (it is unclear whether this refers to *Code Civ. Proc. § 699.040(a)* generally, or only to *Code Civ. Proc. § 699.040(a)(2)*) may be served when the property is levied on or thereafter.

[3] Service of Order

The order must be personally served on the judgment debtor and must contain a notice that failure to comply will subject the judgment debtor to arrest and punishment for contempt of court [*Code Civ. Proc. § 699.040(c)*].

[4] State Statutes

Turnover order in aid of levy as issued on showing of need. *Code Civ. Proc. § 699.040(b)*

Service of order on judgment debtor. *Code Civ. Proc. § 699.040(c)*

[5] Cross References

For a related form,see *§ 254.687*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.694

§ 254.694 Proceedings to Remove Occupants From Personal Property Used as Dwelling [Code Civ. Proc. § 700.080(c)]--Notice of Motion

[1] FORM Proceedings to Remove Occupants From Personal Property Used as Dwelling [Code Civ. Proc. § 700.080(c)]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER DIRECTING REMOVAL OF OCCUPANTS
vs.	)	FROM PERSONAL PROPERTY
_____ [*name*],	)	[Telephone Appearance]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* judgment debtor] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____

[*identify party, e.g.*, judgment creditor] _____ [*name*] will, and hereby does, move for an order directing the removal of persons occupying the personal property levied on under the writ of execution in the above-entitled action. The motion will be made on the grounds that the property which is being occupied has been levied on under the above-mentioned writ of execution.

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*party's status and name*]

CAUTION:
A memorandum is required to be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* **.**

[2] Use of Form

This notice of motion is for use by a judgment creditor to seek an order directing the levying officer to remove the occupants of personal property used as a dwelling [*see Code Civ. Proc. § 700.080(c)*].

[3] Service of Notice

The notice must be served on any legal owner of the property who was served pursuant to *Code Civ. Proc. § 700.090* (levy on vehicle, boat, mobilehome or commercial coach), on the occupant, and, if the judgment debtor is not the occupant, on the judgment debtor. Service may be made personally or by mail [*Code Civ. Proc. § 700.080(c)*].

[4] Hearing on Motion

At the hearing on the motion, the court will determine the occupant's right to possession and will make an order including whatever terms and conditions are appropriate under the circumstances of the case [*Code Civ. Proc. § 700.080(c)*].

[5] State Statutes

Levy on personal property used as a dwelling. *Code Civ. Proc. § 700.080(a)*

Removal of occupants from personal property after levy. *Code Civ. Proc. § 700.080(c)*

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21-254 California Forms of Pleading and Practice--Annotated § 254.695

§ 254.695 Proceedings to Remove Occupants From Personal Property Used as Dwelling [Code Civ. Proc. § 700.080(c)]--Declaration

[1] FORM Proceedings to Remove Occupants From Personal Property Used as Dwelling [Code Civ. Proc. § 700.080(c)]--Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF MOTION FOR ORDER DIRECT-
_____ [*name*],	)	ING REMOVAL OF OCCUPANTS FROM PER-
Defendant.	)	SONAL PROPERTY
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*Set forth facts supporting the motion, e.g.,* A copy of the writ of execution issued in the above-entitled action and personally served on the occupants of the dwelling located at _____ (*address*) on _____ (*date*). The occupants have refused to vacate the premises and surrender custody of the levied-on property to the levying officer].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature*]
_____ [*typed name*]

[2] Use of Form

This form of declaration is for use in supporting a motion for an order directing the levying officer to remove the occupants of personal property used as a dwelling [*see Code Civ. Proc. § 700.080(c)*].

[3] Cross References

For a related form,see *§ 254.694*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.696

§ 254.696 Proceedings to Levy on Property--Removal of Occupants From Personal Property Used as Dwelling [Code Civ. Proc. § 700.080(c)]--Order

[1] FORM Proceedings to Levy on Property--Removal of Occupants From Personal Property Used as Dwelling [Code Civ. Proc. § 700.080(c)]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER GRANTING MOTION TO REMOVE OC-
Defendant.	)	CUPANTS FROM PERSONAL PROPERTY
	)	
	)	

The motion of _____ [*identify judgment creditor, e.g.,* plaintiff] for an order directing the removal of persons occupying the personal property located at _____ [*address*] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is granted and the levying officer is directed to remove the occupants from the dwelling located at _____ [*address*].

IT IS ALSO ORDERED that _____ [*specify terms and conditions, if any, e.g.,* the removal may not

take place until _____ (*date*), and the occupants are entitled to remove any and all non-fixture appliances that they have purchased and installed within the previous one-year period].
Dated: _____.

_____[*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use in directing the removal of persons occupying levied-on personal property which is used as a dwelling [*see Code Civ. Proc. § 700.080(c)*].

[3] Cross References

For a related form,see *§ 254.694*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.697

§ 254.697 Proceedings for Sale of Collectible Property [Code Civ. Proc. §§ 701.510-701.830]--Notice of Intended Sale [Code Civ. Proc. § 701.520(b)]

[1] FORM Proceedings for Sale of Collectible Property [Code Civ. Proc. §§ 701.510-701.830]--Notice of Intended Sale [Code Civ. Proc. § 701.520(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF INTENDED SALE
Defendant.	)	
	)	
	)	

_____

To _____ [*specify judgment debtor, e.g.,* defendant] _____ [*name*] and to _____ his/her attorney of record:

NOTICE IS HEREBY GIVEN that the property described below will be sold at execution sale unless within 10 days after service of this notice of intended sale the judgment debtor applies to the court on noticed motion for an order that the property be collected rather than sold. The motion must be made within 10 days after service of this notice of intended sale.

The property which is to be sold consists of the following: _____ [*describe property*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*judgment creditor*]

[2] Use of Form

This notice of intended sale is for use to notify a judgment debtor that collectible property will be sold at an execution sale unless the judgment debtor moves for an order that the property be collected rather than sold [*see Code Civ. Proc. § 701.520(b), (c)*].

[3] Service and Filing of Notice

The notice of intended sale must be served on the judgment debtor, either personally or by mail, at the time of levy on the property or thereafter. A copy of the notice and proof of service must be filed with the court and with the levying officer [*Code Civ. Proc. § 701.520(b)*].

[4] Collectible Property

For a list of collectible property, see the discussion in *§ 254.80*.

[5] State Statutes

Collectible property. *Code Civ. Proc. § 701.520(a)*

Notice of intended sale of collectible property. *Code Civ. Proc. § 701.520(b)*

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21-254 California Forms of Pleading and Practice--Annotated § 254.698

§ 254.698 Proceedings for Sale of Collectible Property [Code Civ. Proc. §§ 701.510-701.830]--Notice of Motion for Collection of Property [Code Civ. Proc. § 701.520(c)]

[1] FORM Proceedings for Sale of Collectible Property [Code Civ. Proc. §§ 701.510-701.830]--Notice of Motion for Collection of Property [Code Civ. Proc. § 701.520(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER TO COLLECT PROPERTY
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify judgment creditor, e.g.,* plaintiff] _____ [*name*] and to _____ his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify judgment debtor, e.g.,* defendant] will, and hereby does, move for an order that the property described in the notice of intended sale filed in the above-entitled action be collected rather than sold. The motion will be made on the

grounds that the property is defined as collectible property under *Code Civ. Proc. § 701.520(a)* and thus may be collected rather than sold under a writ of execution.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, on the papers, records, and file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*name of moving party*]

CAUTION:
A memorandum is required to be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* **.**

[2] Use of Form

This notice of motion is for use by a judgment debtor in response to a judgment creditor's notice of intended sale of property that is collectible under *Code Civ. Proc. § 701.520(a)* (*see § 254.697*). The motion is made when the judgment debtor seeks to have the property collected rather than sold under the writ of execution [*see Code Civ. Proc. § 701.520(c)*].

[3] Time Period for Making, Serving, and Filing Notice of Motion

The motion must be made within 10 days after the notice of intended sale of the property is served on the judgment debtor [*see § 254.697*]. The judgment debtor must serve a copy of the notice of motion on the judgment creditor either personally or by mail, and file a copy with the levying officer, within the same 10 day period. If the copy is not filed with the levying officer within the applicable time period, the officer must proceed to sell the property. If the copy is filed on time, the officer will continue to collect the property until otherwise ordered by the court [*see Code Civ. Proc. § 701.520(c)*].

[4] State Statutes

Notice of motion for order to collect rather than sell property under writ of execution. *Code Civ. Proc. § 701.520(c)*

[5] Cross References

For a related form,see *§ 254.697*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.699

§ 254.699 Proceedings for Sale of Collectible Property [Code Civ. Proc. §§ 701.510-701.830]--Declaration in Support of Motion for Collection of Property [Code Civ. Proc. § 701.520(c)]

[1] FORM Proceedings for Sale of Collectible Property [Code Civ. Proc. §§ 701.510-701.830]--Declaration in Support of Motion for Collection of Property [Code Civ. Proc. § 701.520(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF MOTION FOR COLLECTION OF
_____ [*name*],	)	PROPERTY
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. The property that has been levied on under the writ of execution in the above-entitled action consists entirely of

_____ [*describe property, e.g.,* chattel paper], which is defined as collectible property under *Section 701.520(a) of the Code of Civil Procedure*, and as such may be collected rather than sold under the writ.

3. The property should continue to be collected rather than sold because _____ [*state reasons why collection would be more equitable than sale under circumstances of case*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature*]
_____ [*typed name*]

[2] Use of Form

This form of declaration is for use in supporting a motion by a judgment debtor that the property specified in the judgment creditor's notice of intended sale of collectible property be collected rather than sold [*see Code Civ. Proc. § 701.520(c)*]. The declaration should show why it would be equitable under the circumstances of the particular case that the property be collected rather than sold [*see Code Civ. Proc. § 701.520(d)*].

[3] Cross References

For a related form, *see § 254.698*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.700

§ 254.700 Proceedings for Sale of Collectible Property [Code Civ. Proc. §§ 701.510-701.830]--Order Granting or Denying Motion for Collection of Property [Code Civ. Proc. § 701.520(d)]

[1] FORM Proceedings for Sale of Collectible Property [Code Civ. Proc. §§ 701.510-701.830]--Order Granting or Denying Motion for Collection of Property [Code Civ. Proc. § 701.520(d)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER GRANTING MOTION TO COLLECT
Defendant.	)	PROPERTY
	)	
	)	

The motion of _____ [*specify judgment debtor, e.g.,* defendant] for an order directing the collection of property came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be _____ [granted *or* denied],

[*EITHER*]

IT IS ORDERED that the motion be, and it hereby is granted and the levying officer is directed to collect the property described below [on the condition that defendant assign said property to plaintiff pursuant to *Sections 708.510-708.560*

of the Code of Civil Procedure]. The property to be collected consists of the following, to wit: _____ [*describe property*].

[*OR*]

IT IS ORDERED that the motion be and it hereby is denied. [*Set forth any terms and conditions of sale, e.g.,* The sale shall be subject to a minimum bid of $_____.]
Dated: _____.

_____[*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use to direct the levying officer to collect personal property rather than to sell it after the judgment creditor has given notice of intended sale of collectible property [*see § 254.697*], and the judgment debtor has responded with a motion for the collection of the property [*see § 254.698*].

The second alternative paragraph reflects the fact that the court may condition the collection order on an assignment of the property by the judgment debtor to the judgment creditor pursuant to *Code Civ. Proc. §§ 708.510-708.560* (assignment order) [*see Code Civ. Proc. § 701.520(d)*].

[3] State Statutes

Notice of intended sale of collectible property. *Code Civ. Proc. § 701.520(b)*

Order for collection of property. *Code Civ. Proc. § 701.520(d)*

[4] Cross References

For a related form, *see § 254.698*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.701

§ 254.701 Request for Notice of Sale of Property Under Writ [Code Civ. Proc. § 701.550]

[1] FORM Request for Notice of Sale of Property Under Writ [Code Civ. Proc. § 701.550]

To _____ [the Clerk of the _____ Court, _____ County or _____ (*name and title of levying officer*)]:

[*EITHER, for request to clerk prior to issuance of writ*]

IT IS HEREBY REQUESTED that the undersigned be given notice by mail of any sale under a writ of _____ [execution *or* sale] issued under the judgment rendered in the _____ Court of _____ County, California, in the case entitled _____[*name*], plaintiff vs. _____[*name*], defendant, Civil Action No. _____, on _____ [*date*], which was entered in Judgment Book _____ at page _____ on _____ [*date*].

IT IS FURTHER REQUESTED that, on any writ issued in the above-entitled action, you note thereon the fact that notice by mail has been requested by the undersigned.

[*OR, for request to levying officer after levy on property*]

IT IS HEREBY REQUESTED that the undersigned be given notice by mail of the sale of the following property levied on under a writ of _____ [execution *or* sale] issued under the judgment rendered in the _____ Court of _____ County, California, in the case entitled _____ [*name*], plaintiff vs. _____ [*name*], defendant, Civil Action No. _____, to wit: _____ [*describe particular property for which notice of sale is requested*]. The judgment was entered on _____ [*date*], in Judgment Book _____ at

page _____ on _____ [*date*].

_____ [*Set forth other information as may be specified by the levying officer*].

[*CONTINUE*]

The address to which the above-requested notice of such sale should be mailed is _____ [address], _____[*city*], California.

_____[*signature*]
_____ [*typed name*]

[2] Use of Form

This form is for use by any person requesting notice of a sale of property under a writ of execution or a writ of sale issued in a specified action. If the request is made prior to issuance of a writ, it must be filed with the clerk of the court in which the judgment is entered. If the request is for notice of sale of particular property that has already been levied on, it must be filed with the levying officer who will conduct the sale [*see Code Civ. Proc. § 701.550*].

[3] Contents

The person requesting notice must specify the title of the court, the case and number of the action in which the judgment was rendered, the date of entry of the judgment, and the address to which he or she desires the notice to be mailed [*Code Civ. Proc. § 701.550(b)*].

[4] State Statutes

Request for notice of sale of property. *Code Civ. Proc. § 701.550*

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21-254 California Forms of Pleading and Practice--Annotated § 254.702

§ 254.702 Notice of Sale of Personal [Code Civ. Proc. §§ 701.530] or Real [Code Civ. Proc. § 701.540] Property

[1] FORM Notice of Sale of Personal [Code Civ. Proc. §§ 701.530] or Real [Code Civ. Proc. § 701.540] Property

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF SALE
Defendant.	)	
	)	
	)	

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to _____ his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____ [*time*], at _____ [*location of sale*], the undersigned will sell to the highest bidder at public auction the following-described property: _____ [*describe property; if real property, include description of interest to be sold, legal description of real property, and its street address or other common designation, if any*].

[*If real property being sold has no street address or other common designation, include EITHER*]

Directions to the location of the real property being sold may be obtained from the undersigned on oral or written request.

[*OR*]

The real property being sold is located _____ [*specify, e.g.,* on the east side of State Highway 1, 12 miles northeast of the crossroads of State Highway 1 and Paradise City Lane, Paradise City, California].

Prospective bidders should refer to Sections *701.510 to 701.680*, inclusive, of the Code of Civil Procedure, for provisions governing the terms, conditions, and effect of the sale and the liability of defaulting bidders.
Dated: _____.

_____, Sheriff
By _____, Deputy Sheriff

[2] Use of Form

This form of notice is for use in giving notice of the sale of either real or personal property under a writ of execution or a writ of sale [*see* Code *Civ. Proc. §§ 701.530, 701.540, 716.020(b)*]. The notice must include a notice to alert prospective buyers to *Code Civ. Proc. §§ 701.510-701.680,* governing sales [*Code Civ. Proc. § 701.547*].

[3] Service and Posting of Notice

[a] Personal Property

In the case of personal property, the notice of sale must be posted and served on the judgment debtor by the levying officer not less than 10 days before the sale. Service may be made personally or by mail [*Code Civ. Proc. § 701.530(b)*]. Posting must be made in three public places in either the city in which the property is to be sold, or, if it is not being sold in a city, in the county in which it is to be sold [*Code Civ. Proc. § 701.530(c)*].

[b] Real Property

In the case of real property, the notice must be posted, mailed to and served on the judgment debtor by the levying officer not less than 20 days before the sale [*Code Civ. Proc. § 701.540(b)*]. Service may be made personally or by mail [*Code Civ. Proc. § 701.540(c)*]. The levying officer must also post the notice in the following places: (1) one public place in either the city in which the interest in the real property is to be sold or, if it is not being sold in a city, in the county in which it is to be sold; and (2) a conspicuous place on the real property [*Code Civ. Proc. § 701.540(d)*]. At the time of posting on the real property pursuant to *Code Civ. Proc. § 701.540(d)(2),* the notice must be served or service must be attempted on one occupant of the real property, or, in the occupant's absence, with a person of suitable age and discretion found on the property when service is attempted who is either an employee or agent of the occupant or a member of the occupant's household. If service on an occupant is not possible when attempted, the levying officer is not required to make further attempts to serve an occupant [*Code Civ. Proc. § 701.540(e)*]. If the property described in the notice consists of more than one distinct lot, parcel, or government subdivision, and any of them lie with relation to the others so as to form one or more continuous, unbroken tracts, only one service or posting is required as to each tract [*Code Civ. Proc. § 701.540(f)*].

[i] Publication of Notice

Notice of the sale of real property must be published pursuant to *Gov. Code § 6063,* with the first publication at least 20 days prior to the time of sale, in a newspaper of general circulation published either in the city in which the real property or any part thereof is situated, or if no part of it is situated in a city, in the judicial district in which the property or a part thereof is located. If no newspaper of general circulation is published in the city or judicial district, the notice

must be published in a newspaper of general circulation in the county in which the property or a part thereof is situated [*Code Civ. Proc. § 701.540(g)*].

[ii] Notice to Persons Having Liens on Property

No earlier than 30 days after the date of levy, the judgment creditor must determine the names of all persons having liens on the property on the date of levy that are of record in the office of the county recorder and must instruct the levying officer to mail notice of sale to each such person at the address used by the county recorder for the return of the instrument creating the person's lien after recording. The levying officer must mail notice to each such person not less than 20 days before the date of sale [*Code Civ. Proc. § 701.540(h)*].

[iii] Waiting Period Before Notice is Given

Notice of sale of an interest in real property, other than a leasehold estate with an unexpired term of less than two years at the time of levy, may not be given until 120 days have expired after the date notice of levy on the interest in the property was served on the judgment debtor [*Code Civ. Proc. § 701.545*]. This waiting period does not apply to foreclosure sales when the property is sold subject to the right of redemption [*see Code Civ. Proc. § 729.010*]. For a discussion of redemption, see *§ 254.150* et seq.

[4] Cross References

For discussion and forms relating to the sale of a dwelling, see Ch. 294, *Homesteads*

[5] State Statutes

Notice of sale of personal property. *Code Civ. Proc. § 701.530*

Notice of sale of real property. *Code Civ. Proc. § 701.540*

Waiting period before giving notice of sale of real property. *Code Civ. Proc. § 701.545*

Notice to prospective bidders. *Code Civ. Proc. § 701.547*

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21-254 California Forms of Pleading and Practice--Annotated § 254.703

§ 254.703 Certificate [Code Civ. Proc. §§ 701.650, 729.040] or Deed [Code Civ. Proc. § 701.660] of Sale [Code Civ. Proc. § 701.670]

[1] FORM Certificate [Code Civ. Proc. §§ 701.650, 729.040] or Deed [Code Civ. Proc. § 701.660] of Sale [Code Civ. Proc. § 701.670]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	_____ [CERTIFICATE *or* DEED]
_____ [*name*],	)	OF SALE
Defendant.	)	[Code Civ. Proc. §§ _____
	)	(701.650 *or* 701.660), 701.670]
	)	

_____

I, _____ [*name*], declare:

I am the [Deputy] Sheriff of _____ County.

Pursuant to judgment in the above-entitled action entered on _____ [*date*], in _____ [*where entered, e.g.*, Judgment Book] Volume No. _____, Page No. _____, [and renewed on _____(*date*), in Judgment Book Volume No. _____, Page No. _____], I sold all of the interest of _____ [*name of judgment debtor*] in the following-described property to _____ [*name of purchaser*] on _____ [*date*].

The property is situated in _____ County and is described as follows: _____ [

particular description].

[*If real property was sold subject to right of redemption under Code Civ. Proc. § 729.010, include*]

The _____ [price paid for each _____ (unit *or* parcel) of real property that is subject to redemption *or* entire price paid] was $_____.

The property is subject to redemption. The redemption period ends on _____ [*date*].

[*CONTINUE*]

I certify that the foregoing is true and correct and that this certificate was executed on _____ [*date*], at _____ [*city*], California.

[2] Use of Form

This form of certificate or deed is for use by a levying officer who has sold property at an execution sale [*see Code Civ. Proc. §§ 701.650, 701.660, 729.040*].

[3] Certificate of Sale of Personal Property

When the purchaser of personal property pays the amount due, the levying officer must deliver the property to the purchaser if the property is capable of manual delivery and, if the purchaser requests, must execute and deliver the certificate of sale to the purchaser. If the property is not tangible personal property or if it is otherwise not capable of manual delivery, the levying officer must execute and deliver a certificate of sale to the purchaser [*Code Civ. Proc. § 701.650(a)*]. If property or a certificate of sale of personal property is delivered pursuant to *Code Civ. Proc. § 701.650(a)*, the levying officer must sign or endorse any document or instrument in his or her possession relating to title or the right to possession of the property and deliver it to the purchaser [*Code Civ. Proc. § 701.650(b)*].

[4] Deed or Certificate of Sale of Real Property

When the purchaser of an interest in real property pays the amount due, the levying officer conducting the sale must execute and deliver a deed of sale to the purchaser and record a duplicate of the deed of sale in the office of the county recorder unless the interest in the property is sold subject to redemption under *Code Civ. Proc. § 729.010*, in which case the levying officer must execute and deliver a certificate rather than a deed of sale [*Code Civ. Proc. §§ 701.660, 729.040(a)*]. In addition to the information required by *Code Civ. Proc. § 701.670* [*see Code Civ. Proc. § 729.040(b)*], the certificate must contain a statement of the price paid for each distinct lot or parcel of real property sold subject to the right of redemption and the total price paid, and a statement that the property is subject to redemption, indicating the applicable redemption period [*see Code Civ. Proc. § 729.040(c)*].

[5] State Statutes

Deed of sale of real property. *Code Civ. Proc. § 701.660*

Certificate of sale of personal property. *Code Civ. Proc. § 701.660*

Contents of certificate or deed. *Code Civ. Proc. § 701.670*

Certificate of sale of real property subject to redemption. *Code Civ. Proc. § 729.040*

Certificate of sheriff generally. *Code Civ. Proc. §§ 2015.3, 2015.5*

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21-254 California Forms of Pleading and Practice--Annotated § 254.704

§ 254.704 Proceedings to Resolve Conflicting Claims to Proceeds of Sale [Code Civ. Proc. § 701.830]--Notice of Motion

[1] FORM Proceedings to Resolve Conflicting Claims to Proceeds of Sale [Code Civ. Proc. § 701.830]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER FOR DISTRIBUTION OF PROCEEDS
vs.	)	[Telephone Appearance]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
_____		

To _____ [*identify party, e.g.,* defendant] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* plaintiff] _____ [*name*] will, and hereby does, move for an order for the

distribution of the proceeds of a sale on a writ of execution that have been deposited with this court. The motion will be made on the grounds that conflicting claims exist as to the rights to such proceeds.

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s)*] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*party's status and name*]

CAUTION:
A memorandum is required to be served and filed with the foregoing notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This notice of motion is for use by any interested person to obtain an order distributing the proceeds of a sale or collection when the levying officer has deposited the proceeds with the court because there are conflicting claims to proceeds [*see Code Civ. Proc. § 701.830(a)*].

[3] Service of Notice

The court will determine by order the persons who must be given notice of the motion and the procedure for giving such notice [*see Code Civ. Proc. § 701.830(a)*].

[4] Response to Motion

Any interested person may request time for filing a response to the motion, for discovery proceedings in connection with the motion, or for other preparation for the hearing, and the court must grant a continuance for a reasonable time for any of these purposes [*Code Civ. Proc. § 701.830(a)*].

[5] State Statutes

Determination of conflicting claims to proceeds of sale or collection. *Code Civ. Proc. § 701.830*

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21-254 California Forms of Pleading and Practice--Annotated § 254.705

§ 254.705 Proceedings to Resolve Conflicting Claims to Proceeds of Sale [Code Civ. Proc. § 701.830]--Declaration [Code Civ. Proc. § 2015.5] in Support of Motion

[1] FORM Proceedings to Resolve Conflicting Claims to Proceeds of Sale [Code Civ. Proc. § 701.830]--Declaration [Code Civ. Proc. § 2015.5] in Support of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF MOTION FOR ORDER FOR DIS-
_____ [*name*],	)	TRIBUTION OF PROCEEDS
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*State facts establishing claim to proceeds e.g.,* On _____ (*date*),

_____ (*name moving party*) sold _____ (*describe property*) to _____ (*name of judgment debtor*), and on _____ (*date*), _____ (*name moving party*) perfected a purchase money security interest in that property. The aforesaid property was sold on _____ (*date*), under the writ of execution issued in the above-entitled action on _____ (*date*). Under *Section 9306(2) of the Commercial Code*, the purchase money security interest continues in the proceeds that are now deposited with this court].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature*]

[2] Use of Form

This form of declaration is for use in supporting a motion for an order for the distribution of the proceeds of an execution sale to which there are conflicting claims [*see Code Civ. Proc. § 701.830*].

[3] Cross References

For a related form, see *§ 254.707*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.706

§ 254.706 Proceedings to Resolve Conflicting Claims to Proceeds of Sale [Code Civ. Proc. § 701.830]--Order

[1] FORM Proceedings to Resolve Conflicting Claims to Proceeds of Sale [Code Civ. Proc. § 701.830]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER FOR DISTRIBUTION OF PROCEEDS
Defendant.	)	
	)	
	)	

The motion of _____ [*identify party, e.g.*, defendant] for an order for the distribution of proceeds of an execution sale came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*]; _____ [*list appearances of any other interested parties*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and the proceeds that are deposited with the above-entitled court are to be distributed as follows: _____ [*specify manner of distribution, e.g.*, $_____ to _____ (*name of judgment creditor*); $_____ to (*name of secured creditor*); and $_____ to _____ (*name of judgment debtor*)].
Dated: _____.

_____[*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use in specifying the distribution of proceeds of an execution sale that were deposited in the court by the levying officer because of conflicting claims to the proceeds [*see Code Civ. Proc. § 701.830*].

[3] When Court May Not Determine Distribution

The court must abate the hearing on the distribution until the issues presented by the motion can be determined in a civil action in any of the following three situations [*Code Civ. Proc. § 701.830(c)*]:

(1) The court is not the proper court under any other provision of law for the trial of a civil action with respect to the subject matter of the motion and any interested person at or prior to the hearing objects to the determination.

(2) A civil action is pending with respect to the subject matter of the motion and jurisdiction has been obtained in the court in which the civil action is pending.

(3) The court determines that the matter should be determined in a civil action.

[4] State Statutes

Order distributing proceeds to which there are conflicting claims. *Code Civ. Proc. § 701.830(b)*

Resolution of conflicting claims in civil action. *Code Civ. Proc. § 701.830(c)*

[5] Cross References

For a related form,see *§ 254.704*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.707

§ 254.707 Proceedings to Recall and Quash Execution and Vacate Levy--Notice of Motion

[1] FORM Proceedings to Recall and Quash Execution and Vacate Levy--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER TO RECALL AND QUASH EXECUTION
vs.	)	AND VACATE LEVY
_____ [*name*],	)	[Telephone Appearance]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*name*], Sheriff of the County of _____, California, to Plaintiff, _____ [*name*], and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.*, defendant] _____ [*name*] will, and hereby does, move for an order recalling and quashing the writ of execution and vacating the lavy of execution made on the following property

_____ [*describe property;*]. The motion will be made on the grounds that _____ [*specify legal grounds, e.g.,* there is no unsatisfied judgment on which a writ of execution could issue in the above-entitled action *or* the parties to the action have entered into a contract which satisfies the judgment heretofore existing in the action].

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*party's status and name*]

CAUTION:
A memorandum is required to be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This notice of motion is for use by a judgment debtor to give the judgment creditor notice that an order recalling and quashing a writ of execution and vacating a levy on that execution is being sought.

[3] California Points and Authorities

For a form of memorandum in support of a motion for an order recalling and quashing a writ of execution, see California Points And Authorities , Ch. 131, *Judgments* (Matthew Bender)

For a form of contention supporting a writ of mandate to compel a lower court to recall and quash a writ of execution, see California Points And Authorities , Ch. 150, *Mandate and Prohibition* (Matthew Bender)

[4] Decisions

[5] Burden of Proof on Debtor

Once writ of execution issues, judgment debtor must present his or her reasons why writ should be quashed. *Slevats v. Feustal (1963) 213 Cal. App. 2d 113, 119, 28 Cal. Rptr. 517*

Burden is on judgment debtor to establish facts justifying order quashing writ. *Lohman v. Lohman (1946) 29 Cal. 2d 144, 150, 173 P.2d 657*

[6] Costs to Prevailing Party

Motion to quash writ of execution is special proceeding, and thus costs are allowed to prevailing party. *Van*

Denburgh v. Goodfellow (1941) 19 Cal. 2d 217, 225, 120 P.2d 20

[7] Persons Who May Make Motion

General rule is that no one but parties to action who are liable to be injured can move for recall of writ unless judgment or writ is void on its face, in which case subsequent purchasers, lienholders, and execution and judgment creditors may so move. *Vest v. Superior Court (1956) 140 Cal. App. 2d 91, 93, 294 P.2d 988*

Levy as not capable of being quashed on ground that judgment debtor has no interest in property levied on. *Vest v. Superior Court (1956) 140 Cal. App. 2d 91, 93, 294 P.2d 988*

[8] Quashing Levy

Party as permitted to levy on property even where there are competing liens and priority of liens has yet to be resolved, in such cases levy is not quashed as condition to resolving priorities. *Peck v. Hagen (1989) 215 Cal. App. 3d 602, 606-607, 263 Cal. Rptr. 198*

Quashing levy of execution as proper where writ of execution void. *Wellborn v. Wellborn (1942) 55 Cal. App. 2d 516, 524-525, 131 P.2d 48*

Plaintiff as entitled to attack proceedings by sheriff at any time where writ of execution void. *Wellborn v. Wellborn (1942) 55 Cal. App. 2d 516, 525, 131 P.2d 48*

All rights and proceedings based on writ of execution as falling with it when it is quashed. *Moreno v. Mihelis (1962) 207 Cal. App. 2d 449, 451, 24 Cal. Rptr. 582*

[9] Recalling and Quashing Writ

Writ of execution as capable of being recalled if it was improperly or inadvertently made or authority therefor revoked. *Evans v. Superior Court (1942) 20 Cal. 2d 186, 188, 124 P.2d 820*

Writ as quashed where court determines that child support payments have been paid. *Meyer v. Meyer (1952) 115 Cal. App. 2d 48, 49, 251 P.2d 335*

Writ as quashed where judgment fully satisfied. *Moreno v. Mihelis (1962) 207 Cal. App. 2d 449, 451, 24 Cal. Rptr. 582*

Court of equity as capable of quashing writ of execution and canceling judgment upon persuasive proof of an agreement which satisfied judgment. *Colby v. Colby (1954) 127 Cal. App. 2d 602, 605, 274 P.2d 417*

Writ as quashed where showing made that sum for which execution was issued was not proper amount due and was falsely represented to be due by plaintiff. *Bryant v. Bryant (1958) 161 Cal. App. 2d 579, 581, 326 P.2d 898*

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21-254 California Forms of Pleading and Practice--Annotated § 254.708

§ 254.708 Proceedings to Recall and Quash Execution and Vacate Levy--Declaration

[1] FORM Proceedings to Recall and Quash Execution and Vacate Levy--Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

	)	
	)	NO. _____
_____ [*name*],	)	DECLARATION OF _____ [*name*]
Plaintiff,	)	IN SUPPORT OF MOTION TO RECALL AND
vs.	)	QUASH EXECUTION AND VACATE LEVY
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. Judgment was entered in favor of _____[*name of judgment creditor*] and against _____[*name of judgment debtor*] on _____[*date*], and is recorded in Judgment Book _____ at page _____ in the clerk's office of _____ County,

California. The judgment _____ [*set forth material portions of judgment, e.g.,* ordered declarant to pay to plaintiff the sum of $_____ each week as and for support of the minor child of the parties].

[*Set forth facts showing satisfaction of the judgment, e.g.,* Plaintiff and declarant entered into an agreement on _____ (*date*), whereby plaintiff agreed to accept the sum of $_____ in lieu of the weekly support payments specified in the judgment. It was further agreed that declarant would be relieved from the obligation of continued weekly payments. Payment of $_____was made by declarant to plaintiff by check dated _____ (*date*), which was cashed by plaintiff on _____ (*date*).]

On _____ [*date*], plaintiff caused a writ of execution to be issued by the clerk of this court. Declarant's property as described in the motion was levied on by the Sheriff of _____ County, California, on _____ [*date*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature*]

[2] Use of Form

This form of declaration is for use in supporting a motion by a judgment debtor for an order recalling and quashing a writ of execution and vacating a levy.

[3] Cross References

For a related form, see *§ 254.707*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.709

§ 254.709 Proceedings to Recall and Quash Execution and Vacate Levy--Order

[1] FORM Proceedings to Recall and Quash Execution and Vacate Levy--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER GRANTING MOTION TO RECALL AND
Defendant.	)	QUASH WRIT OF EXECUTION AND VACATE
	)	LEVY
	)	

The motion of _____ [*identify party, e.g.*, defendant] for an order recalling and quashing the writ of execution entered in the above-entitled action and vacating the levy on defendant's property came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is granted and that the writ of execution issued herein on _____ [*date*], be, and it hereby is, recalled, quashed, and set aside [and the property levied on pursuant to that writ be restored to defendant and the levy vacated].
Dated: _____.

_____[*signature*]

Judge of the _____ Court

[2] Use of Form

This form of order is for use in ordering that a writ of execution be recalled and quashed and that the levy on property based on it be vacated.

[3] Cross References

For a related form,see *§ 254.707*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.710

§ 254.710 Proceedings to Claim Exemption After Levy [Code Civ. Proc. §§ 703.510-703.610]--Claim of Exemption [Code Civ. Proc. § 703.520]--With Financial Statement [Code Civ. Proc. § 703.530] Attached--Judicial Council Forms EJ-160, EJ-165

[1] FORM Proceedings to Claim Exemption After Levy [Code Civ. Proc. §§ 703.510-703.610]--Claim of Exemption [Code Civ. Proc. § 703.520]--With Financial Statement [Code Civ. Proc. § 703.530] Attached--Judicial Council Forms EJ-160, EJ-165

Click here to view image.

Click here to view image.

CAUTION:
These forms must be executed under oath (or declaration under *Code Civ. Proc. § 2015.5*) [*Code Civ. Proc. § 703.520(b)*]. The declarations in these forms satisfy *Code Civ. Proc. § 2015.5*.

[2] Use of Form

This form of claim of exemption is an illustrative reproduction of Judicial Council Form EJ-160, approved by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.30 et seq.*]. The accompanying form of financial statement is an illustrative reproduction of Judicial Council Form EJ-165 (also numbered WG-007), adopted by the Judicial Council for mandatory use [*see Cal. Rules of Ct., Rule 1.30 et seq.*].

Exemptions from execution are found in *Code Civ. Proc. §§ 704.010-704.995*. For specific types of exempt property,see *§ 254.684*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge..

[3] Contents of Claim

The claim sets out the claimant's name, and the address to which papers are to be sent to the claimant or his or her attorney (Paragraphs 1, 2) [*Code Civ. Proc. § 703.520(b)(1)*]. If the claimant is not the judgment debtor, the claim must include the judgment debtor's last known address (Paragraph 3) [*Code Civ. Proc. § 703.520(b)(2)*]. The property must be described, and the code section and facts supporting the exemption must be given (Paragraphs 4-6) [*Code Civ. Proc. § 703.520(b)(3), (5), (6)*]. If the claim of exemption is based on a provision that exempts property to the extent necessary for the support of the judgment debtor and his or her spouse and dependents, Paragraph 7 is to be checked and a financial statement must be attached to the claim [*Code Civ. Proc. §§ 703.520(b)(4), 703.530(a)*]. If the financial statement is included, it must be signed by both the judgment debtor and his or her spouse, unless they are living separate and apart [*Code Civ. Proc. § 703.530(c)*].

If an exemption is claimed pursuant to *Code Civ. Proc. § 704.010* (motor vehicles) or 704.060 (tools and money used in exercise of trade), the claim must describe all other property of the same type, including exempt proceeds of property of the same type, owned by the judgment debtor alone or in combination with others on the date of levy and identify the property, whether or not levied on, to which the exemption is to be applied (Paragraphs 4 and 8). If an exemption is claimed pursuant to *Code Civ. Proc. § 704.100(b)* (aggregate loan value of unmatured life insurance policies), the declaration must state the nature and amount of all other property of the same type owned by the judgment debtor or the spouse of the judgment debtor alone or in combination with others on the date of levy (Paragraph 9) [*Code Civ. Proc. § 703.520(b)(3)*].

[4] Service of Claim and Notice of Claim

Promptly after the filing of the claim of exemption, the levying officer must serve a copy of the claim and a notice of claim of exemption [*see § 254.711*] on the judgment creditor, either personally or by mail [*Code Civ. Proc. § 703.540*].

[5] Cross References

See generally Ch. 15, *Affidavits, Certificates, and Declarations*

For discussion and forms related to the homestead exemption, see Ch. 294, *Homesteads*

[6] State Statutes

Claim of exemption. *Code Civ. Proc. § 703.520*

Exempt property. *Code Civ. Proc. §§ 704.010-704.995*

Declaration under penalty of perjury in lieu of affidavit. *Code Civ. Proc. § 2015.5*

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21-254 California Forms of Pleading and Practice--Annotated § 254.711

§ 254.711 Proceedings to Claim Exemption After Levy [Code Civ. Proc. §§ 703.510-703.610]--Notice of Claim of Exemption [Code Civ. Proc. § 703.540(b)]

[1] FORM Proceedings to Claim Exemption After Levy [Code Civ. Proc. §§ 703.510-703.610]--Notice of Claim of Exemption [Code Civ. Proc. § 703.540(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF CLAIM OF EXEMPTION
Defendant.	)	
	)	
	)	

_____

To _____ [*specify judgment creditor, e.g.,* plaintiff] _____ [*name*] and to _____ his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], a claim of exemption was filed with the undersigned levying officer for the following property, to wit: _____ [*describe property*].

The property described above will be released unless both of the following are filed with the levying officer within 10 days after service of this notice:

A copy of a notice of opposition to the claim of exemption; and

A copy of a notice of motion for an order determining the claim of exemption.
Dated: _____.

_____[*signature*]
Levying Officer

[2] Use of Form

This notice of claim of exemption is for use by a levying officer to notify a judgment creditor that a claim of exemption has been filed. The notice, along with a copy of the exemption claim, must be served either personally or by mail on the judgment creditor promptly after the claim is filed [*see Code Civ. Proc. § 703.540*].

[3] State Statutes

Notice of claim of exemption. *Code Civ. Proc. § 703.540*

[4] Cross References

For a related form,see *§ 254.710*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.712

§ 254.712 Proceedings to Claim Exemption After Levy [Code Civ. Proc. §§ 703.510-703.610]--Notice of Opposition to Claim of Exemption [Code Civ. Proc. §§ 703.550-703.560]--Judicial Council Form EJ-170

[1] FORM Proceedings to Claim Exemption After Levy [Code Civ. Proc. §§ 703.510-703.610]--Notice of Opposition to Claim of Exemption [Code Civ. Proc. §§ 703.550-703.560]--Judicial Council Form EJ-170

Click here to view image.

[2] Use of Form

This form of notice of opposition to claim of exemption is an illustrative reproduction of Judicial Council Form EJ-170, approved by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.30 et seq.*].

This form is for use by a judgment creditor to oppose a claim of exemption by the judgment debtor [*see Code Civ. Proc. §§ 703.550, 703.560*].

The judgment creditor must file the notice of opposition together with a notice of motion for an order determining the claim of exemption [*see § 254.713*] with the court within 10 days after service of the notice of claim of exemption. The judgment creditor must also file a copy of the notice of opposition and notice of motion with the levying officer within the same time period [*Code Civ. Proc. § 703.550*]. If the copies are not filed with the levying officer within the applicable period, the levying officer must immediately release the property to the extent it is claimed to be exempt [*see Code Civ. Proc. § 703.550*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] State Statutes

Notice of opposition to claim of exemption. *Code Civ. Proc. § 703.550*

Contents of notice of opposition. *Code Civ. Proc. § 703.560*

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21-254 California Forms of Pleading and Practice--Annotated § 254.713

§ 254.713 Proceedings to Claim Exemption After Levy [Code Civ. Proc. §§ 703.510-703.610]--Notice of Motion for Order Determining Claim of Exemption [Code Civ. Proc. § 703.550]

[1] FORM Proceedings to Claim Exemption After Levy [Code Civ. Proc. §§ 703.510-703.610]--Notice of Motion for Order Determining Claim of Exemption [Code Civ. Proc. § 703.550]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER DETERMINING CLAIM OF EXEMPTION
vs.	)	[Telephone Appearance]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify claimant, e.g.*, plaintiff] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify judgment creditor, e.g.*, plaintiff] _____ [*name*] will, and hereby does, move for an order

determining _____ [*specify judgment debtor, e.g.,* defendant's] claim that the following-described property is exempt from procedures to enforce a money judgment: _____ [*describe property*]. The motion will be made on the grounds that _____ [*specify judgment debtor e.g.,* defendant] has heretofore filed a claim of exemption in the property and _____ [*specify judgment creditor, e.g.,* plaintiff] has filed a notice of opposition contesting the claim of exemption and alleging that the _____ [property is not exempt from execution under the provision relied on *or* equity in the property claimed to be exempt is in excess of the amount provided in the applicable exemption].

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s*)], and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*party's status and name*]

CAUTION:
A memorandum is required to be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This notice of motion is for use by a judgment creditor to obtain a hearing and order determining the judgment debtor's exemption claim [*Code Civ. Proc. § 703.550*].

The judgment creditor must file the notice of motion together with the notice of opposition (*see § 254.713*.1) with the court, and copies with the levying officer, within 10 days after service of the notice of the claim of exemption on the judgment creditor [*Code Civ. Proc. § 703.550*; for further discussion, see *§ 254.712*]. The hearing on the motion must be held not later than 20 days from the date the notice of motion was filed with the court unless continued by the court for good cause [*Code Civ. Proc. § 703.570(a)*]. The judgment creditor must serve a notice of the hearing and a copy of the notice of opposition on the claimant and on the judgment debtor, if other than the claimant, not less than 10 days prior to the hearing [*Code Civ. Proc. § 703.570(b)*].

[3] State Statutes

Notice of motion for hearing to determine exemption claim. *Code Civ. Proc. § 703.550*

Notice of hearing on motion. *Code Civ. Proc. § 703.570*

[4] Cross References

For a related form,see *§ 254.712*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.714

§ 254.714 Proceedings to Claim Exemption After Levy [Code Civ. Proc. §§ 703.510-703.610]--Notice of Hearing on Claim of Exemption [Code Civ. Proc. §§ 703.550, 703.570]--Judicial Council Form EJ-175

[1] FORM Proceedings to Claim Exemption After Levy [Code Civ. Proc. §§ 703.510-703.610]--Notice of Hearing on Claim of Exemption [Code Civ. Proc. §§ 703.550, 703.570]--Judicial Council Form EJ-175

Click here to view image.

[2] Use of Form

This form of notice of hearing on claim of exemption is an illustrative reproduction of Judicial Council Form EJ-175 (also numbered WG-010), adopted by the Judicial Council for mandatory use [*see Cal. Rules of Ct., Rule 1.30 et seq.*].

This form is for use by the judgment creditor to give notice of a hearing on a claim of exemption when the judgment creditor is opposing the claim that particular property is exempt from execution. The notice, together with a copy of the notice of opposition to the claim of exemption (*see § 254.712*), must be served personally or by mail on the claimant and on the judgment debtor, if other than the claimant, not less than 10 days prior to the hearing [*Code Civ. Proc. § 703.570*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] State Statutes

Notice of hearing on motion to determine exemption claim. *Code Civ. Proc. § 703.570*

[4] Cross References

For related forms,see *§§ 254.712* and *254.713*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.715

§ 254.715 Proceedings to Claim Exemption After Levy [Code Civ. Proc. §§ 703.510-703.610]--Order Determining Claim of Exemption [Code Civ. Proc. § 703.580(d)]

[1] FORM Proceedings to Claim Exemption After Levy [Code Civ. Proc. §§ 703.510-703.610]--Order Determining Claim of Exemption [Code Civ. Proc. § 703.580(d)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER DETERMINING CLAIM OF EXEMP-
Defendant.	)	TION
	)	
	)	

The motion of _____ [*identify judgment creditor e.g.*, plaintiff] for an order determining the _____ [*identify judgment debtor e.g.*, defendant's] claim of exemption came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

[*EITHER, if property entirely exempt or nonexempt*]

IT IS ORDERED that the motion be, and it hereby is granted and it is hereby determined that the following property is

_____ [not exempt from execution *or* exempt from execution pursuant to Section _____ (*specify*) of the Code of Civil Procedure]: _____ [*Describe property*].

[*EITHER, if property partly exempt*]

IT IS ORDERED that the motion be, and it hereby is, granted and it is hereby determined that the _____ [*describe property*] is/are exempt from execution pursuant to Section _____ [*specify*] of the Code of Civil Procedure to the extent of _____ [*dollar amount or list exempt item or items*]. The _____ [value of the property in excess of $_____ *or list nonexempt item or items*] _____ [is *or* are] not exempt from execution.

[*If the property is entirely exempt*]

IT IS FURTHER ORDERED that the levying officer immediately release the property described above.

[*If the property is not exempt, or only partly exempt*]

IT IS FURTHER ORDERED that the levying officer apply the nonexempt property described above toward satisfaction of the judgment entered in favor of _____ [*name of judgment creditor*] in the above-entitled action [and that the exempt property described above be immediately released].
Dated: _____.

_____[*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use in determining a judgment debtor's claim that property is exempt from execution [*see Code Civ. Proc. §§ 703.550, 703.580(d)*].

For a discussion of the hearing procedure and disposition of the property during the proceedings, see *§ 254.110* et seq.

[3] State Statutes

Hearing and order on claim of exemption. *Code Civ. Proc. § 703.530*

Appeal from order determining exemption. *Code Civ. Proc. § 703.600*

[4] Cross References

For related forms,see *§§ 254.712* and *254.713*.

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21-254 California Forms of Pleading and Practice--Annotated §§ 254.716-254.729

[Reserved]

§§ 254.716[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.730

§ 254.730 Writ of Sale [Code Civ. Proc. §§ 712.020, 716.010] or Possession [Code Civ. Proc. §§ 712.020, 714.010, 715.010]--Judicial Council Form EJ-130

[1] FORM Writ of Sale [Code Civ. Proc. §§ 712.020, 716.010] or Possession [Code Civ. Proc. §§ 712.020, 714.010, 715.010]--Judicial Council Form EJ-130

Click here to view image.

[2] Use of Form

This form of writ of execution is an illustrative reproduction of Judicial Council Form EJ-130, approved by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.30 et seq.*].

This form is for use as a writ of sale or a writ of possession. Thus, it has been filled in as a writ of sale of personal property, but may also be used as a writ of sale of real property [*see Code Civ. Proc. § 716.010*], a writ of possession of personal property [*see Code Civ. Proc. § 714.010*], or a writ of possession of real property [*see Code Civ. Proc. § 715.010*].

For discussion of the issuance and execution of writs of sale and possession, see *§ 254.131*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Contents of Writ

[a] Sale of Real or Personal Property

This form has been filled in as a writ of sale of personal property. If the form is to be used as a writ of sale of real property, Paragraph 24.d. on page 2 should be checked rather than Paragraph 24.c.

[b] Possession of Personal Property

If the form is to be used as a writ of possession of personal property, Paragraph 24.b. on page 2 should be checked rather than Paragraph 24.c.

The description of the property in Paragraph 24.e. on page 2 must include the value of the property if specified in the judgment or a supplemental order [*Code Civ. Proc. § 714.010(b)*].

[c] Possession of Real Property

If the form is to be used as a writ of possession of real property, Paragraph 24.a. on page 2 should be checked rather than Paragraph 24.d. The blank following the first line of Paragraph 24.a. should be filled in with the date the unlawful detainer complaint was filed.

If a form of prejudgment claim of right to possession was served in compliance with *Code Civ. Proc. § 415.46*, Paragraph 24.a.(1) should be checked [*see Code Civ. Proc. § 715.010(b)(5), (6)*]. Paragraph 24.a.(1) also states that the judgment is enforceable against all tenants, subtentants, if any, named claimants, if any, and any other occupants of the premises [*see Code Civ. Proc. § 715.010(b)(7)*].

If no form of prejudgment claim of right to possession was served, Paragraph 24.a.(2)(a) should be filled in to state the daily rental value of the property as of that date [*Code Civ. Proc. § 715.010(b)(6)*]. In addition, Paragraph 24.a.(2)(b) should be filled in with the date or dates when the court will hear objections from occupants who are not named in the judgment for possession [*Code Civ. Proc. § 715.010(b)(5)*; *see Code Civ. Proc. § 1174.3(a)* (objections to enforcement of judgment)].

For further discussion relating to prejudgment and postjudgment claims of right to possession, see *§ 254.132[3][b]*. For further discussion and forms relating to use of the writ of possession in unlawful detainer proceedings generally, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

[d] Money Judgment

Whether the writ is for sale of real or personal property, or for possession of real or personal property, Paragraphs 11-20 on page 1 must reflect any money judgment included in the judgment for possession or sale. The money judgment may include, for example, costs, damages, rents, or profits due under the judgment [*Code Civ. Proc. § 712.020(e)*].

[4] Form to Accompany Writ of Possession of Real Property

At the time a writ of possession of real property is served or posted, the levying officer must also serve or post a copy of the form for a claim of right to possession, unless a summons, complaint, and form of prejudgment claim of right to possession were served on all persons who might have occupied the premises at the time the action was filed [*Code Civ. Proc. § 715.010(c)*; *see Code Civ. Proc. § 415.46(a), (b)* (service of prejudgment claim of right to possession)]. The form offers a procedure in which an occupant not named in the judgment can object to enforcement of the judgment [*see Code Civ. Proc. § 1173* (objections)].

For further discussion relating to claims of right to possession, see *§ 254.132[3][b]*. For further discussion and forms relating to use of the writ of possession in unlawful detainer proceedings generally, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

[5] State Statutes

Issuance of writ of possession or sale, generally. *Code Civ. Proc. § 712.010*

Contents of writ of possession or sale. *Code Civ. Proc. § 712.020*

Issuance of writ of possession of personal property. *Code Civ. Proc. § 714.010*

Issuance of writ of possession of real property. *Code Civ. Proc. § 715.010*

Issuance of writ of sale. *Code Civ. Proc. § 716.010*

Execution of writ of sale. *Code Civ. Proc. § 716.020*

Claim of right to possession of real property. *Code Civ. Proc. § 1174.3*

[6] Cross References

For discussion and forms relating to writs of sale on a dwelling house, see Ch. 294, *Homesteads*

For a related form,see *§ 254.680*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.731

§ 254.731 Proceedings for Transfer of Property or Documentary Evidence of Title or Both in Aid of Writ of Sale [Code Civ. Proc. § 716.030]--Notice of Motion

[1] FORM Proceedings for Transfer of Property or Documentary Evidence of Title or Both in Aid of Writ of Sale [Code Civ. Proc. § 716.030]--Notice of Motion
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	))))))))))	NO. _____ NOTICE OF MOTION AND MOTION FOR ORDER DIRECTING TRANSFER OF _____ [PROPERTY *and/or* DOCUMENTARY EVIDENCE OF TITLE] [Telephone Appearance] Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

To _____ [*identify judgment debtor, e.g.,* defendant] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify judgment creditor, e.g.,* plaintiff] _____ [*name*] will, and hereby does, move for an order directing the transfer of possession of _____ [the property *and/or* documentary evidence of title to] the following property, to wit: _____ [*describe property*]. The motion will be made on the grounds that the property is subject to levy under the writ of sale issued in the above-entitled action and that the transfer of possession of _____ [the property *and/or* documentary evidence of title to the property] has been refused.

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*party's status and name*]

CAUTION:

A memorandum is required to be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This notice of motion is for use to seek an order directing the judgment debtor to transfer to the levying officer property or any documentary evidence of title to property or both after a writ of sale has been issued. Otherwise, the judgment creditor may apply for the order ex parte unless a noticed motion is required by the court or a court rule [*see Code Civ. Proc. § 716.030(a)*].

[3] State Statutes

Execution of writ of sale. *Code Civ. Proc. § 716.020*

Proceedings for turnover order under writ of sale. *Code Civ. Proc. § 716.030*

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21-254 California Forms of Pleading and Practice--Annotated § 254.732

§ 254.732 Proceedings for Transfer of Property or Documentary Evidence of Title or Both in Aid of Writ of Sale [Code Civ. Proc. § 716.030]--Declaration

[1] FORM Proceedings for Transfer of Property or Documentary Evidence of Title or Both in Aid of Writ of Sale [Code Civ. Proc. § 716.030]--Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF MOTION FOR ORDER DIRECT-
_____ [*name*],	)	ING TRANSFER OF _____
Defendant.	)	[PROPERTY *and/or* DOCUMENTARY EVIDENCE
	)	OF TITLE]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. On _____ [*date*], a writ of sale was issued in favor of _____ [*name of judgment creditor*] in the above-entitled action for the sale of _____ [*describe property, e.g.,* one 2006 Ford Mustang convertible]. Defendant in the above-entitled action _____ [*set forth facts showing need for order, e.g.,* has refused to surrender the automobile to the levying officer].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature*]
_____ [*typed name*]

[2] Use of Form

This form of declaration is for use in supporting a motion for an order directing the transfer of property or of documentary evidence of title or both to a levying officer after a writ of sale has issued [*see Code Civ. Proc. § 716.030(a), (b)*].

[3] Cross References

For a related form,see *§ 254.731*

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21-254 California Forms of Pleading and Practice--Annotated § 254.733

§ 254.733 Proceedings for Transfer of Property or Documentary Evidence of Title or Both in Aid of Writ of Sale [Code Civ. Proc. § 716.030]--Order

[1] FORM Proceedings for Transfer of Property or Documentary Evidence of Title or Both in Aid of Writ of Sale [Code Civ. Proc. § 716.030]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER GRANTING MOTION FOR TRANSFER
Defendant.	)	OF _____ [PROPERTY *and/or*
	)	DOCUMENTARY EVIDENCE OF TITLE]
	)	

The motion of _____ [*identify judgment creditor, e.g.,* plaintiff] for an order directing the transfer of _____ [property *and/or* documentary evidence of title to property] to the levying officer came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted and _____ [*name of judgment debtor*] is ordered to transfer to the levying officer _____ [possession of *and/or* documentary evidence of title to] the following property: _____ [*describe property, e.g.,* Lot 1 of the Paradise City Subdivision, Paradise City, California].

NOTICE:

Failure to comply with this order may subject you to being held in contempt of court pursuant to *Section 716.030(c) of the Code of Civil Procedure.*

Dated: _____.

_____[*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use in directing the transfer of property or of any documentary evidence of title to property or both after a writ of sale has issued [*see Code Civ. Proc. § 716.030(a)*]. The order must be personally served on the judgment debtor and must contain a notice to the judgment debtor that he or she may be held in contempt of court for failure to comply with the order [*Code Civ. Proc. § 716.030(c)*].

The order may direct the judgment debtor to transfer the foillowing to the levying officer [*Code Civ. Proc. § 716.030(a)*]:

(1) Possession of the property to be sold if the prescribed method of levy is by taking the property into custody [*Code Civ. Proc. § 716.030(a)(1)*].

(2) Possession of any documentary evidence of title to property to be sold [*Code Civ. Proc. § 716.030(a)(2)*]. An order pursuant to "this paragraph"(it is unclear whether this refers to *Code Civ. Proc. § 716.030(a)* generally, or only to *Code Civ. Proc. § 716.030(a)(2)*) may be served either when the property is levied upon or afterward [*Code Civ. Proc. § 716.030(a)(2)*].

[3] State Statutes

Service of order on judgment debtor. *Code Civ. Proc. § 716.030(c)*

[4] Cross References

For a related form,see *§ 254.731*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.734

§ 254.734 Proceedings for Order for Transfer of Possession of Property or Documentary Evidence of Title or Both to Enforce Judgment of Possession [Code Civ. Proc. § 714.030]--Notice of Motion

[1] FORM Proceedings for Order for Transfer of Possession of Property or Documentary Evidence of Title or Both to Enforce Judgment of Possession [Code Civ. Proc. § 714.030]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER DIRECTING TRANSFER OF _____ [PROPERTY *and/or* DOCUMENTARY EVIDENCE OF TITLE]
vs.	)	
_____ [*name*],	)	
Defendant.	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify judgment debtor, e.g.,* defendant] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____

of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* judgment creditor] _____ [*name*] will, and hereby does, move for an order directing the transfer of _____ [possession of *and/or* documentary evidence of title to] the following property: _____ [*describe property*]. The motion will be made on the grounds that _____ [*specify facts demonstrating need for order, e.g.,* the judgment debtor has refused to surrender the property to the levying officer].

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s*)], and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*party's status and name*]

CAUTION:

A memorandum is required to be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form of notice of motion is for use by a judgment creditor seeking an order directing the judgment debtor to transfer possession of personal property or documentary evidence of title to the property or both to the judgment creditor. The noticed motion must be used when required by the court or by a court rule; otherwise the application may be made ex parte. The judgment creditor may apply for the order after entry of the judgment for possession of the personal property, and whether or not a writ of possession has issued [*Code Civ. Proc. § 714.030(a)*]. The court may issue the order on a showing of need [*Code Civ. Proc. § 714.030(b)*].

[3] State Statutes

Order directing transfer of possession of personal property or documentary evidence of title to property or both. *Code Civ. Proc. § 714.030*

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21-254 California Forms of Pleading and Practice--Annotated § 254.735

§ 254.735 Proceedings for Order for Transfer of Possession of Property or Documentary Evidence of Title or Both to Enforce Judgment of Possession [Code Civ. Proc. § 714.030]--Declaration

[1] FORM Proceedings for Order for Transfer of Possession of Property or Documentary Evidence of Title or Both to Enforce Judgment of Possession [Code Civ. Proc. § 714.030]--Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF MOTION FOR ORDER DIRECT-
_____ [*name*],	)	ING TRANSFER OF _____
Defendant.	)	[PROPERTY *and/or* DOCUMENTARY EVIDENCE
	)	OF TITLE]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. On _____ [*date*], a judgment of possession of the property described below was entered in favor of _____ [*name of judgment creditor*] in the above-entitled action. _____ [*Set forth additional facts showing need for order, e.g.,* A writ of possession of the property was issued on _____ (*date*). On _____ (*date*), the levying officer attempted to obtain possession of the property pursuant to the writ, but the judgment debtor refused to transfer possession of the property to the levying officer. The judgment debtor has stated that he/she will continue to refuse to surrender the property].

3. The property for which an order is sought consists of _____ [*describe property*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature*]
_____ [*typed name*]

[2] Use of Form

This form of declaration is for use in supporting a judgment creditor's motion for an order directing the judgment debtor to transfer possession of personal property or documentary evidence of title to the property or both to the judgment creditor [*see Code Civ. Proc. § 714.030(a)*].

Code Civ. Proc. § 2015.5 authorizes a declaration under penalty of perjury, as in the above form, in lieu of an affidavit. For a form of affidavit, see Ch. 15, *Affidavits, Certificates, and Declarations* .

[3] Cross References

For a related form,see *§ 254.734*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.736

§ 254.736 Proceedings for Order for Transfer of Possession of Property or Documentary Evidence of Title or Both to Enforce Judgment of Possession [Code Civ. Proc. § 714.030]--Order

[1] FORM Proceedings for Order for Transfer of Possession of Property or Documentary Evidence of Title or Both to Enforce Judgment of Possession [Code Civ. Proc. § 714.030]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER GRANTING MOTION FOR TRANSFER
Defendant.	)	OF _____ [POSSESSION OF *and/or* DOCUMENTARY EVIDENCE OF TITLE TO]
	)	PERSONAL PROPERTY
	)	

The motion of _____ [*specify judgment creditor, e.g.,* plaintiff] for an order directing the transfer of _____ [possession of *and/or* documentary evidence of title to] the personal property described below came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion should be _____ granted,

IT IS ORDERED that the motion be, and hereby is, granted and that the _____ [*specify party, e.g.,* defendant] is directed to transfer to _____ [*name of judgment creditor*] _____ [possession of *and/or* documentary evidence of title to] the following personal property: _____ [*describe property*].

NOTICE:

Failure to comply with this order may subject you to being held in contempt of court pursuant to *Section 714.030(c) of the Code of Civil Procedure.*

Dated: _____.

_____[*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use in directing the judgment debtor to transfer possession of personal property or documentary evidence of title to the property or both to the judgment creditor [*see Code Civ. Proc. § 714.030*]. The order must be personally served on the judgment debtor and include a notice that noncompliance may subject the judgment debtor to being held in contempt of court [*Code Civ. Proc. § 714.030(c)*].

[3] State Statutes

Order directing transfer of personal property or documentary evidence of title to property or both to judgment creditor. *Code Civ. Proc. § 714.030*

[4] Cross References

For a related form,see *§ 254.734*.

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21-254 California Forms of Pleading and Practice--Annotated §§ 254.737-254.749

[Reserved]

§§ 254.737[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.750

§ 254.750 Notice of Right of Redemption--By Levying Officer--to Judgment Debtor [Code Civ. Proc. § 729.050]

[1] FORM Notice of Right of Redemption--By Levying Officer--to Judgment Debtor [Code Civ. Proc. § 729.050]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF RIGHT OF REDEMPTION
_____ [*name*],	)	[*Code Civ. Proc. § 729.050*]
Defendant.	)	
	)	
	)	

To _____ [*name of judgment debtor*]:

NOTICE IS HEREBY GIVEN that _____ [*name of judgment debtor*] has the right to redeem the real property described below from the sale on execution made by _____ [*name of levying officer*] pursuant to a writ of sale issued on the judgment entered in Action No. _____ of the _____ Court of _____ County, California in which _____ [*name*] was plaintiff and _____ [*name*] was defendant.

The real property is described as follows: _____ [*give legal description*].

The real property was sold by _____ [*name of levying officer*] to _____ [*name of purchaser*] for the sum of $_____ on _____ [*date*].

The property may be redeemed anytime within [three months *or* one year] after the date of sale.
Dated: _____.

_____ [*signature*]

[2] Use of Form

This form of notice is for use by a levying officer in giving notice to the judgment debtor of his or her right to redeem the real property sold at the sale. The notice must indicate the applicable redemption period [*Code Civ. Proc. § 729.050*]. If the proceeds of the sale are sufficient to satisfy the secured indebtedness with interest and costs of action and of sale, the three month period of redemption should be specified [*Code Civ. Proc. § 729.030(a)*]. If, however, the proceeds of the foreclosure sale are not sufficient to satisfy the secured indebtedness with interest and costs of action and of sale, the one year period of redemption should be specified [*Code Civ. Proc. § 729.030(b)*].

Notice must be given promptly after the sale. Service is to be made either personally or by mail [*Code Civ. Proc. § 729.050*; for discussion of service of papers and extension of time for service when service is by mail, see *§ 254.13*].

[3] State Statutes

Notice of right to redeem. *Code Civ. Proc. § 729.050*

Period of redemption. *Code Civ. Proc. § 729.030*

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21-254 California Forms of Pleading and Practice--Annotated § 254.751

§ 254.751 Redemption Proceedings--Declaration [Code Civ. Proc. § 2015.5] Verifying Copy of Assignment or Other Evidence of Interest in Property--By Judgment Debtor's Successor [Code Civ. Proc. § 729.060(a)]

[1] FORM Redemption Proceedings--Declaration [Code Civ. Proc. § 2015.5] Verifying Copy of Assignment or Other Evidence of Interest in Property--By Judgment Debtor's Successor [Code Civ. Proc. § 729.060(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	DECLARATION OF _____
_____ [*name*],	)	VERIFYING COPY OF _____
Respondent.	)	[ASSIGNMENT *or specify other evidence of interest*]
	)	[*Code Civ. Proc. §§ 729.060(a), 2015.5*]
	)	

_____

I, _____ [*name*], declare:

I claim a right of redemption on the real property sold to _____ [*name of purchaser*], on the execution of a writ of sale against the interest of _____ [*name of judgment debtor*] in the real property by _____ [*name and title of levying officer*] on _____ [*date*].

That real property is described as follows: _____ [*give legal description*].

This claim of redemption is based on the accompanying assignment of _____ [*describe, e.g.,* the judgment debtor's ninety-nine-year lease of the described real property].

That assignment was made to declarant on _____[*date*], for the consideration of $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date and place*]

_____[*signature*]

[2] Use of Form

This form of declaration is for verifying a copy of an assignment or other evidence of the successor to judgment debtor's interest. The affidavit must be filed with the deposit of the redemption price. The declaration may also be made by a subscribing witness to the assignment [*Code Civ. Proc. § 729.060(a)*].

[3] State Statutes

Verification of copy of assignment. *Code Civ. Proc. § 729.060(a)(2)*

Filing declaration with redemption deposit. *Code Civ. Proc. § 729.070(b)(3)*

[4] Cross References

For a related form,see *§ 254.752*

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21-254 California Forms of Pleading and Practice--Annotated § 254.752

§ 254.752 Redemption Proceedings--Petition for Order Determining Redemption Dispute [Code Civ. Proc. § 729.070]

[1] FORM Redemption Proceedings--Petition for Order Determining Redemption Dispute [Code Civ. Proc. § 729.070]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION FOR ORDER DETERMINING RE-
_____ [*name*],	)	DEMPTION DISPUTE
Respondent.	)	[*Code Civ. Proc. § 729.070*]
	)	
	)	

_____

Petitioner alleges:

1. On _____ [*date*], a judgment was rendered in Action No. _____ in favor of _____ [*name*], plaintiff, and against _____ [*name*], defendant, in the _____ Court of _____ County, California, directing sale of the _____ [real property *or specify encumbered interest in property, e.g.,* lease] subject to the _____ [mortgage *or* deed of trust *or specify other means of securing interest*].

2. The judgment declared that a deficiency judgment could be ordered against the defendant.

3. _____ [*Name and title of levying officer*] levied on the defendant's interest in the real property

described below on _____ [*date*]. That property is described as follows: _____ [*give legal description*].

4. The above-described real property was sold at public auction to _____ [*name of purchaser*] on _____ [*date*], for the sum of $_____.

5. On _____ [*date*], within [three *or* twelve] months of the sale of the property to _____ [*name of purchaser*], petitioner sought to exercise his/her right of redemption of the property and deposited with _____ [*name and title of levying officer*] the sum of $_____, which included the amount of the purchase price at the sale, taxes and assessments paid by the purchaser, [a reasonable amount for _____ (fire insurance *or* maintenance *or* upkeep *or* repair *or any combination thereof*) costs incurred by the purchaser,] [payment(s) made by the purchaser on a prior obligation secured by the property,] and interest, offset by the amount of $_____, which represents the _____ [rents and profits from the property paid to the purchaser *or* value of the use and occupation of the property to the purchaser].

[*EITHER*]

6. A disagreement between petitioner and _____[*name of purchaser*] exists over the redemption price of the property. _____[*Describe dispute, e.g.,* Petitioner disputes the reasonableness of the amount purchaser claims to have paid for maintenance].

[*AND/OR*]

7. A disagreement between petitioner and _____[*name of purchaser*] exists as to the entitlement of petitioner to redeem the property because the purchaser claims _____ [*describe purchaser's contention, e.g.,* that the assignment of the judgment debtor's interest in real property to petitioner does not include the property described above].

8. Petitioner is the _____ [judgment debtor *or specify, e.g.,* assignee of plaintiff's interest in the property] and is entitled to redeem the property.

[9. _____ (A certified copy of the conveyance of the judgment debtor's interest in the property under which I claim the right to redeem is served herewith *or* A copy of the assignment of the judgment debtor's interest in the property under which I claim the right to redeem is served herewith, together with _____(my declaration *or* the declaration of _____(*name*), a subscribing witness, verifying that assignment)).]

10. Petitioner has paid to _____ [*name and title of levying officer*], the levying officer, the amount necessary for redemption less the sum that is in dispute.

WHEREFORE petitioner prays:

1. That the clerk set this petition for hearing;

2. That _____ [the redemption price be determined *and/or* petitioner's entitlement to redeem the property be determined] by order of the court;

4. That a certificate of redemption be ordered issued after deposit of any additional amount determined to be due with the levying officer; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____[*signature*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date and place*]

_____[*signature*]

[2] Use of Form

This petition is for use by a person seeking to redeem property to obtain a court order determining the redemption dispute when there is a disagreement over either the redemption price or the petitioner's entitlement to redeem the property. A disagreement over the redemption price might arise as to the reasonableness of a sum demanded by the purchaser for fire insurance, maintenance, upkeep, or repair of improvements on the property or as to the necessity of the purchaser's payment of a prior secured obligation or as to the amount by which the redemption price can be offset by rents and profits received by the purchaser or the value of the use and occupation of the property to the purchaser [*see Code Civ. Proc. §§ 729.060, 729.070*].

A disagreement over petitioner's entitlement to redeem the property might arise as to the validity of an assignment of the judgment debtor's interest in the property or sufficiency of the records of conveyance, of the copy of assignment, or the affidavit or other evidence of the successor's interest in the property [*see Code Civ. Proc. §§ 729.060(a), 729.070(a)*].

The contents of the petition are prescribed by *Code Civ. Proc. § 729.070(b)*.

[3] Payment of Amount Not in Dispute

The person seeking to redeem the property must deposit the undisputed amount of the redemption price with the levying officer [*Code Civ. Proc. § 729.070(a)*].

[4] Documents to Be Filed with Petition

If the redemption claim is made by a successor in interest to the judgment debtor, he or she must file either a certified copy of a recorded conveyance or a copy of an assignment or other evidence of his or her interest. An assignment or other evidence of interest must be verified by a declaration [*Code Civ. Proc. § 729.070(b)(3)*].

[5] Hearing Date

The hearing must be held not later than 20 days from the date of the filing of the petition unless continued by the court for good cause [*Code Civ. Proc. § 729.070(c)*].

[6] Notice

A copy of the petition together with a notice of the time and place of the hearing must be served on the purchaser by the person seeking redemption not less than 10 days before the day of hearing [*Code Civ. Proc. § 729.070(d)*; for discussion of service of papers, see *§ 254.13*]. See *§ 254.754* for a notice of hearing.

[7] Verification

If the petition is verified it may be given evidentiary weight as would an affidavit (or declaration [*see Code Civ. Proc. § 2015.5*]) and may be used in support of petitioner's case [*see Code Civ. Proc. § 729.070(f)*; *see In re O'Brien Machinery, Inc. (1964) 224 Cal. App. 2d 563, 569, 36 Cal. Rptr. 782]* . If the verification is to be used as evidence of facts, *Code Civ. Proc. § 446* does not apply and the allegations cannot be based on information and belief because an affidavit which is to be used as evidence must be positive, direct, and not based on hearsay. Matters alleged on information and belief do not serve to establish facts but are hearsay [*Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 204, 151 Cal. Rptr. 721]* .

[8] State Statutes

Petition filed by person seeking redemption when redemption price or entitlement to redemption disputed. *Code Civ. Proc. § 729.070(a)*

Papers required to be filed with petition. *Code Civ. Proc. § 729.070(b)(3)*

Service of petition. *Code Civ. Proc. § 729.070(d)*

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21-254 California Forms of Pleading and Practice--Annotated § 254.753

§ 254.753 Redemption Proceedings--Notice to Levying Officer or Trustee of Filing of Petition for Order Determining Redemption Dispute [Code Civ. Proc. § 729.070(a)]

[1] FORM Redemption Proceedings--Notice to Levying Officer or Trustee of Filing of Petition for Order Determining Redemption Dispute [Code Civ. Proc. § 729.070(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	NOTICE OF FILING OF PETITION FOR ORDER
_____ [*name*],	)	DETERMINING REDEMPTION DISPUTE
Respondent.	)	[*Code Civ. Proc. § 729.070(a)*]
	)	
	)	

To _____ [*name and title of levying officer or trustee*]:

NOTICE IS HEREBY GIVEN that the undersigned has filed a petition for court order determining the _____ [redemption price of *or* entitlement of petitioner to redeem] the real property described below, which you sold pursuant to a judgment of sale entered in Action No. _____ of the _____ Court of _____ County, California, in which _____ [*name*] was plaintiff and _____ [*name*] was defendant.

The real property is described as follows: _____ [*give legal description*].

_____ [*Name of purchaser*] purchased the property at the sale for the sum of

$_____ on _____ [*date*].
Dated: _____.

_____ [*signature*]

[2] Use of Form

This form of notice is for use by a person seeking to redeem property to give notice to the levying officer or trustee of the filing of a petition to determine the redemption price or the entitlement of the petitioner to redeem the property [*Code Civ. Proc. § 729.070(a)*].

[3] State Statutes

Notice of filing of petition for order determining redemption dispute required. *Code Civ. Proc. § 729.070(a)*

[4] Cross References

For a related form,see *§ 254.752*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.754

§ 254.754 Redemption Proceedings--Notice of Hearing of Petition by Person Seeking to Redeem Property to Determine Redemption Dispute [Code Civ. Proc. § 729.070(d)]

[1] FORM Redemption Proceedings--Notice of Hearing of Petition by Person Seeking to Redeem Property to Determine Redemption Dispute [Code Civ. Proc. § 729.070(d)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	NOTICE OF HEARING OF PETITION FOR OR-
_____ [*name*],	)	DER DETERMINING REDEMPTION DISPUTE
Respondent.	)	[*Code Civ. Proc. § 729.070(d)*]
	)	
	)	

_____

To _____ [*name of purchaser*]:

NOTICE IS HEREBY GIVEN that on _____ [*date*], _____ [*name of person seeking redemption*] filed a petition in the above-entitled court for an order determining _____ [the amount required *or* petitioner's entitlement] to redeem the real property that you purchased at a sale on execution of a writ of sale on _____ [*date*].

The clerk of the above-entitled court has set the petition for hearing at _____ _____.M., or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], California.

A copy of the petition is attached hereto and served herewith.
Dated: _____ [*date*].

_____[*signature*]
Attorney for Petitioner

[2] Use of Form

This form of notice is for use by a person seeking to redeem property to give notice to the purchaser of the date of the hearing on the redemptioner's petition to determine a dispute as to the redemption price or the petitioner's entitlement to redeem the property [*see Code Civ. Proc. § 729.070(d)*]. The notice of hearing must give the time and place of the hearing fixed by the clerk [*Code Civ. Proc. § 729.070(d)*].

[3] Service of Petition and Notice

The notice of hearing, together with a copy of the petition, must be personally served on the purchaser by the person seeking redemption not less than 10 days before the day of hearing [*Code Civ. Proc. § 729.070(d)*; for discussion of service of papers, see *§ 254.13*].

[4] Cross References

For a related form,see *§ 254.752*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.755

§ 254.755 Redemption Proceedings--Order Determining Redemption Dispute [Code Civ. Proc. § 729.070(f)]

[1] FORM Redemption Proceedings--Order Determining Redemption Dispute [Code Civ. Proc. § 729.070(f)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	ORDER DETERMINING REDEMPTION DIS-
_____ [*name*],	)	PUTE
Respondent.	)	[*Code Civ. Proc. § 729.070(f)*]
	)	
	)	

_____

The petition of _____ [*name of person seeking redemption*] for an order determining _____ [the redemption price of *or* his/her entitlement to redeem] the real property described in the petition came on regularly for hearing by the court this date. Petitioner appeared by counsel _____ [*name*]; purchaser appeared by counsel _____ [*name*].

The court, finding that notice of hearing has been duly and regularly given according to law, and having considered the evidence presented,

IT IS ORDERED that _____ [petitioner is entitled to redeem the property *and/or* $_____ is a reasonable sum for the purchaser to have paid for _____ (*specify items, e.g.,* fire insurance *or* maintenance *or* upkeep *or* repair *or any combination thereof*), *and/or* it was necessary for purchaser to pay $_____ for payment of a prior secured obligation, *and/or* the redemption price may be offset by the sum of $_____ for (rents and profits from the property paid to the purchaser *or* the

value of the use and occupation of the property to the purchaser)].
Dated: _____.

_____[*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use in determining a dispute over a person's entitlement to redeem property or over the redemption price [*Code Civ. Proc. § 729.070(f)*].

[3] State Statutes

Order on petition to determine redemption dispute. *Code Civ. Proc. § 729.070(f)*]

[4] Cross References

For a related form,see *§ 254.752*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.756

§ 254.756 Redemption Proceedings--Certificate of Redemption [Code Civ. Proc. §§ 729.080(b)]

[1] FORM Redemption Proceedings--Certificate of Redemption [Code Civ. Proc. §§ 729.080(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	CERTIFICATE OF REDEMPTION
_____ [*name*],	)	[*Code Civ. Proc. § 729.080(b)*]
Respondent.	)	
	)	
	)	

_____

I, _____ [*name and title of levying officer or trustee*], do hereby certify that on _____[*date*], _____ [*name of redemptioner*] deposited with me the sum of $_____ for redemption of real property that _____ [*name of purchaser*] purchased on the execution of a writ of sale on _____[*date*].

The sale was made pursuant to a writ of sale issued on the judgment of the above-entitled court in Action No. _____, _____ [*name*], plaintiff, vs. _____ [*name*], defendant, entered on _____ [*date*], in the Judgment Book of the Clerk's records of _____ County at Vol. _____ at page _____.

The property is described as follows: _____ [*give legal description of property*].

The payment made to me in the sum of $_____ by _____ [*name of redemptioner*]

_____ [is the redemption price determined by court order *or* was accepted by the purchaser].

[The Recorder of _____ County is authorized to record this certificate of redemption pursuant to *Section 729.080(b) of the Code of Civil Procedure.*]

_____ [*signature*]

ACKNOWLEDGMENT

	)	
State of _____	)	ss.
County of _____	)	

_____

On _____ [*date*], before me _____ [*name and quality of officer*], personally appeared _____ [*name and title of levying officer*], _____ [personally known to me *or* proved to me on the basis of satisfactory evidence] to be the person whose name is subscribed to this instrument, and acknowledged that he/she executed it.
Dated: _____.

_____ [*signature*]
_____ [*name of office*]
_____ [*seal of office*]

[2] Use of Form

This form of certificate of redemption is for use by the levying officer or trustee to certify that the judgment debtor or the judgment debtor's successor in interest has redeemed the property. It is issued after the person seeking to redeem the property has deposited the redemption price with the levying officer, the levying officer has tendered the deposit to the purchaser, and either the purchaser accepted the tender or the redemption price was determined by court order [*see Code Civ. Proc. § 729.080(b)*].

[3] Recording

The levying officer or trustee must record a duplicate of the certificate of redemption in the office of the recorder of the county where the property is located [*Code Civ. Proc. § 729.080(b)*].

[4] State Statutes

Certificate of redemption. *Code Civ. Proc. § 729.070*

[5] Cross References

For a related form,see *§ 254.752*

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21-254 California Forms of Pleading and Practice--Annotated § 254.757

§ 254.757 Redemption Proceedings--Petition for Order Authorizing Entry on Property by Purchaser at Execution Sale--For Repairs and Maintenance of Premises [Code Civ. Proc. § 729.090(c)]

[1] FORM Redemption Proceedings--Petition for Order Authorizing Entry on Property by Purchaser at Execution Sale--For Repairs and Maintenance of Premises [Code Civ. Proc. § 729.090(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR ORDER AUTHORIZING ENTRY
Respondent.	)	ON PREMISES
	)	
	)	

_____

Petitioner alleges:

1. On _____ [*date*], a judgment for the sale of the real property described below was rendered in favor of _____ [*name*], plaintiff, and against _____ [*name*], defendant, in the _____Court of _____ County, California.

2. The judgment was entered on _____ [*date*], in the Judgment Book of the Clerk's records of _____ County at Vol. _____ at page _____ in the sum of $_____.

3. A writ of sale was issued by the Clerk of the _____ Court of _____ County,

California on _____ [*date*].

4. _____ [*Name and title of levying officer*] levied on the real property owned by the above-named defendant on _____ [*date*]. That property is described as follows: _____ [*give legal description*].

5. The above-described real property was sold at public auction to _____ [*name of petitioner*] on _____ [*date*], for the sum $_____.

6. _____ [*Name of person in possession of property*] remains in possession of the above-described property, and no redemption has been made from the execution. The period of redemption has not passed and will not expire until _____ [*date*].

7. _____ [*Name of judgment debtor or tenant in possession*] refuses the right of entry at all times to petitioner or to his/her agent or contractor in order to make repairs and maintain the property.

WHEREFORE petitioner prays:

1. For an order authorizing petitioner or his/her agent or contractor to enter the property during reasonable hours to repair and maintain the property; and

2. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[*Verification, if desired. See § 254.752.*]

[2] Use of Form

The foregoing form of petition is for use by a purchaser to seek an order enforcing his or her right to enter real property bought at an execution sale for the purpose of making repairs and maintaining the property during the redemption period [*see Code Civ. Proc. § 729.090(c)*].

[3] State Statutes

Purchaser as entitled to enter property during reasonable hours to repair and maintain the premises. *Code Civ. Proc. § 729.090(c)*

[4] Cross References

For discussion of rights and obligations regarding repair and maintenance of leased premises, see Ch. 332, *Landlord and Tenant: The Tenancy*

For a related form,see *§ 254.752*.

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 254 EXECUTIONS AND ENFORCEMENT OF JUDGMENTS
PART V. FORMS
D. Proceedings Involving Redemption

21-254 California Forms of Pleading and Practice--Annotated § 254.758

§ 254.758 Redemption Proceedings--Order Authorizing Repairs and Maintenance by Purchaser at Execution Sale [Code Civ. Proc. § 729.090(c)]

[1] FORM Redemption Proceedings--Order Authorizing Repairs and Maintenance by Purchaser at Execution Sale [Code Civ. Proc. § 729.090(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER AUTHORIZING ENTRY ONTO PROP-
Respondent.	)	ERTY
	)	
	)	

The petition of _____ [*name of purchaser*], purchaser of real property at a sale on a writ of sale on _____ [*date*], described in the petition, for an order authorizing _____ [him/her *or* _____ (*name*), his/her agent,] to enter the property to make repairs and to maintain the property came on regularly for hearing by the court this date. Petitioner appeared by counsel _____ [*name*]; _____ [judgment debtor *or* tenant in possession] appeared by counsel _____ [*name*].

The court, finding that notice of hearing has been duly and regularly given according to law, having considered the evidence presented,

IT IS ORDERED that _____ [*name of purchaser or his/her agent*] hereby is authorized to enter the real property described in the petition at all reasonable hours for the purpose of making repairs and maintaining the

premises.
Dated: _____.

_____[*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use in ordering a person who is still in possession of property that the petitioner purchased at an execution sale to permit the petitioner or his or her agent to enter the property during reasonable hours to make repairs or maintain the premises.

[3] State Statutes

Purchaser as entitled to enter property during reasonable hours to repair and maintain the premises. *Code Civ. Proc. § 729.090(c)*

[4] Cross References

For a related form,see *§ 254.757*.

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Chapter 254 EXECUTIONS AND ENFORCEMENT OF JUDGMENTS
PART V. FORMS
D. Proceedings Involving Redemption

21-254 California Forms of Pleading and Practice--Annotated § 254.759

§ 254.759 Redemption Proceedings--Petition by Purchaser For Order Restraining Waste [Code Civ. Proc. § 729.090(c)]

[1] FORM Redemption Proceedings--Petition by Purchaser For Order Restraining Waste [Code Civ. Proc. § 729.090(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR ORDER RESTRAINING WASTE
Respondent.	)	ON FORECLOSED PROPERTY
	)	
	)	

_____

Petitioner alleges:

1. [*Allege rendition of judgment. See § 254.757, Paragraph 1.*]

2. [*Allege entry of judgment. See § 254.757, Paragraph 2.*]

3. [*Allege issuance of writ of sale. See § 254.757, Paragraph 3.*]

4. [*Allege levy on property and describe property. See § 254.757, Paragraph 4.*]

5. [*Allege sale of property. See § 254.757, Paragraph 5.*]

6. [*Allege possession of property and redemption period. See § 254.757, Paragraph 6.*]

7. _____ [*Name of person in possession of property*] is committing waste on the property by _____ [*state facts demonstrating waste, e.g.,* removing top soil from the property].

8. Petitioner has demanded that _____ [*name of person in possession of property*] desist from committing such waste, but he/she refuses and, unless restrained by this court, he/she will continue to commit such waste.

WHEREFORE, petitioner prays:

1. For an order restraining _____ [*name of person in possession of property*] from committing waste on the real property described above; and

2. For such other and further relief as may be proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[*Verification, if desired. See § 254.752.*]

[2] Use of Form

This petition is for use by a purchaser who is seeking an order to restrain waste by a person remaining in possession of real property that was purchased at a sale on a writ of sale [*see Code Civ. Proc. § 729.090(c)*]. An order restraining waste may be granted, with or without notice to the person in possession, in the discretion of the court [*Code Civ. Proc. § 729.090(c)*].

[3] State Statutes

Purchaser as entitled to court order restraining waste on property during redemption period. *Code Civ. Proc. § 729.090(c)*

[4] Cross References

For further discussion of restraint of waste on property, see Ch. 332, *Landlord and Tenant: The Tenancy* , and Ch. 344, *Life Estates and Remainders*

For related forms,see *§§ 254.752* and *254.757*.

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Chapter 254 EXECUTIONS AND ENFORCEMENT OF JUDGMENTS
PART V. FORMS
D. Proceedings Involving Redemption

21-254 California Forms of Pleading and Practice--Annotated § 254.760

§ 254.760 Redemption Proceedings--Order Restraining Waste [Code Civ. Proc. § 729.090(c)]

[1] FORM Redemption Proceedings--Order Restraining Waste [Code Civ. Proc. § 729.090(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER RESTRAINING WASTE ON PROPERTY
Respondent.	)	
	)	
	)	

The petition of _____ [*name of purchaser at execution sale or judgment creditor*] for an order restraining the commission of waste on the real property described below during the period of redemption came on for hearing by the court this date. The applicant appeared by counsel _____ [*name*]. [*If notice of hearing was given by applicant and an appearance made, add:* _____ (*Name of person in possession*) appeared by counsel _____ (*name*).]

The court, having considered the evidence presented,

IT IS ORDERED that the petition be and hereby is granted and that _____ [*name of person in possession of property*] be and hereby is restrained from _____ [*specify, e.g.*, removing top soil from the property] which is described as follows: _____[*give legal description of property*].
Dated: _____.

_____[*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use in restraining waste on real property which has been sold at an execution sale [*see Code Civ. Proc. § 729.090(c)*].

[3] Cross References

For related forms,see *§§ 254.757* and *254.759*.

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21-254 California Forms of Pleading and Practice--Annotated §§ 254.761-254.779

[Reserved]

§§ 254.761[Reserved]

California Forms of Pleading and Practice--Annotated

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Chapter 254 EXECUTIONS AND ENFORCEMENT OF JUDGMENTS
PART V. FORMS
E. Proceedings Supplemental To Execution And Creditor's Actions

21-254 California Forms of Pleading and Practice--Annotated § 254.780

§ 254.780 Examination Proceedings--Application and Order for Appearance and Examination of Judgment Debtor or Third Person Having Possession or Control of Property in Which Judgment Debtor Has Interest or Who Is Indebted to Judgment Debtor [Code Civ. Proc. §§ 708.110, 708.120]--Judicial Council Form EJ-125

[1] FORM Examination Proceedings--Application and Order for Appearance and Examination of Judgment Debtor or Third Person Having Possession or Control of Property in Which Judgment Debtor Has Interest or Who Is Indebted to Judgment Debtor [Code Civ. Proc. §§ 708.110, 708.120]--Judicial Council Form EJ-125

Click here to view image.

CAUTION:
For discussion of the requirements of *Cal. Rules of Ct., Rule 3.1200* et seq. governing ex parte applications generally, including requirements that an ex parte application be accompanied by a memorandum by a proposed order, by a supporting declaration, and by a declaration regarding efforts to satisfy notice requirements, *see* Ch. 372, *Motions and Orders* .

[2] Use of Form

This form is an illustrative filled-in reproduction of Judicial Council Form EJ-125 (also numbered AT-138, adopted by the Judicial Council for mandatory use [*see Cal. Rules of Ct., Rule 1.30 et seq.*].

The form is an application for an order, and the order itself, directing either of the following individuals to appear for an examination in order to furnish information to aid in the enforcement of a money judgment or to answer concerning property or debt [*see Code Civ. Proc. §§ 708.110, 708.120*]:

- A judgment debtor.

- A person who has possession or control of property in which the judgment debtor has an interest or who is indebted to the judgment debtor.

The form has been filled in to illustrate how it might be used by a judgment creditor, appearing by counsel, to secure examination of a judgment debtor as a matter of right, when the judgment debtor has not been examined during the preceding 120 days [*see Code Civ. Proc. § 708.110(a), (b)*]. If the judgment creditor has caused the judgment debtor to be examined within the last 120 days, the court will make the order only if the judgment creditor by affidavit (or declaration under *Code Civ. Proc. § 2015.5*) or otherwise shows good cause for the order [*Code Civ. Proc. § 708.110(c)*].

Code Civ. Proc. § 708.120(a) expressly states that the affidavit (or declaration under *Code Civ. Proc. § 2015.5*) in support of an application for an order to examine a third party may be based on information and belief. *Code Civ. Proc. § 708.110(c)*, relating to examinations of judgment debtors, is silent on this issue. Under former *Code Civ. Proc. § 715* (a predecessor of *Code Civ. Proc. § 708.110(c)*), however, the affidavit could be based on information and belief [*Tucker v. Fontes (1945) 70 Cal. App. 2d 768, 771, 161 P.2d 697]* . A Report of the Assembly Committee on the Judiciary states that *Tucker* was codified by *Code Civ. Proc. § 708.120(a)* but is silent as to *Code Civ. Proc. § 708.110(c)* [*Annual Report*, 16 Cal. L. Revision Comm'n Reports 2093-2094]. Although it is not clear, it would appear that the affidavit in support of an application for an order for the examination of judgment debtor under *Code Civ. Proc. § 708.110(c)* may also be based on information and belief.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Application Generally Ex Parte

Except as noted *below*, the application for an order of examination is made ex parte [*Code Civ. Proc. §§ 708.110(b), 708.120(a)*].

When the examination is of the judgment debtor and the judgment debtor has been previously examined under *Code Civ. Proc. § 708.110* within the preceding 120 days, the application must be made on noticed motion if the court so directs or a court rule so requires. Otherwise, it may be made ex parte [Code Civ. Proc. § 701.110(c)]. For forms of noticed motion and supporting declaration for use when the court or local rule requires the noticed motion procedure, see *§§ 254.781, 254.782*.

[4] Filling in Form

[a] Order to Appear for Examination

The order to appear for examination includes the name of the person to be examined (Paragraph 1), and the nature of the examination if the person examined is the judgment debtor, (Paragraph 2a) or a third party (Paragraph 2b). However, a third party may not be ordered to appear when the judgment is no longer enforceable [*see Code Civ. Proc. § 683.020*].

The time and place of the hearing is entered in the box below Paragraph 2. If the court has specially appointed a person to serve the order and application [*see Code Civ. Proc. § 708.170(a)*], his or her name should be typed in Paragraph 3. If no person has been specially appointed, counsel may either leave Paragraph 3 as is, or line out the words "or the following specially appointed person (name):."

Although the form provides for signature by either a judge or referee, *Code Civ. Proc. § 708.110(a), (b)* and *708.120(a)* appear to require that the order be signed by a judge as opposed to a referee. *Code Civ. Proc. § 708.110(a), (b)* and *708.120(a)* provide that the court "shall" make an order directing the judgment debtor or third person to appear before the court, or before a referee appointed by the court. Consequently, to avoid a possible challenge to an order signed by a referee, counsel may wish to present the order to a judge for signature. A referee once appointed is, however, like a

judge or temporary judge, expressly authorized to make specified orders [*see Code Civ. Proc. § 708.140(a)*].

[b] Application for Order to Appear for Examination

The form of application sets out the status of the applicant (Paragraph 4), and the status of the person to be examined as the judgment debtor or as a third party (Paragraph 5). If a third party is to be examined, a separate affidavit (or declaration under *Code Civ. Proc. § 2015.5*) must be attached, showing that the third person has possession or control of property in which the judgment debtor has an interest or is indebted to the judgment debtor in an amount exceeding $250. The affidavit (or declaration) may be based on information and belief [*Code Civ. Proc. § 708.120(a)*]. For a form of such declaration, *see § 254.783*.

The application states that the person to be examined resides or has a place of business in the county where examination is sought or within 150 miles of the place of examination (Paragraph 6) [*Code Civ. Proc. § 708.160(b)*].

If the place of the examination is in a court other than the one in which the judgment was entered, a separate affidavit (declaration) stating the residence or place of business of the person to be examined must be attached (Paragraph 7). *Code Civ. Proc. § 708.160* does not expressly authorize this affidavit (declaration) to be made on information and belief, so it must state facts within the personal knowledge of the affiant (declarant) and show that he or she is competent to testify to them [*see Code Civ. Proc. §§ 708.160(c), (d)(2), (3)*]. The examination will take place in a court other than the one in which the judgment was entered if the person to be examined does not reside or have a place of business in the county in which the judgment was entered [*see Code Civ. Proc. § 708.160(c)*; for further discussion of obtaining examination in a court other than the one in which the judgment is entered, see *discussion under § 254.780[7]*].

If the person to be examined is the judgment debtor and the judgment debtor was examined during the 120 days preceding the application for the order, a separate affidavit (or declaration under *Code Civ. Proc. § 2015.5*) showing good cause for the order must be attached (Paragraph 8). *Code Civ. Proc. § 708.110(c)* does not authorize this affidavit (or declaration) to be made on information and belief [*see Code Civ. Proc. § 708.110(c)*]. For a form of such declaration, *see § 254.782*.

[c] Verification

Although the application includes a declaration under penalty of perjury, none of the relevant code sections requires that the application (as opposed to the affidavits or declarations supporting the application) be signed under penalty of perjury or otherwise verified [*see Code Civ. Proc. §§ 491.110(a)* (attachment), 708.110(c), 708.120(a) (enforcement of judgment)]. Nor does there appear to be any general provision in The Attachment Law [*Code Civ. Proc. §§ 481.010-493.060*] or the Enforcement of Judgments Law [*Code Civ. Proc. §§ 680.010-724.260*] so requiring.

[d] Required Notices

Page two of the form sets out notices required by *Code Civ. Proc. §§ 708.110(d)* and *708.120(e)*, relating to enforcement of judgments, as well as those required by *Code Civ. Proc. § 491.110(d)*, relating to attachment. When the form is used to obtain an order for the examination of a third person in enforcement of judgment proceedings, the property or debt that will be the subject of the examination must be described in the space provided in Paragraph (2) in the second blocked notice [*see Code Civ. Proc. § 708.120(a)*].

[5] Service of Order

[a] Judgment Debtor

A copy of the order must be personally served on the judgment debtor not less than 10 days before the date set for

examination. Service of the order creates a lien on the property [*Code Civ. Proc. § 708.110(d)*; for discussion of service of papers, *see § 254.13*]. *Code Civ. Proc. § 708.110* does not specify the duration of the lien, however, it may not be enforced beyond time for enforcement of the judgment [*see Code Civ. Proc. §§ 683.010-683.220, 697.920*].

[b] Third Party

A copy of the order must be served personally on the third person and served either personally or by mail on the judgment debtor not less than 10 days prior to the date set for the examination [*Code Civ. Proc. § 708.120(b)*]. If service is made by mail, the time for service may be extended [*see Code Civ. Proc. § 684.120*]. For discussion of service of papers and extension of the time for service when service is by mail, see *§ 254.13*.

The person serving the order must, when the order is served, tender to the third person fees for the mileage from the third person's residence to the place of examination [*Code Civ. Proc. § 708.120(f)*; *see § 254.220[2]*].

When the property or debt is described in the judgment creditor's application in a manner reasonably adequate to permit it to be identified, service of the order creates a lien on the judgment debtor's interest in the property or on the debt for a period of one year from the date of the order unless extended or terminated sooner by the court [*Code Civ. Proc. § 708.120(c)*].

[6] Sanctions for Failure to Appear

If an order requiring a person to appear for an examination was served by a sheriff, marshal, a person specially appointed by the court in the order, or a registered process server, and the person fails to appear, the court may do either of the following [*Code Civ. Proc. § 708.170(a)(1)*]:

- Pursuant to a warrant, have the person brought before the court to answer for the failure to appear and punish the person for contempt.

- Issue a warrant for the arrest of the person [*see Code Civ. Proc. § 1993*].

If the person's failure to appear was without good cause, the judgment creditor will be awarded reasonable attorney's fees incurred in the examination proceeding. Attorney's fees awarded against the judgment debtor are added to and become part of the principal amount of the judgment [*Code Civ. Proc. § 708.170(a)(2)*].

A person who willfully makes an improper service of an order for an examination that results in the arrest pursuant to *Code Civ. Proc. § 708.170(a)* of the person who fails to appear is guilty of a misdemeanor [*Code Civ. Proc. § 708.170(b)*].

[7] Filing Application in County Other Than One in Which Judgment is Entered

When the examination is sought in a court other than the court in which the money judgment is entered, the judgment creditor is required to file an abstract of judgment in the form prescribed by *Code Civ. Proc. § 674* with the court from which the order is sought and to pay the filing fee required by *Code Civ. Proc. § 708.160(d)(4)*, as well as to submit an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) in support of the application stating the place of residence or place of business of the person sought to be examined and to make any necessary affidavit or showing for the examination as required by *Code Civ. Proc. § 708.110* or *708.120* [*Code Civ. Proc. § 708.160(d)*]. For discussion of when an application may be filed in a court other than the one in which the judgment was entered, see Introduction under Place for Examinations. For a form of declaration in lieu of affidavit required under *Code Civ. Proc. § 708.160*, *see § 254.782*.

[8] Cross References

For detailed discussion and forms relating to ex parte applications generally, see Ch. 372, *Motions and Orders*

[9] State Statutes

Application for order requiring judgment debtor to appear. *Code Civ. Proc. § 708.110(a)*

Ex parte application. *Code Civ. Proc. §§ 708.110(b), (c)*

Noticed motion. *Code Civ. Proc. §§ 708.110(c)*

Service of order creates lien. *Code Civ. Proc. § 708.110(d)*

Service of order on judgment debtor. *Code Civ. Proc. § 708.110(e)*

Warning required to be included in order. *Code Civ. Proc. § 708.110(e)*

Application for order and order requiring third party to appear. *Code Civ. Proc. § 708.120(a)*

Service of order requiring third party to appear. *Code Civ. Proc. § 708.120(b)*

Lien created by service of order requiring third party to appear. *Code Civ. Proc. § 708.120(c)*

Proper court. *Code Civ. Proc. § 708.160*

Sanctions for failure to appear. *Code Civ. Proc. § 708.170(a)*

Willfull improper service. *Code Civ. Proc. § 708.170(b)*

[10] Rules of Court

Procedures governing ex parte applications. *Cal. Rules of Ct., Rule 3.1200 et seq.*

[11] Local Court Rules

Applications for order for examination of judgment debtor. San Francisco Uniform Local Ct. Rules, Rule 8.15

Ex parte applications. Los Angeles Co. Super. Ct. Rules, Rule 9.36 et seq.; San Francisco Uniform Local Ct. Rules, Rule 8.12

[12] Decisions

Disqualified judge prohibited from ordering examination of judgment debtor under former *Code Civ. Proc. § 714* (*now see Code Civ. Proc. § 708.110*). *Noorthoek v. Superior Court (1969) 269 Cal. App. 2d 600, 604-607, 75 Cal. Rptr. 61*

Nature of examination of judgment debtor. *Coleman v. Galvin (1947) 78 Cal. App. 2d 313, 318, 177 P.2d 606*

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E. Proceedings Supplemental To Execution And Creditor's Actions

21-254 California Forms of Pleading and Practice--Annotated § 254.781

§ 254.781 Examination Proceedings--Notice of Motion for Order for Examination Judgment Debtor Examined Within Last 120 Days [Code Civ. Proc. § 708.110]

[1] FORM Examination Proceedings--Notice of Motion for Order for Examination Judgment Debtor Examined Within Last 120 Days [Code Civ. Proc. § 708.110]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER FOR EXAMINATION OF JUDGMENT
vs.	)	DEBTOR EXAMINED WITHIN LAST 120 DAYS
_____ [*name*],	)	[Telephone Appearance]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*name*], defendant and judgment debtor:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*name*], plaintiff and judgment creditor, will, and hereby does, move for an order for examination of

_____ [*name*], defendant and judgment debtor. The motion will be made on the grounds that good cause exists for examination of the defendant and judgment debtor even though _____ [*name*], the plaintiff and judgment creditor, caused him/her to be examined within the last 120 days.

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

CAUTION:
A memorandum must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, *see* Ch. 417, *Points and Authorities* .

[2] Use of Form

This form of notice of motion is for use by a judgment creditor to obtain an order for the examination of a judgment debtor to ascertain what property is available to satisfy the judgment only when the judgment creditor has caused the judgment debtor to be examined within the past 120 days. The application is made by noticed motion only when the court so directs or a court rule so requires [*Code Civ. Proc. § 708.110(c)*; for the mandatory Judicial Council form to be used when a noticed motion is not required, *see § 254.780*]. The court will make an order only if the judgment creditor by affidavit (or declaration under *Code Civ. Proc. § 2015.5*) or otherwise shows good cause for the order [*Code Civ. Proc. § 708.110(c)*; for declaration in support of application, *see § 254.782*].

This form is intended for use by a judgment creditor who was the plaintiff in the action. However, the form may be adapted for use by a judgment creditor who was a cross complainant or a petitioner.

Any proposed order submitted with the noticed motion should be in the form of the mandatory order that is included as a part of Judicial Council Form EJ-125 [*see § 254.780*].

[3] State Statutes

Noticed motion when court directs or required by court rule. *Code Civ. Proc. § 708.110(c)*

[4] Cross References

For a related form,see *§ 254.780*.

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PART V. FORMS
E. Proceedings Supplemental To Execution And Creditor's Actions

21-254 California Forms of Pleading and Practice--Annotated § 254.782

§ 254.782 Examination Proceedings--Declaration in Support of Application or Motion for Order for Examination of Judgment Debtor [Code Civ. Proc. § 708.110]

[1] FORM Examination Proceedings--Declaration in Support of Application or Motion for Order for Examination of Judgment Debtor [Code Civ. Proc. § 708.110]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

	)	
	)	NO. _____
_____ [*name*],	)	DECLARATION IN SUPPORT OF APPLICA-
Plaintiff,	)	TION/MOTION FOR ORDER FOR EXAMINA-
vs.	)	TION OF JUDGMENT DEBTOR
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare that:

1. [*Identity of declarant. See § 254.780, Paragraph 2.*]

2. [*State entry of money judgment. See § 254.780, Paragraph 3.*]

3. [*State nonsatisfaction of judgment. See § 254.780, Paragraph 4.*]

4. [*State residence or place of business of defendant and judgment debtor. See § 254.780, Paragraph 5.*]

5. _____ [*State facts that will show good cause, e.g.,* New evidence has come to light within the last 120 days that the defendant and judgment debtor has property in his/her possession and under his/her control not exempt from execution which he/she unjustly refuses to apply to the satisfaction of the money judgment].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature*]

[2] Use of Form

This form of declaration may be used in lieu of an affidavit required by *Code Civ. Proc. § 708.110(c)* to support an application or a noticed motion for an order for the examination of the judgment debtor examined within the last 120 days [*Code Civ. Proc. § 708.110(c)*; *Code Civ. Proc. § 2015.5*]. The Judicial Council form of application is required for use unless the court directs or court rule requires otherwise [*Code Civ. Proc. § 708.110(c)*]. For the Judicial Council form of application, *see § 254.780*. For a form for a noticed motion for use when required by the court local rule, *see § 254.781*.

This declaration may also be used in lieu of an affidavit required by *Code Civ. Proc. § 708.160* when the judgment creditor seeks an examination in the court in which the money judgment is entered or before a different court. If the examination is sought before a court other than the court in which the judgment is entered, the declaration must state the place of residence or place of business of the person sought to be examined [*Code Civ. Proc. § 708.160(d)(2)*].

This form is intended for use by a judgment creditor who was the plaintiff in the action. However, the form may be adapted for use by a judgment creditor who was a cross complainant or a petitioner.

[3] State Statutes

When affidavit required to show good cause. *Code Civ. Proc. § 708.110(c)*

Affidavit supporting application for examination if court other than court in which judgment is entered. *Code Civ. Proc. § 708.160(d)(2), (3)*

[4] Cross References

For related forms, *see §§ 254.780* and *254.781*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.783

§ 254.783 Examination Proceedings--Declaration Supporting Application for Order for Examination of Third Party [Code Civ. Proc. § 708.120(a)]

[1] FORM Examination Proceedings--Declaration Supporting Application for Order for Examination of Third Party [Code Civ. Proc. § 708.120(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION SUPPORTING APPLICATION
vs.	)	FOR ORDER FOR EXAMINATION OF THIRD
_____ [*name*],	)	PARTY
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare that:

1. [*Identity of declarant. See § 254.780, Paragraph 1.*]

2. [*State entry of money judgment. See § 254.780 Paragraph 3.*]

3. [*State nonsatisfaction of judgment. See § 254.780 Paragraph 4.*]

4. _____ [*Name of person to be examined*] _____ [has _____ (possession *or* control) of property which belongs to the judgment debtor *or* owes a debt to the judgment debtor in an amount exceeding $250]. This _____ [property *or* debt] is as follows: _____ [*describe property or debt*].

5. The _____ [residence *or* place of business] of _____ [*name of person sought to be examined*] is in _____ [*city*], _____ County, California [and the distance from his/her _____ (residence *or* place of business) to the place of trial is less than 150 miles].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature*]
_____ [*typed name*]

[2] Use of Form

This form of declaration is for use by a judgment creditor to support an application for an order for the examination of a third party to ascertain information relating to property of the judgment debtor possessed or controlled by the third party or relating to debts owed to the judgment debtor by the third party as an aid to enforcement of a money judgment [*Code Civ. Proc. § 708.120*]. For the mandatory Judicial Council form of application, *see § 254.780*.

An affidavit or other proof must be submitted to the court showing that the third person has possession or control of property in which the judgment debtor has an interest or is indebted to the judgment debtor in an amount exceeding $250 [*Code Civ. Proc. § 708.120(a)*]. The declaration in this form may be used in lieu of the affidavit required by *Code Civ. Proc. § 708.120(a)* [*Code Civ. Proc. § 2015.5*].

[3] State Statutes

Ex parte application for order. *Code Civ. Proc. § 708.120(a)*

Affidavit in support of judgment creditor's application as based on information and belief. *Code Civ. Proc. § 708.120(a)*

[4] Cross References

For a related form, *see § 254.780*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.784

§ 254.784 Examination Proceedings--Checklist of Information to Be Covered by Judgment Creditor During Examination

[1] FORM Examination Proceedings--Checklist of Information to Be Covered by Judgment Creditor During Examination

A. Personal Information re Examinee

1. Name and address.

2. Telephone number(s).

3. Social security number.

4. Name of spouse, if married; maiden name, if spouse is wife; telephone number(s); social security number.

5. Previous marriages, if any.

6. Names and addresses of previous spouses, if any; how terminated (death or dissolution); dates terminated.

7. Names, ages, and addresses of children of current marriage, if any.

8. Names, ages, and addresses of children of previous marriages, if any.

9. Names, ages, and addresses of parents; dates of death.

B. Type of Dwelling

1. Type of dwelling (apartment, private house, etc.).

2. If living in private home, is it owned by examinee, by family member, or by relative.

3. If living in apartment, is there a lease; landlord's name and address; amount of rent; when rent is paid; manner of paying rent (cash or check); person who pays rent; is rent paid up; term of leasehold; time left to run on leasehold; is there right to voluntarily sublet; any boarders or subtenants; if so, names and addresses and amount paid by each.

C. Employment; Income

1. Present occupation or employment, if any.

2. Length of time so employed.

3. Name and address of employer.

4. Amount of salary and any other compensation, such as commissions received.

5. Amount, if any, currently owed by employer to examinee.

6. Part-time employment, if any; amount received or to be received.

7. Hobbies which generate income, if any.

8. Previous employment; positions held; length of time in each position; names and addresses of each employer; amount of salary and any other compensation.

9. Employment of spouse, if any; length of time so employed; name and address of employer; amount of salary and any other compensation; amount, if any, currently owed by employer to spouse; part-time employment, if any, of spouse; amount received by spouse from such employment; hobbies of spouse which generate income.

10. Employment of children, if any; names and addresses of employers; amount of salary and any other compensation received by each child; amounts, if any, currently owed by each employer; hobbies of each child which generate income; amount each child contributes to family.

11. If officer, director, or stockholder of any corporation, amount of compensation.

12. If owner or part owner of business, describe business; individual, partnership, or corporate in organizational form; name and address of business; positions held during past five years; income derived from business and each position held during past five years.

13. Existence of savings plan; of profit sharing plan; of stock option or stock purchase plans; of deferred compensation plan; of accrued bonuses; of accrued vacation days.

14. Total income (indicating all sources) for past five years not mentioned above.

D. Accounts; Safe Deposit Boxes; Cash

1. Checking or savings accounts in bank, savings and loan, credit union, or other commercial institution; name and address of each institution; joint or individual accounts; present balances in each account; last deposit in each account; last withdrawal from each account.

2. Any other account subject to examinee's disposal; name and address of each institution; other person(s) with access to accounts; type of accounts; last deposit in each account; last withdrawal from each account.

3. Checking or savings accounts of spouse; name and address of each institution; joint or individual accounts; present balance in each account; last deposit in each account; last withdrawl from each account.

4. Safe deposit box; name and address of institution; other person(s) having access to it; any access to another person's safe deposit box; what is kept in box(es).

5. Amount of cash currently on hand.

E. Tangible Personal Property

1. Make, model, year, and license number of vehicle(s); amount owed on vehicle(s), if any; to whom payments made; place vehicle(s) kept.

2. Collection(s) of paintings, art objects, books, stamps, coins, antiques, curios, guns, or any other item which is valuable; value(s) of collection(s); location(s) of collection(s).

3. Boat(s); description(s); registration number(s); amount(s) owed; to whom payments made.

4. Watches, diamonds, or other jewelry; value; where kept.

5. Musical instrument(s); value; where kept.

6. Livestock; value; where kept.

7. Farm implement(s); value; where kept.

8. Office equipment, furnishings, supplies; value; where kept.

9. Machinery, fixtures, and professional equipment and supplies not listed previously; value; where kept.

10. Inventory; value; where kept.

F. Intangible Personal Property

1. Ownership of stocks, bonds, certificates, or any other type of security; in whose names; where located.

2. Ownership of promissory notes, drafts, bills of exchange, or other commercial paper; in whose names; where located.

3. Ownership of savings or other government bonds; in whose names; where located.

4. Ownership of patents, inventions, trade names, trademarks, copyrights, franchises, etc.; in whose names; where located.

5. Claims against other persons; amounts; how claims arose; names and addresses of persons involved.

6. Mortgage(s) on real or personal property; description(s) of property; amount(s) of mortgage(s).

7. Warehouse receipts, bills of lading, documents of title, etc.

8. Judgments; against whom; amounts.

G. Real Property

1. Ownership of or interest in any real property in California or elsewhere; type of interest; legal description; value; amount of mortgages or other obligations due and owing against property; term of leasehold, if any.

2. Homestead on property.

3. Income received from property; amount; from whom; dates payments due.

H. Inheritance

1. Property or money received recently by inheritance or by will; when; description of property; value of property; disposition of property.

2. Interest as heir or legatee in proceedings currently pending; where pending; names and addresses of attorneys involved; nature of interest.

3. Beneficiary under any trust; manner in which trust created; nature of interest; testamentary or inter vivos trust; name and address of trustee; amount received in previous calendar year; when payments made.

I. Money Owed to Examinee

1. Amount of money owed by other persons; names and addresses of such persons; when payable; last payments received; how debts arose; evidence of debts such as notes; location of any notes.

2. Money owed by any public entity, such as income tax refund or claim which will be paid; when payment expected.

J. Insurance Policies; Retirement

1. Life insurance; name of company; amount of policy; names of beneficiaries; total annual premium on policy; length of time policy in effect; any money borrowed against policy; current cash loan value of policy; where kept.

2. If beneficiary of life insurance policy on another person's life, name of person; amount of policy; total annual premium of policy; age and condition of health of insured; where kept.

3. Any accident, health, or disability policies; names of companies; where kept.

4. Any insurance payments currently due (e.g., health or accident payments).

5. Fire insurance on home and furniture; name of company; amount of policy; where kept.

6. Annuity, retirement, or pension plans; names of companies; amounts of policies; total annual premiums on policies; length of time policies in effect; any money borrowed against policies; current cash loan values of policies; where kept.

K. Miscellaneous

1. Any property not mentioned above owned either by examinee or by spouse.

2. Total assets; total debts.

3. Anything of value which is being held by another person for examinee or for spouse; name and address of person; description of property.

4. Any will or trust agreement.

5. Any power of attorney or authority over any stock, bond, or other security or commodity account.

6. Any assignment for benefit of creditors.

7. Any receiver ever appointed.

8. Any petition in bankruptcy filed; when; where; discharge.

9. Any judgments of record against examinee.

10. Current party in any lawsuit; details of action; names and addresses of attorneys.

11. Any transfer, sale, gift, or other disposition of real or personal property during last year; describe property; dates of transfer or disposition; consideration received.

12. Payments to any creditor not previously mentioned.

13. Total average monthly expenses; how met.

14. Books or records kept or maintained during past five years.

[2] Use of Form

The foregoing form of checklist is for use by an attorney of a judgment creditor in examining a judgment debtor. It is provided as an aid for counsel in thinking through the areas which he or she may wish to pursue during an examination. The checklist is illustrative only; many examinations will not require the depth of questioning illustrated, whereas some examinations will require more extensive questioning in particular areas.

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21-254 California Forms of Pleading and Practice--Annotated § 254.785

§ 254.785 Examination Proceedings--Order Applying Property to Satisfaction of Money Judgment [Code Civ. Proc. § 708.205]

[1] FORM Examination Proceedings--Order Applying Property to Satisfaction of Money Judgment [Code Civ. Proc. § 708.205]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER APPLYING PROPERTY TO SATISFAC-
_____ [*name*],	)	TION OF MONEY JUDGMENT
Defendant.	)	[*Code Civ. Proc. § 708.205*]
	)	
	)	

_____

The above-entitled matter came on regularly for hearing by the Court this date. Plaintiff appeared by counsel _____ [*name*] [; defendant appeared by counsel _____ (*name*); *and/or* third party appeared by counsel _____(*name*)].

It appearing to the satisfaction of the Court from the _____ [testimony introduced *or* declaration(s) of _____(*name(s)*)] that plaintiff and judgment creditor _____ [*name*] did, on _____ [*date*], recover judgment in the above-entitled action against _____ [*name*], defendant and judgment debtor, for the sum of $_____ [and for costs in the sum of $_____]; that the judgment remains unsatisfied; that _____ [*name of third person*] _____ [is indebted to _____ (*name of defendant and judgment debtor*) in the sum of $_____; and that this debt is due and payable and is not denied by _____ (*name of*

third person); *and/or* has property in his/her possession that belongs to _____ (*name of defendant and judgment debtor*); and that _____ (*name of third person*) does not claim any interest in the property adverse to the title or right of possession of _____(*name of defendant and judgment debtor*);] and that the _____ [property *or* debt] is not exempt from execution;

[*EITHER*]

IT IS ORDERED that you, _____ [*name of third person*], deliver the property consisting of _____ [*describe property*] to the Sheriff of _____ County within _____ [*number*] days, and that the property be applied to the satisfaction of the money judgment entered herein.

[*AND/OR*]

IT IS ORDERED that you, _____ [*name of third person*], pay to the Sheriff of _____ County the sum of $_____, to be applied to the satisfaction of the money judgment entered herein, within _____ days.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use at the conclusion of examination proceedings to order a judgment debtor's interest in property in the possession or under the control of the judgment debtor or a third person or a debt owed by the third person to the judgment debtor to be applied toward the satisfaction of the money judgment [*Code Civ. Proc. § 708.205(a)*; *Palacio Del Mar Homeowners Assn., Inc. v. McMahon (2009) 174 Cal. App. 4th 1386, 1390-1391, 95 Cal. Rptr. 3d 445* (property may be ordered turned over to levying officer or receiver, but not to judgment creditor directly)]. This order may not be issued if the third person claims an interest in the property adverse to the judgment debtor or denies the debt unless such a claim is determined by the court [*Code Civ. Proc. § 708.205(b)*].

[3] State Statutes

Order applying property or debt toward satisfaction of judgment. *Code Civ. Proc. § 708.205*

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21-254 California Forms of Pleading and Practice--Annotated § 254.786

§ 254.786 Examination Proceedings--Ex Parte Application for Order Forbidding Transfer of Property or Payment of Debt to Judgment Debtor [Code Civ. Proc. § 708.180(c)]

[1] FORM Examination Proceedings--Ex Parte Application for Order Forbidding Transfer of Property or Payment of Debt to Judgment Debtor [Code Civ. Proc. § 708.180(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	EX PARTE APPLICATION FOR ORDER FOR-
vs.	)	BIDDING _____ [TRANSFER OF PROPERTY *or*
_____ [*name*],	)	PAYMENT OF DEBT] TO JUDGMENT DEBTOR
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

1. Plaintiff and judgment creditor _____ [*name*] hereby applies for an order forbidding _____ [*name of third party*] from _____ [transferring property *or* paying a debt] to the judgment debtor until _____ [the _____ (ownership of the property *or* existence of the debt) is determined pursuant to *Code Civ. Proc. § 708.180(a) or* a creditor's suit may be commenced and an order obtained pursuant to *Code Civ. Proc. § 708.240*)].

2. [*State entry of money judgment. See § 254.780, Paragraph 3.*]

3. [*State nonsatisfaction of judgment. See § 254.780, Paragraph 4.*]

4. [*State third party's relation to, and describe, property or debt. See § 254.783, Paragraph 4.*]

5. _____ [*Name of third party*] _____ [claims an interest in the property adverse to the judgment debtor *or* denies the debt].

WHEREFORE, petitioner prays:

That an order be entered herein forbidding _____ [*name of third person*] from _____ [transferring the property *or* paying the debt] to the judgment debtor until _____ [the _____ (ownership of the property *or* the existence of the debt) is deter mined pursuant to *Code Civ. Proc. § 708.180(a) or* a creditor's suit may be commenced and an order obtained pursuant to *Code Civ. Proc. § 708.240*].

_____ [*signature*]
_____ [*typed name*]

CAUTION:

For discussion of the requirements of *Cal. Rules of Ct., Rule 3.1200 et seq.* governing ex parte applications generally, including requirements that an ex parte application be accompanied by a memorandum by a proposed order, by a supporting declaration, and by a declaration regarding efforts to satisfy notice requirements, *see* Ch. 372, *Motions and Orders* .

[2] Use of Form

This form is for use by the judgment creditor to apply ex parte for an order forbidding a third party from transferring property or paying a debt to the judgment debtor when the third party claims an interest in the property adverse to the judgment debtor or denies the debt. The restraint on the transfer of the property or the payment of the debt will remain until ownership of the property or the existence of the debt is determined pursuant to *Code Civ. Proc. § 708.180(a)* or until a creditor's suit may be commenced and an order obtained pursuant to *Code Civ. Proc. § 708.240* [*Code Civ. Proc. § 708.180(c)*].

This form is intended for use by a judgment creditor who was the plaintiff in the action. However, the form may be adapted for use by a judgment creditor who was a cross complainant or a petitioner.

[3] State Statutes

Ex parte application to restrain transfer of property or payment of debt to judgment debtor. *Code Civ. Proc. § 708.180(c)*

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21-254 California Forms of Pleading and Practice--Annotated § 254.787

§ 254.787 Examination Proceedings--Notice of Motion for Order Forbidding Transfer of Property or Payment of Debt [Code Civ. Proc. § 708.180(d)]

[1] FORM Examination Proceedings--Notice of Motion for Order Forbidding Transfer of Property or Payment of Debt [Code Civ. Proc. § 708.180(d)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER FORBIDDING _____
vs.	)	[TRANSFER OF PROPERTY OR PAYMENT OF
_____ [*name*],	)	DEBT]
Defendant.	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*name of third person*]:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____

[*name of plaintiff and judgment creditor*] will, and hereby does, move for an order forbidding the _____ [transfer (or other disposition) of the property *or* paying the debt] to _____ [the judgment debtor *or* any person] until _____ [the _____ (ownership of the property *or* existence of the debt) is determined pursuant to *Code of Civil Procedure section 708.180(a) or* a creditor's suit may be commenced and an order obtained pursuant to *Code of Civil Procedure section 708.240*]. The motion will be made on the grounds that _____ [*name of third person*] _____ [has _____ (possession *or* control) or property in which the judgment debtor has an interest *or* owes the judgment debtor a debt] which is not exempt from the enforecment of a money judgment.

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s)*] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

CAUTION:

A memorandum is required to be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, *see* Ch. 417, *Points and Authorities* .

[2] Use of Form

This form is for use by the judgment creditor to apply for an order forbidding a third party from transferring or otherwise disposing of property to anyone or from paying the debt when the third party claims an interest in the property adverse to the judgment debtor or denies the debt. The restraint on the transfer of the property or the payment of the debt will remain until ownership of the property or the existence of the debt is determined pursuant to *Code Civ. Proc. § 708.180(a)* or until a creditor's suit may be commenced and an order obtained pursuant to *Code Civ. Proc. § 708.240* [*Code Civ. Proc. § 708.180(d)*].

This form is intended for use by a judgment creditor who was the plaintiff in the action. However, the form may be adapted for use by a judgment creditor who was a cross plaintiff or a petitioner.

[3] State Statutes

Motion to forbid transfer of property or payment of debt. *Code Civ. Proc. §§ 708.180(d), 708.240(a)*

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21-254 California Forms of Pleading and Practice--Annotated § 254.788

§ 254.788 Examination Proceedings--Order Forbidding Transfer of Property or Payment of Debt [Code Civ. Proc. § 708.180(c) or 708.180(d)]

[1] FORM Examination Proceedings--Order Forbidding Transfer of Property or Payment of Debt [Code Civ. Proc. § 708.180(c) or 708.180(d)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER FORBIDDING TRANSFER OF PROP-
Defendant.	)	ERTY OR PAYMENT OF DEBT
	)	
	)	

_____

[*EITHER*]

Application having been made _____ [by *or* on behalf of] _____ [*name of plaintiff and judgment creditor*], and good cause appearing therefor,

[*OR*]

The motion of _____ [*identify party, e.g.*, plaintiff and judgment creditor] for an order forbidding _____ [the transfer or other disposition of property to any person *or* the payment of the debt to the

judgment debtor] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; _____ [*name of third person*] appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is granted and,

IT IS ORDERED that you, _____ [*name of third person*] be and are hereby forbidden from _____ [transferring (or otherwise disposing of the property) *or* paying the debt] to _____ [the judgment debtor *or* any person] until _____ [the _____ (interests in the property *or* the existence of the debt) is determined pursuant to *Code of Civil Procedure Section 708.180(a) or* a creditor's suit may be commenced and an order obtained pursuant to *Code of Civil Procedure Section 708.240*].

IT IS FURTHER ORDERED that _____ [*name of plaintiff and judgment creditor*] furnish an undertaking _____ [as provided in *Code of Civil Procedure Section 529 or* in the amount of $_____].

Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form is for use to order a third party not to transfer property or to pay a debt owed the judgment debtor. The first alternative paragraph is used when the judgment creditor has made an ex parte application. The second alternative paragraph is used when the judgment creditor is required to make the application on noticed motion.

When the application is made ex parte, the third party will only be restrained from transferring the property to the judgment debtor. An undertaking may be required by the court [*Code Civ. Proc. § 708.180(c)*]. The court may modify or vacate the order at any time with or without a hearing on such terms as are just [*Code Civ. Proc. § 708.180(c)*].

If the application is made on noticed motion, the third party will be restrained from transferring the property to anyone and from disposing of the property in any other manner. An undertaking pursuant to *Code Civ. Proc. § 529* is mandatory and the court may modify or vacate the order at any time only after notice and a hearing on those terms that are just [*Code Civ. Proc. § 708.180(d)*].

[3] State Statutes

Order restraining transfer or payment to judgment debtor. *Code Civ. Proc. § 708.180(c)*

Order restraining transfer or payment to any person. *Code Civ. Proc. § 708.180(d)*

Order restraining transfer or payment to judgment debtor. *Code Civ. Proc. § 708.240(a)*

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21-254 California Forms of Pleading and Practice--Annotated § 254.789

§ 254.789 Creditor's Suit--Complaint [Code Civ. Proc. § 425.10]--By Judgment Creditor--Against Third Person--For Judgment Debtor's Interest in Property or Debt to Satisfy Money Judgment [Code Civ. Proc. § 708.210] and for Temporary Restraining Order and/or Preliminary Injunction [Code Civ. Proc. § 708.240(b)]

[1] FORM Creditor's Suit--Complaint [Code Civ. Proc. § 425.10]--By Judgment Creditor--Against Third Person--For Judgment Debtor's Interest in Property or Debt to Satisfy Money Judgment [Code Civ. Proc. § 708.210] and for Temporary Restraining Order and/or Preliminary Injunction [Code Civ. Proc. § 708.240(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR JUDGMENT DEBTOR'S IN-
_____ [*name*],	)	TEREST IN PROPERTY OR DEBT TO SATISFY
Defendant.	)	MONEY JUDGMENT
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California.

2. On _____ [*date*], plaintiff recovered a money judgment against _____ [*name of judgment debtor*] for the sum of $_____ [and for costs in the sum of $_____] in Action No. _____, in the _____ [*specify*] Court of _____ County,

entitled _____ vs. _____, which was duly entered in the Judgment Book of that Court, Vol. _____, page _____, on _____ [*date*].

3. [*State nonsatisfaction of judgment. See § 254.780, Paragraph 4.*]

[*EITHER*]

4. Plaintiff is informed and believes and on such information and belief alleges that defendant has in his/her possession and control the property described below which belongs to the judgment debtor and which is subject to execution in satisfaction of the judgment: _____ [*describe property*].

[*OR*]

4. Plaintiff is informed and believes and on such information and belief alleges that defendant is indebted to the judgment debtor in the approximate sum of $_____.

[5. _____ (*Allege specific facts showing that defendant is about to transfer or otherwise dispose of the property in violation of plaintiff's protectible rights and interests, e.g.,* On or about _____ (*date*), defendant initiated negotiations to sell the property to a relative who is a real estate developer for $25,000, although the property has been appraised at $325,000).]

[6. _____ (*Allege, if appropriate, plaintiff's demand that defendant stop his/her threatened conduct, defendant's refusal, and resulting necessity for prompt judicial action to protect plaintiff, e.g.,* On or about _____ [*date*] plaintiff demanded that defendant stop the negotiations for the sale of the property to a real estate developer. Defendant has refused and still refuses to refrain from this action).]

[7. Defendant's (threatened) conduct, unless and until enjoined and restrained by order of this court, will cause great and irreparable injury to plaintiff, for which plaintiff has no adequate remedy at law in that _____ (*specify particular facts which will constitute great and irreparable injury, e.g,* the property is the only substantial asset of _____ (*name of judgment debtor*), and plaintiff's judgment for $75,000 against _____ (*name of judgment debtor*) could be satisied if the property were sold for its full value).]

WHEREFORE, plaintiff prays judgment as follows:

[*EITHER*]

1. That the above-described property now in defendant's possession and control be declared to be the property of _____ [*name of judgment debtor*];

[*OR*]

1. That it be adjudged that defendant is indebted to _____ [*name of judgment debtor*] and that the amount of such indebtedness be determined;

2. That the _____ [property *or* debt] and any other property belonging to _____ [*name of judgment debtor*] that is in the possession or control of defendant be applied to payment of the money

judgment against _____ [*name of judgment debtor*];

[*EITHER*]

3. That defendant be ordered to transfer and deliver all such property of _____ [*name of judgment debtor*] in his/her possession or control to the Sheriff of _____ County within _____ [*number*] days, and that the property be applied to the satisfaction of the judgment entered against _____ [*name of judgment debtor*];

[*OR*]

3. That defendant be ordered to pay _____ [the debt he/she owes to _____ (*name of judgment debtor) or* $_____ (*specify amount*)] to _____ [*name of judgment creditor*] to satisfy the judgment against _____ [*name of judgment debtor*].

[4. For an order requiring defendant to show cause, if any, why he/she should not be enjoined as hereinafter set forth, during the pendency of this action;]

[5. For a temporary restraining order and a preliminary injunction enjoining defendant and his/her agents, servants, and employees, and all persons acting under, in concert with, or for him/her from transferring the property to any person or otherwise disposing of the property in which the judgment debtor has an interest;]

6. For costs of suit herein incurred; and

7. For such other and further relief as the Court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

Verification

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of complaint is for use by a judgment creditor against a third person, who has possession or control of

property in which the judgment debtor has an interest or who is indebted to the judgment debtor, to recover the property interest or debt. It includes optional allegations (Paragraphs 5-7) necessary to apply for a temporary restraining order or preliminary injunction or both, restraining the defendant in the creditor's action, the third person in possession or in control of property in which the judgment debtor has an interest, from transferring the property to any person or otherwise disposing of the property. The court may make, dissolve, and modify any order restraining transfer [*Code Civ. Proc. § 708.240(b)*].

This form is intended for use by a judgment creditor who was the plaintiff in the action. However, the form may be adapted for use by a judgment creditor who was a cross complainant or a petitioner.

For a discussion of the time during which a creditor's suit may be brought, see *§ 254.251*.

[3] Allegations

This complaint alleges:

- The residence of the defendant (Paragraph 1).
- The recovery of judgment against a judgment debtor (Paragraph 2).
- Nonsatisfaction of the judgment (Paragraph 3).
- Defendant's possession of property in which the judgment debtor has an interest or defendant's indebtedness to the judgment debtor (Paragraph 4) [*Code Civ. Proc. § 708.210*].
- Request for a temporary restraining order [for discussion and forms, *see* Ch. 303, *Injunctions*].

[4] Verification

Verification is required if plaintiff seeks a temporary restraining order or a preliminary injunction on the basis of the complaint instead of on affidavits (or declarations under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527*].

[5] Venue

The judgment debtor may be joined in the action but is not an indispensable party [*Code Civ. Proc. § 708.220*]. The residence of the judgment debtor may not be considered, however, in determining the proper venue unless otherwise provided by contract between the judgment debtor and the third person [*Code Civ. Proc. § 708.220*].

[6] Cross References

For discussion and forms relating to temporary restraining orders and preliminary injunctions, see Ch. 303, *Injunctions*

[7] State Statutes

Temporary restraining order and preliminary injunction. *Code Civ. Proc. §§ 525-527, 708.240(b)*

Creditor's suit. *Code Civ. Proc. § 708.210*

Joinder of judgment debtor. *Code Civ. Proc. § 708.220*

Time for bringing suit. *Code Civ. Proc. § 708.230*

No right to jury trial. *Code Civ. Proc. § 708.270*

[8] Decisions

Nature of creditor's action and venue. *Holstein v. Superior Court (1969) 275 Cal. App. 2d 708, 710, 80 Cal. Rptr. 301*

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E. Proceedings Supplemental To Execution And Creditor's Actions

21-254 California Forms of Pleading and Practice--Annotated § 254.790

§ 254.790 Creditor's Suit--Ex Parte Application for Order Restraining Transfer of Property to or Payment of Debt--to Judgment Debtor [Code Civ. Proc. § 708.240(a)]

[1] FORM Creditor's Suit--Ex Parte Application for Order Restraining Transfer of Property to or Payment of Debt--to Judgment Debtor [Code Civ. Proc. § 708.240(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	EX PARTE APPLICATION FOR ORDER RE-
vs.	)	STRAINING _____ [TRANSFER
_____ [*name*],	)	OF PROPERTY *or* PAYMENT OF DEBT] TO
Defendant.	)	JUDGMENT DEBTOR
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

1. Judgment creditor _____ [*name of judgment creditor*] hereby applies for an order forbidding _____ [*name of third party*] from _____ [transferring property *or* paying a debt] to the judgment debtor.

2. [*State entry of money judgment. See § 254.780, Paragraph 3.*]

3. [*State nonsatisfaction of judgment. See § 254.780, Paragraph 4.*]

4. Defendant _____ [*name of third party*] _____ [has _____ (possession *or* control) of property which belongs to the judgment debtor *or* owes a debt to the judgment debtor]. This _____ [property *or* debt] is as follows: _____ [*describe property or debt*].

WHEREFORE, petitioner prays:

That an order be entered herein restraining _____ [*name of third person*] from _____ [transferring the property *or* paying the debt] to the judgment debtor.

_____ [*signature*]
_____ [*typed name*]

CAUTION:

For discussion of the requirements of *Cal. Rules of Ct., Rule 3.1200 et seq.* governing ex parte applications generally, including requirements that an ex parte application be accompanied by a memorandum by a proposed order, by a supporting declaration, and by a declaration regarding efforts to satisfy notice requirements, *see* Ch. 372, *Motions and Orders* .

[2] Use of Form

This form is used by the judgment creditor while a creditor's suit is pending to apply for an order to restrain a third person from transferring to judgment debtor property in which judgment debtor is claimed to have an interest or from paying to the judgment debtor the debt owed. The order will remain in effect until judgment is entered in the action or until such earlier time as the court may provide in the order [*Code Civ. Proc. § 708.240(a)*].

[3] State Statutes

Order restraining transfer of property or payment of debt. *Code Civ. Proc. § 708.240(a)*

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21-254 California Forms of Pleading and Practice--Annotated § 254.791

§ 254.791 Creditor's Suit--Notice of Motion for Order Restraining Transfer of Property to or Payment of Debt--to Judgment Debtor [Code Civ. Proc. § 708.240(a)]

[1] FORM Creditor's Suit--Notice of Motion for Order Restraining Transfer of Property to or Payment of Debt--to Judgment Debtor [Code Civ. Proc. § 708.240(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER RESTRAINING TRANSFER OF PROPERTY
vs.	)	OR PAYMENT OF DEBT
_____ [*name*],	)	[Telephone Appearance]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*name of third person*]:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*name of judgment creditor*] will, and hereby does, move for an order restraining _____ [the transfer

of the property *or* payment of the debt] to the judgment debtor. The motion will be made on the grounds that _____ [*specify legal grounds*].

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name of judgment creditor*] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*party's status and name*]

CAUTION:
A memorandum is required to be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form is used by the judgment creditor while a creditor's suit is pending to apply for an order to restrain a third person from transferring to judgment debtor property in which judgment debtor is claimed to have an interest or from paying to the judgment debtor the debt owed. A notice of motion must be used when the courts so directs or a court rule so requires [*Code Civ. Proc. § 708.240(a)*].

[3] State Statutes

Noticed motion restraining transfer of property or payment of debt. *Code Civ. Proc. § 708.240(a)*

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21-254 California Forms of Pleading and Practice--Annotated § 254.792

§ 254.792 Creditor's Suit--Order Restraining Transfer of Property or Payment of Debt [Code Civ. Proc. § 708.240(a)]

[1] FORM Creditor's Suit--Order Restraining Transfer of Property or Payment of Debt [Code Civ. Proc. § 708.240(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER RESTRAINING TRANSFER OF PROP-
Defendant.	)	ERTY OR PAYMENT OF DEBT
	)	
	)	

_____

[*EITHER*]

Application having been made _____ [by *or* on behalf of] _____ [*name of plaintiff and judgment creditor*], and good cause appearing therefor,

[*OR*

The motion of _____ [*identify party, e.g.*, plaintiff and judgment creditor] for an order restraining _____ [the transfer of property *or* the payment of the debt] to the judgment debtor came on regularly

for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; _____ [*name of third person*] appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is granted and,

IT IS ORDERED that you, _____ [*name of defendant*] be and are hereby restrained from _____ [transferring the property *or* paying the debt] to the judgment debtor until _____ [judgment has been entered in the action *or specify earlier time that court may set*].

IT IS FURTHER ORDERED the you _____ [*name of defendant*] furnish an undertaking in the amount of $_____.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form is for use to order a third party not to transfer property or to pay a debt owed the judgment debtor. The first alternative paragraph is used when the judgment creditor has made an ex parte application. The second alternative paragraph is used when the judgment creditor is required to make the application on noticed motion. The court may require an undertaking and it may modify or vacate the order at any time with or without a hearing on such terms as are just. If the court directs or if a court rule requires, the order will have to be made on noticed motion and the first alternative paragraph is used [*Code Civ. Proc. § 708.240(a)*].

[3] State Statutes

Order restraining transfer or payment. *Code Civ. Proc. § 708.240(a)*

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21-254 California Forms of Pleading and Practice--Annotated § 254.793

§ 254.793 Notice of Motion for Order Determining Claim of Exemption in Third Party Examination [Code Civ. Proc. § 708.120(d)] or in Creditor's Suit [Code Civ. Proc. § 708.260(a)]

[1] FORM Notice of Motion for Order Determining Claim of Exemption in Third Party Examination [Code Civ. Proc. § 708.120(d)] or in Creditor's Suit [Code Civ. Proc. § 708.260(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER DETERMINING CLAIM OF EXEMPTION
vs.	)	[Telephone Appearance]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*name*], plaintiff and judgment creditor:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], defendant and judgment debtor _____ [*name*] will, and hereby does, move for an order determining judgment debtor's claim of exemption in the _____ [property _____ (in the possession *or* under

the control) of *or* debt owed by] _____ [*name of third party*]. The motion will be made on the grounds that _____ [all *or* a portion] of the _____ [property *or* debt] is exempt from enforcement of the money judgment under Section _____ of the Code of Civil Procedure in that _____ [*specify exempt characteristic of property, e.g.,* it is an heirloom].

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

CAUTION:
A memorandum is required to be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, *see* Ch. 417, *Points and Authorities* .

[2] Use of Form

This form of notice of motion for an order determining the judgment debtor's claim of exemption is for use by the judgment debtor to claim that property that is the subject of the examination of a third party or which the judgment creditor is seeking to obtain from a third party to satisfy a money judgment by means of a creditor's suit is exempt from enforcement of a money judgment [*Code Civ. Proc. §§ 708.120(a)* (examination proceedings), 708.260(d) (creditor's suit)].

In an examination proceeding, the claim must be filed with the court and personally served on the judgment creditor at least three days before the date set for the third party's examination. The court must determine any claim of exemption [*Code Civ. Proc. § 708.120(d)*].

In a creditor's suit, the claim must be filed with the court and served on the judgment creditor at least 30 days before the date set for trial. Service may be made personally or by mail [*Code Civ. Proc. § 708.260(a)*; for discussion of service of papers and extension of time for service when service is by mail, *see § 254.13*].

An affidavit (or declaration under *Code Civ. Proc. § 2015.5*) in support of the motion must be executed by the judgment debtor [*Code Civ. Proc. §§ 708.120(d), 708.260(a)*]. The Judicial Council forms of claim of exemption and financial statement are in the form of declarations, and apparently may be used or adapted for use to support this motion [*see § 254.710*].

For a form of order granting the motion, *see § 254.794*. A notice of opposition to the claim is not required [*Code Civ. Proc. §§ 708.120(d), 708.260(a)*].

[3] Waiver of Exemption

Failure of the judgment debtor to make a claim of exemption during the examination proceeding does not preclude the judgment debtor from later claiming the exemption unless the property or debt is described in the order in a manner reasonably adequate to permit it to be identified and the judgment debtor receives notice of the examination proceeding at least 10 days before the date set for the examination [*Code Civ. Proc. § 708.120(d)*].

Failure of the judgment debtor to make a claim of exemption during a creditor's suit is a waiver of the exemption, unless the judgment debtor was not served with process that contained a description of the property or debt reasonably adequate to permit it to be identified and the judgment debtor does not have actual notice of the pendency of the action and the identity of the property or the nature of the debt in issue [*Code Civ. Proc. § 708.260(b)*].

[4] State Statutes

Claim of exemption. *Code Civ. Proc. §§ 708.120(d), 708.260(a)*

Waiver of claim. *Code Civ. Proc. § 708.260(b)*

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21-254 California Forms of Pleading and Practice--Annotated § 254.794

§ 254.794 Order Determining Judgment Debtor's Claim of Exemption For Property or Debt [Code Civ. Proc. § 708.120(d) or 708.260(a)]

[1] FORM Order Determining Judgment Debtor's Claim of Exemption For Property or Debt [Code Civ. Proc. § 708.120(d) or 708.260(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER DETERMINING JUDGMENT DEBTOR'S
Defendant.	)	CLAIM OF EXEMPTION FOR PROPERTY OR
	)	DEBT
	)	

_____

The motion of defendant and judgment debtor _____ [*name*] for an order determining judgment debtor's claim of exemption of _____ [property in the hands of a third person *or* a debt owed by a third person to judgment debtor] came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that the _____ [property _____ (in the possession *or* under the control) of *or* the debt owed by] _____ [*name of third person*] is exempt from enforcement of the money judgment [to the extent _____ (*specify how much of property or debt is exempt*)].

Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form is used to grant a motion for an order determining the judgment debtor's claim that property in the possession or under the control of the third party or a debt owed by the third party is exempt from enforcement of a money judgment [*Code Civ. Proc. § 708.120(d)*].

[3] State Statutes

Order determining exemption. *Code Civ. Proc. § 708.120(d)*

[4] Cross References

For a related form,see *§ 254.793*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.795

§ 254.795 Proceedings for Order Applying Franchise Granted by Public Entity to Satisfaction of Money Judgment [Code Civ. Proc. § 708.920]--Notice of Motion

[1] FORM Proceedings for Order Applying Franchise Granted by Public Entity to Satisfaction of Money Judgment [Code Civ. Proc. § 708.920]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR AP-
Plaintiff,	)	PLICATION OF FRANCHISE TO SATISFACTION
vs.	)	OF MONEY JUDGMENT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*name of judgment debtor or public entity that granted franchise*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* plaintiff] _____ [*name of judgment creditor*] will, and hereby does, move for an

order applying the franchise held by _____ [*name of judgment debtor*], granted by _____ [*name of public entity that granted franchise*] to the satisfaction of the money judgment granted to _____ [*name of judgment creditor*] against _____ [*name of judgment debtor*]. The motion will be made on the ground that the money judgment has not been satisfied, and pursuant to *Section 708.920(a) of the Code of Civil Procedure* the court may order a franchise applied to the satisfaction of a money judgment.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, on the papers, records, and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

CAUTION:
A memorandum is required to be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, *see* Ch. 417, *Points and Authorities* .

[2] Use of Form

This notice of motion is for use by a judgment creditor to apply for an order that the judgment debtor's interest in a franchise granted by a public entity be applied to the satisfaction of a money judgment. Such an order is within the court's discretion to grant [*Code Civ. Proc. § 708.920(a)*; for further discussion, see *§ 254.270* et seq.].

The notice of motion must be served on the judgment debtor and on the public entity that granted the franchise [*Code Civ. Proc. § 708.920(a)*].

[3] State Statutes

Franchise defined. *Code Civ. Proc. § 708.910*

Procedure for order for application of franchise to satisfaction of money judgment. *Code Civ. Proc. § 708.920*

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21-254 California Forms of Pleading and Practice--Annotated § 254.796

§ 254.796 Proceedings for Order Applying Franchise Granted by Public Entity to Satisfaction of Money Judgment [Code Civ. Proc. § 708.920(a)]--Declaration

[1] FORM Proceedings for Order Applying Franchise Granted by Public Entity to Satisfaction of Money Judgment [Code Civ. Proc. § 708.920(a)]--Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF MOTION FOR APPLICATION
_____ [*name*],	)	OF FRANCHISE TO SATISFACTION OF MONEY
Defendant.	)	JUDGMENT
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*Specify judgment creditor, e.g.,* Plaintiff] _____ [*name*] obtained a judgment against _____ [*specify judgment debtor, e.g.,* defendant] _____ [*name*] in the above-entitled action in the amount of $_____ on _____ [*date*].

3. _____ [*Specify facts pertaining to judgment debtor's franchise rights, e.g.,* _____ (*name of judgment debtor*) holds the exclusive right to furnish cable televsion service within the boundaries of the City of _____, under a franchise granted by the City of _____].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of declaration is for use by a judgment creditor in support of a motion for an order for application of a franchise to satisfaction of a money judgment [*see Code Civ. Proc. § 708.920(a), (b)*].

[3] Cross References

For a related form,see *§ 254.795*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.797

§ 254.797 Proceedings for Order Applying Franchise Granted by Public Entity to Satisfaction of Money Judgment [Code Civ. Proc. § 708.920(a)]--Order

[1] FORM Proceedings for Order Applying Franchise Granted by Public Entity to Satisfaction of Money Judgment [Code Civ. Proc. § 708.920(a)]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER GRANTING MOTION TO APPLY FRAN-
Defendant.	)	CHISE TO SATISFACTION OF MONEY JUDG-
	)	MENT
	)	

The motion of _____ [*identify party, e.g.,* Plaintiff] for an order applying a franchise to the satisfaction of a money judgment came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that:

1. The _____ [*specify franchise*] be applied to the satisfaction of the _____ [*specify judgment creditor, e.g.,* plaintiff's] money judgment against _____ [*specify judgment debtor, e.g.,* defendant] by _____ [selling the franchise and applying the proceeds of the sale to the judgment *or*

assigning the franchise to _____ (*specify judgment creditor, e.g.,* plaintiff) *or* appointing a receiver to take over the management and control of the franchise and to turn over the rents, issues, and profits therefrom to the plaintiff for application to the judgment].

[2. _____ (*Specify any additional provisions to effectuate application of franchise to satisfaction of judgment as provided by Code Civ. Proc. § 708.920(b), e.g., place or terms of sale; collection of penalties recoverable by franchise, etc.*)]
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use to direct that a franchise be applied to the satisfaction of a money judgment [*see Code Civ. Proc. § 708.920*].

[3] Methods for Application to Satisfaction of Judgment

If the court orders application of the franchise to the satisfaction of the judgment, it may be done by such means as appear proper to the court, including but not limited to sale of the franchise, assignment of the franchise or proceeds of the franchise, or appointment of a receiver. The court may also include in its order, or make additional orders containing, provisions to effectuate the application of the franchise to the satisfaction of the judgment, including but not limited to provisions relating to the place of sale of the franchise, receipt of proceeds of the franchise, recovery of penalties imposed by law and recoverable for injury to the franchise or for damages or other cause, and the judgment debtor's powers, duties, and liability for penalties and forfeitures [*Code Civ. Proc. § 708.920(b)*].

[4] Cross References

For a related form,see *§ 254.795*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.798

§ 254.798 Proceedings for Order Applying Nonvested Property Interest to Satisfaction of Money Judgment [Code Civ. Proc. § 709.020]--Notice of Motion

[1] FORM Proceedings for Order Applying Nonvested Property Interest to Satisfaction of Money Judgment [Code Civ. Proc. § 709.020]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER APPLYING NONVESTED PROPERTY INTEREST TO SATISFACTION OF MONEY JUDGMENT
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*name of judgment debtor*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* plaintiff] _____ [*name of judgment creditor*] will, and hereby does, move for an

order applying defendant's nonvested property interest in _____ [*describe property interest, e.g.*, the contingent remainder of the estate of _____ (*name*), which estate is held by _____ (*name of life beneficiary*) for life, the remainder to pass to defendant on the death of the life beneficiary, if defendant survives the life beneficiary]. The motion will be made on the ground that _____ [*specify party, e.g.*, plaintiff] _____ [*name of judgment creditor*] has obtained a judgment against _____ [*specify party, e.g.*, defendant] _____ [*name of judgment debtor*], that the money judgment has not been satisfied, and that pursuant to *Section 708.920(a) of the Code of Civil Procedure* the court may order that a nonvested property interest be applied to the satisfaction of a money judgment.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, on the papers, records, and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

CAUTION:
A memorandum is required to be served notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, *see* Ch. 417, *Points and Authorities* .

[2] Use of Form

This notice of motion is for use by a judgment creditor to apply for an order that the judgment debtor's nonvested property interest be applied to the satisfaction of a money judgment [*Code Civ. Proc. § 709.020*; for further discussion, see *§ 254.290* et seq.].

This form is not for use to reach a judgment debtor's interest as beneficiary of a trust, which is governed by *Code Civ. Proc. § 709.010* rather than *Code Civ. Proc. § 709.020* [*see Code Civ. Proc. § 709.010(b)*].

[3] State Statutes

Order applying nonvested property interest to satisfaction of money judgment. *Code Civ. Proc. § 709.020*

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21-254 California Forms of Pleading and Practice--Annotated § 254.799

§ 254.799 Proceedings for Order Applying Nonvested Property Interest to Satisfaction of Money Judgment [Code Civ. Proc. § 709.020]--Declaration

[1] FORM Proceedings for Order Applying Nonvested Property Interest to Satisfaction of Money Judgment [Code Civ. Proc. § 709.020]--Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF MOTION FOR ORDER APPLY-
_____ [*name*],	)	ING NONVESTED PROPERTY INTEREST TO
Defendant.	)	SATISFACTION OF MONEY JUDGMENT
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. [*Existence of judgment. See § 254.796, Paragraph 2.*]

3. _____ [*Specify facts pertaining to judgment debtor's nonvested property rights, e.g.,* Defendant is entitled to the contingent remainder of the estate of _____ (*name*), which estate is presently held by _____ (*name*) for life, if defendant survives the life beneficiary].

4. _____ [*Specify facts to persuade court that interests of the parties will be protected by requested action*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of declaration is for use by a judgment creditor in support of a motion for an order for application of a nonvested property interest to satisfaction of a money judgment [*see Code Civ. Proc. § 709.020*].

[3] Cross References

For a related form,see *§ 254.798*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.800

§ 254.800 Proceedings for Order Applying Nonvested Property Interest to Satisfaction of Money Judgment [Code Civ. Proc. § 709.020]--Order

[1] FORM Proceedings for Order Applying Nonvested Property Interest to Satisfaction of Money Judgment [Code Civ. Proc. § 709.020]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER GRANTING MOTION TO APPLY NON-
Defendant.	)	VESTED PROPERTY INTEREST TO SATISFAC-
	)	TION OF MONEY JUDGMENT
	)	

The motion of _____ [*identify party, e.g.,* plaintiff] for an order applying a nonvested property interest to the satisfaction of a money judgment came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that _____ [*specify judgment debtor, e.g.,* defendant's] _____ [*describe nonvested interest, e.g.,* remainder in the estate of _____ (*name*), which is contingent on defendant surviving _____ (*name*), the life beneficiary] be, and hereby is, applied to the satisfaction of the _____ [*specify judgment creditor, e.g.,*

plaintiff's] money judgment against _____ [*specify judgment debtor, e.g.,* defendant] by _____ [*specify means, e.g.,* the sale of defendant's interest in the contingent remainder, with the proceeds subject to a lien for the benefit of plaintiff].
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use to direct that a nonvested property interest be applied to the satisfaction of a money judgment [*see Code Civ. Proc. § 709.020*]. The interest of the judgment debtor may be applied to the satisfaction of the money judgment by such means as the court, in its discretion, determines are proper to protect the interests of both the judgment debtor and the judgment creditor, including but not limited to the imposition of a lien on or the sale of the judgment debtor's interest [*Code Civ. Proc. § 709.020*].

[3] Cross References

For a related form,see *§ 254.798*.

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[Reserved]

§§ 254.801[Reserved]

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21-254 California Forms of Pleading and Practice--Annotated § 254.820

§ 254.820 Third-Party Claim of Ownership or Right to Possession of Levied Property [Code Civ. Proc. §§ 720.110, 720.130]

[1] FORM Third-Party Claim of Ownership or Right to Possession of Levied Property [Code Civ. Proc. §§ 720.110, 720.130]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	THIRD-PARTY CLAIM OF _____
Defendant.	)	[OWNERSHIP *or* RIGHT TO POSSESSION] OF
	)	LEVIED PROPERTY
	)	

_____

TO _____ [*name and title of levying officer*]:

1. NOTICE IS HEREBY GIVEN that I, _____ [*name*], claim an interest in the following described property: _____ [*describe property*], which was levied on by you on or about _____ [*date*], under a writ of _____ [execution *or* attachment *or* sale *or* possession] issued in the above-entitled action.

2. My interest in the above-described property is that of _____ [*describe interest, e.g.,* owner with title to the property].

3. I acquired my interest in the above-described property from _____ [*name*] on or about

_____ [*date*], by _____ [*specify manner in which interest was acquired, e.g.,* purchase for $_____, which has been paid in full. The bill of sale and cancelled check are attached as Exhibits 1 and 2].

4. The reasonable market value of [my interest in] the above-described property is $_____.

5. I may be served by mail at _____ [*mailing address*], California.

6. I hereby demand that you release the above-described property and the levy thereon.
Dated: _____.

_____ [*signature*]
_____ [*address*]

VERIFICATION

I, _____ [*name*], am a third-party claimant in the above-entitled _____ [action *or* proceeding]. I have read the foregoing claim and know the contents thereof. The same is true of my own knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

CAUTION:

This form of third-party claim must be executed under oath or verified [*Code Civ. Proc. §§ 720.130(a), 2015.5*].

A copy of any writing on which the claim is based must be attached to the claim. If not, at a subsequent hearing on the validity of the claim, the court could in its discretion, exclude from evidence any writing of which a copy had not been attached to the claim [*Code Civ. Proc. § 720.130(b)*].

[2] Use of Form

This form of a third-party claim is for use by a third-party claimant based on ownership or right of possession of the property levied on [*Code Civ. Proc. §§ 720.110, 720.130*]. The third-party claim must contain all of the following [*Code Civ. Proc. §§ 720.130(a)*]:

- The name of the third-party claimant (Paragraph 1).
- A description of the property in which an interest is claimed (Paragraph 1).
- A detailed description of the interest claimed, including a statement of the facts on which the claim is based (Paragraphs 2 and 3).
- An estimate of the market value of the interest claimed (Paragraph 4).

- A California address for service by mail on the third-party claimant (Paragraph 5).

[3] Filing of Claim

The third party must file the claim with the levying officer, together with two copies before the levying officer either sells the property, or delivers possession of it to the creditor, or pays the proceeds of collection to the creditor [*Code Civ. Proc. § 720.120*; *see § 254.312*].

To obtain release of the property, the third-party claimant may file an undertaking with the levying officer, together with two copies, at the time of filing the third-party claim or later [*Code Civ. Proc. §§ 720.620*, *720.640*]. For a discussion of undertakings and objections to them, see *§ 254.314*.

[4] Notice and Service

The levying officer must serve either personally or by mail on the creditor and debtor the notice of the third-party claim no later than five days after the third-party claim has been filed with him or her [*Code Civ. Proc. § 720.140(a), (c)*]. The notice must include a copy of the third-party claim and a statement as to whether or not the third party has filed an undertaking to release the property [*Code Civ. Proc. § 720.140(a)*]. For discussion of service of papers and extension of the time for service when service is by mail, see *§ 254.13*.

[5] State Statutes

Creditor defined. *Code Civ. Proc. § 720.020*

Debtor defined. *Code Civ. Proc. § 720.030*

Authorization for filing of third-party claim based on ownership or right to possession of levied property. *Code Civ. Proc. § 720.110*

Time and manner of filing third-party claim. *Code Civ. Proc. § 720.120*

Contents of claim. *Code Civ. Proc. § 720.130*

Notice and service of claim on creditor and debtor. *Code Civ. Proc. § 720.140*

Prohibition against levying officer disposing of property after timely filing of claim. *Code Civ. Proc. § 720.150*

Filing of undertaking to release property levied on. *Code Civ. Proc. §§ 720.610-720.660*

[6] Decisions

Interest of judgment creditor of seller of automobile as not necessarily superior to that of purchaser who had not secured change of DMV registration records because judgment creditor is not one for whose protection registration requirements were intended; insubstantial noncompliance with *Veh. Code § 5600* as not giving attaching creditor of transferor rights superior to prior buyer with equitable title. *In re Marriage of Finnell (1986) 182 Cal. App. 3d 52, 57, 227 Cal. Rptr. 38*

Third-party claim as required to show on face both subject property belonging to third-party claimant and claimant's

right to possession of it. *Palmquist v. Palmquist (1964) 228 Cal. App. 2d 789, 793, 39 Cal. Rptr. 871*

Owner of one half interest in property as entitled to file third-party claim on behalf of self and coowner. *Chico Tractor, Inc. v. Coyle (1963) 215 Cal. App. 2d 483, 489, 30 Cal. Rptr. 196*

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21-254 California Forms of Pleading and Practice--Annotated § 254.821

§ 254.821 Third-Party Claim of Security Interest in or Lien on Levied Property [Code Civ. Proc. §§ 720.210, 720.230]

[1] FORM Third-Party Claim of Security Interest in or Lien on Levied Property [Code Civ. Proc. §§ 720.210, 720.230]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	THIRD-PARTY CLAIM OF _____
Defendant.	)	[SECURITY INTEREST IN *or* RIGHT TO LIEN
	)	ON] LEVIED PROPERTY
	)	

_____

TO _____ [*name and title of levying officer*]:

1. [*Claimant's name and description of levied property. See § 254.820, Paragraph 1.*]

2. The _____ [security interest in *or* lien on] the above-described property is a _____ [*describe nature of security interest or lien, e.g.,* conditional sales contract] in the total sum of $_____, created on _____ [*date*], by _____ [*describe manner in which security interest or lien was created*].

[*EITHER*]

[3. A copy of the above-described security agreement (and accompanying financial statement) is attached to the claim and marked Exhibit "A", and made a part of this claim.]

[*OR*]

[3. A copy of the agreement which created the above-described lien is attached to the claim and marked Exhibit "A", and made a part of this claim.]

4. The total amount due or to accrue to me under the _____ [security interest *or* lien] is the sum of $_____, with interest at the rate of _____ percent until the date of tender of payment.

5. Payment of this claim or release of the above-described property is hereby demanded.
Dated: _____.

_____ [*signature*]
_____ [*address*]

[*Verification, see § 254.820*.]

CAUTION:

This form of third-party claim must be executed under oath or verified [*Code Civ. Proc. §§ 720.230(a), 2015.5*].

In the case of a security interest, a copy of the security agreement and any financing statement must be attached to the third-party claim. In the case of a lien, a copy of any writing on which the claim is based must be attached. If not, at a subsequent hearing on the validity of the claim, the court could in its discretion, exclude from evidence any writing of which a copy had not been attached to the claim [*Code Civ. Proc. § 720.230(b)*].

[2] Use of Form

This form of a third-party claim may be used by a third party claiming a security interest in or lien on property levied on [*Code Civ. Proc. §§ 720.210, 720.230*].

The contents of the claim are similar to those of a claim under *Code Civ. Proc. § 720.110* (*see § 254.820*). The total amount of the sums due or to accrue under the security interest or lien and the applicable rate of interest on amounts due must be stated [*Code Civ. Proc. § 720.230(a)*].

[3] State Statutes

Authorization for third-party claim by party with a security interest in or lien on personal property levied on. *Code Civ. Proc. § 720.210(a)*

Authorization for third-party claim by secured party claiming security interest in fixtures. *Code Civ. Proc. § 720.210(b)*

Time and manner in filing third-party claim. *Code Civ. Proc. § 720.220*

Contents of claim. *Code Civ. Proc. § 720.230*

Notice and service of claim on creditor and debtor. *Code Civ. Proc. § 720.240*

Prohibition against levying officer disposing of property after timely filing of claim. *Code Civ. Proc. § 720.250*

Filing of undertaking to release property levied on. *Code Civ. Proc. §§ 720.610-720.660*

Requirements of undertaking. *Code Civ. Proc. §§ 720.760-720.800*

Security interest defined. *Com. Code § 1201(b)(35)*

Secured party defined. *Com. Code § 9105(1)(m)*

Lien creditor for purposes of *Com. Code § 9301* defined. *Com. Code § 9102(a)(52)*

Priority of lien creditor over unperfected security interest. *Com. Code § 9301*

[4] Cross References

For a related form, *see § 254.820*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.822

§ 254.822 Declaration in Opposition to Third Party Claim of Security Interest in Levied Property [Code Civ. Proc. § 720.280]

[1] FORM Declaration in Opposition to Third Party Claim of Security Interest in Levied Property [Code Civ. Proc. § 720.280]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DECLARATION IN OPPOSITION TO THIRD-PARTY CLAIM OF SECURITY INTEREST IN LEVIED PROPERTY
Defendant.	)	
	)	
	)	

I, _____ [*name*], declare:

1. I am the plaintiff in the above-entitled action.

2. This declaration is in opposition to the claim of _____ [*name*] that he/she is a secured party with a security interest in the below-described property levied on in this action.

3. The property levied on in this action is _____ [*describe nature of security interest*] and was levied on on _____ [*date*], by virtue of the writ of _____ [execution *or* attachment *or* sale *or* possession] issued in the above-entitled action on _____ [*date*].

[*EITHER*]

4. The security interest claimed by the third-party claimant is invalid because _____ [*specify reasons*].

[*OR*]

4. The security interest claimed by the secured third-party claimant is not entitled to priority over the creditor's lien obtained by me because _____ [*specify reasons*].

[*OR*]

4. The amount demanded in the secured third-party claim of $_____ exceeds the amount to which the secured party is entitled because _____ [*specify reasons*].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

CAUTION:
This form of declaration must be executed under oath or verified [*Code Civ. Proc. §§ 720.280(a), 2015.5*].

[2] Use of Form

This form of declaration is for use by a creditor or plaintiff as a statement in opposition to a third-party claim based on a security interest in property levied on in behalf of the creditor [*Code Civ. Proc. § 720.280*]. The statement should be filed with the creditor's undertaking pursuant to *Code Civ. Proc. § 720.260* [*Code Civ. Proc. § 720.260(a)*]. The creditor must serve a copy of the statement personally or by mail on both the third-party claimant and the debtor [*Code Civ. Proc. § 720.280(b), (c)*]. Note that failure to file a creditor's undertaking together with a statement in opposition concerning the security interest (or a deposit in lieu of an undertaking or notice of exemption as a public entity) could result in release of the property by the levying officer [*Code Civ. Proc. § 720.270(a)*]. A hearing on the validity of the third-party claim may still be had whether or not the property has been released [*Code Civ. Proc. § 720.270(d)*].

If not already filed with the levying officer, the creditor must file the statement of opposition with the court and serve it on the secured party at the time of petitioning for a hearing on the third-party claim, or if the secured party has petitioned for the hearing, the statement must be filed with the court and served personally or by mail on the secured party not later than five days before the date set for the hearing [*Code Civ. Proc. § 720.340*].

[3] Contents of Statement

The statement in opposition must state that the claimed security interest is invalid, that it is not entitled to priority over the creditor's lien, or that the amount demanded in the claim exceeds the amount to which the secured party is entitled

and specify the reasons for the position taken [*Code Civ. Proc. § 720.280(a)*].

[4] State Statutes

Statement in opposition to third-party claim of security interest in levied property. *Code Civ. Proc. § 720.280*

Service and notice of statement on secured party and debtor. *Code Civ. Proc. § 720.280(b)-(c)*

Declaration under penalty of perjury as proper when statement required to be executed under oath. *Code Civ. Proc. § 2015.5*

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21-254 California Forms of Pleading and Practice--Annotated § 254.823

§ 254.823 Demand by Creditor that Secured Party or Lienholder File Third-Party Claim [Code Civ. Proc. §§ 720.510, 720.530]

[1] FORM Demand by Creditor that Secured Party or Lienholder File Third-Party Claim [Code Civ. Proc. §§ 720.510, 720.530]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DEMAND FOR THIRD-PARTY CLAIM TO BE
Defendant.	)	FILED BY SECURED PARTY OR LIENHOLDER
	)	
	)	

TO: _____ [*name and address of secured party or creditor*].

1. I, _____ [*name*], am the judgment creditor herein. My address is _____ [*address*].

2. On _____ [*date*], I obtained a writ of _____ [attachment *or* execution *or* sale *or* possession] issued by the court in the above-entitled action on certain property to wit: _____ [*describe property levied on*] which was subsequently levied on on _____ [*date*].

3. I am informed that you have a _____ [security interest in *or* lien on] the above-described property. If this is correct, you must file with _____ [*title, name, and address of levying officer*] a third-party claim pursuant to *Sections 720.210 through 720.290 of the Code of Civil Procedure*. If you fail to file a third-party

claim within 30 days after receipt of this demand, you will be deemed to have waived any priority that your _____ [security interest *or* lien] may have over my lien on the above-described property unless the property is released from my lien.

4. If your priority _____ [security interest *or* lien] is waived, you may still have a right to share in any excess proceeds of an execution sale of the above-described property as provided in *Section 701.810 of the Code of Civil Procedure.*
Dated: _____.

_____ [*signature*]
_____ [*address*]

[2] Use of Form

This form of demand is for use by a creditor to demand that a secured party or lienholder file a third-party claim on property levied on [*Code Civ. Proc. § 720.510*].

[3] Contents of Demand

The claim must contain the name and address of both the secured party or lienholder and the creditor (Paragraph 1), a detailed description of the personal property levied on and the date of the levy (Paragraph 2), a statement that the secured party or lienholder must file a third-party claim with 30 days or be deemed to have waived any priority that their interest may have had over the creditors lien (Paragraph 3), and a statement that if any priority is waived, the secured party or lienholder may have a right to share in any excess proceeds of an execution sale of the property as provided in *Code Civ. Proc. § 701.810* (Paragraph 4) [*Code Civ. Proc. § 720.530*].

[4] Service and Notice

The creditor's demand for a third-party claim, together with a copy of the demand must be filed with the levying officer who has the responsibility to serve the demand on the secured party or lienholder [*Code Civ. Proc. § 720.520*]. For discussion of service of papers and extension of the time for service when service is by mail, see *§ 254.13*.

[5] State Statutes

Right of secured party or lienholder whose priority interests in levied property was waived to share in excess proceeds from sale. *Code Civ. Proc. § 701.810*

Creditor's right to demand third-party claim. *Code Civ. Proc. § 720.510*

Filing, service, and notice of demand. *Code Civ. Proc. § 720.520*

Contents of claim. *Code Civ. Proc. § 720.530*

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21-254 California Forms of Pleading and Practice--Annotated § 254.824

§ 254.824 Proceedings on Third-Party Claim [Code Civ. Proc. §§ 720.010-720.800]--Petition for Hearing and Attached Order [Code Civ. Proc. § 720.310]

[1] FORM Proceedings on Third-Party Claim [Code Civ. Proc. §§ 720.010-720.800]--Petition for Hearing and Attached Order [Code Civ. Proc. § 720.310]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR HEARING ON THIRD-PARTY
Defendant.,	)	CLAIM AND ORDER
	)	
	)	

_____

To the _____ Court of _____:

1. Petitioner hereby applies as authorized by *Section 720.310 of the Code of Civil Procedure* for a hearing to determine the validity of a third-party claim filed in the above-entitled court pursuant to Section _____ [*720.110 or 720.210*] of the Code of Civil Procedure.

2. _____ [*name*], petitioner, is the _____ [plaintiff and creditor in the above-entitled action *or* third-party claimant to property levied on in the above-entitled action].

3. On _____ [*date*], _____ [*name and title of levying officer*], under a writ of _____ [attachment *or* execution *or* sale *or* possession] issued by this court on _____

[*date*], levied on the property of _____ [defendant *or* judgment debtor] and took possession of the following-described property: _____ [*describe property*].

4. On _____ [*date*], _____ [*name*], delivered to the above-described levying officer a verified claim, together with two copies, asserting _____ [ownership of *or* right to possession of *or* a security interest in *or* a lien on] the above-described property.

[5. _____ (Petitioner *or specify opposing party, e.g.,* Third-party claimant) on _____ (*date*), filed with the above-described levying officer an undertaking to have the above-described property _____ (held *or* released).]

WHEREFORE, petitioner requests that a date for hearing be set by this court to determine the validity of the third-party claim and the proper disposition of the above-described property that is the subject of the claim.
Dated: _____.

_____ [*signature*]

ORDER

The petition of _____ [*identify party, e.g.,* third-party claimant] for a hearing to determine the validity of a third-party claim and the proper disposition of the property that is the subject of the claim, being before this court, and good cause appearing therefor,

IT IS ORDERED that the petition be, and it hereby is, granted and that it be, and it is, set for hearing in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], California, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter can be heard.

IT IS FURTHER ORDERED that a copy of the petition and a copy of this order be served on _____ [*name and title of levying officer*], and on _____ [*name third-party claimant or creditor, which ever applicable*], and on _____ [*name of debtor or defendant*] at least 10 days before the date set for said hearing:
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of petition for an order for hearing on a third-party claim is for use by either a creditor or a third party to obtain a hearing to determine the validity of the third-party claim and the proper disposition of the property which is the subject of the claim [*Code Civ. Proc. § 720.310(a)*]. The application must be made within 15 days after the third-party claim is filed with the levying officer or within 15 days of the filing of an undertaking [*Code Civ. Proc. § 720.310(a)*]. If an undertaking has been filed, Paragraph 5 should be included in the petition. The hearing may be held whether or not an undertaking has been filed, but not if the creditor has made a deposit in lieu of an undertaking pursuant to *Code Civ. Proc. § 720.260* [*Code Civ. Proc. § 720.310(b)*]. Unless continued by the court for good cause shown, the hearing must be held within 20 days after the filing of the petition [*Code Civ. Proc. § 720.310(c)*].

[3] Notice and Service

The petitioner must serve notice of the hearing, personally or by mail, at least 16 court days before the hearing (plus additional time if service is by mail, overnight delivery, etc.), on the adverse party and on the debtor, and file a copy of the notice of hearing with the levying officer [*Code Civ. Proc. §§ 720.320(a), 1005(b)*; *see § 254.825*]. For discussion of service of papers and extension of the time for service when service is by mail, see *§ 254.13*.

[4] Pleadings

The third-party claim and any statement in opposition to a third-party claim by a secured party constitute the pleadings of the third-party claimant and the creditor [*Code Civ. Proc. § 720.350*].

[5] State Statutes

Application for hearing on third-party claim. *Code Civ. Proc. § 720.310*

Notice of hearing and service. *Code Civ. Proc. §§ 720.320, 1005(b)*

Papers to be filed by levying officer. *Code Civ. Proc. § 720.330*

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21-254 California Forms of Pleading and Practice--Annotated § 254.825

§ 254.825 Proceedings on Third-Party Claim [Code Civ. Proc. §§ 720.010-720.800]--Notice of Hearing [Code Civ. Proc. § 720.320]

[1] FORM Proceedings on Third-Party Claim [Code Civ. Proc. §§ 720.010-720.800]--Notice of Hearing [Code Civ. Proc. § 720.320]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF HEARING ON THIRD-PARTY
Defendant.	)	CLAIM
	)	
	)	

_____

To _____ [*name*], _____ [third-party claimant *or specify creditor by designation in underlying proceeding, e.g.*, plaintiff], and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that the petition of _____ [third-party claimant *or specify creditor by designation in underlying proceeding, e.g.*, plaintiff] for a hearing on a third-party claim to _____ [real *or* personal] property which was levied on herein pursuant to a writ of _____ [execution *or* attachment *or* sale *or* possession] issued by the above-entitled court on _____ [*date*], has been set for hearing on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*]. The purpose of the hearing is to determine the validity of the third-party claim and the proper disposition of the property that is the subject of the third-party claim.

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*party's status and name*]

[2] Use of Form

This notice of a hearing on a third-party claim is for use by either the creditor or third-party claimant to notify the adverse party of the time and place for the hearing and that the purpose of the hearing is to determine the validity of the third-party claim and the proper disposition of the property that is the subject of the claim [*Code Civ. Proc. § 720.320*]. Not less than 10 days before the hearing the petitioner must serve the notice, personally or by mail, on the adverse party and on the debtor, and file a copy of the notice with the levying officer [*Code Civ. Proc. § 720.320(a)*].

The petitioner must serve, personally or by mail, notice of the time and place of the hearing on the adverse party and on the debtor. In addition, the petitioner must file a copy of the notice of hearing with the levying officer. The notice must be served and filed in the same manner, and at the same times, prescribed by *Code Civ. Proc. § 1005(b)* [*Code Civ. Proc. § 720.320(a)*; *see also Code Civ. Proc. § 1005(a)(7)*].

Code Civ. Proc. § 1005(b) provides generally that all moving and supporting papers must be served and filed at least 16 court days before the time appointed for the hearing [*Code Civ. Proc. § 1005(b)*; *see also Cal. Rules of Ct., Rule 3.1300(a)*]. If the notice is served by mail, the 16-day period is increased by five calendar days if the place of mailing and the place of address are within the State of California, by 10 calendar days if either the place of mailing or the place of address is outside the State of California but within the United States, or by 20 calendar days if either the place of mailing or the place of address is outside the United States. The 16-day period is increased by two calendar days if the notice is served by fascimile transmission, express mail, or other method of overnight delivery [*Code Civ. Proc. § 1005(b)*; *see also Cal. Rules of Ct., Rule 3.1300(c)* (proof of service of moving papers)].

[3] State Statutes

Notice of hearing on third-party claim. *Code Civ. Proc. §§ 720.320, 1005*

Service and filing requirements. *Code Civ. Proc. §§ 720.320(a), 1005(b)*

Required statement of hearing purpose. *Code Civ. Proc. § 720.320(b)*

[4] Cross References

For a related form,see *§ 254.824*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.826

§ 254.826 Proceedings on Third-Party Claim [Code Civ. Proc. §§ 720.010-720.800]--Judgment Determining Validity of Third Party Claim and Order for Disposition of Property [Code Civ. Proc. § 720.390]

[1] FORM Proceedings on Third-Party Claim [Code Civ. Proc. §§ 720.010-720.800]--Judgment Determining Validity of Third Party Claim and Order for Disposition of Property [Code Civ. Proc. § 720.390]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	JUDGMENT DETERMINING VALIDITY OF
Defendant.	)	THIRD-PARTY CLAIM AND ORDER FOR DIS-
	)	POSITION OF PROPERTY
	)	

The petition of _____ [*identify party, e.g.,* third-party claimant] for an order to determine the validity of a third-party claim to property levied on in the above-entitled action under a writ of _____ [attachment *or* execution *or* sale *or* possession] issued by this court on _____ [*date*], came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; third-party claimant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court and good cause appearing therefor,

IT IS ADJUDGED that _____ [the ownership of or the right of possession of *or* a security interest in *or* a lien on] the below-described property is [not], and at the time it was levied on under the above-mentioned writ of _____ [attachment *or* execution *or* sale *or* possession] was [not] vested in _____,

the third-party claimant. The property levied on and which is the subject of the third-party claim is _____ [*describe property*].

IT IS ORDERED that _____ [*name and title of levying officer*] _____ [release the above-described property and levy and return it to the _____ (*name of debtor or other person as applicable*) *or* proceed with the levy].

[IT IS FURTHER ORDERED that _____ (*prevailing party*) recover from _____ (*adverse party*) the costs incurred in this proceeding in the sum of $_____.]
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of judgment is for use by either the creditor or third-party claimant in proceedings to determine the validity of a third-party claim [*Code Civ. Proc. § 720.390*]. The judgment should be submitted with the petition for hearing or after the hearing on the petition, according to local practice. The court must give judgment determining the validity of the third-party claim and may also order the disposition of the property or its proceeds in accordance with the respective interest of the parties [*Code Civ. Proc. § 720.390*]. The court, however, is not required to make findings [*Code Civ. Proc. § 720.400*]. The judgment is conclusive between the parties to the proceeding, but is appealable [*Code Civ. Proc. §§ 720.390, 720.420*].

[3] State Statutes

Judgment determining claim and order for disposition of property. *Code Civ. Proc. § 720.390*

No findings required in hearing on third-party claim. *Code Civ. Proc. § 720.400*

Right to appeal from judgment determining third-party claim. *Code Civ. Proc. § 720.420*

[4] Decisions

Recovery of costs of storage during pendency of third-party claim for automobile. *Maguire v. Corbett (1953) 119 Cal. App. 2d 244, 251-252, 259 P.2d 507* .

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21-254 California Forms of Pleading and Practice--Annotated § 254.827

§ 254.827 Proceedings on Third-Party Claim [Code Civ. Proc. §§ 720.010-720.800]--Notice of Motion for Order to Stay Sale or Enjoin Transfer or Other Disposition of Levied Property Pending Determination of Validity of Third-Party Claim [Code Civ. Proc. § 720.380(b)]

[1] FORM Proceedings on Third-Party Claim [Code Civ. Proc. §§ 720.010-720.800]--Notice of Motion for Order to Stay Sale or Enjoin Transfer or Other Disposition of Levied Property Pending Determination of Validity of Third-Party Claim [Code Civ. Proc. § 720.380(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER TO _____ [STAY SALE *or*
vs.	)	ENJOIN TRANSFER OR OTHER DISPOSITION]
_____ [*name*],	)	OF LEVIED PROPERTY
Defendant.	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* third-party claimant] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* third-party claimant] _____ [*name*] will, and hereby does, move for an order _____ [staying the sale *or* enjoining transfer or other disposition] of the below-described property levied on in the above-entitled action and claimed by _____ [*name*], third-party claimant, until proceedings to determine the validity of the third-party claim have been commenced and prosecuted to termination. The property that was levied on and is the subject of the third-party claim is _____ [*describe property*]. The motion will be made on the grounds that the above-described property has been claimed by _____ [*name*], third-party claimant and that a petition to determine the validity of his/her claim is now pending before this court.

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*party's status and name*]

CAUTION:
A memorandum is required to be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, *see* Ch. 417, *Points and Authorities* .

[2] Use of Form

This notice of motion is for use by either the creditor, third-party claimant, or debtor to obtain an order for staying the sale or enjoining any transfer or other disposition of property levied on that is the subject of a third-party claim [*Code Civ. Proc. § 720.380(b)*]. The application must be made on noticed motion if required by local court rule or by order of the court, otherwise, it may be made ex parte [*Code Civ. Proc. § 720.380(b)*].

[3] State Statutes

Motion for order staying sale or enjoining any other disposition of property levied on. *Code Civ. Proc. § 720.380(b)*

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21-254 California Forms of Pleading and Practice--Annotated § 254.828

§ 254.828 Proceedings on Third-Party Claim [Code Civ. Proc. §§ 720.310-720.390]--Declaration in Support of Motion for Order to Stay Sale or Enjoin Transfer or Other Disposition of Levied Property Pending Determination of Validity of Third-Party Claim [Code Civ. Proc. § 720.380(b)]

[1] FORM Proceedings on Third-Party Claim [Code Civ. Proc. §§ 720.310-720.390]--Declaration in Support of Motion for Order to Stay Sale or Enjoin Transfer or Other Disposition of Levied Property Pending Determination of Validity of Third-Party Claim [Code Civ. Proc. § 720.380(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF MOTION TO
_____ [*name*],	)	_____ [STAY SALE *or* ENJOIN
Defendant.	)	TRANSFER OR OTHER DISPOSITION] OF
	)	LEVIED PROPERTY
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the

courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. Plaintiff in the above-entitled action obtained a judgment against defendant _____ [*name*] in the amount of $_____.

3. In order to satisfy the judgment, plaintiff obtained a writ of execution pursuant to *Section 699.510 of the Code of Civil Procedure* directing _____ [*name and title of levying officer*] to levy on certain property, to wit: _____ [*describe property*].

4. On _____ [*date*], _____ [*name and title of levying officer*] levied on the above-described property pursuant to the above-described writ of execution.

5. _____ [*Set out facts showing title of declarant or of party through or from whom declarant seeks to obtain property, e.g.*, _____ (*name*), the third-party claimant, has legal title to and is the lawful owner of the above-described property by right of purchase under a bill of sale dated _____ (*date*)].

6. On _____ [*date*], _____ [*name*], third-party claimant, filed a third-party claim with _____ [*name and title of levying officer*] [together with an undertaking in the amount of $_____ for the release of the above-described property] pursuant to *Section 720.110 of the Code of Civil Procedure.*

[7. On _____ (*date*), _____ (*identify party, e.g.*, plaintiff) applied to the above-entitled court for a hearing to determine the validity of the third-party claim pursuant to *Section 720.310 of the Code of Civil Procedure.*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of declaration is for use in support of a motion to stay the sale or enjoin the transfer or other disposition of levied property that is the subject of a third-party claim as provided by *Code Civ. Proc. § 720.380(b)*. Paragraph 7 may be inserted in the declaration when either the plaintiff or third-party claimant has petitioned the court for an order determining the validity of the third-party claim pursuant to *Code Civ. Proc. § 720.310*.

Code Civ. Proc. § 2015.5 authorizes a declaration under penalty of perjury, as in the foregoing form, in lieu of an affidavit. For a form of affidavit, see Ch. 15, *Affidavits, Certificates, and Declarations* .

This form of declaration may also be used to support an ex parte application for an order staying sale of or enjoining any transfer or other disposition of the levied property which is the subject of the third-party claim [*see Code Civ. Proc. § 720.380(b)*].

[3] State Statutes

Petition for order staying sale of or enjoining any transfer or other disposition of the levied property which is the

subject of the third-party claim. *Code Civ. Proc. § 720.380(b)*

Use of declaration under penalty of perjury as authorized to support notice of motion. *Code Civ. Proc. § 2015.5*

[4] Cross References

For related forms,see *§§ 254.820*, *254.821*, *254.825- 254.827*.

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21-254 California Forms of Pleading and Practice--Annotated § 254.829

§ 254.829 Proceedings on Third-Party Claim [Code Civ. Proc. §§ 720.310-720.390]--Order Granting Motion for Order to Stay Sale or Enjoin Transfer or Other Disposition of Levied Property Pending Determination of Validity of Third-Party Claim [Code Civ. Proc. § 720.380(b)]

[1] FORM Proceedings on Third-Party Claim [Code Civ. Proc. §§ 720.310-720.390]--Order Granting Motion for Order to Stay Sale or Enjoin Transfer or Other Disposition of Levied Property Pending Determination of Validity of Third-Party Claim [Code Civ. Proc. § 720.380(b)]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER GRANTING MOTION TO
Defendant.	)	_____ [STAY SALE *or* ENJOIN
	)	TRANSFER OR OTHER DISPOSITION] OF
	)	LEVIED PROPERTY

The motion of _____ [*identify party, e.g.,* third-party claimant] for an order _____ [staying the sale of property *or* enjoining transfer or other disposition of property] levied on under a writ of _____ [*describe writ, e.g.,* execution] issued by this court on _____ [*date*], came on

regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

[*EITHER*]

IT IS ORDERED that the motion be, and it hereby is granted and that _____ [*name and title of levying officer*] is stayed from selling certain property, to wit, _____ [*describe property*] under the writ of _____ [attachment *or* execution *or* sale *or* possession] issued by this court and that is the subject of a third-party claim until such time as the proceedings to determine the validity of the third-party claim have commenced and have been prosecuted to termination.

[*OR*]

IT IS ORDERED that the motion be, and it hereby is granted and that _____ [*identify party, e.g.,* the judgment debtor] is enjoined from transferring or otherwise disposing of certain property, to wit, _____ [*describe property*] levied on under the writ of _____ [attachment *or* execution *or* sale *or* possession] issued by this court and that is the subject of a third-party claim until such time as the proceedings to determine the validity of the third-party claim have commenced and have been prosecuted to termination.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The foregoing form of order is for use by the the creditor, third-party claimant, or debtor who has moved the court for an order staying the sale of, or enjoining the transfer or disposition of levied property which is the subject of a third-party claim [*Code Civ. Proc. § 720.380(b)*]. The order should be submitted to the court for signature either with the filing of the notice of motion or after the hearing on the motion, according to local practice.

[3] State Statutes

Order staying sale or enjoining transfer of property levied on that is subject of third-party claim. *Code Civ. Proc. § 720.380*

[4] Cross References

For related forms,see *§§ 254.827* and *254.828*.

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21-254 California Forms of Pleading and Practice--Annotated §§ 254.830-254.849

[Reserved]

§§ 254.830[Reserved]

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G. Joint Debtors

21-254 California Forms of Pleading and Practice--Annotated § 254.850

§ 254.850 Declaration [Code Civ. Proc. § 2015.5] in Support of Issuance of Summons to Joint Debtor [Code Civ. Proc. § 991]

[1] FORM Declaration [Code Civ. Proc. § 2015.5] in Support of Issuance of Summons to Joint Debtor [Code Civ. Proc. § 991]

[*Caption. As in paper previously filed in action.*]

I am the [attorney for the] plaintiff in the above-entitled action.

On or about _____ [*date*], judgment in this action was entered in favor of plaintiff and against defendant _____ [*name*] in the sum of $_____ together with interest thereon at the rate of _____ percent per year.

_____ [No part of the judgment *or* The sum of $_____] has been paid on the judgment leaving the sum of $_____ remaining unsatisfied together with interest thereon and accrued costs for a total now due on the judgment of $_____.

_____ [*Name*] was named as a defendant in the above-entitled action and is jointly indebted on the obligation which is the subject of the action with defendant _____ [*name of defendant against whom judgment was entered*].

Summons was issued in the action but defendant _____ [*name*] was not served with summons and did not appear in the action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*signature*]
[Attorney for] Plaintiff

[2] Use of Form

The foregoing declaration is for use by a plaintiff who is requesting a summons to a joint debtor. Such summons is issued on the presentation to the clerk of this declaration [*Code Civ. Proc. § 990*]. This declaration may be by the plaintiff, or the plaintiff's agent, representative, or attorney [*Code Civ. Proc. § 991*].

[3] Contents of Form

The declaration identifies the declarant [*Code Civ. Proc. § 991*], describes the judgment [*Code Civ. Proc. § 990*], states that the judgment or some part of it remains unsatisfied, and specifies the amount due [*Code Civ. Proc. § 990*]. The declaration also states that the person against whom the summons will issue is jointly indebted on the obligation, was named in the action, and that summons in the action was issued but that such person was not served and did not appear [*Code Civ. Proc. § 989*].

[4] State Statutes

Joint debtors as summoned to show cause why they should not be bound by judgment. *Code Civ. Proc. § 989*

Summons as issued on presentation of affidavit. *Code Civ. Proc. § 990*

Contents of declaration. *Code Civ. Proc. § 991*

Declaration under penalty of perjury in lieu of affidavit. *Code Civ. Proc. § 2015.5*

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 254 EXECUTIONS AND ENFORCEMENT OF JUDGMENTS
PART V. FORMS
G. Joint Debtors

21-254 California Forms of Pleading and Practice--Annotated § 254.851

§ 254.851 Summons (Joint Debtor) [Code Civ. Proc. § 989]--Judicial Council Form SUM-120

[1] FORM Summons (Joint Debtor) [Code Civ. Proc. § 989]--Judicial Council Form SUM-120

Click here to view image.

[2] Use of Form

This summons is a reproduction of the Judicial Council form of summons for use against a person jointly indebted on an obligation on which the plaintiff has obtained a judgment against the other joint debtor [Judicial Council Form SUM-120], adopted by the Judicial Council for mandatory use [*Code Civ. Proc. § 706.120*; *Cal. Rules of Ct., Rule 1.30 et seq.*] The summons is issued by the clerk, or by the judge if there is no clerk, on presentation of a declaration [*see § 254.850*].

The summons requires the defendant to show cause why that person should not be bound by the judgment entered against the other joint debtor [*see Code Civ. Proc. §§ 989, 990*]. The form informs the person that this is done by a written response to the declaration giving the legal reason why the person should not be bound by the judgment [*see Code Civ. Proc. § 992*].

This summons is served in the same manner as the original summons and is returnable no later than 90 days after the time specified for the return of the original summons [*Code Civ. Proc. § 990*]. For a proof of service form to use with the summons, see Judicial Council form POS-010. A reproduction of that form can be found in Chapter 518, *Service of Summons and Other Papers* . When service of summons is by mail outside California pursuant to *Code Civ. Proc. § 415.40*, cross out "air" in "airmail" in Paragraph 2e.

For a discussion of the procedures for responding to the summons and the consequences of a default, see *§ 254.348*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Cross References

For a procedural guide and discussion of summons, see Ch. 518, *Service of Summons and Papers*

[4] State Statutes

Joint debtor summons as issued on presentation of declaration describing judgment entered against other joint debtor. *Code Civ. Proc. §§ 990, 991*

Answer to joint debtor summons. *Code Civ. Proc. § 992*

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Volume 21: Employer's Liability for Employee's Torts thru Executions and Enforcement of Judgments-Chs. 248-255
Chapter 255 [RESERVED]

21-255 California Forms of Pleading and Practice--Annotated Chapter 255

[RESERVED]

Chapter 255[RESERVED]

California Forms of Pleading and Practice--Annotated

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Volume 22: Explosives thru Food-Chs. 256-268
Chapter 256 EXPLOSIVES

22-256 California Forms of Pleading and Practice--Annotated 256.syn

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§§ 256.03 through 256.09 [Reserved]

§ 256.10 Governing Statutes

§ 256.11 Administrative Regulations

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[1] Ultrahazardous Activity

[2] Strict Liability Theory of Recovery

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§ 256.16 Defense of Assumption of Risk

§ 256.17 Duty of Supplier of Dangerous Instrumentality

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[1] Defenses

[a] Assumption of Risk

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[2] Duty of Manufacturer and Other Suppliers

[3] Injury to Children

[4] Liability for Indirect Injury

[5] Negligence

[6] Nuisance

[7] Res Ipsa Loquitur

[8] Standard of Care

[9] Strict Liability

[10] Ultrahazardous Activity

[11] Measure of Damages

§ 256.34 Law Reviews

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§§ 256.36 through 256.49 [Reserved]

§ 256.50 Complaint for Preliminary [Code Civ. Proc. § 527] and Permanent Injunction [Civ. Code § 3422(1), (3); Code Civ. Proc. § 526] to Abate Nuisance [Civ. Code § 3479; Code Civ. Proc. § 731] and for Damages [Civ. Code § 3333; Code Civ. Proc. § 731] for Injuries to Person and Property Based on Strict Liability--By Landowner Against Quarry--Blasting in Populated Area

[1] FORM

[2] Use of Form

[3] Jurisdiction

[4] Allegations

[5] Verification

[6] Certification re Notice

[7] Specification of Damages

[8] Cross References

§ 256.51 Complaint for Damages [Civ. Code § 3333] for Injuries to Person and Property Based on Negligence [Civ. Code § 1714]--By Landowner Against Quarry--Blasting in Isolated Area

[1] FORM

[2] Use of Form

[3] Jurisdiction

[4] Allegations

[5] Verification

[6] Cross References

§ 256.52 Complaint for Damages [Civ. Code § 3333] for Injuries to Person Based on Strict Liability--By Injured Person Against Construction Company--Blasting in Populated Area

[1] FORM

[2] Use of Form

[3] Cross References

§ 256.53 Complaint for Damages [Civ. Code § 3333] for Injuries to Person Based on Negligence [Civ. Code § 1714]--By Minor and Parents Against Public Entity and Employee--Dangerous Fireworks Left on Municipal Playground

[1] FORM

[2] Use of Form

[3] Action by Minor

[4] Action Against Public Entity

[5] Cross References

§ 256.54 Complaint for Damages [Civ. Code § 3333] for Injuries to Person Based on Negligence [Civ. Code § 1714]--By Worker Against Manufacturer--Explosion of Mislabeled Explosive

[1] FORM

[2] Use of Form

[3] Cross References

§ 256.55 Complaint for Damages [Civ. Code § 3333] for Injuries to Person Based on Negligence [Civ. Code § 1714]--By Employee of Subcontractor Against Other Subcontractor and Employee--Explosion Resulting From Use of Open Flame Equipment in Close Proximity to Explosive Fluid

[1] FORM

[2] Source of Form

[3] Use of Form

[4] Cross References

§ 256.56 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Comparative Negligence--Plaintiff Failed to Use Due Care

[1] FORM

[2] Use of Form

[3] Cross References

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Volume 22: Explosives thru Food-Chs. 256-268
Chapter 256 EXPLOSIVES
PART I. SCOPE

22-256 California Forms of Pleading and Practice--Annotated § 256.01

§ 256.01 Scope of Chapter

This chapter discusses explosives and explosions and includes the following forms relating to injuries caused by blasting:

- A complaint for injunctive relief and for damages for injuries to person and property based on strict liability [*see § 256.50*].
- A complaint for damages for injuries to person and property based on negligence [*see § 256.51*].
- A complaint for damages for injuries to person based on strict liability by an injured person against a construction company [*see § 256.52*].
- A complaint for damages for injuries resulting from the explosion of dangerous fireworks [*see § 256.53*].
- A complaint for damages for injuries resulting from mislabeled explosives [*see § 256.54*].
- A complaint for damages for injuries resulting from an explosive fluid [*see § 256.55*].
- An affirmative defense based on comparative negligence [*see § 256.56*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsPolice PowerTortsStrict LiabilityAbnormally Dangerous ActivitiesGeneral OverviewTortsStrict LiabilityAbnormally Dangerous ActivitiesActivities & Conditions

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Chapter 256 EXPLOSIVES
PART I. SCOPE

22-256 California Forms of Pleading and Practice--Annotated § 256.02

§ 256.02 Cross References

- For allegations for use in a complaint for injuries caused by an exploding bottle, see *Ch. 268, Food, § 268.53*.

- For forms for use in actions involving injuries caused by other types of explosions, see *Ch. 274, Garages and Gas Stations, § 274.43*, Ch. 277, *Gas and Electricity* , and Ch. 553, *Trucks* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsStrict LiabilityAbnormally Dangerous ActivitiesGeneral OverviewTortsStrict LiabilityAbnormally Dangerous ActivitiesActivities & Conditions

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Chapter 256 EXPLOSIVES
PART I. SCOPE

22-256 California Forms of Pleading and Practice--Annotated §§ 256.03 through 256.09

[Reserved]

§§ 256.03[Reserved]

California Forms of Pleading and Practice--Annotated

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Chapter 256 EXPLOSIVES
PART II. LEGAL BACKGROUND

22-256 California Forms of Pleading and Practice--Annotated § 256.10

§ 256.10 Governing Statutes

The manufacture, sale, storage, possession, and use of explosives are governed by *Health & Safety Code §§ 12000-12725*.

High explosives are statutorily distinguished from fireworks. The former are defined in *Health & Safety Code § 12000* and are governed by *Health & Safety Code §§ 12001-12401*, while the latter are governed by *Health & Safety Code §§ 12500-12725*.

The transportation of explosives is governed by *Veh. Code §§ 31600-31620*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsPolice PowerGovernmentsState & Territorial GovernmentsPolice PowerReal Property LawTortsInherently Dangerous ActivitiesTortsStrict LiabilityAbnormally Dangerous ActivitiesGeneral OverviewTortsStrict LiabilityAbnormally Dangerous ActivitiesActivities & Conditions

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Chapter 256 EXPLOSIVES
PART II. LEGAL BACKGROUND

22-256 California Forms of Pleading and Practice--Annotated § 256.11

§ 256.11 Administrative Regulations

Regulations of the State Fire Marshal as to the sale, use, handling, possession, and storage of explosives are set forth in *19 Cal. Code Reg §§ 1550-1584.4*. General industry safety orders regarding explosives appear at *8 Cal. Code Reg §§ 5236-5374*, and construction safety orders appear at *8 Cal. Code Reg §§ 1550-1580*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsPolice PowerReal Property LawTortsInherently Dangerous ActivitiesTortsStrict LiabilityAbnormally Dangerous ActivitiesGeneral OverviewTortsStrict LiabilityAbnormally Dangerous ActivitiesActivities & Conditions

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Chapter 256 EXPLOSIVES
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22-256 California Forms of Pleading and Practice--Annotated § 256.12

§ 256.12 Municipal Ordinances

Except when transporting explosives pursuant to *Veh. Code §§ 31600-31620*, the statutes governing high explosives [*Health & Safety Code §§ 12000-12401*] do not affect the operation of provisions of any city, county, or city and county ordinance respecting the delivery, storage, and handling of explosives where the ordinances are at least as restrictive as the statutes [*Health & Safety Code § 12002*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsPolice PowerReal Property LawTortsInherently Dangerous ActivitiesTortsStrict LiabilityAbnormally Dangerous ActivitiesGeneral OverviewTortsStrict LiabilityAbnormally Dangerous ActivitiesActivities & Conditions

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Chapter 256 EXPLOSIVES
PART II. LEGAL BACKGROUND

22-256 California Forms of Pleading and Practice--Annotated § 256.13

§ 256.13 Explosions in Populated Areas

[1] Ultrahazardous Activity

Ultrahazardous activity involves a risk of serious harm to the person, land, or chattels of others which cannot be eliminated by the exercise of utmost care and which is not a matter of common usage [*Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 785, 56 Cal. Rptr. 128]* . Blasting with explosives in populated surroundings such as in the vicinity of dwelling places or places of business is an ultrahazardous activity [*Alonso v. Hills (1950) 95 Cal. App. 2d 778, 783, 214 P.2d 50]* .

[2] Strict Liability Theory of Recovery

The use of explosives in the vicinity of a residential area requires the invocation of the absolute or strict liability doctrine [*Balding v. D. B. Stutsman, Inc. (1966) 246 Cal. App. 2d 559, 564, 54 Cal. Rptr. 717]* ; that is, a defendant is held strictly liable for damages caused regardless of the degree of care employed when the blasting activity miscarries [*Alonso v. Hills (1950) 95 Cal. App. 2d 778, 783, 214 P.2d 50]* . The basis for the imposition of strict liability in such cases is that a business defendant who has engaged in a dangerous activity for profit is in the best position to administer the loss so that it will be ultimately born by the public [*Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 785, 56 Cal. Rptr. 128]* . It is a question of law for the court to determine whether a case is one of strict or absolute liability; that is, the court must determine whether blasting occurred in the vicinity of dwelling places [*Balding v. D.B. Stutsman, Inc. (1966) 246 Cal. App. 2d 559, 564, 54 Cal. Rptr. 717]* . Liability may be imposed without regard to whether the injury was forcible and direct or indirect as the result of concussions, vibrations, or pulsation of the air [*Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 784, 56 Cal. Rptr. 128]* .

For complaints for damages for injuries to person or property based on strict liability, see *§§ 256.50, 256.52*.

[3] Nuisance Theory of Recovery

A nuisance includes anything which is injurious to health, is indecent or offensive to the senses, or is an obstruction of the free use of property, so as to interfere with the comfortable enjoyment of life or property [*Civ. Code § 3479*]. If it affects an entire community or neighborhood, or any considerable number of persons, it is considered a public nuisance

[*Civ. Code § 3480*]; if not, it is a private nuisance [*Civ. Code § 3481*]. Any person whose property is injuriously affected or whose personal enjoyment is lessened by a nuisance may bring an action to enjoin or abate the nuisance and to recover damages [*Code Civ. Proc. § 731*].

It has been pointed out that nuisance is a field of tort liability rather than a type of tortious conduct and that it is not a separate tort but a species of damage occasioned by conduct which is tortious because it falls into the usual categories of tort liability [*Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 372-373, 82 Cal. Rptr. 689]* . However, it seems that strict liability may be imposed as to conduct which falls within the statutory definition of nuisance [*see Civ. Code § 3479*] and that fault is not an actual element of liability [*see Sturges v. Charles L. Harney, Inc. (1958) 165 Cal. App. 2d 306, 318, 331 P.2d 1072* ; *Alonso v. Hills (1950) 95 Cal. App. 2d 778, 783, 214 P.2d 50* (holding that an action for both damages and injunctive relief could be based on either negligent blasting or blasting in such surroundings as to cause the blasting to be an ultrahazardous activity)].

For a complaint for injunctive relief to abate nuisance, see *§ 256.50*.

[4] Continuing and Permanent Nuisances Distinguished

The distinction between continuing and permanent nuisances is important in determining what damages may be recovered. The remedy for a continuing nuisance is either a suit for injunctive relief or successive actions for damages as new injuries occur. On the other hand, if the nuisance is of indefinite duration and its abatement is impractical, it is considered permanent and all damages, past and prospective, are recoverable in one action [*Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 268-270, 288 P.2d 507]* . The measure of damages for permanent injury would be the depreciation in value of the property caused by the nuisance [*Spaulding v. Cameron (1952) 38 Cal. 2d 265, 270, 239 P.2d 625]* .

An attempt to categorically classify nuisances as permanent or continuing may lead to serious injustice to one or the other of the parties. Thus, in doubtful cases it is recognized that plaintiff should have an election to treat the nuisance as either permanent or continuing. If the defendant is not privileged to continue the nuisance and is able to abate it, the defendant cannot complain if the plaintiff elects to bring successive actions as damages accrue until abatement takes place. However, if it appears improbable as a practical matter that the nuisance can or will be abated, the plaintiff is not limited to the remedy of successive actions [*Spaulding v. Cameron (1952) 38 Cal. 2d 265, 268, 239 P.2d 625]* .

[5] Nuisances Per Se

Certain activities declared by law to be nuisances are referred to as nuisances per se. These activities may be enjoined without proof of their injurious nature [*see In re Brambini (1923) 192 Cal. 19, 24, 218 P.2d 569* (holding business selling liquor illegally to be public nuisance); *Pon v. Wittman (1905) 147 Cal. 280, 292, 81 P. 984* (holding house of prostitution to be public nuisance); *People v. Adco Advertisers (1973) 35 Cal. App. 3d 507, 511, 110 Cal. Rptr. 849* (holding billboard located in violation of provision of Outdoor Advertising Act to be public nuisance)].

Blasting conducted by a quarry in populated areas has been designated a nuisance per se [*Alonso v. Hills (1950) 95 Cal. App. 2d 778, 783, 214 P.2d 50* ; *but see Dauberman v. Grant (1926) 198 Cal. 586, 590, 246 P. 319* ; *McPheeters v. McMahon (1933) 131 Cal. App. 418, 425, 21 P.2d 606* (both cases holding that a lawful business cannot be a nuisance per se but that it may become a nuisance by reason of its location or the manner in which it is conducted)].

For detailed discussion of nuisances and a related procedural guide and forms, see Ch. 391, *Nuisance* .

Legal Topics:

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

Real Property LawTortsInherently Dangerous ActivitiesReal Property LawTortsNuisanceTypesContinuing NuisanceReal Property LawTortsNuisanceTypesNuisance Per SeReal Property LawTortsNuisanceTypesPermanent NuisanceTortsStrict LiabilityAbnormally Dangerous ActivitiesActivities & Conditions

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22-256 California Forms of Pleading and Practice--Annotated § 256.14

§ 256.14 Explosions in Isolated Areas

[1] Negligence

When blasting is conducted in an isolated area, one engaged in it is not automatically subject to the doctrine of strict liability [*Houghton v. Loma Prieta Lbr. Co. (1907) 152 Cal. 500, 505, 93 P. 82* ; *but see Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 786-787, 56 Cal. Rptr. 128* (strict liability doctrine applied where rocket motor testing site in undeveloped area but where plaintiff's property immediately adjoining)]. Liability for damages in such situations is imposed only if the defendant is negligent [*Gallin v. Poulou (1956) 140 Cal. App. 2d 638, 644-645, 295 P.2d 958* ; *Alonso v. Hills (1950) 95 Cal. App. 2d 778, 783, 214 P.2d 50* (blasting in remote place where danger of injury slight as not nuisance per se); *see also § 256.13[3]* et seq.].

For a complaint for damages for injuries based on negligence against quarry owner blasting in isolated area, see *§ 256.51*.

[2] Standard of Care

The degree of care necessary to prevent injury to others is proportional to the danger to be avoided and the consequences reasonably to be anticipated [*Warner v. Santa Catalina Island Co. (1955) 44 Cal. 2d 310, 317, 282 P.2d 12]* . Thus, the degree of care required in dealing with dangerous instrumentalities such as explosives or highly inflammable materials is so great that even a slight deviation constitutes negligence [*Borenkraut v. Whitten (1961) 56 Cal. 2d 538, 545, 15 Cal. Rptr. 635, 364 P.2d 467* (service station attendant as negligent for causing injuries to motorist as a result of backfire which occurred while he was pouring gasoline into the carburetor of motorist's automobile)].

For a complaint for damages for injuries resulting from fireworks left on municipal playground, see *§ 256.53*.

[3] Violation of Statute

The common-law presumption of negligence which arises from an act or failure to act below a statutory standard is codified in *Evid. Code § 669*, which contains two parts.

The first part provides that the failure of a person to exercise due care is presumed if [*Evid. Code § 669(a)*]:

- He or she violated a statute, ordinance, or regulation of a public entity;
- The violation proximately caused death or injury to person or property;
- The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
- The person suffering the death or the injury to person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

The second part provides that the presumption may be rebutted by proof that [*Evid. Code § 669(b)*]:

- The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law; or
- The person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances. However, the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications.

Under the common-law principles identical to these codified principles, it was held that a woman had been negligent where she was cleaning the floor with inflammable liquid in violation of an ordinance and that conduct caused an explosion resulting in death and personal injuries [*Burger v. Burger (1955) 136 Cal. App. 2d 360, 366-367, 288 P.2d 926]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsGeneral OverviewTortsNegligenceProofViolations of LawStatutesTortsNegligenceStandards of CareGeneral OverviewTortsStrict LiabilityAbnormally Dangerous ActivitiesActivities & Conditions

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22-256 California Forms of Pleading and Practice--Annotated § 256.15

§ 256.15 Defense of Comparative Negligence

In all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured does not bar recovery, but the damages awarded are diminished in proportion to the amount of negligence attributable to the person recovering [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

Prior cases involving contributory negligence are, however, instructive insofar as they illustrate negligent conduct of plaintiffs. Thus, a case decided under former law which held that a plaintiff was negligent who threw a lighted match near gas flowing on the ground and whose property was damaged by the resulting fire [*Smith v. Associated Oil Co. (1921) 53 Cal. App. 142, 146, 199 P. 879]* would still be valid with respect to what behavior constitutes negligence. However, under comparative negligence, plaintiff's recovery would depend on the amount of negligence attributable to plaintiff and the amount attributed to defendant oil company, rather than recovery being barred.

For an affimative defense based on comparative negligence of plaintiff, see *§ 256.56*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsGeneral OverviewTortsNegligenceDefensesComparative NegligenceGeneral Overview

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22-256 California Forms of Pleading and Practice--Annotated § 256.16

§ 256.16 Defense of Assumption of Risk

The term "assumption of risk" is sometimes applied to at least two distinct defenses. In primary assumption of risk, the defendant owes no duty to the plaintiff, and there is no liability. In secondary assumption of risk, the defendant does owe a duty to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty, and liability is determined under the comparative fault scheme [*Knight v. Jewett (1992) 3 Cal. 4th 296, 309-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesAssumption of RiskGeneral OverviewTortsNegligenceDefensesAssumption of RiskElements & NatureKnowledge of Danger

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22-256 California Forms of Pleading and Practice--Annotated § 256.17

§ 256.17 Duty of Supplier of Dangerous Instrumentality

A supplier of a dangerous instrumentality has a duty to exercise care commensurate with the danger involved [*Reynolds v. Natural Gas Equipment, Inc. (1960) 184 Cal. App. 2d 724, 736, 7 Cal. Rptr. 879]* . Thus, such a supplier is negligent in failing to warn of the potential hazard of an explosion when the danger is known, or should have been known, to the supplier and when the user does not know of the danger [*Reynolds v. Natural Gas Equipment, Inc. (1960) 184 Cal. App. 2d 724, 737-738, 7 Cal. Rptr. 879]* or would not ordinarily discover it [*Tingey v. E.F. Houghton & Co. (1947) 30 Cal. 2d 97, 102, 179 P.2d 807* (duty of manufacturer to warn of explosive nature of chemical salt)].

California has declined to apply the industry-wide theory of liability involved in blasting cap manufacturing to the matter of drug manufacturing of diethylstilbestrol (DES) [*Sindell v. Abbott Laboratories (1980) 26 Cal. 3d 588, 609, 163 Cal. Rptr. 132, 607 P.2d 924]* .

For a complaint for damages for injuries resulting from mislabeled explosive, see *§ 256.54*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsGeneral OverviewTortsNegligenceDutyAffirmative Duty to ActCreators of Foreseeable Peril

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22-256 California Forms of Pleading and Practice--Annotated §§ 256.18 through 256.29

[Reserved]

§§ 256.18[Reserved]

California Forms of Pleading and Practice--Annotated

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Chapter 256 EXPLOSIVES
PART III. RESEARCH GUIDE

22-256 California Forms of Pleading and Practice--Annotated § 256.30

§ 256.30 Related Matthew Bender Publications

For points and authorities pertaining to actions to abate a nuisance, see California Points and Authorities, Ch. 167, *Nuisance*

For points and authorities pertaining to strict liability for ultrahazardous activities, see California Points and Authorities, Ch. 234, *Ultrahazardous Activities*

Personal Injury: Actions, Defenses, Damages, *Explosives and Explosions*, §§ 1-6

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceRemediesGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsStrict LiabilityAbnormally Dangerous ActivitiesGeneral OverviewTortsStrict LiabilityAbnormally Dangerous ActivitiesActivities & Conditions

California Forms of Pleading and Practice--Annotated

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PART III. RESEARCH GUIDE

22-256 California Forms of Pleading and Practice--Annotated § 256.31

§ 256.31 State Statutes

[1] Explosives

High explosives. *Health & Safety Code §§ 12000-12401*

Effect of state statutes on ordinances of cities, counties, or cities and counties. *Health & Safety Code § 12002*

Statutory requirements regarding marking packages of explosives delivered to common carrier for transportation. *Health & Safety Code § 12088*

Explosives to be kept in completely enclosed containers. *Health & Safety Code § 12150*

Blasting caps to be kept in locked approved magazine. *Health & Safety Code § 12150.5*

Explosives to be kept or stored as specified by rules or regulations adopted by State Fire Marshal. *Health & Safety Code § 12151*

Requirements regarding use of explosives at place of employment. *Lab. Code § 6710*

Transportation of explosives. *Veh. Code §§ 31600-31620*

[2] Fireworks

Dangerous fireworks defined. *Health & Safety Code § 12505*

Fireworks. *Health & Safety Code §§ 12500-12725*

Public display of fireworks. *Health & Safety Code § 12524*

State Fire Marshal as required to adopt rules and regulations relating to fireworks. *Health & Safety Code § 12552*

Liability insurance for public display of fireworks. *Health & Safety Code § 12610*

Application for permit for public display of fireworks. *Health & Safety Code § 12648*

Discharge of fireworks where likelihood of injury to other person as unlawful. *Health & Safety Code § 12680*

Public display as requiring permit. *Health & Safety Code § 12685*

Criminal liability as imposed for sale or delivery of dangerous fireworks to persons under 18 years of age. *Health & Safety Code § 12702*

Injunctive relief for threatened violation of statutes or regulations. *Health & Safety Code § 12720*

Fireworks as subject to seizure. *Health & Safety Code § 12722*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewGovernmentsLocal GovernmentsPolice PowerGovernmentsState & Territorial GovernmentsPolice PowerTortsStrict LiabilityAbnormally Dangerous ActivitiesActivities & Conditions

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§ 256.32 Administrative Regulations

Construction safety orders, explosives. *8 Cal. Code Reg §§ 1550-1580*

General industry safety orders, explosives. *8 Cal. Code Reg §§ 5236-5374*

Sale, use, handling, possession, and storage of explosives; regulations of State Fire Marshal. *19 Cal. Code Reg §§ 1550-1584.4*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewGovernmentsLocal GovernmentsPolice PowerGovernmentsState & Territorial GovernmentsPolice PowerTortsStrict LiabilityAbnormally Dangerous ActivitiesActivities & Conditions

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§ 256.33 Decisions

[1] Defenses

[a] Assumption of Risk

Assumption of risk in comparative negligence system. *Knight v. Jewett (1992) 3 Cal. 4th 296, 309-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

Doctrine of assumption of risk did not apply where abandonment of property would be unreasonable alternative to impose upon plaintiff. *Judson v. Giant Powder Co. (1895) 107 Cal. 549, 554, 40 P. 1020, 1226, 40 P. 1020-1226*

Applicability of doctrine of assumption of risk is based on showing that plaintiff knew and appreciated danger and voluntarily occupied position of danger in disregard of use of ordinary care. *Weaver v. Shell Company (1939) 34 Cal. App. 2d 713, 721, 94 P.2d 364*

Employee assumed only risk of dangers normally incident to occupation and not extraordinary dangers created by negligent acts of others. *Weaver v. Shell Company (1939) 34 Cal. App. 2d 713, 722, 94 P.2d 364*

[b] Negligence of Plaintiff

System of comparative negligence established. *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 823, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226*

Couple was not negligent in failing to leave home before gas explosion. *Gerdes v. Pacific Gas & Elec. Co. (1933) 219 Cal. 459, 469, 27 P.2d 365*

Negligence of plaintiff was shown where plaintiff threw lighted match near gas flowing on ground and such conduct proximately contributed to damage to plaintiff's property. *Smith v. Associated Oil Co. (1921) 53 Cal. App. 142, 146,*

199 P. 879

[2] Duty of Manufacturer and Other Suppliers

Manufacturer liable for defective condition of explosive chemical. *Tingey v. E.F. Houghton & Co. (1947) 30 Cal. 2d 97, 102, 179 P.2d 807*

Duty of manufacturer to appropriately warn user of explosive nature of chemical salt, a danger which was known or should have been known to manufacturer and which user would not ordinarily discover. *Tingey v. E.F. Houghton & Co. (1947) 30 Cal. 2d 97, 102, 179 P.2d 807*

Supplier of dangerous instrumentality has duty to exercise care commensurate with danger involved. *Reynolds v. Natural Gas Equipment, Inc. (1960) 184 Cal. App. 2d 724, 736, 7 Cal. Rptr. 879*

Suppliers of gas burner was negligent in failing to warn of potential hazard of explosion where user ignorant of such danger. *Reynolds v. Natural Gas Equipment, Inc. (1960) 184 Cal. App. 2d 724, 737-738, 7 Cal. Rptr. 879*

Producer of potentially dangerous product was not relieved of liability for negligence where custom was to label but where it failed to properly label so as to warn against improper handling. *Gall v. Union Ice Co. (1951) 108 Cal. App. 2d 303, 312, 239 P.2d 48*

[3] Injury to Children

Right of infant to recover for pain and suffering incurred as result of negligently caused injury. *Capelouto v. Kaiser Foundation Hosp. (1972) 7 Cal. 3d 889, 895, 103 Cal. Rptr. 856, 500 P.2d 880*

Right of parents to recover for injuries to minor child. *Sykes v. Lawlor (1874) 49 Cal. 236, 237-238* ; *Bauman v. City & County of San Francisco (1940) 42 Cal. App. 2d 144, 160-163, 108 P.2d 989 , superseded by statute on other grounds as stated in Brown v. Poway Unified School Dist. (1993) 4 Cal. 4th 820, 831, 15 Cal. Rptr. 2d 679, 843 P.2d 624* ; *McManus v. Arnold Taxi Corp. (1927) 82 Cal. App. 215, 222-225, 255 P. 755*

Defendant was not negligent for failure to inspect premises and discover dynamite caps prior to injury of children where defendant was not responsible for storage of caps. *Reynolds v. Salmonson (1957) 148 Cal. App. 2d 895, 898, 307 P.2d 672*

Statutory provisions prescribing minimum standard of care for custody and storage of explosives such as dynamite caps demonstrate high degree of care the law imposes on possessor of highly explosive substances, especially toward children, even without aid of statute and even where children are trespassers. *Marino v. Valenti (1953) 118 Cal. App. 2d 830, 849, 259 P.2d 84*

Possessor of explosives owes high degree of care to avoid injury to trespassing children who might have access to them in situation where attractive nuisance doctrine might not apply. *Marino v. Valenti (1953) 118 Cal. App. 2d 830, 848, 259 P.2d 84*

Plaintiff minor was negligent where minor was experienced with fireworks and knew explosive nature of powder before igniting it. *Mathews v. Albany (1939) 36 Cal. App. 2d 147, 148, 97 P.2d 266*

[4] Liability for Indirect Injury

California makes no distinction between trespass by forcible injury and trespass committed by consequential and indirect injury, such as concussions, vibrations, shaking of the earth, pulsation of the air, or by physical projectiles or missiles. *Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 784, 56 Cal. Rptr. 128*

[5] Negligence

Liability imposed for injury due to blasting is dependent on particular locality; negligence standard applies to blasting in isolated area. *Houghton v. Loma Prieta Lbr. Co. (1907) 152 Cal. 500, 505, 93 P. 82*

Subcontractor and employee were liable for injuries caused by explosion resulting from operation of blowtorch in close proximity to explosive fluid. *Johnson v. Nicholson (1958) 159 Cal. App. 2d 395, 406-408, 324 P.2d 307*

Blasting in remote places where danger of injury is slight is not nuisance per se and only actionable when negligence alleged and proved. *Alonso v. Hills (1950) 95 Cal. App. 2d 778, 783, 214 P.2d 50*

[6] Nuisance

Where nuisance is permanent all damages are recoverable in one action. *Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 268-270, 288 P.2d 507*

In doubtful cases, plaintiff may elect to treat nuisance as either permanent or continuing. *Spaulding v. Cameron (1952) 38 Cal. 2d 265, 268, 239 P.2d 625*

Measure of damages for permanent injury is depreciation in value of the property. *Spaulding v. Cameron (1952) 38 Cal. 2d 265, 270, 239 P.2d 625*

Nature of nuisance per se. *In re Brambini (1923) 192 Cal. 19, 24, 218 P. 569* ; *Pon v. Wittman (1905) 147 Cal. 280, 292, 81 P. 984* ; *People v. Adco Advertisers (1973) 35 Cal. App. 3d 507, 511, 110 Cal. Rptr. 849*

Nature of nuisance liability. *Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 372-373, 82 Cal. Rptr. 689* ; *Sturges v. Charles L. Harney, Inc. (1958) 165 Cal. App. 2d 306, 318, 331 P.2d 1072*

Blasting is designated nuisance per se and subject to injunctive relief. *Alonso v. Hills (1950) 95 Cal. App. 2d 778, 783, 214 P.2d 50*

Action for both damages and injunctive relief is based on either negligent blasting or blasting in such surroundings as to cause blasting to be ultrahazardous. *Alonso v. Hills (1950) 95 Cal. App. 2d 778, 783, 214 P.2d 50*

[7] Res Ipsa Loquitur

Doctrine of res ipsa loquitur did not apply where plaintiff was injured by spontaneous explosion of 30-year-old blasting cap while handling it following discovery of container of caps nailed to tree on mining property recently acquired by plaintiff's father. *Barrett v. Atlas Powder Co. (1978) 86 Cal. App. 3d 560, 565, 150 Cal. Rptr. 339*

Doctrine of res ipsa loquitur applied where gas burner exploded. *Reynolds v. Natural Gas Equipment, Inc. (1960) 184 Cal. App. 2d 724, 731-735, 7 Cal. Rptr. 879*

Elements of doctrine of res ipsa loquitur. *Reynolds v. Natural Gas Equipment, Inc. (1960) 184 Cal. App. 2d 724, 731-735, 7 Cal. Rptr. 879*

Res ipsa loquitur instruction was proper where explosion resulted from cleaning floor with gasoline in violation of city ordinance and without justification. *Burger v. Burger (1955) 136 Cal. App. 2d 360, 364-365, 288 P.2d 926*

[8] Standard of Care

Degree of ordinary care to be exercised increases with danger reasonably to be apprehended. *Borenkraut v. Whitten (1961) 56 Cal. 2d 538, 545, 15 Cal. Rptr. 635, 364 P.2d 467*

Degree of care required in dealing with dangerous instrumentalities such as explosive or highly inflammable materials is so great that even slight deviation from standard care constitutes negligence. *Borenkraut v. Whitten (1961) 56 Cal. 2d 538, 545, 15 Cal. Rptr. 635, 364 P.2d 467*

Degree of care necessary to prevent injury to others is in proportion to danger to be avoided and consequences reasonably to be anticipated. *Warner v. Santa Catalina Island Co. (1955) 44 Cal. 2d 310, 317, 282 P.2d 12*

Risk incident to dealing with dangerous articles such as explosives and firearms requires such high standard of care that slight deviation therefrom constitutes negligence. *Warner v. Santa Catalina Island Co. (1955) 44 Cal. 2d 310, 317, 282 P.2d 12*

[9] Strict Liability

In case of injury from spontaneous explosion of 30-year-old blasting cap found on mining property, claims of strict (product) liability for defective manufacture and for retail sale (to unknown purchaser 30 years ago) without adequate warning of defect was not supportable by evidence, and summary judgment for defendants was proper, where plaintiff submitted no evidence tending to prove defective manufacture and plaintiff's own expert would testify blasting cap was reasonably designed considering date of manufacture and was made of best materials then available; danger of spontaneous explosion of blasting cap was inherent and obvious, and therefore, retailer had no duty to warn of such danger. *Barrett v. Atlas Powder Co. (1978) 86 Cal. App. 3d 560, 564-567, 150 Cal. Rptr. 339*

Strict liability doctrine applied where rocket motor testing site was in undeveloped area but where plaintiff's property was immediately adjoining and defendant knew of risk of harm to plaintiff's land and improvements. *Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 786-787, 56 Cal. Rptr. 128*

Use of explosives in vicinity of residential area requires invocation of absolute liability doctrine. *Balding v. D.B. Stutsman, Inc. (1966) 246 Cal. App. 2d 559, 564, 54 Cal. Rptr. 717*

Question whether case is one of strict or absolute liability, that is, whether blasting occurred in vicinity of dwelling places, is question of law for the court to determine. *Balding v. D.B. Stutsman, Inc. (1966) 246 Cal. App. 2d 559, 564, 54 Cal. Rptr. 717*

Blasting in populated surroundings is ultrahazardous activity for the miscarriage of which actor is held strictly liable regardless of degree of care; such blasting is subject to injunctive relief. *Alonso v. Hills (1950) 95 Cal. App. 2d 778, 783, 214 P.2d 50*

[10] Ultrahazardous Activity

Activity of welding with blowtorch on waste oil tank is ultrahazardous and justified directed verdict of liability. *Garcia v. Estate of Norton (1986) 183 Cal. App. 3d 413, 419-420, 228 Cal. Rptr. 108*

Ultrahazardous activity is that involving risk of serious harm to person, land, or chattels of others which cannot be eliminated by exercise of utmost care and which is not matter of common usage. *Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 785, 56 Cal. Rptr. 128*

Classification of activity as ultrahazardous does not automatically subject one engaged in it to strict liability standard without regard to place or circumstances. *Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 786, 56 Cal. Rptr. 128*

Ultrahazardous activity is matter of law to be determined by court. *Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 785, 56 Cal. Rptr. 128*

Defendant engaged in business who has engaged in ultrahazardous activity for profit is best able to administer loss. *Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 785, 56 Cal. Rptr. 128*

[11] Measure of Damages

Measure of damages includes damage to property, damage from discomfort and annoyance to the occupant of land and members of household regardless of whether occupant sustained physical injuries, and damages for mental harm including suffering occasioned by fear of future danger. *Alonso v. Hills (1950) 95 Cal. App. 2d 778, 787-788, 214 P.2d 50*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceTypesGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsNegligenceDefensesAssumption of RiskGeneral OverviewTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsStrict LiabilityAbnormally Dangerous ActivitiesActivities & Conditions

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§ 256.34 Law Reviews

King, *A Goals-Oriented Approach to Strict Tort Liability for Abnormally Dangerous Activities*, *48 Baylor L. Rev. 341 (1996)*

Comment, *Mass Accident Class Actions*, *60 Cal. L. Rev. 1615 (1972)*

Baxter, *The SST: From Watts to Harlem in Two Hours*, *21 Stan. L. Rev. 1 (1968)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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Witkin, Summary of California Law, vol. 6, *Torts*, §§ 921, 922, 1171, 1172, 1418, 1421, 1427 (10th ed. 2005)

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[Reserved]

§§ 256.36[Reserved]

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PART IV. FORMS

22-256 California Forms of Pleading and Practice--Annotated § 256.50

§ 256.50 Complaint for Preliminary [Code Civ. Proc. § 527] and Permanent Injunction [Civ. Code § 3422(1), (3); Code Civ. Proc. § 526] to Abate Nuisance [Civ. Code § 3479; Code Civ. Proc. § 731] and for Damages [Civ. Code § 3333; Code Civ. Proc. § 731] for Injuries to Person and Property Based on Strict Liability--By Landowner Against Quarry--Blasting in Populated Area

[1] FORM Complaint for Preliminary [Code Civ. Proc. § 527] and Permanent Injunction [Civ. Code § 3422(1), (3); Code Civ. Proc. § 526] to Abate Nuisance [Civ. Code § 3479; Code Civ. Proc. § 731] and for Damages [Civ. Code § 3333; Code Civ. Proc. § 731] for Injuries to Person and Property Based on Strict Liability--By Landowner Against Quarry--Blasting in Populated Area

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR INJUNCTION AND DAM-
_____ [*name(s)*],	)	AGES
Defendant(s).	)	(Nuisance; Strict Liability)
	)	
	)	

_____

Plaintiff alleges:

FIRST COUNT
(Nuisance)

1. Plaintiff _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence of plaintiff*].

2. Defendant _____ [*name of quarry*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California, with its principal place of business in _____ County, California, and doing business therein [*or allege other capacity and residence of defendant*].

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of such fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by defendants' acts.)]

4. At all times herein mentioned, _____ [*names of agents and employees*] [were residents of _____ County, California and] were the agents and employees of defendant _____ [*name of quarry*], and in doing all of the things hereinafter mentioned, were acting within the course and scope of their authority and employment as such agents and employees and with the permission and consent of defendant _____ [*name of quarry*].

5. Plaintiff is, and at all times herein mentioned was, the owner and in possession and control of that real property situated in _____ County, known as _____ [*street*], _____ [*city*], California, and more particularly described as follows: _____ [*give legal description*].

6. At all times herein mentioned, the property was, and is, located _____ [*describe area showing plaintiff's property to be in populated surroundings*, *e.g.*, in the vicinity of other dwelling houses and places of business in _____ (*city*)].

7. Defendant is, and at all times herein mentioned was, the owner and in possession and control of that real property situated in _____ County, known as _____ [*street*], _____ [*city*], California, and more particularly described as follows: _____ [*give legal description*]. Together with its agents and employees, defendant was conducting _____ [quarrying *or* excavating] operations on the premises.

8. The above-described properties of plaintiff and defendant are _____ [*show relative locations*].

9. On or about _____ [*date*], and from that time until the present, defendant _____ [*name of quarry*], and its agents and employees, caused, conducted, and detonated a recurrent and continuing series of explosions and blasts on the property of defendant. [The explosions and blasts occurred as frequently as _____ (*number*) times per day for _____ (*number*) days of the week.]

10. The explosions and blasts have caused injury to plaintiff in that they constitute an obstruction to the free use of plaintiff's property in the following particulars: _____ [*set forth supporting facts*, *e.g.*, the explosions and blasts have caused the projection of dust, sand, dirt, rocks, and other debris onto the land and improvements, fixtures, dwelling house, and person of the plaintiff. Each of the explosions and blasts sent shock waves, vibrations of the earth, and concussions of the air from the property of defendant onto, through, and against the land and improvements, fixtures, dwelling house, and person of the plaintiff].

11. The explosions and blasts are a nuisance and have injured plaintiff by obstructing plaintiff's free use of the property as described above. Plaintiff's property was, and continues to be, greatly damaged as follows: _____ [*set forth particular damages to the property*, *e.g.*, walls cracked and damaged, window sills stripped, window panes and mirrors broken, dwelling house loosened and weakened in its supports], all to plaintiff's damage in the sum of

$_____.

12. As a further result of the explosions and blasts, plaintiff has been greatly injured in health, strength, and activity, and has suffered, and continues to suffer, distress in mind and body, physical pain and mental anguish, discomfort, annoyance, fright, and shock, all to plaintiff's damage [in the sum of $_____].

13. On or about _____ [*date*], defendant _____ [*name of quarry*], and its agents and employees, threatened to continue the explosions and blasts, and has, in fact, continued to conduct, cause, and detonate the explosions and blasts.

14. Unless defendant is restrained by order of this court from continuing to allow this blasting and nuisance, it will be necessary for plaintiff to commence many successive actions against defendant to secure compensation for damages sustained, thus requiring a multiplicity of judicial proceedings, and plaintiff will be daily threatened with the continuation of the nuisance described above.

15. Unless defendant is enjoined from continuing the blasting operations, plaintiff will be irreparably injured in an amount which cannot be calculated in terms of money, in that plaintiff will be deprived to a substantial extent of the use and comfortable enjoyment of plaintiff's property. _____ [*Allege other irreparable injury, e.g.*, Any efforts to sell or lease plaintiff's property will be without avail because its usefulness will be substantially diminished].

16. Plaintiff has no plain, speedy, or adequate remedy at law, and injunctive relief is expressly authorized by *Section 731 of the Code of Civil Procedure.*

SECOND COUNT
(Strict Liability)

1. Plaintiff incorporates herein Paragraphs 1-9, inclusive, of the First Count.

2. Each of the explosions and blasts caused the projection of _____ [*specify, e.g.*, dust, sand, dirt, rocks, and other debris] onto the _____ [*specify, e.g.*, land and improvements, fixtures, dwelling house and person] of plaintiff. Each of the explosions and blasts sent _____ [*specify, e.g.*, shock waves, vibrations of the earth, and concussions of the air] from the property of defendant _____ [*name of quarry*] onto, through, and against the _____ [*specify, e.g.*, land and improvements, fixtures, dwelling house and person] of plaintiff.

3. As a proximate result of the conduct of defendant _____ [*name of quarry*], and of its agents and employees, as described above, and by reason of the resulting _____ [*specify, e.g.*, projection of objects and sending of shock waves, vibrations, and concussions], plaintiff's property was, and continues to be, greatly damaged as follows: _____ [*set forth particular damages to the property, e.g.*, walls cracked and damaged, window sills stripped, window panes and mirrors broken, dwelling house loosened and weakened in its supports], all to plaintiff's damage in the sum of $_____.

4. As a further proximate result of the conduct of defendant _____ [*name of quarry*], and of its agents and employees, as described above, plaintiff has been greatly injured in health, strength, and activity, and has suffered, and continues to suffer, distress in mind and body, physical pain and mental anguish, discomfort, annoyance, fright, and shock, all to plaintiff's damage.

WHEREFORE, plaintiff prays judgment as follows:

1. For an order requiring defendant to show cause why defendant should not be enjoined, as hereinafter set forth, during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining and restraining defendant, its agents, servants, and employees, and all persons acting under, in concert with, or for them, from continuing the explosions and blasts which create the above-described nuisance on plaintiff's property;

3. For property damages in the sum of $_____;

4. For general damages according to proof;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*signature*]

SUPPORTING DECLARATION OF _____ [*name*]
RE ADVANCE NOTIFICATION

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*specify party, e.g.,* plaintiff) in the above-described action].

[*In succeeding numbered paragraph(s) describe with particularity the actions taken to provide advance notification of the ex parte application in compliance with Cal. Rules of Ct., Rules 3.1203-3.1204, e.g.:*]

[*EITHER*]

2. On _____ [*date*], at _____ [*time not later than 10:00 of the court day before the application*], I informed _____ [defendant(s) *or* _____ (defendant's *or* defendants') attorney, _____ (*name*),] by _____ [*describe manner of notice, e.g.,* by telephone and a faxed letter confirming our conversation], that the above application for a temporary restraining order and order to show cause would be made on _____ [*specify date and time*] at _____ [*specify place*].

3. _____ [*Describe response or lack of response to notification*]. Therefore, I _____ [expect *or* do not expect *or* could not determine whether to expect] oppostion to the application.

[*OR*]

2. In good faith I attempted to inform _____ [defendant(s) *or* _____ (defendant's *or* defendants') attorney, _____ (*name*),] of the time and place the above application for a temporary restraining order and order to show cause would be made, in that I _____ [*specify efforts made*], but I was unable to do so.

[*OR*]

2. Notice to _____ [defendant(s) *or* _____ (defendant's *or* defendants') attorney, _____ (*name*),] of the time and place the above application for a temporary restraining order should not be required for the following reason(s): _____ [*specify*].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This complaint is for use by a landowner or occupier to recover in strict liability for property damages and mental distress damages against a defendant engaged in the ultrahazardous activity of blasting in populated surroundings and to enjoin the continuation of the blasting [*see Civ. Code §§ 3484* (abatement of nuisance does not preclude right to damages based on its past existence), *3501* (remedies against nuisance)]. The form is adapted from the complaint filed in *Alonso v. Hills (1950) 95 Cal. App. 2d 778, 214 P.2d 50* .

[3] Jurisdiction

An action seeking permanent injunctive relief is in the jurisdiction of the superior court as an unlimited civil case [*see Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*].

[4] Allegations

In the First Count, the complaint sets forth the essential allegations to abate a nuisance. It alleges:

- Ownership, control, and relative location of properties of plaintiff and defendant (Paragraphs 5-8).
- A description of the blasting activity (Paragraph 9).
- Facts showing that the blasting activity is a nuisance as defined in *Civ. Code § 3479* (Paragraph 10) [*see Code Civ. Proc. § 731* (action to enjoin or abate a nuisance)].
- Injury to plaintiff or plaintiff's property interest (Paragraphs 10-12); (5) damages (Paragraphs 11, 12) [*Civ. Code § 3333*; *Code Civ. Proc. § 731*].
- Defendant's threatened continuation of the nuisance (Paragraph 13) [*Code Civ. Proc. § 527*].
- The right to injunctive relief (Paragraph 16) [*Code Civ. Proc. § 731*; *see also Code Civ. Proc. §§ 526, 527*].

The complaint also sets forth the essential allegations necessary to recover in strict liability for damages caused by an ultrahazardous activity in the Second Count. It alleges:

- Plaintiff's status as owner and occupier of property (First Count, Paragraph 5).
- The property's location in populated surroundings (First Count, Paragraph 6).
- That defendant engaged in blasting activity (First Count, Paragraph 9).
- Injury to plaintiff and plaintiff's property interest (Second Count, Paragraphs 3, 4).
- Damages (Second Count, Paragraphs 2-4) [*Civ. Code § 3333*].

As an alternative to seeking abatement of the nuisance, plaintiff could sue for permanent damages caused by the nuisance and may include an alternative count for such in the same complaint, although an election between the two inconsistent remedies would ultimately be required [*see Spaulding v. Cameron (1952) 38 Cal. 2d 265, 269, 239 P.2d 625]* .

If the explosions complained of were relatively few in number, and the damages done by each readily distinguishable, each explosion may be alleged individually in a separate cause of action. If they were frequent, and the damage done cumulative in nature, the blasting may be treated as a series, or a single line of conduct, giving rise to a single cause of action as set forth in this form [*see Alonso v. Hills (1950) 95 Cal. App. 2d 778, 782, 214 P.2d 50]* .

If plaintiff is uncertain whether the area in which the blasting took place is populated enough for there to be strict liability in damages on the part of defendants, regardless of the degree of care with which the blasting was performed, and if the facts permit, plaintiff may allege a separate cause of action based on negligence liability [*see Alonso v. Hills (1950) 95 Cal. App. 2d 778, 783-784, 214 P.2d 50* ; *see also § 256.51*].

For additional personal injury damage allegations, see *§ 256.51[1]*, Paragraphs 8-11.

[5] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 7 L.R.R.M. (BNA) 686, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

Otherwise, verification is not required, but verification of this complaint would require the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and preclude use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[6] Certification re Notice

If a temporary restraining order is sought without formal notice, the applicant or the applicant's attorney is required to certify to the court under oath one of the following: (1) he or she informed the opposing party (or his or her attorney) when and where the application would be made no later than 10:00 a.m. the court day before the ex parte appearance, absent a showing of exceptional circumstances that justify a shorter time for notice; (2) he or she in good faith attempted to inform the opposing party (or attorney) but was unable to do so, specifying the efforts made to do so; or (3) for reasons specified he or she should not be required to inform theopposing party (or attorney) [*Code Civ. Proc. § 527(c)(2)*; *see also Cal. Rules of Ct., Rules 3.1203-3.1204* (notice requirements when proceeding ex parte)].

For further discussion and forms for obtaining a temporary restraining order, see Ch. 303, *Injunctions* .

[7] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages (other than punitive damages) must be alleged [*Code Civ. Proc. § 425.10(b)*; *see Civ. Code § 3295(e)* (no claim for punitive damages may state amount)] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For discussion of and forms for requesting and stating the amount of damages sought if they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[8] Cross References

For a complaint for damages based on negligence for blasting in an isolated area, see *§ 256.51*

For alternative allegations as to capacity and residence of parties, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

See generally Ch. 303, *Injunctions* , and Ch. 391, *Nuisance*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 1414, 1418; vol. 13, *Equity*, §§ 160, 164 (10th ed. 2005)

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Volume 22: Explosives thru Food-Chs. 256-268
Chapter 256 EXPLOSIVES
PART IV. FORMS

22-256 California Forms of Pleading and Practice--Annotated § 256.51

§ 256.51 Complaint for Damages [Civ. Code § 3333] for Injuries to Person and Property Based on Negligence [Civ. Code § 1714]--By Landowner Against Quarry--Blasting in Isolated Area

[1] FORM Complaint for Damages [Civ. Code § 3333] for Injuries to Person and Property Based on Negligence [Civ. Code § 1714]--By Landowner Against Quarry--Blasting in Isolated Area

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Negligence)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Capacity and residence of plaintiff. See § 256.50[1], First Count, Paragraph 1.*]

[2. *Capacity and residence of defendant. See § 256.50[1], First Count, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 256.50[1], First Count, Paragraph 3.*]

[4. *Agency allegation. See § 256.50[1], First Count, Paragraph 4.*]

5. At all times herein mentioned, plaintiff was, and now is, the owner of certain real property consisting of land and _____ [*description of improvements, fixtures, dwelling house*] located _____ [

describe the area showing property to be located in secluded or isolated surroundings], and more particularly described as follows: _____ [*give legal description*]. _____ [Plaintiff resided there *or set forth other status of plaintiff with relation to the property*].

6. At all times herein mentioned, defendant was, and now is, the owner of the premises located at _____ [*describe location*], and more particularly described as follows: _____ [*give legal description*]. Together with its agents and employees, defendant was conducting _____ [quarrying *or* excavating] operations on the premises. These premises are _____ [*show location relative to plaintiff's property*].

7. On or about _____ [*date*], defendant _____ [*name of quarry*], and its agents and employees, negligently and carelessly caused, conducted, and detonated an explosion or blast on the property of defendantwhich projected _____ [*specify*, *e.g.*, dust, sand, dirt, rocks, and other debris] onto the _____ [*specify*, *e.g.*, land and improvements, fixtures, dwelling house, and person] of the plaintiff and which sent _____ [*specify*, *e.g.*, shock waves, vibrations on the earth, and concussions of the air] from the property of defendant onto, through, and against the _____ [*specify*, *e.g.*, land and improvements, fixtures, dwelling house, and person] of the plaintiff.

8. As a proximate result of the negligence of defendant _____ [*name of quarry*], and of its agents and employees, as described above, plaintiff was injured in health, strength, and activity, sustaining bodily injury and shock and injury to the nervous system and person, and among others, sustained the following personal injuries: _____ [*describe*], all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. These injuries will result in some permanent disability to plaintiff, all to his/her general damage.

9. As a further proximate result of the negligence of defendant _____ [*name of quarry*], and of its agents and employees, plaintiff has incurred, and will continue to incur, medical and related expenses, the full amount of which is not now known. Plaintiff will move to amend this complaint to allege such amount when ascertained.

10. At the time of the events herein described, plaintiff was gainfully employed as _____ [*describe occupation*], and was earning an average monthly income in excess of $_____. As a further proximate result of the negligence of defendant _____ [*name of quarry*], and of its agents and employees, plaintiff was prevented from attending to his/her usual occupation and has been damaged thereby.

11. By reason of the negligence of defendant _____ [*name of quarry*], and of its agents and employees, plaintiff will in the future be prevented from attending to his/her usual occupation for an undetermined period of time, all to his/her damage in a sum unknown at this time.

12. As a further proximate result of the negligence of defendant _____ [*name of quarry*], and of its agents and employees, plaintiff's property was damaged as follows: _____ [*set forth particular injuries to the property*, *e.g.*, walls cracked and damaged, window sills stripped, window panes and mirrors broken, dwelling house loosened and weakened in its supports]. Plaintiff will be required to pay approximately $_____, for the repair or replacement of the damaged property, which sum is the reasonable value of the repairs and replacements necessitated by the damage.

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages according to proof;

2. For medical and incidental expenses according to proof;

3. For all loss of earnings according to proof;

4. For repairs to, and replacements of, property in the sum of $_____;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This complaint is for use by a landowner or occupier to recover for personal injuries and property damages caused by blasting negligently performed by the defendant where the blasting was conducted in a remote and uninhabitated area.

[3] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[4] Allegations

This complaint contains the essential allegations of a complaint for damages for negligence:

- Facts establishing duty of care owed by defendant (Paragraph 6) [*see Civ. Code § 1708*].

- Allegations of negligence (Paragraph 7) [*see Borenkraut v. Whitten (1961) 56 Cal. 2d 538, 545, 15 Cal. Rptr. 635, 364 P.2d 467* (degree of care required in dealing with explosive or highly inflammable material so great that even slight deviation from standard of care constitutes negligence)].

- Injuries sustained by plaintiff (Paragraphs 8-12).

- Damages (Paragraphs 8-12) [*Civ. Code § 3333*].

These allegations may be used in a complaint for negligent blasting, or they may be used to state an alternative cause of action in complaints in §§ *256.50* and *256.52* where plaintiff is not certain that the court will find that the area in which the blasting was conducted was sufficiently populated to invoke the strict liability doctrine.

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[6] Cross References

For a complaint for injunctive relief to abate nuisance and to recover damages based on strict liability where blasting was in populated area, see *§ 256.50*

For a complaint to recover damages for personal injuries based on strict liability where blasting was in populated area, see *§ 256.52*

See generally Ch. 380, *Negligence*

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 921, 1418 (10th ed. 2005)

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22-256 California Forms of Pleading and Practice--Annotated § 256.52

§ 256.52 Complaint for Damages [Civ. Code § 3333] for Injuries to Person Based on Strict Liability--By Injured Person Against Construction Company--Blasting in Populated Area

[1] FORM Complaint for Damages [Civ. Code § 3333] for Injuries to Person Based on Strict Liability--By Injured Person Against Construction Company--Blasting in Populated Area

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Strict Liability)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Capacity and residence of plaintiff. See § 256.50[1], First Count, Paragraph 1.*]

2. Defendant _____ [*name of construction company*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California, with its principal place of business in _____ County, California, and doing business therein [*or allege other capacity and residence of defendant*].

[3. *Ficititious name allegation, if appropriate. See § 256.50[1], First Count, Paragraph 3.*]

4. At all times herein mentioned, _____ [*names of agents and employees*] [were residents of

_____ County, California and] were the agents and employees of defendant _____ [*name of construction company*], and in doing all of the things hereinafter mentioned, were acting within the course and scope of their authority and employment as such agents and employees and with the permission and consent of defendant.

5. Defendant _____ [*name of construction company*], and its agents and employees, is, and at all times herein mentioned was, engaged in constructing and installing _____ [*describe*, *e.g.*, storm drains, water pipes, and sewers].

6. On or about _____ [*date*], at or about _____ [*time of blast*], defendant, and its agents and employees, caused, conducted, and detonated an explosion or blast for the purpose of _____ [*set forth purpose*, *e.g.*, removal of a rock interfering with grading operation].

7. The explosion or blast was caused, conducted, and detonated by defendant, and its agents and employees, near _____ [*describe the locale as in a populated area or community*, *e.g.*, dwelling houses and places of business].

8. At the time of the above-mentioned explosion or blast, plaintiff was _____ [*specify*, *e.g.*, working *or* standing] approximately _____ [*number*] feet from the site of the explosion or blast.

9. As a proximate result of the explosion or blast, debris was scattered over an extensive area and the plaintiff was struck on _____ [*specify*, *e.g.*, the arm] by a large falling rock.

[10. *Personal injury allegation. See § 256.51[1], Paragraph 8.*]

[11. *Damages allegation for medical expenses. See § 256.51[1], Paragraph 9.*]

[12. *Damages allegations for loss of past and future earnings. See § 256.51[1], Paragraphs 10 and 11.*]

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages according to proof;

2. For medical and incidental expenses according to proof;

3. For all loss of earnings according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 256.51[1].*]

[2] Use of Form

This complaint is for use by an injured party against a construction company to recover damages based on strict liability caused by blasting operations conducted in populated surroundings. The complaint is based on the fact situation in *Balding v. D.B. Stutsman, Inc. (1966) 246 Cal. App. 2d 559, 54 Cal. Rptr. 717* .

Where the plaintiff is uncertain whether the area in which the blasting took place is sufficiently populated for a cause of action to be based on strict liability, and where the facts permit, plaintiff may allege a separate cause of action based on negligence [*see Alonso v. Hills (1950) 95 Cal. App. 2d 778, 783-784, 214 P.2d 50* ; *see also § 256.51*].

[3] Cross References

For a complaint for injunctive relief to abate nuisance and to recover damages based on strict liability where blasting was in populated area, see *§ 256.50*

For a complaint to recover damages for personal injuries based on negligence where blasting was in isolated area, see *§ 256.51*

Witkin, Summary of California Law, vol. 6, *Torts*, § 1418 (10th ed. 2005)

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§ 256.53 Complaint for Damages [Civ. Code § 3333] for Injuries to Person Based on Negligence [Civ. Code § 1714]--By Minor and Parents Against Public Entity and Employee--Dangerous Fireworks Left on Municipal Playground

[1] FORM Complaint for Damages [Civ. Code § 3333] for Injuries to Person Based on Negligence [Civ. Code § 1714]--By Minor and Parents Against Public Entity and Employee--Dangerous Fireworks Left on Municipal Playground

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], a minor, by	)	
_____ [*name*], his/her Guardian	)	NO. _____
[ad Litem],	)	COMPLAINT FOR DAMAGES
_____ [*names of parents*],	)	
Plaintiffs,	)	(Negligence)
vs.	)	[Amount demanded _____
_____ [*name(s)*],	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]

_____

FIRST CAUSE OF ACTION

Plaintiff _____ [*name*], a minor, through his/her guardian [ad litem], alleges:

1. Plaintiff _____ [*name*] is a minor child of the age of _____ years and at all times hereinafter mentioned was of the age of _____ years.

[*EITHER*]

2. On _____ [*date*], _____ [*name*] was, by order duly made in the above-entitled court, appointed guardian of the person of plaintiff _____ [*name*], and ever since has been, and now is, the guardian of said plaintiff as aforesaid.

[*OR*]

2. For the purposes of this action, _____ [*name*] was duly appointed by order of the above-entitled court, and now is, guardian ad litem of plaintiff _____ [*name*].

3. At all times herein mentioned, the defendant _____ [City *or* County] of _____ [*name of public entity*] was a local public entity of the State of California and owned, maintained, and operated through its recreation department, as a park and playground, that certain public area known as _____ [*name of playground*] at _____ [*address*].

[4. *Fictitious name allegation, if appropriate. See § 256.50[1] , First Count, Paragraph 3.*]

5. At all times herein mentioned, _____ and _____ [*names of employees*] [were residents of _____ County, California and] were the employees of defendant _____ [City *or* County] of _____ [*name of public entity*], and in doing all of the things hereinafter mentioned were acting within the course and scope of their employment.

6. On or about the night of _____ [*date*], defendant, and its employees, jointly conducted a fireworks display at the above-mentioned _____ [*name of playground*]. Dangerous fireworks, as such term is defined in *Section 12505 of the Health and Safety Code*, were used at such display.

7. On that night and on the following day, defendant, and its employees, so negligently and carelessly conducted, maintained, and operated the display and the dangerous fireworks used therein and so negligently and carelessly maintained and operated the public area known as _____ [*name of playground*], that a _____ [*name of fireworks*] was not fired or discharged and was left at the public area.

8. On or about _____ [*date*], plaintiff _____ [*name of minor*] was lawfully at _____ [*name of playground*] and there came upon the _____ [*name of fireworks*] which was _____ [*describe appearance, e.g.*, a silver egg-shaped object about three inches in diameter]. Plaintiff examined and handled the dangerous fireworks and, while doing so, it exploded causing the injuries herein alleged.

9. As a proximate result of the negligence and carelessness of the defendant _____ [City *or* County] of _____ [*name of public entity*] and defendant employees _____ and _____ [*names of employees*], as described above, plaintiff was injured in health, strength, and activity, sustained bodily injury and shock and injury to the nervous system and person, and among others, sustained the following personal injuries: _____ [*describe*], all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering.

10. As a proximate result of the negligence and carelessness of defendants and the above-mentioned injuries, plaintiff _____ [*name of minor*] has been damaged.

11. Prior to the commencement of this action, and on or about _____ [*date*], plaintiff caused to be

presented to defendant _____ [City *or* County] of _____ [*name of public entity*] a claim for the damages sought in this action. A true and correct copy of the claim is attached hereto as Exhibit A and made a part hereof.

12. On or about _____ [*date*], defendant _____ [City *or* County] of _____ [*name of public entity*] _____ [rejected the claim in its entirety *or* allowed the claim in the amount of $_____ and rejected it as to the remainder].

SECOND CAUSE OF ACTION

Plaintiffs _____ [*names of parents*] allege:

1. Plaintiffs _____ [*names of parents*] repeat the allegations contained in Paragraphs 1, 3-9, 11, and 12 of the First Cause of Action of plaintiff _____ [*name of minor*], and make each of such allegations a part of this cause of action as if each of such allegations was repeated herein in full.

2. Plaintiffs _____ [*names of parents*] are, and at all times herein mentioned were, the _____ [*specify relationship, e.g.*, father and mother] of plaintiff _____ [*name of minor*].

3. As a proximate result of the negligence of defendant and by reason of the injuries suffered by plaintiff _____ [*name of minor*] as described above, plaintiffs _____ [*names of parents*] were compelled to, and did, necessarily employ medical and surgical aid and attention for their minor child, and did necessarily pay and become liable therefor, and for nursing, medicine, surgical appliances, and incidental expenses; plaintiffs _____ [*names of parents*] are informed and believe that they will incur additional bills for medical, surgical, and other expenses in order to alleviate the pain and suffering and effect a cure of their minor child in a further amount not known to plaintiffs at this time.

WHEREFORE, plaintiffs pray judgment as follows:

1. In favor of plaintiff _____ [*name of minor*] on the First Cause of Action for general damages according to proof;

2. In favor of plaintiffs _____ [*names of parents*] on the Second Cause of Action for medical and incidental expenses according to proof;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiffs

[*Verification, if desired. See § 256.51[1].*]

[2] Use of Form

This complaint is for use by a minor to recover general damages sustained as a result of an explosion of dangerous fireworks. In this complaint, the parents of the minor are joined in a separate cause of action to recover medical expenses incurred in treatment of the minor. When a parent is the guardian ad litem of the minor, the minor's cause of action may include an allegation to recover such medical expenses as have not been paid [*Morningred v. Golden State Co. (1961) 196 Cal. App. 2d 130, 138-139, 16 Cal. Rptr. 219* ; *Mattox v. Isley (1952) 111 Cal. App. 2d 774, 779-780, 245 P.2d 664]* . Some attorneys prefer to seek medical expenses in the minor's cause of action rather than include a separate cause of action by the parents.

[3] Action by Minor

A minor may enforce his or her rights by a civil action in the same manner as an adult, but a guardian or guardian ad litem must conduct the action [*see Code Civ. Proc. §§ 372, 373*; *Fam. Code § 6601*].

[4] Action Against Public Entity

Governmental immunity from liability has been held not to apply where a fireworks exhibit at the state fair was found to be within the proprietary function of the state [*Guidi v. State (1953) 41 Cal. 2d 623, 627-628, 262 P.2d 3]* .

The form in *[1], above*, includes allegations relating to the the need to file a claim against a public entity [*see Gov. Code §§ 905, 905.2*].

For discussion and forms relating to tort claims against public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[5] Cross References

For further discussion of a complaint to recover damages for personal injuries and property damage, see *§ 256.50*

For forms involving the appointment of a guardian ad litem, see Ch. 291, *Guardians ad Litem*

For discussion and forms involving civil actions by minors, see Ch. 364, *Minors: Claims and Property of Minors* , and Ch. 367A *Minors: Tort Actions*

See generally Ch. 380, *Negligence*

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§ 256.54 Complaint for Damages [Civ. Code § 3333] for Injuries to Person Based on Negligence [Civ. Code § 1714]--By Worker Against Manufacturer--Explosion of Mislabeled Explosive

[1] FORM Complaint for Damages [Civ. Code § 3333] for Injuries to Person Based on Negligence [Civ. Code § 1714]--By Worker Against Manufacturer--Explosion of Mislabeled Explosive

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Negligence)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Capacity and residence of plaintiff. See § 256.50[1] , First count, Paragraph 1.*]

2. Defendant _____ [*name of manufacturer*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California, with its principal place of business in _____ County, California, and doing business therein [*or allege other capacity and residence of defendant*].

[3. *Fictitious name allegation, if appropriate. See § 256.50[1] , First Count, Paragraph 3.*]

4. At all times herein mentioned, _____ [*names of agents and employees*] [were residents of

_____ County, California and] were the agents and employees of defendant _____ [*name of manufacturer*], and in doing all of the things hereinafter mentioned, were acting within the course and scope of their authority and employment as such agents and employees and with the permission and consent of defendant.

5. At all times herein mentioned, plaintiff was employed by _____ [*name of employer*] and, at the time of the events hereinafter referred to, was, in the course and scope of his/her employment, using certain chemicals and equipment hereinafter referred to.

6. At all times herein mentioned, defendant _____ [*name of manufacturer*], and its agents, manufactured, distributed, and sold a chemical substance known as _____ [*name of chemical*], which the defendants caused to be placed in steel drums mislabeled "_____" [*product as mislabeled*]. The defendants, and each of them, carelessly and negligently caused _____ [*name of chemical*] to be mislabeled "_____," [*product as mislabeled*] and caused the mislabeled substance to be delivered to the plant where the plaintiff worked. In the manufacture, distribution, and sale of the chemical product, the defendants, and each of them, were careless and negligent, and each of them knew, or in the exercise of due care should have known, that the drums as delivered to the plant contained _____ [*name of chemical*] and not "_____" [*product as mislabeled*].

[7. At all times herein mentioned, defendant _____ (*name of manufacturer*), and its agents, manufactured, sold, and distributed to plaintiff's employer certain pipes and metal equipment to be used in the manufacture of certain apparatus and testing equipment which was being used by plaintiff at the time of the occurrence hereinafter referred to. In the design, manufacture, sale, and distribution of the pipes and metal equipment, the defendants, and each of them, were negligent, and they so carelessly and negligently designed, manufactured, distributed, and sold the pipe and equipment that the same were defective and incapable of sustaining the pressures to which the apparatus was to be subjected, all of which technical information was well-known to the defendants, and each of them, and the defendants, and each of them, knew, or in the exercise of due care should have known, that the pipes and equipment as designed, manufactured, distributed, and sold by them were defective.]

8. On or about _____ [*date*], plaintiff was directed by his/her superiors to flush a fluid propellant from an engine with _____ [*product as mislabeled*], and to do so, plaintiff utilized [the pipes and equipment designed, manufactured, distributed, and sold by defendant _____ (*name of manufacturer*), and its agents, and] and chemical substance designed, manufactured, distributed, and sold by defendant _____ [*name of manufacturer*] and its agents. Plaintiff believed the chemical substance introduced into the system to be _____ [*product as mislabeled*] inasmuch as the same was contained in a steel drum labeled "_____" [*product as mislabeled*]. In truth and in fact said chemical was not _____ [*product as mislabeled*] but _____ [*name of chemical*]. As a direct and proximate result of the [joint and concurrent] negligence of defendants, and each of them, as described above, there was an explosion and plaintiff sustained severe personal injuries as hereinafter set forth. The explosion resulted directly and proximately from the [joint and concurrent] negligence of defendants, and each of them, as described above.

[9. *Personal injury allegation. See § 256.51[1], Paragraph 8*]

[10. *Damages allegation for medical expenses. See § 256.51[1], Paragraph 9.*]

[11. *Damages allegations for loss of past and future earnings. See § 256.51[1] , Paragraphs 10 and 11.*]

[*Prayer. See § 256.52[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 256.51[1].*]

[2] Use of Form

This complaint is for use in an action for damages brought by a worker injured as a result of an explosion caused by a manufacturer's negligent mislabeling of explosives.

[3] Cross References

See generally Ch. 380, *Negligence*

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 1171-1172 (10th ed. 2005)

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California Forms of Pleading and Practice--Annotated

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Volume 22: Explosives thru Food-Chs. 256-268
Chapter 256 EXPLOSIVES
PART IV. FORMS

22-256 California Forms of Pleading and Practice--Annotated § 256.55

§ 256.55 Complaint for Damages [Civ. Code § 3333] for Injuries to Person Based on Negligence [Civ. Code § 1714]--By Employee of Subcontractor Against Other Subcontractor and Employee--Explosion Resulting From Use of Open Flame Equipment in Close Proximity to Explosive Fluid

[1] FORM Complaint for Damages [Civ. Code § 3333] for Injuries to Person Based on Negligence [Civ. Code § 1714]--By Employee of Subcontractor Against Other Subcontractor and Employee--Explosion Resulting From Use of Open Flame Equipment in Close Proximity to Explosive Fluid

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Negligence)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. At all times herein mentioned, plaintiff _____ [*name*] was employed as a laborer by _____ [*name of subcontractor*], an individual doing business under the fictitious name and style of _____ [*name of business*], and was acting in the course and scope of such employment.

2. At all times herein mentioned, plaintiff's employer was engaged in the business of _____ [*describe, e.g.*, cleaning up during and after construction of apartments in a building under construction at _____ (*street*), _____ (*city*), _____ County, California].

3. Defendant _____ [*name of other subcontractor*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California, with its principal place of business in _____ County, California, and engaged in the business of _____ [*describe*, *e.g.*, laying tile in the building under construction].

[4. *Fictitious name allegation, if appropriate. See § 256.50[1] , Paragraph 3.*]

5. At all times herein mentioned, defendant _____ [*name of employee of other subcontractor*] [was a resident of _____ County, California and] was the agent and employee of defendant _____ [*name of other subcontractor*], and in doing all of the things hereinafter mentioned, was acting within the scope of his/her authority and employment as such agent and employee and with the permission and consent of defendant.

6. On or about _____ [*date*], _____ [*name of subcontractor*] instructed and required plaintiff to _____ [*describe*, *e.g.*, clean the cement floors of apartment _____ (*number*) of the building under construction in preparation for the laying of tile thereon].

7. On that date, and at the time of the accident herein alleged, plaintiff's employer instructed and required him/her to use an explosive fluid, _____ [*specify*, *e.g.*, gasoline], in the cleaning of the floors, and pursuant to that instruction and requirement plaintiff was so using the explosive fluid.

8. At the time and place described above, defendant _____ [*name of employee of other subcontractor*] was working in a room adjoining that in which plaintiff was using the above-mentioned _____ [*specify*, *e.g.*, gasoline]. Defendant was _____ [*describe work*, *e.g.*, welding] and was using _____ [*specify*, *e.g.*, a blowtorch] and other open flame instruments in the performance of such work.

9. Defendants, and each of them, knew, or in the exercise of ordinary care should have known, that plaintiff was engaged in such employment in the adjoining room and was using an explosive fluid _____ [*specify*, *e.g.*, gasoline] in the course thereof, but defendants negligently and carelessly used, operated, and directed the use and operation of _____ [*specify*, *e.g.*, a blowtorch] and other open flame instruments in the room adjoining that in which plaintiff was using _____ [*specify*, *e.g.*, gasoline].

10. As a direct and proximate result of the above-mentioned negligence and carelessness of defendants, and each of them, an explosion and fire occurred by which plaintiff was injured in health, strength and activity, sustaining bodily injury and shock and injury to the nervous system and person, and among others, sustained the following personal injuries: _____ [*describe*], all of which injuries have caused and continue to cause plaintiff great mental, physical, and nervous pain and suffering. These injuries will result in some permanent disability to plaintiff, all to his/her general damage.

11. As a further proximate result of the negligence and carelessness of defendants, and each of them, plaintiff has incurred, and will continue to incur, medical and related expenses, the full amount of which is not now known. Plaintiff will move to amend this complaint to allege such amount when ascertained.

12. At the time of the events herein mentioned, plaintiff was earning an average monthly income in excess of $_____. As a further proximate result of the negligence and carelessness of defendants, and each of them, plaintiff will in the future be prevented from attending to his/her usual occupation for an undetermined period of time, all to his/her damage in a sum unknown at this time.

[*Prayer. See § 256.52[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 256.51[1].*]

[2] Source of Form

This form is adapted from a complaint filed by one of the plaintiffs in *Johnson v. Nicholson (1958) 159 Cal. App. 2d 395, 324 P.2d 307* .

[3] Use of Form

The form of complaint in *[1], above*, is for use by an employee to recover for personal injuries resulting from an explosion caused by the negligent use of open flame equipment in close proximity to explosive fluid.

[4] Cross References

For further discussion of a complaint to recover damages for personal injuries and property damage, see *§ 256.50*

For complaints for injuries received from gasoline explosions, see Ch 274, *Garages and Gas Stations* , and Ch. 554, *Trucks*

For forms for use in action concerning gas distributors and exploding gas, see Ch. 277, *Gas and Electricity*

See generally Ch. 380, *Negligence*

Witkin, Summary of California Law, vol. 6, *Torts*, § 922 (10th ed. 2005)

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Chapter 256 EXPLOSIVES
PART IV. FORMS

22-256 California Forms of Pleading and Practice--Annotated § 256.56

§ 256.56 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Comparative Negligence--Plaintiff Failed to Use Due Care

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Comparative Negligence--Plaintiff Failed to Use Due Care

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

At the time and place of the injuries herein alleged, plaintiff was not exercising ordinary care, caution, or prudence to prevent an explosion from occurring. The injuries complained of by plaintiff, if there were any, were proximately caused by his/her own failure to _____ [*describe plaintiff's negligence, e.g.,* take precautionary measures prior to using an explosive fluid _____ (*specify, e.g.,* gasoline) to clean the floor and failure to use due care in applying the fluid].

[2] Use of Form

The defense of plaintiff's negligence in *[1], above,* may be set forth in an answer [*Code Civ. Proc. § 431.30*] to a complaint by a plaintiff for damages based on negligence. Under comparative negligence, damages awarded to a plaintiff are diminished in proportion to the amount of negligence attributable to plaintiff [*see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

[3] Cross References

For a complaint based on negligence for damages for personal injuries, see *§ 256.55*

For the format of affirmative defenses in an answer, see Ch. 26, *Answers*

California Forms of Pleading and Practice--Annotated

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Volume 22: Explosives thru Food-Chs. 256-268
Chapter 257 FALSE IMPRISONMENT

22-257 California Forms of Pleading and Practice--Annotated 257.syn

§ 257.syn Synopsis to Chapter 257: FALSE IMPRISONMENT

§ 257.01 Scope of Chapter

§ 257.02 Cross References

§§ 257.03-257.09 [Reserved]

§ 257.10 Governing Statutes

§ 257.11 Definitions

[1] False Imprisonment

[2] Restraint

[3] False Arrest

§ 257.12 Malicious Prosecution Distinguished

§ 257.13 Joinder of Other Actions

§ 257.14 Personal Action

§ 257.15 Persons Liable

§ 257.16 Statute of Limitations

§ 257.17 Restraint by Private Persons

[1] Without Justification

[2] Defense of Protecting Property

[a] Owners Generally

[b] Merchants

[c] Library Personnel

[d] Theater Owners

§ 257.18 Liability of Private Employers

[1] Respondeat Superior or Joint and Concurrent Tortfeasor

[2] Scope of Authority

[3] Ratification and Authorization

[4] Acts of Security Guards

§ 257.19 Citizen's Arrest

[1] Basis and Validity

[2] Duty to Deliver Custody to Police Officer

[3] Liability of Police Officer Accepting Custody

§ 257.20 Warrantless Arrest by Police Officer

[1] Liability of Officer and Employing Entity

[2] Probable Cause

[3] Evidence of Probable Cause

[4] Determination of Probable Cause

[5] Arrest Resulting From Entrapment

§ 257.21 Liability for Serving Warrant

[1] Warrant Valid on Face

[2] Arrest of Wrong Person

[3] Defects in Proceedings for Issuance

[4] Warrant Maliciously Obtained and Served

§ 257.22 Liability for Issuance of Warrants

[1] Court Clerks

[2] Judges and Magistrates

§ 257.23 Private Person Aiding Officials With Arrest

[1] Assisting Police

[2] Giving Information to Police Officers

[3] Information Leading to Issuance of Warrant

§ 257.24 Detention Following Arrest

[1] Taking Before Magistrate

[2] Release on Bail

[3] Right to Bail

[4] Dismissal of Charges

§ 257.25 Mentally Disordered or Inebriated Persons

[1] Public Liability

[2] Detention for More Than 14 Days

[3] Decisional Law Prior to Lanterman-Petris-Short Act

[4] Failure of Sheriff to Serve Order

[5] Liability of Private Persons

§ 257.26 Damages

[1] Compensatory

[2] Punitive

[a] Oppression, Fraud, or Malice

[b] Liability of Private Employers

§§ 257.27-257.39 [Reserved]

§ 257.40 Related Matthew Bender Publications

[1] California Points and Authorities

[2] California Criminal Defense Practice

[3] Bender's Forms of Discovery

§ 257.41 State Statutes

[1] False Imprisonment

[2] Liability of Employers

[3] Liability of Public Entities and Officers

[a] Generally

[b] After Felony Dismissal

[c] Arrest Without Warrant

[d] Arrest With Warrant

[e] Detention of Prisoners

[4] Mentally Disordered Persons

§ 257.42 Decisions

[1] Citizen's Arrest

[a] In General

[b] Liability of Police Officer Accepting Custody

[2] Damages

[a] Compensatory

[b] Punitive

[i] In General

[ii] Liability of Private Employers

[3] Definitions

[a] False Imprisonment

[b] False Arrest

[c] Restraint

[4] Dependency Proceedings

[5] Detention Following Arrest

[a] Dismissal of Charges or Expiration of Jail Term

[b] Right to Bail

[c] Taking Before Magistrate

[d] Release on Bail

[6] Joinder of Other Actions

[7] Liability for Issuance of Warrants

[a] Court Clerks

[b] Judges and Magistrates

[8] Liability for Serving Warrant

[a] Arrest of Wrong Person

[b] Malice

[c] Warrant Valid on its Face

[9] Malicious Prosecution Distinguished

[10] Mentally Incompetent Persons

[a] Failure of Sheriff to Serve Order

[b] Liability of Public Employees

[11] News Reporters

[12] Personal Action

[13] Persons Liable

[14] Private Persons Aiding Officials With Arrest

[a] Assisting Police

[b] Giving Information to Police Officers

[c] Information Leading to Issuance of Warrant

[15] Public Entities and Officers

[16] Restraint by Private Persons

[a] Defense of Protecting Property

[b] Liability of Private Employers

[i] Active Direction or Supervision

[ii] Liability for Acts of Security Guards

[iii] Ratification and Authorization

[iv] Scope of Authority

[c] Without Justification

[17] Statute of Limitations

[18] Warrantless Arrest by Police Officer

[a] In General

[b] Arrest Resulting From Entrapment

[c] Determination of Reasonable Cause

[d] Evidence of Reasonable Cause

[e] Reasonable Cause

§ 257.43 Attorney General Opinions

§ 257.44 Law Reviews

§ 257.45 Text References

§§ 257.46-257.59 [Reserved]

§ 257.60 Plaintiff's Checklist

[1] Facts to Be Ascertained

[2] Documents to Be Obtained

[3] Additional Counts and Causes of Action

[4] Essential Allegations of Complaint

§ 257.61 Defendant's Checklist

[1] Facts to Be Ascertained

[2] Possible Defenses

§§ 257.62-257.79 [Reserved]

§ 257.80 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Against Private Person Without Arrest--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Specification of Damages

[5] Verification

[6] Jurisdiction

[7] Venue

[a] Individuals

[b] Corporations

[8] Copies

§ 257.81 Complaint [Code Civ. Proc. § 425.10] for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Against Private Person Without Arrest--Detention of Employee for Questioning by Employer

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 257.82 Complaint [Code Civ. Proc. § 425.10] for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Against Private Person Without Arrest--By Store Customer Accused of Shoplifting Against Store, Store Owner or Manager, Guard Agency, Guard Agency Owner or Manager, and Individual Guard

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 257.83 Complaint [Code Civ. Proc. § 425.10] for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Against Private Person Without Arrest--Racetrack Spectator Detained and Ejected by Track Guards

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References.

§ 257.84 Complaint [Code Civ. Proc. § 425.10] for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Citizen's Arrest

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 257.85 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Arrest by Peace Officer Without a Warrant [Penal Code § 836]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Probable Cause for Arrest

[5] Cross References

§ 257.86 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Arrest by Peace Officer Serving Warrant

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 257.87 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False

Imprisonment--Arrest Followed by Unreasonable Delay in Taking Plaintiff Before Magistrate

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 257.88 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Failure to Release Plaintiff on Bail

[1] FORM

[2] Use of Form

[3] Cross References

§ 257.89 Allegation--False Imprisonment--Arrest Pursuant to Warrant With No Reasonable Belief That Person Arrested Was Person Named in Warrant [Civ. Code § 43.55]

[1] FORM

[2] Use of Form

[3] Cross References

§ 257.90 Allegation--False Imprisonment--Arrest Pursuant to Maliciously Obtained Warrant [Civ. Code § 43.55]

[1] FORM

[2] Use of Form

[3] Cross References

§ 257.91 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Private Citizen Acted Pursuant to Request and Instructions of Peace Officer in Making Arrest

[1] FORM

[2] Use of Form

[3] Cross References

§ 257.92 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Private Citizen Made Honest Mistake in Identifying Plaintiff to Police

[1] FORM

[2] Use of Form

§ 257.93 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Private Citizen Gave Information to Police in Good Faith

[1] FORM

[2] Use of Form

[3] Cross References

§ 257.94 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Probable Cause of Defendant to Believe That Plaintiff Had Committed a Felony [Penal Code § 836(a)(3)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 257.95 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Had Probable Cause to Believe That Plaintiff Had Committed a Misdemeanor in His/Her Presence [Penal Code § 836(a)(1)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 257.96 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Failure of Plaintiff to Explain Suspicious Circumstances Giving Probable Cause for Arrest

[1] FORM

[2] Use of Form

[3] Cross References

§ 257.97 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Delay in Taking Plaintiff Before Magistrate Caused by Illness of Plaintiff

[1] FORM

[2] Use of Form

[3] Cross References

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Chapter 257 FALSE IMPRISONMENT
PART I. SCOPE

22-257 California Forms of Pleading and Practice--Annotated § 257.01

§ 257.01 Scope of Chapter

This chapter discusses and contains forms of complaints relating to false imprisonment arising from detention by a private citizen without arrest [*see §§ 257.80 -257.83*], from a citizen's arrest [*see § 257.84*], from an arrest by a police officer without a warrant [*see § 257.85*], from an arrest by a police officer serving a warrant [*see § 257.86*], from an unreasonable delay in taking the person arrested before a magistrate [*see § 257.87*], and from the failure to release the person arrested on bail [*see § 257.88*]. It also contains allegations that an arrest was made pursuant to a warrant with no reasonable belief that the person arrested was the person named in the warrant [*see § 257.89*] and that an arrest was made pursuant to a warrant that was maliciously obtained [*see § 257.90*], as well as affirmative defenses to false imprisonment actions [*see §§ 257.91 -257.97*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsFalse ArrestGeneral OverviewTortsIntentional TortsFalse ImprisonmentGeneral Overview

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22-257 California Forms of Pleading and Practice--Annotated § 257.02

§ 257.02 Cross References

For discussion and forms for use in actions for assault and battery, see Ch. 58, *Assault and Battery* .

For an allegation of attorney's fees incurred in securing release as item of damages in an action for false imprisonment, see Ch. 177, *Damages* .

For discussion and forms for use in actions for slander generally, see Ch. 340, *Libel and Slander* .

For discussion and forms for use in actions for malicious prosecution, see Ch. 357, *Malicious Prosecution and Abuse of Process* .

For discussion and forms for use in actions for intentionally or negligently caused emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress* .

For discussion and forms for use in actions by and against agents and concerning the principal-agent relationship, see Ch. 427, *Principal and Agent* .

For discussion and forms relating to the liability of public entities and officers generally, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCosts & Attorney FeesGeneral OverviewTortsIntentional TortsAbuse of ProcessGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral Overview

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Volume 22: Explosives thru Food-Chs. 256-268
Chapter 257 FALSE IMPRISONMENT
PART I. SCOPE

22-257 California Forms of Pleading and Practice--Annotated §§ 257.03-257.09

[Reserved]

§§ 257.03[Reserved]

California Forms of Pleading and Practice--Annotated

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Chapter 257 FALSE IMPRISONMENT
PART II. LEGAL BACKGROUND

22-257 California Forms of Pleading and Practice--Annotated § 257.10

§ 257.10 Governing Statutes

The procedures and justifications for arrest are contained in *Penal Code § 833 et seq.*, the procedures for admission to bail are contained in *Penal Code § 1268 et seq.*, and the dismissal of criminal actions is covered in *Penal Code § 1381 et seq.* The procedures and justifications for detention of mentally disordered and inebriated persons, as well as persons posing a danger to themselves or others, or gravely disabled, as a result of the use of controlled substances, are contained in *Welf. & Inst. Code § 5000 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsPolice PowerGovernmentsState & Territorial GovernmentsPolice PowerTortsIntentional TortsFalse ArrestGeneral OverviewTortsIntentional TortsFalse ImprisonmentGeneral Overview

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Chapter 257 FALSE IMPRISONMENT
PART II. LEGAL BACKGROUND

22-257 California Forms of Pleading and Practice--Annotated § 257.11

§ 257.11 Definitions

[1] False Imprisonment

False imprisonment, insofar as criminal actions are concerned, is the unlawful violation of the personal liberty of another [*Penal Code § 236*; *see also Penal Code § 210.5* (increased penalty if committed for purposes of protection from arrest or to use person as shield)]. This statutory definition of criminal false imprisonment governs in civil as well as criminal actions [*City of Newport Beach v. Sasse (1970) 9 Cal. App. 3d 803, 810, 88 Cal. Rptr. 476]* and affords a civil right of action for the recovery of damages [*Gogue v. MacDonald (1950) 35 Cal. 2d 482, 484, 218 P.2d 542* ; *see also Penal Code § 9* (failure to specify in Penal Code liability for damages as not affecting right to recover damages at law); *Muller v. Reagh (1963) 215 Cal. App. 2d 831, 836, 30 Cal. Rptr. 633]* . The tort of false imprisonment has been further defined as the nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short [*City of Newport Beach v. Sasse (1970) 9 Cal. App. 3d 803, 810, 88 Cal. Rptr. 476]* . Thus, false imprisonment means unlawful imprisonment [*Muller v. Reagh (1963) 215 Cal. App. 2d 831, 836, 30 Cal. Rptr. 633]* and, hence, imprisonment based on a lawful arrest is not false and is not actionable in tort [*Moore v. City & County of San Francisco (1970) 5 Cal. App. 3d 728, 735, 85 Cal. Rptr. 281]* .

[2] Restraint

The essential element of false imprisonment is restraint of the person [*Onick v. Long (1957) 154 Cal. App. 2d 381, 386, 316 P.2d 427]* . Some restraint of the plaintiff by force or express or implied force is necessary. Although the confinement need not necessarily be in a jail, it is necessary that the plaintiff be imprisoned and deprived of his or her liberty or be forced to remain where he or she does not wish to remain or to go wherehe or she does not wish to go [*People v. Zilbauer (1955) 44 Cal. 2d 43, 51, 279 P.2d 534]* .

Physical force is not the only means of restraint which will support a finding of false imprisonment. Words or conduct furnishing a reasonable apprehension on the part of the one restrained that he or she will not be allowed to leave is sufficient [*Schanafelt v. Seaboard Fin. Co. (1951) 108 Cal. App. 2d 420, 422-423, 239 P.2d 42]* . Examples of conduct sufficient to support a finding of restraint are: threats, either by conduct or words; legal authority; or actual force. It is a question of fact for the trier of fact to determine whether the words or conduct of the defendant were sufficient to induce plaintiff, as a reasonable person, to fear the use of force and coercion if he or she failed to remain in

the place of confinement [*Vandiveer v. Charters (1930) 110 Cal. App. 347, 356, 294 P. 440]* .

[3] False Arrest

A false arrest is merely one way of committing false imprisonment; the two are not separate torts [*Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 673, 123 Cal. Rptr. 525]* . In order to commit false imprisonment, it is unnecessary either to intend to make an arrest or actually to make an arrest. Further, even where the initial arrest is lawful, a person improperly detained pursuant to the arrest has a cause of action for false imprisonment, although not for false arrest [*Moore v. City & County of San Francisco (1970) 5 Cal. App. 3d 728, 735, 85 Cal. Rptr. 281]* . Thus, where the case of false imprisonment is based on unreasonable or unnecessary detention after arrest, the cause of action should not be stated as false arrest but as false imprisonment [*Ogulin v. Jeffries (1953) 121 Cal. App. 2d 211, 216, 263 P.2d 75]* . On the other hand, a false arrest always entails a false imprisonment since an arrest always involves detention and restraint [*Moore v. City & County of San Francisco (1970) 5 Cal. App. 3d 728, 735, 85 Cal. Rptr. 281]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsFalse ArrestGeneral OverviewTortsIntentional TortsFalse ArrestElementsTortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsIntentional TortsFalse ImprisonmentElements

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22-257 California Forms of Pleading and Practice--Annotated § 257.12

§ 257.12 Malicious Prosecution Distinguished

In malicious prosecution the detention is malicious but under due forms of law, whereas in false imprisonment the detention is without color of legal authority [*Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 676-677, 123 Cal. Rptr. 525]* . Malicious prosecution is the procuring of the arrest and prosecution of another under lawful process, but from malicious motives and without probable cause [*Singleton v. Perry (1955) 45 Cal. 2d 489, 494, 289 P.2d 794* ; *Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 676-677, 123 Cal. Rptr. 525]* . In an action for false imprisonment, the provocation, motive, and good faith of the defendant constitute no material element in the case and can be considered only where punitive damages are sought, and then only on the issue of the measure of damages; whereas in an action for malicious prosecution, malice and probable cause are essential elements of the case. In an action for malicious prosecution, the outcome of the prosecution is relevant, whereas in an action for false imprisonment it is not, since no later matter can legalize an act which was illegal at the time it was done, such as an illegal arrest [*Singleton v. Perry (1955) 45 Cal. 2d 489, 494-495, 289 P.2d 794]* . In addition, a cause of action for false imprisonment generally can be distinguished from one for malicious prosecution by the requirement in false imprisonment actions that the defendant actually arrested the plaintiff [*Harden v. San Francisco Bay Area Rapid Transit Dist. (1989) 215 Cal. App. 3d 7, 16-17, 263 Cal. Rptr. 549* (holding that this requirement was satisfied by evidence that warrant was served at defendant's direction by subordinate fellow officer)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsFalse ArrestElementsTortsIntentional TortsFalse ImprisonmentElementsTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionElementsGeneral Overview

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22-257 California Forms of Pleading and Practice--Annotated § 257.13

§ 257.13 Joinder of Other Actions

Actions for malicious prosecution, false imprisonment, and assault and battery are often combined [*see, e.g., Griswold v. Hollywood Turf Club (1951) 106 Cal. App. 2d 578, 580, 235 P.2d 656]* . However, where a cause of action for false imprisonment is joined in a complaint with a cause of action for malicious prosecution, the two are inconsistent and the plaintiff may be required to elect on which theory to go to the jury. But, the failure of the count alleging false imprisonment will not compel reversal of the judgment if malicious prosecution is sufficiently established [*Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 676, 123 Cal. Rptr. 525* ; *Bulkley v. Klein (1962) 206 Cal. App. 2d 742, 747, 23 Cal. Rptr. 855]* . An allegation of assault and battery occurring during a false imprisonment may be stated in the same cause of action as the false imprisonment; it will be treated as an aggravating circumstance [*Oppenheimer v. Los Angeles (1951) 104 Cal. App. 2d 551, 553-554, 232 P.2d 30]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJoinder of Claims & RemediesGeneral OverviewTortsIntentional TortsFalse ArrestElementsTortsIntentional TortsFalse ImprisonmentElementsTortsIntentional TortsMalicious ProsecutionElementsGeneral OverviewTortsProcedureCommencement & ProsecutionGeneral Overview

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§ 257.14 Personal Action

False imprisonment is a personal action which does not give rise to a cause of action in anyone other than the person directly aggrieved [*Coverstone v. Davies (1952) 38 Cal. 2d 315, 324, 239 P.2d 876* ; *Sea World, Inc. v. Superior Court (1970) 13 Cal. App. 3d 100, 106-107, 91 Cal. Rptr. 336]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsFalse ImprisonmentGeneral Overview

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§ 257.15 Persons Liable

All who take part in a false imprisonment are joint tortfeasors and may be joined as defendants. An allegation of or proof of conspiracy is unnecessary to show such liability [*Harden v. San Francisco Bay Area Rapid Transit Dist. (1989) 215 Cal. App. 3d 7, 15, 263 Cal. Rptr. 549* ; *Oppenheimer v. Los Angeles (1951) 104 Cal. App. 2d 551, 553, 232 P.2d 30]* . On the other hand, it is possible for defendants who did not directly participate in the false imprisonment to be liable on the theory of conspiracy. All that isrequired is a concert of action between the defendants to unlawfully detain the plaintiff, an action by the defendant in furtherance of the common scheme, and knowledge by the defendant of the existence of the conspiracy and of its unlawful purpose. A conspirator is liable for all the acts done in furtherance of the conspiracy even though he or she is not a direct actor, and may be liable even if the tort is committed before he or she participates if the conspirator knows the facts and then participates [*Peterson v. Cruickshank (1956) 144 Cal. App. 2d 148, 163, 168, 300 P.2d 915]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsFalse ArrestElementsTortsIntentional TortsFalse ImprisonmentElementsTortsProcedureMultiple DefendantsGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyGeneral Overview

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22-257 California Forms of Pleading and Practice--Annotated § 257.16

§ 257.16 Statute of Limitations

An action for false imprisonment must be commenced within one year after the cause of action accrues [*Code Civ. Proc. § 340(c)*]. If the cause of action is against a public entity, a claim must be filed with the public entity not later than six months days after the action accrues [*Gov. Code § 911.2*]. However, the filing of a subsequent court action is prohibited, and its statute of limitations tolled, during the pendency of any criminal proceeding [*see Gov. Code § 945.3*]. For discussion and forms relating to claims and subsequent actions against public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

A cause of action for false imprisonment accrues on the termination of the wrongful imprisonment [*Collins v. County of Los Angeles (1966) 241 Cal. App. 2d 451, 454-455, 50 Cal. Rptr. 586]* . The fact that plaintiff did not know that the imprisonment was illegal does not bar the running of the statute, unless the plaintiff's ignorance was induced by fraud. Further, the fact that a criminal proceeding connected to the false imprisonment is pending against the plaintiff does not bar the running of the statute [*Collins v. Los Angeles County (1966) 241 Cal. App. 2d 451, 455, 458, 50 Cal. Rptr. 586]* . False imprisonment does not continue after the plaintiff is released on bail [*Collins v. Los Angeles County (1966) 241 Cal. App. 2d 451, 459-460, 50 Cal. Rptr. 586* (relating to limitations period for filing claim against public entity)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsTortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsIntentional TortsFalse ImprisonmentDefensesStatutes of LimitationsTortsProcedureStatutes of LimitationsTollingDisabilitiesTortsPublic Entity LiabilityLiabilityClaim PresentationTime Limitations

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22-257 California Forms of Pleading and Practice--Annotated § 257.17

§ 257.17 Restraint by Private Persons

[1] Without Justification

As long as there has been an intentional, nonconsensual confinement of a person, without lawful privilege, for an appreciable length of time, there has been a false imprisonment. [*City of Newport Beach v. Sasse (1970) 9 Cal. App. 3d 803, 810, 88 Cal. Rptr. 476]* . When the defendant confines the plaintiff with no belief or probable cause to think that the plaintiff has committed a crime, and without good faith, the defendant will be liable for false imprisonment [*Coyne v. Nelson (1951) 107 Cal. App. 2d 469, 475, 237 P.2d 45]* .

[2] Defense of Protecting Property

[a] Owners Generally

The owner of property in the exercise of the lawful right to protect it may detain a person who seeks to interfere with or injure the property for a reasonable length of time for the purpose of investigation in a reasonable manner [*Alterauge v. Los Angeles Turf Club (1950) 97 Cal. App. 2d 735, 737, 218 P.2d 802]* . For protection of property to be a defense to an action for false imprisonment, the owner of the property must have probable cause to believe that the property is about to be stolen or injured [*Collyer v. S.H. Kress & Co. (1936) 5 Cal. 2d 175, 180-181, 54 P.2d 20* ; *Alterauge v. Los Angeles Turf Club (1950) 97 Cal. App. 2d 735, 739, 218 P.2d 802]* . Further, the detention must be for a reasonable length of time and in a reasonable manner [*Collyer v. S. H. Kress & Co. (1936) 5 Cal. 2d 175, 180-181, 54 P.2d 20]* . Although probable cause to believe that property is in the process of being stolen or interfered with is a defense as long as the suspect is detained in a reasonable manner and for a reasonable length of time, there is no right to detain a person for the purpose of securing a confession of a theft of property at a prior time or for the purpose of obtaining restitution. Probable cause is not a defense to such a detention [*Parrott v. Bank of Am. (1950) 97 Cal. App. 2d 14, 23-24, 217 P.2d 89* ; *Moffatt v. Buffums' Inc. (1937) 21 Cal. App. 2d 371, 375, 69 P.2d 424]* .

In addition to these common-law rules, statutes protect persons from false imprisonment actions in specified circumstances [*see Penal Code § 490.5(f), (g)*; *see also § 257.17[2][c]*].

[b] Merchants

The right of a merchant to detain a person whom the merchant believes has stolen or attempted to steal such merchant's property is codified in *Penal Code § 490.5(f)*. This section provides, in pertinent part, that a merchant may detain a person for a reasonable time for the purpose of conducting an investigation in a reasonable manner whenever the merchant has probable cause to believe the person to be detained is attempting to take unlawfully or has taken unlawfully merchandise from the merchant's premises [*Penal Code § 490.5(f)(1)*]. In making the detention a merchant may use a reasonable amount of nondeadly force necessary to protect himself or herself and to prevent escape of the person detained or the loss of property [*Penal Code § 490.5(f)(2)*]. During the period of detention any items that the merchant has reasonable cause to believe are unlawfully taken from his or her premises and which are in plain view may be examined by the merchant for the purposes of ascertaining the ownership thereof [*Penal Code § 490.5(f)(3)*].

The merchant or an agent of the merchant may request the person detained to voluntarily surrender the item, provided the merchant or agenthas probable cause to believe that the person was attempting to unlawfully take or has taken any item from the premises. If the person refuses, a limited and reasonable search may be conducted, by those authorized to make the detention, in order to recover the item. Only packages, shopping bags, handbags, or other property in the immediate possession of the person may be searched, except that clothing worn by the person may not be searched. On surrender or discovery of the item, the person detained may also be requested, but may not be required, to provide adequate proof of his or her true identity [*Penal Code § 490.5(f)(4)*].

It is a defense to any civil action brought by any person resulting from a detention or arrest by a merchant, that the merchant had probable cause to believe that the person detained or arrested had stolen or attempted to steal merchandise and that the merchant acted reasonably under all the circumstances [*Penal Code § 490.5(f)(7)*]. However, the probable cause defense is limited to suits based on a detention and does not extend to suits based on an arrest. In other words, the defense does not give a merchant the right to arrest a person merely on probable cause [*Cervantez v. J. C. Penney Co. (1979) 24 Cal. 3d 579, 590-591, 156 Cal. Rptr. 198, 595 P.2d 975]* . In addition, the statutory right to legally detain a person does not appear to grant protection from liability for summoning the police [*see Pool v. City of Oakland (1986) 42 Cal. 3d 1051, 1066, 232 Cal. Rptr. 528, 728 P.2d 1163* (dicta; decided under prior version of *Penal Code § 490.5*)].

For the purposes of the exercise of the rights under *Penal Code § 490.5(f)*, the term "merchandise" means any personal property capable of manual delivery, displayed, held, or offered for retail sale by a merchant [*Penal Code § 490.5(g)(1)*], and the term "merchant" means an owner or operator, and the agent, consignee, employee, lessee, or officer of an owner or operator of any premises used for the retail purchase or sale of any personal property capable of manual delivery [*Penal Code § 490.5(g)(2)*]. It should be noted that the legislature did not intend to make any changes in existing case law with respect to the merchant's right to detain a suspect; rather, *Penal Code § 490.5(f)* is intended to be declaratory of existing law [*see* Stats. 1976, Ch 1131, § 3].

[c] Library Personnel

In addition to a merchant, the rights provided by *Penal Code § 490.5(f)* also apply to a person employed by a library facility [*see Penal Code § 490.5(f), (g), (h)*]. A library employee may detain a person for a reasonable time for the purpose of conducting a reasonable investigation whenever the employee has probable cause to believe the person is attempting to unlawfully remove or has unlawfully removed books or library material from the premises of the library facility [*Penal Code § 490.5(f)(1)*]. The terms "books or library material" and "library facility" are defined in *Penal Code § 490.5(g)(4)* and *(5)*, respectively. A library employee also has available, in any civil action resulting from the detention or arrest, the defense of probable cause to detain and reasonable manner of detention [*Penal Code § 490.5(f)(7)*]. In addition, a library facility shall post at its entrance and exit a conspicuous sign to read as follows: IN ORDER TO PREVENT THE THEFT OF BOOKS AND LIBRARY MATERIALS, STATE LAW AUTHORIZES THE DETENTION FOR A REASONABLE PERIOD OF ANY PERSON USING THESE FACILITIES SUSPECTED OF COMMITTING "LIBRARY THEFT" (PENAL CODE SECTION 490.5) [*Penal Code § 490.5(h)*].

[d] Theater Owners

A theater owner is also protected under *Penal Code § 490.5(f)* from liability under specified circumstances. A theater owner may detain a person for a reasonable time for the purposes of conducting an investigation in a reasonable manner whenever the theater owner has probable cause to believe the person to be detained is attempting to operate a video recording device within the premises of a motion picture theater without the authority of the theater's owner [*Penal Code § 490.5(f)(1)*; *see also Penal Code § 490.5(g)(3)* (definition of "theater owner"; definition includes agent, employee, or lessor of owner or operator of premises used for exhibition of motion pictures)]. The general provisions permitting use of force [*Penal Code § 490.5(f)(2)*], examination of items in plain view [*Penal Code § 490.5(f)(3)*], and a reasonable search [*Penal Code § 490.5(f)(4)*], applicable to merchants [*see § 257.17[2][b]*] also apply to theater owners. In addition, it is a defense to any civil action brought by any person resulting from detention or arrest by a theater owner that the person detaining or arresting that person had probable cause to believe that the person was attempting to operate a video recording device within the premises of a motion picture theater without the authority of the theater's owner [*Penal Code § 490.5(f)(7)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefensesDefense of PropertyTortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsIntentional TortsFalse ImprisonmentDefensesJustification

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§ 257.18 Liability of Private Employers

[1] Respondeat Superior or Joint and Concurrent Tortfeasor

An employer may be liable for a false imprisonment committed by an employee either indirectly on the doctrine of respondeat superior or directly as a joint and concurrent tortfeasor [*McInerney v. United R.R. (1920) 50 Cal. App. 538, 550, 195 P. 958* ; *see also Benson v. Southern Pac. Co. (1918) 177 Cal. 777, 779-780, 171 P. 948* ; *Canadian Indem. Co. v. Ohio Farmers' Indem. Co. (9th Cir. 1958) 251 F.2d 563, 567]* . If the employee commits the tortious act without the express or implied direction of the employer, the employer can be liable only on the doctrine of respondeat superior. If, however, the employer directs or does not forbid the tortious action, or if the employer participates in the commission of the tort, the employer will be directly and concurrently liable with the employee as a joint tortfeasor [*Benson v. Southern Pac. Co. (1918) 177 Cal. 777, 779-780, 171 P. 948]* . Direct joint liability can arise where the employee's action is in accordancewith the employer's general directions and instructed pattern of doing business [*Canadian Indem. Co. v. Ohio Farmers' Indem. Co. (9th Cir. 1958) 251 F.2d 563, 567]* . As long as the express directions of the employer to the employee were broad enough to include the action taken, the employer may be directly liable as a joint tortfeasor for a false imprisonment rather than merely indirectly liable on the doctrine of respondeat superior [*McInerney v. United R.R. (1920) 50 Cal. App. 538, 550, 195 P. 958]* .

If the employer is liable for the act of the employee only on the doctrine of respondeat superior, the employer cannot be held liable for false imprisonment if the court finds no liability on the part of the employee [*McInerney v. United R.R. (1920) 50 Cal. App. 538, 550, 195 P. 958]* . However, where the employer is directly liable as a joint tortfeasor, the employer may be liable even if there is no liability on the part of the employee [*Jensen v. Southern Pac. Co. (1954) 129 Cal. App. 2d 67, 70-71, 276 P.2d 703* ; *McInerney v. United R.R. (1920) 50 Cal. App. 538, 550, 195 P. 958]* .

Those cases in which the employer may be found directly liable for false imprisonment in the absence of a verdict against the employee-defendant must be distinguished from those cases in which the employee did not commit or actively participate in a false imprisonment and, hence, there is no connection at all between the employer or the employee and the tort. In such cases, the employer cannot be liable [*see, e.g., Turner v. Mellon (1953) 41 Cal. 2d 45, 48, 257 P.2d 15] , overruled in part, Hagerberg v. California Federal Bank (2004) 32 Cal. 4th 350* .

An action for false imprisonment against one's employer is not precluded by the exclusive remedy doctrine of workers' compensation law. If the employee has stated a cause of action for false imprisonment, the action cannot be said to be a normal aspect of the employment relationship; false imprisonment committed by an employer against an employee is always outside the compensation bargain [*Fermino v. Fedco, Inc. (1994) 7 Cal. 4th 701, 723, 30 Cal. Rptr. 2d 18, 872 P.2d 559]* . For complete discussion of the exclusive remedy doctrine, see Ch. 577, *Workers' Compensation* .

[2] Scope of Authority

The employer is liable for the acts of its officers and employees acting within the scope of their authority in an action for false imprisonment [*Kaufman v. Brown (1949) 93 Cal. App. 2d 508, 515, 209 P.2d 156]* . It is a question of fact for the jury whether or not the employee was acting within the scope of his authority as an agent of the employer [*Peckham v. Warner Bros. Pictures, Inc. (1939) 36 Cal. App. 2d 214, 220-221, 97 P.2d 472]* . The act for which the principal can be held liable is one which the agent or employee is empowered under some circumstances to do, even though the employee mistakenly takes that action against the wrong person or with an excess of force or zeal [*McInerney v. United R.R. (1920) 50 Cal. App. 538, 545-546, 195 P. 958]* . For a further discussion of the general principles of employer liability, see Ch. 427, *Principal and Agent* .

Since the actions of an employee in preventing or ending a presently occurring interference with the business or property of the employer is within the duty of the employee, a false imprisonment by the employee occurring during such activity is chargeable to the employer under the doctrine of respondeat superior. On the other hand, where the offense has already been committed, the imprisonment of a suspect for the purposes of obtaining a confession or punishment cannot be said to aid the business of the employer. The employer will, therefore, generally not be liable for acts done after the offense has been completed [*Mackie v. Ambassador Hotel & Inv. Corp. (1932) 123 Cal. App. 215, 223-224, 11 P.2d 3]* .

[3] Ratification and Authorization

Where store detectives followed a customer out into the street and detained her for the purpose of protecting store property they believed had been stolen, it becomes a matter of fact to be proved by the defense whether the employees were authorized to do so by the employer, or whether their acts were ratified by subsequent approval [*Hanna v. Raphael Weill & Co. (1949) 90 Cal. App. 2d 461, 464, 203 P.2d 564]* . It seems that if the acts of an employee in detaining a plaintiff after a crime has been completed for purposes of apprehension or obtaining a confession may be the basis for liability of an employer if the employer authorizes or later ratifies the acts which lead to the false imprisonment [*see* *Hanna v. Raphael Weill & Co. (1949) 90 Cal. App. 2d 461, 463, 203 P.2d 564]* .

[4] Acts of Security Guards

The hirer of a detective agency or guard agency for either a single investigation or for the protection of property is liable for the intentional torts of employees of the private detective or guard agency committed in the course of employment [*Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 663, 109 Cal. Rptr. 269]* . Where the plaintiff has stated a cause of action against the hirer for the intentional tort of the private detective agency, whether or not the tort was committed in the scope of employment is a question of fact [*Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 663, 109 Cal. Rptr. 269]* . Additionally, where the employer of the detective or guard agency retains the right to control the activities of the individual guards or detectives, the employer will be liable directly for their torts rather than merely liable for any torts of the hired agency [*Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 657-658, 109 Cal. Rptr. 269]* . The employer of the guard or detective agency may also be liable on the theory of negligent entrustment or negligent hiring [*Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 664, 109 Cal. Rptr. 269]* . The activities of private detectives are not, however, recognized as ultrahazardous activities giving rise to a nondelegable duty in the employer and, therefore, to direct liability [*Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 661, 109 Cal. Rptr. 269]* .

The business, the guard agency, and the individual guards are all proper defendants in an action for false imprisonment arising in such a situation [*see Alterauge v. Los Angeles Turf Club (1950) 97 Cal. App. 2d 735, 736, 218 P.2d 802]* . The fact that a guard in private employment also has a commission from the public as a police officer does not bar liability of the guard's private employer for acts that are connected with his or her capacity as a private guard or that he or she commits in the performance of his or her duty as an employee [*Hanna v. Raphael Weill & Co. (1949) 90 Cal. App. 2d 461, 463, 203 P.2d 564]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionGeneral OverviewTortsVicarious LiabilityEmployersActivities & ConditionsIntentional TortsTortsVicarious LiabilityEmployersScope of EmploymentGeneral Overview

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§ 257.19 Citizen's Arrest

[1] Basis and Validity

A citizen's arrest may be the basis for a criminal prosecution for false imprisonment [*People v. Agnew (1940) 16 Cal. 2d 655, 659, 107 P.2d 601]* and, therefore, the basis for a civil action for damages [*see Gogue v. MacDonald (1950) 35 Cal. 2d 482, 484, 218 P.2d 542* ; *Muller v. Reagh (1963)215 Cal. App. 2d 831, 836, 30 Cal. Rptr. 633]* . A private person may arrest another only (1) for a public offense committed or attempted in his or her presence; (2) when the person arrested has committed a felony, although not in his or her presence; or (3) when a felony has in fact been committed, and he or she has reasonable cause to believe the person arrested has committed it [*Penal Code § 837*]. When the arrest is for a misdemeanor, the question of whether the arrest was lawful or not will depend on whether the misdemeanor was in fact committed or attempted in the presence of the person making the arrest. A private person may not arrest on probable cause to believe a misdemeanor has been committed [*Penal Code § 837(1)*; *see Hamburg v. Wal-Mart Stores, Inc. (2004) 116 Cal. App. 4th 497, 512, 10 Cal. Rptr. 3d 568* (triable issue remained regarding whether protestors obstructed or intimidated store's customers, in violation of *Pen. Code § 602.1(a)*, in presence of store manager who made citizen's arrest)].

A citizen's arrest without a warrant for a misdemeanor cannot be justified if made after the occasion has passed, though the offense was committed in the presence of the person making the arrest. The person making the arrest must proceed as soon as possible to make the arrest, and if he or she goes about other matters not connected to the arrest, the right to make the arrest without a warrant ceases. In order to then make a valid arrest, he or she must obtain a warrant [*Hill v. Levy (1953) 117 Cal. App. 2d 667, 670, 256 P.2d 622]* .

When the validity of a citizen's arrest turns on whether or not the conduct of the arrested person in the presence of the person making the arrest constituted a public offense, the test to be applied is whether or not the person making the arrest had a reasonable good faith belief that it did. Furthermore, if that conduct did, in fact, constitute a public offense, the person making the arrest is not liable simply because he or she was mistaken as to which particular penal statute was violated [*Gomez v. Garcia (1980) 112 Cal. App. 3d 392, 397, 169 Cal. Rptr. 350]* .

A defendant sued for making a citizen's arrest cannot defend the action on the grounds that the conduct was absolutely

privileged under *Civ. Code § 47(b)* [*see Civ. Code § 47(b)*; *§ 257.44[14][b]*]. That statute does not apply to the act of making a citizen's arrest, which is affirmative conduct that constitutes more than the communicative act of reporting potential criminal activity to the police [*Buchanan v. Maxfield Enters., Inc. (2005) 130 Cal. App. 4th 418, 424-426, 29 Cal. Rptr. 3d 909* ; *Kesmodel v. Rand (2004) 119 Cal. App. 4th 1128, 1136-1137, 15 Cal. Rptr. 3d 118]* .

[2] Duty to Deliver Custody to Police Officer

A private person who has arrested another for the commission of a public offense must, without unnecessary delay, take the person before a magistrate, or deliver him or her to a peace officer [*Penal Code § 847*].

[3] Liability of Police Officer Accepting Custody

The person arrested by a citizen's arrest has a cause of action for false imprisonment against the arresting citizen. There is no liability on the part of the police officer taking him or her into custody or the governmental entity employing the police officer and detaining the plaintiff [*Kinney v. County of Contra Costa (1970) 8 Cal. App. 3d 761, 769, 87 Cal. Rptr. 638]* unless there is an independent wrongful act by the officer, the county or city, or its employees [*Shakespeare v. Pasadena (1964) 230 Cal. App. 2d 387, 389, 40 Cal. Rptr. 871]* .

Where a peace officer accepts custody of a person following a citizen's arrest, the officer is not liable for this action [*Penal Code § 847*]. In fact, the officer would be criminally liable if the officer refused to take the plaintiff into custody [*Penal Code § 142*]. Even where the citizen making the original citizen's arrest did not have probable cause to arrest, the police officer who receives the arrested person into custody need not correctly judge whether probable cause existed for the original arrest in order to avoid liability for false imprisonment. The means of information ordinarily would be scant and any error on the officer's part would be costly. If the officer incorrectly found no probable cause and refused custody, the officer would face criminal sanctions [*see Penal Code § 142*]. On the other hand, if the officer incorrectly found probable cause, the officer would be subject to civil liability to the person arrested [*Kinney v. County of Contra Costa (1970) 8 Cal. App. 3d 761, 767-769, 87 Cal. Rptr. 638]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsFalse ImprisonmentGeneral OverviewTortsIntentional TortsFalse ArrestGeneral OverviewTortsIntentional TortsFalse ArrestElementsTortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsPublic Entity LiabilityImmunityGeneral Overview

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§ 257.20 Warrantless Arrest by Police Officer

[1] Liability of Officer and Employing Entity

False imprisonment may occur with the unauthorized taking of a person into custody by a police officer [*People v. Brock (1963) 220 Cal. App. 2d 605, 607, 34 Cal. Rptr. 113]* , and a police officer who makes an arrest without a warrant may be held civilly liable for false arrest and imprisonment [*Dragna v. White (1955) 45 Cal. 2d 469, 471, 289 P.2d 428]* . Although a police officer or other peace officer is not liable for his or her act or omission, exercising due care, in the execution or enforcement of any law, this exemption from liability is expressly inapplicable to liability for false arrest or false imprisonment [*see Gov. Code § 820.4*].

The employing entity may also be liable in compensatory damages for the false imprisonment of a person by its police officers effecting an unlawful arrest [*see Dawkins v. Los Angeles (1978) 22 Cal. 3d 126, 129, 148 Cal. Rptr. 857, 583 P.2d 711* (judgment against city for $100,000 compensatory damages and against each police officer for $5 punitive damages for false imprisonment and assault and battery; judgment reversed on ground trial court prejudicially erred in refusing defendants' requested jury instruction that initial detention was lawful)].

[2] Probable Cause

A peace officer may generally make a warrantless arrest of a person when any of the following occurs [*Penal Code § 836(a)*; *see also Penal Code § 836(c)-(f)* (warrantless arrest in particular situations)]:

- The officer has probable cause to believe that the person to be arrested has committed a public offense in the officer's presence [*Penal Code § 836(a)(1)*].

- The person arrested has committed a felony, although not in the officer's presence.

- The officer has probable cause to believe that the person to be arrested has committed a felony, whether or not a felony, in fact, has been committed.

Despite the fact that there is no formula for determining the reasonableness of an arrest, that each case is decided on its

facts *Gorlack v. Ferrari (1960) 184 Cal. App. 2d 702, 709, 7 Cal. Rptr. 699]* , and that what constitutes probable cause depends on the circumstances of each case and the situation presented to the officers at the time they were required to act [*White v. Martin (1963) 215 Cal. App. 2d 641, 650-651, 30 Cal. Rptr. 367]* , with reference to the elements of the specific crime the arrestee is alleged to have committed [*see, e.g., Levin v. United Air Lines, Inc. (2008) 158 Cal. App. 4th 1002, 1020-1025, 70 Cal. Rptr. 3d 535*], probable cause nevertheless has been judicially defined. Probable or reasonable cause exists when the facts and circumstances within the knowledge of the officers at the moment of the arrest are sufficient to warrant a prudent person in believing the person arrested has committed the offense [*Wilson v. Los Angeles County (1971) 21 Cal. App. 3d 308, 314,98 Cal. Rptr. 525]* . The standard of care required is that of a person of ordinary care and prudence [*see White v. Martin (1963) 215 Cal. App. 2d 641, 650, 30 Cal. Rptr. 367* ; *Cole v. Johnson (1961) 197 Cal. App. 2d 788, 793, 17 Cal. Rptr. 664]* . The standard of belief required is belief or an honest and strong suspicion that the person arrested was guilty, even if there is room for doubt [*Cole v. Johnson (1961) 197 Cal. App. 2d 788, 793, 17 Cal. Rptr. 664]* .

The test is not whether the evidence would support a conviction, but only whether it supports a strong suspicion [*Mercurius v. Rolon (1964) 231 Cal. App. 2d 359, 362, 41 Cal. Rptr. 789]* . Unless it can be said that prudent persons in the position of the officers knowing what they knew and seeing what they did would not have had probable or reasonable cause to believe and to conscientiously entertain a strong suspicion that the law was being violated or had been violated, the arrest will be held lawful [*White v. Martin (1963) 215 Cal. App. 2d 641, 650-651, 30 Cal. Rptr. 367]* .

[3] Evidence of Probable Cause

Probable or reasonable cause to arrest without a warrant is determined in accordance with the circumstances at the time of the detention, unaffected by the outcome of the charge against the plaintiff or by the conclusion of the trial court [*White v. Martin (1963) 215 Cal. App. 2d 641, 651, 30 Cal. Rptr. 367]* . Nevertheless, a plea or verdict of guilty in a subsequent criminal action arising out of the circumstances of the false imprisonment is admissible on the issue of justification by probable cause for arrest without a warrant. It is simply not conclusive evidence of justification as a matter of law because the person arrested may be found or plead guilty, and the arrest may nevertheless have been unlawful [*Collins v. Owens (1947) 77 Cal. App. 2d 713, 717-718, 176 P.2d 372]* . On the other hand, the fact that the plaintiff in a false imprisonment action based on an arrest has been exonerated in the subsequent criminal proceeding has no bearing on the legality of the arrest. Whereas a conviction will require proof of actual guilt beyond a reasonable doubt, a valid arrest without a warrant may only require probable cause to believe that the arrestee is involved in a crime [*Coverstone v. Davies (1952) 38 Cal. 2d 315, 320-321, 239 P.2d 876]* . Similarly, a subsequent decision not to prosecute made by prosecutors does not vitiate probable cause to arrest [*Johnson v. Lewis (2004) 120 Cal. App. 4th 443, 456, 15 Cal. Rptr. 3d 507]* .

Information supplied to the arresting officers by others (such as a private detective's report) may be relevant on the issue of the existence of probable cause [*see Aitken v. White (1949) 93 Cal. App. 2d 134, 145, 208 P.2d 788]* . Information provided by an untested informer or by an anonymous informer is not, without some showing justifying reliance, sufficient to justify an arrest on grounds of probable cause. However, information from a citizen who is the victim of a crime is sufficient even though the reliability of the person as an informant has not been tested, since the citizen witness will expect to be called to testify after the arrest and may be liable for malicious prosecution if he or she makes unfounded charges [*Wilson v. Los Angeles County (1971) 21 Cal. App. 3d 308, 314-315, 98 Cal. Rptr. 525* , *disapproved on other grounds, Cervantez v. J. C. Penney Co. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975]* .

Reliable information furnishing probable cause for an arrest does not lose its reliability when it is transmitted to the arresting officers through official channels. They are entitled to rely on such information when making an arrest [*Wilson v. Los AngelesCounty (1971) 21 Cal. App. 3d 308, 315, 98 Cal. Rptr. 525* , *disapproved on other grounds, Cervantez v. J. C. Penney Co. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975]* .

[4] Determination of Probable Cause

If the evidence of facts relevant to the existence of probable cause for arrest is without substantial conflict, the question of the existence of probable cause is to be decided by the court as a matter of law [*Pool v. City of Oakland (1986) 42 Cal. 3d 1051, 1069, 232 Cal. Rptr. 528, 728 P.2d 1163* ; *Wilson v. Los Angeles County (1971) 21 Cal. App. 3d 308, 316, 98 Cal. Rptr. 525 , disapproved on other grounds,* *Cervantez v. J. C. Penney Co. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975* ; *White v. Martin (1963) 215 Cal. App. 2d 641, 643, 30 Cal. Rptr. 367]* . When the facts relied on to show probable cause are disputed, that is, when there is conflicting evidence of the facts which confronted the arresting officer, the jury may decide the question of the existence of the facts. It is, nevertheless, the job of the court to determine as a matter of law whether the facts as found by the jury constitute probable cause. The court will normally instruct the jury that, if they find certain facts to be true, their verdict should be for plaintiff, or, if otherwise, for defendant [*Levin v. United Air Lines, Inc. (2008) 158 Cal. App. 4th 1002, 1018-1019, 70 Cal. Rptr. 3d 535* ; *Gibson v. J. C. Penney Co., Inc. (1958) 165 Cal. App. 2d 640, 644-645, 331 P.2d 1057* ; *Aitken v. White (1949) 93 Cal. App. 2d 134, 141, 208 P.2d 788]* .

Despite the general rule that the outcome of a criminal action is not conclusive on a subsequent determination in a civil suit regarding whether reasonable cause to arrest existed [*see discussion under § 257.20[2]*], a prior judicial determination at a criminal preliminary hearing that there was sufficient evidence to hold the plaintiff over for trial may, under some circumstances, preclude that plaintiff from relitigating the issue of probable cause to arrest in a subsequent civil suit [*McCutchen v. City of Montclair (1999) 73 Cal. App. 4th 1138, 1147, 87 Cal. Rptr. 2d 95]* . Absent a showing that evidence not available to the arresting officer at the time of arrest was presented at the preliminary hearing, a finding at the preliminary hearing that there was sufficient evidence to require a criminal defendant to stand trial is a finding of probable cause to arrest that may be given collateral estoppel effect [*McCutchen v. City of Montclair (1999) 73 Cal. App. 4th 1138, 1146-1148, 87 Cal. Rptr. 2d 95* (finding at preliminary hearing was not given collateral estoppel effect because evidence presented at hearing was not limited to evidence available to officer at time of arrest)].

[5] Arrest Resulting From Entrapment

If the offense that police officers seek to use to justify an arrest was committed as a result of entrapment, the offense will not justify the arrest and the officers may be liable for false imprisonment. Entrapment renders illegal the arrest on which the right to custody is based [*Beauregard v. Wingard (1965) 237 Cal. App. 2d 760, 764, 47 Cal. Rptr. 279]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureArrestsProbable CauseCriminal Law & ProcedureArrestsWarrantless ArrestTortsIntentional TortsFalse ArrestGeneral OverviewTortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployees

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22-257 California Forms of Pleading and Practice--Annotated § 257.21

§ 257.21 Liability for Serving Warrant

[1] Warrant Valid on Face

There is no liability on the part of and no cause of action against any peace officer who makes an arrest pursuant to a warrant of arrest regular on its face if the peace officer in making the arrest acts without malice and in the reasonable belief that the person arrested is the one referred to in the warrant [*Civ. Code § 43.55(a)*]. It is the duty of a police officer, for which the officer cannot be held liable, to execute the orders of the court unless they are patently irregular or void [*Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 677-678, 123 Cal. Rptr. 525]* .

A warrant is valid on its face if it proceeds from a court, officer, or body having authority of law to issue process of that nature, and it is legal in form and contains nothing to notify or fairly apprise anyone that it is issued without authority [*Muller v. Reagh (1963) 215 Cal. App. 2d 831, 838, 30 Cal. Rptr. 633]* . A "warrant deemed regular on its face" encompasses not only a paper arrest warrant issued pursuant to a judicial order, but also a judicial order entered into an automated warrant system by law enforcement or court personnel authorized to make such entries at or near the time the judicial order is made [*Civ. Code § 43.55(b)*].

In determining whether process or orders are regular on their face so as to insulate an officer from liability, the validity of the process need not be determined on the basis of scrutiny by a trained legal mind, nor is it to be judged in the light of facts outside its provisions which the officer may know. Unless there is a clear absence of jurisdiction on the part of the court or magistrate issuing the warrant, it is sufficient if on its face it appears to be valid in the judgment of an ordinarily intelligent and informed lay person [*Vallindras v. Massachusetts Bonding & Ins. Co. (1954) 42 Cal. 2d 149, 154, 265 P.2d 907* ; *Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 677-678, 123 Cal. Rptr. 525]* .

For example, if the only defect in the order of commitment for contempt that the sheriff served on the plaintiff in the false imprisonment action wasthat the order failed to specify what plaintiff should do to purge himself of contempt, the sheriff is not civilly liable for false imprisonment for imprisoning the plaintiff pursuant to the order [*Vallindras v. Massachusetts Bonding & Ins. Co. (1954) 42 Cal. 2d 149, 153-154, 265 P.2d 907]* .

The fact that a person held pursuant to a warrant or judgment of commitment is released on habeas corpus due to invalidity of the warrant or judgment does not mean that the officer serving the process and imprisoning the plaintiff will be subject to liability for damages for false imprisonment. Different tests of validity pertain to the habeas corpus and the civil liability situations [*Vallindras v. Massachusetts Bonding & Ins. Co. (1954) 42 Cal. 2d 149, 151-152, 265 P.2d 907]* .

[2] Arrest of Wrong Person

The arresting officer is liable for false imprisonment if the officer fails to use reasonable prudence and diligence to determine whether the person arrested is actually the one described in the warrant or if the officer refuses to act on information offered to him or her that would have disclosed that a mistake was being made by serving the warrant on the wrong person [*Smith v. Madruga (1961) 193 Cal. App. 2d 543, 546-547, 14 Cal. Rptr. 389]* . The question which must be decided is whether the officer was acting in a reasonable belief that the person arrested was the one named in the warrant. Since the applicable standard of reasonableness is the usual tort standard, where the evidence is subject to more than one interpretation, the reasonableness of the officer's conduct is determined as a question of fact by the jury [*Robinson v. City & County of San Francisco (1974) 41 Cal. App. 3d 334, 337, 116 Cal. Rptr. 125]* . For a form of allegation that the officer had no reasonable belief that the person arrested was the person named in the warrant, see *§ 257.89*.

[3] Defects in Proceedings for Issuance

A sheriff or other ministerial officer is justified in the execution of, and must execute, all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings on which they were issued [*Code Civ. Proc. § 262.1*].

The peace officer is not liable for serving a warrant valid on its face, regardless of any defects in the proceedings leading up to the issuance of the warrant [*see Jackson v. Osborn (1953) 116 Cal. App. 2d 875, 881-882, 254 P.2d 871* ; *Barrier v. Alexander (1950) 100 Cal. App. 2d 497, 501, 224 P.2d 436]* . An officer has no duty to investigate the procedure that led to the issuance of the warrant, nor does the officer have any obligation to pass judgment on the judicial act of issuing the warrant. The officer is privileged to execute the warrant even though the officer has personal knowledge of facts that should prevent the arrest; the officer may safely leave all responsibility to the issuing court. The fact that the officer should have known, in the exercise of due care, that the warrant for arrest was improperly issued cannot support liability on the part of the officer for false imprisonment [*Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 677-678, 123 Cal. Rptr. 525* ; *Herndon v. Marin County (1972) 25 Cal. App. 3d 933, 936, 102 Cal. Rptr. 221 , disapproved on other grounds, Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 722 n.10, 117 Cal. Rptr. 241, 527 P.2d 865]* .

[4] Warrant Maliciously Obtained and Served

Civ. Code § 43.5(a) provides a conditional immunity, and the failure of any condition prevents immunity from attaching to a peace officer making the arrest. One of the conditions is that the officer must act without malice in making the arrest. Malice may be determined by taking into account all circumstances surrounding the arrest allegedly known to the arresting officer [*McKay v. County of San Diego (1980) 111 Cal. App. 3d 251, 255, 168 Cal. Rptr. 442]* . Malice is established if the arresting officer fabricated false information to obtain the arrest warrant [*McKay v. County of San Diego (1980) 111 Cal. App. 3d 251, 253-255, 168 Cal. Rptr. 442]* . Failing to investigate and withholding exculpatory evidence from the magistrate when obtaining the warrant may also be sufficient to establish malice [*Laible v. Superior Court (1984) 157 Cal. App. 3d 44, 52-53, 203 Cal. Rptr. 513]* . For a form of allegation that the arresting officer acted maliciously, see *§ 257.90*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsFalse ArrestGeneral OverviewTortsIntentional TortsFalse ArrestElementsTortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsIntentional TortsFalse ImprisonmentElementsTortsIntentional TortsFalse ImprisonmentWarrants

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22-257 California Forms of Pleading and Practice--Annotated § 257.22

§ 257.22 Liability for Issuance of Warrants

[1] Court Clerks

Where court clerks fail to keep proper records indicating that a person has already served a sentence or fail to inform the judge of that fact, they may be liable for false imprisonment if the judge then issues a warrant based on the misinformation [*Sullivan v. Los Angeles, County of (1974) 12 Cal. 3d 710, 722, 117 Cal. Rptr. 241, 527 P.2d 865]* . In addition, county employees who fail to record or report proper information which would have prevented the issuance of a warrant for the arrest of a person who should not have been arrested are also liable for false imprisonment [*see Sullivan v. Los Angeles, County of (1974) 12 Cal. 3d 710, 722, 117 Cal. Rptr. 241, 527 P.2d 865]* . These two situations must be distinguished from the situation in which a police officer wrongfully swears out a new warrant valid on its face for misdemeanor charges which have already been dismissed against the arrestee. The swearing out of the new warrant, although wrongful, has been held to constitute malicious prosecution rather than false imprisonment since it is under color of legal authority and is merely the groundless institution of criminal proceedings for which the police officer and the officer's employer are protected from liability by *Gov. Code§ 821.6* [*Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 674-679, 123 Cal. Rptr. 525]* .

[2] Judges and Magistrates

Few doctrines are as solidly established at common law as the immunity of judges from civil liability for damages for acts, including false imprisonment, committed within their jurisdiction. The immunity applies even where the judge is acting maliciously or corruptly [*Paddleford v. Biscay (1971) 22 Cal. App. 3d 139, 143, 99 Cal. Rptr. 220]* . Justices of the peace, as well as superior court judges, are entitled to this immunity [*Taliaferro v. Contra Costa County (1960) 182 Cal. App. 2d 587, 592, 6 Cal. Rptr. 231* ; *see Frazier v. Moffatt (1951) 108 Cal. App. 2d 379, 386-387, 239 P.2d 123]* .

In determining whether a judge has acted within his or her jurisdiction, a distinction exists between a mere excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. Where a judge acts within his or her subject matter jurisdiction but in excess of his or her jurisdiction in regard to the procedure used in issuing a warrant or process, there is no liability for false imprisonment [*Paddleford v. Biscay (1971) 22 Cal. App. 3d 139, 143-144, 99 Cal. Rptr. 220]* . On the other hand, where a judge acts totally outside of his or her jurisdiction, the rule of judicial immunity for

civil damages does not apply [*De Courcey v. Cox (1892) 94 Cal. 665, 669, 30 P. 95* (justice of the peace issued warrant against plaintiff and tried her for acts not a crime)].

Where a judge acts totally outside of his or her jurisdiction, honesty of purpose or an honest mistake may mitigate damages, but the rule of civil immunity will nevertheless not apply [*De Courcey v. Cox (1892) 94 Cal. 665, 669, 30 P. 95]* . On the other hand, if the act in question was within the general scope of the judge's judicial powers, the test for whether the judge is immune from a civil suit for damages is not whether the judge committed an error in judgment in acting as he or she did, but whether the judge acted in an honest belief that he or she was legally warranted in doing it [*Singer v. Bogen (1957) 147 Cal. App. 2d 515, 524, 305 P.2d 893* ; *Frazier v. Moffatt (1951) 108 Cal. App. 2d 379, 386, 239 P.2d 123]* .

The question often arises whether a judge is immune from civil liability for acts that the judge mistakenly believes to be within his or her jurisdiction. As long as the act is within the general scope of the jurisdiction and there is not a clear absence of all jurisdiction over the subject matter, the determination of jurisdiction is a judicial duty, and error in that determination is itself within the rule of judicial immunity. In general, if any reasonable ground for the assumption of jurisdiction is shown, the immunity applies [*Lewis v. Linn (1962) 209 Cal. App. 2d 394, 397-398, 26 Cal. Rptr. 6]* . Additionally, if a judge honestly and in good faith, without being motivated by malice or corrupt motives, erroneously decides that he or she has jurisdiction, the judge is not liable for that honest mistake in judgment [*Taliaferro v. Contra Costa County (1960) 182 Cal. App. 2d 587, 593, 6 Cal. Rptr. 231]* .

Judicial immunity would not ordinarily protect judges and other judicial actors from liability for false imprisonment or assault and battery if the judge abandons the traditional role of the judge and uses brute force against a litigant, even if the judge's purpose is ostensibly to keep litigants from leaving a room in which their presence is required. However, the act of summoning a peace officer or other court personnel and directing that officer to prevent litigants from leaving would be covered by judicial immunity [*Regan v. Price (2005) 131 Cal. App. 4th 1491, 1498, 33 Cal. Rptr. 3d 130]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsJudicial ImmunityGovernmentsLocal GovernmentsEmployees & OfficialsTortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsIntentional TortsFalse ImprisonmentDefensesImmunityTortsPublic Entity LiabilityImmunityJudicial Immunity

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22-257 California Forms of Pleading and Practice--Annotated § 257.23

§ 257.23 Private Person Aiding Officials With Arrest

[1] Assisting Police

A private citizen who assists in making an arrest, or actually makes a citizen's arrest, pursuant to the request or persuasion of a police officer is not liable for false imprisonment, since it would be a misdemeanor for the citizen to refuse to aid the officer in this situation [*Peterson v. Robison (1954) 43 Cal. 2d 690, 697, 277 P.2d 19* ; *see Penal Code § 150*; *see also Sokol v. Public Utils. Comm'n (1966) 65 Cal. 2d 247, 257, 53 Cal. Rptr. 673, 418 P.2d 265]* . To be liable for false imprisonment, the private citizen must have taken an active part in the arrest [*Wilson v. Los Angeles County (1971) 21 Cal. App. 3d 308, 316-317, 98 Cal. Rptr. 525 , disapproved on other grounds, Cervantez v. J. C. Penney Co. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975]* , such as directing a policeofficer to arrest the plaintiff [*Collins v. Owens (1947) 77 Cal. App. 2d 713, 719, 176 P.2d 372]* or actively causing, procuring, or instigating the arrest [*Hughes v. Oreb (1951) 36 Cal. 2d 854, 859, 228 P.2d 550]* .

The question often arises whether the complaining citizen or the police officer actually made the arrest and is therefore liable for false imprisonment. Since a private person who has made an arrest must deliver the person arrested to a police officer [*see Penal Code § 847*], the cooperation of a police officer is often involved in what is actually a citizen's arrest. Thus, there is often a question of fact whether a citizen's arrest occurred or whether the citizen involved merely complained to the police who then acted pursuant to the demands of the police in making the arrest [*see Ogulin v. Jeffries (1953) 121 Cal. App. 2d 211, 213-214, 263 P.2d 75]* .

[2] Giving Information to Police Officers

Unless the elements of malicious prosecution can be proven, statements made to the police regarding potential criminal activity are protected from civil liability by an absolute privilege under *Civ. Code § 47(b)* [*Hagberg v. California Federal Bank (2004) 32 Cal. 4th 350, 355, 7 Cal. Rptr. 3d 803, 81 P.3d 244* ; *Kashian v. Harriman (2002) 98 Cal. App. 4th 892, 926-927, 120 Cal. Rptr. 2d 576* ; *see Civ. Code § 47(b)*]. Therefore, even if the information is false or given in bad faith, a person is immune from liability for giving information to the police leading to a false arrest or imprisonment [*Hagberg v. California Fed. Bank (2004) 32 Cal. 4th 350, 373-375, 7 Cal. Rptr. 3d 803, 81 P.3d 244* ; *Mulder v. Pilot Air Freight (2004) 32 Cal. 4th 384, 387, 7 Cal. Rptr. 3d 828, 81 P.3d 264]* . However, the privilege only applies to communications to the police or other officials and does not apply to noncommunicative conduct [*see*

Mulder v. Pilot Air Freight (2004) 32 Cal. 4th 384, 387, 7 Cal. Rptr. 3d 828, 81 P.3d 264] .

The absolute privilege applies in this context even if the party making the report to the police allegedly conducts a negligent investigation priorto making the report, and even if third parties may incidentally hear the report [*Devis v. Bank of Am. (1998) 65 Cal. App. 4th 1002, 1008-1012, 77 Cal. Rptr. 2d 238]* . However, the privilege does not apply to the act of making a citizen's arrest, which is affirmative conduct that constitutes more than the communicative act of reporting potential criminal activity to the police [*Kesmodel v. Rand (2004) 119 Cal. App. 4th 1128, 1136-1137, 15 Cal. Rptr. 3d 118]* .

For further discussion of the privilege, see Ch. 340, *Libel and Slander* .

[3] Information Leading to Issuance of Warrant

A private citizen is protected from liability for false imprisonment if that citizen does nothing more than state facts to the magistrate who issues a warrant for arrest, even though the facts are insufficient to show that a crime has been committed. To hold the complainant liable on the basis of the magistrate's mistake in determining that a crime has been committed would be unjust. If a person reports the facts to a magistrate, takes no active part in the arrest, and leaves the matter to the public officials, and if no bad faith appears, that person is not liable merely because the facts stated to the magistrate do not amount to a crime [*Gogue v. MacDonald (1950) 35 Cal. 2d 482, 484-485, 218 P.2d 542]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsFalse ArrestDefensesTortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsIntentional TortsFalse ImprisonmentDefensesGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral Overview

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22-257 California Forms of Pleading and Practice--Annotated § 257.24

§ 257.24 Detention Following Arrest

[1] Taking Before Magistrate

Whether the initial arrest is made with or without a warrant, the police officer who has made the arrest must, without unnecessary delay, take the person arrested before a magistrate [*Penal Code §§ 825(a), 849(a)*]. Even where the initial arrest is lawful, any unreasonable delay in taking the person arrested before a magistrate will amount to a false imprisonement [*Dragna v. White (1955) 45 Cal. 2d 469, 472, 289 P.2d 428* ; *City of Newport Beach v. Sasse (1970) 9 Cal. App. 3d 803, 810, 88 Cal. Rptr. 476]* .

Whether there has been an unreasonable delay is generally a question of fact to be determined by the trier of fact [*Gorlack v. Ferrari (1960) 184 Cal. App. 2d 702, 711, 7 Cal. Rptr. 699]* . The person arrested must, however, in almost all cases, be taken before the magistrate within 48 hours after the arrest, excluding Sundays and holidays [*Penal Code § 825(a)(1)*]. If the 48-hour period expires at a time when the court in which the magistrate is sitting is not in session, the period is extended to include the duration of the next court session. If the 48-hour period expires at a time when the court is in session, the arraignment may take place at any time during that session. However, if the arrest occurs on a Wednesday after the conclusion of the day's court session (provided that the Wednesday is not a holiday), the defendant must be taken before the magistrate no later than the following Friday, provided that Friday is not a holiday [*Penal Code § 825(a)(2)*].

The 48-hour provision does not authorize a detention of that length in all cases. Instead, it places a limit on what may be considered a necessary delay. Detention of less than two days, if unreasonable under the circumstances, is a violation of the duty to the person arrested [*Dragna v. White (1955) 45 Cal. 2d 469, 473, 289 P.2d 428]* . Failure to bring an arrested person before a magistrate cannot be justified on the ground that the delay which occurred was necessary in order to investigate the case [*Peckham v. Warner Bros. Pictures, Inc. (1939) 36 Cal. App. 2d 214, 218, 97 P.2d 472]* .

Where the initial arrest is lawful, subsequent delay in taking the prisoner before the magistrate will not affect the legality of the initial arrest [*Dragna v. White (1955) 45 Cal. 2d 469, 473, 289 P.2d 428* ; *Gorlack v. Ferrari (1960) 184 Cal. App. 2d 702, 710, 7 Cal. Rptr. 699]* . The Supreme Court has disapproved language in decisions to the effect that, when there is an unreasonable delay in taking a person before a magistrate after a lawful arrest, the false

imprisonment dates from the time of the arrest or relates back to the time of the initial arrest even where the arrest was lawful [*see Dragna v. White (1955) 45 Cal. 2d 469, 473, 289 P.2d 428* (disapproving in that respect *Kaufman v. Brown (1949) 93 Cal. App. 2d 508, 513, 209 P.2d 156* , and *Peckham v. Warner Bros. Pictures, Inc. (1939) 36 Cal. App.2d 214, 218, 97 P.2d 472*)]. The false imprisonment therefore begins, and liability for damages resulting from the imprisonment results, only for that period of the imprisonment which occurs after the period of necessary or reasonable delay [*Dragna v. White (1955) 45 Cal. 2d 469, 473, 289 P.2d 428* ; *City of Newport Beach v. Sasse (1970) 9 Cal. App. 3d 803, 810, 88 Cal. Rptr. 476* ; *Gorlack v. Ferrari (1960) 184 Cal. App. 2d 702, 710, 7 Cal. Rptr. 699]* .

[2] Release on Bail

The failure of a jailer to advise a prisoner that the prisoner is entitled to release after bail has been duly fixed, deposited, and the proper authorization for release delivered to the jailer, gives rise to a cause of action for false imprisonment for so much of the detention that occurs after the conditions for release have been met. Either the intentional or the negligent failure of the jailer to release the prisoner under these circumstances constitutes false imprisonment [*Shakespeare v. Pasadena (1964) 230 Cal. App. 2d 375, 384 n. 6, 40 Cal. Rptr. 863* ; *see Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 719, 117 Cal. Rptr. 241, 527 P.2d 865]* .

All procedures necessary for and required before release on bail may be completed before release without giving rise to liability for false imprisonment. Thus, even where the bail is posted, other statutorily imposed conditions precedent to release, such as booking and fingerprinting, may be completed before release without liability for false imprisonment [*Moore v. City & County of San Francisco (1970) 5 Cal. App. 3d 728, 736, 85 Cal. Rptr. 281* ; *see Penal Code § 1295* (booking required)].

It is also possible that reasonable delay could be found where bail had been posted and all procedures completed, but where a large number of prisoners to be processed, the lack of cooperation of the prisoner, and other similar factors excused a delay in release [*see Moore v. City & County of San Francisco (1970) 5 Cal. App. 3d 728, 737, 85 Cal. Rptr. 281]* . However, the fact that the prisoner is a danger to himself or the public will not excuse a failure to release. See discussion of the right to bail under § 257.24[3].

The cause of action for false imprisonment following failure of a jailer to release a prisoner who has completed the proper procedures for release on bail is based on the mandatory duty of the jailer to release the prisoner [*see Penal Code §§ 1269b(g), 1281, 1295*]. The public entity employing the jailer is directly liable for the false imprisonment. Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty [*Gov. Code § 815.6*]. The duty to release on bail is a mandatory duty designed to protect against the kind of injury caused by false imprisonment, and the public entity is therefore directly liable [*Shakespeare v. Pasadena (1964) 230 Cal. App. 2d 375, 386, 40 Cal. Rptr. 863]* .

The jailer is liable as a public employee for injury caused by his or her act or omission to the same extent as a private person [*Gov. Code § 820*], and nothing in the California Tort Claims Act [*Gov. Code § 810 et seq.*] grants an immunity for false imprisonment [*see Gov. Code § 820.4*; *Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 715, 117 Cal. Rptr. 241, 527 P.2d 865* ; *Shakespeare v. Pasadena (1964) 230 Cal. App. 2d 375, 386, 40 Cal. Rptr. 863]* . The public entity employing the jailer is also vicariously liable for the false imprisonment [*see Gov. Code § 815.2(a)*].

[3] Right to Bail

In general, any person who has been arrested or charged with an offense may be released on bail or on his or her own recognizance, except for persons charged with a capital crime, persons charged with violence against another person when there is evidence that release will result in great bodily harm to others, and persons charged with a felony who

have threatened another with great bodily harm when there is substantial likelihood that he or she would do so if released [*see Cal. Const., art. I, § 12*; *Penal Code §§ 1268-1269c* (bail), *1270* (own recognizance), 1270.5 (capital offense); *see also Penal Code § 1270.1* (hearing for persons charged with violent felonies)]. If the case alleges a misdemeanor offense involving the possession or use of a firearm, or in which there is a violation of specified offenses, the court must take into consideration the factors designated in *Penal Code § 1275* in deciding whether to grant or deny a release on the person's own recognizance [*see Penal Code § 1270*]. Moreover, any authorization for detaining persons dangerous to themselves or others must be found in the proper statutory procedures for detention of the mentally ill, the intoxicated, or those in danger of becoming addicted to drugs. The detention of such persons is not contemplated within the criminal bail system [*In re Underwood (1973) 9 Cal. 3d 345, 350-351, 107 Cal. Rptr. 401, 508 P.2d 721]* .

[4] Dismissal of Charges

The jailer is liable for false imprisonment if the jailer knew or should have known of the illegality of the imprisonment. If, therefore, the jailer knew or should have known that the plaintiff's incarceration was unlawful because all charges against the plaintiff had been dismissed, then the jailer is liable for false imprisonment. The test requires that the jailer have actual knowledge that the imprisonment of the plaintiff is unlawful or, alternatively, that the jailer have some notice sufficient to put the jailer, as a reasonable person, under a duty to investigate the validity of the incarceration [*Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 717-719, 117 Cal. Rptr. 241, 527 P.2d 865]* .

Gov. Code § 821.6 only immunizes the government and its employees from liability for malicious prosecution, not false imprisonment; failure to release a prisoner when required is false imprisonment, not malicious prosecution [*Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 722, 117 Cal. Rptr. 241, 527 P.2d 865]* , and false imprisonment is expressly exempted from the immunities granted to public employees [*see Gov. Code § 820.4*].

The employing public entity will be derivatively liable when a public employee is liable for false imprisonment [*see Gov. Code § 815.2*]. In addition, it may be directly as well as derivatively liable for false imprisonment [*Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 715-717, 117 Cal. Rptr. 241, 527 P.2d 865]* . Where a public entity is under a mandatory duty imposed by statute which is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty [*Gov. Code § 815.6*]. *Penal Code § 1384* creates a mandatory duty to release a person from custody if the court directs the action against that person to be dismissed [*Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 715-716, 117 Cal. Rptr. 241, 527 P.2d 865]* . No immunity provision in the California Tort Claims Act [*Gov. Code § 810 et seq.*] insulates a public entity from liability for false imprisonment [*Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 715, 117 Cal. Rptr. 241, 527 P.2d 865]* . Although *Gov. Code § 844.6* bars liability of any public entity for an injury to any prisoner [*see Gov. Code § 844.6(a)(2)*], when a prisoner is detained past the end of his or her jail term or before his or her jail term starts, thenhe or she is not a "prisoner" within the meaning of this statute. The statute does not provide immunity for false imprisonment [*see Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 717, 117 Cal. Rptr. 241, 527 P.2d 865]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsIntentional TortsFalse ImprisonmentElementsTortsIntentional TortsFalse ImprisonmentWarrants

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Chapter 257 FALSE IMPRISONMENT
PART II. LEGAL BACKGROUND

22-257 California Forms of Pleading and Practice--Annotated § 257.25

§ 257.25 Mentally Disordered or Inebriated Persons

[1] Public Liability

The question of whether or not an action for false imprisonment may be brought by a person who has been involuntarily detained in a mental hospital against a public employee or public entity involved in the detention cannot be definitely answered on the basis of present law. Various parts of the Lanterman-Petris-Short Act [*Welf. & Inst. Code § 5000 et seq.*], the Act which governs the detention of persons who are allegedly mentally disordered or inebriated, affect false imprisonment actions.

When any person, as a result of mental disorder or inebriation, is a danger to himself or to others or is gravely disabled, then a peace officer, member of the attending staff of an evaluation facility, designated members of a mobile crisis team provided by *Welf. & Inst. Code § 5651.7* (repealed by Stats. 1991, ch. 89, § 122), or other person designated by the county may, on probable cause, take the person into custody and place that person in a facility designated by the county and approved by the Department of Health as a facility for 72-hour treatment and evaluation [*Welf. & Inst. Code §§ 5150* (mental disorder), *5170* (inebriation)]. Thus, probable cause is required for the detention of a mentally disordered or inebriated person.

[2] Detention for More Than 14 Days

The statutes specifically provide that any individual who is knowingly and willfully responsible for detaining a person for more than 14 days, in violation of the provisions under which such detention is allowed, is liable to the person detained in civil damages [*see Welf. & Inst. Code §§ 5255, 5265*].

[3] Decisional Law Prior to Lanterman-Petris-Short Act

In a case decided before the enactment of either the Lanterman-Petris-Short Act [*Welf. & Inst. Code § 5000 et seq.*] or the California Tort Claims Act [*Gov. Code §§ 810-996.6*], the court of appeal held that the establishment of the lack of probable cause is a necessary element in an action for false arrest or imprisonment of a person allegedly mentally disordered. The court also held that while normally the conviction or acquittal of the person imprisoned is immaterial in an action for false imprisonment, the findings of psychiatrists and the act of a court in committing a person to a mental

hospital are elements to be considered in determining the existence of probable cause for detention of an allegedly mentally disordered person [*see Whaley v. Kirby (1962) 208 Cal. App. 2d 232, 237-238, 25 Cal. Rptr. 50 , disapproved on other grounds, Cervantez v. J. C. Penney Co. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975]* .

After enactment of the California Tort Claims Act [*Gov. Code §§ 810-996.6*] and before the enactment of the Lanterman-Petris-Short Act, however, a court of appeal held that *Gov. Code § 855.8* gives immunity to government entities and employees for diagnosis or preliminary diagnosis of mental illness resulting in confinement and that there is thus no liability for false imprisonment [*see Fish v. Regents of Univ. of Cal. (1966) 246 Cal. App. 2d 327, 333-334, 54 Cal. Rptr. 656]* .

[4] Failure of Sheriff to Serve Order

On the other hand, where service of a notice of hearing is essential to a valid detention order in a mental commitment proceeding, failure of the sheriff to serve the notice will make the sheriff liable for false imprisonment. Jurisdiction in the special civil commitment proceeding depends on strict compliance with statutory procedures. Since the sheriff is under a mandatory duty to serve the notice, failure to perform this duty will subject the sheriff, and the county as the sheriff's employer, to liability [*Culbertson v. Santa Clara County (1968) 261 Cal. App. 2d 274, 276, 67 Cal. Rptr. 752* (decided under former *Welf. & Inst. Code § 5050.2, now Welf. & Inst. Code § 5208*)].

[5] Liability of Private Persons

A private person may apply to the person or agency designated by the county for a petition alleging that there is a person who is, as a result of a mental disorder, a danger to others, or to himself, or is gravely disabled, and requesting that an evaluation of the person's condition be made under court order [*Welf. & Inst. Code § 5201*]. An individual who seeks a petition for court-ordered evaluation knowing that the person for whom the petition is sought is not, as a result of mental disorder, a danger to himself, or to others, or gravely disabled, is liable in civil damages to the person against whom the petition is sought [*Welf. & Inst. Code § 5203*]. In addition, the involuntary detention of a person under *Welf. & Inst. Code § 5150* made without probable cause may constitute the basis of a claim for false imprisonment [*see Brimmer v. California Charter Med., Inc. (1986) 180 Cal. App. 3d 678, 684-686, 225 Cal. Rptr. 752]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentGeneral OverviewTortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsIntentional TortsFalse ImprisonmentElements

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22-257 California Forms of Pleading and Practice--Annotated § 257.26

§ 257.26 Damages

[1] Compensatory

A plaintiff in a false imprisonment action is entitled to damages in an amount which will compensate for all detriment proximately caused by thedefendant's acts, whether it could have been anticipated or not [*see Civ. Code § 3333*]. The amount of money which will compensate the plaintiff for a false imprisonment is not the subject of exact computation. In such cases, the amount of damages is left to the sound discretion of the jury, unless the amount is obviously disproportionate to the injury [*Gibson v. J. C. Penney Co., Inc. (1958) 165 Cal. App. 2d 640, 646-647, 331 P.2d 1057]* . On appeal, a compensatory damage award will be found excessive only if the award is so grossly disproportionate to a sum reasonably warranted by the facts that it shocks the conscience and raises a presumption it was the result of passion or prejudice [*Washington v. Farlice (1991) 1 Cal. App. 4th 766, 773, 2 Cal. Rptr. 2d 607]* .

In false imprisonment cases, extreme anxiety or emotional distress is one of the elements of damage caused by the tortious act, and damages for this suffering may be awarded as part of compensatory damages [*Schanafelt v. Seaboard Fin. Co. (1951) 108 Cal. App. 2d 420, 423, 239 P.2d 42]* . Also, damages to the plaintiff's reputation in the community, such as those resulting from newspaper publicity following the filing of a claim against a public entity, are recoverable as a proximate result of a false imprisonment [*see Gill v. Epstein (1965) 62 Cal. 2d 611, 617, 44 Cal. Rptr. 45, 401 P.2d 397* (disapproved on other grounds in *Manta Management Corp. v. City of San Bernardino (2008) 43 Cal. 4th 400, 412 n.7, 75 Cal. Rptr. 3d 353, 181 P.3d 159*)].

A police officer's liability for unlawful arrest does not include damages caused by incarceration following the arrestee's arraignment on formal charges. The Legislature's imposition of liability when a police officer causes a suspect to be confined unlawfully [*Gov. Code § 820.4*], coupled with the legislature's grant of absolute immunity when a police officer maliciously and without probable cause causes a suspect to be confined through the initiation of lawful process [*Gov. Code § 820.4*], evidences a legislative intent to shield police officers from liability for damages that are attributable to a suspect's incarceration following the institution of lawful process [*Asgari v. City of Los Angeles (1997) 15 Cal. 4th 744, 758 n.10, 63 Cal. Rptr. 2d 842, 937 P.2d 273* (to permit an arrestee to recover damages arising from incarceration following his or her arraignment on formal charges effectively would nullify, in part, the statutory immunity for malicious prosecution; declining to follow the decision in *Gill v. Epstein (1965) 62 Cal. 2d 611, 44 Cal.*

Rptr. 45, 401 P.2d 397 , superseded by statute as stated in Asgari v. City of L.A. (1997) 15 Cal. 4th 744, 758 and disapproving the decision in *Jackson v. City of San Diego (1981) 121 Cal. App. 3d 579, 175 Cal. Rptr. 395* , to the extent they hold that the recovery of damages for post-arraignment confinement is permitted)].

However, this rule does not prevent a plaintiff from seeking damages for injuries suffered after the arraignment that were caused by false arrest and imprisonment that preceded the arraignment. For example, a plaintiff may seek damages for emotional or physical injuries that were suffered after an arraignment if they were a continuation of injuries that were caused by a pre-arraignment arrest and imprisonment [*County of Los Angeles v. Superior Court (2000) 78 Cal. App. 4th 212, 222-224, 92 Cal. Rptr. 2d 668]* .

[2] Punitive

[a] Oppression, Fraud, or Malice

Punitive damages may be awarded in a false imprisonment action when clear and convincing evidence supports the existence of oppression, fraud, or malice [*Civ. Code § 3294(a)*; *see also Parrott v. Bank of Am. (1950) 97 Cal. App. 2d 14, 24, 217 P.2d 89* (decided before 1987 amendment to *Civ. Code § 3294*)]. For discussion and forms relating to punitive damages, see Ch. 177, *Damages* .

Punitive damages may be awarded where defendant has been guilty only of oppression [*see Civ. Code § 3294*], and malice need not be shown separately [*Schanafelt v. Seaboard Fin. Co. (1951) 108 Cal. App. 2d 420, 423, 239 P.2d 42]* .

[b] Liability of Private Employers

An employer will not be liable for punitive damages under *Civ. Code § 3294(a)* for the acts of an employee unless the employer had advance knowledge of the employee's unfitness, and employed him or her with conscious disregard for the safety or rights of others, or authorized or ratified the wrongful conduct for which punitive damages are awarded, or was personally guilty of malice, fraud, or oppression [*Civ. Code § 3294(b)*]. With respect to corporate employers, the employer will not be liable for punitive damages for the acts of an employee unless an officer, director, or managing agent of the corporation had advance knowledge of the unfitness of the employee, and employed him or her anyway with conscious disregard of the safety or rights of others, or unless an officer, director, or managing agent authorized or ratified the wrongful act of the employee, or personally committed an act of malice, fraud, or oppression [*Civ. Code § 3294(b)*].

The trier of fact may determine that in following the company's usual procedures, the conduct of the employee was known and directed by the company. Ratification is a question of fact. The burden of proving its existence rests on the party asserting it, but it may be proved by circumstantial as well as direct evidence. Anything that shows the intention of the principal to adopt or approve the act in question is sufficient. For example, the failure of the principal to repudiate the act as soon as the principal is fully informed of it may bind the principal on the theory that the principal has ratified the act by implication [Hale v. Farmers Ins. Exch. (1974) 42 Cal. App. 3d 681, 692, 117 Cal. Rptr. 146 (decided before codification of vicarious liability provisions of *Civ. Code § 3294*)].

In the case of a corporate defendant, when a false imprisonment occurs without the consent or knowledge of the board of directors or governing officers of a corporation, and there is no subsequent ratification by the board or officials of the action of the corporation's agents, there can be no punitive damages against the corporation [*Alterauge v. Los Angeles Turf Club (1950) 97 Cal. App. 2d 735, 740, 218 P.2d 802* (decided before codification of vicarious liability provisions of *Civ. Code § 3294*)]. Further, the employer will not be liable for punitive damages for acts of employees done within the scope of duty but with excessive zeal or force unless the superior officers of the corporation had either expressly sanctioned these excessive acts of violence or had subsequently ratified them with full knowledge of their extent

andcharacter [*McInerney v. United R.R. (1920) 50 Cal. App. 538, 547, 195 P. 958* (decided before codification of vicarious liability provisions of *Civ. Code § 3294*)], or had hired an unfit employee with conscious disregard of the rights or safety of others [*Civ. Code § 3294(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesPunitive DamagesAvailabilityCorporationsTortsDamagesPunitive DamagesAvailabilityEmployersTortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsIntentional TortsFalse ImprisonmentElementsTortsVicarious LiabilityAgentsRatification

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[Reserved]

§§ 257.27[Reserved]

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22-257 California Forms of Pleading and Practice--Annotated § 257.40

§ 257.40 Related Matthew Bender Publications

[1] California Points and Authorities

For a memorandum of points and authorities related to false imprisonment by confinement of plaintiff in a mental institution, see California Points and Authorities, Ch. 117, *Insane and Incompetent Persons* (Matthew Bender)

[2] California Criminal Defense Practice

For further discussion and forms relating to arrest and detention by police officers, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 11 (Matthew Bender)

[3] Bender's Forms of Discovery

For forms of interrogatories in actions involving the unlawful arrest and detention of a person by another, see 5 Bender' S Forms of Discovery, *False Imprisonment* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCriminal Law & ProcedureArrestsGeneral OverviewPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentGeneral OverviewTortsIntentional TortsFalse ArrestGeneral OverviewTortsIntentional TortsFalse ImprisonmentGeneral Overview

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§ 257.41 State Statutes

[1] False Imprisonment

Every person entitled to the right of protection from bodily restraint or harm, subject to the qualifications and restrictions provided by law. *Civ. Code § 43*

Action for false imprisonment required to be commenced within one year. *Code Civ. Proc. § 340(c)*

Married person allowed to sue and be sued without his or her spouse being joined as party in all actions. *Code Civ. Proc. § 370*

Omission to specify or affirm in Penal Code liability for damages or other remedy at law in civil action for any act punishable under Penal Code does not affect right to recover and enforce damages or other remedies. *Penal Code § 9*

Public officer or other person who arrests any person on criminal charge and willfully delays to take person before magistrate to take his or her examination is guilty of misdemeanor. *Penal Code § 145*

Every public officer or person pretending to be public officer who arrests any person or detains him or her against his or her will under pretense or color of any process or other legal authority without regular process or other lawful authority is guilty of misdemeanor. *Penal Code § 146*

Conspiracy of two or more persons to falsely and maliciously indict another for any crime or to procure another to be charged or arrested for any crime is punishable by imprisonment or fine or both. *Penal Code § 182*

False imprisonment for purposes of protection from arrest or to use person as shield is punishable by imprisonment for three, five, or eight years. *Penal Code § 210.5*

False imprisonment is unlawful violation of personal liberty of another. *Penal Code § 236*

False imprisonment is punishable by fine not exceeding $1,000 or by imprisonment in county jail for not more than one year, or by both; false imprisonment effected by violence, menace, fraud, or deceit is punishable by imprisonment in state prison. *Penal Code § 237*

Private person who has arrested another for commission of public offense is required to take person arrested before magistrate or deliver person to peace officer without unnecessary delay. *Penal Code § 847*

[2] Liability of Employers

Liability of employer for wrongful acts of employee on agency theory. *Civ. Code §§ 2338, 2339*

Employer's liability for punitive damages for acts of employee. *Civ. Code § 3294(b)*

[3] Liability of Public Entities and Officers

[a] Generally

Horse racing board is empowered to provide rules for exclusion from track of known touts, persons convicted of bookmaking and other illegal wagering on horseraces, and other persons whose presence is detrimental to interests of state or horseracing. *Bus. & Prof. Code § 19572*

Venue of cause of action against local government entity. *Code Civ. Proc. § 394*

Public entity liable for injury proximately caused by act or omission of employee within scope of employment if act or omission would give rise to cause of action against that employee; public entity not liable for injury resulting from act or omission of employee where employee immune from liability, except as otherwise provided by statute. *Gov. Code § 815.2*

Public entity under mandatory duty imposed by statute designed to protect against particular kind of injury is liable for injury of that kind proximately caused by its failure to discharge that duty, unless public entity can establish that it exercised reasonable diligence to discharge duty. *Gov. Code § 815.6*

Except as otherwise provided by statute, public employee liable for injury caused by his or her act or omission to same extent as private person, subject to any defenses available to private person. *Gov. Code § 820*

Public employee not liable for injury resulting from his or her act or omission if act or omission was result of exercise of discretion vested in employee, whether or not such discretion was abused. *Gov. Code § 820.2*

Public employee not liable for his or her act or omission, exercising due care, in execution or enforcement of any law; but nothing in section exonerates public employee from liablity for false arrest or false imprisonment. *Gov. Code § 820.4*

"Peace officers" and other public employees who may make arrests defined. *Gov. Code §§ 830-831.6*

Requirement of presentation of claim to public entities. *Gov. Code §§ 905, 905.2*

Person seeking money or damages from peace officer or entity employing officer based on officer's conduct relating to offense charged, including act or omission in investigating or reporting offense or arresting or detaining accused, is required to file claim with governmental entity within six months, or be barred from filing subsequent court action;

however, subsequent court action prohibited from being filed, and its statute of limitations tolled, during pendency of criminal proceeding. *Gov. Code §§ 911.2, 945.3*

Presentation of claim to employing public entity is necessary for liability of public employee. *Gov. Code § 950.2*

[b] After Felony Dismissal

Prosecutor required to send letter to defendant stating that case has been refiled where felony was dismissed and defendant had been released on own recognizance. *Penal Code § 1388*

[c] Arrest Without Warrant

State sealer, county sealers, deputies, and inspectors for weights and measures have no civil liability for false arrest or imprisonment for acting within scope of authority pursuant to *Bus. & Prof. Code § 12013(a)* arising out of any arrest which is lawful or which arresting officer, at time of arrest, had reasonable cause to believe was lawful. *Bus. & Prof. Code § 12013(b)*

Presumption that official duty has been regularly performed does not apply on issue of lawfulness of arrest made without warrant. *Evid. Code § 664*

Any person in whom enforcement of any provision of Food and Agriculture Code is vested has authority, as public officer, to arrest, without warrant, another person wherever such officer has reasonable cause to believe that person to be arrested has in his or her presence violated any provision of code, violation of which is declared to be public offense. *Food & Agric. Code § 7(a)*

Person charged with enforcement of provisions of Food and Agriculture Code has authority to arrest under some circumstances. *Food & Agric. Code § 7(a)*

No civil liability on part of and no cause of action against any person, acting pursuant to *Food & Agric. Code § 7(a)* and within scope of his or her authority, for false arrest or false imprisonment arising out of any arrest which is lawful or which arresting officer, at time of such arrest, had reasonable cause to believe was lawful. *Food & Agric. Code § 7(b)*

No liability for false imprisonment by inspector for Bureau of Food and Drug acting within scope of his or her authority for lawful arrest. *Health & Safety Code § 106500(c)*

Justification for arrest by peace officer without warrant. *Penal Code § 836*

Public officer or employee authorized by ordinance to arrest without warrant on reasonable cause is not liable for false imprisonment arising out of lawful arrest. *Penal Code § 836.5(a), (b)*

Situations justifying citizen's arrest. *Penal Code § 837*

Magistrate authorized to orally order peace officer or private person to arrest any one committing or attempting to commit public offense in presence of magistrate. *Penal Code § 838*

No civil liability on part of no cause of action against any peace officer, acting within scope of his or her authority, for false arrest or false imprisonment arising out of any arrest when arrest was lawful or peace officer, at time of arrest had reasonable cause to believe arrest lawful. *Penal Code § 847(b)(1)*

No civil liability on part of and no cause of action against any peace officer, acting within scope of his or her authority, for false arrest or false imprisonment arising out of any arrest when arrest was made pursuant to charge made on reasonable cause of commission of felony by person to be arrested. *Penal Code § 847(b)(2)*

No civil liability on part of and no cause of action against any peace officer, acting within scope of his or her authority, for false arrest or false imprisonment arising out of any arrest made pursuant to requirements of *Penal Code § 142, 837, 838*, or *839*. *Penal Code § 847(b)(3)*

No civil liability on part of and no cause of action arises against any person, acting pursuant to *Pub. Util. Code § 21252(a)* and within scope of his or her authority, forfalse arrest or false imprisonment arising out of any arrest which is lawful or which arresting officer, at time of arrest, had reasonable cause to believe was lawful. *Pub. Util. Code § 21252(b)*

[d] Arrest With Warrant

Representative of Board of Barbering and Cosmetology has no civil liability for false arrest or imprisonment for acting within scope of authority under *Bus. & Prof. Code § 7414.3(a)* arising out of any arrest that is lawful or that representative, at time of arrest, had reasonable cause to believe was lawful. *Bus. & Prof. Code § 7414.3(b)* (relating to infraction violations of Filante Tanning Facility Act)

No liability and no cause of action arises against any peace officer who makes arrest pursuant to warrant of arrest regular on its face if peace officer acts without malice and in reasonable belief that person arrested is one referred to in warrant. *Civ. Code § 43.55*

Sheriff or other ministerial officer is justified in executing and is required to execute all process and orders regular on their face and issued by competent authority, whatever may be defect in proceedings in which they were issued. *Code Civ. Proc. § 262.1*

Peace officer prohibited from arresting person based on outstanding traffic warrant if person presents proper receipt of payment. *Veh. Code § 40312*

[e] Detention of Prisoners

Right to be taken before magistrate without unnecessary delay on arrest for misdemeanor. *Penal Code § 822*

Right to be taken before magistrate in all cases without unnecessary delay; time limits specified. *Penal Code § 825(a)*

Right to be taken before magistrate without unnecessary delay on arrest without warrant and to have charges laid before magistrate. *Penal Code § 849(a)*

Admission to bail, generally. *Penal Code §§ 1268-1298*

Defendant in criminal action entitled to be released from custody when charges have been dismissed. *Penal Code § 1384*

[4] Mentally Disordered Persons

Public entity or public employee acting within scope of employment is not liable for injury resulting from diagnosing

of failing to diagnose that person is afflicted with mental illness or addiction. *Gov. Code § 855.8(a)*

Person who seeks petition for court-ordered evaluation knowing that person for whom petition is sought is not, as result of mental disorder, danger to himself or others, or gravely disabled, is liable in civil damages. *Welf. & Inst. Code § 5203*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsFalse ArrestGeneral OverviewTortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsIntentional TortsFalse ImprisonmentDefensesStatutes of LimitationsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployeesTortsVicarious LiabilityEmployersGeneral Overview

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22-257 California Forms of Pleading and Practice--Annotated § 257.42

§ 257.42 Decisions

[1] Citizen's Arrest

[a] In General

Imprisonment by citizen's arrest is basis for criminal conviction for false imprisonment. *People v. Agnew (1940) 16 Cal. 2d 655, 659, 107 P.2d 601*

Lawfulness of citizen's arrest for misdemeanor is dependent on whether misdemeanor was in fact committed or attempted in presence of person making arrest. *Leggett v. De Giorgio Corp. (1969) 276 Cal. App. 2d 306, 311-312, 80 Cal. Rptr. 697*

Citizen's arrest without warrant for misdemeanor is unjustified if made after occasion has passed, even though offense was committed in presence of arresting person. *Hill v. Levy (1953) 117 Cal. App. 2d 667, 670, 256 P.2d 622*

[b] Liability of Police Officer Accepting Custody

Peace officer is not liable for action of accepting delivery of person arrested following citizen's arrest. *Kinney v. County of Contra Costa (1970) 8 Cal. App. 3d 761, 768, 87 Cal. Rptr. 638*

Peace officer who accepts custody of person arrested by citizen's arrest is not required to correctly judge whether probable cause existed for arrest. *Kinney v. County of Contra Costa (1970) 8 Cal. App. 3d 761, 768-769, 87 Cal. Rptr. 638*

Detention of arrested citizen by police officer pursuant to officer's statutory duty to accept custody after citizen's arrest does not give rise to false imprisonment, in absence of independent wrongful act. *Shakespeare v. Pasadena (1964) 230 Cal. App. 2d 387, 389, 40 Cal. Rptr. 871*

[2] Damages

[a] Compensatory

Damages to reputation in community as element of damages proximately resulting from false imprisonment if publicity follows. *Gill v. Epstein (1965) 62 Cal. 2d 611, 617, 44 Cal. Rptr. 45, 401 P.2d 397* (disapproved on other grounds in *Manta Management Corp. v. City of San Bernardino (2008) 43 Cal. 4th 400, 412 n.7, 75 Cal. Rptr. 3d 353, 181 P.3d 159*); *cf. Asgari v. City of Los Angeles (1997) 15 Cal. 4th 744, 758 n.10, 63 Cal. Rptr. 2d 842, 937 P.2d 273* (declining to follow decision in *Gill v. Epstein* to extent it holds that recovery of damages for post-arraignment confinement is permitted)

Damages for emotional distress in false imprisonment case are available even without evidence of physical injury. *Washington v. Farlice (1991) 1 Cal. App. 4th 766, 772-774, 2 Cal. Rptr. 2d 607*

Amount of compensatory damages in false imprisonment case is not subject to exact computation and therefore is left to sound discretion of jury. *Gibson v. J. C. Penney Co., Inc. (1958) 165 Cal. App. 2d 640, 646-647, 331 P.2d 1057*

Damages suffered from false arrest are mitigated by fact that arrest without warrant which is not followed by complaint must include record of release and be deemed detention rather than arrest. *Cole v. Johnson (1961) 197 Cal. App. 2d 788, 794, 17 Cal. Rptr. 664*

Damages for emotional distress are properly awarded as part of compensatory damages in false imprisonment cases. *Schanafelt v. Seaboard Fin. Co. (1951) 108 Cal. App. 2d 420, 423, 239 P.2d 42*

Plea or verdict of guilty in subsequent criminal proceeding is admissible on issue of damages for false imprisonment. *Collins v. Owens (1947) 77 Cal. App. 2d 713, 717-718, 176 P.2d 372*

[b] Punitive

[i] In General

Provocation, motive, and good faith of defendant are immaterial to case of false imprisonment, although are considered if punitive or exemplary damages are sought, and then only on issue of measure of damages. *Singleton v. Perry (1955) 45 Cal. 2d 489, 494, 289 P.2d 794*

Provocation, motive, and good faith of defendants in action for false imprisonment are not material elements in case, except as to measure of punitive damages. *Leggett v. De Giorgio Corp. (1969) 276 Cal. App. 2d 306, 311, 80 Cal. Rptr. 697*

Punitive damages awarded because defendant guilty of oppression. *Schanafelt v. Seaboard Fin. Co. (1951) 108 Cal. App. 2d 420, 423, 239 P.2d 42*

Defendant, who did not believe that plaintiff had committed crime or have probable cause to believe so and without good faith imprisoned plaintiff for purpose of aiding in extortion of money from plaintiff, was guilty of oppression, fraud, and malice, and liable for punitive damages. *Coyne v. Nelson (1951) 107 Cal. App. 2d 469, 475, 237 P.2d 45*

Punitive damages for false imprisonment are justified if defendant acted with oppression, fraud, or malice, express or implied. *Parrott v. Bank of Am. (1950) 97 Cal. App. 2d 14, 24, 217 P.2d 89*

[ii] Liability of Private Employers

Circumstances giving rise to liability of employer for punitive damage from acts of employees. Hale v. Farmers Ins. Exch. (1974) 42 Cal. App. 3d 681, 690-692, 117 Cal. Rptr. 146

Punitive damages are proper against employer of person guilty of false imprisonment if such damages are justified as against employee and acts of employee were expressly or implicitly authorized by employer. *Schanafelt v. Seaboard Fin. Co. (1951) 108 Cal. App. 2d 420, 423-424, 239 P.2d 42*

Punitive damages against corporation are improper if false imprisonment was made without consent or subsequent ratification of board of directors or governing officers of corporation. *Alterauge v. Los Angeles Turf Club (1950) 97 Cal. App. 2d 735, 740, 218 P.2d 802*

Employer is not liable for punitive damages for acts of employees done within scope of duty unless superior officers of corporation had either expressly directed such excessive acts or subsequently ratified them with full knowledge of their extent and character. *McInerney v. United R.R. (1920) 50 Cal. App. 538, 547, 195 P. 958*

[3] Definitions

[a] False Imprisonment

Either fraud or deceit is possible basis for false imprisonment [*see Penal Code § 237*]; however, threats of divine retribution are no basis for false imprisonment claim, because such threats are constitutionally protected religious speech. *Molko v. Holy Spirit Ass'n (1988) 46 Cal. 3d 1092, 1123-1124, 252 Cal. Rptr. 122, 762 P.2d 46*

Penal Code § 236, which defines crime of false imprisonment as unlawful violation of personal liberty of another, affords civil right of action for recovery of damages. *Gogue v. MacDonald (1950) 35 Cal. 2d 482, 484, 218 P.2d 542*

Allegations that plaintiff was induced by church official to remain isolated for one week in motel room to contemplate plaintiff's personal problems did not support cause of action for false imprisonment, because plaintiff consented to confinement; church official's threats of divine retribution were protected religious speech. *Snyder v. Evangelical Orthodox Church (1989) 216 Cal. App. 3d 297, 305, 264 Cal. Rptr. 640*

False imprisonment is unlawful violation of personal liberty of another, the interference being absolutely unlawful and without color of legal authority. *Jenkins v. County of Orange (1989) 212 Cal. App. 3d 278, 285, 260 Cal. Rptr. 645*

For purposes of felony false imprisonment conviction under *Penal Code §§ 236, 237*, providing that crime must be "effected" by "violence, menace, fraud or deceit," when victim is child of tender years false imprisonment is committed if violence, menace, fraud or deceit is directed to custodial parent rather than child. *People v. Rios (1986) 177 Cal. App. 3d 445, 450, 222 Cal. Rptr. 913*

Cause of action for false imprisonment requires detention without color of legal authority; no cause of action stated when judicially noticed facts showedthat plaintiff's detention was under color of law, although it violated prior agreement granting plaintiff immunity from prosecution. *Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 607-608, 615, 199 Cal. Rptr. 644*

False imprisonment is unlawful violation of personal liberty of another; false imprisonment does not require movement of victim from one place to another; person already lawfully restrained is capable of being victim of further unlawful restraint by another. *People v. Gibbs (1970) 12 Cal. App. 3d 526, 547-548, 90 Cal. Rptr. 866*

False imprisonment is nonconsensual, intentional confinement of person, without lawful privilege, for appreciable length of time, however short. *City of Newport Beach v. Sasse (1970) 9 Cal. App. 3d 803, 810, 88 Cal. Rptr. 476*

Penal Code definition of false imprisonment governs in civil as well as criminal actions. *City of Newport Beach v. Sasse (1970) 9 Cal. App. 3d 803, 810, 88 Cal. Rptr. 476*

Imprisonment based on lawful arrest is not false imprisonment. *Moore v. City & County of San Francisco (1970) 5 Cal. App. 3d 728, 735, 85 Cal. Rptr. 281*

Definition of crime and tort of false imprisonment. *Collins v. Los Angeles County (1966) 241 Cal. App. 2d 451, 459-460, 50 Cal. Rptr. 586*

False imprisonment is defined by *Penal Code § 236*; definition is same for crime and tort. *Muller v. Reagh (1963) 215 Cal. App. 2d 831, 836, 30 Cal. Rptr. 633*

False imprisonment is unlawful imprisonment. *Muller v. Reagh (1963) 215 Cal. App. 2d 831, 836, 30 Cal. Rptr. 633*

False imprisonment is unlawful violation of personal liberty of another, that is, interference with personal liberty of plaintiff in way which is absolutely unlawful and without authority. *Floro v. Lawton (1960) 187 Cal. App. 2d 657, 667, 10 Cal. Rptr. 98*

Imprisonment pursuant to lawful arrest is not tortious. *Floro v. Lawton (1960) 187 Cal. App. 2d 657, 669, 10 Cal. Rptr. 98*

False impirsonment defined as violation of personal liberty of another; confinement in prison or actual force is unnecessary; only temporary detention is necessary; necessity that person be restrained without sufficient authority; restraint is accomplished by words or acts individual fears to disregard. *Ware v. Dunn (1947) 80 Cal. App. 2d 936, 943, 183 P.2d 128*

Imprisonment pursuant to lawful arrest is not false imprisonment. *Dillon v. Haskell (1947) 78 Cal. App. 2d 814, 816, 178 P.2d 462*

False imprisonment is same whether offense is treated as tort or crime. *Dillon v. Haskell (1947) 78 Cal. App. 2d 814, 816, 178 P.2d 462*

[b] False Arrest

False arrest is only one way of committing false imprisonment. *Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 673, 123 Cal. Rptr. 525*

False arrest is merely one way of committing false imprisonment. *Moore v. City & County of San Franciso (1970) 5 Cal. App. 3d 728, 735, 85 Cal. Rptr. 281*

Person improperly detained pursuant to lawful arrest has cause of action for false imprisonment but not for false arrest. *Moore v. City & County of San Francisco (1970) 5 Cal. App. 3d 728, 735, 85 Cal. Rptr. 281*

False arrest always involves false imprisonment; suit for false imprisonment automatically embraces wrongful arrest; two separate torts are not involved. *Moore v. City & County of San Francisco (1970) 5 Cal. App. 3d 728, 735, 85 Cal.*

Rptr. 281

No basic distinction exists between false arrest and false imprisonment, but false imprisonment is broader term than false arrest. *Floro v. Lawton (1960) 187 Cal. App. 2d 657, 669, 10 Cal. Rptr. 98*

Cause of action based on unreasonable detention after arrest is proper cause of action for false imprisonment, not false arrest. *Ogulin v. Jeffries (1953) 121 Cal. App. 2d 211, 216, 263 P.2d 75*

[c] Restraint

False imprisonment requires some restraint of person by express or implied force, by acts, or by words; confinement to jail is not necessary to constitute restraint of person; confinement is forcing person to remain or to move against his or her wishes. *People v. Zilbauer (1955) 44 Cal. 2d 43, 51, 279 P.2d 534*

Essential element of false imprisonment is restraint of person. *Onick v. Long (1957) 154 Cal. App. 2d 381, 386, 316 P.2d 427*

Words or conduct furnishing reasonable apprehension on part of one restrained that he or she will not be allowed to leave is sufficient to show false imprisonment. *Schanafelt v. Seaboard Fin. Co. (1951) 108 Cal. App. 2d 420, 422-423, 239 P.2d 42*

Restraint occurs if defendant uses words or threats that plaintiff fears to disregard, such as threat of arrest and prosecution. *Parrott v. Bank of Am. (1950) 97 Cal. App. 2d 14, 23, 217 P.2d 89*

Any detention under pretended color of official authority is imprisonment sufficient to show cause of action for false imprisonment. *Ware v. Dunn (1947) 80 Cal. App. 2d 936, 944, 183 P.2d 128*

False imprisonment is accomplished by actual force; threats, either by conduct or words; or legal authority. *Vandiveer v. Charters (1930) 110 Cal. App. 347, 355, 294 P. 440*

Whether words or conduct of defendant were sufficient to cause plaintiff, as reasonable person, to fear use of force and coercion if plaintiff failed to remain where defendant wanted plaintiff was question of fact for trier of fact. *Vandiveer v. Charters (1930) 110 Cal. App. 347, 356, 294 P. 440*

[4] Dependency Proceedings

Social worker was not liable for false imprisonment for failing to investigate facts pursuant to which child was taken from parent for six weeks, because all aspects of law regarding temporary custody of minor were complied with and done under legal authority. *Jenkins v. County of Orange (1989) 212 Cal. App. 3d 278, 285, 260 Cal. Rptr. 645*

[5] Detention Following Arrest

[a] Dismissal of Charges or Expiration of Jail Term

Both county sheriff and county were liable for failure to release plaintiff from jail after all charges against plaintiff were dismissed. *Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 717, 117 Cal. Rptr. 241, 527 P.2d 865*

Jailer is liable for false imprisonment if jailer knew or should have known of illegality of imprisonment because all

charges had been dismissed. *Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 719, 117 Cal. Rptr. 241, 527 P.2d 865*

Gov. Code § 821.6 protects government employees from liability only for malicious prosecution, not for false imprisonment. *Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 720-721, 117 Cal. Rptr. 241, 527 P.2d 865* ; *Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 604-605, 199 Cal. Rptr. 644*

Penal Code § 1384 creates mandatory duty to release prisoner from custody when courts direct charges to be dismissed; *Gov. Code § 815.6* creates liability for failure to use reasonable diligence to discharge mandatory duty. *Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 715, 117 Cal. Rptr. 241, 527 P.2d 865*

Person detained past end of jail term is not "prisoner" within meaning of *Gov. Code § 844.6* barring liability of any public entity for injury to any prisoner, so that public entity may be liable for false imprisonment. *Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 717, 117 Cal. Rptr. 241, 527 P.2d 865*

Although imprisonment originally lawful and court-ordered may become actionable if release is delayed beyond lawful limits, such delay was not due to sheriff's failure to report immediately plaintiff's favorable blood tests since sheriff has no duty to establish system whereby test results would be brought affirmatively to attention of district attorney or plaintiff or plaintiff's counsel. *Tribulski v. County of Los Angeles (1978) 83 Cal. App. 3d 828, 831, 146 Cal. Rptr. 229*

[b] Right to Bail

Right of defendant in criminal action other than capital offense to release on bail, with no exceptions for public safety or safety of defendant. *In re Underwood (1973) 9 Cal. 3d 345, 350-351, 107 Cal. Rptr. 401, 508 P.2d 721*

[c] Taking Before Magistrate

Delay of even few hours is possibly unnecessary for purposes of determining what is unnecessary delay under *Penal Code §§ 847* and *849* requiring person arrested by private person or without warrant to be brought before magistrate without unnecessary delay. *People v. Haydel (1974) 12 Cal. 3d 190, 199, 115 Cal. Rptr. 394, 524 P.2d 866*

Where initial arrest is lawful, subsequent unreasonable delay in bringing person before magistrate does not affect legality of arrest, although it will subject offending person to liability for imprisonment which occurs after period of necessary or reasonable delay. *Dragna v. White (1955) 45 Cal. 2d 469, 473, 289 P.2d 428* ; *City of Newport Beach v. Sasse (1970) 9 Cal. App. 3d 803, 810, 88 Cal. Rptr. 476*

Action for false imprisonment is based on unlawful detention of prisoner for unreasonable period of time and unnecessary delay in bringing prisoner before magistrate as required by Penal Code; *Penal Code § 825(a)*, providing that arrestee must be brought before magistrate within two days after arrest, does not authorize two-day detention in all cases, but provides limit on detention. *Dragna v. White (1955) 45 Cal. 2d 469, 472-473, 289 P.2d 428*

Duty to bring prisoner before magistrate is even more imperative where arrest is made without warrant. *Dragna v. White (1955) 45 Cal. 2d 469, 473, 289 P.2d 428*

Unreasonable delay in taking prisoner before magistrate does not affect legality of arrest, but causes liability for imprisonment during period of unlawful delay; reasonableness of delay is question of fact. *Gorlack v. Ferrari (1960) 184 Cal. App. 2d 702, 711, 7 Cal. Rptr. 699*

Person making arrest without warrant has duty to bring person arrested before magistrate without unnecessary delay;

question of reasonableness of delay is question of fact for jury. *Kaufman v. Brown (1949) 93 Cal. App. 2d 508, 513-514, 209 P.2d 156*

Person detained pursuant to lawful arrest has no cause of action for false arrest, but possibly has cause of action for false imprisonment based on unreasonable delay in taking person before magistrate. *Kaufman v. Brown (1949) 93 Cal. App. 2d 508, 511, 209 P.2d 156*

Peace officer making arrest without warrant was not able to justify failure to bring person arrested before magistrate within reasonable time on ground that delay was necessary to investigate case. *Peckham v. Warner Bros. Pictures, Inc. (1939) 36 Cal. App. 2d 214, 218, 97 P.2d 472*

[d] Release on Bail

Intentional failure to advise prisoner of right to release and following detention gives rise to cause of action for false imprisonment. *Moore v. City & County of San Francisco (1970) 5 Cal. App. 3d 728, 737, 85 Cal. Rptr. 281* ; *Shakespeare v. Pasadena (1964) 230 Cal. App. 2d 375, 384, 40 Cal. Rptr. 863*

Unreasonable delay in releasing prisoner after posting of bail gives rise to cause of action for false imprisonment. *Moore v. City & County of San Francisco (1970) 5 Cal. App. 3d 728, 85 Cal. Rptr. 281*

Detention for booking of arrrestee after bail has been posted does not amount to false imprisonment as matter of law; only unnecessary delay is actionable. *Moore v. City & County of San Francisco (1970) 5 Cal. App. 3d 728, 737, 85 Cal. Rptr. 281*

Jailers are liable for false imprisonment if they refuse or fail to release prisoners when under duty to do so. *Shakespeare v. Pasadena (1964) 230 Cal. App. 2d 375, 386, 40 Cal. Rptr. 863*

[6] Joinder of Other Actions

Malicious prosecution and false imprisonment are inconsistent actions; plaintiff possibly required to elect on which count to go to jury. *Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 676, 123 Cal. Rptr. 525*

Causes of action for false imprisonment and malicious prosecution are allowed to be joined and stated in separate counts. *Bulkley v. Klein (1962) 206 Cal. App. 2d 742, 747, 23 Cal. Rptr. 855*

Action against racetrack, guard agency, and guards for false imprisonment, assault and battery, and malicious prosecution, arising out of plaintiff's ejectment from recetrack. *Griswold v. Hollywood Turf Club (1951) 106 Cal. App. 2d 578, 580, 235 P.2d 656*

Allegation of assault and battery is aggravating circumstance in action for false imprisonment rather than separate cause of action. *Oppenheimer v. Los Angeles (1951) 104 Cal. App. 2d 551, 553-554, 232 P.2d 30*

[7] Liability for Issuance of Warrants

[a] Court Clerks

Possible liability of court clerks for issuance of warrant for arrest which should not have issued. *Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 720-721, 117 Cal. Rptr. 241, 527 P.2d 865*

Swearing out of warrant is malicious prosecution, for which public employees are immune from liability, rather than false imprisonment. *Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 674-679, 123 Cal. Rptr. 525*

[b] Judges and Magistrates

Judge acting totally outside his or her jurisdiction is liable for civil damages, despite honesty of purpose. *De Courcey v. Cox (1892) 94 Cal. 665, 669, 30 P. 95*

Immunity of judges for civil liability applies even if judge acts maliciously or corruptly. *Paddleford v. Biscay (1971) 22 Cal. App. 3d 139, 143, 99 Cal. Rptr. 220*

Distinction exists between excess of jurisdiction and clear absence of all jurisdiction over subject matter. *Paddleford v. Biscay (1971) 22 Cal. App. 3d 139, 143-144, 99 Cal. Rptr. 220*

Determination of existence of jurisdiction is judicial duty and error in that determination is itself within rule of judicial immunity, as long as any reasonable ground for assumption of jurisdiction exists. *Lewis v. Linn (1962) 209 Cal. App. 2d 394, 397-398, 26 Cal. Rptr. 6*

Judge is immune from civil liability for every act performed within general scope of official duty, even though malice is charged. *Taliaferro v. Contra Costa County (1960) 182 Cal. App. 2d 587, 592-593, 6 Cal. Rptr. 231*

If judge could have reasonably believed that he or she had jurisdiction, allegations of malice and corrupt motives will not raise issue of possible liability for civil damages despite judicial immunity. *Taliaferro v. Contra Costa County (1960) 182 Cal. App. 2d 587, 592-593, 6 Cal. Rptr. 231*

Where judicial officer honestly and in good faith without malice or corruption erroneously decides he or she has jurisdiction, officer is not liable for civil damages. *Taliaferro v. Contra Costa County (1960) 182 Cal. App. 2d 587, 592-593, 6 Cal. Rptr. 231*

Judicial officer is immune from civil liability for judicial functions within his or her jurisdiction even if he or she erroneously determines existence of jurisdiction, but acts within scope of general subject matter over which he or she has power. *Singer v. Bogen (1957) 147 Cal. App. 2d 515, 525, 305 P.2d 893*

Procedural irregularities committed by judicial officer in connection with detention do not negate rule of judicial immunity for civil actions for damages if officer was acting within general scope of subject matter over which he or she has power. *Singer v. Bogen (1957) 147 Cal. App. 2d 515, 525, 305 P.2d 893*

Release on habeas corpus does not indicate that judicial officer lacked jurisdiction in such way as to remove immunity from civil liability for false improsonment. *Singer v. Bogen (1957) 147 Cal. App. 2d 515, 525-526, 305 P.2d 893*

Magistrate making or ordering arrest is immune for civil liability because acting within scope of authority as judicial officer. *Frazier v. Moffatt (1951) 108 Cal. App. 2d 379, 384-388, 239 P.2d 123*

Judicial officer is not civilly liable for acts done in official capacity and within jurisdiction; no liability for false imprisonment on warrant that should not have issued. *Malone v. Carey (1936) 17 Cal. App. 2d 505, 507, 62 P.2d 166*

Judicial officer is immune from civil liability for act done in judicial capacity, even issuance of warrant for arrest

knowing it should not issue, and even if malice is involved. *Rogers v. Marion (1936) 11 Cal. App. 2d 750, 750-751, 54 P.2d 760*

[8] Liability for Serving Warrant

[a] Arrest of Wrong Person

Arresting officers and sheriff were not liable for false imprisonment on basis of arresting wrong person three times because warrant was apparently valid on its face and gave accurate name, address, and description of plaintiff; officers were under no duty to determine authenticity and accuracy of disposition paper shown by plaintiff stating that plaintiff was not person named in warrant. *Lopez v. City of Oxnard (1989) 207 Cal. App. 3d 1, 7-12, 254 Cal. Rptr. 556*

Tort standard of reasonableness is applicable to reasonableness of officer's determination of whether person arrested is person named in warrant. *Robinson v. City & County of San Francisco (1974) 41 Cal. App. 3d 334, 337, 116 Cal. Rptr. 125*

Failure to use reasonable prudence to determine if person arrested is one named in warrant creates liability for false imprisonment. *Smith v. Madruga (1961) 193 Cal. App. 2d 543, 546-547, 14 Cal. Rptr. 389*

[b] Malice

Malice in obtaining warrant by withholding exculpatory evidence from magistrate, if done deliberately or with reckless disregard of plaintiff's libertyinterest, may defeat claim of immunity under *Civ. Code § 43.55*. *Laible v. Superior Court (1984) 157 Cal. App. 3d 44, 52-53, 203 Cal. Rptr. 513*

Arresting officer providing deliberately falsified information in obtaining warrant as indication of malice defeating claim of immunity under former *Civ. Code § 43.5(a)* (*now see Civ. Code § 43.55*). *McKay v. County of San Diego (1980) 111 Cal. App. 3d 251, 253-255, 168 Cal. Rptr. 442*

Malice removes immunity for liability for false imprisonment resulting from service of warrant valid on its face. *Robinson v. City & County of San Francisco (1974) 41 Cal. App. 3d 334, 336-337, 116 Cal. Rptr. 125* ; *Herndon v. Marin County (1972) 25 Cal. App. 3d 933, 938-939, 102 Cal. Rptr. 221*

[c] Warrant Valid on its Face

Duty of sheriff is to execute orders of court unless they are patently irregular and void; technical defects are not patent irregularity. *Vallindras v. Massachusetts Bonding & Ins. Co. (1954) 42 Cal. 2d 149, 153-154, 265 P.2d 907*

Validity of process sufficient to protect officer serving it from liability for false imprisonment is determined on basis of whether process appears valid in judgment of ordinarily intelligent lay person, unless there is clear absence of jurisdiction in issuing court or magistrate. *Vallindras v. Massachusetts Bonding & Ins. Co. (1954) 42 Cal. 2d 149, 154, 265 P.2d 907*

Release of person held pursuant to process on habeas corpus due to invalidity of process does not indicate civil liability of person serving process and imprisoning plaintiff falsely; different standards for validity of process apply. *Vallindras v. Massachusetts Bonding & Ins. Co. (1954) 42 Cal. 2d 149, 151-152, 265 P.2d 907*

Warrant is valid on its face if it proceeds from court, officer, or body having authority to issue process of that kind, and

it is legal in form and contains nothing to fairly notify anyone that it is issued without authority. *Muller v. Reagh (1963) 215 Cal. App. 2d 831, 838, 30 Cal. Rptr. 633*

Duty of police officers is to make arrest if they have received warrant valid on its face. *Malone v. Carey (1936) 17 Cal. App. 2d. 505, 506, 62 P.2d 166*

[9] Malicious Prosecution Distinguished

False imprisonment is unlawful violation of personal liberty of another; malicious prosecution is procuring arrest or prosecution of another under lawful process but from malicious motives and without probable cause. *Singleton v. Perry (1955) 45 Cal. 2d 489, 494, 289 P.2d 794*

False imprisonment and malicious prosecution are mutually inconsistent torts; cause of action for malicious prosecution is proper remedy if detention is malicious, but accomplished by procedurally valid means; cause of action for false imprisonment is proper remedy if plaintiff is arrested pursuant to procedurally improper warrant or warrantless arrest. *Cummings v. Farmers Ins. Exch. (1988) 202 Cal. App. 3d 1407, 1422, 249 Cal. Rptr. 568*

Malicious prosecution involves malicious detention under due forms of law, whereas false imprisonment involves detention without color of legal authority; arrest and detention in violation of prior grant of immunity from prosecution, but under color of authority, therefore states offense of malicious prosecution, not false imprisonment. *Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 607-608, 199 Cal. Rptr. 644*

Malicious prosecution distinguished from false imprisonment; termination of prosecution favorable to person prosecuted is essential to claim of malicious prosecution, whereas subsequent exoneration of arrestee has no bearing on validity of arrest for purposes of false imprisonment. *Gomez v. Garcia (1980) 112 Cal. App. 3d 392, 399, 169 Cal. Rptr. 350*

Malicious prosecution is detention under due forms of law, whereas false imprisonment is detention without color of legal authority. *Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 676-677, 123 Cal. Rptr. 525*

Distinction between malicious prosecution and false imprisonment. *Bulkley v. Klein (1962) 206 Cal. App. 2d 742, 746, 23 Cal. Rptr. 855*

Malicious prosecution is procuring arrest or prosecution of another under lawful process, but from malicious motives and without probable cause. *Floro v. Lawton (1960) 187 Cal. App. 2d 657, 667, 10 Cal. Rptr. 98*

Distinction between malicious prosecution and false imprisonment. *Stallings v. Foster (1953) 119 Cal. App. 2d 614, 619, 259 P.2d 1006*

False imprisonment defined as unlawful violation of liberty of another, and distinguished from malicious prosecution. *Barrier v. Alexander (1950) 100 Cal. App. 2d 497, 499, 224 P.2d 436*

[10] Mentally Incompetent Persons

[a] Failure of Sheriff to Serve Order

Failure of sheriff to serve notice of commitment proceedings is basis of liability for resulting confinement. *Culbertson v. Santa Clara County (1968) 261 Cal. App. 2d 274, 276, 67 Cal. Rptr. 752*

[b] Liability of Public Employees

Involuntary hospitalization of person in mental hospital in violation of statutory requirements is false imprisonment. *Maben v. Rankin (1961) 55 Cal. 2d 139, 144, 10 Cal. Rptr. 353, 358 P.2d 681*

Government entities and employees are immune from liability arising from diagnosing or failing to diagnose mental illness. *Fish v. Regents of Univ. of Cal. (1966) 246 Cal. App. 2d 327, 333-334, 54 Cal. Rptr. 656*

Lack of probable cause is necessary element for action for false imprisonment of mental patient. *Whaley v. Kirby (1962) 208 Cal. App. 2d 232, 237, 25 Cal. Rptr. 50 , disapproved on other grounds, Cervantez v. J. C. Penney Co. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975*

Subsequent detention by doctors and commitment of person detained due to mental disorder shows probable cause for original detention by police officer. *Whaley v. Kirby (1962) 208 Cal. App. 2d 232, 238, 25 Cal. Rptr. 50 , disapproved on other grounds, Cervantez v. J. C. Penney Co. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975*

Release of plaintiff on petition for habeas corpus is immaterial to existence of probable cause for detention as mentally disordered. *Whaley v. Kirby(1962) 208 Cal. App. 2d 232, 238, 25 Cal. Rptr. 50 , disapproved on other grounds, Cervantez v. J. C. Penney Co. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975*

[11] News Reporters

City and its police officers were not liable for false arrest of television news cameraman arrested for disobeying police officer's order to leave area of plane crash that had occurred in residential area on ground that cameraman had right of access to disaster site under *Penal Code § 409.5(d)*, because police reasonably, although incorrectly, believed that crash site was scene of crime (assassination of state official). *Leiserson v. City of San Diego (1986) 184 Cal. App. 3d 41, 49-53, 229 Cal. Rptr. 22*

[12] Personal Action

False arrest or imprisonment is personal action which does not give rise to cause of action in anyone other than person directly aggrieved. *Coverstone v. Davies (1952) 38 Cal. 2d 315, 324, 239 P.2d 876*

Actions for false imprisonment are personal actions not giving rise to cause of action in anyone other than person directly affected. *Sea World, Inc. v. Superior Court (1970) 13 Cal. App. 3d 100, 106-107, 91 Cal. Rptr. 336*

Action for false arrest is personal action not giving rise to cause of action in anyone other than person aggrieved. *Onick v. Long (1957) 154 Cal. App. 2d 381, 388, 316 P.2d 427*

[13] Persons Liable

Separate allegation of conspiracy is unnecessary; all defendants may be liable on theory they were joint tortfeasors. *Peterson v. Cruickshank (1956) 144 Cal. App. 2d 148, 167, 300 P.2d 915*

Person who did not directly participate in false imprisonment is liable on theory of conspiracy where there was concert of action to unlawfully restrain plaintiff, action in furtherance of common scheme by defendant, and knowledge by defendant of conspiracy and its unlawful purpose. *Peterson v. Cruickshank (1956) 144 Cal. App. 2d 148, 163, 300*

P.2d 915

Persons who take part in false imprisonment are joint tortfeasors; all such persons are properly joined as defendants without allegation or proof of conspiracy. *Oppenheimer v. Los Angeles (1951) 104 Cal. App. 2d 551, 553, 232 P.2d 30*

Specific allegation of conspiracy to arrest plaintiff is unnecessary to raise issue of liability of several defendants. *Kaufman v. Brown (1949) 93 Cal. App. 2d 508, 515, 209 P.2d 156*

Factual question of whether or not defendants acted jointly and in concert in false imprisonment action. *Kaufman v. Brown (1949) 93 Cal. App. 2d 508, 515, 209 P.2d 156*

[14] Private Persons Aiding Officials With Arrest

[a] Assisting Police

Citizen who makes citizen's arrest at instruction and request of police officer is not liable for false imprisonment. *Peterson v. Robison (1954) 43 Cal. 2d 690, 698, 277 P.2d 19*

Private citizen who assists in making of arrest at request of police officer is not liable for false imprisonment, since it is in fact misdemeanor offense for private citizen to refuse to aid officer. *Peterson v. Robison (1954) 43 Cal. 2d 690, 697, 277 P.2d 19*

Person who procures or participates in unlawful arrest is liable for false imprisonment; but no liability if person, acting in good faith, merely gives information to authorities. *Hughes v. Oreb (1951) 36 Cal. 2d 854, 859, 228 P.2d 550*

Defendant not liable for false imprisonment unless defendant took active part in arrest. *Wilson v. Los Angeles County (1971) 21 Cal. App. 3d 308, 316-317, 98 Cal. Rptr. 525 disapproved on other grounds, Cervantez v. J. C. Penney Co. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975*

Private citizen who assists in making arrest pursuant to request or persuasion of police officer is not liable for false imprisonment. *Floro v. Lawton (1960) 187 Cal. App. 2d 657, 669, 10 Cal. Rptr. 98*

Defendant who directs police officer to arrest plaintiff is liable for false imprisonment. *Collins v. Owens (1947) 77 Cal. App. 2d 713, 719, 176 P.2d 372*

Private person assisting police in making arrest is not liable. *Mackie v. Ambassador Hotel & Inv. Corp. (1932) 123 Cal. App. 215, 222-223, 11 P.2d 3*

[b] Giving Information to Police Officers

Unless elements of malicious prosecution can be proven, statements made to police regarding potential criminal activity are protected from civil liability by absolute privilege under *Civ. Code § 47(b)*, even if information is false or given in bad faith. *Hagberg v. Cal. Fed. Bank (2004) 32 Cal. 4th 350, 355, 373-375* & n.8, *7 Cal. Rptr. 3d 803, 81 P.3d 244* (disapproving inconsistent language in *Miller v. Fano (1901) 134 Cal. 103, 66 P. 183* , *Turner v. Mellon (1953) 41 Cal. 2d 45, 257 P.2d 15* , and *DuLac v. Perma Trans Prods., Inc. (1980) 103 Cal. App. 3d 937, 163 Cal. Rptr. 335*); *Mulder v. Pilot Air Freight (2004) 32 Cal. 4th 384, 387, 7 Cal. Rptr. 3d 828, 81 P.3d 264*

Private person reporting information, even mistaken information, to proper authorities in good faith is not liable for

false imprisonment, even though information is cause of imprisonment. *Peterson v. Robison (1954) 43 Cal. 2d 690, 695, 277 P.2d 19*

Defendant in false imprisonment action is not liable for honest mistake in identifying person arrested for crime. Turner v. Mellon (1953) 41 Cal. 2d 45, 48, 257 P.2d 15

Defendant in false imprisonment action is not liable without taking some active part in bringing about unlawful arrest; defendant who in good faith givesinformation to authorities is not liable. Turner v. Mellon (1953) 41 Cal. 2d 45, 48, 257 P.2d 15 ; *Cummings v. Fire Ins. Exchange (1988) 202 Cal. App. 3d 1407, 1422, 249 Cal. Rptr. 568*

Victim of crime is not liable for false imprisonment as result of reporting honest but mistaken belief that plaintiff was responsible. *Wilson v. Los Angeles County (1971) 21 Cal. App. 3d 308, 316-317, 98 Cal. Rptr. 525 , disapproved on other grounds, Cervantez v. J. C. Penney Co. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975*

Person identifying suspect to police is not liable for honest mistake, including failure to volunteer some information. *Cole v. Johnson (1961) 197 Cal. App. 2d 788, 792, 17 Cal. Rptr. 664*

Private person is not liable for false imprisonment if person gives information, even mistaken information, to proper authorities, even though that information is principal cause of plaintiff's imprisonment. *Floro v. Lawton (1960) 187 Cal. App. 2d 657, 669, 10 Cal. Rptr. 98*

Private person is not liable for false imprisonment for giving information, even mistaken information, to authorities which leads to plaintiff's arrest. *Gorlack v. Ferrari (1960) 184 Cal. App. 2d 702, 709, 7 Cal. Rptr. 699*

[c] Information Leading to Issuance of Warrant

If defendant in false imprisonment action reports facts to magistrate, takes no active part in arrest, but leaves matter to public officials, and no bad faith appears, defendant is not liable merely because facts stated to magistrate do not constitute crime justifying arrest. *Gogue v. MacDonald (1950) 35 Cal. 2d 482, 487, 218 P.2d 542*

[15] Public Entities and Officers

Public employees are not immune from suit for false imprisonment. *Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 715, 117 Cal. Rptr. 241, 527 P.2d 865* ; *Harden v. San Francisco Bay Area Rapid Transit Dist. (1989) 215 Cal. App. 3d 7, 14, 263 Cal. Rptr. 549*

County social workers who detained minor, in proper exercise of their power of protective custody under Welfare and Institutions Code, were not liable for false imprisonment. *Alicia T. v. County of Los Angeles (1990) 222 Cal. App. 3d 869, 883, 271 Cal. Rptr. 513* ; *Jenkins v. County of Orange (1989) 212 Cal. App. 3d 278, 285, 260 Cal. Rptr. 645*

Public entity (county) was subject to civil liability under *Gov. Code § 815.2(a)* for false imprisonment, assault, and intentional infliction of emotional distress arising out of wrongful detention and threatening of motorist by employee (deputy sheriff) while on duty, because employee's wrongful use of police authority was incidental and integral to employee's official duties; therefore, although illegal and unauthorized by employer, actions were within scope of employment. *White v. County of Orange (1985) 166 Cal. App. 3d 566, 571-572, 212 Cal. Rptr. 493*

[16] Restraint by Private Persons

[a] Defense of Protecting Property

Private person who suspects his or her property is being stolen or injured is justified in restraining one who is stealing or interfering with it, if person has probable cause to believe such injury is occurring and detention is reasonable. *Collyer v. S.H. Kress & Co. (1936) 5 Cal. 2d 175, 180-181, 54 P.2d 20*

Company employer is justified in making reasonable investigation and questioning of employees, where there was evidence that employee was engaged in continuous taking of company property rather than one single completed taking in past. *Jaques v. Firestone Tire & Rubber Co. (1960) 183 Cal. App. 2d 632, 635-636, 6 Cal. Rptr. 878*

Person has right to detain another person if he or she has reasonable cause to believe that person is taking his or her property for purpose of investigation; no right to detain where offense has been completed. *Parrott v. Bank of Am. (1950) 97 Cal. App. 2d 14, 23, 217 P.2d 89*

Reasonable cause is required to justify detention by private citizen protecting his or her property. *Alterauge v. Los Angeles Turf Club (1950) 97 Cal. App. 2d 735, 739, 218 P.2d 802*

Right of owner of property to detain person who seeks to interfere with or injure property for reasonable length of time for purpose of investigating in reasonable manner. *Alterauge v. Los Angeles Turf Club (1950) 97 Cal. App. 2d 735, 737, 218 P.2d 802*

Circumstances justifying detention of employee suspected of stealing company property. *Moffatt v. Buffums' Inc. (1937) 21 Cal. App. 2d 371, 375, 69 P.2d 424*

If person has reasonable cause to believe that another is stealing his or her property, as distinguished from situation in which offense has already been completed, person is justified in detaining suspect in reasonable manner for reasonable period of time. *Moffatt v. Buffums' Inc. (1937) 21 Cal. App. 2d 371, 375, 69 P.2d 424*

[b] Liability of Private Employers

[i] Active Direction or Supervision

Employer expressly or impliedly directing actions of employee is liable as joint tortfeasor. *Benson v. Southern Pac. Co. (1918) 177 Cal. 777, 779-780, 171 P. 948*

Cause of action for false imprisonment exists against individual company officials where they actively supervise false imprisonment. *Parrott v. Bank of Am. (1950) 97 Cal. App. 2d 14, 24, 217 P.2d 89*

Corporation and corporate officer actively directing false imprisonment are liable. *Moffatt v. Buffums' Inc. (1937) 21 Cal. App. 2d 371, 375, 69 P.2d 424*

Employer is liable for false imprisonment by employees on doctrine of respondeat superior or on theory of direct participation through express or implieddirection of employee actions. *McInerney v. United R.R. (1920) 50 Cal. App. 538, 550, 195 P. 958*

Employer who has directed actions of employee resulting in false imprisonment is liable as joint tortfeasor, even where employee is not liable; employer is not liable where employee not liable if liability could only be based on respondeat superior. *McInerney v. United R.R. (1920) 50 Cal. App. 538, 550, 195 P. 958*

[ii] Liability for Acts of Security Guards

Liability of employer of detective or guard agency for intentional torts of guards or detectives committed within scope of employment; liability where employer of guard agency retains right to control individual guards or detectives is direct. *Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 657-658, 663, 109 Cal. Rptr. 269*

Acts of private detectives are not ultrahazardous activities giving rise to nondelegable duty. *Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 661, 109 Cal. Rptr. 269*

Action against racetrack, guard agency, and guards for false imprisonment, assault and battery, and malicious prosecution, arising out of plaintiff's ejectment from recetrack. *Griswold v. Hollywood Turf Club (1951) 106 Cal. App. 2d 578, 580, 235 P.2d 656*

Private employee who is also police officer is liable to third parties for acts done in connection with capacity as private employee or while protecting private employer's property; immunity is inapplicable. *Hanna v. Raphael Weill & Co. (1949) 90 Cal. App. 2d 461, 463, 203 P.2d 564*

Proprietor is liable for acts of security guard or detective hired through independent guard agency as long as acts were done within scope of employment. *Martin v. Leatham (1937) 22 Cal. App. 2d 442, 444-445, 71 P.2d 336*

Employer of private detectives is liable for their commission of false imprisonment if their actions were within scope of their employment. *Weir v. Continental Oil Co. (1935) 5 Cal. App. 2d 714, 716, 43 P.2d 375*

[iii] Ratification and Authorization

Acts of employee in detaining person for investigation or obtaining confession of crime already committed is basis for liability of employer where acts were authorized or ratified. *Hanna v. Raphael Weill & Co. (1949) 90 Cal. App. 2d 461, 463, 203 P.2d 564*

Question of whether employees were authorized to follow and detain customer and question of whether their act in doing so was subsequently ratified is question of fact to be proved by defense. *Hanna v. Raphael Weill & Co. (1949) 90 Cal. App. 2d 461, 464, 203 P.2d 564*

[iv] Scope of Authority

Principal is liable for acts of its officers, agents, and employees acting within scope of their authority in action for false imprisonment. *Kaufman v. Brown (1949) 93 Cal. App. 2d 508, 515, 209 P.2d 156*

Whether or not employee was acting within scope of authority as agent of employer is question of fact for jury. *Peckham v. Warner Bros. Pictures, Inc. (1939) 36 Cal. App. 2d 214, 220-221, 97 P.2d 472*

Employer is liable for acts of employee in connection with prevention of ending of crime under doctrine of respondeat superior; no liability for employee's acts done for purpose of punishing for what has already been done. *Mackie v. Ambassador Hotel & Inv. Corp. (1932) 123 Cal. App. 215, 223-224, 11 P.2d 3*

Employee who is empowered to take particular kind of action but mistakenly takes it on wrong person or with excessive force or zeal subjects employer to liability. *McInerney v. United R.R. (1920) 50 Cal. App. 538, 545, 195 P. 958*

Acts of employee that employee is under no circumstances authorized to do do not subject employer to liability.

McInerney v. United R.R. (1920) 50 Cal. App. 538, 545, 195 P. 958

[c] Without Justification

Action of criminal defendant in holding two people captive in car at gunpoint was false imprisonment. *People v. Zilbauer (1955) 44 Cal. 2d 43, 51, 279 P.2d 534*

Confining plaintiff with no good-faith justification was false imprisonment. *Coyne v. Nelson (1951) 107 Cal. App. 2d 469, 475, 237 P.2d 45*

[17] Statute of Limitations

Cause of action for false imprisonment accrues when imprisonment terminates, not when plaintiff discovers that confinement was wrongful, and not when criminal proceeding against plaintiff terminates. *Collins v. County of Los Angeles (1966) 241 Cal. App. 2d 451, 454-455, 458, 50 Cal. Rptr. 586* ; *Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 606-607, 614-615, 199 Cal. Rptr. 644*

False imprisonment does not continue while plaintiff is released on bail. *Collins v. County of Los Angeles (1966) 241 Cal. App. 2d 451, 459-460, 50 Cal. Rptr. 586*

[18] Warrantless Arrest by Police Officer

[a] In General

Police officer who makes arrest without warrant and without justification is civilly liable for false arrest and imprisonment. *Dragna v. White (1955) 45 Cal. 2d 469, 471, 289 P.2d 428*

Where plaintiff has proved arrest without process, followed by imprisonment and damages, burden is then on defendant to prove justification for arrest. *Dragna v. White (1955) 45 Cal. 2d 469, 471, 289 P.2d 428*

Malice and lack of probable cause are essential elements of action for malicious prosecution, not relevant to action for false imprisonment except where probable cause is defense to action based on arrest for offense committedin presence of arresting officer without warrant. *Miller v. Glass (1955) 44 Cal. 2d 359, 362, 282 P.2d 501*

Acquittal of arrestee in subsequent criminal trial has no bearing on issue of legality of initial arrest for purposes of false imprisonment action. *Coverstone v. Davies (1952) 38 Cal. 2d 315, 319, 239 P.2d 876*

False imprisonment occurs if police officer takes person into custody without proper authority. *People v. Brock (1963) 220 Cal. App. 2d 605, 607, 34 Cal. Rptr. 113*

Authority to arrest without warrant is derived from *Penal Code § 836*. *White v. Martin (1963) 215 Cal. App. 2d 641, 650, 30 Cal. Rptr. 367*

[b] Arrest Resulting From Entrapment

Proper test of entrapment in California is whether conduct of law enforcement agent was likely to induce normally law-abiding person to commit offense for which arrested; official conduct amounting to no more than offering opportunity to commit crime is permissible; overbearing conduct such as badgering, cajoling, or importuning is

impermissible. *People v. Barraza (1979) 23 Cal. 3d 675, 689-690, 153 Cal. Rptr. 459, 591 P.2d 947*

Offense committed as result of entrapment is not valid defense to action for false arrest or imprisonment. *Beauregard v. Wingard (1965) 237 Cal. App. 2d 760, 764-765, 47 Cal. Rptr. 279*

[c] Determination of Reasonable Cause

Existence of reasonable cause for arrest is question of law. *Wilson v. Los Angeles County (1971) 21 Cal. App. 3d 308, 316, 98 Cal. Rptr. 525 , disapproved on other grounds, Cervantez v. J. C. Penney Co. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975* ; *White v. Martin (1963) 215 Cal. App. 2d 641, 643, 30 Cal. Rptr. 367*

Probable cause is question of law for court where material evidence is without substantial conflict. *Cole v. Johnson (1961) 197 Cal. App. 2d 788, 793, 17 Cal. Rptr. 664*

Determination of probable cause is question of law for court; jury decides on conflicting evidence concerning existence of facts establishing probable cause. *Gibson v. J. C. Penney Co., Inc. (1958) 165 Cal. App. 2d 640, 644-645, 331 P.2d 1057*

Probable cause is matter of law for court to determine; conflict in evidence relating to probable cause is question for jury. *Roberson v. J. C. Penney Co. (1955) 136 Cal. App. 2d 1, 4, 288 P.2d 275*

Question of probable cause is one for court; jury is allowed to determine existence of disputed facts on which probable cause depends; court is required to determine whether facts amount to probable cause. *Aitken v. White (1949) 93 Cal. App. 2d 134, 141, 208 P.2d 788*

Reviewing court determines, as matter of law, on basis of evidence found below whether probable cause existed for arrest. Mackie v. Ambassador Hotel & Inv. Corp. (1932) 123 Cap App 215, 220, *11 P.2d 3*

[d] Evidence of Reasonable Cause

Warrantless search of suspect's home in absence of exigent circumstances does not immunize police officers from civil liabiilty under *Penal Code § 847(a)*. *George v. City of Long Beach (9th Cir. 1992) 973 F.2d 706*

Information furnished by victim of crime, as opposed to information furnished by untested informant or anonymous informer, is sufficient to justify arrest with probable cause. *Wilson v. Los Angeles County (1971) 21 Cal. App. 3d 308, 314-315, 98 Cal. Rptr. 525 , disapproved on other grounds, Cervantez v. J. C. Penney Co. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975*

Reliable information furnishing probable cause for arrest does not lose its reliability when it is transmitted through official channels to arresting officer. *Wilson v. Los Angeles County (1971) 21 Cal. App. 3d 308, 315, 98 Cal. Rptr. 525 , disapproved on other grounds, Cervantez v. J. C. Penney Co. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975*

Probable cause to arrest without warrant depends on facts and circumstances of case; existence of probable cause must be determined in accordance with circumstances at time of detention. *White v. Martin (1963) 215 Cal. App. 2d 641, 650-651, 30 Cal. Rptr. 367*

Private detective's report, and reputation and prior acts of plaintiff, are admissible on question of existence of probable cause to arrest plaintiff. *Aitken v. White (1949) 93 Cal. App. 2d 134, 145, 208 P.2d 788*

Probable cause to arrest existed because plaintiff held revolver on peace officers attempting to enter room in which plaintiff was trespasser. *Wilson v. Loustalot (1948) 85 Cal. App. 2d 316, 322, 193 P.2d 127*

Plea or verdict of guilty in subsequent criminal proceeding is admissible but not conclusive on issue of reasonable cause to arrest. *Collins v. Owens (1947) 77 Cal. App. 2d 713, 717-718, 176 P.2d 372*

Plea of guilty in subsequent criminal action against plaintiff in false imprisonment action is admissible but not conclusive on issue of justification for arrest where arrest is without warrant. *Collins v. Owens (1947) 77 Cal. App. 2d 713, 717, 176 P.2d 372*

[e] Reasonable Cause

Definition of probable cause to believe that person arrested has committed felony. *Wilson v. Los Angeles County (1971) 21 Cal. App. 3d 308, 314, 98 Cal. Rptr. 525 , disapproved on other grounds, Cervantez v. J. C. Penney Co. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975*

Standard for determination of existence of probable cause. *Wilson v. Los Angeles County (1971) 21 Cal. App. 3d 308, 315-316, 98 Cal. Rptr. 525 , disapproved on other grounds, Cervantez v. J. C. Penney Co. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975*

Test for probable cause is whether evidence would suggest strong suspicion, not whether it would support conviction. *Mercurius v. Rolon (1964) 231 Cal. App. 2d 359, 362, 41 Cal. Rptr. 789*

Probable cause to arrest is defense to case of false imprisonment for arrest without warrant. *White v. Martin (1963) 215 Cal. App. 2d 641, 643, 30 Cal. Rptr. 367*

Probable cause defined. *Cole v. Johnson (1961) 197 Cal. App. 2d 788, 793, 17 Cal. Rptr. 664*

Probable cause is determined on facts of each case. *Gorlack v. Ferrari (1960) 184 Cal. App. 2d 702, 709, 7 Cal. Rptr. 699*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsFalse ArrestGeneral OverviewTortsIntentional TortsFalse ImprisonmentElementsTortsIntentional TortsFalse ImprisonmentRemediesTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployeesTortsVicarious LiabilityEmployersGeneral Overview

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22-257 California Forms of Pleading and Practice--Annotated § 257.43

§ 257.43 Attorney General Opinions

Police officer is required to accept custody of person placed under citizen's arrest when requested to do so by person who made arrest; but officer may then release arrested person pursuant to *Penal Code § 849(b)(1). 73 Ops. Cal. Att'y Gen. 291 (1990)*

Sheriff is potentially liable for false imprisonment if he or she fails to exercise reasonable diligence to effect release of defendant whose discharge from custody has been ordered by court. *63 Ops. Cal. Att'y Gen. 706 (1980)*

Arrest warrant is not rendered invalid by mere passage of time so that officer serving warrant is immune from civil liability. *57 Ops. Cal. Att'y Gen. 542 (1974)*

Police officer is entitled to release from custody person arrested by citizen's arrest without violating Penal Code § 142.5252 Ops. Cal. Att'y Gen. 65 (1969)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 257.44 Law Reviews

Note, *New Class of Plaintiffs in False Imprisonment Actions, 64 Cal. L. Rev. 602 (1976)*

Note, *Merchants' Responses to Shoplifting: An Empirical Study, 28 Stan. L. Rev. 589 (1976)*

Comment, *Civil Procedure; Civil Arrest, 5 Pac. L.J. 268 (1973)*

Comment, *Tort Liability of a Peace Officer for Injuring a Bystander During Suppression of Civil Disturbance, 4 U.S.F. L. Rev. 452 (1970)*

Comment, *The Case Against Improper Motive and Civil Immunity of Police, 7 San Diego L. Rev. 77 (1970)*

Comment, *The Problem of Police Brutality, 10 Santa Clara Lawyer 168 (1969)*

Note, *Civil Liability for Illegal Arrests and Confinements in California, 19 Hastings L.J. 974 (1968)*

Enright, *California's Aggravated Kidnapping Statute--A Need for Revision, 4 San Diego L. Rev. 285 (1967)*

Comment, *Child v. Parent: Erosion of the Immunity Rule, 19 Hastings L.J. 201 (1967)*

Note, *The Privilege of Detention for Investigation: Collyer v. Kress Co. Revisited, 13 Hastings L.J. 156 (1961)*

Note, *Criminal Law: Slight Movements Within an Enclosure Constitute Kidnapping, 10 Hastings L.J. 323 (1959)*

Note, *Criminal Law: Citizen's Arrest in Assistance of Peace Officers: Defenses to Action for Unlawful Arrest and Imprisonment, 44 Cal. L. Rev. 595 (1956)*

Note, *Torts: False Imprisonment: Probable Cause: Instruction on Conflicting Facts, 3 U.C.L.A. L. Rev. 269 (1956)*

Note, *Torts: False Imprisonment: Survival of Actions Against Estate of Tortfeasor, 1 U.C.L.A. L. Rev. 229 (1954)*

Note, *Torts--False Imprisonment--Malicious Prosecution, 24 So. Cal. L. Rev. 130 (1950)*

Note, *Torts--False Imprisonment--Officers, 21 So. Cal. L. Rev. 431 (1948)*

Note, *Torts--False Imprisonment--Arrest Under Process--Arrest of Wrong Person, 18 So. Cal. L. Rev. 162 (1944)*

Note, *Torts: False Imprisonment: Right to Protect Property by Detention of Person Suspected of Theft, 25 Cal. L. Rev. 119 (1936)*

Note, *Torts--False Imprisonment--Probable Cause, 10 So. Cal. L. Rev. 103 (1936)*

Comment, *Tort: False Imprisonment: Liability of Justice under Colorable Jurisdiction, 3 Cal. L. Rev. 171 (1915)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 257.45 Text References

Personal Injury: Actions, Defenses, Damages, Vol. 3, *Assault and Battery*, §§ 1.04, 2.08

Personal Injury: Actions, Defenses, Damages, Vol. 13, *False Arrest and Imprisonment*, §§ 1-6

Personal Injury: Actions, Defenses, Damages, Vol. 14, *Federal Tort Claims Act*, § 1.02[4][b]

Personal Injury: Actions, Defenses, Damages, Vol. 17, *Husband and Wife*, § 5.01

Personal Injury: Actions, Defenses, Damages, Vol. 18, *Insane and Incompetent Persons*, § 1.03[3][b]

Personal Injury: Actions, Defenses, Damages, Vol. 24, *Public Officers and Employees*, § 1.07[3]

Witkin, California Procedure, vol. 3, *Actions*, §§ 511, 739; Vol. 5, *Pleading*, §§ 719-721 (4th ed. 1996-1997)

Witkin, Summary of California Law, vol. 5, *Torts*, § 426-427 et seq. (10th ed. 2005)

6 Cal. Jur. 3d, *Assault and Other Wilful Torts*, §§ 46-59, 70-74, 80, 91-95

Legal Topics:

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

§§ 257.46[Reserved]

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PART IV. PROCEDURAL CHECKLIST

22-257 California Forms of Pleading and Practice--Annotated § 257.60

§ 257.60 Plaintiff's Checklist

NOTE:
The following checklist is illustrative only of the basic points which counsel for a plaintiff in a false imprisonment action should cover.

[1] Facts to Be Ascertained

NOTE:
Not all of the following facts will be ascertainable from the client in the initial interview. Subsequent interviews may be required or it may be necessary to ascertain the facts from another person, including the potential defendant, through discovery procedures.

1. Facts relating to plaintiff:

a. Name, address, and telephone number of plaintiff.

b. Capacity of plaintiff, such as minor or adult.

c. Additional facts as desired relating to plaintiff's financial solvency such as employment status, prior residences, credit, bank, and personal references.

2. Facts relating to defendant(s):

a. Name and address of each potential defendant.

b. Capacity of each potential defendant such as corporation, unincorporated association, agent, employee, public entity, public employer, or peace officer.

c. Description of all potential defendants.

d. Relationship between defendants such as independent contractor of security services or store owner.

3. Facts relating to false imprisonment by private defendant(s):

a. The time, place, and surroundings in which the false imprisonment occurred.

b. The precise acts (pushing, locking door) or words (threats, implied threats, assertions of authority) used to restrain plaintiff.

c. Duration and place of imprisonment, and all acts of defendant(s) and plaintiff during imprisonment.

d. Presence of any witnesses, and description.

e. The existence of a confession made by plaintiff during the imprisonment.

f. Possible defenses or justifications such as conduct of plaintiff giving rise to reasonable cause to believe plaintiff was in the process of interferring with defendant's property or person or reasonable cause for citizen's arrest.

g. Whether police officers were called.

4. Facts relating to false imprisonment arising out of citizen's arrest:

a. Date, time, and place of false imprisonment (arrest).

b. The precise acts and words of defendant(s) used to restrain plaintiff.

c. Whether the arrest occurred at the insistence of or on the initiative of the private citizen, or on the instructions of police officers.

d. All words and acts of defendant(s) and plaintiff during imprisonment, and place and duration of imprisonment.

e. Presence of any witnesses, and description.

f. Possible defenses or justification for defendant(s) such as private citizen making citizen's arrest at insistence of police officers, existence of probable cause in proper circumstances, or citizen merely giving information to police leading to plaintiff's arrest.

g. Whether plaintiff was delivered to a police officer or taken before a magistrate by the arresting citizen [*Penal Code § 847*].

5. Facts relating to false imprisonment arising out of arrest by police officers without warrant:

a. Date, time, and place of false imprisonment (arrest).

b. The precise acts and words of defendant(s) used to restrain plaintiff.

c. All words and acts of defendant(s) and plaintiff during imprisonment, and place and duration of imprisonment.

d. Presence of any witnesses, and description.

e. Possible defenses or justification for defendant(s) such as officers merely taking custody of person pursuant to citizen's arrest [*Penal Code § 847*] or existence of reasonable cause for arrest.

f. Whether plaintiff was taken before a magistrate without unnecessary delay, was released promptly on posting of bail, and other facts relating to detention (see discussion in *§ 257.24*).

g. Facts negating existence of justification for arrest such as entrapment.

h. Citizen complainant as possible although not probable defendant.

6. Facts relating to false imprisonment arising out of arrest by police officers with warrant:

a. Date, time, and place of false imprisonment (arrest).

b. The precise acts, words, and procedures followed by defendant(s) in making the arrest.

c. All words and acts of defendant(s) and plaintiff during imprisonment, and place and duration of imprisonment.

d. Presence of any witnesses, and description.

e. Possible defenses or justification for defendant(s) such as serving warrant valid on its face without malice and in the reasonable belief that plaintiff was the person named in the warrant [*Civ. Code § 43.5*] or immunity of magistrate issuing warrant.

f. Facts tending to show warrant not valid on its face. Such facts will rarely amount to invalidity on face of warrant [*see Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 677-678, 123 Cal. Rptr. 525]* .

g. Facts tending to show that plaintiff attempted to show that plaintiff was not the person named in the warrant.

h. Other facts tending to show malice on the part of the officer.

i. Facts indicating negligent or knowing failure of court personnel to note that plaintiff had already served a sentence or that charges were dismissed, resulting in issuance of warrant.

7. Facts relating to false imprisonment arising out of wrongful detention following arrest:

a. Whether the initial arrest was wrongful.

b. Date, time, and place of initial arrest and confinement in jail.

c. Exact procedures used by defendant(s) in arresting, transporting, booking, and jailing plaintiff, and all words and conduct of plaintiff and defendant(s).

d. Presence of any witnesses, and description.

e. Time elapsed between taking of plaintiff into custody and taking before magistrate, and any facts possibly justifying delay.

f. Whether bail was posted and, if so, whether plaintiff was released promptly, and any circumstances possibly causing delay.

8. Facts relating to false imprisonment arising out of wrongful failure to release prisoner at expiration of jail term or dismissal of charges:

a. Place, dates, and conditions of imprisonment.

b. Date of expiration of jail term or of dismissal of charges.

c. Facts tending to show that sheriff or other jailer knew or reasonably should have known that charges had been dismissed or sentence had expired [*Sullivan v. County of LosAngeles (1974) 12 Cal. 3d 710, 718-719, 117 Cal. Rptr. 241, 527 P.2d 865]* .

d. Date on which plaintiff actually was released.

9. Facts relating to damages:

a. The relationship between the restraint by defendant(s) and plaintiff's damages.

b. The amount ascertainable to date, or before the complaint will be filed, of any damages from loss of income, loss of ability to earn a living, or harm to plaintiff from physical and mental suffering, medical expenses, and other items of damages.

c. Length of detention, including detention after arraignment, but not including time between release on bail and trial on a criminal complaint.

d. Facts mitigating damages such as fact that plaintiff was released without filing of a complaint and arrest was deemed a detention or subsequent plea or verdict of guilty.

e. Facts showing existence of oppression, fraud, or malice which would give rise to punitive damages [*Civ. Code § 3294*].

10. Procedures necessary where defendant is a governmental entity or employee:

a. Plaintiff must file a claim against the proper governmental entity according to the procedures prescribed by the Tort Claims Act [*see Gov. Code § 900 et seq.*] within six months of the accrual of the cause of action for false imprisonment [*Gov. Code § 911.2*] or apply in writing for leave to present the claim late [*see Gov. Code § 911.4(a)*]. For procedures and forms for use in presenting such claims, see Ch. 464, *Public Entities and*

Officers: California Tort Claims Act .

b. The complaint should allege the presentation and denial or other action on the claim [*see Gov. Code § 945.4*].

c. The applicable statutory limitation of time for filing the complaint may be affected by the fact that one or more defendants is a public entity. In order to hold the public entity liable, it will be necessary to comply with the special statutory limitation period [*see, e.g., Gov. Code § 945.6* and, for procedures and forms, *see* Ch. 464, *Public Entities and Officers: California Tort Claims Act*].

d. Generally, the filing of a claim against the public entity employer is necessary for the maintenance of a cause of action against a public employee [*see Gov. Code §§ 950.2, 950.6*].

NOTE:
Judicial relief is available in some cases for a plaintiff who has not timely filed a claim and who has been refused permission to file a late claim [*see Gov. Code § 946.6*].

[2] Documents to Be Obtained

NOTE:
Not all of the following documents will be obtainable from the client in the initial interview. Subsequent interviews may be required or inquiries may be mailed. Also, it may be necessary to obtain documents from persons other than the client.

1. False imprisonment by private persons:

a. Copies of any confession signed by plaintiff during confinement.

b. Company employment records and company records and reports of the incident.

c. Copies of any written instructions to plaintiff constituting threats of force resulting in confinement.

2. False imprisonment resulting from citizen's arrest:

a. Copies of any document relating to the arrest in police records.

b. Tapes and patrolman's records.

3. False imprisonment resulting from arrest by police without warrant:

a. Copies of police reports and documents relating to the arrest.

b. Tapes and patrolman's records.

4. False imprisonment resulting from arrest by police with warrant:

a. Copies of the warrant of arrest.

b. Copies of the affidavit supporting issuance of the warrant.

c. Police report on service of the warrant, detention, and other procedures followed.

5. False imprisonment resulting from wrongful detention following arrest:

a. Copies of police and jail records and tapes relating to the arrest, detention, booking, and release procedures.

b. Copies of the order admitting plaintiff to bail, the records of transmission of that order to the jailer and other documents related to bail.

c. Records relating to the taking of plaintiff before the magistrate.

6. False imprisonment arising out of wrongful failure to release plaintiff after dismissal of charges:

a. Official documents showing dismissal of charges.

b. Any documents showing notification of the jailer of the dismissal of charges.

c. Records of attempts by plaintiff to obtain release.

[3] Additional Counts and Causes of Action

1. Facts giving rise to a cause of action for false imprisonment might also give rise to one or more of the following causes of action which counsel will want to consider:

a. Assault and battery [for procedure and forms, *see* Ch. 58, *Assault and Battery*].

b. Malicious prosecution [for procedure and forms, *see* Ch. 359, *Malicious Prosecution and Abuse of Process*].

c. Intentional infliction of mental suffering and emotional distress [for procedure and forms, *see* Ch. 362, *Mental Suffering and Emotional Distress*].

d. Slander [for procedure and forms, *see* Ch. 340, *Libel and Slander ;* for points and authorities, *see* California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*].

e. Invasion of privacy [for procedures and forms, *see* Ch. 429, *Privacy* ; *see Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 659-660, 109 Cal. Rptr. 269]* .

f. Negligent entrustment (where defendant has employed security guards) [*see Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 663-664, 109 Cal. Rptr. 269]* .

2. Factors to be considered for all causes of action:

a. Financial solvency of possible defendant(s).

b. Difficulties, if any, involved in obtaining jurisdiction over the various defendant(s).

c. Difficulties, if any, in proving liability.

[4] Essential Allegations of Complaint

1. Acts of defendant showing restraint of plaintiff by force or threats of force, including the use of legal authority or purported legal authority [*People v. Zilbauer (1955) 44 Cal. 2d 43, 51, 279 P.2d 534* ; *Onick v. Long (1957) 154 Cal. App. 2d 381, 386, 316 P.2d 427]* .

2. Facts showing the unlawfulness of the restraint:

a. Where the complaint is for restraint by a private citizen without arrest, facts showing the lack of authority for the restraint (and possibly facts showing that there was no justification for the restraint to investigate an interference with defendant's property) [*see §§ 257.80 -257.83*].

b. Where the complaint is for arrest without a warrant, the fact of arrest without a warrant [*see Dragna v. White (1955) 45 Cal. 2d 469, 471, 289 P.2d 428]* .

c. Where the complaint is for arrest with a warrant, facts showing that the warrant was invalid on its face or that there was no reasonable belief that the person arrested was the person arrested in the warrant [*Civ. Code § 43.5*].

3. Resulting imprisonment and damages [*Dragna v. White (1955) 45 Cal. 2d 469, 471, 289 P.2d 428]* .

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Chapter 257 FALSE IMPRISONMENT
PART IV. PROCEDURAL CHECKLIST

22-257 California Forms of Pleading and Practice--Annotated § 257.61

§ 257.61 Defendant's Checklist

NOTE:
The following checklist is illustrative only of the basic points which counsel for a defendant in a false imprisonment action should cover.

[1] Facts to Be Ascertained

NOTE:
Not all of the following facts will be ascertainable from the client in the initial interview. Subsequent interviews may be required or it may be necessary to ascertain facts from others, including the plaintiff, by use of discovery proceedings.

1. Facts relating to defendant:

a. Name, address, and telephone number of defendant.

b. Capacity of defendant such as corporation, unincorporated association, agent, employee, public entity, public employer, peace officer, security guard, or licensed private detective.

c. Additional facts, as desired, relating to defendant's stability and financial solvency such as employment status, prior residences, credit, bank, and personal references.

2. Facts required for the answer:

NOTE:
Counsel should advise his or her client not to discuss the case with any third person, where additional causes of action for libel or slander may be involved.

a. Date, manner, and place of service of complaint and summons.

b. Allegations of complaint.

Ascertain which of the facts alleged in the complaint are true, which are false, and which ones defendant does not know the truth or falsity of.

c. Affirmative defenses.

NOTE:
Affirmative defenses can be raised by demurrer, as well as by answer, where they appear on the face of the complaint or from matters of which the court must or may take judicial notice [*Code Civ. Proc. §§ 430.10, 430.30*].

[2] Possible Defenses

1. That detention of plaintiff by defendant private citizen was justified as a reasonable detention in a reasonable manner for purposes of investigation of an interference with or theft of defendant's property being committed by plaintiff [*Collyer v. S.H. Kress & Co. (1936) 5 Cal. 2d 175, 180-181, 54 P.2d 20]* .

2. That a citizen's arrest was justified by the proper statutory grounds [*see Penal Code § 837*].

3. That a citizen's arrest was performed by defendant at the demand of a police officer [*see Peterson v. Robison (1954) 43 Cal. 2d 690, 697, 277 P.2d 19]* .

4. That defendant only gave information leading to the arrest of plaintiff to the police [*Hagberg v. Cal. Fed. Bank (2004) 32 Cal. 4th 350, 355, 373-375, 7 Cal. Rptr. 3d 803, 81 P.3d 244]* .

5. That a warrantless arrest by a peace officer was lawful [see *Penal Code §§ 836, 836.5, 847(b)(1)*].

6. That an arrest with a warrant was made pursuant to a warrant valid on its face, without malice, in the reasonable belief that the person arrested was the person named in the warrant [*Civ. Code § 43.5*].

7. That a delay in taking an arrested person before a magistrate was reasonable under the circumstances [*see Penal Code §§ 822, 825(a), 849(a)*; *Dragna v. White (1955) 45 Cal. 2d 469, 473, 289 P.2d 428]* .

8. Statute of limitations [*Code Civ. Proc. § 340(c)*].

9. Failure to file a claim with the defendant public entity [*see § 257.85*].

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[Reserved]

§§ 257.62[Reserved]

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Volume 22: Explosives thru Food-Chs. 256-268
Chapter 257 FALSE IMPRISONMENT
PART V. FORMS

22-257 California Forms of Pleading and Practice--Annotated § 257.80

§ 257.80 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Against Private Person Without Arrest--General Form

[1] FORM Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Against Private Person Without Arrest--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*], Defendant(s).	)	(False Imprisonment)
	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California.

2. [Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by their conduct.)]

3. [Defendants _____ (*names*) at all times herein mentioned were the agents and employees of their codefendants _____ (*names*) and in doing these things hereinafter alleged were acting within the course and scope of the agency and with the permission and consent of their codefendants.]

4. On or about _____ [*date*], defendant _____ [*allege facts constituting unprivileged confinement of plaintiff by force or threats for a stated period of time, e.g.*, seized plaintiff and forcibly, against plaintiff's will, and without his/her consent and over his/her protest, placed plaintiff in an automobile and caused plaintiff by force and threats of physical violence to remain in the automobile for a period of 30 minutes. During this time defendant attempted to extort a sum of money from plaintiff by the use of threats, coercion, and threatened criminal prosecution. Following this period of detention, defendant released plaintiff from the automobile without charging him/her with any crime or taking him/her before a magistrate.]

5. Immediately prior to the acts of defendant herein alleged, plaintiff had been peacefully standing on his/her own property, located at _____ [*address*], _____ [*city*], _____ County, California. Plaintiff did not steal, nor was he/she in the process of stealing, any property belonging to defendant or anyone else, nor had he/she committed any crime against defendant or anyone else, and defendant knew of plaintiff's innocence.

6. In making these threats of criminal prosecution and in imprisoning plaintiff, defendant acted with deliberate malice and for the purpose of extorting money from plaintiff.

7. As a proximate result of the acts of defendant(s) [, and each of them], plaintiff was injured in his/her health, strength, and activity, sustaining injury to his/her body and shock and injury to his/her nervous system and person, and among others, sustained the following physical injuries: _____ [*describe*], all of which injuries have caused plaintiff to suffer extreme and severe physical pain and mental anguish. These injuries will result in some permanent disability to plaintiff, namely _____ [*describe*], all to his/her general damage.

8. As a further proximate result of the acts of defendant(s) [, and each of them,] as herein alleged, plaintiff was required to and did employ physicians and surgeons for medical examination, treatment, and care of these injuries, and did incur medical and incidental expenses _____ [*e.g.*, for the services of physicians and surgeons, ambulance service, hospital services, X-rays (*and others as appropriate*)].

[As a proximate result of the acts of defendant(s)(, and each of them,) as herein alleged, plaintiff has incurred, and will incur, further medical and incidental expenses for the care and treatment of these injuries, the exact amount of which is unknown at the present time.]

9. At the time of the acts of defendant herein complained of, plaintiff was _____ [employed *or* employable] as a _____ [*occupation*]. As a further proximate result of the acts of defendant(s) [, and each of them,] as herein alleged, plaintiff has been, and will continue to be, prevented from attending to his/her occupation. The amount of earnings which will be lost to plaintiff is unknown at this time.

10. The acts of defendant(s)[, and each of them,] as herein alleged were willful, wanton, malicious, and oppressive, and justify the awarding of punitive damages.

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages according to proof;

2. For all medical and incidental expenses according to proof;

3. For all loss of earnings, past and future, according to proof;

4. For punitive damages;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form of complaint is for use in an action for false imprisonment of the plaintiff by a private individual or individuals acting without color of legal authority and making no arrest nor filing any criminal charges against plaintiff.

[3] Allegations

This complaint alleges the following:

- Acts of defendant showing restraint of plaintiff against his or her will by force or threats of force (Paragraph 4).

- Facts showing that defendant was without probable cause or good-faith belief that he or she had justification for restraining plaintiff (Paragraph 5) [*see Coyne v. Nelson (1951) 107 Cal. App. 2d 469, 475, 237 P.2d 45* (lack of probable cause or good faith for detention relevant to showing of malice for punitive damages)].

- Malice on the part of defendant (Paragraph 6) [*Civ. Code § 3294*].

[4] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought if they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[6] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[7] Venue

[a] Individuals

Where the defendant in a false imprisonment action is an individual, venue isgoverned by *Code Civ. Proc. § 395*. Therefore, except as otherwise provided by law and subject to the power of the court to transfer actions or proceedings as provided in the statutes, the county in which the defendants or some of them reside at the commencement of the action is the proper county for the trial of the action [*Code Civ. Proc. § 395*]. Because the statute further provides that if the action is for injury to the person, either the county where the injury occurs or the county where the defendants or some of them reside is the proper county, it might be thought that the action could be commenced in the county where the false imprisonment occurred even if the defendants do not reside there [*see Code Civ. Proc. § 395*]. However, "injury to person" as used in *Code Civ. Proc. § 395* does not include a wrong to the person such as false imprisonment. It is limited to physical injury or incapacity [*Monk v. Ehret (1923) 192 Cal. 186, 192-193, 219 P. 452* ; *Johnson v. Superior Court (1965) 232 Cal. App. 2d 212, 218, 42 Cal. Rptr. 645]* .

[b] Corporations

Where the defendant is a corporation, proper venue will exist in the county where the liability arises or in the county where the corporation has its principal place of business [*Code Civ. Proc. § 395.5*]. In false imprisonment actions, the liability arises at the time and place of the imprisonment for the purpose of determining venue [*Sea World, Inc. v. Superior Court (1970) 13 Cal. App. 3d 100, 104-105, 91 Cal. Rptr. 336]* .

[8] Copies

The following copies of the complaint should be prepared:

- Original for filing with the court;
- One copy for each defendant to be served with summons;
- One office file copy; and
- Other copies as desired.

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22-257 California Forms of Pleading and Practice--Annotated § 257.81

§ 257.81 Complaint [Code Civ. Proc. § 425.10] for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Against Private Person Without Arrest--Detention of Employee for Questioning by Employer

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Against Private Person Without Arrest--Detention of Employee for Questioning by Employer

[*Caption. See § 257.80[1].*]

Plaintiff alleges:

[1. *If a corporation or partnership is sued as a defendant, allege capacity and principal place of business* (*or other place of venue*), *such as the following:*

(*EITHER*)

Defendant _____ (*name*) is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of _____, has its principal place of business in _____ County, California, and is, and at all times herein mentioned was, engaged in the business of _____ (*describe*).

(*OR*)

Defendants _____ (*names*) are, and at all times herein mentioned were, partners engaged in the business of _____ (*describe*) under the common name of _____ (*name of partnership*), having their principal place of business at _____ (*address*), _____

County, California, and are sued herein individually and by such common name.]

[2. *Fictitious name allegation, if appropriate.*]

[*See § 257.80[1], Paragraph 2.*]

3. At all times herein mentioned, defendant _____ [*name*] was the agent and employee of defendant _____ [*name*], and in doing the things hereinafter alleged was acting within the course and scope of such agency. Plaintiff is informed and believes and thereon alleges that defendant _____ [*name*] _____ [ratified *or* authorized] the acts of defendant _____ [*name*] by _____ [*specify acts*].

4. Defendant _____ [*name*] is, and at all times herein mentioned was, the _____ [*specify position*] of the _____ [corporation *or* partnership *or other entity*].

5. On _____ [*date*], and _____ [*period of time*] prior thereto, plaintiff was employed as a _____ [*specify position*] by defendant _____ [*name of entity*].

6. _____ [*Allege relevant facts leading up to, during, and after detention of employee by employer, e.g.*, On _____ [*date*], at about _____[*time*], plaintiff was induced to go to the private office of defendant _____ (*name and position*) under the pretext that he /she desired to see him/her on business. Defendants then and there charged plaintiff with having committed _____ (*specifyoffense*) by _____ (*describe*) while _____ (on the job *or specify other circumstances*) and threatened to have plaintiff arrested and publicly charged with the crime unless he/she admitted his/her guilt and signed a written statement to that effect. Despite such threats, plaintiff protested his/her innocence and refused to admit he/she was guilty of any offense; but defendants intentionally caused him/her to be detained against his/her will in the above-described office and caused his/her detention to continue for _____ (*number*) hours, during which time he/she was not permitted to see or call his/her family or friends. Defendants did not give plaintiff food or drink during the time they detained him/her, and plaintiff became unconscious as a result. Thereafter he/she signed a confession of alleged _____ (*specify offense*) in order to obtain his/her release from the detention by defendants.]

7. Defendants, and each of them, maliciously and oppressively conspired together to accomplish the acts herein alleged, and maliciously and oppressively deprived plaintiff of his/her liberty for a period of _____ [*number*] hours, accused plaintiff of having committed the crime of _____ [*specify*] and threatened plaintiff with the disgrace of arrest. Defendants, and each of them, knew that plaintiff had committed no crime whatever and the conspiracy and all the acts done thereunder were malicious and oppressive.

8. As a proximate result of the acts of defendants, and each of them, plaintiff has suffered great damage to his/her reputation and embarrassment in his/her community, all to his/her damage.

[9. *General damages. See § 257.80[1], Paragraph 7.*]

[10. *Medical and incidental expenses. See § 257.80[1], Paragraph 8.*]

[11. *Loss of earnings. See § 257.80[1], Paragraph 9.*]

[12. *Punitive damages. See § 257.80[1], Paragraph 10.*]

[*Prayer. See § 257.80[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 257.80[1].*]

[2] Use of Form

This form of complaint is for use in an action by an employee against his or her employer and fellow employees participating in his or her detention for false imprisonment resulting from a detention for investigation of an alleged offense committed in connection with the employment.

[3] Allegations

This complaint alleges that: (1) the acts of the detaining employee defendants were either ratified or authorized by the defendant employer (Paragraph 3) [*Hanna v. Raphael Weill & Co. (1949) 90 Cal. App. 2d 461, 463, 203 P.2d 564* ; *McInerney v. United R.R. (1920) 50 Cal. App. 538, 549, 195 P. 958]* ; (2) the defendants confined plaintiff without proper justification, for an unreasonable period of time, and in an unreasonable manner (Paragraphs 6 and 7); (3) the defendants conspired to detain plaintiff (Paragraph 7) [*Peterson v. Cruickshank (1956) 144 Cal. App. 2d 148, 163, 168, 300 P.2d 915* ; *Oppenheimer v. Los Angeles (1951) 104 Cal. App. 2d 551, 553, 232 P.2d 30]* ; (4) the defendant's acts were malicious and oppressive (Paragraph 7) [*Civ. Code § 3294*]; and (5) the plaintiff suffered damages to his or her reputation in the community (Paragraph 8) [*Gill v. Epstein (1965) 62 Cal. 2d 611, 617, 44 Cal. Rptr. 45, 401 P.2d 397* (disapproved on other grounds in Manta Management Corp. v. City of San Bernardino (2008) 43 Cal. 4th 400, 412 n.7, 75 Cal. Rptr. 3d 353, 181 P.3d 159); *see* *Asgari v. City of Los Angeles (1997) 15 Cal. 4th 744, 758 n.10, 63 Cal. Rptr. 2d 842, 937 P.2d 273* (declining to follow decision in *Gill v. Epstein* to extent it holds that recovery of damages for post-arraignment confinement is permitted)].

[4] Cross References

See also *§ 257.80*.

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Volume 22: Explosives thru Food-Chs. 256-268
Chapter 257 FALSE IMPRISONMENT
PART V. FORMS

22-257 California Forms of Pleading and Practice--Annotated § 257.82

§ 257.82 Complaint [Code Civ. Proc. § 425.10] for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Against Private Person Without Arrest--By Store Customer Accused of Shoplifting Against Store, Store Owner or Manager, Guard Agency, Guard Agency Owner or Manager, and Individual Guard

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Against Private Person Without Arrest--By Store Customer Accused of Shoplifting Against Store, Store Owner or Manager, Guard Agency, Guard Agency Owner or Manager, and Individual Guard

[*Caption. See § 257.80[1].*]

Plaintiff alleges:

FIRST COUNT

(False Imprisonment)

[1. *Capacity and principal place of business (or other place of venue) of defendant corporation or partnership. See § 257.81[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 257.80[1], Paragraph 2.*]

3. Defendant _____ [*name of owner or manager of store*] is, and at all times herein mentioned was, the _____ [*specify position*] of the _____ [*name of partnership, corporation, or other entity*] is and at all times herein mentioned was, the _____ [*specify position*] of the _____ [*name of guard agency or detective agency*].

Defendant _____ [*name of owner or manager of guard or detective agency*].

Defendant _____ [*name of agency*] is, and at all times herein mentioned was, employed by defendant _____ [*name of store*] to protect the premises and the property therein.

4. At all times herein mentioned, defendants _____ [*name of security guard or detective*] and _____ [*name of agency*] were the agents and employees of defendant _____ [*name of store*] and in doing the things hereinafter alleged were acting within the scope and course of such agency. Plaintiff is informed and believes and thereon alleges that each and every one of the wrongful acts of defendant _____ [*name of security guard or detective*] complained of herein was done under the instructions and approval, express or implied, of _____ [*name(s) and title(s) of owner or manager of store*], defendants herein.

5. _____ [*Allege occurrences prior to, during, and after detention of customer plaintiff by guard or detective, e.g.,* On _____ (*date*), at or about _____ (*time*), and within defendant _____'s (*name*) retail store, while plaintiff was peaceably and in a law-abiding manner shopping and walking in the store, defendant _____ (*name of guard*) seized plaintiff, accused him/her of theft of certain property belonging to defendant _____ (*name of store*), and detained and imprisoned plaintiff by threats of force and vio lence. Defendants, and each of them, accused plaintiff publicly of having stolen certain items from defendants, and plaintiff denied having stolen any items and demanded to be released. Defendants, and each of them, continued to detain plaintiff and forced him/her to move about in the store under their supervision and control and further forced and required plaintiff to remove his/her clothing in front of them, and thereafter continued to imprison and confine plaintiff for a period of _____ (*number*) hours, during which time defendants, and each of them, assaulted and threatened plaintiff.]

6. _____ [*Allege facts showing lack of any reasonable belief on the part of defendants in the guilt of plaintiff, e.g.,* The charge of theft was wholly false and plaintiff did not at any time commit theft or any crime or offense and was wholly innocent of any and all charges made against him/her by defendants, and each of them, and had not committed any act which would give defendants any reasonable cause whatsoever to believe that plaintiff was guilty of any crime or wrongdoing. In making the false charges herein alleged, and confining, detaining, and imprisoning plaintiff as herein alleged, defendants, and each of them, acted with deliberate malice and oppression.]

[7. *Damage to reputation. See § 257.81[1], Paragraph 8.*]

[8. *General damages. See § 257.80[1], Paragraph 7.*]

[9, *Medical and incidental expenses. See § 257.80[1], Paragraph 8.*]

[10. *Loss of earnings. See § 257.80[1], Paragraph 9.*]

[11. *Punitive damages. See § 257.80[1], Paragraph 10.*]

SECOND COUNT

(Negligent Entrustment)

1. Plaintiff refers to and incorporates, as though fully set forth herein, Paragraphs 1-4, inclusive, and Paragraphs 7-11,

inclusive, of the First Count.

2. Defendant _____ [*name of store*] negligently hired and entrusted defendant _____ [*name of guard or detective agency*] to protect its property and premises and to investigate possible harm to its property or premises and to perform other related functions.

THIRD COUNT

(Negligent Entrustment)

1. Plaintiff refers to and incorporates, as though fully set forth herein, Paragraphs 1-4, inclusive, and Paragraphs 7-11, inclusive, of the First Count.

2. Defendant _____ [*name of guard or detective agency*] negligently hired and entrusted defendant _____ [*name of guard or detective*] withthe duties of acting as _____ [*specify*]. _____ [*Allege facts of negligence, if known, e.g.*, Defendant _____ (*name of guard or detective*) was previously convicted of assault with a deadly weapon and was not licensed as a _____ (guard *or* detective) as required by law.]

[*Prayer. See § 257.80[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name name*]

[*Verification, if desired. See § 257.80[1].*]

[2] Use of Form

This form of complaint is for use in an action for false imprisonment and negligent hiring against a retail store, the store owner or manager, a guard or detective agency, the agency owner or manager, and the individual guard or detective, by a customer wrongfully accused of shoplifting and detained in the store.

[3] Allegations

This complaint alleges that: (1) each and every act of defendant guard or detective was expressly or impliedly directed, instructed, and approved by the retail store (Paragraph 4, First Count) [*Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 660 109 Cal. Rptr. 269]* ; (2) plaintiff was detained by the guard or detective and accused of shoplifting and searched, without reasonable cause or belief in guilt (Paragraphs 5, 6, First Count); (3) the defendants' acts were malicious and oppressive (Paragraph 6, First Count) [*Civ. Code § 3294*]; (4) the store was negligent in hiring the guard or detective agency (Paragraph 2, Second Count) [*Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 663-664, 109 Cal. Rptr. 269]* ; and (5) defendant agency was negligent in hiring the individual guard or detective defendant (Paragraph 2, Third Count).

[4] Cross References

See also *§§ 257.80* and *257.81*.

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Chapter 257 FALSE IMPRISONMENT
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22-257 California Forms of Pleading and Practice--Annotated § 257.83

§ 257.83 Complaint [Code Civ. Proc. § 425.10] for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Against Private Person Without Arrest--Racetrack Spectator Detained and Ejected by Track Guards

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Against Private Person Without Arrest--Racetrack Spectator Detained and Ejected by Track Guards

[*Caption. See § 257.80[1].*]

Plaintiff alleges:

[1. *Capacity and principal place of business or residence of defendants. See §§ 257.80[1], 257.81[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 257.80[1], Paragraph 2.*]

3. At all times herein mentioned, defendant _____ [*name of track guard*] was the agent and employee of defendant _____ [*name of track*] and in doing the things hereinafter alleged was acting within the scope and course of said agency. Plaintiff is informed and believes and thereon alleges that defendant _____ [*name of track*] _____ [ratified *or* authorized] the acts of defendant _____ [*name of track guard*] by _____ [*specify acts*].

4. Pursuant to the invitation to the public to attend the horse racing being conducted by defendant _____ [*name of track*] at the aforementioned track, plaintiff purchased an admission ticket and on or about _____ [*date*], was admitted to the premises wherein the races were being run and was admitted to the track as a patron thereof.

5. On or about this date, at or about _____ [*time*], at the aforementioned racetrack, defendants, and each of them, through their paid employees and agents _____ [*names*], maliciously seized and took

plaintiff without a warrant of arrest or any process of any kind, and against his/her will and over his/her protest, to the office located on the premises of the track, and there maliciously restrained and confined plaintiff for a period of _____ [*number*] hours against his/her will and over his/her protest, after which time plaintiff was released without the making of any criminal charges.

[6. *Damage to reputation. See § 257.81[1], Paragraph 8.*]

[7. *General damages. See § 257.80[1], Paragraph 7.*]

[8. *Medical and incidental expenses. See § 257.80[1], Paragraph 8.*]

[9. *Loss of earnings. See § 257.80[1], Paragraph 9.*]

[10. *Punitive damages. See § 257.80[1], Paragraph 10.*]

[*Prayer. See § 257.80[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name name*]

[*Verification, if desired. See see § 257.80.*]

[2] Use of Form

This form of complaint is for use in an action for false imprisonment against a racetrack and its security guard.

[3] Allegations

This complaint alleges (1) restraint and confinement of plaintiff by track guards without a warrant or process (Paragraph 5) and (2) that the restraint was malicious (Paragraph 5).

[4] Cross References.

See also *§§ 257.80 -257.82*

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22-257 California Forms of Pleading and Practice--Annotated § 257.84

§ 257.84 Complaint [Code Civ. Proc. § 425.10] for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Citizen's Arrest

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Citizen's Arrest

[*Caption. See § 257.80[1].*]

Plaintiff alleges:

[1. *Capacity and residence of defendant. See § 257.80[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 257.80[1], Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 257.80[1], Paragraph 3.*]

4. On or about _____ [*date*], at approximately _____ [*time*], at _____ [*address or other location of arrest*] in _____ [*city*], _____ County, California, defendant seized and arrested plaintiff and detained plaintiff and restrained him/her against his/her will and over his/her protest, without any warrant of arrest or any process of any kind and without any justification or cause to believe that plaintiff had committed any crime.

5. After defendant had arrested plaintiff as herein alleged, defendant called the police of the City of _____, and caused plaintiff to be taken into custody and compelled to enter the police car operated by an officer of the police of such city and to be taken to jail and imprisoned against his/her will for a period of _____ [*number*] hours.

6. On _____ [*date*], defendant personally swore to and caused to be filed in the Superior Court of the County of _____, State of California, a criminal complaint, attached as Exhibit A and made a part

hereof, against plaintiff, charging plaintiff with a violation of Section _____ of the Penal Code. The complaint, as sworn to and filed by the defendant, was wholly false. In fact, plaintiff had committed no misdemeanor and no misdemeanor had actually been committed at all.

7. Defendant, in causing the arrest and imprisonment of plaintiff as herein alleged, acted with deliberate malice and oppression and without probable cause.

8. As a proximate result of the acts of defendant herein alleged, a plaintiff was compelled to secure the services of an attorney at law to appear for arraignment and trial in the City of _____, and by virtue thereof, plaintiff is indebted and liable for attorney's fees [in the sum of $_____].

[9. *Damage to reputation. See § 257.81[1], Paragraph 8.*]

[10. *General damages. See § 257.80[1], Paragraph 7.*]

[11. *Medical and incidental expenses. See § 257.80[1], Paragraph 8.*]

[12. *Loss of earnings. See § 257.80[1], Paragraph 9.*]

[13. *Punitive damages. See § 257.80[1], Paragraph 10.*]

[*Prayer. See § 257.80[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name name*]

[*Verification, if desired. See § 257.80[1].*]

[2] Use of Form

This form of complaint is for use in an action for false imprisonment arising out of a citizen's arrest where a misdemeanor had not in fact been committed by plaintiff.

[3] Allegations

This complaint alleges: (1) that defendant private citizen arrested and detained plaintiff without a warrant and without justification (Paragraph 4); (2) that as a result plaintiff was taken into custody by the police and detained in jail (Paragraph 5); (3) that defendant falsely charged plaintiff with a misdemeanor (Paragraph 6); and (4) that defendant was motivated by malice and oppression and had no probable cause to believe plaintiff guilty (Paragraph 7).

[4] Cross References

See also *§ 257.91*.

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22-257 California Forms of Pleading and Practice--Annotated § 257.85

§ 257.85 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Arrest by Peace Officer Without a Warrant [Penal Code § 836]

[1] FORM Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Arrest by Peace Officer Without a Warrant [Penal Code § 836]

[*Caption. See § 257.80[1].*]

Plaintiff alleges:

1. Defendant _____ [*name of public entity*] is, and at all times herein mentioned was, a _____ [*type of public entity*] and political subdivision of the State of California, duly organized and existing under the laws of the State of California.

2. Defendant _____ [*name*] is, and at all times herein mentioned was, employed by defendant _____ [*name of public entity*] as a _____ [*specify, e.g.*, sheriff's deputy *or* police officer], and in doing the things hereinafter alleged was acting within the course and scope of his/her employment.

3. On or about _____ [*date*], plaintiff presented a claim in the amount of $_____ to defendant _____ [*name of public entity*], which is the amount of the compensatory damages sought in this action. A copy of this claim is attached as Exhibit A and made a part hereof. On or about _____ [*date*], defendant _____ [*name of public entity*] _____ [rejected plaintiff's claim in its entirety *or* allowed plaintiff's claim in the amount of $_____ and rejected it as to the remainder].

4. _____ [*Allege facts of arrest without warrant, e.g.*, On the night of _____ (*date*), plaintiff was seized and arrested while sleeping in his/her home at _____ (*address*) in the City of _____, by defendant _____ (*name*), maliciously and without warrant or order of commitment or any other legal authority of any kind, when plaintiff had not committed any crime or public offense. Defendant accused plaintiff of committing the offense of _____ (*specify*), but in fact the offense had

not occurred, nor did defendant have probable cause to believe that it had occurred or that plaintiff had committed it.].

5. Defendant _____ [*name*] delivered plaintiff to the county jail at _____ [*city*], _____ County, California, where plaintiff was imprisoned _____ [for _____ (*number*) hours *or* until _____ (*date*)] when plaintiff secured his/her release by _____ [*describe*].

6. As a proximate result of the acts of defendants herein alleged, plaintiff was compelled to secure his/her release by _____ [*specify, e.g.*, bail bond], for which plaintiff was required to expend money to his/her damage [in the sum of $_____].

[7. *Attorney's fees at arraignment and trial. See § 257.84[1], Paragraph 8.*]

[8. *General damages. See § 257.80[1], Paragraph 7.*]

[9. *Medical and incidental expenses. See § 257.80[1], Paragraph 8.*]

[10. *Loss of earnings. See § 257.80[1], Paragraph 9.*]

11. The acts of defendants _____ [*name(s) of public employee defendant(s)*], as herein alleged, were willfull, wanton, malicious, and oppressive, and justify the awarding of punitive damages.

[*Prayer. See § 257.80.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 257.80[1].*]

[2] Use of Form

This form of complaint is for use in an action for false imprisonment resulting from an unlawful arrest without a warrant by a peace officer.

[3] Allegations

The complaint alleges the following:

- A claim was presented to the public entity employing the arresting officer and that the claim was rejected entirely or in part (Paragraph 3).

- The plaintiff was arrested without a warrant or other legal process (such as an order of commitment) (Paragraph 4).

- The arrest was without probable cause to believe that plaintiff had committed a crime (Paragraph 4) [*see Penal Code § 836(a)*; *Dragna v. White (1955) 45 Cal. 2d 469, 471, 289 P.2d 428]* .

- The plaintiff was detained or imprisoned (Paragraph 5) [*Dragna v. White (1955) 45 Cal. 2d 469, 471, 289 P.2d 428]* .

- The plaintiff suffered special damages in the form of payment to secure his or her release from jail, e.g., premium on bail bond or attorney's fees for writ of habeas corpus (Paragraph 6).

- The plaintiff suffered special damages in the form of attorney's fees for arraignment and trial (Paragraph 7).

[4] Probable Cause for Arrest

A cause of action for false imprisonment is stated where it is alleged that there was an arrest without process, followed by imprisonment and damages. On proof of those facts, the burden is on defendant to prove justification for the arrest. Considerations of both a practical and policy nature underlie this rule. The existence of justification is a matter which ordinarily lies peculiarly within the knowledge of defendant, and plaintiff would encounter almost insurmountable practical problems in attempting to prove the negative proposition of the nonexistence of any justification. This rule also serves to assure that official intermeddling is justified, as it is a serious matter to accuse someone of committing a crime and to arrest him or her without the protection of the warrant process [*Cervantez v. J. C. Penney Co. (1979) 24 Cal. 3d 579, 592, 156 Cal. Rptr. 198, 595 P.2d 975]* .

[5] Cross References

See also *§§ 257.80* and *257.84*.

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22-257 California Forms of Pleading and Practice--Annotated § 257.86

§ 257.86 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Arrest by Peace Officer Serving Warrant

[1] FORM Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Arrest by Peace Officer Serving Warrant

[*Caption. See § 257.80[1].*]

Plaintiff alleges:

[1. *Capacity of defendant public entity. See § 257.85[1], Paragraph 1.*]

[2. *Employment of defendant officer and employee. See § 257.85[1], Paragraph 2.*]

[3. *Presentation and rejection of claim. See § 257.85[1], Paragraph 3.*]

4. On or about _____ [*date*], at or about _____ [*time*], defendant _____ [*name of officer serving warrant or process*] came to the home of plaintiff at _____ [*address*] in _____ [*city*], _____ County, California, and served on plaintiff a warrant for his/her arrest, which was invalid on its face as would clearly appear to an ordinarily intelligent layman, because _____ [*state facts showing clear invalidity appearing on face of warrant, e.g.*, the warrant served by defendant _____ (*name of officer*) was not signed, nor was any signature stamp affixed, by any magistrate, judge, justice, or any other person, nor was the offense for which plaintiff was to be arrested specified in or on this warrant.] The acts of defendant _____ [*name of officer*] herein complained of were done with deliberate malice and oppression towards plaintiff.

[5. *Detention and confinement of plaintiff. See § 257.85[1], Paragraph 5.*]

[6. *Damages from costs of employing counsel. See § 257.84[1], Paragraph 8.*]

[7. *Damages from costs of obtaining release from custody. See § 257.85[1], Paragraph 6.*]

[8. *General damages. See § 257.80[1], Paragraph 7.*]

[9. *Medical and incidental expenses. See § 257.80[1], Paragraph 8.*]

[10. *Loss of earnings. See § 257.80[1], Paragraph 9.*]

[11. *Punitive damages. See § 257.85[1], Paragraph 11.*]

[*Prayer. See § 257.80[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 257.80[1].*]

[2] Use of Form

This form of complaint is for use in an action for false imprisonment (arrest) where the arrest was pursuant to a warrant invalid on its face.

[3] Allegations

The complaint alleges arrest by a police officer pursuant to a warrant invalid on its face (Paragraph 4). When an arrest is made pursuant to a warrant, a complaint for false arrest must allege facts showing that the warrant was invalid on its face [*Muller v. Reagh (1963) 215 Cal. App. 2d 831, 837, 30 Cal. Rptr. 633]* .

[4] Cross References

See also *§§ 257.80* and *257.85*.

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22-257 California Forms of Pleading and Practice--Annotated § 257.87

§ 257.87 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Arrest Followed by Unreasonable Delay in Taking Plaintiff Before Magistrate

[1] FORM Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Arrest Followed by Unreasonable Delay in Taking Plaintiff Before Magistrate

[*Caption. See § 257.80[1].*]

Plaintiff alleges:

[1. *Capacity of defendant public entity. See § 257.85[1], Paragraph 1.*]

[2. *Employment of defendant(s) officer(s) and employee(s). See § 257.85[1], Paragraph 2.*]

[3. *Presentation and rejection of claim. See § 257.85[1], Paragraph 3.*]

[4. *Fictitious name allegation, if appropriate. See § 257.80[1], Paragraph 2.*]

5. On or about _____ [*date*], at or about _____ [*time*], at _____ [*address*], _____ [*city*], _____ County, California defendant(s) _____ [*name(s) of arresting officer(s)*] arrested plaintiff _____ [with *or* without] a warrant and transported plaintiff in a patrol car of _____ [*specify, e.g.*, the police department] of the _____ [*specify public entity*] to the _____ [city *or* county *or specify other jurisdiction*] jail, where plaintiff was forcibly and against his/her will detained in a cell from _____ [*time*] on _____ [*date*], to _____ [*time*] on _____ [*date*], by defendant(s) _____ [*name(s) of chief of police, sheriff, or any other(s) in charge of the jail, and their positions*].

6. _____ [*Allege facts showing unreasonable delay, e.g.*, During the period of his/her confinement in

the _____ (city *or* county *or specify other jurisdiction*) jail as alleged herein, plaintiff demanded to be taken before a magistrate and to have a complaint stating the charges against him/her put before the magistrate, and plaintiff demanded to be visited by his/her attorney, but the demands of plaintiff herein alleged were denied by defendant(s) _____ (*name(s) of officer(s)*), until _____ (*date*), a period of _____ (*number*) _____ (days *or* hours) from the beginning of the confinement herein alleged. Defendant was taken before a magistrate for the first time on _____ (*date*), at _____ [*time*]].

7. The acts of defendant(s) _____ [*name(s) of public employee defendant(s)*] alleged herein were done with malice and oppression towards plaintiff.

[8. *General damages. See § 257.80[1], Paragraph 7.*]

[9. *Medical and incidental expenses. See § 257.80[1], Paragraph 8.*]

[10. *Loss of earnings. See § 257.80[1], Paragraph 9.*]

[11. *Punitive damages. See § 257.85[1], Paragraph 11.*]

[*Prayer. See § 257.80[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 257.80[1].*]

[2] Use of Form

This form of complaint is for use in an action for false imprisonment based on an unreasonable delay in taking a prisoner before a magistrate.

[3] Allegations

This complaint alleges the following [*Civ. Code § 3294*]:

- The facts of the arrest and detention of plaintiff in jail (Paragraph 5).

- The period of delay between the arrest of plaintiff and the time he or she was taken before a magistrate and that plaintiff demanded to be taken before the magistrate (Paragraph 6).

- That the defendants' failure to take plaintiff before a magistrate was malicious and oppressive (Paragraph 7).

[4] Cross References

See also *§§ 257.80*, *257.85*, *257.86*, *257.88* and *257.96*.

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22-257 California Forms of Pleading and Practice--Annotated § 257.88

§ 257.88 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Failure to Release Plaintiff on Bail

[1] FORM Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for False Imprisonment--Failure to Release Plaintiff on Bail

[*Caption. See § 257.80[1].*]

Plaintiff alleges:

[1. *Capacity of defendant public entity. See § 257.85[1], Paragraph 1.*]

[2. *Employment of defendant officer(s) and employee(s). See § 257.85[1], Paragraph 2.*]

[3. *Presentation and rejection of claim. See § 257.85[1], Paragraph 3.*]

[4. *Fictitious name allegation, if appropriate. See § 257.80[1], Paragraph 2.*]

5. _____ [*Allege facts of arrest and imprisonment of plaintiff by defendant(s), e.g.,* On or about _____ (*date*), at or about _____ (*time*), plaintiff was arrested _____ (pursuant to a warrant of arrest *or* without a warrant) at _____ (*address*), _____ (*city*),_____ County, California and taken by defendant(s) _____ (*name(s) of arresting officer(s)*) to the _____ (city *or* county *or specify other jurisdiction*) jail, where he/she was forcibly and against his/her will detained in a cell by defendant(s) _____ (*name(s) of jail officer(s) and those in charge of the jail*)].

6. _____ [*Allege compliance with procedures for release on bail, e.g.,* At or about _____ (*time*) on _____ (*date*), _____ (*name*)(, the plaintiff's _____ [*specify relationship*],) posted bail for the release of plaintiff from custody pursuant to the order

of _____ (*name of magistrate or judge making order for admission to bail*) admitting plaintiff to bail, which order is attached as Exhibit A and made a part hereof].

By the order of _____ [*name and position of magistrate or other official accepting bail*], which order is attached as Exhibit B and made a part hereof, the release of plaintiff from custody was ordered. Plaintiff is informed and believes and thereon alleges that the _____ [certificate *or other necessary document*] ordering the release of plaintiff on bail was delivered to the _____ [*name of official in charge of jail*] at or about _____ [*time*] on _____ [*date*], at which time defendant _____ [*name of jailer*] knew, or should reasonably have known, that plaintiff was entitled to be released on bail. Plaintiff was informed neither of his/her entitlement to be released on bail nor that bail had been posted, until _____ [*date*], at or about _____ [*time*], when he/she was released, a period of _____ [*number*] hours after his/her entitlement to release.

7. Defendants were under a mandatory duty prescribed by Section _____ [*specify*] of the Penal Code to release plaintiff from custody after the completion of procedures for release as herein alleged. The failure of defendants to release plaintiff from custody was the type of injury which Section _____ [*specify*] of the Penal Code was designed to prevent. As a proximate result of the actions of defendants as herein alleged, plaintiff suffered the kind of injury which the above-alleged section of the Penal Code was designed to prevent.

[8. *Allegation of malice and oppression. See § 257.87[1], Paragraph 7.*]

[9. *General damages. See § 257.80[1], Paragraph 7.*]

[10. *Medical and incidental expenses. See § 257.80[1], Paragraph 8.*]

[11. *Loss of earnings. See § 257.80[1], Paragraph 9.*]

[12. *Punitive damages. See § 257.85[1], Paragraph 11.*]

[*Prayer. See § 257.80[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 257.80[1].*]

[2] Use of Form

This form of complaint is for use in an action for false imprisonment against those employed by and responsible for the jail where plaintiff is confined and their employing public entity, arising out of failure to release plaintiff once bail has been posted and other necessary steps for release completed.

[3] Cross References

See also *§§ 257.80*, *257.85 -257.87*.

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Chapter 257 FALSE IMPRISONMENT
PART V. FORMS

22-257 California Forms of Pleading and Practice--Annotated § 257.89

§ 257.89 Allegation--False Imprisonment--Arrest Pursuant to Warrant With No Reasonable Belief That Person Arrested Was Person Named in Warrant [Civ. Code § 43.55]

[1] FORM Allegation--False Imprisonment--Arrest Pursuant to Warrant With No Reasonable Belief That Person Arrested Was Person Named in Warrant [Civ. Code § 43.55]

On or about _____ [*date*], at or about _____ [*time*], defendant served on plaintiff a warrant of arrest, a copy of which is attached to this complaint as Exhibit A and made a part hereof, and took plaintiff into custody pursuant to the purported authority of the attached warrant. In so acting, defendant _____ [*name of arresting officer*] acted without a reasonable belief that the plaintiff was the person named in the attached warrant, in that the warrant names _____ [*name of person on warrant*], whereas the true, correct, and only name by which plaintiff is, or has ever been, known is _____ [*state*]. Plaintiff, at the time of the service of the warrant and his/her arrest, offered to show to defendant _____ [*name of officer*] various pieces of valid identification showing the true name of plaintiff, which would have shown that plaintiff was not the person named in the warrant of arrest attached hereto, but defendant refused all attempts of plaintiff to identify himself/herself.

[2] Use of Form

This form of allegation is for use in an action for false imprisonment (arrest) based on arrest pursuant to a warrant valid on its face but which names a person other than the person arrested. This allegation could be substituted for Paragraph 4 in § 257.86[1].

[3] Cross References

See also *§ 257.86*.

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22-257 California Forms of Pleading and Practice--Annotated § 257.90

§ 257.90 Allegation--False Imprisonment--Arrest Pursuant to Maliciously Obtained Warrant [Civ. Code § 43.55]

[1] FORM Allegation--False Imprisonment--Arrest Pursuant to Maliciously Obtained Warrant [Civ. Code § 43.55]

On or about _____ [*date*], at or about _____ [*time*], defendant served on plaintiff a warrant of arrest, a copy of which is attached to this complaint as Exhibit A and made a part hereof, and took plaintiff into custody pursuant to the purported authority of the attached warrant. Plaintiff's actions in obtaining the warrant and arresting defendant were made with malice, in that _____ [*specify the acts constituting malice, e.g.,* plaintiff possessed significant exculpatory evidence which he/she failed to investigate further and failed to present to the magistrate when seeking an arrest warrant].

[2] Use of Form

This form of allegation is for use in an action for false imprisonment (arrest) based on arrest pursuant to a warrant when the arresting officer acted with malice. The facts are taken from *Laible v. Superior Court (1984) 157 Cal. App. 3d 44, 203 Cal. Rptr. 513* . This allegation may be substituted for Paragraph 4 in *§ 257.86[1]*.

[3] Cross References

See also *§ 257.86*.

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22-257 California Forms of Pleading and Practice--Annotated § 257.91

§ 257.91 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Private Citizen Acted Pursuant to Request and Instructions of Peace Officer in Making Arrest

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Private Citizen Acted Pursuant to Request and Instructions of Peace Officer in Making Arrest

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

In causing the arrest and detention of plaintiff alleged in the complaint filed herein, defendant was acting at the specific request of Officer _____ [*name*], a peace officer who was then and there acting within the course and scope of his/her authority. Each and every act performed by defendant in connection with the arrest and detention of the plaintiff was performed at the specific request and demand of the peace officer.

[2] Use of Form

This form of affirmative defense is for use in an action for false imprisonment where defendant made a citizen's arrest of plaintiff pursuant to the request and demand of a peace officer.

[3] Cross References

See also *§ 257.84*.

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22-257 California Forms of Pleading and Practice--Annotated § 257.92

§ 257.92 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Private Citizen Made Honest Mistake in Identifying Plaintiff to Police

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Private Citizen Made Honest Mistake in Identifying Plaintiff to Police

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

Defendant's act in causing the arrest and detention of the plaintiff herein was justified and resulted from an honest mistake on the part of defendant in that _____ [*set forth facts on which defendant relied in causing the arrest to be made, e.g.,* a crime had in fact been committed on the date and at the time of plaintiff's arrest and detention, and plaintiff was present in the general vicinity where the crime took place; plaintiff bore a startling facial resemblance to the person who committed the crime and his/her clothing was similar to that of the person who robbed _____ [*name of person or place robbed*]. In causing the arrest and detention of the plaintiff, defendant was acting on an honest belief that plaintiff was the person who committed the crime.

[2] Use of Form

This form of affirmative defense of honest mistake is for use in an answer by a private citizen defendant who has caused the arrest of plaintiff by police in the honest belief that plaintiff was the person guilty of a crime.

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22-257 California Forms of Pleading and Practice--Annotated § 257.93

§ 257.93 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Private Citizen Gave Information to Police in Good Faith

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Private Citizen Gave Information to Police in Good Faith

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

Defendant did not participate in the arrest and detention of plaintiff and the only acts performed by defendant that were in any manner connected with such arrest consisted of giving to the arresting officers certain information concerning the observations that defendant made during the time the crime was being committed. In providing such information to the investigating officers, defendant was acting pursuant to their request that he/she answer their questions, and all information that defendant gave the officers was given in good faith and consisted only of those matters and things that defendant believed to be true and accurate.

[2] Use of Form

This form of affirmative defense is for use in an action for false imprisonment where the defendant has merely given information to the police which led to the arrest of plaintiff, but has taken no active part in the arrest.

[3] Cross References

See also *§ 257.92*.

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Chapter 257 FALSE IMPRISONMENT
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22-257 California Forms of Pleading and Practice--Annotated § 257.94

§ 257.94 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Probable Cause of Defendant to Believe That Plaintiff Had Committed a Felony [Penal Code § 836(a)(3)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Probable Cause of Defendant to Believe That Plaintiff Had Committed a Felony [Penal Code § 836(a)(3)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

Defendant had probable cause to believe that the arrest and detention of the plaintiff was lawful in that defendant had been advised that the felony of _____ [*specify*] had been committed in the area where plaintiff was apprehended, and that during the course of an investigation of the report defendant learned _____ [*set forth circumstances indicating to defendant plaintiff's implication in the commission of the crime*].

[2] Use of Form

This form of affirmative defense is for use in an action for false imprisonment based on a warrantless arrest by a police officer for a felony.

[3] Cross References

See also *§ 257.85*.

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Chapter 257 FALSE IMPRISONMENT
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22-257 California Forms of Pleading and Practice--Annotated § 257.95

§ 257.95 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Had Probable Cause to Believe That Plaintiff Had Committed a Misdemeanor in His/Her Presence [Penal Code § 836(a)(1)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Had Probable Cause to Believe That Plaintiff Had Committed a Misdemeanor in His/Her Presence [Penal Code § 836(a)(1)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

At the time of making the arrest alleged in plaintiff's complaint, defendant alleges that defendant was a peace officer acting within the course and scope of his/her authority, and defendant had probable cause to believe that plaintiff had committed a misdemeanor offense in his/her presence, because _____ [*set forth circumstances indicating probable cause to believe that plaintiff had committed a public offense in the presence of defendant*].

[2] Use of Form

This form of affirmative defense is for use in an action for false imprisonment based on a warrantless arrest by a peace officer for a misdemeanor offense committed in the presence of the officer.

[3] Cross References

See also *§ 257.85*.

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22-257 California Forms of Pleading and Practice--Annotated § 257.96

§ 257.96 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Failure of Plaintiff to Explain Suspicious Circumstances Giving Probable Cause for Arrest

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Failure of Plaintiff to Explain Suspicious Circumstances Giving Probable Cause for Arrest

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

Defendant had probable cause to believe that the arrest and detention of the plaintiff was lawful in that at the time of the arrest defendant was a peace officer acting in the course and scope of his/her authority and was on duty patrolling the general area where plaintiff was apprehended; defendant _____ [*specify facts, e.g.,* observed plaintiff moving about in an unlighted business building at or about _____ (*time*); on apprehending plaintiff, defendant requested that he/she show some identification and explain his/her presence in the building at that time of the morning; plaintiff refused to comply with the request to establish his/her identity and refused to offer any explanation as to his/her presence in the building; the area where defendant was assigned to patrol had experienced a high incidence of burglaries prior to the time plaintiff was apprehended in the building, and the combined facts of such high incidence of crime, the type of building involved, the fact that no lights were on in the building, the late hour, and plaintiff's steadfast refusal to identify himself/herself or justify his/her presence in the building in spite of repeated requests that he/she do so, constituted reasonable cause to believe that the plaintiff was engaged in committing a crime at the time of his/her apprehension].

[2] Use of Form

This form of affirmative defense is for use in an answer to a complaint for false imprisonment alleging arrest without a warrant. The defense shows probable cause to arrest.

[3] Cross References

See also *§ 257.85*.

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22-257 California Forms of Pleading and Practice--Annotated § 257.97

§ 257.97 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Delay in Taking Plaintiff Before Magistrate Caused by Illness of Plaintiff

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Delay in Taking Plaintiff Before Magistrate Caused by Illness of Plaintiff

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

The delay in taking plaintiff before a magistrate alleged in plaintiff's complaint resulted from the fact that plaintiff was physically unable to appear before a magistrate at the time of his/her arrest and he/she required immediate medical attention, which was administered to plaintiff at _____ Hospital. Plaintiff was in fact taken before a magistrate as soon as he/she was physically able to make such appearance.

[2] Use of Form

This form of affirmative defense is for use in an action for false imprisonment based on failure to take plaintiff before a magistrate within a reasonable time. The defense alleges that the delay was reasonable since plaintiff was too ill to be taken before a magistrate.

[3] Cross References

See also *§ 257.87*

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Chapter 258 FAMILY LAW ENFORCEMENT: GENERAL ENFORCEMENT PRINCIPLES AND REMEDIES

22-258 California Forms of Pleading and Practice--Annotated 258.syn

§ 258.syn Synopsis to Chapter 258: FAMILY LAW ENFORCEMENT: GENERAL ENFORCEMENT PRINCIPLES AND REMEDIES

§ 258.01 Scope of Chapter

§ 258.02 Cross References

§§ 258.03-258.09 [Reserved]

§ 258.10 Governing Law

§ 258.11 Entry of Judgment as Prerequisite to Enforcement

§ 258.12 Renewal of Judgments

[1] Period of Enforceability; Extension by Application for Renewal

[2] Period for Filing Renewal Application

[a] Lump-Sum Money Judgment or Judgment for Possession or Sale of Property

[b] Money Judgment Payable in Installments

[3] Amount of Renewed Judgment

[4] Vacation of Renewal

[5] Judgment for Child or Spousal Support Is Exempt From Renewal Requirement

§ 258.13 Obtaining Orders

[1] By Motion or Order to Show Cause

[2] Service of Notice

[3] Transfer of Enforcement Proceeding

§ 258.14 Attorney's Fees and Costs

[1] In General

[2] Mandatory Order in Proceeding to Enforce Existing Support Order

[3] Enforcement by Attorney

§ 258.15 Denial of Enforcement Rights to Party in Contempt

§ 258.16 Bankruptcy

[1] Effect on Support Obligation

[a] General Rule of Nondischargeability

[b] Characterization of Obligation as Support

[c] Reimbursement for Public Assistance Benefits

[d] Creditors' Rights After Bankruptcy Action Commenced

[i] Continuing Right to Enforce Support Obligation

[ii] Right to Appear at Bankruptcy Proceedings

[iii] Remedial Orders by California Court if Discharge Occurs

[iv] Exceptions to Automatic Stay in Bankuptcy for Support Collection or Criminal Proceedings Against Debtor

[v] Treatment of Support as Priority Claim

[2] Effect on Judicial Lien to Secure Spousal Obligation

[3] Effect on Property Division

[4] Attorney's Fees

[a] Dischargeability

[b] Award by Bankruptcy Court

§ 258.17 Effect of Death

[1] In General

[2] Support Obligor

[a] In General

[b] Enforcement of Spousal Support Arrearages Against Subsequent Spouse

§ 258.18 Defense of Set-Off or Other Form of Discharge

[1] In General

[2] Support Arrearages

[a] Rule Against Retroactive Modification of Support Order

[b] Debts of Supported Spouse

[c] Debts of Custodial Parent

[d] De Facto Change of Custody

[e] Credit for Overpayments or Payments Directly to Children

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§ 258.19 Effect of Child's Becoming Adult on Enforcement of Child Support

§ 258.20 Satisfaction of Judgment

§ 258.21 Effect of Appeal and Review

§ 258.22 Tort Recovery for Evasion of Support Obligation

§§ 258.23-258.29 [Reserved]

§ 258.30 Governing Law

§ 258.31 Execution Defined

§ 258.32 Court Order Required in Dissolution Cases

§ 258.33 Standing to Apply for Writ

§ 258.34 Types of Judgments and Orders Enforceable by Execution

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[2] Attorney's Fees and Costs

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§ 258.35 Property Subject to Execution

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[2] Pension Benefit Plans Subject to Execution for Support Orders

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§ 258.36 Property Not Subject to Execution

[1] Statutory Exemptions

[2] Claim of Exemption

[3] Application of Exemption to Judgment for Support

§ 258.37 Time for Application

§ 258.38 Time Within Which Writ Will Issue

[1] Civil Actions Generally

[2] Family Law Judgments

§ 258.39 Special Rules for Support Judgments

[1] When Court Order Not Required

[2] When Court Order Required

§ 258.40 Renewal of Judgments

[1] General Rule

[2] Renewal of Judgments for Support

§ 258.41 Procedure to Obtain Writ

[1] If Court Order Is Required

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§ 258.42 Response by Judgment Debtor

§ 258.43 Motion to Recall or Quash Writ of Execution

[1] Power of Court

[2] Grounds for Recall

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§ 258.50 Governing Statutes

§ 258.51 Liens On Real Property

[1] Lump Sum and Installment Money Judgments Compared

[2] Creation of Lien

[3] Duration of Lien

[4] Amount of Lien

[5] Effect of Modified Judgment

§ 258.52 Liens on Personal Property

§ 258.53 Liens Created by Court

§ 258.54 Priorities Between Competing Liens

§§ 258.55-258.59 [Reserved]

§ 258.60 Governing Law

§ 258.61 General Statutory Authority to Order Reasonable Security

[1] Child and Spousal Support

[2] Property Division

§ 258.62 Showing Required

§ 258.63 Procedure

§ 258.64 Types of Security

[1] Liens

[2] Trusts

[3] Life Insurance Policies

[4] Bonds

§§ 258.65-258.69 [Reserved]

§ 258.70 Governing Law

§ 258.71 Judicial Council Forms

§ 258.72 Appointment of Receiver

[1] When Authorized

[2] Who May Apply

[3] Application

§ 258.73 Applicability of Civil Law and Motion Rules to Family Code Proceedings

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§ 258.80 Governing Law

§ 258.81 Orders Enforceable by Contempt

[1] General Principles and Historical Background

[2] Child Support

[a] Enforceable as Law-Imposed Obligation

[b] Statutory Prima Facie Case

[3] Spousal Support

[4] Family Support

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[7] Attorney's Fees and Costs

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§ 258.82 Elements of Contempt

[1] Prima Facie Case in General

[2] Willful Disobedience of Lawful Order

[3] Knowledge of Judgment or Order

[4] Ability to Comply

[a] In General

[b] Judgments and Orders for Support

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§ 258.84 Effect of Parties' Reconciliation

§ 258.85 [Reserved]

§ 258.86 Commencing Contempt Proceeding

[1] Jurisdiction

[2] Statute of Limitations

[3] Multiple Counts

[4] Order to Show Cause Procedure

[a] Supporting Affidavit

[b] Charging Contempt

[c] Notice to Alleged Contemnor

§ 258.87 Response to Contempt Charge

§ 258.88 Hearing

[1] Appearance by Alleged Contemnor and Counsel

[2] No Jury Trial

[3] Evidence

§ 258.89 Conviction and Punishment

[1] Standard of Proof

[2] Punishment

[3] Purgation

§ 258.90 Review of Contempt Proceeding

§ 258.91 Effect of Contempt Finding on Enforcement of Certain Orders

§§ 258.92-258.99 [Reserved]

§ 258.100 Related Matthew Bender Publications

[1] California Points and Authorities

[2] California Family Law

§ 258.101 Federal Statutes

§ 258.102 State Statutes

[1] Contempt

[a] Authority of Court to Enforce Judgments and Orders

[b] Contempt Procedure

[c] Effect of Contempt on Enforcement of Other Judgments

[d] Elements of Contempt

[e] Factors Affecting Use of Contempt as Remedy

[f] Lack of Appellate Remedy

[g] Punishment for Contempt

[h] Review

[2] Execution of Judgments

[3] General Provisions

[4] Liens

[5] Miscellaneous Creditor's Remedies

[6] Receivership

§ 258.103 California Rules of Court

[1] Civil Law and Motion Rules

[2] Family Law Rules

§ 258.104 Decisions

[1] Contempt

[a] Affidavits (Declarations)

[b] Attorney's Fees and Costs

[c] Child Custody and Visitation

[d] Civil Versus Criminal Contempt

[e] Defense

[f] Estoppel

[g] Criminal Actions

[h] Double Jeopardy

[i] Hearing

[j] Inability to Comply

[k] Judgment and Commitment Order

[l] Jurisdiction

[i] Effect of Appeal

[ii] Personal Jurisdiction

[iii] Subject Matter Jurisdiction

[m] Jury Trial Prohibited

[n] Knowledge of Order

[o] Noncompliance With Child Support Order

[p] Notice of Contempt Proceedings

[q] Orders and Judgments Enforceable by Contempt

[i] Attorney's Fees and Costs

[ii] Child Support

[iii] Money Judgments in General

[iv] Orders Dividing Property

[v] Spousal Support

[r] Orders and Judgments Not Enforceable by Contempt

[2] Enforcement of Judgments

[a] Death of Obligor

[b] Dismissal of Main Proceeding

[c] Execution

[3] Liens

[a] Creation of Lien

[b] Powers of Court

[4] Receivership

[a] Appointment

[i] In General

[ii] Discretion of Court

[b] Availability of Receivership

[i] Pendente Lite

[ii] After Judgment

[c] Jurisdiction

[d] Nature of Receivership

[e] Termination of Receivership

§ 258.105 Text References

§§ 258.106-258.109 [Reserved]

§ 258.110 Execution Proceedings [Code Civ. Proc. § 699.010 et seq.; Fam. Code §§ 290, 5100 et seq.]--Ex Parte Application and Declaration for Order Directing Issuance of Writ of Execution and Order [Code Civ. Proc. § 699.510(b)]

[1] FORM

[2] Use of Form

[3] Copies to Prepare

[a] Ex Parte Application

[b] Noticed Motion

§ 258.111 Writ of Execution [Code Civ. Proc. § 699.520(b)]--Cal. Judicial Council Form EJ-130

[1] FORM

[2] Use of Form

[3] Contents of Form

[4] Copies to Prepare

§§ 258.112-258.119 [Reserved]

§ 258.120 Proceeding for Appointment of Receiver [Code Civ. Proc. § 564; Fam. Code § 290]--Order to Show Cause Why Appointment of Receiver on Ex Parte Application Should Not Be Confirmed [Code Civ. Proc. § 566(b)]--Cal. Judicial Council Form FL-300

[1] FORM

[2] Source of Form

[3] Use of Form

[4] Copies to Prepare

[5] Other Papers to Draft

[6] Additional Papers to Be Served

[7] Time of Service

[8] Manner of Service

[9] Proof of Service

[10] Form of Response

§ 258.121 Proceeding for Appointment of Receiver [Code Civ. Proc. § 564; Fam. Code § 290]--Notice of Motion and Proof of Service by Mail--Cal. Judicial Council Form FL-301

[1] FORM

[2] Source of Form

[3] Use of Form

[a] When Noticed Motion Is Preferable

[b] Proof of Service

[4] Copies of Notice of Motion to Prepare

[5] Other Papers

§ 258.122 Proceeding for Appointment of Receiver [Code Civ. Proc. § 564; Fam. Code § 290]--Application for Order and Supporting Declaration--Cal. Judicial Council Form FL-310

[1] FORM

[2] Source of Form

[3] Use of Form

[4] Declaration

[5] Copies to Prepare

§ 258.123 Proceeding for Appointment of Receiver [Code Civ. Proc. § 564; Fam. Code § 290]--Order Confirming Ex Parte Appointment of Receiver--Cal. Judicial Council Form MC-020

[1] FORM

[2] Use of Form

§§ 258.124-258.129 [Reserved]

§ 258.130 Order to Show Cause and Affidavit for Contempt, and Supporting Affidavits of Facts [Fam. Code §§ 290, 292]--Cal. Judicial Council Forms FL-410, FL-411, FL-412

[1] FORMS

[2] Source of Forms

[3] Related Forms

[4] Use of Forms

[5] Contents of Affidavits

[6] Copies to Prepare

§ 258.131 Declaration in Opposition to Order to Show Cause re Contempt [Code Civ. Proc. § 1217; Fam. Code § 290]--Skeletal Form

[1] FORM

[2] Use of Form

[3] Copies to Prepare

[4] Accompanying Papers

§ 258.132 Findings and Order Regarding Contempt--Cal. Judicial Council Form FL-415

[1] FORM

[2] Use of Form

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Chapter 258 FAMILY LAW ENFORCEMENT: GENERAL ENFORCEMENT PRINCIPLES AND REMEDIES
PART I. SCOPE

22-258 California Forms of Pleading and Practice--Annotated § 258.01

§ 258.01 Scope of Chapter

This chapter summarizes civil and selected criminal methods of enforcing orders and judgments in family law proceedings. It discusses the following procedures in the context of family law judgments:

- General principles relating to enforcement of judgments [*see §§ 258.10 -258.22*].
- Writs of execution [*see §§ 258.30 -258.43*].
- Liens [*see §§ 258.50 -258.54*].
- Furnishing security for support orders or property divisions [*see §§ 258.60 -258.64*].
- Appointment of receivers [*see §§ 258.70 -258.73*].
- Contempt, primarily constructive or indirect contempt, based on violations of judgments or orders outside the immediate view and presence of the court or of the judge at chambers [*see §§ 258.80 -258.91*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionCivil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal Contempt

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PART I. SCOPE

22-258 California Forms of Pleading and Practice--Annotated § 258.02

§ 258.02 Cross References

For a discussion and forms relating to special remedies for private enforcement of support obligations, such as earnings withholding (garnishment), earnings assignments, deposits for security, and nonissuance or nonrenewal of professional or commercial licenses, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* . Chapter 259 also discusses methods of enforcement by the district attorney and other local child support agencies. Enforcement of out-of-state support orders under the Uniform Interstate Family Support Act (UIFSA *Fam. Code § 4900 et seq.*), as well as interstate custody enforcement are discussed in Ch. 260, *Family Law Enforcement: Foreign Judgments* .

Other specific topics are discussed in the following chapters:

- A discussion of the characterization of property as either community or separate is set forth in Ch. 122, *Community Property* .

- For discussion, procedural checklist, and forms relating to contempt generally, see Ch. 135, *Contempt* .

- For general discussion of the methods of obtaining judgments in a family law proceeding, see Ch. 221, *Dissolution of Marriage: Procedure* .

- For discussion of the duty of support, see Ch. 224, *Dissolution of Marriage: Child Support* , Ch. 394, *Parent and Child* , and Ch. 412, *Paternity* .

- For discussion, procedural checklists, and forms for use in enforcing a judgment by execution, see Ch. 254, *Executions and Enforcement of Judgments* .

- For discussion, procedural guides, and forms for use in enforcing earnings withholding orders in general, see Ch. 276, *Garnishment* .

- For discussion, procedural guides, and forms relating to judgment liens in general, see *Ch. 318*,

Judgments, § 318.90 et seq.

- For discussion of custody jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJA-*Fam. Code § 3400 et seq.*), see Ch. 394, *Parent and Child* .

- For discussion, procedural guide, and forms regarding the provisional remedy of receivership in general, see Ch. 486, *Receivers* .

- For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers* .

- For alternative forms of verification, see Ch. 572, *Verification* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensEnforcementCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionCivil ProcedureSanctionsContemptCivil ContemptFamily LawChild SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity Property

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PART I. SCOPE

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[Reserved]

§§ 258.03[Reserved]

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Chapter 258 FAMILY LAW ENFORCEMENT: GENERAL ENFORCEMENT PRINCIPLES AND REMEDIES
PART II. LEGAL BACKGROUND
A. Governing Principles

22-258 California Forms of Pleading and Practice--Annotated § 258.10

§ 258.10 Governing Law

The Family Code authorizes enforcement of a judgment or order made pursuant to that Code by execution, appointment of a receiver, contempt, or by such other order as the court in its discretion determines from time to time to be necessary [*Fam. Code § 290*].

Enforcement of child, family, or spousal support orders is governed generally by *Fam. Code § 4500 et seq.* Execution of judgments and liens are governed by *Code Civ. Proc. § 699.010 et seq* and *Code Civ. Proc. § 697.010 et seq*, respectively. Enforcement of family law orders by writ of execution is governed by *Fam. Code § 5100 et seq.* The furnishing of deposits for security is governed by *Fam. Code §§ 290, 4012, 4600-4641*, and *4339*. The appointment of receivers is governed by *Fam. Code § 290* and *Code Civ. Proc. §§ 564-570*. Enforcement of family law orders by contempt is governed by *Fam. Code § 290* and *Code Civ. Proc. § 128(a)(4), 177(2), 177.5, 178, 1209-1222*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionCivil ProcedureSanctionsContemptCivil Contempt

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22-258 California Forms of Pleading and Practice--Annotated § 258.11

§ 258.11 Entry of Judgment as Prerequisite to Enforcement

A judgment may not be enforced until it has been entered [*see Code Civ. Proc. §§ 664, 683.010*]. If the court grants a motion orally, enforcement may not be had until the clerk enters the ruling and order in the court minutes. If the court grants a motion in writing, enforcement may not be had until the order is filed [*see Code Civ. Proc. § 1003* (court's direction is an "order" when made or entered in writing); *In re Marriage of Drake (1997) 53 Cal. App. 4th 1139, 1170, 62 Cal. Rptr. 2d 466]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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22-258 California Forms of Pleading and Practice--Annotated § 258.12

§ 258.12 Renewal of Judgments

[1] Period of Enforceability; Extension by Application for Renewal

A money judgment or judgment for the possession or sale of property that is made or entered under the Family Code, including a judgment for child, family, or spousal support, is enforceable until it is paid in full or otherwise satisfied [*Fam. Code § 291(a)*]. These judgments are exempt from any requirement that a judgment be renewed. A failure to renew such a judgment has no effect on its enforceability [*Fam. Code § 291(b)*]. However, such a judgment *may* be renewed under *Code of Civil Procedure Section 683.110 et seq.* An application for renewal may be filed at any time if the judgment has not previously been renewed as to past due amounts [*Fam. Code § 291(c)(1)*]. An application for renewal may also be filed if the judgment has previously been renewed at any time after a period of at least five years has elapsed from the time of the previous renewal; the renewal may cover the amount of the judgment as previously renewed and any past due amounts that became due and payable after the previous renewal [*Fam. Code § 291(c)(2)*].

A judgment creditor may renew a judgment by filing an application for renewal of the judgment with the court in which the judgment was entered [*Code Civ. Proc. § 683.120(a)*]. On the filing of the application, the clerk must enter the renewal of the judgment in the court records without the need for any further proceedings or order of the court [*see Code Civ. Proc. § 683.150(a)*].

Except as otherwise provided by statute, the filing of the application renews the judgment for another 10-year period from the date on which the application is filed [*Code Civ. Proc. § 683.120(b)*]. In the case of a money judgment payable in installments, the amount of the judgment as renewed [*see [3], below*] is treated as a lump-sum money judgment entered on the date on which the application is filed [*Code Civ. Proc. § 683.120(c)*].

When a judgment expires, all enforcement procedures pursuant to the judgment or to a writ or order issued pursuant to the judgment cease [*Code Civ. Proc. § 683.020(b)*]. If a judgment is renewed, any pending enforcement proceeding that otherwise would have ceased may be continued if, before the end of the prior 10-year period of enforceability, a certified copy of the application for renewal is filed in the enforcement proceeding or with the levying officer, receiver, or other officer acting pursuant to a writ or order [*Code Civ. Proc. § 683.200*]. A judgment may be renewed

notwithstanding any stay of enforcement of the judgment. However, the renewal does not affect the stay [*Code Civ. Proc. 683.210*].

If a judgment is renewed, the date on which the application for renewal was filed is the date that the statute of limitations begins to run for enforcement of the judgment [*Code Civ. Proc. § 683.220*; *see Code Civ. Proc. § 337.5(3)* (limitation period for action to enforce judgment)].

[2] Period for Filing Renewal Application

[a] Lump-Sum Money Judgment or Judgment for Possession or Sale of Property

In the case of a lump-sum money judgment or a judgment for possession or sale of property, the application for renewal may be filed at any time before the expiration of the 10-year period of enforceability [*Code Civ. Proc. § 683.130(a)*; *see Code Civ. Proc. § 683.020*]. In the case of a second or subsequent renewal, the application may be filed at any time after the first five years but before the expiration of the ongoing 10-year period of enforceability [*Code Civ. Proc. §§ 683.110(b), 683.130(a)*; *see Code Civ. Proc. § 683.170* (grounds for vacating renewal); *see also [4], below*].

[b] Money Judgment Payable in Installments

In the case of a money judgment payable in installments, other than a judgment for child, family or spousal support [*see Fam. Code § 4502*; *see also [5], below*], the first application for renewal may be filed at any time as to past due amounts that at the time of filing are not barred by the expiration of the 10-year period of enforceability [*Code Civ. Proc. § 683.130(b)(1)*; *see Code Civ. Proc. §§ 683.020, 683.030* (period of enforceability)]. In the case of second or subsequent renewals, amounts that were previously renewed are treated as lump-sum judgments for purposes of the time for filing the application. As to amounts that became due and payable after the previous renewal, the application must be filed before the expiration of the then-effective 10-year renewal period [*Code Civ. Proc. § 683.130(b)(2)*; *see Code Civ. Proc. §§ 683.020, 683.030* (period of enforceability)].

[3] Amount of Renewed Judgment

The entry of renewal of a money judgment must show the amount of the judgment as renewed. This amount is the amount that is required to satisfy the judgment on the date on which the application for renewal is filed and includes the filing fee for the application [*Code Civ. Proc. § 683.150(b)*].

In the case of a money judgment payable in installments and not previously renewed, the amount of the judgment as renewed is the total of the past due installments, the costs added to the judgment [*see Code Civ. Proc. § 685.090*], the accrued interest that remains unsatisfied and is enforceable on the date on which the application is filed, and the application filing fee [*Code Civ. Proc. § 683.150(c)*].

In the case of a money judgment payable in installments and previously renewed, the amount of the judgment as renewed under the latest renewal is the total of the following that remains unsatisfied and is enforceable on the date on which the latest application is filed [*Code Civ. Proc. § 683.150(d)*]:

- The amount of the judgment as renewed under the previous renewal;
- The past due installments that became due and payable after the previous renewal;
- The costs that have been added on judgment after the previous renewal [*see Code Civ. Proc. § 685.090*];
- The interest that has accrued on the foregoing since the last renewal; and

- The filing fee for the application of renewal.

Interest on a money judgment accrues from the date of entry of the judgment [*Code Civ. Proc. § 685.020(a)*]. Interest on a money judgment payable in installments accrues with regard to each installment on the date the installment becomes due [*Code Civ. Proc. § 685.020(b)*]. For purposes of *Code Civ. Proc. § 685.020*, only the initial support order, whether temporary or final, and whether or not the order is contained in a judgment, may be considered an installment judgment [*Fam. Code § 155*]. No support order or other order or notice issued, that sets forth the amount of support owned for prior time periods or establishes a periodic payment to liquidate the support order for prior periods, may be considered a money judgment for purposes of *Code Civ. Proc. § 685.020(b)* [*Fam. Code § 155*]. For discussion of accrued interest on support arrearages, see *Chapter 259, § 259.16*.

[4] Vacation of Renewal

A renewal of a judgment may be vacated on any ground that would be a defense to an action on the judgment, including the ground that the amount of the renewed judgment as entered is incorrect [*Code Civ. Proc. § 683.170(a)*]. The renewal may also be vacated on the ground that the judgment was satisfied by an accord and satisfaction or that the judgment creditor is estopped to enforce the judgment [*In re Marriage of Thompson (1996) 41 Cal. App. 4th 1049, 1058, 1060, 48 Cal. Rptr. 2d 882]* . The renewal must be vacated if the application for renewal was filed within five years from the time when the judgment was previously renewed [*Code Civ. Proc. § 683.170(a)*].

No later than 30 days after service of the notice of renewal, the judgment debtor may apply by noticed motion for an order of the court vacating the renewal of the judgment. The notice of motion must be served on the judgment creditor personally or by mail [*Code Civ. Proc. § 683.170(b)*].

On the hearing on the motion, the renewal may be vacated on any applicable ground, but another and different renewal may then be entered, including, but not limited to, the renewal of the judgment in a different amount if the decision of the court is that the judgment creditor is entitled to a renewal in a different amount [*Code Civ. Proc. § 683.170(c)*].

A renewal is not subject to attack, however, on the ground that the judgment debtor does not have sufficient personal contacts with California to establish personal jurisdiction when the renewal was entered [*Goldman v. Simpson (2008) 160 Cal. App. 4th 255, 261-264, 72 Cal. Rptr. 3d 729]* . A court has continuing jurisdiction under *Code Civ. Proc. § 410.50*, which is derived from its jurisdiction over the judgment debtor at the time of the original judgment, to enter the renewal [*Goldman v. Simpson (2008) 160 Cal. App. 4th 255, 263-264, 72 Cal. Rptr. 3d 729]* . A renewal is also not subject to attack on the ground that there was no danger that the judgment would not be paid [*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp. (2008) 168 Cal. App. 4th 185, 193-194, 85 Cal. Rptr. 3d 350]* .

[5] Judgment for Child or Spousal Support Is Exempt From Renewal Requirement

A judgment for child support, spousal support, or family support, and a judgment for reimbursement of public assistance benefits or other arrearages, including all lawful interest and penalties computed on the arrearages, is exempt from any requirement that judgments be renewed, if that judgment was entered on or after January 1, 1993, or was in existence as of that date [*Fam. Code §§ 291(a), (b), 4502*; *In re Marriage of Sweeney (1999) 90 Cal. Rptr. 2d 298* ; *see In re Marriage of Cordero (2002) 95 Cal. App. 4th 653, 660, 115 Cal. Rptr. 2d 787* ; *In re Marriage of Cutler (2000) 79 Cal. App. 4th 460, 473, 94 Cal. Rptr. 2d 156]* . Those support judgments are enforceable until paid in full even after the child reaches 18 years of age [*Fam. Code § 291(a)*]. However, if a pre-1993 judgment was extinguished before January 1, 1993, it would no longer be enforceable [*In re Marriage of Cutler (2000) 79 Cal. App. 4th 460, 473, 94 Cal. Rptr. 2d 156* ; *In re Marriage of Sweeney (1999) 76 Cal. App. 4th 343, 347, 90 Cal. Rptr. 2d 298* ; for related discussion, *see § 259.12*].

Although support judgments are not required to be renewed, they may be renewed under the procedure applicable to money judgments generally. The option of renewing the judgment has no effect on the enforceability of the amount due [*Fam. Code § 291(b), (c)*; *see Code Civ. Proc. § 683.110 et seq.*]. An application for renewal of a support judgment may be filed if the judgment has not previously been renewed as to past due amounts at any time [*Fam. Code § 291(c)(1)*]. If the judgment has previously been renewed, the amount of the judgment as previously renewed and any past due amount that became due and payable after the previous renewal may be renewed at any time after a period of at least five years has elapsed from the time the judgment was previously renewed [*Fam. Code § 291(c)(2)*]. Renewal of a support judgment allows for compounding of interest [*Code Civ. Proc. § 683.150(c)*; *In re Marriage of Thompson (1996) 41 Cal. App. 4th 1049, 1057, 48 Cal. Rptr. 2d 882]* . In the case of an amended judgment, the 10-year period within which the judgment creditor must renew the judgment begins on the date the amended judgment was entered, not on the date the original judgment was entered [*In re Marriage of Wilcox (2004) 124 Cal. App. 4th 492, 502, 21 Cal. Rptr. 3d 315]* .

In an action to enforce a judgment for child, family, or spousal support, the defendant may raise, and the court may consider, laches as a defense only with respect to any portion of the judgment the defendant owes to the state [*Fam. Code § 291(d)*]. Before the legislative enactment of this provision, laches was available as a defense to child support arrearages as well as spousal support arrearages [*In re Dancy (2000) 82 Cal. App. 4th 1142, 1147-1160, 98 Cal. Rptr. 2d 775* ; *In re Marriage of Copeman (2001) 90 Cal. App. 4th 324, 328-333, 108 Cal. Rptr. 2d 801* ; *In re Marriage of Fogarty & Rasbeary (2000) 78 Cal. App. 4th 1353, 1360-1364, 93 Cal. Rptr. 2d 653]* . However, the California Supreme Court has held that this statute operates retroactively and bars a laches defense even when the failure to make payments occurred before the statute's enactment [*In re Marriage of Fellows (2006) 39 Cal. 4th 179, 183-190, 46 Cal. Rptr. 3d 49, 138 P.3d 200]* .

The renewal of a judgment is not an appealable event because entry of the renewal is solely a ministerial act, and there is no separate entity called a "renewed judgment." There is merely "the judgment," which remains enforceable for an additional period and for which interest is calculated differently after renewal, but the rights of the judgment creditor arise from the original judgment [*Jonathan Neil & Assocs., Inc. v. Jones (2006) 138 Cal. App. 4th 1481, 1487, 42 Cal. Rptr. 3d 350]* . If the original judgment is reversed on appeal, the renewal, which has no independent existence, is reversed along with it by operation of law [*Jonathan Neil & Assocs., Inc. v. Jones (2006) 138 Cal. App. 4th 1481, 1481-1491, 42 Cal. Rptr. 3d 350]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsRevival of JudgmentsCivil ProcedureRemediesJudgment LiensRenewalsFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsEnforcementLiens

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22-258 California Forms of Pleading and Practice--Annotated § 258.13

§ 258.13 Obtaining Orders

[1] By Motion or Order to Show Cause

Many orders pertaining to enforcement proceedings may be sought by motion, by order to show cause, or by special statutory procedure in some cases. Court orders after judgment are often sought by order to show cause rather than by noticed motion, although this is not required by any statute, and either procedure is correct, provided the party to whom the paper is directed has appeared in the proceeding. If he or she has not appeared, then the order to show cause procedure must be used [for discussion of motions and orders to show cause in family law matters, see Ch. 221, *Dissolution of Marriage: Procedure* , and Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., Ch. 95 (Matthew Bender)]. The Judicial Council has prescribed standard forms of Order to Show Cause [*see* Cal. Judicial Council Form FL-300; *see also In re Marriage of Monge (2001) 93 Cal. App. 4th 911, 914-915, 113 Cal. Rptr. 2d 524]* , Notice of Motion [*see* Cal. Judicial Council Form FL-301], Application for Order and Supporting Declaration [*see* Cal. Judicial Council Form FL-310], and Responsive Declaration [*see* Cal. Judicial Council Form FL-320]. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Motion procedure in civil actions generally is discussed in Ch. 372, *Motions and Orders* .

[2] Service of Notice

After the entry of a judgment of dissolution or legal separation, after a declaration of a void or voidable marriage or judgment of paternity, or after a permanent order in any other proceeding in which the custody or support of a minor child is at issue, no modification of the judgment or order is valid, and no subsequent order in the proceeding is valid, unless any required notice is given directly to the party required to be notified. Under these circumstances, service of notice on the party's attorney of record is not sufficient [*Fam. Code § 215*; *see Albrecht v. Superior Court (1982) 132 Cal. App. 3d 612, 615-617, 183 Cal. Rptr. 417* (decided under substantially identical provisions of former *Civ. Code § 4809*)]. As a matter of courtesy, however, a copy of any notice of motion or order to show cause served on the adverse party should be mailed to the party's last attorney of record, if any.

One court of appeal, however, has held that former *Civ. Code § 4809* (*now see Fam. Code § 215*) should not be interpreted to prevent service of postdecree show cause orders on a respondent's attorney of record if the attorney has just instituted an attack on the judgment on behalf of the respondent. The court reasoned that the statute was designed to cure the problem that arises when the attack on a final judgment is made many years after the dissolution has become final and service is made on an attorney who has long since lost track of his or her client [*In re Marriage of Askren (1984) 157 Cal. App. 3d 205, 210-211, 203 Cal. Rptr. 606* (decided under former *Civ. Code § 4809*)].

[3] Transfer of Enforcement Proceeding

In any enforcement proceeding after a final judgment in a family law proceeding, if it appears that both parties have moved out of the county where the judgment was entered, the court may order that the proceeding be transferred to the county of residence of either party. However, the transfer will be ordered only if it promotes the ends of justice and the convenience of the parties [*Code Civ. Proc. § 397.5*].

Because transfer of an enforcement proceeding is similar to a change of venue, the normal procedure for effecting a change of venue should be followed, to the extent it is appropriate. For a discussion of motions for change of venue, see Ch. 571, *Venue* , and Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., Vol. 4, Ch. 93 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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22-258 California Forms of Pleading and Practice--Annotated § 258.14

§ 258.14 Attorney's Fees and Costs

[1] In General

The court may order attorney's fees and costs to be paid by either party in any proceeding for an order of enforcement [*see Fam. Code §§ 2010(f), 2030(c)*; *In re Marriage of Janssen (1975) 48 Cal. App. 3d 425, 428-429, 121 Cal. Rptr. 701* (decided under former *Civ. Code § 4370*)]. For further discussion of the court's general power to order payment of attorney's fees and costs in a family law proceeding, see Ch. 226, *Dissolution of Marriage: Attorney's Fees* , and Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., vol. 2, Ch. 62 (Matthew Bender).

[2] Mandatory Order in Proceeding to Enforce Existing Support Order

In any action to enforce an existing order for child or spousal support, or to impose a penalty on delinquent child support payments under *Fam. Code § 4720 et seq.*, the court must order the obligor-parent to pay reasonable attorney's fees to the custodial parent (in a proceeding to enforce a child support order) or supported spouse (in a proceeding to enforce a spousal support order), absent good cause to the contrary [*Fam. Code § 3557*]. The court must determine that the obligor has the ability to pay and consider the respective incomes and needs of the parties in order to ensure that each has access to legal representation to preserve all of his or her rights [*Fam. Code § 3557*]. One court has found that good cause for denying a fee request exists if no support is found to be due [*see In re Marriage of Schenck (1991) 228 Cal. App. 3d 1474, 1485, 279 Cal. Rptr. 651* (decided under identical provisions of former *Civ. Code § 4370(c), (d)*)]. Attorney's fees may be ordered to be paid to a prevailing obligee in an interstate enforcement action under UIFSA [Uniform Interstate Family Act--*Fam. Code § 4900 et seq.*, as discussed in Ch.260, *Enforcement of Out-of-State Family Law Judgments*] but may not be ordered against either an individual obligee or a governmental support enforcement agency [*Fam. Code § 4927(b)*].

Orders for attorney's fees and costs are further discussed in Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., vol. 2, Ch. 62 (Matthew Bender).

[3] Enforcement by Attorney

Instead of requiring payment of attorney's fees and costs to the party to whom fees and costs were awarded, the court may in its discretion order the obligated party to make payment directly to the attorney [*see Fam. Code § 272(a)*]. When the court makes an order requiring direct payment to the attorney, the attorney may pursue enforcement in his or her own name [*see Fam. Code § 272(b)*]. Disobedience of an order for payment of fees and costs to an attorney may be punished as contempt [*see Sorell v. Superior Court (1967) 248 Cal. App. 2d 157, 159-160, 56 Cal. Rptr. 222* ; *§ 258.80 et seq.*].

If the attorney attempts to enforce an order for attorney's fees after ceasing to represent the party, the party is entitled to apply for a reallocation of the fees to cover the expense, if any, of retaining another attorney. Therefore, the former attorney must give 10 days' written notice to the party or the successor attorney of any application for enforcement. Notice is required even if the party has not retained another attorney. Proof of notice must be filed. If the party moves, during the 10-day period, for reallocation of the fees, the attorney may not undertake enforcement until after the court rules on the motion [*see Fam. Code § 272(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportCosts & Attorney Fees

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22-258 California Forms of Pleading and Practice--Annotated § 258.15

§ 258.15 Denial of Enforcement Rights to Party in Contempt

No party who is in contempt of a court order or judgment in a dissolution of marriage or legal separation proceeding may enforce the order or judgment by way of execution or otherwise, either in the same action or by a separate action against the other party. However, this restriction does not apply to the enforcement of child or spousal support orders [*Code Civ. Proc. § 1218(b)*]. For discussion of the effect of interference with visitation and child concealment on enforcement of child support, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* . For discussion of contempt as a means to enforce family law judgments and orders, see *§ 258.80* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-258 California Forms of Pleading and Practice--Annotated § 258.16

§ 258.16 Bankruptcy

[1] Effect on Support Obligation

[a] General Rule of Nondischargeability

A discharge in bankruptcy does not discharge the debtor from any debt to a spouse, former spouse, or child of the debtor for spousal or child support in connection with a separation agreement, divorce decree, court order, or property settlement agreement [*11 U.S.C. § 523(a)(5)*; *Cal-Western Reconveyance Corp. v. Reed (2007) 152 Cal. App. 4th 1308, 1320, 62 Cal. Rptr. 3d 244* ; *see Foster v. Bradbury (In re Foster) (2003) 319 F.3d 495, 499* (interest on nondischargeable child support obligations, like interest on nondischargeable tax debt, continues to accrue after Ch.13 petition filed and is not dischargeable)]. However, a debt for support may be discharged in bankruptcy if it has been assigned by the obligee to another entity, voluntarily, by operation of law, or otherwise, other than a debt assigned to a public entity as a condition of receiving certain public assistance payments [*see 42 U.S.C. § 602(a)(2)*; *Welf. & Inst. Code § 11477(a)*; *see 42 U.S.C. § 656(b)* (debt for child support obligation that is enforceable under Part D, Subchapter IV, of Ch. 7 of 42 U.S.C. is not dischargeable in bankruptcy)], or a debt that has been assigned to the federal government, or to a state, or to any political subdivision of a state [*11 U.S.C. § 523(a)(5)(A)*]. The actual nature of the debt as one for support and not the name by which it is designated determines dischargeability [*11 U.S.C. § 523(a)(5)(B)*; *see Sloan v. Mitchell (1972) 28 Cal. App. 3d 47, 50-52, 104 Cal. Rptr. 418]* .

An obligation for attorney's fees ordered payable as child support is also not discharged in bankruptcy, but a prospective order to pay attorney's fees that is not designated to be payable as child support *is* discharged [*Cal-Western Reconveyance Corp. v. Reed (2007) 152 Cal. App. 4th 1308, 1320, 62 Cal. Rptr. 3d 244*].

[b] Characterization of Obligation as Support

In determining whether the debtor's obligation is in the nature of support and therefore nondischargeable in bankruptcy, the parties' intent at the time of executing the settlement agreement is dispositive. The court should consider whether the recipient spouse needed support at the time of the dissolution, whether the obligation terminates on the recipient spouse's death or remarriage, whether the payments are made directly to the recipient spouse and are paid in

installments over a substantial time period, and the labels given to the payments by the parties [*In re Sternberg (9th Cir. 1996) 85 F.3d 1400, 1405* ; *see In re Kritt (9th Cir. BAP 1995) 190 Bankr. 382, 387* (award of community property to wife in marital settlement agreement constituted spousal support and was nondischargeable debt; court properly looked beyond label given obligation to parties' intent and substance of obligation)].

However, whether an obligation arising out of a separation or divorce is nondischargeable support is a question of federal law, and the bankruptcy court is not bound by how the obligation is characterized by either the parties or the state court [*see In re Seixas (9th Cir. B.A.P. 1999) 239 B.R. 398, 1999 Bankr. LEXIS 1245* (debtor's obligation to pay one-half of children's college expenses, pursuant to marital settlement agreement, was nondischargeable child support obligation); *see also In re Marriage of Sprague & Spiegel-Sprague (2003) 105 Cal. App. 4th 215, 216, 220-222, 129 Cal. Rptr. 2d 261* (husband failed to seek relief from automatic stay in wife's bankruptcy to pursue action in state court to characterize *Borson* attorney fees as nondischargeable debt; therefore state court order characterizing the attorney fees as nondischargeable was void, and husband's claim for attorney fees was discharged in bankruptcy)].

[c] Reimbursement for Public Assistance Benefits

The dischargeability of obligations owed to a public entity, such as a county, for the support of a child through public assistance benefits has been an issue of continuing controversy. As discussed hereafter, although cases initially held such obligations dischargeable with respect to benefits furnished before a California support order was in place, later changes to federal bankruptcy and welfare law appear to create a rule of nondischargeability--at least with respect to bankruptcy cases commenced after August 22, 1996.

In two cases decided before changes to the applicable sections of the Bankruptcy Code and federal welfare law, the Ninth Circuit Court of Appeals held that a parent's debt to a county for reimbursement of AFDC payments made to the other parent before entry of a support order is dischargeable [*see In re Ramirez (9th Cir. 1986) 795 F.2d 1494, 1496-1498 , cert. denied, 481 U.S. 1003 (1987)* ; *see also In re Visness (9th Cir. 1995) 57 F. 3d 775, 777-781]* . In each case, the county had obtained an order under (now former) *Welf. & Inst. Code § 11350* for reimbursement of public assistance benefits provided during a period in which the noncustodial parent was not subject to any support order or agreement requiring support. In the leading case, *In re Ramirez*, the noncustodial parent filed for Chapter 7 bankruptcy and sought to determine dischargeability of the reimbursement judgment under a former version of *11 U.S.C. § 523(a)(5)*, which provided that a child support debt that was assigned to another entity was dischargeable in bankruptcy, unless the debt was assigned pursuant to *42 U.S.C. § 602(a)(26)*. The Ninth Circuit held that such a debt was dischargeable because it *had not* been assigned pursuant to Section *602(a)(26)*, which provides for the assignment of only those support rights which have *already accrued* at the time the assignment is executed. Under California law, a right to child support does not accrue in favor of the custodial parent or child until a court order establishes the noncustodial parent's support duty. Therefore, a noncustodial parent's debt to the county for reimbursement of the benefits would not have arisen from an assignment of rights pursuant to the federal statute, but from the operation of former *Welf. & Inst. Code § 11350* [*see In re Ramirez (9th Cir. 1986) 795 F.2d 1494, 1496-1498 , cert. denied, 481 U.S. 1003 (1987)* ; *see also In re Visness (9th Cir. 1995) 57 F. 3d 775, 777-781* (adhering to reasoning of *Ramirez*); *cf. In re Cervantes (9th Cir. B.A.P. 1999) 229 B.R. 19, 24 n.9* (declining to address issue of whether right to support may accrue in absence of support order under revised *Welf. & Inst. Code § 11350(a)*)].

However, the continued vitality of *In re Ramirez* and cases following it is questionable for bankruptcy proceedings that were initiated after August 22, 1996, when changes were introduced to the Bankruptcy Code and federal welfare law [*see* Pub. L. No. 104-93 (amending *42 U.S.C. § 656(b)* (eff. Aug. 22, 1996) and *42 U.S.C. § 656(a)* (eff. July 1, 1997), and adding *11 U.S.C. § 523(a)(18)* and *42 U.S.C. § 608(a)(3)* (eff. July 1, 1997)); *see also In re Leibowitz (9th Cir. 2000) 217 F. 3d 799* (Ninth Circuit's holdings in *Ramirez* and *Visness* no longer applicable in light of new statutory scheme)]. The Bankruptcy Code now provides that a debt owed under state law to a state or a municipality is nondischargeable if it is "in the nature of support" and enforceable under part D of Title IV of the Social Security Act [*11 U.S.C. § 523(a)(18)*]. *Section 602(a)(26) of 42 U.S.C.* has been replaced by *42 U.S.C. § 608(a)(3)*, which requires a

family member to assign to the state any rights to support *which accrue before the date the family ceases to receive* government assistance. Under this provision, a court order for child support and reimbursement obtained by the state before the applicant ceases to receive assistance gives rise to a valid right which accrues before assistance ceases and which can therefore be assigned [*see In re Cervantes (9th Cir. 2000) 219 F. 3d 955* ; *In re Leibowitz (9th Cir. 2000) 217 F. 3d 799]* . Therefore, it appears that the most recent statutory changes will make the public support reimbursement obligation nondischargeable for cases brought after August 22, 1996, even if no preexisting California support order were in place, but this interpretation is subject to further judicial or legislative confirmation.

[d] Creditors' Rights After Bankruptcy Action Commenced

[i] Continuing Right to Enforce Support Obligation

A support obligee may bring suit on his or her claim in any appropriate non-bankruptcy forum, even after the close of the bankruptcy proceeding. It is not necessary for the bankruptcy court to determine the dischargeability of the debt, and the obligee need not object to the discharge in the bankruptcy proceeding [*see 11 U.S.C. § 523(c)(1)*; *In re Marriage of Henderson (1990) 225 Cal. App. 3d 531, 534, 275 Cal. Rptr. 226* , and bankruptcy authorities cited therein].

[ii] Right to Appear at Bankruptcy Proceedings

As a result of provisions of the Bankruptcy Reform Act of 1994, child support creditors or their representatives may appear at bankruptcy proceedings without charge and without having to meet any local rule requirements for attorney appearances [*see* Pub. L. No. 103-394, § 304(g)].

[iii] Remedial Orders by California Court if Discharge Occurs

If child support obligations are discharged in bankruptcy, a California court may make all proper orders for the support, maintenance, and education of the child as the court may deem just [*Fam. Code § 4013*]. A similar rule applies to a discharged obligation for spousal support [*see Fam. Code § 3592*].

[iv] Exceptions to Automatic Stay in Bankuptcy for Support Collection or Criminal Proceedings Against Debtor

The automatic stay of other proceedings that generally goes into effect on the filing of a bankruptcy petition does not operate as a stay of any proceeding for the collection of support from property that is not property of the estate [*11 U.S.C. § 362(b)(2)(B)*]. For bankruptcy proceedings commenced on or after October 24, 1994 [*see* Pub. L. No. 103-394, § 702], the Bankruptcy Reform Act of 1994 has expanded this exception to the automatic stay to include proceedings to establish paternity and proceedings to establish or modify child or spousal support [*11 U.S.C. § 362(b)(2)(A)*].

Another exception to the automatic stay allows for the commencement or continuation of criminal proceedings against the debtor [*11 U.S.C. § 362(b)(1)*]. Therefore, a bankruptcy petition does not shield the debtor from criminal prosecution under *Penal Code § 270* for willful failure to pay child support. Nor does it, by itself, establish that the debtor lacked the "willfulness" required by that section [*People v. Gruntz (1994) 29 Cal. App. 4th 412, 421, 35 Cal. Rptr. 2d 55]* .

[v] Treatment of Support as Priority Claim

Support obligations are further protected in bankruptcy proceedings commenced on or after October 24, 1994, by other provisions of the Bankruptcy Reform Act of 1994 [*see* Pub. L. No. 103-394, § 702]. A trustee may no longer avoid a debtor's prepetition transfer of funds to pay bona fide support obligations [*11 U.S.C. § 547(c)(7)*]. Also, claims made against a bankruptcy estate for support are now seventh in the statutory order for priority of claims, ahead of tax claims [*11 U.S.C. § 507(a)(7)*].

[2] Effect on Judicial Lien to Secure Spousal Obligation

For bankruptcy cases commenced on or after October 24, 1994 [*see* Pub. L. No. 103-394, § 702], the Bankruptcy Reform Act of 1994 generally eliminates a debtor's ability to avoid a judicial lien if it secures a debt for support to a spouse, former spouse, or child of the debtor [*11 U.S.C. § 522(f)(1)(A)(i)*]. The lien may still be avoided if the debt is assigned to another entity or is not actually a debt for support [*11 U.S.C. § 522(f)(1)(A)(ii)*].

This provision was intended to supplement the reach of a 1991 United States Supreme Court decision, *Farrey v. Sanderfoot (1991) 500 U.S. 291, 294, 111 S. Ct. 1825, 114 L. Ed. 2d 337, 346-347* , in which the Court held that a former husband could not avoid a judicial lien on the prior marital home securing the wife's interest under their property division because he did not possess his interest before the lien attached [*see* Cong. Rec. H10752-01, Sec. 304; *see also In re Barnes (9th Cir. B.A.P. 1996) 198 B.R. 779* ; *In re Catli (9th Cir. 1993) 999 F.2d 1405]* . However, the amendment does not affect the issue of whether a judicial lien that secures a property interest can ever be avoided, and the Supreme Court's statutory construction of *11 U.S.C. § 522(f)(1)(A)*, making a distinction based on whether the lien attaches simultaneously with or subsequent to the creation of the debtor-spouse's interest, remains pertinent [*see In re Catli (9th Cir. 1993) 999 F.2d 1405, 1406-1408]* . This determination is a question of state law [*In re Catli (9th Cir. 1993) 999 F.2d 1405, 1408* (husband's interest and wife's lien securing note for half of proceeds of sale of family home attached simultaneously under Washington state community property law; therefore, lien may not be avoided by husband's refusal to sell and declaring bankruptcy)].

[3] Effect on Property Division

Before October 24, 1994, interspousal debts arising from or based on the division of the parties' community property were not among the debts that were nondischargeable in bankruptcy [*see* former *11 U.S.C. § 523(a)* before amendment by Pub. L. No. 103-394, § 304]. Therefore, interspousal property settlement obligations were dischargeable in bankruptcy [*see In re Teichman (9th Cir. 1985) 774 F.2d 1395, 1397-1400* (division of husband's military retirement benefits in dissolution judgment created dischargeable debt with regard to payments due prior to filing of bankruptcy petition; however, post-petition payments were not debts and, therefore, were not subject to discharge)], and enforcement (collection) was thereby precluded [*see Smalley v. Smalley (1959) 176 Cal. App. 2d 374, 375-376]* . The crucial matter for determination was whether an interspousal obligation was actually one for support or one in settlement of the parties' property rights [*see, e.g., In re Marriage of Williams (1984) 157 Cal. App. 3d 1215, 1220-1221, 203 Cal. Rptr. 909]* .

However, the Bankruptcy Reform Act of 1994 created a new exception from discharge for some debts arising out of dissolution or separation that are not in the nature of support. For bankruptcy cases filed on or after October 24, 1994, regardless of when the family law debt at issue was incurred [*see* Pub. L. No. 103-394, § 702], a discharge in bankruptcy does not automatically discharge nonsupport debts incurred in the course of a dissolution or separation, or in connection with a separation agreement, divorce decree, or other family law order [*11 U.S.C. § 523(a)(15)*]. An example of such a debt is a payment to the other spouse that is required to equalize the division of community property.

However, the exception to discharge of *11 U.S.C. § 523(a)(15)* is not limited to interspousal obligations [*cf. 11 U.S.C. § 523(a)(5)* (only support obligations to spouse, former spouse, or child are nondischargeable; debt to third party that is in nature of support, such as to child care provider, remains dischargeable)]. Therefore, debts to third persons assigned to one spouse in a property settlement agreement or dissolution judgment, who thereby must hold the other spouse harmless, may be nondischargeable under *11 U.S.C. § 523(a)(15)*.

A nonsupport debt remains dischargeable if the debtor does not have the ability to pay it from income or property that is not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor, and if the debtor is engaged in business, from the payment of expenditures necessary for the continuation, preservation, and operation of the business [*11 U.S.C. § 523(a)(15)(A)*]. The debt is also dischargeable if it would result in a benefit to the

debtor that outweighs the detrimental consequences to a spouse, former spouse, or child [*11 U.S.C. § 523(a)(15)(B)*]. Therefore, the bankruptcy court retains considerable discretion with regard to the discharge of nonsupport obligations incurred under a dissolution settlement or judgment.

If a nonsupport debt is alleged to be nondischargeable, the creditor must apply to the bankruptcy court for a determination of nondischargeability during the bankruptcy proceeding and within the time permitted by law [*11 U.S.C. § 523(c)(1)*; *see also In re Gendreau (9th Cir. BAP 1995) 191 Bankr. 798, 800-805* (husband's obligation under dissolution decree to pay ERISA pension plan benefits to former wife was nondischargeable debt)]. The creditor spouse has the burden of demonstrating that the debtor spouse incurred the debt in connection with a family law action; then the burden shifts to the debtor to prove at least one of the above bases for dischargeability (his or her inability to pay or a benefit from discharge that outweighs the harm to the creditor) [*In re Jodoin (9th Cir. B.A.P. 1997) 209 B.R. 132, 141* ; *see, e.g., In re Myrvang (9th Cir. 2000) 232 F.3d 1116, 1123* ; *In re Haines (1997) 210 B.R. 586, 590]* .

In assessing the debtor's ability to pay, the disposable income test [*11 U.S.C. § 1325(b)(2)*] provides an "excellent reference point" [*In re Jodoin (B.A.P. 9th Cir. 1997) 209 B.R. 132, 142]* . However, it has been noted that besides the disposable income test, courts have employed a variety of approaches in determining a debtor's ability to pay a divorce-related debt [*In re Myrvang (9th Cir. 2000) 232 F.3d 1116, 1120* (debtor had ability to pay because maintenance payments would be reduced and ended in near future, leaving him with more disposable income)]. The bankruptcy court has the discretion to order a partial discharge even though the statute does not expressly authorize a partial discharge [*In re Myrvang (9th Cir. 2000) 232 F.3d 1116, 1125* (court's order compelling debtor to repay his debt over five-year period was upheld, but imposition of $73,000 penalty for late payment was reversed)]. However, the court must make express findings to support its order of partial discharge [*In re Myrvang (9th Cir 2000) 232 F.3d 1116, 1126]* .

Moreover, the Ninth Circuit Court of Appeals held that the income of a person who lives with a debtor in a romantic relationship may be considered in determining a debtor's ability to pay a debt incurred in a judgment of dissolution, pursuant to *11 U.S.C. § 523(a)(15)*, whenever the debtor and the live-in romantic companion are economically interdependent or form a single economic unit [*In re Short (9th Cir. 2000) 232 F.3d 1018, 1024]* . The question of whether a debtor and a live-in romantic companion are financially interdependent or form a single economic unit is "a fact-intensive inquiry that will vary from case to case," involving such factors as (1) the length of the relationship, (2) the extent of the commingled assets or shared liabilities, and (3) evidence of a debtor's efforts to hide assets in the accounts of a live-in romantic companion [*In re Short (9th Cir. 2000) 232 F.3d 1018, 1024]* .

If a creditor fails to request a determination of nondischargeability in the bankruptcy proceeding, then a debt that allegedly falls within the nondischargeability exception will be discharged, and a California court may not make a determination of nondischargeability [*see In re Marriage of Williams (1984) 157 Cal. App. 3d 1215, 1222, 203 Cal. Rptr. 909]* .

A nonsupport debt is not automatically dischargeable because it falls outside the exception created by *11 U.S.C. § Code 523(a)(15)*. The debt may in some cases be characterized as falling within one of the categories of other nondischargeable debts [*see 11 U.S.C. § 523(a)*; *see also In re Gendreau (9th Cir. BAP 1995) 191 Bankr. 798, 800-805* (husband's obligation under dissolution decree to pay ERISA pension plan benefits to former wife was nondischargeable debt)]. However, if the debt is alleged to be nondischargeable under *11 U.S.C. § 523(a)(2), (4),* or *(6)* (debt for consideration obtained by false pretenses, fiduciary fraud or defalcation, or willful or malicious injury), the creditor must also apply to the bankruptcy court for a determination of nondischargeability [*11 U.S.C. § 523(c)(1)*; *see In re Marriage of Williams (1984) 157 Cal. App. 3d 1215, 1222, 203 Cal. Rptr. 909]* . The fraud required in that latter section requires that the debtor actually intend to defraud the creditor and that the debt arise as a result of the fraud [*In re Tsurukawa, 258 B.R. 192, 198 (9th Cir. B.A.P. 2001)]* . In addition, absent an agency relationship, usually arising out of a partnership, marital status alone is not a sufficient basis for imputing fraud of one spouse to the other spouse for purposes for dischargeability of a debt [*In re Tsurukawa (9th Cir. BA.P. 2001) 258 B.R. 192, 198]* .

Even if a debt does not fall within a statutory category of nondischargeability, it should still be closely examined to determine whether the debtor is actually the individual who has responsibility for the underlying obligation. In one case, for example, involving a Qualified Domestic Relations Order that assigned one-half of an employee's pension plan to his former spouse, the court held that the claim was not discharged by the employee's bankruptcy because it was a claim against the pension plan, rather than a personal claim against the employee [*In re Gendreau (9th Cir. 1997) 122 F.3d 815, 818* ; *see also In re Lowenschuss (9th Cir. 1999) 170 F. 3d 923, 929-930* (because Pennsylvania court's award to wife of share of pension using immediate offset method was immediate and actual distribution of pension plan assets and not merely money judgment against husband, award was nondischargeable in husband's bankruptcy)].

If one spouse's nonsupport debt is discharged in bankruptcy, the other spouse usually remains liable to the creditor, which, in turn, upsets the equal division of community property and obligations [*see, e.g., In re Marriage of Clements (1982) 134 Cal. App. 3d 737, 743-744, 184 Cal. Rptr. 756* ; *see also Sanwa Bank of California v. Chang (2001) 87 Cal. App. 4th 1314, 1319, 105 Cal. Rptr. 2d 330* (community property residence that was fraudulently conveyed to wife remained subject to community debts after wife's husband was discharged from bankruptcy)]. For this reason, a California family law court may increase spousal support under *Fam. Code § 3592* after a discharge in bankruptcy if spousal support jurisdiction is retained [*see In re Marriage of Lynn (2002) 101 Cal. App. 4th 120, 125-126, 123 Cal. Rptr. 2d 611* (discharge may be considered "changed circumstance"); *In re Siragusa (9th Cir. 1994) 27 F.3d 406, 408* (affirming jurisdiction of state court to increase spousal support after discharge of property settlement in bankruptcy)]. However, the court may not modify a previously approved property agreement to allow for a set-off of discharged debts because this type of modification frustrates the intent and purpose of bankruptcy law and violates the supremacy clause of the United States Constitution [*In re Marriage of Williams (1984) 157 Cal. App. 3d 1215, 1224-1227, 203 Cal. Rptr. 909* ; *see In re Marriage of Cohen (1980) 105 Cal. App. 3d 836, 840, 164 Cal. Rptr. 672]* . If there is no agreement, the court may award increased spousal support under *Fam. Code § 3592* only after considering all of the factors set forth in *Fam. Code § 4320* for determining spousal support [*In re Marriage of Lynn (2002) 101 Cal. App. 4th 120, 130-134, 123 Cal. Rptr. 2d 611]* .

A spouse's discharge in bankruptcy does not effect a transmutation of exempted property [*see 11 U.S.C. 522(b)* (property that debtor may exempt from bankruptcy estate)] from community property to the debtor spouse's separate property, nor does it divest a dissolution court of its jurisdiction to divide community interests in the exempted property [*In re Marriage of Seligman (1993) 14 Cal. App. 4th 300, 308-309, 18 Cal. Rptr. 2d 209* (debtor-wife unsuccessfully maintained that family court lacked jurisdiction to divide community property items that bankruptcy court had adjudged to be her exempt property); *cf. In re Roosevelt (9th Cir. 1996) 87 F.3d 311, 313-318* (husband's transfer of real property to wife as her separate property was made when parties executed marital settlement agreement; date of execution, not date of recording, is used to determine whether transfer occurred more than one year before husband filed for bankruptcy); *In re Mantle (9th Cir. BAP 1996) 196 Bankr. 513, 515-517* (proceeds of court-ordered sale of family home placed in escrow pending reimbursement of wife's separate property downpayment were not community property funds belonging to husband's bankruptcy estate)]. For a complete discussion of property transmutations, see Ch. 122, *Community Property* . For further discussion and forms for use in bankruptcy proceedings, see Ch. 94, *Bankruptcy* .

[4] Attorney's Fees

[a] Dischargeability

A debt for the payment of a spouse's attorney's fees may be nondischargeable in bankruptcy under *11 U.S.C. § 523(a)(5)* (*see [1], above*) if the fee obligation can fairly be characterized as additional spousal support. If the fees are ordered on the ground of the spouse's need to obtain adequate legal representation, as is usually the case, then the fee obligation is considered to be support and is nondischargeable [*In re Spong (2d Cir. 1981) 661 F.2d 6, 9* ; *Matter of Gwinn, II (9th Cir. BAP 1982) 6 C.B.C. 2d 1114, 1115-1116, 9 B.C.D. 147* (following *Spong*); *see Matter of Catlow (9th Cir. 1981) 663 F.2d 960, 961* ; *Jones v. Tyson (9th Cir. 1975) 518 F.2d 678, 680-681]* . Similarly, at least one decision holds that

an award of attorney's fees payable to the attorney for the custodial parent in postdissolution child custody proceedings is considered to be child support and is a nondischargeable debt in bankruptcy [*In re Ratcliff (1996) 195 Bankr. 466, 467-468]* . By contrast, a party's court-ordered obligation to pay one-half of the fees of court-appointed health care professionals and a guardian ad litem in a child custody dispute has been found to be dischargeable [*In re Chang (9th Cir. B.A.P. 1997) 210 B.R. 578, 583]* .

If attorney's fees are listed in a bankruptcy petition as an unsecured debt, the creditor may ask the bankruptcy court to make a determination that the attorneys fees are nondischargeable, or apply to the bankruptcy court for relief from the automatic bankruptcy stay, so that a state court can make a determination of dischargeability of the debt [*In re Marriage of Sprague & Spiegel-Sprague (2003) 105 Cal. App. 4th 215, 216, 220-222, 129 Cal. Rptr. 2d 261]* .

The attorney is considered a third-party beneficiary of the award and not an assignee, and therefore has standing to object to dischargeability of the fee obligation in bankruptcy court, and presumably to proceed with collection in state court [*In re Spong (2d Cir. 1981) 661 F.2d 6, 9-11* ; Matter of Gwinn, II (9th Cir. BAP 1982) *6 C.B.C. 2d 1114, 1115, 9 B.C.D. 147* (following *Spong*); *see* [1], *above*].

The debt may be discharged if the spouse on whose behalf the fees were ordered has no personal liability for payment of the fees [*In re Linn (9th Cir. BAP 1984) 10 C.B.C. 2d 1049, 1050-1051, 12 B.C.D. 147*], or if the fee order actually reflects an equitable division of community debts and property rather than support [In re Gibson (9th Cir. BAP 1989) *103 B.R. 218* ; *see [3], above*].

For discussion of attorney's fee orders in dissolution proceedings, see Ch. 226, *Dissolution of Marriage: Attorney's Fees* , and Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., Vol. 4, Ch. 62 (Matthew Bender).

[b] Award by Bankruptcy Court

If a divorce decree provides for the payment of attorney's fees, and state law issues are litigated in bankruptcy proceedings regarding nondischargeability of a debt enforced under the divorce decree, reasonable attorney's fees may be awarded by the bankruptcy court, but only to the extent that they were incurred litigating the state law issues [*Renfrow v. Draper, 232 F.3d 688, 694-695 (9th Cir. 2000)* (wife filed for declaration that debt was nondischargeable under *11 U.S.C. § 523(1)(15)*, and was entitled to attorney's fees incurred in meeting burden of demonstrating validity of debt under state law and amount that is owing)]. The bankruptcy court may also award the enforcing spouse attorney's fees incurred in a state court action that has been subjected to an automatic stay resulting from the filing of a Chapter 7 petition in bankruptcy [*Renfrow v. Draper, 232 F.3d 688, 694-695 (9th Cir. 2000)]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysCoverageExceptionsAlimony, Maintenance & SupportBankruptcy LawDischarge & DischargeabilityNondischarge of Individual DebtsAlimony, Divorce Settlements & SupportCivil ProcedureJusticiabilityStandingGeneral OverviewFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral Overview

California Forms of Pleading and Practice--Annotated

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22-258 California Forms of Pleading and Practice--Annotated § 258.17

§ 258.17 Effect of Death

[1] In General

If the party in whose favor judgment was given dies, a writ of execution may be issued, or the judgment may otherwise be enforced by the personal representative of the estate or a successor in interest [*Code Civ. Proc. § 686.010*]. If the party against whom judgment was given dies, enforcement of the judgment is governed by the creditor claims provisions of the Probate Code [*Code Civ. Proc. § 686.020*; *see Prob. Code §§ 9300, 9302-9303*; *see generally Prob. Code § 9000 et seq.*].

If a party dies before entry of the judgment in a proceeding for legal separation or dissolution of marriage, the proceeding must abate. Death of one of the parties automatically dissolves their marriage [*see Fam. Code § 310(a)*] and vests the probate court with exclusive jurisdiction to determine the survivor's rights with respect to the decedent's interests in property as well as the survivor's rights with respect to property in which the decedent had an interest (for example, community property). But if one of the parties dies after entry of the judgment, the family law court still has jurisdiction to enforce the judgment, insofar as it is enforceable after the party's death [*McClenny v. Superior Court (1964) 62 Cal. 2d 140, 145-146, 41 Cal. Rptr. 460, 396 P.2d 916* ; *Darter v. Magnussen (1959) 172 Cal. App. 2d 714, 718, 342 P.2d 528]* .

For discussion of special applications of these principles in the property context, see Ch. 122, *Community Property* .

A court that has ordered an award of reasonable attorney's fees to an attorney appointed to represent the children of the marriage has jurisdiction to determine the amount of these fees and to allocate payment between the parties after the death of one of the parties. Although the general rule is that following the death of a party the court is deprived of jurisdiction to make further orders concerning attorney's fees, the court retains jurisdiction to enforce a right to attorney's fees adjudicated before the party's death [*In re Marriage of Lisi (1995) 39 Cal. App. 4th 1573, 1575-1576, 46 Cal. Rptr. 2d 623]* .

In actions for nullity of marriage, by contrast, if a party dies before entry of the judgment, the action survives [*see*

Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., vol. 1, Ch. 12 (Matthew Bender)]. The decedent's estate administrator can substitute into the nullity action to obtain a judgment [*In re Marriage of Goldberg (1994) 22 Cal. App. 4th 265, 268, 270-271, 277, 27 Cal. Rptr. 2d 298* (decedent's action for nullity based on fraud would determine whether nieces and nephews or surviving spouse would inherit decedent's estate)].

If the judgment is for money, and property of the obligated party is under levy pursuant to a writ of execution at the time of his or her death, execution may proceed as though the party had not died. The personal representative of the estate takes the deceased party's place [*see Prob. Code § 9303*].

A judgment for the possession of property or a judgment that requires a sale of property is enforceable under the provisions of the Enforcement of Judgments Law [*Code Civ. Proc. § 680.010 et seq.*], notwithstanding the death of the decedent [*see Prob. Code § 9302(a)*]. However, except with respect to property subject to an execution lien at the time of the decedent's death, a judgment on a claim for money is not enforceable under the Enforcement of Judgments Law, but is payable in the course of administration and must be filed or presented in the same manner as other claims against the estate [*see Prob. Code § 9300*].

For discussion of the procedures governing claims against a decedent's estate, *see* Ch. 454, *Probate: Claims Against the Estate* , and California Probate Practice, Ch. 12 (Matthew Bender).

[2] Support Obligor

[a] In General

If the obligated party dies owing support arrearages, the party entitled to support may file a creditor's claim with the personal representative of the estate [*see Pelser v. Pelser (1960) 177 Cal. App. 2d 228, 232, 2 Cal. Rptr. 259* ; *see also Prob. Code § 9300*].

Unless the parties otherwise agree in writing, a spousal support obligation terminates on the date of the obligated party's death [*see Fam. Code § 4337*], and only arrearages then owing can be claimed against the estate. However, the estate of the obligated spouse is liable for child support accruing under a judgment or order after the obligated spouse's death [*Taylor v. George (1949) 34 Cal. 2d 552, 556, 212 P.2d 505* ; *Stein v. Hubbard (1972) 25 Cal. App. 3d 603, 605, 102 Cal. Rptr. 303* ; *see* Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., vol. 2, Ch. 40 (Matthew Bender)].

[b] Enforcement of Spousal Support Arrearages Against Subsequent Spouse

A court-ordered obligation for spousal support is a "debt" that is chargeable against the community property of the obligor's second marriage, except for the noncommingled earnings of the second spouse after the marriage [*In re Marriage of Barnes (1978) 83 Cal. App. 3d 143, 149* ; *see In re Marriage of D'Antoni (1981) 125 Cal. App. 3d 747, 750, 178 Cal. Rptr. 285* (both decided under former law); *Fam. Code §§ 910(a), 911(a)*]. Under the Probate Code, if the obligor dies and his or her separate property or community property of his or her subsequent marriage passes to the subsequent spouse without administration, the surviving spouse is personally liable for all debts of the decedent that are chargeable against the community property and against the decedent's separate property [*see Prob. Code §§ 13550, 13551*]. The liability is enforceable against the surviving spouse in the same manner as it could have been enforced against the decedent if he or she had not died [*see Prob. Code § 13554(a)*]. Thus, if a decedent dies leaving spousal support arrearages, the obligee-former spouse may enforce the liability against the obligor's surviving subsequent spouse, to the extent of any separate property of the decedent or community property of the second marriage that passed to the survivor without administration.

The surviving spouse of a second marriage can, however, elect to subject the community property and decedent's separate property to administration [*see Prob. Code § 13502*]. In that case, the subsequent spouse is not personally liable [*Prob. Code § 13553*], and the obligee-former spouse must file a timely creditor's claim against the decedent's estate in order to recover the arrearages [*see Prob. Code §§ 9000 et seq., 13552*].

For full discussion of transfers of property to surviving spouses without probate administration, see California Probate Practice, Ch. 4 (Matthew Bender). For discussion of creditor's claims against decedents' estates, see California Probate Practice, Ch. 12 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityAbatement on Death of PartyFamily LawChild SupportObligationsTerminationDeathFamily LawMarital Termination & Spousal SupportAnnulmentGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationDeath

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22-258 California Forms of Pleading and Practice--Annotated § 258.18

§ 258.18 Defense of Set-Off or Other Form of Discharge

[1] In General

In general, when one party owes money to another party, the obligor may defend an enforcement action on the ground that the obligation has actually been discharged, in whole or in part. Discharge may be alleged because of set-off, that is, that the obligee also owes money to the obligor, which can be set off against the obligation [*see Code Civ. Proc. § 431.70*], or because the obligation has been satisfied in some way other than actual payment [*see Jackson v. Jackson (1975) 51 Cal. App. 3d 363, 366-367, 124 Cal. Rptr. 101]* . However, as discussed in *[2], below,* in the case of proceedings for collection of support arrearages, there are many qualifications and exceptions to this rule.

[2] Support Arrearages

[a] Rule Against Retroactive Modification of Support Order

Neither child nor spousal support may be modified as to any amount that accrued before the date of filing of a modification motion [*Fam. Code § 3651(c)*; *County of Santa Clara v. Wilson (2003) 111 Cal. App. 4th 1324, 1326-1327, 4 Cal. Rptr. 3d 653* (trial court lacked equitable power to eliminate four months of child support arrearages accruing before father filed modification motion); *see* Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., vol. 2, chs. 42, 52 (Matthew Bender)]. Therefore, an obligor parent or spouse may not defend against collection of support arrearages on a ground that is actually an attempt to secure a retroactive modification of past-due support payments [*Lehrer v. Lehrer (1976) 63 Cal. App. 3d 276, 280-281, 133 Cal. Rptr. 709* ; *see In re Marriage of Beilock (1978) 81 Cal. App. 3d 713, 730-732, 146 Cal. Rptr. 675]* . An attempt to secure retroactive modification would occur, for example, if a noncustodial parent filed a motion to quash execution for child support arrearages because the supported child had actually become emancipated [*see Lehrer v. Lehrer (1976) 63 Cal. App. 3d 276, 280-281, 133 Cal. Rptr. 709]* . The obligor-parent's proper remedy is to move for termination of support. Having failed to do so, he or she may not attempt to modify the support decree retroactively by quashing collection of arrearages [*In re Marriage of Beilock (1978) 81 Cal. App. 3d 713, 730-732, 146 Cal. Rptr. 675* ; *see Lehrer v. Lehrer (1976) 63 Cal. App. 3d 276, 280-281, 133 Cal. Rptr. 709]* . Similarly, a support obligor may not defeat a motion to establish arrears as an attempted retroactive modification, on the ground that it was a prior writ of execution obtained in

a different amount [*In re Marriage of Robinson (1998) 65 Cal. App. 4th 93]* .

Nevertheless, a court has certain equitable and discretionary powers that may be exercised to reduce or eliminate arrearages in determining an obligor's defense to a support action [*see In re Marriage of Okum (1987) 195 Cal. App. 3d 176, 182, 240 Cal. Rptr. 258* ; *In re Marriage of Utigard (1981) 126 Cal. App. 3d 133, 145-146, 178 Cal. Rptr. 546]* . Set-off or other form of payment may be raised under some circumstances as a defense to collection of support arrearages. In these cases, which are discussed in *[d]* and *[e], below*, the motion is deemed not to involve an attempt to modify support retroactively, but rather to show that the obligation has been discharged [*see In re Marriage of Beilock (1978) 81 Cal. App. 3d 713, 732-733, 146 Cal. Rptr. 675]* .

[b] Debts of Supported Spouse

A debt owed by the supported spouse to the paying spouse may not be set off against spousal support arrearages. A spousal support order would not be diminished by the supported spouse's debts to the paying spouse arising before the order; thus, such debts may not be set off against support payments due under the order [*Keck v. Keck (1933) 219 Cal. 316, 320-321, 26 P.2d 300* ; *see Kruger v. Wells Fargo Bank (1974) 11 Cal. 3d 352, 368 n.24, 113 Cal. Rptr. 449, 521 P.2d 441* (characterizing *Keck* as one of many California cases limiting right of set-off in order to carry out state policies protecting interest of debtor)].

[c] Debts of Custodial Parent

A debt owed by the custodial parent or non-parent custodian to the supporting parent may not, under any circumstances, be set off against child support arrearages. The support obligation runs to the child, not to the custodial parent or other custodian [*Williams v. Williams (1970) 8 Cal. App. 3d 636, 640, 87 Cal. Rptr. 754]* .

[d] De Facto Change of Custody

A court has the equitable power to refuse to enforce payment of child support arrearages that accrued during a period of time when the obligor had the actual sole physical custody of the child. The rationale for this rule is that the support obligation is owed to the child, not to the parent [*In re Marriage of Okum (1987) 195 Cal. App. 3d 176, 182, 240 Cal. Rptr. 458]* . In this case, the obligor is deemed in equity to have satisfied the obligation by having provided the actual home and support for the child during the period when arrearages were accruing [*Jackson v. Jackson (1975) 51 Cal. App. 3d 363, 368, 124 Cal. Rptr. 101]* . Thus, the refusal to enforce the support order under these circumstances is not a retroactive modification of the order, but rather an equitable compliance with it [*Jackson v. Jackson (1975) 51 Cal. App. 3d 363, 366-368, 124 Cal. Rptr. 101]* .

This equitable right of set-off exists regardless of the procedural setting in which enforcement of arrearages is sought [*In re Marriage of Trainotti (1989) 212 Cal. App. 3d 1072, 1075, 261 Cal. Rptr. 36* ; *see Fam. Code § 290* (giving court discretion with regard to enforcement remedies)]. It may be asserted in support of the obligor's motion to quash a writ of execution [*see, e.g., In re Marriage of Okum (1987) 240 Cal. Rptr. 458* ; *Jackson v. Jackson (1975) 51 Cal. App. 3d 363, 368, 124 Cal. Rptr. 101]* , or in any other proceeding initiated for the purpose of enforcing the terms of a child support order [*In re Marriage of Trainotti (1989) 212 Cal. App. 3d 1072, 1075-1076, 261 Cal. Rptr. 36]* .

[e] Credit for Overpayments or Payments Directly to Children

Credit against arrearages for amounts paid other than in conformity with the court's order may be viewed as a prohibited retroactive modification [*see Spivey v. Furtado (1966) 242 Cal. App. 2d 259, 264, 51 Cal. Rptr. 362]* . Nevertheless, if an obligor parent overpays child support for a particular period, the trial court has discretion to determine whether the overpayments are to be credited against later arrearages. Overpayment is more likely to be credited with regard to an obligor who has irregular receipt of income. Even in this type of case, the safer practice is to obtain the agreement of the obligee, or at least to notify the obligee that the overpayment in one period is not intended as a gift, but meant to be

applied to future amounts due [*In re Marriage of Peet (1978) 84 Cal. App. 3d 974, 977-980, 149 Cal. Rptr. 108]* .

Similarly, the court has discretion to determine whether payments made directly to the children are to be credited against alleged arrearages [*In re Marriage of Utigard (1981) 126 Cal. App. 3d 133, 145-146, 178 Cal. Rptr. 546* ; *see Spivey v. Furtado (1966) 242 Cal. App. 2d 259, 264-267, 51 Cal. Rptr. 362* (father paid cost of college education directly to children and reduced amount of court-ordered support)]. This type of credit should be rarely granted, because were the parent to proceed properly by way of motion for modification, he or she would have to disclose his or her current financial situation, and support might then be increased, whether or not the manner of payment is also changed [*Spivey v. Furtado (1966) 242 Cal. App. 2d 259, 265-266, 51 Cal. Rptr. 362]* . Relevant considerations are whether the obligee parent had knowledge of the direct payments and failed to object [*see In re Marriage of Utigard (1981) 126 Cal. App. 3d 133, 145-146, 178 Cal. Rptr. 546* (credit allowed)], and whether the noncustodial obligor-parent is attempting to obtain a measure of control over the children by making the substituted payments [*see Spivey v. Furtado (1966) 242 Cal. App. 2d 259, 266, 51 Cal. Rptr. 362* (credit denied)].

[3] Property Division

If one of the parties is to receive money as part of a division of the parties' property, and that party owes a debt (other than support arrearages) to the other, the debt may be set off against the payment owed under the property division. Thus, a husband who owed money under a property settlement was entitled to set it off against the wife's half of joint income tax liability, which the husband had paid [*Murchison v. Murchison (1963) 219 Cal. App. 2d 600, 604-606, 33 Cal. Rptr. 285]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsEnforcementSetoffsFamily LawChild SupportObligationsComputationArrearagesFamily LawChild SupportObligationsComputationArrearagesFamily LawChild SupportObligationsModificationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral Overview

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22-258 California Forms of Pleading and Practice--Annotated § 258.19

§ 258.19 Effect of Child's Becoming Adult on Enforcement of Child Support

The obligation to pay child support ordinarily terminates when the child becomes an adult [*see Fam. Code §§ 2010(c), 3601(a), 3900, 3901(a)* (duty of support and court's jurisdiction to order support extends to "minor" children); *see also Fam. Code §§ 6500, 6501* (minor is a person who is under the age of 18 years; adult is person who is 18 years or older); Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., Vol. 2, Ch. 40 (Matthew Bender)]. However, an action to recover arrearages may be maintained at any time even though the child has attained the age of 18 years [*see Fam. Code § 4503*]. A judgment for child support, including a judgment for arrearages and any penalties or interest thereon, is enforceable until paid in full [*see Fam. Code § 291(a)*].

After the child has become an adult, an action to collect child support arrearages is an action for the benefit of the parent who previously had custody of the child. The child has no standing to seek a writ of execution, since he or she has already received support from the custodial parent, who could seek reimbursement by an execution action [*see In re Marriage of Utigard (1981) 126 Cal. App. 3d 133, 139, 143, 178 Cal. Rptr. 546]* .

The parties may make a marital settlement agreement or stipulated judgment providing that child support payments will continue beyond the date when the child reaches the age of majority [*see Fam. Code §§ 3587, 3901(b)*]. This order may be enforced in the same manner as any other child support order, including, but not limited to contempt [*see Fam. Code §§ 4000, 4500*]. Contempt is discussed at *§ 258.80* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsTerminationAttainment of MajorityFamily LawChild SupportStanding

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22-258 California Forms of Pleading and Practice--Annotated § 258.20

§ 258.20 Satisfaction of Judgment

If a money judgment is satisfied, other than by writ, the judgment creditor must immediately file an acknowledgment of satisfaction with the court [*Code Civ. Proc. § 724.030*]. If the judgment is satisfied by some form of noncash payment or check, the obligation to file the acknowledgment arises only if the payment is actually honored [*Code Civ. Proc. § 724.010(c)*]. For further discussion of procedures for acknowledgment of satisfaction of a judgment and appropriate forms, see *Ch. 318, Judgments, § 318.90* et seq.

The order in which amounts received in satisfaction of a judgment are to be credited against fees, interest, and principal is set forth in *Code Civ. Proc. § 695.220* (judgments for other than support) and *Code Civ. Proc. § 695.221* (support judgments).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionFamily LawChild SupportObligationsEnforcementGeneral Overview

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22-258 California Forms of Pleading and Practice--Annotated § 258.21

§ 258.21 Effect of Appeal and Review

Under various circumstances, enforcement may be stayed pending a decision on appeal [*see Code Civ. Proc. § 916 et seq.*]. Depending on the type of order or judgment, stay may be automatic, in the discretion of the court, or may require the filing of a bond or undertaking. If a stay of enforcement is not available in the trial court, a writ of supersedeas issued by the appellate court may accomplish the same purpose. For further discussion, see Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., vol. 4, Ch. 132 (Matthew Bender).

If enforcement is sought against a party during (or within 90 days after) his or her period of military service for the United States [*see 50 U.S.C. App. § 511(2)*], enforcement may be stayed under the provisions of the Servicemembers Civil Relief Act [*see 50 U.S.C. App. § 501 et seq.*]. For discussion and related forms, see Ch. 136, *Continuances* , and Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., vol. 4, Ch. 131 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureRemediesBondsGeneral OverviewFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsEnforcementArrearage JudgmentsFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral Overview

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22-258 California Forms of Pleading and Practice--Annotated § 258.22

§ 258.22 Tort Recovery for Evasion of Support Obligation

It is unclear whether a child or spouse may enforce a support order through a tort action for damages for wrongful evasion of a support obligation. In a case presenting questions of first impression that the court refused to consider, one court of appeal has held that a former wife and her adult children could not recover in tort for the former husband's wrongful evasion of his spousal and child support obligations, because the plaintiffs' claims were barred by the statute of limitations [*Spellis v. Lawn (1988) 200 Cal. App. 3d 1075, 1079, 246 Cal. Rptr. 385]* . The court noted that plaintiffs' causes of action for compensatory and punitive damages for fraud and intentional infliction of emotional distress required recognition of new theories of recovery for enforcement of a support obligation, and that their cause of action for damages for violation of the statutory duty to support under former *Civ. Code § 196a* [*now see Fam. Code §§ 3900, 4000*] required creation of a new tort. The court ruled, however, that none of the causes of action could have survived the longest applicable limitation period, and therefore the court refused to reach the merits of the case [*Spellis v. Lawn (1988) 200 Cal. App. 3d 1075, 1078-1079, 246 Cal. Rptr. 385* (decided under former *Civ. Code § 196a*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressGeneral Overview

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[Reserved]

§§ 258.23[Reserved]

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22-258 California Forms of Pleading and Practice--Annotated § 258.30

§ 258.30 Governing Law

Execution is authorized as a means of enforcing any judgment or order made or entered pursuant to the Family Code by *Fam. Code § 290*. Any child or family support order may be enforced by a writ of execution under *Fam. Code § 5100 et seq.* Execution is more generally governed by *Code Civ. Proc. § 699.010 et seq.* A stay of enforcement of a money judgment on appeal is governed by *Code Civ. Proc. § 916* Execution sales are governed by *Code Civ. Proc. § 701.510 et seq.* Procedures for claiming exemption after levy on property are set forth in *Code Civ. Proc. § 703.510 et seq.* Exempt property is described in *Code Civ. Proc. § 704.010 et seq.* Statutes pertaining to judgment liens are contained in *Code Civ. Proc. § 697.010 et seq.* The procedures for obtaining an earnings withholding order are set forth in *Code Civ. Proc. § 706.100 et seq.* Federal laws restricting the amount of earnings that may be withheld from a judgment debtor are contained in *15 U.S.C. § 1671 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral Overview

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22-258 California Forms of Pleading and Practice--Annotated § 258.31

§ 258.31 Execution Defined

Execution is a procedure in which a levying officer, such as a sheriff, marshall, or constable, or in some instances, a registered process server, satisfies a judgment by seizing the debtor's property for delivery to the judgment creditor [*see Southern California Lumber Co v. Ocean Beach Hotel Co. (1892) 94 Cal. 217, 221, 29 P. 627* ; *see also Code Civ. Proc. §§ 680.260* (sheriff, marshall, or constable), 699.080(a) (registered process server)]. The levying officer may also sell the seized property and deliver the proceeds to the persons entitled to them, or to the court [*see Code Civ. Proc. §§ 701.050, 701.810-701.830*].

Execution is initiated by the judgment creditor applying to the court for a writ of execution after entry of a money judgment. The writ is addressed to the levying officer or registered process server in the county in which the levy is to be made [*see Code Civ. Proc. § 699.510(a)*]. The clerk of the court must give priority to the application for and issuance of writs of execution on orders or judgments for child support and spousal support [*Code Civ. Proc. § 699.510(a)*]. Within 180 days of issuance of the writ, the levying officer must levy on the property described in the writ in the manner prescribed by law [*see Code Civ. Proc. § 699.530*]. The levying officer must return the writ to the court pursuant to the provisions of *Code Civ. Proc. § 699.560*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-258 California Forms of Pleading and Practice--Annotated § 258.32

§ 258.32 Court Order Required in Dissolution Cases

A trial court has discretion to determine whether execution is an appropriate remedy for enforcing orders made under the Family Code [*see Fam. Code § 290*; *In re Marriage of Oropallo (1998) 68 Cal. App. 4th 997, 1001, 80 Cal. Rptr. 2d 669* (wife who conducted nonjudicial trustee sales of realty that secured husband's debt in marital dissolution was subject to antideficiency statutes and not entitled to writ of execution)]. Therefore, a writ of execution in a dissolution case is not issued as a matter of course, as in ordinary civil actions, but requires a court order [*Messenger v. Messenger (1956) 46 Cal. 2d 619, 630, 297 P.2d 988* ; *In re Marriage of Farner (1989) 216 Cal. App. 3d 1370, 1376-1377, 265 Cal. Rptr. 531* ; *Bonner v. Superior Court (1976) 63 Cal. App. 3d 156, 167, 133 Cal. Rptr. 592]* . However, there is an exception to this rule applicable to most support orders [*see Fam. Code §§ 5100, 5101* (discussed at *§ 258.39, below*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral Overview

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22-258 California Forms of Pleading and Practice--Annotated § 258.33

§ 258.33 Standing to Apply for Writ

A writ of execution is authorized on application by the judgment creditor [*see Code Civ. Proc. § 699.510(a)*]. "Judgment creditor" means the person in whose favor a judgment is rendered or an assignee of record, and in some instances includes a guardian or conservator, personal representative, or other successor in interest of the judgment creditor or assignee of record [*see Code Civ. Proc. § 680.240*]. The district attorney or other local child support agency, however, has statutory authority to enforce child support orders, whether or not the child is receiving public assistance, and also to enforce court ordered spousal support [*see Fam. Code §§ 4351, 17400(a)*].

Although a custodial parent may enforce child support obligations, including arrearages, after the child has reached the age of majority, the child may be barred from seeking to collect the arrearages in his or her own name. The custodial parent is considered the direct beneficiary of the arrearages, and the nature of the action is one for reimbursement of money expended for the children's support [*see In re Marriage of Utigard (1981) 126 Cal. App. 3d 133, 141, 178 Cal. Rptr. 546* (parent barred from setting aside fraudulent conveyance of former spouse by statute of limitations, but children who were minors at time of conveyance were not, under *Code Civ. Proc. § 352(a)*); *see also* the discussion at *§ 258.19, above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-258 California Forms of Pleading and Practice--Annotated § 258.34

§ 258.34 Types of Judgments and Orders Enforceable by Execution

[1] Judgment for Support or Other Money Judgment

Money judgments, including judgments made pursuant to the Family Code, may be enforced by execution [*see Code Civ. Proc. § 699.510(b)*; *Fam. Code §§ 290, 5100*]. A judgment enforceable by execution includes an order for payment of child or family support arrearages [*see Fam. Code § 5100*; *see also* discussion at *§ 258.37, below*]. The court must award interest on the arrearages as a matter of law [*see In re Marriage of Popenhager (1979) 99 Cal. App. 3d 514, 523-524, 160 Cal. Rptr. 379]* . An order for child or spousal support made, entered, or enforceable in California is enforceable under the Family Code, whether or not made pursuant to the Family Code [*Fam. Code § 4500*]. Thus, support orders made under the support agency enforcement provisions of the Family Code or corresponding former sections of the Welfare and Institutions Code [*see Fam. Code § 17400 et seq.*; for discussion and forms, *see* Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*] are enforceable under the Family Code.

Similarly, orders for the payment of money other than for support made in a dissolution action, such as an equalizing payment incident to a division of community property, also may be enforced by execution under the Family Code, even though they are not made pursuant to the Family Code [*see Fam. Code §§ 290, 2601*]. In addition, an order giving one spouse a retroactive community property interest in pension payments already received by the other spouse constitutes a money judgment enforceable by execution [*In re Marriage of Farner (1989) 216 Cal. App. 3d 1370, 1374-1376, 265 Cal. Rptr. 531]* .

[2] Attorney's Fees and Costs

An award of attorney's fees and costs is regarded as an award for support and may be collected by writ of execution [*see Henry v. Henry (1960) 182 Cal. App. 2d 707, 711-713, 6 Cal. Rptr. 418]* . In addition, it has been held that the services of an attorney in a dissolution action qualify as "common necessaries of life" for the benefit of an indigent spouse. Therefore, an attorney had the right to enforce a pendente lite award of fees in a dissolution action by writ of execution on the other spouse's earnings against a claim of exemption filed by the debtor spouse [*In re Marriage of Pallesi (1977) 73 Cal. App. 3d 424, 427-428, 140 Cal. Rptr. 842* ; *see* discussion at *§ 258.36[2], below*].

A judgment creditor may also recover certain costs in obtaining a writ of execution, such as the statutory fee for issuing the writ [*see Code Civ. Proc. §§ 685.050, 685.070*].

[3] Temporary Orders

Temporary orders made during the pendency of an action brought under the Family Code may also be enforced by writ of execution [*see Fam. Code §§ 290, 5100*; *Biltmore Drug Store v. Superior Court (1929) 101 Cal. App. 363, 364-365, 281 P. 710]* . It would appear that temporary orders for attorney's fees and costs are also enforceable by a writ of execution [*see, e.g., In re Marriage of Pallesi (1977) 73 Cal. App. 3d 424, 427-428, 140 Cal. Rptr. 842* ; *see also* discussion at [2], *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-258 California Forms of Pleading and Practice--Annotated § 258.35

§ 258.35 Property Subject to Execution

[1] In General

Except as otherwise provided by law, all property that is subject to enforcement of a money judgment pursuant to *Code Civ. Proc. § 695.010 et seq.* is subject to levy under a writ of execution to satisfy a money judgment [*Code Civ. Proc. § 699.710*]. This includes property in the possession of a third person, except that the lien is effective only as to the extent of the judgment debtor's actual interest in the property [*see In re Marriage of Finnell (1986) 182 Cal. App. 3d 52, 56, 227 Cal. Rptr. 38]* .

A debtor-spouse's community property interest in the marital residence over which the court has reserved jurisdiction is subject to execution to enforce the debt. However, relief must be sought in the family law department, which may fashion an appropriate remedy in support of its reserved jurisdiction to achieve equal division of community property and collection of support. Sale of the debtor spouse's interest is not required by *Code Civ. Proc. § 704.780(b)* [*In re Marriage of Schenck (1991) 228 Cal. App. 3d 1474, 1479-1485, 279 Cal. Rptr. 651]* .

If one spouse's community interest in real property is to be satisfied by means of an equalizing payment from the other spouse, and the obligation is evidenced by a deed of trust on the property, the creditor spouse must use care in enforcing the obligation. In one case, for example, a former wife who had held second trust deeds on several parcels of property sought to obtain a writ of execution to recover the amount of a deficiency that existed between the obligation owed her and the amount recovered through a nonjudicial trustee's sale of the property. An appellate court held that she was barred under antideficiency statutes from recovering the unsatisfied amount owed to her, because, as a junior lienholder, once she had elected to proceed by exercising the power of sale contained in the deed of trust, *Code Civ. Proc. § 580d* precluded any deficiency judgment. Once the former wife became a secured creditor with a right to conduct a nonjudicial sale of her former husband's real property in the case of default, she was subject to the limitations that followed that right [*see In re Marriage of Oropallo (1998) 68 Cal. App. 4th 997, 1007, 80 Cal. Rptr. 2d 669]* .

It should be noted that levy against the wages of a judgment debtor may only be made by an earnings withholding order or by earnings assignment [*see* Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*].

[2] Pension Benefit Plans Subject to Execution for Support Orders

Although generally exempt from execution, payments under a pension or profit-sharing plan may be levied against to satisfy a judgment for child or spousal support. Statutory law provides that amounts held, controlled, or in the process of distribution by a public or private retirement plan for the payment of benefits as an annuity, pension, retirement allowance, disability payment, or death benefit, which are otherwise exempt from execution, are exempt from application toward satisfaction of a child, family, or spousal support judgment only to the extent determined by the court under *Code Civ. Proc. § 703.070(c)* [*see Code Civ. Proc. §§ 704.110(c), 704.115(c)*; *see also* discussion at *§ 258.36[3], below*]. If the amount sought to be applied to the satisfaction of the judgment is payable periodically, the amount payable is subject to an earnings assignment order for support as defined by *Code Civ. Proc. § 706.011(b)* or by any other applicable enforcement procedure, but the amount to be withheld must not exceed the amount permitted to be withheld on an earnings assignment order for support under *Code Civ. Proc. § 706.052* [*Code Civ. Proc. §§ 704.110(c)(2), 704.115(c)(2)*; *see* Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*].

If a public entity, other than the United States, is served with an earnings assignment order for support, that service creates a lien on all employee contributions in the amount necessary to satisfy a support judgment determined under *Code Civ. Proc. § 695.210* to the extent the judgment remains enforceable. The public entity must comply with a request to return employee contributions by delivering them to the court that issued the order, where they are subject to any available procedure to enforce a support order [*Code Civ. Proc. § 704.114*; *see* Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*].

Notwithstanding *Fam. Code § 2060(b)* (limiting enforcement of orders against pension plans unless joined), an order for the payment of child, family, or spousal support may be enforced against an employee benefit plan, regardless of whether the plan has been joined as a party to the proceeding [*Fam. Code § 5103(a)*].

[3] Execution Against Community Property of Subsequent Marriage

A judgment creditor may execute against the community property of a judgment debtor's subsequent marriage to the extent authorized by *Fam. Code § 900 et seq.* A support obligation not arising out of the present marriage is treated as a debt incurred before marriage, regardless of when the order is made or modified and regardless of when any arrearages accrue [*see Fam. Code § 915(a)*]. Therefore, the child or former spouse may enforce the obligation in the same manner as a general creditor [*see Fam. Code §§ 910, 913*].

The earnings of the nonobligor spouse may not be executed on to satisfy the debtor spouse's support obligations from the prior marriage, if they are kept in a deposit account uncommingled with other community property and if the debtor has no right of withdrawal [*Fam. Code § 911(a)*; *see Com. Code § 9102(2)(29)* (deposit account defined)].

For further discussion of debts and liabilities in family law proceedings, see Ch. 122, *Community Property* , and Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-258 California Forms of Pleading and Practice--Annotated § 258.36

§ 258.36 Property Not Subject to Execution

[1] Statutory Exemptions

Certain property is statutorily exempt from execution without the necessity of the judgment debtor filing a claim of exemption [*see Code Civ. Proc. § 699.720(a)(1)-(10)*]. Included in this category are an alcoholic beverage license, a partnership interest when the partnership is not a judgment debtor, and the interest of a trust beneficiary [*see Code Civ. Proc. § 699.720(1), (2), (8)*]. For further discussion, see Ch. 254, *Executions and Enforcement of Judgments* .

Nothing in *Code Civ. Proc. § 699.720(a)* affects or limits the right of the judgment creditor to apply property to the satisfaction of a money judgment pursuant to any applicable procedure other than execution [*Code Civ. Proc. § 699.720(b)*].

[2] Claim of Exemption

In addition to the specific property listed in *Code Civ. Proc. § 699.720(a)* (*see [1], above*), property can be made exempt from enforcement of a money judgment by filing a claim of exemption pursuant to certain statutory procedures [*see Code Civ. Proc. § 703.010 et seq.*].

The exemptions provided by *Code Civ. Proc. § 703.010 et seq.* or by any other statute do not apply if the judgment to be enforced is for the foreclosure of a mortgage, deed of trust, or other lien or encumbrance on the property other than a lien created pursuant to *Code Civ. Proc. § 695.010 et seq.* (enforcement of money judgments) or *Code Civ. Proc. § 481.010 et seq.* (attachments) [*Code Civ. Proc. § 703.010(b)*]. For discussion and forms relating to the foreclosure of mortgages, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

Property for which a claim of exemption may be filed is set forth in *Code Civ. Proc. § 704.010 et seq.*; the homestead exemption for real property is governed by *Code Civ. Proc. § 704.710 et seq.* When a judgment debtor is not currently residing in the homestead, but his or her separated or former spouse continues to reside in or exercise control over possession of the homestead, that judgment debtor continues to be entitled to an exemption until entry of judgment or other legally enforceable agreement dividing the community property between the judgment debtor and the separated or

former spouse, or until a later time period as specified by court order [*Code Civ. Proc. § 704.720(d)*].

A judgment debtor may also claim an exemption after levy of execution. Procedures for claiming an exemption after levy are set forth in *Code Civ. Proc. § 703.510 et seq.* For a detailed discussion and procedural guides for claiming an exemption, see *Ch 254, Executions and Enforcement of Judgments, §§ 254.40 et seq. and 254.130* et seq., and Ch. 294, *Homesteads* .

[3] Application of Exemption to Judgment for Support

Except as otherwise provided by statute, the exemptions provided by *Code Civ. Proc. § 703.010 et seq.* [*see [1], above*], or by any other statute apply to a judgment for child, family, or spousal support [*Code Civ. Proc. § 703.070(a)*]. However, if property is exempt without making a claim, the property is not subject to being applied to the satisfaction of a judgment for child, family, or spousal support [*Code Civ. Proc. § 703.070(b)*; *In re Marriage of Johnson-Wilkes & Wilkes (1996) 48 Cal. App. 4th 1569, 1576, 56 Cal. Rptr. 2d 323* (spouse's disability insurance benefits were exempt from earnings assignment order for child support); for discussion of claims for exemption, *see [2], above*].

Except as provided in *Code Civ. Proc. § 703.070(b)*, discussed *above*, if property sought to be applied to the satisfaction of a judgment for child, family, or spousal support is shown to be exempt under *Code Civ. Proc. § 703.070(a)*, in appropriate proceedings, the court shall, on noticed motion of the judgment creditor, determine the extent to which property for which an exemption must be claimed may nevertheless be applied to the satisfaction of the support judgment. In making this determination, the court must take into account the needs of the judgment creditor, the needs of the judgment debtor and all persons the judgment debtor is required to support, and all other relevant circumstances. The court must effectuate its determination by an order specifying the extent to which the otherwise exempt property is to be applied to the satisfaction of the judgment [*Code Civ. Proc. § 703.070(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 258.37 Time for Application

A child, spousal, or family support order may be enforced by a writ of execution without prior court approval "as long as the support order remains enforceable" [*Fam. Code §§ 5100, 5101*]. Because support orders are enforceable until paid in full [*see Fam. Code § 291(a)*; *Code Civ. Proc. § 683.130(c)(1)*], court approval is not required to enforce an unpaid support order by writ of execution. Thus, a party seeking to enforce an unpaid support order by writ of execution is not required to make a showing of due diligence to the court. In a proceeding to enforce a judgment for child, family, or spousal support, the obligor may raise, and the court may consider, the defense of laches only with respect to any portion of the judgment that is owed to the state [*Fam. Code § 291(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 258.38 Time Within Which Writ Will Issue

[1] Civil Actions Generally

In general, a writ of execution will not issue on the expiration of 10 years after the date of entry of a money judgment or judgment for possession or sale of property [*see Code Civ. Proc. § 683.020*]. However, the judgment may be renewed for an additional 10 years, as provided in *Code Civ. Proc. §§ 683.110 et seq.* [*see § 258.40, below*].

[2] Family Law Judgments

The 10-year time period for enforcement and renewal of judgments under the Code of Civil Procedure does not apply to judgments made or entered pursuant to the Family Code [*Code Civ. Proc. § 683.310*]. Instead, the provisions of *Fam. Code §§ 290, 5100-5104* apply to enforcement of family law judgments.

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-258 California Forms of Pleading and Practice--Annotated § 258.39

§ 258.39 Special Rules for Support Judgments

[1] When Court Order Not Required

A child, family, or spousal support order may be enforced by a writ of execution without prior court approval as long as the support judgment remains enforceable [*Fam. Code § 5100*]. Because support orders are enforceable until paid in full, court approval is not required to enforce an unpaid support order by writ of execution [*see Fam. Code § 291(a)*].

[2] When Court Order Required

The Family Code and Rules of Court do not specify a particular procedure for the issuance of writs of execution in family law proceedings. Although *Fam. Code § 290*, if strictly construed, could be read to require a hearing before issuance of a writ of execution, most courts, in practice, will issue the writ in family law proceedings on ex parte application in a manner applicable to ordinary civil proceedings. Counsel should consult local rules of court or the clerk's office to determine the procedure required in a particular county.

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-258 California Forms of Pleading and Practice--Annotated § 258.40

§ 258.40 Renewal of Judgments

[1] General Rule

As to civil actions in general, the period of enforceability of a money judgment or a judgment for possession or sale of property may be extended by renewal of the judgment as provided in *Code Civ. Proc. § 683.110 et seq.* [*Code Civ. Proc. § 683.110(a)*]. However, a judgment may not be renewed if the application for renewal is filed within five years from the time the judgment was previously renewed under *Code Civ. Proc. § 683.110 et seq.* [*Code Civ. Proc. § 683.110(b)*].

[2] Renewal of Judgments for Support

A judgment for child, spousal, or family support, including a judgment for reimbursement that includes, but is not limited to, reimbursement arising under *Fam. Code § 17402* or other arrearages, and including all lawful interest and penalties, is exempt from any requirement that judgments be renewed. The judgment for support, or a judgment for reimbursement or other arrearages, including all lawful interest and penalties, is enforceable until paid in full [*Code Civ. Proc. § 683.130(c)(1)*; *In re Marriage of Wilcox (2004) 124 Cal. App. 4th 492, 499, 21 Cal. Rptr. 3d 315]* .

However, a money judgment, whether payable in installments or not, for the payment of child, spousal, or family support, or for reimbursement or arrearages, and including all lawful interest, may be renewed optionally, as discussed in *§ 258.12[5]* [*Fam. Code § 291(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 258.41 Procedure to Obtain Writ

[1] If Court Order Is Required

If an order of the court is required to obtain a writ of execution (*see §§ 258.32* and *258.39[2], above*), the judgment debtor or support obligee should proceed by noticed motion. Case law prior to the 1982 enactment of *Fam. Code §§ 5100-5104* suggested that a noticed motion for an order issuing a writ of execution may be more appropriate than an ex parte application in some cases [*see Cochrane v. Cochrane (1943) 57 Cal. App. 2d 937, 939, 135 P.2d 714* ; *see also Martin v. Martin (1970) 5 Cal. App. 3d 749, 755, 85 Cal. Rptr. 339]* . However, notice to the judgment debtor that a writ of execution is sought is not mandated by the due process clause of *U.S. Const., amend. XIV* [*Wyshak v. Wyshak (1977) 70 Cal. App. 3d 384, 392-393, 138 Cal. Rptr. 811]* .

Even if a court order is not required, there may be instances in which a creditor may wish to proceed by noticed motion, as, for example, if issuance of the writ of execution requires an interpretation of the court's language in prior orders [*see Martin v. Martin (1970) 5 Cal. App. 3d 749, 755, 85 Cal. Rptr. 339]* . The notice of motion must be accompanied by a memorandum of points and authorities [*see* Cal. Rules of Ct., Rule 313].

[2] By Ex Parte Application if Court Order Is Not Required

If an order of the court is not required to obtain a writ of execution to enforce a support order (*see § 258.39[2], above*), application for a writ of execution is made pursuant to the provisions of *Code Civ. Proc. § 699.510*.

Subject to *Code Civ. Proc. § 699.510(b)* (enforcement of judgments under Family Code), after entry of a money judgment, the court clerk must issue a writ of execution on application by the judgment creditor. The application is usually made on a local court form, and must be accompanied by a writ of execution that includes all the information set forth in *Code Civ. Proc. § 699.520* [*Code Civ. Proc. § 699.520*; *see § 258.111*, for the form of writ of execution adopted by the Judicial Council]. The writ must be directed to the levying officer in the county where the levy is to be made and to any registered process server. A separate writ must be issued for each county where a levy is to be made. Writs may be issued successively until the money judgment is satisfied, except that a new writ may not be issued for a county until 180 days after the issuance of a prior writ for that county unless the prior writ is first returned [*Code Civ. Proc. §*

699.510(a)].

When a writ of execution is sought to enforce a judgment made pursuant to the Family Code, the application must be accompanied by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) stating the total amount due and unpaid that is authorized to be enforced pursuant to *Fam. Code §§ 5100-5103* on the date of the application. If interest on the overdue installments is sought, the affidavit (or declaration) must state the total amount of the interest and the amount of each due and unpaid installment and the date it became due [*Fam. Code § 5104(a),(b)*; *see Code Civ. Proc. § 685.010* (specifying legal rate of interest of 10 percent)]. The affidavit (or declaration) must be filed in the action and a copy must be attached to the writ delivered to the levying officer. The levying officer must serve the copy of the affidavit (or declaration) on the judgment debtor when the writ of execution is first served on the judgment debtor pursuant to a levy under the writ [*Fam. Code § 5104(c)*; *see §§ 258.110, 258.111* (forms)].

Further requirements for issuance of a writ of execution and notice of levy are set forth in *Code Civ. Proc. § 699.520 et seq.* For a detailed discussion of the procedures for issuance of a writ and levy, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-258 California Forms of Pleading and Practice--Annotated § 258.42

§ 258.42 Response by Judgment Debtor

Once the judgment creditor establishes the right to issuance of the writ, the burden is on the judgment debtor to establish facts justifying an order denying the writ [*Bryant v. Bryant (1958) 161 Cal. App. 2d 579, 582, 326 P.2d 898* ; *see also Bryan v. Bryan (1967) 255 Cal. App. 2d 833, 840, 63 Cal. Rptr. 612]* .

If the application for the order was made on noticed motion, the judgment debtor can file opposition papers to the granting of the motion and appear at the hearing. If the writ was issued on ex parte application, the debtor can serve and file a notice of motion to recall or quash the writ and, if levy has been made, to quash the levy [*see Code Civ. Proc. § 1005*]. The debtor may make the motion on the ground that the writ was improperly issued and, in supporting papers, he or she must set forth facts supporting the allegations that the writ should not have issued [*see Jackson v. Jackson (1975) 51 Cal. App. 3d 363, 368, 124 Cal. Rptr. 101]* . For further discussion, *see § 258.43, below*.

If issuance of the writ was proper, however, and levy was made on exempt property, the judgment debtor's remedy to secure the property's release from the levy is to file a claim of exemption [*see Code Civ. Proc. § 703.510 et seq.*; *see also § 258.36[2], above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 258.43 Motion to Recall or Quash Writ of Execution

[1] Power of Court

By virtue of inherent control over its process, the court has power, on motion, to recall a writ of execution improperly or inadvertently issued [*see Meyer v. Meyer (1952) 115 Cal. App. 2d 48, 49, 251 P.2d 335]* . But once the writ is issued, the burden is on the judgment debtor to present reasons why the writ should be quashed [*see Jackson v. Jackson (1975) 51 Cal. App. 3d 363, 368, 124 Cal. Rptr. 101* ; *Slevats v. Feustal (1963) 213 Cal. App. 2d 113, 119, 28 Cal. Rptr. 517]* .

[2] Grounds for Recall

Execution may be recalled, for example, when the judgment creditor in the affidavit for issuance of the writ falsely represented the amount due from the judgment debtor [*Bryant v. Bryant (1958) 161 Cal. App. 2d 579, 581-582, 326 P.2d 898]* , or when the amount sought to be recovered has already been paid [*Meyer v. Meyer (1952) 115 Cal. App. 2d 48, 49, 251 P.2d 335]* . Execution may also be recalled if the debt represented by the judgment that is the subject of the writ has been equitably satisfied [*In re Marriage of Okum (1987) 195 Cal. App. 3d 176, 182, 240 Cal. Rptr. 458* ; *Jackson v. Jackson (1975) 51 Cal. App. 3d 363, 366-368, 124 Cal. Rptr. 101* (obligor parent actually provided home and all support for child during period in which child support arrearage accrued)].

On a timely motion to recall a writ issued on ex parte application, the trial court may review the affidavit (declaration), order, and execution issued thereon and may exercise its judicial discretion in determining whether the facts set forth in the affidavit are true and whether there has been a misrepresentation of the facts or willful suppression of facts that should have been related to the court in the first instance, or whether the judgment debtor was or was not under a legal duty to support the children and former spouse during the period in question. If the court concludes that the writ should not have issued, the court has the power to recall it and allow enforcement of the judgment only to the extent of the judgment debtor's legal and equitable liability to pay [*Slevats v. Feustal (1963) 213 Cal. App. 2d 113, 119-120, 28 Cal. Rptr. 517* ; *Noice v. Noice (1961) 195 Cal. App. 2d 204, 213, 15 Cal. Rptr. 703* ; *Wilkins v. Wilkins (1950) 95 Cal. App. 2d 605, 610-611, 213 P.2d 748]* . The court may also suspend the writ on condition that specified installment payments be made until the whole debt is discharged when it appears to be for the protection of both the creditor and

debtor to do so under the circumstances prevailing at the time of the hearing of the motion [*Moniz v. Moniz (1966) 241 Cal. App. 2d 74, 76, 50 Cal. Rptr. 267* ; *see also Szamocki v. Szamocki (1975) 47 Cal. App. 3d 812, 818, 121 Cal. Rptr. 231]* .

A motion to recall the writ, and/or to quash the levy, and supporting papers must be prepared on the Judicial Council mandatory forms of Notice of Motion or Order to Show Cause [Cal. Judicial Council Forms FL-300, FL-301] and Application for Order and Supporting Declaration [Cal. Judicial Council Form FL-310]. For illustrative samples of these forms, see Ch. 221, *Dissolution of Marriage: Procedure* .

Legal Topics:

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

§§ 258.44[Reserved]

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C. Liens

22-258 California Forms of Pleading and Practice--Annotated § 258.50

§ 258.50 Governing Statutes

Judgment liens are governed by *Code Civ. Proc. § 697.010 et seq.*

California Forms of Pleading and Practice--Annotated

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22-258 California Forms of Pleading and Practice--Annotated § 258.51

§ 258.51 Liens On Real Property

[1] Lump Sum and Installment Money Judgments Compared

An obligee may create a judgment lien on the obligor's real property to enforce child, family, or spousal support payable in installments [*see Code Civ. Proc. § 697.320(a)(1)*]. Other types of judgments, such as for property division or attorney's fees, may also be enforced by a lien on real property, such as a lump-sum money judgment and a judgment against a health care provider requiring periodic payment, pursuant to *Code Civ. Proc. § 667.7* [*see Code Civ. Proc. §§ 697.310(a), 697.320(a)(2)*]. For general discussion of liens, property subject to liens, procedural guides, and forms for use in enforcing both money and nonmoney judgments, see Ch. 318, *Judgments* .

[2] Creation of Lien

An installment judgment lien on real property is created by recording with the county recorder an abstract, a notice of support judgment, or a certified copy of a judgment for child, family, or spousal support payable in installments, or by recording an interstate lien form [*Code Civ. Proc. § 697.320(a)*; *see Fam. Code § 17523.5* (recording lien in form of digital or digitized electronic record is permitted); *see also Cal-Western Reconveyance Corp. v. Reed (2007) 152 Cal. App. 4th 1308, 1310, 62 Cal. Rptr. 3d 244* (county properly recorded abstract of support judgment and distribution of surplus proceeds from trustee's sale of obligor's residential property was properly distributed to county to satisfy child and spousal support arrearages)]. The Judicial Council form of Abstract of Support Judgment may be used to create the lien for California Support judgments [*see* Cal. Judicial Council Form FL-480; *see Mehrtash v. Mehrtash (2001) 93 Cal. App. 4th 75, 81-82, 112 Cal. Rptr. 2d 802* (support obligee's failure to file abstract of support judgment resulted in denial of request to set aside real property transfer, when obligor's real property was encumbered with senior liens)]. Such a lien is the exclusive method of establishing a lien on real property of the judgment debtor for child and spousal support payments ordered by a court [*Ellrott v. Bliss (1983) 147 Cal. App. 3d 901, 905, 195 Cal. Rptr. 446* (decided prior to 1986 amendment to *Code Civ. Proc. § 697.320* allowing option of filing abstract to create judgment lien)].

To create a valid lien, strict compliance with the statutory requirements is essential with regard to required information. If all mandated information is included, technical noncompliance with form is unlikely to invalidate the lien [*see In re Marriage of Orchard (1990) 224 Cal. App. 3d 155, 158-159, 273 Cal. Rptr. 499* , and cases cited therein].

Such a lien does not also secure the obligee's claims against the obligor for a community property equalization payment and for attorney's fees ordered in the dissolution proceeding [*Cal-Western Reconveyance Corp. v. Reed (2007) 152 Cal. App. 4th 1308, 1311-1312, 62 Cal. Rptr. 3d 244* (abstract of judgment did not purport to cover anything but support)]. The obligee may establish and record a lien against the obligor's real property to satisfy these claims by filing an abstract of money judgment under *Code Civ. Proc. § 674* [*see Cal-Western Reconveyance Corp. v. Reed (2007) 152 Cal. App. 4th 1308, 1313, 62 Cal. Rptr. 3d 244* (rejecting contention that *Fam. Code § 290* gives court discretion to bypass statutory requirements by implying existence of recorded lien or encumbrance when there is none)].

[3] Duration of Lien

Unless the money judgment is satisfied or the judgment lien is released, a judgment lien for child, family, or spousal support payable in installments continues during the period the judgment remains enforceable [*Code Civ. Proc. § 697.320(b)*; *see Fam. Code § 291(a), (b)*]. If an interest in real property that is subject to a lump-sum judgment lien is transferred or encumbered without satisfying or extinguishing the lien, the interest remains subject to the lien as if the interest had not been transferred or encumbered [*Code Civ. Proc. § 697.390(a)*]. If an interest in real property that is subject to an installment judgment lien is transferred or encumbered without satisfying or extinguishing the lien, the interest transferred or encumbered remains subject to the installment judgment lien in the amount of the lien at the time of transfer or encumbrance, plus interest accruing thereafter on that amount [*Code Civ. Proc. § 697.390(b)*; *cf. In re Marriage of Cloney (2001) 91 Cal. App. 4th 429, 443-444, 110 Cal. Rptr. 2d 615* (judgment recorded and indexed under former husband's proper name was constructive notice to subsequent purchaser of real property with title under husband's nickname, when purchaser's escrow agent had actual knowledge of both names)].

[4] Amount of Lien

Unless otherwise provided by statute, a judgment lien on real property is a lien for the amount required to satisfy the money judgment [*Code Civ. Proc. § 697.350(a)*]. A judgment lien for child or spousal support is a lien for the amount of installments as they mature under the terms of the judgment, plus accrued interest and costs as they are added to the judgment pursuant to *Code Civ. Proc. §§ 685.010-685.110*, less the amount of any partial satisfactions. However, it does not become a lien for any installment until the installment becomes due and payable under the terms of the judgment [*Code Civ. Proc. § 697.350(c)*].

Statutory interest on unpaid child support payments accrues as a matter of law on each installment when the installment becomes due. It does not matter whether the judgment clearly states when or if interest will accrue on unpaid child support obligations, or whether the support obligor was personally notified that unpaid child support would be subject to accruing interest [*In re Marriage of Hubner (2004) 124 Cal. App. 4th 1082, 1089, 22 Cal. Rptr. 3d 549]* . Accrued arrearages are treated like a money judgment for purposes of assessing statutory interest and, unless otherwise specified in the judgment, interest accrues as to each installment when the installment becomes due and continue to accrue for so long as the arrearage remains unpaid [*In re Marriage of McClellan (2005) 130 Cal. App. 4th 247, 250-251, 30 Cal. Rptr. 3d 5]* . A judge does not have authority to waive or forgive interest accrued on past-due child support amounts even when circumstances change or the support obligor claims a lack of clarity in the order assessing child support arrearages [*see In re Marriage of McClellan (2005) 130 Cal. App. 4th 247, 251, 259, 30 Cal. Rptr. 3d 5* ; *In re Marriage of Hubner (2004) 124 Cal. App. 4th 1082, 1089, 22 Cal. Rptr. 3d 549]* . An order that determines child support arrearages is not a new installment judgment for purposes of calculating postjudgment interest [*In re Marriage of McClellan (2005) 130 Cal. App. 4th 247, 258-259, 30 Cal. Rptr. 3d 5* ; *see Fam. Code § 155*].

[5] Effect of Modified Judgment

Once a judgment lien has been placed on real or personal property, a subsequent modification of a support judgment may still be enforced as long as certain procedures are followed. If a judgment lien on real property has been created

under a money judgment that is thereafter modified as to its amount, an abstract of the modified judgment or a certified copy of the order modifying the judgment may be recorded in the same manner as the original abstract or certified copy of the judgment is recorded to create a judgment lien [*Code Civ. Proc. § 697.360(a)*; *see § 258.51[2*], *above*; *see also* Cal. Judicial Council Form 1285.80].

If a judgment lien on real property has been created under a money judgment that is thereafter modified to reduce its amount, the judgment lien continues under the terms of the judgment as modified, whether or not the modification is recorded as provided in *Code Civ. Proc. § 697.360(a)* [*Code Civ. Proc. § 697.360(b)*]. If a judgment lien on real property has been created under a money judgment that is thereafter modified to increase its amount, the judgment lien continues under the terms of the original judgment until the modification is recorded. At the time of recording, the judgment lien extends to the judgment as modified, but the priority for the additional amount under the judgment as modified dates from the time the modification is recorded [*Code Civ. Proc. § 697.360(c)*; *see Code Civ. Proc. § 697.380* for priority of liens].

However, if the lien was created by recording an abstract of support judgment [*see Code Civ. Proc. § 697.320*] and the support order is thereafter modified to increase its amount, the judgment lien extends to the judgment as modified without the need for recording another abstract of support judgment. In such a case, the priority for the additional amount under the judgment dates from the time when the modification is effective [*Code Civ. Proc. § 697.360(d)*].

A support obligee must respond in a timely manner to both of the following [*Code Civ. Proc. § 697.360(e)*]:

- A request from a title or escrow company for a demand statement needed to close an escrow relating to a support judgment lien, or

- A request from a support obligor who claims an error exists in the amount of the alleged arrears.

An obligor who complies with the procedures for obtaining a satisfaction of judgment [*Code Civ. Proc. § 724.010 et seq.*] is entitled to the remedies specified therein [*Code Civ. Proc. § 697.360(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensEnforcementFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewReal Property LawNonmortgage LiensJudgment Liens

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22-258 California Forms of Pleading and Practice--Annotated § 258.52

§ 258.52 Liens on Personal Property

A lien may also be imposed on certain items of the obligor's personal property, although this procedure may not be used to enforce installment payments that have not yet matured, such as for continuing child or spousal support payments. A judgment lien on personal property may be created only if the judgment is a money judgment first entered in California after June 30, 1983 [*see Code Civ. Proc. § 697.510(a)*]. Except as provided in *Code Civ. Proc. § 697.540(b)* (relating to court-ordered installment payments on certain money judgments), a judgment lien may not be created under *Code Civ. Proc. §§ 697.510-697.670* if the money judgment is payable in installments unless all of the installments under the judgment have become due and payable at the time the notice of judgment lien is filed [*Code Civ. Proc. § 697.510(a)*]. Therefore, child or spousal support orders for periodic payments are not enforceable by this method, although a support judgment for a lump sum or a family law judgment for property is [*see Code Civ. Proc. § 697.510(a)*].

A judgment lien on personal property may be created pursuant to *Code Civ. Proc. § 697.510 et seq.* as an alternative or in addition to a lien created by levy under a writ of execution pursuant to *Code Civ. Proc. § 699.010 et seq.*, or by use of an enforcement procedure provided by *Code Civ. Proc. § 708.010 et seq.* (miscellaneous creditor's remedies) [*Code Civ. Proc. § 697.520*].

Personal property attachable by a judgment lien created pursuant to *Code Civ. Proc. § 697.510 et seq.* is described in *Code Civ. Proc. § 697.530*. This type of lien may be created by filing a notice of judgment lien with the Secretary of State pursuant to *Code Civ. Proc. § 697.510 et seq.* [*see Code Civ. Proc. §§ 697.510(a), 697.570*]. The judgment debtor must promptly be served with notice of the lien [*see Code Civ. Proc. § 697.560*].

For further discussion and forms for use in creating a judgment lien on personal property, see Ch. 318, *Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensEnforcementFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral Overview

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22-258 California Forms of Pleading and Practice--Annotated § 258.53

§ 258.53 Liens Created by Court

In some instances, the court may, in effect, create a lien on a supporting spouse's property by requiring him or her "to give reasonable security therefor" [*Fam. Code §§ 4012* (child support), *4339* (spousal support)]. For further discussion, a procedural guide, and forms for use in obtaining an order for security, *see* Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsEnforcementLiensFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral Overview

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22-258 California Forms of Pleading and Practice--Annotated § 258.54

§ 258.54 Priorities Between Competing Liens

Other things being equal, first in time is first in right with respect to competing liens upon the same property regardless of one being for support [*Civ. Code § 2897*; *see Cappa v. F & K Rock & Sand, Inc. (1988) 203 Cal. App. 3d 172, 175, 249 Cal. Rptr. 718]* . The Second District Court of Appeal has held that the prior contractual liens of a father's attorney and medical providers took precedence over a lien for child support arrearages lodged against the father's personal injury award [*Wujcik v. Wujcik (1994) 21 Cal. App. 4th 1790, 1793-1795, 27 Cal. Rptr. 2d 102]* . The language in *Fam. Code § 4011* providing that support payments should be made prior to payment of debts to other creditors means that a parent cannot claim inability to pay child support by voluntarily creating large debts in relation to income [*see In re Marriage of Kirk (1990) 217 Cal. App. 3d 597, 607, 266 Cal. Rptr. 76]* ; but it does not establish a priority for support judgments different from that set forth in *Civ. Code § 2897* [*Wujcik v. Wujcik (1994) 21 Cal. App. 4th 1790, 1793-1795, 27 Cal. Rptr. 2d 102]* .

For further discussion of the priorities between liens, see Ch. 342, *Liens and Wage Preferences* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityLiensFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsEnforcementLiensFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral Overview

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22-258 California Forms of Pleading and Practice--Annotated §§ 258.55-258.59

[Reserved]

§§ 258.55[Reserved]

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22-258 California Forms of Pleading and Practice--Annotated § 258.60

§ 258.60 Governing Law

The court's general power to enforce its family law judgments and orders is governed by *Fam. Code § 290*. *Fam. Code § 290* also governs the court's authority to order security to enforce a property division. *Fam. Code § 4012* governs orders for security to enforce child support. *Fam. Code § 4339* governs orders for security to enforce spousal support. *Fam. Code §§ 4600-4641* set out special statutory procedures regarding deposits to secure payment for the support of a minor child.

Support obligations under the Uniform Parentage Act [*Fam. Code § 7600 et seq.*] are also enforceable by an order requiring the furnishing of a bond or other security for the payment of a judgment [*Fam. Code § 7637*; for further discussion, *see* Ch. 412, *Paternity*]. *Penal Code § 270b* gives the court the power to order security for support in criminal nonsupport cases [for further discussion, *see* Ch. 394, *Parent and Child*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsDomestic OffensesNonpayment of Child SupportGeneral OverviewFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEnforcementGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act

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22-258 California Forms of Pleading and Practice--Annotated § 258.61

§ 258.61 General Statutory Authority to Order Reasonable Security

[1] Child and Spousal Support

A court is authorized generally to enforce judgments or orders made under the Family Code, including orders for child or spousal support, by any orders that the court in its discretion determines to be necessary [*see Fam. Code § 290*; *see also Fam. Code §§ 3900-4203* (child support), 4300-4360 (spousal support)]. In addition, security for payment of support can always be provided for in a property settlement agreement and, in the event the settlement is merged in a decree of dissolution, will be enforced by a court according to terms of agreement [*see Petersen v. Petersen (1972) 24 Cal. App. 3d 201, 203, 209, 100 Cal. Rptr. 822]* .

Fam. Code § 4012 includes a provision authorizing a court, on a showing of "good cause," to order that a party required to pay child support give reasonable security for the payment. A comparable provision in *Fam. Code § 4339* authorizes a court to make an order for reasonable security for the enforcement of future spousal support payments, with no mention of a required showing of good cause. It appears that the purpose of the provisions is to provide a practical method of ensuring the continued compliance with the order for support payments, in the same sense that a mortgage secures the payments provided for in a promissory note [*Miller v. Miller (1942) 52 Cal. App. 2d 443, 445-446, 126 P.2d 357* (decided under former *Civ. Code § 140*, which authorized court to enforce child or spousal support order by requiring reasonable security for payments, by appointing a receiver, or by using any other applicable remedy)].

An additional statutory procedure exists to enforce child support orders by obtaining a court-ordered deposit of security for future support payments [*see Fam. Code §§ 4600-4641*; for further discussion, *see also* Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*].

[2] Property Division

A court is authorized generally to enforce orders made under the Family Code, including orders for property division, by any orders that the court in its discretion determines to be necessary [*see Fam. Code § 290*]. By implication, this statutory authority permits the court to order a spouse to post security to ensure or enforce the court's orders for property division contained in a judgment of dissolution or legal separation [*see Fam. Code §§ 2500-2660* (property division)].

For discussion of property rights and procedure for division of property, see Ch. 222. *Dissolution of Marriage: Property Division and Valuation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureRemediesBondsGeneral OverviewFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEnforcementGeneral Overview

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22-258 California Forms of Pleading and Practice--Annotated § 258.62

§ 258.62 Showing Required

Under *Fam. Code § 4012*, a court has the discretion to order security for payment of child support on a showing of "good cause." The spousal support statute does not expressly require that there be good cause for the order [*see Fam. Code § 4339*]. In addition, the security ordered to enforce either spousal or child support must be "reasonable" [*Fam. Code §§ 4012, 4339*].

It is proper for a court to deny a motion for security when, at the time of the motion, there was no arrearage in monthly payments, even though contempt proceedings had been necessary from time to time to compel payment of child support [*Hilmer v. Superior Court (1934) 220 Cal. 71, 72-73, 29 P.2d 175* (decided under former *Civ. Code § 140*)]. It has been suggested, however, that past difficulty in collecting support should weigh in favor of granting security for future payments [*Blankenship v. Blankenship (1963) 212 Cal. App. 2d 736, 745-746, 28 Cal. Rptr. 176* (lien under former *Civ. Code § 140*)]. One court has held that ordering security for payments of spousal and child support was proper when the record showed that the obligor had stated his intention to sell the property and leave the country [*Gonzalez v. Gonzalez (1957) 152 Cal. App. 2d 103, 107-108, 312 P.2d 333* (lien under former *Civ. Code § 140*)].

Once the court has found cause to require security for the payment of court ordered support, it must reasonably restrict the order so that it will not deprive the obligor of property for an indefinite period of time or on contingencies uncertain ever to occur [*In re Marriage of Johnson (1982) 134 Cal. App. 3d 148, 161-162, 184 Cal. Rptr. 444* (lien unreasonable when ordered "until it is clearly shown to the court that [the obligor] has solved his personal problems and shown himself to be sufficiently responsible to assure the prompt payment of child and spousal support")].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-258 California Forms of Pleading and Practice--Annotated § 258.63

§ 258.63 Procedure

No procedure is expressly mandated for obtaining an order for security to enforce child or spousal support [*but see* Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* , for discussion of procedure for obtaining a court-ordered deposit of security for future child support payments]. However, it is improper to order a party to post security for payment of support when the party entitled to support did not request such an order and the supporting party had no opportunity at a hearing to make a showing regarding why security should not be ordered [*see Blankenship v. Blankenship (1963) 212 Cal. App. 2d 736, 745-746, 28 Cal. Rptr. 176* ; *Wilson v. Wilson (1951) 104 Cal. App. 2d 167, 174, 231 P.2d 128* (decided under former *Civ. Code 140*)]. Thus, the recommended procedure for obtaining security would be the use of the order to show cause or notice of motion [*see* Cal. Judicial Council Forms FL-300, FL-301; for forms that may adapted for use, *see also* Ch. 224, *Dissolution of Marriage: Child Support* and Ch. 225, *Dissolution of Marriage: Spousal Support*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-258 California Forms of Pleading and Practice--Annotated § 258.64

§ 258.64 Types of Security

[1] Liens

A court may require a spouse to furnish security for the payment of child or spousal support by making a lien on that spouse's interest in community property [*Reed v. Hayward (1943) 23 Cal. 2d 336, 341-342, 144 P.2d 561* (spousal support); *Gonzalez v. Gonzalez (1957) 152 Cal. App. 2d 103, 107-108, 312 P.2d 333* (child support) (both cases decided under former *Civ. Code § 140*)]. Once such a lien was created, however, a court could not order the supporting spouse to execute a mortgage in satisfaction of the lien because the court's power was limited to the lien's creation [*Miller v. Miller (1962) 227 Cal. App. 2d 322, 329, 38 Cal. Rptr. 571]* . One court has held that the imposition of a lien to secure support payments is an extraordinary and harsh remedy to be resorted to only in cases when other, less onerous remedies are not available [*Loomis v. Loomis (1960) 181 Cal. App. 2d 345, 347, 5 Cal. Rptr. 550]* .

A lien created as security for future payments is distinguishable from a judgment lien for child or spousal support. A judgment lien on real or personal property is created to enforce an order establishing support arrearages and cannot apply to future payments accruing after recordation of the judgment lien [*Simonet v. Simonet (1968) 263 Cal. App. 2d 612, 621, 69 Cal. Rptr. 806* (decided under prior lien statute, *now see Code Civ. Proc. §§ 697.320* (real property) and *697.530* (personal property)]. For discussion of judgment liens, see *§ 258.50 et seq., and Ch. 318, Judgments, § 318.90* et seq.

[2] Trusts

A court may require a party obligated to pay child or spousal support to put money or property in trust as a means of providing security [*Witaschek v. Witaschek (1942) 56 Cal. App. 2d 277, 282, 132 P.2d 600* (decided under former *Civ. Code § 140*)]. Because a support obligation can be enforced against the obligated party's separate property, the court's power to require the placing of property in trust for the payment of support extends to separate as well as community property [*see Fam. Code § 4338*; (setting forth order of payment from community, quasi-community, and separate property); *Smith v. Smith (1942) 49 Cal. App. 2d 716, 719-720, 122 P.2d 346]* .

[3] Life Insurance Policies

A court may exercise its power to require security by an order making the supported party a beneficiary of insurance on the obligated party's life [*Franklin Life Ins. Co. v. Kitchens (1967) 249 Cal. App. 2d 623, 629-632, 57 Cal. Rptr. 652* (decided under former *Civ. Code § 140*)]. At least one earlier decision, however, held that the term "security" did not contemplate protection against the possibility of death by building up an independent insurance estate, reasoning that such a policy does not provide for maintenance of the beneficiary and is effective only on the supporting party's death [*Miller v. Miller (1942) 52 Cal. App. 2d 443, 445-446, 126 P.2d 357* (decided under former *Civ. Code § 140*)].

[4] Bonds

One form of security that a court might require is a bond. In the event such a bond is ordered, the parties' rights with respect to the security will be governed by the law of suretyship [*see Civ. Code §§ 2787-2855*; *Code Civ. Proc. § 995.010 et seq.*]. For discussion and forms relating to suretyship, see Ch. 538, *Suretyship, Bonds, and Undertakings* . In addition, the party seeking enforcement might be required to proceed against the obligated party before resorting to the surety [*see Civ. Code § 2845*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewEstate, Gift & Trust LawTrustsCreationFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsEnforcementLiensFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEnforcementGeneral Overview

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22-258 California Forms of Pleading and Practice--Annotated §§ 258.65-258.69

[Reserved]

§§ 258.65[Reserved]

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E. Appointment of Receiver

22-258 California Forms of Pleading and Practice--Annotated § 258.70

§ 258.70 Governing Law

The appointment of receivers to enforce judgments or orders under the Family Code is expressly authorized by *Fam. Code § 290*. The appointment of receivers in superior court cases other than in limited civil cases generally is governed by *Code Civ. Proc. §§ 564-570*. Appointment of receivers on ex parte application is governed by *Code Civ. Proc. § 566(b)* and by *Cal. Rules of Ct., Rules 3.1175* and *3.1176*. Various rules relating to receivers are set forth in *Cal. Rules of Ct., Rules 3.1177-3.1184*. With respect to the foregoing rules, see the discussion at *§ 258.73, below.*

The appealability of an order appointing a receiver is covered in *Code Civ. Proc. § 904.1(a)(7)* and the effect of the appeal on the order in *Code Civ. Proc. § 917.5*. Bonds and undertakings are governed by the Bond and Undertaking Law (*Code Civ. Proc. § 995.010 et seq.*).

In addition, many multijudge courts have adopted local court rules or policies relating to appointment of receivers and receiverships in family law cases and must be complied with. Therefore, if counsel is unfamiliar with them, he or she should check the rules and policies of the court in which the family law proceeding is pending.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEnforcementGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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§ 258.71 Judicial Council Forms

Applications for orders in family law proceedings must be made by use of the following Judicial Council forms [*Cal. Rules of Ct., Rule 1.31*]:

- Cal. Judicial Council Form FL-300 (Order to Show Cause);
- Cal. Judicial Council Form FL-301 (Notice of Motion);
- Cal. Judicial Council Form FL-310 (Application for Order and Supporting Declaration); and
- Cal. Judicial Council Form FL-320 (Responsive Declaration to Order to Show Cause or Notice of Motion).

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22-258 California Forms of Pleading and Practice--Annotated § 258.72

§ 258.72 Appointment of Receiver

[1] When Authorized

Any judgment or order made or entered pursuant to the Family Code may be enforced by the appointment of a receiver [*Fam. Code § 290*]. Thus, in an appropriate case a receiver will be appointed under *Fam. Code § 290* to enforce support awards in a family law proceeding [*see Alderson v. Alderson (1986) 180 Cal. App. 3d 450, 467-468, 225 Cal. Rptr. 610* (upholding appointment of receiver under former law when husband was over three months behind in child support payments and record reflected ongoing attempt by husband to thwart judicial process)].

A receiver may also be appointed to take charge of and sell the community assets, pay the community liabilities, and divide the proceeds equally between the parties in order to carry out the terms of the judgment dividing the property [*see Code Civ. Proc. § 564(b)(3)*], when a spouse's conduct seriously and dangerously jeopardizes both the community assets and his or her ability to pay spousal and child support. "Whenever financial mismanagement and the intransigence of the parties threaten to dissipate the community property before a division can take place, the trial court has discretion to appoint a receiver to protect the community estate" [*Rosenthal v. Rosenthal (1966) 240 Cal. App. 2d 927, 932-934, 50 Cal. Rptr. 385]* .

Moreover, under the provisions *Code Civ. Proc. § 564(b)(9)*, authorizing appointment of receivers "in all other cases where necessary to preserve the property or rights of any party," a receiver may in a proper case be appointed on ex parte application at the commencement of the family law proceeding before the summons has been served [*Nichols v. Superior Court (1934) 1 Cal. 2d 589, 594-596, 36 P.2d 380* ; *see also Guay v. Superior Court (1957) 147 Cal. App. 2d 764, 767, 305 P.2d 990* (filiation proceeding)].

By the receiver's possession of the property and the subsequent publication of the summons, the court acquires quasi in rem jurisdiction and may subject the property seized to the satisfaction of the subsequent judgment, as well as to payment of the preliminary expenses and charges of the proceeding [*Nichols v. Superior Court (1934) 1 Cal. 2d 589, 598-600, 36 P.2d 380* ; *see also Conklin v. Superior Court (1934) 1 Cal. 2d 601, 603, 36 P.2d 386]* . This rule is subject to the qualification that the respondent have sufficient minimum contacts with the state such that maintenance of

the suit does not offend traditional notions of fair play and substantial justice [*see Shaffer v. Heitner (1977) 433 U.S. 186, 207-208, 216-217, 97 S. Ct. 2569, 53 L. Ed. 2d 683* ; for further discussion of this qualification, *see also* Ch. 323, *Jurisdiction: Personal* , General Introduction].

[2] Who May Apply

Either party may apply for the appointment of a receiver [*see Armbrust v. Armbrust (1946) 75 Cal. App. 2d 272, 274, 171 P.2d 75]* . In addition, the court may appoint a receiver on its own motion [*Venza v. Venza (1949) 94 Cal. App. 2d 878, 883-884, 211 P.2d 913* (nevertheless stressing fact that parties had consented to trial court's appointment)].

[3] Application

There are three separate ways to apply for the appointment of a receiver:

- Ex parte application for the immediate appointment of a receiver and order to show cause why the appointment should not be confirmed, followed by a hearing on the order to show cause;

- Ex parte application for an order to show cause why a receiver should not be appointed, followed by a hearing on the order to show cause; or

- Notice of motion for appointment of receiver, followed by a hearing of the motion.

The first of these procedures is for use when an emergency situation exists requiring the immediate appointment of a receiver without notice to the adverse party, although advance "notification" of the presentation of the application may be required [*see Cal. Rules of Ct., Rules 3.1200-3.1207*; and discussion at *§ 258.73, below*; *see also* Los Angeles Co. Super. Ct. Rules, Rules 9.51(d), 14.0; Bay Area Super. Ct. Dom. Rel. Rules, Rule I(D)(1)]. An ex parte application for the appointment of a receiver pendente lite is rarely granted, and, if it is, the applicant must file an undertaking in an amount fixed by the court to indemnify the defendant against loss in the event it is subsequently determined that the procurement of the appointment was wrongful, malicious, or without sufficient cause [*Code Civ. Proc. § 566(b)*].

The second procedure (order to show cause why receiver should not be appointed) is for use as a substitute for the third procedure (notice of motion) when the adverse party has not yet appeared in the proceeding.

The third is the most common procedure and is for use when counsel determines that the appointment can await a hearing of the application.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEnforcementGeneral Overview

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22-258 California Forms of Pleading and Practice--Annotated § 258.73

§ 258.73 Applicability of Civil Law and Motion Rules to Family Code Proceedings

The Civil Law and Motion Rules (*Cal. Rules of Ct., Rules 3.1100-3.1370*) contain a number of requirements and apply in all trial courts [*Cal. Rules of Ct., Rule 3.1100*]. For example, Cal. Rules of Ct., Rule 3.113 requires the service and filing of points and authorities with a notice of motion; *Cal. Rules of Ct., Rule 3.1306* governs evidence at hearings and *Cal. Rules of Ct., Rule 3.1200-3.1207* require that an ex parte application be accompanied by an affidavit or declaration of prior notification to the opposing party or excuse from notification. The Rules for Receiverships provide procedures for the appointment of receivers and the conduct of receiverships [*Cal Rules of Ct., Rule 3.1175 et seq.*]. These rules cover ex parte appointment of receivers [*Cal Rules of Ct., Rule 3.1175*], confirmation of ex parte appointments [*Cal Rules of Ct., Rule 3.1176*], nomination of receivers [*Cal Rules of Ct., Rule 3.1177*], and the role of the receiver as the agent of the court [*Cal Rules of Ct., Rule 3.1179*], as well as procedures for conducting receiverships [Cal Rules of Ct., Rules 3.180-3.184]. For a discussion of these and other law and motion rules, see Ch. 486, *Receivers* .

For the purposes of the Civil Law and Motion Rules, "law and motion" is defined as including proceedings on application before trial for an order, with three exceptions, one of them being causes arising under the Family Code [*see Cal. Rules of Ct., Rule 3.1103(a)(1)*]. Hence, under *Cal. Rules of Ct., Rule 3.1103(a)(1)*, an application for an order before trial in a family law proceeding is excluded from operation of the Civil Law and Motion Rules, and none of the Civil Law and Motion rules mentioned above applies.

The term "law and motion" is further defined in the rules as including proceedings on application for an order regarding the enforcement of judgment [*Cal. Rules of Ct., Rule 3.1103(a)(2)*]. Hence, proceedings on application for an order regarding the enforcement of a family law judgment, not being excluded by *Cal. Rules of Ct., Rule 3.1103(a)(1)*, discussed above, are subject to the Civil Law and Motion Rules, including the rules mentioned above.

Thus, under the definitions and exclusion set forth in *Cal. Rules of Ct., Rule 3.1103(a)*, a pretrial application for the appointment of a receiver in a family law case is excluded from the Civil Law and Motion Rules, but a posttrial application for the appointment of a receiver to enforce a family law judgment and any orders in the judgment (*Fam. Code § 290*) is subject to the rules.

Without more, *Cal. Rules of Ct., Rule 3.1103(a)* would be fairly clear as to the applicability of the rules in a family law proceeding, although it is not entirely clear why the rules should apply to a posttrial but not a pretrial application for appointment of a receiver. However, "law and motion" is further defined in *Cal. Rules of Ct., Rule 3.1103(a)(2)* as including proceedings on application for the appointment of a receiver. No time limitation is imposed on when the application is made vis-a-vis the trial, or whether the appointment is made on ex parte application or by noticed motion. This provision presents a problem in construction: does *Cal. Rules of Ct., Rule 3.1103(a)(2)*, making the law and motion rules applicable to applications for the appointment of a receiver prevail over the exclusion set forth in *Cal. Rules of Ct., Rule 3.1103(a)(1)*, insofar as pretrial applications for the appointment of a receiver are concerned, or is it subject to it? *Cal. Rules of Ct., Rule 3.1103(a)* would, on its face, appear to be ambiguous on this point and, whatever the meaning intended, additional words would have to be interpolated to clarify that intention; that is, either the phrase "notwithstanding the provisions of subparagraph (1)" or the phrase "subject to the provisions of subparagraph (1)," or words to that effect, would have to be read into *Cal. Rules of Ct., Rule 3.1103(a)(2)* to determine with certainty the applicability of the Civil Law and Motion Rules to a pretrial application for an order appointing a receiver in a family law proceeding.

Until this ambiguity is clarified by the Judicial Council or in a published appellate opinion, it is suggested that counsel comply with the Civil Law and Motion Rules whether the application for appointment of a receiver is made before trial or not. Moreover, even if the Civil Law and Motion Rules do not apply to pretrial applications for orders in family law proceedings, local court rules may contain similar or other requirements and should be checked if counsel is unfamiliar with them.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEnforcementGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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[Reserved]

§§ 258.74[Reserved]

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22-258 California Forms of Pleading and Practice--Annotated § 258.80

§ 258.80 Governing Law

Judgments or orders of a court made or entered under the Family Code may be enforced by contempt pursuant to *Fam. Code § 290*. Additional authority to compel obedience to a court's judgments, orders, and process is contained in *Code Civ. Proc. §§ 128(a)(4), 177(2), 177.5, 178*. *Code Civ. Proc. §§ 1209-1222* define the conduct that constitutes contempt and govern contempt proceedings. Contemptuous conduct that is punishable as a misdemeanor is described in *Penal Code § 166*. Special factors required to be considered in family law contempt proceedings are set forth in *Fam. Code § 2026* (reconciliation of the parties).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementContemptFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementContempt

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22-258 California Forms of Pleading and Practice--Annotated § 258.81

§ 258.81 Orders Enforceable by Contempt

[1] General Principles and Historical Background

Fam. Code § 290 provides broadly for enforcement by contempt of any judgment or under made or entered pursuant to the Family Code. Orders for child or spousal support, child custody, visitation, attorney's fees and costs, and orders restraining conduct typically are enforceable by contempt [*see Miller v. Superior Court (1978) 22 Cal. 3d 923, 930, 151 Cal. Rptr. 6, 587 P.2d 723* ; *Miller v. Superior Court (1937) 9 Cal. 2d 733, 736, 72 P.2d 868* ; *In re Marriage of Thompson (1979) 96 Cal. App. 3d 621, 625, 158 Cal. Rptr. 160* ; *Tilghman v. Superior Court (1974) 40 Cal. App. 3d 599, 607, 115 Cal. Rptr. 195* ; *Fam. Code § 290*].

However, contempt has not been available historically to enforce mere contractual obligations or adjudications of property rights [*see Plumer v. Superior Court (1958) 50 Cal. 2d 631, 635-637, 328 P.2d 193* ; *In re Fontana (1972) 24 Cal. App. 3d 1008, 1011, 101 Cal. Rptr. 465]* . The unavailability of contempt for these purposes developed from the premise that an ordinary money judgment, for example, does not order an alleged contemnor to pay anything, but simply adjudicates an amount that is owed [*see Thomas v. Thomas (1939) 14 Cal. 2d 355, 357, 94 P.2d 810]* . More significantly, because a finding of contempt poses the possibility of incarceration [*see Code Civ. Proc. §§ 1218(c), 1219(a)*], use of contempt as a remedy for a failure to pay money owed raises the issue of violating constitutional prohibitions on imprisonment for debt [*see Cal. Const., art. I, § 10*; *see also U.S. Const., amend. XIII* (prohibiting involuntary servitude)].

More recently, restrictions on the use of contempt authority to enforce judgments or orders for the payment of money have narrowed. While *purely* contractual obligations are still not generally enforceable by contempt [*see In re Marriage of Lane (1985) 165 Cal. App. 3d 1143, 1147, 211 Cal. Rptr. 262* ; *see also Plummer v. Superior Court (1942) 20 Cal. 2d 158, 161-165, 124 P.2d 5* ; *In re Marriage of Jones (1987) 195 Cal. App. 3d 1097, 1103-1104, 241 Cal. Rptr. 231]* , judgments or orders requiring the performance of some action to achieve a division of community property increasingly have been held enforceable by contempt [*see Verner v. Verner (1978) 77 Cal. App. 3d 718, 729, 143 Cal. Rptr. 826* ; *In re Marriage of Fithian (1977) 74 Cal. App. 3d 397, 404-406, 141 Cal. Rptr. 506* ; *but see In re Fontana (1972) 24 Cal. App. 3d 1008, 1011, 101 Cal. Rptr. 465* (order that husband pay wife so that she could make

payments on auto as not enforceable by contempt); *Martins v. Superior Court (1970) 12 Cal. App. 3d 870, 875, 90 Cal. Rptr. 898* (order for payment of money by way of property settlement as not enforceable by contempt)]. For further discussion of such orders, *see [9][a], below.*

[2] Child Support

[a] Enforceable as Law-Imposed Obligation

It is well-settled that judgments or orders for the payment of child support may be enforced by contempt proceedings [*see County of Monterey v. Banuelos (2000) 82 Cal. App. 4th 1299, 1306-1307, 98 Cal. Rptr. 2d 710* (county that has paid support may enforce noncustodial parent's obligation to pay support by contempt in same manner as custodial parent); *In re Marriage of Thompson (1979) 96 Cal. App. 3d 621, 625, 158 Cal. Rptr. 160]* . Moreover, a court's order that an obligated parent pay creditors for goods and services furnished to, or on behalf of, a child for whom support may be ordered is enforceable by contempt [*see Fam. Code §§ 290, 2023*; *see also Bushman v. Superior Court (1973) 33 Cal. App. 3d 177, 183, 108 Cal. Rptr. 765* ; *In re Hendricks (1970) 5 Cal. App. 3d 793, 797-798, 85 Cal. Rptr. 220]* .

The Family Code clarifies that all court orders for child support, including those based on agreements entered into on or after January 1, 1970, are imposed by law and made under the power of the court to render such orders. The support provisions of any such agreements are deemed to be separate and severable from all other provisions relating to property and spousal support [*see Fam. Code §§ 3585, 3651(d), (e)*]. Thus, if such an order is willfully disobeyed, there should be no question that the disobedience was directed to the court [*see Fam. Code § 3585, 3651(d), (e)*]. For discussion of the statutory presumption of contempt with regard to nonpayment of court-ordered child support [*see Code Civ. Proc. § 1209.5*; *see* [b], *below.*

The use of contempt authority to enforce orders for the payment of child support applies to orders for the support of adult children, as well as to stipulations to pay such support, or stipulations for the continuation of child support after a child attains majority [*see Fam. Code §§ 58* (child for whom support may be ordered includes minor or child for whom support authorized under *Fam. Code §§ 3587, 3901, 3910*) *Fam. Code § 290* (order made under Family Code may be enforced by contempt), *3587* (court to effectuate agreement for support of adult child), *3901* (duration of duty), *3910* (duty to maintain incapacitated child), *4001* (order for child support), *4500* (support orders enforceable under Family Code)].

[b] Statutory Prima Facie Case

When a court of competent jurisdiction makes an order compelling a parent to furnish support or necessary food, clothing, shelter, medical attendance, or other remedial care for his or her child, proof that the order was made, filed, and served on the parent, or proof that the parent was present in court when the order was pronounced, and proof that the parent did not comply with the order, is prima facie evidence of a contempt of court [*Code Civ. Proc. § 1209.5*]. *Code Civ. Proc. § 1209.5* has been upheld as constitutional [*Martin v. Superior Court (1971) 17 Cal. App. 3d 412, 418, 95 Cal. Rptr. 110* ; *see Moss v. Superior Court (1998) 17 Cal. 4th 396, 428, 71 Cal. Rptr. 2d 215, 950 P.2d 59* (no constitutional impediment to creation of contempt offense for failure to support child in which ability to pay is not an element); *see also County of Monterey v. Banuelos (2000) 82 Cal. App. 4th 1299, 1306-1307, 98 Cal. Rptr. 2d 710* (county that has paid support is also entitled to a "seek work" order pursuant to statute, and may enforce noncustodial parent's obligation to pay support by contempt in same manner as custodial parent)].

Once this prima facie case has been established, the alleged contemnor has the burden of showing inability to pay by a preponderance of the evidence. In other words, inability to pay is an affirmative defense. Proof of ability to pay *is not* an element of the underlying contempt charge that must be proven beyond a reasonable doubt by the petitioner. Furthermore, contrary to prior appellate case law, the fact that the alleged contemnor merely raises the ability pay as an issue does not shift the burden to the petitioner to prove ability to pay. All the petitioner is required to prove beyond a

reasonable doubt are the elements of the prima facie case set forth in *Code Civ. Proc. § 1209.5* [*Moss v. Superior Court (1998) 17 Cal. 4th 396, 425, 428, 71 Cal. Rptr. 2d 215, 950 P.2d 59* (disapproving, but only to extent inconsistent on this latter point, *In re Feiock (1989) 215 Cal. App. 3d 141, 263 Cal. Rptr. 437*); *see Code Civ. Proc. § 1209.5*]. For related discussion, see *§ 258.82[4], below*.

For general discussion of contempt, see Ch. 135, *Contempt* .

[3] Spousal Support

It is well settled that court orders or judgments that require the payment of spousal support are enforceable by contempt [*Fam. Code § 290*; *see Tilghman v. Superior Court (1974) 40 Cal. App. 3d 599, 612, 115 Cal. Rptr. 195]* . Moreover, an order that an obligated party pay creditors for goods and services furnished to or on behalf of the other party may be enforced by contempt as a form of "support accountability" [*see Fam. Code §§ 290, 2023*; *Bushman v. Superior Court (1973) 33 Cal. App. 3d 177, 182-183, 108 Cal. Rptr. 765* ; *In re Hendricks (1970) 5 Cal. App. 3d 793, 797-798, 85 Cal. Rptr. 220* (order to pay parties' community debts)].

Under the Family Code, spousal support provisions in a marital settlement agreement entered into on or after January 1, 1970, are deemed to be separate and severable from the property division provisions in the agreement. All orders for the support of either party based on the agreement are deemed law-imposed and made under the power of the court to make such orders; these orders are enforceable by contempt [*Fam. Code §§ 3590, 3593*; *see In re Marriage of Harris (1976) 65 Cal. App. 3d 143, 150, 134 Cal. Rptr. 891* ; *In re Marriage of Smiley (1975) 53 Cal. App. 3d 228, 232, 125 Cal. Rptr. 717* (both construing 1967 amendments to predecessor statute to mean that all wife support provisions of a property settlement agreement, whether or not merged, merely approved, or integrated were both modifiable and enforceable by contempt); *but see Tilghman v. Superior Court (1974) 40 Cal. App. 3d 599, 612, 115 Cal. Rptr. 195* (agreement's spousal support provisions that court merely "approves" without being incorporated into judgment are deemed enforceable as contractual obligation only, absent separate spousal support orders in judgment)].

[4] Family Support

When the provisions for any agreement entered into on or after January 1, 1970, combine child support and spousal support without designating the amount to be paid for either types of support, the combined support payments are known as family support [*Fam. Code §§ 92, 3586*. These combined payments are enforceable in the same manner and to the same extent as a child support order [*Fam. Code § 4501*]. For a discussion of enforcement of child support orders by contempt, see *[2][a], above.*

[5] Orders Requiring Security for Support

Court orders requiring the posting of security for child support or spousal support are enforceable by contempt [*see Fam. Code § 290*; *In re Sigesmund (1961) 193 Cal. App. 2d 219, 223, 14 Cal. Rptr. 221]* . For a discussion of orders requiring security for support payments, *§ 258.61[1]* and Ch 259, *Family Law Enforcement: Special Remedies for Support Enforcement*.

[6] Custody and Visitation

Contempt proceedings may be used to enforce child custody and visitation orders, including orders issued by a foreign court [*see Miller v. Superior Court (1978) 22 Cal. 3d 923, 927, 929-930, 151 Cal. Rptr. 6, 587 P.2d 723* ; *Coursey v. Superior Court (1987) 194 Cal. App. 3d 147, 154-157, 239 Cal. Rptr. 365* (contempt judgment annulled in visitation matter)]. Contempt may be based on violation of a necessarily-implied term of a custody or visitation order, and does not require a finding that the contemnor's conduct violated only a specific prohibition [*see Rosin v. Superior Court (1960) 181 Cal. App. 2d 486, 494-495, 5 Cal. Rptr. 421]* .

A court's judgment holding a parent in civil contempt for failure to return a child after scheduled visitation does not bar a subsequent criminal action for the same conduct, because the criminal prosecution does not violate the double jeopardy provisions of the state or federal constitutions [*see People v. Derner (1986) 182 Cal. App. 3d 588, 591-593, 227 Cal. Rptr. 344* ; *see also People v. Batey (1986) 183 Cal. App. 3d 1281, 1288-1289, 228 Cal. Rptr. 787 , cert. denied, 480 U.S. 932]* . For further discussion of the distinction between civil and criminal contempt proceedings, see *§ 258.83, below.*

[7] Attorney's Fees and Costs

Orders for the payment of attorney's fees and costs are enforceable by contempt [*Fam. Code § 290*; *Freeman v. Superior Court (1955) 44 Cal. 2d 533, 537-539, 282 P.2d 857* ; *Sorell v. Superior Court (1967) 248 Cal. App. 2d 157, 159, 56 Cal. Rptr. 222]* . Similarly, orders requiring security for the payment of attorney's fees and costs are enforceable by contempt [*see In re Sigesmund (1961) 193 Cal. App. 2d 219, 223, 14 Cal. Rptr. 221]* .

Sentencing a spouse in contempt under *Code Civ. Proc. § 1218(c)* does not preclude the court from also ordering that spouse to pay the other spouse's reasonable attorney's fees and costs incurred in connection with the contempt proceedings under *Code Civ. Proc. § 1281(a)*, because these provisions are not mutually exclusive [*Goold v. Superior Court (2006) 145 Cal. App. 4th 1, 10-12, 51 Cal. Rptr. 3d 455*].

[8] Restraining Orders

Orders requiring a party to do, or to refrain from doing, a particular act, are enforceable by contempt [*see Fam. Code § 290*]. In addition, violation of certain of these orders is specifically prohibited by the Penal Code and punishable as a misdemeanor [*see Penal Code § 273.6* (punishment for violation of restraining orders obtained pursuant to Family Code)].

[9] Orders Dividing Property

[a] When Enforceable

Judgments and orders requiring the payment of money or transfer of assets in connection with a division of community property have not always been enforceable by contempt because of the constitutional prohibition on imprisonment for debt [*see Cal. Const., art. I, § 10*; *see also U.S. Const., amend. XIII*] and the concept that ordinary money judgments are mere adjudications of rights, rather than a command of the court to pay something [*see § 258.81[1], above*].

Currently, however, restrictions on the use of contempt authority have narrowed. Thus, disobedience of an order to relinquish a portion of a specific fund of money or to convey property as part of an in-kind division of community property may be punished by contempt. Contempt findings have been upheld for the failure to convey real property as ordered by a court as part of a division of community property [*see Sullivan v. Superior Court (1925) 72 Cal. App. 531, 533-536, 237 P. 782]* . Similarly, contempt has been held available to enforce an order requiring a spouse to pay over the other spouse's community share of retirement benefits or pension payments [*Verner v. Verner (1978) 77 Cal. App. 3d 718, 729, 143 Cal. Rptr. 826* ; *In re Marriage of Fithian (1977) 74 Cal. App. 3d 397, 404-406, 141 Cal. Rptr. 506* ; *see In re Marriage of Thomas (1984) 156 Cal. App. 3d 631, 635-638, 203 Cal. Rptr. 58]* .

However, there is still some judicial authority implying that orders requiring the payment of money in connection with a property division are not enforceable by contempt, but these appear to contradict the modern trend of enforceability [*see In re Fontana (1972) 24 Cal. App. 3d 1008, 1011, 101 Cal. Rptr. 465* ; *Martins v. Superior Court (1970) 12 Cal. App. 3d 870, 875, 90 Cal. Rptr. 898]* . Nevertheless, an order that requires payment of community debts from an obligated party's *separate property* may not be subject to enforcement by contempt because of the prohibition on imprisonment for debt [*see In re Fontana (1972) 24 Cal. App. 3d 1008, 1011, 101 Cal. Rptr. 465]* .

There is the further issue of enforceability when there is no actual court order involved. If a property division or transfer is required pursuant to a marital agreement that the court has not ordered the parties to perform through *merger* of the agreement into the overall judgment, noncompliance with the agreement's terms may be subject only to contractual remedies [*see Plummer v. Superior Court (1942) 20 Cal. 2d 158, 161-165, 124 P.2d 5* ; *Lazar v. Superior Court (1940) 16 Cal. 2d 617, 620, 107 P.2d 249* ; *see also In re Marriage of Jones (1987) 195 Cal. App. 3d 1097, 1103-1104, 241 Cal. Rptr. 231* ; *In re Marriage of Lane (1985) 165 Cal. App. 3d 1143, 1147, 211 Cal. Rptr. 262* ; *Howarth v. Howarth (1947) 81 Cal. App. 2d 266, 270-273, 183 P.2d 670]* . For further discussion of enforcing marital agreements, Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*.

[b] Effect of Bankruptcy

It appears that contempt would not be available as a remedy to enforce a property obligation that was properly discharged in bankruptcy, without violating federal law. The automatic stay provisions of federal bankruptcy law generally preclude the bringing of any enforcement action, including contempt, in state court during the pendency of the bankruptcy action regarding assets that are part of the bankruptcy estate. Similarly, once an obligation has been legally discharged in bankruptcy, federal law generally precludes enforcement of the obligation [*see In re Brock (1986) 58 B.R. 797]* .

However, whether a particular obligation is dischargeable must be separately determined by, for example, bringing an adversary proceeding in bankruptcy court to determine dischargeability [*see generally 11 U.S.C. §§ 523, 524, 727, 1141, 1328*; *28 U.S.C. §§ 157, 1334, 1452*; *see also In re Teichman (1985) 774 F.2d 1395, 1397* (both former spouses filed complaints in bankruptcy court to determine dischargeability)]. While many property obligations have been found historically dischargeable [*see, e.g., In re Marriage of Williams (1984) 157 Cal. App. 3d 1215, 1220, 203 Cal. Rptr. 909* (payment to effect equal division of community property as dischargeable; decided before changes to bankruptcy law under 1994 Act); *but see § 258.16[3]*], some property divisions have been subject to only limited dischargeability [*see, e.g., In re Teichman (1985) 774 F.2d 1395, 1397-1400* (obligation to pay over military retirement benefits was only partially dischargeable)], and the Bankruptcy Reform Act of 1994 created new rules in this area, as discussed in *§ 258.16[3]*. For a complete discussion of the dischargeability of community obligations, see Collier Family Law And The Bankruptcy Code, Ch. 6.

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-258 California Forms of Pleading and Practice--Annotated § 258.82

§ 258.82 Elements of Contempt

[1] Prima Facie Case in General

In general, constructive or indirect contempt consists of the willful disobedience of any lawful judgment, order, or process of the court by a person having knowledge of, and the ability to comply with, that judgment, order, or process [*see Code Civ. Proc. § 1209(a)(5)*; *Freeman v. Superior Court (1955) 44 Cal. 2d 533, 537, 282 P.2d 857* ; *Phillips v. Superior Court (1943) 22 Cal. 2d 256, 257-258, 137 P.2d 838* ; *Coursey v. Superior Court (1987) 194 Cal. App. 3d 147, 154, 239 Cal. Rptr. 365* ; *Little v. Superior Court (1968) 260 Cal. App. 2d 311, 317, 67 Cal. Rptr. 77]* . For discussion of prima facie evidence of contempt with regard to nonpayment of court-ordered child support under *Code Civ. Proc. § 1209.5*, see *§ 258.81[1]* and *[2][b], above.*

[2] Willful Disobedience of Lawful Order

Conduct that is contemptuous of the court must be found to be willful, in the sense that it is legally inexcusable [*see Little v. Superior Court (1968) 260 Cal. App. 2d 311, 317, 67 Cal. Rptr. 77]* . However, the court order or judgment allegedly disobeyed must be valid and lawful; refusal to obey a void order or judgment does not constitute contempt [*In re Berry (1968) 68 Cal. 2d 137, 147, 65 Cal. Rptr. 273, 436 P.2d 273* ; *Kreling v. Superior Court (1941) 18 Cal. 2d 884, 885, 118 P.2d 470* ; *see Ketscher v. Superior Court (1970) 9 Cal. App. 3d 601, 604-605, 88 Cal. Rptr. 357]* .

In addition, the order or judgment must be sufficiently definite or disobedience of it cannot be the basis for a finding of contempt [*Ketscher v. Superior Court (1970) 9 Cal. App. 3d 601, 604-605, 88 Cal. Rptr. 357]* .

[3] Knowledge of Judgment or Order

An adjudication of contempt requires a finding that the alleged contemnor had knowledge of the involved judgment or order [*see Freeman v. Superior Court (1955) 44 Cal. 2d 533, 537, 282 P.2d 857* ; *Phillips v. Superior Court (1943) 22 Cal. 2d 256, 257-258, 137 P.2d 838]* . It is insufficient to show only that the alleged contemnor is a party to the proceeding [*Phillips v. Superior Court (1943) 22 Cal. 2d 256, 258, 137 P.2d 838]* .

Knowledge may be established by evidence that an order was made orally in court and the alleged contemnor was present when it was made, or that a copy of the judgment or order was served on the alleged contemnor [*Phillips v. Superior Court (1943) 22 Cal. 2d 256, 257-258, 137 P.2d 838* ; *Mitchell v. Superior Court (1912) 163 Cal. 423, 424-425, 125 P. 1061]* . Knowledge may also be established by evidence that the alleged contemnor sought relief related to the judgment or order at some time before the date of disobedience, such as by seeking modification of it [*Shibley v. Superior Court (1927) 202 Cal. 738, 741, 262 P. 332* ; *Robinson v. Superior Court (1960) 186 Cal. App. 2d 644, 648, 9 Cal. Rptr. 130]* .

A rebuttable presumption of knowledge is raised in the following circumstances:

- The alleged contemnor obeyed the order or judgment for some time before the date of disobedience [*see* *Shibley v. Superior Court (1927) 202 Cal. 738, 741, 262 P. 332]* ;

- The alleged contemnor's attorney was present in court when an order was orally made [*Freeman v. Superior Court (1955) 44 Cal. 2d 533, 537-538, 282 P.2d 857]* ; or

- A copy of the order or judgment was served on the alleged contemnor's attorney [*In re Sigesmund (1961) 193 Cal. App. 2d 219, 223-224, 14 Cal. Rptr. 221]* , or notice of entry of the order or judgment was served on the attorney [*Mossman v. Superior Court (1972) 22 Cal. App. 3d 706, 711-712, 99 Cal. Rptr. 638]* .

[4] Ability to Comply

[a] In General

The ability of an alleged contemnor to comply with a judgment or order must be established to support a finding of contempt for disobedience of it [*see* *In re Liu (1969) 273 Cal. App. 2d 135, 140, 78 Cal. Rptr. 85* (ability to comply as fact essential to establish jurisdiction for contempt proceeding); *see also* *Coursey v. Superior Court (1987) 194 Cal. App. 3d 147, 154-156, 239 Cal. Rptr. 365* ; *Warner v. Superior Court (1954) 126 Cal. App. 2d 821, 824, 273 P.2d 89]* . Conversely, a lack of ability to comply may be raised as a defense to a charge of contempt [*see* *Messenger v. Messenger (1956) 46 Cal. 2d 619, 629, 297 P.2d 988* ; *Bailey v. Superior Court (1932) 215 Cal. 548, 552, 11 P.2d 865]* .

Ability to comply is evaluated in relation to the time of alleged disobedience of the judgment or order in question. Thus, it is generally not necessary to allege a present ability to comply [*see* *Lyon v. Superior Court (1968) 68 Cal. 2d 446, 450, 67 Cal. Rptr. 265, 439 P.2d 1* ; *In re McCarty(1908) 154 Cal. 534, 536-537, 98 P. 540* ; *Sorell v. Superior Court (1967) 248 Cal. App. 2d 157, 162-163, 56 Cal. Rptr. 222]* . Ability to comply at the time the disobedience occurred is one of the allegations found in the mandatory Judicial Council form of declaration charging contempt [*see § 258.130*].

Special considerations regarding the ability to comply are involved with respect to support judgments or orders. For discussion of these considerations, see [b], *below.*

[b] Judgments and Orders for Support

A recurring issue in proceedings concerning contempt of support judgments or orders is whether the alleged contemnor had the ability to comply at the time the disobedience occurred. Historically, disobedience of a child or spousal support order has not been punished as contempt if the obligated party lacked the means to comply with the order because of his or her inability to pay [*see* *Messenger v. Messenger (1956) 46 Cal. 2d 619, 629, 297 P.2d 988* ; *Ex Parte Todd (1897) 119 Cal. 57, 58, 50 P. 1071* (disapproved as applied to child support in *Moss v. Superior Court (1998) 17 Cal. 4th 396, 401, 405, 422, 71 Cal. Rptr. 2d 215, 950 P.2d 59*)]. An obligation to pay support is conditioned on having the

ability to pay [*see generally Fam. Code §§ 4051(b), 4053, 4320(c), (e)*]. However, as discussed hereafter, the California Supreme Court has narrowed the circumstances in which "inability to pay" will excuse disobedience to a *child support* order [*Moss v. Superior Court (1998) 17 Cal. 4th 396, 401, 428, 71 Cal. Rptr. 2d 215, 950 P.2d 59* ; *see also Code Civ. Proc. § 1209.5*].

In construing "inability to pay," courts have held that an obligated party may not simply stop making payments entirely when he or she is no longer able to pay at the level previously ordered. Instead, if that party reasonably foresees an extended period of inability to pay under an existing order, he or she should seek modification of the order, rather than disobeying it [*see Bailey v. Superior Court (1932) 215 Cal. 548, 555, 11 P.2d 865]* . Further, courts held that if the obligated party was not wholly unable to make payments, he or she should pay whatever portion of the court-ordered sum he or she was able to pay, because a reduced ability to pay does not excuse disobedience except to the extent that the court-ordered amount exceeds the obligated party's means [*see Lyon v Superior Court (1968) 68 Cal. 2d 446, 450, 67 Cal. Rptr. 265, 439 P.2d 1* ; *Hoerner v. Superior Court (1960) 182 Cal. App.2d 500, 505, 6 Cal. Rptr. 178]* .

In applying these general precepts to spousal and child support, courts have generally held that a self-imposed inability to pay support generally is not an excuse for disobedience [*Ex Parte Spencer (1890) 83 Cal. 460, 465-466, 23 P. 395* ; *see Bailey v. Superior Court (1932) 215 Cal. 548, 552, 11 P.2d 865]* . Thus, it appears, for example, that if an obligated party is employed and voluntarily relinquishes employment to evade a support obligation, he or she could be found in contempt of court [*see Bailey v. Superior Court (1932) 215 Cal. 548, 552, 11 P.2d 865]* . To address that argument, however, a distinction must be made at present between spousal and child support obligations. In the case of spousal support, an obligated party who is unemployed and able to seek employment, but who refuses to do so, cannot generally be punished by contempt for this refusal, because of the constitutional prohibition [*see U.S. Const., amend. XIII*; *Cal. Const., art. I, § 6*] against involuntary servitude [*see Ex Parte Todd (1897) 119 Cal. 57, 58, 50 P. 1071* (disapproved as applied to child support in *Moss v. Superior Court (1998) 17 Cal. 4th 396, 401, 405, 422, 71 Cal. Rptr. 2d 215, 950 P.2d 59*); *In re Jennings (1982) 133 Cal. App. 3d 373, 386, 184 Cal. Rptr. 53* ; *see also In re Brown (1955) 136 Cal. App. 2d 40, 43, 288 P.2d 27* ; *Bailey v. Superior Court (1932) 215 Cal. 548, 552, 11 P.2d 865]* . In the case of child support, however, the Supreme Court rejected this analysis, in *Moss v. Superior Court (1998) 17 Cal. 4th 396, 71 Cal. Rptr. 2d 215, 950 P.2d 59* . In *Moss*, it concluded that there is no constitutional impediment to imposition of contempt sanctions on a parent "who, having the ability to do so, willfully fails to pay court-ordered child support, or when necessary to make payment possible willfully fails or refuses to seek and accept available employment for which the parent is suited by virtue of education, experience, and physical ability" [*Moss v. Superior Court (1998) 17 Cal. 4th 396, 422, 71 Cal. Rptr. 2d 215, 950 P.2d 59* ; *accord United States v. Ballek (9th Cir. 1999) 170 F.3d 871, 875* ; *cf. Fam. Code § 4505* (authorization for court to require parent to submit listing of employment applications); *see County of Monterey v. Banuelos (2000) 82 Cal. App. 4th 1299, 1306-1307, 98 Cal. Rptr. 2d 710* (county that has paid support is also entitled to a "seek work" order pursuant to statute, and may enforce noncustodial parent's obligation to pay support by contempt in same manner as custodial parent)]. Moreover, a payor parent's inability to pay is an affirmative defense to be proven by a preponderance of evidence by that parent, not an element of the contempt offense to be proven by the party alleging noncompliance [*Moss v. Superior Court (1998) 17 Cal. 4th 396, 425-428, 71 Cal. Rptr. 2d 215, 950 P.2d 59]* .

Although much of the Court's reasoning in *Moss* would appear to apply to an order to pay spousal support, the Court's decision expressly did not discuss the applicability of its ruling to that subject [*Moss v. Superior Court (1998) 17 Cal. 4th 396, 405, 71 Cal. Rptr. 2d 215, 950 P.2d 59]* . At least one later reported decision, however, has inferred that this reasoning would also apply to spousal support. In that instance, a father was found in contempt of orders to pay a mother's pendente lite attorney and expert fees. The court held that when ability to pay has already been determined by the family court in making the order underlying the contempt, ability to pay is not an element of the contempt, but rather inability to pay is an affirmative defense. The court stated that this analysis applied not only to child support orders, but to other similar family law orders as well [*In re Ivey (2000) 85 Cal. App. 4th 793, 798-798, 102 Cal. Rptr. 2d 447]* .

A special statute governs the prima facie showing needed for contempt of judgments and orders for child support [*see Code Civ. Proc. § 1209.5*]. For discussion of this statute and its effect on establishing the ability to comply, see *§ 258.81[1]* and *[2][b], above.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsEnforcementContemptFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementContempt

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§ 258.83 Civil Versus Criminal Contempt

Willful disobedience of a lawful judgment or court order is subject to sanction under both the Code of Civil Procedure and the Penal Code [*see Code Civ. Proc. §§ 1209-1222*; *Penal Code § 166*; *see also Penal Code § 273.6*]. Contempt proceedings under *Code Civ. Proc. §§ 1209-1222* are special proceedings under Part Three of the Code of Civil Procedure (*Code Civ. Proc. §§ 1063-1822.59*) but are often characterized as criminal or "quasi-criminal" in nature because of the penalties associated with a finding of contempt and some of the procedural safeguards required to be observed [*see Raiden v. Superior Court (1949) 34 Cal. 2d 83, 86, 206 P.2d 1081* ; *In re Kreitman (1995) 40 Cal. App. 4th 750, 754, 47 Cal. Rptr. 2d 595* (civil contempt proceedings are quasi-criminal because of penalties that court may impose); *Coursey v. Superior Court (1987) 194 Cal. App. 3d 147, 153, 239 Cal. Rptr. 365* ; *Mulvany v. Superior Court (1986) 184 Cal. App. 3d 906, 908-909, 229 Cal. Rptr. 334* ; *In re Martin (1977) 71 Cal. App. 3d 472, 480, 139 Cal. Rptr. 451]* .

However, trials of contempt enforcement matters under *Code Civ. Proc. §§ 1209-1222* are subject to the provisions of the Code of Civil Procedure insofar as those provisions do not conflict with the due process rights of the alleged contemnor. Thus, for example, *Code Civ. Proc. § 581(b)(1)* permits dismissal of a contempt action at any time before actual commencement of trial. Furthermore, it does not violate principles of double jeopardy or *Penal Code § 1387* (preventing reprosecution of certain criminal matters) if the moving party takes the matter off calendar, but later reschedules it, as long as there were no appearances and no hearing in the proceeding [*see Mulvany v. Superior Court (1986) 184 Cal. App. 3d 906, 907-909, 229 Cal. Rptr. 334]* .

In addition, a contempt proceeding is not, in fact, criminal if its main purpose is to coerce the alleged contemnor into complying with the court's orders, rather than punishing past conduct. In determining this purpose, the entire disposition of the case must be considered. Thus, a finding of civil contempt will not bar, on double jeopardy grounds, a criminal prosecution for the same conduct as that for which civil contempt was found [*see People v. Batey (1986) 183 Cal. App. 3d 1281, 1288-1289, 228 Cal. Rptr. 787* , *cert. denied, 480 U.S. 932* ; *see also People v. Derner (1986) 182 Cal. App. 3d 588, 591-593, 227 Cal. Rptr. 344]* .

For discussion of misdemeanor contempt under the Penal Code [*see Penal Code § 166*], see Ch. 135, *Contempt* . For

discussion of the standard of proof for a finding of contempt in family law proceedings, see *§ 258.89, below.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptCivil ContemptCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptElementsFamily LawChild SupportObligationsEnforcementContemptFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementContempt

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§ 258.84 Effect of Parties' Reconciliation

The reconciliation of the parties, whether conditional or unconditional, is an ameliorating factor to be considered by the court in considering any contempt of an existing court order [*Fam. Code § 2026*].

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[Reserved]

§ 258.85[Reserved]

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22-258 California Forms of Pleading and Practice--Annotated § 258.86

§ 258.86 Commencing Contempt Proceeding

[1] Jurisdiction

Subject matter jurisdiction to adjudicate contempt that is not prosecuted as a misdemeanor is exclusively in the particular court whose order was disobeyed [*Otis v. Superior Court (1905) 148 Cal. 129, 130, 82 P. 853* ; *Pacific Tel. & Tel. Co. v. Superior Court (1968) 265 Cal. App. 2d 370, 373, 72 Cal. Rptr. 177]* . Because actions under the Family Code must be brought in superior court, the superior court that issued the order or judgment disobeyed would be the proper forum [*see Fam. Code § 200*].

It appears that if a court had personal jurisdiction over the alleged contemnor when the involved judgment or order was rendered, that jurisdiction continues for the purpose of the contempt proceeding, even if the alleged contemnor leaves the state [*see Code Civ. Proc. § 410.50(b)*; *Smith v. Superior Court (1977) 68 Cal. App. 3d 457, 464-465, 137 Cal. Rptr. 348* (involving child custody)]. However, a court's power to adjudicate contempt with regard to a party who has left the state is affected by special provisions governing notice of the contempt proceeding [*see Albrecht v. Superior Court (1982) 132 Cal. App. 3d 612, 617-621, 183 Cal. Rptr. 417]* . For discussion of these provisions, see *[4][c], below.*

[2] Statute of Limitations

If the contempt alleged is the failure to pay child, family, or spousal support, the period of limitations for commencing a contempt action is three years from the date that the payment was due [*Code Civ. Proc. § 1218.5(b)*].

If the action before the court is enforcement of another order under the Family Code, the period of limitations for commencing a contempt action is two years from the time that the alleged contempt occurred [*Code Civ. Proc. § 1218.5(b)*].

[3] Multiple Counts

If there have been several distinct acts of disobedience to the same order, they may be charged as separate counts of

contempt, and if the charged party is convicted on two or more of these counts, separate punishment may be imposed for each count [*Donovan v. Superior Court (1952) 39 Cal. 2d 848, 855, 250 P.2d 246* ; *see In re Coleman (1974) 12 Cal. 3d 568, 572, 116 Cal. Rptr. 381, 526 P.2d 533* ; *Lyon v. Superior Court (1968) 68 Cal. 2d 446, 448-449, 67 Cal. Rptr. 265, 439 P.2d 1* ; *Kreling v. Superior Court (1941) 18 Cal. 2d 884, 885-887, 118 P.2d 470* ; *McDowell v. Orsini (1976) 54 Cal. App. 3d 951, 955, 127 Cal. Rptr. 285* ; *Darden v. Superior Court (1965) 235 Cal. App. 2d 80, 83, 45 Cal. Rptr. 44* ; *In re Spollino (1962) 208 Cal. App. 2d 783, 784, 25 Cal. Rptr. 536]* .

If the contempt alleged is for failure to pay child, family, or spousal support, each month for which payment has not been made in full may be alleged as a separate count of contempt and punishment imposed for each count proven [*Code Civ. Proc. § 1218.5(a)*].

[4] Order to Show Cause Procedure

[a] Supporting Affidavit

In cases arising under the Family Code, the aggrieved party initiates a contempt proceeding by presenting a mandatory Judicial Council form to the court. This Judicial Council form combines an order to show cause with an affidavit in support of a finding of contempt [*see § 258.130*]. The purpose of the form is to inform the court that its order or judgment has been willfully disobeyed and to set forth the basis on which the allegation of contempt is made [*see Code Civ. Proc. § 1211*].

The order to show cause and affidavit is not a pleading, in the strict sense, but serves as a complaint for the purpose of framing the issues to be determined [*see Freeman v. Superior Court (1955) 44 Cal. 2d 533, 536, 282 P.2d 857]* . In general, it must set forth facts establishing a prima facie showing of contempt, including rendition of a valid judgment or order, knowledge of the judgment or order by the alleged contemnor, the ability of the alleged contemnor to comply when the judgment or order was disobeyed, and the acts of disobedience [*Darden v. Superior Court (1965) 235 Cal. App. 2d 80, 81, 45 Cal. Rptr. 44* ; *Warner v. Superior Court (1954) 126 Cal. App. 2d 821, 824, 273 P.2d 89* ; *see § 258.82[1], above*].

The affiant is usually the aggrieved party, but affidavits of other persons with knowledge of the contempt may be presented [*see, e.g., Taylor v. Superior Court (1942) 20 Cal. 2d 244, 245, 125 P.2d 1* (declaration of aggrieved party's accountant)]. The mandatory Judicial Council form contemplates that it will be executed under penalty of perjury [*see Code Civ. Proc. § 2015.5*; *see also § 258.130*]. For discussion of *Code Civ. Proc. § 1211.5* which governs the construction, amendment, and review of supporting affidavits and statements of fact, see Ch. 135, *Contempt* .

[b] Charging Contempt

The order to show cause used in family law contempt matters is the mandatory Judicial Council form discussed in [a], *above* [*see* Cal. Judicial Council Form FL-410]. Although the Code of Civil Procedure speaks of presenting the order to show cause form to the judge whose order has been disobeyed, [*Code Civ. Proc. § 1211(a)*], in family proceedings it is normally presented to the clerk in the applicable family law department of the court. Once it has been issued (signed by the judge), conformed copies are returned to the applicant for service on the alleged contemnor.

If the court refuses to charge contempt when the supporting affidavit makes a prima facie showing of contempt, the party presenting the affidavit may petition for a writ of mandate directing the judge to issue an order to show cause [*see, e.g, Radlinski v. Superior Court (1960) 186 Cal. App. 2d 821, 823, 9 Cal. Rptr. 73* (trial court erroneously concluded it lacked jurisdiction; writ issued to set aside discharge)].

[c] Notice to Alleged Contemnor

Once charged with contempt, the alleged contemnor must be notified of the time and place of the hearing at which the

court will hear the evidence [*see* *Arthur v. Superior Court (1965) 62 Cal. 2d 404, 407-409, 42 Cal. Rptr. 441, 398 P.2d 777* ; *see also* *Farace v. Superior Court (1983) 148 Cal. App. 3d 915, 917-918, 196 Cal. Rptr. 297]* . In preparing that form for presentation to the court, the areas of the form designed for that information should be left blank so that the judge or court clerk may complete them, unless the date for hearing is preset by local rule of court. This form must be personally served on the alleged contemnor in the manner authorized for serving a summons in a civil action [*see Code Civ. Proc. § 1016*; *Golden Gate Consol. Hydraulic Mining Co. v. Superior Court of Yuba County (1884) 65 Cal. 187, 191-192, 3 P. 628]* . The order to show cause must be served within the time prescribed by *Code Civ. Proc. § 1005(b)* unless the court prescribes a shorter time. Any defect in the notice, as well as in the service itself, is waived by the alleged contemnor's *general* appearance in the proceeding [*see* *Leonis v. Superior Court (1952) 38 Cal. 2d 527, 531-532, 241 P.2d 253* (appearance through counsel); *Darden v. Superior Court (1965) 235 Cal. App. 2d 80, 82, 45 Cal. Rptr. 44]* .

Under some circumstances, service of the order to show cause may be made on the alleged contemnor's attorney of record in the underlying proceeding, instead of on the alleged contemnor. There is authority that if the alleged contemnor is concealing himself or herself to avoid service or has left the state, the court may direct that service be made on his or her attorney of record [*see* *Shibley v. Superior Court (1927) 202 Cal. 738, 742-743, 262 P. 332* ; *Golden Gate Consol. Hydraulic Mining Co. v. Superior Court of Yuba County (1884) 65 Cal. 187, 191-192, 3 P. 628* ; *Kroneberger v. Superior Court (1961) 196 Cal. App. 2d 206, 210, 16 Cal. Rptr. 339]* .

However, it appears that such service may be made only if the moving party has taken steps reasonably calculated to apprise the alleged contemnor of the action. The moving party must submit an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) to the court alleging specific facts showing the alleged contemnor's concealment or absence and the reasonable efforts taken to locate him or her [*see* *Albrecht v. Superior Court (1982) 132 Cal. App. 3d 612, 617-621, 183 Cal. Rptr. 417]* . Service on the attorney of record also may be authorized in limited other circumstances [*see* *In re Morelli (1970) 11 Cal. App. 3d 819, 834-841, 91 Cal. Rptr. 72* (service of *second* order to show cause on attorney when original was served on alleged contemnor and writ proceedings intervened); *Smith v. Smith (1953) 120 Cal. App. 2d 474, 483, 261 P.2d 567* (service on attorney when contempt was part of continuing proceeding in which jurisdiction over contemnor was already acquired)]. For a general discussion of procedures for service of summons [*see Code Civ. Proc. § 415.10 et seq.*], see Ch. 518, *Service of Summons and Papers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportJurisdictionSubject Matter JurisdictionFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsEnforcementContemptFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementContemptGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 258.87 Response to Contempt Charge

The alleged contemnor may respond to the charge of contempt by admitting or denying it, or may move for a discharge. No written response is currently required by law. Although personal testimony is almost always required at the hearing, a declaration in opposition may be prepared for use in limited cases. A written response may take the form of an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) in opposition to that on which the order to show cause was based, and such a counterdeclaration is in the nature of an answer [*see Lyon v. Superior Court (1968) 68 Cal. 2d 446, 452, 67 Cal. Rptr. 265, 439 P.2d 1* ; *see also Code Civ. Proc. § 1217*].

A counterdeclaration might state, for example, that the alleged contemnor lacked the ability to comply with the involved judgment or order at the time of the purported disobedience, or that the judgment or order was not sufficiently definite to afford compliance [*see Messenger v. Messenger (1956) 46 Cal. 2d 619, 629, 297 P.2d 988* ; *Ketscher v. Superior Court (1970) 9 Cal. App. 3d 601, 604-605, 88 Cal. Rptr. 357]* . Allegations of the affidavit underlying the order to show cause are deemed admitted if not denied in the opposing declaration, and a hearing is required on only the controverted issues [*Crittenden v. Superior Court (1964) 225 Cal. App. 2d 101, 107, 36 Cal. Rptr. 903]* . The Judicial Council has not prescribed a form of opposing declaration. A suggested form is *set forth in § 258.131*. Note that because the declaration is hearsay, its admission is subject to an objection on that ground; and thus, its utility will be limited in the absence of a stipulation for its admission or the presence of a hearsay exception.

Instead of answering, the alleged contemnor may move for a discharge of the proceedings when it appears that the court is without jurisdiction or grounds to proceed with investigation of the charge. This motion may also be called a motion to dismiss or a motion to quash the order to show cause and it has substantially the same function as a demurrer to the complaint in a civil action [*see Taylor v. Superior Court (1942) 20 Cal. 2d 244, 246, 125 P.2d 1]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsEnforcementContemptFamily LawMarital Termination & Spousal SupportDissolution &

DivorceProperty DistributionEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementContempt

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22-258 California Forms of Pleading and Practice--Annotated § 258.88

§ 258.88 Hearing

[1] Appearance by Alleged Contemnor and Counsel

In general, a hearing on the order to show cause may not proceed without the appearance of the alleged contemnor. He or she may appear by being physically present in the courtroom, with or without counsel, or may appear through counsel alone. However, if the court finds that the order to show cause has been validly served on the alleged contemnor and he or she has willfully failed to appear, in person or through counsel, the court may proceed with the hearing or issue a warrant for the alleged contemnor's arrest [*see Farace v. Superior Court (1983) 148 Cal. App. 3d 915, 917-918, 196 Cal. Rptr. 297* ; *see also In re Morelli (1970) 11 Cal. App. 3d 819, 838, 91 Cal. Rptr. 72]* .

The alleged contemnor may apply to the court for appointed counsel if he or she desires legal representation and is unable to afford counsel [*see Gov. Code § 27706(a)* (providing for appointment of public defender for person charged with "any contempt"); *see also In re Shelley (1961) 197 Cal. App. 2d 199, 202-203, 16 Cal. Rptr. 916]* . An indigent defendant must be provided with an attorney at public expense when the defendant has been ordered to show cause why he or she should not be held in contempt for failing to pay child support and the punishment for the contempt includes a possible jail sentence [*County of Santa Clara v. Superior Court (1992) 2 Cal. App. 4th 1686, 1688, 5 Cal. Rptr. 2d 7]* . For discussion of appointment of counsel in general, see California Criminal Defense Practice, Ch. 1 (Matthew Bender).

[2] No Jury Trial

There is no entitlement to a jury trial in contempt proceedings under *Code Civ. Proc. §§ 1209-1222* [*see Pacific Tel. & Tel. Co. v. Superior Court (1968) 265 Cal. App. 2d 370, 375, 72 Cal. Rptr. 177* ; *see also United Farm Workers, AFL-CIO v. Superior Court (1968) 265 Cal. App. 2d 212, 213-215, 71 Cal. Rptr. 513]* . At least one court has held, however, that if the charged party is sentenced to more than 180 days in jail, the right to a jury trial is guaranteed by the United States Constitution and any waiver of that right must be express. If the court tries the contempt charges without a jury and the charged party does not expressly waive the right to a jury trial, the maximum sentence the court may impose is 180 days [*In re Kreitman (1995) 40 Cal. App. 4th 750, 753-755, 47 Cal. Rptr. 2d 595]* .

[3] Evidence

The declaration in support of a finding of contempt [*see § 258.130*] is considered hearsay evidence and is not generally admissible over an objection [*see Evid. Code §§ 353, 1200*]. If the declaration is not admitted and the declarant personally testifies, the court may assume a more involved role in direct examination of the declarant or other witnesses than in some other types of proceedings [*see Code Civ. Proc. § 1217* (judge may examine witnesses for or against person charged with contempt)].

The alleged contemnor cannot be compelled to be a witness against himself or herself and cannot be punished for contempt for refusing to be sworn or to testify [*In re Witherspoon (1984) 162 Cal. App. 3d 1000, 1002, 209 Cal. Rptr. 67* ; *Crittenden v. Superior Court (1964) 225 Cal. App. 2d 101, 105, 36 Cal. Rptr. 903* ; *see also Oliver v. Superior Court (1961) 197 Cal. App. 2d 237, 240, 17 Cal. Rptr. 474]* . However, the alleged contemnor may choose to testify and offer any legitimate excuse to the allegations made [*Sorell v. Superior Court (1967) 248 Cal. App. 2d 157, 161, 56 Cal. Rptr. 222]* , such as financial inability to comply with an order for support [*see Nutter v. Superior Court (1960) 183 Cal. App. 2d 72, 75, 6 Cal. Rptr. 404]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureTrialsDefendant's RightsRight to Remain SilentSelf-Incrimination PrivilegeFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsEnforcementContemptFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementContempt

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22-258 California Forms of Pleading and Practice--Annotated § 258.89

§ 258.89 Conviction and Punishment

[1] Standard of Proof

The court may make a finding of contempt only by proof beyond a reasonable doubt, which is the standard required for conviction of a crime [*see In re Coleman (1974) 12 Cal. 3d 568, 572, 116 Cal. Rptr. 381, 526 P.2d 533* ; *In re Witherspoon (1984) 162 Cal. App. 3d 1000, 1001-1002, 209 Cal. Rptr. 67]* .

[2] Punishment

Punishment for contempt is governed by *Code Civ. Proc. §§ 1218-1219. Code Civ. Proc. § 1218(c)* provides that when a party is found in contempt for failure to comply with an order pursuant to the Family Code, the court must proceed as follows:

1. On a first finding of contempt, the court must order the contemner to perform up to 120 hours of community service, or to be imprisoned for up to 120 hours, for each count of contempt;

2. On the second finding of contempt, the court must order the contemner to perform up to 120 hours of community service, in addition to ordering up to 120 hours of imprisonment, for each count of contempt;

3. On the third or subsequent finding of contempt, the court must order both:

a. 240 hours of imprisonment and community service of up to 240 hours, for each count of contempt, and

b. An administrative fee, not exceeding the actual cost of the contemner's administration and supervision, while assigned to a community service program.

The court must take parties' employment schedules into consideration when ordering community service or imprisonment, or both [Fam. Code § 1218(c)(4)].

Code Civ. Proc. § 1219(a) provides that, with limited exception, when the contempt consists of an omission to perform an act that the convicted party still has the power to perform, that party may be imprisoned until he or she performs it. However, the act to be performed must be specified in the warrant of commitment [*Code Civ. Proc. § 1219(a)*]. For further discussion of punishment for contempt, see Ch. 135, *Contempt* .

A contemnor who has violated a court order may be ordered to pay attorney's fees and costs incurred to the party who initiated the contempt proceeding [*Code Civ. Proc. § 1218(a)*].

[3] Purgation

The court may suspend execution of an order of commitment for contempt and make execution of the order conditional on the convicted party's failure to purge himself or herself of the contempt [*see ' 76 L. & W. Co. v. Superior Court (1892) 93 Cal. 139, 143, 28 P. 813]* . Purgation involves the process by which the convicted party brings himself or herself into compliance with the order or judgment that was disobeyed.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsBurdens of ProofProof Beyond Reasonable DoubtFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsEnforcementContemptFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementContempt

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22-258 California Forms of Pleading and Practice--Annotated § 258.90

§ 258.90 Review of Contempt Proceeding

The judgments and orders in contempt proceedings are final and conclusive [*Code Civ. Proc. § 1222*] and are not appealable [*Code Civ. Proc. § 904.1(a)(1)*]. Because of this nonappealability, review of the proceeding will require use of an appropriate extraordinary writ [*see Code Civ. Proc. §§ 1068* (certiorari or review), *1085* (mandate), *1103* (prohibition); *Penal Code § 1473* (habeas corpus); *see In re Kreitman (1995) 40 Cal. App. 4th 750, 756, 47 Cal. Rptr. 2d 595* (writ of habeas corpus issued)]. However, failure to prevail on, or voluntary dismissal of, an order to show cause re contempt is not a termination of a prior action that will support a malicious prosecution action against an opposing attorney [*see Green v. Uccelli (1989) 207 Cal. App. 3d 1112, 1121, 255 Cal. Rptr. 315* (voluntary dismissal); *Lossing v. Superior Court (1989) 207 Cal. App. 3d 635, 636, 255 Cal. Rptr. 18* (failure to prevail); *see also*; *Mabie v. Hyatt (1998) 61 Cal. App. 4th 581, 595-597, 71 Cal. Rptr. 2d 657* (malicious prosecution action against third parties who made loan to spouse involved in dissolution action); *Chauncey v. Niems (1986) 182 Cal. App. 3d 967, 976-977, 227 Cal. Rptr. 718* (action against former spouse)]. Relief for improper contempt orders is sought by requests for attorney's fees or sanctions within the underlying dissolution proceeding [*see Green v. Uccelli (1989) 207 Cal. App. 3d 1112, 1121, 255 Cal. Rptr. 315]* . For further discussion, see Ch. 135, *Contempt* , Ch. 292, *Habeas Corpus* , Ch. 358, *Mandate and Prohibition* , and Ch. 492, *Review (Certiorari), Writ of*; and California Points and Authorities, Ch. 47, *Contempt* , Ch. 110, *Habeas Corpus* , Ch. 150, *Mandate and Prohibition* , and Ch. 205, *Review (Certiorari), Writ of* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionCriminal Law & ProcedureHabeas CorpusGeneral OverviewFamily LawChild SupportObligationsEnforcementContemptFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementContempt

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22-258 California Forms of Pleading and Practice--Annotated § 258.91

§ 258.91 Effect of Contempt Finding on Enforcement of Certain Orders

No party who is in contempt of a court order or judgment in a marital dissolution or separate maintenance action is permitted to enforce that order or judgment, by way of execution or otherwise, either in the same action or by way of a separate action, against the other party. However, this restriction does not affect or apply to the enforcement of child or spousal support orders [*Code Civ. Proc. § 1218(b)*].

Under the doctrine of disentitlement, a party to a legal proceeding may not seek the aid of a court in hearing his or her demands while standing in an "attitude of contempt" with regard to the orders issued by the court in that proceeding [*see MacPherson v. MacPherson (1939) 13 Cal. 2d 271, 277, 89 P.2d 382* (father could not appeal order that he pay wife's attorney's fees in custody matter while in violation of court orders regarding custody and attorney's fees); *see also Adoption of Jacob C. (1994) 25 Cal. App. 4th 617, 623, 30 Cal. Rptr. 2d 591* (citing *MacPherson* and affirming trial court's decision barring mother in hiding with one of her minor children from participating in hearing to terminate her parental rights)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsEnforcementContemptFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementContempt

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22-258 California Forms of Pleading and Practice--Annotated §§ 258.92-258.99

[Reserved]

§§ 258.92[Reserved]

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22-258 California Forms of Pleading and Practice--Annotated § 258.100

§ 258.100 Related Matthew Bender Publications

[1] California Points and Authorities

For memoranda of points and authorities for use in enforcing judgments and orders by contempt, see California Points and Authorities, Ch. 47, *Contempt* (Matthew Bender)

For memoranda of points and authorities related to actions and attacks on judgments in general, see California Points and Authorities, Ch. 131, *Judgments* , Pts. IV and V, respectively (Matthew Bender)

For memoranda of points and authorities supporting and opposing the appointment of a receiver, see generally California Points and Authorities, Ch. 200, *Receivers* (Matthew Bender)

[2] California Family Law

For discussion and forms relating to custody and visitation rights, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2d ed., chs. 32 and 33 (Matthew Bender)

For discussion and forms relating to enforcement of judgments and orders in California family law proceedings, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2d ed., chs. 140 and 141 (Matthew Bender)

For discussion and forms relating to enforcement of sister state and foreign judgments in family law matters, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2d ed., chs. 150 and 151 (Matthew Bender)

Legal Topics:

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

Civil ProcedureRemediesReceivershipsReceiversGeneral OverviewFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsEnforcementContemptFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementContempt

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22-258 California Forms of Pleading and Practice--Annotated § 258.101

§ 258.101 Federal Statutes

Direct payment of military pension to former spouse. *10 U.S.C. § 1408*

Definition of consumer reporting agency. *15 U.S.C. § 1681a(f)*

Preemption provisions of Employees' Retirement Income Security Act. 29 U.S.C. § 1044

Spendthrift provisions of Employees' Retirement Income Security Act. *29 U.S.C. § 1056(d)(1)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingConsumer ReportsFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewMilitary & Veterans LawVeteransBenefitsPensionsPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)Federal PreemptionGeneral Overview

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22-258 California Forms of Pleading and Practice--Annotated § 258.102

§ 258.102 State Statutes

[1] Contempt

[a] Authority of Court to Enforce Judgments and Orders

Enforcement of family law orders by contempt. *Code Civ. Proc. §§ 128(a)(4), 177(2), 178, 1209-1222*; *Fam. Code § 290*

Power of court to compel obedience to its judgments and orders. *Code Civ. Proc. §§ 128(a)(4), 177(2), 178*

Money sanctions for violation of lawful court order without good cause or substantial justification. *Code Civ. Proc. § 177.5*

[b] Contempt Procedure

Service of papers to bring party into contempt. *Code Civ. Proc. §§ 1005(b), 1015, 1016*

Initiation of proceeding for indirect contempt. *Code Civ. Proc. § 1211*

Sufficiency and amendment of affidavit for contempt. *Code Civ. Proc. § 1211.5*

[c] Effect of Contempt on Enforcement of Other Judgments

Party in contempt of court order or judgment in proceeding for dissolution or legal separation is prohibited from enforcing order or judgment other than one for child support. *Code Civ. Proc. § 1218(b)*

[d] Elements of Contempt

Acts and omissions constituting contempt of court. *Code Civ. Proc. § 1209*; *Penal Code § 166*

Proof required that parent did not comply with order for child support order is prima facie evidence of contempt. *Code Civ. Proc. § 1209.5*

[e] Factors Affecting Use of Contempt as Remedy

Lack of diligence in enforcing certain judgments. *Fam. Code § 291, 5102*

Reconciliation of parties is ameliorating factor to be considered by court. *Fam. Code § 2026*

[f] Lack of Appellate Remedy

Contempt orders and judgments are final and nonappealable. *Code Civ. Proc. §§ 904.1(a)(1), 1222*

[g] Punishment for Contempt

Punishment for contempt for failure to comply with Family Code order. *Code Civ. Proc. § 1218(c)*

Compelling performance of court order by imprisonment for contempt until act performed. *Code Civ. Proc. § 1219(a)*

[h] Review

By certiorari. *Code Civ. Proc. § 1068*

By mandate. *Code Civ. Proc. § 1085*

By prohibition. *Code Civ. Proc. § 1103*

By habeas corpus. *Penal Code § 1473*

[2] Execution of Judgments

Enforcement of Judgments Law. *Code Civ. Proc. §§ 680.010-724.260*

Execution of judgments. *Code Civ. Proc. §§ 699.010-701.830*

Property subject to execution. *Code Civ. Proc. §§ 699.080(a), 699.710*

Writ of execution. *Code Civ. Proc. §§ 699.510-699.520*

General provisions for determination of exempt property. *Code Civ. Proc. §§ 703.010-703.140*

Property exempt from execution. *Code Civ. Proc. §§ 703.070, 704.010-704.210, 704.720*

Procedure for claiming exemption. *Code Civ. Proc. §§ 703.510-703.610*

Enforcement of judgment or order in family law proceeding by execution. *Fam. Code § 290*

Enforcement of child or family support awards by writ of execution. *Fam. Code §§ 5100-5104*

[3] General Provisions

Requirement that after final judgment no subsequent order is valid unless any prior notice required is served on party. *Fam. Code § 215*

Enforcement of judgments, orders, and decrees in family law proceedings. *Fam. Code §§ 290, 291*

[4] Liens

Amount of lien. *Code Civ. Proc. § 697.010*

Priority of lien. *Code Civ. Proc. § 697.020*

Time within which lien is effective. *Code Civ. Proc. § 697.030*

Stay of judgment; effect on lien. *Code Civ. Proc. § 697.040*

Release of property if lien extinguished. *Code Civ. Proc. § 697.050*

Recording of federal court judgment. *Code Civ. Proc. § 697.060*

Liens on real property *Code Civ. Proc. §§ 697.310-697.410*

Judgment lien on personal property. *Code Civ. Proc. §§ 697.510-697.670* Execution liens. *Code Civ. Proc. §§ 697.710-697.750*

Other liens created by enforcement process. *Code Civ. Proc. §§ 697.910-697.920*

[5] Miscellaneous Creditor's Remedies

Withholding against other state benefits. *Code Civ. Proc. § 704.120*

Supplemental proceedings. *Code Civ. Proc. §§ 708.010-708.205*

Service of written interrogatories on judgment debtor. *Code Civ. Proc. §§ 708.020, 2030* (*Code Civ. Proc. § 2030.010 et seq.* effective July 1, 2005)

Creditor's examination. *Code Civ. Proc. §§ 708.110-708.205*

Money owed to judgment debtor by public entity. *Code Civ. Proc. §§ 708.710-708.795*

Claim against state tax refund. *Code Civ. Proc. §§ 708.730, 708.740, 708.795*

Creditor's remedies to reach partnership interest and rights regarding assignment. *Corp. Code §§ 15028, 15673*

[6] Receivership

Appointment of receiver of jointly owned property or fund in danger of being lost, removed, or materially injured. *Code Civ. Proc. § 564(b)(2)*

Appointment of receiver after judgment to carry judgment into effect. *Code Civ. Proc. § 564(b)(3)*

Appointment of receiver after judgment to dispose of property according to judgment, to preserve it during pendency of appeal, or pursuant to *Code Civ. Proc. §§ 680.010-724.260* (enforcement of judgments). *Code Civ. Proc. § 564(b)(4)*

Appointment of receiver in cases in which receivers have been appointed by usages of courts of equity. *Code Civ. Proc. § 564(b)(8)*

Limitations on who may serve as receiver. *Code Civ. Proc. § 566(a)*

Undertaking required of ex parte applicant for appointment of receiver. *Code Civ. Proc. § 566(b)*

Receiver's oath and bond. *Code Civ. Proc. § 567*

Receiver's powers and duties. *Code Civ. Proc. §§ 568-570*

Order appointing receiver is appealable. *Code Civ. Proc. § 904.1(a)(7)*

Appeal does not stay order appointing receiver unless undertaking is given. *Code Civ. Proc. § 917.5*

Bond and Undertaking Law. *Code Civ. Proc. §§ 995.010-996.560*

Service of papers. *Code Civ. Proc. §§ 1005(b), 1010-1020*

Service of notice after judgment in family law proceeding. *Fam. Code § 215*

Enforcement of judgments or orders in proceedings under Family Code by appointment of receiver. *Fam. Code § 290*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionFamily LawChild SupportObligationsEnforcementContemptFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementContempt

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22-258 California Forms of Pleading and Practice--Annotated § 258.103

§ 258.103 California Rules of Court

[1] Civil Law and Motion Rules

Generally. *Cal. Rules of Ct., Rules 3.1100-3.1370*

Applications before trial for order in family law proceedings are excepted from Civil Law and Motion Rules. *Cal. Rules of Ct., Rule 3.1103(a)(1)*

Civil Law and Motion Rules apply to applications for enforcement of judgment or for appointment of receiver. *Cal. Rules of Ct., Rule 3.1103(a)(2)*

Memorandum of points and authorities in specified format are required to accompany notice of motion. *Cal. Rules of Ct., Rule 3.1113*

Time, place, and manner for filing papers generally. *Cal. Rules of Ct., Rules 3.1300, 3.1302*

Evidence at law and motion hearing. *Cal. Rules of Ct., Rule 3.1306*

Additional requirements of ex parte application for appointment of receiver. *Cal. Rules of Ct., Rule 3.1175*

Procedure on ex parte application for appointment of receiver. *Cal. Rules of Ct., Rule 3.1176*

Other provisions regarding receivers. *Cal. Rules of Ct., Rules 3.1177-3.1184*

Requirement that in order to be granted ex parte application be accompanied by affidavit or declaration of prior notification to adverse party or excuse from notification. *Cal. Rules of Ct., Rules 3.1200-3.1207*

[2] Family Law Rules

Service of notices. *Cal. Rules of Ct., Rule 5.10(b)*

Applicability of general civil law to Family Code proceedings. *Cal. Rules of Ct., Rule 5.21*

Papers to be served with application for order. *Cal. Rules of Ct., Rule 5.118(b)*

"Appearance" defined. *Cal. Rules of Ct., Rule 5.120*

When financial declaration must be served and filed. *Cal. Rules of Ct., Rule 5.128*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEnforcementGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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22-258 California Forms of Pleading and Practice--Annotated § 258.104

§ 258.104 Decisions

[1] Contempt

[a] Affidavits (Declarations)

Counterdeclaration to declaration for indirect contempt takes nature of answer and frames issues for hearing. *Lyon v. Superior Court (1968) 68 Cal. 2d 446, 452, 67 Cal. Rptr. 265, 439 P.2d 1*

Affidavit for indirect contempt and counteraffidavit in effect constitutes pleading and frames issues. *Freeman v. Superior Court (1955) 44 Cal. 2d 533, 536, 282 P.2d 857* ; *Darden v. Superior Court (1965) 235 Cal. App. 2d 80, 82, 45 Cal. Rptr. 44*

Failure of wife's affidavit to aver husband's knowledge of support order does not deprive court of overall jurisdiction or render indirect contempt proceedings void *ab initio*; until wife exercised her right to amend affidavit, prohibition was proper remedy to restrain court from adjudging husband in contempt. *Mossman v. Superior Court (1972) 22 Cal. App. 3d 706, 710-713, 99 Cal. Rptr. 638*

Requirements of declaration for indirect contempt. *Darden v. Superior Court (1965) 235 Cal. App. 2d 80, 81, 45 Cal. Rptr. 44* ; *Warner v. Superior Court (1954) 126 Cal. App. 2d 821, 824, 273 P.2d 89*

Allegations in moving party's declaration for indirect contempt are deemed admitted if not controverted. *Crittenden v. Superior Court (1964) 225 Cal. App. 2d 101, 107, 36 Cal. Rptr. 903*

Averment in contempt affidavit that custodial parent "removed the children from the State of California without my knowledge or consent and with the intent of preventing the exercise of my visitation and communication rights" with the minor children is allegation of fact, not mere conclusion. *Rosin v. Superior Court (1960) 181 Cal. App. 2d 486, 490, 5 Cal. Rptr. 421*

[b] Attorney's Fees and Costs

Award of attorney's fees under former *Civ. Code § 4370*, accountant's fees, and costs incurred in prosecuting contempt proceeding on contemnor's failure to comply with existing court orders re support is proper when party's need and contemnor's ability to pay are established. *In re Marriage of Janssen (1975) 48 Cal. App. 3d 425, 428-429, 121 Cal. Rptr. 701*

[c] Child Custody and Visitation

Showing of custodial parent's ability to compel teenaged child to comply with visitation order requires proof of circumstances surrounding contemplated visitation, including relationships between parties and their attitudes regarding visits. *Coursey v. Superior Court (1987) 194 Cal. App. 3d 147, 154-156, 239 Cal. Rptr. 365*

Removal of children from California by custodial parent to defeat other parent's visitation rights is contempt of court despite fact that custody order did not prohibit removal. *Rosin v. Superior Court (1960) 181 Cal. App. 2d 486, 495-500, 5 Cal. Rptr. 421*

[d] Civil Versus Criminal Contempt

Contempt judgment against mother for violating child custody order is civil, rather than criminal, and does not preclude prosecution on double jeopardy grounds for child stealing under *Penal Code § 278.5*. *People v. Batey (1986) 183 Cal. App. 3d 1281, 1288-1289, 228 Cal. Rptr. 787 , cert. denied, 480 U.S. 932*

Criminal contempt punishes, whereas civil contempt coerces; contempt was civil when family law court sought to coerce parent to comply with child custody order and not merely to punish for past violations. *People v. Derner (1986) 182 Cal. App. 3d 588, 591-593, 227 Cal. Rptr. 344*

[e] Defense

Contemnor has duty to show as matter of defense why he or she has not obeyed order. *In re McCarty (1908) 154 Cal. 534, 537, 98 P. 540*

[f] Estoppel

Dismissal of contempt citation after hearing on merits of issue whether mother-in-law aided, abetted, and assisted son in depriving her daughter-in-law of custody as not collaterally estopping subsequent civil litigation on same issue. *Gibson v. Gibson (1971) 15 Cal. App. 3d 943, 945-948, 93 Cal. Rptr. 617*

[g] Criminal Actions

Court's judgment holding father in civil contempt for failure to return child after scheduled visitation period does not bar subsequent criminal action pursuant to *Penal Code § 278.5* for same conduct. *People v. Derner (1986) 182 Cal. App. 3d 588, 591-593, 227 Cal. Rptr. 344*

[h] Double Jeopardy

Court's judgment holding father in civil contempt for failure to return child after scheduled visitation period does not

bar subsequent criminal action pursuant to *Penal Code § 278.5* for same conduct. *People v. Derner (1986) 182 Cal. App. 3d 588, 591-593, 227 Cal. Rptr. 344*

[i] Hearing

Appointment of commissioner to hear civil contempt matter to enforce temporary support order. *Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 10, 118 Cal. Rptr. 21, 529 P.2d 53*

Appearance of contemnor by attorney. *Foley v. Foley (1898) 120 Cal. 33, 39, 52 P. 122* ; *In re Morelli (1970) 11 Cal. App. 3d 819, 838, 91 Cal. Rptr. 72* ; *Morelli v. Superior Court (1968) 262 Cal. App. 2d 262, 268-269, 68 Cal. Rptr. 572*

Code Civ. Proc. § 1209.5 establishes prima facie contempt on basis of proof of child support order, knowledge of order, and noncompliance; ability to pay child support is affirmative defense, not element of contempt, under *Code Civ. Proc. § 1209.5*. *In re Feiock (1989) 215 Cal. App. 3d 141, 146-148, 263 Cal. Rptr. 437* (on remand from *Hicks v. Feiock (1988) 485 U.S. 624, 108 S. Ct. 1423, 99 L. Ed. 2d 721*)

Accused may not be compelled to be witness against himself or herself at hearing on indirect contempt. *In re Witherspoon (1984) 162 Cal. App. 3d 1000, 1002, 209 Cal. Rptr. 67* ; *Crittenden v. Superior Court (1964) 225 Cal. App. 2d 101, 105, 36 Cal. Rptr. 903*

Findings of valid service of order to show cause and willful absence from hearing are necessary to support contempt order when alleged contemnor is not present at hearing. *Farace v. Superior Court (1983) 148 Cal. App. 3d 915, 917-918, 196 Cal. Rptr. 297*

Proof required under *Code Civ. Proc. § 1209.5* of noncompliance with child support order for prima facie evidence of indirect contempt. *Martin v. Superior Court (1971) 17 Cal. App. 3d 412, 414-418, 95 Cal. Rptr. 110*

[j] Inability to Comply

Imposition of contempt sanctions on parent obligated to pay court ordered child support is proper when parent's inability to pay results from willful failure or refusal to seek and accept available employment for which parent is suited by virtue of education, experience, and phyical ability. *Moss v. Superior Court (1998) 17 Cal. 4th 396, 422, 71 Cal. Rptr. 2d 215, 950 P.2d 59*

Showing of custodial parent's ability to compel teenaged daughter to comply with visitation order requires proof of circumstances surrounding contemplated visitation, including relationships between parties and their attitudes regarding visits. *Coursey v. Superior Court (1987) 194 Cal. App. 3d 147, 154-156, 239 Cal. Rptr. 365*

Contempt for failure to pay spousal support is improper when spouse is unemployed and unable to pay. *In re Jennings (1982) 133 Cal. App. 3d 373, 383, 386, 184 Cal. Rptr. 53*

[k] Judgment and Commitment Order

Valid judgment of contempt must meet strict requirements and show facts essential to establish jurisdiction for making of order, contemnor's knowledge of order, ability to comply, and willful disobedience. *In re Jones (1975) 47 Cal. App. 3d 879, 881, 120 Cal. Rptr. 914*

Greater certainty and clarity in order is required to support contempt proceedings than is necessary to support other judgment remedies. *Little v. Superior Court (1968) 260 Cal. App. 2d 311, 316, 67 Cal. Rptr. 77*

Sufficiency of commitment orders. *Darden v. Superior Court (1965) 235 Cal. App. 2d 80, 83-85, 45 Cal. Rptr. 44* ; *Martin v. Superior Court (1962) 199 Cal. App. 2d 730, 738, 18 Cal. Rptr. 773* ; *see In re Bronstein (1964) 225 Cal. App. 2d 136, 137-138, 37 Cal. Rptr. 133* ; *Crittenden v. Superior Court (1964) 225 Cal. App. 2d 101, 107, 36 Cal. Rptr. 903* ; *Nutter v. Superior Court (1960) 183 Cal. App. 2d 72, 75, 6 Cal. Rptr. 404*

[l] Jurisdiction

[i] Effect of Appeal

Trial court is without jurisdiction to punish by contempt violation of order stayed by appeal and from which appeal has been taken. *Smith v. Smith (1953) 120 Cal. App. 2d 474, 479, 261 P.2d 567* (custody order)

Court to which appeal has been taken has jurisdiction over any proceedings necessary to protect subject matter pending appeal, which would include contempt proceeding when appropriate. *Smith v. Smith (1953) 120 Cal. App. 2d 474, 479, 261 P.2d 567*

[ii] Personal Jurisdiction

Jurisdiction of trial court to adjudicate nonresident wife in contempt of court for noncompliance with orders pertaining to child visitation entered in modification proceeding pursuant to stipulation of parties. *Smith v. Superior Court (1977) 68 Cal. App. 3d 457, 464-465, 137 Cal. Rptr. 348*

[iii] Subject Matter Jurisdiction

Court whose order was disobeyed has power to punish for contempt. *Pacific Tel. & Tel. Co. v. Superior Court (1968) 265 Cal. App. 2d 370, 373, 72 Cal. Rptr. 177*

[m] Jury Trial Prohibited

Civil contempt is not triable by jury. *Pacific Tel. & Tel. Co. v. Superior Court (1968) 265 Cal. App. 2d 370, 375, 72 Cal. Rptr. 177* ; *United Farm Workers, AFL-CIO v. Superior Court (1968) 265 Cal. App. 2d 212, 213-215, 71 Cal. Rptr. 513*

[n] Knowledge of Order

Showing that contemnor's attorney was in court representing contemnor at time order was made or was thereafter served with copy of order raises disputable presumption that contemnor had knowledge of order. *Freeman v. Superior Court (1955) 44 Cal. 2d 533, 537-538, 282 P.2d 857* ; *Mossman v. Superior Court (1972) 22 Cal. App. 3d 706, 711, 99 Cal. Rptr. 638* ; *In re Sigesmund (1961) 193 Cal. App. 2d 219, 224, 14 Cal. Rptr. 221*

Requirement that contemnor had knowledge of order at time he or she disobeyed it. *Phillips v. Superior Court (1943) 22 Cal. 2d 256, 257-258, 137 P.2d 838* ; *Mossman v. Superior Court (1972) 22 Cal. App. 3d 706, 709, 99 Cal. Rptr. 638*

[o] Noncompliance With Child Support Order

State child support statute is not preempted under U.S. Const. Supremacy Clause by federal statutes relating to Veterans' Administration disability benefits, even though compliance with child support order based on statute necessitates use of disability benefits; thus, contempt finding against disabled veteran for noncompliance is proper. *Rose v. Rose (1987) 481 U.S. 619, 107 S. Ct. 2029, 95 L. Ed. 2d 599, 614*

Imposition of contempt sanctions on parent obligated to pay court ordered child support is proper when parent's inability to pay results from willful failure or refusal to seek and accept available employment for which parent is suited by virtue of education, experience, and phyical ability. *Moss v. Superior Court (1998) 17 Cal. 4th 396, 422, 71 Cal. Rptr. 2d 215, 950 P.2d 59*

[p] Notice of Contempt Proceedings

Waiver of personal service of order to show cause re contempt by voluntary appearance at hearing by counsel. *Leonis v. Superior Court (1952) 38 Cal. 2d 527, 531, 241 P.2d 253*

When substituted service of contempt citation may be made on citee's attorney of record. *Shibley v. Superior Court (1927) 202 Cal. 738, 742-743, 262 P. 332* ; *Foley v. Foley (1898) 120 Cal. 33, 39, 52 P. 122* ; *Albrecht v. Superior Court (1982) 132 Cal. App. 3d 612, 617-621, 183 Cal. Rptr. 417* ; *Kroneberger v. Superior Court (1961) 196 Cal. App. 2d 206, 210, 16 Cal. Rptr. 339* ; *Smith v. Smith (1953) 120 Cal. App. 2d 474, 485, 261 P.2d 567*

Findings of valid service of order to show cause and willful absence from hearing are necessary to support contempt order when alleged contemnor not present at hearing. *Farace v. Superior Court (1983) 148 Cal. App. 3d 915, 917-918, 196 Cal. Rptr. 297*

Requirement that order to show cause be served on alleged contemnor. *In re Morelli (1970) 11 Cal. App. 3d 819, 835, 91 Cal. Rptr. 72*

Service of order to show cause on contemnor's attorney when contempt proceeding is part of continuous proceeding in which personal jurisdiction over contemnor has already been acquired. *In re Morelli (1970) 11 Cal. App. 3d 819, 834-841, 91 Cal. Rptr. 72* ; *Smith v. Smith (1953) 120 Cal. App. 2d 474, 483, 261 P.2d 567*

Waiver of defective notice of hearing by making general appearance. *Darden v. Superior Court (1965) 235 Cal. App. 2d 80, 82, 45 Cal. Rptr. 44*

[q] Orders and Judgments Enforceable by Contempt

[i] Attorney's Fees and Costs

Spousal and child support orders and orders for attorney's fees and costs are not considered debts within meaning of constitutional prohibition against imprisonment for debt [*Cal. Const., art. I, § 10*] and hence are enforceable by contempt proceeding. *Tilghman v. Superior Court (1974) 40 Cal. App. 3d 599, 612, 115 Cal. Rptr. 195* ; *Bushman v. Superior Court (1973) 33 Cal. App. 3d 177, 182, 108 Cal. Rptr. 765* ; *In re Fontana (1972) 24 Cal. App. 3d 1008, 1010, 101 Cal. Rptr. 465* ; *In re Hendricks (1970) 5 Cal. App. 3d 793, 796, 85 Cal. Rptr. 220*

[ii] Child Support

Law as well settled that orders for spousal support and child support may be enforced by contempt proceedings and that jail sentence imposed pursuant to such proceedings does not constitute imprisonment for debt. *Lyons v. Municipal Court (1977) 75 Cal. App. 3d 829, 840, 142 Cal. Rptr. 449*

Spousal and child support orders and orders for attorney's fees and costs are not considered debts within meaning of constitutional prohibition against imprisonment for debt [*Cal. Const., art. I, § 10*] and hence are enforceable by contempt proceeding. *Tilghman v. Superior Court (1974) 40 Cal. App. 3d 599, 612, 115 Cal. Rptr.195* ; *Bushman v. Superior Court (1973) 33 Cal. App. 3d 177, 182, 108 Cal. Rptr. 765* ; *In re Fontana (1972) 24 Cal. App. 3d 1008, 1010, 101 Cal. Rptr. 465* ; *In re Hendricks (1970) 5 Cal. App. 3d 793, 796, 85 Cal. Rptr. 220*

[iii] Money Judgments in General

Remedy of contempt to enforce money awards is confined generally to law-imposed obligations. *Plumer v. Superior Court (1958) 50 Cal. 2d 631, 635-637, 328 P.2d 193* ; *Bradley v. Superior Court (1957) 48 Cal. 2d 509, 520-522, 310 P.2d 634* (both decided before, and partially abrogated by, 1967 amendment to former *Civ. Code § 139*)

Difference between ordinary money judgment and alimony award. *Thomas v. Thomas (1939) 14 Cal. 2d 355, 357, 94 P.2d 810* ; *Miller v. Superior Court (1937) 9 Cal. 2d 733, 736, 72 P.2d 868*

[iv] Orders Dividing Property

Order requiring payment to nonemployee spouse of portion of pension payments as received by employee spouse, or as nonemployee spouse's community share accrues, is enforceable by contempt or execution. *Verner v. Verner (1978) 77 Cal. App. 3d 718, 728-730, 143 Cal. Rptr. 826* ; *In re Marriage of Fithian (1977) 74 Cal. App. 3d 397, 404-406, 141 Cal. Rptr. 506*

[v] Spousal Support

Law is well settled that orders for spousal support and child support may be enforced by contempt proceedings and that jail sentence imposed pursuant to such proceedings does not constitute imprisonment for debt. *Lyons v. Municipal Court (1977) 75 Cal. App. 3d 829, 840, 142 Cal. Rptr. 449*

Violation of court order for payment of spousal support based on nonintegrated property settlement agreement is contempt. *In re Marriage of Hawkins (1975) 48 Cal. App. 3d 208, 210-211, 121 Cal. Rptr. 681*

Violation of court order for payment of spousal support based on integrated property settlement agreement is contempt. *Tilghman v. Superior Court (1974) 40 Cal. App. 3d 599, 612-613, 115 Cal. Rptr. 195*

Spousal and child support orders and orders for attorney's fees and costs are not considered debts within meaning of constitutional prohibition against imprisonment for debt [*Cal. Const., art. I, § 10*] and hence are enforceable by contempt proceeding. *Tilghman v. Superior Court (1974) 40 Cal. App. 3d 599, 612, 115 Cal. Rptr. 195* ; *Bushman v. Superior Court (1973) 33 Cal. App. 3d 177, 182, 108 Cal. Rptr. 765* ; *In re Fontana (1972) 24 Cal. App. 3d 1008, 1010, 101 Cal. Rptr. 465* ; *In re Hendricks (1970) 5 Cal. App. 3d 793, 796, 85 Cal. Rptr. 220*

Pendente lite order for payment of community debts or mortgage payments as part of and by way of spousal support is not an order for payment of debt within meaning of former *Cal. Const, art. I, § 15* (*now see Cal. Const., art. I, § 10*), prohibiting imprisonment for debts, and is enforceable by contempt. *Bushman v. Superior Court (1973) 33 Cal. App.*

3d 177, 181-183, 108 Cal. Rptr. 765

Violation of court order requiring spouse to pay past community debts as part of alimony award pendente lite is contempt. *In re Hendricks (1970) 5 Cal. App. 3d 793, 797-798, 85 Cal. Rptr. 220*

[r] Orders and Judgments Not Enforceable by Contempt

Refusal to obey void order is not punishable as contempt. *In re Berry (1968) 68 Cal. 2d 137, 147, 65 Cal. Rptr. 273, 436 P.2d 273*

Violation of court order merely approving marital settlement agreement providing for support payments is not punishable by contempt. *Tilghman v. Superior Court (1974) 40 Cal. App. 3d 599, 607, 115 Cal. Rptr. 195*

Violation of agreement to pay sum of money as settlement of property rights incorporated in court's judgment is not punishable by contempt. *In re Fontana (1972) 24 Cal. App. 3d 1008, 1011, 101 Cal. Rptr. 465*

Order that parent designate minor children as beneficiaries of insurance to ensure future payments of child support is enforceable by parties to original divorce decree by contempt, specific performance, or other suitable relief, or enforceable by children. *Franklin Life Ins. Co. v. Kitchens (1967) 249 Cal. App. 2d 623, 632-633, 57 Cal. Rptr. 652*

[2] Enforcement of Judgments

[a] Death of Obligor

Divorce judgment ordering husband to maintain wife as beneficiary on specific amount of life insurance for benefit of minor children of parties is enforceable against husband during his lifetime by contempt proceedings or by suit for specific performance and, when he has failed to comply with order, named his estate as beneficiary, and dies, is enforceable against his executors who hold the proceeds as constructive trustees. *Cramer v. Biddison (1968) 257 Cal. App. 2d 720, 724-725, 65 Cal. Rptr. 624*

[b] Dismissal of Main Proceeding

Dismissal of main action does not deprive court of jurisdiction to enforce uncomplied-with pendente lite order by execution through supplementary proceedings. *Moore v. Superior Court (1970) 8 Cal. App. 3d 804, 811, 87 Cal. Rptr. 620*

[c] Execution

Trial court has discretion in each case to determine whether execution is appropriate remedy for enforcing its order. *Messenger v. Messenger (1956) 46 Cal. 2d 619, 630, 297 P.2d 988* ; *Slevats v. Feustal (1963) 213 Cal. App. 2d 113, 119, 28 Cal. Rptr. 517* (decided prior to enactment of *Fam. Code §§ 5100, 5101*, allowing issuance of writ without court approval as long as support order is enforceable)

Court of equity retain inherent jurisdiction to oversee and enforce execution of its decrees. *Vanderstok v. Bank of America (1972) 29 Cal. App. 3d 731, 734, 105 Cal. Rptr. 699* ; *Brown v. Brown (1971) 22 Cal. App. 3d 82, 84, 99 Cal. Rptr. 311*

Exemption of wife's separate earnings from liability for community debts or separate debts of husband (former *Civ.*

Code § 5117) is lost when her earnings have become commingled with other community property so as to lose their identity. *Robertson v. Willis (1978) 77 Cal. App. 3d 358, 364, 143 Cal. Rptr. 523*

Rendering of legal services and advancement of costs of litigation giving rise to pendente lite award to any attorney in marriage dissolution proceeding is qualified as "common necessaries of life" for benefit of indigent spouse, thereby giving attorney right to enforce award by writ of execution on other spouse's earnings against claim of exemption for those earnings. *In re Marriage of Pallesi (1977) 73 Cal. App. 3d 424, 427-428, 140 Cal. Rptr. 842* (further holding that reconciliation of parties does not affect attorney's right)

Exemptions from execution are purely statutory and pertain to remedy; hence, laws of forum apply. *In re Marriage of DeLotel (1977) 73 Cal. App. 3d 21, 23-24, 140 Cal. Rptr. 553* (affirming order denying motion to exempt pension, treated as motion to quash wife's writ of execution, for unpaid support)

[3] Liens

[a] Creation of Lien

Lien on judgment debtor's real property is created by recording certified copy of judgment or order for alimony or child support (former *Code Civ. Proc. § 674.5*; *now see Code Civ. Proc. §§ 697.320-697.390*). *Heller Properties, Inc. v. Rothschild (1970) 11 Cal. App. 3d 705, 710-712, 90 Cal. Rptr. 133* ; *Simonet v. Simonet (1968) 263 Cal. App. 2d 612, 620-622, 69 Cal. Rptr. 806*

[b] Powers of Court

Court has power to secure payments to spouse made in lieu of division of community property in kind and to grant lien on community property awarded to other spouse. *Lipka v. Lipka (1963) 60 Cal. 2d 472, 479, 35 Cal. Rptr. 71, 386 P.2d 671*

Court lacks power to grant lien on separate property to secure payment of share of community property. *Sanguinetti v. Sanguinetti (1937) 9 Cal. 2d 95, 102, 69 P.2d 845*

Courts have power to compel obedience to their judgments and orders [former *Code Civ. Proc. §§ 128(4)* (*now see Code Civ. Proc. § 128(a)(4)*); *Code Civ. Proc. § 177*], and courts of equity retain inherent jurisdiction to oversee and enforce execution of their decrees. *Vanderstok v. Bank of America (1972) 29 Cal. App. 3d 731, 734, 105 Cal. Rptr. 699* ; *Brown v. Brown (1971) 22 Cal. App. 3d 82, 84, 99 Cal. Rptr. 311*

Court is without jurisdiction to compel obligor party to execute security instruments in form of mortgage and trust deeds on his interest in real properties to satisfy lien imposed. *Miller v. Miller (1964) 227 Cal. App. 2d 322, 329, 38 Cal. Rptr. 571*

Power to impose lien is to be exercised with caution; remedy should be resorted to only when less onerous remedies are not available. *Loomis v. Loomis (1960) 181 Cal. App. 2d 345, 347, 5 Cal. Rptr. 550* ; *see also Blankenship v. Blankenship (1963) 212 Cal. App. 2d 736, 746, 28 Cal. Rptr. 176*

[4] Receivership

[a] Appointment

[i] In General

Appointment on court's own motion. *Venza v. Venza (1949) 94 Cal. App. 2d 878, 883-884, 211 P.2d 913*

Appointment on application of either party. *Armbrust v. Armbrust (1946) 75 Cal. App. 2d 272, 274, 171 P.2d 75*

[ii] Discretion of Court

Appointment rests largely in discretion of trial court and its action in appointing or refusing to appoint receiver will not be disturbed on appeal in absence of showing that court's discretion was abused. *Alderson v. Alderson (1986) 180 Cal. App. 3d 450, 467, 225 Cal. Rptr. 610*

Appointment is matter within discretion of trial court. *Venza v. Venza (1949) 94 Cal. App. 2d 878, 883, 211 P.2d 913* ; *Armbrust v. Armbrust (1946) 75 Cal. App. 2d 272, 275, 171 P.2d 75*

[b] Availability of Receivership

[i] Pendente Lite

Under prior version of *Code Civ. Proc. § 564(7)* (*now see Code Civ. Proc. § 564(b)(8)*), permitting appointment of receiver by superior court in which action, other than limited civil case, is pending in all cases in which receivers have heretofore been appointed by usages of courts of equity, appointment of receiver pendente lite was proper in action for child support by two minor children through their guardian ad litem against their father, incarcerated for murder of their mother, even though no support order had yet been made, in order to prevent dissipation of father's assets when complaint made out case of need by children and ability of father to pay support. *Quaglino v. Quaglino (1979) 88 Cal. App. 3d 542, 545-546, 152 Cal. Rptr. 47*

Whenever financial mismanagement and intransigence of parties threaten to dissipate community property before division can take place, trial court has discretion to appoint receiver to protect community estate. *Rosenthal v. Rosenthal (1966) 240 Cal. App. 2d 927, 934, 50 Cal. Rptr. 385*

If jointly owned property is in danger of being lost or destroyed or misappropriated, trial court in family law proceeding has power to appoint receiver to protect party's interest in property. *Rosenthal v. Rosenthal (1966) 240 Cal. App. 2d 927, 933, 50 Cal. Rptr. 385*

[ii] After Judgment

Trial court has power to appoint receiver when appointment action is necessary to enforce judgment. *Alderson v. Alderson (1986) 180 Cal. App. 3d 450, 467, 225 Cal. Rptr. 610* (affirming judgment appointing receiver to enforce judgment for child support to woman who had custody of three children born during 12-year period of unmarried cohabitation)

Receivership is not ordinarily used to enforce simple money judgment but appointment of receiver in aid of execution is permitted in proper case. *Olsan v. Comora (1977) 73 Cal. App. 3d 642, 646, 140 Cal. Rptr. 835* ; *Jackson v. Jackson (1967) 253 Cal. App. 2d 1026, 1040-1041, 62 Cal. Rptr. 121*

Former *Civ. Code § 140* (*now see Fam. Code § 290*), authorizing appointment of receivers to enforce family law judgments or orders, applies to payments under integrated property settlement agreement which is merged in divorce decree, and is construed with general provisions pertaining to receivers found in *Code Civ. Proc. §§ 564-570*. *Jackson*

v. Jackson (1967) 253 Cal. App. 2d 1026, 1040, 62 Cal. Rptr. 121

Appointment of receiver to liquidate joint interests in property and carry out terms of judgment is authorized by *Code Civ. Proc. § 564.* *Rosenthal v. Rosenthal (1966) 240 Cal. App. 2d 927, 933, 50 Cal. Rptr. 385*

Appointment of receiver in aid of execution to enforce support provisions in integrated property settlement agreement merged in court's judgment. *Tobin v. Tobin (1960) 181 Cal. App. 2d 789, 794, 5 Cal. Rptr. 712*

Appointment of receiver and declaration of lien on husband's property is permitted to enforce payments ordered for wife's support. *Willen v. Willen (1932) 121 Cal. App. 351, 352-354, 8 P.2d 942* .

[c] Jurisdiction

Appointment of receiver to take charge of husband's property in California when court has not acquired in personam jurisdiction over husband is limited to property within court's control. *Baldwin v. Baldwin (1946) 28 Cal. 2d 406, 415, 170 P.2d 670*

Where it appears that wife is entitled to legal separation, permanent alimony, and division of community property and is in indigent circumstances and husband has departed from state and is endeavoring by fraudulent means to dispose of greater part of community property and thus defeat wife's rights in it, superior court has jurisdiction to appoint receiver to take charge of community property and direct receiver to pay from its proceeds alimony during pendency of action even when court has no personal jurisdiction over defendant and appointment is without previous notice to defendant. *Nichols v. Superior Court (1934) 1 Cal. 2d 589, 593-599, 36 P.2d 380*

Actual or constructive possession of life insurance policy through appointment of receiver to secure payment of child support. *Franklin Life Ins. Co. v. Kitchens (1967) 249 Cal. App. 2d 623, 633, 57 Cal. Rptr. 652*

[d] Nature of Receivership

Appointment of receiver is harsh remedy. *Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 351, 113 Cal. Rptr. 281* ; *Cohen v. Herbert (1960) 186 Cal. App. 2d 488, 495, 8 Cal. Rptr. 922*

[e] Termination of Receivership

Receivership pendente lite terminates with rendition of judgment. *Mayo v. Mayo (1936) 8 Cal. 2d 9, 10, 63 P.2d 822*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionFamily LawChild SupportJurisdictionSubject Matter JurisdictionFamily LawChild SupportObligationsEnforcementContemptFamily LawMarital Termination & Spousal SupportCosts & Attorney FeesFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEnforcementContempt

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§ 258.105 Text References

Barber, Family Law Litigation and Enforcement of Orders, pt. 1, *Enforcement of Orders* (Cal. C.E.B. 1986)

Witkin, California Procedure, vol. 6, *Provisional Remedies*, §§ 389-395; 416-458; *Receivers*, § 352; vol. 8, *Enforcement of Judgment*, §§ 9-12, 44-92, 265-316, 399-400, 414-397 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionEnforcementGeneral Overview

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[Reserved]

§§ 258.106[Reserved]

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PART IV. FORMS
A. Execution

22-258 California Forms of Pleading and Practice--Annotated § 258.110

§ 258.110 Execution Proceedings [Code Civ. Proc. § 699.010 et seq.; Fam. Code §§ 290, 5100 et seq.]--Ex Parte Application and Declaration for Order Directing Issuance of Writ of Execution and Order [Code Civ. Proc. § 699.510(b)]

[1] FORM Execution Proceedings [Code Civ. Proc. § 699.010 et seq.; Fam. Code §§ 290, 5100 et seq.]--Ex Parte Application and Declaration for Order Directing Issuance of Writ of Execution and Order [Code Civ. Proc. § 699.510(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	EX PARTE APPLICATION AND DECLARATION
Respondent.	)	FOR ISSUANCE OF WRIT OF EXECUTION
	)	
	)	

I, _____ [*name*], am the _____ [petitioner *or* respondent] in the above-entitled proceeding and hereby apply for an order directing issuance of, and for the issuance of, a writ of execution.

In support of this application, I declare:

On _____ [*date*], the above-entitled court rendered the following _____ [order *or* judgment], which was duly entered and filed in the proceeding [and renewed on _____ (*date*)]. The _____ [order *or* judgment] provided as follows: _____ [*set out pertinent provisions on spousal and child support or family support, equalizing payment ordered pursuant to the division of community*

property, attorney's fees, and costs as appropriate, e.g., respondent is ordered to pay to petitioner for his/her support and maintenance $_____ per month, payable on the first day of each month, commencing _____ (*date*), and continuing each and every month thereafter to and including _____ (*date*), or until either party dies, petitioner remarries, or further order of the court].

[I have not remarried.]

[*EITHER*]

The _____ [order *or* judgment] is in full force and has not been modified.

[*OR*]

The _____ [order *or* judgment] was modified on _____ (*date*) and now provides that _____ [*set out pertinent provisions of modified order or judgment, as above*].

[*CONTINUE*]

The payments ordered and accrued and the interest thereon, and the payments made, are as follows:

PAYMENTS ORDERED & ACCRUED			PAYMENTS MADE		BALANCE DUE	
Date due	Amount	Interest	Date	Amount	Principal	Interest
_____	_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____	_____
_____			_____			
_____						
_____	_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____	_____
_____			_____			
_____						
_____	_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____	_____
_____			_____			
_____						

The total amount due under the _____ [order *or* judgment] is the sum of $_____ principal [$_____ costs, $_____ attorney's fees], and $_____ interest.

WHEREFORE, I pray that a writ of execution issue in my favor for the total sum of $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

ORDER GRANTING ISSUANCE OF WRIT

On reading the application and declaration of judgment creditor _____ [*name*] and good cause appearing therefor, IT IS HEREBY ORDERED that the application be, and it hereby is, granted, and that a writ of execution issue in the sum of $_____ principal, $_____ costs, $_____ attorney's fees, and $_____ interest directed to _____ [*specify levying officer, e.g.,* sheriff] of the County of _____, California.

_____ [*date*]

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of application and declaration for issuance of writ of execution and order at *[1], above*, is for use in securing issuance of a writ of execution [*Code Civ. Proc. § 699.510*; *Fam. Code §§ 290, 5100*]. Alternatively, counsel should check to see if there is a local court form that must be used in the county in which the writ is sought. The writ may be sought to enforce an order payment of child, family, or spousal support without prior court approval as long as the support order remains enforceable [*Fam. Code §§ 5100, 5101*].

This form complies with *Fam. Code § 5104*, which requires the application to be accompanied by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) stating the amount due and unpaid that is authorized to be enforced pursuant to *Fam. Code §§ 5100-5103* on the date of application [*Fam. Code § 5104(a)*]. If interest on the overdue installments is sought, the affidavit or declaration must set forth [*Fam. Code § 5104(b)*]:

- The total amount of interest and
- The amount of each due and unpaid installment and the date it became due.

The affidavit or declaration must be filed in the action and a copy must be attached to the writ of execution delivered to the levying officer. The levying officer must serve the copy of the affidavit or declaration on the judgment debtor when the writ of execution is first served on the judgment debtor pursuant to a levy under the writ [*Fam. Code § 5104(c)*].

[3] Copies to Prepare

[a] Ex Parte Application

If the application is being made ex parte, counsel should prepare the following copies:

- Original for presentation and filing with court clerk.
- One copy for levying officer.
- Copy for client.
- Office copy.

[b] Noticed Motion

If the judgment or order sought to be executed on was entered before the statutory time periods specified in *Fam. Code §§ 5100, 5101*, discussed at *§§ 258.37, 258.39, 258.85*, or if there is other reason to believe that the application may not be granted ex parte, the moving party should proceed by noticed motion. In that case, he or she should prepare the Judicial Council mandatory form of Notice of Motion (Marriage) [FL-301] and Application for Order and Supporting Declaration [FL-310; for forms of the Notice of Motion and Application for Order that may be adapted for use, *see* Ch. 221, *Dissolution of Marriage: Procedure*] in the following number of copies:

- Original for filing with court clerk.
- One copy for levying officer.
- Copy for service on adverse party's attorney or, if none, on adverse party.
- Copy for client.
- Office copy.
- Additional copies as desired.

The copy of the notice or other paper served by mail must bear a notation of the date and place of mailing or be accompanied by an unsigned copy of the affidavit (declaration) or certificate of mailing [*Code Civ. Proc. § 1013(b)*], that is, by an unsigned copy of the proof of service [*see Code Civ. Proc. § 1013a*]. For discussion of service of papers and proof of service generally, see Ch. 518, *Service of Summons and Papers* .

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A. Execution

22-258 California Forms of Pleading and Practice--Annotated § 258.111

§ 258.111 Writ of Execution [Code Civ. Proc. § 699.520(b)]--Cal. Judicial Council Form EJ-130

[1] FORM Writ of Execution [Code Civ. Proc. § 699.520(b)]--Cal. Judicial Council Form EJ-130

Click here to view image.

[2] Use of Form

The form in *[1], above*, is a writ of execution for use by a judgment creditor to enforce a money judgment against the property of the judgment debtor [*see Code Civ. Proc. §§ 699.510, 699.520*]. The form is a reproduction of the form approved for use by the Judicial Council [Cal. Judicial Council Form EJ-130]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The writ should be prepared by the judgment creditor and submitted to the judge or court clerk with the Application and Declaration for Issuance of Writ of Execution [*see § 258.110*; *see also* discussion at *§ 258.41[1]*].

[3] Contents of Form

In item 1, the writ should be directed to the levying officer of any county in which the levy is to be made. The writ is also directed to any registered process server [*see* Item 2]. A separate writ shall be issued for each county in which a levy is to be made [*see Code Civ. Proc. § 699.510(a)*]. Item 3 contains the name of the judgment creditor, and item 4 contains the name and address of the judgment debtor. Items 5 and 6 set forth the date the judgment was entered and the date, if applicable, that the judgment was renewed [*see Code Civ. Proc. § 683.110*]. Items 7 through 10 pertain to information on notice of sale, joint debtors, writ of possession or sale, and an action on a sister-state judgment. Item 11 sets forth the total amount of the judgment or order being enforced. Items 12 and 16 set forth costs and interest allowed after judgment that may be included in the writ [*see Code Civ. Proc. §§ 685.050, 685.090*; *see* Ch. 174, *Costs and Attorney's Fees* for discussion of the procedure and forms for use in securing costs after judgment]. Item 14 records the amount of any payments made on the judgment that are no longer enforceable [*see Code Civ. Proc. § 699.520(e)*]. Item

17 includes the fee for the writ, and item 19 is for further interest accrued from date of issuance of the writ and is completed by the levying officer [*see Code Civ. Proc. § 699.520(g)*].

[4] Copies to Prepare

Counsel should prepare the following copies:

- Original for presentation and filing with judge or court clerk.
- One copy for each county in which levy will be sought.
- Copy for client.
- Office copy.

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22-258 California Forms of Pleading and Practice--Annotated §§ 258.112-258.119

[Reserved]

§§ 258.112[Reserved]

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B. Receivers

22-258 California Forms of Pleading and Practice--Annotated § 258.120

§ 258.120 Proceeding for Appointment of Receiver [Code Civ. Proc. § 564; Fam. Code § 290]--Order to Show Cause Why Appointment of Receiver on Ex Parte Application Should Not Be Confirmed [Code Civ. Proc. § 566(b)]--Cal. Judicial Council Form FL-300

[1] FORM

Click here to view image.

[2] Source of Form

The form in *[1], above*, is a reproduction of the Judicial Council mandatory form of Order to Show Cause [Cal. Judicial Council Form FL-300]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Use of Form

The order to show cause procedure is used when a receiver is appointed on ex parte application before any hearing on the appointment, as illustrated in this form, or as a substitute for a noticed motion when the party against whom it is directed has not yet appeared in the family law proceeding [*see Code Civ. Proc. § 564*; *Fam. Code § 290* (grounds for appointment of reciever); *Code Civ. Proc. § 566(b)* (undertaking required of ex parte applicant for appointment of receiver); *see also Code Civ. Proc. § 567(b)* (oath and undertaking required of receiver); *Cal. Rules of Ct., Rules 3.1103(a)(2), 3.1175, 3.1176* (appointment of receiver on ex parte application); discussions at *§§ 258.72* and *258.73*]. For what constitutes an appearance, see *Cal. Rules of Ct., Rule 5.120*, providing that notice of subsequent proceedings need not be given to a respondent who has not appeared except as provided in the Family Law Rules. If the appointment is made forthwith, the order is to show cause why the appointment should not be confirmed; if the order to show cause procedure is used as a substitute for a noticed motion proceeding when the respondent has not yet appeared in the proceeding, the order is to show cause why a receiver should not be appointed. For additional discussion and forms and a procedural guide regarding appointment of a receiver, see Ch. 486, *Receivers* .

Frequently, the request for appointment of a receiver is combined with an application for injunctive relief against the other party and/or third persons, as in *Nichols v. Superior Court (1934) 1 Cal. 2d 589, 592, 36 P.2d 380* [*see Cal. Rules of Ct., Rules 5.106, 5.118*]. For a discussion of the provisional remedy of pendente lite injunctive relief, including temporary restraining orders, see Ch. 221, *Dissolution of Marriage: Procedure* , and Ch. 303, *Injunctions* .

For when the Civil Law and Motion Rules [*Cal. Rules of Ct., Rules 3.1100 et seq.*; § 258.103[2]] apply to applications for the appointment of a receiver in a family law proceeding, see *Cal. Rules of Ct., Rule 3.1103(a)* and discussion at *§ 258.73*.

[4] Copies to Prepare

The following copies should be prepared:

- Original for judge's signature and filing with court;
- One copy for service on adverse party's attorney of record if any, and, if none, on adverse party;
- Copy for receiver;
- Copy for client;
- Office copy;
- Additional copies as desired.

[5] Other Papers to Draft

The following other papers should be drafted or completed, as specified:

- Draft an Application for Order and Supporting Declaration [*see § 258.122*] in the same number of copies for the same distribution as the order to show cause;
- Draft a memorandum of points and authorities in the same number of copies for the same distribution as the order to show cause [*see Cal. Rules of Ct., Rule 3.1113* and discussion at *§ 258.73*];
- Complete an Income and Expense Declaration [Cal. Judicial Council Form FL-150 et seq.] and a Property Declaration [Cal. Judicial Council Form FL-160; for illustrative forms of income and expense and property declarations, *see* Ch. 221, *Dissolution of Marriage: Procedure*] if relevant to the relief requested [*see Cal. Rules of Ct., Rules 5.118, 5.128*] in the same number of copies for the same distribution as the order to show cause.

[6] Additional Papers to Be Served

In addition to the order to show cause and papers listed at *[5], above,* which must accompany the order to show cause, the order to show cause must also be accompanied by a blank Responsive Declaration on Cal. Judicial Council Form FL-320. If a completed Income and Expense Declaration and a completed Property Declaration are served with the order to show cause, then a blank copy of each of those forms must also be served with the order to show cause [*Cal. Rules of Ct., Rule 5.118(b)*].

Copies of the responsive declaration and the income and expense and property declarations are available in an

interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[7] Time of Service

Cal. Rules of Ct., Rule 3.1176(a) provides that when a receiver is appointed without notice (on ex parte application), the matter shall be made returnable on an order to show cause why the appointment should not be confirmed and the order to show cause must be made returnable on the earliest date that the business of the court will admit, but not later than 15 days from the date of the order. This rule apparently does not apply, however, to applications before trial for orders in family law proceedings [*Cal. Rules of Ct., Rule 3.1103(a)(1)*; *see* discussion at *§ 258.73*]. Neither the Rules of Court governing Family Code Proceedings (*Cal. Rules of Ct., Rules 5.10 et seq.*) nor the Family Code covers the matter; hence, general civil law applies [*Cal. Rules of Ct., Rule 5.21*]. Under the law applicable to civil actions generally, a notice of motion and its supporting papers must be served at least 16 court days before the hearing date [*see Code Civ. Proc. § 1005(b)* (providing time extensions when service is by mail)]. This provision would also apply to an order to show cause. Local court rules, if any, should be checked, however, to ascertain any local requirements with respect to the service of an order to show cause.

[8] Manner of Service

If a final judgment has not been entered, the order to show cause shall be served on the party's attorney of record, if any, and if none on the party [*see Cal. Rules of Ct., Rule 5.10(b)*]. If a final judgment has been entered, the order (which gives notice of the application) must be served on the party and not on the party's attorney of record [*Fam. Code § 215*]. Although not required by law, a courtesy copy should, in this latter event, be sent to the party's attorney.

Neither the Rules of Court governing Family Code proceedings (*Cal. Rules of Ct., Rules 5.10 et seq.*) nor the Family Code specifies the *manner* in which papers are to be served; hence, general civil law applies [*Cal. Rules of Ct., Rule 5.21*]. Under the law applicable to civil actions generally, the order to show cause, supporting papers, and blank forms if served with the summons will be served in the same manner as required for the summons [*Code Civ. Proc. § 413.10 et seq.*] and if served after the summons in the manner provided for the service of papers [*see Code Civ. Proc. § 1010 et seq.*]. For a discussion of these provisions, see Ch. 518, *Service of Summons and Papers* .

[9] Proof of Service

Prepare the proof of service in an original for filing, one file copy, and as many additional copies as may be desired.

[10] Form of Response

Any response to the order to show cause must be on Cal. Judicial Council Form FL-300 (Responsive Declaration to Order to Show Cause or Notice of Motion). For an illustrative form of the responsive declaration, *see* Ch. 221, *Dissolution of Marriage: Procedure* .

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22-258 California Forms of Pleading and Practice--Annotated § 258.121

§ 258.121 Proceeding for Appointment of Receiver [Code Civ. Proc. § 564; Fam. Code § 290]--Notice of Motion and Proof of Service by Mail--Cal. Judicial Council Form FL-301

[1] FORM

Click here to view image.

[2] Source of Form

The form in *[1], above*, is a reproduction of the Judicial Council mandatory form of Notice of Motion [Cal. Judicial Council Form FL-301]. The reverse side of the form contains a mandatory form of Proof of Service by Mail. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Use of Form

[a] When Noticed Motion Is Preferable

This form is for use in applying for a court order [*see Code Civ. Proc. §§ 1003, 1005.5*] appointing a receiver of funds or property [*Code Civ. Proc. § 564*; *Fam. Code § 290*] when the party against whom it is directed has already appeared in the proceeding, and either the facts do not justify immediate appointment on ex parte application or, because of other considerations (such as the cost of the undertaking required to be posted by the applicant [*see Code Civ. Proc. § 566(b)*] as opposed to the value of the property involved), counsel does not desire to proceed by ex parte application. If the party against whom the order is sought has not appeared in the proceeding, application for the appointment of a receiver should be made pursuant to an order to show cause why a receiver should not be appointed. An order to show cause must also be used, whether or not the opposing party has appeared, when the moving party seeks immediate appointment of a receiver by ex parte application [*see Code Civ. Proc. § 566(b)*] and an order to show cause why the appointment should not be confirmed [*see also § 258.120*].

For the applicability of *Cal. Rules of Ct., Rules 3.1100 et seq.* (Civil Law and Motion Rules) to a motion for the appointment of a receiver, see the discussion at *§ 258.73*. On motions generally, both noticed and ex parte, see *Code Civ. Proc. § 1003 et seq.* and Ch. 372, *Motions and Orders*.

[b] Proof of Service

The proof of service on the reverse side of the Notice of Motion is for use by the moving party to prove service by mail of the notice of motion and its supporting papers. The names of the parties and case number should be set forth in the block heading. In item b(1), the appropriate box or boxes should be checked to identify the papers served in addition to the Notice of Motion, a completed application for order and supporting declaration [*see § 258.122*], and a blank Responsive Declaration. The language in subparagraph c is sufficient to permit valid execution of the declaration either within or outside the state of California [*see Code Civ. Proc. § 2015.5*]. The copy of the notice or other paper served by mail must bear a notation of the date and place of mailing or be accompanied by an unsigned copy of the affidavit (declaration) or certificate of mailing [*Code Civ. Proc. § 1013(b)*]; that is, by an unsigned copy of the proof of service [*see Code Civ. Proc. § 1013a*]. For discussion of service of papers and proof of service generally, see Ch. 518, *Service of Summons and Papers* .

[4] Copies of Notice of Motion to Prepare

The following copies should be prepared:

- Original for filing with court clerk;
- Copy for service on adverse party's attorney or, if none, on adverse party;
- Copy for client;
- Office copy;
- Additional copies as desired.

[5] Other Papers

For other papers to be drafted and served, and the additional papers to be served, with the notice of motion, as well as the time, manner, and proof of service, and the form of the response, see *§ 258.120[5] -[10]*.

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22-258 California Forms of Pleading and Practice--Annotated § 258.122

§ 258.122 Proceeding for Appointment of Receiver [Code Civ. Proc. § 564; Fam. Code § 290]--Application for Order and Supporting Declaration--Cal. Judicial Council Form FL-310

[1] FORM Proceeding for Appointment of Receiver [Code Civ. Proc. § 564; Fam. Code § 290]--Application for Order and Supporting Declaration--Cal. Judicial Council Form FL-310

Click here to view image.

[2] Source of Form

The form in *[1], above*, is a reproduction of the Judicial Council mandatory form of Application for Order and Supporting Declaration [Cal. Judicial Council Form FL-310]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Use of Form

This form is for use as an attachment to either an Order to Show Cause [*§ 258.120*] or a Notice of Motion [*§ 258.121*] [*Code Civ. Proc. § 564*; *Fam. Code § 290*]. Blanks have been filled in to illustrate how the form may be used to apply by noticed motion [*§ 258.121*] for the appointment of a receiver to take charge of, manage, and conserve a community property business during the pendency of a dissolution of marriage proceeding. If used as an attachment for *§ 258.120*, the following should be added to Paragraph 9: "and an order to show cause why the appointment should not be confirmed." The form may also be used as an attachment to an application for an Order to Show Cause Why a Receiver Should Not Be Appointed by changing the insert in Paragraph 9 to read "Issuance of an order to show cause why a receiver should not be appointed to take charge of, manage, and conserve the parties' community property business, etc."

For the grounds of appointment, see the discussion at *§ 258.72[1]*.

[4] Declaration

The declaration must be signed by the person having personal knowledge of the facts [*see Code Civ. Proc. §§ 2002(1), 2003, 2009, 2015.5*; *Evid. Code § 702*; *Cal. Rules of Ct., Rule 5.21*]. As many declarations made by different persons as are necessary to establish the ground of the motion may be submitted in support of the motion or order to show cause. This form assumes that the declaration is made by the petitioner.

If the form is used as an attachment to an order made before trial to show cause why the appointment of a receiver on ex parte application should not be confirmed [*§ 258.120*], the better practice would be to set out in the attached declaration the matters required by *Cal. Rules of Ct., Rule 3.1175*, even if the rule does not apply to applications for such orders [*see Cal. Rules of Ct., Rule 3.1103(a)(1)* and discussion at *§ 258.73*]. These are matters that a judge most likely would want to know before appointing a receiver on ex parte application. *Cal. Rules of Ct., Rule 3.1175(a)* provides that, in addition to any other matters supporting an application for the ex parte appointment of a receiver, the applicant must show the following in detail by verified complaint or affidavit (or declaration under *Code Civ. Proc. § 2015.5*):

- The nature of the emergency and the reasons irreparable injury would be suffered by the applicant during the time necessary for a hearing on notice;

- The names, addresses, and phone numbers of the persons in actual possession of the property, or of the president, manager, or principal agent of any corporation in possession of;

- The use being made of the property by the persons in possession; and

- If the property is a part of the plant, equipment, or stock in trade of any business, the nature and approximate size or extent of the business, and facts sufficient to show whether the taking of the property would stop or seriously interfere with the operation of the business.

If any of the above matters are unknown to the applicant and cannot be ascertained by the exercise of due diligence, the applicant may be excused from setting them forth, but the affidavit (declaration) or complaint must fully state the matters unknown and the efforts made to acquire the information [*Cal. Rules of Ct., Rule 3.1175(b)*].

Although the applicability of *Cal. Rules of Ct., Rule 3.1175* to pretrial applications for appointment of a receiver in a family law proceeding is unclear (*see* discussion at *§ 258.73*), the illustrated attached declaration would appear to meet its requirements.

[5] Copies to Prepare

The form and its attached declaration will be prepared in the same number of copies and for the same distribution as the Notice of Motion [*§ 258.121[4]*] or the Order to Show Cause [*§ 258.120[4]*].

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22-258 California Forms of Pleading and Practice--Annotated § 258.123

§ 258.123 Proceeding for Appointment of Receiver [Code Civ. Proc. § 564; Fam. Code § 290]--Order Confirming Ex Parte Appointment of Receiver--Cal. Judicial Council Form MC-020

[1] FORM Proceeding for Appointment of Receiver [Code Civ. Proc. § 564; Fam. Code § 290]--Order Confirming Ex Parte Appointment of Receiver--Cal. Judicial Council Form MC-020

Click here to view image.

[2] Use of Form

The form in *[1], above*, is an illustrative, filled-in reproduction of the optional Judicial Council form that may be used as an additional page to any other Judicial Council form [Cal. Judicial Council Form MC-020]. This form is for use when the court has ordered appointment of a receiver after a hearing. The additional page, containing the language of the order, may be attached to the optional Judicial Council form of Findings and Order After Hearing [*see* Cal. Judicial Council Form FL-340]. An illustrative reproduction of that form is set forth in Ch. 221, *Dissolution of Marriage: Procedure* . On the Findings and Order After Hearing form, item 8, which allows for the attachment of orders other than those listed on the form, should be checked. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

For a form or order drafted by counsel which may, with appropriate modifications, be used in lieu of the foregoing Judicial Council form, see Ch. 486, *Receivers* .

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[Reserved]

§§ 258.124[Reserved]

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C. Contempt

22-258 California Forms of Pleading and Practice--Annotated § 258.130

§ 258.130 Order to Show Cause and Affidavit for Contempt, and Supporting Affidavits of Facts [Fam. Code §§ 290, 292]--Cal. Judicial Council Forms FL-410, FL-411, FL-412

[1] FORMS Order to Show Cause and Affidavit for Contempt, and Supporting Affidavits of Facts [Fam. Code §§ 290, 292]--Cal. Judicial Council Forms FL-410, FL-411, FL-412

Click here to view image.

[2] Source of Forms

The forms in *[1], above*, are reproductions of the mandatory Judicial Council forms of Order to Show Cause and Affidavit for Contempt [Cal. Judicial Council Form FL-410] and two supporting affidavits: Affidavit of Facts Constituting Contempt (Financial and Injunctive Orders) [Cal. Judicial Council Form FL-411] and Affidavit of Facts Constituting Contempt (Domestic Violence/Custody and Visitation) [Cal. Judicial Council Form FL-412]. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Related Forms

The Judicial Council has not adopted any specific form of responsive declaration to the order to show cause or a form of order. Hence, those forms must be drafted by counsel. For a suggested form of opposing declaration, see *§ 258.131*. For additional forms for use in contempt proceedings, see Ch. 135, *Contempt* .

[4] Use of Forms

These forms are to be used in initiating a contempt proceeding when the alleged contemnor willfully failed to comply with a court order or judgment in a family law proceeding [*Fam. Code §§ 290, 292*; *see Code Civ. Proc. § 1209(a)(5)* (disobedience of court order or judgment as contempt)]. The order or judgment disobeyed might require, for example, the payment of spousal or child support, or attorney's fees and costs, but the contempt remedy is not limited to these [

see § 258.81]. The purpose of the proceeding, insofar as the moving party is concerned, is to obtain compliance with the judgment or order [*see Code Civ. Proc. § 1209.5* (prima facie evidence of contempt of child support order); *see also Code Civ. Proc. §§ 1218, 1219* (punishment for contempt, discussed at *§ 258.89[2]*)].

The Order to Show Cause and Affidavit for Contempt form [Cal. Judicial Council Form FL-410] should be completed in all cases in which contempt of a family law order is alleged. If a violation of an order for child, family, or spousal support, attorney's fees and court or other litigation costs, or injunctive orders (unrelated to domestic violence) is alleged, the companion form Affidavit of Facts Constituting Contempt (Financial and Injunctive Orders) should be completed and attached [*see* Cal. Judicial Council Form FL-411]. If a violation of a domestic violence protective order or a custody or visitation order is alleged, the Affidavit of Facts Constituting Contempt (Domestic Violence/Custody and Visitation) form should be completed and attached [*see* Cal. Judicial Council Form FL-412]. In a given case, both companion forms would be needed if both types of orders were violated.

In addition, if the moving party is seeking to recover attorney's fees and costs in connection with bringing the contempt action, he or she must also complete and attach an income and expense declaration [*see* Cal. Judicial Council Form FL-150].

[5] Contents of Affidavits

Grounds for the alleged contempt and supporting facts must be set forth with particularity [*see Coursey v. Superior Court (1987) 194 Cal. App. 3d 147, 154, 239 Cal. Rptr. 365]* . The forms provide standardized language for making the essential allegations (such as the citee's knowledge of the court order and ability to comply, and the like), but counsel must set forth sufficient facts to establish the nature of the order violated, when and where and how it was violated, and why violation was without lawful justification or excuse. Because of the space limitations of the forms, attachments will likely be needed, and the forms anticipate these by including appropriate checkoff boxes to indicate that attachments are being used.

Although the Judicial Council has titled these forms "affidavits" pursuant to statutory mandate [*see Code Civ. Proc. § 1211(b)*; *Fam. Code § 292*], they need not be signed as statements made under oath. Instead, they have been designed to be executed as conventional declarations made under penalty of perjury under the laws of the State of California [*see Code Civ. Proc. § 2015.5*; *cf. Code Civ. Proc. § 2003* (affidavit defined)].

[6] Copies to Prepare

The following copies should be prepared:

- Original for judge's signature and filing with court clerk.
- Conformed copy for filing with proof of service.
- Copy for service on the alleged contemnor [*see Code Civ. Proc. §§ 415.10-415.40, 1005(b), 1015, 1016* (service of papers to bring party into contempt) and discussion at *§ 258.86[4][a]*].
- Courtesy copy for service on alleged contemnor's attorney of record, if any.
- Copy for client.
- Office copy.

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California Forms of Pleading and Practice--Annotated

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Volume 22: Explosives thru Food-Chs. 256-268
Chapter 258 FAMILY LAW ENFORCEMENT: GENERAL ENFORCEMENT PRINCIPLES AND REMEDIES
PART IV. FORMS
C. Contempt

22-258 California Forms of Pleading and Practice--Annotated § 258.131

§ 258.131 Declaration in Opposition to Order to Show Cause re Contempt [Code Civ. Proc. § 1217; Fam. Code § 290]--Skeletal Form

[1] FORM Declaration in Opposition to Order to Show Cause re Contempt [Code Civ. Proc. § 1217; Fam. Code § 290]--Skeletal Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	DECLARATION OF _____
Respondent.	)	[*name*] IN OPPOSITION TO ORDER TO SHOW
	)	CAUSE RE CONTEMPT
	)	

_____

I, _____ [*name*], declare:

I am the _____ [petitioner *or* respondent] in the above-entitled proceeding and the citee in the Order to Show Cause and Declaration For Contempt herein.

[*EITHER*]

The order referred to in the Order to Show Cause and Declaration For Contempt made on _____ [*date*], was invalid in that _____ [*specify invalidity, e.g., lack of jurisdiction, improper entry of default, order did not specify amounts to be paid or times of payment, etc.*].

[*AND/OR*]

The order made on _____ [*date*] ordered payment as follows: _____ [*state payments ordered*]. Payments were _____ [made *or* tendered] as follows: _____ [*either state payments made or tendered and if tendered the manner of the other party's refusal to accept*].

[*AND/OR*]

Compliance with the order made on _____ [*date*] was impossible in that [*state nature of impossibility, e.g.,* the petitioner left his/her former residence and I was unable to locate him/her *or* the property ordered to be transferred to petitioner was destroyed by fire and was not insured against such loss].

[*AND/OR*]

On _____ [*date*], the date the order was made, I was employed and had a net income of $_____ per month.

On _____ [*date*] my employment was terminated and I remained unemployed until _____ [*date*], on which date I was again employed with a net income of $_____ per month. During the period of unemployment I paid to _____ [petitioner *or* respondent] the sum of $_____ per month and since my new employment I have paid _____ [petitioner *or* respondent] the sum of $_____ per month. At all times mentioned I did not have, nor do I now have, the ability to pay the full amount of the order or the ability to pay more than the amounts which I did pay.

[*AND/OR*]

The order made on _____ [*date*], provided for payment of spousal support to _____ [petitioner *or* respondent]. Since _____ [*date*], _____ [petitioner *or* respondent] has been residing at _____ [*address*] with _____ [*name of person sharing household*] and holding _____ [herself *or* himself] out as _____ [his/her wife *or* husband]. I am informed and believe and thereon declare that _____ [petitioner *or* respondent] and _____ [*name of person sharing household*] were married on _____ [*date*] and that my obligation under the order for spousal support terminated on that date.

[*CONTINUE, setting forth any additional defenses the citee may have*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[*typed name*]

[2] Use of Form

The form of declaration in *[1], above*, is for use by a citee named in the Order to Show Cause and Affidavit For Contempt [*§ 258.130*] to set forth facts showing that he or she is not guilty of contempt of court [*Code Civ. Proc. § 1217*; *Fam. Code § 290*]. Alternatively, the allegations may be set forth in the approved Judicial Council form of declaration under penalty of perjury [Cal. Judicial Council Form MC-030]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form contains defensive allegations relating to a lack of validity of the underlying judgment or order; the citee's attempted compliance; the objective impossibility or other inability to comply; and the termination of the judgment or order by operation of law. These allegations may be adapted or omitted according to the grounds that the citee wishes to raise, and other possible defenses may be listed under appropriate circumstances. These might include, for example, that the citee did not have knowledge of the judgment or order [*see Freeman v. Superior Court (1955) 44 Cal. 2d 533, 537, 282 P.2d 857* ; *see also § 258.82*].

There is no specific authority requiring the citee to submit points and authorities with the opposing declaration. However, it is recommended that these be submitted when the declaration challenges the legal validity of the contempt proceeding; that is, when the declaration takes on the nature of a demurrer [*see generally, Taylor v. Superior Court (1942) 20 Cal. 2d 244, 246, 125 P.2d 1* ; *see also Cal. Rules of Ct., Rule 3.1113*].

[3] Copies to Prepare

The following copies should be prepared:

- Original for filing with court clerk;
- Copy for service on attorney for other party [*see Code Civ. Proc. §§ 1005(b), 1011-1017* (service of papers);
- Copy for client;
- Office copy;
- Additional office copy if original is filed by mail to be retained in office file until return of endorsed copy from court.

[4] Accompanying Papers

The following accompanying papers also should be prepared:

- Memorandum of points and authorities, if necessary, in same number of copies and for same distribution as declaration;
- Proof of service. The original of the proof of service will be attached to the original of the declaration, and points and authorities, if any, presented to the clerk for filing. If the declaration and points and authorities are served on the other party's attorney [*see Code Civ. Proc. § 1015*; *Cal. Rules of*

Ct., Rule 5.10(b)] by mail [*see Code Civ. Proc. §§ 1012, 1013*], the copies served must either be accompanied by an unsigned copy of the proof of service or bear a notation of their date and place of mailing [*Code Civ. Proc. § 1013(b)*].

California Forms of Pleading and Practice--Annotated

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Chapter 258 FAMILY LAW ENFORCEMENT: GENERAL ENFORCEMENT PRINCIPLES AND REMEDIES
PART IV. FORMS
C. Contempt

22-258 California Forms of Pleading and Practice--Annotated § 258.132

§ 258.132 Findings and Order Regarding Contempt--Cal. Judicial Council Form FL-415

[1] FORM Findings and Order Regarding Contempt--Cal. Judicial Council Form FL-415

Click here to view image.

[2] Use of Form

The form in *[1], above*, is a reproduction of the Judicial Council form for Findings and Order Regarding Contempt [Cal. Judicial Council Form FL-415]. It is approved for optional use in any governmental or family law-related contempt proceeding arising out of disobedience of a family law order [*see Code Civ. Proc. §§ 1209, 1218* (acts and omissions constituting contempt; punishment limitation); *Fam. Code §§ 17400, 17402, 17404* (child support enforcement by local child support agencies)]. For discussion of contempt proceedings, see *§ 258.80* et seq.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form is filled out by one of the parties following a contempt hearing and presented for the judicial officer's signature. In Paragraph 1, the appropriate box must be checked to indicate whether the matter proceeded by stipulation or as an uncontested or contested matter. In Paragraphs 1b-1f, appropriate boxes must be checked to identify the parties who were present; and names must be filled in for attorneys, governmental agencies, and other individuals or entities making appearances. In Paragraph 1g, the underlying Order to Show Cause and Affidavit for Contempt [Cal. Judicial Council Form FL-410; *see § 258.130*] must be identified by the person who filed and the date of filing. In Paragraphs 2 and 3, appropriate boxes must be checked to identify the "citee," and to indicate that the citee was advised of his or her rights.

Paragraphs 4 through 24 set forth the findings and orders of the court. Counsel should consult the clerk of the court to determine the court's preferences with respect to completion of this portion of the form. Paragraph 25 should be filled in with the number of pages attached if additional orders or findings are made. At the end of the form, the signature of the

citee's attorney is required to approve the completed form as conforming to the court order and findings at the contempt hearing, and the signature of the citee is required to indicate his or her agreement to the terms of the order.

California Forms of Pleading and Practice--Annotated

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Chapter 259 FAMILY LAW ENFORCEMENT: SPECIAL REMEDIES FOR SUPPORT ENFORCEMENT

22-259 California Forms of Pleading and Practice--Annotated 259.syn

§ 259.syn Synopsis to Chapter 259: FAMILY LAW ENFORCEMENT: SPECIAL REMEDIES FOR SUPPORT ENFORCEMENT

§ 259.01 Scope of Chapter

§ 259.02 Cross References

§§ 259.03-259.09 [Reserved]

§ 259.10 Governing Law

§ 259.11 Overview of Remedies for Private Enforcement of Support Obligations

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[2] Earnings Withholding Order for Support (Garnishment)

[3] Earnings Assignment Order

[4] Security Deposit Before Delinquency

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§ 259.13 Effect of Interference With Visitation Rights

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§ 259.15 Motion to Determine Arrearages

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§ 259.17 Property Available to Enforce Child Support Obligation

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§ 259.30 Earnings Withholding (Garnishment) Order

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[2] Compared to Earnings Assignment Order

§ 259.31 "Earnings Withholding Order for Support" Defined; Other Definitions

§ 259.32 Earnings Subject to Withholding

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[c] Equitable Division of Earnings for Support

§ 259.33 Priority of Earnings Assignment for Support

§ 259.34 Orders Issued by Other States or Counties

§ 259.35 Earnings Due and Payable

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[2] Time for Application for Earnings Withholding Order

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§ 259.38 Debtor's Response to Withholding Order

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§ 259.51 Earnings Assignment Defined and Contrasted With Garnishment

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§ 259.53 Mandatory Earnings Assignment Order to Enforce Child and Spousal Support

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§ 259.69 Assignment of Private Retirement Benefits

§ 259.70 Orders Issued by Other States or Counties

§ 259.71 Contractor's Acknowledgment of Compliance

§§ 259.72-259.79 [Reserved]

§ 259.80 Governing Law

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§ 259.87 Right to Use Deposit to Satisfy Support Obligation

§ 259.88 Sale of Nonliquid Assets After Deposit

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§ 259.90 Motion to Stop Use of Money or Sale of Assets

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§ 259.101 Compared to Deposit of Assets Under Fam. Code § 4600 et seq.

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[4] Requirements for Action by Support Agency

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[f] Notice to Recipient of Support Services

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[2] California Family Law

§ 259.171 Federal Statutes

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§ 259.173 State Statutes

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[b] Applicable Code of Civil Procedure Provisions

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[6] Earnings Withholding (Garnishment)

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[b] Exemptions

[c] Procedure

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[9] Judgment Liens

[10] Locating Obligor Parents

[11] Miscellaneous Creditor's Remedies

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[a] Child Support

[b] Provisions Applicable to Both Child and Spousal Support

[c] Spousal Support

[15] Receivership

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[b] Security Deposit After Delinquency

[i] Generally

[ii] Procedure

[c] Security Deposit Before Delinquency

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§ 259.175 Decisions

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[2] Civil Enforcement Methods

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[5] Earnings Withholding (Garnishment) for Support

[a] Equitable Division of Earnings

[b] Orders Enforceable

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§ 259.176 Attorney General Opinions

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§ 259.178 Text References

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§ 259.190 Application for Earnings Withholding Order [Code Civ. Proc. § 706.121]--Cal. Judicial Council Form WG-001

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[2] Use of Form

[3] Contents of Application

[4] Filing Application

§ 259.191 Earnings Withholding Order for Support [Code Civ. Proc. §§ 706.030, 706.052, 706.108]--Cal. Judicial Council Form Rule WG-004

[1] FORM

[2] Use of Form

[3] Service of Order

[4] Instructions to Employer

§§ 259.192-259.199 [Reserved]

§ 259.200 Notice of Intent to Seek Earnings Assignment Order in Event of Default on Pre-July 1, 1990, Support Order [Fam. Code § 5252(b)]

[1] FORM

[2] Use of Form

[3] When Notice of Intent May Be Given

[4] Service of Notice

§ 259.201 Ex Parte Application for Earnings Assignment Order [Fam. Code §§ 5250, 5252(a)]--Cal. Judicial Council Form FL-430

[1] FORM

[2] Source of Form

[3] Use of Form

[4] Filling Out Form

[5] Verification

[6] Income and Expense Declaration

[7] Attorney's Fees

§ 259.202 Earnings Assignment Order for Spousal or Partner Support [Code Civ. Proc. § 706.031; Fam. Code § 5230; 15 U.S.C. §§ 1672, 1673]--Cal. Judicial Council Form FL-435

[1] FORM

[2] Source of Form

[3] Use of Form

[4] Computation of Arrearages

[5] Copies to Prepare

§ 259.203 [Reserved]

§ 259.204 Stay or Termination of Stay of Service of Earnings Assignment Order [Fam. Code § 5260, 5261]--Cal. Judicial Council Form FL-455

[1] FORM

[2] Source of Form

[3] Use of Form

[4] Hearing Requirements

[5] Filling Out Form if Cash or Cash Bond Is to Be Posted

§ 259.205 Declaration of Payment History and Attachment--Cal. Judicial Council Forms FL-420, FL-421

[1] FORMS

[2] Use of Forms

§ 259.206 Qualified Domestic Relations Order for Support, and Attachment--Cal. Judicial Council Forms FL-460, FL-461

[1] FORMS

[2] Use of Forms

[3] Contents of Order

§§ 259.207-259.219 [Reserved]

§ 259.220 Order for Deposit of Assets to Secure Future Child Support Payments [Fam. Code § 4610(a)]--Order to Show Cause With Application and Supporting Declaration--Cal. Judicial Council Forms FL-300, FL-310

[1] FORMS

[2] Source of Forms

[3] Use of Forms

[4] Filling Out Forms

[5] Declaration

[6] Accompanying Papers

[7] Number of Copies

[8] Service

§ 259.221 Order for Deposit of Assets to Secure Future Child Support Payments [Fam. Code § 4610(a)]--Attachment to Order After Hearing--Cal. Judicial Council Form MC-020

[1] FORM

[2] Use of Form

[3] Contents of Order

[4] Preparation of Order

[5] Filing and Service

§ 259.222 Order for Child Support Security Deposit and Evidence of Deposit [Fam. Code §§ 4560, 4562]--Cal. Judicial Council Form FL-400

[1] FORM

[2] Use of Form

§ 259.223 Application for Disbursement From Child Support Security Deposit and Order for Disbursement [Fam. Code § 4570]--Cal. Judicial Council Form FL-401

[1] FORM

[2] Use of Form

[3] Service

§§ 259.224-259.229 [Reserved]

§§ 259.230-259.231 [Reserved]

§ 259.232 Order Directing Payment of Child Support Through County Officer Designated by Court [Fam. Code §§ 4200, 4201, 4202]--General Form

[1] FORM

[2] Use of Form

[3] Application for Order

§ 259.233 Notice of Delinquency [Fam. Code § 4722]--Cal. Judicial Council Form FL-485

[1] FORM

[2] Use of Form

[3] Contents

[4] Service

§ 259.234 Application to Determine Arrearages [Fam. Code § 4726]--Cal. Judicial Council Form FL-490

[1] FORM

[2] Use of Form

§ 259.235 Notice of Motion for Judicial Review of License Denial [Fam. Code § 17520(j), (k)]--Cal. Judicial Council Form FL-670

[1] FORM

[2] Use of Form

[3] Contents

[4] Service of Notice

§ 259.236 Order After Judicial Review of License Denial [Fam. Code § 17520(j)(k)]--Cal. Judicial Council Form FL-675

[1] FORM

[2] Use of Form

§§ 259.237-259.249 [Reserved]

§ 259.250 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Summons and Complaint or Supplemental Complaint (July 1, 1997 or Later Actions), and Declaration for Amended Proposed Judgment--Cal. Judicial Council Forms FL-600, FL-616

[1] FORM--Summons and Complaint or Supplemental Complaint Regarding Parental Obligations--Cal. Judicial Council Forms FL-600

[2] FORM--Declaration for Amended Proposed Judgment--Cal. Judicial Council Form FL-616

[3] Use of Forms

[4] Contents of Complaint Form

[5] Declaration for Amended Proposed Judgment

§ 259.251 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Notice and Acknowledgment of Receipt--Cal. Judicial Council Form Fl-605

[1] FORM

[2] Use of Form

§ 259.252 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Declaration for Default or Uncontested Judgment; and Request to Enter Default Judgment (July 1, 1997 or Later Actions)--Cal. Judicial Council Forms FL-697, FL-620

[1] FORMS

[2] Use of Forms

§ 259.253 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Answer to Complaint or Supplemental Complaint (July 1, 1997 or Later Actions); and Information Sheet--Cal. Judicial Council Forms FL-610, FL-611

[1] FORMS

[2] Use of Forms

[3] Disputing Paternity

[4] Other Defenses

§ 259.254 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Notice of Motion; and Request for Order and Supporting Declaration--Cal. Judicial Council Forms FL-680, FL-684

[1] FORMS

[2] Use of Forms

[3] Hearing on Paternity

[4] Hearing on Child Support

§ 259.255 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Response to Notice of Motion or Order to Show Cause--Cal. Judicial Council Form FL-685

[1] FORM

[2] Use of Form

§ 259.256 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Stipulation and Order (Pre-July 1, 1997 Actions); Stipulation and Order (July 1, 1997 or Later Actions)--Cal. Judicial Council Form FL-625

[1] FORM

[2] Use of Form

[3] Identification of Parties

[4] Child Support Provisions

§ 259.257 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Order After Hearing--Cal. Judicial Council Form FL-687

[1] FORM

[2] Use of Form

§ 259.257A Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Short Form Order After Hearing--Cal. Judicial Council Form FL-688

[1] FORM

[2] Use of Form

§ 259.258 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Stipulation for Judgment or Supplemental Judgment and Judgment (July 1, 1997 or Later Actions)--Cal. Judicial Council Form FL-615

[1] FORM

[2] Use of Form

[3] Significance of Judgment

§ 259.259 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Judgment Regarding Parental Obligations (July 1, 1997 or Later Actions)--Cal. Judicial Council Form FL-630

[1] FORM

[2] Use of Form

§ 259.259A Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Minutes and Order or Judgment--Cal. Judicial Council Form FL-692

[1] FORM

[2] Use of Form

§ 259.260 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Request for Judicial Determination of Support Arrearages--Cal. Judicial Council Form FL-676

[1] FORM

[2] Use of Form

§ 259.261 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Notice of Entry of Judgment and Certificate of Service by Mail--Cal. Judicial Council Form FL-635

[1] FORM

[2] Use of Form

§ 259.262 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Notice and Motion to Cancel (Set Aside) Support Order Based on Presumed Income and Proposed Answer--Cal. Judicial Council Form FL-640

[1] FORM

[2] Use of Form

§ 259.263 Income Withholding Order/Notice for Support--Cal. Judicial Council Forms FL-195, FL-196

[1] FORMS

[2] Use of Forms

§ 259.264 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Request for Hearing Regarding Earnings Assignment--Cal. Judicial Council Form FL-450

[1] FORM

[2] Use of Form

§ 259.265 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Notice of Opposition and Notice of Motion on Claim of Exemption--Cal. Judicial Council Form FL-677

[1] FORM

[2] Use of Form

§ 259.266 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Order Determining Claim of Exemption or Third-Party Claim--Cal. Judicial Council Form FL-678

[1] FORM

[2] Use of Form

§ 259.267 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Notice to Local Child Support Agency of Intent to Take Independent Action to Enforce Support Order--Cal. Judicial Council Form

FL-645

[1] FORM

[2] Use of Form

§ 259.268 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Response of Local Child Support Agency to Notice of Intent to Take Independent Action to Enforce Support Order--Cal. Judicial Council Form FL-646

[1] FORM

[2] Use of Form

§ 259.269 Governmental (and Private) Parentage and Child Support Proceeding--Individual and Governmental Statements for Registration of California Support Order, and Notice of Registration--Cal. Judicial Council Forms FL-440, FL-650, FL-651

[1] FORMS

[2] Use of Forms

§ 259.270 Governmental Parentage and Child Support Proceeding [Fam. Code §§ 4200 et seq., 4350 et seq., 4506.3, 17400]--Notice Regarding Payment of Support--Cal. Judicial Council Form FL-632

[1] FORM

[2] Use of Form

§ 259.271 Governmental Parentage and Child Support Proceeding [Fam. Code § 17404]--Ex Parte Motion by Local Child Support Agency and Declaration for Joinder of Other Parent--Cal. Judicial Council Form FL-660

[1] FORM

[2] Use of Form

§ 259.272 Governmental Parentage and Child Support Proceeding [Fam. Code § 17404]--Notice of Motion and Declaration for Joinder of Other Parent in Governmental Action--Cal. Judicial Council Form FL-661

[1] FORM

[2] Use of Form

§ 259.273 Governmental Parentage and Child Support Proceeding [Fam. Code § 17404]--Responsive Declaration to Motion for Joinder of Other Parent-Consent Order of Joinder--Cal. Judicial Council Form FL-662

[1] FORM

[2] Use of Form

§ 259.274 Governmental Parentage and Child Support Proceeding [Fam. Code § 17404]--Stipulation and Order for

Joinder of Other Parent--Cal. Judicial Council Form FL-663

[1] FORM

[2] Use of Form

§ 259.275 Governmental Parentage and Child Support Proceeding [Fam. Code § 17404 et seq.]--Findings and Recommendation of Commissioner--[Fam. Code § 4251]--Cal. Judicial Council Form FL-665

[1] FORM

[2] Use of Form

§ 259.276 Governmental Parentage and Child Support Proceeding [Fam. Code § 17404 et seq.]--Notice of Objection [Fam. Code § 4251]--Cal. Judicial Council Form FL-666

[1] FORM

[2] Use of Form

§ 259.277 Governmental Parentage and Child Support Proceeding [Fam. Code § 17404 et seq.]--Review of Commissioner's Findings of Fact and Recommendation [Fam. Code § 4251]--Cal. Judicial Council Form FL-667

[1] FORM

[2] Use of Form

§ 259.278 Stipulation and Order Waiving Unassigned Arrears (Governmental) [Fam. Code §§ 4503, 17526]--Cal. Judicial Council Form FL-626

[1] FORM

[2] Use of Form

§ 259.279 Request for Telephone Appearance (Governmental) [Fam. Code § 4251]--Cal. Judicial Council Form FL-679

[1] FORM

[2] Use of Form

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Volume 22: Explosives thru Food-Chs. 256-268

Chapter 259 FAMILY LAW ENFORCEMENT: SPECIAL REMEDIES FOR SUPPORT ENFORCEMENT
PART I. SCOPE

22-259 California Forms of Pleading and Practice--Annotated § 259.01

§ 259.01 Scope of Chapter

This chapter discusses special remedies for enforcing child and spousal support orders, beginning with an overview of the various special remedies for support enforcement [*see §§ 259.10 -259.20*], and continuing with more detailed discussion of the following:

- Earnings withholding (garnishment) orders [*see §§ 259.30 -259.38*].

- Wage and earnings assignments [*see §§ 259.50 -259.71*].

- Statutory procedures for deposit of money or assets to secure future payments of child support, when an earnings assignment is impractical or difficult to enforce. There are separate procedures depending on whether the deposit is sought before and after child support payments become delinquent [*see §§ 259.80 -259.92* (after delinquency), §§ 259.100-259.105 (before delinquency)].

- Procedures involving the nonissuance or nonrenewal of a professional or commercial license under *Fam. Code § 17520* of a person who has not complied with a support order [*see §§ 259.110 -259.121*].

This chapter also includes discussion of miscellaneous other enforcement methods, such as:

- Imposing a six-percent penalty on delinquent support payments pursuant to *Fam. Code § 4720 et seq.* [*see § 259.131*].

- Court orders requiring the payment of spousal and child support to a designated county officer pursuant to *Fam. Code § 4200 et seq.* and *Fam. Code § 4350 et seq.* [*see § 259.133*].

- The state tax refund and lottery winnings intercept program pursuant to *Code Civ. Proc. §§ 708.730, 708.740* [*see § 259.135*].

- Proceedings initiated by a district attorney or other local child support agency to obtain

reimbursement of public benefits on behalf of a child, and to establish paternity, and to establish, enforce, and modify support obligations mainly pursuant to *Fam. Code § 17000 et seq.* [*see §§ 259.150 -259.160*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGarnishmentsFamily LawChild SupportObligationsEnforcementLicensesFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGarnishmentsFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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22-259 California Forms of Pleading and Practice--Annotated § 259.02

§ 259.02 Cross References

For a general discussion of enforcing family law orders and judgments, see Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* .

Enforcement of out-of-state support orders under the Uniform Interstate Family Support Act (UIFSA-- *Fam. Code § 4900 et seq.*), as well as interstate custody enforcement are discussed in Ch. 260, *Family Law Enforcement: Foreign Judgments* .

For a discussion of the duties of parents to support minor children, see Ch. 224, *Dissolution of Marriage: Child Support* , Ch. 394, *Parent and Child* , and Ch. 412, *Paternity* .

For a discussion of earnings assignment for the enforcement of support of a conservatee spouse, see *Ch. 289, Guardianship and Conservatorship: Management of Community Property, § 289.17[6][c]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewFamily LawChild SupportGeneral OverviewFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawGuardiansGeneral OverviewFamily LawPaternity & SurrogacyGeneral Overview

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PART I. SCOPE

22-259 California Forms of Pleading and Practice--Annotated §§ 259.03-259.09

[Reserved]

§§ 259.03[Reserved]

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Chapter 259 FAMILY LAW ENFORCEMENT: SPECIAL REMEDIES FOR SUPPORT ENFORCEMENT
PART II. LEGAL BACKGROUND
A. Overview of Special Remedies for Support Enforcement

22-259 California Forms of Pleading and Practice--Annotated § 259.10

§ 259.10 Governing Law

Enforcement of child, family, or spousal support orders is governed generally by *Fam. Code § 4500 et seq.* Within this chapter, emphasis is on the following support enforcement measures:

- Earnings withholding (garnishment) orders, governed by *Code Civ. Proc. § 706.030 et seq.*;
- Earnings assignment orders, governed by *Fam. Code § 5200 et seq.*;
- Deposits for security, both before and after delinquency, governed by *Fam. Code § 4550 et seq.* and *Fam. Code § 4600 et seq.*, respectively;
- Nonissuance and nonrenewals of professional or commercial licenses, governed by *Fam. Code § 17520* and *Bus. & Prof. Code §§ 31* and *6143.5*;
- Imposition of monetary penalties on a support obligor, governed by *Fam. Code § 4720 et seq.*;
- Payment of support to a court-designated officer, governed by *Fam. Code §§ 4200, 4350*;
- Claims against federal and state tax refunds, lottery winnings, and other state payments, governed by *I.R.C. § 6402* and *Code Civ. Proc. § 708.730 et seq.*, respectively; and
- Civil enforcement by district attorneys and other local child support agencies, governed by *Fam. Code § 17400 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild

SupportObligationsEnforcementGarnishmentsFamily LawChild SupportObligationsEnforcementIncome WithholdingFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGarnishments

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Chapter 259 FAMILY LAW ENFORCEMENT: SPECIAL REMEDIES FOR SUPPORT ENFORCEMENT
PART II. LEGAL BACKGROUND
A. Overview of Special Remedies for Support Enforcement

22-259 California Forms of Pleading and Practice--Annotated § 259.11

§ 259.11 Overview of Remedies for Private Enforcement of Support Obligations

[1] Introduction

Various provisions of the Family Code, Code of Civil Procedure, and other statutes provide devices by which support obligees may obtain enforcement of child, spousal, or family support obligations that have been ordered by the court. This chapter provides an overview of each of these devices, briefly describing the nature of each procedure, the types of support orders that may be enforced by the particular procedure, the types of assets that may be reached through the use of each procedure, and the circumstances in which each procedure may be used.

Support enforcement procedures that are initiated and prosecuted solely by the district attorney or other local child support agency are discussed in *§ 259.150* et seq.

[2] Earnings Withholding Order for Support (Garnishment)

An earnings withholding order for support is an order issued on writ of execution, directing an obligor's employer to withhold and pay a percentage of obligor's earnings to the levying officer to satisfy a judgment for support [*see Code Civ. Proc. § 706.030(a)*; *see generally Code Civ. Proc. § 706.010 et seq.*; *see also 42 U.S.C. § 659(a)*; 5 C.F.R. pt. 581 (special requirements for enforcing support orders from federal employee's pay); *§ 259.30 et seq.*].

Judgments for child or spousal support are enforceable support orders for these purposes [*see Code Civ. Proc. § 706.030(a)*]. "Earnings," which generally means compensation for services rendered within an employment relationship, are reachable assets for these purposes [*see Code Civ. Proc. § 706.011(a), (c), (d)*].

A withholding order for support may be used when the obligee has received a judgment ordering child or spousal support [*see Code Civ. Proc. § 706.030(a)*]. The obligee must obtain a writ of execution and then apply to the levying officer for issuance of the earnings assignment order [*see Code Civ. Proc. § 706.102(a)*].

[3] Earnings Assignment Order

An earnings assignment order is a court order directing an obligor's employer to withhold and pay a percentage of an obligee's earnings to the obligee under a support order [*see Fam. Code § 5230(a)*; *see generally Fam. Code § 5200 et seq.*; *see also 42 U.S.C. § 659(a)*; 5 C.F.R. pt. 581 (special requirements for enforcing support orders from federal employee's pay)]. Earnings assignment orders are issued automatically for support orders issued or modified on or after July 1, 1990 [*see Fam. Code § 5230(a)*], unless the assignment order is stayed or quashed [*see Fam. Code §§ 5260, 5270*]. For support orders first issued or modified before July 1, 1990, the obligee may apply for an earnings assignment order [*see Fam. Code §§ 5230(b), 5250 et seq.*]. An earnings assignment order for support is effective and enforceable notwithstanding the absence of the name, address, or other identifying information about the obligor's employer [*Fam. Code § 5230(b)*]. For full discussion, see *§ 259.50* et seq.

Orders for child, spousal, or family support are enforceable support orders for these purposes [*see Fam. Code §§ 150, 5230(a)*]. "Earnings," which include not only wages, salary, bonuses, benefits and other compensation for services rendered within an employment relationship [*see Fam. Code § 5206(a)*], but also payments for services rendered as an independent contractor [*see Fam. Code § 5206(b)*], and "[a]ny other payments or credits due or becoming due, regardless of source" [*see Fam. Code § 5206(e)*; *see In re Marriage of Johnson-Wilkes & Wilkes (1996) 48 Cal. App. 4th 1569, 1576, 56 Cal. Rptr. 2d 323* (describing limited exceptions)], are reachable assets for these purposes. Thus, "earnings" that may be reached under an earnings assignment order are broader than those that may be garnished under an earnings withholding order for support [*compare Fam. Code § 5206 with Code Civ. Proc. § 706.011(a),(c),(d)*].

An earnings assignment order will be issued automatically when the court orders support, unless the obligor successfully moves to stay or quash the assignment [*see Fam. Code §§ 5230(a), 5260, 5270*]. For the obligee, the advantage of an assignment order over a withholding order is that the obligee need not apply for a writ of execution and can use the procedure to reach certain types of payments that are not reachable under a withholding order [*cf. Code Civ. Proc. §§ 706.011(a), 706.102(a)*]. If more than one order is served on an employer, an earnings assignment order has priority over an earnings withholding order [*see Code Civ. Proc. § 706.031(b)*; *Fam. Code § 5243*].

[4] Security Deposit Before Delinquency

A security deposit before delinquency is a court order directing an obligor to establish a child support trust account in a state or federally chartered financial institution, into which obligor must deposit of up to one year's child support [*see Fam. Code §§ 4560, 4561*; *see generally Fam. Code § 4550 et seq.*]. Amounts may be deducted from the account and paid to the obligee if the obligor is 10 or more days late in making support payments [*see Fam. Code § 4570*]. The court may order establishment of such an account after giving obligor notice and opportunity to apply for elimination or reduction of the deposit requirement on specified grounds [*see Fam. Code § 4565*]. For full discussion, see *§ 259.100* et seq.

Child support orders are enforceable support orders for these purposes [*see Fam. Code § 4560(a)*]. "Moneys" deposited into a financial institution under the security deposit order are reachable assets for these purposes [*see Fam. Code § 4561*].

A security deposit order is discretionary with the court and is available when alternative equivalent security for timely payment is not available [*see Fam. Code §§ 4565(a)(1),(b), 4567*], unless establishment of the deposit would be an "undue hardship" on the obligor [*Fam. Code § 4565(a)(2), 4567*]. It may be appropriate in circumstances when an earnings assignment order [*see* [3], *above*] is not practicable, such as when the obligor is self-employed or otherwise does not regularly receive a salary or wages but has assets available to secure the child support obligation. Unlike the deposit procedure described in *[5], below*, the procedure here may be included in the initial support order, *i.e.*, it is not necessary to show past delinquency [*compare Fam. Code § 4560 with Fam. Code § 4610(a)*].

[5] Security Deposit After Delinquency

A security deposit after delinquency is a court order directing an obligor to deposit cash or other assets with a court-designated deposit-holder to secure future child support payments [*see Fam. Code § 4610(a)*; *see generally Fam. Code § 4600 et seq.*]. The assets may be used or sold to pay child support arrearages if payments continue in arrears [*see Fam. Code § 4630(a)*]. The court may order a security deposit on an order to show cause or noticed motion filed by the obligee, accompanied by a declaration that the obligor is in arrears in a sum equal to 60 days' child support payments [*see Fam. Code § 4610(a)*]. For full discussion, see *§ 259.80* et seq.

Child support orders are enforceable support orders for these purposes [*see Fam. Code § 4610(a)*]. Cash or other assets deposited with the deposit-holder under court order are reachable assets for these purposes [*see Fam. Code §§ 4614-4617*].

Generally, the court may not issue an order requiring deposit of assets under these provisions unless it finds that the obligor-parent is not receiving earnings subject to earnings assignment, that an earnings assignment would not be sufficient to meet the amount of the support obligation, or that an earnings assignment would be difficult to enforce or impractical because of the obligor's job history [*see* Fam. Code § 4513]. Unlike the procedure described in *[4], above*, an order for a security deposit after delinquency is also unavailable unless the obligor is 60 days in arrears under the child support order [*compare Fam. Code § 4560 with Fam. Code § 4610(a)*]. However, this procedure may be useful to obtain access to assets other than cash to satisfy child support arrearages [*see Fam. Code §§ 4614-4617*].

[6] Government Benefits Intercept

A government benefits intercept permits a support obligee, in cases in which the support obligation is not being enforced by a local child support agency, to intercept certain payments by state agencies and other public agencies to the obligor to enforce a support obligation owing to the obligee [*see generally Code Civ. Proc. § 708.710 et seq.*]. Generally, the obligee may file a copy of the judgment directly with the state agency that owes the money to the obligor, prior to the time that the Controller makes the payment to the obligor [*see Code Civ. Proc. §§ 708.730(a), 708.740(a)*], or with any public entity other than a state agency that owes money to the obligor [*see Code Civ. Proc. § 708.750* (note that Legislature enacted second statute numbered *Code Civ. Proc. § 708.750*, by Stats. 1995, ch. 363, but reference here is to first enacted statute)]. If the money is owed for lottery winnings or a state tax refund, the obligor may alternatively file a certified copy of the judgment for support with the local child support agency of the county in which the support judgment is entered or registered, who will then file the obligee's claim with the Department of Social Services [*see Code Civ. Proc. § 708.740(e)*]. The Controller or other public entity then deposits the amount due with the court, which pays the amount over to the obligee unless the obligor successfully claims an exemption [*see Code Civ. Proc. §§ 708.740(c), 708.750, 708.770, 708.775*]. For full discussion, see *§ 259.135*.

Judgments for child, spousal, or family support (as well as any other type of money judgment) are enforceable support orders for these purposes [*see Code Civ. Proc. §§ 708.730(a),(e), 708.740(a),(i)*]. Any money owed by a public entity to the support obligor-judgment debtor, except for earnings owed to a public employee, are reachable assets for these purposes [*see Code Civ. Proc. § 708.720(a),(b)*].

This procedure may be used by support obligee to reach any money owed by a public entity to the obligor, other than earnings [*see Code Civ. Proc. § 708.720(a),(b)*], which may only be withheld under the procedures for wage garnishment or earnings assignment [*see [2]* and *[3], above*]. Thus, this procedure may be used, for example, to reach the obligor's state income tax refund, lottery winnings, or any other sums that the state or a local public entity may owe to the obligor.

[7] Monetary Penalty on Delinquent Support Payments

A monetary penalty on delinquent support payments allows a support obligee to file and serve a notice of delinquency on the obligor whenever payments under a support order are more than 30 days in arrears [*see Fam. Code § 4722(a)*;

see generally Fam. Code § 4720 et seq.]. Any payments that remain unpaid for more than 30 days after such a notice has been filed incur a penalty of 6 percent per month, up to a maximum of 72 percent of the unpaid balance [*see Fam. Code § 4722(b)*]. The support obligee may file a motion to obtain a judgment for the amount of penalties owed; the judgment may then be enforced by issuance of a writ of execution in the same manner as for unpaid child support installments [*see Fam. Code §§ 4725, 4728*]. For full discussion, see *§ 259.131*.

Orders for child, spousal, or family support are enforceable support orders for these purposes [*see Fam. Code §§ 150, 4720*].

There is no access to any particular type of asset for these purposes; instead, there is a penalty for delinquent support payments, intended to encourage obligees to make timely support payments.

The penalty may be invoked any time payments under a support order are more than 30 days in arrears [*see Fam. Code § 4722(a)*], unless the obligor files a timely motion to determine arrearages and proves one of specified grounds for non-imposition of the penalty [*see Fam. Code § 4726*].

[8] Direct Payment of Benefits Under Pension or Retirement Plan

[a] QDRO to Reach ERISA Plan Benefits

Under a special exception to the rules against assigning or alienating employee benefits that are subject to the Employee Retirement Income Security Act of 1974 (ERISA) [*see* 29 U.S.C. § 1000 et seq.], an ERISA-governed retirement or pension plan must make direct payments of employee benefits to a spouse or former spouse pursuant to a state domestic relations order that is deemed "qualified" under federal statute-a "QDRO" [*see 29 U.S.C. § 1056(d)(1), (3)*; *see also Fam. Code § 5103* (enforcement of order for child, family, or spousal support against employee benefit plan); *Marshall v. Marshall (1995) 36 Cal. App. 4th 1170, 1175-1176, 43 Cal. Rptr. 2d 38* (generally, order will be treated as "qualified" only after review by plan administrator, or, on administrator's refusal to recognize order, by judicial declaration that order is qualified)].

A QDRO may be used to enforce orders (including provisions of court-approved property settlement agreements) for child support, spousal support, or marital property rights with respect to a spouse, former spouse, child, or other dependent of a participant in an ERISA-governed employee benefit plan [*29 U.S.C. § 1056(d)(3)(B)(ii)*].

To constitute a QDRO, a domestic relations order must be made pursuant to a state domestic relations law, it must relate to the provision of support or marital property rights with respect to the persons described above, and it must meet other conditions set forth by federal statute for "qualification." To qualify, the order must recognize or create an "alternate payee's" right (or assign the right) to receive all or a portion of the plan participant's benefits, it must clearly specify certain information about the parties, the plan, the amount or percentage of benefits, and payments or period involved, and must not alter the form or amount of benefits [*29 U.S.C. § 1056(d)(3)*]. For an approved Judicial Council form of QDRO for support (earnings assignment order), see *§ 259.206* [Cal. Judicial Council Form 1285.74].

For a full discussion of the requirements for and use of QDRO's, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* . For discussion of the tax effects of distributions made pursuant to a QDRO, see Ch. 227, *Dissolution of Marriage: Tax Effects of Dissolution* .

[b] Direct Payment of Military Retired Pay

Pursuant to federal statute, a spouse or former spouse of a military service member may obtain direct payment of the service member's retired pay to enforce a state court judgment that awards child or spousal support, that divides the retired pay between the spouses in accordance with their marital property interests, or (in conjunction with a

garnishment order) as a means of enforcing a division of other property [*see 10 U.S.C. § 1408*; 32 C.F.R. § 63.1 et seq.].

The provisions for direct payment of retired pay apply to final judgments of dissolution, annulment, or legal separation, as well as property settlement agreements incident to those judgments that are ordered, ratified, or approved by a court. Modifications of these judgments (or such property settlement agreements) that are final are also enforceable. An enforceable order must be "regular on its face," be certified within a prescribed period, be served on the designated agent of the uniformed service, and meet other technical requirements [*see 10 U.S.C. § 1408(a)-(d)*; 32 C.F.R. §§ 63.3, 63.6].

Although a spouse or former spouse must generally have been married to the service member for a specific time period in order to receive direct payments of retired pay as part of a *division* of that pay, these durational requirements *are not* applicable with respect to judgments for the payment of child or spousal support [*10 U.S.C. § 1408(d)(2)*; 32 C.F.R. §§ 63.3, 63.6].

Apart from the above direct payment provisions, federal law also permits garnishment of military wages (and retired pay) to enforce a support award, and, in the case of a support obligor who is in default for a prescribed period, provides for an involuntary allotment from those wages. In addition, other provisions permit the garnishment of military retired pay to enforce a division of property other than that retired pay [*see 42 U.S.C. § 659*; *5 C.F.R. § 581.101 et seq.*].

For discussion of the requirements for obtaining direct payment of military retired pay to enforce a division of community property, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* . For discussion of garnishing the earnings of a federal employee, including those of a military service member, see *§ 259.32[1]*.

[9] Payment by Electronic Funds Transfer

A court may require, by order or judgment, that a child support obligor designate an account for the purpose of paying a child support obligation by electronic funds transfer (EFT) and maintain enough funds in the account to meet the monthly child support obligation. The order may require that the account be an interest-bearing account with a state or federally chartered commercial bank, a savings and loan association, or an account in shares of a federally insured credit union doing business in California. The order must require the obligor to notify the obligee if the designated depository institution or the account number is changed [*Fam. Code § 4508(b)*].

However, a court may not order payment of child support by EFT if a child support obligor is already subject to an earnings assignment order under *Fam. Code § 5200 et seq.* [*Fam. Code § 4508(a)*; *see § 259.50* et seq.].

The court may order that the payment be electronically transferred to either the obligee's account or to the account of the local child support agency. No interest will accrue on any amount subject to EFT as long as the obligor maintains sufficient funds in the designated account to meet the monthly child support obligation [*Fam. Code § 4508(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsEnforcementGarnishmentsFamily LawChild SupportObligationsEnforcementIncome WithholdingFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGarnishments

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A. Overview of Special Remedies for Support Enforcement

22-259 California Forms of Pleading and Practice--Annotated § 259.12

§ 259.12 No Limitation Period Within Which to Bring Enforcement Proceeding

A judgment for child, family, or spousal support, including all lawful interest and penalties computed thereon, is enforceable until paid in full [*Fam. Code § 291(a)*; *see In re Marriage of Garcia (1998) 67 Cal. App. 4th 693, 697, 79 Cal. Rptr. 2d 242]* . An enforcement proceeding on support arrearages may be brought at any time, including after a child for whom support is ordered has reached the age of majority [*Fam. Code § 4503*]. A judgment for reimbursement or other arrearages is exempt from any requirement that judgments be renewed [*Fam. Code § 291(b)*]; however, an application for renewal may be filed, if desired. An application for renewal may be filed: (1) if the judgment has not previously been renewed as to past due amounts, at any time; or (2) if the judgment has previously been renewed, the amount of the judgment as previously renewed and any past due amount that became due and payable after the previous renewal may be renewed at any time after a period of at least five years has elapsed from the time the judgment was previously renewed [*Fam. Code § 291(c)*].

In an action to enforce a judgment for child, family, or spousal support, the defendant may raise, and the court may consider, laches as a defense only with respect to any portion of the judgment the defendant owes to the state [*Fam. Code § 291(d)*].

Renewal of judgments is discussed generally in Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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22-259 California Forms of Pleading and Practice--Annotated § 259.13

§ 259.13 Effect of Interference With Visitation Rights

The existence or enforcement of a duty of child support owed by a noncustodial parent is not affected by a failure or refusal by the custodial parent to implement any rights as to custody or visitation granted by a court to the noncustodial parent [*Fam. Code § 3556*; *see In re Marriage of Comer (1996) 14 Cal. 4th 504, 517, 59 Cal. Rptr. 2d 155, 927 P.2d 265* ; *Moffat v. Moffat (1980) 27 Cal. 3d 645, 651-652, 165 Cal. Rptr. 877, 612 P.2d 967* (decided under former *Code Civ. Proc. §§ 1694,* 4382); *Cooper v. O'Rourke (1995) 32 Cal. App. 4th 243, 246-247* ; *see also* former *Fam. Code § 4845(b)* (same rule under now-repealed Uniform Reciprocal Enforcement of Support Act; *see* Ch. 260, *Family Law Enforcement: Foreign Judgments* , for discussion of current law on this matter); *In re Marriage of Damico (1994) 7 Cal. 4th 673, 678-679, 29 Cal. Rptr. 2d 787, 872 P.2d 126* (construing both statutes as identical); *Camacho v. Camacho (1985) 173 Cal. App. 3d 214, 219-220, 218 Cal. Rptr. 810* (decided under former *Code Civ. Proc. §§ 1694,* 4382; stating converse of rule, that visitation rights are not conditional on timely payment of child support)]. The reason for this rule is that children should not be left without support because of the misconduct of their parents [*In re Marriage of Comer (1996) 14 Cal. 4th 504, 517, 59 Cal. Rptr. 2d 155, 927 P.2d 265* ; *In re Marriage of Ciganovich (1976) 61 Cal. App. 3d 289, 294, 132 Cal. Rptr. 261* ; *Clarke v. Clarke (1970) 4 Cal. App. 3d 583, 589-590, 84 Cal. Rptr. 393* ; *see In re Marriage of Roesch (1978) 83 Cal. App. 3d 96, 103-104, 147 Cal. Rptr. 586 , cert. denied, 440 U.S. 915 (1979)]* . Also, child support and visitation are often said to be independent rights, both accruing to the benefit of the child, which should not be defeated by the conduct of a parent [*Camacho v. Camacho (1985) 173 Cal. App. 3d 214, 219-220, 218 Cal. Rptr. 810* ; *In re Marriage of Comer (1996) 14 Cal. 4th 504, 517, 59 Cal. Rptr. 2d 155, 927 P.2d 265]* .

The California Supreme Court has stated that these principles apply to deny the noncustodial parent an estoppel defense in an action for the enforcement of a child support obligation. The Court indicated that the appropriate remedies for the noncustodial parent being denied custody or visitation are contempt proceedings, termination or reduction of spousal support, change of custody, or a bond to assure compliance with the visitation order [*Moffat v. Moffat (1980) 27 Cal. 3d 645, 651-653, 165 Cal. Rptr. 877, 612 P.2d 967* ; *see Fam. Code § 3028* (court may order financial compensation to parent who has been thwarted in efforts to exercise visitation); *see also Code Civ. Proc. § 1218(b)* (party in contempt of family law order may still enforce support obligation)]. However, in *Marriage of Damico* [*In re Marriage of Damico (1994) 7 Cal. 4th 673, 678-679, 29 Cal. Rptr. 2d 787, 872 P.2d 126]* , the court distinguished between "interference"

with custody or visitation rights, and child "concealment." For further discussion, see *§ 259.14*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyVisitationGeneral OverviewFamily LawChild CustodyVisitationEnforcementSanctionsFamily LawChild SupportObligationsEnforcementGeneral Overview

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§ 259.14 Estoppel Based on Child Concealment

Notwithstanding *Fam. Code § 3556* and policies on which it rests (see *§ 259.13*), the California Supreme Court held in *In re Marriage of Damico* that active concealment of the child, as opposed to mere interference with visitation rights, may give rise to an estoppel defense to enforcement of child support under some circumstances. A custodial parent who conceals herself or himself and the child from the noncustodial parent until the child reaches the age of majority, despite reasonably diligent efforts by the noncustodial parent to locate them, is estopped from collecting child support arrearages for the time of the concealment [*In re Marriage of Damico (1994) 7 Cal. 4th 673, 685, 29 Cal. Rptr. 2d 787, 872 P.2d 126]* . When support has been ordered paid to a court trustee, however, rather than to the custodial parent who is concealing the child, no estoppel arises under *Damico* because the concealment does not prevent the payment of support [*In re Marriage of Walters (1997) 59 Cal. App. 4th 998, 1006-1007, 70 Cal. Rptr. 2d 354]* .

Furthermore, under the Supreme Court's later holding of *In re Marriage of Comer*, a custodial parent's concealment of both parent and child--a concealment that ends while the child *is still a minor*--does not constitute a defense to an action brought on behalf of the child against the noncustodial parent for child support arrearages [*In re Marriage of Comer (1996) 14 Cal. 4th 504, 517, 59 Cal. Rptr. 2d 155, 927 P.2d 265* ; *In re Marriage of Tavares (2007) 151 Cal. App. 4th 620, 625, 60 Cal. Rptr. 3d 39* (concealment is not obstacle to collection of arrears because overdue payments will still benefit child during child's minority when child is entitled to parent's support)]. However, a custodial parent's intentional concealment of a child that ends after the child reaches the age of 18 but while the child is still a full-time high school student [*see Fam. Code § 3901* (obligation to support child under age of 19 who is full-time high school student)] is a defense to the custodial parent's attempt to collect child support arrearages from the noncustodial parent, because it is the custodial parent's concealment until the child reaches the age of majority, not concealment until the termination of the support obligation, that estops the custodial parent from later collecting child support arrearages [*Stanislaus County Dept. of Child Support Servs. v. Jensen (2003) 112 Cal. App. 4th 453, 456-458, 5 Cal. Rptr. 3d 178]* .

When a custodial parent has obtained public assistance payments for the child, and has assigned the right to child support arrearages to the public entity providing such assistance, the conduct of the custodial parent in concealing the child from the other parent does not estop the public entity from seeking child support arrearages, or reimbursement for public assistance payments, from the noncustodial parent, regardless of whether the child is still a minor [*In re*

Marriage of Comer (1996) 14 Cal. 4th 504, 510, 515 n.4, 517, 528-529, 59 Cal. Rptr. 2d 155, 927 P.2d 265 (disapproving, to extent inconsistent, a group of appellate decisions set forth in footnote 4 of opinion; and specifically disapproving *In re Marriage of Smith (1989) 209 Cal. App. 3d 196, 257 Cal. Rptr. 47* , to extent inconsistent); *In re Marriage of Walters (1997) 59 Cal. App. 4th 998, 1004-1005, 70 Cal. Rptr. 2d 354* ; *see also* *In re Marriage of Vroenen (2001) 94 Cal. App. 4th 1176, 1181 n.1, 114 Cal. Rptr. 2d 860* (though custodial parent apparently received some public assistance, no government agency asserted right to arrearages; estoppel defense rejected when concealment ended during minority, and arrearages sought after children reached majority)].

The defense of estoppel is not otherwise available when concealment ends during a child's minority, regardless of when the custodial parent attempts to collect arrearages, but the defense of laches continues to be available when child support remains uncollected for many years after a child reaches the age of majority and when the adult child has no need of the funds [*In re Marriage of Vroenen (2001) 94 Cal. App. 4th 1176, 1181-1183, 114 Cal. Rptr. 2d 860]* .

Note, however, that at least one reported decision has estopped a county from obtaining reimbursement for unnecessary public assistance payments for children who were placed in foster care after their custodial parent--who had concealed the children for many years--was incarcerated, when the county *affirmatively misrepresented* to a juvenile dependency court that it did not know the whereabouts of the noncustodial father. The reviewing court cited *Comer's* recognition that, although mere governmental inaction or delay does not suffice for estoppel, an estoppel may exist when there is some affirmative misrepresentation or acts by a public agency or its representatives that induces reliance by the claimant. It also noted that *Comer* had indicated that evidence of a governmental dereliction of duty rebuts the statutory presumption that a governmental agency has properly performed its official duties by accepting one parent's application for public assistance and seeking to locate the other parent. Thus, in that narrow instance, the county was estopped from seeking a portion of the amount sought to be reimbursed [*County of Orange v. Carl D. (1999) 76 Cal. App. 4th 429, 439-441, 90 Cal. Rptr. 2d 440]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesEquitable EstoppelGeneral OverviewFamily LawChild CustodyInterferenceGeneral OverviewFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsEnforcementArrearage Judgments

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§ 259.15 Motion to Determine Arrearages

Often, in a support enforcement proceeding, the obligor contests the amount of arrearages claimed to be due to the obligee. Although there is no such thing as an independent action to determine arrearages, courts have sanctioned the use of a motion for the determination of arrearages as a way of bringing defenses before the court even if no actual enforcement proceeding is pending [*see County of Shasta v. Smith (1995) 38 Cal. App. 4th 329, 334, 45 Cal. Rptr. 2d 52* ; *see Fam. Code § 290* (general authority of court to make orders to enforce its judgments or orders); *see also Fam. Code § 17526* (judicial determination of arrearages in local support agency enforcement proceedings); *In re Marriage of Robinson (1998) 65 Cal. App. 4th 93, 76 Cal. Rptr. 2d 134]* . The motion is similar to one for a declaratory judgment or accounting unconnected with any specific enforcement of the support obligation by the obligee. It may be used whether the support order was issued in a independent proceeding brought between the individual parties or in a proceeding initiated by a public agency (district attorney or other successor local child support agency) [*County of Shasta v. Smith (1995) 38 Cal. App. 4th 329, 334, 45 Cal. Rptr. 2d 52]* .

The motion is brought as a postjudgment motion in the proceeding in which the child support order was issued. If the order was issued in an independent, the notice provisions of *Fam. Code § 215* are triggered, and notice must be given to all parties to the proceeding. If the order was issued in a proceeding initiated by a district attorney or other local child support agency, then the parties entitled to notice are determined under those provisions [*County of Shasta v. Smith (1995) 38 Cal. App. 4th 329, 334-336, 45 Cal. Rptr. 2d 52* (notice to obligee parent not required in support proceeding brought by district attorney)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementArrearage JudgmentsFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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§ 259.16 Interest Accrued on Support Arrearages

A defaulting parent is required to pay interest on support arrearages as a matter of law [*County of Los Angeles v. Salas (1995) 38 Cal. App. 4th 510, 513, 45 Cal. Rptr. 2d 61* ; *see Cal. Const. art XV, § 1*]. A trial court has no authority to eliminate or waive interest that has accrued on an unpaid child support obligation [*In re Marriage of Perez (1995) 35 Cal. App. 4th 77, 81, 41 Cal. Rptr. 2d 377]* . The lawful interest rate is specified by statute [*see Code Civ. Proc. § 685.010* (currently 10 percent)].

In general, interest commences to accrue on a money judgment on the date of entry of the judgment [*Code Civ. Proc. § 685.020(a)*]. However, unless the judgment provides otherwise, interest on a judgment payable in installments accrues as to each installment when the installment becomes due [*Code Civ. Proc. § 685.020(b)*]. Therefore, unless the judgment specifies otherwise, interest does not accrue on a judgment payable in installments until the obligor defaults on a payment [*County of Alameda v. Weatherford (1995) 36 Cal. App. 4th 666, 670-671, 42 Cal. Rptr. 2d 386* (involving judgment for reimbursement of public benefits under former *Welf. & Inst. Code § 11350*; *now see Fam. Code § 17402*); *see Dupont v. Dupont (2001) 88 Cal. App. 4th 192, 198-199, 105 Cal. Rptr. 2d 607* (term "installment judgment" applies to any child support order payable in installments); *see also United States v. Gill (9th Cir. 2001) 264 F.3d 929, 931-932* ("support obligation" under federal Child Support Recovery Act, *18 U.S.C. § 228*, includes interest on accrued delinquent installments)].

For purposes of *Code Civ. Proc. § 685.020*, only the initial support order, whether temporary or final, and whether or not the order is contained in a judgment, may be considered an installment judgment [*Fam. Code § 155*]. No support order or other order or notice issued, that sets forth the amount of support owned for prior time periods or establishes a periodic payment to liquidate the support order for prior periods, may be considered a money judgment for purposes of *Code Civ. Proc. § 685.020(b)* [*Fam. Code § 155*].

Effective until January 1, 2009, partial payment of an interest-bearing child support obligation must be applied first to the current month's support, and then to reduce the interest accrued; any remaining amount is credited to reduce principal [*Code Civ. Proc. § 695.221*, operative until January 1, 2009]. Effective January 1, 2009, partial payment of an interest-bearing child support obligation must be first credited against the current month's support, then to reduce

principal; any remaining amount is credited against accrued interest [*Code Civ. Proc. § 695.221*, operative January 1, 2009]. Any unpaid principal remaining continues to accrue interest [*Code Civ. Proc. § 685.010(a)*].

Code Civ. Proc. § 695.211 requires that every child support judgment or order provide notice that interest on arrearages accrues at the legal rate. This requirement was added by 1994 legislation, effective September 28, 1994 [*see* Stats 1994, ch. 959. § 1]. It has been held that the statute is not to be applied retroactively [*County of Los Angeles v. Salas (1995) 38 Cal. App. 4th 510, 515 n.1, 45 Cal. Rptr. 2d 61]* . Further, due process does not require that such a notice be given. Therefore, child support orders made before September 28, 1994 are not invalid by reason of omission of notice to the obligor that interest will accrue on arrearages [*County of Los Angeles v. Salas (1995) 38 Cal. App. 4th 510, 514-516, 45 Cal. Rptr. 2d 61* ; *see* *Glenn v. Rice (1917) 174 Cal. 269, 276, 162 P. 1020]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewFamily LawChild SupportObligationsEnforcementArrearage JudgmentsFamily LawChild SupportProcedures

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§ 259.17 Property Available to Enforce Child Support Obligation

By statute, the parents' community, quasi-community, and separate property may be subjected, in the proportions the court deems just, to the support of their children [*Fam. Code § 4008*]. It is not clear from the statute whether it simply states a rule as to what property may be levied on by a creditor or obligee to enforce an existing unpaid obligation, or whether it states a rule as to what property may be considered in setting the amount of child support. To the extent that it purports to do the latter, it is probably superseded by *Fam. Code § 4050 et seq.*, the statewide uniform child support guidelines. For further discussion, see Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., vol. 2, ch. 41 (Matthew Bender).

For discussion of rules regarding characterization of property, see Kirkland, Lurvey, and California Family Law Practice and Procedure, 2d ed., vol. 1, chs. 20, 21 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Duties & RightsProperty RightsCharacterizationSeparate Property

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§ 259.18 Property Available to Enforce Spousal Support Obligation

In the enforcement of an order for spousal support, *Fam. Code § 4338* requires the court to resort to the property described below in the order indicated:

> (1) The earnings, income, or accumulations of either spouse while living separate and apart from the other spouse that would have been community property if the spouse had not been living separate and apart from the other spouse;
>
> (2) The community property;
>
> (3) The quasi-community property; and
>
> (4) The other separate property of the party required to make support payments.

One effect of this statute is that the supporting spouse cannot claim that he or she is making support payments out of community property if there are adequate earnings after separation from which the payments can be made, and therefore cannot claim credit for the payments in the division of community property [*In re Marriage of Tammen (1976) 63 Cal. App. 3d 927, 932-933, 134 Cal. Rptr. 161* (construing substantially similar provisions of former *Civ. Code § 4805*)].

For discussion of rules regarding characterization of property, see Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., vol. 1, chs. 20, 21 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Duties & RightsProperty

RightsCharacterizationSeparate Property

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§ 259.19 Property of Subsequent Marriage

For purposes of determining what property is liable for support, a child or spousal support obligation of a married person that arises from a prior marriage is treated as a premarital debt, regardless of whether a court order for support is made or modified before or during the subsequent marriage and regardless of whether any installment payment on the obligation accrues before or during the subsequent marriage [*see Fam. Code § 915(a)*]. The separate property of the obligor is liable for a debt incurred before or during marriage [*Fam. Code § 913(a)*], but the separate property of the obligor's subsequent spouse is generally not liable [*see Fam. Code § 913(b)*].

The community property of the subsequent marriage is liable for either spouse's premarital support debts, subject to a right of reimbursement [*see Fam. Code § 915(b)*; Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., vol. 1, ch. 23 (Matthew Bender)]. This is true regardless of which spouse has the management and control of the community property and regardless of whether one or both spouses are parties to a debt or judgment for the debt [*see Fam. Code § 910(a)*].

However, the subsequent spouse's earnings during marriage are not liable for the obligor spouse's premarital support debts as long as the earnings are held in a deposit account in which the obligated spouse has no right of withdrawal and are not commingled with other community property, except property insignificant in amount [*see Fam. Code § 911(a)*; *In re Marriage of Barnes (1978) 83 Cal. App. 3d 143, 149, 147 Cal. Rptr. 710* ; *see also In re Marriage of Smaltz (1978) 82 Cal. App. 3d 568, 570, 147 Cal. Rptr. 154* (dictum that noncommingled earnings are not liable for other spouse's spousal support to former spouse); *Wightman v. Franchise Tax Board (1988) 202 Cal. App. 3d 966, 970 n.4, 249 Cal. Rptr. 207]* .

For further discussion of liability for and division of debts of married persons, see Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., Vol. 4, Ch. 23 (Matthew Bender).

Fam. Code § 915 does not limit the matters a court may take into consideration in determining or modifying the amount of a support order, including, but not limited to, the earnings of the spouses of the parties [*Fam. Code § 915(c)*]. For discussion of the effect of a subsequent spouse's income on a parent's child support obligation, see Kirkland,

Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., vol. 2, ch. 41 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Duties & RightsProperty RightsCharacterizationSeparate PropertyFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral Overview

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§ 259.20 Liability of Parent's Estate

A parent's child support obligation that is fixed by a court decree or a property settlement agreement does not cease on the parent's death; it survives as a charge against his or her estate [*Taylor v. George (1949) 34 Cal. 2d 552, 556, 212 P.2d 505* ; *In re Marriage of Bertrand (1995) 33 Cal. App. 4th 437, 439-441, 39 Cal. Rptr. 2d 151]* . The proper procedure to obtain support payments from the parent's estate is to make a creditor's claim for the payments [*see Prob. Code § 9000 et seq.*; *Thomas v. Hobart (1969) 274 Cal. App. 2d 139, 141-142, 78 Cal. Rptr. 844]* . For discussion of creditors' claims against a decedent's estate, see California Probate Practice, ch. 12 (Matthew Bender).

If there is no support order or agreement, the estate of a parent is not liable for the support of a minor child [*Jacobs v. Gerecht (1970) 6 Cal. App. 3d 808, 811-813, 86 Cal. Rptr. 217]* , but the child may apply for a family allowance from the estate during the administration of the estate [*see Prob. Code § 6540(a)*; *Estate of Goulart (1963) 218 Cal. App. 2d 260, 263-266, 32 Cal. Rptr. 229]* . For discussion of family allowances, see California Probate Practice, ch. 8 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewFamily LawChild SupportObligationsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Duties & RightsProperty RightsCharacterizationSeparate Property

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[Reserved]

§§ 259.21[Reserved]

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22-259 California Forms of Pleading and Practice--Annotated § 259.30

§ 259.30 Earnings Withholding (Garnishment) Order

[1] Overview of Procedure

Using the earnings withholding procedure of the Code of Civil Procedure (also known as a wage garnishment), a judgment creditor may enforce a money judgment against the unpaid earnings of the judgment debtor. This procedure is comparable to an earnings assignment order under the Family Code [*see Fam. Code § 5230*; *see also* discussion at *[2], below*, and *§ 259.50 et seq.*].

Under the earnings withholding (wage garnishment) procedure, the court clerk issues an order pursuant to a writ of execution [*Code Civ. Proc. § 706.030(a)*]. The order is served on the employer by the levying officer [*Code Civ. Proc. § 706.021*]. The employer then withholds the employee's earnings and pays them to the levying officer, who in turn pays them to the person entitled to them [*Code Civ. Proc. §§ 706.022, 706.025, 706.026*]. For further discussion of procedure, see *§ 259.37* .

The earnings of an employee may not be required to be withheld by an employer for payment of a debt by means of any judicial procedure other than pursuant to the Wage Garnishment Law (*Code Civ. Proc. §§ 706.010-706.154*), with the exception of an earnings assignment order for support [*Code Civ. Proc. § 706.020*; *Code Civ. Proc. § 706.011(b)*; *see also [2], below*, and *§ 259.50 et seq.*].

[2] Compared to Earnings Assignment Order

The "earnings withholding" (wage garnishment) method should be distinguished from an "earnings assignment," which is a procedure under the Family Code used to secure on-going support [*see Fam. Code § 5200 et seq.*; for discussion of earnings assignment, *see also § 259.50* et seq.]. (Prior to January 1, 1994, an "earnings assignment" was known as a "wage assignment" [*see* former *Civ. Code §§ 4390(a), 4390.3(a)*].) The earnings withholding (garnishment) method allows a spouse to collect only past-due support [*see Code Civ. Proc. § 706.030(a)*], whereas the earnings assignment procedure creates an ongoing lien against the judgment debtor's salary and permits the judgment creditor to collect support payments as they become due, as well as those that are past due [*see Fam. Code § 5230(a)*]. Thus, the earnings assignment procedure may be preferable to ensure that ongoing support will be paid.

However, earnings withholding (wage garnishment) may be used to enforce other family law related judgments for money, such as an equalizing payment for a division of community property [*see Fam. Code § 2550*; for discussion of garnishment to enforce nonsupport judgments, *see also* Ch. 276, *Garnishment*]. Earnings withholding (wage garnishment) may also be appropriate if only arrearages are due.

An earnings withholding order may not be issued against the earnings of the judgment debtor's spouse except by court order on noticed motion [*Code Civ. Proc. § 706.109*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGarnishmentsFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGarnishments

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22-259 California Forms of Pleading and Practice--Annotated § 259.31

§ 259.31 "Earnings Withholding Order for Support" Defined; Other Definitions

If the garnishment order is to collect delinquent support, it is called a "withholding order for support" [*Code Civ. Proc. § 706.030(a)*]. A withholding order for support is statutorily defined as an earnings withholding order issued on a writ of execution to collect delinquent amounts payable under a judgment for the support of a child, spouse, or former spouse of the judgment debtor [*Code Civ. Proc. § 706.030(a)*]. A withholding order for support must be denoted as such on its face [*Code Civ. Proc. § 706.030(a)*].

"Earnings" are defined as compensation payable by an employer to an employee for personal services performed by that employee, whether denominated as wages, salary, commission, bonus, or otherwise [*Code Civ. Proc. § 706.011(a)*]. Additional definitions for purposes of the Wage Garnishment Law are set forth by statute [*see Code Civ. Proc. § 706.011* (defining "earnings," "employee," "employer," "judgment creditor," "judgment debtor," "person," and "earnings assignment order for support")].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGarnishmentsFamily LawChild SupportObligationsEnforcementIncome WithholdingFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGarnishments

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§ 259.32 Earnings Subject to Withholding

[1] Federal Limitations

Under federal law, if the order sought to be enforced is *not* a support order, a judgment debtor's maximum aggregate earnings subject to withholding may not exceed whichever is the less of (1) 25 percent of disposable earnings for that week, or (2) the amount by which the judgment debtor's earnings for that week exceed 30 times the federal minimum hourly wage as prescribed by *29 U.S.C. § 206(a)(1)* [*15 U.S.C. § 1673(a)*; *see 15 U.S.C. § 1672(b)* (defining disposable earnings)].

In the case of an earnings withholding order for support, under federal law, when the debtor is not supporting a new spouse or dependent children (other than the spouse or children supported by the order to be enforced), the maximum amount of the judgment debtor's disposable earnings for any work week that is subject to garnishment must not exceed 60 percent. When the judgment debtor is supporting a new spouse or another dependent child, the maximum amount subject to garnishment is 50 percent. These amounts increase to 65 percent and 55 percent, respectively, if the order is to enforce arrearages that are more than 12 weeks past due [*see 15 U.S.C. § 1673(b)(2)*; *In re Marriage of Williams (1985) 163 Cal. App. 3d 753, 767, 209 Cal. Rptr. 827]* .

[2] State Limitations

[a] In General

State law permits limited execution on a judgment debtor's disposable earnings when using the earnings withholding procedure [*see Code Civ. Proc. §§ 706.050-706.052*]. Except as otherwise provided in the Wage Garnishment Law, the amount of earnings exempt from an earnings withholding order is the amount that may not be withheld from the judgment debtor's earnings under *15 U.S.C. § 1673(a)* (the lesser of 25 percent of disposable earnings or the amount judgment debtor's weekly earnings exceed 30 times federal minimum hourly wage) [*Code Civ. Proc. § 706.050*; *see* discussion under *[1], above*].

A withholding order for support may never exceed the amount that may be withheld for support under federal law

pursuant to *15 U.S.C. § 1673* [*Code Civ. Proc. § 706.052(c)*; *see In re Marriage of Williams (1985) 163 Cal. App. 3d 753, 767, 209 Cal. Rptr. 827]* .

Except as provided in *Code Civ. Proc. § 706.052(b)* (discussed under *[c], below*), when the earnings withholding order is for support, one half of the disposable earnings, as defined by *15 U.S.C. § 1672*, plus any amount withheld from the judgment debtor's earnings pursuant to an earnings assignment order for support (*see § 259.50* et seq.), is exempt from levy under the Wage Garnishment Law [*Code Civ. Proc. § 706.052(a)*].

[b] Exempt Earnings

The portion of the judgment debtor's earnings that the judgment debtor proves is necessary for his or her support or for the support of his or her family supported in whole or in part by the judgment debtor (including a spouse or former spouse) is exempt from levy under the Wage Garnishment Law unless (1) the debt was incurred for the common necessaries of life furnished to the judgment debtor or his or her family; (2) the debt was incurred for personal services rendered by an employee or former employee of the judgment debtor; (3) the order is a withholding order for support under *Code Civ. Proc. § 706.030*; or *(4)* the order is one governed by *Code Civ. Proc. §§ 706.070-706.084* (withholding order for taxes) [*Code Civ. Proc. § 706.051(b),(c)*].

[c] Equitable Division of Earnings for Support

On motion of an interested party, the court must make an equitable division of the judgment debtor's earnings that takes into account the needs of all the persons the judgment debtor is required to support and shall effectuate the division by an order determining the amount to be withheld from his or her earnings pursuant to the withholding order for support. However, the court may not order the withholding of an amount in excess of that allowable under *15 U.S.C. § 1673* (*see* discussion under *[1], above*) [*Code Civ. Proc. § 706.052(b),(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesGarnishmentsFamily LawChild SupportObligationsEnforcementGarnishmentsFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGarnishmentsLabor & Employment LawWage & Hour LawsAssignments, Deductions & Garnishments

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§ 259.33 Priority of Earnings Assignment for Support

Notwithstanding any other provision of the Wage Garnishment Law (*Code Civ. Proc. §§ 706.010-706.154*), a withholding order for support has priority over any other earnings withholding order [*Code Civ. Proc. § 706.030(c)(2)*]. It does not, however, have priority over an earnings assignment order for support [*see Code Civ. Proc. § 706.031(b)*; *Fam. Code § 5200 et seq.*; *see also § 259.50* et seq.]. For further provisions regarding the employer's obligations when more than one earnings withholding order and/or earnings assignment order for support is served, see *Code Civ. Proc. §§ 706.030-706.031*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 259.34 Orders Issued by Other States or Counties

Two statutes enacted in 1997 (and operative January 1, 1998) make reference, respectively, to "withholding orders" issued out-of-state, and orders made out of the local county, and may be applicable to the wage garnishment provisions set forth in the preceding discussion, although their true import is presently unclear. Under one statute, an "earnings assignment or income withholding order for support" issued by a court or administrative agency of another state is binding on an employer of the obligor to the same extent as an earnings assignment order made by a California court. Because an "income withholding order" is defined (at least for interstate enforcement purposes) as not only an earnings assignment order for support, but also "any other order or other legal process directed to an obligor's employer, or other debtor, to withhold from the income of the obligor an amount owed for support," this section might be construed as coming within the ambit of wage garnishment statutes [*Fam. Code §§ 4901(f), 5230.1*].

Under the other section, a local child support agency or obligee may register "an order for support or earnings withholding, or both" obtained in another county of the state, by following the procedures set forth in *Fam. Code § 5600 et seq.* [*See Fam. Code § 5600(a)*].

For further discussion of these statutes, see *§§ 259.70* and *259.159, below* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsCivil ProcedureRemediesProvisional RemediesGarnishmentsFamily LawChild SupportObligationsEnforcementGarnishmentsFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGarnishments

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22-259 California Forms of Pleading and Practice--Annotated § 259.35

§ 259.35 Earnings Due and Payable

The earnings that the judgment creditor seeks to garnish must be actually due and payable to the judgment debtor when the garnishment is sought. A judgment creditor may not acquire any greater right in the property than the judgment debtor has at the time of the garnishment. Thus, an order for earnings withholding may not contemplate future garnishment of yet uncertain earnings, such as pension benefits that have not been paid to a debtor spouse [*In re Marriage of Williams (1985) 163 Cal. App. 3d 753, 763, 209 Cal. Rptr. 827]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsCivil ProcedureRemediesProvisional RemediesGarnishmentsFamily LawChild SupportObligationsEnforcementGarnishmentsFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGarnishments

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22-259 California Forms of Pleading and Practice--Annotated § 259.36

§ 259.36 Pension Benefits

As discussed in *§ 259.32, above*, state and federal law permit only limited execution on a debtor-spouse's "disposable earnings" [*see Code Civ. Proc. § 706.052(c)*; *15 U.S.C. § 1673*]. The term "earnings" under federal law includes periodic payments incident to a pension or retirement program [*15 U.S.C. § 1672(a)*] as long as the benefits are actually due and owing to the employee spouse [*In re Marriage of Williams (1985) 163 Cal. App. 3d 753, 763, 209 Cal. Rptr. 827]* .

In addition, benefits paid to a judgment debtor incident to a pension benefit plan governed by the Employment Retirement and Income Security Act (ERISA) may be garnished under state law without violating the antialienation (spendthrift) and preemption provisions of ERISA [*see 29 U.S.C. §§ 1056(d)(1)* (spendthrift provision), *1144(a)* (preemption provision)] so long as the order for support is in the form of a qualified domestic relations order (QDRO) under the Retirement Equity Act of 1984 [*see 29 U.S.C. § 1056(d)(3)*; *see also* *Marshall v. Marshall (1995) 36 Cal. App. 4th 1170, 1175-1176, 43 Cal. Rptr. 2d 38* (garnishment of ERISA benefits not permitted to enforce collateral orders--i.e., orders not related to subjects to which QDRO exception to antialienation provisions relate; child or spousal support, or marital property rights-thus, garnishment by QDRO was not permitted to enforce *tax liability* assumed by spouse); *In re Marriage of Williams (1985) 163 Cal. App. 3d 753, 760-761, 209 Cal. Rptr. 827]* , or be otherwise exempted from the requirements [*see* Retirement Equity Act of 1984, Pub. L. No. 98-397, § 303(d) (plan administrators required to treat orders as QDROs if benefits were being paid pursuant to order before January 1, 1985, but are *permitted* to treat other orders as QDROs even if they did not otherwise meet current QDRO requirements); *In re Marriage of Williams (1985) 163 Cal. App. 3d 753, 765-766, 209 Cal. Rptr. 827]* .

For a complete discussion of ERISA preemption, the Retirement Equity Act of 1984, and the requirements for QDROs, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* . For a Judicial Council form of QDRO for support (cast as an earnings assignment order for support), see *§ 259.206*.

Legal Topics:

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

Family LawChild SupportObligationsEnforcementGarnishmentsFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGarnishmentsPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)Participation & VestingAlienation & Assignment of BenefitsPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)Participation & VestingQualified Domestic Relations Orders

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§ 259.37 Procedure to Obtain Earnings Withholding Order

[1] Application and Order

The creditor spouse must first apply for, and have the clerk issue, a writ of execution for the amount of past-due support [*see Code Civ. Proc. §§ 699.010-701.830*]. The creditor must then complete the mandatory Judicial Council form of the Application for Earnings Withholding Order [Cal. Judicial Council Form 982.5(1); *see § 259.190*]. The application shall be executed under oath. Its contents are specified by statute [*see Code Civ. Proc. § 706.121*]. The judgment creditor must file it and the writ of execution with the levying officer (who is either the sheriff or marshall) or with a registered process server [*see Code Civ. Proc. §§ 680.260, 680.330*; *see also Code Civ. Proc. §§ 706.102, 706.108*]. The levying officer or registered process server will then issue an earnings withholding order [*Code Civ. Proc. §§ 706.102(a), 706.108(a)*]. If a registered process server issues the order, he or she must, before service on the employer (*see* discussion at [3], *below*), deposit with the levying officer a copy of the writ of execution, the application for issuance of the earnings withholding order, and the order, and must also pay the fee provided in *Gov. Code § 26750* [*Code Civ. Proc. § 706.108(b)*]. Note that a district attorney or other local child support agency may issue a withholding order for support on a notice of levy pursuant to *Fam. Code § 17522* and in such cases, the enforcing agency is deemed to be the levying officer and must follow the procedures for service of the order and administrative review set forth by statute [*see Code Civ. Proc. § 706.030(b)*].

[2] Time for Application for Earnings Withholding Order

Except as otherwise provided by statute, a judgment creditor may enforce a money judgment at any time within 10 years after the judgment was entered or renewed [*see Code Civ. Proc. §§ 683.010-683.220*]. However, child, family, or spousal support arrearages may be enforced through the earnings withholding procedure by a writ of execution or a notice of levy under *Code Civ. Proc. § 706.030* or *Fam. Code § 17522* without prior court approval as long as the support order is enforceable [*see Fam. Code §§ 5100, 5101*].

The judgment creditor must first obtain a writ of execution [*see Code Civ. Proc. §§ 699.010-701.830*]. An application for an earnings withholding order must be made prior to expiration of 180 days from the date the writ of execution was issued [*see Code Civ. Proc. §§ 699.530(b), 706.102(a), 706.108(a)*]. Time limitations governing subsequent earnings

withholding orders are also set forth by statute [*see Code Civ. Proc. § 706.105(h), (k)* (application)].

[3] Service of Order

The levying officer or the process server must serve the earnings withholding order, the form for the employer's return, the notice to employee of earnings withholding, and a copy of the employer's instructions on the judgment debtor's employer within 180 days from the date the writ was issued [*see Code Civ. Proc. §§ 699.530, 706.101, 706.103, 706.108(c), 706.127*]. If service is made by a registered process server, within five court days after service the writ of execution, proof of service on the employer, and written instructions to the employer under *Code Civ. Proc. § 687.010* must be served on the levying officer [*see Code Civ. Proc. § 706.108(d)*].

[4] Employer's Duties

The employer has 10 days to give the judgment debtor notice of the order and of the earnings withholding, unless the debtor is no longer employed by the employer and the employer does not owe him or her any earnings. An employer failing to comply with these notice requirements will not be subject to civil liability, but may be held in contempt [*see Code Civ. Proc. § 706.104(a)*]. The employer must also complete and send the employer's return to the levying officer within 15 days after service. If the earnings withholding order is ineffective, the employer must so state in the return and must send the order with the return to the levying officer [*see Code Civ. Proc. § 706.104(b)*]. The employer must begin withholding the employee's earnings within 10 days after service of the order [*see Code Civ. Proc. § 706.022(a)*]. After withholding the earnings, the employer must pay the withheld sums to the levying officer at least monthly and not later than the 15th day of the month [*see Code Civ. Proc. § 706.025*]. The levying officer must account for all amounts received and pay them to the judgment creditor at least once every 30 days [*see Code Civ. Proc. § 706.026*]. Once the State Disbursement Unit described in *Fam. Code § 17309* is operational, all support payments made pursuant to an earnings withholding order must be made to that unit [*Code Civ. Proc. § 706.030(c)(6)*].

The employer must continue to withhold the earnings until the earliest of the following [*Code Civ. Proc. §§ 706.030(c)(1), 706.022(a)(1)-(3)*]: (1) the date the employer has withheld the full amount required to satisfy the order, (2) the date of termination specified in a court order served on the employer, or (3) the date of termination specified in a notice of termination served on the employer by the levying officer. An employer who willfully fails to withhold and forward support pursuant to a valid earnings withholding order for support that has been issued and served on the employer is liable to the support obligee for the amount of support not withheld, forwarded, or otherwise paid to the support obligee [*Code Civ. Proc. § 706.030(c)(4)*]. In addition, in cases in which a district attorney or other local child support agency has issued a withholding order for support, the employer has additional duties, the failure to comply with which will subject the employer to a civil penalty [*Code Civ. Proc. § 706.030(b)(3), (4)*].

Additionally, in *Code Civ. Proc. § 706.030(b)(3), (4)*, some instances, an employer may be subject to criminal penalties, contempt, or civil liability, for failure to comply with an earnings withholding order [*see Code Civ. Proc. §§ 706.104(a), 706.152-706.154*; *but see Code Civ. Proc. § 706.022(c)* (no liability in certain circumstances)].

For further discussion of instructions for employers, see the "Employer's Instructions" on the reverse of the Judicial Council form of Earnings Withholding Order for Support [*see § 259.191*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionFamily LawChild SupportObligationsEnforcementIncome WithholdingFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral Overview

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§ 259.38 Debtor's Response to Withholding Order

Unless the earnings withholding order is for support, a judgment debtor may claim an exemption under *Code Civ. Proc. § 706.051* (exemption for earnings necessary for family support) if no prior hearing has been held with respect to the earnings withholding order, or if there has been a material change in circumstances since the time of the last prior hearing on the earnings withholding order [*Code Civ. Proc. § 706.105(a)*; *see Code Civ. Proc. § 706.105(k)*]. The procedure for filing the claim is set forth in *Code Civ. Proc. § 706.105(b),(c)*.

If the earnings withholding order is for support and places an undue burden on the judgment debtor, he or she may move for an equitable division of earnings, which takes into account the needs of all the persons the judgment debtor is required to support [*Code Civ. Proc. § 706.052(b)*]. For discussion of this division, see *§ 259.32*.

The judgment debtor may also move to quash or recall the underlying writ on which the earnings withholding order was issued on the grounds that the amount due from the judgment debtor is falsely represented in the application, that the amount sought to be recovered has already been paid, or when the writ was issued by the clerk without authorization from the court [*see Jackson v. Jackson (1975) 51 Cal. App. 3d 363, 368, 124 Cal. Rptr. 101* ; *see also* Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* , regarding motions to recall or quash writs of execution].

In cases brought by a local child support agency, the judgment debtor (support obligor) must also be afforded administrative review, as set forth by statute, to reconsider or modify the amount to be withheld for arrearages. This right to administrative review, however, does not preclude the judgment debtor from seeking either a judicial determination of arrearages or the equitable division of earnings mentioned above, either before or after the administrative review [*Code Civ. Proc. § 706.030(b)(5), (6)*].

For further discussion, procedural checklists, and forms for use in obtaining an earnings withholding order, see Ch. 276, *Garnishment* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionFamily LawChild SupportObligationsEnforcementIncome WithholdingFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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[Reserved]

§§ 259.39[Reserved]

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§ 259.50 Governing Law

Earnings assignments to secure payment of child, spousal, and family support are governed by *Fam. Code §§ 5200-5295*. The priority of earnings assignments for support is governed by *Code Civ. Proc. § 706.031*. Assignment of public benefits is governed by *Code Civ. Proc. §§ 704.110* and *704.114*, and federal limits on earnings assignments are set by *15 U.S.C. § 1673*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementIncome WithholdingFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewLabor & Employment LawWage & Hour LawsAssignments, Deductions & Garnishments

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§ 259.51 Earnings Assignment Defined and Contrasted With Garnishment

An earnings assignment is a statutory procedure by which a portion of an obligor's earnings is ordered to be paid by the obligor's employer directly to the obligee to satisfy a support obligation [*see Fam. Code § 5208, 5230*]. Prior to January 1, 1994, an "earnings assignment" was known as a "wage assignment" [*see* former *Civ. Code §§ 4390(a), 4390.3(a)*]. Unlike an earnings *withholding* order (garnishment), which intercepts earnings only to collect delinquent support, an earnings *assignment* operates both to collect arrearages and to divert earnings for the payment of support prospectively [*see In re Marriage of Stutz (1981) 126 Cal. App. 3d 1038, 1040-1041, 179 Cal. Rptr. 312* ; *see also Code Civ. Proc. § 706.030(a)* (definition of "earnings withholding order for support")]. For discussion of earnings withholding orders, see *§ 259.30* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGarnishmentsFamily LawChild SupportObligationsEnforcementIncome WithholdingFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGarnishments

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§ 259.52 Federal Limitations on Amount of Earnings Assignment

Federal law limits the amount of an individual's earnings that may be subjected to "garnishment" [*15 U.S.C. § 1673(b)*]. An order for the support of any person, including an earnings assignment order, is a garnishment within the definition of the federal limitation [*Marshall v. Dist. Ct. forForty-First-b Jud. Dist. (E.D. Mich. 1978) 444 F. Supp. 1110, 1116* (child support); *see 15 U.S.C. § 1672(c)*].

The amount of the support order is limited by federal law to 60 percent of the obligor's disposable earnings for any workweek subject to the earnings assignment order or, if the obligor is supporting a spouse or dependent child other than the spouse or child who is the subject of the support order, to 50 percent of the indebted parent's disposable earnings. If, and to the extent that, the earnings assignment order is enforcing a support order with respect to a period prior to the 12-week period ending with the beginning of the workweek, the maximum amount of disposable earnings for the week subject to the earnings assignment order is increased to 65 or 55 percent, respectively [*15 U.S.C. § 1673(b)(2)*].

For additional discussion of federal limitations on the permissible amount of earnings withholdings, see Ch. 276, *Garnishment* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 259.53 Mandatory Earnings Assignment Order to Enforce Child and Spousal Support

When the court orders a party to pay support, the court must include in its order an earnings assignment that orders the employer of the obligor to pay to the obligee the portion of the obligor's earnings due or to become due in the future as will be sufficient to pay the ordered support [*Fam. Code § 5230(a)(1)*]. The order also must include an amount to be paid toward the liquidation of any arrearage [*Fam. Code § 5230(a)(2)*]. The court must include an earnings assignment order in any order establishing or modifying support [*Fam. Code § 5230(a)*]. This requirement applies to child, spousal, and family support obligations [*see Fam. Code § 150*]. It also applies to a county's action under *Fam. Code § 17402* to recover public assistance benefits paid (see *§ 259.150* et seq.) and to past-due support and arrearages [*Fam. Code § 150*]. For a mandatory form of earnings assignment order for child or family support (the "Order/Notice to Withhold Income for Child Support" form), see § 259.363 [*See Fam. Code § 5208(b)*]. For a form of qualified domestic relations order (QDRO) for support that is cast as an earnings assignment order, see *§ 259.206*.

The assignment extends to earnings that are due to the obligor or that are to become due in the future [*see Fam. Code § 5208*]. Earnings that are subject to an earnings assignment include the following [*Fam. Code § 5206*]:

1. Wages, salary, bonuses, money, public and private retirement benefits and public employee vacation credits [*see Code Civ. Proc. §§ 704.110, 704.113, 704.115*, discussed in *§§ 259.68* and *259.69*];

2. Payments due for services of independent contractors, interest, dividends, rents, royalties, residuals, patent rights, or mineral or other natural resource rights;

3. Payments of credits due or becoming due as a result of written or oral contracts for services or sales, whether denominated as wages, salary, commission, bonus, or otherwise;

4. Payments due for workers' compensation temporary disability benefits [*Marriage of Johnson-Wilkes & Wilkes (1996) 48 Cal. App. 4th 1569, 1576, 56 Cal. Rptr. 2d 323]* ;

5. Payments due as a result of disability from benefits payable under a disability or health insurance

policy or program; and

6. Any other payments or credits due or becoming due regardless of source.

For the mandatory Judicial Council form of a wage and earnings assignment order for spousal support, see *§ 259.202*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementIncome WithholdingFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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§ 259.54 Service on Employer and Employer's Notice to Obligor

On issuance by the court, an earnings assignment order must be served on the obligor's employer. Service may be by first-class mail [*Fam. Code § 5232*; *see Code Civ. Proc. § 1013* (service by mail)]. An employer is any person for whom the obligor performs services as an employee as defined in *Code Civ. Proc. § 706.011*, and includes the United States government, any public entity as defined in *Gov. Code § 811.2*, and any person or entity paying earnings as defined in *Fam. Code § 5206* [*Fam. Code § 5210*; *see 42 U.S.C. § 659(a)* (making remuneration for federal employment subject to legal process for enforcement of support obligations); *see also § 259.53*, for discussion of definition of "earnings"]. Service of the order creates a lien on the earnings of the employee and the property of the employer to the same extent as does an earnings withholding order (garnishment) [*Fam. Code § 5242*; *see Code Civ. Proc. § 706.029*; *see also § 259.30* et seq. for discussion of earnings withholding orders].

Within 10 days after service of the earnings assignment order or an order/notice to withhold income for child support, the employer must deliver a copy of the order to the obligor, together with a written statement of the obligor's rights under the law to seek to quash, modify, or stay service of the earnings assignment order, and a blank form that the obligor may file with the court to request a hearing to quash, modify, or stay service of the order (with instructions on how to file the form and obtain a hearing date). [*Fam. Code § 5234* (also providing for Judicial Council development of necessary forms); *see § 259.58*]. The statement of rights is included as part of the Judicial Council form for an earnings assignment order [*see* Cal. Judicial Council Form 1285.70; *§ 259.202*]. The order is effective on compliance with these procedures unless service is stayed by the court [*Fam. Code § 5231*; *see § 259.55*, *below*]. The employer must commence withholding under the order from all earnings of the obligor payable for any pay period that ends after the assignment becomes effective [*Fam. Code § 5233*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessGeneral OverviewFamily LawChild SupportObligationsEnforcementIncome WithholdingFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewFamily LawMarital Termination &

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§ 259.55 Stay of Service of Earnings Assignment Order

[1] In General

The court may order that service of the earnings assignment be stayed if the court makes a finding of good cause or when the parties make an alternative arrangement for payment pursuant to *Fam. Code § 5260(b)(2)* [*Fam. Code § 5260(a)*].

Good cause for staying a wage assignment exists only when all of the following conditions exist [*Fam. Code § 5260(b)(1)*]:

- The court provides a written explanation of why the stay would be in the best interests of the child;

- The obligor has a history of uninterrupted, full, and timely payment, other than through a wage assignment or other mandatory process, of previously ordered support during the previous 12 months. "Timely payment" means receipt of support payments within five days of the due date [*Fam. Code § 5220*]. "Due date" of support payments is the date specified in the order for payment or, if none is specified, the last day of the month in which support is to be paid [*Fam. Code § 5204*];

- The obligor does not owe an arrearage for prior support;

- The obligor proves, and the court finds, by clear and convincing evidence that service of the wage assignment would cause extraordinary hardship on the obligor.

Whenever possible, the court must specify a date when a stay ordered due to hardship will automatically terminate.

An alternative arrangement for staying a wage assignment order requires a written agreement between the parties that provides for payment of the support obligation as ordered other than through the immediate service of a wage assignment [*Fam. Code § 5260(b)(2)*]. An agreement between the parties for staying of service of a wage assignment

must include the concurrence of the local child support agency when support is ordered to be paid through a designated county officer [*Fam. Code § 5260(b)(2)*]. Execution of an agreement for an alternative arrangement does not preclude a party from thereafter seeking a wage assignment on violation of the agreement [*Fam. Code § 5260(b)(2)*].

Service of wage assignments issued for foreign orders may not be stayed under any condition [*Fam. Code § 5260(a)*; *see Fam. Code § 4900 et seq.* (UIFSA)].

For the Judicial Council form for an obligor's application for a stay of service of the earnings assignment order, see *§ 259.204*.

[2] Termination of Stay

If service of the earnings assignment order is stayed for good cause and the obligor falls in arrears in payment of any portion of the support, the obligee should sign and file a declaration under penalty of perjury setting forth the facts of the arrearage. The stay of service terminates by operation of law at the time of filing the declaration, without notice to the obligor [*Fam. Code § 5261(b)*]. The filing of the declaration with knowledge of its falsity is punishable as contempt, in addition to any other penalty provided by law [*Fam. Code § 5261(c)*; *see Code Civ. Proc. § 1209*; Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies*].

The stay terminates "earlier" by court order if requested by the local child support agency or by the obligor [*Fam. Code § 5261(a)*]. The most plausible reading of this language is that if the obligor or public agency makes the request, the stay may be terminated before the obligor is in default under the support order.

The stay may be terminated at any time on the request of any other obligee who can establish that good cause no longer exists [*Fam. Code § 5261(a)*]. An agreement between the parties does not preclude a party from seeking termination of the stay if the agreement is violated [*Fam. Code § 5260(b)(2)*].

For the Judicial Council form for the obligee's application for termination of a stay of service, see *§ 259.204*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewFamily LawChild SupportObligationsEnforcementIncome WithholdingFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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22-259 California Forms of Pleading and Practice--Annotated § 259.56

§ 259.56 Prior Support Orders Not Providing for Earnings Assignment

For support orders first issued or modified before July 1, 1990, on which the court did not issue an earnings assignment order, an obligee or a custodial parent receiving services under Title IV-D of the Social Security Act may seek an earnings assignment order by filing a motion or order to show cause with a supporting application [*Fam. Code §§ 5230(b), 5251*]. The obligee must allege under penalty of perjury that the obligor is in default under the support order, either for nonpayment of a sum equal to one month's support or for another occurrence specified in the order [*Fam. Code § 5252(a)*].

The earnings assignment order must be issued "earlier" by court order if requested by the district attorney (or other local child support agency) or the obligor [*Fam. Code § 5252(a)*]. The most plausible reading of this language is that if the obligor or public agency makes the request, the order may be issued before the obligor is in default under the support order.

At least 15 days prior to filing the application, the obligee must give the obligor written notice, by first-class mail, postage prepaid, or by personal service, of his or her intent to seek an earnings assignment if the obligor subsequently is in default on the support obligation [*Fam. Code § 5252(b)*]. This notice may be given at any time, including at the time of filing a petition or complaint in which support is requested or at any subsequent time [*Fam. Code § 5252(b)*]. The obligee's application for the assignment must state that this notice has been given [*Fam. Code § 5252(b)*]. The obligor may waive this notice [*Fam. Code § 5252(b)*].

For a form for the obligee's notice of intent to seek an earnings assignment, see *§ 259.200*. For a form for the obligee's application for the earnings assignment, see *§ 259.201*.

On receipt of the application, the court must issue the earnings assignment order without notice to the obligor [*Fam. Code § 5253*]. The order must include an amount to be paid toward the liquidation of any arrearage or past-due support [*Fam. Code § 5253(b)*]. The filing of the application with knowledge of the falsity of the declaration or notice is punishable as contempt, in addition to any other penalty provided by law [*Fam. Code § 5252(c)*; *see Code Civ. Proc. § 1209*; Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 259.57 Use of Parent Locator Service

If an obligee who is applying for an earnings assignment order under *Fam. Code §§ 5230* or *5252* (discussed in *§§ 259.53* and *259.56*, respectively) or for termination of a stay of service of such an order under *Fam. Code § 5261* (discussed in *§ 259.55[2]*) states in his or her declaration that the whereabouts of the obligor or the identity of the obligor's employer are unknown, the local child support agency) must contact the California parent locator service and Central Registry maintained by the Department of Justice [*Fam. Code § 5280(a)*; *see Fam. Code § 17506*]. On receiving any requested information, the local child support agency must notify the court of the last known address of the obligor and the name and address of the obligor's last known employer [*Fam. Code § 5280(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementParent Locator Services

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22-259 California Forms of Pleading and Practice--Annotated § 259.58

§ 259.58 Obligor's Motion to Quash

An obligor may move to quash an earnings assignment order within 10 days after delivery by the employer of the notice of the assignment order [*Fam. Code § 5271*]. The motion may be made on the following grounds [*Fam. Code § 5270(a),(b)*]:

- The assignment does not correctly state the amount of current or overdue support [*see In re Marriage of Horowitz (1984) 159 Cal. App. 3d 377, 386-387, 205 Cal. Rptr. 880* (appeal from underlying order or judgment of support precludes enforcement by wage assignment)];

- The alleged obligor is not, in fact, the obligor from whom support is due;

- The amount to be withheld exceeds the amount allowable under federal law [*see 15 U.S.C. § 1673(b)*, in *§ 259.52*]; or

- In cases in which the earnings assignment is sought under *Fam. Code § 5250 et seq.*, for good cause as would be sufficient to support a stay of service of the order [*see Fam. Code § 5260*, discussed in *§ 259.55*].

The Family Code provides no specific remedy for a support obligor whose income is wrongly levied by an assignment order improperly served on an exempt source of income, but one court held that a motion to quash was appropriate in that instance [*In re Marriage of Johnson-Wilkes & Wilkes (1996) 48 Cal. App. 4th 1569, 1578, 56 Cal. Rptr. 2d 323* (decided before amendment to Family Code that changed nature of income exempted, but apparently would not change efficacy of using motion to quash as remedy)].

The California Supreme Court has allowed an obligor to assert an estoppel defense under some circumstances because of the custodial parent's concealment of the child during the period when the arrearages accrued but it has held that such concealment cannot provide a basis for an estoppel defense when the concealment ended before the child reached the age of majority, or when the right to seek reimbursement for public assistance payments has been assigned to a

governmental entity [*In re Marriage of Comer (1996) 14 Cal. 4th 504, 510, 516-519, 59 Cal. Rptr. 2d 155, 927 P.2d 265* ; *In re Marriage of Damico (1994) 7 Cal. 4th 673, 683, 29 Cal. Rptr. 2d 787, 872 P.2d 126]* . Child concealment, however, is not an expressly-stated statutory ground for a motion to quash an earnings assignment order under *Fam. Code § 5270 et seq.* For further discussion, see *§ 259.14*.

The clerk of the court must set the motion to quash for hearing within not less than 15 days, nor more than 20 days, after receipt of the notice of motion [*Fam. Code § 5271(b)*]. The obligor must serve a copy of the motion and notice of motion on the obligee named in the earnings assignment no less than 10 days prior to the date of the hearing. Service may be personally or by first-class mail, postage prepaid [*Fam. Code § 5271(c)*].

A finding of error in the amount of the current support or arrearage, or that the amount exceeds federal or state limits is not a ground to vacate the earnings assignment order. The court must modify the order to reflect the correct or allowable amount of support or arrearages. The fact that the obligor may have subsequently paid the arrearages does not relieve the court of its duty to enter the order for assignment [*Fam. Code § 5272*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementIncome WithholdingFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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22-259 California Forms of Pleading and Practice--Annotated § 259.59

§ 259.59 Duties of Employer

The obligor's employer must continue to withhold and forward support as ordered by the court until served with a notice terminating the earnings assignment order [*Fam. Code § 5235(a)*; *see § 259.65*]. Within 10 days of service of a substitution of a payee on the employer, the employer must forward all subsequent support to the governmental entity or other payee that sent the substitution [*Fam. Code § 5235(b)*].

The employer must send the amounts withheld to the obligee within the time period specified by federal law, and report to the obligee the date when the amount was withheld from the obligor's wages [*Fam. Code § 5235(c)*. The employer may deduct $1.50 from the earnings of the employee for each payment made under the order [*Fam. Code § 5235(d)*]. Once the State Disbursement Unit as required by *Fam. Code § 17309* is operational, the employer must send all withheld earnings to the Unit instead of the obligee [*Fam. Code § 5235(e)*].

An employer who willfully fails to withhold and forward support under a valid earnings assignment order is liable to the obligee for the amount of support not withheld, forwarded, or otherwise paid to the obligee, including interest on this amount [*Fam. Code §§ 5235(a), 5241(a), (b)*]. Willful failure to comply with the order is punishable as contempt, in addition to any other penalty or liability provided by law [*Fam. Code § 5241(c)*; *see Code Civ. Proc. § 1218(c)*; Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies*].

If an employer withholds support, as required by the assignment order, but fails to forward the support to the obligee, the local child support agency must take appropriate action to collect the withheld sums from the employer [*Fam. Code § 5241(d)*]. The obligor may not be held in contempt or subject to criminal prosecution for nonpayment of the support that was withheld but not received, and the employer is liable to the obligee for interest incurred as a result of the employer's failure to forward in timely fashion support that the employer withheld [*Fam. Code §§ 5235(a), 5241(b)*].

If the employer either willfully fails to comply with the assignment order or fails to comply on three separate occasions within a 12-month period, two additional remedies become available. Either the child support obligee or the local child support agency on application may obtain an order requiring payment of support by electronic transfer from the employer's bank account. In addition, the court may impose a civil penalty of up to 50 percent of the support amount

that was not received by the obligee [*Fam. Code § 5241(d)*]. If this civil penalty is ordered, it is payable directly to the obligee. The local child support agency is not required to establish or collect it. A court may require electronic transfer or impose the civil penalty after notice and hearing [*Fam. Code § 5241(f)*].

To facilitate employer awareness, the local child support agency must make reasonable efforts to notify any employer subject to an assignment order of the electronic fund transfer provision and enhanced penalties [*Fam. Code § 5241(e)*].

The state or local agency designated to enforce support obligations as required by federal law [*see Fam. Code § 17400* (giving this responsibility to local child support agencies, discussed principally in Ch. 394, *Parent and Child*)] must allow employers to simplify the process of wage withholding by forwarding the amounts of support withheld under more than one court order in a consolidated check, accompanied by an itemized accounting providing names, social security number, or other identifying number, and amount attributable to each obligor [*Fam. Code § 5236*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 259.60 Priorities Among Multiple Orders

An earnings assignment order for support has priority as against any attachment, execution, or other assignment [*Fam. Code § 5243*; *see Code Civ. Proc. § 706.031* (earnings assignment for support has priority over earnings withholding order); *see also Vineyard v. Sisson (1990) 223 Cal. App. 3d 931, 939-940 n.7, 272 Cal. Rptr. 914* (judgment creditor of supported spouse may execute on spousal support in hands of supporting spouse's employer subject to wage assignment, but wage assignment has priority)].

If an earnings assignment order includes, or multiple orders include, both current support and payments toward the liquidation of arrearages, amounts withheld are to be applied in the following order of priority [*Fam. Code § 5238(a)*]:

1. First to the current child support obligation;

2. Then to the current spousal support obligation;

3. Then to the liquidation of child support arrearages; and

4. Then to the liquidation of spousal support arrearages.

When there are multiple assignment orders for the same employee, the employer must prorate the withheld payments as follows: (1) the employer must add together the amount of support due for each assignment if the obligor has more than one assignment for support; (2) if 50 percent of the obligor's net disposable earnings will not pay in full all of the assignments for support, the employer must prorate it first among all of the current support assignments in the same proportion that each assignment bears to the total current support owed; and (3) the employer must apply any remainder to the assignments for arrearage support in the same proportion that each assignment bears to the total arrearage owed [*Fam. Code § 5238(b)*; *see Fam. Code § 5201* ("arrearage" is amount necessary to satisfy support judgment or order under *Code Civ. Proc. § 695.210*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-259 California Forms of Pleading and Practice--Annotated § 259.61

§ 259.61 Computation and Collection of Arrearages

An earnings assignment order must include an amount to be paid toward the liquidation of any arrearage or past due support [*see Fam. Code §§ 5230, 5253*]. However, arrearages are to be computed on the basis of the payments owed and unpaid on the date when the obligor was given notice of the order of assignment [*Fam. Code § 5239*]. An obligor under a pre-July 1, 1990, support order lacking an earnings assignment provision, however, need not be given notice that an earnings assignment order has been issued until after its issuance [*see Fam. Code §§ 5250, 5253*; *see also § 259.56*]. Thus, if the obligee seeks the order to collect arrearages in addition to intercepting earnings for the payment of future support, it may be necessary to proceed by noticed motion or order to show cause [*see Fam. Code 5251*]. Similarly, an obligor need not be given notice of a termination of stay of service until after the order has been served on the employer [*see Fam. Code § 5261(b)*; *see also § 259.55[2]*]. Under this circumstance, to collect arrearages, the obligee would have to proceed with a noticed motion or order to show cause to modify the existing earnings assignment order to incorporate collection of the arrearage [*see Fam. Code § 5230(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsComputationArrearagesFamily LawChild SupportObligationsEnforcementIncome WithholdingFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral Overview

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22-259 California Forms of Pleading and Practice--Annotated § 259.62

§ 259.62 Obligor's Change of Employment

An earnings assignment order must include a requirement that the obligor notify the obligee of any change of employment and of the name and address of his or her new employer within 10 days of obtaining new employment [*Fam. Code § 5281*]. After the obligor has left employment, that employer, at the time when the next payment is due on the earnings assignment, must notify the obligee, by first-class mail, that the obligor has left employment [*Fam. Code § 5282*]. An earnings assignment order is binding on any existing or future employer of the obligor on whom a copy of the order is served [*Fam. Code § 5231*].

If an earnings assignment order that has been served on a prior employer is served on a new employer, the obligor may not move to quash the assignment on any ground that was raised, or that could have been raised but was not raised, when the order was served on the prior employer [*Fam. Code § 5270(d)*; *see § 259.58*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-259 California Forms of Pleading and Practice--Annotated § 259.63

§ 259.63 Obligee's Notice of Change of Address

The obligee must notify the employer of the obligor, by first-class mail, postage prepaid, of any change of address within a reasonable period of time after the change [*Fam. Code § 5237(a)*]. If payments have been ordered to be made to a county officer designated by the court, an obligee who is entitled to receive payment through the officer must similarly notify the officer of any change of address within a reasonable time [*Fam. Code § 5237(b)*]. If the obligee is receiving support payments from the State Disbursement Unit as required by *Fam. Code § 17309* the obligee must notify the Unit of any change of address [*Fam. Code § 5237(c)*]. If the employer or designated county officer, or the State Disbursement Unit is unable to deliver payments under the assignment for a period of six months because of the failure of the obligee to give proper notice of a change of address, the employer, officer or unit must not make any further payments under the earnings assignment order and must return all undeliverable payments to the obligor [*Fam. Code § 5237(d)(1)*]. If payments are being directed to the State Disbursement Unit pursuant to *Fam. Code § 5235(e)*, but the case is not otherwise receiving services from the Title IV-D agency, and the State Disbursement Unit is unable to deliver payments under the assignment order for a period of 45 days due to the failure of the obligee to notify the employer, designated county officer, or State Disbursement Unit of a change of address, the Title IV-D agency must take the following actions [*Fam. Code § 5237(d)(2)*]:

(A) Immediately return the undeliverable payments to the obligor if the obligee cannot be located.

(B) Notify the employer to suspend withholding pursuant to the wage assignment until the employer or Title IV-D agency is notified of the obligee's whereabouts.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementIncome WithholdingFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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22-259 California Forms of Pleading and Practice--Annotated § 259.64

§ 259.64 Modification of Earnings Assignment Order

Whenever the court modifies the amount of support to be paid, a new earnings assignment order must be issued to reflect the modification in support [*see Fam. Code § 5230(a)*]. Therefore, it is unnecessary for the obligee to bring a separate motion to modify the original assignment order.

There is no express statutory authority for the obligor to move for modification of the earnings assignment order.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementIncome WithholdingFamily LawChild SupportObligationsModificationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral Overview

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22-259 California Forms of Pleading and Practice--Annotated § 259.65

§ 259.65 Termination of Service of Earnings Assignment Order

On the filing and service of a motion and notice by the obligor, the court must terminate service of an earnings assignment order if past due support has been paid in full, including interest, and if one of the following conditions exists [*Fam. Code § 5240*]:

- With regard to spousal support orders, the obligee spouse has died or remarried;

- With regard to child support, the child for whom support is owed has died or been emancipated;

- The court determines that good cause, as defined in *Fam. Code § 5260(b)(1)* (discussed in *§ 259.55*), exists to terminate the earnings assignment order, unless there has been more than one application for an earnings assignment;

- The obligor meets the conditions of an alternative arrangement specified in *Fam. Code § 5260(b)(2)*, and a wage assignment has not been previously terminated and subsequently initiated;

- There is no longer a current order for support;

- The termination of a stay of an earnings assignment based on the obligor's alleged failure to make timely support payments [*see Fam. Code § 5261(b)(1)*] was improper, but only if the termination was based on the obligor's failure to make timely support payments as described in *Fam. Code § 5261(b)*.

- The employer or agency designated to provide services under Title IV-D of the Social Security Act or the State Disbursement Unit is unable to deliver payment for a period of six months due to the failure of the obligee to notify that employer or agency or the State Disbursement Unit of a change in the obligee's address.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementIncome WithholdingFamily LawChild SupportObligationsTerminationGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral Overview

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§ 259.66 Retaliation by Employer Prohibited

No employer may use any earnings assignment as grounds for refusing to hire a person or for discharging, taking disciplinary action against, or denying a promotion to, or for taking any other action adversely affecting the terms and conditions of employment of, an employee. An employer who engages in this prohibited conduct may be assessed a civil penalty of no more than $500 [*Fam. Code § 5290*].

For discussion of actions for wrongful discharge generally, see Ch. 249, *Employment Law: Termination and Discipline* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementIncome WithholdingFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewLabor & Employment LawWage & Hour LawsAssignments, Deductions & Garnishments

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§ 259.67 Authority and Duties of Local Child Support Agency

[1] In General

Fam. Code § 5200 et seq. (governing earnings assignment orders) neither expand nor limit the existing duties and authority of the local child support agency with regard to enforcing support obligations, regardless of whether a child or obligee is a welfare recipient, except with respect to the provisions of *Fam. Code § 5246* (concerning notices of assignment in "Title-IV-D" cases, discussed in [2], *below*) [*see Fam. Code §§ 5244, 5245*]. The local child support agency is the obligee under the earnings assignment for all cases in which the support obligation is being established, modified, or enforced under *42 U.S.C. § 654* (Section 454 of the Social Security Act) [*see Fam. Code § 5212*], or in which an application for services has been filed under *42 U.S.C. §§ 651-669* (Title IV-D of the Social Security Act) or *42 U.S.C. §§ 670-679a* (Title IV-E of the Social Security Act) [*Fam. Code § 5214*].

Note that commencing January 1, 2000, responsibility for "Title IV-D" enforcement is officially transferred from county district attorney offices (operating under the aegis of the state Department of Social Services) to local child support agencies that report to a new state Department of Child Support Services. However, a transition period of several years (through January 1, 2003) is provided for by statute to migrate responsibility for handling "Title IV-D" cases to local support agencies. During this transition period, counsel may encounter cases being handled by both types of agencies. Criminal enforcement of support obligations will, in any event, remain with district attorney offices [*see Fam. Code §§ 17304-17310, 17400 et seq.*]. For further discussion of "Title IV-D" enforcement, see *§ 259.150* et seq.

[2] Cases in Which Support Enforcement Services Provided

After the court has ordered an earnings assignment for support in a case in which Title IV-D support enforcement services are being provided ("Title IV-D" cases) [*see Fam. Code § 17400 et seq.*], the local child support agency may serve the employer with a notice of assignment to withhold income for child support ("order/notice to withhold income for child support") in place of the earnings assignment order [*Fam. Code § 5246(a), (b)*]. The contents of the notice are specified by statute [*Fam. Code § 5246(c)*]. An "order/notice to withhold income for child support" has the same force and effect as an earnings assignment order [*Fam. Code § 5246(b)*]. However, it may not reduce the current amount withheld for court-ordered child support [*Fam. Code § 5246(d)(1)*]. If the support order does not provide for an

arrearage payment, or if an additional arrearage accrues after the date of the order, the local child support agency may send an order/notice to withhold income for child support directly to the employer that specifies the updated arrearage amount and directs the employer to withhold an additional amount to be applied towards liquidation of the arrearage, not to exceed the maximum amount permitted under federal law [*Fam. Code § 5246(d)(2)*; *see 15 U.S.C. § 1673(b)*]. If a delinquent child support obligor is receiving payments under the state supplementary income program for aged, blind, and disabled persons, or but for certain excess income would be eligible for such payments, and order/notice to withhold income issued by a local child support agency may not exceed a specified portion of the disability payments [*Fam. Code § 5246(d)(3)*].

A hearing date must be scheduled within 20 days of the date the obligor files a request for a hearing with the court. The court clerk must give notice of the hearing to the local child support agency and the obligor no later than 10 days before the hearing [*Fam. Code § 5246(e)*].

At the hearing, if the obligor establishes that he or she is not the obligor or establishes good cause for an alternative arrangement under *Family Code Section 5260*, the court may order that service of the order/notice to withhold income for child support be quashed. The agency must notify the employer of the order within 10 days [*Fam. Code § 5246(e)(1)*].

If the obligor contends at the hearing that payment of the arrearages at the rate specified in the order/notice to withhold income for child support is excessive or that the total arrearages owing is incorrect, and if the court determines that payment of the arrearages at the specified rate creates an undue hardship on the obligor or that the withholding would exceed the maximum amount permitted under federal law, the court must reduce the rate to a rate that is fair and reasonable considering the parties' circumstances and the child's best interest. If the court determines that the total amount of the arrearages calculated is erroneous, it must modify this amount to the correct amount. When the court takes either action, the local child support agency must serve the employer with an amended order/notice to withhold income for child support within 10 days [*Fam. Code § 5246(e)(2)*].

If the obligor's current support obligation has terminated by operation of law, the local child support agency may serve an order/notice to withhold income for child support on the employer that directs the employer to continue withholding from the obligor's earnings an amount to be applied toward liquidation of the arrearages, not to exceed the maximum amount permitted by federal law, until the local child support agency notifies the employer that the arrearages have been paid in full. The employer must provide the obligor with a copy of the order/notice to withhold income for child support and a blank form that the obligor may file with the court to request a hearing to modify or quash the assignment with instructions on how to file the form and obtain a hearing date. The obligor has the same right to a hearing as specified in *Family Code § 5246(e)* regarding an order/notice to withhold income for support [*Fam. Code § 5246(f)*].

The local child support agency must retain a copy of the order/notice to withhold income for child support and must file a copy with the court whenever a hearing concerning it is requested [*Fam. Code § 5246(g)*]. The local child support agency may transmit an order/notice to withhold income for child support and other forms required by *Fam. Code § 5246* to the employer by electronic means [*Fam. Code § 5246(h)*].

Neither the local child support agency nor the employer is subject to civil liability for any amount withheld and paid to the obligee, the agency, or the State Disbursement under an earnings assignment order or a notice of assignment [*Fam. Code § 5247*].

For discussion of a local child support agency's duty to register out-of-county earning assignment orders [*Fam. Code § 5600 et seq.*], see *§§ 259.70* and *259.159*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsEmployees & Officials

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22-259 California Forms of Pleading and Practice--Annotated § 259.68

§ 259.68 Assignment of Public Retirement and Vacation Benefits

Certain pension, annuity, retirement, disability, death, vacation credits, and other public employee benefits are subject to an earnings assignment order for the enforcement of child and spousal support [*see Fam. Code § 5206(a)*].

Public retirement benefits include the following [*Code Civ. Proc. § 704.110(a), (b)*]:

- All amounts held, controlled, or in process of distribution by a public entity, other than the United States, derived from contributions by the public entity or by its officer or employee for purposes of a pension or an annuity, retirement, disability, death, or other benefits payable by a public retirement system [*Code Civ. Proc. § 704.110(a)(2), (b)*]; and

- All rights and benefits accrued or accruing to any person under a system established by a public entity other than the United States pursuant to statute for retirement, annuity, or pension purposes or payment of disability or death benefits [*Code Civ. Proc. § 704.110(a)(3), (b)*].

If public retirement benefits are payable in a lump sum, they are subject to an earnings assignment order to whatever extent determined by the court on noticed motion [*Code Civ. Proc. § 704.110(c)(1)*; *see Code Civ. Proc. § 703.070(c)* (court determination)].

If public retirement benefits are payable periodically, they are subject to an earnings assignment order up to the amount permitted to be withheld on an earnings withholding order under *Code Civ. Proc. § 706.052* [*Code Civ. Proc. § 704.110(c)(2)*; *see § 259.30* et seq., for discussion of earnings withholding orders]. A paying entity assigning over periodic benefits may deduct from the payment being made to the judgment debtor a sum reflecting the actual cost of administration of the court-ordered support payment up to $2 for each payment made pursuant to court order [*Code Civ. Proc. § 704.110(c)(2)*].

If the intercept procedure provided by *Fam. Code § 17528* is used for benefits that are payable periodically, the amount to be withheld may not exceed the amount permitted to be withheld on an earnings withholding order for support under

[*Code Civ. Proc. § 706.052*]. If the amount sought to be applied to the satisfaction of the judgment is payable as a lump-sum distribution, the amount payable is subject to the intercept procedure of *Section 17528* or any other applicable enforcement procedure [*Code Civ. Proc. § 704.110(c)(3), (4)*]. For a related form of qualified domestic relations order (QDRO) for support, see *§ 259.206*.

Amounts that represent vacation credits accumulated by a public employee are also subject to an earnings assignment order for support whether they are paid periodically or as a lump sum. These amounts are exempt to the same extent as earnings of a judgment debtor [*Code Civ. Proc. § 704.113*; *see §§ 259.32[2][b], 259.53*, and Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* , for discussion of exempt property].

Once a public entity, other than the United States, has been served with an earnings assignment order for support, it must comply with any request for a return of employee contributions by an employee named in the order by delivering the contributions to the clerk of the court from which the order issued [*Code Civ. Proc. § 704.114(b)*]. This money is then subject to any procedure available to enforce an order for support [*Code Civ. Proc. § 704.114(d)*]. If no enforcement procedure is commenced after 30 days have elapsed from the date the court clerk sends notice to the parties that the money has been received, the clerk must, on request, return the money or, under some circumstances, release it to the employee [*Code Civ. Proc. § 704.114(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementIncome WithholdingFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewPensions & Benefits LawGovernmental EmployeesGeneral Overview

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§ 259.69 Assignment of Private Retirement Benefits

Private retirement benefits are subject to an earnings assignment order for support [*see Fam. Code § 5206(a)*; *Code Civ. Proc. § 704.115(c)(2)*]. Private retirement benefits include all amounts held, controlled, or in process of distribution by a private retirement plan for the payment of benefits as an annuity, pension, retirement allowance, disability payment, or death benefit [*Code Civ. Proc. § 704.115(b)*; *see Code Civ. Proc. § 704.115(a)* (definition of "private retirement plan"); *see also Code Civ. Proc. § 704.115(d), (e)* (making pension benefits exempt from process once paid over to obligor, subject to limitations with regard to self-employed retirement plans and individual retirement accounts and annuities)].

Private retirement benefits that become payable in a lump sum are exempt with regard to a support obligation only to whatever extent determined by the court after hearing on a noticed motion [*Code Civ. Proc. § 704.115(c)(1)*; *see Code Civ. Proc. § 703.070(c)* (discussed in Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies*)]. With regard to private pension benefits that are payable periodically, the amount that may be assigned may not exceed the amount permitted to be withheld on an earnings withholding order (garnishment) for support [*Code Civ. Proc. § 704.115(c)(2)*; *see Code Civ. Proc. § 706.052* (discussed in *§ 259.32[2][c]*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementIncome WithholdingFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)General Overview

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22-259 California Forms of Pleading and Practice--Annotated § 259.70

§ 259.70 Orders Issued by Other States or Counties

An earnings assignment order for support issued by a court or administrative agency of another state is binding on an employer of the obligor to the same extent as an order made by a California court [*Fam. Code § 5230.1(a)*]. When an employer receives an earnings assignment order for support from a court or administrative agency of another state, all of the provisions of *Fam. Code § 5200 et seq.* apply [*Fam. Code § 5230.1(b)*].

Otherwise, in general, an obligee may register a foreign support order in a California court in the manner, with the effect, and for the purposes provided for in the civil enforcement provisions of the Uniform Interstate Family Support Act (UIFSA-*Fam. Code § 4900 et seq.*) [*Fam. Code § 4950*]. However, under UIFSA, an interstate income-withholding order may be served directly on the obligor's employer without registration [*Fam. Code § 4940*]. For further discussion of UIFSA, see Ch. 260, *Family Law Enforcement: Foreign Judgments* .

In addition, special provisions exist for the registration and enforcement of "an order for support or earnings withholding, or both" made by another California county under *Fam. Code § 5600 et seq.* These provisions are set forth within the same chapter of the Family Code as the other provisions for earning assignment orders, and because an order for "support or income withholding" may potentially embrace earning assignment orders, the registration procedure apparently applies to such out-of-county orders. These procedures permit both individual obligees as well as public entities such as district attorneys and other local child support agencies to register and enforce the orders [*Fam. Code § 5600*]. For related discussion, see *§ 259.159[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementIncome WithholdingFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral Overview

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§ 259.71 Contractor's Acknowledgment of Compliance

In an effort to ensure the enforcement of support obligations among persons who contract with the State of California, legislation expressly provides that it is California's policy that anyone who enters into a contract with a state agency must recognize the importance of child and family support obligations, and must fully comply with all applicable state and federal laws relating to support enforcement, including, but not limited to, disclosure of information and compliance with earnings assignment orders [*Pub. Con. Code § 7110(a)*]. Each written contract for more than $100,000, executed between a contractor and a state agency, must contain an acknowledgment by the contractor of this state policy, as well as the contractor's acknowledgment that to the best of its knowledge it is fully complying with the earnings assignment orders of all employees and is providing the names of all new employees to the new hire registry maintained by the Employment Development Department [*Pub. Con. Code § 7110(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewPublic Contracts LawGeneral Overview

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[Reserved]

§§ 259.72[Reserved]

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§ 259.80 Governing Law

The court's general power to enforce its family law judgments and orders is governed by *Fam. Code § 290*. *Fam. Code § 290* also governs the court's authority to order security to enforce a property division. *Fam. Code § 4012* governs orders for security to enforce child support. *Fam. Code § 4339* governs orders for security to enforce spousal support. *Fam. Code § 4600 et seq.* set out special statutory procedures regarding deposits to secure payment for the support of a minor child.

Support obligations under the Uniform Parentage Act [*Fam. Code § 7600 et seq.*] are also enforceable by an order requiring the furnishing of a bond or other security for the payment of a judgment [*Fam. Code § 7637*; for further discussion, *see* Ch. 412, *Paternity*]. *Penal Code § 270b* gives the court the power to order security for support in criminal nonsupport cases. For further discussion, *see* Ch. 394, *Parent and Child* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act

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§ 259.81 Availability of Procedure for Deposit to Secure Future Child Support Payments

If a parent who owes child support is more than 60 days behind in payments and certain other conditions exist [*see* discussion at *§ 259.84*], the person entitled to collect the support may apply for an order requiring the obligor-parent to deposit assets, including money, personal property, or real property, as security for future support payments [*see Fam. Code §§ 4610(a), 4614*]. The remedy is particularly useful when it is impractical to obtain an earnings assignment because, for example, the obligor is not receiving a salary subject to an assignment but has other income, or his or her job history shows that an earnings assignment would be difficult to enforce [*see, e.g., Fam. Code § 4613(a), (c)*]. The purpose of this procedure is to provide an extraordinary remedy for cases of bad faith failure to pay child support obligations [*Fam. Code § 4600*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-259 California Forms of Pleading and Practice--Annotated § 259.82

§ 259.82 Application and Hearing

Subject to *Fam. Code §§ 4613* (conditions required for grant of order), 4614 (designation of assets subject to order), and 4615 (providing bond in lieu of cash or other assets), in any proceeding in which the court has ordered either or both parents to pay any amount for the support of a child, on an order to show cause or notice of motion, application, and declaration stating that the parent or parents required to pay support is in arrears in payment in a sum equal to the amount of 60 days of payments, the court must order a deposit for security after an opportunity for a hearing and a determination that one of the conditions for issuance set forth in *Fam. Code § 4613* exist [*Fam. Code § 4610(a)*; *see Fam. Code §§ 4613-4615*; for discussion of the conditions for granting of the order and the amount of deposit, *see also § 259.84*(discussion) and §§ *259.220*, *259.221* (forms)]. The declaration of arrearages must be signed under penalty of perjury by the person or county officer to whom support has been ordered to have been paid [*Fam. Code § 4610(a)*].

On request of any party the court may also issue an ex parte restraining order as specified in *Fam. Code § 4620* [*Fam. Code § 4610(b)*; *see* discussion at *§ 259.83*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-259 California Forms of Pleading and Practice--Annotated § 259.83

§ 259.83 Ex Parte Orders to Protect Against Depletion of Property

During the pendency of any proceeding to secure child support, and on the application of either party in the manner provided by *Fam. Code §§ 240-246*, the court may, without a hearing, issue ex parte orders restraining any person from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, except in the usual course of business or for the necessities of life [*Fam. Code § 4620(a)*]. If the order is directed against a party to the proceeding, the order may require the party to notify the other party of any proposed extraordinary expenditures and to account to the court for all such extraordinary expenditures [*Fam. Code § 4620(a)*]. The protective order will not be granted without notice to the opposite party unless it appears from facts shown by the supporting affidavit or in the application for the order that great or irreparable injury would result to the applicant before the matter can be heard on notice [*Fam. Code § 241*; *see Fam. Code § 4620(a)*].

The matter must be made returnable not later than 20 days or, if good cause appears to the court, 25 days from the date of the order, at which time the ex parte order must expire [*Fam. Code § 4620(b)*]. The order must state on its face the date of expiration of the order, which must expire in one year or on deposit of assets or money to secure child support, whichever first occurs [*Fam. Code § 4620(d)*]. The court, at the hearing, is required to determine for which property the obligor-parent shall be required to report extraordinary expenditures and is required to specify what is deemed an extraordinary expenditure [*Fam. Code § 4620(c)*].

The Judicial Council forms of Application for Order and Supporting Declaration [Cal. Judicial Council Form 1285.20; *see § 259.220*] and of Temporary Restraining Orders (Family Law) [Cal. Judicial Council Form 1285.05; for a form of temporary restraining order, *see* Ch. 221, *Dissolution of Marriage: Procedure*] may be used to obtain a temporary restraining order relating to property.

For general discussion of ex parte protective orders, see Ch. 293, *Harassment and Domestic Violence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportGeneral OverviewFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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22-259 California Forms of Pleading and Practice--Annotated § 259.84

§ 259.84 Conditions for Granting Order

After an application and declaration establishing 60 days' worth of arrearages has been filed [*see* discussion at *§ 259.82*], the court must issue an order to secure child support on a determination that one or more of the following conditions exists:

- The obligor-parent is not receiving salary or wages subject to an earnings assignment for child support, and there is reason to believe that he or she has earned income from some source of employment [*Fam. Code § 4613(a)*; *see Fam. Code § 5200 et seq.* (earnings assignment orders)];

- An earnings assignment for child support would not be sufficient to meet the amount of the support obligation, for reasons other than a change of circumstances that would qualify for a reduction in the amount of child support ordered [*Fam. Code § 4613(b)*]; or

- The job history of the obligor-parent shows that an earnings assignment for child support would be difficult to enforce or would not be a practical means for securing the payment of the support obligation because of circumstances including, but not limited to, multiple concurrent or consecutive employers [*Fam. Code § 4613(c)*].

For discussion of the obligor's defenses, see *§ 259.89*. For discussion of earnings assignment, see *§ 259.50* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportGeneral OverviewFamily LawChild SupportObligationsEnforcementArrearage JudgmentsFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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22-259 California Forms of Pleading and Practice--Annotated § 259.85

§ 259.85 Assets Subject to Order

The designation of assets subject to an order to secure child support is based on concern for maximizing the liquidity and ready conversion into cash of the deposited asset [*Fam. Code § 4614*]. In all instances, the assets must include a sum of money up to or equal in value to one year of support payments or $6,000, whichever is less, or any other assets, personal or real, designated by the court which equal in value up to one year of payments for support of the child or $6,000, whichever is less [*Fam. Code § 4614*]. Assets that are otherwise generally exempt from enforcement of money judgments under *Code Civ. Proc. §§ 703.010-704.995* can be designated as security only if the court, on noticed motion of the person receiving child support, determines that the exempt property nevertheless will be applied to enforce the child support order, taking into account the needs of the person receiving child support, the needs of the obligor-parent and all the persons the obligor-parent is required to support, and all other relevant circumstances [*Code Civ. Proc. § 703.070(b)*; *see Fam. Code § 4614*]. For further discussion of exempt assets, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.

In lieu of depositing cash or other assets, as provided above, the obligor-parent may, if approved by the court, provide a performance bond secured by any real property or other assets of the parent and equal in value to one year of payments [*Fam. Code § 4615*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawChild SupportGeneral OverviewFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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§ 259.86 Order

The order that the court issues must require that the parent or parents obligated to pay support deposit assets to secure future support payments with the district attorney, county officer, or trustee designated by the court [*Fam. Code § 4601*; *see also § 259.221*]. The order will specify a time within which the obligor-parent must make reasonable efforts either to cure the default in child support payments or to comply with a court-approved payment plan, and if payments continue in the arrears, the deposited assets may be used to satisfy the support obligation [*see Fam. Code § 4630(a)*; *see also* discussion in *§ 259.87*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportGeneral OverviewFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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22-259 California Forms of Pleading and Practice--Annotated § 259.87

§ 259.87 Right to Use Deposit to Satisfy Support Obligation

On an obligor-parent's failure, within the time specified by the court, to make reasonable efforts to cure the default in child support payments or to comply with a court-approved payment plan, if payments continue in the arrears, the district attorney, county officer, or trustee designated by the court must use the money or sell or otherwise process the deposited assets for an amount sufficient to pay the arrearage and the amount ordered by the court for the support, maintenance, and education of the child currently due [*Fam. Code § 4630(a)*]. This must occur not less than 25 days after providing the obligor-parent or parents with a written notice served personally or with return receipt requested, unless a motion or order to show cause has been filed to stop the use or sale [*Fam. Code § 4630(a)*; *see* discussion in *§ 259.90*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportGeneral OverviewFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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22-259 California Forms of Pleading and Practice--Annotated § 259.88

§ 259.88 Sale of Nonliquid Assets After Deposit

On deposit of any asset that is not readily convertible into money, the court may, not less than 20 days after serving the obligor-parent or parents with written notice and a hearing, order the sale of that asset or assets and the deposit of the proceeds with the person designated as trustee [*Fam. Code § 4616*].

When the asset ordered to be deposited is real property, the order for sale and deposit must be certified as an abstract of judgment in accordance with *Code Civ. Proc. § 674* (information required in abstract of judgment) [*Fam. Code § 4617(a)*]. A deposit of real property is made effective by recordation of the certified abstract with the county recorder [*Fam. Code § 4617(b)*]. The deposited real property and the rights, benefits, and liabilities attached to that property must continue in the possession of the legal owner [*Fam. Code § 4617(c)*]. For purposes of calculating the time between service of notice of levy and giving the notice of sale of real property as required by *Code Civ. Proc. § 701.545*, the date of the issuance of the order to deposit assets must be construed as the date notice of levy on an interest in real property was served on the judgment debtor [*Fam. Code § 4617(d)*; *see Code Civ. Proc. § 701.545*].

Assets that have been deposited as security are to be construed as assets subject to levy pursuant to *Code Civ. Proc. §§ 701.510-701.680*. The sale of assets must be conducted in accordance with *Code Civ. Proc. §§ 701.510-701.830* (sale and collection of levied property). For further discussion of the sale of assets, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportGeneral OverviewFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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§ 259.89 Defenses

An obligor-parent alleged to be in arrears under *Fam. Code § 4610* may employ any of the following grounds as a defense to a motion to establish security or as a basis for filing a motion to stop the sale or use of assets under *Fam. Code § 4631* (*see* discussion at *§ 259.90*) [*Fam. Code § 4612(a)-(i)*]:

- Child support payments are not in arrears;
- Laches;
- There has been a change in the custody of the children;
- There is a pending motion for reduction in support due to a reduction in income;
- Illness or disability;
- Unemployment;
- Serious adverse impact on the immediate family of the obligor-parent residing with the obligor-parent, that outweighs the impact of denial of the motion or stopping the sale on obligee;
- Serious impairment of the ability of the obligor-parent to generate income; or
- Other emergency conditions.

However, an obligor-parent must rebut the presumptions that nonpayment of child support was willful and without good faith, and that the obligor had the ability to pay the support [*Fam. Code § 4611*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 259.90 Motion to Stop Use of Money or Sale of Assets

An obligor-parent may file a motion to stop the use of the money or the sale of the asset within 15 days after service of notice on him or her by the district attorney, county officer, or trustee designated by the court [*Fam. Code § 4631(a)*; *see* discussion at *§ 259.87*]. Any of the grounds available in *Fam. Code § 4612* as a defense to a motion to establish security can be used as a basis for filing a motion to stop the sale or use of assets under *Fam. Code § 4601(a)(2)* [*Fam. Code § 4632*; *see* discussion in *§ 259.89*]. The clerk of the court must set the motion for hearing not less than 20 days after service on the person or county officer to whom support has been ordered to have been paid [*Fam. Code § 4631(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportGeneral OverviewFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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22-259 California Forms of Pleading and Practice--Annotated § 259.91

§ 259.91 Custody and Return of Assets

Any district attorney, county officer, or trustee designated by the court pursuant to *Fam. Code § 4601* who is responsible for any money or property and for any disbursements under that section is not liable for any action undertaken in good faith and in conformance with that section [*Fam. Code § 4603*].

The district attorney, county officer, or trustee designated by the court must return all assets subject to a court order to secure child support when both of the following occur: (1) one year has elapsed since the court issued the order to secure child support, and (2) the obligor-parent or parents have made all support payments on time during that one-year period [*Fam. Code § 4640*]. When these criteria have been satisfied and when the deposited asset was real property, the district attorney, county officer, or trustee designated by the court must prepare a release in accordance with *Code Civ. Proc. § 697.370* and request the clerk of the court in which the order to deposit assets was rendered to certify the release and to record it in the office of the county recorder [*Fam. Code § 4641*].

The district attorney, county officer, or trustee must, if requested by an obligor-parent, prepare a statement setting forth disbursements and receipts made pursuant to *Fam. Code §§ 4600-4641* [*Fam. Code § 4602*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportGeneral OverviewFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProceduresTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployees

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§ 259.92 Recovery of Expenses by Trustee

The district attorney, county officer, or trustee designated by the court may deduct from the deposited money the sum of $1 for each child support payment made pursuant to *Fam. Code § 4630* [*Fam. Code § 4630(c)*].

If the district attorney, county officer, or trustee designated by the court incurs fees or costs that are not compensated by this $1 deduction, including, but not limited to, fees or costs incurred in any sale of assets pursuant to *Fam. Code §§ 4600-4641* and in the preparation of a statement pursuant to *Fam. Code § 4602*, the court must hear and order the obligor-parent or parents to pay reasonable fees and costs [*Fam. Code § 4604(a)*]. This must occur no less than 20 days after service on the obligor-parent of the notice of motion or order to show cause by the district attorney, county officer, or trustee incurring the fees or costs [*Fam. Code § 4604(a)*]. Fees and costs ordered to be paid by the court are in addition to any deposit made under *Fam. Code §§ 4600-4641*, but must not exceed five percent of one year's child support obligation or the total amount ordered deposited for security, whichever is less [*Fam. Code § 4604(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewFamily LawChild SupportGeneral OverviewFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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22-259 California Forms of Pleading and Practice--Annotated §§ 259.93-259.99

[Reserved]

§§ 259.93[Reserved]

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22-259 California Forms of Pleading and Practice--Annotated § 259.100

§ 259.100 Governing Law

Provisions for the deposit of money to secure the payment of future child support amounts are contained in *Fam. Code § 4550 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-259 California Forms of Pleading and Practice--Annotated § 259.101

§ 259.101 Compared to Deposit of Assets Under Fam. Code § 4600 et seq.

The provisions for a child support security money deposit in *Fam. Code § 4550 et seq.* set forth a more streamlined procedure for establishing security for child support than the statutes governing a deposit of assets in *Fam. Code § 4600 et seq.* The principal difference is that under *Fam. Code § 4560*, the obligor is required to post an amount of money as security at the time the child support order is issued. If the obligor is 10 or more days late in making payment, the obligee may apply for a distribution from the deposit account [*Fam. Code § 4570(a)*]. Under *Fam. Code § 4610(a)*, however, the account is not established until after the obligor is 60 days in arrears [*see* discussion at *§ 259.81*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-259 California Forms of Pleading and Practice--Annotated § 259.102

§ 259.102 Order to Establish Security Deposit Account

Every order or judgment to pay child support may require the payment by the child support obligor of up to one year's child support, or a lesser amount equal to the child support amount due to be paid by the obligor between the time of the date of the order and the date when the support obligation is terminated by operation of law [*Fam. Code § 4560(a)*]. Unless expressly waived by the child support obligee, the court may order the establishment of a child support trust account in every action to establish paternity or for dissolution of marriage in which a child support obligation is imposed by court order [*Fam. Code § 4560(b)*].

A "child support obligee" means either the parent, guardian, or other person to whom child support has been ordered to be paid, or the local child support agency designated by the court to receive the payment [*Fam. Code § 4550*]. Such a public agency is the "child support obligee" for all cases in which an application for services has been filed under Part D of Title IV of the Social Security Act (*42 U.S.C. §. 651 et seq.*) [*Fam. Code § 4550*]. In any case in which support is ordered to be paid through such an agency for a child not receiving public assistance pursuant to the California Work Opportunity and Responsibility to Kids Act (CalWORKs program) (*Welf. & Inst. Code § 11200 et seq.*), the agency must forward the support received to the custodial parent or other person having care or control of the child or children involved [*Fam. Code § 4573*].

In every case in which a child support security deposit is ordered, the court must order that the money be deposited by the obligor in an interest-bearing account with a state or federally chartered financial institution, a trust company authorized to transact trust business in the state, a savings and loan association, or in shares of a credit union doing business in the state and having a trust department [*Fam. Code § 4561*]. The court must also order that evidence of the deposit be provided by the obligor and served on the obligee, and filed with the court within a reasonable time as specified by the court, not to exceed 30 days [*Fam. Code § 4562*]. The money deposited is to be used exclusively to guarantee the monthly payment of child support [*Fam. Code § 4561*].

Among other reasons, the court may decline to establish a child support trust account if it finds that an adequately funded child support trust account already exists pursuant to *Fam. Code §§ 4550-4573* for the benefit of the children

involved in the proceeding, or that the child support obligor has provided adequate alternative security that is equivalent to the child support security deposit [*Fam. Code § 4560(b)*].

The provisions of *Fam. Code § 4550 et seq.* comprise Chapter 2 of the Family Code. Chapter 2 does not apply to temporary child support orders [*Fam. Code § 4551(a)*]. It applies to an application for modification of child support filed on or after January 1, 1992, but does not constitute the basis for modification of child support [*Fam. Code § 4551(b)*]. Chapter 2 of the Family Code does apply to applications for modification of child support in any case in which the child support obligee has previously waived the establishment of a child support trust account, and now seeks the establishment of that child support trust account [*Fam. Code § 4551(c)*]. It also applies to any order or judgment entered by the court on or after January 1, 1993, ordering a child support obligor to pay any then-existing child support arrearage that the child support obligor has unlawfully failed to pay as of the date of that order or judgment, including the arrearages that were incurred prior to January 1, 1992 [*Fam. Code § 4551(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-259 California Forms of Pleading and Practice--Annotated § 259.103

§ 259.103 Application for Withdrawal From Account

On the verified application of the obligee stating under penalty of perjury that the support payment is 10 or more days late, the court must immediately order disbursement of funds from the account solely for the purpose of providing the amount of child support then in arrears [*Fam. Code § 4570(a)*]. Funds so disbursed must be used exclusively for the support, maintenance, and education of the children subject to the child support order [*Fam. Code § 4570(b)*]. The court must also order the account to be replenished by the obligor in the same amounts as are expended from the account to pay the amount of child support that the obligor has failed to pay in a timely manner [*Fam. Code § 4570(c)*]. A copy of the verified application, as well as its order to disburse and replenish funds, must be served on the obligor, who is then subject to contempt of court for failure to comply with the order [*Fam. Code § 4571*]. A copy of the order to disburse and replenish funds must also be served on the depository institution where the child support security deposit is maintained, and on the child support agency with jurisdiction over the case [*Fam. Code § 4572*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 259.104 Application to Reduce or Eliminate Child Support Security Deposit

Prior to entry of a child support security deposit order, the court must give the obligor reasonable notice and opportunity to file an application to reduce or eliminate the child support security deposit [*Fam. Code § 4565(a)*]. The obligor's application may be made on either of the following grounds: (1) the obligor has provided adequate alternative equivalent security to assure timely payment, or (2) the obligor is unable, without undue financial hardship, to pay the support deposit [*Fam. Code § 4565(a)(1), (2)*]. The application must be supported by all reasonable and necessary financial and other information required by the court to establish the existence of either ground for relief [*Fam. Code § 4565(b)*]. It must be filed with the court and served on the obligee and any other party to the proceedings [*Fam. Code §§ 4565(c), 4566*].

The court must then provide notice and opportunity for any parties opposing the application to file responsive financial and other information setting forth the factual and legal bases for the party's opposition [*Fam. Code § 4566*]. After hearing, the court must enter its order exercising its discretion under all the facts and circumstances as disclosed in the admissible evidence before it so as to maximize the payment and deposit, or an equivalent adequate security for payment, without imposition of undue financial hardship on the support obligor. If the court finds that the deposit of the amount required would impose an undue financial hardship on the obligor, the court must reduce this amount to an amount that the child support obligor can pay as the child support security deposit without undue financial hardship [*Fam. Code § 4567*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportGeneral OverviewFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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22-259 California Forms of Pleading and Practice--Annotated § 259.105

§ 259.105 Termination of Account

Any child support security deposit account must be dissolved and any remaining funds in the account returned to the obligor, with any interest earned thereon, on the full payment and cessation of the child support obligation as provided by court order or operation of law [*Fam. Code § 4563*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportGeneral OverviewFamily LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProcedures

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22-259 California Forms of Pleading and Practice--Annotated §§ 259.106-259.109

[Reserved]

§§ 259.106[Reserved]

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22-259 California Forms of Pleading and Practice--Annotated § 259.110

§ 259.110 Governing Law

Procedures involving the nonissuance or nonrenewal of a professional license of a support obligor who is not in compliance with a support order are contained in *Fam. Code § 17520* and *Bus. & Prof. Code §§ 31* and *6143.5*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementLicensesFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewGovernmentsState & Territorial GovernmentsLicenses

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22-259 California Forms of Pleading and Practice--Annotated § 259.111

§ 259.111 Nonpayment of Support as Grounds for Withholding License Issuance or Renewal

Each person who applies for the issuance or renewal of a license to operate a motor vehicle, or a license, certificate, credential, permit, registration, or other means to engage in a business or profession that is regulated by a state board, and who has not complied with a judgment or order for child or family support, is subject to the nonissuance or nonrenewal of the license under *Fam. Code § 17520* [*Bus. & Prof. Code § 31(b)*; *see Fam. Code § 17520(a)(5)* ("license" defined)]. For this reason, the state boards described in *Fam. Code § 17520(a)(2)* can issue only a temporary, not a permanent, license to any person who is certified to a board as not in compliance with a support order or judgment [*Fam. Code § 17520(e)(2)(A)*].

The compliance requirement and the attendant procedures set out in *Fam. Code § 17520* apply only to an applicant for issuance in the first instance, or renewal, of a license, certificate, or registration as previously described [*see Fam. Code § 17520(a)(1)* ("applicant" defined)]. Therefore, *Bus. & Prof. Code §§ 29.5* and *31* and *Fam. Code § 17520* cannot be used to revoke or suspend a person's current license, certificate, or other registration because of that person's failure to comply with a support order or judgment [*see Bus. & Prof. Code §§ 29.5, 31*; *Fam. Code § 17520*].

The current version of the statute became operative January 1, 2000, simultaneously with the repeal of its predecessor, former *Welf. & Inst. Code § 11350.6*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-259 California Forms of Pleading and Practice--Annotated § 259.112

§ 259.112 Boards, Licenses, and Licensees Within Scope of Statute

For purposes of these statutes, a "board" is defined as any entity described in *Business and Professions Code Section 101*, the entities described in *Business and Professions Code Sections 1000* and *3600*, the State Bar, the Department of Real Estate, the Department of Motor Vehicles, the Secretary of State, the Department of Fish and Game, and any other state commission, department, committee, examiner or agency that issues a license, certificate, credential, permit, or registration or any other certification to engage in a business, occupation, or profession, or for recreational purposes, or to the extent required by federal law or regulations, for recreational purposes [*Fam. Code § 17520(a)(2)*; *see Bus. & Prof. Code §§ 1000, 3600* (Board of Chiropractic Examiners and Board of Osteopathic Examiners)]. The term includes all boards, commissions, departments, committees, examiners, entities, and agencies that issue a license, certificate, credential, permit, registration, or any other authorization to engage in a business, occupation, or profession. The failure to name a specific board, commission, department, committee, examiner, entity, or agency does not exclude it from the term [*Fam. Code § 17520(a)(2)*].

A "license" includes active or inactive membership in the State Bar [*see Bus. & Prof. Code § 6143.5*], as well as a certificate, credential, permit, registration, or any other authorization issued by a board that allows a person to engage in a business, occupation, or profession, or to operate a commercial motor vehicle, including appointment and commission by the Secretary of State as a notary public. "License" also includes any driver's license issued by the Department of Motor Vehicles, any commercial fishing license issued by the Department of Fish and Game, and, to the extent required by federal law or regulations, any license used for recreational purposes [*Fam. Code § 17520(a)(5)*; *Tolces v. Trask (1999) 76 Cal. App. 4th 285, 289-291, 90 Cal. Rptr. 2d 294* (suspension of driver's license for nonpayment of child support does not violate parent's constitutional rights to travel or to equal protection)]. The term includes all licenses, certificates, credentials, permits, registrations, and any other authorization issued by a state board that allows a person to engage in a business, occupation, or profession. The failure to name a particular type of license or any of the other types of authorization listed above does not exclude it from this term [*Fam. Code § 17520(a)(5)*].

A "licensee" is any person who holds a license, certificate, credential, permit, registration, or other authorization issued by a board to engage in a business, occupation, or profession, or to operate a commercial motor vehicle [*Fam. Code § 17520(a)(6)*]. A "licensee" is also any person holding a driver's license issued by the Department of Motor Vehicles,

any person holding an appointment and commission by the Secretary of State as a notary public, any person holding a commercial fishing license issued by the Department of Fish and Game, and, to the extent required by federal law or regulations, any person holding a license used for recreational purposes [*Fam. Code § 17520(a)(6)*]. The term includes all persons holding such a license or any of the other types of authorization listed above. The failure to name a specific type of license or other authorization does not exclude a person holding it from the term "licensee" [*Fam. Code § 17520(a)(6)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-259 California Forms of Pleading and Practice--Annotated § 259.113

§ 259.113 Type of Support Delinquency Subject to License Withholding

It appears that *Fam. Code § 17520* applies to child and family support, but not to orders that are solely for spousal support. The statute does not define "support" [*see Fam. Code § 17520*], but it defines "compliance with a judgment or order for support" in part as a judgment or order for child or family support [*see Fam. Code § 17520(a)(4)*]. Additionally, the statute mandates that local child support agencies compile and forward to the State Department of Child Support Services a list of names of obligors who are not in compliance with judgments or orders for child support [*see Fam. Code § 17520(b)*]. The individuals named on these lists are subject to nonissuance or nonrenewal of their licenses [*see Fam. Code § 17520(b)*-(*l*)]. Finally, the statute describes its purpose as to further the public policy of increasing child support enforcement and collections [*see Fam. Code § 17520(p)*].

In this context, "compliance with a judgment or order for support" means that, as set forth in a judgment or order for child or family support rendered by or registered in a court of this state, the obligor is no more than 30 calendar days in arrears in one of the following [*Fam. Code § 17520(a)(4)*; *see Fam. Code § 17520(b)*]:

- Making payments in full for current support,

- Making periodic payments in full, whether court-ordered or by agreement with the district attorney, on a support arrearage, or

- Making periodic payments in full, whether court-ordered or by agreement with the local child support agency, on a judgment for reimbursement for public assistance.

"Compliance with a judgment or order for support" also means that, concerning a judgment or order for child or family support, the obligor has obtained a judicial finding that equitable estoppel, as provided in statute or case law, precludes enforcement of the order [*Fam. Code § 17520(a)(4)*]. Obligors who do not meet the above compliance criteria may be placed on the list to be sent to licensing agencies [*see Fam. Code § 17520(b), (d)*].

Legal Topics:

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§ 259.114 Overview of License Withholding Procedures

This section summarizes the procedures by which a person is identified to a state board as not in compliance with a support order or judgment and by which issuance or renewal of the person's license by that board is withheld. Subsequent sections set forth the specific components of these procedures, including provisions for contest and judicial review.

Initially, each county district attorney or other local child support agency (hereafter, the "local child support agency") supplies the State Department of Child Support Services, on a monthly basis, with the names of and statutorily specified information about individuals who are not in compliance with a judgment or order for child support [*see Fam. Code § 17520(b)*]. Next, the State Department of Child Support Services consolidates the lists and, on a monthly basis, provides a copy of a consolidated list to each state board responsible for the regulation of licenses [*see Fam. Code § 17520(c)*]. On receipt of the consolidated list, each licensing board then notifies any applicant on the list of the board's intent to withhold issuance or renewal of the applicant's license [*see Fam. Code § 17520(d)-(f)*]. The board must, however, issue a temporary license to any applicant on the list who is otherwise eligible for licensure [*see Fam. Code § 17520(e)(2)(A)*]. On receipt of board notification of intent to withhold issuance or renewal of license, the applicant can obtain review from a local child support agency of placement of his or her name on the list [*see Fam. Code § 17520(g)-(j)*]. If desired, the applicant can also seek superior court judicial review of the agency's adverse decision [*see Fam. Code § 17520(k)*].

If the applicant subsequently complies with the support judgment or order, or otherwise prevails on support agency or judicial review, he or she is issued a release by the support agency [*Fam. Code § 17520(j), (k)*]. The release serves to notify the applicant and the board that, for the purposes of the statute, the applicant is in compliance with the support order or judgment [*Fam. Code § 17520*(*l*)], and is therefore entitled to issuance or renewal of the license, absent ineligibility on any other grounds. Each board must collect Social Security numbers from all applicants for the purposes of matching the names on the certified list provided by the State Department of Child Support Services to applicants and licensees, and of responding to requests for this information made by child support agencies [*Fam. Code § 17520(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 259.115 Support Agency Certification to Department of Child Support Services

The identification of support obligors subject to potential license withholding begins at the county level. The district attorney or other local child support agency of each county (hereafter, the "local child support agency") is required to maintain a list of persons included in a case being enforced under Title IV-D of the federal Social Security Act [*see 42 U.S.C. § 654*] for whom a child support order or judgment has been rendered by, or registered in, a California court, and who are not in compliance with that order or judgment [*Fam. Code § 17520(b)*]. The local child support agency submits to the State Department of Child Support Services, on a monthly basis, a continuously updated list containing the names, social security numbers, and last known addresses of these support obligors. The agency must verify, under penalty of perjury, that each person listed is subject to an order or judgment for the payment of support and that each person is not in compliance with that order or judgment [*Fam. Code § 17520(b)*]. As used in the statute, this monthly list is known as the "certified list" [*Fam. Code § 17520(a)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 259.116 Department of Child Support Services Certification to State Boards

The State Department of Child Support Services consolidates the certified lists received from the various local child support agencies statewide. Within 30 calendar days after receiving the lists, the Department then provides a copy of a consolidated list to each board that is responsible for the regulation of licenses, as specified by statute [*Fam. Code § 17520(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 259.117 Board Action on Receipt of Certification

[1] Acceptance and Processing of List

Promptly after receiving the certified consolidated list from the State Department of Child Support Services, and prior to the issuance or renewal of a license, each board determines whether an applicant for license issuance or renewal is on the most recent certified consolidated list provided by the Department [*Fam. Code § 17520(e)(1)*].

[2] Suspension of License

[a] General Procedure; Supplemental List

The State Department of Child Support Services may, when it is economically feasible for the Department and the boards to do so as determined by the Department, in cases in which the Department is aware that certain child support obligors listed on the certified lists have been out of compliance with a judgment or order of support for more than four months, provide a supplemental list of these obligors to each board with which the Department has an interagency agreement to implement such a procedure. On request by the Department, the licenses of these obligors will be subject to suspension, provided that the licenses would not otherwise be eligible for renewal within six months from the date of the request by the Department. The board will have the authority to suspend the license of any licensee on this supplemental list [*Fam. Code § 17520(e)(3)(A)*].

If any license is suspended under *Fam. Code § 17520*, any funds paid by the licensee may not be refunded by the board [*Fam. Code § 17520(e)(3)(D)*].

This procedure does not apply to licenses subject to annual renewal or annual fee [*Fam. Code § 17520(e)(3)(E)*].

[b] Suspension of State Bar Member

The State Bar of California is authorized to transmit to the Supreme Court on an annual basis the names of those members listed by the State Department of Child Support Services as delinquent in their payments of court-ordered

child or family support with a recommendation for their suspension from the practice of law [*Cal. Rules of Ct., Rule 9.22(a)*].

Reinstatement of a suspended State Bar member may occur only after receipt of notification from the State Bar that the member's name has been removed from the State Department of Child Support Services certified list [*see Cal. Rules of Ct., Rule 9.22(a)*; *Fam. Code § 17520(b)*].

[3] Notice of Board Action

[a] Notice to Applicant of Intent to Withhold Issuance or Renewal of License

If an applicant for license issuance or renewal is ascertained to be on the Department's most recent certified consolidated list, the relevant licensing board must immediately serve written notice on the applicant of the board's intent to withhold issuance or renewal of the license [*Fam. Code § 17520(e)(2)*; *see Cal. Rules of Ct., Rule 9.22(b)* (rules and regulations of State Bar contain procedures governing notification, suspension, and reinstatement of State Bar members in manner not inconsistent with *Fam. Code § 17520*)]. The board must notify the applicant either personally or by mail to the applicant's last known mailing address on file with the board [*Fam. Code § 17520(e)(2)*; service by mail must be completed in accordance with *Code Civ. Proc. § 1013*; *Fam. Code § 17520(e)(2)*].

The notice must inform the applicant that the board will issue a temporary license for 150 calendar days [*see Fam. Code § 17520(e)(2)(A)*; discussed in *[4], below*] if the applicant is otherwise eligible for licensure, but that on expiration of that time period the license will be denied unless the board has received a release from the local child support agency that submitted the applicant's name on the certified list [*Fam. Code § 17520(f)(1)*].

[b] Notice of Intent to Suspend License

If a licensee is on a supplemental list (*see* discussion in *[2][a], above*,) the board must immediately notify the licensee [*see Fam. Code § 17520(f)(2)*] that his or her license will be automatically suspended within 150 days after notice is served, unless compliance with statutory requirements is achieved. The notice must be made personally or by mail to the licensee's last known mailing address on file with the board [*Fam. Code § 17520(e)(3)(B)*]. The notice must be complete in accordance with *Code Civ. Proc. § 1013* [*Fam. Code § 17520(e)(3)(B)*]. The 150-day notice period cannot be extended [*Fam. Code § 17520(e)(3)(C)*].

The notice must also inform the licensee that his or her license will continue in its existing status for no more than 150 days from the date of the mailing or service of the notice and thereafter will be suspended indefinitely unless, during the 150-day notice period, the board has received a release from the district attorney who submitted the name on the certified list. Additionally, the notice must inform the licensee that any license suspended under *Fam. Code § 17520* will remain so until the expiration of the remaining license term, unless the board receives a release along with applications and fees, if applicable, to reinstate the license during the license term [*Fam. Code § 17520(f)(2)*].

[c] General Requirements for Notices of Intent to Withhold Issuance or Renewal of, or to Suspend, License

Each board is required to develop its notice in accordance with guidelines provided by the Department of Child Support Services. Notices so developed are subject to the Department's approval [*Fam. Code § 17520(f)*; *see Cal. Rules of Ct., Rule 9.22(b)* (rules and regulations of State Bar contain procedures governing notification, suspension, and reinstatement of State Bar members in manner not inconsistent with *Fam. Code § 17520*)]. The notice must include the address and telephone number of the local child support agency that submitted the name on the certified list, and must emphasize the necessity of obtaining a release from that agency's office as a condition for the issuance, renewal, or continued valid status of a license [*Fam. Code § 17520(f)*].

In addition to the information discussed in *[3][b], above*, and in this section *[3][c]*, the notice must inform the applicant

or licensee that if a license or application is denied or a license is suspended under *Fam. Code § 17520*, any funds paid by the applicant will not be refunded by the board [*Fam. Code § 17520(f)(3)*].

The notice must be accompanied by a copy of a form that the applicant can use to request a review by the district attorney of the applicant's status as a noncompliant support obligor. The State Department of Child Support Services is directed by statute to develop this form [*Fam. Code § 17520(f)(3)*].

[4] Issuance of Temporary License

Each board must issue a temporary license, valid for 150 days, to any applicant whose name is on the certified list, if the applicant is otherwise eligible for licensure [*Fam. Code § 17520(e)(2)(A)*].

Except in the case of a noncommercial driver's license, the 150-day time period for a temporary license cannot be extended, and only one temporary license can be issued during a regular license term. It must coincide with the first 150 days of that term. As this provision applies to a commercial driver's license, "license term" is deemed to be 12 months from the date the application fee is received by the Department of Motor Vehicles [*Fam. Code § 17520(e)(2)(B)*]. In the case of a noncommercial driver's license, on the request of the local child support agency or by order of the court on a showing of good cause, the board must extend the 150-day temporary license for a period not to exceed 150 extra days [Fam. Code § 11360.6(e)(2)(D)]. A license for the full or remainder of the license term will be issued or renewed only if the applicant comes into compliance with the support judgment or order, or otherwise prevails on support agency or judicial review of certification, and he or she is issued a release by the agency [*Fam. Code § 17520(e)(2)(B)*; *see Fam. Code § 17520(j), (l)*].

[5] Use or Release of Information

Any board receiving an inquiry as to the licensed status of an applicant who has had a license denied or suspended under *Fam. Code § 17520* can respond only that the license was denied or the temporary license was issued under that statute. Information collected under the statute is subject to the Information Practices Act of 1977 [*Fam. Code § 17520(q)*; *see Civ. Code § 1798 et seq.*]. The release or other use of information received by a board under *Fam. Code § 17520*, except as authorized by that statute, is a misdemeanor [*Fam. Code § 17520(u)*].

Legal Topics:

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§ 259.118 Applicant's Request for Review of Certification

[1] Written Request

If the applicant wishes to challenge the submission of his or her name on the local support agency's certified list, the applicant must make a timely written request for review on the form provided him or her with board notification of noncompliance [*see Fam. Code § 17520(f)(3)*]. The request for review must be directed to the support agency that certified the applicant's name to the Department of Child Support Services [*Fam. Code § 17520(h)*]. The agency must resolve the request in the same manner and time frame provided in the local child support agency's complaint resolution process under *Family Code Section 17800* [*Fam. Code § 17520(h)*; *but see [2], below*].

[2] Duty to Act With Diligence

The applicant is required to act with diligence in responding to notices from the board and the local child support agency with the recognition that the temporary license will lapse or the license suspension will go into effect after 150 days and that the agency and, if appropriate, the court, must have time to act within that period. An applicant's delay in acting, without good cause, that directly results in the inability of the support agency to complete a review of the applicant's request or the court to hear the request for judicial review within the 150-day period does not constitute the diligence required to justify the issuance of a release [*Fam. Code § 17520(i)*].

[3] Sole Administrative Remedy

The request for review process discussed in *§ 259.117[1]* [*see Fam. Code § 17520(h)*], is the applicant's sole administrative remedy for contesting the issuance of a temporary license or the denial or suspension of a license under *Fam. Code § 17520*. Moreover, the procedures specified in the Administrative Procedure Act [*Gov. Code § 11500 et seq.*] do not apply to the denial or failure to issue or renew a license under that statute [*Fam. Code § 17520(o)*].

Legal Topics:

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§ 259.119 Support Agency's Review of Certification

[1] Establishment of Procedure

Each local child support agency must maintain review procedures to allow an applicant to have the underlying arrearage and any relevant defenses investigated, to provide an applicant information on the process of obtaining modification of a support order, or to provide an applicant assistance in the establishment of a payment schedule on arrearages if the circumstances so warrant [*Fam. Code § 17520(g)(1)*].

[2] Finding That Release Should Issue to Applicant

On completion of review, the local child support agency to which the request for review was directed is required to provide written resolution within 30 days (possibly extended to 60 days) of receipt of the request [*Fam. Code § 17520(h)* (referring to time frame of section 17800); *Fam. Code § 17800*].

The local child support agency must immediately send a written release to the appropriate board and the applicant, if any of the following conditions are met [*Fam. Code § 17520(h)*]:

- The applicant is found to be in compliance or negotiates an agreement with the support agency for a payment schedule on arrearages or reimbursement.

- The applicant has submitted a request for review, but the support agency will be unable to complete the review and send notice of its findings to the applicant within the time specified for resolution of complaints.

- The applicant has filed and served a request for judicial review, but a resolution of that review will not be made within the 150-day period of the temporary license. This condition only applies when the delay in completing the judicial review process is not the result of the applicant's failure to act in a reasonable, timely, and diligent manner on receiving the support agency's notice of its findings.

- The applicant has obtained a judicial finding of compliance as defined in *Fam. Code § 17520*.

The State Department of Child Support Services is responsible for prescribing the release forms to be used by local child support agencies [*Fam. Code § 17520(l)*].

The release serves to notify the applicant and the board that, for the purposes of the statute, the applicant is in compliance with the support order or judgment [*Fam. Code § 17520(l)*], and is therefore entitled to issuance or renewal of the license, absent ineligibility on any other grounds.

[3] Finding That Release Should Not Issue to Applicant

As noted in *[2], above*, on completion of review, the local child support agency to which the request for review was directed is required to inform the applicant, in writing, of the agency's findings [*Fam. Code § 17520(h)*].

Except on the occurrence of the conditions discussed in *[2], above*, the support agency cannot issue a release if the applicant is not in compliance with the judgment or order for support. If the agency finds the applicant not in compliance, the agency must so notify the applicant. The notice must inform the applicant both of the fact that he or she can pursue any one or all of the judicial remedies discussed in *§§ 259.120* and *259.121* and of the name and address of the court in which the appropriate papers should be filed [*Fam. Code § 17520(j)*].

Legal Topics:

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§ 259.120 Judicial Review of Support Agency's Decision

[1] Order to Show Cause or Notice of Motion

On receipt of the local child support agency's findings after request for review that an applicant is not in compliance with a support order or judgment and not otherwise entitled to issuance of a release, the applicant may file an order to show cause or a notice of motion to obtain judicial review of the agency's decision [*Fam. Code § 17520(j)(1)*]. In so doing, the applicant must comply with all statutes and court rules regarding orders to show cause and notices of motion [*Fam. Code § 17520(j)*].

For reproductions of the Judicial Council forms of notice of motion for and order after judicial review of license denial, see *§§ 259.235* and *259.236*.

[2] Grounds for Review

The request for judicial review must state the grounds for which review is requested. Judicial review will be limited to those stated grounds. Review is limited to a determination of each of the following issues [*Fam. Code § 17520(k)*]:

- Whether there is a support judgment, order, or payment schedule on arrearages or reimbursement;
- Whether the petitioner or movant is the obligor covered by the support judgment or order;
- Whether the support obligor is or is not in compliance with the judgment or order for support; and
- The extent to which the needs of the obligor, taking into account the obligor's payment history and the current circumstances of both the obligor and the obligee, warrant a conditional release.

[3] Service of Papers and Evidentiary Hearing

Within seven calendar days after filing the show-cause order or notice of motion, the applicant must serve the request

for judicial review on the local child support agency that submitted the applicant's name on the certified list. Within 20 calendar days after the filing of the show-cause order or notice of motion, the court must hold an evidentiary hearing on the matter [*Fam. Code § 17520(k)*].

[4] Court Findings and Action

The court has the authority to uphold the action, unconditionally release the license, or conditionally release the license. If the judicial review results in a finding by the court that the obligor is in compliance with the judgment or order for support, the local child support agency must immediately send a release to the applicant and to the board in accordance with the procedure discussed in *§ 259.119[2]*; [*Fam. Code § 17520(k)*; *see Fam. Code § 17520(h), (l)*]. If the review results in the court's finding that the needs of the obligor warranted a conditional release (*see* [3], *above*), the court must make findings of fact stating the basis for the release and the payment necessary to satisfy the unrestricted issuance or renewal of the license without prejudice to a later judicial determination of the amount of support arrearages, including interest, and must specify payment terms, compliance with which are necessary to allow the release to remain in effect [*Fam. Code § 17520(k)*]. The legislature has statutorily expressed its intent that a court or support agency, in determining an appropriate payment schedule for arrearages, should base its decision on the facts of the particular case and the priority of payment of child support over other debts. However, the payment schedule must also recognize that certain expenses may be essential to enable an obligor to be employed. Therefore, in reaching its decision, the court or agency must consider both of these goals in setting a payment schedule for arrearages [*Fam. Code § 17520(g)(2)*].

Legal Topics:

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§ 259.121 Applicant's Cumulative or Alternative Judicial Remedies

In addition to or in lieu of seeking judicial review of the local child support agency's findings, the applicant may file an order to show cause or a notice of motion to (1) modify a support judgment or order, (2) fix a payment schedule on arrearages accruing under a support judgment or order, or (3) obtain a court finding of compliance with a judgment or order for support [*Fam. Code § 17520(j)*]. It appears, although it is not clear, that an applicant can pursue these judicial remedies without first exhausting the administrative remedy of submitting a request for review to the support agency [*see Fam. Code § 17520(j)*].

Legal Topics:

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[Reserved]

§§ 259.122[Reserved]

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§ 259.130 Governing Law

The procedure for adding a 6-percent penalty to delinquent support payments through service of a notice of delinquency is governed by *Fam. Code § 4720 et seq.* Orders for the payment of support through a designated county officer are governed by *Fam. Code §§ 4200-4203* (child support), *4350-4352* (spousal support) and *Welf. & Inst. Code §§ 276, 279*. Claims against state tax refunds and lottery winnings are governed by *Code Civ. Proc. §§ 708.710-708.790*.

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§ 259.131 Imposition of Monetary Penalty on Support Obligor

[1] Obligee's Notice of Support Delinquency

Fam. Code §§ 4720-4733 provide a statutory scheme for obtaining civil penalties for an obligor who is delinquent in his or her child support payments. Under this scheme, if the support obligor is more than 30 days in arrears on a support order, the obligee may file and serve a notice of delinquency [*Fam. Code § 4722(a)*]. Except as provided in *Fam. Code § 4726*, and subject to *Fam. Code § 4727*, any amount of child support specified in the notice that remains unpaid for more than 30 days after the notice has been filed and served then incurs a penalty equal to six percent of the delinquent payment for each month that it remains unpaid, up to a maximum of 72 percent of the unpaid balance due [*Fam. Code § 4722(b)*]. This procedure applies to installments of child support that are due on or after January 1, 1992 [*Fam. Code § 4721*].

The scope of support orders to which the delinquency penalty applies is unclear. *Fam. Code § 4720* specifies that "support," for purposes of the delinquency penalty statutes, means support as defined in *Fam. Code § 150*, which includes obligations owing on behalf of a child, spouse, or family, amounts owing to a county for AFDC reimbursement under *Welf. & Inst. Code § 11350*, past-due support and arrearages, and maintenance and education expenses for a minor child or a child described in *Fam. Code § 3901* (support duty continues until child completes 12th grade or reaches age 19, whichever occurs first, or for as long as parents' agreement for additional support extends). However, *Fam. Code § 4721* states that the delinquency penalty only applies to *child* support installments that are due on or after January 1, 1992, and *Fam. Code § 4722(a)* expressly limits the penalty to any amount of *child* support specified in the notice of delinquency. Further, the relevant statutes are located in Chapter 5 of the Family Code, which is entitled "Civil Penalty for Child Support Delinquency." Thus, the procedure most likely was not intended to apply to spousal support. Resolution of this issue will be up to the Legislature or the courts. The Judicial Council form for Notice of Delinquency is expressly limited to child support [*see § 259.233[1]*].

[2] Obligor's Motion to Determine Arrearages

No penalty may be imposed if, in the discretion of the court, within a timely fashion after service of the notice of delinquency, the obligor files and serves a motion to determine arrearages and to show cause why the penalties should

not be imposed [*Fam. Code § 4726(a)*; *see § 259.234* (form)]. The court may also evaluate all the circumstances of the case, and determine if the interests of justice would be served by the imposition of only part of the penalty [*In re Marriage of De Prieto (2002) 104 Cal. App. 4th 748, 759, 128 Cal. Rptr. 2d 380* (trial court did not abuse discretion in reducing penalty because bulk of arrearages accrued when husband was unemployed or underemployed, and arrearages were paid after special master calculated balance owed)]. Further, to deny imposition of the penalty, the court must, at the hearing on the motion, find that the obligor has proved any of the following [*Fam. Code § 4726(b)*; *see In re Marriage of De Prieto (2002) 104 Cal. App. 4th 748, 759, 128 Cal. Rptr. 2d 380* (reference to "a penalty" suggests that monthly penalties can properly be evaluated as separate components, and trial court may examine monthly penalties to determine if any of them should not be imposed in interests of justice)]:

- The child support payments were not 30 days in arrears as of the date of the hearing;

- The obligor suffered a serious illness, disability, or unemployment that substantially impaired his or her ability to comply fully with the support order, and the obligor has made every possible effort to comply with the order;

- The obligor is a public employee and, for reasons related to fiscal difficulties of the employing entity, the obligor has not received a paycheck for 30 days or more; or

- It would not be in the interests of justice to impose a penalty.

[3] Obtaining and Enforcing Judgment on Delinquent Amount

If the child support owed or any arrearages, interest, or penalty remain unpaid more than 30 days after serving the notice of delinquency, the obligee may file a motion to obtain a judgment on the amount owed. The judgment is enforceable in any manner provided by law for the enforcement of judgments [*Fam. Code § 4725*]. Penalties may also be enforced by the issuance of a writ of execution in the same manner as a writ of execution may be issued for unpaid installments of child support as described in *Fam. Code §§ 5100-5104* (discussed in Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies*)]. However, payment of penalties does not take priority over payment of arrearages or current support [*Fam. Code § 4728*].

[4] Effect of Penalty on Determination of Current Support to Be Paid

At any hearing to set or modify the amount payable for the support of a minor child, the court may not consider any penalties imposed in determining the amount of current support to be paid [*Fam. Code § 4730*].

[5] Subsequent Notices of Support Delinquency

A subsequent notice of delinquency may be filed and served at any time. Child support arrearages and ongoing installments listed on subsequent notices must state that they have been listed on a previous notice [*Fam. Code § 4731*]. Any penalty may not be greater than six percent per month of the original amount of support arrearages or support installment. Nor may the penalties on any arrearage amount or support installment exceed 72 percent of the original amount due, regardless of whether or not the installments have been listed on more than one notice [*Fam. Code § 4727*].

[6] Payment of Penalties Collected

Penalties collected pursuant to *Fam. Code § 4720 et seq.* must be paid to the custodian of the child who is the subject of the child support judgment or order, whether or not the child is a recipient of public assistance [*Fam. Code § 4733*].

[7] Enforcement of Support Obligation by Local Child Support Agency

The local child support agency providing support services under Title IV-D of the Social Security Act [*see 42 U.S.C. § 654*] may not enforce child support obligations using the penalties provided for in *Fam. Code § 4720 et seq.* [*Fam. Code § 4729*].

For discussion of other methods of enforcement that may be undertaken by a local child support agency, see *§ 259.150* et seq.

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§ 259.132 Collection

§ of the Social Security Act [*42 U.S.C. § 651 et seq.*], the Department of Child Support Services and the local child support agency have the responsibility for promptly and effectively collecting and enforcing child support obligations [*Fam. Code § 17500(a)*]. The Department and the local child support agency are the public agencies responsible for administering wage withholding for the purposes of Title IV-D of the Social Security Act [*Fam. Code § 17500(b)*; *see 42 U.S.C. § 651 et seq.*].

Except as provided in *Fam. Code § 17450*, the local child support agency must submit child support delinquencies to the Department for purposes of supplementing the collection efforts of the local child support agencies. Submissions must be in the form and manner and at the time prescribed by the Department. The Department will make collection in accordance with *Family Code § 17450* [*Fam. Code § 17500(c)*]. For these purposes, "child support delinquency" means an arrearage or otherwise past due amount that accrues when an obligor fails to make any court-ordered support payment when due, which is more than 60 days past due, and the aggregate amount of which exceeds $100 [*Fam. Code § 17500(c)*].

For a complete discussion of the support enforcement role of the Department of Child Support Services, see § 1259.160.

Legal Topics:

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§ 259.133 Payment of Support to Court-Designated Officer

[1] Child Support

[a] Required Payments to Officer

In any proceeding in which a court makes, or has made, an order requiring the payment of child support to a parent receiving welfare moneys for the maintenance of children for whom support must be ordered, the court must direct that payment of support be made to the county officer designated by the court for that purpose [*Fam. Code § 4200(a)*]. Once the State Disbursement Unit described in *Fam. Code § 17309* is implemented, all payments must be directed to that Unit rather than to a county officer designated by the court [*Fam. Code § 4200(a)*]. Furthermore, the court must direct the local child support agency to appear on behalf of the welfare recipient in any proceeding to enforce the order [*Fam. Code § 4200(b)*].

[b] Discretionary Payments to Officer

In any proceeding in which a court makes, or has made, an order requiring the payment of child support to the person having custody of a child for whom support may be ordered, the court may direct that the payments be made to the county officer designated for that purpose, provided, however, that once the State Disbursement Unit described in *Fam. Code § 17309* is implemented, all payments must be directed to that Unit rather than to a county officer designated by the court [*Fam. Code § 4201(a)*]. The court may also direct the suppport agency to appear on behalf of the minor children in any action to enforce the order [*Fam. Code § 4201(b)*].

In any proceeding in which the court has made an order requiring the payment of child support to a person having custody of a child and support is subsequently assigned to the county, or the person having custody has requested the local child suppport agency to provide child support enforcement services [*see Fam. Code § 17400*], the agency may issue a notice directing that the payments be made to the agency, another county office, or the State Disbursement Unit pursuant to *Fam. Code § 17309*. The notice must be served on both the support obligor and obligee in compliance with *Code Civ. Proc. § 1013* and the agency must file the notice in the action in which the support order was issued [*Fam. Code § 4204*].

Furthermore, in any proceeding in which the custodial parent resides in one county and the parent ordered to pay support resides in another, the court may direct payment to be made to the county officer designated by the court in the custodial parent's county of residence [*Fam. Code § 4202(a)*]. The court also may direct the local child support agency of either county to enforce the order [*Fam. Code § 4202(a)*]. If the order is issued in the county of the noncustodial parent or any county other than the one in which the custodial parent resides, a special procedure for registration of the out-of-county order must be followed for enforcement purposes [*see Fam. Code § 5600*, discussed in *§ 259.159*].

[c] Charging Expenses to Counties

Except as provided by *Fam. Code § 4202*, which concerns enforcement of support orders when the parents reside in different counties, the expenses of the county officer designated by the court and expenses of the local child support agency incurred in enforcing any order of the type described by *Fam. Code § 4200* (parent on welfare) or *Fam. Code § 4201* (discretionary orders) must be a charge on the county where the proceedings are pending [*Fam. Code § 4203(a)* (still referring to district attorney)]. Any fees for service of process in the enforcement of any such order must be a charge on the county where the process is served [*Fam. Code § 4203(b)* (still referring to district attorney)]. A suggested form of court order that includes a provision for the payment of those charges is *set forth in § 259.232*.

[2] Spousal Support

[a] Authorization for Discretionary Payments to Officer

In any proceeding in which a court makes, or has made, an order requiring payment of spousal support, the court may direct that payment be made to the county officer designated by the court for that purpose [*Fam. Code § 4350* (referring to district attorney)]. When such an order is made the court may include in its order any service charge imposed under the authority of *Welf. & Inst. Code § 279* [*Fam. Code § 4350*; *see Welf. & Inst. Code § 279* (authorizing imposition of service charge and requiring inclusion of order to pay service charge when payments are ordered under *Welf. & Inst. Code § 276(a), e.g.*, those to a spouse or child)].

[b] Representation by District Attorney or Other Support Agency

In any proceeding in which the court has entered an order pursuant to *Fam. Code § 4350* the court may also refer the matter of enforcement of the spousal support order to the local child support agency. The agency may bring enforcement proceedings as deemed appropriate [*Fam. Code § 4351(a)*]. However, the provisions of *Fam. Code § 4351* do not preclude the responsible support agency from bringing an action or initiating process to enforce or to punish the failure to obey a spousal support order under any other applicable provision of law, regardless of whether there has been a referral by the court pursuant to *Fam. Code §§ 4350-4352* [*Fam. Code § 4351(c)*].

Furthermore, in any case in which the local child support agency is required to appear on behalf of a welfare recipient in a proceeding to enforce an order requiring payment of child support, the agency must also enforce any order requiring payment to the welfare recipient of spousal support that is in arrears [*Fam. Code § 4351(b)*]. Nevertheless, it has been held that authority of the local child support agency to represent a spousal support obligee under the predecessor to *Fam. Code § 4351* is limited to proceedings involving enforcement of an existing order. The agency is not authorized to represent a spouse in a proceeding to modify the spousal support order [*see In re Marriage of Brown (1987) 189 Cal. App. 3d 491, 495-496, 234 Cal. Rptr. 535* (decided under former *Civ. Code § 4801.7*; *now see Fam. Code § 4351*].

[c] Charging Expenses to Counties

Insofar as expenses of the county officer designated by the court and expenses of the local child support agency incurred in the enforcement of any order referred by the court exceed any service charge imposed under *Welf. & Inst. Code § 279*, they will be a charge on the county where the proceedings are pending [*Fam. Code § 4352(a)* (still referring to

district attorney)]. *Welf. & Inst. Code § 279* permits a county board of supervisors to impose a service charge at a uniform rate sufficient to defray the cost of services of the probation officer or other officer designated by the court, not exceeding two percent of the amount collected, in addition to the payments of support, attorney's fees, or court costs made to the officer designated by the court [*see Welf. & Inst. Code §§ 276(a), 279*]. Any fees for service of process in the enforcement of any such order will be a charge on the county where the process is served [*Fam. Code § 4352(b)* (still referring to district attorney)].

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§ 259.134 Claim Against Federal Tax Refund

The Internal Revenue Service must deduct the amount of any past-due child support from a taxpayer's income tax refund and transfer that amount to the state agency that properly notifies the Secretary that the overpayment is necessary to satisfy the taxpayer's debt for past-due child support. The reduction is applied to satisfy past-due child support that has been assigned and paid by the state agency and then may be applied to satisfy other past-due child support allowed under state law [*I.R.C. § 6402(c)*]. State and federal courts lack jurisdiction to restrain the I.R.S. from this collection activity [*State of Nebraska v. Bentson (9th Cir. 1998) 146 F. 3d 676, 679]* . Notice must be given to the obligor parent whose refund is being intercepted, and to his or her subsequent spouse if a joint return was filed [*see 42 U.S.C. § 664(a)*]. There are then procedures by which the subsequent spouse may make a claim for her or his share of the refund [*see 42 U.S.C. § 664(a)(2), (3)(C)*; *see also Oatman v. Department of Treasury-IRS (9th Cir. 1994) 34 F.3d 788-789], 34 F.3d 787, 789* . Whether she or he is entitled to a share depends on whether under state property law, the property of a subsequent spouse is liable for a spouse's premarital debt for child support [*see Oatman v. Department of Treasury-IRS (9th Cir. 1994) 34 F.3d 788-789], 34 F.3d 787, 789* . For discussion of California law in this regard, see *§ 259.19*. The Internal Revenue Service will pay interest to a taxpayer on any refund amounts that were erroneously withheld for past-due child support unless the error is caused by the state agency to which the amount is owed [*see Rev. Rul. 84-171, 1984-50 C.B. 37*].

The United States Supreme Court has held that the federal earned-income credit [Former *I.R.C. § 43*; *now see I.R.C. § 32*] may be intercepted and transferred to a state for past-due child support.

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§ 259.135 Claims Against Tax Refunds, Lottery Winnings, or Other State Payments to Collect Support

[1] In General

A judgment creditor-obligee under a judgment for child, spousal, or family support may proceed to intercept the judgment debtor-obligor's state income tax refund or California State Lottery winnings before the money is paid by the Controller to the obligor [*see Code Civ. Proc. § 708.730(c), (d), (e)*]. California's state income tax intercept program has been upheld as constitutional against a challenge that it violates procedural due process [*Wightman v. Franchise Tax Board (1988) 202 Cal. App. 3d 966, 978, 249 Cal. Rptr. 207* (construing *Gov. Code § 12419.5*, which authorizes certain offsets by State Controller)].

Different procedures apply depending on whether or not the obligation of support is being enforced by a public entity such as a local child support agency or by the obligee. There are expedited procedures by which the public entity may direct the State Controller to pay over the judgment debtor's funds to a designated county agency [*see Code Civ. Proc. §§ 708.730(c), 708.740(d)* (discussed in *[2], below*)]. There are also procedures by which a judgment creditor under an obligation not being enforced by a public entity may enlist the assistance of the local child support agency in obtaining the funds from the State Controller [*see Code Civ. Proc. § 708.740(e)* (discussed under *[3], below*)]. In this type of case, the funds are deposited with the court [*see Code Civ. Proc. § 708.740(c), (e)* (discussed under [3], *below*)], and the debtor then may assert his or her rights and defenses before the funds can be released [*Code Civ. Proc. § 708.770*]. Finally, there is a procedure by which the judgment creditor may obtain payment of the funds into court through use of the Judicial Council form of Notice of Support Arrearage [*see Code Civ. Proc. §§ 708.730(d), 708.780(c)* (both operative only until December 31, 2000)]. For discussion, see *[3][c], below.*

[2] Enforcement by Local Child Support Agency

If the child, spousal, or family support obligation is being enforced by a local child support agency, the judgment creditor may file an affidavit with the Department of Child Support Services. The affidavit must state that the obligee desires relief and set forth the exact amount then required to satisfy the judgment. Other facts tending to establish the identity of the obligor may also be stated [*Code Civ. Proc. § 708.730(a), (c)*]. Special expedited procedures are also available by which the local child support agency may submit a single affidavit concerning multiple obligors [*see Code*

Civ. Proc. § 708.730(c)].

Money that is owing and unpaid to the obligor by a state agency, including, but not limited to, any personal income or bank and corporate tax refund to which the obligor is otherwise entitled is subject to intercept by the local child support agency [*Code Civ. Proc. § 708.730(c)*]. Presumably, lottery winnings are included within the reach of these procedures.

Filing of the affidavit with the department is sufficient to require the Controller to transfer the funds claimed by the obligor [*Code Civ. Proc. § 708.740(a)*]. Payment is to be directed to the county agency designated in the affidavit [*Code Civ. Proc. § 708.740(d)*].

Promptly on the filing of the affidavit, the department must serve notice of the filing on the obligor. Service may be made personally or by mail [Code Civ. Proc. § 706.730(b), (c)]. The state agency must also send a notice of deposit to the obligor, instructing the obligor to file any and all requests for relief with the local child support agency that filed the affidavit. The obligor must request relief within 15 days after service of notice or be deemed to have waived any claim. If the matter cannot be resolved with the support agency, the obligor may then commence proceedings under *Code Civ. Proc. § 708.770* (claiming exemption), or under any other provision of law [*Code Civ. Proc. § 708.770(g)*; *see Code Civ. Proc. § 703.070* (exemptions applicable to judgment for child support)].

If the claim of the obligor is less than $10, the Controller may disregard the obligee's claim and forward the money to the obligor. If there is more than one claimant for a refund, the Franchise Tax Board has discretion in allocating the overpayment among claimants [*Code Civ. Proc. § 708.740(f)*; *but see Gov. Code § 12419.3* (giving priority to child and family support over spousal support and priority to obligations being enforced by support agency)]. If two or more local child support agencies submit claims on behalf of a obligee, the Controller has the discretion to select the claim or claims to honor [*Code Civ. Proc. § 708.740(g)*; *but see Gov. Code § 12419.3*].

For discussion of the scope of Department of Child Support Services enforcement of support obligations that are referred to the Department by support agencies, see *§ 259.160* [*Fam. Code § 17500*].

[3] Enforcement by Obligee

[a] By Filing Judgment With Public Agency

An obligee may file an abstract or certified copy of the judgment and affidavit with a state agency owing money to the obligor, rather than to seek the assistance of the local child support agency. The papers must be filed before the time when the agency that owes money presents the claim of the obligor to the Controller for payment [*Code Civ. Proc. § 708.740(a)*]. The state agency must note the filing and the amount required to satisfy the judgment in presenting the claim of the judgment debtor to the Controller for payment [*Code Civ. Proc. § 708.740(b)*]. The Controller then deposits the funds directly with the court [*Code Civ. Proc. § 708.740(c)*].

The court clerk must then issue a notice of deposit to the obligor [*see Code Civ. Proc. § 708.770(a)*]. Within 10 days after service of this notice [*see Code Civ. Proc. § 708.770(b)*], the obligor may claim an exemption through the procedure set forth in *Code Civ. Proc. § 708.770*. After expiration of the period for claiming an exemption (if the obligor fails to claim an exemption) or after the court's determination on the claim of exemption, the court must pay the nonexempt portion of the money deposited to the obligee and the balance, if any, to the obligor, unless some other disposition is required by law [*see Code Civ. Proc. § 708.775*].

[b] Assistance of Support Agency in Obtaining Funds From State Controller

If a child, spousal, or family support obligation is not being enforced by the local child support agency under *Family Code Section 17400 et seq.*, and money is owed to the obligor for lottery winnings or a tax refund, the obligee may file a

certified copy of the judgment with the local child support agency of the county in which the support judgment is entered or registered. The agency must then file the obligee's claim with the Department of Child Support Services, as discussed in *[2], above.* Funds received by the local child support agency under this procedure must be deposited with the court [*Code Civ. Proc. § 708.740(e)*; *see Code Civ. Proc. § 708.740(c)*].

The support agency's involvement is limited to these procedures to transfer the money from the state to the court. Any and all notices otherwise required of an obligee or the clerk, and any litigation to enforce rights are the responsibility of the obligee, as if service had been directly on the Controller without the intervention of the agency [*Code Civ. Proc. § 708.740(e)*]. Further, any claim for relief by the judgment debtor must be made with the court [*see Code Civ. Proc. § 708.770*, discussed in *[a], above*] instead of with the district attorney [*see Code Civ. Proc. § 708.770(g)*].

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§ 259.136 Locating Obligor Parents

The California Parent Locator Service and Central Registry, within the Department of Justice, must collect and disseminate information with respect to any parent, putative parent, spouse, or former spouse [*Fam. Code § 17506*]. Generally, only the Department of Child Support Services, the California Child Support Automation System, the California Parent Locator Service and Central Registry, the parent locator services and central registries of other states as defined by federal statutes and regulations, a local child support agency of any county in California, and the federal Parent Locator Service may receive the information [*see Fam. Code § 17506(e)*]. Additionally, employers are required to file information on new and rehired employees with the Employment Development Department [*see Unemp. Ins. Code § 1088.5*]. Information collected pursuant to *Unemp. Ins. Code § 1088.5* may be used for the purpose of locating noncustodial parents or the income of noncustodial parents [*Unemp. Ins. Code § 1088.5(f)(2)*]. Similarly, when requested by the Department of Child Support Services, the Franchise Tax Board (for purposes of support enforcement), or the federal or California Parent Locator Service, the Employment Development Department must provide access to the information it has collected pursuant to *Unemp. Ins. Code § 1088.5*, for purposes of administering the child support enforcement program [*Fam. Code § 17508*; *see § 259.150* et seq.].

Note, also, that on receipt of a written request from a local child support agency enforcing the obligation of parents to support their children, or from an agency of another state enforcing a support obligation, an employer or labor organization must cooperate with and provide relevant employment and income information in its possession to the requesting agency for purposes of establishing, modifying, or enforcing the support obligation [*Fam. Code § 17512(a)*]. An employer or labor organization does not incur any liability for providing this information [*Fam. Code § 17512(a)*]. An employer or labor organization that fails to provide relevant employment information to the requesting agency within 30 days of receiving the request may be assessed a civil penalty, plus attorney's fees and costs [*Fam. Code § 17512(e)*]. For related discussion, see *§ 259.153[5]*.

Legal Topics:

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[Reserved]

§§ 259.137[Reserved]

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§ 259.150 Governing Law

Support enforcement by a local child support agency is a component of California's plan to meet the requirements of Section IV-D of the Social Security Act, *42 U.S.C. § 651 et seq.* This plan was originally set forth in the Welfare and Institutions Code [*see* former *Welf. & Inst. Code §§ 11350, 11350.1, 11475.1*] as an adjunct to provisions for public assistance for families with dependent children (formerly *AFDC* and later TANF), and originally part of the Family Economic Security Act of 1982 [*see Welf. & Inst. Code § 11200*]. It is now, however, primarily set forth in *Fam. Code § 17000 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 259.151 Transition from District Attorneys to Local Child Support Agencies

[1] Introduction

On January 1, 2000, formal responsibility for child support enforcement that has historically resided in the state Department of Social Services' Office of Child Support--and had been implemented by county district attorneys--was transferred to the state Department of Child Support Services (DCSS), which acts through "local child support agencies" at the county level [*See Fam. Code § 17000 et seq.*]. The Department of Child Support Services has been designated as the single organizational unit to administer the federally mandated "Title IV-D" [*42 U.S.C. § 651 et seq.*] state plan for securing child and spousal support, medical support, and determining paternity [*Fam. Code § 17202*].

In order to achieve an orderly and timely transition to the new system of child support enforcement with a minimal disruption of services, the director of the Department of Child Support Services was required to begin the process of transitioning responsibility for cases from district attorney offices to local child support agencies no later than January 1, 2001. The transition must be completed by January 1, 2003, but at least 50 percent of the statewide cases must be transferred into the new system by January 1, 2002 [*Fam. Code § 17305(a)*]. During the transition, district attorneys in counties that have not yet transferred responsibility to local support agencies will continue to be designated the "Title IV-D" organizational unit for those counties [*Fam. Code § 17305(d)(1)*]. In addition, local child support agencies, with the approval of the director of the DCSS, may contract with local district attorneys for limited attorney services until September 1, 2004. All *criminal* enforcement of support obligations will remain the responsibility of district attorneys [*see Fam. Code § 17304*].

This Part generally uses the term "local child support agency" to reflect the revised scheme for public agency enforcement of support obligations. As used in this discussion, however, the term should be understood to also include county district attorneys during the transition period, unless otherwise stated. Note, also, that a significant number of support-related statutes with references to district attorneys were not amended as part of the original legislation creating local child support agencies, and some of these also include references to former Welfare and Institutions Code sections that have now been incorporated into the Family Code. Pending the correction of these statutes to conform to the new scheme, this discussion treats these statutes as if they do conform when the sense and import of the statutes make it

reasonable to do so.

[2] Department of Child Support Services

Operative January 1, *2000, the Family Code* authorizes the establishment of the Department of Child Support Services (DCSS) within the California Health and Human Services Agency. DCSS is designated as the "single organizational unit whose duty it shall be to administer the Title IV-D state plan for securing child and spousal support, medical support, and determining paternity." State plan functions are to be performed by other agencies as required by law, by delegation by DCSS, or by cooperative agreements [*Fam. Code §§ 17200, 17202*]. DCSS is required, for example, to enter into a cooperative agreement with the department of child support services for each county (see *[3], below*) to carry out the requirements of the state plan, and to provide related services [*Fam. Code §§ 17000(h), 17304(a)*].

Organizationally, DCSS consists of a director, who is appointed by the Governor, and such division or other administrative units as the director may find necessary [*Fam. Code § 17204*; *cf. Fam. Code § 17300* (Governor's authority to appoint deputy directors)]. The director is charged with the general duties of (1) being responsible for management of DCSS, (2) administering all federal and state laws and regulations pertaining to the enforcement of child support obligations, (3) performing all statutorily prescribed duties and any other administrative and executive duties imposed by law, and (4) observing and reporting to the Governor, the Legislature, and the public on the conditions of child support enforcement activities throughout the state [*Fam. Code § 17302*].

The director of DCSS has direct oversight and supervisory responsibility of the "Title IV-D" operations of local child support agencies (see *[3], below*), and is responsible for both implementing the transition from district attorney to local child support agency offices (see *[1], above*), and in developing uniform policies, forms, and procedures to be employed statewide by those local agencies [*see Fam. Code §§ 17304(b), 17305, 17306(b)*; *see also Fam. Code § 17310* (director's obligation to formulate regulations and policies, and permitting existing regulations of Department of Social Services and Department of Health Services to remain in effect pending readoption, revision, or repeal by DCSS)].

The DCSS director is also responsible for implementing and managing a single, statewide automated child support system that complies with state and federal requirements, and may delegate responsibility to, or enter into agreements with, any agency or entity the director deems necessary to satisfy this requirement [*see Fam. Code § 17308*; *Welf. & Inst. Code § 10080 et seq.*; *cf. Fam. Code § 17309* (state operation of State Disbursement Unit required by federal law)].

[3] Local Child Support Agencies

Legislation that became operative January 1, 2000, requires each county to establish a "county department of child support services," also known as the "local child support agency," to carry out the actual casework responsibilities of the "Title IV-D" support enforcement program that district attorneys have historically handled. Each local child support agency must be separate and independent from any other county department, and will be managed by a county administrator--who, in turn, reports to the state-level director of DCSS [*Fam. Code § 17304*; *see Fam. Code § 17400(a)*].

Note, however, that the DCSS director is authorized by statute to consolidate the local child support agencies, or any function of the agencies, in more than one county into a single agency, if the director determines that doing so will increase the efficiency of the "Title IV-D" program, and if each county has at least one local child support office accessible to the public [*Fam. Code § 17304(a)*]. In addition, local child support agencies, with approval of the DCSS director, may enter into cooperative agreements with other county departments, as necessary, to carry out their support enforcement responsibilities, but may not enter into agreements to actually run, supervise, manage, or oversee their "Title IV-D" functions. Until September 1, 2004, nevertheless, a local child support agency may enter into a cooperative agreement or contract of limited scope and duration with a district attorney to utilize individual attorneys to carry out

limited attorney services--subject to approval of the agreement by DCSS and a written finding by DCSS that the agreement is made necessary by the small size of the local program or other serious needs of the program [*Fam. Code § 17304(c)*].

[4] Collection and Enforcement

In carrying out its obligations under Title IV-D of the Social Security Act [*42 U.S.C. § 651 et seq.*], the Department of Child Support Services and the local child support agency have the responsibility for promptly and effectively collecting and enforcing child support obligations [*Fam. Code § 17500(a)*]. The Department and the local child support agency are the public agencies responsible for administering wage withholding for the purposes of Title IV-D of the Social Security Act [*Fam. Code § 17500(b)*; *see 42 U.S.C. § 651 et seq.*].

Except as provided in *Fam. Code § 17450*, the local child support agency must submit child support delinquencies to the Department for purposes of supplementing the collection efforts of the local child support agencies. Submissions must be in the form and manner and at the time prescribed by the Department. The Department will make collection in accordance with *Fam. Code § 17450* [*Fam. Code § 17500(c)*]. For these purposes, "child support delinquency" means an arrearage or otherwise past due amount that accrues when an obligor fails to make any court-ordered support payment when due, which is more than 60 days past due, and the aggregate amount of which exceeds $100 [*Fam. Code § 17500(c)*].

For a complete discussion of the support enforcement role of the Department of Child Support Services, see *§ 259.160*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-259 California Forms of Pleading and Practice--Annotated § 259.152

§ 259.152 Reimbursement of Public Benefits for Support of Child

[1] Liability of Noncustodial Parent

Under *Fam. Code § 17402*, in any case involving parental separation from or desertion of a child that results in public benefits being granted to the child, the noncustodial parent is obligated to reimburse the county for its expenditure [*see Fam. Code § 17402(a)*; *see also County of San Luis Obispo v. Nathaniel J. (1996) 50 Cal. App. 4th 842, 844-846, 57 Cal. Rptr. 2d 843]* . The obligation arises not only with respect to public benefits paid for the support of the noncustodial parent's child, but also with respect to benefits paid on behalf of a child of the supported child, that is, the grandchild of the noncustodial parent [*County of San Bernardino v. Martinez (1996) 51 Cal. App. 4th 600, 605-606, 59 Cal. Rptr. 2d 142]* . Reimbursement must be for an amount equal to the amount specified in an order for the support and maintenance of the family issued by a court of competent jurisdiction [*Fam. Code § 17402(a)*; *see County of Alameda v. Johnson (1994) 28 Cal. App. 4th 259, 262-263, 33 Cal. Rptr. 2d 483* (indication of legislative intent that amount of reimbursement not be limited to amount of benefits extended)].

When no court order has been made, the reimbursable amount may potentially exceed the amount of public assistance benefits paid out on behalf of the child, because the statute permits a county to collect from the noncustodial parent an amount equal to the amount specified in a family support order [*see Fam. Code § 17402(a)*; *State of Ohio v. Barron (1997) 52 Cal. App. 4th 62, 69-77, 60 Cal. Rptr. 2d 342* (upholding constitutionality of predecessor section)].

The court determines the amount of the obligation established for each parent with a liability by using the appropriate child support guideline currently in effect and computes it as follows [*Fam. Code § 17402(c)*; *see Fam. Code § 4050 et seq.*; for discussion of child support guidelines, *see* Ch. 224, *Dissolution of Marriage: Child Support*]:

(1) If one parent remains as a custodial parent, the support is computed according to the guideline.

(2) If the parents reside together and neither father nor mother remains as a custodial parent, the guideline support is computed by combining the noncustodial parents' incomes. The combined incomes are used as the high earner's net monthly disposable income in the guideline formula. Income may not be

attributed to the caretaker or governmental agency. The amount of guideline support resulting is proportionately shared between the noncustodial parents based upon their net monthly disposable incomes.

(3) If the parents reside apart and neither father nor mother remains as a custodial parent, the guideline support is computed separately for each parent by treating each parent as a noncustodial parent. Income may not be attributed to the caretaker or government agency.

The guideline "currently in effect" is the one in effect at the time of the determination, not the one in effect during the period at issue [*County of Orange v. Dabbs (1994) 29 Cal. App. 4th 999, 1005-1006, 35 Cal. Rptr. 2d 79* (but noting "gross inconsistency" between statutory language "amount of support which would have been specified," and "appropriate child support guidelines currently in effect"); *County of Alameda v. Johnson (1994) 28 Cal. App. 4th 259, 262-263, 33 Cal. Rptr. 2d 483]* .

Reimbursement is based on a parent's statutory duty of support, which is independent from any judgment or order for the payment of support [*see In re Marriage of Hyon & Kirschner (1991) 231 Cal. App. 3d 449, 455, 282 Cal. Rptr. 408]* .

This provision was added as former *Welf. & Inst. Code § 11350*, the predecessor to *Fam. Code § 17402*, by 1991 legislation, operative January 1, 1992 [*see* 1991 Stats. ch. 110, § 20 (amending former *Welf. & Inst. Code § 11350*)]. Its retroactive application to determine the amount of reimbursement due for periods before that date has been held to meet constitutional requirements [*County of Orange v. Dabbs (1994) 29 Cal. App. 4th 999, 1004-1006, 35 Cal. Rptr. 2d 79* (directly addressing retroactivity issue); *see County of Alameda v. Johnson (1994) 28 Cal. App. 4th 259, 262-263, 33 Cal. Rptr. 2d 483* (applying rule retroactively without discussion)].

Under the statewide child support uniform guideline, the court may, in its discretion, consider the earning capacity of a parent in lieu of that parent's income, if consistent with the best interests of the child [*Fam. Code § 4058(b)*]. However, earning capacity may not be considered as a way of circumventing the exclusion of public assistance benefits from income for child support purposes under *Fam. Code § 4058(c)*. Furthermore, at least one case has held that a parent-recipient of such benefits who chooses not to work in order to remain in the home with young children cannot be ordered to reimburse a county for such benefits paid on behalf of an older child based on what he or she could have earned had he or she have chosen to work [*County of Yolo v. Garcia (1993) 20 Cal. App. 4th 1771, 1776-1780, 25 Cal. Rptr. 2d 681* (county action for reimbursement of foster care costs related to one child of mother who remained in home with other children)]. Such an order would violate the policy expressed in the eligibility for that particular benefit program (the former AFDC program) requirements that single parents of very young children are exempt from work registration requirements [*County of Yolo v. Garcia (1993) 20 Cal. App. 4th 1771, 1777-1778, 25 Cal. Rptr. 2d 681* ; *see Welf. & Inst. Code § 11320.3(b)(6)*]. Whether that holding can now be applied to parents receiving benefits under the successor program to AFDC is presently unclear.

A parent who does not have actual possession and physical control of his or her children is considered to be a noncustodial parent from whom reimbursement may be sought, even if that parent has legal and physical custody under an order issued in a family law or other proceeding [*County of Ventura v. George (1983) 149 Cal. App. 3d 1012, 1018, 197 Cal. Rptr. 245]* . Similarly, a parent who, under a shared physical or joint custody arrangement, has periods of alternating physical custody of less than one month can be a noncustodial parent for reimbursement purposes [*County of Yolo v. Worrell (1989) 208 Cal. App. 3d 471, 475-477, 256 Cal. Rptr. 259]* .

If the judgment for reimbursement is made payable in installments, interest does not accrue until an installment is due unless the judgment provides otherwise [*Code Civ. Proc. § 685.020(b)*]. Therefore, in the absence of a provision in the judgment, a county may not assess postjudgment interest from the date of entry on the total amount of a judgment made payable in installments [*County of Alameda v. Weatherford (1995) 36 Cal. App. 4th 666, 670-671, 42 Cal. Rptr. 2d*

386 ; *see also* *Dupont v. Dupont (2001) 88 Cal. App. 4th 192, 201-202, 105 Cal. Rptr. 2d 607* (child support modification order requiring repayment of support arrearages in installments, rather than original dissolution judgment, was installment judgment for purposes of county's assessment of accrued interest on support arrearages)]. For further discussion of interest on a support judgment, see *§ 259.16*.

For purposes of *Code Civ. Proc. § 685.020*, only the initial support order, whether temporary or final, and whether or not the order is contained in a judgment, may be considered an installment judgment [*Fam. Code § 155*]. No support order or other order or notice issued, that sets forth the amount of support owned for prior time periods or establishes a periodic payment to liquidate the support order for prior periods, may be considered a money judgment for purposes of *Code Civ. Proc. § 685.020(b)* [*Fam. Code § 155*].

[2] Action for Reimbursement

The local child support agency must take appropriate action either [*Fam. Code §§ 17400(n)(1)(A),(B), 17402(b)*]:

- In the superior court in the county that is currently expending public assistance, or

- If public assistance is not currently being expended, in the superior court in the county where the child who is entitled to current support resides or is domiciled.

The local child support agency may establish liability for child support when public assistance was provided by another county or by other counties [*Fam. Code § 17402(b)*]. The Judicial Council form for use by the local child support agency to bring such a proceeding is *set forth in § 259.250*. In addition, in interstate support actions [*Fam. Code § 4900 et seq.*], the local child support agency must take appropriate action to prosecute the case against the support obligor [*State of Ohio v. Barron (1997) 52 Cal. App. 4th 62, 67, 60 Cal. Rptr. 2d 342* ; *see* former *Fam. Code § 4831*].

An action for reimbursement is subject to the three-year period of limitation of *Code Civ. Proc. § 338* [*State of Ohio v. Barron (1997) 52 Cal. App. 4th 62, 70, 60 Cal. Rptr. 2d 342* ; *In re Marriage of Hyon & Kirschner (1991) 231 Cal. App. 3d 449, 454, 282 Cal. Rptr. 408* ; *County of San Mateo v. Booth (1982) 135 Cal. App. 3d 388, 400-401, 185 Cal. Rptr. 349* ; *see* *City and County of San Francisco v. Thompson (1985) 172 Cal. App. 3d 652, 659, 218 Cal. Rptr. 445* (limiting recovery to support amount that would have been ordered to one year before date of filing petition or complaint; applicable to cases filed on or after January 1, 2000)]. The statute is not tolled with regard to the county because of the minority of the child for whom benefits were extended [*Amie v. Superior Court (1979) 99 Cal. App. 3d 421, 426, 160 Cal. Rptr. 271]* .

Judgment in an action brought under *Fam. Code § 17402* may be rendered pursuant to a noticed motion, which must inform the defendant that in order to exercise his or her right to trial, he or she must appear at the hearing on the motion [*Fam. Code § 17404(b)*]. For further discussion of proceedings on the motion, see *§ 259.153[4][i]*. The Judicial Council forms of Notice of Motion and Request for Order and Supporting Declaration are *set forth in § 259.254*. Judicial Council forms of judgment are *set forth in §§ 259.258* and *259.259*.

As a condition for welfare eligibility, the applicant or recipient must assign to the county any rights to child support that he or she may have [*see Welf. & Inst. Code § 11477(a)*]. Thus, a county may also seek reimbursement of welfare expended on behalf of a child through an action to establish or enforce a support obligation [*see Fam. Code §§ 17400, 17404*, discussed in *§ 259.153*].

California courts have subject-matter jurisdiction over support agency actions for reimbursement from a reservation-domiciled Indian parent to recoup certain public assistance payments made on behalf of an Indian child [*County of Inyo v. Jeff (1991) 227 Cal. App. 3d 487, 490-494, 277 Cal. Rptr. 841]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 259.153 Establishment and Enforcement of Child Support Obligation

[1] Statutory Authority

Two provisions of the Family Code, *Fam. Code §§ 17400* and *17404*, authorize a county, through its local child support agency, to establish and enforce a child support obligation. These statutes are the successors to former *Welfare and Institutions Code Sections 11350.1* and *11475.1*, which were repealed, operative January 1, 2000, and that referred to actions brought by district attorneys. For discussion of the transition from district attorneys to local child support agencies, see *§ 259.151[1]*. These statutes overlap in many regards. Each may be generally viewed as empowering the support agency to act to establish paternity and seek child support [*see Fam. Code §§ 17400, 17404*; *see also Fam. Code § 2330.1* (supplemental complaint for paternity); *Welf. & Inst. Code § 11352* (same)]. However, each contains requirements and provisions not found in the other.

Notwithstanding the two distinct statutes, it appears that there is a single action, subject to requirements set forth in the statutes. The California Supreme Court, construing the predecessor statutes has stated that former *Welf. & Inst. Code § 11350.1* (now *Fam. Code § 17404*) specifies the procedures to be followed and limits the issues to be litigated in actions brought under former *Welf. & Inst. Code § 11475.1* (now *Fam. Code § 17400*) [*Monterey County v. Cornejo (1991) 53 Cal. 3d 1271, 1281, 283 Cal. Rptr. 405, 812 P.2d 586* ; *see also County of San Joaquin v. Woods (1989) 210 Cal. App. 3d 56, 58-61, 258 Cal. Rptr. 110]* .

The local child support agency (or, in some cases, the state Attorney General) represents the public interest in establishing, modifying, and enforcing support obligations under these statutes. No attorney-client relationship is created between the agency and any person (for example, the obligee or child) by virtue of the acts of the agency in carrying out the statutory duties [*Fam. Code § 17406(a)*]. However, there are statutory requirements for notices that the agency must give to both support obligees and obligors concerning support-enforcement proceedings initiated and orders obtained under these statutes [*see Fam. Code § 17406(c)-(h), (l)*].

Notwithstanding the responsibilities of the local child support agency with respect to child support obligations, county governments and their employees are generally immune from liability for actions taken in an official capacity to collect

support [*Kaplan v. LaBarbera (1997) 58 Cal. App. 4th 175, 180-181, 67 Cal. Rptr. 2d 903]* . However, local child support agencies must establish a complaint resolution process and the Department of Child Support Services must provide a state administrative hearing procedure (contingent on the availability of federal funding) [*Fam. Code §§ 17800, 17801*]. For a complete discussion of actions against public entities, see Levy, Golden & Sacks, california torts, ch. 60 (Matthew Bender).

[2] Effect of Existing Family Law Support Order

There is a division of authority concerning whether a local child support agency may bring a support-related action if there is an existing support order regarding the same children, whether issued in a family law action or otherwise. One court has stated that in this type of case, the county lacks standing to bring a separate action and must proceed to enforce the existing order by intervening in the prior action pursuant to statute [*Los Angeles County v. Ferguson (1979) 94 Cal. App. 3d 549, 555-558, 156 Cal. Rptr. 565* ; *see Fam. Code § 17400(k)*]. Another court has deviated slightly from this position by sanctioning a separate action, but requiring a change of venue to the county in which an existing family-law support order was issued [*County of San Diego v. Magri (1984) 156 Cal. App. 3d 641, 647-649, 203 Cal. Rptr. 52* (not distinguishing between issues of reimbursement and support order)]. A third court has accepted a limitation on the county's standing only if the existing support order is directed toward the same parent from whom the county seeks a subsequent support order, and has found the limitation to be inapplicable to an action solely for reimbursement of public benefits [*County of Ventura v. George (1983) 149 Cal. App. 3d 1012, 1016-1017, 197 Cal. Rptr. 245]* . However, two other courts have held that only a support order that is issued by another court after the county support action supersedes an order in the county support action. Therefore a county may seek both reimbursement and a new support order even if there is a prior family law court support order directed toward the same parent [*County of El Dorado v. Spence (1986) 182 Cal. App. 3d 698, 703-708, 227 Cal. Rptr. 365* ; *County of Santa Clara v. Farnese (1985) 183 Cal. App. 3d 257, 261-270, 237 Cal. Rptr. 457* ; *cf. County of Yolo v. Worrell (1989) 208 Cal. App. 3d 471, 475, 256 Cal. Rptr. 259* (county not required to intervene in pending family law action)]. For discussion of the treatment of orders in the converse situation, in which there is a preexisting order and a support agency action followed by the filing of an independent family law action, see *§ 259.153[4]* [*see Fam. Code § 17404(d)*].

When past due support is recovered from a support obligor, the fact that the support order was obtained in a family law action does not preclude the county from asserting a claim to reimbursement for public funds expended on the child's behalf if the custodial parent has assigned the right to reimbursement to the county. Additionally, a custodial parent's private attorney, in that instance, cannot assert a "charging lien" against the support recovered from the obligor, even if a retainer agreement signed by the custodial parent purports to permit such a lien. An attorney cannot impress a charging lien on funds owed the client by a third party to the extent those funds are payments of the third party's obligations for child support, because of public policy considerations [*Hoover-Reynolds v. Superior Court (1996) 50 Cal. App. 4th 1273, 1277-1280, 58 Cal. Rptr. 2d 173]* .

[3] Effect of Child Concealment

Whether estoppel based on child concealment is a potential defense to child support enforcement if the custodial parent has assigned her or his rights to accrued support arrearages to a county in exchange for public benefits remained unsettled for a number of years. However, in *In re Marriage of Comer*, the Supreme Court held that when a custodial parent has obtained public assistance payments for a child and has assigned the right to child support arrearages to the public entity providing such assistance, the conduct of the custodial parent in concealing himself or herself and the child from the other parent does not estop the public entity from seeking child support arrearages--or reimbursement for public assistance payments--from the noncustodial parent [*In re Marriage of Comer (1996) 14 Cal. 4th 504, 510, 59 Cal. Rptr. 2d 155, 927 P.2d 265]* . In other words, the noncustodial parent in such a case may not assert concealment as a defense against a county or other governmental agency that has been assigned the right to receive support arrearages for reimbursement of public assistance [*In re Marriage of Comer (1996) 14 Cal. 4th 504, 510, 59 Cal. Rptr. 2d 155, 927 P.2d 265* ; *see In re Marriage of Walters (1997) 59 Cal. App. 4th 998, 1004-1005, 70 Cal. Rptr. 2d 354* ; *but cf.*

County of Orange v. Carl D. (1999) 76 Cal. App. 4th 429, 439-441, 90 Cal. Rptr. 2d 440 (county was estopped from obtaining full reimbursement for dependent children's unnecessary foster care, after affirmatively misrepresenting it did not know whereabouts of noncustodial father)].

[4] Requirements for Action by Support Agency

[a] Overview of Action

Each county must maintain a local child support agency that is responsible for establishing, modifying, and enforcing child support obligations, including medical support orders, and determining paternity regarding children born out of wedlock. The local child support agency must take appropriate action, including criminal action in cooperation with the district attorney, to establish, modify, and enforce child support obligations and, if appropriate, enforce spousal support orders when the child is receiving public assistance, including Medi-Cal. When requested, the agency must take the same actions on behalf of a child who is not receiving public assistance [*Fam. Code § 17400(a)*; *see Fam. Code § 17400(f)* (county outreach program for persons not on public assistance), (i) (defining "out-of-wedlock"); *but see Codoni v. Codoni (2002) 103 Cal. App. 4th 18, 23, 126 Cal. Rptr. 2d 423* (registration of foreign support order in county does not give county authority to enforce order, unless registration includes request for enforcement services)]. It must also refer all cases requiring criminal enforcement services to the district attorney, who must prosecute these cases, as appropriate [*Fam. Code § 17304*].

Attorneys employed by the local child support agency may direct, control, and prosecute civil actions and proceedings in the county's name in support of child support activities of the Department of Child Support Services and the local child support agency [*Fam. Code § 17400(b)*].

The local child support agency's authority to enforce child support obligations includes, but is not limited to the following: [*Fam. Code § 17400(h)*].

1. Using interception and notification systems operated by the Department of Child Support Services to aid in the enforcement of support obligations.

2. Obtaining an initial order for child support that may include medical support, or that is for medical support only, by civil or criminal process.

3. Filing a motion or order to show cause to increase an existing child support order, or responding to a motion or order to show cause brought by an obligor parent to decrease an existing child support order, whether or not the child is receiving public assistance.

4. Filing a motion or order to show cause to obtain an order for medical support [*see Fam. Code § 17400(m)* (describing medical support activities)], or responding to a motion or order to show cause brought by an obligor parent to decrease or terminate an existing medical support order, whether or not the child is receiving public assistance.

5. Responding to a motion or order to show cause brought by the obligor parent to decrease an existing spousal support order if the child is residing with the obligee parent and the agency is also enforcing a related child support obligation owed to the obligee parent by the same obligor.

6. Transferring child support delinquencies to the Department of Child Support Services under *Family Code Section 17500* [*see § 259.160*].

No joinder, coordination of actions, or cross-complaints are permitted. The issues are limited to child support, including

an order for medical support, and parentage, if applicable [*Fam. Code § 17404(a)*; *see* [m], *below*]. However, as discussed in [l], *below*, orders concerning child custody and visitation may be made if these orders have not previously been made by the family court and the court in the agency action has proper jurisdiction and venue in the matter. In addition, the court may allocate the federal income tax dependency exemption to the noncustodial parent because the exemption is highly pertinent to the issue of child support [*Monterey County v. Cornejo (1991) 53 Cal. 3d 1271, 1283-1285, 283 Cal. Rptr. 405, 812 P.2d 586]* . Otherwise, the court may not resolve disputes over custody or visitation [*see County of San Joaquin v. Woods (1989) 210 Cal. App. 3d 56, 58-61, 258 Cal. Rptr. 110]* , or allow cross-complaints against the custodial parent [*Crookham v. Smith (1977) 68 Cal. App. 3d 773, 777-778, 137 Cal. Rptr. 428]* .

There is no right to a jury trial, even if parentage is at issue [*County of Butte v. Superior Court (1989) 210 Cal. App. 3d 555, 557-559, 258 Cal. Rptr. 516]* . The action may not be stayed or delayed because of the pendency of any other action between the parties [*Fam. Code § 17404(a)*].

A support agency may register a support order made or registered in another county by using the procedures set forth in *Family Code Section 5600 et seq.* (see *§ 259.159*).

In addition, a local child support agency may intervene, by ex parte application under *Code of Civil Procedure Section 387(b)*, in any action under the Family Code or other proceeding in which child support is in issue or a reduction in spousal support is sought. By noticed motion, order to show cause, or responsive pleading served on all parties to the action, the agency may request any appropriate relief the agency is authorized to seek [*Fam. Code § 17400(k)*].

[b] Time Limits

If the parent who is receiving support enforcement services provides the local child support agency with substantial, credible information about the residence or work address of the support obligor, the agency must initiate an establishment or enforcement action and serve the defendant within 60 days [*Fam. Code § 17401*].

Any action brought by the local child support agency to establish paternity or child support or to enforce child support obligations must be completed within the time limits set forth by federal law [*Fam. Code § 17400(c)*]. The local child support agency's responsibility applies to spousal support only when the spousal support obligation has been reduced to an order of a court of competent jurisdiction [*Fam. Code § 17400(c)*]. In any action for modification or revocation of an order enforced under Title IV-D of the Social Security Act [*42 U.S.C. § 651* et seq.], the effective date of the modification or revocation is as prescribed by federal law [*42 U.S.C. § 666(a)(9)*], or any subsequent date [*Fam. Code § 17400(c)*].

In any enforcement proceedings instituted by the agency for payment of child or spousal support, an action to recover an arrearage in support payments may be maintained by the agency at any time within the period otherwise specified for the enforcement of a support judgment, even if the child has attained the age of majority [*Fam. Code § 17400(e)*].

[c] Parties to Action

In any action brought by a local child support agency for the support of a minor child or children, the action may be prosecuted in the name of the county on behalf of the child or children, or of a parent of the child or children [*Fam. Code § 17404(a)*]. Third party nonparent family members, however, are not entitled to enlist the local child support agency to prosecute an action to collect child support on their behalf [*Plumas County Dept. of Child Support Services v. Rodriquez (2008) 161 Cal. App. 4th 1021, 1028, 76 Cal. Rptr. 3d 1]* . A parent who has requested or is receiving support enforcement services from the agency is not a necessary party to the action, but may be subpoenaed as a witness [*Fam. Code § 17404(a)*; *see Monterey County v. Cornejo (1991) 53 Cal. 3d 1271, 1283-1285, 283 Cal. Rptr. 405, 812 P.2d 586* (custodial parent's due process rights were not violated by allocation of federal income tax dependency

exemption in proceeding to which she was not a party, because she fully participated in proceeding and had right to have issue redetermined in family law proceeding)]. The child, who is the subject of the proceeding, is not an indispensable party [*County of Tulare v. Boggs (1983) 146 Cal. App. 3d 236, 240-243, 194 Cal. Rptr. 80]* .

In any action to enforce a spousal support order, the action may be plead in the name of the county in the same manner as an action to establish a child support obligation [*Fam. Code § 17404(c)*].

After a support order, including a temporary support order, and an order for medical support only, has been entered in an action brought by the local child support agency under *Family Code Section 17404*, the parent who has requested or is receiving support enforcement services from the agency must be joined as a party to the action, but only in the manner and to the extent, and for the purposes allowed in *Family Code Section 17404*; generally, only for purposes relating to child support, custody, visitation, and restraining orders. Notice of the parent's status as a party must be given to the parent and service of a complaint containing the notice will constitute compliance with the notice requirements [*Fam. Code § 17404(e)(1), (2)*].

Once both parents are parties to the action in a case in which Title IV-D services are currently being provided, the local child support agency must, within five days of receipt, mail to the nonmoving party all pleadings relating solely to the support issue in the action that the moving party has served on the agency [*Fam. Code § 17404(e)(3)*]. There is a rebuttable presumption that service on the local child support agency consistent with these provisions constitutes valid service on the moving party. When this procedure is used to effect service on the nonmoving party, the pleadings must be served on the local child support agency at least 30 days before the hearing [*Fam. Code § 17404(e)(3)*].

A local child support agency of one county may appear on behalf of the local child support agency of any other county in any enforcement proceeding [*Fam. Code § 17400(o)*].

[d] Venue

Venue for the proceeding is in the superior court of the county that is currently providing public assistance [*Fam. Code § 17400(n)(1)(A)*]. If public assistance is not currently being provided, venue for the enforcement proceeding is in the superior court of the county in which the child resides or is domiciled [*Fam. Code § 17400(n)(1)(B)*]. If current support is no longer payable through, or enforceable by, the local child support agency, venue is in the superior court of the county that last provided public assistance for actions to enforce arrearages assigned under *Welfare and Institutions Code Section 11477* [*Fam. Code § 17400(n)(1)(C)*]. If none of these venue rules apply, venue is in the superior court of the county in which the support obligee resides [*Fam. Code § 17400(n)(1)(D)*]. If the support obligee does not reside in California and none of the other venue rules apply, venue is in the superior court of the county in which the support obligor resides [*Fam. Code § 17400(n)(1)(E)*].

If the child becomes a resident of another county after the enforcement action is filed, venue may remain in the county in which the action was filed until the action is completed [*Fam. Code § 17400(n)(2)*].

[e] Pleadings

The Judicial Council is required to develop simplified summons, complaint, and answer forms for use in enforcement proceedings brought by local child support agencies [*Fam. Code § 17400(d)(1)*]. The agency is required to serve the defendant with a copy of the summons and complaint, a proposed judgment, a blank answer form, and a blank income and expense declaration [*see Fam. Code § 17400(d)(2), (3)*]. The defendant must file an answer within 30 days after service of the complaint [*Fam. Code § 17400(d)(2)*]. If the proposed judgment is entered by the court, the support order in the proposed judgment is effective as of the first day of the month following the filing of the complaint, except as provided in former *Fam. Code § 17402(a)(2)* [*Fam. Code § 17400(d)(2)* (former *Fam. Code § 17402(a)(2)* was deleted by Stats. 2004 ch. 305 § 5, but *Fam. Code § 17400(d)(2)* was not amended accordingly)].

[f] Notice to Recipient of Support Services

The local child support agency must serve a copy of the complaint on the recipient of support services, along with a notice that informs the recipient that the agency may enter into a stipulated order to resolve the complaint and that the recipient must assist the prosecuting attorney by sending information on the noncustodial parent's earnings and assets [*Fam. Code § 17406(e)*].

The agency must provide written notice to the recipient of the initial date and time of every hearing in the action for paternity and/or support [*Fam. Code § 17406(f)(1)(A), (C)* (prescribed contents of notice)]. The notice must state the purpose of the hearing or be attached to the motion or other pleading for which the hearing is scheduled [*Fam. Code § 17406(f)(2)*]. The notice must be provided not later than seven days before the hearing or, if the agency receives notice of the hearing less than seven days before the hearing, within two days of the agency's receipt of notice of the hearing [*Fam. Code § 17406(f)(4)(A)*]. The agency's failure to comply with these notice requirements does not affect the validity of any order issued by the court [*Fam. Code § 17406(f)(3)*].

Once a parent who has requested or is receiving support enforcement services becomes a party to the action, in place of complying with the above-described notice requirements, the local child support agency must serve on this parent all pleadings relating to support that the other parent has served on the agency [*Fam. Code § 17406(f)(1)(B)*]. The pleadings must be accompanied by the same notice, as specified above [*Fam. Code § 17406(f)(1)(B), (C)*]. Service of the notice and the pleadings must be completed no later than five days after receipt of the pleadings served on the local child support agency [*Fam. Code § 17406(f)(4)(B)*].

The agency must give the recipient of support services notice of every order obtained by the agency that establishes or modifies the support obligation for the recipient or the children who are the subject of the order [*Fam. Code § 17406(g)*].

If the recipient of support services resides in California, these notices must be mailed to the recipient by first-class mail to his or her last known address, or personally delivered to the recipient [*Fam. Code § 17406(l)(1)*]. Unless otherwise specified, in all actions enforced under the Uniform Interstate Family Support Act (*Family Code Sections 4900 et seq.*), these notices must be mailed by first-class mail to the initiating court [*Fam. Code § 17406(l)(2)*].

[g] Temporary Orders

In any action brought by a local child support agency to establish a child support order, the agency may make a motion for an order for temporary support, effective during the pendency of the action, for each child who is the subject of the action [*Fam. Code § 17400(g)(1)*]. If the defendant is the mother, a presumed father, or any father if the child is at least six months old when the defendant files an answer to the complaint, any motion for an order for temporary support must be filed within 90 days after the answer is filed [*Fam. Code § 17400(g)(2)(A)*]. In any other case in which the defendant has filed an answer before the child's birth, or not more than six months after the child's birth, the time limit is nine months after the child's birth [*Fam. Code § 17400(g)(2)(B)*].

A local child support agency that fails to file within those limits is barred from obtaining a judgment of reimbursement for any support provided for the child during the period between the dates when the time limit expired and when the motion was filed, or in the absence of a motion, when the final judgment is entered. If more than one child is the subject of the action, this limitation applies only to those children whose parental relationship and age would bar recovery were a separate action brought for support of that child or those children [*Fam. Code § 17400(g)*].

[h] Consolidated Proceedings

On the local child support agency's noticed motion, the court may consolidate or combine support or reimbursement

arrearages owed by one obligor to one obligee in two or more court files into a single court file. The court may also combine or consolidate two or more orders for current child support into a single court file [*Fam. Code § 17408(a)*]. Such a motion may be made only if the agency is seeking to enforce the orders to be consolidated [*Fam. Code § 17408(a)*].

Support orders may be consolidated regardless of the nature of the underlying action, whether initiated under the Family Code, the Welfare and Institutions Code, or another law. Support orders may be consolidated only if the children involved have the same mother and father and venue is proper under *Family Code Section 17400(n)* [*Fam. Code § 17408(b)*].

After consolidation of court orders, a single wage assignment for current support and arrearages may be issued if possible [*Fam. Code § 17408(e)*].

In addition, on consolidation, the court must designate which court files the support orders are being consolidated into the primary file, and which court files are subordinate. The court must then order the local child support agency to file a notice in the subordinate court actions indicating that the support orders in those actions were consolidated into the primary file. The notice must state the date of the consolidation, the name of the court, and the primary file number [*Fam. Code § 17408(c)*; Cal. Rules of Ct., Rule 1280.13(a), (b)]. The court may not issue further orders pertaining to support in a subordinate court file, and all enforcement and modification of support orders must occur in the primary court action [*Fam. Code § 17408(d)*; Cal. Rules of Ct., Rule 1280.13(c)].

[i] Motion, Hearing, and Judgment

Judgment in the action may be rendered pursuant to a noticed motion that informs the defendant that to exercise the right to trial, the defendant must appear at the hearing on the motion [*Fam. Code § 17404(b)*]. The Judicial Council form of Notice of Motion is *set forth in § 259.254*.

If the defendant appears at the hearing, the court must ask if the defendant wishes to subpoena evidence and witnesses, and if he or she desires a trial. If parentage is at issue, the court must ask if the defendant wishes genetic tests, if such tests have not already been conducted. If the defendant answers in the affirmative, the court must grant a continuance of not more than 90 days from the date of service of the motion. If a continuance is granted, the court may make an order for temporary support [*Fam. Code § 17404(b)*].

After judgment, the court must issue an earnings assignment order for support [*Fam. Code § 17420*].

[j] Effect of Defendant's Default

If the defendant fails to file an answer or otherwise appear in the action filed by the local child support agency within 30 days of service of process on the defendant, a default judgment may be entered against the defendant, without hearing, and without the presentation of any other evidence or further notice to the defendant [*Fam. Code § 17430(a)*; *County of Yuba v. Savedra (2000) 78 Cal. App. 4th 1311, 1322-1323, 93 Cal. Rptr. 2d 524]* . The court may, on any terms that may be just, relieve the defendant from that part of the judgment or order concerning the amount of child support to be paid. This relief may be granted after the six-month time limit of *Code of Civil Procedure Section 473* has elapsed, based on the grounds and within the time limits specified in *Family Code Section 17432* [*Fam. Code § 17432(a)*]. The court must relieve the defendant from a support judgment or order entered after the defendant's default if the defendant establishes that he or she was mistakenly identified in the order or in any subsequent documents or proceedings as the person having an obligation to provide support [*Fam. Code § 17433*]. This provision applies only when an order has been entered against a person who is not the support obligor named in the judgment or order [*Fam. Code § 17433*].

[k] Retroactivity of Award

An original child support award in a support agency's action to establish paternity and enforce support obligations is retroactive only to the date the motion or order to show cause for support was filed. It is not retroactive to the date of filing the underlying complaint [*County of Santa Clara v. Perry (1998) 18 Cal. 4th 435, 445-446, 75 Cal. Rptr. 2d 738, 956 P.2d 1191* ; *but see County of Riverside v. Burt (2000) 78 Cal. App. 4th 28, 38, 92 Cal. Rptr. 2d 619* (construing *Perry* as not so limiting retroactivity in cases involving reimbursement for payment of public assistance)]. In *Perry*, which consolidated three cases for decision, the Court affirmed appellate court judgments that limited retroactivity of support orders in paternity actions on the basis of *Fam. Code § 4009* "to the date of filing the notice of motion or order to show cause, or to any subsequent date...," and reversed an appellate judgment that permitted retroactivity to the filing date of an underlying paternity complaint. The Court accepted the parties' assumption of the statute's applicability to support enforcement actions for purposes of its determination of what constitutes compliance with that statute, while also finding that this assumption was consistent with language in former *Welf. & Inst. Code § 11475.1(f), (j)* (*now Fam. Code § 17400(g), (k)*). The Court found that, although the Legislature intended to maximize retroactivity of support orders when it amended the predecessor to *Fam. Code § 4009* in 1985, it failed to do so, and the statute's limitation on retroactivity applies "alike to dissolution actions under the Family Code and paternity actions under [now former] Welfare and Institutions Code provisions." In either case, the retroactivity of the support order is determined by the date of filing of the notice of motion or order to show cause [*County of Santa Clara v. Perry (1998) 18 Cal. 4th 435, 440-441, 445-446, 75 Cal. Rptr. 2d 738, 956 P.2d 1191]* .

Perry involved support enforcement actions in *non-public assistance* cases, but the Court did not expressly limit its decision to such cases [*County of Santa Clara v. Perry (1998) 18 Cal. 4th 435, 440-441, 445-446, 75 Cal. Rptr. 2d 738, 956 P.2d 1191]* . However, at least one later reported appellate decision has construed *Perry* as not limiting retroactivity of a support order to the date of filing the notice of motion or order to show cause when the action involves *reimbursement* for the payment of public assistance. In that court's view, when a child support order is initiated by the support enforcement agency to recoup state-furnished support [*See Fam. Code § 17402* (successor to former *Welf. & Inst. Code § 11350*)], the noncustodial parent is liable for such support commencing from the date of payment of the public assistance benefits--subject only to a three-year statute of limitations and that parent's reasonable ability to pay [*County of Riverside v. Burt (2000) 78 Cal. App. 4th 28, 92 Cal. Rptr. 2d 619* (relying on *State of Ohio v. Barron (1997) 52 Cal. App. 4th 62, 60 Cal. Rptr. 2d 342* , in both original opinion and in opinion after retransfer from grant of review)]. Therefore, there is at least some basis for distinguishing between actions brought by support enforcement agencies simply to establish a support obligation, and those brought to not only establish that obligation but to recoup the payment of public assistance payments.

[l] Authority to Decide Custody or Visitation Issues

Orders concerning custody and visitation may be made in a county support action only if such orders have not been previously made by a court of competent jurisdiction, and the court has jurisdiction and is the proper venue for custody and visitation determinations. All issues concerning custody and visitation must be heard and resolved in the manner provided by the Family Code. The local support agency is not be required to serve or receive service of papers, pleadings, or documents, or participate in, or attend any hearing or proceeding relating to issues of custody or visitation, except as otherwise provided by law [*Fam. Code § 17404(e)(4)*].

[m] Determination of Parentage

A final determination of parentage may be made in the action as an incident to obtaining an order for support [*Fam. Code § 17404(a)*].

The local child support agency must provide the mother and the alleged father the opportunity to voluntarily acknowledge paternity by signing a paternity declaration before the hearing or trial in which paternity is at issue. The agency may afford the defendant an opportunity to enter into a stipulation for judgment of paternity after an action for

paternity has been filed in place of the voluntary declaration of paternity [*Fam. Code § 17410*; *see County of Orange v. Smith (2002) 96 Cal. App. 4th 955, 958, 963-965, 117 Cal. Rptr. 2d 336]* .

Notwithstanding any other law, an action for child support may be brought by a local child support agency on behalf of a minor child or caretaker parent based on a voluntary declaration of paternity [*Fam. Code § 17412(a)*]. The court must make appropriate orders for support of the minor child based on the voluntary declaration of paternity, unless evidence is presented that the declaration has been rescinded by the parties or set aside by a court [*Fam. Code § 17412(b) cf. County of Los Angeles v. Pattinson (2002) 102 Cal. App. 4th 1337, 1349, 126 Cal. Rptr. 2d 350* (in action to set aside voluntary declaration of paternity, person who made voluntary declaration must be joined as party and given notice and opportunity to be heard)].

In any action or proceeding brought by the agency to establish parentage, the court must enter a judgment establishing parentage if the parties file a written stipulation that is accompanied by a written advisement and waiver of rights signed by the defendant [*Fam. Code § 17414*].

[n] Indigent Parent's Right to Appointed Counsel

An indigent defendant in a paternity action initiated by the district attorney is constitutionally entitled to appointment of free legal counsel [*Salas v. Cortez (1979) 24 Cal. 3d 22, 29-32, 154 Cal. Rptr. 529, 593 P.2d 226 , cert. denied, 444 U.S. 900* ; *County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 114, 183 Cal. Rptr. 741* (*dicta*); *see Cunningham v. Superior Court (1986) 177 Cal. App. 3d 336, 340, 356, 222 Cal. Rptr. 854]* . However, this right apparently does not obtain if the action is purely one for support enforcement as part of a "Title IV-D" proceeding [*Clark v. Superior Court (1998) 62 Cal. App. 4th 576, 586-587, 73 Cal. Rptr. 2d 53* (noting that neither paternity nor contempt were involved in this case)]. Appointed counsel is required to ensure a "level playing field" in an area of the law in which the resources of the government are marshalled in support of one private citizen against another [*County of Orange v. Dabbs (1994) 29 Cal. App. 4th 999, 1002-1004, 35 Cal. Rptr. 2d 79]* . When the right to appointed counsel otherwise exists, it extends to representation on appeal, at least if the appeal is brought by the district attorney [*County of Orange v. Dabbs (1994) 29 Cal. App. 4th 999, 1002-1004, 35 Cal. Rptr. 2d 79* (distinguished in *Clark v. Superior Court (1998) 62 Cal. App. 4th 576, 588, 73 Cal. Rptr. 2d 53*)]. Note that at least one court of appeal has held that counsel may not be involuntarily conscripted to represent indigent paternity defendants on a *pro bono* basis [*Cunningham v. Superior Court (1986) 177 Cal. App. 3d 336, 351, 356, 222 Cal. Rptr. 854]* .

[o] Reference to Child Support Commissioner

[i] General Rule

All actions filed by the local child support agency or by any other party in a support action or proceeding in which enforcement services are being provided by the county, for an order to establish, modify, or enforce child or spousal support, including actions to establish paternity, must be referred for hearing to a child support commissioner [*see Fam. Code §§ 4250(b), 4251(a)*]. Each court must provide sufficient commissioners to hear these cases [*Fam. Code §§ 4251(a), 4252(a)*; *see Fam. Code § 4252(b)* (requirements for commissioners)]. Judges may hear these cases in place of a commissioner in exceptional circumstances, as discussed under *[ii], below* [*see Fam. Code §§ 4251(a), 4252(b)(7)*].

The child support commissioner acts as a temporary judge, unless an objection is made by the local child support agency or any other party [*Fam. Code § 4251(b)*; *see, e.g., County of Orange v. Smith (2002) 96 Cal. App. 4th 955, 959, 117 Cal. Rptr. 2d 336]* . If any party objects, the commissioner may hear the matter and make findings of fact and a recommended order. Within 10 court days, a judge must ratify this order unless either party objects to it or the order is in error. In either of these cases, the judge must issue a temporary order and schedule a de novo hearing within 10 court days. Any party may waive the right to the review hearing at any time [*Fam. Code § 4251(c)*; *see County of Orange v. Smith (2002) 96 Cal. App. 4th 955, 959, 117 Cal. Rptr. 2d 336* (*Fam. Code § 4251(a), (c)* requires child support cases to

be heard by commissioner, even after objection is made; objecting party may make second objection after commissioner issues recommended order, which entitles party to hearing de novo before superior court judge)].

The moving party must serve the local child support agency with notice of any proceeding under *Family Code Section 4251* in which support is at issue. Any support order entered without the agency's having received proper notice is voidable on the motion of the agency [*Fam. Code § 4251(f)*].

[ii] Exceptional Circumstances

Under "exceptional circumstances," a judge may hear a "Title IV-D" case that would ordinarily be required to be referred to a commissioner [*Fam. Code §§ 4251(a), 4252(b)(7)*]. Pursuant to *Cal. Rules of Ct., Rule 5.305(a)*, exceptional circumstances include instances in which:

- A judge's failure to hear the action would result in significant prejudice or delay to a party, including, but not limited to, added cost or loss of work time;
- Transferring the matter to a commissioner would result in undue consumption of court time;
- There is a physical impossibility or difficulty because of the commissioner being geographically separate from the judge presently hearing the matter;
- The commissioner is absent from the county due to illness, disability, death, or vacation; or
- The commissioner is absent from the county due to service in another county and would have difficulty in travelling to the county in which the matter is pending.

If exceptional circumstances exist and a judge hears the matter, that judge must make an interim order and refer the matter to the commissioner for further proceedings [*Cal. Rules of Ct., Rule 5.305(b)*]. In addition, despite the provisions for exceptional circumstances set forth above, a judge, in the interests of justice, may transfer the case to a commissioner for hearing [*Cal. Rules of Ct., Rule 5.305(c)*].

[iii] Hearing and Recommended Order

At the hearing, the child support commissioner must, when appropriate, do the following [*Fam. Code § 4251(d)*]:

- Review and determine ex parte applications for orders and writs;
- Take testimony;
- Establish a record, evaluate evidence, and make recommendations or decisions;
- Enter judgments or orders based on voluntary acknowledgments of support liability and parentage, and stipulated agreements regarding the amount of child support to be paid;
- Enter default orders and judgments when the defendant does not respond to notice or other process within the time prescribed to respond to that notice [*Fam. Code § 4253*]; and
- In actions in which paternity is at issue, order the mother, child, and alleged father to submit to genetic tests.

On request, the court may permit a telephone appearance at the hearing [*Cal. Rules of Ct., Rule 5.324(c)*; *see Cal. Rules of Ct., Rule 3.670* (telephone appearances in general)]. A party, an attorney, a witness, a parent who has not been joined to the action, or a representative of a local child support agency or government agency may request the court's permission to appear and testify by telephone. The local child support agency may request a telephone appearance on behalf of a party, a parent, or a witness when the agency is appearing in the support action [*Cal. Rules of Ct., Rule 5.324(e)(1), (e)(3)*; *see § 259.279* (Request for Telephone Appearance)]. On its own motion, the court may also allow a telephone appearance [*Cal. Rules of Ct., Rule 5.324(e)(1)*]. Any such request must be filed at least 12 court days before the hearing, and must be served on the other parties, the local child support agency, and attorneys (if any) by personal delivery, fax, express mail, or other means reasonably calculated to ensure delivery by the close of the next business day [*Cal. Rules of Ct., Rule 5.324(e)(2)*]. Any opposition to the request must be made by declaration under penalty of perjury and must be filed and served at least eight court days before the hearing [*Cal. Rules of Ct., Rule 5.324(f)*]. At least five court days before the hearing, the court must notify all parties of its decision on the request [*Cal. Rules of Ct., Rule 5.324(h)*]. During the hearing, if the court determines that a personal appearance is necessary, it may continue the matter and require a personal appearance [*Cal. Rules of Ct., Rule 5.324(i)*].

[iv] Joinder of Issues

On the application of any party, the child support commissioner must join issues concerning custody, visitation, and protective orders in the action filed by the local child support agency [*Fam. Code § 4251(e)*; *see Fam. Code § 17404*]. After joinder, the commissioner must [*Fam. Code § 4251(e)*]:

- Refer the parents for mediation of disputed custody or visitation issues [*Fam. Code § 3170*];

- Accept stipulated agreements concerning custody, visitation, and protective orders, and enter orders pursuant to the agreements; and

- Refer contested issues concerning custody, visitation, and protective orders to a judge or another commissioner for hearing. A child support commissioner may hear these issues only if the court has adopted procedures pursuant to applicable federal requirements to segregate the costs of hearing the child support issues from the costs of hearing these other issues.

[5] Employee Information

On receipt of a written request from a local child support agency that is enforcing a child support obligation, or from an agency of another state enforcing support obligations under *42 U.S.C. § 654*, every employer and labor organization must cooperate and provide relevant employment and income information that they have in their possession for the purpose of establishing, modifying, or enforcing the support obligation. No employer or labor organization shall incur any liability for providing this information to the local child support agency or other requesting agency [*Fam. Code § 17512*].

Relevant employment and income information includes, but is not limited to, all of the following [*Fam. Code § 17512(b)*]:

- Whether a named person has or has not been employed by an employer or whether a named person has or has not been employed to the knowledge of the labor organization;

- The full name of the employee member or the first and middle initial and last name of the employee or member;

- The employee's or member's last known residence address;

- The employee's or member's date of birth;
- The employee's or member's social security number;
- The dates of employment;
- All earnings paid to the employee or member and reported as W-2 compensation in the prior tax year, and the employee's or member's current basic rate of pay;
- Other earnings as defined in *Fam. Code § 5206* including interest, dividends, rent, royalties, worker's compensation payments and disability benefits; and
- Whether dependent health insurance coverage is available to the employee through employment or membership in the labor organization.

The local child support agency or other requesting agency must notify the employer and labor organization of the case file number in making a request for this information. The written request must include at least three of the following elements regarding the person who is the subject of the inquiry: (1) first and last name and middle initial, if known; (2) social security number; (3) driver's license number; (4) birth date; (5) last known address; or (6) spouse's name. The local child support agency or other agency must send a notice that a request for this information has been made to the last known address of the person who is the subject of the inquiry [*Fam. Code § 17512(c), (d)*].

An employer or labor organization that fails to provide relevant employment information to the local child support agency within 30 days of receiving a request may be assessed a civil penalty up to $1,000, plus attorney's fees and costs. Proceedings to impose the civil penalty must be commenced by the filing and service of an order to show cause [*Fam. Code § 17512(e)*].

[6] Access to Financial Institution Records

On written request from a local child support agency referring to a support order under *Fam. Code § 17400*, a financial institution must disclose specified information concerning the account of the person named in the request. A local child support agency may request information only on receipt of certain types of physical evidence or a sworn declaration of a custodial parent that during the preceding 12 months, the person named has had or may have had an account at an office or branch of the financial institution [*Gov. Code § 7480(j)*].

Information obtained may be used only for purposes that are directly connected within the administration of the duties of the local child support agency under *Fam. Code § 17400*. If the request prohibits disclosure, the financial institution may not disclose either the request or its response to the owner of the account or to any other person except the officers and employees of the financial institution who are involved in responding to the request, and to attorneys, auditors, and regulatory authorities who have a need to know in order to perform their duties. Disclosure is also permitted as required by legal process [*Gov. Code § 7480(j)*].

The Fair Credit Reporting Act [*15 U.S.C. § 1681 et seq.*] provides permissible purposes for which a credit reporting agency may furnish a consumer credit report [*see 15 U.S.C. § 1681b*]. *15 U.S.C. § 1681b(a)(3)(A)*, which allows a consumer credit report to be issued to a person the credit reporting agency has reason to believe intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer, and not *15 U.S.C. § 1681b(a)(4)*, which allows the issuance of a consumer credit report in response to a request by the head of a state or local child support enforcement agency or a state or local government official authorized by the head of such an agency,

if the person making the request makes specified certifications, applies to child support enforcement agencies attempting to collect a court-ordered judgment of child support [*Hasbun v. County of Los Angeles (9th Cir. 2003) 323 F.3d 801, 802-805]* .

[7] Determination of Arrearages; Administrative Review and Judicial Determination

On applying to the local child support agency for child support enforcement services, an applicant must be requested to give the agency a statement of arrearages stating whether any support arrearages are owed. If the applicant alleges that arrearages are owed, the statement must be signed under penalty of perjury [*Fam. Code § 17524(a)*].

For all cases opened by the district attorney or local child support agency after December 31, 1995, the district attorney or agency may only enforce arrearages declared under penalty of perjury in the applicant's statement, arrearages accrued after the case was opened, or arrearages determined by the court in the action [*Fam. Code § 17524(b)*]. For cases opened before December 31, 1995, the district attorney or local child support agency may only enforce arrearages that have been based on a statement of arrearages under penalty of perjury or if the agency has some other reasonable basis for believing the amount of claimed arrearages to be correct [*Fam. Code § 17524(c)*].

On request of an obligor or an obligee, the local child support agency must review the amount of arrearages alleged in a statement of arrearages that is submitted by an applicant for child support enforcement services. This review must be completed in the same manner and within the same time frames as a complaint submitted under *Family Code Section 17800*. In the review, the agency must consider all evidence and defenses submitted by either parent on the issues of the amount of support paid or owed [*Fam. Code § 17526(a)*]. The local child support agency also has the discretion to suspend enforcement or distribution of arrearages if it believes that there is a substantial probability that the result of the administrative review will result in a finding that there are no arrearages [*Fam. Code § 17526(b)*].

Any party to an action involving child support enforcement services of the local child support agency may request a judicial determination of arrearages. The party may request an administrative review of the alleged arrearages before requesting a judicial determination. The local child support agency must complete the review in the same manner and under the same time frames specified in *Fam. Code § 17526(a)*. Any motion to determine arrearages filed with the court must include a monthly breakdown showing amounts ordered and amounts paid, in addition to any other relevant information [*Fam. Code § 17526(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportProceduresFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage ActGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 259.154 Independent Action by Parent

[1] In General

The parties may bring an independent action under the Family Code to litigate the issues of support, custody, visitation, or protective orders [*Fam. Code § 17404(d)*]. In such event, any support, custody, visitation, or protective orders issued by the court in an action brought by the local child support agency under *Family Code Section 17404* must be filed in the parties' action. These orders continue in effect until modified by a subsequent court order. If the orders conflict, the last order issued supersedes all other orders and is binding on all parties in the action [*Fam. Code § 17404(d)*].

[2] Modification of Support Order

A parent who has requested or is receiving support enforcement services from the local child support agency may take independent action to modify a support order made under *Family Code Section 17404* while support enforcement services are being provided by the agency. The parent must serve the agency with notice of any action filed to modify the support order, and must provide the agency with a copy of the modified order within 15 calendar days after it is issued [*Fam. Code § 17404(f)(1)*].

[3] Enforcement of Support Order

A parent who has requested or is receiving support enforcement services from the local child support agency may take independent action to enforce a support order made under *Family Code Section 17404* while these services are being provided, as long as the agency consents in writing [*Fam. Code § 17404(f)(2)*]. At least 30 days before filing the action, the parent must provide the agency with written notice of intent to file an enforcement action, describing the type of action the parent intends to file. Within 30 days after receiving the notice, the agency must either provide written consent for the parent to proceed or notify the parent that the agency objects to the parent's proposed action. The agency may object only if it is currently using an administrative or judicial method to enforce the support obligation or if the proposed action would interfere with an investigation the agency is conducting. If the agency does not respond to the parent's notice within 30 days, the agency is deemed to have given consent to the parent's proposed action [*Fam. Code § 17404(f)(2)*].

[4] Order That Support Payments Be Made to Local Child Support Agency

If the parent who filed the action has requested or is receiving support enforcement services, the court must order that all payments of support be made to the local child support agency unless the agency has terminated support enforcement services by case closure as provided by state and federal law [*Fam. Code § 17404(f)(3)*]. Any order obtained by a parent before support enforcement services are terminated is voidable on the agency's motion if it did not receive proper notice of the parent's action [*Fam. Code § 17404(f)(3)*].

A "parent who is receiving support enforcement services" includes a parent who has assigned his or her rights to support under *Welfare and Institutions Code Section 11477* [*Fam. Code § 17404(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsModificationGeneral OverviewFamily LawChild SupportProcedures

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§ 259.155 Judgment by Stipulation With Support Agency

In any case in which the local child support agency has undertaken enforcement of support, it may enter into an agreement with the noncustodial parent on behalf of a minor child or children, a spouse, or former spouse, for the entry of a judgment without action determining paternity, if applicable, and for periodic child and spousal support payments based on the noncustodial parent's reasonable ability to pay or, if for spousal support, an amount previously ordered by a court of competent jurisdiction [*Fam. Code § 17416(a)*]. Such an agreement may be executed before the birth of the child and may provide that judgment is not to be entered until after the child's birth [*Fam. Code § 17416(a)*].

Judgment based on such an agreement may be entered only if the noncustodial parent is represented by legal counsel who signs a certificate as specified by statute [*Fam. Code § 17416(b)(1)*], or a judge determines that the noncustodial parent has willingly, knowingly, and intelligently waived his or her due process rights in agreeing to the entry of the judgment [*Fam. Code § 17416(b)(2)*].

These requirements for a stipulated judgment were added to the statute authorizing an agreement for the entry of a judgment of paternity after the former statute was held unconstitutional because it authorized entry of judgment without a finding that the noncustodial parent understood and waived his or her right to notice and to a hearing to contest the issue of paternity [*see County of Los Angeles v. Soto (1984) 35 Cal. 3d 483, 486 n.2, 489, 198 Cal. Rptr. 779, 674 P.2d 750* ; *County of Ventura v. Castro (1979) 93 Cal. App. 3d 462, 472-473, 156 Cal. Rptr. 66]* . A judgment entered under the former statute is not void and is not rendered involuntary because the current requirements of advice were not followed; however, a judgment is invalid if the noncustodial parent establishes that he or she was in fact unaware of the consequences of the agreement or of the fact that he or she waived his or her rights by executing the agreement, and that he or she would not have executed the agreement had he or she been aware of these matters [*County of Los Angeles v. Soto (1984) 35 Cal. 3d 483, 489-492, 198 Cal. Rptr. 779, 674 P.2d 750]* .

The requirements discussed above also apply to stipulated judgments for support or paternity based on an agreement between an unrepresented defendant and the local child support agency. The stipulated judgment is voidable if an unrepresented defendant can establish that he or she was not advised by the support agency of the right to trial on the question of paternity and ability to support and that he was unaware of these rights and would not otherwise have

executed the agreement [*County of Los Angeles v. Castro (1984) 160 Cal. App. 3d 899, 904, 207 Cal. Rptr. 15]* . The requirement for an on-the-record waiver of the right to counsel does not apply in the case of a default judgment in which the defendant was given proper notice of the right to counsel [*County of Mendocino v. Ted S. (1990) 217 Cal. App. 3d 1202, 1207, 266 Cal. Rptr. 452* (default judgment distinguished from stipulated judgment as resulting from defendant's choice not to appear rather than from unequal bargaining position)].

On the agency's request, the clerk must set the matter for hearing by the court. The hearing must be held within 10 days after the clerk receives the request [*Fam. Code § 17416(d)*].

The agreement between the agency and the defendant must be filed by the clerk, together with any certificate of the attorney or finding of the court. If the statutory requirements are satisfied, the court must enter judgment without action [*Fam. Code § 17416(c)*]. A judgment for support entered in this manner is subject to the Family Code's provisions for enforcement by the local child support agency, and may be enforced by any means through which any other judgment for support may be enforced [*Fam. Code § 17416(c)*].

The local child support agency must effect service of a copy of the judgment on the person who signed the agreement for entry of the judgment and must notify that person in writing of the right to seek modification of the amount of child support on a showing of changed circumstances [*Fam. Code § 17416(e)*].

An order for child support included in a judgment entered in this manner may be modified or revoked in accordance with relevant provisions of the Family Code [*see* Ch. 260, *Family Law Enforcement: Foreign Judgments*]. The court may also modify the order to make the support payments payable to a different person [*Fam. Code § 17416(f)*].

The Judicial Council form of Stipulation for Judgment and Judgment is *set forth in § 259.258*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportProceduresFamily LawPaternity & SurrogacyEstablishing PaternityGeneral Overview

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§ 259.156 Related Support Enforcement Procedures

[1] Recording Abstract of Judgment and Substitution of Payee

Notwithstanding any other provision of law, if a support obligation is being enforced by a local child support agency, the agency may file and record an abstract of judgment [*see Fam. Code § 4506*] and substitute the office and address of the agency designated to receive support payments for the address of the party to whom support was ordered to be paid [*Fam. Code § 4506.1*]. If an abstract of judgment has previously been recorded by the support obligee or by a different governmental agency, the local child support agency may file and record a substitution of payee [*Fam. Code § 4506.2(a)*]. A substitution of payee may also be filed if the support agency has previously recorded an abstract of judgment, but then ceases enforcement of a support obligation at the request of the obligee [Fam. Code § 4502.6(b)]. The recorded substitution of payee does not affect the priorities created by earlier recordations of support judgments or abstracts of support judgments [Fam. Code § 4502.6(d)].

The Judicial Council has developed a single form that combines the substitution of payee, a notice directing payment of support to the support agency [*see Fam. Code §§ 4200, 4201*, discussed in *§ 259.133*], and a notice that support has been assigned to the agency [*Fam. Code § 4506.3*; *see Welf. & Inst. Code § 11477*; *see also § 259.270* (form)].

[2] Levy by Local Child Support Agency

If any support obligor is delinquent in the payment of support for at least 30 days and the local child support agency is enforcing the support obligation under *Family Code Section 17400*, the agency may collect the delinquency or enforce any lien by levy served on all persons having in their possession, or who will have in their possession or under their control any credits or personal property belonging to the obligor, or who owe any debt to the obligor at the time they receive the notice of levy [*Fam. Code § 17522(a)*]. The agency may issue a levy for a support obligation that has accrued under a court order or judgment if the obligor had notice of the accrued support arrearage and did not make a timely request for review [*Fam. Code § 17522(b)*; *see Fam. Code § 17522(c)* (notice requirements); *Fam. Code § 17522(d)* (request for review)].

Any person on whom a levy has been served, who has in his or her possession or under his or her control any credits or

personal property belonging to the delinquent support obligor or owing any debts to the delinquent support obligor at the time of receipt of the levy, must surrender the credits or property to the local child support agency or pay to the agency the amount of any debt owing to the obligor within 10 days of service of the levy [*Fam. Code § 17522(e)*]. Such a person must also surrender any credits or personal property belonging to the delinquent support obligor or the amount of any debt owing to the obligor that comes into his or her possession or control within one year of receipt of notice of the levy, within 10 days of coming into possession or control of the credits, property, or debt [*Fam. Code § 17522(e)*]. Any person who surrenders any credits or personal property or pays the debts owing to the delinquent support obligor to the local child support agency is discharged from any obligation or liability to the obligor to the extent of the amount paid as a result of the levy [*Fam. Code § 17522(f)*].

Any person who is served with a levy and who fails or refuses to surrender any credits or other personal property, or pay any debts owing to the delinquent support obligor, is liable in his or her own person or estate to the local child support agency in an amount equal to the value of the credits or other personal property, or in the amount of the levy up to the amount specified in the levy [*Fam. Code § 17522(h)*]. If any amount required to be paid under a levy is not paid when due, the local child support agency may issue a warrant for enforcement of the lien and for collection of any amount required to be paid to the agency [*Fam. Code § 17522(i)*].

A support obligor's bank account is exempt from levy by a local child support agency under *Fam. Code § 17450(c)(2)* when the obligor's sole income is from Social Security disability insurance benefits [*In re Marriage of Hopkins (2009) 173 Cal. App. 4th 281, 285-292, 92 Cal. Rptr. 3d 570*].

[3] Lien for Support

Notwithstanding any other provision of law, if a support obligor is delinquent in the payment of support and the local child support agency is enforcing the support obligation under *Family Code Section 17400* or Section 17402, a lien for child support arises against the obligor's personal property by operation of law for all amounts of overdue support, regardless of whether the amounts have been adjudicated or otherwise determined [*Fam. Code § 17523(a)(1)*; *see Fam. Code § 17523(c)(3)* (child support lien attaches to obligor's personal property that is subject to attachment by a judgment lien under *Code Civ. Proc. § 697.530*)]. Such a lien also arises when either a court having continuing jurisdiction or the local child support agency determines that the support obligor owes a specific amount of arrearages [*Fam. Code § 17523(a)(2)*]. A child support obligor is delinquent in the payment of support when he or she has failed to make payment equal to one month's support obligation [*Fam. Code § 17523(c)(2)*].

The lien for child support is perfected by filing a notice of child support lien with the Secretary of State under *Code of Civil Procedure Section 697.510* [*Fam. Code § 17523(b), (c)(1)* (form of notice)]. Once filed, the child support lien has the same priority, force, and effect as a judgment lien on personal property under *Code of Civil Procedure Section 697.510 et seq.* [*Fam. Code § 17523(b)*].

A personal property lien for child support arising in another state may be enforced in the same manner and to the same extent as a lien arising in this state [*Fam. Code § 17523(f)*].

[4] "Seek Work" Order

A court may require a parent who is in default of a child support order to submit documentation showing that the parent has actually looked for work [*see Fam. Code § 4505(a)*]. On proper notice, the court has the discretion to impose an employment efforts order on the support obligee, as well as on the support obligor, who is the parent in default [*Barron v. Superior Court (2009) 173 Cal. App. 4th 293, 298-300, 92 Cal. Rptr. 3d 394* (court should not have refused to consider support obligee's participation in CalWORKS welfare-to-work program)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityLiensFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportProcedures

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§ 259.157 Claim of Mistaken Identity

A claim of mistaken identity may be filed with the local child support agency by any person who claims that support enforcement actions have been wrongly taken against the person, or the person's wages or assets, on the basis of an order or judgment naming a different person [*Fam. Code § 17530(a), (b)*]. The claim must include verifiable information or documentation to establish that the person against whom the enforcement actions have been taken is not the person named in the support order or judgment. The agency must resolve a claim of mistaken identity in the same manner and time frames provided for resolution of a complaint under *Fam. Code § 17800* [*Fam. Code § 17530(b)*].

If the agency determines that a claim of mistaken identity is meritorious, or if the court enters an order relieving a defendant from default under *Family Code Section 17433* on the basis of mistaken identity, the agency must take immediate steps necessary to terminate all enforcement activities concerning the claimant, that is, the agency must return to the claimant any assets seized, terminate any levying activities or attachment or assignment orders, release any license renewal or application being withheld under *Fam. Code § 17520*, return any sums paid to any government agency (but not sums paid directly to the support obligee), and ensure that all other enforcement agencies and entities cease further actions against the claimant [*Fam. Code § 17530(c)*]. The agency must also provide the claimant with a statement certifying that the claimant is not the support obligor named in the support order or judgment. This statement is prima facie evidence of the claimant's identity in any subsequent enforcement proceedings or actions with respect to the support order or judgment [*Fam. Code § 17530(c)*].

If the agency rejects a claim, or if the agency, after finding a claim to be meritorious, fails to take any of the remedial steps provided in *Family Code Section 17530(d)*, the claimant may file an action with the superior court to establish his or her mistaken identity or to obtain the prescribed remedies, or both [*Fam. Code § 17530(d)*].

Filing a false claim of mistaken identity is a misdemeanor [*Fam. Code § 17530(e)*].

Legal Topics:

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

Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCriminal Law & ProcedureCriminal OffensesFraudFraud Against the GovernmentFalse ClaimsGeneral OverviewFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsTerminationGeneral OverviewFamily LawChild SupportProcedures

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§ 259.158 Enforcement of Spousal Support

[1] Federally Mandated Enforcement Program

Spousal support may also be enforced by the local child support agency under California's state plan for enforcement of child support, which is required as condition for the state's receipt of federal welfare funds [*see 42 U.S.C. §§ 602(a)(2), 654, 666*; *Fam. Code § 17400 et seq.*]. Under *Fam. Code § 17400(a),* the local child support agency "shall take appropriate action, including criminal action in cooperation with district attorneys, to establish, modify, and enforce child support and, when appropriate, enforce spousal support orders when the child is receiving public assistance, including Medi-Cal, and when requested, shall take the same actions on behalf of a child who is not receiving public assistance, including Medi-Cal."

The local child support agency may enforce only spousal support orders already established by a court of competent jurisdiction; it may not bring an action or a motion to establish the obligation in the first instance [*Fam. Code § 17400(a)*]. However, the agency may appear in response to a motion brought by the obligor parent to decrease an existing spousal support order if there are children residing with the obligee and the agency is also enforcing a related child support obligation owed to the obligee by the same obligor [*Fam. Code § 17400(h)(4)*; *see 42 U.S.C. § 654(a)(4)(B)(ii)* (state must make spousal support collection services available to persons not receiving benefits under the Personal Responsibility and Work Opportunity Reconciliation Act, but only if support obligation with respect to child is being enforced under plan); *cf. Fam. Code § 17604(a)(2)* (state plan concerning spousal support applies only to spousal support included in child support order)].

Nothing in *Fam. Code § 17400* limits the ability of a local child support agency to secure and enforce spousal support orders as authorized under any other provision of law [*Fam. Code § 17400(g)(6)*].

[2] Procedural Limitations

In any action to enforce a spousal support order, the action may be pled in the name of the county in the same manner as an action to establish a child support obligation. The same restrictions on joinder of actions, coordination of actions, and cross complaints, and delay because of the pendency of any other action also apply [*Fam. Code § 17404*]. These

procedural limitations are discussed in *§ 259.153[4]*.

Either party may initiate an independent proceeding to litigate the issues of support, custody, visitation, or protective orders [*See § 259.154*]. In that event, any support, custody, visitation, or protective order issued by the court in an action under *Fam. Code § 17404* must be filed in the other independent action, and continues in effect until modified by a subsequent court order. To the extent that orders conflict, the court order issued last supersedes all other orders and is binding on all parties in that action. [*Fam. Code § 17404(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportProceduresPublic Health & Welfare LawSocial SecurityAssistance to FamiliesChild & Spousal Support

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§ 259.159 Registration of Support-Related Orders From Other Counties

[1] Right of Support Agency or Obligee to Register Order

[a] Registration in General

A local child support agency ("the local child support agency"), or an obligee may register an order for support or earnings withholding, or both, that has been obtained in another California county [*Fam. Code § 5600(a)*]. The orders may be registered in any county in which the obligor, the obligee, or the child resides, or in any county in which the obligor has income, assets, or property [*Fam. Code § 5600(b)*].

This discussion focuses on local child support agency registration of such orders. However, because individual obligees are also permitted to register them, reference to individuals is also made and procedures summarized (*see* [b], *below*). For Judicial Council forms of the registration statement that may be used by a private individual and a support agency, respectively, see *§ 259.269*.

[b] Registration by Obligee

The Family Code clarifies that an obligee may register an out-of-county support or earnings withholding order (or both) in the court of another California county in the manner, with the effect, and for the purposes set forth in *Fam. Code § 5600 et seq.* [*Fam. Code § 5600(b)*]. The procedures to be used by an obligee in registering such orders are essentially the same as those used by the local child support agency (*see* [2], *below*), except as set forth in *Fam. Code § 5602*. That section clarifies that the obligee must prepare, sign, and file the required registration statement, which must be verified, along with the other required documentation. Filing of these materials in the court of the other (nonlocal) county constitutes registration. No filing fee is to be charged by the registering court [*Fam. Code § 5602(a), (b)*].

On registration, the court clerk must promptly send the obligor notice of the registration, together with a copy of the registered support order and the post office address of the obligee, in accordance with the procedures specified in *Fam. Code § 5602(c)*.

[2] Support Agency Procedures

When the local child support agency is responsible for enforcing a support order under *Fam. Code § 17400*, the agency may register a support order made in another county by utilizing the procedures in *Fam. Code § 5602*, or by filing all of the following in the superior court of the county where the agency is located [*Fam. Code § 5601(a)*]:

- An endorsed-filed copy of the most recent support order (or a copy of it);

- A statement of arrearages, including an accounting of amounts ordered and paid each month, together with any added costs, attorney's fees, and interest; and

- A statement prepared by the support agency that shows the agency's post office address, the obligor's last known place of residence or post office address, the obligor's most recent address set forth in the licensing records of the Department of Motor Vehicles, and a list of other states and counties in this state that are known to the support agency in which the original support order and any modifications are registered.

The filing of these documents constitutes registration of the support order [*Fam. Code § 5601(b)*].

Promptly on registration, the local child support agency must serve the obligor with copies of the documents in compliance with the requirements of *Code of Civ. Proc. § 1013* or in any other manner provided by law [*Fam. Code § 5601(c)*].

In addition, on registration, the clerk of the court must forward a notice of registration to the courts in other counties and states in which the original support order and any modifications were issued or registered. No further proceedings concerning the obligor's support obligations may be filed in these other counties [*Fam. Code § 5601(e)*].

These procedures may also be used to register support or wage and earnings assignment orders of other California jurisdictions that have been registered previously for purposes of enforcement under the (now former) Uniform Reciprocal Enforcement of Support Act [former *Fam. Code §§ 4800 et seq.*] in another California county. The local child support agency may register such an order by filing an endorsed-filed copy of it and any subsequent orders, including procedural amendments [*Fam. Code § 5601(f)*; *cf. Fam. Code § 5604* (effect of prior determination of paternity)].

The Judicial Council is required to develop forms to be used in these proceedings [*Fam. Code § 5601(g)*].

[3] Motion to Vacate Registration

An obligor has 20 days after service of notice of the registration of a California support order in which to file a noticed motion requesting the court to vacate the registration or for other relief. If the obligor does not file the motion within this 20-day period, the registered support order and all documents filed in connection with the registration are confirmed [*Fam. Code § 5603(a)*].

The obligor must serve a copy of the motion, personally or by first-class mail, on the office of the local child support agency, the private attorney representing the obligee, or the obligee representing himself or herself who filed the request for registration of the order. Such service must be made not less than 15 days before the date of the hearing on the motion. If service is by mail, *Code of Civ. Proc. § 1013* applies [*Fam. Code § 5603(a)*].

In such a proceeding, cross-complaints and joinder or coordination of actions are not permitted. Claims or defenses are strictly limited to the obligor's identity, the validity of the support order, and the accuracy of the obligee's statement of

the amount of support remaining unpaid unless the amount has been established previously by a judgment or order [*Fam. Code § 5603(a)*]. At the hearing, the obligor may present only matters that the obligor could assert as defenses in an action to enforce a support judgment [*Fam. Code § 5603(b)*].

Any party may introduce into evidence copies of any pleadings, documents, or orders that have been filed in the original court or other courts in which the support order has been registered or modified. Certified copies of the documents are not required unless a party objects to the authenticity or accuracy of a document. In such event, the party who is asserting the document's authenticity must obtain a certified copy of it [*Fam. Code § 5601(d)*].

If the obligor shows, and the court finds, than an appeal from the support order is pending or that a stay of execution has been granted, the court must stay enforcement of the order until the appeal is concluded, the time for appeal has expired, or the order is vacated, on satisfactory proof that the obligor has furnished security for payment of the support ordered. If the obligor shows, and the court finds, any ground on which enforcement of the order may be stayed, the court must stay enforcement of the order for an appropriate period if the obligor furnishes security for payment of support [*Fam. Code § 5603(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportProcedures

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Chapter 259 FAMILY LAW ENFORCEMENT: SPECIAL REMEDIES FOR SUPPORT ENFORCEMENT
PART II. LEGAL BACKGROUND
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22-259 California Forms of Pleading and Practice--Annotated § 259.160

§ 259.160 Enforcement

[1] Duties of Department of Child Support Services and Local Child Support Agencies

A child support delinquency need not be referred to the Department for collection if a jurisdiction outside California is enforcing the support order [*Fam. Code § 17453(i)*].

If a child support delinquency exists at the time a case is opened by the local child support agency, the responsibility for the collection of the child support delinquency must be submitted to the Department no later than 30 days after receipt of the case by the local child support agency [*Fam. Code § 17500(d)*].

When a local child support agency submits a delinquency to the Department of Child Support Services pursuant to *Fam. Code § 17500(c)*, the amount of the delinquency will be collected by the department in any manner authorized under state or federal law [*Fam. Code § 17450(b)(1)*]. Any compensation, fee, commission, expense, or any other fee for service incurred by the Department in the collection of a child support delinquency will not be an obligation of, or collected from, the obligated parent [*Fam. Code § 17450(b)(2)*]. For these purposes, "child support delinquency" means a delinquency as defined in *Fam. Code § 17500(c)* [*Fam. Code § 17450(a)(1)*]. "Earnings" include the items described in *Fam. Code § 5206* [*Fam. Code § 17450(a)(2)*].

The Department may return or allow a local child support agency to retain a child support delinquency for a specified purpose for collection when the Department determines that the return or retention of the delinquency for the specified purpose will enhance the collectibility of the delinquency [*Fam. Code § 17450(c)(1)*]. The Department will establish a process for a local child support agency to request and be allowed to withdraw, rescind, or otherwise recall the submittal of an account that has been submitted [*Fam. Code § 17450(c)(1)*].

If an obligor is disabled, meets the federal Supplemental Security Income resource test, and is receiving Supplemental Security Income/State Supplementary Payments (SSI/SSP), or, but for excess income as described in federal regulations [*20 C.F.R. § 416.1100 et seq.*], would be eligible to receive as SSI/SSP [*see Welf. & Inst. Code § 12200*], and the obligor has supplied the local child support agency with proof of eligibility for, and, if applicable, receipt of, SSI/SSP or

Social Security Disability Insurance benefits, the child support delinquency will not be referred to the Department for collection. If it is referred, it will be withdrawn, rescinded, or otherwise recalled from the Department by the local child support agency [*Fam. Code § 17450(c)(2)*]. The Department will not take any collection action, or if the local child support agency has already taken collection action, will cease collection actions in the case of a disabled obligor when the delinquency is withdrawn, rescinded, or otherwise recalled by the local child support agency in accordance with the established process [*Fam. Code § 17450(c)(2)*].

It is the intent of the Legislature that when the California Child Support Automation System (CCSAS) is fully operational, any statutes that should be modified based upon the status of the system will be revised. During the development and implementation of CCSAS, the department, as the Title IV-D agency, may, through appropriate interagency agreement, delegate any and all of the functions or procedures specified in *Family Code Section 17450 et seq.* to the Franchise Tax Board [*Fam. Code § 17450(d)*]. The Franchise Tax Board will perform those functions or procedures as specified in *Rev. & Tax. Code §§ 19271-19275*, inclusive, until such time as the director, by letter to the executive officer of the Franchise Tax Board, revokes the delegation of Title IV-D functions, and those sections of the Revenue and Taxation Code will be effective for these purposes until the revocation of delegation to the Franchise Tax Board [*Fam. Code § 17450(d)*].

Consistent with the development and implementation of the California Child Support Automation System (CCSAS), the Franchise Tax Board and the Department of Child Support Services will enter into a letter of agreement and an interagency agreement whereby the Department assumes responsibility for collection of child support delinquencies and the Financial Institution Data Match System [*Fam. Code § 17450(e)*; for discussion of the Financial Institution Data Match System, *see* [2], *below*].

Subject to state and federal privacy and information security laws, the Franchise Tax Board will make tax return information available to the Department, upon request, for the purpose of collecting child support delinquencies referred to the Department [*Fam. Code § 17452(a)*]. For these purposes, the Franchise Tax Board will incur no obligation or liability to any person arising from any of the following [*Fam. Code § 17452(b)*:

(1) Furnishing information to the Department as required by *Fam. Code § 17452*.

(2) Failing to disclose to a taxpayer or accountholder that the name, address, social security number, or other taxpayer identification number or other identifying information of that person was included in the data exchange with the Department.

(3) Any other action taken in good faith to comply with the requirements of *Fam. Code § 17452*.

It is the intent of the Legislature that any provision of income tax return information by the Franchise Tax Board to the Department will be done in accordance with the privacy and confidential information laws of California and the United States, and to the satisfaction of the Franchise Tax Board [*Fam. Code § 17452(c)*].

[2] Financial Institution Data Match System

The Department of Child Support Services, in coordination with financial institutions doing business in California, will operate a Financial Institution Data Match System utilizing automated data exchanges to the maximum extent feasible. The Financial Institution Data Match System will be implemented and maintained pursuant to guidelines prescribed by the Department. These guidelines will include a structure by which financial institutions, or their designated data-processing agents, receive from the Department the file or files of past-due support obligors, so that the institution can match with its own list of accountholders to identify past-due support obligor accountholders at the institution [*Fam. Code § 17453(a)*]. To the extent allowed by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193), the guidelines will include an option by which financial institutions without

the technical ability to process the data exchange, or without the ability to employ a third-party data processor to process the data exchange, may forward to the Department a list of all accountholders and their social security numbers, so that the Department can match that list with the file or files of past-due support obligors [*Fam. Code § 17453(a)*].

The Financial Institution Data Match System will not be subject to any limitation in *Gov. Code § 7460 et seq.*, governing governmental access to financial records [*Fam. Code § 17453(b)*]. However, any use of the information for any purpose other than the enforcement and collection of a child support delinquency, as set forth in *Fam. Code § 17450*, is a violation of *Fam. Code § 17212*, protecting individual rights of privacy [*Fam. Code § 17453(b)*].

Until implementation of the California Child Support Automation System, each county must compile a file of support obligors with judgments and orders that are being enforced by local child support agencies pursuant to *Fam. Code § 17400*, and who are past due in the payment of their support obligations. The file must be compiled, updated, and forwarded to the Department of Child Support Services, in accordance with the guidelines prescribed by the Department [*Fam. Code § 17453(c)(1)*]. The Department will compile a file of obligors with support arrearages from requests made by other states for administrative enforcement in interstate cases, in accordance with federal requirements [*Fam. Code § 17453(c)(2)*; *see 42 U.S.C. § 666(a)(14)*]. The file must include, to the extent possible, the obligor's address [*Fam. Code § 17453(c)(2)*].

To effectuate the Financial Institution Data Match System, financial institutions subject to *Fam. Code § 17453* must do all of the following [*Fam. Code § 17453(d)*]:

> (1) Provide to the Department on a quarterly basis, the name, record address and other addresses, social security number or other taxpayer identification number, and other identifying information for each noncustodial parent who maintains an account at the institution and who owes past-due support, as identified by the department by name and social security number or other taxpayer identification number.
>
> (2) In response to a notice or order to withhold issued by the department, withhold from any accounts of the obligor the amount of any past-due support stated on the notice or order and transmit the amount to the department in accordance *Fam. Code § 17454* [*but see Fam. Code § 17453(j)*].

Unless otherwise required by applicable law, a financial institution furnishing a report or providing information to the department pursuant to *Fam. Code § 17453* may not disclose to a depositor, accountholder, codepositor, or coaccountholder, that the name, address, social security number, or other taxpayer identification number or other identifying information of that person has been received from, or furnished to, the Department [*Fam. Code § 17453(e)*].

A financial institution will incur no obligation or liability to any person arising from any of the following [*Fam. Code § 17453(f)*]:

> (1) Furnishing information to the Department as required by *Fam. Code § 17453*.
>
> (2) Failing to disclose to a depositor, accountholder, codepositor, or coaccountholder, that the name, address, social security number, or other taxpayer identification number or other identifying information of that person was included in the data exchange with the Department required by *Fam. Code § 17453*.
>
> (3) Withholding or transmitting any assets in response to a notice or order to withhold issued by the Department as a result of the data exchange. However, this does not preclude any liability that may result if the financial institution does not comply with *Fam. Code § 17456(b)*.
>
> (4) Any other action taken in good faith to comply with the requirements of *Fam. Code § 17453*.

With respect to files compiled until implementation of the California Child Support Automation System [*see Fam. Code § 17453(c)(1)*], the Department will forward to the counties, in accordance with guidelines prescribed by the Department, information obtained from the financial institutions pursuant to *Fam. Code § 17453*. No county may use the information for directly levying on any account. Each county must keep the information confidential as provided by *Fam. Code § 17212* [*Fam. Code § 17453(g)(1)*]. With respect to files compiled by the Department for interstate purposes [*see Fam. Code § 17453(c)(2)*], the amount collected by the Department will be deposited and distributed to the referring state [*Fam. Code § 17453(g)(2)*; *see Fam. Code § 17458*].

For noncustodial parents owing past-due support for which there is a match [*see Fam. Code § 17453(d)(1)*], the amount past due as indicated on the file or files at the time of the match will be a delinquency for the purposes of the department taking any collection action pursuant to *Fam. Code § 17454* [*Fam. Code § 17453(h)*].

Each county must notify the Department upon the occurrence of the following circumstances with respect to an obligor of past-due support [*Fam. Code § 17453(j)(1)*]:

> (A) A court has ordered an obligor to make scheduled payments on a child support arrearages obligation and the obligor is in compliance with that order.
>
> (B) An earnings assignment order or an order/notice to withhold income that includes an amount for past-due support has been served on the obligated parent's employer and earnings are being withheld pursuant to the earnings assignment order or an order/notice to withhold income.
>
> (C) At least 50 percent of the obligated parent's earnings are being withheld for support.

Notwithstanding *Code Civ. Proc. § 704.070*, if any of these conditions exist, the assets of an obligor held by a financial institution are subject to levy [*Fam. Code § 17453(j)(2)*; *see Fam. Code § 17453(d)(2)*]. However, the first $3,500 of an obligor's assets are exempt from collection without the obligor having to file a claim of exemption [*Fam. Code § 17453(j)(2)*]. Furthermore, an obligor may apply for a claim of exemption pursuant to *Code Civ. Proc. § 703.510 et seq.* for an amount that is less than or equal to the total amount levied. The sole basis for a claim of exemption must be the financial hardship for the obligor and the obligor's dependents [*Fam. Code § 17453(j)(3)*]. For the purposes of a claim of exemption, *Code Civ. Proc. § 688.030* will not apply [*Fam. Code § 17453(j)(4)*]. For these claims of exemption, the local child support agency responsible for enforcement of the obligor's child support order is the levying officer [*see Code Civ. Proc. § 703.510 et seq.*], except for the release of property [*Fam. Code § 17453(j)(5)*; *see Code Civ. Proc. § 703.580(e)*]. The local child support agency must notify the Department within two business days of the receipt of a claim of exemption from an obligor. The Department will direct the financial institution subject to the order to withhold to hold any funds subject to the order pending notification by the Department to remit or release the amounts held [*Fam. Code § 17453(j)(6)*]. The superior court in the county in which the local child support agency enforcing the support obligation is located has jurisdiction to determine the amount of exemption. The court must consider the needs of the obligor, the obligee, and all persons the obligor is required to support, and all other relevant circumstances in determining whether to allow any exemption. The court must give effect to its determination by an order specifying the extent to which the amount levied is exempt [*Fam. Code § 17453(j)(7)*]. Within two business days of receipt of an endorsed copy of a court order issued pursuant to *Code Civ. Proc. § 703.580(e)*, the local child support agency must provide the Department with a copy of the order. The Department will instruct the financial institution to remit or release the obligor's funds in accordance with the court's order [*Fam. Code § 17453(j)(8)*].

Out of any money received from the federal government for the purpose of reimbursing financial institutions for their actual and reasonable costs incurred in complying with *Fam. Code § 17453*, the state will reimburse those institutions. To the extent that money is not provided by the federal government for that purpose, the state will not reimburse financial institutions for their costs in complying with *§ 17453* [*Fam. Code § 17453(k)*].

The following definitions apply for these purposes [*Fam. Code § 17453(l)*]:

> (1) "Account" means any demand deposit account, share or share draft account, checking or negotiable withdrawal order account, savings account, time deposit account, or a money market mutual fund account, whether or not the account bears interest.
>
> (2) "Financial institution" has the same meaning as defined in *42 U.S.C. § 669A(d)(1)*.

At least 45 days before sending a notice to withhold, the Department must request that a depository institution provide the Department with a designated address for receiving notices to withhold [*Fam. Code § 17454(a)*]. Once the depository institution has specified a designated address, the Department must send all notices to that address unless the depository institution provides notification of another address. The department must send all notices to withhold to a new designated address 30 days after notification [*Fam. Code § 17454(b)*]. If a notice to withhold is mailed to the branch where the account is located or principal banking office, the depository institution will be liable for a failure to withhold only to the extent that the accounts can be identified in information normally maintained at that location in the ordinary course of business [*Fam. Code § 17454(c)*].

The Department may by notice, served by magnetic media, electronic transmission, or other electronic technology, require any depository institution that the department, in its sole discretion, has reason to believe may have in its possession, or under its control, any credits or other personal property or other things of value, belonging to a child support obligor, to withhold, from the credits or other personal property or other things of value, the amount of any child support delinquency, and interest, due from an obligor and transmit that amount withheld to the Department at the times that it may designate, but not less than 10 business days from receipt of the notice [*Fam. Code § 17454(d)*; for definition of "depository institution," *see 12 U.S.C. § 461(b)(1)(A)*]. The notice must state the amount due from the obligor and be delivered or transmitted to the branch or office reported, or other address designated by that depository institution for purposes of the Department serving notice by magnetic media, electronic transmission, or other electronic technology [*Fam. Code § 17454(d)*]. For these purposes, the term "address" includes telephone or modem number, facsimile number, or any other number designated by the depository institution to receive data by electronic means [*Fam. Code § 17454(d)*].

Any person required to withhold and transmit any amount pursuant to *Fam. Code § 17450 et seq.* must comply with the requirement without resort to any legal or equitable action in a court of law or equity [*Fam. Code § 17456(a)*]. Any person paying the Department any amount required by it to be withheld is not liable to the person from whom withheld unless the amount withheld is refunded to the withholding agent [*Fam. Code § 17456(a)*]. However, if a depository institution withholds and pays to the Department any moneys held in a deposit account in which the delinquent obligor and another person or persons have an interest, or in an account held in the name of a third party or parties in which the delinquent obligor is ultimately determined to have no interest, the depository institution paying those moneys to the Department is not liable to any of the persons who have an interest in the account, unless the amount withheld is refunded to the withholding agent [*Fam. Code § 17456(a)*]. In the case of a deposit account or accounts for which the notice to withhold applies, the depository institution must send a notice by first-class mail to each person named on the account or accounts included in the notice from the Department, provided that a current address for each person is available to the institution [*Fam. Code § 17456(b)*]. This notice must inform each person the reason for the hold placed on the account or accounts, the amount subject to being withheld, and the date by which this amount is to be remitted to the Department [*Fam. Code § 17456(b)*]. An institution may assess the account or accounts of each person receiving this notice a reasonable service charge not to exceed $3 [*Fam. Code § 17456(b)*].

As necessary, the Department will seek reciprocal agreements with other states to improve its ability to collect child support payments from out-of-state obligated parents on behalf of custodial parents residing in California [*Fam. Code § 17460(a)*]. The Department may pursue agreements with the Internal Revenue Service, as permitted by federal law, to improve collections of child support delinquencies from out-of-state obligated parents through cooperative agreements

with the service [*Fam. Code § 17460(a)*].

The California Child Support Automation System [*see Welf. & Inst. Code § 10080 et seq.*] will, for these purposes, include the capacity to interface and exchange information, if feasible, with the Internal Revenue Service, to enable the immediate reporting and tracking of obligated parent information [*Fam. Code § 17460(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportProceduresGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsEmployees & Officials

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§ 259.161 Complaint Resolution Procedure

Each local child support agency must maintain a complaint resolution process [*Fam. Code § 17800*]. The Department of Child Support Services is responsible for issuing uniform forms and procedures for local child support agencies to use in resolving complaints from parents [*Fam. Code § 17800*]. Each local agency is responsible for establishing the required process [*Fam. Code § 17804*]. Any complaint must be made within 90 days after the complainant knew or should have known of the child support action which is the subject of the complaint [*Fam. Code § 17800*]. The agency must provide a written resolution of the complaint within 30 days after its receipt, but the time for resolution may be extended an additional 30 days in accordance with regulations [*Fam. Code § 17800*].

A parent who is dissatisfied with the local child support agency's resolution of the complaint must be afforded an opportunity for a state hearing when any one or more of the following actions or failures to take action by the agency is claimed [*Fam. Code § 17801(a)*]:

1. An application for child support services has been denied or has not been acted on within the required time frame;

2. The child support services case has not been acted on, in violation of state or federal law or regulation, or department letter ruling, or has not yet been acted on within the required time frame;

3. Child support collections have not been distributed or have been distributed or disbursed incorrectly, or the amount of child support arrears (as calculated by the agency) is inaccurate; or

4. The agency's decision to close a child support case.

The local child support agency must provide specified information to parents about child support service hearings [*Fam. Code § 17401.5*].

Before requesting a hearing, the parent must exhaust the complaint resolution process required by *Fam. Code § 17800*,

unless the local child support agency fails to submit a written resolution of the complaint with 30 days of its receipt [*Fam. Code § 17801(b)*]. In such event, the parent may request a hearing. [*Fam. Code § 17801(b)*].

Any request for a hearing must be made within 90 days after receiving written notice of resolution of the complaint, or within 90 days after the complaint is made if no written notice of resolution is provided within the 30-day period [*Fam. Code § 17801(c)*]. The hearing must be set to begin within 30 days after the request is filed [*Fam. Code § 17801(d)*]. All parties must be given written notice of the time and place of the hearing no later than 10 days before the hearing [*Fam. Code § 17801(d)*]. A final decision must be rendered within 20 working days of the hearing [*Fam. Code § 17801(d)*]. The local child support agency and the Franchise Tax Board must comply with and execute this decision [*Fam. Code § 17801(h)*]. A parent who is dissatisfied with the decision may file a petition for review with the superior court within one year after receiving notice of the decision [*Fam. Code § 17803*].

The pendency of a child support service hearing does not affect the obligation to comply with an existing child support order [*Fam. Code § 17801(f)*]. Any child support determination that is subject to the jurisdiction of the superior court and that is required by law to be addressed by motion, order to show cause, or appeal under the Family Code may not be the subject of a state hearing under *Fam. Code § 17801* [*Fam. Code § 17801(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportProcedures

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[Reserved]

§§ 259.162[Reserved]

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22-259 California Forms of Pleading and Practice--Annotated § 259.170

§ 259.170 Related Matthew Bender Publications

[1] California Points and Authorities

For memoranda of points and authorities related to actions and attacks on judgments in general, see California Points and Authorities, ch. 131, *Judgments* , Parts IV and V, respectively (Matthew Bender)

[2] California Family Law

For discussion and forms relating to enforcement of judgments and orders in California family law proceedings, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2d ed., chs. 140 and 141 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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22-259 California Forms of Pleading and Practice--Annotated § 259.171

§ 259.171 Federal Statutes

Direct payment of military pension to former spouse. *10 U.S.C. § 1408*

Definition of earnings. *15 U.S.C. § 1672(a)*

Maximum amount of earnings subject to withholding for support order. *15 U.S.C. § 1673*

Definition of consumer reporting agency. *15 U.S.C. § 1681a(f)*

Preemption provisions of Employees' Retirement Income Security Act. 29 U.S.C. § 1044

Spendthrift provisions of Employees' Retirement Income Security Act. *29 U.S.C. § 1056(d)(1)*

Assignment of accrued support rights to state by welfare recipient. *42 U.S.C. § 602(a)(26)(A)*; see also *42 U.S.C. § 656(a)(2)* (amount of obligation)

Requirements of state plan for support enforcement to obtain federal funding. *42 U.S.C. § 654(20)*

Garnishment by United States of wages owing for support. *42 U.S.C. § 659*

Garnishment of federal tax refund for support. *42 U.S.C. § 664*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementIncome WithholdingLabor & Employment LawWage & Hour LawsAssignments, Deductions & GarnishmentsPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)Federal PreemptionGeneral OverviewPublic Health & Welfare LawSocial SecurityAssistance to FamiliesChild

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22-259 California Forms of Pleading and Practice--Annotated § 259.172

§ 259.172 Federal Regulations

Direct payment of military pension to former spouse. 32 C.F.R. §§ 63.1-63.6

Garnishment of federal tax refund for support. *45 C.F.R. § 303.72*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementIncome WithholdingMilitary & Veterans LawServicemembersRetirementTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesCredits, Overassessments & Refunds (IRC secs. 6401-6427)Authority to Make Credits & Refunds

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22-259 California Forms of Pleading and Practice--Annotated § 259.173

§ 259.173 State Statutes

[1] Civil Penalty for Child Support Delinquency

[a] In General

Definition of "support." *Fam. Code § 4720*

Fam. Code § 4720 et seq. apply only to child support due on or after January 1, 1992. *Fam. Code § 4721*

Notice of delinquency is appropriate when child support payments more than 30 days in arrears; six-percent penalty for support remaining unpaid more than 30 days after notice served, up to 72 percent of unpaid balance due. *Fam. Code § 4722*

Contents of notice of support delinquency. *Fam. Code § 4723*

Service of notice of support delinquency. *Fam. Code § 4724*

Motion to obtain judgment for amount owed when support remains unpaid more than 30 days after notice served. *Fam. Code § 4725*

Motion to determine arrearages and to show cause why penalties should not be imposed. *Fam. Code § 4726*

Subsequent notice of delinquency. *Fam. Code § 4731*

Judicial Council to adopt forms for civil penalties for support delinquency. *Fam. Code § 4732*

Child support delinquency program. *Rev. & Tax. Code § 19001 et seq.*

[b] Penalties

Penalty may not exceed six percent per month of original support or 72 percent of original amount due. *Fam. Code § 4727*

Enforcement of penalties by writ of execution. *Fam. Code § 4728*

District attorney is required to enforce child support obligations, using civil penalties provided. *Fam. Code § 4729*

At hearing to set or modify child support, court may not consider civil penalties imposed. *Fam. Code § 4730*

Penalties to be paid to custodian of child. *Fam. Code § 4733*

[2] Claims Against Tax Refunds, Lottery Winnings, or Other State Payments

Enforcement of support obligation by district attorney through state tax refund intercept. *Code Civ. Proc. § 708.730(c)*

Enforcement of child support obligation by obligee through state tax or lottery winnings intercept. *Code Civ. Proc. § 708.730(d)*

Payment of judgment debtor's funds to designated county agency at direction of district attorney. *Code Civ. Proc. § 708.740(d)*

Procedures by which obligor may assert exemptions regarding money owed by state agency, but intercepted to satisfy support order. *Code Civ. Proc. § 708.770*

[3] Criminal Enforcement Provisions

Criminal nonsupport of child. *Penal Code § 270*

[4] District Attorney or Local Child Support Agency Enforcement

Orders for payment of support through designated county officer. *Fam. Code §§ 4200* (child support), 4350 (spousal support); *Welf. & Inst. Code §§ 276, 279*

Enforcement of support rights by district attorney or local child support agency. *Fam. Code § 17400 et seq.*

[5] Earnings Assignments for Enforcement of Support

[a] In General

Designated county officer must forward support to designated payee within time prescribed by federal law if support is ordered to be paid through county officer on behalf of person not receiving public assistance. *Fam. Code § 3555*

Earnings assignments to secure payment of child, family, or spousal support. *Fam. Code § 5200 et seq.*

Definitions applicable to earnings assignments. *Fam. Code § 5200 et seq.*

Requirement of earnings assignment order whenever court orders support or modification of support. *Fam. Code §*

5230(a)

Obtaining earnings assignment to enforce pre-July 1, 1990, support order on which no earnings assignment order was issued. *Fam. Code §§ 5230(b), 5250-5253*

Effectiveness of earnings assignment order on existing or future employer of obligor. *Fam. Code § 5231*

Service of earnings assignment order on employer. *Fam. Code § 5232*

Simplification for employer of earnings assignment withholding. *Fam. Code § 5236*

Obligee's duty to give notice of change of address. *Fam. Code § 5237*

Computation of arrearages. *Fam. Code § 5239*

Service of assignment order as creating lien on employee's earnings. *Fam. Code § 5242*

Use of Parent Locator Service with regard to application for earnings assignment. *Fam. Code § 5280*

Requirement that obligor give notice of change of employment. *Fam. Code § 5281*

Obligation of Judicial Council to promulgate forms to carry out earnings assignment law. *Fam. Code § 5295*

[b] Applicable Code of Civil Procedure Provisions

Noticed motion to subject otherwise exempt property to process for enforcement of support order. *Code Civ. Proc. § 703.070*

Extent of exemption of public employee benefits from earnings assignment. *Code Civ. Proc. § 704.110*

Extent of exemption of public employee vacation credits from earnings assignment. *Code Civ. Proc. § 704.113*

Extent of exemption of private retirement benefits from earnings assignment. *Code Civ. Proc. § 704.115*

Earnings assignment for support has priority over earnings withholding order (garnishment). *Code Civ. Proc. § 706.031*

[c] Authority and Duties of District Attorney or Other Local Child Support Agency

Earnings assignment law does not expanding duties of district attorney or other local child support agency with regard to enforcement of support obligations. *Fam. Code § 5244*

Earnings assignment law does not limit authority of district attorney or other local child support agency with regard to enforcement of support obligations, whether or not person entitled to support is welfare recipient. *Fam. Code § 5245*

Enforcement of support obligations by district attorney or other local child support agency. *Fam. Code § 17400 et seq.*

California Parent Locator Service and Central Registry. *Fam. Code § 17506*

Availability of earnings assignment order in action brought by district attorney or other local child support agency

under *Fam. Code § 17400 et seq.* to enforce support obligation of absent parent. *Fam. Code § 17420*

[d] Duties of Employer

Duty of employer to withhold earnings pursuant to earnings assignment order. *Fam. Code §§ 5233, 5235*

Duty of employer to deliver copy of assignment order and statement of rights to obligor. *Fam. Code § 5234*

Liability of employer to obligee and other penalties for willful failure to withhold support pursuant to earnings assignment order. *Fam. Code § 5241*

Employer's duty to give notice that obligor has left employment. *Fam. Code § 5282*

Employer's duty to cooperate with district attorney or other local child support agency in enforcement of support obligation. *Fam. Code § 5283*

Prohibition on retaliatory action by employer. *Fam. Code § 5290*

[e] Priorities

Priority of multiple support obligations with respect to earnings assignment orders. *Fam. Code § 5238*

Priority of assignment order for support over attachment, execution, or other assignment. *Fam. Code § 5243*

[f] Quashing, Staying, or Terminating Earnings Assignment Order

Termination of earnings assignment order. *Fam. Code § 5240*

Stay of service of earnings assignment order on showing of good cause or alternative arrangement. *Fam. Code § 5260*

Termination of stay of service of earnings assignment order. *Fam. Code § 5261*

Grounds for motion to quash earnings assignment. *Fam. Code §§ 5270, 5272*

Motion to quash earnings assignment must be filed within 10 days after service on obligor. *Fam. Code § 5271(a), (c)*

Hearing on motion to quash earnings assignment order. *Fam. Code § 5271(b)*

[6] Earnings Withholding (Garnishment)

[a] In General

Earnings withholding (garnishment); Wage Garnishment Law. *Code Civ. Proc. § 706.010 et seq.*

Definitions used in Wage Garnishment Law. *Code Civ. Proc. § 706.011*

Garnishment allowed only pursuant to Wage Garnishment Law. *Code Civ. Proc. § 706.020*

Duty of employer to withhold. *Code Civ. Proc. § 706.022*

Costs and interest recoverable by garnishment. *Code Civ. Proc. § 706.028*

Creation and duration of lien on earnings. *Code Civ. Proc. § 706.029*

Withholding order for support. *Code Civ. Proc. § 706.030*

Priority of earnings assignment order for support. *Code Civ. Proc. § 706.031*

[b] Exemptions

Exempt earnings determined by federal law. *Code Civ. Proc. § 706.050*

Earnings necessary for support of debtor's family are exempt; exceptions. *Code Civ. Proc. § 706.051*

Earnings exempt from earnings withholding order for support. *Code Civ. Proc. § 706.052*

Procedure for debtor to claim exemption. *Code Civ. Proc. § 706.105*

[c] Procedure

Levy made by service of earnings withholding order. *Code Civ. Proc. § 706.021*

Service on employer of multiple orders. *Code Civ. Proc. § 706.023*

Payment of withheld wages to levying officer. *Code Civ. Proc. § 706.025*

Duties of levying officer. *Code Civ. Proc. § 706.026*

Termination of order when judgment satisfied. *Code Civ. Proc. § 706.027*

Judicial council to promulgate practice rules. *Code Civ. Proc. § 706.100*

Service of withholding order and papers. *Code Civ. Proc. § 706.101*

Application for earnings withholding order and papers. *Code Civ. Proc. § 706.102*

Documents served on employer by levying officer; time for service. *Code Civ. Proc. § 706.103*

Duties of employer served with earnings withholding order. *Code Civ. Proc. § 706.104*

No findings required under Wage Garnishment Law. *Code Civ. Proc. § 706.106*

Application for earnings withholding order; delivery to process server. *Code Civ. Proc. § 706.108*

Noticed motion required for issuance of earnings withholding order against spouse of judgment debtor. *Code Civ. Proc. § 706.109*

[7] Execution of Judgments

Enforcement of Judgments Law. *Code Civ. Proc. § 680.010 et seq.*

Execution of judgments. *Code Civ. Proc. § 699.010 et seq.*

Enforcement of judgment or order in family law proceeding by execution. *Fam. Code § 290*

Enforcement of child or family support awards by writ of execution. *Fam. Code §§ 5100-5104*

[8] General Provisions Relating to Support

Duty of support not affected by interference with visitation rights. *Fam. Code § 3556*

Civil actions for enforcement of support. *Fam. Code §§ 4000, 4002, 4303*

Priority of satisfaction regarding enforcement of decree, judgment, or order of support. *Fam. Code § 4338*

Enforcement of support orders. *Fam. Code § 4500 et seq.*

Child Support Delinquency Reporting Act. *Fam. Code § 4700 et seq.*

Support payment and collection booklet must be served on responding party in any child support action. *Fam. Code § 17434(c)*

[9] Judgment Liens

Liens. *Code Civ. Proc. § 697.010 et seq.*

Amount of lien. *Code Civ. Proc. § 697.010*

Priority of lien. *Code Civ. Proc. § 697.020*

Time within which lien is effective. *Code Civ. Proc. § 697.030*

Stay of judgment; effect on lien. *Code Civ. Proc. § 697.040*

Release of property if lien extinguished. *Code Civ. Proc. § 697.050*

Recording of federal court judgment. *Code Civ. Proc. § 697.060*

Liens on real property *Code Civ. Proc. § 697.310 et seq.*

Judgment lien on personal property. *Code Civ. Proc. § 697.510 et seq.*

Execution liens. *Code Civ. Proc. § 697.710 et seq.*

Other liens created by enforcement process. *Code Civ. Proc. § 697.910 et seq.*

[10] Locating Obligor Parents

California Parent Locator Service and Central Registry. *Fam. Code § 17506*

Child support orders collected and stored by the Statewide Automated Child Support System. *Welf. & Inst. Code §§ 16575, 16576*

[11] Miscellaneous Creditor's Remedies

Withholding against other state benefits. *Code Civ. Proc. § 704.120*

Supplemental proceedings. *Code Civ. Proc. § 708.010 et seq.*

Service of written interrogatories on judgment debtor. *Code Civ. Proc. §§ 708.020, 2030* (*Code Civ. Proc. § 2030.010 et seq.* effective July 1, 2005)

Creditor's examination. *Code Civ. Proc. § 708.110 et seq.*

Money owed to judgment debtor by public entity. *Code Civ. Proc. § 708.710 et seq.*

Claim against state tax refund. *Code Civ. Proc. §§ 708.730, 708.740, 708.795*

Creditor's remedies to reach partnership interest and rights regarding assignment. *Corp. Code §§ 15028, 15673*

[12] Nonrenewal of Professional License

Nonrenewal or nonissuance of professional license because of noncompliance with support order. *Bus. & Prof. Code § 31*; *Fam. Code § 17520*

[13] Out-of-State Judgments

Enforcement of Judgments Law. *Code Civ. Proc. § 680.010 et seq.*

Sister-State Money Judgments Act. *Code Civ. Proc. § 1710.10 et seq.*

Uniform Foreign Money Judgments Recognition Act. *Code Civ. Proc. § 1713 et seq.*

Action or special proceeding to enforce sister-state judgment. *Code Civ. Proc. § 1913*

Uniform Divorce Recognition Act. *Fam. Code § 2090 et seq.*

Uniform Interstate Family Support Act. *Fam. Code § 4900 et seq.*

[14] Payment of Support to Court-Designated Officer

[a] Child Support

Mandatory order directing payment of child support to county officer designated by court and directing district attorney to appear on behalf of welfare recipient to enforce order. *Fam. Code § 4200*

Discretionary order directing payment of child support to county officer designated by court and directing district attorney to appear on behalf of minor child to enforce order. *Fam. Code § 4201*

Discretionary order directing payment of child support to court-designated officer of county where custodial parent resides and directing local child support agency to appear on behalf of minor child to enforce order, when parties reside in different counties. *Fam. Code § 4202*

Expenses of county officer and district attorney when court has ordered payment of child support to officer designated by court or has directed district attorney to enforce order are charged to county where proceeding pending. *Fam. Code § 4203*

[b] Provisions Applicable to Both Child and Spousal Support

District attorney is exempt from filing fee in action to establish child support obligation, or to enforce child or spousal support obligation. *Gov. Code § 6103.9*

New and rehired employee information filed with Employment Development Department. *Unemp. Ins. Code § 1088.5*

Authority of probation officers or other designated persons to receive, invest, and disburse payments of child and spousal support. *Welf. & Inst. Code § 276(a)*

Authority of counties to impose service charge when court orders payments of child and spousal support to county officer designated by court. *Welf. & Inst. Code § 279*

[c] Spousal Support

Discretionary order for payment of spousal support to county officer designated by court in any support proceeding. *Fam. Code § 4201*

Enforcement by district attorney of orders for payment of spousal support to court-designated officer. *Fam. Code § 4351*

Expenses of county officer and district attorney in collecting and enforcing spousal support are charged to county where proceeding pending. *Fam. Code § 4352*

[15] Receivership

Appointment of receivers. *Code Civ. Proc. § 564 et seq.*

Enforcement of judgment or order in family law proceeding by appointment of receiver. *Fam. Code § 290*

[16] Security Deposits for Support

[a] In General

Security to enforce payment of child support. *Fam. Code § 4012*

Security to enforce payment of spousal support. *Fam. Code § 4339*

Child Support Security Act. *Fam. Code § 4550 et seq.*

[b] Security Deposit After Delinquency

[i] Generally

Fam. Code § 4600 et seq. provides extraordinary remedy for bad faith failure to pay child support obligations. *Fam. Code § 4600*

Definition of "deposit holder" as district attorney, country, officer, or trustee designed by court. *Fam. Code § 4601*

Immunity from liability for deposit holder acting in good faith under *Fam. Code § 4601*. *Fam. Code § 4603*

Furnishing of security to ensure future child support, when earnings assignment is impractical or difficult to enforce. *Fam. Code § 4613*

Value and type of assets designated for deposit. *Fam. Code §§ 4614, 4615*

Sale or use of deposited assets. *Fam. Code § 4630*

[ii] Procedure

Request for accounting of disbursements and receipts. *Fam. Code § 4602*

Recovery of fees and costs by deposit holder; procedure. *Fam. Code § 4604*

Procedure for obtaining order for deposit for security when obligor-parent is 60 days in arrears. *Fam. Code § 4610*

Presumptions that obligor must rebut. *Fam. Code § 4611*

Obligor's defenses; grounds for motion to stop sale or use of assets. *Fam. Code § 4612*

Order for sale of non-money asset on 20 days written notice. *Fam. Code § 4616*

Requirements for effective deposit of real property. *Fam. Code § 4617*

Ex parte orders to protect against depletion of property. *Fam. Code § 4620*

Motion to stop sale or use of deposited assets. *Fam. Code §§ 4631, 4632*

Return of assets to obligor-parent. *Fam. Code §§ 4640-4641*

[c] Security Deposit Before Delinquency

[i] General Provisions

Child Support Security Act. *Fam. Code § 4550 et seq.*

Definition of "child support obligee" as parent, guardian, or other person to whom support ordered to be paid, or district attorney designated by court. *Fam. Code § 4550*

Application of *Fam. Code § 4550 et seq.* to child support proceedings. *Fam. Code §§ 4551, 4554*

Judicial Council must promulgate rules of court and forms necessary to implement Fam. Code *§ 4550 et seq. Fam. Code* § 4552

Fam. Code § 4550 et seq. is not to be construed to permit action or omission by state that would place state in noncompliance with federal law. *Fam. Code § 4553*

Obligor's duty to provide evidence of deposit. *Fam. Code § 4562*

Use of deposit to make delinquent support payments. *Fam. Code §§ 4570-4573*

[ii] Order for Deposit

Order for "child support security deposit" of money may be made in any order or judgment for child support. *Fam. Code § 4560*

Institutions where court may order child support security to be deposited. *Fam. Code § 4561*

[iii] Reduction or Termination of Deposit

Dissolving of account on full payment of child support obligation. *Fam. Code § 4563*

Application to reduce or eliminate deposit. *Fam. Code § 4565*

Opposition to application to reduce or eliminate deposit. *Fam. Code § 4566*

Hearing and order on application to reduce or eliminate deposit. *Fam. Code § 4567*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementCriminal PenaltiesFamily LawChild SupportObligationsEnforcementGarnishmentsFamily LawChild SupportObligationsEnforcementLiensFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewGovernmentsState & Territorial GovernmentsEmployees & Officials

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§ 259.174 California Rules of Court

Service of notices. *Cal. Rules of Ct., Rule 5.10(b)*

Applicability of general civil law to Family Code proceedings. *Cal. Rules of Ct., Rule 5.21*

Papers to be served with application for order. *Cal. Rules of Ct., Rule 5.118(b)*

"Appearance" defined. *Cal. Rules of Ct., Rule 5.120*

When financial declaration must be served and filed. *Cal. Rules of Ct., Rule 5.128*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportProceduresFamily LawMarital Termination & Spousal SupportSpousal SupportProceduresGovernmentsCourtsRule Application & Interpretation

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§ 259.175 Decisions

[1] Attorney's Fees

Denial of attorney's fees in enforcement proceeding without hearing was erroneous when record did not indicate that court considered respective incomes and needs of parties. *In re Marriage of Popenhager (1979) 99 Cal. App. 3d 514, 525-526, 160 Cal. Rptr. 379*

Reasonableness of order for attorney's fees incurred in enforcing spousal support order in judgment is within sound discretion of trial court. *In re Marriage of Millet (1974) 41 Cal. App. 3d 729, 731, 116 Cal. Rptr. 390*

[2] Civil Enforcement Methods

District attorney is authorized by former *Welf. & Inst. Code § 11475.1* (*see now Fam. Code § 17400 et seq.*) to oppose modification of child and spousal support order on behalf of spouse not receiving public assistance. *Worth v. Superior Court (1989) 207 Cal. App. 3d 1150, 1154-1155, 255 Cal. Rptr. 304*

[3] Death of Obligor

Divorce judgment ordering husband to maintain wife as beneficiary on specific amount of life insurance for benefit of minor children of parties is enforceable against husband during his lifetime by contempt proceedings or by suit for specific performance and, when he failed to comply with order, named his estate as beneficiary, and died, was enforceable against his executors who held proceeds as constructive trustees. *Cramer v. Biddison (1968) 257 Cal. App. 2d 720, 724-725, 65 Cal. Rptr. 624*

Obligation for child support continues after death of obligor and extends to estate. *Franklin Life Ins. Co. v. Kitchens (1967) 249 Cal. App. 2d 623, 631, 635, 57 Cal. Rptr. 652*

Father's obligation to support minor child that is fixed by divorce decree or property settlement agreement does not cease on father's death but survives as charge against estate. *Newhall v. Newhall (1964) 227 Cal. App. 2d 800, 806, 39 Cal. Rptr. 144*

[4] Execution

Adult children have no standing to enforce by execution accrued child support arrearages because custodial parent is beneficiary of execution action after children reach majority. *In re Marriage of Utigard (1981) 126 Cal. App. 3d 133, 137, 143, 178 Cal. Rptr. 546*

[5] Earnings Withholding (Garnishment) for Support

[a] Equitable Division of Earnings

Equitable division of earnings between first and second families is proper when earnings not exempt. *Rankins v. Rankins (1942) 52 Cal. App. 2d 231, 234-235, 126 P.2d 125*

[b] Orders Enforceable

Disability pension covered by ERISA is subject to garnishment under state law for spousal support judgment. *In re Marriage of Williams (1985) 163 Cal. App. 3d 753, 764, 768, 209 Cal. Rptr. 827*

[6] Payment of Support to Court-Designated Officer

Former *Civ. Code § 4801.7* (*now see Fam. Code § 4351*) did not authorize district attorney to defend recipient spouse in action for reduction or termination of spousal support, in contrast to action to enforce support order. *In re Marriage of Brown (1987) 189 Cal. App. 3d 491, 495-496, 234 Cal. Rptr. 535*

Requirement of former *Civ. Code § 4702(a)* (*now see Fam. Code § 4200*) that court order payment of child support to county clerk (designated county officer), is part of federal-state procedure to ensure reimbursement to taxpayers by absent fathers; but does not authorize court to require indigent custodial mothers to partially reimburse county for welfare payments as condition of entry of dissolution judgment. *In re Marriage of Sanabia (1979) 95 Cal. App. 3d 483, 486, 157 Cal. Rptr. 56*

District attorney was empowered under former *Civ. Code § 4702* (*now see Fam. Code § 4200*) to appear on behalf of minor child and child's mother in proceeding to enforce support order when child support was ordered payable to county probation department and mother had assigned rights to receive support to county. *In re Marriage of Guardino (1979) 95 Cal. App. 3d 77, 85-86, 156 Cal. Rptr. 883*

Court that ordered payments of child support to trustee under former *Civ. Code § 4702(a)* (*now see Fam. Code § 4200*) when custodial mother was receiving AFDC properly refused to order that trustee pay any part of support payments into educational trust fund, rather than paying entire amount to county as required by statute. *In re Marriage of Simmons (1977) 72 Cal. App. 3d 205, 207-208, 139 Cal. Rptr. 832*

[7] Setoff Rights

Whether parent should be given credit for child support payments made contrary to provisions of court order is within

sound discretion of trial court. *In re Marriage of Utigard (1981) 126 Cal. App. 3d 133, 145, 178 Cal. Rptr. 546*

Equity prohibits mother from collecting child support arrearages from father that accrued during time when child, with consent of mother, was permanently living with father. *Jackson v. Jackson (1975) 51 Cal. App. 3d 363, 368, 124 Cal. Rptr. 101*

Effect of substituted payments (i.e., payments made directly to child or on behalf of child instead of to custodial parent) on enforceability of child support order. *Spivey v. Furtado (1966) 242 Cal. App. 2d 259, 264-267, 51 Cal. Rptr. 362*

[8] Tax Refund Intercepts

State income tax refund intercept program for delinquent child support meets constitutional requirements of due process. *Wightman v. Franchise Tax Board (1988) 202 Cal. App. 3d 966, 978, 249 Cal. Rptr. 207*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewFamily LawChild SupportObligationsEnforcementGarnishmentsFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGarnishmentsFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationDeath

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§ 259.176 Attorney General Opinions

Unemployment insurance benefits, disability insurance benefits, WIN incentive benefits, and WIN training allowance payments are subject to child but not to spousal support enforcement procedures. *66 Ops. Cal. Atty Gen. 488 (1983)* (decided prior to 1988 amendment of *Code Civ. Proc. § 704.120*, which permits withholding of certain unemployment benefit payments to enforce child and related spousal support judgments)

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationGeneral Overview

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§ 259.177 Law Reviews

Reitmayer, *Modification of Divorce Support Orders Under RURESA: A Procedural and Substantive Quagmire, 20 New Eng. L. Rev. 425 (1984)*

Cavers, *International Enforcement of Family Support, 81 Colum. L. Rev. 994 (1981)*

Mandel, *Registration of Support Orders in California, 5 Glendale L. Rev. 135 (1981)*

Marks-Bennett, *Enforcement of Foreign Support Judgments, Orders or Decrees, 52 Okla. B.J. 1801 (1981)*

Garrett, *Alimony and Child Support Enforcement, 1(4) Fam.* Advoc. 18 (1979)

Crouch, *Interstate Aspects of Divorce Law*, 24(6) Prac. Law. 27 (1978)

Inker, Walsh, Perocchi, *Alimony Orders Following Short-Term Marriages, 12 Fam.* L.Q. 91 (1978)

Busch, *The Role of the District Attorney in Civil and Criminal Child Support Enforcement, 47 L.A. Bar Bull. 56 (1971)*

Comment, *Uniform Foreign Money-Judgment Recognition Act: A Survey of the Case Law, 14 Vand. J. Transnat'l L. 171 (1981)*

Comment, *Uniform Reciprocal Enforcement of Support Act, 20 Washburn L.J. 409 (1981)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Reciprocal Enforcement of Support ActFamily

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§ 259.178 Text References

Witkin, California Procedure, vol. 6, *Provisional Remedies*, §§ 389-395; 416-458; vol. 8, *Enforcement of Judgment*, §§ 9-12, 44-92, 265-316, 399-400, 397-414 (4th ed. 1997)

Legal Topics:

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

§§ 259.179[Reserved]

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PART IV. FORMS
A. Wage Garnishment

22-259 California Forms of Pleading and Practice--Annotated § 259.190

§ 259.190 Application for Earnings Withholding Order [Code Civ. Proc. § 706.121]--Cal. Judicial Council Form WG-001

[1] FORM

Click here to view image.

[2] Use of Form

The form in *[1], above*, is an illustrative, filled-in version of the Application for Earnings Withholding Order form adopted by the Judicial Council for mandatory use [*Code Civ. Proc. §§ 681.030(b), 706.120*; Cal. Judicial Council Form WG-001]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form is for use by a judgment creditor to apply for an earnings withholding order for support. The application may be made when a writ of execution has been issued to the county in which the judgment debtor's employer is to be served, and 180 days have not elapsed from the date the writ was issued [*Code Civ. Proc. §§ 706.102(a), 706.108(a)*; *see also Code Civ. Proc. § 699.530(b)*]. The levying officer must promptly issue the earnings withholding order [*Code Civ. Proc. § 706.102(a)*; *see Code Civ. Proc. § 706.030(a)* (defining "withholding order for support"); § 259.191 (form)].

[3] Contents of Application

The application must be executed under oath and must contain the following [*Code Civ. Proc. § 706.121(a)-(g)*]:

- The name, last known address, and, if known, the social security number of the judgment debtor;
- The name and address of the judgment creditor;

- The court where the judgment was entered and the date of entry;
- The date of issuance of the writ to the county where the earnings withholding order is sought;
- The total amount required to satisfy the order on the day of issuance;
- The name and address of the employer; and
- The name and address of the person to whom the withheld money is to be paid by the levying officer.

Although the form does not contain a direction that the creditor's address be set forth, as required by *Code Civ. Proc. § 706.121(b)*, the better practice would be to type the address after the creditor's name in Paragraph 1. Additionally, although the form does not have a space to include the date the writ of execution was issued, it is deemed to comply with *Code Civ. Proc. § 706.121(d)* [*see Code Civ. Proc. §§ 681.030(b), 706.120*].

[4] Filing Application

The application may be filed with the levying officer in the county to which the writ of execution has been issued [*Code Civ. Proc. § 706.102(a)*], or it may be delivered to a registered process server [*Code Civ. Proc. § 706.108(a)*]. The officer or process server must then issue an earnings withholding order [*see § 259.191*].

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PART IV. FORMS
A. Wage Garnishment

22-259 California Forms of Pleading and Practice--Annotated § 259.191

§ 259.191 Earnings Withholding Order for Support [Code Civ. Proc. §§ 706.030, 706.052, 706.108]--Cal. Judicial Council Form Rule WG-004

[1] FORM

Click here to view image.

[2] Use of Form

The form in *[1], above*, is an illustrative, filled-in version of the Earnings Withholding Order for Support form adopted by the Judicial Council for mandatory use [*Code Civ. Proc. § 706.120*; Cal. Judicial Council Form WG-004]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form is for use by a levying officer or a registered process server. If a writ of execution has been issued to the county in which the judgment debtor's employer is located and 180 days have not expired since the writ issued, the levying officer or registered process server, after receiving an application for an earnings withholding order [*see § 259.190*], must order the withholding or earnings of a judgment debtor in spousal or child support cases [*Code Civ. Proc. §§ 706.030(a), 706.108(a)*; *see Code Civ. Proc. § 699.530(b)*]. Counsel should consult with a levying officer or registered process server in his or her county to determine if local practice requires the officer or server to complete this form.

[3] Service of Order

Service of the order on the employer may be made by personal delivery or by registered or certified mail, postage prepaid, with return receipt requested [*see Code Civ. Proc. §§ 415.10, 415.20, 706.101(b)*], and may be made by either the levying officer or a registered process server [*see Code Civ. Proc. §§ 706.103(a), 706.108(a)*]. The following papers are required to be served on the employer [*Code Civ. Proc. §§ 706.103(a), (b), 706.108(c)*]:

- The original and one copy of the earnings withholding order;
- The form for the employer's return;
- The notice to employee of the earnings withholding order; and
- A copy of the employer's instructions referred to in *Code Civ. Proc. § 706.127* (included on the reverse of the current form), unless the Judicial Council prescribes otherwise.

For discussion and illustrative forms listed in (2) and (3), *above*, see Ch. 276, *Garnishment* .

[4] Instructions to Employer

The reverse side of the form contains Employer's Instructions. The levying officer must serve the form on the debtor spouse's employer, who must give notice to the employee and begin withholding his or her earnings. The instructions set out the employer's duties and include information on the computation of the permissible amounts to be withheld and warnings regarding violations of the garnishment laws set out in *Code Civ. Proc. § 706.010 et seq.*

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22-259 California Forms of Pleading and Practice--Annotated §§ 259.192-259.199

[Reserved]

§§ 259.192[Reserved]

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22-259 California Forms of Pleading and Practice--Annotated § 259.200

§ 259.200 Notice of Intent to Seek Earnings Assignment Order in Event of Default on Pre-July 1, 1990, Support Order [Fam. Code § 5252(b)]

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF INTENT TO SEEK EARNINGS AS-
Respondent.	)	SIGNMENT ORDER
	)	
	)	

TO THE ABOVE-NAMED _____ [*identify party who has been ordered to pay child or spousal support, e.g.,* RESPONDENT] AND TO _____ [*name*], HIS/HER ATTORNEY:

NOTICE IS HEREBY GIVEN that _____ [*name of party to whom support has been ordered to be paid*] will seek an assignment of your earnings without further notice to you in the event you fail to pay the _____ [child *and/or* spousal] support you have been ordered to pay by the court.
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]

_____ [*typed name*]
Attorney for_____ [*party's status and name*]

[2] Use of Form

The form in *[1], above,* is for use in giving notice of intent to seek an earnings assignment order in the event of a default in child or spousal support payments [*see Fam. Code § 5252(b)*; *Fam. Code § 5253* (issuance of earnings assignment support order on receipt of application for assignment)]. The form should be used with regard to a pre-July 1, 1990, support order, or order modifying support, that does not contain an earnings assignment, as a prerequisite to seeking an earnings assignment if the obligor is in default in an amount equal to one month's payment [*Fam. Code §§ 5250, 5252(a)*; *see also Fam. Code §§ 5230(b), 5251* (alternative procedure by notice of motion or order to show cause), all discussed in *§ 259.56*].

[3] When Notice of Intent May Be Given

The obligee need not wait for the obligor to default on the support obligation before giving the notice set out in this form. The notice may be given at any time, including at the time of filing a petition or complaint in which support is requested, or at any subsequent time [*Fam. Code § 5252(b)*]. The notice must be given, however, at least 15 days before filing an application for an earnings assignment order [*Fam. Code § 5252(b)*; *see § 259.201*]. The obligor may, at any time, waive the requirement that this notice be given [*Fam. Code § 5252(b)*].

[4] Service of Notice

This notice must be served on the obligor by first-class mail, postage prepaid, or by personal service. Service must be at least 15 days prior to the filing of an application for an earnings assignment [*Fam. Code § 5252(b)*].

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22-259 California Forms of Pleading and Practice--Annotated § 259.201

§ 259.201 Ex Parte Application for Earnings Assignment Order [Fam. Code §§ 5250, 5252(a)]--Cal. Judicial Council Form FL-430

[1] FORM

[2] Source of Form

The form in *[1], above,* is an illustrative reproduction of the mandatory form of Ex Parte Application for Earnings Assignment Order (Family Law) adopted for use by the Judicial Council [Cal. Judicial Council Form FL-430]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Use of Form

The form in *[1], above,* is for use as an ex parte application for an order to obtain an earnings assignment against a person who is in arrears in payments on a child, spousal, or family support order [*see Lang v. Superior Court (1984) 153 Cal. App. 3d 510, 516, 200 Cal. Rptr. 526* (local rule requiring that application for wage assignment for payments on child support arrearages and for attorney's fees to obtain payments be issued only on noticed motion, rather than on ex parte application, was in conflict with former *Civ. Code § 4701* and former Cal. Rules of Ct., Rule 1285.65)]. As an alternative to proceeding ex parte, the obligee may proceed by noticed motion or order to show cause [*Fam. Code §§ 5230(b), 5251*]. The form is for use with regard to a pre-July 1, 1990, support order on which the court has not previously issued an earnings assignment order [*see Fam. Code §§ 5230(b), 5250-5253*]. With regard to any support order issued or modified after that date, an earnings assignment order must be issued at the time when the support order is made [*see Fam. Code § 5230*]. However, to account for situations in which no earnings assignment order has actually been issued for support ordered on or after July 1, 1990, the form may also be used with respect to such (July 1, 1990, or later) orders. The form also permits a request for *modification* of an existing wage and earnings assignment order.

[4] Filling Out Form

For support ordered before July 1, 1990, the application must allege that the obligor is in default in support payments in a sum equal to the amount of support payable for one month or for any other occurrence specified by the court in the support order (Paragraph 3) [*Fam. Code § 5252(a)*].

In addition, for support ordered before July 1, 1990, the applicant must also allege the giving of written notice of intent to seek an earnings assignment in the event of default (Paragraph 3) [*see Fam. Code § 5252(b)*]. For a form of notice of intent, see *§ 259.200*.

For support orders issued on or after July 1, 1990, the form contains a checkoff box in Paragraph 4 that permits the applicant to indicate that an earnings assignment order has not been issued for support ordered after that date. Paragraph (6) of the form permits the applicant to seek a modification of an existing earnings assignment order. Counsel should mark the check-off boxes applicable to the situation or, if none apply, explain the basis for the modification under the box marked "other."

For discussion of particular problems with the use of an earnings assignment to collect arrearages and attorney's fees, see *§ 259.202[4]*.

[5] Verification

The application must be signed under penalty of perjury by the obligee [*Fam. Code § 5252(a)*].

[6] Income and Expense Declaration

An application for an assignment to pay arrearages or attorney's fees should be accompanied by a completed Income and Expense Declaration in support of the monthly payment requested, unless a current form is on file [*Cal. Rules of Ct., Rules 5.118(b), 5.128* (declaration required when "relevant"); Cal. Judicial Council Form FL-150; for a form of income and expense declaration, *see* Ch. 221, *Dissolution of Marriage: Procedure*].

[7] Attorney's Fees

Absent good cause to the contrary, the court, on determining an ability to pay, must award reasonable attorney's fees to a custodial parent or a supported spouse in any action to enforce an existing order for child or spousal support [*Fam. Code § 3557*].

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22-259 California Forms of Pleading and Practice--Annotated § 259.202

§ 259.202 Earnings Assignment Order for Spousal or Partner Support [Code Civ. Proc. § 706.031; Fam. Code § 5230; 15 U.S.C. §§ 1672, 1673]--Cal. Judicial Council Form FL-435

[1] FORM

[2] Source of Form

The form in *[1], above,* is an illustrative reproduction of the mandatory Judicial Council form of Earnings Assignment Order for Spousal or Partner Support (Family Law) [Cal. Judicial Council Form FL-435]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Use of Form

The form in *[1], above,* is for use as an assignment of salary or wages for spousal support to order an employer to withhold a portion of the earnings of its employee and to pay the amounts withheld as directed by the order [*see 15 U.S.C. §§ 1672, 1673* (restrictions on wage garnishment)]. It may be used as either an initial earnings assignment order [*see Fam. Code §§ 5230(b), 5250-5253* (application for earnings assignment for support orders first issued or modified before July 1, 1990, for which court did not issue earnings assignment)], or an order modifying a prior earnings assignment when the underlying spousal support order has been modified [*see Fam. Code § 5230(a)*]. The order operates as an assignment and is binding on any existing or future employer of the obligor on whom a copy of it is served [*Fam. Code § 5231*; *see also Code Civ. Proc. § 706.031* (priority of earnings assignment for support)].

Instructions to the employer payor and information for the employee obligor appear on the reverse side of the form. An earnings assignment order for support must be issued, and is effective and enforceable, notwithstanding the absence of the name, address, or other identifying information about the obligor's employer or the inclusion of incorrect information about the [*Fam. Code § 5230(b)*].

On and after January 1, 2000, the federal form entitled Order/Notice to Withhold Income for Child Support [Judicial

Council forms FL-195/FL-196, OMB Form No. 0970-0154] is to be used for a wage and earnings assignment order for child support. That form is set forth at *§ 259.263*.

[4] Computation of Arrearages

An earnings assignment order must include an amount to be paid toward the liquidation of any arrearage [*Fam. Code § 5230(b)*]. Therefore, the form in *[1], above*, may be used as an order to withhold amounts from earnings to be applied to arrearages in addition to the ongoing monthly support obligation. There is a problem, however, with use of an earnings assignment to collect arrearages, particularly if the obligee is proceeding ex parte under *Fam. Code § 5252* for support orders issued or modified before July 1, 1990. In the order, the court must set forth the total amount of the arrearages (line 1(b)). Under the applicable statute, however, arrearages are to be computed on the basis of payments owed and unpaid on the date when the obligor has been given notice of the order of assignment [*Fam. Code § 5239*]. Thus, the amount of arrearages apparently cannot be computed until a date subsequent to when the order is issued. Until this procedure is clarified by legislation or rules, counsel should check with the court clerk for local practice, and may wish to collect arrearages by way of an earnings withholding order (garnishment) [*see § 259.30* et seq.] instead of an earnings assignment.

[5] Copies to Prepare

The following copies should be prepared:

- Original for filing with court clerk;
- One copy for the employer to retain;
- A second copy to be delivered to the employer for transmission to the employee;
- A third copy for any court or county official who is to receive and pay over the funds; and
- Additional copy for service by party securing order on employee's attorney or employee if he or she has no attorney.

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22-259 California Forms of Pleading and Practice--Annotated § 259.203

[Reserved]

§ 259.203[Reserved]

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22-259 California Forms of Pleading and Practice--Annotated § 259.204

§ 259.204 Stay or Termination of Stay of Service of Earnings Assignment Order [Fam. Code § 5260, 5261]--Cal. Judicial Council Form FL-455

[1] FORM

[2] Source of Form

The form in *[1], above,* is an illustrative reproduction of the mandatory form of Stay or Termination of Stay of Service of Earnings Assignment Order, adopted by the Judicial Council [Cal. Judicial Council Form FL-455]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Use of Form

The form in *[1], above,* may be used either by a support obligor to request a court order staying service of an earnings assignment order [*Fam. Code § 5260*], or by a support obligee to request an order terminating such a stay [*Fam. Code § 5261*]. For discussion of the grounds for a stay of service, see the discussion in *§ 259.55[1]*. For discussion of the grounds for termination of the stay of service, see the discussion in *§ 259.55[2]*.

[4] Hearing Requirements

Although there is no express statutory requirement for a hearing on an application for a stay of service, it is implied by the lack of any express authority to proceed ex parte [*see Fam. Code § 5260*]. The form reproduced in *[1], above,* states that if the application is made separately from a hearing on support, the obligor must notice a hearing (*see* Notice before item 1 in Application for Stay). Thus, the probable legislative assumption is that the obligor should request a stay at the time of the hearing at which a support order might be entered. Therefore, the obligor should be prepared to make a showing of good cause or alternative arrangement of the parties for stay of service at that time, and the obligee should be placed on notice in some manner of the obligor's intention to request a stay of service.

If the obligee applies for termination of the stay on the ground of arrearages, no hearing is required, and the stay terminates by operation of law on the filing of the declaration [*Fam. Code § 5261(a), (b)*]. If the obligee seeks termination of the stay on any other ground, the form states that a hearing is required (*see* item 3 in Application for Termination of Stay). This may reasonably be inferred from the statutory language, which provides that the obligee must establish that good cause no longer exists [*see Fam. Code § 5261(a)*; *see also Fam. Code § 5260(b)(1)* (conditions for good cause)].

[5] Filling Out Form if Cash or Cash Bond Is to Be Posted

The form in *[1], above*, has been filled out to represent the situation in which the obligor will request stay of service at the hearing in which the support obligation is initially established. In that case, the exact amount of support to be ordered may be unknown, so the form has been modified to reflect the fact that no support order is currently outstanding at the time the form is filed and served (line 2).

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22-259 California Forms of Pleading and Practice--Annotated § 259.205

§ 259.205 Declaration of Payment History and Attachment--Cal. Judicial Council Forms FL-420, FL-421

[1] FORMS

[2] Use of Forms

The forms in *[1], above*, are reproductions of the mandatory Judicial Council forms of Declaration of Payment History and Attachment to Declaration of Payment History [Cal. Judicial Council Forms FL-420, FL-421]. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

These forms are used in proceedings to enforce orders for child, spousal, or family support to show the extent to which an obligor is in arrears in making payments under the order involved. They will ordinarily be attached to other forms that together comprise the notice of motion or order to show cause being brought to enforce the support order [*see, e.g.,* Cal. Judicial Council Form FL-650 (statement for registration of foreign support order)]. In particular, the Attachment form generally should be completed whenever the arrearages declaration is used to show a detailed breakdown of the arrearage components. It appears that the forms may also be used by a support obligor to present the obligor's own statement of arrearages.

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22-259 California Forms of Pleading and Practice--Annotated § 259.206

§ 259.206 Qualified Domestic Relations Order for Support, and Attachment--Cal. Judicial Council Forms FL-460, FL-461

[1] FORMS

[2] Use of Forms

The forms in *[1], above*, are illustrated versions of the approved Judicial Council forms of Qualified Domestic Relations Order for Support (Earnings Assignment Order for Support), and Attachment to Qualified Domestic Relations Order for Support [Cal. Judicial Council Forms FL-460, FL-461]. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The first illustrated form (Qualified Domestic Relations Order for Support) is intended for use as an *earnings assignment order for support* with respect to a support obligor's benefits under an employee benefit plan that is subject to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA-- 29 U.S.C. § 1000 et seq.) [Cal. Judicial Council Form FL-460].

The second illustrated form (Attachment to Qualified Domestic Relations Order for Support), is a statement of confidential identifying information regarding the obligor/employee and a spousal or family"alternate payee" [Cal. Judicial Council Form FL-461]. The Attachment must be completed and served on the employee benefit plan along with a copy of the order.

A qualified domestic relations order (QDRO) may be used to enforce orders (including provisions of court-approved property settlement agreements) for child, spousal or family support, or marital property rights with respect to a spouse, former spouse, child, or other dependent of a participant in an ERISA-governed employee benefit plan [*see 29 U.S.C. § 1056(d)(3)(B)*; discussed in *§ 259.11[8][a]*].

[3] Contents of Order

The Qualified Domestic Relations Order for Support form addresses several possible payout situations of benefits under the plan: monthly or other periodic payments (Item 1); a lump sum distribution (Item 3); and benefits that are not currently in "pay status," but that have been applied for by the support obligor (Item 5). The form notes that if benefits are not yet in pay status and the obligor has neither applied for them, and does not apply for them within 90 days after the plan receives the order, the plan has no obligation to withhold benefits. But, in that event, the plan would have to send prompt written notice to the alternate payee advising that no benefits are currently available for distribution and specifying the earliest date on which the support obligor could begin receiving benefits under the plan if her or she terminated employment (Item 5(b)).

Note that this Qualified Domestic Relations Order for Support form also includes a temporary restraining order (Item 13). The order provides that during any period in which the status of the order as a QDRO is being determined by the plan, or for such further period as may be ordered by the court, the plan is restrained from making a distribution to the support obligor ("participant") or his or her beneficiary (other than a beneficiary under another QDRO) of any amount that would have been payable during that period to any alternate payee named in the order if it had been determined to be a QDRO. The temporary restraining order would not, however, remain in effect for more than 18 months (*see* Item 13). Page 4 of the form contains definitions and further instructions concerning the form.

For a full discussion of requirements for, and use of QDROs, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

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22-259 California Forms of Pleading and Practice--Annotated §§ 259.207-259.219

[Reserved]

§§ 259.207[Reserved]

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22-259 California Forms of Pleading and Practice--Annotated § 259.220

§ 259.220 Order for Deposit of Assets to Secure Future Child Support Payments [Fam. Code § 4610(a)]--Order to Show Cause With Application and Supporting Declaration--Cal. Judicial Council Forms FL-300, FL-310

[1] FORMS

Click here to view image.

[2] Source of Forms

These forms are reproductions of the mandatory Judicial Council forms of Order to Show Cause (Family Law) [Cal. Judicial Council Form FL-300], and of Application for Order and Supporting Declaration [Cal. Judicial Council Form FL-310]. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Use of Forms

These forms are for use by a person entitled to receive court-ordered child support payments when seeking an order for deposit of the parent-obligor's assets in order to secure future support payments [*see Fam. Code § 4610*]. An order for deposit of assets for security may be obtained on an order to show cause [*Fam. Code § 4610(a)*; *see* Cal. Judicial Council Form 1285; *see also § 259.221*]. The form of Application for Order and Supporting Declaration may also be used as an attachment to a Notice of Motion [*Fam. Code § 4610(a)*; *see* Cal. Judicial Council Form FL-301 (form of notice of motion and proof of service by mail)].

[4] Filling Out Forms

The relief requested may be indicated on the Order to Show Cause by checking the box labeled "Other" and specifying that the desired order is for deposit to secure child support payments. On the Application for Order and Supporting Declaration, item 9 allows for requests for unusual relief.

[5] Declaration

Evidentiary facts in support of the request for an order for deposit should be set forth in the space provided at item 10. When additional pages are required for the declaration, the Judicial Council form of Additional Page may be attached [Cal. Judicial Council Form MC-020]. No memorandum of points and authorities need be filed unless required by the court [*Cal. Rules of Ct., Rule 5.118(a)*]. Therefore, the declarations should be specific and should contain no hearsay but instead be made by the person or persons having personal knowledge of the facts. The declaration or declarations must be signed under penalty of perjury by the person or county officer to whom support has been ordered to have been paid [*Fam. Code § 4610(a)*]. A declaration must state at a minimum that the obligor-parent is in arrears in payment in a sum equal to the amount of 60 days of payments [*Fam. Code § 4610(a)*].

The court is required to order a deposit for security if it determines that one of the conditions specified by statute exist, such as the fact that the parent-obligor is not receiving a salary subject to an assignment but has other income, or his or her job history shows that an earnings assignment would be difficult to enforce [*Fam. Code § 4613*; *see* discussion at *§ 259.84*]. In some jurisdictions in which orders to show cause are generally submitted on pleadings, declarations, and offers of proof, counsel should prepare declarations in lieu of testimony in support of the existence of the conditions for a deposit for security. In those jurisdictions in which testimony is allowed only in hearings for pendente lite relief, counsel should ascertain before filing the declaration whether the matter may be specifically assigned for evidentiary hearing and, if not, prepare adequate declarations, or documents authenticated by declaration, showing the necessary facts.

[6] Accompanying Papers

The following papers should be attached:

- A copy of the child support order to be enforced. Although the court file will contain a copy of the order, it may be attached to the Application and Order to Show Cause as a convenience to the judge.

- A blank copy of Responsive Declaration to Order to Show Cause or Notice of Motion (Family Law) [Cal. Judicial Council Form FL-320], a blank copy of Income and Expense Declaration (Family Law) [Cal. Judicial Council Form FL-150], and a blank copy of Property Declaration (Family Law) [Cal. Judicial Council Form FL-160; for a form of responsive declaration, and forms of income and expense and property declarations, *see* Ch. 221, *Dissolution of Marriage: Procedure*] in the same number of copies and for same distribution as Application for Order and Supporting Declaration [*Cal. Rules of Ct., Rule 5.118(b)*; *see Cal. Rules of Ct., Rule 5.128*].

- Declaration by counsel, if required by local rules, to support an award of attorney's fees.

- Completed financial declaration, if petitioner requests attorney's fees, or when otherwise relevant to the relief requested [*Cal. Rules of Ct., Rules 5.118(b), 5.128*].

[7] Number of Copies

Once the judge has signed the order to show cause, the following copies should be made:

- For service on the parent-obligor.

- For service on opposing counsel, if any.

- For filing after service with the original proof of service attached.

- For the client.
- For counsel's own file.

[8] Service

A conformed copy of the signed order to show cause, together with the application and supporting declaration and all accompanying papers must be served at least 16 court days before the time set for the hearing, with an additional 5 days if service is by mail [*Code Civ. Proc. §§ 1003, 1005, 1013a*; *Cal. Rules of Ct., Rule 5.10(b)*]. Following service of these papers, the original proof of service will be filed with the court. Counsel may use the Judicial Council form DV-140, adopted for use in general family law, domestic violence, and parentage proceedings, an illustrative version of which is set forth in Ch. 293, *Harassment and Domestic Violence* . For general discussion of proof of service, see Ch. 518, *Service of Summons and Papers* .

If a final judgment has been entered in the proceeding, the order and accompanying papers must be served on the obligor-parent and not on his or her attorney of record [*Fam. Code § 215*]. If a final judgment has not been entered, service should be on opposing counsel or on the obligor-parent if he or she is unrepresented [*see Cal. Rules of Ct., Rule 5.10(b)*].

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22-259 California Forms of Pleading and Practice--Annotated § 259.221

§ 259.221 Order for Deposit of Assets to Secure Future Child Support Payments [Fam. Code § 4610(a)]--Attachment to Order After Hearing--Cal. Judicial Council Form MC-020

[1] FORM

[2] Use of Form

The form in *[1], above*, is an illustrative, filled-in reproduction of the optional Judicial Council form of additional page to attach to any other Judicial Council form [Cal. Judicial Council Form MC-020]. The form may be used after hearing on an order to show cause if the court has ordered the parent-obligor to deposit certain assets as security for future child support payments [*see Fam. Code § 4610(a)*; *see also* discussion at *§ 259.80 et seq. and § 259.220[3] -[8]*]. This additional page, containing the language of the order, must be attached to the mandatory Judicial Council form of Findings and Order After Hearing [*see* Cal. Judicial Council Form FL-341]. An illustrative reproduction of that form is set forth in Ch. 224, *Dissolution of Marriage: Child Support* . On the Findings and Order After Hearing form, item 8, which allows for the attachment of orders other than those listed on the form, should be checked.

Blank copies of the Findings and Order After Hearing and the form of Additional Page are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. Blank forms may also be procured from the court clerk's office.

[3] Contents of Order

The order the court issues must require the parent obligated for support to deposit assets in order secure future payments with the district attorney, other county officer, or trustee designated by the court [*Fam. Code § 4610(a)*; *see Fam. Code § 4601*]. The order will specify a time within which the obligor-parent must make reasonable efforts either to cure the default in child support payments or to comply with a court-approved payment plan, and if payments continue in the arrears, the deposited assets may be used to satisfy the support obligation [*see Fam. Code § 4630(a)*; *see also* discussion *§ 259.87*].

[4] Preparation of Order

Because the court will ordinarily direct counsel to prepare a formal order, counsel should note the exact wording of the order at the time that the judge gives it from the bench. After completing this form, counsel should as a courtesy send an unsigned copy, with a return, stamped envelope, to opposing counsel (or to the parent-obligor, if unrepresented) to sign and return as conforming to the order made in open court. Counsel can then present the order to the judge for his or her signature. Counsel should consult local rules of court to determine whether this procedure is mandatory.

[5] Filing and Service

The signed form of Findings and Order After Hearing should be presented to the clerk for filing, along with a proof of service of the order on counsel for the parent-obligor. If the order provides for service on the district attorney, county officer, or trustee designated by court to receive the deposit of assets, it is recommended that these officials should also be served and the appropriate proofs of service filed [*see Fam. Code § 4601*].

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22-259 California Forms of Pleading and Practice--Annotated § 259.222

§ 259.222 Order for Child Support Security Deposit and Evidence of Deposit [Fam. Code §§ 4560, 4562]--Cal. Judicial Council Form FL-400

[1] FORM

[2] Use of Form

The form in *[1], above,* is an illustration of the mandatory Judicial Council form for use as an order for a child support security deposit of money and evidence of deposit [*see* Cal. Judicial Council Form FL-400]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form has been adopted under *Fam. Code § 4550 et seq.*, which provides for a deposit of money, before delinquency, to secure future child support payments [*cf. Fam. Code § 4600 et seq.* (providing for deposit of assets to secure future child support payments)]. The language of the form closely tracks the requirements of *Fam. Code §§ 4560*, *4561*, and *4562*.

The order is to be signed by the court and then presented to the financial institution where the account will be established. An officer of the institution should complete the Evidence of Deposit. The original of the form then should be filed with the court, and a copy mailed to the person entitled to receive payment. A copy should also be served on the obligor.

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22-259 California Forms of Pleading and Practice--Annotated § 259.223

§ 259.223 Application for Disbursement From Child Support Security Deposit and Order for Disbursement [Fam. Code § 4570]--Cal. Judicial Council Form FL-401

[1] FORM

[2] Use of Form

The form in *[1], above,* is an illustrated version of the mandatory Judicial Council form intended for use as an application and order for disbursement from a child support security deposit and evidence of deposit [*see* Cal. Judicial Council Form FL-401]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form has been adopted under *Fam. Code § 4550 et seq.*, which provides for a deposit of money, before delinquency, to secure future child support payments [*cf. Fam. Code § 4600 et seq.* (providing for deposit of assets to secure future child support payments)]. The language of the form closely tracks the requirements of *Fam. Code § 4570*, providing for disbursal of the funds.

[3] Service

The court must immediately order a disbursal from the child support security account on receipt of a verified application that support is 10 or more days late [*see Fam. Code § 4570(a)*]. The statute requires that the court cause a copy of the verified application, as well as its order to disburse and replenish funds, to be served on the obligor [*Fam. Code § 4571*]. It does not appear to require that a copy of the application be served before the order is signed. Nevertheless, the face of the form states that a copy of the application must be served on the obligor and proof of its service be attached to the original that is filed with the court. This procedure would appear to require that a copy of the application be served on the obligor before the order is presented for the court's signature. After the order is signed, the court must cause a copy to be served on the depository institution at which the child support security deposit is maintained and on any district attorney with jurisdiction over the case [*Fam. Code § 4572*]. For further discussion, see *§ 259.103*.

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22-259 California Forms of Pleading and Practice--Annotated §§ 259.224-259.229

[Reserved]

§§ 259.224[Reserved]

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22-259 California Forms of Pleading and Practice--Annotated §§ 259.230-259.231

[Reserved]

§§ 259.230[Reserved]

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22-259 California Forms of Pleading and Practice--Annotated § 259.232

§ 259.232 Order Directing Payment of Child Support Through County Officer Designated by Court [Fam. Code §§ 4200, 4201, 4202]--General Form

[1] FORM

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER TO PAY CHILD SUPPORT THROUGH
Respondent.	)	COUNTY OFFICER DESIGNATED BY COURT
	)	(MARRIAGE)
	)	

[The motion of _____ (*name of moving party*) for an order that child support payments be made through a county officer designated by the court came on regularly for hearing this date. Petitioner appeared in person and by counsel _____ (*name of petitioner's counsel*) and respondent appeared in person and by counsel _____ (*name of respondent's counsel*).]

[In consideration of the evidence received and good and sufficient cause appearing,]

IT IS ORDERED, pursuant to Family Code Section _____ [4200 *or* 4201 *or* 4202] that the payments to be made by _____ [respondent *or* petitioner] _____ [*name*] to _____ [*name*] for the support of the _____ [child *or* children] of the parties hereto, as

ordered by the above-entitled court by its _____ [order *or* judgment] _____ [made *or* entered] in the above-entitled proceeding on _____ [*date*], shall be made through the _____ [*name of county officer designated by court, e.g.,* County Probation Officer]. Payments must be made by check or money order payable to the _____ [*name of county officer designated by court, e.g.,* County Probation Officer] and transmitted to that office at _____ [*mailing address*].

The name and home address of the party having custody of the _____ [child *or* children] are _____. He/She shall notify the _____ [*name of county officer designated by court, e.g.,* County Probation Officer] of any change of address in his/her residence within _____ [*specify period, e.g.,* 5] days after the change.

The name, home address, and social security number of the _____ [*obligor party*] are _____.

The name and address of the employer of _____ [*obligor party*] are _____.

The _____ [*obligor party*] shall notify the Court Trustee of any change of address in his/her residence or employment within _____ [*specify period, e.g.,* 5] days after any such change.

[IT IS FURTHER ORDERED that the District Attorney appear on behalf of _____ (*name*), the _____ (custodial party *or* child) in any proceeding or action to enforce this order.]

The attorney for the _____ [*custodial party*] is directed to cause a copy of this order to be personally served on the _____ [*obligor party*] and to promptly file a return of service thereof.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in *[1], above*, is for use as an order requiring child support payments to be made to a county officer designated by the court pursuant to *Fam. Code §§ 4200-4203*. *Fam. Code § 4200* provides for mandatory payments, while *Fam. Code § 4201* provides for permissive payments to a county officer designated by the court. *Fam. Code § 4202* specifies that, when the parties reside in different counties, the court may direct payments to be made to an officer of the county where the custodial parent resides. For further discussion, see *§ 259.133[1]*.

With appropriate modification, this form may also be used as an attachment to the Judicial Council form of Findings and Order After Hearing, as prescribed by Cal. Judicial Council Form 1296.31. Use of that form is described for family law proceedings in Ch. 221, *Dissolution of Marriage: Procedure*, and a copy of that form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Some courts have adopted forms directing payment to a county officer designated by the court, and the office of the court clerk should be consulted to determine whether a particular court has adopted its own form.

[3] Application for Order

Fam. Code §§ 4200-4203 fail to specify the procedure for applying for the order or who may apply, and the Judicial

Council has not adopted rules or specific forms for proceedings under those sections. When the court is required by statute to order payment of child support to a court-designated county officer [*see Fam. Code § 4200* (parent receiving welfare for maintenance of child for whom support may be ordered)], it apparently may make the order without any formal request [*see Fam. Code § 4200*].

However, when payment to a court-designated county officer is permissive [*see Fam. Code §§ 4201* (support order, in general), *4202* (parents residing in different counties)] it is unclear whether the court may make the order without prior notice to the obligated party.

Therefore, except when the court is required to direct payment to the designated county officer [*see Fam. Code § 4200(a)*], it is recommended that application for the order be made by noticed motion or order to show cause, with supporting documentation, general forms of which are discussed in Ch. 221, *Dissolution of Marriage: Procedure* .

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22-259 California Forms of Pleading and Practice--Annotated § 259.233

§ 259.233 Notice of Delinquency [Fam. Code § 4722]--Cal. Judicial Council Form FL-485

[1] FORM

[2] Use of Form

The form in *[1], above*, is an illustrative version of the mandatory Judicial Council form used to give a support obligor notice of delinquency in child support payments [*see Fam. Code § 4722*; Cal. Judicial Council Form FL-485]. This notice must be served on the obligor by the obligee as a condition precedent to attaching a 6-percent penalty on the overdue amount under the procedure set forth in *Fam. Code §§ 4720-4733* [*see Fam. Code §§ 4722, 4727* (penalties)]. For further discussion, see *§ 259.131[1]*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents

The form in *[1], above*, meets the statutory requirements for a notice of delinquency under *Fam. Code § 4723*. The notice must state the amount that the child support obligor is in arrears and set forth the installments of support due, the amounts, if any, that have been paid, and the balance due [*Fam. Code § 4723(b)(1), (2)*]. It must also state that any unpaid installment of child support will incur a penalty of six percent of the unpaid support per month until paid, to a maximum of 72 percent of the original amount of the unpaid support, unless the support arrearage is paid within 30 days of the date of service of the notice of delinquency [*Fam. Code § 4723(b)(3)*]. The notice must be signed under penalty of perjury by the support obligee [*Fam. Code § 4723(a)*].

[4] Service

The notice of delinquency may be served personally or by certified mail, or in any manner provided for service of

summons [*Fam. Code § 4724*]. For discussion of service of summons [*see Code Civ. Proc. § 413.10 et seq.*], see Ch. 518, *Service of Summons and Papers* .

The Judicial Council form of notice also indicates that a blank form of Application to Determine Arrearages [*see* Cal. Judicial Council Form FL-490, illustrated in § 259.234] and blank Notice of Motion [*see* Cal. Judicial Council Form FL-301, illustrated in *§ 258.121*] should also be served on the support obligor.

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22-259 California Forms of Pleading and Practice--Annotated § 259.234

§ 259.234 Application to Determine Arrearages [Fam. Code § 4726]--Cal. Judicial Council Form FL-490

[1] FORM

[2] Use of Form

The form in *[1], above*, is an illustrative version of the mandatory Judicial Council form of Application to Determine Arrearages, for use by a support obligor who has been served with a notice of delinquency under *Fam. Code § 4722* (*§ 259.233*) [*see* Cal. Judicial Council Form FL-490]. Unless the obligor files and serves a motion to determine arrearages and to show cause why a penalty should not be imposed, a 6-percent penalty will be imposed on the amount of unpaid support shown in the notice [*Fam. Code §§ 4722, 4726, 4727*]. The form is designed to be attached to a Judicial Council form of notice of motion or order to show cause. For further discussion, see *§ 259.131[2]* and *§ 259.233[2] -[4]*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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22-259 California Forms of Pleading and Practice--Annotated § 259.235

§ 259.235 Notice of Motion for Judicial Review of License Denial [Fam. Code § 17520(j), (k)]--Cal. Judicial Council Form FL-670

[1] FORM

[2] Use of Form

The form in *[1], above,* is an illustrated version of the mandatory Judicial Council form for use in requesting judicial review of a denial by a local child support agency of a release to obtain a professional or commercial license [*see Fam. Code § 17520(j), (k)*; Cal. Judicial Council Form FL-670]. For further discussion, see *§ 259.110* et seq.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents

The form in *[1], above,* meets the statutory requirements for requesting judicial review of license denial under *Fam. Code § 17520(k)*. The applicant must state the date the agency denied the release and which license the applicant was unable to obtain as a result of the denial. The applicant must also state the grounds on which the judicial review is being sought. The court must hold an evidentiary hearing within 20 calendar days of the filing of the request for judicial review [*see Fam. Code § 17520(k)*].

[4] Service of Notice

Page two of the form contains a mandatory Judicial Council form of Proof of Service [Cal. Judicial Council Form FL-670]. Notice must be served by the applicant on the local child support agency responsible for the denial within seven calendar days of the filing of the petition. Service may be made by personal delivery or by first-class mail, postage prepaid, to the agency's last known address [*see Fam. Code § 17520(k)(3)*].

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22-259 California Forms of Pleading and Practice--Annotated § 259.236

§ 259.236 Order After Judicial Review of License Denial [Fam. Code § 17520(j)(k)]--Cal. Judicial Council Form FL-675

[1] FORM

[2] Use of Form

The form in *[1], above,* is an illustrative version of the mandatory Judicial Council form for use by a party moving for judicial review of a license denial and for use after the review [*see Fam. Code § 17520(k)*; Cal. Judicial Council Form FL-675]. If the judicial review results in a finding by the court that the obligor is in compliance with the judgment or order for support, the local child support agency must immediately send a release to the appropriate board and to the applicant [*see Fam. Code § 17520(h), (k)*; *see also § 259.235[2] -[4]*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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22-259 California Forms of Pleading and Practice--Annotated §§ 259.237-259.249

[Reserved]

§§ 259.237[Reserved]

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22-259 California Forms of Pleading and Practice--Annotated § 259.250

§ 259.250 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Summons and Complaint or Supplemental Complaint (July 1, 1997 or Later Actions), and Declaration for Amended Proposed Judgment--Cal. Judicial Council Forms FL-600, FL-616

[1] FORM--Summons and Complaint or Supplemental Complaint Regarding Parental Obligations--Cal. Judicial Council Forms FL-600

Click here to view image.

[2] FORM--Declaration for Amended Proposed Judgment--Cal. Judicial Council Form FL-616

[3] Use of Forms

The forms illustrated in *[1]-[2], above,* are the Judicial Council forms of Summons and Complaint or Supplemental Complaint Regarding Parental Obligations [Cal. Judicial Council Form FL-600], and Declaration for Amended Proposed Judgment [Cal. Judicial Council Form FL-616]. Because these forms are "adopted" by the Judicial Council rather than "approved," their use is mandatory [*see Cal. Rules of Ct., Rule 1.31*; *Gov. Code § 68511*]. These forme are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms,* which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

These forms are for use by a county, through its local child support agency, in bringing a proceeding for reimbursement of public benefits provided on behalf of a child [*see Fam. Code § 17402*], or to establish paternity, if necessary, and to obtain or modify a child support order, whether or not the child is receiving public assistance [*see Fam. Code § 17400 et seq.*]. Private counsel will encounter these forms if retained to represent the defendant.

For further discussion of proceedings brought by the local child support agency, see *§ 259.150* et seq. For discussion and forms for use in a proceeding to establish parentage brought by one parent against an alleged parent under the Uniform Parentage Act, see Ch. 412, *Paternity* .

[4] Contents of Complaint Form

The Judicial Council's governmental form of Summons and Complaint or Supplemental Complaint Regarding Parental Obligations [Cal. Judicial Council Form FL-600; *see [1], above*], is for use in actions by the local child support agency filed on or after July 1, 1997. The form may be used both to establish an initial support order as well as to establish support after an action has been filed, apparently including a proceeding for marital dissolution or legal separation [*see Fam. Code §§ 2330.1, 3651*]. The form also combines a summons, and contains an expanded statement of rights and responsibilities directed to both the named party defendant (or respondent) and the other parent of the child regarding whom support and a declaration of paternity are sought. The form also contains a special notice regarding the use of court commissioners in hearing the matter, in compliance with current law. By court rule, a proposed judgment must be attached to the form, and not filed-endorsed separately [*Cal. Rules of Ct., Rule 5.325(e)*].

[5] Declaration for Amended Proposed Judgment

The Judicial Council's governmental form of Declaration for Amended Proposed Judgment, is for use in local child support agency enforcement actions [Cal. Judicial Council Form FL-616; *see [2], above*]. The form is used in advance of a judgment in the case to seek a different support order than that originally sought in the local child support agency's complaint. It sets forth the details of when the original complaint and summons were filed and the amount of support originally sought, along with the allegation that, subsequent to that time, either the obligor's income has become unknown or additional income information has been received that would result in a different support order. The form also includes a proof of service, and contemplates that an amended proposed judgment will be attached. By court rule, an amended proposed judgment submitted for filing must be attached to the declaration form, along with a proof of service by mail, if appropriate, as opposed to separately filing the amended proposed judgment [*Cal. Rules of Ct., Rule 5.325(e)*].

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22-259 California Forms of Pleading and Practice--Annotated § 259.251

§ 259.251 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Notice and Acknowledgment of Receipt--Cal. Judicial Council Form Fl-605

[1] FORM

Click here to view image.

[2] Use of Form

The form set forth in *[1], above*, is the mandatory Judicial Council form of Notice and Acknowledgment of Receipt (Governmental) [Cal. Judicial Council Form FL-605]. It is adopted for use when a summons is served by mail in a governmental support proceeding. Two copies of the Notice and Acknowledgment form should be mailed (by first-class or airmail, postage prepaid) to the person to be served, along with a copy of the summons and complaint [Cal. Judicial Council Form FL-600], a proposed judgment [Cal. Judicial Council Form FL-630], a blank answer [Cal. Judicial Council Form FL-610], and a return envelope addressed to the sender (postage prepaid) [*Code Civ. Proc. § 415.30(a)*; *Cal. Rules of Ct., Rule 5.110*]. Service of the summons is deemed complete on the date signed by the defendant, if the acknowledgment is afterwards returned to the sender and filed with the court [*Code Civ. Proc. § 415.30(a)*]. Proof of service includes the form acknowledgment of receipt of summons or other written acknowledgment of receipt of summons satisfactory to the court [*Code Civ. Proc. § 417.10(b)*].

The form may also be used to serve a copy of the summons with standard restraining orders, along with an order to show cause [Cal. Judicial Council Form FL-300] and a blank responsive declaration [Cal. Judicial Council Form FL-320], or along with a completed and a blank income and expense declaration [Cal. Judicial Council Form FL-150]. The form may also be used to serve other documents (item 3). This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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22-259 California Forms of Pleading and Practice--Annotated § 259.252

§ 259.252 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Declaration for Default or Uncontested Judgment; and Request to Enter Default Judgment (July 1, 1997 or Later Actions)--Cal. Judicial Council Forms FL-697, FL-620

[1] FORMS

[2] Use of Forms

The following Judicial Council forms are set forth in *[1], above*:

- Request to Enter Default Judgment (Governmental) [Cal. Judicial Council Form FL-620], for use in actions filed on or after July 1, 1997.

- Declaration for Default or Uncontested Judgment [Cal. Judicial Council Form FL-697].

Because those forms are "adopted" by the Judicial Council rather than "approved," their use is mandatory [*see Cal. Rules of Ct., Rule 1.31*; *Gov. Code § 68511*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

If an answer has not been received from the defendant within the 30-day response period after service, the local child support agency can file a Request to Enter Default. The Request forms illustrated contain allegations concerning the defendant's failure to answer, and concerning the absence of protections for military personnel under federal law. The clerk will fill in the box at the bottom of the page when the request is either granted or rejected. If it is rejected, the clerk must state the reason.

The agency may file a Declaration for Default or Uncontested Judgment along with the Request for Default. The declaration states, at Item 4, that the agency is only seeking the relief requested in the complaint as originally filed or amended. If a default has already been entered, the Declaration may be filed in support of a proposed Judgment

Establishing Parental Relationship and Child Support (*see § 259.259[1]*). In either case, if the agency is seeking child support or health insurance, a proposed Judgment should be attached (see item 5) to the Declaration.

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22-259 California Forms of Pleading and Practice--Annotated § 259.253

§ 259.253 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Answer to Complaint or Supplemental Complaint (July 1, 1997 or Later Actions); and Information Sheet--Cal. Judicial Council Forms FL-610, FL-611

[1] FORMS

[2] Use of Forms

The form set forth in *[1], above*, is an illustrative reproduction of the Judicial Council's form of Answer to Complaint or Supplemental Complaint Regarding Parental Obligations (Governmental) [Cal. Judicial Council Form FL-610]. It includes a reproduction of the Judicial Council's Information Sheet for Service of Process (Governmental) [Cal. Judicial Council Form FL-611]. The Answer form is "adopted" by the Judicial Council, and its use is mandatory; the Information Sheet is "approved" by the Judicial Council, and its use is optional [*see* Introductory Statement to California Rules of Court; *Gov. Code § 68511*]. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

In response to the local child support agency's filing of the underlying paternity action, counsel should complete the Answer form and any necessary attachments. The original version of these documents must be filed with the court clerk within 30 days of service of the complaint [*see Code Civ. Proc. § 412.20(a)(3)*]. Note that the answer form incorporates a proof of service declaration on the second page, which should be signed by the person who effects service on the local child support agency. The Information Sheet for Service of Process (Governmental) provides guidance on completion of the proof of service declaration [Cal. Judicial Council Form FL-611]. If the other parent of the child who is the subject of the action is a party, that person must also be served with the answer and a separate declaration of service should be completed and filed.

If the defendant disputes the amount of support being sought, a financial declaration should be completed and attached to the answer. The defendant should use either the standard Income and Expense Declaration and its attachments or, if

appropriate, the Financial Statement (Simplified) form [Cal. Judicial Council Forms FL-150, FL-155].

[3] Disputing Paternity

Paragraph 1 should list all of the children set forth in the complaint and specify whether or not paternity is contested. Often, the alleged father will not be able to definitely state whether or not he is the father. In such cases the "no" box should be checked, and "(unknown)" may be entered following "no." Even if the defendant is reasonably certain that he is the father, paternity should be denied, and the issue should be resolved by stipulating to blood tests. If he stipulates to paternity and later evidence indicates that there is some doubt, the judgment in the agency's action will be res judicata on the issue [*County of Los Angeles v. Soto (1984) 35 Cal. 3rd 483, 488, 198 Cal. Rptr. 779, 674 P.2d 750* ; *see Guardianship of Claralyn S. (1983)148 Cal. App. 3d 81, 85, 195 Cal. Rptr. 646]* . Determination of parentage is the subject of Ch. 412, *Paternity* .

[4] Other Defenses

Item 4 of the Answer form affords the defendant the opportunity to set forth any additional defenses or objections to the action. Because the issues are limited to parentage and support [*see Fam. Code §§ 17400, 17404*], few other defenses will be applicable. Nevertheless, there are some possible defenses that might be raised, such as, for example:

1. The support amount should be limited by the defendant's ability to pay.

2. The children were living with the defendant for part of the time covered by the complaint.

3. The defendant paid some support during the time covered by the complaint and is entitled to credit for the amounts paid.

4. The defendant was receiving public benefits for part of the time covered by the complaint and had no ability to pay during those periods.

5. The defendant was unemployed, had no income, and had no ability to pay for part of the time covered by the complaint.

An attachment [*see* Judicial Council Form MC-020], entitled Additional page, which may be attached to any form, will likely be needed, given the lack of space provided on the forms.

The amount of child support to be ordered will be determined under the statewide uniform child support guideline [*Fam. Code §§ 4050 et seq., 17400 et seq.*], and it is probably not necessary to set forth factors that will affect the amount of support under the guideline as defenses. Nevertheless, the defendant may want to deny the existence of certain factors that would be relevant under the guideline in order to frame the issues for resolution. For example, if the complaint alleges that the child has special medical needs [*see Fam. Code § 4057(b)(5)(C)*], the defendant may deny that there are in fact such needs. The statewide uniform child support guideline is discussed in Ch. 224, *Dissolution of Marriage: Child Support* ..

Also, regarding reimbursement of public assistance benefits, a statute of limitations defense may be asserted if more than three years of reimbursement is requested in the complaint [*see Code Civ. Proc. § 338(a)*; *In re Marriage of Hyon & Kirschner (1991) 231 Cal. App. 3d 449, 454, 282 Cal. Rptr. 408]* .

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22-259 California Forms of Pleading and Practice--Annotated § 259.254

§ 259.254 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Notice of Motion; and Request for Order and Supporting Declaration--Cal. Judicial Council Forms FL-680, FL-684

[1] FORMS

Click here to view image.

[2] Use of Forms

The forms set forth in *[1], above*, are illustrative reproductions of the Judicial Council forms of Notice and Motion (Governmental) [Cal. Judicial Council Form FL-680] and Request for Order and Supporting Declaration (Governmental) [Cal. Judicial Council Form FL-684], for use in government child support proceedings. These forms are designed for use under *Fam. Code § 17400 et seq.*, which provides that a judgment in a local child support agency proceeding for reimbursement of public benefits or to establish paternity and a child support order may be rendered pursuant to a noticed motion, which must inform the defendant that in order to exercise his or her right to trial, he or she must appear at the hearing on the motion [*Fam. Code § 17404(b)*].

Because these forms are "adopted" by the Judicial Council rather than "approved," their use is mandatory [*see Cal. Rules of Ct., Rule 1.31*; *Gov. Code § 68511*]. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Hearing on Paternity

If paternity is disputed, the first stage in a county proceeding will be the determination of paternity. The agency may notice a hearing using these forms with an order for blood testing attached (line 3d). The hearing must then be continued to a date no more that 90 days from the date of service of the summons. A temporary support order may be issued pending determination of paternity [*see Fam. Code § 17404*]. For further discussion of temporary support orders in paternity proceedings, see Ch. 412, *Paternity* .

Usually the parties stipulate to blood or DNA testing, and if the defendant is excluded, the case ends. If testing shows a high probability of paternity, the defendant will either stipulate to paternity or the matter will be heard by the court. There is no right to a jury trial on the issue of paternity in a county child support enforcement proceeding [*County of Sutter v. Davis (1991) 234 Cal. App. 3d 319, 322-332, 285 Cal. Rptr. 736* ; *County of Butte v. Superior Court (1989) 210 Cal. App. 3d 555, 557-559, 258 Cal. Rptr. 516* ; *County of El Dorado v. Schneider (1987) 191 Cal. App. 3d 1263, 1278-1283, 237 Cal. Rptr. 51]* . This form may be used by either side to set a hearing for the determination of paternity after test results are available. The form may also be used to obtain orders shortening time for service or hearing, restraining orders against transfers of specific property, or other orders (lines 5 through 8).

[4] Hearing on Child Support

If paternity is established, the matter proceeds to a determination of the amount of child support to be ordered. The child support proceeding must be referred out to a child support commissioner in most cases [*see Fam. Code §§ 4251(a), 4252(b)(7)*, discussed in *§ 259.253[4][o]*].

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22-259 California Forms of Pleading and Practice--Annotated § 259.255

§ 259.255 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Response to Notice of Motion or Order to Show Cause--Cal. Judicial Council Form FL-685

[1] FORM

[2] Use of Form

The form in *[1], above*, is an illustrative version of the Judicial Council form of Response to Governmental Notice of Motion or Order to Show Cause [*see* Cal. Judicial Council Form FL-685]. Because this form is "adopted" by the Judicial Council rather than "approved," its use is mandatory [*see Cal. Rules of Ct., Rule 1.31*; *Gov. Code § 68511*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The defendant fills in the response to correspond to the support agency's requests in the form of Request for Order and Supporting Declaration (see *§ 259.254*). In line 1, defendant either acknowledges or continues to contest his paternity of the children.

If paternity is determined, by stipulation or after hearing, the child support order will be made according to the provisions of the statewide uniform child support guideline [*see Fam. Code § 4050 et seq.*]. In most cases, the "order requested" is merely the statement on line 2 of the Request for Order, that child support be based on the guideline. There is no basis on which to oppose such an order, so box 2a may be checked. However, if the Request sets forth any particular dollar amount, or any specific factors that the county alleges should be considered in determining guideline support, then box 2b may also be checked and the appropriate contrary order be entered. Box 2b may also be used to set forth any specific factor that the defendant claims should reduce the amount of support that would be due under the guideline. The guideline is considered in detail in Ch. 224, *Dissolution of Marriage: Child Support* .

Line 7 provides space for the defendant to state the facts supporting his position on all disputed issues. If this space is inadequate, the defendant should check the box indicating that the facts are contained in an attached declaration. Judicial Council Form for Attached Declaration [Cal. Judicial Council Form MC 031] should be used.

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22-259 California Forms of Pleading and Practice--Annotated § 259.256

§ 259.256 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Stipulation and Order (Pre-July 1, 1997 Actions); Stipulation and Order (July 1, 1997 or Later Actions)--Cal. Judicial Council Form FL-625

[1] FORM

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of the mandatory Judicial Council form of Stipulation and Order. [Cal. Judicial Council Form FL-625]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Line 1a indicates that the matter was resolved by stipulation, without an actual court appearance. Thus, the parties may use this form if they reach an agreement without having a hearing.

[3] Identification of Parties

The "appearances" boxes in line 1b may seem confusing. In a support agency initiated proceeding, the county is the plaintiff [*Fam. Code § 17404(a)*], and the agency represents the "public interest," not the custodial parent or the child [*Fam. Code § 17406(a)*]. Thus, it would appear at first blush to be in error to provide for separate appearances by the plaintiff/petitioner and also by the agency.

Click here to view image.

However, the agency may provide child support enforcement services on behalf of a child who is not receiving public assistance [*Fam. Code § 17400(a)*]. A custodial parent who is receiving these support enforcement services from the

support agency and who is not currently receiving public assistance on her or his own behalf or on behalf of a child must be asked to execute, or consent to, any stipulation establishing or modifying a support order in any action in which that person is named as a party, before the stipulation is filed [*Fam. Code § 17406(j)*]. The form (and the Judicial Council) seems to contemplate that in such a case, the proceeding will actually be brought by the custodial parent, possibly even with private counsel, and the agency will provide supporting services.

The form provides a space in the caption to set forth the name of the "other parent," and includes both an optional check-off box to show joinder of that parent as a party (3 *l*) and separate signature lines for that parent and his or her attorney by which to join in the stipulation.

[4] Child Support Provisions

Line 3d of the form sets forth the court's actual support order. A child support order may take many forms, not all of which will fit within the structure of this form. The form contains language by which a stipulation can be made to an amount other than as calculated under the guideline (line 3b(1)). For child support provisions for use in agreements, see Kirkland, Lurvey & Richmond California Family Law Rractice And Procedure 2d Ed., Vol. 6, Ch. 214 (Matthew Bender).

The form in [1], *above*, does not contain provisions with which to make all of the findings required under the statewide uniform child support guideline [*see Fam. Code §§ 4056, 4072*]. It would seem to be appropriate, perhaps even essential, to use the Judicial Council form of Child Support Extended Information Attachment [Cal. Judicial Council Form FL-342] with this form. An example of this form is set forth in Ch. 224, *Dissolution of Marriage: Child Support* . At a minimum, a printout of the data generated by a computer software support program should be attached, and this is provided for in line 3c of the form.

The form provides for an order for child support arrears. However, it does not specifically provide for an order for reimbursement of public benefits under *Fam. Code § 17402*. If this form is used to stipulate to a reimbursement order, it should be made clear that the order is in this nature and not an order for the payment of arrearages under a prior child support order. An order for reimbursement of public benefits may be entered on line 3m of the form.

This form requires both parents to complete the Judicial Council's Child Support Case Registry Form [Cal. Judicial Council Form FL-191]. In addition, the following Judicial Council forms must be attached to the form (apart from items that otherwise may be ordered attached): Notice of Rights and Responsibilities [Cal. Judicial Council Form FL-192] and Information Sheet on Changing a Child Support Order [Cal. Judicial Council Form FL-192, side 2].

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22-259 California Forms of Pleading and Practice--Annotated § 259.257

§ 259.257 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Order After Hearing--Cal. Judicial Council Form FL-687

[1] FORM

Click here to view image.

[2] Use of Form

The form in *[1], above,* is an illustrative version of the mandatory Judicial Council form of Order After Hearing (Governmental) [Cal. Rules of Ct. Rule FL-687]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form is prepared by one of the parties following the hearing in a county-initiated child support proceeding. The contents and structure of the form are parallel to the Judicial Council Stipulation and Order form (see *§ 259.256*). For discussion of important concerns in the use of the form, see *§ 259.256[2] -[5]*.

The order requires both parents to complete the Judicial Council's Child Support Case Registry Form [Cal. Judicial Council Form FL-191] and to deliver or mail it to the local child support agency within 10 days of the date of the order; and to notify the local child support agency of any change in the information within 10 days of the change by submitting an updated form. In addition, note that the following Judicial Council forms must be attached to the order (apart from items that otherwise may be ordered attached): Notice of Rights and Responsibilities [Cal. Judicial Council Form FL-192] and Information Sheet on Changing a Child Support Order [Cal. Judicial Council Form FL-192 side 2].

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22-259 California Forms of Pleading and Practice--Annotated § 259.257A

§ 259.257A Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Short Form Order After Hearing--Cal. Judicial Council Form FL-688

[1] FORM

[2] Use of Form

The form set forth in *[1], above*, a reproduction of the Short Form Order After Hearing (Governmental) [Cal. Judicial Council Form FL-688], approved by the Judicial Council for optional use in governmental child support proceedings. The form is designed for use under *Fam. Code §§ 17400* (local child support agency operations), *17402* (obligation of noncustodial parent to county), 17404 (civil procedure and pleadings), and *17406* (actions involving paternity or support). The purpose of the form is to provide a simplified order after hearing for cases that have been continued for further hearing [*see* Judicial Council Family and Juvenile Law Advisory Committee Report (August 24, 2001)].

Note that Line 3(d) provides a box to be checked to suspend current child support until further order of the court, but that the court retains jurisdiction to order support retroactive to the date when the support obligor becomes employed or able to pay support. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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22-259 California Forms of Pleading and Practice--Annotated § 259.258

§ 259.258 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Stipulation for Judgment or Supplemental Judgment and Judgment (July 1, 1997 or Later Actions)--Cal. Judicial Council Form FL-615

[1] FORM

Click here to view image.

[2] Use of Form

The form set out in *[1], above*, is an illustrative reproduction of the Judicial Council form entitled Stipulation for Judgment or Supplemental Judgment Regarding Parental Obligations and Judgment (Governmental) [Cal. Judicial Council Form FL-615]. Because the form is "adopted," rather than "approved," its use is mandatory with respect to the actions to which it applies [*see* Introductory Statement to California Rules of Court; *Gov. Code § 68511*].

The form appears to be designed to meet the requirements of former *Welfare and Institutions Code Section 11476.1*, the precursor statute to *Fam. Code § 17404*.

The form is prepared by one of the parties, usually the local child support agency, and submitted to the judge for signature. The contents and structure of the form are similar to the Judicial Council forms of Stipulation and Order (see *§ 259.256*) and Order After Hearing (see *§ 259.257*).

Note that the form [Cal. Judicial Council Form FL-615] includes signature lines for the parent who is the obligee of the support order and that parent's attorney, as well as for the obligor parent and that parent's attorney, and the support agency representative. Box 3(o) of the form should be marked (and the obligee parent's name inserted) if that parent was not a party to the proceeding before to execution of the stipulation.

This form requires both parents to complete the Judicial Council's Child Support Case Registry Form [Cal. Judicial Council Form FL-191] and to deliver or mail it to the support agency within 10 days of the date of the judgment; and to notify the agency of any change in the information within 10 days of the change by submitting an updated form. In

addition, the following Judicial Council forms must be attached to the second version of the form (apart from items that otherwise may be ordered attached): Notice of Rights and Responsibilities [Cal. Judicial Council Form FL-192] and Information Sheet on Changing a Child Support Order [Cal. Judicial Council Form FL-192 side 2].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Significance of Judgment

The question of the significance of a judgment in an agency-initiated action, as opposed to an order, requires some attention of counsel. As child support is always modifiable prospectively [*Fam. Code § 3651(a)*], there is no real significance to a "judgment" to pay future child support. However, it would seem that the defendant's paternity or nonpaternity must be resolved in a final judgment [*cf. Fam. Code § 7636* (effect of judgment in Uniform Parentage Act proceeding)] which would then be afforded res judicata effect [*see County of Los Angeles v. Soto (1984) 35 Cal. 3rd 483, 488, 198 Cal. Rptr. 779, 674 P.2d 750* ; *Guardianship of Claralyn S. (1983) 148 Cal. App. 3d 81, 85, 195 Cal. Rptr. 646]* .

Another area in which the effect of a final judgment should be considered is with regard to any arrearages under a prior child support order. Such a determination would be res judicata as to the amount of unpaid support for the specified past period [*see In re Marriage of Taylor (1981) 122 Cal. App. 3d 209, 214, 175 Cal. Rptr. 716]* , and should foreclose any future claim that a different amount is due for support during that period. The form is somewhat ambiguous in this area. The form provides space to indicate payments to be made for "past periods" and these periods can be specified (line 3f). This apparently refers to arrearages but does not use that specific term. Line 3g contains the advisement that if the form is being used as a judgment on a supplemental complaint (which is one possible use of the form), it does not "modify or supersede any prior judgment or order for support or arrearages, unless specifically provided"). Given these ambiguities, it is suggested that arrearages be set forth in the areas of the forms described above, *and* that the check-off box entitled "Other" (line 3(p)) may be used to clarify that arrearages to be paid are as set forth in those areas, and are to be paid under a specific prior order (that is described by the person filling in the form). Alternatively, mark the box entitled "Other" and set forth the arrearages under that heading or by an attachment, describing the prior order, the period of time covered, the total amount of support due under the order, the amount remaining unpaid, the details of payments, and the child with respect to whom the order applies.

A similar area of concern is any provision for reimbursement of public benefits provided on behalf of the children under *Fam. Code § 17402*. Although the form was intended for use under former *Welf. & Inst. Code § 11350*, the reimbursement statute repealed in 1999, there is no specific language anywhere on the form that sets forth a judgment or order for reimbursement. If this form is used in a reimbursement context, the reimbursement order should be set forth under the box provided for "Other" orders (line 3(p)). It should be specific as to the period of time covered and the amount of benefits provided during the time that is covered by the order. It should state that the order represents a determination of the defendant's ability to pay support for the period at issue [*see Fam. Code § 17402* former *Welf. & Inst. Code § 11350(a)(2), (c)*; *In re Marriage of Hyon & Kirschner (1991) 231 Cal. App. 3d 449, 454, 282 Cal. Rptr. 408]* .

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§ 259.259 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Judgment Regarding Parental Obligations (July 1, 1997 or Later Actions)--Cal. Judicial Council Form FL-630

[1] FORM

Click here to view image.

[2] Use of Form

The form set forth in *[1], above*, is an illustrative reproduction of the Judicial Council form entitled Judgment Regarding Parental Obligations (Governmental) [Cal. Judicial Council Form FL-630]. Because the form is "adopted," rather than "approved," its use is mandatory with respect to actions to which it applies [*see* Introductory Statement to California Rules of Court; *Gov. Code § 68511*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form may be used not only as an original judgment, but also as an amended or supplemental judgment by marking the appropriate boxes in the caption. In addition, it has been designed so that the support agency can serve it on the defendant (as a proposed judgment) at the time of serving the summons and complaint, so that if the defendant defaults the judgment can be entered as proposed. This form also provides an opportunity to list the support obligee (denominated the "other parent," in the usual context of the form) and to join that parent as a party to the proceeding.

The form requires the parents to notify the local child support agency in writing within 10 days of any change in residence or employment. The Judicial Council form Notice of Rights and Responsibilities--Health Care Costs and Reimbursement Procedures and Information Sheet on Changing a Child Support Order [Judicial Council Form FL-192] must also be attached.

One of the parties, usually the support agency representative, will prepare the form, and submit it to the judge for signature after opposing counsel has reviewed it as to form and content. For a related discussion of important concerns

in the use of such a form, see *§ 259.258[2] -[3]*.

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22-259 California Forms of Pleading and Practice--Annotated § 259.259A

§ 259.259A Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Minutes and Order or Judgment--Cal. Judicial Council Form FL-692

[1] FORM

Click here to view image.

[2] Use of Form

The form in *[1]*, *above*, is the Judicial Council's form that may be used for preparation of the court minutes of the hearing in a support enforcement proceeding. It may also be used in place of Cal. Judicial Council Forms FL-615 [*see § 259.258*], FL-625 [*see § 259.256*], FL-665 [*see § 259.275*], and FL-687 [*see § 259.257*]. If this form is used as both the court minutes and as an alternative to one of these other forms, an additional form of order need not be prepared. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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22-259 California Forms of Pleading and Practice--Annotated § 259.260

§ 259.260 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Request for Judicial Determination of Support Arrearages--Cal. Judicial Council Form FL-676

[1] FORM

[2] Use of Form

The form in *[1], above*, is an illustrated version of the Judicial Council's mandatory form of Request for Judicial Determination of Support Arrearages (Governmental) [Cal. Judicial Council Form FL-676]. The form is designed to be used by a support obligor to obtain a hearing to contest the amount of support arrearages that the county claims the obligor owes. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form contemplates that the obligor will attach both a statement of the amount of the arrearage that the county support agency claims is owed, as well as the obligor's own statement. The agency s statement will likely have appeared in the accusatory pleading against the obligor, and a copy of that pleading can be appended and labeled as an attachment. Regarding the obligor's own statement of the arrearage, it appears that the obligor could prepare a statement in the form of an attachment on the Judicial Council's form of Attached Declaration, or by completing the Judicial Council forms of Declaration of Support Arrearage and Attachment to Declaration of Support Arrearage [Cal. Judicial Council Forms FL-420, FL-421]. An information sheet describing completion of the form, along with filing and service, is set out as page 3 of the form.

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22-259 California Forms of Pleading and Practice--Annotated § 259.261

§ 259.261 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Notice of Entry of Judgment and Certificate of Service by Mail--Cal. Judicial Council Form FL-635

[1] FORM

[2] Use of Form

The form in *[1], above*, is an illustrated version of the Judicial Council's mandatory form of Notice of Entry of Judgment and Certificate of Service by Mail (Governmental) [Cal. Judicial Council Form FL-635]. The form is designed to be used by the local support agency to notify a party to a support action of the entry of a judgment in the action-whether by default or otherwise. It includes space for a court clerk's certificate of mailing. Unless the practice of the court is otherwise, it would be expected that the requesting party complete the names and addresses of the persons to whom the notice is to be sent, as well as providing preaddressed (and postage paid) envelopes for this purpose. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form contemplates that a copy of the judgment that has been entered will be attached to the notice. The form contains a preprinted notice advising that if the support agency does not know the extent of the obligor's earnings, the obligor will be presumed to earn the minimum wage, at 40 hours per week, as provided by state law. It also notifies the recipient that if the support order is based on the obligor's presumed income, the obligor can move to set aside the support provisions of the judgment, so long as the motion is filed no later than one year from the date the first support collection (under the judgment) is made. For a related form of motion, see *§ 259.262*.

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22-259 California Forms of Pleading and Practice--Annotated § 259.262

§ 259.262 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Notice and Motion to Cancel (Set Aside) Support Order Based on Presumed Income and Proposed Answer--Cal. Judicial Council Form FL-640

[1] FORM

[2] Use of Form

The form in *[1], above,* is an illustrative version of the Judicial Council's mandatory form of Notice and Motion to Cancel (Set Aside) Support Order Based on Presumed Income and Proposed Answer (Governmental) [Cal. Judicial Council Form FL-640]. The form is designed to be used by a support obligor to move to set aside a support order that was based on a *presumed* amount of income of the obligor, in an action brought by the local child support agency. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form contemplates that the obligor will attach a completed Answer to Complaint or Supplemental Complaint Regarding Parental Obligations (see *§ 259.253*), along with either the standard Income and Expense Declaration (and related forms), or, if the obligor's circumstances warrant, the Financial Statement Simplified form [Cal. Judicial Council Forms FL-150, FL-155, FL-610]. An information sheet describing completion of the form, along with filing and service, is set out as page 3 of the form.

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22-259 California Forms of Pleading and Practice--Annotated § 259.263

§ 259.263 Income Withholding Order/Notice for Support--Cal. Judicial Council Forms FL-195, FL-196

[1] FORMS

Click here to view image.

[2] Use of Forms

The forms in *[1], above,* are illustrative versions of the federally mandated forms of Income Withholding Order/Notice for Support (FL-195/FL-196), adopted for mandatory use by the Judicial Council, with California modifications. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Page 1 of the form provides areas to fill in regarding employer and employee/obligor information, identification of minor children who are the subject of a support order, whether enrollment in health insurance coverage for the children is required, amounts of current and past-due (or other) support, and remittance information. It is necessary to set forth the employer's federal identification number on the form, and if some type of electronic funds transfer is contemplated for remittance of the payment, the bank account number, bank routing code, and any FIPS code must be listed.

Page 2 of the form contains additional information for employers and other withholders. As indicated in the employer's instructions, the employer or other withholder must provide a copy of the form to the employee, along with a blank form of Request for Hearing Regarding Earnings Assignment [Cal. Judicial Council Form FL-450; *§ 259.264*] within a 10-day time period. Extensive preprinted instructions on filling out the form are also illustrated above at the end of the form. For related discussion, see *§ 259.54*.

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22-259 California Forms of Pleading and Practice--Annotated § 259.264

§ 259.264 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Request for Hearing Regarding Earnings Assignment--Cal. Judicial Council Form FL-450

[1] FORM

Click here to view image.

[2] Use of Form

The form in *[1], above,* is an illustrative version of the Judicial Council's mandatory form of Request for Hearing Regarding Notice of Earnings Assignment (Governmental) [Cal. Judicial Council Form FL-450]. The form is designed to permit a support obligor to request a hearing to set aside an earnings assignment order (including an Interstate Order/Notice to Withhold Income for Child Support) or to modify the amount of the assignment. Detailed instructions concerning completion and filing of the form are set out as page 3 of the form. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Note that the form instructions indicate that the court clerk will provide information concerning the hearing date, time, and location to the person requesting the hearing so that he or she can complete Box 1 of the form; and that after the form is filed, the clerk will send notification of this hearing information by mail to the persons listed on page 2 of the form (under Clerk's Certificate of Mailing). Unless the practice of the court is otherwise, it would be expected that the requesting party will complete the names and addresses of the persons to whom the notice is to be sent, as well as providing preaddressed (and postage paid) envelopes for this purpose.

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22-259 California Forms of Pleading and Practice--Annotated § 259.265

§ 259.265 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Notice of Opposition and Notice of Motion on Claim of Exemption--Cal. Judicial Council Form FL-677

[1] FORM

Click here to view image.

[2] Use of Form

The form in *[1], above,* is an illustrative version of the Judicial Council's mandatory form of Notice of Opposition and Notice of Motion on Claim of Exemption (Governmental) [Cal. Judicial Council Form FL-677]. The form is designed to be used by the local child support agency to oppose a Claim of Exemption from execution on a judgment filed by the judgment debtor or another claimant. The form indicates that, in addition to the original of the notice being filed with the court, a copy of the notice must be served on the judgment debtor and any other claimant at least 10 days before the hearing. A proof of service by mail declaration is set out on page 2 of the form. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms,* which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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22-259 California Forms of Pleading and Practice--Annotated § 259.266

§ 259.266 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Order Determining Claim of Exemption or Third-Party Claim--Cal. Judicial Council Form FL-678

[1] FORM

[2] Use of Form

The form in *[1], above*, is an illustrative version of the Judicial Council's mandatory form of Order Determining Claim of Exemption or Third-Party Claim (Governmental) [Cal. Judicial Council Form FL-678]. The form is used to set forth a court order that either approves (in whole or in part) or denies a claim of exemption by a judgment debtor or third party claimant with regard to execution on a judgment. The form may be used regardless of whether the matter proceeded by stipulation or by a court hearing. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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22-259 California Forms of Pleading and Practice--Annotated § 259.267

§ 259.267 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Notice to Local Child Support Agency of Intent to Take Independent Action to Enforce Support Order--Cal. Judicial Council Form FL-645

[1] FORM

[2] Use of Form

The form in *[1], above,* is an illustrative version of the Judicial Council's mandatory form of Notice to Local Child Support Agency of Intent to Take Independent Action to Enforce Support Order (Governmental) [Cal. Judicial Council Form FL-645]. The form may be used by a person who is receiving support enforcement services from the local child support agency to notify the agency of that person's intention to independently enforce a support order. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form instructions, reproduced as page 3 of the form, indicate that the person giving notice must wait at least 30 days before filing an independent enforcement action to permit the agency to respond to the notice, and that if the agency objects within that time period, the independent action cannot summarily, at least, go forward. If the district attorney or agency consents to the action or fails to timely object, the independent action may be filed, so long as this is done within 180 days of the date that the original notice was provided to the agency. The original of the notice should be retained by the person giving notice so that it may be included as part of the papers filed with the independent action. A declaration of mailing of the notice to the agency is included on page 2 of the form.

For an illustrative response to the notice, see *§ 259.268*.

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22-259 California Forms of Pleading and Practice--Annotated § 259.268

§ 259.268 Governmental Parentage and Child Support Proceeding [Fam. Code § 17400 et seq.]--Response of Local Child Support Agency to Notice of Intent to Take Independent Action to Enforce Support Order--Cal. Judicial Council Form FL-646

[1] FORM

[2] Use of Form

The form in *[1], above,* is an illustrative version of the Judicial Council's mandatory form of Response of Local Child Support Agency to Notice of Intent to Take Independent Action to Enforce Support Order (Governmental) [Cal. Judicial Council Form FL-646]. The form is used by a child support agency to respond to a private citizen's (support obligee's) notice of intent to commence an independent support enforcement action. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms,* which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The agency has 30 days from the effective mailing date of the notice (see *§ 259.268*) in which to make a written response by using this form. The form provides check-off boxes by which the agency can either consent or object to the independent enforcement action proposed. It also incorporates a declaration of mailing that is cast as service by mail (although the term "proof of service" is not used).

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22-259 California Forms of Pleading and Practice--Annotated § 259.269

§ 259.269 Governmental (and Private) Parentage and Child Support Proceeding--Individual and Governmental Statements for Registration of California Support Order, and Notice of Registration--Cal. Judicial Council Forms FL-440, FL-650, FL-651

[1] FORMS

[2] Use of Forms

Illustrated in , *above*, are two versions of the Judicial Council form of Statement for Registration of California Support Order, for use, respectively, by individuals and by a support enforcement agency [Cal. Judicial Council Forms FL-440, FL-650; *see Cal. Fam. Code §§ 5601, 5602*]. The first version, for use by private individuals [Cal. Judicial Council Form FL-440], has been "approved" for optional use. The second version, for use by governmental agencies [Cal. Judicial Council Form FL-650], has been "adopted" and therefore is mandatory for such agencies to use.

Also illustrated in *[1], above*, is the Judicial Council's mandatory form of Notice of Registration of California Support Order [Cal. Judicial Council Form FL-651], which appears to be for use by the registering and receiving courts only. It appears that its intended use is for court clerks to notify courts in other California counties and states in which the original order for support and any modifications were issued or registered of the registration of the order by the *district attorney* [*see Fam. Code § 5601(e)*]. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

With respect to registration by private persons, the Family Code clarifies that an obligee may register an *out-of-county* support or earnings withholding order (or both) in the court of another California county in the manner, with the effect, and for the purposes set forth in *Fam. Code § 5600 et seq.* [*Fam. Code § 5600(b)*]. No filing fee is to be charged by the registering court [*Fam. Code § 5602(a), (b)*]. On registration, the court clerk must promptly send the obligor notice of the registration, together with a copy of the registered support order and the post office address of the obligee, in accordance with the procedures specified in *Fam. Code § 5602(c)*. For further discussion of the procedures associated with registration, see *§ 259.159*. See also Ch. 260, *Family Law Enforcement: Foreign Judgments* .

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22-259 California Forms of Pleading and Practice--Annotated § 259.270

§ 259.270 Governmental Parentage and Child Support Proceeding [Fam. Code §§ 4200 et seq., 4350 et seq., 4506.3, 17400]--Notice Regarding Payment of Support--Cal. Judicial Council Form FL-632

[1] FORM

Click here to view image.

[2] Use of Form

The form in *[1], above*, is a reproduction of the Judicial Council form of Notice Regarding Payment of Support, which has been adopted for mandatory use by local child support agencies in support enforcement actions [Cal. Judicial Council Form FL-632; *see Cal. Rules of Ct., Rule 5.360*]. The form combines a substitution of payee, a notice directing payment of support to the local child support agency, and a notice that support has been assigned to the agency [*see Fam. Code §§ 4200, 4201, 4204, 4506.3*; *Welf & Inst. Code § 11477*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

When a local child support agency is providing services as required by *Fam. Code § 17400*, the agency may appear in any action or proceeding that it did not initiate by giving this notice to all parties that it is providing services under Title IV-D of the Social Security Act [*Cal. Rules of Ct., Rule 5.360*].

The name, address, and telephone number of the county child support agency and the name of the attorney of record is sufficient for any papers filed by the agency [*Cal. Rules of Ct., Rule 5.320*]. The name of the deputy or assistant district attorney or attorney of the child support agency, who is not the attorney of record, and the State Bar number of the attorney or record or any of his or her assistants is not required [*Cal. Rules of Ct., Rule 5.320*].

The local child support agency must file the original of the notice in the action or proceeding with proof of service by mail on the parties [*Fam. Code § 4204*; *Cal. Rules of Ct., Rule 5.360*]. On service and filing of the notice, the court may not require the agency to file any other notice or pleading before the agency appears in the action or proceeding [*Cal.*

Rules of Ct., Rule 5.360].

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22-259 California Forms of Pleading and Practice--Annotated § 259.271

§ 259.271 Governmental Parentage and Child Support Proceeding [Fam. Code § 17404]--Ex Parte Motion by Local Child Support Agency and Declaration for Joinder of Other Parent--Cal. Judicial Council Form FL-660

[1] FORM

[2] Use of Form

The form in *[1], above*, is a reproduction of the Judicial Council form of Ex Parte Motion by Local Child Support Agency and Declaration for Joinder of Other Parent, which has been adopted for mandatory use in agency support enforcement actions [Cal. Judicial Council Form FL-660]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form combines an ex parte application and court order, and is designed to be used by a local child support agency to join a parent to the proceeding who has requested or is receiving support enforcement services from the agency, and who has requested joinder. This parent is denominated the "Other Parent" in the caption of the form. A preprinted notice on the form advises that once joinder is ordered, either parent may raise issues concerning "support, custody, visitation, and restraining orders" but not concerning other matters.

For a related form designed for use if a noticed motion is made for joinder of the other parent, see *§ 259.272*.

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22-259 California Forms of Pleading and Practice--Annotated § 259.272

§ 259.272 Governmental Parentage and Child Support Proceeding [Fam. Code § 17404]--Notice of Motion and Declaration for Joinder of Other Parent in Governmental Action--Cal. Judicial Council Form FL-661

[1] FORM

[2] Use of Form

The form in *[1], above*, is a reproduction of the Judicial Council form of Notice of Motion and Declaration for Joinder of Other Parent in Governmental Action, which has been approved for use in support enforcement actions [Cal. Judicial Council Form FL-661]. Because the form has been "approved" rather than "adopted," its use is optional. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form may be used by a local child support agency, the defendant support obligor, or the parent who has requested or is receiving support enforcement services from the agency (denominated the "Other Parent") to move to join that "other parent" as a party to the proceeding. If the joinder motion is granted, either parent may raise issues concerning "support, custody, visitation, and restraining orders" but not concerning other matters. The form includes a proof of service declaration (page 3) and detailed instructions for completion (pages 4-5).

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22-259 California Forms of Pleading and Practice--Annotated § 259.273

§ 259.273 Governmental Parentage and Child Support Proceeding [Fam. Code § 17404]--Responsive Declaration to Motion for Joinder of Other Parent-Consent Order of Joinder--Cal. Judicial Council Form FL-662

[1] FORM

[2] Use of Form

The form in *[1], above*, is a reproduction of the Judicial Council form of Responsive Declaration to Motion for Joinder of Other Parent-Consent Order of Joinder, which has been adopted for mandatory use in support enforcement actions [Cal. Judicial Council Form FL-662]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form is designed for use by a local child support agency, defendant support obligor, or a parent who has requested or is receiving support enforcement services from the agency (denominated the "Other Parent") to respond to an application to join that "other parent" as a party to the proceeding. If agreement to joinder is the response (Paragraph 1-a), and there are no objections to joinder from another respondent, the court may utilize the consent order set forth on page 2 of the form to order joinder. For an alternative form of stipulation and order for joinder, see *§ 259.274*.

If the respondent disagrees with joinder (Paragraph 1-b), he or she should also set forth any reasons why the statements contained in the application for joinder [*see § 259.272*] are incorrect or insufficient (Paragraph 3). Paragraph 2 of the form should also be completed to indicate whether there are any other family law cases pending between the parties. The form also incorporates a proof of service declaration (page 3) and detailed instructions for completion (page 4).

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22-259 California Forms of Pleading and Practice--Annotated § 259.274

§ 259.274 Governmental Parentage and Child Support Proceeding [Fam. Code § 17404]--Stipulation and Order for Joinder of Other Parent--Cal. Judicial Council Form FL-663

[1] FORM

Click here to view image.

[2] Use of Form

The form in *[1], above,* is a reproduction of the Judicial Council form of Stipulation and Order for Joinder of Other Parent, which has been adopted for mandatory use in support enforcement actions [Cal. Judicial Council Form FL-663]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form is designed to permit a local child support agency, defendant support obligor, and a parent who has requested or is receiving support enforcement services from the agency (denominated the "Other Parent") to agree to the joinder of that "other parent" as a party to the proceeding, without the need for a hearing on the issue. Once joined, either parent may raise issues concerning "support, custody, visitation, and restraining orders" but not concerning other matters. The form includes a preprinted order for joinder that is based on the stipulation (page 1) along with detailed instructions for its completion (page 2).

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22-259 California Forms of Pleading and Practice--Annotated § 259.275

§ 259.275 Governmental Parentage and Child Support Proceeding [Fam. Code § 17404 et seq.]--Findings and Recommendation of Commissioner--[Fam. Code § 4251]--Cal. Judicial Council Form FL-665

[1] FORM

Click here to view image.

[2] Use of Form

This form is an illustration of the mandatory Judicial Council form of Findings and Recommendation of Commissioner, for use in child support proceedings involving the local child support agency in which the matter has been referred to a commissioner for hearing [Cal. Judicial Council Form FL-665; *see Fam. Code § 4251*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form has been adopted for use in setting forth a commissioner's findings and recommended order with respect to the payment of child support, including arrearages, and in making related orders, such as an order to maintain health insurance coverage for a child. If one of the parties has objected to a commissioner hearing the matter, the hearing may go forward, but the objecting party's name must be listed in Paragraph 1, along with the name of the commissioner, and the objector has 10 court days (from the date of the recommended order) to file a notice of objection to the recommended order [*Fam. Code § 4251(c)*]. For a form of notice, see *§ 259.276*.

This form requires both parents to complete the Judicial Council's Child Support Case Registry Form [Cal. Judicial Council Form FL-191] and to deliver or mail it to the local support agency within 10 days of the date of the judgment; and to notify the agency of any change in the information within 10 days of the change by submitting an updated form. In addition, the following Judicial Council forms must be attached to the form (apart from items that otherwise may be ordered attached): Notice of Rights and Responsibilities [Cal. Judicial Council Form FL-192] and Information Sheet on Changing a Child Support Order [Cal. Judicial Council Form FL-192 side 2].

Because the form is designed to be manually delivered or mailed to the parties by the court clerk, the names and addresses of the parties should be completed on the last page of the form, which contains a clerk's certificate of mailing or service. Sufficient copies of the form and its attachments must be provided to the clerk, along with postage paid, preaddressed envelopes, for this purpose.

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22-259 California Forms of Pleading and Practice--Annotated § 259.276

§ 259.276 Governmental Parentage and Child Support Proceeding [Fam. Code § 17404 et seq.]--Notice of Objection [Fam. Code § 4251]--Cal. Judicial Council Form FL-666

[1] FORM

[2] Use of Form

The form in *[1], above*, is an illustrative version of the mandatory Judicial Council form of Notice of Objection, for use in child support proceedings involving the local child support agency in which the matter has been referred to a commissioner for hearing [Cal. Judicial Council Form FL-666; *see Fam. Code § 4251*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form would be used by a party who objected to a commissioner hearing the matter, and who therefore also objects to the findings and recommendations of that commissioner and who wishes to have the matter set for a new hearing before a judge. The form must be filed with the clerk of the court where the commissioner's findings and recommendations were made within 10 court days of the date that the order was made [*see Fam. Code § 4251(c)*].

The form does not make reference to service of the form on any of the other parties, so it is unclear whether service is actually required. However, it is suggested that counsel for the objecting party serve a copy of the notice form by mail on the other parties (and attach a proof of service by mail to it).

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22-259 California Forms of Pleading and Practice--Annotated § 259.277

§ 259.277 Governmental Parentage and Child Support Proceeding [Fam. Code § 17404 et seq.]--Review of Commissioner's Findings of Fact and Recommendation [Fam. Code § 4251]--Cal. Judicial Council Form FL-667

[1] FORM

[2] Use of Form

The form in *[1], above*, is an illustrative version of the mandatory Judicial Council form of Review of Commissioner's Findings of Fact and Recommendation, for use in child support proceedings involving the local child support agency in which the matter has been referred to a commissioner for hearing [Cal. Judicial Council Form FL-667; *see Fam. Code § 4251*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form is designed to permit a judge to either ratify a commissioner's recommended order or to set the matter for a new hearing. In general, in the absence of an error in the recommended order, that order will be ratified unless one of the parties has timely objected to it (see *§ 259.276*) [*see Fam. Code § 4251(c)*]. Even if a new hearing is ordered and scheduled (see Paragraph 4(c)), the court must issue a temporary order, which should be set forth in Paragraph 4(d), or in an attachment.

Once signed by the judge, the clerk of the court will mail a copy of the form to each of the parties. Accordingly, the names and addresses of the parties should be completed on the last page of the form, which contains a clerk's certificate of mailing. Sufficient copies of the form must be provided to the clerk, along with postage paid, preaddressed envelopes, for this purpose.

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[1] FORM

Click here to view image.

[2] Use of Form

The form in *[1], above,* is the Judicial Council form Stipulation and Order Waiving Unassigned Arrears [Cal. Judicial Council Form FL-626] for use by a person to whom past support arrearages are owed to waive those arrearages. It was approved by the Judicial Council for optional use. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The parties have the right to have the local child support agency review and audit the amount due, including all amounts ordered, all payments, and all credits, and if they are not satisfied with the agency's audit, they have the right to have a court hearing to determine the amount due [*Fam. Code § 17526*; for discussion, *see § 259.153[7]*]. The stipulation does not waive the right to collect Aid arrears, *i.e.,* past-due child support belonging to the county in exchange for receipt of public assistance benefits, or the right to future child support. The stipulation also does not affect any current child support orders, which remain in full force and effect.

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§ 259.279 Request for Telephone Appearance (Governmental) [Fam. Code § 4251]--Cal. Judicial Council Form FL-679

[1] FORM

Click here to view image.

[2] Use of Form

The form in [1], *above,* is the mandatory Judicial Council form Request for Telephone Appearance (Governmental) [Cal. Judicial Council Form FL-679; *see Cal. Rules of Ct., Rule 5.324(e)(3)*]. This form is available in an interactive, electronic format in *LexisNexis[(R)] Automated California Judicial Council Forms,* which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

This form may be used by a party, an attorney, a witness, a parent who has not been joined to the action, or a representative of a local child support agency or government agency to request the court's permission to appear and testify by telephone at any hearing or conference related to an action for child support when the local child support agency is providing services under title IV-D of the Social Security Act [*Cal. Rules of Ct., Rule 5.324(c), (e)(1)*]. The local child support agency may request a telephone appearance on behalf of a party, a parent, or a witness when the agency is appearing in the support action [*Cal. Rules of Ct., Rule 5.324(e)(1)*]. Any such request must be filed at least 12 court days before the hearing, and must be served on the other parties, the local child support agency, and attorneys (if any) by personal delivery, fax, express mail, or other means reasonably calculated to ensure delivery by the close of the next business day [*Cal. Rules of Ct., Rule 5.324(e)(2)*].

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Volume 22: Explosives thru Food-Chs. 256-268
Chapter 260 FAMILY LAW ENFORCEMENT: FOREIGN JUDGMENTS
PART I. SCOPE

22-260 California Forms of Pleading and Practice--Annotated § 260.01

§ 260.01 Scope of Chapter

This chapter concerns the establishment, enforcement, and modification of foreign judgments and orders arising from marital litigation in other states and foreign countries. The chapter discusses the following:

- Validity of sister-state family judgments and orders [*see §§ 260.10 -260.25*].

- General principles of establishing a foreign judgment, other than one for support or custody, in California [*see §§ 260.50 -260.54*].

- Jurisdiction to make or modify a child support order under the federal Full Faith and Credit for Child Support Orders Act (FFCCSOA) [28 U.S.C. § 1338B; *see §§ 260.60 -260.67*].

- Enforcement and modification of support obligations and orders under the Uniform Interstate Family Support Act (UISFA) [*Fam. Code § 4900 et seq.*], which has replaced the Uniform Reciprocal Enforcement of Support Act (URESA) [former *Fam. Code § 4800 et seq.*] effective January 1, 1998, as the jurisdictional and procedural scheme governing interstate support enforcement [*see §§ 260.80 -260.175*].

- Interstate custody enforcement under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) [*Fam. Code § 3400 et seq.*], which became operative January 1, 2000, in California [Stats. 1999, ch. 867], replacing the former Uniform Child Custody Jurisdiction Act (UCCJA) [*see §§ 260.200* -260.212].

- General remedies against international child abduction under the Hague Convention on International Child Abduction [*see 53 Fed. Reg. 23608 (1988)* ; 1980 Hague Convention, art. 41; § 260.250 et seq.].

Legal Topics:

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

Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsFamily LawChild CustodyEnforcementUniform Child Custody Jurisdiction & Enforcement ActFamily LawChild SupportJurisdictionSubject Matter JurisdictionFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionGeneral Overview

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PART I. SCOPE

22-260 California Forms of Pleading and Practice--Annotated § 260.02

§ 260.02 Cross References

For detailed discussion of interstate jurisdiction to establish and modify child custody and visitation orders under the Uniform Child Custody Jurisdiction and Enforcement Act [*Fam. Code § 3400 et seq.*] and the federal Parental Kidnaping Prevention Act [*28 U.S.C. § 1738A*], *see* Ch. 394, *Parent and Child* , and Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., Chs. 32, and 142 (Matthew Bender).

For enforcement of foreign money judgments under the Sister State Money-Judgments Act (SSMJA) [*Code Civ. Proc. § 1710.10 et seq.*], see Ch. 318, *Judgments*, and Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., Ch. 151 (Matthew Bender).

For additional discussion of recognition and validity of foreign judgments in the context of family law proceedings, *see* Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., Ch. 150 (Matthew Bender).

For discussion of related, general topics, see the following chapters:

- Ch. 182, *Declaratory Relief*, discussing procedures and providing forms for use in declaratory relief actions.

- Ch. 372, *Motions and Orders*, discussing and providing forms for use in filing an order to show cause.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsGeneral Overview

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[Reserved]

§§ 260.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Validity of Sister-State Family Law Judgments and Orders
1. Decrees of Divorce

22-260 California Forms of Pleading and Practice--Annotated § 260.10

§ 260.10 Jurisdiction of State of Matrimonial Domicile

The state of the matrimonial domicile may decree a divorce of the spouses, whether or not it remains the domicile of either spouse, and whether or not personal jurisdiction is obtained over the defendant or respondent [*Estin v. Estin (1948) 334 U.S. 541, 547, 68 S. Ct. 1213, 92 L. Ed. 1561]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionNonresident SpousesFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionResidency Requirements

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A. Validity of Sister-State Family Law Judgments and Orders
1. Decrees of Divorce

22-260 California Forms of Pleading and Practice--Annotated § 260.11

§ 260.11 Jurisdiction Based on One Spouse's Domicile in Decree State

As long as one party before the court in a dissolution proceeding is domiciled within a state, a court of that state has jurisdiction to terminate the marriage, whether or not it was the state of matrimonial domicile at any time, and whether or not the court obtained personal jurisdiction over the nonresident spouse [*Williams v. North Carolina (1942) 317 U.S. 287, 296-301, 63 S. Ct. 207, 87 L. Ed. 279]* . Ex parte divorce is an exception to the rule that a court must have personal jurisdiction over a party before it may adjudicate his or her substantive rights. However, due process requires something more than mere presence of one party within a jurisdiction before that party may invoke the legal process of the forum to force an absent spouse to defend his or her marital status in that forum [*Whealton v. Whealton (1967) 67 Cal. 2d 656, 661, 63 Cal. Rptr. 291, 432 P.2d 979]* . Therefore, a party must have a bona fide domicile within the decree state, and the jurisdictional fact of a party's actual domicile within the decree state may be collaterally attacked. A party asserting the invalidity of the foreign decree has the burden of proving lack of domicile [*Williams v. North Carolina (1945) 325 U.S. 226, 232-239, 65 S. Ct. 1092, 89 L. Ed. 1577]* .

For cases addressing collateral attack on a sister-state divorce decree based on lack of jurisdiction, see *§ 260.304[2]* [*but see* cases collected at *§ 260.304[9]*]. Jurisdiction to grant a judgment of dissolution in California is discussed in Ch. 221, *Dissolution of Marriage: Procedure* . Collateral attack on a sister-state divorce decree based on lack of a bona fide domicile is discussed in Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., Ch. 150 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionNonresident SpousesFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionResidency Requirements

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22-260 California Forms of Pleading and Practice--Annotated § 260.12

§ 260.12 Possible Jurisdiction if Neither Spouse Is Domiciled in Decree State

It has been the rule that if neither spouse has a bona fide domicile in the decree state when a decree of divorce or dissolution of marriage was made, the decree is not entitled to full faith and credit in any other state [*Bell v. Bell (1901) 181 U.S. 175, 177, 21 S. Ct. 551, 45 L. Ed. 804]* , at least if it was granted on constructive service [*Williams v. North Carolina (1942) 317 U.S. 287, 291, 63 S. Ct. 207, 87 L. Ed. 279]* . This rule is said to reflect the due process considerations involved in adjudicating rights of an absent party in an inconvenient forum; it also reflects the interests of the states in regulating the marital status of their domiciliaries and limits forum shopping for self-serving substantive divorce law [*Whealton v. Whealton (1967) 67 Cal. 2d 656, 659-660, 63 Cal. Rptr. 291, 432 P.2d 979]* .

The historical view of the domicile requirement was that it was based on the legal fiction that the marital status was a *res* that was present at the permanent home of either spouse. As such, it gave the court *in rem* jurisdiction to dissolve the marriage [*see Whealton v. Whealton (1967) 67 Cal. 2d 656, 661, 63 Cal. Rptr. 291, 432 P.2d 979]* , and it appeared to be an absolute condition precedent in all cases. In an older case [*Crouch v. Crouch (1946) 28 Cal. 2d 243, 169 P.2d 897]* , the California Supreme Court stated that a decree of divorce may always be attacked on the ground that the foreign court had no jurisdiction because the petitioning party had not established a bona fide domicile. The court went on to state, in dicta, that a decree based on either personal or constructive service, or even on personal appearance, may be attacked on this ground [*Crouch v. Crouch (1946) 28 Cal. 2d 243, 250, 169 P.2d 897* ; *see also Aldabe v. Aldabe (1962) 209 Cal. App. 2d 453, 465-466, 26 Cal. Rptr. 208]* .

Subsequent United States Supreme Court decisions have now eroded the view that domicile is an absolute requirement for subject matter jurisdiction, such that it may not be conferred on a court by consent, waiver, or estoppel [*see In re Marriage of Ben-Yehoshua (1979) 91 Cal. App. 3d 259, 263, 154 Cal. Rptr. 80]* . If the defendant spouse appeared in the proceedings and contested the issue of domicile, or appeared and admitted a valid domicile, or was personally served in the decree state [*see, e.g., Burnham v. Superior Court of Cal. (1990) 495 U.S. 604, 607-608, 619, 110 S. Ct. 2105, 109 L. Ed. 2d 631* , discussed in Ch. 221, *Dissolution of Marriage: Procedure* , and in Ch. 324, *Jurisdiction: Subject Matter*], the subsequent decree is entitled to full faith and credit and may not be attacked [*see Cook v. Cook (1951) 342 U.S. 126, 127-128, 72 S. Ct. 157* (and cases cited therein); *see also Whealton v. Whealton (1967) 67 Cal.*

2d 656, 663, 63 Cal. Rptr. 291, 432 P.2d 979 (stating, in dicta, that when both parties are before the court, it is questionable whether domicile is an indispensable prerequisite for jurisdiction)]. The same is true if the defendant appeared and had the opportunity to contest domicile, even if the issue was not actually raised [*Sherrer v. Sherrer (1948) 334 U.S. 343, 348, 68 S. Ct. 1087* ; *Heuer v. Heuer (1949) 33 Cal. 2d 268, 271, 201 P.2d 385]* . Further, the emerging modern view is that all jurisdiction should be based on concepts of fundamental fairness, and that the traditional labels of *in rem, quasi in rem,* and *in personam* jurisdiction are meaningless because they do not compel particular results [*see* *Shaffer v. Heitner (1977) 433 U.S. 186, 196-206, 97 S. Ct. 2569, 53 L. Ed. 2d 683* (quasi in rem jurisdiction insufficient to give state jurisdiction over defendant who otherwise lacks minimum contacts with state); *Whealton v. Whealton (1967) 67 Cal. 2d 656, 661 n.3, 63 Cal. Rptr. 291, 432 P.2d 979]* .

All assertions of state court jurisdiction must be evaluated according to whether there are sufficient minimum contacts among the state, the defendant, and the litigation to guarantee that maintenance of the suit does not offend traditional notions of fair play and substantial justice [*Shaffer v. Heitner (1977) 433 U.S. 186, 196-206, 97 S. Ct. 2569, 53 L. Ed. 2d 683]* . In this regard, there might be sufficient divorce jurisdiction if the defendant has, or has had, the requisite minimum contacts with the decree state, even if neither spouse is domiciled in the state at the time of the decree [*see, e.g.,* *Aldabe v. Aldabe (1962) 209 Cal. App. 2d 453, 457-458, 26 Cal. Rptr. 208* (parties lived on ranch overlapping California and Nevada; structures were all in California, but they had many contacts with Nevada including vehicle and voter registration; court held that husband's domicile was in California based solely on location of house and denied full faith and credit to Nevada decree)]. If so, the law would be that personal jurisdiction is not required if a valid domicile is established [*Whealton v. Whealton (1967) 67 Cal. 2d 656, 661, 63 Cal. Rptr. 291, 432 P.2d 979]* , and that a valid domicile is not required if personal jurisdiction can be validly attained, whether by personal service or on the basis of minimum contacts.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditFull Faith & Credit StatuteConstitutional LawRelations Among GovernmentsFull Faith & CreditFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionNonresident SpousesFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionResidency Requirements

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§ 260.13 Uniform Divorce Recognition Act

The Uniform Divorce Recognition Act [*Fam. Code § 2090 et seq.*] provides that a divorce obtained in another jurisdiction is of no force or effect in California if both parties to the marriage were domiciled in California at the time the foreign divorce proceeding was commenced [*Fam. Code § 2091*]. The Act has been enacted by only a few states in addition to California [*see* text preceding former Code Civ. Proc. § 5000 in West's Annotated Civil Code (1983)]. The Act appears to have been drafted on the assumption that domicile is a required condition precedent in all cases to assume divorce jurisdiction. However, the application of the Act is limited by the full faith and credit clause of the United States Constitution [*Fam. Code § 2093*; *see U.S. Const., art. IV, § 1*]. If a sister state has another constitutionally permissible basis for jurisdiction besides domicile, such as perhaps personal jurisdiction over both parties obtained by the consent of one and personal service on the other [*see Burnham v. Superior Court of Cal. (1990) 495 U.S. 604, 607-608, 619, 110 S. Ct. 2105, 109 L. Ed. 2d 631]* , California would probably be required by the constraints of the full faith and credit clause, to give full faith and credit to the judgment, the domicile requirements of the Uniform Act notwithstanding [*see Fam. Code § 2093*].

Under the Uniform Act, either of the following factors is prima facie evidence that a person was domiciled in California at the time of commencing a divorce proceeding in another state [*Fam. Code § 2092*]:

- The fact that he or she was domiciled in California within 12 months before the commencement of the divorce proceeding and resumed residence in California within 18 months after leaving the other state; or

- The fact that he or she maintained a place of residence within California at all times after leaving this state and then returned.

If a statute provides that a fact or group of facts is prima facie evidence of another fact, it establishes a rebuttable presumption [*Evid. Code § 602*]. Every rebuttable presumption is either a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof [*Evid. Code § 601*]. The rebuttable presumption

raised by proving either of the two factual situations listed above is apparently a presumption affecting the burden of producing evidence. Thus, if the party challenging the validity of the foreign divorce decree proves either of the above facts, the burden of producing evidence apparently shifts to the person defending the bona fides of the domicile on which the foreign court's divorce jurisdiction was based [*see Herczog v. Herczog (1960) 186 Cal. App. 2d 318, 322, 9 Cal. Rptr. 5]* .

It has been argued that the above provision of the Uniform Divorce Recognition Act violates the full faith and credit clause by shifting the burden of proof from the person attacking an ex parte foreign judgment to the person defending its validity [Note, *Foreign Divorce Recognition in California, 16 Hastings L.J. 121, 127-128* (1964)]. The full faith and credit clause requires that a sister-state judgment be presumed valid, and that the burden of proving the decree invalid is on the assailant [*Williams v. North Carolina (1945) 325 U.S. 226, 233-234, 65 S. Ct. 1092, 89 L. Ed. 1577]* . This constitutional argument does not appear to have been raised, successfully or otherwise, in any reported case. At the very least, however, proof of either set of facts specified in the Uniform Act (California domicile immediately before and after foreign proceeding or California residence during foreign proceeding) provides evidence that will support other evidence adduced by the party challenging the bona fides of domicile allegedly established in the foreign divorce jurisdiction [*see Sohnlein v. Winchell (1964) 230 Cal. App. 2d 508, 510-511, 41 Cal. Rptr. 145]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditFull Faith & Credit StatuteEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionSister State Divorce

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§ 260.14 Divisible Divorce

The term "divisible divorce" has been applied to divorce proceedings conducted without personal jurisdiction over the respondent-spouse. In these proceedings, the court has jurisdiction based on the petitioner's domicile to terminate the marital status [*see § 260.11*]. However, it cannot adjudicate any of the incidents of marriage that require personal jurisdiction over the absent spouse, and any such part of a judgment is not entitled to full faith and credit [*Estin v. Estin (1948) 334 U.S. 541, 548-549, 68 S. Ct. 1213, 92 L. Ed. 1561]* .

Thus, without personal jurisdiction over the obligor spouse, a court cannot impose, modify, or terminate orders for the support of either party or their children [*see Estin v. Estin (1948) 334 U.S. 541, 548, 68 S. Ct. 1213, 92 L. Ed. 1561* ; *Hudson v. Hudson (1959) 52 Cal. 2d 735, 742-743, 344 P.2d 295* ; *Perry v. Perry (1953) 119 Cal. App. 2d 461, 463, 259 P.2d 953]* . As a consequence, if an ex parte foreign divorce has terminated the parties' marital status without fixing support rights, these matters can be determined in a separate subsequent action in California, if personal jurisdiction can be obtained over the former spouse whose rights will be affected [*see Hudson v. Hudson (1959) 52 Cal. 2d 735, 745, 344 P.2d 295* ; *see also Weber v. Superior Court (1960) 53 Cal. 2d 403, 405-406, 2 Cal. Rptr. 9]* . Conversely, if another state has proper jurisdiction over support and property issues but has not been asked to terminate the marriage of the parties, a California court may assume jurisdiction for the limited purpose of terminating the marriage, assuming California properly has jurisdiction for that purpose [*see In re Marriage of Gray (1988) 204 Cal. App. 3d 1239, 1248-1254, 251 Cal. Rptr. 846* (legal separation granted in foreign state, dissolution action allowed in California)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditFull Faith & Credit StatuteFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionDivisible Divorce

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§ 260.15 Concurrent Jurisdiction and Multiple Judgments

Courts in two states may have concurrent jurisdiction to terminate a marriage. If a prior action is pending in another state, California may stay or abate its proceeding. However, the determination is discretionary, not mandatory. Factors that may be considered include comity, the prevention of multiple and vexatious litigation, judicial economy, the interests of the forum, and the convenience of the parties [*Leadford v. Leadford (1992) 6 Cal. App. 4th 571, 574-575, 8 Cal. Rptr. 2d 9* ; *see* *In re Marriage of Gray (1988) 204 Cal. App. 3d 1239, 1249-1251, 251 Cal. Rptr. 846* (rule of jurisdictional priority does not necessarily control if countervailing policies apply); *see also* *Farmland Irrigation Co. v. Dopplmaier (1957) 48 Cal. 2d 208, 215, 308 P.2d 732]* .

A judgment rendered in one state will not be recognized or enforced in another state if an inconsistent, but valid, judgment is subsequently rendered in another action between the parties and if the earlier judgment is superseded by the later judgment under the law of the state where the later judgment was rendered. This is the case even if the court that rendered the later judgment denied full faith and credit to the first judgment or made other errors of fact or law. The rationale for this rule is based on principles of full faith and credit and res judicata. The losing party is precluded from attacking the later inconsistent judgment if he or she has not sought appellate review of that judgment [*In re Marriage of Hanley (1988) 199 Cal. App. 3d 1109, 1117-1118, 245 Cal. Rptr. 441 , disapproved on other grounds,* *Leadford v. Leadford (1992) 6 Cal. App. 4th 571, 575, 8 Cal. Rptr. 2d 9]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent JurisdictionCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditFull Faith & Credit StatuteCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataFamily LawMarital Termination & Spousal SupportDissolution & DivorceJurisdictionSister State Divorce

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[Reserved]

§§ 260.16[Reserved]

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§ 260.20 Annulment

It has been held in California that California has jurisdiction to annul a marriage contracted elsewhere if one party to the marriage is domiciled in this state, and that personal service on the other party is not required [*Bing Gee v. Chan Lai Yung Gee (1949) 89 Cal. App. 2d 877, 883, 202 P.2d 360]* . However, in an annulment matter, the applicable law is that of the state in which the marriage was contracted. That law will be applied by the court in whatever state the action for annulment is brought. Therefore, domicile of a party, which may be necessary for jurisdiction in a divorce or dissolution proceeding (*see §§ 260.11* and *260.12, above*), is not a prerequisite for jurisdiction in an annulment matter. If a court has personal jurisdiction over both parties, it may determine the nullity of a marriage regardless of the parties' domiciles [*Whealton v. Whealton (1967) 67 Cal. 2d 656, 664, 63 Cal. Rptr. 291, 432 P.2d 979]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewFamily LawMarital Termination & Spousal SupportAnnulmentGeneral OverviewFamily LawMarital Termination & Spousal SupportAnnulmentJurisdictionFamily LawMarital Termination & Spousal SupportAnnulmentProcedures

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§ 260.21 Spousal Support

A valid decree of spousal support (often called alimony under the laws of states other than California) requires personal jurisdiction over the payor spouse [*Perry v. Perry (1953) 119 Cal. App. 2d 461, 463-464, 259 P.2d 953]* . However, full faith and credit requires recognition and enforcement of a sister-state spousal support decree only to the extent to which it is enforceable in the place where it was rendered. Thus, only past installments that have accrued and are not subject to modification by the originating court are recognized in California as entitled to full faith and credit [*Biewend v. Biewend (1941) 17 Cal. 2d 108, 110, 109 P.2d 701* ; *In re Marriage of Murray (2002) 101 Cal. App. 4th 581, 597, 124 Cal. Rptr. 2d 342]* .

Past obligations that may be modified retroactively and future obligations, whether or not prospectively modifiable, are not entitled to full faith and credit [*Worthley v. Worthley (1955) 44 Cal. 2d 465, 468, 283 P.2d 19]* , because a modifiable award of support is viewed as lacking the requisite finality to compel recognition and enforcement under the *full faith and credit clause* [*see* *Petersen v. Petersen (1972) 24 Cal. App. 3d 201, 206, 100 Cal. Rptr. 822]* . These obligations may be enforced under principles of comity, however, if personal jurisdiction over the paying spouse is obtained in California [*Worthley v. Worthley (1955) 44 Cal. 2d 465, 473-474, 283 P.2d 19* ; *Petersen v. Petersen (1972) 24 Cal. App. 3d 201, 206, 100 Cal. Rptr. 822]* . The establishment, modification, and enforcement of a valid foreign support order in California is discussed in *§ 260.150* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditFull Faith & Credit StatuteFamily LawMarital Termination & Spousal SupportSpousal SupportJurisdictionFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral Overview

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§ 260.22 Child Support

A child support order made consistently with the provisions of the federal Full Faith and Credit for Child Support Orders Act (FFCCSOA) is entitled to full faith and credit, and must be enforced according to its terms, and cannot be modified by a court of another state except as provided in that Act [*28 U.S.C. § 1738B(a)*]. FFCCSOA preempts state law regarding child support jurisdiction to the extent that it is inconsistent with FFCCSOA [*Kilroy v. Superior Court (1997) 54 Cal. App. 4th 793, 800-806, 63 Cal.Rptr. 2d 390* (FFCCSOA applied without any consideration of potentially conflicting provisions of *URESA); In re Marriage of Lurie (1995) 33 Cal. App. 4th 658, 673-676, 39 Cal. Rptr. 2d 835* (court found no different result under FFCCSOA, but implicit in its holding is view that had FFCCSOA yielded different result, that result would be required); *cf. People v. Superior Court (Smolin) (1986) 41 Cal. 3d 758, 770, 225 Cal. Rptr. 438, 716 P.2d 991 , reversed, other grounds, State of California v. Superior Court (1987) 482 U.S. 400, 107 S. Ct. 2433, 96 L. Ed. 2d 332* (federal Parental Kidnapping Prevention Act, *28 U.S.C. § 1738A*, preempts state child custody jurisdiction law to extent it is inconsistent)].

Under FFCCSOA, a state's child support order is valid and entitled to full faith and credit if (1) the court that made the order has both subject matter jurisdiction and personal jurisdiction over the contestants under its own law; and (2) reasonable notice and opportunity to be heard is given to the contestants [*28 U.S.C. § 1738B(c)*; *see 28 U.S.C. § 1738B(b)* (contestants include parents, other parties, and any public assignee)]. Once a state court makes a valid child support order, that court has continuing, exclusive jurisdiction over the order as long as the state is the child's state or the residence of any contestant, unless the court of another state validly modifies the order as provided by FFCCSOA [*28 U.S.C. § 1738B(d)*]. The modification rules under FFCCSOA [*see 28 U.S.C. § 1738B(e)*], the Uniform Interstate Family Support Act (UIFSA) [*see Fam. Code § 4900 et seq.*], and the establishment, modification, and enforcement of a valid foreign support order in California generally are discussed in *§ 260.140* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsFederal Common LawPreemptionCivil

ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditFull Faith & Credit StatuteFamily LawChild SupportJurisdictionPersonal JurisdictionFamily LawChild SupportJurisdictionSubject Matter Jurisdiction

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§ 260.23 Child Custody

A child custody determination made consistently with the provisions of the federal Parental Kidnaping Prevention Act (PKPA) is entitled to full faith and credit, must be enforced according to its terms and cannot be modified by a court of another state, except as provided in that act [*28 U.S.C. § 1738A(a)*]. The PKPA and the Uniform Child Custody Jurisdiction and Act [*Fam. Code § 3400 et seq.*] are discussed in *§ 260.200* et seq. and in Ch. 394, *Parent and Child* .

Legal Topics:

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

[1] Judgment Affecting Real Property

A court of one state cannot directly affect or determine the title to land in another. However, a court that has personal jurisdiction over the parties can compel the execution of a conveyance in the form required by the law of the situs [*Rozan v. Rozan (1957) 49 Cal. 2d 322, 330-331, 317 P.2d 11]* . Therefore, California may adjudicate rights to land located in another state [*In re Marriage of Economou (1990) 224 Cal. App. 3d 1466, 1479-1480, 274 Cal. Rptr. 473]* , and California will recognize the decree of a court of another state that directs a conveyance of California real estate [*Rozan v. Rozan (1957) 49 Cal. 2d 322, 330-331, 317 P.2d 11* ; *Farley v. Farley (1964) 227 Cal. App. 2d 1, 6, 38 Cal. Rptr. 357 , cert. denied, 379 U.S. 945]* . A subsequent action in the situs state is required to effect any change in the title to the land there [*In re Marriage of Economou (1990) 224 Cal. App. 3d 1466, 1480-1481, 274 Cal. Rptr. 473]* .

However, to be entitled to full faith and credit in California the decree must be valid and not subject to collateral attack in the rendering state. If, under its own law, a state does not have jurisdiction to adjudicate the rights of parties to land in another state, a judgment that purports to do so is void for lack of jurisdiction, and is not entitled to full faith and credit in California [*Barber v. Barber (1958) 51 Cal. 2d 244, 247, 331 P.2d 628* ; *Farley v. Farley (1964) 227 Cal. App. 2d 1, 6, 38 Cal. Rptr. 357 , cert. denied, 379 U.S. 945]* . If a state has ex parte jurisdiction to dissolve a marriage based on the domicile of one party and there is real property at issue located within the state, the law is unsettled. The traditional rule gave the court jurisdiction to determine the rights of both parties if [*Title etc. Restoration Co. v. Kerrigan (1906) 150 Cal. 289, 308, 88 P. 356* ; *see In re Marriage of Leff (1972) 25 Cal. App. 3d 630, 645, 102 Cal. Rptr. 195]* :

- It had personal jurisdiction over one party;
- It had subject-matter jurisdiction because of the location of the property; and
- Notice to the absent spouse met the standards of constitutional due process.

However, in *Shaffer v. Heitner* [*Shaffer v. Heitner (1977) 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683]* , the United States Supreme Court held that a state court was without jurisdiction to determine the rights of a nonresident, nonappearing party to personal property located within the state unless that party had sufficient minimum contacts with the state to ensure that maintenance of the suit did not offend traditional notions of fair play and substantial justice. In other words, personal jurisdiction over one party and subject-matter jurisdiction over personal property would not support a decree entitled to full faith and credit in California if the absent party had no connection with the rendering situs [*Shaffer v. Heitner (1977) 433 U.S. 186, 212, 97 S.Ct. 2569, 53 L. Ed. 2d 683]* .

The applicability of *Shaffer* to real property is unclear. It is quite possible that the physical location of land might by itself constitute an adequate contact with the rendering situs; the Court pointed out that when claims to real property are the source of the underlying dispute of the parties, it would be unusual for the state where property is located not to have jurisdiction [*Shaffer v. Heitner (1977) 433 U.S. 186, 207-208, 97 S. Ct. 2569, 53 L. Ed. 2d 683* ; *see also* concurring opinion of Powell, J., *433 U.S. 186, 217, 97 S. Ct. 2569, 53 L. Ed. 2d 683]* .

[2] Judgment Affecting Tangible Personal Property

Tangible personal property is subject to the same rules as real property [*see [1], above*], with one notable difference: the decision of the United States Supreme Court in *Shaffer v. Heitner* [*Shaffer v. Heitner (1977) 433 U.S. 186, 213-217, 97 S. Ct. 2569, 53 L. Ed. 2d 683]* clearly applies, and California is therefore not required to recognize an ex parte decree that purports to dispose of personal property located in the foreign state unless the absent party's contacts with the situs of the decree represent the type of minimum contacts that are required to obtain in personam jurisdiction over a defendant properly served with a summons outside of California.

[3] Judgment Affecting Intangible Personal Property

Intangible personal property is subject to the same rules as tangible personal property [*see [2], above*], but with an added complication related to determination of the property's location. If the efficacy of a foreign ex parte decree to dispose of intangible personal property is challenged in California litigation, the California court will determine the location of the property according to the totality of contacts that it had with the jurisdiction where the decree was rendered [*In re Marriage of Leff (1972) 25 Cal. App. 3d 630, 646, 102 Cal. Rptr. 195]* . Because these are the same considerations used to determine the fairness of asserting jurisdiction over the property of an absent defendant [*Shaffer v. Heitner (1977) 433 U.S. 186, 213-217, 97 S. Ct. 2569, 53 L. Ed. 2d 683]* , it appears that in the case of intangible personal property the issues of assigning a situs to the property and determining the fairness of litigating the rights of an absent party should be resolved by the same analysis.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 260.25 Sister-State Money Judgment

A money judgment, such as a judgment for a sum to achieve an equal distribution of community property, is valid and entitled to full faith and credit if the court obtained personal jurisdiction over the judgment debtor in accordance with constitutional standards of due process [*Shaffer v. Heitner (1977) 433 U.S. 186, 213-217, 97 S. Ct. 2569, 53 L. Ed. 2d 683]* . The Sister States Money-Judgments Act (SSMJA) [*Code Civ. Proc. § 1710.10 et seq.*], a nonexclusive statutory procedure for enforcement of sister-state money judgments, is discussed in *Ch. 318, Judgments, § 318.180* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditFull Faith & Credit Statute

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A. Validity of Sister-State Family Law Judgments and Orders
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[Reserved]

§§ 260.26[Reserved]

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§ 260.50 Governing Law

Establishment of a sister-state judgments as a California judgment is generally governed by *Code Civ. Proc. § 1913*. Other statutory regimes permit establishment of specific types of judgments for enforcement purposes, such as the Uniform Interstate Family Support Act (UIFSA) [*Fam. Code § 4900 et seq.*], discussed in *§ 260.80* et seq., the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), discussed in *§ 260.200* et seq., and the Sister State Money-Judgments Act (SSMJA) [*Code Civ. Proc. § 1710.10 et seq.*], discussed in Ch. 318, *Judgments* .

Proof of a sister-state or foreign country judgment is governed by *Evid. Code § 1530*. Venue in a proceeding to enforce a child support obligation is governed by *Code Civ. Proc. § 395(a)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsFamily LawChild CustodyEnforcementUniform Child Custody Jurisdiction & Enforcement ActFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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22-260 California Forms of Pleading and Practice--Annotated § 260.51

§ 260.51 Establishment of Foreign Judgment in California

[1] By Civil Action

Subject to certain exceptions regarding fiduciaries [*see Code Civ. Proc. § 1913(b)*], *Code Civ. Proc. § 1913(a)* provides that the effect of a judicial record of another state is the same as in California except that it can only be enforced in California by an action or special proceeding [*Code Civ. Proc. § 1913(a)*]. A judgment is a judicial record within the meaning of this section [*Little v. Stevens (1972) 23 Cal. App. 3d 112, 113, 99 Cal. Rptr. 885]* .

Therefore, a foreign judgment (one entered by any jurisdiction other than California, including sister states, the territories of the United States, and foreign countries) may be established in California by filing a civil action for that purpose [*Hamilton v. Superior Court of San Mateo County (1974) 37 Cal. App. 3d 418, 422, 112 Cal. Rptr. 450* ; *see Leverett v. Superior Court (1963) 222 Cal. App. 2d 126, 131, 34 Cal. Rptr. 784]* . When it is so established, it becomes a California judgment for purposes of enforcement in California [*Hamilton v. Superior Court of San Mateo County (1974) 37 Cal. App. 3d 418, 422, 112 Cal. Rptr. 450]* .

The general civil action to establish a foreign judgment is becoming less common because there are more specific statutory procedures to enforce foreign family-law-related judgments in California. Foreign support obligations and orders must be enforced under the Uniform Interstate Family Support Act (UISFA) [*Fam. Code § 4900 et seq.*] because of its jurisdictional rules (*§ 260.80 et seq*). Therefore, use of the general civil complaint under *Code Civ. Proc. § 1913* is essentially limited to the enforcement of family law money judgments for amounts other than support.

The Sister State Money-Judgments Act (SSMJA) [*Code Civ. Proc. § 1710.10 et seq.*] also provides a special procedure to establish and enforce out-of-state money judgments. For further discussion of the SSMJA, see Ch. 318, *Judgments* .

The Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*] is appropriate for enforcing judgments made in foreign countries. It applies to foreign-country judgments that grant or deny recovery of a sum of money and that are final, conclusive, and enforceable under the law of the foreign country [*Code Civ. Proc. § 1715(a)*; *see Manco Contracting Co. (W.L.L.) v. Bezdikian (2008) 45 Cal. 4th 192, 195-196, 201-203, 85 Cal. Rptr. 3d*

233 (California court must look to foreign country's law to determine finality and conclusiveness of money judgment)]. The Act does not apply to a foreign-country judgment for divorce, support, or maintenance, or other judgment rendered in connection with domestic relations [*Code Civ. Proc. § 1715(b)(3)(A)*; *see In re Marriage of Lyustiger (2009) 177 Cal. App. 4th 1367, 1369, 1374-1377, 99 Cal. Rptr. 3d 922* (orders of British domestic relations court requiring husband to pay wife's attorney's fees were deemed orders for support and thus not enforceable under former Uniform Foreign Money-Judgments Recognition Act)]. However, such a judgment may be recognized by a California court under principles of comity or otherwise [*Code Civ. Proc. §§ 1715(b)(3)(B), 1723*].

[2] Venue

A civil action to establish a foreign judgment is transitory and may be brought in any county in the state [*Hamilton v. Superior Court of San Mateo County (1974) 37 Cal. App. 3d 418, 422, 112 Cal. Rptr. 450]* . However, in a proceeding to enforce an obligation of child support, the county in which the child resides is the proper county for trial of the action [*Code Civ. Proc. § 395(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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§ 260.52 Proof of Foreign Judgments

[1] Sister State Judgments

The existence and contents of a sister state judgment may be proved by producing a copy of the judgment that is attested to or certified as correct by the public employee (usually the clerk of the rendering court) who has legal custody of the judgment [*see Evid. Code § 1530(a)(2)*]. The attested or certified copy provides prima facie evidence of the existence and contents of the judgment [*Evid. Code § 1530(a)*].

[2] Foreign Country Judgments

The existence and contents of a foreign country judgment may be proved by producing a copy of the judgment that is attested to as correct by a person having authority to make the attestation. The attestation must be accompanied by a final statement certifying the genuineness of the signature and the official position of either [*Evid. Code § 1530(a)(3)*]:

- The person who attested the copy as a correct copy; or
- Any foreign official who has certified either the genuineness of the signature and official position of the person actually attesting the copy.

The final certificate must be made by a secretary of a United States embassy or legation, by one of certain United States consular officials, or by a diplomatic or consular official of the foreign country in question assigned or accredited to the United States [*Evid. Code § 1530(a)(3)*]. After reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the purported judgment, the court may, for good cause shown [*Evid. Code § 1530(a)(3)*]:

- Admit an attested copy without a final statement; or
- Permit the judgment to be evidenced by an attested summary without a final statement.

The attested copy of the foreign judgment provides prima facie evidence of the existence and contents of the judgment [

Evid. Code § 1530(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsEvidenceAuthenticationSelf-Authentication

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22-260 California Forms of Pleading and Practice--Annotated § 260.53

§ 260.53 Interstate Enforcement of Support

[1] Historical Overview of Statutory Schemes

The problem of the enforcement of support obligations, particularly child support, across state lines is one that has become increasingly troublesome as society has become more mobile. The need for a uniform nationwide procedure to enforce the support orders of one state in the courts of another state where the obligor is subject to process has been recognized for quite some time. The Uniform Reciprocal Enforcement of Support Act (URESA) was originally enacted by California in 1953. In 1968, the National Conference of Commissioners on Uniform State Laws revised the uniform act. California enacted the revisions in 1970 under the title of "The Revised Uniform Reciprocal Enforcement of Support Act of 1968" (RURESA) [*see* former *Code Civ. Proc. § 1650*; Stats. 1970, ch. 1126]. Additional 1974 amendments to URESA/RURESA added a procedure for enforcement of support awards by registration [*see* former *Code Civ. Proc. § 1697 et seq.*; Stats. 1974, ch. 80].

In 1988, the National Conference of Commissioners on Uniform State Laws (NCCUSL) formed a drafting committee to revise URESA to reflect the dramatic changes in child support that had taken place since the prior revisions of 1968 and 1974. After an initial draft making some minor changes to URESA, the committee decided that URESA should be replaced in its entirety by a system based on significantly different concepts. The result was the first draft of the Uniform Interstate Family Support Act (UIFSA), which was completed in 1993.

Most states abandoned URESA and enacted UIFSA within the next several years. As a result of the experiences of those states, the NCCUSL promulgated and approved further amendments to UIFSA on July 18, 1996. UIFSA is *considered in detail in § 260.80* et seq.

Meanwhile, Congress enacted the Full Faith and Credit for Child Support Orders Act (FFCCSOA), effective October 20, 1994 (*see § 260.60* et seq.). FFCCSOA essentially took the jurisdictional rules of UIFSA and imposed them on the states, whether or not they had enacted UIFSA. Congress then made enactment of UIFSA by January 1, 1998 mandatory on the states as a condition of receiving federal funds for the enforcement of child support [*42 U.S.C. § 666(f)*; *see 42 U.S.C. § 609(a)(8)*]. California then enacted UIFSA, effective January 1, 1998 [*see Fam. Code § 4900 et*

seq.; Stats. 1997, ch. 194].

[2] Jurisdictional Effect of FFCCSOA and UIFSA on Other Law

UIFSA provides that its remedies are cumulative and do not affect the availability of remedies under other state law [*Fam. Code § 4903*]. Nevertheless, this provision is severely limited by the fact that, unlike URESA, UIFSA and FFCCSOA contain significant limitations on the jurisdiction of a state to make or modify a support order [*see 28 U.S.C. § 1738B*; *Fam. Code § 4905 et seq.*]. Therefore, unless the jurisdictional rules of these statutes have been met, California courts are without jurisdiction to make or modify a spousal or child support order. The effect is that all interstate support enforcement proceedings should be brought under UIFSA rather than the general civil action authorized by *Civ. Code § 1913*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditFull Faith & Credit StatuteFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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§ 260.54 Child Support Jurisdiction Compared to Child Custody Jurisdiction

While there are certainly strong public policy reasons why child custody issues and child support issues should always be litigated in the same forum, this has not been the state of the law under URESA and is not the state of the law under FFCCSOA and UIFSA. While there are some parallels between the child support jurisdictional rules of FFCCSOA and UIFSA and the child custody jurisdictional rules of the Parental Kidnaping Prevention Act (PKPA) [*28 U.S.C. § 1738A*] and the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJA) [*Fam. Code § 3400 et seq.*] there remain some significant differences.

One fundamental difference is that child support jurisdiction requires personal jurisdiction over the respondent-obligor [*see 28 U.S.C. § 1738B(c)(1)(B)*; *Fam. Code § 4905*]. In contrast, the PKPA and UCCJEA are subject matter jurisdiction statutes only; it is not necessary to have personal jurisdiction over a parent or child if the requirements of those statutes have otherwise been met [*In re Marriage of Leonard (1981) 122 Cal. App. 3d 443, 459, 175 Cal. Rptr. 903* (*criticized on other grounds in Kumar v. Superior Court (1982) 32 Cal. 3d 689, 699 n.12, 186 Cal. Rptr. 772, 652 P.2d 1003*)].

ILLUSTRATION:

Mother gives birth to child in California. Father lives in North Carolina. California has child custody jurisdiction under both the PKPA and UCCJEA because it is the child's home state [*28 U.S.C. § 1738A(b)(4), (c)(2)*; *Fam. Code § 3402(g), 3421(a)(1)*]. However, California cannot establish paternity and make a child support order unless it can obtain personal jurisdiction over the father under the long-arm provisions of UIFSA [*28 U.S.C. § 1738B(c)(1)(B)*; *see Fam. Code § 4905*].

In case of multiple filings, UIFSA gives priority to a child's home state [*see Fam. Code § 4908*, discussed in *§ 260.92*], but that state must still be able to exercise personal jurisdiction over the respondent [*see 28 U.S.C. § 1738B(c)(1)(B)*; *Fam. Code § 4905* (UIFSA long-arm statute), discussed in *§ 260.90[1]*].

Conversely, even though a responding state under UIFSA may have personal jurisdiction over the respondent, it will not be able to exercise child custody jurisdiction unless the requirements of the PKPA and UCCJEA are also met. In the

illustration above, if the mother initiates paternity and support proceedings in North Carolina because she cannot obtain personal jurisdiction over the father in California, the father may not invoke child custody jurisdiction in North Carolina to obtain visitation rights. California is the child's home state, and the PKPA requires that child custody determinations be made in the child's home state [*see 28 U.S.C. § 1738A(c)(2)*].

Both the PKPA and FFCCSOA include the concept of continuing, exclusive jurisdiction, as does the more recent UCCJEA; that is, that the court that makes a valid order retains jurisdiction to the exclusion of other courts as long as the child or a parent continues to reside there [*28 U.S.C. §§ 1738A(d), 1738B(d)*, discussed in *§ 260.65*]. However, each statute provides different exceptions to this rule. Under the PKPA, a state that otherwise has continuing, exclusive jurisdiction may decline to exercise its jurisdiction and cede jurisdiction to another state [*28 U.S.C. § 1738A(f)(2)*]. However, there is no right of the parties to waive the continuing, exclusive child custody jurisdiction of the decree state. Under FFCCSOA and UIFSA, each individual contestant may file a written consent to transfer continuing, exclusive child support jurisdiction to a new state [*28 U.S.C. § 1738B(e)(2)*; *Fam. Code §§ 4909(a)(2), 4960(a)(2)*], but there is no right of a court to decline to exercise its continuing, exclusive child support jurisdiction and transfer jurisdiction to another state.

ILLUSTRATION:

Parents were divorced in North Carolina, and father was given primary physical custody of child. Father and child moved to California. North Carolina has continuing, exclusive jurisdiction as to both custody and support under PKPA, UCCJEA, and FFCCSOA as long as the mother continues to reside there. The North Carolina court may relinquish child custody jurisdiction to California without the consent of the mother; however, it must retain its child support jurisdiction unless the mother consents to jurisdiction in California. In contrast, even if the mother consents to child support jurisdiction in California, the North Carolina court may, but need not, relinquish its child custody jurisdiction.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewFamily LawChild CustodyEnforcementUniform Child Custody Jurisdiction & Enforcement ActFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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22-260 California Forms of Pleading and Practice--Annotated §§ 260.55-260.59

[Reserved]

§§ 260.55[Reserved]

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22-260 California Forms of Pleading and Practice--Annotated § 260.60

§ 260.60 Governing Law

Provisions for interstate child support jurisdiction under the federal Full Faith and Credit for Child Support Orders Act (FFCCSOA) are set forth in *28 U.S.C. § 1738B.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditFull Faith & Credit StatuteFamily LawChild SupportJurisdictionGeneral OverviewFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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22-260 California Forms of Pleading and Practice--Annotated § 260.61

§ 260.61 Purposes of FFCCSOA

The federal Full Faith and Credit for Child Support Orders Act (FFCCSOA) [*see* 28 U.S.C. § 1738B; Pub. L. No. 103-383], signed by the president on October 20, 1994, and effective as of that date [*see* *In re Marriage of Lurie (1995) 33 Cal. App. 4th 658, 673, 39 Cal. Rptr. 2d 835* (also noting general rule that federal statutes operate retroactively to apply to appeals pending on effective date)], establishes national standards under which state courts are to determine their jurisdiction to issue child support orders and the effect to be given by each state to child support orders issued by the courts of other states [*see* Pub. L. No. 103-383, § (2)(b)]. The purposes of FFCCSOA are (1) to facilitate the enforcement of child support orders among the states; (2) to discourage continuing interstate controversies over child support in the interest of greater financial stability and secure family relationships for the child; and (3) to avoid jurisdictional competition and conflict among state courts in the establishment of child support orders [*see* Pub. L. No. 103-383, § (2)(c)]. If an order is validly made under FFCCSOA, it must be afforded full faith and credit by all other states, it must be enforced according to its terms, and it cannot be modified except as provided in FFCCSOA [*28 U.S.C. § 1738B(a)*].

FCCSOA is constitutional and must be enforced in California courts under the Supremacy and Full Faith and Credit clauses of the U.S. Constitution [*Kilroy v. Superior Court (1997) 54 Cal. App. 4th 793, 808-820, 63 Cal.Rptr. 2d 390]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditFull Faith & Credit StatuteFamily LawChild SupportJurisdictionGeneral OverviewFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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§ 260.62 Congressional Findings

In enacting FFCCSOA, Congress made the following findings with regard to the need for the Act [*see* Pub. L. No. 103-383, § (2)(a); *see also In re Marriage of Lurie (1995) 33 Cal. App. 4th 658, 673-674, 39 Cal. Rptr. 2d 835]* :

1. There is a large and growing number of child support cases annually involving disputes between parents who reside in different states;

2. The laws by which the courts of different jurisdictions determine their authority to establish child support orders are not uniform;

3. Those laws, along with the limits imposed by the federal system on the authority of each state to take certain actions outside its own boundaries, do the following:

a. Encourage noncustodial parents to relocate outside the states where their children and the custodial parents reside to avoid the jurisdiction of the courts of such states, resulting in an increase in the amount of interstate travel and communication required to establish and collect on child support orders and a burden on custodial parents that is expensive, time consuming, and disruptive of occupations and commercial activity;

b. Contribute to the pressing problem of relatively low levels of child support payments in interstate cases and to inequities in child support payments levels that are based solely on the noncustodial parent's choice of residence;

c. Encourage a disregard of court orders resulting in massive arrearages nationwide;

d. Allow noncustodial parents to avoid the payment of regularly scheduled child support payments for extensive periods of time, resulting in substantial hardship for the children

for whom support is due and for their custodians; and

e. Lead to the excessive relitigation of cases and to the establishment of conflicting orders by the courts of various jurisdictions, resulting in confusion, waste of judicial resources, disrespect for the courts, and a diminution of public confidence in the rule of law.

4. Among the results of the conditions described are the following:

a. The failure of the courts of the states to give full faith and credit to the judicial proceedings of the other states;

b. The deprivation of rights of liberty and property without due process of law;

c. Burdens on commerce among the States; and

d. Harm to the welfare of children and their parents and other custodians.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditFull Faith & Credit StatuteFamily LawChild SupportJurisdictionGeneral OverviewFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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§ 260.63 Preemption of State Law

FFCCSOA preempts state law regarding child support jurisdiction to the extent that it is inconsistent with FFCCSOA [*see Kilroy v. Superior Court (1997) 54 Cal. App. 4th 793, 800-806, 63 Cal. Rptr. 2d 390* (FFCCSOA applied without any consideration of potentially conflicting provisions of *URESA); In re Marriage of Lurie (1995) 33 Cal. App. 4th 658, 673-676, 39 Cal. Rptr. 2d 835* (court found no different result under FFCCSOA, but implicit in its holding is view that had FFCCSOA yielded different result, that result would be required); *cf. People v. Superior Court (Smolin) (1986) 41 Cal. 3d 758, 770, 225 Cal. Rptr. 438, 716 P.2d 991 , reversed, other grounds, State of California v. Superior Court (1987) 482 U.S. 400, 107 S. Ct. 2433, 96 L. Ed. 2d 332* (federal Parental Kidnaping Prevention Act, *28 U.S.C. § 1738A*, preempts state child custody jurisdiction law to extent it is inconsistent)].

There were major jurisdictional differences between FFCCSOA and the former Uniform Reciprocal Enforcement of Support Act (URESA) [former *Fam. Code § 4800 et seq.*], particularly in their modification provisions. Therefore, orders that were validly made under URESA are subject to reexamination under FFCCSOA [*see 28 U.S.C. § 1738B(f)*, discussed in *§ 260.65*]. The jurisdictional rules of FFCCSOA conform to those of current California law, the Uniform Interstate Family Support Act (UIFSA) [*Fam. Code § 4900 et seq.*; *see* discussion in *§ 260.91*]. However, there may be an issue of preemption with regard to the choice-of-law provisions of FFCCSOA and UIFSA. For discussion see *§§ 260.67* and *260.118*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 260.64 General Child Support Jurisdiction

Under FFCCSOA, a state's child support order is valid and entitled to full faith and credit if (1) the court that makes the order has both subject matter jurisdiction and personal jurisdiction over the contestants under its own state law; and (2) reasonable notice and opportunity to be heard is given to the contestants [*28 U.S.C. § 1738B(c)*; *see 28 U.S.C. § 1738B(b)* (contestants include parents, other parties, and any public assignee)].

The full faith and credit provision of the FFCCSOA [*28 U.S.C. § 1738B*] is constitutional under U.S. *Const., art. I, § 8, cl. 3* (congressional power to regulate interstate commerce), because child support payments between parents in different states substantially affect interstate commerce [*Harding v. Harding (2002) 99 Cal. App. 4th 626, 633-636, 121 Cal. Rptr. 2d 450* (provision also does not violate *U.S. Const., 10th Amend*--powers not conferred on federal government by Constitution reserved to states)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 260.65 Continuing Jurisdiction and Modification Jurisdiction

Once a state court makes a valid child support order, that court has continuing, exclusive jurisdiction over the order as long as the state is the child's state or the residence of any individual contestant [*28 U.S.C. § 1738B(d)*; *see Kilroy v. Superior Court (1997) 54 Cal. App. 4th 793, 805-806, 63 Cal. Rptr. 2d 390]* . That continuing jurisdiction precludes another state's modification of the order except as specifically provided under FFCCSOA [*28 U.S.C. § 1738B(a)(2), (d)*]. "Modification" under FFCCSOA means a change in a child support order that affects the amount, scope, or duration of the order and modifies, replaces, supersedes, or otherwise is made subsequent to the child support order [*28 U.S.C. § 1738B(b)*].

By contrast, the setting-off of a prior child support arrearage under a California order has been held not to be an impermissible modification of an out-of-state judgment for child support arrears. In that case, it was found simply to be a determination concerning the manner of enforcing the out-of-state judgment [*Keith G. v. Suzanne H. (1998) 61 Cal. App. 4th 1440, 1447* (order at issue did not violate either FFCCSOA or more general constitutional principle of full faith and credit)].

Under FFCCSOA's modification rules, one state's court may modify another state's child support order only if [*28 U.S.C. § 1738B(e)*]:

1. The court has jurisdiction to make such a child support order in that the party seeking modification has registered the order in a state with jurisdiction over the nonmovant for the purpose of modification [*28 U.S.C. § 1738B(e)(1)*; *see 28 U.S.C. § 1738B(i)*]; and

2. Either:

a. The court of the other state no longer has continuing, exclusive jurisdiction of the child support order because that state no longer is the child's state or the residence of any individual contestant [*see, e.g., In re Marriage of Lurie (1995) 33 Cal. App. 4th 658,*

675, 39 Cal. Rptr. 2d 835] ; or

b. Each individual contestant has filed written consent to that court's making the modification and assuming continuing, exclusive jurisdiction over the order.

A court of a State that no longer has continuing, exclusive jurisdiction of a child support order may still enforce the order with respect to nonmodifiable obligations and unsatisfied obligations that accrued before the date on which a court of another state validly modified the order [*28 U.S.C. § 1738B(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportJurisdictionContinuing JurisdictionFamily LawChild SupportJurisdictionExclusive JurisdictionFamily LawChild SupportObligationsEnforcementInterstate EnforcementGeneral OverviewFamily LawChild SupportObligationsModificationGeneral Overview

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1. Interstate Child Support Jurisdiction Under FFCCSOA

22-260 California Forms of Pleading and Practice--Annotated § 260.66

§ 260.66 Recognition of Child Support Orders

If one or more child support orders have been issued with regard to an obligor and a child, FFCCSOA sets forth rules to determine which order to recognize for purposes of continuing, exclusive jurisdiction [*28 U.S.C. § 1738B(f)*]. The order that is recognized under these rules then becomes the one entitled to continuing, exclusive jurisdiction [*28 U.S.C. § 1738B(f)(5)*].

If only one court has issued a child support order, that order must be recognized [*28 U.S.C. § 1738B(f)(1)*]. This provision suggests that if there is only one outstanding child support order, that order is valid whether or not the order was made by a court with proper jurisdiction under FFCCSOA, and thus immune from collateral attack for want of jurisdiction. However, FFCCSOA also provides that states must enforce foreign child support orders "made consistent with this section" [*28 U.S.C. § 1738B(a)(1)*], which suggests that "recognition" under FFCCSOA does not necessarily imbue the order with validity if the issuing court lacked jurisdiction under any provision of FFCCSOA.

If two or more courts have issued child support orders for the same obligor and child, and only one of the courts would have continuing, exclusive jurisdiction under FFCCSOA, the order of that court must be recognized [*28 U.S.C. § 1738B(f)(2)*]. However, if more than one court would have exclusive continuing jurisdiction, an order issued by a court in the current home state of the child [*see 28 U.S.C. § 1738B(b)* ("child's home state" means state in which child lived with parent or person acting as parent for at least six consecutive months immediately preceding time of filing of a petition or comparable pleading for support; or if child is less than six months old, state in which child lived from birth with any of them)], must be recognized. If the child's current home state is not one of the decree states, then most recently issued order must be recognized [*28 U.S.C. § 1738B(f)(3)*].

It is not readily apparent how more than one court could possess "exclusive" jurisdiction. What is probably contemplated is that under URESA, support orders from more than one state were possible. Each decree state might still be the state of residence of one individual contestant. This provision would then set forth a rule for determining the priority of multiple valid URESA orders. For further discussion, see *§ 260.94*.

If none of the courts would have continuing, exclusive jurisdiction, then the court having jurisdiction over the parties may issue its own support order, which then must be recognized [*28 U.S.C. § 1738B(f)(4)*].

The Uniform Interstate Family Support Act (UIFSA) contains a procedure for obtaining a declaration as to which support order is entitled to recognition under these same rules [*see Fam. Code § 4911*]. For discussion, see *§ 260.94[2]*. For a form for use to bring a motion for determination of the order entitled to recognition under UIFSA, see § 260.332.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 260.67 Choice of Law

[1] Statutory Rules Under FFCCSOA

In general, the law of the forum state applies in any proceeding to establish, modify, or enforce a child support order [*28 U.S.C. § 1738B(h)(1)*]. However, the law of the state that issued an order applies in interpreting the order. Interpreting the order includes determining the duration of current payments and other obligations of support [*28 U.S.C. § 1738B(h)(2)*]. Also, in a proceeding to enforce arrears under a child support order, the court must apply the statute of limitation of either the forum state or the state of the court that issued the order, whichever statute provides the longer period of limitation [*28 U.S.C. § 1738B(h)(3)*; *see Fam. Code § 4953(b)*, discussed in *§ 260.118[3]* (same rule under UIFSA)]. Because California has no limitation period for the enforcement of support [*see Fam. Code § 291(a), (b)*; *Trend v. Bell (1997) 57 Cal. App. 4th 1092, 1096-1098, 68 Cal. Rptr. 2d 54]* , support arrearages will always be enforceable in a California interstate proceeding.

[2] Duration of Duty of Support; Age of Majority

Under the choice-of-law rules of FFCCSOA, it is clear that if a second state is only enforcing a child support order of another state, it must apply the rules governing the duration of the duty of support, including the age of majority, of the state that issued the order [*28 U.S.C. § 1738B(h)(2)* (law of original decree state applies in interpreting order, and interpreting order includes determining duration of current payments and other obligations of support)]. The second phrase defining "interpreting" to include durational rules was added by Congress in its 1996 amendments to FFCCSOA]. What is not clear is whether it must also retain the decree state's rules if it has jurisdiction to modify the order after the decree state has lost its continuing, exclusive jurisdiction.

It may certainly be argued that once a new state acquires modification jurisdiction, it is no longer interpreting the prior order, but making a new one. In this case, the forum state should apply its own law, including its durational rules and age of majority. Therefore, if a new state has modification jurisdiction, a party should be able to obtain either an extension or an early termination of support by registering the order and moving to modify it in another state that has different duration rules or a different age of majority [*see In re Marriage of Lurie (1995) 33 Cal. App. 4th 658,*

673-676, 39 Cal. Rptr. 2d 835 (construing FFCCSOA prior to its 1996 amendments, as permitting California, as forum state, to terminate a duty of support when child turned 18, even though duty extended to age 21 under law of New York, the decree state)]. This result, however, is in conflict with the Uniform Interstate Family Support Act (UIFSA), which prohibits a modifying state from modifying any provision of the order that would not be modifiable in the issuing state [*see Fam. Code § 4960(c)*, discussed in *§ 260.118[2]*].

To construe FFCCSOA so as to conform it to UIFSA, It might be argued that before a state may modify a child support order of another state, it must first interpret the order. Thus, FFCCSOA would require that in this interpretation, the durational rules and the age of majority of the decree state must be applied. Under this view, the modifying court is not writing with a clean slate, but is limited to changing only those aspects of the order that are not within the realm of "interpretation" as defined in FFCCSOA. From a public-policy perspective, parents should not be able to forum shop for a different duration of support other than the one that was originally imposed on them by the court and laws of their original decree state.

[3] Amount of Support

In a proceeding for an initial support order, FFCCSOA would require the amount of child support to be computed under the child support guideline of the forum state, regardless of whether or not it is the state of the child's residence [*see 28 U.S.C. § 1738B(h)(1)*; *cf. In re Marriage of Angoco & San Nicolas (1994) 27 Cal. App. 4th 1527, 1532-1533, 33 Cal. Rptr. 2d 305]* . However, FFCCSOA would seem to clearly foreclose the ability of an obligee parent to obtain an upward modification of support simply because the obligor parent is now domiciled in a jurisdiction with higher child support guidelines [*see In re Marriage of Angoco & San Nicolas (1994) 27 Cal. App. 4th 1527, 1532-1533, 33 Cal. Rptr. 2d 305]* . As long as the custodial parent and the child remain in the decree state, that state has continuing *exclusive* jurisdiction, and the state of the obligor's domicile has no jurisdiction to enter any modification or subsequent order [*see 28 U.S.C. § 1738B(e)*, discussed in *§ 260.65*]. Thus, there can only be a modification proceeding in a new state if the child and both parents (or parties) have left the decree state (or if the noncustodial parent will give written consent to jurisdiction in his or her new state of domicile) [*see 28 U.S.C. § 1738B(e)*].

PRACTICE TIP:

Counsel representing obligors in UIFSA actions need to be particularly wary of the consent exception. Do not confuse personal jurisdiction with modification jurisdiction under FFCCSOA. Obviously, the jurisdiction of the obligor's domicile has personal jurisdiction over him or her, but it may not have FFCCSOA jurisdiction. Don't execute a consent to the court's jurisdiction proposed by the obligee or district attorney without considering all choice-of-law issues and discussing them with your client.
Commentary by the Publisher's Editorial Staff

If the decree state has lost its continuing, exclusive jurisdiction, modification proceedings may be brought in the state of the obligor's domicile, or in the state of the obligee's and child's domicile if personal jurisdiction over the obligor can be obtained there [*see 28 U.S.C. § 1738B(c)(1)(B), (e)(1)*; *see also In re Marriage of Lurie (1995) 33 Cal. App. 4th 658, 673-676, 39 Cal. Rptr. 2d 835]* . In such a case, it would appear that FFCCSOA requires that child support be computed under the guideline in effect in the forum state [*see 28 U.S.C. § 1738B(h)(1)*; *cf. Fam. Code § 4917(b), 4953*, discussed in *§ 260.118[1]* (under UIFSA, law of issuing state governs amount of support)].

PRACTICE TIP:

While computing support under the guideline of the forum state makes complete sense if all of the parties are now domiciled there, in other situations it permits both parties to forum shop in search of the most favorable guideline. For example, consider *Marriage of Angoco and San Nicolas*, noted above. Mother and child were domiciled in Guam, a low-support jurisdiction, while father was domiciled in California, arguably a high-support jurisdiction, at least in this case. Suppose that the existing child support order had been issued in another state that had lost its continuing, exclusive jurisdiction because

everybody had moved away. Father could initiate modification proceedings in Guam, while mother could initiate them in California. FFCCSOA does not address the potential jurisdictional conflict in this case, and the forum shopping, race to the courthouse, and potential for multiple conflicting orders are just what the statute is supposed to deter. *Commentary by the Publisher's Editorial Staff*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportJurisdictionContinuing JurisdictionFamily LawChild SupportJurisdictionExclusive JurisdictionFamily LawChild SupportObligationsComputationGeneral OverviewFamily LawChild SupportObligationsEnforcementInterstate EnforcementGeneral OverviewFamily LawChild SupportObligationsModificationAttainment of Majority

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[Reserved]

§§ 260.68[Reserved]

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The legislature has revised various provisions of UIFSA [Stats. 2002, ch. 349], but these revisions will not become operative before July 1, 2004, at the earliest, and only if (1) Congress amends *42 U.S.C. § 666(f)* to statutorily require or authorize, in connection with the approval of state plans for purposes of federal funding, the adoption of UIFSA as promulgated by the National Conference of Commissioners on Uniform State Laws in 2001, or (2) the federal office of Child Support Enforcement or the Secretary of Health and Human Services approves, either generally or with specific application to California, a waiver, exemption, finding, or other indicia of regulatory approval of UIFSA, as promulgated by the National Conference of Commissioners on Uniform State Laws in 2001, in connection with the approval of state plans for purposes of federal funding [Stats. 2002, ch. 349, § 47]. In general, the revisions address personal jurisdiction, simultaneous proceedings, jurisdiction to modify support orders, and determinations of paternity and the controlling child support order. They also transfer specified enforcement responsibilities from the Attorney General to the Department of Child Support Enforcement. These revisions will be included in a subsequent release for this publication if they become operative.

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22-260 California Forms of Pleading and Practice--Annotated § 260.80

§ 260.80 Governing Law

California's version of the Uniform Interstate Family Support Act is set forth in *Fam. Code § 4900 et seq.* The federal mandate for its enactment as a condition of California receiving federal child support enforcement funds is set forth in *42 U.S.C. § 666(f)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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§ 260.81 Federal Compulsion For UIFSA

As noted in the historical discussion (§ 260.53[1]), the Uniform Interstate Family Support Act is a uniform act that must be enacted by the states as a condition of receiving federal child support enforcement funds [*see 42 U.S.C. § 666(f)*]. Further, UIFSA must be enacted as "approved by the American Bar Association on February 9, 1993, and as in effect on August 22, 1996, including any amendments officially adopted as of such date by the National Conference of Commissioners on Uniform State Laws" [*42 U.S.C. § 666(f)*]. This language would seem to preclude states from adopting their own additions to or modifications of UIFSA. Hence, although UIFSA is state law, it is subject to the political process of the state only at the cost of a loss of significant federal funds [*42 U.S.C. § 609(a)(8)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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§ 260.82 General Structure of UIFSA

UIFSA is a complete replacement for the Uniform Reciprocal Enforcement of Support Act, which had previously been in force in all of the states, including California [*see* former *Fam. Code § 4800 et seq.*]. Unlike URESA, UIFSA contains jurisdictional rules designed to ensure that only one state at a time has jurisdiction to address child support, whether in the context of making an initial child support order or of modifying the order of another state [*see Fam. Code § 4905 et seq.*; discussions in *§§ 260.91* and *260.98*]. UIFSA also includes a mechanism for obtaining a support order in an interstate proceeding if no such order is in place [*Fam. Code § 4935*, discussed in *§ 260.96[1]*], *below*]; procedures for enforcing income-withholding orders in other states without judicial proceedings [*see Fam. Code § 4940 et seq.*, discussed in *§ 260.140* et seq.]; and registration procedures for the enforcement of the support order of one state in another [*see Fam. Code § 4950 et seq.*, discussed in *§ 260.150* et seq.]. UIFSA also expressly authorizes determination of parentage in proceedings under it [*see Fam. Code § 4965*, discussed in *§ 260.97*, *below*] and provides procedures for interstate extradition for criminal failure to provide support *see Fam. Code §§ 4970*, *4971*, discussed in *§ 260.170* et seq.].

UIFSA may perhaps best be seen as the union of the jurisdictional principles of the Full Faith and Credit for Child Support Orders Act (FFCCSOA) [*compare Fam. Code § 4905 et seq. with 28 U.S.C. § 1738B*; *see § 260.60* et seq.] with the registration procedure for interstate orders in URESA [*compare Fam. Code § 4950 et seq. with* former *Fam. Code § 4848 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportGeneral OverviewFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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§ 260.83 UIFSA Compared to FFCCSOA

There is little practical difference between UIFSA and the Full Faith and Credit for Child Support Orders Act (FFCCSOA) [*28 U.S.C. § 1738B*; *see § 260.60* et seq.]. FFCCSOA is a federal statute that implements the Full Faith and Credit Clause of the federal Constitution [U.S. Const., art. IV, § I]. UIFSA is state law, albeit, state law that is federally compelled [*see 42 U.S.C. § 666(f)*; *see § 260.53[1]*]. FFCCSOA addresses jurisdiction only, while UIFSA includes jurisdictional rules within a complete procedural scheme for addressing support orders in an interstate context. However, the jurisdictional rules of both statutes are the same. Both present the concept of continuing, exclusive jurisdiction as a vehicle for ensuring that only one state at a time has jurisdiction to make or modify a child support order, and both provide the same rules for determining the state with continuing, exclusive jurisdiction [*compare 28 U.S.C. § 1738B(e)*, discussed in *§ 260.65 with Fam. Code § 4909*, discussed in *§ 260.91*]. Further, both provide the same rules for determining which of multiple child support orders for the same obligor and children is entitled to recognition [*compare 28 U.S.C. § 1738B(f)*, discussed in *§ 260.66 with Fam. Code § 4911*, discussed in *§ 260.94*].

One possible issue concerns the choice-of-law provisions of the two statutes [*compare 28 U.S.C. § 1738B(h) with Fam. Code §§ 4917, 4953*]. For further discussion of this issue, see *§§ 260.67* and *260.118*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditFull Faith & Credit StatuteFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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§ 260.84 UIFSA Compared to URESA

[1] Limits on State Court Subject Matter Jurisdiction

The principal difference between UIFSA and the Uniform Reciprocal Enforcement of Support Act (URESA), which it replaced, is that UIFSA limits state court jurisdiction to enter and modify child support orders, while URESA did not. Under URESA, once a support order was registered in another state, the order essentially was converted into an order of the state of registration. It was subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a support order of the registering state [former *Fam. Code § 4853(a)*]. Under this approach, the registering state could modify the order once it was properly before its courts for enforcement [*see* former *Fam. Code § 4845(a)*; *In re Marriage of Aron (1990) 224 Cal. App. 3d 1086, 1095-1096, 274 Cal. Rptr. 357* (modification permitted in subsequent proceedings on writ of execution to enforce registered judgment)].

This situation gave rise to the question of "supersession." Under URESA, the general rule was that a modification of another states support order did not nullify (supersede) the prior order unless otherwise specifically provided by the modifying court [former *Fam. Code § 4840*]. Therefore, unless supersession was found, the original order was still enforceable in the state that rendered it, even though only the modification would be enforceable in the second state. It was not uncommon for the courts of the decree state to refuse to construe the modification as a supersession and to enforce the original order according to its terms [*see, e.g., In re Marriage of Ward (1994) 29 Cal. App. 4th 1452, 1456-1457, 35 Cal. Rptr. 2d 32* (California refused to find supersession by Colorado court that modified California order; found California order to still be enforceable according to its terms)].

The primary focus of UIFSA is to avoid this type of situation. Under the concept of continuing, exclusive jurisdiction, only one state at a time has jurisdiction to make or modify a child support order [*see Fam. Code § 4909*, discussed in *§ 260.91, below*]. The registering state may enforce another state's child support order, but may not modify the order unless the decree state has lost its continuing, exclusive jurisdiction [*see Fam. Code §§ 4959, 4960*, discussed in *§ 260.98, below*]. As with FFCCSOA (*see § 260.65*), continuing, exclusive jurisdiction is lost only after both parents and the child no longer reside in the decree state, or if all parties consent to jurisdiction in the registering state [*Fam. Code §*

4909(a)].

[2] Personal Jurisdiction; Long-Arm Statute

UIFSA includes a statute that specifies when the court of one state may exercise personal jurisdiction over a child support obligor who is domiciled in another state [*see Fam. Code § 4905*, discussed in *§ 260.90, below*]. URESA did not address any aspect of personal jurisdiction.

[3] Interstate Transfer of Evidence and Discovery

UIFSA includes provisions streamlining the receipt of evidence across state lines by use of modern technology [*see Fam. Code § 4930*, discussed in *§ 260.119, below*]. It also provides for interstate assistance in obtaining discovery [*see Fam. Code § 4932*, discussed in *§ 260.120, below*]. URESA had no similar provisions.

[4] Private Counsel and Attorney Fees

UIFSA expressly authorizes any individual to employ private counsel for representation in UIFSA proceedings [*see Fam. Code § 4923*, discussed in *§ 260.121, below*]. It does not, however, expressly address the appointment of counsel to represent the child. URESA provided expressly that privately retained counsel could represent an obligee in any proceeding under it [former *Fam. Code § 4805*]. It did not specifically address the obligor's right to employ counsel, though such a right was presumed and provided in California.

URESA provided that no party could obtain attorney fees from the other except on a showing of bad faith [former *Fam. Code § 4803(b)*; *see In re Marriage of Hubner (1988) 205 Cal. App. 3d 660, 669-670, 252 Cal. Rptr. 428]* . UIFSA provides for attorney fees to the obligee as prevailing party, but not against the obligee except as provided by other law [*see Fam. Code § 4927(b)*, discussed in *§ 260.121, below*].

[5] Nonjudicial Enforcement of Income-Withholding Orders

UIFSA provides for the enforcement of income-withholding orders by service on an employer in another state without the necessity of registration or of any judicial procedure whatsoever [*Fam. Code § 4940*; *see § 260.140* et seq.]. Under URESA, an income-withholding order was enforceable through the registration procedure [former *Fam. Code § 4849*; *see* former *Fam. Code § 4802(p)* ("foreign support order" defined as including foreign order for assignment of wages for satisfaction of support order)].

[6] Proceeding By Complaint or Registration

URESA included two means of proceeding; by complaint [*see* former *Fam. Code § 4824 et seq.*] and by registration [*see* former *Fam. Code § 4848 et seq.*]. An obligee seeking enforcement in California of an existing support order could proceed by either complaint or registration [*see* former *Fam. Code §§ 4822, 4848*]. However, if a duty of support had not been reduced to a judgment or order, the obligee had to seek enforcement of that duty by complaint rather than by registration, because the registration procedure was limited to enforcing duties of support based on existing orders [*see* former *Fam. Code § 4848*]. The complaint procedure was somewhat cumbersome, with steps that followed those in a traditional civil action.

UIFSA retains the essential structure of URESA's registration procedure for existing orders [*see Fam. Code § 4850 et seq.*; *see § 260.150* et seq.], but does not include a complaint procedure. If there is currently no support order in place, UIFSA does provide for the establishment of an initial support order [*see Fam. Code § 4935*, discussed in *§ 260.96[1]*; *see also Fam. Code § 4901(c)* ("duty of support" is obligation imposed or imposable by law to provide support for a child, spouse, or former spouse, including an unsatisfied obligation to provide support)]. But whatever remedy is sought, any proceeding under UIFSA is commenced by the filing of a petition, either in the initiating state for

forwarding to the responding state, or in any state in which the court can obtain personal jurisdiction over the respondent [*see Fam. Code § 4915(b), (c)*, discussed in *§ 260.112, below*]. The same form of petition is to be used, regardless of the nature of the proceeding or the particular remedy sought [*see Fam. Code § 4926*, discussed at *§ 260.113, below*; *see also § 260.312* (Uniform Support Petition)].

Further, any individual may initiate any proceeding under UIFSA [*see Fam. Code § 4915(c)*, discussed at *§ 260.112, below*]. Under URESA, only an obligee could seek its remedies, and only through the auspices of a governmental support enforcement agency [*see* former *Fam. Code §§ 4825, 4852*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Reciprocal Enforcement of Support Act

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§ 260.85 UIFSA Compared to SSMJA

The Sister State Money-Judgments Act (SSMJA) [Code Civ. Proc. § 1710 et seq.; *see* Ch. 318, *Judgments*] provides a method of filing a general civil action for establishing an out-of-state money judgment as a judgment enforceable in California [*see Epps v Russell (1976) 62 Cal. App. 3d 201, 203, 133 Cal. Rptr. 30]* . However, the SSMJA is not available to enforce sister state support orders as defined in *Fam. Code § 155* [*Code Civ. Proc. § 1710.10(c)*].

Fam. Code § 155 defines a support order as "a judgment or order of support in favor of an obligee, whether temporary or final, or subject to modification, termination, or remission, regardless of the kind of action or proceeding in which it is entered." This is still the definition of "support order" that was found in URESA [*compare Fam. Code § 155 with* former *Fam. Code § 4802(k)*; *see also* former *Code Civ. Proc. § 1653(k)*].

There is conflicting case law on what constituted a "support order" for purposes of URESA. One line held that a sister state judgment ordering payment of support arrearages was a support order and enforceable under the URESA registration procedures, and therefore not enforceable under SSMJA, even if it was a nonmodifiable final judgment for a liquidated sum of money [*Morris v. Cohen (1983) 149 Cal. App. 3d 507, 513-514, 196 Cal. Rptr. 834* ; *see Neuman v. Barbera (1985) 164 Cal. App. 3d 437, 442, 210 Cal. Rptr. 556]* . However, at least two other appellate courts held that a support order under URESA did not include a judgment for a liquidated amount of arrearages; and because such a money judgment is constitutionally entitled to full faith and credit in other states, it must also be so entitled in California [*Liebow v. Superior Court (1981) 120 Cal. App. 3d 573, 580-581, 175 Cal. Rptr. 26* ; *Fishman v. Fishman (1981) 117 Cal. App. 3d 815, 822-823, 173 Cal. Rptr. 59]* .

The definition of a "support order" under UIFSA expressly encompasses arrearages and reimbursement [*Fam. Code § 4901(u)*, discussed in *§ 260.174*]. Therefore, should the reference in the SSMJA be construed as referring to UIFSA rather than the old URESA definition in *Fam. Code § 155*, or should *Fam. Code § 155* be amended to bring it into conformity with UIFSA, the former view would prevail, and support arrearages would not be enforceable under SSMJA.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditFull Faith & Credit StatuteFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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[Reserved]

§§ 260.86[Reserved]

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22-260 California Forms of Pleading and Practice--Annotated § 260.90

§ 260.90 Personal Jurisdiction

[1] Bases for Personal Jurisdiction Over Nonresident

UIFSA contains a long-arm statute the broadly extends personal jurisdiction over nonresidents in support proceedings. In any proceeding to establish, enforce, or modify a support order or to determine parentage, a California court may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if any of the following apply [*Fam. Code § 4905*]:

1. The individual is personally served with notice within this state.

2. The individual submits to the jurisdiction of this state by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction.

3. The individual resided with the child in this state.

4. The individual resided in this state and provided prenatal expenses or support for the child.

5. The child resides in this state as a result of the acts or directives of the individual.

6. The individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse [*see also Fam. Code § 7620(a)* (same provision in Uniform Parentage Act; *see* Ch. 412, *Paternity*].

7. The individual has filed a declaration of paternity under *Fam. Code § 7570 et seq.* (*see* Ch. 412, *Paternity*).

8. There is any other basis consistent with the California and United States Constitutions for the exercise

of personal jurisdiction. The constitutional limitations on the exercise of personal jurisdiction are discussed in Ch. 323, *Jurisdiction: Personal* .

[2] Procedure When Exercising Jurisdiction Over Nonresident

The intent of UIFSA's long-arm statute is to reduce the need for interstate proceedings under UIFSA. If California as a forum state can exercise personal jurisdiction over a nonresident parent, then it may not be necessary to initiate proceedings designed to bind the respondent parent in another state. In this sense, a proceeding involving a nonresident parent over whom long-arm jurisdiction is exercised under UIFSA is a UIFSA proceeding in only a limited sense. While the discovery and evidentiary provisions of UIFSA may be used [*see Fam. Code §§ 4930, 4932*, discussed in *§§ 260.119* and *260.120, below*], in all other respects, UIFSA procedures do not apply. A California court is to apply its own procedural and substantive law, including the rules on choice of law other than those of UIFSA [*Fam. Code § 4906*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditFull Faith & Credit StatuteFamily LawChild SupportJurisdictionPersonal JurisdictionFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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22-260 California Forms of Pleading and Practice--Annotated § 260.91

§ 260.91 Continuing, Exclusive Jurisdiction

[1] Basic Concept

As with the Full Faith and Credit for Child Support Orders Act (FFCCSOA) [*28 U.S.C. § 1738B*; *see § 260.60* et seq.], the central jurisdictional feature of UIFSA is the concept of continuing, exclusive jurisdiction. Under UIFSA, a court that makes a valid child support order retains exclusive jurisdiction to modify the order as long as the requirements for continuing, exclusive jurisdiction remain fulfilled. The court of another state may enforce a child support order registered in that state, but may not modify it unless the decree state has lost its continuing, exclusive jurisdiction [*Fam. Code § 4959*; *see Fam. Code § 4960* and discussion at *§ 260.98, below*].

[2] Non-UIFSA Jurisdictional Requirements

The first requirement for continuing, exclusive jurisdiction is that the order must be made consistent with California law [*Fam. Code § 4909(a), (f)*]. Thus, any jurisdictional requirements that are imposed by California law other than UIFSA must also be met. Hence, there must be personal jurisdiction over all parties (*see § 260.90*), and the order must be made in some proceeding in which the court has subject matter jurisdiction over support orders. Jurisdiction to order child support is discussed in Ch. 394, *Parent and Child* and jurisdiction to order spousal support is discussed in Ch. 225, *Dissolution of Marriage: Spousal Support* .

[3] California's Continuing, Exclusive Jurisdiction Over Its Child Support Orders

If a California court has jurisdiction to make a child support order, it has continuing, exclusive jurisdiction [*Fam. Code § 4909(a)*]:

1. As long as California remains the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued; or

2. Until all of the parties who are individuals have filed written consents with the California court for a

tribunal of another state to modify the order and assume continuing, exclusive jurisdiction.

Simply stated, the state that makes a child support order retains the exclusive jurisdiction to modify that order until either all of the parties have left the state or have consented to transfer jurisdiction to another state [*see Stone v. Davis (2007) 148 Cal. App. 4th 596, 601-602, 55 Cal. Rptr. 3d 833* (written consent filed with issuing court is required to transfer continuing, exclusive jurisdiction to another state, and parties' actions in filing matters in another state does not establish their consent to other state's gaining continuing, exclusive jurisdiction)].

[4] California's Continuing, Exclusive Jurisdiction Over Its Spousal Support Orders

If a California court has jurisdiction to make a spousal support order, it has continuing, exclusive jurisdiction over the order throughout the existence of the support obligation. A California court may not modify a spousal support order issued by a tribunal of another state having continuing, exclusive jurisdiction over that order under the law of that state [*Fam. Code § 4909(f)*; *see Lundahl v. Telford (2004) 116 Cal. App. 4th 305, 312-318, 9 Cal. Rptr. 3d 902* (under UIFSA, spousal support obligor who seeks modification of support order issued by another state must make modification motion in that state)]. Thus, there is effectively no longer any right for one court to modify a spousal support order made by the court of another state [*see Fam. Code § 4910(c)* (If California lacks continuing, exclusive jurisdiction over spousal support order, it may not serve as responding tribunal to modify spousal support order of another state)]. Neither loss of contacts with the decree state nor consent constitute grounds for a new state to assume jurisdiction over spousal support. The decree state will always have "continuing, exclusive jurisdiction over that order under the law of that state" because that state is essentially compelled by federal law to have enacted UIFSA, and therefore, will have continuing, exclusive jurisdiction over the order throughout the existence of the support obligation [*Fam. Code § 4909(f)*].

[5] Loss of Continuing, Exclusive Child Support Jurisdiction to Another State

A court that validly modifies the child support order of another state under UIFSA becomes the tribunal of continuing, exclusive jurisdiction [*Fam. Code § 4960(d)*]. Therefore, if a California child support order is modified by a tribunal of another state under UIFSA or a law substantially similar to UIFSA, California loses its continuing, exclusive jurisdiction [*Fam. Code § 4909(b), (c)*]. On registration, California must recognize the modifying order of the other state for purposes of enforcement [*Fam. Code § 4961*], and it may no longer modify the order [*Fam. Code § 4909(b)*]. This statute appears to be poorly worded. It states that California "*may not exercise its continuing jurisdiction to modify the order* if the order has been modified by a tribunal of another state pursuant to this chapter or a law substantially similar to this chapter." But the order may be modified by the other state under UIFSA only if California *has lost* its continuing, exclusive jurisdiction [*see Fam. Code §§ 4959, 4960* (UIFSA §§ 610, 611)]. Therefore, California no longer will have any continuing jurisdiction to modify the order.

Also, if a California support order is validly modified by another state, California's enforcement jurisdiction is limited. California may still entertain enforcement proceedings with regard to the order, but it may only [*Fam. Code §§ 4909(c), 4961*]:

1. Enforce the order that was modified as to amounts that accrued before the modification;

2. Enforce only nonmodifiable aspects of that order; and

3. Provide other appropriate relief for violations of that order that occurred before the effective date of the modification.

In other words, once another state assumes continuing, exclusive jurisdiction because the parties have all either left California or consented to jurisdiction in another state, California's modification jurisdiction is lost and its enforcement

jurisdiction is limited to those matters expressly provided for by UIFSA.

[6] California's Recognition of Continuing, Exclusive Jurisdiction of Another State

California courts must recognize the continuing, exclusive jurisdiction of a tribunal of another state that has issued a child support order under UIFSA or a law substantially similar to UIFSA [*Fam. Code § 4909(d)*]. This recognition means that California may not modify the order, even if it is registered for enforcement in California, unless the decree state has lost its continuing, exclusive jurisdiction [*Fam. Code § 4959*; *see Fam. Code § 4960* and discussion in *§ 260.98, below*].

[7] Effect of Temporary Child Support Order

If addressing child support in the first instance, a California court may issue a temporary support order on a showing of probable paternity [*see Fam. Code § 4935(b)*, discussed in *§ 260.96[2], below*]. However, a temporary support order issued ex parte or pending resolution of a jurisdictional conflict does not create continuing, exclusive jurisdiction in the issuing state [*Fam. Code § 4909(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportJurisdictionContinuing JurisdictionFamily LawChild SupportJurisdictionExclusive JurisdictionFamily LawChild SupportJurisdictionPersonal JurisdictionFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportObligationsTypesTemporary Support

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22-260 California Forms of Pleading and Practice--Annotated § 260.92

§ 260.92 Simultaneous Proceedings for Initial Child Support Order in Two or More States

Under UIFSA, it is possible for more than one state to have personal jurisdiction to address child support in the first instance.

ILLUSTRATION:

Mother and father met in California, had a relationship here, and a child was conceived here. Father then moved to North Carolina. Mother traveled to North Carolina with the child and they all lived there together for a few months. Mother and child subsequently returned to California. Under UIFSA, both California and North Carolina have long-arm jurisdiction over the nonresident parent; California because the child was conceived there, and North Carolina because the nonresident parent cohabited with the child there [*see Fam. Code § 4905(a)(3), (6)*]. Consequently, under UIFSA, child support proceedings may be initiated in either state.

If proceedings are initiated in more than one state, UIFSA provides a preference for the child's home state if there is one [*see Fam. Code § 4908(a)(3)*]. The child's home state is the state in which a child lived with a parent or a person acting as parent for at least six consecutive months immediately preceding the time of filing of a petition or comparable pleading for support. In the case of a child who is less than six months old, the state in which the child lived from birth with any parent or person acting as parent is the home state. A period of temporary absence of any of them is counted as part of the six-month or other period [*Fam. Code § 4901(d)*]. However, in order for the home-state preference to apply to exclude the jurisdiction of any other state in which proceedings were commenced earlier, the home-state proceeding must be filed before the expiration of the time allowed in the other state for filing a responsive pleading challenging the exercise of jurisdiction by that state [*Fam. Code § 4908(a)(1)*], and the contesting party must timely challenge the exercise of jurisdiction in the other state [*Fam. Code § 4908(a)(2)*; *see In re Marriage of Newman (2000) 80 Cal. App. 4th 846, 851, 95 Cal. Rptr. 2d 691* (*Fam. Code § 4908(a)(2)* does not divest California court from making spousal or child support order even if dissolution is pending in or has been granted by another state and California spouse has not challenged that state's jurisdiction, as long as out-of-state case did not raise support issue)]. If all of these conditions have been met, the state in which proceedings were first initiated may not exercise jurisdiction to establish a support

order and must cede jurisdiction to the child's home state [*Fam. Code § 4908(b)*].

PRACTICE TIP:

Note that in the illustration above, there may be no home state. California will not become the child's home state until after six monthshave passed after the mother's and child's return. Hence, is important for the mother to win the race to the court house and file first. Even if California is the child's home state, if the father files first in North Carolina and no challenge is made to jurisdiction there, the North Carolina order is valid, and North Carolina will be the state of continuing, exclusive jurisdiction even though the child remains with the mother in California. Hence, it is extremely important for the home-state parent to move quickly to challenge jurisdiction in the other state. *Commentary by the Publisher's Editorial Staff*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 260.93 Enforcement and Modification of Support by Court of Continuing, Exclusive Jurisdiction

A California court may serve as an initiating tribunal to request a tribunal of another state to enforce or modify a support order issued in that state [*Fam. Code § 4910(a)*; *see Fam. Code § 4901(h), (i)* (definitions of "initiating state" and "initiating tribunal"); *see also* discussion at *§ 260.111*]. A California court that has continuing, exclusive jurisdiction over a support order may act as a responding tribunal to enforce or modify the order [*Fam. Code § 4910(b)*; *see Fam. Code § 4901(p), (q)* (definitions of "responding state" and "responding tribunal"); *see also* discussion at *§ 260.111, below*]. If a party subject to the continuing, exclusive jurisdiction of the issuing state no longer resides there, in subsequent proceedings the tribunal may receive evidence from another state and obtain discovery through a tribunal of another state [*Fam. Code § 4910(b)*; *see Fam. Code §§ 4930, 4932*, discussed at *§§ 260.119* and *260.120, below* ; *see also Fam. Code § 4901(i), (j)* ("issuing state" is state in which tribunal issues a support order or renders a judgment determining parentage)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportJurisdictionContinuing JurisdictionFamily LawChild SupportJurisdictionExclusive JurisdictionFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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§ 260.94 Recognition of Controlling Child Support Order

[1] Rules for Determining Which Order Controls

If a proceeding is brought under UIFSA and only one tribunal has issued a child support order, the order of that tribunal controls and must be so recognized [*Fam. Code § 4911(a)*]. This recognition presumes that the issuing tribunal had jurisdiction [*see Fam. Code § 4952(c)*, discussed in *§ 260.151* (California court must recognize and enforce registered order if issuing tribunal had jurisdiction); *see also 28 U.S.C. § 1738B(a)*, discussed in *§ 260.64* (order made in violation of jurisdiction rules of FFCCSOA need not be extended full faith and credit in other states)].

If two or more child support orders have been issued by California or another state with regard to the same obligor and child, California must apply the following rules in determining which order to recognize for purposes of continuing, exclusive jurisdiction [*Fam. Code § 4911(b)*]:

1. If only one of the tribunals would have continuing, exclusive jurisdiction under UIFSA, the order of that tribunal controls and must be so recognized.

2. If more than one of the tribunals would have continuing, exclusive jurisdiction under UIFSA, an order issued by a tribunal in the current home state of the child controls and shall be so recognized. But if an order has not been issued in the current home state of the child, the order most recently issued controls and shall be so recognized.

3. If none of the tribunals would have continuing, exclusive jurisdiction under UIFSA, and California has jurisdiction over the parties shall issue, it must issue a child support order, which controls and must be so recognized.

The second situation above raises some difficulties. Under UIFSA, it is impossible for more than one state to have continuing, *exclusive* jurisdiction (*see § 260.91[1], above*). Hence, this rule and its preference for the home state and

secondary preference for the most recent order would never come into play. However, this rule is somewhat unartfully addressed to the possibility that under URESA, more than one state may have issued a valid child support order for the same obligor and child (*see § 260.83*) and each state remains the current domicile of one parent. In this situation, it might be said that under UIFSA, each state has some claim to continuing, exclusive jurisdiction [*see* Sampson, Uniform Interstate Family Support Act, Unofficial Annotations to UIFSA § 207, pp. 123-124]. Even in this situation, it really can't be said that both states actually have continuing, exclusive jurisdiction under UIFSA. Applying the rules of UIFSA and FFCCSOA, the jurisdiction of the second state to issue an order would depend on whether the first state had lost jurisdiction. If not, a court could find the second order to be invalid, that is, that that state would not have continuing, exclusive jurisdiction under UIFSA. And if the second order was issued after October 20, 1994, the effective date of FFCCSOA, it is clearly invalid and not entitled to full faith and credit (*see § 260.64*).

ILLUSTRATION:

Father, mother, and child all lived in North Carolina. The parents separated, and a child support order was issued by a North Carolina court. Father then moved to California, where mother registered her North Carolina order under URESA and obtained a modification increasing support to the California guideline level, which was permitted under URESA [*see In re Marriage of Angoco & San Nicolas (1994) 27 Cal. App. 4th 1527, 33 Cal. Rptr. 2d 305]* . The North Carolina order is to be recognized under UIFSA as long as it is still the child's home state. If the child no longer is domiciled in North Carolina, then the California order is to be recognized because it is the more recent order.

If there were multiple orders from California and one or more other states for the same obligor and child, amounts collected and credited for a particular period under a support order issued by a tribunal of another state must be credited against the amounts accruing or accrued for the same period under the California support order [*Fam. Code § 4913*].

[2] Motion to Determine Controlling Order

If two or more child support orders have been issued for the same obligor and child and if the obligor or the individual obligee resides in California, a party may request a California court to determine which order controls and must be so recognized. The request must be accompanied by a certified copy of every support order in effect. The requesting party must give notice of the request to each party whose rights may be affected by the determination [*Fam. Code § 4911(c)*]. For a form for use to bring a motion for determination of the order entitled to recognition under UIFSA, see *§ 260.313*.

The state that issued the order that is determined to be the controlling order is the one that then must be viewed as having continuing, exclusive jurisdiction [*Fam. Code § 4911(d)*]. In making the determination, or in issuing a new child support order if no state is determined to have continuing, exclusive jurisdiction [*see Fam. Code § 4911(b)(3)*], the California court must state in that order the basis on which it made its determination [*Fam. Code § 4911(e)*].

Within 30 days after issuance of an order determining the identity of the controlling order, the party obtaining the order must file a certified copy of it with each tribunal that issued or registered an earlier order of child support. A party who obtains the order and fails to file a certified copy is subject to appropriate sanctions by a tribunal in which the issue of failure to file arises. However, the failure to file does not affect the validity or enforceability of the controlling order [*Fam. Code § 4911(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 260.95 Multiple Child Support Orders for Two or More Obligees

In responding to multiple registrations or petitions for enforcement of two or more child support orders in effect at the same time with regard to the same obligor and different individual obligees, at least one of which was issued by a tribunal of another state, a California court must enforce those orders in the same manner as if the multiple orders had been issued by a California court [*Fam. Code § 4912*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsEnforcementGeneral Overview

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§ 260.96 Jurisdiction to Issue Initial Support Order

[1] When California May Issue Initial Order

Under *Fam. Code § 4935*, if a support order entitled to recognition under UIFSA (*see § 260.94*) has not been issued, California, as responding state, may issue a support order only if the individual seeking the order resides in another state or the support enforcement agency seeking the order is located in another state [*Fam. Code § 4935(a)*]. On finding, after notice and opportunity to be heard, that an obligor owes a duty of support, the court must issue a support order directed to the obligor and may issue any other orders authorized under UIFSA [*Fam. Code § 4935(c)*; *see Fam. Code § 4919*, discussed in *§ 260.115*, *below*].

At first glance, *Section 4935* might seem to foreclose the possibility of a party obtaining a support order in his or her own jurisdiction of domicile. However, it must be read in concert with the long-arm personal jurisdiction provisions [*see Fam. Code § 4905*, discussed at *§ 260.90[1]*]. Section 4935 applies only if there is no basis for obtaining personal jurisdiction over the opposing party in one's home state. Otherwise, the long-arm statute would serve no purpose. As such, Section 4935 merely states a rule that if there is no basis for long-arm jurisdiction, one cannot bring a UIFSA proceeding for an initial support order in one's home state.

[2] Temporary Support Order

A California court in addressing a petition for an initial support order may issue a temporary child support order if any of the following conditions apply [*Fam. Code § 4935(b)*]:

1. The respondent has signed a verified statement acknowledging parentage.

2. The respondent has been determined by or pursuant to law to be the parent.

3. There is other clear and convincing evidence that the respondent is the child's parent.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsFamily LawChild SupportJurisdictionPersonal JurisdictionFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportObligationsTypesTemporary Support

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22-260 California Forms of Pleading and Practice--Annotated § 260.97

§ 260.97 Jurisdiction to Determine Parentage

A California court may serve as an initiating or responding tribunal (*see § 260.111, below*) in a proceeding brought under UIFSA or a law or procedure substantially similar to UIFSA, URESA, or RURESA to determine that the petitioner or the respondent is the parent of a particular child [*Fam. Code § 4965(a)*; *see § 260.118[4], below*; applicable law]. For the federal form of affidavit for use in establishing paternity in a UIFSA proceeding, see*§ 260.314*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewFamily LawChild SupportJurisdictionSubject Matter JurisdictionFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawPaternity & SurrogacyGeneral Overview

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§ 260.98 Modification Jurisdiction

[1] On Motion by Nonresident Petitioner

Unless all of the individual parties are now living in California [*see Fam. Code § 4962*, discussed at *[2], below*], after a child support order issued in another state has been registered in California (*see § 260.150*), the California court may modify that order after notice and hearing it finds that one of the following requirements is met [*Fam. Code § 4960(a)*]:

> 1. The child, the individual obligee, and the obligor do not reside in the issuing state, a petitioner who is a not a California resident seeks modification, and the respondent is subject to the personal jurisdiction in California; or
>
> 2. The child, or an individual party is subject to personal jurisdiction in California, and all of the parties who are individuals have filed written consents in the issuing tribunal for a California court to modify the support order and assume continuing, exclusive jurisdiction over the order. However, if the issuing state is a foreign jurisdiction that has not enacted a law or established procedure substantially similar to the procedures under UIFSA, the consent otherwise required of an individual residing in California is not required for California to assume jurisdiction to modify the child support order. A consent that is signed by the parties' attorneys, but not by the parties themselves, is valid and enforceable [*Knabe v. Brister (2007) 154 Cal. App. 4th 1316, 1324, 65 Cal. Rptr. 3d 493*].

Thus, modification jurisdiction requires establishing that the decree state has lost its continuing, exclusive jurisdiction either because no party continues to reside there or by the consent of all parties (*§ 260.91*) [*see In re Marriage of Amezquita & Archuleta (2002) 101 Cal. App. 4th 1415, 1419-1422, 124 Cal. Rptr. 2d 887* (California court did not have jurisdiction over support obligor for purposes of modifying out-of-state child support order, based on obligor's assignment to active military duty in California; obligor was resident and domiciliary of state that issued order and, thus, that state retained continuing, exclusive jurisdiction over child support)]. However, it additionally requires that the party seeking modification not be a California resident. Hence, a California resident may not register a support order

from another state in California as a way of obtaining a modification of the order as long as at least one party remains a resident of a state other than California.

[2] All Individual Parties in California

If all of the individual parties now reside in California and the child does not reside in the issuing state, a California court state has jurisdiction to enforce and to modify the issuing state's child support order in a proceeding to register that order [*Fam. Code § 4962(a)*]. A California court that exercises jurisdiction under these circumstances must apply the general principles of Article 1 of UIFSA [*see Fam. Code § 4900 et seq.*], the jurisdictional rules of Article 2 of UIFSA [*see Fam. Code § 4905 et seq.*], and California procedural and substantive law to the proceeding for enforcement or modification. UIFSA Articles 3, 4, 5, 7, and 8 do not apply [*Fam. Code § 4962(b)*].

[3] Modification Limited by Law of Issuing State

A California court may not modify any aspect of a child support order that may not be modified under the law of the issuing state. If two or more tribunals have issued child support orders for the same obligor and child, the order that controls and must be so recognized [*see Fam. Code § 4911*, discussed at *§ 260.94*] establishes the aspects of the support order that are nonmodifiable [*Fam. Code § 4960(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportJurisdictionPersonal JurisdictionFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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3. UIFSA: Jurisdictional Provisions

22-260 California Forms of Pleading and Practice--Annotated § 260.99

§ 260.99 Petitioner's Immunity to Collateral Personal Jurisdiction

Participation by a petitioner in a proceeding before a responding tribunal, whether in person, by private attorney, or through services provided by the support enforcement agency, does not confer personal jurisdiction over the petitioner in another proceeding [*Fam. Code § 4928(a)*]. A petitioner is not amenable to service of civil process while physically present in this state to participate in a UIFSA proceeding [*Fam. Code § 4928(b)*]. However, this immunity does not extend to civil litigation based on acts unrelated to a UIFSA proceeding committed by a party while present in California to participate in the proceeding [*Fam. Code § 4928(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewFamily LawChild SupportJurisdictionPersonal JurisdictionFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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22-260 California Forms of Pleading and Practice--Annotated §§ 260.100-260.109

[Reserved]

§§ 260.100[Reserved]

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22-260 California Forms of Pleading and Practice--Annotated § 260.110

§ 260.110 Proceedings Under UIFSA

[1] Authorized Proceedings

UIFSA provides for the following proceedings [*Fam. Code § 4915*]:

1. Establishment of an initial order for spousal support or child support [*see Fam. Code § 4935*; (UIFSA Art. 4), discussed at *§ 260.96[1]*];

2. Enforcement of a support order and income-withholding order of another state without registration [*see Fam. Code § 4940 et seq.* (UIFSA Art. 5), discussed at *§ 260.140* et seq.];

3. Registration of an order for spousal support or child support of another state for enforcement [*see Fam. Code § 4950 et seq.* (UIFSA Art. 6), discussed at *§ 260.150* et seq.];

4. Modification of an order for child support or spousal support issued by a California court [*see Fam. Code § 4905 et seq.* (UIFSA Art. 2)];

5. Registration in California of an order for child support of another state for modification in California [*see Fam. Code § 4950 et seq.* (UIFSA Art. 6), discussed at *§ 260.98*];

6. Determination of parentage [*see Fam. Code § 4965* (UIFSA Art. 7), discussed at *§ 260.97*];

7. Assertion of jurisdiction by a state over nonresidents [*see Fam. Code § 4905* (UIFSA Art. 2), discussed at *§ 260.90*].

Except as otherwise provided in UIFSA, the general procedures in Article 3 of UIFSA (and in *§ 260.110 et seq.*) [*see Fam. Code § 4915 et seq.* (UIFSA Art. 3)] apply to all of the above proceedings [*Fam. Code § 4915(a)*].

[2] Proceedings by Public Entity for Reimbursement of Public Benefits

Note that it is not clear whether a proceeding by a public entity for reimbursement of public benefits extended on behalf of a child is a proceeding authorized under UIFSA [*cf.* former *Fam. Code § 4821* (authority under URESA of state or county to secure reimbursement of support furnished on behalf of child); *In re Marriage of Hyon & Kirschner (1991) 231 Cal. App. 3d 449, 455, 282 Cal. Rptr. 408* (under URESA, court could order obligor to reimburse public entity for benefits provided to the child without violating rule against retroactive modification of support)]. UIFSA's definition of "obligee" includes a state or political subdivision to which the rights under a duty of support or support order have been assigned or that has independent claims based on financial assistance provided to an individual obligee [*Fam. Code § 4901(l)(2)*; *see § 260.173*]. Therefore, it would seem that the drafters of UIFSA intended to grant rights to political entities holding assignments of support rights on account of the granting of public benefits.

The problem is that they did not expressly grant those rights in the enumeration of UIFSA proceedings in *Fam. Code § 4915*. Of the proceedings therein set forth, it would seem that public benefits reimbursement could only possibly be a proceeding for the establishment of an order for child support order under *Fam. Code § 4935* [*Fam. Code § 4915(b)(1)*]. Section 4935 provides that the court may issue a *support order* if the support enforcement agency seeking the order is located in another state. The question is whether an order for reimbursement of public benefits is such a "support order." Under UIFSA, a "support order" is one *for the benefit* of a child, spouse, or former spouse that provides for monetary support, health care, arrearages, or *reimbursement* [*Fam. Code § 4901(u)*, discussed in *§ 260.174*]. While the reference to "reimbursement" might encompass reimbursement of public benefits (it might be construed as referring to reimbursement to the individual obligee of particular costs incurred on behalf of the child), it may be questioned whether such an order is one "for the benefit" of the child.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActGovernmentsLocal GovernmentsClaims By & Against

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22-260 California Forms of Pleading and Practice--Annotated § 260.111

§ 260.111 Initiating and Responding States and Tribunals

UIFSA provides for the involvement of at least two states in support proceedings. Like URESA, these states are called the initiating and responding states. An initiating state is a state from which a proceeding is forwarded or in which a proceeding is filed for forwarding to a responding state [*Fam. Code § 4901(i)*; *see Fam. Code § 4901(j)* ("initiating tribunal" means the authorized tribunal in an initiating state)]. A responding state is a state in which a proceeding is filed or to which a proceeding is forwarded for filing from an initiating state [*Fam. Code § 4901(p)*; *see Fam. Code § 4901(q)* ("responding tribunal" means the authorized tribunal in a responding state)]. An initiating or responding tribunal is the authorized tribunal in the initiating or responding state [*Fam. Code § 4901(h),(o)*].

A tribunal is a court, administrative agency, or quasi-judicial entity authorized to establish, enforce, or modify support orders or to determine parentage [*Fam. Code § 4901(v)*]. In California, the tribunal of the state is the superior court [*Fam. Code § 4902*; *see Fam. Code § 4907* (California superior court may serve as an initiating tribunal to forward proceedings to another state and as a responding tribunal for proceedings initiated in another state)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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22-260 California Forms of Pleading and Practice--Annotated § 260.112

§ 260.112 Commencement of Proceeding

An individual who believes that he or she is owed a duty of support by a person domiciled in another state may commence a proceeding authorized under UIFSA by filing a petition in his or her home state (as initiating tribunal) for forwarding to the alleged obligor's state of domicile (as responding tribunal) or by filing a petition or a comparable pleading directly in a tribunal of any state that has or can obtain personal jurisdiction over the respondent. UIFSA proceedings may also be initiated by a support enforcement agency (*see § 260.122, below*) [*Fam. Code § 4915(c)*]. If there is already a support order in place from another state, the order may be registered for enforcement in California. Registration is the filing of a support order or paternity judgment in any California superior court in which enforcement is sought [*Fam. Code § 4901(n)*; *see Fam. Code § 4901(o)* "registering tribunal" is tribunal in which a support order is registered)]. A minor parent, or a guardian or other legal representative of a minor parent, may maintain a proceeding on behalf of or for the benefit of the minor's child [*Fam. Code § 4916*].

If a petition or comparable pleading is received by an inappropriate California tribunal, it must forward the pleading and accompanying documents to an appropriate tribunal in California or another state and notify the petitioner of where and when the pleading was sent [*Fam. Code § 4920*]. For further discussion of when a proceeding is required to be transferred, see *§ 260.116*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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22-260 California Forms of Pleading and Practice--Annotated § 260.113

§ 260.113 Contents of Pleadings and Supporting Documents; Required Forms

[1] General Requirements for Petition and Supporting Documents

A petitioner seeking to establish or modify a support order or to determine parentage in a proceeding under this chapter must verify the petition. Unless otherwise ordered [*see Fam. Code § 4926*, discussed *below*], the petition or accompanying documents must provide, so far as known, the name, residential address, and social security numbers of the obligor and the obligee, and the name, sex, residential address, social security number, and date of birth of each child for whom support is sought. The petition must be accompanied by a certified copy of any support order in effect. The petition may include any other information that may assist in locating or identifying the respondent [*Fam. Code § 4925(a)*]. The petition must specify the relief sought [*Fam. Code § 4925(b)*].

On a finding that the health, safety, or liberty of a party or child would be unreasonably put at risk by the disclosure of identifying information, or if an existing order so provides, a tribunal must order that the address of the child or party or other identifying information not be disclosed in a pleading or other document filed in a UIFSA proceeding. The finding may be made ex parte [*Fam. Code § 4926*].

The petition and accompanying documents must conform substantially with the requirements imposed by the forms mandated by federal law for use in cases filed by a support enforcement agency [*Fam. Code § 4925(b)*]. All UIFSA forms approved by either the National Conference of Commissioners on Uniform State Laws or the United States Department of Human Services are adopted by the Judicial Council by the Rules of Court for use in family law and other support actions in California [*Cal. Rules of Ct., Rule 5.27*]. For forms promulgated by the United States Department of Health and Human Services, see *§ 260.310*. The use of forms adopted by the Judicial Council is mandatory [*see* Cal. Rules of Ct., Introductory Statement; *see also* Forms at §§ 260.311-260.319].

[2] Issuance and Service of Summons or Order to Show Cause

If a petition or comparable pleading under the UIFSA is filed in a California court, the local child support agency or petitioner may request the issuance of a summons or may request the court to issue an order requiring the respondent to

appear personally at a specified time and place to show cause why an order should not be issued as prayed in the petition or comparable pleading on file [*Fam. Code § 5000(a)*]. If a summons is issued, the local child support agency or petitioner must cause a copy of the summons, petition, and other documents to be served on the respondent according to law [*Fam. Code § 5000(b)*]. If an order to show cause is issued, a copy of the order, the petition, and other documents must be served on the respondent at least 15 days before the hearing [*Fam. Code § 5000(c)*]. The petition or pleading served on the respondent must be accompanied by a blank responsive form that permits the respondent to answer the petition and raise any defenses by checking applicable boxes. It must also be accompanied by a blank income and expense declaration or simplified financial statement, with instructions for completing the forms [*Fam. Code § 5000(d)*].

[3] Service on Respondent of Proposed Judgment

In an action under UIFSA, prosecuted by the local child support agency or the attorney general that is initiated by service of summons and petition or other comparable pleading, the respondent may also be served with a proposed judgment that is consistent with the relief sought in the petition or pleading [*Fam. Code § 5002(a)*]. If the respondent's income or income history is unknown to the agency, it may serve a form of proposed judgment with the petition and other documents on the respondent, informing the respondent that income will be presumed in the amount of the minimum wage, at 40 hours per week, established by the Industrial Welfare Commission pursuant to *Lab. Code § 1182.11*, unless information about the respondent's income is provided to the court. The respondent must also receive notice that the proposed judgment will become effective if he or she fails to file a response with the court within 30 days after service [*Fam. Code § 5002(a)*].

Note, however, that, if a judgment under UIFSA was obtained on the basis of presumed income [*see Fam. Code § 5002*], the court may set aside that part of the judgment or order concerning the amount of child support to be paid, as provided under *Fam. Code § 17432* [*Fam. Code § 5002(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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22-260 California Forms of Pleading and Practice--Annotated § 260.114

§ 260.114 California's Duties as Initiating Tribunal

On the filing of a UIFSA petition, California as the initiating state must forward three copies of the petition and its accompanying documents to the responding tribunal or appropriate support enforcement agency in the responding state [Fam. Code § 4818(a)(1)]. If, however, the identity of the responding tribunal is unknown, the pleadings may be forwarded to the state information agency of the responding state with a request that they be forwarded to the appropriate tribunal and that receipt be acknowledged [*Fam. Code § 4918(a)(2)*].

If a responding state has not enacted UIFSA or a law or procedure substantially similar to UIFSA, California may issue a certificate or other document and make findings required by the law of the responding state. If the responding state is a foreign jurisdiction, the California court may specify the amount of support sought and provide other documents necessary to satisfy the requirements of the responding state [*Fam. Code § 4918(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticeService of ProcessGeneral OverviewFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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22-260 California Forms of Pleading and Practice--Annotated § 260.115

§ 260.115 California's Duties as Responding Tribunal

When a California superior court as responding tribunal receives a petition or comparable pleading from an initiating tribunal, or when a UIFSA proceeding is initiated directly in a California superior court [*Fam. Code § 4915(c)*, discussed at *§ 260.112, above*], it must cause the petition or pleading to be filed and notify the petitioner of where and when it was filed [*Fam. Code § 4919(a)*]. To the extent otherwise authorized by law, a California court as responding tribunal may do one or more of the following [*Fam. Code § 4919(b)*]:

1. Issue or enforce a support order, modify a child support order, or render a judgment to determine parentage.

2. Order an obligor to comply with a support order, specifying the amount and the manner of compliance.

3. Order income withholding.

4. Determine the amount of any arrearages, and specify a method of payment.

5. Enforce orders by civil or criminal contempt, or both.

6. Set aside property for satisfaction of the support order.

7. Place liens and order execution on the obligor's property.

8. Order an obligor to keep the tribunal informed of the obligor's current residential address, telephone number, employer, address of employment, and telephone number at the place of employment.

9. Issue a bench warrant for an obligor who has failed after proper notice to appear at a hearing ordered

by the tribunal and enter the bench warrant in any local and state computer systems for criminal warrants.

10. Order the obligor to seek appropriate employment by specified methods.

11. Award reasonable attorney's fees and other fees and costs.

12. Grant any other available remedy.

The court must include in a support order issued under UIFSA, or in the documents accompanying the order, the calculations on which the support order is based [*Fam. Code § 4919(c)*]. It must send a copy of the order to the petitioner, respondent, and initiating tribunal, if any [*Fam. Code § 4919(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticeService of ProcessGeneral OverviewFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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22-260 California Forms of Pleading and Practice--Annotated § 260.116

§ 260.116 Transfer of Proceeding

If before filing, a petition or comparable pleading under the UIFSA is received by the local child support agency or the superior court and the county in which it is received is not the appropriate jurisdiction for trial of the action, the court or agency must forward the pleadings and any accompanying documents to the appropriate court in California or to the jurisdiction of another state, without filing the pleadings or order of the court, and must notify the petitioner, the California Central Registry, and the local child support agency of the receiving county where and when the pleading was sent [*Fam. Code § 5001(a)*].

If, after a petition or comparable pleading is filed, it appears that the respondent is not or is no longer a resident of the county in which the action has been filed, on ex parte application by the local child support agency or the petitioner, the court must transfer the action to the appropriate court in California or to the appropriate jurisdiction of another state, and must notify the petitioner, the respondent, the California Central Registry, and the local child support agency of the receiving county where and when the pleading was sent [*Fam. Code § 5001(b)*]. However, if the respondent becomes a resident of another county or jurisdiction after an action or registered order under UIFSA has been filed, the action *may* remain in the county where the action was filed until the action is completed [*Fam. Code § 5001(e)*].

If, after entry of an order by a California court on an action filed under UIFSA or an order of another state registered in a court of this state for enforcement or modification under UIFSA, it appears that the respondent is not or is no longer a resident of the county in which the foreign order has been registered, on ex parte application by the local child support agency of the transferring or receiving county or of the petitioner, the court must transfer the registered order and all documents subsequently filed in the action to the appropriate California court [*Fam. Code § 5001(c)*]. The court must notify the petitioner, the respondent, the California Central Registry, and the local child support agency of the transferring and receiving county where and when the registered order and all other appropriate documents were sent. Transfer of certified copies of these documents is sufficient [*Fam. Code § 5001(c)*]. However, if the respondent becomes a resident of another county or jurisdiction after an action or registered order under UIFSA has been filed, the action *may* remain in the county where the action was filed until the action is completed [*Fam. Code § 5001(e)*].

If, in an action initiated in a California court under UIFSA or a predecessor law for interstate enforcement of support, the petitioner is no longer a resident of the county in which the action has been filed, on ex parte application by the petitioner or the district attorney, the court must transfer the action to the appropriate California court and notify the responding jurisdiction where and when the action was transferred [*Fam. Code § 5001(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewFamily LawChild SupportJurisdictionGeneral OverviewFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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22-260 California Forms of Pleading and Practice--Annotated § 260.117

§ 260.117 Defenses

[1] Interference With Visitation and Child Concealment

A responding tribunal may not condition the payment of a support order issued under UIFSA on compliance by a party with provisions for visitation [*Fam. Code § 4919(d)*]. The term "compliance with visitation" is a change from URESA, which provided that a duty of support was unaffected by "interference" with rights of custody or visitation" [*see* former *Fam. Code § 4845(b)*].

In *In re Marriage of Damico* [*In re Marriage of Damico (1994) 7 Cal. 4th 673, 29 Cal. Rptr. 2d 787, 872 P.2d 126]* , the California Supreme Court distinguished between interference with visitation on the one hand, and child concealment on the other, and allowed an estoppel defense as to arrearages of child support that accrued during periods of actual concealment if the concealment continued until the child reached the age of majority [*In re Marriage of Damico (1994) 7 Cal. 4th 673, 678, 682-685, 29 Cal. Rptr. 2d 787, 872 P.2d 126]* . This raises the possibility of some defense to arrearages under UIFSA based on child concealment.

However, in *In re Marriage of Comer* [*In re Marriage of Comer (1996) 14 Cal. 4th 504, 59 Cal. Rptr. 2d 155, 927 P.2d 265]* , the Court clarified that a custodial parent's concealment that ends while the child *is still a minor* does not constitute a defense to an action brought on behalf of the child against the noncustodial parent for child support arrearages. The Court further held that if a custodial parent has obtained public assistance payments for the child and has assigned the right to child support arrearages to the public entity providing the assistance, the conduct of the custodial parent in concealing the child from the other parent does not estop the public entity from seeking child support arrearages, or reimbursement for public assistance payments, from the noncustodial parent [*In re Marriage of Comer (1996) 14 Cal. 4th 504, 510, 515 n.4, 517, 529, 59 Cal. Rptr. 2d 155, 927 P.2d 265* (disapproving, to extent inconsistent, a group of appellate decisions set forth in footnote 4 of opinion; and specifically disapproving *In re Marriage of Smith (1989) 209 Cal. App. 3d 196, 257 Cal. Rptr. 47* , to extent inconsistent); *see* *Willmer v. Willmer (2006) 144 Cal. App. 4th 951, 963, 51 Cal. Rptr. 3d 10* (following *Comer* and rejecting support obligor's claims that because obligee secreted herself and their child in Germany and then waited for him to leave Germany to begin

proceedings against him estopped obligee from enforcing German support judgment)]. Thus, the scope of any possible defense is extremely limited.

For further discussion, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* .

[2] Nonparentage

If there has been no prior determination of parentage, either the petitioner or the respondent may be adjudged the parent of a particular child in a UIFSA proceeding. California may serve as either the initiating or responding state for a determination of parentage [*Fam. Code § 4965(a)*]. If California is the responding tribunal, it must apply the Uniform Parentage Act [*see Fam. Code § 7600 et seq.*] its own procedural and substantive law, and its rules for choice of law [*Fam. Code § 4965(b)*]. However, a party whose parentage of a child has been previously determined by or pursuant to law may not plead nonparentage as a defense to a proceeding under UIFSA [*Fam. Code § 4929*].

Determination of parentage in California under the Uniform Parentage Act is the subject of Ch. 412, *Paternity* . For more in-depth consideration of the scientific proof of parentage, see Vitek, Disputed Paternity Proceedings (5th ed. Matthew Bender). For additional consideration of determination of parentage under UIFSA, see Disputed Paternity Proceedings ch. 7, (Matthew Bender).

[3] Lack of Jurisdiction in Issuing Court

Except as otherwise provided in Article 6 of UIFSA [*see Fam. Code § 4950 et seq.*; *see § 260.90* et seq.], a California court must recognize and enforce a registered order only if the issuing tribunal had jurisdiction [*Fam. Code § 4952(c)*; *see § 260.151, below*]. The jurisdictional invalidity of a registered order may be raised as a defense to enforcement of the order under UIFSA [*see* Sampson, Uniform Interstate Family Support Act, Unofficial Annotations to UIFSA § 606, p. 156]. Therefore, California is not required to recognize and enforce a registered support order that was made by a state that lacked personal jurisdiction over a party, subject matter jurisdiction under FFCCSOA [*see 28 U.S.C. § 1738B(a)*, discussed at *§ 260.64, above* (full faith and credit required only for orders made consistent with FFCCSOA)], subject matter jurisdiction under UIFSA, or any other aspect of jurisdiction required by its own law [*cf. In re Marriage of Nosbisch (1992) 5 Cal. App. 4th 629, 633, 6 Cal. Rptr. 2d 817* (collateral attack of judgment under URESA); *see § 260.91[1], above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyVisitationGeneral OverviewFamily LawChild SupportJurisdictionGeneral OverviewFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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22-260 California Forms of Pleading and Practice--Annotated § 260.118

§ 260.118 Choice of Law

[1] When California Law Applies; Enforcement of Registered Order

Except as otherwise provided in UIFSA, a California court as responding tribunal must:

1. Apply its own procedural and substantive law, including the rules on choice of law, generally applicable to similar proceedings originating in California and may exercise all powers and provide all remedies available in those proceedings [*Fam. Code § 4917(a)*]; and

2. Determine the duty of support and the amount payable in accordance with the California law and support guidelines [*Fam. Code § 4917(b)*; *see Fam. Code § 4901(k)* ("law" under UIFSA includes decisional and statutory law and rules and regulations having force of law); *see also Scott v. Superior Court (1984) 156 Cal. App. 3d 577, 584-586, 202 Cal. Rptr. 920* (in California URESA proceeding seeking support from California-domiciled father for New York-domiciled adult child, California law imposing duty to support adult indigent child was to be applied even though law of New York imposed no such duty)].

UIFSA, however, also provides that in the registration and enforcement of a support order, the law of the issuing state governs the nature, extent, amount, and duration of current payments and other obligations of support and the payment of arrearages under the order [*Fam. Code § 4953(a)*]. An "issuing state" is one in which a tribunal issues a support order or renders a judgment determining parentage [*Fam. Code § 4901(i)*]. Therefore, if California is only enforcing a registered order of another state, it cannot apply its own law on the duration of support. For example, it may not apply its lower age of majority to deny enforcement to an order that requires support to be paid to age 21, thereby effectively terminating support at age 18 [*cf. In re Marriage of Taylor (1981) 122 Cal. App. 3d 209, 212-215, 175 Cal. Rptr. 716* (same result under URESA)]. Similarly, when a court of the issuing state has determined that the support order is void, California must give full faith and credit to this determination that the order is no longer enforceable, and may not register the order [*Scheuerman v. Hauk (2004) 116 Cal. App. 4th 1140, 1144-1146, 11 Cal. Rptr. 3d 125* (order

unenforceable because statute of limitations of issuing state had expired, even though under California law order would have been enforceable)].

[2] In Modification Proceedings

If the issuing state has lost its continuing, exclusive jurisdiction and California has jurisdiction to make or modify a child support order, the general rule applies; that is, that California is to apply its own law and may raise or lower support to the amount provided by the California uniform child support guideline [*see Fam. Code § 4917*; *see also In re Marriage of Crosby and Grooms (2004) 116 Cal. App. 4th 201, 207-209, 10 Cal. Rptr. 3d 146* (California law applied to modification of Idaho child support order)]. However, a California court may not modify any aspect of a child support order that may not be modified under the law of the issuing state [*Fam. Code § 4960(c)*]. For example, if child support was ordered through age 21 in accordance with the law of the issuing state, and California law generally ends the support obligation at age 18, any modification of the order by a California court may not affect the duration of support to age 21 [*see* Sampson, Uniform Interstate Family Support Act, Unofficial Annotations to UIFSA § 611, p. 164-165].

ILLUSTRATION:

Parents were divorced in New York, which was the state of marital domicile. The child support order provided for support until the child reaches the age of majority, which in New York is 21 years. Both parents and the child subsequently leave New York and father settles in California, where the age of majority is 18 years [*Fam. Code § 6500*]. Mother registers her New York order in California, and moves for modification of support to increase the amount. Father requests termination of support because the child is now 18. California has jurisdiction to modify the order under UIFSA because New York has lost its continuing, exclusive jurisdiction in that no party continues to reside there [*Fam. Code § 4909(a)(1)*; *see § 260.91[5], above*]. Under UIFSA, because New York could not entertain a motion to modify the order to reduce the support obligation from the legal limit of 21 years to 18 years, California is similarly so prohibited. California may adjust the amount of support up or down, but it may not shorten the duration of the duty of support [*Fam. Code §§ 4917(b), 4960(c)*; *see In re Marriage of Chester (1995) 37 Cal. App. 4th 1624, 1629-1636, 44 Cal. Rptr. 2d 717* . (reaching this result under URESA); *cf. In re Marriage of Lurie (1995) 33 Cal. App. 4th 658, 673-676, 39 Cal. Rptr. 2d 835* (reaching opposite result under URESA and FFCCSOA); *see also* Sampson, Uniform Interstate Family Support Act, Unofficial Annotations to UIFSA § 611, p. 164-165, n. 161 (expressly noting that purpose of UIFSA § 611(c) is to reverse the majority position reached by state court under URESA, that a modifying court may apply its own durational rules)].

It must be noted, however, that this result might possibly be in conflict with the Full Faith and Credit for Child Support Orders Act (FFCCSOA). FFCCSOA, as amended in 1996, provides that the law of the state that issued an order applies in interpreting the order, and that interpreting the order includes determining the duration of current payments and other obligations of support [*28 U.S.C. § 1738B(h)(2)*]. FFCCSOA is clearly in conformance with UIFSA with regard to registration proceedings for enforcement only [*see Fam. Code § 4953(a)*; *see § 260.118[1], above*]. What is not clear under FFCCSOA is whether or not in a modification proceeding in a new state after the original decree state has lost its continuing, exclusive jurisdiction, the court is "interpreting" the prior order. If so, the original decree state's durational rules and age of majority must be applied, and there is no conflict between UIFSA and FFCCSOA. However, if not, FFCCSOA otherwise requires the law of the forum state to be applied [*28 U.S.C. § 1738B(h)(1)*], and FFCCSOA, as federal law, would preempt any conflicting provisions of UIFSA [*see In re Marriage of Lurie (1995) 33 Cal. App. 4th 658, 673-676, 39 Cal. Rptr. 2d 835* (construing FFCCSOA before 1996 amendments as allowing California, as modifying state, to apply its own durational law)]. For further discussion of FFCCSOA's choice-of-law provisions regarding duration and amount of support, see *§§ 260.67[2]* and*[3]*.

[3] Statute of Limitation on Arrearages

In a proceeding for arrearages under UIFSA, the California statute of limitation or that of the issuing state, whichever is longer, applies [*Fam. Code § 4953(b)*]. Because since January 1, 1993, California has had no statute of limitation on the collection of arrearages [*see Fam. Code §§ 291(a),(b), 4502* (judgment for support is enforceable until paid in full)], there is effectively no statute of limitation for the collection of arrearages for any support order registered and enforced in California. Thus, it would appear that anytime a support obligor moves to California, support arrearages may be enforced, no matter how long they may have been barred under the law of the issuing state [*see Trend v. Bell (1997) 57 Cal. App. 4th 1092, 1096-1098, 68 Cal. Rptr. 2d 54* (obligor moved to California years after support obligation terminated; court found that under prior California law that provided a ten-year limitation period, period was tolled because the obligor was outside of California; hence, claim was not barred when law was amended to remove limitation period as of January 1, 1993)].

[4] Parentage

In a proceeding in California as the responding state in which parentage is at issue, a California court must apply the Uniform Parentage Act [*see Fam. Code § 7600 et seq.*; Ch. 412, *Paternity*]. California procedural and substantive law, and California rules on choice of law [*Fam. Code § 4965(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewFamily LawChild SupportObligationsEnforcementArrearage JudgmentsFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage ActGovernmentsLegislationStatutes of LimitationsTime Limitations

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22-260 California Forms of Pleading and Practice--Annotated § 260.119

§ 260.119 Evidence

[1] Receipt of Documents, Records and Testimony

Because the petitioner is not required to be physically present in the responding tribunal for the establishment, enforcement, or modification of a support order or the rendition of a judgment determining parentage [*Fam. Code § 4930(a)*], UIFSA contains a number of rules designed to streamline the process of resolving interstate support enforcement issues. These rules allow the courts to take advantage of components of modern technology.

A verified petition, affidavit, document substantially complying with federally mandated forms, and a document incorporated by reference in any of them, not excluded under the hearsay rule if given in person, is admissible in evidence if given under oath by a party or witness residing in another state [*Fam. Code § 4930(b)*]. Also, a copy of the record of child support payments certified as a true copy of the original by the custodian of the record may be forwarded to a responding tribunal. The copy is evidence of facts asserted in it, and is admissible to show whether payments were made [*Fam. Code § 4930(c)*]. Copies of bills for testing for parentage, and for prenatal and postnatal health care of the mother and child, furnished to the adverse party at least 10 days before trial, are admissible in evidence to prove the amount of the charges billed and that the charges were reasonable, necessary, and customary [*Fam. Code § 4930(d)*].

Documentary evidence that is transmitted from another state to a California court by telephone, telecopier, or other means that do not provide an original writing may not be excluded from evidence on an objection based on the means of transmission [*Fam. Code § 4930(e)*]. Thus, documents may be received by fax and admitted into evidence.

In a UIFSA proceeding, a California court may permit a party or witness residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means at a designated tribunal or other location in that state. California must cooperate with tribunals of other states in designating an appropriate location for the deposition or testimony [*Fam. Code § 4930(f)*].

[2] Privileges

If a party called to testify at a civil hearing under UIFSA refuses to answer on the ground that the testimony may be self-incriminating, the trier of fact may draw an adverse inference from the refusal [*Fam. Code § 4930(g)*]. Also, a privilege against disclosure of communications between spouses and the defense of immunity based on the relationship of husband and wife or parent and child do not apply in a UIFSA proceeding [*Fam. Code § 4930(h), (i)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDocumentary EvidenceGeneral OverviewEvidencePrivilegesSelf-Incrimination PrivilegeGeneral OverviewFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act

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22-260 California Forms of Pleading and Practice--Annotated § 260.120

§ 260.120 Interstate Judicial Communication and Assistance With Discovery

A California court may communicate with a tribunal of another state in writing, or by telephone or other means, to obtain information concerning the laws of that state, the legal effect of a judgment, decree, or order of that tribunal, and the status of a proceeding in the other state. And a California court may furnish similar information by similar means to a tribunal of another state [*Fam. Code § 4931*].

A California court may also do both of the following [*Fam. Code § 4932*]:

1. Request a tribunal of another state to assist in obtaining discovery.

2. On request, compel a person over whom it has jurisdiction to respond to a discovery order issued by a tribunal of another state.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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22-260 California Forms of Pleading and Practice--Annotated § 260.121

§ 260.121 Representation by Counsel; Fees, and Costs

An individual may employ private counsel to represent him or her in proceedings authorized by UIFSA [*Fam. Code § 4923*]. UIFSA does not specifically provide for the appointment of counsel to represent a child.

The petitioner may not be required to pay a filing fee or other costs in a UIFSA proceeding [*Fam. Code § 4927(a)*]. If an obligee prevails, a responding tribunal may assess against an obligor filing fees, reasonable attorney's fees, other costs, and necessary travel and other reasonable expenses incurred by the obligee and the obligee's witnesses [*Fam. Code § 4927(b)*]. What constitutes "prevailing" is not defined.

A tribunal may not assess fees, costs, or expenses against the obligee or the support enforcement agency of either the initiating or the responding state, except as provided by other law [*see, e.g., Fam. Code § 271* (attorney fees may be awarded in the nature of sanctions for improper litigation conduct)]. Attorney's fees may be taxed as costs, and may be ordered paid directly to the attorney, who may enforce the order in the attorney's own name. Payment of support owed to the obligee has priority over fees, costs, and expenses [*Fam. Code § 4927(b)*].

A tribunal must order the payment of costs and reasonable attorney's fees if it determines that a hearing was requested primarily for delay. In a proceeding for the registration and enforcement of an order [*see Fam. Code § 4950 et seq.* (UIFSA Art. 6)], a hearing is presumed to have been requested primarily for delay if a registered support order is confirmed or enforced without change [*Fam. Code § 4927(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportProcedures

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22-260 California Forms of Pleading and Practice--Annotated § 260.122

§ 260.122 Duties of Public Officers and Agencies

[1] Support Enforcement Agency

[a] Duties Expressed in UIFSA

Under UIFSA, A "support enforcement agency" means a public official or agency authorized to do any of the following [*Fam. Code § 4901(t)*]:

1. Seek enforcement of support orders or laws relating to the duty of support.

2. Seek establishment or modification child support.

3. Seek determinations of parentage.

4. Locate obligors or their assets.

In California, the district attorney offices of the counties and local child support agencies are the state's support enforcement agencies [*see Fam. Code § 17400 et seq.*, discussed in Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*].

A California support enforcement agency, on request, must provide services to a petitioner in a UIFSA proceeding [*Fam. Code § 4921(a)*]. In providing services, the agency must do all of the following [*Fam. Code § 4921(b)*]:

1. Take all steps necessary to enable an appropriate California court state or tribunal of another state to obtain jurisdiction over the respondent.

2. Request an appropriate tribunal to set a date, time, and place for a hearing.

3. Make a reasonable effort to obtain all relevant information, including information as to income and property of the parties.

4. Within 14 days, exclusive of Saturdays, Sundays, and legal holidays, after receipt of a written notice from an initiating, responding, or registering tribunal, send a copy of the notice to the petitioner.

5. Within 14 days, exclusive of Saturdays, Sundays, and legal holidays, after receipt of a written communication from the respondent or the respondent's attorney, send a copy of the communication to the petitioner.

6. Notify the petitioner if jurisdiction over the respondent cannot be obtained.

7. Perform the acts required by *Fam. Code § 4978*.

A support enforcement agency providing services to a petitioner must also do the following [*Fam. Code § 4978*]:

1. Inform the petitioner of the requirement that the pleadings contain identifying information about the petitioner and the child, including a residential address, unless an order of nondisclosure is granted under *Fam. Code §§ 4926, 4977*;

2. Inform the petitioner of the right to seek an order of nondisclosure and provide information about how that order may be obtained;

3. Inform the petitioner that the agency must seek an order of nondisclosure on the petitioner's behalf if he or she has previously obtained a protective or restraining order or has been granted a good cause exception from cooperation requirements under *Welf. & Inst. Code § 11477.04*, and instruct the petitioner to notify the agency of any such order or exception;

4. Seek an order of nondisclosure under *Fam. Code §§ 4926, 4977* if the petitioner informs the agency that he or she has obtained a protective or restraining order or has been granted a good cause exception from cooperation requirements under *Welf. & Inst. Code § 11477.04*.

[b] Duties to Petitioner Under Support Enforcement Statutes; Compromise and Settlement of Claim

UIFSA does not create or negate a relationship of attorney and client or other fiduciary relationship between a support enforcement agency or the attorney for the agency and the individual being assisted by the agency [*Fam. Code § 4921(c)*]. In California, by statute no such attorney-client relationship exists [*see Fam. Code § 17406(a)*, discussed in Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*].

Nevertheless, *Fam. Code § 17406* sets forth specific duties that a district attorney or other local child support agency owes to a person requesting child support enforcement services. One of these is the duty to obtain the consent of the person being served to any stipulated order or judgment establishing or modifying a support order, if the person is not currently receiving public assistance [*Fam. Code § 17406(j)*]. It has been held that this provision and duty apply to a petitioner being served by a California district attorney in a URESA proceeding [*Carlson v. Eassa (1997) 54 Cal. App. 4th 684, 695, 62 Cal. Rptr. 2d 884]* . The court found generally that the child support enforcement provisions of the support enforcement statutes were intended to apply in the interstate context, and based its decision in part on the public policy underlying the need for efficient and fair interstate enforcement procedures [*Carlson v. Eassa (1997) 54 Cal. App. 4th 684, 695, 62 Cal. Rptr. 2d 884* (risk of delay in obtaining signature of custodial parent is far outweighed by necessity of resolving support issues in a balanced and thoughtful manner; whether parent lives in same county, another county, or more distant state should not be basis for bypassing these considerations)]. Therefore, a similar result

might be anticipated under UIFSA with regard to settlement, and also with regard to other duties imposed on the support agencies under the support enforcement statutes.

PRACTICE TIP:

The court in *Carlson v. Eassa* found that the consent requirement of former *Welf. & Inst. Code § 11478.2(j)* (now see *Fam. Code § 17406*) applied to proceedings under the former URESA. Under UIFSA, an even better argument might be that there is nothing in UIFSA that grants a support enforcement agency any authority to compromise and settle a claim without the consent of the petitioning parent. Only through an assignment of rights, as is required on a grant of public benefits, would a support enforcement agency acquire the authority to settle the parent's claim. *Commentary by the Publisher's Editorial Staff*

[2] Attorney General; As State Information Agency

If the Attorney General determines that the support enforcement agency is neglecting or refusing to provide services to an individual, the Attorney General may order the agency to perform its duties under UIFSA or may provide those services directly to the individual [*Fam. Code § 4922*].

The Attorney General's office is also the state information agency under UIFSA [*Fam. Code § 4924(a)*]. As such, it must do all of the following [*Fam. Code § 4924(b)*]:

1. Compile and maintain a current list, including addresses, of the California tribunals that have jurisdiction under UIFSA and any California support enforcement agencies and transmit a copy to the state information agency of every other state.

2. Maintain a register of tribunals and support enforcement agencies received from other states.

3. Forward to the appropriate tribunal in the place in California in which the individual obligee or the obligor resides, or in which the obligor's property is believed to be located, all documents concerning a proceeding under UIFSA received from an initiating tribunal or the state information agency of the initiating state.

4. Obtain information concerning the location of the obligor and the obligor's property within California not exempt from execution, by such means as postal verification and federal or state locator services, examination of telephone directories, requests for the obligor's address from employers, and examination of governmental records, including, to the extent not prohibited by other law, those relating to real property, vital statistics, law enforcement, taxation, motor vehicles, driver's licenses, and social security.

Under the former URESA, if the Attorney General believed that a support order or a support-related order was erroneous and presented a question of law warranting an appeal in the public interest, he or she could pursue the appeal in a California appellate court or cause the appeal to be taken in the state that issued the order [former *Fam. Code § 4847*]. There is no similar express statutory authorization for the Attorney General to pursue appeals under UIFSA.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportProceduresGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsEmployees & Officials

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22-260 California Forms of Pleading and Practice--Annotated § 260.123

§ 260.123 Receipt and Disbursement of Payments

A California support enforcement agency or court must disburse promptly any amounts received under a support order, as directed by the order. The agency or court must furnish to a requesting party or tribunal of another state a certified statement by the custodian of the record of the amounts and dates of all payments received [*Fam. Code § 4933*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportProceduresGovernmentsLocal GovernmentsAdministrative Boards

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22-260 California Forms of Pleading and Practice--Annotated § 260.124

§ 260.124 Declaration of Foreign Jurisdiction as Reciprocating State

When the Attorney General is satisfied that reciprocal provisions will be made by a foreign jurisdiction for the establishment of support orders for obligees in California, or for enforcement of support orders made within California, the Attorney General may declare the foreign jurisdiction to be a reciprocating state for purposes of establishing and enforcing support obligations. Such a declaration may be revoked by the Attorney General, or otherwise reviewed by the court in an action brought to support a support order, or to enforce the order of a reciprocating jurisdiction [*Fam. Code § 5005*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportProceduresGovernmentsLocal GovernmentsEmployees & Officials

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22-260 California Forms of Pleading and Practice--Annotated §§ 260.125-260.139

[Reserved]

§§ 260.125[Reserved]

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22-260 California Forms of Pleading and Practice--Annotated § 260.140

§ 260.140 Administrative Enforcement of Orders of Other States

A party seeking to enforce a support order or an income-withholding order, or both, issued by a tribunal of another state may send the documents required for registering the order to a California support enforcement agency [*Fam. Code § 4946(a)*]. On receipt of the documents, the support enforcement agency, without initially seeking to register the order, must consider and, if appropriate, use any administrative procedure authorized by California law to enforce the orders. If the obligor does not contest administrative enforcement, the order need not be registered. If the obligor contests the validity or administrative enforcement of the order, the support enforcement agency must register the order under UIFSA [Fam. Code § 4947].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsEnforcementIncome WithholdingFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportProcedures

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22-260 California Forms of Pleading and Practice--Annotated § 260.141

§ 260.141 Enforcement of Income-Withholding Order of Another State Directly on Employer

An income-withholding order [*see Fam. Code § 4901(f)* ("income-withholding order" is an earnings assignment order for support as defined in *Fam. Code § 5208(a)*, or any other order or legal process directed to an obligor's employer or other debtor, to withhold support from the income of the obligor)] issued in another state may be sent to the person or entity who is the obligor's employer [*see Fam. Code § 5210*, discussed in Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*] without first filing a petition or comparable pleading or registering the order with a California court [*Fam. Code § 4940*]. If the order appears regular on its face, the employer must treat it as if it had been issued by a California court [*Fam. Code § 4941(b)*]. On receipt of an income-withholding order, the obligor's employer must immediately provide a copy of the order to the obligor [*Fam. Code § 4941(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementIncome WithholdingFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportProcedures

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22-260 California Forms of Pleading and Practice--Annotated § 260.142

§ 260.142 Employer's Withholding and Distribution of Funds

Except as otherwise provided in UIFSA [*Fam. Code §§ 4941(d), 4942*, discussed in *§ 260.143, below*], the employer must withhold and distribute the funds as directed in the withholding order by complying with terms of the order which specify any of the following [*Fam. Code § 4941(c)*]:

1. The duration and the amount of periodic payments of current child support, stated as a sum certain.

2. The person or agency designated to receive payments and the address to which the payments are to be forwarded.

3. Medical support, whether in the form of periodic cash payment, stated as a sum certain, or ordering the obligor to provide health insurance coverage for the child under a policy available through the obligor's employment.

4. The amount of periodic payments of fees and costs for a support enforcement agency, the issuing tribunal, and the obligee's attorney, stated as sums certain.

5. The amount of periodic payments of arrearages and interest on arrearages, stated as sums certain.

However, the employer must comply with the law of the state of the obligor's principal place of employment for withholding from income with respect to any of the following [*Fam. Code § 4941(d)*]:

1. The employer's fee for processing an income-withholding order.

2. The maximum amount permitted to be withheld from the obligor's income.

3. The times within which the employer must implement the withholding order and forward the child

support payment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementIncome WithholdingFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportProcedures

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22-260 California Forms of Pleading and Practice--Annotated § 260.143

§ 260.143 Multiple Income-Withholding Orders

If an obligor's employer receives multiple income-withholding orders with respect to the earnings of the same obligor, the employer satisfies the terms of the multiple orders if the employer complies with the law of the state of the obligor's principal place of employment to establish the priorities for withholding and allocating income withheld for multiple child support obligees [*Fam. Code § 4942*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementIncome WithholdingFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportProcedures

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22-260 California Forms of Pleading and Practice--Annotated § 260.144

§ 260.144 Employer Immunity; Penalties for Noncompliance

An employer who complies with an income-withholding order issued in another state in accordance with UIFSA is not subject to civil liability to any individual or agency with regard to the employer's withholding of child support from the obligor's income [*Fam. Code § 4943*]. However, a California employer who willfully fails to comply with an income-withholding order issued by another state and received for enforcement is subject to the same penalties that may be imposed for noncompliance with a California income-withholding order [*Fam. Code § 4944*; *see Fam. Code § 5241* (penalties under California law for willful noncompliance)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementIncome WithholdingFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportProceduresLabor & Employment LawEmployer LiabilityGeneral Overview

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22-260 California Forms of Pleading and Practice--Annotated § 260.145

§ 260.145 Contest by Obligor

An obligor may contest the validity or enforcement of an income-withholding order issued in another state and received directly by a California employer in the same manner as if the order had been issued by a tribunal of this state [*Fam. Code § 4945(a)*; *see Fam. Code § 5270* (motion to quash earnings assignment order)]. UIFSA's choice-of-law provisions apply to the contest [*Fam. Code § 4945(a)*; *see Fam. Code § 4953*; *see § 260.118, above*].

To contest the validity or enforcement of an income withholding order, the obligor must first file a completed request for hearing, with a copy of the income withholding order attached [*Cal. Rules of Ct., Rule 5.335(b)*; Cal. Judicial Council Form FL-450; *see* Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*]. No fee is to be charged to file the request for hearing [*Cal. Rules of Ct., Rule 5.335(c)*].

The obligor must give notice of the contest to (1) a support enforcement agency providing services to the obligee; (2) each employer that has directly received an income-withholding order; and (3) the person or agency designated to receive payments in the income-withholding order or, if no person or agency is designated, to the obligee [*Fam. Code § 4945(b)*]. By court rule, however, the actual notice is sent by the court clerk after the hearing is scheduled, using postage paid, preaddressed envelopes that the obligor is required to furnish the clerk [*Cal. Rules of Ct., Rule 5.335(e)*].

Any later proceedings filed in the same court that involve the same parties and are filed under UIFSA must utilize the same file number as that created for the request for hearing [*Cal. Rules of Ct., Rule 5.335*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementIncome WithholdingFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportProcedures

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5. UIFSA: Enforcement of Out-of-State Orders Without Registration

22-260 California Forms of Pleading and Practice--Annotated §§ 260.146-260.149

[Reserved]

§§ 260.146[Reserved]

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22-260 California Forms of Pleading and Practice--Annotated § 260.150

§ 260.150 Procedure for Registration of Order for Enforcement in California

A support order or an income-withholding order issued by a tribunal of another state may be registered in California for enforcement [*Fam. Code § 4950*]. Registration in California is accomplished by sending the following documents and information to the appropriate California court [*Fam. Code § 4951(a)*]:

1. A letter of transmittal to the court requesting registration and enforcement.

2. Two copies, including one certified copy, of all orders to be registered, including any modification of an order.

3. A sworn statement by the party seeking registration or a certified statement by the custodian of the records showing the amount of any arrearage.

4. The name of the obligor and, if known:

a. The obligor's address and social security number;

b. The name and address of the obligor's employer and any other source of income of the obligor; and

c. A description and the location of property of the obligor in this state not exempt from execution.

5. The name and address of the obligee and, if applicable, the agency or person to whom support payments are to be remitted.

On receipt of a request for registration, the registering tribunal must cause the order to be filed as a foreign judgment,

together with one copy of the documents and information, regardless of their form [*Fam. Code § 4951(b)*]. The order is registered when the order is filed in the registering court in California [*Fam. Code § 4952(a)*].

A petition or comparable pleading seeking a remedy that must be affirmatively sought under other California law may be filed at the same time as the request for registration or later. The pleading must specify the grounds for the remedy sought [*Fam. Code § 4951(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportProcedures

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22-260 California Forms of Pleading and Practice--Annotated § 260.151

§ 260.151 Effect of Registration for Enforcement

A registered order issued in another state is enforceable in the same manner and is subject to the same procedures as an order issued by a California court [*Fam. Code § 4952(b)*; *but see Codoni v. Codoni (2002) 103 Cal. App. 4th 18, 23, 126 Cal. Rptr. 2d 423* (registration of foreign support order in county does not give county authority to enforce order, unless registration includes request for enforcement services)]. However, except as otherwise provided in Article 6 of UIFSA, a California court must recognize and enforce a registered order (but may not modify it) only if the issuing tribunal had jurisdiction [*Fam. Code § 4952(c)*; *see § 260.117[3], above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportProcedures

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22-260 California Forms of Pleading and Practice--Annotated § 260.152

§ 260.152 Notice of Registration of Order

When a support order or income-withholding order issued in another state is registered, the registering tribunal must notify the nonregistering party. The notice must be accompanied by a copy of the registered order and the documents and relevant information accompanying the order [*Fam. Code § 4954(a)*]. The notice must inform the nonregistering party [*Fam. Code § 4954(b)*]:

1. That a registered order is enforceable as of the date of registration in the same manner as an order issued by a California court;

2. That a hearing to contest the validity or enforcement of the registered order must be requested within 20 days after notice;

3. That failure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and enforcement of the order and the alleged arrearages and precludes further contest of that order with respect to any matter that could have been asserted; and

4. Of the amount of any alleged arrearages.

On registration of an income-withholding order for enforcement, the registering tribunal must notify the obligor's employer as provided in California earnings assignment statutes [*Fam. Code § 4954(c)*; *see Fam. Code § 5200 et seq.* (earnings assignment orders discussed in Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsFamily LawChild

SupportObligationsEnforcementIncome WithholdingFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportProcedures

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22-260 California Forms of Pleading and Practice--Annotated § 260.153

§ 260.153 Procedure to Contest Validity or Enforcement of Registered Order

A nonregistering party seeking to contest the validity or enforcement of a registered order in California must request a hearing within 20 days after notice of the registration. The nonregistering party may seek to vacate the registration, to assert any defense to an allegation of noncompliance with the registered order, or to contest the remedies being sought or the amount of any alleged arrearages [*Fam. Code § 4955(a)*; *see Fam. Code § 4956*, discussed in *§ 260.154, below* (defenses to registration and enforcement)]. For a form for use in moving to vacate registration of an order under UIFSA, see *§ 260.313*.

If the nonregistering party fails to contest the validity or enforcement of the registered order in a timely manner, the order is confirmed by operation of law [*Fam. Code § 4955(b)*]. If a nonregistering party requests a hearing to contest the validity or enforcement of the registered order, the registering court must schedule the matter for hearing and give notice to the parties of the date, time, and place of the hearing [*Fam. Code § 4955(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportProcedures

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22-260 California Forms of Pleading and Practice--Annotated § 260.154

§ 260.154 Respondent's Contest of Registration or Enforcement

A party contesting the validity or enforcement of a registered order or seeking to vacate the registration has the burden of proving one or more of the following defenses [*Fam. Code § 4956(a)*]:

1. The issuing tribunal lacked personal jurisdiction over the contesting party; see *Willmer v. Willmer (2006) 144 Cal. App. 4th 951, 958-961, 51 Cal. Rptr. 3d 10* (obligor failed to meet burden of proving that German court lacked jurisdiction over him based on its service on him by publication).

2. The order was obtained by fraud.

3. The order has been vacated, suspended, or modified by a later order.

4. The issuing tribunal has stayed the order pending appeal.

5. There is a defense under California law to the remedy sought (for example, the respondent might assert a de facto change of custody during the period for which arrearages are alleged) [*see In re Marriage of Okum (1987) 195 Cal. App. 3d 176, 182, 240 Cal. Rptr. 458]* .

6. Full or partial payment has been made.

7. The statute of limitation precludes enforcement of some or all of the arrearages [*see Fam. Code §§ 291(a),(b), 4502, 4953*; *see § 260.118[3], above* (there is no limitation on the enforcement of child support arrearages in California, and California law applies)].

In addition, defenses that are generally available under UIFSA may presumably be raised (*see § 260.117, above*), including nonpaternity if not previously adjudicated [*see Fam. Code §§ 4929, 4965*; *see § 260.117[2], above*], lack of subject matter jurisdiction in the issuing court [*Fam. Code § 4952(c)*; *see § 260.117[3], above*], and perhaps child

concealment under some limited circumstances [*see In re Marriage of Comer (1996) 14 Cal. 4th 504, 510, 515 n.4, 517, 529, 59 Cal. Rptr. 2d 155, 927 P.2d 265* ; discussed in *§ 260.117[1], above*].

If a party presents evidence establishing a full or partial defense, the court may stay enforcement of the registered order, continue the proceeding to permit production of additional relevant evidence, and issue other appropriate orders. An uncontested portion of the registered order may be enforced by all remedies available under California law [*Fam. Code § 4956(b)*]. If the contesting party does not establish a defense to the validity or enforcement of the order, the registering tribunal must issue an order confirming the order [*Fam. Code § 4956(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportProcedures

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22-260 California Forms of Pleading and Practice--Annotated § 260.155

§ 260.155 Responsive Pleadings Raising Other Issues

Under URESA as enacted in California, at a hearing on a motion to vacate a registered order, there could be no joinder of actions, coordination of actions, or cross complaints. The claims or defenses were limited strictly to the identity of the obligor, the validity of the underlying foreign order, and the accuracy of the obligee's statement of the amount of support remaining unpaid [*see* former *Fam. Code § 4853(b)*]. The obligor could present only matters that would be available as defenses in an action to enforce a California support judgment [*see* former *Fam. Code § 4853(c)*; *see also In re Marriage of Aron (1990) 224 Cal. App. 3d 1086, 1095, 274 Cal. Rptr. 357* (dissolution, custody, and visitation could not be considered)].

There is no similar provision in UIFSA. Therefore, it would seem that at least theoretically, a respondent might attempt to raise custody and visitation issues in a response to a UIFSA registration, provided the court has child custody jurisdiction, which requires neither personal jurisdiction nor child support jurisdiction under UIFSA [*see § 260.54*].

Whether the courts will actually allow a party to raise issues unrelated to the enforcement of the registered order remains to be seen. There is indication that the drafters of UIFSA believed that they had foreclosed consideration of visitation issues in a UIFSA proceeding by providing that the responding court may not condition the payment of support on compliance with visitation [*see* Sampson, Uniform Interstate Family Support Act, Unofficial Annotations to UIFSA § 305, p. 132 n. 93 (under UIFSA § 305(d), *Fam. Code § 4919(d)*, visitation issues are explicitly severed from support issues)]. While this provision may foreclose raising visitation issues as a defense to nonpayment of support [*see § 260.117[1]*], it does not really foreclose asserting modification of custody or visitation in response to a UIFSA proceeding.

However, if personal jurisdiction over the petitioner is required in order to receive particular relief and it is not otherwise obtainable, participation in a UIFSA proceeding by registering an order does not provide any basis for acquiring personal jurisdiction over the registering party [*see Fam. Code § 4928*; *see § 260.99*]. Therefore, it would not be possible to raise any claim requiring personal jurisdiction over the petitioner, such as the imposition of a property-related monetary obligation, in response to a UIFSA registration.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJoinder of Claims & RemediesGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportProcedures

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22-260 California Forms of Pleading and Practice--Annotated § 260.156

§ 260.156 Res Judicata Effect of Confirmed Order

Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration [*Fam. Code § 4957*]. Thus, a party is collaterally estopped from relitigating any matter that could have been asserted in a contest to registration, including the amount of arrearages alleged to be due under the order [*see Fam. Code § 4956(a)(6)*]. A nonregistering obligee is not precluded, however, from objecting to an understatement of the arrears after registration, because this is a matter that could *not* have been asserted at the time of registration [de *Leon v. Jenkins (2006) 143 Cal. App. 4th 118, 123-126, 49 Cal. Rptr. 3d 145*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportProcedures

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22-260 California Forms of Pleading and Practice--Annotated § 260.157

§ 260.157 Registration of Child Support Order of Another State for Modification

A party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another state must register that order in California in the same manner as otherwise provided in UIFSA (*see § 260.150, above*). A petition for modification may be filed at the same time as a request for registration, or later. The pleading must specify the grounds for modification [*Fam. Code § 4958*; *cf. Marriage of Lurie (1995) 33 Cal. App. 4th 658, 662, 39 Cal. Rptr. 2d 835* (under URESA, modification was seen as separate procedural step after order was registered and registration was confirmed)].

Once registered for modification, a California court may enforce a child support order of another state in the same manner as if the order had been issued by a California court. However, the registered order may be modified only if California has modification jurisdiction [*Fam. Code § 4959*]. For further discussion, see *§ 260.98, above*.

Modification of a registered child support order is subject to the same requirements, procedures, and defenses that apply to the modification of an order issued by a California court, and the order may be enforced and satisfied in the same manner [*Fam. Code § 4960(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportObligationsModificationGeneral OverviewFamily LawChild SupportProcedures

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22-260 California Forms of Pleading and Practice--Annotated § 260.158

§ 260.158 Notice to Issuing Tribunal of Modification

Within 30 days after issuance of a modified child support order, the party obtaining the modification must file a certified copy of the order with the issuing tribunal that had continuing, exclusive jurisdiction over the earlier order, and in each tribunal in which the party knows the earlier order has been registered. A party who obtains the order and fails to file a certified copy is subject to appropriate sanctions by a tribunal in which the issue of failure to file arises. The failure to file does not affect the validity or enforceability of the modified order of the new tribunal having continuing, exclusive jurisdiction [*Fam. Code § 4963*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportProcedures

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22-260 California Forms of Pleading and Practice--Annotated §§ 260.159-260.169

[Reserved]

§§ 260.159[Reserved]

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22-260 California Forms of Pleading and Practice--Annotated § 260.170

§ 260.170 Interstate Rendition

The Governor of the state may demand that the Governor of another state surrender an individual found in the other state who is charged criminally in this state with having failed to provide for the support of an obligee [*Fam. Code § 4970(b)(1)*]. On the demand by the Governor of another state, the Governor of California must surrender an individual found in California who is charged criminally in the other state with having failed to provide for the support of an obligee [*Fam. Code § 4970(b)(2)*]. The "Governor" includes an individual performing the functions of Governor or the executive authority of the state of California [*Fam. Code § 4970(a)*]. A provision for extradition of individuals not inconsistent with UIFSA applies to the demand even if the individual whose surrender is demanded was not in the demanding state when the crime was allegedly committed and has not fled from that state [*Fam. Code § 4970(c)*].

Before making a demand that the Governor of another state surrender an individual charged criminally in California with having failed to provide for the support of an obligee, the California Governor may require a California prosecutor to demonstrate that at least 60 days previously, the obligee had initiated proceedings for support under UIFSA or that the proceeding would be of no avail [*Fam. Code § 4971(a)*]. If, under UIFSA or a law substantially similar to UIFSA, URESA, or RURESA, the Governor of another state makes a demand that the California Governor surrender an individual charged criminally in that state with having failed to provide for the support of a child or other individual to whom a duty of support is owed, the California Governor may require a prosecutor to investigate the demand and report whether a proceeding for support has been initiated or would be effective. If it appears that a proceeding would be effective but has not been initiated, the Governor may delay honoring the demand for a reasonable time to permit the initiation of a proceeding [*Fam. Code § 4971(b)*].

If a proceeding for support has been initiated and the individual whose rendition is demanded prevails, the Governor may decline to honor the demand. If the petitioner prevails and the individual whose rendition is demanded is subject to a support order, the Governor may decline to honor the demand if the individual is complying with the support order [*Fam. Code § 4971(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsDomestic OffensesNonpayment of Child SupportGeneral OverviewFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportProceduresGovernmentsState & Territorial GovernmentsEmployees & Officials

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22-260 California Forms of Pleading and Practice--Annotated § 260.171

§ 260.171 Uniformity of Application and Construction; Severability

UIFSA must be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of interstate support enforcement among states enacting it [*Fam. Code § 4975*]. If any provision of UIFSA or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of UIFSA that can be given effect without the invalid provision or application [*Fam. Code § 4976*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportProceduresGovernmentsLegislationInterpretation

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22-260 California Forms of Pleading and Practice--Annotated § 260.172

§ 260.172 "States" Under UIFSA

A "state" within the meaning of UIFSA is a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term "state" also includes both of the following [*Fam. Code § 4901(s)(2)*]:

1. An Indian tribe.

2. A foreign jurisdiction that has enacted a law or established procedures for issuance and enforcement of support orders which are substantially similar to the procedures under UIFSA, URESA, or RURESA.

The California Attorney General may declare that a foreign jurisdiction is a reciprocating state for purposes of establishing and enforcing support obligations if he or she is satisfied that reciprocal provisions will be made by a foreign jurisdiction for the establishment of support orders for obliges in California or for enforcement of support orders made within this state [*Fam. Code § 5005*; *see Willmer v. Willmer (2006) 144 Cal. App. 4th 951, 956, 51 Cal. Rptr. 3d 10* (Attorney General has declared that Germany is reciprocating state)].

Unlike URESA, there is no reciprocity requirement other than that for foreign jurisdictions [*see* former *Fam. Code § 4802(j)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawChild SupportProceduresGovernmentsNative AmericansAuthority & Jurisdiction

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22-260 California Forms of Pleading and Practice--Annotated § 260.173

§ 260.173 "Obligors" and "Obligees" Under UIFSA

Under UIFSA, an "obligor" is an individual, or the estate of a decedent [*Fam. Code § 4901(m)*]:

1. Who owes or is alleged to owe a duty of support;

2. Who is alleged but has not been adjudicated to be a parent of a child; or

3. Who is liable under a support order.

An "Obligee" means any of the following [*Fam. Code § 4901(l)*]:

1. An individual to whom a duty of support is, or is alleged to be, owed or in whose favor a support order has been issued or a judgment determining parentage has been rendered.

2. A state or political subdivision to which the rights under a duty of support or support order have been assigned or which has independent claims based on financial assistance provided to an individual obligee.

3. An individual seeking a judgment determining parentage of the individual's child.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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22-260 California Forms of Pleading and Practice--Annotated § 260.174

§ 260.174 "Support Orders" and "Children" Under UIFSA

Under UIFSA, a "support order" is a judgment, decree, or order, whether temporary, final, or subject to modification, for the benefit of a child, a spouse, or a former spouse, that provides for monetary support, health care, arrearages, or reimbursement, and may include related costs and fees, interest, income withholding, attorney's fees, and other relief [*Fam. Code § 4901(u)*]. A "spousal support order" is a support order for a spouse or former spouse of the obligor [*Fam. Code § 4901(r)*]. A "child support order" is a support order for a child, including a child who has attained the age of majority under the law of the issuing state [*Fam. Code § 4901(b)*].

A "child" is an individual, whether over or under the age of majority, who is, or is alleged to be, owed a duty of support by the individual's parent or who is, or is alleged to be, the beneficiary of a support order directed to the parent [*Fam. Code § 4901(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportGeneral OverviewFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral Overview

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22-260 California Forms of Pleading and Practice--Annotated § 260.175

§ 260.175 "Income" Under UIFSA

Under UIFSA"income" includes earnings or other periodic entitlements to money from any source and any other property subject to withholding for support under California law [*Fam. Code § 4901(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support Act

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22-260 California Forms of Pleading and Practice--Annotated §§ 260.176-260.199

[Reserved]

§§ 260.176[Reserved]

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Volume 22: Explosives thru Food-Chs. 256-268
Chapter 260 FAMILY LAW ENFORCEMENT: FOREIGN JUDGMENTS
PART II. LEGAL BACKGROUND
D. Interstate Custody Enforcement
1. Enforcement Under UCCJEA

22-260 California Forms of Pleading and Practice--Annotated § 260.200

§ 260.200 Governing Statutes and Overview of UCCJEA

[1] Governing Statutes

Interstate custody and visitation enforcement in California is governed by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA--*Fam. Code § 3400 et seq.*), and in particular, *Fam. Code § 3441 et seq.* within that Act. The federal Parental Kidnapping Prevention Act (*28 U.S.C. § 1738A*) preempts state law on the issue of interstate jurisdiction to render a valid custody decree. California's enactment of the UCCJEA, however, makes the necessity of invoking the PKPA less likely, because of the substantial conformity between the two acts.

[2] Overview of Enforcement Under UCCJEA

The Uniform Child Custody Jurisdiction and Enforcement Act, [*Fam. Code § 3400 et seq.*] or UCCJEA, became operative in California on January 1, 2000 [Stats. 1999, ch. 867] with only a few variations from the model act [*see* UCCJEA, 9 Uniform Laws Annotated 647 (1999)] that was promulgated by the National Council of Commissioners on Uniform State Laws in 1997. Unlike its predecessor, the former Uniform Child Custody Jurisdiction Act, [former *Fam. Code § 3400 et seq.*] or UCCJA, the UCCJEA sets forth uniform procedures and remedies for the interstate enforcement of custody and visitation orders that have been validly entered under the jurisdictional provisions of the UCCJEA [*see Fam. Code § 3421 et seq.*] by state courts [Commissioner's Prefatory Note to UCCJEA, 9 Uniform Laws Annotated 652 (1999)].

First, the UCCJEA [*Fam. Code § 3400 et seq.*] provides a procedure for interstate registration of child custody determinations. This allows a party, for example, to ascertain in advance whether a custody determination will be recognized, before sending a child out of state for visitation [Commissioner's Prefatory Note to UCCJEA, 9 Uniform Laws Annotated 653 (1999); *see Fam. Code § 3445*; *see § 260.203*]. Second, the UCCJEA includes a procedure for interstate enforcement of child custody determinations, written along the lines of habeas corpus, that basically limits the scope of an enforcing court's inquiry to whether the court that issued the custody determination had jurisdiction and complied with due process [Commissioner's Prefatory Note to UCCJEA, 9 Uniform Laws Annotated 653 (1999); *see Fam. Code § 3448*; *see § 260.206*]. Third, the UCCJEA provides a procedure for temporary interstate enforcement of

visitation provisions of child custody determinations [*see Fam. Code § 3444*; *see § 260.202*].

Additionally, the UCCJEA authorizes California courts to use its enforcement provisions [*see Fam. Code § 3441 et seq.*] to enforce orders for the return of a child that are made under the Hague Convention (*see § 260.250* et seq.) on international child abduction as if the orders were child custody determinations [*Fam. Code § 3442*].

[3] Definitions of Special Terms Under UCCJEA

[a] Petitioner

For purposes of UCCJEA enforcement, a "petitioner" is a person [*Fam. Code § 3441(a)*]:

1. Who seeks enforcement of an order for return of a child under the Hague Convention (*see § 260.250* et seq.) on international child abduction; or

2. Who seeks enforcement of a child custody determination.

[b] Respondent

For purposes of UCCJEA enforcement, a "respondent" is a person [*Fam. Code § 3441(b)*]:

1. Against whom a proceeding has been commenced for enforcement of an order for return of a child under the Hague Convention (*see § 260.250* et seq.) on international child abduction; or

2. Against whom a proceeding has been commenced for enforcement of a child custody determination.

[4] Uniformity of Application and Construction; Severability; Applicability to Motion Pending at Enactment

The UCCJEA must be applied and construed with consideration given to the need to promote uniformity of the law with respect to the subject of interstate child custody jurisdiction among the states that enact it [*Fam. Code § 3461*]. If any provision of the UCCJEA or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the UCCJEA that can be given effect without the invalid provision or application [*Fam. Code § 3462*].

A motion or request for relief made in a custody proceeding or to enforce a custody determination that was commenced before the effective date of the UCCJEA is governed by the law in effect at the time the motion or request was made [*Fam. Code § 3465*]. Because a child custody proceeding lasts throughout a child's minority, a motion for custody modification that is filed before January 1, 2000 will be governed by prior law (the UCCJA), [*see* former *Fam. Code § 3400 et seq.*] but a motion filed after January 1, 2000, will be governed by the UCCJEA [Commissioner's Comment to UCCJEA § 405, 9 Uniform Laws Annotated 706 (1999); *see Fam. Code § 3400 et seq.*].

[5] Compatibility With Parental Kidnapping Prevention Act

The federal Parental Kidnapping Prevention Act (PKPA--*28 U.S.C. § 1738A*) controls child custody jurisdiction in interstate conflicts. If the jurisdiction assumed by a California court making a custody determination is consistent with the PKPA, its decree is entitled to full faith and credit in all other states, and must be enforced according to its terms by the courts of other states [*28 U.S.C. § 1738A(a)*].

In addition, the PKPA preempts state law, including a state's version of the UCCJA, to the extent that it conflicts with the PKPA, on the issue of jurisdiction by a state to render a valid custody decree [*People v. Superior Court (Smolin)*

(1986) 41 Cal. 3d 758, 770, 225 Cal. Rptr. 438, 716 P.2d 991 , reversed, on other grounds, California v. Superior Court of California (1987) 482 U.S. 400, 107 S. Ct. 2433, 96 L. Ed. 2d 332 ; *Wallace v. Superior Court (1993) 15 Cal. App. 4th 1182, 1184, 19 Cal. Rptr. 2d 157]* . However, California's enactment of the UCCJEA (and simultaneous repeal of the former UCCJA) now brings California law into substantial conformity with the PKPA on both the issues of custody jurisdiction and enforcement [*see 28 U.S.C. § 1738A(a), (c)*; *Fam. Code §§ 3423, 3443, 3446*]. Thus, there is less likelihood of a PKPA preemption issue when California courts proceed under the UCCJEA. For discussion of differences between the current UCCJEA and the former UCCJA, and the PKPA, see Ch. 394, *Parent and Child* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyEnforcementUniform Child Custody Jurisdiction & Enforcement ActFamily LawChild CustodyInterferenceParental Kidnapping Prevention ActFamily LawChild CustodyJurisdictionGeneral OverviewFamily LawChild CustodyProcedures

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22-260 California Forms of Pleading and Practice--Annotated § 260.201

§ 260.201 Sister-State Custody Orders Entitled to Recognition and Enforcement

In general, a California court must accord full faith and credit to an order issued by another state, and consistent with the UCCJEA must enforce a child custody determination by a court of another state unless the order has been vacated, stayed, or modified by a court having UCCJEA jurisdiction [*Fam. Code § 3453*; *see Fam. Code § 3421 et seq.*].

Specifically, a California court must recognize and enforce a child custody determination made by a court of another state if [*Fam. Code § 3444(a)*]:

> 1. The other court exercised jurisdiction in substantial conformity with the UCCJEA; [*see Fam. Code § 3400 et seq.*] or
>
> 2. The child custody determination was made under factual circumstances meeting the jurisdictional standards of the UCCJEA [*see Fam. Code § 3400 et seq.*] and the determination has not been modified under the UCCJEA [*see Fam. Code § 3400 et seq.*].

A state court's duty to enforce is generally the same under the UCCJEA [*see Fam. Code § 3400 et seq.*] and the former UCCJA [*see* former *Fam. Code § 3400 et seq.*]. However, unlike the former law, the UCCJEA provisions that require enforcement and limit modification of another state's child custody determination are now consistent with those of the PKPA [Commissioner's Comment to UCCJEA § 303, 9 Uniform Laws Annotated 690 (1999); *see 28 U.S.C. § 1738A(a)*]. Thus, a child custody determination made under the UCCJA that is enforceable under the PKPA will likewise be enforceable under the UCCJEA, and a determination made under the UCCJA that is not enforceable under the PKPA will likewise not be enforceable under the UCCJEA [Commissioner's Comment to UCCJEA § 303, 9 Uniform Laws Annotated 690 (1999)].

For example, a child custody determination made under the former UCCJA that used "significant connection" jurisdiction when a "home state" existed will not be enforceable under either the PKPA or the UCCJEA, even though "significant connection" jurisdiction is one of the four concurrent bases of UCCJA jurisdiction [Commissioner's

Comment to UCCJEA § 303, 9 Uniform Laws Annotated 690 (1999)]. PKPA policy strongly discourages a state from exercising its concurrent "significant connection" jurisdiction under the UCCJA when another state could exercise "home state" jurisdiction [Commissioner's Comment to UCCJEA § 303, 9 Uniform Laws Annotated 690 (1999)].

A California court may utilize any remedy available under California law to enforce a child custody determination made by a court of another state [*Fam. Code § 3443(b)*]. Although a child custody determination made by a court of another state remains a determination of that state, the determination is enforced in the same manner as a California child custody determination [Commissioner's Comment to UCCJEA § 303, 9 Uniform Laws Annotated 690-691 (1999)].

Also, the remedies provided in the UCCJEA enforcement provisions [*see Fam. Code § 3441 et seq.*] are cumulative and do not affect the availability of other remedies to enforce a child custody determination [*Fam. Code § 3443(b)*]. Normally, UCCJEA remedies will be used to enforce a custody determination, but any other remedies available under California law, such as citation for contempt of court, may be employed to ensure that a child custody determination is obeyed [Commissioner's Comment to UCCJEA § 303, 9 Uniform Laws Annotated 690 (1999)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-260 California Forms of Pleading and Practice--Annotated § 260.202

§ 260.202 Temporary Enforcement of Sister-State Visitation Orders

A California court that lacks jurisdiction to modify a child custody determination may issue a temporary order enforcing either [*Fam. Code § 3444(a)*]:

1. A visitation schedule made by a court of another state.

2. The visitation provisions of a child custody determination made by another state that does not provide for a specific visitation schedule.

A temporary order that implements a visitation schedule provided in a child custody determination may include make-up, or substitute, visitation [Commissioner's Comment to UCCJEA § 304, 9 Uniform Laws Annotated 691 (1999)]. A temporary order that implements visitation under a child custody determination that does not provide a schedule may substitute a specific visitation schedule for such general provisions as "reasonable and seasonable" visitation [Commissioner's Comment to UCCJEA § 304, 9 Uniform Laws Annotated 691 (1999)].

However, a court without UCCJEA jurisdiction cannot provide for a permanent change in visitation [Commissioner's Comment to UCCJEA § 304, 9 Uniform Laws Annotated 691 (1999)]. Thus, requests for permanent changes must be addressed to the court with exclusive, continuing jurisdiction [*see Fam. Code § 3422*] or modification jurisdiction [*see Fam. Code § 3423*] under the UCCJEA [Commissioner's Comment to UCCJEA § 304, 9 Uniform Laws Annotated 691 (1999)].

If a California court makes a temporary order enforcing visitation under a child custody determination that does not provide a visitation schedule [*see Fam. Code § 3444(a)(2)*], the court must specify in the order a period that it considers adequate to allow the petitioner to obtain an order from the court with UCCJEA jurisdiction [*Fam. Code § 3444(b)*; *see Fam. Code § 3421 et seq.* (criteria for UCCJEA jurisdiction)]. The temporary order remains in effect until the petitioner obtains an order from the other court or until the specified period expires [*Fam. Code § 3444(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-260 California Forms of Pleading and Practice--Annotated § 260.203

§ 260.203 Registration Procedure for Enforcement of Sister-State Custody Orders

[1] In General

The UCCJEA procedure for registration of child custody determinations, which parallels that for registration of child support orders under UIFSA (*see § 260.150* et seq.) can be used by *pro se* and other litigants to either immediately seek enforcement, or to predetermine the enforceability of any custody determination [Commissioner's Comment to UCCJEA § 305, 9 Uniform Laws Annotated 693 (1999)]. Registration of a custody determination without any accompanying request for enforcement is permitted, and this can be of significant assistance in international cases. For example, a custodial parent under a foreign custody order can receive an advance determination of whether the foreign order will be recognized and enforced before sending a child to the United States for visitation [Commissioner's Comment to UCCJEA § 305, 9 Uniform Laws Annotated 693 (1999); *see* 1996 Hague Convention, art. 26 (signatory nations must provide procedure for advance determination of enforceability of custody orders);*§ 260.250 et seq.*].

[2] Request for Registration of Custody Order

A child custody determination [*see Fam. Code § 3402(c)* (definition of "child custody determination")] issued by a court of another state may be registered in California, with or without a simultaneous request for enforcement, by sending the following documents and information to the appropriate California court [*Fam. Code § 3445*]:

1. A letter or other document requesting registration (see Ch. 394, *Parent and Child*);

2. Two copies, including one certified copy, of the order sought to be registered;

3. A sworn statement by the person seeking registration that the order has not been modified; and

4. The names and addresses of the person seeking registration, and of any parent or person acting as a parent [*see Fam. Code § 3402(m)* (definition of "person acting as a parent")] who has been awarded custody or visitation in the determination sought to be registered, unless confidentiality is statutorily

required [*see Fam. Code § 3429*] because of allegations of domestic violence or child abuse.

[3] Action by Court on Receipt of Registration Request

[a] Filing Sister-State Custody Order as Foreign Judgment

On receipt of the request for registration that meets the requirements set forth in *[2], above*, the registering California court must cause the child custody determination to be filed as a foreign judgment, together with one copy of the accompanying documents and information, regardless of their form [*Fam. Code § 3445(b)(1)*]. The registering court must also issue a special notice, as set forth in *[b], below* [*Fam. Code § 3445(b)(2)*].

[b] Notice by Court

After a California court has received a qualifying request to register a sister-state custody determination as a foreign judgment (see *[2], above*), the court must serve notice on the persons named in the request, and provide them with an opportunity to contest the registration [*Fam. Code § 3445(b)(2)*].

The notice served by the registering court must state that [*Fam. Code § 3445(c)*]:

1. A registered child custody determination is enforceable as of the date of the registration in the same manner as a custody determination issued by a California court;

2. A hearing to contest the validity of the registered determination must be requested within 20 days after service of notice; and

3. Failure to contest the registration will result in confirmation of the child custody determination and preclude further contest with respect to any matter that could have been asserted.

[4] Contest of Registration

Any person seeking to contest the validity of a registered child custody determination must request a hearing within 20 days after service of the notice [*Fam. Code § 3445(d)*]. At the hearing, the court must confirm the registered order unless the person contesting registration establishes one of the following [*Fam. Code § 3445(d)*]:

1. That the court issuing the custody determination did not have jurisdiction under the UCCJEA [*see Fam. Code § 3421 et seq.*];

2. That the child custody determination sought to be registered has been vacated, stayed, or modified by a court having jurisdiction under the UCCJEA [*see Fam. Code § 3421 et seq.*]; or

3. That the person contesting registration was entitled to notice, but notice was not given according to UCCJEA standards for notice to persons outside the state [*see Fam. Code § 3408*] in the proceedings before the court that issued the child custody order for which registration is being sought.

[5] Confirmation of Registration

If no timely request for a hearing to contest the validity of the registration is made, then registration of the child custody determination is confirmed as a matter of law [*Fam. Code § 3445(e)*]. The person requesting registration and all persons served must be notified of the confirmation [*Fam. Code § 3445(e)*].

Confirmation of a registered child custody determination, whether by operation of law or after notice and hearing,

precludes further contest of the determination with respect to any matter that could have been asserted at the time of registration [*Fam. Code § 3445(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-260 California Forms of Pleading and Practice--Annotated § 260.204

§ 260.204 Ability to Enforce and Modify Registered Order

A California court may grant any relief normally available under California law to enforce a registered child custody determination made by a court of another state [*Fam. Code § 3446(a)*]. Thus, although a registered custody order remains an order of the issuing state, the order can be enforced as if it were a California order [Commissioner's Comment to UCCJEA § 306, 9 Uniform Laws Annotated 693 (1999)].

A California court must recognize and enforce, and may not modify except in accordance with the jurisdictional provisions of the UCCJEA, [*Fam. Code § 3421 et seq.*] a registered child custody determination made by a court of another state [*Fam. Code § 3446(b)*]. Thus, in order for a California court to modify a registered custody order, California must have modification jurisdiction under the UCCJEA [*see Fam. Code §§ 3423, 3446*; Commissioner's Comment to UCCJEA § 306, 9 Uniform Laws Annotated 693 (1999)]. For related discussion and a form for modification of a registered order, see Ch. 394, *Parent and Child* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 260.205 Procedure When Simultaneous Enforcement and Modification Proceedings Exist

If a proceeding for UCCJEA enforcement of a child custody determination is commenced in a California court, and the court learns that a proceeding to modify the determination is pending in another state court that has UCCJEA jurisdiction to modify the determination [*see Fam. Code § 3421 et seq.*], then the enforcing California court must immediately communicate with the modifying court [*Fam. Code § 3447*]. According to a Commissioner's comment, the enforcement proceeding generally will take precedence over the modification proceeding, but the courts must communicate immediately to avoid duplicative litigation [Commissioner's Comment to UCCJEA § 307, 9 Uniform Laws Annotated 694 (1999) (noting that PKPA requires enforcement of child custody determinations made under PKPA)].

The proceeding for enforcement will continue unless the California court, after consultation with the modifying court, stays or dismisses the enforcement proceeding [*Fam. Code § 3447*]. The courts may decide that either the enforcement proceeding or the modification proceeding should go forward, but the ultimate decision rests with the court having exclusive, continuing UCCJEA jurisdiction [Commissioner's Comment to UCCJEA § 307, 9 Uniform Laws Annotated 694 (1999); *see Fam. Code § 3422*]. If neither court has exclusive, continuing jurisdiction, then the ultimate decision rests with the court that has UCCJEA modification jurisdiction [Commissioner's Comment to UCCJEA § 307, 9 Uniform Laws Annotated 694 (1999); *see Fam. Code § 3423*]. The court with exclusive, continuing jurisdiction (or, in some cases, with modification jurisdiction) may enjoin the parties from continuing with the enforcement proceeding, if the court determines that an enforcement proceeding should be stayed or dismissed, and the enforcing court does not comply [Commissioner's Comment to UCCJEA § 307, 9 Uniform Laws Annotated 694 (1999)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-260 California Forms of Pleading and Practice--Annotated § 260.206

§ 260.206 Procedure to Enforce Custody Order

[1] In General

The UCCJEA provides a summary procedure for production of the child, based on habeas corpus, as the normal remedy for enforcement of a sister state child custody determination [Commissioner's Comment to UCCJEA § 308, 9 Uniform Laws Annotated 695 (1999)]. The procedure is commenced through the filing of a petition, as described in [2], *below*.

[2] Petition for Enforcement of Custody Order

A person seeking enforcement of a sister-state custody order may bring an enforcement proceeding by verified petition under the provisions of *Fam. Code § 3448*. For a form of petition, including verification, see *§ 260.350[1]*. A certified copy (or a copy of a certified copy) of each custody order to be enforced, and of any order confirming registration of a custody order, must be attached to the petition [*Fam. Code § 3448(a)*]. The petition must state all of the following [*Fam. Code § 3448(b)*]:

1. Whether the court that issued the child custody determination identified the jurisdictional basis it relied on when exercising jurisdiction; and, if so, what the basis was.

2. Whether the determination for which enforcement is sought has been vacated, stayed, or modified by a court whose decision must be enforced under the UCCJEA; and, if so, the identity of the court, the case number, and the nature of the proceeding.

3. Whether any proceeding has been commenced that could affect the current proceeding, including proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions; and, if so, the identity of the court, the case number, and the nature of the proceeding.

4. The present physical address of the child and the respondent, if known.

5. Whether relief in addition to the immediate physical custody of the child and attorney's fees is sought, including a request for assistance from law enforcement officials; [*see* § 260.211] and, if so, the relief sought.

6. If the child custody determination has been registered and confirmed, [*see Fam. Code § 3445*; *see § 260.203*] the date and place of registration.

The petition is intended to provide the court with as much information as possible, and the petitioner is responsible for informing the court of all proceedings that could affect the enforcement action [Commissioner's Comment to UCCJEA § 308, 9 Uniform Laws Annotated 695 (1999)]. The phrase "procedure relating to domestic violence" is intended to include criminal prosecutions for child abuse or domestic violence as well as proceedings for protective orders [Commissioner's Comment to UCCJEA § 308, 9 Uniform Laws Annotated 695 (1999)].

[3] Order for Respondent's Appearance on Filing Petition

When the petition is filed, the court must order the respondent to appear in person with or without the child at a hearing [*Fam. Code § 3448(c)*]. The hearing must be held on the next judicial day after service of the order to appear, unless that date is impossible; in that event, it must be held on the first judicial day possible [*Fam. Code § 3448(c)*]. The term "first judicial day" means the next day when a judge is at the courthouse [Commissioner's Comment to UCCJEA § 308, 9 Uniform Laws Annotated 695 (1999)]. At the petitioner's request, the court may extend the hearing date [*Fam. Code § 3448(c)*]. The court may also enter any order necessary to ensure the safety of the parties and the child at this time [*Fam. Code § 3448(c)*].

The order for the respondent to appear must state [*Fam. Code § 3448(d)*]:

1. The time and place of the hearing;

2. That, at the hearing, the court will order that the petitioner may take immediate physical custody of the child, as well as ordering the payment of fees, costs, and expenses [*see* Fam. Code § 3542], and may schedule a hearing to determine whether further relief is appropriate, unless the respondent appears and establishes *either* of the following:

a. That the child custody determination has not been registered and confirmed as provided by *Fam. Code § 3445*, and that all of the following are true: (i) the issuing court lacked jurisdiction under the UCCJEA, [*see Fam. Code § 3421 et seq.*]; (ii) the child custody determination has been vacated, stayed, or modified by a court with UCCJEA jurisdiction, [*see Fam. Code § 3421 et seq.*]; and (iii) the respondent was entitled to notice, but notice was not given notice according to the UCCJEA notice requirements [*see Fam. Code § 3408*] in the proceedings before the court that issued the custody order for which enforcement is sought; or

b. That the child custody determination was registered and confirmed [*see Fam. Code § 3448(d)(2)* (referring, possibly in error, to *Fam. Code § 3444*, concerning temporary enforcement, instead of to *Fam. Code § 3445*, which concerns registration); *see also* Commissioner's Comment to UCCJEA § 308, 9 Uniform Laws Annotated 695-696 (1999)], but has been vacated, stayed, or modified by a court with UCCJEA jurisdiction [*see Fam. Code § 3421 et seq.*].

[4] Service of Petition and Order to Appear

Unless a warrant to take immediate physical custody of the child is issued, so that notice is temporarily waived by the court [*see Fam. Code § 3451*], the respondent and any person who has physical custody of the child must be served with the petition for enforcement and the order to appear [*Fam. Code § 3449*]. Service may be by any method authorized by California law [*Fam. Code § 3449*].

[5] Hearing for Enforcement of Custody Order

[a] Issuance of Temporary Order to Prevent Child's Endangerment

At the enforcement hearing, the court may issue a temporary, emergency order in appropriate circumstances, for example, if the child would be endangered by enforcement of a custody or visitation order [*Fam. Code § 3450(a)*; Commissioner's Comment to UCCJEA § 310, 9 Uniform Laws Annotated 697 (1999); *see Fam. Code § 3424*].

[b] Order for Immediate Physical Custody of Child; Defenses

In the absence of circumstances requiring the issuance of a temporary, emergency order for custody, the court, on finding that the petitioner is entitled to custody, must order that the petitioner may take immediate physical custody of the child [*Fam. Code § 3450(a)*]. A Commissioner's comment explains that a court must enforce a custody determination that complies with either the PKPA [*see 28 U.S.C. § 1738A(a)*] or the jurisdictional provisions of the UCCJEA [*see Fam. Code § 3421 et seq.*], and the certified copy of the custody determination is prima facie evidence that the issuing court had jurisdiction to issue the order entitling the petitioner to custody [Commissioner's Comment to UCCJEA § 310, 9 Uniform Laws Annotated 697 (1999)].

However, the court will not enforce the order entitling the petitioner to custody if the respondent appears and establishes either of the following [*Fam. Code § 3450(a)*]:

> 1. That the child custody determination has not been registered and confirmed under *Fam. Code § 3445* and that *one* of the following is true: (i) the issuing court lacked UCCJEA jurisdiction [*see Fam. Code § 3421 et seq.*]; (ii) the child custody determination for which enforcement is sought has been vacated, stayed, or modified by a court with UCCJEA jurisdiction [*see Fam. Code § 3421 et seq.*]; or (iii) the respondent was entitled to notice, but notice was not given according to UCCJEA standards for notice [*see Fam. Code § 3408*] in the proceedings before the court that issued the child custody determination to be enforced; or
>
> 2. That the child-custody determination to be enforced was registered and confirmed under *Fam. Code § 3445*, but has been vacated, stayed, or modified by a court with UCCJEA jurisdiction [*see Fam. Code § 3421 et seq.*].

It is a defense to enforcement of a child custody determination that another jurisdiction has issued a custody determination that must be enforced under the UCCJEA [*see Fam. Code § 3421 et seq.*]. For example, if one state court has based its original custody determination on "significant connections" under the UCCJA [*see* former *Fam. Code § 3403(a)(2)*] and another court has rendered an original custody determination based on "home state" jurisdiction under the UCCJA, [*see* former *Fam. Code § 3403(a)(1)*] then both the UCCJEA [*see Fam. Code § 3421 et seq.*] and the PKPA mandate that the "home state" determination be enforced [Commissioner's Comment to UCCJEA § 310, 9 Uniform Laws Annotated 697 (1999); *see Fam. Code § 3450(a)(1)(A)*].

The defense of lack of notice under UCCJEA standards [*see Fam. Code § 3408*] is the same as the defense would be under the law of the state that issued the notice in the proceedings that resulted in the contested custody determination [Commissioner's Comment to UCCJEA § 310, 9 Uniform Laws Annotated 697 (1999); *see Fam. Code § 3450(a)(1)(C)*]. Thus, if the defense of lack of notice would not be available under state law if the respondent purposely

hid from the petitioner, deliberately avoided service, or elected not to participate in the custody proceedings, then the defense would not be available under the UCCJEA [Commissioner's Comment to UCCJEA § 310, 9 Uniform Laws Annotated 697 (1999)].

[6] Award of Fees; Grant of Additional Relief

At the enforcement hearing, the court must award the fees, costs, and expenses authorized by the UCCJEA [*Fam. Code § 3450(b)*; *see Fam. Code § 3452*; *see § 260.208*]. The court may grant additional relief, including a request for the assistance of law enforcement officials [*see Fam. Code § 3455*; *see* § 260.211], and may set a further hearing to determine whether additional relief is appropriate [*Fam. Code § 3450(b)*].

[7] Effect of Testimonial Privileges

If a party called to testify refuses to answer on the ground that the testimony may be self-incriminating, then the court may draw an adverse inference from the refusal [*Fam. Code § 3450(c)*]. Neither the privilege against disclosure of communications between spouses nor the defense of immunity based on the husband/wife or parent/child relationship may be invoked in a UCCJEA enforcement proceeding [Fam. Code § 3540(d)]. These rules parallel the UIFSA [*see § 260.119*] procedures in child support proceedings [Commissioner's Comment to UCCJEA § 310, 9 Uniform Laws Annotated 698 (1999)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesWritsGeneral OverviewFamily LawChild CustodyEnforcementGeneral OverviewFamily LawChild CustodyEnforcementUniform Child Custody Jurisdiction & Enforcement ActFamily LawChild CustodyProcedures

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22-260 California Forms of Pleading and Practice--Annotated § 260.207

§ 260.207 Procedure for Warrant to Take Custody of Child

[1] Verified Application

When filing a petition for enforcement of a child custody determination, the petitioner may also file a verified application for a warrant to take physical custody of the child, if the child is imminently likely to suffer serious physical harm or to be removed from California [*Fam. Code § 3451(a)*; *see* for a form, *see § 260.351[1]*]. The application for the warrant must include the statements required by *Fam. Code § 3448(b)* for a petition for enforcement of a child custody determination [*Fam. Code § 3451(b)*; *see § 260.206[2]*].

[2] Grounds for Issuance of Warrant

If the court finds, after hearing the testimony of the petitioner or other witness, that the child is imminently likely to suffer serious physical harm or to be removed from California, then the court may issue a warrant to take physical custody of the child [*Fam. Code § 3451(b)*]. When there is reason to believe that the child will be harmed or removed once the respondent learns of the enforcement proceeding, the court should temporarily waive the UCCJEA notice requirements [*see Fam. Code § 3448(c)*] and issue the custody warrant [Commissioner's Comment to UCCJEA § 311, 9 Uniform Laws Annotated 698-699 (1999)]. Circumstances in which issuance of a warrant may be appropriate include situations in which the respondent is hiding the child, abusing the child, a flight risk, or involved in a criminal proceeding [Commissioner's Comment to UCCJEA § 311, 9 Uniform Laws Annotated 699 (1999)]. For related orders the court may make in aid of protecting the child, see *[5]-[6], below*.

[3] Testimony

Testimony may be heard in person, by telephone, or by any means acceptable under California law [Commissioner's Comment to UCCJEA § 311, 9 Uniform Laws Annotated 699 (1999)].

[4] Contents of Warrant

A warrant to take physical custody of a child must do all of the following [*Fam. Code § 3451(c)*]:

1. Recite the facts on which a conclusion of imminent serious physical harm or removal from California is based.

2. Direct law enforcement officers to take physical custody of the child immediately.

3. Provide for the placement of the child pending final relief.

[5] Service of Warrant and Removal of Child

The respondent must be served with the petition, warrant, and order immediately after the child is taken into physical custody [*Fam. Code § 3451(d)*].

A warrant to take physical custody of a child is enforceable throughout California [*Fam. Code § 3451(e)*]. If the court finds, after hearing the testimony of the petitioner or other witness, that a less intrusive remedy is not effective, the court may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances of the case, the court may authorize law enforcement officers to make a forcible entry at any hour [*Fam. Code § 3451(e)*].

[6] Placement of Child

The court may impose conditions on the placement of a child to ensure the appearance of the child and the child's custodian [*Fam. Code § 3451(f)*]. The court may use whatever means are available under California law, such as surrender of a passport, or cash bonds [Commissioner's Comment to UCCJEA § 311, 9 Uniform Laws Annotated 699 (1999)].

[7] Timing of Hearing in Relation to Service of Warrant

The petition for enforcement of the child custody determination must be heard on the next judicial day after the warrant to take physical custody of the child is executed, unless that date is impossible. In that event, the court must hold the enforcement hearing on the first judicial day possible [*Fam. Code § 3451(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyEnforcementGeneral OverviewFamily LawChild CustodyEnforcementUniform Child Custody Jurisdiction & Enforcement ActFamily LawChild CustodyProcedures

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22-260 California Forms of Pleading and Practice--Annotated § 260.208

§ 260.208 Award of Costs, Fees, and Expenses

The court must award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate [*Fam. Code § 3452(a)*; *see also Fam. Code § 3* (award of district attorney costs); *see* § 260.211[3]]. Necessary and reasonable expenses include costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings [*Fam. Code § 3452(a)*].

The term "prevailing party" is defined according to California law [Commissioner's Comment to UCCJEA § 312, 9 Uniform Laws Annotated 700 (1999)]. According to a Commissioner's comment, normally the court will award fees and costs, as incurred by both private persons and public officials, against the nonprevailing party [Commissioner's Comment to UCCJEA § 312, 9 Uniform Laws Annotated 700 (1999)]. The UCCJEA implements the policies of the PKPA [Commissioner's Comment to UCCJEA § 312, 9 Uniform Laws Annotated 700 (1999); *see* Pub. L. 96-611 § 8(c)].

The court may not assess fees, costs, or expenses against a state unless authorized by law other than the UCCJEA [*Fam. Code § 3452(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewFamily LawChild CustodyEnforcementUniform Child Custody Jurisdiction & Enforcement ActFamily LawChild CustodyInterferenceParental Kidnapping Prevention Act

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22-260 California Forms of Pleading and Practice--Annotated § 260.209

§ 260.209 Appeal of Enforcement Order

An appeal may be taken from a final order in a proceeding under the UCCJEA enforcement provisions [*see Fam. Code § 3421 et seq.*] in accordance with expedited appellate procedures in other civil cases. Unless the court enters a temporary emergency order [*see Fam. Code § 3424*], the enforcing court may not stay an order enforcing a child custody determination pending appeal.

According to a Commissioner's comment, absent an emergency, a court should not stay an enforcement order, because that would defeat the purpose of having a quick enforcement procedure [Commissioner's Comment to UCCJEA § 314, 9 Uniform Laws Annotated 701 (1999)]. Appellate courts are generally favorable toward extraordinary writ petitions as a way of obtaining timely review of interstate child custody determinations [*see Zenide v. Superior Court (1994) 22 Cal. App. 4th 1287, 1293, 27 Cal. Rptr. 2d 703* (decided under UCCJEA's predecessor statute, UCCJA (former *Fam. Code § 3400 et seq.*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewFamily LawChild CustodyAwardsGeneral OverviewFamily LawChild CustodyEnforcementUniform Child Custody Jurisdiction & Enforcement Act

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22-260 California Forms of Pleading and Practice--Annotated § 260.210

§ 260.210 Involvement and Reimbursement of Law Enforcement Officials

[1] District Attorney

In a UCCJEA enforcement case [*see Fam. Code § 3441 et seq.*], or in a case involving the Hague Convention on International Child Abduction (*see § 260.250* et seq.), a district attorney is authorized to proceed in accordance with California family law procedures for locating a missing party or child [*Fam. Code § 3455(a)*; *see Fam. Code § 3130 et seq.*]. The district attorney acts on behalf of the court and may not represent any party [*Fam. Code § 3455(b)*].

Note that, in this regard, the California UCCJEA differs from the model UCCJEA, because the Legislature elected to retain California law, rather than adopt the model UCCJEA provisions governing the role of a prosecutor or public official in locating a child, obtaining a child's return, or enforcing a child custody determination [*see Fam. Code § 3455(a)*; *cf.* UCCJEA § 315(a), 9 Uniform Laws Annotated 701 (1999)].

[2] Law Enforcement Officer

At the request of a district attorney acting under the UCCJEA, [*see Fam. Code § 3455*] a law enforcement officer may take any lawful action reasonably necessary to locate a child or a party, or to assist the district attorney with UCCJEA responsibilities [*Fam. Code § 3456*].

[3] Assessment of Expenses and Costs

The court may assess all direct expenses and costs incurred by a district attorney acting under the UCCJEA enforcement provisions [*see Fam. Code §§ 3455, 3456*], in accordance with the California procedure for payment of district attorney expenses in locating a missing party or child [*Fam. Code § 3457*; *see Fam. Code § 3134* (payment of expenses); *see also Fam. Code § 3452*; for discussion of award of fees and costs under UCCJEA, *see § 260.208*].

Note that, in this regard, the California UCCJEA differs from the model UCCJEA, which authorizes a court to assess a public official's direct costs and expenses against a respondent who is not the prevailing party [*see Fam. Code § 3457*;

cf. UCCJEA § 317, 9 Uniform Laws Annotated 701 (1999) (assessment of expenses against nonprevailing respondent)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewFamily LawChild CustodyAwardsGeneral OverviewFamily LawChild CustodyEnforcementUniform Child Custody Jurisdiction & Enforcement ActFamily LawChild CustodyInterferenceInternational Child Abduction Remedies Act

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[Reserved]

§§ 260.211[Reserved]

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22-260 California Forms of Pleading and Practice--Annotated § 260.250

§ 260.250 Overview of Hague Convention and Implementing Legislation

On July 1, 1988, the Convention on Civil Aspects of International Child Abduction, originally made at The Hague, Netherlands, on October 25, 1980, became operative in the United States [*see 53 Fed. Reg. 23608 (1988)* ; 1980 Hague Convention, art. 43]. Federal implementing legislation was enacted in 1988 [*see 42 U.S.C. § 11601 et seq.*], and interim federal regulations have been adopted [*see 22 C.F.R. §§ 94.1-94.8*].

The convention establishes legal rights and procedures for the return of a child wrongfully removed to, or retained in, a country other than the child's habitual place of residence [*see 42 U.S.C. § 11601(a)(4)*; *see also Friedrich v. Friedrich (6th Cir. 1993) 983 F.2d 1396, 1400-1402* (construing "habitual residence" as where child actually lives, not where parent may have legal domicile)]. However, it applies only to children under age 16 [1980 Hague Convention, art. 4].

The convention aims to protect children internationally from the harmful effects of their wrongful removal or retention, and to establish procedures to ensure their prompt return to the state of their habitual residence [*Shalit v. Coppe (9th Cir. 1999) 182 F.3d 1124, 1127]* . A child's removal is wrongful under the Convention only if the parent seeking the child's return possesses custody rights [1980 Hague Convention, art. 3; *see Gonzalez v. Gutierrez (2002) 311 F.3d 942, 955-956, 973* (father having only access rights to children could not compel their return to Mexico under Hague Convention, and *ne exeat* clause in foreign custody agreement did not confer "rights of custody" on parent who only had access rights)]. The dual objectives of the convention are to secure the prompt return of children who are wrongfully removed or retained, and to ensure that rights of custody and access under the law of one contracting state are effectively respected in the other contracting states. One of the paramount purposes of the convention is to restore the statue quo and deter parents from crossing international borders to search for a more sympathetic court [*Shalit v. Coppe (9th Cir. 1999) 182 F.3d 1124, 1127]* .

In construing the Hague Convention, fact analysis plays a particularly important role in determining the "habitual residence" of a child. This is because if a child is alleged to have been wrongfully removed from, or retained in, a country by a parent, a court must determine whether that child had become a habitual resident of the country where he or she was residing with the then custodial parent immediately prior to the wrongful removal or retention. Because the

necessary fact-finding regarding "habitual residence" is not specifically defined under the Convention, case law has looked to numerous facts and circumstances to determine whether a child was habitually resident in a particular country [*see generally Mozes v. Mozes (9th Cir. 2001) 239 F.3d 1067, 1071-1072]* .

Note that if a court determines from all available evidence that the parent petitioning for return of a child has *already agreed* to abandon the child's prior habitual residence, then no unlawful retention has occurred and the Convention does not intervene [*see Mozes v. Mozes (9th Cir. 2001) 239 F.3d 1067, 1076-1078]* . Similarly, if the parent petitioning for return has consented to or subsequently acquiesced to the child's retention or removal, then the Convention does not intervene [*42 U.S.C. § 11603(e)(2)(B)*; Hague Convention, art. 13; *Gonzalez-Caballero v. Mena (9th Cir. 2001) 251 F.3d 789, 793]* .

The Convention is in effect between the United States and the following countries:

- Argentina.
- Australia.
- Austria.
- The Bahamas.
- Belize.
- Bosnia-Herzogovina.
- Burkina Faso.
- Canada.
- Chile.
- Croatia.
- Cyprus.
- Denmark.
- Ecuador.
- Finland.
- France.
- Germany.
- Greece.
- Honduras.
- Hungary.

- Ireland.
- Israel.
- Luxembourg.
- Macedonia.
- Mauritius.
- Mexico.
- Monaco.
- The Netherlands.
- New Zealand.
- Norway.
- Panama.
- Poland.
- Portugal.
- Romania.
- Slovenia.
- Spain.
- St. Kitts and Nevus.
- Sweden.
- Switzerland.
- The United Kingdom.
- Zimbabwe.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyInterferenceInternational Child Abduction Remedies Act

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22-260 California Forms of Pleading and Practice--Annotated § 260.251

§ 260.251 General Remedies Under Convention

The Hague Convention sets forth both judicial and administrative remedies to secure the return of a child who has been wrongfully removed to, or retained in, a country that has signed the convention, and to obtain rights of access (visitation) with the child [*see* 1980 Hague Convention, art. 1]. The judicial remedies involve bringing a civil action in the country in which the child is physically present [*see* 1980 Hague Convention, arts. 11-12]. The administrative remedies contemplate use of a "central authority" in each signatory country, which is charged with assisting in the collection and exchange of information about the child's whereabouts, securing the voluntary return of the child, and providing information about applicable law [1980 Hague Convention, arts. 6-10]. These remedies may be used separately or together, in addition to any other remedies provided by the law of the involved countries [*see 42 U.S.C. § 11603(h)*; 1980 Hague Convention, arts. 11, 12, 29].

The Convention does not technically require that the child be returned to the country of habitual residence, although in the classic abduction case this will occur. If the petitioner-parent has moved, the child will be returned to the petitioner, not the country of habitual residence [*Gaudin v. Remis (9th Cir. 2002) 282 F.3d 1178]* . However, because the Convention presumes that the petitioner is located in a different country from that of the abductor and the child, such that multiple countries could potentially make a custody determination, the Convention cannot be invoked when the petitioning parent moves permanently to the same country in which the abductor and the children are located [*Gaudin v. Remis (9th Cir. 2002) 282 F.3d 1178, 1183]* .

The return of the child pursuant to civil proceedings under the Hague Convention does not foreclose criminal prosecution of a parent under the International Parental Kidnapping Crime Act of 1993 [*18 U.S.C. § 1204*; *see United States v. Ventre (9th Cir. 2003) 338 F.3d 1047, 1051-1054* (district court had jurisdiction to accept father's guilty plea under IPKCA after child was returned to United States from Italy)].

Legal Topics:

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

Family LawChild CustodyInterferenceInternational Child Abduction Remedies Act

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22-260 California Forms of Pleading and Practice--Annotated § 260.252

§ 260.252 Court Actions in United States

State courts and United States District Courts have concurrent original jurisdiction of actions arising under the Hague Convention [*42 U.S.C. § 11603(a)*]. Anyone seeking to initiate judicial proceedings under the Convention may file a petition for relief in any court that has jurisdiction and that is authorized to exercise jurisdiction where the child is located when the petition is filed [*see 42 U.S.C. § 11603(b)*; *cf. In re Marriage of Condon (1998) 62 Cal. App. 4th 533, 556, 73 Cal. Rptr. 2d 33* (U.S. citizen filed action in Australia, where child was located, and obtained order that child be returned to California)].

Courts may determine only rights under the Convention and not the merits of any underlying child custody claims [*see 42 U.S.C. §§ 11601(b)(4), 11603(d)*; 1980 Hague Convention, art. 19; *see, e.g., Gaudin v. Remis (9th Cir. 2002) 282 F.3d 1178, 1182* (Hague Convention does not extend to custody determinations but simply restores preabduction status quo by allowing for return of wrongfully abducted child); *Gonzalez-Caballero v. Mena (9th Cir. 2001) 251 F.3d 789, 794* (unwed Panamanian mother's right of return extinguished by her consent or acquiescence to child's removal to United States by American father)]. The court may only determine whether the removal or retention of the child was wrongful under the law of the child's habitual residence, and, if so, order the return of the child to the place of habitual residence for the court there to decide the merits of the custody dispute, unless the alleged abductor can establish a permissible defense [*Shalit v. Coppe (9th Cir. 1999) 182 F.3d 1124, 1128]* . The convention's references to the "law of the State in which the child was habitually resident" is purposefully broad, and is not limited to internal or domestic law, but includes the conflict of law rules of the state of habitual residence [*Shalit v. Coppe (9th Cir. 1999) 182 F.3d 1124, 1128-1129]* . Courts may take measures under state or federal law to protect the child's well-being or to prevent his or her further removal or concealment pending a final disposition of the petition, but may not order a child removed from a person having physical control of the child unless the applicale requirements of state law are satisfied [*see 42 U.S.C. § 11604*].

Legal Topics:

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

Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent JurisdictionFamily LawChild CustodyInterferenceInternational Child Abduction Remedies ActFamily LawChild CustodyJurisdictionGeneral Overview

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22-260 California Forms of Pleading and Practice--Annotated § 260.253

§ 260.253 Role of U.S. Central Authority

Alternatively, or in addition, a person seeking relief under the Convention may apply for assistance to the Central Authority in the United States. The Office of Citizens' Consular Services in the Bureau of Consular Affairs, a subdivision of the State Department, has been designated to serve in that capacity. Any "person, institution, or other body" may apply to the Office of Citizens Consular Services for assistance [*22 C.F.R. §§ 94.2, 94.5*].

If a child has been abducted *to* the United States, this office must, in part, do the following [*see 22 C.F.R. §§ 94.5, 94.6*]:

- Confirm (or determine) the child's whereabouts.
- Ascertain the child's welfare.
- Attempt to obtain a voluntary agreement for visitation or the child's return.
- Assist applicants in obtaining information about legal representation.
- Provide information, on request, to foreign central authorities about the status of the case and applicable law.
- Consult with appropriate agencies about possible arrangements for temporary care or return travel for the child.

Separate rules govern the office's responsibilities if a child has been abducted *from* the United States [*see 22 C.F.R. § 94.7*]. Among the resources available to the office is the federal Parental Locator Service. The office is required to resort to that service before seeking information from other government agencies [*see 42 U.S.C. § 11608(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyInterferenceInternational Child Abduction Remedies ActGovernmentsFederal GovernmentExecutive Offices

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[Reserved]

§§ 260.254[Reserved]

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§ 260.300 Related Matthew Bender Publications

[1] California Points and Authorities

For a discussion of void judgments and their effect, see California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* (Matthew Bender)

[2] California Family Law

For detailed discussion of interstate child custody jurisdictional issues under the federal Parental Kidnapping Prevention Act [*28 U.S.C. § 1738A*] and under the Uniform Child Custody Jurisdiction and Enfrocement Act [*Fam. Code § 3400 et seq.*], *see* Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., Chs. 32 and 142 (Matthew Bender)

For a discussion of enforcement of child custody orders in an international setting under the Hague Convention on International Child Abduction, *see* Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., Ch. 142 (Matthew Bender).

For additional discussion of recognition and validity of foreign judgments in the context of family law proceedings, *see* Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., Ch. 150 (Matthew Bender).

Enforcement of foreign money judgments under the Sister State Money-Judgments Act (SSMJA) [*Code Civ. Proc. § 1710.10 et seq.*] is discussed in Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d ed., Ch. 151 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 260.301 Federal Constitution

Full faith and credit clause. U.S. *Const., art. IV, § 1*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 260.302 Federal Statutes

Parental Kidnaping Prevention Act of 1980. *28 U.S.C. § 1738A*

Full Faith and Credit for Child Support Orders Act. *28 U.S.C. § 1738B*

Requirement that states enact Uniform Interstate Family Support Act. *42 U.S.C. § 666(f)*

Implementation of Hague Convention on International Child Abduction. *42 U.S.C. § 11601 et seq.*

Legal Topics:

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

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

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§ 260.305 Decisions

NOTE:

The following cases were decided under the former Uniform Reciprocal Enforcement of Support Act of 1968 (URESA-former *Civ. Code § 4800 et seq.*), which has been replaced with the Uniform Interstate Family Support Act (UIFSA-*Fam. Code § 4900 et seq.*), operative January 1, 1998 [*see* Stats. 1997, ch. 194].

[1] Choice of Law

Out-of-state judgment for child support arrearages is enforceable under RURESA, and not Sister-State Money Judgments Act (*Code Civ. Proc. § 1710.10 et seq.*), because legislature intended that all foreign support orders be enforced under *RURESA. Neuman v. Barbera (1985) 164 Cal. App. 3d 437, 442-443, 210 Cal. Rptr. 556*

Law of state in which support obligation originated is judicially noticed and applied by California courts. *Petersen v. Petersen (1972) 24 Cal. App. 3d 201, 205, 100 Cal. Rptr. 822*

After foreign divorce judgment is established as California judgment, California law applies to determine change of circumstances to justify modification. *Petersen v. Petersen (1972) 24 Cal. App. 3d 201, 205, 100 Cal. Rptr. 822*

Validity and effect of sister state divorce judgment is governed by laws of that state. *Rall v. Lovell (1951) 105 Cal. App. 2d 507, 510, 233 P.2d 681*

Law of state where divorce judgment was rendered and by which its effect is to be determined must be established as a fact, though effect of law when proved is question of fact for the court. *Rall v. Lovell (1951) 105 Cal. App. 2d 507, 510, 233 P.2d 681*

[2] Collateral Attack

Collateral impeachment of foreign divorce decree by extrinsic evidence in California action is proper to show that foreign court did not have jurisdiction over parties or subject matter. *Crouch v. Crouch (1946) 28 Cal. 2d 243,*

249-251, 169 P.2d 897

Extrinsic evidence is admissible to show that foreign dissolution judgment is void in fact although not void on face for lack of jurisdiction. *Hammell v. Britton (1941) 19 Cal. 2d 72, 81, 119 P.2d 333*

When divorce decree rendered in sister state is offered in evidence as to bar to asserted right, court may inquire into jurisdiction of sister state court that rendered decree; if jurisdictional defect does not appear on face of record, presumption of jurisdiction is conclusive; divorce decree of sister state may be impeached collaterally by extrinsic evidence and reexamination of jurisdiction of sister state is in effect trial de novo on that issue. *In re Marriage of Leff (1972) 25 Cal. App. 3d 630, 636, 102 Cal. Rptr. 195*

Foreign divorce decree is not entitled to full faith and credit when neither party was domiciled in divorce state and attacking party was not served within that jurisdiction and did not appear in action. *Carmichael v. Carmichael (1963) 216 Cal. App. 2d 674, 678, 31 Cal. Rptr. 514*

[3] Declaratory Relief Action

Declaratory relief action is proper to test validity of foreign divorce. *Klinker v. Klinker (1955) 132 Cal. App. 2d 687, 283 P.2d 83*

[4] Defenses to Enforcement Action

[a] Interference With Visitation

Even if custodial parent did conceal child, strong public policy requires noncustodial parent to reimburse state agency for AFDC payments made to custodial parent. *In re Marriage of Kelley (1986) 186 Cal. App. 3d 613, 620, 231 Cal. Rptr. 6* (no finding of concealment)

Active concealment of child by custodial parent is distinguished from "interference with rights of visitation" noted in former *Code Civ. Proc. § 1694* (then former *Fam. Code § 4845*), so that "active concealment" is allowed as defense to enforcement of support award for arrearages accrued during period of concealment. *Solberg v. Wenker (1985) 163 Cal. App. 3d 475, 480-481, 209 Cal. Rptr. 545*

[b] Statute of Limitations

Obligor may raise defense of California statute of limitations against enforcement of sister-state judgment despite fact that judgment was final and for liquidated sum. *Morris v. Cohen (1983) 149 Cal. App. 3d 507, 514-517, 196 Cal. Rptr. 834*

[5] Domicile

Determination of issue of domicile when person maintains two residences depends to great extent on person's intention as manifested by acts and declarations. *In re Marriage of Leff (1972) 25 Cal. App. 3d 630, 642, 102 Cal. Rptr. 195*

Bona fide domicile in sister state necessary to support foreign divorce decree is question of fact. *In re Marriage of Leff (1972) 25 Cal. App. 3d 630, 641, 102 Cal. Rptr. 195*

[6] Enforcement of Established Judgment

1975 Texas judgment awarding wife 22.5 percent of husband's military retirement benefit is entitled to enforcement in California despite 1981 United States Supreme Court decision precluding award of federal military retirement pay to nonearning spouse because Texas judgment was final, and thus res judicata and entitled to full faith and credit, before decision issued. *Tyus v. Tyus (1984) 160 Cal. App. 3d 789, 795, 206 Cal. Rptr. 817*

Foreign judgment is enforceable in this state only by an action. *Hamilton v. Superior Court of San Mateo County (1974) 37 Cal. App. 3d 418, 422, 112 Cal. Rptr 450*

Sister state divorce judgment established as foreign judgment, in full force and effect, becomes California judgment for purposes of enforcement in this state. *Hamilton v. Superior Court of San Mateo County (1974) 37 Cal. App. 3d 418, 422, 112 Cal. Rptr 450*

Foreign judgment established as judgment of this state is enforceable by contempt proceeding, by execution, and by proceedings supplemental to execution. *Leverett v. Superior Court (1963) 222 Cal App. 2d 126, 133, 34 Cal. Rptr. 784*

[7] Establishing Sister State Judgments in California

Court has jurisdiction to modify custody order in action to establish foreign judgment as California judgment, but does not have jurisdiction to modify child support payments unless it has personal jurisdiction over defendant. *Kulko v. Superior Court (1977) 19 Cal. 3d 514, 520, 138 Cal. Rptr. 586, 564 P.2d 353* (holding that under facts of case, trial court had personal jurisdiction over nonresident, nondomiciliary defendant and reversed on this point by United States Supreme Court in *Kulko v. Superior Court (1978) 436 U.S. 84, 98 S. Ct. 1690, 56 L. Ed. 2d 132, 147 , reh'g denied, 438 U.S. 908*

Establishing foreign divorce decree as California judgment is unnecessary when decree makes no provision for support and neither party actually seeks to enforce or modify it in any manner. *Knodel v. Knodel (1975) 14 Cal. 3d 752, 760 n.10, 122 Cal. Rptr. 521, 537 P.2d 353*

Action to establish and enforce sister state judgment is proper. *Lewis v. Lewis (1957) 49 Cal. 2d 389, 317 P.2d 987* (separate maintenance); *Worthley v. Worthley (1955) 44 Cal. 2d 465, 283 P.2d 19* (separate maintenance); *Biewend v. Biewend (1941) 17 Cal. 2d 108, 109 P.2d 701* (divorce)

Trial court properly established Georgia decree as California judgment, modified child support provisions, and set child support arrearages. *In re Marriage of Hattis (1987) 196 Cal. App. 3d 1162, 1171, 242 Cal. Rptr. 410*

[8] Filing Application

Code Civ. Proc. § 1710.15(a) of SSMJA (*Code Civ. Proc. § 1710.10 et seq.*), providing that judgment creditor may apply for entry of judgment based on sister state judgment by filing application in California court, does not require that application be filed by attorney. *Kessler v. Kessler (1983) 141 Cal. App. 3d 94, 97-98, 190 Cal. Rptr. 109* (New York conservator for obligee wife, although not a California attorney, allowed to file application in California to enter New York judgment for delinquent spousal support against California resident husband)

[9] Full Faith and Credit

Full faith and credit clause requires that judgment for alimony that cannot be modified under law of rendering state

cannot be modified elsewhere. *Elkind v. Byck (1968) 68 Cal. 2d 453, 459-460, 67 Cal. Rptr. 404, 439 P.2d 316*

Regarding accrued installments not subject modification by court rendering original order, order for payment of money as alimony rendered by court of competent jurisdiction must be recognized by all other states under full faith and credit clause of United States Constitution. *Lewis v. Lewis (1957) 49 Cal. 2d 389, 395, 317 P.2d 987*

Valid dissolution judgment rendered by court of competent jurisdiction in one state is accorded full faith and credit by every other court in *United States. Biewend v. Biewend (1941) 17 Cal. 2d 108, 111-112, 109 P.2d 701*

Full faith and credit bars defendant from collaterally attacking sister state divorce decree on jurisdictional grounds when defendant participated in divorce proceedings and was accorded full opportunity to contest jurisdictional issues and when foreign decree is not susceptible to such collateral attack in courts of state which rendered it. *In re Marriage of Leff (1972) 25 Cal. App. 3d 630, 637, 102 Cal. Rptr. 195*

Court of one state has no legal right to annul, vacate, or set aside foreign judgment. *In re Marriage of Leff (1972) 25 Cal. App. 3d 630, 635, 102 Cal. Rptr. 195*

Before California must give full faith and credit to sister state divorce decree, two conditions are required: (1) decree must be one not susceptible to collateral attack in courts of state that rendered it, and (2) there must be participation by party aggrieved under circumstances which have afforded party full opportunity to contest jurisdictional issues. *Aldabe v. Aldabe (1962) 209 Cal. App. 2d 453, 469-470, 26 Cal. Rptr. 208*

[10] Jurisdiction

Act of nonresident, nondomiciliary father in sending child to California pursuant to child's wishes to live with mother, was insufficient contact with California under due process clause to permit California to exercise in personam jurisdiction over father to increase child support, in mother's California action to establish foreign divorce decree as California judgment and modify judgment as established to gain custody of children and increase amount of child support originally awarded. *Kulko v. Superior Court (1978) 436 U.S. 84, 98 S. Ct. 1690, 56 L. Ed. 2d 132, 137 , reh'g denied, 438 U.S. 908* (reversing *Kulko v. Superior Court (1977) 19 Cal. 3d 514, 138 Cal. Rptr. 586, 564 P.2d 353* , and pointing out that mother could seek child support increase by suing father in father's state of residence or by proceeding pursuant to (now former) Revised Uniform Reciprocal Enforcement of Support Act of 1968 because foreign state has comparable statutory procedure (Uniform Reciprocal Enforcement of Support Act, former *Fam. Code § 4800 et seq.*))

[11] Modification of Original Order

[a] Between Different States

California courts must afford defendant opportunity to litigate issue of modification of foreign support decree. *Worthley v. Worthley (1955) 44 Cal. 2d 465, 472, 283 P.2d 19*

Despite apparent prohibition of former *Code Civ. Proc. § 1694* (former *Fam. Code § 4845*), California court may modify Ohio judgment and condition payment of support on custodial parent's compliance with visitation provisions, because Ohio permits such modification. *Creed v. Schultz (1983) 148 Cal. App. 3d 733, 741-742, 196 Cal. Rptr. 252*

Decree of dissolution rendered in Michigan requiring one parent alone to support children does not abrogate support duty of other parent; state agency providing support to children is entitled to seek reimbursement from other parent under former RURESA (URESA, former *Fam. Code § 4800 et seq.*). *Carr v. Marshman (1983) 147 Cal. App. 3d*

1117, 1121, 1123, 195 Cal. Rptr. 603

Support provision of Arizona marital settlement agreement is enforceable in California after registration of Arizona dissolution decree if agreement was merged into decree under Arizona law. *In re Marriage of Alper (1981) 116 Cal. App. 3d 925, 928-929, 172 Cal. Rptr. 402*

Reciprocal support order does not supersede support provisions of original judgment, when no request for modification was made and reciprocal order did not specifically refer to intent to modify. *In re Marriage of Popenhager (1979) 99 Cal. App. 3d 514, 521, 160 Cal. Rptr. 379*

[b] Between California Counties

Child support order entered in dissolution proceeding in one county of California may be modified by court in another county when order has been properly registered pursuant to former *Code Civ. Proc. § 1697(b)* (former *Fam. Code § 4848(b)*). *In re Marriage of Straeck (1984) 156 Cal. App. 3d 617, 621, 203 Cal. Rptr. 69*

Portion of judgment awarding attorney's fees in dissolution proceeding does not constitute "support order" within meaning of former *Code Civ. Proc. § 1653(k)* (former *Fam. Code § 155*), and therefore is enforceable under Sister-State Money Judgment Act (*Code Civ. Proc. § 1710.10 et seq.*) and not former RURESA (*see* URESA, former *Fam. Code § 4800 et seq.*). *Fishman v. Fishman (1981) 117 Cal. App. 3d 815, 821-823, 173 Cal. Rptr. 59*

[12] Pendente Lite Orders

Award by California trial court for support pendente lite was proper in action to establish foreign judgment for alimony and attorney's fees. *Hood v. Hood (1962) 211 Cal. App. 2d 332, 27 Cal. Rptr. 47*

[13] URESA

[a] Applicability of Act

Out-of-state judgment for child support arrearages was enforceable under former RURESA, and not the SSMJA, because Legislature intended that all foreign support orders be enforced under RURESA. *Neuman v. Barbera (1985) 164 Cal. App. 3d 437, 442-443, 210 Cal. Rptr. 556* Money judgment based on delinquent spousal and child support, and enforceable by execution in sister state, constituted "support order" within meaning of URESA, and therefore was enforceable under former URESA, construed within context of *SSMJA. Morris v. Cohen (1983) 149 Cal. App. 3d 507, 513- 514, 196 Cal. Rptr 834* (criticizing contrary holding in *Liebow v. Superior Court (1981) 120 Cal. App. 3d 573, 579-581, 175 Cal. Rptr. 26*)

Although initially enacted to enforce support obligations of deserting fathers, URESA applied to any situation in which there was breach of duty of support. *Carr v. Marshman (1983) 147 Cal. App. 3d 1117, 1119, 195 Cal. Rptr. 603*

Although father had been awarded custody and ordered to provide for children's support on dissolution of marriage, when his whereabouts were unknown, State of Florida, properly brought URESA action in California against obligor mother, and California court properly ordered mother to reimburse Florida for future welfare funds that Florida would be obliged to pay for support of children who were living in Florida with paternal grandmother. *State of Florida ex rel. Dep't of Health & Rehabilitative Services v. Vernon (1982) 138 Cal. App. 3d 827, 829-831, 188 Cal. Rptr. 322*

Money judgment based on delinquent alimony and enforceable by execution in sister state was not "support order"

within meaning of former *Code Civ. Proc. § 1653(k)* (URESA), and was thus enforceable under *SSMJA. Liebow v. Superior Court (1981) 120 Cal. App. 3d 573, 579-581, 175 Cal. Rptr. 26* (criticized in *Morris v. Cohen (1983) 149 Cal. App. 3d 507, 513-514, 196 Cal. Rptr 834*)

Portion of judgment awarding attorney's fees in dissolution proceeding did not constitute "support order" within meaning of former *Code Civ. Proc. § 1653(k)* (URESA), and was thus enforceable under SSMJA. *Fishman v. Fishman (1981) 117 Cal. App. 3d 815, 821-823, 173 Cal. Rptr. 59* (criticized in *Neuman v. Barbera (1985) 164 Cal. App. 3d 437, 441-442, 210 Cal. Rptr. 556*)

[b] Child Support

Order for child support by rendering state is not dispositive of welfare of child for all time and in all states; states share power over parent-child relationship to extent of obligor's presence in each. *Elkind v. Byck (1968) 68 Cal. 2d 453, 459-460, 67 Cal. Rptr. 404, 439 P.2d 316*

[c] Constitutionality

Obligor is not entitled to jury trial in proceeding under URESA when issue is amount of support to be paid; privilege against self-incrimination is not applicable in civil proceeding. *Reynolds v. Reynolds (1978) 86 Cal. App. 3d 732, 734-735, 150 Cal. Rptr. 423*

Provisions of URESA are not vague and unconstitutional, and not violative of equal protection of laws. *Harmon v. Harmon (1958) 160 Cal. App. 2d 47, 53-54, 324 P.2d 901*

Classification of certain persons as being entitled to support under URESA is reasonable and has fair and substantial relation to object of law; therefore, URESA was not violative of equal protection of laws. *Smith v. Smith (1954) 125 Cal. App. 2d 154, 169, 270 P.2d 613*

[d] Purpose of Act

Purpose of former URESA was to provide person in one state with expeditious means to secure support from person in another state who was legally liable for such support. *Scott v. Superior Court (1984) 156 Cal. App. 3d 577, 585, 202 Cal. Rptr. 920* ; *Banks v. McMorris (1975) 47 Cal. App. 3d 723, 728, 121 Cal. Rptr. 185*

URESA was designed to enable a dependent in one state to secure money for support from a person residing in another state who was legally liable for the support of the dependent. *Clark v. Clark (1966) 246 Cal. App. 2d 619, 622, 54 Cal. Rptr. 875*

URESA provided means for enforcing child or spousal support obligations of obligors located outside the jurisdiction in which the dependent spouse or children were present. *Mehrstein v. Mehrstein (1966) 245 Cal. App. 2d 646, 648, 54 Cal. Rptr. 65*

[14] Venue

Foreign judgment is not a "final judgment" within meaning of *Code Civ. Proc. § 397.5*, relating to change of venue after final judgment, until established as domestic judgment. *Hamilton v. Superior Court of San Mateo County (1974) 37 Cal. App. 3d 418, 425, 112 Cal. Rptr. 450*

Venue of action to establish foreign judgment as California judgment is governed by *Code Civ. Proc. § 395*.
Hamilton v. Superior Court of San Mateo County (1974) 37 Cal. App. 3d 418, 422, 112 Cal. Rptr. 450

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsFamily LawChild CustodyInterferenceGeneral OverviewFamily LawChild SupportObligationsEnforcementArrearage JudgmentsFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Reciprocal Enforcement of Support ActGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 260.306 Law Reviews

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22-260 California Forms of Pleading and Practice--Annotated § 260.310

§ 260.310 UIFSA Forms Matrix--Department of Health and Human Services Form

[1] FORM UIFSA Forms Matrix--Department of Health and Human Services Form

Click here to view image.

[2] Use of Form

The form in *[1], above*, sets forth a listing of the United States Department of Health and Human Services (DHHS) forms that are needed in the various proceedings that may be brought under the Uniform Interstate Family Support Act (UIFSA). The left column lists the various possible proceedings that might be initiated or remedies that might be sought, and the right column indicates the forms that are for use for the indicated proceeding or remedy. DHHS forms have been adopted by Rules of Court for use in California [*see Cal. Rules of Ct., Rule 5.27*].

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22-260 California Forms of Pleading and Practice--Annotated § 260.311

§ 260.311 Notice of Registration of Out-of-State Support Order--Cal. Judicial Council Form FL-570

[1] FORM Notice of Registration of Out-of-State Support Order--Cal. Judicial Council Form FL-570

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative, filled-in version of the approved Judicial Council form of Notice of Registration of Out-of-State Support Order, for use in proceedings to enforce out-of-state support and income withholding orders [Cal. Judicial Council Form FL-570; *see Fam. Code §§ 4952, 4954*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

According to the form, the support obligor can contest the validity or enforcement of the registered order by requesting a hearing within 25 days of the mailing date of the notice, using the Judicial Council form of Request for Hearing Regarding Registration of Support Order, which is set forth at § 260.312[1] [*see* Cal. Judicial Council Form FL-575]. This time period, set by statute at "20 days after notice," is apparently extended to 21 court days because notice is being given by mail to an addressee within California [*see Code Civ. Proc. §§ 1005(b), 1013(a)*; *Fam. Code §§ 4954(b)(2), 4955(a)*].

[3] Additional Items to Be Supplied to Court Clerk

The Notice of Registration of Out-of-State Support Order is designed to be mailed to the support obligor by the court clerk, with a copy to the child support agency, if that agency is involved in the case. Thus, a sufficient number of the following items should be should be submitted to the court clerk for this purpose:

- Preaddressed mailing envelopes (with postage prepaid).

- Copies of the completed form Notice of Registration of Out-of-State Support Order.
- Copies of the out-of-state order.
- Copies of the registration statement for the order.

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22-260 California Forms of Pleading and Practice--Annotated § 260.312

§ 260.312 Request for Hearing Regarding Registration of Support Order--Cal. Judicial Council Form FL-575

[1] FORM Request for Hearing Regarding Registration of Support Order--Cal. Judicial Council Form FL-575

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative, filled-in version of the mandatory Judicial Council form of Request for Hearing Regarding Registration of Support Order [Cal. Judicial Council Form FL-575]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form may be used by a support obligor (or someone alleged to be a support obligor) to obtain a hearing for the purpose of contesting the validity or enforcement of an out-of-state or California support order (including an order for income withholding) that has been registered in California [*see Fam. Code §§ 4954(b)(2), 4955(a), 5603*]. The most common grounds for vacation of the registered order are set out in Paragraph 2 of the form, and counsel should mark the check-off box or boxes that apply. For discussion of the grounds for vacating registration, see *§ 260.154*. For discussion of other defenses under the Uniform Interstate Family Law Act (UIFSA-*Fam. Code § 4900 et seq.*), see *§ 260.117*.

The completed form must be filed with the court clerk, after obtaining a hearing date from the clerk. Depending on local practice, that date will either be filled in directly by the clerk, or by counsel after the date is set (see Paragraph 1). Preaddressed, and postage paid, envelopes, along with sufficient copies of the completed form, must also be presented to the court clerk for mailing to the parties-whose names and addresses must be set forth on page two of the form.

For a form of statement to register a California support order, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*, § 259.369. See also § 260.330[2] -[3].

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22-260 California Forms of Pleading and Practice--Annotated § 260.313

§ 260.313 Declaration Supporting Motion for Determination of Controlling Order

[1] FORM Declaration Supporting Motion for Determination of Controlling Order

_____[*name*], states as follows:

1. I am a resident of the state of California, currently residing at _____[*address*].

2. _____ [*Set forth party status with regard to UIFSA proceedings, e.g.,* I am the Petitioner in this proceeding under the Uniform Interstate Family Support Act (UIFSA), *Family Code Section 4900 et seq.* for the registration of a support order from the state of Ohio].

3. _____ [*Set forth details of first support order, e.g.,* I am the child support obligor under an order issued _____ (*date*) by the Court of Common Pleas of Stark County, Ohio in case number _____, an action for paternity under Ohio Law, entitled Brown v. Black. Under this order, I am required to pay child support to _____ (*name of obligee*) for the benefit of _____ (*name(s) of child or children*)]. A certified copy of this order is set forth as Attachment A to this Application for Order and Supporting Declaration.

4. _____ [*Set forth details of second support order, e.g.,* I am also the support obligor under an order issued _____ (*date*) by the Superior Court of California, County of Alameda, in case number _____, a proceeding for registration and modification of the above-noted Ohio order under the Uniform Reciprocal Enforcement of Support Act (URESA), former *Family Code Section 4800 et seq.* Under this order, I am required to pay child support to the same obligee for the benefit of the same child as under the Ohio order]. A certified copy of this order is set forth as Attachment B to this Application for Order and Supporting Declaration.

5. _____ [*Set forth any grounds for challenging the jurisdiction of either of the courts that made a prior order, e.g.,* At the time when the California court exercised jurisdiction to modify the Ohio order, it did not have, and could not assume continuing, exclusive jurisdiction as required by UIFSA because the obligee and child were then

still domiciled in the State of Ohio. Therefore, California was without jurisdiction to modify the Ohio order].

[*EITHER, if priority is based on child's home state*]

6. _____ [*Set forth claim for priority of one order or the other based on the child's home state, e.g.,* Even if it is determined that the California court acted within its jurisdiction, the Ohio order is the order entitled to recognition as the sole controlling order under UIFSA because Ohio remains the home state of the child. The child lives there with his mother, the obligee under both the Ohio and California orders, and has lived there for at least six consecutive months preceding the filing of this motion].

[*OR, if there is no order from home state, and priority is based on timing of orders*]

6. _____ [*If child's current home state is not one of issuing states of the orders at issue, set forth claim that most recent order controls, e.g.,* The California order is the order entitled to recognition as the sole controlling order under UIFSA because neither Ohio nor California is the child's home state, and the California order is the one issued most recently].

[*CONTINUE*]

7. _____ [*Set forth relief requested, e.g.,* Based on the above-stated facts, I request an order of this court that the Ohio order is the controlling order and must be recognized as such under the Uniform Interstate Family Support Act, and that the California order is of no further force and effect, and is not entitled to recognition or enforcement in this or any other state or jurisdiction].

[2] Use of Form

The form in [1], *above,* is a sample declaration in support of a motion to determine which of multiple support orders issued for the same obligor and child is the controlling order that is entitled to recognition. Under the Uniform Interstate Family Support Act (UIFSA), only one such order may be in place at any time [*see Fam. Code § 4911* (discussed in *§ 260.94*)]. However, under the now-repealed Uniform Reciprocal Enforcement of Support Act (URESA), it was possible for there to be multiple valid orders in place for the same obligor and child. UIFSA contains priorities to determine which of multiple URESA orders in the one that is entitled to recognition and enforcement [*see Fam. Code § 4911(b)*].

UIFSA also contains a procedure for determining which is the controlling order. If two or more child support orders have been issued for the same obligor and child and if the obligor or the individual obligee resides in California, a party may request a California court to determine which order controls and must be so recognized. The request must be accompanied by a certified copy of every support order in effect. The requesting party must give notice of the request to each party whose rights may be affected by the determination [*Fam. Code § 4911(c)*]. Because California is to apply its own procedural law in UIFSA proceedings [*Fam. Code § 4917(a)*; *see § 260.118[1]*], a party requesting a determination of the controlling order would proceed by Notice of Motion [*see* Cal. Judicial Council Form FL-301] or Order to Show Cause [*see* Cal. Judicial Council Form FL-300]. The Judicial Council Form of Application for Order and Supporting Declaration [Cal. Judicial Council Form FL-310] should be used. Examples of these Judicial Council forms are set forth in Ch. 221, *Dissolution of Marriage: Procedure* . For an illustration and discussion of the Department of Health and Human Services form of UIFSA Notice of Determination of Controlling Order, see*§ 260.319*.

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22-260 California Forms of Pleading and Practice--Annotated § 260.314

§ 260.314 Summons (UIFSA)--Cal. Judicial Council Form FL-510

[1] FORM Summons (UIFSA)--Cal. Judicial Council Form FL-510

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative, filled-in version of the mandatory Judicial Council form of Summons (UIFSA) [Cal. Judicial Council Form FL-510]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is intended to be used with the Uniform Support Petition [*see § 260.310[1]*] and any accompanying papers in proceedings brought under the Uniform Interstate Family Support Act (UIFSA-*Fam. Code § 4900 et seq.*). For discussion of related papers, see *§§ 260.315[2], [3], 260.316[2]*, and *260.317[2], [3]*.

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22-260 California Forms of Pleading and Practice--Annotated § 260.315

§ 260.315 Order to Show Cause (UIFSA)--Cal. Judicial Council Form FL-515

[1] FORM Order to Show Cause (UIFSA)--Cal. Judicial Council Form FL-515

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative, filled-in version of the mandatory Judicial Council form of Order to Show Cause (UIFSA) [Cal. Judicial Council Form FL-515]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form is designed for use by governmental agencies or private parties to set up a hearing to obtain either initial court orders or to modify existing orders in a proceeding under the Uniform Interstate Family Support Act (UIFSA-*Fam. Code § 4900 et seq.*).

For general discussion of serving orders to show cause in family law matters, see Ch. 221, *Dissolution of Marriage: Procedure* .

[3] Contents of and Attachments to Form

The show cause order is directed to the respondent, whose name is to be listed in Paragraph 1 of the form. Hearing information should be set forth in Paragraph 2.

Although not specified by the form, it appears that the moving party may use the Judicial Council form of Application for Order and Supporting Declaration (Family Law-Uniform Parentage) [*see* Cal. Judicial Council Form FL-310] to apply for the orders being sought, and the Judicial Council form of Temporary Orders (Family Law-Uniform Parentage) [*see* Cal. Judicial Council Form FL-305] to describe any orders granted pending a hearing that are not on the face of the

Order to Show Cause form [*see Fam. Code §§ 4906, 4917(a)* (use of California procedural and substantive law)]. For illustrative filled-in versions of those forms, see Ch. 221, *Dissolution of Marriage: Procedure* . In addition, a specialized form of ex parte application and order has been adopted for use in obtaining an order of nondisclosure of a party's or child's address or other identifying information [*see* Cal. Judicial Council Form FL-511, illustrated in § 260.317].

Paragraph 3 of this Order to Show Cause form provides a series of checkoff boxes by which to indicate the various forms that are to be served along with this form. For example, if the Uniform Support Petition has not yet been served on the respondent, that Petition, the General Testimony form, and any associated forms may be ordered served on the respondent with this Order to Show Cause form. In addition, appropriate blank responsive and financial declaration forms may be ordered served [*see, e.g.*, Cal. Judicial Council Forms FL-150, FL-155, FL-320, FL-520]. In modification situations, a copy of the most recent support order should be attached and the checkoff box marked.

If the court grants an order shortening time for service or hearing, the details of this order are to be set forth in Paragraph 4 of this form. Paragraph 4 also provides checkoff boxes by which to indicate the granting of any temporary or other orders.

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22-260 California Forms of Pleading and Practice--Annotated § 260.316

§ 260.316 Response to Uniform Support Petition (UIFSA)--Cal. Judicial Council Form FL-520

[1] FORM Response to Uniform Support Petition (UIFSA)--Cal. Judicial Council Form FL-520

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative, filled-in version of the mandatory Judicial Council form of Response to Uniform Support Petition (UIFSA), for use by a respondent in a proceeding under the Uniform Interstate Family Support Act (UIFSA-*Fam. Code § 4900 et seq.*) [Cal. Judicial Council Form FL-520]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form permits the respondent:

- To admit or deny parentage of the children for whom support is at issue in the proceeding (Paragraph 1).
- To request genetic testing (Paragraph 2).
- To agree or disagree with the support being sought (Paragraph 3).
- To agree or disagree with other court orders requested (Paragraph 4).
- To request a court hearing (Paragraph 5).

Any voluntary declaration of paternity signed by the parents should be attached, and the associated checkoff box (Paragraph 1.b.) marked.

In addition, a respondent who objects to the amount of support requested may (but is not required to, for purposes of filing the form) attach a completed Income and Expense Declaration or Financial Statement (Simplified) [*see* Cal. Judicial Council Forms FL-150, FL-155]. It would appear that the financial declaration actually should be attached if the respondent admits parentage and only objects to the amount of support that has been requested--in contrast to opposing support because he or she denies being a parent.

Paragraph 6 of the form contains spaces in which the respondent must list his or her address and telephone number(s) for purposes of receipt of all official notices. The respondent must also notify the court and opposing parties of any changes to this information.

The original of the Response form must be filed with the court within 30 days of the date of service of the Uniform Support Petition. A copy of the Response must first be served on the other parties and the proof of service information completed on page two of the Response, before filing the original form with the court.

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22-260 California Forms of Pleading and Practice--Annotated § 260.317

§ 260.317 Ex Parte Application for Order for Nondisclosure of Address and Order (UIFSA)--Cal. Judicial Council Form FL-511

[1] FORM Ex Parte Application for Order for Nondisclosure of Address and Order (UIFSA)--Cal. Judicial Council Form FL-511

Click here to view image.

[2] Use of Form

This form is an illustrative version of the mandatory Judicial Council form of Ex Parte Application for Order for Nondisclosure of Address and Order (UIFSA) [Cal. Judicial Council Form FL-511].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form is intended to be used to obtain, ex parte, a court order requiring the nondisclosure of the address or other identifying information of a party or child in a proceeding under the Uniform Interstate Family Support Act (UIFSA-*Fam. Code § 4900 et seq.*) [*see Fam. Code § 4926*]. The basis for the order is a finding by the court that the health, safety, freedom of movement, or physical or emotional well-being of the applicant or the applicant's child would be unreasonably put at risk by the disclosure of identifying information in the pleadings or other documents filed in the proceeding [*see Fam. Code §§ 4926, 4977*]. *Fam. Code § 4977* provides for the order to be sought by a "child, parent, guardian or other caretaker of a child, or party."

[3] Contents of Form

Except when the child support agency is the applicant, the applicant's name must be listed in Paragraph 1, along with the name of the protected person-that is, the person who is the subject of the nondisclosure order (which, in many cases, will be the same as the applicant). If the child support agency files the application, Paragraph 2 should be completed. In

Paragraph 3, the mailing address of the protected person *for service of process* must be set forth. This designated address must not be that of a governmental agency unless the agency has first consented in writing to the designation [*see Fam. Code § 4977(b)*]. In Paragraph 4, the applicant must set forth facts supporting issuance of the nondisclosure order. An attached declaration may be used if there is insufficient space on the form in which to provide the details.

The court's findings and order are set out in Paragraphs 5 et seq. If the order for nondisclosure is granted, a copy is to be served on the other party (and the agency if it is not the applicant) by first-class mail [*see Fam. Code § 4977(b)*]. The order will not expire until further order of the court, issued after a hearing on a noticed motion brought by the other party [*see Fam. Code § 4977(c)*].

A notice on the form provides that "use of this ex parte application and order will require that the UIFSA petition in this matter be initiated in the California court in which this application is submitted pursuant to *Fam. Code §§ 4907* and *4918*." For discussion of the UIFSA Order to Show Cause, see *§§ 260.315[2], [3]*.

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22-260 California Forms of Pleading and Practice--Annotated § 260.318

§ 260.318 Judgment Regarding Parental Obligations (UIFSA)--Cal. Judicial Council Form FL-530

[1] FORM Judgment Regarding Parental Obligations (UIFSA)--Cal. Judicial Council Form FL-530

Click here to view image.

[2] Use of Form

This form is an illustration of the mandatory Judicial Council form of Judgment Regarding Parental Obligations (UIFSA) [Cal. Judicial Council Form FL-530]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is for use in setting forth the terms of a judgment concerning support obligations for children in the context of a proceeding under the Uniform Interstate Family Support Act (UIFSA-- *Fam. Code § 4900 et seq.*). The form may be used either to reflect the terms of a *proposed* or *actual* judgment. If the form is used as a proposed judgment, the checkoff box in Paragraph 1(a) should be marked. That paragraph advises the respondent that if he or she fails to file a response within 30 days of being served with Summons (§ 260.314) and the Uniform Support Petition (§ 260.310), the proposed judgment will become legally binding. However, if the form is used as the actual judgment, the checkoff box in Paragraph 1(b) should be marked.

Additional checkoff boxes on the form provide for setting out:

- The nature of the proceeding, parties' appearances, and who is to pay support (Paragraph 2);
- The basis for the support order (Paragraphs 3-5); and
- The identity of the child or children for whom support is to be paid, the finding that the respondent is a parent of that child or children, amounts of current and past due support to be paid and related payment

details (Paragraph 6).

The form includes a provision for issuance of an earnings assignment order (Paragraph 6(f)), as well as orders to provide and maintain health insurance (Paragraph 6(g)), and for the parent ordered to pay support to pay costs (Paragraph 6(l)). Orders not otherwise preprinted on the form may be set forth in Paragraph 6(m).

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22-260 California Forms of Pleading and Practice--Annotated § 260.319

§ 260.319 Ex Parte Application for Transfer and Order (UIFSA)--Cal. Judicial Council Form FL-560

[1] FORM Ex Parte Application for Transfer and Order (UIFSA)--Cal. Judicial Council Form FL-560

Click here to view image.

[2] Use of Form

Set forth in [1], *above*, is a filled-in, illustrative version of the mandatory Judicial Council form of Ex Parte Application for Transfer and Order (UIFSA) [Cal. Judicial Council Form FL-560]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is for use by a petitioner or local child support agency to apply ex parte for an order transferring a proceeding brought under the Uniform Interstate Family Law Act (*Fam. Code § 4900 et seq.*) to another county within California. The application is based on the ground that the petitioner, the respondent (or both of these individuals) reside elsewhere than the county in which a UIFSA petition has been filed, an order has been entered, or in which another state's order has been registered [*see Fam. Code § 5001*]. It requires that the applicant identify the California county where the absent party or parties now reside, and name the tribunal to which the transfer should be made--typically, the superior court of the new county of the absent party's residence.

If the court grants the transfer order, the court clerk will send copies of the order to the parties and support agencies. Therefore, counsel should plan on providing multiple copies and preaddressed, stamped envelopes to the clerk for this purpose.

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22-260 California Forms of Pleading and Practice--Annotated §§ 260.320-260.349

[Reserved]

§§ 260.320[Reserved]

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B. Custody

22-260 California Forms of Pleading and Practice--Annotated § 260.350

§ 260.350 Petition to Enforce Sister-State Custody Order

[1] FORM Petition to Enforce Sister-State Custody Order

Jurisdiction to Determine Custody and Visitation

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION TO ENFORCE SISTER-STATE CUS-
_____ [*name*],	)	TODY ORDER
Respondent	)	[*Fam. Code § 3448*]
	)	
	)	

Petitioner alleges:

1. Petitioner _____[*name*] is the _____ [*e.g.*, mother] of the _____[*name of child*], a minor, born _____[*date*], in _____[*place of birth*], and currently residing at _____[*specify address of child's actual location, if known*].

2. Respondent, _____[*name*] is the _____ [*e.g.*, father] of the above-named child, and is currently residing at _____[*specify respondent's address, if known*].

3. Petitioner and respondent were married at the times of the child's conception and birth. Thereafter, they were divorced by a decree of _____[*name and state of court*] dated _____. The child was determined to be a child of the marriage in the decree of divorce, and custody and visitation of the child were provided for in the decree as further described hereafter.

4. After the parties' divorce, petitioner and the child permanently left the state of _____[*decree state*], and moved to California on _____[*date*]. California has been the continuous residence and domicile of the child since that time.

5. Respondent has continued to reside in _____[*decree state*]. Therefore, _____[*decree state*] has exclusive, continuing jurisdiction under the Parental Kidnapping Prevention Act (Title *28 United States Code, Section 1738A(d)*), and the Uniform Child Custody Jurisdiction and Enforcement Act (*Section 3422 of the California Family Code*).

6. Under the above decree of divorce, _____ [*specify custody and visitation provisions of decree, e.g.,* petitioner was granted primary physical custody of the child, subject to respondent's right to exercise "reasonable" visitation. Respondent's visitation rights are not further expressed or enumerated]. A certified copy of the decree is attached to this petition.

7. The court that issued the above decree of divorce _____ [*specify whether court identified jurisdictional basis that it relied on, and if so, what it was, e.g.,* identified "home state" jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act as the jurisdictional basis that it relied on when exercising jurisdiction].

8. The custody order to be enforced in the above divorce decree _____ [*specify whether custody order has been vacated, stayed, or modified, and if so, identify the court, case number, and nature of the proceeding, e.g.,* has not been vacated, stayed, or modified to date].

9. _____ [*Specify whether any proceedings have been commenced that could affect the current proceeding, and if so, identify the court, case number, and the nature of the proceeding, e.g.,* No proceedings relating to domestic violence, protective orders, termination of parental rights, adoption, or other matters have been commenced that could affect the current proceeding].

10. On _____[*date*], at _____[*place of registration*], the above divorce decree was registered and confirmed as a child custody determination under *Section 3445 of the California Family Code*. A certified copy of the order confirming registration is attached to this petition.

11. _____ [*Specify facts supporting need for enforcement of custody decree, e.g.,* Respondent called petitioner and requested that the child visit him in _____ (*name of state*) for a period of two months during summer vacation. Petitioner granted the request, but respondent did not return the child to California after the two-month visitation period expired. Petitioner requests an order that requires respondent to return the child to petitioner's custody on or before _____ (*date*)].

12. Petitioner requests a reasonable award of necessary costs, fees, and expenses as authorized under *Section 3452 of the California Family Code*. Respondent has the ability to pay such an award.

13. _____ [*Specify any relief sought in addition to immediate custody of child and fees, costs, and expenses, e.g.,* Petitioner requests the assistance of the district attorney in locating and returning the child to petitioner's custody].

14. A completed declaration under the Uniform Child Custody Jurisdiction and Enforcement Act is attached.

WHEREFORE, Petitioner prays judgment as follows:

1. For an order enforcing the _____[*decree state*] custody order of _____[*date*], to provide _____ [*specify, e.g.*, that petitioner may take immediate physical custody of the child, and that respondent will immediately return the child to California];

2. For an order requiring respondent to pay the cost of airfare from _____[*state of Respondent's residence*] to California;

3. For reasonable attorney's fees;

4. For costs of suit herein incurred;

5. _____ [*Specify any other relief sought in the body of the petiion, e.g.*, For an order requiring the district attorney to proceed in accordance with *Section 3130 et seq. of the California Family Code* to locate respondent and the child, and to return the child to petitioner's custody].

6. For such other and further relief as the court may deem proper.

_____[*date*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____[*name*], am the Petitioner in this matter. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*signature*]

_____ [*typed name*]

Petitioner

[2] Use of Form

The form in *[1], above*, is a sample petition for California enforcement of an out-of-state child custody determination under the Uniform Child Custody Jurisdiction and Enforcement Act [*Fam. Code § 3400 et seq.*] and Parental Kidnapping Prevention Act [*28 U.S.C. § 1738A*]. The petition is authorized under *Fam. Code § 3448*. For discussion of the required contents of the petition, see *§ 260.206[2]* [*see Fam. Code § 3448(b)*].

For purposes of illustration, the allegations of this form assume that the child's parents are divorced, and one of them continues to reside in the state that made the child custody determination (the "decree state"). The child and one parent now live in California, and that parent wants to enforce the custodial arrangement. Given this scenario, the other state court retains custody jurisdiction because one parent still resides in the other state, and because the other state court has not made a determination that significant connections with the other state no longer exist [*see Fam. Code § 3422*].

A certified copy of the custody decree (that is, of the divorce decree containing the custody order) should be attached to the petition, although statute also permits attachment of a "copy of a certified copy" [*Fam. Code § 3448(a)*].

This form also assumes that the sister-state custody order has been registered and confirmed in California (without opposition) under *Fam. Code § 3445*, and therefore, the form provides for the petitioner to list the date and place of registration. It appears, however, that formal registration of the sister-state child custody determination is not required for enforcement, and if no registration has taken place, this should be stated in the petition [*see, e.g., Fam. Code § 3448(b)(6)*].

The petition for enforcement must be verified [*Fam. Code § 3448(a)*]. As with any petition involving custody or visitation, a completed UCCJEA declaration (see Ch. 221, *Dissolution of Marriage: Procedure*) should be attached [*see Fam. Code §§ 3400 et seq., 3429*]. For further discussion of jurisdiction under the PKPA and UCCJEA, see Ch 394, *Parent and Child* .

For a form of declaration in support of the issuance of a warrant for the immediate custody of a child, see *§ 260.351*.

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Volume 22: Explosives thru Food-Chs. 256-268
Chapter 260 FAMILY LAW ENFORCEMENT: FOREIGN JUDGMENTS
PART IV. FORMS
B. Custody

22-260 California Forms of Pleading and Practice--Annotated § 260.351

§ 260.351 Declaration in Support of Application for Custody Warrant and Order

[1] FORM--Declaration in Support of Application for Warrant to Take Physical Custody of Child
Declaration in Support of Application for Warrant to Take Physical Custody of Child

1. I, _____[*name*], am the _____ [petitioner *or* respondent] in this matter and _____ [*specify relationship, e.g.,* father] of the child, _____[*name of child*], whose custody is the subject of these proceedings. I am a resident of the state of _____[*name of state*]. _____ [*Describe custody award, e.g.,* I was awarded the primary physical custody of the child by decree rendered by a court of the state of on _____ (*decree state*), on _____ (*date*)].

2. _____ [*Specify facts supporting issuance of custody warrant on basis of imminent likelihood of serious physical harm or removal from California, e.g.,* On _____ (*date*), Respondent took the child from school and fled to California without informing me of her California address. I have located respondent and the child with the help of private investigators. Respondent is living with the child in an apartment, and has not enrolled the child in school. On two previous occasions, respondent has taken the child without permission, in violation of the custody order that I now seek to enforce, and has secreted herself and the child for several weeks. Respondent has never voluntarily returned the child, but has only relinquished the child after being located by me].

3. As shown by these facts, the child is imminently likely to _____ [suffer serious physical harm *or* be removed from California]. A warrant to take immediate custody of the child pursuant to *Section 3451 of the California Family Code* is required for the child's protection.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

Petitioner

VERIFICATION [*see form in § 260.350*]

[2] FORM--Order for Warrant to Take Physical Custody of Child Order for Warrant to Take Physical Custody of Child

THE COURT FINDS:

1. That _____ [*Party in violation of custody order, e.g.,* Respondent], _____[*name*], has _____ [*recite factual findings, e.g.,* removed _____ (*name of child*), a minor, born _____ (*date*) from the lawful custody of _____ (*specify other party, e.g.,* petitioner), _____ (*name*), on three separate occasions, without permission and in violation of a child custody order entered on _____ (*date*) by a court of competent jurisdiction of the state of _____ (*name of state*); that on each occasion respondent has secreted the child and herself until she was located by petitioner; that Respondent has never voluntarily relinquished the child after secreting the child; and that respondent is presently living in California with the child after removing the child without permission from the child's school in _____ (*name of state*).]

2. That _____[*name of child*] is imminently likely to _____ [suffer serious physical harm *or* be removed from California].

THEREFORE, THE COURT ORDERS: that a warrant to take immediate physical custody of _____[*name of child*] shall immediately issue pursuant to *Section 3451 of the California Family Code*. The warrant is enforceable throughout California and may be executed by any peace officer in the performance of his or her duties as a sworn officer.

_____[*date*]

_____ [*signature*]

Judge of the Superior Court

[3] Use of Forms

The forms in *[1]* and*[2], above,* are for use in applying for a warrant to take physical custody of a child who is likely to immediately suffer serious physical harm or be removed from the state [*see Fam. Code § 3451(a)*].

The form in *[1], above,* is a declaration of facts describing the need for the child custody warrant. The form in [2], *above,* is a sample order issuing the warrant on the basis of the declaration.

The premise of these forms is that the state that entered the initial child custody determination has exclusive and continuing jurisdiction, but that California has been asked to enforce the custody order [*see Fam. Code §§ 3422, 3448*]. The forms assume that the noncustodial parent has abducted the child from the decree state, and is expected to flee with the child if given advance notice of a child custody enforcement hearing [*see Fam. Code § 3448(d)*]. For further discussion of enforcement procedures, *see § 260.206*.

The application for a child custody warrant should be filed with the petition for enforcement of the child custody order [*Fam. Code § 3451*]. The declaration must be verified [*Fam. Code § 3451(a)*]. For a form of verification, see *§*

260.350[1].

For all declarations supporting family law motions, it is recommended that the Judicial Council form for Attached Declaration [Cal. Judicial Council Form MC-031] be used and attached to the Application for Order and Supporting Declaration form. The Judicial Council form for Additional Page [Cal. Judicial Council Form MC-020] may be used to attach orders to the Findings and Order After Hearing form that do not appear on the face of that form, such as the order in *[2], above*.

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Chapter 264 FAX FILING AND SERVICE OF PAPERS

22-264 California Forms of Pleading and Practice--Annotated 264.syn

§ 264.syn Synopsis to Chapter 264: FAX FILING AND SERVICE OF PAPERS

§ 264.01 Scope of Chapter

§ 264.02 Cross References

§ 264.03 Governing Law

§§ 264.04-264.09 [Reserved]

§ 264.10 Fax Filing and Service

[1] Authorization

[2] Statewide Applicability

[3] Papers Excluded From Fax Rules

[a] Service of Summons and Other Opening Papers

[b] Documents Carrying Original Seal of Court

[c] Wills, Codicils, Bonds, and Undertakings

§ 264.11 Definitions

[1] Fax Transmission

[2] Fax Machine

[3] Fax Filing

[4] Service by Fax

[5] Transmission Record

[6] Fax

[7] Fax Filing Agency

§ 264.12 Standards Applicable to Machines Used for Fax Filing

§ 264.13 Format of Papers Transmitted by Fax

§§ 264.14-264.19 [Reserved]

§ 264.20 Filing Through Fax Filing Agency

[1] Duties of Agency

[2] Requirement of Advance Arrangements

§ 264.21 Direct Filing

§ 264.22 Mandatory Use of Fax Cover Sheet by Filing Party

§ 264.23 Notation of Fax Filing

§ 264.24 Transmission Record of Fax Filing

§ 264.25 When Fax Filing Deemed Completed

§ 264.26 Motion for Order Directing Filing Nunc Pro Tunc

§ 264.27 Payment of Filing Fees

[1] Payment by Charge Card

[2] Payment on Account

§ 264.28 [Reserved]

§ 264.29 Signed Documents

[1] In General

[2] Demand for Inspection of Original Signed Document

§§ 264.30-264.39 [Reserved]

§ 264.40 Fax Service of Notices by Court

§ 264.41 Fax Service of Papers by Parties

[1] Consent by Written Agreement

[2] Availability of Fax Machine

[3] Service Lists

§ 264.42 When Fax Service Is Complete

§ 264.43 Extension of Time Periods When Service Is by Fax

§ 264.44 Proof of Service by Fax

§ 264.45 Service of Papers Opposing a Motion; Reply Papers

§§ 264.46-264.49 [Reserved]

§ 264.50 State Statutes

§ 264.51 California Rules of Court

§ 264.52 Local Court Rules

§ 264.53 Law Reviews

§§ 264.54-264.59 [Reserved]

§ 264.60 Facsimile Transmission Cover Sheet [Cal. Rules of Ct., Rule 2.304(b)]--Judicial Council Form MC-005

[1] FORM

[2] Use of Form

[3] Filing Fees

§ 264.61 Proceedings for Order Filing Paper Nunc Pro Tunc [Cal. Rules of Ct., Rule 2.304(d)]--Notice of Motion and Proof of Transmission

[1] FORM

[2] Use of Form

[3] Proof of Transmission

[4] Transmission Record

[5] Memorandum

[6] Cross References

§ 264.62 Proceedings for Order Filing Paper Nunc Pro Tunc [Cal. Rules of Ct., Rule 2.304(d)]--Order

[1] FORM

[2] Use of Form

[3] Notice of Order

§ 264.63 Proof of Service of Papers by Fax--Declaration by One Other Than Member of State Bar or Court Clerk [Code Civ. Proc. § 1013a(1); Cal. Rules of Ct., Rule 2.306(h)]

[1] FORM

[2] Use of Form

[3] Declaration Under Penalty of Perjury

[4] Contents

[5] Transmission Report

[6] Cross References

§ 264.64 Proof of Service of Papers by Fax--Certificate by Active Member of State Bar [Code Civ. Proc. § 1013a(2); Cal. Rules of Ct., Rule 2.306(h)]

[1] FORM

[2] Use of Form

[3] Contents

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22-264 California Forms of Pleading and Practice--Annotated § 264.01

§ 264.01 Scope of Chapter

This chapter discusses the filing and service of papers by facsimile transmission (fax) under *Cal. Rules of Ct., Rule 2.300 et seq.* It includes the following forms:

- Judicial Council form of a fax cover sheet [*see § 264.60*].
- Forms of notice of motion and order directing that a document be filed nunc pro tunc following an error in the transmission or processing of a document filed by fax [*see §§ 264.61, 264.62*].
- Forms of proof of service by fax [*see §§ 264.63, 264.64*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewGovernmentsCourtsCourt Records

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22-264 California Forms of Pleading and Practice--Annotated § 264.02

§ 264.02 Cross References

For discussion and forms relating to service of papers generally, including electronic filing and service, see Ch. 518, *Service of Summons and Papers* .

For discussion and forms relating to fax filing in juvenile courts under *Cal. Rules of Ct., Rule 5.522*, see Ch. 327, *Juvenile Courts: Jurisdiction and General Procedures* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-264 California Forms of Pleading and Practice--Annotated § 264.03

§ 264.03 Governing Law

Code Civ. Proc. § 1010.5 authorizes the Judicial Council to adopt rules permitting the filing of papers by fax transmission. The rules adopted are *Cal. Rules of Ct., Rule 2.300 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-264 California Forms of Pleading and Practice--Annotated §§ 264.04-264.09

[Reserved]

§§ 264.04[Reserved]

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PART II. LEGAL BACKGROUND
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22-264 California Forms of Pleading and Practice--Annotated § 264.10

§ 264.10 Fax Filing and Service

[1] Authorization

Cal. Rules of Ct., Rules 2.300-2.306 govern the filing and service of papers by fax. The Judicial Council adopted the rules under the authority of the Code of Civil Procedure [*see* former *Code Civ. Proc. § 1012.5* (fax pilot project--repealed effective January 1, 2002 (Stats 2001, ch. 115)] and under the Council's constitutional power to adopt court rules [*see Cal. Const., art. VI, § 6*]. *Code Civ. Proc. § 1010.5* also authorizes the Judicial Council to adopt rules regarding filing of papers by fax, both directly with the courts and through third parties. The rules may provide that the fax document constitutes an original document [*see Code Civ. Proc. § 1010.5*].

[2] Statewide Applicability

Cal. Rules of Ct., Rules 2.300-2.306, referred to below as the fax rules, apply to fax filing and service in civil, probate, and family law proceedings in all trial courts [*Cal. Rules of Ct., Rule 2.300(a)*].

These rules do not apply to juvenile court proceedings [*Cal. Rules of Ct., Rule 2.300(a)*; *see Cal. Rules of Ct., Rule 5.522* (rule governing fax filing in juvenile courts)].

[3] Papers Excluded From Fax Rules

[a] Service of Summons and Other Opening Papers

The fax rules do not affect the requirements for personal or substituted service of the summons and complaint or any other opening paper [*see Cal. Rules of Ct., Rules 2.300, 2.306(a)* (discussed under [b], *below*), 2.300(6), 2.301(5), 2.306 (rules authorizing "service of papers," but not service of summons, by fax)].

[b] Documents Carrying Original Seal of Court

A court may not issue by fax any document that is intended to carry the original seal of the court [*Cal. Rules of Ct., Rule*

2.300(c); *see also* discussion under [a], *above*]. However, a court may serve any notice by fax in the same manner that litigants may serve papers by fax [*Cal. Rules of Ct., Rule 2.306(c)*; *see also* discussion in *§ 264.40* et seq. *below*].

[c] Wills, Codicils, Bonds, and Undertakings

A will, codicil, bond, or undertaking may not be filed by fax [*Cal. Rules of Ct., Rule 2.300(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-264 California Forms of Pleading and Practice--Annotated § 264.11

§ 264.11 Definitions

[1] Fax Transmission

"Fax transmission" means the transmission of a copy of a document by a system that encodes a document into electrical signals, transmits these electrical signals over a telephone line, and reconstructs the signals to print a duplicate of the original document at the receiving end [*Cal. Rules of Ct., Rule 2.301(2)*].

[2] Fax Machine

"Fax machine" means a machine that can send, in regular resolution, a facsimile transmission using the international standard for scanning, coding, and transmission established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the International Telecommunications Union (CCITT). "Fax machine" includes, a fax modem that is connected to a personal computer [*Cal. Rules of Ct., Rule 2.301(3)* (also citing, with respect to the applicable international standard, CCITT Red Book, Recommendations T.4 and T.30, vol. VII, Facsimile VII.3 (Malaga-Torremolinos, 1984) (U.N. Bookstore Code ITU 6731)].

[3] Fax Filing

"Fax filing" or "filing by fax" means the fax transmission of a document to a court that accepts such documents [*Cal. Rules of Ct., Rule 2.301(4)*].

[4] Service by Fax

"Service by fax" means the transmission of a document to a party or the attorney for a party under the fax rules [*Cal. Rules of Ct., Rule 2.301(5)*].

[5] Transmission Record

"Transmission record" means the document printed by the sending fax machine stating the telephone number of the

receiving machine, the number of pages sent, the transmission time and date, and an indication of errors in transmission [*Cal. Rules of Ct., Rule 2.301(6)*].

[6] Fax

"Fax" is an abbreviation for "facsimile," and refers, as indicated by the context, to facsimile transmission or to a document so transmitted [*Cal. Rules of Ct., Rule 2.301(1)*].

[7] Fax Filing Agency

"Fax filing agency" means an entity that receives documents by fax for processing and filing with the court [*Cal. Rules of Ct., Rule 2.301(7)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-264 California Forms of Pleading and Practice--Annotated § 264.12

§ 264.12 Standards Applicable to Machines Used for Fax Filing

A fax machine used to send documents to a court must send at an initial transmission speed of no less than 4800 baud and be able to generate a transmission record [*Cal. Rules of Ct., Rule 2.301(3)*; *see § 264.11[2], [5]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-264 California Forms of Pleading and Practice--Annotated § 264.13

§ 264.13 Format of Papers Transmitted by Fax

A document used for transmitting a fax must comply with *Cal. Rules of Ct., Rule 2.100 et seq.* form or format of papers [*Cal. Rules of Ct., Rule 2.302*; *but see Cal. Rules of Ct., Rule 3.20(a)* (preempting local rules relating to, among other things, the form and format of papers)]. For discussion and forms relating to format requirements of motions generally, see Ch. 372, *Motions and Orders* ; see also discussion and forms in specific substantive or procedural articles relating to the particular proceeding or action in which the paper is to be filed.

Any exhibit that exceeds 81/2 by 11 inches must be reduced to not more than 81/2 by 11 inches before it is transmitted. The court may require the filing party to file the original of an exhibit that the party has filed by fax [*Cal. Rules of Ct, Rule 2.302*].

For discussion of additional format requirements applicable under the fax rules, see *§ 264.23*. For discussion relating to the format preparation of papers transmitted by fax to a fax filing agency for eventual filing with the court, see *§ 264.20*.

Legal Topics:

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

§§ 264.14[Reserved]

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22-264 California Forms of Pleading and Practice--Annotated § 264.20

§ 264.20 Filing Through Fax Filing Agency

[1] Duties of Agency

A party may transmit a document by fax to a fax filing agency for filing with any trial court. The fax filing agency acts as an agent of the filing party and not as an agent of the court [*Cal. Rules of Ct., Rule 2.303(a)*; *see* Cal. *Rules of Ct., Rule 2.301(7)* (defining fax filing agency; discussed in *§ 264.11[7]*)].

A fax filing agency that receives documents for filing must prepare the document so that it complies with *Cal. Rules of Ct., Rule 2.100 et seq.* and any other requirements for filing with the court. In addition, the agency must physically transport the document to the court, file the document with the court, and pay any applicable filing fee [*Cal. Rules of Ct., Rule 2.303(b)*; for discussion of format of papers, *see § 264.13*].

Except as otherwise provided in the fax rules, a fax filing agency must keepconfidential all documents transmitted to it [*Cal. Rules of Ct., Rule 2.303(d)*].

By filing a document with the court, a fax filing agency certifies that it has complied with the fax rules and that the document filed is the full and unaltered fax-produced document received by the agency. The agency is not required to give any additional certification [*Cal. Rules of Ct., Rule 2.303(e)*].

[2] Requirement of Advance Arrangements

A fax filing agency is not required to accept papers for filing unless appropriate arrangements for payment of filing fees and service charges have been made by the transmitting party before the papers are transmitted to the fax filing agency. If an agency received document from a party with whom it does not have prior arrangements, the agency may discard the document without notice to the sender [*Cal. Rules of Ct., Rule 2.303(c)*].

Legal Topics:

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

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22-264 California Forms of Pleading and Practice--Annotated § 264.21

§ 264.21 Direct Filing

A party may file by fax directly to any court that, by local rule, has provided for direct fax filing. The local rule must provide the fax telephone number for filings and specific telephone numbers for any departments to which fax filings should be made directly [*Cal. Rules of Ct., Rule 2.304(a)*].

For discussion relating to the payment of fees in courts in which direct fax filing is permitted and the paper to be filed requires a filing fee, see *§ 264.27*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-264 California Forms of Pleading and Practice--Annotated § 264.22

§ 264.22 Mandatory Use of Fax Cover Sheet by Filing Party

A party filing a document directly by fax must use the mandatory Judicial Council Form MC-005 "Facsimile Transmission Cover Sheet (Fax Filing)" [*Cal. Rules of Ct., Rules 1.31, 2.304(b)*; for an illustration of the form, *see § 264.60*]. The cover sheet must be the first page transmitted, followed by any special handling instructions needed to ensure that the document complies with local rules. Neither the cover sheet nor the special handling instructions are to be filed in the case. The court must ensure that any credit card information on the cover sheet is not disclosed publicly.The court is not required to keep a copy of the cover sheet [*Cal. Rules of Ct., Rule 2.304(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-264 California Forms of Pleading and Practice--Annotated § 264.23

§ 264.23 Notation of Fax Filing

Each document transmitted for direct filing with the court or filed by a fax filing agency by fax must contain the phrase words "by fax" immediately below the title of the document [*Cal. Rules of Ct., Rule 2.304(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-264 California Forms of Pleading and Practice--Annotated § 264.24

§ 264.24 Transmission Record of Fax Filing

A party filing by fax must cause the transmitting fax machine to print a transmission record of each filing by fax [*Cal. Rules of Ct., Rule 2.304(d)*; *see Cal. Rules of Ct., Rules 2.301(6)* (defining fax transmission record; discussed in *§ 264.11[5]*); *see also § 264.12*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-264 California Forms of Pleading and Practice--Annotated § 264.25

§ 264.25 When Fax Filing Deemed Completed

There is no single statewide time limit in the rules for deeming a fax filing complete. Rather, the matter is left to the practice of each court as embodied in its local rules governing the deadlines for filing. Each court determines when it accepts documents for filing, and may apply those deadlines created by its existing rules to filings made by fax [*Rosenberg v. Superior Court (1994) 25 Cal. App. 4th 897, 900, 30 Cal. Rptr. 2d 803* (*Cal. Rules of Ct., Rule 2.306(g)* requires only that service by fax be complete by 5 p.m. or be deemed served on the next court day; rule does not encompass filing by fax)]. *Code Civ. Proc. § 1010.6(a)(3)*, relating to electronic filing, does provide that papers filed after the close of business are deemed filed the next day. For discussion of electronic filing and service under section 1010.6, see *Ch. 518, Service of Summons and Papers, § 518.40* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewGovernmentsCourtsCourt RecordsGovernmentsCourtsRule Application & Interpretation

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Chapter 264 FAX FILING AND SERVICE OF PAPERS
PART II. LEGAL BACKGROUND
B. Fax Filing

22-264 California Forms of Pleading and Practice--Annotated § 264.26

§ 264.26 Motion for Order Directing Filing Nunc Pro Tunc

If a document transmitted to the court by fax machine is not filed with the court because of an error in the transmission of the document to the court, that was unknown to the sending party, or because of a failure by the court to process the document on receipt, the sending party may move the court for an order directing that the document be filed nunc pro tunc. The motion must be accompanied by the transmission record (*discussed under § 264.24*) and a proof of transmission in the form set out in *Cal. Rules of Ct., Rule 2.304(d)* [*Cal. Rules of Ct., Rule 2.304(d)*]. For a form of motion for an order directing nunc pro tunc filing under *Cal. Rules of Ct., Rule 2.304(d)*, including a form a proof of transmission, see *§ 264.61*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeContent & FormGovernmentsCourtsCourt Records

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22-264 California Forms of Pleading and Practice--Annotated § 264.27

§ 264.27 Payment of Filing Fees

[1] Payment by Charge Card

A court may permit the use of credit cards, debit cards, or electronic funds transfers under *Gov. Code § 6159(b)* if approved by the Judicial Council. [*see Gov. Code § 6159(c)*; *Cal. Rules of Ct., Rule 2.304(e)(1)*]. When a paper to be filed by fax requires a filing fee, that paper must include on the fax cover sheet (*discussed under § 264.22, above*), the credit or debit card account number to which the fees may be charged, the signature of the cardholder authorizing the charging of the fees, and the expiration date of the credit or debit card [*Cal. Rules of Ct., Rule 2.304(e)(1)*].

The amount charged is the applicable filing fee plus any fee or discount imposed by the card issuer or draft purchaser [*Cal. Rules of Ct., Rule 2.304(e)(3)*].

Before it accepts a fax filing charged to a credit or credit card, a court may seek authorization from the company that issued the card. If the charge is not approved by the issuing company, the court may reject the filing of the paper [*Cal. Rules of Ct., Rule 2.304(e)(2)*]. If the court accepts a paper for filing and the charge is later rejected by the issuing company, the court may proceed according to *Code Civ. Proc. § 411.20* relating to returned checks [*Cal. Rules of Ct., Rule 2.304(e)(2)*]. For discussion of Section 411.20, see Ch. 123, *Complaints and Cross Complaints* .

[2] Payment on Account

If the court so provides in its local rule establishing a direct filing program, an account may be used to pay fees for documents filed by fax by an attorney or party who has established the account with the court before filing any paper by fax that requires a filing fee [*Cal. Rules of Ct., Rule 2.304(f)*]. The court may require a deposit in advance of an amount not to exceed $1,000 or the court may agree to bill the attorney not more often than monthly [*Cal. Rules of Ct., Rule 2.304(f)*].

Legal Topics:

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

Banking LawBank ActivitiesElectronic BankingFund TransfersBanking LawConsumer ProtectionCredit Card AgreementsGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeGeneral OverviewGovernmentsCourtsCourt RecordsGovernmentsCourtsRule Application & Interpretation

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22-264 California Forms of Pleading and Practice--Annotated § 264.28

[Reserved]

§ 264.28[Reserved]

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22-264 California Forms of Pleading and Practice--Annotated § 264.29

§ 264.29 Signed Documents

[1] In General

A party who files or serves a signed document by fax represents that the original signed document is in the party's possession or control [*Cal. Rules of Ct., Rule 2.305(a)*].

Notwithstanding any provision of law to the contrary, including *Evid. Code §§ 255* and *260* (defining the terms "original" and "duplicate" for purposes of the Evidence Code), a signature produced by fax transmission is deemed to be an original [*Cal. Rules of Ct., Rule 2.305(d)*].

[2] Demand for Inspection of Original Signed Document

At any time after filing or service of a signed fax document, any other party may serve a demand for production of the original physically signed document. The demand must be served on all other parties but not filed with the court. [*Cal. Rules of Ct., Rule 2.305(b)*].

If a demand for production of the original signed document is made, the parties must arrange a meeting at which the original signed document can be examined [*Cal. Rules of Ct., Rule 2.305(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewEvidenceDocumentary EvidenceBest Evidence RuleGovernmentsCourtsCourt Records

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22-264 California Forms of Pleading and Practice--Annotated §§ 264.30-264.39

[Reserved]

§§ 264.30[Reserved]

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22-264 California Forms of Pleading and Practice--Annotated § 264.40

§ 264.40 Fax Service of Notices by Court

A court may serve a notice by fax in the same manner that litigants may serve papers by fax [*Cal. Rules of Ct., Rule 2.306(c)*]. Thus, the court may serve notices by fax on an attorney who consents to fax service [*see Cal. Rules of Ct., Rule 2.306(a)(1)*; *see also discussion under § 264.41*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewGovernmentsCourtsCourt Records

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22-264 California Forms of Pleading and Practice--Annotated § 264.41

§ 264.41 Fax Service of Papers by Parties

[1] Consent by Written Agreement

Service by fax is permitted only if the parties agree and a written confirmation of that agreement is made [*Cal. Rules of Ct., Rule 2.306(a)(1)*]. Any notice or other document must be transmitted to a fax machine maintained by the person on whom it is served at the fax machine telephone numberas last given by that person on any document that the party has filed in the case and served on the party making service [*Cal. Rules of Ct., Rule 2.306(a)(2)*].

Inclusion of a fax number in the attorney identification information in the upper left corner of a paper filed with a court does not constitute consent to service by fax unless otherwise provided by law [*see Cal. Rules of Ct., Rule 2.111(1)*].

[2] Availability of Fax Machine

A party or attorney agreeing to accept service by fax must make his or her fax machine generally available for receipt of served documents between 9:00 a.m. and 5:00 p.m. on days that are not court holidays under *Code Civ. Proc. § 136*. This rule, however, does not prevent the party or attorney from sending other documents by fax or providing for normal repair and maintenance of the fax machine during these hours [*Cal. Rules of Ct., Rule 2.306(f)*].

[3] Service Lists

In a case in which the parties have agreed to service by fax, the plaintiff or petitioner named first in the complaint or petition, in addition to its responsibilities under *Cal. Rules of Ct., Rule 3.254*, must maintain a current list of the parties that includes their fax numbers for service of notice on each party [*Cal. Rules of Ct., Rule 2.306(b)(1)(A)*] and furnish a copy of the list on request to any party or the court [*Cal. Rules of Ct., Rule 2.306(b)(1)(B)*] .

In a case in which the parties have agreed to service by fax, each party, in addition to its responsibilities under *Cal. Rules of Ct., Rule 3.254*, must furnish the first-named plaintiff or petitioner with the party's current fax number for service of notice when it first appears in the action [*Cal. Rules of Ct., Rule 2.306(b)(2)(A)*]. If the party serves an order, notice, or pleading on a party that has not yet appeared in the action, that party must serve a copy of the service list at

the same time that the order, notice, or pleading is served [*Cal. Rules of Ct., Rule 2.306(b)(2)(B)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewGovernmentsCourtsCourt Records

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22-264 California Forms of Pleading and Practice--Annotated § 264.42

§ 264.42 When Fax Service Is Complete

Service by fax is complete on transmission of the entire document to the receiving party's fax machine [*Cal. Rules of Ct., Rule 2.306(g)*].

Although service is complete at the time of transmission [*Cal. Rules of Ct., Rule 2.306(g)*], service that is completed after 5:00 p.m. is deemed to have occurred on the next court day [*Cal. Rules of Ct., Rule 2.306(g)*].

Rule 2.306 includes extensions of time in case of service by fax [*see Cal. Rules of Ct., Rules 2.306(d)* and *discussion under § 264.43*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeTime LimitationsCivil ProceduresPleading & PracticePleadingsTime LimitationsGeneral OverviewGovernmentsCourtsCourt Records

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22-264 California Forms of Pleading and Practice--Annotated § 264.43

§ 264.43 Extension of Time Periods When Service Is by Fax

Service by fax is complete on transmission [*see § 264.42*], but any period of notice and any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which period or date is prescribed by statute or rule of court, is extended by two days. If service is governed by *Code Civ. Proc. § 1005(b)*, the extension is two calendar days; if governed by *Code Civ. Proc. § 1013(e)* and/or *Cal. Rules of Ct., Rule 2.306(d)*, the extension is two court days [*compare Code Civ. Proc. § 1005(b) with Code Civ. Proc. § 1013(e)*; *Cal. Rules of Ct., Rule 2.306(d)*].

Code Civ. Proc. § 1005(b) applies to the notices listed in Section 1005(a), and to all other proceedings under the Code of Civil Procedure in which notice is required and no other time or method is prescribed by law or by court or judge [*Code Civ. Proc. § 1005(a)*].

When Section 1005(b) applies, *Code Civ. Proc. § 1013(e)* does not [*Code Civ. Proc. § 1005(b)*]. In addition, Section 1013(e) provides that the extension does not apply to the following to extend the time for filing:

- Notice of intent to move for a new trial.
- Notice of intent to move to vacate a judgment pursuant to *Code Civ. Proc. § 663a*.
- Notice of appeal.

Otherwise, the Section 1013 extension applies absent a specific exception provided for by other statute or rule of court [*Code Civ. Proc. § 1013(e)*; *cf. Cal. Rules of Ct., Rule 2.306(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion

PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewGovernmentsCourtsCourt Records

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22-264 California Forms of Pleading and Practice--Annotated § 264.44

§ 264.44 Proof of Service by Fax

Proof of service by fax may be made by any method provided in *Code Civ. Proc. § 1013a* (governing proof of service by mail), with the following exceptions [*Cal. Rules of Ct., Rule 2.306(h)*]:

- The time, date, and sending fax machine telephone number must be used instead of the date and place of deposit in the mail [*Cal. Rules of Ct., Rule 2.306(h)(1)*];

- The name and fax telephone number of the person served must be used instead of the name and address of the person served as shown on the envelope [*Cal. Rules of Ct., Rule 2.306(h)(2)*];

- A statement that the document was sent by fax transmission and that the transmission was reported as complete and without error must be used instead of the statement that the envelope was sealed and deposited in the mail with postage fully prepaid [*Cal. Rules of Ct., Rule 2.306(h)(3)*];

- A copy of the transmission report must be attached to the proof of service and the proof of service must declare that the transmission report was properly issued by the sending fax machine [*Cal. Rules of Ct., Rule 2.306(h)(4)*]; and

- Service of papers by fax is ineffective if the transmission does not fully conform to the provisions of *Cal. Rules of Ct., Rule 2.306* [*Cal. Rules of Ct., Rule 2.306(h)(5)*].

Thus, it appears that, with the foregoing exceptions, proof of service by fax may be made by a nonattorney as described under *Code Civ. Proc. § 1013a(1)* or *(3)* [*see § 264.63*], by an attorney as prescribed by *Code Civ. Proc. § 1013a(2)* [*see § 264.64*], and by a clerk of a court of record as prescribed by *Code Civ. Proc. § 1013a(4)*. For discussion and forms relating to proof of service of papers generally under *Code Civ. Proc. § 1013a*, see Ch. 518, *Service of Summons and Papers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-264 California Forms of Pleading and Practice--Annotated § 264.45

§ 264.45 Service of Papers Opposing a Motion; Reply Papers

Notwithstanding *Code of Civ. Proc. § 1005(a)* or *(b)*, all papers opposing a motion and all reply papers must be served by personal delivery, facsimile transmission, express mail, or other means consistent with *Code of Civ. Proc. § 1010*, *1011*, *1012*, and *1013*, and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers, as applicable, are filed. This provision applies to the service of opposition and reply papers regarding motions for summary judgment or summary adjudication, in addition to the motions listed in *Code of Civ. Proc. § 1005(a)* [*Code Civ. Proc. § 1005(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewGovernmentsCourtsCourt Records

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22-264 California Forms of Pleading and Practice--Annotated §§ 264.46-264.49

[Reserved]

§§ 264.46[Reserved]

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22-264 California Forms of Pleading and Practice--Annotated § 264.50

§ 264.50 State Statutes

Service and filing of papers generally. *Code Civ. Proc. §§ 1010-1020*

Judicial Council authority to promulgate rules. *Code Civ. Proc. § 1010.5*

Authority to adopt local rules permitting electronic filing and service, and conditions for local rules. *Code Civ. Proc. § 1010.6*

Fax filing project. *Code Civ. Proc. § 1012.5* (repealed January 1, 2002;Stats 2001, ch. 115)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewGovernmentsCourtsCourt RecordsGovernmentsCourtsRule Application & Interpretation

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PART III. RESEARCH GUIDE

22-264 California Forms of Pleading and Practice--Annotated § 264.51

§ 264.51 California Rules of Court

Rules governing fax filing and service. *Cal. Rules of Ct., Rules 2.300-2.306*

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-264 California Forms of Pleading and Practice--Annotated § 264.52

§ 264.52 Local Court Rules

Fax filing. Alameda Co. Super. Ct. Rules, Rule 1.8

Fax filing. Alpine Co. Super. Ct. Rules, Rule 3.8

Fax filing. Amador Co. Super. Ct. Rules, Rule 11.16

Fax filing. Butte Co. Super. Ct. Rules, Rule 13.1

Fax filing. Calaveras Co. Super. Ct. Rules, Rule 3.7

Fax filing. Colusa Co. Super. Ct. Rules, Rule 5.13

Fax filing. Contra Costa Co. Super. Ct. Rules, Rule 27

Fax filing. Del Norte Co. Super. Ct. Rules, Rule XIII

Fax filing. El Dorado Co. Super. Ct. Rules, Rule 7.09.00

Fax filing. Fresno Co. Super. Ct. Rules, Rule 4.1.6

Fax filing. Kern Co. Super. Ct. Rules, Rule 3.2

Fax filing. Los Angeles Co. Super. Ct. Rules, Rule 18.1

Fax filing. Mendocino Co. Super. Ct. Rules, Rule 11.2

Fax filing. Merced Co. Super. Ct. Rules, Rule 2g

Fax filing. Mono Co. Super. Ct. Rules, Rule 5.3

Fax filing. Napa Co. Super. Ct. Rules, Rule 2.11

Fax filing. Nevada Co. Super. Ct. Rules, Rule 1.06(B)

Fax filing. Orange Co. Super. Ct. Rules, Rule 380

Fax filing. Riverside Co. Super. Ct. Rules, Rule 1.0091

Fax filing. Sacramento Co. Super. Ct. Rules, Rule 9.20

Fax filing. San Benito Co. Super. Ct. Rules, Rule 10.3

Fax filing. San Bernardino Co. Super. Ct. Rules, Rule 1830

Fax filing. San Diego Co. Super. Ct. Rules, Rule 2.5.3

Fax filing. San Francisco Co. Super. Ct. Rules, Rule 2.6(D)

Fax filing. San Joaquin Co. Super. Ct. Rules, Rule 6-100

Fax filing. San Luis Obispo Co. Super. Ct. Rules, Chapter 29

Fax filing. Santa Barbara Co. Super. Ct. Rules, Rule 1008

Fax filing. Santa Clara Co. Super. Ct. Rules, Rule 12

Fax filing. Shasta Co. Super. Ct. Rules, Rule 5.14

Fax filing. Siskiyou Co. Super. Ct. Rules, Rule 2.15

Fax filing. Ventura Co. Super. Ct. Rules, Rule 4.04

Fax filing. Yolo Co. Super. Ct. Rules, Rule 2.3

Fax filing. Yuba Co. Super. Ct. Rules, Rule 2.5

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22-264 California Forms of Pleading and Practice--Annotated § 264.53

§ 264.53 Law Reviews

Jordahl, *Plugging Into the Fax Track*, 8(10) Cal. Law. 78 (1988)

Legal Topics:

For related research and practice materials, see the following legal topics:
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22-264 California Forms of Pleading and Practice--Annotated §§ 264.54-264.59

[Reserved]

§§ 264.54[Reserved]

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22-264 California Forms of Pleading and Practice--Annotated § 264.60

§ 264.60 Facsimile Transmission Cover Sheet [Cal. Rules of Ct., Rule 2.304(b)]--Judicial Council Form MC-005

[1] FORM Facsimile Transmission Cover Sheet [Cal. Rules of Ct., Rule 2.304(b)]--Judicial Council Form MC-005

Click here to view image.

[2] Use of Form

The form is for use by a party filing a paper with a court by fax transmission [*Cal. Rules of Ct., Rules 2.304(b)*]. For discussion of this mandatory form [*Cal. Rule of Ct., Rule 1.31*], see *§ 264.22*.

The form should only be used in courts that have, by local rule, provided for direct filing by fax pursuant to *Cal. Rules of Ct., Rule 2.304(a)*.

The form must be used in any county which permits direct filing to the court by fax [*Cal. Rules of Ct., Rule 2.304(b)*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Filing Fees

The cover sheet requires the filing party to provide information concerning the payment of filing fees. If the court so provides in its local rule establishing a direct fax filing program, an account may be used, as in this example, to pay fees for documents filed by fax by an attorney or party who has established the account with the court before filing any paper by fax that requires a filing fee [*Cal. Rules of Ct., Rule 2.304(f)*]. The court may require a deposit in advance of an amount not to exceed $1,000 or the court may agree to bill the attorney not more often than monthly [*Cal. Rules of Ct., Rule 2.304(f)*]. In addition, credit cards, debit cards, electronic fund transfers, or debit accounts may be used to charge filing fees on fax filings made directly with the court [*Cal. Rules of Ct., Rule 2.304(e)(1)*].

For discussion of filing fees, see *§§ 264.27* and *264.28*.

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22-264 California Forms of Pleading and Practice--Annotated § 264.61

§ 264.61 Proceedings for Order Filing Paper Nunc Pro Tunc [Cal. Rules of Ct., Rule 2.304(d)]--Notice of Motion and Proof of Transmission

[1] FORM Proceedings for Order Filing Paper Nunc Pro Tunc [Cal. Rules of Ct., Rule 2.304(d)]--Notice of Motion and Proof of Transmission

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MOTION AND NOTICE OF MOTION FOR OR-
Plaintiff,	)	DER FILING PAPER NUNC PRO TUNC
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] will, and hereby does, move for an order filing nunc pro tunc the _____ [*specify document, e.g.,* answer in the above-entitled action], which _____ [*identify party, e.g.,* defendant] had attempted to file by facsimile transmission on _____ [*date*]. The

motion will be made on the ground that _____ [there was an error in the transmission of the document to the court that was unknown to the sending party *or* there was a failure to process the facsimile filing when such filing was received by the court].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*signature*]
Attorney for_____ [*moving party*]

PROOF OF TRANSMISSION

I, _____ [*name*], declare:

At the time of transmission, I was at least 18 years of age and not a party to this legal proceeding. On _____ [*date*], at _____ [*time*], I transmitted to the _____ [*identify court*] the following documents by fax machine under *Rule 2.304 of the California Rules of Court*: _____ [*specify documents transmitted*]. The court's fax telephone number that I used was _____ [*specify number used*]. The fax machine I used complied with *Rule 2.301 of the California Rules of Court* and no error was reported by the machine. Pursuant to *Rule 2.304 of the California Rules of Court*, I caused the machine to print a transmission record of the transmission, a copy of which is attached to this declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[*Attach printed transmission record.*]

[2] Use of Form

The form of notice of motion and proof of transmission set out in [1], *above*, is for use in seeking an order directing the filing of a paper nunc pro tunc, when a prior attempted facsimile filing has failed either (1) because of an error in the transmission of the document to the court that was unknown to the sending party or (2) because of a failure by the court to process the facsimile filing when the filing was received [*Cal. Rules of Ct., Rule 2.304(d)*].

The form should only be used in courts that have, by local rule, provided for direct filing by fax pursuant to *Cal. Rules of Ct., Rule 2.304(a)*.

For a form of proposed order granting the motion, *see § 264.62*.

[3] Proof of Transmission

The notice of motion contains a proof of transmission in the form as required under *Cal. Rules of Ct., Rule 2.304(d)*.

[4] Transmission Record

The motion for an order filing a document nunc pro tunc must be accompanied by the transmission record of the attempted transmission [*Cal. Rules of Ct., Rule 2.304(d)*]. The transmission record is the document printed by the sending facsimile machine that states the telephone number of the receiving machine, the number of pages sent, the transmission time and date, and an indication of errorsin transmission [*Cal. Rules of Ct., Rules 2.301(6)*]. Apparently, a copy of the transmission record is sufficient [*see Cal. Rules of Ct., Rule 2.304(d)* (form of proof of transmission referring to "copy of" transmission record); *but see Cal. Rules of Ct., Rule 2.304(d)* (stating that the "motion must be accompanied by the transmission record")].

[5] Memorandum

A memorandum must be filed and a copy served with the motion [*Cal. Rules of Ct., Rules 3.1112, 3.1113*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and general forms, see Ch. 417, *Points and Authorities* .

[6] Cross References

For discussion, general forms, and a procedural checklist relaing to noticed motions, see Ch. 372, *Motions and Orders*

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Volume 22: Explosives thru Food-Chs. 256-268
Chapter 264 FAX FILING AND SERVICE OF PAPERS
PART IV. FORMS

22-264 California Forms of Pleading and Practice--Annotated § 264.62

§ 264.62 Proceedings for Order Filing Paper Nunc Pro Tunc [Cal. Rules of Ct., Rule 2.304(d)]--Order

[1] FORM Proceedings for Order Filing Paper Nunc Pro Tunc [Cal. Rules of Ct., Rule 2.304(d)]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

_____

The motion of _____ [*identify moving party, e.g.,* defendant] for an order directing that the _____ [*specify document, e.g.,* answer in the above-entitled action] be filed nunc pro tunc came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted, and that the _____ [*specify document, e.g.,* answer in the above-entitled action] be filed nunc pro tunc as of _____ [*date*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of order set out in [1], *above*, may be submitted to the court as a proposed order when the court has granted a motion under *Cal. Rules of Ct., Rule 2.304(d)*.

[3] Notice of Order

The prevailing party must give notice of the court's order to all other parties or their attorneys, unless notice is waived by all parties in open court and is entered in the minutes [*see Code Civ. Proc. § 1019.5(a)*]. For further discussion and forms of such notice and proof of service, see Ch. 372, *Motions and Orders* , and Ch. 518, *Service of Summons and Papers* .

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Volume 22: Explosives thru Food-Chs. 256-268
Chapter 264 FAX FILING AND SERVICE OF PAPERS
PART IV. FORMS

22-264 California Forms of Pleading and Practice--Annotated § 264.63

§ 264.63 Proof of Service of Papers by Fax--Declaration by One Other Than Member of State Bar or Court Clerk [Code Civ. Proc. § 1013a(1); Cal. Rules of Ct., Rule 2.306(h)]

[1] FORM Proof of Service of Papers by Fax--Declaration by One Other Than Member of State Bar or Court Clerk [Code Civ. Proc. § 1013a(1); Cal. Rules of Ct., Rule 2.306(g)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DECLARATION OF SERVICE BY FAX TRANS-
Defendant.	)	MISSION
	)	
	)	

_____

I, _____ [*name*], declare:

I am, and was at the time of the service hereinafter mentioned, over the age of 18 years and not a party to the above-entitled cause. My _____ [residence *or* business] address is _____ [*specify address*] and I am _____ [a resident of *or* employed in] _____ [*county from which document was transmitted*] County, California.

On _____ [*date*], at _____ [*time*], I served the _____ [*set forth exact title of document(s) served*] on _____ [*state full name of served party or parties*] by fax transmission pursuant to *Rule 2.306 of the California Rules of Court*. The telephone number of the sending fax machine was _____ [*specify*], and the telephone number of the receiving fax machine was _____ [*specify*]. A transmission report was properly issued by the sending fax machine, and the

transmission was reported as complete and without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[*Attach printed transmission record.*]

[2] Use of Form

The form set out in [1], *above*, is for use to prove service by fax transmission of one or more papers by a person other than an active member of the State Bar or a court clerk [*see Code Civ. Proc. § 1013a(1)*; *Cal. Rules of Ct., Rule 2.306(h)*]. The form should only be used in courts that have, by local rule, provided for direct filing by fax pursuant to *Cal. Rules of Ct., Rule 2.304(a)*.

[3] Declaration Under Penalty of Perjury

Proof of service by fax transmission by a person other than an active member of the State Bar or a court clerk is required to be made by affidavit [*Code Civ. Proc. § 1013a(1)*; *see Code Civ. Proc. § 2009* (use of affidavit to prove service of papers)] or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*].

False proof of service constitutes perjury [*Penal Code §§ 27(b), 118*].

[4] Contents

The affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) of service by mail must set forth the exact title of the document served and filed in the cause. It must show the name and residence or business address of the person making the service, that he or she is a resident of or employed in the county from which the transmission was sent, that he or she is over the age of 18 years and not a party to the cause, and the time and date of transmittal [*see Code Civ. Proc. § 1013a(1)*].

In addition, the affidavit or declaration must show the sending fax machine telephone number, and the name and fax machine number of the person served. The declaration must also state that the document was transmitted by fax transmission and that the transmission was reported as complete and without error [*Cal. Rules of Ct., Rule 2.306(h)(3)*].

[5] Transmission Report

A copy of the transmission report must be attached to the proof of service [*Cal. Rules of Ct., Rule 2.306(h)(4)*].

[6] Cross References

For general forms of affidavit, see Ch. 15, *Affidavits, Certificates, and Declarations*

For general discussion and forms relating to service of papers, see Ch. 518, *Service of Summons and Papers*

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Chapter 264 FAX FILING AND SERVICE OF PAPERS
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22-264 California Forms of Pleading and Practice--Annotated § 264.64

§ 264.64 Proof of Service of Papers by Fax--Certificate by Active Member of State Bar [Code Civ. Proc. § 1013a(2); Cal. Rules of Ct., Rule 2.306(h)]

[1] FORM Proof of Service of Papers by Fax--Certificate by Active Member of State Bar [Code Civ. Proc. § 1013a(2); Cal. Rules of Ct., Rule 2.306(g)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ATTORNEY'S CERTIFICATE OF SERVICE BY
Defendant.	)	FAX TRANSMISSION
	)	
	)	

_____

I, _____ [*name*], certify:

I am, and at all times mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is _____ [*specify address*].

On _____ [*date*], at _____ [*time*], I served the _____ [*set forth exact title of document(s) served*] on _____ [*state full name of served party or parties*] by fax transmission pursuant to *Rule 2.306 of the California Rules of Court*. The telephone number of the sending fax machine was _____ [*specify*], and the telephone number of the receiving fax machine was _____ [*specify*]. A transmission report was properly issued by the sending fax machine, and the transmission was reported as complete and without error.
Dated: _____.

_____ [*signature*]

[*Attach printed transmission record.*]

[2] Use of Form

The form set out in [1], *above*, is for use to prove service of one or more papers by fax transmission, by an active member of the State Bar [*Code Civ. Proc. § 1013a(2)*]. The form should only be used in courts that have, by local rule, provided for direct filing by fax pursuant to *Cal. Rules of Ct., Rule 2.304(a)*.

An attorney's certificate of service is not required to be made by affidavit or otherwise sworn to and, hence, is not executed under penalty of perjury [*cf. Code Civ. Proc. § 2015.3* (certificate of sheriff, marshal, or superior court clerk has same force as affidavit)]. Nevertheless, a willfully false proofof service would constitute a violation of the attorney's oath to discharge the duties of an attorney to the best of his or her knowledge and ability [*Bus. & Prof. Code § 6067*] and of the duty not to mislead the judge or any judicial officer by any artifice or false statement of fact or law [*Bus. & Prof. Code § 6068(d)*] and, hence, would subject the attorney to possible suspension or disbarment [*Bus. & Prof. Code § 6103*].

[3] Contents

The certificate of service must set forth the exact title of the documents served and filed in the cause. It must show the name and business address of the person making the service, that he or she is an active member of the State Bar of California, and that he or she is not a party to the cause [*Code Civ. Proc. § 1013a(2)*]. For additional discussion relating to the contents, see *§ 264.63[2]* et seq.

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Volume 22: Explosives thru Food-Chs. 256-268
Chapter 265 FEDERAL COURTS: JURISDICTION AND REMOVAL

22-265 California Forms of Pleading and Practice--Annotated 265.syn

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§ 265.02 Cross References

§§ 265.03-265.09 [Reserved]

§ 265.10 Governing Statutes

§ 265.11 Federal Courts in California

§ 265.12 Grounds for Federal Jurisdiction

§ 265.13 Federal Jurisdiction Required to Be Pleaded

§ 265.14 Federal Question Jurisdiction

[1] In General

[2] Sufficiency of Allegation

[3] Abstention or Deferral

[4] Preemption

§ 265.15 Diversity of Citizenship Jurisdiction

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[2] Improper Joinder

[3] Fictitious Defendants

[4] Corporations

[5] Limited Partnerships and Limited Liability Companies

[6] Class Actions

[a] Minimal Diversity

[i] In General

[ii] Exceptions

[b] "Mass Actions"

[7] Pleading Jurisdictional Amount

[a] In General

[b] Joinder of Claims and Parties

[c] Objection by Defendant

§ 265.16 "Case or Controversy" Requirement

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[2] Standing of Parties

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[4] Mootness of Claims

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§ 265.20 Amending Jurisdictional Allegations

§§ 265.21-265.29 [Reserved]

§ 265.30 Governing Law

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[2] Joinder of Defendants

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[2] Attachment, Bond, or Order in State Court

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[b] Timing of Answer

[c] Demand for Jury Trial

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[1] In General

[2] Grounds for Remand

[3] Remand Order

[4] Costs

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[a] When Available

[i] Motion Denied

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[2] Eastern District of California

[3] Northern District of California

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[1] Amending of Jurisdictional Allegations

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[3] Case or Controversy

[a] Mootness

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[10] Grounds for Federal Jurisdiction

[11] Pendent Jurisdiction

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[1] Preliminary Determinations

[2] Preparing and Filing Motion to Remand Removed Action

[3] Preparing and Filing Motion to Sever and Remand

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[1] FORM

[2] Use of Form

[3] Cross References

§ 265.81 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Multiple Parties [28 U.S.C.S. § 1332(a)(1)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.82 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Unincorporated Association [28 U.S.C.S. § 1332(a)(1)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.83 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Partnerships [28 U.S.C.S. § 1332(a)(1)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.84 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Trustee in Bankruptcy [28 U.S.C.S. § 1332(a)(1)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.85 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Estate Administrator [28 U.S.C.S. § 1332(a)(1)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.86 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Plaintiff as Nominal Representing Party [28 U.S.C.S. § 1332(a)(1)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.87 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Representative of Incompetent Where Incompetent's Citizenship Controls [28 U.S.C.S. § 1332(a)(1), (c)(2)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.88 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Representative of Infant Where Infant's Citizenship Controls [28 U.S.C.S. § 1332(a)(1), (c)(2)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.89 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Corporations [28 U.S.C.S. § 1332(a)(1), (c)(1)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.90 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Alienage [28 U.S.C.S. 1332(a)(2)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.91 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Class Action [28 U.S.C.S. § 1332(d)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.92 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Interpleader [28 U.S.C.S. § 1335]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.93 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--General Federal Question [28 U.S.C.S. § 1331]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.94 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Particular Federal Question [Official Form 2(c)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.95 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action to Enjoin, Set Aside, Enforce, Annul, or Suspend Order of Surface Transportation Board [28 U.S.C.S. § 1336]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.96 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Proceeding to Review Decision of Secretary of Health, Education, and Welfare Under Social Security Act [42 U.S.C.S. § 405(g)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.97 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages for Violation of the Communications Act of 1934 [47 U.S.C.S. § 207]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.98 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Arising Under Law Regulating Interstate Commerce [28 U.S.C.S. § 1337]--General Form

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.99 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Against Carrier Under Interstate Commerce Act for Damage to Property [28 U.S.C.S. § 1337; 49 U.S.C.S. § 11707(a)(1)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.100 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action to Recover on Reparation Order of Interstate Commerce Commission [28 U.S.C.S. § 1337; 49 U.S.C.S. § 16(2)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.101 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Under Fair Labor Standards Act [28 U.S.C.S. § 1337; 29 U.S.C.S. §§ 201-219]--General Form

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.102 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Under Fair Labor Standards Act [28 U.S.C.S. § 1337; 29 U.S.C.S. §§ 201-219]--For Declaratory Judgment [28 U.S.C.S. § 2201]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.103 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Under Fair Labor Standards Act [28 U.S.C.S. § 1337; 29 U.S.C.S. §§ 201-219]--For Overtime Compensation [28 U.S.C.S. § 2201]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.104 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Under Fair Labor Standards Act [28 U.S.C.S. § 1337; 29 U.S.C.S. §§ 201-219]--To Enjoin Violation [28 U.S.C.S. § 2201]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.105 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action by Motor Carrier to Enjoin Interference With Interstate Commerce [28 U.S.C.S. §§ 1331, 1337; 49 U.S.C.S. §§ 10521-10526]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.106 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Antitrust Action [28 U.S.C.S. § 1337]--General Form

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.107 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Treble Damages Under the Sherman Act [15 U.S.C.S. §§ 1, 2] and Clayton Act [15 U.S.C.S. § 15]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.108 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Injunction Under the Sherman Act [15 U.S.C.S. § 26]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.109 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Under the Securities Act of 1933 to Rescind Fraudulent Sale and to Secure Restitution or for Damages [15 U.S.C.S. § 77v(a)]

[1] FORM

[2] Use of Form

§ 265.110 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages Under the Securities Exchange Act of 1934 [15 U.S.C.S. §§ 78p(b), 78aa]

[1] FORM

[2] Use of Form

§ 265.111 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Wrongful Death Under the Federal

Employers' Liability Act [45 U.S.C.S. § 56]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.112 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Under the Federal Employers' Liability Act [45 U.S.C.S. § 56] and the Safety Appliance Act [45 U.S.C.S. §§ 1-23]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.113 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages for Violation of "Packers' and Stockyards' Act, 1921" [7 U.S.C.S. § 209]

[1] FORM

[2] Use of Form

§ 265.114 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Declaration of Invalidity or Noninfringement of Patent [28 U.S.C.S. § 1338]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.115 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Infringement of Patent [28 U.S.C.S. § 1338; 35 U.S.C.S. §§ 271, 281]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.116 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Infringement of Trademark and for Unfair Competition [28 U.S.C.S. § 1338]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.117 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Infringement of Copyright and Unfair Competition [28 U.S.C.S. § 1338]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.118 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action to Recover Property Seized Under Law of the United States [28 U.S.C.S. § 1356]

[1] FORM

[2] Use of Form

§ 265.119 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages for Injury to Person or Property While Acting Under Federal Law Involving Protection or Collection of Revenue or Right to Vote [28 U.S.C.S. § 1357]

[1] FORM

[2] Use of Form

§ 265.120 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Civil Rights Action [28 U.S.C.S. § 1343]--General Form

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.121 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Civil Rights Action [28 U.S.C.S. § 1343]--To Enjoin Enforcement of Local Law or Regulation [42 U.S.C.S. §§ 1981, 1982]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.122 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Civil Rights Action [28 U.S.C.S. § 1343]--Damages for Conspiracy to Interfere [42 U.S.C.S. § 1985]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.123 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Civil Rights Action [28 U.S.C.S. § 1343]--Damages for Failure to Prevent Conspiracy to Interfere [42 U.S.C.S. §§ 1985, 1986]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.124 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Civil Rights Action [28 U.S.C.S. § 1343]--Deprivation of Right to Vote [42 U.S.C.S. § 1971]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.125 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Against Alien Property Custodian Under Trading With the Enemy Act to Recover on Debt Owing From Enemy [50 U.S.C.S. App. § 9(a)]

[1] FORM

[2] Use of Form

§ 265.126 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages Under the Tucker Act [28 U.S.C.S. § 1346(a)(2)]--General Form

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.127 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages Under the Tucker Act [28 U.S.C.S. § 1346(a)(2)--To Recover Value of Property Taken by Government

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.128 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages Under the Tucker Act [28 U.S.C.S. § 1346(a)(2)--Suit by Alien [28 U.S.C.S. § 2502]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.129 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Against United States for Refund of Federal Taxes [28 U.S.C.S. § 1346(a)(1)]--Income Taxes

[1] FORM

[2] Use of Form

§ 265.130 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Against United States for Refund of Federal Taxes [28 U.S.C.S. § 1346(a)(1)]--Estate Taxes

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.131 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action to Quiet Title and to Cancel Federal Tax Lien [28 U.S.C.S. § 2410]

[1] FORM

[2] Use of Form

§ 265.132 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages Under the Federal Tort Claims Act [28 U.S.C.S. §§ 1346(b), 2671-2680]

[1] FORM

[2] Use of Form

§ 265.133 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Partition of Lands Where United States Is Tenant in Common or Joint Tenant [28 U.S.C.S. § 1347]

[1] FORM

[2] Use of Form

§ 265.134 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action by or Against Corporation, More Than One-Half of Whose Stock Is Owned by United States [28 U.S.C.S. § 1349]

[1] FORM

[2] Use of Form

§ 265.135 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Alien's Action for Tort [28 U.S.C.S. § 1350

[1] FORM

[2] Use of Form

§ 265.136 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Suit Against Consul or Vice Consul [28

U.S.C.S. § 1351]

[1] FORM

[2] Use of Form

§ 265.137 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action on Bond Executed Under Law of United States [28 U.S.C.S. § 1352]

[1] FORM

[2] Use of Form

§ 265.138 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Involving Right of Indian to Allotment of Land [28 U.S.C.S. § 1353]

[1] FORM

[2] Use of Form

§ 265.139 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Between Citizens of Same State Claiming Lands Under Grants From Different States [28 U.S.C.S. § 1354]

[1] FORM

[2] Use of Form

§ 265.140 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Qui Tam Action Under False Claims Act [31 U.S.C.S. § 232]

[1] FORM

[2] Use of Form

§ 265.141 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action in Name of United States [Fed. R. Civ. P., Rule 17(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.142 Notice of Motion and Motion to Dismiss for Lack of Subject Matter Jurisdiction [Fed. R. Civ. P., Rule 12(b)(1)]--Lack of Diversity Jurisdiction [28 U.S.C.S. § 1332(a)(1)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.143 Notice of Motion and Motion to Dismiss for Lack of Subject Matter Jurisdiction [Fed. R. Civ. P., Rule 12(b)(1)]--Lack of General Federal Questions [28 U.S.C.S. § 1331(a)(1)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.144 Notice of Motion and Motion to Dismiss for Lack of Subject Matter Jurisdiction [Fed. R. Civ. P., Rule 12(b)(1)]--Lack of Jurisdictional Amount [28 U.S.C.S. § 1332(a)(1)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.145 Order Dismissing Action for Lack of Subject Matter Jurisdiction [Fed. R. Civ. P., Rule 12(h)(3)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.146 Denial of Jurisdictional Allegations in Answer [Fed. R. Civ. P., Rule 8(b)]

[1] FORM

[2] Use of Form

[3] Cross References

§§ 265.147through 265.159 [Reserved]

§ 265.160 Notice of Removal From State Court to Federal District Court [28 U.S.C.S. §§ 1441, 1446]

[1] FORM

[2] Use of Form

[3] Signature Requirement

[4] Filing Requirements

[5] When Removal Complete

[6] Cross References

§ 265.161 Allegation of Ground for Removal--Federal Question [28 U.S.C.S. §§ 1331, 1441(a), (b)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.162 Allegation of Ground for Removal--Diversity of Citizenship [28 U.S.C.S. §§ 1332, 144,(b)]--In General

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.163 Allegation of Ground for Removal--Diversity of Citizenship [28 U.S.C.S. §§ 1332, 144(b)]--Improper Designation of Parties

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.164 Allegation of Ground for Removal--Diversity of Citizenship [28 U.S.C.S. §§ 1332, 1441(b)]--Class Action

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.165 Allegation of Ground for Removal--Separate and Independent Claim or Cause of Action Removable if Sued on Alone [28 U.S.C.S. § 1441(c)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.166 Notice of Filing Removal Notice [28 U.S.C.S. § 1446(d)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.167 Clerk's Certificate on Transcript of Record [28 U.S.C.S. § 1447(b)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.168 Notice of Motion and Motion to Remand Removed Action [28 U.S.C.S. § 1447(c)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.169 Order Granting Remand [28 U.S.C.S. § 1447(c)]

[1] FORM

[2] Use of Form

§ 265.170 Notice of Motion and Motion to Sever Claims and Remand Nonremovable Claims [28 U.S.C.S. § 1441(c))]

[1] FORM

[2] Use of Form

[3] Cross References

§ 265.171 Order Severing Claims and Remanding Nonremovable Claims [28 U.S.C.S. § 1441(c)]

[1] FORM

[2] Use of Form

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Chapter 265 FEDERAL COURTS: JURISDICTION AND REMOVAL
PART I. SCOPE

22-265 California Forms of Pleading and Practice--Annotated § 265.01

§ 265.01 Scope of Chapter

This chapter discusses and contains forms related to:

- An overview of the grounds for federal court jurisdiction and of the federal courts in California [*see §§ 265.10 -265.12*].
- Federal question jurisdiction [*see § 265.14*].
- Diversity of citizenship jurisdiction, including in class actions [*see § 265.15*].
- Other topics related to the jurisdiction of federal courts [*see §§ 265.16 -165.20*].
- Removal of civil actions from state court to federal district court [*see §§ 265.30 -265.40*].

The forms relating to jurisdiction are:

- Jurisdictional allegations for use in federal courts in cases in which jurisdiction is based on diversity of citizenship [*see §§ 265.80 -265.92*].
- Jurisdictional allegation for a general federal question [*see § 265.93*].
- Jurisdictional allegations for particular federal questions [*see §§ 265.94 -265.141*].
- A notice of motion, motion to dismiss for lack of subject matter jurisdiction and accompanying form of order [*see §§ 265.142 -265.145*].
- A denial of federal jurisdiction for use in a responsive pleading [*see § 265.146*].

The forms relating to removal of actions are:

- Notice of removal [*see § 265.160*].
- Allegations of different grounds for removal [*see §§ 265.161 -265.165*].
- A notice of filing the notice of removal [*see § 265.166*].
- A clerk's certificate on the transcript of record [*see § 265.167*].
- A notice of motion, motion to remand removed action and accompanying form of order [*see §§ 265.168*- 169].
- A motion to sever claims and remand nonremovable claims and accompanying order [*see §§ 265.170 -265.171*].

This chapter includes a Research Guide [*see § 265.50* et seq.]

This chapter also includes Procedural Checklists for seeking removal [*see § 265.70*], opposing removal [*see § 265.71*] and for a hearing on a motion for removal [*see* § 265.72].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureRemovalGeneral OverviewCivil ProcedureRemovalPostremoval RemandsMotions for Remand

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§ 265.02 Cross References

- For discussion of and other forms of motions and orders, see Ch. 372, *Motions and Orders* .

- For discussion of civil rights actions, see Chs. 112- 117A, *Civil Rights: Government-Funded Programs and Activities* , *Civil Rights: The Post-Civil War Civil Rights Statutes, Civil Rights: Prisoners' Rights, Civil Rights: Employment Discrimination, Civil Rights: Discrimination in Business Establishments, Civil Rights: Housing Discrimination, and Civil Rights: Interference with Civil Rights By Threats, Intimidation, Coercion, or Violence.*

- For additional discussion of class actions, see Ch. 120, *Class Actions* .

- For discussion of trademark actions, see Ch. 549, *Trademark and Trade Names* .

- For forms of jurisdictional allegations for use in actions brought under the Jones Act, see Ch. 522, *Ships and Shipping* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPersonal InjuriesMaritime Workers' ClaimsJones ActProcedureGeneral OverviewCivil ProcedureClass ActionsGeneral OverviewCivil Rights LawCivil Rights ActsGeneral OverviewTrademark LawGeneral Overview

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[Reserved]

§§ 265.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Jurisdiction

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§ 265.10 Governing Statutes

Jurisdiction based on general federal questions is governed by *28 U.S.C.S. § 1331*. Jurisdiction based on diversity of citizenship is governed by *28 U.S.C.S. § 1332*. In addition, there are a number of special provisions in the United States Code that provide independent jurisdictional bases for specific types of actions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral Overview

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22-265 California Forms of Pleading and Practice--Annotated § 265.11

§ 265.11 Federal Courts in California

The federal court system in California is divided into four districts. The Northern District has locations in Eureka, San Francisco, San Jose and Oakland. The Eastern District has locations in Sacramento, Fresno, Tahoe, Yosemite, Redding and Bakersfield. The Central District has locations in Los Angeles, Santa Ana and Riverside. The Southern District has locations in San Diego and El Centro.

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22-265 California Forms of Pleading and Practice--Annotated § 265.12

§ 265.12 Grounds for Federal Jurisdiction

Jurisdiction of an action in the federal district court depends on the existence of a general or particular federal question or diversity of citizenship [*see 28 U.S.C.S. §§ 1331, 1332*; *Pan Am. Pac. Corp. v. Superior Court (1961) 366 U.S. 656, 663, 81 S. Ct. 1303, 6 L. Ed. 2d 584]* . In addition, at least in cases in which jurisdiction is based on diversity of citizenship, the $75,000 jurisdictional amount requirement must be met [*see 28 U.S.C.S. § 1332*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral Overview

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A. Jurisdiction

22-265 California Forms of Pleading and Practice--Annotated § 265.13

§ 265.13 Federal Jurisdiction Required to Be Pleaded

Federal courts are courts of limited jurisdiction [*Grace v. American Central Ins. Co. (1883) 109 U.S. 278, 283, 3 S. Ct. 207, 27 L. Ed. 932]* . They are empowered to act only in those specific instances authorized by Congress [*McGlynn v. Employers Commercial Union Ins. Co. of America (D.P.R. 1974) 386 F. Supp. 774, 776-777]* and only when such a basis for federal jurisdiction is shown in the complaint [*Schaedler v. Reading Eagle Publication, Inc. (3d Cir. 1967) 370 F.2d 795, 799]* . Therefore, unless governed by specific provisions applicable to special proceedings [*see Fed. R. Civ. P., Rules 1, 81*], in any suit of a civil nature whether cognizable as a case at law or in equity, a pleading that sets forth a claim for relief, whether an original claim, counterclaim, cross claim, or a third-party claim, must contain a short and plain statement of the grounds on which the court's jurisdiction depends, unless the court already has jurisdictionand the claim needs no new grounds of jurisdiction to support it [*Fed. R. Civ. P., Rule 8(a)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral Overview

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A. Jurisdiction

22-265 California Forms of Pleading and Practice--Annotated § 265.14

§ 265.14 Federal Question Jurisdiction

[1] In General

The federal district courts have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States [*28 U.S.C.S. § 1331*]. An action "arises under" federal law if the complaint presents a substantial dispute over the effect of a federal law and the result turns on the federal question. Usually, federal law creates the cause of action, but a case may also "arise under" federal law if vindication of a right under state law turns on a construction of federal law [*Berg v. Leason (9th Cir. 1994) 32 F.3d 422, 423* (citing *Merrell Dow Pharmaceuticals v. Thompson (1986) 478 U.S. 804, 808, 106 S. Ct. 3229, 92 L. Ed. 2d 650*)]. On the other hand, a federal district court does not have subject matter jurisdiction to hear a direct appeal from the final judgment of a state court under this statute [*District of Columbia Court of Appeals v. Feldman (1983) 460 U.S. 462, 483, 103 S. Ct. 1303, 75 L. Ed. 2d 206* ; *Noel v. Hall (9th Cir. 2003) 341 F.3d 1148, 1154* (allegation of legal error)].

In addition to the general federal question jurisdiction conferred on the federal courts by *28 U.S.C.S. § 1331*, federal question jurisdiction may also be conferred on district courts by specific statutes. When it is clear that an action involves a federal question arising under a particular statute, then jurisdiction is conferred on the district court, and there is no additional requirement that general federal question jurisdiction under *28 U.S.C.S. § 1331* be alleged. In such a case, any additional allegation of federal court jurisdiction may be stricken from the pleading because the code sections conferring particular and general federal question jurisdiction are independent and mutually exclusive [*see American Amusement Co. v. Ludwig (D. Minn. 1949) 82 F. Supp. 265, 266-267]* . Thus, in actions arising under a special jurisdictional statute such as suits under the patent, copyright, and trademark laws [*28 U.S.C.S. § 1338*; *see, e.g., Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP (2010) 183 Cal. App. 4th 238, 244, 107 Cal. Rptr. 3d 373* (dismissing for lack of jurisdiction over patent law issues arising from legal malpriactice claim)] or in actions arising out of the violation of laws regulating interstate commerce [*28 U.S.C.S. § 1337*], jurisdiction is conferred on the district courts by pleading the particular act and alleging that the action arises thereunder [*see Technical Tape Corp. v. Minnesota Mining & Mfg. Co. (2d Cir. 1952) 200 F.2d 876, 876-877* ; *American Amusement Co. v. Ludwig (D. Minn. 1949) 82 F. Supp. 265, 266]* .

Federal jurisdiction is also conferred when either the United States or an agency whose congressional charter authorizes it to bring suit in federal court is the plaintiff [*28 U.S.C.S. § 1345*]. Federal jurisdiction may also be available when Congressional charters authorize certain agencies to "sue or be sued" in federal court [*see, e.g., 12 U.S.C.S. § 1441a(a)(5)(J)* (Resolution Trust Corporation); *12 U.S.C.S. § 1819(b)(2)(B)* (Federal Deposit Insurance Corporation); *28 U.S.C.S. § 2679* (Federal Employees Liability Reform and Tort Compensation Act of 1988); *36 U.S.C.S. § 300105(a)(5)* (American Red Cross); *see also American Red Cross v. S.G. (1992) 505 U.S. 247, 112 S. Ct. 2465, 2471-2472, 120 L. Ed. 2d 201, 212* (grant of original jurisdiction must be specific as to federal courts)].

However, it should be noted that regardless of whether jurisdiction is conferred on a district court by *28 U.S.C.S. § 1331* or some particular federal statute, if the facts giving the court jurisdiction are set forth in the complaint, the statutory provision conferring jurisdiction need not be specifically pleaded [*Williams v. United States (9th Cir. 1969) 405 F.2d 951, 954]* .

[2] Sufficiency of Allegation

When the jurisdiction of a district court has been invoked on the sole ground that the cause involves a federal question, it is not enough to allege that questions of a federal character arise in the case; in addition, it must plainly appear that the averments attempting to bring the case within federal jurisdiction are real and substantial [*Blumenstock Bros. Advertising Agency v. Curtis Pub. Co. (1919) 252 U.S. 436, 441, 40 S. Ct. 385, 64 L. Ed. 649]* . Moreover, a suggestion of one party that the other will or may set up a claim under the Constitution or laws of the United States does not make the suit one arising under the Constitution or those laws. The claim for relief itself must present a federal question unaided either by anything alleged in anticipation of avoidance of defenses which may be interposed by another party or by a petition for removal [*Skelly Oil Co. v. Phillips Petroleum Co. (1949) 339 U.S. 667, 672, 70 S. Ct. 876, 94 L. Ed. 1194]* .

[3] Abstention or Deferral

Federal and state courts often exercise concurrent jurisdiction over the same subject matter. When that happens, a federal court generally need neither abstain (that is, dismiss the case before it) nor defer to the state proceedings (that is, withhold action until the state proceedings have concluded). In rare circumstances, however, principles of federalism and comity dictate otherwise [*Growe v. Emison (1993) 507 U.S. 25, 32, 113 S. Ct. 1075, 122 L. Ed. 2d 388]* . Whether a case meets the requirements of a particular abstention doctrine is a question of law that a federal court will review de novo [*Mission Oaks Mobile Home Park v. City of Hollister (9th Cir. 1993) 989 F.2d 359, 360 , cert. denied, 127 L. Ed. 2d 373 (1994)]* .

For example, abstention has been found necessary when the federal action raises difficult questions of state law bearing on important matters of state policy, or when federal jurisdiction has been invoked to restrain ongoing state criminal proceedings [*see Colorado River Water Cons. Dist. v. U.S. (1976) 424 U.S. 800, 814-817, 96 S. Ct. 1236, 47 L. Ed. 2d 483]* . Deferral has been required when (1) the complaint touches a sensitive area of social policy on which the federal courts ought not enter unless there is no open alternative to its adjudication; (2) such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy; and (3) the possibly determinative issue of state law is doubtful [*see Railroad Commission of Texas v. Pullman Co. (1941)312 U.S. 496, 498-501, 61 S. Ct. 643, 85 L. Ed. 971* ; *Almodovar v. Reiner (9th Cir. 1987) 832 F.2d 1138, 1140* ; *see also 40235 Washington Street Corp. v. Lusardi (9th Cir. 1992) 976 F.2d 587, 588]* . However, *Pullman* abstention is appropriate only when the state statute is sufficiently uncertain that it is clearly subject to a limiting construction or interpretation that would save it from invalidation [*Yniguez v. Arizonans for Official English (9th Cir. 1995) 42 F.3d 1217, 1227* ; *Lind v. Grimmer (9th Cir. 1994) 30 F.3d 1115, 1121 , cert. denied sub nom Wang v. Lind, 513 U.S. 1111 (1995)* (citing *Harman v. Forssenius (1965) 380 U.S. 528, 534-535, 85 S. Ct. 1177, 14 L. Ed. 2d 50*)].

Deferral is also appropriate when the case involves a local issue arising out of a complex regulatory scheme [*see*

Burford v. Sun Oil Co. (1943) 319 U.S. 315, 332, 63 S. Ct. 1098, 87 L. Ed. 1424 ; *Hotel Employees v. Nevada Gaming Com'n (9th Cir. 1993) 984 F.2d 1507, 1512]* and will impact and unduly burden the state regulatory scheme [*Hawthorne Sav. F.S.B. v. Reliance Ins. Co. (9th Cir. 2005) 421 F.3d 835, 848* (as amended) (federal court interpretation of California law concerning whether to defer to insurance insolvency proceedings in other states would not be unduly burdensome)]. A somewhat different deferral test applies in declaratory relief cases [*see* *Brillhart v. Excess Ins. Co. (1942) 316 U.S. 491, 495, 62 S. Ct. 1173, 86 L. Ed. 1620* ; *40235 Washington Street Corp. v. Lusardi (9th Cir. 1992) 976 F.2d 587, 588]* .

While there is no absolute rule to this effect, abstention is generally disfavored in *First Amendment* cases and in cases in which there is potential federal preemption of state law [*see, e.g.,* *Sycuan Band of Mission Indians v. Roache (9th Cir. 1995) 54 F.3d 535, 541* (abstention not appropriate when, despite state interest in enforcement, the matter is subject to exclusive federal jurisdiction); *Yniguez v. Arizonans for Official English (9th Cir. 1995) 42 F.3d 1217, 1227* (*First Amendment*); *Bud Antle, Inc. v. Barbosa (9th Cir. 1994) 35 F.3d 1355, 1365-1366* , *modified on other grounds* *35 F.3d 1355, 45 F.3d 1261 (1995)* (important state interest not implicated because federal law preempted and state court would be acting beyond its jurisdiction to adjudicate the claim); *Lind v. Grimmer (9th Cir. 1994) 30 F.3d 1115, 1121* , *cert. denied sub nom* *Wang v. Lind 513 U.S. 1111 (1995)* (actual issue not substance of state law but rather its abridgement of freedom of expression granted by *First Amendment*); *cf.* *Almodovar v. Reiner (9th Cir. 1987) 832 F.2d 1138, 1140-1141* (*First Amendment* case, but involved state statute susceptible of a limiting construction)].

Although the *Pullman* doctrine has been referred to as a form of "abstention," it is preferrable to speak of *Pullman* "deferral" to highlight the distinction between those circumstances that require dismissal of a suit and those that require postponing consideration of its merits [*Growe v. Emison (1993) 507 U.S. 25, 32 n.1, 113 S. Ct. 1075, 122 L. Ed. 2d 388]* . The *Pullman* doctrine is a narrow exception to the district court's duty to decide cases that are properly before it. A district court that abstains under *Pullman* must dismiss the state-law claim and stay its proceedings on the constitutional question until a state court has resolved the state issue. A district court has no discretion to abstain if the abstention requirements are not met [*Cedar Shake & Shingle Bur. v. City of Los Angeles (9th Cir. 1993) 997 F.2d 620, 622]* .

The principle that federal courts should under certain circumstances abstain in favor of ongoing state proceedings was enunciated in *Younger v. Harris (1971) 401 U.S. 37, 43, 91 S. Ct. 746, 27 L. Ed. 2d 669* . Although *Younger* involved state criminal proceedings, its holding has been extended to other proceedings that are judicial in nature [*Ohio Civil Rights Comm'n v. Dayton Schools (1986) 477 U.S. 619, 627, 106 S. Ct. 2718, 91 L. Ed. 2d 512* ; *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose (9th Cir. 2008) 546 F.3d 1087, 1092* ("state civil actions and state administrative proceedings"); *Bud Antle, Inc. v. Barbosa (9th Cir. 1994) 35 F.3d 1355, 1365* , *modified on other grounds* *35 F.3d 1355, 45 F.3d 1261 (1995)*]. In addressing *Younger* abstention issues, federal district courts must exercise jurisdiction except when specific legal standards are met, and may not exercise jurisdiction when those standards are met. There is no discretion vested in the district courts to do otherwise [*San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose (9th Cir. 2008) 546 F.3d 1087, 1092]* . Accordingly, the limited circumstances in which abstention by federal courts is appropriate remain the exception rather than the rule [San Jose Silicon Valley Chamber of Commerce Political Action Com. v. City of San Jose (9th C ir.2008) *546 F.3d 1087, 1092]* . For *Younger* abstention to be required, three elements are necessary: (1) ongoing state proceedings; (2) implicating important state interests; (3) that afford the plaintiff the opportunity to raise the constitutional claims [*Agriesti v. MGM Grand Hotels, Inc. (9th Cir. 1995) 53 F.3d 1000, 1001]* . While there are only three "threshold elements" to application of *Younger*, there is a vital and indispensable fourth element: The policies behind the *Younger* doctrine must be implicated by the actions requested of the federal court; once the three aforementioned elements are satisfied, the court does not automatically abstain, but abstains only if there is a *Younger*-based reason to abstain, i.e., if the court's action would enjoin, or have the practical effect of enjoining, ongoing state court proceedings [*AmerisourceBergen Corp. v. Roden (9th Cir. 2007) 495 F.3d 1143, 1149*]. An exception to this general rule applies if there is a showing of bad faith, harassment, or some other extraordinary circumstance that would make abstention inappropriate [*see* *Middlesex County Ethics Comm. v. Garden State Bar*

Ass'n (1982) 457 U.S. 423, 435, 437, 102 S. Ct. 2515, 73 L. Ed. 2d 116 ; *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose (9th Cir. 2008) 546 F.3d 1087, 1092*]. For purposes of *Younger* abstention, there is no principled distinction between finality of judgments for purposes of appellate review and finality of state-initiated proceedings [*San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose (9th Cir. 2008) 546 F.3d 1087, 1093* (administrative proceeding)].

Questions of deferral may also arise among the federal courts when a case that will adequately address a party's claims is already pending. In this situation, "the general principle is to avoid duplicative litigation," and advance judicial economy [*Colorado River Water Cons. Dist. v. U.S. (1976) 424 U.S. 800, 817, 96 S. Ct. 1236, 47 L. Ed. 2d 483* ; *O'Neill v. U.S. (9th Cir. 1995) 50 F.3d 677, 688]* . Those circumstances are "exceedingly rare," because the existence of a substantial doubt as to the adequacy of the state court action to address a party's claims precludes the granting of a stay [*Smith v. Central Ariz. Water Cons. Dist. (9th Cir. 2005) 418 F.3d 1028, 1033* (stay properly denied)].

For a detailed discussion of the abstention doctrine, see Moore's Federal Practice, Ch. 122 (3rd ed. Matthew Bender).

[4] Preemption

Complete preemption of state law by a federal statute provides exclusive federal question jurisdiction [*Hall v. North American Van Lines, Inc. (9th Cir. 2007) 476 F.3d 683, 687-688* (claim, but not necessarily relief, must arise under federal law); *see Atkins v. Praxair Inc. (9th Cir. 2006) 182 Fed. Appx. 724* , 726, (federal question jurisdiction based on Employee Retirement Income Security Act of 1974, *29 U.S.C.S. § 1001, et seq.*, preemption of state law claims that "relate to" an employee benefit plan under ERISA)]. Partial preemption of state law by a federal law provides federal question jurisdiction over claims based on the subject of preemption [*see Peralta v. Hispanic Bus., Inc. (9th Cir. 2005) 419 F.3d 1064, 1068-1069* (federal question jurisdiction based on Employee Retirement Income Security Act of 1974, *29 U.S.C.S. § 1001, et seq.*, preemption of state law claims that "relate to" an employee benefit plan under ERISA)].

On the other hand, reverse preemption provisions in federal statutes bar federal question jurisdiction [see *Qwest Corp. v. City of Surprise (9th Cir. 2006) 434 F.3d 1176, 1184* (federal Tax Injunction Act bars federal subject matter jurisdiction to enjoin state tax collection)].

Similarly, the existence of a defense based upon federal law is insufficient to support jurisdiction [*Hall v. North American Van Lines, Inc. (9th Cir. 2007) 476 F.3d 683, 687* ; *Wayne v. DHL Worldwide Express (9th Cir. 2002) 294 F.3d 1179, 1183]* .

For discussion of preemption as a basis for removal to federal court, see *§ 265.33[2][d]*. For discussion of determining whether and to what extent a federal law preempts state law, see *§ 531.91*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsWell-Pleaded Complaint RuleCivil ProcedureFederal & State InterrelationshipsAbstentionCivil ProcedureFederal & State InterrelationshipsFederal Common LawPreemption

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Chapter 265 FEDERAL COURTS: JURISDICTION AND REMOVAL
PART II. LEGAL BACKGROUND
A. Jurisdiction

22-265 California Forms of Pleading and Practice--Annotated § 265.15

§ 265.15 Diversity of Citizenship Jurisdiction

[1] In General

The federal district courts have original jurisdiction of all civil actions in which the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and the action is between: (1) citizens of different states; (2) citizens of a state and citizens or subjects of a foreign state; (3) citizens of different states and in which foreign states or citizens or subjects thereof are additional parties; and (4) a foreign state (defined in *28 U.S.C.S. § 1603(a)*) as plaintiff and citizens of a state or of different states [*28 U.S.C.S. § 1332(a)*; *see* Pub. L. No. 100-702, § 201, 102 Stat. 4646 (former $50,000 jurisdictional minimum applies to actions commenced prior to January 19, 1997)].

The amount-in-controversy requirement excludes only "interest and costs" and therefore includes attorney's fees as well as any other sums that would be paid to a party as a result of judgment [*Guglielmino v. McKee Foods Corp. (9th Cir. 2007) 506 F.3d 696, 700-701* (attorney fees and back payments of health benefits and taxes)].

For the purposes of diversity and removal jurisdiction, an alien admitted to the United States for permanent residence is deemed a citizen of the state in which he or she is domiciled [*28 U.S.C.S. § 1332(a)* (applicable to civil actions commenced or removed on or after May 18, 1989)]. For the same purposes, the legal representative of the estate of a decedent is deemed to be a citizen only of the same state as the decedent, and the legal representative of an infant or incompetent is a citizen only of the same state as the infant or incompetent [*28 U.S.C.S. § 1332(c)(2)* (applicable to civil actions commenced or removed on or after May 18, 1989)].

No diversity jurisdiction is conferred on a district court under *28 U.S.C.S. § 1332* in a case involving citizens of different states unless proper and complete allegations of diversity of citizenship are made showing that no plaintiff is a citizen of the same state as any of the defendants; that is, each plaintiff must be able to sue each defendant [*see Treinies v. Sunshine Mining Co. (1939) 308 U.S. 66, 71, 60 S. Ct. 44, 84 L. Ed. 85* ; *Fifty Associates v. Prudential Ins. Co. of America (9th Cir. 1970) 446 F.2d 1187, 1190* ; *Potter's Photographic Applications Co. v. Ealing Corporation (E.D. N.Y. 1968) 292 F. Supp. 92, 107, 1968 Trade Cas. (CCH) P72622]* . Diversity of citizenship is assessed at the time the action is filed. Once established, diversity jurisdiction is not defeated by the addition of a nondiverse party who

was not an indispensable party at the time the complaint was filed [*Mattel, Inc. v. Bryant (9th Cir. 2006) 446 F.3d 1011, 1013* (intervenor not indispensible); *Freeport-McMoRan Inc. v. K. N. Energy (1991) 498 U.S. 426, 428, 111 S. Ct. 858, 112 L. Ed. 2d 951]* .

Under the court-made "domestic relations exception" to diversity jurisdiction, federal courts will not exercise diversity jurisdiction in cases involving the issuance of a divorce, alimony, or child custody decree. This exception, however, does not apply to a tort action between former spouses or to an action seeking to enforce an alimony decree rendered by a state court [*Ankenbrandt v. Richards (1992) 504 U.S. 689, 703-704, 112 S. Ct. 2206, 119 L. Ed. 2d 468* (tort); *Barber v. Barber (1859) 16 L. Ed. 226, 21 How. 582* (enforcement)].

Under the court-made "probate exception" to diversity jurisdiction, federal courts will not exercise diversity jurisdiction in cases involving probate of a will or administration of an estate. However, federal courts of equity do have jurisdiction to entertain suits in favor of creditors, legatees and heirs and other claimants against a decedent's estate to establish their claims so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court [*Marshall v. Marshall (2006) 547 U.S. 293, 126 S. Ct. 1735* ; *126 S. Ct. 1735, 164 L. Ed. 2d 480, 497]* .

[2] Improper Joinder

A district court does not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively joined to invoke the jurisdiction of the court [*28 U.S.C.S. § 1359*]. Although motive alone is irrelevant in determining whether a party has been improperly or collusively joined, if a nominal party who has no real or substantial interest in the dispute or controversy is designated simply for the purpose of creating diversity of citizenship, such a party has been improperly or collusively named [*McSparran v. Weist (3rd Cir. 1968) 402 F.2d 867, 873, 875]* . In addition, if a party has been improperly joined as a plaintiff or defendant to the action in order to create diversity jurisdiction, the court will look beyond the pleadings, arrange the parties according to their sides in the dispute, and, if necessary, dismiss the action for want of jurisdiction [*Smith v. Sperling (1957) 354 U.S. 91, 99-100, 77 S. Ct. 1112, 1 L. Ed. 2d 1205* ; *Dawson v. Columbia Ave. Sav. Fund, Safe Deposit, Title, & Trust Co. (1905) 197 U.S. 178, 180, 25 S. Ct. 420, 49 L. Ed. 713]* .

Sanctions may be imposed against an attorney for failing to conduct a reasonable investigation of a client's domicile before filing a diversity action [*Hendrix v. Naphtal (9th Cir. 1992) 971 F.2d 398, 399-400]* .

[3] Fictitious Defendants

Inclusion of fictitious defendants in a complaint originally filed in federal court destroys diversity jurisdiction [*Garter-Bare Co. v. Munsingwear, Inc. (9th Cir. 1980) 650 F.2d 975, 981* ; *Molnar v. National BroadcastingCompany (9th Cir. 1956) 231 F.2d 684, 685-686* ; *compare 28 U.S.C.S. § 1441(a)* (fictitiously named defendants are disregarded for purposes of removal); for further discussion of removal, *see § 265.30* et seq.].

When a fictitious defendant allegation has been used, diversity jurisdiction may be restored if the fictitious defendants are subsequently dismissed, or if the fictitious defendants have not been served when the trial begins [*Preaseau v. Prudential Ins. Co. (9th Cir. 1979) 591 F.2d 74, 75-76* (dismissal of fictitious defendants); *Southern Pacific Co. v. Haight (9th Cir. 1942) 126 F.2d 900, 903-904* , *cert. denied 317 U.S. 676* (nonservice of fictitious defendants)].

[4] Corporations

For the purposes of diversity and removal jurisdiction, a corporation is deemed a citizen of any state by which it has been incorporated and of the state where it has its principal place of business [*28 U.S.C.S. § 1332(c)(1)*]. However, in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or

unincorporated, to which action the insured is not joined as a party defendant, that insurer is deemed a citizen of the state in which the insured is a citizen, as well as of any state by which the insurer has been incorporated and of the state where it has its principal place of business [*28 U.S.C.S. § 1332(c)(1)* (applicable to civil actions commenced or removed on or after May 18, 1989)]. Unless the cause of action brought against the insurer is of such a nature that liability could be imposed against the insured, the action is not considered a direct action under the diversity statute [*Searles v. Cincinnati Ins. Co. (9th Cir. 1993) 998 F.2d 728, 729]* .

Allegations of diversity jurisdiction in an action in which a corporation is a party must contain both the place of incorporation and the principal place of business of the corporate party [*Moore v. Sylvania Elec. Prod., Inc. (3rd Cir. 1972) 454 F.2d 81, 84 n.1*]. "Principal place of business" is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities. It is normally be the place where the corporation maintains its headquarters, provided that the headquarters is the actual center of direction, control, and coordination, i.e., the "nerve center," and not simply an office where the corporation holds its board meetings [*The Hertz Corp. v. Friend (2010) -- U.S. --,130 S. Ct. 1181, 175 L. Ed. 2d 1029, 1041-1042* ; *see Breitman v. May Co. California (9th Cir. 1994) 37 F.3d 562, 564* (*citing Industrial Techtronics, Inc. v. Aero Alloy (9th Cir. 1990) 912 F.2d 1090, 1092)]* . A bare allegation that a corporation is a citizen of a certain state without such additional allegations is considered a mere conclusion of law and is insufficient to confer diversity jurisdiction on the district court [*Fifty Associates v. Prudential Ins. Co. of America (9th Cir. 1970) 446 F.2d 1187, 1190]* .

[5] Limited Partnerships and Limited Liability Companies

For the purposes of diversity and removal jurisdiction, a limited partnership is not in its own right a "citizen" of the state that created it [*Carden v. Arkoma Associates (1990) 494 U.S. 185, 187, 192-196, 110 S. Ct. 1015, 108 L. Ed. 2d 157]* . A federal court must look to the citizenship of the general partners and the limited partners to determine whether there is complete diversity [*Carden v. Arkoma Associates (1990) 494 U.S. 185, 187, 192-196, 110 S. Ct. 1015, 108 L. Ed. 2d 157, 163]* . The same rule applies to limited liability companies [*Johnson v. Columbia Props. Anchorage, LP (9th Cir. 2006) 437 F.3d 894, 899]* .

[6] Class Actions

[a] Minimal Diversity

[i] In General

The Class Action Fairness Act of 2005 (CAFA), which applies to all actions commenced on or after February 18, 2005 [*Progressive West Insurance Co. v. Preciado (9th Cir. 2007) 479 F.3d 1014, 1016* (cross complaint filed on February 17, 2005, and subsequently amended not subject to CAFA); *Bush v. Cheaptickets, Inc. (9th Cir. 2005) 425 F.3d 683, 686-687* (complaint filed on February 17, 2005 not subject to CAFA)], provides special rules for diversity jurisdiction in class actions. The CAFA adds a new subsection (d) to the diversity statute, U.S.C.S. § 1332 providing for federal jurisdiction based on "minimal diversity." Under the new subsection, federal district courts have jurisdiction over any class action in which: (1) the matter in controversy exceeds $5 million, and (2) any member of a plaintiff class and any defendant are citizens of different states [U.S.C.S. § 1332(d)(2)]. A defendant seeking removal in an action in which the plaintiff's complaint prays for relief in an amount below the jurisdiction amount must prove with "legal certainty" that the amount in controversy is satisfied [*Lowdermilk v. United States Bank Nat. Ass'n (9th Cir. 2007) 479 F.3d 994, 998-1003* (defendant failed to meet burden of proof)]. Attorney fees are included in the amount in controversy for determining federal class action jurisdiction if an award of fees is authorized by statute [*Lowdermilk v. United States Bank Nat. Ass'n (9th Cir. 2007) 479 F.3d 994, 1000]* .

Jurisdiction is also present where any member of the plaintiff class is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a U.S. state, and where any member of the plaintiff class is a citizen of a U.S. state and any defendant is a foreign state or a citizen or subject of a foreign state [U.S.C.S. § 1332(d)(2)].

Prior to the enactment of the CAFA, courts did not enjoy diversity jurisdiction over class actions unless there was complete diversity of citizenship between all named representatives of the plaintiff class and all defendants [*see State Farm Fire & Casualty Co. v. Tashire (1967) 386 U.S. 523, 87 S Ct 1199, 18 L Ed2d 270]* .

For purposes of determining diversity jurisdiction, citizenship of the members of the plaintiff class is determined as of the date of filing the complaint or amended complaint [U.S.C.S. § 1332(d)(7)].

[ii] Exceptions

The CAFA contains some exceptions to the rule of "minimal diversity" [*Serrano v. 180 Connect Inc. (9th Cir. 2007) 478 F.3d 1018, 1023* (provisions set forth in § 1332(d)(3), (4) are exceptions to jurisdiction)]:

- Minimal diversity jurisdiction is unavailable in a class action in which the primary defendants are states, state officials, or other government entities due to *11th Amendment* considerations [*28 U.S.C.S. § 1332(d)(5)*; for discussion of the *11th Amendment* as it pertains to federal jurisdiction, *see § 265.18*].

- Minimal diversity jurisdiction is unavailable in a class action in which there are fewer than 100 members of all proposed plaintiff classes in the aggregate [*28 U.S.C.S. § 1332(d)(5)*].

- Minimal diversity jurisdiction is unavailable in a class action in which two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the state in which the action was originally filed [*28 U.S.C.S. § 1332(d)(4)(B)*].

- Minimal diversity jurisdiction is unavailable in a class action in which more than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the state in which the action was originally filed; at least one defendant from whom significant relief is sought and whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class is a citizen of the state in which the action was originally filed; principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the state in which the action was originally filed; and during the three years preceding the filing of the class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons [U.S.C.S. § 1332(d)(4)(A)].

- Minimal diversity jurisdiction is unavailable in certain class actions pertaining to the Securities Act of 1933 and to corporations' and business enterprises' governance [*28 U.S.C.S. § 1332(d)(9)*].

The objecting party bears the burden of proof as to the applicability of an express statutory exception [*Serrano v. 180 Connect Inc. (9th Cir. 2007) 478 F.3d 1018, 1023-1024* (applied to *28 U.S.C.S. § 1332(d)(3), (4)*) (disapproving *Lao v. Wickes Furniture Co., Inc. (C.D. Cal. 2006) 455 F. Supp. 2d 1045*)].

Additionally, a court has discretion to decline to exercise minimal diversity jurisdiction if more than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the state in which the action was originally filed [*28 U.S.C.S. § 1332(d)(3)*].

[b] "Mass Actions"

A "mass action" is any civil action in which monetary relief claims of 100 or more people are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact [*28 U.S.C.S. § 1332(d)(11)(A)*]. A mass action is treated as a class action for purposes of diversity jurisdiction except that diversity jurisdiction does not

exist over any plaintiff whose individual claim does not satisfy the $75,000 jurisdiction minimum for diversity jurisdiction [*28 U.S.C.S. § 1332(d)(11)(A)*; *Abrego Abrego v. The Dow Chem. Co. (9th Cir. 2006) 443 F.3d 676, 686-690* (no individual claim satisfied $75,000 minimum)].

A mass action does not include any civil action in which any of the following is true [*28 U.S.C.S. § 1332(d)(11)(B)(ii)*]:

- All of the claims arise from an alleged event or occurrence in the state in which the action was filed, with the allegedly resulting injuries in that state or in states contiguous to that state.

- The claims are joined on motion fo a defendant.

- All claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a state statute specifically authorizing such an action.

- The claims have been consolidated or coordinated solely for pretrial proceedings.

[7] Pleading Jurisdictional Amount

[a] In General

In any action in which the jurisdiction of the federal court is based on diversity of citizenship, the matter in controversy must exceed, exclusive of interest and costs, the sum or value of $75,000 [*see 28 U.S.C.S. § 1332(a)* (effective January 19, 1997)]. As with other jurisdictional matters, the amount in controversy must be specifically alleged [*see Century Southwest Cable Television, Inc. v. CIIF Associates (9th Cir. 1994) 33 F.3d 1068, 1071]* . Generally, the sum claimed by the plaintiff in his or her prayer for relief controls if the claim is apparently made in good faith [*St. Paul Mercury Indem. Co. v. Red Cab Co. (1938) 303 U.S. 283, 288-289, 58 S. Ct. 586, 82 L. Ed. 845]* , unless the rest of the complaint qualifies or detracts from the claimed sum so that it cannot be said that jurisdiction appears on the face of the complaint taken as a whole [*KVOS, Inc. v. Associated Press (1936) 299 U.S. 269, 277, 57 S. Ct. 197, 81 L. Ed. 183]* .

It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal [*St. Paul Mercury Indem. Co. v. Red Cab Co. (1938) 303 U.S. 283, 288-289, 58 S. Ct. 586, 82 L. Ed. 845]* . The subsequent inability of the plaintiff to recover an amount adequate to give the court jurisdiction does not in itself show his or her bad faith [*St. Paul Mercury Indem. Co. v. Red Cab Co. (1938) 303 U.S. 283, 289, 58 S. Ct. 586, 82 L. Ed. 845]* . However, except when express provision therefor is otherwise made in a statute of the United States, when the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff [*28 U.S.C.S. § 1332(b)*].

[b] Joinder of Claims and Parties

A single plaintiff is permitted to aggregate his or her claims for relief in order to satisfy the jurisdictional amount requirement, even though such claims are separate and distinct [*see Lemmon v. Cedar Point, Inc. (6th Cir. 1969) 406 F.2d 94, 96]* . Two or more plaintiffs may not, however, combine separate and distinct claims in a single suit in order to satisfy the requisite jurisdictional amount unless such plaintiffs have united to enforce a single title or right in which they have a common and undivided interest [*Pinel v. Pinel (1916) 240 U.S. 594, 596, 36 S. Ct. 416, 60 L. Ed. 817* ; *see Snow v. Ford Motor Co. (9th Cir. 1977) 561 F.2d 787, 789-790* (class members not permitted to aggregate separate and distinct claims for relief to satisfy jurisdictional amount)]. A plaintiff also may not combine his or her claimwith the defendant's compulsory counterclaim in order to satisfy the jurisdictional amount when the defendant has objected from

the beginning to the federal court's assumption of jurisdiction over the plaintiff's main action on the ground that the amount in controversy in that action was insufficient [*Motorists Mutual Ins. Co. v. Simpson (7th Cir. 1968) 404 F.2d 511, 514]* . For discussion of aggregating claims in class or mass actions, see *§ 265.15[6]*.

[c] Objection by Defendant

A court is not bound to dismiss an action on a defendant's motion that is based solely on an alleged insufficient pleading of the amount in controversy if the pleading taken as a whole sufficiently alleges the requisite jurisdictional amount. However, when the allegations regarding the amount in controversy are challenged by the defendant in an appropriate manner, the plaintiff must support them by competent proof [*KVOS, Inc. v. Associated Press (1936) 299 U.S. 269, 278, 57 S. Ct. 197, 81 L. Ed. 183* (motion to dismiss for failure to allege requisite jurisdictional amount reciting facts in opposition to plaintiff's jurisdictional allegation)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionAlienage JurisdictionCitizenshipCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyChallengesCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipBusiness EntitiesCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipIndividuals

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22-265 California Forms of Pleading and Practice--Annotated § 265.16

§ 265.16 "Case or Controversy" Requirement

[1] In General

Article III of the United States Constitution confers jurisdiction only over actual "cases" and "controversies" (also referred to as "justiciable" cases), effectively prohibiting federal courts from rendering advisory opinions [*S.E.C. v. Medical Committee for Human Rights (1972) 404 U.S. 403, 407, 92 S. Ct. 577, 30 L. Ed. 2d 560* ; *Muskrat v. United States (1911) 219 U.S. 346, 362, 31 S. Ct. 250, 55 L. Ed. 246]* . The application of the following three basic doctrines enables the federal courts to safeguard this aspect of their jurisdiction:

- Standing (whether the parties bringing the suit are appropriate to seek redress for the alleged injury).
- Ripeness (whether the case is based upon concrete, as distinguished from hypothetical facts).
- Mootness (whether resolution of the issues or redress of the rights of the parties has been rendered unnecessary or inappropriate by subsequent events).

A fourth, more obscure doctrine related to justiciability prohibits courts from resolving "political questions" that would require consideration of policy issues that are more properly the province of the legislative or executive branch.

[2] Standing of Parties

For a party to have standing to bring a suit in federal court, that party must have suffered an injury in fact that is concrete and particularized, not conjective or hypothetical, that is fairly traceable to the challenged action of the defendant, and that is likely to be redressed by a favorable decision by the court [*Lujan v. Defenders of Wildlife (1992) 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351, 364* ; *Nuclear Information and Resource Service v. Nuclear Regulatory Comm. (9th Cir. 2006) 457 F.3d 941, 950* (procedural injury can satisfy the requirements for standing)]. Under certain circumstances, it is permissible to raise the rights of third persons, but only when those whose rights have been impaired cannot defend their rights themselves [*see, e.g.,* *Griswold v. Connecticut (1965) 381 U.S. 479, 481, 85 S. Ct. 1678, 14 L. Ed. 2d 510* (physicians could raise privacy rights of married couples who would be denied

contraceptives if challenged statute enforced); *Barrows v. Jackson (1953) 346 U.S. 249, 258-259, 73 S. Ct. 1031, 97 L. Ed. 1586* (party to restrictive covenant barring non-Caucasians from property ownership could raise *Fourteenth Amendment* rights of those persons)].

When the federal cause of action is statutory, the plaintiff must also meet a prudential standing test. The prudential standing analysis examines whether the plaintiff has been granted a right to sue by the statute under which he or she brings suit [*Doran v. 7-Eleven, Inc. (9th Cir. 2007) 506 F.3d 1191, 1201* (ADA plaintiff who has Article III standing as a result of at least one barrier at a place of public accommodation may, in one suit, permissibly challenge all barriers in that public accommodation that are related to his or her specific disability); *Ashley Creek Phosphate Co. v. Norton (9th Cir. 2005) 420 F.3d 934, 939-940* (standing provision of Administrative Procedures Act, *5 U.S.C.S. § 702*, requires that the interest sought to be protected be arguably within the zone of interests protected or regulated by the statute on which the claim is based)].

When a plaintiff states an overbreadth claim under the *First Amendment*, the court suspends the prudential standing doctrine because of the special nature of the risk to expressive rights. While the prudential standing doctrine typically prevents the court from hearing lawsuits on the basis of injuries to non-parties, the overbreadth doctrine operates as a narrow exception permitting the lawsuit to proceed on the basis of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression [*Get Outdoors II, LLC v. City of San Diego (9th Cir. 2007) 506 F.3d 886, 891*].

[3] Ripeness of Controversy

The doctrine of ripeness is applied to prevent a case from being decided prematurely or on a hypothetical basis. Litigation is required to be based on actual issues between the parties [*see United Public Workers of America (C.I.O.) v. Mitchell (1947) 330 U.S. 75, 90-91, 67 S. Ct. 556, 91 L. Ed. 754]* . This aspect of ripeness is considered in a two prong test: (1) the fitness of the issues for judicial decision; and (2) the hardship to the parties of withholding court consideration [*Manufactured Home Cmtys., Inc. v. City of San Jose (9th Cir. 2005) 420 F.3d 1022, 1033]* . However, a declaratory judgment is often available in cases in which resolution would otherwise have to await potential violation of a legal standard and the attendant consequences before the issues could be resolved. Common examples are declaratory actions by insurance carriers to determine the availability of coverage [*see Maryland Casualty Co. v. Pacific Coal & Oil Co. (1941) 312 U.S. 270, 273-274, 61 S. Ct. 510, 85 L. Ed. 826]* and challenges to criminal statutes prior to a potential violator's being subjected to arrest and prosecution *see Steffel v. Thompson (1974) 415 U.S. 452, 459, 94 S. Ct. 1209, 39 L. Ed. 2d 505]* . While a substantive due process violation by the government is complete as soon as the government action occurs, the mere existence of a statute that may or may not ever be applied to plaintiffs is insufficient to create a ripe case or controversy [*Action Apt. Ass'n v. Santa Monica Rent Control Opinion Bd. (9th Cir. 2007) 509 F.3d 1020, 1026-1027*]. The basic question is whether the facts alleged, under the circumstances, show a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant a declaratory judgment [*Maryland Casualty Co. v. Pacific Coal & Oil Co. (1941) 312 U.S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 826]* .

[4] Mootness of Claims

[a] General Rule

A case or issue is considered moot if it "has lost its character as a present, live controversy of the kind that must exist if [a court is] to avoid advisory opinions on abstract propositions of law" [*Lindquist v. Idaho State Bd. of Corrections (9th Cir. 1985) 776 F.2d 851, 853-854* (quoting *Connolly v. Pension Benefit Guaranty Corp. (9th Cir. 1982) 673 F.2d 1110, 1113)]* . Stated another way, a claim is moot when "the issues are no longer 'live' or the parties lack a legally cognizable interest in the outcome" [*Shoshone-Bannock Tribes v. Fish & Game Com'n, Idaho (9th Cir. 1994) 42 F.3d 1278, 1281* (quoting *Murphy v. Hunt (1982) 455 U.S. 478, 481, 102 S. Ct. 1181, 71 L. Ed. 2d 353*)]. An actual controversy must exist at all stages of review, not just when the complaint is filed [*Alvarez v. Smith (2009) -- U.S. --*

130 S. Ct. 576, 580, 175 L. Ed. 2d 447] . Accordingly, mootness is a jurisdictional defect that renders the court unable to proceed and may be raised at any time during the pendency of the litigation by either a party or by the court *sua sponte* [*see Barilla v. Ervin (9th Cir. 1989) 886 F.2d 1514, 1519]* .

Mootness is a question of law that appellate courts review de novo [*Suter v. Goedert (9th Cir. 2007) 504 F.3d 982, 985*].

[b] Exceptions Allowing Hearing of Otherwise Moot Claims

The following two principal exceptions to the mootness doctrine allow cases or issues that have otherwise been rendered moot to be resolved by the federal courts [*Native Village of Noatak v. Blatchford (9th Cir. 1994) 38 F.3d 1505, 1509]* :

- Cases involving fact patterns that are capable of repetition, yet evading review.

- Cases in which the defendant has voluntarily ceased the questioned conduct or practice, but is free to resume it at any time.

Two elements must be established for a case to be considered "capable of repetition but evading review." First, the injury suffered by the plaintiff must be one that is so limited in duration that it cannot be fully litigated prior to the cessation or expiration of the circumstances giving rise to the claim [*see Roe v. Wade (1973) 410 U.S. 113, 125, 93 S. Ct. 705, 35 L. Ed. 2d 147* ; *Barilla v. Ervin (9th Cir. 1989) 886 F.2d 1514, 1519]* . Second, there must be a reasonable expectation that the same complaining party would be subject to the same action in the future [*Weinstein v. Bradford (1975) 423 U.S. 147, 149, 96 S. Ct. 347, 46 L. Ed. 2d 350* ; *Barilla v. Ervin (9th Cir. 1989) 886 F.2d 1514, 1519]* .

When there is a voluntary cessation of the complained-of conduct by a defendant, but the conduct is capable of being resumed at any time, a case is not generally considered moot [*United States v. W.T. Grant Co. (1953) 345 U.S. 629, 632-633, 73 S. Ct. 894, 97 L. Ed. 1303* ; *Lindquist v. Idaho State Bd. of Corrections (9th Cir. 1985) 776 F.2d 851, 854]* . However, a case may be moot if there is no reasonable expectation that the alleged violation will resume and intervening relief or events have irrevocably eradicated the effect of the alleged violation [*Lindquist v. Idaho State Bd. of Corrections (9th Cir. 1985) 776 F.2d 851, 854* (citing *County of Los Angeles v. Davis (1979) 440 U.S. 625, 631, 99 S. Ct. 1379, 59 L. Ed. 2d 642*)]. Amendment or repeal of an offending statute or regulation generally renders a case or issue moot despite the technical ability of the legislative or regulatory body to reenact the questioned provision [*Native Village of Noatak v. Blatchford (9th Cir. 1994) 38 F.3d 1505, 1510* (citing *Burke v. Barnes (1987) 479 U.S. 361, 363, 107 S. Ct. 734, 93 L. Ed. 2d 732*)]. Exceptions are rare, and involve situations in which the statute is virtually certain to be reenacted [*City of Mesquite v. Aladdin's Castle, Inc. (1982) 455 U.S. 283, 289* & n.11, *102 S. Ct. 1070, 71 L. Ed. 2d 152* (city had expressly stated that the offending statute would be reenacted if the case was dismissed as moot); *Native Village of Noatak v. Blatchford (9th Cir.1994) 38 F.3d 1505, 1510]* . Mootness of the substantive issues while the case is on review will not deprive the court of authority to enter such orders as are necessary to finally dispose of the suit, however [*U.S. Bancorp v. Bonner Mall (1994) 513 U.S. 18, 115 S. Ct. 386, 130 L. Ed. 2d 233, 239-240]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityCase or Controversy RequirementsActual DisputesCivil ProcedureJusticiabilityMootnessGeneral OverviewCivil ProcedureJusticiabilityMootnessEvading Review ExceptionCivil ProcedureJusticiabilityRipenessGeneral OverviewCivil ProcedureJusticiabilityStandingGeneral Overview

California Forms of Pleading and Practice--Annotated

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§ 265.17 Supplemental Jurisdiction

[1] Relation to Pendent and Ancillary Jurisdiction Generally

Before Congress enacted the Judicial Improvements Act of 1990 (Pub. L. No. 101-650), the district court's power to adjudicate claims that presented no independent ground for federal jurisdiction derived solely from the common law doctrines of "pendent" jurisdiction, which included "pendent party" jurisdiction and "ancillary" jurisdiction. These doctrines allowed a federal court to hear claims over which it had no original jurisdiction, as defined by *28 U.S.C.S. §§ 1331* (federal question jurisdiction) and 1332 (diversity jurisdiction), if those claims were connected in certain ways to other claims that did fall within the court's original jurisdiction. Pendent and ancillary jurisdiction were distinct from the special type of removal jurisdiction codified in *28 U.S.C.S. § 1441(c)* [*see* discussion in *§ 265.36*], which permits removal of state-law claims if the case also includes a separate and independent, and therefore unrelated, claim falling within the court's original federal question jurisdiction [*see 28 U.S.C.S. § 1441(c)*].

The Judicial Improvements Act of 1990 (Pub. L. No. 101-650), which took effect on December 1, 1990, generally retains the common law test for pendent jurisdiction over state-law claims raised in an original complaint, permits pendent party jurisdiction in federal-question cases in abrogation of *Finley v. United States (1989) 490 U.S. 545, 109 S. Ct. 2003, 104 L. Ed. 2d. 593* , and restricts ancillary jurisdiction over claims and parties added by plaintiffs in ongoing diversity actions [*see* Pub. L. No. 101-650, § 310].

[2] Over Pendent State-Law Claims Raised in Original Complaint

Under the doctrine of pendent jurisdiction enunciated in *United Mine Workers v. Gibbs (1966) 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218* , a federal court had jurisdiction over the state-law claims in an action if the federal-law claims and state-law claims in the case derived from a common nucleus of operative fact and were such that a plaintiff would ordinarily be expected to try them all in one judicial proceeding [*Carnegie-Mellon Univ. v. Cohill (1988) 484 U.S. 343, 349, 108 S. Ct. 614, 98 L. Ed. 2d 720* ; *United Mine Workers v. Gibbs (1966) 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed 2d 218]* . The *Gibbs* Court reasoned that U.S. *Const., art. III, § 2* contains a grant of judicial power to decide any claim arising under the Constitution, federal laws, or treaties. Therefore, pendent jurisdiction over a state claim exists when the relationship between the federal claim and the state claim permits the conclusion that the entire action

before the court comprises but one constitutional "case" [*United Mine Workers v. Gibbs (1966) 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed 2d 218]* .

28 U.S.C.S. § 1367, enacted as part of the Judicial Improvements Act of 1990 [*see* Pub. L. No. 101-650, § 310], now provides that in any civil action over which a district court has original jurisdiction, the court has supplemental jurisdiction over all other claims that are so related to claims in the action within the court's original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution [*28 U.S.C.S. § 1367(a)*]. The district courts have this supplemental jurisdiction except when a federal statute expressly provides otherwise [*28 U.S.C.S. § 1367(a)*]. Because the *Gibbs* test for pendent jurisdiction was based on the "case" requirement of Article III, it appears that the same test applies to supplemental jurisdiction under *28 U.S.C.S. § 1367*: a district court can hear state-law claims if the state-law and federal-law claims in a case derive from a common nucleus of operative fact and are such that a plaintiff would ordinarily be expected to try them all in one judicial proceeding.

Under *Gibbs*, the exercise of pendent jurisdiction was discretionary and the district court had to weigh the values of judicial economy, convenience, fairness, and comity between the federal and state judiciary in order to decide whether to hear the pendent state-law claims [*see Carnegie-Mellon Univ. v. Cohill (1988) 484 U.S. 343, 349-350, 108 S. Ct. 614, 98 L. Ed. 2d 720* ; *United Mine Workers v. Gibbs (1966) 383 U.S. 715, 726-727, 86 S. Ct. 1130, 16 L. Ed 2d 218]* . *28 U.S.C.S. § 1367* now sets forth explicit criteria for the exercise of that discretion. The court may decline to exercise its supplemental jurisdiction over a claim if one of the following conditions exists [*28 U.S.C.S. § 1367(c)*]:

(1) The claim raises a novel or complex issue of state law, including the law of the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States [*see 28 U.S.C.S. § 1367(e)* "state" defined)];

(2) The claim substantially predominates over the claim or claims over which the court has original jurisdiction;

(3) The court has dismissed all the claims over which it has original jurisdiction; or

(4) In exceptional circumstances, there are other compelling reasons for declining jurisdiction.

A district court with power to hear state law claims has discretion to keep, or decline to keep, them under the conditions set out in the statute [*Acri v. Varian Assocs., 114 F.3d 999, 1000 (9th Cir. 1997)* (en banc)]. The Ninth Circuit applies the *Gibbs*-test factors to the district court's exercise of discretion in cases falling within one of the aforementioned circumstances [*see Satey v. JPMorgan Chase Co. (9th Cir. 2008) 521 F.3d 1087, 1091* (all federal claims dismissed)].

If the court chooses to decline to exercise its supplemental jurisdiction over a state-law claim, the limitations period for the claims is tolled while the claim is pending and for a period of 30 days after it is dismissed, unless state law provides for a longer tolling period. The same tolling provision applies to any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the state-law claim [*see 28 U.S.C.S. § 1367(d)*].

Although one Ninth Circuit case suggests remand of the state law claim(s) is proper even though the case was originally filed in the district court [*see Brady v. Brown (9th Cir. 1995) 51 F.3d 810, 816]* , the more logical rule is that remand is unavailable for claims never filed in or removed from state court [*Misischia v. Pirie (9th Cir. 1995) 60 F.3d 626, 631]* .

[3] Over State-Law Claims Involving Pendent Parties

Before the enactment of the Judicial Improvements Act of 1990, the theory of "pendent party" jurisdiction was rejected by both the Ninth Circuit and the United States Supreme Court. A district court had no jurisdiction over a plaintiff's state-law claims, whether or not they shared a common nucleus of operative facts with federal-law claims in the case, if

the state-law claims required for their resolution the joinder of a party or parties for whom no independent basis of jurisdiction existed [*see Finley v. United States (1989) 490 U.S. 545, 548-549, 551, 556, 109 S. Ct. 2003, 104 L. Ed. 2d 593* ; *Ayala v. U.S. (9th Cir.1977) 550 F.2d 1196, 1198]* . Under the theory of "ancillary" jurisdiction, however, the courts did adjudicate state-law claims brought by defending parties in an ongoing action through such procedures as compulsory counterclaims, impleader, cross claims, or intervention as of right [*see Owen Equipment & Erection Co. v. Kroger (1978) 437 U.S. 365, 375 n.18, 376, 98 S. Ct. 2396, 57 L. Ed. 2d 274* ; *see also* discussion in *§ 265.17[4]*].

28 U.S.C.S. § 1367(a), enacted as part of the Judicial Improvements Act of 1990, now provides that supplemental jurisdiction, defined as jurisdiction over all claims that are so related to claims within the court's original jurisdiction that they form part of the same "case" or controversy, extends to claims involving the joinder or intervention of additional parties [*28 U.S.C.S. § 1367(a)*; for discussion of "case" requirement, *see § 265.17[2]*]. This abrogates *Finley* and longstanding law in the Ninth Circuit.

If the district court's original jurisdiction is based on diversity of citizenship rather than on the existence of a federal question, it appears that supplemental jurisdiction cannot be invoked to permit the joinder or intervention of additional parties [*see 28 U.S.C.S. § 1367(a)* (supplemental jurisdiction is based on claims forming part of same "case")]. Therefore, the Supreme Court's rejection of pendent party jurisdiction still applies in a diversity case if the addition of a new, nondiverse party would destroy complete diversity and there is no other independent basis for federal jurisdiction [*see Owen Equipment & Erection Co. v. Kroger (1978) 437 U.S. 365, 376, 98 S. Ct. 2396, 57 L. Ed. 2d 274* (disallowing plaintiff's state-law cause of action against citizen of same state in diversity case)]. For discussion of diversity requirements, see *§ 265.15* .

[4] Over Ancillary Claims and Parties Added to Ongoing Action

Before the enactment of the Judicial Improvements Act of 1990, "ancillary" jurisdiction typically involved claims raised in an ongoing federal action by a defendant or another person whose rights might be lost irretrievably if the claim could not be raised in the action. Such a claim fell within the district court's jurisdiction if it had a logical dependence on the original complaint [*Owen Equipment & Erection Co. v. Kroger (1978) 437 U.S. 365, 375-376, 98 S. Ct. 2396, 57 L. Ed. 2d 274]* . The exercise of ancillary jurisdiction was upheld in situations involving compulsory counterclaims, impleader, cross claims, or intervention as of right [*see Owen Equipment & Erection Co. v. Kroger (1978) 437 U.S. 365, 375 n.18, 376, 98 S. Ct. 2396, 57 L. Ed. 2d 274* ; *Aldinger v. Howard (1976) 427 U.S. 1, 11, 96 S. Ct. 2413, 49 L. Ed. 2d 276* (intervention); *Danner v. Himmelfarb (9th Cir. 1988) 858 F. 2d 515, 521* (defendant's cross claim against codefendant)]. Ancillary jurisdiction also extended to subsequent suits brought to effectuate a federal court's judgment in the principal action [*see Aldinger v. Howard (1976) 427 U.S. 1, 11 n.7, 96 S. Ct. 2413, 49 L. Ed. 2d 276]* .

28 U.S.C.S. § 1367(b), enacted as part of the Judicial Improvements Act of 1990, now limits federal jurisdiction over certain ancillary actions brought by plaintiffs in diversity cases. In any civil action of which the district court has original jurisdiction founded solely on *28 U.S.C.S. § 1332* (diversity jurisdiction) [discussed in *§ 265.15*], the district court does not have supplemental jurisdiction over the following types of claims if the exercise of jurisdiction would destroy diversity or otherwise be inconsistent with the jurisdictional requirements of *28 U.S.C.S. § 1332* [*28 U.S.C.S. § 1367(b)*]:

(1) Claims by plaintiff against persons made parties under the following:

(a) *Fed. R. Civ. P., Rule 14* (claim against third party who is or may be liable for all or part of claim asserted against party in main action);

(b) *Fed. R. Civ. P., Rule 20* (permissive joinder when asserted right to relief arises out of same transaction or occurrence and common question of law or fact exists); or

(c) *Fed. R. Civ. P., Rule 24* (intervention of right when necessary to protect third party's interest in property or transaction that is subject of main action; permissive intervention when claim and main action have common question of law or fact);

(2) Claims by persons proposed to intervene as plaintiffs under *Fed. R. Civ. P., Rule 19* (compulsory joinder of persons needed for just adjudication); or

(3) Claims by persons seeking to intervene as plaintiffs under *Fed. R. Civ. P., Rule 24* (intervention of right when necessary to protect third party's interest in property or transaction that is subject of main action;permissive intervention when claim and main action have common question of law or fact).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionAncillary JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionPendent ClaimsCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionPendent Parties

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§ 265.18 Eleventh Amendment Bar to Certain Suits Against States

[1] In General

The *Eleventh Amendment of the United States Constitution* provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any foreign State" [*U.S. Const., amend. XI*]. The *Eleventh Amendment* has been construed not just as a limitation on federal court jurisdiction, but as a recognition of a state's sovereign immunity from suit, and has been construed to render states immune from suit by their own citizens, as well as by citizens of another state [*see, e.g., Pennhurst State School & Hosp. v. Halderman (1984) 465 U.S. 89, 98, 104 S. Ct. 900, 79 L. Ed. 2d 67* ; *Edelman v. Jordan (1974) 415 U.S. 651, 662-663, 94 S. Ct. 1347, 39 L. Ed. 2d 662* ; *Native Village of Noatak v. Blatchford (9th Cir. 1994) 38 F.3d 1505, 1511]* . Its protection extends under certain circumstances to state agencies and instrumentalities, and to state officials acting in their official capacities [*see, e.g., Florida Dept. of State v. Treasure Salvors, Inc. (1982) 458 U.S. 670, 684, 102 S. Ct. 3304, 73 L. Ed. 2d 1057* (state agencies); *Han v. U.S. Dept. of Justice (9th Cir. 1995) 45 F.3d 333, 338* (state officials); *Almond Hill School v. U.S. Dept. of Agriculture (9th Cir. 1985) 768 F.2d 1030, 1034-1035* (state agencies)]. *Eleventh Amendment* immunity is a jurisdictional matter that may be raised at any time during the pendency of the litigation by either a party or the court [*see Edelman v. Jordan (1974) 415 U.S. 651, 677-678, 94 S. Ct. 1347, 39 L. Ed. 2d 662]* , but, unlike subject matter jurisdiction, may be waived [*see* discussion in *§ 265.18[4][b]*].

The *Eleventh Amendment* was adopted in response to states' fears that federal courts would require them to pay Revolutionary War debts out of their state treasuries [*Hess v. Port Authority Trans-Hudson (1994) 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245, 255]* , and to this day the potential vulnerability of the state treasury to pay federal court judgments remains the most salient factor in determining whether *Eleventh Amendment* immunity is available [*see, e.g., Hess v. Port Authority Trans-Hudson (1994) 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245, 260-261* (whether entity is an agency of a state for *Eleventh Amendment* purposes largely dependent on whether state funds would be the source of any judgment); *Native Village of Noatak v. Blatchford (9th Cir. 1994) 38 F.3d 1505, 1512* (claims against state officials ultimately seeking payment from state treasury barred by *Eleventh Amendment*)].

Eleventh Amendment protection extends only to actions in which the relief sought is retrospective or compensatory in nature and does not barsuits seeking only prospective, injunctive, or declaratory relief [*see, e.g.,* *Edelman v. Jordan (1974) 415 U.S. 651, 664-667, 94 S. Ct. 1347, 39 L. Ed. 2d 662* ; *Native Village of Noatak v. Blatchford (9th Cir. 1994) 38 F.3d 1505, 1511-1512* ; *Ulaleo v. Paty (9th Cir. 1990) 902 F.2d 1395, 1398* (citing *Ex parte Young (1908) 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714*)]. In determining whether the relief sought is prospective or retroactive, the courts will look to the substance of the remedy sought, and not the form in which the claim is made [*see* *Native Village of Noatak v. Blatchford (9th Cir. 1994) 38 F.3d. 1505, 1512* (citing *Papasan v. Allain (1986) 478 U.S. 265, 279, 106 S. Ct. 2932, 92 L. Ed. 2d 209* ; *Ulaleo v. Paty (9th Cir. 1990) 902 F.2d 1395, 1399]* . For instance, in one case, the Ninth Circuit emphasized that the overriding question in determining whether the remedy sought is prospective, rather than in the nature of damages or reparations, is whether the relief is to remedy future or past wrongs. "An injunction that will in practical effect require payment of funds out of the state treasury is nonetheless permissible if it requires only that officials conform their *future* actions to federal law" [*Coeur d'Alene Tribe of Idaho v. State of Idaho (9th Cir. 1994) 42 F.3d 1244, 1252* (emphasis added; citing *Quern v. Jordan (1979) 440 U.S. 332, 337, 99 S. Ct. 1139, 59 L. Ed. 358*)] or if "payment of state funds ... [is] a necessary consequence of compliance in the future" and is merely ancillary to the prospective relief granted [*Edelman v. Jordan (1974) 415 U.S. 651, 667-668, 94 S. Ct. 1347, 39 L. Ed. 2d 662]* .

[2] Application to State Agencies

Agencies, instrumentalities, and arms of the state (collectively "state agencies") are entitled to *Eleventh Amendment* immunity on the same basis as are the states themselves [*see, e.g.,* *Florida Dept. of State v. Treasure Salvors, Inc. (1982) 458 U.S. 670, 684, 102 S. Ct. 3304, 73 L. Ed. 2d 1057* ; *Franceschi v. Schwartz (9th Cir. 1995) 57 F.3d 828, 831* (per curiam)]. Whether an entity is a state agency for *Eleventh Amendment*purposes will depend on the state law creating the agency, including the degree of autonomy granted the agency and the degree of control retained by the state [*see* *Lake Country Estates v. Tahoe Planning Agcy. (1979) 440 U.S. 391, 401, 99 S. Ct. 1171, 59 L. Ed. 2d 401* ; *cf. Hess v. Port Authority Trans-Hudson (1994) 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245, 260-261* (control of agency by state not dispositive)]. However, the overriding factor in assessing the availability of *Eleventh Amendment*immunity to a state agency is whether any recovery against the agency would be payable from the state treasury, i.e., whether the state is the real party in interest [*see, e.g.,* *Hess v. Port Authority Trans-Hudson (1994) 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245, 260-261* ; *Alaska Cargo Transport, Inc. v. Alaska R.R. Corp. (9th Cir. 1993) 5 F.3d 378, 380]* . Applying this analysis, municipalities, counties, and municipal agencies are generally found not to be state agencies [*see* *Mt. Healthy City Board of Educ. v. Doyle (1977) 429 U.S. 274, 280, 97 S. Ct. 568, 50 L. Ed. 2d 471]* . A California school district and county office of education are arms of the state for purposes of *Eleventh Amendment* sovereign immunity [*Stoner v. Santa Clara County Office of Educ. (9th Cir. 2007) 502 F.3d 1116, 1122* (qui tam action under False Claims Act, *31 U.S.C.S. § 3729 et seq.*)].

[3] Application to State Officials

Absolute immunity of state officials under the *Eleventh Amendment* extends only to a very limited class of officials, including the governor [*Alaska v. EEOC (9th Cir. 2007) 508 F.3d 476, 477*], legislators carrying out their legislative functions, and judges carrying out their judicial functions. Other state officials may be held personally liable under federal law for actions taken in their official capacities [*Hafer v. Melo (1991) 502 U.S. 21, 27-31, 112 S. Ct. 358, 116 L. Ed. 2d 301* (other state officials subject to liability under *42 U.S.C. § 1983*); *Stoner v. Santa Clara County Office of Educ. (9th Cir. 2007) 502 F.3d 1116, 1124-1125* (qui tam action under False Claims Act, *31 U.S.C.S. § 3729 et seq.*)].

Under the doctrine of *Ex Parte Young* and its progeny, state officials acting under an allegedly unconstitutional statute or in an unauthorized manner are acting individually and not in their official capacities, and can be sued "as any other tortfeasor" under the theory that a state cannot act in a manner violative of federal law and, therefore, cannot authorize its officials to do so [*see* *Ex Parte Young (1908) 209 U.S. 123, 159-160, 28 S. Ct. 441, 52 L. Ed. 714* ; *see also* *Han v. U.S. Dept. of Justice (9th Cir. 1995) 45 F.3d 333, 338* ; *Ulaleo v. Paty (9th Cir. 1990) 902 F. 2d 1395, 1398]* .

However, this doctrine only applies to suits for prospective relief, such as an injunction or declaratory judgment, because if money judgments against the officials would have to be paid out of the state treasury, the state is the real party in interest [*Ford Motor Co. v. Treasury Department (1945) 323 U.S. 459, 464, 65 S. Ct. 347, 89 L. Ed. 389* ; Almond Hill School v. U.S. Dept. of Agriculture (9th Cir. 1985, *768 F.2d 1030, 1033)]* .

A distinction is drawn between allegation of violation of federal rights under color of state law by state officials and mere violation of state law not implicating federal rights. Conduct under authority of state law that violates no federal right is "merely tortious," and does not implicate an *Eleventh Amendment* analysis. The test of whether federal rights are implicated can be met by the adequate allegation of an ongoing violation of a federal right [*Wilbur v. Locke (9th Cir. 2005) 423 F.3d 1101, 1111* (ongoing violation properly alleged); *Coeur d'Alene Tribe of Idaho v. State of Idaho (9th Cir. 1994) 42 F.3d 1244, 1251]* , and the possibility that the state official may eventually prevail on the merits does not confer *Eleventh Amendment* immunity [*Scheuer v. Rhodes (1974) 416 U.S. 232, 238, 94 S. Ct. 1683, 40 L. Ed. 2d 90]* .

[4] Exceptions

[a] In General

The two major exceptions to *Eleventh Amendment* immunity are (1) waiver by a state, and (2) abrogation of immunity by Congressional action under the enforcement provisions of the Constitution [*see, e.g.,* *Atascadero State Hospital v. Scanlon (1985) 473 U.S. 234, 238, 105 S. Ct. 3142, 87 L. Ed. 2d 171* ; *Micomonaco v. State of Washington (9th Cir. 1995) 45 F.3d 316, 319]* . Immunity against suits by the United States or sister states is deemed to have been surrendered in the "plan of convention" based on principles of comity and federal supremacy [*see* *Blatchford v. Native Village of Noatak (1991) 501 U.S. 775, 780-782, 111 S. Ct. 2578, 115 L. Ed. 2d 686* ; *South Dakota v. North Carolina (1904) 192 U.S. 286, 317, 24 S. Ct. 269, 48 L. Ed. 448]* .

[b] Waiver by States

A state's waiver of its *Eleventh Amendment* privileges of immunity must be unequivocal, expressly stated, or inferred by overwhelming implication [*see generally* *Atascadero State Hospital v. Scanlon (1985) 473 U.S. 234, 239-240, 105 S. Ct. 3142, 87 L. Ed. 2d 171* ; *Pennhurst State School & Hosp. v. Halderman (1984) 465 U.S. 89, 99, 104 S. Ct. 900, 79 L. Ed. 2d 67]* . The waiver must be specific as to lawsuits in federal court [*Atascadero State Hospital v. Scanlon (1985) 473 U.S. 234, 241, 105 S. Ct. 3142, 87 L. Ed. 2d 171* ; *Pennhurst State School & Hosp. v. Halderman (1984) 465 U.S. 89, 99, 104 S. Ct. 900, 79 L. Ed. 2d 67]* ; a waiver of state court immunity is not necessarily coextensive with a waiver of *Eleventh Amendment* immunity [*Dept. of Health v. Florida Nursing Home Assn. (1981) 450 U.S. 147, 149, 150, 101 S. Ct. 1032, 67 L. Ed. 2d 132* ; *Coeur d'Alene Tribe of Idaho v. State of Idaho (9th Cir. 1994) 42 F.3d 1244, 1249* (citing *Edelman v. Jordan (1974) 415 U.S. 651, 677 n.19, 94 S. Ct. 1347, 39 L. Ed. 2d 662*)]. A state may also waive its immunity in specific cases by appearing and defending a lawsuit on its merits [*Fordyce v. City of Seattle (9th Cir. 1995) 55 F.3d 436, 441]* .

[c] Abrogation by Congressional Action

Congressional abrogation of *Eleventh Amendment*immunity occurs when suits against the states are authorized by clear statutory language under the enforcement provision of the Constitution or its amendments [*see, e.g.,* *Fitzpatrick v. Bitzer (1976) 427 U.S. 445, 456, 96 S. Ct. 2666, 49 L. Ed. 2d 614* (*Fourteenth Amendment*); *Parden v. Terminal R. of Alabama Docks Dept. (1964) 377 U.S. 184, 192, 84 S. Ct. 1207, 12 L. Ed. 2d 233* (Commerce Clause)]. The "Congressional abrogation" exception still involves an element of waiver by the states; by empowering Congress to regulate by ratifying a Constitutional amendment or by entering statehood, the states have surrendered a portion of their sovereignty [*see, e.g.,* *Fitzpatrick v. Bitzer (1976) 427 U.S. 445, 456, 96 S. Ct. 2666, 49 L. Ed. 2d 614* , (states waived their *Eleventh Amendment* defense when assenting to adoption of the *Fourteenth Amendment*); *Parden v. Terminal R. of Alabama Docks Dept. (1964) 377 U.S. 184, 192, 84 S. Ct. 1207, 12 L. Ed. 2d 233* (by empowering Congress to

regulate interstate commerce, the states necessarily surrendered that portion of their sovereignty that would interfere with that regulation)].

To determine when Congress has validly abrogated state immunity under the *Eleventh Amendment*, a court must resolve two predicate questions [*Alaska v. U.S. (9th Cir. 2009) 564 F.3d 1062, 1066]* :

- Whether Congress unequivocally expressed its intent to abrogate; and
- If so, whether Congress acted pursuant to a valid grant of constitutional authority.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawState AutonomyGeneral OverviewConstitutional LawState AutonomyAbrogation of ImmunityConstitutional LawState AutonomyWaiverConsentConstitutional LawState AutonomyWaiverFederal ProgramsConstitutional LawState AutonomyWaiverInterstate Commerce

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§ 265.19 Raising Lack of Federal Jurisdiction

A defense of lack of jurisdiction over the subject matter to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third-party claim, may either be asserted in the responsive pleading thereto, if one is required by the Federal Rules of Civil Procedure, or, at the option of the pleader, be made by motion [*Fed. R. Civ. P., Rule 12(b)(1)*]. However, a defect in the subject matter jurisdiction of the federal court is such a fundamental defect that a challenge to the court's jurisdiction is not waivable [*see Savarese v. Edrick Transfer & Storage, Inc. (9th Cir. 1975) 513 F.2d 140, 142 n.1*]. To determine whether subject matter jurisdiction exists, the court may consider extra-pleading material, including affidavits or any other evidence properly before the court [*St. Clair v. City of Chico (9th Cir. 1989) 880 F.2d 199, 201 , cert. denied, 493 U.S. 993, 110 S. Ct. 541, 107 L. Ed. 2d 539 (1989)]* . Such determinations are questions of law subject to de novo review [*American International Enterprises, Inc. v. Federal Deposit Insurance Corporation (9th Cir. 1993) 3 F.3d 1263, 1266* ; *see Nike, Inc. v. Comercial Iberica De Exclusivas Deportivas (9th Cir. 1994) 20 F.3d 987, 990* ; *North Star Alaska v. U.S. (9th Cir. 1993) 9 F.3d 1430, 1432]* . A court must dismiss the action whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter [*Fed. R. Civ. P., Rule 12(h)(3)*]. Thus, whether raised on the court's own motion or on the motion of a party to the action, dismissal of an action for lack of subject matter jurisdiction is always timely and permissible, regardless of whether it be made at the trial court level [*see In re Union Nat'l Bank & Trust Co. of Souderton, Pa. (E.D. Pa. 1968) 287 F. Supp. 431, 433]* or at the appellate court level [*see Louisville & N.R. Co. v. Mottley (1908) 211 U.S. 149, 152, 29 S. Ct. 42, 53 L. Ed. 126]* .

PRACTICE TIP:

Federal Subject Matter Jurisdiction. There are non-constitutional grounds on which the federal district court may dismiss a suit before considering the existence of federal subject matter jurisdiction. These include jurisdictional grounds that are discretionary, such as pendent jurisdiction [see *§ 265.17*] or *Younger* abstention [*see § 265.14[3]*], grounds of prudential standing, such as statutory standing, and grounds that are "logically antecedent to the existence of any Article III issues," such as class certification under *Fed. R. Civ. P., Rule 23*, and the demand pleading requirements of *Fed. R. Civ. P., Rule 23.1* for derivative actions [*see Potter v. Hughes (9th Cir. 2008) 546 F.3d 1051, 1055* (derivative

action)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticePleadingsAnswers

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22-265 California Forms of Pleading and Practice--Annotated § 265.20

§ 265.20 Amending Jurisdictional Allegations

Defective allegations of jurisdiction may be amended in the trial or appellate court [*28 U.S.C.S. § 1653*]. An amendment to establish jurisdiction is broadly permitted under *28 U.S.C.S. § 1653* in order to avoid dismissal on technical grounds [*Miller v. Davis (6th Cir. 1974) 507 F.2d 308, 311* (permitting amendment to allege diversity jurisdiction when allegation was erroneously based on nonjurisdictional federal statute)]. However, *28 U.S.C.S. § 1653* only addresses incorrect statements about jurisdiction when jurisdiction actually exists; it does not extend to defects in the jurisdictional facts themselves [*Newman-Green, Inc. v. Alfonzo-Larrain (1989) 490 U.S. 826, 830-831, 109 S. Ct. 2218, 104 L. Ed. 2d 893]* . Therefore, for example, a district court may permit a plaintiff to amend a defective jurisdictional allegation if the court had subject matter jurisdiction over the action at the time the action was commenced. However, if the court did not have jurisdiction over the claims alleged in the original complaint, then the court's order granting leave to amend the complaint would be a nullity [*Morongo Band of Mission Indians v. Cal. St. Bd. of Equal. (9th Cir. 1988) 858 F.2d 1376, 1380-1381 , cert. denied, 488 U.S. 1006 (1989)* (not permitting amendment when case did not arise under federal law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to Evidence

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[Reserved]

§§ 265.21[Reserved]

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§ 265.30 Governing Law

The removal of civil actions from state courts to federal district courts is governed by *28 U.S.C.S. §§ 1441-1452*. The removal of claims related to bankruptcy cases is specifically governed by *28 U.S.C.S. § 1452*.

Removal of a criminal prosecution appears to follow the general removal procedure for civil actions. Formerly removal of civil actions required the posting of a bond, while criminal actions did not [*see* former *28 U.S.C.S. § 1446(d)* (civil action bond requirement), repealed in 1988; *see generally* Moore's Federal Practice, § 107 App. 08[2] (3rd ed. Matthew Bender)]. However, criminal actions are subject to the additional provisions of *28 U.S.C.S. § 1446(c)* and *(e)*.

The removal statutes and court decisions are intended to have uniform nationwide application. They are construed as setting up national criteria, irrespective of local law, for determining in what instances suits are to be removed from state to federal courts [*Grubbs v. General Electric Credit Corp. (1972) 405 U.S. 699, 705, 92 S. Ct. 1344, 31 L. Ed. 2d 612]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawPractice & ProceedingsJurisdictionRemovalCivil ProcedureRemovalGeneral Overview

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22-265 California Forms of Pleading and Practice--Annotated § 265.31

§ 265.31 Availability of Removal

[1] Actions Removable

Except as otherwise expressly provided by Congress, any civil action brought in a state court of which the federal district courts have original jurisdiction may be removed by the defendant to the federal district court for the district and division embracing the place where that action is pending [*28 U.S.C.S. § 1441(a)*]. If the civil action is founded on a claim or right arising under the Constitution, treaties, or laws of the United States, the action is removable without regard to the citizenship or residence of the parties [for discussion of federal question jurisdiction, *see § 265.14*]. If the civil action is not so founded, the action is removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which that action is brought [*28 U.S.C.S. § 1441(b)*; for discussion of diversity jurisdiction, *see § 265.34*]. The citizenship of defendants sued under fictitious names is disregarded for purposes of removal [*28 U.S.C.S. § 1441(a)*].

Any civil action brought in a state court against a foreign state may be removed by the foreign state to the district court of the United States for the district and division embracing the place where that action is pending [*28 U.S.C.S. § 1441(d)*; *see 28 U.S.C.S. § 1603(a)* (definition of foreign state)].

For purposes of removal, the term "civil action" appears to encompass civil proceedings, and the fact that a case involves a special proceeding rather than a civil action should not preclude removal [*see, e.g.,* Drainage Dist. No. 19 v. *Chicago, M. & St. P. Ry. Co. (W.D. Mo. 1912) 198 F. 253* (assessment proceeding); *Katz v. Herschel Mfg. Co. (C.D. Neb. 1902) 198 F. 253* (unlawful detainer proceeding); *see also Moore's Federal Practice, § 107.12* (3rd ed. Matthew Bender)].

[2] Actions Not Removable

Certain civil actions in any state court are not removable to any federal district court. For example, neither an action against a railroad or its receivers or trustees arising under *45 U.S.C.S. §§ 51-60*, nor an action arising under the state worker's compensation laws, is removable [*see 28 U.S.C.S. § 1445(a), (c)*, respectively]. Nor is an action against a carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments arising under *49 U.S.C.S. §*

11706 or *14706*, unless the matter in controversy exceeds $75,000, exclusive of interest and costs [*28 U.S.C.S. § 1445(b)*].

[3] Removal in Specified Actions

A civil action brought in state court against the United States or any of its agencies or any officer (or person acting under that officer) of the United States or any of its agencies, sued in either official or individual capacity for any act under color of office, or a property holder whose title is derived from a federal officer when the action affects the validity of a federal law, an officer of the federal judiciary, or a member of Congress may be removed by the defendant to the district court of the United States for the district and division embracing the place where that action is pending [*28 U.S.C.S. § 1442(a)*]. A defendant who is a federal officer seeking removal under *28 U.S.C.S. § 1442(a)* must demonstrate that the defendant is a "person" within the meaning of the statute; there is a causal nexus between the defendant's actions, taken pursuant to a federal officer's directions, and plaintiff's claims; and the defendant can assert a "colorable federal defense" [*Jefferson County v. Acker (1999) 527 U.S. 423, 431, 119 S. Ct. 2069, 144 L. Ed. 2d 408* (under *28 U.S.C.S. § 1442(a)(3)* concerning actions against officers of federal courts); *Durham v. Lockheed Martin Corp. (9th Cir. 2006) 445 F.3d 1247, 1251* (under *28 U.S.C.S. § 1442(a)(1)* concerning actions against federal officers generally)]. This rule is an exception to the general rule that an anticipated or actual federal defense generally does not qualify a case for removal [*Jefferson County v. Acker (1999) 527 U.S. 423, 431, 119 S. Ct. 2069, 144 L. Ed. 2d 408]* . The right of removal created by this provision is absolute for conduct performed under color of federal office, and the policy favoring removal should not be frustrated by a narrow, grudging interpretation of the statutory language [*Medical Dev. Int'l v. Cal. Dep't of Corr. & Rehab. (9th Cir. 2009) 585 F.3d 1211, 1216]* .

A personal action brought in any state court by an alien against a federal civil officer who is not a resident of that state when jurisdiction was obtained by personal service may be removed to the federal district court for the district and division in which the defendant was served with process [*28 U.S.C.S. § 1442(b)*].

Pending cases rendered subject to original federal jurisdiction by the substitution or joinder of an agency with regard to which Congress has granted the capacity to "sue or be sued" in federal court may be removable on the substitution or joinder of that party, even if the case is already on appeal in state court [*Resolution Trust Corp. v. Bayside Developers (9th Cir. 1994) 43 F.3d 1230, 1236-1237* ; *Resolution Trust Corp. v. BVS Development, Inc. (9th Cir. 1994) 42 F.3d 1206, 1211]* .

Removal of actions against members of the armed forces is governed by *28 U.S.C.S. § 1442a*. Additional types of actions that have specific provisions are civil rights cases and foreclosure actions against the United States [*see 28 U.S.C.S. §§ 1443, 1444*, respectively].

Upon the Attorney General's certification under *28 U.S.C.S. § 2679*, Federal Employees Liability Reform and Tort Compensation Act of 1988, that the federal employee was acting within the scope of his or her employment, filed in a case alleging liability of an individual federal employee, the U.S. government is substituted as the defendant and the case is removed to federal court [*28 U.S.C.S. § 2679(d)(2)*; Osborn v. Haley (2007) - *549 U.S.225, (230) 127 S. Ct. 881, 166 L. Ed. 2d 819* , (once removed under *28 U.S.C.S. § 2679(d)(2)*, district court may not remand to state court)].

The Securities Litigation Uniform Standards Act of 1998 (SLUSA), *15 U.S.C.S. § 78bb(f)(1)*, authorizes removal and dismissal of actions involving covered securities based on the allegations in the complaint and does not require any additional evidentiary showing from either party. The propriety of removal is determined solely on the basis of the pleadings filed in state court. The court may permit the defendant to support removal by supplementing the pleadings with additional evidence of SLUSA's applicability, no authority requires that a district court must consider additional evidence from the plaintiff on a motion to remand [*U.S. Mortg., Inc. v. Saxton, 494 F.3d 833, 842 (9th Cir. 2007)*]. The elements of preemption under SLUSA, *15 U.S.C.S. § 78bb(f)(2)*, are: (1) the class action is a "covered" class action, and it alleges; (2) state and common law claims; (3) a misrepresentation or omission of material fact; (4) the

misrepresentations or omissions at issue were "in connection with" the purchase or sale of a security under *15 U.S.C.S. § 78bb(f)(1)(A)*; and (5) the action involves "covered securities" within the meaning of *15 U.S.C.S. § 78bb(f)(5)(E)* [*U.S. Mortg., Inc. v. Saxton (9th Cir. 2007) 494 F.3d 833, 843-844*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisActions Against Foreign StatesCivil ProcedureRemovalBasisCases Involving Federal OfficersCivil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalNonremovable Actions

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§ 265.32 Right of Removal

[1] Statutory Right

The right of removal from the state courts to the federal courts is statutory. A suit commenced in a state court must remain there until cause is shown under some act of Congress for its transfer [*Self v. General Motors Corp. (9th Cir. 1978) 588 F.2d 655, 657]* . Removal jurisdiction cannot be conferred on federal courts by consent of the parties [*see American Fire & Cas. Co. v. Finn (1951) 341 U.S. 6, 17-18, 18 n.17, 71 S. Ct. 534, 95 L. Ed. 702* ; *Othman v. Globe Indem. Co. (9th Cir. 1985) 759 F.2d 1458, 1460 n.2* , *overruled on other grounds* in *Bryant v. Ford Motor Co. (9th Cir. 1987) 844 F.2d 602, 605* (*Bryant* abrogated by amendment of *28 U.S.C.S. § 1441(a)*)].

[2] Original Jurisdiction of Federal Court

A suit may be removed to federal district court only if the action is subject to the district court's original jurisdiction [*28 U.S.C.S. § 1441(a)*]. Federal district courts have original federal jurisdiction of actions arising under the Constitution, laws, or treaties of the United States [*28 U.S.C.S. § 1331* (original jurisdiction of district courts); *Sullivan v. First Affiliated Securities, Inc. (9th Cir. 1987) 813 F.2d 1368, 1371* , *cert. denied, 484 U.S. 850* ; *see § 265.14*]. They also have original jurisdiction of diversity suits brought between citizens of different states when the matter in controversy exceeds $75,000, exclusive of interests and costs [*28 U.S.C.S. § 1332*; for discussion of diversity as a basis of removal, *see § 265.34[1]*]. Although the *28 U.S.C.S. § 1441(a)* reference to original jurisdiction mainly involves *28 U.S.C.S. § 1331* or *1332*, that reference is as broad as the grant of original federal jurisdiction [*see Moore's Federal Practice, § 107.14* (3rd ed. Matthew Bender)]. Federal district courts also have original jurisdiction as provided in *28 U.S.C.S. §§ 1333 et seq.*, and in actions involving specific federal agencies as provided by statute [*see, e.g., 12 U.S.C.S. § 1441(a)*(*l*) (Resolution Trust Corporation); *12 U.S.C.S. § 1819(b)(2)(B)* (Federal Deposit Insurance Corporation)].

[3] Burden of Proof

The burden of establishing federal jurisdiction is placed on the party seeking removal. The removal statute is strictly construed against removal jurisdiction [*Sullivan v. First Affiliated Securities, Inc. (9th Cir. 1987) 813 F.2d 1368, 1371 , cert. denied, 484 U.S. 850; see also Abrego Abrego v. The Dow Chem. Co. (9th Cir. 2006) 443 F.3d 676, 683-686*

(burden of proof unchanged under Class Action Fairness Act of 2005, 28 U.S.C.S. § 1453(b))] . Placing a strict burden on the party seeking removal reflects the notion that a plaintiff should be free to decide what law he or she will rely on [*Carpenters Southern Cal. Admin. v. Majestic Housing (9th Cir. 1984) 743 F.2d 1341, 1343-1344* ; *see Karambelas v. Hughes Aircraft Co. (9th Cir. 1993) 992 F.2d 971, 974* (party can base removal on facts developed at deposition); *see also* discussion in *§ 265.37[1][a]*].

When a complaint filed in state court alleges on its face an amount in controversy sufficient to meet the federal jurisdictional threshold, such requirement is presumptively satisfied unless it appears to a "legal certainty" that the plaintiff cannot actually recover that amount [*Guglielmino v. McKee Foods Corp. (9th Cir. 2007) 506 F.3d 696, 699* ; *Sanchez v. Monumental Life Ins. Co. (9th Cir. 1996) 102 F.3d 398, 402*].

If the amount of damages plaintiff seeks is unclear, the defendant seeking removal bears the burden of proving by a preponderance of the evidence the facts supporting federal jurisdiction, including the jurisdictional amount [*Guglielmino v. McKee Foods Corp. (9th Cir. 2007) 506 F.3d 696, 699* (variance between sections of complaint warranted application of this standard); *Gaus v. Miles, Inc. (9th Cir. 1992) 980 F.2d 564, 566-567]* .

[4] Waiver of Right of Removal

Only clear and unequivocal waivers will defeat a party's right to remove to federal court. A defendant can, however, make such affirmative use of the processes of a state court as to constitute waiver or estoppel of any right of removal. What acts legally constitute waiver are not always clear, but acts performed before removability becomes apparent will not constitute waiver [*California Republican Party v. Mercier (C.D. Cal. 1986) 652 F. Supp. 928, 931* ; *see Moore's Federal Practice, § 107.18* (3rd ed. Matthew Bender)]. The filing of a permissive counterclaim or third-party complaint does constitute waiver, as does the seeking of a continuance in an unlawful detainer proceeding [*see California Republican Party v. Mercier (C.D. Cal. 1986) 652 F. Supp. 928, 931-932]* . Although there is some authority that filing an answer in the state court also constitutes a waiver [*see, e.g., Vendetti v. Schuster (W.D. Pa. 1965) 242 F. Supp. 746, 754* ; *General Phoenix Corp. v. Malyon (S.D. N.Y. 1949) 88 F. Supp. 502, 503]* , the better view appears to be that such a filing does not result in waiver, at least if the notice of removal itself is timely filed [*see Haun v. Retail Credit Co. (W.D. Pa. 1976) 420 F. Supp. 859, 864* ; *Moore's Federal Practice, § 107.18* (3rd ed. Matthew Bender)]. Similarly, moving to dismiss or quash service or filing a demurrer has been held not to result in a waiver [*see Polizzi v. Cowles Magazines, Inc. (1952) 345 U.S. 663, 664, 73 S. Ct. 900, 97 L. Ed. 1331* (motion to dismiss or quash); *Hildreth v. General Instrument, Inc. (D. S.C. 1966) 258 F. Supp. 29, 30-31* (demurrer)]. Nevertheless, waiver will be strictly applied when removal occurs close to the time of trial in the state action [*California Republican Party v. Mercier (C.D. Cal. 1986) 652 F. Supp. 928, 931-932]* .

In a case where removal first became available during the pendency of an appeal due to the substitution of the Resolution Trust Corporation for an insolvent financial institution, the RTC's filing of a petition for rehearing concurrently with its notice of removal did not constitute waiver of the right to remove the action. The court held that the petition for rehearing was a defensive action required to prevent the automatic entry of judgment and did not manifest an intent to litigate in state court [*Resolution Trust Corp. v. Bayside Developers (9th Cir. 1994) 43 F.3d 1230, 1240]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalWaiversEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

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§ 265.33 Federal Question

[1] Arises Under Federal Law

Federal question jurisdiction involves a right or immunity created by the Constitution or laws of the United States as raised by the plaintiff's cause of action [*see 28 U.S.C.S. § 1441(a), (b)*; *Takeda v. Northwestern Nat. Life Ins. Co. (9th Cir. 1985) 765 F.2d 815, 821-822* ; for further discussion, *see § 265.31[1], above*]. If a federal law does not provide a private right of action, then a state law action based on its violation does not raise a substantial federal question [*see Merrell Dow Pharmaceuticals v. Thompson (1986) 478 U.S. 804, 813-814, 106 S. Ct. 3229, 92 L. Ed. 2d 650* ; *see also Utley v. Varian Associates, Inc. (9th Cir. 1987) 811 F.2d 1279, 1283, 1286 , cert. denied 484 U.S. 824* (executive order)]. For a form of allegation of federal jurisdiction as a ground for removal, see *§ 265.161*. For additional general discussion of federal jurisdiction, see *§ 265.12*.

[2] "Well-Pleaded Complaint" Rule

[a] In General

Whether a case is one arising under the Constitution, a law, or a treaty of the United States to satisfy the requirements of *28 U.S.C.S. § 1331* must be determined from what necessarily appears in the plaintiff's statement of his or her own claim in the complaint, bill, or declaration, unaided by anything alleged in anticipation of avoidance of defenses that the defendant may interpose. Thus, a federal court does not have original jurisdiction over a case in which the complaint presents a state-law cause of action, but also asserts that federal law deprives the defendant of a defense he or she may raise, or that a federal defense that may be raised by the defendant is insufficient to defeat the claim. A defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case arises under federal law. A right or immunity created by the Constitution, laws, or treaties of the United States must be an essential element of the plaintiff's cause of action. This requirement has been termed the "well-pleaded complaint" rule [*Franchise Tax Bd. v. Laborers Vac. Trust (1983) 463 U.S. 1, 9-11, 103 S. Ct. 2841, 77 L. Ed. 2d 420* ; *Ramirez v. Fox Television Station, Inc. (9th Cir. 1993) 998 F.2d 743, 747* ; *Carpenters Southern Cal. Admin. v. Majestic Housing (9th Cir. 1984) 743 F.2d 1341, 1344]* . Accordingly, a plaintiff cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in

which the claim shall be litigated [*Karambelas v. Hughes Aircraft Co. (9th Cir. 1993) 992 F.2d 971, 974]* . Conversely, the presence of underlying federal issues does not create jurisdiction over a well-pleaded state law claim [*Hall v. North American Van Lines, Inc. (9th Cir. 2007) 476 F.3d 683, 687]* .

The "well-pleaded complaint" rule does not apply to removal by a federal officer under *28 U.S.C.S. § 1442(a)* [*Durham v. Lockheed Martin Corp. (9th Cir. 2006) 445 F.3d 1247, 1253* (citing *Jefferson County v. Acker (1999) 527 U.S. 423, 431, 119 S. Ct. 2069, 144 L. Ed. 2d 408*)] or to cases in which federal jurisdiction is afforded under a separate and independent jurisdictional grant [*American Red Cross v. S.G. (1992) 505 U.S. 247, 112 S. Ct. 2465, 2472, 120 L. Ed. 2d 201]* .

[b] Plaintiff as Master of Complaint

Normally, the existence of federal jurisdiction on removal must be determined from the face of the plaintiff's complaint. As master of the complaint, the plaintiff should be free to frame and pursue his or her theory of pleading. When an area of law is regulated by both federal and state law, if the federal law does not preempt all state regulation, federal jurisdiction is not preferred. The plaintiff has the prerogative of determining the theory of his or her action and, so long as fraud is not involved, may defeat removal to the federal courts by avoiding allegations that provide a basis for the assertion of federal jurisdiction [*Salveson v. Western States Bankcard Ass'n (9th Cir. 1984) 731 F.2d 1423, 1426-1427]* . Thus, a suit brought on a state statute does not automatically arise under the laws or the Constitution of the United States because the act complained of is prohibited thereby [*Garibaldi v. Lucky Food Stores, Inc. (9th Cir. 1984) 726 F.2d 1367, 1370 , cert. denied, 471 U.S. 1099 (1985)]* . It should be noted, however, that a plaintiff choosing to pursue only a state action in state court, despite the availability of a federal cause of action, may be precluded from raising the parallel federal action in any future proceedings by the doctrine of res judicata [*Williams v. Caterpillar Tractor Co. (9th Cir. 1986) 786 F.2d 928, 933 , aff'd 482 U.S. 386, 107 S. Ct. 2425, 96 L. Ed. 2d 318, 326 (1987)]* .

[c] Artful Pleading Exception

One important exception to the well-pleaded complaint rule arises when the claim, although ostensibly asserted under state law, is in fact a federal law claim, but by artful pleading is misrepresented in order to defeat the defendant's right to a federal forum [*Salveson v. Western States Bankcard Ass'n (9th Cir. 1984) 731 F.2d 1423, 1426-1427]* . Essentially this exception renders a case removable, regardless of the pleading, if the only remedy available to the plaintiff is federal, and the state court necessarily must look to federal law in passing on the claim [*Sullivan v. First Affiliated Securities, Inc. (9th Cir. 1987) 813 F.2d 1368, 1372 , cert. denied, 484 U.S. 850]* . The federal law need not afford the same remedies as state law to support removal [*Hyles v. Mensing (9th Cir. 1988) 849 F.2d 1213, 1215]* .

The artful pleading doctrine is a narrow exception to the straightforward rules of removal jurisdiction, and will be applied only if the particular conduct complained of is governed exclusively by federal law [*Sullivan v. First Affiliated Securities, Inc. (9th Cir. 1987) 813 F.2d 1368, 1372 , cert. denied sub nom. First Alliance Sec. v. Sullivan, 98 L. Ed. 2d 106]* . By its very nature, resolution of the artful pleading issue requires looking outside the facts of the complaint [*Salveson v. Western States Bankcard Ass'n (9th Cir. 1984) 731 F.2d 1423, 1427]* . Looking beyond the actual complaint is particularly appropriate when the central federal claim is inseparable from the state law theory, and when the question of federal jurisdiction turns on the out-of-state status of the parties and the interstate nature of the transactions involved [*T.O.C., Inc. v. United Artists Theatre Circuit (ND Cal. 1986) 631 F. Supp. 832, 834]* .

[d] Complete Preemption

One corollary of the well-pleaded complaint rule developed in case law is that Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character. Whether or not federal law has completely preempted state law depends on whether the preemptive force of the federal statute is so powerful as to displace entirely any state cause of action. If so, then any such suit is purely a creature of federal law,

notwithstanding the fact that state law would provide a cause of action in the absence of the federal statute [*see Caterpillar v. Williams (1987) 482 U.S. 386, 107 S. Ct. 2425, 96 L. Ed. 2d 318, 327-328* ; *Metropolitan Life Ins. Co. v. Taylor (1987) 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed. 2d 55, 63]* . In areas in which federal law completely preempts state law, a claim purportedly based on state law is considered to be a federal claim from its inception, so that such claims are considered to have arisen under federal law for the purposes of removal [*Hall v. North American Van Lines, Inc. (9th Cir. 2007) 476 F.3d 683, 688* (removal for complete preemption is instance of artful pleading rule); *Miles v. Okun (9th Cir. 2005) 430 F.3d 1083, 1088*]. Removal is proper under the complete preemption doctrine only when Congress intended the federal cause of action to be exclusive [*Beneficial Nat'l Bank v. Anderson (2003) 539 U.S. 1, 8-9* & n.5, *123 S. Ct. 2058, 156 L. Ed. 2d 1* (exclusive jurisdiction by complete exemption of usury claims against national banks under *12 U.S.C.S. §§ 85, 86*); *Miles v. Okun (9th Cir. 2005) 430 F.3d 1083, 1088* (*11 U.S.C.S. § 303(i)* provides exclusive cause of action for damages resulting from filing of involuntary bankruptcy petition)].

Complete preemption is the exception rather than the rule, and has been found in a limited number of cases [*see Caterpillar Inc. v. Williams (1987) 482 U.S. 386, 107 S. Ct. 2425, 96 L. Ed. 2d 318, 327-328, 328 n. 8*]. The test for complete preemption is "whether Congress clearly manifested an intent to convert state law claims into federal question claims" [*Ansley v. Ameriquest Mortgage Co. (9th Cir. 2003) 340 F.3d 858, 862]* . Among the most prominent cases of complete preemption are the following: *Metropolitan Life Ins. Co. v. Taylor (1987) 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed. 2d 55, 65* (state contract and tort claims for improper processing of disability claim and wrongful termination completely preempted by and within civil enforcement provisions of ERISA (*29 U.S.C.S. § 1001*)); *Oneida Indian Nation v. County of Oneida (1974) 414 U.S. 661, 675, 94 S. Ct. 772, 39 L. Ed. 2d 73* (state law complaint alleging right of possession to Indian tribal lands completely preempted); and *Avco Corp. v. Aero Lodge, I.A.M. & A.W. (1968) 390 U.S. 557, 559-561, 88 S. Ct. 1235, 20 L. Ed. 2d 126* (state law action to enforce collective bargaining contracts completely preempted by *§ 301 of Labor* Management Relations Act (*29 U.S.C.S. § 185(a)*).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsWell-Pleaded Complaint RuleCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureFederal & State InterrelationshipsFederal Common LawPreemptionCivil ProceduresPleading & PracticePleadingsComplaintsRequirements

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§ 265.34 Diversity Jurisdiction

[1] In General

Diversity jurisdiction exists when the civil action involves citizens of different states and the matter in controversy exceeds $75,000, exclusive of interests and costs [*28 U.S.C.S. § 1332(a)*]. The citizenship of a corporation is its state of incorporation and the state where its principal place of business is located [*28 U.S.C.S. §§ 1332(c), 1441(b)*]. For a form of allegation of diversity of citizenship as a ground for removal, see *§ 265.162*. For additional general discussion of diversity jurisdiction, see *§ 265.15*.

Diversity cases are removable only if no party in interest, properly joined as a defendant, is a citizen of the state in which the action is brought [*28 U.S.C.S. § 1441(b)*; *Motor Vehicle Cas. Co. v. Russian, Etc. (N.D. Cal. 1981) 538 F. Supp. 488, 491 n.5*]. When an action is removed on the basis of diversity, the requisite diversity must exist both when the action is filed in state court and when the defendant petitions for removal [*Miller v. Grgurich (9th Cir. 1985) 763 F.2d 372, 373* ; *Strasser v. KLM Royal Dutch Airlines (C.D. Cal. 1986) 631 F. Supp. 1254, 1256* ; for discussion of how plaintiff's actions may affect diversity, *see § 265.35[3], below*]. A court may dismiss nondiverse defendants in order to preserve jurisdiction if they are not indispensable parties [*Othman v. Globe Indem. Co. (9th Cir. 1985) 759 F.2d 1458, 1463* , *overruled on other grounds in Bryant v. Ford Motor Co. (9th Cir. 1987) 844 F.2d 602, 605* (*Bryant* abrogated by amendment of *28 U.S.C.S. § 1441(a)*)]. Federal diversity jurisdiction is not defeated when there is a legitimate controversy between diverse citizens and aliens are additional parties [*Transure, Inc. v. Marsh and McLennan, Inc. (9th Cir. 1985) 766 F.2d 1297, 1298* ; *see 28 U.S.C.S. § 1332(a)(3)*].

Removal is not improper because of the existence or the possibility of the existence of an unnamed party with an interest [*Lincoln Property Co. v. Roche (2005) 546 U.S. 81 126 S. Ct. 606, 163 L. Ed. 2d 415, 421]* .

[2] Fictitious Defendants

For purposes of removal, the citizenship of defendants sued under fictitious names shall be disregarded [*28 U.S.C.S. § 1441(a)* (as amended November 19, 1988)].

Prior to the 1988 amendment of *28 U.S.C.S. § 1441(a)*, the *Ninth Circuit Court of Appeals in Bryant v. Ford Motor Co. (9th Cir. 1987) 844 F.2d 602* held that the presence of Doe defendants destroyed diversity and precluded removal, and that if a defendant attempted to remove a case prior to the dismissal or unequivocal abandonment of all Doe defendants, the district court was required to remand the case to state court [*Bryant v. Ford Motor Co. (9th Cir. 1987) 844 F.2d 602, 605-606]* . Before *Bryant*, the general rule was that the presence of fictitiously named defendants, or Doe defendants, defeated diversity jurisdiction, and removal was not possible [*Bryant v. Ford Motor Co. (9th Cir. 1987) 844 F.2d 602, 605]* . However, there were many exceptions to that general rule [*Bryant v. Ford Motor Co. (9th Cir. 1987) 844 F.2d 602, 605]* , including the following: (1) when the named defendants proved that the Doe defendants were wholly fictitious [*see, e.g., Grigg v. Southern Pacific Co. (9th Cir. 1957) 246 F.2d 613, 619]* ; (2) when the complaint contained no charging allegations against the Doe defendants [*see, e.g., Chism v. National Heritage Life Ins. Co. (9th Cir. 1985) 637 F.2d 1328, 1330]* ; and (3) when the Doe defendants were not indispensable parties [*see, e.g., Othman v. Globe Indem. Co. (9th Cir. 1985) 759 F.2d 1458, 1463]* .

The 1988 amendment of *28 U.S.C.S. § 1441(a)* applies retroactively to cases pending on November 19, 1988 [*Kruso v. International Telephone & Telegraph Corp. (9th Cir. 1989) 872 F.2d 1416, 1424-1425]* . As a result, it appears that *28 U.S.C.S. § 1441(a)* applies to those cases already pending in state court that could not previously be removed because of the *Bryant* decision and to cases pending in federal court that under *Bryant* would have been remanded to state court.

[3] Class Actions

The Class Action Fairness Act of 2005 added a new provision to the removal statutes. *28 U.S.C.S. § 1453* authorizes removal by any defendant without consent of the other defendants [*28 U.S.C.S. § 1453(b)*]. Removal shall be in accordance with *28 U.S.C.S. § 1446*, except that the usual one-year limit on removal is inapplicable to class actions [*28 U.S.C.S. § 1453(b)*].

For further discussion of diversity jurisdiction in class and mass actions, see *§ 265.15[6]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionAmount in ControversyGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipIndividualsCivil ProcedureRemovalProceedingsTime LimitationsCivil ProcedureClass ActionsGeneral Overview

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§ 265.35 Joinder of Parties

[1] Fraudulent Joinder

Normally in an action that is sought to be removed the district court must take the plaintiff's pleadings as it finds them. But when a colorable claim of fraudulent joinder of parties is raised, the court may look beyond the pleadings to determine if the joinder, although fair on its face, is a sham or fraudulent device to prevent removal. In so doing, the court may pierce the pleadings, consider the entire record, and determine the basis of joinder by any means available. If the joinder of a nondiverse defendant is shown to be only a fraudulent device to prevent removal, the court may disregard the joinder and retain jurisdiction [*Lewis v. Time Inc. (E.D. Cal. 1979) 83 F.R.D. 455, 460 , aff'd 710 F.2d 549, 550 (1983)]* .

Fraudulent joinder is a term of art, and does not reflect on the integrity of the plaintiff or counsel. It is merely the rubric applied when a court finds either that no cause of action is stated against the nondiverse defendant, or in fact no cause of action exists. A joinder is fraudulent if there is no real intention to get a joint judgment, and there is no colorable ground for so claiming. Doubt arising from merely inartful, ambiguous, or technically defective pleadings should be resolved in favor of remand. Additionally, a fraudulent joinder claim ordinarily must be capable of summary determination [*Lewis v. Time Inc. (E.D. Cal. 1979) 83 F.R.D. 455, 460 , aff'd 710 F.2d 549, 550 (1983)]* . For a form that includes an allegation of fraudulent joinder of parties for use in a notice of removal, see *§ 265.162*.

Different considerations apply in an action implicating *First Amendment* rights. The proper course when a strong claim of fraudulent joinder is made in such a case is for the court to retain jurisdiction without prejudice to the plaintiff's right to move for remand at any point in the litigation when it can be demonstrated that the cause of action that is assertedly without substance is in fact a viable claim [*Lewis v. Time Inc. (E.D. Cal. 1979) 83 F.R.D. 455, 462 , aff'd 710 F.2d 549, 550 (1983)]* .

[2] Joinder After Removal

If the plaintiff seeks to amend the original complaint through the joinder of an additional defendant after the case has been removed to federal court, he or she must obtain leave of the court or the written consent of the defendant [*Desert*

Empire Bank v. Ins. Co. of N. America (9th Cir. 1980) 623 F.2d 1371, 1374-1375 ; *see Fed. R. Civ. P., Rules 15, 20*]. If there is an attempt to join a necessary, non-diverse party after the case has been removed to federal court, the district court has the following options [*28 U.S.C.S. § 1447(e)*; *Fed. R. Civ. P., Rule 19*; *Yniques v. Cabral (9th Cir. 1993) 985 F.2d 1031, 1035]* :

(1) Deem the party "indispensable" and dismiss the case;

(2) Deem the party not indispensable and continue its jurisdiction over the lawsuit without joinder; or

(3) Allow joinder and remand the case to state court.

The district court, however, does not have the option of authorizing joinder and then dismissing the case [*Yniques v. Cabral (9th Cir. 1993) 985 F.2d 1031, 1035]* .

[3] Voluntary-Involuntary Rule

When diversity of citizenship is the basis for removal, diversity must exist both when the action is filed in state court and when the defendant petitions for removal [*Strasser v. KLM Royal Dutch Airlines (C.D. Cal. 1986) 631 F. Supp. 1254, 1256]* . The voluntary-involuntary rule, an important exception to this rule, requires that a suit remain in state court unless a voluntary act of the plaintiff brings about a change that renders the case removable [*Self v. General Motors Corp. (9th Cir. 1978) 588 F.2d 655, 657* ; *see Bertha v. Beech Aircraft Corp. (C.D. Cal. 1987) 674 F. Supp. 24, 25-26]* . The result of this exception is that federal jurisdiction will lie whenever dismissal of nondiverse defendants results from the plaintiff's voluntary act, even though diversity was lacking when the action was originally filed in state court. This serves to nullify the danger that a plaintiff might join a nondiverse defendant merely to defeat jurisdiction, and then dismiss the suit concerning that defendant [*see Strasser v. KLM Royal Dutch Airlines (C.D. Cal. 1986) 631 F. Supp. 1254, 1256]* .

Thus, a voluntary termination of the case against the resident defendant, such as a voluntary dismissal, discontinuance, or other abandonment of the action by the plaintiff, allows for removal of the action on the remaining defendant's request [*Schmidt v. Capitol Life Ins. Co. (N.D. Cal. 1986) 626 F. Supp. 1315, 1318]* . However, an involuntary termination of the case against the resident defendant, such as a summary judgment or other dimissal on the merits, over the plaintiff's objection, does not support removal [*Strasser v. KLM Royal Dutch Airlines (C.D. Cal. 1986) 631 F. Supp. 1254, 1256]* . Any case removed to the federal court that fails to satisfy this voluntary-involuntary test must be remanded for lack of federal subject matter jurisdiction. No action, much less inaction, by either party can confer federal subject matter jurisdiction [*Strasser v. KLM Royal Dutch Airlines (C.D. Cal. 1986) 631 F. Supp. 1254, 1257-1258]* .

The voluntary-involuntary rule also applies to actions arising under federal law. Thus, if a case is transformed into an action arising under federal law not by the voluntary action of the plaintiff, but instead by action of a defendant, the action is not removable and must remain in state court [*People of State of Cal. v. Keating (9th Cir. 1993) 986 F.2d 346, 348* (defendant filed third-party claim under federal law against Resolution Trust Corporation; but only RTC had right to remove under *12 U.S.C.S. § 1441a(l)(3)* exemption)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionDiversity JurisdictionCitizenshipGeneral OverviewCivil ProcedureJurisdictionDiversity JurisdictionCitizenshipIndividualsCivil ProcedureRemovalProceedingsGeneral OverviewCivil ProcedureRemovalProceedingsFraudulent JoinderCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of Court

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§ 265.36 Separate and Independent Claim

Whenever a separate and independent claim or cause of action within the court's federal question jurisdiction is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed. The district court may determine all issues in the case or, in its discretion, may remand all matters in which state law predominates [*28 U.S.C.S. § 1441(c)*; *see 28 U.S.C.S. § 1331* (federal question jurisdiction), discussed in *§ 265.14[1]*]. Before Congress enacted the Judicial Improvements Act of 1990 (Pub. L. No. 101-650), diversity jurisdiction over the separate and independent claim was also a ground for removing the entire case to federal court, and the court had the discretion to remand the claims over which it had no diversity jurisdiction [*see* former *28 U.S.C.S. § 1441(c)*]. By limiting removal to those cases in which the anchoring claim involves a federal question, the Act significantly restricts the doctrine of removal based on federal jurisdiction over a separate and independent claim. For a form of allegation of a separate and independent claim for use in a notice of removal, see *§ 265.165*. For a form of motion to sever claims and remand an action, see *§ 265.170*. For an order granting severance and remand, see *§ 265.171*.

When there is a single wrong to the plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under *28 U.S.C.S. § 1441(c)* [*American Fire & Cas. Co. v. Finn (1951) 341 U.S. 6, 13-14, 71 S. Ct. 534, 95 L. Ed. 702* ; *Motor Vehicle Cas. Co. v. Russian, Etc. (N.D. Cal. 1981) 538 F. Supp. 488, 494]* . The plaintiff's pleading controls in the federal court's determination whether or not the claim is separate and independent [*American Fire & Cas. Co. v. Finn (1951) 341 U.S. 6, 14, 71 S. Ct. 534, 95 L. Ed. 702]* . Additionally, the court does not focus on whether there was a single primary right involved, but whether the various claims involve a single wrong to the plaintiff [*Boggs v. Lewis (9th Cir. 1988) 863 F.2d 662, 664-665* (negligence claim against driver and bad faith refusal to settle claim against insurer were separate and independent under state law, involved substantially different facts and transactions, and sought markedly different relief); *Motor Vehicle Cas. Co. v. Russian, Etc. (N.D. Cal. 1981) 538 F. Supp. 488, 494]* . An appeal is not a separate and independent claim; rather, it is a continuation of the same action commenced in the trial court [*Resolution Trust Corp. v. Bayside Developers (9th Cir. 1994) 43 F.3d 1230, 1240]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionPendent ClaimsCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionSame Case & ControversyCivil ProcedureRemovalBasisFederal Questions

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§ 265.37 Effect of Removal

[1] Jurisdiction Acquired by District Court

[a] In General

The filing of the notice of removal and bond (bond requirement contained in former *28 U.S.C.S. § 1446(d)* was repealed in 1988), the provision of written notice to all adverse parties, and the filing of a copy of the notice with the state court effects removal immediately [*28 U.S.C.S. § 1446(d)*].

Once a notice of removal is filed, the district court will determine whether federal jurisdiction can be invoked, either by diversity or federal question [*Schroeder v. Trans World Airlines, Inc. (9th Cir. 1983) 702 F.2d 189, 191]* . Although the removability of an action must be judged by the pleadings at the time of removal, the court can consider a plaintiff's subsequent attempt to amend the complaint as relating to his or her true intent at the time the action was removed [*Green v. Mutual of Omaha (N.D. Cal. 1982) 550 F. Supp. 815, 818* ; for discussion of the burden of proof, *see § 265.32[3], above*]. The notice of removal, including supporting affidavits, may be used to clarify the action in determining whether it raises a federal question or diversity jurisdiction [*Bright v. Bechtel Petroleum, Inc. (9th Cir. 1986) 780 F.2d 766, 769, 769 n.3* ; *Schroeder v. Trans World Airlines, Inc. (9th Cir. 1983) 702 F.2d 189, 191]* .

Ordinarily, when a case has been properly removed, federal jurisdiction is not defeated by later changes or developments in the suit, such as changes in citizenship, parties, the amount involved, or the cause of action pleaded [*Williams v. Costco Wholesale Corp. (9th Cir. 2006) 471 F.3d 975, 976* (no amended notice of removal is necessary); *Lopez v. General Motors Corp. (9th Cir. 1983) 697 F.2d 1328, 1332]* . However, a notable exception to this rule involves the destruction of diversity caused by the joinder of an indispensable party. Thus, when the district court finds a necessary party was not joined and that person should be joined, if that person's citizenship destroys diversity jurisdiction, the case may be remanded to state court [*Takeda v. Northwestern Nat. Life Ins. Co. (9th Cir. 1985) 765 F.2d 815, 819-821* ; *see Fed. R. Civ. P., Rule 19* (joinder of necessary parties)]. For discussion of the procedures for remanding a proceeding back to state court, see *§ 265.40[1]*.

[b] District Court's Jurisdiction Is Not Derivative

The district court to which an action is removed is not precluded from hearing and determining any claim in that action because the state court from which that action is removed did not have jurisdiction over that claim [*28 U.S.C.S. § 1441(e)*].

[c] Pendent State-Law Claims

On removal, a federal court has the power to hear the entire case, including state-law claims sharing a common nucleus of operative facts with the federal-claim claims in the case, by exercising its supplemental jurisdiction, known before the enactment of the Judicial Improvements Act of 1990 (Pub. L. No. 101-650) as "pendent" jurisdiction [*see 28 U.S.C.S. § 1367* (supplemental jurisdiction); *Bale v. General Telephone Co. of California (9th Cir. 1986) 795 F. 2d 775, 778* (removal of pendent state claims); *see also* discussion in *§ 265.17[1]*]. Supplemental jurisdiction is discretionary, however, and the district court may decline to exercise it [*Carnegie-Mellon Univ. v. Cohill (1988) 484 U.S. 343, 350, 357, 108 S. Ct. 614, 98 L. Ed. 2d 720]* . If the court determines that pendent state-law claims properly belong in state court, it may either dismiss the state-law claims without prejudice, allowing the plaintiff to refile an action in state court, or may remand the state-law claims to the state court [*see Carnegie-Mellon Univ. v. Cohill (1988) 484 U.S. 343, 350-351, 357, 108 S. Ct. 614, 98 L. Ed. 2d 720]* . For a discussion of *28 U.S.C.S. § 1367(c)*, which sets forth the factors to be considered by the court in deciding whether to exercise its supplemental jurisdiction, *see § 265.17[2]*.

Remand to the state court, rather than dismissal of state-law claims without prejudice, may be particularly appropriate when the applicable state statute of limitations has expired, foreclosing the plaintiff from filing a new action in state court [*see Carnegie-Mellon Univ. v. Cohill (1988) 484 U.S. 343, 352-353, 357, 108 S. Ct. 614, 98 L. Ed. 2d 720]* . If the court chooses to dismiss the state-law claims, however, the limitations period for those claims is tolled while the claims are pending and for a period of 30 days after they are dismissed, unless state law provides for a longer tolling period. The same tolling provision applies to any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the state-law claims [*see 28 U.S.C.S. § 1367(d)*].

[2] Termination of State Court Jurisdiction

Removal of a civil action from a state court to a federal court operates as a literal removal of the action from the state court and terminates that court's jurisdiction to proceed in the action. Thereafter the federal court has exclusive jurisdiction and may conduct proceedings accordingly, although, if federal jurisdiction is subsequently found wanting, the federal court must remand the action to the state court of origin. The state courtmay resume its first-instance jurisdiction if, and only if, there is a remand of the action to it from the federal court. If the federal court dismisses the action rather than remanding it, there is no action in which the state court can resume jurisdiction. The state court will exceed its jurisdiction if it permits further proceedings in the action after the federal court has dismissed the action [*Sugimoto v. Exportadora de Sal, S.A. de C.V. (1991) 233 Cal. App. 3d 165, 168, 284 Cal. Rptr. 275* ; *Allstate Ins. Co. v. Superior Court (1982) 132 Cal. App. 3d 670, 674-676, 183 Cal. Rptr. 330* ; *see 28 U.S.C.S. § 1446(d)* (filing copy of notice of removal with state court clerk effects removal unless and until case is remanded)]. After removal, a state court lacks jurisdiction even to dismiss the case without prejudice [*Sugimoto v. Exportadora de Sal, S.A. de C.V. (1991) 233 Cal. App. 3d 165, 168, 284 Cal. Rptr. 275]* .

In keeping with the exclusive nature of the federal court's jurisdiction on removal, subsequent actions in the state court involving the same claims will not be allowed. For example, injunctive relief enjoining prosecution of a state action was appropriate in one case after the plaintiff unsuccessfully moved to remand an action back to the state court, and then filed a second state court action alleging the same claims raised in federal action [*see Takeda v. Northwestern Nat. Life Ins. Co. (9th Cir. 1985) 765 F.2d 815, 817-818]* .

It appears, however, that the removal procedure may not be used to exploit the plaintiff's inability to proceed in state

court. Thus, when a case is ultimately remanded back to the state court, it appears that the filing of a notice of removal may toll the deadline for appealing from certain state court orders [*see Strasser v. KLM Royal Dutch Airlines (C.D. Cal. 1986) 631 F. Supp. 1254, 1257* (appeal from summary judgment)].

[3] Impact of Proceedings in State Court

The federal rules apply after removal and neither add to nor abrogate what has been done in the state court prior to removal. The federal court takes the case as it finds it on removal and treats everything that occurred in the state court as if it had taken place in federal court [*Butner v. Neustadter (9th Cir. 1963) 324 F.2d 783, 785* ; *see Fed. R. Civ. P., Rule 81(c)*]. Thus, a default judgment entered in the state court is not set aside as a matter of law on removal to the district court. Instead, it must be regarded as valid unless and until the district court sets it aside [*Butner v. Neustadter (9th Cir. 1963) 324 F.2d 783, 785-786]* ; *Resolution Trust Corp v. Bayside Developers (9th Cir. 1994) 43 F.3d 1230, 1238* (district court determined that it sat as though reviewing California Court of Appeal's decision and addressed a motion for new trial on the merits)]. A state court's denial of summary judgment, however, does not preclude the federal court from revisiting the issue after removal [*Crane v. The Arizona Republic (9th Cir. 1992) 972 F.2d 1511, 1516 n.3*].

[4] Judicial Review of Removal

Removal of a case from state to federal court is a question of federal subject matter jurisdiction that is reviewable de novo by the federal court of appeals [*Ramirez v. Fox Television Station, Inc. (9th Cir. 1993) 998 F.2d 743, 747* ; *Williams v. Caterpillar Tractor Co. (9th Cir. 1986) 786 F.2d 928, 930 , aff'd 482 U.S. 386, 391, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987)* (appeal from judgment following removal of action and subsequent dismissal)].

If a case is removed without objection (for example, if the plaintiff did not make a motion to remand), tried on its merits, and judgment is entered by the district court, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court [*Grubbs v. General Electric Credit Corp. (1972) 405 U.S. 699, 702, 92 S. Ct. 1344, 31 L. Ed. 2d 612* ; *Harper v. San Diego Transit Corp. (9th Cir. 1985) 764 F.2d 663, 666 n.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsExclusive JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionPendent ClaimsCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalPostremoval RemandsGeneral OverviewCivil ProcedureRemovalPostremoval RemandsAppellate Review

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22-265 California Forms of Pleading and Practice--Annotated § 265.38

§ 265.38 Procedure for Removal

[1] Notice of Removal

A defendant or defendants desiring to remove any civil action from a state court must file in the district court of the United States for the district and division within which that action is pending a notice of removal signed pursuant to *Fed. R. Civ. P., Rule 11*, and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served on him or her in that action [*28 U.S.C.S. § 1446(a)*]. For a form of notice of removal, see *§ 265.160*. The civil removal statute has no requirement that all grounds for removal be listed in the notice [*Williams v. Costco Wholesale Corp. (9th Cir. 2006) 471 F.3d 975, 976* (if original complaint supports federal jurisdiction on both diversity and federal question grounds, defendant is not required to list both grounds in notice of removal)].

Although formerly a bond was required to accompany the notice of removal, the bond requirement was deleted in 1988 [*see* former *28 U.S.C.S. § 1441(d)*; *see also § 265.39[2]*]. The notice need not be accompanied by discovery documents such as interrogatories and notices of depositions, or other discovery requests [*Visicorp v. Software Arts, Inc. (N.D. Cal. 1983) 575 F. Supp. 1528, 1531]* .

[2] Joinder of Defendants

[a] Generally

When there is more than one defendant, removal may not be had unless all the defendants file or join in a notice of removal [*Varney v. Johns-Manville Corp. (N.D. Cal. 1987) 653 F. Supp. 839, 840 n.1*]. However, the Ninth Circuit Court of Appeals does not require the joinder of a defendant who has not been served; the defendants who have been served can remove by themselves. Thus, the failure to include defendants, who had never been served, in the notice of removal does not preclude removal [*Salveson v. Western States Bankcard Ass'n (9th Cir. 1984) 731 F.2d 1423, 1429]* . For further discussion of who must join in notices of removal, see *Moore's Federal Practice, § 107.30* (3rd ed. Matthew Bender).

Proper joinder of the defendants may involve some troublesome distinctions concerning nominal or formal parties, and proper, necessary, and indispensable parties. Federal law, not state law or characterization by parties, determines who is the plaintiff and who is the defendant for removal purposes [*Chicago, R.I. & P.R. Co. v. Stude (1953) 346 U.S. 574, 580, 74 S. Ct. 290, 98 L. Ed. 317* ; for additional discussion, *see Moore's Federal Practice, § 107.30* (3rd ed. Matthew Bender)].

Removal under *28 U.S.C.S. § 1442(a)* represents an exception to the general rule that all defendants must join in the removal petition. Given that the federal officer is the only one entitled to remove under § 1442, the officer can remove without other defendants joining in the petition, and the entire case is removed to the federal court [*Ely Valley Mines, Inc. v. Hartford Accident & Indem. Co. (9th Cir. 1981) 644 F.2d 1310, 1315]* .

[b] Class Action Rules

Under the Class Action Fairness Act of 2005 any defendant may remove the action to federal court without consent of the other defendants [*28 U.S.C.S. § 1453(b)*]. Removal must be in accordance with *28 U.S.C.S. § 1446*, except that the usual one-year limit on removal is inapplicable to class actions [*28 U.S.C.S. § 1453(b)*].

For further discussion of diversity jurisdiction in class and mass actions, see *§ 265.15[6]*.

[3] Deadline for Filing Notice of Removal

[a] Action Initially Removable

The notice of removal must be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief on which that action or proceeding is based, or within 30 days after the service of summons on the defendant if that initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter [*28 U.S.C.S. § 1446(b)*; *see Blankenberg v. Commercial Ins. Co. of Newark, N.J. (N.D. Cal. 1987) 655 F. Supp. 223, 225]* . In some cases, the particular statute authorizing removal may specify the time limits for filing notices of removal [*see, e.g., 12 U.S.C.S. § 1441a*(*l*)(3)(A), *12 U.S.C.S. § 1819(b)(2)(B)*].

The thirty-day time period for removal starts to run from defendant's receipt of the initial pleading only when that pleading affirmatively reveals on its face the facts necessary for federal court jurisdiction [*Harris v. Bankers Life & Casualty Co. (9th Cir. 2005) 425 F.3d 689, 690-691* (statement of party's residency, rather than citizenship, and not at time of filing of action, in initial complaint was insufficient to ascertain diversity)]. Parties are not charged with notice of removability until they've received a paper that gives them enough information to remove [*Durham v. Lockheed Martin Corp. (9th Cir. 2006) 445 F.3d 1247, 1251]* .

[b] Action Subsequently Becomes Removable

If the case stated by the initial pleading is not removable, a notice of removal may be filed within 30 days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one thatis or has become removable, except that a case may not be removed on the basis of diversity jurisdiction conferred by *28 U.S.C.S. § 1332* more than one year after commencement of the action [*28 U.S.C.S. § 1446(b)*; *Harris v. Bankers Life & Casualty Co. (9th Cir. 2005) 425 F.3d 689, 694* (facts in initial complaint insufficient to establish diversity)]. The papers that trigger the 30-day period of *28 U.S.C.S. § 1446(b)* are limited to papers in the case. Thus, when an action was not removable when filed, but subsequently became removable by a statutory amendment, that amendment is not within the parameters of *28 U.S.C.S. § 1446(b)*, and the defendant will not be permitted to remove the case [*Chen v. China Airlines Ltd. (N.D. Cal. 1989) 713 F. Supp. 1322, 1323* ; *but see Resolution Trust Corp. v. Bayside Developers (9th Cir. 1995) 43 F.3d 1230, 1234-1235* (although amendment to *12 U.S.C.S. § 1441a*(*l*), providing that RTC need not be formally substituted into a case to remove the

case, was enacted during pendency of action, the amendment was considered procedural and not substantive, and could be applied)].

When the voluntary dismissal or abandonment of a resident defendant creates complete diversity between the parties to state proceedings, the nonresident defendant may remove the case to federal court within 30 days of the dismissal or abandon ment. The defendant need not speculate on or anticipate an abandonment from the plaintiff's expressions of intent or other equivocal action. Rather, the defendant is entitled to await affirmative and certain action by a plaintiff confirming that abandonment before exercising the right of removal [*Schmidt v. Capitol Life Ins. Co. (N.D. Cal. 1986) 626 F. Supp. 1315, 1318* ; *see 28 U.S.C.S. § 1446(b)*].

Similarly, a nonresident defendant is under no obligation to investigate the status of resident codefendants as to facts bearing on whether plaintiff will abandon claims against the codefendants [*Harris v. Bankers Life & Casualty Co. (9th Cir. 2005) 425 F.3d 689, 696-697* ("clue" in complaint that nonresident defendant could have used to determine that resident codefendant was dead does not run period for filing removal)].

[c] Effect of Multiple Defendants

When there is more than one defendant, and the defendants receive notice of the removability of the case at different times, the 30-day filing requirement of *28 U.S.C.S. § 1446(b)* begins when one defendant receives notice that the case has become removable. This is consistent with the requirement that the statute be strictly interpreted against permitting removal [*Varney v. Johns-Manville Corp. (N.D. Cal. 1987) 653 F. Supp. 839, 840]* .

However, a separate 30-day filing period begins to run upon the service of papers sufficient to establish the right to removal in cases against federal officers under *28 U.S.C.S. § 1442(a)*, regardless of the officer's knowledge of other grounds for removal [*Durham v. Lockheed Martin Corp. (9th Cir. 2006) 445 F.3d 1247, 1253* (denial of removal was improper)].

[d] Waiver of Objection to Untimely Notice of Removal

The right to raise the issue of the untimeliness of the defendant's notice of removal may be waived. Thus, a plaintiff who appears repeatedly before the district court before raising the timeliness objection waives that right [*Meadows v. Bicrodyne Corp. (9th Cir. 1986) 785 F.2d 670, 672]* .

[4] Notice to Adverse Parties

Promptly after the filing of the notice of removal and bond (bond requirement contained in former *28 U.S.C.S. § 1446(d)* was repealed in 1988), the defendant must give written notice of them to all adverse parties andmust file a copy of the notice with the clerk of the state court, which shall effect the removal. The state court will proceed no further in the case [*28 U.S.C.S. § 1446(d)*]. For a form of notice of filing of the notice of removal and bond, see *§ 265.166*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalProceedingsNoticesCivil ProcedureRemovalProceedingsTime LimitationsCivil ProcedureRemovalProceedingsUnanimityCivil ProcedureRemovalWaivers

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§ 265.39 Procedure After Removal

[1] Orders, Process, and Records

In any case removed from a state court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the state court or otherwise [*28 U.S.C.S. § 1447(a)*]. It may require the party seeking removal to file with its clerk copies of all records and proceedings in the state court or may cause the same to be brought before it by writ of certiorari issued to the state court [*28 U.S.C.S. § 1447(b)*]. For a form for use in obtaining a state clerk's certificate on the transcript of record, see *§ 265.167*.

In all cases removed to any federal district court in which any one or more of the defendants has not been served with process, the service has not been perfected prior to removal, or the process served proves to be defective, that process or service may be completed or new process issued in the same manner as in cases originally filed in that district court [*28 U.S.C.S. § 1448*]. Section 1448 does not deprive any defendant on whom process is served after removal of his or her right to move to remand the case [*28 U.S.C.S. § 1448*].

When a party is entitled to copies of the records and proceedings in state court, to be used in any district court, and the clerk of that state court, on demand and the tender of the legal fees, fails to deliver certified copies, the district court may, on affidavit reciting those facts, direct that record to be supplied by affidavit or otherwise. Thereupon those proceedings, trial, and judgment may be had in that district court, and all such process awarded, as if certified copies had been filed in the district court [*28 U.S.C.S. § 1449*].

[2] Attachment, Bond, or Order in State Court

Whenever any action is removed from a state court to a federal district court, any attachment or sequestration of the goods or estate of the defendant in that action in the state court will hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the state court [*28 U.S.C.S. § 1450*]. Similarly, all bonds, undertakings, or security given by either party in an action prior to its removal will remain valid and effectual notwithstanding that removal [*28 U.S.C.S. § 1450*; *see also* Ch. 538, *Suretyship, Bonds, and Undertakings*]. All injunctions, orders, and other proceedings had in an action prior to

its removal willremain in full force and effect until dissolved or modified by the district court [*28 U.S.C.S. § 1450*].

[3] Application of Federal Rules

[a] In General

The Federal Rules of Civil Procedure apply to civil actions removed to the federal district courts and govern procedure after removal. Repleading is not necessary unless the court orders it [*Fed. R. Civ. P., Rule 81(c)*].

[b] Timing of Answer

In a removed action in which the defendant has not answered, the defendant must answer or present other available defenses or objections within 20 days after the receipt through service or otherwise of a copy of the initial pleading, within 20 days after the service of summons on the initial pleading, then filed, or within 5 days after the filing of the notice of removal, whichever period is longest [*see Fed. R. Civ. P., Rule 81(c)*].

[c] Demand for Jury Trial

If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury will be accorded it, if the party's demand for a jury trial is served within 10 days after the notice of removal is filed if the party is the defendant. If that party is not the defendant, that demand must be served within 10 days after service on the party of the notice of the filing of the notice of removal [*see Fed. R. Civ. P., Rule 81(c)*; *see, e.g., Tushner v. United States Dist. Court (9th Cir. 1987) 829 F.2d 853, 854-856* (calculation of time period for filing jury demand in removed case)]. A party who, prior to removal, made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If the applicable state law does not require the parties to make express demands for a jury trial, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this demand on its own motion and must do so as a matter of course at the re quest of any party. The failure of a party to make demand as directed constitutes a waiver of trial by jury [*see Fed. R. Civ. P., Rule 81(c)*].

[4] Limitation Period for Naming Fictitious Defendants

Code Civ. Proc. §§ 474 and *583.210* operate to extend the statute of limitations in situations in which an identified defendant may be substituted in for a previously named fictitious defendant in a removed action; the timeliness of the claim is not determined by *Fed. R. Civ. P., Rule 15(c)* [*Lindley v. General Elec. Co. (9th Cir. 1986) 780 F.2d 797, 799-801 , cert. denied 476 U.S. 1186* (period of limitation extended three years from commencement of action to discovery of Doe's identity and service of summons)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalProceedingsGeneral OverviewCivil ProceduresPleading & PracticePleadingsAnswersCivil ProceduresPleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProceduresPartiesFictitious NamesCivil ProcedureTrialsJury TrialsJury Demands

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§ 265.40 Procedure for Remand

[1] In General

A case removed from state court to federal court may be remanded back to the state court only in accordance with *28 U.S.C.S. § 1447* [*Thermtron Products, Inc. v. Hermansdorfer (1976) 423 U.S. 336, 345-346, 96 S. Ct. 584, 46 L. Ed. 2d 542]* . A narrow exception to this rule exists with regard to any claim that is both independently nonremovable and separate and independent from the claim providing the basis for removal; such a claim may be remanded in the court's discretion [*28 U.S.C.S. § 1441(c)*; *see* *Carnegie-Mellon Univ. v. Cohill (1988) 484 U.S. 343, 354-356, 108 S. Ct. 614, 98 L. Ed. 2d 720, 732-734* ; *see* discussion in *§ 265.36, above*]. Remand may occur any time before final judgment [*28 U.S.C.S. § 1447(c)*].

The proper procedure for challenging removal is by motion to remand, which puts in issue the validity of the grounds for the removal itself [*Societa Anonima Lucchese, Etc. v. Catania S. Corp. (D. Mass. 1977) 440 F. Supp. 461, 463* ; *see also* discussion in [4], *below*]. A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal [*28 U.S.C.S. § 1447(c)*].

Although generally the motion for remand is made by the party who initially brought the action in state court, the party who filed the notice of removal also may move for remand [*see* *American Fire & Cas. Co. v. Finn (1951) 341 U.S. 6, 17-18, 71 S. Ct. 534, 95 L. Ed. 702]* . Additionally, the federal district court may sua sponte remand an action [*see 28 U.S.C.S. § 1447(c)*]. Indeed, when there is a lack of federal jurisdiction the district court to which an action is removed has an immediate and continuing duty to remand the case on its own motion [*Strasser v. KLM Royal Dutch Airlines (C.D. Cal. 1986) 631 F. Supp. 1254, 1258]* . Nevertheless, the district court may not remand a case sua sponte on procedural grounds after the 30-day period to remand has expired [*Lively v. Wild Oats Markets, Inc. (2006) 456 F.3d 933, 939-942* (review of remand ordered on basis of violation of forum defendant rule in *28 U.S.C.S. § 1441(b)* is subject to 30-day limit in *28 U.S.C.S. § 1447(c)*; sua sponte remand was improper); *Maniar v. Federal Deposit Ins. Corp. (9th Cir. 1992) 979 F.2d 782, 785-786* (untimely removal is a procedural rather than a jurisdictional defect)].

For a form of motion to remand an action, see *§ 265.168*. For a form of motion to sever and remand separate claims, see

§ 265.170.

[2] Grounds for Remand

If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case will be remanded [*28 U.S.C.S. § 1447(c)*; for further discussion of federal jurisdiction, *see § 265.32[2]*]. A case may also be remanded on the basis of any defect in the removal procedure [*28 U.S.C.S. § 1447(c)*].

Where plaintiff moves to remand and it is unclear or ambiguous from the face of a state--court complaint whether the requisite amount in controversy is pled, the removing defendant bears the burden of establishing, by a preponderance of the evidence, that the amount in controversy exceeds the jurisdictional amount. Under this burden, the defendant must provide evidence establishing that it is more likely than not that the amount in controversy exceeds that amount [*Guglielmino v. McKee Foods Corp. (9th Cir. 2007) 506 F.3d 696, 701*].

An otherwise properly removed action may not be remanded because the district court considers the federal docket too crowded, and a court that remands an action for that reason will have exceeded its authority in remanding on grounds not permitted by the controlling statute [*Thermtron Products, Inc. v. Hermansdorfer (1976) 423 U.S. 336, 344-345, 96 S. Ct. 584, 46 L. Ed. 2d 542]* .

Under the principles of *Thermtron*, a federal court with jurisdiction over a removed case may not remand it on discretionary grounds. Abstention is a judicially created doctrine; its application is discretionary. Thus, when abstention, rather than a ground in *28 U.S.C.S. § 1447(c)*, is the basis of a remand, the remand is in error [*Ryan v. State Bd. of Elections of State of Ill. (7th Cir. 1981) 661 F.2d 1130, 1133-1134]* . Nevertheless, after removal of a case has been effected, a federal district court arguably may invoke principles of abstention or deferral while retaining jurisdiction in any situation when they would apply in a case within the court's original jurisdiction [*see Moore's Federal Practice, §§ 107.31, 107.41* (3rd ed. Matthew Bender)]. For further discussion of when a federal court may abstain from or defer hearing a case, see *§ 265.14[3]*.

[3] Remand Order

A certified copy of the order of remand will be mailed by the clerk of the district court to the clerk of the state court. The state court may thereupon proceed with the case [*28 U.S.C.S. § 1447(c)*]. For a form of order granting a remand, see *§ 265.169*. For a form of order granting severance and remand, see *§ 265.171*.

A remand order ends the federal court's jurisdiction [*Seedman v. United States Dist. Court (9th Cir. 1988) 837 F.2d 413, 414* (second removal petition does not "reinvest" jurisdiction in federal district court); *Pelleport Investors v. Budco Quality Theatres (9th Cir. 1984) 741 F.2d 273, 279 n. 3*]. Such an order is res judicata and constitutes collateral estoppel in a subsequent proceeding for removal when the identical parties and identical issues of fact and law are involved [*see Mertan v. E.R. Squibb & Sons, Inc. (C.D. Cal. 1980) 581 F. Supp. 751, 753]* .

[4] Costs

On remand, the court may require the payment of just costs and any actual expenses, including attorney's fees, incurred as a result of the removal [*28 U.S.C.S. § 1447(c)*]; The determination of when costs may be awarded must balance the desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, and the right to remove as a general matter, when the statutory criteria are satisfied. The standard for awarding fees should turn on the reasonableness of the removal. Absent unusual circumstances, courts may award attorney's fees only where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied [*Martin v. Franklin Cap. Corp. (2005) 546 U.S. 132, 141, 126 S. Ct. 704, 163 L. Ed. 2d 547]* .

An award of fees pursuant to *28 U.S.C.S. § 1447(c)* is collateral to the decision to remand. Thus, the district court retains jurisdiction after a remand to entertain a plaintiff's motion for attorney's fees [*Moore v. Permanente Medical Group, Inc. (9th Cir. 1992) 981 F.2d 443, 445, 448]* .

A party is well advised to seek a remand when it appears removal is improper or the court is without jurisdiction, because failure to do so may result in a reduction of the costs ultimately awarded. For example, in one case in which the defendant removed the action because it presented federal law issues, yet once in federal court argued against its jurisdiction and moved to dismiss the federal claims and to remand the state law causes of action, the court found that the defendant's removal merited an award of costs. However, the court also found that the plaintiff had failed to attempt to remand the action to state court, and thus reduced the costs awarded to the plaintiff [*Johnson v. Smith (N.D. Cal. 1986) 630 F. Supp. 1, 5-6]* .

Similarly, a plaintiff's own acts in the state court action may affect the availability of costs. For example, in another case the action was improperly removed because the removal petition (now notice of removal) was not timely filed, but the plaintiff's motion for costs was still denied. The court reasoned that the defendants had presented a plausible argument regarding the timeliness of the petition and the plaintiff failed to notify all the defendants of the dismissal of the defendant that created the complete diversity of citizenship, thereby creating confusion regarding the commencement of the 30-day filing limit [*Varney v. Johns-Manville Corp. (N.D. Cal. 1987) 653 F. Supp. 839, 840-841]* .

When there is no change of parties or issues following the remand of an action to state court on the ground of lack of diversity, a subsequent notice of removal is a misuse of process that warrants an award of costs to the plaintiff and the plaintiff's counsel, as well as to the state court, for the necessary and reasonable expenses incurred because of the unwarranted delay in trial and the forced preparation of opposing pleadings caused by the defendant's oppressive and futile actions [*Mertan v. E.R. Squibb & Sons, Inc. (C.D. Cal. 1980) 581 F. Supp. 751, 753]* .

A decision to grant costs under *28 U.S.C.S. § 1447(c)* is reviewed under the standard of abuse of discretion and will be overturned if it is based on an erroneous determination of law [*Durham v. Lockheed Martin Corp. (9th Cir. 2006) 445 F.3d 1247, 1250]* .

[5] Review

[a] When Available

[i] Motion Denied

The district court's order denying a motion to remand an action to state court is reviewable [*see Sullivan v. First Affiliated Securities, Inc. (9th Cir. 1987) 813 F.2d 1368, 1370 , cert. denied 98 L. Ed. 2d 106]* . It appears review may be by an interlocutory appeal of the order denying remand [*see Sullivan v. First Affiliated Securities, Inc. (9th Cir. 1987) 813 F.2d 1368, 1370 , cert. denied 98 L. Ed. 2d 106]* , or by an appeal after final judgment [*see Carpenters Southern Cal. Admin. v. Majestic Housing (9th Cir. 1984) 743 F.2d 1341, 1343* (review after summary judgment); *Salveson v. Western States Bankcard Ass'n (9th Cir. 1984) 731 F.2d 1423, 1426* (review after dismissal)].

[ii] Motion Granted

An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise, with certain exceptions. First, an order remanding a case to the state court from which it was removed pursuant to *28 U.S.C.S. § 1443* (civil rights case) is reviewable by appeal or otherwise [*28 U.S.C.S. § 1447(d)*]. Only remands based on grounds specified in 1447(c) are immune from review under 1447(d) [*Quackenbush v. Allstate Insurance Co. (1996) 517 U.S. 706, 712, 116 S. Ct. 1712, 135 L. Ed. 2d 1]* . Specifically, review of a district court's characterization of its remand as resting upon lack of subject matter jurisdiction, to the extent it is permissible at all, is limited to confirming

that that characterization was colorable [*Powerex Corp. v. Reliant Energy Services (2007) 551 U.S. 224, 127 S. Ct. 2411, 2418, 168 L. Ed. 2d 112*]. Second, an order remanding a class action to state court is reviewable if an application is made to the court of appeals within seven court [*see* Amalgamated Transit Union Local 1309, *AFL-CIO v. Laidlaw Transit Servs., Inc. (9th Cir. 2005) 435 F.3d 1140, 1146* (applying *Fed. R. App. P., Rule 26(a)(2)*)] days after the entry of the order [*28 U.S.C.S. § 1453(c)(1)*; Amalgamated Transit Union Local 1309, *AFL-CIO v. Laidlaw Transit Servs., Inc. (9th Cir. 2005) 435 F.3d 1140, 1146* (intent of Congress was to require filing of application *within* 7 days of entry of remand); *Bush v. Cheaptickets, Inc. (9th Cir. 2005) 425 F.3d 683, 685* (appeal filed on the seventh day after entry of order is timely)].

A remand order based on the district court's application of the abstention doctrine does not fall into either category of remand order described in section 1447(c), because it is not based on lack of subject matter jurisdiction or defects in removal procedure, and it is therefore subject to review [*Quackenbush v. Allstate Insurance Co. (1996) 517 U.S. 706, 712, 116 S. Ct. 1712, 135 L. Ed. 2d 1]* . By the same token, a federal district court's remand after declining supplemental jurisdiction under *28 U.S.C.S. § 1367(c)(3)* is appealable under *28 U.S.C.S. § 1291* rather than subject to review by mandamus under *28 U.S.C.S. § 1651* [*California Dep't of Water Resources v. Powerex Corp. (9th Cir. 2008) 533 F.3d 1087, 1095-1096* (overruling prior contrary rulings)]. Similarly, a remand order based on events subsequent to removal, which caused the district court to lose jurisdiction, is subject to review, because the remand was not taken for one of the grounds listed in *28 U.S.C.S. § 1447(c)* [*Reddam v. KPMG LLP (9th Cir. 2006) 457 F.3d 1054, 1058-1059* (designated arbitration organization declined jurisdiction)]. Likewise, the violation of the forum defendant rule contained in *28 U.S.C.S. § 1441(b)* is not jurisdictional, and therefore review of a remand ordered on the basis of such a violation is not barred by *28 U.S.C.S. § 1447(d)* [*Lively v. Wild Oats Markets, Inc. (2006) 456 F.3d 933, 939-942]* .

An appellate court has jurisdiction to decide whether a district court has the power to issue a remand order, although the appellate court cannot examine whether a particular exercise of power was proper [*Northern California District Council of Laborers v. Pittsburg-Des Moines Steel Co. (9th Cir. 1995) 69 F.3d 1034, 1037-1038* ; *see Thermtron Products, Inc. v. Hermansdorfer (1976) 423 U.S. 336, 351-352, 96 S. Ct. 584, 46 L. Ed. 2d 542* (decided under prior version of section 1447(c))]. For example, failure to comply with the 30-day time limit deprives the district court of power to order remand on the basis of a defect in removal procedure, and a remand order based on a procedural defect that was not raised within the 30-day period may be vacated by the appellate court [*Northern California District Council of Laborers v. Pittsburg-Des Moines Steel Co. (9th Cir. 1995) 69 F.3d 1034, 1038* ; *Maniar v. FDIC (9th Cir. 1992) 979 F.2d 782, 786]* .

The policy underlying the general nonreviewability of *28 U.S.C.S. § 1447(d)* is to prevent delay by protracted litigation over jurisdictional issues. Thus, the district court is the final arbiter of whether it has jurisdiction to hear the case. However, when a district court bypasses the jurisdictional arguments and reaches the merits of the case, the policy is inapplicable, and review is possible. For example, remand based on a forum selection clause is subject to review, because denial of review would deprive the defendant of the right to appeal the court's decision on the substantive issue of the validity of the clause [*Pelleport Investors v. Budco Quality Theatres (9th Cir. 1984) 741 F.2d 273, 276-277* ; *see Clorox v. U.S. Dist. Ct. for N.D. of California (9th Cir. 1985) 779 F.2d 517, 519-521]* . Similarly, a remand based on the overcrowded condition of the federal docket is not within the grounds of *28 U.S.C.S. § 1447(c)*, and such a remand is reviewable [*Thermtron Products, Inc. v. Hermansdorfer (1976) 423 U.S. 336, 344-345, 96 S. Ct. 584, 46 L. Ed. 2d 542]* .

[b] Means of Obtaining Review

When an order granting remand is subject to review, as discussed in *§ 265.40[5][a], above*, the proper method for obtaining review is to appeal the order [*Quackenbush v. Allstate Insurance Co. (1996) 517 U.S. 706, 714-715, 116 S. Ct. 1712, 135 L. Ed. 2d 1* (disavowing statement in *Thermtron Products, Inc. v. Hermansdorfer (1976) 423 U.S. 336, 352-353, 96 S. Ct. 584, 46 L. Ed. 2d 542* , that review is available only by mandamus)]. As a discretionary appeal, the appeal of the remand of a class action under *28 U.S.C.S. § 1453(c)(1)* requires the permission of the court of appeals,

which must be applied for in accordance with *Fed. R. App. P., Rule 5* [Amalgamated Transit Union Local 1309, *AFL-CIO v. Laidlaw Transit Servs., Inc. (9th Cir. 2005) 435 F.3d 1140, 1145]* .

Occasionally, the issues of removal and remand may be inseparable from another issue. For example, when an action is removed to district court and that court enjoins the prosecution of a parallel state action, the propriety of the underlying removal is intertwined with the propriety of the granting of the injunction. Thus, the refusal to remand is an issue properly reviewable on an appeal of the propriety of the preliminary injunction [*Takeda v. Northwestern Nat. Life Ins. Co. (9th Cir. 1985) 765 F.2d 815, 818]* .

[c] Standard of Review

The standard of review in determining whether the district court erred in denying remand to the state court is whether the case was properly removed to the federal court under *28 U.S.C.S. § 1441* in the first instance. The court will strictly construe the removal statute against removal jurisdiction [*Takeda v. Northwestern Nat. Life Ins. Co. (9th Cir. 1985) 765 F.2d 815, 818* ; *Salveson v. Western States Bankcard Ass'n (9th Cir. 1984) 731 F. 2d 1423, 1426* ; *see Karambelas v. Hughes Aircraft Company (9th Cir. 1993) 992 F.2d 971, 973* (if party makes no motion to remand case to state court, question is not whether removal was proper, but whether federal court would have had original jurisdiction had case been filed in that court)]. Because *28 U.S.C.S. § 1441* authorizes removal of any action based on a claim or right arising under federal law, the question on review thus becomes whether the district court correctly concluded that the plaintiff's claim arose under federal law [*Carpenters Southern Cal. Admin. v. Majestic Housing (9th Cir. 1984) 743 F.2d 1341, 1343]* . That question is reviewed de novo [*Sullivan v. First Affiliated Securities, Inc. (9th Cir. 1987) 813 F.2d 1368, 1371 , cert. denied sub nom. First Alliance Sec. v. Sullivan 98 L. Ed. 2d 106]* .

When an order granting remand is reviewable [*see* discussion in [b], *above*], apparently the district court's order should not be overturned unless it was clearly erroneous as a matter of law [*see Survival Sys. v. U.S. Dist. Ct. for S.D. Cal. (9th Cir. 1987) 825 F.2d 1416, 1419 n.2 , cert. denied, 484 U.S. 1042 (1988)]* . The type of review depends on the nature of the decisions made in the remand order [*Sever v. Alaska Pulp Corp. (9th Cir. 1992) 978 F.2d 1529, 1539]* .

The standard for reviewing an award of attorney's fees under *28 U.S.C.S. § 1447(c)* is whether the district court abused its discretion [*Moore v. Permanente Medical Group, Inc. (9th Cir. 1992) 981 F.2d 443, 447-448]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureRemovalPostremoval RemandsAppellate ReviewCivil ProcedureRemovalPostremoval RemandsMotions for RemandCivil ProcedureRemovalPostremoval RemandsProcedural DefectsCivil ProcedureRemediesCosts & Attorney FeesGeneral Overview

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B. Removal of Causes

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[Reserved]

§§ 265.41[Reserved]

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§ 265.50 Related Matthew Bender Publications

For forms pertaining to federal practice, see Bender's Federal Practice Forms (Matthew Bender) and Moore's Manual--Forms (Matthew Bender)

For discussion of federal practice and procedure, see Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California (Matthew Bender), Bender's Federal Practice Manual (Matthew Bender), Federal Litigation Guide (Matthew Bender), Moore's Federal Practice (3rd ed. Matthew Bender), and Moore's Manual--Federal Practice and Procedure (Matthew Bender)

For forms relating to discovery in federal court, see Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California (Matthew Bender) and Bender's Forms of Discovery (Matthew Bender)

For discussion relating to evidence in federal courts, see Weinstein's Evidence, United States Rules (Matthew Bender)

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§ 265.51 Federal Statutes

Original jurisdiction of district courts in all civil actions arising under the Constitution, laws, or treaties of United States. *28 U.S.C.S. § 1331*

Denial and imposition of cost in cases in which plaintiff adjudged to be entitled to recover less than $75,000. *28 U.S.C.S. § 1332*

Federal courts have original jurisdiction of all civil actions in which matter in controversy exceeds $75,000, exclusive of interest and costs, and is between citizens of different states, citizens of state and foreign states, citizens of different states in which foreign citizens are additional parties, and foreign state as plaintiff and citizens of state or different states. *28 U.S.C.S. § 1332(a)*

Corporation deemed citizen for purposes of diversity jurisdiction of state by which it has been incorporated and of state where it has its principal place of business. *28 U.S.C.S. § 1332(c)(1)*

In direct action against insurer to which insured not joined as defendant, insurer deemed citizen of state of which insured is citizen, as well as of any state in which insurer is incorporated and of any state where it has principal place of business. *28 U.S.C.S. § 1332(c)(1)*

Legal representative of decedent's estate deemed citizen only of same state as decedent for purposes of diversity jurisdiction and removal. *28 U.S.C.S. § 1332(c)(2)*

Legal representative of infant or incompetent deemed citizen only of same state as infant or incompetent for purposes of diversity jurisdiction and removal. *28 U.S.C.S. § 1332(c)(2)*

District court lacks jurisdiction in action in which any party, by assignment or otherwise, has been improperly joined to invoke court's jurisdiction. *28 U.S.C.S. § 1359*

Supplemental jurisdiction over related state claims, including joinder or intervention of additional parties. *28 U.S.C.S. § 1367(a)*

Exceptions applicable to diversity cases. *28 U.S.C.S. § 1367(b)*

Factors to be considered in deciding whether to exercise supplemental jurisdiction. *28 U.S.C.S. § 1367(c)*

Tolling of limitation period for claim asserted under supplemental jurisdiction. *28 U.S.C.S. § 1367(d)*

Defective allegations of jurisdiction permitted to be amended, upon terms in trial or appellate courts. *28 U.S.C.S. § 1653*

Citizenship of national banks for purposes of diversity jurisdiction. *28 U.S.C.S. § 1348*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 265.52 Federal Rules of Civil Procedure

Pleading setting forth claim for relief must contain short and plain statement of grounds on which court's jurisdiction depends, unless court already has jurisdiction and claim needs no new grounds of jurisdiction to support it. *Fed. R. Civ. P., Rule 8(a)(1)*

Defense of lack of subject matter jurisdiction may be asserted either in responsive pleading or by motion. *Fed. R. Civ. P., Rule 12(b)(1)*

Dismissal of action when court lacks jurisdiction of subject matter. *Fed. R. Civ. P., Rule 12(h)(3)*

Unincorporated association or partnership having no capacity to sue or be sued as permitted to sue or be sued in its common name in federal courts for purpose of enforcing for or against it a substantive right existing under Constitution or laws of United States. *Fed. R. Civ. P., Rule 17(b)*

Capacity or authority of party to sue or be sued in representative capacity as required to be alleged in order to show jurisdiction of court. *Fed. R. Civ. P., Rule 9(b)*

Executor, administrator, guardian, bailee, trustee of express trust, party with whom or in whose name contract has been made for benefit of another, or party authorized by statute as permitted to sue in his or her own name without joining party for whose benefit action is brought. *Fed. R. Civ. P., Rule 17(a)*

Interpleader. *Fed. R. Civ. P., Rule 22*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 265.53 Local Federal Rules

[1] Central District of California

Form of pleadings and papers filed with court. U.S. Dist. Ct., Cen. Dist. of Cal., Rule 3

Jurisdictional allegations. U.S. Dist. Ct., Cen. Dist. of Cal., Rule 3.7.1

[2] Eastern District of California

Form of papers presented for filing with the court. U.S. Dist. Ct., East. Dist. of Cal., Rules 3-200, 7-130

Jurisdictional allegations. U.S. Dist. Ct., East. Dist. of Cal., Rule 8-204

[3] Northern District of California

Format and filing of pleadings, papers, and amendments. U.S. Dist. Ct., No. Dist. of Cal., Rules 3-2, 3-4 et seq.

Jurisdictional allegations. U.S. Dist. Ct., No. Dist. of Cal., Rule 3-5

[4] Southern District of California

Format and filing of pleadings, papers, and amendments. U.S. Dist. Ct., So. Dist. of Cal., Rules 3.1, 5.1

Legal Topics:

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

GovernmentsCourtsRule Application & Interpretation

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§ 265.54 Decisions

[1] Amending of Jurisdictional Allegations

Amendment of incorrect jurisdictional allegation permitted only when jurisdiction does in fact exist. *Newman-Green, Inc. v. Alfonzo-Larrain (1989) 490 U.S. 826, 830-831, 109 S. Ct. 2218, 104 L. Ed. 2d 893*

[2] Ancillary Jurisdiction

State claim raised in ongoing federal action by defendant, or by another person whose rights might be lost irretrievably if claim cannot be raised in action, falls within federal court's ancillary jurisdiction if claim has logical dependence on original complaint. *Owen Equipment & Erection Co. v. Kroger (1978) 437 U.S. 365, 375-376, 98 S. Ct. 2396, 57 L. Ed. 2d 274*

Federal court extends jurisdiction to encompass ancillary disputes whenever complete justice may be done thereby. *Consolo v. Federal Maritime Comm'n (1966) 383 U.S. 607, 617 n.14, 86 S. Ct. 1018, 16 L. Ed. 2d 131*

[3] Case or Controversy

[a] Mootness

When injury suffered by plaintiff is limited in duration and there is a reasonable expectation that plaintiff will be subject to same action in the future, case is "capable of repetition yet evading review," and not moot. *Roe v. Wade (1973) 410 U.S. 113, 125, 93 S. Ct. 705, 35 L. Ed. 2d 147*

Amendment or repeal of a statute generally moots the action challenging it. *Native Village of Noatak v. Blatchford (9th Cir. 1994) 38 F.3d 1505, 1510*

[b] Ripeness

Person challenging constitutionality of criminal statute did not have to first violate the statute and risk arrest and prosecution for case to be ripe for review. *Steffel v. Thompson (1974) 415 U.S. 452, 459, 94 S. Ct. 1209, 39 L. Ed. 2d 505*

Declaratory relief action to determine existence of insurance coverage not barred by doctrine of ripeness. *Maryland Casualty Co. v. Pacific Coal & Oil Co. (1941) 312 U.S. 270, 273-274, 61 S. Ct. 510, 85 L. Ed. 826*

Without a more fully developed factual record, including evidence of some real threat of enforcement of canons for judicial candidates, and without a showing that withholding federal adjudication would have imposed hardship on plaintiff, the district court should have declined jurisdiction for lack of a justiciable case or controversy. Given that the constitutional challenges were not ripe, the appellate court vacated the district court's order and judgment and remanded with instructions to dismiss. *Alaska Right to Life v. Feldman (9th Cir. 2007) 504 F.3d 840, 851-852*

An as-applied taking claim is ripe only if the landowner can establish that (1) the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue, and (2) the landowner has sought compensation through the procedures the state has provided for doing so. *Vacation Vill., Inc. v. Clark County (9th Cir. 2007) 497 F.3d 902, 912*

[c] Standing

Assignee of claim has standing under *Lujan's* standards for Article III jurisdiction. *Sprint Communs. Co., L.P. v. APCC Servs. (2008) 554 U.S. 269, 128 S. Ct. 2531, 171 L. Ed. 2d 424, 431, 437*

General criteria for dismissing action for lack of standing. *Lujan v. Defenders of Wildlife (1992) 504 U.S. 555, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351*

Physician challenging statute limiting distribution of contraceptives could assert constitutional privacy rights of couples denied access to the contraceptives. *Griswold v. Connecticut (1965) 381 U.S. 479, 481, 85 S. Ct. 1678, 14 L. Ed. 2d 510*

Party to restrictive race covenant who sold property in violation of covenant could also assert *Fourteenth Amendment* rights of non-Caucasian potential homebuyers. *Barrows v. Jackson (1953) 346 U.S. 249, 258-259, 73 S. Ct. 1031, 97 L. Ed. 1586*

As to *Lujan's* requirement that a plaintiff's injury be actual or imminent, a disabled individual who is currently deterred from patronizing a public accommodation due to a defendant's failure to comply with the Americans with Disabilities Act (ADA) has suffered "actual injury." *Doran v. 7-Eleven, Inc. (9th Cir. 2007) 506 F.3d 1191, 1196*

A plaintiff has standing to challenge barriers in a public accommodation under the Americans With Disabilities Act when he or she has actually encountered those barriers. A plaintiff may challenge barriers not personally encountered if those barriers have deterred the plaintiff from patronizing the public accommodation. *Skaff v. Meridien N. Am. Beverly Hills, LLC (9th Cir. 2007) 506 F.3d 832, 838*

To establish Article III standing, a litigant must show that the allegedly unlawful conduct caused him to suffer an actual or imminent injury--not a hypothetical, conjectural, or abstract injury--that a favorable decision would likely redress. *United States v. Lazarenko (9th Cir. 2006) 469 F.3d 815, 822*

To show a concrete and particularized interest, environmental plaintiffs must allege that they will suffer harm by virtue of their geographic proximity to and use of areas that will be affected by the agency's policy. *Nuclear Information and Resource Service v. Nuclear Regulatory Comm. (9th Cir. 2006) 457 F.3d 941, 953*

[4] Choice of Law as Separate Issue

Choice-of-law concerns are separate from jurisdictional questions, and arise only after jurisdiction is established and should not complicate or distort jurisdictional inquiry. *Keeton v. Hustler Magazine, Inc. (1984) 465 U.S. 770, 778, 104 S. Ct. 1473, 79 L. Ed. 2d 790*

[5] Diversity of Citizenship Jurisdiction

[a] In General

State law limiting the availability of the class action based on the relief sought did not apply under federal diversity jurisdiction. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co. (2010) -- U.S. --, 130 S. Ct. 1431, 176 L. Ed. 2d 311, 318-319*

When jurisdiction is based on diversity of citizenship, court lacks power to entertain claim against third-party defendant when action was dismissed as to primary defendant and both plaintiff and third-party defendant were citizens of same state. *Owen Equipment & Erection Co. v. Kroger (1978) 437 U.S. 365, 376-377, 98 S. Ct. 2396, 57 L. Ed. 2d 274*

In cases in which jurisdiction is based on diversity of citizenship, all parties on one side must be of diverse citizenship to those on other side. *Treinies v. Sunshine Mining Co. (1939) 308 U.S. 66, 71, 60 S. Ct. 44, 84 L. Ed. 85*

California State Board of Equalization, as agency of state for assessing and collecting state taxes, has no "citizenship" for purposes of diversity jurisdiction under *28 U.S.C.S. § 1332* or interpleader under *28 U.S.C.S. § 1335*, which requires diversity of citizenship. *Morongo Band of M. Indians v. Cal. St. Bd. of Equal. (9th Cir. 1988) 849 F.2d 1197, 1200*

District court's abstention from exercising diversity jurisdiction because of subsequent parallel state actions held to be abuse of discretion because there was no possibility of fragmentation of case between federal and state courts, issues before district court had been fully briefed and were ripe for resolution, state proceedings had been stayed, and no significant question of state law or sensitive area of state policy was involved. *Mobil Oil Corp. v. City of Long Beach (9th Cir. 1985) 772 F.2d 534, 541-543*

Diversity of citizenship destroyed by joinder under *Fed. R. Civ. P., Rule 19*, of employer as necessary party in action by employee against provider ofgroup medical insurance to employer's company. *Takeda v. Northwestern Nat. Life Ins. Co. (9th Cir. 1985) 765 F.2d 815, 819-821*

Fed. R. Civ. P., Rule 19(a)(2), required joinder of child in parent's action because child had interest relating to subject of action and was so situated that disposition of action in his absence could impair or impede his ability to protect that interest. *Aguilar v. Los Angeles County (9th Cir. 1985) 751 F.2d 1089, 1091-1094*

Federal court as having jurisdiction over cases when domestic relations issues are implicated only tangentially; court as able to exercise discretion to decline jurisdiction when issues are closely related to domestic relations exception, and comity and policy counsel against federal court intervention. *Fern v. Turman (9th Cir. 1984) 736 F.2d 1367, 1370*

When jurisdiction of district court is based on diversity of citizenship, pleading Doe defendants in complaint destroys

that jurisdiction. *Garter-Bare Co. v. Munsingwear, Inc. (9th Cir. 1980) 650 F.2d 975, 981*

Permissive joinder properly allowed when defendant joined was proper party to litigation but diversity jurisdiction was destroyed because party defendant's residence was state of plaintiff bank's incorporation. *Desert Empire Bank v. Ins. Co. of N. America (9th Cir. 1980) 623 F.2d 1371, 1374*

Citizenship of each member of unincorporated association or partnership as required to be alleged regardless of fact that under state law such entity is capable of suing or being sued. *Fifty Associates v. Prudential Ins. Co. of America (9th Cir. 1970) 446 F.2d 1187, 1190* (applying rule to partnerships)

Citizenship of bankrupt as determinative and that of trustee as immaterial. *Bush v. Elliott (1906) 202 U.S. 477, 484, 26 S. Ct. 668, 50 L. Ed. 1114*

In passing on presence of diversity jurisdiction, court as required to consider citizenship of real party in interest. *Fernandez-Cerra v. Commercial Ins. Co. of Newark (D. P.R. 1972) 344 F. Supp. 314, 317*

In cases where one party represents another, nature of representation, as defined by state law, as required to be studied to determine whether representing party is real party in interest or nominal beneficiary party. *Fernandez-Cerra v. Commercial Ins. Co. of Newark (D. P.R. 1972) 344 F. Supp. 314, 317*

Federal court as not having jurisdiction to entertain suit in which both plaintiff and defendant are aliens. *Dassigienis v. Cosmos Carriers & Trading Corp. (2d Cir. 1971) 442 F.2d 1016, 1017*

Alien required to aver that he or she is subject or citizen of foreign state. *Blair Holdings Corp. v. Rubenstein (S.D. N.Y. 1954) 122 F. Supp. 602, 603*

Actual service of process on diverse defendants as required to confer subject matter jurisdiction under *28 U.S.C.S. § 1335*. *Cripps v. Life Ins. Co. of North America (9th Cir. 1992) 980 F. 2d 1261, 1265-1266*

Subject matter jurisdiction under interpleader as unavailable to settle rent money dispute involving California Indian tribe, member of that tribe, and California State Board of Equalization; no diversity of citizenship between tribe and tribal member, and state agency as not having "citizenship" for purposes of diversity jurisdiction under *28 U.S.C.S. § 1332* and interpleader. *Morongo Band of M. Indians v. Cal. St. Bd. of Equal. (9th Cir. 1988) 849 F.2d 1197, 1200*

Reverse preemption provisions in federal statutes not barring federal diversity jurisdiction. *Hawthorne Sav. F.S.B. v. Reliance Ins. Co. (9th Cir. 2005) 421 F.3d 835, 842-844*

[b] Corporations

Petitioner's unchallenged declaration suggests that corporation's center of direction, control, and coordination, its "nerve center," and its corporate headquarters are one and the same, and they are located in New Jersey, not in *California. The Hertz Corp. v. Friend (2010) -- U.S. --, 130 S. Ct. 1181, 175 L. Ed. 2d 1029, 1044*

Corporation's principal place of business to be determined by application of "operations" or "nerve center" test. *Breitman v. May Company California (9th Cir. 1994) 37 F.3d 562, 564*

Allegations of diversity jurisdiction in action in which corporation is party are required to contain both place of incorporation and principal place of business. *Moore v. Sylvania Elec. Prod., Inc. (3rd Cir. 1972) 454 F.2d 81, 84 n.1*

Allegations of diversity jurisdiction, in case in which corporation is party, are required to show manner corporation is citizen. *Fifty Associates v. Prudential Ins. Co. of America (9th Cir. 1970) 446 F.2d 1187, 1190*

A national bank is located for the purpose of qualification for diversity jurisdiction in the State designated in its articles of association as its main office. *Wachovia Bank, National Association v. Schmidt (2006) 546 U.S. 303, 307, 126 S. Ct. 941, 163 L. Ed. 2d 797*

[c] Improper Joinder

Court permitted to look beyond pleadings and arrange parties according to actual sides in dispute. *Dawson v. Columbia Ave. Sav. Fund, Safe Deposit, Title, & Trust Co. (1905) 197 U.S. 178, 180 25 S. Ct. 420, 49 L. Ed. 713*

If nominal party having no real or substantial interest in dispute is designated simply for purpose of creating diversity of jurisdiction, such party as having been improperly joined. *McSparran v. Weist (3d Cir. 1968) 402 F.2d 867, 873*

Motive is relevant in determining whether party has been improperly joined to invoke jurisdiction of federal court. *McSparran v. Weist (3d Cir. 1968) 402 F.2d 867, 874*

[6] Eleventh Amendment

[a] General Immunity From Federal Suit

Potential vulnerability of state treasury to pay federal court judgments is the most salient factor in determining whether *Eleventh Amendment*immunity is available. *Hess v. Port Authority Trans-Hudson (1994) 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245, 260-261*

Eleventh Amendment immunity is available only in actions in which the relief sought is compensatory or retrospective in nature; the test is whether the relief will remedy future or past wrongs. *Coeur d'Alene Tribe of Idaho v. State of Idaho (9th Cir. 1994) 42 F.3d 1244, 1252*

[b] Exceptions to Eleventh Amendment Immunity

The two major exceptions to *Eleventh Amendment* Immunity are waiver by a state and abrogation of immunity by Congressional action under the enforcement provisions of the *Constitution. Atascadero State Hospital v. Scanlon (1985) 473 U.S. 234, 238, 105 S. Ct. 3142, 87 L. Ed. 2d 171* Government Employee Rights Act's provision, *42 U.S.C.S. § 2000e-5(g)(1)*, makes congressional intent to abrogate state sovereign immunity unmistakably clear, in that it expressly covers state employees, and expressly gives them a right to collect damages payable by the employer, the state. *Alaska v. U.S. (9th Cir. 2009) 564 F.3d 1062, 1066*

[c] State Agencies

Overriding factor in determining whether *Eleventh Amendment* immunity is available to a state agency is whether any recovery against the agency would be payable from the state treasury; i.e., whether the state is the real party in interest. *Hess v. Port Authority Trans-Hudson (1994) 513 U.S. 30, 115 S. Ct. 394, 130 L. Ed. 2d 245, 260-261*

[d] State Officials

State officials acting under an unconstitutional statute or in an unauthorized manner are acting individually and not in their officials capacities on the theory that a state cannot act in an unconstitutional manner and, hence, cannot authorize its officials to do so. *Ex Parte Young (1909) 209 U.S. 123, 159-160, 28 S. Ct. 441, 52 L. Ed. 714*

[7] Federal Jurisdiction Required to Be Pleaded

Case cognizable in federal trial court, in absence of diversity of citizenship, unless it appears from face of complaint that determination of suit depends on question of federal law. *Pan American Pac. Corp. v. Superior Court (1961) 366 U.S. 656, 663, 81 S. Ct. 1303, 6 L. Ed. 2d 584*

Federal courts are courts of limited jurisdiction. *Grace v. American Central Ins. Co. (1883) 109 U.S. 278, 283, 3 S. Ct. 207, 27 L. Ed. 932*

Failure to present specific basis for federal jurisdiction in complaint is not fatal when facts alleged are sufficient to support jurisdiction. *L.A. Branch NAACP v. L.A. Unified School Dist. (9th Cir. 1983) 714 F.2d 946, 951 , cert. denied, 467 U.S. 1209 (1984)*

[8] Federal Question Jurisdiction

Complaint alleging violation of federal statute as element of state cause of action, when Congress has determined that no private federal cause of action exists for violation, does not state claim "arising under the Constitution, laws, or treaties of the United States" under *28 U.S.C.S. § 1331*. *Merrell Dow Pharmaceuticals v. Thompson (1986) 478 U.S. 804, 817, 106 S. Ct. 3229, 92 L. Ed. 2d 650, 664*

In suit involving jurisdiction based on federal question, plaintiff's claim must present federal question unaided by anything alleged in anticipation of avoidance of defenses that defendant may interpose. *Skelly Oil Co. v. Phillips Petroleum Co. (1949) 339 U.S. 667, 672, 70 S. Ct. 876, 94 L. Ed. 1194*

In causes involving federal question jurisdiction, averments of complaint attempting to bring case within federal jurisdiction must be real and substantial. *Blumenstock Bros. Advertising Agency v. Curtis Pub. Co. (1919) 252 U.S. 436, 440, 40 S. Ct. 385, 64 L. Ed. 649*

Malicious prosecution action brought after successful defense of federal securities and racketeering charges did not present a federal question because task of deciding whether underlying federal claims had been legally tenable did not raise a substantial question of federal law. *Berg v. Leason (9th Cir. 1994) 32 F.3d 422, 425*

When declaratory judgment plaintiff asserts claim that is in nature of defense to threatened or pending action, character of threatened or pending action determines whether federal question jurisdiction exists with regard to declaratory judgment action; if declaratory judgment defendant could have brought coercive action in federal court to enforce its rights, jurisdiction exists for declaratory relief. *Levin Metals Corp. v. Parr-Richmond Terminal Co. (9th Cir. 1986) 799 F.2d 1312, 1315*

Suit challenging city's interpretation of ordinance is not forbidden appeal of state court final judgment under Rooker-Feldman doctrine. *Manufactured Home Cmtys., Inc. v. City of San Jose (2005) 420 F.3d 1022, 1029-1030*

Specific statutes may grant jurisdictional exceptions to the Rooker-Feldman doctrine doctrine. *Doe v. Mann (2005) 415 F.3d 1038, 1043*

Jurisdiction on basis of claim arising under laws of United States is not established by assertion of federal preemption

defense to claims arising under state law. *Fern v. Turman (9th Cir. 1984) 736 F.2d 1367, 1368-1369* (court applied domestic relations exception to diversity jurisdiction)

Jurisdictional amount need not be alleged under *28 U.S.C.S. § 1337*. *Felter v. Southern Pac. Co. (1959) 359 U.S. 326, 329-330, 79 S. Ct. 847, 3 L. Ed. 2d 854*

Action under *49 U.S.C.S. § 20(11)* (*now see 49 U.S.C.S. § 11707(a)(1)*) as arising under *28 U.S.C.S. § 1337* (act of Congress regulating commerce). *Peyton v. Railway Express Agency, Inc. (1942) 316 U.S. 350, 351-353, 62 S. Ct. 1171, 86 L. Ed. 1525*

Erroneous discharge and union's breach of duty entitle employees to remedy against both union and employer. *Hines v. Anchor Motor Freight, Inc. (1976) 424 U.S. 554, 572, 96 S. Ct. 1048, 47 L. Ed. 2d 231*

Pleading multiple bases of federal court jurisdiction as permitted. *Technical Tape Corp. v. Minnesota Mining & Mfg. Co. (2d Cir. 1952) 200 F.2d 876, 877-878*

General subject matter jurisdiction of federal court not narrowed by Safe Drinking Water Act, *42 U.S.C.S. § 300g-3(b)(2)*1453(c)(1). *United States v. Alisal Water Corp. (9th Cir. 2005) 431 F.3d 643, 651*

Jurisdiction of action to rescind sale and recover consideration under *15 U.S.C.S. § 77v(a)* irrespective of citizenship of parties or amount in controversy. *Deckert v. Independence Shares Corp. (1940) 311 U.S. 282, 289-290, 61 S. Ct. 229, 85 L. Ed. 189*

Federal Employers' Liability Act creates cause of action against state-owned railroad enforceable in state court. *Hilton v. S.C. Pub. R. Com. (1991) 502 U.S. 197, 112 S. Ct. 560, 116 L. Ed. 2d 560, 567, 572*

Jurisdiction, where no diversity of citizenship, as dependent on Federal Employers' Liability Act even though act complained of constitutes violation of *Safety Appliance Act. Jacobson v. New York, New Haven & Hartford Co. (1st Cir. 1953) 206 F.2d 153, 158*

Federal district court has concurrent jurisdiction with United States Claims Court over Tucker Act claims and mixed-Tucker Act claims not exceeding $10,000, but Federal Circuit and not Ninth Circuit has exclusive jurisdiction over appeal. *Brant v. Cleveland Nat. Forest Service (9th Cir. 1988) 843 F.2d 1222, 1223-1224*

Suit to recover value of property taken by government as founded either on Constitution or on implied promise to pay. *United States v. Dickinson (1947) 331 U.S. 745, 747, 67 S. Ct. 1382, 91 L. Ed. 1789*

Jurisdictional amount as required to be alleged in suit by or against corporation incorporated by Act of Congress and of which United States is more than one-half owner. *Federal Intermediate Credit Bank v. Mitchell (1927) 277 U.S. 213, 214, 48 S. Ct. 114, 72 L. Ed. 854*

Jurisdiction under *28 U.S.C.S. § 1353* is not available for dispute over rent due on lease of Indian allotment, because complaint assumed validity of Indian's interest in allotment and authority to enter into lease with respect to that interest. *Morongo Band of Mission Indians v. Cal. St. Bd. of Equal. (9th Cir. 1988) 849 F.2d 1197, 1201*

Operation of Attorney General's certification invoking *28 U.S.C.S. § 2679*, Federal Employees Liability Reform and Tort Compensation Act of 1988, upon federal jurisdiction over individual federal employee. *Osborn v. Haley (2007) 549 U.S. 225, 127 S. Ct. 881, 166 L. Ed. 2d 819*

California Elections Commission proceeding was ongoing for purposes of *Younger* abstention, in that while the

commission had determined violation, it had not yet ascertained the applicable fine, so the federal district court was required to abstain under the four *Younger* principles. *San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose (9th Cir. 2008) 546 F.3d 1087, 1092*

California court of appeal could exercise jurisdiction over case concerning assignment of patent royalties, even if the affirmative defense of the invalidity of the patent itself was raised. *Applera Corp. v. MP Biomedicals, LLC (2009) 173 Cal. App. 4th 769, 785, 93 Cal. Rptr. 3d 178*

Inventor's claim for damages for having to defend the reexamination of patents during which he was unable to enforce his patent rights arose under federal patent laws and therefore was subject to the exclusive jurisdiction of the federal courts under *28 U.S.C. § 1338*. *Lockwood v. Sheppard, Mullin, Richter & Hampton (2009) 173 Cal. App. 4th 675, 687 93 Cal. Rptr. 3d 220*

[9] Forum Selection Clause

Federal court jurisdiction is not precluded by forum selection clause (in contract between New Jersey corporation and Delaware corporation operating in California) that states "courts of California, County of Orange, shall have jurisdiction over any action at law relating to ... this contract"; clause is permissive, not mandatory. *Hunt-Wesson Foods, Inc. v. Supreme Oil Co. (9th Cir. 1987) 817 F.2d 75, 77*

District court was in error in assuming that state and federal courts would have had jurisdiction in absence of forum selection clause when there were insufficient contacts with California to confer jurisdiction over New Jersey corporation; when forum selection clause is permissive, not mandatory, federal district court errs in remanding to state court. *Hunt-Wesson Foods, Inc. v. Supreme Oil Co. (9th Cir. 1987) 817 F.2d 75, 77-78*

[10] Grounds for Federal Jurisdiction

Federal courts have only the power that is authorized by U.S. Const., art. III, and statutes enacted by Congress pursuant to that article. *Bender v. Williamsport Area School Dist. (1986) 475 U.S. 534, 541, 106 S. Ct. 1326, 89 L. Ed. 2d 501*

Federal rules of civil procedure do not create or withdraw federal jurisdiction. *Owen Equipment & Erection Co. v. Kroger (1978) 437 U.S. 365, 370, 98 S. Ct. 2396, 57 L. Ed. 2d 274*

States have no power to enlarge or contract federal jurisdiction, however extensive their power to create and define substantive rights. *BNSF Rail. Co. v.O'Dea (9th Cir. 2009) 572 F.3d 785, 788-789* ; *Duchek v. Jacobi (9th Cir. 1981) 646 F. 2d 415, 417-419*

Federal courts are empowered to act only in those specific instances authorized by *Congress. McGlynn v. Employers Commercial Union Ins. Co. of America (D.P.R. 1974) 386 F. Supp. 774, 776-777*

[11] Pendent Jurisdiction

District court has jurisdiction over state-law claims in action if federal-law claims and state-law claims in action derive from common nucleus of operative fact and are such that plaintiff would ordinarily be expected to try them all in one judicial proceeding. *Carnegie-Mellon Univ. v. Cohill (1988) 484 U.S. 343, 349, 108 S. Ct. 614, 98 L. Ed. 2d 720*

If state and federal claims derive from common nucleus of operative fact, or, without regard to federal and state character, claims are such that they would ordinarily be brought in single proceeding, then, assuming substantiality of

federal issues, court may exercise its pendent jurisdiction to hear both federal and state claims. *United Mine Workers v. Gibbs (1966) 383 U.S. 715, 725, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218*

No separate and independent claim or cause of action under *28 U.S.C.S. § 1441(c)* as occurring when there is single wrong to plaintiff, for which relief is sought, arising from interlocked series of transactions. *American Fire & Cas. Co. v. Finn (1951) 341 U.S. 6, 13-14, 71 S. Ct. 534, 95 L. Ed. 702*

Refusal to exercise supplemental jurisdiction in case raising novel issues of state law. *Manufactured Home Cmtys., Inc. v. City of San Jose (2005) 420 F.3d 1022, 1034*

Dismissal of pendent state constitutional claims authorized when they raised novel questions of state law and court had already dismissed federalconstitutional claims. Harris v. Joint School District No. 241 *(9th Cir. 1994) 41 F.3d 447, 449*

Pendent jurisdiction depends on federal court's jurisdiction over one claim, to which second, nonfederal claim may be appended; without federal claim on which to append related state cause of action, federal court has no basis for asserting jurisdiction. *Aragon v. Federated Dept. Stores, Inc. (9th Cir. 1985) 750 F.2d 1447, 1457-1458*

Federal court's refusal to exercise its power to assume pendent jurisdiction requires dismissal of state claims; court is unable to decline to exercise its power for purposes of jurisdiction and assert its power for purposes of ordering dismissed claims to arbitration. *Kehr v. Smith Barney, Harris Upham & Co., Inc. (9th Cir. 1984) 736 F.2d 1283, 1287*

Pendent jurisdiction existed over state claims of fraud and malpractice against class attorneys, deriving from common operative fact with federal claims, when jurisdiction over claims of fraud in earlier settlement existed. *Valerio v. Boise Cascade Corp. (9th Cir. 1981) 645 F.2d 699, 700*

[12] Amount

[a] In General

Sum claimed by plaintiff in prayer for relief controls for purposes of determining requisite jurisdictional amount if claim is apparently made in good faith. *St. Paul Mercury Indem. Co. v. Red Cab Co. (1937) 303 U.S. 283, 288-289, 58 S. Ct. 586, 82 L. Ed. 845*

Dismissal of action for failure to allege requisite jurisdictional amount permitted only when it appears to legal certainty that claim is really for less than jurisdictional amount. *St. Paul Mercury Indem. Co. v. Red Cab Co. (1937) 303 U.S. 283, 288-289, 58 S. Ct. 586, 82 L. Ed. 845*

Inability of plaintiff to recover amount adequate to give court jurisdiction does not in itself show bad faith. *St. Paul Mercury Indem. Co. v. Red Cab Co. (1937) 303 U.S. 283, 289, 58 S. Ct. 586, 82 L. Ed. 845*

Failure to allege jurisdictional amount deprives court of diversity jurisdiction. *Century Southwest Cable Television, Inc. v. CIIF Associates (9th Cir. 1994) 33 F.3d 1068 1071*

Parties permitted to aggregate all claims over which court would independently have jurisdiction but for jurisdictional amount requirement; single plaintiff is able to aggregate as many claims as he or she has against single diverse defendant in order to meet jurisdictional amount, even if no single claim reaches that amount; plaintiff may aggregate several federal question claims against single defendant in order to reach jurisdictional amount; right of aggregation exists even when one claim is based on diversity of citizenship and one or more on presence of federal question. *Hunter v. United Van Lines (9th Cir. 1984) 746 F.2d 635, 650*

[b] Joinder of Claims and Parties

Multiple-party plaintiffs not permitted to combine separate and distinct claims in single suit in order to satisfy requisite jurisdictional amount unlessplaintiffs have joined to enforce single title or right in which they have common and undivided interest. *Pinel v. Pinel (1916) 240 U.S. 594, 596, 36 S. Ct. 416, 60 L. Ed. 817*

Claims of minority shareholders of telephone company against majority shareholders for breach of fiduciary duty were common and undivided interest under California law that could therefore be aggregated to satisfy jurisdictional amount. *Eagle v. American Tel. and Tel. Co. (9th Cir. 1985) 769 F.2d 541, 545-547*

Plaintiffs in class action not permitted to aggregate claims or combine potential attorney's fees to meet jurisdictional amount requirement. *Goldberg v. CPC Intern., Inc. (9th Cir. 1982) 678 F.2d 1365, 1367*

Plaintiff permitted to aggregate causes of action in order to satisfy jurisdictional amount requirement. *Lemmon v. Cedar Point, Inc. (6th Cir. 1969) 406 F.2d 94, 96*

Plaintiff not permitted to combine claim with defendant's compulsory counterclaim if defendant has properly objected to court's jurisdiction. *Motorists Mutual Ins. Co. v. Simpson (7th Cir. 1968) 404 F.2d 511, 514*

[c] Objection by Defendant

Plaintiff has burden of proof when jurisdiction of court challenged by defendant in answer. *KVOS, Inc. v. Associated Press (1936) 299 U.S. 269, 278, 57 S. Ct. 197, 81 L. Ed. 183*

[13] Raising Lack of Jurisdiction

Dismissal of action for lack of subject matter jurisdiction always timely and permissible. *Louisville & N.R. Co. v. Mottley (1908) 211 U.S. 149, 152, 29 S. Ct. 42, 53 L. Ed. 126* (appellate court); *In re Union Nat'l Bank & Trust Co. of Souderton, Pa. (E.D. Pa. 1968) 287 F. Supp. 431, 433* (trial court)

Federal jurisdiction not created by aggregating state-law claim with federal claim that does not meet jurisdictional amount requirement--even if state-law claim arises out of same nucleus of operative facts as federal claim. *Hunter v. United Van Lines (9th Cir. 1984) 746 F.2d 635, 652*

Challenge to court's jurisdiction is not waivable. *Savarese v. Edrick Transfer & Storage, Inc. (9th Cir. 1975) 513 F.2d 140, 142 n.1*

Challenge to district court's subject matter jurisdiction as not waivable and when made as required to be considered by court. *Savarese v. Edrick Transfer & Storage, Inc. (9th Cir. 1975) 513 F.2d 140, 142 n. 1*

Burden of proving jurisdiction of district court as resting with the party alleging it. *McNutt v. General Motors Acceptance Corp. (1935) 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135*

Motion to dismiss for lack of subject matter jurisdiction as always timely and permissible. *In re Union Nat'l Bank & Trust Co. of Souderton, Pa. (E.D. Pa. 1968) 287 F. Supp. 431, 433*

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§ 265.55 Law Reviews

Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990, 24 U.C. Davis L. Rev. 735 (1991)*

Note, *The Congressional Resurrection of Supplemental Jurisdiction in the Post-Finley Era, 42 Hastings L.J. 1611 (1991)*

Note, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context, 100 Yale L.J. 511 (1990)*

Note, *Second Bites at the Jurisdictional Apple: A Proposal for Preventing False Assertions of Diversity of Citizenship, 41 Hastings L.J. 1417 (1990)*

Note, *Federal Court Abstention in Diversity of Citizenship Cases, 62 S. Cal. L. Rev. 1237 (1989)*

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Winters, *Jurisdiction Over Unnamed Plaintiffs in Multistate Class Actions, 73 Cal. L. Rev. 181 (1985)*

Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 36 Stan. L. Rev. 895 (1984)*

Comment, *Federal Jurisdiction and the Domestic Relations Exception: A Search for Parameters, 31 UCLA L. Rev. 843 (1984)*

Note, *Suits by Foreigners Against Foreign States in United States Courts: A Selective Expansion of Jurisdiction, 90 Yale L.J. 1861 (1981)*

Legal Topics:

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§ 265.60 Related Matthew Bender Publications

For forms relating to removal, see 4 Bender's Federal Practice Forms and 1 Moore's Manual--Federal Practice Forms, ch. 8 (Matthew Bender)

For discussion relating to removal, see Moore's Federal Practice, Ch. 107 (3rd ed. Matthew Bender), 1 Moore's Manual--Federal Practice and Procedure, ch. 8, and Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 3 (Matthew Bender)

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Federal question jurisdiction. *28 U.S.C.S. § 1331*

Diversity of citizenship jurisdiction. *28 U.S.C.S. § 1332*

Other grounds for original federal district court jurisdiction. *28 U.S.C.S. § 1333 et seq.*

Actions removable generally. *28 U.S.C.S. § 1441*

Removal in specified actions. *28 U.S.C.S. § 1442 et seq.*

Nonremovable actions. 28 U.S.C.S. § 1454

Removal procedure. *28 U.S.C.S. § 1446*

Defendant seeking removal as required to give written notice to all adverse parties. *28 U.S.C.S. § 1446(d)*

Procedure after removal generally. *28 U.S.C.S. § 1447*

Procedure for remand. *28 U.S.C.S. § 1447(c), (d)*

District court may remand all matters in which state law predominates if they were removed by joinder with separate and independent claim or cause of action within court's federal question jurisdiction. *28 U.S.C.S. § 1441(c)*

Authority of district court to order case remanded, and to order payment of just costs, actual expenses, and attorney's fees on remand. *28 U.S.C.S. § 1447(c)*

Remand order as generally not reviewable on appeal or otherwise. *28 U.S.C.S. § 1447(d)*

Process or service after removal. *28 U.S.C.S. § 1448*

Supplying state court record. *28 U.S.C.S. § 1449*

Effect of attachment, bond, or order in state court action. *28 U.S.C.S. § 1450*

Removal of bankruptcy related claims. *28 U.S.C.S. § 1452*

Corporation as citizen of state where it is incorporated and state where it has its principal place of business for purposes of removal under *28 U.S.C.S. § 1441*. *28 U.S.C.S. § 1332(c)(1)*

In direct action against incorporated or unincorporated insurer, when insured is not joined as defendant, insurer as also citizen of state where insured is citizen. *28 U.S.C.S. § 1332(c)(1)*

Removal of otherwise nonremovable claim or cause of action when joined with separate and independent claim or cause of action within district court's federal question jurisdiction. *28 U.S.C.S. § 1441(c)*

Removal of action or proceeding relating to an arbitration agreement subject to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *9 U.S.C.S. § 204*

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Service and filing of motions and papers. *Fed. R. Civ. P., Rule 5*

Time for service of motions and affidavits. *Fed. R. Civ. P., Rule 6(d), (e)*

Motion procedures generally. *Fed. R. Civ. P., Rule 7(b)*

Form of pleadings. *Fed. R. Civ. P., Rule 10*

Signing of pleadings, motions, and papers; sanctions. *Fed. R. Civ. P., Rule 11*

Defense based on lack of jurisdiction. *Fed. R. Civ. P., Rule 12(b)*

Dismissal of action for lack of jurisdiction. *Fed. R. Civ. P., Rule 12(h)(3)*

Procedure in federal action after removal and application of Federal Rules of Civil Procedure generally. *Fed. R. Civ. P., Rule 81(c)*

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§ 265.63 Local Federal Rules

[1] Central District of California

Form of pleadings and papers. U.S. Dist. Ct., Cen. Dist. of Cal., Rule 3

Jurisdictional allegations. U.S. Dist. Ct., Cen. Dist. of Cal., Rule 3.7.1

Making and opposing motions. U.S. Dist. Ct., Cen. Dist. of Cal., Rule 7

[2] Eastern District of California

Form of pleadings and papers. U.S. Dist. Ct., East. Dist. of Cal., Rules 3-200, 7-130

Jurisdictional allegations. U.S. Dist. Ct., East. Dist. of Cal., Rule 8-204

Making and opposing motions. U.S. Dist. Ct., East. Dist. of Cal., Rule 78-230

Bonds and sureties. U.S. Dist. Ct., East. Dist. of Cal., Rule 233

[3] Northern District of California

Form of pleadings and papers. U.S. Dist. Ct., No. Dist. of Cal., Rules 3-2, 3-4 et seq.

Jurisdictional allegations. U.S. Dist. Ct., No. Dist. of Cal., Rule 3-5

Making and opposing motions. U.S. Dist. Ct., No. Dist. of Cal., Rule 7

[4] Southern District of California

Form of pleadings and papers. U.S. Dist. Ct., So. Dist. of Cal., Rules 3.1, 5.1

Making and opposing motions. U.S. Dist. Ct., So. Dist. of Cal., Rule 7.1

Bonds and sureties. U.S. Dist. Ct., So. Dist. of Cal., Rule 65.1.2

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§ 265.64 Decisions

[1] Actions Removable

Only state court actions that originally could have been filed in federal court as removable to federal court. *Caterpillar Inc. v. Williams (1987) 482 U.S. 386, 107 S. Ct. 2425, 96 L. Ed. 2d 318, 327*

Complaint alleging violation of federal statute as element of state cause of action, when there is no private, federal cause of action for violation of federal statute, as not stating claim arising under Constitution, laws, or treaties of United States and removal of cause of action to federal court is improper. *Merrell Dow Pharmaceuticals v. Thompson (1986) 478 U.S. 804, 817, 106 S. Ct. 3229, 92 L. Ed. 2d 650*

[2] Artful Pleading

Artful pleading doctrine as invoked only in exceptional circumstances. *Redwood Theatres, Inc. v. Festival Enterprises (9th Cir. 1990) 908 F.2d 477, 479*

When prior federal judgment was grounded in state rather than federal law, res judicata as no basis for removal of subsequent state claims arising out of same facts. *Ultramar America, Ltd. v. Dwelle (9th Cir. 1990) 900 F.2d 1412, 1417*

Artful pleading doctrine as not justifying removal on basis of facts not alleged in complaint. *Caterpillar v. Williams (1987) 482 U.S. 386, 107 S. Ct. 2425, 96 L. Ed. 2d 318, 330*

Complaint omitting allegations of federal law that are essential to establishment of plaintiff's claim as artfully pleaded; court as properly recharacterizing artfully pleaded complaint as though it had been well pleaded. *Paige v. Henry J. Kaiser Co. (9th Cir. 1987) 826 F.2d 857, 860-861*

Artful pleading doctrine as not basis for denying remand of state law action that had been filed shortly before federal action alleging substantially samefacts, since state law claims were not barred by res judicata or preempted. *Sullivan v. First Affiliated Securities, Inc. (9th Cir. 1987) 813 F.2d 1368, 1376 , cert. denied sub nom. First Alliance Sec. v. Sullivan, 98 L. Ed. 2d 106*

If state claim is found on removal to be artfully pleaded federal claim that was previously before federal court and was dismissed, res judicata as applicable and case should be dismissed. *Salveson v. Western States Bankcard Ass'n (9th Cir. 1984) 731 F.2d 1423, 1432*

[3] Diversity

Appropriateness of petition for removal alleging diversity as close question when petition was filed after trial against nondiverse defendant was bifurcated from trial against diverse defendant, but was neither frivolous nor legally unreasonable so as to warrant sanctions under *Fed. R. Civ. P., Rule 11*. *Lemos v. Fencl (9th Cir. 1987) 828 F.2d 616, 618-619*

Removal based on diversity of citizenship as proper even though plaintiffs and original corporate defendant were all residents of California, when principal creditor of corporation with which bankrupt original corporate defendant merged was resident of another state. *Meadows v. Bicrodyne Corp. (9th Cir. 1986) 785 F.2d 670, 671-672*

Voluntary-involuntary rule as requiring that suit remain in state court unless voluntary act of plaintiff brings about change rendering case removable. *Self v. General Motors Corp. (9th Cir. 1978) 588 F.2d 655, 657*

Personal injury action brought by California resident in state court against California citizen and out-of-state corporation as not removable to federal court after final judgment against California defendant; plaintiff as neither dismissing nor discontinuing case against that defendant voluntarily or otherwise. *Self v. General Motors Corp. (9th Cir. 1978) 588 F.2d 655, 660*

Joinder of nondiverse defendants as fraudulent if pleadings do not minimally satisfy state pleading requirements, if in fact no cause of action exists, or there is no intention to secure joint judgment. *Lewis v. Time Inc. (E.D. Cal. 1979) 83 F.R.D. 455, 465 , aff'd 710 F.2d 549, 550 (1983)*

[4] Effect of Removal

Removal of civil action as according exclusive jurisdiction in federal court; state court as unable to resume jurisdiction of case unless case is remanded. *Allstate Ins. Co. v. Superior Court (1982) 132 Cal. App. 3d 670, 674-675, 183 Cal. Rptr. 330*

[5] Federal Question

Question whether claim arises under federal law as determined by complaint; defense that raises federal question as inadequate to confer federal jurisdiction. *Merrell Dow Pharmaceuticals v. Thompson (1986) 478 U.S. 804, 808, 106 S. Ct. 3229, 92 L. Ed. 2d 650*

Federal jurisdiction sufficient for removal as not created by defendant pleading counter-claim presenting federal question. *Takeda v. Northwestern Nat. Life Ins. Co. (9th Cir. 1985) 765 F.2d 815, 821-822*

[6] Pendent State Claims

District court as having discretion to remand removed case involving pendent claims on proper determination that retaining jurisdiction would be inappropriate, such as when all federal law claims have dropped out of action and only pendent state law claims remain. *Carnegie-Mellon Univ. v. Cohill (1988) 484 U.S. 343, 350-351, 357, 108 S. Ct. 614, 98 L. Ed. 2d 720*

Federal court as acquiring jurisdiction over pendent state law claims when it acquires jurisdiction on removal; dismissal of federal claim as not depriving federal court of power to adjudicate remaining pendent state claims. *Bright v. Bechtel Petroleum, Inc. (9th Cir. 1986) 780 F.2d 766, 771*

[7] Preemption

Federal preemption as ordinarily raised as defense to allegations in complaint; case as not removable to federal court on basis of federal defense, including defense of preemption, even if defense is anticipated in complaint, and even if both parties concede that federal defense is the only question truly at issue. *Caterpillar Inc. v. Williams (1987) 482 U.S. 386, 392-393, 107 S. Ct. 2425, 96 L. Ed. 2d 318, 327*

Fact that defendant might ultimately prove that plaintiff's claims are preempted as not establishing that they are removable. *Caterpillar v. Williams (1987) 482 U.S. 386, 398, 107 S. Ct. 2425, 96 L. Ed. 2d 318*

State common law action, preempted by and within civil enforcement provisions of ERISA (*29 U.S.C.S. § 1001*), as arising under federal law and removable to federal court. *Metropolitan Life Ins. Co. v. Taylor (1987) 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed. 2d 55, 60-65*

When federal law completely preempts state law claim and supplants it with federal claim, state law claim as removable to federal court even if federal law fails to provide plaintiff with remedies available under state law or if federal defense completely bars federal claim. *Young v. Anthony's Fish Grottos, Inc. (9th Cir. 1987) 830 F.2d 993, 998-999*

Carmack Amendment, *49 U.S.C.S. § 14706*, is the exclusive cause of action for contract claims alleging delay, loss, failure to deliver or damage to property by interstate carriers, and thus provides a basis for removal of completely preempted state-law cause of action. *Hall v. North American Van Lines, Inc. (9th Cir. 2007) 476 F.3d 683, 687-688*

[8] Remand

The bar on review of remand to state court for lack of federal subject matter jurisdiction contained in *28 U.S.C.S. § 1447(d)* is applicable to a suit removed under the Foreign Sovereign Immunities Act of 1976, *28 U.S.C.S. § 1441(d)*. *Powerex Corp. v. Reliant Energy Services, Inc. (2007)551U.S.224, 127 S. Ct. 2411, 2419-2421, 168 L. Ed. 2d 112*

Once an action alleging liability of an individual federal employee is removed to federal court upon the Attorney General's certification under *28 U.S.C.S. § 2679*, Federal Employees Liability Reform and Tort Compensation Act of 1988, that the federal employee was acting within the scope of his or her employment, federal district court may not remand to state court.*28 U.S.C.S. § 2679(d)(2)*; *Osborn v. Haley (2007) 549 U.S. 225, 127 S. Ct. 881, 166 L. Ed. 2d 819*

Completely preempted contract claim presenting a federal question as constituting grounds for properly denying motion to remand. *Hall v. North American Van Lines, Inc. (9th Cir. 2007) 476 F.3d 683, 687-688*

Remand of action outside the scope of complete preemption by *§ 301 of the Labor* Management Relations Act as error.

Ward v. Circus Circus Casinos, Inc. (9th Cir. 2007) 473 F.3d 994, 999

Amendment of complaint after removal in manner giving diversity jurisdiction precluding remand after dismissal of sole claim in original complaint giving federal question jurisdiction. *Williams v. Costco Wholesale Corp. (9th Cir. 2006) 471 F.3d 975, 977*

Remand order based on defendant's waiver of right of removal by participation in state court action as within bounds of *28 U.S.C.S. § 1447(c)* and as not reviewable by appeal or otherwise; remand order based on untimeliness of removal as similarly not reviewable. *Schmitt v. Insurance Co. of North America (9th Cir. 1988) 845 F.2d 1546, 1551*

28 U.S.C.S. § 1447(d) as barring review of remand orders by appeal or mandamus, even if district court's decision that under *28 U.S.C.S. § 1447(c)*, removal was improvident and without jurisdiction, was erroneous. *Kunzi v. Pan American World Airways, Inc. (9th Cir. 1987) 833 F.2d 1291, 1293*

Once basis for removal jurisdiction is dropped from proceedings, federal court as possessing power to hear remaining state claims, although not obliged to exercise that power; district court as having discretion to remand rest of action to state court from which it was removed. *Price v. PSA, Inc. (9th Cir. 1987) 829 F.2d 871, 876*

When only issue decided by remand order is jurisdictional issue, e.g., that claim was state claim and not artfully pled federal claim, remand order as not reviewable on appeal as substantive decision, and only avenue of review available as by mandamus. *Survival Sys. v. U.S. Dist. Ct. for S.D. Cal. (9th Cir. 1987) 825 F.2d 1416, 1418*

28 U.S.C.S. § 1447(d) as barring review of only those remand orders that are based on lack of jurisdiction; § 1447(d) as not foreclosing review of remand order based on resolution of merits of some matter of substantive law apart from any jurisdictional decision. *Clorox v. U.S. Dist. Ct. for N.D. of California (9th Cir. 1985) 779 F.2d 517, 520*

Procedural defect of failure to obtain consent of all defendants as basis for denying review of remand order under *28 U.S.C.S. § 1447(d)* for any grounds listed in *28 U.S.C.S. § 1447(c)*. *Aguon-Schulte v. Guam Election Comm. (2006) 469 F.3d 1236, 1240-1241*

[9] Removal Jurisdiction

Federal district court as authorized to impose sanctions under *Fed. R. Civ. P., Rule 11*, even if district court is later determined to be without subject-matter jurisdiction to hear removed action and case is remanded to state court. *Willy v. Coastal Corp. (1992) 503 U.S. 131, 112 S. Ct. 1076, 117 L. Ed. 2d 280, 285-286, 290*

The requirement in *28 U.S.C.S. § 1442(a)* of "any act under color of such office" is construed as requiring a causal connection between the charged conduct and the official authority. That connection is established where the challenged conduct involves actions entrusted to a receiver in his or her capacity as receiver. *Medical Dev. Int'l v. Cal. Dep't of Corr. & Rehab. (9th Cir. 2009) 585 F.3d 1211, 1216*

Jurisdictional requirement as met when district court has jurisdiction over all parties to render judgment; prevailing party in original two-sided litigation as not required to show that there was also jurisdiction regarding virtually unrelated claims that state court had permitted to be joined in same lawsuit. *Grubbs v. General Electric Credit Corp. (1972) 405 U.S. 699, 705-706, 92 S. Ct. 1344, 31 L. Ed. 2d 612*

Party seeking removal as bearing burden of establishing federal jurisdiction. *Miller v. Grgurich (9th Cir. 1985) 763 F.2d 372, 373*

Party invoking removal statute as having burden of establishing jurisdiction; removal statute as strictly construed against removal jurisdiction. *Salveson v. Western States Bankcard Asso. (9th Cir. 1984) 731 F.2d 1423, 1426, 1984-1 Trade Cas. (CCH) P65974*

[10] Removal Procedure

Process, pleadings, and orders served that must be filed with removal petition as not including discovery and discovery requests from state court action. *Visicorp v. Software Arts, Inc. (N.D. Cal. 1983) 575 F. Supp. 1528, 1531*

Right to remove state court case to federal court as limited to defendants; plaintiff as not permitted to accomplish removal by re filing of state court complaint. *American Intern. Underwriters v. Continental Ins. (9th Cir. 1988) 843 F.2d 1253, 1260-1261*

"Or otherwise" language of *28 U.S.C.S. § 1446(b)* as pertaining only to those states that allow plaintiff to commence suit without filing or serving initial pleading immediately; "or otherwise" as not meaning that receipt of initial pleading without proper service will trigger removal period. *Thomason v. Republic Ins. Co. (E.D. Cal. 1986) 630 F. Supp. 331, 333-334*

Removal petition as timely filed even though petition was not made within 30 days of receipt of copy of initial pleading, when defendant was not properly served and never received equivalent of service. *Thomason v. Republic Ins. Co. (E.D. Cal. 1986) 630 F. Supp. 331, 334*

Unless agreement specifies otherwise, refusal of designated arbitration organization to accept jurisdiction under Convention on the Recognition and Enforcement of Foreign Arbitral Awards does not eliminate basis for federal jurisdiction [*Reddam v. KPMG LLP (9th Cir. 2006) 457 F.3d 1054, 1058]*

[11] Well-Pleaded Complaint

Well-pleaded complaint rule does not apply to questions of jurisdiction under statutory independent jurisdictional grant. *American Nat'l Red Cross v. S.G. (1992) 505 U.S. 247, 112 S. Ct. 2465, 2472, 120 L. Ed. 201*

Presence or absence of federal jurisdiction as governed by well-pleaded complaint rule; well-pleaded complaint rule as providing that federal jurisdiction exists only when federal question is presented on face of complaint. *Caterpillar Inc. v. Williams (1987) 482 U.S. 386, 107 S. Ct. 2425, 96 L. Ed. 2d 318, 327*

Presence or absence of federal-question jurisdiction is governed by well-pleaded complaint rule; well-pleaded complaint rule as providing that federal jurisdiction exists only when federal question is presented on face of complaint. *Hall v. North American Van Lines, Inc. (9th Cir. 2007) 476 F.3d 683, 687*

Well-pleaded complaint rule as basic principle marking boundaries of federal question jurisdiction of federal district courts. *Metropolitan Life Ins. Co. v. Taylor (1987) 481 U.S. 58, 107 S. Ct. 1542, 95 L. Ed. 2d 55, 63*

Although plaintiff is master to decide what law to rely on, independent corollary of well-pleaded complaint rule as establishing that plaintiff is unable to defeat removal by omitting to plead necessary federal questions in complaint. *Franchise Tax Bd. v. Laborers Vac. Trust (1983) 463 U.S. 1, 22, 103 S. Ct. 2841, 77 L. Ed. 2d 420*

Legal Topics:

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

Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsWell-Pleaded Complaint RuleCivil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalPostremoval RemandsGeneral OverviewCivil ProcedureRemovalProceedingsGeneral Overview

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§ 265.65 Law Reviews

Hermann, *Certifying Appeals From Remand Orders*, 11(8) Cal. Law. 59 (1991)

Braun, *Reviewability of Remand Orders; Striking the Balance in Favor of Equality Rather Than Expediency, 30 Santa Clara L. Rev. 21 (1990)*

Rosenblatt, *Removal of Criminal Prosecutions of Federal Official: Returning to the Original Intent of Congress, 29 Santa Clara L. Rev. 21 (1989)*

Yeomans, *How to Avoid Rule 11 Sanctions, 34 Prac. Law. 61 (1988)*

Doernberg, *There's No Reason for It; It's Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction, 38 Hastings L.J. 597 (1987)*

Note, *Removal Doctrine Reaffirmed: Franchise Tax Board v. Construction Laborers Vacation Trust, 70 Cornell L. Rev. 557 (1985)*

Comment, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule, 51 U. Chi. L. Rev. 634 (1984)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsWell-Pleaded Complaint RuleCivil ProcedureRemovalBasisGeneral OverviewCivil ProcedureRemovalBasisCases Involving Federal OfficersCivil ProcedureRemovalPostremoval RemandsAppellate ReviewCivil ProcedureSanctionsBaseless FilingsGeneral Overview

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22-265 California Forms of Pleading and Practice--Annotated § 265.70

§ 265.70 Party Seeking Removal

[1] Preliminary Determinations

NOTE:
The following procedural guide deals with removal of general civil actions. It does not address removal in criminal cases, civil actions involving federal officers or members of the armed forces, or actions dealing with civil rights or bankruptcy.

☐ Determine if action is within original jurisdiction of district court [*see 28 U.S.C.S. §§ 1331-1365, 1441(a)*; *see § 265.12*].

☐ Grounds for federal jurisdiction:

☐ Federal question involves claim or right arising out of Constitution, treaties, or laws of United States [*see 28 U.S.C.S. § 1441(b)*; *see § 265.12*].

☐ Diversity of citizenship [*see 28 U.S.C.S. §§ 1332(a), 1441(b)*; *see § 265.15*]:

☐ No defendant is citizen of California.

☐ Matter in controversy exceeds $75,000, exclusive of interests and costs.

☐ Special "minimal diversity" rules for class or mass actions [*see § 265.15[6]*].

☐ Determine if action joins nonremovable claim or cause of action with separate and independent claim or cause of

action within district court's federal question jurisdiction [*see 28 U.S.C.S. § 1441(c)*; *see § 265.36*].

☐ Determine if action is not removable [*see 28 U.S.C.S. § 1445*; *see § 265.31[2]*].

☐ Certain acts such as filing permissive counterclaim or third-party complaint may waive right to remove [*see § 265.32[4]*].

[2] Preparing and Filing Notice of Removal

☐ Obtain consent from all other defendants [*see § 265.38[2]*].

☐ Time for filing notice of removal.

☐ When case stated by initial pleading is removable, notice of removal must be filed within the shorter period of following [*see 28 U.S.C.S. § 1446(b)*; *see § 265.38[3][a]*]:

☐ 30 days after receipt, through service or otherwise, of copy of initial pleading setting forth claim for relief on which state court action is based, or

☐ 30 days after service of summons if initial pleading has then been filed in court and is not required to be served.

☐ When case stated by initial pleading is not removable, notice of removal must be filed as follows [*see § 265.38[3][b]*]:

☐ Within 30 days after receipt, through service or otherwise, of copy of amended pleading, motion, order, or other paper from which it may first be ascertained that case is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by *28 U.S.C.S. § 1332* more than one year after commencement of the action [*see 28 U.S.C.S. § 1446(b)*], or

☐ Within 30 days of dismissal or abandonment of any California defendant.

☐ When there are multiple defendants, and they receive notice of removability at different times, 30-day filing period begins with first notice [*see § 265.38[3][c]*].

☐ File notice of removal.

☐ File in United States district court for district and division where action is pending [*see 28 U.S.C.S. § 1446(a)*; FORMS: §§ 265.160-265.165].

☐ File copy of all process, pleadings, and orders served in state court action [*28 U.S.C.S. § 1446(a)*].

☐ Notice to adverse parties and state court.

☐ Promptly after filing notice of removal, give written notice to all adverse parties [*see 28 U.S.C.S. § 1446(d)*; FORM: § 265.166].

☐ At same time, file copy of notice of removal with state court clerk.

☐ Prepare record.

☐ File copies of all state court records and proceedings with district court clerk [*see 28 U.S.C.S. § 1447(b)*; FORM: § 265.167]; or

☐ Prepare form of writ of certiorari for district court to issue to state court to obtain those records and proceedings [*see 28 U.S.C.S. § 1447(b)*].

☐ If state court clerk, on demand and tender of legal fees, fails to deliver certified copies of its records and proceedings, prepare affidavit for district court reciting those facts, and directing that record to be supplied by affidavit or otherwise [*28 U.S.C.S. § 1449*].

☐ Any attachment or sequestration of goods or estate in state court action will hold those goods or estate to answer final judgment in same manner in district court. All bonds, undertakings, or security given prior removal will remain valid and effectual after removal [*see 28 U.S.C.S. § 1450*].

[3] Preparing and Filing Motion to Enjoin State Court Proceedings

☐ Removal provides district court with exclusive jurisdiction and prohibits further proceedings in state court [*see § 265.37[2]*].

☐ Prepare, file, and serve notice of motion and points and authorities to enjoin state court proceedings [*see Fed. R. Civ. P., Rules 5, 7(b), 11* (general motion procedures)].

[4] Opposing Motion for Remand

☐ Preliminary determinations.

☐ Remand is only appropriate when the district court lacks subject matter jurisdiction, or when there is a defect in the removal procedure [*see 28 U.S.C.S. § 1447(c)*; *see § 265.40[2]*].

☐ When nonremovable and separate and independent claim is joined with claim within district court's federal question jurisdiction [*see 28 U.S.C.S. § 1441(c)*; *see § 265.36*].

☐ Prepare, file, and serve papers opposing motion for remand [*see Fed. R. Civ. P., Rules 5, 7(b), 11* (general motion procedures)].

☐ If motion for remand is granted on grounds other than those of *28 U.S.C.S. § 1447(c)*, seek review if appropriate [*see § 265.40[5]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsWell-Pleaded Complaint RuleCivil ProcedureRemovalBasisDiversity of CitizenshipCivil ProcedureRemovalBasisFederal QuestionsCivil ProcedureRemovalPostremoval RemandsAppellate ReviewCivil ProcedureRemovalProceedingsNotices

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§ 265.71 Party Opposing Removal

[1] Preliminary Determinations

☐ Remand on the ground that the district court lacks subject matter jurisdiction is available any time before final judgment [*see 28 U.S.C.S. § 1447(c)*; *see § 265.40[2*]; for form of motion to remand action, *see § 265.168*].

☐ A motion to remand on the basis of any defect in the removal procedure must be made within 30 days after the filing of the notice of removal [*see 28 U.S.C.S. § 1447(c)*; *see § 265.40[2*]; for form of motion to remand action, *see § 265.168*].

☐ Remand of pendent state law claims is available when federal claims have been eliminated [*see § 265.37[1][c]*].

[2] Preparing and Filing Motion to Remand Removed Action

☐ Prepare, file, and serve notice of motion and points and authorities [*see Fed. R. Civ. P., Rules 5, 7(b), 11* (general motion procedures)].

☐ Request award of just costs and any actual expenses, including attorney's fees [*28 U.S.C.S. § 1447(c)*; *see § 265.40[4]*].

☐ Prepare remand order for court's signature. After certified copy of order is mailed by district court clerk to state court clerk, state court may proceed with case [*28 U.S.C.S. § 1447(c)*; *see § 265.40[3]*; FORM: § 265.169].

☐ If motion for remand is denied, seek review if appropriate [*see § 265.40[5]*].

[3] Preparing and Filing Motion to Sever and Remand

Nonremovable and separate and independent claim may be severed from claim providing basis for removal [*see 28 U.S.C.S. § 1441(c)*; *see* the Introduction under Separate and Independent Claim; FORMS: §§ 265.170-265.171]. For steps involved in preparation and review of motion, see Paragraph II(A)(2), (5).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionPendent ClaimsCivil ProcedureRemovalPostremoval RemandsAppellate ReviewCivil ProcedureRemovalPostremoval RemandsJurisdictional DefectsCivil ProcedureRemovalPostremoval RemandsMotions for RemandCivil ProcedureRemovalProceedingsTime Limitations

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[Reserved]

§§ 265.72[Reserved]

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22-265 California Forms of Pleading and Practice--Annotated § 265.80

§ 265.80 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Natural Persons [28 U.S.C.S. § 1332(a)(1)]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Natural Persons [28 U.S.C.S. § 1332(a)(1)]

Plaintiff _____[*name*] is a citizen of the State of _____ and defendant is a citizen of the State of _____[*name of state other than that of plaintiff's citizenship*]. The matter in controversy exceeds the sum of $75,000, exclusive of interest and costs.

[2] Use of Form

The form of allegation, *above*, is for use by a plaintiff in a complaint filed in federal district court to allege diversity of citizenship as the ground of federal jurisdiction. *28 U.S.C.S. § 1332(a)* was amended in 1997. In civil actions commenced on or after January 19, 1997, the matter in controversy must exceed the sum of $75,000, exclusive of interest and costs. Civil actions commenced prior to that date need only meet the former $50,000 jurisdictional minimum.

[3] Cross References

Moore's Federal Practice, § 8.03, § 102.02 (3rd ed. Matthew Bender)

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 2.

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§ 265.81 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Multiple Parties [28 U.S.C.S. § 1332(a)(1)]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Multiple Parties [28 U.S.C.S. § 1332(a)(1)]

Plaintiff _____[*name*] is a citizen of the State of _____, and plaintiff _____[*name*] is a citizen of the State of _____. Each of the defendants is a citizen of the State of _____[*name of state other than states in which plaintiffs are citizens*]. The matter in controversy exceeds the sum of $75,000, exclusive of interest and costs.

[2] Use of Form

The form of allegation, *above*, is for use by a plaintiff in a complaint filed in federal district court to allege diversity of citizenship as the ground of federal jurisdiction in a case with multiple parties.

[3] Cross References

For general discussion and references relating to allegations based on diversity of citizenship, see *§ 265.80*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.82

§ 265.82 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Unincorporated Association [28 U.S.C.S. § 1332(a)(1)]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Unincorporated Association [28 U.S.C.S. § 1332(a)(1)]

Plaintiff is an unincorporated association, composed of the following persons as members: _____[*state name and citizenship of each member*]. Defendant is a citizen of the State of _____[*name of state other than state of plaintiff's citizenship*]. The matter in controversy exceeds the sum of $75,000, exclusive of interests and costs.

[2] Use of Form

The form of allegation, *above*, is for use by a plaintiff unincorporated association in a complaint filed in federal district court to allege diversity of citizenship as the ground of federal jurisdiction.

[3] Cross References

For general discussion and references relating to allegations based on diversity of citizenship, see *§ 265.80*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.83

§ 265.83 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Partnerships [28 U.S.C.S. § 1332(a)(1)]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Partnerships [28 U.S.C.S. § 1332(a)(1)]

Plaintiffs _____[*name*] and _____[*name*], copartners doing business under the firm name of _____, are each citizens of the State of _____. Defendant _____[*name*] is a citizen of the State of _____[*name of state other than state of plaintiffs' citizenship*], and defendant _____[*name*] is a citizen of the State of _____[*name of state other than state of plaintiffs' citizenship*]. Defendants are copartners doing business under the firm name of _____. The matter in controversy exceeds the sum of $75,000, exclusive of interest and costs.

[2] Use of Form

The form of allegation, *above*, is for use by a plaintiff partnership in a complaint filed in federal district court to allege diversity of citizenship as the ground of federal jurisdiction.

[3] Cross References

For general discussion and references relating to allegations based on diversity of citizenship, see *§ 265.80*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.84

§ 265.84 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Trustee in Bankruptcy [28 U.S.C.S. § 1332(a)(1)]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Trustee in Bankruptcy [28 U.S.C.S. § 1332(a)(1)]

Plaintiff is a trustee in bankruptcy of _____[*name*], a citizen of the State of _____.
Defendant is a citizen of the State of _____[*name of state other than that of bankrupt's citizenship*].
The matter in controversy exceeds the sum of $75,000, exclusive of interest and costs.

[2] Use of Form

The form of allegation, *above*, is for use by a plaintiff trustee in bankruptcy in a complaint filed in federal district court to allege diversity of citizenship as the ground of federal jurisdiction.

[3] Cross References

For general discussion and references relating to allegations based on diversity of citizenship, see *§ 265.80*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.85

§ 265.85 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Estate Administrator [28 U.S.C.S. § 1332(a)(1)]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Estate Administrator [28 U.S.C.S. § 1332(a)(1)]

Plaintiff _____[*name*] is the _____[*specify legal representative, e.g.*, personal representative *or* administrator *or* executor of the will] of the estate of _____[*name*], deceased, who was a citizen of the State of _____. Defendant is a citizen of the State of _____[*name of state other than that of deceased's citizenship*]. The matter in controversy exceeds the sum of $75,000, exclusive of interest and costs.

[2] Use of Form

The form of allegation, *above*, is for use by a legal representative of the estate of a decedent in a complaint filed in federal district court to allege diversity of citizenship as the ground of federal jurisdiction. The legal representative is deemed to be a citizen only of the same state as the decedent [*28 U.S.C.S. § 1332(c)(2)* (applicable to civil actions commenced or removed on or after May 18, 1989)].

[3] Cross References

For general discussion and references relating to allegations based on diversity of citizenship, see *§ 265.80*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.86

§ 265.86 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Plaintiff as Nominal Representing Party [28 U.S.C.S. § 1332(a)(1)]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Plaintiff as Nominal Representing Party [28 U.S.C.S. § 1332(a)(1)]

Plaintiff brings this action for the use of _____[*name*], a citizen of the State of _____. Defendant is a citizen of the State of _____[*name of state other than that of represented party*]. The matter in controversy exceeds the sum of $75,000, exclusive of interest and costs.

[2] Use of Form

The form of allegation, *above*, is for use where the plaintiff is a nominal representing party bringing an action on behalf of or for the use of the real party in interest [*see Fernandez-Cerra v. Commercial Ins. Co. of Newark (D. P.R. 1972) 244 F. Supp. 314, 317]* . The legal representative of an infant or incompetent is a citizen only of the same state as the infant or incompetent [*28 U.S.C.S. § 1332(c)(2)* (applicable to civil actions commenced or removed on or after May 18, 1989)].

[3] Cross References

For general discussion and references relating to allegations based on diversity of citizenship, see *§ 265.80*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.87

§ 265.87 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Representative of Incompetent Where Incompetent's Citizenship Controls [28 U.S.C.S. § 1332(a)(1), (c)(2)]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Representative of Incompetent Where Incompetent's Citizenship Controls [28 U.S.C.S. § 1332(a)(1), (c)(2)]

Plaintiff is an incompetent person and a citizen of the State of _____, and brings this action through _____[*name*], his/her _____[conservator *or* guardian ad litem]. Defendant is a citizen of the State of _____[*name of state other than that of plaintiff's citizenship*]. The matter in controversy exceeds the sum of $75,000, exclusive of interest and costs.

[2] Use of Form

The form of allegation, *above*, is for use by a representative of an incompetent, where the incompetent's citizenship controls, in a complaint filed in federal district court to allege diversity of citizenship as the ground of federal jurisdiction.

[3] Cross References

For general discussion and references relating to allegations based on diversity of citizenship, see *§ 265.80*. For discussion and references relating to allegations based on diversity of citizenship where plaintiff is a nominal representing party, see *§ 265.86*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.88

§ 265.88 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Representative of Infant Where Infant's Citizenship Controls [28 U.S.C.S. § 1332(a)(1), (c)(2)]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Representative of Infant Where Infant's Citizenship Controls [28 U.S.C.S. § 1332(a)(1), (c)(2)]

Plaintiff is a minor and a citizen of the State of _____, and brings this action through _____[*name*], his/her _____[guardian *or* guardian ad litem]. Defendant is a citizen of the State of _____[*name of state other than that of plaintiff's citizenship*]. The matter in controversy exceeds the sum of $75,000, exclusive of interest and costs.

[2] Use of Form

The form of allegation, *above*, is for use by a representative of an infant, where the infant's citizenship controls, in a complaint filed in federal district court to allege diversity of citizenship as the ground of federal jurisdiction.

[3] Cross References

For general discussion and references relating to allegations based on diversity of citizenship, see *§ 265.80*. For discussion and references relating to allegations based on diversity of citizenship where plaintiff is a nominal representing party, see *§ 265.86*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.89

§ 265.89 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Corporations [28 U.S.C.S. § 1332(a)(1), (c)(1)]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Corporations [28 U.S.C.S. § 1332(a)(1), (c)(1)]

Plaintiff is a corporation incorporated under the laws of the State of _____, having its principal place of business in the State of _____. Defendant is a corporation incorporated under the laws of the State of _____[*name of state other than state in which plaintiff is incorporated or has its principal place of business*], having its principal place of business in a state other than the State of _____[*name of state other than state in which plaintiff is incorporated or has its principal place of business*].

[2] Use of Form

This allegation is for use by a plaintiff corporation in a complaint filed in federal district court to allege diversity of citizenship as the ground of federal jurisdiction. A corporation is a citizen of any state by which it has been incorporated and of the state where it has its principal place of business [*28 U.S.C.S. § 1332(c)*]. However, certain exceptions apply in any direct action against an insurer when the insured is not joined as a party defendant [*28 U.S.C.S. § 1332(c)(1)* (applicable to civil actions commenced or removed on or after May 18, 1989); *see § 265.15[4]*].

[3] Cross References

For general discussion and references relating to allegations based on diversity of citizenship, see *§ 265.80*.

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§ 265.90 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Alienage [28 U.S.C.S. 1332(a)(2)]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Alienage [28 U.S.C.S. 1332(a)(2)]

Plaintiff is a _____[subject *or* citizen *or* corporation incorporated under the laws] of the _____[Kingdom *or* Republic *or* Sovereign State] of _____. [Each] defendant is a citizen of the State of _____. The matter in controversy exceeds the sum of $75,000, exclusive of interest and costs.

[2] Use of Form

The form of allegation, *above*, is for use by an alien plaintiff in a complaint filed in federal district court to allege diversity of citizenship as the ground of federal jurisdiction. The Constitution extends judicial power to controversies between a state or citizen thereof and foreign states or citizens or subjects thereof [U.S. *Const., Art. III, § 2*]. An alien is admitted to United States for permanent residence as citizen of state of domicile [*28 U.S.C.S. § 1332(a)*].

[3] Cross References

For general discussion and references relating to allegations based on diversity of citizenship, see *§ 265.80*.

Moore's Federal Practice, § 102.70 (3rd ed. Matthew Bender)

36 C.J.S. Federal Courts § 53

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22-265 California Forms of Pleading and Practice--Annotated § 265.91

§ 265.91 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Class Action [28 U.S.C.S. § 1332(d)]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Diversity of Citizen--Class Action [28 U.S.C.S. § 1332(d)]

Plaintiff _____[*name*] is a member of the plaintiff class and is a citizen of the State of _____. Defendant _____ is a citizen of the State of _____[*name of state other than states in which plaintiff named above is a citizens*]. The aggregated claims of all plaintiffs exceed $5 million, exclusive of interest and costs.

[2] Use of Form

The form of allegation, *above*, is for use by a plaintiff class in a complaint filed in federal district court to allege diversity of citizenship in a class action as the ground of federal jurisdiction. The new rules of the Class Action Fairness Act of 2005 (CAFA) provide for federal jurisdiction based on "minimal diversity" [*28 U.S.C.S. § 1332(d)(6)*]. For discussion of the rules of the CAFA, see *§ 265.15[6]*.

[3] Cross References

For general discussion and references relating to allegations based on diversity of citizenship, see *§ 265.80*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.92

§ 265.92 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Interpleader [28 U.S.C.S. § 1335]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Interpleader [28 U.S.C.S. § 1335]

This is an action of interpleader brought under *28 United States Code Section 1335*. Defendant _____[*name of adverse claimant*] is a citizen of the State of _____ and defendant _____[*name of adverse claimant*] is a citizen of the State of _____[*name of state other than that of first defendant's citizenship*]. The amount in controversy exceeds $500, as hereinafter more fully appears.

[2] Use of Form

The form of allegation, *above*, is for use in an interpleader action in which the claimants are citizens of diverse states and the amount in controversy exceeds $500. The federal courts have jurisdiction in an interpleader action by a stakeholder where value of stake is $500 or more and two adverse claimants of diverse citizenship have claim to stake [*28 U.S.C.S. § 1335(a)(1)*].

[3] Cross References

For general discussion and references relating to allegations based on diversity of citizenship, see *§ 265.80*.

Moore's Federal Practice, §§ 22.03 -22.04 (3rd ed. Matthew Bender)

36 C.J.S. Federal Courts § 58(2)

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§ 265.93 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--General Federal Question [28 U.S.C.S. § 1331]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--General Federal Question [28 U.S.C.S. § 1331]

This action arises under the _____ [United States Constitution, Article _____, Section _____ *or* _____ Amendment to the United States Constitution, Section _____ *or* Act of _____, _____ statute _____, _____ United States Code Section _____ *or* Treaty of the United States with _____ (*describe treaty*)], as hereinafter more fully appears.

[2] Use of Form

The form of allegation, *above*, is for use by a plaintiff in a case involving a federal question. Judicial power extends to all cases arising under Constitution, laws of United States, and treaties made, or which shall be made, under their authority [U.S. *Const., Art. III, § 2*]. District courts have original jurisdiction of all civil actions arising under Constitution, laws, or treaties of United States [*28 U.S.C.S. § 1331*].

[3] Cross References

Moore's Federal Practice, §§ 8.03[3], [4][a], [b] (3rd ed. Matthew Bender)

35A C.J.S. Federal *Civil Procedure § 271*

36 C.J.S. Federal Courts §§ 28-30

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22-265 California Forms of Pleading and Practice--Annotated § 265.94

§ 265.94 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Particular Federal Question [Official Form 2(c)]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Particular Federal Question [Official Form 2(c)]

This action arises under the Act of _____, _____ Statute _____, _____ United States Code Section _____, as hereinafter more fully appears.

[2] Use of Form

The form of allegation, *above*, is adapted from Official Form 2(c) and is for use when the jurisdiction of the federal court is founded on the existence of a question arising under a particular statute. Additional forms of jurisdictional allegations based on special jurisdictional provisions of the United States Code may be *found in §§ 265.95 -265.141*.

[3] Cross References

Moore's Federal Practice, § 8.03[4]; *§§ 120.02[1], 120.10* (3rd ed. Matthew Bender)

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22-265 California Forms of Pleading and Practice--Annotated § 265.95

§ 265.95 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action to Enjoin, Set Aside, Enforce, Annul, or Suspend Order of Surface Transportation Board [28 U.S.C.S. § 1336]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action to Enjoin, Set Aside, Enforce, Annul, or Suspend Order of Surface Transportation Board [28 U.S.C.S. § 1336]

This action is one to _____[enjoin *or* review and set aside *or* enforce *or* annul *or* suspend] an order of the Surface Transportation Board. Jurisdiction is conferred on this court by *28 United States Code Section 1336*.

[2] Use of Form

The form of allegation, *above*, is for use in actions to enforce, enjoin, set aside, annul, or suspend order of Surface Transportation Board [*28 U.S.C.S. § 1336(a)*].

[3] Cross References

For general discussion and references relating to allegations based on particular federal questions, see *§ 265.94*.

36 C.J.S., *Federal Courts*, § 35(1)

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22-265 California Forms of Pleading and Practice--Annotated § 265.96

§ 265.96 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Proceeding to Review Decision of Secretary of Health, Education, and Welfare Under Social Security Act [42 U.S.C.S. § 405(g)]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Proceeding to Review Decision of Secretary of Health, Education, and Welfare Under Social Security Act [42 U.S.C.S. § 405(g)]

This is an action in the judicial district in which plaintiff resides to review a final decision of the Secretary of Health, Education, and Welfare, of which this court has jurisdiction under *42 United States Code Section 405(g)*, as amended.

[2] Use of Form

The form of allegation, *above*, is for use in proceedings to review the final decisions of the Secretary of Health, Education, and Welfare [*42 U.S.C.S. § 405(g)*].

[3] Cross References

For general discussion and references relating to allegations based on particular federal questions, see *§ 265.94*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.97

§ 265.97 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages for Violation of the Communications Act of 1934 [47 U.S.C.S. § 207]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages for Violation of the Communications Act of 1934 [47 U.S.C.S. § 207]

This is an action for damages brought under the provisions of the Act of June 19, 1934, c 652, Section 206, 48 Statute 1072, known as the Communications Act of 1934, *47 United States Code Section 206*, as hereinafter more fully appears. Jurisdiction is conferred on this court by *47 United States Code Section 207*.

[2] Use of Form

The form of allegation, *above*, is for use in an action for damages for violation of the Communications Act of 1934 [*47 U.S.C.S. §§ 206, 207*].

[3] Cross References

For general discussion and references relating to allegations based on particular federal questions, see *§ 265.94*.

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§ 265.98 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Arising Under Law Regulating Interstate Commerce [28 U.S.C.S. § 1337]--General Form

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Arising Under Law Regulating Interstate Commerce [28 U.S.C.S. § 1337]--General Form

This action arises under the _____ Act, _____ Statute _____, _____ United States Code Section _____, a law of the United States regulating commerce.

[2] Use of Form

The form of allegation, *above*, is for use in an action arising under the laws regulating interstate commerce [*28 U.S.C.S.§ 1337*].

[3] Cross References

For general discussion and references relating to allegations based on particular federal questions, see *§ 265.94*.

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§ 265.99 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Against Carrier Under Interstate Commerce Act for Damage to Property [28 U.S.C.S. § 1337; 49 U.S.C.S. § 11707(a)(1)]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Against Carrier Under Interstate Commerce Act for Damage to Property [28 U.S.C.S. § 1337; 49 U.S.C.S. § 11707(a)(1)]

This is an action under the Interstate Commerce Act, *49 United States Code Section 11707(a)(1)*, of which this court has jurisdiction under *28 United States Code Section 1337*, as hereinafter more fully appears. The defendant operates a line of railroad through this district.

[2] Use of Form

The form of allegation, *above*, is for use in an action against a carrier under the Interstate Commerce Act for damage to property [*49 U.S.C.S. § 11707(a)(1)*].

[3] Cross References

For general discussion and references relating to allegations based on laws regulating interstate commerce, see *§ 265.98*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.100

§ 265.100 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action to Recover on Reparation Order of Interstate Commerce Commission [28 U.S.C.S. § 1337; 49 U.S.C.S. § 16(2)]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action to Recover on Reparation Order of Interstate Commerce Commission [28 U.S.C.S. § 1337; 49 U.S.C.S. § 16(2)]

This action is brought to recover damages and reparations under the provisions of the Interstate Commerce Act, *49 United States Code Section 11705(c)(2)*. Jurisdiction is conferred on this court by this section and by *28 United States Code Section 1337*.

[2] Use of Form

The form of allegation, *above*, is for use in an action to recover on a reparation order of the Interstate Commerce Commission [*49 U.S.C.S. § 16(2)*].

[3] Cross References

For general discussion and references relating to allegations based on laws regulating interstate commerce, see *§ 265.98*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.101

§ 265.101 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Under Fair Labor Standards Act [28 U.S.C.S. § 1337; 29 U.S.C.S. §§ 201-219]--General Form

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Under Fair Labor Standards Act [28 U.S.C.S. § 1337; 29 U.S.C.S. §§ 201-219]--General Form

This action arises under the Fair Labor Standards Act of 1938, 52 Statute 1060, *29 United States Code Sections 201-219*, as hereinafter more fully appears. Jurisdiction is conferred on this court by *28 United States Code Section 1337*.

[2] Use of Form

The form of allegation, *above*, is a general form for use in an action under the Fair Labor Standards Act [*28 U.S.C.S. § 1337*; *29 U.S.C.S. §§ 201-219*].

[3] Cross References

For general discussion and references relating to allegations based on laws regulating interstate commerce, see *§ 265.98*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.102

§ 265.102 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Under Fair Labor Standards Act [28 U.S.C.S. § 1337; 29 U.S.C.S. §§ 201-219]--For Declaratory Judgment [28 U.S.C.S. § 2201]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Under Fair Labor Standards Act [28 U.S.C.S. § 1337; 29 U.S.C.S. §§ 201-219]--For Declaratory Judgment [28 U.S.C.S. § 2201]

This is an action for a declaratory judgment under *28 United States Code Section 2201* for the purpose of determining an actual controversy between the parties concerning the provisions of the Act of June 25, 1938, c 676, 52 Statute 1069, *29 United States Code Sections 201-219*, known as the Fair Labor Standards Act. Such controversy involves the proper interpretation and application of the Fair Labor Standards Act, a law of the United States regulating commerce. The controversy is in all respects one of which this court has jurisdiction under *28 United States Code Section 1337*.

[2] Use of Form

The form of allegation, *above*, is a form for use in an action for declaratory judgment under the Fair Labor Standards Act [*28 U.S.C.S. § 1337*; *29 U.S.C.S. §§ 201-219*; U.S.C.S. § 2201].

[3] Cross References

For general discussion and references relating to allegations based on laws regulating interstate commerce, see *§ 265.98*. For general discussion and general form relating to allegation based on Fair Labor Standards Act, see *§ 265.101*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.103

§ 265.103 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Under Fair Labor Standards Act [28 U.S.C.S. § 1337; 29 U.S.C.S. §§ 201-219]--For Overtime Compensation [28 U.S.C.S. § 2201]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Under Fair Labor Standards Act [28 U.S.C.S. § 1337; 29 U.S.C.S. §§ 201-219]--For Overtime Compensation [28 U.S.C.S. § 2201]

This action is brought to recover from the defendant unpaid overtime compensation, an additional equal amount as liquidated damages and reasonable counsel fees under the provisions of the Act of June, 25, 1938, c 676, 52 Statute 1069, *29 United States Code Sections 201-219*, known as the Fair Labor Standards Act, a law of the United States regulating interstate com merce. Jurisdiction is conferred on this court by *28 United States Code Section 1337*.

[2] Use of Form

The form of allegation, *above*, is a form for use in an action for overtime compensation under the Fair Labor Standards Act [*28 U.S.C.S. § 1337*; *29 U.S.C.S. §§ 201-219*; U.S.C.S. § 2201].

[3] Cross References

For general discussion and references relating to allegations based on laws regulating interstate commerce, see *§ 265.98*. For general discussion and general form relating to allegation based on Fair Labor Standards Act, see *§ 265.101*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.104

§ 265.104 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Under Fair Labor Standards Act [28 U.S.C.S. § 1337; 29 U.S.C.S. §§ 201-219]--To Enjoin Violation [28 U.S.C.S. § 2201]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Under Fair Labor Standards Act [28 U.S.C.S. § 1337; 29 U.S.C.S. §§ 201-219]--To Enjoin Violation [28 U.S.C.S. § 2201]

Plaintiff brings this action to enjoin defendant from violating the provisions of Section 15(a)(2) of the Fair Labor Standards Act of 1938, Act of June 25, 1938, c 676, 52 Statute 1060, *29 United States Code Sections 201-219*, hereinafter called the Act. Jurisdiction of this action is conferred on the court by Section 17 of the Act, *29 United States Code Section 217*, and by *28 United States Code Section 1337*.

[2] Use of Form

The form of allegation, *above*, is a form for use in an action to enjoin a violation of the Fair Labor Standards Act [*28 U.S.C.S. § 1337*; *29 U.S.C.S. §§ 201-219*; U.S.C.S. § 2201].

[3] Cross References

For general discussion and references relating to allegations based on laws regulating interstate commerce, see *§ 265.98*. For general discussion and general form relating to allegation based on Fair Labor Standards Act, see *§ 265.101*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.105

§ 265.105 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action by Motor Carrier to Enjoin Interference With Interstate Commerce [28 U.S.C.S. §§ 1331, 1337; 49 U.S.C.S. §§ 10521-10526]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action by Motor Carrier to Enjoin Interference With Interstate Commerce [28 U.S.C.S. §§ 1331, 1337; 49 U.S.C.S. §§ 10521-10526]

This action arises under the Commerce Clause of the United States *Constitution, Article I, Section 8, Clause 3,* and Part II of the Interstate Commerce Act, *49 United States Code Sections 10521-10526,* as hereinafter more fully appears.

[2] Use of Form

The form of allegation, *above*, is a form for use in an action by a motor carrier to enjoin interference with interstate commerce [*28 U.S.C.S. §§ 1331, 1337*; *49 U.S.C.S. §§ 10521-10526*].

[3] Cross References

For general discussion and references relating to allegations based on laws regulating interstate commerce, see *§ 265.98*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.106

§ 265.106 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Antitrust Action [28 U.S.C.S. § 1337]--General Form

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Antitrust Action [28 U.S.C.S. § 1337]--General Form

This action arises under a law to protect trade and commerce against restraints and monopolies, in particular _____[*cite statute*], as hereinafter more fully appears.

[2] Use of Form

The form of allegation, *above*, is a form for use in an antitrust action arising out of the Sherman Act [*15 U.S.C.S. §§ 1-7*] or the Clayton Act [*15 U.S.C.S. § 15*].

[3] Cross References

For general discussion and references relating to allegations based on laws regulating interstate commerce, see *§ 265.98*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.107

§ 265.107 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Treble Damages Under the Sherman Act [15 U.S.C.S. §§ 1, 2] and Clayton Act [15 U.S.C.S. § 15]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Treble Damages Under the Sherman Act [15 U.S.C.S. §§ 1, 2] and Clayton Act [15 U.S.C.S. § 15]

This action arises under the antitrust laws of the United States, more particularly the Sherman Antitrust Act, *15 United States Code Sections 1* and *2*, and *Section 4* of the Clayton Act, *15 United States Code Section 15*, as hereinafter more fully appears.

[2] Use of Form

The form of allegation, *above*, is a form for use in an action for treble damages under the Sherman Act [*15 U.S.C.S. §§ 1, 2*] or the Clayton Act [*15 U.S.C.S. § 15*].

[3] Cross References

For general discussion and references relating to allegations based on antitrust laws, see *§ 265.106*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.108

§ 265.108 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Injunction Under the Sherman Act [15 U.S.C.S. § 26]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Injunction Under the Sherman Act [15 U.S.C.S. § 26]

This is an action to enjoin violation of the Sherman Antitrust Act, *15 United States Code Sections 1-7* as hereinafter more fully appears. Jurisdiction is conferred on this court by *15 United States Code Section 26*.

[2] Use of Form

The form of allegation, *above*, is a form for use in an injunction action arising out of the Sherman Act [*15 U.S.C.S. § 26*].

[3] Cross References

For general discussion and references relating to allegations based on antitrust laws, see *§ 265.106*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.109

§ 265.109 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Under the Securities Act of 1933 to Rescind Fraudulent Sale and to Secure Restitution or for Damages [15 U.S.C.S. § 77v(a)]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Under the Securities Act of 1933 to Rescind Fraudulent Sale and to Secure Restitution or for Damages [15 U.S.C.S. § 77v(a)]

This court has jurisdiction of this action under Section 22(a) of the Securities Act of 1933, 48 Statute 86(a), as amended, *15 United States Code Section 77v(a)*.

[2] Use of Form

The form of allegation, *above*, is a form for use in an action under the Securities Act of 1933 to rescind a fraudulent sale and to secure restitution or for damages. The federal courts have jurisdiction over suits brought to enforce liability or duty created by the Securities Act of 1933 [*15 U.S.C.S. § 77v(a)*].

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22-265 California Forms of Pleading and Practice--Annotated § 265.110

§ 265.110 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages Under the Securities Exchange Act of 1934 [15 U.S.C.S. §§ 78p(b), 78aa]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages Under the Securities Exchange Act of 1934 [15 U.S.C.S. §§ 78p(b), 78aa]

This action arises under Section 16(b) of the Securities Exchange Act of 1934, *15 United States Code Section 78p(b)*, and this court has jurisdiction under Sections 16(b) and 27 of the Act, *15 United States Code Section 78aa*, as amended.

[2] Use of Form

The form of allegation, *above*, is a form for use in an action for damages under the Securities Exchange Act of 1934 to recover an insider's profit from the purchase and sale of stock within six months [*15 U.S.C.S. § 78p(b)*]. Under *15 U.S.C.S. § 78aa*, the district courts have exclusive jurisdiction to enforce a liability or duty created by the Securities Exchange Act of 1934.

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22-265 California Forms of Pleading and Practice--Annotated § 265.111

§ 265.111 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Wrongful Death Under the Federal Employers' Liability Act [45 U.S.C.S. § 56]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Wrongful Death Under the Federal Employers' Liability Act [45 U.S.C.S. § 56]

Plaintiff is the executor of the estate of _____[*name*], deceased, who died on _____[*date*], as the result of injuries sustained as hereinafter described.

Before and at the time of the injury sustained by plaintiff's decedent resulting in his/her death, all of which is herein com plained of, defendant owned and operated a railroad extending through the State of California and several other states and was a common carrier engaged in commerce between the several states, territories, District of Columbia, and foreign nations; and the injuries complained of occurred while it was engaging in such commerce and while plaintiff's decedent was employed by defendant in such commerce, his/her duties being in furtherance of interstate and foreign commerce and directly, closely, and substantially affecting such commerce. This action is brought by plaintiff for the benefit of _____[*describe*, *e.g.*, the surviving widow(er)] and _____[*describe*, *e.g.*, minor child], the dependents of the decedent, under and pursuant to the provisions of *45 United States Code Sections 51-60*, known as the Federal Employers' Liability Act.

[2] Use of Form

The form of allegation, *above*, is a form for use in an action for wrongful death under the Federal Employers' Liability Act [*45 U.S.C.S. §§ 51-60*]. This act gives federal courts concurrent jurisdiction [*45 U.S.C.S. § 56*].

[3] Cross References

For other forms of federal jurisdictional allegations in actions involving railroads, see Ch. 485 *Railroads* .

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22-265 California Forms of Pleading and Practice--Annotated § 265.112

§ 265.112 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Under the Federal Employers' Liability Act [45 U.S.C.S. § 56] and the Safety Appliance Act [45 U.S.C.S. §§ 1-23]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Under the Federal Employers' Liability Act [45 U.S.C.S. § 56] and the Safety Appliance Act [45 U.S.C.S. §§ 1-23]

This action arises under the Federal Employers' Liability Act, *45 United States Code §§ 51-60*, and under the Safety Appliance Act, *45 United States Code §§ 1-23*.

[2] Use of Form

The form of allegation, *above*, is a form for use in an action under the Federal Employers' Liability Act [*45 U.S.C.S. §§ 51-60*] and the Safety Appliance Act [*45 U.S.C.S. §§ 1-23*].

[3] Cross References

For a general form of jurisdictional allegation under the Federal Employers' Liability Act, see *§ 265.111*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.113

§ 265.113 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages for Violation of "Packers' and Stockyards' Act, 1921" [7 U.S.C.S. § 209]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages for Violation of "Packers' and Stockyards' Act, 1921" [7 U.S.C.S. § 209]

This is an action for damages for violation of the "Packers' and Stockyards' Act, 1921," particularly _____[*give specific citation*], as hereinafter more fully appears. Jurisdiction thereof is vested in this court by the Act of August 15, 1921, c 64, Section 308, 42 Statute 165, *7 United States Code Section 209*.

[2] Use of Form

The form of allegation, *above*, is a form for use in an action for damages for violation of the Packers' and Stockyards' Act of 1921 [*7 U.S.C.S. § 209*].

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22-265 California Forms of Pleading and Practice--Annotated § 265.114

§ 265.114 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Declaration of Invalidity or Noninfringement of Patent [28 U.S.C.S. § 1338]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Declaration of Invalidity or Noninfringement of Patent [28 U.S.C.S. § 1338]

This is an action to secure a declaratory judgment in respect to validity of a patent and to determine whether such patent, if it be valid, is being infringed by plaintiff. This court has jurisdiction under *28 United States Code Section 1338*.

[2] Use of Form

The form of allegation, *above*, is a form for an action for declaration of invalidity or noninfringement of a patent. Under *28 U.S.C.S. § 1338*, the federal district courts have exclusive jurisdiction in patent cases.

[3] Cross References

Moore's Federal Practice § 57.20[2] (3rd ed. Matthew Bender)

Borchard, *Declaratory Judgments* (2d ed.), § 804

36 C.J.S., *Federal Courts*, § 32

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22-265 California Forms of Pleading and Practice--Annotated § 265.115

§ 265.115 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Infringement of Patent [28 U.S.C.S. § 1338; 35 U.S.C.S. §§ 271, 281]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Infringement of Patent [28 U.S.C.S. § 1338; 35 U.S.C.S. §§ 271, 281]

This action arises under the patent laws of the United States, more particularly *35 United States Code Sections 271* and *281*, as hereinafter more fully appears. Jurisdiction is conferred on this court by *28 United States Code Section 1338*.

[2] Use of Form

The form of allegation, *above*, is a form for an action for infringement of a patent [*35 U.S.C.S. §§ 271*, *281*].

[3] Cross References

For form of allegation of jurisdiction in an action for declaration of invalidity or noninfringement of patent, see *§ 265.114*.

For other forms of federal jurisdictional allegations in actions involving patent infringement, see Ch. 411, *Patents and Inventions* .

Moore's Federal Practice § 57.20[2] (3rd ed. Matthew Bender)

Borchard, *Declaratory Judgments* (2d ed.), § 804

36 C.J.S., *Federal Courts*, § 32

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22-265 California Forms of Pleading and Practice--Annotated § 265.116

§ 265.116 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Infringement of Trademark and for Unfair Competition [28 U.S.C.S. § 1338]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Infringement of Trademark and for Unfair Competition [28 U.S.C.S. § 1338]

This is a civil action arising under the trademark laws of the United States, for infringement of a trademark registered in the United States Patent Office and for unfair competition. Jurisdiction is conferred on this court by *28 United States Code Section 1338*.

[2] Use of Form

The form of allegation, *above*, is a form for an action for infringement of trademark and for unfair competition [*28 U.S.C.S. § 1338*]. *28 U.S.C.S. § 1338(a)* gives district courts exclusive jurisdiction in actions arising under acts relating to trademarks. *28 U.S.C.S. § 1338(b)* authorizes joinder of an unfair competition claim with a substantial and related claim under trademark laws.

[3] Cross References

For form of allegation of jurisdiction in an action for declaration of invalidity or noninfringement of patent, see *§ 265.114*.

For a form of jurisdictional allegation in an action for infringement of a registered trademark under the Lanham Trademark Act [*15 U.S.C.S. §§ 1051-1127*], see Ch. 549, *Trademarks and Trade Names* .

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22-265 California Forms of Pleading and Practice--Annotated § 265.117

§ 265.117 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Infringement of Copyright and Unfair Competition [28 U.S.C.S. § 1338]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Infringement of Copyright and Unfair Competition [28 U.S.C.S. § 1338]

This action arises under the copyright laws of the United States, as hereinafter more fully appears. Jurisdiction is conferred on this court by *28 United States Code Section 1338*.

[2] Use of Form

The form of allegation, *above*, is a form for an action for infringement of copyright and for unfair competition [*28 U.S.C.S. § 1338*]. *28 U.S.C.S. § 1338* gives district courts exclusive jurisdiction in actions arising under acts relating to copyright and provides for joinder of unfair competition claims.

[3] Cross References

For form of allegation of jurisdiction in an action for declaration of invalidity or noninfringement of patent, see *§ 265.114*

For another form of federal jurisdictional allegation in an action involving infringement and unfair competition, see Ch. 349, *Literary Property and Copyright*

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22-265 California Forms of Pleading and Practice--Annotated § 265.118

§ 265.118 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action to Recover Property Seized Under Law of the United States [28 U.S.C.S. § 1356]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action to Recover Property Seized Under Law of the United States [28 U.S.C.S. § 1356]

This is an action to recover property owned by plaintiff and seized by _____[*name*] acting under the _____ Act, _____ Statute _____, _____ United States Code Section _____. Jurisdiction is vested in this court by *28 United States Code Section 1356*.

[2] Use of Form

The form of allegation, *above*, is a form for an action for an action to recover property seized under the law of the United States. The federal district courts have exclusive jurisdiction over actions involving seizures under any law of United States not within admiralty and maritime jurisdiction or exclusive jurisdiction of Court of International Trade [*28 U.S.C.S. § 1356*].

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22-265 California Forms of Pleading and Practice--Annotated § 265.119

§ 265.119 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages for Injury to Person or Property While Acting Under Federal Law Involving Protection or Collection of Revenue or Right to Vote [28 U.S.C.S. § 1357]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages for Injury to Person or Property While Acting Under Federal Law Involving Protection or Collection of Revenue or Right to Vote [28 U.S.C.S. § 1357]

This action is for damages for a[n] _____[personal injury to plaintiff and an injury to plaintiff's property *or* injury to plaintiff's property] sustained while acting under the _____ Act, _____ Statute _____, _____ United States Code Section _____, an Act of Congress for the _____ [_____ (protection *or* collection) of revenues of the United States *or* for the enforcement of a right of a citizen of the United States to vote in the State of California]. Jurisdiction is vested in this court by *28 United States Code Section 1357*.

[2] Use of Form

The form of allegation, *above*, is a form for an action for damages for injury to a person or property on account of an act done under a statute for protection or collection of revenues or to enforce a right to vote [*28 U.S.C.S. § 1357*].

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22-265 California Forms of Pleading and Practice--Annotated § 265.120

§ 265.120 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Civil Rights Action [28 U.S.C.S. § 1343]--General Form

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Civil Rights Action [28 U.S.C.S. § 1343]--General Form

This is an action to redress the deprivation under color of _____[law *or* statute *or* ordinance *or* regulation *or* custom *or* usage] of the State of California, of a[n] _____[right *or* privilege *or* immunity] secured to plaintiff by the _____ [United States Constitution, Article _____, Section _____ *or* Act of _____ (, _____ Statute _____, United States Code Section _____)], providing for equal rights of citizens or of all persons within the jurisdiction of the United States. Jurisdiction is conferred on this court by *28 United States Code Section 1343*.

[2] Use of Form

The form of allegation, *above*, is for use in various civil rights actions [*see, e.g., 42 U.S.C.S. §§ 1983, 1986, 1988*]. The federal courts have jurisdiction over actions to redress deprivation under color of state law of rights secured by the Constitution or a federal statute providing for equal rights [*28 U.S.C.S. § 1343*].

[3] Cross References

For forms of federal court jurisdictional allegation for use in an action under *42 U.S.C.S. § 1983* for deprivation of rights under color of state law, see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

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22-265 California Forms of Pleading and Practice--Annotated § 265.121

§ 265.121 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Civil Rights Action [28 U.S.C.S. § 1343]--To Enjoin Enforcement of Local Law or Regulation [42 U.S.C.S. §§ 1981, 1982]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Civil Rights Action [28 U.S.C.S. § 1343]--To Enjoin Enforcement of Local Law or Regulation [42 U.S.C.S. §§ 1981, 1982]

This action arises under the *Fourteenth Amendment to the United States Constitution*, and *42 United States Code Sections 1981* and *1982*, as hereinafter more fully appears. Jurisdiction is conferred on this court by *28 United States Code Section 1343*.

[2] Use of Form

The form of allegation, *above*, is for use in a civil rights action to enjoin enforcement of a local law or regulation [*42 U.S.C.S. §§ 1981, 1982*].

[3] Cross References

For general form of allegation of jurisdiction in a civil rights action, see *§ 265.120*

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22-265 California Forms of Pleading and Practice--Annotated § 265.122

§ 265.122 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Civil Rights Action [28 U.S.C.S. § 1343]--Damages for Conspiracy to Interfere [42 U.S.C.S. § 1985]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Civil Rights Action [28 U.S.C.S. § 1343]--Damages for Conspiracy to Interfere [42 U.S.C.S. § 1985]

This is an action to recover damages for _____ [personal injuries to plaintiff *or* injury to plaintiff's property *or* deprivation of plaintiff's right or privilege as a citizen of the United States to _____ (*describe right or privilege*)] by an act done in furtherance of a conspiracy mentioned in *42 United States Code Section 1985*, as hereinafter more fully appears. Jurisdiction is conferred on this court by *28 United States Code Section 1343*.

[2] Use of Form

The form of allegation, *above*, is for use in an action for damages for conspiracy to interfere with civil rights [*42 U.S.C.S. § 1985*]. The federal courts have jurisdiction over actions arising out of *42 U.S.C.S. § 1985* [*28 U.S.C.S. § 1343*].

[3] Cross References

For general form of allegation of jurisdiction in a civil rights action, see *§ 265.120*

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22-265 California Forms of Pleading and Practice--Annotated § 265.123

§ 265.123 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Civil Rights Action [28 U.S.C.S. § 1343]--Damages for Failure to Prevent Conspiracy to Interfere [42 U.S.C.S. §§ 1985, 1986]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Civil Rights Action [28 U.S.C.S. § 1343]--Damages for Failure to Prevent Conspiracy to Interfere [42 U.S.C.S. §§ 1985, 1986]

Plaintiff brings this action under *42 United States Code Section 1986* to recover damages for defendant's failure to _____[prevent *or* aid in preventing] a wrong mentioned in *42 United States Code Section 1985*, which defendant knew was about to occur and had the power to prevent, as hereinafter more fully appears. Jurisdiction is conferred on this court by *28 United States Code Section 1343*.

[2] Use of Form

The form of allegation, *above*, is for use in a civil rights action for damages for failure to prevent a conspiracy to interfere [*42 U.S.C.S. §§ 1985, 1986*]. Jurisdiction is conferred by *28 U.S.C.S. § 1343*.

[3] Cross References

For general form of allegation of jurisdiction in a civil rights action, see *§ 265.120*

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22-265 California Forms of Pleading and Practice--Annotated § 265.124

§ 265.124 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Civil Rights Action [28 U.S.C.S. § 1343]--Deprivation of Right to Vote [42 U.S.C.S. § 1971]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Civil Rights Action [28 U.S.C.S. § 1343]--Deprivation of Right to Vote [42 U.S.C.S. § 1971]

The jurisdiction of this court is invoked under *28 United States Code Section 1331*, this being an action which arises under the United States *Constitution, Article I, Sections 2* and *4, Amendments XIV, XV*, and XVII to the Constitution, and *42 United States Code Sections 1971* and *1983*. The jurisdiction of this court is also invoked under *28 United States Code Section 1357*, this being an action to enforce the right of a citizen of the United States to vote in the State of California. The jurisdiction of this court is further invoked under *28 United States Code Section 1343*, this being an action authorized by law to be brought to redress the deprivation under color of law, statute, ordinance, regulation, custom, and usage of a state of rights, privileges, and immunities secured by the United States *Constitution, Article I, Sections 2* and *4*, and *Amendments XIV, XV*, and XVII to the Constitution, and of rights secured by *42 United States Code Sections 1971* and *1983*, all of which hereinafter more fully appears.

[2] Use of Form

The form of allegation, *above*, is for use in a civil rights action for deprivation of the right to vote [*42 U.S.C.S. § 1971*]. Jurisdiction is conferred by *28 U.S.C.S. § 1343*.

[3] Cross References

For general form of allegation of jurisdiction in a civil rights action, see *§ 265.120*

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22-265 California Forms of Pleading and Practice--Annotated § 265.125

§ 265.125 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Against Alien Property Custodian Under Trading With the Enemy Act to Recover on Debt Owing From Enemy [50 U.S.C.S. App. § 9(a)]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Against Alien Property Custodian Under Trading With the Enemy Act to Recover on Debt Owing From Enemy [50 U.S.C.S. App. § 9(a)]

This action arises under the Trading With the Enemy Act, 40 Statute 411, as amended, *50 United States Code Appendix Section 9(a)*, as hereinafter more fully appears.

[2] Use of Form

The form of allegation, *above*, is adapted from *Markham v. Cabell (1945) 326 U.S. 404, 66 S. Ct. 193, 90 L. Ed. 165* and is for use in an action against an alien property custodian under the Trading With the Enemy Act to recover on a debt owing from the enemy [*50 U.S.C.S. App. § 9(a)*]. Jurisdiction is conferred by *28 U.S.C.S. § 1356*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.126

§ 265.126 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages Under the Tucker Act [28 U.S.C.S. § 1346(a)(2)]--General Form

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages Under the Tucker Act [28 U.S.C.S. § 1346(a)(2)]--General Form

This action is brought under *28 United States Code Section 1346(a)(2)*. The plaintiff's claim does not exceed $10,000, excluding interest and costs, and is founded on _____ [a contract with the defendant *or* the United States Constitution, Article _____, Section _____ *or* the Act of _____, _____ Statute _____, _____ United States Code Section _____ *or* a regulation of _____ (*specify executive department*)], as hereinafter more fully appears.

[2] Use of Form

The form of allegation, *above*, is for use in an action for damages under the Tucker Act, which provides the district court original jurisdiction over actions against the United States not exceeding $10,000 and founded either on the Constitution, an Act of Congress, an executive department regulation, or on express or implied contract with United States, or for damages in cases not sounding in tort [*28 U.S.C.S. § 1346(a)(2)*].

[3] Cross References

Moore's Federal Practice § 20.06[2] (3rd ed. Matthew Bender)

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22-265 California Forms of Pleading and Practice--Annotated § 265.127

§ 265.127 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages Under the Tucker Act [28 U.S.C.S. § 1346(a)(2)--To Recover Value of Property Taken by Government

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages Under the Tucker Act [28 U.S.C.S. § 1346(a)(2)--To Recover Value of Property Taken by Government

This is an action to recover just compensation for certain lands in _____ County, California, appropriated for public use, and damages to the residue of the tract, as hereinafter more fully appears. Plaintiff is a citizen of the United States. Plaintiff's claim does not exceed $10,000 and is founded on the *Fifth Amendment to the United States Constitution*, and jurisdiction is conferred on this court by *28 United States Code Section 1346(a)(2)*.

[2] Use of Form

The form of allegation, *above*, is for use in an action for damages under the Tucker Act to recover the value of property taken by the government [*28 U.S.C.S. § 1346(a)(2)*].

[3] Cross References

For general form of allegation of jurisdiction in cases arising under the Tucker Act, see *§ 265.126*

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22-265 California Forms of Pleading and Practice--Annotated § 265.128

§ 265.128 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages Under the Tucker Act [28 U.S.C.S. § 1346(a)(2)--Suit by Alien [28 U.S.C.S. § 2502]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages Under the Tucker Act [28 U.S.C.S. § 1346(a)(2)--Suit by Alien [28 U.S.C.S. § 2502]

Plaintiff is a _____[citizen *or* subject] of the _____[Kingdom *or* Republic *or* Sovereign State] of _____, which government accords to citizens of the United States the right to prosecute claims against such government in its courts. This action is brought under the provisions of *28 United States Code Sections 1346* and *2502*. The plaintiff's claim _____ [does not exceed $10,000, exclusive of interest and costs, and is founded on _____ (the United States Constitution, Article _____, Section _____ *or* the Act of _____, _____ Statute _____, _____ United States Code Section _____ *or* a regulation of _____[*specify executive department*] *or* a contract with the United States) *or* is for damages, does not sound in tort, and does not exceed $10,000, exclusive of interest and costs], as hereinafter more fully appears.

[2] Use of Form

The form of allegation, *above*, is for use in an action by an alien for damages under the Tucker Act [*28 U.S.C.S. § 1346(a)(2)*]. *28 U.S.C.S. § 2502* provides a citizen or subject of a foreign government to prosecute a claim against the United States in federal courts.

[3] Cross References

For general form of allegation of jurisdiction in cases arising under the Tucker Act, see *§ 265.126*

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22-265 California Forms of Pleading and Practice--Annotated § 265.129

§ 265.129 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Against United States for Refund of Federal Taxes [28 U.S.C.S. § 1346(a)(1)]--Income Taxes

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Against United States for Refund of Federal Taxes [28 U.S.C.S. § 1346(a)(1)]--Income Taxes

Plaintiff brings this action against the United States for the recovery of income taxes erroneously and illegally assessed and collected from plaintiff. Plaintiff is a citizen of the United States, and jurisdiction is conferred on this court by *28 United States Code Section 1346(a)(1)*.

[2] Use of Form

The form of allegation, *above*, is for use in an action against the United States to recover internal revenue tax erroneously or illegally assessed or collected [*28 U.S.C.S. § 1346(a)(1)*].

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22-265 California Forms of Pleading and Practice--Annotated § 265.130

§ 265.130 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Against United States for Refund of Federal Taxes [28 U.S.C.S. § 1346(a)(1)]--Estate Taxes

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Against United States for Refund of Federal Taxes [28 U.S.C.S. § 1346(a)(1)]--Estate Taxes

Plaintiff is the _____[executor of the last will and testament *or* administrator of the estate] of _____[*name*], deceased. Plaintiff brings this action against the United States to recover estate taxes erroneously and illegally assessed and collected by defendant from plaintiff. Plaintiff is a citizen of the United States, and jurisdiction is conferred on this court by *28 United States Code Section 1346(a)(1)*.

[2] Use of Form

The form of allegation, *above*, is for use in an action against the United States to recover estate taxes internal revenue tax erroneously or illegally assessed or collected [*28 U.S.C.S. § 1346(a)(1)*].

[3] Cross References

For general form of allegation of jurisdiction in actions involving income taxes, see *§ 265.129*

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22-265 California Forms of Pleading and Practice--Annotated § 265.131

§ 265.131 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action to Quiet Title and to Cancel Federal Tax Lien [28 U.S.C.S. § 2410]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action to Quiet Title and to Cancel Federal Tax Lien [28 U.S.C.S. § 2410]

This is an action to quiet title to certain real property on which the United States claims a lien for federal income taxes and for cancellation as to such property of a tax lien filed by the United States. This court has jurisdiction of this action under *28 United States Code Section 2410(a)*.

[2] Use of Form

The form of allegation, *above*, is for an action to quiet title and to cancel a federal tax lien [*28 U.S.C.S. § 2410*]. Federal courts have jurisdiction over actions affecting property on which the United States has a lien [*28 U.S.C.S. § 2410(a)*].

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22-265 California Forms of Pleading and Practice--Annotated § 265.132

§ 265.132 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages Under the Federal Tort Claims Act [28 U.S.C.S. §§ 1346(b), 2671-2680]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Damages Under the Federal Tort Claims Act [28 U.S.C.S. §§ 1346(b), 2671-2680]

This action is brought under the Federal Tort Claims Act, *28 United States Code Sections 1346(b)* and *2671*-2680, as hereinafter more fully appears. Plaintiff is a citizen of the United States.

[2] Use of Form

The form of allegation, *above*, is for an action under the Federal Tort Claims Act [*28 United States Code Sections 1346(b)* and *2671*-2680]. District courts have exclusive jurisdiction over actions against the United States for damages for injury caused by the negligence of a government employee [*28 U.S.C.S. § 1346(b)*]. Tort claims procedures can be found in *28 U.S.C.S. §§ 2671-2680*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.133

§ 265.133 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Partition of Lands Where United States Is Tenant in Common or Joint Tenant [28 U.S.C.S. § 1347]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action for Partition of Lands Where United States Is Tenant in Common or Joint Tenant [28 U.S.C.S. § 1347]

This action is brought by a _____[tenant in common *or* joint tenant] for the partition of lands, and the United States is one of such _____[tenants in common *or* joint tenants]. Jurisdiction is conferred on this court by *28 United States Code Section 1347*.

[2] Use of Form

The form of allegation, *above*, is for use in an action for partition of lands where the United States is a tenant in common or a joint tenant. District courts have original jurisdiction in such actions [*28 U.S.C.S. § 1347*].

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22-265 California Forms of Pleading and Practice--Annotated § 265.134

§ 265.134 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action by or Against Corporation, More Than One-Half of Whose Stock Is Owned by United States [28 U.S.C.S. § 1349]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action by or Against Corporation, More Than One-Half of Whose Stock Is Owned by United States [28 U.S.C.S. § 1349]

_____[Plaintiff *or* Defendant] is a corporation incorporated by the Act of Congress of _____[*date*], _____ Statute _____, and more than one-half of its capital stock is owned by the government of the United States. The matter in controversy exceeds the sum of $10,000, exclusive of interest and costs.

[2] Use of Form

The form of allegation, *above*, is for use in an action by or against a corporation whose stock is more than one-half owned by the United States *28 U.S.C.S. § 1349*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.135

§ 265.135 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Alien's Action for Tort [28 U.S.C.S. § 1350

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Alien's Action for Tort [28 U.S.C.S. § 1350

Plaintiff is a _____[citizen *or* subject] of the _____[Republic *or* Kingdom *or* Sovereign State] of _____ and brings this action to recover damages for a tort in violation of the _____ [law of nations *or* treaty of the United States with _____ (*specify*)], as hereinafter more fully appears.

[2] Use of Form

The form of allegation, *above*, is for use in an alien's action for a tort committed in violation of the law of nations or a treaty with the United States [*28 U.S.C.S. § 1350*].

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22-265 California Forms of Pleading and Practice--Annotated § 265.136

§ 265.136 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Suit Against Consul or Vice Consul [28 U.S.C.S. § 1351]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Suit Against Consul or Vice Consul [28 U.S.C.S. § 1351]

Defendant is a _____[Consul *or* Vice Consul] appointed by _____[*name*] for _____[*state appointed position*] in the State of _____ and duly recognized by the President of the United States.

[2] Use of Form

The form of allegation, *above*, is for use in a suit against a consult or vice consul. Federal courts have original and exclusive jurisdiction in all such actions [*28 U.S.C.S. § 1351*].

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22-265 California Forms of Pleading and Practice--Annotated § 265.137

§ 265.137 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action on Bond Executed Under Law of United States [28 U.S.C.S. § 1352]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action on Bond Executed Under Law of United States [28 U.S.C.S. § 1352]

This is an action on a bond executed under the Act of _____, _____ Statute _____, _____ United States Code Section _____. Jurisdiction is conferred on this court by *28 United States Code Section 1352*.

[2] Use of Form

The form of allegation, *above*, is for use in an action on a bond executed under the law of the United States [*28 U.S.C.S. § 1352*].

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22-265 California Forms of Pleading and Practice--Annotated § 265.138

§ 265.138 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Involving Right of Indian to Allotment of Land [28 U.S.C.S. § 1353]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Involving Right of Indian to Allotment of Land [28 U.S.C.S. § 1353]

This action involves the right of plaintiff, a person of _____[Indian blood *or* part Indian blood *or* Indian descent], to an allotment of land under the _____ [Act of _____, _____ Statute _____, _____ United States Code Section _____ *or* treaty of the United States with _____ (*specify*)]. Jurisdiction is conferred on this court by *28 United States Code Section 1353*.

[2] Use of Form

The form of allegation, *above*, is for use in an action involving the right of an American Indian to allotment of land [*28 U.S.C.S. § 1353*].

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22-265 California Forms of Pleading and Practice--Annotated § 265.139

§ 265.139 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Between Citizens of Same State Claiming Lands Under Grants From Different States [28 U.S.C.S. § 1354]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action Between Citizens of Same State Claiming Lands Under Grants From Different States [28 U.S.C.S. § 1354]

This is a suit of a civil nature between citizens of the same state, the State of California, claiming lands under grants from different states. The plaintiff claims under a grant from the State of _____ and the defendant claims under a grant from the State of _____.

[2] Use of Form

The form of allegation, *above*, is for use in an action between citizens of the same state claiming lands under grants from different states [*28 U.S.C.S. § 1354*].

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22-265 California Forms of Pleading and Practice--Annotated § 265.140

§ 265.140 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Qui Tam Action Under False Claims Act [31 U.S.C.S. § 232]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Qui Tam Action Under False Claims Act [31 U.S.C.S. § 232]

_____[*Name*], the realtor, institutes and prosecutes this action in the name of, for, and on behalf of the United States and in his own behalf, under and pursuant to *31 United States Code Sections 231, 232*, and *235*.

[2] Use of Form

The form of allegation, *above*, is for use in a Qui Tam action under the False Claims Act [*31 U.S.C.S. §§ 232-235*].

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22-265 California Forms of Pleading and Practice--Annotated § 265.141

§ 265.141 Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action in Name of United States [Fed. R. Civ. P., Rule 17(a)]

[1] FORM Allegation of Jurisdiction [Fed. R. Civ. P., Rule 8(a)(1)]--Action in Name of United States [Fed. R. Civ. P., Rule 17(a)]

This is a suit of a civil nature brought in the name of the United States under the Act of _____, _____ Statute _____, _____ United States Code Section _____.

[2] Use of Form

The form of allegation, *above*, is for use in a civil action in the name of the United States [*Fed. R. Civ. P., Rule 17(a)*].

[3] Cross References

Moore's Federal Practice § 17.10[3][e] (3rd ed. Matthew Bender)

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22-265 California Forms of Pleading and Practice--Annotated § 265.142

§ 265.142 Notice of Motion and Motion to Dismiss for Lack of Subject Matter Jurisdiction [Fed. R. Civ. P., Rule 12(b)(1)]--Lack of Diversity Jurisdiction [28 U.S.C.S. § 1332(a)(1)]

[1] FORM Notice of Motion and Motion to Dismiss for Lack of Subject Matter Jurisdiction [Fed. R. Civ. P., Rule 12(b)(1)]--Lack of Diversity Jurisdiction [28 U.S.C.S. § 1332(a)(1)]

UNITED STATES DISTRICT COURT,
_____ DISTRICT OF CALIFORNIA

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	Civil Action, File No. _____
_____ [*name(s)*],	)	NOTICE OF MOTION AND MOTION TO DIS-
Defendant(s).	)	MISS COMPLAINT
	)	
	)	

_____

To: _____,
Attorney for Plaintiff

_____
[*address of attorney*]

Please take notice that the undersigned will move this court at Room _____, United States Court House, _____, City of _____, on the _____ day of _____[*date*], at _____ o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order to dismiss this action on the grounds that the jurisdiction of this court is invoked solely on the basis that there is diversity of citizenship between the parties to this action. Such diversity does not exist

since the controversy is not between citizens of different states in that _____ [defendant is a citizen of the State of _____, the state of which plaintiff is also alleged to be a citizen *or* the complaint fails to allege the citizenship of the parties *or* defendant _____ (*name*) is an indispensable party to this suit since the interest of this defendant is identical with that of the plaintiff's in that _____ (*state grounds*) and, therefore, because this defendant should be realigned as a party plaintiff, defendant _____ (*name*) and this defendant are both citizens of the State of _____].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant
_____ [*attorney's address*]

[2] Use of Form

The notice of motion and motion, *above*, is for use in a federal court action in which the plaintiff has invoked the jurisdiction of the court in his or her complaint [*see Fed. R. Civ. P., Rule 8(a)(1)*] on the diversity of the citizenship of the parties [*see 28 U.S.C.S. § 1332(a)(1)*]. Counsel should consult the appropriate local district court rule before using the foregoing form since some courts require or prefer that a notice of motion and motion be separate documents. Local rules may also vary as to which accompanying papers are required.

The defense of lack of subject matter jurisdiction may be contained in the answer or made by motion [*Fed. R. Civ. P., Rule 12(b)(1)*]. Dismissal of the action is proper whenever it appears that court lacks jurisdiction over subject matter [*Fed. R. Civ. P., Rule 12(h)(2)*].

[3] Cross References

For form of order dismissing action for lack of subject matter jurisdiction, see *§ 265.145*

Moore's Federal Practice § 12.30 (3rd ed. Matthew Bender)

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22-265 California Forms of Pleading and Practice--Annotated § 265.143

§ 265.143 Notice of Motion and Motion to Dismiss for Lack of Subject Matter Jurisdiction [Fed. R. Civ. P., Rule 12(b)(1)]--Lack of General Federal Questions [28 U.S.C.S. § 1331(a)(1)]

[1] FORM Notice of Motion and Motion to Dismiss for Lack of Subject Matter Jurisdiction [Fed. R. Civ. P., Rule 12(b)(1)]--Lack of General Federal Questions [28 U.S.C.S. § 1331(a)(1)]

UNITED STATES DISTRICT COURT,
_____ DISTRICT OF CALIFORNIA

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	Civil Action, File No. _____
_____ [*name(s)*],	)	NOTICE OF MOTION AND MOTION TO DIS-
Defendant(s).	)	MISS COMPLAINT
	)	
	)	

_____

To: _____,
Attorney for Plaintiff

_____
[*address of attorney*]

Please take notice that the undersigned will move this court at Room _____, United States Court House, _____, City of _____, on the _____ day of _____[*date*], at _____ o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order to dismiss this action on the grounds that the court lacks jurisdiction because it appears on the face of the complaint that the alleged claim does not arise under the Constitution, laws, or treaties of the

United States as alleged therein.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant
_____ [*attorney's address*]

[2] Use of Form

The form of notice of motion and motion, *above*, is for use in a federal court action in which the plaintiff has invoked the jurisdiction of the court in his or her complaint [*see 28 U.S.C. § 1331*] on a general question jurisdiction [*see 28 U.S.C. § 1331(a)(1)*]. Counsel should consult the local appropriate district court rule before using the foregoing form since some courts require or prefer that a notice of motion and motion be separate documents. Local rules may also vary as to which accompanying papers are required.

[3] Cross References

For further discussion and for form of notice of motion and motion to dismiss for lack of subject matter jurisdiction--diversity jurisdiction, see *§ 265.142*

For form of order dismissing action for lack of subject matter jurisdiction, see *§ 265.145*

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22-265 California Forms of Pleading and Practice--Annotated § 265.144

§ 265.144 Notice of Motion and Motion to Dismiss for Lack of Subject Matter Jurisdiction [Fed. R. Civ. P., Rule 12(b)(1)]--Lack of Jurisdictional Amount [28 U.S.C.S. § 1332(a)(1)]

[1] FORM Notice of Motion and Motion to Dismiss for Lack of Subject Matter Jurisdiction [Fed. R. Civ. P., Rule 12(b)(1)]--Lack of Jurisdictional Amount [28 U.S.C.S. § 1332(a)(1)]

UNITED STATES DISTRICT COURT,
_____ DISTRICT OF CALIFORNIA

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	Civil Action, File No. _____
_____ [*name(s)*],	)	NOTICE OF MOTION AND MOTION TO DIS-
Defendant(s).	)	MISS COMPLAINT
	)	
	)	

_____

To: _____,
Attorney for Plaintiff

_____
[*address of attorney*]

To plaintiff _____[*name*] and to his/her/its attorney of record:

PLEASE TAKE NOTICE that the undersigned will move this court at Room _____, United States District Court House, _____[*street address*], _____[*city*], on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, for an

order to dismiss this action. This motion is made on the ground that the court lacks jurisdiction because the amount actually in controversy is less than $75,000, exclusive of interest and costs[, all of which more clearly appears in the affidavit(s) of _____ (*name(s)*) attached hereto as Exhibit(s) _____ and made a part hereof]. All attached exhibits and a memorandum of law in support of the above motion are attached hereto and made a part hereof.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant
_____ [*attorney's address*]

[2] Use of Form

The combined form of notice of motion and motion, above, is for use in a federal court action in which the plaintiff has invoked the jurisdiction of the court in his or her complaint [*see Fed. R. Civ. P., Rule 8(a)(1)*] on diversity of citizenship [*see 28 U.S.C.S. § 1332(a)(1)*] and has failed to allege the requisite $75,000 jurisdictional amount. Counsel should consult the appropriate local district court rule before using the form since some courts require or prefer that a notice of motion and motion be separate documents. Local rules may also vary as to which accompanying papers are required.

[3] Cross References

For further discussion and for form of notice of motion and motion to dismiss for lack of subject matter jurisdiction--diversity jurisdiction, see *§ 265.142*

For form of order dismissing action for lack of subject matter jurisdiction, see *§ 265.145*

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22-265 California Forms of Pleading and Practice--Annotated § 265.145

§ 265.145 Order Dismissing Action for Lack of Subject Matter Jurisdiction [Fed. R. Civ. P., Rule 12(h)(3)]

[1] FORM Order Dismissing Action for Lack of Subject Matter Jurisdiction [Fed. R. Civ. P., Rule 12(h)(3)]

UNITED STATES DISTRICT COURT,
_____ DISTRICT OF CALIFORNIA

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	Civil Action, File No. _____
_____ [*name*],	)	ORDER DISMISSING ACTION FOR LACK OF
Defendant.	)	SUBJECT MATTER JURISDICTION
	)	
	)	

This cause came on for hearing on _____[*date*], on defendant's motion to dismiss this act for lack of subject matter jurisdiction, and the court having heard the arguments of counsel and being fully advised,

IT IS ORDERED, that the defendant's motion be granted and that this action be dismissed for lack of subject matter jurisdiction.
Dated: _____.

_____ [*signature*]
United States District Judge

[2] Use of Form

The form of order, *above*, may, and under some local district court rules should, be combined with a notice of motion and motion to dismiss for lack of subject matter jurisdiction. Counsel should also consult local district court rules to

determine whether any additional requirements must be met in connection with the form.

[3] Cross References

For forms of motion to dismiss for lack of subject matter jurisdiction, see *§§ 265.142 -265.144*

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22-265 California Forms of Pleading and Practice--Annotated § 265.146

§ 265.146 Denial of Jurisdictional Allegations in Answer [Fed. R. Civ. P., Rule 8(b)]

[1] FORM Denial of Jurisdictional Allegations in Answer [Fed. R. Civ. P., Rule 8(b)]

UNITED STATES DISTRICT COURT,
_____ DISTRICT OF CALIFORNIA

_____ [*name*]	)	
Plaintiff,	)	
vs.	)	Civil Action, File No. _____
_____ [*name*],	)	ANSWER
Defendant.	)	
	)	
	)	

Defendant denies that this court has jurisdiction over the subject matter of this action as alleged in Paragraph _____ of plaintiff's complaint in that _____[there is no diversity of citizenship between the plaintiff and defendant to this action *or* this action does not arise under the Constitution, laws, or treaties of the United States *or* the matter in controversy does not exceed the sum of $75,000, exclusive of interest and costs, since the complaint does not set forth any facts to warrant the conclusion that there is such an amount involved].

[2] Use of Form

The form of denial, *above*, is for use in an answer in which defendant wishes to challenge the court's subject matter jurisdiction in the answer.

[3] Cross References

For form of notice of motion and motion to dismiss for lack of subject matter jurisdiction and related discussion, see *§ 265.142*

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[Reserved]

§§ 265.147[Reserved]

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B. Removal of Causes (#ssa00000380#)

22-265 California Forms of Pleading and Practice--Annotated § 265.160

§ 265.160 Notice of Removal From State Court to Federal District Court [28 U.S.C.S. §§ 1441, 1446]

[1] FORM Notice of Removal From State Court to Federal District Court [28 U.S.C.S. §§ 1441, 1446]

UNITED STATES DISTRICT COURT,
_____ DISTRICT OF CALIFORNIA

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	
vs.	)	Civil Action, File No. _____
_____ [*name*(*s*)],	)	NOTICE OF REMOVAL
Defendant(s).	)	
	)	
	)	

To the Judges of the United States District Court for the _____ District of California, _____ Division:

The notice of removal of _____[*name*] [, by and with the written consent of the other defendant(s) herein,] respectfully shows:

1. On _____[*date*], an action was commenced against defendant in the Superior Court of California, County of _____, No. _____, entitled _____[*name*], Plaintiff vs. _____[*name*], Defendant.

2. On _____[*date*], service was made on defendant of a summons and complaint, copies of which are annexed to this notice. _____[No further proceedings have been had in the state court action *or list and attach all other process, pleadings, and orders*.]

3. The above-described action is a civil action of which this court has original jurisdiction under the provisions of United States Code, Title _____, Section _____, and is one that may be removed to this court by defendant, pursuant to _____[*United States Code, Title 28, Section 1441 or other appropriate reference*], according to the following facts: _____[*set out short and plain statements of facts for each ground that entitle defendant to removal; see, e.g., §§ 265.161 -265.164 for allegations of grounds for removal*].

[4. Defendant files herewith a bond with good and sufficient surety conditioned that it will pay all costs and disbursements incurred by reason of the removal proceedings hereby brought, should it be determined that this action is not removable or is improperly removed.]

[5. Defendant(s) _____ (*name*(*s*)), and its/their attorney(s), join in and consent to the removal of this cause to the United States District Court for the _____ District of California, _____ Division.]

WHEREFORE, defendant prays that the above action now pending against him/her/it in the Superior Court of California, County of _____, be removed therefrom to this Court.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner
Office and P.O. Address
_____
_____

[2] Use of Form

The form of notice of removal, *above*, is for use by the defendant in an action brought in state court to remove that action to federal court. A defendant desiring to remove any civil action from a state court must file in the district court of the United States for the district and division within which that action is pending a notice of removal signed pursuant to *Fed. R. Civ. P., Rule 11* and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served on him or her in that action [*28 U.S.C.S. § 1446(a)* (term "removal petition" changed to "notice of removal" in 1988 without major substantive change); *see* discussion in *§ 265.39*]. For sample allegations of grounds for removal for use in Paragraph 3 of the foregoing form, see *§§ 265.161 -265.164*.

[3] Signature Requirement

Every notice of removal of a party represented by an attorney must be signed by at least one attorney in the attorney's individual name, and include a statement of that attorney's address. A party who is not represented by an attorney must sign his or her notice of removal and include his or her address. The notice need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by the signer that he or she has read the notice of removal, that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose. If a notice of removal is not signed, it will be stricken unless it is signed promptly after the omission is called to the attention of the party seeking removal. If a notice of removal is signed in violation of *Fed. R. Civ. P., Rule 11*, the court, on motion or on its own initiative, shall impose on the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to

the other party the amount of the reasonable expenses incurred because of the filing of the notice of removal, including a reasonable attorney's fee [*see 28 U.S.C.S. § 1446(a)*; *Fed. R. Civ. P., Rule 11*].

[4] Filing Requirements

The notice of removal must be filed within 30 days after receipt by the defendant, by service or otherwise, of a copy of the initial pleading setting forth the claim for relief on which the action or proceeding is based, or within 30 days after the service of summons on the defendant if the initial pleading has been filed in court and is not required to be served on the defendant, whichever period is shorter [*28 U.S.C.S. § 1446(b)*; for further discussion, *see § 265.38[3]*].

[5] When Removal Complete

Giving prompt written notice of the notice of removal to the adverse parties and filing of a copy of the notice with the clerk of the state court will effect removal [*28 U.S.C.S. § 1446(d)*; for a form of notice, *see § 265.166*]. If it appears that the district court lacks subject matter jurisdiction, remand may occur at any time before final judgment. If remand is based on any defect in the removal procedure, a motion to remand must be made within 30 days after the filing of the notice of removal [*see 28 U.S.C.S. § 1447(c)*; *see § 265.40[2*]; for form of motion to remand action, *see § 265.168*].

[6] Cross References

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms of prayers and verification, see Ch. 420, *Prayers* and Ch. 572, *Verification*

Note, *A Uniform Methodology for Assessing Rule 11 Sanctions: A Means to Serve the End of Conserving Public and Private Legal Resources*, *63 S. Cal. L. Rev. 1855 (1990)*

Moore's Federal Practice, § 107.18[2] (3rd ed. Matthew Bender)

1 *Moore's Manual--Federal Practice and Procedure, ch. 8, § 8.05*

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22-265 California Forms of Pleading and Practice--Annotated § 265.161

§ 265.161 Allegation of Ground for Removal--Federal Question [28 U.S.C.S. §§ 1331, 1441(a), (b)]

[1] FORM Allegation of Ground for Removal--Federal Question [28 U.S.C.S. §§ 1331, 1441(a), (b)]

It appears from the plaintiff's complaint that this is a civil action that arises under

[*EITHER*]

the Constitution of the United States, Article _____, Section _____.

[*OR*]

the _____ Amendment to the Constitution of the United States, Section _____.

[*OR*]

the Act of _____, _____ Stat. _____, United States Code, Title _____, Section _____.

[*OR*]

the Treaty of the United States with _____[*describe treaty*].

[*CONTINUE*]

The action is one arising under this provision in that _____[*briefly set forth claim as alleged in complaint, showing that action arises under the designated provision*].

[2] Use of Form

The form of allegation, *above*, is for use by a defendant in a state court action in his or her notice of removal of that action to a federal court based on the action arising under federal law. When using this allegation, it should be inserted at the end of Paragraph 3 of the notice of removal in § 265.160.

Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, laws, or treaties, of the United States is removable without regard to the citizenship or residence of the parties [*28 U.S.C.S. § 1441(b)*; *see 28 U.S.C.S. § 1331*]. Such a right must be an essential element of the plaintiff's cause of action before the action will be removed [*Takeda v. Northwestern Nat. Life Ins. Co. (9th Cir. 1985) 765 F.2d 815, 822 ; see § 265.14*].

[3] Cross References

For form of Notice of Removal, *see § 265.160* and related discussion

Moore's Federal Practice, §§ 107.04, 107.14 (3rd ed. Matthew Bender)

1 *Moore's Manual--Federal Practice and Procedure, ch. 8, § 8.02*

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22-265 California Forms of Pleading and Practice--Annotated § 265.162

§ 265.162 Allegation of Ground for Removal--Diversity of Citizenship [28 U.S.C.S. §§ 1332, 144,(b)]--In General

[1] FORM Allegation of Ground for Removal--Diversity of Citizenship [28 U.S.C.S. §§ 1332, 144,(b)]--In General

The above-described action is a civil action of which this court has original jurisdiction under the provisions of *Title 28, Section 1332 of the United States Code*, and is one that may be removed to this court by defendant, pursuant to *Title 28, Section 1441 of the United States Code*, in that it is a civil action wherein the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different states.

[*EITHER, if individual plaintiff and individual defendant*]

Plaintiff _____[*name*], at the time this action was commenced, was and still is a citizen of the State of _____. Defendant _____[*name*], at the time this action was commenced, was and still is a citizen of the State of _____, and was not and is not a citizen of the State of California, wherein this action was brought.

[*OR, if individual plaintiff and corporate defendant*]

Plaintiff _____[*name*], at the time this action was commenced, was and still is a citizen of the State of _____. Defendant _____[*name*], at the time this action was commenced, was and still is a corporation incorporated under the laws of the State of _____, with its principal place of business in the State of _____, and was not and is not incorporated under the laws of the State of California, wherein this action was brought.

[2] Use of Form

The form of allegation, *above*, is for use by a defendant in a state court action in his or her notice of removal of the

action to a federal court based on diversity of citizenship. When using this allegation, it should be substituted for Paragraph 3 of the notice of removal in § 265.160.

Any civil action of which the district courts have original jurisdiction is removable if none of the parties in interest properly joined and served as defendants is a citizen of California [*28 U.S.C.S. § 1441(b)*]. For purposes of removal, the citizenship of defendants sued under fictitious names is disregarded [*28 U.S.C.S. § 1441(a)*]. The district courts have original jurisdiction of all civil actions when the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different states [*28 U.S.C.S. § 1332(a)*; *see § 265.15*].

[3] Cross References

For form of Notice of Removal, *see § 265.160* and related discussion

Moore's Federal Practice, § 107.14[2] (3rd ed. Matthew Bender)

1 *Moore's Manual--Federal Practice and Procedure, ch. 8, Removal From State Courts, § 8.02*

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B. Removal of Causes (#ssa00000380#)

22-265 California Forms of Pleading and Practice--Annotated § 265.163

§ 265.163 Allegation of Ground for Removal--Diversity of Citizenship [28 U.S.C.S. §§ 1332, 144(b)]--Improper Designation of Parties

[1] FORM Allegation of Ground for Removal--Diversity of Citizenship [28 U.S.C.S. §§ 1332, 144(b)]--Improper Designation of Parties

[*EITHER, if plaintiff or defendant is nominal party*]

_____[Plaintiff *or* Defendant] _____[*name*] is not a necessary party to this action, but is only a formal party without any interest in the action, _____[in whose favor *or* against whom] no substantial relief _____[is sought *or* can be granted].

[*OR, if parties should be realigned*]

Defendant _____[*name*], at the time this action was commenced, was and still is a citizen of the State of _____. The interest of that defendant in this action is identical with that of plaintiff _____[*name*] in that his/her interest is _____ [*set forth interest briefly, e.g.,* that the alleged lease between _____ (*name*) and _____ (*name*) be declared valid and enforceable against this defendant]; and therefore defendant _____[*name*] should be aligned as a party plaintiff.

[*OR, if improper joinder contrary to allegations in complaint*]

Plaintiff has fraudulently and improperly joined defendant _____[*name*] as codefendant, in that, contrary to the allegations of the complaint herein, that defendant _____[*set forth basis of improper joinder, e.g.,* was not present with defendant in the automobile owned and operated by defendant at the time of the collision complained of, and did not have control of it, and did not, in any manner or degree, contribute to plaintiff's

damage either by his own negligence or joint negligence with defendant, all of which was, or readily might have been, known by plaintiff or his counsel] and plaintiff fraudulently and improperly joined _____[*name*] as a sham defendant for the sole purpose of avoiding and defeating the removal of this action to the United States District Court.

[*OR, if improper joinder appears from face of complaint*]

Plaintiff has fraudulently and improperly joined defendant _____[*name*] as codefendant, in that the complaint shows on its face that _____ [*set forth basis of improper joinder, e.g.*, plaintiff has neither alleged, nor has, a claim or cause of action against this defendant on account of _____ (*describe events in question*), and whatever claim or cause of action plaintiff may have by reason of _____ (*describe events in question*) is against defendant _____ (*name*) alone], and that defendant _____[*name of codefendant*] is a sham defendant, joined by plaintiff as a codefendant for the sole purpose of avoiding and defeating the removal of this action to the United States District Court.

[2] Use of Form

The allegations, *above*, are for use by a defendant in a state court action in his or her notice of removal of that action to a federal court based on diversity of citizenship. The purpose of each allegation is to demonstrate that there is diverse citizenship, even though diversity does not appear on the face of the complaint. When using these allegations, they should be combined at the end of the appropriate allegation in Form 92 relating to diversity jurisdiction generally, and then be substituted for Paragraph 3 of the notice of removal in § 265.160.

[3] Cross References

For related form of Notice of Removal, *see § 265.160* and related discussion. For form of allegation of removal on the basis of diversity of citizenship, see *§ 265.162* and related discussion

Moore's Federal Practice, § 17.13[2], 102.21(3rd ed. Matthew Bender)

Moore's Manual--Federal Practice and Procedure, ch. 8, Removal From State Courts, § 8.02

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22-265 California Forms of Pleading and Practice--Annotated § 265.164

§ 265.164 Allegation of Ground for Removal--Diversity of Citizenship [28 U.S.C.S. §§ 1332, 1441(b)]--Class Action

[1] FORM Allegation of Ground for Removal--Diversity of Citizenship [28 U.S.C.S. §§ 1332, 144(b)]--Class Action

The above-described action is a civil action of which this court has original jurisdiction under the provisions of *Title 28, Section 1332(d) of the United States Code*, and is one that may be removed to this court by defendant, pursuant to *Title 28, Section 1453(b) of the United States Code*, in that it is a class action wherein the matter in controversy exceeds the sum or value of $5 million, exclusive of interest and costs, and in which a member of the plaintiff class and a defendant are citizens of different states.

Plaintiff _____[*name*], a member of the plaintiff class, at the time this action was commenced, was and still is a citizen of the State of _____. Defendant _____[*name*], at the time this action was commenced, was and still is a citizen of the State of _____, and was not and is not a citizen of the State of California, wherein this action was brought.

[2] Use of Form

The form of allegation, *above*, is for use by a defendant in a state court class action in his or her notice of removal of the action to a federal court based on minimal diversity of citizenship. When using this allegation, it should be substituted for Paragraph 3 of the notice of removal in § 265.160.

Under the Class Action Fairness Act, a class action is removable by a single defendant, without the consent of the other defendants, if (1) the amount in controversy exceeds $5 million, and (2) any member of a plaintiff class and any defendant are citizens of different states [*28 U.S.C.S. §§ 1332(d), 1453(b)*]. For discussion of the new class action rules, see *§ 265.15[6]*. For discussion of removal in class action cases, see *§ 265.34[3]*.

[3] Cross References

For form of Notice of Removal, *see § 265.160* and related discussion

Moore's Federal Practice, § 107.14[2] (3rd ed. Matthew Bender)

1 *Moore's Manual--Federal Practice and Procedure, ch. 8, Removal From State Courts, § 8.02*

Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 2

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California Forms of Pleading and Practice--Annotated

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Volume 22: Explosives thru Food-Chs. 256-268
Chapter 265 FEDERAL COURTS: JURISDICTION AND REMOVAL
PART V. FORMS
B. Removal of Causes (#ssa00000380#)

22-265 California Forms of Pleading and Practice--Annotated § 265.165

§ 265.165 Allegation of Ground for Removal--Separate and Independent Claim or Cause of Action Removable if Sued on Alone [28 U.S.C.S. § 1441(c)]

[1] FORM Allegation of Ground for Removal--Separate and Independent Claim or Cause of Action Removable if Sued on Alone [28 U.S.C.S. § 1441(c)]

In the above-entitled action, plaintiff _____[*name*] alleges against defendant _____[*name*] a separate and independent claim or cause of action in that _____[*set forth nature of claim or cause of action to show that it is separate and independent from other claims or causes of action that have been joined*]. If sued on alone, that claim or cause of action would be one over which this court has original jurisdiction under the provisions of *Section 1331 of Title 28 of the United States Code* because it arises under _____[*cite to specific article or amendment of United States Constitution, section of federal law, or article of treaty*]. By virtue of the provisions of *Section 1441(c) of Title 28 of the United States Code*, this entire case is one that may be removed to this court.

[2] Use of Form

The allegation, *above*, is for use by a defendant in a state court action in his or her notice of removal when otherwise nonremovable claims or causes of action in the case are joined with a separate and independent claim or cause of action that raises a federal question. When using this allegation, it should be substituted for Paragraph 3 of the form of notice of removal in § 265.160.

Whenever a separate and independent claim or cause of action within the court's federal question jurisdiction is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues in the case [*28 U.S.C.S. § 1441(c)*; *see 28 U.S.C.S. § 1331* (federal question jurisdiction), discussed in *§ 265.14[1], above*]. For further discussion, see *§ 265.36*.

[3] Cross References

For related form of Notice of Removal, *see § 265.160* and related discussion. For related form of allegation of ground for removal, see *§ 265.161* and related discussion

Moore's Federal Practice, Ch. 107 (3rd ed. Matthew Bender)

Moore's Manual--Federal Practice and Procedure, ch. 8, Removal From State Courts, § 8.03

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22-265 California Forms of Pleading and Practice--Annotated § 265.166

§ 265.166 Notice of Filing Removal Notice [28 U.S.C.S. § 1446(d)]

[1] FORM Notice of Filing Removal Notice [28 U.S.C.S. § 1446(d)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	NO. _____
vs.	)	NOTICE OF FILING NOTICE OF REMOVAL
_____ [*name*(*s*)],	)	[*28 U.S.C.S. § 1446(d)*]
Defendant(s).	)	
	)	
	)	

To _____[*name*], attorney for plaintiff:

[*EITHER*]

NOTICE IS HEREBY GIVEN that _____[*name*], defendant in the above-entitled action, has on _____[this date *or specify other date*] filed his/her/its notice of removal, a copy of which is attached hereto, in the Office of the Clerk of the United States District Court for the _____ District of California, _____ Division.

[*OR*]

NOTICE IS HEREBY GIVEN that a notice of removal of the above-entitled action from the _____

Court of the State of California, County of _____, to the United States District Court for the _____ District of California, _____ Division, [a copy of which is attached hereto,] was/were duly filed this day in the United States District Court for the _____ District of California.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

The form of notice, *above*, is for use by a defendant in a state action who is seeking removal to federal court to provide notice of the filing of the notice of removal with the federal district court. Promptly after the filing of the notice of removal, the defendant must give written notice thereof to all adverse parties and must file a copy of the notice of removal with the clerk of the state court. The state court will proceed no further in the case [*28 U.S.C.S. § 1446(d)*; *see § 265.38[4]*].

[3] Cross References

Moore's Federal Practice, §§ 107.30[2][a], [b] (3rd ed. Matthew Bender)

1 *Moore's Manual--Federal Practice and Procedure, ch. 8, Removal From State Courts, § 8.05*

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22-265 California Forms of Pleading and Practice--Annotated § 265.167

§ 265.167 Clerk's Certificate on Transcript of Record [28 U.S.C.S. § 1447(b)]

[1] FORM Clerk's Certificate on Transcript of Record [28 U.S.C.S. § 1447(b)]

[*EITHER*]

[*Caption in state court action. See § 265.166.*]

I, _____[*name*], Clerk of the _____ Court of the State of California, for the [City and] County of _____, do hereby certify that the foregoing is a full, true, and correct copy of the _____[*describe records*] in the above-entitled action, which constitute all the papers on file in this office in that action.

[*OR*]

	)	
State of _____,	)	**ss.**
[City and] County of _____	)	

_____

I, _____[*name*], Clerk of the _____ Court of _____, do hereby certify that the above and foregoing is a true and correct copy of the record, and of the whole thereof, in the above-entitled action, heretofore pending in the _____ Court, being cause No. _____ wherein _____[*name*] is plaintiff and _____[*name*] is defendant, that record consisting of _____. All of this record appears in the files and records in my office.

[*CONTINUE*]

IN TESTIMONY WHEREOF, I have signed hereunto and affixed the seal of this court on _____[*date*].

_____ [*signature*]
Clerk
[*seal*]

[2] Use of Form

The form, *above*, is for use by the defendant in a state action to obtain a clerk's certificate on the transcript of the record for use in the removal of that action to federal court. Once the action has been re moved, the district court may require the defendant to file with its clerk copies of all records and proceedings in the state court, or may cause the same to be brought before it by writ of certiorari issued to that state court [*28 U.S.C.S. § 1447(b)*]. In addition to the notice of removal and bond (bond requirement contained in former *28 U.S.C.S. § 1446(d)* was repealed in 1988), the defendant must file in the district court a copy of all process, pleadings, and orders served on him or her in that action [*28 U.S.C.S. § 1446(a)*]. For further discussion, see *§ 265.39[1]*. For a related form of Notice of Filing Removal Notice, see *§ 265.166*.

[3] Cross References

1 *Moore's Manual--Federal Practice and Procedure, ch. 8, Removal From State Courts, § 8.06*

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22-265 California Forms of Pleading and Practice--Annotated § 265.168

§ 265.168 Notice of Motion and Motion to Remand Removed Action [28 U.S.C.S. § 1447(c)]

[1] FORM Notice of Motion and Motion to Remand Removed Action [28 U.S.C.S. § 1447(c)]

UNITED STATES DISTRICT COURT,
_____ DISTRICT OF CALIFORNIA

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	Civil Action, File No. _____
vs.	)	NOTICE OF MOTION AND MOTION TO RE-
_____ [*name*(*s*)],	)	MAND REMOVED ACTION
Defendant(s).	)	[*28 U.S.C.S. § 1447(c)*]
	)	Date: _____
	)	Time: _____

_____

To defendant _____[*name*] and to his/her/its attorney of record:

PLEASE TAKE NOTICE that the undersigned will move this court at Room _____, United States District Court House, _____[*street address*], _____[*city*], on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, for an order remanding this cause to the _____ Court of the State of California for the [City and] County of _____. This motion is made on the ground that the cause was improperly removed [and is not within the jurisdiction of this court], in that _____[*select one or more of the following grounds for improper removal*]

[*EITHER*]

the notice of removal was not timely filed

[*AND/OR*]

defendant did not promptly give notice to the plaintiff of the filing of the notice of removal [and bond for removal]

this cause was removable, if at all, when defendant filed his/her/its answer to the _____[original *or* amended pleading]. Defendant failed to move for removal within the thirty days required by *Section 1446(b) of Title 28 of the United States Code*

[*AND/OR*]

the matter in controversy does not exceed $75,000, exclusive of interest and costs

[*AND/OR*]

this court has no jurisdiction of the claim asserted in the complaint

[*AND/OR*]

no separate and independent claim or cause of action is asserted by plaintiff against defendant _____[*name*]

[*AND/OR*]

the complaint herein does not present a claim or right arising under the Constitution, treaties, or laws of the United States

[*AND/OR*]

_____[*name*], properly joined and served as a defendant in this action, is a citizen of the State of California, wherein this action was originally brought

[*AND/OR*]

all of the defendants did not join in the notice of removal

[*AND/OR*]

defendant is not one of the parties referred to in *Section 1442 of Title 28 of the United States Code*

[*AND/OR*]

defendant is not a member of the armed forces referred to in *Section 1442a of Title 28 of the United States Code*

[*AND/OR*]

this is a civil action arising under the workers' compensation laws of the State of California

[*AND/OR*]

this action is not a civil rights case within *Section 1443 of Title 28 of the United States Code*

[*AND/OR*]

this action is a civil action against a railroad, arising under Sections 51-60 of Title 45 of the United States Code, and therefore, cannot be removed to this court

[*AND/OR*]

this action is a civil action against a carrier to recover damages for loss of shipments, arising under Section 11706 or 14706 of Title 49 of the United States Code, and is not removable because the matter in controversy does not exceed $50,000, exclusive of interest and costs

[*AND/OR*]

the controversy is not wholly between citizens of different states, defendant _____[*name*] being a citizen of _____, the same state as that of which plaintiff is a citizen

[*AND/OR*]

this action is not a civil action within *Section 1441(a) of Title 28 of the United States Code*

[*OR specify some other grounds*]

[*CONTINUE as part of same paragraph*]

[, all of which more clearly appears in the affidavit(s) of _____ (*name(s)*) attached hereto as Exhibit(s) _____ and made a part hereof]. Plaintiff further moves this court for an order that defendant _____[*name*] pay plaintiff for all his/her/its costs and actual expenses, including attorney's fees, incurred by reason of the removal proceedings. All attached exhibits and a memorandum of law in support of the above motion are attached hereto and made a part hereof.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The combined form of notice of motion and motion, *above*, is for use by the plaintiff in the underlying state action to move the federal court to remand back to state court a case that was previously removed to federal court. The alternative clauses set forth different grounds for remand. When appropriate, more than one ground may be used. When the ground for remand is any defect in the removal procedure, the motion must be made within 30 days after the filing of the notice of removal. If the ground for remand is that the district court lacks subject matter jurisdiction, the motion may be made any time before final judgment [*see 28 U.S.C.S. § 1447(c)*; *see § 265.40*].

Counsel should consult the appropriate local district court rules before using the form since some courts may require a particular format for the moving papers [*see, e.g.,* U.S. Dist. Ct., So. Dist. of Cal., Rule 7.1; U.S. Dist. Ct., No. Dist. of Cal., Rules 7-2(b)]. The motion should be supported by briefs and memoranda [*see, e.g.,* U.S. Dist. Ct., Cen. Dist. of Cal., Rule 7.5.1; U.S. Dist. Ct., No. Dist. of Cal., Rules 7-2(b)]. Factual contentions raised in the motion must be supported by affidavits or declarations [*see* U.S. Dist. Ct., Cen. Dist. of Cal., Rule 7.5.2; U.S. Dist. Ct., East. Dist. of Cal., Rule 43-140, 78-230(i); U.S. Dist. Ct., No. Dist. of Cal., Rules 7-2(d), 7-5; U.S. Dist. Ct., So. Dist. of Cal., Rule 7.1(f)].

For the related form of order granting remand, see *§ 265.169*.

[3] Cross References

Moore's Federal Practice, § 107.41 (3rd ed. Matthew Bender)

1 *Moore's Manual--Federal Practice and Procedure, ch. 8, Removal From State Courts, § 8.08*

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22-265 California Forms of Pleading and Practice--Annotated § 265.169

§ 265.169 Order Granting Remand [28 U.S.C.S. § 1447(c)]

[1] FORM Order Granting Remand [28 U.S.C.S. § 1447(c)]

UNITED STATES DISTRICT COURT,
_____ DISTRICT OF CALIFORNIA

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	Civil Action, File No. _____
vs.	)	ORDER GRANTING REMAND
_____ [*name*(*s*)],	)	[*28 U.S.C.S. § 1447(c)*]
Defendant(s).	)	
	)	
	)	

The motion of plaintiff _____[*name*] for an order to remand the above-entitled action to the _____ Court of the State of California, [City and] County of _____, came on regularly for hearing by the court on _____[*date*]. Plaintiff appeared by counsel _____[*name*]; defendant appeared by counsel _____[*name*].

On proof made to the satisfaction of the court that the motion ought to be granted.

IT IS ORDERED that the motion be, and it hereby is, granted and that this case be remanded to the _____ Court of the State of California, [City and] County of _____; and that a certified copy of this order be mailed by the clerk of this court to the clerk of the _____ Court of the State of California, [City and] County of _____.

[IT IS FURTHER ORDERED that plaintiff _____[*name*] have and recover his/her/its costs and

disbursements, including attorney's fees, in this court against defendant _____[*name*], to be taxed by the clerk.]
Dated: _____.

_____ [*signature*]
United States District Judge

[2] Use of Form

The form of order, *above*, is for use by a plaintiff in the state action who has convinced the court that a remand of the case is appropriate. If it appears that the district court lacks subject matter jurisdiction, or that a defect in the removal procedure has occurred, the district court will remand the case [*28 U.S.C.S. § 1447(c)*; *see § 265.40[3]*]. An optional award of costs and attorney's fees is included [*see 28 U.S.C.S. § 1447(c)*; *see § 265.40[4]*].

For the related form of Notice of Motion and Motion to Remand Removed Action, see *§ 265.168*.

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22-265 California Forms of Pleading and Practice--Annotated § 265.170

§ 265.170 Notice of Motion and Motion to Sever Claims and Remand Nonremovable Claims [28 U.S.C.S. § 1441(c))]

[1] FORM Notice of Motion and Motion to Sever Claims and Remand Nonremovable Claims [28 U.S.C.S. § 1441(c))]

UNITED STATES DISTRICT COURT,
_____ DISTRICT OF CALIFORNIA

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	Civil Action, File No. _____
vs.	)	NOTICE OF MOTION AND MOTION TO SEVER
_____ [*name*(*s*)],	)	CLAIMS AND REMAND
Defendant(s).	)	[*28 U.S.C.S. § 1441(c)*]
	)	Date: _____
	)	Time: _____

To defendant _____[*name*] and to his/her/its attorney of record:

PLEASE TAKE NOTICE that the undersigned will move this court at Room _____, United States District Court House, _____[*street address*], _____[*city*], on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, for an order severing the claim or cause of action asserted by him/her/it against defendant _____[*name*] from the claim or cause of action asserted by plaintiff _____[*name*] in this action, and remanding the claim or cause of action asserted by this plaintiff to the _____ Court of California, [City and] County of _____. This motion is made on the ground that the claim or cause of action asserted by this plaintiff is separate and independent from the claim or cause of action of plaintiff _____[*name*] and involves _____[only *or* predominantly] questions of state law. A memorandum of law in support of the above

motion is attached hereto and made a part hereof.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The combined form of notice of motion and motion, *above*, is for use by a plaintiff, after the action has been removed under *28 U.S.C.S. § 1441(c)*, to sever his or her state claims from another plaintiff's federal claims and remand the state claims to state court. When otherwise nonremovable claims are removed to federal court because a separate and independent claim involving a federal question was joined in the same action, the district court has the discretion to remand all matters in which state law predominates [*see 28 U.S.C.S. § 1441(c)*, discussed in *§ 265.36*].

For discussion of how a court determines whether a claim or cause of action arises under federal or state law, see *§ 265.33[2]*.

For related form of order, see *§ 265.171*. For Notice of Motion and Motion to Remand Removed Action, see *§ 265.168*.

[3] Cross References

Moore's Federal Practice, § 107.41 (3rd ed. Matthew Bender)

Moore's Manual--Federal Practice and Procedure, ch. 8, Removal From State Courts, §§ 8.03, 8.08

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22-265 California Forms of Pleading and Practice--Annotated § 265.171

§ 265.171 Order Severing Claims and Remanding Nonremovable Claims [28 U.S.C.S. § 1441(c)]

[1] FORM Order Severing Claims and Remanding Nonremovable Claims [28 U.S.C.S. § 1441(c)]

UNITED STATES DISTRICT COURT,
_____ DISTRICT OF CALIFORNIA

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	Civil Action, File No. _____
vs.	)	ORDER GRANTING SEVERANCE OF CLAIMS
_____ [*name*(*s*)],	)	AND REMAND
Defendant(s).	)	[*28 U.S.C.S. § 1441(c)*]
	)	
	)	

The motion of plaintiff _____[*name*] for an order severing the claim or cause of action asserted by plaintiff against defendant _____[*name*] from the claim or cause of action asserted by plaintiff _____[*name*] and remanding the above-entitled action to the _____ court of the State of California, [City and] County of _____, came on regularly for hearing by the court on _____[*date*]. Plaintiff appeared by counsel _____[*name*]; defendant appeared by counsel _____[*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that the claim or cause of action asserted by plaintiff _____[*name*] against defendant _____[*name*] be severed from the claim or cause of action asserted by plaintiff _____[*name*] against defendant; and that the claim or cause of action asserted by plaintiff _____[*name*] be remanded to the _____ Court of the State of

California, [City and] County of _____; and that a certified copy of this order be mailed by the clerk of this court to the clerk of the _____ Court of the State of California, [City and] County of _____.

IT IS FURTHER ORDERED that _____ [the claim or cause of action asserted by plaintiff _____ (*name*) be and hereby is stricken from the complaint in this action *or* plaintiff _____ (*name*) file an amended complaint in this action within _____ days after service of this order].
Dated: _____.

_____ [*signature*]
United States District Judge

[2] Use of Form

The combined form of order, *above*, is for use by a plaintiff in an action that was removed under *28 U.S.C.S. § 1441(c)* when the district court has granted the plaintiff's motion to sever and remand his or her state law claims. When otherwise nonremovable claims are removed to federal court because a separate and independent claim involving a federal question was joined in the same action, the district court has the discretion to remand all matters in which state law predominates [*see 28 U.S.C.S. § 1441(c)*; for discussion of this statute, *see § 265.36*].

For related form of Notice of Motion and Motion to Sever Claims and Remove Nonremovable Claims, see *§ 265.170*.

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Volume 22: Explosives thru Food-Chs. 256-268
Chapter 266 FENCES

22-266 California Forms of Pleading and Practice--Annotated 266.syn

§ 266.syn Synopsis to Chapter 266: FENCES

§ 266.01 Scope

§ 266.02 Cross Reference

§§ 266.03- 266.09 [Reserved]

§ 266.10 Governing Statutes

§ 266.11 Definitions

§ 266.12 Type of Property

§ 266.13 Liability for Injury Caused by Fences

[1] No Duty to Construct Fence

[2] Duty to Persons on Premises

[3] Duty to Persons off Premises

[4] Violation of Statute

§ 266.14 Criminal Liability for Destroying Fence

§ 266.15 Civil Liability for Damaging Fence

[1] Damage as Trespass

[2] Measure of Damages

[3] Injunctive Relief

§ 266.16 Fences as Encroachments

[1] Encroachment as Trespass or Nuisance

[2] Injunctive Relief

[3] Balancing Conveniences

§ 266.17 Contribution for Division Fence

§ 266.18 Fences as Nuisances

[1] Spite Fences Over 10 Feet in Height

[2] Fences Less Than 10 Feet in Height

[3] Injunctive Relief or Damages

§§ 266.19- 266.29 [Reserved]

§ 266.30 State Constitution

§ 266.31 State Statutes

[1] Criminal Liability

[2] Division and Partition Fence

[3] Duty of Railroad

[4] Electrified Fences

[5] Highway Fences

[6] Injunction

[7] Jurisdiction

[8] Lawful Fence

[9] Nuisance

[10] Regulation of Advertisements on Fences

[11] Rights and Obligations of Fence Owners

[12] Roof Access to Commercial Establishments

[13] Spite Fence

[14] Statute of Limitations

[15] Venue

[16] Violation of Statute

§ 266.32 Decisions

[1] Civil Liability for Damaging Fence

[a] In General

[b] Injunctive Relief

[c] Measure of Damages

[2] Contribution for Division Fence

[3] Criminal Liability for Destroying Fence

[4] Definitions

[5] Fences as Encroachments

[a] Encroachment as Trespass or Nuisance

[b] Injunctive Relief; Balancing Conveniences

[6] Fences as Nuisance

[a] Fences Less Than 10 Feet

[b] Injunctive Relief and Damages

[7] Fence Over Easement

[8] Jurisdiction

[9] Liability for Injury Caused by Fences

[a] Duty to Persons off Premises

[b] Duty to Persons on Premises

[c] No Duty of Landowner to Construct Fence

[d] Violation of Statute

[10] Type of Property

§ 266.33 Law Reviews

§ 266.34 Text References

§§ 266.35- 266.39 [Reserved]

§ 266.40 Complaint for Damages for Personal Injuries Based on Negligence by Person on Premises Against Owner--Person Injured by Collapsing Fence

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction and Venue

[5] Verification

[6] Specification of Damages

[7] Statute of Limitations

[8] Cross References

§ 266.41 Complaint for Damages for Personal Injuries Based on Negligence by Passing Pedestrian Against Owner--Pedestrian Injured at Night by Barbed-Wire Fence Protruding Onto Sidewalk

[1] FORM

[2] Use of Form

[3] Allegations

§ 266.42 Complaint for Property Damage and Damages for Personal Injuries Based on Negligence by Automobile Owner-Operator Against Ranch Owner--Collision With Livestock Which Escaped Through a Defective Fence

[1] FORM

[2] Use of Form

[3] Allegations

[4] Statute of Limitations

§ 266.43 Complaint for Damages to Real Property Based on Negligence by Property Owner Against Automobile Owner--Automobile Collision With Fence

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction

[5] Venue

[6] Statute of Limitations

§§ 266.44- 266.49 [Reserved]

§ 266.50 Complaint for Compensatory and Punitive Damages to Real Property Based on Trespass by Landowner Against Adjoining Landowner--For Willful and Intentional Destruction of Fence

[1] FORM

[2] Use of Form

[3] Allegations

§ 266.51 Complaint for Temporary Restraining Order and Preliminary Injunction and for Permanent Injunction to Restrain Construction of Fence and for Compensatory Damages by Landowner Against Defendant Constructing Fence on Landowner's Property

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction

[5] Verification

[6] Certification re Notice

[7] Showing Requirements for ex Parte Temporary Restraining Order

§ 266.52 Complaint for Permanent Injunction to Compel Removal of Encroaching Structure and for Compensatory and Punitive Damages by Landowner Against Adjoining Landowner--Construction of Fence on Landowner's Property

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction

§ 266.53 Affirmative Defense to Complaint Seeking Permanent Injunction to Compel Removal of Encroaching Fence--Based on Balancing of Conveniences

[1] FORM

[2] Use of Form

[3] Allegations

[4] Affirmative Relief

§§ 266.54- 266.59 [Reserved]

§ 266.60 Complaint to Establish Boundary and Quiet Title to Real Property [Code Civ. Proc. §§ 760.020(a), 761.020] and for Damages and Permanent Injunction by Landowner Against Adjoining Landowner--Construction and Maintenance of Fence on Landowner's Property

[1] FORM

[2] Use of Form

[3] Required Allegations

[4] Who Must Be Made Defendants

[a] Persons Claiming Interest in Property

[b] Representatives and Heirs of Deceased Claimants

[5] Unknown Defendants

[6] Verification

[7] Jurisdiction and Venue

[8] Service of Summons

[9] Lis Pendens

[10] Statutes of Limitations

[11] Cross References

§§ 266.61- 266.69 [Reserved]

§ 266.70 Complaint to Recover Proportionate Part of Construction Cost of Division Fence [Civ. Code § 841(2)] by Landowner Against Adjoining Landowner--Adjoining Landowner Used Division Fence as Part of Enclosure

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction

[5] Statute of Limitations

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Chapter 266 FENCES
PART I. SCOPE

22-266 California Forms of Pleading and Practice--Annotated § 266.01

§ 266.01 Scope

This chapter discusses fences and includes the following forms:

- Complaints for use in actions involving injuries and property damage caused by negligently maintained fences [§§ *266.40-266.42*].

- Complaints for use in actions involving damage caused to fences, either negligently [*§ 266.43*], or willfully [*§ 266.50*].

- Complaint for a temporary restraining order, preliminary injunction, and a permanent injunction to restrain construction of a fence encroaching on plaintiff's property and for damages [*§ 266.51*].

- Complaint for a permanent injunction to compel removal of an encroaching fence and for damages [*§ 266.52*].

- A form of affirmative defense to a complaint seeking to compel removal of an encroaching fence based on the doctrine of balancing of conveniences [*§ 266.53*].

- Complaint to establish a boundary and quiet title to real property, for a permanent injunction against construction and maintenance of a fence, and for damages [*§ 266.60*].

- Complaint for use to recover a proportion of the cost of a division fence between plaintiff's and defendant's property [*§ 266.70*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersFences

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22-266 California Forms of Pleading and Practice--Annotated § 266.02

§ 266.02 Cross Reference

For discussion and forms for use in actions involving encroachments and party walls, see Ch. 11, *Adjoining Landowners*

For forms for use by owners of domestic animals killed by a railroad due to its failure to properly fence the right-of-way, see Ch. 23, *Animals: Civil Liability* , and Ch. 485, *Railroads* , respectively

For discussion and forms for use in actions by property owners against automobile owners and operators for damage to real and personal property, see *Ch. 83, Automobiles: Bringing the Action § 83.60*

For forms for use in actions involving boundaries generally, see Ch. 101, *Boundaries*

For a form for use in an action involving a fence which interferes with a prescriptive easement, see Ch. 240, *Easements*

For a form for use in an action to remove an improvement mistakenly affixed to the land of another, see Ch. 279, *Good Faith Improver of Real Property*

For a discussion and forms for use in actions involving injunctive relief generally, see Ch. 303, *Injunctions*

For discussion and forms for use in actions involving negligence generally, see Ch. 380, *Negligence*

For a form for use in an action involving a spite fence, see Ch. 391, *Nuisance*

For a discussion and forms for use in actions involving trespass generally, see Ch. 550, *Trespass*

Legal Topics:

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

Real Property LawAdjoining LandownersBoundariesReal Property LawAdjoining LandownersEasementsReal Property LawAdjoining LandownersEncroachmentsReal Property LawAdjoining LandownersParty WallsReal Property LawTortsTrespass to Real Property

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22-266 California Forms of Pleading and Practice--Annotated §§ 266.03- 266.09

[Reserved]

§§ 266.03[Reserved]

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22-266 California Forms of Pleading and Practice--Annotated § 266.10

§ 266.10 Governing Statutes

The rights and obligations of coterminous owners of fences are governed by *Civ. Code §§ 801(14)* and *841(2)*. A spite fence is defined as a private nuisance in *Civ. Code § 841.4*, and the statutes governing nuisances generally are contained in *Civ. Code §§ 3479-3503* and in *Code Civ. Proc. § 731*. The standards to which a fence must conform in grazing counties are set forth in *Food & Agric. Code § 17121*. Criminal sanctions are imposed for the willful destruction of fences in *Penal Code § 602(h)*. The duty of railroads to build fences to avert injury to domestic animals is governed by *Pub. Util. Code §§ 7626-7631*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesProperty CrimesDestruction of PropertyGeneral OverviewReal Property LawAdjoining LandownersFencesReal Property LawTortsNuisanceTypesPrivate Nuisance

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22-266 California Forms of Pleading and Practice--Annotated § 266.11

§ 266.11 Definitions

Webster's Seventh New Collegiate Dictionary defines a fence as a barrier intended to prevent escape or intrusion or to mark a boundary, especially such a barrier made of posts and wire or boards. However, a natural barrier is considered to be a fence for the purpose of recovering contribution for a division fence [*Gonzales v. Wasson (1876) 51 Cal. 295, 298* (steep bank); *Comerford v. Dupuy (1861) 17 Cal. 308, 309* (steep bluff on ocean);*see also § 266.17*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersFences

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22-266 California Forms of Pleading and Practice--Annotated § 266.12

§ 266.12 Type of Property

A fence is a fixture constituting part of the realty [*Morrissey v. Morrissey (1923) 191 Cal. 782, 783, 218 P. 396* ; *Collins v. Bartlett (1872) 44 Cal. 371, 383]* unless it is not attached to the soil, in which case a fence is personal property [*Pennybecker v. McDougal (1874) 48 Cal. 160, 164]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersFencesReal Property LawFixtures & ImprovementsGeneral Overview

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22-266 California Forms of Pleading and Practice--Annotated § 266.13

§ 266.13 Liability for Injury Caused by Fences

[1] No Duty to Construct Fence

A landowner has no duty to construct a fence to enclose his or her property [*see Loveland v. Gardner (1889) 79 Cal. 317, 320, 21 P. 766]* unless that duty has been established by agreement [*Brenot v. Southern P. R. Co. (1927) 202 Cal. 630, 636-637, 262 P. 732]* or by statute [*see, e.g., Pub. Util. Code § 7626* (requiring railroad corporation to erect and maintain good and sufficient fence on both sides of its tracks)].

[2] Duty to Persons on Premises

Civ. Code § 1714(a) provides that everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself. In *Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* , the Supreme Court departed from the traditional rules governing the liability of the owners and occupiers of land. It held that *Civ. Code § 1714*, rather than plaintiff's status as a trespasser, licensee, or invitee, controlled the liability of tenants for injuries to their social guests, even though a plaintiff's status could have some bearing on the question of liability [*Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561* ; *see also Carlson v. Ross (1969) 271 Cal. App. 2d 29, 32, 76 Cal. Rptr. 209* (landowner incurred liability for injury to social guest on premises by application of test set forth in *Rowland v. Christian, above*)]. The test has also been applied in a case involving a business invitee [*Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 25-38, 77 Cal. Rptr. 914]* .

The Court stated that in the absence of a statutory provision declaring an exception to the fundamental principles enunciated by *Civ. Code § 1714*, no exception should be made unless clearly supported by public policy [*Rowland v. Christian (1968) 69 Cal. 2d 108, 112, 70 Cal. Rptr. 97, 443 P.2d 561]* . It decided that no public policy required that an exception be carved out of the statute for tenants in possession when they were sued by their guests [*see Rowland v. Christian (1968) 69 Cal. 2d 108, 119-120, 70 Cal. Rptr. 97, 443 P.2d 561]* .

Although the Supreme Court has not held expressly that the rule of *Rowland v. Christian* applies in landlord-tenant cases, it has so indicated in dictum [*see Mark v. Pacific Gas & Electric Co. (1972) 7 Cal. 3d 170, 183, 101 Cal. Rptr.*

908, 496 P.2d 1276] . In addition, a court of appeal has held that the common-law rules regarding the liability of a landlord for an accident on the leased premises have been superseded by *Civ. Code § 1714* [*Brennan v. Cockrell Investments, Inc. (1973) 35 Cal. App. 3d 796, 802, 111 Cal. Rptr. 122]* .

For a form of complaint for use by a person injured by a fence while on defendant's property, see *§ 266.40*.

[3] Duty to Persons off Premises

An owner or possessor of land is liable to persons off the premises for creating or maintaining dangerous artificial conditions or for permitting dangerous disrepair [*Coates v. Chinn (1958) 51 Cal. 2d 304, 308, 332 P.2d 289* (plaintiff's car struck eucalyptus limb on highway on rainy night; defendant planted tree alongside highway with knowledge of tendency of large limbs to fall); *Wisher v. Fowler (1970) 7 Cal. App. 3d 225, 228, 86 Cal. Rptr. 582* (falling tree); *Potter v. Empress Theatre Co. (1949) 91 Cal.App. 2d 4, 12, 204 P.2d 120* (defendant negligently allowed theater marquee to stand without proper support; plaintiff injured when marquee fell)]. Thus, once a fence has been constructed and maintenance has been undertaken, a duty arises to exercise reasonable care to prevent the fence from becoming dangerous [*see Loveland v. Gardner (1889) 79 Cal. 317, 320, 21 P. 766]* . For example, a person who has constructed and maintains a barbed-wire fence in a negligent manner, allowing barbed wire to hang loosely from the fence, is liable for injuries occasioned thereby to the domestic animals of others [*Loveland v. Gardner (1889) 79 Cal. 317, 320-321, 21 P. 766]* .

The liability of a defendant who negligently constructed and maintains a barbed-wire fence is not dependent on the question of whether or not the fence comes up to the legislative standard of a lawful fence as set forth in former Pol. Code § 19(23) (*now see Food & Agric. Code § 17121*), which defines a lawful fence as any fence which is good, strong, substantial, and sufficient to prevent the ingress and egress of livestock [*Loveland v. Gardner (1889) 79 Cal. 317, 320, 21 P. 766]* . Nevertheless, in determining whether a fence is adequate, the trial court may consider the definition of a "good and substantial" wire fence and a "lawful fence" as described by former *Agric. Code §§ 403* and 412 (*now see Food & Agric. Code § 17121*) [*Summers v. Parker (1953) 119 Cal. App. 2d 214, 216, 259 P.2d 59* (passing motorist sustained personal injuries when automobile collided with defendant's steer which was lying in highway having strayed through defendant's fence)]. For a discussion of the presumption of negligence that arises from a violation of a statute or ordinance, see [4], *below*. For a form of complaint for use by a motorist injured in a collision with defendant's livestock that escaped through a defective fence, see *§ 266.42*.

Because it is the duty of a landowner to exercise reasonable care to prevent a fence from becoming dangerous [*Loveland v. Gardner (1889) 79 Cal. 317, 320, 21 P. 766]* , it is no defense that the fence was constructed entirely on defendant's land if it was negligently constructed and maintained [*Loveland v. Gardner (1889) 79 Cal. 317, 320, 21 P. 766]* . It is also not a defense that the property was used for a lawful purpose [*Loveland v. Gardner (1889) 79 Cal. 317, 321, 21 P. 766]* .

For a form of complaint for use by a person injured by defendant's fence though not on defendant's property, see *§ 266.41*.

[4] Violation of Statute

The common-law presumption of negligence that arises from the violation of a statute or ordinance is codified in *Evid. Code § 669*, which contains two parts. The first part provides that the failure of a person to exercise due care is presumed if all of the following apply [*Evid. Code § 669(a)*]:

- The person violated a statute, ordinance, or regulation of a public entity.
- The violation proximately caused death or injury to person or property.

- The death or injury resulted from an occurrence the nature of which the statute, ordinance, or regulation was designed to prevent.

- The person suffering the death or the injury to his or her person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

The second part provides that the presumption may be rebutted by proof of either of the following [*Evid. Code § 669(b)*]:

- That the person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.

- That the person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his or her maturity, intelligence, and capacity under similar circumstances. The presumption may not be rebutted by proof of this degree of care if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsConstruction DefectsTortsNegligenceCausationProximate CauseGeneral OverviewTortsNegligenceDutyGeneral OverviewTortsNegligenceDutyAffirmative Duty to ActSpecial RelationshipsPremise OwnersTortsNegligenceProofViolations of LawStatutes

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§ 266.14 Criminal Liability for Destroying Fence

Destruction of a fence in violation of former *Penal Code § 602(8)* (*now see Penal Code § 602(h)*) subjects a person to criminal liability for trespass, a misdemeanor [*Messick v. Superior Court (1922) 57 Cal. App. 340, 341-342, 207 P. 58]* . However, a person who tears down a fence in good faith and with a reasonable belief in his or her legal right to do so, does not incur any criminal liability [*Seabridge v. McAdam (1895) 108 Cal. 345, 349, 41 P. 409]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesProperty CrimesBurglary & Criminal TrespassCriminal TrespassGeneral Overview

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§ 266.15 Civil Liability for Damaging Fence

[1] Damage as Trespass

A trespass to real and personal property is committed when an adjoining landowner enters the property of a neighbor and destroys a fence attached to the neighbor's property [*McCormick v. Appleton (1964) 225 Cal. App. 2d 591, 595, 37 Cal. Rptr. 544]* .

An owner of a fence may bring a civil action for damages for the wrongful removal [*Morrissey v. Morrissey (1923) 191 Cal. 782, 783, 218 P. 396]* or for the willful and wanton destruction of a fence [*McCormick v. Appleton(1964) 225 Cal. App. 2d 591, 597-598, 37 Cal. Rptr. 544]* . For a form of complaint for use by a landowner to recover for the intentional and willful destruction of his or her fence, see *§ 266.50*.

[2] Measure of Damages

The measure of damages for destruction of a fence is the amount that will compensate a party for the value of the property at the time of its destruction [*Hancock v. George R. Curtis Paving Co. (1931) 114 Cal. App. 624, 628, 300 P. 65* ; *see also Givens v. Markall (1942) 51 Cal. App. 2d 374, 381, 124 P.2d 839* (when fixture destroyed has substantial independent value, measure of damages is value of fixture)]. However, if the fixture which is destroyed has no substantial value apart from that of the land, the measure of damages is the diminution of the value of the land [*Wilmerton v. Morton (1946) 74 Cal. App. 2d 891, 897, 169 P.2d 992]* .

When an adjoining landowner wrongfully removes a preexisting boundary fence, *Civ. Code § 841*, which requires coterminous owners equally to maintain fences between them unless one of them chooses to let the land lie without fencing, will not be applied to reduce the damages owed [*McCormick v. Appleton (1964) 225 Cal. App. 2d 591, 595-596, 37 Cal. Rptr. 544* ;*see also § 266.17*].

[3] Injunctive Relief

When an adjoining landowner is willfully and wantonly destroying a boundary fence, an injunction may issue in addition to the recovery of both compensatory and punitive damages [*McCormick v. Appleton (1964) 225 Cal. App.*

2d 591, 597, 37 Cal. Rptr. 544] . However, no injunction will issue to restrain the commission of a trespass if the plaintiff has a complete and adequate remedy at law, as in a situation in which the defendant tore down plaintiff's fences and entered plaintiff's property under claim of right [*Leach v. Day (1865), 645-646]* . For a form of complaint for use to recover compensatory and punitive damages in this situation, see *§ 266.50*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyTrespassGeneral OverviewTortsPremises Liability & PropertyTrespassRemediesDamagesCompensatory DamagesTortsPremises Liability & PropertyTrespassRemediesInjunctions

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§ 266.16 Fences as Encroachments

[1] Encroachment as Trespass or Nuisance

The erection of a fence by a defendant on a portion of an adjoining landowner's property is an encroachment [*Oertel v. Copley (1957) 152 Cal. App. 2d 287, 291, 313 P.2d 105]* . An encroachment on an adjoining tract of land constitutes a trespass [*see* *Rankin v. DeBare (1928) 205 Cal. 639, 641, 271 P. 1050]* , while an encroachment into the airspace above the land constitutes a nuisance [*Kafka v. Bozio (1923) 191 Cal. 746, 750, 218 P. 753* ; *Case v. Sisich (1929) 97 Cal. App. 106, 110, 275 P. 492]* .

[2] Injunctive Relief

When injunctive relief is sought in a case involving a fence that is an encroachment, a court may either grant an injunction or apply the doctrine of balancing of conveniences to deny injunctive relief and compel the plaintiff to accept damages instead [*Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 201, 323 P.2d 1001* (encroaching sign); *City of Dunsmuir v. Silva (1957) 154 Cal. App. 2d 825, 827, 317 P.2d 653* (encroaching building); *Oertel v. Copley (1957) 152 Cal. App. 2d 287, 290, 313 P.2d 105* (defendant erected fence on plaintiff's land in reliance on owner's promise to deed area to defendant)]. When a plaintiff is compelled to accept damages, the court may exercise its discretion and protect the defendant by granting an easement over the area on which the fence is encroaching [*see* *Oertel v. Copley (1957) 152 Cal. App. 2d 287, 292, 313 P.2d 105]* .

When an injunction is granted compelling a party to remove an encroaching fence, the injunction is mandatory in form [*Kettenhofen v. Superior Court (1961) 55 Cal. 2d 189, 191, 10 Cal. Rptr. 356, 358 P.2d 684]* . Generally, an injunction will issue to prevent a wrongful act if the continuance of which will, in time, ripen into an easement and deprive plaintiff of the use of his or her property or some part of it [*Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 201, 323 P.2d 1001* (encroaching sign); *City of Dunsmuir v. Silva (1957) 154 Cal. App. 2d 825, 827, 317 P.2d 653* (encroaching building)]. However, if the encroachment causes injury so slight as to bring it within the maxim *de minimis non curat lex* (*i.e.*, "the law does not concern itself about trifles") [*see* *Rothaermel v. Amerige (1921) 55 Cal. App. 273, 276, 203 P. 833* ; *see also* Black's Law Dictionary 388 (5th ed. 1979)] because the encroachment was innocently made and the cost of removing it would be great compared to the inconvenience caused plaintiff by continuance of the encroachment, the court may, in its discretion, deny the injunction and compel the plaintiff to accept

damages [*Oertel v. Copley (1957) 152 Cal. App. 2d 287, 290, 313 P.2d 105* (defendant erected fence on plaintiff's land in reliance on owner's promise to deed area to defendant)]. This rule is often cited as the doctrine of balancing of conveniences [*see* *Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 200, 323 P.2d 1001* (encroaching building); *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 562-564, 250 P.2d 660* (encroaching driveway, badminton court, and fence)].

For forms of complaint for use by a landowner to enjoin the construction of a fence on his or her property or to compel the removal of a fence that has already been constructed on his or her property, see *§ 266.51* or *§ 266.52*, respectively.

[3] Balancing Conveniences

Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 250 P.2d 660 concerned an action to compel removal of several encroachments, one of which was a wire fence constructed on a cement abutment. The court of appeal commented that in order to deny the injunction, three major factors must be present [*Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 562-563, 250 P.2d 660]* :

- Defendant must be innocent; the encroachment must not be the result of defendant's willful act, and perhaps not the result of defendant's negligence. In this same connection, the court should weigh plaintiff's conduct to ascertain if he or she is in any way responsible for the situation.

- Plaintiff must not suffer irreparable injury by the encroachment. If the plaintiff does suffer irreparable injury, the injunction should be granted regardless of the injury to defendant, except, perhaps, when the rights of the public will be adversely affected.

- The hardship to defendant, if the injunction were granted instead, must be greatly disproportionate to the hardship caused plaintiff by the continuance of the encroachment; this disproportionate hardship must clearly appear in the evidence and must be proved by the defendant.

When a court balances conveniences to determine that an injunction, otherwise warranted, should be withheld, its action approaches an exercise of the right of eminent domain in favor of a private person. Thus, proof of irreparable injury to the defendant is a necessary element of a defense based on balancing of conveniences. Deprivation of a substantial benefit to defendant as a result of an injunction falls short of imposition of substantial hardship [*Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 200, 323 P.2d 1001]* .

When the court applies the doctrine of balancing of conveniences and awards plaintiff damages in lieu of an injunction, it is within its power to protect the defendant in the use of an encroaching fence by granting defendant an easement [*Oertel v. Copley (1957) 152 Cal. App. 2d 287, 292, 313 P.2d 105* ; *see* *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 562-563, 250 P.2d 660]* . For a form of affirmative defense based on balancing conveniences for use in response to a complaint for injunction to compel removal of the fence, see *§ 266.53*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersEncroachmentsReal Property LawAdjoining LandownersFencesReal Property LawTortsNuisanceGeneral OverviewTortsPremises Liability & PropertyTrespassRemediesDamagesCompensatory DamagesTortsPremises Liability & PropertyTrespassRemediesInjunctions

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§ 266.17 Contribution for Division Fence

Coterminous owners are mutually bound to maintain equally the fences between them unless one of them chooses to let his or her land lie without fencing [*Civ. Code § 841(2)*]. Where one of the owners makes that choice and then afterwards decides to enclose his or her land, that owner must refund to the other owner a just proportion of the value, at that time, of any division fence which was made by the latter [*Civ. Code § 841(2)*]. In addition, the right of having the whole of a division fence maintained by one owner may be acquired as an easement [*Civ. Code § 801(14)*].

A landowner who is entitled to a contribution from an adjoining landowner may enforce his or her right to contribution by a civil action [*Reusche v. Milhorn (1933) 218 Cal. 696, 697-698, 24 P.2d 792* ; *Gonzales v. Wasson (1876) 51 Cal. 295, 298* (coterminous landowner recovered half the value of a division fence previously constructed by him from defendant who used the fence to enclose his own land)]. In order for a landowner to be entitled to bring an action for contribution against an adjoining landowner, it is not necessary that the fences used by the adjoining landowner to complete the enclosure of his or her own land be lawful fences within the meaning of the former Fence Acts of 1885 and 1860 (*now Food & Agric. Code § 17121*) [*Meade v. Watson (1885) 67 Cal. 591, 594, 8 P. 311]* , that the adjoining landowner construct fences at places where natural barriers exist, or that the adjoining landowner completely enclose the land [*Gonzales v. Wasson (1876) 51 Cal. 295, 298]* . But in order to recover a just proportion of the value of the division fence, it is necessary for the landowner to prove his or her construction of the division fence, to establish its value at the time of the enclosure, and to make a demand for value from the defendant [*Meade v. Watson (1885) 67 Cal. 591, 595, 8 P. 311]* . For a form of complaint for use to recover proportionate cost of construction of a division fence, see *§ 266.70*.

Civ. Code § 841 is not available by way of defense or mitigation to reduce damages owed by an adjoining landowner who wrongfully removed a preexisting boundary fence [*McCormick v. Appleton (1964) 225 Cal. App. 2d 591, 595-596, 37 Cal. Rptr. 544]* .

For a form of complaint to recover a proportion of the cost of a boundary fence from plaintiff's adjoining landowner, see *§ 266.70*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersFences

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22-266 California Forms of Pleading and Practice--Annotated § 266.18

§ 266.18 Fences as Nuisances

[1] Spite Fences Over 10 Feet in Height

Any fence or other structure in the nature of a fence which unnecessarily exceeds 10 feet in height and which is maliciously erected or maintained for the purpose of annoying the owner or occupant of adjoining property is a private nuisance [*Civ. Code § 841.4*]. Any owner or occupant of adjoining property who is injured either in his or her comfort or in the enjoyment of his or her estate by that nuisance may enforce the remediesagainst its continuance prescribed in *Civ. Code §§ 3501-3503* (relief against private nuisances) [*Civ. Code § 841.4*].

[2] Fences Less Than 10 Feet in Height

Even though a fence under 10 feet in height is not a spite fence as defined by statute, it may still be a nuisance if it is constructed with a malicious intent [*Griffin v. Northridge (1944) 67 Cal. App. 2d 69, 75, 153 P.2d 800]* and if the usefulness of the fence to the defendants is subordinate and incidental [*Hutcherson v. Alexander (1968) 264 Cal. App. 2d 126, 132, 70 Cal. Rptr. 366* (fence erected between competing businesses for purpose of annoying competitor and hiding business from view)]. Thus, even a lawful use of one's property constitutes a nuisance if it is part of a general scheme to annoy a neighbor and if the main purpose of the use is to prevent a neighbor's reasonable enjoyment of his or her property [*Zimmer v. Dykstra (1974) 39 Cal. App. 3d 422, 438, 114 Cal. Rptr. 380* (fence erected to block neighbor's use of prescriptive easement)].

[3] Injunctive Relief or Damages

In order for plaintiff to obtain injunctive relief against the builder of a spite fence, a malicious intent must be the motive in building the spite fence, and the usefulness of the structure must be clearly subordinate and incidental [*Haehlen v. Wilson (1936) 11 Cal. App. 2d 437, 441-442, 54 P.2d 62* (erection of six and one-half foot fence to protect property from trespassers was lawful use of land not constituting private nuisance); *Taliaferro v. Salyer (1958) 162 Cal. App. 2d 685, 690, 328 P.2d 799* (maintenance of six-foot division fence on owner's property was not a private nuisance)]. It should be noted, though, that courts will not establish aesthetic standards to which builders of fences must conform. Thus, no injunction is available to require removal of an ugly or untidy fence [*Haehlen v. Wilson (1936) 11 Cal. App. 2d 437, 441, 54 P.2d 62]* .

An owner or occupant of land is entitled to compensation for annoyance, discomfort, and inconvenience caused by a nuisance on adjoining property [*Griffin v. Northridge (1944) 67 Cal. App. 2d 69, 73, 153 P.2d 800* (fence under 10 feet in height as nuisance)]. In addition to injunctive relief to compel an adjoining landowner to remove a fence, compensatory damages and, if the defendant acts maliciously in constructing a fence, punitive damages may be recovered [*Zimmer v. Dykstra (1974) 39 Cal. App. 3d 422, 437-438, 114 Cal. Rptr. 380* ; *Hutcherson v. Alexander (1968) 264 Cal. App. 2d 126, 135-136, 70 Cal. Rptr. 366]* .

For further discussion of nuisances and a complaint against an adjoining landowner for maintenance of a spite fence, see Ch. 391, *Nuisance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersFencesReal Property LawTortsNuisanceRemediesDamagesCompensatory DamagesReal Property LawTortsNuisanceRemediesDamagesPunitive DamagesReal Property LawTortsNuisanceRemediesInjunctionsGeneral OverviewReal Property LawTortsNuisanceTypesPrivate Nuisance

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PART II. LEGAL BACKGROUND

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[Reserved]

§§ 266.19[Reserved]

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22-266 California Forms of Pleading and Practice--Annotated § 266.30

§ 266.30 State Constitution

Jurisdiction of superior court. *Cal. Const., art VI, § 10*

Legal Topics:

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

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22-266 California Forms of Pleading and Practice--Annotated § 266.31

§ 266.31 State Statutes

[1] Criminal Liability

Trespass to fence as constituting misdemeanor. *Penal Code § 602(h)*

[2] Division and Partition Fence

Acquisition of easement compelling one coterminous owner to maintain whole of division fence. *Civ. Code § 801(14)*

Duty of coterminous owners equally to maintain fences between their properties. *Civ. Code § 841(2)*

[3] Duty of Railroad

Railroad's duty to report injury to, or killing of, animal on railroad right-of-way. *Food & Agric. Code §§ 21881-21886*

Railroad's duty to build fences to avert injury to domestic animals. *Pub. Util. Code §§ 7626-7631*

[4] Electrified Fences

Electrified fences. *Food & Agric. Code §§ 17150-17153*

[5] Highway Fences

Fence as encroachment on state highway. *Sts. & Hy. Code § 660(b)*

Removal of fences made necessary by alteration or opening of county highways. *Sts. & Hy. Code § 1027*

Fence as encroachment on county highway. *Sts. & Hy. Code § 1450(b)*

[6] Injunction

Injunctive relief generally. *Civ. Code §§ 3420-3423*; *Code Civ. Proc. § 525 et seq.*

[7] Jurisdiction

Jurisdiction in limited civil cases. *Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86*

[8] Lawful Fence

Lawful fence in grazing counties defined. *Food & Agric. Code § 17121*

[9] Nuisance

Nuisance generally. *Civ. Code §§ 3479-3503*; *Code Civ. Proc. § 731*

[10] Regulation of Advertisements on Fences

Right of cities to regulate signs and advertisements on fences. *Gov. Code § 38774*

[11] Rights and Obligations of Fence Owners

Duty of life tenant to keep fence in repair. *Civ. Code § 840*

Requirements concerning fencing of abandoned excavations. *Health & Safety Code §§ 115700-115720*

[12] Roof Access to Commercial Establishments

Authority of State Fire Marshal to regulate use of fences obstructing roof access. *Health & Safety Code § 13108.6*

[13] Spite Fence

Fence, or other structure in nature of fence, unnecessarily exceeding 10 feet in height, and maliciously erected or maintained for purposes of annoying owner or occupant of adjoining property, as private nuisance. *Civ. Code § 841.4*

[14] Statute of Limitations

Time to commence action for recovery of real property as five years. *Code Civ. Proc. § 318*

Possession within five years as required to be shown in order to assert cause of action or defense arising out of title to real property, or to rents or profits out of real property. *Code Civ. Proc. § 319*

Time to commence action for trespass or for injury to real property as three years. *Code Civ. Proc. § 338(b)*

[15] Venue

Venue of actions concerning real property. *Code Civ. Proc. § 392*

[16] Violation of Statute

Violation of statute as presumed negligence. *Evid. Code § 669*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureVenueGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawAdjoining LandownersFencesReal Property LawTortsNuisanceGeneral Overview

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22-266 California Forms of Pleading and Practice--Annotated § 266.32

§ 266.32 Decisions

[1] Civil Liability for Damaging Fence

[a] In General

Civil action for damages for wrongful removal of fence. *Morrissey v. Morrissey (1923) 191 Cal. 782, 783, 218 P. 396*

Trespass to real and personal property as committed when adjoining landowner enters property of neighbor and destroys fence. *McCormick v. Appleton (1964) 225 Cal. App. 2d 591, 595, 37 Cal. Rptr. 544*

[b] Injunctive Relief

Destruction of fence and entry onto property of plaintiff is trespass for which remedy at law deemed adequate and no injunctive relief granted. *Leach v. Day (1865) 27 Cal. 644, 27 Cal. 643, 645-646*

Right to injunctive relief and compensatory and punitive damages for trespass to real and personal property for willful and wanton destruction of boundary fence. *McCormick v. Appleton (1964) 225 Cal. App. 2d 591, 597-598, 37 Cal. Rptr. 544*

[c] Measure of Damages

Civ. Code § 841, requiring coterminous owners equally to maintain fences between them unless one chooses to let land lie without fencing, does not apply to reduce damages owed by adjoining landowner who wrongfully removes preexisting boundary fence. *McCormick v. Appleton (1964) 225 Cal. App. 2d 591, 595-596, 37 Cal. Rptr. 544*

Measure of damages for destruction of fixture that has no substantial value apart from that of land is diminution of value of land. *Wilmerton v. Morton (1946) 74 Cal. App. 2d 891, 897, 169 P.2d 992*

Measure of damages is value of fixture destroyed when it has substantial independent value. *Givens v. Markall (1942) 51 Cal. App. 2d 374, 381, 124 P.2d 839*

Measure of damages for destruction of fence is amount that will compensate party for value of property at time of destruction. *Hancock v. George R. Curtis Paving Co. (1931) 114 Cal. App. 624, 628, 300 P. 65*

[2] Contribution for Division Fence

Right to action for contribution for division fence. *Reusche v. Milhorn (1933) 218 Cal. 696, 697-698, 24 P.2d 792* ; *Meade v. Watson (1885) 67 Cal. 591, 593, 8 P. 311* ; *Gonzales v. Wasson (1876) 51 Cal. 295, 298*

Action to recover part of cost of division fence involves title to real property. *Reusche v. Milhorn (1933) 218 Cal. 696, 697, 24 P.2d 792*

Fences used by defendant to complete enclosure need not be lawful fences within the meaning of former Fence Acts of 1885 and 1860 (*now see Food & Agric. Code § 17121*). *Meade v. Watson (1885) 67 Cal. 591, 594, 8 P. 311*

Landowner must prove construction, establish value, and demand value from defendant in order to recover contribution for division fence. *Meade v. Watson (1885) 67 Cal. 591, 595, 8 P. 311*

Payment for partition fence is recoverable although defendant's land not completely enclosed and although no fences constructed at places where natural barriers exist. *Gonzales v. Wasson (1876) 51 Cal. 295, 298*

[3] Criminal Liability for Destroying Fence

No probable cause to charge person with crime of maliciously tearing down fence if act was done in good faith and with reasonable belief in legal right to do so. *Seabridge v. McAdam (1895) 108 Cal. 345, 349, 41 P. 409*

Trespass to fence is misdemeanor if fence was destroyed in violation of former *Penal Code § 602(8)* (*now see Penal Code § 602(h)*). *Messick v. Superior Court (1922) 57 Cal. App. 340, 341-342, 207 P. 58*

[4] Definitions

Natural barrier is fence for purpose of recovering contribution for division fence. *Gonzales v. Wasson (1876) 51 Cal. 295, 298* ; *Comerford v. Dupuy (1861) 17 Cal. 308, 309*

[5] Fences as Encroachments

[a] Encroachment as Trespass or Nuisance

Encroachment constitutes trespass. *Rankin v. DeBare (1928) 205 Cal. 639, 641, 271 P. 1050*

Encroachment on airspace above adjoining land is nuisance rather than trespass. *Kafka v. Bozio (1923) 191 Cal. 746, 750, 218 P. 753* ; *Case v. Sisich (1929) 97 Cal. App. 106, 110, 275 P. 492*

Erection of fence by defendant on portion of adjoining landowner's property is encroachment; action for injunctive relief and damages is justified. *Oertel v. Copley (1957) 152 Cal. App. 2d 287, 291-292, 313 P.2d 105*

[b] Injunctive Relief; Balancing Conveniences

Injunction compelling party to remove fence is mandatory injunction. *Kettenhofen v. Superior Court (1961) 55 Cal. 2d 189, 191, 10 Cal. Rptr. 356, 358 P.2d 684*

Injunction may be issued to prevent encroachment from ripening into easement. *Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 201, 323 P.2d 1001* ; *City of Dunsmuir v. Silva (1957) 154 Cal. App. 2d 825, 827, 317 P.2d 653*

Irreparable injury to defendant if injunction imposed is necessary element in balancing of conveniences defense. *Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 200, 323 P.2d 1001*

Mandatory injunction will be denied and plaintiff will be required to accept damages if encroachment does not cause irreparable injury, was innocently made, and cost of removal is great compared to inconvenience caused. *Oertel v. Copley (1957) 152 Cal. App. 2d 287, 290, 313 P.2d 105* ; *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 559, 250 P.2d 660*

Court of equity has power to protect defendants in use of encroaching fence, incident to balancing of conveniences and awarding plaintiffs damages for encroachment, by granting defendants' easement. *Oertel v. Copley (1957) 152 Cal. App. 2d 287, 292, 313 P.2d 105* ; *see Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 563, 250 P.2d 660*

Necessary elements of doctrine of balancing of conveniences. *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 562-563, 250 P.2d 660*

Mandatory injunction to compel adjoining owner to remove encroachment causing no appreciable damage will be denied if adequate remedy at law exists. *Rothaermel v. Amerige (1921) 55 Cal. App. 273, 276, 203 P. 833*

[6] Fences as Nuisance

[a] Fences Less Than 10 Feet

Even lawful use of one's property constitutes nuisance if it is part of general scheme to annoy neighbor and main purpose of use is preventing neighbor's reasonable enjoyment of his or her property. *Zimmer v. Dykstra (1974) 39 Cal. App. 3d 422, 438, 114 Cal. Rptr. 380* ; *Hutcherson v. Alexander (1968) 264 Cal. App. 2d 126, 130, 70 Cal. Rptr. 366*

Fence under 10 feet in height is a nuisance, even though not a spite fence as defined by statute, if it was constructed with malicious intent, interfered with adjoining landowner's full enjoyment of home, and usefulness to defendants was subordinate and incidental. *Hutcherson v. Alexander (1968) 264 Cal. App. 2d 126, 132, 70 Cal. Rptr. 366*

Erection of fence between properties or competing businesses for main purpose of annoying competitor and hiding business from view from public street is nuisance. *Hutcherson v. Alexander (1968) 264 Cal. App. 2d 126, 130, 70 Cal. Rptr. 366*

Maintenance of six-foot division fence on one's own property does not constitute private nuisance. *Taliaferro v. Salyer (1958) 162 Cal. App. 2d 685, 690, 328 P.2d 799*

Fence not 10 feet in height is a nuisance if constructed with malicious intent. *Griffin v. Northridge (1944) 67 Cal. App. 2d 69, 75, 153 P.2d 800*

Erection of fence six and one-half feet in height, to protect property from trespassers, is not unusual or unlawful.

Haehlen v. Wilson (1936) 11 Cal. App. 2d 437, 441, 54 P.2d 62

Courts will not set up aesthetic standards to which fence builders must conform; no relief will be granted if plaintiff alleges only that fence or wall has ugly or untidy appearance. *Haehlen v. Wilson (1936) 11 Cal. App. 2d 437, 441, 54 P.2d 62*

[b] Injunctive Relief and Damages

Plaintiff is entitled to punitive damages when defendant acts maliciously in constructing fence. *Zimmer v. Dykstra (1974) 39 Cal. App. 3d 422, 438, 114 Cal. Rptr. 380*

Remedies for nuisance include injunctive relief and compensatory and punitive damages. *Hutcherson v. Alexander (1968) 264 Cal. App. 2d 126, 135-136, 70 Cal. Rptr. 366*

Owner of residence occupied as home is entitled to compensation for annoyance, discomfort, and inconvenience caused by nuisance on adjoining property. *Griffin v. Northridge (1944) 67 Cal. App. 2d 69, 73, 153 P.2d 800*

Compensation for nuisance will not be denied because it is not continuous. *Griffin v. Northridge (1944) 67 Cal. App. 2d 69, 76, 153 P.2d 800*

Single intentional trespass on rights of another justifies award of punitive damages. *Griffin v. Northridge (1944) 67 Cal. App. 2d 69, 76, 153 P.2d 800*

Malicious intent must be motive in building fence and usefulness of structure must be clearly subordinate and incidental for injunctive relief to lie. *Haehlen v. Wilson (1936) 11 Cal. App. 2d 437, 441-442, 54 P.2d 62*

[7] Fence Over Easement

Defendant's erection of fence did not extinguish prescriptive easement acquired by plaintiffs. *Zimmer v. Dykstra (1974) 39 Cal. App. 3d 422, 435-437, 114 Cal. Rptr. 380*

Injunction issues to compel adjoining landowner to remove fence blocking ingress and egress over prescriptive easement. *Zimmer v. Dykstra (1974) 39 Cal. App. 3d 422, 437-438, 114 Cal. Rptr. 380*

Erection of fence by holder of prescriptive easement does not extinguish easement. *Zimmer v. Dykstra (1974) 39 Cal. App. 3d 422, 434-435, 114 Cal. Rptr. 380*

[8] Jurisdiction

Action for contribution for division fence involves title to real property and vests original jurisdiction in superior court and appellate jurisdiction in Supreme Court. *Reusche v. Milhorn (1933) 218 Cal. 696, 697, 24 P.2d 792*

Jurisdiction is conferred on superior court when right to title or possession of real property a material issue. *Morrissey v. Morrissey (1923) 191 Cal. 782, 784, 218 P. 396*

[9] Liability for Injury Caused by Fences

[a] Duty to Persons off Premises

Owner or possessor of land is liable for creating or maintaining dangerous artificial conditions or for permitting dangerous disrepair. *Coates v. Chinn (1958) 51 Cal. 2d 304, 308, 332 P.2d 289* ; *Wisher v. Fowler (1970) 7 Cal. App. 3d 225, 228-229, 86 Cal. Rptr. 582* ; *Potter v. Empress Theatre Co. (1949) 91 Cal. App. 2d 4, 12, 204 P.2d 120*

Having constructed and undertaken to maintain fence, landowner has duty to exercise reasonable care to prevent fence from becoming dangerous. *Loveland v. Gardner (1889) 79 Cal. 317, 320, 21 P. 766*

Construction of fence entirely on defendant's land is no defense if negligently constructed and maintained. *Loveland v. Gardner (1889) 79 Cal. 317, 320, 21 P. 766*

Lawful use of property is no defense when fence negligently constructed and maintained. *Loveland v. Gardner (1889) 79 Cal. 317, 321, 21 P. 766*

Plaintiff is entitled to recover damages for injury sustained by domestic animals as proximate result of defendant's negligent construction and maintenance of fence. *Loveland v. Gardner (1889) 79 Cal. 317, 320-321, 21 P. 766*

Liability for negligently constructing and maintaining fence does not depend on whether fence met statutory standard as set forth in former Pol. Code § 19(23) (*now see Food & Agric. Code § 17121*). *Loveland v. Gardner (1889) 79 Cal. 317, 320, 21 P. 766*

Court may consider definition of "good and substantial" wire fence and "lawful fence" as described by statutes (former *Agric. Code §§ 403*, 412, *now see Food & Agric. Code § 17121*) in determining liability for negligently maintained fence. *Summers v. Parker (1953) 119 Cal. App. 2d 214, 216, 259 P.2d 59*

[b] Duty to Persons on Premises

Civ. Code § 1714, rather than plaintiff's status as trespasser, licensee, or invitee determines liability of tenants for injuries to their social guests even though that status may have some bearing on liability. *Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561*

Civ. Code § 1714 supersedes Common-law rules regarding liability of landlord for accident on leased premises. *Brennan v. Cockrell Investments, Inc. (1973) 35 Cal. App. 3d 796, 800, 111 Cal. Rptr. 122*

Principles of *Rowland v. Christian* apply to determine landowner's liability for injury to social guest on premises. *Carlson v. Ross (1969) 271 Cal. App. 2d 29, 32, 76 Cal. Rptr. 209*

[c] No Duty of Landowner to Construct Fence

Duty to construct and maintain fence established by agreement. *Brenot v. Southern P. R. Co. (1927) 202 Cal. 630, 636-637, 262 P. 732*

Landowner has no duty to construct fence. *Loveland v. Gardner (1889) 79 Cal. 317, 320, 21 P. 766*

[d] Violation of Statute

Statutory standard may be higher than "reasonable person" standard, creating liability for violation of statute when none existed at common law. *Sierra-Bay Fed. Land Bank Assn. v. Superior Court (1991) 227 Cal. App. 3d 318,*

333-336, 277 Cal. Rptr. 753

Risk can be assumed even when defendant's negligence is presumed. *King v. Magnolia Homeowners Assn. (1988) 205 Cal. App. 3d 1312, 1316, 253 Cal. Rptr. 140*

[10] Type of Property

Fence is fixture constituting part of realty. *Morrissey v. Morrissey (1923) 191 Cal. 782, 783, 218 P. 396*

Fence is personal property rather than fixture if it is not attached to soil. *Pennybecker v. McDougal (1874) 48 Cal. 160, 164*

Improvement, such as fence on public land, is part of realty. *Collins v. Bartlett (1872) 44 Cal. 371, 383*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesProperty CrimesBurglary & Criminal TrespassCriminal TrespassGeneral OverviewReal Property LawAdjoining LandownersEncroachmentsReal Property LawAdjoining LandownersFencesReal Property LawTortsNuisanceGeneral OverviewTortsNegligenceProofViolations of LawStatutes

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§ 266.33 Law Reviews

Note, *Boundary Litigation in California*, *11 Stan. L. Rev. 720 (1959)*

Comment, *Spite Fence*, *5 Cal. L. Rev. 177 (1917)*

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§ 266.34 Text References

Personal Injury Actions, Defenses, And Damages, *Fences and Gates*, §§ 1.01-4.02 (Matthew Bender)

Personal Injury Actions, Defenses, And Damages, *Mines, Minerals and Quarries*, § 1.01; *Municipal Corporations*, § 1.02(3); *Party Walls*, § 1 (Matthew Bender)

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 693-703; vol. 6, *Torts*, §§ 1088, 1089, 1727-1733; vol. 12, *Real Property*, §§ 373-376; vol. 13, *Equity*, §§ 140, 172 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersFencesTortsPremises Liability & PropertyGeneral Overview

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§§ 266.35[Reserved]

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PART IV. FORMS

22-266 California Forms of Pleading and Practice--Annotated § 266.40

§ 266.40 Complaint for Damages for Personal Injuries Based on Negligence by Person on Premises Against Owner--Person Injured by Collapsing Fence

[1] FORM Complaint for Damages for Personal Injuries Based on Negligence by Person on Premises Against Owner--Person Injured by Collapsing Fence

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Negligence)
_____ [*name(s)*], [and DOES I	)	[Amount demanded _____
through _____,] Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, the owner and in possession and control of that real property situated in _____ County, known as _____ [*address*], _____ [*city*], California, and more particularly described as follows: _____ [*give*

legal description].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries and damages as herein alleged were proximately caused by those defendants.)]

[3. At all times herein mentioned, defendants _____ (*names*) were the agents and employees of the remaining defendants, and in doing the things herein alleged, were acting within the course and scope of that agency and employment.]

4. Defendant _____ [*name*] is, and at all times herein mentioned was, the owner and in possession and control of a fence constructed of _____ [*specify, e.g.,* wood *or* brick] which was about _____ [*number*]feet in length and _____ [*number*] feet in height located on the above-described real property.

5. On or about _____ [*date*], and prior to that time, defendant negligently and carelessly maintained the fence in a defective and dangerous condition in that _____ [*describe, e.g.,* it leaned severely to one side and had begun to fall apart]. Defendant knew, or in the exercise of reasonable care should have known, that the maintenance of the fence in that dangerous condition created an unreasonable risk of injury to persons lawfully on defendant's premises, and that the fence was likely to collapse and injure someone.

6. On the above-mentioned date, plaintiff was lawfully on defendant's premises for the purpose of _____ [*state purpose, e.g.,* a social visit *or* selling magazines] when, as a proximate result of defendant's negligence and carelessness in maintaining the fence, it collapsed and struck plaintiff violently on his/her _____ [*identify area of injury, e.g.,* right forehead, right shoulder, and right arm] causing plaintiff to sustain severe and painful injuries as hereinafter alleged.

7. As a proximate result of the negligence of defendant[s, and each of them], plaintiff was hurt and injured in his/her health, strength, and activity, sustaining bodily injury and shock and injury to his/her nervous system and person. All of these injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that these injuries will result in some permanent disability to him/her]. As a result of these injuries, plaintiff has suffered general damage [in the amount of $_____].

8. As a [further] proximate result of the negligence of defendant[s, and each of them], plaintiff has incurred, and will continue to incur, medical and related expenses. [The full amount of these expenses is not known to plaintiff at this time, and plaintiff will move to amend this complaint to state the amount of these expenses when the amount becomes known to him/her, or on proof of the amount.]

[*EITHER*]

9. As a further proximate result of the negligence of defendant[s, and each of them], plaintiff was prevented from attending to his/her usual occupation as a _____ [*state occupation*] at a _____ [wage *or* salary] of $_____ per _____ [week *or* month] _____ [for a period of _____ (*specify*) *or* from the date of his/her injury to the date of the filing of this complaint] and thereby lost earnings [to his/her damage _____ (in the sum of $_____ *or* in an as yet unascertained amount. Plaintiff will seek to amend this complaint at when he/she has ascertained the amount of

lost earnings)].

[*OR*]

9. As a further proximate result of the negligence of defendant[s, and each of them], plaintiff's earning capacity has been greatly and impaired, both in the past and present, and will likely continue to be impaired in the future. [The exact amount of damage from plaintiff's lost earning capacity is not known to plaintiff at this time, and plaintiff will move to amend this complaint to state the amount when it becomes known to him/her, or on proof of that amount.]

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages [in the sum of $_____];

2. For medical and related expenses [according to proof];

3. For loss of earnings [_____ (in the sum of $_____ *or* according to proof)];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in *[1], above*, is a complaint to recover damages for personal injuries, and is for use by a person who was injured by a collapsing fence while on defendant's premises. It is based on negligence [*Civ. Code § 1714(a)*]. For

discussion of the duty owed by an owner or occupier of real property to persons on the premises, see *§ 266.13[2]*.

[3] Allegations

The complaint in *[1], above*, alleges (1) defendant's ownership of property on which fence is situated (Paragraphs 1, 4); (2) defendant's possession and control of the fence (Paragraph 4) [*Loveland v. Gardner (1889) 79 Cal. 317, 321, 21 P. 766* ; *see also Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561]* ; (3) defendant's breach of his or herduty to reasonably care for and maintain the fence (Paragraph 5); (4) personal injuries proximately caused by that breach (Paragraph 6); and (5) damages (Paragraphs 7-9) [*Civ. Code § 3333*].

[4] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

In limited civil cases, the first page of the first paper must state that it is a limited civil case and whether the amount demanded exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

In an action for injury to the person or to personal property from a wrongful act or negligence, either the county where the injury occurs or the county where the defendants, or some of them, reside at the commencement of the action is a proper county for the trial of the action [*Code Civ. Proc. § 395(a)*].

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Specification of Damages

If an action is brought to recover actual or punitive damages for personal injury or wrongful death, the amount demanded must not be stated, but the complaint must comply with *Code Civ. Proc. § 422.30*, and, in a limited civil case, with *Gov. Code § 70613(b)* [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages must be alleged [*Code Civ. Proc. § 425.10(a)(2)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[7] Statute of Limitations

The statute of limitations for actions for personal injury, other than assault, battery, or wrongful injury or death, is one

year [*Code Civ. Proc. § 340(c)*]. The statute of limitations is two years for an action for assault, battery, or injury to, or the death of, an individual caused by the wrongful act or neglect of another [*Code Civ. Proc. § 335.1*].

[8] Cross References

For alternative allegations as to capacity and residence of defendant, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms of prayers, see Ch. 420, *Prayers*

For alternative forms of verifications, see Ch. 572, *Verification*

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22-266 California Forms of Pleading and Practice--Annotated § 266.41

§ 266.41 Complaint for Damages for Personal Injuries Based on Negligence by Passing Pedestrian Against Owner--Pedestrian Injured at Night by Barbed-Wire Fence Protruding Onto Sidewalk

[1] FORM Complaint for Damages for Personal Injuries Based on Negligence by Passing Pedestrian Against Owner--Pedestrian Injured at Night by Barbed-Wire Fence Protruding Onto Sidewalk

[*Caption. See § 266.40[1].*]

Plaintiff alleges:

1. [*Allegation as to defendant's ownership and control of real property. See § 266.40[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 266.40[1], Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 266.40[1], Paragraph 3.*]

4. Defendant _____ [*name*] is, and at all times herein mentioned was, the owner and in possession and control of a barbed-wire fence which was about _____ [*number*] feet in length and _____ [*number*] feet in height located on the above-described property. Defendant has maintained, and continues to maintain, the barbed-wire fence which separates his/her premises from the sidewalk of _____ [*name of street*] which runs adjacent to the premises on the _____ [*specify direction*] side thereof.

5. On or about _____ [*date*], and prior to that time, defendant negligently and carelessly maintained the barbed-wire fence in that _____ [*describe, e.g.,* he/she allowed a portion of the fence, for a distance of approximately _____ (*number*) of feet, to become and remain unfastened from the fence post and to protrude onto the sidewalk for a distance of approximately _____ (*number*) of inches].

6. On the above-mentioned date, and prior to that time, defendant further negligently and carelessly maintained the

premises in that he/she failed to give any warning to pedestrians using the sidewalk of the condition of the barbed-wire fence, and it presented a danger to those using the sidewalk and passing by the premises.

7. On the above-mentioned date at _____ [*time of night*], plaintiff _____ [*name*] was passing by defendant's premises as a pedestrian on the sidewalk. As a proximate result of the negligence of defendant in maintaining the barbed-wire fence and premises in the above-described condition, and in failing to give any warning of the danger to passing pedestrians, and, particularly as a result of defendant's negligence and carelessness in not warning pedestrians passing by in the nighttime, plaintiff struck the barbed-wire fence and sustained severe and painful injuries as hereinafter alleged.

8. [*Injuries. See § 266.40[1], Paragraph 7.*]

9. [*Damages for medical expenses. See § 266.40[1], Paragraph 8.*]

10. [*Damages for lost earnings. See § 266.40[1], Paragraphs 9.*]

[*Prayer. See § 266.40[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 266.40[1].*]

[2] Use of Form

This form is a complaint for use in an action by a pedestrian against an owner or occupier of real property to recover damages sustained when the pedestrian was walking on a sidewalk and struck a barbed-wire fence that protruded from the property onto the sidewalk. The complaint is based on negligence [*Civ. Code § 1714(a)*]. For discussion of the duty owed by an owner or possessor of real property to persons on the premises, see *§ 266.13[3]*.

For discussion of jurisdiction, venue, and statute of limitations applicable to this type of action, see *§ 266.40[4], [7]*.

[3] Allegations

The complaint alleges (1) defendant's possession, control, and maintenance of the fence (Paragraph 4) [*Loveland v. Gardner (1889) 79 Cal. 317, 321, 21 P. 766* ; *see also Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561]* ; (2) defendant's breach of his or her duty to reasonably care for and maintain the fence, including a description of the dangerous condition into which it had fallen (Paragraph 5); (3) defendant's failure to warn of the dangerous condition of the fence (Paragraph 6); and (4) that plaintiff suffered personal injuries as a proximate result of defendant's failure to maintain the fence or warn of its dangerous condition (Paragraph 7) [*see Barlow v. Los Angeles County Flood Control Dist. (1950) 96 Cal. App. 2d 979, 984-985, 216 P.2d 903* (dangerous excavation near public street)].

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22-266 California Forms of Pleading and Practice--Annotated § 266.42

§ 266.42 Complaint for Property Damage and Damages for Personal Injuries Based on Negligence by Automobile Owner-Operator Against Ranch Owner--Collision With Livestock Which Escaped Through a Defective Fence

[1] FORM Complaint for Property Damage and Damages for Personal Injuries Based on Negligence by Automobile Owner-Operator Against Ranch Owner--Collision With Livestock Which Escaped Through a Defective Fence

[*Caption. See § 266.40[1].*]

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, the owner and in possession and control of that real property situated in _____ County, California, known as the _____ [*name of ranch or farm*], and more particularly described as follows: _____ [*give legal description*]. The _____ [*name of ranch or farm*] has a frontage of _____ [*number*] _____ [feet *or* miles] on the _____ [*direction*] side of _____ [*name or number of highway*].

[2. *Fictitious name allegation, if appropriate. See § 266.40[1], Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 266.40[1], Paragraph 3.*]

4. Defendant _____ [*name*] is, and at all times herein mentioned was, the owner and in possession and control of a _____ [*specify type of fence, e.g.,* barbed-wire] fence which was about _____ [*number*] feet in length and _____ [*number*] feet in height located on the above-described property. Defendant has maintained, and continues to maintain, the _____ [*specify type of fence, e.g.,* barbed-wire] fence which separates his/her premises from _____ [*name or number of highway*], which runs adjacent to the premises as described above.

5. On or about _____ [*date*], and prior to that time, defendant negligently and carelessly maintained the _____ [*specify type of fence, e.g.,* barbed-wire] fence in that _____ [*describe, e.g.,* he/she allowed the wires to hang loose and free from the posts, some posts were rotted and partly burned through, and several posts rested on the surface of the ground and were not imbedded therein].

6. At all times herein mentioned plaintiff _____ [*name*] was, and is, the owner of a certain _____ [*specify year, make, model*] automobile, California License No. _____.

7. On the above-mentioned date, at or about the hour of _____ _____.M., plaintiff was operating the above-mentioned automobile traveling _____ [*direction*] on _____ [*name or number of highway*], toward the town of _____ in _____ County.

8. Defendant at that time, and at all times prior thereto, had so negligently and carelessly maintained the _____ [*specify type of fence, e.g.,* barbed-wire] fence that a _____ [*specify type of livestock, e.g.,* steer] had escaped through the defective fence from defendant's _____ [ranch *or* farm] where it had been placed for _____ [*describe, e.g.,* pasturage] and was lying on the highway, directly in the pathway of plaintiff's oncoming automobile, thus causing plaintiff to collide with the _____ [*specify type of livestock, e.g.,* steer] and to sustain severe and painful injuries and damages as hereinafter alleged.

9. [*Injuries. See § 266.40[1], Paragraph 7.*]

10. [*Damages for medical expenses. See § 266.40[1], Paragraph 8.*]

11. [*Damages for lost earnings. See § 266.40[1], Paragraph 9.*]

12. Immediately prior to, and at the time of the collision, plaintiff's _____ [*specify make*] automobile was in good mechanical condition. As a further proximate result of the negligence of defendant as herein alleged, plaintiff's automobile was damaged and depreciated to the extent of $ _____, which sum is a reasonable amount for the necessary repairs to the automobile.

13. As a further proximate result of the negligence of defendant as herein alleged, plaintiff lost the use of his/her _____ [*make*] automobile for a period of _____ [*number*] days, and was damaged thereby in the sum of $_____.

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

1. For general damages [in the sum of $_____];

2. For medical and related expenses [according to proof];

3. For loss of earnings _____ [in the sum of $ _____ *or* according to proof];

4. For repairs to plaintiff's automobile in the sum of $ _____;

5. For loss of use of that automobile in the sum of $ _____;

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 266.40[1]* .]

[2] Use of Form

This form is a complaint for use by an automobile owner who has been injured, and whose automobile has been damaged, in a collision with livestock which escaped onto the highway through a defective fence [*see Food & Agric. Code § 16902* (one who controls livestock must not permit it to stray unaccompanied on highway)]. The complaint is based on negligence and seeks recovery of damages for injuries to plaintiff's person and property from the owner of the fence. For discussion of jurisdiction and venue, see *§ 266.40[4]*.

[3] Allegations

The form alleges (1) defendant's ownership of a ranch abutting the highway (Paragraph 1); (2) defendant's ownership, control, and maintenance of the fence separating his or her ranch from the highway (Paragraph 4) [*see Food & Agric. Code § 17121* (lawful fence is one sufficient to prevent ingress and egress of livestock)]; (3) defendant's negligence in failing to maintain the fence, and a description of the condition into which the fence had deteriorated (Paragraphs 5, 8); (4) plaintiff's ownership of the automobile and a description of it (Paragraph 6); (5) where and in which direction plaintiff was traveling at the time of the accident (Paragraph 7); (6) the accident and injuries sustained by plaintiff (Paragraph 8); and (7) the damage sustained to plaintiff's automobile (Paragraphs 12, 13) [*see Summers v. Parker (1953) 119 Cal. App. 2d 214, 217, 259 P.2d 59]* . Plaintiff is not required to prove the exact spot at which livestock escaped from defendant's property to recover damages [*Summers v. Parker (1953) 119 Cal. App. 2d 214, 217, 259 P.2d 59]* , but in an action involving a collision between livestock and a motor vehicle, there is no presumption of negligence on the part of the livestock's owner [*Food & Agric. Code § 16904*].

[4] Statute of Limitations

Actions for injury to personal property must be brought within three years [*Code Civ. Proc. § 338(c)*]. Actions for personal injury caused by the negligence of another must be brought within one year [*Code Civ. Proc. § 340(c)*]. However, the statute of limitations is two years for an action for assault, battery, or injury to, or the death of, an individual caused by the wrongful act or neglect of another [*Code Civ. Proc. § 335.1*].

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22-266 California Forms of Pleading and Practice--Annotated § 266.43

§ 266.43 Complaint for Damages to Real Property Based on Negligence by Property Owner Against Automobile Owner--Automobile Collision With Fence

[1] FORM Complaint for Damages to Real Property Based on Negligence by Property Owner Against Automobile Owner--Automobile Collision With Fence

[*Caption. See § 266.40[1].*]

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California.

[2. *Fictitious name allegation, if appropriate. See § 266.40[1], Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 266.40[1], Paragraph 3.*]

4. At all times herein mentioned, plaintiff _____ [*name*] was, and now is, the owner of real property situated at _____ [*address*] in _____ [*city*], _____ County, California, and on which real property was located a certain _____ [*specify type, e.g.,* wooden *or* wire] fence which was approximately _____ [*number*] feet in length and _____ [*number*] feet in height.

5. At all times herein mentioned, defendant _____ [*name*], was the owner of a certain _____ [*specify year, make, model*] automobile, California License No. _____.

6. On or about _____ [*date*], at or about the hour of _____ [*time*], defendant negligently, carelessly, and unlawfully owned, maintained, operated, and drove the _____ [*specify make*] automobile on _____ [*street*], a public street and highway which is adjacent to the premises of

plaintiff, so as to proximately cause the automobile to leave that street and run into and on the premises of plaintiff and to collide with the _____ [*specify type, e.g.,* wooden *or* wire] fence, causing _____ [*describe damage to fence, e.g.,* the boards in the fence to break and the posts of the fence to collapse].

7. As a proximate result of the negligence of defendant, plaintiff was damaged as follows: _____ [*describe reasonable value of expenditures for repairs or replacement of fence*].

WHEREFORE, plaintiff prays judgment as follows:

1. For damages to plaintiff's fence in the sum of $_____;

2. For general damages for _____ [*enumerate any further items of damage*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 266.40[1].*]

[2] Use of Form

This form is a complaint for use by the owner of a fence against an automobile owner to recover for damage to the fence resulting from negligent operation of the automobile. For discussion of civil liability for damaging a fence, see *§ 266.15*.

[3] Allegations

The complaint alleges:

- Plaintiff's ownership of real property on which the fence is situated (Paragraph 4).
- Defendant's ownership of a motor vehicle (Paragraph 5) [*Veh. Code § 17150*].
- Defendant's breach of a duty of care (Paragraph 6).
- Injury to real property caused by defendant's negligence (Paragraph 6).
- Damages (Paragraph 7) [*Civ. Code § 3333*;*see also § 266.15[2]*].

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in

controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

In limited civil cases, the first page of the first paper must state that it is a limited civil case and whether the amount demanded exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[5] Venue

Subject to the power of the court to transfer actions and proceedings as provided in *Code Civ. Proc. § 392 et seq.*, the superior court in the county where the subject real property, or some part of it, is situated is the proper court for the trial of actions for the recovery of real property, or of an estate or interest in the property, or for the determination, in any form, of that right or interest, and for injuries to real property [*Code Civ. Proc. § 392(a)(1)*].

[6] Statute of Limitations

Actions for trespass on or injury to real property must be brought within three years [*Code Civ. Proc. § 338(b)*].

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[Reserved]

§§ 266.44[Reserved]

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22-266 California Forms of Pleading and Practice--Annotated § 266.50

§ 266.50 Complaint for Compensatory and Punitive Damages to Real Property Based on Trespass by Landowner Against Adjoining Landowner--For Willful and Intentional Destruction of Fence

[1] FORM Complaint for Compensatory and Punitive Damages to Real Property Based on Trespass by Landowner Against Adjoining Landowner--For Willful and Intentional Destruction of Fence

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Trespass)
_____ [*name(s)*], [and DOES I	)	[Amount demanded _____
through _____,] Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff _____ [*name*] is, and at all times herein mentioned was, the owner and in possession and control of that real property situated in _____ County, known as _____ [*address*], _____ [*city*], California, and more particularly described as follows: _____ [*give legal description*]. Located on plaintiff's property is a _____ [*specify type of fence, e.g.,* wooden *or* brick *or* wire] fence which is approximately _____ [*number*] feet in length and _____ [*number*] feet in height.

2. [*Allegation of defendant's ownership and control of real property. See § 266.40[1], Paragraph 1.*]

3. The above-described properties of plaintiff and defendant adjoin each other at plaintiff's _____ [

specify direction, e.g., north] and defendant's _____ [*specify direction, e.g.,* south] boundaries.

[4. *Fictitious name allegation, if appropriate. See § 266.40[1], Paragraph 2.*]

[5. *Agency allegation, if appropriate. See § 266.40[1], Paragraph 3.*]

6. On or about _____ [*date*], defendant entered onto plaintiff's property and willfully and intentionally, with intent to injure plaintiff and his/her property, destroyed plaintiff's _____ [*specify type of fence, e.g.,* wooden *or* brick *or* wire] fence by _____ [*describe acts of destruction, e.g.,* burning it to the ground *or* striking it repeatedly with a bulldozer *or* pulling it from the ground]. Defendant knew he/she was on plaintiff's property and had no good-faith belief that he/she had a right to be there.

7. As a proximate result of defendant's willful and intentional destruction of plaintiff's fence as described above, plaintiff was forced to construct a new fence on the property and to expend $_____ for _____ [*specify, e.g.,* materials] and $_____ for _____[*specify, e.g.,* labor], totaling damages in the sum of $_____.

8. In destroying plaintiff's _____ [*specify type of fence, e.g.,* wooden *or* brick *or* wire] fence, defendant acted maliciously and oppressively toward plaintiff in that _____ [*specify, e.g.,* at all times prior to, during, and after defendant destroyed plaintiff's fence, he/she knew that the fence was located on plaintiff's property as herein described, but in disregard of plaintiff's rights, defendant entered the property and destroyed the fence]. Plaintiff therefore is entitled to punitive damages.

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages in the sum of $_____;

2. For punitive damages;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 266.40[1].*]

[2] Use of Form

The form of complaint at *[1], above,* is for use by a landowner in an action based on trespass to recover compensatory and punitive damages from an adjoining landowner who willfully and intentionally destroyed a fence on the landowner's property [*see McCormick v. Appleton (1964) 225 Cal. App. 2d 591, 595, 597-598, 37 Cal. Rptr. 544* ; *see also Penal Code § 602(h)* (trespass to fence is misdemeanor); *Penal Code § 602.2* (applicability of trespass ordinance or

resolution to land enclosed by fence)].

For discussion of civil liability for damaging a fence, see *§ 266.15*.

For discussion of jurisdiction, venue, and the statute of limitations applicable to this action, see *§ 266.43[4] -[6]*.

[3] Allegations

The complaint in *[1], above*, alleges:

- Possession by plaintiff of the real property on which the alleged trespass was committed (Paragraph 1) [*Gomez v. Reed (1918) 178 Cal. 759, 763, 174 P. 658* ; *Demartin v. Albert (1885) 68 Cal. 277, 279, 9 P. 157]* .

- Unlawful entry or invasion of plaintiff's rights by the defendant (Paragraph 6) [*see Morgan v. French (1945) 70 Cal. App. 2d 785, 788-790, 161 P.2d 800]* .

- Consequent damages (Paragraph 7) [*Civ. Code § 3333*; *Gomez v. Reed (1918) 178 Cal. 759, 763, 174 P. 658* ; *Demartin v. Albert (1885) 68 Cal. 277, 279, 9 P. 157]* .

- Facts entitling plaintiff to punitive damages (Paragraph 8) [*Civ. Code § 3294*].

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§ 266.51 Complaint for Temporary Restraining Order and Preliminary Injunction and for Permanent Injunction to Restrain Construction of Fence and for Compensatory Damages by Landowner Against Defendant Constructing Fence on Landowner's Property

[1] FORM Complaint for Temporary Restraining Order and Preliminary Injunction and for Permanent Injunction to Restrain Construction of Fence and for Compensatory Damages by Landowner Against Defendant Constructing Fence on Landowner's Property

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR TEMPORARY RESTRAINING
_____ [*name(s)*], [and DOES I	)	ORDER, PRELIMINARY INJUNCTION, PER-
through _____,] Defendant(s).	)	MANENT INJUNCTION, AND DAMAGES
	)	

_____

Plaintiff alleges:

1. Plaintiff _____ [*name*] is, and at all times herein mentioned was, the owner and in possession and control of that real property situated in _____ County, known as _____ [*address*], _____ [*city*], California, and more particularly described as follows: _____ [*give legal description*].

2. Defendant is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence of defendant*].

[3. *Fictitious name allegation, if appropriate. See § 266.40[1], Paragraph 2.*]

[4. *Agency allegation, if appropriate. See § 266.40[1], Paragraph 3.*]

5. On or about _____ [*date*], defendant, without the consent of plaintiff, willfully and intentionally entered on plaintiff's land, began to construct, and continues to construct, a _____ [*specify type of fence, e.g.,* wooden *or* brick] fence near the _____ [*specify direction, e.g.,* north *or* south] side of plaintiff's premises, thereby blocking plaintiff's use of a strip of land _____ [*number*] feet by _____ [*number*] feet in dimension, and further preventing plaintiff free ingress and egress to the side door of the dwelling house situated on plaintiff's property.

6. Although plaintiff has notified defendant that the fence is being constructed on plaintiff's property, defendant continues to construct thefence and further threatens to _____ [*describe threatened act, e.g.,* build a brick barbeque on the above-mentioned strip of land], thus permanently depriving plaintiff of the free use and enjoyment of the property.

7. If defendant continues to construct the fence as threatened and finishes its construction, plaintiff will suffer irreparable injury in that _____ [*state reasons, e.g.,* ingress and egress to the side door of plaintiff's dwelling house will be permanently blocked and plaintiff will be deprived of the free use and enjoyment of the strip of land as described above *or* defendant's continued use of plaintiff's property will ripen into a prescriptive easement]. Defendant's behavior thus will necessitate that plaintiff bring a multiplicity of actions in order to protect his/her rights.

8. Plaintiff has no adequate remedy at law in that pecuniary compensation will not afford adequate relief for the loss of the free use and enjoyment of plaintiff's property.

9. As a further proximate result of defendant's conduct as described above, _____ [*describe any damages to plaintiff's person or property to date*]. [Plaintiff will continue to be damaged in this manner so long as defendant's conduct continues. The full amount of damage is not now known to plaintiff, and plaintiff will amend this complaint to state the full amount when it becomes known, or upon proof thereof.]

WHEREFORE, plaintiff prays judgment as follows:

1. For an order requiring defendant to show cause, if any exists, why he/she should not be enjoined as hereinafter set forth, during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant from continuing to construct the fence as described above;

3. For damages in the sum of $_____, plus damages in such further sums as may be sustained and as are ascertained before final judgment herein;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 266.40[1].*]

CERTIFICATION RE NOTICE

I hereby certify that _____ [*either* on _____ (*date*), I informed defendant of what time and where the foregoing application for a temporary restraining order would be made *or* on _____ (*date*), in good faith Iattempted to inform defendant of what time and where the foregoing application for a temporary restraining order would be made, by _____ (*specify efforts*), but I was unable to do so *or* notice to defendant of the foregoing application for a temporary restraining order should not be required for the reason that _____ (*specify*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*signature*]

_____ [*typed name*]

[Attorney for] Plaintiff

[2] Use of Form

The form of complaint in *[1], above*, is for use by a landowner to obtain a temporary restraining order, a preliminary injunction, and a permanent injunction to restrain a defendant from constructing, and continuing to construct, a fence on the landowner's property [*Civ. Code § 3420 et seq.*; *Code Civ. Proc. § 525 et seq.*; *see* discussion at *§ 266.16*]. The complaint also seeks compensatory damages.

For discussion, procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

[3] Allegations

The complaint in *[1], above*, alleges: (1) plaintiff's ownership of the land on which the fence is being constructed (Paragraph 1); (2) defendant's willful and intentional conduct which interferes with plaintiff's rights (Paragraph 5); (3) defendant's threat to continue the conduct which interferes with plaintiff's rights (Paragraph 6) [*Code Civ. Proc. § 526*]; (4) defendant's conduct as causing irreparable injury to plaintiff (Paragraph 7) [*Code Civ. Proc. §§ 526, 527(c)(1)*; *see also City of Dunsmuir v. Silva (1957) 154 Cal. App. 2d 825, 827, 317 P.2d 653* (injunctive relief is appropriate to prevent wrongful act if continuance of that act will ripen into easement and deprive plaintiff of use of property or some part of it)]; (5) the fact that plaintiff has no adequate remedy at law (Paragraph 8) [*Code Civ. Proc. § 526*]; and (6) damages (Paragraph 9) [*Civ. Code § 3333*].

For discussion of the limitation period applicable to an action involving trespass on or injury to real property, see *§ 266.43[6]*.

[4] Jurisdiction

Because the complaint seeks permanent injunctive relief, the action is in thejurisdiction of the superior court and is may not be a limited civil case except as otherwise authorized by statute [*see Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*]. When title or right to possessionis to be tried, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

Venue for an action involving real property or an interest therein is discussed at *§ 266.43[5]*.

[5] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*]) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[6] Certification re Notice

When a temporary restraining order is sought without formal notice, the applicant or the applicant's attorney is required to certify to the court under oath that [*Code Civ. Proc. § 527(c)(2)*]:

- Within a reasonable time prior to the application he or she informed the opposing party (or his or her attorney, if any) at what time and where the application would be made; or

- He or she in good faith attempted to inform the opposing party (or attorney) but was unable to do so, specifying the efforts made to do so; or

- For reasons specified he or she should not be required to inform the opposing party (or attorney).

The requirement for certification as to notice does not apply to an order issued under the Family Code [*Code Civ. Proc. § 527(g)*].

[7] Showing Requirements for ex Parte Temporary Restraining Order

If a temporary restraining order is to be granted ex parte, it must appear from facts shown by the verified complaint, or by the affidavit or declaration, that great or irreparable injury would result to the applicant before the matter can be heard on notice [*Code Civ. Proc. § 527(c)(1)*].

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California Forms of Pleading and Practice--Annotated

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Chapter 266 FENCES
PART IV. FORMS

22-266 California Forms of Pleading and Practice--Annotated § 266.52

§ 266.52 Complaint for Permanent Injunction to Compel Removal of Encroaching Structure and for Compensatory and Punitive Damages by Landowner Against Adjoining Landowner--Construction of Fence on Landowner's Property

[1] FORM Complaint for Permanent Injunction to Compel Removal of Encroaching Structure and for Compensatory and Punitive Damages by Landowner Against Adjoining Landowner--Construction of Fence on Landowner's Property

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff, vs. _____ [*name(s)*],	)	NO. _____
[and DOES I through _____,]	)	COMPLAINT FOR PERMANENT INJUNCTION
Defendant(s).	)	AND DAMAGES
	)	
	)	

_____

Plaintiff alleges:

FIRST COUNT
(Willful Trespass)

1. Plaintiff _____ [*name*] is, and at all times herein mentioned was, the owner and in possession and control of that real property situated in _____ County, known as _____ [*address*], _____ [*city*], California, and more particularly described as follows: _____ [*give legal description*].

2. Defendant _____ [*name*] is, and at all times herein mentioned was, the owner and in possession and control of that real property situated in _____ County, known as _____ [*address*], _____ [*city*], California, and more particularly described as follows: _____ [*give legal description*].

3. The above-described properties of plaintiff and defendant adjoin each other at plaintiff's _____ [*specify direction, e.g.,* north] and defendant's _____ [*specify direction, e.g.,* south] boundaries.

[4. *Fictitious name allegation, if appropriate. See § 266.40[1], Paragraph 2.*]

[5. *Agency allegation, if appropriate. See § 266.40[1], Paragraph 3.*]

6. On or about _____ [*date*], defendant caused a certain _____ [*specify type of fence, e.g.,* wooden *or* brick] fence to be constructed, running in a _____ [*state direction, e.g.,* northerly-southerly] direction, for a distance of _____ [*number*] feet in length, and standingentirely on the property of the plaintiff. That fence encroaches and trespasses on plaintiff's property by extending over the above-mentioned boundary between plaintiff's and defendant's properties and onto plaintiff's land without plaintiff's consent.

7. Defendant willfully and intentionally caused that fence to encroach on plaintiff's property as described above and knew that he/she was building on plaintiff's property without any good-faith belief that he/she had a right to do so.

8. The area of plaintiff's land blocked off by defendant's fence is approximately _____ [*number*] square feet. The value of the use of that area of land is $_____ per _____ [*specify, e.g.,* month]. As a proximate result of this encroachment plaintiff has suffered, and will continue to suffer, damages for the loss of use of that area in the sum of $_____ per _____ [*specify, e.g.,* month] as long as the encroachment remains on his/her land.

9. In causing the fence to encroach on plaintiff's property, defendant acted maliciously and oppressively toward plaintiff in that _____ [*state reasons, e.g.,* at all times prior to, during, and after defendant caused the fence to encroach on plaintiff's property defendant had knowledge of the location of the above-mentioned common boundary line and that the fence would and did encroach on plaintiff's property as described above, but in disregard of plaintiff's rights defendant caused the fence to be built and maintained in such a manner that it encroaches on plaintiff's property]. Plaintiff therefore claims punitive damages.

10. Unless defendant is compelled to remove the encroachment from plaintiff's land, plaintiff will suffer irreparable injury in that _____ [*specify, e.g.,* a continuation of such encroachment will ripen into a prescriptive easement].

SECOND COUNT
(Negligent Trespass)

11. Plaintiff incorporates herein Paragraphs 1-6, inclusive, and 10 of his/her First Count.

12. In causing the fence to encroach on plaintiff's property as described above, defendant acted negligently and carelessly and in complete disregard of the true location of the boundary line between plaintiff's and defendant's properties.

13. As a proximate result of the negligence and the resulting trespass, plaintiff has suffered damages from the loss of

use of the property encroached on in the sum of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For a permanent injunction compelling defendant to remove the encroachment described herein from plaintiff's property and to restore plaintiff's property to its condition immediately prior to the encroachment;

2. For general damages in the sum of $_____;

3. For punitive damages;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 266.40[1].*]

[2] Use of Form

The form in *[1], above*, is a complaint for use by a landowner to seek a permanent injunction to compel removal of an encroaching fence and for damages against an adjoining landowner [*see Kettenhofen v. Superior Court (1961) 55 Cal. 2d 189, 191, 10 Cal. Rptr. 356, 358 P.2d 684* ; *Oertel v. Copley (1957) 152 Cal. App. 2d 287, 291-292, 313 P.2d 105* ; *see* discussion at *§ 266.16*]. The complaint has two counts:

- The First Count alleges that the encroachment was placed on plaintiff's property willfully and intentionally (First Count, Paragraph 7) [*see Brown Derby Hollywood Corp. v. Hatton (1964) 61 Cal. 2d 855, 858-859, 40 Cal. Rptr. 848, 395 P.2d 896* (right to injunction when encroachment is willful)].

- The Second Count alleges, in the alternative, that the encroachment was placed on plaintiff's property negligently (Second Count, Paragraph 12) [*see Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 564, 250 P.2d 660* (right to injunction when encroachment was negligent)].

Jurisdiction for this type of action is discussed at *§ 266.51[3]*]. Applicable venue is discussed at *§ 266.43[5]*.

[3] Allegations

Both counts allege (1) plaintiff's ownership of the land on which the fence was built (Paragraph 1); (2) defendant's status as owner of adjoining property (Paragraphs 2, 3); (3) that defendant built the fence on plaintiff's property (Paragraph 6); (4) when defendant built the fence [*see Code Civ. Proc. § 338(b)* (three-year limitation period for trespass on or injury to real property)]; and (5) that at all times during the building of that fence, defendant knew (First Count, Paragraph 9), or should have known (Second Count, Paragraph 12) that he or she had no right to do so.

As a ground for injunction under *Code Civ. Proc. § 526(a)(2)*, the complaint alleges that continuance of the encroachment will cause plaintiff irreparable injury (First Count, Paragraph 10) [*see Fairrington v. DykeWater Co. (1958) 50 Cal. 2d 198, 201, 323 P.2d 1001* (equity will enjoin any act which, if continuous, will give rise to an easement)]. See generally Ch. 550, *Trespass* .

If there is a dispute over title to the area of the encroachment, a second cause of action could be joined to quiet title thereto [*see Code Civ. Proc. §§ 427.10* (permissive joinder of causes of action), 760.010 et seq. (quiet title action), and Ch. 482, *Quieting Title*]. For a form of complaint doing just that, see *§ 266.60*.

[4] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*]) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction

Because the complaint seeks permanent injunctive relief, the action is in the jurisdiction of the superior court and may not be a limited civil case except as otherwise authorized by statute [*see Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*]. When title or right to possession is to be tried, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

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22-266 California Forms of Pleading and Practice--Annotated § 266.53

§ 266.53 Affirmative Defense to Complaint Seeking Permanent Injunction to Compel Removal of Encroaching Fence--Based on Balancing of Conveniences

[1] FORM Affirmative Defense to Complaint Seeking Permanent Injunction to Compel Removal of Encroaching Fence--Based on Balancing of Conveniences

AS A SEPARATE [_____ (*if more than one, specify number, e.g,* FIRST)] AND AFFIRMATIVE DEFENSE [*if more than one cause of action,state:* TO THE _____ (*specify number, e.g,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. In constructing a _____ [*specify type of fence, e.g.,* wooden *or* brick] fence on plaintiff's land as alleged in the complaint in this action, defendant acted innocently, in good faith, and in the belief that the portion of property encroached on belonged to defendant. Prior to causing the encroachment, defendant relied on information from a surveyor licensed by the State of California and from maps and boundary descriptions showing that the land belonged to defendant. Plaintiff did not at any time until subsequent to completion of the encroachment object to its existence, nor did he/she inform defendant that the subject land belonged to plaintiff.

2. _____ [*Set forth facts showing that hardship to defendant if injunction is granted would be greatly disproportionate to hardship to plaintiff if injunction is denied, e.g.,* The cost of removal of the encroachment would be $_____, which greatly exceeds any damage to plaintiff's property caused by its continuance. The encroachment does not seriously interfere with plaintiff's use or enjoyment of his/her property, whereas its removal will cause defendant's property to become unsightly and would substantially limit defendant's use and enjoyment of his/her land and property in the following respects: _____ (*specify*)].

3. Plaintiff will not suffer irreparable injury as a result of the continued presence of the encroachment in that _____ [*set forth supporting facts, e.g.,* the presence of the encroachment enhances the value of plaintiff's property and has not caused, nor will it cause, depreciation of its saleable value, nor does it limit or preclude any present or future use of plaintiff's property].

[2] Use of Form

The form in *[1], above*, is an affirmative defense for use in an action seeking an injunction to compel removal of an encroachment in the form of a fence, when defendant neither intentionally nor negligently placed the fence on plaintiff's property, but believed he or she owned the land in question. By this affirmative defense based on the doctrine of balancing of conveniences, defendant seeks to limit plaintiff to pecuniary compensation because of the relative hardship to defendant in removing the encroachment [*see Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 200,323 P.2d 1001* ; *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 562-563, 250 P.2d 660]* . This defense is discussed at *§ 266.16[3]*.

[3] Allegations

The defense alleges (1) defendant's innocence (Paragraph 1); (2) the disproportionate hardship to defendant if he or she is compelled to remove the encroachment (Paragraph 2) [*see Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 200, 323 P.2d 1001* (irreparable hardship to defendant if injunction imposed is necessary element in maintaining defense of balancing of conveniences)]; and (3) the absence of irreparable injury to plaintiff if the encroachment is permitted to continue (Paragraph 3) [*see Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 562-563, 250 P.2d 660* (leading case); *Brown Derby Hollywood Corp. v. Hatton (1964) 61 Cal. 2d 855, 858, 40 Cal. Rptr. 848, 395 P.2d 896]* .

[4] Affirmative Relief

Affirmative relief may be sought in conjunction with this defense, by way of cross complaint [*see Code Civ. Proc. §§ 425.10* (contents of cross complaint), *431.30(c)* (affirmative relief may not be claimed by way of answer)] to protect defendant in his or her continued use of the encroachment. That relief has frequently been in the form of an easement granted by the court [*see Oertel v. Copley (1957) 152 Cal. App. 2d 287, 292, 313 P.2d 105* ; *see Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 563, 250 P.2d 660* ;*see* generally Ch. 13, *Adverse Possession*], but may not exceed what is reasonably necessary to protect defendant [*Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 563, 250 P.2d 660* (holding that court should have awarded easement instead of fee title to encroached land)].

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[Reserved]

§§ 266.54[Reserved]

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22-266 California Forms of Pleading and Practice--Annotated § 266.60

§ 266.60 Complaint to Establish Boundary and Quiet Title to Real Property [Code Civ. Proc. §§ 760.020(a), 761.020] and for Damages and Permanent Injunction by Landowner Against Adjoining Landowner--Construction and Maintenance of Fence on Landowner's Property

[1] FORM Complaint to Establish Boundary and Quiet Title to Real Property [Code Civ. Proc. §§ 760.020(a), 761.020] and for Damages and Permanent Injunction by Landowner Against Adjoining Landowner--Construction and Maintenance of Fence on Landowner's Property

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s) of known defendant(s)*] [*if unknown defendants are included, add:*; and all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud on plaintiff's title thereto] [; and DOES I-_____, inclusive],	)	COMPLAINT TO ESTABLISH BOUNDARY AND QUIET TITLE, AND FOR DAMAGES AND INJUNCTION
Defendant(s).	)	

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Quiet Title)

1.-3. [*Allegations of ownership of respective adjoining properties by plaintiff and defendant. See § 266.52[1], Paragraphs 1-3, adding to allegations of Paragraphs 1 and 2 the street address or common designation, if any, of the property.*]

[4. Defendants DOES I-_____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants claim some right, title, estate, lien, or interest in the above-described property adverse to plaintiff's title; that each of them isresponsible in some manner for the wrongful conduct herein alleged; and that their claims, and each of them, constitute a cloud on plaintiff's title to that property.]

5. The basis of plaintiff's title is _____ [*describe basis of plaintiff's title, e.g.,* a deed from _____ (*name of grantor*) granting the above-described property in fee simple to plaintiff dated _____, and recorded in the Official Records of the County of _____, Book/Reel _____, page/image _____].

6. Defendant(s) claims/claim some right, title, estate, lien, or interest in and to the lands of plaintiff described above, or a portion thereof, and dispute and deny that the true and correct boundary line between their respective properties runs as follows: _____ [*set forth legal description of boundary line which plaintiff believes to be correct*], but to the contrary, contend that the true and correct boundary line between their respective lands runs as follows: _____ [*set forth legal description of boundary line which defendant(s) claims/claim to be correct*].

7. Plaintiff is seeking to quiet title against the claims of defendant(s) as follows: defendant(s) _____ [*name(s) of the named defendant(s)*], who claims/claim some right, title, estate, lien, or interest in and to the lands of plaintiff hereinbefore described, based on the purported boundary described in Paragraph 6 [*continue with whichever are applicable:*; the claims of the successor defendants described in Paragraph _____; the claims of all unknown defendants described in Paragraph 8, whether or not the claim or cloud is known to plaintiff; and the unknown, uncertain, or contingent claim, if any, of _____ (*name*) more fully described in Paragraph 9]. Defendant's/Defendants' claim(s) is/are without any right whatever, and defendant(s) is/are without any right, title, estate, lien, or interest whatever in the above-mentioned real property or any part thereof [except the following: _____ (*set forth any adverse claims of which plaintiff admits the validity, e.g.,* the utility easement held by Pacific Gas and Electric Company)].

[8. *If "all persons unknown" are named as defendants, allege:* The defendants herein named as "all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud on plaintiff's title thereto" (hereinafter sometimes referred to as "the unknown defendants") are unknown to plaintiff. These unknown defendants, and each of them, claim some right, title, estate, lien, or interest in the above-described property adverse to plaintiff's title; and their claims, and each of them, constitute a cloud on plaintiff's title to that property.]

[9. *If the claim of a named defendant is unknown, uncertain, or contingent, allege:* The claim of _____ (*name of defendant*) is _____ (unknown *or* uncertain *or* contingent). (*If the lack of knowledge, uncertainty, or contingency is caused by a transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, allege:* _____ (*Name*), age _____, is the person who would be entitled to an adverse claim if _____ (*describe contingency*) had occurred prior to the commencement of this action.) (*If this person is subject to a legal disability, allege:* This person is subject to _____ (*specify legal disability*).)]

10. Plaintiff seeks to quiet title as of _____ [*date*]. [*If the date is a date other than the date the*

complaint is filed, allege why a determination as of that date is sought.]

SECOND CAUSE OF ACTION
(Willful Trespass)

11. Plaintiff incorporates herein the allegations of Paragraphs 1 through _____ [3 *or, if fictitious name allegation is appropriate:* 4], inclusive, of the First Cause of Action.

[12. *Agency allegation, if appropriate. See § 266.40[1], Paragraph 3.*]

13. On or about _____ [*date*], defendant(s) _____ [*name(s) of known defendant(s)*] unlawfully, and with force and violence, entered plaintiff's property and constructed a _____ [*specify type of fence, e.g.,* wooden *or* brick] fence on the land, disturbed plaintiff in the use and occupation of the land, and prevented plaintiff from enjoying the land as he/she otherwise would have done. At all times since _____ [*date*], defendant(s) has/have maintained, and continues/continue to maintain, the fence and to encroach on the property of plaintiff, all to plaintiff's damage in the sum of $_____.

THIRD CAUSE OF ACTION
(Injunction)

14. Plaintiff incorporates herein the allegations of Paragraphs 1 through _____ [3 *or, if fictitious name allegation is appropriate:* 4], inclusive, of the First Cause of Action and Paragraph 13 of the Second Cause of Action.

[15. *Agency allegation, if appropriate. See § 266.40[1], Paragraph 3.*]

16. Defendant(s) _____ [*name(s) of known defendant(s)*] has/have threatened to maintain the fence and to oppose, with force and violence, the removal of the fence by plaintiff and has/have stated that if plaintiff removes the fence, defendant(s) will reconstruct the fence at the place where it now exists as often as plaintiff removes it, thus permanently depriving plaintiff of the use and enjoyment of plaintiff's property. Plaintiff fears that defendant(s) will carry out the above-described threats unless restrained by this court. If defendant(s) continue/continues the encroachment, he/she/they will cause plaintiff irreparable injury in that _____ [*specify, e.g.,* a continuation of such encroachment will ripen into a prescriptive easement], and defendant(s) will harass, vex, and annoyplaintiff, requiring plaintiff to bring a multiplicity of actions to protect his/her rights.

WHEREFORE, plaintiff prays judgment as follows:

On the FIRST CAUSE OF ACTION:

1. That defendant(s) be required to set forth each and every claim he/she/they may assert in and to plaintiff's lands and to the location of the boundary line set out above;

2. That this court adjudge the true and correct location of the boundary line;

3. That plaintiff's title in and to his/her lands be quieted and that it be adjudged that plaintiff is the owner in fee simple and entitled to the possession of the lands, that the true and correct location of the boundary line between plaintiff's land and defendant's/defendants' land is as described in this complaint, and that the defendant(s) has/have no right, title, estate, lien, or interest in or to the land of plaintiff, or any portion thereof;

4. That the defendant(s) (, and each of them,) be forever enjoined and restrained from claiming or asserting any claim or interest in or to plaintiff's land, or any portion thereof, and from questioning, distributing, or interfering with the boundary line hereinbefore set out in this complaint, or attempting so to do;

On the SECOND CAUSE OF ACTION:

5. For general damages in the sum of $_____;

On the THIRD CAUSE OF ACTION:

6. For judgment that defendant(s), his/her/their agents, attorneys, and all persons claiming by or under him/her/them, subsequent to the filing of this action, be perpetually enjoined and restrained from maintaining the fence on the land of plaintiff, and from allowing the fence to remain on the property of plaintiff, or in any manner interfering with the use or occupation thereof by plaintiff;

On all CAUSES OF ACTION:

7. For costs of suit herein incurred; and

8. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 266.40[1].*]

[2] Use of Form

The form of complaint in *[1], above*, is for use to establish a boundary line and to quiet title to the properties involved when there is a dispute between adjoining landowners over the location of the boundary line (First Cause of Action) [*see generally* Ch. 482, *Quieting Title*]; to recover damages for a fence constructed by the adjoining owner on the plaintiff's property (Second Cause of Action); and to enjoin the adjoining owner from further maintenance of the fence (Third Cause of Action) [*see* discussion at *§ 266.16* and forms at §§ *266.51, 266.52*].

In drafting the complaint for injunctive relief, it is assumed that counsel will be filing affidavits [*see Code Civ. Proc. § 2015.5* (declarations)] in support of the allegations in the complaint. If the complaint will not be so supported, counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . In addition, if no affidavits are prepared, the compliant will have to be verified [*see Code Civ. Proc. § 527*]. For discussion, forms, and a procedural checklist regarding the requirements for obtaining injunctions, see Ch. 303, *Injunctions* .

A plaintiff who intends to name unknown persons as defendants in the quiet title cause of action may wish to obtain a title report before commencing the action, because an examination of the record title and an inspection of the property

will be necessary [*see Code Civ. Proc. § 762.060(b)*]. Also, the court may order plaintiff to obtain a title report and keep it available for inspection and copying by the parties [*Code Civ. Proc. § 762.040(b)*].

[3] Required Allegations

Plaintiff in quiet title action must prove title in himself or herself superior to that of defendant, rather than relying on any weakness in defendant's title [*Gerhard v. Stephens (1968) 68 Cal. 2d 864, 918, 69 Cal. Rptr. 612, 442 P.2d 692]* . By statute, a quiet title complaint must include the following allegations:

(1) A description of the property that is the subject of the action (Paragraphs 1-3). In the case of tangible personal property, the description must include its usual location. In the case of real property, the description must include both its legal description and its street address or common designation, if any [*Code Civ. Proc. § 761.020(a)*].

(2) The title of the plaintiff as to which a determination is sought and the basis of the title (Paragraphs 1, 3, 5-6). If the title is based on adverse possession, the complaint must allege the specific facts constituting the adverse possession [*Code Civ. Proc. § 761.020(b)*;*see also* Ch. 13, *Adverse Possession*].

(3) The adverse claims to the title of the plaintiff against which a determination is sought (Paragraphs 6-9). If the plaintiff admits the validity of any adverse claim, the complaint must so state [*Code Civ. Proc. § 762.060(c)*]. If the claim or the share or quantity of the claim of a person required to be named as a defendant is unknown, uncertain, or contingent, theplaintiff must so state in the complaint. If the lack of knowledge, uncertainty, or contingency is caused by a transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, the plaintiff must also state in the complaint, so far as is known to the plaintiff, the name, age, and legal disability, if any, of the person in being who would be entitled to the claim had the contingency on which the claim depends occurred prior to the commencement of the action (Paragraph 9) [*Code Civ. Proc. § 762.020(b)*].

(4) The date as of which the determination is sought (Paragraph 10). If the determination is sought as of date other than the date the complaint is filed, the complaint must include a statement of the reasons why a determination as of that date is sought [*Code Civ. Proc. § 761.020(d)*].

(5) A prayer for the determination of the title of the plaintiff against the adverse claims [*Code Civ. Proc. § 761.020(e)*].

The allegations of the Second and Third Causes of Action, for removal of the fence and injunction, parallel those used in § 266.52[1] and discussed at *§ 266.52[3]*.

[4] Who Must Be Made Defendants

[a] Persons Claiming Interest in Property

The plaintiff must name as defendants the persons having adverse claims to the title of the plaintiff against which a determination is sought [*Code Civ. Proc. § 762.010*]. If the name of a person required to be named as a defendant is not known to plaintiff, the plaintiff must so state in the complaint and must name as parties all persons unknown in the manner described in *[5], below* [*Code Civ. Proc. § 762.020(a)*].

The court on its own motion may, and on motion of any party must, make such orders as appear appropriate for joinder of any additional parties who are necessary or proper [*Code Civ. Proc. § 762.040(a)*].

[b] Representatives and Heirs of Deceased Claimants

If a person required to be named as a defendant is dead and the plaintiff knows of a personal representative, the plaintiff

must join the personal representative [*Code Civ. Proc. § 762.030(a)*]. If a person required to be named as a defendant is dead, or is believed by the plaintiff to be dead, and the plaintiff knows of no personal representative, the plaintiff must state these facts in an affidavit filed with the complaint [*Code Civ. Proc. § 762.030(b)(1)*;*see generally* Ch. 15, *Affidavits, Certificates, and Declarations*]. If it is stated in the affidavit that such person is dead, the plaintiff may join as defendants "the testate and intestate successors of _____ (*name of deceased person*), deceased, and all persons claiming by, through, or under such decedent," naming them in that manner [*Code Civ. Proc. § 762.030(b)(2)*].

If a person required to be named as a defendant is believed by plaintiff to be deceased, the person believed to be deceased may be named as a defendant as may that person's successors. The successors must be denominated as follows: "the testate and intestate successors of _____ (*name of person believed to be deceased*), believed to be deceased, and all persons claiming by, through, or under such person" [*Code Civ. Proc. § 762.030(b)(3)*].

The complaint at [1], *above*, does not contain any allegations regarding defendants who are personal representatives [*Code Civ. Proc. § 762.030(a)*] or heirs and intestate or testate successors [*Code Civ. Proc. § 762.030(b)*] of persons known or believed by the plaintiff to be deceased. If those defendants are necessary in your particular situation, use the appropriate allegations from Ch. 482, *Quieting Title*.

[5] Unknown Defendants

In addition to the persons required to be named as defendants in the action, the plaintiff may name as defendants "all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud upon plaintiff's title thereto," naming them in that manner (Paragraph 8) [*Code Civ. Proc. § 762.060(a)*]. If unknown defendants are named, the plaintiff must name as defendants the persons having adverse claims that are of record or known to the plaintiff or reasonably apparent from an inspection of the property [*Code Civ. Proc. § 762.060(b)*]. Naming unknown defendants and serving them by publication [*see* discussion at [8], *below*] will entitle the plaintiff to an in rem judgment against all persons known and unknown who were parties to the action, and all persons not parties to the action and unknown to plaintiff who had a claim that was not recorded when the lis pendens was filed [*Code Civ. Proc. § 764.030*; *see also Code Civ. Proc. § 764.045* (further limitation on judgment)], except that a person who is in open and actual possession of the property cannot be named as an unknown defendant [*Code Civ. Proc. § 763.010(c)*].

Some practitioners also additionally designate testate and intestate successors and "all persons unknown" as DOES. That is not recommended because it differs from the statutory language of *Code Civ. Proc. §§ 762.030(b)(2), (3)* and *762.060*, by which those defendants are to be designated, and because it may limit the in rem effect of the judgment by limiting the number of adverse claimants in those classes [*see Code Civ. Proc. § 763.030(b)*]. Fictitious defendants may be named as DOES pursuant to *Code Civ. Proc. § 474* [*see Code Civ. Proc. § 760.060* (rules governing civil actions generally as applicable in quiet title actions unless they are inconsistent with quiet title provisions)].

[6] Verification

A quiet title complaint must be verified [*Code Civ. Proc. § 761.020*].

[7] Jurisdiction and Venue

Quiet title actions are in the jurisdiction of the superior court and are not limited civil cases [*Code Civ. Proc. §§ 85, 86, 580(b)(3), 760.040(a)*]. Subject to the power of the court to transfer actions, the proper county for the trial of an action to quiet title to real property is the county in which the real property, or some of it, is located [*Code Civ. Proc. § 760.050(a)*].

[8] Service of Summons

The form, content, and manner of the service of summons in quiet title actions is the same as in civil actions generally [*Code Civ. Proc. § 763.010(a)*]. If unknown defendants are named, there must also be service by publication and posting [*Code Civ. Proc. § 763.010(b)*]. The requirements for service by publication and posting are discussed in Ch. 482, *Quieting Title* . The procedure for service of summons is set forth in Ch. 518, *Service of Summons and Papers* .

[9] Lis Pendens

Immediately on the commencement of a quiet title action by filing the complaint, the plaintiff must file a lis pendens in the office of the county recorder of each county in which any real property described in the complaint is located [*Code Civ. Proc. § 761.010(a)*]. The lis pendens gives constructive notice of the pendency of the action to subsequent purchasers or encumbrancers [*Code Civ. Proc. § 405.24*]. For forms of lis pendens, see Ch. 348, *Lis Pendens* .

[10] Statutes of Limitations

No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appears that the plaintiff, or his or her ancestor, predecessor, or grantor, was seized or possessed of the property in question, within five years before the commencement of the action [*Code Civ. Proc. § 318*]. Additionally, no cause of action or defense arising out of the title to real property or to rents or profits out of real property is effectual unless it appears that the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person was seized or possessed of the premises within five years before the commencement of the act in respect to which that action is prosecuted or defense made [*Code Civ. Proc. § 319*].

Actions for trespass on or injury to real property are to be brought within three years [*Code Civ. Proc. § 338(b)*].

[11] Cross References

For other forms for use in actions to establish boundaries and quiet title, see Ch. 101, *Boundaries*

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Chapter 266 FENCES
PART IV. FORMS

22-266 California Forms of Pleading and Practice--Annotated §§ 266.61- 266.69

[Reserved]

§§ 266.61[Reserved]

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Chapter 266 FENCES
PART IV. FORMS

22-266 California Forms of Pleading and Practice--Annotated § 266.70

§ 266.70 Complaint to Recover Proportionate Part of Construction Cost of Division Fence [Civ. Code § 841(2)] by Landowner Against Adjoining Landowner--Adjoining Landowner Used Division Fence as Part of Enclosure

[1] FORM Complaint to Recover Proportionate Part of Construction Cost of Division Fence [Civ. Code § 841(2)] by Landowner Against Adjoining Landowner--Adjoining Landowner Used Division Fence as Part of Enclosure

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO RECOVER PROPORTIONATE
_____ [*name(s)*], [and DOES I	)	COST OF DIVISION FENCE
through _____,] Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1.-2. [*Allegations of ownership of respective properties by plaintiff and defendant. See § 266.52[1], Paragraphs 1-2, adding to allegations of Paragraphs 1 and 2 the street address or common designation, if any, of the property.*]

3. The above-described properties of plaintiff and defendant adjoin each other at plaintiff's _____ [*specify direction, e.g.,* north] and defendant's _____ [*specify direction, e.g.,* south] boundaries, for a distance of _____ [*length of coterminous boundary*] feet, and this division line between plaintiff's and defendant's properties runs _____ [*designate general direction, e.g.,* east to west].

[4. *Fictitious name allegation, if appropriate. See § 266.40[1] Paragraph 2.*]

[5. *Agency allegation, if appropriate. See § 266.40[1], Paragraph 3.*]

6. Beginning on or about _____ [*date*], and continuing until _____ [*date*], plaintiff erected a division fence along the above-described boundary line between plaintiff's and defendant's property for a distance of _____ [*number*] feet in length. The fence was constructed of _____ [*describe material used, e.g.,* cinder blocks] and was installed as follows: _____ [*describe method of construction, e.g.,* two workers were employed over a two-day period]. Plaintiff expended $_____ for materials, $_____ for labor, and $_____ for other costs, for a total expenditure of $_____.

7. At the time plaintiff constructed the division fence, defendant had neither fenced the boundaries of his/her land nor enclosed the land in any manner, and at that time defendant chose to let such land lie without fencing, other than plaintiff's fence as described above.

8. On or about _____ [*date*], defendant first made use of plaintiff's previously constructed division fence as described above when defendant began to enclose his/her lands as follows: _____ [*describe manner in which fence was constructed and material used, e.g.,* two neighbors and one hired worker enclosed defendant's land with brick fence in two days]. Plaintiff's division fence was made a part of the enclosure as follows: _____ [*describe, e.g.,* defendant constructed brick fences on three sides of his/her property and joined the fences at either end of plaintiff's previously constructed cinder block division fence, in order to form a complete enclosure].

9. At the time when defendant made use of plaintiff's division fence to complete the enclosure of defendant's land, the fence which forms the boundary between the properties of plaintiff and defendant was valued at $_____, a sum which represents the _____ [*specify, e.g.,* cost of repair *or* cost of replacement]. Defendant's just proportion of that value is the sum of $_____. _____ [*Allege facts to establish just proportion*].

10. On or about _____ [*date*], after defendant used the division fence constructed by plaintiff to complete the enclosure of defendant's land, plaintiff made _____ [*specify manner of demand, e.g.,* a written] demand of defendant that defendant pay plaintiff a just proportion of the value of the division fence at the time defendant made use of it. Defendant refused then, and refuses now, to pay plaintiff the defendant's just proportionate share of the value of the fence, or any part thereof. A true and correct copy of the demand is attached hereto as Exhibit A and made a part hereof.

WHEREFORE, plaintiff prays judgment as follows:

1. For recovery of defendant's just proportion of the value of the above-described fence, a sum of $_____;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 266.40[1].*]

[2] Use of Form

This form of complaint is for use by a landowner against an adjoining landowner to recover a proportionate part of the construction cost of a division fence constructed by the landowner when the adjoining landowner later made use of the division fence to enclose his or her land [*see § 266.17*; *Meade v. Watson (1885) 67 Cal. 591, 592, 594, 8 P. 311* ; *Gonzales v. Wasson (1876) 51 Cal. 295, 298* (payment for partition fence is recoverable even though defendant's land is not completely enclosed)].

[3] Allegations

The complaint alleges: (1) ownership by plaintiff and defendant of adjoining property sharing a coterminous boundary (Paragraphs 1-3); (2) plaintiff's construction of a division fence (Paragraph 6) [*see Meade v. Watson (1885) 67 Cal. 591, 595, 8 P. 311* (plaintiff is required to prove construction, establish value, and demand value from defendant to recover contribution for division fence)]; (3) defendant's later use of division fence to enclose defendant's land (Paragraph 8) [*see Civ. Code § 841(2)*]; (4) value of division fence at time of use by defendant (Paragraph 9) [*Meade v. Watson (1885) 67 Cal. 591, 595, 8 P. 311]* ; and (5) plaintiff's demand of defendant for a just proportion of fence's value (Paragraph 10) [*Meade v. Watson (1885) 67 Cal. 591, 595, 8 P. 311]* .

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

In limited civil cases, the first page of the first paper must state that it is a limited civil case and whether the amount demanded exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[5] Statute of Limitations

An action on a liability created by statute, other than a penalty or forfeiture, must be brought within three years[*Code Civ. Proc. § 338(a)*].

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Chapter 267 FIRES

22-267 California Forms of Pleading and Practice--Annotated 267.syn

§ 267.syn Synopsis to Chapter 267: FIRES

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§ 267.03 Governing Law

§§ 267.04through 267.09 [Reserved]

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§ 267.11 Duty of Landowner

[1] Reasonable Use of Property

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[3] Power Company

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§ 267.12 Liability of Lessee to Lessor for Fire

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[1] Bar to Recovery for Injuries

[2] Rule Not Applicable to Private Safety Employees

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§ 267.16 Immunity of Public Entities

[1] General Rule of Nonliability

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§ 267.17 Water Companies

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[3] Designers and Engineers

§ 267.18 Fire Suppression Costs

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[2] Measure of Damages

[3] Inapplicability of Civ. Code § 3346 to Fires

§ 267.19 Recovery of Cleanup Costs From Burning of Hazardous Substances

§ 267.20 Negligence as Matter of Law

§ 267.21 Defense of Plaintiff's Negligence

§ 267.22 Defense of Assumption of Risk

§ 267.23 Nuisance

§§ 267.24through 267.29 [Reserved]

§ 267.30 Related Matthew Bender Publications

§ 267.31 Federal Statutes

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[1] Regulations

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[a] Generally

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[a] Generally

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[10] Proof

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§ 267.33 Decisions

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[2] Warranty

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[c] Railroad

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[a] Generally

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[13] Proof

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§ 267.50 Complaint for Damages to Property Based on Negligence--Fire Negligently Started or Permitted to Occur [Health & Safety Code § 13007]--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Cross References

§ 267.51 Complaint for Damages to Property Based on Negligence--Fire Negligently Started or Permitted to Occur [Health & Safety Code § 13007]--Lessor Against Lessee--Maintaining Premises in Violation of Health & Safety Code § 13001 and City Ordinance

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 267.52 Complaint for Damages to Property Based on Negligence--Fire Negligently Started or Permitted to Occur [Health & Safety Code § 13007]--By Tenant Against Other Tenant--Storing Flammables Without Permit

[1] FORM

[2] Use of Form

§ 267.53 Complaint for Damages to Property Based on Negligence--Fire Negligently Allowed to Spread to Property of Another [Health & Safety Code § 13008]--By Building Occupant Against Business Owner

[1] FORM

[2] Use of Form

§ 267.54 Complaint for Damages Based on Negligence--For Recovery of Expenses Incurred in Fighting Fire and for Cost of Providing Rescue or Emergency Services [Health & Safety Code § 13009(a)] and Related Costs [Health & Safety Code § 13009.1]

[1] FORM

[2] Use of Form

§ 267.55 Complaint for Recovery of Expenses Incurred in Fighting Fire and Cost of Providing Rescue or Emergency Services [Health & Safety Code § 13009(a)] and Related Costs [Health & Safety Code § 13009.1]--Uncorrected Fire Hazard [Health & Safety Code § 13009(a)]

[1] FORM

[2] Use of Form

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§ 267.56 Complaint for Damages for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Landowner for Negligent Burning

[1] FORM

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[2] Use of Form

§ 267.58 Complaint for Damages to Property and Personal Injuries Based on Negligence--By Tenant Against Landlord--Permitting Defective Boiler to Remain on Premises

[1] FORM

[2] Use of Form

§ 267.59 Allegation--Negligent Cigarette Smoking [Health & Safety Code § 13001]

[1] FORM

[2] Use of Form

§ 267.60 Allegation--Accumulation of Combustible Materials With Use of Certain Appliances [Health & Safety Code § 13001]

[1] FORM

[2] Use of Form

§ 267.61 Complaint [Fed. R. Civ. P., Rule 7(a)] by Property Owner Against Federal Government in Federal District Court Under Federal Tort Claims Act [28 U.S.C. §§ 1346(b), 2671-2680]--For Damages Caused by Forest Fire Negligently Set and Permitted to Escape

[1] FORM

[2] Use of Form

[3] Contents of Complaint

[4] Verification

[5] Signature

[6] No Trial by Jury

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Chapter 267 FIRES
PART I. SCOPE

22-267 California Forms of Pleading and Practice--Annotated § 267.01

§ 267.01 Scope of Chapter

This chapter discusses and contains forms for use in actions arising from the negligent setting or control of fires that result in property damage or personal injury to others.

The chapter contains:

- Forms of complaint to recover damages to property [*see §§ 267.50 -267.53*].
- Forms of complaint and allegations for personal injuries [*see §§ 267.56 -267.60*].
- Forms of complaint for fire suppression costs [*see §§ 267.54, 267.55*].

Legal Topics:

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

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22-267 California Forms of Pleading and Practice--Annotated § 267.02

§ 267.02 Cross References

For a form of complaint for use in an action for damages from an airplane fire and crash, see *Ch. 16, Airplanes and Airports, § 16.47*

For discussion and forms involving wrongful death actions, see Ch. 181, *Death and Survival Actions*

For forms of complaint for use in actions involving explosives, see Ch. 256, *Explosives*

For a form of complaint for use in an action involving a fire while filling an automobile's gas tank, see *Ch. 274, Garages and Gas Stations, § 274.43*

For actions by insureds against insurance companies based on fire insurance, see Ch. 308, *Insurance*

For a forms of allegation of breach of a covenant to insure against fire and to refrain from keeping inflammable substances on leased premises, see *Ch. 332, Landlord and Tenant: The Tenancy, §§ 332.44, 332.47*

For a more detailed discussion of negligence and for forms for use in negligence actions generally, see Ch. 380, *Negligence*

For a form of complaint for use in an action to abate a fire hazard as a nuisance, see Ch. 391, *Nuisance*

For forms for use in actions concerning consumers injured by fires resulting from defective products and forms for use in products liability actions generally, see Ch. 460, *Products Liability*

For forms for use in actions involving fires on ships, see Ch. 522, *Ships and Shipping*

For a form of complaint for use in an action to recover amount of payment for fire damages caused by insured's tenant, see Ch. 536, *Subrogation*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsSubrogationGeneral OverviewReal Property LawTortsNuisanceGeneral OverviewTortsProducts LiabilityGeneral OverviewTortsStrict LiabilityAbnormally Dangerous ActivitiesActivities & ConditionsTortsWrongful Death & Survival ActionsGeneral Overview

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22-267 California Forms of Pleading and Practice--Annotated § 267.03

§ 267.03 Governing Law

Liability for negligence is governed generally by *Civ. Code §§ 1708* (duty to abstain from injuring person or property of another), 1714(a) (liability for negligent acts or omissions), and *Civ. Code § 3333* (measure of damages for proximately caused detriment).

Misdemeanor penalties for acts relating to or concerning fires are provided for in *Health & Safety Code §§ 13000-13006.5*. The liability to the owner of property for damages due to fires is governed by *Health & Safety Code § 13007* (negligently set or attended fires), *Health & Safety Code § 13008* (negligently permitting fire to escape to the lands of another), and *Health & Safety Code §§ 13009* and *13009.1* (costs incurred by public or private entity to fight fire on any public or private property).

Although liability for many negligent acts resulting in fire damage to property of another may be predicated specifically on *Health & Safety Code §§ 13007* and *13008*, many cases proceed upon general negligence principles [*see, e.g., Eberhard v. Bruhn (1970) 13 Cal. App. 3d 836, 838, 91 Cal. Rptr. 915]* , particularly because *Health & Safety Code §§ 13007* and *13008* relate only to property damage and do not cover injuries to persons [*see Health & Safety Code §§ 13007, 13008*; *Eberhard v. Bruhn (1970) 13 Cal. App. 3d 836, 838, 91 Cal. Rptr. 915* (recovery for property damage and personal injuries sought on general negligence principles)].

Activities relating to forests and forestry that are specifically prohibited are covered in *Pub. Res. Code § 4411 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesProperty CrimesArsonSimple ArsonGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsNegligenceCausationProximate CauseGeneral OverviewTortsNegligenceProofViolations of LawStatutes

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[Reserved]

§§ 267.04[Reserved]

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22-267 California Forms of Pleading and Practice--Annotated § 267.10

§ 267.10 Duty to Prevent Fire Damage Generally

Any person who personally or through another willfully, negligently, or in violation of law, allows fire to be set to, or allows a fire kindled or attended by him or her to escape to, the property of another, whether privately or publicly owned, is liable to the owner of the property for any damages to the property caused by the fire [*Health & Safety Code § 13007*].

Liability under *Health & Safety Code § 13007* may result from either of the following [*County of Ventura v. Southern Cal. Edison Co. (1948) 85 Cal. App. 2d 529, 532, 193 P.2d 512]* :

- A finding that a fire was caused by defendant's direct and affirmative act of setting it, which either was negligence in itself or was done in a negligent manner; or

- Defendant's knowledge of the operative facts accompanied by acquiescence in, or abstinence from preventing, the occurrence of the particular act or event, if defendant had a duty and power to prevent that occurrence.

The second situation is illustrated by *County of Ventura v. Southern Cal. Edison Co. (1948) 85 Cal. App. 2d 529, 532-533, 193 P.2d 512* . In that case, the defendant power company was found liable for damages resulting from a fire caused by the negligent construction and maintenance of transmission and telephone lines because the company, charged with knowledge of the condition of its equipment, took no steps to prevent the occurrence of fire that was a reasonably foreseeable consequence of the condition of those lines.

Health and Safety Code § 13007 permits recovery for "any damages to the property." It is generally accepted that a person may recover lost profits for property damage caused by negligence [*see J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 803-804, 157 Cal. Rptr. 407, 598 P.2d 60]* . The statute has been liberally construed to place no restrictions on the type of property damage that is compensable. Thus, loss of profits from a business connected to property that is negligently damaged by a set fire is a form of property damage, and is compensable under the general rule [*McKay v. State of California (1992) 8 Cal. App. 4th 937, 939-940, 10 Cal. Rptr. 2d 771* (Department of Forestry and Fire Prevention liable for loss of profits resulting from fire damage to plaintiff's fruit trees and retail produce facility from

controlled-burn fire on adjacent property)].

For a general form of complaint for use when a fire is negligently started or permitted to occur, see *§ 267.50[1]*. For forms of allegations for use when a fire was started as a result of negligence cigarette smoking, or as a result of use of certain appliances near accumulated combustible materials, see *§§ 267.59* and *267.60*, respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesGeneral OverviewTortsDamagesCompensatory DamagesLost IncomeGeneral OverviewTortsDamagesCompensatory DamagesProperty DamageGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareGeneral Overview

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22-267 California Forms of Pleading and Practice--Annotated § 267.11

§ 267.11 Duty of Landowner

[1] Reasonable Use of Property

The possessor of land is required to make reasonable use of his or her premises that causes no unreasonable harm to those in the vicinity, either by reason of the character of the use itself or because of the manner in which it is conducted [*Reid & Sibell v. Gilmore & Edwards Co. (1955) 134 Cal. App. 2d 60, 65-66, 285 P.2d 364]* .

The test of permissible use of one's land is whether the act or use was a reasonable exercise of the dominion that the owner of the property has by virtue of his or her ownership, having regard to all affected interests and public policy [*Reid & Sibell v. Gilmore & Edwards Co. (1955) 134 Cal. App. 2d 60, 66, 285 P.2d 364]* . Thus, the rule that the reasonableness of the use of land by an adjoining landowner must be determined according to the circumstances of each case is applicable to creation of unreasonable fire risks; if the owner of premises allows them to remain in such a condition as to constitute a danger to other property in case of fire, this negligence will make him or her liable for damages to that other property by an accidental fire starting on his or her premises, even if he or she has no connection with the fire's origin [*Reid & Sibell v. Gilmore & Edwards Co. (1955) 134 Cal. App. 2d 60, 66-67, 285 P.2d 364* ; *see Scally v. Pacific Gas & Elec. Co. (1972) 23 Cal. App. 3d 806, 817, 100 Cal. Rptr. 501* (citing *Reid* for the proposition that property owners are under an independent duty to prevent the accumulation of inflammable material on their premises)].

Even the presence of a forest ranger who directs and supervises the setting and control of fires does not necessarily relieve defendants of the duty imposed by law of exercising due diligence to avoid damage to the property of others [*Leuteneker v. Fisher (1957) 155 Cal. App. 2d 33, 35, 317 P.2d 143]* .

For a form of complaint for damages for personal injuries based on negligence against a landowner for negligent burning, see *§ 267.56[1]*. For a form of complaint by a tenant against a landlord for permitting a defective boiler to remain on the premises, see *§ 267.58[1]* For a complaint by an independent contractor against a building owner for representing that it was safe to discharge rubbish into an incinerator, see *§ 267.57[1]*.

[2] For Escaping Fire

Any person who allows any fire burning on his or her property to escape to the property of another, whether privately or publicly owned, without exercising due diligence to control that fire, is liable to the owner of the other property for the damages to the property caused by the fire [*Health & Safety Code § 13008*; *see City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1019, 244 Cal. Rptr. 507]* . If the plaintiff has been damaged by a fire spreading to his or her land from the land of another, he or she may recover if he or she can show negligence on the part of the defendant either in starting or in controlling the fire. That is, if the plaintiff can prove that the defendant either initially set the fire in a negligent manner, or that the defendant negligently allowed a properly set fire to spread beyond his or her own lands, and that the plaintiff has thereby suffered damages, then the defendant will be liable for those damages [*Sampson v. Hughes (1905) 147 Cal. 62, 64, 81 P. 292* ; *see also City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1019, 244 Cal. Rptr. 507* (*Health & Safety Code § 13008* provides a basis for the recovery of damages for injury caused to the property, but nothing more); *but see* Robinson v. United States (E.D. Cal 2001) 175 F. Supp. 2d 1215 (homeowners, whose property was destroyed by a fire that started as a prescribed fire on federal property but that spread, were not limited to recovery for property damages under Health & Safety Code §§ 13007 and 13008, and where plaintiffs assert rights under common law, the statutory remedies provided by sections 13007 and 13008 will be read as supplementing rather than supplanting plaintiffs' recovery under the common law)].

In addition, a negligent invasion by fire that damages real property constitutes a trespass [*Elton v. Anheuser-Busch Beverage Group, Inc. (1996) 50 Cal. App. 4th 1301, 1307, 58 Cal. Rptr. 2d 303* ; for discussion of trespass, see Ch. 550, *Trespass*]. If the land trespassed on is under cultivation or intended or used for raising livestock, attorney's fees would be available under *Code Civ. Proc. § 1021.9* [*see Elton v. Anheuser-Busch Beverage Group, Inc. (1996) 50 Cal. App. 4th 1301, 1307-1308, 58 Cal. Rptr. 2d 303]* .

A defendant is not liable if the fire was started lawfully and with due care and subsequently spread to the lands of another despite the defendant's due diligence in attempting to confine it [*Garnier v. Porter (1891) 90 Cal. 105, 108-109, 27 P. 55]* .

For a form of complaint by a property owner against the federal government in United States District Court under the Federal Tort Claims Act for damages caused by a forest fire that was negligently set and permitted to escape, see *§ 267.61[1]*.

[3] Power Company

An electric company has the duty to make its electrical wires safe under all the exigencies created by the surrounding circumstances [*Scally v. Pacific Gas & Elec. Co. (1972) 23 Cal. App. 3d 806, 815, 100 Cal. Rptr. 501* ; *Lozano v. Pacific Gas & Elec. Co. (1945) 70 Cal. App. 2d 415, 422, 161 P.2d 74]* . The duty is an alternative one, either to insulate the wires or to locate them where they will be comparatively harmless [*Scally v. Pacific Gas & Elec. Co. (1972) 23 Cal. App. 3d 806, 815-816, 100 Cal. Rptr. 501* ; *Polk v. City of Los Angeles (1945) 26 Cal. 2d 519, 527, 159 P.2d 931]* .

Conformity to general custom of power companies in maintaining power lines does not excuse a defendant from liability unless that practice is consistent with due care under the circumstances [*Scally v. Pacific Gas & Elec. Co. (1972) 23 Cal. App. 3d 806, 816, 100 Cal. Rptr. 501* ; *Polk v. City of Los Angeles (1945) 26 Cal. 2d 519, 529, 159 P.2d 931]* . Similarly, if a duty to insulate exists, the factor of expense or inconvenience will not excuse compliance with the duty [*Scally v. Pacific Gas & Elec. Co. (1972) 23 Cal. App. 3d 806, 816, 100 Cal. Rptr. 501]* .

The duty of safe design, construction, operation, and maintenance of electrical facilities and rights-of-way also includes preventing trees and other vegetation from growing close enough to electrical transmission lines to create a danger of their coming in contact with the line and causing a fire [*Scally v. Pacific Gas & Elec. Co. (1972) 23 Cal. App. 3d 806, 818, 100 Cal. Rptr. 501]* .

[4] Railroad

A railroad has no independent duty to keep the right-of-way free from combustible material. A railroad company is liable for failing to use due care to keep the right-of-way clear of flammable material only if the cause of the fire was due to some act or omission of the railroad company itself, such as sparks from a locomotive [*Scally v. Pacific Gas & Elec. Co. (1972) 23 Cal. App. 3d 806, 817, 100 Cal. Rptr. 501* (dictum)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawElectric Power IndustryGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareGeneral OverviewTortsPremises Liability & PropertyTrespassGeneral OverviewTransportation LawRail TransportationMaintenance & Safety

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§ 267.12 Liability of Lessee to Lessor for Fire

A lessee may be liable to his or her lessor for the destruction of the leased premises by fire, if the lessee's storage of articles on the premises is the proximate cause of that destruction. The lessee is liable if the storage violated the restrictions of the lease or if the premises were leased for the storage of specified articles but the lessee, without the lessor's authorization, stored other items that were more dangerous and combustible [*Gentleman v. Nadell & Co. (1961) 197 Cal. App. 2d 545, 552, 17 Cal. Rptr. 389]* .

For a form of complaint for damages for use by a lessor against a lessee for maintaining the premises in violation of *Health & Safety Code § 13007* and city ordinance, see *§ 267.51[1]*. For forms of complaint for use by a tenant against another tenant, see *§§ 267.52, 267.53*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyLessees & LessorsLiability of Lessees

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§ 267.13 Causation

The plaintiff must show by a preponderance of the evidence that the negligence of the defendant was the proximate cause of the fire. That the defendant's negligence could possibly have been the cause is not sufficient. The proof must raise a reasonable inference that the negligence complained of was the proximate cause of the injury [*Hill v. Matthews Paint Co. (1957) 149 Cal. App. 2d 714, 724, 308 P.2d 865]* . Such proof may be wholly circumstantial; direct evidence is not required to establish the cause of the fire [*New Zealand Ins. Co. v. Brown (1952) 110 Cal. App. 2d 411, 413, 242 P.2d 674]* . Alleging that the cause of the fire is a violation of a statute or ordinance presents a question of fact for the finder of fact [*Reid & Sibell v. Gilmore & Edwards Co. (1955) 134 Cal. App. 2d 60, 72, 285 P.2d 364]* .

Recovery for damages caused by a fire does not require a showing that the fire was directly communicated to the property destroyed. Recovery is allowed for a fire that burns across intervening lands before reaching the property involved if there was no superseding cause between the origin of the fire and the loss complained of. Time and distance do not affect the issue of a defendant's liability except as to the question of proximate cause. Generally a fire, however far it may go, is one continuous fire and is the proximate cause of all the injuries and damage it may produce in its destructive march, whether it goes to abutting property or several miles [*Osborn v. City of Whittier (1951) 103 Cal. App. 2d 609, 617-618, 230 P.2d 132]* .

Also, the defendant's negligence need not be the sole proximate cause of the plaintiff's injuries; it is sufficient that it be one of the contributing causes thereof [*Reid & Sibell v. Gilmore & Edwards Co. (1955) 134 Cal. App. 2d 60, 65, 285 P.2d 364]* . If an injury is produced by the concurrent effect of two separate wrongful acts, each is the proximate cause of the injury [*Vedder v. County of Imperial (1974) 36 Cal. App. 3d 654, 660, 111 Cal. Rptr. 728]* . Thus, one who negligently stores gasoline and other highly combustible chemicals on his or her property or knowingly permits such negligent storage may be liable to others for a fire-incurred loss even though the fire was actually started by the negligent conduct of others [*Vedder v. County of Imperial (1974) 36 Cal. App. 3d 654, 660, 111 Cal. Rptr. 728]* . Obviously, the storage of materials that are highly flammable but not self-igniting will cause harm only if a fire occurs. However, the happening of the very event the likelihood of which made the actor's conduct negligent and subjects the actor to liability, cannot relieve the actor from liability. If the spreading of a fire by a chemical was foreseeable, the negligent storage of that chemical will give rise to liability despite the defendant's lack of responsibility for the original fire [*see* *Reid & Sibell v. Gilmore & Edwards Co. (1955) 134 Cal. App. 2d 60, 65, 285 P.2d 364]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceInferences & PresumptionsInferencesEvidenceProcedural ConsiderationsBurdens of ProofPreponderance of EvidenceEvidenceProcedural ConsiderationsCircumstantial & Direct EvidenceTortsNegligenceCausationProximate CauseGeneral OverviewTortsNegligenceCausationProximate CauseConcurrent Causation

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§ 267.14 Res Ipsa Loquitur

Res ipsa loquitur applies if an accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible. Fire damage cases have no peculiar characteristics isolating them from res ipsa loquitur [*Greening v. General Air-Conditioning Corp. (1965) 233 Cal. App. 2d 545, 552, 43 Cal. Rptr. 662* ; *see Seeley v. Combs (1966) 65 Cal. 2d 127, 133, 52 Cal. Rptr. 578, 416 P.2d 810* (citing *Greening* favorably)].

The doctrine of res ipsa loquitur has been applied to forest fire damage that occurred while defendant's tractor was being operated without a spark arrester [*see Roddiscraft, Inc. v. Skelton Logging Co. (1963) 212 Cal. App. 2d 784, 803-804, 28 Cal. Rptr. 277]* and to fire damage suits involving combustible liquid fuels [*see Ward v. Silveria (1951) 102 Cal. App. 2d 114, 118, 226 P.2d 732* ; *Roselip v. Raisch (1946) 73 Cal. App. 2d 125, 134-136, 166 P.2d 340]* . It has been approved in support of a plaintiff whose property was burned when a sagging electric power cable came within arcing distance of vegetation [*see Phillips v. Southern Cal. Edison Co., Ltd. (1937) 23 Cal. App. 2d 222, 225, 72 P.2d 769]* . Similarly, a court has sustained an inference of negligence when defendant's electrician worked on the wiring of a sign that started to smoke and burn shortly thereafter; the court observed that fires do not normally occur from electric wiring that is properly installed and maintained [*see Alhambra Bowl, Inc. v. Ledbetter Sign Co. (1963) 211 Cal. App. 2d 777, 781, 27 Cal. Rptr. 680]* .

For a further discussion of the doctrine of res ipsa loquitur, see Ch. 380, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceProofRes Ipsa LoquiturGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityGeneral Overview

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22-267 California Forms of Pleading and Practice--Annotated § 267.15

§ 267.15 "Fireman's" Rule

[1] Bar to Recovery for Injuries

Under the common law "fireman's" rule, a publicly employed firefighter has no cause of action against a person whose negligence causes a fire in which the firefighter is injured. This rule applies whether or not the injury occurred on the negligent person's premises. Furthermore, it applies whether or not the injured person was a paid firefighter, if the duties for which that person was trained specifically included fighting fires [*Baker v. Superior Court (1982) 129 Cal. App. 3d 710, 716-717, 181 Cal. Rptr. 311* (rule applicable to "volunteer" firefighters paid $5 per call); *Giorgi v. Pacific Gas & Elec. Co. (1968) 266 Cal. App. 2d 355, 358, 360, 72 Cal. Rptr. 119* ; *see* *Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 544, 34 Cal. Rptr. 2d 630, 882 P.2d 347* (rule based on employment by public, not amount or fact of compensation); *Hubbard v. Boelt (1980) 28 Cal. 3d 480, 484-485, 169 Cal. Rptr. 706, 620 P.2d 156* (rule extends to both negligent and reckless conduct); *Scott v. E. L. Yeager Constr. Co. (1970) 12 Cal. App. 3d 1190, 1196, 91 Cal. Rptr. 232* (declining to distinguish between active and passive negligence in applying rule); *see also* *Bay Area Rapid Transit v. Superior Court (1980) 113 Cal. App. 3d 1018, 1022, 170 Cal. Rptr. 390* (rule applicable despite allegations that injuries would have been avoidable had rescue apparatus functioned properly)].

In California, the "fireman's" rule applies not only to firefighters but also to police officers and other public safety personnel [*Hubbard v. Boelt (1980) 28 Cal. 3d 480, 483-484, 169 Cal. Rptr. 706, 620 P.2d 156* ; *Walters v. Sloan (1977) 20 Cal. 3d 199, 202, 142 Cal. Rptr. 152, 571 P.2d 609* ; *Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 405, 22 Cal. Rptr. 2d 514* ; *see also* *City of Oceanside v. Superior Court (2000) 81 Cal. App. 4th 269, 279-280, 96 Cal. Rptr. 2d 621* (publicly employed lifeguard); *Kelhi v. Fitzpatrick (1994) 25 Cal. App. 4th 1149, 1157, 31 Cal. Rptr. 2d 182* (highway patrol officer)].

For further discussion of the "fireman's" rule, see Ch. 380, *Negligence* , and Ch. 421, *Premises Liability* .

[2] Rule Not Applicable to Private Safety Employees

The California Supreme Court has distinguished between publicly employed firefighters and private safety employees, holding that the "fireman's" rule does not preclude a private safety employee from stating a cause of action against a third party, who is not his or her employer, for injuries caused by that third party's negligence in starting a fire [

Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 534-535, 547, 34 Cal. Rptr. 2d 630, 882 P.2d 347] .

The Court reasoned that by establishing public fire departments and taxing themselves to pay for their services, the public in effect has purchased exoneration from their duty of care towards the firefighters employed by those departments and does not have to pay twice, through both taxation and individual liability, for those services [*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 543, 34 Cal. Rptr. 2d 630, 882 P.2d 347]* .

In contrast, a defendant whose negligence injures private safety employees employed by another does not have the same relationship with those private safety employees as a member of the public has with publicly employed firefighters, because the defendant has not paid in any way to be relieved of the duty of care owed toward the private employees. Another consideration supporting the distinction between publicly employed firefighters and private safety employees is that actions by publicly employed firefighters would involve costly litigation over subrogation that would ultimately be financed by the public and that would not benefit the firefighter, who receives retirement or workers' compensation benefits, whereas actions by private safety employees shift the loss from the innocent employees and their employer to the third party whose negligence caused the injuries [*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 543, 34 Cal. Rptr. 2d 630, 882 P.2d 347]* .

A third distinction is that the public good is best served by a quick response to fires without questions about the fire's cause, which warrants eliminating the public's duty of care to publicly employed firefighters, but no similar concern justifies eliminating the duty of care owed by third parties to private safety employees [*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 544, 34 Cal. Rptr. 2d 630, 882 P.2d 347]* .

[3] Exception to Rule for Independent Act of Misconduct

The "fireman's" rule does not bar recovery, however, for injuries sustained as a result of conduct that is independent of the act that created the need for the presence of the firefighter or police officer. A possessor of premises is therefore liable for failing to warn of a known, hidden danger on the premises or for misrepresenting the nature of the risk [*Lipson v. Superior Court (1982) 31 Cal. 3d 362, 378, 182 Cal. Rptr. 629, 644 P.2d 822* (misrepresenting nature of toxic chemicals); *Donohue v. San Francisco Hous. Auth. (1993) 16 Cal. App. 4th 658, 663, 20 Cal. Rptr. 2d 148* (firefighter slipping and falling on wet steps while inspecting building for fire code violations); *Bartholomew v. Klingler Co. (1975) 53 Cal. App. 3d 975, 978, 126 Cal. Rptr. 191* (firefighter falling through defectively maintained roof while fighting fire)]. The rationale for this exception is that firefighters or police officers who suffer injury in this situation are in the same position as anyone venturing onto the premises. Their occupations compel them to face felons or fires, not faulty fences, and they have had no special training to deal with the cause of their injury [*Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 407, 22 Cal. Rptr. 2d 514* ; *Malo v. Willis (1981) 126 Cal. App. 3d 543, 548-549, 178 Cal. Rptr. 774* ; *see City of Sacramento v. Superior Court (1982) 131 Cal. App. 3d 395, 401, 182 Cal. Rptr. 443]* .

For further discussion of exceptions to the "fireman's" rule, see Ch. 380, *Negligence* .

[4] Exceptions to Rule Under Civ. Code § 1714.9

Civ. Code § 1714.9 provides that notwithstanding statutory or decisional law to the contrary, any person is responsible not only for the results of that person's willful acts causing injury to a peace officer, firefighter, or any emergency medical personnel employed by a public entity, but is also responsible for any injury occasioned to that person by the want of ordinary care or skill in the management of the person's property or person, in any of the following situations [*Civ. Code § 1714.9(a)*]:

- The conduct causing injury occurs after the person knows or should have known of the presence of the peace officer, firefighter, or emergency medical personnel.

- The conduct causing injury violates a statute, ordinance, or regulation, and the conduct causing injury was itself not the event that precipitated either the response or presence of the peace officer, firefighter, or emergency medical personnel.

- The conduct causing injury was intended to injure the peace officer, firefighter, or emergency medical personnel.

- The conduct causing the injury is arson as defined by *Penal Code § 451*.

Although *Civ. Code § 1714.9* uses the phrase "that person" to refer both to the person willfully injuring a peace officer, a firefighter, or emergency medical personnel, as well as to the person injured by negligence, it was intended to create, and has been applied as creating, an exception to the "fireman's" rule for both willful and negligent acts that fall into any of its four categories [*see, e.g., Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 408-410, 22 Cal. Rptr. 2d 514* (stating rule but concluding that rule was inapplicable under facts of case); *Gibb v. Stetson (1988) 199 Cal. App. 3d 1008, 1014-1016, 245 Cal. Rptr. 283* ; *City of Redlands v. Sorensen (1985) 176 Cal. App. 3d 202, 208-211, 221 Cal. Rptr. 728]* .

Conduct occurring after a defendant knew or should have known of the presence of a peace officer, a firefighter, or emergency medical personnel does not include conduct that occurs before the peace officer, firefighter, or emergency medical personnel have undertaken their duties [*Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 408-409, 22 Cal. Rptr. 2d 514* ; *see also Kelhi v. Fitzpatrick (1994) 25 Cal. App. 4th 1149, 1158, 1160, 31 Cal. Rptr. 2d 182* (highway patrolman fortuitously present at scene of accident cannot invoke *Civ. Code § 1714.9* exception because negligent conduct occurred before officer responded to the risk created by accident)].

Civ. Code § 1714.9(a)(1) does not apply to create liability when a peace officer, firefighter, or emergency medical personnel has been negligently injured by a fellow public safety member employed by a different public safety agency, when both were jointly engaged in the discharge of their responsibilities [*Calatayud v. State of California (1998) 18 Cal. 4th 1057, 1072, 77 Cal. Rptr. 2d 202 . 959 P.2d 360]* . For these purposes, joint engagement between public service agencies does not require formal coordination between the agencies. It is sufficient that the officers from one agency were trying to assist officers from the other in their official duties [*McElroy v. State of California (2002) 100 Cal. App. 4th 546, 548-549, 122 Cal. Rptr. 2d 612]* .

The additional liability created by *Civ. Code § 1714.9* does not preclude reduction of an award of damages because of the comparative fault of the peace officer or firefighter causing the injury [*Civ. Code § 1714.9(b)*]. In addition, the liability imposed by *Civ. Code § 1714.9* does not apply to an employer of a peace officer, a firefighter, or emergency service personnel [*Civ. Code § 1714.9(d)*]. The employer of a firefighter, a peace officer, or emergency medical personnel may, however, be subrogated to the rights granted by *Civ. Code § 1714.9* to the extent of the workers' compensation benefits and other liabilities of the employer, including all salary, wage, pension, or other emolument paid to the employee or the employee's dependents [*Civ. Code § 1714.9(c)*].

The liability provided by *Civ. Code § 1714.9(a)(1)* for injury-causing conduct occurring after the person knows or should have known of the presence of the peace officer, firefighter, or emergency medical personnel, does not apply if the injury is caused by the negligence of another public safety member employed by a different public safety agency while the public safety personnel were jointly engaged in the discharge of their responsibilities [*Calatayud v. State of California (1998) 18 Cal. 4th 1057, 1064, 1072, 77 Cal. Rptr. 2d 202, 959 P.2d 360]* . The court of appeal has extended this rationale to preclude application under these circumstances of the common law independent acts exception as well [*City of Oceanside v. Superior Court (2000) 81 Cal. App. 4th 269, 280-283, 96 Cal. Rptr. 2d 621* ; *see also § 267.15[3]*].

Civ. Code § 1714.9(a)(1) does not apply when a public safety officer attends an employer-required, job-related training

course and is injured during the course of that training, and section 1714.9(a)(3) does not apply where there is no evidence that defendants intended to injure plaintiff [Hamilton v. Martinelli & Associates (2003) 110 Cal. App. 4th 1012, 1029, 2 Cal. Rptr. 3d 168].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDefensesFirefighter's RuleTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesReasonable Care

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§ 267.16 Immunity of Public Entities

[1] General Rule of Nonliability

The general rule in California is that a public entity is not liable for an injury arising out of an act or omission of the public entity or a public employee or any other person except as otherwise provided by statute [*Gov. Code § 815(a)*]. Moreover, the liability of a public entity established by *Gov. Code § 814 et seq.* is subject to any immunity of the public entity provided by statute, including *Gov. Code § 814 et seq.*, and is subject to any defense that would be available to the public entity if it were a private person [*Gov. Code § 815(b)*]. Statutes conferring governmental immunity must be strictly construed and such immunity should not be decreed unless the Legislature has clearly provided for it [*Baldwin v. State of California (1972) 6 Cal. 3d 424, 435-436, 99 Cal. Rptr. 145, 491 P.2d 1121]* .

[2] Immunity for Providing Emergency Services

Neither a public enitity nor emergency rescue personnel shall be liable for any injury caused by an action taken by emergency rescue personnel acting withing the scope of their employment to provide emergency services, unless the action taken was performed in bad faith or in a grossly negligent manner. However, there can be liability under *Veh. Code § 17001 et seq.* (operation of motor vehicles) [*Health & Safety Code § 1799.107(b)*]. For this purpose, it is presumed that the action taken when providing emergency services was performed in good faith and without gross negligence. This presumption affects the burden of proof [*Health & Safety Code § 1799.107(c)*].

"Emergency rescue personnel" means any person who is an officer, employee, or member of a fire department or fire protection or firefighting agency of the federal government, the State of California, a city, county, city and county, district, or other public or municipal corporation or political subdivision of California, or of a private fire department, whether the person is a volunteer or partly paid or fully paid, while he or she is actually engaged in providing emergency services [*Health & Safety Code § 1799.107(d)*]. "Emergency services" include, but are not limited to, first aid and medical services, rescue procedures and transportation, or other related activities necessary to insure the health or safety of a person in imminent peril [*Health & Safety Code § 1799.107(e)*].

[3] Exception for Fire Damage Caused by Dangerous Condition on Property

Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that certain conditions existed at the time of the injury [*see Gov. Code § 835*]. To state a cause of action against a public entity under *Gov. Code § 835*, a plaintiff must plead that [*Vedder v. County of Imperial (1974) 36 Cal. App. 3d 654, 659, 111 Cal. Rptr. 728]* :

- A dangerous condition existed on the public property at the time of the injury;
- The dangerous condition proximately caused the injury;
- The dangerous condition created a reasonably foreseeable risk of the kind of injury sustained; and
- The public entity had actual or constructive notice of the dangerous condition of the property in sufficient time to have taken measures to protect against the dangerous condition.

For a general discussion and form for such a cause of action, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

A public entity may be liable under *Gov. Code § 835* for damages resulting from fire when the dangerous condition consisted of the county's knowingly permitting a tenant to negligently store gasoline or other highly combustible materials on its property. Such liability is possible regardless of the fact that the fire itself was initially started through the negligence of a third person [*see Vedder v. County of Imperial (1974) 36 Cal. App. 3d 654, 659-660, 111 Cal. Rptr. 728]* .

In the *Vedder* decision, the defendant county was alleged to have knowingly acquiesced in the storage of combustible chemicals by the tenant, thus creating a severe fire risk. It was further alleged that the county had knowledge that there was insufficient fire fighting equipment to prevent or control chemical fires, and that as a result of the defendant's permitting this dangerous condition to exist on its property, and the negligence of the nonpublic defendants in starting the fire, the plaintiff was damaged by the ensuing fire. The court held that the plaintiff had alleged the elements necessary to state a cause of action against the county under *Gov. Code § 835* with sufficient particularity to withstand the test of a general demurrer [*see Vedder v. County of Imperial (1974) 36 Cal. App. 3d 654, 660, 111 Cal. Rptr. 728]* .

[4] For Fire Protection Services or Equipment

Neither a public entity nor a public employee is liable for failure to establish a fire department or otherwise to provide fire protection service [*Gov. Code § 850*]. Neither a public entity that has undertaken to provide fire protection service, nor an employee of such public entity, is liable for any injury resulting from the failure to provide or maintain sufficient personnel, equipment, or other fire protection facilities [*Gov. Code § 850.2*]. *Gov. Code §§ 850* and *850.2* are designed to provide immunity to a public entity from the consequences which might otherwise result from its political decision to provide, or not to provide, fire protection to the public generally, and the extent to which such fire protection is in fact provided.

Gov. Code §§ 850 and *850.2* should not be applied to allow a public entity to escape responsibility for damages resulting from its failure to provide fire protection on property which it owns and manages itself, particularly where it has permitted a dangerous fire condition to exist on the property. In that situation, lack of fire protection is a proper factor to be considered as contributing to the existence of a dangerous condition on the property [*Vedder v. County of Imperial (1974) 36 Cal. App. 3d 654, 660-661, 111 Cal. Rptr. 728* (holding sections not applicable to case where tenant of county stored highly combustible chemicals on the property with the knowledge of the county)]. Nor is a public entity or its employee, acting within the scope of his employment, liable for any injury resulting from the condition of fire protection, fire fighting equipment, or facilities, or (except as provided in *Veh. Code § 17000 et seq.*) for any injury caused in fighting fires [*Gov. Code § 850.4*]. This immunity extends to injuries suffered by a firefighter who is not an

employee of the governmental entity, but who is injured while engaging in firefighting activities [*State of California v. Superior Court (2001) 87 Cal. App. 4th 1409, 1413, 105 Cal. Rptr. 2d 499* (privately-employed pilot engaged in firefighting activities)]. The immunity provided in *Gov. Code § 850.4*, however, does not extend to nonfirefighting situations [*Lewis v. Mendocino Fire Prot. Dist. (1983) 142 Cal. App. 3d 345, 346-347, 190 Cal. Rptr. 883* (no immunity from liability for injuries caused in removing fallen tree from person)].

Any member of an organized fire department, fire protection district, or other fire fighting unit of either the state or any political subdivision, any employee of the Department of Forestry, or any other public employee when acting in the scope of his or her employment, may transport or arrange for the transportation of any person injured by a fire, or by a fire protection operation, to a physician and surgeon or hospital if the injured person does not object to such transportation. Neither a public entity nor a public employee is liable for any injury suffered by the injured person as a result of or in connection with such transportation for any medical, ambulance, or hospital bills incurred by or in behalf of the injured person or for any other damages, but a public employee is liable for injury proximately caused by his or her willful misconduct in transporting the injured person or arranging for such transportation [*Gov. Code § 850.8*].

In a case in which the Department of Forestry and Fire Protection sought to recover its costs in fighting a brush fire from real parties in interest, the affirmative defenses of comparative negligence or failure to mitigate damages were not available to real parties; real parties were not allowed to challenge the reasonableness of the methods the Department used (or did not use) to fight the fire [People ex rel. Grijalva v. Superior Court (2008) 159 Cal. App. 4th 1072, 1077, 72 Cal. Rptr. 3d 53].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceCausationProximate CauseGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDefensesGeneral OverviewTortsPublic Entity LiabilityImmunityGeneral Overview

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22-267 California Forms of Pleading and Practice--Annotated § 267.17

§ 267.17 Water Companies

[1] General Immunity

No water corporation which has undertaken to provide fire protection service, nor any employee of such corporation acting in the course and scope of his or her employment, is liable for any death or injury to a person or damage to or loss of property resulting from failure to provide or maintain an adequate water supply or pressure, or any equipment or other fire protection facility or service; however, such immunity from liability must not exceed that of a public agency or any of its employees, as the case may be, under similar circumstances [*Pub. Util. Code § 774*; *see Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 808 n. 5, 110 Cal. Rptr. 543* (indicating in dictum that it is arguable that mutual water companies, as defined in *Pub. Util. Code §§ 2705, 2725*, do not fall within this immunity grant)]. Moreover, although there are several rational attacks on water company immunity that can be made, California case law immunized water companies from civil liability for loss by fire due to failure to maintain their systems properly [*Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 806-807, 110 Cal. Rptr. 543* (indicating that the record of the case adequately presents the issue for Supreme Court consideration); *see Heieck & Moran v. City of Modesto (1966) 64 Cal. 2d 229, 233, 49 Cal. Rptr. 377, 411 P.2d 105* (discussing public entity immunity under *Gov. Code §§ 850.2, 850.4*)].

[2] Liability Through Contract

A water company will not be liable under contract for failure to provide the required water for fire fighting purposes unless the contract specifically undertakes to supply water for that purpose [*Niehaus Bros. Co. v. Contra Costa Water Co. (1911) 159 Cal. 305, 322-323, 113 P. 375* ; *Lainer Invs. v. Department of Water & Power (1985) 170 Cal. App. 3d 1, 9-10, 215 Cal. Rptr. 812]* . A water company is not liable for damages resulting from failure to supply water for a particular use in the absence of a specific undertaking to supply water for that use [*Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 808-809, 110 Cal. Rptr. 543* ; *see Gelhaus v. Nevada Irrigation Dist. (1955) 43 Cal. 2d 779, 782, 278 P.2d 689]* .

A water company's liability for a consumer's loss resulting from fire can only be created by an express private contract whereby the water company agrees to furnish water as a protection against fire. It is only where the contract calls for water service for the purposes of extinguishing fires that loss of the premises by fire may be compensated in damages as

having been reasonably supposed to have been within the contemplation of the parties [*Luis v. Orcutt Town Water Co. (1962) 204 Cal. App. 2d 433, 438-439, 22 Cal. Rptr. 389]* .

[3] Designers and Engineers

The immunity conferred on water companies is strictly defined and does not extend to all water suppliers or persons who assume some role in establishing a water system [*Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 810, 110 Cal. Rptr. 543]* . Negligence in the design, engineering, construction, and maintenance of a water system can be the basis of an action against a developer and/or engineers. However, while a developer may be held strictly liable for a defective water system, even when the system was not on the plaintiffs' properties, engineers or others who render a professional service cannot be held liable on such a theory. This is an application of the general rule that when the primary objective of a transaction is to obtain services, the doctrines of implied warranty and strict liability do not apply [*Stuart v. Crestview Mut. Water Co. (1973) 110 Cal. Rptr. 543]* . When a plaintiff proves negligence on the part of a developer, engineer, etc., but a water company's acts or omission were a superseding cause, the plaintiff cannot recover [*Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 810 n.8, 110 Cal. Rptr. 543* (dictum)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawUtility CompaniesLiabilityTortsMalpractice & Professional LiabilityProfessional ServicesTortsNegligenceDefensesPrivate ImmunitiesGeneral OverviewTortsProducts LiabilityDesign DefectsTortsProducts LiabilityManufacturing Defects

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22-267 California Forms of Pleading and Practice--Annotated § 267.18

§ 267.18 Fire Suppression Costs

[1] Recoverable as Damages

An action to recover fire suppression costs not incurred in protecting one's own property is a creature of statute. Hence, the right to recover all fire suppression costs resulting from negligence in allowing a fire to spread is strictly limited to that provided in *Health & Safety Code § 13009* [*City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1020, 244 Cal. Rptr. 507* (rejecting city's contention that it had a right to recover fire suppression costs pursuant to common law)].

The following persons who are responsible for a fire are liable for the fire suppression costs incurred in fighting the fire and for the cost of providing rescue or emergency medical services; and those costs will be a charge against that person [*Health & Safety Code § 13009(a)*]:

- Any person who negligently, or in violation of the law, sets a fire, allows a fire to be set, or allows a fire kindled or attended by him or her to escape onto any public or private property;

- Any person other than a mortgagee, who, being in actual possession of a structure, fails or refuses to correct, within the time allotted for correction, despite having the right to do so, a fire hazard prohibited by law, for which a public agency properly has issued a notice of violation; or

- Any person, including a mortgagee, who, having an obligation under other provisions of law to correct a fire hazard prohibited by law, for which a public agency has properly issued a notice of violation, fails or refuses to correct the violation within the time allotted for correction, despite having the right to do so.

The charge constitutes a debt of such person, and is collectible by the person, or by the federal, state, county, public, or private agency incurring such expenses in the same manner as in the case of an obligation under a contract, expressed or implied [*Health & Safety Code § 13009(a)*; *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1019* & n.2, *244 Cal. Rptr. 507* (decided under pre-1988 wording of *Health & Safety Code § 13009* and holding 1987

amendment of that statute is prospective only, as there is nothing in amendment indicating legislative intent that it apply retrospectively and in view of principle that retrospective imposition of increased liabilities is to be carefully avoided); *see People v. Southern Cal. Edison Co. (1976) 56 Cal. App. 3d 593, 603, 128 Cal. Rptr. 697* (holding that an action to recover fire suppression costs is a creature of statute and that the amount when determined is collectible in the same manner as in the case of an obligation under contract)].

Health & Safety Code § 13009(a), however, merely provides a method whereby fire suppression costs might be recovered, which is governed by the procedure applicable to a suit on a contract, express or implied, and does not constitute a declaration that the recovery sounds in contract instead of tort [*People v. Zegras (1946) 29 Cal. 2d 67, 68-69, 172 P.2d 883* ; *Globe Indem. Co. v. State of California (1974) 43 Cal. App. 3d 745, 749, 118 Cal. Rptr. 75]* . The state may recover for fire suppression costs [*Giorgi v. Pacific Gas & Elec. Co. (1968) 266 Cal. App. 2d 355, 360, 72 Cal. Rptr. 119]* . Absent any statute, one protecting his or her own property has the right to recover fire suppression costs from the wrongdoer [*Globe Indem. Co. v. State of California (1974) 43 Cal. App. 3d 745, 749, 118 Cal. Rptr. 75]* .

Furthermore, any person liable under *Health & Safety Code § 13009(a)* is also liable for investigative, reporting, and accounting costs, and for the costs of collecting any funds pursuant to *Health & Safety Code § 13009* [*Health & Safety Code § 13009.1(a)*]. In a proceeding to recover these costs, any testimony, admission, or other statement made by the defendant, or any evidence derived therefrom, cannot be admitted or otherwise used in any criminal proceeding arising out of the same conduct [*Health & Safety Code § 13009.1(d)*].

For forms of complaint for recovery of expenses incurred in fighting fire, see *§§ 267.54, 267.55*.

[2] Measure of Damages

Health & Safety Code § 13009(a) is a compensatory statute for expenses incurred in fighting fires and is not intended to exact pecuniary punishment or a penalty against a person or entity liable under the statute [*People v. Southern Cal. Edison Co. (1976) 56 Cal. App. 3d 593, 604, 128 Cal. Rptr. 697]* . However, the statute gives no direction as to whether contract or tort principles are applicable in fixing the amount of such expenses nor as to the manner in which expenses constituting the statutory debt are to be determined [*Globe Indem. Co. v. State of California (1974) 43 Cal. App. 3d 745, 749, 118 Cal. Rptr. 75]* . Consequently, the general statutory provisions and case law governing compensatory damages must be read in conjunction with *Health & Safety Code § 13009(a)* in measuring the expenses incurred in fighting fires [*People v. Southern Cal. Edison Co. (1976) 56 Cal. App. 3d 593, 604, 128 Cal. Rptr. 697]* .

The law of compensatory damages is based on the principle that a person who is injured must be justly compensated therefor to a degree commensurate with the injury sustained by him or her [*Civ. Code §§ 3281, 3282*; *People v. Southern Cal. Edison Co. (1976) 56 Cal. App. 3d 593, 604, 128 Cal. Rptr. 697]* . *Civ. Code § 3359* provides that an award of compensatory damages must in every instance be reasonable and that, whenever an obligation of any kind apparently creates, contrary to substantial justice, a right to recover unconscionable and grossly oppressive damages, no more than reasonable damages can be recovered by virtue of that obligation [*People v. Southern Cal. Edison Co. (1976) 56 Cal. App. 3d 593, 604, 128 Cal. Rptr. 697]* .

In the light of these principles, the proper measure for determining expenses incurred for fighting fires pursuant to *Health & Safety Code § 13009(a)* requires that [*People v. Southern Cal. Edison Co. (1976) 56 Cal. App. 3d 593, 605, 128 Cal. Rptr. 697]* :

- The expenses claimed be incurred in fighting the fire;
- The expenses be the proximate result of defendant's wrongful conduct; and

- The expenses be reasonably incurred.

A public entity's own negligence in fighting a fire or in failing to minimize its firefighting costs cannot be used to reduce the entity's recovery of firefighting costs. The Government Code provides public entities with immunity from direct liability for damages caused by negligence in fighting fires, and this immunity also prevents a defendant from utilizing the affirmative defenses of comparative fault and failure to mitigate to reduce his or her own liability for fire suppression costs [*People ex rel. Grijalva v. Superior Court (2008) 159 Cal. App. 4th 1072, 1078, 72 Cal. Rptr. 3d 53* ; *see Gov. Code §§ 850, 850.2*, 850.5].

Health & Safety Code § 13009.1 authorizes recovery of the cost of investigating and making any reports with respect to the fire and the costs related to accounting for that fire and the collection of any funds pursuant to *Health & Safety Code § 13009*, including, but not limited to, the administrative costs of operating a fire suppression cost recovery program. Liability for accounting and collection costs is limited to the actual amount expended attributable to the fire. The court has discretion in awarding these costs. Plaintiffs bear the burden of proving by a preponderance of the evidence the liability of defendant for costs and the amount of costs recoverable. The liability constitutes a debt of the person liable and is collectible by the person, or by the federal, state, county, public, or private agency incurring these costs, in the same manner as an obligation under an express or implied contract [*Health & Safety Code § 13009.1(a)-(c), (e)*]. These provisions do not create a right to attorney's fees by the party seeking to recover fire suppression costs or by a party who successfully defends against such an action [*Dep't of Forestry & Fire Prot. v. LeBrock (2002) 96 Cal. App. 4th 1137, 1140-1142, 117 Cal. Rptr. 2d 790]* .

Plaintiff may recover the cost of providing rescue and emergency services in addition to the expense of fighting the fire [*see Health & Safety Code § 13009(a)*].

[3] Inapplicability of Civ. Code § 3346 to Fires

Civ. Code § 3346 provides for the measure of damages for casual or involuntary trespass against trees, timber, or underwood on the land of another. In *Gould v. Madonna (1970) 5 Cal. App. 3d 404, 406, 85 Cal. Rptr. 457* , the court found no California case in which *Civ. Code § 3346* has been applied to the negligent spreading of fire, nor any case determining that such spreading constituted a trespass. The court held *Civ. Code § 3346* not to be applicable to the case at hand based on the statutory history of the section that demonstrated a legislative intention that only actual damages be recoverable for injury caused by negligently set fires. That history indicated that the Legislature has set up a statutory scheme concerning timber fires that is completely separate from the scheme to meet the situation of cutting or other types of injury to timber contemplated by *Civ. Code § 3346* [*see Gould v. Madonna (1970) 5 Cal. App. 3d 404, 407, 85 Cal. Rptr. 457* ; *see County of Ventura v. Southern Cal. Edison Co. (1948) 85 Cal. App. 2d 529, 534, 193 P.2d 512* (liability for fire suppression expenses replaced treble damages that were formerly recoverable)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 267.19 Recovery of Cleanup Costs From Burning of Hazardous Substances

Those expenses of an emergency response necessary to protect the public from a real and imminent threat to health and safety, which are incurred by a public agency to confine, prevent, or mitigate the release, escape, or burning of hazardous substances, are a charge against any person whose negligence caused the incident if evacuation beyond the property where the incident originates is necessary to prevent loss of life or injury or the incident results in the spread of fire posing a real and imminent threat to public health and safety beyond the property of origin [*Health & Safety Code § 13009.6(a)(1)*]. If the negligence causing the incident occurs in the course of the person's employment, the charge created against the person is also a charge against his or her employer [*Health & Safety Code § 13009.6(a)(3)*].

"Hazardous substance," as used in *Health & Safety Code § 13009.6(a)(1)*, means any hazardous substance listed in *Health & Safety Code § 25316* [*Health & Safety Code § 13009.6(c)*]. "Mitigation" includes actions by a public agency to monitor or model ambient levels of airborne hazardous substances for the purpose of determining or assisting in the determination of whether or not to evacuate areas around the property where the incident originates [*Health & Safety Code § 13009.6(d)*].

Expenses reimbursable to a public agency under *Health & Safety Code § 13009.6* are a debt of the person liable and are collectible in the same way as a contractual obligation [*Health & Safety Code § 13009.6(a)(2)*]. The amount of any reimbursement for eligible costs received by a public agency pursuant to *Health & Safety Code § 25300 et seq.* must be deducted from any amount otherwise recoverable [*Health & Safety Code § 13009.6(b)*].

An action to recover the expenses may be joined with any civil action for penalties, fines, injunction, or other relief brought against the responsible person or employer, or both, arising out of the same incident [*Health & Safety Code § 13009.6(a)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesCleanupGovernmentsLocal GovernmentsClaims By & AgainstTortsDamagesCompensatory DamagesGeneral OverviewTortsNegligenceActionsGeneral

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§ 267.20 Negligence as Matter of Law

When a statute is intended to protect the class of persons in which the plaintiff is included against the risk of the type of harm he or she has sustained, a violation of the statute gives rise to a presumption of negligence [*Evid. Code § 669*; *Courtell v. McEachen (1959) 51 Cal. 2d 448, 459, 334 P.2d 870* ; *see generally* Ch. 380, *Negligence*]. However, this presumption does not arise if the type of harm that occurred was not one that the statute was designed to prevent [*Wawanesa Mut. Ins. Co. v. Matlock (1997) 60 Cal. App. 4th 583, 587, 70 Cal. Rptr. 2d 512* (minor held not to be negligent per se for having provided a pack of cigarettes to another minor, who dropped a cigarette and started a fire; statute making it illegal to furnish tobacco to minors was designed to prevent early addiction to tobacco, not to prevent fires)].

The presumption of negligence may be rebutted by evidence establishing a reasonable justification or excuse for disobeying the statute [*Ewing v. Balan (1959) 168 Cal. App. 2d 619, 622, 336 P.2d 561* (violation of *Health & Safety Code § 16905*, requiring gas appliances to be maintained in good repair, that resulted in explosion and fire as raising the presumption)]. The person who has violated the statute has the burden of showing that he or she did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law [*Roddiscraft, Inc. v. Skelton Logging Co. (1963) 212 Cal. App. 2d 784, 801, 804, 28 Cal. Rptr. 277]* . Thus, when the unexcused violation of a fire safety statute resulted in the very harm the statute was designed to protect against, the violator was found negligent as a matter of law [*Travelers Indem. Co. v. Titus (1968) 265 Cal. App. 2d 515, 517, 71 Cal. Rptr. 490]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 267.21 Defense of Plaintiff's Negligence

The defense of contributory negligence has been invalidated in California and replaced with a system of comparative negligence in which the fundamental purpose is to assign responsibility and liability for damage in direct proportion to the negligence of each of the parties. Thus, in all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured does not bar recovery, but the damages awarded are diminished in proportion to the amount of negligence attributable to the person recovering [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226* ; *see generally* Ch. 380, *Negligence*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceGeneral OverviewTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityGeneral Overview

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§ 267.22 Defense of Assumption of Risk

In analyzing assumption of risk in light of the adoption of the comparative negligence doctrine [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 829, 119 Cal. Rptr. 858, 532 P.2d 1226]* , the Supreme Court has distinguished between two separate types of implied assumption of risk [*Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *see also Ford v. Gouin (1992) 3 Cal. 4th 339, 342, 11 Cal. Rptr. 2d 30, 834 P.2d 724]* . Under "primary assumption of risk," by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury. In such a case, the doctrine operates as a complete bar to the plaintiff's recovery [*Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . Under "secondary assumption of risk," the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty. In this situation, the doctrine is merged into the comparative fault scheme, and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties [*Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

The Supreme Court has not yet ruled on the proper analysis of implied assumption of risk in the context of actions arising from the negligent setting or control of fires that result in property damage or personal injury to others. It appears, however, that the Court in *Knight* rejected any approach that considers whether the plaintiff was reasonable in assuming a risk, or whether there was a voluntary acceptance of a specific, known, and appreciated risk. Rather, a court would consider the nature of the activity and the parties' relationship to the activity [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 312-313, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . If the nature of the activity and the relationship of the parties is such that the plaintiff "did not consent to negligent conduct or agree to excuse [the defendant] from liability in the event of such negligence" a defendant may be found to have breached a duty of care, and a plaintiff's choice to encounter the risk of such negligence would only permit an apportionment of damages under secondary assumption of risk, rather than a complete bar to recovery under primary assumption of risk [*Knight v. Jewett (1992) 3 Cal. 4th 296, 314-316, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

The Court in *Knight* did discuss the "firefighter's rule" as an example of primary assumption of the risk, in that the person who set the fire owed no duty to any firefighter and therefore cannot be liable to the firefighter even if it could be concluded that the firefighter acted unreasonably in encountering the risk [*see Knight v. Jewett (1992) 3 Cal. 4th 296,*

309-310 n.5, 11 Cal. Rptr. 2d 2, 834 P.2d 696 ; *see also* discussion in *§ 267.15*].

For complete discussion of assumption of the risk, see Ch. 380, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesAssumption of RiskGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityGeneral Overview

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§ 267.23 Nuisance

A person who creates or allows the existence of a dangerous condition on its property may be liable to others for a fire-incurred loss even though the fire was actually started by the negligent conduct of others. This is also true if the defendant allows the existence of a public nuisance. When an injury is produced by the concurrent effect of two separate wrongful acts, each is a proximate cause of the injury [*Vedder v. County of Imperial (1974) 36 Cal. App. 3d 654, 660-661, 111 Cal. Rptr. 728]* .

A public entity can be subject to liability for fire damages resulting from a dangerous condition on its property or from a fire hazard constituting a public nuisance [*Vedder v. County of Imperial (1974) 36 Cal. App. 3d 654, 660-661, 111 Cal. Rptr. 728]* .

Gov. Code § 815 does not bar nuisance actions against public entities to the extent that those actions are founded on *Civ. Code §§ 3479-3481*, which define public and private nuisances [*Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 937, 101 Cal. Rptr. 568, 496 P.2d 480]* . A fire hazard constitutes a public nuisance [*Vedder v. County of Imperial (1974) 36 Cal. App. 3d 654, 661, 111 Cal. Rptr. 728]* .

For a discussion of actions based on nuisance generally, see Ch. 391, *Nuisance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceTypesPrivate NuisanceReal Property LawTortsNuisanceTypesPublic NuisanceTortsNegligenceActionsGeneral OverviewTortsNegligenceCausationProximate CauseConcurrent CausationTortsPremises Liability & PropertyGeneral Premises LiabilityGeneral Overview

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[Reserved]

§§ 267.24[Reserved]

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§ 267.30 Related Matthew Bender Publications

For forms of interrogatories for use in actions involving the spread of a fire to adjoining land, see Bender's Forms Of Discovery, *Fires* (Matthew Bender)

Personal Injury: Actions, Defenses, Damages, *Inflammable Substances* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityGeneral Overview

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§ 267.31 Federal Statutes

Federal Tort Claims Act. *28 U.S.C. §§ 1346(b), 2671*-2680

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityLiabilityFederal Tort Claims ActGeneral Overview

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Chapter 267 FIRES
PART III. RESEARCH GUIDE

22-267 California Forms of Pleading and Practice--Annotated § 267.32

§ 267.32 State Statutes

[1] Regulations

Adoption of minimum standards for fire prevention. *Health & Safety Code §§ 13143-13143.10*

Regulations and requirements pertaining to flammable or explosive materials. *Health & Safety Code § 19810 et seq.*

Adoption of local fire prevention regulations to meet local conditions may be more restrictive than state statutes. *Pub. Res. Code § 4117*

Fire restrictions in national forests, state parks, and state forests. *Pub. Res. Code § 4331-4333*

Prohibition or suspension of use of open fire by proclamation. *Pub. Res. Code §§ 4423.1-4423.5*

[2] Chemicals and Fabrics

Flammability standards for flexible polyurethane foam. *Bus. & Prof. Code § 19161.3*

Flammable materials in places of assemblage. *Health & Safety Code §§ 13115, 13116, 13119*

Flammable solvents must be labeled as flammable. *Health & Safety Code § 13118*

Flame retardant chemicals and fabrics. *Health & Safety Code §§ 13120-13130*

Transfer of flammable liquids by portable internal combustion pump. *Health & Safety Code § 13150 et seq.*

Flammability standards for children's clothing. *Health & Safety Code § 19820 et seq.*

[3] Vehicles

Requirement of spark arrester to operate internal combustion engine on forest-covered, brush-covered, or grass-covered lands. *Pub. Res. Code §§ 4442, 4442.5*

Firefighting vehicles are exempt from vehicle license and other fees. *Rev. & Tax Code §§ 10781, 10786*; *Veh. Code §§ 9101, 9102*

Publicly owned vehicle operated by fire department is authorized emergency vehicle. *Veh. Code § 165*

Nonliability for personal injury or death of any person or damage to property resulting from operation of authorized emergency vehicle responding to fire alarm. *Veh. Code §§ 17004, 17004.5*

Driving over fire hose is prohibited. *Veh. Code § 21708*

Displaying sign with words "fire" or "fire department" on vehicle other than one owned and operated by fire department or fire district is unlawful. *Veh. Code § 27905*

[4] Water Companies and Water

Water corporations are required to furnish water free of charge in case of fire. *Civ. Code § 549(a)*

Water corporation is not permitted to charge in connection with its water system any entity providing fire protection services to others for supplying water for fire protection purposes except pursuant to written agreement with entity providing fire protection services. *Civ. Code § 549(b)(1)*; *see Pub. Util. Code § 2713(a)*

Nonliability of water corporation which undertakes to provide fire protection service for damages resulting from failure to provide adequate water supply or pressure, or any equipment or other fire protection facility or service. *Pub. Util. Code § 774*

Irrigation district is allowed to deliver water for fire protection purposes. *Water Code § 22077*

[5] Fire Protection

[a] Generally

State is allowed to require services of persons with or without compensation to protect life and property from fire. *Gov. Code § 204*

Marking fire hydrant and water supply locations. *Health & Safety Code § 13060*

Duties of State Fire Marshal. *Health & Safety Code §§ 13100-13110.5*

Sprinkler and fire alarm systems and devices. *Health & Safety Code §§ 13113-13114.5*

Fire alarm and sprinkler systems in facilities in which individuals are placed by government agencies for protective care and supervision. *Health & Safety Code §§ 13113.5, 13131, 13132, 13143.6*

State Board of Fire Services. *Health & Safety Code § 13140.5 et seq.*

Portable fire extinguishers. *Health & Safety Code § 13160 et seq.*

Regulation of automatic fire extinguishing systems. *Health & Safety Code § 13195 et seq.*

Fire standard for clothes cleaning establishments. *Health & Safety Code § 13201 et seq.*

Fire protection standards for high rise structures. *Health & Safety Code § 13210 et seq.*

Owner or operator of hotel, motel, high-rise structure, apartment buildings, and office buildings two stories or more in height is required to provide emergency procedures to be followed in case of fire, including procedures for handicapped and nonambulatory persons. *Health & Safety Code § 13220 et seq.*

Propane storage and handling. *Health & Safety Code § 13240 et seq.*

Civil actions to abate fire hazards. *Health & Safety Code § 13250 et seq.*

Abatement of hazardous weeds and rubbish. *Health & Safety Code § 14875 et seq.*

Fire companies in unincorporated towns. *Health & Safety Code § 14825 et seq.*

Underwriters' fire patrols. *Ins. Code § 10020 et seq.*

Willful or malicious construction or maintenance in structure of fire-protection system that is known to be inoperable or impaired and to threaten safety of occupant or user in event of fire. *Penal Code § 386*

Department of Forestry and Fire Protection is responsible for providing forest fire protection and prevention, contract fire protection, and associated emergency services and assistance. *Pub. Res. Code §§ 713, 714*

Department of Forestry and Fire Protection is permitted to provide rescue, first aid, and other emergency services to public in state responsibility areas. *Pub. Res. Code § 4114*

Department of Forestry and Fire Protection may enter contracts and cooperative agreements with counties and federal government for preventing fires. *Pub. Res. Code §§ 4133, 4141, 4144*

Hazardous fire areas. *Pub. Res. Code § 4251 et seq.*

Duty to assist in combating fire. *Pub. Res. Code § 4436*

Disposal of flammable waste material. *Pub. Res. Code §§ 4437-4441*

Requirements to use equipment on forest, brush, or grass-covered land during time when burning permits are required. *Pub. Res. Code §§ 4427, 4428, 4430, 4431*

[b] Districts

Fire companies in unincorporated towns. *Health & Safety Code § 14825 et seq.*

Fire Protection District Law of 1987. *Health & Safety Code § 13800 et seq.*; *Pub. Contract Code § 20811 et seq.*

[6] Burnings

Operation of rubbish dumps. *Pub. Res. Code § 4371 et seq.*

Prohibited burnings. *Pub. Res. Code § 4421 et seq.*

Campfire requirements. *Pub. Res. Code §§ 4432, 4433*

Requirements for operation of incinerator on federal lands or area protected by Director of Forestry. *Pub. Res. Code § 4446*

Department of Forestry burning contracts. *Pub. Res. Code §§ 4475-4478, 4480*

Burning of brush-covered lands. *Pub. Res. Code § 4491 et seq.*

[7] Forest Fires

Prevention and control of forest fires. *Pub. Res. Code § 4101 et seq.*

Procedure for presenting claim for damages relating to prevention and extinguishment of forest fires. *Pub. Res. Code § 4116*

Actions at forest fire which constitute misdemeanor. *Pub. Res. Code § 4165*

Firebreaks in mountainous area or forest-covered, brush-covered, or grass-covered lands. *Pub. Res. Code § 4291 et seq.*

[8] Liability for Fire

[a] Generally

Liability for negligent acts. *Civ. Code § 1714(a)*

Liability for injuries to firefighters resulting from negligent acts. *Civ. Code § 1714.9*

[b] Specifically

Any person who personally or through another willfully, negligently, or in violation of law, sets fire to, allows fire to be set to, or allows fire kindled or attended by him or her to escape to property of another, whether privately or publicly owned, is liable to owner of such property for any damages to property caused by such fire. *Health & Safety Code § 13007*

Any person who allows any fire burning on his or her property to escape to property of another, whether privately or publicly owned, without exercising due diligence to control such fire, is liable to owner of such property for damages to property caused by such fire. *Health & Safety Code § 13008*

[c] Damages

Expenses of fighting fires (and cost of providing rescue or emergency medical services) are a charge against any person made liable by *Health & Safety Code § 13009(a)* for damages caused by such fires; such charge constitutes debt of such person and are collectible by person or by federal, state, county, public, or private agency incurring such expenses in same manner as in case of obligation under contract, expressed or implied. *Health & Safety Code § 13009*

Any person liable under *Health & Safety Code § 13009(a)* for costs of suppressing fire and providing rescue or emergency medical services is liable for investigative and reporting costs as well as accounting and costs of collection pursuant to *Health & Safety Code § 13009*. *Health & Safety Code § 13009.1*

Expenses of emergency response necessary to protect public from threat to health and safety from burning of hazardous substance are recoverable from negligent person. *Health & Safety Code § 13009.6*

[9] Liability of Public Entities

Immunity of public entity from liability arising out of fire protection service. *Gov. Code § 850 et seq.*

Qualified immunity for emergency medical services rendered by firefighter. *Health & Safety Code § 1799.107*

[10] Proof

Escape of campfire from control is prima facie evidence that person maintaining campfire was negligent. *Pub. Res. Code § 4434*

Occurrence of fire originating from operation or use of any engine, barbeque, or other dcvice which may kindle a fire is prima facie evidence of negligence. *Pub. Res. Code § 4435*

[11] Nuisances

Uncontrolled fires and fire hazards are public nuisances. *Pub. Res. Code § 4170 et seq.*

[12] Criminal Acts Relating to Fires

Negligently permitting fire to spread to land of another is misdemeanor. *Health & Safety Code § 13000*

Failure to clear flammable material from area in which operating device likely to cause fire is misdemeanor. *Health & Safety Code § 13001*

Negligent handling of cigarette or other thing likely to cause fire in place in which it may directly or indirectly start fire is misdemeanor. *Health & Safety Code § 13001*

Throwing flammable substances is misdemeanor. *Health & Safety Code § 13002*

Specific acts relating to vehicles likely to cause fires are misdemeanors. *Health & Safety Code §§ 13003-13005*

Failure to report smoldering combustion is misdemeanor. *Health & Safety Code § 13006.5*

Interfering with discharge of duty by fireman is misdemeanor. *Penal Code §§ 148.2, 245.1*

Assault with deadly weapon or firearm on police or firefighter engaged in the performance duties is subject to imprisonment in state prison. *Penal Code §§ 245(c), (d)*

Tampering with fire protection equipment, fire protection installation, fire alarm apparatus or giving any false alarm is misdemeanor; giving false alarm resulting in great bodily injury or death is felony. *Penal Code § 148.4*

Dumping waste matter, including any flaming or glowing material, on any public or private highway or in any body of water is misdemeanor. *Penal Code §§ 374, 374.3, 374.7* (violation of *Penal Code § 374b* (now *Penal Code § 374.3*) was made infraction by 1980 amendment (Stats. 1980, ch. 74) rather than a misdemeanor; *see also Penal Code § 374.4*); *see Veh. Code § 23111*

Willful or malicious construction or maintenance in structure of fire-protection system that is known to be inoperable or impaired and to threaten safety of occupant or user in event of fire. *Penal Code § 386*

Sightseer at scene of disaster who impedes emergency personnel in performance of their duties is guilty of misdemeanor. *Penal Code § 402(a)*

Police are allowed to close area whenever menace to public health or safety is created by fire. *Penal Code § 409.5*

Arson. *Penal Code § 450 et seq.*

Maliciously tearing down sign relating to fire control is misdemeanor. *Penal Code § 602(f)*

Building fires on lands posted against trespass is misdemeanor. *Penal Code § 602(j)*

Entry into designated mountain fire district is punishable as specified. *Veh. Code §§ 38301.5, 40000.24*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstReal Property LawTortsNuisanceTypesPublic NuisanceTortsDamagesCompensatory DamagesGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsPublic Entity LiabilityImmunityGeneral Overview

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§ 267.33 Decisions

[1] Strict Liability

Doctrine of strict liability is applicable when injury results to person as proximate result of defect in design of residential building and installation of appliance in accordance with such design. *Hyman v. Gordon (1973) 35 Cal. App. 3d 769, 772-774, 111 Cal. Rptr. 262* (child sustained injuries from fire when gasoline came into contact with pilot light and burners of water heater in garage)

[2] Warranty

Manufacturer of flammable substance or one which gives off flammable fumes is strictly liable if label fails to give appropriate warning to purchasing public. *Crane v. Sears, Roebuck & Co. (1963) 218 Cal. App. 2d 855, 859-861, 32 Cal. Rptr. 754*

[3] Negligence as Matter of Law

When ordinance or statute is intended to protect certain class from particular risk of harm, violation of that statute or ordinance is per se breach of duty, absent excuse or justification for violation. *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1021, 244 Cal. Rptr. 507*

Violation of fire safety statue resulting in very harm statute designed to protect against establishes negligence as matter of law. *Travelers Indem. Co. v. Titus (1968) 265 Cal. App. 2d 515, 517, 71 Cal. Rptr. 490*

Where penal statute establishes standard of care, and when violation of statute is proximate cause of kind of injury to member of protected class it was designed to protect, violator is presumed negligent. *Ewing v. Balan (1959) 168 Cal. App. 2d 619, 622, 336 P.2d 561* (violation of *Health & Safety Code § 16905* resulting in fire)

[4] Negligent Acts

Defendant is liable for damages caused by fire either negligently set or negligently permitted to spread. *Sampson v. Hughes (1905) 147 Cal. 62, 64*

Social host defendant is immune from liability under *Civ. Code § 1714(c)* for plaintiff's injuries caused by fire from burning cigarette, to extent those injuries were caused by guests' consumption of alcohol furnished by defendant; to extent plaintiff's injuries were not caused by guest's consumption of alcohol, defendant is not liable under negligence theory as matter of law for failure to supervise sober adult guests who smoked cigarettes. *Biles v. Richter (1988) 206 Cal. App. 3d 325, 329, 253 Cal. Rptr. 414*

Either lack of due care or violation of industrial safety order [8 Cal. Code Reg § 4150] is basis for liability for negligent starting of fire. *Eberhard v. Bruhn (1970) 13 Cal. App. 3d 836, 839, 91 Cal. Rptr. 915*

[5] Duty of Landowner

[a] Generally

Common-law distinctions as to duty owed between guests, invitees, and trespassers are abolished and liability is predicated on ordinary negligence under provisions of *Civ. Code § 1714*, a civil law, and not a common-law, principle. *Rowland v. Christian (1968) 69 Cal. 2d 108, 112-120, 70 Cal. Rptr. 97, 443 P.2d 561*

Liability of landowner for injuries to child caused by outdoor fire. *Courtell v. McEachen (1959) 51 Cal. 2d 448, 454-460, 334 P.2d 870*

Landowner is not liable for fire damage to property of another when fire was lawfully started with due care and subsequently spread to lands of another despite defendant's due diligence in attempting to confine it. *Garnier v. Porter (1891) 90 Cal. 105, 108-109, 27 P. 55*

Health & Safety Code §§ 13007 and *13008* establishes basis of fire liability but not standard of care for landowner. *People v. Southern Pac. Co. (1983) 139 Cal. App. 3d 627, 633, 188 Cal. Rptr. 913*

Electric company is under duty to make its electrical wires safe under all exigencies created by surrounding circumstances. *Scally v. Pacific Gas & Elec. Co. (1972) 23 Cal. App. 3d 806, 815, 100 Cal. Rptr. 501* (dictum)

Property owners are under independent duty to prevent accumulation of flammable material on their premises. *Scally v. Pacific Gas & Elec. Co. (1972) 23 Cal. App. 3d 806, 817, 100 Cal. Rptr. 501*

Cases as holding that railroad under no independent duty to keep right-of-way free of combustible material. *Scally v. Pacific Gas & Elec. Co. (1972) 23 Cal. App. 3d 806, 817, 100 Cal. Rptr. 501*

Liability of landlord to tenant for destruction of property by fire caused by defective gas water heater. *Ewing v. Balan (1959) 168 Cal. App. 2d 619, 621-623, 336 P.2d 561*

Duty of landowner to make reasonable use of premises. *Reid & Sibell v. Gilmore & Edwards Co. (1955) 134 Cal. App. 2d 60, 65-66, 285 P.2d 364*

Presence of forest ranger directing and supervising controlled fires does not necessarily relieve defendants of duty of exercising due diligence to avoid damage to property of others. *Leuteneker v. Fisher (1957) 155 Cal. App. 2d 33, 35, 317 P.2d 143*

Liability for storing flammables in excessive amounts in violation of local ordinance. *Reid & Sibell v. Gilmore & Edwards Co. (1955) 134 Cal. App. 2d 60, 70-72, 285 P.2d 364*

Two classifications of acts that give rise to liability under *Health & Safety Code § 13007* (liability for negligent starting or handling of fire): first, liability based on affirmative acts; or second, liability predicated on knowing acquiescence in occurrence leading to fire when duty and power to prevent it existed. *County of Ventura v. Southern Cal. Edison Co. (1948) 85 Cal. App. 2d 529, 539-540, 193 P.2d 512*

[b] Power Company

Electric company is under duty to make its electrical wires safe under all exigencies created by surrounding circumstances. *Scally v. Pacific Gas & Elec. Co. (1972) 23 Cal. App. 3d 806, 815, 100 Cal. Rptr. 501* ; *Lozano v. Pacific Gas & Elec. Co. (1945) 70 Cal. App. 2d 415, 422, 161 P.2d 74*

Duty to make electrical wires safe is alternative one, either to insulate wires or to so locate them as to make them comparatively harmless. *Scally v. Pacific Gas & Elec. Co. (1972) 23 Cal. App. 3d 806, 815-816, 100 Cal. Rptr. 501* ; *Polk v. City of Los Angeles (1945) 26 Cal. 2d 519, 527, 159 P.2d 931*

Court's jury instruction errors in negligence damage action arising out of fire allegedly caused by allowing power line to come into contact with tree are harmless. *Scally v. Pacific Gas & Elec. Co. (1972) 23 Cal. App. 3d 806, 821, 100 Cal. Rptr. 501*

[c] Railroad

Cases holding that railroad is under no independent duty to keep right-of-way free from combustible material. *Scally v. Pacific Gas & Elec. Co. (1972) 23 Cal. App. 3d 806, 817, 100 Cal. Rptr. 501*

[6] Public Entities

[a] Generally

United States as not subject to liability for firefighting expenses voluntarily incurred and unrelated to any claim of damage to property under Federal Torts Claims Act (*28 U.S.C. §§ 1346(b), 2671*-2680), regardless of whether claim sounds in tort or contract. *California v. United States (N.D. Cal 1961) 195 F. Supp. 793, 794 , aff'd, 307 F.2d 941*

State is never permitted to sue in tort in its political or governmental capacity, although as owner of property, it may resort to same tort actions as any individual proprietor to recover for injuries to property. *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1018, 244 Cal. Rptr. 507*

Recovery of punitive damages by, or against (*see Gov. Code § 818*), public entities is not authorized; reasons for rule. *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1023-1026, 244 Cal. Rptr. 507*

[b] Liability of Public Entities

Statutes conferring governmental immunity are strictly construed. *Baldwin v. State of California (1972) 6 Cal. 3d 424, 435-436, 99 Cal. Rptr. 145, 491 P.2d 1121*

Where Department of Forestry and Fire Protection sought to recover its costs in fighting a brush fire from real parties in interest, the affirmative defenses of comparative negligence or failure to mitigate damages were not available to real parties; real parties were not allowed to challenge the reasonableness of the methods the Department used (or did not use) to fight the fire. *People ex rel. Grijalva v. Superior Court (2008) 159 Cal. App. 4th 1072, 1077, 72 Cal. Rptr. 3d 53*

Immunity provided by Gov. Code § 850.4 is affirmative defense required to be pled and proved or deemed waived. *McMahan's of Santa Monica v. City of Santa Monica (1983) 146 Cal. App. 3d 683, 689, 194 Cal. Rptr. 582*

Valve in city water system used to fight fires is part of city fire protection facilities, and city immune from liability under *Gov. Code §§ 850.2* and *850.4* for damages caused by valve's improper closure. *New Hampshire Ins. Co. v. City of Madera (1983) 144 Cal. App. 3d 298, 304-305, 192 Cal. Rptr. 548*

City's adoption of Uniform Fire Code does not create mandatory duty under *Gov. Code § 815.6* to keep water system operating given § 2.108 of Fire Code precluding creation of liability for acts taken under *Code. New Hampshire Ins. Co. v. City of Madera (1983) 144 Cal. App. 3d 298, 306-307, 192 Cal. Rptr. 548*

Fire district is not immune from liability under *Gov. Code § 850.4* for negligent injury to person during nonfirefighting rescue. *Lewis v. Mendocino Fire Prot. Dist. (1983) 142 Cal. App. 3d 345, 346-347, 190 Cal. Rptr. 883*

Complaint alleging that city fire captain negligently caused escaping gas to ignite and explode, injuring plaintiff, is not barred by *Gov. Code § 850.4* (providing that public entity is immune from liability for injuries caused in fighting fires). *Potter v. City of Oceanside (1981) 114 Cal. App. 3d 564, 566, 170 Cal. Rptr. 753*

Complaint for damages for injury to lessee's property by airport fire is not subject to general demurrer by defendant entity when it charges nonpublic entity with negligent conduct in starting fire and public entity defendant with permitting dangerous condition of storage of gasoline and other highly combustible chemicals on its property without fire protection, with notice of such condition, and alleges such dangerous condition to be nuisance. *Vedder v. County of Imperial (1974) 36 Cal. App. 3d 654, 658-661, 111 Cal. Rptr. 728*

State is not liable for damages arising out of arson committed by prisoner released by state [*Gov. Code § 845.8(a)*] under rehabilitation program notwithstanding allegations of ministerial negligence. *State of California v. Superior Court (1974) 37 Cal. App. 3d 1023, 1025-1026, 112 Cal. Rptr. 706*

Requirements for stating cause of action under *Gov. Code § 835*. *Vedder v. County of Imperial (1974) 36 Cal. App. 3d 654, 659, 111 Cal. Rptr. 728*

Nonliability of state for injuries sustained by minor burned by sitting in hot coals concealed by sand on public beach although state through its agents had knowledge that people had been burned a number of times by hot coals on the beach but had neither actual nor constructive notice of the existence of the particular hot coals in which minor sat. *State v. Superior Court of San Mateo County (1968) 263 Cal. App. 2d 396, 399-400, 69 Cal. Rptr. 683*

[7] Liability of Water Company

In action against city water company by building owner and tenants for damages sustained when fire service connection installed by water department at owner's request and subject to ordinance rates failed to operate because of faulty installation, water department is not liable unless parties contracted with express purpose of providing fire protection and service provided was not available to community in general except on basis of specific contract; payment for such special service is necessarily more than mere fee to cover costs of installation and ordinary ordinance rates for

supply of water. *Lainer Invs. v. Department of Water & Power (1985) 170 Cal. App. 3d 1, 14-15, 215 Cal. Rptr. 812*

California law immunizes water companies from civil liability for loss by fire due to failure to maintain their systems properly. *Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 806-807, 110 Cal. Rptr. 543* (indicating that record of case adequately presents issue for Supreme Court consideration)

Property owners suffering fire damage states cause of action for negligence against developers and engineers of water system. *Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 809-810, 110 Cal. Rptr. 543*

Express private contract whereby water company agrees to furnish water as protection against fire as leading to liability for failure to provide such water. *Luis v. Orcutt Town Water Co. (1962) 204 Cal. App. 2d 433, 438-439, 22 Cal. Rptr. 389*

[8] Causation

Since a party can only be liable under Health & Safety Code §§ 13007, 13009, and 13009.1 if its wrongful conduct was the proximate cause of defendant's harm and the issue of causation remained for trial, summary judgment on the United States' claims against a public utility that allegedly started a forest fire when a squirrel had an unfortunate encounter with an electrical transformer near a hydroelectric power generation facility was not appropriate. *United States v. Southern Cal. Edison Co. (E.D. Cal. 2006) 413 F. Supp. 2d 1101*

Defendant's work train crew's attempts to suppress fire are not within meaning of word "attended" under *Health & Safety Code § 13007*; "attended" more likely refers to controlled fires such as burning operations. *People v. Southern Pac. Co. (1983) 139 Cal. App. 3d 627, 638, 188 Cal. Rptr. 913*

Proof requires reasonable inference that negligence complained of was proximate cause of injury. *Hill v. Matthews Paint Co. (1957) 149 Cal. App. 2d 714, 724, 308 P.2d 865*

Circumstantial evidence of cause of fire is sufficient to raise inference of causation; direct proof is not required. *New Zealand Ins. Co. v. Brown (1952) 110 Cal. App. 2d 411, 413, 242 P.2d 674*

Time and distance between start of fire and its communication to plaintiff's property does not affect question of defendant's liability except as to question of proximate cause. *Osborn v. City of Whittier (1951) 103 Cal. App. 2d 609, 617-618, 230 P.2d 132*

If injury produced by concurrent effect of two separate wrongful acts, each is proximate cause of injury. *Vedder v. County of Imperial (1974) 36 Cal. App. 3d 654, 660, 111 Cal. Rptr. 728*

[9] Damages

Where railroad company work crew ignited a fire while repairing a rail in a national forest, the government was entitled to recover its damages for all timber destroyed, not just timber located in areas where logging was not prohibited. The government's damages were not limited to diminution of market value of the property because no real estate market value existed; rather, the government was entitled to full compensation for all of its damages, including value of the timber destroyed, reforestation costs due to damage to the soil and for young growth, pre-merchantable trees destroyed by the fire, and damages for loss of habitat and other loss of the burned land during the period of growth. Reforestation costs between $24 million and $33 million were not excessive in relation to alleged damages of $121 million inflicted on the land, and were not too speculative as a matter of law. *United States v. Union Pac. R.R. Co. (E.D. Cal. 2008) 565 F.Supp. 2d 1136*

Homeowners, whose property was destroyed by a fire that started as a prescribed fire on federal property but that spread, were not limited to recovery for property damages under Health & Safety Code §§ 13007 and 13008, and where plaintiffs assert rights under common law, the statutory remedies provided by sections 13007 and 13008 will be read as supplementing rather than supplanting plaintiffs' recovery under the common law. Robinson v. United States (E.D. Cal. 2001) 175 F. Supp. 2d 1215

Health and Safety Code § 13007 as liberally construed to place no restrictions on type of property damage that is compensable; hence, loss of profits from business connected to property that is negligently damaged by set fire as compensable. *McKay v. State of California (1992) 8 Cal. App. 4th 937, 939-940, 10 Cal. Rptr. 2d 771*

Plaintiff whose property was damaged by fire caused by defendant's negligent storage of plastics materials is entitled to recover for all injury to property proximately caused by defendant's negligence, including not only cost of repairs, but also recovery for inconvenience caused by injury or loss of use. *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1022-1023, 244 Cal. Rptr. 507*

Jury instructions allowing award to plaintiffs of both fair market value of timber destroyed and cost of reforestation are proper when fire destroyed trees and damaged soil and plaintiff required by law to replant, because these are separate injuries. *People v. Southern Pac. Co. (1983) 139 Cal. App. 3d 627, 634-635, 188 Cal. Rptr. 913*

Negligent spreading of fire is not a trespass within meaning of *Civ. Code § 3346*, relating to damages for trespass. *Gould v. Madonna (1970) 5 Cal. App. 3d 404, 406, 85 Cal. Rptr. 457*

Damages for negligently allowing fire to spread to land of another are governed by *Health & Safety Code § 13007*, authorizing recovery of actual damages, rather than *Civ. Code § 3346(a)*, authorizing treble and double damages for wrongful injuries to timber, trees, or underwood on land of another. *Gould v. Madonna (1970) 5 Cal. App. 3d 404, 406-407, 85 Cal. Rptr. 457*

[10] Fire Suppression Costs

[a] Generally

United States is not subject to liability for firefighting expenses voluntarily incurred and unrelated to any claim of damage to property under Federal Tort Claims Act, regardless of whether claim sounds in tort or contract. *People v. United States (N.D. Cal. 1961) 195 F. Supp. 793, 794 , aff'd, 307 F.2d 941*

Health & Safety Code § 13009 does not constitute declaration that recovery sounds in contract instead of tort. *People v. Zegras (1946) 29 Cal. 2d 67, 68-69, 172 P.2d 883*

Liability for firefighting expenses under former *Health & Safety Code § 13009* is limited to situations in which liability for property damage exists under *Health & Safety Code § 13007*. *People v. Southern Pac. Co. (1983) 139 Cal. App. 3d 627, 637-639, 188 Cal. Rptr. 913* (limited in effect by 1987 amendments to *Health & Safety Code § 13009*)

Proper measure for determining "expense" incurred for fighting fires pursuant to *Health & Safety Code § 13009* as requiring that (1) expenses claimed be incurred in fighting fire; (2) expenses be proximate result of defendant's wrongful conduct; and (3) expenses be reasonably incurred. *People v. Southern Cal. Edison Co. (1976) 56 Cal. App. 3d 593, 605, 128 Cal. Rptr. 697*

Absent statute, one protecting his or her own property has right to recover fire suppression costs from wrongdoer.

Globe Indem. Co. v. State of California (1974) 43 Cal. App. 3d 745, 749, 118 Cal. Rptr. 75

Right of state to recover fire suppression costs against one who negligently caused forest fire is expressly provided by *Health & Safety Code § 13009*. *Giorgi v. Pacific Gas & Elec. Co. (1968) 266 Cal. App. 2d 355, 360, 72 Cal. Rptr. 119*

Right of public entity to recover fire suppression expenses. *People v. Wilson (1966) 240 Cal. App. 2d 574, 576-577, 49 Cal. Rptr. 792*

Nonliability for fire suppression expenses under *Health & Safety Code §§ 13007-13009* when negligently set or controlled fire confined to defendant's land and does not escape to land of another. *People v. Williams (1963) 222 Cal. App. 2d 152, 154-156, 34 Cal. Rptr. 806*

Code Civ. Proc. § 339(1) is applicable statute of limitations for action involving fire suppression costs. *People v. Wilson (1966) 240 Cal. App. 2d 574, 576, 49 Cal. Rptr. 792* (two years)

[b] Measure of Damages

Regular payroll expenses of firefighting employees, and interest from date of demand for payment, are properly recovered under *Health & Safety Code § 13009*. *People v. Southern Pac. Co. (1983) 139 Cal. App. 3d 627, 639-641, 188 Cal. Rptr. 913*

Proper measure for determining expense incurred for fighting fires pursuant to *Health & Safety Code § 13009* requires that: (1) expenses claimed be incurred in fighting fire; (2) expenses be proximate result of defendant's wrongful conduct; and (3) expenses be reasonably incurred. *People v. Southern Cal. Edison Co. (1976) 56 Cal. App. 3d 593, 605, 128 Cal. Rptr. 697*

[11] Fireman's Rule

"Fireman's" rule is not applicable to bar recovery by private safety employees injured in fire negligently started by employees of third party; by establishing public fire departments and taxing themselves to pay for their services, public in effect is purchasing exoneration from duty of care and not required to pay twice, through taxation and individual liability, for those services; in contrast, defendant whose negligence injures private safety employees employed by another does not have same relationship with those private safety employees is member of public has with publicly-employed firefighters, because defendant has not paid in any way to be relieved of duty of care owed toward private employees. *Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 539-547, 34 Cal. Rptr. 2d 630, 882 P.2d 347*

"Fireman's" rule is not separate concept, but example of application of assumption of risk doctrine set forth in *Knight v. Jewett (1992) 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; proper basis for rule is not plaintiff's voluntary acceptance of known risk of injury in course of employment, but rather public policy determination that person who negligently starts fire does not owe duty of care to protect responding firefighter from very danger that requires firefighter's presence. *Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 538, 541-542, 34 Cal. Rptr. 2d 630, 882 P.2d 347* .

Fireman's rule is not applicable merely because firefighter or police officer encountered risk that caused injuries by chance rather than by being summoned to scene by radio call. *Kelhi v. Fitzpatrick (1994) 25 Cal. App. 4th 1149, 1152, 1158-1159, 31 Cal. Rptr. 2d 182*

Treating with chemical spills is traditionally within scope of firefighter's ordinary duties, and fireman's rule applicable so long as danger present is of type ordinarily associated with handling of potentially dangerous chemicals. *Rowland v. Shell Oil Co. (1986) 179 Cal. App. 3d 399, 404-405, 224 Cal. Rptr. 547*

Fireman's rule does not encompass intentional torts directed specifically against firefighter or police officer while he or she is trying to perform his or her duties after being called to the scene. *Krueger v. City of Anaheim (1982) 130 Cal. App. 3d 166, 168-169, 181 Cal. Rptr. 631*

Paid fireman has no cause of action against one whose passive negligence caused fire in which he or she was injured. *Giorgi v. Pacific Gas & Elec. Co. (1968) 266 Cal. App. 2d 355, 360, 72 Cal. Rptr. 119*

[12] Defenses

[a] Assumption of Risk

Assumption of risk when plaintiff agrees to relieve defendant of obligation of reasonable conduct is not merged into comparative negligence system. *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 119 Cal. Rptr. 858, 532 P.2d 1226*

Assumption of risk when plaintiff unreasonably undertakes to encounter specific known risk imposed by defendant's negligence is merged into comparative negligence system. *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 119 Cal. Rptr. 858, 532 P.2d 1226*

Defense of assumption of risk is inapplicable when action is based on violation of safety law intended to protect class of which plaintiff is member; benefit of safety orders extends to general public in places of employment and to homeowner's property when he or she contracts to have work done on his or her property (fire in homeowner's kitchen caused by violation of former 8 Cal. Code Reg § 4150 relating to providing adequate fire extinguishing facilities when flammable liquids are used). *Eberhard v. Bruhn (1970) 13 Cal. App. 3d 836, 839, 91 Cal. Rptr. 915*

[b] Negligence of Plaintiff

Defense of contributory negligence is invalidated in California and replaced with system of comparative negligence; purpose of comparative negligence system as to assign liability for damage in direct proportion to negligence of each of parties. *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226*

Tenant who burns waste in incinerator constructed and maintained in violation of provisions of *Pub. Res. Code § 4446* is negligent as matter of law when unattended fire escapes from incinerator and burns landlord's buildings; landlord's insurer, which paid loss, is barred from recovery in subrogation against tenant on ground of landlord's contributory negligence consisting of his or her having maintained incinerator in violation of law. *Travelers Indem. Co. v. Titus (1968) 265 Cal. App. 2d 515, 517-519, 71 Cal. Rptr. 490*

Negligence established when flammable debris exploded after plaintiff dumped rubbish into incinerator which defendant had assured contained no live flame. *Freeman v. Nickerson (1946) 77 Cal. App. 2d 40, 46, 174 P.2d 688*

[13] Proof

Jury instruction is proper when trial court instructed jury pursuant to *Pub. Res. Code § 4435* that if it found fire originated from operation or use of defendant's railroad equipment, the jury must find defendant negligent, unless

persuaded otherwise by preponderance of evidence. *People v. Southern Pac. Co. (1983) 139 Cal. App. 3d 627, 632-634, 188 Cal. Rptr. 913*

Fire chief with long experience with fires is qualified as expert witness to testify as to origin of fire. *Alhambra Bowl, Inc. v. Ledbetter Sign Co. (1963) 211 Cal. App. 2d 777, 780, 27 Cal. Rptr. 680*

Admissibility of evidence as to prior fires in arson prosecution. *People v. Maler (1972) 23 Cal. App. 3d 973, 978-981, 100 Cal. Rptr. 650*

[14] Res Ipsa Loquitur

Applicability of doctrine of res ipsa loquitur when fire erupted in hay barn after defendant had backed his truck into small area of barn surrounded on three sides by readily combustible dry hay stacked to rafters, cutting off air circulation. *Seeley v. Combs (1966) 65 Cal. 2d 127, 130-133, 52 Cal. Rptr. 578, 416 P.2d 810*

In action by building owner against lessee for damages caused by fire in lessee's premises, plaintiff is entitled to conditional res ipsa loquitur instructions when only probable causes of fire were lessee's overloading circuits or negligent installation by contractor employed by lessee. *Pappas v. Carson (1975) 50 Cal. App. 3d 261, 268-269, 123 Cal. Rptr. 343*

Application of res ipsa loquitur in action involving forest fire. *Roddiscraft, Inc. v. Skelton Logging Co. (1963) 212 Cal. App. 2d 784, 793-805, 28 Cal. Rptr. 277*

[15] Insurance

Subrogation by insurance company to recover payments to lessors of building on account of fire damage. *Agricultural Ins. Co. v. Smith (1968) 262 Cal. App. 2d 772, 777-779, 69 Cal. Rptr. 50*

[16] Nuisance

Maintenance of fire hazard sufficiently extreme to menace public health and safety constitutes public nuisance within meaning of *Civ. Code § 3480*; when such condition exists, public entity has right to summarily abate nuisance, particularly in face of emergency. *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1017, 244 Cal. Rptr. 507*

Gov. Code § 815 (immunity of public entity) does not bar nuisance actions against public entities to extent such actions are founded on *Civ. Code §§ 3479-3481*, which define public and private nuisances. *Vedder v. County of Imperial (1974) 36 Cal. App. 3d 654, 661, 111 Cal. Rptr. 728*

Fire hazard is public nuisance. *County of San Diego v. Carlstrom (1961) 196 Cal. App. 2d 485, 491, 16 Cal. Rptr. 667* ; *People v. Oliver (1948) 86 Cal. App. 2d 885, 889, 195 P.2d 926*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsGeneral OverviewTortsNegligenceCausationProximate CauseGeneral OverviewTortsNegligenceProofViolations of LawStatutesTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral OverviewTortsStrict LiabilityGeneral Overview

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§ 267.34 Attorney General Opinions

Cities and counties are not permitted to adopt building standards relating to fire and panic safety more stringent that those of State Fire Marshal; fire protection district is not permitted to adopt fire prevention code or other regulations setting forth building standard relating to fire and panic safety stricter than those in State Building Standards Code. 72 Ops. Cal. Att'y Gen. 180 (1989)

Fire Marshal has authority to enforce roof covering regulations in certain portions of fire hazard severity zones. *71 Ops. Cal. Att'y Gen. 72 (1988)*

Department of Forestry and Fire Protection has no authority to provide hazardous material cleanup, rescue, first aid, and emergency medical services when emergency is not related to fire or threat of fire, or to emergency declared pursuant to California Emergency Services Act. 70 Ops. Cal. Att'y Gen. 126 (1987)

Public utility district that provides fire protection services through private independent voluntary fire force has duty to enforce fire and panic safety regulations. *69 Ops. Cal. Att'y Gen. 260 (1986)*

Fire protection district does not have authority to adopt ordinance requiring installation of water reservoir at time of construction of each new building in district; nor may it impose "mitigation fee" on each person obtaining building permit in district. *68 Ops. Cal. Att'y Gen. 225 (1985)*

State Fire Marshal is authorized (1) to establish criteria pertaining to tests or test protocols designed to evaluate the toxicity and combustibility of construction materials and (2) to adopt specific tests in accordance with these criteria for evaluating such materials. *68 Ops. Cal. Att'y Gen. 85 (1985)*

Enforcement responsibility of State Fire Marshal under *Health & Safety Code § 13108* respecting state owned and occupied buildings that do not conform to fire and panic safety regulations adopted by marshal comprises enforcement of compliance by various administrative and judicial remedies determined on case-by-case basis. *64 Ops. Cal. Att'y Gen. 386 (1981)*

Authority of fire protection districts to issue burning permits. *55 Ops. Cal. Att'y Gen. 45 (1972)*

Portable Fire Extinguisher Law. 53 Ops. Cal. Att'y Gen. 359 (1970)

Public fire fighter employees are required to have certificates of registration to service or test portable fire extinguishers. *52 Ops. Cal. Att'y Gen. 53 (1969)*

First-aid training required for volunteer firemen and forestry personnel whose duties constist primarily of fire fighting. *51 Ops. Cal. Att'y Gen. 125 (1968)*

Authority to require private property owners to standardize threading on interior standpipes used for fire protection. *38 Ops. Cal. Att'y Gen. 12 (1961)*

Private schools under college level are required to comply with requirements for fire alarm system or automatic sprinklers for buildings in which children are cared for overnight. *29 Ops. Cal. Att'y Gen. 22 (1957)*

County ordinances relating to forest practices are invalid. *28 Ops. Cal. Att'y Gen. 190 (1956)*

Landowner is under duty to control fire on his or her own land. *28 Ops. Cal. Att'y Gen. 227 (1956)*

Privately operated institution furnishing 24-hour care for more than six children, aged, or mental patients is required to equip buildings with approved alarm system or automatic sprinkler system. *27 Ops. Cal. Att'y Gen. 59 (1956)*

Liability for smoke hazard resulting from burning of brush on property along highway. *7 Ops. Cal. Att'y Gen. 214 (1945)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesCleanupGovernmentsLocal GovernmentsPolice PowerGovernmentsState & Territorial GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsPolice PowerTortsPremises Liability & PropertyGeneral Overview

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22-267 California Forms of Pleading and Practice--Annotated § 267.35

§ 267.35 Law Reviews

Comment, *The Fireman's Rule: Defining Its Scope Using the Cost-Spreading Rationale, 71 Cal. L. Rev. 218 (1983)*

Comment, *Negligence Actions by Police Officers and Firefighters: A Need for a Professional Rescuers Rule, 66 Cal. L. Rev. 585 (1978)*

Comment, *An Examination of the California Fireman's Rule, 6 Pac. L.J. 660 (1975)*

Comment, *Mass Accident Class Actions, 60 Cal. L. Rev. 1615 (1972)*

Comment, *Giorgi v. Pacific Gas and Electric Co.: The "Fireman's Rule" in California, An Anachronism? 4 U.S.F. L. Rev. 125 (1969)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewTortsNegligenceGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDefensesFirefighter's RuleTortsProcedureSettlementsMultipartiesGeneral Overview

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22-267 California Forms of Pleading and Practice--Annotated § 267.36

§ 267.36 Text References

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 310-315; vol. 6, *Torts*, 840-859, 1100, 1426-1427; vol. 8, *Constitutional Law*, § 1076 (10th ed. 2005)

Legal Topics:

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

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[Reserved]

§§ 267.37[Reserved]

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PART IV. FORMS

22-267 California Forms of Pleading and Practice--Annotated § 267.50

§ 267.50 Complaint for Damages to Property Based on Negligence--Fire Negligently Started or Permitted to Occur [Health & Safety Code § 13007]--General Form

[1] FORM Complaint for Damages to Property Based on Negligence--Fire Negligently Started or Permitted to Occur [Health & Safety Code § 13007]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Negligence)
[and DOES 1 through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California.

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as Does I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by that negligence.)]

[3. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of such agency.]

4. At all times herein mentioned, plaintiff was the owner of that certain building and lot located at _____ [*address*], _____ [*city*], _____County, California [, and carrying on therein the business of _____ (*specify, e.g.,* a retail grocery store)].

5. [On or about _____ [*date*], plaintiff had stored on the premises items of _____ (personal property *or* inventory) (used in connection with that business), to wit: _____ (*specify property, e.g.,* foodstuffs and dry goods); as a proximate result of the fire, hereinafter complained of, the _____ (personal property *or* inventory) was _____ (damaged *or* completely destroyed).]

6. On or about _____ [*date*], at or about _____ [*time*], defendant _____ [*name*] negligently and carelessly caused and permitted a fire to _____ [be set *or* escape] to plaintiff's premises.

7. As a proximate result of the negligence of defendant[s, and each of them], [and the fire resulting therefrom,] plaintiff's real property at _____ [*address*], _____ [*city*], _____ County, California, was _____ [*describe damage, e.g.,* destroyed beyond repair, all to plaintiff's damage in the sum of $_____ *or* damaged]. [*If property was not destroyed, add:* Plaintiff has expended $_____ for repair of such property, which is a reasonable sum for such repair.]

8. [Before the fire, the _____ (personal property *or* inventory) of plaintiff was of a reasonable market value of $_____. By reason of the destruction of the personal property caused by the fire, the reasonable market value of the _____ (personal property *or* inventory) after the fire was $_____. Plaintiff was thereby damaged in the sum of $_____.]

9. [As a proximate result of the fire and the consequent loss of his/her premises by reason of the negligence of defendant(s, and each of them), plaintiff was unable to carry on his/her business for a period of _____ (*specify*) and was obliged to move his/her place of business to another location; as a result of being unable to carry on his/her business and as a result of this dislocation of his/her business, plaintiff sustained further losses in the total sum of $_____; (the items making up that sum of $_____ are set forth in Exhibit A, which is attached hereto and made a part hereof).]

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages in the sum of $_____;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form of complaint is for use in an action to recover for damages to personal or real property resulting from the negligent starting or controlling of fire. This kind of action may be brought under *Health & Safety Code § 13007*, or it may be brought based on general negligence principles [*see, e.g., Eberhard v. Bruhn (1970) 13 Cal. App. 3d 836, 838, 91 Cal. Rptr. 915]* .

However, if personal injuries are involved, *Health & Safety Code § 13007* will not provide a basis for recovery for those injuries because that section addresses itself only to the issue of property damage [*see Health & Safety Code § 13007*].

A negligent invasion by fire that causes damage to real property also constitutes a trespass [*Elton v. Anheuser-Busch Beverage Group, Inc. (1996) 50 Cal. App. 4th 1301, 1307, 58 Cal. Rptr. 2d 303]* . For discussion of trespass, and forms for alleging trespass, see Ch. 550, *Trespass* .

For discussion of the duty to prevent fire damage generally, see *§§ 267.10, 267.11*.

[3] Allegations

A complaint for property damage caused by fire should allege facts showing:

- Description of the property damaged or destroyed and plaintiff's ownership or interest therein (Paragraphs 4, 5).
- Defendant's negligence in setting the fire or in permitting it to spread to the property of another (Paragraph 6).
- Damage to plaintiff's property (Paragraphs 5, 7).
- Defendant's negligence in setting the fire was the proximate cause of the damage (Paragraphs 5, 7).
- Plaintiff was damaged in a certain sum thereby (Paragraphs 7-9).

[4] Verification

Although verification of this complaint is not required, verification will require any answer to be verified also, if the

action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[5] Cross References

For alternative allegations as to capacity and residence of parties, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For forms relating to causes of action involving explosions, see Ch. 256, *Explosives*

See generally Ch. 380, *Negligence*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively

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22-267 California Forms of Pleading and Practice--Annotated § 267.51

§ 267.51 Complaint for Damages to Property Based on Negligence--Fire Negligently Started or Permitted to Occur [Health & Safety Code § 13007]--Lessor Against Lessee--Maintaining Premises in Violation of Health & Safety Code § 13001 and City Ordinance

[1] FORM Complaint for Damages to Property Based on Negligence--Fire Negligently Started or Permitted to Occur [Health & Safety Code § 13007]--Lessor Against Lessee--Maintaining Premises in Violation of Health & Safety Code § 13001 and City Ordinance

[*Caption. See § 267.50[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 267.50[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 267.50[1], Paragraph 2.*]

3. [*Agency allegation, if appropriate. See § 267.50[1], Paragraph 3.*]

4. At all times herein mentioned, plaintiff was the owner of that certain parcel of land located at _____ [*address*] in _____ [*city*], _____ County, California; prior to the fire hereinafter complained of, the real property was improved by various structures comprising a _____ [*specify, e.g.,* lumber yard]. At the time of the fire, the real property and improvements were leased by plaintiff to, and occupied exclusively by, defendant _____ [*name*].

5. On or about _____ [*date*], at or about the hour of _____ [*time*], defendant negligently started a fire and negligently failed thereafter to extinguish that fire.

6. As a direct and proximate result of defendant's negligence, plaintiff's property was _____ [*describe damage, e.g.,* destroyed beyond repair, all to plaintiff's damage in the sum of $_____ *or* damaged]. [*If*

property was not destroyed, add: Plaintiff has expended $_____ for repair of such property, which is a reasonable sum for such repair.]

7. The defendant's negligence consisted in part of violation of *Section 13001 of the Health and Safety Code* in that: _____ [*allege facts constituting violation of section, e.g.,* Defendant operated in the lumber yard a defective electric ripsaw which was emitting sparks, without first clearing from the immediate area of such operation flammable materials, namely, sawdust and shavings which subsequently caught fire(; the use of the defective saw was also in violation of Section _____ of the Ordinances of _____ [*city*], California, prohibiting the use of an electric device from which electrical energy escapes)].

8. [The negligent conduct further consisted in part in _____ (*allege facts constituting violation of ordinance, e.g.,* defendant's negligent failure to maintain at the lumber yard "proper housekeeping" within the meaning of Section _____ of the Ordinances of the City of _____, California, by permitting the accumulation about the electric ripsaw of large amounts of sawdust and shavings which subsequently were set afire as described above).]

9. [*Damages allegations, as appropriate. See § 267.50[1], Paragraphs 6 and 7.*]

[*Prayer. See § 267.50[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 267.50[1].*]

[2] Use of Form

This form of complaint is for use in an action by a lessor against a lessee to recover for damages to real property resulting from the negligent maintenance of the premises in violation of Health & Safety Code § 13001 and a city ordinance.

For additional discussion, including comments relating to actions under *Health & Safety Code § 13007*, verification of the complaint, and additional cross references, see *§ 267.50*.

For discussion of a lessee's liability to a lessor for fire, see *§ 267.12*.

[3] Allegations

A complaint for property damage caused by negligent violation of a statute or city ordinance should allege facts showing:

- The violation of the code section or local ordinance (Paragraphs 7, 8);
- That such violations proximately caused the damage or injuries complained of (Paragraphs 6, 7).

[4] Cross References

See generally Ch. 334, *Landlord and Tenant: Damages Claims*

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22-267 California Forms of Pleading and Practice--Annotated § 267.52

§ 267.52 Complaint for Damages to Property Based on Negligence--Fire Negligently Started or Permitted to Occur [Health & Safety Code § 13007]--By Tenant Against Other Tenant--Storing Flammables Without Permit

[1] FORM Complaint for Damages to Property Based on Negligence--Fire Negligently Started or Permitted to Occur [Health & Safety Code § 13007]--By Tenant Against Other Tenant--Storing Flammables Without Permit

[*Caption. See § 267.50[1].*]

Plaintiff alleges:

FIRST COUNT
(Negligence)

1. [*Capacity and residence of defendant. See § 267.50[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 267.50[1], Paragraph 2.*]

3. [*Agency allegation, if appropriate. See § 267.50[1], Paragraph 3.*]

4. Defendant _____ [*name*] is, and at all times herein mentioned was, a tenant and in exclusive occupancy and control of portions of _____ [*describe occupied portions, e.g.,* the basement and ground floors] of that certain building and property located at _____ [*address*] in _____ [*city*], _____ County, California.

5. On or about _____ [*date*], and for some time prior thereto, plaintiff was a tenant in the building occupying _____ [*describe occupied portions, e.g.,* the entire second floor] and carrying on therein the business of _____ [*specify, e.g.,* a retail shoe store]; at that time plaintiff had stored on his/her premises items of personal property used in connection with that business, to wit: _____ [*specify*

property, e.g., inventory of shoes for men and women]; as a result of the fire hereinafter complained of, the personal property was _____ [damaged *or* completely destroyed].

6. On or about _____ [*date*], a fire occurred which resulted in _____ [damage to *or* destruction of] the building, including the premises occupied by plaintiff.

7. On or about _____ [*date*], defendant negligently stored and maintained in _____ [drums *or* kegs] in the _____ [premises *or* building] large quantities of flammable material commonly known as _____ [*specify substance, e.g.,* paint thinner] which material was of such nature that it would flash or emit a flammable vapor below a temperature of _____ [*e.g.,* one hundred and ten degrees (110) Fahrenheit].

8. On or about _____ [*date*], at or about the hour of _____ [*time*], a fire originated in the premises occupied and controlled by defendant in which the _____ [*specify substance, e.g.,* paint thinner] was so stored and maintained; the fire then ignited large quantities of the _____ [*specify substance, e.g.,* paint thinner] with the result that the fire became uncontrollable and spread to and reached the premises occupied by plaintiff and caused the destruction and loss of his/her personal property as hereinabove set forth; the negligent storage and maintenance by defendant of such large quantities of such _____ [*specify substance, e.g.,* paint thinner] on defendant's premises was the proximate cause of the loss by fire of the personal property of plaintiff.

9-10. [*Damages allegations, as appropriate. See § 267.50[1], Paragraphs 8, 9.*]

SECOND COUNT
(Negligence Per Se)

1. Plaintiff refers to and herein incorporates Paragraphs 1-10, inclusive, of the First Count as if fully set forth herein.

2. At all times herein mentioned, and specifically on or about _____ [*date*], there was in full force and effect in the City of _____, _____ County, California, _____ [*section number*] of the Municipal Code, enacted on _____ [*date*].

3. It was and is provided by that code, Section _____ thereof, as follows: _____ [*set out pertinent details of code section requiring permit for storage of flammables*].

4. At no time herein mentioned did defendant make application for or possess a permit as required by that ordinance.

5. The flammable material, commonly known as _____ [*specify substance, e.g.,* paint thinner], so stored and maintained by defendant in his/her premises, was a material of the class covered by the ordinance, to wit: _____ [*specify, e.g.,* a hydrocarbon of such nature that it would flash or emit a flammable vapor below a temperature of _____ [*e.g.,* one hundred and ten (110) Fahrenheit]; on or about _____ [*date*], the _____ [*specify substance, e.g.,* paint thinner] was so stored and maintained by defendant in his/her premises without an authorizing permit therefor and was greatly in excess of _____ [*amount specified by ordinance, e.g.,* five gallons]; and such storage and maintenance thereof was in violation of the express terms of the ordinance.

[*Prayer. See § 267.50[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 267.50[1].*]

[2] Use of Form

This form of complaint is for use in an action by one tenant of a building against another tenant for damages to personal property resulting from the negligent storing of flammables without a permit.

The First Count is in terms of general negligence principles, and the Second Count is based on violation of the ordinance requiring a permit to store such materials.

For additional discussion, including comments relating to actions under *Health & Safety Code § 13007*, verification of the complaint, and additional cross references, see *§ 267.50*.

For discussion of a lessee's liability to a lessor for fire, see *§ 267.12*.

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22-267 California Forms of Pleading and Practice--Annotated § 267.53

§ 267.53 Complaint for Damages to Property Based on Negligence--Fire Negligently Allowed to Spread to Property of Another [Health & Safety Code § 13008]--By Building Occupant Against Business Owner

[1] FORM Complaint for Damages to Property Based on Negligence--Fire Negligently Allowed to Spread to Property of Another [Health & Safety Code § 13008]--By Building Occupant Against Business Owner

[*Caption. See § 267.50[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 267.50[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 267.50[1], Paragraph 2.*]

3. [*Agency allegation, if appropriate. See § 267.50[1], Paragraph 3.*]

4. At all times herein mentioned, defendant _____ [*name*] conducted the business of _____ [*specify, e.g.,* retail paint sales] at _____ [*address*] in _____ [*city*], _____ County, California.

5. At all times herein mentioned, plaintiff was a _____ [*allege type of occupancy, e.g.,* tenant] of certain premises located at _____ [*address*] in _____ [*city*], _____ County, California [, such premises being adjacent to defendant's place of business].

6. At all times herein mentioned, plaintiff was the owner of certain _____ [*specify personal property, e.g.,* paper bags] which he/she kept in storage at the building.

7. On or about _____ [*date*], at or about the hour of _____ [*time*], defendant negligently and carelessly caused and permitted a fire, set within his/her building, to spread beyond and escape from the

building.

8. As a proximate result of the negligence of defendant[s, and each of them], and the escape of the fire resulting therefrom, the premises leased to plaintiff at _____ [*address*] in _____ [*city*], _____ County, California, were _____ [*describe extent of damage, e.g.,* totally destroyed *or* severely damaged].

9. As a further proximate result of the negligence of defendant[s, and each of them], and the escape of the fire resulting therefrom, plaintiff's personal property stored at those premises was _____ [*describe extent of damage, e.g.,* totally destroyed *or* damaged].

10-11. [*Damages allegations, as appropriate. See § 267.50[1], Paragraphs 8 and 9.*]

[*Prayer. See § 267.50[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 267.50[1].*]

[2] Use of Form

This form of complaint is for use in an action by a building occupant against a business owner for damages to personal property resulting from the defendant's negligently permitting a fire set on his or her property to spread to the premises of plaintiff. Although this type of situation is arguably covered by *Health & Safety Code§ 13007, Health & Safety Code § 13008* specifically addresses itself to the problem of spreading fires. Hence, this form can be used by itself to state a cause of action or in conjunction with previous forms as an independent count.

For additional discussion, including comments relating to verification of the complaint, as well as additional cross references, see *§ 267.50*.

For discussion of a lessee's liability to a lessor for fire, see *§ 267.12*.

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22-267 California Forms of Pleading and Practice--Annotated § 267.54

§ 267.54 Complaint for Damages Based on Negligence--For Recovery of Expenses Incurred in Fighting Fire and for Cost of Providing Rescue or Emergency Services [Health & Safety Code § 13009(a)] and Related Costs [Health & Safety Code § 13009.1]

[1] FORM Complaint for Damages Based on Negligence--For Recovery of Expenses Incurred in Fighting Fire and for Cost of Providing Rescue or Emergency Services [Health & Safety Code § 13009(a)] and Related Costs [Health & Safety Code § 13009.1]

[*Caption. See § 267.50[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 267.50[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 267.50[1], Paragraph 2.*]

3. [*Agency allegation, if appropriate. See § 267.50[1], Paragraph 3.*]

4. At all times herein mentioned, plaintiff was the owner of that property located at _____ [*address or description*], _____ County, California.

5. On or about _____ [*date*], at or about the hour of _____ [*time*], defendant negligently and carelessly caused and permitted a fire to _____ [be set *or* escape] to the above-described property.

6. As a proximate result of the negligence of defendant[s, and each of them], and the fire resulting therefrom, plaintiff incurred expenses in the fighting of the fire to protect his/her property; plaintiff's expenditures in the fighting of the fire totalled $_____, which is a reasonable sum for such expenses.

7. [As a further proximate result of the negligence of defendant(s, and each of them), and the fire resulting therefrom, plaintiff incurred expenses for the cost of providing _____ (rescue services *or* emergency medical services) in the amount of $_____.]

8. [As a proximate result of the negligence of defendant(s, and each of them), and the fire resulting therefrom, plaintiff incurred expenses for the cost of _____ (investigating and making reports with respect to that fire *and/or* accounting for that fire and collecting funds pursuant to *Health & Safety Code § 13009*) in the amount of $_____.]

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 267.50[1].*]

[2] Use of Form

This form of complaint is for use in an action to recover expenses incurred in fighting a fire on public or private property and for the cost of providing rescue or emergency medical services pursuant to *Health & Safety Code § 13009*.

The form may also be used to recover the costs of investigating and making any reports regarding the fire and of accounting for the fire and of the collection of any funds pursuant to *Health & Safety Code § 13009*, including, but not limited to, the administrative costs of operating a fire suppression cost recovery program. This latter liability is limited to the actual amount expended attributable to the fire [*Health & Safety Code § 13009.1(a)(1), (2)*]. Neither a party seeking to recover fire suppression costs nor a party who successfully defends against such an action has a right to recover attorney's fees [*Dep't of Forestry & Fire Prot. v. LeBrock (2002) 96 Cal. App. 4th 1137, 1140-1142, 117 Cal. Rptr. 2d 790]* .

The form may provide a basis for an independent cause of action, or it may be joined as a count in a complaint for recovery of damages to property.

For additional discussion, including comments relating to verification of the complaint, as well as cross references, see *§ 267.50*.

For discussion of fire suppression costs as damages, see *§ 267.18*.

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22-267 California Forms of Pleading and Practice--Annotated § 267.55

§ 267.55 Complaint for Recovery of Expenses Incurred in Fighting Fire and Cost of Providing Rescue or Emergency Services [Health & Safety Code § 13009(a)] and Related Costs [Health & Safety Code § 13009.1]--Uncorrected Fire Hazard [Health & Safety Code § 13009(a)]

[1] FORM Complaint for Recovery of Expenses Incurred in Fighting Fire and Cost of Providing Rescue or Emergency Services [Health & Safety Code § 13009(a)] and Related Costs [Health & Safety Code § 13009.1]--Uncorrected Fire Hazard [Health & Safety Code § 13009(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAIN T FOR RECOVERY OF FIRE SUP-
_____ [*name*],	)	PRESSION AND RELATED COSTS
[and DOES 1 through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 267.50[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 267.50[1], Paragraph 2.*]

3. [*Agency allegation, if appropriate. See § 267.50[1], Paragraph 3.*]

4. At all times mentioned herein, defendant was the _____ [*specify status, e.g.,* owner],

_____ [in actual possession of *or* obligated under law to correct a fire hazard, prohibited by law, at] the _____ [*describe structure and/or other property, e.g.,* one-story California ranch-style house and garage and surrounding property] located at _____ [*street address and city*] _____ County, California.

5. On or about _____ [*date*], _____ [*specify public agency*] issued to defendant a notice of violation of _____ [*specify law on which notice was based, e.g.,* ordinance number _____ of the _____ (*name*) Fire Protection District] prohibiting fire hazards because _____ [*describe fire hazard, e.g.,* defendant engaged in activities in his garage involving the operation of a welding torch without first clearing the inflammable material surrounding the welding site or taking other precautions necessary to ensure against the starting or spreading of fire].

6. Despite having the right to correct the above-described fire hazard, defendant failed and/or refused to do so within the _____ [*specify period of time, e.g.,* three-month] time limit allotted for correction.

7. On or about _____ [*date*], at or about the hour of _____ [*time*], the above-mentioned property and/or structure was _____ [damaged *or* destroyed] by a fire that resulted from defendant's maintenance of and refusal to correct the fire hazard described above.

8. As a proximate result of the acts of defendant[s, and each of them,], and the fire resulting therefrom, plaintiff _____ [*specify provider of fire suppression services*] incurred expenses in the fighting of the fire in the sum of $_____, which is a reasonable sum for these expenses.

[9. As a further proximate result of the acts of defendant(s, and each of them,), and the fire resulting therefrom, plaintiff _____ (*specify provider of rescue and/or emergency medical services*) incurred expenses for the cost of providing _____ (rescue *and/or* emergency medical) services in the amount of $_____.]

[10. As a further proximate result of the acts of defendant(s, and each of them,), and the fire resulting therefrom, plaintiff _____ (*specify fire fighting entity*) incurred expenses for the cost of _____ (investigating and making reports with respect to that fire *and/or* accounting for that fire and collecting funds pursuant to *Health & Safety Code § 13009*) in the amount of $_____.]

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 267.50[1].*]

[2] Use of Form

This form of complaint is for use by a person, or by the federal, state, county, public, or private agency incurring fire supression, rescue, and/or emergency medical costs to bring an action to recover those costs.

The action may be brought against a person [*see Health & Safety Code § 13009(a)*]:

- Other than a mortgagee, who, being in actual possession of a structure, fails or refuses to correct, within the time allotted for correction, despite having the right to do so, a fire hazard prohibited by law, for which a public agency properly has issued a notice of violation; or

- Including a mortgagee, who, having an obligation under other provisions of law to correct a fire hazard prohibited by law, for which a public agency has properly issued a notice of violation, fails or refuses to correct the hazard within the time allotted for correction, despite having the right to do so.

The action may also be used to recover the costs of investigating and making any reports regarding the fire, and of accounting for the fire, and of the collection of any funds pursuant to *Health & Safety Code § 13009*, including, but not limited to, the administrative costs of operating a fire suppression cost recovery program [*Health & Safety Code § 13009.1*]. Neither a party seeking to recover fire suppression costs nor a party who successfully defends against such an action has a right to recover attorney's fees [*Dep't of Forestry & Fire Prot. v. LeBrock (2002) 96 Cal. App. 4th 1137, 1140-1142, 117 Cal. Rptr. 2d 790]* .

For additional discussion, including comments relating to verification of the complaint, as well as cross references, see *§ 267.50*.

For further discussion of fire suppression costs as damages, see *§ 267.18*.

[3] Allegations

This form alleges:

- The defendant's status as a person in actual possession of premises, other than a mortgagee, or as a person, including a mortgagee, having an obligation under law to correct a fire hazard on premises (Paragraph 4).

- The issuance of a notice of violation relating to a fire hazard by a public agency (Paragraph 5).

- That the defendant failed or refused to correct the violation within the allotted time, despite having the right to do so (Paragraph 6).

- That a fire resulted from the hazard (Paragraph 7).

- That the plaintiff incurred fire supression expenses (Paragraph 8).

- An optional allegation, that the plaintiff incurred rescue and/or emergency medical expenses (Paragraph 9) [see *Health & Safety Code § 13009(a)*].

It also includes an optional allegation that the plaintiff incurred costs for investigation and reporting related to the fire

and for collecting the amounts due under *Health & Safety Code § 13009* [see *Health & Safety Code § 13009.1*].

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22-267 California Forms of Pleading and Practice--Annotated § 267.56

§ 267.56 Complaint for Damages for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Landowner for Negligent Burning

[1] FORM Complaint for Damages for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Landowner for Negligent Burning

[*Caption. See Form 1.*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 267.50[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 267.50[1], Paragraph 2.*]

3. [*Agency allegation, if appropriate. See § 267.50[1], Paragraph 3.*]

4. Defendant _____ [*name*] is, and at all times herein mentioned was, the owner of the following real property, consisting of a lot [and building thereon], located at _____ [*address*] in _____ [*city*], _____ County, California.

5. On or about _____ [*date*], at or about the hour of _____ [*time*], plaintiff was on the premises of defendant _____ [*allege plaintiff's status, e.g.,* on the invitation of defendant].

6. At that time and place, defendant[s, and each of them], _____ [*allege facts constituting negligence, e.g.,* so carelessly and negligently started a fire outside his/her premises during a high wind to burn rubbish, and so negligently maintained and controlled the fire, as to proximately cause a cinder to be blown by the wind on the person of plaintiff setting his clothes afire], and proximately causing the injuries and damages herein described.

7. As a proximate result of the negligence of defendant[s, and each of them], plaintiff was [severely burned and was

thereby] hurt and injured in his/her health, strength, and activity, sustaining injury to his/her body and shock and injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has suffered general damages.

8. As a further proximate result of the negligence of defendant[s, and each of them], plaintiff has incurred, and will continue to incur, medical and related expenses.

9. As a further proximate result of the negligence of defendant[s, and each of them], plaintiff's earning capacity has been greatly impaired, both in the past and at present.

10. As a proximate result of the negligence of defendant[s, and each of them], [and the fire resulting therefrom], plaintiff's _____ [*describe personal property, e.g.,* clothing] was _____ [*describe damage, e.g.,* destroyed beyond repair, all to plaintiff's damage in the sum of $_____ *or* damaged]. [*If property was not destroyed, add:* Plaintiff has expended $_____ for repair of such _____ (*describe personal property*), which is a reasonable sum for such repair.]

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 267.50[1].*]

[2] Use of Form

This form of complaint is for use in an action to recover damages for personal injuries sustained as a result of a landowner's negligent burning. When the plaintiff also seeks to recover for damages to real property, this complaint may join, with minor modifications, a second count in the format prescribed by §§ *267.50[1]* or *267.52[1]*.

For additional discussion, including comments relating to verification of the complaint, as well as cross references, see *§ 267.50*.

For discussion of a landowner's duty to make reasonable use of his or her property, see *§ 267.11[1]*.

[3] Allegations

A complaint for recovery of damages for personal injuries caused by fire should allege facts showing:

- Defendant's duty owed to plaintiff (Paragraphs 4, 5).
- Breach of that duty (Paragraph 6).
- Plaintiff's injuries were proximately caused by defendant's negligence (Paragraph 6).
- Plaintiff's damages (Paragraphs 7-10).

[4] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

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22-267 California Forms of Pleading and Practice--Annotated § 267.57

§ 267.57 Complaint for Damages to Property and Personal Injuries Based on Negligence--By Independent Contractor Against Building Owner--Representation That Incinerator Was Safe to Discharge Rubbish Into

[1] FORM Complaint for Damages to Property and Personal Injuries Based on Negligence--By Independent Contractor Against Building Owner--Representation That Incinerator Was Safe to Discharge Rubbish Into

[*Caption. See § 267.50[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 267.50, Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 267.50[1], Paragraph 2.*]

3. [*Agency allegation, if appropriate. See § 267.50[1], Paragraph 3.*]

4. On _____ [*date*], and prior thereto, plaintiff was engaged in the business of _____ [*describe, e.g.,* laying, installing, repairing, and refinishing hardwood floors] and was operating his/her business at _____ [*address*] in _____ [*city*], _____ County, California.

5. Prior to _____ [*date*], plaintiff had entered into a[n] [oral] contract with defendant wherein plaintiff, for an agreed compensation, was to _____ [*describe the duties plaintiff was to perform under the contract, e.g.,* install and finish certain hardwood floors] at _____ [*location where work was to be performed*]. Pursuant to that contract, plaintiff, prior to _____ [*date*], entered on the premises for the purpose of fulfilling the terms of his/her agreement. In connection with the performance of the contract _____ [*continue description of duties and events leading up to injury, e.g.,* to smooth the hardwood floors that plaintiff installed in the apartment, it was necessary for plaintiff to and he/she did use a sanding machine, which use produced an accumulation of wood sawdust and fine shavings, which are generally known to be highly

combustible and flammable]. As the rubbish accumulated, plaintiff, prior to _____ [*date*], asked defendant what disposition should be made of it and then and there stated to defendant that the material was highly combustible and flammable. Defendant advised plaintiff to dispose of the accumulation by discharging same into a certain chute, which led to an incinerator on the premises. Defendant did then and there carelessly and negligently advise plaintiff that no fire was built in the incinerator and that it was safe to discharge the accumulation into the incinerator [chute] at any time.

6. The accumulation of rubbish constituted a highly dangerous, explosive, combustible, and flammable mixture, which fact was known to defendant at the time he/she advised the discharge into the incinerator [chute].

7. Thereafter and on _____ [*date*], plaintiff, relying on the statements of defendant and believing that no fire had been built in the incinerator, discharged into the incinerator [chute a certain quantity of the rubbish. In truth and in fact, on _____ [*date*], defendant had built a fire in the incinerator, which fact was unknown to plaintiff. On throwing the mixture into the incinerator [chute], the mixture then and there exploded with great force and violence, caught fire, and burned.

8. As a proximate result of the carelessness and negligence of defendant and of the resulting explosion and fire, the burning mixture was caused to be thrown on the body of plaintiff, causing him/her serious personal injuries, to wit: _____ [*describe injuries*].

9-12. [*Damages allegations, as appropriate. See § 267.56[1], Paragraphs 7-10.*]

[*Prayer. See § 267.56[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 267.50[1].*]

[2] Use of Form

This form of complaint is for use in an action to recover for property damages and personal injuries sustained as a result of a building owner's negligently representing to an independent contractor that it was safe to discharge rubbish into the incinerator.

For additional discussion, including comments relating to verification of the complaint and specification of damages, and cross references, see *§§ 267.50* and *267.56*.

For discussion of a landowner's duty to make reasonable use of his or her property, see *§ 267.11[1]*.

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22-267 California Forms of Pleading and Practice--Annotated § 267.58

§ 267.58 Complaint for Damages to Property and Personal Injuries Based on Negligence--By Tenant Against Landlord--Permitting Defective Boiler to Remain on Premises

[1] FORM Complaint for Damages to Property and Personal Injuries Based on Negligence--By Tenant Against Landlord--Permitting Defective Boiler to Remain on Premises

[*Caption. See § 267.50[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 267.50[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 267.50[1], Paragraph 2.*]

3. [*Agency allegation, if appropriate. See § 267.50[1], Paragraph 3.*]

4. At all times herein mentioned, defendant owned certain improved real estate located at _____ [*address*] in _____ [*city*], _____ County, California, and rented it to plaintiff.

5. At all times herein mentioned, defendant reserved control to himself/herself and undertook the duty to care for and maintain all portions of the premises.

6. Plaintiff, prior to _____ [*date*], noticed that there was a defective boiler on the premises, notified defendant of the defective condition that existed, and requested defendant to repair the same.

7. On or about _____ [*date*], at or about the hour of _____ [*time*], the defect caused the boiler to, and it did, explode. As a proximate result of the explosion, a fire broke out at the premises.

8. The fire was caused by the negligence and carelessness of defendant, his/her agents, servants, and employees in

failing to use reasonable care to keep the premises in a reasonably safe condition; permitting a dangerous condition to exist after he/she was informed of the defective boiler which was on the premises; causing a dangerous condition to exist which constituted a fire hazard and a menace to the safety of persons lawfully in the building; failing to repair or replace the defective boiler after such information was given to defendant; causing the dangerous condition to exist and failing to remedy same although during the period of time defendant had actual knowledge and notice of the condition and had reasonable opportunity to remedy the same.

9. On and before the day of such fire, plaintiff had all his/her household furnishings and personal belongings on the premises; as a proximate result of the fire, all such personal property and furnishings belonging to plaintiff were _____ [damaged *or* completely destroyed].

10. [*Damages allegations, as appropriate. See § 267.56[1], Paragraphs 7-10.*]

[*Prayer. See § 267.56[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 267.50[1].*]

[2] Use of Form

This form of complaint is for use in an action to recover for property damages and personal injuries sustained as a result of a landlord's negligently permitting a defective boiler to remain on the premises, which boiler caused the complained of fire.

For additional discussion, including comments relating to verification of the complaint and specification of damages, and cross references, see *§§ 267.50* and *267.56*.

For discussion of a landowner's duty to make reasonable use of his or her property, see *§ 267.11[1]*.

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22-267 California Forms of Pleading and Practice--Annotated § 267.59

§ 267.59 Allegation--Negligent Cigarette Smoking [Health & Safety Code § 13001]

[1] FORM Allegation--Negligent Cigarette Smoking [Health & Safety Code § 13001]

On or about _____ [*date*], at or about the hour of _____ [*time*], defendant so negligently and carelessly smoked, used, and handled lighted cigarettes in that place that, as a proximate result, a fire occurred; the fire spread to plaintiff's _____ [building *or* premises] which thereby caught fire and burned.

[2] Use of Form

This form of allegation is for use in a complaint in an action by a property owner to recover for damages to property or personal injuries sustained as a result of a fire caused by defendant's negligent handling of cigarettes. With appropriate modifications, this allegation can be used as the basis for recovery, or can be joined as a separate count, in any of the forms *set forth in § 267.50* et seq..

For discussion of the duty to prevent fire damage generally, see *§ 267.10*.

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22-267 California Forms of Pleading and Practice--Annotated § 267.60

§ 267.60 Allegation--Accumulation of Combustible Materials With Use of Certain Appliances [Health & Safety Code § 13001]

[1] FORM Allegation--Accumulation of Combustible Materials With Use of Certain Appliances [Health & Safety Code § 13001]

On or before _____ [*date of fire*], defendant was in [the exclusive] possession of premises located at _____ [*address*] in _____ [*city*], _____ County, California [, which premises were in the same building as the premises occupied by plaintiff]. On or before that date, defendant permitted the accumulation of combustible materials, to wit: _____ [*describe, e.g.,* rags], on his/her premises and in conjunction therewith maintained and operated certain appliances, to wit: _____ [*specify, e.g.,* a welding torch] on those premises, the combination of which resulted in the fire which occurred on _____ [*date*], at or about the hour of _____ [*time*], and which _____ [*describe extent of damage, e.g.,* entirely consumed and destroyed the building which was then occupied by _____ (both plaintiff and defendant *or* plaintiff)].

[2] Use of Form

This form of allegation is for use in a complaint in an action by a property owner to recover for damages to property or personal injuries sustained as a result of a fire caused by defendant's negligent accumulation of combustible materials in conjunction with the use of certain devices likely to cause a fire. With appropriate modifications, this allegation can be used as the basis for recovery, or can be joined as a separate count, in any of the forms of complaint contained in §§ *267.50- 267.58*.

For discussion of the duty to prevent fire damage generally, see *§ 267.10*.

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California Forms of Pleading and Practice--Annotated

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Volume 22: Explosives thru Food-Chs. 256-268
Chapter 267 FIRES
PART IV. FORMS

22-267 California Forms of Pleading and Practice--Annotated § 267.61

§ 267.61 Complaint [Fed. R. Civ. P., Rule 7(a)] by Property Owner Against Federal Government in Federal District Court Under Federal Tort Claims Act [28 U.S.C. §§ 1346(b), 2671-2680]--For Damages Caused by Forest Fire Negligently Set and Permitted to Escape

[1] FORM Complaint [Fed. R. Civ. P., Rule 7(a)] by Property Owner Against Federal Government in Federal District Court Under Federal Tort Claims Act [28 U.S.C. §§ 1346(b), 2671-2680]--For Damages Caused by Forest Fire Negligently Set and Permitted to Escape

UNITED STATES DISTRICT COURT FOR THE _____ DISTRICT OF CALIFORNIA

_____ [*name(s)*],	)	
Plaintiff(s),	)	
vs.	)	Civil Action File No. _____
_____ [*name(s)*],	)	COMPLAINT [AND DEMAND FOR JURY TRI-
[and DOES 1 through _____,]	)	AL]
Defendant(s).	)	
	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 267.50[1], Paragraph 1.*]

2. Jurisdiction is founded on and the action arises under the Federal Tort Claims Act, *28 U.S.C. §§ 1346(b), 2671-2680*, as hereinafter more fully appears.

3. Plaintiff is a resident of the City of _____, State and _____ District of California.

4. [*Fictitious name allegation, if appropriate. See § 267.50[1], Paragraph 2.*]

5. At all times herein mentioned defendants _____ [*specify, e.g.,* DOES 1-10, inclusive] were the agents, servants, and employees of the Forest Service, Department of Agriculture, United States of America, and in doing the things hereinafter alleged were acting in the course and scope of their authority as such agents, servants, and employees, and with the permission and consent of the United States of America.

6. On or about _____ [*date*], at or about the hour of _____ [*time*], in _____ [*identify forest, e.g.,* Klamath National Forest], _____ County, State and _____ District of California, defendant United States of America, by and through its agents and employees, carelessly and negligently permitted certain forest fires to be lighted, which fires were negligently and carelessly permitted to escape from control and spread to the property of plaintiff.

7. As a proximate result of the negligence of defendant United States of America, by and through its employees, real and personal property owned by plaintiff was damaged and destroyed by the fire [and plaintiff suffered personal injuries] as hereinafter set forth in more detail.

8. [*Damages allegation, as appropriate. See § 267.50, Paragraphs 7, 8.*]

WHEREFORE, plaintiff demands judgment against defendant in the sum of $_____ [*or other relief*].

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

This form of complaint is for use by a property owner against the federal government to recover for damages to property resulting from a forest fire negligently set and permitted to escape to plaintiff's property.

[3] Contents of Complaint

Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation of the nature of the pleading as set forth in *Fed. R. Civ. P., Rule 7(a)* (permissible pleadings in federal district courts). In a complaint, the title of the action must include the names of all the parties [*Fed. R. Civ. P., Rule 10(a)*].

A pleading setting forth a claim for relief shall contain a short statement of the grounds on which federal court jurisdiction is based, a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for relief [*Fed. R. Civ. P., Rule 8(a)*]. There are no technical forms of pleading, but each averment must be simple, concise, and direct [*Fed. R. Civ. P., Rule 8(e)*].

All averments of a claim shall be made in numbered paragraphs, each containing a statement of a single set of

circumstances, and each separate claim shall be stated in a separate count [*Fed. R. Civ. P., Rule 10(b)*].

[4] Verification

Except when otherwise specifically provided by rule or statute, pleadings in federal district courts need not be verified or accompanied by affidavit [*Fed. R. Civ. P., Rule 11*].

[5] Signature

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. The signature of an attorney or party constitutes a certificate by him that he has read the pleading; that to the best of his or her knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation [*Fed. R. Civ. P., Rule 11(a)*].

If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, on motion or on its own initiative, shall impose on the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee [*Fed. R. Civ. P., Rule 11(a)*].

[6] No Trial by Jury

An action brought against the United States under *28 U.S.C. § 1346(b)* must be tried by the court without a jury [*28 U.S.C. § 2402*].

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Volume 22: Explosives thru Food-Chs. 256-268
Chapter 268 FOOD

22-268 California Forms of Pleading and Practice--Annotated 268.syn

§ 268.syn Synopsis to Chapter 268: FOOD

§ 268.01 Scope of Chapter

§ 268.02 Cross References

§§ 268.03-268.09 [Reserved]

§ 268.10 Food Defined

§ 268.11 Statutory Regulation of Food Products

[1] In General

[2] State Statutes

[3] Constitutionality of State Statutes

[4] Federal Laws; Preemption

§ 268.12 Enforcement of State Statutes

[1] In General

[2] Embargo and Seizure

[3] Condemnation

[4] Reclamation of Food

[5] Injunctions, Fines, and Civil Penalties

§ 268.13 Packaged Foods and Their Containers

[1] Strict Liability

[2] Breach of Implied Warranty

[a] In General

[b] Notice of Breach

[c] Privity Unnecessary

[d] Proof of Breach of Implied Warranty

[e] Plaintiff's Negligence Not a Defense

[3] Express Warranty

[4] Negligence

[a] In General

[b] Res Ipsa Loquitur

[5] Limitation on Liability for Inherently Unsafe Products

§ 268.14 Food Services

[1] Strict Liability

[2] Breach of Implied Warranty

[3] Negligence

§ 268.15 Donations by Food Facility to Food Bank

[1] In General

[2] Limitations on Liability Regarding Food Donations

[a] Food Facility

[b] Nonprofit Charitable Organization or Food Bank

[3] Additional Immunities

§ 268.16 Donations of Agricultural Products to Nonprofit Charitable Organization

[1] In General

[2] Liability in Connection With Agricultural Donations

[a] Limitation Regarding County Agency or Donor

[b] Liability of Nonprofit Charitable Organization

§§ 268.17-268.29 [Reserved]

§ 268.30 Related Matthew Bender Publications

§ 268.31 State Statutes

[1] Enforcement

[2] General Food Regulations

[3] Liability

§ 268.32 Administrative Regulations

§ 268.33 Decisions

[1] Breach of Express Warranty

[2] Breach of Implied Warranty

[3] Constitutionality of Statutes

[4] Defenses to Breach of Implied Warranty

[5] Negligence

[6] Police Power to Regulate Foods

[7] Strict Liability

§ 268.34 Law Reviews

§ 268.35 Text References

§§ 268.36-268.49 [Reserved]

§ 268.50 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Breach of Implied Warranty [Com. Code § 2314(1)], Negligence [Civ. Code § 1714(a)], and Strict Liability in Tort--By Purchaser-Consumer of Defective Food Product Against Manufacturer and Retailer--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Specification of Damages

[5] Verification

[6] Cross References

[7] Text References

§ 268.51 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Breach of Implied Warranty [Com. Code § 2314(1)], Negligence [Civ. Code § 1714(a)], and Strict Liability in Tort--By Diner Against Restaurant--Harmful Foreign Substance in Prepared Food

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 268.52 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Breach of an Express Warranty [Com. Code § 2313]--By Purchaser Against Manufacturer and Retailer--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

[5] Text References

§ 268.53 Allegations of Negligence [Civ. Code § 1714(a)]--Exploding Bottle

[1] FORM

[2] Use of Form

[3] Cross References

§ 268.54 Allegations of Negligence [Civ. Code § 1714(a)]--Food or Beverage Container Containing Identified Harmful Foreign Substances

[1] FORM

[2] Use of Form

[3] Cross References

§ 268.55 Allegations of Breach of Implied Warranty of Fitness for Human Consumption [Com. Code § 2314]--Identified Harmful Foreign Substance in Container of Packaged Food

[1] FORM

[2] Use of Form

[3] Cross References

§ 268.56 Allegations of Breach of Implied Warranty of Fitness for Human Consumption [Com. Code § 2314]--Unidentified Harmful Foreign Substances in Container of Packaged Food

[1] FORM

[2] Use of Form

[3] Cross References

§ 268.57 Allegation of Breach of Implied Warranty of Fitness for Human Consumption [Com. Code § 2314]--Spoiled Dish of Prepared food

[1] FORM

[2] Use of Form

[3] Cross References

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Volume 22: Explosives thru Food-Chs. 256-268
Chapter 268 FOOD
PART I. SCOPE

22-268 California Forms of Pleading and Practice--Annotated § 268.01

§ 268.01 Scope of Chapter

This chapter discusses the governmental regulation of the manufacture, sale, and distribution of food products and the theories of liability on which civil actions for damages arising from the use or consumption of defective food products may be based. Immunities from liability for certain charitable food donations are also discussed.

This chapter includes forms of complaints:

- By a purchaser against a manufacturer and a retailer for damages caused by consuming a defective, packaged food product [*see § 268.50*].

- By a diner against a restaurant for damages caused by consuming an unwholesome meal prepared by the restaurant [*see § 268.51*].

- By a purchaser against a manufacturer and retailer for damages caused by a breach of an express warranty pertaining to a food product [*see § 268.52*].

The chapter also provides alternative forms of allegations of negligence [*see §§ 268.53, 268.54*] and of breach of an implied warranty of fitness for human consumption [*see §§ 268.55 -268.57*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsAgriculture & FoodProcessing, Storage & DistributionGovernmentsAgriculture & FoodProduct QualityTortsNegligenceGeneral OverviewTortsProducts LiabilityBreach of WarrantyTortsProducts LiabilityStrict Liability

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Chapter 268 FOOD
PART I. SCOPE

22-268 California Forms of Pleading and Practice--Annotated § 268.02

§ 268.02 Cross References

The following chapters provide detailed discussion of the general causes of action that are used in products liability cases:

- For discussion of and forms for actions involving negligence, see Ch. 380, *Negligence*
- For discussion of and forms for use in actions involving products liability, see Ch. 460, *Products Liability*
- For additional discussion and forms pertaining to express and implied warranties, see Ch. 500, *Sales and Secured Transactions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceGeneral OverviewTortsProducts LiabilityGeneral Overview

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22-268 California Forms of Pleading and Practice--Annotated §§ 268.03-268.09

[Reserved]

§§ 268.03[Reserved]

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Chapter 268 FOOD
PART II. LEGAL BACKGROUND

22-268 California Forms of Pleading and Practice--Annotated § 268.10

§ 268.10 Food Defined

For purposes of state regulation, food is defined as any article used or intended for food, drink, confection, condiment, or chewing gum by human or other animal and any article that is used or intended for use as a component of any such article [*Health & Safety Code § 109935*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsAgriculture & FoodProcessing, Storage & DistributionGovernmentsAgriculture & FoodProduct Quality

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Chapter 268 FOOD
PART II. LEGAL BACKGROUND

22-268 California Forms of Pleading and Practice--Annotated § 268.11

§ 268.11 Statutory Regulation of Food Products

[1] In General

The production, distribution, and sale of food products are regulated by federal, state, and local laws. Such regulation of food products to conserve and protect the health of its citizens is a legitimate exercise of police power [*Lewis Food Co. v. State of California (1952) 110 Cal. App. 2d 759, 762, 243 P.2d 802]* .

[2] State Statutes

The Sherman Food, Drug, and Cosmetic Law (*Health & Safety Code § 109875 et seq.*) generally regulates the production and sale of food in the State of California [*see Health & Safety Code § 110425 et seq.* (general provisions applicable to foods)]. Particular groups or types of foods are covered under various provisions of the Health and Safety Code and the Food and Agriculture Code [*see, e.g., Food & Agric. Code §§ 32501 et seq.* (Milk and Milk Products Act of 1947), *40501 et seq.* (certification, processing and canning, and canned foods), *42501 et seq.* (fruit, nut, and vegetable standards)].

[3] Constitutionality of State Statutes

Unless the objectives of a state or local law under attack are clearly erroneous and without reasonable foundation, the law is to be upheld, not struck down [*Lewis Food Co. v. State of California (1952) 110 Cal. App. 2d 759, 762, 243 P.2d 802]* . To determine the constitutionality of a police power statute, a court must first look at the purposes of the regulation; secondly, it must ascertain whether the statute in question is related in a reasonable fashion to those purposes [*Tip Top Foods, Inc. v. Lyng (1972) 28 Cal. App. 3d 533, 541, 104 Cal. Rptr. 718]* . For example, recordkeeping requirements imposed on manufacturers of imitation milk products have been upheld as a constitutional exercise of police power since they serve the purpose of aiding in tracing dangerous and contaminated products if a particular batch of a product should be defectively manufactured [*Tip Top Foods, Inc. v. Lyng (1972) 28 Cal. App. 3d 533, 543, 104 Cal. Rptr. 718* ; *Coffee-Rich, Inc. v. Fielder (1972) 1972 Trade Cas. (CCH) P74186, 27 Cal. App. 3d 792, 812-813, 104 Cal. Rptr. 252]* .

Similarly, labeling and informational requirements that have been imposed on manufacturers and distributors of

products have been upheld since they are reasonably related to the statutory purposes of preventing deception and protecting public health [*see In re Bear (1932) 216 Cal. 536, 541-542, 15 P.2d 489* ; *Tip Top Foods, Inc. v. Lyng (1972) 28 Cal. App. 3d 533, 544-548, 104 Cal. Rptr. 718]* .

On the other hand, a state statute that provided that no imitation milk products could be used at any penal institution or in any state-supported charitable institution was determined to be unconstitutional since there was nothing to indicate that this provision was reasonably necessary to promote public health and safety or the general welfare of the community [*Coffee-Rich, Inc. v. Fielder (1972) 1972 Trade Cas. (CCH) P74186, 27 Cal. App. 3d 792, 811, 104 Cal. Rptr. 252* (declaring former *Food & Agric. Code § 38904* unconstitutional)].

[4] Federal Laws; Preemption

The production and sale of food and food products are also the subject of a substantial body of federal legislation. In some situations, both federal and state authorities may exercise authority over a particular type of food. For example, the California Legislature may impose more demanding standards on the quality of avocados imported into the state than the federal standards regulating the maturity of avocados that may pass in interstate commerce since the maturity of avocados is not a subject of exclusive federal regulation and the state has a legitimate interest in the protection of the public against fraud and deception in the sale of food products at the retail level [*Florida Avocado Growers v. Paul (1963) 373 U.S. 132, 142-144, 83 S. Ct. 1210, 10 L. Ed. 2d 248]* . In other situations, federal legislation will preempt state legislation, and state officials must comply with the requirements of the federal laws. For example, in the federal Wholesome Meat Act of 1967, Congress left no doubt that only its provisions are applicable to the mislabeling or misbranding of meat. The enforcement of inconsistent California laws on this subject exceeded the concurrent enforcement rights of the state and its officers [*see Jones v. Rath Packing Co. (1977) 430 U.S. 519, 530-532, 97 S. Ct. 1305, 51 L. Ed. 2d 604]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsFederal Common LawPreemptionConstitutional LawSubstantive Due ProcessScope of ProtectionGovernmentsAgriculture & FoodProcessing, Storage & DistributionGovernmentsAgriculture & FoodProduct Quality

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22-268 California Forms of Pleading and Practice--Annotated § 268.12

§ 268.12 Enforcement of State Statutes

[1] In General

The Attorney General, any district attorney, or any city attorney to whom the Department of Health reports any violation of the Sherman Food, Drug, and Cosmetic Law (*Health & Safety Code § 109875 et seq.*) can begin appropriate proceedings in the proper court [*Health & Safety Code § 111840*]. The Department of Health, however, is not required to institute proceedings if it believes that the public interest will be adequately served in the circumstances by a suitable written notice or warning [*Health & Safety Code § 111845*].

[2] Embargo and Seizure

An authorized agent of the State Department of Health who finds, or who has probable cause to believe, that any food is adulterated, misbranded, or falsely advertised or that the sale of any food would be in violation of the Sherman Food, Drug, and Cosmetic Law may affix to the food a tag or other appropriate marking. The agent gives notice that the food is, or is suspected of being, adulterated, misbranded, or falsely advertised, or that the sale of the food would be in violation of the food laws. No person may remove or dispose of the tagged food unless permission for removal or disposal has been given by an authorized agent of the Department of Public Health or by a court [*Health & Safety Code §§ 111860, 111865*]. If there is reasonable cause to believe that the embargo will be violated, an authorized agent may remove the food to a place of safekeeping [*Health & Safety Code § 111875*]. When an agent finds that the food is not in violation of the food laws, he or she will remove the tag or other markings [*Health & Safety Code § 111870*].

[3] Condemnation

An agent of the State Department of Health who finds any meat, meat products, seafoods, poultry, vegetable, fruit, or other food that is unsound or that contains any filthy, decomposed, or putrid substance, or that may be poisonous or deleterious to health or otherwise unsafe, may declare the food to be a nuisance. After this action, the department, or its authorized agent, will condemn or destroy the food or render it unsalable as human food by decharacterization [*Health & Safety Code § 111890*]. The Department of Health then will commence proceedings for condemnation of the food in the superior court that has jurisdiction over the food [*see Health & Safety Code § 111880*]. If the court finds that the food is in violation of the laws, the food must be destroyed after entry of judgment at the expense of the owner or

claimant [*Health & Safety Code § 111885*]. Any superior court of this state may condemn any food, drug, device, or cosmetic under provisions of this part. In the absence of an order, the food, drug, device, or cosmetic may be destroyed under the supervision of an authorized agent of the department who has the written consent of the owner, his or her attorney, or authorized representative [*Health & Safety Code § 111895*].

The food need not necessarily be injurious to health in order to be condemned. The authorities may condemn if the food is decomposed, and no requirement exists that the decomposition must be to such an extent that consumption of the article would be injurious to health. Also, there is not any requirement that the article be unfit for food. The laws are aimed not only at preventing the manufacture and sale of contaminated and harmful foods, but are also aimed at preventing fraud in the sale and manufacture of the food. For example, in one situation, cases of candy were condemned despite a showing that the candies were not harmful to human health. Since the label "Life Savers" stands for a certain quality and type of goods, to place the label on stale candy that has lost its flavoring was to misrepresent or misbrand the product within the meaning of the applicable code sections [*People v. 748 Cases of Life Saver Candy (1949) 94 Cal. App. 2d 599, 605-608, 211 P.2d 383* (decided under former Health & Safety Code §§ 26459, *26470(3), 26472(3), 26490, 26563*); *now see Health & Safety Code § 110745*].

[4] Reclamation of Food

If the adulteration or misbranding can be corrected by proper labeling or processing of the food or if the false advertisement can be corrected and all provisions of the law complied with, the court may order that the food be delivered to the owner or claimant to be brought into compliance. Before such delivery, all costs, fees, and expenses in connection with the embargo must be paid and a bond posted. An agent of the Department of Health will supervise the compliance procedure, and the owner must bear the expense of such supervision. The bond will be discharged when the court finds that the food is no longer in violation of the laws and that all of the expenses of the supervision have been paid [*Health & Safety Code § 111885*].

[5] Injunctions, Fines, and Civil Penalties

The Attorney General or any district attorney, on behalf of the Department of Health, may bring an action in superior court to grant a temporary or permanent injunction restraining any person from violating any provision of the Sherman Food, Drug, and Cosmetic Law. Any proceeding must conform to *Code Civ. Proc. § 525 et seq.*, dealing with permanent and temporary injunctions, except that the department will not be required to allege facts necessary to show, or tending to show, lack of adequate remedy at law or irreparable damage or loss [*Health & Safety Code § 111900*]. See generally Ch. 303, *Injunctions* for a more detailed discussion of the procedure for obtaining an injunction. In addition to injunctive relief, the court may impose as a civil penalty damages in the maximum amount of $1,000 for each day the violation is continued [*Health & Safety Code § 111915*]. On finding a violation, the court must also award to the department all reasonable costs, including for storage and testing, incurred by the department in investigating and prosecuting the action. The reasonableness of the costs is to be determined by the court [*Health & Safety Code § 111905*].

The State Department of Health is authorized to issue and serve a complaint against a person that it concludes, after reasonable examination, has violated any of the Sherman Food, Drug, and Cosmetic Law provisions or related regulations [*Health & Safety Code § 111855(a), (c)*; *see also Health & Safety Code §§ 108900, 112260, 111940 et seq.* (similar provisions for certain hazardous substances)]. If the alleged violator does not file a notice of defense, the department may issue an order setting civil penalties [*Health & Safety Code § 111855(d)*], which may not exceed $1,000 per day [*Health & Safety Code § 111855(b)*]. The order is not subject to review by any court or agency [*Health & Safety Code § 111855(d)*].

If a notice of defense is filed, a department hearing officer must conduct a hearing within 90 days after the department receives the notice of defense [*Health & Safety Code § 111855(d)*]. On finding that the person has committed

violations, the officer may impose civil penalties [*Health & Safety Code § 111855(a), (f)*].

An order setting civil penalties made after a hearing becomes effective and final on issuance, must be served on the person who was served with the complaint, and is reviewable by a petition for writ of mandate made to the superior court within 30 days after the person is served with a copy of the decision [*Health & Safety Code § 111855(f), (g)*; *see generally Code Civ. Proc. § 1094.5*]. The court must uphold the administrative decision if the decision is based on substantial evidence in the whole record. The filing of the writ will not stay any corrective action required by the decision or the accrual of any penalties assessed [*Health & Safety Code § 111855(g)*]. This remedy is in addition to, and does not supersede or limit, any other civil or criminal remedies, and the court may grant any appropriate relief within its jurisdiction [*Health & Safety Code § 111855(g), (h)*]. For general discussion of administrative hearings and mandate proceedings for judicial review of administrative decisions and forms for use in such proceedings, see Ch. 473, *Public Agency Adjudication* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCriminal Law & ProcedureSentencingFinesGovernmentsAgriculture & FoodProcessing, Storage & DistributionGovernmentsAgriculture & FoodProduct Quality

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22-268 California Forms of Pleading and Practice--Annotated § 268.13

§ 268.13 Packaged Foods and Their Containers

[1] Strict Liability

A manufacturer is strictly liable in tort if an article it places on the market and knows will be used without inspection for defects proves to have a defect that causes injury to a person [*Greenman v. Yuba Power Products, Inc. (1963) 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 377 P.2d 897* (defective power tool)]. Under the strict products liability theory, manufacturers and suppliers of defective products are liable for injuries caused by those defects, regardless of whether or not they were negligent in designing, manufacturing, or distributing the products [*Jimenez v. Superior Court (2002) 29 Cal. 4th 473, 477, 127 Cal. Rptr. 2d 614, 58 P.3d 450]* .

The strict liability theory appears to be applicable to defective food products and their containers manufactured, processed, or distributed by retailers and manufacturers. For discussion and forms of products liability generally, see Ch. 460, *Products Liability* .

Strict liability cannot be based on the presence of a substance natural to the food [*Ford v. Miller Meat Co. (1994) 28 Cal. App. 4th 1196,1201-1202, 33 Cal. Rptr. 2d 899* (bone fragment in packaged hamburger is natural substance, relying on *Mexicali Rose v. Superior Court (1992) 1 Cal. 4th 617, 4 Cal. Rptr. 2d 145, 822 P.2d 1292* , which involved restaurant food)].

Moreover, manufacturers and sellers are not strictly liable for injuries or death caused by a common consumer product intended for personal consumption if the product is inherently unsafe and, with the ordinary knowledge common to the community, is known to be unsafe by the ordinary consumer who consumes the product [*see Civ. Code § 1714.45*]. For further discussion, *see [5], below.*

For a form of complaint for damages against a manufacturer or retailer for injuries caused by defective food or food containers, based on strict liability, negligence, and breach of implied warranties, *see § 268.50*.

[2] Breach of Implied Warranty

[a] In General

Damages for injuries caused by defective food may also be sought on a theory of breach of implied warranty. Unless excluded or modified, a warranty that goods will be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind [*Com. Code § 2314(1)*]. To be merchantable, goods must be at least fit for the ordinary purposes for which such goods are used [*Com. Code § 2314(2)(c)*]. The implied warranty that the food is fit for human consumption extends to every consumer of food [*Klein v. Duchess Sandwich Co., Ltd. (1939) 14 Cal. 2d 272, 284, 93 P.2d 799* ; *Kassouf v. Lee Bros., Inc. (1962) 209 Cal. App. 2d 568, 573, 26 Cal. Rptr. 276* (both decided under former Com. Code § 1735; *now see Com. Code § 2314*)].

Examples of cases in which a breach of implied warranty was found include:

- A wrapped sandwich that contained maggots [*Klein v. Duchess Sandwich Co., Ltd. (1939) 14 Cal. 2d 272, 282, 93 P.2d 799* (decided under former Com. Code § 1735; *now see Com. Code § 2314*)].

- Salami that contained trichinae [*Vaccarezza v. Sanguinetti (1945) 71 Cal. App. 2d 687, 689-691, 163 P.2d 470* (decided under former Com. Code § 1735; *now see Com. Code § 2314*)].

- A chocolate bar that was covered with worms and webbing [*Kassouf v. Lee Bros., Inc. (1962) 209 Cal. App. 2d 568, 571-573, 26 Cal. Rptr. 276* (decided under former Com. Code § 1735; *now see Com. Code § 2314*)].

- A bottle of soda that contained a cleaning brush [*Medeiros v. Coca-Cola Bottling Co. (1943) 57 Cal. App. 2d 707, 714-715, 135 P.2d 676* (decided under former Com. Code § 1735; *now see Com. Code § 2314*)].

The implied warranty of merchantability extends to the packaging or other material that contains the food. For example, if a milk bottle is so defective that it breaks under normal handling, it is not fit for the ordinary use for which it was intended, and the delivery of such a defective bottle constitutes a breach of an implied warranty [*Vassallo v. Sabatte Land Co. (1963) 212 Cal. App. 2d 11, 16, 27 Cal. Rptr. 814* (decided under former Com. Code § 1735; *now see Com. Code § 2314*); *but see* *Trust v. Arden Farms Co. (1958) 50 Cal. 2d 217, 221-223, 324 P.2d 583* (decided under former Com. Code § 1735; *now see Com. Code § 2314*)].

Breach of implied warranty cannot, however, be based on the presence of a substance natural to the food [*Ford v. Miller Meat Co. (1994) 28 Cal. App. 4th 1196, 1201-1202, 33 Cal. Rptr. 2d 899* (bone fragment in packaged hamburger is natural substance, relying on *Mexicali Rose v. Superior Court (1992) 1 Cal. 4th 617, 4 Cal. Rptr. 2d 145, 822 P.2d 1292* , which involved restaurant food)].

Manufacturers and sellers are not liable under an implied warranty theory for injuries or death caused by a common consumer product intended for personal consumption if the product is inherently unsafe and is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community [*see Civ. Code § 1714.45*]. For further discussion, *see* [5] *below*.

For a form of complaint for damages against a manufacturer or retailer for injuries caused by defective food or food containers, based on strict liability, negligence, and breach of implied warranties, see *§ 268.50*.

For further general discussion of liability for breach of implied warranties, see Ch. 460, *Products Liability* , and Ch. 500, *Sales and Secured Transactions* .

[b] Notice of Breach

When goods have been accepted, the buyer must, within a reasonable time after he or she discovers or should have discovered any breach of an implied warranty, notify the seller of the breach or be barred from any remedy [*Com. Code § 2607(3)(A)*]. Notwithstanding the arguments that the purpose of notice in food actions is to afford the seller an opportunity to make good the defective article and that this cannot be done if the food has been consumed, the requirement of notice has been applied to the sale of foods on the theory that the purpose of notice is to advise the seller that he must meet a claim for damages. The law requires that the seller have an early warning [*Whitfield v. Jessup (1948) 31 Cal. 2d 826, 830, 193 P.2d 1* (decided under former Com. Code § 1735; *now see Com. Code § 2314*)].

The question of what constitutes a reasonable time under *Com. Code § 2607(3)(A)* for the giving of notice is usually a question of fact for the jury [*Los Angeles Nut House v. Holiday Hardware Corp. (9th Cir. 1987) 825 F.2d 1351, 1354* (applying California law)].

[c] Privity Unnecessary

Privity of contract is not necessary in sales of food since the implied warranty of fitness is intended not only for the benefit of the immediate buyer but also for the benefit of the ultimate consumer. To allow recovery by a third person who consumed unwholesome food purchased by another would not impose a greater burden either on the manufacturer or on the immediate seller of the food since the implied warranty that the food is for the purpose for which it was intended, human consumption, is extended to every consumer [*Klein v. Duchess Sandwich Co., Ltd. (1939) 14 Cal. 2d 272, 284, 93 P.2d 799* (decided under former Com. Code § 1735; *now see Com. Code § 2314*)].

[d] Proof of Breach of Implied Warranty

To establish a breach of implied warranty, the preponderance of the evidence must show that the product was defective when it left the defendant and was sold to the plaintiff [*Trust v. Arden Farms Co. (1958) 50 Cal. 2d 217, 223, 324 P.2d 583* ; *Tidlund v. Seven Up Bottling Co. (1957) 154 Cal. App. 2d 663, 666, 316 P.2d 656]* . Thus, if a plaintiff fails to show that the condition of a defective container did not change after it left the possession of the manufacturer, recovery is denied [*Trust v. Arden Farms Co. (1958) 50 Cal. 2d 217, 221-223, 324 P.2d 583* (milk bottle handled at least once during three days it sat in plaintiff's refrigerator and was accessible to three children in house)].

[e] Plaintiff's Negligence Not a Defense

The breach of an implied warranty imposes an absolute liability on the manufacturer and seller, regardless of any negligent actions by a plaintiff. If the negligence of the plaintiff was a factor instead of having an implied affirmation that the food is reasonably fit for human consumption, plaintiff will have an affirmation only that it was fit to be consumed in the exercise of ordinary care [*Kassouf v. Lee Bros., Inc. (1962) 209 Cal. App. 2d 568, 572-573, 26 Cal. Rptr. 276* (decided under former Com. Code § 1735; *now see Com. Code § 2314*)].

[3] Express Warranty

Any affirmation of fact or promise made by the seller to the buyer that relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise [*Com. Code § 2313(1)(a)*]. Similarly, any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods will conform to the description [*Com. Code § 2313(1)(b)*].

Any representation on which a buyer relies as to special quality made by a seller to induce a sale is a warranty, especially if inspection by the buyer is not possible and the seller knows the quality of the goods and the buyer does not. Generally, the courts will construe liberally in favor of the buyer any language used by the seller in making affirmations respecting the quality of his goods and to enlarge the responsibility of the seller to construe every affirmation by him or her to be a warranty if such construction is at all reasonable [*see* *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 112-113, 120 Cal. Rptr. 681, 534 P.2d 377* (statement that game contained completely safe ball that would not hit player); *Lane*

v. C. A. Swanson & Sons (1955) 130 Cal. App. 2d 210, 214-215, 278 P.2d 723 (can label stated contents were "boned chicken")].

For a form of complaint for damages against a manufacturer or retailer for injuries caused by breach of an express warranty pertaining to a food product, see *§ 268.52*.

For further general discussion of liability for breach of express warranties, see Ch. 460, *Products Liability* , and Ch. 500, *Sales and Secured Transactions* .

[4] Negligence

[a] In General

Damages for injuries caused by defective food or defective food containers may also be predicated on a theory of negligence [*see generally Civ. Code § 1714(a)*]. Examples of cases in which damages for negligence were upheld include a prepared and wrapped sandwich that contained maggots [*Klein v. Duchess Sandwich Co., Ltd. (1939) 14 Cal. 2d 272, 275-276, 93 P.2d 799]* and a soda bottle that contained a decayed mouse [*Moss v. Coca Cola Bottling Co. (1951) 103 Cal. App. 2d 380, 382, 229 P.2d 802]* . Note, however, that manufacturers and sellers are not liable on a negligence theory for injuries or death caused by a common consumer product intended for personal consumption if the product is inherently unsafe and is known to be unsafe by the ordinary consumer who consumes the product, with the ordinary knowledge common to the community [*see Civ. Code § 1714.45*]. For further discussion, *see [5] below*.

For a form of complaint for damages against a manufacturer or retailer for injuries caused by defective food or food containers, based on strict liability, negligence, and breach of implied warranties, see *§ 268.50*.

For further general discussion of liability for negligence, see Ch. 460, *Products Liability* , and Ch. 380, *Negligence* .

[b] Res Ipsa Loquitur

The doctrine of res ipsa loquitur, a presumption affecting the burden of producing evidence [*Evid. Code § 646*], has been applied to defective food and container actions.

For example, after showing that defendant bottling company had exclusive control of the charging and inspection of bottles, plaintiffs have taken advantage of res ipsa loquitur and recovered damages for injuries suffered when a soda bottle exploded in the plaintiff's hand [*Escola v. Coca Cola Bottling Co. (1944) 24 Cal. 2d 453, 461, 150 P.2d 436]* and when a plaintiff obtained a soft drink from a vending machine that contained a dead mouse [*Paul v. Rodgers Bottling Co. (1960) 183 Cal. App. 2d 680, 685, 6 Cal. Rptr. 867]* .

A plaintiff might be able to rely on res ipsa loquitur if a bone fragment in ground meat were of a size that could not remain after the grinding process, but if the bone particle is so tiny it could come through the grinding process, the presence of the fragment cannot be attributed to lack of due care, and negligence can not be established [*Ford v. Miller Meat Co. (1994) 28 Cal. App. 4th 1196, 1203, 33 Cal. Rptr. 2d 899* (bone fragment in packaged hamburger too small to be basis of liability)].

For a detailed discussion of the doctrine of res ipsa loquitur, see Ch. 380, *Negligence* .

[5] Limitation on Liability for Inherently Unsafe Products

A manufacturer or seller is not liable in a products liability action for injuries or death caused by a common consumer product intended for personal consumption if the product is inherently unsafe and is known to be unsafe by the ordinary consumer who consumes the product, with the ordinary knowledge common to the community [*Civ. Code § 1714.45(a)*

]. "Common consumer product" means items such as sugar, castor oil, alcohol, tobacco, or butter that are identified in the Restatement (Second) of Torts § 402A, comment i [*Civ. Code § 1714.45(a)(2)*].

The statutory limitation on liability for inherently unsafe products bars actions premised on inherently unsafe qualities of some foods (for example, to recover damages for illnesses caused by high cholestterol), but not actions for injuries caused by harmful foreign substances found in a containor of food. In addition, the limitation does not exempt tobacco manufacturers and their successors from liability for the manufacture and sale of tobacco products [*Civ Code § 1714.45(g)*]. For further discussion, see Ch. 460, *Products Liability* , and J. Cotchett & R. Cartwright, eds., California Products Liability Actions, Ch.2 (Matthew Bender rev. ed.)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSales of GoodsWarrantiesExpress WarrantiesContracts LawSales of GoodsWarrantiesMerchantabilityTortsNegligenceGeneral OverviewTortsNegligenceProofRes Ipsa LoquiturEvidentiary EffectTortsProducts LiabilityStrict Liability

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§ 268.14 Food Services

[1] Strict Liability

A plaintiff has no cause of action in strict liability if the injury-producing substance is natural to the preparation of the food served; in such a situation, it can be said that the substance was reasonably expected by its very nature, and the food cannot be determined defective [*Mexicali Rose v. Superior Court (1992) 1 Cal. 4th 617, 630-631, 4 Cal. Rptr. 2d 145, 822 P.2d 1292* (chicken bone in chicken enchilada)]. However, if the injury-causing substance is foreign to the food served, a cause of action in strict liability can be stated, and the trier of fact will determine whether the substance (1) could be reasonably expected by the average consumer, and (2) rendered the food defective [*Mexicali Rose v. Superior Court (1992) 1 Cal. 4th 617, 631, 4 Cal. Rptr. 2d 145, 822 P.2d 1292]* .

Strict liability for failure to warn also applies to restaurants in the context of food allergies. A restaurant may be strictly liable for failing to warn customers about additives in the food served. The product added, which itself may not be defective, may be defective because of inadequate warnings [*Livingston v. Marie Callenders, Inc. (1999) 72 Cal. App. 4th 830, 838, 85 Cal. Rptr. 2d 528]* . In that situation, a defendant may be liable if its product contained an ingredient to which a substantial number of the population is allergic, the ingredient is one whose danger is not generally known, or if known is not one which the customer would reasonably expect to find in the product, and the defendant knew or should have known that the ingredient was present and was dangerous [*Livingston v. Marie Callenders, Inc. (1999) 72 Cal. App. 4th 830, 839, 85 Cal. Rptr. 2d 528]* .

For a form of complaint for damages against a restaurant or other eating establishment for injuries caused by serving defective food, see *§ 268.51*.

[2] Breach of Implied Warranty

The serving for value of food or drink to be consumed either on the premises or elsewhere is a sale subject to the Uniform Commercial Code [*Com. Code § 2314(1)*]. As a necessary incident to such a sale, there exists an implied warranty that imposes on the restaurant operator the obligation to furnish food reasonably fit for human consumption. If a patron suffers injury as a result of eating food that is not reasonably fit for human consumption, the restaurant operator is liable for damages [*Mix v. Ingersoll Candy Co. (1936) 6 Cal. 2d 674, 680, 59 P.2d 144* (decided under former Com.

Code § 1735; *now see Com. Code § 2314*)]. For example, it has been deemed reversible error for a trial court to deny plaintiff the right to raise breach of an implied warranty as a theory of liability when glass was found in her meal [*Goetten v. Owl Drug Co. (1936) 6 Cal. 2d 683, 685-688, 59 P.2d 142* (decided under former Com. Code § 1735; *now see Com. Code § 2314*)].

Liability under a theory of implied warranty is precluded if the injury-producing substance is natural to the preparation of the food served; in such a situation, it can be said that the substance was reasonably expected by its very nature, and the food cannot be determined unfit [*Mexicali Rose v. Superior Court (1992) 1 Cal. 4th 617, 630-631, 4 Cal. Rptr. 2d 145, 822 P.2d 1292* (chicken bones in chicken enchilada); *see Mix v. Ingersoll Candy Co. (1936) 6 Cal. 2d 674, 682, 59 P.2d 144* (bones in meat pie; decided under former Com. Code § 1735: *now see Com. Code § 2314*); *Lamb v. Hill (1952) 112 Cal. App. 2d 41, 42, 245 P.2d 316* (decided under former Com. Code § 1735; *now see Com. Code § 2314*)]. However, if the injury-causing substance is foreign to the food served, a cause of action for breach of the implied warranty can be stated, and the trier of fact will determine whether the substance (1) could be reasonably expected by the average consumer and (2) rendered the food unfit [*Mexicali Rose v. Superior Court (1992) 1 Cal. 4th 617, 631, 4 Cal. Rptr. 2d 145, 822 P.2d 1292]* .

The notice requirements involved in the implied warranty theory of recovery [*see Com. Code § 2607(3)(A)*] must be met if an action is commenced for damages resulting from defective food service [*see discussion under § 268.13[2][b], above*].

For a form of complaint for damages against a restaurant or other eating establishment for injuries caused by breach of implied warranty in connection with food service, see *§ 268.51*.

[3] Negligence

Restaurants have also been held liable for damages caused by negligent food preparation that resulted in the service of unwholesome or injurious foods [*see, e.g., Goetten v. Owl Drug Co. (1936) 6 Cal. 2d 683, 687, 59 P.2d 142* ; *Mix v. Ingersoll Candy Co. (1936) 6 Cal. 2d 674, 682-683, 59 P.2d 144* ; *see generally Civ. Code § 1714(a)*]. A plaintiff injured by a substance in his or her food, whether the substance is natural or foreign to the food served, may recover under a negligence theory if the presence of the substance was due to a restaurant operator's failure to exercise due care in food preparation [*Mexicali Rose v. Superior Court (1992) 1 Cal. 4th 617, 632-633, 4 Cal. Rptr. 2d 145, 822 P.2d 1292* (overruling *Mix v. Ingersoll Candy Co. (1936) 6 Cal. 2d 674, 59 P.2d 144* , to the extent that it precluded negligence cause of action for injury caused by substances natural to preparation of food served)]. For discussion and forms concerning negligence, see Ch. 380, *Negligence* .

For a form of complaint for damages against a restaurant or other eating establishment for injuries caused by negligence in the preparation or service of food, see *§ 268.51*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSales of GoodsWarrantiesMerchantabilityTortsNegligenceActionsGeneral OverviewTortsProducts LiabilityBreach of WarrantyTortsProducts LiabilityStrict Liability

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§ 268.15 Donations by Food Facility to Food Bank

[1] In General

Any food facility may donate, free of charge, food to a food bank or to any other nonprofit charitable organization for distribution to persons free of charge [*Health & Safety Code § 114432*; *see Health & Safety Code § 113841*; *Rev. & Tax. Code § 214* (nonprofit charitable organization defined)]. For the purposes of *Health & Safety Code § 114432 et seq.*, "food bank" means a surplus food collection and distribution system operated and established to assist in bringing donated food to nonprofit charitable organizations and to individuals for the purpose of reducing hunger and meeting nutritional needs [*Health & Safety Code § 113783*].

[2] Limitations on Liability Regarding Food Donations

[a] Food Facility

No food facility that donates food as permitted by *Health & Safety Code § 114432 et seq.* is subject to civil or criminal liability or penalty for violation of any laws, regulations, or ordinances regulating the labeling or packaging of the donated product or, with respect to any other laws, regulations, or ordinances, for a violation occurring after the time of the donation [*Health & Safety Code § 114433*].

No food facility that donates any food that is fit for human consumption at the time it was donated to a nonprofit charitable organization or a food bank is liable for any damage or injury resulting from the consumption of the donated food, except with regard to injury resulting from negligence or a willful act in the preparation or handling of donated food [*Civ. Code § 1714.25(a)*]. The immunity from civil liability under *Civ. Code § 1714.25(a)* applies regardless of compliance with any laws, regulations, or ordinances regulating the packaging or labeling of food and regardless of compliance with any laws, regulations, or ordinances regulating the storage or handling of the food by the donee after the donation of the food [*Civ. Code § 1714.25(a)*].

[b] Nonprofit Charitable Organization or Food Bank

A nonprofit charitable organization (as defined in *Health & Safety Code § 113841*) or a food bank (as defined in *Health*

& Safety Code § 113783) that, in good faith, receives and distributes without charge food that is fit for human consumption at the time it was distributed is not liable for an injury or death due to the food unless the injury or death is a direct result of the negligence, recklessness, or intentional misconduct of the organization [*Civ. Code § 1714.25(b)* (limitation), *(c)* (definitions)].

[3] Additional Immunities

The immunities provided in *Health & Safety Code § 114432 et seq.* and by *Civ. Code § 1714.25* are in addition to any other immunities provided by law, including those provided by *Food & Agric. Code §§ 58501-58509* [*Health & Safety Code § 114434*; *see Food & Agric. Code § 58505, discussed under § 268.16[2][a] below*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewGovernmentsAgriculture & FoodProcessing, Storage & DistributionGovernmentsAgriculture & FoodProduct QualityTortsNegligenceDefensesPrivate ImmunitiesGeneral OverviewTortsNegligenceDefensesPrivate ImmunitiesCharitable Immunity

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§ 268.16 Donations of Agricultural Products to Nonprofit Charitable Organization

[1] In General

Any person engaged in the business of processing, distributing, or selling any agricultural product may donate, free of charge, any product that is in a condition that it may be used as food for human beings, to a nonprofit charitable organization within California [*Food & Agric. Code § 58502(a)*; *see Food & Agric. Code § 58501(c)*; *Rev. & Tax. Code § 214* (nonprofit charitable organization defined)]. An "agricultural product" is any fowl, animal, vegetable, or other stuff, product, or article that is customary food, or that is proper for food, for human beings [*Food & Agric. Code § 58501(a)*].

[2] Liability in Connection With Agricultural Donations

[a] Limitation Regarding County Agency or Donor

No county or county agency established pursuant to the California Food Bank Act of 1984 (*Food & Agric. Code §§ 58501-58509*) and no person who donates any agricultural product is liable for any injury, including, but not limited to, injury resulting from the ingesting of the product, as a result of any act, or the omission of any act, in connection with donating any product pursuant to the Act, except with regard to any injury resulting from gross negligence or a willful act [*Food & Agric. Code § 58505*].

[b] Liability of Nonprofit Charitable Organization

Nothing in the California Food Bank Act of 1984 (*Food & Agric. Code §§ 58501-58509*) relieves any nonprofit charitable organization from any liability for any injury, including, but not limited to, injury resulting from the ingesting of the agricultural product, as a result of receiving, accepting, gathering, or removing any agriculatural product donated under the Act [*Food & Agric. Code § 58506*].

Legal Topics:

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

Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewGovernmentsAgriculture & FoodProcessing, Storage & DistributionGovernmentsAgriculture & FoodProduct QualityTortsNegligenceDefensesPrivate ImmunitiesGeneral OverviewTortsNegligenceDefensesPrivate ImmunitiesCharitable Immunity

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[Reserved]

§§ 268.17[Reserved]

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§ 268.30 Related Matthew Bender Publications

J. Cotchett & R. Cartwright, eds., California Products Liability Actions (Matthew Bender rev. ed.)

Legal Topics:

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

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§ 268.31 State Statutes

[1] Enforcement

Department of Health as empowered to issue regulations providing for issuance of permits to manufacturers, processors, or packers of class of food that may be injurious to health. *Health & Safety Code § 110430*

Enforcement of food laws. *Health & Safety Code § 111840 et seq.*

Embargo and seizure of foods. *Health & Safety Code § 111860 et seq.*

Condemnation of unsafe food. *Health & Safety Code §§ 111890, 111895*

Injunctions and fines. *Health & Safety Code §§ 111900, 111915*

[2] General Food Regulations

Milk and Milk Products Act of 1947. *Food & Agric. Code § 32501 et seq.*

Certification, processing and canning, and canned foods. *Food & Agric. Code § 40501 et seq.*

Fruit, nut, and vegetable standards. *Food & Agric. Code § 42501 et seq.*

California Food Bank Act of 1984, regarding donations of agricultural products. *Food & Agric. Code §§ 58501-58509*

Sherman Food, Drug, and Cosmetic Law. *Health & Safety Code § 109875 et seq.*

Regulation of foods generally. *Health & Safety Code § 110425 et seq.*

Registration of persons manufacturing, packing, or holding processed food with State Department of Health Services. *Health & Safety Code § 110460 et seq.*

Donations by food facility to food bank. *Health & Safety Code § 114432 et seq.*

[3] Liability

Negligence defined. *Civ. Code § 1714(a)*

Limitation on liability regarding food donated by food facility. *Civ. Code § 1714.25*; *Health & Safety Code §§ 114433, 114434*

Limitation on liability regarding inherently unsafe common consumer products for personal consumption. *Civ. Code § 1714.45*

Express warranties defined. *Com. Code § 2313(1)(a),(b)*

Service of food as covered by the implied warranty of merchantability. *Com. Code § 2314(1)*

Implied warranty of merchantability. *Com. Code § 2314(1)*

Merchantability as fitness for intended purpose. *Com. Code § 2314(2)(c)*

Res ipsa loquitur. *Evid. Code § 646*

Limitations on liability regarding donations of agricultural products. *Food & Agric. Code § 58505*

Liability of nonprofit charitable organization regarding donated agricultural products. *Food & Agric. Code § 58506*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 268.32 Administrative Regulations

Food and agricultural regulations. *3 Cal. Code Reg. § 1 et seq.*

Food regulations. *17 Cal. Code Reg. § 10750 et seq.*

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§ 268.33 Decisions

[1] Breach of Express Warranty

Express warranty given on can label and in newspaper advertisement as breached when can of "boned chicken meat" found to contain bones. *Lane v. C. A. Swanson & Sons (1955) 130 Cal. App. 2d 210, 214-215, 278 P.2d 723*

Label on can coupled with newspaper advertisement as constituting express warranty. *Lane v. C. A. Swanson & Sons (1955) 130 Cal. App. 2d 210, 214-215, 278 P.2d 723* ; *see* *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 112 n.7, 120 Cal. Rptr. 681, 534 P.2d 377* (citing with approval *Lane v. C.A. Swanson & Sons* warranty liability standard in product liability claim involving golf-training device)

[2] Breach of Implied Warranty

Implied warranty of fitness as extending to sale of food by restaurant or soda fountain. *Vogel v. Thrifty Drug Co. (1954) 43 Cal. 2d 184, 187, 272 P.2d 1* (glass in dish of ice cream served at soda fountain; decided under former Com. Code § 1735; *now see Com. Code § 2314*)

Notice requirement imposed in breach of implied warranty cases as notifying seller that seller must meet a claim for damages. *Whitfield v. Jessup (1948) 31 Cal. 2d 826, 830, 193 P.2d 1* (decided under former Com. Code § 1735; *now see Com. Code § 2314*)

Implied warranty fitness for ultimate consumer. *Klein v. Duchess Sandwich Co., Ltd. (1939) 14 Cal. 2d 272, 284, 93 P.2d 799* (decided under former Com. Code § 1735; *now see Com. Code § 2314*)

Privity of contract as unnecessary to maintain action for breach of implied warranty. *Klein v. Duchess Sandwich Co., Ltd. (1939) 14 Cal. 2d 272, 284, 93 P.2d 799* (decided under former Com. Code § 1735; *now see Com. Code § 2314*)

Breach of implied warranty for food unfit for human consumption. *Klein v. Duchess Sandwich Co., Ltd. (1939) 14*

Cal. 2d 272, 282, 93 P.2d 799 (sandwich with maggots); *Kassouf v. Lee Bros., Inc. (1962) 209 Cal. App. 2d 568, 571-573, 26 Cal. Rptr. 276* (worms and webbing on candy bar); *Vaccarezza v. Sanguinetti (1945) 71 Cal. App. 2d 687, 689-691* (salami with trichinae); *Medeiros v. Coca-Cola Bottling Co. (1943) 57 Cal. App. 2d 707, 714-715, 135 P.2d 676* (cleaning brush in a soda bottle) (all of the foregoing cases decided under former Com. Code § 1735; *now see Com. Code § 2314*)

Persons who maintain restaurant as warranting that food is wholesome and free from substances dangerous to humans. *Goetten v. Owl Drug Co. (1936) 6 Cal. 2d 683, 687, 59 P.2d 142* (decided under former Com. Code § 1735; *now see Com. Code § 2314*)

Implied warranty as imposing obligation on restaurant keeper that food is "reasonably fit" for human consumption. *Mix v. Ingersoll Candy Co. (1936) 6 Cal. 2d 674, 680, 59 P.2d 144* (decided under former Com. Code § 1735; *now see Com. Code § 2314*)

Breach of implied warranty for defective milk bottle. *Vassallo v. Sabatte Land Co. (1963) 212 Cal. App. 2d 11, 16, 27 Cal. Rptr. 814* (decided under former Com. Code § 1735; *now see Com. Code § 2314*)

Defendant bottling company as not liable for breach of implied warranty when plaintiff failed to prove that soda was unfit for consumption when sold to plaintiff and that, as a result of drinking contents of bottle, plaintiff sustained injuries. *Tidlund v. Seven Up Bottling Co. (1957) 154 Cal. App. 2d 663, 666-667, 316 P.2d 656*

No requirement of privity between ultimate consumer and manufacturer. *Vaccarezza v. Sanguinetti (1945) 71 Cal. App. 2d 687, 698, 163 P.2d 470* (decided under former Com. Code § 1735; *now see Com. Code § 2314*)

[3] Constitutionality of Statutes

Recordkeeping requirements imposed on manufacturers and distributors as constitutional. *Tip Top Foods, Inc. v. Lyng (1972) 28 Cal. App. 3d 533, 543, 104 Cal. Rptr. 718* ; *Coffee-Rich, Inc. v. Fielder (1972) 1972 Trade Cas. (CCH) P74186, 27 Cal. App. 3d 792, 812-813, 104 Cal. Rptr. 252*

Labeling and informational requirements imposed on products that resemble milk as not unconstitutional since they are reasonably related to statutory purposes of preventing deception and protecting public health. *Tip Top Foods, Inc. v. Lyng (1972) 28 Cal. App. 3d 533, 544-548, 104 Cal. Rptr. 718*

Labeling and informational requirements imposed on manufacturers as constitutional. *Tip Top Foods, Inc. v. Lyng (1972) 28 Cal. App. 3d 533, 544-548, 104 Cal. Rptr. 718* (imitation milk products); *Lewis Food Co. v. State of California (1952) 110 Cal. App. 2d 759, 762, 243 P.2d 802* (labeling of horse meat); *In re Bear (1932) 216 Cal. 536, 541-542, 15 P.2d 489* (labeling of imported eggs)

Determining constitutionality of police-power statute as accomplished by looking at purpose of regulation and ascertaining whether the statute is reasonably related to the purpose. *Tip Top Foods, Inc. v. Lyng (1972) 28 Cal. App. 3d 533, 541, 104 Cal. Rptr. 718*

Labeling requirements imposed on imitation milk products as constitutional. *Coffee-Rich, Inc. v. Fielder (1972) 1972 Trade Cas. (CCH) P74186, 27 Cal. App. 3d 792, 813-817, 104 Cal. Rptr. 252*

Former *Agric. Code § 38904*, prohibiting penal and charitable institutions from using imitation milk products, as unconstitutional since no indication the provision is reasonably necessary to promote public health, safety, or the general welfare of the community. *Coffee-Rich, Inc. v. Fielder (1972) 1972 Trade Cas. (CCH) P74186, 27 Cal. App.*

3d 792, 811, 104 Cal. Rptr. 252

Police power as not including the right to tell the public or any part of the public which of the products that do conform to the Agricultural Code may be consumed. *Coffee-Rich, Inc. v. Fielder (1972) 1972 Trade Cas. (CCH) P74186, 27 Cal. App. 3d 792, 811, 104 Cal. Rptr. 252*

[4] Defenses to Breach of Implied Warranty

Presence of harmful substance that is natural to type of food, such as chicken bone in chicken enchilada or chicken pie, as not breach of implied warranty. *Mexicali Rose v. Superior Court (1992) 1 Cal. 4th 617, 630-631, 4 Cal. Rptr. 2d 145, 822 P.2d 1292* ; *Mix v. Ingersoll Candy Co. (1936) 6 Cal. 2d 674, 682, 59 P.2d 144* (decided under former Com. Code § 1735; *now see Com. Code § 2314*)

Defense of loss of control as successfully asserted by seller when plaintiff failed to show that product was defective when it left defendant. *Trust v. Arden Farms Co. (1958) 50 Cal. 2d 217, 223, 324 P.2d 583* (defective milk bottle); *Tidlund v. Seven Up Bottling Co. (1957) 154 Cal. App. 2d 663, 666, 316 P.2d 656* (soda containing insects shown to have been left open on table for short period of time)

Purchaser as not responsible for inspection of packaged foods. *Kassouf v. Lee Bros., Inc. (1962) 209 Cal. App. 2d 568, 571, 26 Cal. Rptr. 276*

[5] Negligence

Restaurant operator's duty to exercise due care in the preparation and service of food. *Mexicali Rose v. Superior Court (1992) 1 Cal. 4th 617, 632, 4 Cal. Rptr. 2d 145, 822 P.2d 1292* ; *Mix v. Ingersoll Candy Co. (1936) 6 Cal. 2d 674, 682-683, 59 P.2d 144*

Presence of natural substance in food that causes injury (chicken bone in chicken enchilada) may give rise to negligence action, even though presence of such natural substances does not give rise to strict liability or breach of implied warranty of merchantibility or fitness claims. *Mexicali Rose v. Superior Court (1992) 1 Cal. 4th 617, 632-633, 4 Cal. Rptr. 2d 145, 822 P.2d 1292*

Res ipsa loquitur as not applicable when plaintiff failed to prove that milk bottle was not mishandled or that its condition had not changed since it left possession of defendant. *Trust v. Arden Farms Co. (1958) 50 Cal. 2d 217, 220-222, 324 P.2d 583*

Res ipsa loquitur applied to food cases. *Escola v. Coca Cola Bottling Co. (1944) 24 Cal. 2d 453, 461, 150 P.2d 436* (exploding soda bottle); *Paul v. Rodgers Bottling Co. (1960) 183 Cal. App. 2d 680, 685, 6 Cal. Rptr. 867* (dead mouse in soda bottle)

Negligence of manufacturer and seller of foods. *Klein v. Duchess Sandwich Co., Ltd. (1939) 14 Cal. 2d 272, 275-276, 93 P.2d 799* (maggots in sandwich); *Moss v. Coca Cola Bottling Co. (1951) 103 Cal. App. 2d 380, 382,229 P.2d 802* (dead mouse in soda bottle); *Medeiros v. Coca-Cola Bottling Co. (1943) 57 Cal. App. 2d 707, 714-715, 135 P.2d 676* (brush in soda bottle)

Negligence of providers of food services. *Goetten v. Owl Drug Co. (1936) 6 Cal. 2d 683, 687, 59 P.2d 142*

Due care as not requiring restaurant owner to serve perfect chicken pie from which all bones have been eliminated. *Lamb v. Hill (1952) 112 Cal. App. 2d 41, 42, 245 P.2d 316*

[6] Police Power to Regulate Foods

Fundamental principles of due process as entitling dairy to trial to review order of administrative officer made without notice or hearing under regulation that makes no provision for administrative review. *Alta-Dena Dairy v. County of San Diego (1969) 271 Cal. App. 2d 66, 77, 76 Cal. Rptr. 510*

Writ of mandate as proper remedy for dairy seeking relief from order by local health officer without reasonable cause. *Alta-Dena Dairy v. County of San Diego (1969) 271 Cal. App. 2d 66, 72-73, 76 Cal. Rptr. 510*

Writ of mandate as granted to dairy when local health officer had no reasonable cause to conclude milk contained communicable disease or danger to human health. *Alta-Dena Dairy v. County of San Diego (1969) 271 Cal. App. 2d 66, 72-73, 76 Cal. Rptr. 510*

Tests of portion of 2,624 30-pound cans of frozen eggs showing them to contain decomposed substances as supporting conclusion in proceeding to condemn and destroy quarantined eggs that all cans were adulterated within meaning of former *Health & Safety Code §§ 26470* and *26580* (*now see Health & Safety Code §§ 110420, 111015*). *People v. 2,624 Thirty-Pound Cans of Frozen Eggs (1964) 224 Cal. App. 2d 134, 136, 36 Cal. Rptr. 427*

Universal regulation of food products as legitimate exercise of police power. *Lewis Food Co. v. State of California (1952) 110 Cal. App. 2d 759, 762, 243 P.2d 802*

State statute as upheld unless objective clearly erroneous and without reasonable foundation. *Lewis Food Co. v. State of California (1952) 110 Cal. App. 2d 759, 762, 243 P.2d 802*

State, federal, and municipal inspection of meat as designed to protect men, women, and children from infection. *Lewis Food Co. v. State of California (1952) 110 Cal. App. 2d 759, 762, 243 P.2d 802*

Placing label "Life Saver" on stale candy as misrepresentation or misbranding since label stands for certain quality and type of goods. *People v. 748 Cases of Life Saver Candy (1949) 94 Cal. App. 2d 599, 607, 211 P.2d 383*

Decomposed food as subject to condemnation though not injurious to health. *People v. 748 Cases of Life Saver Candy (1949) 94 Cal. App. 2d 599, 605, 211 P.2d 383*

Condemnation of decomposed candy as permitted to prevent fraud in sale and manufacture. *People v. 748 Cases of Life Saver Candy (1949) 94 Cal. App. 2d 599, 608, 211 P.2d 383*

[7] Strict Liability

Elements necessary to show manufacturer's strict liability. *Greenman v. Yuba Power Products, Inc. (1963) 59 Cal. 2d 57, 64, 27 Cal. Rptr. 697, 377 P.2d 897* (defective power tool)

Defendant may be strictly liable to plaintiff who has allergic reaction to ingredient in product. *Livingston v. Marie Callenders, Inc. (1999) 72 Cal. App. 4th 830, 839, 85 Cal. Rptr. 2d 528*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSales of GoodsWarrantiesExpress WarrantiesContracts LawSales of GoodsWarrantiesMerchantabilityGovernmentsAgriculture & FoodProcessing, Storage &

DistributionGovernmentsAgriculture & FoodProduct QualityTortsNegligenceActionsGeneral Overview

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§ 268.34 Law Reviews

Depew and Willing, *Developments in Food, Drug and Cosmetic Law, 24 Bus. Law. 967 (1969)*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsAgriculture & FoodGeneral OverviewGovernmentsAgriculture & FoodFederal Food, Drug & Cosmetic ActGovernmentsAgriculture & FoodProcessing, Storage & DistributionGovernmentsAgriculture & FoodProduct Quality

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§ 268.35 Text References

Witkin, Summary of California Law, vol. 3, *Sales*, §§ 81-101, 104-106, 191-192; vol. 6 *Torts*, § 956 (9th ed. 1987, 1988)

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsAgriculture & FoodProcessing, Storage & DistributionGovernmentsAgriculture & FoodProduct Quality

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[Reserved]

§§ 268.36[Reserved]

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Volume 22: Explosives thru Food-Chs. 256-268
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PART IV. FORM

22-268 California Forms of Pleading and Practice--Annotated § 268.50

§ 268.50 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Breach of Implied Warranty [Com. Code § 2314(1)], Negligence [Civ. Code § 1714(a)], and Strict Liability in Tort--By Purchaser-Consumer of Defective Food Product Against Manufacturer and Retailer--General Form

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Breach of Implied Warranty [Com. Code § 2314(1)], Negligence [Civ. Code § 1714(a)], and Strict Liability in Tort--By Purchaser-Consumer of Defective Food Product Against Manufacturer and Retailer--General Form
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*], [and DOES I	)	(Breach of Implied Warranty, Negligence, and Strict
through _____,]	)	Liability)
Defendants.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

Plaintiff alleges:

FIRST COUNT
(Breach of Warranty)

1. Defendant _____ [*name of manufacturer*] is, and at all times herein mentioned was, _____ [a corporation organized and existing under the laws of the State of California *or* a corporation organized and existing under the laws of the State of _____ and authorized to do business and doing business in California], with its principal place of business in _____ [*city*], _____ County, California.

2. Defendant _____ [*name of manufacturer*] is, and at all times herein mentioned was, engaged in the _____ [*specify activity, e.g.,* manufacture *or* processing *or* canning *or* selling] of foods for sale to and use by members of the general public, and plaintiff is informed and believes, and thereon alleges, that, as part of its business, defendant _____ [*specify, e.g.,* manufactured *or* processed *or* canned *or* sold] the _____ [*specify defective or harmful food, e.g.,* can of fruit] hereinafter referred to.

3. Defendant _____ [*name of retailer*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California, with its principal place of business at _____ [*address*], _____ [*city*], California.

4. Defendant _____ [*name of retailer*] is, and at all times herein mentioned was, engaged in the retail business of selling foods for human consumption by the general public.

[5. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that the harm to plaintiff as herein alleged was proximately caused by such conduct of defendants.)]

6. At all times herein mentioned, defendants, and each of them, intended that the _____ [*specify type of food, e.g.,* can of fruit] distributed by them was to be used for human consumption.

7. On or about _____ [*date*], plaintiff bought from defendant _____ [*name of retailer*] at its store located at _____ [*address*] the _____ [*specify type of food, e.g.,* can of fruit] and paid the required purchase price. The _____ [*specify, e.g.,* can] bore the label of, and had been manufactured and processed by, defendant _____ [*name of manufacturer*].

8. On or about _____ [*date*], plaintiff opened the _____ [*specify type of food, e.g.,* can of fruit] and proceeded to _____ [*specify, e.g.,* eat] it. After having consumed a portion of the _____ [*specify type of food, e.g.,* can of fruit] plaintiff discovered _____ [*specify defect, e.g.,* that it contained a hazardous foreign substance, namely, metallic slivers].

9. At all times herein mentioned, defendants, and each of them, warranted to the general public and to plaintiff in particular that the _____ [*specify type of food, e.g.,* can of fruit] was fit for human consumption.

10. Defendants, and each of them, breached their implied warranty when they offered for sale to the general public, and sold to plaintiff in particular, the _____ [*specify type of food, e.g.,* can of fruit] in that _____ [*specify defect that breach of warranty, e.g.,* it contained metallic slivers], which rendered the product unfit for human consumption. Plaintiff had purchased and consumed the _____ [*specify, e.g.,* can of fruit] in reliance on the implied warranty breached by defendants.

11. Before the discovery by plaintiff, he/she did not know the dangerous and unhealthful condition of the _____ [*specify type of food, e.g.,* can of fruit], but he/she reasonably believed it to be safe, pure, and fit for human consumption.

12. Within a reasonable time after the discovery by plaintiff of the breach of the implied warranty by defendants _____ [*name of manufacturer*] and _____ [*name of retailer*], plaintiff advised defendants in writing of the breach of warranty.

13. As a proximate result of consuming the harmful and defective _____ [*specify type of food and defect, e.g.,* can of fruit and some of the metallic slivers contained in it], plaintiff suffered _____ [*describe personal injuries, e.g.,* nausea, vomiting, and serious and permanent injuries to his/her health, strength, and activity] and was caused to suffer extreme physical and mental pain, all to plaintiff's general damage [in the sum of $_____].

14. As a further and proximate result of consuming the harmful and defective _____ [*specify type of food, e.g.,* can of fruit], plaintiff was required to and did employ _____ [*specify, e.g.,* physicians and surgeons *or other medical personnel*] to examine, treat, and care for him/her [and incurred additional expenses for hospital bills and other incidental medical expenses]. [Plaintiff is informed and believes, and thereon alleges, that, as a proximate result of the defect and injuries described above, plaintiff will be required to incur additional medical expenses (in the sum of $_____).]

15. As a further proximate result of consuming the harmful and defective _____ [*specify type of food, e.g.,* can of fruit] described above, plaintiff was prevented from attending to his/her usual _____ [occupation *or* profession]. [Plaintiff is informed and believes, and thereon alleges, that he/she will continue to be prevented from attending to his/her usual _____ (occupation *or* profession) for a period in the future that cannot now be ascertained and will thereby sustain further loss of earnings.]

SECOND COUNT
(Negligence)

16. Plaintiff refers to Paragraphs 1 through 8 and 13 through 15 of the First Count and incorporates them herein by reference.

17. Because defendant _____ [*name of manufacturer*] was engaged in the business of _____ [*specify activity, e.g.,* manufacturing *or* processing *or* canning *or* selling] of food and because defendant _____ [*name of retailer*] was engaged in the sale and distribution of food to the general public, each defendant owed a duty to the general public and to plaintiff in particular to use reasonable care to see that the products sold by them were fit for human consumption.

18. Defendants, and each of them, neglected to use reasonable care in the manufacture, processing, preparation, and sale of the _____ [*specify type of food, e.g.,* can of fruit] described above, and, as a proximate result of their negligence and carelessness, _____ [*describe defect, e.g.,* metallic slivers were present in the _____ (*specify type of food, e.g.,* can of fruit) purchased and partially eaten by plaintiff].

THIRD COUNT
(Strict Liability)

19. Plaintiff refers to Paragraphs 1 through 8 and 13 through 15 of the First Count and incorporates them herein by reference.

20. Defendants, and each of them, at all times herein mentioned knew that the defective food products would be

purchased and used without inspection for defects by the purchaser or user.

21. At the time of plaintiff's purchase, the _____ [*specify type of food, e.g.,* can of fruit] was defective in that _____ [*specify nature of defect, e.g.,* it contained a hazardous foreign substance, namely, metallic slivers]. This defect rendered the product hazardous and unfit for human consumption.

22. Plaintiff neither knew nor had reason to know at the time of his/her purchase or at any time prior to the _____ [accident *or* occurrence] described above that the product hereinabove described was defective.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages according to proof [or if a limited civil case, in the sum of $_____];

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form of complaint in *[1], above,* is for use by a plaintiff who sues a manufacturer and retailer to recover damages [*Civ. Code § 3333*] for injuries suffered from consumption of a defective food product. For alternative forms of allegations of negligence [*Civ. Code § 1714(a)*] or breach of warranty pertaining to packaged foods that may be used in particular circumstances, see *§§ 268.53 -268.57*.

In an appropriate case, counsel may wish to combine this form with a cause of action for breach of express warranty, as shown in § 268.52.

[3] Allegations

This complaint alleges that defendants:

- Have breached the implied warranty that the food is fit for human consumption (First Count, Paragraphs 6-12) [*see Com. Code § 2314*; *Kassouf v. Lee Bros., Inc. (1962) 209 Cal. App. 2d 568, 571-573, 26 Cal. Rptr. 276* (decided under former Com. Code § 1735; *now see Com. Code § 2314*)];

- Were negligent in the manufacture, processing, sale, and distribution of the food product (Second Count, Paragraphs 17, 18) [*see Civ. Code § 1714(a)*; *Klein v. Duchess Sandwich Co., Ltd. (1939) 14 Cal. 2d 272, 275-276, 93 P.2d 799]* ; and

- Are strictly liable in tort for the manufacture and sale of a defective and harmful food product (Third Count, Paragraphs 20-22) [*see generally Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 261, 37 Cal. Rptr. 896, 391 P.2d 168* (defective automobile); *Greenman v. Yuba Power Prods., Inc. (1963) 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 377 P.2d 897* (defective power tool)].

[4] Specification of Damages

In a superior court action that is not a limited civil case, brought to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*]. The defendant may at any time request a statement setting forth the nature and amount of damages being sought [*Code Civ. Proc. § 425.11(b)*].

Otherwise, the amounts claimed as damages must be alleged [*Code Civ. Proc. § 425.10(a)(2)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. Then counsel must remember to seek leave to amend the complaint.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see *Ch. 177, Damages, § 177.40* et seq., and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[6] Cross References

For alternative allegations as to agency, capacity, and residence of parties and for fictitious name allegations, see Ch. 20 *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, § 177.40* et seq.

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For further discussion of and forms for use in negligence actions, see Ch. 380, *Negligence*

For alternative forms of prayers, see Ch. 420, *Prayers*

For further discussion of and forms for use in products liability actions, see Ch. 460, *Products Liability*

For further discussion of and forms for use in actions for breach of warranty, see Ch. 500, *Sales and Secured Transactions*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

[7] Text References

J. Cotchett & R. Cartwright, eds., california products liability actions, chs. 2, 6 (Matthew Bender rev. ed.)

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§ 268.51 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Breach of Implied Warranty [Com. Code § 2314(1)], Negligence [Civ. Code § 1714(a)], and Strict Liability in Tort--By Diner Against Restaurant--Harmful Foreign Substance in Prepared Food

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Breach of Implied Warranty [Com. Code § 2314(1)], Negligence [Civ. Code § 1714(a)], and Strict Liability in Tort--By Diner Against Restaurant--Harmful Foreign Substance in Prepared Food

[*Caption. See § 268.50.*]

Plaintiff alleges:

FIRST COUNT
(Breach of Warranty)

1. Defendant(s) _____ [*name(s)*] is/are, and at all times herein mentioned was/were, a(n) _____ [*specify type of business of entity, e.g.,* individual *or* partnership] doing business as _____ [*name of restaurant or establishment that serves food*], located at _____ [*address*] in _____ [*city*], _____ County, California.

[2. *Fictitious name allegation, if appropriate. See § 268.50, First Count, Paragraph 5.*]

3. On or about _____ [*date*], defendant(s) owned and operated the restaurant located at _____ [*address*], known as _____ [*name of restaurant*], where he/she/it/they solicited the patronage of members of the public and prepared and sold food to customers for consumption [on the premises].

4. At all times herein mentioned and prior to _____ [*date of occurrence*], defendant(s) enjoyed a

general reputation in the locality for serving good quality and wholesome food. Defendant(s) impliedly warranted to the public and to plaintiff that the foods served to the public and plaintiff in particular were clean, wholesome, and free from harmful and injurious foreign substances and were reasonably fit for human consumption.

5. On or about _____ [*date of occurrence*], in reliance on the warranties of defendant(s) and in reliance on the skill, experience, and judgment of defendant(s) in the selection, preparation, and service of foods, and for each of these reasons, plaintiff entered the _____ [*specify, e.g.,* restaurant] and ordered _____ [*type of meal or particular food*] [for immediate consumption on the premises]. _____ [*Type of meal or particular food*] was served to plaintiff. Plaintiff then ate the meal served by defendant and paid the price charged by defendant.

6. The _____ [*type of meal or particular food*] was/were not clean, wholesome, and free from harmful or injurious foreign substances but instead contained hazardous and unhealthful foreign substances[, namely, _____ (*identify foreign substance, if known*)] and was in other respects unfit for human consumption. Plaintiff could not determine the condition of the _____ [*type of meal or particular food*] by reasonable inspection and did not know the true condition of the food when served to him/her by defendant(s) and consumed by plaintiff.

7. As a direct and proximate result of plaintiff eating the _____ [*type of meal or particular food*], plaintiff _____ [*specify injury suffered, e.g.,* became violently ill within one hour after consumption of the meal and suffered injuries and damages as are more particularly set forth below].

8. After discovery by plaintiff of the breach of warranty of defendant(s), and within a reasonable time, plaintiff in writing advised defendant(s) of his/her/its/their breach of warranty.

9-11. [*Damage allegations. See § 268.50, First Count, Paragraphs 13-15.*]

SECOND COUNT
(Negligence)

12. Plaintiff refers to Paragraphs 1 through 4 and 9 through 11 of the First Count and incorporates them herein by reference.

13. Because defendant(s) was/were engaged in the business of preparation, selling, and service of food to the general public, he/she/it/they owed a duty to the general public, and to plaintiff in particular, to use reasonable care to see that food sold by him/her/it/them was free from harmful foreign substances and was otherwise fit for human consumption.

14. Defendant(s) failed and neglected to use reasonable care in the preparation and selling of the _____ [*type of meal or particular food*], and, as a proximate result of his/her/its/their negligence and carelessness, plaintiff was served an unwholesome, unhealthful, and hazardous _____ [*type of meal or particular food*], which plaintiff purchased and consumed.

THIRD COUNT
(Strict Liability)

15. Plaintiff refers to Paragraphs 1 through 4 and 9 through 11 of the First Count and incorporates them herein by reference.

16. Defendant(s) knew that the food, including _____ [*type of meal or particular food*], served by him/her/it/them to his/her/its/their customers would be purchased for consumption by members of the public and would be consumed without inspection for defects therein.

17. On or about _____ [*date*], plaintiff entered the restaurant of defendant(s) and purchased _____ [*type of meal or particular food*] [for immediate consumption on the premises].

18. The _____ [*type of meal or particular food*] which was served to plaintiff was defective in that _____ [*describe defect*].

19. At all times herein mentioned, plaintiff neither knew nor had reason to know of the existence of the foregoing described defect, and at the time and place mentioned above consumed the defective _____ [*type of meal or particular food*], proximately causing the injuries described above.

[*Prayer. See § 268.50.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 268.50.*]

[2] Use of Form

The form in *[1], above,* is a general complaint for damages [*Civ. Code § 3333*] for personal injuries suffered by a patron of a restaurant or other eating establishment who suffers personal injuries from the consumption of prepared food containing a harmful foreign substance. For a form of allegation involving breach of warranty based on service of prepared food that was spoiled or otherwise unwholesome, see *§ 268.57*.

[3] Allegations

The complaint alleges that the defendants

- Have breached the implied warranty that the food is fit for human consumption (First Count, Paragraphs 3-8) [*see Com. Code § 2314(1)*; *Goetten v. Owl Drug Co. (1936) 6 Cal. 2d 683, 685-688, 59 P.2d 142* (decided under former Com. Code § 1735; *now see Com. Code § 2314*)];

- Were negligent in the preparation of food (Second Count, Paragraphs 13, 14) [*see Civ. Code § 1714(a)*; *Goetten v. Owl Drug Co. (1936) 6 Cal. 2d 683, 685-688, 59 P.2d 142* (decided under former Com. Code § 1735; *now see Com. Code § 2314*)]; and

- Are strictly liable in tort for the preparation and sale of defective food (Third Count, Paragraphs 16-19) [*see Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 261, 37 Cal. Rptr. 896, 391 P.2d 168* (defective automobile); *Greenman v. Yuba Power Products, Inc. (1963) 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 377 P.2d 897* (defective power tool)], or for the failure to warn in the context of allergies [*Livingston v. Marie Callenders, Inc. (1999) 72 Cal. App. 4th 830, 839, 85 Cal. Rptr. 2d 528* (food additive)].

[4] Cross References

For additional comments and cross references, see *§ 268.50*.

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Volume 22: Explosives thru Food-Chs. 256-268
Chapter 268 FOOD
PART IV. FORM

22-268 California Forms of Pleading and Practice--Annotated § 268.52

§ 268.52 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Breach of an Express Warranty [Com. Code § 2313]--By Purchaser Against Manufacturer and Retailer--General Form

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Breach of an Express Warranty [Com. Code § 2313]--By Purchaser Against Manufacturer and Retailer--General Form
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*], [and DOES I	)	(Breach of Express Warranty)
through _____,]	)	[Amount demanded _____
Defendants.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1-4. [*Capacity and residence of defendants. See § 268.50, First Count, Paragraphs 1-4.*]

[5. *Fictitious name allegation, if appropriate. See § 268.50, First Count, Paragraph 5.*]

6. At all times herein mentioned, defendant _____ [*name of manufacturer*] was engaged in the business of _____ [*specify, e.g.,* manufacturing *or* processing *or* canning *or* distributing] food products in general and _____ [*specify, e.g.,* cans of boned chicken meat] in particular.

7. At all times herein mentioned, defendant _____ [*name of retailer*] was engaged in the business of selling food products in general and _____ [*specify, e.g.,* cans of boned chicken meat] in particular to members of the general public.

8. At all times herein mentioned, defendants, and each of them, represented to the public, including plaintiff, by means of _____ [*specify media, e.g.,* newspaper, magazine, television, and radio advertisements] that defendant _____'s [*name of manufacturer*] _____ [*specify, e.g.,* cans of boned chicken meat] _____ [*specify representations, e.g.,* were completely free from bones]. [On or about _____ (*date*), plaintiff read the advertisement by defendants, and each of them, in _____ (*name of newspaper or magazine*), which expressly warranted that defendant _____'s (*name of manufacturer*) _____ (*specify warranty, e.g.,* cans of boned chicken meat were completely free from bones).]

9. On or about _____ [*date*], plaintiff bought from defendant _____ [*name of retailer*] at its store located at _____ [*address*], a certain _____ [*specify, e.g.,* can of bone chicken meat] and paid the required purchase price. The _____ [*specify, e.g.,* can] bore the label of defendant _____ [*name of manufacturer*] and indicated that it had been manufactured and processed by defendant _____ [*name of manufacturer*]. The label expressly warranted that the contents _____ [*specify, e.g.,* were completely free from bones in that it stated that the contents were "boned chicken meat."]

[10. When purchasing the _____ (*specify, e.g.,* can of boned chicken meat), plaintiff relied on the express warranties of defendants, and each of them, as represented _____ (*specify, e.g.,* in the above-mentioned newspaper advertisement and on the label of the can).]

11. Defendants breached their express warranties regarding the above-described _____ [*specify product, e.g.,* cans of chicken meat] when they offered for sale to the general public and to plaintiff _____ [*specify, e.g.,* cans of boned chicken meat that did contain bones]. On or about _____ [*date*], plaintiff opened the above-mentioned _____ [*specify, e.g.,* can of chicken meat] and proceeded to consume its contents. After _____ [*specify, e.g.,* eating] a portion, plaintiff discovered _____ [*specify breach of warranty, e.g.,* a bone in the chicken meat, which caught in plaintiff's throat].

12. As a proximate result of the _____ [*specify, e.g.,* chicken bone caught in plaintiff's throat], in violation of defendants' express warranties, plaintiff suffered the following injuries: _____ [*specify injuries*]. The described injuries caused plaintiff to sustain general damages [in the sum of $_____].

13. As a further proximate result of the _____ [*specify, e.g.,* chicken bone], plaintiff was compelled to and did employ physicians and surgeons and other medical personnel. [Plaintiff was required to secure X rays and hospital and nursing care.] [Plaintiff is informed and believes and on information and belief states that he/she will require additional medical care.]

14. [*Loss of earnings allegation. See § 268.50, First Count, Paragraph 15.*]

[*Prayer. See § 268.50.*]

_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 268.50.*]

[2] Use of Form

The form in *[1], above,* is a complaint for damages [*Civ. Code § 3333*] for personal injuries arising out of the breach of an express warranty [*Com. Code § 2313(1)(a), (b)*] given by a manufacturer or seller in which the warranty has stated that the goods will conform to a certain description or promise.

In an appropriate case, counsel may wish to combine this form with causes of action for breach of implied warranty, negligence, and strict liability, as set forth in the complaint in *§ 268.50*.

[3] Allegations

The foregoing form alleges that plaintiff, in reliance on the express warranty given on the label of the container of a food product and through advertisements in the media, purchased and consumed a certain food product and thereupon found that the defendants had breached the express warranty since the food did not conform to the description on the label and in the advertisements (Paragraphs 8-11) [*see Com. Code § 2313(1)(a), (b)*; *Lane v. C. A. Swanson & Sons (1955) 130 Cal. App. 2d 210, 214-215, 278 P.2d 723]* .

Counsel may wish to omit optional Paragraph 10. Under the basis of bargain criteria of *Com. Code § 2313*, it is not necessary that plaintiff prove reliance. A warranty statement made by the seller is presumptively part of the basis of the bargain and the burden rests on the seller to prove that the resulting bargain does not rest at all on the representation [*Keith v. Buchanan (1985) 173 Cal. App. 3d 13, 23, 220 Cal. Rptr. 392]* .

[4] Cross References

For additional comments and cross references, see *§ 268.50*.

[5] Text References

J. Cotchett & R. Cartwright, eds., california products liability actions, chs. 2, 6, 7 (Matthew Bender rev. ed.)

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22-268 California Forms of Pleading and Practice--Annotated § 268.53

§ 268.53 Allegations of Negligence [Civ. Code § 1714(a)]--Exploding Bottle

[1] FORM Allegations of Negligence [Civ. Code § 1714(a)]--Exploding Bottle

1. Because defendants were engaged in the business of manufacturing, processing, bottling, selling, and distributing of glass bottles of _____ [*specify, e.g.,* catsup], they owed a duty to the general public, and to plaintiff in particular, to use reasonable care to see that the containers sold by them were fit for safe use and that the food products contained therein were fit for human consumption.

2. Defendants breached that duty of reasonable care when they so negligently and carelessly manufactured, processed, bottled, sold, and distributed a glass bottle of _____ [*specify, e.g.,* catsup] that the container exploded _____ [*specify, e.g.,* in the hands of plaintiff], causing him/her to sustain serious injuries.

[2] Use of Form

The form of allegation in *[1], above,* alleges that defendants were negligent in the preparation and bottling of a food product and caused the container to explode [*see Vassallo v. Sabatte Land Co. (1963) 212 Cal. App. 2d 11, 16, 27 Cal. Rptr. 814* (decided under former Com. Code § 1735; *now see Com. Code § 2314*)]. With appropriate modifications, the form may be used for allegations of breach of implied warranty and a strict liability [*see § 268.50, see also Evid. Code § 646*]. In an appropriate case, it may be substituted for Paragraphs 17 and 18, in the Second Count of the complaint *set out in § 268.50*.

[3] Cross References

For general forms alleging negligence, see Ch. 380, *Negligence*

For alternative forms alleging negligence in products liability actions, see Ch. 460, *Products Liability*

For additional comments and cross references, see *§ 268.50*.

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Chapter 268 FOOD
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22-268 California Forms of Pleading and Practice--Annotated § 268.54

§ 268.54 Allegations of Negligence [Civ. Code § 1714(a)]--Food or Beverage Container Containing Identified Harmful Foreign Substances

[1] FORM Allegations of Negligence [Civ. Code § 1714(a)]--Food or Beverage Container Containing Identified Harmful Foreign Substances

1. Because defendants were engaged in the business of _____ [*specify activity, e.g.,* manufacturing, bottling, packaging, selling, and distributing] food and beverages in general, and _____ [*specify particular food product, e.g.,* bottled beverages] in particular, to members of the general public, they owed a duty to the general public and to plaintiff in particular to use reasonable care to see that the products sold by them were free from harmful foreign substances and otherwise fit for human consumption.

2. Defendants breached that duty by so negligently and carelessly _____ [*specify activity, e.g.,* manufacturing, bottling, packaging, selling, and distributing] its products as to a allow _____ [*specify foreign substance, e.g.,* a dead rodent] to enter and become packaged in _____ [*specify food product, e.g.,* a bottled beverage] bearing defendant's label that was purchased and partially consumed by plaintiff. Plaintiff did not know and had no reason to know before consuming _____ [*specify food product, e.g.,* the bottled beverage] that it contained _____ [*specify foreign substance, e.g.,* a dead rodent].

[2] Use of Form

The form of allegation in *[1], above,* is for use in a complaint against a manufacturer and retailer for negligent manufacture, processing, sale, and distribution of a packaged food or beverage product that contained a harmful foreign substance. With appropriate modifications, the form may be used for allegations of breach of implied warranty and strict liability [*see § 268.50*]. In an appropriate case, it may be substituted for Paragraphs 17 and 18, in the Second Count of the complaint *set out in § 268.50*.

[3] Cross References

For additional comments and cross references, see *§ 268.50*.

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22-268 California Forms of Pleading and Practice--Annotated § 268.55

§ 268.55 Allegations of Breach of Implied Warranty of Fitness for Human Consumption [Com. Code § 2314]--Identified Harmful Foreign Substance in Container of Packaged Food

[1] FORM Allegations of Breach of Implied Warranty of Fitness for Human Consumption [Com. Code § 2314]--Identified Harmful Foreign Substance in Container of Packaged Food

1. Defendant warranted to plaintiff that the _____ [*specify packaged food product, e.g.,* can of fruit cocktail] sold by him/her to plaintiff was wholesome, free from foreign substances, and otherwise fit for human consumption. In reliance on the implied warranty, plaintiff purchased and ate the _____ [*specify food product, e.g.,* fruit cocktail].

2. The _____ [*specify food product, e.g.,* fruit cocktail] was not clean, wholesome, and free from harmful or injurious foreign substances and was not reasonably fit for human consumption, as warranted. On the contrary, it was unclean and unwholesome since it contained _____ [*specify, e.g.,* a small hard stone], and it was wholly unfit for human consumption. Plaintiff did not know or have any reasonable means of knowing at the time he/she purchased and ate the _____ [*specify food product, e.g.,* fruit cocktail] that the same was unclean, unwholesome, contained _____ [*specify, e.g.,* a small hard stone], and was unfit for human consumption, but he/she believed the _____ [*specify, e.g.,* fruit cocktail] was pure and fit for human consumption.

[2] Use of Form

The form of allegation in *[1], above,* is for damages arising from a breach of the implied warranty of fitness for human consumption for injuries caused by the presence of an identified harmful foreign substance in a packaged food or beverage product. With appropriate modifications, the form may be used for allegations of negligence and strict liability [*see § 268.50*]. In an appropriate case, these allegations may be substituted for Paragraphs 9-11, in the First Count of the complaint *set out in § 268.50*.

[3] Cross References

For additional comments and cross references, see *§ 268.50*.

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22-268 California Forms of Pleading and Practice--Annotated § 268.56

§ 268.56 Allegations of Breach of Implied Warranty of Fitness for Human Consumption [Com. Code § 2314]--Unidentified Harmful Foreign Substances in Container of Packaged Food

[1] FORM Allegations of Breach of Implied Warranty of Fitness for Human Consumption [Com. Code § 2314]--Unidentified Harmful Foreign Substances in Container of Packaged Food

1. At the time of the purchase of _____ [*specify packaged food product, e.g.,* the can of tuna] from defendant by plaintiff, defendant warranted that the contents of _____ [*specify packaged food product, e.g.,* the can of tuna] were wholesome, free of harmful foreign substances, and otherwise fit for human consumption.

2. [Plaintiff is informed and believed and thereon alleges that] [D]efendant breached that implied warranty in that the _____ [*specify packaged food product, e.g.,* can of tuna] sold by defendant to plaintiff was in fact unwholesome and contained harmful foreign substances that rendered it unfit for human consumption. At the time that plaintiff purchased the _____ [*specify packaged food product, e.g.,* can of tuna] and at the time that he/she _____[partially] consumed its contents, plaintiff believed it to be fit for human consumption and was unaware and had no reason to know that it contained harmful foreign substances.

[2] Use of Form

The form of allegation in *[1], above,* is for damages arising from a breach of implied warranty to fitness for human consumption for injuries caused by the presence of unidentified foreign or dangerous matter in a packaged food or beverage product. With appropriate modifications, the form may be used for allegations of negligence and strict liability [*see § 268.50*]. In an appropriate case, these allegations may be substituted for Paragraphs 9-11, in the First Count of the complaint *set out in § 268.50*.

[3] Cross References

For additional comments and cross references, see *§ 268.50*.

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22-268 California Forms of Pleading and Practice--Annotated § 268.57

§ 268.57 Allegation of Breach of Implied Warranty of Fitness for Human Consumption [Com. Code § 2314]--Spoiled Dish of Prepared food

[1] FORM Allegation of Breach of Implied Warranty of Fitness for Human Consumption [Com. Code § 2314]--Spoiled Dish of Prepared food

The _____ [*type of meal or particular food*] was/were not clean, wholesome, and free from harmful or injurious foreign substances but, instead, was/were spoiled, contaminated, unwholesome, deleterious, and poisoned and in such a condition as to be dangerous to life and health, and was/were in other respects unfit for human consumption. Plaintiff could not determine the condition of the _____ [*type of meal or particular food*] by reasonable inspection and did not know the true condition of the food when served to him/her by defendant(s) and consumed by plaintiff.

[2] Use of Form

The form of allegation in *[1], above,* is for use in an action against a restaurant operator for damages arising from a breach of the implied warranty of fitness for human consumption for injuries caused by consuming spoiled and contaminated prepared food. With appropriate modifications, the form may be used for allegations of negligence and strict liability [*see § 268.50*]. In an appropriate case, these allegations may be substituted for Paragraph 6 in the First Count of the complaint *set out in § 268.50*.

[3] Cross References

For additional comments and cross references, see *§ 268.51*.

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Volume 23: Fraud and Deceit thru Good Faith Improver of Real Property-Chs. 269-279
Chapter 269 FRAUD AND DECEIT

23-269 California Forms of Pleading and Practice--Annotated 269.syn

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§ 269.02 Cross References

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§ 269.12 Fraud and Deceit Distinguished

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§ 269.14 Types of Misrepresentations

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§ 269.30 Punitive Damages

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§ 269.34 No Cause of Action for Fraud Based on Termination of Employment

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[5] Constructive Fraud

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[c] Defenses

[6] Consumers Legal Remedies Act

[7] Damage as Element of Cause of Action

[8] Defendants

[a] Liability for Fraud of Agent

[b] Public Immunity and Liability

[9] Defenses

[a] Generally

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[c] Statute of Limitations

[10] Definitions

[11] Election of Remedies

[12] Elements

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§ 269.70 Plaintiff's Checklist

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[2] Use of Form

[3] Allegations

[4] Strict Pleading Requirements

[5] Corporate Defendant

[6] Damages

[7] Verification

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§ 269.92 Allegations for Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit--Negligent Misrepresentation of Fact [Civ. Code § 1710(2)]--General Form

[1] FORM

[2] Use of Form

[3] Text References

[4] Cross References

§ 269.93 Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit--Suppression of Fact [Civ. Code § 1710(3)]--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Text References

[5] Cross References

§ 269.94 Complaint for Damages for Fraud and Deceit--Promise Made Without Intention to Perform [Civ. Code § 1710(4)]--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Text References

[5] Cross References

§ 269.95 Complaint for Damages for Fraud and Deceit [Civ. Code § 3343]--Intentional Misrepresentation [Civ. Code § 1710(1)]--Fraud in Sale of Land--By Buyer Against Seller Misrepresenting Acreage

[1] FORM

[2] Use of Form

[3] Allegations

[4] Venue

[5] Text References

[6] Cross References

§ 269.96 Complaint for Damages for Fraud and Deceit [Civ. Code § 3343]--Intentional and Negligent Misrepresentation [Civ. Code § 1710(1), (2)]--Suppression of Fact [Civ. Code § 1710(3)]--Concerning Effect of Easement--By Buyer Against Seller and Broker

[1] FORM

[2] Use of Form

[3] Allegations

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§ 269.97 Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit [Civ. Code § 3343]--Intentional Misrepresentation [Civ. Code § 1710(1)]--Concerning Existence of Infestation--By Buyer of Real Property Against Seller and Pest Control Operator

[1] FORM

[2] Use of Form

[3] Allegations

[4] Text References

[5] Cross References

§ 269.98 Complaint for Damages for Fraud and Deceit [Civ. Code § 3343]--International Misrepresentation [Civ. Code § 1710(1)]--Concerning Filled-in Land--By Buyer Against Seller

[1] FORM

[2] Use of Form

[3] Allegations

[4] Alternative Theories

[5] Text References

[6] Cross References

§ 269.99 Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit--Fraud in Sale of Personal Property--By Buyer Against Seller--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Damages in Cases Involving Sales of Goods

[5] Alternative Theories of Recovery

[6] Text References

[7] Cross References

§ 269.100 Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit [Civ. Code § 3343]--Intentional Misrepresentation [Civ. Code § 1710(1)]--Profits and Other Facts Concerning Sale of Business--By Buyer Against Seller

[1] FORM

[2] Use of Form

[3] Allegations

[4] Text References

[5] Cross References

§ 269.101 Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit--Concealment and Suppression of Fact [Civ. Code §§ 1573, 1710(3)]--Higher Offer for Property Made to Real Estate Broker Obtaining Secret Profit--By Seller Against Broker and Conspiring Purchaser

[1] FORM

[2] Use of Form

[3] Allegations

[4] Damages

[5] Text References

[6] Cross References

§ 269.102 Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit [Civ. Code §§ 1709, 3333]--Constructive Fraud [Civ. Code § 1573]--Employee Obtaining Money From Employer's Account Without

Authorization

[1] FORM

[2] Use of Form

[3] Allegations

[4] Text References

[5] Cross References

§ 269.103 Allegation for Complaint [Code Civ. Proc. § 425.10]--Reason for Failure to Discover Fraud Before Running of Statutory Period of Limitation [Code Civ. Proc. § 338(d)]

[1] FORM

[2] Use of Form

[3] Text References

[4] Cross References

§ 269.104 Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit [Civ. Code §§ 1709, 1710]--Intentional [Civ. Code § 1710(1)] or Negligent [Civ. Code § 1710(2)] Misrepresentation--Misrepresentation in Employment Recommendation Causing Injury to Third Person

[1] FORM

[2] Use of Form

[3] Allegations

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23-269 California Forms of Pleading and Practice--Annotated § 269.01

§ 269.01 Scope of Chapter

This chapter discusses actions at law for damages based on the tort of deceit or on the existence of constructive fraud. It includes the Judicial Council form of fraud cause of action attached to the Judicial Council form of complaint for personal injury, property damage, or wrongful death [§ 269.90], forms of complaints for damages for fraud and deceit based on intentional misrepresentation [§ 269.91], on negligent misrepresentation [§ 269.92], on suppression of fact [§ 269.93], on a promise made without the intention to perform it [§ 269.94]; various forms concerning misrepresentations about real property [§ 269.95-269.98]; a form for fraud in the sale of personal property [§ 269.99]; a form concerning misrepresentations in the sale of a business [§ 269.100]; a form concerning fraud and deceit of a real estate broker in concealing and suppressing a fact from the client [§ 269.101]; a form concerning the constructive fraud of an employee in obtaining money from the employer's account without authorization [§ 269.102]; and a form of an allegation extending the statute of limitations for an action for damages for fraud and deceit on grounds of reasonable failure to discover the fraud [§ 269.103].

This chapter does not include forms or an extended discussion of remedies for fraud other than damages although fraud may also be the basis for equitable relief. For discussion of other types of relief predicated on fraud, see Ch. 7, *Accounting, Action For* , Ch. 8, *Accounts Stated and Open Accounts* , Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights* , Ch. 107, *Cancellation of Instruments* , Ch., 121, *Common Counts* , Ch. 140, *Contracts* , Ch. 150, *Conversion* , Ch. 205, *Defaults and Default Judgments* , Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* , Ch. 488, *Reformation of Instruments* , Ch. 490, *Rescission and Restitution* , and Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

For discussion and forms relating to relief based on fraud in various factual situations, see Ch. 14, *Advertising* , Ch. 57, *Art* , Ch. 77, *Auctions and Auctioneers* , Ch. 95, *Banks, Deposits, and Checks* , Ch. 103, *Brokers* , Ch. 104, *Building Contracts* , Ch. 122, *Community Property* , Ch. 127, *Consumer Contracts and Loans* , Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* , Ch. 184, *Deeds* , Ch. 307, *Insolvency* , Ch. 308, *Insurance* , Ch. 318, *Judgments* , Ch. 393, *Oil and Gas* , Ch. 401, *Partnerships: Actions Between General Partners and Partnership* , Ch. 440, *Probate: Is Probate Necessary ?*, Ch. 460, *Products Liability*, Ch. 462, *Public Accountants* , Ch. 489, *Relief from Judgments and Orders* , Ch. 500, *Sales and Secured Transactions* , Ch. 538, *Suretyship, Bonds, and Undertakings* , and Ch. 569, *Vendor and Purchaser* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationConstructive FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationGeneral Overview

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23-269 California Forms of Pleading and Practice--Annotated § 269.02

§ 269.02 Cross References

For a form of complaint for an accounting against a real estate broker, see Ch. 7, *Accounting, Action for.*

For a form alleging the defense of fraud to an action based on account stated, see Ch. 8, *Accounts Stated and Open Accounts* .

For a form of complaint for use in an action to set aside a decree of adoption rendered due to fraudulently induced consent, see Ch. 12E, *Adoptions: Attack on Decree* .

For a form of complaint for use in an action for fraud based on false advertising, see Ch. 14, *Advertising* .

For a form of complaint for use in an action against an endorser of products for negligent endorsement, see Ch. 14, *Advertising* .

For forms of complaints for fraud under the Consumers Legal Remedies Act and related forms, see Ch. 14, *Advertising* .

For discussion, complaints, and related forms for use in annulment of marriage on grounds of fraud, see Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights* .

For a form of complaint by the buyer against the seller of an art work for fraud, see Ch. 57, *Art* .

For a form of complaint for fraud by a seller against an auctioneer-buyer, see Ch. 77, *Auctions and Auctioneers* .

For a form of complaint against a bank manager for fraud, see Ch. 95, *Banks, Deposits, and Checks* .

For a form of complaint by a creditor against a bank for fraud and misrepresentation as to solvency, see Ch. 95, *Banks, Deposits, and Checks* .

For a form of complaint against a broker secretly acquiring a client's property, see Ch. 103, *Brokers* .

For a form of complaint against a broker acquiring property adversely to the principal, see Ch. 103, *Brokers* .

For a complaint against a broker selling property on terms different from those demanded by client and in obtaining client's signature by deception, see Ch. 103, *Brokers* .

For a form of complaint against a building contractor for fraud in completing work contrary to plans, see Ch. 104, *Building Contracts* .

For a form of complaint for fraud against a building contractor, see Ch. 104, *Building Contracts* .

For discussion and forms relating to cancellation of deeds and other instruments on the ground of fraud, see Ch. 107, *Cancellation of Instruments* .

For discussion of waiver of tort and complaints based on common counts, see Ch. 121, *Common Counts* .

For a complaint for rescission of a property settlement agreement for fraudulent concealment of community property assets or value, see Ch. 122, *Community Property* .

For a form of notice of motion to modify judgments dissolving marriage on ground of extrinsic fraud, see Ch. 122, *Community Property* .

For discussion and forms relating to consumer rights, see Ch. 127, *Consumer Contracts and Loans* , Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* , and Ch. 129, *Consumer Credit Reporting* .

For a form of affirmative defense to a contract action based on fraud, see Ch. 140, *Contracts* .

For a form of complaint for conversion based on fraudulent representations, see Ch. 150, *Conversion* .

For forms of allegations of damages in actions for fraud, see Ch. 177, *Damages* .

For a form of allegation of fraud in the procurement of a deed, see Ch. 184, *Deeds* .

For forms of allegations of fraud for use in actions vitiating consent to a contract, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

For a form of allegation of fraudulent statements in an application for insurance, see Ch. 308, *Insurance* .

For a form of complaint to recover overpayments induced by fraudulent claim of loss, see Ch. 308, *Insurance* .

For a form of complaint based on fraudulent representations by an insurance agent, see Ch. 308, *Insurance* .

For a form of complaint for fraud by an insured against an insurance company defaulting on a policy, see Ch. 308, *Insurance* .

For a discussion of negligent misrepresentation involving a risk of physical harm, see Ch. 380, *Negligence* .

For a form of complaint for fraud in the transfer of oil and gas interests, see Ch. 393, *Oil and Gas* .

For forms of complaints by third parties against partners and by one partner against another based on fraud, see Ch. 401,

Partnerships: Actions Between General Partners and Partnership .

For forms of allegations of fraud in a will contest and a form of special verdict as to fraud in a will contest, see Ch. 444, *Probate: Will Contests* .

For a general discussion of the possibility of recovery for defects in products on the grounds of fraud and deceit, see Ch. 460, *Products Liability* .

For a discussion of the liability of accountants and auditors for negligent and intentional misrepresentation, see Ch. 462, *Public Accountants* .

For discussion and forms related to actions to quiet title to real and personal property, see Ch. 482, *Quieting Title* .

For a form of complaint for reformation based on fraud, see Ch. 488, *Reformation of Instruments* .

For a form of complaint to set aside a default judgment based on fraud, see Ch. 489, *Relief From Judgments and Orders* .

For forms of complaints to set aside judgments rendered due to extrinsic fraud, see Ch. 489, *Relief From Judgments and Orders* .

For a form of notice of motion and related forms for use in setting aside a judgment on the ground of fraud, see Ch. 489, *Relief From Judgments and Orders* .

For a form of complaint for restitution based on rescission of contract on ground of fraud, see Ch. 490, *Rescission and Restitution* .

For a form of complaint in a consumer class action based on fraud, see Ch. 500, *Sales and Secured Transactions* .

For discussion regarding the fiduciary duties owed by stockbrokers to their clients, see Ch. 515, *Securities and Franchise Regulation*

For a form of complaint by a surety against a person fraudulently obtaining execution of a bond, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

For discussion and forms relating to the establishment of constructive trusts in property obtained through fraud or deceit, see Ch. 561, *Trusts: Constructive Trusts* .

For a form of complaint for rescission of the sale of a house on the ground of fraud, see Ch. 569, *Vendor and Purchaser* .

For a form of complaint based on fraudulent misrepresentation concerning termite infestation, see Ch. 569, *Vendor and Purchaser* .

For a form of complaint for fraudulent concealment of an ordinance violation, see Ch. 569, *Vendor and Purchaser* .

For a form of affirmative defense alleging that an option was obtained by fraud, see Ch. 569, *Vendor and Purchaser* .

For a form of complaint for fraud in representing that a multiple unit building was legal, see Ch. 569, *Vendor and Purchaser* .

For a form of complaint for fraud in the exchange of land, see Ch. 569, *Vendor and Purchaser* .

For a form of affirmative defense to an action for fraud on the ground of inspection by vendee, see Ch. 569, *Vendor and Purchaser* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionFalse AdvertisingGeneral OverviewCivil ProcedureRemediesEquitable AccountingsGeneral OverviewReal Property LawBrokersGeneral OverviewReal Property LawDeedsGeneral OverviewTortsIntentional TortsConversionGeneral Overview

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[Reserved]

§§ 269.03[Reserved]

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23-269 California Forms of Pleading and Practice--Annotated § 269.10

§ 269.10 Governing Statutes

Liability for the tort of deceit is governed by *Civ. Code § 1709*, and the tort of deceit is defined in *Civ. Code § 1710*. The statute of limitations for actions for relief on the ground of fraud is governed by *Code Civ. Proc. § 338(d)*. Constructive fraud is defined by *Civ. Code § 1573*. Compensatory damages for deceit generally are governed by *Civ. Code §§ 1709* and *3333*; compensatory damages for one defrauded in the purchase, sale, or exchange of property are governed by *Civ. Code § 3343*. Punitive damages based on fraud are governed by *Civ. Code § 3294*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationConstructive FraudGeneral OverviewTortsDamagesCompensatory DamagesGeneral OverviewTortsDamagesPunitive DamagesGeneral Overview

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§ 269.11 Definitions

[1] Fraud

In its broad and general sense, the concept of fraud includes anything that is intended to deceive, including all statements, acts, concealments, and omissions involving a breach of legal or equitable duty, trust, or confidence that results in injury to one who justifiably relies thereon [*Ach v. Finkelstein (1968) 264 Cal. App. 2d 667, 674, 70 Cal. Rptr. 472]* . More particularly, a fraudulent misrepresentation is one made with the knowledge that it is or may be untrue, and with the intention that the person to whom it is made act in reliance on it [*Wilke v. Coinway, Inc. (1967) 257 Cal. App. 2d 126, 136, 64 Cal. Rptr. 845]* . But fraud occurs in so many situations that it is difficult to define, and each case must be considered on its own facts [*see Estate of Arbuckle (1950) 98 Cal. App. 2d 562, 568, 220 P.2d 950]* .

[2] Deceit

A deceit can be: (1) the suggestion, as a fact, of something that is not true, by one who does not believe it to be true; (2) the assertion, as a fact, of something that is not true, by one who has no reasonable ground for believing it to be true; (3) the suppression of a fact, by one who is bound to disclose it, or who gives information or other facts that are likely to mislead for want of communication of that fact; or (4) a promise, made without any intention of performing it [*Civ. Code § 1710*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral Overview

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§ 269.12 Fraud and Deceit Distinguished

Under the Civil Code, "fraud" and "deceit" are technically two distinct concepts. "Fraud" refers to one of the bases for rescission of a contract based on lack of valid consent [*see Civ. Code §§ 1566, 1567(3), 1689(b)(1)*]. "Deceit" refers to the basis for the tort cause of action for damages [*see Civ. Code §§ 1709, 1710*]. Nevertheless, the courts frequently use the terms interchangeably to refer to the common-law tort cause of action for fraud or deceit [*see, e.g., Gold v. Los Angeles Democratic League (1975) 49 Cal. App. 3d 365, 374, 122 Cal. Rptr. 732* ; *City Bank of San Diego v. Ramage (1968) 266 Cal. App. 2d 570, 588, 72 Cal. Rptr. 273]* .

The practical distinction is not between the terms "fraud" and "deceit" but between the use of *Civ. Code § 1572* and *Civ. Code § 1710* as the basis for determining the existence of fraud or deceit. Reliance on *Civ. Code § 1572* is appropriate if misrepresentation is asserted as a defense to enforcement of a contract. *Civ. Code §§ 1709* and *1710* are applicable if a misrepresentation or false promise is asserted as the basis for recovery of tort damages [*see Bezaire v. Fidelity & Deposit Co. (1970) 12 Cal. App. 3d 888, 892, 91 Cal. Rptr. 142]* . The elements that are necessary to show fraud or deceit for the purpose of the tort remedy and for the purpose of showing that there was no valid consent to a contract are, however, very similar [*South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 Cal. App. 3d 750, 765, 102 Cal. Rptr. 286]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesRescission & RedhibitionGeneral OverviewTortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsDamagesCompensatory DamagesGeneral Overview

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§ 269.13 Elements

The elements of deceit are (1) a false representation or concealment of a material fact (or, in some cases, an opinion) susceptible of knowledge, (2) made with knowledge of its falsity or without sufficient knowledge on the subject to warrant a representation, (3) with the intent to induce the person to whom it is made to act on it, (4) and an act by that person in justifiable reliance on the representation, (5) to that person's damage [*South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 Cal. App. 3d 750, 765, 102 Cal. Rptr. 286* ; *Balfour, Guthrie & Co. v. Hansen (1964) 227 Cal. App. 2d 173, 192-193, 38 Cal. Rptr. 525]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudElements

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§ 269.14 Types of Misrepresentations

[1] Knowingly False Statements

A statement of fact that is not true suggested by one who does not believe it to be true constitutes deceit [*Civ. Code § 1710(1)*]. In other words, a material and knowingly false representation can support one of the elements of deceit [*see Block v. Tobin (1975) 45 Cal. App. 3d 214, 219, 119 Cal. Rptr. 288]* .

[2] Negligent Misrepresentations

"Negligent misrepresentation" is a basis of tort recovery separate and distinct from the tort of negligence; it is a form of the tort of deceit [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 407, 11 Cal. Rptr. 2d 51, 834 P.2d 745* ; *see Civ. Code § 1710(2)*]. A cause of action for deceit may be based on a misrepresentation that was not known to be false, but that was made by one who had no reasonable ground for believing it to be true [*Civ. Code §§ 1709, 1710(2)*; *Gagne v. Bertran (1954) 43 Cal. 2d 481, 487-488, 275 P.2d 15* ; *Wilke v. Coinway, Inc. (1967) 257 Cal. App. 2d 126, 136, 64 Cal. Rptr. 845* ; *see Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 407-408, 11 Cal. Rptr. 2d 51, 834 P.2d 745]* . An objectively reasonable basis for an inaccurate belief, however, is sufficient to protect the person making the representation from liability. For example, if a landowner has an objectively reasonable basis for an inaccurate belief concerning the location of boundaries or area, the landowner has not breached his or her duty to be informed regarding such matters before making a representation regarding the location of the property [*Quality Wash Group V, Ltd. v. Hallak (1996) 50 Cal. App. 4th 1687, 1696-1697, 58 Cal. Rptr. 2d 592]* . If a person asserts that a thing is true within that person's personal knowledge, or makes a statement as of his or her own knowledge, or makes such an absolute, unqualified, and positive statement that implies knowledge on his or her part, although in fact the person has no knowledge whether that assertion is true or false, and the person's statement proves to be false, that person is as culpable as if he or she had willfully asserted something to be true that he or she knew to be false, and is equally guilty of fraud [*Howell v. Courtesy Chevrolet, Inc. (1971) 16 Cal. App. 3d 391, 402, 94 Cal. Rptr. 33]* .

A false representation must be a positive assertion, because the tort of deceit based on negligent misrepresentation does not apply to implied statements [*Evan F. v. Hughson United Methodist Church (1992) 8 Cal. App. 4th 828, 841 n.2, 10 Cal. Rptr. 2d 748* ; *Yanase v. Automobile Club of S. Cal. (1989) 212 Cal. App. 3d 468, 473* ; *cf. Byrum v. Brand (1990) 219 Cal. App. 3d 926, 941-942, 268 Cal. Rptr. 609* (no cause of action stated because defendant had neither

made untrue statements nor actively concealed or suppressed any such facts; court appeared to leave open question whether nondisclosure of known, material facts could be sufficient assertion)]. However, a cause of action for negligence may be based on a negligent failure to disclose a material fact if there is a duty of care to disclose such a fact [*see, e.g., OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp. (2007) 157 Cal. App. 4th 835, 855, 68 Cal. Rptr. 3d 828* (investment bank could be liable for known material omissions in offering memorandum issued in support of sale of securities); *Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App. 4th 334, 349, 23 Cal. Rptr. 2d 377* (cause of action stated for negligent failure to disclose soil contamination that materially affected value of property)].

To be actionable, the representation must be of a past or existing material fact. A representation is not normally actionable as a negligent misrepresentation if it is merely an expression of opinion as to a future fact or occurrence [*Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells (2000) 86 Cal. App. 4th 303, 309-310, 103 Cal. Rptr. 2d 159* ; *see generally § 269.17*].

A cause of action for negligent misrepresentation has been recognized only if either (1) information is conveyed in a commercial setting for a business purpose, or (2) providing false information poses a risk of and results in physical harm to a person or property [*Friedman v. Merck & Co.(2003) 107 Cal. App. 4th 454, 477, 131 Cal. Rptr. 2d 885]* . For a discussion of a cause of action for negligent misrepresentation involving a risk of physical harm, see Ch. 380, *Negligence* .

[3] Suppression or Nondisclosure of Fact

Fraud and deceit may consist of the suppression of a fact by one who is bound to disclose it or who gives information of other facts that are likely to mislead for want of communication of that fact [*Civ. Code § 1710(3)*; *People v. Highland Fed. Sav. & Loan (1993) 14 Cal. App. 4th 1692, 1718, 19 Cal. Rptr. 2d 555* (concealment of fact is not actionable under *Civ. Code § 1710* unless defendant is under duty to disclose); *Stevens v. Superior Court (1986) 180 Cal. App. 3d 605, 608-610, 225 Cal. Rptr. 624* ; *Outboard Marine Corp. v. Superior Court (1975) 52 Cal. App. 3d 30, 37, 124 Cal. Rptr. 852]* . If concealment of a material fact is calculated to induce a false belief, the distinction between active concealment and affirmative misrepresentation is not significant. Both are fraudulent, and an active concealment has the same force and effect as a representation that is positive in form [*Outboard Marine Corp. v. Superior Court (1975) 52 Cal. App. 3d 30, 37, 124 Cal. Rptr. 852]* .

The duty to disclose facts arises if a person undertakes to speak, so that the speaker is bound not only to tell the truth but also not to suppress or conceal facts within speaker's knowledge that materially qualify those stated, because one who speaks at all must make a full and fair disclosure [*Brownlee v. Vang (1965) 235 Cal. App. 2d 465, 477, 45 Cal. Rptr. 458]* . For example, the vendor of property who voluntarily speaks concerning the property may not conceal any information within the vendor's knowledge bearing materially on the subject about which the vendor speaks [*McCue v. Bruce Enterprises, Inc. (1964) 228 Cal. App. 2d 21, 27-28, 39 Cal. Rptr. 125]* . Additionally, if the seller of property knows of facts materially affecting the value or desirability of the property, which are known or accessible only to him, and also knows that these facts are not known to, or within the reach of diligent attention of the buyer, the seller is under a duty to disclose these facts to the buyer [*Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App. 4th 334, 349, 23 Cal. Rptr. 2d 377* ; *Prichard v. Reitz (1986) 178 Cal. App. 3d 465, 468-469, 223 Cal. Rptr. 734* ; *see Snelson v. Ondulando Highlands Corp. (1970) 5 Cal. App. 3d 243, 251, 84 Cal. Rptr. 800* (action for rescission)]. This duty to disclose can extend to a duty to disclose lawsuits affecting the property's value or desirability, even lawsuits that are past and settled, and the issue of whether an undisclosed matter is of sufficient materiality to have affected the value or desirability of the property is a question of fact [*Calemine v. Samuelson (2009) 171 Cal. App. 4th 153, 165-166, 89 Cal. Rptr. 3d 495*]. If a beneficiary under a deed of trust is selling property pursuant to a power of sale, he or she may owe a common law duty to the prospective buyers to disclose known facts materially affecting the value of the property [*Karoutas v. HomeFed Bank (1991) 232 Cal. App. 3d 767, 771, 775, 283 Cal. Rptr. 809* (court of appeal reversed general demurrer without leave to amend; complaint had alleged facts sufficient to raise common-law duty to disclose)].

However, a real estate agent's duty to disclose is limited to those facts discovered in a diligent visual inspection. For example, an agent has no duty to ask a homeowner's association about construction defects in the common area of a planned unit development [*Padgett v. Phariss (1997) 54 Cal. App. 4th 1270, 1284, 63 Cal. Rptr. 2d 373]* .

The existence of a fiduciary relationship such as that between a stockbroker and his or her customers [*see Black v. Shearson, Hammill & Co. (1968) 266 Cal. App. 2d 362, 367-368, 72 Cal. Rptr. 157]* , title insurance company and client [*see Moe v. Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 289, 306, 98 Cal. Rptr. 547]* , attorney and client [*see Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 1159, 217 Cal. Rptr. 89]* , or any principal-agent relationship [*see St. James Armenian Church of L.A. v. Kurkjian (1975) 47 Cal. App. 3d 547, 551, 121 Cal. Rptr. 214]* also gives rise to a duty to disclose material facts [*LiMandri v. Judkins (1997) 52 Cal. App. 4th 326, 336-337, 60 Cal. Rptr. 2d 539]* so that the suppression or concealment of a material fact by the fiduciary constitutes actionable fraud [*Moe v. Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 289, 306, 98 Cal. Rptr. 547]* .

For a discussion of constructive fraud, which also arises from the failure of a fiduciary to disclose a material fact, see *§ 269.22*.

[4] Duty to Third Persons

The writer of a letter of recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to third persons [*Randi W. v. Muroc Joint Unified Sch. Dist. (1997) 14 Cal. 4th 1066, 1081, 60 Cal. Rptr. 2d 263, 929 P.2d 582]* . However, if there is no resulting physical injury or special relationship between the parties, the writer of a letter of recommendation has no duty of care extending to third persons for misrepresentations made concerning former employees [*Randi W. v. Muroc Joint Unified Sch. Dist. (1997) 14 Cal. 4th 1066, 1081, 60 Cal. Rptr. 2d 263, 929 P.2d 582]* .

The Court relied on Restatement (Second) of Torts §§ 310 (regarding intentional conduct) and 311 (regarding negligent conduct), as well as its analysis of whether a duty of care should be imposed for the benefit of third persons. In deciding that the Restatement principles should be followed and a duty imposed, the Court emphasized that the foreseeability of harm, the link between the conduct and the injury, the moral blame attributable to the conduct, the availability of insurance or alternative courses of conduct, and public policy considerations on balance supported the imposition of the duty [*Randi W. v. Muroc Joint Unified Sch. Dist. (1997) 14 Cal. 4th 1066, 1076-1081, 60 Cal. Rptr. 2d 263, 929 P.2d 582]* .

The Court also noted that *Civ. Code § 47(c)* may well give rise to a defense in some actions involving letters of reference; however, in dictum (because that section applies only to communications made on request of prospective employers, a situation not present in the case before the Court) the Court noted that the statute was primarily intended to provide employers with a defense in an action by the former employee, not to insulate employers from all tort liability arising from employment disclosures [*Randi W. v. Muroc Joint Unified Sch. Dist. (1997) 14 Cal. 4th 1066, 1080-1081, 60 Cal. Rptr. 2d 263, 929 P.2d 582]* . For discussion of the defenses afforded by *Civ. Code § 47*, see Ch. 340, *Libel and Slander* .

[5] Promise Without Intention to Perform

[a] Actionable Promises

Deceit may consist of a promise, made without any intention of performing it [*see Civ. Code § 1710(4)*], and such a promise is actionable if the other party relies on it as an inducement [*Brockway v. Heilman (1967) 250 Cal. App. 2d 807, 811, 58 Cal. Rptr. 772]* . Since a promise to do something necessarily implies the intention to perform, if that intention is absent, there is an implied misrepresentation of the fact of that intention [*Meyer v. Ford Motor Co. (1969)*

275 Cal. App. 2d 90, 103, 79 Cal. Rptr. 816] . The promise, to constitute fraud, must be made in bad faith and without intent to perform and must touch a substantive part of the consideration moving the party with whom the promisor is dealing [*Harazim v. Lynam (1968) 267 Cal. App. 2d 127, 133, 72 Cal. Rptr. 670]* . In addition, the defendant must not have intended to perform the promise at the time it was made [*O'Mary v. Mitsubishi Elecs. Am., Inc.(1997) 59 Cal. App. 4th 563, 579, 69 Cal. Rptr. 2d 389* (fraud action properly dismissed if laid off employee offered no evidence to show that employer had no intent to perform promise of lifetime employment at time promise was made); *Kett v. Graeser (1966) 241 Cal. App. 2d 571, 573, 50 Cal. Rptr. 727]* .

In contrast, a declaration of intention, although in the nature of a promise, made in good faith, without intention to deceive, and in the honest expectation that it will be fulfilled, even though it is not carried out, does not constitute fraud. The essence of an action for deceit based on a promise made without any intention of performing it is the lack of intent, at the time of making the promise, to perform it. The mere failure to perform a promise made in good faith does not constitute fraud [*Church of Merciful Saviour v. Volunteers of Am. (1960) 184 Cal. App. 2d 851, 859, 8 Cal. Rptr. 48]* . Furthermore, the subsequent failure to perform a promise does not give rise to any inference that the defendant did not intend to perform when he or she made the promise. Though fraudulent intent must often be established by circumstantial evidence, something more than nonperformance is required to prove the defendant's intent not to perform [*Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 30, 216 Cal. Rptr. 130, 702 P.2d 212* (disapproving *Santoro v. Carbone (1972) 22 Cal. App. 3d 721, 728, 99 Cal. Rptr. 488* and other cases holding that inference is created by failure to perform); *Magpali v. Farmers Group, Inc. (1996) 48 Cal. App. 4th 471, 55 Cal. Rptr. 2d 225]* . Fraudulent intent may be inferred from such circumstances as the defendant's failure to even attempt performance the issue of fraudulent intent is one for the trier of fact [*Locke v. Warner Bros., Inc. (1997) 57 Cal. App. 4th 354, 368, 66 Cal. Rptr. 2d 921* (based on evidence that film studio had expressed an absolute unwillingness to work with actress, trier of fact reasonably could infer that studio never intended to give the actresses' movie proposals a good faith evaluation)]. The issue of fraudulent intent is one for the trier of fact [*Locke v. Warner Bros., Inc. (1997) 57 Cal. App. 4th 354, 368, 66 Cal. Rptr. 2d 921]* .

[b] Effect of Statute of Frauds

An action for fraud may be maintained even if the allegedly fraudulent promise is unenforceable as a contract due to the statute of frauds, although proof in such an action is subject to the problems *discussed under § 269.14[5][a]* [*Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 29-31, 216 Cal. Rptr. 130, 702 P.2d 212* (overruling *Kroger v. Baur (1941) 46 Cal. App. 2d 801, 803, 117 P.2d 50* and progeny)]. In addition, in some instances, an oral collateral promise may have been made by the defendant to induce the plaintiff to enter into a contract required by the statute of frauds to be in writing [*Kett v. Graeser (1966) 241 Cal. App. 2d 571, 573, 50 Cal. Rptr. 727]* . However, a licensed real estate broker may not bring an action for fraud based on an alleged oral promise to pay a commission, because a licensed broker is presumed to know about the statute of frauds; his or her reliance on such an oral promise is therefore unreasonable as a matter of law [*Phillippe v. Shapell Indus. (1987) 43 Cal. 3d 1247, 1270, 241 Cal. Rptr. 22, 743 P.2d 1279* ; *American Int'l Enters., Inc. v. Federal Deposit Ins. Corp. (9th Cir. 1993) 3 F.3d 1263, 1270* (applying California law)].

[c] Effect of Parol Evidence Rule

Generally, the tort action for fraud cannot be used to circumvent the effect of the parol evidence rule. That is, the plaintiff cannot seek to vary the terms of an agreement containing a merger clause by bringing an action for the tort of fraud rather than for breach of contract and allege that the nonperformance of the oral promise was the nonperformance of a promise made without the intent to perform. If the plaintiff can show that the promise concerned a collateral matter and was made to induce the plaintiff to enter the contract, however, the plaintiff may recover damages from a defendant who has made an oral promise without the intent to perform despite the existence of a merger clause in the main contract [*Kett v. Graeser (1966) 241 Cal. App. 2d 571, 574-575, 50 Cal. Rptr. 727* ; *see, e.g.,* *Agosta v. Astor (2004) 120 Cal. App. 4th 596, 606-607, 15 Cal. Rptr. 3d 565* (fraudulent inducement to change employment was actionable, even though "at-will" employment provision in written contract precluded tort recovery for termination of

employment)].

A written contractual provision that no other representations were made will not necessarily preclude a fraud action based on representations that were not included in the written agreement [*Ron Greenspan Volkswagen v. Ford Motor Land Dev. Corp. (1995) 32 Cal. App. 4th 985, 987-989, 38 Cal. Rptr. 2d 783]* .

A written contractual provision that no other representations were made will not necessarily preclude a fraud action based on representations that were not included in the written agreement [*Ron Greenspan Volkswagen v. Ford Motor Land Dev. Corp. (1995) 32 Cal. App. 4th 985, 987-989, 38 Cal. Rptr. 2d 783]* .

Fraud in obtaining an instrument [*Vogelsang v. Wolpert (1964) 227 Cal. App. 2d 102, 122, 38 Cal. Rptr. 440]* or in inducing a party to enter into a contract by a material false promise may be shown by parol evidence [*see Code Civ. Proc. § 1856(g)*]. Evidence of an oral promise consistent with the written agreement is admissible under the parol evidence rule, while evidence of an oral promise at variance with the written agreement is not [*see Code Civ. Proc. § 1856(a)*]. Thus, *Code Civ. Proc. § 1856(g)*, embodying the so-called fraud exception to the parol evidence rule, does not apply to promissory fraud if the evidence in question is offered to show a promise that contradicts an integrated written agreement. Unless the false promise is either independent of or consistent with the written instrument, evidence of the false promise is not admissible [*Wang v. Massey Chevrolet (2002) 97 Cal. App. 4th 856, 873-876, 118 Cal. Rptr. 2d 770* ; *Alling v. Universal Mfg. Corp. (1992) 5 Cal. App. 4th 1412, 1436-1437, 7 Cal. Rptr. 2d 718* ; *see Brinderson-Newberg v. Pacific Erectors (9th Cir. 1992) 971 F.2d 272, 280-281] , cert. denied, 507 U.S. 914* . However, that rule only bars evidence of false promises. For example, parol evidence of a misrepresentation of fact concerning the content of an agreement, made at the time of signing, is admissible to void a contract [*Pacific State Bank v. Greene (2003) 110 Cal. App. 4th 375, 378-380, 1 Cal. Rptr. 3d 739]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawStatutes of FraudsGeneral OverviewEvidenceDocumentary EvidenceParol EvidenceTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationNondisclosureGeneral Overview

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Chapter 269 FRAUD AND DECEIT
PART II. LEGAL BACKGROUND

23-269 California Forms of Pleading and Practice--Annotated § 269.15

§ 269.15 Actual Reliance

[1] General Rule

To state a cause of action for deceit based on a misrepresentation, a plaintiff must plead and prove that he or she actually relied on the misrepresentation [*Mirkin v. Wasserman (1993) 5 Cal. 4th 1082, 1088, 1091-1093, 23 Cal. Rptr. 2d 101, 858 P.2d 568* ; *see also Bay Summit Cmty. Ass'n v. Shell Oil Co. (1996) 51 Cal. App. 4th 762, 767, 59 Cal. Rptr. 2d 322* (failure to prove actual reliance precluded fraud cause of action)].

Forbearance, or the decision not to exercise a right or power, is sufficient to fulfill the element of reliance necessary to state a cause of action for fraud or negligent misrepresentation [*Small v. Fritz Cos., Inc. (2003) 30 Cal. 4th 167, 174, 132 Cal. Rptr. 2d 490, 65 P.3d 1255]* . In one case, for example, the California Supreme Court recognized the right of stock investors to bring a common law action for fraud or negligent misrepresentation based on false statements or reports issued by corporate directors that induced the holders of that company's stock to decide not to sell the stock, although a plaintiff in such an action must plead actual reliance with specificity to state a cause of action [*Small v. Fritz Cos., Inc. (2003) 30 Cal. 4th 167, 171, 132 Cal. Rptr. 2d 490, 65 P.3d 1255]* . Actual reliance may be shown, for example, with allegations that if plaintiff had read a truthful account of the corporation's financial status, the plaintiff would have sold a specified amount of stock on a specified date [*Small v. Fritz Cos., Inc. (2003) 30 Cal. 4th 167, 184, 132 Cal. Rptr. 2d 490, 65 P.3d 1255]* . However, federal law preempts class action suits alleging fraud or misrepresentation in connection with the sale or purchase of securities, including actionable conduct that induces a decision to hold already-purchased securities, if those suits are brought in the name of 50 or more class members [*Merrill Lynch v. Dabit (2006) 547 U.S. 71* (preemption based on Securities Litigation Uniform Standards Act of 1998, codified at *15 U.S.C.S. § 78bb(f)(1)(A)*)].

[2] Effect of Lack of Communication of Representation to Plaintiff

Because the plaintiff must have actually relied on the misrepresentation in order to state a cause of action for deceit, there is generally no liability if the plaintiff never heard or read the misrepresentation before entering into the transaction [*see Mirkin v. Wasserman (1993) 5 Cal. 4th 1082, 1088, 1091-1100, 23 Cal. Rptr. 2d 101, 858 P.2d 568* ; *Suarez v. Life Ins. Co. of N. Am. (1988) 206 Cal. App. 3d 1396, 1408, 254 Cal. Rptr. 377* ; *see also Edmunds v. Valley Circle Estates (1993) 16 Cal. App. 4th 1290, 1301-1304, 20 Cal. Rptr. 2d 701* (selling partner as unable to rely on

buying partner's statement of intention regarding resale if selling partner's decision to sell predated statement)]. An exception exists if the representation was made to a person acting as an agent of the plaintiff, even if that person does not repeat the misrepresentation to the plaintiff [*see Mirkin v. Wasserman (1993) 5 Cal. 4th 1082, 1097-1098, 23 Cal. Rptr. 2d 101, 858 P.2d 568* ; *see also Grinnell v. Charles Pfizer & Co. (1969) 274 Cal. App. 2d 424, 441, 79 Cal. Rptr. 369* (patients permitted to sue pharmaceutical firms on basis of misrepresentations communicated to physicians on theory that physicians had acted as patients' agents); *Toole v. Richardson-Merrell, Inc. (1967) 251 Cal. App. 2d 689, 707, 60 Cal. Rptr. 398* (same); *Roberts v. Salot (1958) 166 Cal. App. 2d 294, 301, 333 P.2d 232* (property owner permitted to sue lender for misrepresentations made to owner's agent)]. Another exception exists if a misrepresentation in an employment letter of recommendation presents a substantial, foreseeable risk of physical injury to a third person, and a third person is injured as a result. In such a case, it is sufficient that the employer relied on the misrepresentation; the injured third person need not have [*Randi W. v. Muroc Joint Unified Sch. Dist. (1997) 14 Cal. 4th 1066, 1085, 60 Cal. Rptr. 2d 263, 929 P.2d 582]* . For further discussion, see *§ 269.24[2]*.

In one case, the California Supreme Court permitted a class action by parents suing for alleged false representations contained in television advertisements directed at children, even though it was conceded that many of the parents had not actually heard the misrepresentations, nor had the children literally repeated them to the parents [*see Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 219, 197 Cal. Rptr. 783, 673 P.2d 660] , superseded by statute as stated in Gartin v. S&M NuTec LLC, 245 F.R.D. 429, 2007 U.S. Dist. LEXIS 38050* . In a later case, the Court interpreted this decision as merely standing for the proposition that "children cannot be expected to convey representations about products with precision," andas not dispensing with the requirement that the representation be communicated to and relied on by the plaintiff [*Mirkin v. Wasserman (1993) 5 Cal. 4th 1082, 1098-1099, 23 Cal. Rptr. 2d 101, 858 P.2d 568]* . However, communication and reliance may be shown with evidence that the plaintiff was influenced by widespread advertising targeted at a group of which the plaintiff was a member, even if the plaintiff cannot specify that any particular advertisement or statement was made directly to him or her or that the plaintiff relied on any one advertisement [*Bullock v. Philip Morris USA, Inc. (2008) 159 Cal. App. 4th 655, 676, 71 Cal. Rptr. 3d 775* ; *Boeken v. Philip Morris, Inc. (2005) 127 Cal. App. 4th 1640, 1660-1661, 26 Cal. Rptr. 3d 638]* .

[3] "Fraud-on-Market" Doctrine Inapplicable to Common-Law Fraud Actions

The "fraud-on-the-market" doctrine used in actions under federal and state securities laws does not apply to common-law fraud actions. The "fraud-on-the-market" doctrine allows persons who purchase or sell securities at a price affected by a misrepresentation to sue the person who made the misrepresentation, even if the buyer or seller never actually heard or relied on the misrepresentation [*see Mirkin v. Wasserman (1993) 5 Cal. 4th 1082, 1100-1108, 23 Cal. Rptr. 2d 101, 858 P.2d 568]* . As noted in § 269.15[1], however, subject to federal preemption of class actions with 50 or more class plaintiffs, the California Supreme Court has subsequently recognized the right of stock investors to bring a common law action for fraud or negligent misrepresentation based on false statements or reports issued by corporate directors that induced the holders of that company's stock to decide not to sell the stock, although a plaintiff in such an action must plead actual reliance with specificity to state a cause of action [*Small v. Fritz Cos., Inc. (2003) 30 Cal. 4th 167, 171, 132 Cal. Rptr. 2d 490, 65 P.3d 1255]* .

For discussion of forms for use in actions for securities fraud under California law, see Ch. 515, *Securities and Franchise Regulation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Securities LawLiabilitySecurities Exchange Act of 1934 ActionsImplied Private Rights of ActionElements of ProofRelianceFraud on the MarketTortsBusiness TortsFraud & MisrepresentationActual FraudElementsTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationElements

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§ 269.16 Justifiable Reliance

[1] Subjective Test

The test for determining justifiability of reliance is whether the person claiming reliance was justified in believing the representation in the light of his or her own knowledge and experience [*Gray v. Don Miller & Assocs., Inc. (1984) 35 Cal. 3d 498, 503, 198 Cal. Rptr. 551, 674 P.2d 253]* .

The plaintiff is not held to the standard of precaution or minimum knowledge of the hypothetical reasonable person. The plaintiff will be denied recovery only if the plaintiff's conduct is manifestly unreasonable in the light of the plaintiff's own intelligence or information. It must be shown that the plaintiff put faith in representations that were "preposterous" or "shown by facts within [his or her] observation to be so patently and obviously false that [the plaintiff] must have closed [his or her] eyes to avoid discovery of the truth." Even in the case of a mere negligent misrepresentation, a plaintiff is not barred unless the plaintiff's conduct, in the light of the plaintiff's own information and intelligence, is preposterous and irrational [*Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 964-965, 72 Cal. Rptr. 722* ; *see Atari Corp. v. Ernst & Whinney (9th Cir. 1992) 981 F.2d 1025, 1030-1031]* .

[2] Effect of Plaintiff's Knowledge of Defendant's Untrustworthiness

A plaintiff who in fact had a generalized distrust of the defendant's honesty or who actually mistrusted the defendant's statements with regard to the fraudulent transaction may be unable to show the required justifiable and reasonable reliance on the defendant's statements [*see Julrik Prods., Inc. v. Chester (1974) 38 Cal. App. 3d 807, 810, 113 Cal. Rptr. 527]* . Actual reliance is present only when the plaintiff acts based on belief in the *truth* of defendant's representations. A plaintiff who suspects that defendant's claims are *false* and acts based on that suspicion with the intent to sue for fraud if plaintiff's suspicions turn out to be true has not actually relied on the truth of defendant's misrepresentations [*Buckland v. Threshold Enterprises, Ltd. (2007) 155 Cal. App. 4th 798, 808, 66 Cal. Rptr. 3d 543]* . Thus, for example, a consumer who purchases a product with the belief that the manufacturer has falsely represented the product in its advertising cannot show actual reliance when purchasing the product with the specific intent to sue if the advertising does turn out to be false [*Buckland v. Threshold Enterprises, Ltd. (2007) 155 Cal. App. 4th 798, 808-809, 66 Cal. Rptr. 3d 543]* . In the case of fraud by omission, the plaintiff's requisite belief is in the material completeness of the defendant's representations [*Buckland v. Threshold Enterprises, Ltd. (2007) 155 Cal. App. 4th*

798, 808, 66 Cal. Rptr. 3d 543] .

If a plaintiff learns that one representation by a defendant is false, the plaintiff may not assume other representations by the defendant were true [*Roland v. Hubenka (1970) 12 Cal. App. 3d 215, 225, 90 Cal. Rptr. 490* ; *see American Air Equip., Inc. v. Pacific Employers Ins. Co. (1974) 37 Cal. App. 3d 322, 328, 112 Cal. Rptr. 366]* .

[3] Effect of Defendant's Assurances

If the plaintiff has only a suspicion of fraud and the defendant lulls the plaintiff into inaction by a false representation, the defendant will not be permitted to assert that the plaintiff lost the right to recover damages by accepting the assurance of the defendant that there was no fraud [*Brownlee v. Vang (1965) 235 Cal. App. 2d 465, 474, 45 Cal. Rptr. 458]* , or by accepting the defendant's plausible explanation of facts that might otherwise arouse suspicion [*Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 966, 72 Cal. Rptr. 722]* . The plaintiff is not precluded from justifiably relying on later misrepresentations of the defendant if the defendant has corrected the results of the first misrepresentation on request [*Shearer v. Cooper (1943) 21 Cal. 2d 695, 701, 134 P.2d 764]* .

[4] Effect of Fiduciary or Confidential Relationship

If there is a fiduciary relationship between the plaintiff and the defendant, the plaintiff has the right to rely on representations made to him or her without the duty of further inquiry [*Davis v. Kahn (1970) 7 Cal. App. 3d 868, 878, 86 Cal. Rptr. 872* ; *see Greenfield v. Insurance Inc. (1971) 19 Cal. App. 3d 803, 811, 97 Cal. Rptr. 164* (insurance agent representing he had obtained coverage that he had not obtained)].

[5] Effect of Defendant's Superior Knowledge

As a general rule, one has a right to rely on statements of material facts essentially connected with the substance of the transaction if he or she is ignorant or inexperienced in regard to the matters about which the material misrepresentations are made and this ignorance is known to the other party, who is also aware that reliance is being placed on those representations and that the facts are not and cannot be expected to be within the first party's knowledge [*Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 966, 72 Cal. Rptr. 722]* . The plaintiff also has the right to rely on representations if he or she lacks equal facilities for learning the truth, such as if the facts are peculiarly within the knowledge of the speaker and are difficult for the hearer to ascertain, or if from the circumstances surrounding the transaction the hearer is forced to rely on the speaker's statements [*Meyer v. Ford Motor Co. (1969) 275 Cal. App. 2d 90, 105, 79 Cal. Rptr. 816]* .

[6] Effect of Plaintiff's Independent Investigation or Lack of Investigation

If one is justified in relying, and in fact does rely, on false representations, his or her right of action is not destroyed merely because he or she could have discovered the true facts by investigation or other means. In other words, the plaintiff has no duty to investigate the truth of representations that he or she was justified in relying on [*Howell v. Courtesy Chevrolet, Inc. (1971) 16 Cal. App. 3d 391, 403, 94 Cal. Rptr. 33]* . Even if the plaintiff has an opportunity to make an inspection or investigation that would reveal the falsity of the defendant's statements to him or her, he or she is not required to make the investigation if the defendant has asserted facts about the subject matter [*Storage Servs. v. Oosterbaan (1989) 214 Cal. App. 3d 498, 508, 262 Cal. Rptr. 689* ; *Balfour, Guthrie & Co. v. Hansen (1964) 227 Cal. App. 2d 173, 193, 38 Cal. Rptr. 525]* . The fact than an investigation would have revealed the falsity of a misrepresentation will not alone bar recovery, unless the conduct of the plaintiff in the light of the plaintiff's own intelligence and information was manifestly unreasonable [*Meyer v. Ford Motor Co. (1969) 275 Cal. App. 2d 90, 105, 79 Cal. Rptr. 816]* .

Even if the plaintiff does make an independent investigation or examination of property, this does not preclude reliance on the defendant's representations if the falsity of the statement is not apparent from an inspection, or the person making

the representations has superior knowledge, or the party relying on the investigation is not competent to judge the facts without expert assistance [*Snelson v. Ondulando Highlands Corp. (1970) 5 Cal. App. 3d 243, 252, 84 Cal. Rptr. 800* ; *Horn v. Guaranty Chevrolet Motors (1969) 270 Cal. App. 2d 477, 482, 75 Cal. Rptr. 871]* . In addition, if plaintiff made an attempt to investigate but negligently failed to discover the falsity of the defendant's representations, this negligence will not relieve the defendant from liability for his or her intentional misrepresentations [*Manderville v. PCG&S Group, Inc. (2007) 146 Cal. App. 4th 1486, 1502-1503, 55 Cal. Rptr. 3d 59]* .

If, however, a party to whom a misrepresentation has been made does make an independent investigation and ascertains that the representation is false, he or she is not justified in relying on the misrepresentation [*Mercer v. Elliott (1962) 208 Cal. App. 2d 275, 279, 25 Cal. Rptr. 217* ; *but see Kramer v. Musser (1943) 57 Cal. App. 2d 942, 946, 136 P.2d 74* (plaintiff who undertakes investigation as held to knowledge that would have been obtained had plaintiff pursued investigation to its end)].

[7] Effect of Failure to Read Insurance Policy

In cases involving alleged fraudulent misrepresentations concerning insurance coverage, some courts have applied what appears to be an exception to the usual rule that a plaintiff has no duty to investigate the truth of affirmative representations unless the plaintiff is aware of facts indicating the falsity of the representations [*see § 269.16[6]*]. These courts have held that if an insured receives and accepts an insurance policy, he or she is bound by its terms and cannot thereafter complain that he or she did not read the policy or know its terms. An insured who fails to read or understand the terms of the policy is precluded from claiming justifiable reliance on coverage misrepresentations by a broker or agent if the insured could have ascertained the truth by reading the express terms of the policy [*see Hadland v. NN Investors Life Ins. Co. (1994) 24 Cal. App. 4th 1578, 1586-1589, 30 Cal. Rptr. 2d 88* ; *Hackethal v. National Cas. Co. (1987) 189 Cal. App. 3d 1102, 1111-1112, 234 Cal. Rptr. 853]* .

[8] Effect of Plaintiff's Discovery of True Facts Before Close of Escrow in Real Property Sale

The plaintiff's discovery of the true facts after signing a real property purchase agreement but before the close of escrow does not preclude a finding of justifiable reliance with respect to false representations made by the defendant before the purchase agreement was signed. The plaintiff's reliance at the inception of the agreement is sufficient to support recovery for fraud [*Jue v. Smiser (1994) 23 Cal. App. 4th 312, 313, 316-318, 28 Cal. Rptr. 2d 242]* .

[9] Effect of Plaintiff's Legal Duty to Act in Response to Representations

If misrepresentations trigger actions that are mandated by law on the part of the person to whom the representations are made, then these actions are not taken in reliance on the misrepresentations. In one case, for example, an employer was required by law and by its workers' compensation insurance policy to report any claims to its insurer. Because of this legal requirement, the employer could not demonstrate reliance on an alleged fraudulent claim filed by an employee when it reported the claim to the insurer [*Leegin Creative Leather Prods., Inc. v. Diaz (2005) 131 Cal. App. 4th 1517, 1525, 33 Cal. Rptr. 3d 139]* .

[10] Constructive Notice Not Applicable

The plaintiff in an action for fraud is not held to constructive notice of a public record that would reveal the true facts [*Seeger v. Odell (1941) 18 Cal. 2d 409, 415, 115 P.2d 977]* .

[11] Burden of Proof and Evidence

[a] In General

The fact that reliance was not justified is a defense [*see Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942,*

964-965, 72 Cal. Rptr. 722] , but the plaintiff has the burden of proof on the issue of justifiable reliance [*American Air Equip., Inc. v. Pacific Employers Ins. Co. (1974) 37 Cal. App. 3d 322, 327 n.4, 112 Cal. Rptr. 366]* . Whether the plaintiff justifiably relied is generally a question of fact [*Meyer v. Ford Motor Co. (1969) 275 Cal. App. 2d 90, 105, 79 Cal. Rptr. 816]* , but it is not necessary to show reliance on a false representation by direct evidence. The fact of reliance on false representations may be inferred from the circumstances attending the transaction, which often afford much stronger and more satisfactory evidence of the inducement that prompted the party defrauded to enter into the contract than his or her direct testimony to the same effect [*Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 814, 94 Cal. Rptr. 796, 484 P.2d 964]* .

[b] Class Actions

In a class action for fraud, the plaintiff must show that the defendant made false material representations to each member of the class with knowledge of their falsity or an unreasonable belief in their veracity and that these representations were made with intent to and did induce justifiable reliance by each member of the class and that each member of the class suffered damages as a result [*see* *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 811, 94 Cal. Rptr. 796, 484 P.2d 964]* . The representative plaintiff must by common proof show that substantially the same representations were made to each member of the class. One way of showing common representations is to show that the defendant used a standardized sales pitch or brochure [*see* *Occidental Land, Inc. v. Superior Court (1976) 18 Cal. 3d 355, 361-362, 134 Cal. Rptr. 388, 556 P.2d 750]* . If representations were in fact made to all the members of a class, a persuasive inference that each of them relied on the representations arises without separate proof of reliance by each individual plaintiff [*Collins v. Rocha (1972) 7 Cal. 3d 232, 237, 102 Cal. Rptr. 1, 497 P.2d 225* ; *see* *Mirkin v. Wasserman (1993) 5 Cal. 4th 1082, 1095, 23 Cal. Rptr. 2d 101, 858 P.2d 568]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudDefensesTortsBusiness TortsFraud & MisrepresentationActual FraudElementsTortsIntentional TortsBreach of Fiduciary DutyGeneral Overview

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§ 269.17 Opinion and Fact

[1] Opinions Not Actionable

Ordinarily, mere statements of opinion, including legal conclusions drawn from a true statement of facts, are not actionable [*see Wilke v. Coinway, Inc. (1967) 257 Cal. App. 2d 126, 136, 64 Cal. Rptr. 845]* , and the plaintiff may not show justifiable reliance on mere statements of opinion [*Wilke v. Coinway, Inc. (1967) 257 Cal. App. 2d 126, 136, 64 Cal. Rptr. 845]* . There is a special type of opinion known as puffing, an exaggerated statement of the opinion of a seller about his or her wares, for which the seller is not held liable [*see Hauter v. Zogarts (1975) 14 Cal. 3d 104, 111* n.5, *120 Cal. Rptr. 681, 534 P.2d 377]* .

[2] Distinction Between Opinion and Fact

The line between opinion and fact is not distinct. If the opinion is rendered under circumstances such that it may be regarded as amounting to a positive affirmation of fact, it will be treated as a representation of fact for purposes of a deceit action [*Mercer v. Elliott (1962) 208 Cal. App. 2d 275, 280, 25 Cal. Rptr. 217]* . An assertion that factually describes an important characteristic of a product is not a seller's mere puffing or opinion and is actionable. The courts, in addition, have consistently narrowed the scope of puffing and expanded the liability that flows from broad statements of manufacturers as to the quality of their products. A statement, for example that a product is safe is usually held to be a statement of fact [*Hauter v. Zogarts (1975) 14 Cal. 3d 104, 111-113, 120 Cal. Rptr. 681, 534 P.2d 377* ; *Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 Cal. App. 3d 388, 424, 264 Cal. Rptr. 779]* . If there is a reasonable doubt as to whether a particular statement is an expression of opinion or the affirmation of a fact, the determination rests with the trier of fact [*Pacesetter Homes, Inc. v. Brodkin (1970) 5 Cal. App. 3d 206, 212, 85 Cal. Rptr. 39]* .

[3] Opinions That Are Actionable

An expression of opinion is treated as an actionable misrepresentation if any of the following applies: the one expressing the opinion does not in fact entertain it [*Ogier v. Pacific Oil & Gas Corp. (1955) 132 Cal. App. 2d 496, 506, 282 P.2d 574* ; *see also Anderson v. Handley (1957) 149 Cal. App. 2d 184, 187, 308 P.2d 368* (expression of opinion as to character or skill of another)]; the opinion amplifies false representations of fact [*Harazim v. Lynam*

(1968) 267 Cal. App. 2d 127, 133, 72 Cal. Rptr. 670 ; *Wilke v. Coinway, Inc. (1967) 257 Cal. App. 2d 126, 136, 64 Cal. Rptr. 845]* ; the opinion is expressed in a manner implying a factual basis that does not exist [*Harazim v. Lynam (1968) 267 Cal. App. 2d 127, 133, 72 Cal. Rptr. 670]* ; if the opinion is expressed as a fact [*Harazim v. Lynam (1968) 267 Cal. App. 2d 127, 132, 72 Cal. Rptr. 670]* ; the opinion is expressed by a party possessing superior knowledge to that of the plaintiff [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 407-408, 11 Cal. Rptr. 2d 51, 834 P.2d 745* ; *Gagne v. Bertran (1954) 43 Cal. 2d 481, 489, 275 P.2d 15* ; *Pacesetter Homes, Inc. v. Brodkin (1970) 5 Cal. App. 3d 206, 211, 85 Cal. Rptr. 39* ; *Ogier v. Pacific Oil & Gas Corp. (1955) 132 Cal. App. 2d 496, 506-507, 282 P.2d 574]* ; or if there is a fiduciary relationship between the plaintiff and the defendant [*Katz v. Feldman (1972) 23 Cal. App. 3d 500, 504, 100 Cal. Rptr. 367* ; Harazim v. Lynam (1968) 267 App. 2d 127, 133, *72 Cal. Rptr. 670]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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23-269 California Forms of Pleading and Practice--Annotated § 269.18

§ 269.18 Misrepresentation of Law

[1] General Rule

Absent special circumstances, a misrepresentation of law is not actionable fraud [*Bledsoe v. Watson (1973) 30 Cal. App. 3d 105, 110, 106 Cal. Rptr. 197* ; *Regus v. Schartkoff (1957) 156 Cal. App. 2d 382, 388, 319 P.2d 721]* . That is, a representation of law by a layperson not occupying a confidential relationship toward the one to whom it is addressed and based on facts equally known or accessible to both does not ordinarily justify reliance on the representation [*Regus v. Schartkoff (1957) 156 Cal. App. 2d 382, 388, 319 P.2d 721]* .

[2] Exceptions

The rule precluding liability for misrepresentations of law has several exceptions. One of the most commonly known and recognized exceptions arises if the parties occupy confidential or fiduciary relations toward one another [*see* *Lynch v. Cruttenden & Co. (1993) 18 Cal. App. 4th 802, 808, 22 Cal. Rptr. 2d 636* ; *Katz v. Feldman (1972) 23 Cal. App. 3d 500, 504, 100 Cal. Rptr. 367* ; *Bank of Am. v. Sanchez (1934) 3 Cal. App. 2d 238, 242, 38 P.2d 787]* .

This exception is not limited to situations in which there is a formal fiduciary or confidential relationship (for example, an attorney-client relationship). The exception extends to fiduciary or confidential relationships that may arise out of moral, social, domestic, or personal relationships. For example, the existence of friendly relations between the parties during a period of several years may entitle the injured party, in an appropriate case, to place confidence in the integrity and honesty of the other party and in the truth of representations made by the latter regarding a transaction between them [*Bank of Am. v. Sanchez (1934) 3 Cal. App. 2d 238, 243, 38 P.2d 787* ; *see* *Lynch v. Cruttenden & Co. (1993) 18 Cal. App. 4th 802, 809, 22 Cal. Rptr. 2d 636* (plaintiffs justified in relying on defendant's representations regarding legal effect of documents signed by them because defendant had obtained control over funds through trust and confidence reposed in defendant as their friend and as purported expert in investments)].

Another exception exists if one who has had superior means of obtaining information possesses a knowledge of the law and thereby gains an unconscionable advantage over another who is ignorant and has not been in a situation to become informed [*Orange County Rock Prods. Co. v. Cook Bros. Equip. Co. (1966) 246 Cal. App. 2d 698, 701, 55 Cal. Rptr. 265* ; *Regus v. Schartkoff (1957) 156 Cal. App. 2d 382, 388-389, 319 P.2d 721]* . An exception also exists if the party

expressing the opinion purports to have (or is reasonably believed by the other party to have) expert knowledge concerning the matter [*see Seeger v. Odell (1941) 18 Cal. 2d 409, 414, 115 P.2d 977* ; *Lynch v. Cruttenden & Co. (1993) 18 Cal. App. 4th 802, 808, 22 Cal. Rptr. 2d 636* ; *Regus v. Schartkoff (1957) 156 Cal. App. 2d 382, 388, 319 P.2d 721]* .

Legal Topics:

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§ 269.19 Intent to Induce Reliance

[1] General Rule

Some cases have implied that an actual intent on the part of the defendant to deceive the plaintiff is a necessary element of the cause of action for deceit [*see, e.g., Lesperance v. North Am. Aviation, Inc. (1963) 217 Cal. App. 2d 336, 345, 31 Cal. Rptr. 873]* . However, one who deceives another with the intent to induce that other person to alter his or her position to his or her injury or risk is liable for any damages that the other person thereby suffers [*Civ. Code § 1709*]. The required intent is the intent to induce reliance so that the person defrauded alters his or her position, and is not the intent to defraud [*Gagne v. Bertran (1954) 43 Cal. 2d 481, 488* n.5, *275 P.2d 15* ; *De Zemplen v. Home Fed. Sav. & Loan Ass'n (1963) 221 Cal. App. 2d 197, 207, 34 Cal. Rptr. 334]* . The fact that negligent misrepresentation is made actionable by *Civ. Code § 1710(2)* further indicates that the intent to induce reliance, rather than the intent to deceive, is the required intent [*Hale v. George A. Hormel & Co. (1975) 48 Cal. App. 3d 73, 82-86, 121 Cal. Rptr. 144]* .

The defendant's intent to cause the plaintiff to suffer a particular type of damage or harm is not an element of a cause of action for fraud [*Lovejoy v. AT&T Corp. (2001) 92 Cal. App. 4th 85, 92-94, 111 Cal. Rptr. 2d 711]* .

[2] Inference of Intent

An intent to induce the plaintiff to alter his or her position can be inferred from the fact that the defendant made the representation with knowledge that the plaintiff would act in reliance on it [*Gagne v. Bertran (1954) 43 Cal. 2d 481, 488, 275 P.2d 15* ; *Eddy v. Sharp (1988) 199 Cal. App. 3d 858, 864, 245 Cal. Rptr. 211* ; *see Civ. Code § 1709*], since direct proof of intent is often impossible [*Santoro v. Carbone (1972) 22 Cal. App. 3d 721, 728, 99 Cal. Rptr. 488]* . For example, an accounting firm that prepares financial reports for a research company for inclusion in a confidential offering memorandum to be communicated to potential investors was found to have known to a substantial certainty that investors would rely on the reports in the course of the transaction [*Anderson v. Deloitte & Touche (1997) 56 Cal. App. 4th 1468, 1477-1478, 66 Cal. Rptr. 2d 512* (forecasts and underlying assumptions to which reports referred were designed for the specific purpose of attracting investors and could not reasonably be understood to have any other purpose)].

Intent is usually proved by inference from the fact of concealment or from misrepresentation of material facts [*Horn v.*

Guaranty Chevrolet Motors (1969) 270 Cal. App. 2d 477, 483, 75 Cal. Rptr. 871] .

[3] Intent to Induce Reliance by Public or by Class of Persons

One who commits a deceit with intent to defraud the public or a particular class of persons is deemed to have intended to defraud every individual in that class who is actually misled by the deceit [*Civ. Code § 1711*]. Thus, liability may be imposed if the representation was intended to be relied on by the public or by a general class of persons that includes the plaintiff; the defendant need not have intended that the representation be relied on by the plaintiff specifically [*see Barnhouse v. City of Pinole (1982) 133 Cal. App. 3d 171, 191-192, 183 Cal. Rptr. 881* ; *see also Civ. Code § 1711*]. However, there is no liability unless the representation was ultimately communicated to and actually relied on by the plaintiff [*see Mirkin v. Wasserman (1993) 5 Cal. 4th 1082, 1088-1100, 23 Cal. Rptr. 2d 101, 858 P.2d 568* ; *see also § 269.15[2]*].

Legal Topics:

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

In order to constitute actionable fraud, the alleged false representation must be of a material fact [*Adkins v. Wyckoff (1957) 152 Cal. App. 2d 684, 689, 313 P.2d 592]* . This requirement is related to the requirement that the representation by the defendant must have induced the plaintiff to alter his or her position--that is, that the plaintiff must have actually relied on the defendant's representation [*see Sanfran Co. v. Rees Blow Pipe Mfg. Co. (1959) 168 Cal. App. 2d 191, 202, 335 P.2d 995* (causation in misrepresentation cases as frequently presented in terms of reliance and inducement); *see also § 269.15[2]*]. A fraudulent misrepresentation is not actionable unless the plaintiff's conduct in reliance on the misrepresentation caused the loss for which the plaintiff seeks damages [*Bezaire v. Fidelity & Deposit Co. (1970) 12 Cal. App. 3d 888, 893, 91 Cal. Rptr. 142]* . The materiality of the representation and the actual reliance of the plaintiff on the representation are both necessary to show that the damage claimed was sustained by reason of the fraud. The fraud and the damage sustained must have a cause and effect relationship to each other [*Hill v. Wrather (1958) 158 Cal. App. 2d 818, 825, 323 P.2d 567]* .

To be material, the misrepresentation must be such that the plaintiff would not have acted as the plaintiff did without it [*Adkins v. Wyckoff (1957) 152 Cal. App. 2d 684, 689, 313 P.2d 592]* . The fact represented or suppressed is deemed material if it relates to a matter of substance and directly affects the purpose for which the deceived party acted [*Handley v. Handley (1960) 179 Cal. App. 2d 742, 746, 3 Cal. Rptr. 910* (misrepresentation as ground for annulment of marriage contract)]. Concealment is material if the knowledge suppressed is so important that its mere repression amounts to fraud [*Sanfran Co. v. Rees Blow Pipe Mfg. Co. (1959) 168 Cal. App. 2d 191, 205, 335 P.2d 995]* . On the other hand, a false representation that cannot affect the intrinsic merits of a business transaction must necessarily be immaterial because reliance on it could not produce injury in a legal sense [*Hill v. Wrather (1958) 158 Cal. App. 2d 818, 824-825, 323 P.2d 567]* .

The plaintiff will also be unable to show materiality or causation if the plaintiff could have done nothing to improve his or her position if the plaintiff had known initially that the representation was false [*Bezaire v. Fidelity & Deposit Co. (1970) 12 Cal. App. 3d 888, 893, 91 Cal. Rptr. 142]* . However, it is unnecessary that the defendant's representations be the sole cause of the damage. If they are a substantial factor in inducing the plaintiff to act, even though the plaintiff also relies in part on the advice of others, reliance and materiality are sufficiently shown [*Wennerholm v. Stanford Univ. Sch. of Med. (1942) 20 Cal. 2d 713, 717, 128 P.2d 522* ; *Anderson v. Handley (1957) 149 Cal. App. 2d 184,*

186-187, 308 P.2d 368] . It is sufficient if the evidence shows that the representation was an inducement to the plaintiff to act without showing that it was the sole inducement [*Sanfran Co. v. Rees Blow Pipe Mfg. Co. (1959) 168 Cal. App. 2d 191, 205, 335 P.2d 995]* .

Legal Topics:

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§ 269.21 Damage as Element of Cause of Action

Fraud without damage furnishes no ground for action [*Wallis v. Farmers Group, Inc. (1990) 220 Cal. App. 3d 718, 734, 269 Cal. Rptr. 299 , overruled in part by, Dore v. Arnold Worldwide, Inc., 39 Cal. 4th 384* ; *South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 Cal. App. 3d 750, 765, 102 Cal. Rptr. 286* ; *see Fraker v. Sentry Life Ins. Co. (1993) 19 Cal. App. 4th 276, 285-286, 23 Cal. Rptr. 2d 372]* . A plaintiff may recover for fraud only if the plaintiff shows that because of the defendant's misrepresentations, the plaintiff has sustained some pecuniary damage or injury from having been put in a position worse than he or she would have occupied had there been no fraud [*R.D. Reeder Lathing Co. v. Cypress Ins. Co. (1970) 3 Cal. App. 3d 995, 999, 84 Cal. Rptr. 98]* . The plaintiff must allege and prove the precise amount of damages [*Santoro v. Carbone (1972) 22 Cal. App. 3d 721, 728, 99 Cal. Rptr. 488]* .

Legal Topics:

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§ 269.22 Constructive Fraud

[1] Definition

Constructive fraud is (1) any breach of duty by which a person, without an actually fraudulent intent, gains an advantage by misleading another to his or her prejudice, or to the prejudice of anyone claiming under him or her; or (2) any act or omission that the law specially declares to be fraudulent, without respect to actual fraud [*Civ. Code § 1573*].

In its generic sense, constructive fraud comprises all acts, omissions, and concealments involving a breach of legal or equitable duty, trust, or confidence, and resulting in damage to another person. Constructive fraud exists in cases in which conduct, although not actually fraudulent, ought to be treated as fraud. That is, it exists in situations in which the conduct is a constructive or quasi fraud, and has all the actual consequences and legal effects of actual fraud. Constructive fraud occurs if there is a breach of duty arising from a confidential relationship, that is, a relationship in which trust and confidence is reposed by one person in the integrity and fidelity of another [*Barrett v. Bank of Am. (1986) 183 Cal. App. 3d 1362, 1368-1369, 229 Cal. Rptr. 16* (criticized in *Price v. Wells Fargo Bank (1989) 213 Cal. App. 3d 465, 476, 261 Cal. Rptr. 735* to extent it suggests that relationship between bank and loan customer is quasi-fiduciary); *Estate of Arbuckle (1950) 98 Cal. App. 2d 562, 568, 220 P.2d 950* ; *see also Feeney v. Howard (1889) 79 Cal. 525, 529, 21 P. 984* ; *Salahutdin v. Valley of Cal., Inc. (1994) 24 Cal. App. 4th 555, 562, 29 Cal. Rptr. 2d 463* ; *Guthrie v. Times-Mirror Co. (1975) 51 Cal. App. 3d 879, 889, 124 Cal. Rptr. 577]* , with justification [*Twomey v. Mitchum, Jones & Templeton, Inc. (1968) 262 Cal. App. 2d 690, 711, 69 Cal. Rptr. 222]* .

[2] Presumption of Fraud

If during the existence of the fiduciary relationship one of the parties secures any advantage over the other, the transaction is presumptively fraudulent and the burden is on the party gaining the advantage to show fairness and good faith in all respects. The presumption is evidence and is sufficient to sustain a finding of fraud although there may be direct evidence to the contrary [*Boyd v. Bevilacqua (1966) 247 Cal. App. 2d 272, 290-291, 55 Cal. Rptr. 610]* .

[3] Breach of Duty of Disclosure

If there is a duty to speak because of a trust or confidential relationship, a failure to do so is considered constructive

fraud [*Blair v. Mahon (1951) 104 Cal. App. 2d 44, 49, 230 P.2d 832]* . Wherever there is a confidential relationship, there is a duty to make full disclosure of all material facts within the agent's or trustee's knowledge relating to the transaction [*Montoya v. McLeod (1985) 176 Cal. App. 3d 57, 64, 221 Cal. Rptr. 353* ; *Ford v. Cournale (1973) 36 Cal. App. 3d 172, 182, 111 Cal. Rptr. 334]* .

Such a duty exists between a real estate broker and his or her client [*Salahutdin v. Valley of Cal., Inc. (1994) 24 Cal. App. 4th 555, 562-563, 29 Cal. Rptr. 2d 463* ; *Ford v. Cournale (1973) 36 Cal. App. 3d 172, 182, 111 Cal. Rptr. 334* ; *Kachig v. Boothe (1971) 22 Cal. App. 3d 626, 634-635, 99 Cal. Rptr. 393]* ; between a title insurance company and all principals to the escrow and between an escrow officers and all principals to the escrow [*Moe v. Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 289, 306, 98 Cal. Rptr. 547]* ; between joint venturers [*Davis v. Kahn (1970) 7 Cal. App. 3d 868, 877-878, 86 Cal. Rptr. 872* ; *Boyd v. Bevilacqua (1966) 247 Cal. App. 2d 272, 290, 55 Cal. Rptr. 610]* ; between spouses negotiating a property settlement agreement [*Boeseke v. Boeseke (1974) 10 Cal. 3d 844, 849, 112 Cal. Rptr. 401, 519 P.2d 161* (but duty is qualified in case of spouses); *see Fam. Code §§ 721, 1100(e)*]; between the executor of an estate and the devisees and legatees [*Blair v. Mahon (1951) 104 Cal. App. 2d 44, 49, 230 P.2d 832]* ; between the officers, directors, and managers of a corporation and the stockholders [*Credit Managers Ass'n of So. Cal. v. Superior Court (1975) 51 Cal. App. 3d 352, 360-361, 124 Cal. Rptr. 242]* ; and between any agent and principal [*McFate v. Bank of Am. of Cal. (1932) 125 Cal. App. 683, 687, 14 P.2d 146]* .

For example, a real estate broker representing a buyer breaches his or her fiduciary duty to the buyer if the broker makes erroneous statements concerning material characteristics of a parcel of property without disclosing that he or she is merely passing on information provided by the seller and that he or she has not independently investigated the truth of those statements. Such a breach of duty may constitute constructive fraud, depending on the circumstances [*see Salahutdin v. Valley of Cal., Inc. (1994) 24 Cal. App. 4th 555, 562-563, 29 Cal. Rptr. 2d 463]* .

[4] Defenses

In an action for constructive fraud, the applicable statute of limitations is *Code Civ. Proc. § 338(d)*, the same statute applicable to actions based on deceit [*Agair, Inc. v. Shaeffer (1965) 232 Cal. App. 2d 513, 517-519, 42 Cal. Rptr. 883]* . Contributory negligence is not a defense to an action for constructive fraud based on misrepresentations by a fiduciary [*Bacon v. Bacon (1907) 150 Cal. 477, 489, 89 P. 317]* .

Legal Topics:

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§ 269.23 Evidence

[1] Burden of Proof

Although some earlier cases assumed that fraud must be proved by clear and convincing evidence, later cases have indicated that fraud need only be proved by a preponderance of the evidence [*see Sierra Nat'l Bank v. Brown (1971) 18 Cal. App. 3d 98, 104-106, 95 Cal. Rptr. 742* ; *Teledyne Indus., Inc. v. EON Corp. (S.D.N.Y. 1975) 401 F. Supp. 729, 737* (interpreting California law); *see also Evid. Code § 115* (except as otherwise provided by law, a party's burden proof requires proof by a preponderance of the evidence)]. However, if "fraud" as defined by *Civ. Code § 3294(c)(3)* is asserted as a basis for recovery of punitive damages, it must be proven by clear and convincing evidence [*Civ. Code § 3294(a)*; *see also § 269.30*].

[2] No Presumption; Inference Permitted

Fraud is never presumed [*Fowler v. Fowler (1964) 227 Cal. App. 2d 741, 748, 39 Cal. Rptr. 101]* . The facts constituting fraud must be determined from the circumstances of each case, and fraud may be proved from direct evidence or inferred from all the circumstances in the case, [*Ach v. Finkelstein (1968) 264 Cal. App. 2d 667, 675, 70 Cal. Rptr. 472]* . Thus, fraud may be proved by inference and circumstantial evidence [*Vogelsang v. Wolpert (1964) 227 Cal. App. 2d 102, 111, 38 Cal. Rptr. 440]* because it is often impossible to prove directly. The circumstances surrounding the transaction and the relationship of the parties will often be facts from which fraud may be inferred [*Balfour, Guthrie & Co. v. Hansen (1964) 227 Cal. App. 2d 173, 192, 38 Cal. Rptr. 525]* .

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§ 269.24 Liability for Misrepresentation Made to Third Party

[1] Relied on by Third Party

Although the plaintiff must ultimately receive and actually rely on the misrepresentation [*see § 269.15*], it is not necessary that the defendant communicate directly with the plaintiff. The defendant is subject to liability if he or she communicates a fraudulent misrepresentation to a third person with the intention or with reason to expect that it would be repeated to and relied on by the plaintiff or by a class of persons including the plaintiff [*see Mirkin v. Wasserman (1993) 5 Cal. 4th 1082, 1095-1097, 23 Cal. Rptr. 2d 101, 858 P.2d 568* (but finding rule inapplicable to facts of case); *Barnhouse v. City of Pinole (1982) 133 Cal. App. 3d 171, 191-192, 183 Cal. Rptr. 881* ; Restatement (Second) of Torts § 533].

Having "reason to expect" that a fraudulent misrepresentation will be communicated to and influence a third party requires only knowledge on the part of the person making the misrepresentation such that a reasonable person would conclude that there is a special likelihood that the misrepresentations will induce reliance by third parties. Mere foreseeability that a third party might so rely is insufficient [*Geernaert v. Mitchell (1995) 31 Cal. App. 4th 601, 608-609, 37 Cal. Rptr. 2d 483* (buyers of real property had stated cause of action against sellers once and twice removed by alleging that defendants intended or had reason to expect that misrepresentations would be passed to subsequent buyers)]. To the extent that *BAJI No. 12.50* requires actual intent to commit a fraud against a third person in order to incur liability to that third person, it has been disapproved by the court of appeal [*Geernaert v. Mitchell (1995) 31 Cal. App. 4th 601, 609 n.3, 37 Cal. Rptr. 2d 483]* .

If the misrepresentation made to the third party is negligent rather than knowingly false, the courts have been somewhat more reluctant to allow recovery to a plaintiff to whom the representation was not directly communicated. Although privity of contract between the plaintiff and the defendant is not a prerequisite to recovery, the courts analyze a number of factors in determining whether the defendant should be held liable, including the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, any moral blame attached to the defendant's conduct, and the policy of preventing future harm [*De Zemplen v. Home Fed. Sav. & Loan Ass'n (1963) 221 Cal. App. 2d 197, 206, 34 Cal. Rptr. 334]* .

California follows the rule of *Restatement (Second) of Torts, § 552(2)*, regarding negligent misrepresentations made by suppliers of information and evaluations for the use and benefit of others [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 408-414, 11 Cal. Rptr. 2d 51, 834 P.2d 745* (auditors)]. Under that rule, liability is limited to the narrow and circumscribed class of persons for whose benefit the representations are made, either in transactions that the supplier of information intends, or knows that the recipient intends, to influence, or in substantially similar transactions [*see Restatement (Second) of Torts, § 552(2) & cmt. (j)*; *Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 408-409, 11 Cal. Rptr. 2d 51, 834 P.2d 745* ; *see also Mariani v. Price Waterhouse (1999) 70 Cal. App. 4th 685, 707-708, 82 Cal. Rptr. 2d 671* (no evidence that auditor intended to induce guarantors of corporation's debt to rely on results of audit of corporation)]. To support liability under this rule, the plaintiff must have relied on the misrepresentations in his or her capacity as a member of the protected class, rather than in some other capacity [*Mariani v. Price Waterhouse (1999) 70 Cal. App. 4th 685, 705-706, 82 Cal. Rptr. 2d 671* (auditors had no liability to the plaintiffs as individual guarantors of corporate debt because alleged reliance involved actions in capacity as corporate officers)]. Professional suppliers of information subject to this rule include, but are not limited to, attorneys, accountants, architects, auditors, engineers, and title insurers or abstractors [*see Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 410, 11 Cal. Rptr. 2d 51, 834 P.2d 745]* .

Applying this rule, the court of appeal has held that the auditor of an insurance company owes a duty of care not to make negligent misrepresentations to the Insurance Commissioner if the Commissioner is acting in the capacity of representative of policyholders and creditors. The court in that case rejected the auditor's argument that liability to the Commissioner could not be imposed if the auditor lacked knowledge that the report would be supplied to the Commissioner, because filing the report with the Commissioner is mandated by statute, and knowledge of this would be imputed to the auditor [*Arthur Andersen v. Superior Court (1998) 67 Cal. App. 4th 1481, 1506-1507, 79 Cal. Rptr. 2d 879]* .

[2] Letter of Recommendation

The writer of a letter or recommendation owes to third persons a duty not to misrepresent the facts in describing the qualifications and character of a former employee, if making these misrepresentations would present a substantial, foreseeable risk of physical injury to third persons [*Randi W. v. Muroc Joint Unified Sch. Dist. (1997) 14 Cal. 4th 1066, 1081, 60 Cal. Rptr. 2d 263, 929 P.2d 582* ; *see § 269.24[1]*]. Applying this rule, the California Supreme Court held that former employers' positive recommendations of a person whom the employers knew had been accused of sexually inappropriate behavior toward minors could be the basis of a cause of action by the guardian ad litem of a student that the person allegedly assaulted in the person's subsequent employment at a school [*Randi W. v. Muroc Joint Unified Sch. Dist. (1997) 14 Cal. 4th 1066, 1081-1087, 60 Cal. Rptr. 2d 263, 929 P.2d 582]* .

In addressing the reliance element, the Court held that it was sufficient that the plaintiff alleged that the school district that hired the person relied on the former employers' representations in the letters of recommendation, and that the injury resulted from action that the recipient of the defendants' misrepresentation took in reliance on those misrepresentations [*Randi W. v. Muroc Joint Unified Sch. Dist. (1997) 14 Cal. 4th 1066, 1085, 60 Cal. Rptr. 2d 263, 929 P.2d 582]* . The Court noted that in such a case, it would be unusual for the person ultimately injured by the employee to be aware of the letters of recommendation, much less actually rely on them [*Randi W. v. Muroc Joint Unified Sch. Dist. (1997) 14 Cal. 4th 1066, 1085, 60 Cal. Rptr. 2d 263, 929 P.2d 582]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudElements

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23-269 California Forms of Pleading and Practice--Annotated § 269.25

§ 269.25 Liability for Fraud of Agent

If an agent acting within his or her actual or apparent authority gains an advantage by means of fraud, the principal is jointly liable with the agent for damages, even though the principal is innocent of personally participating in the fraud, if the principal accepts and retains the benefits that result from the transaction [*Ach v. Finkelstein (1968) 264 Cal. App. 2d 667, 677, 70 Cal. Rptr. 472]* . The principal is not permitted to derive any benefit from a transaction that involved the fraud of the principal's agent acting within his or her authority by claiming that the fraud was not authorized by the principal [*Balfour, Guthrie & Co. v. Hansen (1964) 227 Cal. App. 2d 173, 192, 38 Cal. Rptr. 525]* .

However, a principal is not vicariously liable for fraud if an agent is using the principal to obtain a benefit for the agent and other parties in a transaction in which the principal will ultimately not benefit, and if the plaintiff was one of those other parties and knew that the agent's actions did not arise from the normal conduct of the agent's duties on behalf of the principal, but were designed ultimately to benefit only the individual parties to the transaction [*Saks v. Charity Mission Baptist Church (2001) 90 Cal. App. 4th 1116, 1138-1139, 110 Cal. Rptr. 2d 45* (plaintiff knew that church pastor was using church's name only to secure public funding for construction project, after which title for purchased property would be transferred to private partnership that would include plaintiff and pastor as partners)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsLiability of PrincipalBusiness & Corporate LawAgency RelationshipsRatificationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral Overview

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§ 269.26 Public Immunity and Liability

Gov. Code § 822.2 provides that a public employee acting in the scope of his or her employment is not liable for an injury caused by his or her misrepresentation, whether or not such misrepresentation be negligent or intentional, unless the public employee is guilty of actual fraud, corruption, or actual malice. *Gov. Code § 818.8* provides that a public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether such misrepresentation be negligent or intentional [*see Schonfeld v. City of Vallejo (1974) 50 Cal. App. 3d 401, 407, 123 Cal. Rptr. 669]* . Fraudulent concealment is within the immunity granted by *Gov. Code § 818.8* [*Schonfeld v. City of Vallejo (1974) 50 Cal. App. 3d 401, 409, 123 Cal. Rptr. 669* ; *but see Michael J. v. Los Angeles County Dept. of Adoptions (1988) 201 Cal. App. 3d 859, 872, 875, 247 Cal. Rptr. 504* (county adoption agency subject to liability for intentional misrepresentation or fraudulent concealment in adoption process)]. The immunity granted by *Gov. Code § 818.8* also applies to alleged intentional or negligent interference with economic advantage or business relations that is based on misrepresentation [*Los Angeles Equestrian Ctr., Inc. v. City of Los Angeles (1993) 17 Cal. App. 4th 432, 449-450, 21 Cal. Rptr. 2d 313]* .

Actual fraud for the purpose of *Gov. Code § 822.2* does not mean actual fraud as defined by *Civ. Code § 1572* or deceit as defined by *Civ. Code § 1710*. It means that in addition to the elements of common law deceit, the public employee is motivated by corruption or actual malice; that is, the employee has a conscious intent to deceive, vex, annoy, or harm the injured party in that party's business [*Schonfeld v. City of Vallejo (1974) 50 Cal. App. 3d 401, 409-410, 123 Cal. Rptr. 669]* .

Although tort liability of a public entity for false representations made by a public employee is barred by *Gov. Code § 818.8(a)*, and the public entity is therefore not liable on a tort theory for fraudulent inducements, the public entity is still liable for damages for breach of contract [*Warner Constr. Corp. v. Los Angeles (1970) 2 Cal. 3d 285, 293-294, 85 Cal. Rptr. 444, 466 P.2d 996]* .

In determining whether the immunity provisions apply, some courts have drawn a distinction between misrepresentations that cause interference with financial or commercial interests and those that cause harm in a social service area, such as adoption placement. For example, in a case involving placement for adoption of a child suffering from a physical disorder, an appellate court held that *Gov. Code §§ 818.8* and *822.2* do not immunize a county from

liability for intentional misrepresentation or fraudulent concealment of a child's medical condition. It also found that public policy considerations support recognition of a cause of action against a public agency for intentional misrepresentation or fraudulent concealment in the adoption process [*Michael J. v. Los Angeles County Dep't of Adoptions (1988) 201 Cal. App. 3d 859, 872, 875, 247 Cal. Rptr. 504]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsRatificationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudDefensesTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployees

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23-269 California Forms of Pleading and Practice--Annotated § 269.27

§ 269.27 Amount of Compensatory Damages

[1] General Rule

One who willfully deceives another with intent to induce him or her to alter his or her position to his or her injury or risk, is liable for any damages that the injured party thereby suffers [*Civ. Code § 1709*]. Additionally, for the breach of an obligation not arising from a contract, the measure of damages, unless otherwise expressly provided by the Civil Code, is the amount that will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not [*Civ. Code § 3333*]. These statutes govern the amount of damages for fraud and deceit, with the exceptions discussed in *§ 269.27[2]* and *§ 269.27[3]*. It appears that if a business deal involving the possible purchase or sale of property is never completed, the measure of damages will be governed by the general *Civ. Code §§ 1709* and *3333*, rather than by *Civ. Code § 3343*, which deals with damages from the purchase, sale, or exchange of real property [*Block v. Tobin (1975) 45 Cal. App. 3d 214, 220, 119 Cal. Rptr. 288]* .

Even under *Civ. Code §§ 1709* and *3333*, damages are not recoverable if the fact of damage is too remote, speculative, or uncertain. One may recover compensation for time and effort expended in reliance on a defendant's misrepresentation. One may not, however, recover anticipated profits from a business deal if it is uncertain whether, even in the absence of deceit, there would have been any profit at all [*Block v. Tobin (1975) 45 Cal. App. 3d 214, 219-220, 119 Cal. Rptr. 288]* .

If damages are based on *Civ. Code §§ 1709* and *3333* (as distinguished from the "out-of-pocket loss" measure provided by *Civ. Code § 3343*), damages may be calculated as of the date the plaintiff discovered the fraud, and are not limited to damages as of the date of the transaction [*Salahutdin v. Valley of Cal., Inc. (1994) 24 Cal. App. 4th 555, 568, 29 Cal. Rptr. 2d 463]* .

[2] Sale or Exchange of Property

[a] Statutory Measure of Damages

A person defrauded in the purchase, sale, or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of what the defrauded person received.

However, the defrauded person may not recover any amount measured by the differences between the value of property as represented and the actual value of the property [*Civ. Code § 3343(a), (b)(1)*]. The defrauded person may also recover additional damages arising from the particular transaction, including [*Civ. Code § 3343(a)*]:

- Amounts actually and reasonably expended in reliance on the fraud;

- An amount that compensates the defrauded party for loss of use and enjoyment of the property to the extent that such loss was proximately caused by the fraud;

- If the defrauded party has been induced by the fraud to sell or part with the property, an amount that will compensate him or her for profits or other gains that might reasonably have been earned by use of the property had he or she retained it; and

- If the defrauded party has purchased or acquired the property, an amount that will compensate him or her for any loss of profits or other gains that were reasonably anticipated and would have been earned from the use or sale of the property had it possessed the characteristics fraudulently attributed to it by the party committing the fraud; but only if and to the extent that (a) the property was acquired for the purpose of using or reselling it for a profit, (b) the defrauded party reasonably relied on the fraud in anticipating profits, and (c) the loss of profits was proximately caused by the fraud and the reliance on it.

In enacting *Civ. Code § 3343(a)*, the legislature enacted an "out-of-pocket loss" measure of damages, as opposed to the "benefit-of-the-bargain" rule applied in many other jurisdictions, which allows recovery of the difference between the value of the property as represented and the actual value of the property received [*see Stout v. Turney (1978) 22 Cal. 3d 718, 725, 150 Cal. Rptr. 637, 586 P.2d 1228* ; *Civ. Code § 3343(b)(1)*; *see also Salahutdin v. Valley of Cal., Inc. (1994) 24 Cal. App. 4th 555, 563-565* & n.6, *29 Cal. Rptr. 2d 463* ; *Housley v. City of Poway (1993) 20 Cal. App. 4th 801, 812-813* & n.9, *24 Cal. Rptr. 2d 554]* . However, the plaintiff is not required to allege and prove an "out-of-pocket loss" (that is, a difference between the amount paid for the property and its actual value) in order to recover the consequential or "additional" categories of damages listed in *Civ. Code § 3343(a)(1)-(4)* [*Stout v. Turney (1978) 22 Cal. 3d 718, 727-730, 150 Cal. Rptr. 637, 586 P.2d 1228]* .

[b] Recoverability of Lost Profits

If the plaintiff has been defrauded in the sale of the property, additional damages under *Civ. Code § 3343(a)(2), (3)* (loss of use and enjoyment and loss of profits) are only available if, under the terms of the particular transaction, the seller retained some right to use the property or participate in the profits from the property after transfer or conveyance to the defendant [*Channell v. Anthony (1976) 58 Cal. App. 3d 290, 315-318, 129 Cal. Rptr. 704* (management contract giving sellers right to continue to live on and operate farm as sufficient interest)]. Furthermore, if the seller elects to enforce the contract and recover the sale price to which he or she agreed, the seller cannot recover lost profits under *Civ. Code § 3343(a)(3)*; however, the seller may recover lost profits if he or she elects to rescind the sale contract [*see Croeni v. Goldstein (1994) 21 Cal. App. 4th 754, 759-760, 26 Cal. Rptr. 2d 412]* .

The provision of *Civ. Code § 3343(a)(4)* allowing a defrauded buyer to recover profits that would have been earned if the property had the characteristics represented by the seller only applies if the defrauded party actually acquires the property. Thus, in one case, the court of appeal held that it was improper to award profits lost as a result of the defendant's fraudulent breach of a promise to sell a parcel of agricultural property to the plaintiff. The plaintiff in that case had been induced to purchase a note secured by the defendant's property (rather than the property itself) by the defendant's fraudulent promise to sell the property to the plaintiff [*see Kenly v. Ukegawa (1993) 16 Cal. App. 4th 49, 53-56, 19 Cal. Rptr. 2d 771]* .

[c] Rules for Valuation of Property

In applying *Civ. Code § 3343*, the court will assess damages as of the day on which the fraudulent transaction occurred. The value of the property will be determined as of the date of sale [*McCue v. Bruce Enterprises, Inc. (1964) 228 Cal. App. 2d 21, 30-32, 39 Cal. Rptr. 125]* . The trier of fact may determine a figure for the correct value of the property that is between the figures offered by the experts for the plaintiff and the defendant [*Ach v. Finkelstein (1968) 264 Cal. App. 2d 667, 677-678, 70 Cal. Rptr. 472]* .

[d] Mental Distress Damages Not Recoverable

Mental distress is not an element of damages for fraud under *Civ. Code § 3343* [*Sierra Nat'l Bank v. Brown (1971) 18 Cal. App. 3d 98, 103, 95 Cal. Rptr. 742* ; *see In re Marriage of McNeill (1984) 160 Cal. App. 3d 548, 559, 206 Cal. Rptr. 641]* .

[3] Sale of Goods

Remedies for material misrepresentation or fraud in the sale of goods include all remedies available under *Com. Code §§ 2101-2724* for nonfraudulent breach [*Com. Code § 2721*]. Damages available for breach of warranty and other available remedies include the difference between the value of the goods as warranted and their actual value [*see Com. Code §§ 2714(2), (3), 2715*].Damages may include incidental and consequential damages, including lost profits if the lost profits could not reasonably be prevented through mitigation efforts or otherwise [*Green Wood Industrial Co. v. Forceman Internat. Development Group, Inc. (2007) 156 Cal. App. 4th 766, 774, 67 Cal. Rptr. 3d 624* ; *see Com. Code § 2715(2)(a)*].

This measure of damages is inconsistent with that provided by *Civ. Code § 3343* governing damages for fraud in the sale or exchange of property, which provides that nothing in *Civ. Code § 3343* will permit the defrauded person to recover any amount measured by the difference between the value of the property as represented and its actual value [*Civ. Code § 3343(b)(1)*].

Com. Code § 2721 has been described as an exception to *Civ. Code § 3343* in that its purpose is to give the defrauded buyer of goods the same remedies as those specified for breach of warranty, and therefore in a proper case to give the buyer the "benefit of the bargain" [*Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 Cal. App. 3d 388, 430-431, 264 Cal. Rptr. 779]* . Inasmuch as the legislature, in enacting *Com. Code § 2721*, expressed the intent to make fraud remedies in the commercial context as broad as, and coextensive with, remedies applicable in the absence of fraud, one court found it worthy of note that *Civ. Code § 3343*, the "out-of-pocket" statute, was not repealed despite its sharp conflict with the Commercial Code [*see Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 Cal. App. 3d 388, 431, 264 Cal. Rptr. 779]* .

The term "goods" for the purpose of *Com. Code § 2721* means all things, including specially manufactured goods, which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities, and things in action. The term also includes the unborn young of animals, growing crops, and other things attached to realty as described in *Com. Code § 2107* [*Com. Code § 2105*].

[4] Breach of Fiduciary Duty

Some court of appeal decisions have held that if there is fraud by a fiduciary, the out-of-pocket loss rule of *Civ. Code § 3343* does not apply. Instead, the much broader provisions of *Civ. Code §§ 1709* and *3333* are applicable [*Salahutdin v. Valley of Cal., Inc. (1994) 24 Cal. App. 4th 555, 566-568, 29 Cal. Rptr. 2d 463* ; *Simone v. McKee (1956) 142 Cal. App. 2d 307, 315, 298 P.2d 667]* . Thus, the fraudulent fiduciary must make good the full amount of the loss of which the fiduciary's breach of faith is the cause [*Prince v. Harting (1960) 177 Cal. App. 2d 720, 730-731, 2 Cal. Rptr. 545]* .

Although the California Supreme Court has held that only "out-of-pocket loss" may be recovered for negligent misrepresentations by a fiduciary [*Alliance Mortgage Co. v. Rothwell (1995) 10 Cal. 4th 1226, 1249-1250, 44 Cal. Rptr. 2d 352, 900 P.2d 601* ; *see also Fragale v. Faulkner (2003) 110 Cal. App. 4th 229, 237, 1 Cal. Rptr. 3d 616]* , there is a conflict among court of appeal decisions concerning whether *Civ. Code §§ 1709* and *3333* authorize a "benefit-of-the-bargain" measure in cases of fiduciary fraud [*compare Fragale v. Faulkner (2003) 110 Cal. App. 4th 229, 237-239, 1 Cal. Rptr. 3d 616* (authorizing "benefit-of-bargain" measure for intentional misrepresentations); *Salahutdin v. Valley of Cal., Inc. (1994) 24 Cal. App. 4th 555, 565-568, 29 Cal. Rptr. 2d 463* (authorizing "benefit-of-bargain" measure); *and Pepitone v. Russo (1976) 64 Cal. App. 3d 685, 688-689, 134 Cal. Rptr. 709* (authorizing "benefit-of-bargain" measure); *with Hensley v. McSweeney (2001) 90 Cal. App. 4th 1081, 1085-1086, 109 Cal. Rptr. 2d 489* (*Civ. Code § 3333* does not permit "benefit-of-bargain" measure); *and Overgaard v. Johnson (1977) 68 Cal. App. 3d 821, 827-828, 137 Cal. Rptr. 412* (*Civ. Code § 3333* does not permit "benefit-of-bargain" measure)].

However, even if a defendant is not the plaintiff's fiduciary, the law provides a quasi-contractual remedy to prevent one from being unjustly enriched at the expense of another [*see Civ. Code § 2224* (involuntary trust)]. For example, if a real estate broker, who is under a duty of honesty even to a person for whom her or she is not acting as an agent, deceives that person, an obligation will be imposed to repay the money unjustly received on the theory of constructive trust [*see Ward v. Taggart (1959) 51 Cal. 2d 736, 741-742, 336 P.2d 534]* . For discussion of constructive trusts, see Ch. 561, *Trusts: Constructive Trusts* .

[5] Fraud Against Secured Creditor

The primary measure of damages for fraud against a secured lender is the extent of the impairment of security, that is, the amount by which the indebtedness exceeds the actual value of the security. A foreclosure sale establishes the actual value of the security. Thus, if the secured property is sold at auction for an amount sufficient to satisfy the indebtedness, there is no impairment of security, and the secured party is not damaged. Any damage suffered thereafter is not a proximate result of the fraudulent transaction [*GN Mortgage Corp. v. Fidelity Nat'l Title Ins. Co. (1994) 21 Cal. App. 4th 1802, 1808, 27 Cal. Rptr. 2d 47]* .

This general rule does not apply, however, in an action brought against a party other than the debtor, if the lender alleges not only that the defendant's fraudulent conduct induced the lender to make the loan, but also that the lender justifiably relied on the defendant's misrepresentations when subsequently purchasing the property at foreclosure sale for the full amount of the indebtedness. Under those circumstances, damages would be measured either by the lender's out-of-pocket and consequential losses under *Civ. Code § 3343*, or under *Civ. Code § 3333* if the defendant stood in a fiduciary relationship to the lender [*Alliance Mortgage Co. v. Rothwell (1995) 10 Cal. 4th 1226, 1249-1250, 44 Cal. Rptr. 2d 352, 900 P.2d 601* ; *Michelson v. Camp (1999) 72 Cal. App. 4th 955, 965-969, 85 Cal. Rptr. 2d 539]* .

For discussion of damages as a required element of a fraud cause of action, see *§ 269.21*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleEnforceabilityFraud & MisrepresentationTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudRemediesTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsIntentional TortsBreach of Fiduciary DutyRemedies

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§ 269.28 Attorney's Fees

Attorney's fees incurred in bringing an action for fraud are not recoverable [*Bezaire v. Fidelity & Deposit Co. (1970) 12 Cal. App. 3d 888, 892, 91 Cal. Rptr. 142]* . However, a person who is required through the tort of another to act in protection of his or her interest by bringing or defending an action against a third person is entitled to recover as damages compensation for the reasonably necessary attorney's fees incurred [*Moe v. Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 289, 303, 98 Cal. Rptr. 547]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsFraud & MisrepresentationActual FraudRemediesTortsDamagesCosts & Attorney FeesGeneral Overview

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§ 269.29 Interest on Damages

[1] Entitlement if Amount of Damages Is Certain

Prejudgment interest can be proper in a fraud action if damages can be ascertained with certainty [*Greenfield v. Insurance Inc. (1971) 19 Cal. App. 3d 803, 813, 97 Cal. Rptr. 164]* . To recover interest for prejudgment amounts due the plaintiff need not plead or specially pray for interest [*Greenfield v. Insurance Inc. (1971) 19 Cal. App. 3d 803, 813, 97 Cal. Rptr. 164]* .

[2] At Jury's Discretion

In an action for breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be awarded in the discretion of the jury [*Civ. Code § 3288*]. Although the statute uses the word "jury," the trial court, if acting as the trier of fact, may award prejudgment interest under the statute [*Bullis v. Security Pac. Nat'l Bank (1978) 21 Cal. 3d 801, 814 n.16, 148 Cal. Rptr. 22, 582 P.2d 109* ; *Segura v. McBride (1992) 5 Cal. App. 4th 1028, 1040 n.13, 7 Cal. Rptr. 2d 436]* . However, in a case tried to a jury, the court may not usurp the discretion conferred on the jury by the statute [*Barry v. Raskov (1991) 232 Cal. App. 3d 447, 457, 283 Cal. Rptr. 463]* .

Prejudgment interest under *Civ. Code § 3288* may be awarded only on a recovery of a specific sum of money or of property subject to specific valuation. It may not be awarded on nonpecuniary damages that are not readily subject to precise calculation, such as the intangible, noneconomic aspects of mental and emotional injury [*Greater Westchester Homeowners Ass'n, Inc. v. City of Los Angeles (1979) 26 Cal. 3d 86, 103, 160 Cal. Rptr. 733, 603 P.2d 1329]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestPrejudgment InterestTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudRemedies

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§ 269.30 Punitive Damages

[1] Basis for Recovery

Fraud is a ground for awarding punitive damages [*Stevens v. Superior Court (1986) 180 Cal. App. 3d 605, 610, 225 Cal. Rptr. 624* ; *Horn v. Guaranty Chevrolet Motors (1969) 270 Cal. App. 2d 477, 484, 75 Cal. Rptr. 871]* . "Fraud" as a basis for punitive damages is defined in *Civ. Code § 3294(c)(3)* as an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant to thereby deprive a person of legal rights or property, or to otherwise cause injury. Because *Civ. Code § 3294(c)(3)* requires that the misrepresentation, deceit, or concealment be intentional, punitive damages may not be awarded for a negligent misrepresentation [*see Reid v. Moskovitz (1989) 208 Cal. App. 3d 29, 32, 255 Cal. Rptr. 910]* .

Although punitive damages can only be awarded in an action for breach of an obligation other than one arising from contract [*see Civ. Code § 3294(a)*], punitive damages may be awarded in an action for fraudulent inducement to enter into a contract, which is a tort action, not a contract action [*Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal. App. 3d 1220, 1239, 1 Cal. Rptr. 2d 301* ; *Kuchta v. Allied Builders Corp. (1971) 21 Cal. App. 3d 541, 549, 98 Cal. Rptr. 588]* . Punitive damages may also be granted along with rescission [*see In re Marriage of McNeill (1984) 160 Cal. App. 3d 548, 561, 206 Cal. Rptr. 641* ; *Horn v. Guaranty Chevrolet Motors (1969) 270 Cal. App. 2d 477, 484, 75 Cal. Rptr. 871]* . Punitive damages may also be awarded if fraud accompanies a breach of contract, so long as the conduct constituting the fraud is independent from the conduct constituting the breach of contract [*see Robinson Helicopter Co., Inc. v. Dana Corp. (2004) 34 Cal. 4th 979, 990-991, 22 Cal. Rptr. 3d 352, 102 P.3d 268]* . By contrast, if the plaintiff waives the fraud damages and sues on the contract, no exemplary damages can be awarded under *Civ. Code § 3294*. This is also true if the plaintiff elects to sue on a common count [*Brockway v. Heilman (1967) 250 Cal. App. 2d 807, 812, 58 Cal. Rptr. 772]* .

For additional discussion of punitive damages, see Ch. 177, *Damages* .

[2] Liability of Employers

An employer will not be liable for punitive damages under *Civ. Code § 3294(a)* for the fraudulent acts of an employee unless the employer had advance knowledge of the employee's unfitness and employed him or her with conscious

disregard for the safety or rights of others, or authorized or ratified the wrongful conduct for which punitive damages are awarded, or was personally guilty of malice, fraud, or oppression. With respect to corporate employers, the employer will not be liable for punitive damages for the acts of an employee unless an officer, director, or managing agent of the corporation had advance knowledge of the unfitness of the employee and employed him or her with conscious disregard of the safety or rights of others, or unless an officer, director, or managing agent authorized or ratified the wrongful act of the employee, or personally committed an act of malice, fraud, or oppression [*Civ. Code § 3294(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudRemediesTortsDamagesPunitive DamagesAvailabilityGeneral OverviewTortsDamagesPunitive DamagesAvailabilityEmployers

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23-269 California Forms of Pleading and Practice--Annotated § 269.31

§ 269.31 Defenses

[1] In General

Because the plaintiff in a fraud action has the burden of pleading and proving all the necessary elements that constitute deceit [*Hills Transp. Co. v. Southwest Forest Industries, Inc. (1968) 266 Cal. App. 2d 702, 707-708, 72 Cal. Rptr. 441]* , there are few matters that a defendant will need to raise as affirmative defenses. Most defenses to the tort action for deceit are raised by a general denial of one or more of the necessary elements pleaded by the plaintiff. A failure of the plaintiff to plead one or more of the necessary elements may, of course, be challenged by demurrer [*Code Civ. Proc. § 430.10(e)*]. For points and authorities supporting demurrers to complaints for fraud, see California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender).

[2] Plaintiff's Negligence

The defense of contributory negligence does not apply to actions for negligent misrepresentation, just as it does not apply to actions for intentional misrepresentation. Justifiable reliance may be shown even if the plaintiff relied under such circumstances as to make it unreasonable to accept the defendant's statement without an independent inquiry or investigation [*Howell v. Courtesy Chevrolet, Inc. (1971) 16 Cal. App. 3d 391, 403, 94 Cal. Rptr. 33]* . The plaintiff's recovery is not reduced unless the plaintiff's conduct, in the light of the plaintiff's own information and intelligence, is preposterous and irrational [*see Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 965, 72 Cal. Rptr. 722]* . That is, the plaintiff's conduct is not the subject of a strictly objective test [*see Godfrey v. Steinpress (1982) 128 Cal. App. 3d 154, 176, 180 Cal. Rptr. 95* ; *Howell v. Courtesy Chevrolet, Inc. (1971) 16 Cal. App. 3d 391, 403, 94 Cal. Rptr. 33* ; *Wilke v. Coinway, Inc. (1967) 257 Cal. App. 2d 126, 138, 64 Cal. Rptr. 845* ; *Vogelsang v. Wolpert (1964) 227 Cal. App. 2d 102, 111-112, 38 Cal. Rptr. 440]* .

[3] Lack of Justifiable Reliance

The plaintiff has the burden of proof on the issue of the plaintiff's justifiable reliance on the defendant's representation [*American Air Equip., Inc. v. Pacific Employers Ins. Co. (1974) 37 Cal. App. 3d 322, 327 n.4, 112 Cal. Rptr. 366]* . However, evidence of lack of justifiable reliance by the plaintiff is frequently introduced as a defense to an action for deceit [*see, e.g., Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 964-965, 72 Cal. Rptr. 722]* . For discussion of

justifiable reliance, see *§ 269.16*.

[4] Statute of Limitations

[a] Applicable Period

If the complaint states a cause of action for fraud, the period of limitation expires at the end of three years after the time when the action accrued, which is the time when the aggrieved party discovered facts constituting the fraud, as provided by *Code Civ. Proc. § 338(d)* [*Sun'N Sand, Inc. v. United Cal. Bank (1978) 21 Cal. 3d 671, 701, 148 Cal. Rptr. 329, 582 P.2d 920* ; *Galusha v. Fraser (1918) 178 Cal. 653, 656, 174 P. 311]* .

[b] Late Discovery Exception

If it is apparent from the face of the pleading that the statute of limitations has run, in order to avoid the bar of the statute, the plaintiff must state, with particularity, facts, rather than conclusions, that excuse his or her failure to learn of the fraud within the statutory period. The plaintiff must show diligence exercised to discover the facts and must plead and prove facts showing: (1) lack of knowledge; (2) lack of means of obtaining knowledge (in the exercise of reasonable diligence the facts could not have been discovered at an earlier date); and (3) how and when the plaintiff did actually discover the fraud or mistake. Under this rule, constructive or presumed notice is equivalent to knowledge. When the plaintiff has notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation (such as public records or corporate books), the statute commences to run [*Casualty Ins. Co. v. Rees Inv. Co. (1971) 14 Cal. App. 3d 716, 719-720, 92 Cal. Rptr. 857]* .

However, if the plaintiff has the right, due to the existence of a fiduciary relationship, to rely on statements of the defendant without further inquiry, the statute of limitations does not run merely because the means of discovery were available, and the plaintiff is not compelled to disprove that the means existed. The plaintiff need only establish facts sufficientto show that he or she made an actual discovery of unknown information within three years before the filing of the action [*Davis v. Kahn (1970) 7 Cal. App. 3d 868, 878, 86 Cal. Rptr. 872]* . Even if the defendant's status as a fiduciary obviates any duty on the plaintiff's part to inquire into the representations of the defendant, however, a duty of investigation may arise if the plaintiff becomes aware of facts that would make a reasonable person suspicious. If such an awareness is shown to have existed, the plaintiff will be charged with constructive knowledge of matters that would have been revealed by an investigation, and this imputed knowledge can be sufficient to start the running of the statute of limitations of *Code Civ. Proc. § 337(3)* or *Code Civ. Proc. § 338(d)* [*Miller v. Bechtel Corp. (1983) 33 Cal. 3d 868, 875-876, 191 Cal. Rptr. 619, 663 P.2d 177]* .

[5] Statutory Privileges

Under the appropriate circumstances, the statutory privileges of *Civ. Code § 47* may be used in defense of a fraud claim. In one case, for example, the court of appeal held that the litigation privilege of *Civ. Code § 47(b)* applied to defeat a fraud claim alleging that the defendant executed a release of claims with no intention of abiding by the release and then filed federal counterclaims that were covered by the release [*Navellier v. Sletten (2003) 106 Cal. App. 4th 763, 771, 131 Cal. Rptr. 2d 201]* . For further discussion of these privileges, see Ch. 340, *Libel and Slander* .

[6] Implied Waiver

A plaintiff claiming to have been induced into signing a contract by fraud or deceit is deemed to have waived a claim for damages for that fraud if, after discovering the fraud, the plaintiff enters into a new agreement with the defendant regarding the same subject matter that supersedes the former agreement and confers significant benefits on the plaintiff [*Oakland Raiders v. Oakland-Alameda County Coliseum, Inc. (2006) 144 Cal. App. 4th 1175, 1185, 51 Cal. Rptr. 3d 144* (relying on *Schmidt v. Mesmer (1897) 116 Cal. 267, 48 P. 54* , and other cases)]. This rule of implied waiver

focuses on the conduct of the plaintiff in entering into a new contract that has the effect of ratifying the original agreement. Thus, waiver may be found despite testimony that the plaintiff did not subjectively intend to waive a claim for fraud, at least when this intent was not made manifest when the subsequent contractual agreement was reached [*see Oakland Raiders v. Oakland-Alameda County Coliseum, Inc. (2006) 144 Cal. App. 4th 1175, 1186-1190, 51 Cal. Rptr. 3d 144]* .

In one case, for example, the court of appeal held that plaintiff, the Oakland Raiders National Football League team, had waived the right to sue the Oakland-Alameda County Coliseum for fraud in inducing the Raiders in 1995 to sign a long-term agreement to play at the Coliseum. The Raiders' claimed that the Coliseum misrepresented the level of advance season ticket sales, inducing the Raiders to agree to return to Oakland rather than pursue other available options. The court of appeal held that the Raiders had waived the fraud claim, however, because after learning during the 1995 season that season ticket sales were not as high as they had been told, the Raiders subsequently entered into a new contract with the Coliseum in September 1996. This new contract concerned the same subject matter as the previous contract, modified the rights of the parties, conferred significant financial benefits on the Raiders, and otherwise reaffirmed the validity and enforceability of the 1995 agreement [*Oakland Raiders v. Oakland-Alameda County Coliseum, Inc. (2006) 144 Cal. App. 4th 1175, 1190-1191, 51 Cal. Rptr. 3d 144]* .

While the existence of waiver is generally a question of fact, implied waiver, when based on conduct that is manifestly inconsistent with the intent to enforce a known right, may be determined as a matter of law if the underlying facts are undisputed [*Oakland Raiders v. Oakland-Alameda County Coliseum, Inc. (2006) 144 Cal. App. 4th 1175, 1191, 51 Cal. Rptr. 3d 144]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsBusiness TortsFraud & MisrepresentationActual FraudDefensesTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationDefensesTortsNegligenceDefensesComparative NegligenceGeneral Overview

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§ 269.32 Election of Remedies

If the plaintiff has been induced to enter into a contract by the defendant's fraud, the plaintiff has a choice of either affirming the contract and suing for damages for deceit or rescission of the agreement and restitution of the property exchanged with the defendant. The plaintiff, not the defendant, has the right to election of remedies [*Kaluzok v. Brisson (1946) 27 Cal. 2d 760, 763, 167 P.2d 481* ; *Brockway v. Heilman (1967) 250 Cal. App. 2d 807, 811, 58 Cal. Rptr. 772]* . If the plaintiff elects to stand on the contract and sue for damages, continued performance of the contract does not constitute a waiver of the plaintiff's action for damages. However, courts have stated that if the plaintiff elects not to rescind, the plaintiff must stand toward the other party at arm's length, comply with the contract, and not ask for favors of the other party or offer to perform the contract on conditions the plaintiff has no right to extract or make any new agreement, or the plaintiff will waive the fraud [*Bagdasarian v. Gragnon (1948) 31 Cal. 2d 744, 750-752, 192 P.2d 935* ; *but see Persson v. Smart Inventions, Inc. (2005) 125 Cal. App. 4th 1141, 1154, 23 Cal. Rptr. 3d 335* (although contract for sale of stock shares contained claims release language, party allowed to affirm contract and sue in tort because fraudulently induced to enter contract)]. The plaintiff may, however, plead and pray in the alternative for rescission and for damages for deceit [*see Boeseke v. Boeseke (1967) 255 Cal. App. 2d 848, 852, 63 Cal. Rptr. 651]* .

The doctrine of election of remedies applies only if the plaintiff seeks inconsistent remedies in causes of action based on the same set of facts. It therefore does not preclude a plaintiff from pursuing two causes of action, as breach of contract and fraud, if each action arose out of different obligations and different operative facts [*Pat Rose Assocs. v. Coombe (1990) 225 Cal. App. 3d 9, 18, 275 Cal. Rptr. 1]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesElection of RemediesTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationGeneral Overview

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§ 269.33 No Cause of Action for Fraud Based on False Representations of Love or Sexual Desire

Civ. Code § 43.4 provides that a fraudulent promise to marry or to cohabit after marriage does not give rise to a cause of action for damages. One court of appeal has held that the public policy behind this statute precludes an action for fraud and deceit based on allegedly false or fraudulent representations of love, passion, or sexual desire, that induced the plaintiff to marry and transfer property to the defendant [*see Askew v. Askew (1994) 22 Cal. App. 4th 942, 952-959, 28 Cal. Rptr. 2d 284]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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23-269 California Forms of Pleading and Practice--Annotated § 269.34

§ 269.34 No Cause of Action for Fraud Based on Termination of Employment

The California Supreme Court has held, on policy grounds, that an employee may not bring a tort cause of action for fraud against his or her employer based on misrepresentations made to effect a termination of employment [*Hunter v. Up-Right, Inc. (1993) 6 Cal. 4th 1174, 1178, 1184-1185, 26 Cal. Rptr. 2d 8, 864 P.2d 88]* . The Court indicated, however, that a misrepresentation not aimed at terminating an employee's employment, but instead designed to induce the employee to alter detrimentally his or her position in some other respect may, in some cases, form the basis for a valid fraud claim [*Hunter v. Up-Right, Inc. (1993) 6 Cal. 4th 1174, 1185, 26 Cal. Rptr. 2d 8, 864 P.2d 88]* . For further discussion, see Ch. 249, *Employment Law: Termination and Discipline* .

Legal Topics:

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

§§ 269.35[Reserved]

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§ 269.50 California Points and Authorities

For memoranda of points and authorities related to forms in this chapter, see California Points and Authorities, Ch. 105, *Fraud and Deceit, Duress, Menace, Undue Influence, and Mistake* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 269.51 California Torts

For discussion of the torts of fraud and deceit and negligent misrepresentation, see N. Levy, M. Golden & L. Sacks, California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts* , Pt. A (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 269.52 State Statutes

Fraud or misrepresentation after inspection by any licensed pest control operator concerning infestation of structures whether or not any report was made is ground for disciplinary action by Structural Pest Control Board. *Bus. & Prof. Code § 8644*

Registration of and misrepresentation by telephonic seller; seller defined. *Bus. & Prof. Code §§ 17511-17511.10*

Liability for deceptive use of computer software or spyware to take control over, or gain personal information from, another person's computer. *Bus. & Prof. Code § 22947 et seq.*

Liability for use of Internet or e-mail to solicit, request, or induce another to provide identifying information through unauthorized representation that solicitor is particular business. *Bus. & Prof. Code § 22948 et seq.*

Transferors, optionors, and certain lessors of residences with between one and four units required to provide statutory disclosure form regarding conditions, appliances, and alterations to prospective transferees, lessees, optionees; broker inspection and disclosure required on form; actual damages recoverable for violation. *Civ. Code §§ 1102-1102.14*

Between July 1, 1985, and December 31, 1986, transferors of one to four unit residential properties required to disclose to prospective transferees whether additions, alterations, or major repairs were completed under appropriate permit; actual damages, including attorney's fees, recoverable for failure to disclose; other remedies preserved. Former *Civ. Code § 1134.5*

Escrow agent not liable for failure of transferor of one to four unit residential property to give required disclosures regarding permitless additions, alterations, or major repairs. Former *Civ. Code § 1134.5(h)*

Fraud is either actual or constructive. *Civ. Code § 1571*

Actual fraud defined. *Civ. Code § 1572*

Constructive fraud defined. *Civ. Code § 1573*

Liability of equity purchaser for damages arising from statement made or act committed by his or her representative, in connection with acquisition of residence in foreclosure. *Civ. Code §§ 1695.15, 1695.16, 1695.17*

One who willfully deceives another person with intent to induce other person to alter his or her position to his or her injury or risk is liable for any damages that other person suffers. *Civ. Code § 1709*

Deceit is suggestion, as fact, of something that is not true, by one who does not believe it to be true *Civ. Code § 1709(1)*

Deceit is assertion, as fact, of something that is not true, by one who has no reasonable ground for believing it to be true. *Civ. Code § 1710(2)*

Deceit is suppression of fact, by one who is bound to disclose it, or who gives information of other facts that are likely to mislead for want of communication of that fact. *Civ. Code § 1710(3)*

Deceit is promise, made without any intention of performing it. *Civ. Code § 1710(4)*

Person who with intent to defraud sells or disposes of mechanical or electrical devices with nameplate, serial number, or other identification removed or altered without authorization is civilly liable to manufacturer and purchaser. *Civ. Code § 1710.1*

Neither owner, owner's agent, nor transferee's agent required to disclose to transferee, purchaser, lessee, or renter that occupant of property had AIDS. *Civ. Code § 1710.2*

One who practices deceit with intent to defraud public or class of persons deemed to have intended to defraud every individual in that class who is misled. *Civ. Code § 1711*

Person who gains thing by fraud, violation of trust, or other wrongful act as, unless he or she has some other and better right to it, involuntary trustee of thing gained, for benefit of person who would otherwise have had it. *Civ. Code § 2224*

Liability of foreclosure consultant for damages arising from statement made or act committed by his or her representative in connection with foreclosure-consultant services. *Civ. Code §§ 2945.9, 2945.10, 2945.11*

Exemplary damages for oppression, fraud, or malice. *Civ. Code § 3294*

Amount of claim for punitive damages required not to be stated. *Civ. Code § 3295(e)*

Measure of damages for breach of obligation not arising from contract is amount that will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not. *Civ. Code § 3333*

Measure of damages for one defrauded in purchase, sale, or exchange of property. *Civ. Code § 3343*

Civil remedy for violation of prohibition against deceptive campaign advertisement. *Civ. Code § 3344.6*; *Penal Code § 115.2*

Treble penalty in action by or on behalf of senior citizen or disabled person for deceptive or unfair acts, practices, or methods of competition. *Civ. Code § 3345*

Statute of limitations for fraud is three years; cause of action not accruing until discovery by aggrieved party of facts constituting fraud. *Code Civ. Proc. § 338(d)*

County in which defendants, or some of them, reside is proper county for trial of action. *Code Civ. Proc. § 395(a)*

In action by real estate lender for fraudulent inducement to make real estate loan, exemplary damages equal to 50 percent of actual damages allowed. *Code Civ. Proc. § 726(f)*

Statute of fraud provision that no evidence is admissible to charge person on representation as to credit of third person unless there is writing subscribed by person to be charged. *Code Civ. Proc. § 1974*

Goods are all things, including specially manufactured goods, that are movable at time of identification to contract for sale other than money in which price is to be paid, investment securities, and things in action. *Com. Code § 2107*

Buyer who has accepted goods is entitled to damages for breach of warranty measured by difference at time and place of acceptance between value of goods accepted and value they would have had if they had been as warranted, unless special circumstances show other damages. *Com. Code § 2714*

Buyer entitled to incidental damages resulting from seller's breach, including injury to person or property proximately resulting from breach of warranty. *Com. Code § 2715*

Remedies for material misrepresentation or fraud include all remedies available under *Com. Code §§ 2101-2724* for nonfraudulent breach. *Com. Code § 2721*

Fraud liability of directors, officers, employees, or agents of Thrift Guaranty Corporation. *Fin. Code § 18496.1*

Public entity not liable for injury caused by misrepresentation by employee of public entity whether or not misrepresentation is negligent or intentional. *Gov. Code § 818.8*

Public employee acting in scope of employment not liable for injury caused by his or her misrepresentation, whether or not misrepresentation is negligent or intentional, unless he or she is guilty of actual fraud, corruption, or actual malice. *Gov. Code § 822.2*

Legal Topics:

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

[1] Actions Between Partners in Consensual Sexual Relationship

Woman who had abortion based on sexual partner's promise, which he never intended to keep, that he would impregnate her in one year had no cause of action for fraud and deceit; privacy and public policy considerations prevent adjudication of promises and representations between consenting adults regarding their sexual relationship. *Perry v. Atkinson (1987) 195 Cal. App. 3d 14, 18-21, 240 Cal. Rptr. 402*

Claims of fraud and negligence against person who engaged in sexual intercourse with plaintiff for failure to disclose venereal disease stated cause of action and were not barred by privacy considerations. *Kathleen K. v. Robert B. (1984) 150 Cal. App. 3d 992, 996-997, 198 Cal. Rptr. 273*

Allegations that defendant misrepresented to plaintiff prior to engaging in sexual intercourse that he was unable to get anyone pregnant and that plaintiff thereafter suffered ectopic pregnancy leaving her sterile stated cause of action in deceit; right to privacy does not shield sexual relations from judicial scrutiny if privacy used as shield from liability at expense of other party. *Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 385, 193 Cal. Rptr. 422*

Claims of fraud and negligent misrepresentation against child's mother for falsely representing that she was taking birth control pills did not state cause of action in tort; privacy and general public policy considerations preclude courts' interference with birth control practices of partners in consensual sexual relationships. *Stephen K. v. Roni L. (1980) 105 Cal. App. 3d 640, 645, 164 Cal. Rptr. 618*

[2] Actual Reliance

Actual reliance is required element of action for fraud or deceit; plaintiff who never heard or read misrepresentations unable to state cause of action for deceit because California statutory and common law governing tort of fraud or deceit does not incorporate fraud-on-the-market doctrine of federal securities law. *Mirkin v. Wasserman (1993) 5 Cal. 4th 1082, 1088, 1095, 1100, 1108, 23 Cal. Rptr. 2d 101, 858 P.2d 568*

Insurance agent owed no duty to avoid misrepresenting policy being provided to spouse of insured, as spouse did not rely on any misrepresentations to change his position to his detriment. *The MEGA Life & Health Ins. Co. v. Superior Court (2009) 172 Cal. App. 4th 1522, 1530-1532, 92 Cal. Rptr. 3d 399*

Plaintiff could not prove actual reliance because defendant sold entire asbestos manufacturing enterprise to successor corporation years before manufacture of asbestos to which plaintiff was exposed. *Cadlo v. Owens-Ill., Inc. (2004) 125 Cal. App. 4th 513, 520, 23 Cal. Rptr. 3d 1*

Plaintiffs, homeowners and developer, required to prove actual reliance to recover for fraud from defendants who manufactured and sold defective plumbing pipes and system components; misrepresentations made by defendants when marketing products were insufficient, in absence of evidence that plaintiffs actually heard and relied on those misrepresentations. *Gawara v. United States Brass Corp. (1998) 63 Cal. App. 4th 1341, 1348-1359, 74 Cal. Rptr. 2d 663*

Plaintiffs unable to establish reliance on defendant insurer's alleged misrepresentations concerning coverage under insurance policy, thus precluding fraud claim against insurer, because plaintiffs' assignors disputed insurer's coverage position rather than relying on it. *McLaughlin v. National Union Fire Ins. Co. (1994) 23 Cal. App. 4th 1132, 1148, 29 Cal. Rptr. 2d 559*

[3] Amount of Compensatory Damages

[a] Breach of Duty

One under duty of honesty who defrauds one for whom he or she is not agent is nevertheless under duty to repay money unjustly received on theory of constructive trust. *Ward v. Taggart (1959) 51 Cal. 2d 736, 741-742, 336 P.2d 534*

In action by lender who relied on appraisal against real estate appraiser for negligence or fraud in appraising real property by overstating its value, measure of damages is not measure applicable to action for impairment of security but, instead, that provided by *Civ. Code §§ 1709, 3333*, plus any punitive damages that may be awarded. *Foggy v. Ralph F. Clark & Assocs., Inc. (1987) 192 Cal. App. 3d 1204, 1214, 238 Cal. Rptr. 130*

Party permitted to recover consequential damages resulting from his or her acts in reliance on other party's misrepresentations; same damages, however, not permitted to be recovered on different theories. *Walker v. Signal Co., Inc. (1978) 84 Cal. App. 3d 982, 995, 149 Cal. Rptr. 119* (plaintiff cannot recover double damages sustained by recovering all compensatory damages under breach of contract theory and additional compensatory damages under fraud theory)

Civ. Code § 3343 not applicable to measure of damages for fraud and deceit between one business partner and another. *Prince v. Harting (1960) 177 Cal. App. 2d 720, 730-731, 2 Cal. Rptr. 545*

Fraudulent fiduciary required to make good full amount of caused by fiduciary's breach of faith. *Prince v. Harting (1960) 177 Cal. App. 2d 720, 730-731, 2 Cal. Rptr. 545*

If there is fraud by fiduciary, *Civ. Code § 3343* out-of-pocket loss rule for damages is inapplicable; *Civ. Code §§ 1709* and *3333* is applicable instead. *Simone v. McKee (1956) 142 Cal. App. 2d 307, 315, 298 P.2d 667*

[b] General Rule

Anticipated profits is improper measure of damages if it is uncertain whether, in absence of negligent misrepresentation, any profit at all would have been derived. *Christiansen v. Roddy (1986) 186 Cal. App. 3d 780, 790-791, 231 Cal. Rptr. 72*

Amount of damages properly reflected great emotional distress and incidental damages resulting from defendant's attempts to enforce contract tainted by fraud. *Lewis v. Upton (1984) 151 Cal. App. 3d 232, 237, 198 Cal. Rptr. 494*

Damages not recoverable if fact of damage is too remote, speculative, or uncertain. *Block v. Tobin (1975) 45 Cal. App. 3d 214, 219-220, 119 Cal. Rptr. 288*

Anticipated profits not properly recovered as damages if it is uncertain whether in absence of deceit, any profit at all would have been derived. *Block v. Tobin (1975) 45 Cal. App. 3d 214, 220, 119 Cal. Rptr. 288*

Plaintiff allowed to recover compensation for time and effort expended in reliance on defendant's misrepresentation. *Block v. Tobin (1975) 45 Cal. App. 3d 214, 220, 119 Cal. Rptr. 288*

Business deal involving possible purchase or sale of real property that is never completed gives rise to damages for fraud measured by *Civ. Code §§ 1709* and *3333* rather than *Civ. Code § 3343* dealing with damages for fraud in purchase and sale of property. *Block v. Tobin (1975) 45 Cal. App. 3d 214, 220, 119 Cal. Rptr. 288*

[c] Loss of Profits

If, due to peculiar nature of defrauded business, profit is delayed rather than totally lost, measure of damages is financial loss in delay in realization of profit rather than total profit temporarily denied by defendant's fraud. *Dean W. Knight & Sons, Inc. v. First W. Bank & Trust Co. (1978) 84 Cal. App. 3d 560, 563, 148 Cal. Rptr. 767* (loss of real estate developer's profits caused by defendant's temporarily forcing plaintiff into Chapter XI bankruptcy)

[d] Sale of Goods

In action brought by purchaser of airplane against manufacturer, arising from destruction of airplane caused by defects after airplane had functioned properly some five years after purchase, measure of damages is market value of aircraft at time plaintiff effectively lost use of it (that is, on date of accident); exception to *Com. Code § 2714(2)*, which provides measure of damages for breach of warranty based on time and place of acceptance of goods, is applicable because plaintiff used product for period of time without noticing defect. *Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 Cal. App. 3d 388, 432-433, 264 Cal. Rptr. 779*

[e] Sale or Exchange of Property

In case involving purchase, sale, or exchange of real property, plaintiff not required to show out-of-pocket loss to recover any "additional damage[s]" listed in *Civ. Code § 3343*. *Stout v. Turney (1978) 22 Cal. 3d 718, 729-730, 150 Cal. Rptr. 637, 586 P.2d 1228*

In absence of fiduciary relationship between plaintiff and defendant, recovery in tort action for fraud involving purchase or sale of real property is limited to actual damages. *Ward v. Taggart (1959) 51 Cal. 2d 736, 741, 336 P.2d 534*

Misrepresentation as to acreage of land planted in orange trees is actionable fraud. *Morey v. Bovee (1933) 218 Cal.*

780, 782-783, 25 P.2d 2

When plaintiff sold his house in reliance on representations from broker and another seller that plaintiff would simultaneously be able to purchase seller's house, but plaintiff was unable to do so because of undisclosed tax liens on seller's property and was unable to find affordable replacement property in same area due to rapidly escalating housing costs, compensatory damages that included appreciation in value of property plaintiff sold from time he sold it to time of trial were appropriate, because plaintiff would otherwise have held onto own property longer, and harm done to plaintiff was to decrease his buying power in rapidly appreciating housing market. *Strebel v. Brenlar Investments, Inc. (2006) 135 Cal. App. 4th 740, 748-750, 37 Cal. Rptr. 3d 699*

Under *Civ. Code § 3343*, property owner who was defrauded into granting right-of-way easement for road construction, which affected additional property to which easement had not been granted, is not entitled to "cost of repair" of additional property affected by construction (that is, cost of restoring it to its condition prior to construction), but is only entitled to value of additional property "taken" for construction. *Housley v. City of Poway (1993) 20 Cal. App. 4th 801, 812-813, 24 Cal. Rptr. 2d 554*

Vendor's assertion to purchaser of amount of acreage was actionable misrepresentation to purchaser, who did not survey property until one year after purchase; because purchaser acquired property to subdivide and develop, fact that actual value of land was more than price paid did not deprive purchaser of right to damages for loss of anticipated profits pursuant to *Civ. Code § 3343(a)(4)*. *Cory v. Villa Props. (1986) 180 Cal. App. 3d 592, 597-598, 601-603, 225 Cal. Rptr. 628*

Measure of damages for fraud in real property transaction is historically loss of benefit of bargain, but California has adopted out-of-pocket loss rule by statute in *Civ. Code § 3343*. *Pepper v. Underwood (1975) 48 Cal. App. 3d 698, 706-707, 122 Cal. Rptr. 343 , overruled on other grounds, Stout v. Turney (1978) 22 Cal. 3d 718, 150 Cal. Rptr. 637, 586 P.2d 1228* ; *Coleman v. Ladd Ford Co. (1963) 215 Cal. App. 2d 90, 93, 29 Cal. Rptr. 832*

Foreclosure is one circumstance to be considered in determining actual out-of-pocket loss under *Civ. Code § 3343*. *Ford v. Cournale (1973) 36 Cal. App. 3d 172, 184, 111 Cal. Rptr. 334*

Mental distress is not element of damages for fraud under *Civ. Code § 3343*. *Sierra Nat'l Bank v. Brown (1971) 18 Cal. App. 3d 98, 103, 95 Cal. Rptr. 742*

Losses suffered by plaintiff as result of foreclosure were recoverable under *Civ. Code § 3343*. *Burkhouse v. Phillips (1971) 18 Cal. App. 3d 661, 666, 96 Cal. Rptr. 197*

Plaintiff allowed to recover damages in sale of property even if there is no difference in price paid for it by plaintiff and actual value of property, if there is evidence that defendant represented that property would produce income that it would not produce. *Burkhouse v. Phillips (1971) 18 Cal. App. 3d 661, 665, 96 Cal. Rptr. 197*

Person who mitigates damages allowed to recover reasonable cost of doing so, provided that it does not exceed damages prevented or reasonably expected. *Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 968, 72 Cal. Rptr. 722*

Additional damages also included reasonable value of time fruitlessly spent by plaintiff in reliance on representations of defendant. *Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 969, 72 Cal. Rptr. 722*

Question of damages is for trier of fact, who may determine figure for correct value of property that is between figures offered by experts for plaintiff and defendant. *Ach v. Finkelstein (1968) 264 Cal. App. 2d 667, 677-678, 70 Cal. Rptr.*

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Court assesses damages under *Civ. Code § 3343* as of day on which fraudulent transaction involving property occurred. *McCue v. Bruce Enterprises, Inc. (1964) 228 Cal. App. 2d 21, 30-32, 39 Cal. Rptr. 125*

Courts consider circumstances subsequent to time of sale in applying *Civ. Code § 3343* to determine actual out-of-pocket loss. *Hahn v. Food Serv. Equip. Co. (1963) 220 Cal. App. 2d 412, 416, 33 Cal. Rptr. 851*

Loss of time and effort or loss of salary are items of damage proximately caused by fraudulent misrepresentations as inducement to execute lease. *Lawson v. Town & Country Shops, Inc. (1958) 159 Cal. App. 2d 196, 205, 323 P.2d 843*

Cost of repairs has some probative value on issue of damages, but is not itself measure of damages. *Central Mut. Ins. Co. v. Schmidt (1957) 152 Cal. App. 2d 671, 676-677, 313 P.2d 132*

[4] Attorney's Fees

Whether phrased as cause of action for fraud or as one for breach of contract, borrower's only injury resulting from bank's three-year delay in turning over to borrower's trustee in bankruptcy assets of borrower that constituted bank's collateral was trustee's attorney's fees necessitated by bankruptcy proceeding; those fees recoverable only in bankruptcy proceeding. *Kruse v. Bank of Am. (1988) 202 Cal. App. 3d 38, 61-62, 248 Cal. Rptr. 217*

Person who is required through fraud of another to act in protection of his or her interest by bringing or defending action against third person is entitled to recover compensation for reasonably necessary attorney's fees incurred. *Moe v. Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 289, 303, 98 Cal. Rptr. 547*

Attorney's fees incurred in bringing action for fraud are not recoverable. *Bezaire v. Fidelity & Deposit Co. (1970) 12 Cal. App. 3d 888, 892, 91 Cal. Rptr. 142*

[5] Constructive Fraud

[a] Allegations Generally

Existence of fiduciary or other confidential relationship between plaintiff and defendant required to be alleged in complaint. *Feeney v. Howard (1889) 79 Cal. 525, 529, 21 P. 984*

Substantial evidence supported trial court finding that real estate broker committed breach of duty constituting constructive fraud by making affirmative statements to clients concerning size, boundaries, and subdividability of property, knowing these facts to be material to clients, without disclosing that he had not confirmed accuracy of statements. *Salahutdin v. Valley of Cal., Inc. (1994) 24 Cal. App. 4th 555, 563, 29 Cal. Rptr. 2d 463*

Absent either individual duty to plaintiff or personal financial interest in matter, attorney for corporation or for majority of shareholders not liable for conspiracy (along with client) to commit constructive fraud if charge rests on fiduciary duty of disclosure owed only by client. *Skarbrevik v. Cohen, England & Whitfield (1991) 231 Cal. App. 3d 692, 711, 282 Cal. Rptr. 627*

In constructive fraud action by investor against financial consultant, alleging nondisclosure, special verdict requiring finding of defendant's intentional failure to disclose material facts was reversible error, because theory of breach of fiduciary duty does not require element of intent. *Byrum v. Brand (1990) 219 Cal. App. 3d 926, 938, 268 Cal. Rptr. 609*

In action against investment advisor brought by defendant's clients, fiduciary relationship shown by plaintiffs' lack of sophistication concerning investments generally and their personal trust in defendant's professional expertise; breach of fiduciary duty evidenced by defendant's commingling of client funds and omission of facts relating to substantial investment risks; finding of liability for constructive fraud not precluded by absence of specific pleading, because evidence supporting cause of action for alleged actual fraud was substantially same and defendant made no objection to trial brief. *Stokes v. Henson (1990) 217 Cal. App. 3d 187, 194-197, 265 Cal. Rptr. 836*

Relationship between stockbroker and client is fiduciary in nature, whether or not client is "sophisticated" with regard to stock trading; stockbroker breached fiduciary duty to client by failing to explain risks of investing employee trust fund proceeds in options trading and by making that type of investment without express, unsolicited orders from client; action brought by trustees of profit-sharing plan against stockbroker for breach of fiduciary duty was not preempted by ERISA (*29 U.S.C. § 1144(a)*), because suit does not affect plan per se. *Duffy v. Cavalier (1989) 215 Cal. App. 3d 1517, 1533, 264 Cal. Rptr. 740*

Between fiduciaries, actual notice is question of fact; distribution of report, which had footnote disclosing separate interest of some partners in assets leased to partnership, at partnership meeting was not sufficient to charge other partners with notice of separate interests or profit on lease. *Rosenfeld, Meyer & Susman v. Cohen (1987) 191 Cal. App. 3d 1035, 1059, 237 Cal. Rptr. 14*

Constructive fraud presumed from relation of parties to transaction or circumstances under which it takes place; constructive fraud often existing if parties to contract have special confidential or fiduciary relationship that affords one party power to take undue advantage of other party. *Ford v. Shearson Lehman Am. Express, Inc. (1986) 180 Cal. App. 3d 1011, 1020, 225 Cal. Rptr. 895*

Causation issue turns on whether or not plaintiff justifiably relied on facts presented; proximate cause of plaintiff's injury is inapplicable concept in cause of action for constructive fraud. *Montoya v. McLeod (1985) 176 Cal. App. 3d 57, 65, 221 Cal. Rptr. 353*

Breach of duty necessary for constructive fraud defined in *Civ. Code § 1573* is required to be breach of duty created by confidential relationship. *Guthrie v. Times-Mirror Co. (1975) 51 Cal. App. 3d 879, 889, 124 Cal. Rptr. 577*

Confidential relationship giving rise to possible constructive fraud arises whenever trust and confidence is reposed by one person in integrity and fidelity of another. *Twomey v. Mitchum, Jones & Templeton, Inc. (1968) 262 Cal. App. 2d 690, 711, 69 Cal. Rptr. 222*

Confidential and fiduciary relationship is synonymous in law and exists whenever trust and confidence is reposed by one person in integrity and fidelity of another; existence of confidential relationship precludes one party from participating in profit or advantage resulting from dealings of parties to relationship. *Twomey v. Mitchum, Jones & Templeton, Inc. (1968) 262 Cal. App. 2d 690, 708, 69 Cal. Rptr. 222*

If during existence of confidential relationship one party gains advantage, burden on that party to show fairness and good faith in all respects. *Boyd v. Bevilacqua (1966) 247 Cal. App. 2d 272, 290-291, 55 Cal. Rptr. 610*

Constructive fraud actionable even though material misstatements are made without intent to deceive. *Cardozo v. Bank of Am. (1953) 116 Cal. App. 2d 833, 839, 254 P.2d 949*

Constructive fraud consists of all acts, omissions, and concealments involving breach of legal or equitable duty, trust, or confidence, and resulting in damage to another; constructive fraud exists if conduct, although not actually fraudulent, ought to be treated as fraud; constructive fraud arises from breach of confidential relationship. *Estate of Arbuckle*

(1950) 98 Cal. App. 2d 562, 568, 220 P.2d 950

[b] Breach of Duty

Contractual choice-of-law provision applicable to all causes of actions, including tort causes of actions for breach of fiduciary duty, arising from or related to contract. *Nedlloyd Lines B.V. v. Superior Court (1992) 3 Cal. 4th 459, 464-466, 468-471, 11 Cal. Rptr. 2d 330, 834 P.2d 1148*

One spouse has fiduciary duty to account to other during property settlement negotiation. *Boeseke v. Boeseke (1974) 10 Cal. 3d 844, 849, 112 Cal. Rptr. 401, 519 P.2d 161*

Managing spouse permitted to protect his or her own interests and assume adverse position despite existence of relationship with other spouse. *Boeseke v. Boeseke (1974) 10 Cal. 3d 844, 850, 112 Cal. Rptr. 401, 519 P.2d 161*

Auto club had no duty to members concerning safety features of motels listed in Tourbook because intention of Tourbook is to give recommendations on attractions and accommodations; any special relationship between auto club and member using Tourbook was restricted to such listing and rating of accommodation and did not include within its scope matters of neighborhood safety or security measures. *Yanase v. Automobile Club of So. Cal. (1989) 212 Cal. App. 3d 468, 476-478, 260 Cal. Rptr. 513*

Law firm liable to third party (mortgage brokerage) for fraudulent misrepresentation because member of firm prepared misleading letter stating that he had reviewed loan documentation and explained terms of loan transaction to client as required by mortgage broker supplying loan to client, but client later sued mortgage broker for fraud because she had not understood terms of loan. *Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices (1989) 207 Cal. App. 3d 1277, 1283-1284, 255 Cal. Rptr. 483*

Officers, directors, and managers of corporation have fiduciary obligation to stockholders and creditors and therefore are liable for constructive fraud if they have breached duty to corporation. *Credit Managers Assn. v. Superior Court (1975) 51 Cal. App. 3d 352, 360, 124 Cal. Rptr. 242*

Real estate broker has same obligation of service and loyalty as does trustee in favor of beneficiary; agent has duty not to misrepresent amount of income to be expected from property and to disclose all material facts. *Ford v. Cournale (1973) 36 Cal. App. 3d 172, 182, 111 Cal. Rptr. 334*

Material fact required to be disclosed by fiduciary is one that would be likely to affect principal's judgment and whose concealment would lead to principal's injury. *Ford v. Cournale (1973) 36 Cal. App. 3d 172, 182, 111 Cal. Rptr. 334*

Real estate broker owes his or her principal same duty of undivided service and loyalty as trustee owes to his or her beneficiary, including duty to disclose all material facts. *Kachig v. Boothe (1971) 22 Cal. App. 3d 626, 634-635, 99 Cal. Rptr. 393*

Title insurance company is trustee as to all principals to escrow; escrow officer has duty to each of principals to act fairly and to disclose any facts affecting principals' interests. *Moe v. Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 289, 306, 98 Cal. Rptr. 547*

Joint venture is undertaking by two or more persons jointly to carry out single business enterprise; joint venturers assume status of fiduciaries. *Davis v. Kahn (1970) 7 Cal. App. 3d 868, 877-878, 86 Cal. Rptr. 872*

Fraud includes failure to speak if there is duty to speak due to existence of confidential relationship. *Blair v. Mahon*

(1951) 104 Cal. App. 2d 44, 49, 230 P.2d 832

Agent under duty to disclose any interest agent has that is adverse to principal; failure to disclose such interest is constructive fraud. *McFate v. Bank of Am. of Cal. (1932) 125 Cal. App. 683, 687, 14 P.2d 146*

[c] Defenses

Contributory negligence not defense to constructive fraud. *Bacon v. Bacon (1907) 150 Cal. 477, 489, 89 P. 317*

In personal injury action, plaintiff has no claim for damages based on allegation that defendant would assert in defense invalid release obtained by fraud or negligent misrepresentation; plaintiff's recourse is to resist defense in that action, not to allege independent cause of action for asserting it; attorney's fees and mental stress resulting from having to disprove adversary's falsely asserted defense are not normally compensable damages. *MacCharles v. Bilson (1986) 186 Cal. App. 3d 954, 957-958, 231 Cal. Rptr. 155*

Existence of actual damages is essential element of cause of action for damages for fraud; nonsuit proper because plaintiff failed to show any resulting injury. *Downer v. Bramet (1984) 152 Cal. App. 3d 837, 844, 199 Cal. Rptr. 830*

Applicable statute of limitations for action for damages for constructive fraud is former *Code Civ. Proc. § 338(4)* (*now see Code Civ. Proc. § 338(d)*). *Agair, Inc. v. Shaeffer (1965) 232 Cal. App. 2d 513, 517-519, 42 Cal. Rptr. 883*

[6] Consumers Legal Remedies Act

Complaint for consumer class action filed after effective date of Consumers Legal Remedies Act [*Civ. Code §§ 1750-1784*] alleging conduct described by *Civ. Code § 1770* required to follow procedures specified in that act. *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 818-819, 94 Cal. Rptr. 796, 484 P.2d 964* ; *Outboard Marine Corp. v. Superior Court (1975) 52 Cal. App. 3d 30, 37, 124 Cal. Rptr. 852*

[7] Damage as Element of Cause of Action

Because payment of money that one is already contractually bound to pay is not money damages in action for fraud, borrower could not claim as damages loan payments made in reliance on lender's promise to renegotiate terms of loan. *Auerbach v. Great W. Bank (1999) 74 Cal. App. 4th 1172, 1185, 88 Cal. Rptr. 2d 718*

In fraud/intentional misrepresentation action against alarm company, plaintiff not precluded as matter of law from attempting to prove "causal nexus" between misrepresentation inducing reliance on alarm system and later losses due to criminal acts of third parties; however, nonsuit against plaintiff proper given failure to prove causation at trial. *Helm v. K.O.G. Alarm Co. (1992) 4 Cal. App. 4th 194, 202-203, 5 Cal. Rptr. 2d 615*

Purchasers of property, who may have made misleading representations or nondisclosures to obtain loan, not liable for fraud because plaintiff (mortgage guaranty insurer) had suffered no damage; insurer's payment to lender unnecessary because lender had made successful full credit bid on property and therefore was not damaged by any act of purchasers. *Commonwealth Mortgage Assurance Co. v. Superior Court (1989) 211 Cal. App. 3d 508, 520-521, 259 Cal. Rptr. 425*

Fraud without damage furnishes no ground for action and no defense to action. *South Tahoe Gas Co. v. Hofmann Land Improvement Co., Inc. (1972) 25 Cal. App. 3d 750, 765, 102 Cal. Rptr. 286* ; *McCue v. Bruce Enterprises, Inc. (1964) 228 Cal. App. 2d 21, 30, 39 Cal. Rptr. 125*

Plaintiff required to allege and prove precise amount of damages for fraud. *Santoro v. Carbone (1972) 22 Cal. App. 3d 721, 728, 99 Cal. Rptr. 488*

Plaintiff who has been put in position worse than plaintiff occupied had there been no fraud has cause of action for fraud. *R.D. Reeder Lathing Co. v. Cypress Ins. Co. (1970) 3 Cal. App. 3d 995, 999, 84 Cal. Rptr. 98*

[8] Defendants

[a] Liability for Fraud of Agent

Brokerage firm liable for employee broker's fraud in inducing securities purchase under federal law, for failure to provide reasonable supervision and training, and under California law, for acts of its agent performed within scope of agent's authority. *Seymour v. Summa Vista Cinema, Inc. (9th Cir. 1987) 809 F.2d 1385, 1388* ; *see also Alhino v. Starr (1980) 112 Cal. App. 3d 158, 174, 169 Cal. Rptr. 136*

Principal liable for agent's fraud if principal places agent in position to defraud. *Alhino v. Starr (1980) 112 Cal. App. 3d 158, 174, 169 Cal. Rptr. 136*

Principal who puts agent in position that enables agent to commit fraud while apparently acting within his or her authority liable to third person for fraud. *Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 960, 72 Cal. Rptr. 722*

Belief in agent's authority required to be generated by some act or neglect of principal before principal can be held liable. *Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 960, 72 Cal. Rptr. 722*

If agent acting within actual or apparent authority gains advantage by means of fraud, principal is jointly liable with agent for damages. *Ach v. Finkelstein (1968) 264 Cal. App. 2d 667, 677, 70 Cal. Rptr. 472*

Principal not permitted to derive any benefit from transaction involving fraud of his or her agent by claiming fraud was not authorized by principal. *Balfour, Guthrie & Co. v. Hansen (1964) 227 Cal. App. 2d 173, 192, 38 Cal. Rptr. 525*

[b] Public Immunity and Liability

Public entity liable for damages for breach of contract despite fact that breach was also fraudulent and suit for fraud would be barred by *Gov. Code §§ 818.8* and *822.2*. *Warner Constr. Corp. v. Los Angeles (1970) 2 Cal. 3d 285, 293-294, 85 Cal. Rptr. 444, 466 P.2d 996*

Immunity under *Gov. Code § 818.8* is applicable to intentional or negligent interference with economic relationships based on misrepresentations of city's employees. *Los Angeles Equestrian Ctr., Inc. v. City of Los Angeles (1993) 17 Cal. App. 4th 432, 449-450, 21 Cal. Rptr. 2d 313*

Immunity provided governmental entities by *Gov. Code § 818.8* for misrepresentation applies not only to intentional misrepresentation and negligent misrepresentation, but also to concealment (that is, suppression of fact). *Chevlin v. Los Angeles Cmty. Coll. Dist. (1989) 212 Cal. App. 3d 382, 390, 260 Cal. Rptr. 628* ; *Harshbarger v. City of Colton (1988) 197 Cal. App. 3d 1335, 1343, 243 Cal. Rptr. 463*

Gov. Code §§ 818.8, 822.2 does not preclude action against county adoption agency for intentional misrepresentation or fraudulent concealment of adoptee's medical condition as part of adoption process. *Michael J. v. Los Angeles County Dept. of Adoptions (1988) 201 Cal. App. 3d 859, 872, 875, 247 Cal. Rptr. 504*

Tort actions for misrepresentation made by state employees barred by Tort Claims Act (*Gov. Code § 818.8*). *Seymour v. State of California (1984) 156 Cal. App. 3d 200, 205, 201 Cal. Rptr. 15*

Immunity for misrepresentation afforded by *Gov. Code § 818.8* does not preclude action seeking liability based on contract. *Arthur L. Sachs, Inc. v. City of Oceanside (1984) 151 Cal. App. 3d 315, 320-321, 198 Cal. Rptr. 483*

Fraudulent concealment within immunity granted by *Gov. Code § 818.8* to public entities for injury caused by misrepresentation of employee. *Schonfeld v. City of Vallejo (1974) 50 Cal. App. 3d 401, 409, 123 Cal. Rptr. 669*

Actual fraud, for purposes of avoiding immunity granted to public employees by *Gov. Code § 822.2* and to public entities by *Gov. Code § 818.8* means that public employee is motivated by corruption, or actual malice, that is, has conscious intent to deceive, vex, annoy, or harm injured party. *Schonfeld v. City of Vallejo (1974) 50 Cal. App. 3d 401, 409-410, 123 Cal. Rptr. 669*

[9] Defenses

[a] Generally

In action by computer hardware broker against manufacturer for fraud, breach of fiduciary duty, and rescission, defendant immune from civil liability based on its good faith cooperation with government in criminal investigation. *Caesar Elecs. Inc. v. Andrews (9th Cir. 1990) 905 F.2d 287, 289*

Defendant accused of fraud entitled to rely on plaintiff's lack of specific factual allegations, including factually devoid discovery responses, to procure summary judgment. *Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 576-577, 37 Cal. Rptr 2d 653*

In action for fraud, intentional misrepresentation, and conspiracy to interfere with prospective business advantage based on defendants' actions in causing nonfinal judgment and making false statements to trial court in underlying action, dismissal of complaint proper on ground that defendants were absolutely privileged pursuant to *Civ. Code § 47(b). Boston v. Nelson (1991) 227 Cal. App. 3d 1502, 1506-1507, 278 Cal. Rptr. 386*

Service station operator's claims of violation of covenant of good faith, fraud, and interference with prospective advantage arising from oil company's failure to maintain underlying ground lease were preempted by federal Petroleum Marketing Practices Act (*15 U.S.C. § 2806(a)*). *Mobil Oil Corp. v. Superior Court (1987) 189 Cal. App. 3d 485, 488-490, 234 Cal. Rptr. 482*

Plaintiff has burden of proof on issue of justifiable reliance. *American Air Equip., Inc. v. Pacific Employers Ins. Co. (1974) 37 Cal. App. 3d 322, 327, 112 Cal. Rptr. 366*

Defense of contributory negligence not applicable to actions for negligent misrepresentation. *Howell v. Courtesy Chevrolet, Inc. (1971) 16 Cal. App. 3d 391, 403, 94 Cal. Rptr. 33*

Plaintiff's negligence is defense to action for negligent misrepresentation but is not defense to intentional misrepresentation. *Balfour, Guthrie & Co. v. Hansen (1974) 227 Cal. App. 2d 173, 196-198, 38 Cal. Rptr. 525* ; *Meyer v. Ford Motor Co. (1969) 275 Cal. App. 2d 90, 105, 79 Cal. Rptr. 816*

Plaintiff has burden of pleading and proving every element that constitutes fraud and deceit. *Hills Transp. Co. v. Southwest Forest Industries, Inc. (1968) 266 Cal. App. 2d 702, 707-708, 72 Cal. Rptr. 441*

Negligence of plaintiff is no defense to action for fraud and deceit. *Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 964-965, 72 Cal. Rptr. 722*

Lack of justifiable reliance is defense to action for fraud. *Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 964-965, 72 Cal. Rptr. 722*

Negligence of plaintiff is not defense to intentional tort of fraud; plaintiff not held to standard of caution of reasonable person and exceptionally gullible people allowed to recover from defendant who took advantage of circumstances. *Carroll v. Dungey (1963) 223 Cal. App. 2d 247, 256-257, 35 Cal. Rptr. 681*

[b] Late Discovery

Plaintiff who asserts fraud claim brought over three years (*see Code Civ. Proc. § 338(d)*) after commission of fraud required to affirmatively excuse failure to discover fraud within three years after it occurred, by establishing facts showing absence of negligence and absence of actual or presumptive knowledge of facts sufficient to put plaintiff on inquiry. *Denholm v. Houghton Mifflin Co. (9th Cir. 1990) 912 F.2d 357, 362*

Plaintiff with knowledge of facts sufficient to make reasonable person suspicious is charged with knowledge that would be gained by reasonable investigation despite defendant's status as fiduciary. *Miller v. Bechtel Corp. (1983) 33 Cal. 3d 868, 875-876, 191 Cal. Rptr. 619, 663 P.2d 177*

Triable issue of fact existed as to when investor had sufficient knowledge of fraud and resulting damage caused by investment principals to trigger running of statute of limitations; mere belief that investment funds had been lost, without more, did not trigger duty to investigate whether actionable fraud occurred. *Cleveland v. Internet Specialties West, Inc. (2009) 171 Cal. App. 4th 24, 31-33, 88 Cal. Rptr. 3d 892*

Cause of action for negligent misrepresentation accrued only when plaintiff company learned that defendant had misrepresented qualifications of employee accountant provided to plaintiff, rather than when plaintiff earlier learned, or should have learned of, accountant's independent fraud and embezzlement. *E-Fab, Inc. v. Accountants, Inc. Services (2007) 153 Cal. App. 4th 1308, 1323, 64 Cal. Rptr. 3d 9*

Summary judgment on fraud action based on expiration of statute of limitations was proper because plaintiff discovered injury-producing wrongdoing of some sort almost nine years prior to filing action and inquiry at that time would have led to discovery of fraud. *Kline v. Turner (2001) 87 Cal. App. 4th 1369, 1374, 105 Cal. Rptr. 2d 699*

Late discovery exception applicable in fraud action brought against escrow agent who allegedly improperly disbursed escrow funds pursuant to forged amended instructions; plaintiff has no duty to inquire regarding improper disbursal of escrow funds because escrow agent was fiduciary for limited purpose of carrying out escrow instructions. *Lee v. Escrow Consultants, Inc. (1989) 210 Cal. App. 3d 915, 920-922, 259 Cal. Rptr. 117*

Action on commercial blanket bond indemnifying against fraudulent acts of employees was timely even though loss on fidelity bonds ordinarily occurs at time of employee's dishonest act, because claim concerned secured loan made because of fraudulent misrepresentations. *Pacific-S. Mortgage Trust Co. v. Insurance Co. of N. Am. (1985) 166 Cal. App. 3d 703, 709-713, 212 Cal. Rptr. 754*

Plaintiff bringing action eight years after injuries sustained from intrauterine device was barred by statute of limitations from bringing cause of action in personal injury, but not barred from bringing cause of action in fraud that is based on alleged fraudulent representations because plaintiff brought action within three years after discovering allegedly concealed facts pursuant to *Code Civ. Proc. § 338(d)*. *Snow v. A.H. Robins Co. (1985) 165 Cal. App. 3d 120, 130-135,*

211 Cal. Rptr. 271

If it is apparent from face of complaint that statute has run, plaintiff required to state in complaint facts excusing plaintiff's failure to learn of fraud within statutory period. *Casualty Ins. Co. v. Rees Inv. Co. (1971) 14 Cal. App. 3d 716, 719-720, 92 Cal. Rptr. 857*

If statute has otherwise run, plaintiff required to plead and prove facts showing (1) lack of knowledge, (2) lack of means of obtaining knowledge, and (3) how and when plaintiff did actually discover fraud. *Casualty Ins. Co. v. Rees Inv. Co. (1971) 14 Cal. App. 3d 716, 719-720, 92 Cal. Rptr. 857*

When plaintiff has notice or information of circumstances to put reasonable person on inquiry or has opportunity to obtain knowledge from sources open to plaintiff's investigation, statute commences to run. *Casualty Ins. Co. v. Rees Inv. Co. (1971) 14 Cal. App. 3d 716, 719-720, 92 Cal. Rptr. 857*

If plaintiff has right to rely on defendant's statements without further inquiry because, for example, they are in confidential relationship, statute does not commence to run merely because means of discovery were open; plaintiff required only to show that plaintiff made actual discovery of unknown information within three years before filing action. *Davis v. Kahn (1970) 7 Cal. App. 3d 868, 878, 86 Cal. Rptr. 872*

[c] Statute of Limitations

In action brought by seller of in-wall heaters against consumer safety group that certified that heaters were safe for consumer use, statute of limitations began to run when heaters were recalled due to safety issues and plaintiff was required to bear portion of cost of recall. *Platt Elec. Supply, Inc. v. EOFF Elec., Inc. (9th Cir. 2008) 522 F.3d 1049, 1055-1056*

Statute of limitations tolled by broker's reassurances to client regarding matters relevant to possible misrepresentations; if client relied on broker's advice not to worry or close out position or on promises that broker would monitor client's account, statute of limitations does not begin to run on dates of those promises/reassurances. *Vucinich v. Paine, Webber, Jackson & Curtis, Inc. (9th Cir. 1986) 803 F.2d 454, 460*

Statute of limitations begins to run when one should have been put on notice of fraud or misrepresentation; tolling of statute of limitations allowed if broker reassures client on concerns relevant to possible misrepresentation. *Vucinich v. Paine, Webber, Jackson & Curtis, Inc. (9th Cir. 1984) 739 F.2d 1434, 1436*

Period of limitation for fraud expires at end of three years after time action accrued or after discovery of fraud, as provided by former *Code Civ. Proc. § 338(4)* (*now see Code Civ. Proc. § 338(d)*). *Galusha v. Fraser (1918) 178 Cal. 653, 656, 174 P. 311*

In action for conspiracy to defraud, allegations supporting tolling of limitations period under delayed discovery rule establish timely filing under *Code Civ. Proc. § 338(d)*; plaintiffs not required additionally to allege tolling under "last overt act doctrine" under *Wyatt v. Union Mortgage Co. (1979) 24 Cal. 3d 773, 788, 157 Cal. Rptr. 392, 598 P.2d 45* , because plaintiff is required only to plead either alternative theory. *Aaroe v. First Am. Title Ins. Co. (1990) 222 Cal. App. 3d 124, 128-129, 271 Cal. Rptr. 434*

Limitation period on former partners' cause of action against other former partners for fraud based on concealment of profits derived from sale and rental of property to dissolved partnership was postponed by fraudulent concealment, and did not commence until plaintiffs had actual or inquiry notice. *Rosenfeld, Meyer & Susman v. Cohen (1987) 191 Cal.*

App. 3d 1035, 1059-1060, 237 Cal. Rptr. 14

Between fiduciaries, actual notice is question of fact; distribution of report, which had footnote disclosing separate interest of some partners in assets leased to partnership, at partnership meeting was not sufficient to charge other partners with notice of separate interests or profit on lease. *Rosenfeld, Meyer & Susman v. Cohen (1987) 191 Cal. App. 3d 1035, 1059, 237 Cal. Rptr. 14*

Three-year statute of limitations under former *Code Civ. Proc. § 338(4)* (*now see Code Civ. Proc. § 338(d)*) for civil conspiracy based on fraud commences when last overt act of conspiracy completed. *Livett v. F.C. Financial Associates (1981) 124 Cal. App. 3d 413, 418, 177 Cal. Rptr. 411*

If gist of action is for fraud, action governed by former *Code Civ. Proc. § 338(4)* (*now see Code Civ. Proc. § 338(d)*) period of limitation regardless of form of action or relief sought. *Turner v. Milstein (1951) 103 Cal. App. 2d 651, 659, 230 P.2d 25*

Action for constructive fraud arising from fraudulently inducing one party to breach contract is governed by limitation period of former *Code Civ. Proc. § 338(4)* (*now see Code Civ. Proc. § 338(d)*). *Romano v. Wilbur Ellis & Co. (1947) 82 Cal. App. 2d 670, 674, 186 P.2d 1012*

[10] Definitions

Fraud includes anything intended to deceive, including all statements, acts, concealments, and omissions involving breach of legal or equitable duty, trust, or confidence that results in injury to one who justifiably relies. *Ach v. Finkelstein (1968) 264 Cal. App. 2d 667, 674, 70 Cal. Rptr. 472*

Fraudulent representation is one made with knowledge that it is or may be untrue and with intention that person to whom it is made act in reliance on it. *Wilke v. Coinway, Inc. (1967) 257 Cal. App. 2d 126, 136, 64 Cal. Rptr. 845*

[11] Election of Remedies

If plaintiff elects to stand on contract and sue for damages, continued performance of contract is not waiver of action for damages; if party elects to rescind, continued performance is possible waiver of right to do so. *Bagdasarian v. Gragnon (1948) 31 Cal. 2d 744, 750-752, 192 P.2d 935*

Defrauded person has choice of either rescinding contract or affirming contract, retaining property, and suing for damages. *Kaluzok v. Brisson (1946) 27 Cal. 2d 760, 763, 167 P.2d 481* ; *Brockway v. Heilman (1967) 250 Cal. App. 2d 807, 811, 58 Cal. Rptr. 772*

Complaint and proof indicating repeated false representations by automobile seller and dealer that car had been repaired was action in deceit, entitling plaintiff to tort damages, and contract was merely foundational backdrop for action. *Sprague v. Frank J. Sanders Lincoln Mercury, Inc. (1981) 120 Cal. App. 3d 412, 419, 174 Cal. Rptr. 608*

[12] Elements

Actual reliance required element of action for fraud or deceit. *Mirkin v. Wasserman (1993) 5 Cal. 4th 1082, 1088, 1095, 1100, 1108, 23 Cal. Rptr. 2d 101, 858 P.2d 568*

Making of misrepresentations to one group intending to influence behavior of ultimate purchasers who are not recipients of original misrepresentation, and succeeding in plan, was sufficient to establish liability for fraud. *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 222, 197 Cal. Rptr. 783, 673 P.2d 660 , superseded by statute as stated in Gartin v. S&M NuTec LLC, 245 F.R.D. 429, 2007 U.S. Dist. LEXIS 38050* (advertising to induce children to influence parents to make purchases)

Plaintiff stockholders failed to raise triable issue of fact as to whether outside directors had knowledge or reason to know of false or fraudulent accounting practices perpetrated in order to manipulate stock price. *Bains v. Moores (2009) 172 Cal. App. 4th 445, 459-470, 91 Cal. Rptr. 3d 309*

Employer's misrepresentation to trust concerning status of employee for purposes of coverage under employer's group life insurance policy is fraud against insurer if misrepresentation was made to trust with intent that it would be repeated to and acted on by insurer. *Pacific Standard Life Ins. Co. v. Tower Indus., Inc. (1992) 9 Cal. App. 4th 1881, 1891, 12 Cal. Rptr. 2d 524*

Cause of action for fraud not stated, and triable issue of fact not raised in opposition to summary judgment motion, if there were no allegations of affirmative misrepresentation, intentional conduct, or justifiable reliance. *City of Hope Nat'l Med. Ctr. v. Superior Court (1992) 8 Cal. App. 4th 633, 639 n.3, 10 Cal. Rptr. 2d 465*

Complaint in fraud action against corporation required to specify person who made representations; demurrer properly sustained because of plaintiff's failure to do so. *Tarmann v. State Farm Mut. Auto. Ins. Co. (1991) 2 Cal. App. 4th 153, 156-158, 2 Cal. Rptr. 2d 861*

Contractual or fiduciary duty not required for liability to be found under either intentional fraud or negligent misrepresentation theory. *Lacher v. Superior Court (1991) 230 Cal. App. 3d 1038, 1046-1047, 281 Cal. Rptr. 640*

Elements of fraud that give rise to tort action for deceit are (1) misrepresentation, (2) knowledge of falsity, (3) intent to defraud, (4) justifiable reliance, and (5) resulting damage. *Hohe v. San Diego Unified Sch. Dist. (1990) 224 Cal. App. 3d 1559, 1565, 274 Cal. Rptr. 647* ; *Semore v. Pool (1990) 217 Cal. App. 3d 1087, 1102, 266 Cal. Rptr. 280* ; *Hackethal v. National Cas. Co. (1987) 189 Cal. App. 3d 1102, 1111, 234 Cal. Rptr. 853*

In action based on discrepancies between description of land acreage in property-exchange contract and actual acreage, plaintiff unable to prove fraud because of failure to produce evidence of scienter on part of defendant regarding inaccuracy of contract description or evidence that would put reasonable person on inquiry regarding accuracy. *Marvin v. Adams (1990) 224 Cal. App. 3d 956, 963, 274 Cal. Rptr. 308*

In employee's action against former employer based on allegedly wrongful termination, cause of action in fraud, based on oral promises of continuing employment that contradicted parties' integrated at-will employment agreement, lacked necessary element of justifiable reliance. *Slivinsky v. Watkins-Johnson Co. (1990) 221 Cal. App. 3d 799, 807, 270 Cal. Rptr. 585*

Cause of action for fraud requires clear allegation that each representation was false when made. *Stansfield v. Starkey (1990) 220 Cal. App. 3d 59, 74, 269 Cal. Rptr. 337*

In action against manufacturer of mechanical heart valve that was ultimately recalled because of failures resulting in deaths, patient in whom still-functioning valve had been implanted was able to state cause of action in fraud based on misrepresentations regarding valve's propensity to fail, omission of facts showing prior failure, and lack of warnings of serious risk, made with intent to induce plaintiff to choose that valve over valves made by several other manufacturers. *Khan v. Shiley Inc. (1990) 217 Cal. App. 3d 848, 858, 266 Cal. Rptr. 106*

In action brought by laid-off employee against employer, alleging several causes of action based on employer's failure to rehire plaintiff, cause of action in fraud lacked element of false representation, because based on statements regarding available positions and plaintiff's status regarding reinstatement that were true when made. *Kerr v. Rose (1990) 216 Cal. App. 3d 1551, 1564-1565, 265 Cal. Rptr. 597 , superseded by statute on other grounds as stated in Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573,*

Complaint alleging that employer knowingly made false promises that employer would pay commission to plaintiff, that promises were made to induce plaintiff to work for employer, that plaintiff relied on those promises by entering into employment relationship, and that employer failed to pay commissions, was sufficient to withstand demurrer. *Douglas v. Superior Court (1989) 215 Cal. App. 3d 155, 158, 263 Cal. Rptr. 473*

Action against insurer, based on false advertising that insurance policy covered loss of use of limbs although in fact only dismemberment of limbs was covered, did not meet elements of fraud action; statements in advertisement were succinct but not actually misleading, and plaintiff's father and not plaintiff was person who had relied on advertisement prior to purchase of policy. *Suarez v. Life Ins. Co. of N. Am. (1988) 206 Cal. App. 3d 1396, 1408, 254 Cal. Rptr. 377*

Negligent misrepresentation requires intent to induce plaintiff's reliance; intent to induce plaintiff's reliance is absent if defendant did not know plaintiffs and did not know that plaintiffs would rely on alleged misrepresentation. *Christiansen v. Roddy (1986) 186 Cal. App. 3d 780, 787-788, 231 Cal. Rptr. 72*

Justifiable reliance and representation without reasonable belief are elements of negligent misrepresentation. *Christiansen v. Roddy (1986) 186 Cal. App. 3d 780, 788-789, 231 Cal. Rptr. 72*

Justifiable reliance is essential element of causes of action for fraud and conspiracy to commit fraud. *Chicago Title Ins. Co. v. Superior Court (1985) 174 Cal. App. 3d 1142, 1151, 220 Cal. Rptr. 507*

Pleadings alleging that medical problems were proximate result of false and fraudulent representations adequately stated cause of action in fraud despite incorporating language from other causes of action asserting that injuries were caused by defendants' negligence. *Snow v. A.H. Robins Co. (1985) 165 Cal. App. 3d 120, 131-134, 211 Cal. Rptr. 271*

Essential allegations in action against attorney are (1) misrepresentation, (2) knowledge of falsity, (3) intent to defraud, (4) justifiable reliance, and (5) resulting damages, each pleaded with sufficient factual specificity to allow defendant to understand charges. *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz (1976) 57 Cal. App. 3d 104, 109, 128 Cal. Rptr. 901*

Knowledge of falsity of statement and intent to deceive are not elements of negligent misrepresentation and therefore not element of every cause of action for deceit. *Hale v. George A. Hormel & Co. (1975) 48 Cal. App. 3d 73, 82-86, 121 Cal. Rptr. 144*

Elements of case of fraud and deceit. *South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 Cal. App. 3d 750, 765, 102 Cal. Rptr. 286* ; *Collins v. Marvel Land Co. (1970) 13 Cal. App. 3d 34, 44, 91 Cal. Rptr. 291* ; *Ach v. Finkelstein (1968) 264 Cal. App. 2d 667, 676, 70 Cal. Rptr. 472* ; *Teacher v. Leddel (1966) 247 Cal. App. 2d 95, 97, 55 Cal. Rptr. 271* ; *Vogelsang v. Wolpert (1964) 227 Cal. App. 2d 102, 109-110, 38 Cal. Rptr. 440*

Necessity of alleging cause and effect relationship between fraud and damages sought in order to show cause of action. *Zumbrun v. University of Southern California (1972) 25 Cal. App. 3d 1, 12, 101 Cal. Rptr. 499*

Knowledge of falsity of statement is necessary element of cause of action for deceit. *Harazim v. Lynam (1968) 267 Cal. App. 2d 127, 130, 72 Cal. Rptr. 670* ; *Black v. Shearson, Hammill & Co. (1968) 266 Cal. App. 2d 362, 367, 72 Cal. Rptr. 157* ; *Vogelsang v. Wolpert (1964) 227 Cal. App. 2d 102, 109, 38 Cal. Rptr. 440*

[13] Evidence

Fraud sometimes required to be shown by clear and convincing evidence. *Thompson v. Occidental Life Ins. Co. (1973) 9 Cal. 3d 904, 919, 109 Cal. Rptr. 473, 513 P.2d 353* ; *K. King & G. Schuler Corp. v. King (1968) 259 Cal. App. 2d 383, 396, 66 Cal. Rptr. 330*

Burden of proof required in fraud case I no more than preponderance of evidence. *Sierra Nat'l Bank v. Brown (1971) 18 Cal. App. 3d 98, 104-105, 95 Cal. Rptr. 742*

Facts that constitute fraud required to be determined from circumstances of each case. *Ach v. Finkelstein (1968) 264 Cal. App. 2d 667, 675, 70 Cal. Rptr. 472*

Fraud allowed to be proved from direct evidence or inferred from all circumstances in case. *Ach v. Finkelstein (1968) 264 Cal. App. 2d 667, 675, 70 Cal. Rptr. 472*

Fraud allowed to be proved from inference and circumstantial evidence. *Vogelsang v. Wolpert (1964) 227 Cal. App. 2d 102, 111, 38 Cal. Rptr. 440*

Fraud often difficult to prove directly; circumstances surrounding transaction and relationship of parties are facts from which fraud is often inferred. *Balfour, Guthrie & Co. v. Hansen (1964) 227 Cal. App. 2d 173, 192, 38 Cal. Rptr. 525*

Fraud is odious and therefore never presumed. *Fowler v. Fowler (1964) 227 Cal. App. 2d 741, 748, 39 Cal. Rptr. 101*

[14] Federal Racketeer Influenced and Corrupt Organizations Act (RICO)

Misrepresentations by which promoter induced broadcaster to invest in joint venture to acquire and sell rights to telecast fight was not pattern of racketeering activity sufficient to state cause of action under *18 U.S.C. § 1961(5)*; single scheme or episode sufficient only if circumstances suggest threat of continuing activity. *Medallion Television Enters. v. SelecTV of Cal. (9th Cir. 1987) 833 F.2d 1360, 1363-1365*

Allegations of mail fraud (*18 U.S.C. § 1341*) describing intent to defraud and facts as to time, place, and content of alleged mailings was pattern of racketeering activity sufficient to state cause of action under RICO (*18 U.S.C. § 1961 et seq.*). *People v. Highland Fed. Sav. & Loan (1993) 14 Cal. App. 4th 1692, 1719-1720, 19 Cal. Rptr. 2d 555*

[15] Fraud and Deceit Distinguished

Deceit giving rise to action for damages and fraud vitiating consent to contract both evolved from action on case of deceit; privity of contract originally required. *Hale v. George A. Hormel & Co. (1975) 48 Cal. App. 3d 73, 82-86, 121 Cal. Rptr. 144*

Elements of tort of fraud and deceit and elements of actual fraud showing no consent to contract are same. *South Tahoe Gas Co. v. Hofmann Land Improvements Co. (1972) 25 Cal. App. 3d 750, 765, 102 Cal. Rptr. 286*

False promise or misrepresentation that is basis for action in tort for damages is actionable under *Civ. Code §§ 1709* and *1710*, rather than *Civ. Code § 1572*. *Bezaire v. Fidelity & Deposit Co. (1970) 12 Cal. App. 3d 888, 892, 91 Cal. Rptr. 142*

[16] Implied Misrepresentations

In action under *Civ. Code § 1710* by title company against bank, bank's practice of repeatedly honoring third party's checks payable to title company did not impliedly represent that third party had sufficient funds to cover checks because third party, rather than bank, was responsible for whatever representations were presented to title company through uttering checks. *Chicago Title Ins. Co. v. Superior Court (1985) 174 Cal. App. 3d 1142, 1156, 220 Cal. Rptr. 507* (noting apparent conflict between California and federal law over whether check constitutes representation, but commenting that conflict was of no concern under facts of this case)

[17] Intent

Intent permissibly established by inference from acts of parties, because direct proof of fraudulent intent often impossible. *Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 Cal. App. 3d 388, 411-412, 264 Cal. Rptr. 779*

Actual fraud occurs if one party to contract intends to deceive another party to contract or to induce another party to enter contract on basis of promise made without any intention of performing it; existence of intent at time of promise is always question of fact. *Walter E. Heller W., Inc. v. Tecrim Corp. (1987) 196 Cal. App. 3d 149, 160-161, 241 Cal. Rptr. 677*

[18] Interest on Damages

Constitutional rate of 7 percent is proper prejudgment interest rate applicable to fraud claim. *Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 Cal. App. 3d 388, 434, 264 Cal. Rptr. 779*

Prejudgment interest at rate of 7 percent is proper in action by insured to recover on commercial blanket bond indemnifying against fraudulent acts of employees. *Pacific-S. Mortgage Trust Co. v. Insurance Co. of N. Am. (1985) 166 Cal. App. 3d 703, 716, 212 Cal. Rptr. 754*

Civ. Code § 3328, providing for recovery of interest on certain damages, as authorizes interest in fraud actions in discretion of trier of fact. *Greenfield v. Insurance Inc. (1971) 19 Cal. App. 3d 803, 813, 97 Cal. Rptr. 164*

Plaintiff not required to plead or specially pray for interest. *Greenfield v. Insurance Inc. (1971) 19 Cal. App. 3d 803, 813, 97 Cal. Rptr. 164*

[19] Justifiable Reliance

[a] Burden of Proof and Evidence

Whether plaintiff's reliance on defendant's representations regarding financial condition of company plaintiff contemplated buying was justifiable is measured from moment plaintiff was committed to purchase company's stock, which occurred once plaintiff's obligation to purchase was no longer conditional. *Atari Corp. v. Ernst & Whinney (9th Cir. 1992) 981 F.2d 1025, 1029*

Reliance on misrepresentation is question of fact for trial court; issue is whether person claiming reliance was justified in believing representation in light of his or her own knowledge and experience. *Gray v. Don Miller Assocs., Inc. (1984) 35 Cal. 3d 498, 503, 198 Cal. Rptr. 551, 674 P.2d 253*

Reliance not required to be shown by direct evidence; reliance may be inferred from circumstances surrounding

transaction. *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 814, 94 Cal. Rptr. 796*

Reliance by party to commercial contract on oral representations, despite clause in written agreement that all representations had been included in written agreement, was not unreasonable as matter of law. *Ron Greenspan Volkswagen v. Ford Motor (1995) 32 Cal. App. 4th 985, 987-989, 38 Cal. Rptr. 2d 783*

Justifiable reliance decided matter of law if reasonable minds can come to only one conclusion based on facts; reliance not reasonable if attorney who used releases in her practice relied on equestrian instructor's representation that release was meaningless. *Guido v. Koopman (1991) 1 Cal. App. 4th 837, 843-844, 2 Cal. Rptr. 2d 437*

In fraud action brought by purchaser of airplane against manufacturer, arising from destruction of airplane when broken landing gear ripped away from wing, damaging wing fuel tank and causing fire, defendant's representations that landing gear was designed to break away from wing without rupturing wing fuel tank was material, and plaintiff's reliance on representations was justified; reliance established if representation substantially influenced choice, even though other influences operated as well. *Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 Cal. App. 3d 388, 425, 264 Cal. Rptr. 779*

Borrower's refusal on three separate occasions to pledge ranch as collateral for long-term (construction) financing was further evidence that borrower was not reasonably justified in believing its increased short-term debt would be paid from long-term loan. *Kruse v. Bank of Am. (1988) 202 Cal. App. 3d 38, 56-57, 248 Cal. Rptr. 217*

Facts that borrower sought financing elsewhere after bank initially denied long-term financing, that borrower knew loan it sought exceeded bank officer's lending authority, and that regional approval was required, established that borrower's reliance was not justified, despite saccharine comments made by regional bank officer during site visit. *Kruse v. Bank of Am. (1988) 202 Cal. App. 3d 38, 55, 248 Cal. Rptr. 217*

Testimony concerning one's own reliance is legally insufficient if that reliance is without justification; plaintiff's misguided belief in statement on which no reasonable person would rely was not justifiable reliance. *Kruse v. Bank of Am. (1988) 202 Cal. App. 3d 38, 54, 248 Cal. Rptr. 217*

Whether plaintiff justifiably relied is generally question of fact. *Meyer v. Ford Motor Co. (1969) 275 Cal. App. 2d 90, 105, 79 Cal. Rptr. 816*

[b] Class Actions

Plaintiffs alleging fraud in advertising permitted to base cause of action on allegation that they acted in response to advertising campaign, even if they cannot recall specific advertisement that induced behavior desired by advertisers. *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 222, 197 Cal. Rptr. 783, 673 P.2d 660 , superseded by statute as stated in Gartin v. S&M NuTec LLC, 245 F.R.D. 429, 2007 U.S. Dist. LEXIS 38050*

If representations were made at same time and place to all class members who act on them at same time, persuasive inference arises that each of them relied on representations. *Collins v. Rocha (1972) 7 Cal. 3d 232, 237, 102 Cal. Rptr. 1, 497 P.2d 225*

Material misrepresentations made to class members support at least inference of reliance as to entire class. *Danzig v. Jack Grynberg & Assocs. (1984) 161 Cal. App. 3d 1128, 1138, 208 Cal. Rptr. 336*

Defendant who deceives public by advertisements intended to induce reliance is liable to any individual who reasonably relied on representations. *Block v. Tobin (1975) 45 Cal. App. 3d 214, 219, 119 Cal. Rptr. 288*

[c] Correction to Initial Misrepresentation

Plaintiff's reliance on defendant's initial misrepresentation was not negated by defendant's later disclosure to plaintiff of truth, if defendant had deceived plaintiff into setting in which plaintiff could be "brainwashed" and rendered incapable of deciding not to act on initial misrepresentation. *Molko v. Holy Spirit Ass'n (1988) 46 Cal. 3d 1092, 1108 , superseded by statute as stated in Scheiding v. Dinwiddie Const. Co. (1999) 69 Cal. App. 4th 64, 81 Cal. Rptr. 2d 360 .*

[d] Defendant Having Superior Knowledge

Plaintiff who lacks equal facilities for learning truth justified in relying on defendant. *Meyer v. Ford Motor Co. (1969) 275 Cal. App. 2d 90, 105, 79 Cal. Rptr. 816*

Plaintiff has right to rely on representations if defendant has superior knowledge and knows of plaintiff's ignorance of subject matter. *Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 966, 72 Cal. Rptr. 722*

Reliance on representations not precluded by independent investigation if person making representations has superior knowledge or party relying is not competent to judge facts without expert assistance. *Brady v. Carman (1960) 179 Cal. App. 2d 63, 68, 3 Cal. Rptr. 612*

Because plaintiff was ignorant of effect of easement on property and defendant was real estate broker with professional knowledge of its effect who gave evasive answers to plaintiff's inquiries, defendant was chargeable with fraud. *Brady v. Carman (1960) 179 Cal. App. 2d 63, 68-70, 3 Cal. Rptr. 612*

Owner of real estate, in absence of facts to contrary, is presumed to know boundaries and area of his or her land; buyer warranted in relying on representations by owner as to such facts. *Nathanson v. Murphy (1955) 132 Cal. App. 2d 363, 369, 282 P.2d 174*

Owner of real estate presumed to know boundaries and area of his or her own land. *Dohrman v. J. B. Roof, Inc. (1930) 108 Cal. App. 456, 464, 291 P. 879*

[e] Fiduciary Relationship of Plaintiff and Defendant

Relationship of seller to buyer not ordinarily vested with fiduciary obligation. *Committee on Children's Television, Inc. v. General Foods Corp. (1983) 35 Cal. 3d 197, 222, 197 Cal. Rptr. 783, 673 P.2d 660 , superseded by statute as stated in Gartin v. S&M NuTec LLC, 245 F.R.D. 429, 2007 U.S. Dist. LEXIS 38050*

Instruction that one to whom fiduciary relationship is owed has right to rely on representations made by fiduciary without further investigation was error; beneficiary of fiduciary relationship charged with duty to investigate facts of which he or she has actual knowledge. *Miller v. Bechtel Corp. (1983) 33 Cal. 3d 868, 875, 191 Cal. Rptr. 619, 663 P.2d 177 ; Kruse v. Bank of Am. (1988) 202 Cal. App. 3d 38, 55 n.10, 248 Cal. Rptr. 217*

Insurance agent liable for damages for fraud because agent represented he had obtained coverage for plaintiff that he had in fact not obtained; plaintiff's reliance justified due to relationship between agent and client despite existence of written policy not showing coverage. *Greenfield v. Insurance Inc. (1971) 19 Cal. App. 3d 803, 811, 97 Cal. Rptr. 164*

Plaintiff has right to rely on representations made to him or her by defendant who is fiduciary without duty of further inquiry. *Davis v. Kahn (1970) 7 Cal. App. 3d 868, 878, 86 Cal. Rptr. 872*

[f] Investigation by Plaintiff

Investigation by plaintiff of land did not preclude justifiable reliance if accuracy of defendant's representations could be checked only by experts. *Shearer v. Cooper (1943) 21 Cal. 2d 695, 704, 134 P.2d 764*

Plaintiff not held to constructive notice of public records that would reveal true facts. *Seeger v. Odell (1941) 18 Cal. 2d 409, 415, 115 P.2d 977*

Triable issue of fact remained on whether disclaimer in life insurance materials was sufficient to put purchaser on notice that agent's assertions that out-of-pocket premium payments were not required after eleventh year might be false. *Broberg v. The Guardian Life Ins. Co. of America (2009) 171 Cal. App. 4th 912, 921-922, 90 Cal. Rptr. 3d 225*

Pursuant to *Civ. Code § 1668*, defendant real estate brokers could not rely on exculpatory clauses in real estate sales contract to avoid liability for intentional misrepresentation or fraud; plaintiffs' failure to thoroughly investigate zoning restrictions prior to purchase was no defense when contract gave them right, but not duty, to investigate. *Manderville v. PCG&S Group, Inc. (2007) 146 Cal. App. 4th 1486, 1500-1502, 55 Cal. Rptr. 3d 59*

In civil action regarding insurance fraud, in which verdict finding fraud was based on misrepresentation of amount of loss, award for costs of insurer's investigation was reversed on basis of insufficient evidence of actual reliance; insurer had duty to investigate every claim; evidence showed that investigation was not instigated by representations of insured, but rather by normal procedures of investigating every claim. *Orient Handel v. United States Fid. & Guar. Co. (1987) 192 Cal. App. 3d 684, 693-696, 237 Cal. Rptr. 667*

Reliance on defense attorney's representations that defendant would pay plaintiff money owed after dismissal, without independent investigation, was not reasonable or justifiable, and therefore precluded recovery for fraud based on defendant's failure to pay after dismissal of suit with prejudice. *Wilhelm v. Pray, Price, Williams & Russell (1986) 186 Cal. App. 3d 1324, 1331-1332, 231 Cal. Rptr. 355*

No duty imposed in law to employ means of discovering truth. *Howell v. Courtesy Chevrolet, Inc. (1971) 16 Cal. App. 3d 391, 403, 94 Cal. Rptr. 33*

Inspection by plaintiff does not prevent justifiable reliance on defendant's statements if falsity of statements is not apparent from inspection, person making representations has superior knowledge, or party relying on investigation is not competent to judge facts without expert assistance. *Snelson v. Ondulando Highlands Corp. (1970) 5 Cal. App. 3d 243, 252, 84 Cal. Rptr. 800* ; *Horn v. Guaranty Chevrolet Motors (1969) 270 Cal. App. 2d 477, 482, 75 Cal. Rptr. 871*

If plaintiff begins investigation, plaintiff's failure to discover truth excused by defendant's superior knowledge of facts, difficulty of ascertaining all of facts, or plaintiff's incompetence to judge facts without expert assistance. *Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 966, 72 Cal. Rptr. 722*

Fact that plaintiff relied to some extent on independent advice does not bar plaintiff's recovery in all cases. *Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 966, 72 Cal. Rptr. 722*

Plaintiff not required to make investigation if defendant has asserted facts about matter. *Balfour, Guthrie & Co. v. Hansen (1964) 227 Cal. App. 2d 173, 193, 38 Cal. Rptr. 525*

Plaintiff precluded from reliance on defendant's representations only if plaintiff had means at hand for determining truth or falsity of it and resorts to such means. *Mercer v. Elliott (1962) 208 Cal. App. 2d 275, 279, 25 Cal. Rptr. 217*

Plaintiff who undertook to investigate real property for sale and truth of representations concerning it required to proceed with investigation to its end with diligence and completeness, but not required to employ experts to investigate. *Kramer v. Musser (1943) 57 Cal. App. 2d 942, 946-947, 136 P.2d 74*

Purchaser who undertakes to make investigation after representation has been made, who has available means of learning truth, and who actually learns facts, is not justified in relying on representation; in absence of these circumstances, purchaser has right to rely on representations of seller. *Dohrman v. J. B. Roof, Inc. (1930) 108 Cal. App. 456, 464, 291 P. 879*

[g] Plaintiff's Conduct

Licensed real estate broker's reliance on oral promise to pay commission not sufficiently reasonable to support action for fraud. *American Int'l Enters., Inc. v. Federal Deposit Ins. Corp. (9th Cir. 1993) 3 F.3d 1263, 1270* (relying on *Phillippe v. Shapell Indus. (1987) 43 Cal. 3d 1247, 1270, 241 Cal. Rptr. 22, 743 P.2d 1279*)

Reliance on misrepresentations not justifiable because plaintiff's investigation and analysis had uncovered information demonstrating that audited statements plaintiff relied on were patently and obviously false. *Atari v. Ernst & Whinney (9th Cir. 1992) 981 F.2d 1025, 1030-1031*

Commercial tenant in shopping mall stated cause of action for intentional or negligent misrepresentation when alleging that landlord during negotiations overstated size of rental space by 7.6 percent and understated size of shopping mall by 8.1 percent, resulting in overpayment in rent of $90,000; lease provision stating that parties agreed that sizes were "reasonable approximations," and payments based on sizes stated were not subject to revision, did not preclude plaintiff from showing that sizes were materially and unreasonably inaccurate. *McClain v. Octagon Plaza, LLC (2008) 159 Cal. App. 4th 784, 793-797, 71 Cal. Rptr. 3d 885*

Lease clause specifying that tenant is not relying on representations about other potential tenants for shopping mall prevented tenant who admitted to reading lease before signing from relying on other such representations without first seeking clarification. *Hinesley v. Oakshade Town Ctr. (2005) 135 Cal. App. 4th 289, 302-303, 37 Cal. Rptr. 3d 364*

Causal connection between misrepresentation of extent of defendant's right to use trademark and name, and plaintiff's payment of litigation expenses related to dispute with third party over use of name, was too tenuous to support judgment for plaintiff because plaintiff probably would have invested anyway and payment of those litigation expenses was probably not required by investment agreement. *Okun v. Morton (1988) 203 Cal. App. 3d 805, 828-829, 250 Cal. Rptr. 220*

Detrimental reliance sometimes unreasonable in light of plaintiff's intelligence and experience. *Chicago Title Ins. Co. v. Superior Court (1985) 174 Cal. App. 3d 1142, 1151, 220 Cal. Rptr. 507*

Justifiable reliance shown even if plaintiff relied under such circumstances as to make it unreasonable for plaintiff to accept defendant's statement without independent inquiry or investigation. *Howell v. Courtesy Chevrolet, Inc. (1971) 16 Cal. App. 3d 391, 403, 94 Cal. Rptr. 33*

Plaintiff denied recovery only if plaintiff's conduct in relying on defendant was manifestly unreasonable in light of plaintiff's own intelligence and information. *Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 964-965, 72 Cal. Rptr. 722*

Fact that investigation would have revealed falsity of misrepresentation to plaintiff does not bar recovery. *Hartong v.*

Partake, Inc. (1968) 266 Cal. App. 2d 942, 964-965, 72 Cal. Rptr. 722

In case of negligent misrepresentation, plaintiff not barred unless plaintiff's conduct, in light of plaintiff's own information and intelligence, is irrational and preposterous. *Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 964-965, 72 Cal. Rptr. 722*

Test of fraudulent representation is its effect on particular mind, whether strong and circumspect mind or weak and relying one. *Wilke v. Coinway, Inc. (1967) 257 Cal. App. 2d 126, 138, 64 Cal. Rptr. 845*

Credulity of plaintiff not usually defense to action for fraud; fraud not subject of strictly objective test. *Vogelsang v. Wolpert (1964) 227 Cal. App. 2d 102, 111-112, 38 Cal. Rptr. 440*

[h] Pleading Reliance

Allegations that defendant concealed and removed person who injured plaintiff from area, and that concealment required expenditure of great effort by plaintiff, were merely allegations of damage rather than allegations of change in position amounting to reliance; thus, no fraud cause of action stated. *Hepe v. Paknad (1988) 199 Cal. App. 3d 412, 420, 244 Cal. Rptr. 823*

[i] Untrustworthy Defendant

Plaintiff who discovers that defendant has made one false representation not precluded from justifiably relying on other misrepresentations of defendant if defendant corrected results of first representation on request. *Shearer v. Cooper (1943) 21 Cal. 2d 695, 701, 134 P.2d 764*

Person taking several bad checks in payment from one defendant not justified in relying on worth of any check after first was dishonored. *American Air Equip., Inc. v. Pacific Employers Ins. Co. (1974) 37 Cal. App. 3d 322, 325, 327-328, 112 Cal. Rptr. 366*

Plaintiff who learns that one representation by defendant is false is not justified in assuming that other representations by defendant are true. *Roland v. Hubenka (1970) 12 Cal. App. 3d 215, 225, 90 Cal. Rptr. 490*

If defendant has made plausible explanation of facts otherwise arousing suspicion, plaintiff not required to investigate further. *Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 966, 72 Cal. Rptr. 722*

Defendant who lulls plaintiff into inaction although plaintiff suspects fraud is not permitted to assert that plaintiff lost right to recover damages by accepting assurance of defendant that there was no fraud. *Brownlee v. Vang (1965) 235 Cal. App. 2d 465, 474, 45 Cal. Rptr. 458*

Buyer of powerboat who noticed possible discrepancies was justified in relying on assertion of seller concerning boat's engines, because seller reassured buyer. *Harper v. Silver (1962) 200 Cal. App. 2d 103, 109, 19 Cal. Rptr. 78*

[20] Materiality

Defendant's representations not required to be sole cause of damage; but only required to be substantial factor in inducing plaintiff to act. *Wennerholm v. Stanford Univ. Sch. of Med. (1942) 20 Cal. 2d 713, 717, 128 P.2d 522 ; Anderson v. Handley (1957) 149 Cal. App. 2d 184, 186-187*

If plaintiff would not have done any differently had plaintiff not relied on defendant's representation, or if plaintiff had no choice and could have done nothing to improve his or her position if plaintiff had not relied on defendant, required conduct of plaintiff is lacking. *Bezaire v. Fidelity & Deposit Co. (1970) 12 Cal. App. 3d 888, 892-893, 91 Cal. Rptr. 142*

Representation that induces plaintiff to take risk plaintiff would not otherwise have taken is material fact that induced plaintiff to change position. *Kozlowsky v. Westminster Nat'l Bank (1970) 6 Cal. App. 3d 593, 597-598, 86 Cal. Rptr. 52*

To show damages, plaintiff required to show that defendants deceived plaintiff with intent to induce plaintiff to alter his or her position to his or her injury or risk and that plaintiff was damaged as result. *Meyer v. Ford Motor Co. (1969) 275 Cal. App. 2d 90, 106, 79 Cal. Rptr. 816*

Fact represented or suppressed is deemed material if it relates to matter of substance and directly affects purpose for which deceived party acted. *Handley v. Handley (1960) 179 Cal. App. 2d 742, 746, 3 Cal. Rptr. 910*

Concealment is material if knowledge suppressed is so important and obviously so well in recollection of party withholding it, that its mere repression amounts to fraud. *Sanfran Co. v. Rees Blow Pipe Mfg. Co. (1959) 168 Cal. App. 2d 191, 205, 335 P.2d 995*

Misrepresentation or concealment of known fact of fill in lot sold to another is material inducement that works fraud on buyer who is ignorant of fact. *Ashburn v. Miller (1958) 161 Cal. App. 2d 71, 79, 326 P.2d 229*

Fraud and damage sustained required to have cause and effect relationship to each other. *Hill v. Wrather (1958) 158 Cal. App. 2d 818, 825, 323 P.2d 567*

False representation that cannot affect intrinsic merits of business transaction is immaterial because reliance on it cannot produce injury in legal sense. *Hill v. Wrather (1958) 158 Cal. App. 2d 818, 824-825, 323 P.2d 567*

To be material, representation required to be such that plaintiff would not have acted as plaintiff did without it; false representation required to be of material fact. *Adkins v. Wyckoff (1957) 152 Cal. App. 2d 684, 689, 313 P.2d 592*

Misrepresentation as to acreage of piece of real property constitutes material misrepresentation; sellers who did not have property surveyed did not have sufficient knowledge to make representation as to acreage. *Nathanson v. Murphy (1955) 132 Cal. App. 2d 363, 367-368, 282 P.2d 174*

Whether existence of fill is material depended on nature and extent of fill; filing of map showing fill and letting of contract for grading by defendant was evidence of defendant's knowledge of extent of fill. *Rothstein v. Janss Inv. Corp. (1941) 45 Cal. App. 2d 64, 72-73, 113 P.2d 465*

[21] Mental Suffering Damages

Damages for emotional distress not recoverable in fraud action if claim for emotional distress is based on same conduct alleged to show fraud. *Kruse v. Bank of Am. (1988) 202 Cal. App. 3d 38, 67, 248 Cal. Rptr. 217*

General damages for mental pain and suffering are recoverable for deceit. *Sprague v. Frank J. Sanders Lincoln Mercury, Inc. (1981) 120 Cal. App. 3d 412, 417, 174 Cal. Rptr. 608*

[22] Negligent Misrepresentations

Allegations that defendant knew or could have known true facts, that defendant made false statement, and that plaintiff relied on it required to be pleaded in case of negligent misrepresentation. *Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 423, 282 P.2d 890*

Representation to be actionable need not be made with knowledge of falsity, but need only be assertion, as fact, of something that is not true, by one who has no reasonable ground for believing it to be true. *Gagne v. Bertran (1954) 43 Cal. 2d 481, 487-488, 275 P.2d 15* ; *Muraoka v. Budget Rent-A-Car, Inc. (1984) 160 Cal. App. 3d 107, 119, 206 Cal. Rptr. 476* ; *Wilke v. Coinway, Inc. (1967) 257 Cal. App. 2d 126, 136, 64 Cal. Rptr. 845*

Professional who negligently performed soil tests to determine presence of fill and represented that soil was sound although it was not is liable for negligent misrepresentation. *Gagne v. Bertran (1954) 43 Cal. 2d 481, 487-489, 275 P.2d 15*

Investment bank sued by purchasers of securities for material omissions and "half-truths" contained in offering memorandum, which made numerous representations about established success of issuing company's business strategy and strong prospects going forward, but failed to mention company's recent poor quarter and "channel stuffing" with product that enabled company to inflate financial estimates for upcoming year, were sufficient to support action for negligent misrepresentation. *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp. (2007) 157 Cal. App. 4th 835, 855, 68 Cal. Rptr. 3d 828*

Stock investors stated causes of action for negligent and intentional misrepresentation against accounting firms by alleging that firms negligently or intentionally inflated value of corporation's assets and value in anticipation of merger with another corporation, knowing that reports and statements would be relied on by other parties such as investors. *Murphy v. BDO Seidman, LLP (2003) 113 Cal. App. 4th 687, 695-696, 6 Cal. Rptr. 3d 770*

If independent accountant prepares corporation's financial records, in addition to performing audit on records, accountant is not acting as independent auditor and may be liable for negligent misrepresentation to third parties, such as underwriter, who reasonably and foreseeably relied on financial records, audit, or both. *Nutmeg Sec., Ltd. v. McGladrey & Pullen (2001) 92 Cal. App. 4th 1435, 1441-1444, 112 Cal. Rptr. 2d 657*

False representation required to be positive assertion; tort of negligent misrepresentation does not arise from implied statements. *Evan F. v. Hughson United Methodist Church (1992) 8 Cal. App. 4th 828, 841 n.2, 10 Cal. Rptr. 2d 748* ; *Yanase v. Automobile Club. of So. Cal. (1989) 212 Cal. App. 3d 468, 473, 476, 260 Cal. Rptr. 513*

Cause of action for negligent misrepresentation included within meaning of "fraud" for purposes of *Civ. Code § 1668*, prohibiting contractual waiver of liability for fraud (as well as willful injury to person or property of another). *Blankenheim v. E. F. Hutton & Co. (1990) 217 Cal. App. 3d 1463, 1472-1473, 266 Cal. Rptr. 593* ; *Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 Cal. App. 3d 388, 404, 264 Cal. Rptr. 779*

"Hold-harmless" agreement between stockbroker and customer violated *Civ. Code § 1668*, and therefore was ineffective to bar negligent misrepresentation action arising from investment losses. *Blankenheim v. E. F. Hutton & Co. (1990) 217 Cal. App. 3d 1463, 1473, 266 Cal. Rptr. 593*

Purported exculpatory clause in sales contract, in which buyer agreed to waive all claims for negligence, was ineffective by reason of *Civ. Code § 1668* to bar negligent misrepresentation action alleging defect in airplane. *Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 Cal. App. 3d 388, 404, 264 Cal. Rptr. 779*

Responsibility for negligent misrepresentation rests on existence of legal duty, imposed by contract, statute, or otherwise, owed by defendant to injured person. *Eddy v. Sharp (1988) 199 Cal. App. 3d 858, 864, 245 Cal. Rptr. 211*

One party to business transaction under duty to exercise reasonable care to disclose facts basic to transaction to other party, if party knows that other is acting under mistake regarding facts and would reasonably expect disclosure of those facts due to relationship between them, customs of trade, or other objective circumstances. *Eddy v. Sharp (1988) 199 Cal. App. 3d 858, 864, 245 Cal. Rptr. 211*

Negligent misrepresentation requires allegation that defendant made false representations honestly believing they were true, but having no reasonable ground for that belief. *Wilhelm v. Pray, Price, Williams & Russell (1986) 186 Cal. App. 3d 1324, 1332-1333, 231 Cal. Rptr. 355*

Person who makes statement that implies knowledge on that person's part, although in fact that person has no knowledge whether it is true or false, is guilty of fraud if statement proves to be false. *Howell v. Courtesy Chevrolet, Inc. (1971) 16 Cal. App. 3d 391, 402, 94 Cal. Rptr. 33*

Elements of cause of action for negligent misrepresentation. *Christiansen v. Roddy (1986) 186 Cal. App. 3d 780, 785-786, 231 Cal. Rptr. 72*

Endorser of product for gain liable to purchaser who relies on endorsement in purchasing product and is injured as result, if, as result of defendant's negligence, product was not as represented. *Hanberry v. Hearst Corp. (1969) 276 Cal. App. 2d 680, 683, 81 Cal. Rptr. 519*

Doctors liable for negligent misrepresentation concerning effectiveness of sterilization operation. *Custodio v. Bauer (1967) 251 Cal. App. 2d 303, 314, 314 n. 8, 59 Cal. Rptr. 463*

Even person who has no duty to speak has duty to speak truth if he or she does speak; person with no knowledge of facts liable for fraud and negligent misrepresentations made without reasonable grounds for believing them to be true. *Balfour, Guthrie & Co. v. Hansen (1964) 227 Cal. App. 2d 173, 192-193, 38 Cal. Rptr. 525*

Factors to be considered in determining whether defendant should be liable for negligent misrepresentations to person not in privity with defendant. *De Zemplen v. Home Fed. Sav. & Loan Ass'n (1963) 221 Cal. App. 2d 197, 206, 34 Cal. Rptr. 334*

[23] Opinion and Fact

An assertion that factually describes important characteristic of product is not seller's mere puffing and is actionable. *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 111-113, 120 Cal. Rptr. 681, 534 P.2d 377*

Reliance on opinion justified if person making statement holds himself or herself out as expert, person to whom he or she speaks has hired him or her to supply information, and statement implies that person speaking knows facts that justify statement. *Gagne v. Bertran (1954) 43 Cal. 2d 481, 489, 275 P.2d 15*

Statement of law or opinion made by fiduciary to person in fiduciary relationship is actionable as misrepresentation. *Katz v. Feldman (1972) 23 Cal. App. 3d 500, 504, 100 Cal. Rptr. 367* ; *Harazim v. Lynam (1968) 267 Cal. App. 2d 127, 133, 72 Cal. Rptr. 670*

Determination of whether statement is fact or opinion is for trier of fact if there is reasonable doubt. *Pacesetter Homes, Inc. v. Brodkin (1970) 5 Cal. App. 3d 206, 212, 85 Cal. Rptr. 39*

Opinion treated representation of fact if one expressing it does not in fact believe it to be true, if opinion amplifies false statement of fact, if opinion implies nonexistent factual basis, if opinion is expressed as fact, and if opinion is expressed by defendant having superior knowledge of subject. *Pacesetter Homes, Inc. v. Brodkin (1970) 5 Cal. App. 3d 206, 211, 85 Cal. Rptr. 39*

Superior knowledge that justifies reliance on statement of opinion means that party has held himself or herself out as particularly knowledgeable or that knowledge assumed to be possessed by defendant is motivation for plaintiff to enter into transaction; more than superior bargaining acumen required. *Pacesetter Homes, Inc. v. Brodkin (1970) 5 Cal. App. 3d 206, 212, 85 Cal. Rptr. 39*

Opinion misrepresenting facts on which it is based is actionable. *Harazim v. Lynam (1968) 267 Cal. App. 2d 127, 133, 72 Cal. Rptr. 670* ; *Wilke v. Coinway, Inc. (1967) 257 Cal. App. 2d 126, 136, 64 Cal. Rptr. 845*

Misrepresentations of law by lay persons are insufficient to show actionable misrepresentations; but expressions of opinion are actionable if person making them holds himself or herself out as especially qualified. *Harazim v. Lynam (1968) 267 Cal. App. 2d 127, 132, 72 Cal. Rptr. 670*

Opinion actionable if affirmed as fact material to transaction rather than stated as opinion. *Harazim v. Lynam (1968) 267 Cal. App. 2d 127, 132, 72 Cal. Rptr. 670* ; *Mercer v. Elliott (1962) 208 Cal. App. 2d 275, 280, 25 Cal. Rptr. 217*

Plaintiff not allowed to justifiably rely on mere statements of opinion. *Wilke v. Coinway, Inc. (1967) 257 Cal. App. 2d 126, 136, 64 Cal. Rptr. 845*

Representations as to value of goods are usually considered representations of opinion and are not actionable; value considered representation of fact if represented as fact. *Clar v. Board of Trade (1958) 164 Cal. App. 2d 636, 645, 331 P.2d 89*

Expression of opinion as to character and skill of another is not generally actionable, but is actionable if dishonestly made to one entitled to rely on it. *Anderson v. Handley (1957) 149 Cal. App. 2d 184, 187, 308 P.2d 368* ; *Ogier v. Pacific Oil & Gas Corp. (1955) 132 Cal. App. 2d 496, 506, 282 P.2d 574*

Expression of opinion actionable if party making it has superior knowledge or special information. *Ogier v. Pacific Oil & Gas Corp. (1955) 132 Cal. App. 2d 496, 506-507, 282 P.2d 574*

[24] Pleading Requirements

Facts constituting fraud required to be specifically pleaded so that court can determine whether prima facie case has been alleged. *Cooper v. Leslie Salt Co. (1969) 70 Cal. 2d 627, 636, 75 Cal. Rptr. 766, 451 P.2d 406*

If plaintiffs relied on representations of defendant in purchasing option and expending sums in preparation for purchase of property, cause of action stated for damages for fraud and deceit. *Collins v. Marvel Land Co. (1970) 13 Cal. App. 3d 34, 44, 91 Cal. Rptr. 291*

Every element of cause of action for fraud required to be alleged both factually and specifically; policy of liberal construction of pleadings not available to sustain defective complaint for fraud. *Goldrich v. Natural Y Surgical Specialties, Inc. (1994) 25 Cal. App. 4th 772, 782, 31 Cal. Rptr. 2d 162* ; *Stansfield v. Starkey (1990) 220 Cal. App. 3d 59, 73, 269 Cal. Rptr. 337* ; *Cooper v. Equity Gen. Ins. (1990) 219 Cal. App. 3d 1252, 1262, 268 Cal. Rptr. 692*

Facts constituting fraud required to be set forth with particularity. *La Vista Cemetery Assn. v. American Sav. & Loan Ass'n (1970) 12 Cal. App. 3d 365, 369, 90 Cal. Rptr. 722* ; *Morton v. Loveman (1968) 267 Cal. App. 2d 712, 720, 73 Cal. Rptr. 623*

Legal conclusions of fraud insufficient for complaint and facts constituting fraud required to be pleaded. *Lesperance v. North Am. Aviation, Inc. (1963) 217 Cal. App. 2d 336, 344, 31 Cal. Rptr. 873*

[25] Potential Plaintiffs

Writer of letter of recommendation owes to third persons duty not to misrepresent facts in describing qualifications and character of former employee, if making these misrepresentations would present substantial, foreseeable risk of physical injury to third persons [*Randi W. v. Muroc Joint Unified Sch. Dist. (1997) 14 Cal. 4th 1066, 1081, 60 Cal. Rptr. 2d 263, 929 P.2d 582* (but no duty absent resulting physical injury or special relationship)].

Privity of contract not required to hold defendant liable for negligent misrepresentations not made directly to plaintiff. *De Zemplen v. Home Fed. Sav. & Loan Ass'n (1963) 221 Cal. App. 2d 197, 206, 34 Cal. Rptr. 334*

Factors to be considered in determining liability of defendant if negligent misrepresentations were not made directly to plaintiff. *De Zemplen v. Home Fed. Sav. & Loan Ass'n (1963) 221 Cal. App. 2d 197, 206, 34 Cal. Rptr. 334*

False representation made by one person with intention that it should come to attention of another person and be acted on and that is acted on to that other person's injury gives person so acting same right of relief as if representation had been made to him or her directly. *Simone v. McKee (1956) 142 Cal. App. 2d 307, 313-314, 298 P.2d 667* ; *Wice v. Schilling (1954) 124 Cal. App. 2d 735, 745, 269 P.2d 231*

[26] Products Liability

Plaintiff injured by product that fails to perform as represented may properly combine causes of action for fraud, breach of express and implied warranties, and strict liability in tort based on defective design. *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 108, 120 Cal. Rptr. 681, 534 P.2d 377*

Absent endorsement or sponsorship for economic gain, publisher of advertisement has no duty to investigate safety of advertised product; thus, no cause of action for fraud or negligent misrepresentation is stated against publisher based on injuries sustained from use of product. *Walters v. Seventeen Magazine (1987) 195 Cal. App. 3d 1119, 1121-1122, 241 Cal. Rptr. 101*

Action for fraudulent misrepresentations concerning piece of real property and house on it also included causes of action for rescission based on misrepresentation, negligent design and development of property, strict liability for defective design and manufacture, breach of warranties, failure of consideration, and mistake resulting in damages. *Snelson v. Ondulando Highlands Corp. (1970) 5 Cal. App. 3d 243, 249, 84 Cal. Rptr. 800*

Endorser of product for profit liable for negligent misrepresentation in endorsing product but not liable on warranty theory or strict liability in tort. *Hanberry v. Hearst Corp. (1969) 276 Cal. App. 2d 680, 687, 81 Cal. Rptr. 519*

[27] Promise Without Intention to Perform

[a] In General

Failure to perform promise does not create inference that defendant did not intend to perform when defendant made promise; although fraudulent intent often established by circumstantial evidence, something more than mere nonperformance required to prove defendant's intent not to perform. *Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 30, 216 Cal. Rptr. 130, 702 P.2d 212*

Promise by real estate broker to buyer to use broker's daughter on loan application for credit purposes, with her name to be removed from title after close of escrow, was actionable fraud because broker had no intention of keeping promise, but was instead using buyer to provide funds for broker's acquisition of property in daughter's name. *Warren v. Merrill (2006) 143 Cal. App. 4th 96, 110-111, 49 Cal. Rptr. 3d 122*

Airplane manufacturer's representation that fuel tank would not rupture on impact was form of promissory fraud, in action brought by purchaser of airplane arising from destruction of airplane caused by rupture of fuel tank following damage to wing. *Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 Cal. App. 3d 388, 419 n.20, 264 Cal. Rptr. 779*

Fraud based on promise without intention to perform established by buyer's testimony that he had no intention of putting up money to back purchase transaction. *Manson v. Reed (1986) 186 Cal. App. 3d 1493, 1502-1504, 231 Cal. Rptr. 446*

In malpractice action brought by sellers of business against their attorney for damages sustained when buyers sued sellers because of business liabilities not recorded on balance sheet, cross complaint by attorney against buyers' attorney stated cause of action for fraud based on allegations that buyers' attorney promised sellers' attorney, without intent to perform, that buyers would accept balance sheet as correct, rather than enforcing agreement's strict warranty that balance sheet was accurate. *Cicone v. URS Corp. (1986) 183 Cal. App. 3d 194, 202-203, 227 Cal. Rptr. 887*

Facts necessary for establishing fraud or deceit based on promise without intention to perform. *Muraoka v. Budget Rent-A-Car, Inc. (1984) 160 Cal. App. 3d 107, 119, 206 Cal. Rptr. 476* ; *Bondi v. Jewels by Edwar, Ltd. (1968) 267 Cal. App. 2d 672, 677, 73 Cal. Rptr. 494* ; *Fowler v. Fowler (1964) 227 Cal. App. 2d 741, 747-748, 39 Cal. Rptr. 101*

Promise implies intention to perform; lack of intention to perform is implied misrepresentation. *Meyer v. Ford Motor Co. (1969) 275 Cal. App. 2d 90, 103, 79 Cal. Rptr. 816*

Promise to constitute fraud required to be made in bad faith and without intent to perform, and required to touch substantive part of transaction. *Harazim v. Lynam (1968) 267 Cal. App. 2d 127, 133, 72 Cal. Rptr. 670*

Complaint for false promise required to plead facts to show intention of promisor to cause promisee to act in reliance on promise and contemporaneous intention not to perform promise clearly, unequivocally, and with particularity. *Hills Transp. Co. v. Southwest Forest Industries, Inc. (1968) 266 Cal. App. 2d 702, 708, 72 Cal. Rptr. 441*

Complaint based on false promise to enter into contract required by statute of frauds to be in writing required to be particularly specific. *Hills Transp. Co. v. Southwest Forest Industries, Inc. (1968) 266 Cal. App. 2d 702, 707, 72 Cal. Rptr. 441*

Promise made without intention to perform is actionable if other party relies on it as inducement. *Brockway v. Heilman (1967) 250 Cal. App. 2d 807, 811, 58 Cal. Rptr. 772*

To be fraudulent, promise required to have been without intent to perform at time it was made. *Kett v. Graeser (1966) 241 Cal. App. 2d 571, 573, 50 Cal. Rptr. 727* ; *Church of Merciful Saviour v. Volunteers of America, Inc. (1960) 184 Cal. App. 2d 851, 858-860, 8 Cal. Rptr. 48*

Mere failure to perform promise made in good faith in absence of confidential relationship between parties is not fraud. *Ampuero v. Luce (1945) 68 Cal. App. 2d 811, 817, 157 P.2d 899*

[a] Statute of Frauds and Parol Evidence Rule

Licensed real estate broker not permitted to maintain action for fraud based on alleged oral promise to pay commission because licensed broker has presumed knowledge of statute of frauds and his or her reliance on such oral promise is therefore unreasonable as matter of law. *American Int'l Enters., Inc. v. Federal Deposit Ins. Corp. (9th Cir. 1993) 3 F.3d 1263, 1270* (applying California law); *Phillippe v. Shapell Industries (1987) 43 Cal. 3d 1247, 1270, 241 Cal. Rptr. 22, 743 P.2d 1279*

Action for fraud maintainable if allegedly fraudulent promise is unenforceable as contract due to statute of frauds. *Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 29-31, 216 Cal. Rptr. 130, 702 P.2d 212*

Evidence of false promise inconsistent with matter covered by written instrument is inadmissible under parol evidence rule; false promise that is independent of or consistent with matters covered by writing is admissible. *Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 Cal. App. 3d 388, 420-421, 264 Cal. Rptr. 779* ; *Coast Bank v. Holmes (1971) 19 Cal. App. 3d 581, 590-591, 97 Cal. Rptr. 30*

Plaintiff able to show false oral collateral promise made by defendant to induce plaintiff to enter into contract required to be in writing by statute of frauds. *Kett v. Graeser (1966) 241 Cal. App. 2d 571, 573, 50 Cal. Rptr. 727*

Fraud in obtaining instrument always allowed to be shown by parol evidence. *Vogelsang v. Wolpert (1964) 227 Cal. App. 2d 102, 122, 38 Cal. Rptr. 440*

[28] Proximate Cause

Individual shareholder of corporate loan applicant did not state cause of action for fraud against bank that denied loan request; individual's transfer, at bank's request, of controlling interest to person who was borrowing money from bank and reloaning it to plaintiff's corporation was not proximate cause of corporation's inability to arrange financing elsewhere, which in turn led to failure of business, because transfer could have been rescinded after loan application was denied. *Kruse v. Bank of Am. (1988) 202 Cal. App. 3d 38, 62-65, 248 Cal. Rptr. 217*

No liability attaches for fraud if only damages suffered by plaintiff were inevitable or resulted from unrelated causes; failure of bank to pay proceeds to borrower's other creditors was not actionable because cause of borrower's loss was self-created indebtedness and proceeds were turned over to borrower's trustee in bankruptcy. *Kruse v. Bank of Am. (1988) 202 Cal. App. 3d 38, 60-62, 248 Cal. Rptr. 217*

In case in which one company borrowed from bank to loan funds to second company, in which bank lacked confidence but promised to consider as loan candidate, bank's failure to disclose its lack of confidence to borrower was not proximate cause of borrower's losses to extent that second company repaid borrower. *Kruse v. Bank of Am. (1988) 202 Cal. App. 3d 38, 53-54, 248 Cal. Rptr. 217*

[29] Public Policy

Damages sought in action for fraud by nonbiological parent, for developing close relationship with child misrepresented to be his and for performing parental acts, were not damages that should be compensable under law in action for fraud. *Nagy v. Nagy (1989) 210 Cal. App. 3d 1262, 1269-1270, 258 Cal. Rptr. 787*

[30] Punitive Damages

[a] Generally

Punitive damages properly awarded to buyer of commercial real estate complex, against developer-seller that leased property after purchase, based on seller's breach of agreement to guarantee rents of tenants. *Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal. App. 3d 1220, 1255, 1260, 1 Cal. Rptr. 2d 301* (allowing punitive damages on buyer's cross complaint in declaratory relief action by seller, but reducing amount based on relation to compensatory damages)

Claim for punitive damages was mere incident to causes of action and was not basis for cause of action. *Kruse v. Bank of Am. (1988) 202 Cal. App. 3d 38, 62, 248 Cal. Rptr. 217*

Fraud alone is adequate basis under *Civ. Code § 3294* for awarding punitive damages. *Orient Handel v. United States Fid. & Guar. Co. (1987) 192 Cal. App. 3d 684, 697, 237 Cal. Rptr. 667* (punitive damages award reversed because finding of fraud reversed); *Walker v. Signal Co., Inc. (1978) 84 Cal. App. 3d 982, 996, 149 Cal. Rptr. 119*

Pleading of fraud alone is sufficient to seek punitive damages; allegation that fraud was motivated by malicious desire to inflict injury is unnecessary. *Stevens v. Superior Court (1986) 180 Cal. App. 3d 605, 610, 225 Cal. Rptr. 624*

Punitive damages for fraudulent acts of agents or employees is proper if awarded against parties responsible for fraud, including those parties who ratify fraud after its commission. *Walker v. Signal Co., Inc. (1978) 84 Cal. App. 3d 982, 999, 149 Cal. Rptr. 119*

Punitive damages properly awarded in action for fraud in inducement to enter contract, which is tort action, although punitive damages may not be awarded in action for breach of contract. *Kuchta v. Allied Builders Corp. (1971) 21 Cal. App. 3d 541, 549, 98 Cal. Rptr. 588*

Punitive damages properly awarded if necessary allegations are in complaint, listed in pretrial conference order, there is evidence to support them, and verdict assesses compensatory damages and punitive damages separately to show that compensatory damages have been awarded. *Sierra Nat'l Bank v. Brown (1971) 18 Cal. App. 3d 98, 103, 95 Cal. Rptr. 742*

Punitive damages even in fraud action not recoverable unless there are also actual and substantial compensatory damages. *Bezaire v. Fidelity & Deposit Co. (1970) 12 Cal. App. 3d 888, 892, 91 Cal. Rptr. 142*

Fraud alone is ground for awarding punitive damages, and fraud allowed to be either express or implied. *Horn v. Guaranty Chevrolet Motors (1969) 270 Cal. App. 2d 477, 484, 75 Cal. Rptr. 871*

If plaintiff rescinds contract, waives fraud damages, and sues on contract, or if plaintiff elects to sue on common count, no punitive damages allowed. *Brockway v. Heilman (1967) 250 Cal. App. 2d 807, 812, 58 Cal. Rptr. 772*

If essence of action is fraud rather than breach of contract as such, exemplary damages properly allowed. *Brockway v. Heilman (1967) 250 Cal. App. 2d 807, 812, 58 Cal. Rptr. 772*

[b] Liability of Employers

Punitive damages award against brokerage firm whose employee broker defrauded securities purchasers was proper because of firm's own malice as evidenced by its failure to investigate prior suits against broker for similar conduct in

reckless disregard of rights of others and failure to supervise or, on basis of firm's ratification of broker' acts, by failure to act when it knew of broker's fraudulent activity. *Seymour v. Summa Vista Cinema, Inc. (9th Cir. 1987) 809 F.2d 1385, 1388* (applying California law; *see also Krusi v. Bear, Stearns & Co. (1983) 144 Cal. App. 3d 664, 678-689, 192 Cal. Rptr. 793* (reckless disregard theory); *Hobbs v. Bateman Eichler, Hill Richards, Inc. (1985) 164 Cal. App. 3d 174, 193-194, 210 Cal. Rptr. 387* (ratification theory)

Employer not liable in punitive damages for fraudulent acts of agents or employees unless employer has authorized acts, except if employer knowingly ratifies fraud after its commission or if fraud was committed by agent or employee acting in managerial capacity. *Kuchta v. Allied Builders Corp. (1971) 21 Cal. App. 3d 541, 549, 98 Cal. Rptr. 588*

Punitive damages and interest properly awarded in same case. *Vogelsang v. Wolpert (1964) 227 Cal. App. 2d 102, 125, 38 Cal. Rptr. 440*

[31] Required Intent

Intent to deceive not essential element of cause of action for deceit; required intent is intent to induce action. *Gagne v. Bertran (1954) 43 Cal. 2d 481, 488 n.5, 275 P.2d 15*

Intent to induce plaintiff to alter his or her position may be inferred from fact that defendant made representation with knowledge plaintiff would act in reliance on it. *Gagne v. Bertran (1954) 43 Cal. 2d 481, 488, 275 P.2d 15*

Intent to induce reliance allowed to be established from conduct of parties. *Santoro v. Carbone (1972) 22 Cal. App. 3d 721, 728, 99 Cal. Rptr. 488*

Intent usually proved by inference from fact of concealment or misrepresentation of material facts. *Horn v. Guaranty Chevrolet Motors (1969) 270 Cal. App. 2d 477, 483, 75 Cal. Rptr. 871*

[32] Suppression and Failure to Disclose

Executor has fiduciary relationship to all persons having interest in estate; executor's misrepresentation and concealment was extrinsic fraud supporting motion to set aside court's order regarding probate of will. *Estate of Sanders (1985) 40 Cal. 3d 607, 616-619, 221 Cal. Rptr. 432, 710 P.2d 232*

Credit union not liable for providing summary opinion that customer's creditworthiness was "satisfactory," even though customer maintained almost continuous overdrafts that it eventually covered, because inquiries from other lender were general, couched in form of checklist, and did not seek more specific information. *Lease & Rental Mgmt. Corp. v. Arrowhead Cent. Credit Union (2005) 126 Cal. App. 4th 1052, 1061, 24 Cal. Rptr. 3d 483*

Corporate president and stockholder, who undertook to provide all relevant financial information about corporation prior to reaching agreement to purchase all shares owned by other stockholder, had duty to disclose new product that corporation was about to sell, even if profits from sales of new product could not be accurately predicted. *Persson v. Smart Inventions, Inc. (2005) 125 Cal. App. 4th 1141, 1164-1165, 23 Cal. Rptr. 3d 335*

Because attorneys for corporation negotiating merger with second company revealed to shareholders of second company that their client was preparing third-party financing transaction, attorneys could be liable for fraud for intentionally concealing from those shareholders that financing transaction included issuing shares of stock that would seriously dilute value of stock that shareholders would be receiving as part of proposed merger. *Vega v. Jones, Day, Reavis & Pogue (2004) 121 Cal. App. 4th 282, 292-294, 17 Cal. Rptr. 3d 26*

Pub. Util. Code § 2889.5 imposes several steps of disclosure that phone company must take before changing consumer's telephone service provider, and failure to comply with statutory requirements can constitute fraudulent concealment, even if change is subsequently reflected in consumer's phone bill. *Lovejoy v. AT&T Corp. (2004) 119 Cal. App. 4th 151, 158-162, 14 Cal. Rptr. 3d 117*

No relationship existed sufficient to impose duty to disclose to plaintiffs that defendants were undercover journalists and that hidden cameras would record conversations in public restaurant to be used as part of televised report on matter of public interest. *Wilkins v. National Broad. Co. (1999) 71 Cal. App. 4th 1066, 1082-1083, 84 Cal. Rptr. 2d 329*

If seller transfers real property to relocation management company with knowledge that property will be resold to future purchaser, seller has duty under *Civ. Code § 1102 et seq.* and common law to make full disclosure of facts that materially affect value or desirability of property, and duty to disclose runs to ultimate purchaser and not just to relocation management company; relocation management company does not owe buyer duty to investigate or disclose if company has no knowledge of relevant, material facts and lacks knowledge of any misrepresentation made by original sellers. *Shapiro v. Sutherland (1998) 64 Cal. App. 4th 1534, 1546-1550, 76 Cal. Rptr. 2d 101*

Tenants who sought to compel beneficial (nonrecord) owners of subject properties to disclose their ownership did not state cause of action for fraudulent concealment because duty under *Civ. Code § 1962* to disclose owners of dwelling applies only to record owners. *People v. Highland Fed. Sav. & Loan (1993) 14 Cal. App. 4th 1692, 1719-1720, 19 Cal. Rptr. 2d 555* (concealment of fact not actionable under *Civ. Code § 1710* unless defendant has duty to disclose)

Elements of fraudulent nondisclosure are: (1) nondisclosure by defendant of facts materially affecting value or desirability of property; (2) defendant's knowledge of facts and plaintiff's ignorance of or inability to ascertain facts; (3) defendant's intention to induce action by plaintiff; (4) inducement of plaintiff to act by reason of nondisclosure; and (5) resulting damage. *Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 Cal. App. 3d 388, 404, 407-408, 264 Cal. Rptr. 779* (jury instructions omitting elements regarding intent and reliance constituted reversible error); *La Jolla Village Homeowners' Ass'n v. Superior Court (1989) 212 Cal. App. 3d 1131, 1151-1152, 261 Cal. Rptr. 146* (complaint insufficient to establish elements of cause of action)

Circumstances in which nondisclosure or concealment may constitute actionable fraud are: (1) defendant is in fiduciary relationship with plaintiff; (2) defendant had exclusive knowledge of material facts not known to plaintiff; (3) defendant actively conceals material fact from plaintiff; and (4) defendant makes partial representation but suppresses some material facts. *Heliotis v. Schuman (1986) 181 Cal. App. 3d 646, 650-651, 226 Cal. Rptr. 509*

Cause of action for fraud and deceit was stated because complaint alleged that hospital intentionally concealed from patient that unlicensed, foreign physician was authorized by hospital to function as staff physician without proper medical qualifications and without necessary supervision required by *Bus. & Prof. Code § 2112*. *Stevens v. Superior Court (1986) 180 Cal. App. 3d 605, 610, 225 Cal. Rptr. 624*

Real estate owner/broker who intentionally conceals material facts and makes material false representations to purchaser is liable for fraudulent conduct. *Prichard v. Reitz (1986) 178 Cal. App. 3d 465, 469, 223 Cal. Rptr. 734*

For purposes of *Civ. Code § 1710(3)*, bank owed no common law or statutory duty to disclose, to noncustomer to whom depositor issued checks, bank's suspicions of check kiting scheme involving depositor's accounts, because imposition of duty would result in loss of privacy to depositor, expense, and commercial havoc. *Chicago Title Ins. Co. v. Superior Court (1985) 174 Cal. App. 3d 1142, 1159, 220 Cal. Rptr. 507*

Absent existing duty to volunteer information, and notice of that duty, mere failure to disclose is not fraud; criminal defendant who pleaded guilty to misdemeanor while felony case pending on same facts was not under duty to disclose outstanding felony to court because nothing in record indicated defendant knew that prosecutor did not read instruction

in file to object to misdemeanor plea; contention that defendant's fraud abrogated double jeopardy bar to second prosecution was rejected. *Crayton v. Superior Court (1985) 165 Cal. App. 3d 443, 447, 451, 211 Cal. Rptr. 605*

Seller under duty to disclose facts to buyer if seller knows of facts materially affecting value or desirability of real property that are accessible only to seller and also knows that such facts are not known to, or within reach of diligent attention and observation of, buyer. *Reed v. King (1983) 145 Cal. App. 3d 261, 265, 193 Cal. Rptr. 130*

Fraud and deceit consist of suppression of fact by one bound to disclose it or by one who gives information or other facts that are likely to mislead for want of communication of that fact. *Outboard Marine Corp. v. Superior Court (1975) 52 Cal. App. 3d 30, 37, 124 Cal. Rptr. 852*

Duty of disclosure arises from existence of any principal-agent relationship, whether compensated or gratuitous. *St. James Armenian Church of Los Angeles v. Kurkjian (1975) 47 Cal. App. 3d 547, 551, 121 Cal. Rptr. 214*

Fiduciary relationship gives rise to duty to disclose material facts; to fail to do so is actionable fraud even without active suppression of facts. *Moe v. Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 289, 306, 98 Cal. Rptr. 547* ; *Black v. Shearson, Hammill & Co. (1968) 266 Cal. App. 2d 362, 367-368, 72 Cal. Rptr. 157*

Seller of real property knowing of facts materially affecting value or desirability of property is under duty to disclose these facts to buyer. *Snelson v. Ondulando Highlands Corp. (1970) 5 Cal. App. 3d 243, 251, 84 Cal. Rptr. 800*

Concealment of fact that car offered for sale as new had been stolen and stripped before being reconditioned was deceit. *Horn v. Guaranty Chevrolet Motors (1969) 270 Cal. App. 2d 477, 482, 75 Cal. Rptr. 871*

Failure to disclose that land is filled was fraud. *Oakes v. McCarthy Co. (1968) 267 Cal. App. 2d 231, 261, 73 Cal. Rptr. 127*

Stockbroker has fiduciary duty to his or her customers; existence of conflicting duty to others does not prevent liability to customers. *Black v. Shearson, Hammill & Co. (1968) 266 Cal. App. 2d 362, 367-368, 72 Cal. Rptr. 157*

As general rule, seller not in confidential relationship with buyer is not under duty to make full disclosure concerning object being sold. *Brownlee v. Vang (1965) 235 Cal. App. 2d 465, 477, 45 Cal. Rptr. 458*

Person who undertakes to speak is bound not only to tell truth but not to suppress or conceal facts that materially qualify those stated. *Brownlee v. Vang (1965) 235 Cal. App. 2d 465, 477, 45 Cal. Rptr. 458*

Vendor who undertakes to speak has duty to make complete disclosure. *McCue v. Bruce Enterprises, Inc. (1964) 228 Cal. App. 2d 21, 27-28, 39 Cal. Rptr. 125*

Concealment of existence of easement is actionable fraud. *Carroll v. Dungey (1963) 223 Cal. App. 2d 247, 250, 35 Cal. Rptr. 681*

Facts concealed required to be material facts affecting transaction in order for there to be actionable fraud. *Pacific Odorite Corp. v. Gersh (1949) 94 Cal. App. 2d 174, 178, 210 P.2d 318*

[33] Venue

In action for damages for tort of deceit, proper venue is county of defendant's residence. *Kaluzok v. Brisson (1946) 27 Cal. 2d 760, 764, 167 P.2d 481*

Action for fraud triable in county of residence of defendant; even if cause of action for relief in tort is joined with cause of action concerning title to real property, defendant entitled to have action tried in his or her county of residence.
Claycomb v. Caronna (1952) 113 Cal. App. 2d 561, 565-566, 248 P.2d 779

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationConstructive FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationGeneral OverviewTortsDamagesCosts & Attorney FeesGeneral Overview

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Crane, *Recent Decisions on Damages in Commercial Cases in California*, *12 Hastings L.J. 109 (1960)*

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Note, *Torts--Fraud and Deceit--Negligence--Negligent Misrepresentation Resulting in Bodily Harm*, *22 S. Cal. L. Rev. 77 (1948)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesElection of RemediesTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudRemediesTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationNondisclosureGeneral Overview

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Witkin, Summary of California Law, vol. 2, *Insurance*, § 243; vol 5, *Torts*, §§ 767-830; vol. 6, *Torts*, §§ 1710-1716 (10th ed. 2005)

23 Cal. Jur. 2d, *Fraud and Deceit*, §§ 1-91

37 Am. Jur. 2d, *Fraud and Deceit*, §§ 1-491

Legal Topics:

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

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PART IV. PROCEDURAL CHECKLIST

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§ 269.70 Plaintiff's Checklist

NOTE:
The following checklist is illustrative only of the basic points that counsel for a plaintiff in a deceit action should cover.

[1] Facts to Be Ascertained

NOTE:
Not all of the following facts will be ascertainable from the client in the initial interview. Subsequent interviews may be required, or it may be necessary to ascertain the facts from other persons, including the potential defendant, by use of discovery proceedings.

1. Facts relating to the plaintiff:

a. Name, address, and telephone number of the plaintiff.

b. Capacity of the plaintiff, such as minor, adult, corporation, unincorporated association, partner in partnership, or public employee.

c. Additional facts, as desired, relating to the plaintiff's stability and financial solvency such as employment status, prior residences, credit, bank, and personal references.

2. Facts relating to the defendant:

a. Name and address of each potential defendant.

b. Capacity of each potential defendant such as corporation, unincorporated association, agent, employee, public entity, public employer, public employee, licensed professional, or professional corporation.

c. Facts relating to professional status of the defendant. (If the defendant has professional knowledge with regard to the subject matter of the misrepresentations, the defendant may be liable for negligent misrepresentation concerning any statements that prove to be false [*see Custodio v. Bauer (1967) 251 Cal. App. 2d 303, 314, 314 n. 8, 59 Cal. Rptr. 463]* . The plaintiff will also have a greater right due to the defendant's superior knowledge to justifiably rely on the defendant's statements [*see Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 966, 72 Cal. Rptr. 722]* .)

3. Facts relating to possible confidential or fiduciary relationship between the plaintiff and the defendant. The existence of a confidential or fiduciary relationship will determine whether the plaintiff can bring an action for constructive fraud [*see Civ. Code § 1573*], in which case it will be unnecessary to show the existence of actual fraud [*Estate of Arbuckle (1950) 98 Cal. App. 2d 562, 568, 220 P.2d 950]* , and the measure of damages will be the more liberal measure applicable to such actions [*see Civ. Code §§ 1709, 3333*; *Simone v. McKee (1956) 142 Cal. App. 2d 307, 315, 298 P.2d 667* ; *see also §§ 269.22, 269.27*]. The existence of a confidential or fiduciary relationship will also give rise to a duty on the part of the defendant to disclose material facts to the plaintiff, even in the absence of active suppression or concealment, creating a case of actual fraud and deceit [*Moe v. Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 289, 306, 98 Cal. Rptr. 547* ; see *Civ. Code § 1710(3)*]. The existence of a fiduciary relationship will also give the plaintiff a right to rely justifiably on representations made by the defendant without the duty of further inquiry [*Davis v. Kahn (1970) 7 Cal. App. 3d 868, 878, 86 Cal. Rptr. 872]* .

NOTE:

It is not necessary that the relationship between the plaintiff and the defendant be an actual fiduciary relationship. In some cases, the necessary duty can arise from a relationship of actual confidence and trust between the parties [*Feeney v. Howard (1889) 79 Cal. 525, 529, 21 P. 984]* .

4. In cases involving fraudulent statements:

a. The precise words that were spoken or written by the defendant(s).

b. The actual facts.

c. The date on which the misrepresentation was made.

d. The name of the person making the representation, and, if the person was an employee or officer of a corporation or business, the exact position held by that person. If the defendant is a public employee or entity, whether the misrepresentation was made with actual malice, fraud, or corruption, in the sense of a conscious intent to deceive, vex, annoy, or harm the plaintiff [*Schonfeld v. City of Vallejo (1974) 50 Cal. App. 3d 401, 409, 123 Cal. Rptr. 669]* .

e. The circumstances surrounding the misrepresentation, such as whether it was made during a business transaction, negotiations for a sale, social occasion, in an advertisement concerning a product, or in another kind of document.

f. If the misrepresentation was intentional or negligent, that is, whether there is evidence that the defendant knew the statement to be false. (In many cases it is advisable to plead counts for both intentional and negligent misrepresentation.)

g. Whether the misrepresentation also concerned the defendant's intention to perform some act in the

future, and therefore possibly also was a promise made without the intention to perform it at the time it was made [*see Civ. Code § 1710(4)*].

5. In cases involving a failure to disclose information that the defendant had a duty to disclose or the suppression of a fact by one who is bound to disclose it or who gives information or other facts that are likely to mislead for want of communication of that fact [*Civ. Code § 1710(3)*].

a. Whether the defendant had a confidential or fiduciary relationship with the plaintiff, in which case the defendant had a duty to disclose the fact and not merely to refrain from active suppression of the fact, giving rise to an action for constructive fraud [*see Civ. Code § 1573*].

b. Whether the defendant was, by reason of a confidential or fiduciary relationship or other business or personal relationship between the plaintiff and the defendant, bound to disclose a fact that the defendant suppressed [*Civ. Code § 1710(3)*]:
I. Was there a fiduciary relationship?

ii. Was the defendant a seller of property aware of facts not known or discoverable by buyer [*Snelson v. Ondulando Highlands Corp. (1970) 5 Cal. App. 3d 243, 251, 84 Cal. Rptr. 800]* ?

iii. Did the defendant undertake to speak at all concerning the transaction but suppress facts that materially qualified the facts revealed [*Brownlee v. Vang (1965) 235 Cal. App. 2d 465, 477, 45 Cal. Rptr. 458]* ?

6. Facts relating to justifiable reliance by the plaintiff:

a. Did the plaintiff actually believe the defendant's representations?

b. Did the plaintiff undertake an independent investigation [*see Snelson v. Ondulando Highlands Corp. (1970) 5 Cal. App. 3d 243, 252, 84 Cal. Rptr. 800* ; *Mercer v. Elliott (1962) 208 Cal. App. 2d 275, 279, 25 Cal. Rptr. 217]* ?

c. Did any previous acts of the defendant arouse the reasonable suspicion of the plaintiff [*see American Air Equip., Inc. v. Pacific Employers Ins. Co. (1974) 37 Cal. App. 3d 322, 325, 327-328, 112 Cal. Rptr. 366* ; *Roland v. Hubenka (1970) 12 Cal. App. 3d 215, 255, 90 Cal. Rptr. 490]* ?

d. Did seller verbally or through correcting suspected defects reassure the plaintiff as to his or her trustworthiness [*Brownlee v. Vang (1965) 235 Cal. App. 2d 465, 474, 45 Cal. Rptr. 458]* ?

e. Did the relationship between the plaintiff and the defendant justify the plaintiff's reliance [*Davis v. Kahn (1970) 7 Cal. App. 3d 868, 878, 86 Cal. Rptr. 872]* ?

7. Facts relating to existence and amount of damages:

a. The relationship between any damages and the plaintiff's reliance on the defendant's fraudulent representations [*see R.D. Reeder Lathing Co. v. Cypress Ins. Co. (1970) 3 Cal. App. 3d 995, 999, 84 Cal. Rptr. 98]* .

b. If the fraud involved the sale, purchase, or exchange of property [*see Civ. Code § 3343*]:

I. The difference between the value of the property as represented and its actual value [

see Civ. Code § 3343].

ii. If the property was purchased for profit, loss of reasonably anticipated profits [*see Civ. Code § 3343(a)*].

iii. Any amounts reasonably expended in reliance on the fraud [*see Civ. Code § 3343(a)*].

iv. Compensation for loss of use and enjoyment [*see Civ. Code § 3343(a)*].

v. Other additional damages such as amounts spent in an attempt to mitigate damages [*see Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 968, 72 Cal. Rptr. 722]* and loss of earnings [*see Lawson v. Town & Country Shops, Inc. (1958) 159 Cal. App. 2d 196, 205, 323 P.2d 843]* .

c. If the fraud involved a breach of duty, an amount that will compensate the plaintiff for any damages suffered [*see Civ. Code §§ 1709, 3333*].

d. If the fraud involved a situation other than the purchase, sale, or exchange of property, such as an uncompleted business deal, an amount that will compensate the plaintiff for any damages suffered [*see Block v. Tobin (1975) 45 Cal. App. 3d 214, 220, 119 Cal. Rptr. 288]* .

e. Interest on damages [*see Civ. Code § 3288*].

f. Punitive damages [*see Civ. Code § 3294*].

[2] Documents to Be Obtained

NOTE:
Not all of the following documents will be obtained from the client in the first interview. Subsequent interviews may be required, or, if circumstances permit, the documents might be mailed to the attorney. Also, it might be necessary to obtain these documents from persons other than the client.

1. Written misrepresentations: Copies of any written documents, such as contracts, letters, or escrow agreements, containing the fraudulent misrepresentations or promises of the defendant. Misrepresentations may also appear in published advertisements, sales literature, billboards, and other public places, and counsel will want to have copies or photographs of such misrepresentations made immediately.

2. Spoken misrepresentations: Declarations from persons who heard the defendant utter the misrepresentations. Written memoranda concerning these misrepresentations. Tapes of any radio or television broadcasts containing material misrepresentations, if appropriate.

3. Documents showing items and amounts of damages suffered by the plaintiff.

[3] Additional Counts and Causes of Action

1. Facts giving rise to a cause of action for damages for fraud and deceit might also give rise to one or

more of the following causes of action, among others, that counsel might want to consider:

a. If a fiduciary has taken a secret profit, in addition to an action for fraudulent concealment of the profit and a count based on any affirmative misrepresentations concerning it, the plaintiff may wish to bring an action for an accounting. For procedure and forms, see Ch. 7, *Accounting, Action for*.

b. Counsel may wish to waive the tort action and sue on a common count for money had and received [*City Bank of San Diego v. Ramage (1968) 266 Cal. App. 2d 570, 585, 587, 72 Cal. Rptr. 273]* . See generally Ch. 121, *Common Counts* .

c. If the defendant has made fraudulent misrepresentations concerning a consumer product, counsel should consider counts for intentional and negligent misrepresentations and for concealment of facts, and separate causes of action for strict liability in tort, breach of warranty, and negligent design and manufacture [*see Hauter v. Zogarts (1975) 14 Cal. 3d 104, 108, 120 Cal. Rptr. 681, 534 P.2d 377* ; *Snelson v. Ondulando Highlands Corp. (1970) 5 Cal. App. 3d 243, 249, 84 Cal. Rptr. 800]* .

d. If the defendant's fraud was the making of a promise without the intent to perform at the time it was made, the promise may also be a part of a contract that has been breached, giving rise to a cause of action for breach of contract. For discussion and forms for damages for breach of contract, see Ch. 140, *Contracts* .

e. Fraud may also be the basis for an equitable action for rescission [*Santoro v. Carbone (1972) 22 Cal. App. 3d 721, 728-729, 99 Cal. Rptr. 488]* . For discussion and forms related to rescission and restitution, see Ch. 490, *Rescission and Restitution* .

f. Property obtained through fraud and deceit may become the subject of a constructive trust through an equitable proceeding. For discussion and forms related to the imposition of a constructive trust, see Ch. 561, *Trusts: Constructive Trusts* .

g. If a deed or instrument has been obtained through fraud, the equitable proceeding for cancellation of the instrument or an action to quiet title may be appropriate. For discussion and forms related to such proceedings, see Ch. 107, *Cancellation of Instruments* and Ch. 482, *Quieting Title* .

h. If one party to a written agreement has justifiably relied on the other's false representations that the instrument represents the actual agreement between the parties, the defrauded party may have the instrument reformed to reflect the true agreement [*see Security-First Nat'l Bank v. Earp (1942) 19 Cal. 2d 774, 777-778, 122 P.2d 900]* . For a discussion and form for reformation of instruments, see Ch. 488, *Reformation of Instruments* .

[4] Essential Allegations for the Complaint

1. If the defendant has made an intentional misrepresentation:

a. The false representation made by the defendant [*see Scafidi v. Western Loan & Bldg. Co. (1946) 72 Cal. App. 2d 550, 558, 165 P.2d 260]* ;

b. The falsity of the representation made by the defendant [*see McDougall v. Roberts (1919) 43 Cal. App. 553, 556, 185 P. 483]* . This element is normally shown by allegations of the exact false representation and the actual facts, so that the necessary element of the materiality of the representation is also shown in the complaint [*see Adkins v. Wyckoff (1957) 152 Cal. App. 2d 684, 689, 313 P.2d 592]* ;

c. The defendant's knowledge of the falsity of the representation [*see Civ. Code § 1710(1)*; *Harazim v. Lynam (1968) 267 Cal. App. 2d 127, 130, 72 Cal. Rptr. 670]* ;

d. The defendant's intent to induce the plaintiff to rely and to defraud and deceive the plaintiff [*see Mirkin v. Wasserman (1993) 5 Cal. 4th 1082, 1100, 23 Cal. Rptr. 2d 101, 858 P.2d 568* ; *Hale v. George A. Hormel & Co. (1975) 48 Cal. App. 3d 73, 82-86, 121 Cal. Rptr. 144]* ;

e. Actual and justifiable reliance by the plaintiff [*see Harazim v. Lynam (1968) 267 Cal. App. 2d 127, 130, 72 Cal. Rptr. 670]* ;

f. The plaintiff's damage caused by the defendant's representation and the plaintiff's reliance on it [*see Zumbrun v. University of Southern California (1972) 25 Cal. App. 3d 1, 12, 101 Cal. Rptr. 499]* .

2. If the defendant has made a negligent misrepresentation, the same allegations are required as in the case of an intentional misrepresentation, except:

a. The defendant need not have been aware of the falsity of the misrepresentation. The plaintiff needs only to allege facts showing that the defendant made the statement without reasonable grounds for believing it to be true [*see Civ. Code § 1710(2)*; *Gagne v. Bertran (1954) 43 Cal. 2d 481, 487-488, 275 P.2d 15]* .

b. The defendant need not have intended to defraud and deceive the plaintiff. The plaintiff needs only to allege facts showing that the defendant intended to induce action by the plaintiff in reliance on the representation [*Gagne v. Bertran (1954) 43 Cal. 2d 481, 488 n. 5, 275 P.2d 15]* .

3. If the deceit consists of a failure to disclose or a concealment of a material fact [*Civ. Code § 1710(3)*]:

a. Facts showing that the defendant was bound to disclose the fact that the defendant suppressed [*see Civ. Code § 1710(3)*];

b. Information revealed by the defendant that was likely to mislead for want of communication of a fact that the defendant suppressed [*see Civ. Code § 1710(3)*; *McCue v. Bruce Enterprises, Inc. (1964) 228 Cal. App. 2d 21, 27-28, 39 Cal. Rptr. 125]* ;

c. Justifiable reliance by the plaintiff resulting in damages (see D(1)(e), *above*).

4. If the defendant has made a promise without the intention to perform it at the time it was made:

a. Promise made by the defendant without the intention to perform it at the time it was made [*see Bondi v. Jewels by Edwar, Ltd. (1968) 267 Cal. App. 2d 672, 677, 73 Cal. Rptr. 494* ; *Hills Transp. Co. v. Southwest Forest Industries, Inc. (1968) 266 Cal. App.*

2d 702, 707, 72 Cal. Rptr. 441] .

b. Intent of the defendant to induce action by the plaintiff [*see Bondi v. Jewels by Edwar, Ltd. (1968) 267 Cal. App. 2d 672, 677, 73 Cal. Rptr. 494]* .

c. Nonperformance of the promise by the defendant [*see Bondi v. Jewels by Edwar, Ltd. (1968) 267 Cal. App. 2d 672, 677, 73 Cal. Rptr. 494]* .

d. Justifiable reliance by the plaintiff resulting in damages [*see Bondi v. Jewels by Edwar, Ltd. (1968) 267 Cal. App. 2d 672, 677, 73 Cal. Rptr. 494]* .

5. If the action for damages is based on constructive fraud [*Civ. Code § 1573*]:

a. Fiduciary or confidential relationship between the plaintiff and the defendant [*see Feeney v. Howard (1889) 79 Cal. 525, 529, 21 P. 984* ; *Guthrie v. Times-Mirror Co. (1975) 51 Cal. App. 3d 879, 889, 124 Cal. Rptr. 577]* .

b. A material misstatement, failure to disclose facts, or other breach of duty by the defendant, even in the absence of fraudulent intent to deceive [*see Ford v. Cournale (1973) 36 Cal. App. 3d 172, 182, 111 Cal. Rptr. 334* ; *Twomey v. Mitchum, Jones & Templeton, Inc. (1968) 262 Cal. App. 2d 690, 707, 69 Cal. Rptr. 222* ; *Cardozo v. Bank of Am. (1953) 116 Cal. App. 2d 833, 839, 254 P.2d 949]* .

c. Reliance by the plaintiff and resulting damages [*see Civ. Code § 1573*; *Twomey v. Mitchum, Jones & Templeton, Inc. (1968) 262 Cal. App. 2d 690, 710-711, 69 Cal. Rptr. 222]* .

NOTE:
Constructive fraud usually involves actual fraud and deceit as well, whether the defendant has misrepresented his or her intention to act as a fiduciary for the plaintiff [*see* *Civ. Code § 1710(4)*], concealed a profit that he or she was bound to disclose [*Civ. Code § 1710(3)*], or misrepresented the amount of a profit obtained on the plaintiff's account or other fact [*Civ. Code § 1710(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsFraud & MisrepresentationActual FraudElementsTortsBusiness TortsFraud & MisrepresentationActual FraudRemediesTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationElementsTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationRemediesTortsIntentional TortsBreach of Fiduciary DutyGeneral Overview

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Chapter 269 FRAUD AND DECEIT
PART IV. PROCEDURAL CHECKLIST

23-269 California Forms of Pleading and Practice--Annotated § 269.71

§ 269.71 Defendant's Checklist

NOTE:
The following checklist is illustrative only of the basic points that counsel for a defendant in a fraud and deceit action should cover.

[1] Facts to Be Ascertained

NOTE:
Not all of the following facts will be ascertainable from the client in the initial interview. Subsequent interviews may be required or it may be necessary to ascertain the facts from others, including the plaintiff, by use of discovery proceedings.

1. Facts relating to the defendant:

a. Name, address, and telephone number of the defendant.

b. Capacity of the defendant such as corporation, unincorporated association, agent, employee, public entity, public employer, public employee, partner in partnership, or some other capacity.

NOTE:
The defendant's capacity will generally be revealed by the complaint. Nevertheless, counsel will wish to confirm the allegation with his or her client. Of course, if the capacity is not revealed by the complaint, counsel will wish to ascertain it.

c. Additional facts, as desired relating to the defendant's stability and financial solvency such as employment status, prior residences, credit, bank, and personal references.

2. Facts required for the answer:

NOTE:
Counsel should advise his or her client not to discuss the case with any third person.

a. Date, manner, and place of service of the complaint and summons.

b. Allegations of the complaint: Ascertain which of the facts alleged in the complaint are true, which ones are false, and which ones the defendant does not know the truth or falsity of.

[2] Affirmative Defenses

NOTE:
Affirmative defenses can be raised by demurrer, as well as by answer, if they appear on the face of the complaint or from matters of which the court must or may take judicial notice [*Code Civ. Proc. §§ 430.10, 430.30*]

1. Statute of limitations *Code Civ. Proc. § 338(d)*.

2. Statute of frauds. See Ch. 140, *Contracts* , and Ch. 530, *Statute of Frauds* , for discussion and forms relating to this defense. In actions for deceit, the statute of frauds [*Civ. Code § 1624*] may be used as a defense to an action for a promise made without the intention to perform it [*Civ. Code § 1710(4)*] if the promise was also contractual. The plaintiff cannot get around the statute of frauds by alleging that the defendant's contractual promise involving an oral contract required to be in writing was a fraudulent promise made without any intention of performing it [*Kett v. Graeser (1966) 241 Cal. App. 2d 571, 573, 50 Cal. Rptr. 727* ; *but see § 269.14[5][b]*].

3. Negligence. Although it is fairly certain that the plaintiff's negligence is not a defense even to a negligently made misrepresentation by the defendant, the defendant may wish to plead facts showing the plaintiff's negligence. This issue is closely connected to that of whether or not the plaintiff's reliance on the defendant's representation was justified [*see §§ 269.16* (justifiable reliance), *269.31[2]* (plaintiff's negligence)].

4. There are other matters that the defendant's counsel will want to keep in mind that, while not affirmative defenses, counter the plaintiff's case. For example, the defendant will want to show that the plaintiff's reliance on the defendant's statements was not justified or that the plaintiff did not in fact rely on the defendant's representations, as, for example, if the plaintiff made a complete investigation of the subject matter, and learned that the defendant's representations were false [*Mercer v. Elliott (1962) 208 Cal. App. 2d 275, 279, 25 Cal. Rptr. 217]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsTortsBusiness TortsFraud & MisrepresentationActual FraudDefensesTortsBusiness TortsFraud & MisrepresentationActual FraudElementsTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationDefensesTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationElements

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[Reserved]

§§ 269.72[Reserved]

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23-269 California Forms of Pleading and Practice--Annotated § 269.90

§ 269.90 Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12]--Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code §§ 3333, 3343] for Fraud and Deceit [Civ. Code §§ 1709, 1710; Cal. Judicial Council Forms PLD-PI-001, PLD-C-001(3)]

[1] FORM Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12; Cal. Rules of Ct., Rule 982.1(a)]--Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code §§ 3333, 3343] for Fraud and Deceit [Civ. Code §§ 1709, 1710; Cal. Judicial Council Forms PLD-PI-001, PLD-C-001(3)]

Click here to view image.

[2] Judicial Council Trial Court Forms

Code Civ. Proc. § 425.12 requires that the Judicial Council develop and approve official forms for use in California trial courts for any complaint, cross complaint, or answer in any action based on personal injury, property damage, wrongful death, unlawful detainer, breach of contract, or fraud. Use of these forms is optional [*see Code Civ. Proc. § 425.12*].

[3] Use of Form

This complaint may be used in any action for deceit [*see Civ. Code §§ 1709, 1710*]. It consists of the Judicial Council complaint for personal injury, property damage, or wrongful death to which a Judicial Council fraud cause of action has been attached [*see Code Civ. Proc. §§ 425.12*; Cal. Judicial Council Forms PLD-PI-001, PLD-C-001(3)].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The approved cause of action for fraud is listed with the contracts forms [*see* Cal. Judicial Council Form PLD-C-001(3)], but any approved cause of action may be attached to any approved form of complaint [*see Cal. Rules of Ct., Rule 1.45(b)*]. Thus, it appears to be appropriate to state a tort cause of action for deceit by filing the fraud cause of action attached to the general complaint for personal injury, property damage, or wrongful death.

The other forms in this chapter contain allegations that may be incorporated into the fraud cause of action, as appropriate.

[4] Filling Out General Complaint

For a detailed explanation for filling out the Judicial Council form of complaint for personal injury, property damage, and wrongful death generally, see the Comments to that form in Ch. 380, *Negligence* . Information particularly applicable to filling out the complaint form in fraud actions is set out here. For a detailed discussion of filling out the exemplary damages attachment, see the Comments to that form of attachment in Ch. 177, *Damages*.

In the heading of the complaint form, boxes are provided for designating the type of action being brought. If using the complaint in an action for fraud, counsel should check the box marked "OTHER" and specify fraud as the type of action. In addition, counsel should check the box marked "Other Damages" and specify the types of damages sought, such as compensatory and exemplary in this sample form.

In **Paragraph 10.**, counsel should designate the causes of action attached to the complaint. In an action for fraud, counsel should check box 10.f., "Other", and specify fraud as the cause of action that is attached.

In **Paragraph 11.**, counsel should check box 11.g.,"other damage", and specify the nature of the plaintiff's loss. The additional boxes in **Paragraph 11.** present specific types of loss that appear to be applicable only in the context of an action for personal injury, property damage, or wrongful death. Thus, the box for "other damage" should be used in a fraud action to avoid any ambiguity [*see §§ 269.27, 269.30*].

In **Paragraph 14.**, the prayer for relief, counsel should check the appropriate boxes for compensatory damages and punitive damages. The sample form requests both. Attorney's fees incurred in bringing an action for fraud are not recoverable [*Bezaire v. Fidelity & Deposit Co. (1970) 12 Cal. App. 3d 888, 892, 91 Cal. Rptr. 142* ; *see § 269.28*].

[5] Filling Out Fraud Cause of Action

[a] Heading and Preliminary Information

The fraud cause of action heading should be filled in with the short title of the case, and the number of the cause of action. In addition, counsel should fill in the page number of the cause of action and check the appropriate box stating whether the cause of action is attached to a complaint or cross complaint.

In **Paragraph FR-1.**, counsel should fill in the names of the plaintiff and the defendant and state the date on that the defendant defrauded the plaintiff.

[b] Alleging Deceit

[i] In General

One who willfully deceives another with intent to induce the other to alter his or her position to his or her injury or risk is liable for any damages that the other person thereby suffers [*Civ. Code § 1709*; *see §§ 269.12, 269.13*].

[ii] Intentional or Negligent Misrepresentation (Paragraph FR-2.)

Counsel should check the box for **Paragraph FR-2.** if the action is based on intentional or negligent misrepresentation. This type of deceit includes the suggestion as a fact of something that is not true by one who does not believe it to be true, or the assertion as a fact of something that is not true by one who has no reasonable ground for believing it to be

true [*Civ. Code § 1710(1), (2)*; *see § 269.14[1], [2]*; *see also §§ 269.91, 269.92*].

In **Paragraph FR-2.a.**, counsel should state the representations of material factthat were made by the defendant. The facts constituting fraud must be specifically pleaded so that the court can determine from the complaint whether or not a prima facie case is alleged [*Cooper v. Leslie Salt Co. (1969) 70 Cal. 2d 627, 636, 75 Cal. Rptr. 766, 451 P.2d 406* ; *see § 269.91[4]*].

Paragraph FR-2.b. states that the representations alleged in **Paragraph FR-2.a.** were in fact false, and leaves space for counsel to fill in the true facts. If additional space is needed, counsel should state the true facts on an attachment labeled Attachment FR-2.b.

Counsel should check the appropriate box in **Paragraph FR-2.c.**; stating either that the defendant knew that the representations were false when made, or that the defendant had no reasonable ground for believing that the representations were true. **Paragraph FR-2.d.**, incorporating **Paragraph FR-5.** (plaintiff's acts induced by the defendant's conduct), contains the remaining allegations necessary to state a cause of action for fraud or deceit.

[iii] Concealment (Paragraph FR-3.)

Counsel should check the box for **Paragraph FR-3.** if the action is based on concealment or suppression of material facts. Deceit includes the suppression of a fact by one who is bound to disclose it or who gives information of other facts that are likely to mislead for want of communication of the suppressed fact [*Civ. Code § 1710(3)*; *see §§ 269.14[3], 269.93*].

Paragraph FR-3.a. contains space for alleging the concealed or suppressed material facts; they may be alleged in attachment FR-3.a. instead. The facts should be stated with specificity [*see § 269.91[4]*]. In **Paragraph FR-3.b.**, counsel should check a box describing the nature of the concealment or suppression. The boxes allow the plaintiff to allege that the defendant concealed or suppressed material facts either (1) that the defendant was bound to disclose or (2) by telling the plaintiff other facts to mislead the plaintiff and prevent the plaintiff from discovering the concealed or suppressed facts. Finally, **Paragraph FR-3.c.**, incorporating **Paragraph FR-5.**, contains the remaining allegations necessary to state a cause of action for fraud or deceit.

[iv] Promise Without Intent to Perform (Paragraph FR-4.)

Counsel should check the box for **Paragraph FR-4.** if the action is based on a promise made by the defendant without the intent to perform. Deceit includes a promise made without any intention of performing it [*Civ. Code § 1710(4)*; *see §§ 269.14[5], 269.94*].

In **Paragraph FR-4.a.**, counsel should state the facts showing the defendant's promise about a material matter without any intention of performing it; the facts may be alleged in attachment FR-4.a. instead [*see § 269.91[4]*]. **Paragraph FR-4.b.**, incorporating **Paragraph FR-5.**, contains the remaining allegations necessary to state a cause of action for fraud or deceit.

[v] Plaintiff's Induced Acts and Damages (Paragraphs FR-5., FR-6.)

Counsel should set out in **Paragraph FR-5.** the facts showing the plaintiff's acts induced in justifiable reliance on the defendant's conduct. The plaintiff's damages should be stated in **Paragraph FR-6.** [*see §§ 269.16, 269.21*]. If **Paragraphs FR-5.** and **FR-6.** do not contain sufficient space for the allegations, counsel should state the facts on separate attachments labeled Attachments FR-5. and FR-6.

[c] Other Allegations (Paragraph FR-7.)

The fraud cause of action allows additional space, in **Paragraph FR-7.**, for stating other allegations. Counsel may use this space, for example, to allege a reason for failing to discover fraud before expiration of the three-year statute of limitations [*Code Civ. Proc. § 338(d)*; *see § 269.103*]. As another example, this sample form states on information and belief that the fictitiously named defendants are liable for the occurrences alleged in the complaint.

[6] Filling Out Exemplary Damages Attachment

General information pertaining to filling out this form is contained in the Comments to this form in Ch. 177, *Damages* . The following comments discuss this form as it should be used in an action for fraud or deceit.

Fraud alone is a ground for awarding punitive damages, and the fraud may be either express or implied [*see Civ. Code § 3294(a), (c)(3)*; *Horn v. Guaranty Chevrolet Motors (1969) 270 Cal. App. 2d 477, 484, 75 Cal. Rptr. 871* ; *see also § 269.30*; *see generally* Ch. 177, *Damages* .]. Therefore, counsel should check the box marked "fraud" in **Paragraph EX-1.** of the Exemplary Damages Attachment.

In **Paragraph EX-2.**, counsel should state the facts supporting the plaintiff's claim for punitive damages. The sample form alleges that the defendant fraudulently concealed facts concerning the plumbing system in a residence that was sold to the plaintiff. These facts are essentially the same as the allegations set out in **Paragraphs FR-2.** through **FR-6.** of the fraud cause of action [*see [5], above*], because fraud alone will support an award of punitive damages.

In **Paragraph EX-3.**, counsel should check the box for subparagraph **b.** Although, in an action for deceit, the amount of damages generally must be stated [*see Code Civ. Proc. § 425.10(b)*], the amount of exemplary damages is "not shown pursuant to *Civil Code Section 3295(e)*," which applies to claims for exemplary damages in any action in which the trial is commenced on or after January 1, 1988 [*Civ. Code § 3295(f)*].

[7] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[8] Cross References

For similar forms, see *§§ 269.91 -269.94*.

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23-269 California Forms of Pleading and Practice--Annotated § 269.91

§ 269.91 Complaint for Damages for Fraud and Deceit--Intentional Misrepresentation of Fact [Civ. Code § 1710(1)]--General Form

[1] FORM Complaint for Damages for Fraud and Deceit--Intentional Misrepresentation of Fact [Civ. Code § 1710(1)]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*], Defendant(s).	)	(Deceit)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

The plaintiff alleges:

[*EITHER*]

1. The defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ [*city*], _____ County, California.

[*AND/OR*]

2. The defendant _____ [*name*], is, and at all times herein mentioned was, a corporation organized and

existing under the laws of the State of Cal. with its principal place of business in _____ [*city*], _____ County, California.

[*EITHER*]

3. [The plaintiff is informed and believes and thereon alleges that,] [A]t all times herein mentioned, defendant _____ [*name*] was the agent and employee of defendant _____ [*name*], and in doing the things herein alleged was acting within the course and scope of such agency and employment and with the permission and consent of his/her codefendant.

[*OR*]

3. [The plaintiff is informed and believes and thereon alleges that] [D]efendant _____ [*name*], who made the representations herein alleged, is the _____ [*specify position*] of defendant _____ [*name of corporation*] and, at the time of the making of the representations herein alleged and at all times herein mentioned was acting within the course and scope of his/her employment and authority for that defendant _____ [*name of corporation*].

[*CONTINUE*]

[4. The plaintiff is ignorant of the true names and capacities of the defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. The plaintiff will amend this complaint to allege their true names and capacities when ascertained. (The plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that the plaintiff's damages as herein alleged were proximately caused by their conduct.)]

[*EITHER*]

5. On or about _____ [*date*], defendant _____ [*name*] made the following representation(s) to the plaintiff: _____ [*allege in exact language, or as close to exact language as possible, the representations of material fact claimed by the plaintiff to be false*].

[*OR*]

5. On or about _____ [*date(s)*], defendant _____ [*name*] made the following representation(s) to _____ [the public *or specify class of persons of which the plaintiff is a member*] in _____ [*specify media by which representations were made, e.g.,* advertising brochures distributed to potential purchasers]: _____ [*allege in exact language, or as close to exact language as possible, the representations of material fact claimed by the plaintiff to be false*]. On or about _____ [*date(s)*], the plaintiff _____ [saw *or* heard *or* read] these representations in _____ [*specify media by which representations were communicated to the plaintiff, e.g.,* advertising brochures mailed by the defendant to potential purchasers].

[*CONTINUE*]

6. The representations made by the defendant were in fact false. The true facts were _____ [*specify*].

[*EITHER*]

7. When the defendant made these representations, he/she/it knew them to be false and made these representations with the intention to [deceive and defraud the plaintiff and to] induce the plaintiff to act in reliance on these representations in the manner hereafter alleged, or with the expectation that the plaintiff would so act.

[*OR*]

7. When the defendant made these representations, he/she/it knew them to be false and made these representations with the intention to [deceive and defraud _____ (the public *or specify class of persons of which the plaintiff is a member*) and to] induce members of _____ [the public *or specify class of persons of which the plaintiff is a member*] to act in reliance on these representations in the manner hereafter alleged, or with the expectation that they would so act.

[*CONTINUE*]

8. The plaintiff, at the time these representations were made by the defendant and at the time the plaintiff took the actions herein alleged, was ignorant of the falsity of the defendant's representations and believed them to be true. In reliance on these representations, the plaintiff was induced to and did _____ [*specify actions taken by plaintiff*]. Had the plaintiff known the actual facts, he/she would not have taken such action. The plaintiff's reliance on the defendant's representations was justified because _____ [*specify*].

9. As a proximate result of the fraudulent conduct of the defendant(s) as herein alleged, the plaintiff was _____ [*allege facts showing allowable damages, e.g.*, induced to expend _____ (*number*) hours of his/her time and energy in an attempt to derive a profit from the _____ (*specify type of business*) sold to the plaintiff by the defendant(s) but has received no profit or other compensation for his/her time and energy], by reason of which the plaintiff has been damaged in the sum of $_____.

10. The aforementioned conduct of the defendant(s) was an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant(s) with the intention on the part of the defendant(s) of thereby depriving the plaintiff of property or legal rights or otherwise causing injury, and was despicable conduct that subjected the plaintiff to a cruel and unjust hardship in conscious disregard of the plaintiff's rights, so as to justify an award of exemplary and punitive damages.

WHEREFORE, the plaintiff prays judgment as follows:

1. For general damages in the sum of $_____;

2. For special damages for _____ [*specify*] in the sum of $_____;

3. For punitive damages in an amount appropriate to punish the defendant(s) and deter others from engaging in similar misconduct;

4. For costs of suit incurred herein; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of Cal. that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

This form of complaint is for use in an action for damages for fraud and deceit based on an intentional misrepresentation of fact by the defendant [*Civ. Code § 1710(1)*].

[3] Allegations

The complaint alleges:

- The exact false representations made by the defendant (Paragraph 4) [*Scafidi v. Western Loan & Bldg. Co. (1946) 72 Cal. App. 2d 550, 558, 165 P.2d 260]* ;

- The falsity of the statements and the true facts (Paragraph 5);

- That the defendant knew of the falsity of the representations (Paragraph 6);

- That the misrepresentations were made with the intent to deceive and defraud the plaintiff or the public and with the intent to induce the plaintiff or the public to act (Paragraph 6) [*Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 811, 94 Cal. Rptr. 796, 484 P.2d 964* ; *Harazim v. Lynam (1968) 267 Cal. App. 2d 127, 130, 72 Cal. Rptr. 670* ; *Civ. Code § 1711*];

- Actual and justifiable reliance by the plaintiff on the misrepresentations (Paragraph 7) [*see Mirkin v. Wasserman (1993) 5 Cal. 4th 1082, 1088, 1091-1093, 23 Cal. Rptr. 2d 101, 858 P.2d 568* ; *Harazim v. Lynam (1968) 267 Cal. App. 2d 127, 130, 72 Cal. Rptr. 670]* ;

- The plaintiff's damage as a result of the defendant's misrepresentations (Paragraph 8) [*see Fraker v. Sentry Life Ins. Co. (1993) 19 Cal. App. 4th 276, 285-286, 23 Cal. Rptr. 2d 372* ; *Zumbrun v. University of S. Cal. (1972) 25 Cal. App. 3d 1, 12* ; *Lesperance v. North Am. Aviation, Inc. (1963) 217 Cal. App. 2d 336, 345, 31 Cal. Rptr. 873]* ; and

- Facts supporting an award of punitive damages (Paragraph 9) [*Civ. Code § 3294*].

[4] Strict Pleading Requirements

The facts constituting fraud must be specifically pleaded so that the court can determine from the complaint whether a prima facie case is alleged [*Cooper v. Leslie Salt Co. (1969) 70 Cal. 2d 627, 636, 75 Cal. Rptr. 766* ; *see, e.g., Goldrich v. Natural Y Surgical Specialties, Inc. (1994) 25 Cal. App. 4th 772, 782-783* (conclusory allegation that defendants made false representations that their product was safe for use in breast surgery and posed no dangerous risks of injury to plaintiff, without indicating specifically what was said by whom or in what manner, lacked the requisite specificity for pleading fraud)]. General allegations are insufficient [*Morton v. Loveman (1968) 267 Cal. App. 2d 712, 720, 73 Cal. Rptr. 623]* . Every element of the cause of action for fraud must be alleged in the proper manner, factually and specifically [*Lesperance v. North Am. Aviation, Inc. (1963) 217 Cal. App. 2d 336, 344, 31 Cal. Rptr. 873]* .

However, if a fraud claim is based on a series of numerous misrepresentations, such as an advertising campaign that is alleged to be misleading, plaintiffs need not allege the specific advertisements the individual plaintiffs relied upon. It is sufficient for the plaintiff to provide a representative selection of the advertisements or other statements to indicate the language upon which the claim is based [*Morgan v. AT&T Wireless Services, Inc. (2009) 177 Cal. App. 4th 1235, 1255-1257, 99 Cal. Rptr. 3d 768*].

[5] Corporate Defendant

A plaintiff who wishes to charge a corporation with making a fraudulent misrepresentation must allege the name of the person who spoke, that person's authority to speak, to whom he or she spoke, what he or she said or wrote, and when it was said or written [*Archuleta v. Grand Lodge of Int'l Ass'n of Machinists (1968) 262 Cal. App. 2d 202, 208-209, 68 Cal. Rptr. 694* ; *Gautier v. General Tel. Co. (1965) 234 Cal. App. 2d 302, 308, 44 Cal. Rptr. 404]* .

[6] Damages

The amount and type of damages available in an action for deceit will depend on the fact situation involved in the fraudulent transaction. Damages for fraud in the purchase, sale, or exchange of property, for example, are governed by *Civ. Code § 3343*, with the exception that damages for fraud in the sale or purchase of "goods" as defined in the Commercial Code are governed by *Com. Code § 2721*. The attorney must ascertain the applicable statute and allege the proper items of general and special damages available under that statute. For a discussion of compensatory damages, see *§ 269.27*.

Punitive damages may also be recoverable in an action for deceit if the defendant's conduct amounts to fraud as defined by *Civ. Code § 3294(c)(3)* [*see Civ. Code § 3294(a)*]. Although, in an action for deceit, the amount of damages must generally be stated in the complaint [*Code Civ. Proc. § 425.10(b)*], the amount of punitive damages must not be stated in any action [*Civ. Code § 3295(e), (f)*]. For further discussion, see *§ 269.30*.

[7] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[8] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in

controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[9] Copies

The following copies of this complaint should be prepared:

- Original to be filed with the court;
- One copy together with a copy of the summons to be served on each defendant;
- One copy for the office file;
- One copy for the plaintiff; and
- Other copies as desired.

[10] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading tort damages, see Ch. 177, *Damages*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For discussion relating to venue and forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

[11] California Points and Authorities

For memoranda of points and authorities related to this complaint, see California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender)

[12] California Torts

For detailed discussion of the elements of a cause of action for deceit, see Levy, Golden, and Sacks, California Torts, Ch. 40, Pt. A (Matthew Bender)

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23-269 California Forms of Pleading and Practice--Annotated § 269.92

§ 269.92 Allegations for Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit--Negligent Misrepresentation of Fact [Civ. Code § 1710(2)]--General Form

[1] FORM Allegations for Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit--Negligent Misrepresentation of Fact [Civ. Code § 1710(2)]--General Form

1. When the defendant made these representations, he/she/it had no reasonable ground for believing them to be true in that _____ [*specify facts showing defendant's lack of reasonable basis for believing in the truth of the representations*].

[*EITHER*]

2. The defendant made these representations with the intention of inducing the plaintiff to act in reliance on these representations in the manner hereafter alleged, or with the expectation that the plaintiff would so act.

[*OR*]

2. The defendant made these representations with the intention of inducing members of _____ [the public *or specify class of persons of which plaintiff is a member*] to act in reliance on these representations in the manner hereafter alleged, or with the expectation that they would so act.

[2] Use of Form

These allegations are for use in an action for damages for deceit based on negligent misrepresentation, i.e., a false misrepresentation made by the defendant without reasonable ground for believing the representation to be true [*see Civ. Code § 1710(2)*]. The allegations in Paragraphs 1 and 2 of this form may be substituted for the allegations in Paragraph 7 of the complaint *set forth in § 269.91*, in which case the subsequent paragraphs (Paragraphs 8, 9, and 10) of § 269.91 should be renumbered accordingly.

[3] Text References

Witkin, California Procedure (2d ed.), Vol. 3, *Pleading*, § 587

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 818-826 (10th ed. 2005)

23 Cal. Jur. 2d, *Fraud and Deceit*, § 28

[4] Cross References

For a similar form, see *§ 269.91*.

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23-269 California Forms of Pleading and Practice--Annotated § 269.93

§ 269.93 Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit--Suppression of Fact [Civ. Code § 1710(3)]--General Form

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit--Suppression of Fact [Civ. Code § 1710(3)]--General Form

[*Caption. See § 269.91.*]

The plaintiff alleges:

[1. *Capacity and residence of the defendant. See § 269.91, Paragraph 1.*]

[2. *Agency allegation, if appropriate. See § 269.91, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 269.91, Paragraph 3.*]

4. On or about _____ [*date*], defendant _____ [*name*] _____ [*allege facts showing the suppression of a fact by one who is bound to disclose it or by one who gives information of other facts that are likely to mislead for want of communication of the suppressed fact, e.g.*, represented to the plaintiff that the house that the defendant sought to sell to the plaintiff was recently inspected and found free of termites, was structurally sound, and was generally in good condition, but failed to reveal and suppressed the fact that the house had defects in its plumbing that were severe and chronic and that caused the house to be uninhabitable without substantial repairs to the plumbing system, which fact was known to the defendant at all times herein mentioned. The suppression of the fact of these plumbing defects was likely to mislead the plaintiff and did in fact mislead the plaintiff in the light of the other representations made by the defendant concerning the good condition of the _____ (*specify property*)].

5. The [representations and] failures to disclose information and suppressions of information herein alleged to have been made by the defendant _____ [*name*] were made with the intent to induce the plaintiff to act in

the manner herein alleged in reliance thereon.

6. The plaintiff, at the time these failures to disclose and suppressions of facts occurred, and at the time the plaintiff took the actions herein alleged, was ignorant of the existence of the facts that the defendant suppressed and failed to disclose. If the plaintiff had been aware of the existence of the facts not disclosed by the defendant, the plaintiff would not have, as he/she did, _____ [*specify actions taken by plaintiff in reliance on defendant*]. _____ [*Allege if the fact that plaintiff's reliance was justified is not apparent from the other facts as stated, facts otherwise showing justifiable reliance*].

[7. *Damages. See § 269.91, Paragraph 8.*]

[8. *Punitive damages. See § 269.91, Paragraph 9.*]

[*Prayer. See § 269.91.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 269.91.*]

[2] Use of Form

This complaint is for use in an action for damages for fraud and deceit in which the actionable deceit consists of the suppression of a fact by one who is bound to disclose it or who gives information of other facts that are likely to mislead for want of communication of that fact.

[3] Allegations

This complaint alleges (1) suppression of a fact by one bound to disclose it or who gives information likely to mislead for want of communication of that fact (Paragraph 4) [*see Civ. Code § 1710(3)*]; (2) intent to induce reliance (Paragraph 5); and (3) actual and justifiable reliance on the actions of the defendant (Paragraph 6).

[4] Text References

Witkin, California Procedure (2d ed.), vol. 3. *Pleading*, § 582

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 794-799 (10th ed. 2005)

23 Cal. Jur. 2d, *Fraud and Deceit*, §§ 45, 46

[5] Cross References

For similar forms, see *§ 269.91* and *269.92*.

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23-269 California Forms of Pleading and Practice--Annotated § 269.94

§ 269.94 Complaint for Damages for Fraud and Deceit--Promise Made Without Intention to Perform [Civ. Code § 1710(4)]--General Form

[1] FORM Complaint for Damages for Fraud and Deceit--Promise Made Without Intention to Perform [Civ. Code § 1710(4)]--General Form

[*Caption. See § 269.91.*]

The plaintiff alleges:

[1. *Capacity and residence of the defendant. See § 269.91, Paragraph 1.*]

[2. *Agency allegation, if appropriate. See § 269.91, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 269.91, Paragraph 3.*]

4. On or about _____ [*date*], defendant _____ [*name*] promised the plaintiff that _____ [*allege a promise made regarding a material fact, e.g.*, the defendant would employ and continue to employ the plaintiff, the plaintiff would close his/her business and enter the employ of the defendant's company _____ (*name*), for so long as the plaintiff should satisfactorily perform the duties of _____ (*specify position*)].

5. At the time the defendant made the promise to the plaintiff, the defendant had no intention of performing it.

6. The promise was made by the defendant with the intent to induce the plaintiff to _____ [*allege defendant's actual intent in making the false promise, e.g.*, close his/her business and thereby remove the plaintiff as a competitor of the defendant's and remain in the employ of the defendant until the defendant should choose, at his/her will, to terminate the plaintiff's employment].

7. The plaintiff, at the time this promise was made and at the time the plaintiff took the actions herein alleged, was ignorant of the defendant's secret intention not to perform and _____ [*allege facts showing justifiable reliance on the promise, e.g.*, the plaintiff could not, in the exercise of reasonable diligence, have discovered the defendant's secret intention]. In reliance on the promise of the defendant, the plaintiff _____ [*allege acts of plaintiff*]. If the plaintiff had known of the actual intention of the defendant, the plaintiff would not have taken such action.

8. The defendant failed to abide by his/her promise _____ [*allege facts showing nonperformance, e.g.*, and on _____ [*date*], terminated the employment of the plaintiff and refused to allow the plaintiff to perform his/her duties and to pay him/her under their agreement. But for the termination of employment, the plaintiff would have continued to perform his/her duties satisfactorily under the contract].

[9. *Damages. See § 269.91, Paragraph 8.*]

[10. *Punitive damages. See § 269.91, Paragraph 9.*]

[*Prayer. See § 269.91.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 269.91.*]

[2] Use of Form

This complaint is for use in action for damages for fraud and deceit based on a promise made without the intention of performing it. Whenever the facts indicate that there is a promise made without the intent to perform, causes of action may also exist for breach of contract and intentional misrepresentation of fact [*see Block v. Tobin (1975) 45 Cal. App. 3d 214, 218-219, 119 Cal. Rptr. 288* ; *Bondi v. Jewels by Edwar, Ltd. (1968) 267 Cal. App. 2d 672, 676-677, 73 Cal. Rptr. 494]* .

[3] Allegations

This complaint alleges [*see Bondi v. Jewels by Edwar, Ltd. (1968) 267 Cal. App. 2d 672, 677, 73 Cal. Rptr. 494]* :

- A promise made by the defendant concerning a material fact (Paragraph 4).
- That the defendant was without any intention of performing the promise at the time it was made (Paragraph 5).
- That the promise was made with the intent to induce the plaintiff to act in reliance (Paragraph 6).
- That the plaintiff justifiably acted in reliance on the defendant's promise (Paragraph 7).
- That the defendant failed to perform the promise (Paragraph 8).
- Resulting damages (Paragraphs 9, 10).

[4] Text References

Witkin, California Procedure (2d ed.), Vol. 3, *Pleading* § 581

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 781-787 (10th ed. 2005)

[5] Cross References

For similar forms, see *§§ 269.91 -269.93*.

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23-269 California Forms of Pleading and Practice--Annotated § 269.95

§ 269.95 Complaint for Damages for Fraud and Deceit [Civ. Code § 3343]--Intentional Misrepresentation [Civ. Code § 1710(1)]--Fraud in Sale of Land--By Buyer Against Seller Misrepresenting Acreage

[1] FORM Complaint for Damages for Fraud and Deceit [Civ. Code § 3343]--Intentional Misrepresentation [Civ. Code § 1710(1)]--Fraud in Sale of Land--By Buyer Against Seller Misrepresenting Acreage

[*Caption. See § 269.91.*]

The plaintiff alleges:

[1. *Capacity and residence of the defendant. See § 269.91, Paragraph 1.*]

[2. *Agency allegation, if appropriate. See § 269.91, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 269.91, Paragraph 3.*]

4. On or about _____ [*date*], defendant _____ [*name*] was the owner of certain real property located in _____ [*city*], _____ County, California, and known as _____ [*provide address or legal description*].

5. On or about the above-mentioned date, at _____ [*address*], _____ [*city*], _____ County, California, defendant _____ [*name*], with the intent to defraud and deceive the plaintiff and with the intent to induce the plaintiff to purchase the above-described real property for a sum of $_____, represented to the plaintiff that this property _____ [*specify, e.g.*, contained _____ (*number*) acres of land]. This representation was false, and the defendant knew it to be false at the time he/she made it, and at all times herein mentioned. In fact and truth, the above-described real property _____ [*specify, e.g.*, contained only _____(*number*) acres of land].

6. The plaintiff did not know that this representation was untrue, but on the other hand, believed it to be true. In reliance

on this representation, the plaintiff entered into a contract of purchase and sale of the above-described real property with the defendant, and paid the defendant the sum of $_____ as a purchase price therefor. The contract of sale is attached hereto as Exhibit A and made a part hereof. Except for the false representation of the defendant, the plaintiff would not have entered into the above-mentioned contract and would not have paid the contract sum of $_____, or any sum, for the above-described real property, to the defendant. _____ [*Allege, if necessary, facts showing justifiable reliance, e.g.,* The plaintiff did not inspect the property or any documents pertaining to it, but was urged by the defendant to accept the defendant's assurances as to the acreage contained in the property].

7. As a proximate result of the above-described fraud and deceit of the defendant, the plaintiff has been damaged in the sum of $_____, which is the difference between the purchase price of $_____ paid by the plaintiff for the above-described property and the true value of the property, which is $_____.

8. As a further proximate result of the above-described fraud and deceit of the defendant, the plaintiff has _____ [*allege other items of allowable damages, e.g.*, lost the use and enjoyment of the above-described property], by reason of which the plaintiff has been damaged in the sum of $_____.

[9. *Punitive damages. See § 269.91, Paragraph 9.*]

[*Prayer. See § 269.91.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 269.91.*]

[2] Use of Form

This complaint is for use in an action for damages for fraud and deceit that involves an intentional misrepresentation made to the purchaser of real property by the seller concerning the acreage contained in the property.

[3] Allegations

This complaint alleges (1) that the defendant was the owner of the property about which the representation was made (Paragraph 4); (2) that the defendant made a false representation as to the number of acres contained in the property, with the intent to induce reliance by the plaintiff, and that the defendant knew of the falsity of the representation (Paragraph 5); (3) the falsity of the representation as shown by the true acreage (Paragraph 5); (4) that the plaintiff did not know the representation was untrue and in fact relied on it in purchasing the property, and that such reliance was justifiable (Paragraph 6); and (5) damages (Paragraphs 7-9) [*Civ. Code § 3343*].

[4] Venue

In an action for damages for the tort of deceit, the proper venue is the county of the defendant's residence, as provided by *Code Civ. Proc. § 395(a)*. Such an action does not come within the provisions of *Code Civ. Proc. § 392(a)(1)*, allowing the action to be brought in the county in which the property is situated if the action is for the recovery of real property, because the action for damages for deceit does not determine or affect the title to the real property or any interest in it. The title remains with the plaintiff [*Kaluzok v. Brisson (1946) 27 Cal. 2d 760, 764, 167 P.2d 481]* .

Generally, an action for fraud is triable in the county of the residence of the defendant and the mere fact that, incidentally, rights in real property may be involved does not change the rule. Furthermore, even if a cause of action for relief in tort is joined with a cause of action concerning the title to real property, the defendant is nevertheless entitled to have the case tried in his or her county of residence [*Claycomb v. Caronna (1952) 113 Cal. App. 2d 561, 565-566, 248 P.2d 779]* .

[5] Text References

Witkin, California Procedure (2d ed.), vol. 3, *Pleading*, §§ 592, 593

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 812-813 (10th ed. 2005)

[6] Cross References

For a similar form, see *§ 269.91*.

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23-269 California Forms of Pleading and Practice--Annotated § 269.96

§ 269.96 Complaint for Damages for Fraud and Deceit [Civ. Code § 3343]--Intentional and Negligent Misrepresentation [Civ. Code § 1710(1), (2)]--Suppression of Fact [Civ. Code § 1710(3)]--Concerning Effect of Easement--By Buyer Against Seller and Broker

[1] FORM Complaint for Damages for Fraud and Deceit [Civ. Code § 3343]--Intentional and Negligent Misrepresentation [Civ. Code § 1710(1), (2)]--Suppression of Fact [Civ. Code § 1710(3)]--Concerning Effect of Easement--By Buyer Against Seller and Broker

[*Caption. See § 269.91.*]

The plaintiff alleges:

FIRST COUNT

(Intentional Misrepresentation)

[1. *Capacity and residence of the defendant. See § 269.91, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 269.91, Paragraph 3.*]

3. At all times herein mentioned, defendant _____ [*name*] was, and now is, a real estate broker duly licensed as such by the State of Cal., Department of Real Estate.

4. On or about _____ [*date*], defendant _____ [*name*] was the owner of the real property located in _____ [*city*], _____ County, California, and known as _____ [*provide legal description or address*].

5. At all times herein mentioned, the defendant broker _____ [*name*] was the agent of the defendant owner _____ [*name*], and at all times herein mentioned, in doing the things and in making the representations herein alleged, was acting in the course and scope of the agency, and with the knowledge and consent of his/her codefendant.

6. On or about _____ [*date*], in _____ [*city*], _____ County, California, the plaintiff entered into a written agreement with the defendants to purchase the above-described property, a copy of which agreement is attached hereto as Exhibit A and made a part hereof.

7. On or about _____ [*date*], the plaintiff was shown by the defendants a copy of a preliminary title search of the above-described property and noticed from this title search that the property was subject to an easement _____ [*describe*].

8. The defendant broker _____ [*name*] then and there falsely represented to the plaintiff that the easement was _____ [*specify the false representation as to the harmless nature of the easement or as to its nonexistence, e.g.*, simply a strip one foot wide and one foot deep along the edge of the property that would at no time obstruct and prevent or effect in any way any construction on the property].

9. The true facts are that the easement _____ [*allege the true nature, extent, and effect of the easement that exists, e.g.*, is 30 feet wide and 16 feet deep, giving the plaintiff little more than the right to cross it, and then only under limited circumstances].

10. The defendants, and each of them, knew when they made these representations concerning the easement to the plaintiff that these representations were false, and the defendants, and each of them, made the representations with the intent to deceive the plaintiff and to induce the plaintiff to take the actions herein alleged, and with the intent to prevent the plaintiff from further inquiring into the effect of the easement across the property.

11. The plaintiff believed these representations of the defendants, and each of them, to be true, and in reliance on these representations the plaintiff was induced to complete the purchase of the above-described real property on _____ [*date*], would not, at a cost of $_____. The plaintiff would not have purchased the real property herein described and would not have expended the sums herein alleged for improvements on the property if he/she had not relied on these representations by the defendants, and each of them.

12. _____ [*Allege facts showing interference with use of the property resulting from the easement, e.g.*, After the purchase of the above-described property, the plaintiff caused plans to be drawn for a dwelling house, a garage, and driveways to be constructed on this property. On or about _____ (*date*), the plaintiff began the construction of a dwelling house on the real property in accordance with these plans. Thereafter, on or about _____ (*date*), _____ (*allege acts of owner of easement preventing or hindering construction or other activity on the property*)].

13. The above-described property would have a value of $_____, the price paid by the plaintiff to the defendants for the property, only if there were no easement. With the easement as it actually exists, the property has a true value of only $_____.

The plaintiff was obliged to and did spend $_____ for _____ [*allege expenses of plaintiff in reliance on defendants' representations, e.g.*, the construction of a dwelling house on the property before he/she learned of the true nature, extent, and effect of the easement, which prevented completion of the construction]. As a result of the fraud and deceit of the defendants, and each of them, the plaintiff has been damaged in the sum of $_____.

[14. *Punitive damages. See § 269.91, Paragraph 9.*]

SECOND COUNT

(Negligent Misrepresentation)

1. The plaintiff refers to and incorporates, as though fully set forth herein, Paragraphs 1-9, inclusive, and 11-14, inclusive, of the First Count.

2. The defendants, and each of them, when they made these representations concerning the easement to the plaintiff had no reasonable ground for believing that the representations were true, and the defendants, and each of them, made the representations with the intent to induce the plaintiff to take the actions herein alleged, and with the intent to prevent the plaintiff from further inquiring into the effect of the easement across the property.

THIRD COUNT

(Suppression of Fact)

1. The plaintiff refers to and incorporates, as though fully set forth herein, Paragraphs 1-7, inclusive, 9, and 12-14, inclusive, of the First Count.

2. On or about _____ [*date*], defendant broker _____ [*name*] represented to the plaintiff that although an easement existed across the above-described property, it would at no time obstruct or prevent or affect in any way any construction on the property, and the defendants failed to reveal and suppressed the fact that _____ [*allege facts showing that the easement was actually an obstruction, e.g.*, on or about _____ [*date*], the owner of the easement had prevented the previous owner of the property, defendant _____ (*name*), from constructing a dwelling house on the property]. The failure to disclose these facts concerning the easement was likely to mislead and did in fact mislead the plaintiff in the light of other representations concerning the easement made by the defendants.

3. The defendants, and each of them, made the failures to disclose and the suppressions of information herein alleged with the intent to induce the plaintiff to act in the manner herein alleged in reliance thereon, and with the intent to prevent the plaintiff from further inquiring into the effect of the easement across the property.

[*Prayer. See § 269.91.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 269.91.*]

[2] Use of Form

This complaint is for use in an action for damages for fraud and deceit arising from the intentional or negligent misrepresentation and intentional suppression of the nature, extent, and effect of an easement across property to be sold by the seller and the seller's real estate broker. The complaint states alternate theories of recovery: intentional misrepresentation by the defendants, negligent misrepresentation by the defendants, and intentional suppression by the defendants of facts likely to mislead.

[3] Allegations

The First Count of the complaint alleges (1) the false representation concerning the easement by the seller's broker (Paragraph 8), (2) the true facts (Paragraph 9), (3) that the defendants knew of the falsity of the representations and made them with the intent to deceive and induce reliance (Paragraph 10), (4) that the plaintiff in fact relied on the representations in purchasing the property (Paragraph 11), (5) acts of the plaintiff in reliance on the defendants' representations (Paragraph 12), and (6) damages as a result of such reliance (Paragraphs 13, 14) [*Civ. Code § 3343*]. The Second Count alleges that the defendants made the representations without reasonable grounds for believing them to be true (Paragraph 2) [*Civ. Code § 1710(2)*]. The Third Count alleges (1) that the defendants failed to disclose and suppressed facts from the plaintiff that were likely to mislead the plaintiff in the light of other representations made by the defendants (Paragraph 2) [*Civ. Code § 1710(3)*] and (2) that these failures to disclose and suppressions of information were done with the intent to induce the plaintiff's reliance (Paragraph 3).

[4] Cross References

For a similar form, see *§ 269.91*.

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23-269 California Forms of Pleading and Practice--Annotated § 269.97

§ 269.97 Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit [Civ. Code § 3343]--Intentional Misrepresentation [Civ. Code § 1710(1)]--Concerning Existence of Infestation--By Buyer of Real Property Against Seller and Pest Control Operator

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit [Civ. Code § 3343]--Intentional Misrepresentation [Civ. Code § 1710(1)]--Concerning Existence of Infestation--By Buyer of Real Property Against Seller and Pest Control Operator

[*Caption. See § 269.91.*]

The plaintiff alleges:

1. The defendant _____ [*name of seller*] is now, and at all times herein mentioned was, a resident of _____ [*city*], _____ County, California.

The defendant _____ [*name of pest control operator*] is now, and at all times herein mentioned was, a duly licensed pest control operator, licensed as such by the State of Cal., Structural Pest Control Board. The defendant _____ [*name of pest control operator*] is, and at all times herein mentioned was, a resident of _____ [*city*], _____ County, California [*or allege other capacity and residence of the defendant, as appropriate*].

[2. *Fictitious name allegation, if appropriate. See § 269.91, Paragraph 3.*]

3. On or about _____ [*date*], the plaintiff, as buyer, and the defendant _____ [*name*], as seller, entered into a written agreement for the purchase and sale of a family dwelling and appurtenances located at _____ [*address*], _____ [*city*], _____ County, California, for a total purchase price of $_____. A copy of this agreement is attached hereto as Exhibit A and made a part hereof. On or about _____ [*date*], the plaintiff and the defendant executed written escrow instructions for the purchase and sale of the above-described property at the stated price; a copy of the escrow

instructions is attached hereto as Exhibit B and made a part hereof.

4. Both the agreement of purchase and sale and the escrow instructions provided in writing that the defendant _____ [*name*], as seller, would deposit in escrow a report executed by a licensed termite control operator, determining the true condition of the property in regard to termite infestation, dry rot, and fungi, and further provided in writing that the defendant would pay for all work necessary to place the property in a condition free of these infestations, if found.

5. On or about _____ [*date*], the defendant _____ [*name of seller*] falsely represented _____ [*allege circumstances and exact language of seller's representation that property was free of termites and other infestations, e.g.*, that the defendant had been the owner and in personal possession of the property for many years continuously and immediately before the purchase of the property by the plaintiff and was acquainted with the house and that the house was in good condition and had no termite infestation, dry rot, fungi, or other infestations of any kind].

6. At all times herein mentioned, the defendant _____ [*name of pest control operator*] was the agent of the defendant _____ [*name of seller*], and at all times herein mentioned, in doing things and in making the representations herein alleged was acting in the course and scope of the agency, and with the knowledge and consent of his/her codefendant. The defendant _____ [*name of seller*] employed the defendant _____ [*name of pest control operator*] to inspect the property and to furnish a report showing the condition of the property in regard to termite infestation, dry rot, and fungi, in accordance with the attached contract for purchase and sale, Exhibit A, and the attached escrow instructions, Exhibit B.

7. The defendant _____ [*name of pest control operator*], with full knowledge of all the foregoing and for the purpose of inducing the plaintiff to purchase the property and do the acts herein alleged, falsely purported to make an inspection of the property to determine the presence or absence of termite infestation, dry rot, and fungi, and furnished and deposited in escrow a written statement signed by the defendant _____ [*name of pest control operator*], attached hereto as Exhibit C and made a part hereof. The attached report purported to be a true and correct report of the condition of the property in regard to termite infestation, dry rot, and fungi. This statement represented that the defendant _____ [*name of pest control operator*] had inspected the property and the property was free and clear of any infestation by termites, dry rot, and fungi of any kind, and required no work whatsoever to place the property in a free and clear condition.

8. The true facts are that, at all times herein mentioned and for many years before this time, the property was and had been heavily infested with _____ [*state conditions*], and had been heavily damaged thereby so that it required extensive repairs and improvements in order to correct these conditions and place the property in a free and clear condition.

9. The representations and statements of the defendant _____ [*name of seller*] were and are false and were known by him/her to be false at the time they were made. The representations of the defendant _____ [*name of pest control operator*] were and are false and were known by him/her to be false, since the defendant _____ [*name of pest control operator*] made no reasonable inspection of the property. These representations were made by the defendants, and each of them, with the intent to induce the plaintiff to rely thereon in doing the acts herein alleged.

10. Immediately after the furnishing of the report of the defendant _____ [*name of pest control operator*], the plaintiff closed the escrow, performed the agreement of purchase, and took possession of the property. In doing these acts, the plaintiff was acting in reliance on the above-alleged representations of the defendants, and each of them, which he/she believed to be true, and the plaintiff would not have purchased the property except for these representations of the defendants, and each of them. _____ [*Allege facts showing justifiable reliance,*

if necessary, e.g., Although the plaintiff inspected the property, he/she was unable to detect any signs of infestation that in fact existed, and the plaintiff relied on the representations of the defendants, and each of them].

11. On or about _____ [*date*], immediately on discovering the true condition of the property, the plaintiff repeatedly notified the defendants, and each of them, by letters attached hereto as Exhibit D and made a part hereof, of the true condition of the property and of the work required to place the property in a condition free from infestation; the defendants, and each of them, failed and refused, and continue to fail and refuse, to correct this condition. The plaintiff caused the infestations to be removed and the necessary repairs to be made to the property as a result of the damage done to the property. The reasonable cost of this was a sum of $_____, and the plaintiff was damaged as a result of the acts of the defendant herein alleged in that sum.

[12. *Damages. See § 269.95, Paragraph 7.*]

[13. *Additional damages. See § 269.95, Paragraph 8.*]

[14. *Punitive damages. See § 269.91, Paragraph 9.*]

[*Prayer. See § 269.91.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 269.91.*]

[2] Use of Form

This complaint is for use in an action for damages for fraud and deceit in which the seller of real property and a pest control operator hired by the seller have falsely represented to the buyer that the property is free of infestation by pests. It alleges intentional misrepresentation by the seller as to the condition of the property and intentional and negligent misrepresentation by the pest control operator.

[3] Allegations

This complaint alleges: (1) the false representation by the seller (Paragraph5); (2) that the pest control operator was the agent of the seller (Paragraph 6); (3) the false representation of the pest control operator, with knowledge that the plaintiff was going to rely on the pest control operator's report (Paragraph 7) [*Wice v. Schilling (1954) 124 Cal. App. 2d 735, 745, 269 P.2d 231]* ; (4) the actual facts (Paragraph 8); (5) knowledge of the falsity of the representations or that they were made with no reasonable belief in their truth (Paragraph 9) [*Civ. Code § 1710(1), (2)*]; (6) reliance by the plaintiff (Paragraph 10); and (7) damages (Paragraphs 11-14) [*Civ. Code § 3343*].

[4] Text References

23 Cal. Jur. 2d, *Fraud and Deceit*, § 32

[5] Cross References

For similar forms, see *§§ 269.91 -269.93*, *269.95*, and *269.96*. For a complaint for rescission of a contract for sale of real property based on a fraudulent representation concerning termite infestation, see Ch. 569, *Vendor and Purchaser*

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23-269 California Forms of Pleading and Practice--Annotated § 269.98

§ 269.98 Complaint for Damages for Fraud and Deceit [Civ. Code § 3343]--International Misrepresentation [Civ. Code § 1710(1)]--Concerning Filled-in Land--By Buyer Against Seller

[1] FORM Complaint for Damages for Fraud and Deceit [Civ. Code § 3343]--International Misrepresentation [Civ. Code § 1710(1)]--Concerning Filled-in Land--By Buyer Against Seller

[*Caption. See § 269.91.*]

The plaintiff alleges:

[1. *Capacity and residence of the defendant. See § 269.91, Paragraph 1.*]

[2. *Agency allegation, if appropriate. See § 269.91, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 269.91, Paragraph 3.*]

4. On or about _____ [*date*], the plaintiff and the defendant entered into a contract in writing, attached hereto as Exhibit A and made a part hereof, in which the plaintiff agreed to purchase from the defendant certain improved real property commonly described as _____ [*provide address or legal description*].

5. On or about _____ [*date*], and during the negotiations for the above-described contract for purchase and sale, the defendant falsely represented to the plaintiff that _____ [*allege misrepresentation concerning fill, e.g.*, the land to be sold was suitable for the purpose of constructing a dwelling house on it and contained no fill].

6. In fact, the above-described property _____ [*allege extent and existence of fill on the land*].

7. These representations were made by the defendant with the intent to deceive and defraud the plaintiff and to induce him/her to enter the above-described contract for purchase and sale of the property.

8. The representations made by the defendant were in fact false and were known by the defendant to be false at the time they were made and at all times herein mentioned.

9. The plaintiff relied on these representations by the defendant in entering the above-described agreement for purchase and sale of the property, and the plaintiff would not have entered into the above-described agreement but for the representations of the defendant. The reliance by the plaintiff on these representations by the defendant was justified because _____ [*allege justification, e.g.*, at the time these representations were made, the defendant was in a position of advantage with respect to knowledge of facts concerning the land and its suitability for construction of a building on it, and, more particularly, the defendant knew that the land consisted of a filled-in _____ (*specify, e.g.*, creek bed), which fill had not been suitably prepared for building; the plaintiff could not have discovered by due diligence the existence of this filled condition or of the quality or suitability of the land for building, despite making an inspection of the land by viewing it].

10. These representations by the defendant were a material inducement to the plaintiff to enter into the above-described contract for purchase of the real property and had the plaintiff known that the land the land was in fact _____ [*allege extent and type of fill*], the plaintiff would not have entered the above-described contract.

11. On or about _____ [*date*], _____ [*allege discovery of fill and resulting damage, e.g.*, the plaintiff was informed by the contractor whom he/she consulted concerning the construction of a dwelling on the land that the land was in fact unsuitable for building without extensive soil preparation]. As a result thereof and of the defendant's fraud and deceit, the plaintiff was damaged in the sum of $_____, which is the difference between the purchase price of the property and the actual value of the property, which is the sum of only $_____.

[12. *Additional damages. See § 269.95, Paragraph 8.*]

[13. *Punitive damages. See § 269.91, Paragraph 9.*]

[*Prayer. See § 269.91.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 269.91.*]

[2] Use of Form

This complaint is for use in an action for damages for fraud and deceit in which the vendor of real property has misrepresented the character of the land, specifically that the land does not consist of fill.

[3] Allegations

This complaint alleges: (1) the false representation by the defendant concerning the character of the land (Paragraph 5) [*Snelson v. Ondulando Highlands Corp. (1970) 5 Cal. App. 3d 243, 251, 84 Cal. Rptr. 800]* ; (2) the true fact of the extent and existence of fill (Paragraph 6); (3) the defendant's intent to defraud and induce reliance by the plaintiff

(Paragraph 7) [*Civ. Code § 1709*]; (4) the defendant's knowledge of the falsity of the representations (Paragraph 8); (5) the plaintiff's reliance and justifiable reliance (Paragraph 9); (6) that the defendant's representations were a material inducement to the plaintiff to enter the contract (Paragraph 10) [*Snelson v. Ondulando Highlands Corp. (1970) 5 Cal. App. 3d 243, 251, 84 Cal. Rptr. 800]* ; and (7) resulting damages to the plaintiff (Paragraphs 11, 13).

[4] Alternative Theories

The plaintiff in a cause of action concerning misrepresentations as to the character of land may often also state as a theory of recovery the failure of the defendant to disclose the known fact that the land was filled and unsuitable for building [*see Snelson v. Ondulando Highlands Corp. (1970) 5 Cal. App. 3d 243, 251, 84 Cal. Rptr. 800* ; *Oakes v. McCarthy Co. (1968) 267 Cal. App. 2d 231, 260-261, 73 Cal. Rptr. 127]* .

If the plaintiff seeks an expert opinion from a professional concerning the condition of the soil and is incorrectly informed of its character by the professional, there may also be a cause of action for negligent misrepresentation against the professional for failure to correctly determine the character of the soil [*see Gagne v. Bertran (1954) 43 Cal. 2d 481, 487-489, 275 P.2d 15]* .

[5] Text References

23 Cal. Jur. 2d, *Fraud and Deceit*, § 13

[6] Cross References

For similar forms, see *§§ 269.91* and *269.95 -269.97*.

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23-269 California Forms of Pleading and Practice--Annotated § 269.99

§ 269.99 Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit--Fraud in Sale of Personal Property--By Buyer Against Seller--General Form

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit--Fraud in Sale of Personal Property--By Buyer Against Seller--General Form

[*Caption. See § 269.91.*]

The plaintiff alleges:

[1. *Capacity and residence of defendant. See § 269.91, Paragraph 1.*]

[2. *Agency allegation, if appropriate. See § 269.91, Paragraph 2.* [*date*]]

[3. *Fictitious name allegation, if appropriate. See § 269.91, Paragraph 3.*]

4. On or about _____ [*date*], the plaintiff and the defendant entered into a[n] _____ [written *or* oral] contract in which the plaintiff agreed to purchase and defendant agreed to sell _____ [*describe personal property*], for a total purchase price of $_____ [; *if contract is written, add*: a copy of the contract is attached hereto as Exhibit A and made a part hereof].

5. On or about _____ [*date*], and at all times during the negotiations for the purchase and sale of this property and until the date of execution of the contract, defendant _____ [_____ (*allege fraud of defendant, e.g.,* represented to the plaintiff or concealed from the plaintiff and failed to disclose) that _____ (*specify representations or conditions of property not disclosed as to quality, model, or other material fact*)].

[*EITHER*]

6. In reality, these representations of the defendant concerning the property were false and the true facts were that the property was _____ [*specify true condition*].

[*OR*]

6. The true facts concerning this property, which the defendant suppressed and failed to reveal, were _____ [*specify*].

7. _____ [*Allege type of misrepresentation, e.g.*, The defendant knew these representations to be false at all times herein mentioned *or* The defendant made these representations without reasonable ground for believing them to be true, in that _____ (*specify*) *or* The defendant concealed and suppressed the true facts, although the true facts were known to him/her/it and he/she/it was under a duty to disclose these facts because _____ (*allege facts showing duty*)].

8. These _____ [representations *or* suppressions and concealments] of the defendant were made with the intent to induce the plaintiff to rely on them and to induce the plaintiff to enter into the contract herein alleged [*add if appropriate*: with the intent to defraud and deceive the plaintiff].

9. The plaintiff relied on the _____ [representations *or* nonexistence of the facts suppressed by the defendant] and was induced by this to purchase the property. The plaintiff would not have purchased the property if the true facts had been known to the plaintiff. This reliance by the plaintiff was justified because _____ [*specify*].

10. The actual value of the property that the plaintiff purchased from the defendant was $_____, and the contract price that the plaintiff paid to the defendant was $_____; the plaintiff was therefore damaged by the fraud and deceit of the defendant in the sum of $_____ [*or allege other measure of damages as appropriate*].

[11. *Punitive damages. See § 269.91, Paragraph 9.*]

[*Prayer. See § 269.91.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 269.91.*]

[2] Use of Form

This complaint is for use in an action for damages for fraud and deceit in the sale of personal property.

[3] Allegations

This complaint alleges: (1) a written or oral contract of purchase and sale (Paragraph 4); (2) misrepresentation or concealment of material fact by the defendant (Paragraph 5); (3) the actual facts (Paragraph 6); (4) fraud of the

defendant (Paragraph 7) [*Civ. Code § 1710(1), (2), (3)*]; (5) the defendant's fraudulent intent (Paragraph 8); (6) reliance and justifiable reliance by the plaintiff (Paragraph 9); and (7) damages (Paragraphs 10, 11) [*Civ. Code § 3343*].

[4] Damages in Cases Involving Sales of Goods

In a fraud action regarding the sale of goods governed by the Commercial Code, *Com. Code § 2721*, which allows defrauded persons to secure the "benefit of their bargain," in effect supersedes the "out-of-pocket" rule of *Civ. Code § 3343*, which otherwise applies to fraud actions [*Continental Airlines, Inc. v. McDonnell Douglas Corp. (1989) 216 Cal. App. 3d 388, 431, 264 Cal. Rptr. 779]* . Under *Com. Code § 2721*, remedies for fraud include all remedies available under *Com. Code §§ 2101-2724* for nonfraudulent breach.

The term "goods" for the purpose of *Com. Code § 2721* means all things, including specially manufactured goods, which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities, and things in action. The term also includes the unborn young of animals, growing crops, and other identified things attached to realty as described in *Com. Code § 2107* [*Com. Code § 2105*].

For further discussion of damages, see *§ 269.27[3]*.

[5] Alternative Theories of Recovery

If the seller of goods has made a material misrepresentation concerning the goods sold, the plaintiff may have, in addition to a cause of action for fraud and deceit, a cause of action for breach of warranty [*see Hauter v. Zogarts (1975) 14 Cal. 3d 104, 114-118, 120 Cal. Rptr. 681, 534 P.2d 377* ; *see Com. Code §§ 2313, 2314, 2316*; for further discussion, *see* Ch. 500, *Sales and Secured Transactions*]. In addition, if personal injuries have resulted from a defective condition of the product sold, the seller will be liable in damages on the theory of strict liability in tort. In some cases, the defective condition causing the injury will be one that the seller warranted against and that the seller represented did not exist [*see Hauter v. Zogarts (1975) 14 Cal. 3d 104, 120-121, 120 Cal. Rptr. 681, 534 P.2d 377]* . For discussion of strict liability actions, see Ch. 460, *Products Liability* .

[6] Text References

23 Cal. Jur. 2d, *Fraud and Deceit*, § 13

[7] Cross References

For similar forms, see *§§ 269.91 -269.93* and *269.95*.

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23-269 California Forms of Pleading and Practice--Annotated § 269.100

§ 269.100 Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit [Civ. Code § 3343]--Intentional Misrepresentation [Civ. Code § 1710(1)]--Profits and Other Facts Concerning Sale of Business--By Buyer Against Seller

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit [Civ. Code § 3343]--Intentional Misrepresentation [Civ. Code § 1710(1)]--Profits and Other Facts Concerning Sale of Business--By Buyer Against Seller

[*Caption. See § 269.91* .]

The plaintiff alleges:

[1. *Capacity and residence of the defendant. See § 269.91, Paragraph 1*.]

[2. *Agency allegation, if appropriate. See § 269.91, Paragraph 2*.]

[3. *Fictitious name allegation, if appropriate. See § 269.91, Paragraph 3*.]

4. On or about _____ [*date*], the defendant was the owner of a business known as _____, located at _____ [*address*], _____ [*city*], _____ County, California.

5. On or about _____ [*date*], the defendant falsely and fraudulently represented to the plaintiff that the business as then operated by the defendant was _____ [*allege misrepresentations, e.g.*, a profitable business earning net profits in excess of $_____ per year; that all equipment owned and used by the business was easy to operate and would require no night work for the owner and would not tax an owner suffering from a heart condition so that such owner could run the business without exerting himself/herself physically and without giving his/her own personal service; and that obtaining employees would be no problem].

6. These representations of the defendant were false. The true facts were that the business as operated by the defendant was _____ [*allege facts, e.g.*, not profitable and was not then earning at a rate of $_____ per year, but was earning less than $_____ per year; the business was not easy to operate and required night work for the owner and heavy labor at all hours of the day and night; and employees are not easy to hire and keep for the business].

7. The defendant, at all times herein mentioned, knew these representations to be false and made these representations with the intent to cause the plaintiff to reply on them and to deceive the plaintiff and to induce the plaintiff to purchase the business from the defendant and take the other actions herein alleged.

8. The plaintiff believed and relied on these representations by the defendant and was thereby induced to purchase the business with its stock, fixtures, and _____ [*specify other appurtenances, if any*] and paid the defendant the sum of $_____ for the business. Had it not been for the plaintiff's reliance on the defendant's representations, the plaintiff would not have purchased the business.

9. By reason of the fraud and deceit of the defendant, the plaintiff was required to expend _____ [*number*] hours of labor on the business, with no compensation, and was thereby damaged in the sum of $_____, the value of the plaintiff's labor thus expended. By reason of the fraud and deceit of the defendant, the plaintiff was further damaged in the sum of $_____, the difference between the price paid for the business and its fair market value of $_____ [*or allege other damages, e.g., insolvency and valuelessness of the business*].

[10. *Punitive damages. See § 269.91, Paragraph 9.*]

[*Prayer. See § 269.91* .]

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 269.91* .]

[2] Use of Form

This form of complaint is for use in an action for damages for fraud and deceit against the seller of a business who has fraudulently represented material facts concerning the business, such as the amount of profits it made and the amount of labor required, for the purpose of inducing the buyer to purchase the business.

[3] Allegations

This complaint alleges: (1) the false representations of the defendant (Paragraph 5); (2) the falsity of the representations and the true facts (Paragraph 6); (3) the defendant's knowledge of the falsity of the representations (Paragraph 7); (4) the defendant's intent to deceive and induce action by the plaintiff (Paragraph 7); (5) the plaintiff's reliance (Paragraph 8); and (6) damages (Paragraphs 9, 10) [*Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 969, 72 Cal. Rptr. 722* ; *Lawson v. Town & Country Shops, Inc. (1958) 159 Cal. App. 2d 196, 203, 323 P.2d 843]* .

[4] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, § 776 (10th ed. 2005)

23 Cal. Jur. 2d, *Fraud and Deceit*, § 16

[5] Cross References

For a similar form, see *§ 269.91*.

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§ 269.101 Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit--Concealment and Suppression of Fact [Civ. Code §§ 1573, 1710(3)]--Higher Offer for Property Made to Real Estate Broker Obtaining Secret Profit--By Seller Against Broker and Conspiring Purchaser

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit--Concealment and Suppression of Fact [Civ. Code §§ 1573, 1710(3)]--Higher Offer for Property Made to Real Estate Broker Obtaining Secret Profit--By Seller Against Broker and Conspiring Purchaser

[*Caption. See § 269.91* .]

The plaintiff alleges:

[1. *Capacity and residence of the defendant. See § 269.91, Paragraph 1*.]

[2. *Agency allegation, if appropriate. See § 269.91, Paragraph 2*.]

[3. *Fictitious name allegation, if appropriate. See § 269.91, Paragraph 3*.]

4. At all times herein mentioned, the defendant _____ [*name*] was, and now is, a real estate broker duly licensed as such by the State of Cal., Department of Real Estate.

5. On or about _____ [*date*], the plaintiff was the owner of improved real property, known as _____ [*provide address or legal description*].

6. On or about _____ [*date*], the defendant _____ [*name of broker*] offered to act as agent and broker on behalf of the plaintiff for the purpose of selling the property owned by the plaintiff for the benefit of the plaintiff. Pursuant to this offer by the defendant broker, the plaintiff executed and delivered to the defendant broker a written authorization to sell the property, which authorization is attached hereto as Exhibit A and made a part hereof.

7. On or about _____ [*date*], the defendant broker informed the plaintiff that the defendant _____ [*name or purchaser*] had offered to purchase the property for a price of $_____. At the same time, the defendant broker informed the plaintiff that he/she had no other offers in excess of the sum offered by the defendant _____ [*name of purchaser*] and that this sum was the best price possibly obtainable for the property.

8. Each and every one of these representations made by the defendant broker to the plaintiff was false. The true facts were that the defendant broker knew at the time these representations were made, and at all times herein mentioned, that _____ [*name of other offeror*] had made an offer, and communicated it to the defendant broker to purchase the plaintiff's property for the sum of $_____ [*sum higher than that revealed by the defendant broker*]. The defendant broker concealed the existence of this higher offer by _____ [*name of other offeror*] in violation of his/her duties as the agent, real estate broker, and fiduciary of the plaintiff.

9. The defendants, and each of them, knew that these representations were false at the time they were made and at all times herein mentioned; the defendants, and each of them, concealed the higher offer from the plaintiff and made these representations with the intent to induce the plaintiff to sell his/her property at the lower price and with the intent to defraud and deceive the plaintiff, in furtherance of a conspiracy between the defendants to have the sale made to the defendant purchaser for the express purpose of reselling the property to _____ [*name of higher offeror*] and thus obtaining a secret profit to be given to the defendants, in the amount of $_____.

10. On or about _____ [*date*], the plaintiff, in reliance on these representations of the defendant broker and in the belief that the sum of $_____ was the only and best obtainable offer for the property, as represented by the defendant broker _____ [*name*], sold the property to the defendant purchaser _____ [*name*]. If it had not been for the representations by the defendant broker and for the concealment by the defendant broker of the higher offer, and if the plaintiff had known the true facts, the plaintiff would not have sold his/her property to the defendant purchaser _____ [*name*] at that price.

11. By reason of the fraud and deceit of the defendants, and each of them, the plaintiff was damaged in the sum of $_____.

[12. *Punitive damages. See § 269.91, Paragraph 11*.]

[*Prayer. See § 269.91* .]

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 269.91* .]

[2] Use of Form

This form of complaint is for use in an action for damages for fraud and deceit against a real estate broker and a private person conspiring with the broker to induce the plaintiff to sell property at a lower price than could be obtained, knowing that there exists a higher offer for the property, and obtaining a secret profit by reselling the property to the higher offeror.

[3] Allegations

The complaint alleges (1) capacity of the defendant as a real estate broker (Paragraph 4); (2) that the defendant was the agent of the plaintiff (Paragraph 6) [*Simone v. McKee (1956) 142 Cal. App. 2d 307, 312, 298 P.2d 667]* ; (3) the nature of the defendant's representation to the plaintiff (Paragraph 7); (4) the falsity of the defendant's representation (Paragraph 8); (5) the defendant's knowledge of the falsity of the representations and concealment of the higher offer (Paragraph 9) [*Civ. Code § 1710(1), (3)*]; (6) the defendant's intent to induce reliance by the plaintiff (Paragraph 11); (7) the plaintiff's action in reliance and justifiable reliance on the defendants (Paragraph 10); and (8) damages (Paragraphs 11, 12).

[4] Damages

If a fiduciary breaches a duty, and is guilty of fraud, damages for the fraud are governed by *Civ. Code §§ 1709* and *3333*, rather than by *Civ. Code § 3343*, even if a sale or exchange of property is involved [*Simone v. McKee (1956) 142 Cal. App. 2d 307, 315, 298 P.2d 667* ; *see § 269.27[4]*].

[5] Text References

Witkin, California Procedure (2d ed.), vol. 3, *Pleading*, § 577

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 794-795 (10th ed. 2005)

23 Cal. Jur. 2d, *Fraud and Deceit*, §§ 5-7, 45, 56

[6] Cross References

For similar forms, see *§§ 269.91* and *269.93*.

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Volume 23: Fraud and Deceit thru Good Faith Improver of Real Property-Chs. 269-279
Chapter 269 FRAUD AND DECEIT
PART V. FORMS

23-269 California Forms of Pleading and Practice--Annotated § 269.102

§ 269.102 Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit [Civ. Code §§ 1709, 3333]--Constructive Fraud [Civ. Code § 1573]--Employee Obtaining Money From Employer's Account Without Authorization

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit [Civ. Code §§ 1709, 3333]--Constructive Fraud [Civ. Code § 1573]--Employee Obtaining Money From Employer's Account Without Authorization

[*Caption. See § 269.91* .]

The plaintiff alleges:

[1. *Capacity and residence of the defendant. See § 269.91, Paragraph 1*.]

[2. *Agency allegation, if appropriate. See § 269.91, Paragraph 2*.]

[3. *Fictitious name allegation, if appropriate. See § 269.91, Paragraph 3*.]

4. The defendant _____ [*name*] was the employee of the plaintiff _____ [*name*] from _____ [*date*], until _____ [*date*]. As the plaintiff's employee, the defendant had authority to draw checks on the plaintiff's account at the _____ branch of the _____Bank, located at _____ [*address*], _____ [*city*], _____ County, California, account number _____, _____ [as long as no individual check draw exceeded the sum of $_____ *or* as long as the total amount drawn did not exceed $_____ per _____], which checks were to be used to pay minor business operating expenses incurred by the defendant in the course of his/her employment at the plaintiff's business.

5. By virtue of the defendant's employment by the plaintiff, the defendant owed to the plaintiff a fiduciary duty, and by virtue of the plaintiff's having placed confidence in the fidelity and integrity of the defendant in entrusting the defendant

with the authority to draw small sums from the plaintiff's account, a confidential relationship existed at all times herein mentioned between the plaintiff and the defendant.

6. Despite having voluntarily accepted the trust and confidence reposed in him/her by the plaintiff with regard to the plaintiff's funds in the above-described bank account, and in violation of this relationship of trust and confidence, the defendant abused the trust and confidence of the plaintiff by, on the following occasions, withdrawing the following amounts from the bank account of the plaintiff for the defendant's own personal use rather than for the authorized purposes connected with the plaintiff's business: _____ [*allege dates and amounts of checks drawn on account*]. No part of these sums has been returned by the defendant to the plaintiff, despite the plaintiff's demand therefor.

7. The defendant did the acts herein alleged with the intent to deceive and defraud the plaintiff, and the defendant employed the following devices to conceal from the plaintiff the fact that the defendant had obtained funds from the plaintiff's business bank account for the defendant's own use: _____ [*allege acts of concealment*]. The defendant did these acts with the intent to induce reliance by the plaintiff in the continuing fidelity of the defendant as an employee entrusted with the plaintiff's funds and access to the plaintiff's bank account.

8. The plaintiff in fact placed confidence and reliance in the defendant until on or about _____ [*date*], when, through _____ [*allege circumstances*], the plaintiff discovered the true facts concerning the withdrawals made for the defendant's personal use, as alleged above. The plaintiff reasonably relied on the defendant in view of their long-standing employer-employee relationship.

9. As a result of the fraud of the defendant as herein alleged, the plaintiff has been damaged in the sum of $_____.

[10. *Punitive damages. See § 269.91, Paragraph 9.*]

[*Prayer. See § 269.91* .]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired, See § 269.91* .]

[2] Use of Form

This complaint is for use in an action for damages for constructive fraud [*Civ. Code § 1573*] in which an employee has abused the confidence placed in him or her by his or her employer for the purpose of obtaining money to which the employee is not entitled.

[3] Allegations

This complaint alleges: (1) the existence of a confidential and fiduciary relationship, in which the plaintiff placed trust in the defendant (Paragraphs 4, 5); (2) the breach of duty gaining an advantage to the employee at fault, by misleading the employer to his/her/its prejudice (Paragraph 6) [*Civ. Code § 1573(1)*]; (3) intent to deceive and defraud the plaintiff through concealment of the facts (Paragraph 7) [*Civ. Code § 1710(3)*; *but see Civ. Code § 1573(1)* (no such intent required)]; (4) the plaintiff's actual and justifiable reliance on the defendant (Paragraph 8); and (5) damages (Paragraphs

9, 10) [*Civ. Code §§ 1709, 3333*].

[4] Text References

Witkin, California Procedure (2d ed.), Vol. 3, *Pleading* § 577

[5] Cross References

For a similar form, see *§ 269.91*.

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23-269 California Forms of Pleading and Practice--Annotated § 269.103

§ 269.103 Allegation for Complaint [Code Civ. Proc. § 425.10]--Reason for Failure to Discover Fraud Before Running of Statutory Period of Limitation [Code Civ. Proc. § 338(d)]

[1] FORM Allegation for Complaint [Code Civ. Proc. § 425.10]--Reason for Failure to Discover Fraud Before Running of Statutory Period of Limitation [Code Civ. Proc. § 338(d)]

[*EITHER*]

The fraud and deceit of the defendant as herein alleged was not discovered by the plaintiff until on or about _____ [*date*], a date within three years before the commencement of this action. The plaintiff could not with due diligence discover the fraud and deceit of the defendant until on or about this date because _____ [*specify reasons, e.g.*, the plaintiff had no way of knowing and could not determine the true condition of the building constructed by the defendant until it began to crack and required repairs].

[*OR*]

_____ [*Allege facts showing existence of fiduciary relationship between the plaintiff and the defendant, and lack of any grounds for suspicion as to fiduciary's representations, e.g.*, At all times herein mentioned, the defendant was acting as the real estate agent and broker for the plaintiff, pursuant to a written authorization to sell the plaintiff's real property, known as _____ (*provide address or legal description*), which authorization is attached hereto as Exhibit A and made a part hereof; as the plaintiff's real estate agent and broker, the defendant was acting as agent for the plaintiff with regard to the sale of property herein alleged. The plaintiff was never aware of any facts that made him/her suspicious of the veracity of the defendant's representations, and did not discover the fraud and deceit of the defendant herein alleged until on or about _____ [*date less than three years before commencement of the action*].

[2] Use of Form

These allegations are for use in an action for damages for fraud and deceit if the three year statute of limitations has

expired before the plaintiff has filed the complaint, but the failure to file within the period is excused by the plaintiff's failure to discover the fraud within that period [*Code Civ. Proc. § 338(d)*].

[3] Text References

Witkin, California Procedure, Vol. 5, *Pleading*, § 883 (4th ed. 1997)

[4] Cross References

For a similar form, see *§ 269.91*.

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23-269 California Forms of Pleading and Practice--Annotated § 269.104

§ 269.104 Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit [Civ. Code §§ 1709, 1710]--Intentional [Civ. Code § 1710(1)] or Negligent [Civ. Code § 1710(2)] Misrepresentation--Misrepresentation in Employment Recommendation Causing Injury to Third Person

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages for Fraud and Deceit [Civ. Code §§ 1709, 1710]--Intentional [Civ. Code § 1710(1)] or Negligent [Civ. Code § 1710(2)] Misrepresentation--Misrepresentation in Employment Recommendation Causing Injury to Third Person

[*Caption. See § 269.91.*]

The plaintiff alleges:

1. [*Capacity and residence of the defendant. See § 269.91, Paragraph 1.*]

2. [*Agency allegation, if appropriate. See § 269.91, Paragraph 2.*]

3. [*Fictitious name allegation, if appropriate. See § 269.91, Paragraph 3.*]

4. On or about _____ [*date*], the defendant represented to _____ [*name of prospective employer*] that _____ [*name of person who injured plaintiff*] possessed the following characteristics and/or qualifications: _____ [*specify representations made in letter of recommendation, e.g.,* a fondness for children and a good ability to work with children].

5. The representations described in Paragraph 4 were false in that _____ [*specify facts that show falsity of representations, e.g.,* the defendant had terminated _____ (*name of person who injured plaintiff*) because of an assault on a child in his/her charge].

6. The misrepresentation alleged in Paragraph 4, above, presented a substantial, foreseeable risk of physical injury in that _____ [*specify facts tending to show risk of injury, e.g.,* the history of assault of children posed a

danger to children under his/her charge, and the representations made it more likely that he/she would be employed in a setting in which he/she would oversee children].

7. [The plaintiff is informed and believes, and thereon alleges, that] The misrepresentation alleged in Paragraph 4, above, was relied on by _____ [*name of prospective employer*] in its determination to hire _____ [*name of person who injured plaintiff*].

8. _____ [*Allege injury, e.g.,* On or about _____ (*date*), _____ (*name of person who injured plaintiff*), while in the employ of _____ (*name of prospective employer*), assaulted the plaintiff by seizing her and attempting to push her into an empty room. As a result, the plaintiff's arm and leg were bruised, and she feared for her safety and suffered emotional distress as a result of that fear for her safety.]

9. _____ [*Allege damages suffered as a result of the injury, e.g.,* The plaintiff incurred medical expenses in (the sum of $_____ *or* an amount according to proof).]

10. [*Punitive damages. See § 269.91, Paragraph 9.*]

[*Prayer. See § 269.91.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

This form of complaint is for use in an action for damages for fraud and deceit, based on a misrepresentation made in an employment reference that presented a substantial, foreseeable risk of physical injury to third persons, and that in fact resulted in physical injury to a third person [*see Randi W. v. Muroc Joint Unified Sch. Dist. (1997) 14 Cal. 4th 1066, 1081, 60 Cal. Rptr. 2d 263, 929 P.2d 582]* . Ordinarily, the allegations in this complaint would be made in conjunction with an action against the employer of the person who actually committed the wrongful act that injured the plaintiff, and against that person if he or she has assets likely to be subject to enforcement.

[3] Allegations

This complaint alleges the following:

- The representations made by the defendant in an employment reference (especially a letter of recommendation) (Paragraph 4).

- The falsity of those representations (Paragraph 5) [*see Randi W. v. Muroc Joint Unified Sch. Dist. (1997) 14 Cal. 4th 1066, 1083-1084, 60 Cal. Rptr. 2d 263, 929 P.2d 582* (positive assertions in reference that failed to disclose known material facts concerning misconduct sufficient to constitute affirmative misrepresentation)].

- The representations presented a substantial, foreseeable risk of physical injury to third persons (Paragraph 6) [*Randi W. v. Muroc Joint Unified Sch. Dist. (1997) 14 Cal. 4th 1066, 1081, 60 Cal. Rptr. 2d 263, 929 P.2d 582]* .

- That the misrepresentations were relied on by the person or entity who hired the person who injured

the plaintiff (Paragraph 7) [*see Randi W. v. Muroc Joint Unified Sch. Dist. (1997) 14 Cal. 4th 1066, 1084-1085, 60 Cal. Rptr. 2d 263, 929 P.2d 582* (reliance requirement satisfied if recommendation was relied on in hiring; plaintiff need not have relied on misrepresentation)].

- The plaintiff's injury and damages resulting from the hiring of the person (Paragraphs 8 and 9).

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Chapter 270 FRAUDULENT CONVEYANCES

23-270 California Forms of Pleading and Practice--Annotated 270.syn

§ 270.syn Synopsis to Chapter 270: FRAUDULENT CONVEYANCES

§ 270.01 Scope of Chapter

§ 270.02 Cross References

§§ 270.03- 270.09 [Reserved]

§ 270.10 Governing Law

§ 270.11 Purpose of Law of Fraudulent Transfers

§ 270.12 Right to Jury Trial

§ 270.13 Fraud Distinguished

§§ 270.14- 270.29 [Reserved]

§ 270.30 Governing Law

§ 270.31 Jury Trial

§ 270.32 Nature and Purpose of Law of Fraudulent Transfers

§ 270.33 Persons Pemitted to Attack Transfer or Obligation

[1] In General

[2] Assignee for Benefit of Creditors

[3] Trustee in Bankruptcy

[4] Prosecution of Underlying Indebtedness

§ 270.34 Required Injury to Creditor

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[2] Property Held in Trust

[3] Exempt Property

[4] Homesteads

[5] Property Subject to Valid Lien

[6] Interest Held in Tenancy by the Entireties

§ 270.35 Transfers and Obligations

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[2] Transfers That Are Not Voidable

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[b] Noncollusive Enforcement of Lien

[3] Change of Beneficiary of Life Insurance Policy

§ 270.36 Debtor's Retention of Interest in Property

§ 270.37 When Transfer Occurs

[1] Real Property Other Than Fixtures

[2] Other Property and Fixtures

[3] Transferee's Interest Not Perfected Before Commencement of Creditor's Actions

§ 270.38 When Obligation Is Incurred

§ 270.39 Grounds for Finding Fraudulent Transfers

§ 270.40 Transfers Made With Actual Fraudulent Intent

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[2] Knowledge of Fraud by Transferee

[3] Future Creditors

[4] Character of Intent

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§ 270.41 Transfer Made With Intent or Belief That Debts Incurred Will Not Be Paid

§ 270.42 Transfer Made by Insolvent Without Reasonably Equivalent Consideration

[1] In General

[2] Present Creditors Only Protected

[3] Insolvency Defined

[a] In General

[b] Insolvency of Partnership

[c] Debts Excluded from Calculation

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[e] Nonpayment of Debts as Giving Rise to Presumption of Insolvency

[f] Determined as of Time of Transfer

[4] Presumption of Solvency; Burdens of Proof

[5] Reasonably Equivalent Value of Consideration

[a] Generally

[b] Illegal Consideration

[c] Antecedent Debts

§ 270.43 Transfers Made Without Reasonably Equivalent Consideration Leaving Insufficient Capital in Hands of Grantor

§ 270.44 Creditor's Remedies

[1] Avoidance of Transfer or Obligation

[2] Attachment

[3] Injunction

[4] Appointment of Receiver

[5] Other Relief; Accounting

[6] In Action on Underlying Claim

§ 270.45 Remedies Compared

§ 270.46 Transferee's Right to Give Undertaking

§ 270.47 Rights of Transferee in Property Transferred

[1] In General

[2] Good Faith Transferee Who Paid Reasonably Equivalent Value

[3] Good Faith Transferee Who Did Not Pay Reasonably Equivalent Value

[4] Participant in Actual Fraud

§ 270.48 Liability of Transferee

[1] Innocent Transferee

[2] Conspiring Transferee

§ 270.49 Statute of Limitations

[1] Transfers Made With Actual Intent to Defraud

[2] Transfers Made During Lawsuit Establishing Debtor-Creditor Relationship

[3] Transfers for Less Than Reasonably Equivalent Value

[4] Outside Limit

[5] Quiet Title Action by Execution Sale Purchaser

§§ 270.50- 270.69 [Reserved]

§ 270.70 Governing Law

§ 270.71 Transfers Made Without Accompanying Change of Possession

§ 270.72 Requirement of Delivery and Change of Possession

§ 270.73 Good Faith and Adequate Consideration

§ 270.74 Required Possession of Property by Transferor

§ 270.75 Relationship of Transferor and Transferee

§ 270.76 Impracticality of Actual Delivery

§ 270.77 Accessions to Personal Property as Not Transfers

§ 270.78 Statutory Exceptions

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[2] Claim Arising After Filing of Financing Statement and Publication of Notice

[3] Buyer in Ordinary Course of Business Overrides Exceptions

[4] Purchase or Security Interest From Transferee

[5] Notice and Publication Requirements

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[b] Security Interest Acquired From Transferee

§ 270.79 Retention of Possession by Merchant-Seller

§ 270.80 Retention of Goods by Lessor

§ 270.81 Creditors Entitled to Attack Transfer

§ 270.82 Creditors Protected by Other Statutory Schemes

§ 270.83 Remedies for Creditors and Good-Faith Purchasers

§ 270.84 Statute of Limitations

§ 270.85 Effect of Transfer on Transferee

§§ 270.86- 270.99 [Reserved]

§ 270.100 Governing Law

§ 270.101 Objective of Bulk Sales Law

§ 270.102 Effect of Failure to Give Required Notice

[1] In General

[2] Buyer's Liability to Single Claimant

[3] Good Faith Exceptions

[4] Limit on Buyer's Cumulative Liability

[5] Effect Under Prior Law

§ 270.103 Transactions Subject to Bulk Sales Law

[1] Basic Definitions and Applicability

[2] "Inventory" Defined

[3] "Equipment" Defined

[4] "Sale in Ordinary Course of Seller's Business" Defined

[5] "Date of Bulk-Sale Agreement" Defined

§ 270.104 Buyer's Duties With Respect to Bulk Sale Other Than Auction

§ 270.105 Bulk Sale for Cash or Obligation to Pay Cash

[1] In General

[2] Duty to Apply Consideration to Creditors' Claims

[3] Dispute as to Claims Due: Claimant's Right to Attachment

[4] Cash Insufficient to Pay All Claims in Full

[5] Payment of Claims; Interpleader Action as Alternative

[6] Effect on Lien or Security Interest

§ 270.106 Escrow Procedures

[1] Buyer's Deposit

[2] When Deposit Does Not Cover Claims

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[b] Priorities for Distribution

§ 270.107 Bulk Sales by Auction

[1] Auctioneer or Liqudiator as "Buyer"

[2] "Auctioneer" and "Liquidator" Defined

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§ 270.108 Transactions Excepted From Bulk Sales Law

[1] Transfers to Satisfy Obligations

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[3] Sale Required by Law

[4] Buyer Assumes Known Claims

[5] Buyer Assumes All Seller's Debts

[6] Newly Organized Entity Assumes All Seller's Debt

[7] Sales for Less Than $10,000 or More Than $5 Million

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[9] Transfer of Liquor License

[10] Transfer of Goods in Warehouse

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[2] Definitions

[3] Forms of Fraudulent Transfers or Obligations

[4] Insolvency

[5] Preferences

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§ 270.130A California Civil Jury Instructions

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[2] Action to Set Aside Fraudulent Transfer

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[b] Assignment

[c] Award of Interest

[d] Equitable Defenses

[e] Jury Trial

[f] Parties to Action

[g] Procedural Prerequisites

[h] Splitting Cause of Action

[i] Statute of Limitations

[3] Burden of Proof

[4] Conspiracy

[5] Creditors Permitted to Attack Transfer

[a] Interest Which May Be Reached

[b] Interest Which May Not Be Reached

[c] Persons With Contingent Claims

[d] Required Injury

[6] Insolvency

[7] Levying Execution on Property

[8] Liability of Transferee

[a] In General

[b] Good Faith Transferee

[c] Conspiring Transferee

[9] Lis Pendens

[10] Preferences

[11] Reasonably Equivalent Value

[a] In General

[b] Antecedent Debts

[12] Specific Transfers

[13] Statute of Limitations

[14] Transfer Binding on Transferor

[a] In General

[b] Exceptions

[15] Transferee's Rights

[a] Good Faith Transferee

[b] Fraudulent Transferee

[16] Transfers Made Leaving Unreasonably Small Remaining Assets

[17] Transfers Made With Actual Fraudulent Intent

[a] In General

[b] Burden of Proof

[c] Evidence of Fraudulent Intent

[i] Particular Circumstances and Inferences

[ii] Transfers to Relations

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§ 270.133 Text References

§§ 270.134- 270.149 [Reserved]

§ 270.150 State Statutes

[1] Accessions to Personal Property

[2] Attachment and Execution

[3] Transfers Made Without Actual Delivery

[a] In General

[b] Retention by Lessor

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[1] Delivery If Transferor Is Cotenant

[2] Impracticality of Actual Delivery

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[4] Requisites of Delivery and Change of Possession

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§ 270.170 State Statutes

[1] Attachment

[2] Bulk Sales Within Scope of Bulk Sales Law

[3] Definitions

[4] Liability for Failure to Give Notice

[5] Notice

[6] Sale for Cash or Obligation to Pay Cash

[7] Tax Liability

[8] Transactions Excepted From Bulk Sales Law

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§ 270.190 Complaint to Set Aside Fraudulent Transfer or Annul Fraudulent Obligation [Civ. Code § 3439.07(a)(1)]--And for Damages Based on Conspiracy--Transfer Made or Obligation Incurred With Actual Fraudulent Intent [Civ. Code § 3439.04(a)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction

[5] Venue

[6] Statute of Limitations

[7] Necessary Party Defendants

[8] Other Remedies

[9] Recordation of Lis Pendens

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[11] State Statutes

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[a] Elements of Conspiracy Action

[b] Elements of Fraudulent Transfer Action

[c] Nature of Action

[d] Parties to Action

[e] Privilege Against Self-Incrimination

[f] Receivership

[g] Recovery of Interest

[h] Splitting Cause of Action

[i] Venue

[13] Text References

[14] Cross References

§ 270.191 Allegation--In Complaint to Set Aside Fraudulent Transfer or Obligation [Civ. Code § 3439.07(a)]--Transfer Made or Obligation Incurred by Insolvent Other Than Partnership [Civ. Code §§ 3439.02(a), (c)-(e), 3439.05]

[1] FORM

[2] Use of Form

[3] Alleging Debtor's Insolvency

[4] State Statutes

[5] Decisions

[6] Text References

§ 270.192 Allegation--In Complaint to Set Aside Fraudulent Transfer or Obligation [Civ. Code § 3439.07(a)]--Transfer Made or Obligation Incurred by Insolvent Partnership [Civ. Code §§ 3439.02, 3439.05]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 270.193 Allegation--In Complaint to Set Aside Fraudulent Transfer or Annul Fraudulent Obligation [Civ. Code § 3439.07(a)(1)]--Transfer Made or Obligation Incurred by Person Believing Debts Will Be Incurred Beyond Person's Ability to Pay [Civ. Code § 3439.04(a)(2)(B)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

§ 270.194 Complaint to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)]--Transfer Made Leaving Unreasonably Small Remaining Assets With Which to Engage in Business or Transaction [Civ. Code § 3439.04(a)(2)(A)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

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[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

§ 270.196 Allegation--In Complaint to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)--Concealment of Fraudulent Transfer by Transferor and Transferee [Civ. Code § 3439.09(a), (c)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 270.197 Allegations--In Complaint to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)]--For

Accounting of Profits or Proceeds Received by Transferee

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

§ 270.198 Cross Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--In Action to Set Aside Fraudulent Transfer or Obligation [Civ. Code § 3439.07(a)(1)]--To Determine Tranferee's or Obligee's Right to Retain Interest in or Lien on Property or to Enforce Obligation [Civ. Code § 3439.08(d)]

[1] FORM

[2] Use of Form

[3] Affirmative Relief

[4] State Statutes

[5] Decisions

[6] Cross References

§ 270.199 Affirmative Defense--To Action to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)]--Transfer as Preference of Defendant Transferee Over Plaintiff [Civ. Code § 3432]

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Decisions

§ 270.200 Affirmative Defense--To Action to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)]--Plaintiff Creditor Not Harmed by Fraudulent Transfer

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[a] Exempt Property; Homesteads

[b] No Injury Sustained by Creditor

[c] Property Previously Subjected to Execution

[5] Cross References

§ 270.201 Affirmative Defense--To Action to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)]--Transfer Resulted From Termination of Lease on Debtor's Default [Civ. Code § 3439.08(e)(1)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 270.202 Affirmative Defense--To Action to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)]--Transfer Resulted from Noncollusive Enforcement of Lien in Accordance With Applicable Law [Civ. Code § 3439.08(e)(2)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

§§ 270.203- 270.219 [Reserved]

§ 270.220 Complaint to Set Aside Transfer of Personal Property--Transfer Made Without Immediate Delivery Followed by Actual and Continued Change of Possession [Civ. Code § 3440(a)]--By Creditor of Transferor

[1] FORM

[2] Use of Form

[3] Allegations

[4] Remedies

[5] State Statutes

[6] Decisions

[7] Text References

[8] Cross References

§ 270.221 Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--To Determine Validity of Transfer of Personal Property When There Was No Immediate Delivery Followed by Actual and Continued Change of Possession--By Purchaser for Value in Good Faith Subsequent to Transfer [Civ. Code § 3440]

[1] FORM

[2] Use of Form

[3] Alternative Remedies

[4] Cross References

§ 270.222 Affirmative Defense--To Action to Set Aside or Declare Void Transfer of Personal Property--Transfer of Property Excluded by Statute [Civ. Code § 3440.1(a)-(g), (i)-(m)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 270.223 Affirmative Defense--To Action to Set Aside or Declare Void Transfer of Personal Property--Transfer Occurred or Claim of Plaintiff Arose After Filing of Financing Statement and Publication of Notice [Civ. Code §§ 3440.1(h), 3440.2]

[1] FORM

[2] Use of Form

[3] Cross References

§§ 270.224- 270.239 [Reserved]

§ 270.240 Notice of Intended Bulk Sale [Com. Code § 6105]--For General Use

[1] FORM

[2] Use of Form

[3] Recording, Publication, and Delivery of Notice

[4] Contents of Notice

[5] State Statutes

[6] Text References

§ 270.241 Notice of Intended Bulk Sale [Com. Code § 6105]--By Auction or Conducted by Liquidator on Seller's Behalf [Com. Code § 6108]

[1] FORM

[2] Use of Form

[3] Contents of Notice

[4] State Statutes

[5] Cross References

§ 270.242 Complaint for Recovery of Claim--By Claimant Against Buyer of Bulk Sale [Com. Code § 6107]

[1] FORM

[2] Use of Form

[3] Who May Be Plaintiff

[a] "Claimant" Defined

[b] "Claim" Defined

[c] Holders of Contingent and Unliquidated Claims Excepted

[4] Allegations

[5] Statute of Limitations

[a] One Year Period

[b] "Date of Sale" Defined

[6] State Statutes

[7] Text References

[8] Cross References

§ 270.243 Allegations--In Complaint for Recovery of Claim--By Claimant Against Auctioneer or Liquidator Who Conducted Bulk Sale [Com. Code §§ 6107, 6108]

[1] FORM

[2] Use of Form

[3] Relevant Definitions

[a] Bulk Sale

[b] Auctioneer

[c] Liquidator

[d] Date of Bulk Sale

[4] Cross References

§ 270.244 Affirmative Defense--To Action for Recovery of Claim by Claimant Against Buyer of Bulk Sale [Com. Code § 6107]--Sale Excluded by Stature [Com. Code § 6103(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 270.245 Affirmative Defense--To Action for Recovery of Claim by Claimant Against Buyer of Bulk Sale [Com. Code § 6107]--Statutory Limit on Cumulative Liability for Single Sale Exceeded [Com. Code § 6107(d)-(f)]

[1] FORM

[2] Use of Form

[3] Limit on Buyer's Cumulative Liability

[a] Sale Consists Only of Inventory and Equipment

[b] Net Contract Price Defined

[c] Assets Sold Include Property Other Than Inventory and Equipment

[d] Net Value Calculation

[4] State Statutes

[5] Cross References

§ 270.246 Affirmative Defense--To Action for Recovery of Claim by Claimant Against Buyer of Bulk Sale [Com. Code § 6107]--Good Faith Attempt to Comply With, or to Exclude Sale From, Bulk Sale Notice Requirements [Com. Code § 6107(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

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Chapter 270 FRAUDULENT CONVEYANCES
PART I. SCOPE

23-270 California Forms of Pleading and Practice--Annotated § 270.01

§ 270.01 Scope of Chapter

This chapter discusses and contains forms for use in actions to set aside fraudulent transfers and conveyances and annul fraudulent obligations under the Uniform Fradulent Transfer Act. As used in this part, the term transfer includes conveyances of real property, transfers of personal property, and obligations.

This chapter contains forms of complaints and allegations for use in actions by creditors to set aside fraudulent transfers and annul fraudulent obligations [*see §§ 270.190 -270.197*], a cross complaint for use by a transferee or obligee in an action to set aside the allegedly fraudulent transfers or obligation for determination of the tranferee's or obligee's right to retain an interest in or lien on the property or to enforce the obligation [*see § 270.198*], and forms of affirmative defenses for use by transferees or obligees of allegedly fraudulent transfers or obligations in actions to have the transfer or obligation set aside [*see §§ 270.199 -270.202*].

This chapter also discusses and contains forms for use in actions involving transfers under *Civ. Code § 3440 et seq.* of personal property made without immediate delivery and an actual change of possession. It includes forms of complaints by a creditor to set aside such a transfer [*see § 270.220*] and for declaratory relief determining the validity of such a transfer by a purchaser from the transferor [*see § 270.221*]. It also includes affirmative defenses for use in actions under *Civ. Code § 3440 et seq.* when transfers of property are made which are excepted from the provisions of *Civ. Code § 3440 et seq.* [§§ 270.222, 270.223].

This chapter also discusses the notice requirements for bulk sales under *Com. Code § 6101 et seq.*, the various exceptions and alternatives to those requirements, and the consequences of failure to give the notice. Forms in this part include notices [§§ 270.240, 270.241], a complaint to set aside or to recover the value of a bulk sale that was not made in compliance with the notice requirements [*see § 270.242*], an allegation for use to modify such a complaint when the bulk sale was made by a sale at an auction or was conducted by a liquidator [*see § 270.243*], and affirmative defenses to such actions [*see §§ 270.244 -270.246*].

Legal Topics:

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

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§ 270.02 Cross References

For discussion and forms for use in attachment and execution proceedings, and in third-party claims in such proceedings, see Ch. 62, *Attachment* , and Ch. 254, *Executions and Enforcement of Judgments* .

For a discussion and forms for use in actions to quiet title, see Ch. 482, *Quieting Title* .

For discussions and forms for use in attachment and execution proceedings, and in third-party claims in such proceedings, see Ch. 62, *Attachment* , and *Executions and Enforcement of Judgments*, respectively.

Legal Topics:

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

§§ 270.03[Reserved]

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23-270 California Forms of Pleading and Practice--Annotated § 270.10

§ 270.10 Governing Law

The Uniform Fraudulent Transfer Act is contained in *Civ. Code § 3439 et seq.* Void transfers of personal property by persons having possession or control of the property and accompanied by an immediate delivery followed by an actual and continued change of possession of the property are governed by *Civ. Code § 3440 et seq.* Sales in bulk made in noncompliance with notice requirements when notices are required are governed by *Com. Code § 6101 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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23-270 California Forms of Pleading and Practice--Annotated § 270.11

§ 270.11 Purpose of Law of Fraudulent Transfers

Generally, the law of fraudulent transfers is designed primarily for the protection of creditors of persons who make such transfers. A creditor pursuing an action or proceeding under *Civ. Code § 3439 et seq.* (Uniform Fraudulent Transfer Act) or *Civ. Code § 3440 et seq.* (transfers without delivery and change of possession) has the right to treat property which his or her debtor has fraudulently disposed of as if the debtor still had possession [*see Civ. Code § 3518*]. Thus, a transfer or obligation which is fraudulent as to a creditor is void as to that creditor [*Civ. Code § 3439.07(a)(1)*; *Civ. Code § 3440*]. In the case of a bulk sale conducted without required notice, the buyer is liable to the creditor for the amount of its claim that remains unpaid because of the failure to publish or record proper notice [*see Com. Code § 6107*].

Although a creditor of a transferor in an appropriate fact situation may invoke the three separate laws governing fraudulent conveyances in his or her action to have a conveyance made by his or her debtor declared void [*see Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 587, 589, 592, 25 Cal. Rptr. 545, 375 P.2d 425* ; *see also* Uniform Commercial Code Comment to former *Com. Code § 6101*], the object of each of these laws is different. The Uniform Fraudulent Transfer Act is designed to prevent debtors from placing property beyond the reach of their creditors when the property should be legitimately made available to satisfy the creditors' demands [*see Chichester v. Mason (1941) 43 Cal. App. 2d 577, 584, 111 P.2d 362* (decided under former *Civ. Code §§ 3439*, 3442)]. The object of *Civ. Code § 3440*, making fraudulent transfers of personal property without delivery and actual change of possession, is to prevent the deception of creditors arising out of the ostensible ownership of the property by the transferor who has made a secret transfer of the property [*see Dersch v. Thomas (1934) 138 Cal. App. Supp. 785, 789, 30 P.2d 630]* . Finally, the object of *Com. Code § 6101 et seq.* is to prevent merchantswho owe debts from selling out their stock in trade for any price and disappearing with the proceeds of the sale [*see* Uniform Commercial Code Comment to former *Com. Code § 6101*].

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For related research and practice materials, see the following legal topics:
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23-270 California Forms of Pleading and Practice--Annotated § 270.12

§ 270.12 Right to Jury Trial

When a creditor sues "to recover a fraudulent conveyance of a determinate sum of money," the creditor has a right under the California Constitution to demand a jury trial on that cause of action [*Cal. Const., art. I, § 16*; *Wisden v. Superior Court (2004) 124 Cal. App. 4th 750, 760, 21 Cal. Rptr. 3d 523]* . (Note that this holding is based on historical peculiarities of English common law, especially the nature of a common law action for money had and received. This holding does not apply, and the court's reasoning might not be relevant, to an action based on a fraudulent conveyance of personal property or real property.

Legal Topics:

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23-270 California Forms of Pleading and Practice--Annotated § 270.13

§ 270.13 Fraud Distinguished

The law governing cases of transfers made in fraud of creditors should be distinguished from that which governs cases of fraud involving misrepresentations. The fraud that entitles a party to rescind a transfer or seek damages arising out of the transfer is based on false representations inducing reliance, whereas a transfer or obligation may be in fraud of creditors because it was a gift by an insolvent donor [*Civ. Code § 3439.05*; *see Judicial Council of California Civil Jury Instructions, CACI No. 4203* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)], was designed to put the property beyond the reach of creditors [*see Civ. Code § 3439.04(a)*; *Judicial Council of California Civil Jury Instructions, CACI Nos. 4200, 4202* (LexisNexis Matthew Bender) (related California Judicial Council jury instructions)], or, in the case of personal property, because it was not followed by immediate delivery [*see Civ. Code § 3440*; *Strong v. Strong (1943) 22 Cal. 2d 540, 547, 140 P.2d 386]* .

Legal Topics:

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

§§ 270.14[Reserved]

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23-270 California Forms of Pleading and Practice--Annotated § 270.30

§ 270.30 Governing Law

The Uniform Fraudulent Transfer Act is contained in *Civ. Code § 3439 et seq.* In addition, *Civ. Code § 3439.10* provides that, unless displaced by the provisions of the act, the principles of law and equity, including the law merchant and the law relating to principle and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions. Therefore, compliance with the Bulk Sales Act [*see Com. Code § 6101 et seq.*; *see also § 270.100* et seq.] does not preclude recovery on a fraudulent transfer claim, as the two acts are not mutually exclusive [*see Monastra v. Konica Business Machines, U.S.A., Inc. (1996) 43 Cal. App. 4th 1628, 1639-1640, 51 Cal. Rptr. 2d 528]* .

The changes made by the adoption of the California version of the Uniform Fraudulent Transfer Act in 1986 [Stats. 1986, ch. 383] apply only to transfers made or obligations incurred on or after January 1, 1987. As to transfers made or obligations incurred prior to that date, the law in effect at the time the transfer was made or the obligation was incurred applies. Insofar as the provisions of *Civ. Code § 3439 et seq.* are substantially the same as the provisions of former *Civ. Code § 3439 et seq.* (which was repealed by Stats. 1986, ch. 383), they are to be construed as restatements and continuations, and not as new enactments [*Civ. Code § 3439.12*].

However, the Uniform Fraudulent Transfer Act does not supersede or otherwise eliminate common law remedies that existed before the uniform laws went into effect. Rather, the remedies of the UFTA and its predecessor are cumulative to the pre-existing common law remedies [*Wisden v. Superior Court (2004) 124 Cal. App. 4th 750, 758, 21 Cal. Rptr. 3d 523* ; *Cortez v. Vogt (1997) 52 Cal. App. 4th 917, 929, 60 Cal. Rptr. 2d 841* ; *see Macedo v. Bosio (2001) 86 Cal. App. 4th 1044, 1051, 104 Cal. Rptr. 2d 1]* .

The law governing fraudulent transfers was originally adopted in California in 1872. In 1939, California enacted amendments to substantially conform to the 1939 version of the Uniform Fraudulent Conveyance Act (UFCA). The Uniform Fraudulent Transfer Act (UFTA) was adopted in 1984. Except for changes to conform to bankrupcty law and the Uniform Commercial Code, it parallels the Uniform Fraudulent Conveyances Act. In 1986, California adopted the UFTA with certain variations and exceptions. Notably absent from the California version is Section 5 of the Uniform Fraudulent Transfer Act which relates to preferential transfers to insiders, because preferences are allowable under

California law [*see Civ. Code § 3432* (debtor is allowed to pay one creditor in preference over another)].

In this part, unless otherwise noted, cases decided before 1940 were decided under the California law prior to adoption of the 1939 admendments, and cases decided before 1987 were decided under the California law as it existed after adoption of the 1939 admendments but before enactment of the 1986 amendments.

To the extent that provisions of the bankruptcy code are similar to the California version of the UFTA, cases decided under the bankruptcy code may be persuasive [*see, e.g., 11 U.S.C. §§ 101(54)* (definition of transfer), 548 (fraudulent transfers)].

Legal Topics:

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23-270 California Forms of Pleading and Practice--Annotated § 270.31

§ 270.31 Jury Trial

Because the right to trial by jury existed for common-law fraudulent transfer claims when the California Constitution was adopted in 1850, in California a plaintiff still has a right to trial by jury on a claim for fraudulent transfer [*Wisden v. Superior Court (2004) 124 Cal. App. 4th 750, 756-757, 760, 21 Cal. Rptr. 3d 523]* . This is notwithstanding the fact that the UFTA itself does not provide for trial by jury. The rights established by the UFTA are cumulative to pre-existing rights. Moreover, even if the Legislature had intended to abolish the common-law right of action by adopting the UFTA, it could not thereby dispense with the right to trial by jury [*Wisden v. Superior Court (2004) 124 Cal. App. 4th 750, 758, 21 Cal. Rptr. 3d 523]* . It is of no major consequence if the prayer in plaintiff's complaint does not expressly seek damages, for neither the prayer nor even the form of action pleaded is conclusive; rather the legal or equitable nature of a cause of action is determined by the nature of the rights involved, the mode of relief to be afforded, and the facts of the particular case [*Wisden v. Superior Court (2004) 124 Cal. App. 4th 750, 755, 757, 21 Cal. Rptr. 3d 523]* .

Legal Topics:

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23-270 California Forms of Pleading and Practice--Annotated § 270.32

§ 270.32 Nature and Purpose of Law of Fraudulent Transfers

The Uniform Fraudulent Transfer Act (*Civ. Code § 3439 et seq.*) prohibits debtors from making transfers of property in fraud of the rights of their creditors. The Act and its predecessor Civil Code sections [former *Civ. Code §§ 3439-3439.12*, 3442] have been designed to prevent debtors from placing property beyond the reach of their creditors when that property should legitimately be available for the satisfaction (those such creditors' demands [*Chichester v. Mason (1941) 43 Cal. App. 2d 577, 584, 111 P.2d 362* (decided prior to 1939 amendments)]. If a debtor makes a fraudulent transfer within the meaning of the Act, the creditor has the right to have the interest of the debtor in the property transferred at the time of the transfer subjected to the creditor's claim [*see Ahmanson Bank & Trust Co. v. Tepper (1969) 269 Cal. App. 2d 333, 343, 74 Cal. Rptr. 774]* . Whether his or her claim has matured or remained unmatured, the creditor can elect from several remedies, subject to certain rights of the transferee, including having the transfer or obligation set aside, attaching or levying execution against the asset transferred or its proceeds in the hands of the transferee, enjoining disposition of the asset or its proceeds, appointment of a receiver to take charge of the asset or its proceeds, and other provisional and equitable remedies [*Civ. Code § 3439.07*].

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23-270 California Forms of Pleading and Practice--Annotated § 270.33

§ 270.33 Persons Pemitted to Attack Transfer or Obligation

[1] In General

A person may seek the remedies provided under the Uniform Fraudulent Transfer Act only if he or she is a creditor to whom a debt is owed within the meaning of the Act [*Civ. Code § 3439.07*; *see Hansen v. Cramer (1952) 39 Cal. 2d 321, 323, 245 P.2d 1059* ; *Pope v. National Aero Fin. Co. (1965) 236 Cal. App. 2d 722, 728, 46 Cal. Rptr. 233]* . A creditor is defined as a person having any claim against a debtor and includes an assignee of a general assignment for the benfit of creditors, as defined in *Code Civ. Proc. § 493.010* [*Civ. Code § 3439.01(c)*]. A claim is a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured [*Civ. Code § 3439.01(b)*]. Thus, a creditor need not show that he or she has a specific lien on the property subject to the creditor's claim or that a particular claim has been prosecuted to judgment [*Estate of Kalt (1940) 16 Cal. 2d 807, 811, 108 P.2d 401* (decided under pre-1939 law); *see Weisenburg v. Cragholm (1971) 5 Cal. 3d 892, 896, 97 Cal. Rptr. 862, 489 P.2d 1126]* . For example, in tort actions, because the relationship of debtor and creditor arises the moment the cause of action accrues [*Hansen v. Cramer (1952) 39 Cal. 2d 321, 323, 245 P.2d 1059* ; *Freeman v. LaMorte (1957) 148 Cal. App. 2d 670, 307 P.2d 734]* , a person having a tort claim is not required to prosecute his or her action before seeking a remedy under the Fraudulent Transfer Act [*see Hansen v. Cramer (1952) 39 Cal. 2d 321, 323, 245 P.2d 1059]* .

However, a creditor may not attack a transfer if the claim against the debtor has been reduced to judgment and the judgment is subsequently reversed. In such a case, if the reversed judgment was the sole basis for the trial court's determination that the plaintiff creditor was a creditor within the meaning of the Uniform Fraudulent Transfer Act, the plaintiff is not entitled to any remedy under the act [*Weisenburg v. Cragholm (1971) 5 Cal. 3d 892, 895-896, 97 Cal. Rptr. 862, 489 P.2d 1126]* .

[2] Assignee for Benefit of Creditors

An assignee of a general assignment for the benefit of creditors may exercise any or all of the creditors' rights specified in *Civ. Code § 3439.07* if they are available to any one or more creditors of the assignor who are beneficiaries of the assignment, and, in that event (1) only to the extent the rights or remedies are so available and (2) only for the benefit of

those creditors whose rights are asserted by the assignee [*Civ. Code § 3439.07(d)*; for discussion of *Civ. Code § 3439.07, see §§ 270.44, 270.45*; for discussion of assignment for benefit of creditors, *see* Ch. 307, *Insolvency*].

[3] Trustee in Bankruptcy

A trustee in bankruptcy may assert the rights of a creditor available under applicable law to avoid a fraudulent transfer if there is a creditor holding an unsecured claim that is allowable under *11 U.S.C. § 502* or that is not allowable only under *11 U.S.C. § 502(e)* [*11 U.S.C. § 544(b)*; *see* Collier On Bankruptcy(15th ed), Ch. 544, *Trustee as Lien Creditor and as Successor to Certain Purchasers*]. Under *11 U.S.C. § 544(b)*, the trustee may assert California law, which reaches certain transfers that are not avoidable under the bankruptcy code. The bankruptcy code provision with respect to fraudulent transfers allows avoidance only of transfers made within the year prior to the filing of the petition in bankrutpcy; however, certain other transfers, specifically preferences, are voidable under bankruptcy law while they would not be under California law [*see 11 U.S.C. §§ 547* (preferences), 548 (fraudulent transfers); *see also* Collier On Bankruptcy(15th ed), Ch. 547, *Preferences*; Ch. 548, *Fraudulen Transfers and Obligations*]. District courts and bankrupcty courts have original but not exclusive jurisdition over actions by trustees to set aside preferences and fraudulent transfers [*28 U.S.C. §§ 157(b)(1), (2)(F), (H), 1334, see 28 U.S.C. § 1409(b), (c)* (venue)].

[4] Prosecution of Underlying Indebtedness

Since the creditor's claim need not be reduced to judgment, the cause of action on the underlying indebtedness owed to a plaintiff creditor may be adjudicated in the same action as one for setting aside the defendant's fraudulent transfer or obligation [*see Ahmanson Bank & Trust Co. v. Tepper (1969) 269 Cal. App. 2d 333, 343, 74 Cal. Rptr. 774* ; *Michal v. Adair (1944) 66 Cal. App. 2d 382, 389, 152 P.2d 490]* . However, a creditor may set aside a fraudulent transfer or obligation, or attach the fraudulently transferred asset in the hands of the transferee, or seek any of the remedies enumerated at *Civ. Code § 3439.07(a)(3)*, even though his or her claim has not yet matured if the elements necessary for a fraudulent transfer or obligation to be set aside are present [*see Civ. Code § 3439.07(a)(1)-(3)*; *Weisenburg v. Cragholm (1971) 5 Cal. 3d 892, 896, 97 Cal. Rptr. 862, 489 P.2d 1126]* .

Legal Topics:

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23-270 California Forms of Pleading and Practice--Annotated § 270.34

§ 270.34 Required Injury to Creditor

[1] In General

Even though a person is a creditor within the meaning of the Uniform Fraudulent Transfer Act, a transfer that may otherwise be in fraud of the creditor may only be attacked if he or she is injured by the transfer [*Mehrtash v. Mehrtash (2001) 93 Cal. App. 4th 75, 80, 112 Cal. Rptr. 2d 802* ; *Haskins v. Certified Escrow & Mortgage Co. (1950) 96 Cal. App. 2d 688, 691, 216 P.2d 90]* . A creditor does not sustain injury unless the transfer or obligation puts beyond his or her reach property which would be subject to the payment of the creditor's debt [*Mehrtash v. Mehrtash (2001) 93 Cal. App. 4th 75, 80-81, 112 Cal. Rptr. 2d 802* (plaintiff failed to show she was injured by transfer of heavily mortgaged property when she produced no evidence that value of property could support any net recovery for her in event conveyance were set aside); *Haskins v. Certified Escrow & Mortgage Co. (1950) 96 Cal. App. 2d 688, 691, 216 P.2d 90* ; *see Costa v. Neves (1938) 12 Cal. 2d 121, 125, 82 P.2d 600]* .

When a debtor has transferred property that could be protected by the minimum-bid requirement for a judicial sale of a homestead as defined in *Code Civ. Proc. § 704.710* [*see § 270.34[3]*], a particular creditor can have no cause of action under the UFTA if, taking into account the aggregate amount of all valid liens on the property having priority over that creditor's claim [*see* Code Civ. Proc. § 3439.01(a)(1) ("asset" subject to UFTA does not include property "to the extent it is encumbered by a valid lien"); *see also § 270.34[5]*] plus the exemption amount specified in *Code Civ. Proc. § 704.730*, a judicial sale would not yield any proceeds that could be applied toward satisfaction of that creditor's claim. In such a case, the transfer cannot be fraudulent as to that creditor because that creditor has not in fact been injured [*Fidelity Nat'l Title Ins. Co. v. Schroeder (2009) 179 Cal. App. 4th 834, 845, 101 Cal. Rptr. 3d 854]* , even if the debtor had "actual intent to hinder, delay, or defraud any creditor of the debtor" [*see* Code Civ. Proc. § 3439.04(a)(1) (what is "fraudulent" transfer)]. As to that particular creditor, it is not the transfer, rather it is the effect of *Code Civ. Proc. § 704.710 et seq.*, that puts the property out of reach for payment of the debt [*Fidelity Nat'l Title Ins. Co. v. Schroeder (2009) 179 Cal. App. 4th 834, 845, 101 Cal. Rptr. 3d 854]* ; therefore, the creditor has no cause of action to set aside the transfer.

[2] Property Held in Trust

When one who holds property as trustee for another (for example, under a resulting trust) conveys the property to the beneficiary, neither the creditors nor the trustee in bankruptcy of the grantor can attack the conveyance [*Owings v. Laugharn (1942) 53 Cal. App. 2d 789, 791* P.2d114; *but see In re Lewis W. Shurtleff, Inc. (9th Cir. 1985) 778 F.2d 1416, 1419* (allowing transfer to be set aside by trustee in bankruptcy when alleged constructive trust had not yet been perfected by state court judgment)]. This rule is derived from the rule that the judgment of a creditor is a lien only on the interest of the judgment debtor. Latent equities against the debtor, such as those which arise on a resulting trust, may be asserted against judgment creditor, who as to such equities does not have the status of bona fide purchaser [*see McGee v. Allen (1936) 7 Cal. 2d 468, 473, 60 P.2d 1026]* . Thus, as to property held in trust by a trustee, a creditor of the trustee has sustained no injury, since he or she has no interest in the property which may be subjected to his or her claim [*see Owings v. Laugharn (1942) 53 Cal. App. 2d 789, 791, 128 P.2d 114* ; *Zeller v. Knapp (1933) 135 Cal. App. 122, 128, 26 P.2d 704]* .

[3] Exempt Property

A transfer is not subject to the UFTA unless the property transferred is an "asset" as defined [*Fidelity Nat'l Title Ins. Co. v. Schroeder (2009) 179 Cal. App. 4th 834, 841, 101 Cal. Rptr. 3d 854]* ; and the statutory definition excludes property "to the extent it is generally exempt under nonbankruptcy law" [Code Civ. Proc. § 3439.01(a)(2)]. The term "generally exempt" is merely a recognition that all exemptions are subject to exceptions [*Fidelity Nat'l Title Ins. Co. v. Schroeder (2009) 179 Cal. App. 4th 834, 845 n.7, 101 Cal. Rptr. 3d 854]* .

Among the exemptions that could be applicable is the declared-homestead exemption provided in *Code Civ. Proc. § 704.910 et seq.* [*see § 270.34[4]*].

The so-called homestead exemption provided in *Code Civ. Proc. § 704.710 et seq.* is not an exemption of the kind that would exclude property from the definition of "asset" in the UFTA. The purpose of *Code Civ. Proc. § 704.710 et seq.* is to preclude a judicial sale of a homestead as defined [*see Code Civ. Proc. § 704.710(c)*; *see also Ch. 294, Homesteads, § 294.50* et seq.] unless a bid is received that exceeds the sum of all liens and encumbrances plus a specified amount that is described in a code provision as a homestead exemption amount [*see Code Civ. Proc. §§ 704.720, 704.730, 704.800*]. In short, the statutory provisions impose a minimum-bid requirement for a judicial sale of property that meets the statutory definition of a homestead; and if the minimum required bid is not received, the property may not be sold [*Code Civ. Proc. §§ 704.720(a), 704.800(a)*]. Although "exemption" is used repeatedly in the statutory text, property that could become protected against a judicial sale because of the minimum-bid requirement is not for that reason "exempt under nonbankruptcy law" for purposes of the UFTA. The property can be the subject of a fraudulent transfer [*Reddy v. Gonzalez (1992) 8 Cal. App. 4th 118, 122, 10 Cal. Rptr. 2d 58]* . However, the minimum-bid requirement could have the effect of preventing a creditor from having a cause of action under the UFTA, as discussed in *§ 270.34[1]*.

[4] Homesteads

Property cannot be the subject of a fraudulent transfer "to the extent [the property] is generally exempt under nonbankruptcy law" [Code Civ. Proc. § 3439.01(a)(2); *see § 270.34[3]*]. This exclusion covers property to the extent that it is protected by a declared homestead pursuant to *Code Civ. Proc. § 704.910 et seq.* A homestead declaration effectively shields a debtor's dwelling from the reach of judgment creditors in most kinds of cases [*Code Civ. Proc. § 704.950(a)*; *Fidelity Nat'l Title Ins. Co. v. Schroeder (2009) 179 Cal. App. 4th 834, 844, 101 Cal. Rptr. 3d 854]* . A homestead declaration provides no protection against certain judgment liens for child, family, or spousal support [*Code Civ. Proc. § 704.950(b)*]. A judgment lien for any other kind of debt can attach to the debtor's dwelling in spite of a homestead declaration, but the lien can cover only the amount of any surplus over the sum of the aggregate value of all liens having priority plus the value of the declared-homestead exemption [*Code Civ. Proc. § 704.950(c)*].

That a debtor files a declaration of homestead to hinder and delay his or her creditors does not affect its validity because

the very purpose of the homestead law is to protect the property from existing debts [*Lucci v. United Credit & Collection Co. (1934) 220 Cal. 492, 496, 31 P.2d 369* ; *Putnam Sand & Gravel Co. v. Albers (1971) 14 Cal. App. 3d 722, 725, 92 Cal. Rptr. 636]* . For discussion and forms relating to homesteads, see Ch. 294, *Homesteads* .

[5] Property Subject to Valid Lien

To the extent that property of the debtor is encumbered by a valid lien it would not be available to satisfy a creditor's claim and is therefore excepted from the UFTA's definition of assets of the debtor [*Civ. Code § 3439.01(a)(1)*]. A lien is a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien [*Civ. Code § 3439.01(f)*]. A valid lien is one that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings [*Civ. Code § 3439.01(j)*]. The debtor's equity in the collateral remains available to creditors, however.

A lien given by a debtor with actual intent to hinder, delay, or defraud any creditor of the debtor might be valid but nevertheless is fraudulent as to any creditor [*Civ. Code § 3439.04(a)(1)*; *see Judicial Council of California Civil Jury Instructions, CACI No. 4200* (LexisNexis Matthew Bender); *see also Civ. Code § 3439.04(b)* (factors to be considered in determining debtor's actual intent); *Judicial Council of California Civil Jury Instructions, CACI No. 4201* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction) and such a lien is voidable except against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee [*Civ. Code § 3439.08(a)*; *see Judicial Council of California Civil Jury Instructions, CACI No. 4207* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)].

A lien given by a debtor without receiving a reasonably equivalent value in exchange for the lien could, in the circumstances be, fraudulent as to any creditor [*see Civ. Code § 3439.04(a)(2)*; *Judicial Council of California Civil Jury Instructions, CACI No. 4202* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)]. However, a transfer of the encumbered property through enforcement of the lien would not necessarily be voidable [*see Civ. Code § 3439.08(e)(2)*; *Judicial Council of California Civil Jury Instructions, CACI No. 4207* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction); § 270.35[2][b]].

[6] Interest Held in Tenancy by the Entireties

The interest of the debtor in property held in tenancy by the entireties is excluded from the UFTA's definition of assets of the debtor to the extent that the debtor's interest is not subject to process by a creditor holding a claim against only one tenant [*Civ. Code § 3439.01(a)(3)*].

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§ 270.35 Transfers and Obligations

[1] In General

A debtor must have actually made a transfer of his or her asset or incurred an obligation before a creditor will be able to invoke any of the remedies provided under the Uniform Fraudulent Transfer Act [*see* Civ. Code § 3499 et seq.; *Menick v. Goldy (1955) 131 Cal. App. 2d 542, 547, 280 P.2d 844* (creditor is required to prove transfer to be entitled to relief)]. "Transfer" means every mode, direct or indirect, absolute or conditional, vouluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance [*Civ. Code § 3439.01(i)*; *see Judicial Council of California Civil Jury Instructions, CACI No. 4204* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)]. Examples of transfers within the meaning of the former *Civ. Code § 3439.01* include a payment of money in satisfaction of a gambling debt [*see Tokar v. Redman (1956) 138 Cal. App. 2d 350, 354, 291 P.2d 987]* , a donee's exercise of a general power of appointment [*see Estate of Kalt (1940) 16 Cal. 2d 807, 814, 108 P.2d 401* (decided under law as it existed prior to 1939 amendments)], and, by analogy to the donee's exercise of a general power of appointment, a legatee's renunciation of his or her legacy [*see Estate of Kalt (1940) 16 Cal. 2d 807, 814, 108 P.2d 401* (decided under law as it existed prior to 1939 amendments); *Estate of Jensen (1972) 26 Cal. App. 3d 474, 480, 102 Cal. Rptr. 617* ; *but see Prob. Code § 283* (disclaimer does not constitute fraudulent transfer)]. Although the word transfer is interpreted broadly, it designates only those transactions which, as between the parties, pass, or purport to pass, the title or right of possession to the property. That is, the transfer must be such as would vest the real or apparent ownership of some interest in the transferee [*see Scholle v. Finnell (1916) 173 Cal. 372, 377, 159 P. 1179* (conversion of debtor's livestock by son after debtor's acquiesence in commingling of herds did not amount to transfer)].

Based on the policy considerations underlying the Uniform Fraudulent Transfer Act and the Family Code provisions governing dissolution judgments and settlements, the California Supreme Court has held that the Uniform Fraudulent Transfer Act applies to property transfers under marital settlement agreements [*Mejia v. Reed (2003) 31 Cal. 4th 657, 669, 3 Cal. Rptr. 3d 390, 74 P.3d 166* (woman whose affair resulted in birth of child sought lien on real property that father of child transferred to his wife in resulting marital dissolution); *see* Ch. 222, *Dissolution of Marriage: Property Division and Valuation*].

[2] Transfers That Are Not Voidable

[a] Leases

A transfer by a debtor without receiving a reasonably equivalent value in exchange for the transfer could be, in the circumstances, fraudulent as to any creditor [*see Civ. Code § 3439.04(a)(2)*; *Judicial Council of California Civil Jury Instructions, CACI No. 4202* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)]. However, such a transfer is not voidable if it results from the termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law [*Civ. Code § 3439.08(e)(1)*; *see Judicial Council of California Civil Jury Instructions, CACI No. 4207* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)].

[b] Noncollusive Enforcement of Lien

A lien given by a debtor without receiving a reasonably equivalent value in exchange for the lien could be, under the circumstances, fraudulent as to any creditor [*see Civ. Code § 3439.04(a)(2)*; *Judicial Council of California Civil Jury Instructions, CACI No. 4202* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)]. However, a transfer of the encumbered property through enforcement of the lien in a noncollusive manner and in compliance with applicable law (including Division 9 of the Commercial Code) would not be voidable as long as the transfer occurred otherwise than by either a retention of collateral under *Com. Code §§ 9620* and *9621* or a voluntary transfer of the collateral by the debtor to the lienor in satisfaction of all or part of the secured obligation [*Civ. Code § 3439.08(e)(2)*; *see Judicial Council of California Civil Jury Instructions, CACI No. 4207* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)].

[3] Change of Beneficiary of Life Insurance Policy

Civ. Code § 3439.08(b) appears to have abrogated prior law regarding the extent to which a debtor/insured's change of beneficiary under a life insurance policy might constitute a fraudulent transfer. Under prior law, the debtor/insured's change of beneficiary under a life insurance policy constituted a fraudulent transfer if the policy proceeds would have been available to satisfy the obligation in question [Headen v. Miller (l983) *141 Cal. App. 3d 169, 175-176, 190 Cal. Rptr. 198* (change of beneficiary from partner to the insured partner's wife found fraudulent because proceeds were a contingent partnership asset)]. However, because *Civ. Code § 3439.08(b)* now specifies that a creditor is only entitled to recover from the transferee the lesser of value of asset transferred, as of date of transfer, or the amount necessary to satisfy its claim, it appears that a creditor can only reach the nonexempt portion of the lesser of the cash surrender value, the loan value, or the premiums paid [*Civ. Code § 3439.08(b), (c)*; *Code Civ. Proc. § 704.100* (exemption for life insurance policy); *see* Headen v. Miller (l983) *141 Cal. App. 3d 169, 173-175, 190 Cal. Rptr. 198* (discussing prior limits on value reachable by creditor); *see also Judicial Council of California Civil Jury Instructions, CACI No. 4207* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)].

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§ 270.36 Debtor's Retention of Interest in Property

A debtor cannot make a disposition of his or her property that will effectively put the property or the income from the property beyond the reach of his or her creditors if the debtor has still retained the right to use the property or to receive the income from it [*see Nelson v. California Trust Co. (1949) 33 Cal. 2d 501, 502, 202 P.2d 1021* (debtor was settlor and beneficiary of spendthrift trust)); *McColgan v. Walter Magee, Inc. (1916) 172 Cal. 182, 186, 155 P. 995* (debtor was settlor and beneficiary of spendthrift trust)]. In such a case, although the nominal title to the property may have been transferred to another, the property nevertheless is subject to the debts of its owner on the principle that one cannot be the equitable owner of property and still have it exempt from the owner's debts [*Sasaki v. Kai (1942) 56 Cal. App. 2d 406, 410, 133 P.2d 18]* . Thus, because the debtor remains the equitable owner, a creditor need not bring an action to set aside a fraudulent transfer, but may attach the transferred asset, or its proceeds, in an action on the underlying claim if attachment would otherwise be available in the action on the underlying claim, in accordance with the Attachment Law, *Code Civ. Proc. § 481.010 et seq.* [*Civ. Code § 3439.07(b)*]. Furthermore, once the creditor has obtained a judgment on the underlying debt he or she can levy execution on the asset transferred or its proceeds in the hands of the transferee [*Civ. Code § 3439.07(c)*].

A creditor attaching or levying on the property in the name of the transferee may also use statutory proceedings in aid of attachment and execution. Those proceedings include examinations of the third party, applications for orders restaining further transfer of the asset, and creditor's suits [*see Code Civ. Proc. §§ 491.110 et seq.* (attachment), 708.010 et seq. (execution); *see also Hustead v. Superior Court (1970) 2 Cal. App. 3d 780, 790, 83 Cal. Rptr. 26* (creditor's bill proper only after third party has claimed interest); *Wulfjen v. Dolton (1944) 24 Cal. 2d 878, 889-890, 151 P.2d 840* (creditor's bill necessary and proper when third party claims interest); *see generally* Ch. 62, *Attachment* , and Ch. 254, *Executions and Enforcement of Judgments*]. Although actions to set aside fraudulent transfers are sometimes referred to as creditor's bills, the substantive and procedural prerequisites of a creditor's bill under *Code Civ. Proc. § 708.210 et seq.* are quite different from the substance of and prerequisites necessary to maintain and action to set aside a fraudulent transfer [*see Heffernan v. Bennett & Armour (1944) 63 Cal. App. 2d 178, 183-184, 146 P.2d 482* (action to set aside fraudulent transfer prior to obtaining judgment referred to a creditor's bill); *see also § 270.45*].

In the event of a debtor's putatively fraudulent transfer of the debtor's dwelling, in which the debtor continues to have an

interest as the beneficial user of the property--for example, A and B, owning their house together, convey title to B alone, and thereafter A continues to live in the house along with B--a judgment creditor might be foreclosed from pursuing the property in the hands of the transferee because of the minimum-bid requirement for a judicial sale of a homestead as defined in *Code Civ. Proc. § 704.710(c)*, and the creditor also might not have a cause of action under the UFTA to set aside the transfer [*see § 270.34[1], [3]*]. A creditor in that situation is not necessarily without a judicial remedy, however. If the facts were supportive, the creditor could have a cause of action for a declaratory judgment that the transferee holds title as a resulting trustee for the debtor's benefit [*Fidelity Nat'l Title Ins. Co. v. Schroeder (2009) 179 Cal. App. 4th 834, 847-850, 101 Cal. Rptr. 3d 854]* . Thus, the creditor, armed with a judgment lien in one hand and a resulting-trust declaratory judgment in the other hand, could wait until some future date when satisfaction of the creditor's claim through a judicial sale would be possible. For discussion of resulting trusts, see Ch. 562, *Trusts: Resulting Trusts* .

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§ 270.37 When Transfer Occurs

[1] Real Property Other Than Fixtures

With respect to an asset that is real property other than a fixture, a transfer is made when it is so far perfected that a good faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee. For purposes of determining when a transfer is made, the interest of a seller or purchaser under a contract for the sale of the asset is considered a real property asset [*Civ. Code § 3439.06(a)(1)*]. For example, if transferees take possession prior to recordation of a deed, no subsequent purchaser from the debtor can acquire a superior claim, because he or she would have constructive notice of transferees' interest. Thus, the transferees' interest would be perfected by possession [*see In re Gulino (9th Cir. 1985) 779 F.2d 546, 550-551* (applying California law to determine what is necessary to perfect transfer)]. The language of *Civ. Code § 3439.06(a)(1)* is identical with that of *11 U.S.C. § 547(e)(1)(A)*, which governs time of perfection for purposes of determining whether a transfer made within the 90 days immediately preceeding the filing of a bankrupcty petition may be set aside. Cases decided under *11 U.S.C. § 547(e)(1)(A)* therefore may provide guidance in interpreting *Civ. Code § 3439.06(a)(1)* [*see 11 U.S.C. § 547(e)(1)(A)*].

If applicable law does not permit the transfer of real property other than a fixture to be perfected as against a good faith purchaser from the debtor as provided in *Civ. Code § 3439.06(a)*, the transfer is made when it becomes effective between the debtor and the transferee [*Civ. Code § 3439.06(c)*]. A transfer is not made until the debtor has acquired rights in the asset transferred [*Civ. Code § 3439.06(d)*].

[2] Other Property and Fixtures

With respect to an asset that is not real property or that is a fixture, a transfer is made when it is so far perfected that a creditor on a simple contact cannot acquire a judicial lien otherwise than under the UFTA that is superior to the interest of the transferee [*Civ. Code § 3439.06(a)(2)*]. If applicable law does not permit the transfer to be perfected as provided in *Civ. Code § 3439.06(a)*, the transfer is made when it becomes effective between the debtor and the transferee [*Civ. Code § 3439.06(c)*]. A transfer is not made until the debtor has acquired rights in the asset transferred [*Civ. Code § 3439.06(d)*].

[3] Transferee's Interest Not Perfected Before Commencement of Creditor's Actions

If the applicable law permits the transfer to be perfected as provided in *Civ. Code § 3439.06(a)* (discussed in *§ 270.37[1], [2]*) and the transfer is not so perfected before the commencement of an action for relief under the UFTA, the transfer is deemed made immediately before the commencement of the action [*Civ. Code § 3439.06(b)*].

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§ 270.38 When Obligation Is Incurred

An oral obligation is incurred when it becomes effective between the parties [*Civ. Code § 3439.06(e)(1)*]. An obligation evidenced by a writing is incurred when the writing executed by the obligor is delivered to, or for the benfit of, the obligee [*Civ. Code § 3439.06(e)(2)*].

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§ 270.39 Grounds for Finding Fraudulent Transfers

The Uniform Fraudulent Transfer Act provides four distinct grounds for finding a transfer to be fraudulent as to creditors [*see Civ. Code §§ 3439.04, 3439.05*; *see Judicial Council of California Civil Jury Instructions, CACI Nos. 4200 -4203* (LexisNexis Matthew Bender) (related California Judicial Council jury instructions)]. Three of these grounds involve transfers which are constructively fraudulent as to creditors, that is, those transfers in which the intent to defraud is presumed in law [*see Civ. Code §§ 3439.04-3439.06, 3439.08*; *Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 374, 125 Cal. Rptr. 804* ; *Pope v. National Aero Fin. Co. (1965) 236 Cal. App. 2d 722, 728, 46 Cal. Rptr. 233* ; *see also Judicial Council of California Civil Jury Instructions, CACI Nos. 4202, 4203, 4207* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)]. The other ground involves transfers or conveyances made with actual intent to hinder, delay, or defraud creditors [*see Civ. Code § 3439.04(a)*; *Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 375, 125 Cal. Rptr. 804]* .

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§ 270.40 Transfers Made With Actual Fraudulent Intent

[1] In General

A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation incurred, if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud any creditor of the debtor [*Civ. Code § 3439.04(a)(1)*; *see Judicial Council of California Civil Jury Instructions, CACI No. 4200* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)]. When there is actual intent to defraud, neither the solvency of the transferor nor the amount of consideration received in exchange for the transfer or obligation is material [*Fross v. Wotton (1935) 3 Cal. 2d 384, 388-389, 44 P.2d 350* ; *McKnight v. Superior Court (1985) 170 Cal. App. 3d 291, 299, 215 Cal. Rptr. 909]* . Thus, a finding of insolvency is not necessary in order to set aside a transfer when there is actual intent to defraud, and a finding of solvency does not preclude a finding of actual intent to defraud. Evidence regarding solvency may be relevant to the issue of ac-tual intent to defraud [*Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 378, 125 Cal. Rptr. 804* ; *Fross v. Wotton (1935) 3 Cal. 2d 384, 388-389, 44 P.2d 350]* .

[2] Knowledge of Fraud by Transferee

A transfer or an obligation is not voidable under *Civ. Code § 3439.04(a)(1)* [*see § 270.40[1]*] against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee [*Civ. Code § 3439.08(a)*; *see Judicial Council of California Civil Jury Instructions, CACI No. 4207* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)]. Therefore, a showing of good faith and reasonably equivalent value is all that is required to defeat a creditor's action based on *Civ. Code § 3439.04(a)* [*Annod Corp. v. Hamilton & Samuels (2002) 100 Cal. App. 4th 1286, 1294, 123 Cal. Rptr. 2d 924]* .

Proof that good faith was absent would require evidence of deliberate wrongful conduct [*Lewis v. Superior Court (1994) 30 Cal. App. 4th 1850, 1858-1859, 37 Cal. Rptr. 2d 63]* . "Good faith," as the term is used in *Civ. Code § 3439.08(a)*, means that the transferee acted without actual fraudulent intent and that he or she did not collude with the debtor or otherwise actively participate in a fraudulent scheme of the debtor. The transferee's knowledge that the transferor had fraudulent intent may be relevant, in combination with other facts, on the issue of the transferee's good

faith [*Annod Corp. v. Hamilton & Samuels (2002) 100 Cal. App. 4th 1286, 1299, 123 Cal. Rptr. 2d 924* (citing legislative committee comment)]. Thus, for example, a partner's acceptance of distributions from the partnership, with knowledge that lease payments were overdue, was not tantamount to participation in a fraudulent scheme. The partner was not prohibited from receiving a partnership draw authorized by the relevant partnership documents merely because the partnership could not make its rental payments [*Annod Corp. v. Hamilton & Samuels (2002) 100 Cal. App. 4th 1286, 1299-1300, 123 Cal. Rptr. 2d 924]* .

[3] Future Creditors

A transfer or obligation is fraudulent as to both future and present creditors when it is made or incurred with actual intent to hinder, delay, or defraud any creditors [*Civ. Code § 3439.04(a)*]. For example, even if creditors at the time of the signing of an agreement to convey as asset could have been satisfied, the agreement may still be considered fraudulent as impairing the rights of future creditors if the transferor and transferee believed at the time of the signing of the agreement that an additional indebtedness could accumulate rendering the transferor unable to pay the full amount of his or her indebtedness, including the claims of both present and future creditors [*see Severance v. Knight-Counihan Co. (1947) 29 Cal. 2d 561, 567, 177 P.2d 4* ; *see also Heffernan v. Bennett & Armour (1952) 110 Cal. App. 2d 564, 578-581, 584, 243 P.2d 846]* .

[4] Character of Intent

An actual intent to defraud, hinder, or delay does not require a finding that the transferor acted maliciously with the desire of causing harm to one or more creditors. Although the transferor may sincerely regret his or her action, if it can be objectively determined that there was an actual intent to do just what was done, that is, to remove assets and make impossible either the satisfaction of the creditor's claim or the collection of the creditor's judgment, the requisite intent for a fraudulent transfer is established [*Economy Refining & Serv. Co. v. Royal Nat'l Bank of N.Y. (1971) 20 Cal. App. 3d 434, 441-442, 97 Cal. Rptr. 706]* .

[5] Preferences Distinguished

Although a creditor may intend by a transfer of his or her assets to remove assets and make impossible the collection of a particular creditor's judgment, if the transfer operates only as a preference of one creditor of the transferor over another, the transfer is not subject to attack except by a trustee in bankruptcy [*see Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 591, 25 Cal. Rptr. 545, 375 P.2d 425* ; *Economy Refining & Serv. Co. v. Royal Nat'l Bank of N.Y. (1971) 20 Cal. App. 3d 434, 97 Cal. Rptr. 706]* . This principle is embodied in *Civ. Code § 3432* which provides that a debtor may pay one creditor in preference to another, or may give one creditor security for his or her demand in preference to another. Even though a preference may hinder or delay other creditors in the collection of their claims, it is not, thereby, rendered void. It is also immaterial that the preferred creditor had knowledge that such a consequence would follow the preference [*United States Fid. & Guar. Co. v. Postel (1944) 64 Cal. App. 2d 567, 571-572, 149 P.2d 183]* , or that the preferred creditor is a near relative of the transferor and the unpreferred creditor's action to enforce the transferor's indebtedness was pending at the time of the transfer [*see Arnold v. Hadgis (1951) 102 Cal. App. 2d 88, 92, 226 P.2d 641]* .

However, a preference must extinguish, or at least diminish, depending on the amount of the payment and the agreement of the parties, the debt of the preferred creditor [*Economy Refining & Serv. Co. v. Royal Nat'l Bank of N.Y. (1971) 20 Cal. App. 3d 434, 442, 97 Cal. Rptr. 706* ; *see Kemp v. Lynch (1937) 8 Cal. 2d 457, 461, 65 P.2d 1316* (simulated transfer made with intent not to pay unpreferred creditor with debtor retaining full beneficial interest in property transferred is void as to creditor)].

The general immunity of a preference from attack by unpreferred creditors also does not apply when a person who dominates and controls an insolvent corporation attempts to secure for himself or herself an advantage over other

creditors of the corporation. In such a case, the corporate dominator is treated in the same manner as is a director of an insolvent corporation and thus occupies a fiduciary relationship to his or her creditors [*Title Ins. & Trust Co. v. California Dev. Co. (1915) 171 Cal. 173, 205-207, 152 P. 542* ; *Commons v. Schine (1973) 35 Cal. App. 3d 141, 144, 110 Cal. Rptr. 606]* .

[6] Establishing Requisite Fraudulent Intent

Whether a transfer is made with actual intent to defraud, hinder, or delay any creditor of the transferor is not a question of law, but one of fact to be determined by the trial court [*TWM Homes, Inc. v. Atherwood Realty & Inv. Co. (1963) 214 Cal. App. 2d 826, 844, 29 Cal. Rptr. 887]* . Therefore, the party claiming that the transfer was fraudulent has the burden of showing the vendor's fraudulent intent and the knowledge thereof by the vendee [*Vaughn v. Coccimiglio (1966) 241 Cal. App. 2d 676, 679, 50 Cal. Rptr. 876]* . This burden of proof may be met with circumstantial evidence [*Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 588, 25 Cal. Rptr. 545, 375 P.2d 425]* because in most cases proof of actual intent to hinder, delay, or defraud cannot be made by direct proof, but must be made by inferences from circumstances surrounding the conveyance, as well as the relationship and interests of the parties [*Neumeyer v. Crown Funding Corp. (1976) 56 Cal. App. 3d 178, 183, 128 Cal. Rptr. 366* ; *Slater v. Bielsky (1960) 183 Cal. App. 2d 523, 526, 6 Cal. Rptr. 683]* . However, the fact of such fraud need only be proved by the ordinary standard of a preponderance of the evidence [*Liodas V Sahadi (1977) 19 Cal. 3d 278, 291-292, 137 Cal. Rptr. 635, 562 P.2d 316* , *overruling Aggregates Associated. Inc. v. Packwood (1962) 58 Cal. 2d 580, 588, 25 Cal. Rptr. 545, 375 P.2d 425* ; *see Asadoorian V Kludjian (1930) 210 Cal. 564, 565, 292 P. 644* (fraud must be proved by preponderance of evidence)].

[7] Circumstances Indicating Fraud

Although the question of whether a transfer was made with intent to defraud one's creditors is not a question of law, the circumstances surrounding the transfer and the relationship of the parties to the transfer may raise an inference of or may indicate actual fraudulent intent [*see Wood v. Kaplan (1960) 178 Cal. App. 2d 227, 231, 2 Cal. Rptr. 917]* . For example, whenever a confidential relationship between the parties to the transaction is shown to exist, the parties are held to a fuller and stricter proof of the consideration, and of the fairness of the transaction [*Wood v. Kaplan (1960) 178 Cal. App. 2d 227, 230, 231, 2 Cal. Rptr. 917* (parent-child relationship raises inference of fraud)].

Similarly, although proof of the transferor's solvency does not preclude a finding of an actual intent to defraud a creditor, evidence of solvency is relevant to the issue of the actual intent of the transferor [*see Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 378, 125 Cal. Rptr. 804]* . Thus, the fact that a transfer rendered the transferor insolvent or was made at a time when the transferor was insolvent [*see Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 378, 125 Cal. Rptr. 804* ; *Wood v. Kaplan (1960) 178 Cal. App. 2d 227, 230, 2 Cal. Rptr. 917]* , or that the transfer was of almost all of the transferor's nonexempt property [*see Burrows v. Jorgensen (1958) 158 Cal. App. 2d 644, 648, 323 P.2d 150]* is considered as an indication or evidence that the conveyance was made with actual fraudulent intent.

However, when the circumstances surrounding the allegedly fraudulent transfer, such as the insolvency of the transferor, comport equally with a theory of honest and fair dealing, a finding of a fraudulent transfer may not be made [*Hedden v. Waldeck (1937) 9 Cal. 2d 631, 636, 72 P.2d 114* ; *see Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 588, 25 Cal. Rptr. 545, 375 P.2d 425* (speed of transfer did not permit inference of fraud when speed was required to protect interests of allegedly fraudulent transferor)].

Legal Topics:

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23-270 California Forms of Pleading and Practice--Annotated § 270.41

§ 270.41 Transfer Made With Intent or Belief That Debts Incurred Will Not Be Paid

A transfer made or obligation incurred without the transferor's or obligor's receiving reasonably equivalent value in exchange for the transfer or obligation is fraudulent as to a creditor, whether that creditor's claim arose before or after the transfer was made or the obligation was incurred, if the transferor or obligor intended to incur, or believed, or reasonably should have believed, that he or she would incur debts beyond his or her ability to pay as they became due [*Civ. Code § 3439.04(a)(2)(B)*; *see Judicial Council of California Civil Jury Instructions, CACI No. 4202* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)]. This requires finding not only that the transfer was made without reasonably equivalent value but also that the transferor or obligor intended or believed that he or she would incur debts beyond his or her ability to pay as they became due. Presumably it does not require finding that the transferor in fact could not pay his or her debts as they became due or that such debts were incurred [*see Pope v. National Aero Fin. Co. (1965) 236 Cal. App. 2d 722, 728-730, 46 Cal. Rptr. 233* (reasonably equivalent value found)]. If the defendant has a complete defense to an action based on *Civ. Code § 3439.04(a)(1)* [*see § 270.40[2]*], then the defendant necessarily also has a complete defense to an action based on *Civ. Code § 3439.04(b)(2)* [*Annod Corp. v. Hamilton & Samuels (2002) 100 Cal. App. 4th 1286, 1294, 123 Cal. Rptr. 2d 924]* .

Legal Topics:

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23-270 California Forms of Pleading and Practice--Annotated § 270.42

§ 270.42 Transfer Made by Insolvent Without Reasonably Equivalent Consideration

[1] In General

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor was insolvent at the time or became insolvent as a result of the transfer or obligation [*Civ. Code § 3439.05*; *see Judicial Council of California Civil Jury Instructions, CACI No. 4203* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)]. A transfer under *Civ. Code § 3439.05* is considered constructively fraudulent as to creditors of the transferor [*Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 374, 125 Cal. Rptr. 804]* . That is, proof of insolvency and of lack of reasonably equivalent value are presumptively conclusive of the fraudulent intent of the transferor, and the actual intent to defraud on the part of the transferor is immaterial and need not be established [*Stearns v. Los Angeles City School Dist. (1966) 244 Cal. App. 2d 696, 727, 53 Cal. Rptr. 482* ; *Menick v. Goldy (1955) 131 Cal. App. 2d 542, 547, 280 P.2d 844]* . Nevertheless, to set aside a transfer under *Civ. Code § 3439.05*, the creditor must prove both that reasonably equivalent value was not received and insolvency. Lack of evidence to support one element renders the other element unimportant [*Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 589, 25 Cal. Rptr. 545, 375 P.2d 425* ; *Annod Corp. v. Hamilton & Samuels (2002) 100 Cal. App. 4th 1286, 1294-1295, 123 Cal. Rptr. 2d 924]* .

[2] Present Creditors Only Protected

Civ. Code § 3439.05 protects only existing creditors of the transferor at the time of a constructively fraudulent transfer or obligation. A person invoking this section must establish this status [*TWM Homes, Inc. v. Atherwood Realty & Inv. Co. (1963) 214 Cal. App. 2d 826, 843, 29 Cal. Rptr. 887* ; *see Pope v. National Aero Fin. Co. (1965) 236 Cal. App. 2d 722, 728, 46 Cal. Rptr. 233]* .

[3] Insolvency Defined

[a] In General

Under *Civ. Code § 3439.05* a creditor must show that a transfer or an obligation was made or incurred by a person who was insolvent or was thereby rendered insolvent [*see Civ. Code § 3439.05*; *Pope v. National Aero Fin. Co. (1965) 236 Cal. App. 2d 722, 728, 46 Cal. Rptr. 233* ; *Judicial Council of California Civil Jury Instructions, CACI No. 4203* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)]. A debtor is insolvent if, at fair valuations, the sum of the debtor's debts is greater than all of the debtor's assets [*Civ. Code § 3439.02(a)*; *see Judicial Council of California Civil Jury Instructions, CACI Nos. 4205, 4206* (LexisNexis Matthew Bender) (related California Judicial Council jury instructions)]. It appears that this fair value provision will abrogate prior case law that allowed admission of evidence as to unmatured or contingent claims without any attempt to determine the likelihood of their being collectible or the present value of the probable ultimate liability [*see, e.g.*, *Estate of Anderson (1977) 68 Cal. App. 3d 1010, 1015, 137 Cal. Rptr. 727* ; *Babcock v. Omansky (1973) 31 Cal. App. 3d 625, 632, 107 Cal. Rptr. 512]* .

[b] Insolvency of Partnership

A debtor which is a partnership is insolvent if, at fair valuations, the sum of the partnership's debts is greater than the aggregate of (1) all of the partnership's assets and (2) the sum of the excess value of each general partner's nonpartnership assets over the partner's nonpartnership debts [*Civ. Code § 3439.02(b)*; *see Judicial Council of California Civil Jury Instructions, CACI Nos. 4205, 4206* (LexisNexis Matthew Bender) (related California Judicial Council jury instructions)]. Under this provision, assets of the general partners which could be reached to satisfy partnership obligations are included in determining the solvency of the partnership.

[c] Debts Excluded from Calculation

Under this definition, the term "debts" does not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset [*Civ. Code § 3439.02(e)*; *Fross v. Wotton (1935) 3 Cal. 2d 384, 388, 44 P.2d 350* ; *see Ahmanson Bank & Trust Co. v. Tepper (1969) 269 Cal. App. 2d 333, 339, 74 Cal. Rptr. 774* ; *Judicial Council of California Civil Jury Instructions, CACI Nos. 4205, 4206* (LexisNexis Matthew Bender) (related California Judicial Council jury instructions)]. Since *Civ. Code § 3439.01(a)(1)*, discussed in *§ 270.34[5]*, excludes property encumbered by a valid lien from the definition of assets, this provision, by excluding the related debts, amounts to an equalizing adjustment [*see Civ. Code § 3439.01(a)(1)*].

The California Supreme Court has held that future child support payments should not be viewed as a debt under the Uniform Fraudulent Transfer Act. It noted that unearned income is not an asset under the Act unless it is subject to levy by a creditor, and future earnings would not appear on the balance sheet to offset a child support obligation. The court stated that to treat future support payments as a debt while not viewing the earning capacity from which they will be paid as an asset would yield an absurd result. Such treatment would label many persons with support obligations as insolvent under the Act, even though they were current on their obligations and would be able to pay future obligations as they became due [*Mejia v. Reed (2003) 31 Cal. 4th 657, 670-672, 3 Cal. Rptr. 3d 390, 74 P.3d 166* (finding transferor not insolvent at time of transfer nor rendered insolvent by transfer, when future child support payments were not viewed as debt; thus, no triable issue of fact found as to constructive fraud under *Civ. Code § 3439.05*)].

[d] Assets Excluded from Calculation

Exempt property of the debtor is excluded from this calcution, to the extent that it is exempt under nonbankruptcy law [*see Civ. Code § 3439.01(a)(2)* (defining assets, discussed in *§ 270.34[3]*); *Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 375, 125 Cal. Rptr. 804]* . Also excluded from assets for purpose of this calculation is property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors, or that has been transferred in a manner making the transfer voidable under *Civ. Code §§ 3439-3439.12* [*Civ. Code § 3439.02(d)*; *see Judicial Council of California Civil Jury Instructions, CACI Nos. 4205, 4206* (LexisNexis Matthew Bender) (related California Judicial Council jury instructions)]. Similarly, assets beyond the court's jurisdiction have also been excluded [*Wight v. Rohlffs (1941) 48 Cal. App. 2d 696, 702-708, 121 P.2d 76* ; *see Stearns v. Los Angeles City School Dist. (1966) 244 Cal. App.*

2d 696, 737, 53 Cal. Rptr. 482] .

[e] Nonpayment of Debts as Giving Rise to Presumption of Insolvency

A debtor is presumed to be insolvent if he or she is generally not paying his or her debts as they become due [*Civ. Code § 3439.02(c)*; *see Judicial Council of California Civil Jury Instructions, CACI Nos. 4205, 4206* (LexisNexis Matthew Bender) (related California Judicial Council jury instructions)]. This provision was added by the 1986 amendments; it abrogates holdings to the contrary decided under the 1939 version of the UFCA and reinstates the rule of former *Civ. Code § 3450* and cases decided thereunder [*see, e.g.,* *Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 589, 25 Cal. Rptr. 545, 375 P.2d 425* (failure to meet obligations as they come due as insufficient; proof that debts exceed assets as required); *Wight v. Rohlffs (1941) 48 Cal. App. 2d 696, 699, 121 P.2d 76* (decided under former *Civ. Code § 3450*, repealed Stats. 1939 ch. 329, § 1; failure to met obligations as they mature as sufficient proof of insolvency)]. This presumption requires evidence that the debtor was not paying his or her debts as they came due and is not to be confused with the presumption of solvency applicable at the outset, which is discussed in *§ 270.42[4]*.

[f] Determined as of Time of Transfer

The crucial date in determining the fair salable value of the transferor's assets and the transferor's probable liability on his or her existing debts is the date of the transfer [*Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 376, 125 Cal. Rptr. 804]* . The subsequent insolvency of the transferor is not, of itself, sufficient foundation for an inference of insolvency at the time of the transfer or obligation [*Stearns v. Los Angeles City School Dist. (1966) 244 Cal. App. 2d 696, 738, 53 Cal. Rptr. 482* ; *see* *Tokar v. Redman (1956) 138 Cal. App. 2d 350, 355, 291 P.2d 987* (allegation that after year of gambling with transferee, transferor became insolvent as insufficient, since allegation does not state that transferor's gambling resulted in his insolvency)].

[4] Presumption of Solvency; Burdens of Proof

At the outset, the debtor's solvency is presumed and the burden of proving insolvency is on the creditor seeking to set aside the transfer or obligation or attach the asset transferred [*Neumeyer v. Crown Funding Corp. (1976) 56 Cal. App. 3d 178, 186, 128 Cal. Rptr. 366* ; *Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 375, 125 Cal. Rptr. 804]* . In order to overcome this initial burden there must be some evidentiary basis invoking the presumption established by *Civ. Code § 3439.02(c)* (generally not paying debts as they come due), discussed in *§ 270.42[3][e]*, or for determining that the fair value of the debtor's obligations exceeded the fair value of his or her nonexempt assets at the time of the transfer or obligation [*Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 589, 25 Cal. Rptr. 545, 375 P.2d 425* ; *Neumeyer v. Crown Funding Corp. (1976) 56 Cal. App. 3d 178, 186, 128 Cal. Rptr. 366]* . However, once the creditor has made a prima facie showing of insolvency, as by showing that the debtor made a voluntary transfer without receiving reasonably equivalent value in exchange when there are existing indebtednesses, the burden of proof on the issue of insolvency shifts to the transferor or transferee, whoever is defending the action, to prove that the transferor was solvent or had sufficient assets to pay debts existing at the time of the transfer or obligation [*Neumeyer v. Crown Funding Corp. (1976) 56 Cal. App. 3d 178, 186-190, 128 Cal. Rptr. 366* ; *Wight v. Rohlffs (1941) 48 Cal. App. 2d 696, 699, 121 P.2d 76]* . Similarly, if insolvency at the time of the transfer or obligation is admitted or stipulated to, or once it is proved, the burden of proving that reasonably equivalent value was received in exchange is on the debtor or the tranferee or obligee, not on the creditor [*Kirkland v. Risso (1979) 98 Cal. App. 3d 971, 978, 159 Cal. Rptr. 798]* .

[5] Reasonably Equivalent Value of Consideration

[a] Generally

In addition to proving the insolvency of the transferor, a creditor seeking to establish that a transfer or obligation was fraudulent under *Civ. Code § 3439.05* must also prove that the transferor or obligor did not receive consideration of reasonably equivalent value in exchange for the transfer or obligation [*Civ. Code § 3439.05*; *Pope v. National Aero*

Fin. Co. (1965) 236 Cal. App. 2d 722, 728, 46 Cal. Rptr. 233 ; *see Judicial Council of California Civil Jury Instructions, CACI No. 4203* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)].

Value is given for a transfer or obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied; however, value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor (for example, an annuity) or another person [*Civ. Code § 3439.03*].

Generally, the issue of whether or not reasonably equivalent value was received as consideration is to be determined from the standpoint of the creditor and is a question of fact [*Hansen v. Cramer (1952) 39 Cal. 2d 321, 323, 245 P.2d 1059* ; *Patterson v. Missler (1965) 238 Cal. App. 2d 759, 767, 48 Cal. Rptr. 215]* . A transfer or obligation is deemed to have been made or incurred without receipt of reasonably equivalent value in exchange if the debtor is thereby rendered execution proof. In this respect the existence of any intent of fraud on the part of either the grantor or the grantee is an immaterial factor [*Hansen v. Cramer (1952) 39 Cal. 2d 321, 324-325, 245 P.2d 1059* ; *see Patterson v. Missler (1965) 238 Cal. App. 2d 759, 767, 48 Cal. Rptr. 215]* .

[b] Illegal Consideration

If consideration given for property or an obligation is illegal, the debtor may be considered not to have received a reasonably equivalent value [*see Tokar v. Redman (1956) 138 Cal. App. 2d 350, 354, 291 P.2d 987]* . For example, because playing certain gambling games for money is illegal, the consideration for the payment of a gambling loss incurred in playing them, that is, the opportunity to win more than the amount wagered, is likewise illegal, and does not constitute a fair consideration for the monies paid [*Tokar v. Redman (1956) 138 Cal. App. 2d 350, 354, 291 P.2d 987]* .

[c] Antecedent Debts

Reasonably equivalent value is received by the transferor or obligor if he or she gives security for or satisfies a preexisting debt which is not disproportionately small as compared with the property transferred or the new obligation entered into [*see Civ. Code § 3439.03*; *Annod Corporation v. Hamilton & Samuels (2002) 100 Cal. App. 4th 1286, 1296-1297, 123 Cal. Rptr. 2d 924* (in action by landlord against partners who took partnership draws rather than paying rent, receipt of delayed draws did not show fraudulent intent; money transferred in satisfaction of antecedent debts of partnership were transfers for value under *Civ. Code § 3439.03*); *Economy Refining & Serv. Co. v. Royal Nat'l Bank of N.Y. (1971) 20 Cal. App. 3d 434, 441, 97 Cal. Rptr. 706* ; *Pope v. National Aero Fin. Co. (1965) 236 Cal. App. 2d 722, 729, 46 Cal. Rptr. 233]* . In determining the reasonableness of the consideration, the debtor's good faith belief in the enforceability of the debt rather than its actual enforceability is determinative. For instance, a transfer made in good faith by an insolvent in settlement or compromise will not be deemed fraudulent for lack of proof of the enforceability of the underlying claim [*see* Mayors v. C I R (1986) *785 F.2d 757, 761 (IRS attempt to set aside transfer)]* .

The antecedent debt alleged in support of a transfer or obligation must be a legally enforceable obligation of the transferor or obligor. Thus, the discharge of the debt of another does not constitute a reasonable consideration for a transfer by one who is not responsible therefor [*Hansen v. Cramer (1952) 39 Cal. 2d 321, 324, 245 P.2d 1059]* . This rule is subject to the exception that if a debtor pays the obligation of another in the good faith belief that he or she is legally responsible for that obligation, there is deemed to be good consideration [*see Bank of California v. Virtue & Scheck, Inc. (1983) 140 Cal. App. 3d 1026, 1040, 190 Cal. Rptr. 54* (transfer by debtor in exchange for account receivable as reasonably equivalent consideration despite fact that transferor had only orally guaranteed payment of the receivable)]. Similarly, this rule does not apply to an obligation barred by the statute of limitations. The discharge of such an obligation, if a reasonable equivalent is otherwise given in good faith, does not lack reasonable consideration [*United States Fid. & Guar. Co. v. Postel (1944) 64 Cal. App. 2d 567, 571, 149 P.2d 183]* .

Satisfaction of a "moral obligation" normally is not consideration. A moral obligation may provide consideration for a new promise to pay a time-barred debt that would be enforceable but for the statute of limitations. The satisfaction of a time-barred debt may also be considered "reasonably equivalent value" [*In re Prejean (9th Cir. 1993) 994 F.2d 706, 708]* .

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23-270 California Forms of Pleading and Practice--Annotated § 270.43

§ 270.43 Transfers Made Without Reasonably Equivalent Consideration Leaving Insufficient Capital in Hands of Grantor

A transfer made or an obligation incurred by a debtor who did not receive reasonably equivalent value in exchange for the transfer or obligation is fraudulent as to a creditor whose claim arose either before or after the transfer was made or the obligation was incurred, if the debtor was engaged, or was about to engage, in a business or transaction for which his or her remaining assets were unreasonably small in relation to the business or transaction [*Civ. Code § 3439.04(a)(2)(A)*; *see Judicial Council of California Civil Jury Instructions, CACI No. 4202* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)]. This provision, unlike *Civ. Code § 3439.05* (transfer made by insolvent debtor), permits one who was not a creditor of a transferor engaged in business at the time of a transfer or obligation to attack the transfer or obligation if he or she subsequently becomes a creditor of the business [*see Holcomb v. Nunes (1955) 132 Cal. App. 2d 776, 777-778, 283 P.2d 301]* . If the defendant has a complete defense to an action based on *Civ. Code § 3439.04(a)(1)* [*see § 270.40[2]*], then the defendant necessarily also has a complete defense to an action based on *Civ. Code § 3439.04(a)(2)(A)* [*Annod Corp. v. Hamilton & Samuels (2002) 100 Cal. App. 4th 1286, 1294, 123 Cal. Rptr. 2d 924]* .

Whether the transferor left himself or herself with unreasonably small capital after a transfer or obligation is a question of fact which the creditors have the burden of establishing [*see Pope v. National Aero Fin. Co. (1965) 236 Cal. App. 2d 722, 728, 46 Cal. Rptr. 233* ; *Holcomb v. Nunes (1955) 132 Cal. App. 2d 776, 781, 283 P.2d 301]* . The test for determining whether the transfer or obligation was made without reasonably equivalent consideration is the same as that used under *Civ. Code § 3439.05* (transfer or obligation by insolvent without reasonably equivalent consideration) [*Holcomb v. Nunes (1955) 132 Cal. App. 2d 776, 780, 283 P.2d 301* ; *see* discussion in *§ 270.42[5]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23-270 California Forms of Pleading and Practice--Annotated § 270.44

§ 270.44 Creditor's Remedies

[1] Avoidance of Transfer or Obligation

Whether or not his or her claim has matured, a creditor with respect to whom a transfer or obligation is fraudulent may bring an action under *Civ. Code § 3439 et seq.* to avoid the transfer or obligation to the extent necessary to satisfy his or her underlying claim [*Civ. Code § 3439.07(a)(1)*; *see Civ. Code § 3439.01(b), (c)* (claim and creditor defined); for a complaint to set aside a fraudulent transfer or obligation, and allegations for use in particular situations, *see §§ 270.190 -270.197*; *see also Sanwa Bank California v. Chang (2001) 87 Cal. App. 4th 1314, 1317-1318, 105 Cal. Rptr. 2d 330* (creditor brought action against wife for fraudulent conveyance after husband transferred family residence to her and then failed to include it in his bankruptcy estate)]. Although the fraudulent transfer or obligation is considered void as against the creditor, the creditor does not have the right to possession of the property transferred without resort to legal process [*Wagner v. Trout (1954) 124 Cal. App. 2d 248, 254, 268 P.2d 537]* .

To the extent a transfer is voidable in an action by a creditor under *Civ. Code § 3439.07(a)(1)*, the creditor may recover judgment for whichever is less, (1) the value of the asset transferred at the time of the transfer, with whatever adjustment the equities may require, or (2) the amount necessary to satisfy the creditor's claim [*Civ. Code § 3439.08(b), (c)*; *see discussion under § 270.47*]. Judgment may be entered against the first transferee of the asset, the person for whose benefit the transfer was made, and any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee [*Civ. Code § 3439.08(b)(1), (2)*; *see Judicial Council of California Civil Jury Instructions, CACI No. 4207* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)]. Under prior law, an action to avoid or set aside a fraudulent transfer was considered an equitable remedy, and the creditor was entitled to assert rights only against the property transferred. The only instance in which a creditor could have a money judgment against the transferee in an action to set aside a fraudulent transfer was when (1) the transferee had knowingly participated in the fraudulent transfer with the intention of defrauding creditors and (2) the asset tranferred was no longer available, as when the transferee no longer retained any interest in the asset transferred [*Flowers & Sons Development Corp. v. Municipal Court (1978) 86 Cal. App. 3d 818, 825, 150 Cal. Rptr. 555]* . It is not clear whether *Civ. Code § 3439.08(b)* will be interpreted to expand the creditor's choice of possible types of judgments or whether *Civ. Code § 3439.08(b)* is only intended as guidance for determining the amount of a money judgment

against a transferee when such a judgment would be proper under criteria established by prior case law.

[2] Attachment

Under the 1986 amendments, whether or not his or her claim has matured, a creditor with respect to whom a transfer or obligation is fraudulent may bring an action under *Civ. Code §§ 3439-3439.12* for attachment or other provisional remedy against the asset transferred or its proceeds in accordance with the procedures described in The Attachment Law, *Code Civ. Proc. § 481.010-493.060* [*Civ. Code § 3439.07(a)(2)*; *see Civ. Code § 3439.01(b), (c)* (claim and creditor defined)]. This form of attachment is in addition to attachment sought in an action on the underlying claim [*see Civ. Code § 3439.07(b)*]. One advantage gained by a creditor attaching the asset transferred prior to the maturity of his or her underlying claim is the benefit of the attachment lien provided by *Code Civ. Proc. §§ 488.500-488.510* and the possible priority of that lien over certain competing creditors of the tranferor or transferee [*see Code Civ. Proc. § 488.500*]. The attachment lien remains in effect for three years, but may be extended by order of the court for no more than eight years [*Code Civ. Proc. § 488.510(a)-(d)*]. For discussion and forms relating to attachment, see Ch. 62, *Attachment* . For a complaint to avoid a fraudulent transfer, and allegations for use to adapt that complaint to particular situations, which can be used as a basis for attachment, see *§§ 270.190 -270.197*.

[3] Injunction

Whether or not his or her claim has matured and subject to applicable principles of equity, a creditor with respect to whom a transfer or obligation is fraudulent may bring an action under *Civ. Code §§ 3439-3439.12* for an injunction against further dispostion by the debtor or a transferee, or both, of the asset transferred or its proceeds. This relief is to be given in accordance with the applicable rules of civil procedure, which are discussed in Ch. 303, *Injunctions* [*Civ. Code § 3439.07(a)(3)(A*); *see Civ. Code §§ 3420-3423* (permanent injunctions); *see Civ. Code § 3439.01(b), (c)* (claim and creditor defined); *Code Civ. Proc. § 525 et seq.* (provisional remedies)]. For a form of complaint to avoid a fraudulent transfer, and allegations for use to adapt that complaint to particular situations, which can be used as a basis for injunctive relief, see *§§ 270.190 -270.197*.

[4] Appointment of Receiver

Whether or not his or her claim has matured and subject to applicable principles of equity, a creditor with respect to whom a transfer or obligation is fraudulent may bring an action under *Civ. Code §§ 3439-3439.12* for appointment of a receiver to take charge of the asset transferred or its proceeds. This relief is to be given in accordance with the applicable rules of civil procedure, which are discussed in Ch. 486, *Receivers* [*Civ. Code § 3439.07(a)(3)(B)*; *see Civ. Code § 3439.01(b), (c)* (claim and creditor defined); *Code Civ. Proc. §§ 564-571* (receivers); *Code Civ. Proc. §§ 525-535* (provisional remedies)]. For a complaint to avoid a fraudulent transfer, and allegations for use to adapt that complaint to particular situations, which can be used as a basis for appointment of a receiver, see *§§ 270.190 -270.197*.

[5] Other Relief; Accounting

Whether or not his or her claim has matured, and subject to applicable principles of equity and in accordance with applicable rules of civil procedure, a creditor with respect to whom a transfer or obligation is fraudulent may bring an action under *Civ. Code §§ 3439-3439.11* for any other relief the circumstances may require [*Civ. Code § 3439.07(a)(3)(C)*; *see Civ. Code § 3439.01(b), (c)* (claim and creditor defined)]. A common form of incidental relief is accounting [*see Heffernan v. Bennett & Armour (1944) 63 Cal. App. 2d 178, 185, 146 P.2d 482]* .

[6] In Action on Underlying Claim

If a creditor has commenced an action on the underlying claim against the debtor (transferor/obligor), the creditor may attach the asset transferred or its proceeds if the remedy of attachment is available in the action under applicable law and the property is subject to attachment in the hands of the transferee under applicable law [*Civ. Code § 3439.07(b)*;

for discussion and forms relating to attachment, *see* Ch. 62, *Attachment*]. Similarly, once the creditor has obtained a judgment on the underlying claim against the debtor (transferor/obligor), the creditor may levy execution on the asset transferred or its proceeds in the hands of the transferee [*Civ. Code § 3439.07(c)*; for discussion and forms relating to execution and related remedies, such as creditor's suits under *Code Civ. Proc. §§ 708.210-708.290, see* Ch. 254, *Executions and Enforcement of Judgments*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 270.45 Remedies Compared

In an action to set aside a fraudulent transfer, the issue of whether the transfer or obligation was fraudulent as to a creditor of the transferor is fully litigated. Thus, a judgment setting aside a fraudulent transfer or obligation amounts to a lien on the fraudulently tranferred property [*Liuzza v. Bell (1940) 40 Cal. App. 2d 417, 429, 104 P.2d 1095]* . The judgment may order the property sold to satisfy the lien of the creditor, so long as the lien for the protection of a good faith transferee is satisfied from the sale [*see Civ. Code § 3439.08(d)* (lien for protection of good faith transferee), discussed in *§ 270.47[3]*; *see Patterson v. Missler (1965) 238 Cal. App. 2d 759, 771, 48 Cal. Rptr. 215]* .

Although the following cases decided prior to the 1982 amendments to creditors' remedies provisions may no longer apply if the particular creditor's remedy invoked in aid of execution provides that the court may determine competing claims to the property levied on [*see, e.g., Code Civ. Proc. § 708.180(a)*], the general rule has been that when a creditor chooses to disregard the fraudulent transfer and attach or levy execution on the property in the hands of the transferee, the attachment or execution proceeding does not confer jurisdiction on the court to determine adverse claims between the transferee and the creditor. The creditor or other purchaser at the execution sale acquires whatever interest the debtor had in the property. After the sale, the creditor or other purchaser can bring a quiet title action against the transferee or await action by the transferee or anyone claiming through the tranferee [*see Wells Fargo Bank v. PAL Investments, Inc. (1979) 96 Cal. App. 3d 431, 434-438, 157 Cal. Rptr. 818* (no jurisdiction to determine whether note and second deed of trust were fraudulent as to levying creditor); *Blue v. Superior Court (1956) 147 Cal. App. 2d 278, 283-284, 305 P.2d 209* (no jurisdiction to determine whether judgment debtor had interest in property; purchaser may quiet title or await action by others)].

Legal Topics:

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23-270 California Forms of Pleading and Practice--Annotated § 270.46

§ 270.46 Transferee's Right to Give Undertaking

In an action by a creditor to set aside a transfer or annul an obligation on the ground that the transfer or obligation is fraudulent as to the creditor, the transferee may give an undertaking as provided in *Civ. Code §§ 3445-3449* [*Civ. Code § 3446(a)*]. If an undertaking is given, the transferee may sell, encumber, transfer, convey, mortgage, pledge, or otherwise dispose of the property or obligation, or a part thereof, and the purchaser, encumbrancer, transferee, mortgagee, grantee, or pledgee of the property or obligation takes, owns, holds, and possesses the property or obligation unaffected by the action and any judgment that is rendered in the action [*Civ. Code § 3446(b)*]. The undertaking is required to be in the lesser of the following amounts [*Civ. Code § 3448*]:

- Double the value of the property or obligation; or
- Double the amount of the creditor's claim in the action.

The undertaking must be conditioned that, if it is determined in the action that the transfer or obligation was fraudulent as to the creditor, the transferee will pay to the creditor the lesser of (1) the value of the property or obligation as estimated in the undertaking, or (2) the amount determined in the action to be due and owing to the creditor by the person who transferred the property or incurred the obligation [*Civ. Code § 3447*]. The undertaking becomes effective 10 days after it is served on the creditor [*Civ. Code § 3449*]. For discussion and forms relating to the procedure for executing, objecting to, and enforcing the liability on an undertaking, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 270.47 Rights of Transferee in Property Transferred

[1] In General

A judgment in favor of a creditor in a fraudulent transfer action sets aside the transfer or obligation insofar as it affects the creditor of the transferor; however, the transfer or obligation may still be enforced against the transferor or obligor, and all persons claiming through him or her, by all other persons, including the transferee or obligee, unless the transferee or obligee was a knowing participant in the fraud [*McGee v. Allen (1936) 7 Cal. 2d 468, 476, 60 P.2d 1026* ; *see Ahmanson Bank & Trust Co. v. Tepper (1969) 269 Cal. App. 2d 333, 344, 74 Cal. Rptr. 774* (transfer void as to knowing transferee and also as to subsequent transferee who took after lis pendens had been filed in action to set aside initial fraudulent transfer)].

A transferor or obligor cannot revoke a transfer or obligation made to an innocent transferee or obligee to defraud his or her creditors. The transferor is barred by the doctrine of unclean hands from attacking the transfer as against the innocent transferee or anyone claiming through that transferee [*Moore v. Schneider (1925) 196 Cal. 380, 385, 238 P. 81* ; *Samuelson v. Ingraham (1969) 272 Cal. App. 2d 804, 806-808, 77 Cal. Rptr. 750]* .

In a situation involving a conspiring or knowing transferee or obligee, neither the tranferor nor the participating transferee or obligee can enforce the transfer or obligation. It is considered void and unenforceable as against public policy, its purpose having been unlawful [*see Severance v. Knight-Counihan Co. (1947) 29 Cal. 2d 561, 568-569, 177 P.2d 4* (denying enforcement of contract to conspiring obligee on ground that contract was void)].

[2] Good Faith Transferee Who Paid Reasonably Equivalent Value

A transfer made or an obligation incurred by a transferor with actual intent to hinder, delay, or defraud one or more of his or her creditors is not voidable against a person who took in good faith and for reasonably equivalent value or against any subsequent transferee or obligee [*Civ. Code §§ 3439.04(a)(1), 3439.08(a)*; *see Judicial Council of California Civil Jury Instructions, CACI Nos. 4200, 4207* (LexisNexis Matthew Bender) (related California Judicial Council jury instructions)]. Thus, a creditor attacking a transfer as intentionally fraudulent must not only allege and prove fraudulent intent on the part of the transferor, but must also allege and prove lack of good faith on the part of the

transferee and/or lack of reasonably equivalent consideration received by the transferor in order to have the transfer or obligation set aside [*Civ. Code § 3439.08(a)*; *see Annod Corporation v. Hamilton & Samuels (2002) 100 Cal. App. 4th 1286, 1294-1295, 123 Cal. Rptr. 2d 924* (affirming summary judgment for defendants in fraudulent conveyance action brought by landlord against partners who took partnership draws rather than paying rent; transfers were shown to be made in good faith and for reasonably equivalent value); *Kuhlman v. Pacific States S. & L. Co. (1940) 17 Cal. 2d 820, 821-822, 112 P.2d 620* ; *Boness v. Richardson Mineral Springs (1956) 141 Cal. App. 2d 251, 261, 296 P.2d 581]* .

[3] Good Faith Transferee Who Did Not Pay Reasonably Equivalent Value

A good faith transferee or obligee is entitled, to the extent of the value given to the debtor for the obligation or transfer, to the following [*Civ. Code § 3439.08(d)*]:

- A lien on or a right to retain any interest in the asset transferred;
- Enforcement of any obligation incurred; and
- Reduction in the amount of the liability on the judgment.

This is an expansion of former *Civ. Code § 3439.09(c)* which only provided for retention of the asset as security for repayment; however, *Civ. Code § 3439.08(d)* is in accord with cases decided under the former section which have established the priority of the transferee's lien and the various items for which the good faith transferee is entitled to repayment or reimbursement. If a judgment for the creditor authorizes the asset to be sold, the proceeds must first be applied to the transferee's lien, and then to the payment of the creditor's underlying claim. Any excess proceeds are to be returned to the transferee [*Patterson v. Missler (1965) 238 Cal. App. 2d 759, 772-773, 48 Cal. Rptr. 215]* .

"Good faith" means that the transferee acted without actual fraudulent intent and did not collude with the debtor or otherwise actively participate in the fraudulent scheme of the debtor. The transferee's knowledge of the transferor's fraudulent intent, in combination with other facts, may be relevant on the issue of the transferee's good faith [*Annod Corp. v. Hamilton & Samuels (2002) 100 Cal. App. 4th 1286, 1299, 123 Cal. Rptr. 2d 924* ; *see Judicial Council of California Civil Jury Instructions, CACI No. 4207* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)].

The amount of the lien to secure repayment of the defendant transferee's investment should include his or her original investment in the purchase price, together with interest thereon from the date of the investment to the date of the judgment, as well as the amount expended by defendant in the preservation and maintenance of the subject property, less the reasonable rental value of that property between the date of the transfer or obligation and the date of judgment if defendant remains in possession of the property. If the reasonable rental value exceeds the expenses of preservation and maintenance, the excess should be deducted from the amount of the transferee's original investment [*Patterson v. Missler (1965) 238 Cal. App. 2d 759, 771-773, 48 Cal. Rptr. 215]* . A transferee is entitled to be reimbursed only for those expenditures which actually preserved the property or added to its value. A transferee who procures management or legal services in connection with the rental of the property is not entitled to reimbursement, for instance, since such services do not preserve or add to the value of the property [*Patterson v. Missler (1965) 238 Cal. App. 2d 759, 772, 48 Cal. Rptr. 215]* .

In addition, a good faith transferee has been held to be entitled, under former *Civ. Code § 3439.09(c)*, to credit for sums expended in paying other debts of the transferor [*Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 591, 25 Cal. Rptr. 545, 375 P.2d 425]* . This rule is supported by the rule permitting a debtor to pay one creditor in preference to another in the absence of fraud and entitles the transferee, to credit for payments made to other creditors of the transferor which the transferee assumed on taking the fraudulently transferred property [*Civ. Code § 3432*; *see Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 591, 25 Cal. Rptr. 545, 375 P.2d 425* (good faith

transferee/assignee of demolition contract paid assignor's creditors who did work on the contract)].

[4] Participant in Actual Fraud

Ordinarily, a transferee who has participated in intentional fraud is not entitled to reimbursement of any purchase price he or she paid. Such payment has been referred to as money paid to insure the fraud against detection [*Burke v. Koch (1888) 75 Cal. 356, 359, 17 P. 228* ; *see Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 585, 25 Cal. Rptr. 545, 375 P.2d 425* (distinguished on basis that evidence did not support finding that transferee had knowledge of transferor's insolvency or fraudulent intent)]. Nevertheless, if a fraudulent transferee increases the equity in the asset transferred, as by paying a mortgage on fraudulently conveyed real property, he or she is entitled to credit in the form of being subrogated to the rights of the original mortgagee. Thus, the creditor cannot reach any greater interest in the asset than that which he or she could have reached on the date of the transfer [*Ackerman v. Merle (1902) 137 Cal. 169, 171, 69 P. 983* ; *but see Puccetti v. Girola (1944) 63 Cal. App. 2d 240, 249-250, 146 P.2d 714* (fraudulent grantee who took more income from property as not entitled to credit for principal, interest, taxes, insurance, and upkeep)]. For a cross complaint that may be modified for use by a fraudulent transferee seeking reimbursement, see *§ 270.198*.

Legal Topics:

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§ 270.48 Liability of Transferee

[1] Innocent Transferee

A transferee who has no intent to defraud creditors of the transferor and who returns to the transferor or to creditors of the transferor everything of value he or she received from the transferor, or enough to satisfy the creditor's claim, whichever is less, has no personal liability to the creditors of the transferor [*Cohen v. Heavey (1968) 261 Cal. App. 2d 766, 770-772, 68 Cal. Rptr. 180* ; *see Civ. Code § 3439.08(b), (c)* (creditor may avoid transfer only to extent of lesser of value of asset transferred on date of transfer or amount necessary to satisfy creditor's underlying claim); *see also Civ. Code § 3439.08(d)* (good faith transferee is entitled to lien or credit to extent of value given), discussed in *§ 270.44*].

A corollary to the innocent transferee rule can be applied to an innocent investor in a "Ponzi scheme." A Ponzi scheme is a financial fraud that induces investment by promising extremely high, risk-free returns, usually in a short time period, from an allegedly legitimate business venture. The fraud consists of funneling money received from later investors to early investors in the guise of profits from the alleged business venture, thereby cultivating an illusion that a legitimate profit-making business opportunity exists and inducing further investment [*In re United Energy Corp. (9th Cir. 1991) 944 F.2d 589, 590 n.1*]. When the scheme inevitably collapses, the perpetrator often winds up in bankruptcy or in receivership, and the trustee or receiver might then undertake to recover money that was paid out to early investors so that the recovered money can be ratably restored to the duped later investors. The perpetrator is a debtor in this situation, and the investors are creditors having restitution claims. Assuming that an early investor was innocent of complicity in the Ponzi scheme, the trustee or receiver can recover money that the perpetrator paid to that investor, subject to two limitations. First, the maximum recovery is limited to the total amount paid to such an investor, less the aggregate amount that the investor had put into the Ponzi scheme. (In other words, if the investor's restitution claim was actually paid, the investor is entitled to keep the restored money. If the investor received less than that amount, the investor has no liability.) Second, the maximum recoverable amount is further limited the portion of it that the investor put into the Ponzi scheme within the applicable limitation period under the UFTA (normally four years; *see § 270.49* for discussion of limitation periods). The trustee or receiver also may recover interest on the recoverable amount [*Donell v. Kowell (9th Cir. 2008) 533 F.3d 762, 770-772* (applying UFTA to allow recovery from investors in Ponzi scheme, describing theories of liability on which receiver may proceed, and describing two-step process for determining

existence of liability and amount of recovery)].

[2] Conspiring Transferee

A transferee who participates or conspires with the transferor to intentionally defraud creditors of the latter is liable for return of the asset transferred or its value, at least to the extent necessary to satisfy the creditor's claim [*Civ. Code § 3439.08(b), (c)*]. Because such activity on the part of a transferee or obligee constitutes the tort of conspiracy, a personal money judgment may be entered against him or her [*Taylor v. S & M Lamp Co. (1961) 12 Cal. Rptr. 323]* . If the transferee has sold the property or converted it to his or her own use, judgment against him or her may be taken for the value or the asset [*Holmes v. Hatch (1938) 11 Cal. 2d 376, 386, 80 P.2d 70* ; *Wright v. Salzberger (1932) 121 Cal. App. 639, 644-645, 9 P.2d 860* (judgment for amount received on sale of asset as proper, though less than value of asset)]. Any income or rentals earned from the fraudulently transferred property also may be reached to satisfy the creditor's claim, and a decree requiring the tranferee to account for them is proper in the action to set aside the fraudulent transfer [*Michal v. Adair (1944) 66 Cal. App. 2d 382, 388, 152 P.2d 490* ; *Wright v. Salzberger (1932) 121 Cal. App. 639, 645, 9 P.2d 860]* . Similarly, when the asset transferred has been invested by the transferee to improve other property, a lien may be imposed on the improved property for the benefit of the creditor [*Hickson v. Thielman (1956) 147 Cal. App. 2d 11, 15, 304 P.2d 122]* .

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§ 270.49 Statute of Limitations

[1] Transfers Made With Actual Intent to Defraud

If a transfer made or an obligation incurred was fraudulent because it was made or incurred with actual intent to hinder, delay, or defraud any creditor of the debtor [*see Civ. Code § 3439.04(a)(1)*; *see Judicial Council of California Civil Jury Instructions, CACI No. 4200* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)], then an action to set aside the transfer or obligation [*see Civ. Code § 3439.07(a)*] must be brought, or an attachment or levy must be made [*see Civ. Code § 3439.07(b),(c)*], within four years after the transfer was made or the obligation was incurred, or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant [*Civ. Code § 3439.09(a)*; *see Judicial Council of California Civil Jury Instructions, CACI No. 4208* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)].

The Uniform Fraudulent Transfer Act does not provide the exclusive remedy for fraudulent transfers, however. Such transfers also may be attacked by a common law action. The applicable statute of limitations would be the one for relief on the ground of fraud or mistake [*see Code Civ. Proc. § 338(d)* (three years)], and the cause of action would accrue, not when the fraudulent transfer occurs, but when the judgment against the debtor is obtained (or later, in the event of belated discovery) [*Macedo v. Bosio (2001) 86 Cal. App. 4th 1044, 1050-1052, 104 Cal. Rptr. 2d 1* ; *see § 270.49[2]*].

[2] Transfers Made During Lawsuit Establishing Debtor-Creditor Relationship

When an allegedly fraudulent transfer is made during a pending lawsuit that will establish whether, and the extent to which, a debtor-creditor relationship exists, the limitation period does not commence to run until the judgment in the underlying action becomes final. The four-year limitation period, that is, the language, "four years after the transfer was made or the obligation was incurred," accommodates a tolling until the underlying liability becomes fixed by a final judgment [*Cortez v. Vogt (1997) 52 Cal. App. 4th 917, 937, 60 Cal. Rptr. 2d 841]* .

[3] Transfers for Less Than Reasonably Equivalent Value

If a transfer made or an obligation incurred was fraudulent because it was made or incurred without receiving a

reasonably equivalent value in exchange, either in specified circumstances [*see Civ. Code § 3439.04(a)(2)*; *Judicial Council of California Civil Jury Instructions, CACI No. 4202* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)] or if the debtor was insolvent at the time or became insolvent as a result of the transfer or obligation [*see Civ. Code § 3439.05*; *Judicial Council of California Civil Jury Instructions, CACI No. 4203* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)], then an action to set aside the transfer or obligation under *Civ. Code § 3439.07(a)* must be brought or attachment or levy pursuant to *Civ. Code § 3439.07(b)* or *(c)* must be made within four years after the transfer was made or the obligation was incurred [*Civ. Code § 3439.09(b)*; *see Judicial Council of California Civil Jury Instructions, CACI No. 4208* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)].

[4] Outside Limit

Notwithstanding any other provision of law, an action to set aside a fraudulent transfer must be brought or levy must be made within seven years after the transfer was made or the obligation was incurred [*Civ. Code § 3439.09(c)*; *see Judicial Council of California Civil Jury Instructions, CACI No. 4208* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)].

[5] Quiet Title Action by Execution Sale Purchaser

The Official Comment to the UFTA takes the position that bringing an action includes both a creditor's levy on the property in the hands of the transferee and the creditor's filing of a quiet title action against the transferee. However, California cases have held that the limitation period applicable to fraudulent transfers does not apply to a quiet title action brought by a creditor who purchased at an execution sale after the fraudulently transferred property was levied on in the hands of the transferee. The limitation period for the creditor-purchaser's quiet title action has been said to commence on the date the purchaser receives the sheriff's deed [*Hager v. Shindler (1865) 29 Cal. 47, 60]* and on the date of the sale [*Puccetti v. Girola (1944) 63 Cal. App. 2d 240, 248, 146 P.2d 714]* .

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[Reserved]

§§ 270.50[Reserved]

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23-270 California Forms of Pleading and Practice--Annotated § 270.70

§ 270.70 Governing Law

Transfers of personal property that are void as against the transferor's creditors because they were accomplished without immediate delivery and actual change or possession are governed by *Civ. Code § 3440 et seq.* The reasonable retention of goods held by a merchant-seller under the Uniform Commercial Code is governed by *Com. Code § 2402*. Retention of possession of personal property by a lessor in the current course of trade is governed by *Com. Code § 10308*.

Although the term "fraudulent" was deleted from *Civ. Code § 3440 et seq.* effective January 1, 1986, the term has been retained in some instances in this Part for convenience.

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23-270 California Forms of Pleading and Practice--Annotated § 270.71

§ 270.71 Transfers Made Without Accompanying Change of Possession

Except as otherwise provided in *Civ. Code § 3440 et seq.* [*see discussion in § 270.78*], every transfer of personal property made by a person having at the time the possession of the property, and not accompanied by an immediate delivery followed by an actual and continued change of possession of the things transferred, is void as against the transferor's creditors (unsecured or secured) at the time of the transfer, and those who become creditors while the transferor remains in possession, and the successors in interest of those creditors, and as against buyers from the transferor for value in good faith subsequent to the transfer [*Civ. Code § 3440(a)*; *see Fletcher v. Commercial Discount Co. (1930) 103 Cal. App. 656, 659, 284 P. 990* (subsequent purchaser)].

As used in *Civ. Code § 3440 et seq.*, "creditor" means a person who has a claim, as defined in *Civ. Code § 3439.01* (Uniform Fraudulent Transfer Act), and includes an assignee of a general assignment for the benefit of creditors, as defined in *Code Civ. Proc. § 493.010*, of a debtor. "Creditor" also includes any person to whom the transferor's estate devolves in trust for the benefit of persons other than the transferor. Any such assignee or trustee may exercise any and all the rights and remedies specified in *Civ. Code § 3440 et seq.*, if they are available to any one or more creditors of the assignor or transferor who are beneficiaries of the assignment or trust, and in that event, (1) only to the extent the rights or remedies are so available, and (2) only for the benefit of those creditors whose rights are asserted by the assignee or trustee [*Civ. Code § 3440(b)*; *see Civ. Code § 3439.01* (creditor is person having any claim, whether matured or unmatured, liquidiated or unliquidated, absolute, fixed, or contingent)].

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23-270 California Forms of Pleading and Practice--Annotated § 270.72

§ 270.72 Requirement of Delivery and Change of Possession

The primary purpose of *Civ. Code § 3440 et seq.* is to protect against fraud and deception arising out of secret transfers and ostensible ownership inferable from the fact of possession by the transferor [*see Dersch v. Thomas (1934) 138 Cal. App. Supp. 785, 789, 30 P.2d 630]* . When a transfer is found to be void as to creditors and purchasers in good faith of the transferor, such creditors or purchasers are, in essence, found to be entitled to rely on the apparent custody of the property by the transferor without further inquiry into the actual ownership [*see Southern Cal. Collection Co. v. Napkie (1951) 106 Cal. App. 2d 565, 570, 235 P.2d 434* ; *Dersch v. Thomas (1934) 138 Cal. App. Supp. 785, 788-789, 30 P.2d 630]* .

In order for a transfer which is otherwise subject to the provisions of *Civ. Code § 3440* to be immune from attack under *Civ. Code § 3440*, the transferee's conduct in relation to the property transferred must be such as to give notice to the public that a change in the ownership and possession has taken place [*see McKee Stair Bldg. Co. v. Martin (1899) 126 Cal. 557, 559, 58 P. 1044]* . Delivery must be made of the property, and the vendee must take actual possession, which must be open and unequivocal, carrying with it the usual marks and indications of ownership by the transferee. While the possession must be continuous, it need not be continued indefinitely so long as it is bona fide and openly taken and is kept for such a length of time as to give general advertisement of the status of the property and claim of it by the vendee [*Bunting v. Saltz (1890) 84 Cal. 168, 172, 24 P. 167]* . Thus, *Civ. Code § 3440* requires that the transferee take and continuously hold the possession of the property purchased, in such manner and accompanied with such plain and unmistakable acts of possession, control, and ownership, as a prudent, bona fide purchaser would in the exercise of his or her rights over the property, so that all persons might have notice that he or she owned and had possession of the property [*Southern Cal. Collection Co. v. Napkie (1951) 106 Cal. App. 2d 565, 571, 235 P.2d 434]* .

In this regard, no writings pertaining to a transfer or personal property, regardless of their number of character, can create an actual and continued change of possession as to creditors of the transferor. Only acts can effect a valid transfer, which acts must consist of a visible, actual, continued change of possession [*George v. Pierce (1898) 123 Cal. 172, 175, 55 P. 775, 56 P. 53* ; *O'Connor v. O'Connor, Rice & Barnes (1941) 44 Cal. App. 2d 1, 4, 111 P.2d 656* (creditors could levy on debtor's property that had been falsely labeled to indicate ownership by another but was in debtor's possession)].

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23-270 California Forms of Pleading and Practice--Annotated § 270.73

§ 270.73 Good Faith and Adequate Consideration

Since the object of *Civ. Code § 3440 et seq.* is to protect creditors against sales that are surreptitious due to the transferor's continuing possession of the property [*see Nicholson v. McDonald (1961) 193 Cal. App. 2d 675, 679, 14 Cal. Rptr. 505* ; *Dersch v. Thomas (1934) 138 Cal. App. Supp. 785, 789, 30 P.2d 630]* , the question of good faith and adequate consideration for a transfer is wholly immaterial and is no defense to a finding that the transfer was void under *Civ. Code § 3440* as to such creditors [*Dot Records, Inc. v. Freeman (1966) 247 Cal. App. 2d 204, 206, 55 Cal. Rptr. 455]* .

In addition, the fact of the insolvency or solvency of the transferor or the fact that the transfer constituted no more than a preference of one creditor over another also is an immaterial consideraton if the transfer is otherwise void as to creditors of the transferor under *Civ. Code § 3440* [*see Pfahler v. Worcester (1922) 56 Cal. App. 384, 385-386, 205 P. 491]* .

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23-270 California Forms of Pleading and Practice--Annotated § 270.74

§ 270.74 Required Possession of Property by Transferor

A person must have had possession of the personal property at the time of a transfer of the property in order for the transaction come within the terms of *Civ. Code § 3440* [*see Cosby v. Cline (1921) 186 Cal. 698, 701, 200 P. 801* (automobile in possession of sheriff pursuant to attachment order at time transfer made)]. If the transferor did not have possession of the personal property, it is not necessary that the transferee receive or that he or she retain possession of it in order to be protected against the claims of the creditors of the transferor [*Behlen v. Mackie (1952) 113 Cal. App. 2d 132, 133-134, 247 P.2d 847]* . Thus, *Civ. Code § 3440* is not designed to create interests in a transferor greater than those of which he or she was in possession at the time of the transfer; and it is only the transfer of such interests which can be considered to be conclusively void as to the transferor's creditors under *Civ. Code § 3440* [*see Behlen v. Mackie (1952) 113 Cal. App. 2d 132, 133-134, 247 P.2d 847]* .

Similarly, when title to materials being removed from the ground, such as growing crops, or from certain structures, such as bricks from a building being demolished, is transferred, the failure of the transferee to take immediate delivery followed by an actual and continued change of possession of the materials does not render the transferee's title subject to the claims of the creditors of the trasferor. In such cases, because the crops or bricks are not susceptible of manual delivery until harvested or removed, and are not in the possession of the transferor, no transfer has been made within the terms of *Civ. Code § 3440*. However, once the crop is harvested or the bricks are removed, it is the duty of the transferee to take immediate possession of the materials and to retain possession [*see Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 590, 25 Cal. Rptr. 545, 375 P.2d 425* (removal of bricks); *O'Brien v. Ballou (1897) 116 Cal. 318, 321, 48 P. 130* (harvesting of crops)].

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23-270 California Forms of Pleading and Practice--Annotated § 270.75

§ 270.75 Relationship of Transferor and Transferee

The fact that the transferor and transferee were husband and wife, parent and child, employer and employee, or otherwise parties to a relationship which under ordinary circumstances would not be expected to be required to attend to the formalities of the transfer of property required by *Civ. Code § 3440*, and that retention of possession of the property transferred by the transferor ordinarily might be expected, furnishes no reason why the provisions of *Civ. Code § 3440* should receive a construction different from and more liberal than they would receive in the case of a transfer between strangers [*see Southern Cal. Collection Co. v. Napkie (1951) 106 Cal. App. 2d 565, 570, 235 P.2d 434* ; *Blaney v. Cline (1921) 53 Cal. App. 686, 687-688, 200 P. 751]* .

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§ 270.76 Impracticality of Actual Delivery

The requirement of an actual change of possession may be dispensed with when it would be unreasonably burdensome to require it and when it would lead to absurd results [*Raddatz v. Hedgpeth (1963) 223 Cal. App. 2d 633, 637, 35 Cal. Rptr. 855]* . In such a case, when the character and situation of the property delivered are such that actual physical delivery cannot be made, symbolic delivery is considered sufficient to free the property so delivered from the claims of the creditors of the transferor [*see Southern Cal. Collection Co. v. Napkie (1951) 106 Cal. App. 2d 565, 571, 235 P.2d 434]* . Thus, when a movable is bulky and not readily transferable by manual delivery, the rule of *Civ. Code § 3440* is relaxed by reason of the impracticality of actual delivery by ordinary means and methods [*Shepherd v. Gamble (1950) 95 Cal. App2d 890, 892, 214 P.2d 403]* . Similarly, if removal of the thing which is being transferred would cause damage to the property from which the thing is being removed, no actual delivery is required in order for the transfer to be valid as against the creditors of the transferor [*see Raddatz v. Hedgpeth (1963) 223 Cal. App. 2d 633, 35 Cal. Rptr. 855]* . In this situation, however, the transfer is nonetheless subject to attack by the transferor's creditors if the transferee could have effectively excluded the transferor from possession of the property and thereby assumed full control over the property, but did not do so [*see Raddatz v. Hedgpeth (1963) 223 Cal. App. 2d 633, 637-638, 35 Cal. Rptr. 855]* .

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23-270 California Forms of Pleading and Practice--Annotated § 270.77

§ 270.77 Accessions to Personal Property as Not Transfers

Alterations in or additions to articles of personal property belonging to another which are accessions to that property do not constitute transfers of title which could be considered conclusively fraudulent as to creditors of the transferor under *Civ. Code § 3440* [*Raddatz v. Hedgpeth (1963) 223 Cal. App. 2d 633, 638, 35 Cal. Rptr. 855* ; *Dersch v. Thomas (1934) 138 Cal. App. Supp. 785, 789, 30 P.2d 630]* . When things belonging to different owners have been united so as to form a single thing, and cannot be separated without injury, the whole is considered to belong to the owner of the thing which forms the principal part [*see Civ. Code § 1025*]. Thus, if the addition is of such a nature that the thing added cannot be removed without injury, title passes by accession and not by transfer [*Dersch v. Thomas (1934) 138 Cal. App. Supp. 785, 789, 30 P.2d 630]* . Moreover, even though the thing added is removable without injury, if it becomes a component part of that to which it is added, and if, by virtue of contract, title passes, the transaction has all the characteristics of title acquired by accession [*Dersch v. Thomas (1934) 138 Cal. App. Supp. 785, 789, 30 P.2d 630* (replacement of old body with new body on truck purchased under conditional sales contract with alleged fraudulent transferee constituted accession, with title of body and truck in fact remaining in conditional vendor, although new body could be removed without injury to truck)].

However, it is essential in order for this rule to apply that it appear that the accessory be so closely united with the principal article that it constitute an integral and permanent part of it [*Raddatz v. Hedgpeth (1963) 223 Cal. App. 2d 633, 638, 35 Cal. Rptr. 855* (title to electric motors on mill site passed by transfer and not accession where motors were removable without damage and had not become permanant and integral part of mill)].

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§ 270.78 Statutory Exceptions

[1] In General

Civ. Code § 3440 et seq. does not apply to transfers of any of the following [*Civ. Code § 3440.1*]:

- Things in action.

- Ships or cargoes if either are at sea or in a foreign port.

- The sale of accounts or chattel paper governed by the Uniform Commercial Code, security interests, and contracts of bottomry or respondentia.

- Wines or brandies in the wineries, distilleries, or wine cellars of the makers or owners of the wines or brandies, or other persons having possession, care, and control of the wines or brandies, and the pipes, casks, and tanks in which the wines or brandies are contained, if the transfers are made in writing and executed and acknowledged, and if the transfers are recorded in the book of the official records in the office of the county recorder of the county in which the wines, brandies, pipes, casks, and tanks are situated.

- A transfer or assignment made for the benefit of creditors generally or by any assignee acting under an assignment for the benefit of creditors generally, or to any security agreement made for the benefit of creditors generally. This exception applies to a form of statutory assignment for the benefit of creditors, enabling an insolvent debtor, through his or her assignee, to provide for the immediate conversion of the assigned property or the disposal thereof, and the distribution of the proceeds ratably among the creditors; it also applies to a form of assignment in which a transfer is, in effect, only a conveyance in trust by way of paying or securing certain obligations of the debtor. In the case of either form of assignment, so long as the assignment is made for the benefit of creditors generally, it is protected in its operation as to delivery, and the continued change of possession of the property assigned [*Brainard v.*

Fitzgerald (1935) 3 Cal. 2d 157, 161, 44 P.2d 336 ; *see generally* Ch. 307, *Insolvency*].

- Property exempt from enforcement of a money judgment. Since creditors can make no claims to property exempt from execution, the transfer of such property cannot be deemed fraudulent as to such creditors [*Bufkin v. Cline (1919) 180 Cal. 381, 383, 181 P. 390* ; for property exempt from execution, *see Code Civ. Proc. § 704.010 et seq.* and Ch. 254, *Executions and Enforcement of Judgments*].

- Standing timber.

- Subject to the limitations of *Civ. Code § 3440.3* (discussed in *§ 270.78[3]*), a transfer of personal property if: (1) a financing statement satisfying the requirements of *Civ. Code § 3440.1(h)(1)* is filed in the office of the Secretary of State prior to the date of the intended transfer; and (2) publication of a notice of intended transfer is completed in accordance with the requirements of *Civ. Code § 3440.1(h)(2)* 10 days before the transfer occurs [§ 270.78[5]].

- Personal property not located within this state at the time of the transfer or attachment of the lien if this provision is not used for the purpose of evading *Civ. Code § 3440 et seq.*

- A transfer of property which (1) is subject to a statute or treaty of the United States or a statute of California that provides for the registration of transfers of title or issuance of certificates of title, and (2) is so far perfected under that statute or treaty that a bona fide purchaser cannot acquire an interest in the property transferred that is superior to the interest of the transferee.

- A transfer of personal property in connection with a transaction in which the property is immediately thereafter leased by the transferor from the transferee, provided the transferee purchased the property for value and in good faith within the meaning of *Com. Code § 10308(c)*.

- Transition property, as defined in *Pub. Util. Code § 840*, or recovery property, as defined in *Pub. Util. Code § 848*.

- A transfer of property by any governmental entity.

[2] Claim Arising After Filing of Financing Statement and Publication of Notice

Subject to *Civ. Code § 3440.3*, discussed in *§ 270.78[3]*, a transfer of personal property is not void under *Civ. Code § 3440* as against a creditor of the transferor or as against a buyer from the transferor if the creditor's or buyer's claim or right against the transferor arises after the date by which all of the requirements of *Civ. Code § 3440.1(h)*, discussed in *§ 270.40[1]*, have been met, other than the requirement that filing of the financing statement and publication of the notice referred to therein be completed prior to the transfer [*Civ. Code § 3440.2*].

[3] Buyer in Ordinary Course of Business Overrides Exceptions

A transfer of personal property as to which the conditions set forth in any of the following sections are satisfied, is nevertheless void under *Civ. Code § 3440* as against a person who has purchased the personal property from the transferor and who is a "buyer in the ordinary course of business," as defined in *Com. Code § 1201(b)(9)* [*Civ. Code § 3440.3*]:

- *Civ. Code § 3440.1(h)* [filing of financing statement and publication of notice of intended transfer, discussed in *§ 270.40[1]*];

- *Civ. Code § 3440.2* [discussed in *§ 270.78[2]*]; or

- *Civ. Code § 3440.5(b)* [filing of financing statement and publication of notice of security interest granted by transferee, discussed in *§ 270.78[4]*].

[4] Purchase or Security Interest From Transferee

Civ. Code § 3440 et seq. do not affect the rights of a buyer for value in good faith who purchases the transferred property from the transferee or from a successor in interest of the transferee, provided the transferor is no longer in possession of the personal property at the time of the purchase by that buyer [*Civ. Code § 3440.4*]. Similarly, *Civ. Code § 3440 et seq.* do not affect the rights of a secured party who, for value and in good faith, acquires a security interest in the transferred personal property from the transferee, or from the transferee's successor in interest, if the transferor is no longer in possession of the personal property at the time the security interest attaches [*Civ. Code § 3440.5(a)*]. Additionally, except as provided in *Civ. Code § 3440.3*, discussed in *§ 270.78[3]*, *Civ. Code § 3440 et seq.* do not affect the rights of a secured party who acquires a security interest from the transferee, or from the transferee's successor in interest, in the personal property if (1) a financing statement satisfying the requirements of *Civ. Code § 3440.5(b)(1)* is filed in the office of the Secretary of State on or before the date the security agreement is executed, and (2) publication of a notice of intended transfer is completed in accordance with the requirements of *Civ. Code § 3440.5(b)(2)* 10 days before the date of execution of the security agreement by the intended debtor [*Civ. Code § 3440.5(b)*; § 270.78[5][b]].

[5] Notice and Publication Requirements

[a] Transfer of Personal Property

To insulate a transfer of personal property from attack under *Civ. Code § 3440 et seq.*, the following conditions must be satisfied [*Civ. Code § 3440.1(h)*]:

- **Financing Statement.** Prior to the date of the intended transfer, the transferor or the transferee must file a financing statement, with respect to the property transferred, signed by the transferor. The financing statement must be filed in the office of the Secretary of State in accordance with the provisions of Chapter 5 of Division 9 of the Commercial Code [*see Com. Code § 9501 et seq.*], but may use "transferor" and "transferee" in lieu of "debtor" and "secured party." The provisions of Chapter 5 apply as appropriate to the financing statement. A standard form approved by the Secretary of State as Form UCC-1 is available at www.sos.ca.gov/business/ucc/ucc.htm, and many office supply stores. For an illustration of the form, see *California Legal Forms, Ch. 42, Secured Transactions, § 42.211* (Matthew Bender).

- **Notice Requirements.** The transferor or the transferee must publish a notice of intended transfer one time in a newspaper of general circulation published in the judicial district in which the personal property is located, if there is one, and if there is none in the judicial district, then in a newspaper of general circulation in the county embracing the judicial district. The publication must be completed not less than 10 days before the date the transfer occurs. The notice must contain (1) the name and address of the transferor and transferee, (2) a general statement of the character of the personal property intended to be transferred; (3) an indication of the place where the personal property is located; and (4) a date on or after which the transfer is to be made. For a form for this notice, see California Legal Forms, Ch. 53, *Leases of Equipment and Other Personal Property* (Matthew Bender).

[b] Security Interest Acquired From Transferee

To insulate a security interest given by a transferee from attack under *Civ. Code § 3440 et seq.*, the following conditions must be satisfied [*Civ. Code § 3440.5(b)*]:

- **Financing Statement.** On or before the date the security agreement is executed, the intended debtor or secured party must file a financing statement with respect to the property transferred, signed by the intended debtor. The financing statement must be filed in the office of the Secretary of State in accordance with the provisions of Chapter 5 of Division 9 of the Commercial Code [*see Com. Code § 9501 et seq.*], but must use "transferor" and "transferee" instead of "debtor" and "secured party" (and use "secured party" instead of "assignee of secured party"). The provisions of Chapter 5 apply as appropriate to the financing statement. For the purpose of indexing, and in any certification of search, the Secretary of State may refer to any financing statement filed pursuant to this paragraph as a financing statement under the Commercial Code and may describe the transferor as a debtor and the transferee as a secured party. (This filing does not perfect the security interest of the secured party. Perfection of the security interest is governed by Division 9 of the Commercial Code [*see Com. Code § 9101 et seq.*].) A standard form approved by the Secretary of State as Form UCC-1 is available at www.sos.ca.gov/business/ucc/ucc.htm and many office supply stores. For an illustration of the form, see *California Legal Forms, Ch. 42, Secured Transactions § 42.211* (Matthew Bender).

- **Notice Requirement.** The intended debtor or secured party must publish a notice of transfer one time in the same type of paper described in § 270.78[5][a]. The publication must be completed not less than 10 days before the execution by the intended debtor of the intended security agreement. The notice must contain (1) the names and addresses of the transferor, the transferee, the intended debtor, and the secured party, (2) a general statement of the character of the personal property transferred and intended to be subject to the security interest; (3) the location of the personal property; and (4) a date on or after which the security agreement is to be executed by the intended debtor.

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23-270 California Forms of Pleading and Practice--Annotated § 270.79

§ 270.79 Retention of Possession by Merchant-Seller

In transactions governed by the Uniform Commercial Code, the rights of unsecured creditors of the seller with respect to goods which have been identified to a contract for sale are subject to the buyer's right to recover the goods under *Com. Code §§ 2502, 2716*, unless a creditor of the seller may treat a sale or an identification of goods to a contract for sale as void if as against him a retention of possession by the seller is fraudulent or void under any rule of law of the state where the goods are situated [*Com. Code § 2402(1), (2)*; *see Gardner v. Sullivan & Crowe Equip. Co. (1971) 17 Cal. App. 3d 592, 596, 94 Cal. Rptr. 893* (applying *Civ. Code § 3440*)]. However, the retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification does not create a conclusive presumption of fraud or voidness as to creditors of the seller [*see Com. Code § 2402(2)*; *Gardner v. Sullivan & Crowe Equip. Co. (1971) 17 Cal. App. 3d 592, 596, 94 Cal. Rptr. 893* ; *see also Civ. Code § 3440 et seq.* (*Com. Code § 2402(2)* is not restricted by provisions of *Civ. Code § 3440 et seq.*)], unless the identification to the contract or delivery is made not in the current course of trade but in satisfaction of or as security for a preexisting claim for money, security, or the like [*Com. Code § 2402(3)(b)*]. When delivery or identification by way of satisfying or securing an antecedent obligation is made, the law of fraudulent conveyances may apply and render fraudulent the delivery or identification as to creditors of the seller [*see Com. Code § 2402(3)(b)*].

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23-270 California Forms of Pleading and Practice--Annotated § 270.80

§ 270.80 Retention of Goods by Lessor

A creditor of a lessor in possession of goods subject to a lease contract may treat the lease contract as void if, as against the creditor, retention of possession by the lessor is fraudulent or void under any statute or rule of law. However, retention of possession in good faith and current course of trade after the lease contract becomes enforceable is not fraudulent or void [*Com. Code § 10308(a)*; *see Com. Code § 10600* (transition provision); *see also* Civ. Code § 3340.1(k) (exceptions), discussed in *§ 270.78[1]*].

Nothing in Division 10 of the Commercial Code [*see* Com. Code § 10100 et seq.] impairs the rights of creditor of a lessor if the lease contract is made under circumstances which, under any statute or rule of law apart from Division 10, would constitute the transaction a fraudulent transfer or voidable preference [*Com. Code § 10308(b)*].

A creditor of a seller may treat a sale or an identification of goods to a contract as void if, as against the creditor, retention of possession by the seller is fraudulent under any statute or rule of law. However, retention of possession of goods pursuant to a lease contract entered into by the seller as lessee and the buyer as lessor in connection with the sale or identification of the goods in good faith is not fraudulent if the buyer bought for value and in good faith [*Com. Code § 10308(b)*].

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23-270 California Forms of Pleading and Practice--Annotated § 270.81

§ 270.81 Creditors Entitled to Attack Transfer

To be entitled to attack a transfer of personal property which was not accompanied by an immediate delivery followed by an actual and continued change of possession of the property, a creditor must have been a creditor of the transferor at the time of the transfer sought to be avoided or must have become a creditor of the transferor while the transferor remained in possession. Successors in interest of those creditors and buyers from the transferor for value in good faith subsequent to the transfer are also entitled to attack the transfer [*Civ. Code § 3440(a)*; *see Brown v. O'Neal (1892) 95 Cal. 262, 267, 30 P. 538* (entity which became creditor while transferor retained possession)]. A creditor or buyer must, however, assert his or her rights within the limitation period discussed in *§ 270.84* [*Civ. Code § 3440.6*].

In addition, *Civ. Code § 3440(a)* makes no distinction between totally unsecured creditors and those creditors who have realized on their security and are seeking to recover any deficiency which may exist [*In re Trinity Tractor Co. (1970) 3 Cal. App. 3d 428, 439-440, 83 Cal. Rptr. 783]* . At least in the case of a secured creditor who, based on the original contract between the creditor and the transferor, never did intend to rely solely upon his or her security for payment of his or her claim, the secured creditor may be considered a general creditor as to any deficiency which may exist, and is permitted to attack any transfer which is otherwise void as to such creditor under *Civ. Code § 3440* [*In re Trinity Tractor Co. (1970) 3 Cal. App. 3d 428, 440, 83 Cal. Rptr. 783]* .

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§ 270.82 Creditors Protected by Other Statutory Schemes

If a creditor is as fully protected against surreptitious sales or encumbrances as the Legislature deems necessary, the requirements of *Civ. Code §§ 3440-3440.9* may have no application. For example, a sale conducted in compliance with the Bulk Sales Law [*Com. Code §§ 6101-6111*; *see § 270.100* et seq.] by means of which a creditor receives knowledge of the pendency of such a sale and is able to take appropriate means to protect himself or herself need not comply with the requirements of *Civ. Code §§ 3440-3440.9* [*Nicholson v. McDonald (1961) 193 Cal. App. 2d 675, 679, 14 Cal. Rptr. 505]* .

However, it should be noted that the purpose of the statute and its terms are distinct considerations. Although the main reason for requiring an immediate delivery and continuous change of possession may be to give notice to creditors, the fact that one who is a creditor at the time of the attempted transfer may otherwise have notice of such transfer does not make it valid as to him when there is no such delivery and change of possession [*Joseph Herspring Co. v. Jones (1921) 55 Cal. App. 620, 624, 203 P. 1038* ; *see* *Schuch v. Northrup-Jones, Inc. (1958) 162 Cal. App. 2d 279, 285, 328 P.2d 279]* . In the case of one becoming a creditor after such notice, the consideration might have some bearing on the question of estoppel or of good faith [*Joseph Herspring Co. v. Jones (1921) 55 Cal. App. 620, 624, 203 P. 1038]* .

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§ 270.83 Remedies for Creditors and Good-Faith Purchasers

A creditor of the transferor and a purchaser for value in good faith of the transferor subsequent to the transfer may bring an action to have set aside a transfer of personal property which was void as to such creditor or purchaser under *Civ. Code § 3440* [*Pfahler v. Worcester (1922) 56 Cal. App. 384, 384-386, 205 P. 491]* .

In the alternative, the creditor of the transferor may have a writ of attachment or execution issued on the personal property in question, in which case the transferee as third-party claimant must bring proceedings on his or her third-party claim to show that the requirements of *Civ. Code § 3440* for a valid transfer of the property as to the attaching or executing creditor were met [*see* *Dot Records, Inc. v. Freeman (1966) 247 Cal. App. 2d 204, 207-208, 55 Cal. Rptr. 455* (writ of attachment); *Southern Cal. Collection Co. v. Napkie (1951) 106 Cal. App. 2d 565, 568, 235 P.2d 434* (writ of execution)]. That is, one who relies on obtaining title as against the creditor of the transferor must prove that delivery was immediate and the new possession continued [*Dot Records, Inc. v. Freeman (1966) 247 Cal. App. 2d 204, 208, 55 Cal. Rptr. 455]* . Moreover, the sole question in such proceedings is whether the transferor has any interest subject to sale under execution. The court is without jurisdiction to determine the exact nature of the title to or interest in the property of either the transferee or creditor [*Southern Cal. Collection Co. v. Napkie (1951) 106 Cal. App. 2d 565, 572, 235 P.2d 434]* . For discussion and forms relating to attachment proceedings, see Ch. 62 *Attachment* . For discussion and forms relating to levy by writ of execution, see Ch. 254, *Executions and Enforcement of Judgments* ,. For discussion and forms relating to required responses to the transferee's third party claim after service of the writ of execution, see Ch. 254, *Executions and Enforcement of Judgments* .

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§ 270.84 Statute of Limitations

An action brought or levy made under *Civ. Code §§ 3440-3440.9* must be brought or made within one year after the earliest of the following dates [*Civ. Code § 3440.6*]:

- The date the person bringing the action or making the levy should have discovered the transfer in the exercise of reasonable diligence;

- The date the person bringing the action or making the levy obtained actual knowledge of the transfer;

- The date the delivery of, and actual and continued change of possession of, the property transferred occurred; or

- If a financing statement filed pursuant to *Civ. Code § 3440.1(h)* has not lapsed, the date the filing and publication requirements of *Civ. Code § 3440.1(h)* were met, other than the requirement that the filing of the financing statement and publication of the required notice be completed prior to the transfer.

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§ 270.85 Effect of Transfer on Transferee

As is true with conveyances of property found to be fraudulent under the Uniform Fraudulent Conveyance Act [*see* discussion in *§ 270.47*], a conveyance which is void under *Civ. Code § 3440* vests title to the property transferred in the transferee, except as against the creditors of the transferor. Thus, while the transfer is void as to the creditors of the transferor, it is binding on the parties and those in privity with them [*Ramirez v. Hartford Acci. & Indem. Co. (1938) 29 Cal. App. 2d 193, 196-197, 84 P.2d 172]* .

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[Reserved]

§§ 270.86[Reserved]

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§ 270.100 Governing Law

Bulk sales are governed by *Com. Code § 6101 et seq.* Former *Com. Code §§ 6106, 6106.1,* and *6107,* as in effect on December 31, 1990, govern bulk sales conducted on or after January 1, 1991, pursuant to bulk-sale agreement dated before then [*see Com. Code § 6111(b)* (discussed in § 270.109)]. The wage and unemployment compensation liability that may follow after making a bulk sale is governed by *Code Civ. Proc. § 1205* and *Unemp. Ins. Code §§ 1731-1734,* respectively.

Legal Topics:

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§ 270.101 Objective of Bulk Sales Law

The bulk sales law is designed to prevent merchants from making surreptitious sales or encumbrances of their stock-in-trade that are not in the ordinary course of business and that in effect defraud or defeat claims of their creditors [*see Com. Code § 6102(a)(3)* (defining "bulk sale"); *Nicholson v. McDonald (1961) 193 Cal. App. 2d 675, 679, 14 Cal. Rptr. 505* (decided under former *Civ. Code § 3440.1*); *see also Danning v. Daylin, Inc. (9th Cir. 1973) 488 F.2d 185, 187]* . The law is designed to afford the seller's creditors an opportunity to satisfy their claims before the sellers can dispose of their assets and vanish with the proceeds of those sales [*see Reed v. Anglo Scandinavian Corp. (E.D. Cal. 1969) 298 F. Supp. 310, 313]* . It is the buyer, however, who must give notice of the proposed sale and who is liable to the seller's creditors if notice is not given [*see Com. Code §§ 6104, 6107*].

Compliance with the Bulk Sales Act does not preclude recovery on a claim made under the Uniform Fraudulent Transfer Act [*see* Com. Code § 3439 et seq.; *see also § 270.30* et seq.]. The two acts are not mutually exclusive, and the Bulk Sales Act was never intended to substitute for after-the-fact remedies that are otherwise available to injured creditors [*see Monastra v. Konica Business Machines, U.S.A., Inc. (1996) 43 Cal. App. 4th 1628, 1641-1643, 51 Cal. Rptr. 2d 528]* .

In 1988, the National Conference of Commissioners on Uniform State Laws recommended that Division 6 of the Commercial Code be repealed. The recommendation was based on several factors leading to the conclusion that creditors have become able to protect themselves in other ways and that the relatively expensive and onerous mechanisms of the Bulk Transfer Law are no longer necessary. The factors included (1) the increase in credit reporting services, which has given creditors the ability to make better-informed decisions about whether to extend credit; (2) the development of the minimum contacts doctrine, which has allowed creditors to obtain in personam jurisdiction over sellers who leave a state after selling their business; and (3) the availability of Division 9, which provides a relatively simple and inexpensive way for the creditor to take a security interest in inventory [Harris, *Practicing Under Existing Bulk Sales Law--And a Look at the Future of Article 6*, 22 U.C.C. L.J. 195, 197 (1990)]. The Conference also approved a new Division 6 for enactment by states that might prefer not to repeal the Bulk Transfer Law. California's new Bulk Sales Law, as enacted by Stats. 1990, ch. 1191, differs in several respects from the new uniform Bulk Sales Law, but reflects a similar intent.

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§ 270.102 Effect of Failure to Give Required Notice

[1] In General

A buyer's failure to comply with the requirements of *Com. Code § 6104* does *not* do any of the following [*Com. Code § 6107(h)*]:

- Impair the buyer's rights in or title to the assets;
- Render the sale ineffective, void, or voidable [*see § 270.102[5]*];
- Entitle a creditor to more than a single satisfaction of its claim [*see Com. Code § 6107(i)*]; or
- Create liability other than as provided in the Bulk Sales Law (*Com. Code § 6101 et seq.*).

Payment of the buyer's liability under *Com. Code § 6107(a)* (discussed in *§ 270.102[2]*) discharges pro tanto the seller's debt to the creditor [*Com. Code § 6107(i)*].

Unless otherwise agreed, a buyer has an immediate right of reimbursement from the seller for any amount paid to a creditor in partial or total satisfaction of the buyer's liability under *Com. Code § 6107* ((a) [*Com. Code § 6107(j)*; *see Jeffery v. Volberg (1958) 159 Cal. App. 2d 815, 818, 324 P.2d 964* (decided under prior law; transferor may maintain action for purchase price of assets despite violation of bulk transfer laws)].

[2] Buyer's Liability to Single Claimant

Except in the case of a buyer who made a good faith and commercially reasonable effort to comply with the notice requirements or to exclude the sale from the application of the notice requirements by bringing it within one of the exceptions set forth in *Com. Code § 6103(c)*, and subject to the limitations on cumulative liability, a buyer who fails to comply with the requirements of *Com. Code § 6104* with respect to a claimant is liable to that claimant for damages in the amount of the claim, reduced by any amount that the claimant would not have realized if the buyer had complied [

Com. Code § 6107(a); *Gifford v. J & A Holdings (1997) 54 Cal. App. 4th 996, 999, 1005, 63 Cal. Rptr. 2d 253* (notice recorded less than 12 business days before date of anticipated sale specified in notice was defective notice because of noncompliance with *Com. Code § 6105*); *see Com. Code § 6107(c)* (discussed in *§ 270.102[3]*, good faith attempt to comply or exclude sale under *Com. Code § 6103(c)*)]. The claimant has the burden of establishing the validity and amount of the claim. The buyer has the burden of establishing the amount that the claimant would not have realized if the buyer had complied [*Com. Code § 6107(b)*; *see Com. Code § 6102(a)(5)* (defining "claimant," discussed in *§ 270.242[3][a]*)].

The buyer's liability under *Com. Code § 6107(a)* is limited to holders of liquidated claims because no action may be brought under *Com. Code § 6107(a)* by or on behalf of a claimant whose claim is unliquidated or contingent [*Com. Code § 6107(g)*].

[3] Good Faith Exceptions

A buyer who made a good faith and commercially reasonable effort to comply with the requirements of *Com. Code § 6104* or to exclude the sale from the application of the Bulk Sales Law by bringing it within one of the exceptions in *Com. Code § 6103(c)* is not liable to creditors for failure to comply with the requirements of *Com. Code § 6104*. The buyer has the burden of establishing the good faith and commercial reasonableness of its effort [*Com. Code § 6107(c)*; *Gifford v. J & A Holdings (1997) 54 Cal. App. 4th 996, 999, 1005-1007, 63 Cal. Rptr. 2d 253* (attempt to cure defective notice, which was recorded less than 12 business days before date of anticipated sale, by merely postponing closing of sale escrow, without notice, was not commercially reasonable means of satisfying purpose of *Com. Code § 6105* notice requirement)].

[4] Limit on Buyer's Cumulative Liability

In a single bulk sale in which the assets consist only of inventory and equipment, the buyer's cumulative liability for failure to comply with the requirements of *Com. Code § 6104* may not exceed an amount equal to twice the net contract price, less the amount of any part of the net contract price paid to or applied for the benefit of the seller or a creditor except to the extent that the payment or application is applied to a debt that is secured by the assets and that has been taken into consideration in determining the net contract price [*Com. Code § 6107(d)(1)*; *see Com. Code § 6102(a)(11)* (defining "net contract price," discussed in *§ 270.245[3][b]*)].

A payment made by the buyer to a person to whom the buyer is, or believes it is, liable under *Com. Code § 6107(a)* reduces pro tanto the buyer's cumulative liability under *Com. Code § 6107(d)* [*Com. Code § 6107(f)*].

In a single bulk sale in which the assets include property other than inventory and equipment, the buyer's cumulative liability for failure to comply with the requirements of *Com. Code § 6104* may not exceed an amount equal to twice the net value of the inventory and equipment less the amount of the portion of any part of the net contract price paid to or applied for the benefit of the seller or a creditor that is allocable to the inventory and equipment except to the extent that the payment or application is applied to a debt that is secured by the assets and that has been taken into consideration in determining the net contract price [*Com. Code § 6107(d)(2)*; *see Com. Code §§ 6102(a)(11), 6107(e)* (defining "net contract price" and "net value," respectively, discussed in *§ 270.245[3][b], [d]*)].

[5] Effect Under Prior Law

Under the law applicable to sales conducted on or before December 31, 1990, if the buyer failed to give the required notice of bulk sale, the sale was fraudulent and void against any creditor of the seller [former *Com. Code § 6105(1)*; *see also* former *Com. Code § 6108* (exception for auction sales)]. This was true regardless of the seller's good faith and the adequacy of the consideration [*Danning v. Daylin, Inc. (9th Cir. 1973) 488 F.2d 185, 188]* .

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§ 270.103 Transactions Subject to Bulk Sales Law

[1] Basic Definitions and Applicability

A "bulk sale" means either of the following [*Com. Code § 6102(a)(3)*; *see Com. Code § 6102(b)(4)* (definition of "sale" in *Com. Code § 2106(1)* applies)]:

- In the case of a sale by auction or a sale or series of sales conducted by a liquidator on the seller's behalf, a sale or series of sales not in the ordinary course of the seller's business of more than half of the seller's inventory and equipment, as measured by a value on the date of the bulk-sale agreement [*see Com. Code § 6102(a)(10)* (liquidator as one regularly engaged in business of disposing of assets for businesses contemplating liquidation or dissolution)]; or

- In all other cases, a sale not in the ordinary course of the seller's business of more than half the seller's inventory and equipment, as measured by value on the date of the bulk-sale agreement.

A "sale" consists in the passing of title from the seller to the buyer for a price [*Com. Code § 2106(1)*; *see Com. Code § 6102(b)(4)* (applying that definition in *Com. Code § 6101 et seq.*)]. "Value" means fair market value [*Com. Code § 6102(a)(15)*].

Unless the transaction qualifies for one of the exceptions set forth in *Com. Code § 6103(c)* (discussed in *§ 270.108*), the Bulk Sales Law applies to a bulk sale if (1) the seller's principal business is the sale of inventory from stock, including those who manufacture what they sell, or that of a restaurant owner; and (2) on the date of the bulk-sale agreement, the seller is located in California, or, if the seller is located in a jurisdiction that is not a part of the United States, the seller's major executive office in the United States is in California [*Com. Code § 6103(a)*]. A seller is deemed to be located at its place of business. If a seller has more than one place of business, the seller is deemed located at its chief executive office [*Com. Code § 6103(b)*].

[2] "Inventory" Defined

Goods are "inventory" if they are held by a person who holds them for sale or lease or to be furnished under contracts of service, or if he or she has so leased or furnished them, or if they are raw materials, work in process, or materials used or consumed in a business. Inventory of a person is not to be classified as his or her equipment [*see Com. Code §§ 6102(b)(3), 9102(a)(48)*].

[3] "Equipment" Defined

Goods are "equipment" if they are used or bought for use primarily in business (including farming or a profession) or by a debtor who is a nonprofit organization or a governmental subdivision or agency or if the goods are not included in the definition of inventory, farm products, or consumer goods [*see Com. Code §§ 6102(b)(2), 9102(a)(33)*].

[4] "Sale in Ordinary Course of Seller's Business" Defined

A sale is "in the ordinary course of the seller's business" if the sale comports with usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices [*Com. Code § 6102(a)(13)*].

[5] "Date of Bulk-Sale Agreement" Defined

In the case of a sale by auction or conducted by a liquidator, "date of the bulk-sale agreement" means the date on which the seller engages the auctioneer or liquidator [*Com. Code § 6102(a)(8)(i)*]. In all other cases, "date of the bulk-sale agreement" means the date on which a bulk-sale agreement becomes enforceable between the buyer and the seller [*Com. Code § 6102(a)(8)(ii)*].

Legal Topics:

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23-270 California Forms of Pleading and Practice--Annotated § 270.104

§ 270.104 Buyer's Duties With Respect to Bulk Sale Other Than Auction

In a bulk sale as defined *Com. Code § 6102(a)(3)(ii)*, that is, one other than an auction or one conducted by a liquidator, the buyer must do each of the following [*Com. Code § 6104*]:

- Obtain from the seller a list of all business names and addresses used by the seller within three years before the date the list is sent or delivered to the buyer;

- Give notice of the bulk sale in accordance with *Com. Code § 6105*; and

- If the consideration for the sale is $2 million or less and is substantially all cash or an obligation of the buyer to pay cash in the future to the seller or a combination thereof, comply with *Com. Code § 6106.2* (discussed in *§ 270.105*).

For a form for notice of sale and discussion of its requirements, *see § 270.240*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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23-270 California Forms of Pleading and Practice--Annotated § 270.105

§ 270.105 Bulk Sale for Cash or Obligation to Pay Cash

[1] In General

Com. Code § 6106.2 governs a bulk sale if the consideration is $2 million or less and is substantially all cash or an obligation of the buyer to pay cash in the future to the seller or a combination thereof [*Com. Code § 6106.2(a)*]. If a bulk sale is subject to *Com. Code § 6106.2*, additional announcements are required in the notice of sale [*Com. Code § 6106.2(f)*; *see § 270.240*].

[2] Duty to Apply Consideration to Creditors' Claims

On every bulk sale subject to *Com. Code § 6106.2*, except one made by sale at auction or a sale or series of sales conducted by a liquidator on the seller's behalf, it is the duty of the buyer or, if the transaction is handled through an escrow, the escrow agent, to apply the cash consideration in accordance with *Com. Code § 6106.2* so far as necessary to pay those debts of the seller for which claims are due and payable on or before the date of the bulk sale and are received in writing on or prior to the date specified as the last date to file claims with the person designated in the notice to receive claims. This duty of the buyer or escrow agent runs to each claimant timely filing the claim [*Com. Code § 6106.2(b)*].

"Date of the bulk sale" as used in this context means the later of the date on which either of the following occurs [*Com. Code § 6102(a)(7)(i)(B)*]:

- More than 10 percent of the net contract price is paid to or for the benefit of the seller; or
- More than 10 percent of the assets, as measured by value, are transferred to the buyer.

[3] Dispute as to Claims Due: Claimant's Right to Attachment

If the seller disputes whether a claim is due and payable on the date of the bulk sale or the amount of any claim, the buyer or escrow agent must do both of the following [*Com. Code § 6106.2(c)*]:

- Withhold from distribution an amount equal to (1) 125 percent of the first $7,500 of the claim, and (2) an amount equal to that portion of the claim in excess of the first $7,500, or the pro rata amount under *Com. Code § 6106.4(b)*, if applicable; and

- Send a written notice to the claimant filing the claim on or before two business days after the distribution, stating that the amount will be paid to the seller, or to the other claimants in accordance with *Com. Code § 6106.4(b)*, as the case may be, unless attached within 25 days from the mailing of the notice.

Any portion of the amount withheld that is not attached by the claimant within that time is paid by the buyer or escrow agent to the seller, or to the other claimants in accordance with *Com. Code § 6106.4(b)* if they have not been paid in full. An attachment of any amount so withheld is limited in its effect to the amount withheld for the attaching claimant, and gives the attaching claimant no greater priority or rights with respect to its claim than the claimant would have had if the claim had not been disputed [*Com. Code § 6106.2(c)*]. For purposes of *Com. Code § 6106.2(c)*, a claimant may obtain the issuance of an attachment for a claim that is less than $500 and that otherwise meets the requirements of *Code Civ. Proc. § 483.010* or for a claim that is a secured claim or lien of the type described in *Code Civ. Proc. § 483.010* [*Com. Code § 6106.2(c)*]. For further discussion and forms relating to the provisional remedy of attachment as governed by *Code Civ. Proc. § 481.010 et seq.*, see Ch. 62, *Attachment* .

This remedy is in addition to any other remedies the claimant may have, including any right to attach the property intended to be transferred or any other property [*Com. Code § 6106.2(c)*].

[4] Cash Insufficient to Pay All Claims in Full

If the cash consideration payable is not sufficient to pay all of the claims received in full, and no escrow has been established pursuant to *Com. Code § 6106.4* (discussed in *§ 270.106*), the buyer must follow the procedures specified in *Com. Code § 6106.4(a)-(c)*, and the immunity established by *Com. Code § 6106.4(a)(3)* applies to the buyer [*Com. Code § 6106.2(d)*].

[5] Payment of Claims; Interpleader Action as Alternative

Within 45 days after the buyer takes legal title to any of the goods, the buyer or escrow agent must either pay to the extent of the cash consideration the claims filed and not disputed, or the applicable portion thereof to the extent of the cash consideration under *Com. Code § 6106.4(b)*, or institute an action in interpleader pursuant to *Code Civ. Proc. § 386(b)* and deposit the consideration with the clerk of the court pursuant to *Code Civ. Proc. § 386(c)* [*Com. Code § 6106.2(e)*]. The action must be brought in the appropriate court in the county in which the seller had its principal place of business in *California. Code Civ. Proc. §§ 386.1* and 386.6apply in the action [*Com. Code § 6106.2(e)*; *see* discussion and forms in Ch. 314, *Interpleader*].

[6] Effect on Lien or Security Interest

Com. Code § 6106.2 is not to be construed to release any security interest or other lien on the property that is the subject of the bulk sale unless the secured party or lienholder gives a voluntary release [*Com. Code § 6106.2(g)*].

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23-270 California Forms of Pleading and Practice--Annotated § 270.106

§ 270.106 Escrow Procedures

[1] Buyer's Deposit

Specified escrow procedures are applicable if the notice of a bulk sale subject to *Com. Code § 6106.2* (discussed in *§ 270.105*) states that claims may be filed with an escrow agent. In those situations, the intended buyer has to deposit with the escrow agent the full amount of the purchase price or consideration [*Com. Code § 6106.4(a)*; *see § 270.240* (form of notice)].

[2] When Deposit Does Not Cover Claims

[a] Notice and Postponement

If, at the time the bulk sale subject to *Com. Code § 6106.2* is otherwise ready to be consummated, the amount of cash deposited or agreed to be deposited at or prior to consummation in the escrow is insufficient to pay in full all of the claims filed with the escrow agent, the escrow agent must do the following [*Com. Code § 6106.4(a)*]:

(1) Delay the distribution of the consideration and the passing of legal title for a period of not less than 25 days nor more than 30 days from the date the notice required in paragraph (2) is mailed.

(2) Within five business days after the time the bulk sale would otherwise have been consummated, send a written notice to each claimant who has filed a claim stating (a) the total consideration deposited or agreed to be deposited in the escrow, (b) the name of each claimant who filed a claim against the escrow and the amount of each claim, (c) the amount proposed to be paid to each claimant, (d) the new date scheduled for the passing of legal title pursuant to paragraph (1), and (e) the date on or before which distribution will be made to claimants, which must not be more than five days after the new date specified for the passing of legal title. To the extent that an obligation of the buyer to pay cash in the future is a part of the consideration and the cash consideration is not sufficient to pay all claims filed in full, the notice must also state the amount, terms, and due dates of the obligation and the portion of the claims expected to be paid by that obligation [*Com. Code § 6106.4(c)*].

(3) If no written objection to the distribution described in the notice required by paragraph (2) is received by the escrow agent prior to the new date specified in the notice for the passing of legal title, the escrow agent must not be liable to any person to whom the notice required by paragraph (2) was sent for any good faith error that may have been committed in allocating and distributing the consideration as stated in the notice.

[b] Priorities for Distribution

If the amount of cash deposited or agreed to be deposited in escrow at or prior to consummation of a bulk sale subject to *Com. Code § 6106.2* is insufficient to pay in full all of the claims filed with the escrow agent, the escrow agent must distribute the consideration in the following order of priorities [*Com. Code § 6106.4(b)*]:

- All obligations owing to the United States, to the extent given priority by federal law.

- Secured claims, including statutory and judicial liens, to the extent of the consideration fairly attributable to the value of the properties securing the claims and in accordance with the priorities provided by law. A secured creditor must participate in the distribution pursuant to *Com. Code § 6106.4(b)* only if a release of lien is deposited by the secured creditor conditioned only on receiving an amount equal to the distribution.

- Escrow and professional charges and brokers' fees attributable directly to the sale.

- Wage claims given priority by *Code Civ. Proc. § 1205*.

- All other tax claims.

- All other unsecured claims pro rata, including any deficiency claims of partially secured creditors.

To the extent that an obligation of the buyer to pay cash in the future is a part of the consideration and the cash consideration is not sufficient to pay all claims filed in full, the escrow agent must apply all principal and interest received on the obligation to the payment of claims in accordance with *Com. Code § 6106.4(b)* until they are paid in full before making any payment to the seller [*Com. Code § 6106.4(c)*].

No funds may be drawn from the escrow, prior to the actual closing and completion of the escrow, for the payment, in whole or in part, of any commission, fee, or other consideration as compensation for a service that is contingent on the performance of any act, condition, or instruction set forth in the escrow [*Com. Code § 6106.4(c)*].

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23-270 California Forms of Pleading and Practice--Annotated § 270.107

§ 270.107 Bulk Sales by Auction

[1] Auctioneer or Liqudiator as "Buyer"

Bulk sales by auction and bulk sales conducted by a liquidator on the seller's behalf are governed by *Com. Code §§ 6104*, *6105*, and *6107*, with some modifications [*Com. Code § 6108(a)*; for discussion of *Com. Code §§ 6104*, *6105*, and *6107*, *see §§ 270.102*, *270.104*, and *270.240*]. "Buyer" in the context of a bulk sale by auction or a bulk sale conducted by a liquidator refers to the auctioneer or liquidator, as the case may be [Com. Code § 6108(a)(1)]. Thus, it is the auctioneer or liquidator who must comply with the requirements of *Com. Code §§ 6104* and *6105* [*see Com. Code §§ 6105(a)*, *6108(a)(3)* (notice requirements for sale by auction or liquidation); *see § 270.241*]. A person who buys at a bulk sale conducted by auction or by a liquidator need not comply with the requirements of *Com. Code §§ 6104* and *6105*, and is not liable for the failure of the auctioneer or liquidator to comply with the requirements imposed on it [*Com. Code § 6108(c)*].

[2] "Auctioneer" and "Liquidator" Defined

The term "auctioneer" means a person whom the seller engages to direct, conduct, control, or be responsible for a sale by auction [*Com. Code § 6102(a)(2)*].

The term "liquidator" means a person who is regularly engaged in the business of disposing of assets for businesses contemplating liquidation or dissolution [*Com. Code § 6102(a)(10)*].

[3] Cumulative Liability of Auctioneer or Liquidator

In determining the cumulative liability of an auctioneer or liquidator, "net contract price" refers to net proceeds of the auction or net proceeds of the sale, as the case may be [*Com. Code § 6108(a)(2)*]. In a single bulk sale, the cumulative liability of the auctioneer or liquidator for failure to comply with the requirements of *Com. Code §§ 6104*, *6105*, and 6108may not exceed the amount of the net proceeds of the sale allocable to inventory and equipment sold less the amount of the portion of any part of the net proceeds paid to or applied for the benefit of a creditor that is allocable to the inventory and equipment [*Com. Code § 6108(a)(4)*].

A payment made by the auctioneer or liquidator to a person to whom the auctioneer or liquidator is, or believes it is, liable under *Com. Code § 6108* reduces pro tanto the auctioneer's or liquidator's cumulative liability under *Com. Code § 6108(a)(4)* [*Com. Code § 6108(b)*].

Legal Topics:

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23-270 California Forms of Pleading and Practice--Annotated § 270.108

§ 270.108 Transactions Excepted From Bulk Sales Law

[1] Transfers to Satisfy Obligations

The Bulk Sales Law does not apply to a transfer made to secure payment or performance of an obligation [*Com. Code § 6103(c)(1)*]. Specific transfers in payment or performance of an obligation that are excepted from the Bulk Sales Law include the following:

- A transfer of collateral to a secured party pursuant to *Com. Code § 9609* [*Com. Code § 6103(c)(2)*].
- A sale of collateral pursuant to *Com. Code § 9610* [*Com. Code § 6103(c)(3)*].
- Retention of collateral pursuant to *Com. Code § 9620* [*Com. Code § 6103(c)(4)*].
- A sale of an asset encumbered by a security interest or lien if (a) all the proceeds of the sale are applied in partial or total satisfaction of the debt secured by the security interest or lien, or (b) the security interest or lien is enforceable against the asset after it has been sold to the buyer and the net contract price is zero [*Com. Code § 6103(c)(5)*].
- A general assignment for the benefit of creditors or to a subsequent transfer by the assignee [*Com. Code § 6103(c)(6)*].

[2] Sales in Course of Judicial or Administrative Proceeding

The Bulk Sales Law does not apply to a sale by an executor, administrator, receiver, trustee in bankruptcy, debtor in possession, or any public officer under judicial process [*Com. Code § 6103(c)(7)*], nor does it apply to a sale made in the course of judicial or administrative proceedings for the dissolution or reorganization of an organization [*Com. Code § 6103(c)(8)*].

[3] Sale Required by Law

A sale required by, and made pursuant to statute is not subject to the Bulk Sales Law [*Com. Code § 6103(c)(13)*].

[4] Buyer Assumes Known Claims

A sale to a buyer whose principal place of business is in the United States is not subject to the Bulk Sales Law if the buyer satisfies each of the following requirements [*Com. Code § 6103(c)(9)*]:

- Not earlier than 21 days before the date of the bulk sale (1) obtains from the seller a verified and dated list of claimants of whom the seller has notice three days before the seller sends or delivers the list to the buyer, or (2) conducts a reasonable inquiry to discover the claimants;

- Assumes in full the debts owed to claimants of whom the buyer has knowledge on the date the buyer receives the list of claimants from the seller or on the date the buyer completes the reasonable inquiry, as the case may be;

- Is not insolvent after the assumption; and

- Records and publishes notice of the assumption not later than 30 days after the date of the bulk sale in the manner provided in *Com. Code § 6105* (for discussion of recording and publication requirements, *see § 270.240[3]*).

The notice of assumption must state each of the following [*Com. Code § 6103(d)*]:

- That a sale that may constitute a bulk sale has been or will be made;

- The date or prospective date of the bulk sale;

- The individual, partnership, or corporate names and the addresses of the seller and buyer;

- The address to which inquiries about the sale may be made, if different from the seller's address; and

- That the buyer has assumed or will assume in full the debts owed to claimants of whom the buyer has knowledge on the date the buyer receives the list of claimants from the seller or completes a reasonable inquiry to discover the claimants.

[5] Buyer Assumes All Seller's Debts

A sale to a buyer whose principal place of business is in the United States is not subject to the Bulk Sales Law if the buyer satisfies each of the following requirements [*Com. Code § 6103(c)(10)*]:

- Assumes in full the debts that were incurred in the seller's business before the date of the bulk sale;

- Is not insolvent after the assumption; and

- Records and publishes notice of the assumption not later than 30 days after the date of the bulk sale in the manner provided by *Com. Code § 6105* (for discussion of recording and publication requirements, *see § 270.240[3]*).

The notice of assumption must state each of the following [*Com. Code § 6103(e)*]:

- That a sale that may constitute a bulk sale has been or will be made;
- The date or prospective date of the bulk sale;
- The individual, partnership, or corporate names and the addresses of the seller and buyer;
- The address to which inquiries about the sale may be made, if different from the seller's address; and
- That the buyer has assumed or will assume the debts that were incurred in the seller's business before the date of the bulk sale.

[6] Newly Organized Entity Assumes All Seller's Debt

A sale to a new organization that is organized to take over and continue the business of the seller and that has its principal place of business in the United States is not subject to the Bulk Sales Law if each of the following conditions are satisfied [*Com. Code § 6103(c)(11)*]:

- The buyer assumes in full the debts that were incurred in the seller's business before the date of the bulk sale;
- The seller receives nothing from the sale except an interest in the new organization that is subordinate to the claims against the organization arising from the assumption; and
- The buyer records and publishes notice of the assumption not later than 30 days after the date of the bulk sale in the manner provided in *Com. Code § 6105* (for discussion of recording and publication requirements, *see § 270.240[3]*).

The required contents of the notice are the same as those required in a sale pursuant to *Com. Code § 6103(c)(10)*, discussed in *§ 270.108[5]* [*Com. Code § 6103(e)*].

[7] Sales for Less Than $10,000 or More Than $5 Million

A sale of assets is not subject to the Bulk Sales Law if the value of those assets, net of liens and security interests, is less than $10,000 [*Com. Code § 6103(c)(12)(i)*]. If a debt is secured by assets and other property of the seller, the net value of the assets is determined by subtracting from their value an amount equal to the product of the debt multiplied by a fraction, the numerator of which is the value of the assets on the date of the bulk sale and the denominator of which is the value of all property securing the debt on the date of the bulk sale [*Com. Code § 6103(c)(12)(i)*].

A sale of assets also is not subject to the Bulk Sales Law if the value of those assets on the date of the bulk-sale agreement is more than $5 million [*Com. Code § 6103(c)(12)(ii)*].

For purposes of this exception, the value of assets is presumed to be equal to the price the buyer agrees to pay for the assets. In a sale by auction or a sale conducted by a liquidator on the seller's behalf, however, the value of assets is presumed to be the amount the auctioneer or liquidator reasonably estimates the assets will bring at auction or on liquidation [*Com. Code § 6103(f)*].

[8] Sale and Lease Back

A transfer of personal property is not subject to the Bulk Sales Law if the personal property is leased back to the

transferor immediately following the transfer and either (1) a financing statement was filed and notice of intended transfer was published in compliance with *Civ. Code § 3440.1(h)*, or *(2)* the transferee purchased the property for value and in good faith so as to render the transfer exempt under *Civ. Code § 3440.1(k)* [*Com. Code § 6103(c)(14)*].

[9] Transfer of Liquor License

A transfer of a liquor license that is subject to and complies with *Bus. & Prof. Code § 24070 et seq.* is not subject to the Bulk Sales Law if the transferee records and publishes notice of the transfer at least 12 business days before the transfer is to be consummated in the manner provided in *Com. Code § 6105* and the notice contains the information set forth in *Com. Code § 6105(a)(1)-(4)*, inclusive [*Com. Code § 6103(c)(15)*]. For discussion of the recording and publication requirements, and the contents of the notice, see *§ 270.240[3], [4]*.

[10] Transfer of Goods in Warehouse

A transfer of goods in a warehouse is not subject to the Bulk Sales Law if a warehouse receipt has been issued by, and a copy of the receipt is kept at, the warehouse in which the goods are stored [*Com. Code § 6103(c)(16)*]. For further discussion of warehouses and warehouse receipts, see Ch. 213, *Documents of Title* .

Legal Topics:

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A. Uniform Fraudulent Transfer Act

23-270 California Forms of Pleading and Practice--Annotated § 270.130

§ 270.130 State Statutes

[1] Creditor's Remedies

Creditor permitted to maintain action to avoid fraudulent transfer or obligation, except against person who took in good faith and for reasonably equivalent value or subsequent transferee or obligee, to extent of lesser of value of property transferred on date of transfer or amount necessary to satisfy claim. *Civ. Code §§ 3439.07(a)(1), 3439.08(a)-(c)*

Creditor permitted attachment or other provisional remedy against asset transferred or its proceeds. *Civ. Code § 3439.07(a)(2), (b)*

Availability of injunctive relief against further dispostion of asset transferred or its proceeds; appointment of receiver; and any other relief circumstances may require. *Civ. Code § 3439.07(a)(3)*

Creditor who has judgment on underlying claim against debtor is permitted to levy execution on asset transferred or its proceeds. *Civ. Code § 3439.07(c)*

Assignee of general assignment for benefit of creditors is entitled to exercise remedies to extent beneficiaries of assignment could. *Civ. Code § 3439.07(d)*

[2] Definitions

Assets. *Civ. Code § 3439.01(a)*

Claim. *Civ. Code § 3439.01(b)*

Creditor. *Civ. Code § 3439.01(c)*

Debt. *Civ. Code § 3439.01(d)*

Debtor. *Civ. Code § 3439.01(e)*

Lien. *Civ. Code § 3439.01(f)*

Person. *Civ. Code § 3439.01(g)*

Property. *Civ. Code § 3439.01(h)*

Transfer. *Civ. Code § 3439.01(i)*

Valid lien. *Civ. Code § 3439.01(j)*

[3] Forms of Fraudulent Transfers or Obligations

Transfer made or obligation incurred by debtor with actual intent to hinder, delay, or defraud any creditor is fraudulent as to creditor, whether creditor's claim arose before or after transfer was made or obligation was incurred. *Civ. Code § 3439.04(a)(1)*

Transfer made or obligation incurred without receipt by debtor of reasonably equivalent value in exchange is fraudulent as to creditor, whether creditor's claim arose before or after transfer was made or obligation was incurred, if debtor was engaged in or was about to engage in business or transaction for which remaining assets were unreasonably small. *Civ. Code § 3439.04(a)(2)(A)*

Transfer made or obligation incurred without receipt by debtor of reasonably equivalent value in exchange is fraudulent as to creditor, whether creditor's claim arose before or after transfer was made or obligation was incurred, if debtor intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due. *Civ. Code § 3439.04(a)(2)(B)*

Transfer made or obligation incurred by debtor who did not receive reasonably equivalent value in exchange for transfer or obligation and who is or will be rendered insolvent thereby is fraudulent as to creditors whose claims arose before transfer was made or obligation was incurred. *Civ. Code § 3439.05*

[4] Insolvency

Debtor is insolvent if at fair valuations, sum of debts is greater than assets. *Civ. Code § 3439.02(a)*

Partnership is insolvent if at fair valuations, sum of partnership debts is greater than aggregate of all partnership's assets and sum of excess of value of each general partner's nonpartnership assets over partner's nonpartnership debts. *Civ. Code § 3439.02(b)*

Debtor who is generally not paying his or her debts as they become due is presumed to be insolvent. *Civ. Code § 3439.02(c)*

For purposes of determining insolvency, assets transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or in other manner so as to be voidable under *Civ. Code §§ 3439-3439.12* are excluded. *Civ. Code § 3439.02(d)*

For purposes of determining insolvency, obligation is excluded to extent it is secured by valid lien on property of debtor not included as asset. *Civ. Code § 3439.02(e)*

[5] Preferences

Debtor is entitled to pay one creditor, or to give security to one creditor, in preference to another. *Civ. Code § 3432*

[6] Statute of Limitations

Action to set aside fraudulent transfer under *Civ. Code § 3439.04(a)(1)* (transfer made with actual intent to defraud, hinder, or delay creditor) must be brought or attachment or levy must be made within four years after transfer was made or obligation was incurred, or, if later, within one year after transfer or obligation was or could reasonably have been discovered by claimant. *Civ. Code § 3439.09(a)*

Action to set aside transfer as fraudulent under *Civ. Code §§ 3439.04(a)(2)* or *34390.05* (transfers without reasonably equivalent value in exchange) must be brought or attachment or levy must be made within four years after transfer was made or obligation was incurred. *Civ. Code § 3439.09(b)*

Despite any other provision of law, action to set aside fraudulent transfer is required to be brought within seven years after transfer was made or obligation was incurred. *Civ. Code § 3439.09(c)*

[7] Transferees' Rights

Transfer or obligation, fraudulent because it was made with actual intent to defraud, hinder, or delay creditor, is not voidable as against person who took in good faith and for reasonably equivalent value or any subsequent transferee or obligee. *Civ. Code § 3439.08(a)*

Transfer or obligation is only subject to being set aside to extent of lesser of value of property transferred on date of transfer or amount necessary to satisfy claim. *Civ. Code § 3439.08(b), (c)*

Good faith transferee or obligee is entitled, to extent of value given to debtor for obligation or transfer, to lien on or right to retain any interest in asset transferred. *Civ. Code § 3439.08(d)(1)*

Good faith obligee is entitled, to extent of value given to debtor for obligation, to enforcement of any obligation incurred. *Civ. Code § 3439.08(d)(2)*

Good faith transferee or obligee is entitled, to extent of value given to debtor for obligation or transfer, to reduction in amount of liability on judgment. *Civ. Code § 3439.08(d)(3)*

Transfer is not voidable under *Civ. Code § 3439.04(a)(2)* or *Civ. Code § 3439.05* if it results from termination of lease on debtor's default pursuant to lease and applicable law. *Civ. Code § 3439.08(e)(1)*

Transfer is not voidable under *Civ. Code § 3439.04(a)(2)* or *Civ. Code § 3439.05* if it results from enforcement of lien in noncollusive manner in compliance with applicable law (other than retention of collateral under *Com. Code §§ 9620* and *9621* or voluntary transfer of collateral by debtor to lienor) in satisfaction of all or part of secured obligation. *Civ. Code § 3439.08(e)(2)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationExaminers, Officers & TrusteesFraudulent TransfersGeneral OverviewMergers & Acquisitions LawFraudulent TransfersCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawPurchase & SaleFraudulent Transfers

California Forms of Pleading and Practice--Annotated

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Volume 23: Fraud and Deceit thru Good Faith Improver of Real Property-Chs. 269-279
Chapter 270 FRAUDULENT CONVEYANCES
PART III. RESEARCH GUIDE
A. Uniform Fraudulent Transfer Act

23-270 California Forms of Pleading and Practice--Annotated § 270.130A

§ 270.130A California Civil Jury Instructions

For related jury instructions regarding issues arising under the Uniform Fraudulent Transfer Act, see Judicial Council of California Civil Jury Instructions (Caci), Series 4200 (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions

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PART III. RESEARCH GUIDE
A. Uniform Fraudulent Transfer Act

23-270 California Forms of Pleading and Practice--Annotated § 270.131

§ 270.131 Decisions

[1] Action to Quiet Title

Trustee in bankruptcy seeking declaration that conveyance by debtor was void and to quiet title in debtor was not subject to statute of limitations; limitation was not applicable against grantor remaining in possession and therefore not applicable against trustee. *In re Allustiarte (9th Cir. 1986) 786 F.2d 910, 913*

In transferee's action to quiet title, defendant creditor who relies on defense of fraudulent conveyance is required to allege whether conveyance was intentionally fraudulent or made by insolvent without consideration. *Winberry v. Lopez (1960) 178 Cal. App. 2d 672, 677, 3 Cal. Rptr. 245*

[2] Action to Set Aside Fraudulent Transfer

[a] In General

Summary adjudication for plaintiff on causes of action seeking to set aside fraudulent transfers pursuant to *Civ. Code § 3439.04(a), (b)* was properly granted, despite defendant's assertion that privilege against self-incrimination precluded summary adjudication because he faced potential criminal prosecution arising from same facts and that court should have denied or continued motion instead. *Fisher v. Gibson (2001) 90 Cal. App. 4th 275, 286-287, 109 Cal. Rptr. 2d 145*

Cause of action on underlying debtor's indebtedness to creditor was permitted to be adjudicated in same action as one for setting aside fraudulent transfer. *Ahmanson Bank & Trust Co. v. Tepper (1969) 269 Cal. App. 2d 333, 343, 74 Cal. Rptr. 774* ; *Michal v. Adair (1944) 66 Cal. App. 2d 382, 389, 152 P.2d 490*

If case is tried on theory of actual fraud, creditor is unable to subsequently claim constructive fraud predicated on insolvency and lack of receipt by debtor of reasonably equivalent value in exchange. *Stearns v. Los Angeles City*

School Dist. (1966) 244 Cal. App. 2d 696, 729-730, 53 Cal. Rptr. 482

When there is transfer or agreement to transfer which may be in fraud of creditors, proof and establishment of fact of transfer is not binding on third-party creditor. *Stearns v. Los Angeles City School Dist. (1966) 244 Cal. App. 2d 696, 729, 53 Cal. Rptr. 482*

Tenacity of purpose and diversity of effort on part of creditor in seeking to have fraudulent transfers set aside is likened to those employed in search for buried treasure, which it is. *Rose v. Knapp (1957) 153 Cal. App. 2d 379, 380-381, 314 P.2d 812*

Fraudulent transfer is void, not voidable, as to creditors. *Strangman v. Duke (1956) 140 Cal. App. 2d 185, 191, 295 P.2d 12*

Creditor by reason of fraudulent transfer obtains no right to possession of property transferred. *Wagner v. Trout (1954) 124 Cal. App. 2d 248, 254, 268 P.2d 537*

[b] Assignment

Assignment of right to set aside fraudulent transfer is permissible. *Michal v. Adair (1944) 66 Cal. App. 2d 382, 388, 152 P.2d 490*

[c] Award of Interest

In action to recover value of property transferred by bankrupt while insolvent, without consideration and, with actual intent to defraud creditors, awarding interest from date of transfer is proper under *Civ. Code § 3288*, since transfer is deemed void as well as fraudulent, and transferee is treated as constructive trustee and required to account for what he has received. *Bass v. Youngblood (1963) 221 Cal. App. 2d 278, 289, 34 Cal. Rptr. 326*

[d] Equitable Defenses

Unclean hands is defense in actions to set aside fraudulent conveyance. *Freeman v. LaMorte (1957) 148 Cal. App. 2d 670, 674, 307 P.2d 734*

[e] Jury Trial

Because (1) common-law right to trial by jury existed for fraudulent transfer claims when California Constitution was adopted in 1850, (2) the Uniform Fraudulent Transfer Act is cumulative to (and does not supersede) the common-law action for fraudulent transfer, and (3) the Legislature cannot in any event dispose of a common-law right to jury trial that existed when the California Constitution was adopted, the California Constitution continues to guaranty the right to jury trial in an action for fraudulent conveyance. *Wisden v. Superior Court (2004) 124 Cal. App. 4th 750, 755-758, 21 Cal. Rptr. 3d 523*

[f] Parties to Action

Spouse of transferee is not indispensable party to action to set aside fraudulent transfer when marriage did not occur until after transfer sought to be set aside or when transfer or conveyance specifies title taken by transferee as separate property. *In re Allustiarte (9th Cir. 1986) 786 F.2d 910, 915-916*

Transferor, though proper party defendant, is not necessary one. *TWM Homes, Inc. v. Atherwood Realty & Inv. Co. (1963) 214 Cal. App. 2d 826, 848, 29 Cal. Rptr. 887*

Transferees are necessary parties defendant in action to set aside fraudulent conveyance or to have it declared void. *T W M Homes, Inc. v. Atherwood Realty & Inv. Co. (1963) 214 Cal. App. 2d 826, 848, 29 Cal. Rptr. 887* ; *Heffernan v. Bennett & Armour (1952) 110 Cal. App. 2d 564, 586, 243 P.2d 846*

[g] Procedural Prerequisites

Creditor is not required to reduce his or her claim to judgment before seeking benefit of remedy of right to have transfer set aside. *Weisenburg v. Cragholm (1971) 5 Cal. 3d 892, 896, 97 Cal. Rptr. 862, 489 P.2d 1126*

If there is actual fraud, creditor is able to maintain action to set aside transfer without showing that defendant has no other assets to satisfy judgment. *Freeman v. LaMorte (1957) 148 Cal. App. 2d 670, 675, 307 P.2d 734*

Creditor is unable without legal process to appropriate property fraudulently transferred by debtor for payment of debtor's obligations. *Wagner v. Trout (1954) 124 Cal. App. 2d 248, 254, 268 P.2d 537*

[h] Splitting Cause of Action

Plaintiff is not permitted to split his or her cause of action and to attack separately conveyance of real estate and secondly transfer of personal property. *Heffernan v. Bennett & Armour (1944) 63 Cal. App. 2d 178, 184, 146 P.2d 482*

[i] Statute of Limitations

If common law cause of action is brought, applicable statute of limitations is *Code Civ. Proc. § 338(d)* (providing three-year statute of limitations for actions for relief on ground of fraud or mistake); cause of action accrues when judgment against debtor is secured, or later if there was belated discovery. *Macedo v. Bosio (2001) 86 Cal. App. 4th 1044, 1050-1052, 104 Cal. Rptr. 2d 1*

[3] Burden of Proof

Defendant transferee moving for summary judgment is required to negate necessary element of plaintiff's case or to establish complete defense; therefore, summary judgment for defendant transferee was not proper when evidence was insufficient to negate either transferor's insolvency or lack of fair consideration. *McKnight v. Faber (1986) 185 Cal. App. 3d 639, 645-647, 230 Cal. Rptr. 57*

Defendant transferee was not entitled to summary judgment when no facts were presented from which court could determine whether note given by transferee was fair equivalent of interest conveyed. *McKnight v. Faber (1986) 185 Cal. App. 3d 639, 646-647, 230 Cal. Rptr. 57*

Defendant transferee was not entitled to summary judgment when no facts were presented from which court could determine present fair salable value of transferor's assets. *McKnight v. Faber (1986) 185 Cal. App. 3d 639, 646-647, 230 Cal. Rptr. 57*

[4] Conspiracy

Privilege of former *Civ. Code § 47(2)* (*now Civ. Code § 47(b)*) claimed by transferor's attorney with respect to misrepresentations made at time of allegedly spurious motion for new trial in action on underlying debt was not established without showing that statements were made in furtherance of litigation and to promote justice; fact that statements were made while litigation was pending was insufficient. *McKnight v. Faber (1986) 185 Cal. App. 3d 639, 649-650, 230 Cal. Rptr. 57*

[5] Creditors Permitted to Attack Transfer

[a] Interest Which May Be Reached

Creditor is entitled to have interest of his or her debtor in property at time of transfer subjected to creditor's claim. *Ackerman v. Merle (1902) 137 Cal. 169, 171, 69 P. 983* ; *Ahmanson Bank & Trust Co. v. Tepper (1969) 269 Cal. App. 2d 333, 344, 74 Cal. Rptr. 774*

If debtor only holds property as trustee for beneficiary under resulting trust, transfer of that property by debtor to beneficiary is not subject to attack as fraudulent transfer. *Owings v. Laugharn (1942) 53 Cal. App. 2d 789, 791, 128 P.2d 114*

[b] Interest Which May Not Be Reached

General rule is that principles of fraudulent transfer do not apply to declarations of homestead, and fact that debtor filed such declaration to hinder and delay his or her creditors does not affect its validity. *Lucci v. United Credit & Collection Co. (1934) 220 Cal. 492, 496, 31 P.2d 369* ; *Putnam Sand & Gravel Co. v. Albers (1971) 14 Cal. App. 3d 722, 92 Cal. Rptr. 636*

Transfer by judgment debtor of equity of redemption in property sold to creditor at execution sale is not fraudulent transfer; execution sale to creditor terminates creditor's lien (created by recording abstract of judgment). *Fry v. Bihr, (1970) 6 Cal. App. 3d 248, 251-252, 85 Cal. Rptr. 742* ; *Moore v. Hall (1967) 250 Cal. App. 2d 25, 29-30, 58 Cal. Rptr. 70* ; *Siegel v. Farrar (1932) 120 Cal. App. 193, 196-197, 7 P.2d 319*

Transfer of debtor's exempt property is not subject to attack by creditor. *Burrows v. Jorgensen (1958) 158 Cal. App. 2d 644, 649, 323 P.2d 150*

[c] Persons With Contingent Claims

Under *Civ. Code § 3439.01* person with contingent claim is creditor, but once claim has been satisfied, that creditor has no standing to seek to have transfer set aside. *Allard v. De Lorean (9th Cir. 1989) 884 F.2d 464, 466*

[d] Required Injury

Creditor whose underlying claim is reduced to judgment which is subsequently unqualifiedly reversed is not entitled to have allegedly fraudulent transfer set aside. *Weisenburg v. Cragholm (1971) 5 Cal. 3d 892, 895-897, 97 Cal. Rptr. 862, 489 P.2d 1126*

Relationship of debtor and creditor arises in tort case at moment cause of action accrues. *Hansen v. Cramer (1952) 39 Cal. 2d 321, 323, 245 P.2d 1059*

To show injury from transfer, here by assignment of rents and profits from property which secured its debt, secured creditor is required to show that indebtedness owed to it is not fully secured. *Hibernia Sav. & Loan Soc. v. Belcher (1935) 4 Cal. 2d 268, 274, 48 P.2d 681*

Transfer in fraud of creditors is permitted to be attacked only by one who is injured by transfer; creditor does not sustain injury unless transfer puts beyond his or her reach property which he or she would otherwise be able to subject to payment of his or her debt. *Haskins v. Certified Escrow & Mortgage Co. (1950) 96 Cal. App. 2d 688, 691, 216 P.2d 90*

[6] Insolvency

Future child support payments should not be viewed as debt under *Uniform Fraudulent Transfer Act. Mejia v. Reed (2003) 31 Cal. 4th 657, 670-672, 3 Cal. Rptr. 3d 390, 74 P.3d 166*

Fair value of alleged insolvent's assets is to be determined as of date of transfer. *Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 376, 125 Cal. Rptr. 804*

Solvency and not insolvency is presumed; for this reason, burden of proof as to insolvency is on party claiming it to be fact. *Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 375, 125 Cal. Rptr. 804*

Subsequent insolvency is not of itself sufficient foundation for inference of insolvency at time of or as result of transfer. *Stearns v. Los Angeles City School Dist. (1966) 244 Cal. App. 2d 696, 738, 53 Cal. Rptr. 482*

Trust instrument which provides that trustee pay net income from trust estate to trustor for life and then pay accrued accumulated income to beneficiary and which renders decedent trustor's estate insolvent has effect of fraudulent transfer. *Estate of Camm (1946) 76 Cal. App. 2d 104, 110, 172 P.2d 547*

Transfers is not made in contemplation of insolvency if underlying debt is secured and alleged defrauded creditor has made no showing that indebtedness was not fully secured. *Kirkpatrick v. Towers (1943) 60 Cal. App. 2d 251, 259, 140 P.2d 681*

Amply secured debts are not to be taken into consideration for purpose of determining financial condition of grantor. *Kirkpatrick v. Towers (1943) 60 Cal. App. 2d 251, 259, 140 P.2d 681*

[7] Levying Execution on Property

Creditor is permitted to levy execution on property as if there had been no transfer. *Strong v. Strong (1943) 22 Cal. 2d 540, 547, 140 P.2d 386* ; *Kuzmicki v. Nelson (1950) 101 Cal. App. 2d 278, 280, 225 P.2d 233*

[8] Liability of Transferee

[a] In General

Constructive trust for benefit of creditor or trustee in bankruptcy is properly imposed on property in hands of transferee when transfer was part of scheme to defraud creditors. *In re Allustiarte (9th Cir. 1986) 786 F.2d 910, 913*

Fraudulently conveyed asset which has been sold at trustee's sale is subject to being followed into whatever form it has been converted either on theory of following res into hands of constructive trustee or by applying kind of equitable

conversion. *Ahmanson Bank & Trust Co. v. Tepper (1969) 269 Cal. App. 2d 333, 344-345, 74 Cal. Rptr. 774*

[b] Good Faith Transferee

Innocent grantee is required to account for everything he or she received under fraudulent transfer; such a grantee who returns to grantor or assignor all property is not personally liable to creditors for value of property returned. *Cohen v. Heavey (1968) 261 Cal. App. 2d 766, 770-771, 68 Cal. Rptr. 180*

In creditors' action against transferees, creditors are relegated to their rights against property and are unable to recover money damages from those who hold property unless transferors and transferees participated in scheme of misrepresentation against defrauded creditor. *Stearns v. Los Angeles City School Dist. (1966) 244 Cal. App. 2d 696, 719, 53 Cal. Rptr. 482*

[c] Conspiring Transferee

Debtor and those who conspire with him or her to conceal assets for purpose of defrauding creditors are committing tort of conspiracy. *Taylor v. S & M Lamp Co. (1961) 190 Cal. App. 2d 700, 706, 12 Cal. Rptr. 323*

Fraudulent transferee who returned property to debtor is not relieved of responsibility for transfer if he or she is liable for conspiracy. *Hickson v. Thielman (1956) 147 Cal. App. 2d 11, 15, 304 P.2d 122*

[9] Lis Pendens

Entry of summary judgment in favor of defendant transferee did not automatically entitle defendant to expungement of lis pendens; after judgment, lis pendens remains until statutory ground for expungement is established. *McKnight v. Faber (1986) 185 Cal. App. 3d 639, 651, 230 Cal. Rptr. 57*

[10] Preferences

Transfer that appears to be lawful preference but is made with actual fraudulent intent pursuant to secret agreement under which grantor retains full beneficial interest is void. *Kemp v. Lynch (1937) 8 Cal. 2d 457, 461, 65 P.2d 1316*

Transfer of security interests in land by client to attorney for services was not fraudulent as to another creditor, even though transfer was preference that resulted in debtor being unable to satisfy debts of other creditors. *Wyzard v. Goller (1994) 23 Cal. App. 4th 1183, 1185*

In absence of fraud, preferential transfer of assets by debtor to creditors is valid unless subject to attack under federal bankruptcy law; rule is applicable to creditors of partnership. *Commons v. Schine (1973) 35 Cal. App. 3d 141, 144, 110 Cal. Rptr. 606*

Creditor who dominates and controls insolvent corporation is not permitted to use that power to secure advantage over other creditors of corporation; controller-dominator is liable to creditors of insolvent corporation for any preference he or she has taken for his or her benefit and to their disadvantage. *Commons v. Schine (1973) 35 Cal. App. 3d 141, 144, 110 Cal. Rptr. 606*

Rule permitting one creditor to be preferred over another has no application to situation in which debt of preferred creditor is not extinguished or diminished. *Economy Refining & Serv. Co. v. Royal Nat'l Bank of N.Y. (1971) 20 Cal.*

App. 3d 434, 442, 97 Cal. Rptr. 706

Pendency of creditor's action to enforce underlying indebtedness is not indicative of fraudulent intent if debtor is in position in which he or she must allow one creditor or another to obtain preference and there is no other evidence to indicate fraud. *Arnold v. Hadgis (1951) 102 Cal. App. 2d 88, 92, 226 P.2d 641*

Fact that preference of particular creditor hinders or delays other creditors in collection of their claims does not render void that preferential payment. *United States Fid. & Guar. Co. v. Postel (1944) 64 Cal. App. 2d 567, 572, 149 P.2d 183*

[11] Reasonably Equivalent Value

[a] In General

Transfer of money to person who "invested" in Ponzi scheme after debtor formed fraudulent intent to operate Ponzi scheme was transfer for reasonably equivalent value, up to aggregate amount that transferee had paid to debtor, because transferee gave up claim for restitution that transferee had acquired on handing over money to debtor in belief that money was being invested; but any money that transferee received in addition to amount that transferee had paid to debtor would be fraudulent transfer as matter of law. *AFI Holding, Inc. v. Mackenzie (9th Cir. 2008) 525 F.3d 700, 708-709* (restitution claim provides reasonably equivalent value); *Santa Barbara Capital Mgmt. v. Neilson (In re Slatkin), 525 F.3d 805, 814-815* (payment of additional money is fraudulent transfer)

Civ. Code §§ 1614-1615 create presumption that execution of note is supported by consideration and placing burden of showing lack of consideration on other party; evidence that alleged lender's assets never totalled amount of loan was sufficient to establish lack of consideration. *In re Allustiarte (9th Cir. 1986) 786 F.2d 910, 916*

Whether or not reasonably equivalent value was received by debtor in exchange is to be determined from standpoint of creditor. *Hansen v. Cramer (1952) 39 Cal. 2d 321, 323, 245 P.2d 1059*

One test for lack of receipt of reasonably equivalent value is whether debtor is rendered execution proof by transfer; existence of intent of fraud on part of grantor or grantee is immaterial factor. *Hansen v. Cramer (1952) 39 Cal. 2d 321, 325, 245 P.2d 1059*

Exchange of $42,000 for $144,000 equity in $200,000 ranch is not reasonably equivalent value. *Stearns v. Los Angeles City School Dist. (1966) 244 Cal. App. 2d 696, 735, 53 Cal. Rptr. 482*

Whether or not reasonably equivalent value was received by debtor in exchange is question of fact. *Patterson v. Missler (1965) 238 Cal. App. 2d 759, 767, 48 Cal. Rptr. 215*

If property conveyed is valued in excess of mortgage, agreement on part of grantee to pay mortgage is not valuable consideration as against grantor's creditors. *Patterson v. Missler (1965) 238 Cal. App. 2d 759, 767, 48 Cal. Rptr. 215*

What constitutes reasonably equivalent value is question of fact. *Patterson v. Missler (1965) 238 Cal. App. 2d 759, 767, 48 Cal. Rptr. 215*

Because playing gambling games for money is illegal, consideration for payment of gambling loss is likewise illegal and is not receipt of reasonably equivalent value in exchange for monies paid. *Tokar v. Redman (1956) 138 Cal. App. 2d 350, 354, 291 P.2d 987*

[b] Antecedent Debts

Transfer made in good faith by insolvent in settlement or compromise of claim is not fraudulent for lack of proof of enforceability of underlying claim. Mayors v. C I R (1986) *785 F.2d 757, 761 (IRS attempt to set aside transfer)*

Antecedent debt in support of transfer is required to be legally enforceable obligation of grantor; discharge of debt of another is not receipt of reasonably equivalent value by one who is not responsible therefor. *Hansen v. Cramer (1952) 39 Cal. 2d 321, 324, 245 P.2d 1059*

In fraudulent conveyance action brought by landlord against partners who took partnership draws rather than paying rent, timing of partnership draws (receipt of delayed draws) did not show fraudulent intent; money transferred in satisfaction of antecedent debts of partnership, i.e., overdue partnership draws, were transfers for value under *Civ. Code § 3439.03*. *Annod Corporation v. Hamilton & Samuels (2002) 100 Cal. App. 4th 1286, 1296-1297, 123 Cal. Rptr. 2d 924*

Antecedent debt of $21,000 was reasonable value for 1982 transfer of one-quarter interest in real property even though same interest sold for $30,000 in 1985; comparable value established by 1979 sale of another quarter interest for $20,000. *Barisich v. Lewis (1990) 226 Cal. App. 3d 12, 20, 275 Cal. Rptr. 331*

Payment by debtor of obligation of another in good faith belief that he or she is legally responsible for that obligation is good consideration. *Bank of California v. Virtue & Scheck, Inc. (1983) 140 Cal. App. 3d 1026, 1040, 190 Cal. Rptr. 54*

Antecedent debt of corporation is not satisfied if corporation is dissolved and new corporation formed in its place is liable for that debt. *Economy Refining & Service Co. v. Royal Nat'l Bank (1971) 20 Cal. App. 3d 434, 441, 97 Cal. Rptr. 706*

Antecedent indebtedness which is disproportionately small compared with property transferred or new obligation entered into is not receipt of reasonably equivalent value. *Pope v. National Aero Fin. Co. (1965) 236 Cal. App. 2d 722, 728, 46 Cal. Rptr. 233*

Payment which discharges obligation barred by statute of limitations is receipt of reasonably equivalent value if payment is made in good faith; that payment is not fraudulent transfer. *United States Fid. & Guar. Co. v. Postel (1944) 64 Cal. App. 2d 567, 572, 149 P.2d 183*

[12] Specific Transfers

Transfer is void when debtor did not have requisite intent to convey and continued to exercise dominion and control over property allegedly conveyed. *In re Allustiarte (9th Cir. 1986) 786 F.2d 910, 914-915*

Uniform Fraudulent Transfer Act applies to property transfers under marital settlement agreements. *Mejia v. Reed (2003) 31 Cal. 4th 657, 669, 3 Cal. Rptr. 3d 390, 74 P.3d 166*

Debtor is unable by any disposition of his or her own property to put same or income thereof beyond reach of his or her creditors, so long as right to receive and use it is retained. *McColgan v. Magee, Inc. (1916) 172 Cal. 182, 186, 155 P. 995* ; *Katz v. Driscoll (1948) 86 Cal. App. 2d 313, 321, 194 P.2d 822*

Conveyance by insolvent debtor without receipt of reasonably equivalent value to himself and wife as joint tenants is fraudulent conveyance because on death debtor has effectively placed one-half of property beyond reach of creditors. *Rupp v. Kahn (1966) 246 Cal. App. 2d 188, 195, 55 Cal. Rptr. 108*

Payment of money in satisfaction of gambling debt is transfer. *Tokar v. Redman (1956) 138 Cal. App. 2d 350, 354, 291 P.2d 987*

Conveyance by mere record title holder to true owner is not fraudulent conveyance. *Perske v. Perske (1954) 125 Cal. App. 2d 795, 800, 271 P.2d 528*

[13] Statute of Limitations

Trustee in bankruptcy seeking declaration that conveyance by debtor was void and to quiet title in debtor is not subject to statute of limitations; under California law, limitation is not applicable against grantor remaining in possession and therefore not applicable against trustee. *In re Allustiarte (9th Cir. 1986) 786 F.2d 910, 913*

If common law cause of action is brought, applicable statute of limitations is *Code Civ. Proc. § 338(d)* (providing three-year statute of limitations for actions for relief on ground of fraud or mistake); cause of action accrues when judgment against debtor is secured, or later, if there was belated discovery. *Macedo v. Bosio (2001) 86 Cal. App. 4th 1044, 1050-1052, 104 Cal. Rptr. 2d 1*

Cause of action for fraudulent conveyance alleged to have been made in April 1984, and first pleaded in third amended complaint filed in August 1987, was not protected by doctrine of relation back, and was barred by three-year limitation period applicable under former law. *Filmservice Laboratories, Inc. v. Harvey Bernhard Enterprises, Inc. (1989) 208 Cal. App. 3d 1297, 1309, 256 Cal. Rptr. 735*

[14] Transfer Binding on Transferor

[a] In General

Transferor of property transferred to defraud creditors is unable to revoke transfer. *Severance v. Knight-Counihan Co. (1947) 29 Cal. 2d 561, 568, 177 P.2d 4*

Wrongful conduct of transferor in transferring properties under oral trust for sole purpose of defeating claims of his or her creditors bars that transferor from maintaining suit against subsequent transferee. *Samuelson v. Ingraham (1969) 272 Cal. App. 2d 804, 806, 808, 77 Cal. Rptr. 750*

Transfer in fraud of creditors binds on transferor. *Slater v. Bielsky (1960) 183 Cal. App. 2d 523, 526, 6 Cal. Rptr. 683* ; *Heffernan v. Bennett & Armour (1952) 110 Cal. App. 2d 564, 585, 243 P.2d 846*

Title to property fraudulently transferred is vested in purported transferor insofar as rights of latter's creditors are concerned. *Kuzmicki v. Nelson (1950) 101 Cal. App. 2d 278, 280, 225 P.2d 233*

[b] Exceptions

Transferor who conveyed property to daughter with intent to defraud creditors (particularly one claimant of damages for tort) is entitled nevertheless to recover property from her heirs following daughter's death, when creditors were not actually defrauded (and tort claim eventually proved unmeritorious). *Estate of Blanco (1978) 86 Cal. App. 3d 826, 830-838, 150 Cal. Rptr. 645*

[15] Transferee's Rights

[a] Good Faith Transferee

When transfer is only constructively fraudulent, transferee is entitled to credit for sum expended in paying other debts. *Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 591, 25 Cal. Rptr. 545, 375 P.2d 425*

Judgment setting aside fraudulent transfer affects rights of creditor and not rights of transferee as against his or her transferor unless transferee was also active participant in fraud. *Ahmanson Bank & Trust Co. v. Tepper (1969) 269 Cal. App. 2d 333, 344, 74 Cal. Rptr. 774*

Former *Civ. Code § 3439.09(b)* (now *Civ. Code § 3439.08(d)*) protecting innocent purchaser or encumbrancer who without actual fraudulent intent has given less than reasonably equivalent value confers on purchaser lien on property to secure repayment of his or her investment. *Patterson v. Missler (1965) 238 Cal. App. 2d 759, 771, 48 Cal. Rptr. 215*

[b] Fraudulent Transferee

Fraudulent transferee is not entitled to reimbursement for outlays made in connection with acquisition of property in fraud of creditors. *Butler v. San Francisco Gas & Elec. Co. (1914) 168 Cal. 32, 39, 141 P. 818*

Conveyance of family residence by quitclaim deed from husband to wife was fraudulent; the community property asset was not listed in husband's bankruptcy estate, but was prebankruptcy community property and could be looked to by creditor for payment; although husband was discharged from personal liability on debt to creditor, wife remained personally liable. *Sanwa Bank California v. Chang (2001) 87 Cal. App. 4th 1314, 1317-1319, 105 Cal. Rptr. 2d 330*

If transferee had notice of and was knowing party to fraud, transfer is void as between transferor and transferee. *Ahmanson Bank & Trust Co. v. Tepper (1969) 269 Cal. App. 2d 333, 344, 74 Cal. Rptr. 774*

[16] Transfers Made Leaving Unreasonably Small Remaining Assets

Although argument can be made that leveraged buyout (LBO) that leaves surviving entity with insufficient resources to pay creditors may be fraudulent under *Civ. Code § 3439.05*, Legislature, in enacting predecessor to *Civ. Code § 3439.05*, did not intend it to cover LBO; fraudulent conveyance law was designed to protect creditors from secret transactions, and LBO was sufficiently publicized to allow creditors opportunity to obtain financial information before extending credit. *Kupetz v. Wolf (9th Cir. 1988) 845 F.2d 842, 849-850*

Burden on plaintiff to show that defendant debtor was left with unreasonably small capital under former *Civ. Code § 3439.05* (*now see Civ. Code § 3439.04(a)(2)(A)* (debtor's remaining assets compared to business or transaction)) after executing conveyance to transferee. *Holcomb v. Nunes (1955) 132 Cal. App. 2d 776, 781, 283 P.2d 301*

[17] Transfers Made With Actual Fraudulent Intent

[a] In General

If parties to leveraged buyout (LBO) fully intend to hinder general creditors and benefit selling shareholders, conveyance is fraudulent under *Civ. Code § 3439.07*; but when selling shareholders had no intent to defraud and did not know how buyer planned to finance purchase, no creditors existed on date of purchase, and only creditors complaining became creditors after transfer, LBO was not fraudulent conveyance. *Kupetz v. Wolf (9th Cir. 1988) 845 F.2d 842, 846-850*

Actual intent to defraud does not require finding that transferor acted maliciously with desire to cause harm to creditor; intent to prefer certain creditors over others as fraudulent rather than as valid preference because, although assets remained available to preferred creditors, debt to preferred creditors was not diminished or satisfied. *Economy Refining & Serv. Co. v. Royal Nat'l Bank of N.Y. (1971) 20 Cal. App. 3d 434, 441-442, 97 Cal. Rptr. 706*

Solvency of transferor is immaterial in establishing actual intent to defraud creditors under former *Civ. Code § 3439.07* (*now see Civ. Code § 3439.04(a)*). *Stearns v. Los Angeles City School Dist. (1966) 244 Cal. App. 2d 696, 727, 53 Cal. Rptr. 482*

[b] Burden of Proof

Burden of proof to establish fraudulent intent of tranferor is by preponderance of evidence. *Liodas v. Sahadi (1977) 19 Cal. 3d 278, 286-293, 137 Cal. Rptr. 635, 562 P.2d 316* (overruling contrary holding of *Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 588, 25 Cal. Rptr. 545, 375 P.2d 425* and cases decided thereunder on standard of proof)

Proof of fraud is permitted to be made by circumstantial evidence. *Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 588, 25 Cal. Rptr. 545, 375 P.2d 425*

Party who claims transfer to be fraudulent has burden of showing transferor's fraudulent intent and knowledge thereof by transferee. *Vaughn v. Coccimiglio (1966) 241 Cal. App. 2d 676, 679, 50 Cal. Rptr. 876*

Whether transfer is made with actual intent to defraud creditors is question of fact. *TWM Homes, Inc. v. Atherwood Realty & Inv. Co. (1963) 214 Cal. App. 2d 826, 844, 29 Cal. Rptr. 887*

Because of difficulty of direct proof, in most cases proof of actual intent to defraud creditors consists of inferences from circumstances surrounding transaction and relationship and interests of parties. *Slater v. Bielsky (1960) 183 Cal. App. 2d 523, 526, 6 Cal. Rptr. 683*

[c] Evidence of Fraudulent Intent

[i] Particular Circumstances and Inferences

Findings of fraud are not supported by evidence of circumstances surrounding alleged fraudulent transfer which comport equally with theory of honesty and fair dealing; speed of transfer does not permit inference of fraud when speed was required to protect interests of grantor. *Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 588, 25 Cal. Rptr. 545, 375 P.2d 425*

Finding that purported transfer of partnership interest was fraudulent was supported by evidence that formalities were not observed in transfering interest, and transferror partner remained as signatory on partnership's bank account after purported withdrawl. *Eddy v. Temkin (1985) 167 Cal. App. 3d 1115, 1118-1121,*

Evidence of secret trust or reservation of interest in grantor is persuasive evidence, but not conclusive presumption, of fraud. *Bank of California v. Virtue & Scheck, Inc. (1983) 140 Cal. App. 3d 1026, 1034-1039, 190 Cal. Rptr. 54*

Fraud is provable by inferences from circumstances surrounding transaction, relationship and interest of parties. *Neumeyer v. Crown Funding Corp. (1976) 56 Cal. App. 3d 178, 183, 128 Cal. Rptr. 366* ; *Burns v. Radoicich (1947) 77 Cal. App. 2d 697, 700-701, 176 P.2d 77*

Proof of solvency does not preclude finding of actual intent to defraud, but as relevant to issue of intent. *Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 378, 125 Cal. Rptr. 804*

When confidential relation is shown to exist, parties are held to fuller and stricter proof of consideration, and of fairness of transaction. *Wood v. Kaplan (1960) 178 Cal. App. 2d 227, 231, 2 Cal. Rptr. 917*

Fact that transfer left transferor insolvent raises presumption that conveyance was actually fraudulent. *Wood v. Kaplan (1960) 178 Cal. App. 2d 227, 230, 2 Cal. Rptr. 917*

Transfers of almost all of transferor's nonexempt property indicate of intent to defraud creditors. *Burrows v. Jorgensen (1958) 158 Cal. App. 2d 644, 648, 323 P.2d 150*

Indicia of fraud, though insufficient when considered separately, may provide sufficient evidence of fraudulent intent when considered together. *Burns v. Radoicich (1947) 77 Cal. App. 2d 697, 700-701, 176 P.2d 77*

[ii] Transfers to Relations

Transfers between close relatives are not presumed to be fraudulent per se, but when confidential relationship exists, fuller and stricter proof of consideration and fairness of transaction are required. *Kirkland v. Risso (1979) 98 Cal. App. 3d 971, 978-979, 159 Cal. Rptr. 798* ; *Wood v. Kaplan (1960) 178 Cal. App. 2d 227, 231, 2 Cal. Rptr. 917*

Relationship of parent and child, when coupled with other suspicious circumstances, such as fact that transfer rendered transferor insolvent, is sufficient to raise inference of fraud in transfer. *Wood v. Kaplan (1960) 178 Cal. App. 2d 227, 230-231, 2 Cal. Rptr. 917*

Transfer from debtor to relative without consideration and which renders debtor insolvent is presumptively fraudulent. *Hickson v. Thielman (1968) 147 Cal. App. 2d 11, 15, 304 P.2d 122*

Voluntary transfer made by debtor to member of his or her family while insolvent or in contemplation of insolvency, is conclusively presumed to be fraudulent as to existing creditors. *Menick v. Goldy (1955) 131 Cal. App. 2d 542, 547, 280 P.2d 844*

Relationship between transferor and transferee does not justify inference of fraud in transfer, but is fact which allows greater weight than would otherwise attach to be given to other circumstances, if any appear. *Burns v. Radoicich (1947) 77 Cal. App. 2d 697, 700-701, 176 P.2d 77*

[d] Transferee's Knowledge

Knowledge of transferee who took transferor's interest in demolition contract when transferor was having trouble completing job and paying bills related to contract was insufficient basis for finding fraudulent intent on part of transferee when transferee agreed to pay and did pay all claims of creditors of transferor arising from that job. *Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 587-588, 25 Cal. Rptr. 545, 375 P.2d 425*

No inference of fraudulent intent on part of transferee can be drawn from speed of transfer in view of fact that transferor had received notice from other party that it would cancel contract and complete it from proceeds of performance bond unless contractor/transferor made other arrangements to complete job. *Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 588, 25 Cal. Rptr. 545, 375 P.2d 425*

Transfer made for reasonably equivalent value was not permitted to be attacked by transferor's creditor, even though transaction was entered into by debtor with intent to delay or defraud creditor, unless transferee also intended or participated in or had knowledge of fraudulent intent. *Kuhlman v. Pacific States S. & L. Co. (1940) 17 Cal. 2d 820, 821-822, 112 P.2d 620* ; *Enos v. Picacho Gold Mining Co. (1943) 56 Cal. App. 2d 765, 774, 133 P.2d 663*

When there is evidence of common design between transferor and transferee to defraud creditors, declarations of transferor subsequent to transfer are admissable. *McGee v. Allen (1936) 7 Cal. 2d 468, 476, 60 P.2d 1026*

Transferee's knowledge of transferor's fraudulent intent is insufficient if transferee has no notice of facts and circumstances that would induce prudent person to inquire into fraudulent purpose. *Boness v. Richardson Mineral Springs (1956) 141 Cal. App. 2d 251, 261, 296 P.2d 581*

Deed, even though supported by consideration, is permitted to be set aside as fraudulent if transferee had knowledge of transferor's fraudulent intent and intended to assist in fraudulent purpose, such as by agreeing to hold land in secret trust. *Knapp v. Elliott (1947) 81 Cal. App. 2d 667, 673, 184 P.2d 934*

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§ 270.132 Law Reviews

Budnitz, *The Duties Imposed by Bankruptcy Courts Upon Mortgages at Foreclosure Sales: How to Avoid Avoidance Under Section 548, 46 Bus. Law. 1183 (1991)*

Kennedy, "The Uniform Fraudulent Transfer Act," *18 UCC L. J. 195 (1986)*

Shanker, "What Every Lawyer Should Know about the Law of Fraudulent Transfers," 31(8) The Practical Lawyer 43 (1985)

Note, "Good Faith and Fraudulent Conveyances," *97 Harvard L. Rev. 495 (1983)*

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§ 270.133 Text References

Witkin, California Procedure, Vol. 5 *Pleading,* § 836, Vol. 8 *Enforcement of Judgment,* §§ 445-477 (4th ed. 1997)

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§ 270.150 State Statutes

[1] Accessions to Personal Property

When things belonging to different owners are united so as to form single thing, and cannot be separated without injury, whole belongs to owner of thing forming principal part. *Civ. Code § 1025*

[2] Attachment and Execution

Property exempt. *Code Civ. Proc. §§ 704.010 et seq., 704.710 et seq.*

Third-party claims. *Code Civ. Proc. § 720.010 et seq.*

[3] Transfers Made Without Actual Delivery

[a] In General

Transfer of personal property made by person having possession and not accompanied by immediate delivery followed by actual and continued change of possession is void. *Civ. Code § 3440(a)*

Creditor defined; creditor includes assignee for benefit of creditors under *Code Civ. Proc. § 493.010. Civ. Code § 3440(b)*

Transfers of personal property to which *Civ. Code § 3440 et seq.* are not applicable. *Civ. Code §§ 3440.1, 3440.2*

Filing and publication requirements necessary to insulate transfer of personal property from attack under *Civ. Code § 3440 et seq. Civ. Code § 3440.1(h)*

Transfers otherwise not subject to attack because requirements of *Civ. Code §§ 3440.1(h), 3440.2,* or *3440.5(b)* are met are nevertheless void as against purchaser from transferor who is "buyer in ordinary course of business" under *Com. Code § 1201(b)(9). Civ. Code § 3440.3*

Civ. Code § 3440 et seq. do not affect rights of buyer for value in good faith from transferee, provided transferor is not in possession at time of purchase. *Civ. Code § 3440.4*

Civ. Code § 3440 et seq. do not affect rights of secured party who, for value in good faith, acquires security interest from transferee, provided transferor is not in possession at time security interest attaches. *Civ. Code § 3440.5(a)*

Except as against "buyer in ordinary course of business," *Civ. Code § 3440 et seq.* do not affect rights of secured party who fulfills specified filing and publication requirements prior to acquisition of security interest from transferee. *Civ. Code § 3440.5(b)*

One-year limitation period on creditor's action or levy under *Civ. Code § 3440 et seq.. Civ. Code § 3440.6*

[b] Retention by Lessor

Com. Code § 10308(a) (retention of possession by lessor in good faith and in current course of trade) is not restricted by *Civ. Code §§ 3440-3440.9. Civ. Code § 3440.9*

[c] Right of Retention by Merchant-Seller

Com. Code § 2402(2) (right of merchant-seller to retain property) is not restricted by *Civ. Code §§ 3440-3440.9. Civ. Code § 3440.9*

Creditor of seller is permitted to treat sale or identification of goods to contract as void if seller's retention fraudulent under *Civ. Code § 3440* unless seller retains possession in good faith and current course of trade for commercially reasonable time. *Com. Code § 2402(2)*

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§ 270.151 Decisions

[1] Delivery If Transferor Is Cotenant

Cotenant in sole possession of property who sells his or her interest in such property is required to transfer actual possession of property in order to protect transferee from creditors of cotenant. *Brown v. O'Neal (1892) 95 Cal. 262, 266, 30 P. 538* ; *Haster v. Blair (1940) 41 Cal. App. 2d 896, 899, 107 P.2d 933*

If other cotenants are in possession of property in which one contenant sells his or her interest, such contenant is permitted to make valid sale without placing his or her transferee in custody of property. *Brown v. O'Neal (1892) 95 Cal. 262, 266, 30 P. 538*

[2] Impracticality of Actual Delivery

Because physical delivery of cattle is practicable, tagging and segregation was not sufficient constructive delivery. *In re Black & White Cattle Co. (9th Cir. 1986) 783 F.2d 1454, 1458-1459*

[3] Purpose of Requiring Delivery and Actual Change of Possession

Transferee's conduct in relation to property is required to be such as to give notice to public that change in ownership and possession has taken place. *Dot Records, Inc. v. Freeman (1966) 247 Cal. App. 2d 204, 207, 55 Cal. Rptr. 455*

[4] Requisites of Delivery and Change of Possession

Delivery is required to be immediate, actual, visible, apparent and not constructive, manifested by such outward signs as renders it evident that transferor's possession has wholly ceased. *Dot Records, Inc. v. Freeman (1966) 247 Cal. App. 2d 204, 207, 55 Cal. Rptr. 455*

When transferor subsequent to delivery of bill of sale of personal property continues to have use and control of that property in same manner and to like extent as before, no delivery is made as required to constitute valid delivery. *Southern Cal. Collection Co. v. Napkie (1951) 106 Cal. App. 2d 565, 570, 235 P.2d 434*

When evidence shows no apparent change in possession of automobile, fact that title has changed and transferee in partial possession of it does not render transfer free from attack by creditor. *Dot Records, Inc. v. Freeman (1966) 247 Cal. App. 2d 204, 207-208, 55 Cal. Rptr. 455*

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§ 270.152 Text References

California Legal Forms, Ch. 53, *Personal Property Leasing* (Matthew Bender)

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§ 270.170 State Statutes

[1] Attachment

When attachment may be obtained; claim must be for $500 or more. *Code Civ. Proc. § 483.010*

Attachment of funds in escrow under *Com. Code § 6106.2* is obtainable even if claim is for less than $500 or is secured in way that would defeat attachment under *Code Civ. Proc. § 483.010*. *Com. Code § 6106.2(c)*

[2] Bulk Sales Within Scope of Bulk Sales Law

Bulk sale by seller (1) whose principal business is sale of inventory from stock or who is restaurant owner; and (2) who is located in California on date of bulk-sale agreement, or, if seller is located outside United States, whose major executive office in United States is in *California. Com. Code § 6103(a)*

Seller is deemed to be located at its place of business; seller with more than one place of business is located at its chief executive office. *Com. Code § 6103(b)*

[3] Definitions

Assets. *Com. Code § 6102(a)(1)*

Auctioneer. *Com. Code § 6102(a)(2)*

Bulk sale. *Com. Code § 6102(a)(3)*

Buyer. *Com. Code § 2103(1)(a)*; *see Com. Code § 6102(b)(1)*

Claim. *Com. Code § 6102(a)(4)*

Claimant. *Com. Code § 6102(a)(5)*

Creditor. *Com. Code § 6102(a)(6)*

Date of the bulk sale. *Com. Code § 6102(a)(7)*

Date of the bulk-sale agreement. *Com. Code § 6102(a)(8)*

Debt. *Com. Code § 6102(a)(9)*

Equipment. *Com. Code § 9102(a)(33)*; *see Com. Code § 6102(b)(2)*

In ordinary course of seller's business. *Com. Code § 6102(a)(13)*

Inventory. *Com. Code § 9102(a)(48)*; *see Com. Code § 6102(b)(3)*

Liquidator. *Com. Code § 6102(a)(10)*

Net contract price. *Com. Code § 6102(a)(11)*

Net proceeds. *Com. Code § 6102(a)(12)*

Sale. *Com. Code § 2106(1)*; *see Com. Code § 6102(b)(4)*

Seller. *Com. Code § 2103(1)(d)*; *see Com. Code § 6102(b)(5)*

United States. *Com. Code § 6102(a)(14)*

Value. *Com. Code § 6102(a)(15)*

Verified. *Com. Code § 6102(a)(16)*

[4] Liability for Failure to Give Notice

Liability of auctioneer or liquidator for failure to comply with *Com. Code §§ 6104-6108*. *Com. Code §§ 6107, 6108*

Buyer's liability to single claimant. *Com. Code § 6107(a)*

Limits on buyer's cumulative liability in single bulk sale. *Com. Code § 6107(d)*

Net value of asset defined for purposes of determining cumulative liability for single sale that included property other than inventory and equipment. *Com. Code § 6107(e)*

Buyer's payment to person to whom buyer is, or believes it is, liable under *Com. Code § 6107(a)* reduces pro tanto buyer's cumulative liability under *Com. Code § 6107(d)*. *Com. Code § 6107(f)*

Action is barred on unliquidated or contingent claim. *Com. Code § 6107(g)*

[5] Notice

Contents and requirements for recording, publishing, and delivering of notice of bulk sale sale. *Com. Code §§ 6104(a), 6105*

Notice of bulk sale by auction or through liquidator. *Com. Code §§ 6104(a), 6105, 6108(a), (c)*

Additional notice requirements when consideration is $2 million or less and is cash or obligation of buyer to pay cash in future or combination thereof. *Com. Code § 6106.2(f)*

[6] Sale for Cash or Obligation to Pay Cash

Procedures applicable when consideration is $2 million or less and is cash or obligation of buyer to pay cash in future or combination thereof. *Com. Code § 6106.2(a)*

Buyer or escrow agent is required to apply cash consideration to pay claims. *Com. Code § 6106.2(b)*

Procedures when claim is disputed; claimant's right to attachment. *Com. Code § 6106.2(c)*

Procedure when cash is insufficient to pay all claims in full. *Com. Code §§ 6106.2(d), 6106.4(a)-(c)*

Buyer or escrow agent's duty to pay claims or file interpleader action. *Com. Code § 6106.2(e)*

Additional notice requirements when consideration is $2 million or less and is cash or obligation of buyer to pay cash in future or combination thereof. *Com. Code § 6106.2(f)*

Lien or security interest as may only be released voluntarily. *Com. Code § 6106.2(g)*

Deposit required of buyer when escrow is used. *Com. Code § 6106.4*

Escrow agent's duties when deposit does not cover claims; notice and postponement; priorities for distribution. *Com. Code § 6106.4(a)-(c)*

[7] Tax Liability

Successors or assigns of person liable for sales or use tax on sale of business or stock of goods are required to withhold sufficient amount of purchase price to cover liability unless person liable produces receipt of State Board of Equalization showing no amount due. *Rev. & Tax. Code § 6811*

Failure of purchaser of business or stock of goods to withhold purchase price as required by Rev. & Tax Code § 6811renders purchaser personally liable therefor. *Rev. & Tax. Code § 6812*

[8] Transactions Excepted From Bulk Sales Law

Transfers to satisfy obligations. *Com. Code § 6103(c)(1)-(5)*

General assignment for benefit of creditors. *Com. Code § 6103(c)(6)*

Sales in course of judicial or administrative proceeding. *Com. Code § 6103(c)(7)-(8)*

Buyer assumes known claims. *Com. Code § 6103(c)(9)*

Buyer assumes all seller's debts. *Com. Code § 6103(c)(10)*

Newly organized entity assumes all seller's debt. *Com. Code § 6103(c)(11)*

Sales for less than $10,000 or more than $5 million. *Com. Code § 6103(c)(12)*

Sale required by law. *Com. Code § 6103(c)(13)*

Sale and lease back. *Com. Code § 6103(c)(14)*

Transfer of liquor license. *Com. Code § 6103(c)(15)*

Transfer of goods in warehouse. *Com. Code § 6103(c)(16)*

[9] Wage and Unemployment Compensation Liability

Preference over creditors of seller or seller of wage claims in sale of business or stock-in-trade. *Code Civ. Proc. § 1205*

Person or employing unit acquiring bulk sale from employer as required to withhold sufficient property to cover employer's delinquent payments under Unemployment Insurance Act, unless employer produces certificate showing no amount due. *Unemp. Ins. Code § 1731*

Certificate of Department of Human Resources Development. *Unemp. Ins. Code § 1732*

Personal liability for failure to withhold amount due for delinquent unemployment compensation payments. *Unemp. Ins. Code § 1733*

Remedies for collection against person or unit acquiring bulk sale. *Unemp. Ins. Code § 1734*

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§ 270.171 Law Reviews

Frisch & Wladis, *General Provisions, Sales, Bulk Transfers, and Documents of Title, 46 Bus. Law. 1455 (1991)*

Harris, *Practicing Under Existing Bulk Sales Law--And a Look at the Future of Article 6*, 22 U.C.C. L.J. 195 (1990)

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Ring, *Bulk Sales Problems in California, 42 Calif. L. Rev. 579 (1954)*

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§ 270.172 Text References

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Witkin, Summary of California Law, vol. 3, *Sales*, §§ 212-220 (9th ed. 1987)

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A. Uniform Fraudulent Transfer Act

23-270 California Forms of Pleading and Practice--Annotated § 270.190

§ 270.190 Complaint to Set Aside Fraudulent Transfer or Annul Fraudulent Obligation [Civ. Code § 3439.07(a)(1)]--And for Damages Based on Conspiracy--Transfer Made or Obligation Incurred With Actual Fraudulent Intent [Civ. Code § 3439.04(a)]

[1] FORM Complaint to Set Aside Fraudulent Transfer or Annul Fraudulent Obligation [Civ. Code § 3439.07(a)(1)]--And for Damages Based on Conspiracy--Transfer Made or Obligation Incurred With Actual Fraudulent Intent [Civ. Code § 3439.04(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____[*name*], Plaintiff,	)	COMPLAINT TO _____
vs.	)	[SET ASIDE *or* ANNUL] FRAUDULENT
_____ [*name* (*s*)], Defendant(s).	)	_____
	)	[TRANSFER *or*
	)	OBLIGATION] AND FOR DAMAGES
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION

(To _____ [Set Aside *or* Annul] Fraudulent _____ [Transfer *or* Obligation])

1. Defendants are, and at all times herein mentioned were, residents of _____ County, California [*or allege other capacity and residence*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants claims an interest in the property hereinafter described and which is the subject of this action.)]

3. _____ [From and after _____ (*date*), *or* At all times mentioned herein] plaintiff _____ [was *or* has been] the holder of a certain claim against defendant _____ [*name of transferor*]. This claim consists of _____ [*specify claim, and if based on a document, attach a copy as an exhibit, e. g.,* a note payable to plaintiff in the principal sum of $5,000 with interest thereon from and after _____ (*date*), at _____ percent per annum, all due on _____ (*date*). A copy of the note is attached as "Exhibit A" and incorporated by reference.]

[*EITHER*]

4. No part of the aforementioned claim has matured [, and no part of the sum defendant _____ (*name of transferor*) is required to pay is due and owing,] because _____ [*specify nature of nonmaturity, if appropriate, e. g.,* the time fixed for payment by defendant is _____ (*date*)].

[*OR*]

4. This claim for which defendant _____ [*name of transferor*] is indebted to plaintiff is in the sum of $_____. [Plaintiff has performed all conditions, covenants, and promises under the contract, on his/her part to be performed (, except _____ [*condition not performed*], the performance of which was excused on the ground that _____ [*specify*]).] Neither the whole nor any part of this sum has been paid [except the sum of $_____] and there is now due and unpaid from this defendant the sum of $_____ together with interest thereon at the rate of _____ percent per annum from _____ [*date*].

[*OR*]

4. On _____ [*date*], an action was commenced by plaintiff against defendant _____ [*name of transferor*] based on the aforementioned claim in the _____[*court*], No. _____ in the files and records of this court. Judgment in that action was duly rendered in favor of the plaintiff for the sum of $_____, and for costs in the sum of $_____, for a total of the sum of $_____. The judgment became final on _____ [*date*], prior to the filing of this action. The judgment _____ [has never been appealed and the time for appealing has expired *or if appealed and affirmed, so state*] and has never been vacated or modified. Plaintiff is still the owner of the judgment of which no part has been satisfied. A certified copy of the judgment is attached hereto as Exhibit "B" and made a part hereof.

[*CONTINUE*]

[5. On or about _____ (*date*), defendant _____ (*name of transferor*) was the owner and in possession and control of _____ (*describe property fraudulently transferred), e.g.*, that real property situated in _____ County, known as _____ (*street*), _____ (*city*), California, and more particularly described as follows: _____ (*give legal description*).]

[*EITHER*]

6. [Plaintiff is informed and believes and thereon alleges that] [o]n or about _____ [*date*], defendant _____ [*name of transferor*] transferred by _____ [*describe manner of transfer, e.g.*, deeded] the above-described property to defendant _____[*name of transferee*]. [*If instrument was recorded, official registration was changed, or security interest was given by UCC filing, give the particulars of the recordation, transfer of registration, or filing, e.g.*, On _____ (*date*), the contract of sale was recorded in Book _____, page _____, Official Records in the Office of the County Recorder of _____ County, California.]

[*OR*]

6. [Plaintiff is informed and believes and thereon alleges that] [o]n or about _____ [*date*], defendant _____ [*name of obligor*] and defendant _____[*name of obligee*] entered into an agreement under which defendant _____ [*name of obligor*] became obligated to _____ [*specify, e.g.*, purchase from defendant _____ (*name of obligee*) 2,000 head of cattle over a period of five years and to pay _____ (*name of obligee*) $_____ per head for the feeding, raising, care, and shipping of those cattle]. Defendant _____ [*name of obligor*] has _____ [not yet made any payments *or* paid $_____] to _____ (*name of obligee*) in fulfillment of this contract.

[*CONTINUE*]

7. [Although on the date of the aforementioned _____ (transfer *or* agreement) no part of plaintiff's claim against defendant _____ (*name of transferor*) had matured,] [p]laintiff is [further] informed and believes and thereon alleges that the _____[transfer was made *or* obligation was incurred] with an actual intent to hinder, delay, or defraud [all of defendant _____'s (*name of tranferor*) (then and future) creditors, including] plaintiff in the collection of his/her/its/their claim(s).

8. In exchange for the aforementioned _____[transfer *or* obligation], defendant _____ [*name of tranferor or obligor*] received _____ [$_____ *or* consideration worth $_____in the form of _____ (*specify, e.g.*, discharge of a $6,000 gambling debt previously owing from defendant _____ (*name of obligor*) to defendant _____ (*name of obligee*)]. At the time the _____ [transfer was made *or* obligation was incurred], the value of the _____ [*specify property transferred or obligation incurred, e.g.*, real property] was not less than $_____. Thus, the defendant _____ [*name of tranferor or obligor*] did not receive reasonably equivalent value in exchange for the _____ [*specify, e.g.*, land].

[9. (Plaintiff is informed and believes and thereon alleges that) (t)he above-described _____ [property *or* obligation] was received by defendant _____ [*name of transferee or obligee*] with knowledge that defendant _____ [*name of transferor or obligor*] intended to hinder, delay, or defraud the collection of

plaintiff's aforementioned claim (and the claims of all the _____ [then *or* then and future] creditors of defendant _____ [*name of transferor or obligor*]). Defendant _____ [*name of transferee or obligee*] had such knowledge by virtue of _____[*specify, e.g.*, an agreement made on _____(*date*), between defendant _____ (*name of transferor or obligor*) and defendant _____ (*name of transferee or obligee*) to defraud the plaintiff in the collection of his/her claim *or allege other facts which show transferee's knowledge of transferor's intent or knowledge of facts which would put transferee on notice of transferor's intent*].

SECOND CAUSE OF ACTION
(Conspiracy)

[*To be included if transferee or obligee had knowledge of fraudulent intent of transferor based on agreement with transferor.*]

10. Plaintiff refers to and incorporates herein Paragraphs 1. through 9., inclusive, of the First Cause of Action.

11. As alleged above, on _____ [*date*], defendants _____ [*name*] and _____ [*name*] agreed and knowingly and willfully conspired between themselves to _____ [*specify, e.g.*, hinder, delay, and defraud] plaintiff in the collection of his/her claim against defendant _____ [*name of transferor*].

12. Under this conspiracy, the above-named defendants agreed _____ [*state facts showing the nature of agreement e.g.*, that _____ (*name of defendant transferee or obligee*) should take the payments received from _____ (*name of defendant transferor or obligor*) under the sham cattle investment contract and place them in an account in his/her own name until the statute of limitations had expired on plaintiff's claim, at which time he/she was to return the money to _____ (*name of defendant transferor or obligor*)].

13. Defendants _____ [*name*] and _____ [*name*] did the acts and things herein alleged pursuant to, and in furtherance of, the conspiracy and agreement alleged above.

14. As a proximate result of the wrongful acts herein alleged, plaintiff has been generally damaged in the sum of $_____.

[15. *Here and in subsequent paragraphs allege any items of special damages.*]

[16. At all times mentioned herein, defendant _____ (*name of transferee or obligee*) knew of plaintiff's claim against _____ (*name of transferor or obligor*) and knew that plaintiff's claim could only be satisfied out of the _____ (property transferred *or* sums expended by _____ (*name of obligor*) in fulfillment of the obligation). Notwithstanding this knowledge, defendant _____ (*name of transferee or obligee*) intentionally, willfully, fraudulently, and maliciously did the things herein alleged to defraud and oppress plaintiff. Plaintiff is therefore entitled to exemplary or punitive damages.]

WHEREFORE, plaintiff prays judgment as follows:

On the First Cause of Action:

1. That the _____ [(transfer *or* conveyance) from defendant _____ (*name of transferor*) to defendant _____ (*name of transferee*) be set aside *or* obligation incurred by defendant _____ (*name of obligor*) be annulled and declared void as to the plaintiff herein to the extent necessary to satisfy plaintiff's _____ (claim *or* judgment) in the sum of $_____ plus interest thereon at the rate of _____ percent per annum from _____(*date*)];

[2. That the property in the hands of defendant _____ (*transferee*) be attached in accordance with the provisions of *Sections 481.010 through 493.060 of the Code of Civil Procedure.*]

[3. That defendant _____ (*name of transferee*) be restrained from disposing of the property (transferred *or* conveyed) _____ (until _____(*date*), which date is the date on which the aforementioned claim held by plaintiff against defendant _____ (*name of transferor*) will have matured and the sum of $_____ will be due and owing from this defendant);]

[4. That a temporary restraining order be granted plaintiff enjoining and restraining defendant _____ (*name of transferee*), and his/her representatives, attorneys, and agents from selling, transferring, conveying, or otherwise disposing of any of the property transferred;]

[5. That an order pendente lite be granted plaintiff enjoining and restraining defendant _____ (*name of transferee*) and his/her representatives, attorneys, servants, and agents from selling, transferring, conveying, assigning, or otherwise disposing of any of the property transferred;]

[6. That the judgment herein be declared a lien on the property transferred;]

[7. That an order be made declaring that defendant _____ (*name of transferee*) holds _____(*specify all or undivided portion of property, e.g.,* an undivided one-quarter interest in) the property described above in trust for plaintiff);]

[8. That defendant _____ (*name of transferee*) be required to account to plaintiff for all profits and proceeds earned from or taken in exchange for the property described above;]

On the Second Cause of Action against defendants, and each of them, as follows:

9. For general damages in the sum of $_____;

[10. For special damages in the sum of $_____];

[11. For exemplary or punitive damages;]

On all causes of action:

12. For costs of suit herein incurrred; and

13. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This complaint is for use by a creditor in an action to set aside a transfer or conveyance or annul an obligation which was made by a defendant transferor with actual intent to delay, hinder, or defraud plaintiff in the collection of his or her claim against the transferor [*see Civ. Code §§ 3439.04, 3439.07(a)(1)*]. The form may be used by a creditor with either a matured or an unmatured claim or by a creditor who has reduced his or her claim against the transferor to judgment [*see Civ. Code § 3439.07(a)* (remedies available); *see also Civ. Code § 3439.01(b), (c)* (claim and creditor defined); *Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 369, 125 Cal. Rptr. 804* (claim reduced to judgment)].

The form also contains a second cause of action for conspiracy for use against a transferee or obligee who knowingly conspired or participated with the transferor to defraud plaintiff [*see Holmes v. Hatch (1938) 11 Cal. 2d 376, 386, 80 P.2d 70* ; *Taylor v. S & M Lamp Co. (1961) 190 Cal. App. 2d 700, 706, 712-713, 12 Cal. Rptr. 323]* . The second cause of action should be used if plaintiff's damages for conspiracy would exceed those available under *Civ. Code §§ 3439-3439.12*.

If the plaintiff is the holder of a matured claim against the defendant transferor which has not been reduced to judgment, this complaint may be combined with a cause of action on the underlying claim [*see Ahmanson Bank & Trust Co. v. Tepper (1969) 269 Cal. App. 2d 333, 343, 74 Cal. Rptr. 774]* .

[3] Allegations

This complaint alleges in part that the plaintiff is a creditor of the defendant transferor (Paragraph 3) [*see Civ. Code § 3439.07*; *Hansen v. Cramer (1952) 39 Cal. 2d 321, 323, 245 P.2d 1059]* , and that the plaintiff's claim is unmatured, has matured, or has been reduced to judgment [*Civ. Code §§ 3439.01(b), 3439.04, 3439.07(a)*; *Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 369, 125 Cal. Rptr. 804]* . Although there is no requirement that the creditor reduce his or her claim to judgment before bringing an action to set aside a fraudulent transfer or annul a fraudulent obligation [*see Rupp v. Kahn (1966) 246 Cal. App. 2d 188, 191, 197, 55 Cal. Rptr. 108]* , alternative allegations are included to distinguish the status of the particular plaintiff's underlying claim (alternative Paragraphs 4). If a transfer is involved rather than an obligation, or if an obligation was incurred to transfer specific property, optional Paragraph 5 should be used to allege the previous ownership of that property by defendant transferor or obligor [*see Civ. Code § 3439.01(i)* (definition of transfer as including payment of money); *Tokar v. Redman (1956) 138 Cal. App. 2d 350, 354, 291 P.2d 987* (payment of gambling debt as transfer); *see also Judicial Council of California Civil Jury Instructions, CACI No.*

4204 (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)].

The complaint further alleges the transfer or obligation (alternative Paragraphs 6), the specific intent of the tranferor or obligor to defraud, hinder, or delay plaintiff (Paragraph 7) [*see Civ. Code § 3439.04(a)*], and the facts establishing that the transfer or obligation was made or incurred without receipt by the debtor of consideration of reasonably equivalent value (Paragraph 8) [*see Civ. Code § 3439.03* (definition of value)]. If no allegation is made that reasonably equivalent consideration was not received in exchange for the property or obligation, plaintiff creditor must allege that the transferor's intent to defraud plaintiff was known to the transferee at the time of the transfer or incurring of the obligation (optional Paragraph 9) [*Kuhlman v. Pacific States S. & L. Co. (1940) 17 Cal. 2d 820, 821-822, 112 P.2d 620* ; *McKnight v. Superior Court (1985) 170 Cal. App. 3d 291, 299, 215 Cal. Rptr. 909* (if transferee participates in fraudulent transfer with knowledge or intent to assist transferor to defraud or hinder creditor, transfer as fraudulent even if full value is given in consideration)].

If the debtor is a partnership, counsel should insert capacity allegations stating the individual names of the partners, the partnership name, that they did business under the partnership name, and that they are being sued individually and by the partnership name pursuant to *Code Civ. Proc. § 369.5* [*see Code Civ. Proc. § 369.5*; *see* Ch. 20, *Allegations Commonly Used* , and Ch. 402, *Partnerships: Actions Between General Partners or Partnerships and Third Parties* , § 402.12; Ch. 405, *Partnerships: Actions Between Limited Partners or Partnerships and Third Parties*, § 405.12; *see also § 270.192*]. Additionally, Paragraph 3 should be modified to set forth the name of the partner who incurred the claim and to allege that in so doing he or she was acting for and on behalf of the partnership and as its agent within the scope of his or her authority [*see Corp. Code § 16301*].Similarly, Paragraph 6 should be modified to set forth the name of the partner who made the fraudulent transfer or incurred the fraudulent obligation and to allege that in so doing he or she was acting for and on behalf of the partnership and as its agent within the scope of his or her authority [*see Corp. Code § 16305(a)*].

This complaint contains a Second Cause of Action for conspiracy for use against a transferee or obligee who knowingly participated in the plan and agreed to aid the debtor, often for the transferee's benefit too. This cause of action alleges the formation and operation of the conspiracy (Paragraph 11) [*see Orloff v. Metropolitan Trust Co. (1941) 17 Cal. 2d 484, 488, 110 P.2d 396]* , the wrongful act of defrauding plaintiff as a creditor (Paragraphs 12 and 13) [*see Taylor v. S & M Lamp Co. (1961) 190 Cal. App. 2d 700, 706, 12 Cal. Rptr. 323]* , the defendants transferor's and transferee's knowledge of the conspiracy and its unlawful purpose (Paragraphs 8, 11, and 13) [*see Cohen v. Heavey (1968) 261 Cal. App. 2d 766, 771, 68 Cal. Rptr. 180* ; *Taylor v. S & M Lamp Co. (1961) 190 Cal. App. 2d 700, 706, 12 Cal. Rptr. 323]* , damage resulting from the wrongful act (Paragraphs 14 and 15) [*see Taylor v. S & M Lamp Co. (1961) 190 Cal. App. 2d 700, 705, 706, 12 Cal. Rptr. 323]* , and the basis for punitive damages (optional Paragraph 16) [*see Civ. Code § 3294*].

[4] Jurisdiction

An action to set aside a fraudulent transfer has traditionally been considered an equitable action [*see Stearns v. Los Angeles City School Dist. (1966) 244 Cal. App. 2d 696, 719, 53 Cal. Rptr. 482* ; *Wagner v. Trout (1954) 124 Cal. App. 2d 248, 254, 268 P.2d 537* ; *but see Civ. Code § 3439.08(b), (c)* and discussion in *§ 270.44[1]*]. An exception to the equitable action theory, even under prior law, allowed a money judgment to be entered against a conspiring transferee who subsequently sold the property making it unavailable for satisfaction of the creditor's underlying debt [*Flowers & Sons Development Corp. v. Municipal Court (1978) 86 Cal. App. 3d 818, 825, 150 Cal. Rptr. 555* ; *see § 270.196*]. If an action to set aside a fraudulent transfer is considered an equitable remedy, it could be handled as a limited civil case only if the property fraudulently transferred is valued at not more than $25,000 [*Code Civ. Proc. § 86(b)(1)*; *see Code Civ. Proc. §§ 85, 86(a)(7)(A), 580(b)(4), 1060* (declaratory relief in action that is otherwise limited civil case)]. Otherwise, the action must be brought in the superior court as a case of unlimited jurisdiction [*see Cal. Const., art. VI, § 10*].

[5] Venue

An action to set aside a fraudulent conveyance of real property has been considered local in nature since the court is in effect determining a right or interest in real property and the effect of a judgment for the plaintiff would be to reinvest the title to the property in the debtor to the extent of the debtor's obligation to the plaintiff [*Rice v. Schubert (1951) 101 Cal. App. 2d 638, 640-642, 226 P.2d 50]* . The applicable venue provision for such an action is thus contained in *Code Civ. Proc. § 392(a)(1)*, which provides that subject to the power of the court to transfer actions and proceedings as provided in *Code Civ. Proc. § 397*, the county in which the real property, which is the subject of the action, or some part thereof, is situated, is the proper county for the trial for such an action [*see Rice v. Schubert (1951) 101 Cal. App. 2d 638, 640-642, 226 P.2d 50]* .

However, when the plaintiff's underlying claim has already been reduced to judgment, the action has been considered one in the nature of a creditor's bill in aid of execution. The primary purpose of such an action is to redress the frustration of the plaintiff creditor's execution and, therefore, the judgment would not act directly on the land. Such an action, being transitory in nature, as is an action to set aside a fraudulent transfer of personal property, may be properly tried in the county in which the defendants or some of them reside at the commencement of the action [*see Code Civ. Proc. § 395*; *Los Angeles City School Dist. v. Redwood Empire Title Co. (1962) 206 Cal. App. 2d 398, 402-403, 23 Cal. Rptr. 662* ; for discussion and forms relating to creditor's suits, *see* Ch. 254, *Executions and Enforcement of Judgments*].

Finally, it should be noted that if the action to set aside the fraudulent conveyance involves a corporate defendant, *Code Civ. Proc. § 395.5*, providing that a corporation or association may be sued in the county where the corporation's principal place of business is situated, may apply, regardless of whether the action is considered local or transitory in nature. The predecessor constitutional section to *Code Civ. Proc. § 395.5*, *Cal. Const., art. XII, § 16*, has been held controlling [*Los Angeles City School Dist. v. Redwood Empire Title Co. (1962) 206 Cal. App. 2d 398, 403, 23 Cal. Rptr. 662]* .

[6] Statute of Limitations

An action to set aside a fraudulent transfer on the ground that it was made with actual intent to defraud, hinder, or delay a creditor must be brought within four years after the transfer was made or the obligation was incurred, or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant [*Civ. Code § 3439.09(a)*; *Judicial Council of California Civil Jury Instructions, CACI No. 4208* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)]. Notwithstanding any other provision of law, an action to set aside a fraudulent transfer must be brought within seven years after the transfer was made or the obligation was incurred [*Civ. Code § 3439.09(c)*; *Judicial Council of California Civil Jury Instructions, CACI No. 4208* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)].

The Uniform Fraudulent Transfer Act is not the exclusive remedy by which fraudulent conveyances and transfers may be attacked; they may also be attacked by a common law action. If such an action is brought, the applicable statute of limitations is *Code Civ. Proc. § 338(d)* (providing three-year statute of limitations for actions for relief on ground of fraud or mistake) and the cause of action accrues not when the fraudulent transfer occurs, but when the judgment against the debtor is secured (or later, if there was belated discovery) [*Macedo v. Bosio (2001) 86 Cal. App. 4th 1044, 1050-1052, 104 Cal. Rptr. 2d 1* (following principles set forth in *Cortez v. Vogt (1997) 52 Cal. App. 4th 917, 937, 60 Cal. Rptr. 2d 841*); *see § 270.49*].

If an action to set aside a fraudulent transfer is considered an equitable action, rather than an action for money as is arguably authorized by *Civ. Code § 3439.08(b), (c)* (discussed in *§ 270.44[1]*), the creditor must also be aware of the possiblity of being barred by laches [*see Heffernan v. Bennett & Armour (1952) 110 Cal. App. 2d 564, 583, 243 P.2d 846* ; *Pedro v. Soares (1937) 18 Cal. App. 2d 600, 610, 64 P.2d 776]* . Laches is applied only when the delay in

commencing the action was unnecessary and caused some injury to the defendant [*see Pedro v. Soares (1937) 18 Cal. App. 2d 600, 610-611, 64 P.2d 776]* .

[7] Necessary Party Defendants

The transferee of a fraudulent transfer is a necessary party defendant in an action to set aside the fraudulent transfer [*TWM Homes, Inc. v. Atherwood Realty & Inv. Co. (1963) 214 Cal. App. 2d 826, 848, 29 Cal. Rptr. 887]* since the residue of the property fraudulently transferred is returned to the defendant transferee after the claim of the plaintiff creditor is satisfied [*see Civ. Code § 3439.08(b)-(d)*; *Heffernan v. Bennett & Armour (1952) 110 Cal. App. 2d 564, 586, 243 P.2d 846* ; *Liuzza v. Bell (1940) 40 Cal. App. 2d 417, 430, 104 P.2d 1095]* . The transferor, although a proper party defendant, is not a necessary one, since he or she has reserved no interest, legal or equitable, in the property conveyed [*see TWM Homes, Inc. v. Atherwood Realty & Inv. Co. (1963) 214 Cal. App. 2d 826, 848, 29 Cal. Rptr. 887* ; *Liuzza v. Bell (1940) 40 Cal. App. 2d 417, 424, 104 P.2d 1095]* .

[8] Other Remedies

The primary relief granted to a creditor in his or her action to have set aside a fraudulent transfer is a primary lien imposed on the property conveyed to secure payment of the creditor's claim [*see Patterson v. Missler (1965) 238 Cal. App. 2d 759, 771, 48 Cal. Rptr. 215]* . The transferee may be declared a constructive trustee of the asset and may be required to account for anything he or she received [*see McKnight v. Superior Court (1985) 170 Cal. App. 3d 291, 295-300, 215 Cal. Rptr. 909* ; *Bass v. Youngblood (1963) 221 Cal. App. 2d 278, 289, 34 Cal. Rptr. 326]* .

The creditor, whether or not his or her claim has matured, may seek attachment and other provisional remedies set forth at *Code Civ. Proc. §§ 481.010-493.060* in connection with an action to set aside the fraudulent transfer or obligation [*Civ. Code § 3439.07(a)(2)*]. If this complaint is combined with a cause of action on the underlying claim, attachment may be had if it would otherwise be available in an action on the underlying claim [*Civ. Code § 3439.07(b)*].

In addition, the creditor, whether the holder of a mature claim or a claim which has not matured may also move for the appointment of a receiver to take over the management and control of the property or its proceeds [*Civ. Code § 3439.07(a)(3)(B)*; *Burrows v. Jorgensen (1958) 158 Cal. App. 2d 644, 648, 323 P.2d 150]* . A receiver may be appointed by the court in which an action or proceeding is pending, or by a judge of the court, in any of the following cases (among others):

- In an action by creditor to subject any property or fund to the creditor's claim, when it is shown that the property or fund is in danger of being lost, removed, or materially injured [*Code Civ. Proc. § 564(b)(1)*];

- After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal [*Code Civ. Proc. § 564(b)(4)*];

- In all other cases when necessary to preserve the property or rights of any party [*Code Civ. Proc. § 564(b)(9)*].

For further discussion and forms for allegations, prayers, and orders for the appointment of receivers, see Ch. 486, *Receivers* .

In addition, the creditor, whether or not his or her claim has matured, and subject to applicable principles of equity and rules of civil procedure, may seek an injunction against the debtor or a transferee, or both, or restraining further disposition of the asset or its proceeds [*Civ. Code § 3439.07(a)(3)(A)*; *see San Francisco v. Market S. R. Co. (1950) 95 Cal. App. 2d 648, 655-658, 213 P.2d 780* (request for preliminary injunction based on threat to distribute liquidating

dividend by defendant corporation to its stockholders without provision for payment of outstanding tort claims denied when complaint was unverified and failed adequately to show imminent violation)]. The court may make any order which the circumstances of the case may require [*Civ. Code § 3439.07(a)(3)(C)*].

[9] Recordation of Lis Pendens

At the time the creditor files an action to set aside a fraudulent conveyance, a notice of lis pendens should be recorded and served on the necessary parties [*see Code Civ. Proc. § 409 et seq.*; *McKnight v. Superior Court (1985) 170 Cal. App. 3d 291, 295-300, 215 Cal. Rptr. 909* (lis pendens suppported by verified complaint to set aside fraudulent conveyance and impose constructive trust)]. A successful fraudulent conveyance claim requesting relief pursuant to *Civ. Code § 3439.07(a)(1)* can result in the voiding of a transfer of title of specific real property. By definition, the voiding of a transfer of real property will affect the title to or possession of real property. Clearly such a fraudulent conveyance action "affects title to, or the right to possession of" real property [*see Code Civ. Proc. § 405.4*] and is therefore a real property claim for purposes of the lis pendens statutes. The complaint must adequately plead the fraudulent conveyance claim by alleging that the defendant transferred specified real property with the intent to defraud; for instance, "and defendant made this transfer with the actual intent to hinder, delay, and/or defraud all of defendant's creditors in the collection of their claims." The complaint also should ask the court to void the transfer of the specified property to the extent necessary to satisfy the claim in the complaint [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 649-650 15 Cal. Rptr. 3d 805, 93 P.3d 395]* .

Once the lis pendens has been recorded, it imparts constructive notice to anyone who could otherwise acquire an interest in the property superior to the plaintiff's by purchasing from the grantee for value and without notice of plaintiff's claim [*see Ahmanson Bank & Trust Co. v. Tepper (1969) 269 Cal. App. 2d 333, 341-342, 74 Cal. Rptr. 774]* . For a discussion of the requirements for recording a notice of lis pendens and forms for such notices, see Ch. 348, *Lis Pendens* .

[10] Undertaking to Release Property

On the filing of an action seeking relief from a fraudulent transfer, the transferee may file an undertaking permitting him or her to transfer, convey, encumber, or otherwise dispose of the property unaffected by the action or the judgment rendered [*Civ. Code § 3446*]. The undertaking must be for the lesser of double the value of the property or double the amount of the creditor's claim in the action [*Civ. Code § 3448*]. It requires that if the transfer or obligation is determined to be fraudulent, the transferee pay the creditor the lesser of the value of the property as estimated in the undertaking or the amount determined in the action to be due and owing to the creditor by the transferor or obligor [*Civ. Code § 3447*]. The procedures for objecting to the undertaking or the sureties on the undertaking are contained in the Bond and Undertaking Law [*see Code Civ. Proc. §§ 995.010-996.560*; *see also* Ch. 538, *Suretyship, Bonds, and Undertakings*].

[11] State Statutes

Transfer made or obligation incurred with actual intent to defraud either present or future creditors is fraudulent as to both present and future creditors. *Civ. Code § 3439.04(a)*

Creditor is permitted to maintain action to have fraudulent transfer or obligation set aside or annulled to extent necessary to satisfy claim except against purchaser or encumbrancer who gave reasonably equivalent value without knowledge of fraud at time of purchase. *Civ. Code §§ 3439.04(a), 3439.07(a)(1), 3439.08*

Undertaking to free property subject to fraudulent transfer action. *Civ. Code § 3445 et seq.*

[12] Decisions

[a] Elements of Conspiracy Action

Civil liability for conspiracy exists when conspiracy has been formed and operated to accomplish by concerted action unlawful action or purpose or lawful purpose by unlawful means. *Taylor v. S & M Lamp Co. (1961) 190 Cal. App. 2d 700, 706, 12 Cal. Rptr. 323*

Contrary to public policy for debtor to transfer or conceal property for purpose of defrauding creditors. *Taylor v. S & M Lamp Co. (1961) 190 Cal. App. 2d 700, 706, 12 Cal. Rptr. 323*

[b] Elements of Fraudulent Transfer Action

Failure of complaint to allege that consideration was inadequate or that transferee intended or participated in or had knowledge of transferor's fraudulent intent was not stating cause of action to set aside actually fraudulent transfer. *Kuhlman v. Pacific States S. & L. Co. (1940) 17 Cal. 2d 820, 821-822, 112 P.2d 620* (decided under law as it existed prior to 1939 amendments)

Creditor is not required to reduce claim to judgment before maintaining action to set aside fraudulent transfer. *Rupp v. Kahn (1966) 246 Cal. App. 2d 188, 197, 55 Cal. Rptr. 108*

[c] Nature of Action

Action is neither on underlying contract nor on judgment but is equitable relief against obstruction caused by transfers which hinder creditor in satisfaction of his or her claim by ordinary process of law. *Fleischmann v. Lotito (1936) 6 Cal. 2d 365, 366, 57 P.2d 922*

[d] Parties to Action

Transferee is necessary party in action to set aside fraudulent transfer. *TWM Homes, Inc. v. Atherwood Realty & Inv. Co. (1963) 214 Cal. App. 2d 826, 848, 29 Cal. Rptr. 887* ; *Heffernan v. Bennett & Armour (1952) 110 Cal. App. 2d 564, 586, 243 P.2d 846*

Transferor, even though proper party defendant, is not necessary one. *T W M Homes, Inc. v. Atherwood Realty & Inv. Co. (1963) 214 Cal. App. 2d 826, 848, 29 Cal. Rptr. 887*

[e] Privilege Against Self-Incrimination

Summary adjudication for plaintiff on causes of action seeking to set aside fraudulent transfers pursuant to *Civ. Code § 3439.04(a), (b)* was properly granted, despite defendant's assertion that privilege against self-incrimination precluded summary adjudication because he faced potential criminal prosecution arising from same facts, and court should have denied or continued motion instead. *Fisher v. Gibson (2001) 90 Cal. App. 4th 275, 286-287, 109 Cal. Rptr. 2d 145*

[f] Receivership

Code Civ. Proc. § 564(b)(1), (4), and *(9)* authorize appointment of receiver in actions to set aside fraudulent transfers. *Burrows v. Jorgensen (1958) 158 Cal. App. 2d 644, 648, 323 P.2d 150*

[g] Recovery of Interest

Amount of plaintiff's lien imposed on property fraudulently transferred to secure repayment of his or her claim includes interest on money judgment from date of entry. *Patterson v. Missler (1965) 238 Cal. App. 2d 759, 771, 48 Cal. Rptr. 215*

In action to recover value of property fraudulently transferred by bankrupt, award of interest from date of transfer is proper exercise of court's discretion under *Civ. Code § 3288* (awarding of interest in actions based on fraud) since transfer is deemed void as well as fraudulent, and transferee is treated as constructive trustee who is required to account for what he has received. *Bass v. Youngblood (1963) 221 Cal. App. 2d 278, 289, 34 Cal. Rptr. 326*

[h] Splitting Cause of Action

Plaintiff is not permitted to split his or her cause of action and to attack separately conveyance of real estate as well as transfer of personal property. *Heffernan v. Bennett & Armour (1944) 63 Cal. App. 2d 178, 184, 146 P.2d 482*

[i] Venue

Action to set aside fraudulent conveyance of real property is considered local in nature, and applicable venue provision, therefore, as contained in *Code Civ. Proc. § 392*, which provides that county in which real property or some part thereof is situated is proper county for trial of action. *Rice v. Schubert (1951) 101 Cal. App. 2d 638, 640-642, 226 P.2d 50*

When fraudulent conveyance action is not considered action to enforce lien on real property, but bill in aid of execution, action is considered transitory in nature and normal venue provisions are applicable. *Los Angeles City School Dist. v. Redwood Empire Title Co. (1962) 206 Cal. App. 2d 398, 402-403, 23 Cal. Rptr. 662*

[13] Text References

Witkin, California Procedure, Vol. 5, *Pleading*, § 836, Vol. 8, *Enforcement of Judgment*, §§ 445-453, 459, 473 (4th ed.)

[14] Cross References

For discussion and forms relating to accounting, see Ch. 7, *Accounting, Action for*.

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used* .

For discussion and forms relating to attachment, see Ch. 62, *Attachment* .

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions* .

For complaints for breach of contract, see Ch. 140, *Contracts* .

For alternative allegations of damages, see Ch. 177, *Damages* .

For forms for allegations and prayers for appointment of receivers, see Ch. 486, *Receivers* .

For alternative forms for prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification* .

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A. Uniform Fraudulent Transfer Act

23-270 California Forms of Pleading and Practice--Annotated § 270.191

§ 270.191 Allegation--In Complaint to Set Aside Fraudulent Transfer or Obligation [Civ. Code § 3439.07(a)]--Transfer Made or Obligation Incurred by Insolvent Other Than Partnership [Civ. Code §§ 3439.02(a), (c)-(e), 3439.05]

[1] FORM Allegation--In Complaint to Set Aside Fraudulent Transfer or Obligation [Civ. Code § 3439.07(a)]--Transfer Made or Obligation Incurred by Insolvent Other Than Partnership [Civ. Code §§ 3439.02(a), (c)-(e), 3439.05]

1. On or about _____ [*date*], the date on which the _____ [aforementioned transfer was made *or* above-described obligation was incurred], defendant _____ [*name of transferor*] had incurred an extensive indebtedness [in addition to the above-described obligation]. [Plaintiff is informed and believes and thereon alleges that] [t]he obligations of defendant _____ [*name of transferor*], other than the above-described claim of plaintiff, included both matured and unmatured claims.

2. [Plaintiff is informed and believes and thereon alleges that] [d]efendant _____ [*name of transferor*] had paid neither the whole nor any part of his/her indebtedness owed to creditors holding any such matured claims [except the sum of $_____] and that the total fair value of such matured claims was at least $_____. In addition, defendant _____ [*name of transferor*] was potentially indebted to other creditors holding outstanding claims against him/her which had not yet matured with a total fair value of at least $_____. Together, the fair value of defendant _____'s [*name of transferor*] potential liability for all his/her existing debts was at least $_____.

[*EITHER*]

3. [Plaintiff is (further) informed and believes and thereon alleges that] _____ [as a result of the _____ (making of the aforementioned transfer *or* incurring of the above-described obligation), defendant _____ (*name of transferor*) thereby rendered himself/herself insolvent *or* defendant _____ (*name of transferor*) at the time of the _____ (making of the aforementioned

transfer *or* incurring of the above-described obligation) was insolvent] in that _____ [at fair valuations, the sum of defendant _____'s (*name of transferor*) debts was greater than all of his/her/its assets *and/or* defendant _____ (*name of transferor*) was generally not paying his/her debts as they became due].

[*OR*]

3. Plaintiff is [further] informed and believes and thereon alleges that defendant _____ [*name of transferor*] was insolvent at the time of the _____ [making of the aforementioned transfer *or* incurring of the above-described obligation] since plaintiff has instituted an extensive search for but has found neither defendant _____ [*name of transferor*] nor any assets which defendant _____ [*name of transferor*] may have had at the time of the _____ [making of the aforementioned transfer *or* incurring of the above-described obligation] against which plaintiff could have satisfied his/her claim.

[2] Use of Form

These allegations may be used in place of Paragraph 7 of the First Cause of Action of § 270.190[1], in a creditor's action to set aside a transfer or annul an obligation made or incurred by the creditor's debtor for less than reasonably equivalent value and who was insolvent at the time of the transfer or obligation or was rendered insolvent thereby [*see Civ. Code § 3439.05*; *Judicial Council of California Civil Jury Instructions, CACI No. 4203* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)]. In addition, they may be included as a separate cause of action in the creditor's complaint to set aside a transfer or annul an obligation made with actual fraudulent intent as set forth in *see § 270.190* [*see Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 374-379, 125 Cal. Rptr. 804]* .

Although a plaintiff may be a creditor holding a matured claim or a claim which has not matured against the transferor, these allegations may be used only by a plaintiff whose claim arose before the transfer was made or the obligation was incurred who was a creditor at the time of the making of the conveyance or incurring of the obligation; and this fact must be alleged in plaintiff's complaint [*Civ. Code § 3439.05*; *see Pope v. National Aero Fin. Co. (1965) 236 Cal. App. 2d 722, 728, 46 Cal. Rptr. 233* ; *TWM Homes, Inc. v. Atherwood Realty & Inv. Co. (1963) 214 Cal. App. 2d 826, 843, 29 Cal. Rptr. 887* ; *Judicial Council of California Civil Jury Instructions, CACI No. 4203* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)].

[3] Alleging Debtor's Insolvency

A complaint to set aside a transfer conveyance or annul an obligation which was made or incurred by a debtor who was insolvent or was rendered insolvent thereby must allege either that the debtor was insolvent at the time of the making of the transfer conveyance or the incurring of the obligation, or that the making of the transfer or the incurring of the obligation resulted in the debtor's insolvency. A complaint that merely alleges that after making a transfer for which the debtor received less than reasonably equivalent value in exchange, the debtor was in fact insolvent does not state a cause of action for setting aside the transfer [*see Tokar v. Redman (1956) 138 Cal. App. 2d 350, 355, 291 P.2d 987]* .

Although pleading generally that the transferor was insolvent at the time of making the fraudulent transfer or was rendered insolvent thereby may be sufficient to allege insolvency [*see TWM Homes, Inc. v. Atherwood Realty & Inv. Co. (1963) 214 Cal. App. 2d 826, 847, 29 Cal. Rptr. 887]* , this form specifically alleges the debtor's insolvency by alleging that the fair value of the debtor's obligations exceeded the then fair value of his or her assets and/or that the debtor was generally not paying its debts as they became due [*see Civ. Code § 3439.01(a)(1), (2)* (assets exclude exempt property and property to extent encumbered by valid lien), 3439.02(a) (defining insolvency), (b) (defining insolvency of partnership), (c) (presumption of insolvency arising from nonpayment of debts), (e) (debts for purpose of determining insolvency exclude those secured by valid lien); *TWMHomes, Inc. v. Atherwood Realty & Inv. Co. (1963)*

214 Cal. App. 2d 826, 847, 29 Cal. Rptr. 887 ; *see also Judicial Council of California Civil Jury Instructions, CACI Nos. 4205, 4206* (LexisNexis Matthew Bender) (related California Judicial Council jury instructions)]. In the alternative, this form alleges that plaintiff creditor was unable to locate the debtor or any of his or her assets (second alternative Paragraph 3) [*see Civ. Code § 3439.02(d)* (assets for purpose of determining insolvency exclude those transferred to hinder or defraud creditors); *Neumeyer v. Crown Funding Corp. (1976) 56 Cal. App. 3d 178, 186, 128 Cal. Rptr. 366* ; *see also Judicial Council of California Civil Jury Instructions, CACI Nos. 4205, 4206* (LexisNexis Matthew Bender) (related California Judicial Council jury instructions)]. The latter allegation is sufficient to shift the burden of pleading and proving that the debtor-transferor was in fact solvent to the defendant transferee [*see Neumeyer v. Crown Funding Corp. (1976) 56 Cal. App. 3d 178, 186-190, 128 Cal. Rptr. 366]* .

[4] State Statutes

Assets defined to exclude exempt property, property to extent encumbered by valid lien, and tenancy by entirety property which could not be reached by creditor of only one tenant. *Civ. Code § 3439.01(a)*

Valid lien is effective against holder of judicial lien subsequently obtained by legal or equitable process or proceeding. *Civ. Code § 3439.01(j)*

Debtor is insolvent if at fair valuations, sum of debts is greater than assets. *Civ. Code § 3439.02(a)*

Partnership is insolvent if at fair valuations, sum of partnership debts is greater than aggregate of all partnership's assets and sum of excess of value of each general partner's nonpartnership assets over partner's nonpartnership debts. *Civ. Code § 3439.02(b)*

Debtor who is generally not paying his or her debts as they become due is presumed to be insolvent. *Civ. Code § 3439.02(c)*

In determining insolvency, assets transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or in other manner so as to be voidable under *Civ. Code §§ 3439-3439.12* are excluded. *Civ. Code § 3439.02(d)*

In determining insolvency, obligation is excluded to extent it is secured by valid lien on property of debtor not incuded as asset. *Civ. Code § 3439.02(e)*

Transfer made or obligation incurred by debtor who did not receive reasonably equivalent value in exchange for transfer or obligation and who is or will be rendered insolvent thereby is fraudulent as to creditors whose claims arose before transfer was made or obligation was incurred. *Civ. Code § 3439.05*

[5] Decisions

Conveyance by insolvent partnership of partnership asset without receipt of reasonably equivalent value is transfer in fraud of creditors, without regard to debtor's actual intent. Headen v. Miller (l983) *141 Cal. App. 3d 169, 172, 190 Cal. Rptr. 198*

Change in beneficiary of insurance policy from one partner to other partner's wife is fraudulent transfer if creditors establish that insurance proceeds were asset of partnership and thus subject to claims to extent proceeds exceed amount exempt from enforcement of judgment. Headen v. Miller (l983) *141 Cal. App. 3d 169, 176, 190 Cal. Rptr. 198*

Allegation that debtor was insolvent after making transfer or conveyance is insufficient to establish that transfer thereby rendered debtor insolvent. *Tokar v. Redman (1956) 138 Cal. App. 2d 350, 355, 291 P.2d 987*

Civ. Code § 3439.05 protects only existing creditors and person invoking section as required to establish status as creditor at time transfer was made. *TWM Homes, Inc. v. Atherwood Realty & Inv. Co. (1963) 214 Cal. App. 2d 826, 843, 29 Cal. Rptr. 887*

Actual fraudulent intent of debtor is immaterial if transfer constructively fraudulent under *Civ. Code § 3439.05*. *Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 374, 125 Cal. Rptr. 804*

Burden of proof as to insolvency under *Civ. Code § 3439.05* is on party claiming it as fact. *Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 375, 125 Cal. Rptr. 804*

When plaintiff creditor has established prima facie case of insolvency by demonstrating extensive liabilities on part of debtor and evidence shows that all efforts by creditors to locate either debtor or his or her assets have proven fruitless, burden of producing further evidence on insolvency issue is shifted to transferee. *Neumeyer v. Crown Funding Corp. (1976) 56 Cal. App. 3d 178, 186-190, 128 Cal. Rptr. 366*

[6] Text References

Witkin, California Procedure, Vol. 8, *Enforcement of Judgment*, §§ 454-456 (4th ed.)

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23-270 California Forms of Pleading and Practice--Annotated § 270.192

§ 270.192 Allegation--In Complaint to Set Aside Fraudulent Transfer or Obligation [Civ. Code § 3439.07(a)]--Transfer Made or Obligation Incurred by Insolvent Partnership [Civ. Code §§ 3439.02, 3439.05]

[1] FORM Allegation--In Complaint to Set Aside Fraudulent Transfer or Obligation [Civ. Code § 3439.07(a)]--Transfer Made or Obligation Incurred by Insolvent Partnership [Civ. Code §§ 3439.02, 3439.05]

1. Defendant _____ [*name*] is, and at all times herein mentioned, was a partnership, sued herein under the name _____ [it has assumed *or* by which it is known]. Defendant _____'s [*name of partnership*] principal place of business is in [_____ (*city*),] _____ County, California.

2. Defendants _____ [*names*] are, and at all times herein mentioned were, partners of the above-named partnership and are sued herein both individually and as partners of defendant _____ [*name of partnership*]. [Defendants _____ (*names*) are, and at all times herein mentioned were, residents of _____ County, California.]

3. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned and in doing all of the things herein alleged, each of the individual defendants was authorized and empowered to act as agent of the other individual defendants and of the defendant partnership, and each and all of the things herein alleged to have been done by each individual defendant were done by him or her in the capacity and as agent of the other individual defendants and of the defendant partnership.

4. _____ [From and after _____ [*date*] *or* At all times herein mentioned] plaintiff _____ [was *or* has been] the holder of a certain claim against defendants _____ [*name of partnership and individual partners*]. This claim consists of _____ [*specify claim, and if based on a document, attach a copy as an exhibit, e.g.,* a note payable to plaintiff in the principal sum of $5,000 with interest thereon from and after _____(*date*), at _____ percent per annum, all due on _____ (*date*). A copy of the note is attached as "Exhibit A" and incorporated by reference.] This _____ [*specify, e.g.,* note] was _____ [*specify, e.g.,* negotiated and executed by

_____ (*name of individual partner*)] as partner on behalf of the defendant partnership. The _____[*describe benefit of particular transaction, e.g.,* proceeds of the note] were used in and benefitted the partnership business.

[*EITHER*]

5. [Plaintiff is informed and believes and thereon alleges that] [o]n or about _____ [*date*], defendant _____ [*name of partnership*], by and through defendant(s) _____ [*name(s) of individual partner(s*)] as partner(s) on behalf of the defendant partnership _____ [*describe manner of transfer, e.g.,* deeded] the above-described property to defendant _____ [*name of transferee*]. [*If instrument was recorded, official registration was changed, or security interest was given by UCC filing, give the particulars of the recordation, transfer of registration, or filing, e.g.,* On _____ (*date*), the deed was recorded in _____(Book *or* Reel) _____ (*number*) _____ (Page *or* Image) _____(*number*), Official Records in the Office of the County Recorder of _____ County, California.]

[*OR*]

5. [Plaintiff is informed and believes and thereon alleges that] [o]n or about _____ [*date*], defendant _____ [*name of partnership*], by and through defendant(s) _____ [*name(s) of individual partners*] as partner(s) on behalf of the defendant partnership entered into an agreement under which defendant _____[*name of partnership*] became obligated to _____[*specify, e.g.,* lease from defendant _____ (*name of obligee*) 2,000 square feet of commercial space at _____(*address*) for a period of five years and to pay _____(*name of obligee*) $_____ per year as rental]. Defendant _____ [*name of partnership*] has _____ [not yet made any payments *or* paid $_____] to _____ (*name of obligee*) in fulfillment of this _____ [*specify, e.g.,* lease].

[*CONTINUE*]

6. On or about _____ [*date*], the date on which the aforementioned _____ [transfer was made *or* obligation was incurred], defendant _____ [*name of partnership*] had incurred extensive indebtedness [in addition to the claim of plaintiff]. [Plaintiff is informed and believes and thereon alleges that] [t]he obligations of defendant _____ [*name of transferor*], other than the above-described claim of plaintiff, included both matured and unmatured claims.

7. [Plaintiff is informed and believes and thereon alleges that] [d]efendant _____ [*name of partnership*] had paid neither the whole nor any part of its indebtedness owing to creditors holding matured claims [except the sum of $_____] and that the total fair value of such matured claims was at least $_____. In addition, defendant _____ [*name of partnership*] was potentially indebted to other creditors holding outstanding claims which had not yet matured with a total fair value of at least $_____. Together, the fair value of defendants' potential liability for all existing partnership debts was at least $_____.

[*EITHER*]

8. [Plaintiff is (further) informed and believes and thereon alleges that] _____ [(a)s a result of _____ (making the aforementioned transfer *or* incurring the above-described obligation), defendant _____ (*name of partnership*) thereby rendered itself insolvent *or* (d)efendant _____ (*name of partnership*) at the time of _____ (making the aforementioned transfer *or* incurring the above-described obligation) was insolvent] in that _____ [at fair valuations, the sum of the partnership's debts was greater than the aggregate of all of the partnership's assets and the sum of the excess (, in any) of the value of each general partner's nonpartnership assets over the partner's nonpartnership debts *and/or* defendant _____ (*name of partnership*) was generally not paying its debts as they became due].

[*OR*]

8. [Plaintiff is (further) informed and believes and thereon alleges that] [d]efendant _____ (*name of partnership*) was insolvent at the time of the _____ [making the aforementioned transfer *or* incurring the above-described obligation] because plaintiff has instituted an extensive search for but has found neither defendants _____ [*names of individual partners*] nor any assets which defendant _____ [*name of partenrship*] or defendants _____ [*names of individual partners*] may have had at the time of _____ [making the aforementioned transfer *or* incurring the above-described obligation] against which plaintif could have satisfied his/her/its claim.

[2] Use of Form

These allegations are for use to set aside a fraudulent transfer or obligation made or incurred by a partnership which is insolvent or which is rendered insolvent by the transfer or obligation [*see Civ. Code §§ 3439.02(b), 3439.05*; *Code Civ. Proc. § 369.5*; *Corp. Code §§ 16301, 16305(a)*; *Judicial Council of California Civil Jury Instructions, CACI Nos. 4203, 4205, 4206* (LexisNexis Matthew Bender) (related California Judicial Council jury instructions)]. The allegations may be used in place of Paragraphs 1, 3, 6, and 7 of the First Cause of Action in § 270.190[1]. Unless plaintiff can and wishes to rely solely on the presumption of insolvency arising because the partnership is generally not paying its debts as they become due [*Civ. Code § 3439.02(c)*], the excess, if any, of each general partner's nonpartnership assets over nonpartnership debts will have to be taken into account in order to establish the partnership's insolvency (first alternative Paragraph 8) [*Civ. Code § 3439.02(b)*].

[3] Allegations

This form contains:

- Capacity allegations which may be used in place Paragraph 1 in § 270.190[1] when the transferor/debtor is a partnership (Paragraphs 1-3) [*see Code Civ. Proc. § 388*];

- Allegations that the underlying obligation was incurred on behalf of and for the benefit of the partnership (Paragraph 4) and that the fraudulent transfer was made or obligation was incurred on behalf of the partnership (alternative Paragraphs 5) which may be used in place of Paragraphs 3 and 6 in *see § 270.190* when the transferor/debtor is a partnership [*see Corp. Code §§ 16301, 16305(a)*];

- Allegations that the partnership had other matured and unmatured claims against it at the time of the transfer or obligation (Paragraph 6);

- Allegations of the fair value of those obligations (Paragraph 7) [*see Civ. Code § 3439.02(a)*; *see also Judicial Council of California Civil Jury Instructions, CACI Nos. 4205, 4206* (LexisNexis Matthew Bender) (related California Judicial Council jury instructions)]; and

- Allegations of insolvency (alternative Paragraphs 8) which may be used in place of alternative Paragraphs 3 in *see § 270.191* when the transferor/debtor is a partnership [*see Civ. Code § 3439.02(b), (c)*; *see also Judicial Council of California Civil Jury Instructions, CACI Nos. 4205, 4206* (LexisNexis Matthew Bender) (related California Judicial Council jury instructions)].

[4] Cross References

See also *§§ 270.190* and *270.191*.

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§ 270.193 Allegation--In Complaint to Set Aside Fraudulent Transfer or Annul Fraudulent Obligation [Civ. Code § 3439.07(a)(1)]--Transfer Made or Obligation Incurred by Person Believing Debts Will Be Incurred Beyond Person's Ability to Pay [Civ. Code § 3439.04(a)(2)(B)]

[1] FORM Allegation--In Complaint to Set Aside Fraudulent Transfer or Annul Fraudulent Obligation [Civ. Code § 3439.07(a)(1)]--Transfer Made or Obligation Incurred by Person Believing Debts Will Be Incurred Beyond Person's Ability to Pay [Civ. Code § 3439.04(b)(2)]

At the time defendant _____ [*name of transferor*] _____ [made the aformentioned transfer *or* incurred the above-described obligation], he/she _____ [intended *and/or* believed *and/or* reasonably should have believed] that he/she would thereafter incur debts which would be beyond his/her ability to pay as they became due.

[2] Use of Form

This allegation may be used in place of Paragraph 7 of the First Cause of Action of § 270.190[1], with appropriate modifications made in that form, in a creditor's action to set aside a transfer or conveyance or annul an obligation if the transfer was made or the obligation incurred without the debtor's receiving reasonably equivalent value in exchange therefor and when the debtor intended to incur, or believed or reasonably should have believed, that he or she would thereafter incur debts beyond his or her ability to pay as they become due. A person who was a creditor at the time of the transfer or the incurring of the obligation or a person who subsequently became a creditor may bring such an action [*see Civ. Code § 3439.04(a)(2)(B)*; *Judicial Council of California Civil Jury Instructions, CACI No. 4202* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)].

[3] State Statutes

Transfer made or obligation incurred by debtor who did not receive reasonably equivalent value in exchange therefor and who intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due held fraudulent as to both present and future creditors. *Civ. Code §*

3439.04(a)(2)(B)

[4] Decisions

Complaint to set aside transfers made or obligations incurred which are fraudulent under *Civ. Code § 3439.04(a)(2)(B)* is required to allege that plaintiff was creditor of debtor, that transfers were made or obligations entered into with intent or belief that debts would be incurred beyond individual's ability to pay as they became due, and that transfers were made or obligations were incurred without reasonably equivalent consideration. *Pope v. National Aero Fin. Co. (1965) 236 Cal. App. 2d 722, 728, 46 Cal. Rptr. 233*

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23-270 California Forms of Pleading and Practice--Annotated § 270.194

§ 270.194 Complaint to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)]--Transfer Made Leaving Unreasonably Small Remaining Assets With Which to Engage in Business or Transaction [Civ. Code § 3439.04(a)(2)(A)]

[1] FORM Complaint to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)]--Transfer Made Leaving Unreasonably Small Remaining Assets With Which to Engage in Business or Transaction [Civ. Code § 3439.04(b)(1)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO HAVE FRAUDULENT TRANS-
_____[*name*(*s*)],	)	FER SET ASIDE
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Capacity and residence of defendant. See § 270.190[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 270.190[1], Paragraph 2.*]

[*EITHER*]

3. On or about _____ [*date*], defendant _____ [*name of transferor*] was

_____ [engaged in *or* about to engage in] a business in the State of California as _____ [*describe business, e.g.*, a contractor for the construction of residential dwellings].

[*OR*]

3. On or about _____ [*date*], defendant _____ [*name of transferor*] was _____ [engaged in *or* about to engage in] a transaction with _____ [*specify person(s) involved, e.g.*, plaintiff] in which defendant _____ [*name of transferor*] _____[would *or* was] _____ [*describe transaction, e.g.*, raise certain cattle stock for eventual sale, the proceeds of which sale were to be divided between defendant _____ (*name of transferor*) and plaintiff].

[4. On or about _____ (*date*), defendant _____ (*name of transferor*) did commence that _____ (business *or* transaction). On or about _____ (*date*), this _____ (business *or* transaction) entirely failed and collapsed as proximate result of the unreasonably small remaining assets with which to carry on the _____ (business *or* transaction).]

5. [*Transfer of property or incurring of obligation on date on which transferor was engaged or was about to engage in business or transaction by defendant transferor. See § 270.190[1], Paragraphs 5 and 6.*]

6. Plaintiff is informed and believes and thereon alleges that the assets remaining in the defendant _____'s [*name of transferor*] hands after the aforementioned _____ [transfer *or* obligation] were unreasonably small in relation to the above-described _____[business *or* transaction] [in that following this _____(transfer *or* obligation), defendant _____ (*name of transferor*) retained no more than the sum of $_____ (*or state other assets available to defendant transferor*) and the sum of at least $_____ was required to meet the reasonably foreseeable liabilities of the _____ (business *or* transaction)]. [This _____ (business *or* transaction) entirely failed and collapsed as a proximate result of the unreasonably small remaining assets with which to carry on the _____ (business *or* transaction), as alleged above.]

7. [*Lack of reasonably equivalent value for transfer. See § 270.190[1], Paragraph 8.*]

8. _____ [On the date of the aforementioned _____ (transfer *or* obligation) *or* On or about _____ (*date*), while the _____ (business *or* transaction) was continuing], plaintiff became _____ [*allege status of plaintiff as holder of claim against defendant transferor; see § 270.190[1], Paragraphs 3 and 4.*]

[*Prayer. See § 270.190[1].*]

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 270.190[1].*]

[2] Use of Form

This complaint is for use by a creditor to set aside a transfer made or an obligation incurred by a debtor without receipt

by the debtor of reasonably equivalent value in exchange therefor, when the debtor was engaged in or was about to engage in a business or transaction for which the debtor's remaining assets were unreasonably small in relation to the business or transaction. Relief on this ground is available to the creditor whether or not the creditor's underlying claim against the debtor arose before or after the transfer was made or the obligation was incurred [*Civ. Code § 3439.04(a)(2)(A)*; *see Judicial Council of California Civil Jury Instructions, CACI No. 4202* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)]. This form may also be included as a separate count in a creditor's action to set aside a conveyance made with actual fraudulent intent or made by an insolvent for less than fair consideration [*see Pope v. National Aero Fin. Co. (1965) 236 Cal. App. 2d 722, 728, 46 Cal. Rptr. 233* ; *see §§ 270.190* and *270.191*].

[3] State Statutes

Transfer made or obligation incurred by debtor without receipt of reasonably equivalent value in exchange when debtor was engaged in or was about to engage in business or transaction for which debtor's remaining assets were unreasonably small in relation to business or transaction is fraudulent as to creditor whose claim arose before or after transfer was made or obligation was incurred. *Civ. Code § 3439.04(a)(2)(A)*

[4] Decisions

Whether transferor left himself or herself unreasonably small remaining assets under *Civ. Code § 3439.04(a)(2)(A)* after transfer is question of fact with burden on creditors to establish this fact. *Pope v. National Aero Fin. Co. (1965) 236 Cal. App. 2d 722, 728, 46 Cal. Rptr. 233* ; *Holcomb v. Nunes (1955) 132 Cal. App. 2d 776, 781, 283 P.2d 301* (construing former *Civ. Code § 3439.05*)

Finding that transfer left debtor with unreasonably small assets for transaction was unsupported by evidence when transfer occurred while plaintiff and debtor were still negotiating and be fore they actually agreed to engage in transaction together and since asset transferred was not comtemplated to be devoted by debtor to transaction. *Holcomb v. Nunes (1955) 132 Cal. App. 2d 776, 780-781, 283 P.2d 301*

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23-270 California Forms of Pleading and Practice--Annotated § 270.195

§ 270.195 Allegation--In Complaint to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)]--Transferee's Conversion of Property Conveyed to Own Use

[1] FORM Allegation--In Complaint to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)]--Transferee's Conversion of Property Conveyed to Own Use

Plaintiff is informed and believes and thereon alleges that on or about _____ [*date*], defendant _____[*name of transferee*] transferred the above-described property to _____ [*name*] who for such transfer gave _____[the sum of $_____ and _____(*or describe other consideration*)]. Defendant _____[*name of transferee*] has converted the _____ [sum *or other consideration as described above*] to his/her own use [and has used such _____ (sum *or describe other consideration*) to _____ (*describe form into which consideration has been converted by defendant transferee, e.g.*, make the following improvements on other property of which he/she is now the owner, to wit: _____ [*describe; if real property, give legal description*])].

[2] Use of Form

This allegation is for use by a creditor in his or her action to set aside a fraudulent transfer after the defendant transferee has sold the property and converted the proceeds of the sale to his or her own use [*see Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 591, 25 Cal. Rptr. 545, 375 P.2d 425* ; *Cohen v. Heavey (1968) 261 Cal. App. 2d 766, 770-771, 68 Cal. Rptr. 180]* . When this form is included in the creditor's complaint, a personal judgment may be rendered against the transferee in the amount of the proceeds which the transferee converted to his or her own use [*Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 591, 25 Cal. Rptr. 545, 375 P.2d 425]* . In addition, in equity, the property may be followed into whatever form it has been converted after the fraudulent transfer, subject to any party's superior rights, either on the theory of following the res into the hands of a constructive trustee, or by applying a kind of equitable conversion. Under either theory, the creditor is entitled to subject the property or funds to a lien as security for repayment of his or her claim, subject to any right of reimbursement the transferee may have [*see Civ. Code § 3439.08(b), (c)* (judgment against original or successor transferee in lesser of amount necessary to satisfy creditor's claim or value, at time of transfer, of asset transferred); *see also Ahmanson Bank & Trust Co. v. Tepper*

(1969) 269 Cal. App. 2d 333, 344-345, 74 Cal. Rptr. 774 ; *Ohio Elec. Car Co. v. Duffet (1920) 48 Cal. App. 674, 678, 192 P. 298]* .

In the case of an innocent transferee, while the transferee must account for everything received under the fraudulent transfer, no personal judgment may be rendered against the transferee if he or she was not benefitted by the transfer [*Cohen v. Heavey (1968) 261 Cal. App. 2d 766, 771, 68 Cal. Rptr. 180* (innocent transferee as not liable when he returned property to transferor)].

[3] State Statutes

Good faith transferee, notwithstanding voidability of transfer, is entitled, to extent of value given to debtor for obligation or transfer, to lien on or right to retain any interest in asset transferred, enforcement of any obligation incurred, and reduction in amount of liability on judgment. *Civ. Code § 3439.08(d)*

[4] Decisions

Fraudulent transferee who has sold property fraudulently transferred is personally liable to creditors of his or her transferor for amount of proceeds of sale which he or she converted to his or her own use. *Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 591, 25 Cal. Rptr. 545, 375 P.2d 425*

Innocent transferee required to account for everything received under fraudulent transfer. *Cohen v. Heavey (1968) 261 Cal. App. 2d 766, 770, 68 Cal. Rptr. 180*

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23-270 California Forms of Pleading and Practice--Annotated § 270.196

§ 270.196 Allegation--In Complaint to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)--Concealment of Fraudulent Transfer by Transferor and Transferee [Civ. Code § 3439.09(a), (c)]

[1] FORM Allegation--In Complaint to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)--Concealment of Fraudulent Transfer by Transferor and Transferee [Civ. Code § 3439.09(a), (c)]

Defendant _____ [*name of transferor*] [and defendant _____ (*name of transferee*)] willfully and surreptitiously concealed the aforementioned _____ [transfer *or* obligation] from _____ [plaintiff *and/or* all of defendant _____'s (*name of transferor*) creditors]. Plaintiff did not discover, and could not reasonably have discovered, the existence of the fraud and fraudulent _____ [transfer *or* obligation] until _____ (*date*), at which time _____[*specify how plaintiff learned of transfer or obligation, e.g.,* defendant _____'s (*name of transferor*) former spouse informed plaintiff of the transfer].

[*If appropriate, add:* The fraudulent transfer was made during the pendency of a lawsuit that established the debtor-creditor relationship between plaintiff and defendant. The judgment in that lawsuit became final on _____ (*date*).]

[2] Use of Form

This allegation is for use in a creditor's action to set aside a fraudulent transfer when it appears on the face of the complaint that the action is being brought more than four years from the date that the fraudulent transfer was made or the fraudulent obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the creditor [*Civ. Code § 3439.09(a)*; *Judicial Council of California Civil Jury Instructions, CACI No. 4208* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)]. Notwithstanding any other provision of law, a cause of action with respect to a fraudulent transfer or obligation is extinguished if no action is brought within seven years after the transfer was made or the obligation was incurred [*Civ. Code § 3439.09(c)*; *Judicial Council of California Civil Jury Instructions, CACI No. 4208* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)].

The optional language at the end of the form may be used when an allegedly fraudulent transfer was made during a pending lawsuit that would establish whether, and the extent to which, a debtor-creditor relationship exists. In this situation, the limitation period does not commence to run until the judgment in the underlying action becomes final. The four-year limitation period, i.e., the language, "four years after the transfer was made or the obligation was incurred," accommodates a tolling until the underlying liability becomes fixed by a final judgment [*Cortez v. Vogt (1997) 52 Cal. App. 4th 917, 937, 60 Cal. Rptr. 2d 841]* .

[3] Cross References

See also *§ 270.190*.

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23-270 California Forms of Pleading and Practice--Annotated § 270.197

§ 270.197 Allegations--In Complaint to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)]--For Accounting of Profits or Proceeds Received by Transferee

[1] FORM Allegations--In Complaint to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)]--For Accounting of Profits or Proceeds Received by Transferee

1. Between _____ [*date*], which was the date of the aforementioned fraudulent _____ [transfer *or* obligation], and the date of the filing of the above-entitled action, defendant _____ [*name of transferee*] collected and received _____ [*specify what was received and from whom, e.g.,* from the tenants in possession of the real property all the rents and profits from the real property], amounting to at least the sum of $_____ [*estimated amount received*].

2. Plaintiff has heretofore demanded of defendant _____ [*name of transferee*] that he/she account to plaintiff for any and all sums so received by him/her, and that he/she include such sums as part of the property which plaintiff may subject to his/her claim against defendant _____ [*name of transferor*], but defendant _____ [*name of transferee*] has failed and refused to so do, and still fails and refuses to make such accounting.

[2] Use of Form

This allegation should be included in a creditor's complaint to have set aside a fraudulent transfer or obligation when the defendant transferee has received profits, income, or other proceeds from the property, and the creditor's claim will not be fully satisfied by the property fraudulently transferred [*see Michal v. Adair (1944) 66 Cal. App. 2d 382, 388, 152 P.2d 490]* . In such a case, when the transfer is set aside, the creditor may have a decree against the transferee for an accounting of the income or proceeds while the property was in the transferee's possession to the extent necessary to satisfy his or her claim against the transferor. Such a decreee is a proper incident to an action to set aside a fraudulent transfer or obligation [*Wright v. Salzberger (1932) 121 Cal. App. 639, 645, 9 P.2d 860* ; *see Patterson v. Missler (1965) 238 Cal. App. 2d 759, 770-774, 48 Cal. Rptr. 215]* .

[3] State Statutes

Reference to take accounting. *Code Civ. Proc. §§ 638, 639*

[4] Decisions

Rentals from property fraudulently conveyed by debtor are subject to claims of defrauded creditor. *Michal v. Adair (1944) 66 Cal. App. 2d 382, 388, 152 P.2d 490* ; *Wright v. Salzberger (1932) 121 Cal. App. 639, 645, 9 P.2d 860*

[5] Cross References

See also *§ 270.190*.

For a discussion and forms for use in actions involving an accounting, see Ch. 7, *Accounting, Action for*.

For memoranda of points and authorities for use in actions involving an accounting generally, see California Points and Authorities, Ch. 12, *Accounting* (Matthew Bender).

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§ 270.198 Cross Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--In Action to Set Aside Fraudulent Transfer or Obligation [Civ. Code § 3439.07(a)(1)]--To Determine Tranferee's or Obligee's Right to Retain Interest in or Lien on Property or to Enforce Obligation [Civ. Code § 3439.08(d)]

[1] FORM Cross Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--In Action to Set Aside Fraudulent Transfer or Obligation [Civ. Code § 3439.07(a)(1)]--To Determine Tranferee's or Obligee's Right to Retain Interest in or Lien on Property or to Enforce Obligation [Civ. Code § 3439.08(d)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff [and Cross Defendant],	)	NO. _____
vs.	)	CROSS COMPLAINT FOR DECLARATORY RE-
_____ [*name*],	)	LIEF
Defendant [and Cross Complainant]	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Cross complainant alleges:

1. Cross defendants _____ [*name of creditor/plaintiff*] and _____ [*name of transferor or obligor*] are, and at all times herein mentioned were, residents of _____ County, California [*or allege other capacity and residence*].

2. On or about _____ [*date*], cross defendant _____ [*name of creditor/plaintiff*] commenced an action against cross complainant to have set aside a _____ [_____ (transfer *or* conveyance) of certain property *or* certain obligation], which _____ [transfer *or*

conveyance *or* obligation] was alleged to be in fraud of cross defendant's rights as a creditor of [cross defendant] _____ [*name of transferor or obligor*], who is the person alleged to have made the _____ [transfer *or* conveyance *or* obligation].

3. In cross defendant's complaint to set aside this _____ [transfer *or* obligation], cross defendant alleges: _____ [*set forth the pertinent allegations of cross defendant's complaint in this paragraph and additional paragraphs, including cross defendant's status as creditor, ownership by the transferor at the time of transfer or obligation, making of transfer or incurring of obligation by transferor with actual fraudulent intent, cross complainant's participation is such fraud, and/or lack of reasonably equivalent value given by cross complainant for transfer. See § 270.190[1], First Cause of Action, Paragraphs 3-9*]. [A copy of this complaint is attached as Exhibit _____ and incorporated by reference.]

4. Cross complainant had no knowledge of _____[cross defendant's _____ (*name of creditor/plaintiff*) claim against _____ (*name of tranferor or obligor*) or of _____'s (*name of transferor or obligor*) actual intent to hinder, delay, or defraud cross defendant _____ (*name of creditor/plaintiff*) in the collection of his/her/its claim *or* of _____'s (*name of tranferor or obligor*) _____(insolvency *or* financial embarassment)] nor did cross complaintant have knowledge of any facts which would put him/her/it on notice of that _____ [*sepcify, e.g.*, claim or insolvency].

5. As consideration for the allegedly fraudulent _____ [transfer *or* obligation], cross complainant _____ [paid $_____ and _____ (*or describe other consideration, e.g.*, assumed the payments due on a certain promisory note dated _____ [*date*], in favor of Megabucks, Inc. with a then remaining principal balance of $_____ with interest at the rate of _____ percent per annum secured by a certain deed of trust on the property conveyed, which deed of trust was recorded on _____ (*date*), at _____ (Book *or* Reel) _____ (Page *or* Image) in the Official Records of the county recorder of _____ County, _____ (*state*). Copies of the promissory note and deed of trust are attached as Exhibits _____ and _____, and incorporated by reference)]. This consideration constituted reasonably equivalent value in that it was _____ [a fair equivalent *or* not in an amount disproportionately small as compared] to the value of the _____ [property transferred *or* obligation undertaken] and was made in good faith, as more fully described in Paragraph 4.

6. In addition, from _____ [*date*], which was the date of the allegedly fraudulent _____ [transfer *or* obligation], to the date of the filing of cross defendant's action to set aside the _____ [transfer *or* obligation], cross complainant expended the sum of $_____, _____ [*specify expenditure that benefitted property, payments made on any obligation assumed or undertaken in connection with the transfer, and/or counterperformance of obligee, if any, e.g.*, consisting of principal and interest payments made on the deed of trust encumbering the property].

7. Therefore, an actual controversy has arisen and now exists between cross complainant and cross defendant(s) concerning their respective rights in the property conveyed in that cross complainant contends that in the event cross defendant _____ [*name of plaintiff/creditor*] is adjudged entitled to have the _____ [*specify, e.g.*, conveyance] set aside for being in fraud of his/her rights against _____ [*name of transferor*], cross complainant is entitled _____ [to retain _____ (an interest in *or* a lien on) the property to the extent of the payments made in acquisition and maintanence of, and otherwise to benefit (or improve) the property or cross defendant's interest, if any, therein *or* to enforce the _____ (*specify, e.g.*, contract) against _____ (*obligor*) to the extent of the value given to him/her/it by cross complainant], whereas cross defendant disputes this contention and contends that such _____ [property *or* _____ (*specify e.g.*, contract)] is not subject to any such interest as claimed by cross complainant.

8. Cross complainant desires a judicial determination of his/her rights, and in particular, a declaration as to whether in the event that cross defendant _____ [*name of plaintiff/creditor*] is entitled to have the alleged fraudulent _____ [*specify, e.g.,* conveyance] set aside, cross complainant is entitled to retain _____ [*specify, e.g.,* a lien on the property as security for repayment of the consideration given for the property and sums expended in preserving and maintaining the property].

10. Such a declaration is necessary and appropriate at this time in order that cross complainant may ascertain his/her rights in the _____ [property *or* _____ (*specify e.g.,* contract)].

WHEREFORE, cross complainant prays judgment against cross defendant as follows:

[*EITHER, when tranfer is at issue*]

[1. For a declaration, in the event cross defendant _____ (*name of creditor/plaintiff*) be adjudged entitled to set aside the aforementioned transfer, that cross complainant is entitled to retain _____ (an interest in *or* a lien on) the property to the extent of (the aggregate of) the consideration given therefor, together with interest thereon at the legal rate from the date said consideration was paid (*add as applicable:* and all sums expended in maintenance, improvement, and preservation of the property and in payment of liens and encumbrances against the property).]

[*OR, if obligation is at issue*]

[1. For a declaration, in the event cross defendant _____ (*name of creditor/plaintiff*) be adjudged entitled to set aside the aforementioned _____ (*specify obligation, e.g.,* contract), that cross complainant is entitled to enforce the _____ (*specify obligation, e.g.,* contract) to the extent of (the aggregate of) the consideration given therefor, together with interest thereon at the legal rate from the date said consideration was paid (*add as applicable:* and all sums expended in preperation for and commencement of performance thereunder).]

[*CONTINUE*]

[2. For a declaration, in the event cross defendant _____ (*name of creditor/plaintiff*) be adjudged entitled to a money judgment against cross complainant, that cross complainant is entitled to a reduction in the amount of liability thereunder equal to the sums set forth in Item 1.]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Cross Complainant

[*Verification, if desired. See § 270.190[1].*]

[2] Use of Form

This cross complaint for declaratory relief should be used whenever a defendant transferee or obligee in an action by a creditor to set aside the transfer or obligation as fraudulent, claims either (1) that the transfer or obligation, which was allegedly made or incurred by the plaintiff's debtor with actual intent to defraud, hinder, or delay a creditor, was taken by the cross complainant (defendant) in good faith and for reasonably equivalent value and therefore may not be set aside [*Civ. Code § 3439.08(a)*; *see Judicial Council of California Civil Jury Instructions, CACI No. 4207* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction); *§ 270.47[2]*] or (2) that he or she is a good faith transferee or obligee and is therefore entitled to retain an interest in or lien on the property, or to enforce the obligation, or to a reduction in the amount of liability on any judgment in favor of the creditor [*Civ. Code § 3439.08(d)*; *see § 270.47[3]*]. Although the first of these contentions must also be raised as an affirmative defense, it is recommended that a cross complaint seeking affirmative relief also be filed because the consequences of a finding that the transfer or obligation was not made for reasonably equivalent value may be quite onerous if the rationale discussed in *§ 270.198[3]* is correct.

Civ. Code § 3439.08(d)(2), allowing enforcement of the obligation, was added by the 1986 amendments. It is not clear whether the debtor/obligor is a necessary parrty to any action seeking a declaration regarding the extent to which the obligation remains enforceable; therefore, this complaint includes the debtor/obligor as a cross defendant. It does not appear that the debtor/transferor is a necessary party to a cross complaint seeking other relief under *Civ. Code § 3439.08(d)(1)* or *(3)*.

In addition to the statutory authority granting the transferee or obligee the right to retain an interest or lien, to enforce the obligation, or to reduction of liability on any judgment against him or her to the extent of value given, case law has established the transferee's or obligee's right to interest on his or her initial investment and has clarified specific elements of value such as amounts expended by the transferee in the preservation and maintenance of the subject property, less the reasonable rental value of the property while the transferee remains in possesson [*see Patterson v. Missler (1965) 238 Cal. App. 2d 759, 771-772, 48 Cal. Rptr. 215]* or sums expended to pay encumbrances on the property at the time of the transfer. Similarly, if a good faith obligee or assignee of a contract has assumed obligations to suppliers or other parties under the contract, he or she is entitled to reimbursement or credit for sums so paid [*see Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 584-586, 589-591, 25 Cal. Rptr. 545, 375 P.2d 425]* .

[3] Affirmative Relief

A judgment in favor of a creditor in a fraudulent transfer action sets aside the transfer or obligation insofar as it affects the creditor, even though, as between the transferor or obligor and the transferee or obligee, the transfer or obligation remains in full effect [*McGee v. Allen (1936) 7 Cal. 2d 468, 476, 60 P.2d 1026* ; *Ahmanson Bank & Trust Co. v. Tepper (1969) 269 Cal. App. 2d 333, 344, 74 Cal. Rptr. 774]* . Because, as between the transferee and the creditor, the transfer or obligation is considered void, it could be reasoned that a transferee or obligee asserting the right to reimbursement or a lien or reduction of liability under a judgment is seeking affirmative relief against the creditor. Such affirmative relief must be sought by way of a cross complaint, rather than by way of an affirmative defense in the answer, because affirmative relief may not be claimed in the answer [*see Code Civ. Proc. § 431.30(c)*; *see also Code Civ. Proc. § 428.10(b)* (permissive cross complaint may appropriately assert claim, right, or interest in property which is subject of complaint)]. Still, if the transferee or obligee is seeking reduction of liability under a money judgment, it could be argued that the relief sought is in the nature of a set off, which can be asserted by way of affirmative defense [*see Code Civ. Proc. § 431.70* (cross demand for money is properly asserted in answer)]. It should also be noted that in cases decided prior to the addition of *Code Civ. Proc. § 431.30(c)*, the courts did not appear to require the transferee to assert his or her right to such reimbursement by way of a cross complaint [*see Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 583-586, 25 Cal. Rptr. 545, 375 P.2d 425* ; *Patterson v. Missler (1965) 238 Cal. App. 2d 759, 763, 770-774, 48 Cal. Rptr. 215]* .

[4] State Statutes

Transfer made or obligation incurred by transferor with actual intent to hinder, delay, or defraud one or more of his or her creditors is not voidable against person who took in good faith and for reasonably equivalent value or against any subsequent transferee or obligee. *Civ. Code § 3439.08(a)*

Good faith transferee or obligee is entitled, to extent of value given to debtor for obligation or transfer, to lien on or right to retain any interest in asset transferred. *Civ. Code § 3439.08(d)(1)*

Good faith obligee is entitled, to extent of value given to debtor for obligation, to enforcement of any obligation incurred. *Civ. Code § 3439.08(d)(2)*

Good faith transferee or obligee is entitled, to extent of value given to debtor for obligation or transfer, to reduction in amount of liability on judgment. *Civ. Code § 3439.08(d)(3)*

[5] Decisions

Fact that person is disposing of entire business is suspicious circumstance which imposes on vendee obligation to made reason- able inquiry to determine liabilities of vendor. *In re Baker (S.D. Cal. 1926) 13 F.2d 413, 414*

Transfer was properly set aside as to purchaser who did not pay fair value or inquire as to vendor's financial condition because vendee was put on notice and required to inquire by facts that transaction involved entire assets of business and between purchaser's visits to business premises stock had depleted so substantially as to indicate dispositions were not in ordinary course of business. *In re Baker (S.D. Cal. 1926) 13 F.2d 413, 414*

Rule that fraudulent transferee is not entitled to reimbursement for outlays made in connection with acquisition of property in fraud of creditors is inapplicable if title to property acquired only on payment of such outlays or if property subject to mortgage and outlays constituted payment of such mortgage. *Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 585-586, 25 Cal. Rptr. 545, 375 P.2d 425*

Good faith transferee is entitled to credit for sums expended in paying other debts of grantor. *Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 591, 25 Cal. Rptr. 545, 375 P.2d 425*

Reasonably equivalent value of exchange is to be determined from standpoint of creditor. *Hansen v. Cramer (1952) 39 Cal. 2d 321, 324, 245 P.2d 1059* ; *Patterson v. Missler (1965) 238 Cal. App. 2d 759, 766, 48 Cal. Rptr. 215*

Former *Civ. Code § 3439.09(b)*(*see now Civ. Code § 3439.08(d)(1)*), protecting innocent purchaser or encumbrancer who wthout actual fraudulent intent has given less than fair consideration, confers on purchaser lien on property to secure repayment of his or her investment. *Patterson v. Missler (1965) 238 Cal. App. 2d 759, 771, 48 Cal. Rptr. 215*

Any excess of income over expenses of maintaining property must be deducted from amount of good faith transferee's original investment; sale of property to satisfy creditor may not be held unless minimum bids would cover net amount of transferee's investment; net amount must be deducted from any money judgment entered against good faith tranferee. *Patterson v. Missler (1965) 238 Cal. App. 2d 759, 771-772, 48 Cal. Rptr. 215*

Lien or credit of good faith transferee includes interest on amount of consideration paid (with deductions, if any, as described in prior entry), but only expenses which maintain or preserve property; legal fees and management fees pertaining to rental property are not maintanence or preservation. *Patterson v. Missler (1965) 238 Cal. App. 2d 759, 771-772, 48 Cal. Rptr. 215*

Transferee who remains in possession of property pending appeal does so voluntarily and is not entitled to lien or credit for expenses of maintanence or preservation after entry of judgment; similarly, creditor is not entitled to account for value of transferee's use pending appeal. *Patterson v. Missler (1965) 238 Cal. App. 2d 759, 773, 48 Cal. Rptr. 215*

Good faith transferee is one who is not aware of fraudulent intent of transferor and who has no notice of facts or circumstances that would induce prudent person to inquire. *Boness v. Richardson Mineral Springs (1956) 141 Cal. App. 2d 251, 261, 296 P.2d 581*

[6] Cross References

For a discussion and forms for cross complaints, see Ch. 123, *Complaints and Cross Complaints* .

For a discussion and forms for use in actions for declaratory relief, see Ch. 182, *Declaratory Relief* .

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A. Uniform Fraudulent Transfer Act

23-270 California Forms of Pleading and Practice--Annotated § 270.199

§ 270.199 Affirmative Defense--To Action to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)]--Transfer as Preference of Defendant Transferee Over Plaintiff [Civ. Code § 3432]

[1] FORM Affirmative Defense--To Action to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)]--Transfer as Preference of Defendant Transferee Over Plaintiff [Civ. Code § 3432]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

1. The _____ [transfer made to *or* obligation incurred in favor of] this defendant by [defendant] _____ [*name of tranferor or obligor*], which _____ [transfer *or* obligation] was alleged to be in fraud of plaintiff's rights as creditor of [defendant] _____ [*name of transferor*], was in fact a mere preference of this defendant's claim against [defendant] _____ [*name of transferor*].

2. This defendant's claim arose on or about _____[*date*], on which date [defendant] _____ [*name of transferor or obligee*] became indebted to this defendant in the sum of $_____ for [*specify, e. g.* work, labor, and services rendered by this defendant to (defendant) _____ (*name of transferor or obligee*) at his/her special request].

3. The _____ [transfer *or* obligation] sought to be set aside in fact operated to _____ [discharge this defendant's claim *or* reduce this defendant's claim to the sum of $_____] [and was made for reasonably equivalent value in that it was _____ (a fair equivalent *or* not in an amount disproportionately small as compared) to the value of the _____ (property transferred *or* obligation undertaken) and was made in good faith].

[2] Use of Form

This form is an affirmative defense for use by a defendant transferee or obligee who was a creditor of the transferor in an action by another creditor to set aside an allegedly fraudulent transfer by the transferor. The defense raised is that the

transfer or obligation was merely operated as a preference of the transferee over the plaintiff creditor [*see Civ. Code § 3432*]. Even though a transfer giving a preference to one creditor was intended to make impossible the plaintiff creditor's claim and the preferred creditor knew that such a consequence would follow, the preference is not subject to attack except in supplementary proceedings in bankruptcy [*see Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 591, 25 Cal. Rptr. 545, 375 P.2d 425* ; *United States Fid. & Guar. Co. v. Postel (1944) 64 Cal. App. 2d 567, 571-572, 149 P.2d 183]* .

[3] Allegations

In order for a preference to be valid, it must have reduced or extinguished the obligation owing to the preferred creditor (Paragraph 3) [*see Economy Ref. & Serv. Co. v. Royal Nat'l Bank of N.Y. (1971) 20 Cal. App. 3d 434, 441-442, 97 Cal. Rptr. 706]* . In most instances the transferor's or obligor's receipt of value reasonably equivalent to the amount of the debt extinguished or reduced will be an issue. In those instances, the preferred creditor will have to use the optional allegation that the preferential transfer was made for reasonably equivalent value (Paragraph 3) [*see, e.g., Civ. Code §§ 3439.04(a)(2), 3439.05* (lack of receipt of reasonably equivalent value as element of fraudulent transfer); *Judicial Council of California Civil Jury Instructions, CACI Nos. 4202, 4203* (LexisNexis Matthew Bender) (related California Judicial Council jury instructions)].

[4] State Statutes

Debtor is permitted to pay one creditor in preference to another, or give to one creditor security for payment of his demand in preference to another. *Civ. Code § 3432*

[5] Decisions

Although creditor may intend by transfer of assets to remove those assets and make impossible collection of particular creditor's judgment, when transfer operates as mere preference, transfer is not subject to attack except in bankruptcy proceedings. *Aggregates Associated, Inc. v. Packwood (1962) 58 Cal. 2d 580, 591, 25 Cal. Rptr. 545, 375 P.2d 425* ; *United States Fid. & Guar. Co. v. Postel (1944) 64 Cal. App. 2d 567, 571-572, 149 P.2d 183*

When attorney's fees were reasonable, transfer of property to attorney in payment of fees, even though transfer rendered debtor insolvent, was preference and could not be set aside as fraudulent; fact that debtor was son-in-law of transferee did not raise presumption of fraud. *Hedden v. Waldeck (1937) 9 Cal. 2d 631, 638-640, 72 P.2d 114*

Assignment of rents and profits by insolvent corporation in payment of attorney's fees as preference and could not be set aside as fraudulent when fees were not excessive and assignment was made in good faith. *Hibernia Sav. & Loan Soc. v. Belcher (1935) 4 Cal. 2d 268, 273-274, 48 P.2d 681*

Preference rule inapplicable in cases in which debt of preferred creditor is not extinguished, or at least diminished. *Economy Ref. & Serv. Co. v. Royal Nat'l Bank of N.Y. (1971) 20 Cal. App. 3d 434, 442, 97 Cal. Rptr. 706*

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23-270 California Forms of Pleading and Practice--Annotated § 270.200

§ 270.200 Affirmative Defense--To Action to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)]--Plaintiff Creditor Not Harmed by Fraudulent Transfer

[1] FORM Affirmative Defense--To Action to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)]--Plaintiff Creditor Not Harmed by Fraudulent Transfer

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

1. Plaintiff was not harmed or injured in any manner by the allegedly fraudulent transfer since this transfer did not put beyond the plaintiff's reach any property which he/she would have been able to subject to the payment of his/her claim against [defendant] _____ [*name of transferor*].

2. The property transferred was in fact not available or subject to the plaintiff's claim against [defendant] _____ [*name of transferor*] because _____ [*allege facts showing that transfer did not injure plaintiff, e.g.,* the property conveyed was exempt from attachment and execution under *Code of Civil Procedure Sections 704.710-704.850* in that (defendant) _____ (*name of transferor*) actually resided in the dwelling on that property and same constituted his/her principal residence and his/her equity in the property did not exceed $_____, the amount of the exemption to which he/she (as _____ (*specify category of exemption, e.g.,* head of a household)) was entitled pursuant to *Code of Civil Procedure Section 704.730(a)* _____ ((1) *or* (2) *or* (3))].

[2] Use of Form

This affirmative defense is for use by a defendant transferee in a creditor's action to set aside a fraudulent transfer when the property transferred in fact did not place any assets beyond the creditor's reach which the creditor would have been able to subject to his or her claim. Types of situations in which this defense is appropriate include the following:

- The property transferred or the debtor's interest in that property is exempt from execution by the

creditor [*see Civ. Code § 3439.01(a)(2)* (assets do not include property to extent it is exempt under nonbankrutpcy law); *Wells Fargo Bank v. PAL Investments, Inc. (1979) 96 Cal. App. 3d 431, 434-438, 157 Cal. Rptr. 818* ; *Putnam Sand & Gravel Co. v. Albers (1971) 14 Cal. App. 3d 722, 725, 92 Cal. Rptr. 636* ; *see § 270.34[3], [4]*].

- The debtor in fact had no beneficial interest in the property transferred, such as when he or she held title to the property as trustee for another person [*see, e.g., Owings v. Laugharn (1942) 53 Cal. App. 2d 789, 791, 128 P.2d 114* and § 270.34[2]], or when the property was fully encumbered by valid liens [*see Civ. Code § 3439.01(a)(1)* discussed in *§ 270.34[5]*].

- The property transferred had previously been subjected to execution by the creditor on that claim, as when only the transfer of the debtor's equity of redemption is under attack [*see, e.g., Costa v. Neves (1938) 12 Cal. 2d 121, 125, 82 P.2d 600]* .

- The value of the property could not support any net recovery for the creditor in the event the conveyance was set aside [*see, e.g., Mehrtash v. Mehrtash (2001) 93 Cal. App. 4th 75, 80-81, 112 Cal. Rptr. 2d 802]* (plaintiff failed to show she was injured by transfer of heavily mortgaged property when she produced no evidence that value of property could support any net recovery for her in event conveyance were set aside); *accord, Fidelity Nat'l Title Ins. Co. v. Schroeder (2009) 179 Cal. App. 4th 834, 842-845, 101 Cal. Rptr. 3d 854* (trial court correctly followed *Mehrtash* decision in concluding that judgment creditor failed to prove cause of action to set aside transfer of debtor's interest in his residence because, assuming transfer were set aside and court-ordered sale of property ensued forthwith, no proceeds would have been available to satisfy any portion of creditor's claim; therefore no injury was shown)].

- The creditor is otherwise uninjured by the transfer, as when he or she is already adequately secured or when the transfer discharged a preexisting debt [*Hibernia Sav. & Loan Soc'y. v. Belcher (1935) 4 Cal. 2d 268, 273-274, 48 P.2d 681]* .

[3] State Statutes

Assets of debtor for purposes of Uniform Fraudulent Transer Act does not include property to extent encumbered by valid lien. *Civ. Code § 3439.01(a)(1)*

Assets of debtor for purpose of Uniform Fraudulent Transfer Act means property not exempt from liability for his or her debts. *Civ. Code § 3439.01(a)(2)*

Assets of debtor for purposes of Uniform Fraudulent Transer Act does not include interest held in tenancy by entireties to extent it is not subject to process by creditor holding claim against only one tenant. *Civ. Code § 3439.01(a)(3)*

Valid lien for purposes of Uniform Fraudulent Transer Act is one that is effective against holder of subsequently obtained judicial lien. *Civ. Code § 3439.01(j)*

Property exempt from execution is exempt from attachment. *Code Civ. Proc. § 487.020*

Property exempt from execution. *Code Civ. Proc. § 703.010 et seq.*

Provisions relating to homestead exemption. *Code Civ. Proc. § 704.710 et seq.*

General provisions relating to declared homesteads. *Code Civ. Proc. § 704.910 et seq.*

Conveyance of property subject to homestead. *Code Civ. Proc. § 704.940*

Homestead is exempt from execution or forced sale. *Code Civ. Proc. § 704.950*

[4] Decisions

[a] Exempt Property; Homesteads

Principles of fraudulent transfer are not applicable to homestead; fact that declaration of homestead was filed to hinder or delay creditor did not affect validity of homestead or constitute grounds for it to be set aside. *Lucci v. United Credit and Collection Co. (1934) 220 Cal. 492, 496, 31 P.2d 369* ; *Wells Fargo Bank v. PAL Investments, Inc. (1979) 96 Cal. App. 3d 431, 434-438, 157 Cal. Rptr. 818* ; *Putnam Sand & Gravel Co. v. Albers (1971) 14 Cal. App. 3d 722, 725, 92 Cal. Rptr. 636*

Transfer of homestead protected property cannot be subject of fraudulent conveyance action by creditors who do not have lien on that property. *Tassone v. Tovar (1994) 28 Cal. App. 4th 765, 768-769, 33 Cal. Rptr. 2d 786*

Defendant transferee was not entitled to summary judgment when no facts were presented from which court could determine whether there was excess value of property conveyed over homestead exemption. *McKnight v. Faber (1986) 185 Cal. App. 3d 639, 647, 230 Cal. Rptr. 57*

[b] No Injury Sustained by Creditor

To show injury from transfer, secured creditor is required to show that indebtedness owed to it is not fully secured. *Hibernia Sav. & Loan Soc'y. v. Belcher (1935) 4 Cal. 2d 268, 274, 48 P.2d 681*

Plaintiff failed to show she was injured by transfer of heavily mortgaged property when she produced no evidence that value of property could support any net recovery for her in event conveyance were set aside. *Mehrtash v. Mehrtash (2001) 93 Cal. App. 4th 75, 80-81, 112 Cal. Rptr. 2d 802*

[c] Property Previously Subjected to Execution

When creditor levied execution on real property encumbered by intentionally fraudulent mortgage, but did not seek to have mortgage set aside, transfer of debtor's equity of redemption and redemption by transferee could not be set aside as fraudulent transfer, since property had once been subjected to creditor's judgment. *Costa v. Neves (1938) 12 Cal. 2d 121, 125, 82 P.2d 600*

Transfer without consideration by judgment debtor of equity of redemption in property intentionally fraudulently conveyed and thereafter sold to creditor at execution sale is not fraudulent transfer; execution sale to creditor terminated creditor's lien (created by recording abstract of judgment); redemption by transferee frees property from claim of creditor's deficiency. *Fry v. Bihr (1970) 6 Cal. App. 3d 248, 251-252, 85 Cal. Rptr. 742* (price bid/paid at execution sale and for redemption amounted to value of debtor's interest); *Moore v. Hall (1967) 250 Cal. App. 2d 25, 29-30, 58 Cal. Rptr. 70* ; *Siegel v. Farrar (1932) 120 Cal. App. 193, 196-197, 7 P.2d 319* (price bid/paid at execution sale and for redemption was much less than value of debtor's interest)

[5] Cross References

For a discussion of property which is exempt from attachment or execution, see Ch. 254, *Executions and Enforcement of Judgments* .

For a discussion and forms for use in actions against property on which homesteads have been declared, see Ch. 294 *Homesteads* .

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23-270 California Forms of Pleading and Practice--Annotated § 270.201

§ 270.201 Affirmative Defense--To Action to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)]--Transfer Resulted From Termination of Lease on Debtor's Default [Civ. Code § 3439.08(e)(1)]

[1] FORM Affirmative Defense--To Action to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)]--Transfer Resulted From Termination of Lease on Debtor's Default [Civ. Code § 3439.08(e)(1)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

1. The transfer sought to be set aside is not voidable under Civil Code Section _____ [3439.04(a)(2) *or* 3439.05] because it resulted from the termination of that certain lease by and between this defendant as lessor and _____ [*name of transferor*] as lessee, dated _____ [*date*], a copy of which is attached as Exhibit _____ and incorporated by reference, pursuant to _____ [*specify, e.g,* Paragraph 10] of that lease and applicable law, specifically, _____ [*specify, e.g, Code of Civil Procedure Sections 1161-1179a*] at a time when _____ [*name of transferor*] was in default under the provisions of that lease.

2. On or about _____ [*date*], when _____ [*name of transferor*] was in default of his/her obligations under that lease for _____ [*describe default, e.g,* failure to make rental payments for the months of July through September, _____ (*year*), inclusive,] this defendant elected to terminate the lease and served _____ [*name of transferor*] a notice of that election [and notice to _____ (*specify payment of rental or other condition required to cure default, e.g.,* pay arrearages or quit)], a copy of which is attached as Exhibit _____ and incorporated by reference.

3. Thereafter, _____ [*describe final outcome by abandonment or surrender by lessee or commencement and/or conclusion of unlawful detainer action, e.g.,* this defendant commenced action number _____ in the _____ Court of _____ County, California, entitled _____ (*title of case*), for possession of the premises and rents owed. That action was settled by a

compromise agreement dated _____ (*date*) (, a copy of which is attached as Exhibit _____ and incorporated by reference) by which _____ (*name of transferor*) surrendered any claim to his/her interest in the premises (inlcuding fixtures and improvements) and lease and this defendant forgave all rents then owing and unpaid].

[2] Use of Form

This affirmative defense is for use by a defendant lessor who has terminated a lease in a creditor's action to set aside that termination as a fraudulent transfer because it was made without receiving a reasonably equivalent value in exchange [*see Civ. Code §§ 3439.04(a)(2), 3439.05*,3439.08(e)(1); *Judicial Council of California Civil Jury Instructions, CACI Nos. 4202, 4203, 4207* (LexisNexis Matthew Bender) (related California Judicial Council jury instructions); *see also Civ. Code § 3439.01(i)* (transfer includes involuntary transfers and disposition of or parting with any interest); *Judicial Council of California Civil Jury Instructions, CACI No. 4204* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)]. This defense is not applicable to any transfer voidable on the grounds of actual intent to defraud, hinder, or delay. In order to establish this defense, the debtor's interest in the lease must have been terminated for default of the debtor/transferor pursuant to a provision in the lease and applicable law [*Civ. Code § 3439.08(e)(1)*; *see Judicial Council of California Civil Jury Instructions, CACI No. 4207* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)].

Civ. Code § 3439.08(e)(1) was added by the UFTA and overrules *In re Ferris (W.D. Okla. 1976) 415 F. Supp. 33, 39-41* and cases decided thereunder, which invalidated the termination of a lease in the lessee's subsequent bankruptcy because the value of the remaining term and the improvements which reverted to the lessor was not reasonably equivalent to the arrearages [*see* Kennedy, *The Uniform Fraudulent Transfer Act*, 18 U.C.C. L.J. 195, 207-208].

[3] State Statutes

Transfer not voidable under *Civ. Code § 3439.04(a)(2)* or *Civ. Code § 3439.05* if it results from termination of lease on debtor's default pursuant to lease and applicable law. *Civ. Code § 3439.08(e)(1)*

[4] Cross References

For discussion and forms relating to termination of leases, see Ch. 332, *Landlord and Tenant: The Tenancy* , and Ch. 333, *Landlord and Tenant: Eviction Actions* .

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23-270 California Forms of Pleading and Practice--Annotated § 270.202

§ 270.202 Affirmative Defense--To Action to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)]--Transfer Resulted from Noncollusive Enforcement of Lien in Accordance With Applicable Law [Civ. Code § 3439.08(e)(2)]

[1] FORM Affirmative Defense--To Action to Set Aside Fraudulent Transfer [Civ. Code § 3439.07(a)(1)]--Transfer Resulted from Noncollusive Enforcement of Lien in Accordance With Applicable Law [Civ. Code § 3439.08(e)(2)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT alleges:

1. The transfer sought to be set aside is not voidable under Civil Code Section _____ [*3439.04(a)(2) or 3439.05(b)*] because it resulted from the noncollusive _____ [*specify manner of enforcement, e.g.,* foreclosure at private sale] of that certain _____ [*specify instrument, act, or filing creating lien, e.g.,* deed of trust, dated _____ (*date*), by and between _____ (*specify, e.g.,* this defendant) as beneficiary, _____ (*name*) as trustee, and _____ (*name of transferor*) as trustor, which was recorded on _____ (*date*), at _____ (Book *or* Reel) _____ (Page *or* Image) of the Official Records of the County recorder of _____ County, California, a copy of which is attached as Exhibit _____ and incorporated by reference], pursuant to _____ [*specify, e.g.,* Paragraph 10] of that _____[*specify instrument, e.g.,* deed of trust] and applicable law, specifically, _____ [*specify, e.g., Civil Code Sections 2920-2944.5*] at a time when there remained owing to _____ [*specify, e.g.,* this defendant] from _____ [*name of transferor*] the sum of $ _____ under the _____ [*specify obligation for which lien was security, e.g.,* note] which was secured by the _____ [*specify instrument evidencing lien, e.g.,* deed of trust]. That _____ [*specify manner of enforcement, e.g.,* private foreclosure sale] discharged _____ [all *or* $ _____ of] the obligation.

2. On or about _____ [*date*], when _____ [*name of transferor*] was in default of

his/her obligations under that _____ [*specify obligation for which lien was security, e.g.,* note] for _____ [*describe default, e.g.,* failure to make payments of principal and interest for the months of July through September, _____ (*year*), inclusive,] _____ [*name of lienor or* this defendant] _____ [*descibe all actions taken prior to sale or other means of enforcement of lien, e.g.,* gave and recorded notice of default as required by *Civil Code Sections 2924* and *2924b*. On _____ [*date*], when _____ (*name of tranferor*) had not cured the default, a notice of sale was given, posted, and published as required by *Civil Code Section 2924f.*]

3. On _____ [*date*], _____ [*describe sale or other method of final enforcement of lien and evdience of transfer of title, e,g.,* _____ (*name*), as trustee, sold _____'s (*name of transferor*) interest in the property to _____ (*name or* this defendant) as the highest bidder for $_____ in accordance with the provisions of *Civil Code Sections 2924g* and *2924h*. The trustee's deed was given on _____ [*date*]. A copy of the trustee's deed is attached as Exhibit _____ and incorporated by reference].

[2] Use of Form

This affirmative defense is for use by a defendant who enforced a lien, or purchased property sold pursuant to the en forcement of a lien, in an action by a creditor of the debtor to set aside the transfer as fraudulent because it was made without receiving a reasonably equivalent value in exchange [*see Civ. Code §§ 3439.04(a)(2), 3439.05, 3439.08(e)(2)*; *Judicial Council of California Civil Jury Instructions, CACI Nos. 4202, 4203, 4207* (LexisNexis Matthew Bender) (related California Judicial Council jury instructions); *see also Civ. Code § 3439.01(i)* (transfer includes involuntary transfers and disposition of or parting with any interest); *Judicial Council of California Civil Jury Instructions, CACI No. 4204* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)]. This defense is not applicable to any transfer voidable on the ground of actual intent to defraud, hinder, or delay. Nor is it available if the collateral was retained by the secured party pursuant to *Com. Code §§ 9620* and *9621* or if the debtor voluntarily tranferred the collateral to the lienor, as by a deed in lieu of foreclosure. In order to establish this defense, the debtor's interest in the collateral must have been terminated in a noncollusive manner pursuant to applicable law, including Division 9 of the Commercial Code [*see Com. Code § 9101 et seq.*] other than as mentioned above, and the transfer must have resulted in satisfaction of all or part of the secured obligation [*Civ. Code § 3439.08(e)(2)*; *see Judicial Council of California Civil Jury Instructions, CACI No. 4207* (LexisNexis Matthew Bender) (related California Judicial Council jury instruction)].

Civ. Code § 3439.08(e)(2) was added by the UFTA and overrules *Durrett v. Washington Nat'l Ins. Co. (5th Cir. 1980) 621 F.2d 201, 203-204* and cases decided thereunder, to adopt the position of California and the Ninth Circuit that reasonably equivalent value is presumed to be received by the debtor at a noncollusive and regularly conducted foreclosure sale open to all bidders [*see In re Madrid (B.A.P. 9th Cir. 1982) 21 B.R. 424 , 6 C.B.C. 2d 1133, 1135-1136 , aff'd on other grounds In re Madrid (9th Cir. 1984) 725 F.2d 1197, 1199* ; *Engelbertson v. Loan & Bldg. Asso. (1936) 6 Cal. 2d 477, 479, 58 P.2d 647]* .

[3] State Statutes

Recitals in trustee's deed of compliance with all requirements of law regarding serving, mailing, and posting of notices constitute prima facie evidence of compliance, which is conclusive in favor of bona fide purchaser or encumbrancer for value and without notice. *Civ. Code § 2924(c)*

Transfer is not voidable under *Civ. Code § 3439.04(a)(2)* or *Civ. Code § 3439.05* if it results from enforcement of lien in noncollusive manner in compliance with applicable law (other than retention of collateral under *Com. Code §§ 9620* and *9621* or vouluntray transfer of collateral by debtor to lienor) in satisfaction of all or part of secured obligation. *Civ.*

Code § 3439.08(e)(2)

[4] Decisions

Inadequacy of price is insufficient ground to set aside foreclosure sale unless inadequacy is caused by some irregularity, fraud, unfairness, or oppression. *Engelbertson v. Loan & Bldg. Asso. (1936) 6 Cal. 2d 477, 479, 58 P.2d 647* ; *Oller v. Sonoma County Land Title Co. (1955) 137 Cal. App. 2d 633, 635-636, 290 P.2d 880*

Recitals in trustee's deed of default, compliance with *Civ. Code §§ 2924, 2924b*, posting and publishing of notice of sale after not less than three months from date of recording of notice of default, and sale at public auction to highest bidder constituted conclusive proof of essential facts. *Abrahamer v. Parks (1956) 141 Cal. App. 2d 82, 84, 296 P.2d 341*

Beneficiary who purchases at foreclosure sale is not bona fide purchaser for purposes of presumption of *Civ. Code § 2924(c)*; as to such a purchaser, recitals in trustee's deed are only prima facie evidence of compliance and controvertable by trustor's evidence. *Beck v. Reinholtz (1956) 138 Cal. App. 2d 719, 723, 292 P.2d 906*

[5] Cross References

For discussion and forms relating to foreclosure of mechanics liens, see Ch. 361, *Mechanics Liens* .

For discussion and forms relating to foreclosure of other liens, see Ch. 342, *Liens and Wage Preferences* .

For discussion and forms relating to enforcement of liens under Article 9 or the Commercial Code, see Ch. 503, *Sales: Secured Transactions* .

For discussion and forms relating to foreclosure of mortgages and deeds of trusts, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

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[Reserved]

§§ 270.203[Reserved]

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B. Transfers Without Delivery And Change Of Possession

23-270 California Forms of Pleading and Practice--Annotated § 270.220

§ 270.220 Complaint to Set Aside Transfer of Personal Property--Transfer Made Without Immediate Delivery Followed by Actual and Continued Change of Possession [Civ. Code § 3440(a)]--By Creditor of Transferor

[1] FORM Complaint to Set Aside Transfer of Personal Property--Transfer Made Without Immediate Delivery Followed by Actual and Continued Change of Possession [Civ. Code § 3440(a)]--By Creditor of Transferor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO SET ASIDE VOID TRANSFER
_____ [*name*(*s*)],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 270.190[1], First Cause of Action, Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 270.190[1], First Cause of Action, Paragraph 2.*]

3. Plaintiff _____ [became *or* was] the holder of a certain claim against defendant _____ [*name of transferor*] while that defendant remained in possession of the personal property hereinafter described. This claim _____ [consists *or* consisted] of _____ [*allege transaction or events which gave rise to claim. See § 270.190[1], First Cause of Action, Paragraph 4.*]

4. [*Describe status of claim, i.e., whether it has not matured, has matured, or has been reduced to judgment. See § 270.190[1], First Cause of Action, Paragraph 4.*]

5. On or about _____ [*date*], defendant _____ [*name of transferor*] was the owner and in possession of _____ [*state generally character of personal property transferred*].

6. On or about _____ [*date*], defendant _____ [*name of transferor*] and defendant _____ [*name of transferee*] entered into an agreement whereby defendant _____ [*name of transferor*] _____ [promised *or* intended] to _____ [transfer *or state other form of transfer*] the above-described personal property to defendant _____ [*name of transferee*], which _____ [transfer *or other*] was to take place on _____ (*date*). Pursuant to this agreement, a bill of sale was signed and executed [*or allege other form of delivery of title to property transferred*].

7. On or about _____ [*date of intended transfer or other as described above*], defendant _____ [*name of transferor*] did make the aforementioned _____ [transfer *or other*], but that _____ [transfer *or other*] was not accompanied by an immediate delivery followed by an actual and continued change of possession of the above-described property. In fact, defendant _____ [*name of transferor*] remained in possession of this property.

WHEREFORE, plaintiff prays judgment as follows:

1. That the _____ [transfer *or other*] from defendant _____ [*name*] to defendant _____ [*name*] be set aside, annulled, and declared void as to plaintiff herein to the extent necessary to satisfy plaintiff's _____ [claim *or* judgment] in the sum of $_____ plus interest thereon at the rate of _____ percent per annum from _____ [*year*];

[2. For an order restraining and enjoining defendant(s, and each of them,) and his/her/their representatives, attorneys, servants, and agents from selling, transferring, conveying, assigning, or otherwise disposing of any of the property transferred until such time as plaintiff has had satisfied his/her claim against defendant _____ (*name of transferor*);]

[3. That the judgment herein be declared a lien on the property conveyed.]

4. For costs of suit incurred herein; and

5. For such other form of relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 270.190[1].*]

[2] Use of Form

This complaint is for use by a creditor in an action to have declared void a transfer of personal property made by a defendant transferor having at the time possession of the property and not accompanied by an immediate delivery followed by an actual and continued change of possession of the property [*see Civ. Code § 3440(a)*; *Gray v. Little*

(1929) 97 Cal. App. 442, 444-446, 275 P. 870] . Both transferor and transferee are named as defendants. The transferee is a necessary party [*TWM Homes, Inc. v. Atherwood Realty & Inv. Co. (1963) 214 Cal. App. 2d 826, 848, 29 Cal. Rptr. 887* ; *see § 270.190[7]*].

The complaint would also appear to state a cause of action for declaratory relief (declaration of rights and duties as between parties) under *Code Civ. Proc. § 1060*. A plaintiff who wishes to take advantage of the calendar priority accorded actions for declaratory relief may modify the allegations of Paragraphs 6 and 7 of § 270.221[1] by replacing references to plaintiff as a purchaser with references to plaintiff as a creditor and incorporate the allegations as modified in the form [*Code Civ. Proc. § 1062.3*]. With appropriate modifications, the form may also be used as a separate count to be included in a creditor's action against a defendant transferee under the Uniform Fraudulent Conveyance Act [*see §§ 270.190 -270.194*].

Civ. Code § 86(b)(1) provides that cases in equity to try title to personal property are limited civil cases when the amount involved does not exceed $25,000.

[3] Allegations

This complaint alleges that plaintiff was a creditor of the defendant transferor while the defendant remained in possession of the property (Paragraph 3) [*see Civ. Code § 3440(a)*; *Brown v. O'Neal (1892) 95 Cal. 262, 267, 30 P. 538]* . By analogy to actions under the Uniform Fraudulent Conveyance Act, this allegation may show that plaintiff is the holder of a tort claim, and Paragraph 4 is included to show the status of plaintiff's claim [*see § 270.190*] since *Civ. Code § 3440* makes no distinction among creditors holding secured or unsecured claims, tort or contract claims, or among creditors holding claims which have not matured or have matured or claims reduced to judgment. In addition, this complaint alleges that defendant transferor was in possession of the property at the time of the transfer of the property (Paragraphs 5, 7) [*see Civ. Code § 3440(a)*; *Cosby v. Cline (1921) 186 Cal. 698, 701, 200 P. 801]* , that defendants transferor and transferee entered into an agreement for the transfer of the property (Paragraph 6), that the transfer was not accompanied by an immediate delivery followed by an actual and continued change of possession of property transferred (Paragraph 7) [*see Civ. Code § 3440(a)*; *Bunting v. Saltz (1890) 84 Cal. 168, 172, 24 P. 167* ; *Southern Cal. Collection Co. v. Napkie (1951) 106 Cal. App. 2d 565, 571, 235 P.2d 434]* , and that defendant transferor thereafter remained in possession of the property (Paragraph 7) [*see Civ. Code § 3440(a)*].

[4] Remedies

When a transfer is void as to a creditor of the transferor under *Civ. Code § 3440* [*see Civ. Code § 3440*], that creditor is entitled to have the transfer set aside [*see Gray v. Little (1929) 97 Cal. App. 442, 444-446, 275 P. 870]* . In addition, by analogy to the Uniform Fraudulent Conveyance Act, this complaint prays for injunctive relief restraining the defendants from disposing of the property, and to have a lien declared on the property [*see § 270.190*]. For other forms of supplemental remedies available in fraudulent conveyance actions, and for procedural requirements for such actions, see *§ 270.190[8]*.

A creditor as to whom a transfer is void under *Civ. Code § 3440* may also disregard the transfer and levy on the property in the hands of either the transferor or transferee [*Dot Records, Inc. v. Freeman (1966) 247 Cal. App. 2d 204, 207-208, 55 Cal. Rptr. 455* (writ of attachment); *Southern Cal. Collection Co. v. Napkie (1951) 106 Cal. App. 2d 565, 568, 235 P.2d 434* (writ of execution)]. For discussion and forms relating to attachment proceedings, see Ch. 62, *Attachment* . For discussion and forms relating to levy by writ of execution, see Ch. 254, *Executions and Enforcement of Judgments* . For discussion and forms relating to required responses to the transferee's third party claim after service of the writ of execution, see Ch. 254, *Executions and Enforcement of Judgments* .

[5] State Statutes

Unless otherwise provided in *Civ. Code § 3440 et seq.*, transfers of personal property by persons having at time possession of property are void as to creditors of transferor while transferor in possession and purchasers for value in good faith subsequent to transfer when transfer not accompanied by immediate delivery followed by actual and continued change of possession. *Civ. Code § 3440*

Transfers to which *Civ. Code § 3440 et seq.* do not apply. *Civ. Code §§ 3440.1-3440.5, 3440.9*

One-year statute of limitations for action brought or levy made under *Civ. Code § 3440 et seq.. Civ. Code § 3440.6*

[6] Decisions

Only creditor of transferor while transferor remains in possession of property is permitted to attack transfer otherwise conclusively fraudulent under *Civ. Code § 3440*. *Brown v. O'Neal (1892) 95 Cal. 262, 267, 30 P. 538*

Person is required to have had possession of personal property at time of transfer of such property in order that transaction come within terms of *Civ. Code § 3440*. *Cosby v. Cline (1921) 186 Cal. 698, 701, 200 P. 801*

Writings pertaining to transfer of personal property cannot create actual and continued change of possession as to creditors of transferor. *George v. Pierce (1898) 123 Cal. 172, 175, 55 P. 775, 56 P. 53*

Civ. Code § 3440makes no distinction between totally unsecured creditors and those creditors who have realized upon their security and are seeking to recover deficiency. *In re Trinity Tractor Co. (1970) 3 Cal. App. 3d 428, 439-440, 83 Cal. Rptr. 783*

[7] Text References

Witkin, Summary of California Law, Vol. 3, *Sales*, §§ 210, 211 (9th ed. 1987)

[8] Cross References

See also *§ 270.190*.

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23-270 California Forms of Pleading and Practice--Annotated § 270.221

§ 270.221 Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--To Determine Validity of Transfer of Personal Property When There Was No Immediate Delivery Followed by Actual and Continued Change of Possession--By Purchaser for Value in Good Faith Subsequent to Transfer [Civ. Code § 3440]

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--To Determine Validity of Transfer of Personal Property Where No Immediate Delivery Followed by Actual and Continued Change of Possession--By Purchaser for Value in Good Faith Subsequent to Transfer [Civ. Code § 3440]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*], [and DOES I	)	COMPLAINT FOR DECLARATORY RELIEF
through _____,] Defendant(s).	)	
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 270.190[1], First Cause of Action, Paragraph 1.*]

2. [*Possession or control of property by defendant transferor. See § 270.220[1], Paragraph 5.*]

3. On the aforementioned date, defendant _____[*name of transferor*] did _____ [transfer *or describe other form of transfer*] the above-described personal property to defendant _____ [*name of transferee*], which _____ [transfer *or other as described above*] was not accompanied by an immediate delivery followed by an actual and continued change of possession of the above-described property. Following this _____ [transfer *or describe as above*] defendant _____ [*name of*

transferor] in fact continued to remain in possession of this property.

4. On or about _____ [*state date subsequent to transfer described above*], plaintiff, without notice of any prior _____ [transfer *or other as described above*] to defendant _____ [*name of transferee*] or any interest that defendant _____ [*name of transferee*] claimed in the above-described property, entered into a[n] [written] agreement with defendant _____ [*name of transferor*] who was still in possession of the property, wherein defendant _____ [*name of transferor*] agreed to _____ [sell and deliver *or* grant an interest in the property] and plaintiff agreed to _____ [accept and purchase *or* acquire such interest in] the property for the sum of $_____. [A copy of this agreement is attached as Exhibit _____, and incorporated by reference.]

5. [*EITHER, if transferor has transferred property to plaintiff*]

On or about _____ [*date*], _____ [defendant _____ (*name of transferor*) did sell and deliver this property to plaintiff *or* plaintiff did acquire this interest in the property from defendant _____ (*name of transferor*)].

[*OR, if transferor has transferred property to transferee*]

5. Plaintiff is informed and believes and thereon alleges that subsequent to the aforementioned agreement with plaintiff, defendant _____ [*name of transferor*] did actually deliver the above-described property to defendant _____ [*name of transferee*] who still remains in possession of the property, and refuses to give up the property to plaintiff on plaintiff's demand, although plaintiff was and is at all times ready, able, and willing to accept and have delivered to him/her the property, pursuant to his/her agreement with defendant _____ [*name of transferor*].

6. An actual controversy has arisen and now exists, therefore, between plaintiff and defendant _____ [*name of transferee*] concerning their respective rights and duties in that plaintiff contends that the _____[transfer *or describe as above*] of the above-described property to defendant _____ [*name of transferee*] was void under *Section 3440 of the Civil Code* as against plaintiff, who is a _____ purchaser for value in good faith subsequent to the transfer, since this _____ [transfer *or describe as above*] was not accompanied by an immediate delivery followed by an actual and continued change of possession of the property _____ [transferred *or describe as above*]; whereas defendant _____ [*name of transferee*] dis putes this contention and contends that the _____ [transfer *or describe as above*] to him/her of the property by defendant _____[*name of transferor*] was a valid _____ [transfer *or describe as above*] and that he/she is entitled to [remain in] possession of the property [free from any interest which plaintiff claims in this property].

7. Plaintiff desires a judicial determination of his/her rights and duties and a declaration as to whether the _____ [transfer *or describe as above*] of the above-described property on _____ [*date*], by defendant _____ [*name of transferor*] to defendant _____ [*name of transferee*] was a valid _____ [transfer *or describe as above*] of this property and whether the subsequent _____ [transfer *or describe as above*] of [an interest in] the same property to plaintiff _____ [rendered void defendant _____'s (*name of transferee*) interest or title in the property *or* subjected any interest which defendant _____ (*name of transferee*) may have in the property to plaintiff's above-described interest].

8. Such a declaration is necessary and appropriate at this time in order that plaintiff may ascertain his/her rights and

duties.

WHEREFORE, plaintiff prays judgment against defendant(s) [, and each of them,] as follows:

1. For a declaration that the _____ [transfer *or describe as above*] on _____ [*date*], of the above-described property by defendant _____ [*name of transferor*] to defendant _____ [*name of transferee*] was void as to plaintiff;

2. That the subsequent purchase by plaintiff of this property be declared a valid transfer as against any interests defendant(s) _____ [*name of transferor*] and _____ [*name of transferee*] may claim in the property [, and that any interest which defendant _____(*name of transferee*) may have in the property be subjected to plaintiff's claim];

[3. *If defendant transferee remains in possession of property, add:* For possession of the property or its value in the sum of $_____ in case delivery cannot be had;]

[4. For damages incurred to date in the sum of $_____and for each day hereafter until judgment is rendered for plaintiff, at the rate of $_____ per day;]

5. For costs of suit herein incurred; and

6. For such other relief and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 270.190[1].*]

[2] Use of Form

This complaint for declaratory relief is for use by a good faith purchaser for value who purchased personal property from a transferor who had previously transferred the property to a third party, but who retained possession of the property after the earlier transfer. This complaint seeks a determination that the earlier transfer is void. Under *Civ. Code § 3440(a)*, except as otherwise provided, a transfer of personal property made by a person in possession of the property at the time of the transfer, and not accompanied by an immediate delivery followed by an actual and continued change of possession of the property, is void as against:

- The transferor's creditors (secured or unsecured) at the time of the transfer;
- Those who become creditors while the transferor remains in possession;
- The successors in interest of those creditors; and
- Buyers from the transferor for value in good faith subsequent to the transfer.

[3] Alternative Remedies

A purchaser for value in good faith subsequent to a transfer which was void as to him or her under *Civ. Code § 3440(a)* may also, as alternative relief, bring an action to recover possession of the property or its value and for damages for wrongful detention where the property remains in the possession of the transferor or transferee [*see Code Civ. Proc. § 667*]. For a complaint for use in such an action, see Ch. 119, *Claim and Delivery* . The purchaser may also bring an action for cancellation of a written instrument when the void transfer was based on a written instrument. For a complaint for cancellation of a written instrument, see Ch. 107, *Cancellation of Instruments* . In addition, the purchaser having possession of the property may bring an action to have the void transfer set aside [*see § 270.220*].

[4] Cross References

See also *§§ 270.190*, *270.220*.

For a discussion and forms for use in actions to recover possession of personal property or its value, see Ch. 119, *Claim and Delivery* .

For a discussion and forms for use in actions to cancel written instruments, see Ch. 107, *Cancellation of Instruments* .

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23-270 California Forms of Pleading and Practice--Annotated § 270.222

§ 270.222 Affirmative Defense--To Action to Set Aside or Declare Void Transfer of Personal Property--Transfer of Property Excluded by Statute [Civ. Code § 3440.1(a)-(g), (i)-(m)]

[1] FORM Affirmative Defense--To Action to Set Aside or Declare Void Transfer of Personal Property--Transfer of Property Excluded by Statute [Civ. Code § 3440.1(a)-(g), (i)-(l)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the transfer of property on or about _____ [*date*], from defendant _____ [*name of transferor*] to defendant herein is not void as to plaintiff in the above-entitled action for any failure to accompany the transfer with an immediate delivery of the property to defendant herein followed by an actual and continued change of possession of the property in that the transfer was _____ [*specify exempted transfer*], the transfer of which is not subject to the general provisions of *Civil Code Section 3440 et seq.*

[2] Use of Form

This affirmative defense is for use in an answer to a complaint brought by a creditor or subsequent purchaser of personal property, the transfer of which is alleged to be void as to the creditor or purchaser when the property was of a character specifically excluded from *Civ. Code § 3440 et seq.* under *Civ. Code § 3440.1(a)-(g)* and *(i)-(m)*. For a discussion of property excluded by statute from the provisions of *Civ. Code § 3440 et seq.*, see *§ 270.78[1]*.

[3] Cross References

See also *§§ 270.220, 270.221*.

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23-270 California Forms of Pleading and Practice--Annotated § 270.223

§ 270.223 Affirmative Defense--To Action to Set Aside or Declare Void Transfer of Personal Property--Transfer Occurred or Claim of Plaintiff Arose After Filing of Financing Statement and Publication of Notice [Civ. Code §§ 3440.1(h), 3440.2]

[1] FORM Affirmative Defense--To Action to Set Aside or Declare Void Transfer of Personal Property--Transfer Occurred or Claim of Plaintiff Arose After Filing of Financing Statement and Publication of Notice [Civ. Code §§ 3440.1(h), 3440.2]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. In compliance with the provisions of *Section 3440.1(h)(1) of the Civil Code*, on or about _____[*date*], and before the date of the transfer of the personal property as described in plaintiff's complaint, _____ [*name of transferor or transferee*] filed a financing statement in the office of the Secretary of State. In compliance with the provisions of *Section 3440.1(h)(2) of the Civil Code*, on or about _____ [*date*], and not less than 10 days before the transfer of the personal property described in plaintiff's complaint, _____[*name of transferor or transferee*] caused notice of the intended transfer to be published in _____ [*name of newspaper*], a newspaper of general circulation published _____ [in the judicial district *or, if there is none in the judicial district,* in the county embracing the judicial district] in which the personal property was located. Copies of the financing statement and proof of publication of the notice of intended transfer are attached hetreto as Exhibits "_____" and "_____," respectively, and made a part hereof.

[2. The transfer of property described in plaintiff's complaint is not void as to plaintiff herein in that plaintiff is not a "buyer in the ordinary course of business" as that term is defined by Subdivision (9) of *Section 1201 of the Commercial Code*, and plaintiff's claim or right against (defendant) _____ (transferor *or name of transferor*) did not arise until after the dates of filing of the financing statement and publication of the notice of intended transfer as set forth above in Paragraph 1.]

[2] Use of Form

This affirmative defense is for use in an answer to a complaint brought by a creditor of a transferor or by a purchaser of personal property from a transferor seeking to have the transfer or purchase set aside or declared void, when the transfer or purchase is insulated from attack under *Civ. Code § 3440 et seq.* either (1) because a financing statement was filed and notice of intended transfer was published prior to the transfer in compliance with *Civ. Code § 3440.1(h)* (Paragraph 1); or (2) because the plaintiff's interest in the property did not arise until after the filing of the financing statement and publication of notice of intended transfer (Paragraphs 1 and 2) [*Civ. Code § 3440.2*]. For a discussion of the notice requirements, fulfillment of which insulate a transfer from attack, see discussion in *§ 270.78[5][a]*. For a discussion of provisions insulating a transfer from attack if the plaintif's claim arises after filing of the financing statement and publication of notice, see discussion in *§ 270.78[2]*.

[3] Cross References

See also *§§ 270.220 -270.222*.

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[Reserved]

§§ 270.224[Reserved]

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23-270 California Forms of Pleading and Practice--Annotated § 270.240

§ 270.240 Notice of Intended Bulk Sale [Com. Code § 6105]--For General Use

[1] FORM Notice of Intended Bulk Sale [Com. Code § 6105]--For General Use

NOTICE IS HEREBY GIVEN that _____ [*name of seller*], whose business address is _____ [*street address*], _____ [*city*], _____ County, California, intends to sell to _____ [*name of buyer*], [a California corporation,] whose business address is _____ [*street address*], _____ [*city*], _____ County, California, the following property now located at _____ [*street address*], _____ [*city*], _____County, California: _____ [*generally describe property, e.g.*, all the trade, fixtures, equipment, inventory, and supplies of that certain business known as _____ (*name of business*) located at _____(*street address*), _____ (*city*), _____County, California].

During the three immediately preceding years, _____[*name of seller*] has conducted business under the following names at the following addresses:

Dates	Business Names	Business Addresses
_____	_____	_____
_____		
_____		
_____	_____	_____
_____		
_____		

It is anticipated that the aforementioned sale will occur on _____ [*date at least 12 business days after recording, publishing, and mailing to county tax collector of this notice*], at the office of _____ [

describe place sale will be consummated].

The aforementioned sale _____ [is *or* is not] subject to *Section 6106.2 of the Commercial Code*. [*If consideration is $2 million or less and is cash, or seller's obligation to pay cash in future, or combination thereof, add:* Claims of creditors may be filed with _____ (*name*) at _____ (*address*) on or before _____ (*last business day before date given in preceding paragraph*). Claims will be deemed timely filed only if actually received by the person designated in this notice before the close of business on _____ (*date specified as last date for filing claims*).]
Dated: _____.

_____ [*signature of buyer*]

[2] Use of Form

This notice is for use by a buyer of a bulk sale that is subject to the Bulk Sales Law (*Com. Code § 6101 et seq.*) [*see Com. Code § 6103(a), (b)* (discussed in *§ 270.103*)] to comply with *Com. Code §§ 6104(b), (c), 6105*, and, if applicable, *Com. Code § 6106.2(f)*. Failure to publish, record, and deliver the notice as required does not affect the validity of the sale to or the title of the purchasers [*Com. Code § 6107(h)(1), (2)*], but renders the buyer liable to any creditors of the seller for damages in the amount of their claims, reduced by amounts that the claimants would not have realized if the buyer had complied, and reduced pursuant to the limitations on a buyer's cumulative liability [*see Com. Code § 6107* (discussed in *§ 270.102*)].

In order to comply with its obligations with respect to this notice, the buyer must obtain from the seller a list of all business names and addresses used by the seller within three years before the date the list is sent or delivered to the buyer [*Com. Code § 6104(a)*].

[3] Recording, Publication, and Delivery of Notice

This notice must be recorded by the buyer of a bulk sale that is subject to the Bulk Sales Law [*see Com. Code § 6103(a), (b)* (discussed in *§ 270.103[1]*)] in the office of the county recorder in the county or counties in California in which the tangible assets are located, and, if different, in the county in which the seller is located [*see Com. Code § 6103(a)(2), (b)* (location of seller, discussed in *§ 270.103[1]*)] at least 12 business days before the date of the bulk sale [*Com. Code § 6105(b)(1)*].

The notice in this form must also be published at least once at least 12 business days before the date of the bulk sale. The notice must be published in a newspaper of general circulation published in the judicial district in California in which the tangible assets are located and in the judicial district, if different, in which the seller is located [*see Com. Code § 6103(a)(2), (b)*], if in either case there is one, and if there is none, then in a newspaper of general circulation in the county in which the judicial district is located [*Com. Code § 6105(b)(2)*]. If the tangible assets are located in more than one judicial district in California, the publication of the notice is required to be in a newspaper of general circulation published in the judicial district in California in which a greater portion of the tangible assets are located, on the date the notice is published, than in any other judicial district in California, and, if different, in the judicial district in which the seller is located [*Com. Code § 6105(b)*; *see Com. Code § 6103(a)(2), (b)* (location of seller, discussed in *§ 270.103[1]*)].

Finally, to be effective, the notice in this form must be delivered or sent by registered or certified mail at least 12 business days before the the date of the bulk sale to the county tax collector in the county or counties in California in which the tangible assets are located [*Com. Code § 6105(b)(3)*]. If delivered during the period from January 1 to May 7, inclusive, the notice must be accompanied by a completed business property statement with respect to property involved in the bulk sale pursuant to *Rev. & Tax. Code § 441* [*Com. Code § 6105(b)(3)*].

The term "business day" in this context means any day other than a Saturday, a Sunday, or day observed as a holiday by the state government [*Com. Code § 6105(b)*].

[4] Contents of Notice

The notice of intended bulk sale must state each of the following [*Com. Code § 6105(a)*]:

- That a bulk sale is about to be made.

- The names and business addresses of the seller and buyer, and any other business name and address listed by the seller [*see Com. Code § 6104(a)* (buyer's obligation to obtain from seller list of all business names and addresses used by seller within three years of date list is sent or delivered to buyer)].

- The location and general description of the assets.

- The place and anticipated date of the bulk sale.

- Whether or not the bulk sale is subject to *Com. Code § 6106.2*, and, if it is, the name and address of the person with whom claims may be filed and the last date for filing claims, which must be the business day before the date stated in the notice as the anticipated date of sale.

Claims are deemed timely filed only if actually received by the person designated in the notice to receive claims before the close of business on the day specified in the notice as the last date for filing claims [*Com. Code § 6106.2(f)*]. A sale is subject to *Com. Code § 6106.2* if the consideration is $2 million or less and is substantially (1) all cash or (2) an obligation of the buyer to pay cash in the future to the seller or a combination of those two forms of consideration [*Com. Code § 6106.2(a)*].

[5] State Statutes

Buyer's obligations with respect to bulk sale. *Com. Code § 6104*

Contents and requirements for recording and publishing notice to creditors of intended bulk sale. *Com. Code § 6105*

Failure to publish and record notice as provided in *Com. Code §§ 6104, 6105* renders buyer liable to creditors of seller. *Com. Code § 6107*

Transition provisions governing sales under back sales agreements dated prior to January 1, 1991. *Com. Code § 6111*

[6] Text References

California Legal Forms, Ch. 17, *Buying and Selling a Business or Professional Practice* (Matthew Bender).

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23-270 California Forms of Pleading and Practice--Annotated § 270.241

§ 270.241 Notice of Intended Bulk Sale [Com. Code § 6105]--By Auction or Conducted by Liquidator on Seller's Behalf [Com. Code § 6108]

[1] FORM Notice of Intended Bulk Sale [Com. Code § 6105]--By Auction or Conducted by Liquidator on Seller's Behalf [Com. Code § 6108]

NOTICE IS HEREBY GIVEN that _____ [*name of seller*], whose business address is _____ [*street address*], _____ [*city*], _____ County, California, intends to sell _____ [at public auction *or* by liquidation] the following described property now located at _____ [*street address*], _____[*city*], _____ County, California: _____ [*generally describe property*].

During the three immediately preceding years, _____[*name of seller*] has conducted business under the following names at the following business addresses:

Dates	Business Names	Business Addresses
_____ _____ _____	_____	_____
_____ _____ _____	_____	_____

The _____ [auction *or* liquidation sale(s)] will be conducted at _____ [*street address*], _____ [*city*], _____ County, California, [*if liquidation:* beginning] on _____ [*date at least 12 business days after recording, publishing of, and mailing to county tax collector a copy of this notice*], beginning at _____ [*time*], and continuing thereafter until concluded].

The aforementioned sale is not subject to *Section 6106.2 of the Commercial Code*

The _____ [auctioneer(s) *or* liquidator(s)] will be _____ [*name(s)*], whose address(es) is/are _____ [*street address*], _____ [*city*], _____ County, California, and the terms of the sale will be _____ [*state terms, e.g.,* cash].
Dated: _____.

_____ [*signature(s) of*

auctioneer(s) or liquidator(s)]

[2] Use of Form

This notice must be recorded, published, and delivered or mailed to the county tax collector in the manner prescribed by *Com. Code § 6105(b)* [*see § 270.240[3]*] by the auctioneer or liquidator of a bulk sale that is subject to the provisions of *Com. Code § 6101 et seq.* [*see Com. Code § 6108(a)(1), (3)*]. A person engaged by the seller to direct, conduct, control, or be responsible for a sale by auction is an auctioneer [*Com. Code § 6102(a)(2)*]. A person who is regularly engaged in the business of disposing of assets for businesses contemplating liquidation or dissolution is a liquidator [*Com. Code § 6102(a)(10)*].

The failure of the auctioneer or liquidator to give the foregoing notice does not affect the validity of the sale to or the title of the purchasers [*Com. Code § 6107(h)(1), (2)*], but renders the auctioneer or liquidator liable to the creditors of the seller for damages in the amount of their claims, reduced by amounts that the claimants would not have realized if the buyer had complied, and reduced pursuant to the limitations on the auctioneer's or liquidator's cumulative liability [*see Com. Code §§ 6107, 6108(a), (b)* (discussed in *§§ 270.102, 270.107*)].

[3] Contents of Notice

This notice must contain the information required by *Com. Code § 6105(a)* [*see § 270.240[4]*] and, in addition, the following information [*Com. Code § 6108(a)(3)*]:

- The sale is to be by auction or liquidation.
- The name of the auctioneer or liquidator.
- The time and place of the auction or the time and place on or after which the liquidator will begin to sell assets on the seller's behalf.

[4] State Statutes

Requirements of notice of bulk sale by auction or by liquidation. *Com. Code §§ 6104, 6105, 6108(a)*

Liability of auctioneer or liquidator. *Com. Code §§ 6107, 6108*

[5] Cross References

See also *§ 270.240*.

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23-270 California Forms of Pleading and Practice--Annotated § 270.242

§ 270.242 Complaint for Recovery of Claim--By Claimant Against Buyer of Bulk Sale [Com. Code § 6107]

[1] FORM Complaint for Recovery of Claim--By Claimant Against Buyer of Bulk Sale [Com. Code § 6107]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RECOVERY OF CLAIM
_____ [*name*], [and DOES I	)	(Bulk Sale Law)
through _____,] Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 270.190[1], First Cause of Action, Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 270.190[1], First Cause of Action, Paragraph 2.*]

3. Plaintiff _____ [became *or* was] the holder of a certain claim against _____ [*name of seller*] incurred by _____ [*name of seller*] in the conduct of his/her/its business described in Paragraph 5. The claim arose before date of the bulk sale described in Paragraphs 6 and 7. This claim consists/consisted of _____[*allege transaction or events that gave rise to claim. See § 270.190[1], First Cause of Action, Paragraph 3*].

[*EITHER, if claim not matured*]

4. No part of the aforementioned claim has matured[, and no part of it is due and owing,] because _____ [*specify nature of nonmaturity, if appropriate, e.g.,* the time fixed for payment is _____(*date*)].

[*OR, if claim has matured*]

4. This claim for which _____ [*name of seller*] is indebted to plaintiff is in the sum of $_____. [Plaintiff has performed all conditions, covenants, and promises under the contract, on his/her/its part to be performed(, except _____ (*condition not performed*), the performance of which was excused on the ground that _____(*specify*)).] Neither the whole nor any part of this sum has been paid [except the sum of $_____], and there is now due and unpaid the sum of $_____ together with interest thereon at the rate of _____ percent per annum from _____ [*date*].

[*OR, if claim was reduced to judgment*]

4. On _____ [*date*], an action was commenced by plaintiff against _____ [*name of seller*] based on the aforementioned claim in the _____ [*specify court*], No. _____ in the files and records of this court. Judgment in that action was duly rendered in favor of plaintiff for the sum of $_____, and for costs in the sum of $_____, for a total of the sum of $_____. The judgment became final on _____ [*date*], prior to the filing of this action. The judgment _____ [has never been appealed and the time for appealing has expired *or* was appealed and affirmed on _____(*date*)]. The judgment has never been vacated or modified. Plaintiff is still the owner of the judgment of which no part has been satisfied. A certified copy of the judgment is attached hereto as Exhibit "B" and made a part hereof.

[*CONTINUE*]

5. Prior to _____ [*date*], _____ [*name of seller*] was engaged in the business of _____ [*describe business*] [under the business name of _____ (*state name*)] at _____[*street address*], _____ [*city*], _____County, California.

6. On or about this date, _____ [*name of seller*] sold to defendant _____ [*name of buyer*] _____ [*allege consideration for sale, e.g.,* for cash and notes] _____ [this business, including (all the) inventory and equipment thereof *or* more than half of the inventory and equipment of this business] having the value of $_____, by a bill of sale dated on the same date.

7. This sale was not made in the ordinary course of _____'s [*name of seller*] business in that it did not comport with the usual and customary practices of the kind of business in which _____[*name of seller*] was engaged or with _____'s [*name of seller*] usual and customary practices.

[*EITHER, if there was failure to properly record with county recorder*]

8. Subsection (b)(1) of *Section 6105 of the Commercial Code* was not complied with, in that this sale was not preceded by a notice of intended bulk sale recorded in the Office of the County Recorder of _____County, California [*if assets were located in more than one county add:*, and in the Office of the County Recorder of _____ County, California,] in which county/counties the tangible assets to be sold were located by defendant _____ [*name of buyer*] at least 12 business days before the date of the sale. [*If seller was located in different county than assets, add*: Nor was any notice recorded in the Office of the County Recorder of _____ County, California, the county in which _____'s (*name of seller*) _____ (chief executive office *or* major executive office in the United States) was located.]

[*OR, if there was failure to properly publish notice of intended sale*]

8. In noncompliance with Subsection (b)(2) of *Section 6105 of the Commercial Code*, this sale was not preceded by a notice of intended bulk sale published at least once in a newspaper of general circulation published in [the Judicial District of] _____ County, California, in which _____ [District *or* County] the tangible assets to be sold [or the greater portion of them] were/was located by defendant _____ [*name of buyer*] at least 12 business days before the date of the sale. [*If seller was located in different judicial district than assets, add*: Nor was any notice published in a newspaper of general circulation published in (the _____ (*name of district*) Judicial District of) _____ County, California, in which _____ (District *or* County) _____'s (*name of seller*) _____ (chief executive office *or* major executive office in the United States) was located.]

[*OR, if there was failure to comply with other requirements of Com. Code § 6105*]

8. In noncompliance with Subsection _____[*specify subsection(s), e.g.,* (a)(2)] of *Section 6105 of the Commercial Code*, this sale _____ [*if notice was published and recorded in compliance with Com. Code § 6105, allege facts showing noncompliance with requirements of contents of notice so that plaintiff had no notice of intended bulk sale, e.g.,* did not contain all prior business names and addresses used by _____ (*name of seller*) within three immediately preceding years, under one of which names he/she/it was engaged in business at the time plaintiff became the holder of his/her/its claim. Plaintiff is informed and believes and on such information and belief alleges that defendant never obtained, or attempted to obtain from _____(*name of seller*) the list of its former business names and addresses as required by Commercial CodeSection 6104(a)].

[*OR, if there was failure to comply with requirements of Com. Code § 6106.2*]

8. The consideration for the sale was less than two million dollars ($2,000,000) and consisted substantially of _____ [cash *or* the seller's obligation to pay cash in the future *or* a combination of cash and the seller's obligation to pay cash in the future]. In noncompliance with subsection (f) of *Section 6106.2 of the Commercial Code*, _____ [*specify nature of noncompliance, e.g.,* the notice of the sale did not specify any person with whom creditors of _____ (*name of seller*) were to file claims].

[*CONTINUE*]

9. As a proximate result of defendant's noncompliance with the applicable statute, as alleged above, plaintiff was

prevented from duly filing a timely claim, to plaintiff's damage.

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____ plus interest thereon at the rate of _____ percent per annum;

2. For the costs of suit incurred herein; and

3. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 270.190.*]

[2] Use of Form

This form of complaint is for use by a creditor holding a claim, other than an unliquidated or contingent one, against a seller of a bulk sale that was subject to the notice requirements of *Com. Code §§ 6104* and *6105* to recover the amount of the claim from a buyer who failed to publish, record, or deliver the notice or to otherwise comply with the provisions of *Com. Code § 6104*, *6105*, or *6106.2(f)* [*see Com. Code § 6107(a), (g)*]. The buyer is liable to the claimant for damages in the amount of the claim, reduced by any amount that the claimant would not have realized if the buyer had complied [*Com. Code § 6107(a)*]. The claimant has the burden of establishing the validity and amount of the claim. The buyer has the burden of establishing the amount that the claimant would not have realized if the buyer had complied [*Com. Code § 6107(b)*; *see § 270.102*].

This complaint is based on the requirements that went into effect on January 1, 1991, and is applicable if the sale occurred on or after January 1, 1991, pursuant to a bulk sale agreement dated on or after January 1, 1991. If the sale occurred on or after January 1, 1991, pursuant to a bulk sale agreement dated before January 1, 1991, compliance with the former notice provisions (those set forth in former *Com. Code §§ 6106* and *6107*) is required, and the form will have to be modified accordingly [*see Com. Code § 6111* (discussed in § 270.109)].

[3] Who May Be Plaintiff

[a] "Claimant" Defined

"Claimant" means a person holding a claim incurred in the seller's business other than any of the following claims [*Com. Code § 6102(a)(5)*]:

- An unsecured and unmatured claim for employment compensation and benefits, including commissions and vacation, severance, and sick-leave pay;

- A claim for injury to an individual or to property, or for breach of warranty, unless (A) a right of action for the claim has accrued, (B) the claim has been asserted against the seller, and (C) the seller knows the identity of the person asserting the claim and the basis on which the person has asserted it; or

- A claim for taxes owing to a governmental unit, if (A) a statute governing the enforcement of the

claim permits or requires notice of the bulk sale to be given to the governmental unit in a manner other than by compliance with the requirements of *Com. Code § 6101 et seq.*, and *(B)* notice is given in accordance with that statute.

[b] "Claim" Defined

"Claim" means a right to payment from the seller, whether or not the right is reduced to judgment, liquidated, fixed, matured, disputed, secured, legal, or equitable. The term includes costs of collection and attorney's fees only to the extent that the California law permits the holder of the claim to recover them in an action against the obligor [*Com. Code § 6102(a)(4)*].

[c] Holders of Contingent and Unliquidated Claims Excepted

Note that no action may be brought under *Com. Code § 6107(a)* by or on behalf of a claimant whose claim is unliquidated or contingent [*Com. Code § 6107(g)*].

[4] Allegations

This complaint alleges:

- Plaintiff's status as a claimant (Paragraph 3) [*see Com. Code § 6102(a)(5)* (discussed in [a] *above*)].

- The status of plaintiff's underlying claim against the seller (alternative Paragraphs 4) [*see Com. Code § 6102(a)(4)* (discussed *above*); *but see Com. Code § 6107(g)* (no action may be brought on unliquidated or contingent claim)].

- The type and location of the seller's business (Paragraph 5).

- The fact, date, consideration, and relevant characteristics of the sale, namely that it was of all or a substantial part of the seller's business (Paragraph 6) and that it was not in the ordinary course of that business (Paragraph 7) [*see Com. Code § 6102(a)(3)(ii)* (defining "bulk sale" other than by auction or through liquidator); *see also Com. Code § 6102(a)(13)* (defining "in the ordinary course of the seller's business")].

- Defendant's failure to comply with the notice requirements of *Com. Code §§ 6104* and *6105*, including, if applicable, *Com. Code § 6106.2(f)* (alternative Paragraphs 8).

- The resulting damage to plaintiff (Paragraph 9) [*see Com. Code § 6107(b)*].

More than one alternative Paragraph 8 may be used or any of the alternative Paragraphs 8 may be combined to reflect the actual noncompliance involved.

[5] Statute of Limitations

[a] One Year Period

Unless the buyer, auctioneer, or liquidator conceals the fact that the bulk sale occurred, an action under *Com. Code § 6101 et seq.* against a buyer, auctioneer, or liquidator must be commenced within one year after the date of the bulk sale [*Com. Code § 6110(a)*].

If the buyer, auctioneer, or liquidator conceals the fact that the sale has occurred, the limitation is tolled and an action

under *Com. Code § 6101 et seq.* may be commenced within whichever of the following periods is earlier [*Com. Code § 6110(b)*]:

- One year after the person bringing the action discovers that the sale has occurred; or

- One year after the person bringing the action should have discovered that the sale has occurred, but no later than two years after the date of the bulk sale.

Complete noncompliance with the requirements of *Com. Code § 6101 et seq.* does not of itself constitute concealment [*Com. Code § 6110(b)*; *accord, In re Borba (9th Cir. 1984) 736 F.2d 1317, 1320* (decided under former *Com. Code § 6111*)].

[b] "Date of Sale" Defined

Unless the sale is an auction or is conducted by a liquidator on the seller's behalf, the phrase "date of the bulk sale" means the later of the date on which either of the following occurs: (1) more than 10 percent of the net contract price is paid to or for the benefit of the seller; or (2) more than 10 percent of the assets, as measured by value, are transferred to the buyer [*Com. Code § 6102(a)(7)(i)(B)*; *see Com. Code § 6102(a)(11)* (defining "net contract price," discussed in *§ 270.245[3][b]*); *see also Com. Code § 6102(a)(15)* (defining "value" as fair market value)].

For purposes of determining the date of sale, delivery of a negotiable instrument [*see Com. Code § 3104(a)*] to or for the benefit of the seller in exchange for assets constitutes payment of the contract price to the extent of the amount of the note [*Com. Code § 6102(a)(7)(ii)(A)*]. To the extent that the contract price is deposited in an escrow, the contract price is paid to or for the benefit of the seller when the seller acquires the unconditional right to receive the deposit or when the deposit is delivered to the seller or for the benefit of the seller, whichever occurs first [*Com. Code § 6102(a)(7)(ii)(B)*].

An asset is transferred when a person holding an unsecured claim can no longer obtain through judicial proceedings rights to the asset that are superior to those of the buyer arising as a result of the bulk sale [*Com. Code § 6102(a)(7)(ii)(C)*]. A person holding an unsecured claim can obtain those superior rights to a tangible asset at least until the buyer has an unconditional right under the bulk-sale agreement to possess the asset, and a person holding an unsecured claim can obtain those superior rights to an intangible asset at least until the buyer has an unconditional right under the bulk-sale agreement to use the asset [*Com. Code § 6102(a)(7)(ii)(C)*].

[6] State Statutes

Buyer's liability to single claimant for failure to comply with *Com. Code §§ 6104, 6105*. *Com. Code § 6107(a)*

Burdens of proof. *Com. Code § 6107(b)*

Buyer who made good faith attempt to comply or to bring sale within exception of *Com. Code § 6103(c)* as not liable. *Com. Code § 6107(c)*

Limits on buyer's cumulative liability. *Com. Code § 6107(d)-(f)*

Action barred on unliquidated or contingent claim. *Com. Code § 6107(g)*

Statute of limitations for action brought under bulk sale provisions of Com. Code *§ 6101 et seq. Com. Code* § 6110

[7] Text References

Witkin, Summary of California Law, vol. 3, *Sales*, § 220 (9th ed. 1987)

[8] Cross References

See also *§§ 270.190, 270.240*.

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23-270 California Forms of Pleading and Practice--Annotated § 270.243

§ 270.243 Allegations--In Complaint for Recovery of Claim--By Claimant Against Auctioneer or Liquidator Who Conducted Bulk Sale [Com. Code §§ 6107, 6108]

[1] FORM Allegations--In Complaint for Recovery of Claim--By Claimant Against Auctioneer or Liquidator Who Conducted Bulk Sale [Com. Code §§ 6107, 6108]--Sale Occurred on or After January 1, 1991 [Com. Code § 6111]

1. Defendant _____ [*name*] was at all times mentioned in this complaint engaged in business as _____ [an auctioneer *or* a liquidator] at the auction described herein, having _____ [direction of *or* control of *or* responsibility for] this auction.

2. On or about _____ [*date*], _____ [*name of seller*] engaged defendant _____ [*name of auctioneer or liquidator*] to sell [more than half of the inventory and equipment of] the aforementioned business _____ [at an auction *or* through a sale or series of sales] to be conducted at _____ [*street address*], _____ [*city*], _____ County, California, on _____ [*date*].

3. Defendant did _____ [auction *or* liquidate] _____ [more than half of the inventory and equipment of] this business on [or after] that date, and did sell and deliver [all the] goods, wares, merchandise, and fixtures thereof to _____ [various purchasers, the identity of whom plaintiff does not know; nor does plaintiff know the amount of consideration paid, but these facts are known by defendants _____ (*name(s) of auctioneer(s) and seller*) *or state names of purchasers and describe consideration paid, if known*].

4. Section(s) _____ [*specify subsections of Com. Code §§ 6104-6108 with which defendant failed to comply*] of the Commercial Code was/were not complied with, in that defendant did not give proper notice of the intended bulk sale _____ [by auction *or* through a liquidator] because _____ [*allege facts showing noncompliance with requirements of recording, publishing, or mailing or delivering notice by defendant auctioneer or liquidator, or his/her/its/their failure to comply with requirements of contents of the notice. See § 270.242[1], alternative Paragraphs 8.*].

[2] Use of Form

These allegations may be used in place of Paragraphs 6-8 of § 270.242[1] by a creditor holding a claim, other than an unliquidated or contingent one, against a seller of a bulk sale that was conducted by auction or through a liquidator when the auctioneer or liquidator failed to publish, record, or deliver the notice, or otherwise to comply with the provisions of *Com. Code §§ 6104-6108* relating to the notice of intended bulk sale [*see Com. Code §§ 6104-6108*, and discussion in *§ 270.107*].

[3] Relevant Definitions

[a] Bulk Sale

In the case of a sale by auction or a sale or series of sales conducted by a liquidator on the seller's behalf, a "bulk sale" means a sale or series of sales not in the ordinary course of the seller's business of more than half of the seller's inventory and equipment, as measured by value on the date of the bulk-sale agreement [*Com. Code § 6102(a)(3)(i)*; *see also § 270.103*].

[b] Auctioneer

An auctioneer is a person whom the seller engages to direct, conduct, control, or be responsible for a sale by auction [*Com. Code § 6102(a)(2)*].

[c] Liquidator

A liquidator is a person who is regularly engaged in the business of disposing of assets for businesses contemplating liquidation or dissolution [*Com. Code § 6102(a)(10)*].

[d] Date of Bulk Sale

The date of a bulk sale by auction or one that is conducted by a liquidator on the seller's behalf is the date on which more than 10 percent of the net proceeds is paid to or for the benefit of the seller [*Com. Code § 6102(a)(7)(i)(A)*].

[4] Cross References

See also *§§ 270.241* and *270.242*.

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23-270 California Forms of Pleading and Practice--Annotated § 270.244

§ 270.244 Affirmative Defense--To Action for Recovery of Claim by Claimant Against Buyer of Bulk Sale [Com. Code § 6107]--Sale Excluded by Stature [Com. Code § 6103(c)]

[1] FORM Affirmative Defense--To Action for Recovery of Claim by Claimant Against Buyer of Bulk Sale [Com. Code § 6107]--Sale Statutorily Excluded [Com. Code § 6103(c)]

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges that the bulk sale of property on or about _____ [*date*] from _____ [*name of seller*] to defendant herein was not in violation of Section(s) _____ [6104 *or* 6105 *or* 6106.2 *and if defendant is auctioneer or liquidator, add* and 6108] of the Commercial Code for any failure of defendant to comply with the provisions of that statute relating to the requirements for recording, publishing, or mailing or delivering a notice of bulk sale because the sale was specifically excluded from the requirements of that notice by *Section 6103(c) of the Commercial Code*. Specifically, this sale was excluded by Section 6103(c)(_____) [*specify subparagraph*] of the Commercial Code in that _____ [*state generally character of sale and property excluded as provided in Com. Code § 6103(c)(1)-(16), e.g.,* the property sold was immediately leased back to the transferor immediately following the transfer, a financing statement was filed, and notice of intended transfer was published in compliance with *Section 3440.1(h) of the Civil Code*].

[2] Use of Form

This affirmative defense is for use in an answer to a complaint brought by a creditor of a seller of a bulk sale against the buyer for failure of the buyer to comply with the bulk sale notice provisions of *Com. Code § 6101 et seq.* The defense asserted is that the sale was not subject to those provisions because it was specifically excepted by *Com. Code § 6103(c)(1)-(16)* [*see § 270.108*].

The foregoing form may also be modified for use when the sale was not subject to the bulk sale notice requirements because it did not fall within the definition of bulk sale, such as when the inventory and equipment sold were less than half, as valued on the date of the bulk sale agreement, of the seller's inventory and equipment, or when the sale was one that comported with the usual or customary practices in the kind of business in which the seller is engaged [*Com. Code §§ 6102(a)(3), (13)* 6103(a)-(b); *see § 270.103*].

[3] State Statutes

Bulk sale defined. *Com. Code § 6102(a)(3)*; *see also Com. Code §§ 2106(1), 6102(a)(8), (13), (15)* (related definitions)

Sales to which *Com. Code § 6101 et seq.* applies. *Com. Code § 6103(a)-(b)*

Transfers not subject to bulk sale notice provisions of Com. Code *§ 6101 et seq. Com. Code* § 6103(c)

[4] Cross References

See also *§ 270.242*.

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23-270 California Forms of Pleading and Practice--Annotated § 270.245

§ 270.245 Affirmative Defense--To Action for Recovery of Claim by Claimant Against Buyer of Bulk Sale [Com. Code § 6107]--Statutory Limit on Cumulative Liability for Single Sale Exceeded [Com. Code § 6107(d)-(f)]

[1] FORM Affirmative Defense--To Action for Recovery of Claim by Claimant Against Buyer of Bulk Sale [Com. Code § 6107]--Statutory Limit on Cumulative Liability for Single Sale Exceeded [Com. Code § 6107(d)-(f)]

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

1. The assets sold as the bulk sale described in the complaint consisted _____ [*indicate whether assets consisted only of inventory and equipment, e.g.,* entirely of inventory and equipment].

2. The net contract price was $_____.

[3. The net value of the inventory and equipment was $_____.]

4. _____ [*Specify amount or portion, e.g.,* All] of the [portion of the] net contract price [that was allocable to inventory and equipment] was paid to or applied for the benefit of the seller or creditors of the seller. _____ [*Specify amount or portion, e.g.,* None] of [that portion of] the net contract price was paid or applied towards debts that were secured by assets that were part of the bulk sale and that were taken into consideration in determining the net contract price.

5. Defendant has made payments to claimants other than plaintiff herein [and other than the payments on debts described in Paragraph 4][, and to persons it believed held bona fide claims,] in satisfaction of claims owed[, or believed to be owed,] by _____ [*name of seller*], totalling $_____.

[2] Use of Form

The foregoing affirmative defense is for use in an answer to a complaint brought by a creditor of a seller of a bulk sale against the buyer for failure of the buyer to comply with the bulk sale notice provisions of *Com. Code § 6101 et seq.* The defense asserted is that the buyer has already paid claims in excess of the amount of its cumulative liability for a

single bulk sale [*see Com. Code § 6107(d)-(f)*]. The buyer's cumulative liability is generally limited to two times the net contract price, or if the sale included property other than inventory and equipment, two times the value of the inventory and equipment, less the portion of the net contract price paid to or applied for the benefit of the seller or its creditors (or, again, in the case of a sale that included property other than inventory and equipment, sums so paid or applied that were allocable to inventory and equipment,) excepting from that deduction debts secured by the assets sold and taken into account in determining the net contract price [*Com. Code § 6107(d)*; *see § 270.245[3]*].

The foregoing form may also be modified for use when the limit on cumulative liability would be exceeded if defendant had to pay plaintiff's claim and other claims made against it arising from the same bulk sale. In that situation, the buyer may wish to consider answering, filing a cross complaint in interpleader, depositing with the court an amount equal to its remaining exposure under the cumulative limit, and asking the court to apportion that amount among the remaining claimants. For discussion and forms relating to interpleader, see Ch. 314, *Interpleader* .

Paragraph 3 and the bracketed portions of Paragraph 4 are only applicable if the bulk sale involves assets other than inventory and equipment [*see Com. Code § 6107(d)(2)*].

A payment made by the buyer to a person to whom the buyer is, or believes it is, liable under *Com. Code § 6107(a)* reduces pro tanto the buyer's cumulative liability under *Com. Code § 6107(d)* (Paragraph 5) [*Com. Code § 6107(f)*].

[3] Limit on Buyer's Cumulative Liability

[a] Sale Consists Only of Inventory and Equipment

In a single bulk sale in which the assets consist only of inventory and equipment, the buyer's cumulative liability for failure to comply with the requirements of *Com. Code § 6104* may not exceed an amount equal to twice the net contract price, less the amount of any part of the net contract price paid to or applied for the benefit of the seller or a creditor except to the extent that the payment or application is applied to a debt that is secured by the assets and that has been taken into consideration in determining the net contract price [*Com. Code § 6107(d)(1)*].

[b] Net Contract Price Defined

The phrase "net contract price" means the new consideration the buyer is obligated to pay for the assets less each of the following [*Com. Code § 6102(a)(11)*]:

- The amount of any proceeds of the sale of an asset, to the extent that the proceeds are applied in partial or total satisfaction of a debt secured by the asset; and

- The amount of any debt to the extent that it is secured by a security interest or lien that is enforceable against the asset before and after it has been sold to a buyer. If a debt is secured by an asset and by other property of the seller, the amount of the debt secured by a security interest or lien that is enforceable against the asset is determined by multiplying the debt by a fraction, the numerator of which is the value of the new consideration for the asset on the date of the bulk sale and the denominator of which is the value of all property securing the debt on the date of the bulk sale.

[c] Assets Sold Include Property Other Than Inventory and Equipment

In a single bulk sale in which the assets include property other than inventory and equipment, the buyer's cumulative liability for failure to comply with the requirements of *Com. Code § 6104* may not exceed an amount equal to twice the net value of the inventory and equipment less the amount of the portion of any part of the net contract price paid to or applied for the benefit of the seller or a creditor that is allocable to the inventory and equipment, except to the extent that the payment or application is applied to a debt that is secured by the assets and that has been taken into

consideration in determining the net contract price [*Com. Code § 6107(d)(2)*].

[d] Net Value Calculation

The phrase "net value" of an asset within the meaning of *Com. Code § 6107(d)(2)* (sale that includes property other than inventory and equipment) is the value of the asset less each of the following [*Com. Code § 6107(e)*]:

- The amount of any proceeds of the sale of an asset, to the extent that the proceeds are applied in partial or total satisfaction of a debt secured by the asset; and

- The amount of any debt to the extent that it is secured by a security interest or lien that is enforceable against the asset before and after it has been sold to a buyer. If a debt is secured by an asset and other property of the seller, the amount of the debt secured by a security interest or lien that is enforceable against the asset is determined by multiplying the debt by a fraction, the numerator of which is the value of the asset on the date of the bulk sale and the denominator of which is the value of all property securing the debt on the date of the bulk sale. The portion of a part of the net contract price paid to or applied for the benefit of the seller or a creditor that is "allocable to the inventory and equipment" is the portion that bears the same ratio to that part of the net contract price as the net value of the inventory and equipment bears to the net value of all of the assets.

[4] State Statutes

Buyer's liability to single claimant. *Com. Code § 6107(a)*

Limits on buyer's cumulative liability in single bulk sale. *Com. Code § 6107(d)*

Net value of asset defined for purposes of determining cumulative liability for single sale that included property other than inventory and equipment. *Com. Code § 6107(e)*

Buyer's payment to person to whom buyer is, or believes it is, liable under *Com. Code § 6107(a)* as reducing pro tanto buyer's cumulative liability. *Com. Code § 6107(f)*

Action as barred on unliquidated or contingent claim. *Com. Code § 6107(g)*

[5] Cross References

See also *§§ 270.240* and *270.242*.

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Chapter 270 FRAUDULENT CONVEYANCES
PART IV. FORMS
C. Bulk Sales

23-270 California Forms of Pleading and Practice--Annotated § 270.246

§ 270.246 Affirmative Defense--To Action for Recovery of Claim by Claimant Against Buyer of Bulk Sale [Com. Code § 6107]--Good Faith Attempt to Comply With, or to Exclude Sale From, Bulk Sale Notice Requirements [Com. Code § 6107(c)]

[1] FORM Affirmative Defense--To Action for Recovery of Claim by Claimant Against Buyer of Bulk Sale [Com. Code § 6107]--Good Faith Attempt to Comply With, or to Exclude Sale From, Bulk Sale Notice Requirements [Com. Code § 6107(c)]

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

1. On or about _____ [*date*], and prior to the time of the transaction described in the complaint as a bulk sale, defendant made a good faith and commercially reasonable attempt to _____ [comply with the requirements of Section(s) _____ (6104 *and/or* 6105) of the Commercial Code *or* bring the transaction within the exclusion of Section(s) 6103(c)_____ (*specify subparagraph*) of the Commercial Code].

[*Describe, in as many paragraphs as necessary, all elements necessary to establish a good faith and commercially reasonable attempt at compliance or exclusion. The following, by way of example, are allegations relating to the exclusion of Com. Code§ 6103(c)(9).*]

2. Defendant's principal place of business is _____.

3. On _____ [*date not earlier than 21 days before the date of the bulk sale*], defendant demanded of _____ [*name of seller*] and received from _____[*name of seller*] a verified and dated list of claimants of whom the seller had notice three days' before the seller delivered the list to the buyer. A true and correct copy of that list is attached hereto marked Exhibit "A" and made a part hereof.

4. Defendant assumed in full all debts on that list, and sent notice of its assumption to all creditors on that list, in the

form of the letter, a true copy and correct copy of which is attached hereto marked Exhibit "B" and made a part hereof.

5. Defendant is, and has at all times relevant hereto, been solvent and able to meet its current obligations as they mature.

6. On _____ [*date not later than 30 days after sale*], defendant caused a notice of assumption to be recorded in the Office of the County Recorder of _____ County, California, [*if assets were located in more than one county add* and in the Office of the County Recorder of _____ County, California,] in which county/counties the tangible assets sold were located. [*If seller was located in different county than assets, add:* The same form of notice of assumption was also recorded, on _____ (*date not later than 30 days after sale*), in the Office of the County Recorder of _____County, California, the county in which _____'s (*name of seller*) _____ (chief executive office *or* major executive office in the United States) was located.] A true copy and correct copy of that notice is attached hereto marked Exhibit "C" and made a part hereof.

7. Defendant caused a notice of assumption to be published in the _____ [*name of newspaper*], a newspaper of general circulation published in [the _____ (*name*) Judicial District of] _____ County, California, in which _____ [District *or* County] the tangible assets sold[, or the greater portion of them,] were located. The notice was published on _____ [*date not later than 30 days after sale*]. [*If seller was located in different judicial district than assets, add:* Defendant also caused the same form of notice of assumption to be published on _____ (*date not later than 30 days after sale*), in the _____ (*name of newspaper*), a newspaper of general circulation published in (the _____ (*name of district*) Judicial District of) _____ County, California, in which _____ (District *or* County) _____'s (*name of seller*) _____ (chief executive office *or* major executive office in the United States) was located.] A true copy and correct copy of that notice is attached hereto marked Exhibit "D" and made a part hereof.

[2] Use of Form

This affirmative defense is for use in an answer to a complaint brought by a creditor of a seller of a bulk sale against the buyer for failure of the buyer to comply with the bulk sale notice provisions of *Com. Code § 6101 et seq.* The defense asserted is that the buyer made a good faith and commercially reasonable attempt to comply with the requirements of Com. Code § 6104or to exclude the sale from the application of the Bulk Sales Law under *Com. Code § 6103(c)* (discussed in *§ 270.170[8]*) [*Com. Code § 6107(c)*]. The buyer has the burden of establishing the good faith and commercial reasonableness of the effort [*Com. Code § 6107(c)*]. Good faith was not a defense under prior versions of the Bulk Transfer Law [*see Danning v. Daylin, Inc. (9th Cir. 1973) 488 F.2d 185, 190]* .

All allegations except those in Paragraph 1 will vary depending on the particular exclusion attempted or insufficiency in compliance with the requirements of *Com. Code §§ 6104, 6105*. In the foregoing form, Paragraphs 2-7 are based on an attempt to bring the transaction within the exclusion set forth in *Com. Code § 6103(c)(9)* (discussed in *§ 270.108[4]*). The individualized assumption agreements alleged in Paragraph 4 are not required by the statute, but the allegations may be included if desired whenever such agreements are utilized.

[3] State Statutes

Good faith attempt to comply or to exclude transaction from scope of Bulk Sales Law as complete defense. *Com. Code § 6107(c)*

Burden of establishing good faith and commercial reasonableness of effort as on buyer asserting it. *Com. Code § 6107(c)*

Exclusions

Transfers to satisfy obligations. *Com. Code § 6103(c)(1)-(5)*

General assignment for benefit of creditors. *Com. Code § 6103(c)(6)*

Sales in course of judicial or administrative proceeding. *Com. Code § 6103(c)(7)-(8)*

Buyer assumes known claims. *Com. Code § 6103(c)(9)*

Buyer assumes all seller's debts. *Com. Code § 6103(c)(10)*

Newly organized entity assumes all seller's debt. *Com. Code § 6103(c)(11)*

Sales for less than $10,000 or more than $5 million. *Com. Code § 6103(c)(12)*

Sale required by law. *Com. Code § 6103(c)(13)*

Sale and lease back. *Com. Code § 6103(c)(14)*

Transfer of liquor license. *Com. Code § 6103(c)(15)*

Transfer of goods in warehouse. *Com. Code § 6103(c)(16)*

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Chapter 272 GAMBLING

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§ 272.syn Synopsis to Chapter 272: GAMBLING

§ 272.01 Scope of Chapter

§ 272.02 Cross References

§§ 272.03 - 272.09 [Reserved]

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§ 272.12 Illegality of Gambling Contracts

[1] Basis of Illegality

[2] Contrary to Express Provision of Law

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§ 272.13 Doctrine of in Pari Delicto

[1] Parties' Enforcement of Gambling Contract Precluded

[2] Applied to Stakeholder

[3] Demurrer Available

[4] Effect of Fraud or Deceit

[5] Effect of Withdrawal From Gambling Contract

[6] Where Right to Recover Is Not Dependent on Gambling Contract

§ 272.14 No Enforcement of Gambling Debt

[1] By Licensed Gambling Establishment

[a] Money Used for Gambling

[b] Burden of Proof

[c] Defense of Illegality

[d] Presumptions

[e] Sufficiency of Evidence to Rebut Defense of Illegality

[2] By Party to Contract With Notice

[3] By Third Party With Notice

[4] Exception for Enforcement of Properly Rendered Foreign Judgment

§ 272.15 Spouse's Statutory Right to Recover Community Property Transferred in Discharge of Gambling Debt

§§ 272.16 - 272.29 [Reserved]

§ 272.30 Federal Constitution

§ 272.31 State Constitution

§ 272.32 State Statutes

[1] Bucket Shop Law

[2] Community Property

[3] Evidence

[4] Gaming

[5] Holder in Due Course

[6] Horse Racing

[7] Unlawful Contracts

§ 272.33 Decisions

[1] Bingo

[2] Definitions

[3] Doctrine of In Pari Delicto

[a] Applied to Gambling

[b] Applied to Stakeholder

[c] Demurrer Available

[d] Fraud or Deceit

[e] Right to Recover Not Dependent on Gambling Contract

[f] Withdrawal From Gambling Contract

[4] Gambling Contracts Are Illegal

[a] Illegality of Contract Is a Defense

[b] Contrary to Express Provision of Law

[c] Contrary to Public Policy or Good Morals

[d] Raising Issue of Illegality

[5] Gambling Debt Owed to Licensed Gambling Establishment

[a] Burden of Proof

[b] Defense of Illegality

[c] Presumptions

[d] Rebutting Defense of Illegality

[5A] Gambling Control Act

[6] Gambling Debt Owed to Private Party With Knowledge

[7] Gambling Debt Owed to Third Party With Notice

[8] Horse Racing

[9] Lottery

[10] Pai Gow

[11] Poker

[12] Racketeer Influenced and Corrupt Organizations Act

[13] Statutory Right to Recover Gambling Losses

[14] Video Games

§ 272.34 Attorney General Opinions

§ 272.35 Law Reviews

§ 272.36 Text References

§§ 272.37 - 272.39 [Reserved]

§ 272.40 Affirmative Defense--Illegal Contract [Civ. Code § 1667(1)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 272.41 Affirmative Defense--Contract Contrary to Public Policy [Civ. Code § 1667(2),(3)]--Gambling Establishment Seeking Recovery on Check Cashed for Customer for Gambling Purposes

[1] FORM

[2] Use of Form

[3] Illegality of Contract

[4] Allegations

[5] Cross References

§§ 272.42 - 272.49 [Reserved]

§ 272.50 Complaint to Recover Community Personal Property [Fam. Code § 1100(b)] and Damages [Civ. Code § 3333; Code Civ. Proc. § 667]--Property Transferred by One Spouse to Defendant in Satisfaction of Gambling Debt Without Consideration and Without Plaintiff Spouse's Consent

[1] FORM

[2] Use of Form

[3] Allegations

[4] Unauthorized Gifts of Community Personal Property

[5] Status of Property at Issue

[6] Jurisdiction

[7] Verification

[8] Cross References

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PART I. SCOPE

23-272 California Forms of Pleading and Practice--Annotated § 272.01

§ 272.01 Scope of Chapter

This chapter deals with contracts arising from gambling transactions. It includes the following forms:

- An affirmative defense to an illegal contract concerning a wager on the outcome of an election [*see § 272.40*].

- An affirmative defense to a contract contrary to public policy and good morals in an action by a gambling establishment to recover on a check cashed for a customer for gambling purposes [*see § 272.41*].

- A complaint to recover community personal property transferred in satisfaction of a gambling debt and damages [*see § 272.50*].

This chapter does not discuss criminal liability that results from participation in gambling generally [*Penal Code § 330 et seq.*], nor does it discuss the regulation of horse racing [*Penal Code § 337.1 et seq.*; *Bus. & Prof. Code § 19400 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesIllegal BargainsContracts LawDefensesPublic Policy ViolationsContracts LawNegotiable InstrumentsEnforcementDefensesIllegalityFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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23-272 California Forms of Pleading and Practice--Annotated § 272.02

§ 272.02 Cross References

- For discussion of answers and affirmative defenses generally and forms of answers, see Ch. 26, *Answers* .

- For an affirmative defense in an action to recover on a promissory note given for a gambling debt, see Ch. 385, *Negotiable Instruments* .

- For a discussion and forms for use in recovering community personal property generally, see Ch. 122, *Community Property* .

- For a discussion and forms for use in raising the affirmative defense of illegality of contract and contract contrary to public policy and good morals, see Ch. 140, *Contracts* .

- For a form for use by a spectator falsely imprisoned by guards at a horse racetrack, see Ch. 257, *False Imprisonment* .

- For a form of complaint to be brought under the Uniform Fraudulent Conveyance Act by a creditor against a gambling club for money lost there by an insolvent debtor, see Ch. 270, *Fraudulent Conveyances* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationExaminers, Officers & TrusteesFraudulent TransfersGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCommercial Law (UCC)Negotiable Instruments (Article 3)General OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyTortsIntentional TortsFalse ImprisonmentGeneral Overview

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[Reserved]

§§ 272.03[Reserved]

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23-272 California Forms of Pleading and Practice--Annotated § 272.10

§ 272.10 Governing Statutes

Unlawful contracts are defined in *Civ. Code § 1667* and are governed generally by *Civ. Code §§ 1595, 1596, 1598, 1599,* and *1689*.

A spouse's right to recover a gift or other disposal of community personal property for less than fair and reasonable value is governed by *Fam. Code § 1100(b)*. The right of one spouse to make a claim against the other spouse for a breach of the fiduciary duty imposed by *Fam. Code § 1100*, which results in impairment to the claimant spouse's present undivided one-half interest in the community estate, is governed by *Fam. Code § 1101*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesIllegal BargainsContracts LawDefensesPublic Policy ViolationsContracts LawNegotiable InstrumentsEnforcementDefensesIllegalityFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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23-272 California Forms of Pleading and Practice--Annotated § 272.11

§ 272.11 Definitions

A wagering or gambling contract takes the form of a bet or wager involving gain and loss, between known participants, of money or property staked on the happening in the future of an event at the time uncertain [*see Brown v. Board of Police Comm'rs (1943) 58 Cal. App. 2d 473, 477, 136 P.2d 617]* .

A premium or reward is distinguished from a bet or wager in that a premium is a reward for some act done while a bet or wager is a stake upon an uncertain event [*Brown v. Board of Police Comm'rs (1943) 58 Cal. App. 2d 473, 477, 136 P.2d 617]* .

Webster's Seventh New Collegiate Dictionary defines a stakeholder as a person entrusted with the stakes of two or more bettors.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesIllegal BargainsContracts LawDefensesPublic Policy ViolationsContracts LawNegotiable InstrumentsEnforcementDefensesIllegality

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§ 272.12 Illegality of Gambling Contracts

[1] Basis of Illegality

An agreement for a bet or wager is one in which the promisor agrees to perform on the happening of a condition, and for which performance he or she receives no agreed exchange [*see Kyne v. Kyne (1940) 16 Cal. 2d 436, 438, 106 P.2d 620* ; *Matthews v. Lopus (1914) 24 Cal. App. 63, 66, 140 P. 306* ; *Schenck v. Hirshfeld (1913) 22 Cal. App. 709, 710, 136 P. 725]* . At common law, wagers made in respect to matters not affecting the feelings, interest, or character of third persons, or the public peace or good morals, or public policy, were legal contracts that could be enforced [*Johnston v. Russell (1869) 37 Cal. 670, 672]* . However, *Civ. Code § 1667*, enacted in 1872, specifies that a contract is not lawful which is (1) contrary to an express provision of law; (2) contrary to the policy of express law, though not expressly prohibited; or (3) otherwise contrary to good morals [*Civ. Code § 1667*].

[2] Contrary to Express Provision of Law

A contract that is contrary to an express provision of law is not lawful [*Civ. Code § 1667(1)*]. Such a contract is void from its inception [*see Matthews v. Lopus (1914) 24 Cal. App. 63, 67, 140 P. 306]* . For example, a wagering agreement concerning the outcome of an election in violation of *Penal Code §§ 337a, 659*, and former Elec. Code § 11504 [*see Kyne v. Kyne (1940) 16 Cal. 2d 436, 438-439, 106 P.2d 620]* and a wagering agreement concerning the outcome of a wrestling match in violation of former Penal Code § 337a (now *Penal Code § 337a(6)*) [*Matthews v. Lopus (1914) 24 Cal. App. 63, 67, 140 P. 306]* are illegal contracts [*see Civ. Code § 1667(1)*]. The general rule is that the court will not recognize such illegal contracts and will not aid the parties, but will leave them where it finds them [*Kyne v. Kyne (1940) 16 Cal. 2d 436, 438, 106 P.2d 620* ; *Szadolci v. Hollywood Park Operating Co. (1993) 14 Cal. App. 4th 16, 19, 17 Cal. Rptr. 2d 356* (whether party is seeking to recover winnings or stake)]. The defense of illegality is open to the parties to the contract and to those claiming under them [*Kyne v. Kyne (1940) 16 Cal. 2d 436, 439, 106 P.2d 620]* .

For a form of affirmative defense based on this ground, see *§ 272.40*.

[3] Contrary to Public Policy or Good Morals

A contract that is contrary to the policy of express law, though not expressly prohibited or otherwise contrary to good morals, is not lawful [*Civ. Code § 1667(2),(3)*]. Because a gambling game is contrary to the policy of express law, or contrary to good morals though not expressly prohibited by statute, it is unlawful [*see Civ. Code § 1667(2),(3)*; *Union Collection Co. v. Buckman (1907) 150 Cal. 159, 161, 88 P. 708* (gambling game); *Braverman v. Horn (1948) 88 Cal. App. 2d 379, 381, 198 P.2d 948* (dice game in Nevada gambling establishment); *Lavick v. Nitzberg (1948) 83 Cal. App. 2d 381, 382, 188 P.2d 758* (draw poker)]. A contract founded on a gambling consideration is unlawful and unenforceable [*Union Collection Co. v. Buckman (1907) 150 Cal. 159, 161, 88 P. 708* (promissory note given for money lost in gambling game); *see Lavick v. Nitzberg (1948) 83 Cal. App. 2d 381, 382, 188 P.2d 758* (promissory note given in gambling game in gambling house)].

For a form of affirmative defense based on this ground, see *§ 272.41*.

[4] Raising Issue of Illegality

If the illegality of a contract does not appear from the face of the complaint, it becomes a matter for an affirmative defense to be specially pleaded in the answer, with the burden of proof of illegality placed on the defendant [*Hamilton v. Abadjian (1947) 30 Cal. 2d 49, 53, 179 P.2d 804* (action by assignee of gambling house to recover on check honored for purpose of providing prospective customer with funds with which to gamble); *see Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 63-64, 71 Cal. Rptr. 817* (action by assignor to collect on checks cashed in gaming establishment and returned for lack of sufficient funds); *Eaton v. Brock (1954) 124 Cal. App. 2d 10, 13, 268 P.2d 58* (action to have validity of contract between milk distributor and cooperative corporation judicially decreed)]. For forms of affirmative defense, see *§§ 272.40* and *272.41*.

The failure to plead illegality as a defense, however, is not a waiver. Whenever the evidence shows that the plaintiff in substance seeks to enforce an illegal contract, the court has both the power and duty to ascertain the truth so that it does not unwittingly lend its assistance to the encouragement of what public policy forbids [*see Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 147-148, 308 P.2d 713* (action for damages for equipment rental)]. The illegality may be raised at any time, in the trial court or on appeal, by the parties or on the court's own motion [*see Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 148, 308 P.2d 713* ; *Griffis v. Squire (1968) 267 Cal. App. 2d 461, 465-466, 73 Cal. Rptr. 154* (action to quiet title to real property and for damages for rent owed); *but see Prudential Ins. Co. v. Fromberg (1966) 240 Cal. App. 2d 185, 190, 49 Cal. Rptr. 475* (decision holding that defense of illegality could not be raised for first time on appeal where plaintiff had no opportunity to present to trial court elements and concepts which would negate defendant's claim of illegality)]. For further discussion of pleading affirmative defenses and pleading illegality of contract, see Ch. 26, *Answers* , and Ch. 140, *Contracts* , respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewContracts LawDefensesIllegal BargainsContracts LawDefensesPublic Policy ViolationsContracts LawNegotiable InstrumentsEnforcementDefensesIllegality

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23-272 California Forms of Pleading and Practice--Annotated § 272.13

§ 272.13 Doctrine of in Pari Delicto

[1] Parties' Enforcement of Gambling Contract Precluded

The general rule is that the courts will not recognize an illegal betting contract if the gambling activity is classified as an unlawful and forbidden enterprise [*Bradley v. Doherty (1973) 30 Cal. App. 3d 991, 994, 106 Cal. Rptr. 725 , cert. denied, 414 U.S. 878* (betting on outcome of various games, including pinball games, in violation of *Penal Code § 337a(6)*)]. A court applies the doctrine of in pari delicto to the parties to such a contract and will not aid them; rather it will leave them where it finds them [*Bradley v. Doherty (1973) 30 Cal. App. 3d 991, 994, 106 Cal. Rptr. 725 , cert. denied, 414 U.S. 878]* . Thus, a party who is in pari delicto is denied recovery of that party's stakes or winnings under a wagering contract that violates the law [*Kyne v. Kyne (1940) 16 Cal. 2d 436, 438, 106 P.2d 620* (wagering agreement on outcome of election in violation of *Penal Code §§ 337a, 659*, and former Elec. Code § 11504); *Bradley v. Doherty (1973) 30 Cal. App. 3d 991, 994, 106 Cal. Rptr. 725 , cert. denied, 414 U.S. 878* (betting on outcome of various games, including pinball games, in violation of *Penal Code § 337a(6)*)]. California cases are uniform in holding that when money or property is lost in a transaction between parties which is prohibited by law, neither party has standing in a court of law or equity to recover the losses [*Lee On v. Long (1951) 37 Cal. 2d 499, 502-503, 234 P.2d 9 , cert. denied, 342 U.S. 947* (plaintiff barred from recovering money seized by peace officers in gambling raid); *Wallace v. Opinham (1946) 73 Cal. App. 2d 25, 28, 165 P.2d 709* (losses incurred in card game "twenty-one" which is prohibited by *Penal Code § 330*)].

[2] Applied to Stakeholder

The general rule that a court will not recognize an illegal wagering contract and will not aid the parties, but will leave them where it finds them, is applied to deny relief whether the party against whom the relief is sought is a party to the wager or is a stakeholder for the parties to the wager [*Kyne v. Kyne (1940) 16 Cal. 2d 436, 438, 106 P.2d 620]* . Because the plaintiff-bettor and the defendant-stakeholder stand in pari delicto in execution of the criminal and illegal agreement [*Matthews v. Lopus (1914) 24 Cal. App. 63, 68, 140 P. 306* (money wagered upon outcome of wrestling contest was deposited with a stakeholder)], no recovery is granted.

[3] Demurrer Available

A complaint to recover property by one who has committed a public offense is subject to demurrer [*Schenck v. Hirshfeld (1913) 22 Cal. App. 709, 711, 136 P. 725* (money wagered on outcome of election)] on the grounds that the plaintiff is unable to state a cause of action because he or she is in pari delicto with the defendant [*Bradley v. Doherty (1973) 30 Cal. App. 3d 991, 998, 106 Cal. Rptr. 725 , cert. denied, 414 U.S. 878* (demurrer was properly sustained without leave to amend when plaintiff sought to recover money lost in betting with defendant on outcome of pinball games which defendant had rigged)].

[4] Effect of Fraud or Deceit

The general rule which denying recovery to a party seeking to recover stakes or winnings under a wagering contract that violates the law is applied even if the winner wins the gambling game by fraud or deceit [*Bradley v. Doherty (1973) 30 Cal. App. 3d 991, 994, 106 Cal. Rptr. 725 , cert. denied, 414 U.S. 878]* . Similarly, a party is not allowed to recover gambling losses sustained as a result of voluntary participation in a gambling game prohibited by statute, even if the other party may have resorted to fraud to win [*Wallace v. Opinham (1946) 73 Cal. App. 2d 25, 25-26, 29-30, 165 P.2d 709* (in game of "twenty-one" which was prohibited by statute, winner may have resorted to fraud by furnishing marked deck of cards)], because to prove the alleged fraud by means of which the losses were incurred, evidence of the loser's own participation in the unlawful gambling game is required, thereby placing the loser in pari delicto with the winner [*see Wallace v. Opinham (1946) 73 Cal. App. 2d 25, 26, 165 P.2d 709]* . Public policy reasons preclude the courts from distinguishing between degrees of turpitude of parties engaged in unlawful transactions [*Bradley v. Doherty (1973) 30 Cal. App. 3d 991, 995, 106 Cal. Rptr. 725* , cert. denied, *414 U.S. 878, 94 S. Ct. 70, 38 L. Ed. 2d 123]* .

[5] Effect of Withdrawal From Gambling Contract

A gambling contract that is opposed to good morals and public policy is not recognized by the courts [*Matthews v. Lopus (1914) 24 Cal. App. 63, 66, 140 P. 306]* . However, a party to the contract may disaffirm the contract prior to the execution of the transaction to which the contract relates [*Matthews v. Lopus (1914) 24 Cal. App. 63, 66, 140 P. 306]* and then later be restored judicially to the status quo by having his or her money returned [*Matthews v. Lopus (1914) 24 Cal. App. 63, 66, 140 P. 306]* . Relief is granted by a court on the ground that one who repents of an act frowned upon by law will be furnished aid in withdrawing consideration ventured [*Schenck v. Hirshfeld (1913) 22 Cal. App. 709, 710, 136 P. 725]* . Withdrawal of the money wagered may be made and enforced only up to the time of the happening of the event on which the wager is conditioned and only when the wagering agreement is not in violation of a criminal statute [*Schenck v. Hirshfeld (1913) 22 Cal. App. 709, 711, 136 P. 725]* . When a wager is a crime by statute, the transaction is void from the inception and not subject to disaffirmance or withdrawal [*Matthews v. Lopus (1914) 24 Cal. App. 63, 70, 140 P. 306* (wager on outcome of wrestling contest in violation of former Penal Code § 337a, now *Penal Code § 337a(6)*; *see Schenck v. Hirshfeld (1913) 22 Cal. App. 709, 711, 136 P. 725* (wager on outcome of election in violation of former Penal Code § 60)].

[6] Where Right to Recover Is Not Dependent on Gambling Contract

Although there may be some illegal features connected with a transaction involved in a suit, a party nevertheless is able to recover if a cause of action is otherwise legitimate and if a case can be made out without reliance on the illegality [*Cal-Neva Lodge, Inc. v. Marx (1960) 178 Cal. App. 2d 186, 189, 2 Cal. Rptr. 889]* . The test is whether or not the plaintiff can establish a case otherwise than through the medium of the illegal transaction to which the plaintiff is a party [*Cal-Neva Lodge, Inc. v. Marx (1960) 178 Cal. App. 2d 186, 189, 2 Cal. Rptr. 889]* . For example, when an agent's duty to pay a gambling casino arose not from an illegal gambling agreement or transaction but from a separate agreement of the agent to collect for and pay to the casino moneys owed it by other parties, the casino was able to recover from the agent [*Cal-Neva Lodge, Inc. v. Marx (1960) 178 Cal. App. 2d 186, 189, 2 Cal. Rptr. 889* (agent collected moneys owed casino by parties suffering gambling losses and agent failed to pay casino)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersContracts LawDefensesIllegal BargainsContracts LawDefensesPublic Policy ViolationsTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral Overview

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23-272 California Forms of Pleading and Practice--Annotated § 272.14

§ 272.14 No Enforcement of Gambling Debt

[1] By Licensed Gambling Establishment

[a] Money Used for Gambling

When a defendant gambler produces uncontradicted testimony that the money was obtained and used for gambling, plaintiff gambling house's mere proof that no restrictions were placed on the gambler's use of the money by the gambling house at the time the check was cashed is insufficient to support a finding of a nongambling purpose and use [*see Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 68, 71 Cal. Rptr. 817]* . Although the phrase "without restriction on its use" is often used by a gambling house seeking to justify recovery on a check cashed for a customer, the real issue is whether the check was cashed for the purpose of providing funds to gamble with the donor [*Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 68, 71 Cal. Rptr. 817* ; *Braverman v. Horn (1948) 88 Cal. App. 2d 379, 381, 198 P.2d 948]* . If a check is cashed for the purpose of providing funds with which to gamble, the gambling house operator has in fact participated in the illegal transaction [*see Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 71 Cal. Rptr. 817]* and is precluded from recovery.

[b] Burden of Proof

A party claiming that a person is guilty of a crime or wrongdoing has the burden of proof on that issue [*Evid. Code § 520*]; except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he or she is asserting [*Evid. Code § 500*]. Thus, when the issue of illegality of a gambling transaction is raised as an affirmative defense by way of the defendant-gambler's answer, the defendant has the burden of proving the illegality of the gambling transaction [*Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 67, 71 Cal. Rptr. 817* ; *see also Hamilton v. Abadjian (1947) 30 Cal. 2d 49, 53, 179 P.2d 804]* .

The principle that the courts will not aid parties to an illegal contract has been extended to cases involving licensed gambling establishments and their customers for whom checks are cashed for the purpose of gambling [*see Hamilton v. Abadjian (1947) 30 Cal. 2d 49, 52, 179 P.2d 804]* . Therefore, the owner of a gambling house who honors a check for the purpose of providing a prospective customer with funds with which to gamble, and who then participates in the

transaction thus promoted by the cashing of the check, is unable to recover on that check when it is subsequently dishonored by the gambler [*see Hamilton v. Abadjian (1947) 30 Cal. 2d 49, 52-53, 179 P.2d 804* (upholding Nevada gambling house recovery on checks determined to have been cashed and used by gambler for nongambling purposes; upholding disallowance of recovery on checks determined to have been cashed and used by gambler for gambling purposes); *Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 63, 71 Cal. Rptr. 817* (Nevada gambling house disallowed recovery on checks because of finding by appellate court that there was insufficient evidence to sustain trial court's finding that defendant gambler did not obtain and use money for gambling purposes); *see Lavick v. Nitzberg (1948) 83 Cal. App. 2d 381, 383, 188 P.2d 758* (checks given for chips in gambling house, to be used in poker game; checks held unenforceable, as contrary to good morals, under *Civ. Code § 1667*, regardless of whether particular form of gambling prohibited by statute or not); *Braverman v. Horn (1948) 88 Cal. App. 2d 379, 381, 198 P.2d 948* (checks given for chips or cash for use in house dice game)]. Whether a check is honored by a payment of cash or of chips, if the purpose is to enable the drawer gambler to use the proceeds in a gambling game conducted by the payor gambling house, the latter has no cause of action of the check [*Braverman v. Horn (1948) 88 Cal. App. 2d 379, 381, 198 P.2d 948]* . The underlying principle supporting nonrecovery by the gambling house is tat the check in the suit is a contract in payment of a gambling debt and as such is unenforceable under *Civ. Code § 1667* [*Braverman v. Horn (1948) 88 Cal. App. 2d 379, 381, 198 P.2d 948]* .

[c] Defense of Illegality

When a gambling house seeks to recover on a check cashed for its customer for the purpose of providing gambling funds, a gambler may defend against the action by raising the illegality of the gambling transaction [*see Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 63-64, 71 Cal. Rptr. 817]* . This affirmative defense is raised in the answer by alleging that [*see Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 63-64, 71 Cal. Rptr. 817]* :

- The check was cashed for the customer by the gambling house for the known purpose of gambling and

- The gambling house participated with the customer in the gambling transaction promoted by the check cashing.

[d] Presumptions

The Evidence Code abrogated the judicial doctrine that a presumption is evidence [*Evid. Code § 600(a)*; *see also Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 66, 71 Cal. Rptr. 817]* . The Code also abolished the statutory presumption of legality [*see* former Code Civ. Proc. § 1963(1); *see also Hamilton v. Abadjian (1947) 30 Cal. 2d 49, 52, 179 P.2d 804]* and supplanted it by a statutory rule placing on the party claiming illegality the burden of proof on that issue [*Evid. Code § 520*; *see also Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 66, 71 Cal. Rptr. 817]* . Therefore it is no longer possible, as it was in a pre-1967 case, for a jury to weigh a presumption of regularity or legality of a check-cashing transaction, as asserted by a gambling house, against evidence offered by the defendant-gambler of the illegality of the transaction and to find in favor of the gambling house and against the gambler on the basis of the presumption only [*see Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 66, 71 Cal. Rptr. 817* ; *but see Hamilton v. Abadjian (1947) 30 Cal. 2d 49, 53, 179 P.2d 804* (pre-1967 case in which gambling house recovered on certain checks because presumption of legality of transaction was weighed as evidence by jury)].

[e] Sufficiency of Evidence to Rebut Defense of Illegality

A plaintiff gambling house embarks on a trial without benefit of presumptions as evidence [*Evid. Code § 600(a)*] and without benefit of a presumption of legality of the transaction [*Evid. Code § 520*]. Mere evidence that a gambling house had placed no restriction on a customer's use of money and that nongambling objectives were available if the customer chose to spend money on them is insufficient to rebut the defense of illegality [*see Lane & Pyron, Inc. v. Gibbs (1968)*

266 Cal. App. 2d 61, 68, 71 Cal. Rptr. 817] . The only inferences available from the uncontradicted evidence are of the customer's gambling purpose in cashing the checks and the mutual participation of the payees and maker in gambling with the proceeds [*Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 68, 71 Cal. Rptr. 817]* .

[2] By Party to Contract With Notice

The fact that money is borrowed for gambling purposes does not prevent recovery of the money by the lender if he or she was without knowledge of the purpose of the loan [*see* *Leite v. Dietz (1949) 95 Cal. App. 2d 41, 42, 212 P.2d 265]* . Thus, when the payee of a promissory note delivers money to the maker without knowledge of the purpose for which the maker intends to spend the proceeds, the payee's recovery on the note cannot be defeated by proof that the maker thereafter used the proceeds for an unlawful purpose [*Leite v. Dietz (1949) 95 Cal. App. 2d 41, 43* P.2d265]. This rule applies only in a case in which the lender is without knowledge of the illegal purpose of the loan and may not therefore be treated as a party to the gambling transaction [*Leite v. Dietz (1949) 95 Cal. App. 2d 41, 43, 212 P.2d 265]* . On the other hand, if a lender advances money to a borrower with the understanding that it is to be used in gambling, he or she cannot recover the money thus advanced [*see* *Leite v. Dietz (1949) 95 Cal. App. 2d 41, 43, 212 P.2d 265* (payee unable to recover on promissory note when inference was that she knew money was borrowed for the purpose of paying gambling debt)]. When money is loaned by one player to another while both are participating in a gambling game for the sole and known purpose of enabling the other player to continue the game, the lender is unable to recover on the subsequently unpaid check [*see* *Rose v. Nelson (1947) 79 Cal. App. 2d 751, 751-752, 180 P.2d 749* (check which was issued to cover I.O.U.'s given during poker game was returned from bank unpaid); *but see* *Corbin v. Wachhorst (1887) 73 Cal. 411, 413, 15 P. 22* (payee of promissory note able to recover on note although payee participated in dice game and knew purpose for which money intended to be used when it did not appear payee won any of the money or that maker of note lost any of it in the dice throwing)].

[3] By Third Party With Notice

A third party is a person who was not an original party to the gambling transaction. Such a person may or may not have the rights of a holder in due course. For example, even if the consideration for a promissory note is won at gambling, the note is valid in the hands of an innocent indorsee unless it is declared void by statute [*see* *Haight v. Joyce (1852) 2 Cal. 64, 66-67* (original debt not incurred in gambling house; innocent indorsee, by definition, as without notice of gambling transaction)]. And the presumption of consideration attending negotiable instruments (*see* former Civ. Code § 3105 and former Code Civ. Proc. § 1963(21)) has been replaced by a rule declaring that the defendant's admitted signature entitles the holder to recover unless the defendant establishes a defense [*Com. Code § 3308(b)*; *Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 67, 71 Cal. Rptr. 817]* . If the defendant proves a defense or claim in recoupment, the plaintiff's right to payment is subject to the defense or claim, except to the extent that the plaintiff proves that the plaintiff has rights of a holder in due course that are not subject to the defense or claim [*Com. Code § 3308(b)*].

However, if the third party had notice at the time he or she received checks that they were given in payment of a gambling debt, then he or she was not a holder in due course because the consideration for the instruments was illegal and the title of the person negotiating them was defective [former Civ. Code § 3136, now *Com. Code § 3305(a)(1)(B)* (illegality of transaction); *see* *Union Collection Co. v. Buckman (1907) 150 Cal. 159, 161-162, 88 P. 708* ; *Sasner v. Ornsten (1949) 93 Cal. App. 2d 467, 471, 209 P.2d 44* ; *see also Com. Code § 3302(a)(2)(F)* (to be holder in due course one must take without notice of defense or claim described in *Com. Code § 3305(a)*)].

Notice of a defense or claim in recoupment as to a negotiable instrument such as to deprive a third party transferee of the status of holder in due course and preclude his or her recovery requires either actual knowledge of the defect or knowledge of facts, circumstances or suspicions so cogent and obvious that the party's action in passively taking the instrument amounts to bad faith [former Civ. Code § 3137, now *Com. Code §§ 1202(a), 3302(a)(2)(F)*; *Sasner v. Ornsten (1949) 93 Cal. App. 2d 467, 471, 209 P.2d 44* (denial of recovery on three checks brought by third party holder

against maker on ground that holder at time checks were delivered to him by payee had knowledge of fact that they were given in payment of gambling debts); *but see Com. Code § 1202(a)*, which defines "notice" as actual knowledge or notice of the existence of facts and circumstances known at the time that gives reason to know that the fact exists].

For a further discussion of negotiable instruments or commercial paper and for forms for use in actions on promissory notes and checks, see Ch. 385, *Negotiable Instruments* .

[4] Exception for Enforcement of Properly Rendered Foreign Judgment

A gambling debt that is incurred in another jurisdiction in which gambling is legal may be enforceable in California if the plaintiff obtains a judgment on the debt in the foreign jurisdiction and files a complaint in California for enforcement of that judgment. In recent years, California has expanded its acceptance of gambling, as manifested by the introduction of the California lottery and other innovations. Thus, enforcement of a foreign judgment for a gambling debt incurred in a jurisdiction in which gambling is legal is not so antagonistic to California public policy interests as to preclude the extension of comity [*Crockford's Club, Ltd. v. Si-Ahmed (1988) 203 Cal. App. 3d 1402, 1406, 250 Cal. Rptr. 728]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsContracts LawDefensesIllegal BargainsContracts LawDefensesPublic Policy ViolationsContracts LawNegotiable InstrumentsEnforcementDefensesIllegalityEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

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§ 272.15 Spouse's Statutory Right to Recover Community Property Transferred in Discharge of Gambling Debt

Fam. Code § 1100(b) provides that a spouse may not make a gift of community personal property or dispose of community personal property for less than fair and reasonable value, without the written consent of the other spouse. Because an obligation arising from a gambling debt is unenforceable as a result of the unlawfulness of the transaction out of which the debt arose, a transfer of funds in discharge of such a debt is without consideration [*Novo v. Hotel Del Rio (1956) 141 Cal. App. 2d 304, 307, 295 P.2d 576]* .

Thus, one spouse's transfer of community funds to the winner of a gambling game is a transfer of those funds without the other spouse's consent and without receipt by the transferor spouse of valuable consideration [*see Novo v. Hotel Del Rio (1956) 141 Cal. App. 2d 304, 307, 295 P.2d 576* (decided under former Civ. Code § 172)]. Such a transfer may be set aside in its entirety by the nontransferring spouse during the transferor spouse's lifetime, and may be set aside with regard to one half the amount transferred after the transferor spouse's death [*Novo v. Hotel Del Rio (1956) 141 Cal. App. 2d 304, 308, 295 P.2d 576]* . For a form for a complaint to seek recovery of community funds, see *§ 272.50*.

Further, a nontransferring spouse's action to recover these community funds may not be barred on the theory that the transferor spouse benefited indirectly by the other spouse's recovery and was, therefore, unjustly enriched [*Novo v. Hotel Del Rio (1956) 141 Cal. App. 2d 304, 307-308, 295 P.2d 576]* . In fact, such an action would only return to the community that which was unlawfully taken from it and would merely place the parties in the positions they occupied prior to the transaction [*Novo v. Hotel Del Rio (1956) 141 Cal. App. 2d 304, 307-308, 295 P.2d 576]* .

Fam. Code § 1101 provides one spouse with a statutory claim against the other spouse for any breach of fiduciary duty that results in substantial impairment to the claimant spouse's present undivided one-half interest in the community estate [*Fam. Code § 1101(a)*]. The breach is actionable merely on *impairment* of the claimant's interest; a *substantial impairment* is not required [*Fam. Code § 1101(a)*]. It appears that a claim against a spouse could be made under this provision for a transfer of community funds for gambling purposes in violation of *Fam. Code § 1100(b)* [*see Fam. Code § 1101(a)*]. For detailed discussion of remedies under this section, see Ch. 122, *Community Property* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesIllegal BargainsContracts LawDefensesPublic Policy ViolationsContracts LawNegotiable InstrumentsEnforcementDefensesIllegalityFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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[Reserved]

§§ 272.16[Reserved]

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23-272 California Forms of Pleading and Practice--Annotated § 272.30

§ 272.30 Federal Constitution

Privileges and immunities, due process, and *equal protection clauses. U.S. Const., amend. XIV, § 1*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawEqual ProtectionScope of ProtectionConstitutional LawPrivileges & Immunities

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§ 272.31 State Constitution

Due process of law; privileges and immunities. *Cal. Const., art. I, § 7*

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§ 272.32 State Statutes

[1] Bucket Shop Law

Bucket Shop Law. *Corp. Code § 29000 et seq.*

Contract for purchase or sale of capital stock without intention to receive or deliver is void and unenforceable. *Corp. Code § 29104*

[2] Community Property

Interests of husband and wife in community property during marriage relation are present, existing, and equal. *Fam. Code § 751*

Community property defined. *Fam. Code § 760*

Transfer of community personalty for less than fair and reasonable value, without written consent of spouse. *Fam. Code § 1100(b)*

Claim against spouse for any breach of fiduciary duty resulting in impairment to claimant's undivided half interest in community estate. *Fam. Code § 1101*

[3] Evidence

Burden of proof. *Evid. Code §§ 500, 520*

Presumption does not constitute evidence. *Evid. Code § 600(a)*

[4] Gaming

Gambling Control Act. *Bus. & Prof. Code § 19800 et seq.*

Gaming defined; punishment. *Penal Code § 330*

Lotteries. *Penal Code § 319 et seq.*

Private, nonprofit, eligible organizations may operate raffles to provide funding for beneficial and charitable works. *Penal Code § 320.5*

Gaming, in general. *Penal Code § 330 et seq.*

[5] Holder in Due Course

Circumstances under which notice of defense or claim exists against purchaser of instrument. *Com. Code §§ 3302-3305, 3307*

[6] Horse Racing

Horse racing regulations. *Bus. & Prof. Code § 19400 et seq.*; *Penal Code § 337.1 et seq.*

Notice defined. *Com. Code § 1202(a)*

[7] Unlawful Contracts

Object of contract defined. *Civ. Code § 1595*

Object required to be lawful. *Civ. Code § 1596*

Partial illegality. *Civ. Code § 1598*

Contract with several objects. *Civ. Code § 1599*

Unlawful contracts defined. *Civ. Code § 1667 et seq.*

Contract is unlawful if in violation of law, public policy, or morals. *Civ. Code § 1667*

Rescission of unlawful contracts. *Civ. Code § 1689(b)(5), (6)*

Rescission of illegal contract. *Civ. Code § 1689(b)(5)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesIllegal BargainsContracts LawDefensesPublic Policy ViolationsContracts LawNegotiable InstrumentsEnforcementDefensesIllegalityContracts LawRemediesRescission & RedhibitionGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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§ 272.33 Decisions

[1] Bingo

Pen. Code § 326.5(b) does not prohibit nonprofit organization from using bingo proceeds to pay attorney fees associated with the bingo operation. *Arden Carmichael, Inc. v. County of Sacramento (2000) 79 Cal. App. 4th 1070, 1078, 94 Cal. Rptr. 2d 673*

Under *Cal. Const., art. IV, § 19*, decision whether to allow bingo is left to local government entities and thus is local concern; local government may allow one type of bingo as defined in *Penal Code § 326.5* while prohibiting other type. *Lubavitch Congregation v. City of Long Beach (1990) 217 Cal. App. 3d 1388, 1394, 266 Cal. Rptr. 513*

[2] Definitions

Mere use of electronic vending machines to dispense lottery tickets does not transform lawful sale of tickets into unlawful use of slot machines, when machines inject no additional element of chance into determination or distribution of winning lottery ticket. *Trinkle v. California State Lottery (2003) 105 Cal. App. 4th 1401, 1405, 129 Cal. Rptr. 2d 904*

Telephone card vending machines that also had "sweepstakes" feature was slot machine under *Penal Code § 330b*; by inserting money and purely by chance (without any skill whatsoever), user could receive or become entitled to receive money. *Lockyer v. Pacific Gaming Technologies (2000) 82 Cal. App. 4th 699, 703, 98 Cal. Rptr. 2d 400*

Finding that "Match 5" jukeboxes constitute illegal slot machines and "flipperless" pinball machines constitute illegal gambling devices upheld; argument that definitions of prohibited slot machines under *Penal Code §§ 330b* and *330.1* are unconstitutionally vague rejected; exemption for "antiques" under *Penal Code § 330.7* held inapplicable. *Trinkle v. Stroh (1997) 60 Cal. App. 4th 771, 779, 784, 70 Cal. Rptr. 2d 661*

California State Lottery Keno does not meet statutory definition of "lottery game" under *Gov. Code § 8880.12* or

"lottery" under *Pen. Code § 319*; it is house-banked game in which participants bet individually against game's operator, the *California State Lottery. Western Telcon, Inc. v. California (1996) 13 Cal. 4th 475, 479, 53 Cal. Rptr. 2d 812, 917 P. 2d 651*

Term "percentage game" in *Penal Code § 330* is not unconstitutionally vague, but encompasses any game of chance from which house collects money calculated as portion of wagers made or sums won in play, exclusive of charges or fees for use of space and facilities; "rental fee" based on percentage of wagers renders game illegal percentage game. *Huntington Park Club Corp. v. County of Los Angeles (1988) 206 Cal. App. 3d 241, 248, 249, 253 Cal. Rptr. 408* (pai gow); *Sullivan v. Fox (1987) 189 Cal. App. 3d 673, 679, 235 Cal. Rptr. 5*

"Banking game" within meaning of *Penal Code § 330* is game in which "house" or "bank" is participant, taking all comers, paying all winners, and collecting from all losers. *Huntington Park Club Corp. v. County of Los Angeles (1988) 206 Cal. App. 3d 241, 250, 253 Cal. Rptr. 408* (pai gow); *Sullivan v. Fox (1987) 189 Cal. App. 3d 673, 678, 235 Cal. Rptr. 5*

Gaming statute is required to give adequate warning of nature of conduct that is illegal; gaming statute advising person of common and ordinary intelligence what games are prohibited and what games are permitted as sufficient. *Walker v. Meehan (1987) 194 Cal. App. 3d 1290, 1302, 240 Cal. Rptr. 171*

Judicial definition of "percentage game" used in *Penal Code § 330* is any game in which house collects money calculated as portion of wagers made or sums won in play. *Walker v. Meehan (1987) 194 Cal. App. 3d 1290, 1296-1297, 240 Cal. Rptr. 171*

"Wagering" for purpose of prohibition against pari-mutuel employee wagering on results of race while on duty [see *4 Cal. Code Reg § 1969*] includes placing bet for another as well as betting for employee's own account. *Overturf v. California Horse Racing Bd. (1978) 86 Cal. App. 3d 979, 984, 150 Cal. Rptr. 657*

Gaming is synonymous with gambling and taking form of bet or wager involving gain and loss, between known participants, of money or property staked upon happening in future of event at time uncertain. *Brown v. Board of Police Comm'rs (1943) 58 Cal. App. 2d 473, 477, 136 P.2d 617*

Distinction between wager or bet and premium or reward. *Brown v. Board of Police Comm'rs (1943) 58 Cal. App. 2d 473, 477, 136 P.2d 617*

[3] Doctrine of In Pari Delicto

[a] Applied to Gambling

Gambling activity classified as an unlawful and forbidden enterprise to which doctrine of in pari delicto applies. *Bradley v. Doherty (1973) 30 Cal. App. 3d 991, 997, 106 Cal. Rptr. 725 , cert. denied, 414 U.S. 878* (betting on outcome of pinball games)

General rule that court will not recognize an illegal betting contract and will not aid parties thereto, but will leave them where it finds them as denying relief to parties seeking to recover either their stakes or their winnings under wagering contract that violates the law. *Bradley v. Doherty (1973) 30 Cal. App. 3d 991, 994, 106 Cal. Rptr. 725 , cert. denied*

Constitutionality of applying doctrine of in pari delicto to bar action to recover money lost in fixed gambling by compulsive gambler. *Bradley v. Doherty (1973) 30 Cal. App. 3d 991, 993-998, 106 Cal. Rptr. 725*

Courts deny relief to parties seeking to recover either stakes or winnings under wagering contract that is in violation of law. *Kyne v. Kyne (1940) 16 Cal. 2d 436, 438, 106 P.2d 620*

California cases are uniform in holding that when money or property is lost in transaction between parties that is prohibited by law, neither party has standing in court of law or equity to recover losses. *Wallace v. Opinham (1946) 73 Cal. App. 2d 25, 28, 165 P.2d 709*

Plaintiff is barred from recovering money seized by peace officers in gambling raid because claim based on illegal transaction and court would not aid persons who had committed crime to recover property used in perpetration of unlawful act. *Lee On v. Long (1951) 37 Cal. 2d 499, 502-503, 234 P.2d 9 , cert. denied, 342 U.S. 947*

Doctrine of in pari delicto is constitutionally applied to prohibit recovery of money lost by compulsive gambler. *Bradley v. Doherty (1973) 30 Cal. App. 3d 991, 997-998, 106 Cal. Rptr. 725 , cert. denied, 414 U.S. 878*

[b] Applied to Stakeholder

Plaintiff-bettor and defendant-stakeholder stand in pari delicto in execution of criminal and illegal agreement. *Matthews v. Lopus (1914) 24 Cal. App. 63, 68, 140 P. 306*

Recovery denied whether party against whom relief sought was party to wager or stakeholder for parties to wager. *Kyne v. Kyne (1940) 16 Cal. 2d 436, 438, 106 P.2d 620*

[c] Demurrer Available

Complaint to recover property by one who committed a public offense is subject to demurrer. *Schenck v. Hirshfeld (1913) 22 Cal. App. 709, 711, 136 P. 725* (money wagered on outcome of election)

Demurrer without leave to amend is correctly sustained by court when, because of necessary application of doctrine of in pari delicto, appellant cannot state a cause of action. *Bradley v. Doherty (1973) 30 Cal. App. 3d 991, 998, 106 Cal. Rptr. 725 , cert. denied, 414 U.S. 878* (betting on outcome of various games, including pinball games)

[d] Fraud or Deceit

Rule denying recovery to parties seeking to recover stakes or winnings under wagering contract which violates law is applied even though winner wins gambling by fraud or deceit. *Bradley v. Doherty (1973) 30 Cal. App. 3d 991, 994, 106 Cal. Rptr. 725 , cert. denied, 414 U.S. 878*

Plaintiff is disallowed to recover gambling losses sustained as result of voluntary participation in card game prohibited by statute, even though defendant may have resorted to fraud by furnishing marked deck of cards. *Wallace v. Opinham (1946) 73 Cal. App. 2d 25, 25-26, 29-30, 165 P.2d 709*

Plaintiff is unable to recover gambling losses when unable to prove alleged fraud by means of which losses were incurred without evidence of plaintiff's own participation in unlawful card game; parties as in pari delicto. *Wallace v. Opinham (1946) 73 Cal. App. 2d 25, 26, 165 P.2d 709*

Courts are not arbiters of incidental acts of participant in gambling games prohibited by law; public policy precludes courts from distinguishing between degrees of turpitude of parties engaged in outlawed transactions. *Bradley v. Doherty (1973) 30 Cal. App. 3d 991, 995, 106 Cal. Rptr. 725 , cert. denied, 414 U.S. 878*

[e] Right to Recover Not Dependent on Gambling Contract

Although suit may involve transaction with some illegal features, plaintiff is able to recover if cause of action is otherwise legitimate and if case can be made out without aid of illegality. *Cal-Neva Lodge, Inc. v. Marx (1960) 178 Cal. App. 2d 186, 189, 2 Cal. Rptr. 889*

Test of application is whether plaintiff can establish case otherwise than through medium of illegal transaction to which plaintiff is a party. *Cal-Neva Lodge, Inc. v. Marx (1960) 178 Cal. App. 2d 186, 189, 2 Cal. Rptr. 889*

Defendant-agent's duty to pay corporate plaintiff arises not from illegal agreement or transaction, but from separate agreement of agent to collect for and pay to principal the money owed. *Cal-Neva Lodge, Inc. v. Marx (1960) 178 Cal. App. 2d 186, 189, 2 Cal. Rptr. 889* (agent collected moneys owed by parties suffering gambling losses and agent failed to pay casino)

[f] Withdrawal From Gambling Contract

Gambling contracts opposed to good morals and public policy are not recognized by courts; however, person is able to disaffirm such a contract and be restored to status quo prior to execution of transaction to which contract relates. *Matthews v. Lopus (1914) 24 Cal. App. 63, 66, 140 P. 306*

Party who disaffirms or withdraws from contract involving wager before event occurs ordinarily is entitled to return of money. *Matthews v. Lopus (1914) 24 Cal. App. 63, 66, 140 P. 306*

Relief granted on ground that one who repents of act frowned upon by law will be furnished aid in withdrawing consideration ventured. *Schenck v. Hirshfeld (1913) 22 Cal. App. 709, 710, 136 P. 725*

Court will not lend aid to enable persons who have committed a public offense to recover property used in its perpetration. *Schenck v. Hirshfeld (1913) 22 Cal. App. 709, 711, 136 P. 725*

Transaction void from inception when wager is a crime by statute; not subject to disaffirmance or withdrawal. *Matthews v. Lopus (1914) 24 Cal. App. 63, 70, 140 P. 306* (wager on outcome of wrestling contest in violation of former Penal Code § 337a, now *Penal Code § 337a(6)*)

When wager agreement is not in violation of criminal statute, withdrawal of money may be made and enforced only up to time of happening of event upon which wager conditioned. *Schenck v. Hirshfeld (1913) 22 Cal. App. 709, 711, 136 P. 725* (wager on outcome of election in violation of former Penal Code § 60)

When wager agreement is not in violation of criminal statute, party to wager is able to withdraw money from contest before occurrence of event upon which wager was conditioned; but if wager is a penal offense, money is not recoverable at any time from stakeholder. *Schenck v. Hirshfeld (1913) 22 Cal. App. 709-711, 22 Cal. App. 709, 711, 136 P. 725*

If wager is a crime by statute, party thereto is unable to recover money from stakeholder although transaction was not completed and although party repudiated transaction and demanded return of money. *Matthews v. Lopus (1914) 24 Cal. App. 63, 67-68, 140 P. 306*

[4] Gambling Contracts Are Illegal

[a] Illegality of Contract Is a Defense

Agreement for bet or wager is one in which promisor agrees to perform on happening of a condition, and for which performance he or she receives no agreed exchange. *Kyne v. Kyne (1940) 16 Cal. 2d 436, 438, 106 P.2d 620* ; *Matthews v. Lopus (1914) 24 Cal. App. 63, 66, 140 P. 306* ; *Schenck v. Hirshfeld (1913) 22 Cal. App. 709, 710, 136 P. 725*

Wagering agreements in violation of express provision of law are illegal contracts. *Kyne v. Kyne (1940) 16 Cal. 2d 436, 438-439, 106 P.2d 620* ; *Matthews v. Lopus (1914) 24 Cal. App. 63, 67, 140 P. 306*

Defense of illegality as open to parties to illegal contract and those claiming under them. *Kyne v. Kyne (1940) 16 Cal. 2d 436, 439, 106 P.2d 620*

Court does not recognize illegal contracts and will not aid parties thereto, but will leave them where it finds them. *Kyne v. Kyne (1940) 16 Cal. 2d 436, 438, 106 P.2d 620*

Full opportunity to present defense that game is not gambling is essential element of due process. *Bank of America v. Long Beach (1975) 50 Cal. App. 3d 882, 886, 124 Cal. Rptr. 256*

[b] Contrary to Express Provision of Law

Contract contrary to express provision of law is void from inception. *Matthews v. Lopus (1914) 24 Cal. App. 63, 67, 140 P. 306*

Wagering contract concerning outcome of wrestling match in violation of *Penal Code § 337a*, now *Penal Code § 337a(6)*, is illegal. *Matthews v. Lopus (1914) 24 Cal. App. 63, 66, 140 P. 306*

Wagering agreement concerning outcome of election is illegal contract under *Penal Code §§ 337a, 659*, and former Elec. Code § 11504. *Kyne v. Kyne (1940) 16 Cal. 2d 436, 438-439, 106 P.2d 620*

Courts will not recognize illegal contracts or aid parties thereto, but leaves them where it finds them. *Kyne v. Kyne (1940) 16 Cal. 2d 436, 438, 106 P.2d 620*

[c] Contrary to Public Policy or Good Morals

Gambling is contrary to public policy or good morals and hence unlawful under provisions of *Civ. Code § 1667*. *Union Collection Co. v. Buckman (1907) 150 Cal. 159, 161, 88 P. 708* ; *Braverman v. Horn (1948) 88 Cal. App. 2d 379, 381, 198 P.2d 948* ; *Lavick v. Nitzberg (1948) 83 Cal. App. 2d 381, 382, 188 P.2d 758*

Civ. Code § 1667 establishes law that contract founded upon a gambling consideration is unenforceable. *Lavick v. Nitzberg (1948) 83 Cal. App. 2d 381, 382, 188 P.2d 758*

Contracts of wager, or betting, are generally void in contravention of policy of law. *Schenck v. Hirshfeld (1913) 22 Cal. App. 709, 710, 136 P. 725*

Check or promissory note given in gambling house to owner of house for purpose of enabling maker to participate in game of chance with owner or employees are unenforceable under provisions of *Civ. Code § 1667*. *Lavick v. Nitzberg (1948) 83 Cal. App. 2d 381, 383, 188 P.2d 758* (owner unable to recover when defendant purchased chips for poker game with checks, lost chips, and stopped payment on checks)

Check in payment of gambling debt is contract that is contra bonos mores and unenforceable under *Civ. Code § 1667*. *Braverman v. Horn (1948) 88 Cal. App. 2d 379, 381, 198 P.2d 948*

[d] Raising Issue of Illegality

Pleading illegality of contract as defense. *Cain v. Burns (1955) 131 Cal. App. 2d 439, 442, 280 P.2d 888*

Illegality of contract not appearing from face of complaint is matter of affirmative defense to be specially pleaded; burden of proof of illegality is on defendant. *Hamilton v. Abadjian (1947) 30 Cal. 2d 49, 53, 179 P.2d 804* ; *Eaton v. Brock (1954) 124 Cal. App. 2d 10, 13, 268 P.2d 58*

Court as required to consider issue of illegality of contract if facts of case present issue, whether pleaded or not. *Clejan v. Reisman (1970) 5 Cal. App. 3d 224, 238, 84 Cal. Rptr. 897*

When evidence shows that plaintiff seeks to enforce illegal contract, court has both power and duty to ascertain true facts in order to avoid unwittingly lending assistance to encouragement of what public policy forbids. *Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 147-148, 308 P.2d 713*

Parties not raising issue of illegality at trial is immaterial. *Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 148, 308 P.2d 713* ; *Griffis v. Squire (1968) 267 Cal. App. 2d 461, 465-466, 73 Cal. Rptr. 154*

Question of illegality of agreement is considered for first time on appeal. *Griffis v. Squire (1968) 267 Cal. App. 2d 461, 465-466, 73 Cal. Rptr. 154*

Circumstances under which defendant disallowed to raise defense of illegality of contract for first time on appeal. *Prudential Ins. Co. v. Fromberg (1966) 240 Cal. App. 2d 185, 190, 49 Cal. Rptr. 475*

[5] Gambling Debt Owed to Licensed Gambling Establishment

[a] Burden of Proof

When issue of illegality of gambling transaction is raised by defendant-maker's answer in assignee's action for collection of gambling-tinged checks, defendant has burden of proof of illegality. *Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 67, 71 Cal. Rptr. 817* ; *Hamilton v. Abadjian (1947) 30 Cal. 2d 49, 53, 179 P.2d 804*

[b] Defense of Illegality

Owner of gambling house who honors check for purpose of providing prospective customer with funds with which to gamble and who then participates in transaction thus promoted by his or her act is unable to recover on check. *Hamilton v. Abadjian (1947) 30 Cal. 2d 49, 52, 179 P.2d 804* ; *Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 63, 71 Cal. Rptr. 817* ; *Braverman v. Horn (1948) 88 Cal. App. 2d 379, 381, 198 P.2d 948* ; *Lavick v. Nitzberg (1948) 83 Cal. App. 2d 381, 383, 188 P.2d 758*

Defense of illegality underlying gambling transaction is raised by answer alleging checks cashed for known purpose of gambling and that gambling casino participated with customer in gambling transaction promoted by check cashing. *Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 63-64, 71 Cal. Rptr. 817*

Gambling house's mere proof that no restriction placed on gambler's use of money at time check cashed is insufficient

to support finding of nongambling purpose and use. *Lane & Pyron, Inc. Gibbs (1968) 266 Cal. App. 2d 61, 68, 71 Cal. Rptr. 817*

In action by gambling house to recover on check cashed for customer, issue is whether check was cashed for purpose of providing funds to gamble with donor. *Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 68, 71 Cal. Rptr. 817* ; *Braverman v. Horn (1948) 88 Cal. App. 2d 379, 381, 198 P.2d 948*

When check is cashed for purpose of providing funds to gamble, gambling house operator has participated in illegal transaction. *Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 68, 71 Cal. Rptr. 817*

Gambling house has no cause of action on checks cashed for customer, whether cashed for cash or chips, when purpose is to enable gambler to use proceeds in gambling game conducted by payor gambling house. *Braverman v. Horn (1948) 88 Cal. App. 2d 379, 381, 198 P.2d 948*

Principle supporting nonrecovery by gambling house is that check in suit is contract in payment of gambling debt and as such contra bonos mores and unenforceable under *Civ. Code § 1667*. *Braverman v. Horn (1948) 88 Cal. App. 2d 379, 381, 198 P.2d 948*

[c] Presumptions

Civ. Code § 1614 creates presumption affecting burden of producing evidence and not burden of proof; once evidence is admitted sufficient to call existence of consideration into question, proponent of written instrument retains burden of proving consideration. *Rancho Santa Fe Pharmacy, Inc. v. Seyfert (1990) 219 Cal. App. 3d 875, 884, 883, 268 Cal. Rptr. 505*

Plaintiff is entitled to rely on presumption that there was sufficient consideration for checks, that transaction was legal, and that it was not contrary to public policy. *Hamilton v. Abadjian (1947) 30 Cal. 2d 49, 52, 179 P.2d 804* (hotel's assignee recovered in part on action brought to enforce payment on checks cashed for guest by hotel, in whose casino gambling occurred; case decided prior to enactment of *Evid. Code §§ 520, 600(a)*)

If transaction is fair and regular on face, burden of proof of unlawful purpose is person asserting illegality. *Hamilton v. Abadjian (1947) 30 Cal. 2d 49, 53, 179 P.2d 804*

Weighing of presumption of legality against evidence of illegal purpose is no longer possible as Evidence Code adopted in 1967 abolished statutory presumption of legality (former Code Civ. Proc. § 1963(1)) and abrogated judicial doctrine that a presumption is evidence (*Evid. Code § 600(a)*). *Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 66, 71 Cal. Rptr. 817*

Presumption of legality (former Code Civ. Proc. § 1963(1)) has been supplanted by statutory rule placing upon party claiming illegality the burden or proof on that issue (*Evid. Code § 520*). *Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 66, 71 Cal. Rptr. 817*

Presumption of fairness and regularity (former Code Civ. Proc. § 1963(19)) has been replaced by statutory maxim cautioning that private transactions are (usually) fair and regular (*Civ. Code § 3545*). *Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 66, 71 Cal. Rptr. 817*

Presumption of consideration attending negotiable instruments (former Code Civ. Proc. § 1963(21); *Civ. Code § 3105*) has been replaced by rule declaring defendant's admitted signature entitles holder to recover unless defendant establishes defense (*Com. Code § 3308(b)*). *Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 66-67, 71 Cal.*

Rptr. 817

[d] Rebutting Defense of Illegality

Whether defendant met burden of proof of illegality is question for trier of fact; question is whether substantial evidence exists to support its conclusion. *Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 67, 71 Cal. Rptr. 817*

Plaintiff's evidence that two gambling houses placed no restriction on customer's use of money and that nongambling objectives were available if customer chose to spend money on them is insufficient to rebut the defense of illegality. *Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 68, 71 Cal. Rptr. 817*

Only inferences available from uncontradicted evidence is customer's gambling purpose in cashing checks and mutual participation of payees and maker in gambling with proceeds. *Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 68, 71 Cal. Rptr. 817*

Although phrase "without restriction on its use" is often used, real issue is whether check was cashed "for purpose of providing funds" to gamble with donor. *Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 68, 71 Cal. Rptr. 817*

[5A] Gambling Control Act

City's gaming control regulatory ordinance, which mirrored Gaming Control Act (GCA) [*Bus. & Prof. Code § 19800 et seq.*] in requiring key employees to provide personal information in order to be licensed, was not preempted by GCA; ordinance was not unconstitutional for violating employees' privacy, but city was required to notify employees before disclosing their personal information. *Gilbert v. City of San Jose (2003) 114 Cal. App. 4th 606, 616-617, 7 Cal. Rptr. 3d 692*

[6] Gambling Debt Owed to Private Party With Knowledge

When payee of promissory note delivers money to maker without knowledge of purpose for which maker intends to spend proceeds, payee's recovery on note is not defeated by proof that maker thereafter used proceeds for unlawful purpose; but rule applies only when lender is without knowledge of illegal purpose of loan and therefore is not to be treated as party to gambling transaction. *Leite v. Dietz (1949) 95 Cal. App. 2d 41, 43, 212 P.2d 265*

Promissory note is given without consideration when it is executed to pay gambling debt to bookmaker; inference that bookmaker's wife, payee of note who advanced in cash amount represented by note, was aware of husband's scheme to clear gambling debt by loan from her. *Leite v. Dietz (1949) 95 Cal. App. 2d 41, 42-43, 212 P.2d 265*

Money loaned by one player to another while both are participating in poker game for sole purpose of enabling other player to continue game is gambling debt that precludes recovery by lender. *Rose v. Nelson (1947) 79 Cal. App. 2d 751, 751-752, 180 P.2d 749*

Summary judgment for defendant is appropriate in action to recover on unpaid check when loans made by plaintiff to defendant were for sole purpose of enabling defendant to use proceeds in poker game in which both parties were participating. *Rose v. Nelson (1947) 79 Cal. App. 2d 751, 752, 180 P.2d 749*

Payee of promissory note, given for money loaned by him in good faith to be used in throwing dice, is able to maintain

an action on note against maker, although payee knew purpose for which money was intended to be used, when it does not appear that payee won any of the money, or that maker of note lost any of it, in the dice throwing. *Corbin v. Wachhorst (1887) 73 Cal. 411, 413, 15 P. 22*

[7] Gambling Debt Owed to Third Party With Notice

If consideration for promissory note is won at gambling, note is valid in hands of innocent endorsee unless declared void by statute. *Haight v. Joyce (1852) 2 Cal. 64, 66-67*

Presumption of consideration attending negotiable instruments (former Code Civ. Proc. § 1963(21) *Civ. Code § 3105*) has been replaced by rule declaring defendant's admitted signature entitles holder to recover unless defendant establishes defense (*Com. Code § 3308(b)*). *Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 67, 71 Cal. Rptr. 817*

Person taking check with notice that it was given in payment of gambling debt is not holder in due course, inasmuch as consideration for instrument is illegal and title of person negotiating it is defective (former Civ. Code § 3136, now *Com. Code §§ 3302(a)(2)(F), 3305(a)(1)(B).* *Sasner v. Ornsten (1949) 93 Cal. App. 2d 467, 471, 209 P.2d 44*

Notice of defect in title in negotiable instrument such as to deprive third party transferee of status of holder in due course and preclude recovery requires either actual knowledge of defect or knowledge of facts, circumstances or suspicions so cogent and obvious that party's action in passively taking instrument amounts to bad faith (former Civ. Code § 3137, now Com. Code §§ 1202(a), 3302(a)(2)(F), 3305(a)(1)(B). *Sasner v. Ornsten (1949) 93 Cal. App. 2d 467, 471, 209 P.2d 44*

When party gave checks to defendant in payment of gambling losses incurred in presence of third-party plaintiff, and defendant endorsed and negotiated checks to plaintiff to apply to preexisting indebtedness rather than depositing them to defendant's own account, plaintiff was unable to recover on checks as holder in due course. *Sasner v. Ornsten (1949) 93 Cal. App. 2d 467, 472, 209 P.2d 44*

Promissory notes given to evidence alleged gambling indebtedness are based upon immoral and illegal consideration and are unenforceable. *Union Collection Co. v. Buckman (1907) 150 Cal. 159, 161, 88 P. 708*

Assignee of holder of promissory notes given to evidence alleged gambling indebtedness as occupying no better position in suit than holder of note; when note was nonnegotiable, defenses available against holder of note were available against assignee. *Union Collection Co. v. Buckman (1907) 150 Cal. 159, 161-162, 88 P. 708*

Contract made in consideration of prior illegal one or in compromise of dispute arising from it is also illegal and unenforceable. *Union Collection Co. v. Buckman (1907) 150 Cal. 159, 166, 88 P. 708* (compromise of claim based on illegal gambling contract is unenforceable)

[8] Horse Racing

Gambler's expungement from bookmaking conviction did not automatically make him "rehabilitated" within meaning of Horse Racing Board rules permitting board to make exception authorizing convicted bookmakers to participate in parimutuel gambling in future; board has discretion to make such an exception, but is not required to do so. *Opdyk v. California Horse Racing Board (1995) 34 Cal. App. 4th 1826, 1830, 41 Cal. Rptr. 2d 263*

Purchasers of share in cancelled parimutuel (horse race) ticket have no cause of action against track, or against person who sold them shares in it, because any form of wagering or betting on result of horse race other than system permitted

by statute is illegal under *Bus. & Prof. Code § 19595*. *Szadolci v. Hollywood Park Operating Co. (1993) 14 Cal. App. 4th 16, 20-21, 17 Cal. Rptr. 2d 356* (causes of action pleaded were negligence, conspiracy, and negligent hiring)

Administrative Procedure Act is inapplicable to exclusion hearings under *Bus. & Prof. Code § 19573*. *Morrison v. California Horse Racing Bd. (1988) 205 Cal. App. 3d 211, 220, 252 Cal. Rptr. 293*

Because Horse Racing Board rules allow board to exclude licensed owners from entry to racetrack, owner's reliance on license as assurance of admittance to racetracks was unreasonable and insufficient to invoke equitable estoppel. *Morrison v. California Horse Racing Bd. (1988) 205 Cal. App. 3d 211, 217-218, 252 Cal. Rptr. 293*

Exclusion from racetrack of racehorse owner who had felony conviction for bank robbery and against whom there was evidence of off-premises conduct involving threats, intimidation, and illegal loan activities, was proper. *Morrison v. California Horse Racing Bd. (1988) 205 Cal. App. 3d 211, 220-221, 252 Cal. Rptr. 293*

Use of messenger service to purchase pari-mutuel tickets on bettor's behalf violates prohibition on off-track betting; prohibition on forwarding of money to be wagered on horse racing is within legitimate police power of state and not violative of *Equal Protection Clause*. *Advanced Delivery Service, Inc. v. Gates (1986) 183 Cal. App. 3d 967, 976-977, 228 Cal. Rptr. 557*

Pari-mutuel employees properly disciplined for "wagering" on results of race while on duty [*see 4 Cal. Code Reg. §§ 1950, 1969*] when employees placed bets for others, even though employees never wagered with their own money. *Overturf v. California Horse Racing Bd. (1978) 86 Cal. App. 3d 979, 983-986, 150 Cal. Rptr. 657*

Plaintiff, in order to be entitled to hearing before California Horse Racing Board, is required to assert in hearing request that he or she had been excluded from racetrack under a Board rule but that he or she was not a person covered by that rule. *Greenberg v. Hollywood Turf Club (1970) 7 Cal. App. 3d 968, 980, 86 Cal. Rptr. 885* (licensed stable agent employee not permitted to enter stable area)

Bus. & Prof. Code § 19572 authorizes state horse racing board to promulgate regulations excluding undesirable persons from racetracks; rules promulgated by board in exercise of that authority does not constitute an unconstitutional delegation of legislative power. *Epstein v. California Horse Racing Bd. (1963) 222 Cal. App. 2d 831, 834-835, 35 Cal. Rptr. 642*

In absence of statute, no constitutional common-law right to admittance to racetrack or other places of amusement exists comparable to common-law right of access to inn. *Epstein v. California Horse Racing Bd. (1963) 222 Cal. App. 2d 831, 840, 35 Cal. Rptr. 642*

Legislature and the people have reversed policy that bets on horse racing are unenforceable with respect to gambling done on licensed premises of racing association and through pari-mutuel machines. *Nevcal Enterprises, Inc. v. Cal-Neva Lodge, Inc. (1961) 194 Cal. App. 2d 177, 180-181, 14 Cal. Rptr. 805*

[9] Lottery

Purchase of winning ticket by person who did not rely on outdated sign, posted where ticket was purchased, stating that payout would be over 10 years created contract with 18-year payout in accordance with Lottery rule actually in effect; equitable estoppel was not applicable to change 18-year term. *Hair v. State of California (1991) 2 Cal. App. 4th 321, 328-329, 2 Cal. Rptr. 2d 871*

When issue was whether fourth of four winning tickets had ever been issued or was subject of retailer's "request for

adjustment" to reflect issuing terminal's printing or cutting error, denial of request for continuance for further discovery and granting motion for summary judgment was error in view of fact that someone at Lottery had written number of missing winning ticket on adjustment request, creating possibility but not inference that request related to that ticket number. *Aguimatang v. California State Lottery (1991) 234 Cal. App. 3d 769, 803-804, 286 Cal. Rptr. 57*

Holders of three winning tickets were not entitled to share fourth part represented by "unclaimed" ticket; unclaimed winnings reverted to Education *Fund. Aguimatang v. California State Lottery (1991) 234 Cal. App. 3d 769, 786, 789, 286 Cal. Rptr. 57* (applying former Gov. Code § 8880.32(c), (e))

Lottery advertisements are not offers to potential purchasers to enter into unilateral contracts by buying lottery tickets; thus, potential purchaser who could not purchase ticket with chosen numbers because ticket machine malfunctioned has no cause of action (against state or retailer) for breach of contract. *Brown v. California State Lottery Com. (1991) 232 Cal. App. 3d 1335, 1339-1340, 284 Cal. Rptr. 108*

Retailer whose contract with Lottery Commission allowed her to play scratcher tickets unsold at end of game was not entitled to play ticket that was stolen, scratched, and found to be $100,000 winner and returned to retailer, because that would violate requirement that all play be by fair chance. *Horan v. State of California (1990) 220 Cal. App. 3d 1503, 1508-1510, 270 Cal. Rptr. 194*

[10] Pai Gow

Pai gow, played with rotating dealer who did not act as bank, was not banking game; county and sheriff bound by prior adjudication. *City of Bell Gardens v. County of Los Angeles (1991) 231 Cal. App. 3d 1563, 1569, 283 Cal. Rptr. 91*

Pai gow is illegal "percentage game" within meaning of *Penal Code § 330* even though house does not play if house charges "rental fee" to each player based on percentage of wagers. *Huntington Park Club Corp. v. County of Los Angeles (1988) 206 Cal. App. 3d 241, 249, 253 Cal. Rptr. 408*

[11] Poker

"Texas Hold'em" poker is neither form of stud poker nor otherwise prohibited by *Penal Code § 330*; differentiation turns on house percentage aspect of game, not face exposure of cards. *Tibbetts v. Van de Kamp (1990) 222 Cal. App. 3d 389, 396, 271 Cal. Rptr. 792*

[12] Racketeer Influenced and Corrupt Organizations Act

Indian tribe is not state or political subdivision within meaning of 18 U.S.C. § 1995, which prohibits gambling in violation of law of any state of political subdivision; thus, action would not lie to enjoin bingo game being conducted on reservation in violation of tribal ordinance when game was legal under California law. *Morongo Band of Mission Indians v. Rose (9th Cir. 1990) 893 F.2d 1074, 1079, 1079 n.5*

[13] Statutory Right to Recover Gambling Losses

Obligation arising from gambling debts is unenforceable because of unlawfulness of transaction out of which debts arose; transfer of funds in discharge of such debt is without consideration. *Novo v. Hotel Del Rio (1956) 141 Cal. App. 2d 304, 307, 295 P.2d 576* (decided under interpretation of former Civ. Code § 172)

Winner of gambling game who accepts check from loser gains no title to check or to funds which check produces. *Novo v. Hotel Del Rio (1956) 141 Cal.App. 2d 304, 307, 295 P.2d 576* (decided under interpretation of former Civ. Code § 172)

Husband's transfer of community funds to winner of gambling game is a transfer of community funds without consent of wife and without receipt by husband of valuable consideration within meaning of former Civ. Code § 172, now *Civ. Code § 5125(b)*. *Novo v. Hotel Del Rio (1956) 141 Cal. App. 2d 304, 307, 295 P.2d 576*

Wife able to set aside during lifetime of husband a transfer of community property by husband without valuable consideration and without wife's consent. *Novo v. Hotel Del Rio (1956) 141 Cal. App. 2d 304, 307, 295 P.2d 576* (decided under interpretation of former Civ. Code § 172)

[14] Video Games

Video poker games that entitled winner to free game are illegal slot machines within meaning of *Penal Code § 330b(b)* because free game is something of value and outcome is dependent on hazard or chance. *Score Family Fun Center, Inc. v. County of San Diego (1990) 225 Cal. App. 3d 1217, 1220-1222, 275 Cal. Rptr. 358*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewContracts LawDefensesIllegal BargainsContracts LawDefensesPublic Policy ViolationsContracts LawNegotiable InstrumentsEnforcementDefensesIllegalityTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral Overview

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§ 272.34 Attorney General Opinions

Jackpot poker played for money in California is unlawful for violating constitutional and statutory proscriptions against lotteries. *72 Ops. Cal. Atty. Gen. 143 (1989)*

"Casino night" event sponsored by charitable organization is unlawful if chips won by players are used at end of event to acquire raffle tickets or to bid at auction for valuable merchandise. *71 Ops. Cal. Atty. Gen. 139 (1988)*

Electronic bingo system that substitutes hand computer with stored bingo "card" matrices do not qualify as bingo within meaning of *Penal Code § 326.5(o)*. *70 Ops. Cal. Atty. Gen. 304 (1987)*

Community college district is not entity that may be authorized by local ordinance to conduct bingo games under *Penal Code § 326.5*. *70 Ops. Cal. Atty. Gen. 109 (1987)*

Scheme for distribution of property by chance is "lottery" within meaning of *Penal Code § 319* when opportunity to participate for free is not publicly disclosed but "available" on request. *68 Ops. Cal. Atty. Gen. 275 (1985)*

Coin-operated video game simulating blackjack, draw poker, hi-lo, and craps with no reward to winner such as free replay, extra playing time, or other direct pay-out is not illegal gambling device. *66 Ops. Cal. Atty. Gen. 276 (1983)*

Bingo game provisions of *Penal Code § 326.5* supersedes lottery prohibition provisions of *Penal Code § 319 et seq.* *60 Ops. Cal. Att'y Gen. 130 (1977)*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsGaming & Lotteries

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§ 272.35 Law Reviews

Rychlak, *Video Gambling Devices, 37 UCLA L. Rev. 555 (1990)*

Reppy, *Retroactivity of the 1975 California Community Property Reforms, 48 S. Cal. L Rev 977 (1975)*

Comment, "California's New Community Property Law--Its Effect on Interspousal Mismanagement Litigation," *5 Pac. L.J. 723 (1974)*

Jacobson, "The California Lottery Law: Don't Take a Chance," 48 Cal. St. B.J. 58 (1973)

Comment, "Negotiable Instruments: Licensed Gambling Establishments and California's Public Policy," *4 U.S.F. L. Rev. 135 (1969)*

Note, "Municipal Corporations: Gambling Ordinance Held Valid as Proper Subject for Municipal Regulation in a Field Not Occupied by State Legislation.--*In re Hubbard* (Cal. 1964)," *53 Cal. L. Rev. 902 (1965)*

Comment, "Wife Recovers Husband's Gambling Losses," *9 Stan L. Rev. 400 (1957)*

Note, "Recovery by Wife of Money Paid by Husband in Satisfaction of Gambling Debt," *30 S. Cal. L Rev 95 (1956)*

Notes, "Criminal Forfeiture; Standing to Sue: Recovery of Money Seized in Gambling Raid," *40 Cal. L. Rev. 147 (1952)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesIllegal BargainsContracts LawDefensesPublic Policy ViolationsContracts LawNegotiable InstrumentsEnforcementDefensesIllegalityFamily LawMarital Duties & RightsProperty

RightsCharacterizationCommunity PropertyGovernmentsState & Territorial GovernmentsGaming & Lotteries

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§ 272.36 Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 425,426, 451, 452, 454, 630-634; vol. 11, *Community Property*, § 143 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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[Reserved]

§§ 272.37[Reserved]

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23-272 California Forms of Pleading and Practice--Annotated § 272.40

§ 272.40 Affirmative Defense--Illegal Contract [Civ. Code § 1667(1)]

[1] FORM Affirmative Defense--Illegal Contract [Civ. Code § 1667(1)]

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. The contract set forth in the complaint as the subject of this action was and is unenforceable for the reason that it is contrary to an express provision of the law.

2. _____ [*Specify illegality, e.g.,* On _____ [*date*], a _____ (*specify, e.g.,* primary *or* general) election was held in the State of California. On or prior to that date, _____ (*name of plaintiff*) entered into a wagering agreement with _____ (*name of defendant*) in the amount of $_____ concerning the number of votes each party believed would be cast for _____ (*name*), a candidate for _____ (*specify, e.g.,* the Senate *or* Governor). It is this agreement which the plaintiff, who won the wager, now seeks to enforce against the defendant.]

[2] Use of Form

The form of affirmative defense in [1], *above,* alleges that the contract in question is contrary to an express provision of the law. It is for use by the defendant in an action brought by another party to a wagering agreement to recover his or her winnings. A contract which is contrary to an express provision of law is unlawful [*Civ. Code § 1667(1)*]. Since a wagering agreement is in violation of an express provision of law, it is an illegal contract [*Kyne v. Kyne (1940) 16 Cal. 2d 436, 438-439, 106 P.2d 620* (relying on *Penal Code §§ 337a, 659* and former Elec. Code § 11504)].

[3] Cross References

For discussion and forms for use in alleging affirmative defenses, see Ch. 26, *Answers* .

For a form for use in alleging an affirmative defense to an action to recover on a promissory note given for a gambling

consideration, see Ch. 385, *Negotiable Instruments* .

For a form for use in alleging an illegal contract contrary to an express provision of law as a defense, see Ch. 140, *Contracts* .

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 451, 452, 630-634 (10th ed. 2005)

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23-272 California Forms of Pleading and Practice--Annotated § 272.41

§ 272.41 Affirmative Defense--Contract Contrary to Public Policy [Civ. Code § 1667(2),(3)]--Gambling Establishment Seeking Recovery on Check Cashed for Customer for Gambling Purposes

[1] FORM Affirmative Defense--Contract Contrary to Public Policy [Civ. Code § 1667(2),(3)]--Gambling Establishment Seeking Recovery on Check Cashed for Customer for Gambling Purposes

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. The contract set forth by _____ [*name of plaintiff gambling establishment*] in the complaint as the subject of this action was and is unenforceable for the reason that it is contrary to the policy of express law and to good morals.

2. During the evening of _____ [*date*], and the morning of _____ [*date*], _____ [*name of defendant*] cashed a series of _____ [*number*] checks at _____ [*name of gambling establishment*], which is located _____ [*specify, e.g.,* on the Nevada side of Lake Tahoe].

3. The check-cashing transaction took place at _____ [*specify, e.g.,* the gambling tables *or* the cashier's cages, located _____ (*number*) feet from the nearest game]. The checks in the amount of $_____ were cashed by _____ [*name of defendant* for _____ [*specify, e.g.,* chips *or* money] and were cashed for the known purpose of gambling.

4. During the evening of _____ [*date*], and the morning of _____ [*date*], _____ [*name of defendant*] played _____ [*specify name of game, e.g.,* craps *or* twenty-one *or* roulette] and lost at the gaming tables of _____ [*name of gambling establishment*] the proceeds of the checks that he/she had cashed there.

[2] Use of Form

The form of affirmative defense in [1], *above,* on the grounds that a gambling contract is contrary to public policy or

good morals is for use to include in an answer by a party against whom a gambling establishment seeks to collect for checks that were cashed for the party but which were returned to the gambling establishment unpaid for lack of sufficient funds. It alleges that a gambling house that honors a check for the purpose of providing a prospective customer with funds with which to gamble and who then participates in the transaction thus promoted by his or her act is unable to recover on the check [*Hamilton v. Abadjian (1947) 30 Cal. 2d 49, 52, 179 P.2d 804* ; *Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 63, 71 Cal. Rptr. 817* ; *Braverman v. Horn (1948) 88 Cal. App. 2d 379, 381, 198 P.2d 948* ; *Lavick v. Nitzberg (1948) 83 Cal. App. 2d 381, 188 P.2d 758]* . The principle supporting nonrecovery by the gambling house is that the check in the suit is a contract in payment of a gambling debt and is unenforceable under *Civ. Code § 1667* [*Braverman v. Horn (1948) 88 Cal. App. 2d 379, 381, 198 P.2d 948]* . Indeed, when a check is cashed for the purpose of providing funds to gamble, the gambling house operator has participated in an illegal transaction [*Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 68, 71 Cal. Rptr. 817]* .

The form is adapted from the answer filed in *Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 63-64, 71 Cal. Rptr. 817* . In *Lane*, plaintiff sued to collect on checks cashed in a gambling establishment and returned for lack of sufficient funds.

[3] Illegality of Contract

A contract is not lawful if it is [*Civ. Code § 1667*]:

- Contrary to an express provision of law (*see* Form 1);
- Contrary to the policy of express law, though not expressly prohibited; or
- Otherwise contrary to good morals.

A party to a contract may rescind the contract if the contract is unlawful for causes which do not appear in its terms or conditions, and the parties are not equally at fault or if the public interest will be prejudiced by permitting the contract to stand [*Civ. Code § 1689(b)(5),(6)*].

[4] Allegations

The form of affirmative defense alleges that [*see* *Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 63-64, 71 Cal. Rptr. 817]* :

- Defendant had cashed the checks for the known purpose of gambling (Paragraph 2).
- Defendant lost the money to the gambling house where the check was cashed (Paragraph 3).

[5] Cross References

For discussion and forms for use in alleging affirmative defenses, see Ch. 26, *Answers* .

For a form for use in alleging a contract contrary to public policy as a defense, see Ch. 140, *Contracts* .

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 425, 426 (10th ed. 2005)

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[Reserved]

§§ 272.42[Reserved]

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23-272 California Forms of Pleading and Practice--Annotated § 272.50

§ 272.50 Complaint to Recover Community Personal Property [Fam. Code § 1100(b)] and Damages [Civ. Code § 3333; Code Civ. Proc. § 667]--Property Transferred by One Spouse to Defendant in Satisfaction of Gambling Debt Without Consideration and Without Plaintiff Spouse's Consent

[1] FORM Complaint to Recover Community Personal Property [Fam. Code § 1100(b)] and Damages [Civ. Code § 3333; Code Civ. Proc. § 667]--Property Transferred by One Spouse to Defendant in Satisfaction of Gambling Debt Without Consideration and Without Plaintiff Spouse's Consent

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO RECOVER PERSONAL PROP-
_____ [*name*],	)	ERTY
Defendant.	)	AND DAMAGES
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California.

2. Plaintiff and _____ [*name of plaintiff's spouse*] are, and at all times herein mentioned were, husband and wife.

3. During their marriage plaintiff and _____ [*name of plaintiff's spouse*] acquired as community

property certain personal property described as follows: _____ [*give a reasonably certain description of property, e.g.*, funds by virtue of husband's own personal services and earnings *or* a 1994 Volkswagen sedan].

[*EITHER*]

4. The total amount of funds involved is $_____.

[*OR*]

4. The value of the above-described community personal property is $_____. [*If there is more than one item of property, give value of each item separately*.]

[*CONTINUE*]

5. On or about _____ [*date*], _____ [*name of plaintiff's spouse*] incurred gambling losses as a result of participation in a _____ [*describe type of gambling game, e.g.*, game of draw low-ball poker *or* game of dice]. On or about _____ [*date*], _____ [*name of plaintiff's spouse*] transferred the above-described community personal property to defendant _____ [*name of donee*] for less than fair and reasonable value and without the written consent of plaintiff. Defendant _____ [*name of donee*] now has possession of the property.

6. As a proximate result of the wrongful detention of the community personal property by defendant _____ [*name of donee*] plaintiff has suffered damages in the sum of $_____ [*specify damages such as interest on the value of the property or, if appropriate, its rental value or depreciation*].

WHEREFORE, plaintiff prays judgment as follows:

1. For possession of _____ [*specify, e.g.*, the funds transferred *or* the sedan, or its value in the sum of $_____ if possession cannot be obtained];

2. For damages in the sum of $_____;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The complaint in [1], *above*, is for use to seek recovery of possession of community personal property transferred by plaintiff's spouse in satisfaction of a gambling debt without consideration and without plaintiff's written consent. When a spouse disposes of community personal property, it is necessary to obtain written consent from the other spouse, and to obtain a fair and reasonable value for the property [*Fam. Code § 1100(b)*]. Additionally, with respect to the management and control of community personal property, each spouse is required to act as a fiduciary toward the other spouse [*Fam. Code § 1100(e)*]. Thus, one spouse has the right to recover possession of community personal property transferred by the other without consideration and without consent [*Lynn v. Herman (1946) 72 Cal. App. 2d 614, 617-618, 165 P.2d 54* (decided under interpretation of former Civ. Code § 172)]. The allegation of the character of property as community property is a question of fact [*Estate of Hill (1914) 167 Cal. 59, 62-63, 138 P. 690]* .

[3] Allegations

This complaint alleges that:

- Plaintiff is the spouse of the donor (Paragraph 2).

- The property is community property (Paragraph 3) [*see Fam. Code § 760* (defining community property); *see also Estate of Hill (1914) 167 Cal. 59, 62-63, 138 P. 690* (stating that an allegation that property owned by a married person is separate or community property is an allegation of ultimate fact and the evidence from which this is determined is not to be set forth in a pleading)].

- The property was given to another person for less than fair and reasonable value and without plaintiff's written consent (Paragraph 5) [*Fam. Code § 1100(b)*; *Novo v. Hotel Del Rio (1956) 141 Cal. App. 2d 304, 307, 295 P.2d 576]* .

- Defendant is in possession of the property (Paragraph 5) [*see Riciotto v. Clement (1892) 94 Cal. 105, 107, 29 P. 414* (holding that a complaint to recover possession of personal property must allege that defendant has possession of the property)].

It should also be alleged that the property has a certain value (Paragraph 4) so that an alternative judgment may be rendered for that value in the event possession cannot be obtained [*see Code Civ. Proc. §§ 627, 667*; *see also Claudius v. Aguirre (1891) 89 Cal. 501, 504-506, 26 P. 1077* (discussing application of *Code Civ. Proc. § 667* in action to obtain possession of personal property)]; *see* generally Ch. 119, *Claim and Delivery*].

[4] Unauthorized Gifts of Community Personal Property

Either spouse has the management and control of the community personal property, with the same absolute power of disposition, other than testamentary, as the spouse has of the separate estate of the spouse [*Fam. Code § 1100(a)*]. An exception, however, is that one spouse may not make a gift of community personal property or dispose of community personal property for less than fair and reasonable value, without the other spouse's written consent [*Fam. Code § 1100(b)*].

In cases decided under former Civ. Code § 172, now *Fam. Code § 1100(b)*, when a husband transferred community personal property in violation of former Civ. Code § 172, now *Fam. Code § 1100(b)*, the transfer was voidable in its entirety by the wife during the husband's lifetime [*Novo v. Hotel Del Rio (1956) 141 Cal. App. 2d 304, 308, 295 P.2d 576* (husband transferred community personal property in satisfaction of gambling debt)] and possession was recovered by her [*Lynn v. Herman (1946) 72 Cal. App. 2d 614, 617, 618, 165 P.2d 54]* . The same principles should apply with equal force when a wife makes a transfer of community personal property for less than fair and reasonable value and without the written consent of her husband, because of provisions granting equal management and control of such property to both spouses [*see Fam. Code § 1100(a)*].

Fam. Code § 1101 provides one spouse with a statutory claim against the other spouse for any breach of fiduciary duty that results in substantial impairment to the claimant spouse's present undivided one-half interest in the community estate [*Fam. Code § 1101(a)*]. The breach is actionable merely on *impairment* of the claimant's interest, rather than on a *substantial impairment*. Furthermore, if the spouse breaches the fiduciary duty to the claimant spouse, including the duty under *Fam. Code § 1100, above*, and under *Fam. Code § 721*, related to property transactions generally, the claimant spouse may recover attorney's fees [*Fam. Code § 1101(a),(g)*]. It appears that a claim against a spouse could be made under this provision for a transfer of community funds for gambling purposes in violation of *Fam. Code § 1100(b)* [*see Fam. Code § 1101(a)*]. For a detailed discussion of remedies under this section, see Ch. 122, *Community Property* .

[5] Status of Property at Issue

If, in a particular action, there is an issue as to whether the property is community property or one spouse's separate property, the plaintiff spouse may join the transferor spouse as a defendant [*see Code Civ. Proc. §§ 379(a)(2)* (joinder of parties defendant), 427.10(a) (joinder of causes)] and seek a declaratory judgment against him or her regarding the status of the property [*see Code Civ. Proc. §§ 1060, 1062*; *see* generally Ch. 182, *Declaratory Relief*].

If the transferor spouse is joined, the plaintiff may also wish to assert a claim against that spouse for breach of fiduciary duty, and seek the remedies provided by statute for that breach, such as an accounting [*see Fam. Code § 1101*]. For a discussion of making such a claim and the remedies provided by statute [*see Fam. Code § 1101*], see Ch. 122, *Community Property* .

[6] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[7] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[8] Cross References

See generally, Ch. 119, *Claim and Delivery* .

For a discussion and form for use in recovering community personal property, see Ch. 122, *Community Property* .

Witkin, Summary of California Law, vol. 11, *Community Property*, § 143 (10th ed. 2005)

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§ 273.02 Cross References

§§ 273.03-273.09 [Reserved]

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[1] By Participants

[2] By Owners and Promoters: Generally Applicable Duties

[3] Specific Duties Owed by Owners

[a] Protection From Hazards of Game

[b] Protection From Third Parties' Conduct

[4] Spectator's Assumption of Risk

[a] Basic Doctrine

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§ 273.12 Defenses

[1] In General

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[3] Assumption of Risk

§§ 273.13-273.29 [Reserved]

§ 273.30 Participants' Duty of Care

[1] General Duty of Care

[2] Duty Analysis Determines Assumption of Risk Issues

[3] Effect of Violation of Statute or Local Ordinance

[4] Specific Duty Based on Nature of Sport Involved

[5] Intentional Injury or Conduct Outside Range of Ordinary Activity of Sport

[a] Basis for Liability to Other Participants

[b] Determining Whether Conduct Is Outside Range of Ordinary Activity

[6] Analysis Not Limited to Competitive Sports

[7] Nature of Duty in Specific Sports

[a] Golf

[b] Hunting

[c] Sportfishing

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[e] Marathons

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[g] Discus

[h] Recreational Skiing

[i] Waterskiing

[i] Owner or Operator of Facilities

[ii] Boat Drivers and Operators

§ 273.31 Duty of Care of Persons in Control of Activity

[1] Coaches and Instructors

[2] Other Persons in Control

§ 273.32 Proprietor's General Duty of Care to Participants

§ 273.33 Specific Proprietors' Duties

[1] Ski Resort Operator

[a] No Duty to Eliminate Inherent Risks

[b] Duty of Care Regarding Ski Lifts

[2] Owner of Golf Course

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[a] General Duty of Care

[b] Public Pool Operators' Duties Regarding Lifeguards

[i] When Lifeguards Required

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[a] Duty of Care to Riders

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§ 273.34 Establishing Liability

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§§ 273.35-273.49 [Reserved]

§ 273.50 California Points and Authorities

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[1] Duty of Care Owed to Spectators

[a] By Owners and Promoters

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§ 273.55 Law Reviews

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§ 273.70 California Points and Authorities

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[1] Boxing, Wrestling, and Martial Arts

[2] Football

[3] Performance-Enhancing Drugs

[4] Swimming

[a] Ocean

[b] Public Swimming Pool

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[5] Waterskiing

§ 273.72 Administrative Regulations

[1] Boxing, Wrestling, and Martial Arts

[2] Swimming

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§ 273.73 Decisions

[1] Assumption of Risk by Participant

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[4] Discus

[5] Golf

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[9] Swimming

[a] Comparative Negligence

[b] Duty of Landowner

[c] Duty of Public Swimming Facility Proprietor

[i] Exercise Reasonable Care for Patron's Safety

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§ 273.75 Law Reviews

§ 273.76 Text References

§§ 273.77-273.89 [Reserved]

§ 273.90 Complaint for Damages [Civ. Code § 3333] for Personal Injuries and Property Damage Based on Negligence [Civ. Code § 1714(a)]--By Spectator Against Owner-Operator of Team

[1] FORM

[2] Use of Form

[3] Potential Bases of Liability

[4] Specification of Damages

[5] Verification

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[7] State Statutes

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[2] Use of Form

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[2] Use of Form

§ 273.113 Allegation--Coach or Instructor Breached Duty of Care Owed to Plaintiff

[1] FORM

[2] Use of Form

§ 273.114 Allegation--Swimming Pool Proprietor's Breach of Duty Imposed by Law Caused Injury

[1] FORM

[2] Use of Form

[3] Cross References

§ 273.115 Allegation--Swimming Pool Proprietor's Breach of Duty Imposed by Law Caused Injury

[1] FORM

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[1] FORM

[2] Use of Form

[3] Cross References

§ 273.117 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Plaintiff's Primary Assumption of Risk Defeats Cause of Action--Injury Resulted from Risk Inherent to Active Sport, and Co-Participant Defendant's Conduct Was Within Range of Sport's Ordinary Activity

[1] FORM

[2] Use of Form

[3] Cross References

[4] Decisions

§ 273.118 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Plaintiff's Primary Assumption of Risk Defeats Cause of Action--Injury Resulted from Risk Inherent to Sport, and Defendant Proprietor Did Nothing to Increase or Conceal Risk

[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

§ 273.119 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Comparative Fault Principles Require Reduction of Any Recovery by Plaintiff in Proportion to Plaintiff's Degree of Fault--Secondary Assumption of Risk Doctrine Applies if Defendant Breached Any Duty Owed to Plaintiff, Because Plaintiff's Knowing Encounter of Risk Was Cause of Injury

[1] FORM

[2] Use of Form

[3] Cross References

§ 273.120 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Comparative Fault Principles Require Reduction of Any Recovery by Plaintiff in Proportion to Plaintiff's Degree of Fault--Plaintiff's Contributory Negligence Was Cause of Injury

[1] FORM

[2] Use of Form

[3] Cross References

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Chapter 273 GAMES, SPORTS, AND ATHLETICS
PART I. SCOPE

23-273 California Forms of Pleading and Practice--Annotated § 273.01

§ 273.01 Scope of Chapter

This chapter discusses the liability of owners and operators of athletic parks and stadiums, of promoters of athletic teams and events, and of participants in athletic contests or events for injuries received by spectators. It contains a general form of complaint [*see § 273.90*], and forms of allegation for alleging that the defendant is liable because of a failure to protect plaintiff from foreseeable criminal conduct of third parties [*see § 273.91*], and that defendant's negligence can be presumed under the res ipsa loquitur doctrine [*see § 273.92*]. It also includes forms of affirmative defense alleging that plaintiff's primary assumption of risk precludes, as a matter of law, a finding that defendant owed a duty of care to prevent the plaintiff's injury [*see § 273.93*], and that any damages that plaintiff is entitled to recover should be reduced due to plaintiff's comparative fault [*see § 273.94*].

This chapter also discusses and contains forms for use by persons injured while participating in sports or games, including a general form of complaint [*see § 273.110*], allegations that plaintiff was injured due to a breach of duty by a co-participant [*see §§ 273.111, 273.112*], that plaintiff was injured due to a breach of duty by a coach or instructor [*see § 273.113*], and that plaintiff was injured due to a breach of duty by the proprietor of the facility [*see §§ 273.114 -273.116*]. This part also includes forms of affirmative defense asserting that plaintiff's action is precluded by the primary assumption of risk doctrine [*see §§ 273.117, 273.118*], and that comparative fault principles require a reduction of any recovery granted to plaintiff based on the proportion of fault attributable to plaintiff [*see §§ 273.119, 273.120*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesAssumption of RiskAthletic & Recreational ActivitiesTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSports Facilities

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23-273 California Forms of Pleading and Practice--Annotated § 273.02

§ 273.02 Cross References

For a complaint for damages against a proprietor of an athletic facility for the loss of deposited articles, see Ch. 93, *Bailments*

For a form of complaint for damages under the Unruh Civil Rights Act for discrimination in denial of the use of public facilities, see Ch. 116, *Civil Rights: Discrimination in Business Establishments*

For allegations of damages for personal injuries and property damage, see Ch. 177, *Damages*

For forms for use in alleging a cause of action based on the doctrine of respondeat superior, see Ch. 248, *Employer's Liability for Employee's Torts*

For discussion and forms regarding assumption-of-risk issues generally, see Ch. 380, *Negligence*

For causes of action involving minors generally, see Ch. 394, *Parent and Child*

For forms for use in actions against property owners and possessors for injuries relating to the conditions of the property generally, see Ch. 421, *Premises Liability*

For forms for use in bringing a cause of action against a governmental entity, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

For forms for use in negligence actions based on slips and falls, see Ch. 525, *Slip and Fall*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsPremises

Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral OverviewTortsVicarious LiabilityBailees

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[Reserved]

§§ 273.03[Reserved]

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Chapter 273 GAMES, SPORTS, AND ATHLETICS
PART II. LEGAL BACKGROUND
A. Injuries to Spectators

23-273 California Forms of Pleading and Practice--Annotated § 273.10

§ 273.10 Duty of Care Owed to Spectators

[1] By Participants

Generally, a player's mistake that results in an injury to a spectator or or other nonparticipant is of a sort that occurs naturally in the game or sport taking place, and as such does not make the player liable for the injury [*see Mann v. Nutrilite, Inc. (1955) 136 Cal. App. 2d 729, 735, 289 P.2d 282]* . For example, batting a ball foul into the grandstands at a baseball game is not itself negligence [*see Quinn v. Recreation Park Ass'n (1935) 3 Cal. 2d 725, 728, 46 P.2d 144]* . Nor is a player whose errant throw strikes a person standing on the field liable absent any showing of reckless disregard of others' safety [*see Mann v. Nutrilite, Inc. (1955) 136 Cal. App. 2d 729, 734-735, 289 P.2d 282]* .

A participant in a spectator sport is liable, however, for the willful and intentional assault of a patron of the game or exhibition [*see Wiersma v. City of Long Beach (1940) 41 Cal. App. 2d 8, 11, 106 P.2d 45* (court assumed that participant, who defaulted in action, was liable for assault on spectator; issue before court was whether promoter was vicariously liable)], or for a reckless act that causes injury to a nonparticipant [*see Bonetti v. Double Play Tavern (1954) 274 P.2d 751* (employer liable under respondeat superior for act of player, who threw baseball out of park after game was over and struck passerby)].

[2] By Owners and Promoters: Generally Applicable Duties

In general, everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury on himself or herself [*Civ. Code § 1714(a)*; *see Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561* (liability of possessor of land, based on negligence in operation and control of that land, is determined by *Civ. Code § 1714(a)*)]. For complete discussion of the generally applicable duties of owners and possessors of land, see Ch. 421, *Premises Liability* .

Beyond this general formulation, the precise nature of the duty owed by owners and promoters to spectators is not clear. Courts have consistently held that the promoter of a sporting event, or the proprietor of the stadium in which that event is taking place, is not an insurer of the patron's safety [*see, e.g., Quinn v. Recreation Park Ass'n (1935) 3 Cal. 2d 725,*

729, 46 P.2d 144 ; *Neinstein v. Los Angeles Dodgers, Inc. (1986) 185 Cal. App. 3d 176, 181, 229 Cal. Rptr. 612* ; *Brown v. San Francisco Ball Club (1950) 99 Cal. App. 2d 484, 486-487, 222 P.2d 19]* . In addition, although courts have stated that promoters and owners must exercise ordinary care to protect patrons from injury [*see, e.g., Quinn v. Recreation Park Ass'n (1935) 3 Cal. 2d 725, 729, 46 P.2d 144* ; *Neinstein v. Los Angeles Dodgers, Inc. (1986) 185 Cal. App. 3d 176, 181, 229 Cal. Rptr. 612]* , courts have also criticized applications of this rule that would impose liability on owners of teams, at least for hazards that are generated by the way the particular game is played [*see Neinstein v. Los Angeles Dodgers, Inc. (1986) 185 Cal. App. 3d 176, 181, 229 Cal. Rptr. 612* (stating that "it is not the role of the courts to effect a wholesale remodeling of a revered American institution through application of the tort law")].

The California Supreme Court has noted that, in the sports context, conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself [*Knight v. Jewett (1992) 3 Cal. 4th 296, 315, 11 Cal. Rptr. 2d 2, 834 P.2d 696 (Court gave example of moguls posing risk of harm to skiers, but also creating challenge that is part of sport, so ski resorts have no duty to eliminate moguls)]* . Defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, but do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport [*Knight v. Jewett (1992) 3 Cal. 4th 296, 315-316, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

[3] Specific Duties Owed by Owners

[a] Protection From Hazards of Game

In a 1935 case, the California Supreme Court defined the duty of care applicable to owners of stadiums as requiring only that screened seats be provided for as many as may be reasonably expected to call for them on any ordinary occasion. Under this rule, if a spectator chooses to occupy an unscreened seat, or is unable to secure a screened seat and consequently occupies a seat that is not screened, the spectator assumes the risk of being struck by thrown or batted ball, and cannot recover for injuries resulting from being struck [*Quinn v. Recreation Park Ass'n (1935) 3 Cal. 2d 725, 729, 46 P.2d 144]* . At least one judgment for a plaintiff in a case involving an injury to a spectator has been affirmed under this standard [*Ratcliff v. San Diego Baseball Club (1938) 27 Cal. App. 2d 733, 738, 81 P.2d 625* (judgment for plaintiff, injured when bat slipped from batter's hands and struck plaintiff while she was walking to screened seat, affirmed; jury could reasonably have concluded that screen behind plate should have extended further)], and another case held that the owner had not established as a matter of law that it had provided enough protected seats [*Rudnick v. Golden W. Broadcasters (1984) 156 Cal. App. 3d 793, 796, 202 Cal. Rptr. 900* (evidence that 2,300 seats were protected was insufficient to establish that this was all that may reasonably be expected to seek them, given that 10 to 20 times that number of spectators regularly attend games)]. Nevertheless, the continued validity of *Quinn* has been questioned.

One court of appeal stated that the duty set forth in *Quinn* was of little practical value, because only a spectator in an unprotected seat would be injured, and such a spectator would be precluded from recovery regardless of the reason he or she sat there [*Neinstein v. Los Angeles Dodgers, Inc. (1986) 185 Cal. App. 3d 176, 182, 229 Cal. Rptr. 612* (also stating that duty to provide screened seats is unnecessary, as spectators fearing injury can sit sufficient distance away from field to avoid likelihood of injury)]. The court also opined that the duty to supply an adequate number of protected seats, which was the basis of the reversal of a summary judgment for the defendant in *Rudnick*, appears to lack any causal nexus with an injury to a plaintiff [*Neinstein v. Los Angeles Dodgers, Inc. (1986) 185 Cal. App. 3d 176, 183, 229 Cal. Rptr. 612]* .

The California Supreme Court has stated (in the context of injuries to participants) that a defendant generally has no duty to eliminate, or protect a plaintiff from, risks inherent to the sport itself, but has only a duty not to increase those risks [*Knight v. Jewett (1992) 3 Cal. 4th 296, 315-316, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *§ 273.54[1][a]*]. It remains to be seen whether this statement of the duties of owners of sports facilities would permit any liability for injuries such

as those incurred when a foul ball strikes a spectator at a baseball game, regardless of the protection (if any) provided by screens or backstops. One court of appeal, in a case decided well before *Knight*, speculated that a person seated behind a screen and relying on it for protection, who is injured by a ball penetrating the screen, might be permitted to recover [*see Neinstein v. Los Angeles Dodgers, Inc. (1986) 185 Cal. App. 3d 176, 182 n.3, 229 Cal. Rptr. 612]* . This result could be seen as an application of the rule that a defendant does have a duty not to increase risks inherent to the sport, as a spectator seated behind a screen should be able to rely on the screen to protect him or her. It could also be argued that the level of protection that owners have historically provided--screens behind home plate at baseball parks, plastic or wire mesh above baseboards in ice hockey rinks--has become sufficiently customary to be evidence of an accepted standard of care.

For a form of complaint alleging that an owner is liable for damages resulting from a breach of the owner's duty of care to a spectator, *see § 273.90*.

The precise nature of the duty owed to spectators is also closely tied to the assumption of the risk doctrine. In *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* , the Supreme Court held that "primary assumption of risk" precludes a plaintiff from recovering damages, based on a finding that, under the circumstances of the case, the defendant owed no duty to the plaintiff to prevent the injuries suffered [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 310, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . The assumption of risk issues are discussed in *§ 273.10[4][a]*.

[b] Protection From Third Parties' Conduct

The owner of a stadium or auditorium staging a sporting event must use reasonable care to protect his or her patrons against injury through the negligent or wrongful acts of other patrons on the premises, if he or she has reasonable cause to anticipate such acts and the probability of injury from them [*Sample v. Eaton (1956) 145 Cal. App. 2d 312, 316, 302 P.2d 431* (spectator at wrestling exhibition injured by bottle thrown by another spectator); *see Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561* (status of plaintiff as trespasser, licensee, or invitee is not determinative of liability)]. The owner is under a duty to protect his or her patrons by taking appropriate measures to restrain conduct by third persons, which he or she should be aware of and should realize is dangerous [*Sample v. Eaton (1956) 145 Cal. App. 2d 312, 316, 302 P.2d 431]* . For the purposes of determining the foreseeability of criminal conduct by third persons, it is not necessary that similar events have occurred before, if under the circumstances the risk should have been foreseen [*see Isaacs v. Huntington Mem'l Hosp. (1985) 38 Cal. 3d 112, 126-129, 211 Cal. Rptr. 356, 695 P.2d 653]* .

However, at least one case has refused to hold the owner of a sport stadium liable for injury caused by third parties' criminal conduct in the parking lot, despite evidence that the security in the lot was inadequate, because the plaintiffs failed to show that the improvements in security would have deterred the particular incident that injured plaintiffs [*Noble v. Los Angeles Dodgers, Inc. (1985) 168 Cal. App. 3d 912, 917, 214 Cal. Rptr. 395]* .

For a form setting out an allegation that a stadium owner or operator is liable for injuries caused by foreseeable conduct of a third person, *see § 273.91*. For complete discussion of the general rules involved in determining liability based on third parties' conduct, see Ch. 421, *Premises Liability* .

[4] Spectator's Assumption of Risk

[a] Basic Doctrine

The doctrine of assumption of risk as it applies to the liability of owners and possessors of premises is currently in flux. In *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* , the lead opinion of the Court stated that assumption of the risk issues will be analyzed to determine whether, on the one hand, the defendant had no duty to prevent the injury suffered by the plaintiff, in which case the plaintiff cannot recover due to his or her "primary

assumption of risk," or whether on the other hand defendant did breach a duty of care owed to plaintiff, in which case plaintiff's conduct in encountering the known risk caused by the defendant's breach of duty may be considered by the trier of fact for purposes of apportioning fault under comparative negligence principles [*Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . In his concurring opinion, Justice Mosk stated that he concurred "generally" with the analysis used in the lead opinion, although he would prefer to go further and eliminate the doctrine of assumption of risk entirely, applying instead comparative fault principles [*Knight v. Jewett (1992) 3 Cal. 4th 296, 321, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (Mosk, J., concurring)].

The precise issue before the Court in *Knight* was the liability of a participant in a touch football game for injuries suffered by another participant. For discussion of this aspect of the assumption of risk doctrine, see *§ 273.30*. Although the case before the Court did not involve an injury to a spectator, in its discussion of the assumption of the risk doctrine the Court stated in broad terms that assumption of the risk does not depend on the subjective knowledge of the plaintiff. Instead, the doctrine involves an analysis of the defendant's duty of care, and the nature of that duty in the sports context depends heavily on the nature of the sport itself [*Knight v. Jewett (1992) 3 Cal. 4th 296, 316-317, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

For a form of affirmative defense alleging that plaintiff's primary assumption of risk precludes any recovery, *see § 273.93*. For further discussion of assumption of the risk generally, see Ch. 380, *Negligence* .

[b] Application of Doctrine to Spectator Cases

Although the California Supreme Court has not expressly ruled on a case involving liability to a nonparticipant, the court of appeal has applied to spectators the rule stated in *Knight* that defendants generally have a duty to use due care not to increase the risks to a particpant over and above those inherent in the sport. In one opinion, the court of appeal ruled that although foul balls may represent an inherent risk--and under *Knight,* an assumed risk--to spectators attending baseball games, the owners of the baseball team have a duty not to increase those risks [*Lowe v. California League of Prof'l Baseball (1997) 56 Cal. App. 4th 112, 119, 123, 65 Cal. Rptr. 2d 105* (triable issue of fact regarding whether teams' mascot cavorting in stands and distracting spectator's attention, while baseball game in progress, increased inherent risk of spectator's being struck by foul ball)].

In addition, in its discussion of the liability of participants, the Supreme Court has emphasized its view that the duty depends not on the consent or knowledge of the particular plaintiff, but rather on the defendant's role in, or relationship to, the sport [*Knight v. Jewett (1992) 3 Cal. 4th 296, 316-317, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . The Court cited with approval a court of appeal case in which the court affirmed a judgment that held a stadium owner liable for an injury (suffered when plaintiff was struck by a baseball bat that slipped from the hands of a player), but that exonerated the player [*Ratcliff v. San Diego Baseball Club (1938) 27 Cal. App. 2d 733, 736, 81 P.2d 625]* . The Court pointed out that an analysis focusing on the plaintiff's knowledge of the risks of a baseball game would have treated the action against both defendants similarly with regard to that risk. Instead, the Court stated that the court of appeal implicitly recognized that two separate potential duties were at issue--the ballplayer's duty to play the game without carelessly throwing the bat, and the duty of the stadium owner to provide a reasonably safe stadium with regard to the particularly dangerous hazard of a thrown bat. The separate duties involved were the reason that the verdict absolving the player but holding the owner liable was not inconsistent [*Knight v. Jewett (1992) 3 Cal. 4th 296, 317, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

This analysis, with its focus on the nature of the activity involved rather than on the plaintiff's subjective knowledge of the risks accompanying the activity, appears to make the plaintiff's knowledge (or lack of knowledge) of the sport involved irrelevant to his or her ability to recover for injuries suffered as a spectator [*cf.* *Quinn v. Recreation Park Ass'n (1935) 3 Cal. 2d 725, 730-731, 46 P.2d 144* (evidence that plaintiff knew game of baseball and dangers of game supported trial court's finding that she assumed risk as matter of law); *Brown v. San Francisco Ball Club (1950) 99 Cal. App. 2d 484, 488-489, 222 P.2d 19* (court rejected contention that plaintiff's limited experience with baseball

supported recovery, holding that assumption of risk could be based on either "common knowledge" of dangers that should be imputed to plaintiff, or that plaintiff was negligent in not observing obvious risks of danger); *Shurman v. Fresno Ice Rink (1949) 91 Cal. App. 2d 469, 476, 205 P.2d 77* (plaintiff did not have sufficient knowledge of risks of ice hockey to establish as matter of law her knowing assumption of risk)].

Instead, in determining whether an owner had a duty to prevent a specific injury, the trial court will examine the risks inherent to the sport and the steps the sponsoring business entity reasonably should be obligated to take in order to minimize the risks without altering the nature of the sport [*Knight v. Jewett (1992) 3 Cal. 4th 296, 317, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *see also Neinstein v. Los Angeles Dodgers, Inc. (1986) 185 Cal. App. 3d 176, 181, 229 Cal. Rptr. 612* (basing refusal to find liability at least in part on conclusion that to do so would alter nature of game)].

In a case relying on the analysis of *Knight v. Jewett*, the court of appeal held that a professional hockey club, the league, and the owners and operators of the hockey arena owed no duty to a spectator to protect her from being hit in the face by a flying puck during pregame warm-ups [*Nemarnik v. Los Angeles Kings Hockey Club (2002) 103 Cal. App. 4th 631, 643, 127 Cal. Rptr. 2d 10]* . The court noted, and the plaintiff conceded, that the risk of being hit with a flying puck was an inherent risk of attending a hockey game. The plaintiff argued, however, that her injury was caused by the failure of the arena staff to prevent an unusually large number of spectators from congregating between her and the ice, in violation of arena policies, which obstructed her view and prevented her from seeing the puck until it was too late. Despite the plaintiff's arguments, the court concluded that obstructions of view caused by the unpredictable movements of other fans are an inherent and unavoidable part of attending a sporting event [*Nemarnik v. Los Angeles Kings Hockey Club (2002) 103 Cal. App. 4th 631, 638, 127 Cal. Rptr. 2d 10]* .

Moreover, the court noted that the plaintiff failed to allege that she would have been able to avoid the puck if the crowd had not congregated, and therefore the court considered the issue to be not whether the defendants owed a duty to provide better crowd control, but whether they owed a duty to eliminate the risk of injuries caused by flying pucks [*Nemarnik v. Los Angeles Kings Hockey Club (2002) 103 Cal. App. 4th 631, 640, 127 Cal. Rptr. 2d 10]* . The court refused to impose a duty to eliminate the danger of flying pucks, concluding that to do so would force the defendants either to provide a floor-to-ceiling protective screen around the rink, which would reduce the quality of everyone's view, or increase the cost of tickets to cover the increased liability costs, which would make ticket prices too costly for some potential spectators [*Nemarnik v. Los Angeles Kings Hockey Club (2002) 103 Cal. App. 4th 631, 641, 127 Cal. Rptr. 2d 10]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAssault & BatteryGeneral OverviewTortsNegligenceDefensesAssumption of RiskAthletic & Recreational ActivitiesTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSports Facilities

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§ 273.11 Res Ipsa Loquitur

The requirements for application of the res ipsa loquitur doctrine are: (1) that it is the kind of accident which ordinarily does not occur in the absence of someone's negligence; (2) that it was caused by an agency or instrumentality in the exclusive control of the defendant; and (3) that the accident was not due to any voluntary action on the part of the plaintiff [*Shahinian v. McCormick (1963) 59 Cal. 2d 554, 559, 30 Cal. Rptr. 521, 381 P.2d 377* ; *Khanoyan v. All Am. Sports Enters., Inc. (1964) 229 Cal. App. 2d 785, 787-788, 40 Cal. Rptr. 596]* . For example, when a spectator occupying a position in the area designated for his use was injured through no voluntary action on his part from flying debris resulting from the deliberate destruction of motor vehicles within the exclusive control of those producing the event, the injuries were held not to occur ordinarily in the absence of someone's negligence and the doctrine of res ipsa loquitur was held applicable [*see Khanoyan v. All Am. Sports Enters, Inc. (1964) 229 Cal. App. 2d 785, 793, 40 Cal. Rptr. 596]* .

For a form allegation that the res ipsa loquitur doctrine applies to a specific factual situation, *see § 273.92*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesAssumption of RiskAthletic & Recreational ActivitiesTortsNegligenceProofRes Ipsa LoquiturGeneral OverviewTortsNegligenceProofRes Ipsa LoquiturElementsGeneral OverviewTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSports Facilities

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§ 273.12 Defenses

[1] In General

Defenses against an action alleging that defendant is liable for injuries to a spectator tend to focus on plaintiff's failure to state a cause of action, usually through attacks on the plaintiff's allegations of the duty owed by defendant. As such, these defenses are most likely to be raised by demurrer or by motion for summary judgment. The exception to this tendency is an allegation that the plaintiff was contributorily negligent; the defense of comparative negligence must be pleaded as an affirmative defense [*see Simmons v. Wexler (1979) 94 Cal. App. 3d 1007, 1014, 156 Cal. Rptr. 810]* .

For discussion and forms regarding the pleading of defenses in negligence actions generally, see Ch. 26, *Answers* , and Ch. 380, *Negligence* .

[2] Plaintiff's Comparative Negligence

The complete defense of contributory negligence has been invalidated in California, and replaced with a system of comparative negligence in which the fundamental purpose is to assign responsibility and liability for damage in direct proportion to the negligence of each of the parties. Thus, in all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured does not bar recovery, but the damages awarded are diminished in proportion to the amount of negligence attributable to the person recovering [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

Comparative negligence principles are also applied in so-called "secondary assumption of risk" cases, in which the defendant has breached a duty of care owed to plaintiff, creating a risk of harm to plaintiff that plaintiff then chose to encounter [*Knight v. Jewett (1992) 3 Cal. 4th 296, 310, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . Thus, comparative negligence principles are likely to arise after a defendant fails to establish that no duty of care existed under circumstances, thereby making the complete bar of the "primary assumption of risk" doctrine inapplicable [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 310, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . The assumption of the risk doctrine is discussed in more detail in *§§ 273.10[4][a]* and *273.12[3]*.

Any contention that the plaintiff's negligence contributed to his or her injury, whether denominated as comparative negligence or secondary assumption of risk, should be set forth in an affirmative defense allegation [*see Code Civ. Proc. § 431.30(g)*; *see also Singer v. Superior Court (1960) 54 Cal. 2d 318, 323-324, 5 Cal. Rptr. 697, 353 P.2d 305* (negligence of plaintiff, and causative link with plaintiff's injury, may be alleged generally in answer)].

For a form setting out the affirmative defense that plaintiff's recovery should be reduced under principles of comparative fault, *see § 273.94*.

[3] Assumption of Risk

The defense of assumption of risk has been held to be two separate doctrines. In cases involving "primary assumption of risk"--in which, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular harm that caused the injury--the doctrine continues to operate as a complete bar to the plaintiff's recovery. In cases involving "secondary assumption of risk"--in which the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty--the doctrine is merged into the comparative fault scheme, and the trier of fact, in apportioning the loss resulting from the injury, may consider the respective responsibility of the parties [*Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

The California Supreme Court has stated that, under this approach, the question of the existence and scope of a defendant's duty of care is a legal question, which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity, and is an issue to be determined by the court, rather than by the jury. Thus, the question is amenable to resolution by summary judgment [*Knight v. Jewett (1992) 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . However, court of appeal decisions disagree on whether the court, rather than the jury, decides whether the defendant increased the risks inherent in the activity, which can support imposition of liability under the primary assumption of risk doctrine. Decisions assigning this responsibility to the court point out that this issue goes to establishing the proper duty of care, which is the province of the court [*compare Huff v. Wilkins (2006) 138 Cal. App. 4th 732, 745, 41 Cal. Rptr. 3d 754* (court decides issue); *with Vine v. Bear Valley Ski Co. (2004) 118 Cal. App. 4th 577, 592-593* & n.4 (jury decides issue)].

Conversely, courts concluding that the issue should go to the jury point out that the inquiry requires application of a general duty of care, the duty not to increase the risks inherent in the activity, to the facts of the particular case, and as such, the inquiry is one traditionally left for the trier of fact [*Luna v. Vela (2008) 169 Cal. App. 4th 102, 112, 86 Cal. Rptr. 3d 588* (jury to determine whether homeowner increased risks inherent in volleyball when failing to mark net tie-down lines)]. In a 2007 opinion, the Supreme Court suggested that, in the context of primary assumption of risk, the question of whether a defendant has acted recklessly should be left to the jury, supporting the conclusion that the question of whether the defendant increased the risks inherent in an activity should also be left to the jury [*Shin v. Ahn (2007) 42 Cal. 4th 482, 499-500, 64 Cal. Rptr. 3d 803, 165 P.3d 581* ; *see Luna v. Vela (2008) 169 Cal. App. 4th 102, 113, 86 Cal. Rptr. 3d 588*].

Ordinarily, the question of assumption of risk would be raised in the answer, as a ground for objection to the complaint that does not appear on the face of the pleading [*see Code Civ. Proc. § 430.30(b)*]. If it appears on the face of the complaint that the defendant did not owe plaintiff a duty to prevent the injury suffered, the objection may be raised by demurrer [*see Code Civ. Proc. § 430.30(a)*], although it seems that in most cases the court would need to go beyond the pleadings to resolve the issue.

For a form of affirmative defense alleging that plaintiff's primary assumption of risk precludes any recovery, *see § 273.93*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesAssumption of RiskAthletic & Recreational ActivitiesTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSports Facilities

California Forms of Pleading and Practice--Annotated

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Volume 23: Fraud and Deceit thru Good Faith Improver of Real Property-Chs. 269-279
Chapter 273 GAMES, SPORTS, AND ATHLETICS
PART II. LEGAL BACKGROUND
A. Injuries to Spectators

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[Reserved]

§§ 273.13[Reserved]

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Chapter 273 GAMES, SPORTS, AND ATHLETICS
PART II. LEGAL BACKGROUND
B. Injuries to Participants

23-273 California Forms of Pleading and Practice--Annotated § 273.30

§ 273.30 Participants' Duty of Care

[1] General Duty of Care

The general rule in California is that persons have a duty to use due care to avoid injury to others, and may be held liable if their careless conduct injures another person [*Civ. Code § 1714(a)*]. However, in the sports setting conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself [*Knight v. Jewett (1992) 3 Cal. 4th 296, 315, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (citing as example rule that ski resorts have no duty to remove moguls, despite risk of harm posed, because risk and challenge posed by moguls are part of sport of skiing); *see also O'Donoghue v. Bear Mountain Ski Resort (1994) 30 Cal. App. 4th 188, 193, 35 Cal. Rptr. 2d 467* (rough terrain, trees, and ravines as inherent risks of skiing on advanced run)]. Thus, the nature of a sport is highly relevant in defining the duty of care owed by a particular defendant. Generally, defendants have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, but do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport [*Knight v. Jewett (1992) 3 Cal. 4th 296, 315-316, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *see, e.g., Yancey v. Superior Court (1994) 28 Cal. App. 4th 558, 566, 33 Cal. Rptr. 2d 777* (participants in discus have duty to be sure field is clear of other participants before throwing)].

[2] Duty Analysis Determines Assumption of Risk Issues

An analysis of the duty of care owed in a particular case is essential to the determination whether the plaintiff assumed the risk of the injury he or she suffered. "Primary assumption of risk" involves cases in which the assumption of risk doctrine embodies a legal conclusion that there is no duty on the part of the defendant to protect a plaintiff from a particular risk; in these cases, recovery by the plaintiff is barred. "Secondary assumption of risk" involves cases in which a defendant does owe a duty of care to the plaintiff, but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of duty; in these cases, recovery is determined using principles of comparative fault to apportion recovery according to the parties' respective degrees of fault [*Knight v. Jewett (1992) 3 Cal. 4th 296, 308-310, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . For further discussion of the assumption of risk doctrine, see Ch. 380, *Negligence* .

[3] Effect of Violation of Statute or Local Ordinance

In *Cheong v. Antablin* [*Cheong v. Antablin (1997) 16 Cal. 4th 1063, 1066, 68 Cal. Rptr. 2d 859, 946 P.2d 817*], the California Supreme Court determined that a local ordinance placing a duty on skiers to ski in a safe and reasonable manner neither altered the rule that a skier owed a duty to fellow skiers not to injure them intentionally or to act recklessly, nor abrogated the assumption of risk defense. First, the Court rejected the plaintiff's argument that the ordinance imposed a higher duty of care on the defendant than that established in *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* , although it recognized that *Knight* was a development of the common law of torts, and that the legislature could, within constitutional limits, choose to modify the common law by statute. Whether a local ordinance such as the instant one could modify *Knight* was, according to the Court, less clear. The Court did not decide this question here because it concluded that the ordinance did not modify the *Knight* standard even if it assumed it could. According to the Court, the ordinance evinced no clear intent to modify common law assumption of risk principles.

Next, the Court rejected the plaintiff's second argument that *Evid. Code § 669(a)* provided him with a cause of action. The plaintiff had argued that he was provided with a cause of action by *Evid. Code § 669(a)* because: (1) the defendant violated an ordinance, (2) the violation caused the plaintiff's injury, (3) the ordinance was designed to prevent the injury, and (4) the plaintiff was one of the class the ordinance was intended to protect. Relying heavily on *Ford v. Gouin* [*Ford v. Gouin (1992) 3 Cal. 4th 339, 11 Cal. Rptr. 2d 30, 834 P.2d 724*], the plaintiff argued that if a plaintiff who is a participant in an active sport is also a member of the class of persons intended to be protected by a statute, then *Evid. Code § 669* will in turn transform the statute into a legal duty of due care on the defendant, thus abrogating the assumption of risk defense. In response, the Court determined that there was no legal duty in this case because the elements of *Evid. Code § 669(a)* had not been met. Specifically, the plaintiff had not demonstrated that he was one of the class the ordinance was intended to protect. By stating that skiers assumed the inherent risks of skiing, including the risk of collision and the risk that others would fail to ski within their own ability, the ordinance made clear that the plaintiff, who was injured in a collision with a fellow skier, was not one of the class of persons for whose protection the ordinance was adopted [*Cheong v. Antablin (1997) 16 Cal. 4th 1063, 1071, 68 Cal. Rptr. 2d 859, 946 P.2d 817]* .

NOTE:

Liability Between Coparticipants. The following issue was raised in *Cheong v. Antablin* [*Cheong v. Antablin (1997) 16 Cal. 4th 1063, 68 Cal. Rptr. 2d 859, 946 P.2d 817*] and left undecided by the Court: whether the breach of a statutory duty under *Evid. Code § 669(a)* would create tort liability between coparticipants in an active sport despite the *Knight* doctrine of primary assumption of risk. According to the Court, Justice Arabian's opinion in *Ford* implicitly assumed, and the opinions of Justice George, joined by Chief Justice Lucas, and Justice Mosk expressly concluded, that if the four elements of *Evid. Code § 669(a)* were satisfied, that the statute created tort liability between coparticipants in an active sport, despite the *Knight* doctrine of primary assumption of risk. A number of the justices who signed the majority opinion in *Cheong* questioned whether this conclusion was correct. Three justices were of the opinion that *Evid. Code § 669(a)* only creates an evidentiary presumption of negligence, while the *Knight* doctrine, when applicable, provides that negligence alone is insufficient to impose tort liability. However, the Court did not resolve the issue because it determined that even if the conclusion was correct, the elements of *Evid. Code § 669(a)* had not been met in this case.

One court of appeal decision adopted the approach that a presumption of negligence under *Evid. Code § 669(a)* could not overcome the primary assumption of risk defense, because the primary assumption of risk defense protects against liability for conduct that is merely negligent [*see Distefano v. Forester (2001) 85 Cal. App. 4th 1249, 1272-1274, 102 Cal. Rptr. 2d 813* (violation of standard of care provided by statutes governing off-road driving did not overcome primary assumption of risk defense, because negligence was insufficient basis for tort liability between participants in sport of off-roading)]. However, the court's analysis of the issue was dicta because the court had already held that the plaintiff failed to plead the issue at trial and could not amend his pleading on appeal [*Distefano v. Forester*

(2001) 85 Cal. App. 4th 1249, 1266, 102 Cal. Rptr. 2d 813] . At least one subsequent court of appeal opinion has adopted the conclusion of the *Distefano* court, based primarily on the fact that a majority of the California Supreme Court appeared to agree with that conclusion [*Moser v. Ratinoff (2003) 105 Cal. App. 4th 1211, 1226, 130 Cal. Rptr. 2d 198]* .

Another court of appeal opinion has subsequently held that provisions of the Harbors and Navigation Code governing the use of jet skis did not abrogate the primary assumption of risk doctrine, because the language of the statutes did not demonstrate a clear intent to do so [*Whelihan v. Espinoza (2003) 110 Cal. App. 4th 1566, 1575, 2 Cal. Rptr. 3d 883* ; *see Harb. & Nav. Code §§ 655(a), 655.7(c)*]. The plaintiff in that case was driving a jet ski that collided with another driven by her friend. Although the statutes at issue in that case criminalize reckless or negligent operation of watercraft and were enacted after the Supreme Court's decision in *Knight v. Jewett*, the court concluded that the statutes did not prevent application of the primary assumption of risk doctrine to the active sport of jet skiing, which by its very nature involves skill and challenges that pose a significant risk of injury [*Whelihan v. Espinoza (2003) 110 Cal. App. 4th 1566, 1573-1575, 2 Cal. Rptr. 3d 883]* .

Because the plaintiff specifically pleaded only negligent conduct on the part of the defendant, the court rejected the plaintiff's argument that triable issues remained as to whether the defendant's conduct was so reckless as to be outside the range of the ordinary activity involved in jet skiing [*Whelihan v. Espinoza (2003) 110 Cal. App. 4th 1566, 1575-1576, 2 Cal. Rptr. 3d 883]* ; *but see Huff v. Wilkins (2006) 138 Cal. App. 4th 732, 740-743, 746, 41 Cal. Rptr. 3d 754* (although plaintiff did not plead recklessness, summary judgment was inappro priate because defendants did not establish that their violation of statutory requirements governing operation of all-terrain vehicles (ATVs) by minors did not increase risk inherent in off-road ATV activity). A subsequent court of appeal opinion has reached the same result under similar facts [*Peart v. Ferro (2004) 119 Cal. App. 4th 60, 78-82, 13 Cal. Rptr. 3d 885* (personal watercraft used by parties was not technically jet ski because it was equipped with seat)].

[4] Specific Duty Based on Nature of Sport Involved

In some situations, the careless conduct of others is treated as an "inherent risk" of a sport, thus barring recovery by the plaintiff. For example, in a game of baseball, a player generally cannot recover if he or she is hit and injured by a carelessly thrown ball, and in a basketball game, recovery is not permitted for an injury caused by a carelessly extended elbow [*Knight v. Jewett (1992) 3 Cal. 4th 296, 316, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *see also Mann v. Nutrilite, Inc. (1955) 136 Cal. App. 2d 729, 734-735, 289 P.2d 282* (baseball); *Thomas v. Barlow (1927) 5 N.J. Misc. 764, 138 A. 208* (basketball)].

The California Supreme Court has held that the determination of the duty owed in a specific situation does not depend on the particular plaintiff's subjective knowledge or appreciation of the potential risk [*Knight v. Jewett (1992) 3 Cal. 4th 296, 316, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . Instead, the determination turns on whether the defendant had a legal duty to avoid specific conduct or to protect the plaintiff against a particular risk of harm. The nature of the defendant's duty depends heavily on the nature of the sport itself, and frequently will also depend on the defendant's role in, or relationship to, the sport [*Knight v. Jewett (1992) 3 Cal. 4th 296, 316-317, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

The question of the existence and scope of the defendant's duty of care in this context is a legal question, which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court rather than by the jury [*Knight v. Jewett (1992) 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (also noting that this characterization makes assumption of risk question more amenable to summary judgment resolution)].

The primary assumption of risk doctrine protects a party who is pursuing a sport in an appropriate venue from liability for an injury to another party who is engaged in a different activity in the same venue. A plaintiff who knowingly engages in his or her own activity assumes the risk of injury caused by a party who is vigorously engaged in a different

activity in the same venue [*Mastro v. Petrick (2001) 93 Cal. App. 4th 83, 90, 112 Cal. Rptr. 2d 185]* . Therefore, the liability of a defendant in such a case hinges on whether the defendant's conduct was so reckless as to fall outside the range of ordinary activity involved in the defendant's sport [*Mastro v. Petrick (2001) 93 Cal. App. 4th 83, 89-91, 112 Cal. Rptr. 2d 185* (primary assumption of risk protected snowboarder from liability for injury to skier)].

The extent to which a plaintiff can unilaterally change the nature of a sport in advance through agreeing to participate in a less vigorous activity is not entirely settled. The Supreme Court in *Knight* concluded that a defendant's liability must be based on the nature of the sport itself, rather than on the particular plaintiff's subjective knowledge and expectations [*Knight v. Jewett (1992) 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . Although that approach may be justified in the context of a competitive sport, one court of appeal opinion concluded that a plaintiff's admonition to the defendant to go slow or "take it easy" prior to the plaintiff's riding on a water tube being towed behind a motorboat could not be used to change the inherent nature of the sport of water "tubing," which, according to the court of appeal, is inherently about trying to stay on the tube as it whips quickly through the water [*Record v. Reason (1999) 73 Cal. App. 4th 472, 483-484, 86 Cal. Rptr. 2d 547]* . However, the dissent in that case noted that this particular result is subject to criticism on the grounds that these words should have created a factual dispute as to exactly what risk the plaintiff assumed [*Record v. Reason (1999) 73 Cal. App. 4th 472, 490-491, 86 Cal. Rptr. 2d 547]* . Although the majority's approach would carry more weight in the context of a competitive sport, in which there are multiple participants at once, in the context of water tubing, the only participant is arguably the person riding the tube, and that person should have been able to define the nature of the activity in advance.

[5] Intentional Injury or Conduct Outside Range of Ordinary Activity of Sport

[a] Basis for Liability to Other Participants

A participant in an active sport breaches a legal duty of care to other participants--that is, engages in conduct that properly may subject him or her to financial liability--only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport [*Knight v. Jewett (1992) 3 Cal. 4th 296, 320, 321, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

[b] Determining Whether Conduct Is Outside Range of Ordinary Activity

In determining whether or not specific conduct is "totally outside the range of ordinary activity involved in the sport," the California Supreme Court has stated that, in the heat of an active sporting event, a participant's normal energetic conduct often includes accidentally careless behavior, and that vigorous participation in sporting events likely would be chilled if legal liability were to be imposed on a participant based on his or her ordinary careless conduct. Thus, even if a participant's conduct violates a rule of the game and may subject the violator to internal sanctions prescribed by the sport itself, imposition of legal liability for that conduct might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule [*Knight v. Jewett (1992) 3 Cal. 4th 296, 318-319, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

In one case, for example, the California Supreme Court held that the primary assumption of risk doctrine protected a community college from liability when an intercollegiate baseball player was struck by a pitch, even if the pitch was thrown at the player intentionally. The Court determined that the risk of being hit with a pitch was inherent in the game of baseball, and despite the fact that the conduct was in violation of the official rules of the game, intentionally throwing a pitch at or near a batter was a recognized strategy that was part of the game [*Avila v. Citrus Cmty. Coll. Dist. (2006) 38 Cal. 4th 148, 163-165, 41 Cal. Rptr. 3d 299, 131 P.3d 383]* . In another case before it, the Court held that the collision between plaintiff and defendant, after which defendant stepped on plaintiff's hand, may have been due to defendant's negligence, but was not outside the range of ordinary activity in a game of football (even "touch" football) and therefore could not be the basis for tort liability [*Knight v. Jewett (1992) 3 Cal. 4th 296, 320-321, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

One subsequent case applied this analysis to hold that a defendant's consumption of alcohol while skiing was not an activity ordinarily involved in skiing, and that assumption of risk did not preclude a cause of action based on defendant's collision with plaintiff, which plaintiff alleged was caused at least in part by defendant's consumption of alcohol. Although collisions are an inherent risk of skiing and therefore defendant did not have a duty to avoid an inadvertent collision with plaintiff, defendant did have a duty to avoid increasing the risk of collision [*Freeman v. Hale (1994) 30 Cal. App. 4th 1388, 1395-1396, 36 Cal. Rptr. 2d 418]* . Furthermore, the court noted that consumption of alcohol could be prohibited during or shortly before skiing without fundamentally altering the nature of the sport; such a prohibition would instead promote vigorous participation in the sport by permitting skiers to ski to the best of their physical abilities [*Freeman v. Hale (1994) 30 Cal. App. 4th 1388, 1396, 36 Cal. Rptr. 2d 418]* .

Similarly, a snowboarder has a duty not to board at a high rate of speed into a flat area used for resting without looking ahead to see and avoid contact with other skiers or boarders who are using the area to rest between runs [*Lackner v. North (2006) 135 Cal. App. 4th 1188, 1200-1201, 37 Cal. Rptr. 3d 863* (triable issue existed as to whether snowboarder acted recklessly)]. The court of appeal in another case also held that requiring a snowboarder to watch where he or she is going and not engage in a snowball fight while snowboarding at a high rate of speed would not deter vigorous participation in the sport or otherwise fundamentally alter the nature of snowboarding [*Mammoth Mountain Ski Area v. Graham (2006) 135 Cal. App. 4th 1367, 1373-1374, 38 Cal. Rptr. 3d 422* ; *see also Yancey v. Superior Court (1994) 28 Cal. App. 4th 558, 565-566, 33 Cal. Rptr. 2d 777* (requiring discus throwers to ensure field was clear before throwing would not change nature of sport)].

[6] Analysis Not Limited to Competitive Sports

The general rule limiting the duty of care to intentional or reckless conduct [*see § 273.30[5][a]*] applies to participants engaged in noncompetitive but active sports activity [*Ford v. Gouin (1992) 3 Cal. 4th 339, 345, 11 Cal. Rptr. 2d 30, 834 P.2d 724* (analysis applied to case involving waterskier injured due to alleged negligence of boat driver); *see also Freeman v. Hale (1994) 30 Cal. App. 4th 1388, 1394-1395, 36 Cal. Rptr. 2d 418* (skier injured in collision with another skier); *Stimson v. Carlson (1992) 11 Cal. App. 4th 1201, 1205-1206, 14 Cal. Rptr. 2d 670* (analysis applied to injury sustained while sailing)]. In *Knight v. Jewett* [*Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696*], the Court noted that the limited duty of care applicable to co-participants has been applied in situations involving a wide variety of active sports, ranging from baseball to ice hockey and skating. Because the touch football game at issue in the case clearly fell within the rationale of the limited duty rule, the Court had no occasion to decide whether a comparable limited duty of care appropriately should be applied to other less active sports, such as archery or golf [*Knight v. Jewett (1992) 3 Cal. 4th 296, 320 n.7, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . Because of the special danger to others posed by the sport of hunting, however, past cases generally have found the ordinary duty of care applies to hunting accidents [*Knight v. Jewett (1992) 3 Cal. 4th 296, 320 n.7, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *see also Summers v. Tice (1948) 33 Cal. 2d 80, 83, 199 P.2d 1*].

In *Cheong v. Antablin* [*Cheong v. Antablin (1997) 16 Cal. 4th 1063, 68 Cal. Rptr. 2d 859, 946 P.2d 817*], the Court applied the principles of duty and assumption of risk enunciated in *Knight v. Jewett* [*see § 273.30[2]*] to collisions between recreational skiers. The Court restated the basic principles of *Knight's* lead opinion as the controlling law, and concluded that the principles of primary assumption of risk barred the action. In response to the plaintiff's argument that a local ordinance imposed a higher duty on the defendant than *Knight* established, the majority refused to consider whether a local ordinance can even modify the duty established by *Knight*, but held that in any event, the local ordinance in question did not modify that duty [*Cheong v. Antablin (1997) 16 Cal. 4th 1063, 1068-1070, 68 Cal. Rptr. 2d 859, 862-863]* .

The court of appeal has defined a "sport" for primary assumption of risk purposes as an activity done for enjoyment or thrill, requiring physical exertion as well as elements of skill, and involving a challenge containing a potential risk of injury [*Record v. Reason (1999) 73 Cal. App. 4th 472, 482, 86 Cal. Rptr. 2d 547* (water "tubing" was sport)]. In one

case, for example, passengers out for a simple boat ride around a lake were not engaged in a sport that comes under the primary assumption of risk doctrine. Even though the boat could have been used for sporting activities, the type of boating engaged in by the passengers was not competitive or physically challenging, nor did it require special skills or physical abilities. Therefore, the driver of the boat owed a duty of care to the passengers [*Shannon v. Rhodes (2001) 92 Cal. App. 4th 792, 800-801, 112 Cal. Rptr. 2d 217]* .

By contrast, the court of appeal in another case held that the primary assumption of risk doctrine applies to the activity of riding a personal watercraft, even if the rider is merely a passenger and the watercraft is being operated at a modest rate of speed. The court noted that a personal watercraft is open to the elements, with no hull or cabin, and is designed for high performance, speed, and quick turning maneuvers. In addition, unlike the benign activity of riding in a boat, riding a personal watercraft requires some physical exertion and balance by the passenger to hold onto the operator, or grips or handles, to avoid being thrown off the vessel [*Truong v. Nguyen (2007) 156 Cal. App. 4th 865, 887-891, 67 Cal. Rptr. 3d 675*]. In another case, an organized, long-distance bicycle ride on a public highway was a sport covered by the primary assumption of risk doctrine, even though the ride was noncompetitive. A ride of that kind, with a large number of riders, is an athletic activity done for enjoyment and physical challenge, and the risk of injury caused by a negligent coparticipant who swerves into another rider is inherent in the sport [*Moser v. Ratinoff (2003) 105 Cal. App. 4th 1211, 1220-1222, 130 Cal. Rptr. 2d 198]* .

Similarly, fitness training under the guidance of a personal trainer is a physical activity involving an element of risk or danger to which the primary assumption of risk doctrine may be applied [*Rostai v. Neste Enters. (2006) 138 Cal. App. 4th 326, 333, 41 Cal. Rptr. 3d 411]* . The risks of injury inherent in fitness training may include injury to the obvious muscles such as those in the legs and arms, but also to less obvious areas such as the heart. For example, a personal trainer successfully defended on the basis of primary assumption of risk in a case in which a client suffered a heart attack due to overexertion during his first workout with the trainer. Although the client argued that the primary assumption of risk doctrine did not apply to the activity, the court disagreed and concluded that the trainer did nothing more than push the client beyond his comfort level, which was inherent in the training regimen and consistent with the goals of the activity [*Rostai v. Neste Enters. (2006) 138 Cal. App. 4th 326, 333-334, 41 Cal. Rptr. 3d 411]* .

An injury sustained during a non-competitive practice for a competitive sport or activity can fall within the primary assumption of risk doctrine [*Shelly v. Stepp (1998) 62 Cal. App. 4th 1288, 1294, 73 Cal. Rptr. 2d 323* (primary assumption of risk applied to injury sustained by exercise rider of racehorse at track)]. For discussion of the effect of the primary assumption of risk doctrine on coaches, trainers, or instructors, see *§ 273.31[1]*.

[7] Nature of Duty in Specific Sports

[a] Golf

The primary assumption of risk doctrine as first articulated in *Knight v. Jewett* has been applied to golf so that a golfer has no duty to protect other participants against risks inherent in golfing [*Shin v. Ahn (2007) 42 Cal. 4th 482, 497, 64 Cal. Rptr. 3d 803, 165 P.3d 581* ; *Dilger v. Moyles (1997) 54 Cal. App. 4th 1452, 1456, 63 Cal. Rptr. 2d 591]* . Thus, a golfer who injures another golfer with an errant golf shot may defend against liability on the basis of the primary assumption of risk doctrine, so long as the defendant golfer did not intend to injure the other golfer or engage in conduct so reckless as to be totally outside the range of ordinary activity involved in the sport [*Shin v. Ahn (2007) 42 Cal. 4th 482, 497, 64 Cal. Rptr. 3d 803, 165 P.3d 581]* .

The violation of a golfing rule of etiquette by the defendant does not in and of itself establish a basis for liability [*Shin v. Ahn (2007) 42 Cal. 4th 482, 497, 64 Cal. Rptr. 3d 803, 165 P.3d 581]* . For example, while rules of golfing etiquette state that a player should ensure that no one is standing close by or in a position to be hit when making a shot, the risk of being hit with an errant ball is inherent in the sport and whether the defendant acted recklessly when injuring another golfer with an errant shot depends on the totality of circumstances. While a golfer cannot just ignore other

players when making a shot, once having checked to see if others are reasonably likely to be struck and having concluded that it is safe to hit, a golfer who then concentrates on the ball in order to make the shot is not required to break his or her concentration in order to check the field again [*Shin v. Ahn (2007) 42 Cal. 4th 482, 497-500, 64 Cal. Rptr. 3d 803, 165 P.3d 581]* . Factors that may bear on whether a golfer's conduct was reasonable, negligent, or reckless may include the golfer's skill level, whether topographical conditions obscure the golfer's view, what steps the golfer took to determine whether anyone was within range, and the distance and angle between plaintiff and defendant when the shot was made [*Shin v. Ahn (2007) 42 Cal. 4th 482, 500, 64 Cal. Rptr. 3d 803, 165 P.3d 581]* . While failure to warn of an errant shot by yelling "fore" may be negligent, it does not constitute reckless or intentional conduct and does not breach a legal duty to other participants because it does not alter the inherent risk of being struck by a golf ball [*Dilger v. Moyles (1997) 54 Cal. App. 4th 1452, 1456, 63 Cal. Rptr. 2d 591]* .

Primary assumption of risk may be applied under these circumstances regardless of whether plaintiff and defendant were golfing as part of the same group or merely happened to be on the same course [*Shin v. Ahn (2007) 42 Cal. 4th 482, 494, 64 Cal. Rptr. 3d 803, 165 P.3d 581]* .

[b] Hunting

Because of the special danger to others posed by the sport of hunting, cases have generally found the ordinary duty of care to be applicable to hunting accidents [*Knight v. Jewett (1992) 3 Cal. 4th 296, 320 n.7, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *see Summers v. Tice (1948) 33 Cal. 2d 80, 83, 199 P.2d 1]* .

[c] Sportfishing

Danger of injury from a fisher's hook or sinker flying toward another fisher is an inherent risk in sportfishing and coparticipants owe no duty to protect other participants from this harm under the doctrine of primary assumption of risk [*Mosca v. Lichtenwalter (1997) 58 Cal. App. 4th 551, 553, 68 Cal. Rptr. 2d 58]* . Attempting to free an entangled line is a typical adjunct of fishing, even where a preferred method of line retreival is not used, and does not create and abnormal risk of injury from flying hooks and sinkers beyond that inherent in the sport [*Mosca v. Lichtenwalter (1997) 58 Cal. App. 4th 551, 555, 68 Cal. Rptr. 2d 58]* .

[d] Horseracing

Racehorses are by nature difficult to control, and a rider traveling on a track at high speeds in close proximity to others engaged in similar activity assumes the risk of injury caused by another unruly horse, even though the injury may have been caused through the ordinary negligence of the person in charge of the other horse [*Shelly v. Stepp (1998) 62 Cal. App. 4th 1288, 1294-1295, 73 Cal. Rptr. 2d 323]* .

[e] Marathons

The organizers of a marathon owe a duty of care to the runners to organize and conduct a reasonably safe race. Therefore, the organizers have a duty to provide adequate water and electrolyte fluids along the 26-mile course, because doing so minimizes the risks of dehydration and hyponatremia without altering the nature of the sport [*Saffro v. Elite Racing, Inc. (2002) 98 Cal. App. 4th 173, 179, 119 Cal. Rptr. 2d 497]* .

[f] Off-Roading

In a case involving a participant at an "off-roading" course whose dune buggy crested a blind hill and collided with another participant riding a motorcycle, the court of appeal held that the resulting injury was subsumed under the primary assumption of risk doctrine, because the risk of inadvertent collision and injury was inherent in the recreational activity of off-roading at a course provided for just such activities [*Distefano v. Forester (2001) 85 Cal. App. 4th 1249, 1262-1264, 102 Cal. Rptr. 2d 813]* . The court concluded that driving fast in the middle of the dirt trail while

ascending a blind hill was not so reckless as to be outside the range of ordinary activities involved in the sport [*Distefano v. Forester (2001) 85 Cal. App. 4th 1249, 1274, 102 Cal. Rptr. 2d 813]* . In addition, the court held that the defendant owed the plaintiff no duty to use a "spotter" at the top of the hill or equip his buggy with a tall whipper to make the vehicle visible over the crest of the hill, because the plaintiff failed to provide evidence that the lack of these precautions was so reckless as to be outside the range of ordinary activities involved in the sport [*Distefano v. Forester (2001) 85 Cal. App. 4th 1249, 1275, 102 Cal. Rptr. 2d 813]* .

However, another court of appeal decision held that the operation of an all-terrain vehicle by a minor without first complying with reasonable safety regulations governing that operation increased the risks of injury to other operators beyond those inherent in the activity, and that imposing liability for such conduct would not chill vigorous participation in off-road, recreational all-terrain vehicle use [*Huff v. Wilkins (2006) 138 Cal. App. 4th 732, 740-743, 41 Cal. Rptr. 3d 754]* .

[g] Discus

Persons involved in the sport of discus have a duty of care to persons in the expected target area because of the potentially lethal nature of the projectiles involved. This duty includes checking the target area and being sure it is clear before throwing [*Yancey v. Superior Court (1994) 28 Cal. App. 4th 558, 566, 33 Cal. Rptr. 2d 777]* .

[h] Recreational Skiing

Downhill recreational skiers owe a duty to fellow skiers not to injure them intentionally or to act recklessly, but a skier may not sue another for simple negligence [*Cheong v. Antablin (1997) 16 Cal. 4th 1063, 1066, 68 Cal. Rptr. 2d 859, 861]* . Thus, a skier will not be held liable for a collision caused by quick and aggressive skiing, as this is an inherent part of the sport, even if the skier makes a quick turn without looking [*Towns v. Davidson (2007) 147 Cal. App. 4th 461, 471, 54 Cal. Rptr. 3d 568]* .

An owner or operator of a ski resort owes no duty to protect skiers from risks inherent in the sport, such as the risk of encountering rough terrain, trees, rocks, or ravines [*O'Donoghue v. Bear Mountain Ski Resort (1994) 30 Cal. App. 4th 188, 192-193, 35 Cal. Rptr. 2d 467]* . Similarly, a ski resort operator has no duty to protect a skier from the inherent risk of colliding with a ski run tower [*Connelly v. Mammoth Mountain Ski Area (1995) 39 Cal. App. 4th 8, 12, 45 Cal. Rptr. 2d 855]* or a plainly-visible snowmaking hydrant located on a ski run [*Souza v. Squaw Valley Ski Corp. (2006) 138 Cal. App. 4th 262, 267, 41 Cal. Rptr. 3d 389]* . However, a ski resort operator does have a duty not to increase the risks inherent in skiing through the dangerous placement of hard-to-see signposts in a ski run [*Van Dyke v. S.K.I. Ltd. (1998) 67 Cal. App. 4th 1310, 1317, 79 Cal. Rptr. 2d 775]* .

[i] Waterskiing

[i] Owner or Operator of Facilities

The owner or operator of a resort providing water-ski facilities to the public has a duty to his or her patrons to use reasonable care for their safety if any of the activities of the recreational area present dangers to them [*Sorensen v. Hutson (1959) 175 Cal. App. 2d 817, 825, 346 P.2d 785]* . Such a duty includes not only the maintenance of the premises in a reasonably safe condition, but also the protection of patrons by taking appropriate measures to restrain conduct by third persons that the owner should be aware of, and that he or she should realize is dangerous [*Sorensen v. Hutson (1959) 175 Cal. App. 2d 817, 826-827, 346 P.2d 785]* .

For example, when a collision between two boats resulted in injury to a beginner water-skier, the jury could reasonably have concluded that the defendant had breached his or her duty when he or she brought together persons engaged in various activities (including waterskiing and bathing) and failed to take steps to protect swimmers and beginner water-skiers from the actions of other patrons [*see* *Sorensen v. Hutson (1959) 175 Cal. App. 2d 817, 827, 346 P.2d*

785] . Similarly, the jury was entitled to find that the defendant water conservation district had breached its duty of reasonable care to the plaintiff water-skier when it failed to notify either the county to which it leased a reservoir or the skier that a reduction of the water level had taken place and that shallow areas of the reservoir presented a hazard to water-skiers [*see Larson v. Santa Clara Valley Water Conservation Dist. (1963) 218 Cal. App. 2d 515, 520-524, 32 Cal. Rptr. 875]* .

[ii] Boat Drivers and Operators

Waterskiing is considered an active sport, and the driver of a water ski boat is a co-participant with the waterskier. Thus, the driver may be held liable for injuries to the water-skier only if the driver intentionally injured the water-skier or engaged in conduct that was so reckless as to be totally outside the range of the ordinary activities involved in the sport [*see Ford v. Gouin (1992) 3 Cal. 4th 339, 344-345, 11 Cal. Rptr. 2d 30, 834 P.2d 724]* . This conclusion is not altered by the fact that the relationship between the driver and the water-skier is cooperative, rather than competitive, in nature because the skier undertakes vigorous, athletic activity, and the ski boat driver operates the boat in a manner that is consistent with, and enhances, the excitement and challenge of the active conduct of the sport [*see Ford v. Gouin (1992) 3 Cal. 4th 339, 345, 11 Cal. Rptr. 2d 30, 834 P.2d 724* ; *see also Record v. Reason (1999) 73 Cal. App. 4th 472, 482, 86 Cal. Rptr. 2d 547* (water "tubing" as sport for purposes of primary assumption of risk)].

An operator of a boat or vessel does not, absent some specifically applicable rule defining proper channels, have a right that others travel in a fixed channel or corridor of water. Nevertheless, within limitations, he or she does have a right that is superior to that of others to some portion of a corridor of water. For example, navigating a vessel between a towing vessel and its tow is prima facie negligent operation [*Press v. Lyford (1974) 36 Cal. App. 3d 986, 991, 111 Cal. Rptr. 817* ; *see also 14 Cal. Code Reg. § 6697(c)*]. Generally, a motorboat with a water-skier in tow that is maintaining a fixed course has a right-of-way over a motorboat planning to cross the channel within which the skier is running [*Press v. Lyford (1974) 36 Cal. App. 3d 986, 992, 111 Cal. Rptr. 817]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAssault & BatteryGeneral OverviewTortsNegligenceDefensesAssumption of RiskAthletic & Recreational ActivitiesTortsNegligenceProofViolations of LawStatutesTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSports Facilities

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§ 273.31 Duty of Care of Persons in Control of Activity

[1] Coaches and Instructors

Similar to the duty owed by participants in competitive sports, coaches, trainers, and instructors owe a limited duty of care to those they instruct not to increase the risks inherent in learning the particular sport [*Rodrigo v. Koryo Martial Arts (2002) 100 Cal. App. 4th 946, 956, 961, 122 Cal. Rptr. 2d 832* (tae kwon do instructor did not increase risk of sport by having students wait in line to perform kick, even if inadequate supervision allowed one student to accidentally kick another while waiting in line)]. Generally, determining liability based on the defendant's status as an instructor hinges on the facts surrounding the participants' levels of experience and/or their relationships to one another in the activity undertaken, rather than merely the labels given to the participants [*Regents of Univ. of Cal. v. Superior Court (1996) 41 Cal. App. 4th 1040, 1046, 48 Cal. Rptr. 2d 922]* . Moreover, a student's subjective expectation that he or she would not be injured during the activity is irrelevant to application of the primary assumption of risk doctrine in this context. Instead, the scope of the instructor's duty is determined by the nature of the sport and the parties' relationship to the sport and to each other [*Rodrigo v. Koryo Martial Arts (2002) 100 Cal. App. 4th 946, 957-959, 122 Cal. Rptr. 2d 832]* .

Thus, in one case the primary assumption of risk doctrine was successfully invoked when a student in a rock climbing class was killed in a fall when his supporting ropes came free during a rock climbing exercise. In that particular case, the court concluded that the student had not been taken beyond his level of experience or capability during the activity that lead to the fall, and that the risk of such a fall was inherent in the sport [*Regents of Univ. of Cal. v. Superior Court (1996) 41 Cal. App. 4th 1040, 1046-1047, 48 Cal. Rptr. 2d 922]* . In another case, primary assumption of risk was a bar to recovery against the employer of theinstructors of a noncontact football class when a participant was injured in an unintentional collision with another player, since the instructors did nothing to increase the dangers inherent in the game [*Fortier v. Los Rios Cmty. Coll. Dist. (1996) 45 Cal. App. 4th 430, 436-439, 52 Cal. Rptr. 2d 812]* .

The mere fact that a student participant may have, in hindsight, been pushed beyond his or her capabilities, or required to perform without adequate instruction, will not preclude application of the primary assumption of risk doctrine, at least absent reckless conduct that is totally outside the range of ordinary activity involved in teaching or coaching or an

intent to injure by the instructor [*Kahn v. East Side Union High Sch. Dist. (2003) 31 Cal. 4th 990, 1011, 4 Cal. Rptr. 3d 103, 75 P.3d 30* ; *Bushnell v. Japanese-Am. Religious & Cultural Ctr. (1996) 43 Cal. App. 4th 525, 531-532, 50 Cal. Rptr. 2d 671* (primary assumption of risk precluded liability to student injured during judo instruction); *see also Allan v. Snow Summit, Inc. (1996) 51 Cal. App. 4th 1358, 1365, 1368-1371, 59 Cal. Rptr. 2d 813* (although express assumption of risk precluded liability for injuries suffered by ski student who fell on slopes, defendant was also protected by primary assumption of risk when instructor encouraged plaintiff to attempt more challenging ski run)].

In one case, for example, the California Supreme Court held that a high school swimming coach and a school district were not entitled to summary judgment because there were triable issues of fact as to whether the coach was reckless in requiring the plaintiff, a 14-year-old student, to dive into a shallow racing pool without adequate instruction. The plaintiff, who hit the bottom of the pool while performing the dive, presented evidence that she had not received any instruction from her coach on how to perform the dive safely, even though the dive was considered one of the riskiest maneuvers in the sport. She also presented evidence that the coach knew that she had a deep-seated fear of performing the dive, had previously promised her she would not have to make the dive, and had waited until the beginning of a competitive meet to inform her that she had the choice of either making the dive or not competing with the team [*Kahn v. East Side Union High Sch. Dist. (2003) 31 Cal. 4th 990, 1011-1013, 4 Cal. Rptr. 3d 103, 75 P.3d 30]* .

In another case, the court of appeal held that, as a matter of law, a ski instructor's assessment errors in evaluating either the skill level of his students or the difficulty of the conditions of the terrain did not rise to the level of recklessness sufficient to overcome the primary assumption of risk doctrine [*Kane v. National Ski Patrol Sys., Inc. (2001) 88 Cal. App. 4th 204, 214, 105 Cal. Rptr. 2d 600]* . The court in that case noted that the risks of falling and being injured or even killed are inherent in skiing and that instructors must make subjective judgments about a student's skill level to sufficiently challenge the student so that the student will improve those skills [*Kane v. National Ski Patrol Sys., Inc. (2001) 88 Cal. App. 4th 204, 214, 105 Cal. Rptr. 2d 600]* .

However, if imposition of a duty of care would not fundamentally alter the nature of the sporting activity, the primary assumption of risk defense does not apply. In one case, for example, a seventh-grade student in a physical education golf class was inadvertently hit in the face by a golf club swung by another student. The student sued the instructor and the school district, alleging negligent supervision, and the court of appeal held that the primary assumption of risk doctrine did not apply. The court concluded that being hit in the head by a golf club was not an inherent risk of the game of golf and that imposing a prudent person duty of care on the defendants would not fundamentally alter the game of golf, chill vigorous participation in the sport, or chill a coach's ability to challenge student athletes to push themselves [*Hemady v. Long Beach Unified School Dist. (2006) 143 Cal. App. 4th 566, 576-579, 49 Cal. Rptr. 3d 464]* .

A coach, trainer, or instructor is not an insurer, and a student must exercise due care for his or her own safety by noticing that which is obvious, and by asking appropriate questions [*Tan v. Goddard (1993) 13 Cal. App. 4th 1528, 1534-1535, 17 Cal. Rptr. 2d 89* ; *see also Ferrari v. Grand Canyon Dories (1995) 32 Cal. App. 4th 248, 253-257, 38 Cal. Rptr. 2d 65* (summary judgment for defendant river rafting company upheld on basis of primary assumption of risk in suit brought by customer injured while rafting with guide)]. Thus, even when primary assumption of risk may not apply, secondary assumption of risk may apply if the student's voluntary action in encountering a danger caused by the coach's, trainer's, or instructor's breach of duty is a cause of the student's injury [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 310, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

Application of secondary assumption of risk principles to determine the liability of instructors and coaches is proper when the instructor or coach fails to provide a safe environment in which to perform the activity without unnecessary risk [*see Bushnell v. Japanese-Am. Religious & Cultural Ctr. (1996) 43 Cal. App. 4th 525, 532-534, 50 Cal. Rptr. 2d 671]* . For example, a student at a jockey training school who was injured when the horse he was riding fell was not barred from recovering from the school and one of its trainers. The trainer knew that the horse had injured its foot and was not walking normally, but nevertheless instructed the student to ride the horse on a rocky track. Summary judgment for the school and the trainer was reversed because there was a triable issue regarding whether the trainer had breached

his duty to ensure that the horses he assigned the student to ride were reasonably safe to ride under the conditions the trainer prescribed [*Tan v. Goddard (1993) 13 Cal. App. 4th 1528, 1531, 1534-1535, 17 Cal. Rptr. 2d 89]* .

Similarly, secondary assumption of risk applied in a case involving an experienced horse show competitor who was injured while practicing jumps at a riding club. An instructor at the club raised the height of the jumps without lengthening the distance between obstacles; when the plaintiff followed the instructor's directions to ride through the course in a reverse direction, her horse landed too close to an obstacle, knocked it down, and popped up into the air, causing her to lose her balance and fall. The plaintiff was entitled to have the trier of fact consider comparative fault principles, because the instructor (and the riding club that employed her) had breached their duty to plaintiff to ensure that the jumps were not beyond the capacity of horse and rider [*Galardi v. Seahorse Riding Club (1993) 16 Cal. App. 4th 817, 820, 822-823, 20 Cal. Rptr. 2d 270]* .

[2] Other Persons in Control

A duty of care to participants similar to that of a coach or instructor also applies to others who are not participants or proprietors [*see § 273.32*], but who are in control of an athletic or sporting activity. These persons have a duty to the participants not to increase the risks inherent in the activity; for example, they have a duty not to supply faulty equipment [*Bjork v. Mason (2000) 77 Cal. App. 4th 544, 552-556, 92 Cal. Rptr. 2d 49* (general negligence rules apply to providing equipment and triable issue of fact existed as to whether defendant owed duty not to provide defective rope used in water tubing); *see Wattenbarger v. Cincinnati Reds, Inc. (1994) 28 Cal. App. 4th 746, 754, 33 Cal. Rptr. 2d 732* (dictum)], as well as a duty not to provide equipment designed in such a way as to increase the risks inherent in the sport [*Sanchez v. Hillerich & Bradsby Co. (2002) 104 Cal. App. 4th 703, 715, 128 Cal. Rptr. 2d 529* (particular baseball bat design substantially increased risk that pitcher would be hit by line drive)]. Similarly, the primary assumption of risk doctrine will not insulate an equipment manufacturer from liability for supplying defective equipment [*Ford v. Polaris Indus., Inc. (2006) 139 Cal. App. 4th 755, 770-775, 43 Cal. Rptr. 3d 215* (jet ski manufacturer could be liable for defective design); *Bunch v. Hoffinger Indus., Inc. (2004) 123 Cal. App. 4th 1278, 1300, 20 Cal. Rptr. 3d 780* (manufacturer of swimming pool liner not shielded from liability for failing to warn of hazards of diving into shallow pool)].

Under the doctrine of primary assumption of risk, a defendant in charge of a sporting activity has a duty not to increase the risks inherent in a sport, but no duty to decrease the risks that are inherently present in that sport. For example, a Little League Baseball association has no duty to reduce the risk of injury from being struck by a baseball, a risk inherent in the sport, by providing helmets with face guards, if the face guard was not a part of the normal safety equipment used by the League [*Balthazor v. Little League Baseball, Inc. (1998) 62 Cal. App. 4th 47, 52, 72 Cal. Rptr. 2d 337]* . Similarly, the League has no duty to provide safety glasses to help reduce the risk of players getting hit by a fly ball that they have lost sight of in the glare of the sun, the risk of which is an inherent part of the game of baseball [*West v. Sundown Little League of Stockton, Inc. (2002) 96 Cal. App. 4th 351, 359, 116 Cal. Rptr. 2d 849]* .

In one case, defendant, a major league baseball team, was not entitled to summary judgment against plaintiff, a pitcher on his high school's baseball team who was injured while participating in a tryout conducted by defendant's employees, because those employees had a duty of care toward plaintiff. While taking his turn pitching to several batters, plaintiff felt his arm "pop" after the third pitch, but he experienced no particular pain. He stepped off the pitcher's mound and told defendant's employees that his arm had popped. After receiving no response from them, he returned to the mound and threw another pitch; he immediately experienced severe pain and quit pitching. Although defendant's employees had no duty to protect plaintiff from the risks inherent in baseball, defendant did have a duty not to increase those risks by permitting plaintiff to continue to pitch after his arm popped [*Wattenbarger v. Cincinnati Reds, Inc. (1994) 28 Cal. App. 4th 746, 753-754, 33 Cal. Rptr. 2d 732]* .

A person is in control of a sport or game, and is not a coparticipant, if he or she is merely observing and not actively engaged in the activity [*Wattenbarger v. Cincinnati Reds, Inc. (1994) 28 Cal. App. 4th 746, 754, n.6, 33 Cal. Rptr. 2d*

732] . In one case, for example, the defendant's employees were not coparticipants because they decided what would be done and when, determined who would play what positions and for how long, supplied the equipment, and eliminated players with injuries from participating in the tryout [*Wattenbarger v. Cincinnati Reds, Inc. (1994) 28 Cal. App. 4th 746, 754, 33 Cal. Rptr. 2d 732]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawCivil LiabilityInjuries of Student AthletesTortsNegligenceDefensesAssumption of RiskAthletic & Recreational ActivitiesTortsNegligenceDefensesAssumption of RiskElements & NaturePrimary Assumption of RiskTortsNegligenceDefensesAssumption of RiskElements & NatureSecondary Assumption of RiskTortsNegligenceStandards of CareReasonable CareGeneral Overview

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§ 273.32 Proprietor's General Duty of Care to Participants

Generally, everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury on himself or herself [*Civ. Code § 1714(a)*; *see Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561* (liability of possessor of land, based on negligence in operation and control of that land, is determined by *Civ. Code § 1714(a)*)]. For further discussion of the generally applicable duties of owners and possessors of land, see Ch. 421, *Premises Liability* .

The California Supreme Court has noted that in the sports context, conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself [*Knight v. Jewett (1992) 3 Cal. 4th 296, 315, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . Defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, but do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport [*Knight v. Jewett (1992) 3 Cal. 4th 296, 315-316, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . Thus, a ski resort has no duty to eliminate moguls, as the challenge and risks posed by moguls are part of the sport of skiing even though they pose a risk of harm. However, a resort operator does have a duty to maintain towropes in a safe, working condition in order not to expose skiers to an increased risk of harm [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 315-316, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

While sports facility operators have a duty not to increase the risks inherent in a sport being played at the facility, the facility operators do not owe a duty to sports participants to provide advance notice of the availability of an automatic external defibrillator at the facility for use should a medical emergency arise [*Rotolo v. San Jose Sports & Entertainment, LLC (2007) 151 Cal. App. 4th 307, 323, 334-335, 59 Cal. Rptr. 3d 770]* . Under the relevant statutes, building owners and operators are under no duty to acquire and install such devices, and those who do make a defibrillator available are generally provided with immunity for its use during emergencies, so long as certain statutory conditions are met [*see Health & Safety Code § 1797.196(b), (f)*]. The court of appeal has held that these statutory requirements, which are intended to encourage the voluntary provision of defibrillators, occupy the field of liability for use or provision of these medical devices, and the courts are not free to impose an additional duty to notify sports participants or other invitees of the existence or location of such a device [*Rotolo v. San Jose Sports & Entertainment,*

LLC (2007) 151 Cal. App. 4th 307, 321-324, 334-335, 59 Cal. Rptr. 3d 770] .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesAssumption of RiskAthletic & Recreational ActivitiesTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSports Facilities

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23-273 California Forms of Pleading and Practice--Annotated § 273.33

§ 273.33 Specific Proprietors' Duties

[1] Ski Resort Operator

[a] No Duty to Eliminate Inherent Risks

A ski resort operator is not the insurer of skiers' safety, and does not have a duty to eliminate obvious hazards such as trees along ski runs [*Danieley v. Goldmine Ski Assocs., Inc. (1990) 218 Cal. App. 3d 111, 121-122, 266 Cal. Rptr. 749]* . This holding seems in accord with the general principles set forth in *Knight v. Jewett (1992) 3 Cal. 4th 296, 315-316, 11 Cal. Rptr. 2d 2, 834 P.2d 696* , in which the California Supreme Court held that a proprietor does not have a duty to eliminate risks inherent to a sport. It seems likely that trees, like moguls, are a risk inherent to the sport of skiing, and that a proprietor does not have a duty to eliminate such a risk. However, if the proprietor's conduct increases the risk to skiers--for example, by grooming runs in a way that increases the danger of colliding with a tree--it is possible that liability could exist [*see* *Knight v. Jewett (1992) 3 Cal. 4th 296, 315-316, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

In a case governed by the primary assumption of risk doctrine set forth in *Knight v. Jewett (1992) 3 Cal. 4th 296, 315-316, 11 Cal. Rptr. 2d 2, 834 P.2d 696* , the court held that an owner and operator of a ski resort had no duty to protect plaintiff, an intermediate to advanced level skier, against the risks inherent in the sport, and that those risks included encountering rough terrain, trees, rocks, and ravines. The court upheld summary judgment for defendant, ruling that defendant's general duty not to increase risks to skiers on its property over and above those inherent in the sport did not impose a duty on defendant to change the entire mountain to ensure plaintiff's safety [*O'Donoghue v. Bear Mountain Ski Resort (1994) 30 Cal. App. 4th 188, 192-193, 35 Cal. Rptr. 2d 467]* .

[b] Duty of Care Regarding Ski Lifts

A ski resort operator, at least insofar as the operator transports the skiers' bodies by means of a device such as a chair lift, may be held to the standard of care of a common carrier [*see Civ. Code § 2100* (carrier for reward must exercise utmost care and diligence); *Squaw Valley Ski Corp. v. Superior Court (1992) 2 Cal. App. 4th 1499, 1508-1510]* . It has been held, however, that an operator of a rope tow, whereby the skier maintained constant contact with the slope and

could have disembarked at any time, had no higher duty than that owed to a skier skiing down the slope on a designated trail [*see McDaniel v. Dowell (1962) 210 Cal. App. 2d 26, 31, 26 Cal. Rptr. 140* (plaintiff struck by another skier while holding onto towrope)]. For discussion of the duties imposed on common carriers, see Ch. 109, *Carriers* .

[2] Owner of Golf Course

Although the owner of a golf course has a duty to provide a reasonably safe course and not increase the risk inherent in golfing, the owner may be entitled to summary judgment on the basis of primary assumption of risk in an action alleging negligent course design, if the court finds as a matter of law that the design of the course did not increase the risks inherent in the sport [*see American Golf Corp. v. Superior Court (2000) 79 Cal. App. 4th 30, 38-39, 93 Cal. Rptr. 2d 683* (no triable issue of fact as to whether construction and placement of yardage markers increased risk of getting struck with errant shot)]. However, if a triable issue of fact exists as to whether the design of the course violated the duty to provide a reasonably safe golf course, the action may be governed by secondary assumption of risk principles, and summary judgment would be inappropriate [*see Morgan v. FUJI Country USA, Inc. (1995) 34 Cal. App. 4th 127, 134, 40 Cal. Rptr. 2d 249* (plaintiff alleged that golf course owner had breached duty of care by not reasonably protecting golfers teeing off on one hole from being hit by golf balls from adjacent hole)].

[3] Operator of Swimming Facility

[a] General Duty of Care

The owner and operator of a swimming facility is required to exercise reasonable care for the safety of his or her patrons in view of the use of the premises that might reasonably be anticipated [*Flora v. Bimini Water Co. (1911) 161 Cal. 495, 500, 119 P. 661* (12-year-old boy drowned); *Gates v. Gautier (1938) 29 Cal. App. 2d 524, 525, 85 P.2d 141* (diver injured on rough and jagged rocks on bottom of lake); *see also Johnson v. Bimini Hot Springs (1943) 56 Cal. App. 2d 892, 900, 133 P.2d 650* (proprietor of swimming facility as required to use reasonable and ordinary care in maintenance of shower room)]. The owner or proprietor will be liable for bodily harm caused to a patron by a dangerous condition on the premises if he or she knows or should know of the danger, which he or she has no basis for believing that the patron will discover, and if the owner or proprietor fails to give an adequate warning of that danger [*Alvarado v. Anderson (1959) 175 Cal. App. 2d 166, 173-174, 346 P.2d 73* (diver injured on defective diving apparatus); *see Rowland v. Christian (1968) 69 Cal. 2d 108, 112-120, 70 Cal. Rptr. 97, 443 P.2d 561* (rejecting former common-law distinctions among guests, invitees, and trespassers regarding duties owed by possessors of land)]. The fact that the patron is a child who may use equipment on the proprietor's premises for an unintended purpose does not relieve the owner of the duty to exercise reasonable care for the child's safety [*Alvarado v. Anderson (1959) 175 Cal. App. 2d 166, 174, 346 P.2d 73]* .

[b] Public Pool Operators' Duties Regarding Lifeguards

[i] When Lifeguards Required

Lifeguard service must be provided for any public swimming pool that is of wholly artificial construction and for the use of which a direct fee is charged [*Health & Safety Code § 116045(a)*]. For all other public swimming pools, lifeguard service must be provided or signs must be erected clearly indicating that such service is not provided [*Health & Safety Code § 116045(a)*; *see also Health & Safety Code §§ 116025* (public swimming pool defined), *116028* (lifeguard service defined); *22 Cal. Code Reg. § 65501 et seq.*].

The proprietor of a bathing establishment is not required, as a matter of law, to have a lifeguard stationed in immediate proximity to the deep water end of the swimming pool [*see Flora v. Bimini Water Co. (1911) 161 Cal. 495, 500]* . However, if the regulations of the Department of Health require that one or more "qualified" lifeguards must be on duty at each pool, it is the duty of a lifeguard to use reasonable care and diligence in watching a public swimming pool and the persons using the pool so that he or she may, in case of an emergency, render reasonable assistance to one likely to

drown [*Lindsey v. De Vaux (1942) 50 Cal. App. 2d 445, 456, 123 P.2d 144]* .

[ii] Violation of Statute, Ordinance, or Regulation

Violation of a statute, ordinance, or regulation may give rise to a presumption of negligence on the part of the defendant pool owner-operator if: (1) he or she violated the statute, ordinance, or regulation of a public entity; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence the nature of which the statute, ordinance, or regulation was designed to protect; and (4) the person suffering the death or injury to his or her person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted [*Atkins v. Bisigier (1971) 16 Cal. App. 3d 414, 421, 94 Cal. Rptr. 49* (citing *Evid. Code § 669(a)*)]. Thus, when an administrative regulation that required ropes and buoys in swimming pools was designed to prevent drowning accidents but not to protect against diving accidents, a pool owner's violation of the regulation did not give rise to liability for a diving accident because the individual injured in that accident was not a member of the class that the regulation was designed to protect [*see Atkins v. Bisigier (1971) 16 Cal. App. 3d 414, 421-422, 94 Cal. Rptr. 49* (involving former 17 Cal. Code Reg § 7786)].

Proof of statutory or regulatory safety violations can establish a pool owner's negligence as a matter of law, but does not automatically establish liability; the plaintiff still bears the burden of showing that the defendant's negligence was a proximate cause of the accident [*see Haft v. Lone Palm Hotel (1970) 3 Cal. 3d 756, 765, 91 Cal. Rptr. 745, 478 P.2d 465]* . However, the breach of a statutory duty itself will often suffice to give rise to an inference from which a jury may find that a given injury was the actual and proximate cause of the violation [*Haft v. Lone Palm Hotel (1970) 3 Cal. 3d 756, 765, 91 Cal. Rptr. 745, 478 P.2d 465* ; *see, e.g., Lucas v. Hesperia Golf & Country Club (1967) 255 Cal. App. 2d 241, 252, 63 Cal. Rptr. 189* ; *Lindsey v. De Vaux (1942) 50 Cal. App. 2d 445, 454-455, 123 P.2d 144]* .

The statutory obligation to provide a lifeguard may be satisfied by the mere posting of an adequate warning sign [*see Health & Safety Code § 24101.4*], but failure to post the sign is a basis for a finding of proximate cause. The sign does considerably more than indicate to potential swimmers that no lifeguard is present; it gives notice of the general hazards present in a given swimming pool and most importantly serves as a continuing warning of the potential danger to the novice swimmer. The mere absence of a lifeguard hardly provides such cautionary advice [*Haft v. Lone Palm Hotel (1970) 3 Cal. 3d 756, 768, 91 Cal. Rptr. 745, 478 P.2d 465]* . Thus, the liability of a pool owner who has neither provided a lifeguard nor erected a warning sign is to be measured with respect to his or her wrongful omission to provide lifeguard services and not with respect to the failure to post the requisite sign [*Haft v. Lone Palm Hotel (1970) 3 Cal. 3d 756, 768-769, 91 Cal. Rptr. 745, 478 P.2d 465* ; *see Lucas v. Hesperia Golf & Country Club (1967) 255 Cal. App. 2d 241, 251, 63 Cal. Rptr. 189]* .

[4] Commercial Stable Facility

[a] Duty of Care to Riders

Owners and operators of commercial horse-riding facilities or stables owe a duty of care to their patrons to ensure that the horses and services they provide do not increase the risk of injury above the level inherent in the activity of horseback riding [*Harrold v. Rolling J Ranch (1993) 19 Cal. App. 4th 578, 586, 23 Cal. Rptr. 2d 671* ; *see also Knight v. Jewett (1992) 3 Cal. 4th 296, 315-316, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . This duty of care to the riders who rent their horses encompasses all of the following: supplying horses that are not unduly dangerous and that are properly shod, warning riders of a particular horse's predisposition to behavior that increases the ordinary risk of horse riding, providing equipment that is not faulty, and providing trails that are not dangerous [*Harrold v. Rolling J Ranch (1993) 19 Cal. App. 4th 578, 587-588, 23 Cal. Rptr. 2d 671]* .

[b] No Duty to Provide "Ideal" Horses

A commercial stable facility's duty towards its patrons does not extend to eliminating hazards that are inherent in the

sport of horseback riding. Thus, the owner or operator of the stable has no duty to provide "ideal" horses that never buck, bite, break into a trot or gallop, or stumble, or horses that never "spook" when confronted by a frightening event or a rider's unusual movements. Sudden movements by a horse are as inherent in horseback riding as the presence of moguls on a ski slope. A rider thrown by the sudden movement of a horse is analogous to a passenger in a boat who is thrown off balance and injured by the sudden movement of a wave; neither the stable owner nor the boat owner is liable for the resulting injuries because no duty is imposed on either to protect against these occurrences [*Harrold v. Rolling J Ranch (1993) 19 Cal. App. 4th 578, 588-589, 23 Cal. Rptr. 2d 671]* .

In a subsequent case, however, another court of appeal decision held that a company that provided riding horses to a Girl Scout camp owed a duty not to knowingly or without due care provide horses inappropriate for beginning riders at a children's camp [*Giardino v. Brown (2002) 98 Cal. App. 4th 820, 834, 120 Cal. Rptr. 2d 77]* . In that case, a horse provided by the defendant spooked while an 11-year-old girl at the camp was tying the horse to a post, causing the child to get her hand caught in the rope and eventually leading to the amputation of two fingers. In reversing a summary judgment for the defendant, the court of appeal held that there was a triable issue of fact as to whether the particular horse was unduly dangerous for use at the children's camp, in light of evidence that the horse was "head-shy" and subject to spooking and that the defendant must have known this about the 20-year-old horse [*Giardino v. Brown (2002) 98 Cal. App. 4th 820, 836-837, 120 Cal. Rptr. 2d 77]* . Although recognizing that it would impossible to prevent a horse from ever spooking, which is an inherent risk in horseback riding, the court of appeal concluded that primary assumption of risk would not bar this particular action if the evidence showed that the defendant either (1) increased the risks inherent in the activity by providing a horse that was inappropriate to the skill level of the participants at the Girl Scout camp or (2) failed to warn of the horse's unusual or unsafe disposition [*Giardino v. Brown (2002) 98 Cal. App. 4th 820, 835, 120 Cal. Rptr. 2d 77]* .

In addition to application in the context of commercial horseback riding facilities, the primary assumption of risk doctrine may also protect a social host who provides a horse for riding by a guest. In one case, the court of appeal held that the primary assumption of risk doctrine provided a complete defense to the owners of a cattle ranch who had invited friends to their ranch for a barbecue and one guest who asked to ride one of their horses was injured. The guest assured the owners that she had ridden before, but she lost control of the horse, which broke into a gallop and swerved suddenly, throwing her into a fence. The court noted that while the horse was trained for work on the cattle ranch, a fact that the guest should have realized under the circumstances, the owners had no reason to know that the horse would bolt without apparent reason, as he had been a gentle horse previously around guests and when being ridden. Moreover, the owners did not purport to be horseback riding instructors or coaches and had not organized a riding event. The court concluded that the owners were entitled to take the guest at her word when she assured them that she had experience as a rider, especially in light of the fact that the guest appeared confident and in control of the horse when she first mounted. Under those circumstances, the owners had no duty to provide the guest with instructions on how to ride or control the horse [*Levinson v. Owens (2009) 176 Cal. App. 4th 1534, 1549-1551, 98 Cal. Rptr. 3d 779*]. In addition, the court also concluded that one comment made to the guest while the stirrups were being adjusted telling her not to pull back on the reins could not reasonably be interpreted to mean, even by a rider with only minimal experience, that she should never pull back on the reins to control the horse, and thus did not constitute conduct that increased the risks inherent in horseback riding [*Levinson v. Owens (2009) 176 Cal. App. 4th 1534, 1552, 98 Cal. Rptr. 3d 779*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesAssumption of RiskAthletic & Recreational ActivitiesTortsNegligenceDefensesAssumption of RiskElements & NaturePrimary Assumption of RiskTortsNegligenceDefensesAssumption of RiskElements & NatureSecondary Assumption of RiskTortsNegligenceProofViolations of LawStatutesTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSports Facilities

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23-273 California Forms of Pleading and Practice--Annotated § 273.34

§ 273.34 Establishing Liability

[1] Res Ipsa Loquitur

The res ipsa loquitur doctrine permits an inference that a defendant was negligent if the plaintiff establishes the following three elements: (1) the accident is of a kind that ordinarily does not occur in the absence of someone's negligence; (2) it is caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it is not due to any voluntary action or contribution on the part of the plaintiff [*see Evid. Code § 646*; *Shahinian v. McCormick (1963) 59 Cal. 2d 554, 559, 30 Cal. Rptr. 521, 381 P.2d 377* ; *Press v. Lyford (1974) 36 Cal. App. 3d 986, 994, 111 Cal. Rptr. 817]* .

The doctrine of res ipsa loquitur has been applied to a case in which a swimming area was under the control and management of the owner or his or her servants and the accident was such that it would not have occurred had the owner used proper care for the safety of his or her patrons [*Young v. Gautier (1938) 28 Cal. App. 2d 494, 498, 82 P.2d 959* (inference was sufficient to sustain judgment against swimming facility proprietor)]. However, the doctrine will not be applied if the balance of probabilities is not such that negligence is the most likely cause of the accident. For example, the res ipsa loquitur presumption was held inapplicable in a case in which the plaintiff skier sued for damages for injuries received as a result of a fall from the defendant's chair lift type of ski tow. The accident occurred when the plaintiff failed to successfully disembark at the designated point and was carried beyond the landing platform before falling 30 feet from the chair to the ground. Because there was some question regarding the exact cause of the accident, plaintiff requested an instruction on res ipsa loquitur, which the trial court refused to give. Although the requested instruction was improper in other particulars, the court of appeal affirmed the refusal principally because the instruction as offered assumed a balance of probabilities in favor of negligence, which the court held was not the case under the circumstances [*see Houser v. Floyd (1963) 220 Cal. App. 2d 778, 785, 34 Cal. Rptr. 96]* .

For general discussion of the res ipsa loquitur doctrine, see Ch. 380, *Negligence* .

[2] Presumption of Negligence Based on Violation of Law

The failure of a person to exercise due care is presumed if: (1) he or she violated a statute, ordinance, or regulation of a

public entity; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence of the nature that the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or injury to his or her person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted [*Evid. Code § 669(a)*]. The application of this presumption in the context of a swimming facility's violation of statutes regarding lifeguards is discussed in *§ 273.33[4][b]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesAssumption of RiskAthletic & Recreational ActivitiesTortsNegligenceProofRes Ipsa LoquiturGeneral OverviewTortsNegligenceProofRes Ipsa LoquiturEvidentiary EffectTortsNegligenceProofViolations of LawStatutesTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSports Facilities

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[Reserved]

§§ 273.35[Reserved]

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23-273 California Forms of Pleading and Practice--Annotated § 273.50

§ 273.50 California Points and Authorities

For forms of contention relating to the liability of a sports stadium proprietor, see California Points and Authorities, Ch. 178, *Premises Liability* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesAssumption of RiskAthletic & Recreational ActivitiesTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSports Facilities

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23-273 California Forms of Pleading and Practice--Annotated § 273.51

§ 273.51 California Torts

For discussion of the implied assumption of the risk doctrine following *Knight v. Jewett*, see Levy, Golden & Sacks, California Torts, Ch. 4 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesAssumption of RiskAthletic & Recreational ActivitiesTortsNegligenceDefensesAssumption of RiskElements & NaturePrimary Assumption of RiskTortsNegligenceDefensesAssumption of RiskElements & NatureSecondary Assumption of RiskTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSports Facilities

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23-273 California Forms of Pleading and Practice--Annotated § 273.52

§ 273.52 Forms of Discovery

For forms of interrogatories for use in civil actions generally by persons threatened with or injured through intentional force or violence, see Bender's Forms of Discovery, Ch. 11, *Assault and Battery* (Matthew Bender)

For forms of interrogatories for use in actions against promoters of sporting events, see Bender's Forms of Discovery, Ch. 12, *Athletics, Games and Sports* (Matthew Bender)

For forms of interrogatories for use in actions for injuries caused by defective construction or maintenance of grandstands, see Bender's Forms of Discovery, Ch. 129, *Metal Failure* (Matthew Bender)

For forms of interrogatories dealing generally with actions involving the relationship of master and servant, see Bender's Forms of Discovery, Ch. 76, *Employment Suits* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewReal Property LawTortsConstruction DefectsTortsIntentional TortsAssault & BatteryGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSports FacilitiesTortsVicarious LiabilityEmployersGeneral Overview

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§ 273.53 State Statutes

Liability for negligence. *Civ. Code § 1714(a)*

Measure of damages for negligence. *Civ. Code § 3333*

Statute of limitations applicable to actions for personal injuries or wrongful death. *Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)* (one-year period prior to 2003)

Statute of limitation on actions for injury to personal property as three years. *Code Civ. Proc. § 338(c)*

Permissive joinder of causes of action in complaint. *Code Civ. Proc. § 427.10(a)*

Res ipsa loquitur instruction. *Evid. Code § 646*

Actions by minors. *Fam. Code § 6601*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureParties Capacity of PartiesGuardiansCivil ProcedureParties JoinderPermissive JoinderGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsDamagesCompensatory DamagesGeneral OverviewTortsNegligenceActionsGeneral Overview

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23-273 California Forms of Pleading and Practice--Annotated § 273.54

§ 273.54 Decisions

[1] Duty of Care Owed to Spectators

[a] By Owners and Promoters

Owner as generally under no duty to eliminate (or protect plaintiff against) risks inherent in sport itself, but as having duty to use due care not to increase risk to participant over and above those inherent in sport. *Knight v. Jewett (1992) 3 Cal. 4th 296, 315-316, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

Risks inherent in sport as defined not only by virtue of nature of sport itself, but also by reference to steps sponsoring business reasonably should be obligated to take in order to minimize risks without altering nature of sport. *Knight v. Jewett (1992) 3 Cal. 4th 296, 317, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

Proprietor or operator of baseball stadium as required to exercise ordinary care to protect patrons against injury from batted or thrown baseballs. *Quinn v. Recreation Park Ass'n (1935) 3 Cal. 2d 725, 729, 46 P.2d 144* ; *Brown v. San Francisco Ball Club (1950) 99 Cal. App. 2d 484, 487, 222 P.2d 19*

Sports arena operator as not required by its duty of care to design and construct building in manner that would thwart spectator's derring-do. *Edwards v. California Sports, Inc. (1988) 206 Cal. App. 3d 1284, 1288, 254 Cal. Rptr. 170* (no liability for injury that occurred when intoxicated plaintiff was attempting to scale guard fence)

Owner of baseball stadium as under no duty to protect spectators from natural hazards generated by way in which game is played; imposing liability as unacceptably requiring owner to protect all seats or to increase price of tickets to cover costs of compensating injured spectators. *Neinstein v. Los Angeles Dodgers, Inc. (1986) 185 Cal. App. 3d 176, 181, 229 Cal. Rptr. 612*

Promoter as not entitled to summary judgment merely by alleging number of available screened seats, without showing correlation to number of requests reasonably expected for them and without showing actual availability to those who are

not season ticket holders. *Rudnick v. Golden W. Broadcasters (1984) 156 Cal. App. 3d 793, 796, 202 Cal. Rptr. 900*

[b] By Players

Player as not negligent by mere act of batting foul ball into grandstand. *Quinn v. Recreation Park Ass'n (1935) 3 Cal. 2d 725, 728, 46 P.2d 144*

Errant throw during baseball warm-up as not negligence on part of player. *Mann v. Nutrilite, Inc. (1955) 136 Cal. App. 2d 729, 734-735, 289 P.2d 282*

[2] Res Ipsa Loquitur

Doctrine of res ipsa loquitur as applicable to case in which spectator was injured at "demolition derby" but precise facts leading to injury were unknown. *Khanoyan v. All Am. Sports Enters., Inc. (1964) 229 Cal. App. 2d 785, 789-793, 40 Cal. Rptr. 596*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsGeneral OverviewTortsNegligenceDefensesAssumption of RiskAthletic & Recreational ActivitiesTortsNegligenceDefensesAssumption of RiskElements & NaturePrimary Assumption of RiskTortsNegligenceProofRes Ipsa LoquiturGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSports Facilities

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23-273 California Forms of Pleading and Practice--Annotated § 273.55

§ 273.55 Law Reviews

Note, *Strike One, and You're Out: Should Ballparks Be Strictly Liable to Baseball Fans Injured by Foul Balls? 19 Loy. L.A. L. Rev. 589 (1985)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 273.56 Text References

Personal Injury: Actions, Defenses, Damages, Vol. 26, *Sports Injury*, §§ 1.01-1.04, 1.08, 1.11-1.14, 1.19 (Matthew Bender)

Witkin, Summary of California Law, Vol. 6, *Torts*, §§ 1104-1112 (9th ed. 1988)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsGeneral OverviewTortsNegligenceDefensesAssumption of RiskAthletic & Recreational ActivitiesTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSports Facilities

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23-273 California Forms of Pleading and Practice--Annotated §§ 273.57-273.69

[Reserved]

§§ 273.57[Reserved]

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23-273 California Forms of Pleading and Practice--Annotated § 273.70

§ 273.70 California Points and Authorities

For forms of contention relating to assumption of risk, including assumption by participants in sports activities, see California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesAssumption of RiskAthletic & Recreational ActivitiesTortsNegligenceDefensesAssumption of RiskAthletic & Recreational ActivitiesTortsNegligenceDefensesAssumption of RiskElements & NaturePrimary Assumption of RiskTortsNegligenceDefensesAssumption of RiskElements & NatureSecondary Assumption of RiskTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSports FacilitiesTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSports Facilities

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23-273 California Forms of Pleading and Practice--Annotated § 273.71

§ 273.71 State Statutes

[1] Boxing, Wrestling, and Martial Arts

Boxing, wrestling, and martial arts regulations. *Bus. & Prof. Code § 18600 et seq.*

Professional martial arts fighter as required, prior to licensure, to demonstrate ability to perform. *Bus. & Prof. Code § 18642.5*

Operator of professional boxers' training gymnasium as required to inspect and log daily, on approved form, professional boxing license or sparring permit of individuals using gymnasium. *Bus. & Prof. Code § 18643(c)*

Failure of licensed training gymnasium owner, operator, fighter, boxer, trainer, second, or manager to report to State Athletic Commission injury or knockout of licensed boxer or fighter or holder of sparring permit as grounds for suspension of license. *Bus. & Prof. Code § 18654*

Regulation of contests, matches, and exhibitions. *Bus. & Prof. Code § 18720 et seq.*

Amateur boxing regulations. *Bus. & Prof. Code § 18750 et seq.*

Martial arts regulations. *Bus. & Prof. Code § 18760 et seq.*

Wrestling regulations. *Bus. & Prof. Code § 18770 et seq.*

Criminal liability. *Bus. & Prof. Code § 18870 et seq.*

Recovery of treble damages, and costs and attorney's fees at discretion of court, when unlicensed person causes injury or damage to another while providing goods or performing services for which specified licenses are required. *Code Civ. Proc. § 1029.8*

[2] Football

Duty of public school district to maintain protective football equipment in safe and serviceable condition; helmet certification requirement. *Educ. Code § 39617*

[3] Performance-Enhancing Drugs

Notice regarding unlawful use or transfer of anabolic steroids, testosterone, and human growth hormone as required in, and in contracts for lease of, specified athletic facilities. *Civ. Code § 1812.97*

[4] Swimming

[a] Ocean

Ocean water-contact sports, defined and regulated. *Health & Safety Code § 116070 et seq.*

[b] Public Swimming Pool

Rules regarding sanitation, healthfulness, and safety of public swimming pools. *Health & Safety Code § 116025 et seq.*

Public swimming pool defined. *Health & Safety Code § 116025*

Lifeguard service defined. *Health & Safety Code § 116028*

Artificially constructed swimming facilities, as defined, as exempt from construction standards of *Health & Safety Code § 116025 et seq.*, but as not exempt from water purity and swimmer safety standards contained therein. *Health & Safety Code § 116030*

Emergency water safety course and CPR certificates as required for aquatic-activities instructors at public swimming pools. *Health & Safety Code § 116033*

Person operating or maintaining public swimming pool as required to do so in sanitary, healthful, and safe manner. *Health & Safety Code § 116040*

Lifeguard services as required for any public swimming pool of wholly artificial construction and for use of which direct fee is charged; all other swimming pools as required to provide lifeguard services or signs clearly indicating that such services are not provided. *Health & Safety Code § 116045(a)*

Department of Health as entitled to make and enforce rules and regulations pertaining to public swimming pools. *Health & Safety Code § 116050*

Public swimming pool constructed, operated, or maintained contrary to provisions of *Health & Safety Code § 116025 et seq.* as a public nuisance, dangerous to health. *Health & Safety Code § 116060*

[c] Resorts

Resort as required to be equipped with lifeboat and safety equipment. *Health & Safety Code § 116025 et seq.*

Rules regarding regulation of swimming resorts. *Health & Safety Code § 116000 et seq.*

Resort for purposes of *Health & Safety Code § 116000 et seq.* as meaning any public bathing or swimming place or resort on river or stream. *Health & Safety Code § 24050*

Requirement that person maintaining resort sound depth of water, locate eddies and pools, determine presence and nature of dangers and obstructions, and warn of and rope off such dangers. *Health & Safety Code §§ 116005-116015*

[5] Waterskiing

Operation and equipment of vessels generally. *Harb. & Nav. Code § 650 et seq.*

Prohibition of negligent or reckless operation of motorboat or vessel or negligent manipulation of water skis; Department of Boating and Waterways as entitled to adopt regulations minimizing danger to life, limb, or property. *Harb. & Nav. Code § 655(a)*

Speed limit for power boats operating within 100 feet of person bathing (excluding water-skiers) or within 200 feet of beach, swimming float, or landing float. *Harb. & Nav. Code § 655.2*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawCivil LiabilityInjuries in Physical Education ClassesEducation LawCivil LiabilityInjuries of Student AthletesGovernmentsState & Territorial GovernmentsPolice PowerTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSports FacilitiesTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSwimming Areas

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§ 273.72 Administrative Regulations

[1] Boxing, Wrestling, and Martial Arts

Professional boxing rules. *4 Cal. Code Reg § 201 et seq.*

Martial arts rules. *4 Cal. Code Reg § 500 et seq.*

Amateur boxing rules. *4 Cal. Code Reg § 600 et seq.*

Wrestling rules. *4 Cal. Code Reg § 800 et seq.*

[2] Swimming

Regulations regarding public swimming pools. *22 Cal. Code Reg. § 65501 et seq.*

Regulations as applying to all pools except private pools maintained by individuals for use of family and friends; regulations as applying to, but not limited to, all commercial pools, real estate and community pools, pools at hotels, motels, resorts, auto and trailer parks, auto courts, apartment houses, clubs, public or private schools, and gymnasiums and health establishments; regulations as applying to all auxiliary structures and equipment thereof. *22 Cal. Code Reg. § 65503*

Lifesaving, first aid, and control of bathers. *22 Cal. Code Reg. § 65539*

[3] Waterskiing

Pilot rules and rules of road. *14 Cal. Code Reg § 6600 et seq.*

Navigating vessel or skis between a towing vessel and its tow or tows as constituting evidence of reckless or negligent operation within meaning of *Harb. & Nav. Code § 655. 14 Cal. Code Reg. § 6697(c)*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsPolice PowerTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSports FacilitiesTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSwimming Areas

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B. Injuries to Participants

23-273 California Forms of Pleading and Practice--Annotated § 273.73

§ 273.73 Decisions

[1] Assumption of Risk by Participant

Participant in active sport as liable for breach of legal duty of care to other participants in active sport only if participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside range of ordinary activity involved in sport. *Knight v. Jewett (1992) 3 Cal. 4th 296, 320, 321, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

Defense of assumption of risk as not subsumed by comparative negligence when plaintiff agrees to relieve defendant of an obligation of reasonable conduct. *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 829, 119 Cal. Rptr. 858, 532 P.2d 1226* (adopting system of comparative negligence in California)

Assumption of risk as not precluding cause of action based on defendant's collision on ski slopes with plaintiff, allegedly caused at least in part by defendant's consumption of alcohol, because defendant's consumption of alcohol while skiing was not activity ordinarily involved in skiing; although collisions are inherent risk of skiing and therefore defendant did not have duty to avoid an inadvertent collision with plaintiff, defendant did have duty to avoid increasing risk of collision. *Freeman v. Hale (1994) 30 Cal. App. 4th 1388, 1394, 36 Cal. Rptr. 2d 418*

Primary assumption of risk as barring recovery by skier who went through gap between trees, thinking he could cross over to another ski run, and skied over edge of ravine onto rocks below; owner and operator of ski resort as having no duty to protect plaintiff against risks inherent in sport of skiing (such as trees, rocks, rough terrain, or ravines) by, in effect, changing entire mountain to ensure plaintiff's safety. *O'Donoghue v. Bear Mountain Ski Resort (1994) 30 Cal. App. 4th 188, 192-193, 35 Cal. Rptr. 2d 467* .

Primary assumption of risk as generally inapplicable if defendant is coach, trainer, instructor, or person in control of activity, because these persons, unlike coparticipants, owe duty of care to those in their charge. *Wattenbarger v. Cincinnati Reds, Inc. (1994) 28 Cal. App. 4th 746, 754, 33 Cal. Rptr. 2d 732* ; *Galardi v. Seahorse Riding Club (1993) 16 Cal. App. 4th 817, 822-823, 20 Cal. Rptr. 2d 270*

Participant in major league baseball tryout as not barred by primary assumption of risk from recovering for injuries sustained after he told team employees his arm had "popped" while pitching and they permitted him to continue; team employees as having duty not to increase risk to participants beyond those inherent in game. *Wattenbarger v. Cincinnati Reds, Inc. (1994) 28 Cal. App. 4th 746, 754, 33 Cal. Rptr. 2d 732*

Primary assumption of risk as not applicable to discus participant struck by discus thrown by coparticipant who threw before checking target area; coparticipant as having duty of care to be sure target area was clear before throwing. *Yancey v. Superior Court (1994) 28 Cal. App. 4th 558, 566-567, 33 Cal. Rptr. 2d 777*

Primary assumption of risk as barring recovery of rider for injuries suffered when horse "spooked" and threw her; commercial operator of horse-riding facility as having no duty to provide customers with ideal horses that never engage in sudden movements. *Harrold v. Rolling J Ranch (1993) 19 Cal. App. 4th 578, 588-589, 23 Cal. Rptr. 2d 671*

Risks assumed by participant in game as usually limited to its natural and ordinary risks; if danger such as defect in premises occurs outside range of hazards inherent in game, participant as assuming that danger only if he or she knows of it. *Chase v. Shasta Lake Union Sch. Dist. (1968) 259 Cal. App. 2d 612, 616, 66 Cal. Rptr. 517*

[2] Bowling

Applicability of doctrine of res ipsa loquitur in action against bowling center for injuries sustained by dangerous and unsafe glass exit door. *Dennis v. Carolina Pines Bowling Ctr. (1967) 248 Cal. App. 2d 369, 372-374, 56 Cal. Rptr. 453*

[3] Boxing and Wrestling

Liability of promoter for injuries to combatants in illegal boxing match; consent of participants as not relieving promoter of liability. *Hudson v. Craft (1949) 33 Cal. 2d 654, 660, 204 P.2d 1*

[4] Discus

Participant in discus as having duty of care to be sure target area is clear before throwing; injured coparticipant as not barred from recovery because requirement of checking target area before throwing as not chilling vigorous participation in sport. *Yancey v. Superior Court (1994) 28 Cal. App. 4th 558, 566-567, 33 Cal. Rptr. 2d 777*

[5] Golf

Possessor of land as having duty to warn patron not only of conditions known by possessor to be dangerous, but also of dangerous conditions that possessor might have found by exercise of ordinary care. *Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 27, 77 Cal. Rptr. 914*

Golfer as assuming risk of many hazards incident to game of golf arising from errors of other players. *Strand v. Conner (1962) 207 Cal. App. 2d 473, 475, 24 Cal. Rptr. 584*

[6] Horseback Riding

Duty of care of commercial horseriding facility as not including duty to provide ideal horses that never make sudden movements; sudden movements as risk inherent in sport of horseback riding. *Harrold v. Rolling J Ranch (1993) 19*

Cal. App. 4th 578, 588-589, 23 Cal. Rptr. 2d 671

[7] Skating

Operator of skating rink as not insurer of his or her patrons' safety; operator as owing duty, however, to protect patrons from risks other than those normally incident to sport. *Hairston v. Studio Amusements, Ltd. (1948) 86 Cal. App. 2d 735, 740, 195 P.2d 498* ; *Thomas v. Studio Amusements, Inc. (1942) 50 Cal. App. 2d 538, 543, 123 P.2d 552*

Reckless action by other skaters capable of being prevented by instructors stationed on rink for protection of patrons as not normal risk involved in sport of roller skating; plaintiff as not having assumed that risk. *Hairston v. Studio Amusements, Ltd. (1948) 86 Cal. App. 2d 735, 740, 195 P.2d 498* ; *Thomas v. Studio Amusements, Inc. (1942) 50 Cal. App. 2d 538, 543, 123 P.2d 552*

Use of expert testimony in case involving roller skating accident. *Hairston v. Studio Amusements, Ltd. (1948) 86 Cal. App. 2d 735, 737-740, 195 P.2d 498*

[8] Skiing

Intervening act of another skier in striking and injuring ski school student as not breaking chain of proximate cause if intervening act was reasonably foreseeable by ski school instructor. *Davis v. Erickson (1960) 53 Cal. 2d 860, 863, 3 Cal. Rptr. 567, 350 P.2d 535*

Triable issue of fact existed regarding whether ski resort increased inherent risks by converting ordinary slope into racing slope without properly marking area. *Solis v. Kirkwood Resort Co. (2001) 94 Cal. App. 4th 354, 365-367, 114 Cal. Rptr. 2d 265*

Ski lift operator as common carrier within meaning of *Civ. Code § 2168*; absent express exemption by legislature, as subject to heightened standard of care generally applicable to common carriers under *Civ. Code § 2100*. *Squaw Valley Ski Corp. v. Superior Court (1992) 2 Cal. App. 4th 1499, 1512-1514, 3 Cal. Rptr. 2d 897*

Danger of being struck by another skier who has lost control of his or her actions as risk incident to use of skiing facilities. *McDaniel v. Dowell (1962) 210 Cal. App. 2d 26, 36, 26 Cal. Rptr. 140*

[9] Swimming

[a] Comparative Negligence

Defendant pool owners as bearing burden of proof of plaintiff's negligence; if such evidence does not appear, plaintiff as entitled to instruction that victim was not negligent as matter of law; child, obeying directions of parent, as not reasonably capable of being found to be negligent in his or her own right. *Haft v. Lone Palm Hotel (1970) 3 Cal. 3d 756, 777, 91 Cal. Rptr. 745, 478 P.2d 465*

Patron of bathing resort as required to use reasonable care for his or her own safety, but such patron as entitled to assume owner has discharged duty to provide reasonably safe place and as not required to make critical inspection. *Gates v. Gautier (1938) 29 Cal. App. 2d 524, 525, 85 P.2d 141* (diver striking head on rough and jagged rocks)

[b] Duty of Landowner

When public is led to believe that premises have been provided, offered, and held out for public entry, occupier as assuming duty of reasonable care to see that place is safe for reasonably anticipated uses; duty as extending to those who are injured when they enter in response to such invitation. *O'Keefe v. South End Rowing Club (1966) 64 Cal. 2d 729, 736, 51 Cal. Rptr. 534, 414 P.2d 830* (diver injured while jumping off pier located on private property)

[c] Duty of Public Swimming Facility Proprietor

[i] Exercise Reasonable Care for Patron's Safety

Duty of swimming facility owner as required to use reasonable care to keep bottom of lake where people bathe free from everything that might injure feet of bathers. *Young v. Gautier (1938) 28 Cal. App. 2d 494, 498, 82 P.2d 959* (glass on bottom of lake)

Owner-operator of bathing resort as required to use reasonable care for safety of patrons in view of use of premises that might reasonably be anticipated. *Rovegno v. San Jose Knights of Columbus Hall Ass'n (1930) 108 Cal. App. 591, 595, 291 P. 848*

[ii] Sanitation

Private waterfront property as not "public swimming pool" as contemplated in *Health & Safety Code § 24100*. *O'Keefe v. South End Rowing Club (1966) 64 Cal. 2d 729, 739-740, 51 Cal. Rptr. 534, 414 P.2d 830*

"Public swimming pool" as defined in *Health & Safety Code § 24100* as including any artificially constructed pool that is commonly and regularly used by many persons in community pursuant to general invitation issued to large or indeterminate group, such as entire community, as opposed to invitation to specific occasion or occasions; nature and extent of use made of swimming pool as determining its character. *Lucas v. Hesperia Golf & Country Club (1967) 255 Cal. App. 2d 241, 249, 63 Cal. Rptr. 189* ; *Askew v. Parker (1957) 151 Cal. App. 2d 759, 763, 312 P.2d 342*

"Public swimming pool" as including all commercial pools and pools at hotels, motels, resorts, auto and trailer parks, auto courts, apartment houses, clubs, public or private schools, and gymnasium and health establishments. *Lucas v. Hesperia Golf & Country Club (1967) 255 Cal. App. 2d 241, 249, 63 Cal. Rptr. 189*

[d] Proof

[i] In General

Evidence in form of inspection reports of pool in question by county health department as admissible on issue of defendant pool owner's willful and wanton misconduct. *Haft v. Lone Palm Hotel (1970) 3 Cal. 3d 756, 778-779, 91 Cal. Rptr. 745, 478 P.2d 465*

Mere fact that drowning occurred as not conclusive proof of negligence. *Flora v. Bimini Water Co. (1911) 161 Cal. 495, 500, 119 P. 661*

[ii] Causation

Under facts of case (no witnesses at all to drownings), plaintiffs, in proving defendant pool owner's violation of statutory lifeguard requirement, as sustaining their initial burden of proof on issue of causation; burden as then shifting to defendants to show violation was not proximate cause of deaths; in absence of such proof, defendants' causation of

such death as established as matter of law. *Haft v. Lone Palm Hotel (1970) 3 Cal. 3d 756, 765, 769-775, 91 Cal. Rptr. 745, 478 P.2d 465*

When alleged act of negligence consisted of failure to provide qualified lifeguard protection for public pool, question of causation and of what would have happened had such precaution been taken as not capable of direct proof and as largely a matter of speculation of inference; such question as for jury and not court. *Lindsey v. De Vaux (1942) 50 Cal. App. 2d 445, 454-455, 123 P.2d 144* ; *Rovegno v. San Jose Knights of Columbus Hall Ass'n (1930) 108 Cal. App. 591, 595, 291 P. 848*

[e] Res Ipsa Loquitur

When facts give rise to inference of negligence from inherent nature and character of act causing injury, that is, when facts give application to principle of res ipsa loquitur, burden of proceeding as shifted to defendant who must adduce evidence to meet plaintiff's prima facie case in order to escape adverse finding. *Young v. Gautier (1938) 28 Cal. App. 2d 494, 496, 82 P.2d 959*

[10] Waterskiing

Doctrine of res ipsa loquitur as applicable when defendant boat operator ran over plaintiff water-skier, operator was in sole control of boat, and plaintiff was not responsible for accident. *Shahinian v. McCormick (1963) 59 Cal. 2d 554, 559-561, 30 Cal. Rptr. 521, 381 P.2d 377*

When defendant boat operator may have violated local ordinance by operating motorboat in excess of legal speed limit, instruction to jury that assumption of the risk was not valid defense as appropriate only if plaintiff contends that violation was sole proximate cause of accident. *Shahinian v. McCormick (1963) 59 Cal. 2d 554, 565, 30 Cal. Rptr. 521, 381 P.2d 377*

Possible defense of plaintiff's negligence as arising when plaintiff water-skier consents to ski with boat operator who plaintiff knows or should know is inexperienced. *Shahinian v. McCormick (1963) 59 Cal. 2d 554, 568-569, 30 Cal. Rptr. 521, 381 P.2d 377* (skier injured while waiting in water for boat operator to pick him up)

Plaintiff water-skier as entitled, on request, to conditional res ipsa loquitur jury instruction when water-skier was maintaining fixed course and defendant motorboat operator was turning toward water-skier even though water-skier could have held on to tow rope and avoided accident but let go of rope. *Press v. Lyford (1974) 36 Cal. App. 3d 986, 994-997, 111 Cal. Rptr. 817*

Water-skier as having duty to keep proper lookout for own safety. *Press v. Lyford (1974) 36 Cal. App. 3d 986, 993, 111 Cal. Rptr. 817*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesAssumption of RiskAthletic & Recreational ActivitiesTortsNegligenceDefensesAssumption of RiskElements & NaturePrimary Assumption of RiskTortsNegligenceProofRes Ipsa LoquiturGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSwimming Areas

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§ 273.74 Attorney General Opinions

Public swimming pool health and safety standards (*Health & Safety Code § 116025 et seq.*) as applicable to mineral baths and like facilities. *52 Ops. Cal. Att'y Gen. 63 (1969)*

Swimming pools owned in common by individual members of condominium apartment building as subject to regulations under *Health & Safety Code § 116025 et seq.* *43 Ops. Cal. Att'y Gen. 256 (1964)*

Operators of picnic grounds bordering on stream as possibly falling within definition of "resort" for purposes of *Health & Safety Code §§ 24051-24052*, if swimming and bathing permitted. *27 Ops. Cal. Att'y Gen. 113 (1956)*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSwimming Areas

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§ 273.75 Law Reviews

Comment, *Playing With Liability: The Risk Release in High Risk Sports, 24 Cal. W. L. Rev. 127 (1987-1988)*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsGeneral OverviewTortsNegligenceDefensesAssumption of RiskAthletic & Recreational Activities

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23-273 California Forms of Pleading and Practice--Annotated § 273.76

§ 273.76 Text References

Personal Injury: Actions, Defenses, Damages, Vol. 5, *Beaches, Swimming Pools and Bathing Establishments,* §§ 1-6 (Matthew Bender)

Personal Injury: Actions, Defenses, Damages, Vol. 26, *Sports Injury,* §§ 1-6 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsGeneral OverviewTortsNegligenceDefensesAssumption of RiskAthletic & Recreational ActivitiesTortsNegligenceDefensesAssumption of RiskElements & NaturePrimary Assumption of RiskTortsNegligenceDefensesAssumption of RiskElements & NatureSecondary Assumption of RiskTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSwimming Areas

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[Reserved]

§§ 273.77[Reserved]

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PART IV. FORMS
A. Injuries to Spectators

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§ 273.90 Complaint for Damages [Civ. Code § 3333] for Personal Injuries and Property Damage Based on Negligence [Civ. Code § 1714(a)]--By Spectator Against Owner-Operator of Team

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries and Property Damage Based on Negligence [Civ. Code § 1714(a)]--By Spectator Against Owner-Operator of Team

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DAMAGES
[and DOES 1 through _____,]	)	(Negligence)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[*EITHER*]

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California.

[*OR*]

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California with its principal place of business in _____ [*city*], _____ County, California.

[*CONTINUE*]

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and plaintiff's injuries as herein alleged were proximately caused by defendants' negligence).]

[3. (Plaintiff is informed and believes and thereon alleges that) at all times herein mentioned each of the defendants sued herein as DOE was the agent and employee of each of the remaining defendants and was at all times acting within the purpose and scope of that agency and employment.]

4. At all times herein mentioned, defendant _____ [*name*] was engaged in the operation and ownership of a _____ [*specify, e.g.,* baseball] team and invited the public to attend and observe _____ [*specify, e.g.,* baseball] games at _____ [*name of stadium or park*] in _____ [*city*], _____ County, California, for a stipulated admission fee.

5. On or about _____ [*date*], at or about _____ [*time*], plaintiff, having duly paid the required admission fee, was seated in the grandstand provided by defendant [and in a seat behind a screen that separated the portion of the grandstand in which plaintiff was seated from the playing area, and which was impliedly represented by defendant to be sufficient to protect plaintiff and other patrons sitting behind it from _____ (*specify, e.g.,* baseballs) that might be (hit *or* thrown) in the direction of that section of the grandstand].

6. While plaintiff was thus seated, _____ [*describe accident, e.g.,* a foul ball hit by a batter came through the protective screen and struck plaintiff on the head], causing plaintiff to sustain the injuries hereinafter alleged.

7. Defendant carelessly and negligently [constructed,] maintained and repaired the premises in that he/she _____ [*specify acts or omissions leading to accident, e.g.,* permitted the protective screen to become and remain in such a weak and defective condition that it could not prevent batted balls from entering that portion of the grandstand and injuring spectators].

8. As a proximate result of the negligence of defendant[s, and each of them], plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her body and shock and injury to his/her nervous system and person, all of which have caused and continue to cause plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has suffered general damages.

9. As a further proximate result of the negligence of defendant[s, and each of them], plaintiff has incurred, and will continue to incur, medical and related expenses.

10. As a further proximate result of the negligence of defendant[s, and each of them], plaintiff's earning capacity has been greatly impaired, both in the past and at present.

[11. As a proximate result of the negligence of defendant(s, and each of them), plaintiff's _____ (

describe personal property, e.g., clothing) was _____ (*describe damage, e.g.,* destroyed beyond repair, all to plaintiff's damage in the sum of $_____ *or* damaged). (*If property was not destroyed, add:* Plaintiff has expended $_____ for repair of such _____ (*describe personal property*), which is a reasonable sum for such repair).]

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

4. [For property damages (in the sum of $_____)];

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read this complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

Plaintiff

[2] Use of Form

This general form of complaint is for use by a spectator at a sporting event to recover damages for personal injuries and property damages based on the negligence of the owner-operator of the team in providing for the safety of the spectators.

With appropriate modifications, this form can be used to allege a wrongful death action. For forms of allegation for use in wrongful death actions, see Ch. 181, *Death and Survival Actions* .

[3] Potential Bases of Liability

The precise bases on which a spectator may recover damages from an owner-operator, for injuries caused by the risks inherent to the game, are currently not clear. Older authority held that an owner had a duty to provide screened seats for as many spectators as may be reasonably expected to call for them on any ordinary occasion [*Quinn v. Recreation Park Ass'n. (1935) 3 Cal. 2d 725, 729, 46 P.2d 144* ; *see also Rudnick v. Golden W. Broadcasters (1984) 156 Cal. App. 3d 793, 796, 202 Cal. Rptr. 900* (reversing summary judgment in favor of owner; evidence did not show that protected seats existed sufficient to satisfy duty under *Quinn*)]. However, it is not clear whether this authority is still viable in light of the California Supreme Court decision in *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* . In *Knight*, the Court discussed the duty of owners in terms that seems to indicate that an owner has no duty to protect a plaintiff from a risk inherent to the game; in addition, the Court noted that the duty of an owner also depends on the steps the sponsoring business entity reasonably should be obligated to take in order to minimize the risks without altering the nature of the sport [*Knight v. Jewett (1992) 3 Cal. 4th 296, 317, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

The court of appeal has applied to spectators the rule stated in *Knight*, that defendants generally have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.

One court ruled that while foul balls may represent an inherent risk, and under *Knight*, an assumed risk to spectators attending baseball games, the owners of the team have a duty not to increase those risks [*Lowe v. California League of Prof'l Baseball (1997) 56 Cal. App. 4th 112, 119, 123, 65 Cal. Rptr. 2d 105* (triable issue of fact as to whether the teams' mascot cavorting in the stands and distracting spectator's attention, while the baseball game was in progress, constituted negligence in the form of increasing the inherent risk of spectator being struck by a foul ball)]. Another court of appeal opinion applied the same standard, but concluded that a professional hockey club, the league, and the owners and operators of the hockey arena owed no duty to a spectator to protect her from the risk of being hit in the face by a flying puck during pregame warm-ups, because this risk was inherent in attending a game [*Nemarnik v. Los Angeles Kings Hockey Club (2002) 103 Cal. App. 4th 631, 643, 127 Cal. Rptr. 2d 10]* . For further discussion, see *§ 273.10[3][a], [4][b]*.

The factual situation used as an example in this form of complaint involves a defective screen, which would presumably give rise to liability even under the more limited duty that may be applied pursuant to the language in *Knight* [*see Neinstein v. Los Angeles Dodgers, Inc. (1986) 185 Cal. App. 3d 176, 182 n.3, 229 Cal. Rptr. 612* (liability could be possible if injury was due to defective protection)]. For a form of allegation for use in a case in which the injury to plaintiff was caused by a third person's conduct, *see § 273.91*. For a form of allegation asserting that the res ipsa loquitur presumption is applicable, *see § 273.92*.

[4] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For discussion and forms relating to negligence actions generally, see Ch. 380, *Negligence*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

[7] State Statutes

Statute of limitations applicable to actions for personal injuries or wrongful death. *Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)* (one-year period prior to 2003)

Statute of limitations applicable to actions for injury to personal property. *Code Civ. Proc. § 338(c)*

[8] Decisions

In determining duty of defendant in particular factual situation, nature of defendant's duty in sports context depends heavily on nature of sport itself, and scope of legal duty owed by defendant frequently will also depend on defendant's role in, or relationship to, such sport. *Knight v. Jewett (1992) 3 Cal. 4th 296, 316-317, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (dicta)

Cases have analyzed duty of sports facility owners with regard to spectators, in process of defining risks inherent in particular sport, not only by virtue of nature of sport itself, but also by reference to steps sponsoring business entity reasonably should be obligated to take in order to minimize risks without altering nature of sport. *Knight v. Jewett (1992) 3 Cal. 4th 296, 316, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (dicta)

Promoter of sporting event as required to use reasonable care to protect patrons from injuries. *Quinn v. Recreation Park Ass'n (1935) 3 Cal. 2d 725, 729, 46 P.2d 144* (baseball); *Brown v. San Francisco Ball Club (1950) 99 Cal. App. 2d 484, 487, 222 P.2d 19* (baseball); *Shurman v. Fresno Ice Rink (1949) 91 Cal. App. 2d 469, 475, 205 P.2d 77* (hockey); *Ratcliff v. San Diego Baseball Club (1938) 27 Cal. App. 2d 733, 735, 81 P.2d 625* (baseball)

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23-273 California Forms of Pleading and Practice--Annotated § 273.91

§ 273.91 Allegation--Owner-Operator Liable for Failure to Protect Plaintiff From Foreseeable Conduct of Third Person

[1] FORM Allegation--Owner-Operator Liable for Failure to Protect Plaintiff From Foreseeable Conduct of Third Person

1. On or about _____ [*date*], plaintiff _____ [*specify conduct that is basis of duty to plaintiff, e.g.,* attended a baseball game at _____ (*name of park or stadium*), owned and operated by defendant].

2. At that time and place, _____ [*describe incident that caused injury to plaintiff, e.g.,* as plaintiff was leaving the park, plaintiff was assaulted by a group of youths who had been loitering in the parking lot appurtenant to _____ (*name of park or stadium*) (and owned and controlled by defendant)].

3. The injury to plaintiff was foreseeable to defendant in that _____ [*specify factors supporting contention that defendant should have foreseen incident, e.g.,* defendant knew or should have known that a group of youths often congregated in the area in which plaintiff was assaulted, that the lighting in the area was inadequate to provide for the safety of patrons returning to their cars, and that prior assaults had taken place in the same general area under similar circumstances].

4. Defendant's negligence was a proximate cause of plaintiff's injuries because _____ [*specify causal link between defendant's negligence and plaintiff's injury, e.g.,* defendant's repair of the broken lights, and periodic security patrol of the area, along with a warning to patrons of the risk of criminal activity in that area of the parking lot, would have enabled plaintiff to have taken steps to avoid the assault].

[2] Use of Form

These allegations are for use in a complaint for damages for personal injuries sustained by plaintiff due to the actions of a third person, when it is contended that the owner and possessor of property was negligent in failing to control the conduct of the third person or to warn plaintiff of the danger. The allegations may be inserted in the form in *§ 273.90* in

place of Paragraphs 5 through 7.

[3] Decisions

Evidence that stadium owner's security was "inadequate" as insufficient to impose liability on owner for injury caused by assault by third person, absent evidence that owner's negligence was proximate cause of injury. *Noble v. Los Angeles Dodgers, Inc. (1985) 168 Cal. App. 3d 912, 916-918, 214 Cal. Rptr. 395*

Owner of stadium or auditorium staging sporting event as required to use reasonable care to protect patrons against injury through wrongful acts of other patrons on premises where he or she has reasonable cause to anticipate such acts and probability of injury therefrom; owner as under duty to protect patrons by taking appropriate measures to restrain conduct by third persons that he or she should be aware of and should realize to be dangerous. *Sample v. Eaton (1956) 145 Cal. App. 2d 312, 316, 302 P.2d 431*

Evidence that employees did not attempt to stop spectators from fighting and throwing various articles, and that concessionaire made no attempt to stop defendant from taking or throwing beverage bottle despite fact that man had been using bad language and had been throwing other articles, defendant sponsor of wrestling exhibition as having breached duty of reasonable care toward plaintiff spectator when plaintiff struck in face by thrown bottle. *Sample v. Eaton (1956) 145 Cal. App. 2d 312, 316-317, 302 P.2d 431*

Absence of conduct placing track owner on notice of potentially negligent or reckless conduct of patrons as precluding owner's liability for injury to plaintiff caused by negligence of other patrons. *Port v. California Jockey Club (1955) 134 Cal. App. 2d 158, 160, 285 P.2d 60* (patron injured at horse race by another patron running up stairway)

[4] Cross References

For a related form, *see § 273.90*

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23-273 California Forms of Pleading and Practice--Annotated § 273.92

§ 273.92 Allegation--Res Ipsa Loquitur Presumption Applies

[1] FORM Allegation--Res Ipsa Loquitur Presumption Applies

Plaintiff was, at the time of his/her injury, occupying a _____ [seat *or* position] in the area designed for use by spectators. The injury was not caused by any voluntary action on the part of plaintiff, but was instead caused by _____ [*specify general cause of accident, e.g.,* flying debris resulting from the deliberate destruction of motor vehicles], which was within the exclusive control of defendant at the time the injury occurred. Because such an injury does not ordinarily occur in the absence of negligence, the res ipsa loquitur presumption should apply.

[2] Use of Form

This form of allegation is for use in a complaint for damages for personal injury, when the injury was suffered under circumstances in which the res ipsa loquitur doctrine may be used to establish that a defendant was negligent. The allegations may be inserted in the *form in § 273.90* in place of Paragraphs 6 and 7.

The example used in this complaint, that plaintiff was injured by flying debris caused by defendant's destruction of motor vehicles (in a "demolition derby"), is taken from the factual situation in *Khanoyan v. All Am. Sports Enters., Inc. (1964) 229 Cal. App. 2d 785, 40 Cal. Rptr. 596* . The res ipsa loquitur doctrine has been applied rarely in other spectator sports contexts, usually because it has generally been held that participants' conduct that can cause injury to spectators (such as fouling a baseball into the stands) is not negligent [*see, e.g., Quinn v. Recreation Park Ass'n (1935) 3 Cal. 2d 725, 728, 46 P.2d 144]* . However, res ipsa loquitur could well apply to an injury caused by a condition of the stadium, such as a collapse of a grandstand.

The res ipsa loquitur doctrine applies only to establish the presumption that a defendant was negligent [*see Evid. Code § 646*]. If the owner-operator of the premises did not owe a duty to the spectator to prevent the injury that occurred, no liability will be imposed. The determination of duty will ordinarily be made in the context of a contention that "primary assumption of risk" applies to bar any recovery by plaintiff [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 314-316, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . For a form of affirmative defense contending that primary assumption of risk bars

recovery, see *§ 273.93*.

[3] Decisions

Spectator occupying position in area designated for his or her use, injured through no voluntary action of his or her own part from flying debris resulting from deliberate destruction of motor vehicles within exclusive control of those producing event, as suffering injuries not ordinarily occurring in absence of someone's negligence; doctrine of res ipsa loquitur as therefore applicable. *Khanoyan v. All Am. Sports Enters., Inc. (1964) 229 Cal. App. 2d 785, 793, 40 Cal. Rptr. 596*

[4] Cross References

For a related form, see *§ 273.90*

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23-273 California Forms of Pleading and Practice--Annotated § 273.93

§ 273.93 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Spectator's Assumption of Risk--Primary Assumption of Risk Bars Any Recovery by Plaintiff

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Spectator's Assumption of Risk--Primary Assumption of Risk Bars Any Recovery by Plaintiff

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. Defendant _____ [*name*] is the _____ [owner *or* operator *or* owner-operator] of _____ [*name of premises at which injury occurred*]. Plaintiff's injury, as alleged in Paragraph[s] _____ of the complaint, was caused by _____ [*specify cause of injury as alleged in plaintiff's complaint, e.g.,* being struck by a baseball that was batted into the stands].

2. It is a risk inherent to the sport of _____ [*specify, e.g.,* baseball] that _____ [*specify risk that led to injury, e.g.,* balls will be hit into the grandstands, with the concomitant risk of injury to spectators]. Defendant _____ [*name*] has no duty to eliminate, or protect a plaintiff against, risks inherent in the sport itself, and because defendant _____ [*name*] has done nothing to increase those risks, the primary assumption of risk doctrine supports the conclusion that defendant _____ [*name*] owed no duty to plaintiff to prevent the injury alleged.

[2] Use of Form

The defense of primary assumption of risk may be set forth in an answer [*Code Civ. Proc. § 431.30*] to a complaint by a plaintiff for damages, which alleges that the plaintiff's injury suffered as a spectator was caused by defendant's negligence. If the facts that support the defense appear on the face of the complaint, this form may be adapted to a demurrer to the complaint [*see Code Civ. Proc. § 430.30(a)*].

The California Supreme Court has held that pursuant to the analysis used in *Li v. Yellow Cab Co.* [*Li v. Yellow Cab*

Co. (1975) 13 Cal. 3d 804, 824-825, 829, 119 Cal. Rptr. 858, 532 P.2d 1226] , "assumption of the risk" is actually two separate defenses. "Primary assumption of risk" involves instances in which the assumption of risk doctrine embodies a legal conclusion that there is no duty on the part of the defendants to protect the plaintiff from a particular risk, while "secondary assumption of risk" involves those instances in which the defendant does owe a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty. In primary assumption of risk cases, the plaintiff is completely barred from recovery, whereas in secondary assumption of risk cases the comparative fault system adopted in *Li* is applied [*Knight v. Jewett (1992) 3 Cal. 4th 296, 308, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . Although *Knight* involved an injury to a participant in a sporting event, it seems likely that the Court will apply a similar analysis to cases involving injury to a spectator.

Counsel may also desire to allege that secondary assumption of risk applies in case the court finds primary assumption of risk inapplicable [*see § 273.94*].

[3] Cross References

For forms of answers, see Ch. 26, *Answers*

For general forms of affirmative defenses, see Ch. 380, *Negligence*

For a related form, see *§ 273.90*

[4] Decisions

Assumption of risk in which plaintiff undertakes to encounter specific known risk imposed by defendant's negligence as merged into comparative negligence system. *Knight v. Jewett (1992) 3 Cal. 4th 296, 308, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 829, 119 Cal. Rptr. 858, 532 P.2d 1226*

Assumption of risk in which plaintiff agrees to relieve defendant of obligation of reasonable conduct as not merged into comparative negligence system, but as constituting complete defense. *Knight v. Jewett (1992) 3 Cal. 4th 296, 308, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 119 Cal. Rptr. 858, 532 P.2d 1226*

Assumption of risk as affirmative defense required to be pleaded separately. *Routh v. Quinn (1942) 20 Cal. 2d 488, 493, 127 P.2d 1* ; *Johnson v. Pacifica (1970) 4 Cal. App. 3d 82, 88, 84 Cal. Rptr. 246*

Assumption of risk as not raised by pleading negligence of plaintiff. *Fonseca v. County of Orange (1972) 28 Cal. App. 3d 361, 368-369, 104 Cal. Rptr. 566*

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23-273 California Forms of Pleading and Practice--Annotated § 273.94

§ 273.94 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Secondary Assumption of Risk, or Other Negligence by Spectator, Requires Apportionment Based on Comparative Fault

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Secondary Assumption of Risk, or Other Negligence by Spectator, Requires Apportionment Based on Comparative Fault

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. At the time and place of the accident alleged, plaintiff himself/herself did not exercise ordinary care, caution, or prudence to avoid the accident, and the resulting _____ [injuries *or* damages], if any, sustained by plaintiff were proximately caused and contributed to by the negligence of plaintiff in that _____ [*set out acts of plaintiff constituting his/her negligence, e.g.,* plaintiff, although participating in the athletic event as a spectator and seated in the grandstands for that purpose, failed to observe either the playing of the game or the hitting of the ball, and was struck by such ball as a proximate result of his/her own inattention and failure to take adequate precautions to avoid the flight of that ball].

[2. Plaintiff's conduct in _____ (*specify conduct that supports inference that plaintiff knowingly encountered a risk of injury caused by defendant's breach of duty, e.g.,* remaining in his/her seat after defendant's employee informed plaintiff of danger posed by torn protective screen and offered plaintiff another, protected seat) was a proximate cause of his/her injury, and justifies an apportionment of any damages based on the parties' respective degrees of fault.]

[2] Use of Form

This form of affirmative defense is for use in alleging the defense that plaintiff's negligence while a spectator at an athletic exhibition or game was a proximate cause of his or her injury, permitting the jury to apportion damages based on the parties' respective degrees of fault. The defense of contributory negligence has been invalidated in California and replaced with a system of comparative negligence in which the fundamental purpose is to assign responsibility and

liability for damage in direct proportion to the negligence of each of the parties. Thus, in all actions for negligence resulting in injury to person or property, the negligence of the person injured does not bar recovery but the damages awarded are diminished in proportion to the amount of negligence attributable to the person recovering [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

Optional Paragraph 2 is for use when assumption of risk is an issue, and alleges that plaintiff's conduct in the face of a known risk constitutes secondary assumption of risk, which has been held to be a variant of comparative negligence [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 308, 310, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 119 Cal. Rptr. 858, 532 P.2d 1226]* . If defendant is asserting as well that plaintiff's recovery should be barred under the primary assumption of risk doctrine [*see § 273.93*], counsel should also allege that secondary assumption of risk applies in case the court finds primary assumption of risk inapplicable.

[3] Pleading Negligence of Plaintiff

Generally, it is not necessary to set out the plaintiff's acts that constitute his or her negligence, although the defendant may do so. The defendant must plead the facts on which he or she relies to support the defense and must allege the causal connection between those facts and the injury. However, this simply means that a defendant may allege that the plaintiff was negligent in and about those matters alleged in the complaint and that such negligence proximately contributed to his or her injury [*Singer v. Superior Court (1960) 54 Cal. 2d 318, 323, 5 Cal. Rptr. 697, 353 P.2d 305]* .

[4] Decisions

Secondary assumption of risk doctrine, involving cases in which plaintiff knowingly encounters risk of injury created by defendant's breach of duty owed to plaintiff, as subsumed into comparative fault system. *Knight v. Jewett (1992) 3 Cal. 4th 296, 308, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

Negligence of plaintiff as affirmative defense that must be pleaded. *Crabbe v. Mammoth Channel Gold Mining Co. (1914) 168 Cal. 500, 505, 143 P. 714* ; *Provost v. Worrall (1956) 142 Cal. App. 2d 367, 373, 298 P.2d 726*

[5] Cross References

For related forms, see *§§ 273.90, 273.93*

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[Reserved]

§§ 273.95[Reserved]

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23-273 California Forms of Pleading and Practice--Annotated § 273.110

§ 273.110 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injury and Property Damage Based on Negligence [Civ. Code § 1714(a)]--By Participant in Sport

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injury and Property Damage Based on Negligence [Civ. Code § 1714(a)]--By Participant in Sport

[*Caption. See § 273.90.*]

[1. *Capacity or residence of defendant. See § 273.90, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 273.90, Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 273.90, Paragraph 3.*]

[*EITHER, if defendant is sued as possessor or owner of premises*]

4. At all times mentioned in this complaint, defendant _____ [*name*] was the _____ [*specify interest in property, e.g.,* owner *or* lessee] of _____ [*describe property on which injury occurred or from which injury was caused, e.g.,* the ski resort commonly known as Breakleg Ridge].

[*OR, if defendant was a co-participant in a sport with plaintiff*]

4. At the time that plaintiff was injured, as hereinafter alleged, defendant _____ [*name*] was engaged in the sport of _____ [*specify, e.g.,* baseball], having _____ [*set forth circumstances of defendant's participation, e.g.,* been a member of the Spikers baseball team, which played the Bunny Rabbits team of which plaintiff was a member in the Lawyer's League pursuant to that league's regular schedule on

_____ (*date*)].

[*CONTINUE*]

5. On or about _____ [*date*], plaintiff _____ [*set forth nature of plaintiff's participation in the activity, e.g.*, paid admission to the Breakleg Ridge Ski Resort and began to ski on the intermediate slope of that resort *or* began the baseball game between the Spikers and the Bunny Rabbits as second baseman for the Bunny Rabbits team].

6. In the course of plaintiff's _____ [*specify nature of participation, e.g.*, skiing on the intermediate slope *or* participation in the baseball game], _____ [*describe events leading up to, and causing, plaintiff's injury, e.g*, while plaintiff was proceeding down the mountain, a chair from the chair lift that was passing over plaintiff fell in plaintiff's path, causing him/her to fall *or* after plaintiff fielded a throw and tagged second base to retire defendant _____ (*name*), who had been a runner at first base, and after plaintiff moved approximately ten feet toward the pitcher's mound from second base, defendant _____(*name*) did not slide or otherwise act as a retired baserunner was required by the rules to do, but veered out of the baseline toward plaintiff and collided violently with plaintiff, striking plaintiff in the neck and knocking plaintiff to the ground].

7. _____ [*Allege facts tending to show that defendant's conduct breached a duty of care that he/she owed to plaintiff. See §§ 273.111 -273.116*.]

8. _____ [*Allege damages incurred as a result of defendant's conduct. See § 273.90, Paragraphs 8-11*.]

[*Prayer. See § 273.90*.]

[*Verification, if desired. See § 273.90*.]

[2] Use of Form

This general form of complaint is for use by a plaintiff injured while participating in an active sport, to recover damages caused by the negligence of defendant. The form may be used in an action against the owner or possessor of premises, based on a dangerous condition of the property or some other conduct that breached a duty of care owed to plaintiff and was the proximate cause of plaintiff's injury. The form may also be used in an action against another participant in the active sport, whose conduct in the course of that participation breached the duty of care defendant owed to plaintiff under the circumstances.

[3] Allegations

Allegations that can support the legal conclusion that defendant owed a duty of care to plaintiff, and breached that duty causing plaintiff's injury, are *set forth in §§ 273.111 -273.116*. The question of the existence and scope of defendant's duty of care is a legal question, which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity; it is an issue to be decided by the court, rather than the jury [*Knight v. Jewett (1992) 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . The allegations in §§ 273.111-273.116 either have been found sufficient to support the legal conclusion that defendant owed a duty of care to plaintiff, or have been set forth as the threshold for a finding of a duty of care. However, public policy considerations can influence the question of duty [*see, e.g., Knight v. Jewett (1992) 3 Cal. 4th 296, 317, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (cases have analyzed duty of owner of ballpark with reference to steps sponsoring business reasonably should be obligated to take in order to minimize risks without altering nature of sport)]. Thus, counsel should be prepared to argue the general effects likely to

result from the finding on duty that counsel seeks the court to reach. The issue of the applicable duty of care owed to participants is discussed in *§§ 273.30[1]* and *273.32*.

[4] Defendant's Response Regarding Duty of Care

If the defense contends that defendant had no duty of care to prevent the harm to plaintiff under the circumstances, it may make this contention either by demurrer if the lack of duty appears on the face of the complaint [*see Code Civ. Proc. § 430.30(a)*], or by answer if the lack of duty does not appear on the face of the complaint [*see Code Civ. Proc. § 430.30(b)*]. In most cases, especially cases in which the defense contends that the doctrine of primary assumption of risk embodies a legal conclusion that the defendant had no duty to protect the plaintiff from a particular risk, the question will be determined on a motion for summary judgment [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 308, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (determination is amenable to resolution by summary judgment)]. For a form of affirmative defense asserting that primary assumption of risk precludes plaintiff's recovery, *see § 273.117*.

[5] Cross References

For a related form, see *§ 273.90*

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23-273 California Forms of Pleading and Practice--Annotated § 273.111

§ 273.111 Allegation--Co-Participant Breached Duty to Plaintiff by Intentionally Injuring Plaintiff

[1] FORM Allegation--Co-Participant Breached Duty to Plaintiff by Intentionally Injuring Plaintiff

1. Defendant _____ [*name*]'s conduct during _____ [*specify sport or activity in which plaintiff and defendant were participating, e.g.,* the baseball game] on _____ [*date*], in which he/she _____ [*specify facts supporting conclusion that defendant intentionally injured plaintiff, e.g.,* struck plaintiff on the back of the head while plaintiff was watching the conclusion of a play on the other side of the field], was an intentional injury, and therefore breached the duty of care owed to plaintiff as another participant, and can subject defendant _____ [*name*] to financial liability.

[2] Use of Form

This allegation may, in an appropriate case, be inserted into Paragraph 7 of the complaint in *§ 273.110* to allege that defendant's conduct intentionally injured plaintiff, and therefore breached the duty of care owed by participants in active sports to other participants [*Knight v. Jewett (1992) 3 Cal. 4th 296, 318-320, 321, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (requiring intentional injury, or conduct so reckless as to be totally outside range of ordinary activity involved in particular sport; citing cases in which liability was found)]. The rule that participants in active sports or activities breach a duty of care to other participants only if he or she intentionally injures another player or engages in reckless conduct is discussed in *§ 273.30[5]*. For a form alleging that defendant's reckless conduct breached the duty of care owed to other participants, see *§ 273.112*.

[3] Cross References

For discussion and forms regarding assumption of risk, and the relationship of the doctrine to the determination of the existence and scope of a duty of care under the circumstances, see Ch. 380, *Negligence*

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23-273 California Forms of Pleading and Practice--Annotated § 273.112

§ 273.112 Allegation--Co-Participant Breached Duty by Reckless Conduct Outside Range of Ordinary Activity

[1] FORM Allegation--Co-Participant Breached Duty by Reckless Conduct Outside Range of Ordinary Activity

1. Defendant _____ [*name*]'s conduct during _____ [*specify sport or activity in which plaintiff and defendant were participating, e.g.,* the baseball game] on _____ [*date*], in which he/she _____ [*set forth facts surrounding injury that support conclusion that defendant engaged in conduct so reckless that it was totally outside the range of the ordinary activity involved in the sport, e.g.,* slid into plaintiff while plaintiff was standing ten feet from second base toward the pitcher and outside the baseline, after the conclusion of the play], was totally outside the range of the ordinary activity of the sport of _____ [*specify sport or activity, e.g.,* baseball] in that _____ [*specify facts supporting conclusion that conduct is outside the range of ordinary activity, e.g.,* was cause for immediate suspension from the league under the rules of the sport], and therefore breached the duty of care owed to plaintiff as another participant, and can subject defendant _____ [*name*] to financial liability.

[2] Use of Form

This allegation may, in an appropriate case, be inserted into Paragraph 7 of the complaint in *§ 273.110* to allege that defendant's conduct can be the basis for liability because it was so reckless that it was totally outside the range of the ordinary activity involved in the sport, and therefore breached the duty of care owed by participants in active sports to other participants [*Knight v. Jewett (1992) 3 Cal. 4th 296, 318-320, 321, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (requiring intentional injury, or conduct so reckless as to be totally outside range of ordinary activity involved in particular sport; citing cases in which liability was found)]. The rule that participants in active sports or activities breach a duty of care to other participants only if he or she intentionally injures another player or engages in reckless conduct is discussed in *§ 273.30[5][a]*. For a form alleging that defendant's intentional injury of plaintiff breached the duty of care owed to other participants, see *§ 273.112*.

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23-273 California Forms of Pleading and Practice--Annotated § 273.113

§ 273.113 Allegation--Coach or Instructor Breached Duty of Care Owed to Plaintiff

[1] FORM Allegation--Coach or Instructor Breached Duty of Care Owed to Plaintiff

1. Defendant _____ [*name*] was plaintiff's _____ [coach *or* instructor *or* trainer], and in that relationship plaintiff entrusted himself/herself to the tutelage of defendant _____ [*name*]. As an instructor or coach of plaintiff, defendant _____ [*name*] owed a duty not to increase the risk of harm inherent in learning an active sport by engaging in reckless conduct or conduct intended to cause injury to plaintiff. Defendant _____ [*name*] breached the duty of due care he/she owed to plaintiff by _____ [*specify conduct that caused plaintiff's injury that is alleged to be intentional or reckless, e.g.,* having plaintiff perform a dangerous dive into a shallow racing pool without adequate instruction on how to perform the dive safely].

[2] Use of Form

This allegation may, in an appropriate case, be inserted into Paragraph 7 of the complaint in *§ 273.110* to allege that defendant's conduct can be the basis for liability because, as plaintiff's coach, instructor, or trainer, defendant owed plaintiff a dutynot to increase the risk of harm inherent in learning an active sport by engaging in reckless conduct--that is, conduct that is totally outside the range of the ordinary activity involved in coaching or teaching the sport, or conduct intended to cause injury to the plaintiff [*Kahn v. East Side Union High Sch. Dist. (2003) 31 Cal. 4th 990, 1011, 4 Cal. Rptr. 3d 103, 75 P.3d 30]* .

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23-273 California Forms of Pleading and Practice--Annotated § 273.114

§ 273.114 Allegation--Swimming Pool Proprietor's Breach of Duty Imposed by Law Caused Injury

[1] FORM Allegation--Swimming Pool Proprietor's Breach of Duty Imposed by Law Caused Injury

[*EITHER*]

1. At the above-specified time and place, defendant[s, and each of them,] negligently supervised, controlled, and managed the swimming pool because the lifeguard on duty at the time plaintiff _____ [*specify nature of injury, e.g.,* was struck by the collapsing diving platform and dragged underwater], was engaged in duties other than superintending the safety of the bathers, in violation of *Health and Safety Code Sections 116038* and *116045*.

[*AND/OR*]

2. At the above-specified time and place, defendant(s, and each of them,) so negligently managed, maintained, and equipped the swimming pool as to be in violation of *Health and Safety Code Section 116043*.

[*CONTINUE*]

3. Defendant's statutory violation[s] was/were the proximate cause of plaintiff's injury, in that _____ [*set forth facts supporting causation, e.g.,* plaintiff's injury occurred at a point in the swimming pool within 10 feet of the lifeguard stand, and if the lifeguard had been at his/her position plaintiff's injury could have been prevented by timely action by the lifeguard].

[2] Use of Form

This allegations may, in an appropriate case, be inserted into Paragraph 7 of the *form in § 273.110*, in a case in which it is alleged that defendant, the owner or operator of a swimming pool subject to the provisions of *Health & Safety Code §*

116025 et seq., violated one or more of the statutes or regulations that was designed to prevent the injury that plaintiff suffered, and that the violation was the proximate cause of the plaintiff's injury [*see Evid. Code § 669(a)* (requirements for establishing presumption of negligence based on violation of statute, ordinance, or regulation); *see also § 273.33[4][a]*].

[3] Cross References

For discussion and forms regarding liability of property owners and possessors generally, see Ch. 421, *Premises Liability*

For discussion and forms related to actions involving public defendants, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

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23-273 California Forms of Pleading and Practice--Annotated § 273.115

§ 273.115 Allegation--Swimming Pool Proprietor's Breach of Duty Imposed by Law Caused Injury

[1] FORM Allegation--Swimming Facility's Negligence Increased Risk of Harm

1. On or about _____ [*date*], at _____ [*time*], plaintiff was a patron _____ [in the swimming pool *or* at the beach] maintained and operated by defendant, having paid the fee entitling him/her to be admitted to the _____ [area *or* facility]. [At the time of the incidents alleged herein, lifeguards were present and supervising the area.]

2. At the time and place above stated, while plaintiff was _____ [swimming *or* diving from a diving board attached to _____ (*specify, e.g.,* the pool *or* a raft)], plaintiff was struck by a _____ [person who had dived from the board *or* submerged swimmer], and sustained the injuries described below as a direct and proximate result of the negligence of defendant _____ [*specify negligent conduct, e.g.,* in the construction and maintenance of the _____ (pool *or* beach) and the diving board, in that the distance between the diving and swimming areas was not sufficient to provide for the safety of users of either area].

[3. Defendant's lifeguard(s) failed to warn swimmers and divers of the proximity of the diving and swimming areas.]

[2] Use of Form

This form of allegation is for use in a complaint by a patron injured at a swimming pool or beach as a result of a collision between a swimmer and a diver, on the ground that the owner-operator of the swimming establishment was negligent in constructing the pool or other premises so that the swimming and diving areas were too close together. Optional Paragraph 3 alleges that defendant's lifeguard(s) negligently failed to warn plaintiff of the known danger [*see Alvarado v. Anderson (1959) 175 Cal. App. 2d 166, 173, 174, 346 P.2d 73]* . With appropriate modifications, this form of allegation can be used to allege that defendant's negligence was the cause of any injury incurred by plaintiff. The allegations may be substituted for Paragraph 7 of the *form in § 273.110*.

[3] Cross References

For a related form, see *§ 273.114*

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23-273 California Forms of Pleading and Practice--Annotated § 273.116

§ 273.116 Allegation--Ski Lift Operator Breached Duty of Care to Skier Not to Increase Risks Inherent to Sport

[1] FORM Allegation--Ski Lift Operator Breached Duty of Care to Skier Not to Increase Risks Inherent to Sport

1. At all times herein mentioned defendant owned, controlled, maintained, managed, and operated a resort area commonly known as _____ in _____ County, California, and in connection with the operation invited members of the general public to that area to use, for a fee to be paid defendant, the outdoor and skiing facilities, including ski runs and slopes, maintained, controlled, and operated by defendant.

2. On or about _____ [*date*], at about _____ [*time*], plaintiff, as a member of the general public, paid to defendant the required consideration for entry into the resort, and was a patron of defendant at the resort area. At that time and place plaintiff was skiing across and on certain slopes maintained in the resort area, more particularly those in the proximity of _____ [*specify, e.g.,* the beginners rope tow].

3. At that time and place defendant so negligently operated, maintained, and controlled the slope that _____ [*describe dangerous condition, e.g.,* a deep and dangerous break, hole, and depression had formed there] making a dangerous and defective condition, and one likely to cause persons using the slope to injure themselves.

4. At that time and place defendant knew, or in the exercise of reasonable care should have known, of the dangerous and defective condition of the slope but, notwithstanding that knowledge or obligation to know, defendant negligently failed to give warning or notice of the dangerous and defective condition to persons using the slope or to take other precautions for the safety of persons using the slope.

5. As a direct and proximate result of defendant's negligence and the resulting dangerous and defective conditions of the slope, plaintiff, while using the slope, _____ [*describe accident, e.g.,* fell and dropped into the break, hole, and depression] and was injured as alleged below.

6. As a direct and proximate result of defendant's negligence as alleged above, plaintiff suffered serious personal

injuries, and among others sustained the following injuries: _____ [*describe*].

[7. Defendant owed to plaintiff a duty of utmost care in the operation of the _____ (*specify type of lift involved in incident that caused plaintiff's injury, e.g.,* chair lift) due to defendant's status as a common carrier in the operation of that lift.]

[2] Use of Form

This form of complaint is for use by a plaintiff skier who sustained injuries to person or property as a result of the alleged negligence of the owner-operator of a ski resort, or its employees. With minor modifications, the form can be used to state a cause of action for injuries arising out of any defect in the slope or equipment of which the defendant knew or should have been aware was creating reasonable danger to his or her other patrons, beyond the risks inherent to the sport of skiing. The allegations set forth in this form may be inserted in Paragraph 7 of the *form in § 273.110*, as appropriate.

Optional Paragraph 7 of this form may be used if the injury was sustained as a result of the operation of a ski lift. Operation of a ski lift subjects the defendant to the duty of care imposed on common carriers by *Civ. Code § 2100* [*see Squaw Valley Ski Corp. v. Superior Court (1992) 2 Cal. App. 4th 1499, 1508-1509, 1515, 3 Cal. Rptr. 2d 897* ; *see also § 273.33[1][a]*].

[3] Cross References

For discussion and forms regarding liability of property owners and possessors generally, see Ch. 421, *Premises Liability*

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23-273 California Forms of Pleading and Practice--Annotated § 273.117

§ 273.117 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Plaintiff's Primary Assumption of Risk Defeats Cause of Action--Injury Resulted from Risk Inherent to Active Sport, and Co-Participant Defendant's Conduct Was Within Range of Sport's Ordinary Activity

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Plaintiff's Primary Assumption of Risk Defeats Cause of Action--Injury Resulted from Risk Inherent to Active Sport, and Co-Participant Defendant's Conduct Was Within Range of Sport's Ordinary Activity

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. Plaintiff's injury as alleged in his/her complaint was sustained while plaintiff and defendant were participants in _____ [*specify activity, and if necessary facts tending to show that activity is active sport, e.g.,* a game of competitive table tennis, which requires significant physical exertion and involves inherent risks to participants].

2. Plaintiff's injury as alleged in his/her complaint resulted from the risk, inherent to the activity of _____ [*specify activity, e.g.,* table tennis], that _____ [*specify risk that was cause of injury, e.g.,* defendant would hit the table while returning a shot, causing the table to move toward plaintiff and injure him/her].

3. Because any injury to plaintiff resulted from a risk inherent to the active sport in which he/she was a participant, and because defendant _____ [*name*] neither intentionally injured plaintiff nor injured plaintiff by conduct so reckless that it was outside the range of the ordinary activity involved in the sport, plaintiff should be barred from recovery on the ground that the primary assumption of risk doctrine requires a finding that defendant _____ [*name*] breached no duty of care owed to plaintiff.

[2] Use of Form

This form is for alleging the affirmative defense that plaintiff cannot recover damages because the doctrine of primary

assumption of risk compels the finding that, under the facts alleged, defendant owed no duty of care to prevent the injury allegedly suffered by plaintiff. The basis for the defense is that plaintiff's injury as alleged in the complaint was incurred during participation in an active sport, and that defendant neither intentionally injured plaintiff nor engaged in conduct so reckless as to be totally outside the range of the ordinary activity involved in the sport [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 320, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

This form can be adapted for use in a demurrer if the facts constituting the defense appear on the face of the complaint [*see Code Civ. Proc. § 430.30(a)*].

[3] Cross References

For forms of answers, see Ch. 26, *Answers*

For general forms of affirmative defenses, see Ch. 380, *Negligence*

For related forms, see *§§ 273.90, 273.93*

[4] Decisions

Participant in active sport as breaching duty of care to other participant, and therefore subject to liability, only if participant intentionally injures another player or engages in conduct so reckless as to be totally outside range of ordinary activity involved in sport. *Knight v. Jewett (1992) 3 Cal. 4th 296, 320, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

Person injured by swinging boom on sailboat, allegedly due to negligence of helmsman, as precluded from recovery by primary assumption of risk doctrine, as failure to warn of course change constitutes risk inherent to active sport of sailing. *Stimson v. Carlson (1992) 11 Cal. App. 4th 1201, 1205-1206, 14 Cal. Rptr. 2d 670*

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23-273 California Forms of Pleading and Practice--Annotated § 273.118

§ 273.118 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Plaintiff's Primary Assumption of Risk Defeats Cause of Action--Injury Resulted from Risk Inherent to Sport, and Defendant Proprietor Did Nothing to Increase or Conceal Risk

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Plaintiff's Primary Assumption of Risk Defeats Cause of Action--Injury Resulted from Risk Inherent to Sport, and Defendant Proprietor Did Nothing to Increase or Conceal Risk

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. Plaintiff's injury as alleged in his/her complaint was sustained while plaintiff was participating in _____ [*specify activity, e.g.,* snow skiing].

2. Plaintiff's injury as alleged in his/her complaint resulted from the risk, inherent to the activity of _____ [*specify activity, e.g.,* skiing], that _____ [*specify risk that was cause of injury, e.g.,* plaintiff would encounter moguls while skiing down the slope].

3. Because any injury to plaintiff resulted from a risk inherent to the activity in which plaintiff was participating, and because defendant _____ [*name*] neither increased the risks posed to plaintiff beyond those inherent to the activity, nor concealed any risks of the activity, plaintiff should be barred from recovery on the ground that the primary assumption of risk doctrine requires a finding that defendant _____ [*name*] breached no duty of care owed to plaintiff.

[2] Use of Form

This form is for alleging the affirmative defense that plaintiff cannot recover damages because the doctrine of primary assumption of risk compels the finding that, under the facts alleged, defendant owed no duty of care to prevent the injury allegedly suffered by plaintiff. The basis for the defense is that plaintiff's injury as alleged in the complaint was

incurred during participation in an activity and caused by a risk inherent to that activity, and that defendant had no duty to protect plaintiff from that risk. The doctrine of primary assumption of risk permits a defendant to be held liable for injury to a participant in a sport only if the defendant has breached the duty to use due care not to increase the risks to a participant over and above those inherent to the sport [*Knight v. Jewett (1992) 3 Cal. 4th 296, 315-316, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

This form can be adapted for use in a demurrer if the facts constituting the defense appear on the face of the complaint [*see Code Civ. Proc. § 430.30(a)*].

[3] Decisions

Ski resort as not required to protect plaintiff against injury caused by risk inherent to sport of skiing, and obvious to reasonable participant. *Danieley v. Goldmine Ski Assocs., Inc. (1990) 218 Cal. App. 3d 111, 122-123, 266 Cal. Rptr. 749* (plaintiff injured when she collided with tree at edge of run)

Duty of care of commercial horseriding facility as not including duty to provide ideal horses that never make sudden movements; sudden movements as risk inherent in sport of horseback riding. *Harrold v. Rolling J Ranch (1993) 19 Cal. App. 4th 578, 588-589, 23 Cal. Rptr. 2d 671*

[4] Cross References

For related forms, see *§§ 273.90, 273.94, 273.117, 273.119, 273.120*

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23-273 California Forms of Pleading and Practice--Annotated § 273.119

§ 273.119 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Comparative Fault Principles Require Reduction of Any Recovery by Plaintiff in Proportion to Plaintiff's Degree of Fault--Secondary Assumption of Risk Doctrine Applies if Defendant Breached Any Duty Owed to Plaintiff, Because Plaintiff's Knowing Encounter of Risk Was Cause of Injury

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Comparative Fault Principles Require Reduction of Any Recovery by Plaintiff in Proportion to Plaintiff's Degree of Fault--Secondary Assumption of Risk Doctrine Applies if Defendant Breached Any Duty Owed to Plaintiff, Because Plaintiff's Knowing Encounter of Risk Was Cause of Injury

AS A [_____ (*if more than one, specify number, e.g.,* SECOND)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that to the extent that defendant breached any duty of care owed to plaintiff, plaintiff chose to encounter the known risk created by that breach of duty, and the injury to plaintiff alleged in the complaint was caused by the combined effect of plaintiff's and defendant's culpable conduct. Therefore, the secondary assumption of risk doctrine applies to make comparative fault principles applicable to reduce any recovery by plaintiff in proportion to his/her degree of fault.

[2] Use of Form

This form is for use in alleging the defense of secondary assumption of risk in a case in which plaintiff was injured while participating in a sport or other activity. Secondary assumption of risk, in which the assumption of risk doctrine is merged into the comparative fault scheme, applies to cases in which a defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty. In this situation, the trier of fact apportions the loss resulting from the injury based on the relative responsibility of the parties [*Knight v. Jewett (1992) 3 Cal. 4th 296, 315, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

This form of affirmative defense should be asserted as an alternative defense to the assertion that primary assumption of risk precludes plaintiff's cause of action [*see §§ 273.117, 273.118*], if the court finds that defendant did owe a duty of care to plaintiff.

[3] Cross References

For related forms, *see §§ 273.90, 273.93, 273.110, 273.117*

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23-273 California Forms of Pleading and Practice--Annotated § 273.120

§ 273.120 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Comparative Fault Principles Require Reduction of Any Recovery by Plaintiff in Proportion to Plaintiff's Degree of Fault--Plaintiff's Contributory Negligence Was Cause of Injury

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Comparative Fault Principles Require Reduction of Any Recovery by Plaintiff in Proportion to Plaintiff's Degree of Fault--Plaintiff's Contributory Negligence Was Cause of Injury

AS A [_____ (*if more than one, specify number, e.g.,* SECOND)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the _____ [*describe accident, e.g.,* collision between plaintiff and defendant], as alleged in plaintiff's complaint, and the injuries and damages, if any, sustained by plaintiff from the collision, were proximately caused or contributed to by the careless, reckless, and negligent manner in which plaintiff _____ [*describe plaintiff's actions leading to the accident, e.g.,* made use of the gymnasium equipment *or* entered the pool without looking where he/she was going *or* water-skied too close to the shoreline] prior to and at the time of the accident. Plaintiff's negligence and lack of due care were the proximate cause of the accident.

[2] Use of Form

This form is for use in alleging the defense of plaintiff's negligence and lack of due care in a negligence action involving a participant in an athletic game or activity.

[3] Cross References

For related forms, see *§§ 273.110, 273.117*

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§ 274.27 Text References

§§ 274.28-274.39 [Reserved]

§ 274.40 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Customer Against Garage or Service Station Operator and Employees--Fall Over Obstruction in Walkway

[1] FORM

[2] Use of Form

[3] Allegations

[4] Specifying Amount of Damages

[5] Verification

[6] Venue

[7] Cross References

§ 274.41 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §

1714(a)]--By Customer Against Garage or Service Station Operator--Slip and Fall on Oil or Other Slippery Substance

[1] FORM

[2] Use of Form

[3] Cross References

§ 274.42 Complaint for Personal Injuries and Property Damage [Civ. Code § 3333] Based on Negligence [Civ. Code § 1714(a)]--By Customer Against Service Station Operator and Employees--Collision With Automobile Operated by Employee

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 274.43 Complaint for Personal Injuries and Property Damage [Civ. Code § 3333] Based on Negligence [Civ. Code § 1714(a)]--By Customer Against Garage Operator and Employees--Employee's Conduct During Vehicle Repair or Servicing

[1] FORM

[2] Use of Form

[3] Cross References

§ 274.44 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Customer Against Garage Operator--Customer Struck by Vehicle Driven by Another Customer

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 274.45 Complaint for Personal Injuries and Property Damage [Civ. Code § 3333] Based on Negligence [Civ. Code § 1714(a)]--By Automobile Owner Against Garage Operator and Employees--Defective Automobile Repairs Resulting in Accident

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 274.46 Complaint for Personal Injuries and Property Damage [Civ. Code § 3333] Based on Negligent Misrepresentation [Civ. Code § 1710(2)]--By Automobile Owner Against Repair Shop--Defectively Repaired Brakes Represented as Adequate for Safe Operation of Automobile

[1] FORM

[2] Use of Form

[3] Allegations

[4] Alternate Theory of Recovery

[5] Cross References

§ 274.47 Complaint for Damages [Civ. Code § 3300] for Breach of Automotive Repair Contract--By Automobile Owner Against Garage Operator--Negligent Work and Defective Materials

[1] FORM

[2] Use of Form

[3] Allegations

[4] Attorney's Fees

[5] Cross References

§ 274.48 Complaint for Money Due Under Automotive Repair Contract [Civ. Code § 3302; Bus. & Prof. Code §§ 9884.8, 9884.9]--By Repairer Against Customer

[1] FORM

[2] Use of Form

[3] Allegations

[4] Attorney's Fees

[5] Alternative Remedy

[6] Cross References

§ 274.49 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--By Customer to Action by Automobile Repairer--Lack of Written Estimate or Authorization [Bus. & Prof. Code § 9884.9]

[1] FORM

[2] Use of Form

[3] Cross References

§ 274.50 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--By Customer to Action by Automotive Repairer--Lack of Registration as Automotive Repair Dealer [Bus. & Prof. Code § 9884.16]

[1] FORM

[2] Use of Form

[3] Cross References

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Chapter 274 GARAGES AND GAS STATIONS
PART I. SCOPE

23-274 California Forms of Pleading and Practice--Annotated § 274.01

§ 274.01 Scope of Chapter

This chapter discusses and contains forms for use in actions related to the duties, obligations, and rights of garage and service station operators and their customers. Topics covered include liability for the operation of the premises [*see § 274.10*], bailment of motor vehicles [*see § 274.13*], and the respective rights of the customer and garage operator regarding automotive repairs [*see §§ 274.11* and *274.14*]. Business and tort issues relating to the sale of gasoline are also briefly discussed [*see § 274.12*].

The chapter includes the following forms of complaints relating to the maintenance and operation of garage or gas station premises:

- Complaints by the customer for personal injury sustained on the garage or gas station premises due to the condition or conduct of business on the premises [*see §§ 274.40 -274.43*].

- A complaint by the customer against the garage or gas station operator for injuries caused by another customer [*see § 274.44*].

The chapter also includes the following forms relating to motor vehicle repair and servicing:

- A complaint for negligent repair based on tort liability [*see § 274.45*] and on breach of contract [§ 274.47].

- A tort complaint for negligent misrepresentation that a repair is safe [*see § 274.46*].

- A complaint by the garage operator to recover payment for a repair [*see § 274.48*].

- Affirmative defenses to an action to recover the cost of a repair, based on the following grounds:

    - Plaintiff's failure to have provided a written estimate or authorization [*see § 274.49*].

- Plaintiff's lack of registration as an automotive repair dealer [*see § 274.50*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailmentsEnergy & Utilities LawOil IndustryGasoline Dealers & DistributorsTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesStoresTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligencePremises Leased for Public Use

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PART I. SCOPE

23-274 California Forms of Pleading and Practice--Annotated § 274.02

§ 274.02 Cross References

For discussion and forms generally relating to the actions discussed in this chapter, see Ch. 119, *Claim and Delivery* , Ch. 121, *Common Counts* , Ch. 140, *Contracts* , Ch. 150, *Conversion* , Ch. 177, *Damages* , Ch. 181, *Death and Survival Actions* , Ch. 269, *Fraud and Deceit* , and Ch. 380, *Negligence* . See also Ch. 91, *Automobiles: Actions Involving Defects and Repairs* , Ch. 93, *Bailments* , Ch. 277, *Gas and Electricity* , Ch. 342, *Liens and Wage Preferences* , Ch. 421, *Premises Liability* , and Ch. 525, *Slip and Fall* .

For discussion and forms relating to actions for injuries resulting from the sale of defective automobile equipment, see Ch. 91, *Automobiles: Actions Involving Defects and Repairs* . In this connection, see Ch. 460, *Products Liability* , and Ch. 502, *Sales: Warranties* , for discussion and forms for complaints based on breach of express and implied warranties and strict liability in tort.

For discussion and forms relating to actions for the rental and lease of defective property, see Ch. 93, *Bailments* , and Ch. 460, *Products Liability* .

For discussion and forms relating to actions for unfair and deceptive business practices under the Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*] and violations of the Unruh Retail Installment Sales Act [*Civ. Code § 1801 et seq.*], see Ch. 501, *Sales: Retail Installment Sales* , and Ch. 504, *Sales: Consumers Legal Remedies Act* . On the subject of unfair and deceptive business practices in general, see Ch. 565, *Unfair Competition* .

Petroleum marketing franchises may be governed by California's Franchise Investment Law (*Corp. Code § 31000 et seq.*) and/or by the Federal Petroleum Marketing Practices Act (*15 U.S.C. § 2801 et seq.*, hereinafter "PMPA"), both of which are discussed in Ch. 515, *Securities and Franchise Regulation* . Note that actions regarding franchise termination, unlawful detainer, breach of implied covenant of good faith and fair dealing, or unfair trade practices are preempted by the PMPA to the extent that those actions cannot enjoin or prohibit a franchise termination, or the nonrenewal of a franchise, that would be proper under the PMPA [*Exxon Corp. v. Miro (C.D. Cal. 1983) 555 F. Supp. 234, 237-238* ; *California Arco Distributors, Inc. v. Atlantic Richfield Co. (1984) 158 Cal. App. 3d 349, 364, 204 Cal. Rptr. 743]* . State courts have concurrent jurisdiction with federal courts over PMPA claims [*Union Oil v. O'Riley (1990) 226 Cal. App. 3d 199, 204, 276 Cal. Rptr. 483 , review denied, 112 S. Ct. 75]* . This position is contrary to earlier holdings in

Rustom v. Atlantic Richfield Co. (C.D. Cal. 1985) 618 F. Supp. 210 , and *Niakan v. Samaan (1988) 199 Cal. App. 3d 716, 719, 245 Cal. Rptr. 24* ; however, it seems to reflect the intention of the United States Supreme Court in vacating the previous state court judgment of dismissal in *O'Riley* and remanding the case for further consideration in light of *Tafflin v. Levitt (1990) 493 U.S. 455, 458, 110 S. Ct. 792, 107 L. Ed. 2d 887* , which held that state courts had concurrent jurisdiction over RICO suits (Racketeer Influenced and Corrupt Organizations Act; *18 U.S.C. § 1961 et seq.*) [*Union Oil v. O'Riley (1990) 226 Cal. App. 3d 199, 202, 204, 276 Cal. Rptr. 483 , review denied, 112 S. Ct. 75]* . Aspects of leases that do not involve a franchise are discussed in Ch. 332, *Landlord and Tenant: The Tenancy* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsIntentional TortsConversionGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsVicarious LiabilityBaileesTortsWrongful Death & Survival ActionsGeneral Overview

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23-274 California Forms of Pleading and Practice--Annotated § 274.03

§ 274.03 Governing Law

The general negligence principles of *Civ. Code § 1714(a)* govern the tort duties and liabilities of garage or service station operators in connection with the maintenance of their premises, motor vehicle repairs and servicing, the sale of gasoline, and the bailment of motor vehicles for storage, repair, and servicing.

Motor vehicle repairs and servicing are regulated by Bus. & Prof. Code § 9880 et seq., Civ. Code *§ 1718, Health & Safety Code* § 44000 et seq., Veh. Code §§ 12000-12003, and *Veh. Code § 24000 et seq.*, and may be subject to the Unruh Retail Installment Sales Act [*Civ. Code § 1801 et seq.*].

The sale and distribution of petroleum products is regulated by *Bus. & Prof. Code § 13400 et seq.* and *Bus. & Prof. Code §§ 21200-21203*. The sale and distribution of antifreeze, brake fluid, and automatic transmission fluid are regulated by *Bus. & Prof. Code § 13700 et seq.*

The garageman's lien is governed generally by *Civ. Code § 2872 et seq.* and specifically by *Civ. Code §§ 3068-3075* and by *Veh. Code §§ 22851, 22851.4-22851.12, 22852.5, 22856.*

Unlawful detainer actions by petroleum distributors against gasoline dealers are governed by *Code Civ. Proc. § 1174(a).*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityLiensEnergy & Utilities LawOil IndustryGasoline Dealers & DistributorsReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesStores

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[Reserved]

§§ 274.04[Reserved]

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23-274 California Forms of Pleading and Practice--Annotated § 274.10

§ 274.10 Premises Liability

[1] As Occupier of Property

The operator of a garage or service station, as an occupier of property, is under a duty of ordinary care in managing his or her property to avoid exposing persons on the premises to an unreasonable risk of harm, and he or she is liable for injuries proximately resulting from the failure to fulfill that duty. This liability is based on the general negligence principles embodied in *Civ. Code § 1714(a)* [*see Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561]* .

For further discussion, see Ch. 421, *Premises Liability* .

[2] Dangerous Conditions Created by Operator on Abutting Sidewalk

If a business enterprise is conducted in such a manner as to create a hazard on an abutting sidewalk and the operator of the business knows or has reason to know of the hazard, he or she is under a duty to exercise reasonable care to protect persons using the sidewalk from injury as a result of the hazard [*Kopfinger v. Grand Central Pub. Market (1964) 60 Cal. 2d 852, 859, 37 Cal. Rptr. 65, 389 P.2d 529]* .

Thus, a garage or service station operator, utilizing a driveway across a public sidewalk as access to its premises is charged with maintaining the driveway portion of the sidewalk in a reasonably safe condition for use by pedestrians [*see Lee v. Ashizawa (1964) 60 Cal. 2d 862, 865-866, 37 Cal. Rptr. 71, 389 P.2d 535* (liability of storekeeper for injuries resulting from oily driveway in front of garage)]. The operator is not responsible, however, when a third person creates a risk of harm on the sidewalk abutting his or her premises during activities unrelated to his or her enterprise [*see Lee v. Ashizawa (1964) 60 Cal. 2d 862, 867, 37 Cal. Rptr. 71, 389 P.2d 535]* .

[3] Duty to Conduct Operations Safely

[a] Duty of Ordinary Care With Respect to Customers

A garage or service station operator is under a duty of ordinary care to avoid injuring customers while servicing vehicles

[*Morton v. Hinds (1931) 113 Cal. App. 437, 440-441]* or moving vehicles [*Beck v. Sirota (1941) 42 Cal. App. 2d 551, 557, 109 P.2d 419]* . The operator is not required, however, to warn of dangerous actions which are, or should be, obvious to customers [*Morton v. Hinds (1931) 113 Cal. App. 437, 441]* . Nor is he or she negligent in directing a customer to park his or her own vehicle when the customer is licensed to drive and displays no physical impediment which would interfere with the vehicle's operation [*Heath v. Keyser (1946) 74 Cal. App. 2d 877, 879, 169 P.2d 668]* .

When supplying a customer's vehicle with gasoline, a service station operator owes a duty to exercise the care of a reasonable person dealing with a dangerous instrumentality in general and explosive or highly flammable materials in particular. Because of the great risks involved, the utmost care is required; even a slight deviation from the standard will constitute negligence and impose liability for resulting injuries to customers [*Borenkraut v. Whitten (1961) 56 Cal. 2d 538, 545, 15 Cal. Rptr. 635, 364 P.2d 467]* .

A customer's recovery for injuries sustained as a result of a garage or service station operator's negligent conduct of operations may be reduced under comparative negligence principles if the customer has negligently contributed to his or her injuries [*see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 829, 119 Cal. Rptr 858, 532 P.2d 1226]* by stepping into a position of danger [*Grasgreen v. Acme Auto Parks (1958) 165 Cal. App. 2d 680, 682, 332 P.2d 337]* or by participating in the servicing of his or her vehicle without exercising judgment or care [*Morton v. Hinds (1931) 113 Cal. App. 437, 441, 298 P. 160* ; *Strand v. Everett (1927) 84 Cal. App. 358, 362, 258 P. 115]* .

The customer is not guilty of failing to take precautions for his or her own safety, however, when the customer has no reasonable basis to believe that the operator will take actions that pose a danger to persons in close proximity [*Borenkraut v. Whitten (1961) 56 Cal. 2d 538, 543, 15 Cal. Rptr. 635, 364 P.2d 467* ; *Bischoff v. Newby's Tire Service (1958) 166 Cal. App. 2d 563, 568, 333 P.2d 44]* .

[b] Duty to Control Third Persons

The operator of a garage or service station is under a duty to control or adequately warn against accidental, negligent, or intentional acts of third persons which threaten harm to others on the premises if the operator has reason to anticipate such acts and the probability of injury resulting from them [*see Taylor v. Centennial Bowl, Inc. (1966) 65 Cal. 2d 114, 121, 52 Cal. Rptr. 561, 416 P.2d 793* (bowling alley parking lot); *see also Barker v. Wah Low (1971) 19 Cal. App. 3d 710, 712, 721, 97 Cal. Rptr. 85* (question of fact as to negligence of restaurant operators in failing to protect customer against negligent operation of vehicle by other customers)].

The operator is not an insurer, however, and is not liable for the unforseeable, momentary negligence of a third person [*Hunter v. Mohawk Petroleum Corp. (1959) 51 Cal. 2d 439, 441, 334 P.2d 193* ; *but see Taylor v. Centennial Bowl, Inc. (1966) 65 Cal. 2d 114, 122-124, 52 Cal. Rptr. 561, 416 P.2d 793* (distinguishing *Hunter* and indicating that a warning may be insufficient protection under certain circumstances)]. For example, a parking lot operator is not negligent in directing customer to park his or her own vehicle and is not liable for another customer's injuries resulting from negligent operation of the vehicle while the customer is parking [*Heath v. Keyser (1946) 74 Cal. App. 2d 877, 879, 169 P.2d 668]* . However, the specific circumstances of the operation of the premises may give rise to a triable issue of fact as to whether operators of the premises were negligent in failing to protect customers from potentially harmful operation of vehicles by other customers [*Barker v. Wah Low (1971) 19 Cal. App. 3d 710, 712, 721, 97 Cal. Rptr. 85* (question of fact raised whether operator of drive-in restaurant failed to provide adequate barriers between parking area and service area where customers stood and failed to adequately direct vehicular traffic upon premises)]. For example, the California Supreme Court has held that neither the owner of a commercial building nor a parking services company owed a legal duty of care to prevent a sexual assault in the building's underground parking garage [*Sharon P. v. Arman, Ltd. (1999) 21 Cal. 4th 1181, 1185, 91 Cal. Rptr. 2d 35, 989 P.2d 121] , superseded by statute on other grounds as stated in Saelzler v. Advanced Group 400 (2001) 25 Cal. 4th 763, 767-768, 107 Cal. Rptr. 2d 617, 23 P.3d 1143* . Under the factual circumstances of that particular case, which included a 10-year absence of criminal assaults in the garage prior to the assault on the plaintiff, the Court held as a matter of law that the occurrence of a

violent third-party sexual assault was not sufficiently foreseeable to impose a duty of care. The Court also specifically rejected the argument that underground parking garages were so inherently dangerous that a duty of care to provide security measures exists even in the absence of prior similar incidents [*Sharon P. v. Arman, Ltd. (1999) 21 Cal. 4th 1181, 1194-1195, 91 Cal. Rptr. 2d 35, 989 P.2d 121] , superseded by statute on other grounds as stated in Saelzler v. Advanced Group 400 (2001) 25 Cal. 4th 763, 767-768, 107 Cal. Rptr. 2d 617, 23 P.3d 1143* .

Nor is the operator liable for a sudden, intentional, criminal assault of a customer by a third person which the operator has no reason to anticipate and no reasonable opportunity or means to prevent [*see Rogers v. Jones (1976) 56 Cal. App. 3d 346, 351, 128 Cal. Rptr. 404* (stadium parking lot)].

For discussion of the general principles regarding the liability of a person in possession of real property for a third person's actions, see Ch. 421, *Premises Liability* .

[4] Liability of Nonpossessory Lessor

An owner of property who leases the property for use as a garage or service station, a use involving the admission of the public, is under a duty to see that it is safe for the purposes intended and to exercise reasonable care to discover and repair dangerous conditions on the premises before transferring possession to the lessee. The lessor will be liable for injuries of garage or service station customers proximately resulting from his or her failure to correct dangerous conditions existing at the time the lessee takes possession [*Hayes v. Richfield Oil Corp. (1952) 38 Cal. 2d 375, 380-381, 240 P.2d 580]* .

If the lessor of property used as a garage or service station exercises a large degree of control over the lessee's operations, the negligence of the lessee in maintaining the premises will be imputed to the lessor under the doctrine of respondeat superior, and the lessor will be liable for injuries to customers proximately resulting from dangerous conditions of the premises arising after the transfer of possession [*Dorsic v. Kurtin (1971) 19 Cal. App. 3d 226, 238-239, 96 Cal. Rptr. 528]* .

A lessor of service station premises who exercises a large degree of control over his or her lessee's operations may qualify as an employer of the lessee under *Lab. Code § 6304* with the concomitant duty of furnishing a safe place of employment for the lessee under *Lab. Code §§ 6400* and *6401*; in this capacity, the lessor may be liable for workers' compensation [*Lab. Code § 3201 et seq.*] in an action at law for injuries to the lessee resulting from a dangerous condition of the premises [*Lab. Code §§ 3600, 3601, 3706*; *Mezerkor v. Texaco, Inc. (1968) 266 Cal. App. 2d 76, 89-94, 72 Cal. Rptr. 1]* .

Even if he or she does not qualify as an employer, the lessor may be liable in a civil action for injuries to the lessee and his or her employees from a defective condition of the premises if the defect is latent when he or she transfers the premises to the lessee or if he or she fails to carry out a duty to repair assumed by lease agreement within a reasonable time after receiving actual or constructive notice of the defect [*Mezerkor v. Texaco, Inc. (1968) 266 Cal. App. 2d 76, 96, 72 Cal. Rptr. 1 , reh'g denied, 266 Cal. App. 2d 105, 72 Cal. Rptr. 639]* .

For general discussion and forms relating to these bases of liability, see Ch. 334, *Landlord and Tenant: Claims for Damages* , and Ch. 577, *Workers' Compensation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesStoresTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligencePremises Leased for Public Use

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23-274 California Forms of Pleading and Practice--Annotated § 274.11

§ 274.11 Motor Vehicle Repair and Service

[1] Tort Liability

A garage or service station operator undertaking to repair or service a motor vehicle owes a duty to exercise due care in doing so. This duty is owed not only to the party at whose request the operator performs the repairs but also to all persons who would be exposed to a foreseeable risk of harm during the normal use of the vehicle if the repairs are negligently done, and the operator is liable for all personal injuries and property damage resulting from his or her negligence [*Spolter v. Four-Wheel Brake Serv. Co. (1950) 99 Cal. App. 2d 690, 222 P.2d 307* ; *see* *Dahms v. General Elevator Co. (1932) 214 Cal. 733, 741-742, 7 P.2d 1013* (duty of care owed by repairer of chattels and liability for negligence); *Jackson v. Ryder Truck Rental, Inc. (1993) 16 Cal. App. 4th 1830, 1846, 20 Cal. Rptr. 2d 913* (duty of care owed by vehicle maintenance company and liability for death of driver of negligently-maintained vehicle); *see Sabella v. Wisler (1963) 59 Cal. 2d 21, 29, 27 Cal. Rptr. 689, 377 P.2d 889* (tort liability of building contractor for diminution in value of construction as result of negligent workmanship); and *see* Ch. 300, *Indemnity and Contribution* , in relation to property owners' indemnification by repairmen whose defective work results in the owners' liability for injuries of third persons].

He or she is not liable, however, for injuries sustained during subsequent use of the automobile if his or her negligence was not a proximate or contributing cause of the injuries, for example, if the injuries would have occurred despite the defective repair [*Ulwelling v. Crown Coach Corp. (1962) 206 Cal. App. 2d 96, 123, 126, 23 Cal. Rptr. 631]* or if a user's knowledge of the defect intervenes between the operator's negligence and the injuries [*Youtz v. Thompson Tire Co. (1941) 46 Cal. App. 2d 672, 677, 116 P.2d 636]* .

An operator is responsible not only for his or her own work but also for the work of an independent contractor who repairs or services a vehicle at his or her request [*Reeder v. Hoag (1958) 158 Cal. App. 2d 41, 44, 321 P.2d 793* ; *see Bus. & Prof. Code § 9884.9* (automotive repair dealer's liability for work done by third person)].

An operator is negligent in performing repairs if he or she carelessly creates a dangerous defect in the vehicle during his or her work, fails to reasonably inspect and test his or her work for defects, or fails to correct defects which he or she discovers during such inspection [*Ulwelling v. Crown Coach Corp. (1962) 206 Cal. App. 2d 96, 121-122, 23 Cal.*

Rptr. 631 ; *Dunn v. Vogel Chevrolet Co. (1959) 168 Cal. App. 2d 117, 120, 335 P.2d 492]* . He or she is also negligent if he or she misrepresents to a customer that a vehicle on which he or she has performed repairs is safe to operate and permits the customer to take and operate the vehicle under that erroneous impression [*Reeder v. Hoag (1958) 158 Cal. App. 2d 41, 44, 321 P.2d 793]* .

The operator is not negligent, however, if he or she fails to perform repairs that the exercise of ordinary care does not require, even though other effective methods of repair are available [*Ulwelling v. Crown Coach Corp. (1962) 206 Cal. App. 2d 96, 123, 23 Cal. Rptr. 631]* . Nor is the operator negligent if he or she warns a customer that repairs are incomplete and untrustworthy [*Reeder v. Hoag (1958) 158 Cal. App. 2d 41, 44, 321 P.2d 793]* . For forms of complaint for use by an automobile owner to recover damages from a negligent repairer, see Ch. 91, *Automobiles: Actions Involving Defects and Repairs* .

With an exception for installation during emergency roadside service of a disabled vehicle, dealers and persons holding a retail seller's permit are prohibited from selling, offering for sale, exposing for sale, or installing on a vehicle axle for use on a highway any pneumatic tire having less than a specified amount of tread depth [*Veh. Code § 27465(a)*; *see Veh. Code § 27465(b)*]. While a violation of this provision may presumably support the imposition of tort liability, this provision does not apply when a tire already mounted on a vehicle is removed and remounted on that same vehicle by a dealer or retail seller [*Alcala v. Vazmar Corp. (2008) 167 Cal. App. 4th 747, 759, 84 Cal. Rptr. 3d 402]* .

[2] Contract Rights and Liabilities

[a] Regulated Contracts

For the purposes of the Automotive Repair Act (*Bus. & Prof. Code §§ 9880-9889.48*), an automotive repair dealer is a person who, for compensation, engages in the business of repairing or diagnosing malfunctions of motor vehicles [*Bus. & Prof. Code § 9880.1(a)*]. Motor vehicles governed by the Act are passenger vehicles required to be registered with the Department of Motor Vehicles, and all motorcycles whether or not required to be registered by the Department of Motor Vehicles [*Bus. & Prof. Code § 9880.1(d)*].

"Motor vehicle repair" means all maintenance of and repairs to motor vehicles performed by an automotive repair dealer, including automotive body repair work, except those made pursuant to a commercial business agreement, and also except repairing tires; changing tires; lubricating vehicles; installing light bulbs, batteries, windshield wiper blades and other minor accessories; cleaning, adjusting, and replacing spark plugs; replacing fan belts, oil, and air filters; and other minor service, which the Director of Consumer Affairs, by regulation, determines are customarily performed by gasoline service stations [*Bus. & Prof. Code § 9880.1(e)*; *see Bus. & Prof. Code § 9880.1(i)* (defining commercial business agreement); *16 Cal. Code Reg § 3303(h)* (excepting repair to part of recreational vehicle intended for human habitation and unrelated to operation of vehicle)]. Restoration of a classic car is repair within the meaning of *Bus. & Prof. Code § 9880.1(e)*, at least when it involves mechanical work, as opposed to upholstery and body work [*Schreiber v. Kelsey (1976) 62 Cal. App. 3d Supp. 45, 50 , 133 Cal. Rptr. 508]* .

Automotive repair dealers must register with the Bureau of Automotive Repair, in the Department of Consumer Affairs [*Bus. & Prof. Code §§ 9884-9884.7*]. A person who is required to have a valid registration cannot have the benefit of any lien for labor or materials and does not have the right to sue on a contract for motor vehicle repairs done by that person unless he or she has a valid registration [*Bus. & Prof. Code § 9884.16*; for a complaint for use by a dealer to recover for repairs made, *see § 274.48*].

[b] Required Estimates and Invoices

An automotive repair dealer must give the customer a written estimated price for labor and parts necessary for a specific job. No work may be done and no charges can accrue before authorization to proceed is obtained from the customer [

Bus. & Prof. Code § 9884.9(a)]. The customer may designate another person to authorize work or parts supplied in excess of the estimated price, if the designation is made in writing at the time the initial authorization to proceed is signed by the customer. The designee cannot be the automotive repair dealer providing repair services, an insurer involved in a claim that includes the motor vehicle being repaired, or an employee or agent or person acting on behalf of the dealer or insurer [*Bus. & Prof. Code § 9884.9(d)*; *see Bus. & Prof. Code § 9880.1(j)* (definition of customer); *16 Cal. Code Reg. § 3353(f)* (form and content of designation and procedures to be followed by automotive repair dealer in recording designation)]. Thus, the owner of the vehicle can designate a spouse or partner, for instance, to give oral authorization for doing work or supplying parts beyond what was estimated.

No charge may be made for work done or parts supplied in excess of the estimated price without the oral or written consent of the customer or designee, which must be obtained at some time after it is determined that the estimated price is insufficient and before the work not estimated is done or the parts not estimated are supplied. Written consent may be provided by electronic mail or facsimile transmission from the customer or designee [*Bus. & Prof. Code § 9884.9(a) see 16 Cal. Code Reg. § 3353(c)(2), (3)* (procedures to be followed by automotive repair dealer if authorization or consent for increase in original estimated price is provided by electronic mail or facsimile transmission)].

If consent is oral, the dealer must make a notation on the work order of the date, time, name of person authorizing the additional repairs, and telephone number called, if any, with a specification of the additional parts and labor and the total additional cost and must either [*Bus. & Prof. Code § 9884.9(a)*]:

- Make a notation on the invoice of the same facts set forth in the notation on the work order; or

- On completion of the repairs, obtain the customer's signature or initials to an acknowledgment of notice and consent.

The repair dealer cannot recover for repairs furnished without the required written estimate, even when the owner orally authorized the repairs [*Bus. & Prof. Code § 9884.9(a)*; *Donaldson v. Abot (1987) 194 Cal. App. 3d 817, 820-821, 239 Cal. Rptr. 801* ; *Bennett v. Hayes (1975) 53 Cal. App. 3d 700, 703-704, 125 Cal. Rptr. 825]* . This prohibition extends to a contract claim and to a common count or quasi-contract recovery of the value of the services [*Donaldson v. Abot (1987) 194 Cal. App. 3d 817, 820-821, 239 Cal. Rptr. 801* ; *Bennett v. Hayes (1975) 53 Cal. App. 3d 700, 703-704, 125 Cal. Rptr. 825]* . For an affirmative defense based on the failure to provide the estimate, see *§ 274.49*.

All work done by an automotive repair dealer must be recorded on an invoice with parts and service work listed, and their prices subtotaled separately. If entirely or partially used, rebuilt, or reconditioned parts are supplied, the invoice must clearly state that fact. One copy of the invoice must be given to the customer and one copy must be retained by the dealer [*Bus. & Prof. Code § 9884.8*]. The invoice must show the dealer's registration number and the corresponding business name and address. If the dealer's telephone number is shown, it must comply with the requirements of *16 Cal. Code Reg. § 3371(b)* (the same number as that listed for the dealer's firm name and address in the telephone directory). In addition, the invoice must describe all service work done, including all warranty work, and separately identify each part so that the customer can understand what was purchased, also stating whether the part was new, used, reconditioned, rebuilt, or an OEM crash part, or a non-OEM aftermarket crash part [*Bus. & Prof. Code § 9884.8*; *16 Cal. Code Reg. § 3356(a)*].

For a complaint for use by an automotive repair dealer to recover payment for repairs made, see *§ 274.48*.

[c] Repairer's Liability for Breach of Repair Contract

When a garage or service station operator improperly or negligently repairs or services a customer's automobile, the operator may be liable to the customer for damages that are proximately caused by, or that in the ordinary course of things would be likely to result from, his or her breach of an express or implied contractural obligation to perform the

repairs or services with due care and skill. Damages may include the cost of completing the work properly and the value of the customer's loss of the automobile's use [*Civ. Code § 3300*; *Turgeon v. Barney (1924) 70 Cal. App. 432, 434, 233 P. 394* ; *see Kavalaris v. Anthony Bros., Inc. (1963) 217 Cal. App. 2d 737, 741, 32 Cal. Rptr. 205* (contractor's duty of reasonable care and liability for negligent performance based on contract)].

For discussions of actions based on intentional or negligent misrepresentation in a contractual context, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* , and Ch. 269, *Fraud and Deceit* .

For discussions of actions based on breach of an express or implied warranty, see Ch. 91, *Automobiles: Actions Involving Defects and Repairs* , and Ch. 502, *Sales: Warranties* .

Warranty actions are more likely to arise in the context of a sale, but can arise in contracts for labor and materials under appropriate circumstances [*see Pollard v. Saxe & Yolles Dev. Co. (1974) 12 Cal. 3d 374, 378, 115 Cal. Rptr. 648, 525 P.2d 88* ; *Aced v. Hobbs-Sesack Plumbing Co. (1961) 55 Cal. 2d 573, 580-583, 12 Cal. Rptr. 257, 360 P.2d 897 , superseded by statute as stated in Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116, 132, 87 Cal. Rptr. 3d 5* ; *Gagne v. Bertran (1954) 43 Cal. 2d 481, 486, 275 P.2d 15* (no warranty for labor and service provided by test-hole driller); *Swett v. Gribaldo, Jones & Associates (1974) 40 Cal. App. 3d 573, 575-576, 115 Cal. Rptr. 99* (refusing to impose warranty liability on provider of service, namely soils engineer)].

For discussion of actions based on unfair or deceptive practices in connection with repair services under the Consumers Legal Remedies Act [*see Civ. Code § 1750 et seq.*] and violations of the requirements for retail sales and repair contracts under the Unruh Retail Installment Sales Act [*Civ. Code § 1801 et seq.*], see Ch. 501, *Sales: Retail Installment Sales* , and Ch. 504, *Sales: Consumers Legal Remedies Act* .

[3] Liability for Wrongful Retention of Repaired Vehicle

If a repairer retains or retakes possession of a repaired vehicle, usually to maintain and assert a lien claimed under *Civ. Code § 3068* (discussed under Garageman's Lien, *below*), when he or she has no right to do so, the repairer is liable to return the vehicle, or for its value, for conversion, and for any damages caused by the wrongful retention, including the reasonable rental value of the vehicle for the period during which the customer was deprived of its use [*Harris v. Dixon Cadillac Co. (1982) 132 Cal. App. 3d 485, 489-493, 183 Cal. Rptr. 299* ; *see Zhadan v. Downtown Los Angeles Motor Distributors, Inc. (1979) 100 Cal. App. 3d 821, 831-833, 161 Cal. Rptr. 225]* . In addition, in any action brought by or on behalf of the legal owner or lessor to recover a vehicle alleged to be wrongfully withheld by the person claiming a lien pursuant to *Civ. Code § 3068*, the prevailing party shall be entitled to reasonable attorney's fees and costs, not to exceed $1,750 [*Civ. Code § 3068(d)*]. The wrongful assertion of the right to possession usually arises from a situtation in which the repairer failed to give the customer a written estimate or to obtain the customer's authorization for the repairs [*see e.g., Harris v. Dixon Cadillac Co. (1982) 132 Cal. App. 3d 485, 488-489, 183 Cal. Rptr. 299* ; *Zhadan v. Downtown Los Angeles Motor Distributors, Inc. (1979) 100 Cal. App. 3d 821, 833, 161 Cal. Rptr. 225]* . For a form of complaint with causes of action for claim and delivery and conversion for use by a customer whose vehicle is wrongfully retained, see Ch. 119, *Claim and Delivery* .

In an egregious case (for instance, when the dealer forged the customer's signature on copies of estimates and authorizations provided to the Bureau of Automotive Repairs during its investigation of the customer's complaint, or made false statements in its notice of lien sale), punitive damages may be assessed against the repairer [*Harris v. Dixon Cadillac Co. (1982) 132 Cal. App. 3d 485, 493-494, 183 Cal. Rptr. 299* (*$45,000); Zhadan v. Downtown Los Angeles Motor Distributors, Inc. (1979) 100 Cal. App. 3d 821, 834-839, 161 Cal. Rptr. 225* ($90,000)].

Legal Topics:

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

Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationContracts LawTypes of ContractsPersonal Service AgreementsTortsDamagesCosts & Attorney FeesGeneral OverviewTortsNegligenceDutyForeseeability of InjuryTortsNegligenceStandards of CareReasonable CareGeneral Overview

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23-274 California Forms of Pleading and Practice--Annotated § 274.12

§ 274.12 Sale of Petroleum and Other Automotive Fluids

[1] Statutory Licensing and Regulation

Licensing, product standards, and labeling, as well as advertising and other business practices in connection with the retail sale of petroleum products for motor vehicles, are regulated by *Bus. & Prof. Code §§ 13400 et seq.* Similar statutory regulation is provided for the sale or distribution of antifreeze, coolant, brake fluid, and automatic transmission fluid [*Bus. & Prof. Code §§ 13700 et seq.*]. In addition, a petroleum distributor whose refining capacity or sales volume is 50,000 barrels per day or more is prohibited from engaging in unfair price discrimination and is liable for treble damages and attorney's fees to any person injured by such discrimination [*Bus. & Prof. Code §§ 21200-21203*]. For discussion and forms related to unfair competition and unfair or fraudulent business practices, see Ch. 565, *Unfair Competition* .

Franchise agreements between a refiner and a distributor, a refiner and a retailer, a distributor and another distributor, or a distributor and a retailer of petroleum products are regulated by *Bus. & Prof. Code §§ 20999-21150.1* and by the Franchise Investment Law [*Corp. Code §§ 31000-35104*]. For discussion and forms relating to actions under the Franchise Investment Law, see Ch. 515, *Securities and Franchise Regulation* .

[2] Refueling Service for Disabled Drivers

Every service station operator (except during hours when only one employee is on duty, or when two employees are on duty but one employee is assigned exclusively to the preparation of food) must provide refueling service on request to a disabled driver whose vehicle bears a disabled plate or placard. The operator may not charge a price that is higher than the price of self-service fuel [*Bus. & Prof. Code § 13660(a), (b)*]. Service stations that are required to provide this service must post a notice, in a single location that is conspicuous to a driver seeking refueling service, that refueling service is available, and if applicable, the hours during which it is available [*Bus. & Prof. Code § 13660(c)(1), (2)*]. Service stations that are exempt from the refueling service requirement must post a single notice, in a location conspicuous to drivers seeking refueling service, that the service station does not provide refueling service for disabled individuals [*Bus. & Prof. Code § 13660(c)(3)*].

Local law enforcement agencies are required to investigate alleged violations on the verified complaint of any person or

public agency [*Bus. & Prof. Code § 13660(e)*; *see Bus. & Prof. Code § 13660(f)*]. Individuals may also file a verified complaint with the city attorney, district attorney, or Attorney General [*Bus. & Prof. Code § 13660(g)*].

Any intended beneficiary of *Bus. & Prof. Code § 13660* or any public agency that exercises oversight of the service station may enforce Section 13660. Any such actions are governed by *Code Civ. Proc. § 1021.5*, relating to recovery of attorney's fees [*Bus. & Prof. Code § 13660(h)*; for discussion of Code Civ. PNC.§ 1021.5, *see* Ch. 174, *Costs and Attorney's Fees*].

[3] Sale of Gasoline to Intoxicated Persons

It has been held that a service station operator who sells gasoline to a visibly intoxicated motorist who then injures a third person is not liable for the third person's injuries [*Fuller v. Standard Stations, Inc. (1967) 250 Cal. App. 2d 687, 692-694, 58 Cal. Rptr. 792]* . This holding predates, but is consistent with, the statement of public policy expressed in *Bus. & Prof. Code § 25602(c)* that the holdings in Vesely v. Sager [*Vesely v. Sager (1971) 5 Cal. 3d 153, 157, 95 Cal. Rptr. 623, 486 P.2d 151]* , Bernhard v. Harrah's Club [*Bernhard v. Harrah's Club (1976) 16 Cal. 3d 313, 319-321, 128 Cal. Rptr. 215, 546 P.2d 719*], and Coulter v. Superior Court [*Coulter v. Superior Court (1978) 21 Cal. 3d 144, 151, 145 Cal. Rptr. 534, 577 P.2d 669]* be abrogated in favor of prior judicial interpretation finding that the consumption of alcoholic beverages is the proximate cause of injuries inflicted by an intoxicated person [*Bus. & Prof. Code § 25602(c)*].

For general discussion and forms for use in actions for injuries causes by intoxicated persons, see Ch. 19, *Alcoholic Beverages: Civil Liability* .

[4] Negligent Delivery by Gasoline Distributor

A distributor of gasoline owes a duty of care in handling gasoline in its custody and control so as to avoid a risk of harm to persons or their property as a result of ignition or explosion [*Feeney v. Standard Oil Co. (1922) 58 Cal. App. 587, 591-593, 209 P. 85* ; *but see George v. Bekins Van & Storage Co. (1949) 33 Cal. 2d 834, 842, 205 P.2d 1037* (disapproving dictum in *Feeney* and indicating that careless smoking by employee in course of employment may be imputed to employer); *see also Borenkraut v. Whitten (1961) 56 Cal. 2d 538, 545, 15 Cal. Rptr. 635, 364 P.2d 467* (utmost care required of persons dealing with explosive or highly flammable materials)].

Thus, a distributor may be liable for personal injuries and property damage resulting from the ignition of gasoline during a delivery to a service station if the distributor has failed to equip its delivery trucks with devices designed to prevent or extinguish the ignition of gasoline or if the distributor's agent has negligently ignited the gasoline in the course of a delivery [*Weaver v. Shell Company (1939) 34 Cal. App. 2d 713, 716, 718-719, 94 P.2d 364]* .

In an action for injuries to a service station attendant resulting from the negligent ignition of gasoline during a delivery by an agent of a distributor, it is no defense to the distributor's liability that the attendant assumed the risk of gasoline ignition as an incident of his or her employment: an employee does not assume the risk of such extraordinary dangers as may be created by the negligent acts of others unless he or she participates in such negligent acts or knows or has reason to know that they are about to be committed [*Weaver v. Shell Company (1939) 34 Cal. App. 2d 713, 722, 94 P.2d 364]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawOil IndustryGasoline Dealers & DistributorsEnergy & Utilities LawOil IndustryFranchising & MarketingTortsNegligenceDefensesAssumption of RiskGeneral OverviewTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDangerous

ConditionsGeneral Overview

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§ 274.13 Motor Vehicle Bailments

[1] Nature of Bailment

When a person deposits possession of his or her motor vehicle with a garage or service station operator for the repair, servicing, or storage of the vehicle in return for a compensation, a contractual relationship called a bailment for hire arises: the operator receiving possession of the vehicle is the bailee or depositary, and the person depositing possession of the vehicle is the bailor or depositor [*Civ. Code §§ 1814, 1851*; *Guidici v. Pacific Automobile Ins. Co. (1947) 79 Cal. App. 2d 128, 133, 179 P.2d 337* (bailment for repair); *U Drive, etc. v. System A. Parks (1937) 28 Cal. App. 2d Supp. 782, 784 , 71 P.2d 354* (bailment for storage; *disapproved by Gardner v. Downtown Porsche Audi (1986) 180 Cal. App. 3d 713, 715, 721, 225 Cal. Rptr. 757* to extent *U Drive* is interpreted to allow garages to exempt themselves from liability for negligent care of the vehicles entrusted to them)]. For a discussion of the principles generally applicable to bailments for hire, see Ch. 93, *Bailments* .

A bailment for hire of a motor vehicle is distinguished from the licensor-licensee relationship that arises when a person parks and locks his or her motor vehicle in a lot, carries away the keys, and retains the right to remove the vehicle at will; no bailment is created in the latter situation since the owner of the parking lot acquires no dominion over the vehicle nor any right to control its removal [*Porter v. Los Angeles T. Club (1940) 40 Cal. App. 2d Supp. 840, 842 , 105 P.2d 956]* .

[2] Duty to Preserve and Redeliver Vehicle

A garage or service station operator must exercise ordinary care to preserve a vehicle that he or she possesses as a bailee for hire from loss or damage [*Civ. Code § 1852*; *Beetson v. Hollywood Athletic Club (1930) 109 Cal. App. 715, 718* (bailee for storage); *see Downey v. Martin Aircraft Service (1950) 96 Cal. App. 2d 94, 97, 214 P.2d 581* (bailee of airplanes for repair)]. He or she is under the same duty with respect to the contents of bailed vehicles to the extent that he or she is informed of their presence [*Homan v. Burkhart (1930) 108 Cal. App. 363, 366]* . He or she is not an insurer of the safety of the vehicle and its contents, however, and is not responsible for any loss, destruction, or damage to the vehicle or its contents that is not the result of negligence on his or her part [*Homan v. Burkhart (1930) 108 Cal. App. 363, 366, 291 P. 624* ; *Emigh v. Wood (1927) 81 Cal. App. 347, 350]* .

As bailee of a vehicle, a garage or service station operator also is under an obligation to deliver the vehicle, on demand, to the person for whose benefit it was bailed [*Civ. Code §§ 1822, 1823*], unless the operator has a lien on the vehicle [*Civ. Code § 1822*; for discussion, *see § 274.14*] or unless the operator has been forbidden or prevented from making delivery by the vehicle's real owner or by acts of law, and he or she has given prompt notice of such adverse proceedings to the person for whose benefit the vehicle was bailed [*Civ. Code §§ 1822, 1825*].

In contrast to these duties of a bailee for hire of a vehicle, a parking lot operator who merely licenses a driver to park a vehicle in his or her lot assumes no responsibility for the safekeeping of the vehicle against loss or damage [*Porter v. Los Angeles T. Club (1940) 40 Cal. App. 2d Supp. 840, 841-842 , 105 P.2d 956]* .

[3] Return of Vehicle to Intoxicated Bailor

A bailee, such as a restaurant or its related valet parking service, has no duty to withhold automobiles from intoxicated patrons [*Knighten v. Sam's Parking Valet (1988) 206 Cal. App. 3d 69, 73, 253 Cal. Rptr. 365]* . There is no special relationship between the bailee and the potential victim that would give rise to such a duty. It would be inappropriate to impose such a duty on bailees when police officers who temporarily detain drunk drivers are not liable for allowing them to continue driving [*Knighten v. Sam's Parking Valet (1988) 206 Cal. App. 3d 69, 74,74 n.1, 253 Cal. Rptr. 365* (analogizing in dicta that under the police case, ironically, liability would only arise if the bailee did intervene to prevent the bailor from driving but negligently secured the vehicle or bailor)].

In returning a chattel to the bailor, a bailee does not entrust it. Thus, a bailee is not liable for negligent entrustment based on its return of a vehicle to an obviously inebriated bailor [*Knighten v. Sam's Parking Valet (1988) 206 Cal. App. 3d 69, 75, 253 Cal. Rptr. 365]* . This holding is not based on a bailee's obligation to return the vehicle to the customer because, under these circumstances, a bailee could lawfully refuse to return a vehicle to a bailor who was not fit to drive. Any citizen has the right to interfere with an attempt to commit a crime, and driving under the influence of alcohol is a crime [*see Veh. Code § 23152(a)*; *see also Gov. Code § 13970* (immunity to persons whose direct action prevents commission of crime against person or property of another); *Knighten v. Sam's Parking Valet (1988) 206 Cal. App. 3d 69, 75-76, 253 Cal. Rptr. 365]* . The court was unwilling to impose a duty to withhold the vehicle based on a bailee's right to do so because the imposition of civil liability in these circumstances would lead to unforeseeable consequences. Furthermore, imposition of such a duty would be inconsistent with the public policy expressed in *Bus. & Prof. Code § 25602(c)* that the consumption of alcoholic beverages is the proximate cause of injuries inflicted by an intoxicated person [*Knighten v. Sam's Parking Valet (1988) 206 Cal. App. 3d 69, 76, 253 Cal. Rptr. 365]* .

For discussion and forms for asserting other theories on which liability might be predicated in this or similar situations, see Ch. 19, *Alcoholic Beverages: Civil Liability* .

[4] Liability

[a] In General

A garage or service station operator may be held liable for the loss, destruction, or damage of a vehicle and its contents under the following theories:

- In a negligence action based on his or her failure as a bailee for hire to exercise ordinary care for the preservation of the vehicle and its contents [*Homan v. Burkhart (1930) 108 Cal. App. 363, 366-367* ; *Hobson v. Silvea (1920) 50 Cal. App. 35, 38, 194 P. 525]* ;

- In a contract action based on his or her breach of a bailment agreement to exercise ordinary care for the preservation of the vehicle [*Mehesy v. Mission Garage (1922) 60 Cal. App. 275, 277, 212 P. 643]* ; or

- In a contract action based on his or her breach of a bailment agreement to redeliver the vehicle on demand [*Gardner v. Downtown Porsche Audi (1986) 180 Cal. App. 3d 713* (disapproving *U Drive & Tour, Ltd. v. System Auto Parks, Ltd. (1937) 28 Cal. App. 2d Supp. 782* to extent *U Drive* is interpreted to allow garages to exempt themselves from liability for negligent care of the vehicles entrusted to them)].

An operator may be liable for conversion of a vehicle as well as for breach of a bailment contract if he or she delivers the vehicle to someone other than the person entitled to receive it, albeit innocently and by mistake [*Fisher v. Pickwick Hotel, Inc. (1940) 42 Cal. App. 2d Supp. 823, 825-826 , 108 P.2d 1001]* or if he or she sells it without authorization [*Neff v. Campbell (1930) 106 Cal. App. 286, 287, 289 P. 217]* .

The operator is not liable for conversion of the vehicle, however, if he or she delivers the vehicle to a person whom he or she believes, after the exercise of reasonable care and vigilance, has a claim to possession that is superior to that of the bailor or if he or she refuses to deliver a vehicle to its legal owner until the bailor, its legal possessor, has been heard with respect to his or her rights in the vehicle [*see Lambert v. Valentine (1923) 61 Cal. App. 712, 714, 215 P. 692* ; *see also Civ. Code §§ 1822, 1825* (excusing bailee from failure to deliver on demand when third party has asserted right to property, or the property has been attached under legal process, and the bailee has given prompt notice to the bailor); *Messerall v. Fulwider (1988) 199 Cal. App. 3d 1324, 1329-1333, 245 Cal. Rptr. 548* (bailee liable for conversion of boat and trailer after refusing to deliver them to legal owner who was not bailor)].

Nor is the operator liable for conversion of the vehicle if the vehicle has been lost or destroyed through his or her negligence. Failure to exercise care for the preservation of the bailed vehicle is not an act of dominion of the sort necessary to make the operator a converter; conversion exists only when a bailee, having the power to do so, refuses to redeliver goods to which the bailor is entitled [*George v. Bekins Van & Storage Co. (1949) 33 Cal. 2d 834, 838, 205 P.2d 1037]* .

For discussion of the availability of actions for the conversion or recovery of vehicles bailed to a garage or service station operator for repair, servicing, or storage when the operator has refused to deliver the vehicle on demand and tender of charges secured by a lien, see *§ 274.14*.

[b] Limitations on Liability

The liability of a garage or service station operator for the negligent loss or damage of a motor vehicle or its contents that he or she possesses as a bailee cannot exceed the amount that the operator is informed by the bailor, or has reason to suppose, the vehicle or its contents to be worth [*Civ. Code § 1840*; *Homan v. Burkhart (1930) 108 Cal. App. 363, 368-369, 291 P. 624* ; *but see Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 854, 88 Cal. Rptr. 39* (statutory limitation inapplicable when bailee has no reason to suppose that bailed property has any special value over or under actual value and bailor has not disclosed its value)].

[c] Disclaimer of Liability Invalid

A garage or service station operator may not limit his or her liability for loss or damage to a vehicle by contractural agreement with the vehicle's bailor. Automobile repair contracts "affect the public interest" within the meaning of *Tunkl v. Regents of University of California (1963) 60 Cal. 2d 92, 32 Cal. Rptr. 33, 383 P.2d 441* , and therefore clauses that exculpate repair firms for ordinary negligence in handling and securing vehicles under repair run afoul of *Civ. Code § 1668* and are invlaid as contrary to public policy [*Gardner v. Downtown Porsche Audi (1986) 180 Cal. App. 3d 713* (*disapproving U Drive & Tour, Ltd. v. System Auto Parks, Ltd. (1937) 28 Cal. App. 2d Supp. 782* to extent *U Drive* is interpreted to allow garages to exempt themselves from liability for negligent care of the vehicles entrusted to them)]. For discussion of statutory restrictions on such contractual limitations under *Civ. Code §§ 1630-1630.5*, see Ch. 93,

Bailments .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawTypes of ContractsBailmentsTortsIntentional TortsConversionGeneral OverviewTortsNegligenceDefensesExculpatory ClausesAgreements Affecting the Public InterestTortsVicarious LiabilityBailees

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§ 274.14 Garageman's Lien

[1] Possessory Lien

Every person has a lien dependent on possession for the compensation to which he or she is legally entitled for making repairs or performing labor on, and furnishing supplies and materials for, and for the storage, repair, or safekeeping of, and for the rental of parking space for, any vehicle of a type subject to registration under the Vehicle Code, subject to the limitations set forth in *Civ. Code § 3067 et seq.* (governing liens on vehicles). This lien arises at the earlier of either (1) the time a written statement of charges for completed work or services is presented to the registered owner or (2) 15 days after the work or services are completed [*Civ. Code § 3068(a)*].

A person seeking to enforce a lien for the storage and safekeeping of a vehicle may not impose any charge exceeding that for one day of storage if, 24 hours or less after the vehicle is placed in storage, a request is made for the release of the vehicle. If the request is made more than 24 hours after the vehicle is placed in storage, charges may be imposed on a full, calendar-day basis for each day, or part of a day, that the vehicle is in storage [*Civ. Code § 3068.1(a)*].

The lien is expressly made dependent on possession. In this respect, *Civ. Code § 3068* conflicts with *Civ. Code § 1856*, which, in general terms, gives a depositary for hire a lien for storage charges and other charges, the lien not being dependent on possession. Therefore, *Civ. Code § 3068* controls in any case in which it is applicable, and *Civ. Code § 1856* does not apply [*see Code Civ. Proc. § 1859*]. The lien allowed by *Civ. Code § 3068(a)* may arise in favor of a garage operator who stores a vehicle at the direction of a public officer after attaching it [*see Bentinck v. Menotti (1929) 97 Cal. App. 412, 413-414, 275 P. 850* ; *see also Civ. Code § 3068.1*; *Veh. Code § 22851*, discussed, respectively, in [4] and [5], *below*].

When retaining a vehicle under a lien, the operator of a garage is a bailee for hire of the vehicle [*see Mozzetti v. Superior Court (1971) 4 Cal. 3d 699, 709, 94 Cal. Rptr. 412, 484 P.2d 84* ; *see also* discussion in *§ 274.13*]. On completion of the work or services, the lienholder must not dismantle, disengage, remove, or strip from the vehicle the parts used to complete the work or services [*Civ. Code § 3068(a)*].

[2] Duration of Lien

A lien arising under *Civ. Code § 3068(a)* because work or services have been performed on a vehicle with the consent of the registered owner arises when a written statement of charges for completed work or services is presented to the registered owner or 15 days after the work or services are completed, whichever occurs first [*Civ. Code § 3068(a)*]. The lien is extinguished, and no lien sale may be conducted, unless the lienholder applies for authorization to conduct a lien sale within 30 days after the lien has arisen or an action in court is filed within 30 days after the lien has arisen [*Civ. Code § 3068(b)(1)*; *see Civ. Code §§ 3071-3074* (lien-sale procedures)].

In addition, a lien arising under *Civ. Code § 3068(a)* for work or services that were performed on a vehicle with the consent of the registered owner is extinguished and no lien sale may be conducted, if the lienholder, after written demand made by either personal service or certified mail with return receipt requested by the legal owner or the lessor, fails to comply with that demand as follows:

- After a demand to inspect the vehicle, the lienholder fails to permit that inspection by the legal owner or lessor, or his or her agent, within a period of time not sooner than 24 hours nor later than 72 hours after the receipt of that written demand, during the normal business hours of the lienholder [*Civ. Code § 3068(b)(3)*].

- After a demand to receive a written copy of the work order or invoice reflecting the services or repairs performed on the vehicle and the authorization from the registered owner requesting the lienholder to perform the services or repairs, the lienholder fails to provide that copy to the legal owner or lessor, or his or her agent, within 10 days after the receipt of that written demand [*Civ. Code § 3068(b)(4)*].

[3] Procedure After Extinguishment of Lien

A person whose lien for work or services on a vehicle has been extinguished must turn over possesssion of the vehicle at the place where the work or services were performed to the legal owner or lessor on demand of the legal owner or lessor and on tender by the legal owner or lessor, by cashier's check or in cash, of only the amount for storage, safekeeping, or parking rental for the vehicle to which the person is entitled by *Civ. Code § 3068(c)* [*Civ. Code § 3068(b)(2)*; *see also Civ. Code § 3068(d)* (attorney's fees and costs), discussed under [6], *below*].

[4] Vehicles Authorized to Be Removed

Every person has a lien dependent on possession for the compensation to which the person is legally entitled for towing, storage, or labor associated with recovery of load salvage of any vehicle subject to registration that has been authorized to be removed by a public agency, a private property owner pursuant to *Veh. Code § 22658*, or a lessee, operator, or registered owner of the vehicle. The lien is deemed to arise on the date of possession of the vehicle, and possession is deemed to arise when the vehicle is removed and is in transit [*Civ. Code § 3068.1(a)*].

If the vehicle has been determined to have a value of $4,000 or less, the lien must be satisfied pursuant to *Civ. Code § 3072*. Lien-sale proceedings pursuant to *Civ. Code § 3072* must commence within 15 days after the date the lien arises. No storage accrues beyond the 15-day period unless lien-sale proceedings have commenced. The storage lien may be for a period of up to 60 days if a completed notice of a pending lien sale form has been filed pursuant to *Civ. Code § 3072* within 15 days after the lien arises. The Department of Motor Vehicles provides a form for this purpose: Form REG 668 (Notice of Pending Lien Sale for Vehicle Valued $4,000 or Less) [*see California Legal Forms, Ch. 102A, Personal Property Liens, § 102A.230* (Matthew Bender)]. The storage lien may be for a period of up to 120 days if [*Civ. Code § 3068.1(b)*]:

- A declaration of opposition is filed pursuant to *Civ. Code § 3072* (the declaration can be made using a space on Form REG 668, referenced *above*);

- The vehicle has an out-of-state registration;

- The vehicle identification number has been altered or removed; or

- A person with an interest in the vehicle becomes known to the lienholder after the lienholder has complied with *Civ. Code § 3072(b)*.

If the vehicle has been determined to have a value exceeding $4,000, pursuant to *Veh. Code § 22670*, the lien must be satisfied pursuant to *Civ. Code § 3071*. The storage lien may be for a period not exceeding 120 days, if an application for an authorization to conduct a lien sale has been filed pursuant to *Civ. Code § 3071* [*Civ. Code § 3068.1(c)*].

Any person who improperly causes a vehicle to be towed or removed in order to create or acquire an enforceable lienhold interest forfeits all claims for towing, removal, or storage and is liable to the owner or lessee of the vehicle for the cost of removal, transportation, and storage, damages resulting from the towing, removal, transportation, or storage of the vehicle, attorney's fees, and court costs [*Civ. Code § 3070(d)(1)*]. A person "improperly causes a vehicle to be towed or removed" when engaging in any of several enumerated acts, including but not limited to the following:

- Failure to comply with *Veh. Code § 10650, 10652.5, 10655*, or *22658* [*Civ. Code § 3070(d)(2)(A), (C)*].

- Misrepresentation of information described in *Veh. Code § 10650(b)* [*Civ. Code § 3070(d)(2)(B)*].

- Failure, when obtaining authorization for removal of a vehicle from a vehicle owner or operator where a law enforcement officer is not present at the scene of an accident, to present a form for signature that plainly identifies all applicable towing and storage fees and charges by type and amount and identifies the name and address of the storage facility unless a different storage facility is specified by the vehicle owner or operator, and to furnish a copy of the signed form to the owner or operator [*Civ. Code § 3070(d)(2)(D)*].

- Failure by the owner or operator of a facility used for the storage of towed vehicles to display, in plain view at all cashiers' stations, a conspicuous sign, disclosing storage fees and charges in force, including the maximum daily storage rate [*Civ. Code § 3070(d)(2)(E)*].

- Undertaking repairs or service on a vehicle that is being stored at a facility used for the storage of towed vehicles without first providing a written estimate to, and obtaining the express written consent of, the owner of the vehicle [*Civ. Code § 3070(d)(2)(F)*].

- The promise to pay, or the payment of, money or other valuable consideration by any owner or operator of a towing service to the owner or operator of the premises from which the vehicle is towed or removed, for the privilege of towing or removing the vehicle [*Civ. Code § 3070(d)(2)(G)*].

[5] Vehicles Removed by Peace Officers or Other City or County Employees

Under *Veh. Code § 22851*, a similar lien arises whenever a vehicle has been removed to a garage under *Veh. Code § 22650 et seq.* (governing removal of parked and abandoned vehicles) and the keeper of the garage has received certain notice as provided in those code sections. In such a case, the keeper of the garage has a lien dependent on possession for compensation for towage and for caring for such vehicle and for keeping it safe for a period not exceeding 60 days or 120 days, if an application for authorization to hold a lien sale has been filed under *Civ. Code § 3068.1* within 30 days after the removal of the vehicle to the garage.

Possession is deemed to arise when the vehicle is removed and is in transit. If the owner is unknown or if the vehicle is not recovered by the owner within that period of time, the keeper of the garage may satisfy his or her lien in the manner set forth in *Veh. Code § 22850 et seq.* [*Veh. Code § 22851(a)(1)*; *see Stypmann v. City & Cty. of San Francisco (9th Cir. 1977) 557 F.2d 1338, 1343-1345* (holding former *Veh. Code § 22851* unconstitutional in failing to provide for hearing, unless vehicle was sold to satisfy lien; provision for a hearing is now made in *Veh. Code § 22851.8*)].

Notwithstanding any other provision of law, no cause of action for despoliation of evidence arises against a towing company that sells a vehicle at, or disposes of a vehicle after, a lien sale, unless the company knew, or should have known, that the vehicle would be needed as evidence in a legal action [*Veh. Code § 22856*]. For discussion and a form relating to despoliation of evidence generally, see Ch. 195, *Discovery: Inspection of Tangible Evidence* ,.

[6] Limitation in Absence of Notice to Owner and Obtaining Owner's Consent for Services

In order to preserve the full amount of a lien in the following cases, the person claiming the lien must give actual notice in writing, either by personal service or by registered letter addressed to the legal owner named in the registration certificate, and the written consent of that legal owner must be obtained, before any work, services, storage, safekeeping, or rental of parking space are performed [*Civ. Code § 3068(c)(1)*; *see California Legal Forms, Ch. 102A, Personal Property Liens, § 102A.200* (Matthew Bender) (form combining notice and owner's consent)]. Unless that notice is given and the legal owner's consent is obtained, the liens listed below are limited as follows:

- For work and services, the enforceable lien is limited to $1,500.

- For storage, safekeeping, or rental of parking space, the enforceable lien is limited to $1,025. However, no fee or service charge may be imposed for parking and storage of the vehicle for the period beginning with the 16th day of possession and continuing until three days after written notice by certified mail, return receipt requested, is sent to the legal owner by the lienholder, if the name and address of the legal owner are known or can be ascertained from Department of Motor Vehicles records [*Veh. Code § 10652.5(a)*].

- For any storage or safekeeping, rendered or performed at the request of any person other than the legal owner or lessor, if an application for an authorization to conduct a lien sale [*see California Legal Forms, Ch. 102A, Personal Property Liens, § 102A.220* (Matthew Bender) (form for application to conduct lien sale of vehicle valued at over $4,000)] has been filed pursuant to *Civ. Code § 3071* within 30 days after the commencement of the storage or safekeeping, the enforceable lien is limited to $1,250.

Subject to the limitation stated in *Veh. Code § 10652.5*, discussed *above*, if any portion of a lien includes charges for the care, storage, or safekeeping of, or for the rental of parking space for, a vehicle for a period in excess of 60 days, the portion of the lien that accrued after the expiration of that period is invalid unless the lienholder has complied with *Veh. Code §§ 10650* and *10652* [*Civ. Code § 3068(c)(2)*].

The charge for the care, storage, or safekeeping of a vehicle that may be charged to the legal owner or lessor may not exceed that for one day of storage if, 24 hours or less after the vehicle is placed in storage, a request is made for the release of the vehicle. If the request is made more than 24 hours after the vehicle is placed in storage, charges may be imposed on a full, calendar-day basis for each day, or part thereof, that the vehicle is in storage [*Civ. Code § 3068(c)(3)*].

In any action brought by or on behalf of the legal owner or lessor to recover a vehicle alleged to be wrongfully withheld by the person claiming a lien pursuant to *Civ. Code § 3068*, the prevailing party is entitled to reasonable attorney's fees and costs not to exceed $1,750 [*Civ. Code § 3068(d)*].

[7] Loss of Lien

Whenever the possessory lien on any vehicle is lost through trick, fraud, or device, the repossession of the vehicle by the lienholder revives the possessory lien. However, any lien so revived is subordinate to any right, title, or interest of any person under any sale, transfer, encumbrance, lien, or other interest acquired or secured in good faith and for value between the time of the loss of possession and the time of repossession [*Civ. Code § 3070(a)*].

[8] Redemption of Lien

Every person having an interest in a vehicle subject to a lien for services and materials has a right to redeem it from the lien [*Civ. Code § 2903*; *Covington v. Grant (1927) 82 Cal. App. 749, 751, 256 P. 213]* . If such a person makes a demand for the vehicle accompanied by payment or tender of payment of the lawful amount of the lien, the lien is extinguished and the person is entitled to immediate possession of the vehicle [*Civ. Code §§ 2905, 2909*; *Universal C.I.T. Credit Corp. v. Rater (1963) 214 Cal. App. 2d 493, 495, 29 Cal. Rptr. 631* ; *Lindsay v. Kleiber Motor Truck Co. (1930) 110 Cal. App. 479, 482, 294 P. 454]* .

A lien is not discharged by a garage or service station operator's demand for a sum in excess of the amount secured by the lien in the absence of a tender of the actual amount due [*Goodman v. Anglo-California Trust Co. (1923) 62 Cal. App. 702, 706, 217 P. 1078]* . The requirements of demand and tender may be excused, however, by conduct on the part of the operator indicating that demand and tender would be useless [*Enfield v. Hoffman Motor Co. (1953) 117 Cal. App. 2d 800, 807, 257 P.2d 458]* .

An operator who refuses to deliver a vehicle on proper demand and tender by a person entitled to redeem it may be liable for conversion [*see Civ. Code § 3068(d)* (attorney's fees and costs), discussed under [6], *above*; *Zhadan v. Downtown Los Angeles Motor Distributors, Inc. (1979) 100 Cal. App. 3d 821, 825, 161 Cal. Rptr. 225* ; *Covington v. Grant (1927) 82 Cal. App. 749, 751, 256 P. 213]* or for wrongful detention in an action to recover possession of the vehicle [*Harris v. Dixon Cadillac Co. (1982) 132 Cal. App. 3d 485, 489-493, 183 Cal. Rptr. 299* ; *see Lindsay v. Kleiber Motor Truck Co. (1930) 110 Cal. App. 479, 483, 294 P. 454]* .

The operator may also be liable for conversion or wrongful detention if he or she bases his or her refusal to deliver a vehicle on a ground inconsistent with his or her lien, thereby waiving the lien [*Enfield v. Huffman Motor Co. (1953) 117 Cal. App. 2d 800, 808, 257 P.2d 458]* . In contrast, a refusal designed to protect the vehicle in order that it remain subject to a lien does not extinguish the lien and, hence, does not constitute a conversion [*Civ. Code § 2910*; *Enfield v. Hoffman Motor Co. (1953) 117 Cal. App. 2d 800, 808, 257 P.2d 458]* .

[9] Enforcement of Lien

An operator may enforce a lien on a vehicle for services and materials by selling the vehicle in accord with the procedures contained in *Civ. Code §§ 3071-3074* [*see* California Legal Forms, Ch. 102A, *Personal Property Transactions*; § 102A.120 et seq. (Matthew Bender), for a transaction guide and forms relating to these procedures]. However, an automotive repair dealer who is not validly registered under the Automotive Repair Act (*Bus. & Prof. Code § 9880 et seq.*) cannot use the sale procedures to satisfy a lien for labor or materials [*Bus. & Prof. Code § 9884.16*].

A sale of a vehicle to satisfy the claim secured by a lien extinguishes the lien [*Civ. Code § 2910*]. If a sale is conducted in violation of the statutory procedures it is void, a purchaser at the sale takes no title to the vehicle, and the vehicle's original owner is entitled to possession of the vehicle [*Lundblade v. Pierce (1928) 95 Cal. App. 192, 194, 272 P. 329* ; *Peerless Ins. Etc. Co. v. Dwyer E. Co. (1926) 78 Cal. App. 141, 143-144, 248 P. 303]* . A lien sale in violation of a bailment contract for storage of a vehicle constitutes conversion of the vehicle by a garage operator [*Neff v. Campbell (1930) 106 Cal. App. 286, 287, 289 P. 217]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationContracts LawSecured TransactionsPerfection & PriorityPriorityLiensContracts LawTypes of ContractsBailments

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[Reserved]

§§ 274.15[Reserved]

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PART III. RESEARCH GUIDE

23-274 California Forms of Pleading and Practice--Annotated § 274.20

§ 274.20 Related Matthew Bender Publications

For discussion and forms relating to fuel pump licensing by a service station, see California Legal Forms, Ch. 3, *Articles of Incorporation* (Matthew Bender)

For forms relating to automotive repair dealers under the Automotive Repair Act (*Bus. & Prof. Code § 9880 et seq.*), see California Legal Forms, Ch. 92, *Service Contracts* (Matthew Bender)

For discussion, a transaction guide, and forms relating to bailments of and liens on motor vehicles, see California Legal Forms, Ch. 102, *Personal Property Transactions* (Matthew Bender)

Personal Injury: Actions, Defenses, Damages, Vol. 4A, *Garages and Parking Places* (premises liability); *Gasoline*, § 1.04 (sale of gasoline); Vol. 5A, *Repairs Negligently Made* (repairs) (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailmentsEnergy & Utilities LawOil IndustryGasoline Dealers & DistributorsTortsTransportation TortsMotor VehiclesGeneral Overview

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23-274 California Forms of Pleading and Practice--Annotated § 274.21

§ 274.21 State Statutes

[1] Bailments

Regulation of contractual limitations on liability of bailee of motor vehicle for storage. *Civ. Code §§ 1630, 1630.5*

Voluntary deposit, depositor, and depositary defined. *Civ. Code § 1814*

Depositary required to redeliver thing deposited to depositor on demand. *Civ. Code §§ 1822, 1823*

Depositary required to give notice to depositor of any proceeding taken adversely to his interest in thing deposited. *Civ. Code § 1825*

Liability of depositary for unauthorized use of thing deposited. *Civ. Code §§ 1835, 1836*

Limitation on bailee's liability for negligent loss or damage to bailed property. *Civ. Code § 1840*

Deposit for hire defined. *Civ. Code § 1851*

Depositary for hire required to use ordinary care for preservation of thing deposited. *Civ. Code § 1852*

Lien of depositary for hire. *Civ. Code § 1856*

Inspection of vehicles in garage, repair shop, or parking lot by public officials. *Veh. Code §§ 2805, 10656*

Records and reports of stored vehicles required of garages, repair shops, and parking lots. *Veh. Code §§ 10650-10655*

Bailee's unauthorized use and alteration of stored vehicles as misdemeanor. *Veh. Code § 10854*

[2] Garageman's Lien

Unenforceability of lien or contract for repairs by automotive repair dealer lacking valid registration. *Bus. & Prof. Code § 9884.16*

Nature and kinds of liens. *Civ. Code § 2872 et seq.*

Personal obligation not implied by creation of lien. *Civ. Code § 2890*

Lienor not entitled to expense of holding property. *Civ. Code § 2892*

Priority of liens. *Civ. Code § 2897*; *Veh. Code § 6301*

Redemption of property from lien. *Civ. Code §§ 2903-2905*

Extinction of liens. *Civ. Code §§ 2909, 2910, 2913*

Lien on personalty for labor, storage, repair, or protection of property. *Civ. Code § 3051* (inapplicable to any vehicle as defined in *Veh. Code § 670* that is subject to registration); *Civ. Code § 3068(a)*(motor vehicle repairs)

Limitation on liens for motor vehicles services or parking. *Civ. Code § 3068(c)*

Assignment of lien for labor or materials. *Civ. Code § 3069*

Revival of lien lost through fraud by lienor's repossession. *Civ. Code § 3070*

Violation of *Civ. Code § 3067 et seq.* by lien claimant as misdemeanor. *Civ. Code § 3070*

Sale of vehicle to satisfy lien. *Civ. Code § 3071 et seq.*

Legal owner's right to redeem vehicle after lien sale. *Civ. Code § 3071(k)*

Lienor's damages for another's conversion of property subject to lien. *Civ. Code § 3338*

Release to owner of vehicle stored at direction of public officer. *Veh. Code § 22850.3(a)*

Garagekeeper's lien for towage and storage of vehicle at direction of public officer. *Veh. Code §§ 22851, 22851.4 et seq.*

[3] Motor Vehicle Repair and Service

[a] Automotive Repair Dealers

[i] Requirements in General

Definitions. *Bus. & Prof. Code § 9880.1*

Requirements, procedure, and criteria for registration of automotive repair dealers. *Bus. & Prof. Code § 9880.2 et seq.*

Establishment of Bureau of Automotive Repair in Department of Consumer Affairs. *Bus. & Prof. Code § 9882 et seq.*

Requirement of invoice separately stating work done and parts supplied. *Bus. & Prof. Code § 9884.8*

Requirement of written estimate and customer consent prior to automotive repairs by dealer or third person. *Bus. & Prof. Code § 9884.9*

Return of replaced automotive parts to customer on request. *Bus. & Prof. Code § 9884.10*

[ii] Sanctions

Injunction. *Bus. & Prof. Code § 9884.14*

Criminal prosecution and punishment. *Bus. & Prof. Code §§ 9884.15, 9889.20, 9889.22*

Bar to enforcement of lien and contract action. *Bus. & Prof. Code § 9884.16*

Civil actions not precluded. *Bus. & Prof. Code § 9884.18*

[b] Farm Machinery Repair Shops

Invoice and written estimate requirements. *Civ. Code § 1718*

[c] Lamp, Brake, and Pollution Control Device Stations

Licensing and regulation of lamp and brake adjusting stations. *Bus. & Prof. Code § 9887.1 et seq.*

Licensing and regulation of motor vehicle pollution control device inspectors and repairers. *Health & Safety Code § 44000 et seq.*

[d] Sale and Installation of Automotive Parts

Invoice requirements and federal safety standards applicable to sale and installation of new automobile parts. *Veh. Code §§ 12000-12003*

Prohibition of sale, lease, or installation of unlawful glass, lighting equipment, signal devices, brakes, vacuum, or pressure hoses, mufflers, exhausts, or other equipment used in vehicles. *Veh. Code § 24005*

[e] Service Stations

Definition. *Bus. & Prof. Code § 13650*

Service stations must provide during operating hours (and make available at no cost to customers who purchase motor vehicle fuel) water, compressed air, and gauge for measuring air pressure for use in servicing passenger vehicles and commercial vehicles up to specified unladen weight. *Bus. & Prof. Code § 13651(a)*

Service stations within 660 feet of accessible right of way of interstate or primary highway must provide public restrooms for use by their customers during business hours; exemption for stations that were operational before 1990 and would have to construct permanent restroom facility to comply. *Bus. & Prof. Code § 13651(b)*

Service stations in California must conspicuously display list of applicable state and federal taxes per gallon of motor vehicle fuel. *Bus. & Prof. Code § 13651(c)*

Criminal prosecution and fine. *Bus. & Prof. Code §§ 13652, 13653*

[f] Vehicle Equipment Standards

General provisions. *Veh. Code §§ 24000-28053*

Lighting equipment. *Veh. Code §§ 26100-26102*

Windshield coatings. *Veh. Code § 26708.5*

Exhaust systems. *Veh. Code §§ 27150.1-27156.5*

Air pollution control devices. *Veh. Code § 27156*; *see also Health & Safety Code § 44011.6(j)* (authority to require removal from service if heavy-duty vehicle emits excessive smoke); *Veh. Code § 27159* (vehicle owner pays towing cost and storage fees for vehicle removed from service pursuant to *Health & Safety Code § 44011.6*)

Tires. *Veh. Code §§ 27455, 27460.5, 27465, 27500-27504*

Tire traction devices. *Veh. Code §§ 605, 27459.5*

Odometers. *Veh. Code §§ 28050-28051.5, 28053*

[g] Unruh Retail Installment Sales Act

Applicability of retail installment sales contract requirements established by Unruh Retail Installment Sales Act [*Civ. Code § 1801 et seq.*] to motor vehicle repair and servicing. *Civ. Code § 1802.2*

[4] Premises Liability

Liability for failure to exercise ordinary care and skill in the management of property and personal actions. *Civ. Code § 1714(a)*

[5] Sale of Petroleum and Other Automotive Fluids

[a] Antifreeze

Regulation of sales and distribution. *Bus. & Prof. Code § 13700 et seq.*

[b] Automatic Transmission Fluid

Regulation of sale and distribution. *Bus. & Prof. Code § 13700 et seq.*

[c] Brake Fluid

Regulation of sales and distribution. *Bus. & Prof. Code § 13700 et seq.*

[d] Coolant

Regulation of sales and distribution. *Bus. & Prof. Code § 13700 et seq.*

[e] Petroleum Products

Prohibition of petroleum product sales conditioned on purchase of other items; under certain conditions, however, person operating car wash facility may condition sale or offer of sale of petroleum products on purchase of car wash services. *Bus. & Prof. Code § 13411*

Refueling services to disabled persons at same price as that charged general public for fuel without refuel service charge. *Bus. & Prof. Code § 13660*

Regulation of petroleum products and related activities. *Bus. & Prof. Code § 13400 et seq.*

Prohibition of and civil liability for unfair price discrimination by distributors of motor vehicle fuels or oils. *Bus. & Prof. Code §§ 21200-21203*

Regulation of petroleum products franchises. *Bus. & Prof. Code §§ 20999-21150.1*

Application of Franchise Investment Law [*Corp. Code §§ 31000-35104*] to agreements between distributors and retail sellers of petroleum products. *Corp. Code §§ 31005, 31005.5, 31104*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityLiensContracts LawTypes of ContractsBailmentsEnergy & Utilities LawOil IndustryGasoline Dealers & DistributorsTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesGeneral Overview

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23-274 California Forms of Pleading and Practice--Annotated § 274.22

§ 274.22 Unlawful Detainer Actions

Possession is not to be restored, except under *Code Civ. Proc. § 1166a*, to petroleum distributor in unlawful detainer action against gasoline dealer unless court determines distributor had good cause under *Bus. & Prof. Code § 20999.1* to terminate, cancel, or refuse to renew dealer's franchise. *Code Civ. Proc. § 1174(a)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesTerminationsGood CauseEnergy & Utilities LawOil IndustryGasoline Dealers & DistributorsReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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§ 274.23 Administrative Regulations

Automotive equipment standards and installation requirements. *13 Cal. Code Reg. § 601 et seq.*

Licensing and regulation of lamp and brake adjusting stations and motor vehicle pollution control installation and inspection stations. *16 Cal. Code Reg. § 3305 et seq.*

Licensing and regulation of automotive repair dealers. *16 Cal. Code Reg. § 3351 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawOil IndustryGasoline Dealers & DistributorsGovernmentsState & Territorial GovernmentsLicensesGovernmentsState & Territorial GovernmentsPolice Power

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23-274 California Forms of Pleading and Practice--Annotated § 274.24

§ 274.24 Decisions

[1] Affiliation With Petroleum Distributor

Bus. & Prof. Code §§ 20999, 20999.1 regulating termination of gasoline dealer's franchise applied to arrangement begun before statute enacted but renegotiated after statute went into effect. *Union Oil Co. v. Moesch (1979) 88 Cal. App. 3d 72, 78, 151 Cal. Rptr. 517*

[2] Bailments

[a] Existence of Bailment

Garage operator in possession of vehicle for purposes of repair as bailee for hire of vehicle. *Guidici v. Pacific Automobile Ins. Co. (1947) 79 Cal. App. 2d 128, 133, 179 P.2d 337* ; *Lambert v. Valentine (1923) 61 Cal. App. 712, 714, 215 P. 692*

Parking lot attendant's acceptance of automobile for parking and issuance of parking ticket in return for fee as bailment for hire. *U Drive, Etc., v. System A. Parks (1937) 28 Cal. App. 2d Supp. 782, 784* , *71 P.2d 354* (disapproved on other grounds by *Gardner v. Downtown Porsche Audi (1986) 180 Cal. App. 3d 713, 715, 721, 225 Cal. Rptr. 757*)

Bailment of automobile contents incident to bailment for hire of automobile, where bailee is aware of contents, constituting bailment for hire of contents even though bailee receives no compensation for storing contents as such. *Homan v. Burkhart (1930) 108 Cal. App. 363, 366, 291 P. 624*

Creation of license rather than bailment when driver parks automobile in lot without transferring possession or right to control its removal to owner of lot. *Porter v. Los Angeles T. Club (1940) 40 Cal. App. 2d Supp. 840, 842* , *105 P.2d 956*

[b] Bailee's Duty of Care

Bailee for hire of motor vehicle chargeable only with ordinary care in safeguarding vehicle, not with insuring its safety. *Homan v. Burkhart (1930) 108 Cal. App. 363, 366, 291 P. 624*

Loss of vehicle during bailment without negligence on part of bailee as justification for bailee's failure to deliver vehicle to bailor. *Emigh v. Wood (1927) 81 Cal. App. 347, 350, 253 P. 947*

Tort liability of bailee of automobile for failing to exercise ordinary care for preservation of automobile in accord with duty imposed by bailment contract for storage of automobile. *Hobson v. Silvea (1920) 50 Cal. App. 35, 38, 194 P. 525*

Delivery of automobile by garage operator to unauthorized person as breach of operator's obligation under contract of storage to exercise ordinary care for preservation of automobile, imposing liability for damage to automobile during unauthorized use. *Mehesy v. Mission Garage (1922) 60 Cal. App. 275, 278, 212 P. 643*

[c] Burden of Proof

Proof of bailment and bailee's subsequent refusal on bailor's demand to make delivery as prima facie showing of conversion or breach of bailment contract to redeliver, casting burden on defendant bailee to explain refusal and establish lack of fault on his part. *U Drive, etc. v. System A. Parks (1937) 28 Cal. App. 2d Supp. 782, 784-785 , 71 P.2d 354* (disapproved on other grounds by *Gardner v. Downtown Porsche Audi (1986) 180 Cal. App. 3d 713, 715, 721, 225 Cal. Rptr. 757*)

Proof that vehicle was delivered to bailee for repair and returned by bailee in damaged condition imposing burden on bailee of proving that damage occurred without any fault on his part, whether complaint alleges negligence, conversion, or breach of contract. *Redfoot v. J. T. Jenkins Co. (1955) 138 Cal. App. 2d 108, 112, 291 P.2d 134*

Presumption of negligence on part of bailee of automobile for repairs equivalent to res ipsa loquitur presumption when automobile is damaged, destroyed, or stolen while in bailee's possession. *Redfoot v. J. T. Jenkins Co. (1955) 138 Cal. App. 2d 108, 114-115, 291 P.2d 134*

Bailor's demand for property bailed for storage and repair unnecessary where acts of bailee show conversion, determination to refuse delivery, or destruction or loss of property. *Downey v. Martin Aircraft Service (1950) 96 Cal. App. 2d 94, 100, 214 P.2d 581*

Allegation of tender of storage charges or demand for automobile unnecessary in action in tort for damages to automobile. *Hobson v. Silvea (1920) 50 Cal. App. 35, 38, 194 P. 525*

[d] Conversion by Bailee

Delivery of automobile by garage attendant to one other than person entitled to its possession as breach of contract and conversion. *Fisher v. Pickwick Hotel, Inc. (1940) 42 Cal. App. 2d Supp. 823, 824-826 , 108 P.2d 1001*

Sale of vehicle to satisfy lien for storage charges in breach of bailment agreement as conversion. *Neff v. Campbell (1930) 106 Cal. App. 286, 287, 289 P. 217*

Negligence of bailee for hire in caring for goods lost or destroyed while in his or her possession as insufficient act of dominion to constitute conversion. *George v. Bekins Van & Storage Co. (1949) 33 Cal. 2d 834, 838, 205 P.2d 1037*

Liability of bailee of automobile for repair for conversion if he or she delivers automobile to person other than bailor

unless bailee believes after exercising reasonable care that such person has claim to possession which is superior to that of bailor. *Lambert v. Valentine (1923) 61 Cal. App. 712, 714, 215 P. 692*

[e] Limitation of Bailee's Liability

Garage or service station operator may not limit his or her liability for loss or damage to vehicle by contractural agreement with vehicle's bailor. *Gardner v. Downtown Porsche Audi (1986) 180 Cal. App. 3d 713, 715, 721,* (disapproving *U Drive & Tour, Ltd. v. System Auto Parks, Ltd. (1937) 28 Cal. App. 2d Supp. 782* to extent *U Drive* is interpreted to allow garages to exempt themselves from liability for negligent care of the vehicles entrusted to them)

Limitation of bailee's liability for negligent loss of contents of automobile under *Civ. Code § 1840*. *Homan v. Burkhart (1930) 108 Cal. App. 363, 368-369, 291 P. 624*

[3] Garageman's Lien

[a] Creation and Validity of Lien

Validity of garageman's right to retain vehicle under lien without notice or hearing. *Adams v. Department of Motor Vehicles (1974) 11 Cal. 3d 146, 157, 113 Cal. Rptr. 145, 520 P.2d 961*

Garageman holding vehicle under claim of lien as bailee for hire of vehicle. *Mozzetti v. Superior Court (1971) 4 Cal. 3d 699, 709, 94 Cal. Rptr. 412, 484 P.2d 84*

Creation of garageman's lien on vehicle by garage operator's performance of services and supply of materials at request of vehicle's owner or legal possessor. *Goodman v. Anglo-California Trust Co. (1923) 62 Cal. App. 702, 704, 217 P. 1078* ; *Davenport v. Grundy Motor Sales Co. (1915) 28 Cal. App. 409, 411, 152 P. 932* ; *C.I.T. Corp. v. Biltmore Garage (1934) 3 Cal. App. 2d Supp. 757; Pacific States F. Corp. v. Freitas (1931) 113 Cal. App. Supp. 757, 767, 295 P. 804*

Request of thief for repair and storage of vehicle insufficient to create garageman's lien against legal owner of vehicle. *Ins. Corp. v. Pellissier S. Garage (1937) 24 Cal. App. 2d Supp. 768, 769 , 69 P. 236*

Conditional sales contract prohibiting creation of liens on vehicle insufficient to deprive garageman of lien for repairs and storage if prohibition is uncommunicated. *Pacific States F. Corp. v. Freitas (1931) 113 Cal. App. Supp. 757, 769-770, 295 P. 804*

Right of garage or service station operator to retain vehicle under lien for services and materials until payment or tender of payment. *Lindsay v. Kleiber Motor Truck Co. (1930) 110 Cal. App. 479, 481-482, 294 P. 454*

Garageman's lien on vehicle stored at request of public officer. *Bentinck v. Menotti (1929) 97 Cal. App. 412, 413, 275 P. 850*

Garageman's lien for work done on vehicle by third person at garageman's request. *Goodman v. Anglo-California Trust Co. (1923) 62 Cal. App. 702, 705, 217 P. 1078*

[b] Enforcement of Lien

Sale of vehicle to satisfy garageman's lien as nullity and waiver of lien if conducted in violation of statutory procedure.

Lundblade (1928) 95 Cal. App. 192, 194, 272 P. 329 ; *Peerless Ins. Etc. Co. v. Dwyer E. Co. (1926) 78 Cal. App. 141, 143-144, 248 P. 303*

Lien sale of vehicle in violation of bailment contract for storage as conversion. *Neff v. Campbell (1930) 106 Cal. App. 286, 287, 289 P. 217*

[c] Extent of Lien

Amount of garageman's lien as sum which is actually due and owing. *Griffith v. Reddick (1919) 41 Cal. App. 458, 460, 182 P. 984*

Exclusion of cost of storing vehicle during garageman's assertion of lien from amount of charges secured by lien. *Owens v. Pyeatt (1967) 248 Cal. App. 2d 840, 845, 57 Cal. Rptr. 100*

Exclusion of cost of work done on other vehicles from amount secured by garageman's specific lien on vehicle. *Golden State Co. v. Motor Car Co. (1921) 185 Cal. 402, 404, 197 P. 56*

Statutory limitation of garageman's lien for services against vehicle owner in absence of owner's notification and consent to garage operator's services performed at request of vehicle's legal possessor. *Universal C.I.T. Credit Corp. v. Rater (1963) 214 Cal. App. 2d 493, 495, 29 Cal. Rptr. 631* ; *Pacific States F. Corp. v. Freitas (1931) 113 Cal. App. Supp. 757, 769-770, 295 P. 804* ; *Lindsay v. Kleiber Motor Truck Co. (1930) 110 Cal. App. 479, 481, 294 P. 454* ; *Hessel v. Pickwick Stages System, Inc. (1929) 100 Cal. App. 682, 684, 280 P. 1016*

Inapplicability of statutory limitation of garageman's lien for services as against vehicle owner to vehicle's legal possessor requesting services. *Brown v. J. E. French Co. (1967) 253 Cal. App. 2d Supp. 1079, 1080 , 60 Cal. Rptr. 646*

[d] Priority of Lien

Priority of garageman's lien over preexisting security interest under conditional sales contract. *Pacific States F. Corp. v. Freitas (1931) 113 Cal. App. Supp. 757, 772, 295 P. 804*

Priority of garageman's lien over preexisting chattel mortgage. *Mortgage Securities Co. v. Pfaffmann (1917) 177 Cal. 109, 113, 169 P. 1033*

[e] Redemption of Lien

Redemption of lien by person having interest in property subject to lien. *Covington v. Grant (1927) 82 Cal. App. 749, 751, 256 P. 213*

Extinction of lien on vehicle by demand for vehicle and payment or tender of amount of lien. *Universal C.I.T. Credit Corp. v. Rater (1963) 214 Cal. App. 2d 493, 495, 29 Cal. Rptr. 631* ; *Lindsay v. Kleiber Motor Truck Co. (1930) 110 Cal. App. 479, 482, 294 P. 454*

Excuse of demand and tender of payment as conditions of redeeming vehicle from garageman's lien when demand and tender would be futile. *Enfield v. Hoffman Motor Co. (1953) 117 Cal. App. 2d 800, 807, 257 P.2d 458*

Garageman's demand for sum in excess of amount of lien as not waiving lien. *Enfield v. Hoffman Motor Co. (1953)*

117 Cal. App. 2d 800, 807, 257 P.2d 458 ; *Goodman v. Anglo-California Trust Co. (1923) 62 Cal. App. 702, 706, 217 P. 1078*

Waiver of lien on vehicle by garageman's conduct inconsistent with lien rather than conduct designed to protect lien. *Enfield v. Hoffman Motor Co. (1953) 117 Cal. App. 2d 800, 808, 257 P.2d 458*

Garageman's refusal to deliver vehicle upon proper demand and tender as conversion. *Covington v. Grant (1927) 82 Cal. App. 749, 751, 256 P. 213*

Garageman's waiver of lien on vehicle as basis of vehicle owner's action to recover possession of vehicle. *Enfield v. Hoffman Motor Co. (1953) 117 Cal. App. 2d 800, 808, 257 P.2d 458*

[f] Requirement of Possession

Termination of garageman's lien on vehicle for services and materials by voluntary, unconditional surrender of vehicle; ineffectiveness of repossession to revive lien. *Pacific States Finance Corp. v. Freitas (1931) 113 Cal. App. Supp. 757, 767, 295 P. 804* ; *Covington v. Grant (1927) 82 Cal. App. 749, 751, 256 P. 213* ; *Davis v. Young (1925) 75 Cal. App. 359, 364, 242 P. 743* ; *Goodman v. Anglo-California Trust Co. (1923) 62 Cal. App. 702, 704, 217 P. 1078*

Ineffectiveness of agreement between garageman and vehicle's legal possessor that lien on vehicle continue after garageman's voluntary surrender of possession to continue lien against vehicle's owner. *Jess H. Young & Son, Inc. v. Victory Tool & Die Co. (1961) 189 Cal. App. 2d 824, 828, 11 Cal. Rptr. 516* ; *C.I.T. Corp. v. Biltmore Garage (1934) 3 Cal. App. 2d Supp. 757; Davis v. Young (1925) 75 Cal. App. 359, 363, 242 P. 743* ; *Goodman v. Anglo-California Trust Co. (1923) 62 Cal. App. 702, 704, 217 P. 1078*

Issue of sufficiency of garageman's constructive possession of vehicle to continue lien on vehicle during periodic removal of vehicle by legal possessor. *C.I.T. Corp. v. Biltmore Garage (1934) 3 Cal. App. 2d Supp. 757* (lien extinguished); *Pacific States F. Corp. v. Freitas (1931) 113 Cal. App. Supp. 757, 769-771, 295 P. 804* (lien preserved)

Revival of garageman's lien upon repossession of vehicle lost through fraud. *Griffith v. Reddick (1919) 41 Cal. App. 458, 460, 182 P. 984*

Subordination of garageman's lien on vehicle to interests of good-faith purchasers and encumbrancers for value acquired during time that garageman is fraudulently deprived of possession of vehicle. *Huie v. Howard Soo Hoo (1933) 132 Cal. App. Supp. 787, 793, 22 P.2d 808*

Right of garageman to possession of vehicle or amount of lien on vehicle in action to recover property. *Connell v. Hogg (1919) 181 Cal. 730, 731, 186 P. 134* ; *Griffith v. Reddick (1919) 41 Cal. App. 458, 461, 182 P. 984*

Action for conversion as remedy of lienor who is fraudulently deprived of property subject to lien under *Civ. Code § 3051*. *Arques v. National Superior Co. (1945) 67 Cal. App. 2d 763, 767-768, 779, 155 P.2d 643*

[4] Motor Vehicle Repair and Service

[a] Contract Rights and Liabilities

Liability of person who contracts to service and repair chattels for personal injuries resulting from service and repair which make chattels dangerous. *Dahms v. General Elevator Co. (1932) 214 Cal. 733, 737-738, 7 P.2d 1013*

Contract action by garage operator to recover balance due for motor vehicle repairs. *Atwater v. Argonne Van & Storage Co. (1946) 74 Cal. App. 2d 410, 413, 168 P.2d 776*

Sufficiency of complaint for recovery of charges for services which joins common counts for agreed price and reasonable value of services with count based on express contract which is fully performed except for payment by defendant. *Haggerty v. Warner (1953) 115 Cal. App. 2d 468, 474-475, 252 P.2d 373*

Nonexistence of cause of action for work, labor, and services in absence of expressed or implied promise on part of recipient of services to pay for them. *Shepherd v. Perea (1950) 98 Cal. App. 2d 518, 520, 220 P.2d 776*

Nonliability of vehicle owner who neither requested nor authorized automotive repairs to repairman for any portion of costs of repairs performed at request of vehicle's legal possessor when repairman's limited lien against owner under former *Civ. Code § 3068(b)* [*now see Civ. Code § 3068(c)*] is extinguished by owner's tender of amount of limited lien. *Universal C.I.T. Credit Corp. v. Rater (1963) 214 Cal. App. 2d 493, 495, 29 Cal. Rptr. 631*

Liability of repairman for failure to use due care and for using defective parts in repairing automobile. *Turgeon v. Barney (1924) 70 Cal. App. 432, 434-435, 233 P. 394*

Contractor's duty of reasonable care and liability for negligent performance based on contract. *Kavalaris v. Anthony Bros., Inc. (1963) 217 Cal. App. 2d 737, 741, 32 Cal. Rptr. 205*

Failure to give written estimate for labor and parts prior to automobile repairs as violation of *Bus. & Prof. Code § 9884.9* barring recovery for repairs in action based on contract or common count (quantum meruit). *Bennett v. Hayes (1976) 53 Cal. App. 3d 700, 704, 125 Cal. Rptr. 825*

[b] Damages

Insufficient evidence of indebtedness and reasonableness of charges to support judgment for repairman in action for reasonable value of labor and materials. *MacIntosh v. Chicago Electric M. Co. (1919) 44 Cal. App. 320, 321, 186 P. 364*

Nonallowance of interest on claim for reasonable value of automobile repairs until value is determined by agreement, verdict, or judgment unless value can be determined by reference to established market values. *Owens v. Pyeatt (1967) 248 Cal. App. 2d 840, 845, 57 Cal. Rptr. 100*

Nonrecovery of costs of storing vehicle during its repair or assertion of garageman's lien in garage operator's action for reasonable value of automobile services and materails. *Owens v. Pyeatt (1967) 248 Cal. App. 2d 840, 845, 57 Cal. Rptr. 100*

[c] Res Ipsa Loquitur

Applicability of res ipsa loquitur to create inference of negligent vehicle repair by garage operator. *Dunn v. Vogel Chevrolet Co. (1959) 168 Cal. App. 2d 117, 120, 335 P.2d 492*

Jurors in position to draw inference of garage operator's negligent repair from circumstantial evidence on basis of their common experience. *Spolter v. Four-Wheel Brake Serv. Co. (1950) 99 Cal. App. 2d 690, 695, 222 P.2d 307*

Applicability of garage repairman's duty of ordinary care to automobile dealer who undertakes repairs of vehicle sold to customer. *Pearson Ford Co. v. Ford Motor Co. (1969) 273 Cal. App. 2d 269, 275, 78 Cal. Rptr. 279*

[d] Tort Liability

Liability of garage operator for personal injuries proximately resulting from negligent servicing of automobile. *Zambrana v. Standard Oil Co. (1972) 26 Cal. App. 3d 209, 214, 102 Cal. Rptr. 699* ; *Spolter v. Four-Wheel Brake Serv. Co. (1950) 99 Cal. App. 2d 690, 693-695, 222 P.2d 307*

Liability of garage operator for negligent maintenance and repair of motor vehicle but not for failure to use effective alternative method of repair. *Ulwelling v. Crown Coach Corp. (1962) 206 Cal. App. 2d 96, 119-123, 23 Cal. Rptr. 631*

Duty of garage operator to conduct reasonable inspection of repairs which he or she has performed. *Dunn v. Vogel Chevrolet Co. (1959) 168 Cal. App. 2d 117, 122, 335 P.2d 492*

Negligence of garage operator in misrepresenting safety of vehicle after repair and liability for damage to vehicle proximately ="274/274-44" RELEASE="114">resulting from negligence. *Reeder v. Hoag (1958) 158 Cal. App. 2d 41, 44, 321 P.2d 793*

Nonliability of garage operator for negligent vehicle repairs when negligence was not proximate cause of injuries sustained during malfunction of vehicle. *Ulwelling v. Crown Coach Corp. (1962) 206 Cal. App. 2d 96, 123, 23 Cal. Rptr. 631* ; *Youtz v. Thompson Tire Co. (1941) 46 Cal. App. 2d 672, 677, 116 P.2d 636*

[e] Warranties

Warranties of quality in contracts for labor and materials. *Pollard v. Saxe & Yolles Dev. Co. (1974) 12 Cal. 3d 374, 378, 115 Cal. Rptr. 648, 525 P.2d 88* ; *Aced v. Hobbs-Sesack Plumbing Co. (1961) 55 Cal. 2d 573, 580-583, 12 Cal. Rptr. 257, 360 P.2d 897 , superseded by statute as stated in Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116, 132, 87 Cal. Rptr. 3d 5* ; *Gagne v. Bertran (1954) 43 Cal. 2d 481, 486, 275 P.2d 15*

[5] Premises Liability

[a] General Principles

Liability of land occupier predicated on ordinary negligence under *Civ. Code § 1714* and common law distinctions between guest, invitees, and trespassers abolished. *Rowland v. Christian (1968) 69 Cal. 2d 108, 112-120, 70 Cal. Rptr. 97, 443 P.2d 561*

Test of land occupier's liability under *Civ. Code § 1714* as whether in managing his or her property occupier has acted as reasonable person in view of probability of injury to others. *Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561*

Relevance of person's status as invitee to duties and liabilities of land occupier. *Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 25-26, 77 Cal. Rptr. 914*

[b] Dangerous Conditions

[i] Duty of Care

Liability of garage or service station operator for business visitor's injuries resulting from oily surface of which operator knew or should have known in the exercise of ordinary care and which he or she should have realized involved

unreasonable risk to business visitors. *Milton v. Montgomery Ward & Co., Inc. (1973) 33 Cal. App. 3d 133, 141, 108 Cal. Rptr. 726* ; *Lehman v. Richfield Oil Corp. (1953) 121 Cal. App. 2d 261, 264, 263 P.2d 13*

Duty of service station operator to exercise ordinary care to keep passageways through which customers may be induced to go in reasonably safe condition so as not to unnecessarily expose customers to danger or accident. *Thompson v. B.F. Goodrich Co. (1941) 48 Cal. App. 2d 723, 726-727, 120 P.2d 693*

Liability of garage owner and user for dangerous condition of driveway crossing public sidewalk. *Lee v. Ashizawa (1964) 60 Cal. 2d 862, 865-866, 37 Cal. Rptr. 71, 389 P.2d 535*

Duty of business enterprise to maintain adjacent public sidewalk free of dangerous conditions created by conduct of business. *Kopfinger v. Grand Central Pub. Market (1964) 60 Cal. 2d 852, 859, 37 Cal. Rptr. 65, 389 P.2d 529*

Maintaining premises in condition of absolute safety not required of service station operator. *Mondine v. Sarlin (1938) 11 Cal. 2d 593, 597, 81 P.2d 903*

Propriety of instruction setting forth standard of care applicable to city for public sidewalk in action for injuries resulting from dangerous condition of service station. *Milton v. Montgomery Ward & Co., Inc. (1973) 33 Cal. App. 3d 133, 142, 108 Cal. Rptr. 726*

Question of fact for jury as to whether dangerous condition of premises existed long enough so that garage or service station operator should have discovered it and remedied it in the exercise of ordinary care. *Mackoff v. Biltmore Garages, Inc. (1963) 222 Cal. App. 2d 846, 850, 35 Cal. Rptr. 462* ; *Lehman v. Richfield Oil Corp. (1953) 121 Cal. App. 2d 261, 264-265, 263 P.2d 13*

Error to give instruction on unavoidable accident where evidence showed that service station attendant may have made concrete surface dangerously slick while washing floor without warning persons on premises of risk. *Levin v. Union Oil Co. (1959) 174 Cal. App. 2d 402, 405, 345 P.2d 14*

[ii] Obvious Dangers

Duty of property occupier to warn of dangerous condition of premises actually known or discoverable in course of reasonable inspection unless danger is obvious. *Henderson v. McGill (1963) 222 Cal. App. 2d 256, 259, 34 Cal. Rptr. 897*

Duty of property occupier to warn of physically obvious danger which customer is not likely to see. *Henderson v. McGill (1963) 222 Cal. App. 2d 256, 260, 34 Cal. Rptr. 897*

Nonliability of garage operator for business visitor's injuries on step with protruding pipe where step was in plain view and well lighted. *Herrin v. White (1951) 106 Cal. App. 2d 796, 797, 236 P.2d 180*

[iii] Operator's Knowledge of Danger

Use of direct and circumstantial evidence to prove dangerous condition of premises existed long enough that in exercise of ordinary care it should have been discovered and remedied. *Mackoff v. Biltmore Garages, Inc. (1963) 222 Cal. App. 2d 846, 849, 35 Cal. Rptr. 462* ; *Lehman v. Richfield Oil Corp. (1953) 121 Cal. App. 2d 261, 264, 263 P.2d 13*

Constructive knowledge of dangerous condition of premises as question of fact for jury. *Mackoff v. Biltmore*

Garages, Inc. (1963) 222 Cal. App. 2d 846, 850, 35 Cal. Rptr. 462 ; *Lehman v. Richfield Oil Corp. (1953) 121 Cal. App. 2d 261, 264-265, 263 P.2d 13*

Absence of inspection during particular time period warranting inference of garage operator's constructive knowledge of dangerous condition. *Mackoff v. Bittmore Garages, Inc. 222 Cal. App. 2d 846, 850, 35 Cal. Rptr. 462*

[c] Duty to Conduct Operations Safely

[i] Duty of Ordinary Care

Question of fact for jury whether parking lot employee exercised due care in operating vehicle which struck customer and whether parking lot customer was negligent in stepping from position of safety. *Grasgreen v. Acme Auto Parks (1958) 165 Cal. App. 2d 680, 682, 332 P.2d 337*

Duty owed by parking lot operator and employees to business visitors to exercise reasonable care in moving automobiles. *Beck v. Sirota (1941) 42 Cal. App. 2d 551, 557, 109 P.2d 419*

Duty of garage or service station to exercise ordinary care not to injure customers while servicing their vehicles but no duty to warn customers of obvious dangers. *Morton v. Hinds (1931) 113 Cal. App. 437, 440-441, 298 P. 160*

[ii] Duty to Control Third Persons

Neither owner of commercial building nor parking services company owed legal duty of care to prevent sexual assault in building's underground parking garage by providing security guard, improved lighting and maintenance, operational surveillance cameras, or periodic walk-throughs by existing personnel; as matter of law, given absence of assaults in garage for extended period of years, occurrence of violent third-party sexual assault was not sufficiently foreseeable to impose duty of care under circumstances of case. *Sharon P. v. Arman, Ltd. (1999) 21 Cal. 4th 1181, 1185, 1195, 1197-1198, 91 Cal. Rptr. 2d 35, 989 P.2d 121 , superseded by statute on other grounds as stated in Saelzler v. Advanced Group 400 (2001) 25 Cal. 4th 763, 767-768, 107 Cal. Rptr. 2d 617, 23 P.3d 1143*

Duty of business to protect customers from foreseeable accidental, negligent, or intentionally harmful conduct of third persons. *Taylor v. Centennial Bowl, Inc. (1966) 65 Cal. 2d 114, 121, 52 Cal. Rptr. 561, 416 P.2d 793*

Nonliability of service station operator for customer's injuries resulting from unforeseeable negligence of third person. *Hunter v. Mohawk Petroleum Corp. (1959) 51 Cal. 2d 439, 441, 334 P.2d 193* (distinguished in *Taylor, above*)

Triable issue of fact as to whether operators of drive-in restaurant were negligent in failing to protect customer from potentially harmful operation of vehicles by other customers insofar as operators failed to provide adequate barriers between parking areas and service area where customers stood and failed to adequately direct vehicular traffic upon premises. *Barker v. Wah Low (1971) 19 Cal. App. 3d 710, 712, 723, 97 Cal. Rptr. 85*

Garage operator not negligent in directing customer to park own vehicle and not liable for another customer's injuries resulting from negligent operation of vehicle during parking by customer. *Heath v. Keyser (1946) 74 Cal. App. 2d 877, 879, 169 P.2d 668*

[iii] Gasoline Service

Duty of utmost care required of service station operators while supplying customers' vehicles with gasoline.

Borenkraut v. Whitten (1961) 56 Cal. 2d 538, 545, 15 Cal. Rptr. 635, 364 P.2d 467

Liability of service station operator for customer's personal and property damage resulting from fire caused by operator's negligence in pumping gasoline before customer inserted hose into tank of vehicle. *Sanders v. Austin (1919) 180 Cal. 664, 665, 182 P. 449*

Negligence of service station operator for overfilling gasoline tank of customer's vehicle. *Strand v. Everett (1927) 84 Cal. App. 358, 362, 258 P. 115*

[d] Liability of Nonpossessory Lessor

Duty of lessor of property as service station, purpose involving admission of public, to see that property is safe for purposes intended and to exercise reasonable care to inspect and repair before transferring possession to lessee. *Hayes v. Richfield Oil Corp. (1952) 38 Cal. 2d 375, 380-381, 240 P.2d 580*

Service station operator's agency relationship with oil corporation, arising from corporation's right to control service station operations under lease and products agreement, as basis of corporation's liability for service station customer's injuries from dangerous condition of premises. *Dorsic v. Kurtin (1971) 19 Cal. App. 3d 226, 238-239, 96 Cal. Rptr. 528*

Lessor of service station premises who exercises extensive control over lessee's operations as "employer" under *Lab. Code § 6304* with duty to furnish safe place of employment for lessee and his employees. *Mezerkor v. Texaco, Inc. (1968) 266 Cal. App. 2d 76, 89-94, 72 Cal. Rptr. 1 , reh'g denied, 266 Cal. App. 2d 105, 72 Cal. Rptr. 639*

Duty of lessor of service station to transfer premises free of latent defects and to perform duty to repair assumed by lease within reasonable time of receiving actual or constructive notice of defect. *Mezerkor v. Texaco, Inc. (1968) 266 Cal. App. 2d 76, 89-94, 72 Cal. Rptr. 1 , reh'g denied, 266 Cal. App. 2d 105, 72 Cal. Rptr. 639*

[e] Negligence of Customer

Customer not negligent in standing near service station operator working on vehicle when customer has no reason to expect specific conduct by operator and no reason to know that such conduct involves risk of harm to persons in close proximity. *Borenkraut v. Whitten (1961) 56 Cal. 2d 538, 543, 15 Cal. Rptr. 635, 364 P.2d 467*

Question of fact for the jury whether visitor who fell into unguarded service station grease pit was negligent in traversing station by unfamiliar, unlit route rather than previously traveled, illuminated route with husband who knew of pit but failed to warn of it. *Hayes v. Richfield Oil Corp. (1952) 38 Cal. 2d 375, 385, 240 P.2d 580*

Question of fact for jury whether business visitor to service station acted reasonably when he discovered himself in zone of danger and had no opportunity for mature reflection about prudent conduct under circumstances. *Mondine v. Sarlin (1938) 11 Cal. 2d 593, 598, 81 P.2d 903*

Assumption of risk instruction properly denied where evidence showed business visitor's general knowledge of danger from grease on repair area floor but no actual knowledge of specific danger created by slope of floor. *Dorsic v. Kurtin (1971) 19 Cal. App. 3d 226, 234-235, 96 Cal. Rptr. 528*

Negligence of business visitor or licensee on garage premises in pulling handle of ordnance device before examining device. *Richardson v. Oliveri (1966) 244 Cal. App. 2d 369, 373, 53 Cal. Rptr. 59*

Inference of business visitor's negligence warranted by evidence that visitor noticed area was damp but did not use any more care for his or her own safety than if it had been dry. *Levin v. Union Oil Co. (1959) 174 Cal. App. 2d 402, 405, 345 P.2d 14*

Reasonableness of customer's conduct in standing eight or nine feet away from garage operator using hammer to repair customer's tire. *Bischoff v. Newby's Tire Service (1958) 166 Cal. App. 2d 563, 568, 333 P.2d 44*

Negligence of parking lot customer in stepping from position of safety. *Grasgreen v. Acme Auto Parks (1958) 165 Cal. App. 2d 680, 682, 332 P.2d 337*

Negligence of service station customer in ordering indefinite quantity of gasoline. *Strand v. Everett (1927) 84 Cal. App. 358, 362, 258 P. 115*

Question of fact for jury whether service station customer was reasonably justified in assuming that passageway was unobstructed and not negligent in failing to look down. *Thompson v. B.F. Goodrich Co. (1941) 48 Cal. App. 2d 723, 727-728, 120 P.2d 693*

Right of business visitor to presume that parking lot operator and his agents would exercise care in moving vehicle so as to avoid injury to visitor. *Beck v. Sirota (1941) 42 Cal. App. 2d 551, 557, 109 P.2d 419*

[f] Res Ipsa Loquitur

Application of res ipsa loquitur doctrine to create inference of negligence in conduct of operations. *Borenkraut v. Whitten (1961) 56 Cal. 2d 538, 548, 15 Cal. Rptr. 635, 364 P.2d 467* (vehicle servicing with gasoline); *Bischoff v. Newby's Tire Serv. (1958) 166 Cal. App. 2d 563, 566-568, 333 P.2d 44* (tire repair)

Inapplicability of res ipsa loquitur to create inference of negligence in servicing of customer's vehicle. *La Porte v. Houston (1948) 33 Cal. 2d 167, 169-170, 199 P.2d 665*

Application of res ipsa loquitur to create inference of repair shop's negligence in maintaining premises free from dangerous conditions. *Anderson v. Joseph (1955) 136 Cal. App. 2d 382, 388-389, 288 P.2d 524*

[6] Sale of Gasoline

[a] Delivery of Gasoline by Distributor

Utmost care required of persons dealing with explosive or highly flammable materials. *Borenkraut v. Whitten (1961) 56 Cal. 2d 538, 545, 15 Cal. Rptr. 635, 364 P.2d 467*

Liability of gasoline distributor for injuries resulting from failure to properly equip its trucks with devices which would prevent or extinguish ignition of gasoline and for negligent delivery by its agents. *Rudolph v. Tubbs (1955) 46 Cal. 2d 55, 58, 291 P.2d 913* ; *Weaver v. Shell Company (1939) 34 Cal. App. 2d 713, 716, 718-719, 94 P.2d 364*

No assumption of risk by service station attendant of distributor's negligent ignition of gasoline during delivery unless attendant participated in negligent act or knew that it was to be committed. *Weaver v. Shell Company (1939) 34 Cal. App. 2d 713, 722, 94 P.2d 364*

Duty of gasoline distributor to handle gasoline with care so as to avoid risk of harm to persons or their property from ignition or explosion of gasoline. *Feeney v. Standard Oil Co. (1922) 58 Cal. App. 587, 591-593, 209 P. 85*

[b] Retail Sale

Nonliability of service station operator for injuries incurred in explosion which was intentionally caused by purchasers of gasoline from operator, even though sale of gasoline violated city ordinance, when intentional misconduct of purchasers was neither foreseeable nor one of dangers against which ordinance was designed to protect. *Gonzalez v. Derrington (1961) 56 Cal. 2d 130, 133-134, 14 Cal. Rptr. 1, 363 P.2d 1*

Nonliability of service station operator who sells gasoline to recognizably intoxicated motorist who then injures third person. *Fuller v. Standard Stations, Inc. (1967) 250 Cal. App. 2d 687, 692-693, 58 Cal. Rptr. 792*

[7] Unfair Business Practices

It is not *per se* illegal under *15 U.S.C. § 1* (Sherman Act) for lawful, economically integrated joint venture between gasoline producers to set prices at which venture's products, provided by those producers, are sold in geographic area where those producers formerly competed with each other in selling those same products. *Texaco Inc. v. Dagher (2006) 547 U.S. 1,126 S. Ct. 1276, 1279-1281, 164 L. Ed. 2d 1*

Preliminary injunction against parking lot owner and towing company for engaging in unfair business practices [*Bus. & Prof. Code § 17200*] as proper when defendants hoisted or towed away vehicles without sufficient warning, when drivers were subjected to payment of fees to have their cars "let down" in the parking lot, when drivers were coerced into paying by physical intimidation or misrepresentations concerning existence of liens or other rights of tower, when drivers were charged unconscionable fees to retrieve their vehicles from hoisting and impoundment, when drivers were forced to waive claims for damage to their property in order to get it back, and when owner of parking lot accepted kickbacks on towing fees. *People v. James (1981) 122 Cal. App. 3d 25, 35-36, 177 Cal. Rptr. 110*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityLiensContracts LawTypes of ContractsBailmentsEnergy & Utilities LawOil IndustryGasoline Dealers & DistributorsEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewTortsIntentional TortsConversionGeneral Overview

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23-274 California Forms of Pleading and Practice--Annotated § 274.25

§ 274.25 Attorney General Opinions

Inapplicability of registration requirements of Automotive Repair Act [*Bus. & Prof. Code §§ 9880-9889.21*] to individuals engaged exclusively in repainting motor vehicles. *56 Ops. Cal. Att'y Gen. 271, 274 (1973)*

Applicability of registration requirements of Automotive Repair Act [*Bus. & Prof. Code §§ 9880-9889.21*] to machine shops which rebuild automotive parts. *55 Ops. Cal. Att'y Gen. 276, 277-278 (1972)*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicensesGovernmentsState & Territorial GovernmentsPolice Power

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23-274 California Forms of Pleading and Practice--Annotated § 274.26

§ 274.26 Law Reviews

California Garagemen's Liens--Impact and Aftermath of Adams v. Department of Motor Vehicles, 6 Pac. L.J. 98 (1975)

California Garagemen's Liens: Procedural Due Process Restored, 3 Pepp. L. Rev. 445 (1975)

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityLiens

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23-274 California Forms of Pleading and Practice--Annotated § 274.27

§ 274.27 Text References

Witkin, Summary of California Law, vol. 4, *Sales*, §§ 53, 332 (repairs); vol. 5, *Torts*, §§ 818-828; vol. 6, *Torts*, §§ 1082-1157 (premises liability); vol 13, *Personal Property*, §§ 156-166 (bailments), 216-255 (garageman's line) (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityLiensContracts LawTypes of ContractsBailments

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23-274 California Forms of Pleading and Practice--Annotated §§ 274.28-274.39

[Reserved]

§§ 274.28[Reserved]

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23-274 California Forms of Pleading and Practice--Annotated § 274.40

§ 274.40 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Customer Against Garage or Service Station Operator and Employees--Fall Over Obstruction in Walkway

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Customer Against Garage or Service Station Operator and Employees--Fall Over Obstruction in Walkway

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR PERSONAL INJURIES
_____ [*names*],	)	(Negligence)
Defendants.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name of garage or services station operator*] is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California [with its principal place of business in _____ (*city*), _____ County, California] [*or allege other capacity and residence*].

2. Defendant _____ [*name of employee*] is, and at all times herein mentioned was, a resident of _____ [*city*], _____ County, California [*or allege other capacity and residence*].

3. Defendant _____ [*name of employee*] is, and at all times herein mentioned was, a resident of _____ [*city*], _____ County, California.

4. [Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of said fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by said negligence.)]

5. At all times herein mentioned, defendant _____ [*name of garage or service station operator*] was the [owner and] operator of a _____ [garage *or* service station], located at _____ [*street address and city*], _____ County, California, where defendant engaged in the repair and servicing of motor vehicles for the general public.

6. [Plaintiff is informed and believes and thereon alleges that] at all times herein mentioned, defendants _____ [*name of employees*] were the agents and employees of their codefendants, and did the things hereinafter mentioned in the scope of their authority as such agents and employees with the permission and consent of their codefendants.

7. On or about _____ [*date*], plaintiff was in the above-mentioned garage for the purpose of _____ [*allege purpose relating to defendant's business, e.g.*, purchasing new tires and having defendants, and each of them, install such tires on his/her automobile].

8. At that time and place, defendants, and each of them, so negligently and carelessly operated, managed, and maintained the garage as to cause or allow _____ [*allege obstruction of walkway, e.g.*, a jack handle to dangerously protrude from beneath an automobile across a walkway between the service area and the office of the garage without lighting or other warning of the presence of the jack handle to persons using the walkway]. Defendants, and each of them, knew, or in the exercise of ordinary care in operating, managing, and maintaining the garage, should have known, that this dangerous condition existed.

9. At this time and place, plaintiff _____ [*allege use of walkway relating to defendant's business, e.g.*, passed from the service area to the office of the garage to pay the bill for the purchase and installation of tires on his/her automobile]. As a proximate result of the negligence of defendants, and each of them, plaintiff was tripped by the _____ [*specify obstruction, e.g.*, jack handle left on the ground] and fell violently to the surface of the walkway, sustaining the injuries alleged below.

10. As a proximate result of the negligence of defendants, and each of them, plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her body and shock and injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has suffered general damages.

11. As a further proximate result of the negligence of defendants, and each of them, plaintiff has been required to expend money and incur obligations for medical services, X-rays, drugs, and sundries reasonably required in the treatment of the injuries herein alleged [, and plaintiff will continue to incur such medical and related expenses].

12. As a further proximate result of the negligence of defendants, and each of them, plaintiff was prevented from attending to his/her usual occupation as a _____ [*state occupation*] _____ [for a period of _____ (*specify*) *or* to the date of the filing of this complaint] and thereby lost earnings.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This complaint may be used by a customer of a garage or service station against the operator and employees of the garage or service station for personal injuries resulting from a fall over a nonobvious obstruction in a walkway of the garage or service station that the operator and employees failed to remove or warn against [for discussion, *see § 274.10[3][a]*].

[3] Allegations

The complaint alleges:

- Facts from which a duty of care owed to plaintiff by defendants under *Civ. Code § 1714(a)* can be inferred, namely, possession and control of the premises by defendants (Paragraph 5).

- Circumstances surrounding plaintiff's presence on the premises indicating that a reasonably prudent person in defendants' position would have acted to prevent injury to plaintiff (Paragraph 7) [*see*

Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561] .

- Defendants' negligent maintenance of a dangerous condition on the premises with actual or constructive knowledge of the danger in breach of defendants' duty of care owed to plaintiff (Paragraph 8) [*Lehman v. Richfield Oil Corp. (1953) 121 Cal. App. 2d 261, 264, 263 P.2d 13]* .

- Injuries to plaintiff as a proximate result of defendants' negligence (Paragraph 9).

- Damages resulting from the injury (Paragraphs 10-12).

[4] Specifying Amount of Damages

In an action brought to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Venue

In an action for injury to person or personal property from a wrongful act or negligence, either the county where the injury occurs or the county where the defendants, or some of them, reside at the commencement of the action is the proper county for the trial of the action [*Code Civ. Proc. § 395*]. If venue is based on the situs of the wrongful act or negligence, then the bracketed portion of Paragraph 1 is not needed, nor are Paragraphs 2 and 3, alleging the residence of the defendants.

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For a procedural guide to actions based on negligence, see Ch. 380, *Negligence*

For alternative forms for prayers, see Ch. 420, *Prayers*

For forms related to actions for personal injuries resulting from dangerous conditions of business premises, see Ch. 525, *Slip and Fall*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms for verification, see Ch. 572, *Verification*

For points and authorities relating to actions based on premises liability, see California Points and Authorities, Ch. 178, *Premises Liability*

Personal Injury: Actions, Defenses, Damages, Vol. 15, *Garages, Parking Places, and Approaches* (Matthew Bender)

Witkin, California Procedure, vol. 4, *Pleading*, §§ 548, 564 (4th ed. 1997)

Witkin, Summary of California Law, Vol. 4, *Real Property*, § 608; Vols. 5 and 6, *Torts*, §§ 891-897, 918-932 (9th ed. 1987)

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23-274 California Forms of Pleading and Practice--Annotated § 274.41

§ 274.41 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Customer Against Garage or Service Station Operator--Slip and Fall on Oil or Other Slippery Substance

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Customer Against Garage or Service Station Operator--Slip and Fall on Oil or Other Slippery Substance

[*Caption. See § 274.40[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 274.40[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 274.40[1], Paragraph 4.*]

3. On or about _____ [*date*], defendant [owned,] operated, managed, maintained, and was in possession and control of a _____ [garage *or* service station] located at _____ [*street address and city*], _____ County, California, wherein defendant repaired and serviced the public's automobiles for compensation.

4. At that time and place, plaintiff was in and upon the premises of the above-described _____ [garage *or* service station] for the purpose of _____ [*allege purpose relating to defendant's business, e.g.,* having his/her automobile lubricated and the oil and oil filter of the automobile changed for a price agreed upon with defendant].

5. At that time and place, defendant carelessly and negligently operated, managed, and maintained the above-described _____ [garage *or* service station] premises in a dangerous and unsafe condition in that defendant, acting by and through his/her/its agents and employees, caused _____ [oil *or specify other slippery substance*] to collect on and coat the floor of the premises and to render the floor extremely slippery, which condition

defendant failed to remove or warn against although he/she knew, or in the exercise of reasonable care should have known, that the condition was dangerous to persons on the premises.

6. As a proximate result of the above-described negligence of defendant, plaintiff tripped, slipped, and fell on the _____ [oil *or specify other slippery substance*]-coated floor of the above-described _____ [garage *or* service station] and suffered _____ [*describe injuries*], all to his/her general damage.

7. As a further proximate result of the negligence of defendant, plaintiff has incurred [, and will continue to incur,] medical and related expenses.

8. As a further proximate result of the negligence of defendant, plaintiff was prevented from attending to his/her usual occupation as a _____ [*state occupation*] from _____ [*date*] through _____ [*e.g.*, the present] and thereby lost earnings. [Plaintiff is informed and believes and thereon alleges that he/she will continue to be prevented from attending to his/her occupation for a period in the future, and will thereby lose future earnings.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verfication, if desired. See § 274.40[1]*.]

[2] Use of Form

This form of complaint may be used in a negligence action by a garage or service station customer against the operator of the garage or service station to recover damages for personal injuries sustained during a slip and fall on oil or another slippery substance covering the floor of the premises [*Milton v. Montgomery Ward & Co., Inc. (1973) 33 Cal. App. 3d 133, 141, 108 Cal. Rptr. 726* (oily surface); *Lehman v. Richfield Oil Corp. (1953) 121 Cal. App. 2d 261, 264, 263 P.2d 13* (oily surface) *Dorsic v. Kurtin (1971) 19 Cal. App. 3d 226, 234-235, 96 Cal. Rptr. 528* (grease on sloping floor); for further discussion, see *§ 274.10[3][a]*].

[3] Cross References

For information and cross references about complaints in general, see *§ 274.40[4]* et seq.

For forms relating to actions for personal injuries resulting from a slippery floor of premises, see Ch. 525, *Slip And Fall*

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23-274 California Forms of Pleading and Practice--Annotated § 274.42

§ 274.42 Complaint for Personal Injuries and Property Damage [Civ. Code § 3333] Based on Negligence [Civ. Code § 1714(a)]--By Customer Against Service Station Operator and Employees--Collision With Automobile Operated by Employee

[1] FORM Complaint for Personal Injuries and Property Damage [Civ. Code § 3333] Based on Negligence [Civ. Code § 1714(a)]--By Customer Against Service Station Operator and Employees--Collision With Automobile Operated by Employee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR PERSONAL INJURIES AND
_____ [*names*],	)	PROPERTY DAMAGE
Defendants.	)	(Negligence)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1-3. [*Capacity and residence of defendants. See § 274.40[1], Paragraphs 1-3.*]

4. [*Fictitious name allegation, if appropriate. See § 274.40[1], Paragraph 4.*]

5. At all times herein mentioned, defendant _____ [*name of service station operator*] was engaged in the sale and distribution of oil and gas products and the repair and servicing of the general public's motor vehicles for compensation on premises located at _____ [*street address and city*], _____ County,

California.

6. [*Agency allegation. See § 274.40[1], Paragraph 6.*]

7. At all times herein mentioned, plaintiff was the owner of a certain _____ [*specify year, make, model*] automobile, License No. _____.

8. On or about _____ [*date*], plaintiff drove the above-described automobile onto the above-described service station premises for the purpose of _____ [*specify purpose related to defendant's business, e.g.*, purchasing gasoline for the automobile]. At that time and place, the defendants, and each of them, so negligently and carelessly maintained, managed, drove, and operated another vehicle on the premises as to cause the vehicle to forcefully and violently collide with and strike plaintiff's automobile, proximately injuring both plaintiff's person and automobile as hereinafter alleged.

9-11. [*Personal injuries and damages. See § 274.40[1], Paragraphs 10-12.*]

12. As a further proximate result of the negligence of defendants, and each of them, plaintiff's automobile was _____ [*describe damage, e.g.*, destroyed beyond repair, all to plaintiff's damage in the sum of $_____ *or* damaged]. [*If property was not destroyed, add:* Plaintiff has expended $_____ for repair of such automobile, which is a reasonable sum for such repair.]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

4. For _____ [damages to *or* repair of] plaintiff's automobile in the sum of $_____;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 274.40[1].*]

[2] Use of Form

This form of complaint may be used in a negligence action by a service station customer against the operator and employees of the service station to recover for personal injuries and property damage resulting from collision with

another vehicle operated by the employees on the premises. Garage and service station operators have a duty to conduct the activities on their premises safely so as to avoid injuring their customers, a duty which includes the safe operation of vehicles [*see Beck v. Sirota (1941) 42 Cal. App. 2d 551, 557, 109 P.2d 419* (parking lot); for discussion, see *§ 274.10[3][a]*].

[3] Allegations

The complaint alleges:

- Facts from which a duty of care owed to plaintiff by defendants under *Civ. Code § 1714(a)* can be inferred, namely, possession and control of the premises by defendants (Paragraph 5).

- Circumstances surrounding plaintiff's presence on the premises indicating that a reasonably prudent person in defendants' position would have acted to prevent injury to plaintiff (Paragraph 8) [*see Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561]* .

- Breach of defendants' duty of care owed to plaintiff by defendants' negligent conduct of operations (Paragraph 8).

- Injuries to plaintiff's person and property as a proximate result of defendants' negligence (Paragraph 8).

- Damages resulting from the injuries (Paragraphs 9-11).

[4] Cross References

For information and cross references about complaints in general, see *§ 274.40[4]* et seq.

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23-274 California Forms of Pleading and Practice--Annotated § 274.43

§ 274.43 Complaint for Personal Injuries and Property Damage [Civ. Code § 3333] Based on Negligence [Civ. Code § 1714(a)]--By Customer Against Garage Operator and Employees--Employee's Conduct During Vehicle Repair or Servicing

[1] FORM Complaint for Personal Injuries and Property Damage [Civ. Code § 3333] Based on Negligence [Civ. Code § 1714(a)]--By Customer Against Garage Operator and Employees--Employee's Conduct During Vehicle Repair or Servicing

[*Caption. See § 274.42[1].*]

Plaintiff alleges:

1-3. [*Capacity and residence of defendants. See § 274.40[1], Paragraphs 1-3.*]

4. [*Fictitious name allegation, if appropriate. See § 274.40[1], Paragraph 4.*]

5. At all times herein mentioned, defendant _____ [*name of garage operator*] was the operator of a garage located at _____ [*street address and city*], _____County, California, and engaged in the servicing and repair of motor vehicles for the general public.

6. [*Agency allegation. See § 274.40[1], Paragraph 6.*]

7. At all times herein mentioned, plaintiff was the owner of a certain _____ [*specify year, make, model*] automobile, License No. _____.

8. On or about _____ [*date*], plaintiff was in and upon the premises of the above-described garage for the purpose of having defendants, and each of them _____ [*specify nature of automotive repairs or servicing, e.g.*, determine and eliminate the cause of stalling in his/her automobile].

9. Defendants, and each of them, in undertaking the above-described _____ [repairs *or* servicing] negligently and carelessly _____ [*specify, e.g.*, poured a large amount of gasoline into the carburetor of the automobile and simultaneously turned the ignition of the automobile, causing a sudden backfire to occur, with flames shooting out of the carburetor and enveloping the automobile in its entirety; defendants, and each of them, further negligently and carelessly failed to warn plaintiff of the possible results of the actions of defendants and permitted plaintiff to stand in a position where plaintiff could be, and was, enveloped by the flames].

10. [*Personal injuries and damages. See § 274.40[1], Paragraphs 10-12.*]

11. [*Property damage. See § 274.42[1], Paragraph 12.*]

[*Prayer. See § 274.42[1].*]

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 274.40[1].*]

[2] Use of Form

This form of complaint may be used by a garage customer against an garage operator and his or her employees in a negligence action to recover for personal injuries and property damage resulting from conduct of the employees in connection with repair of the customer's automobile. A garage or service station operator is under a duty of ordinary care to avoid injuring customers while servicing their vehicles [*Morton v. Hinds (1931) 113 Cal. App. 437, 440-441, 298 P. 160]* . When handling gasoline, an explosive and highly flammable material, the operator owes a duty of utmost care [*Borenkraut v. Whitten (1961) 56 Cal. 2d 538, 545, 15 Cal. Rptr. 635, 364 P.2d 467]* .

A customer is not negligent in standing near a service station operator working on a vehicle when the customer has no reason to expect specific conduct by the operator and has no reason to know that that conduct involves risk of harm to persons in close proximity [*Borenkraut v. Whitten (1961) 56 Cal. 2d 538, 543, 15 Cal. Rptr. 635, 364 P.2d 467* ; *see Bischoff v. Newby's Tire Service (1958) 166 Cal. App. 2d 563, 568, 333 P.2d 44* (reasonable person could find that customer's conduct in standing eight or nine feet away from garage operator using hammer to repair customer's tire was safe)].

For futher discussion, see *§ 274.10[3][a]*.

[3] Cross References

For information and cross references about complaints in general, see *§ 274.40[4]* et seq.

Personal Injury: Actions, Defenses, Damages, Vol. 15, *Garages, Parking Places, and Approaches* (Matthew Bender)

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 918, 922 (10th ed. 2005)

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23-274 California Forms of Pleading and Practice--Annotated § 274.44

§ 274.44 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Customer Against Garage Operator--Customer Struck by Vehicle Driven by Another Customer

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Customer Against Garage Operator--Customer Struck by Vehicle Driven by Another Customer

[*Caption. See § 274.40[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 274.40[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 274.40[1], Paragraph 4.*]

3. At all times herein mentioned, defendant operated a garage located at _____ [*street address and city*], _____ County, California, for the parking and storage of the public's motor vehicles for a compensation.

4. On or about _____ [*date*], plaintiff drove his/her vehicle into the above-described garage for the purpose of parking it while attending to business in the neighborhood, and, at the direction of defendant, plaintiff parked the vehicle himself/herself on the premises.

5. At the above-specified time and place, defendant so negligently operated, managed, and maintained defendant's garage as to permit and direct customers to park and unpark their own vehicles, although defendant knew, or in the exercise of reasonable care should have known, that the extreme congestion of parked vehicles, the lack of open space to safely maneuver vehicles without considerable driving ability, skill, and care, and the absence of pedestrian paths by barriers protected from moving vehicles within the garage exposed customers walking from and to their parked vehicles to an unreasonable risk of harm from the unskilled and negligent operation of vehicles by other customers.

6. At that time and place, as a proximate result of defendant's negligence, plaintiff, while walking from his/her parked vehicle to a garage exit, was struck by a vehicle negligently operated by another customer and suffered _____ [*describe injuries*], all to his/her general damage.

7-8. [*Special damages. See § 274.41[1], Paragraphs 7, 8.*]

[*Prayer. See § 274.41[1].*]

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 274.40[1].*]

[2] Use of Form

This form of complaint may be used in a negligence action for personal injuries by a customer of a garage against the operator of the garage for personal injuries when the customer has been struck by a vehicle driven by another customer. The operator of a garage may be liable for injuries to a customer resulting from the accidental, negligent, or intentional acts of third persons on garage premises if the operator had reason to anticipate such acts and the probability of injury resulting from them [*see Taylor v. Centennial Bowl, Inc. (1966) 65 Cal. 2d 114, 121, 52 Cal. Rptr. 561, 416 P.2d 793* (assault and battery in bowling alley parking lot); *cf. Hunter v. Mohawk Petroleum Corp. (1959) 51 Cal. 2d 439, 441, 334 P.2d 193* (nonliability of service station operator for customer's injuries resulting from unforeseeable negligence of third person); for further discussion, see *§ 274.10[3][b]*].

[3] Allegations

The complaint alleges:

- Facts from which a duty of care owed to plaintiff may be inferred, namely possession, control, and management of the premises by defendant (Paragraph 3).

- Circumstances surrounding plaintiff's presence on the premises indicating that a reasonably prudent person in defendant's position would have acted to prevent injury to plaintiff (Paragraph 4) [*see Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561]* .

- Defendant's breach of the duty owed to plaintiff by negligent failure to protect plaintiff against the foreseeable negligence of other persons on the premises (Paragraph 5).

- Injury and damages to plaintiff as a proximate result of defendant's negligence (Paragraphs 5-8).

[4] Cross References

For information and cross references about complaints in general, see *§ 274.40[4]* et seq.

For a general allegation in a complaint relating to an action by a business visitor against a possessor of land for failure to protect against acts of others on the premises, see Ch. 421, *Premises Liability* .

Personal Injury: Actions, Defenses, Damages, Vol. 15, *Garages, Parking Places, and Approaches* (Matthew Bender)

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 1129-1133, 1137 (10th ed. 2005)

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23-274 California Forms of Pleading and Practice--Annotated § 274.45

§ 274.45 Complaint for Personal Injuries and Property Damage [Civ. Code § 3333] Based on Negligence [Civ. Code § 1714(a)]--By Automobile Owner Against Garage Operator and Employees--Defective Automobile Repairs Resulting in Accident

[1] FORM Complaint for Personal Injuries and Property Damage [Civ. Code § 3333] Based on Negligence [Civ. Code § 1714(a)]--By Automobile Owner Against Garage Operator and Employees--Defective Automobile Repairs Resulting in Accident

[*Caption. See § 274.42[1].*]

Plaintiff alleges:

1-3. [*Capacity and residence of defendants. See § 274.40[1], Paragraphs 1-3.*]

4. [*Fictitious name allegation, if appropriate. See § 274.40[1], Paragraph 4.*]

5. At all times herein mentioned, defendant _____ [*name of garage operator*] was engaged in the servicing and repair of motor vehicles for the general public at _____ [*street address and city*], _____ County, California.

6. [*Agency allegation. See § 274.40[1], Paragraph 6.*]

7. At all times herein mentioned, plaintiff was the owner of a certain automobile described as _____ [*specify year, make, model*], License No. _____.

8. On or about _____ [*date*], plaintiff left his/her automobile at defendant's garage for the purpose of having defendants, and each of them, repair the _____ [*specify part of automobile to be repaired*] of the above-described automobile. Defendant _____ [*name of garage operator*] stated to plaintiff that defendants, and each of them would make such repairs for a certain consideration, which consideration plaintiff agreed

to pay.

9. Thereafter, on or about _____ [*date*], defendants, and each of them, performed the above-specified repairs on plaintiff's automobile and returned the automobile to plaintiff upon plaintiff's payment of the agreed consideration.

10. Defendants, and each of them, negligently and carelessly made those repairs on plaintiff's automobile in that they _____ [*specify nature of improper repair*], leaving plaintiff's automobile in a defective and dangerous condition. Defendants, and each of them, knew, or in the exercise of reasonable care, should have known, of this condition and that the operation of the automobile in this condition was dangerous to life and limb.

11. Thereafter, on or about _____ [*date*], plaintiff was operating his/her automobile along and on _____ [*street*] near _____ [*specify intersecting street*] in _____ [*city*], _____ County, California, when, as a proximate result of the negligence of defendants, and each of them, _____ [*specify failure of automobile related to defendants' repairs*], causing the automobile to _____ [*describe accident*] and resulting in the injuries and damages hereinafter alleged.

12-14. [*Personal injuries and damages. See § 274.40[1], Paragraphs 10-13.*]

15. [*Property damage. See § 274.42[1], Paragraph 12.*]

[*Prayer. See § 274.42[1].*]

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired See § 274.40[1].*]

[2] Use of Form

This form of complaint may be used in a negligence action for personal injuries and property damage by an automobile owner against the operator and employees of a garage for defective automotive repairs which cause the automobile to malfunction during operation and result in an accident. Persons undertaking to repair and service a vehicle are liable for personal and property damages which are the foreseeable result if the repair or servicing is negligently done [*see Zambrana v. Standard Oil Co. (1972) 26 Cal. App. 3d 209, 214, 102 Cal. Rptr. 699* ; *Spolter v. Four-Wheel Brake Serv. Co. (1950) 99 Cal. App. 2d 690, 222 P.2d 307* ; *see also Dahms v. General Elevator Co. (1932) 214 Cal. 733, 737-738, 7 P.2d 1013* (liability of person who contracts to service and repair chattels for personal injuries resulting from service and repair which make chattels dangerous); for further discussion, *see § 274.11[1]*]. The doctrine of res ipsa loquitur may be available to create an inference that a garage operator negligently repaired a vehicle repair [*Dunn v. Vogel Chevrolet Co. (1959) 168 Cal. App. 2d 117, 120, 335 P.2d 492]* .

Under appropriate facts, the allegations of this complaint may be combined with allegations based on a garage operator's misrepresentation of the adequacy of automotive repairs and services. For a complaint based on negligent

misrepresentation, see *§ 274.46*.

[3] Allegations

The complaint alleges:

- Facts from which the defendants' duty of care in making automotive repairs may be inferred (Paragraphs 5, 8, 9).
- Defendants' negligent performance of repairs in breach of their duty of care (Paragraph 10).
- Injuries and damages proximately resulting from defendants' breach (Paragraphs 11-15).

[4] Cross References

For information and cross references about complaints in general, see *§ 274.40[4]* et seq.

For alternative complaints by automobile owners against repair shops for negligent automotive repairs and servicing, see Ch. 92, *Automobiles: Actions Involving Defects and Repairs* .

For discussion and a form relating to property owner's indemnification by repairmen whose negligent work results in the owners' liability for injuries of third persons, see Ch. 300, *Indemnity and Contribution* .

For forms of plaintiff's interrogatories to a defendant garage operator in an action for personal injuries resulting from negligent repair of automobile brakes, see 5 Bender'S Forms of Discovery, *Garages and Service Stations*

Personal Injury: Actions, Defenses, Damages, Vol. 25, *Repairs Negligently Made* (Matthew Bender)

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 1160, 1161, 11618, 1169, 1171, 1175 (10th ed. 2005)

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23-274 California Forms of Pleading and Practice--Annotated § 274.46

§ 274.46 Complaint for Personal Injuries and Property Damage [Civ. Code § 3333] Based on Negligent Misrepresentation [Civ. Code § 1710(2)]--By Automobile Owner Against Repair Shop--Defectively Repaired Brakes Represented as Adequate for Safe Operation of Automobile

[1] FORM Complaint for Personal Injuries and Property Damage [Civ. Code § 3333] Based on Negligent Misrepresentation [Civ. Code § 1710(2)]--By Automobile Owner Against Repair Shop--Defectively Repaired Brakes Represented as Adequate for Safe Operation of Automobile

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR PERSONAL INJURIES AND
_____ [*name*],	)	PROPERTY DAMAGE
Defendant.	)	(Negligent Misrepresentation)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 274.40[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 274.40[1], Paragraph 4.*]

3. At all times herein mentioned, defendant operated a shop for the servicing and repair of automobiles at _____ [*street address and city*], _____County, California, and held himself/herself out to the public, including plaintiff, as possessing the knowledge, skill, and experience necessary to the business of

automotive servicing and repair, in particular, the repair, conditioning, and adjustment of automobile brakes.

4. On or about _____ [*date*], plaintiff delivered a certain _____ [*specify year, make, model*] automobile, License No. _____ owned by plaintiff to defendant for the repair, conditioning, and adjustment of its brakes.

5. Thereafter, or on about _____ [*date*], defendant made representations to plaintiff, with knowledge that plaintiff would act in reliance thereon, that the brakes of plaintiff's automobile were fully repaired, conditioned, and adjusted, and were in an adequate condition for the safe operation of the automobile.

6. These representations of defendant were untrue in that the brakes of plaintiff's automobile were in a defective and dangerous condition, completely inadequate for the safe stopping of the automobile while the automobile was in operation.

7. When defendant made these representations, he/she had no sufficient or reasonable ground for believing them to be true in that he/she had negligently repaired, adjusted, and conditioned the brakes of plaintiff's automobile without testing or examining the brakes after his/her work to determine if they functioned properly in stopping plaintiff's automobile, and defendant knew or should have known that he/she could not accurately state that the brakes of plaintiff's automobile were in an adequate condition for the safe operation of plaintiff's automobile without making such testing and examination.

8. At the above-specified time and place, plaintiff, believing defendant's representations to be true and relying thereon and on the skill and judgment of defendant, took his/her automobile from defendant's repair shop and commenced to operate it; immediately thereafter, as plaintiff was operating his/her automobile along and on _____ [*street*], near _____ [*specify intersecting street*], in _____ [*city*], _____ County, California, and attempting to brake and stop his/her automobile, the brakes failed to hold, grab, or stop the automobile, causing plaintiff's automobile to violently collide with _____ [*specify object of impact, e.g.,* another automobile], proximately resulting in the injuries to plaintiff's person and automobile hereinafter alleged.

9. As a proximate result of the negligence of defendant, plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her body and shock and injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has suffered general damages.

10-11. [*Special damages. See § 274.41[1], Paragraphs 7-8.*]

12. As a further proximate result of the negligence of defendant, plaintiff's automobile was _____ [*describe damage, e.g.,* destroyed beyond repair, all to plaintiff's damage in the sum of $_____ *or* damaged]. [*If property was not destroyed, add:* Plaintiff has expended $_____ for repair of his/her automobile, which is a reasonable sum for such repair.]

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

4. For _____ [damages to *or* repair of] plaintiff's automobile in the sum of $_____;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 274.40[1].*]

[2] Use of Form

This complaint may be used in an action for personal injuries and property damage by an automobile owner against a repair shop for negligent misrepresentation of the adequacy of brake repairs for safe operation of the automobile [*see Civ. Code §§ 1709, 1710(2)*; *Reeder v. Hoag (1958) 158 Cal. App. 2d 41, 44, 321 P.2d 793* (negligence of garage operator in misrepresenting safety of vehicle after repair and liability for damage to vehicle proximately resulting from negligence); for further discussion, see *§ 274.11[1]*].

This complaint may be combined with allegations basing the repair shop's liability on negligence in performing repairs. For such allegations based on negligence, see *§ 274.45*.

[3] Allegations

The complaint alleges that [*Gagne v. Bertran (1954) 43 Cal. 2d 481, 487-488, 275 P.2d 15* (elements of actionable deceit based on negligent misrepresentation)]:

- The defendant made material misrepresentations of fact with knowledge that plaintiff would act in reliance thereon (Paragraph 5).

- The representations were false (Paragraph 6).

- The defendant made the representations without reasonable grounds for believing them to be true (Paragraph 7).

- Plaintiff justifiably and actually relied on the representations and was thereby damaged in the manner and amount alleged (Paragraphs 8-12).

[4] Alternate Theory of Recovery

Warranties, analogous to those which apply to the sale of goods under *Com. Code §§ 2313-2318*, may arise in contracts for labor and materials under appropriate circumstances [*Pollard v. Saxe & Yolles Dev. Co. (1974) 12 Cal. 3d 374, 378, 115 Cal. Rptr. 648, 525 P.2d 88* ; *Aced v. Hobbs-Sesack Plumbing Co. (1961) 55 Cal. 2d 573, 580-583, 12 Cal. Rptr. 257, 360 P.2d 897 , superseded by statute as stated in Cardinal Health 301, Inc. v. Tyco Electronics Corp.*

(2008) 169 Cal. App. 4th 116, 132, 87 Cal. Rptr. 3d 5 ; *Gagne v. Bertran (1954) 43 Cal. 2d 481, 486, 275 P.2d 15]* . For complaints based on breach of express and implied warranties, see Ch. 91, *Automobiles: Actions Involving Defects and Repairs* , and Ch. 502, *Sales: Warranties* .

[5] Cross References

For information and cross references about complaints in general, see *§ 274.40[4]* et seq.

See generally Ch. 269, *Fraud and Deceit*

For alternative allegations of a complaint based on negligent misrepresentation of automobile repairs, see Ch. 91, *Automobiles: Actions Involving Defects and Repairs*

For complaints based on breach of express and implied warranties, see Ch. 91, *Automobiles: Actions Involving Defects and Repairs* , and Ch. 502, *Sales: Warranties*

Witkin, California Procedure, vol. 5, *Pleading*, §§ 667-689 (9th ed. 1997)

Witkin, Summary of California Law, vol. 4, *Sales*, § 53; vol. 5, *Torts*, §§ 818-826 (10th ed. 2005)

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23-274 California Forms of Pleading and Practice--Annotated § 274.47

§ 274.47 Complaint for Damages [Civ. Code § 3300] for Breach of Automotive Repair Contract--By Automobile Owner Against Garage Operator--Negligent Work and Defective Materials

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Automotive Repair Contract--By Automobile Owner Against Garage Operator--Negligent Work and Defective Materials

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Breach of Contract)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, a resident of _____ [*city*], _____ County, California [*or allege other capacity and residence*].

2. [*Fictitious name allegation, if appropriate. See § 274.40[1], Paragraph 4.*]

3. At all times herein mentioned, defendant operated a garage for the servicing and repair of automobiles at _____ [*street address and city*], _____ County, California, and held himself/herself out to the public, including plaintiff, as possessing the knowledge, skill, and experience necessary to the business of automotive servicing and repair.

4. At all times herein mentioned, plaintiff was the owner of a certain _____ [*specify year, make, model*] automobile, License No. _____.

5. On or about _____ [*date*], plaintiff entered into _____ [a written *or* an oral] agreement with defendant whereby defendant agreed to _____ [*specify nature of repair or service, e.g.*, rebuild the transmission of plaintiff's automobile], and plaintiff agreed to pay defendant therefor _____ [the sum of $_____ *or* the reasonable value of the work, labor, and materials supplied by defendant]. [A copy of the agreement is attached hereto as Exhibit A and made a part hereof.]

6. Plaintiff has performed all conditions, covenants, and promises under the above-specified agreement to be performed on his/her part [, except _____ (*condition not performed*), the performance of which was excused on the ground that _____(*specify*)].

7. Defendant entered into the performance of the agreement, but he/she failed and neglected to perform in accordance with the terms therein in that defendant _____ [*specify negligent work and defective materials used, e.g.*, rebuilt the transmission of plaintiff's automobile in such a negligent, careless, and unworkmanlike manner, and used such inferior, defective, and unsuitable gears and bearings that the transmission was wholly inadequate for the normal and efficient operation of plaintiff's automobile and ceased to function entirely within two weeks after defendant's work].

8. On or about _____ [*date*], plaintiff informed defendant of the defects of his/her work under the agreement and demanded that defendant remedy the same, but defendant failed and refused, and continues to fail and refuse, to do so.

9. By reason of defendant's negligent failure and refusal to perform and complete the agreement in accordance with its terms, plaintiff has been damaged in the sum of $_____, the amount which plaintiff has been required to pay for _____ [*specify corrective work, e.g.*, the repair and replacement of the gears and bearings in the transmission of the automobile] to remedy defendant's work, which is a reasonable sum for such work.

10. As a further result of defendant's negligence, plaintiff suffered the loss of the use and enjoyment of his/her automobile from _____ [*date*] to _____ [*date*], the reasonable value of which use was and is $_____ per day, to plaintiff's further damage in the sum of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____;

2. For the loss of use of the automobile in the sum of $_____;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 274.40[1].*]

[2] Use of Form

This complaint may be used in an action by an automobile owner against a garage operator for property damages resulting from the operator's negligent performance and use of defective materials under a contract for automotive repairs or services [*see Kavalaris v. Anthony Bros., Inc. (1963) 217 Cal. App. 2d 737, 741, 32 Cal. Rptr. 205* (contractor's duty of reasonable care and liability for negligent performance based on breach of contract); *Turgeon v. Barney (1924) 70 Cal. App. 432, 434-435, 233 P.394* (liability of repairman in contract action for failure to use due care and for using defective parts in repairing automobile); for further discussion, see *§ 274.11[2][c]*].

[3] Allegations

The complaint alleges the following [*see Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377* ; *Lortz v. Connell (1969) 273 Cal. App. 2d 286, 290, 78 Cal. Rptr. 6* ; *see also Civ. Code § 3300 et seq.* (damages in action based on contract)]:

- The contract between plaintiff and defendant (Paragraph 5).
- Plaintiff's performance of the contract or excuse for nonperformance (Paragraph 6).
- Defendant's negligent performance and use of defective materials in breach of the contract (Paragraph 7).
- Plaintiff's demand that defendant remedy the work and defendant's continuing refusal to do so (Paragraph 8).
- Damages resulting from defendant's breach (Paragraphs 9-10).

If it cannot be ascertained from the complaint whether contract is written, oral, or implied by conduct, the complaint will be subject to a demurrer (Paragraph 5) [*Code Civ. Proc. § 430.10(g)*].

[4] Attorney's Fees

If the contract included an attorney's fee provision, it is not necessary to plead or to prove either the contract provision for attorney's fees or the amount of attorney's fees incurred. It is sufficient to make the contract with the attorney's fees provision part of the complaint (Paragraph 4 and/or 7) [*Ganey v. Doran (1987) 191 Cal. App. 3d 901, 911-912, 236 Cal. Rptr. 787]* . However, no election or waiver results from pleading a contractual right to attorney's fees [*Lanyi v. Goldblum (1986) 177 Cal. App. 3d 181, 188, 223 Cal. Rptr. 32]* . Attorney's fees authorized by contract are an item of costs [*Civ. Code § 1717(a)*; *Code Civ. Proc. § 1033.5(a)(10),(c)(5)*]. For discussion and forms regarding claims for and determination of the amount of attorney's fees under a contract provision, see Ch. 174, *Costs And Attorney's Fees* .

[5] Cross References

For information and cross references about complaints in general, see *§ 274.40[4]* et seq.

See generally Ch. 140, *Contracts* .

For forms relating to actions based on unfair or deceptive practices in connection with repair services under the

Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*] and violations of the requirements for retail installment sales and repair contracts under the Unruh Retail Installment Sales Act [Civ. Code § 1801 et seq.], see Ch. 501, *Sales: Retail Installment Sales* , and Ch. 504, *Sales: Consumers Legal Remedies Act*

Witkin, California Procedure, vol. 4, *Pleading*, §§ 479-502 (4th ed. 1997)

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 847, 869-898, 907 (10th ed. 2005)

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23-274 California Forms of Pleading and Practice--Annotated § 274.48

§ 274.48 Complaint for Money Due Under Automotive Repair Contract [Civ. Code § 3302; Bus. & Prof. Code §§ 9884.8, 9884.9]--By Repairer Against Customer

[1] FORM Complaint for Money Due Under Automotive Repair Contract [Civ. Code § 3302; Bus. & Prof. Code §§ 9884.8, 9884.9]--By Repairer Against Customer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONEY
_____ [*name*],	)	[Amount demanded _____
Defendant.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. Plaintiff is now, and at all times herein mentioned was, registered with the Bureau of Automotive Repairs in the Department of Consumer Affairs as an automotive repair dealer and was doing business in _____ [*city*], _____ County, California [under the fictitious business name of _____ (*name*), with respect to which plaintiff has filed the statement and published the notice as required by *Sections 17910 through 17917 of the Business and Professions Code or other appropriate allegations regarding plaintiff's capacity*].

2. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California, residing at _____ [*street address*], and owner of a certain _____ [*specifiy year, make, and model*] automobile, _____ [California *or other*] License No. _____.

[3. *Fictitious name allegation, if appropriate. See § 274.40[1], Paragraph 4.*]

4. On or about _____ [*date*], plaintiff entered into a _____ [written *or* oral] agreement with defendant whereby plaintiff agreed to _____ [*specify nature of repair, e.g.,* rebuild the transmission of defendant's automobile] and defendant agreed to pay plaintiff the sum of $_____ for the _____ [maintenance *or* repairs *or* restoration]. Plaintiff gave defendant an initial written estimate of $_____ for the labor and parts necessary for the job. Defendant _____ [orally acknowledged that estimate and authorized *or* signed a written acknowledgment of that estimate and authorization for] plaintiff to proceed with the _____ [maintenance *or* repairs *or* restoration] in accordance with that estimate. _____[*If authorization was oral, add* Defendant's oral authorization was noted on the original estimate.] A copy of that estimate is attached marked Exhibit "A" and incorporated by reference.

[5. After plaintiff gave defendant the initial written estimate, plaintiff discovered that _____ (*specify nature of additional part, repair, or other reason for additional cost, e.g.,* defendant's automobile also needed to have the timing chains repaired). The estimated cost of parts and labor for this additional _____ (maintenance *or* repairs *or* restoration) was $_____. Plaintiff _____ (*specify manner in which excess estimate was transmitted to and approved by defendant, e.g.,* telephoned defendant at her place of work, told defendant of the additional work recommended and the estimated price of the additional repair. Defendant orally authorized the additional work. Defendant's oral authorization was noted in the original work order, a copy of which is Exhibit "A," and on the final invoice, a copy of which is attached as Exhibit "B" and incorporated by reference).]

6. Plaintiff has performed all conditions, covenants, and promises under the above-specified agreement to be performed on his/her part, [except _____ (*condition not performed*), the performance of which was excused on the ground that _____ (*specify*)].

7. On _____ [*date*], plaintiff presented defendant a final invoice for the completed _____ [maintenance *or* repairs *or* restoration], [a copy of which is attached as Exhibit "B" and incorporated by reference,] and demanded that defendant pay the agreed sum of $_____ for _____ [that maintenance *or* that restoration *or* those repairs]. Defendant failed and refused, and continues to fail and refuse, to pay that sum, [except $_____], and the sum of $_____ remains due, owing, and unpaid.

[8. As a proximate cause of defendant's refusal to pay for the _____ (maintenance *or* repairs *or* restoration) and take possession of his/her/its automobile, plaintiff has been required to store the automobile. The _____ (agreed value of this storage *or* the cost to plaintiff of providing storage) is $_____ per month.]

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____ with interest at _____ [*specify contract or legal rate*] percent from _____ [*date of demand*].

[2. For plaintiff's storage costs, according to proof;]

3. For costs of suit [including reasonable attorney's fees] herein incurred; and

4. For such other and further releif as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 274.40[1].*]

[2] Use of Form

This complaint is for use by an automobile repairer to recover the agreed price of completed repairs from the automobile owner who authorized those repairs [*see Civ. Code § 3302*; *Bus. & Prof. Code §§ 9880.1(a)* (automotive repair dealer defined), 9980.1(e) (motor vehicle repairs defined), 9880.1(j) (customer defined), 9884.8 (final invoice requirement), 9884.9 (written estimate and authorization requirements)].

To preserve the possessory lien granted an automobile repairer under *Civ. Code § 3068*, the repairer must either apply for authorization to conduct a lien sale or commence an action within 30 days after the lien has arisen [*Civ. Code § 3068(b)*]. The lien is deemed to arise at the earlier of either (1) the time a written statement of charges for completed work or services is presented to the registered owner or (2) 15 days after the work or services are completed [*Civ. Code § 3068(a)*; for discussion, see *§ 274.48[5]*].

[3] Allegations

This complaint first alleges plaintiff's status and registration (Paragraph 1) [*see Bus. & Prof. Code § 9884.16* (unregistered repairer does not acquire lien and has no right to sue); for corporate and other status allegations, see Ch. 20, *Allegations Commonly Used*].

Defendant's status and ownership of the vehicle on which repairs were made is alleged in Paragraph 2. The venue allegation used here is defendant's residence [*see Code Civ. Proc. § 395(a)*]. In an action arising from an offer or provision of goods, services, loans or extensions of credit intended primarily for personal, family or household use, other than an obligation described in *Civ. Code § 1812.10* (in the Unruh Retail Installment Sales Act [*Civ. Code § 1801 et seq.*]; for discussion, see Ch. 501, *Sales: Retail Installment Sales*) or *Civ. Code § 2984.4* (in the Rees Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 2981 et seq.*]; for discussion, see Ch. 89, *Automobiles: Sales and Financing Under the Rees Levering Act*), or in an action arising from a transaction consummated as a proximate result of either an unsolicited telephone call made by a seller engaged in the business of consummating transactions of that kind or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller, the superior court in the county where the buyer or lessee in fact signed the contract, or where the buyer or lessee resided at the time the contract was entered into, or where the buyer or lessee resides at the commencement of the action, is the proper court for the trial of the action [*Code Civ. Proc. § 395(b)*; *see Fontaine v. Superior Court (CashCall, Inc.) (2009) 175 Cal. App. 4th 830, 838-840, 96 Cal. Rptr. 3d 607* (statute applies to action by or against consumer, and if any defendant in consumer's action is individual, that is irrelevant to application of statute)].

The formation and scope of the initial contract and the giving of the written estimate required by *Bus. & Prof. Code § 9884.9* and *16* Cal. Code Reg § 3353 are alleged in Paragraph 4 [for discussion, *see § 274.11[2][b]*; *see also Universal C.I.T. Credit Corp. v. Rater (1963) 214 Cal. App. 2d 493, 495, 29 Cal. Rptr. 631* ; *Shepherd v. Perea (1950) 98 Cal. App. 2d 518, 520, 220 P.2d 776* (nonexistence of cause of action for work, labor, and services in absence of express or implied promise on part of recipient of services to pay for them)].

Paragraph 5 is for use when additional work was authorized in excess of the original estimate [*Bus. & Prof. Code § 9884.9(a), (d)*; for discussion, *see § 274.11[2][b]*].

The form then alleges:

- Plaintiff's performance (Paragraph 6).

- Presentation to defendant of the final written invoice required by *Bus. & Prof. Code § 9884.8* and *16* Cal. Code Reg § 3356 (Paragraph 7).

- Demand for payment (Paragraph 7).

- Defendant's failure or refusal to make payment (Paragraph 7) [*see Civ. Code § 3302* (interest on contract after breach by failure to pay money); *Civ. Code §§ 3287, 3289* (rates of interest)].

A lienholder is not entitled to recover storage costs incurred to protect the lien [*Civ. Code § 2892*; *Owens v. Pyeatt (1967) 248 Cal. App. 2d 840, 845, 57 Cal. Rptr. 100]* . Thus, optional Paragraph 8 should not be used unless there was an agreement to pay storage charges, and even then it is not clear whether this prohibition could be varied by agreement [*see Owens v. Pyeatt (1967) 248 Cal. App. 2d 840, 845, 57 Cal. Rptr. 100* (involving repair of an automobile and noting absence of any such agreement); *Pemberton v. Davis (9th Cir. 1968) 403 F.2d 515, 517* (commenting that there was no express or implied agreement by the aircraft owner to pay storage fees)].

[4] Attorney's Fees

If the contract included an attorney's fee provision, it is not necessary to plead or to prove either the contract provision for attorney's fees or the amount of attorney's fees incurred. It is sufficient to make the contract with the attorney's fees provision part of the complaint (Paragraph 4 and/or 7) [*Ganey v. Doran (1987) 191 Cal. App. 3d 901, 911-912, 236 Cal. Rptr. 787]* . However, no election or waiver results from pleading a contractual right to attorney's fees [*Lanyi v. Goldblum (1986) 177 Cal. App. 3d 181, 188, 223 Cal. Rptr. 32]* . Attorney's fees authorized by contract are an item of costs [*Civ. Code § 1717(a)*; *Code Civ. Proc. § 1033.5(a)(10),(c)(5)*]. For discussion and forms regarding claims for and determination of the amount of attorney's fees under a contract provision, see Ch. 174, *Costs And Attorney's Fees* .

[5] Alternative Remedy

If the repairer has retained possession of the repaired vehicle, he or she could recover the amounts owed by selling the vehicle in accordance with the statutory procedures contained in *Civ. Code §§ 3071-3074* [*Civ. Code § 3071* (vehicle worth more than $4,000); *Civ. Code § 3072* (vehicle worth $4,000 or less)]. To preserve the possessory lien, the repairer must apply for authorization to conduct a lien sale, or file a court action, within 30 days after the lien has arisen [*Civ. Code § 3068(b)*; *see* discussion in *§ 274.14[2], [9]*]. For transaction guide and forms relating to lien sale procedures, see California Legal Forms, Ch. 102A, *Personal Property Liens* (Matthew Bender).

[6] Cross References

For discussion and forms relating to miscellaneous action against automobile manufacturers, dealers, and repairers, see Ch. 91, *Automobiles: Actions Involving Defects and Repairs*

For discussion and a form of complaint for use by the payee of a check that is returned unpaid to collect treble damages, see Ch. 385, *Negotiable Instruments*

For addition of a common count for labor, work, and materials, see Ch. 121, *Common Counts*

For discussion and a form of affidavit of compliance with the venue requirments of the Unruh Act (*Civ. Code § 1801 et seq.*), see Ch. 501, *Sales: Retail Installment Sales*

Witkin, California Procedure, Vols. 4 and 5, *Pleading*, §§ 476-501, 859, 867 (4th ed. 1997)

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Chapter 274 GARAGES AND GAS STATIONS
PART IV. FORMS

23-274 California Forms of Pleading and Practice--Annotated § 274.49

§ 274.49 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--By Customer to Action by Automobile Repairer--Lack of Written Estimate or Authorization [Bus. & Prof. Code § 9884.9]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--By Customer to Action by Automobile Repairer--Lack of Written Estimate or Authorization [Bus. & Prof. Code § 9884.9]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES THAT:

1. In allegedly rendering the services and furnishing the materials pursuant to the agreement alleged in plaintiff's complaint, plaintiff was performing motor vehicle repairs and acting as an automotive repair dealer within the meaning of *Section 9880.1 of the Business and Professions Code*.

[*EITHER, as total defense of no written estimate*]

2. At the time of plaintiff's alleged performance under the alleged agreement, plaintiff had not _____ [furnished defendant with a written estimate *nor* obtained defendant's authorization to proceed] as required by *Section 9884.9 of the Business and Professions Code*.

[*OR, as partial defense to charges in excess of initial estimate*]

2. At the time of plaintiff's alleged performance under the alleged agreement, plaintiff had not [furnished defendant with an estimate for nor] obtained defendant's authorization to proceed with any work or charges in excess of that contained in the original $_____ estimate, as required by *Section 9884.9 of the Business and Professions Code*.

[*CONTINUE*]

3. Therefore, plaintiff was not authorized to perform any work [other than that which was the subject of the initial written estimate], and no charges [in excess of those shown on the inital written estimate] have accrued or are owing from defendant to plaintiff.

[2] Use of Form

The affirmative defense in [1], *above*, is for use by an automobile owner in answer to a complaint by an automotive repair dealer to recover for repairs that were never authorized by the owner or for which no estimate was furnished [*Bus. & Prof. Code § 9884.9*; *16 Cal. Code Reg 3353*; for discussion, *see § 274.11[2]*]. If no written estimate is provided, the repair dealer cannot recover on the contract or under a common count or quasi-contract theory [*Donaldson v. Abot (1987) 194 Cal. App. 3d 817, 820-821, 239 Cal. Rptr. 801* ; *Bennett v. Hayes (1975) 53 Cal. App. 3d 700, 703-704, 125 Cal. Rptr. 825]* .

[3] Cross References

For the format of the answer, see Ch. 26, *Answers*

For forms for defenses to action based on contract, see Ch. 140, *Contracts*

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23-274 California Forms of Pleading and Practice--Annotated § 274.50

§ 274.50 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--By Customer to Action by Automotive Repairer--Lack of Registration as Automotive Repair Dealer [Bus. & Prof. Code § 9884.16]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--By Customer to Action by Automotive Repairer--Lack of Registration as Automotive Repair Dealer [Bus. & Prof. Code § 9884.16]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES THAT:

1. In allegedly rendering the services and furnishing the materials pursuant to the agreement alleged in plaintiff's complaint, plaintiff was performing motor vehicle repairs and acting as an automotive repair dealer within the meaning of *Section 9880.1 of the Business and Professions Code*.

2. At the time of plaintiff's alleged performance under the alleged agreement, plaintiff was not validly registered as an automotive repair dealer, as required by *Section 9884.6 of the Business and Professions Code*.

3. Therefore, plaintiff is barred by *Section 9884.16 of the Business and Professions Code* from suing on the alleged agreement for motor vehicle repairs.

[2] Use of Form

The affirmative defense in [1], *above*, may be used in an answer to a complaint by a garage operator to recover for motor vehicle repairs that he or she has performed if the repairs fall within the definition of *Bus. & Prof. Code § 9880.1(e)* and if the operator is required to register as an automotive repair dealer with the Bureau of Automotive Repair in the Department of Consumer Affairs [*Bus. & Prof. Code §§ 9880.1, 9880.2, 9884.6*], but the operator has not done so. A person required to register as an automotive repair dealer does not have the right to sue on a contract for motor vehicle repairs unless he or she has a valid registration [*Bus. & Prof. Code § 9884.16*; for discussion, *see § 274.11[2][a]*].

[3] Cross References

For cross references relating to affirmative defenses in general, see *§ 274.49[3]*

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 1000, 1008-1014, 1023-1025 (4th ed. 1997)

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Chapter 276 GARNISHMENT

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[4] Employee

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[2] Writ of Execution

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[4] Application for Earnings Withholding Order

[5] Time to Apply for Earnings Withholding Order

[6] Issuance of Earnings Withholding Order

[7] Service of Earnings Withholding Order

[8] Service of Order as Creating Lien

[9] Withholding Period

[10] Employer's Duty to Withhold

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[b] Multiple Orders

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§ 276.120 Proceedings for Equitable Division of Earnings Subject to Earnings Withholding Order for Support [Code Civ. Proc. § 706.052(b)]--Notice of Motion [Code Civ. Proc. § 1010]

[1] FORM

[2] Use of Form

[3] Equitable Division of Earnings

[4] California Law Revision Commission Comment

[5] Cross References

[6] State Statutes

§ 276.121 Proceedings for Equitable Division of Earnings Subject to Earnings Withholding Order for Support [Code Civ. Proc. § 706.052(b)]--Order Determining Amount to Be Withheld From Earnings

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross Reference

§ 276.122 Proceedings for Levy on Funds Other Than Wages or Salary Owed Judgment Debtor by Public Entity [Code Civ. Proc. §§ 708.710-708.795]--Statement of Exact Amount Required to Satisfy Judgment and Request for Statutory Relief [Code Civ. Proc. § 708.730(a)]--Declaration [Code Civ. Proc. § 2015.5] by Attorney

[1] FORM

[2] Use of Form

[3] Declaration in Lieu of Affidavit

[4] Memorandum of Credits

[5] Nonliability of Public Officer or Employee When Judgment Debtor Insufficiently Identified

[6] Filing Fee

[7] Cross References

[8] State Statutes

[9] Decisions

§ 276.123 Proceedings for Levy on Funds Other Than Wages or Salary Owed Judgment Debtor by Public Entity [Code Civ. Proc. §§ 708.710-708.795]--Statement of Exact Amount Required to Satisfy Judgment and Request for Statutory Relief [Code Civ. Proc. § 708.730(a)]--Declaration [Code Civ. Proc. § 2015.5] by Judgment Creditor

[1] FORM

[2] Use of Form

[3] Cross Reference

§ 276.124 Application for Earnings Withholding Order [Code Civ. Proc. § 706.121]--Judicial Council Form WG-001

[1] FORM

[2] Use of Form

[3] Contents of Application

[4] Execution of Application

[5] Filing Application

[6] Final Order for Unsatisfied Costs and Interest

[7] Satisfaction of Judgment

[8] Cross References

[9] State Statutes

§ 276.125 Earnings Withholding Order [Code Civ. Proc. §§ 706.022, 706.108, 706.125]--Judicial Council Form WG-002

[1] FORM

[2] Use of Form

[3] Issuance of Order

[4] Contents of Order

[5] Instructions to Employer

[6] Papers Served

[7] Person to Be Served

[8] Method of Service

[a] In General

[b] Service by Registered Process Server

[9] State Statutes

§ 276.126 Earnings Withholding Order for Support [Code Civ. Proc. § 706.030] and Instructions to Employer [Code Civ. Proc. § 706.127]--Judicial Council Form WG-004

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross Reference

§ 276.127 Employee Instructions [Code Civ. Proc. § 706.122]--Judicial Council Form WG-003

[1] FORM

[2] Use of Form

[3] Contents of Instructions

[4] State Statutes

§ 276.128 Employer's Return [Code Civ. Proc. § 706.126]--Judicial Council Form WG-005

[1] FORM

[2] Use of Form

[3] Contents of Form

[4] Procedure if Order Is Ineffective

[5] State Statutes

§ 276.129 Claim of Exemption [Code Civ. Proc. § 706.123]--Judicial Council Form WG-006

[1] FORM

[2] Use of Form

[3] When Claim May Be Made

[4] How Claim of Exemption Is Made

[5] Contents and Execution of Claim

[6] Execution of Claim

[7] Restrictions on Claim of Exemption

[8] Cross References

[9] State Statutes

§ 276.130 Financial Statement [Code Civ. Proc. §§ 703.530, 706.105(b), 706.124]--Judicial Council Form WG-007

[1] FORM

[2] Use of Form

[3] Contents and Execution of Statement

[4] State Statutes

[5] Cross Reference

§ 276.131 Notice of Filing of Claim of Exemption [Code Civ. Proc. §§ 706.105(c)(3), 1005(b)]--Judicial Council Form WG-008

[1] FORM

[2] Use of Form

[3] Content of Notice

[4] Hearing to Oppose Claim

[5] State Statutes

§ 276.132 Notice of Opposition to Claim of Exemption [Code Civ. Proc. §§ 706.105(d), 706.128]--Judicial Council Form WG-009

[1] FORM

[2] Use of Form

[3] Contents of Form

[4] Time for Filing Notice

[5] Waiver of Opposition

[6] Procedure if No Notice of Opposition Filed

[7] State Statutes

§ 276.133 Notice of Motion [Code Civ. Proc. § 1010] for Order Determining Claim of Exemption [Code Civ. Proc. § 706.105(e)]

[1] FORM

[2] Use of Form

[3] Supporting Memorandum

[4] Right to Hearing on Claim of Exemption

[5] Duplication of Notice

[6] Cross References

[7] State Statutes

§ 276.134 Notice of Hearing on Claim of Exemption [Code Civ. Proc. § 706.105(e)]--Judicial Council Form WG-010

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross Reference

§ 276.135 Order Determining Claim of Exemption [Code Civ. Proc. § 706.105(g)]--Judicial Council Form WG-011

[1] FORM

[2] Use of Form

[3] Modification or Termination of Earnings Withholding Order

[4] Liability for Amounts Withheld

[5] State Statutes

§ 276.136 Notice of Termination or Modification of Earnings Withholding Order [Code Civ. Proc. § 706.105(f), (g)]--Judicial Council Form WG-012

[1] FORM

[2] Use of Form

[3] State Statutes

§ 276.137 Tax Garnishment Claim of Exemption and Financial Declaration [Code Civ. Proc. §§ 706.076, 706.081]--Judicial Council Form WG-026

[1] FORM

[2] Use of Form

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[4] Applicability of Wage Garnishment Law

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[a] Issuance by State

[b] Issuance by Court

[8] State Statutes

[9] Cross Reference

§ 276.138 Application for and Order Staying Enforcement of Earnings Withholding Order Taken Against Party

During Period of Military Service [Mil. & Vet. Code § 402(d)]

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[2] Use of Form

[3] Supporting Memorandum

[4] Cross References

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Chapter 276 GARNISHMENT
PART I. SCOPE

23-276 California Forms of Pleading and Practice--Annotated § 276.01

§ 276.01 Scope of Chapter

This chapter discusses and contains forms relating to garnishment, particularly to garnishment of wages owed by an employer to a judgment debtor and to garnishment of money owed by a public entity to a judgment debtor. It also discusses the procedure for garnishing deposit accounts and property in safe deposit boxes standing in the name of a third person or in the names of the judgment debtor and a third person. Withholding orders for taxes are not discussed in this Introduction, except incidentally, since they are governed by specific statutory provisions [*see Code Civ. Proc. §§ 706.070-706.084*; *see also § 276.137*].

Included in this chapter are a form of notice of motion for use in proceedings seeking an equitable division of earnings subject to an earnings withholding order for support [*see § 276.120*], and a form of order determining the equitable division of earnings [*see § 276.121*]. Also included are forms of declarations under penalty of perjury, executed by the judgment creditor's attorney and the judgment creditor, respectively, to be filed, together with an abstract or certified copy of the money judgment, with the appropriate public official to garnish money, other than wages or salary, owed a judgment debtor by a public entity [*see §§ 276.122, 276.123*]. Forms for use in wage garnishments [*see §§ 276.124 -276.136*] include the application by a judgment creditor to initiate a wage garnishment [*see § 276.124*], earnings withholding orders [*see §§ 276.125, 276.126*], the claim of exemption and financial statement filed by the judgment debtor [*see §§ 276.129, 276.130*], and forms for use by a judgment creditor to oppose a claim of exemption [*see §§ 276.132 -276.134*]. A form for claiming an exemption of otherwise nonexempt wages from garnishment for taxes to the extent allowed by law is also included [*see § 276.137*] and the statutes governing that procedure are discussed in the comments to that form.

This chapter also includes a procedural checklist covering both the garnishment of earnings owed a judgment debtor by an employer and the garnishment of money other than wages or salary owed a judgment debtor by a state or local public entity.

Wage assignments to enforce child support judgments or orders are discussed in Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* .

For a discussion and forms for the prejudgment attachment of property other than wages or salary, see Ch. 62,

Attachment . For a discussion, procedural checklist, and forms for use in proceedings involving writs of execution generally, see Ch. 254, *Executions and Enforcement of Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 276.02 Cross References

For procedures and forms for obtaining a writ of attachment, see Ch. 62, *Attachment* .

For discussion and forms for obtaining a wage assignment for child, spousal, or family support, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* .

For a discussion and forms of writs of execution and forms for filing a claim of exemption under other than the Wage Garnishment Law, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.

For a discussion and related forms for use in supplementary proceedings to enforce a judgment, see *Ch. 254, Executions and Enforcement of Judgments, § 254.180* et seq.

For a form for a complaint for abuse of process for wrongful garnishment, see Ch. 357, *Malicious Prosecution and Abuse of Process* .

Legal Topics:

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[Reserved]

§§ 276.03[Reserved]

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§ 276.10 Garnishment Defined

A garnishment is the levy by a third person on debts owing to a judgment debtor by the garnishee, that is, by the person owing the debt [*see generally* Black's Law Dictionary (5th ed. 1979); Los Angeles County Employees Union, Local 434 v. *County of Los Angeles (1973) 33 Cal. App. 3d 269, 272, 109 Cal. Rptr. 46* (using terms "attachment" and "attachment debtor" in lieu of "levy" and "judgment debtor"); *Code Civ. Proc. §§ 706.010, 706.021*]. The term "garnishment" is, however, seldom used in the California statutes, although the procedure it denotes is incorporated in both the attachment and execution statutes [*see Code Civ. Proc. §§ 488.300-488.485, 491.110, 491.190, 492.040* (attachment) and Ch. 62, *Attachment*; and *Code Civ. Proc. §§ 700.010-700.200* (execution), and Ch. 254, *Executions and Enforcement of Judgments*]. In common legal parlance, garnishment has been said to be the legal or equitable procedure by which a creditor reaches a debtor's personal property that is in the possession or control of a third party [*see* Brunn, *Wage Garnishment in California: A Study and Recommendations, 53 Calif. L. Rev. 1214, 1215 (1965)*]. Among the types of property frequently garnished are wages held by a debtor's employer, bank accounts in the possession of a bank or savings and loan association, and inheritances under the control of the executor or administrator of an estate.

Legal Topics:

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

[1] In General

Certain types of property have been exempted from execution [*see generally Code Civ. Proc. §§ 704.010-704.210*]. For most types of exempt property, a judgment debtor desiring to make a claim of exemption must follow the procedures outlined in *Code Civ. Proc. §§ 703.510-703.610*. The judgment debtor bears the burden of proving his or her right to an exemption [*Perfection Paint Products v. Johnson (1958) 164 Cal. App. 2d 739, 741, 330 P.2d 829]* . For a detailed discussion and forms for making a claim of exemption, see Ch. 254, *Executions and Enforcement of Judgments* , Pt. I.

[2] For Other Money Proceeds

Exemptions may also be claimed for unemployment compensation and unemployment compensation disability benefits [*Code Civ. Proc. § 704.120*], certain types of retirement or pension benefits [*Code Civ. Proc. §§ 704.110, 704.115*], public assistance payments [*Code Civ. Proc. § 704.170*], and workers' compensation awards [*Code Civ. Proc. § 704.160*]. Exemptions may also be claimed for life insurance and health insurance proceeds up to a certain amount [*Code Civ. Proc. §§ 704.100, 704.130*]. For a detailed listing of the exemptions that may be claimed, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 276.12 Vacation or Stay of Garnishment Based on Military Service

[1] Under Servicemembers Civil Relief Act

Under the Servicemembers Civil Relief Act (*50 U.S.C. App. § 501 et seq.*), when a person in military service is a defendant in an action or proceeding commenced before, during, or within 90 days after his or her period of military service, the court may, in its discretion, on its own motion vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment [*50 U.S.C. App. § 524*]. The court must vacate or stay an attachment or garnishment on the application of the person in military service or of someone on his or her behalf, unless the court is of the opinion that the defendant's ability to comply with the judgment is not materially affected by reason of his or her military service [*50 U.S.C. App. § 524*; *see also 50 U.S.C. App. §§ 511* (definitions), 514, 516 (additional persons protected)].

The court has discretion to deny an application to vacate an attachment or garnishment due to the alternative language of the statute, allowing the court to vacate *or* stay an attachment or garnishment [*Halstead v. Halstead (1946) 72 Cal. App. 2d 832, 834-835, 165 P.2d 513]* . A stay may be ordered for the period of military service and 90 days thereafter or any part of that period subject to such terms as may be just. When the person in military service is a codefendant with others, the plaintiff may proceed against the others by leave of court [*50 U.S.C. App. § 525*].

[2] Under State Law

Effective June 21, 2002, in any action or proceeding against a service member, before or during the period of service or within 60 days thereafter, the court may in its own discretion on it own motion, or must on application by the service member or someone on the service member's behalf, vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment, unless in the court's opinion the defendant's ability to comply with the judgment entered or sought is not materially affected by reason of the military service [*Mil. & Vet. Code § 403(c)(2)*]. Any stay may be ordered for the period of military service and three months thereafter, or any part of that period, and subject to those terms as may be just, including terms with respect to payment in installments of those amounts at those times the court may fix. When the person in military service is a codefendant with others, the plaintiff may nevertheless, by leave of court, proceed against the others [*Mil. & Vet. Code § 403(d)*].

A "service member" is defined for these purposes as either of the following [*Mil. & Vet. Code § 400(a)*]:

- Officers and enlisted members of the National Guard called or ordered into active state service by the Governor pursuant to *Mil. & Vet. Code §§ 143* or *146* or into active federal service by the President pursuant to Title 10 or 32 of the United States Code.

- Reservists of the United States Military Reserve who have been called to full-time active duty.

"Military service" means full-time active state or federal service as defined in *Mil. & Vet. Code § 400(a)(1)* or full-time active of a reservist as defined in *Mil. & Vet. Code § 400(a)(2)*, for a period in excess of seven days in any 14-day period. Days of service for a service member called to active service or duty since September 11, 2001, to engage in homeland defense against terrorism are credited toward the seven-day period [*Mil. & Vet. Code § 400(b)*].

A certificate signed by an appropriately authorized officer of the military department, branch, or unit in which a service member is serving is prima facie evidence as to any of the following facts as stated in the certificate [*Mil. & Vet. Code § 409.8(a)*]:

- That a person named has not been, or is, or has been in the military service.

- The time when and the place where the person entered military service.

- The person's residence at that time, and the rank, branch, and unit of the service the person entered.

- The dates within which the person was in the military service.

- The monthly pay received by the person at the date of issuing the certificate.

- The time when and the place where the person died in or was discharged from the service.

The authorized officer must furnish the certificate on application. Any certificate purporting to be signed by an officer purporting on the face of the certificate to have been authorized to sign it, is prima facie evidence of its contents and of the authority of the signer to issue it [*Mil. & Vet. Code § 409.8(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 276.13 Government Agencies as Garnishees

[1] Limited Liability of Federal Government

[a] Three Considerations

The liability of a federal government entity as garnishee involves three considerations: (1) whether the action is barred by sovereign immunity; (2) whether the entity would be liable under state garnishment laws; and (3) if a federal statute permits a garnishment proceeding against the United States, whether the entity has met the statutory requirements [*see Millard v. U.S. (Fed. Cir. 1990) 916 F.2d 1, 3 , reh'g denied, 500 U.S. 916* ; *see § 276.13[b] -[d]*].

To obtain garnishment against a federal public entity as garnishee, counsel should follow the procedures under California law unless a specific federal statute governs [*see, e.g., 42 U.S.C. § 659*; *see § 276.17*].

[b] Action Barred by Sovereign Immunity

In a garnishment proceeding against a federal agency as garnishee, the first consideration is whether sovereign immunity bars the action. No legal proceeding, including garnishment, may be brought against the United States, absent a waiver of sovereign immunity [*Millard v. U.S. (Fed. Cir. 1990) 916 F.2d 1, 3 , reh'g denied, 500 U.S. 916* ; *United States v. Sherwood (1941) 312 U.S. 584, 586, 61 S. Ct. 767]* . Thus, if sovereign immunity has not been waived by a federal statute, a creditor is barred from obtaining garnishment of compensation or other funds due from the United States to a judgment debtor [*see, e.g., Brockelman v. Brockelman (D.C. Kan. 1979) 478 F. Supp. 141, 142-143* (garnishment unavailable against income tax refunds); *Exchange Nat. Bank v. Daniel Hale Williams University (N.D. Ill. 1979) 473 F. Supp. 656, 657* (garnishment unavailable against *HEW); Bolling v. Howland (M.D. Tenn. 1975) 398 F. Supp. 1313, 1316* (garnishment unavailable for support arrearages in pre-1974 case)]. Similarly, sovereign immunity will bar the suit of a judgment debtor who had a right to funds paid to a creditor by a federal agency that honored a writ of garnishment, provided that the writ was regular on its face, was issued by a court with subject matter jurisdiction, and was properly served on the agency, which then gave notice of garnishment to the judgment debtor [*see Millard v. U.S. (Fed. Cir. 1990) 916 F.2d 1, 6 , reh'g denied, 500 U.S. 916* (citing general principles of garnishment law); *United States v. Morton (1984) 467 U.S. 822, 836, 104 S. Ct. 2769, 81 L. Ed. 2d 680* (citing *42 U.S.C. § 659(f)* and regulations

thereunder)].

Sovereign immunity of the United States has been waived for legal proceedings for the following: (1) enforcement of child support and alimony obligations against remuneration for employment payable to any individual by any agency, subdivision, or instrumentality of the United States or District of Columbia [*42 U.S.C. § 659*(enacted in 1974); *see Millard v. U.S. (Fed. Cir. 1990) 916 F.2d 1, 3 , reh'g denied, 500 U.S. 916* ; *see also* discussion in *§ 276.17*]; and (2) enforcement of any obligation against remuneration or other property held by any federal agency that has been authorized to sue or be sued [*see, e.g., Franchise Tax Bd. v. United States Postal Service (1984) 467 U.S. 512, 516-525, 104 S. Ct. 2549, 81 L. Ed. 2d 446* (waiver for suit against Postal Service under *39 U.S.C. § 401(1)*); *Federal Housing Admin. v. Burr (1940) 309 U.S. 242, 244-249, 60 S. Ct. 488, 84 L. Ed. 724* (waiver for suit against Federal Housing Authority *12 U.S.C. § 1702*)]. However, specific statutes also retain sovereign immunity for payments from certain government retirement and benefit plans [*see, e.g., 5 U.S.C. § 8346* (civil service retirement benefits); *10 U.S.C. § 1440* (armed forces annuities based on retired or retainer pay); *10 U.S.C. § 1450(i)* (armed forces Survivor Benefit Plan annuities); *42 U.S.C. § 407* (federal old-age, survivors, and disability insurance benefits)].

[c] Liability Under State Garnishment Laws

If sovereign immunity is waived, the second consideration governing liability of a federal agency as garnishee is whether garnishment would be available under state law. If a private employer would not be required to comply with a writ of garnishment under state law, then the federal government would not have to do so. Similarly, if a private employer would not be liable to a judgment debtor for payments made to a garnishor on a writ of garnishment, neither would a federal agency [*Millard v. U.S. (Fed. Cir. 1990) 916 F.2d 1, 3 , reh'g denied, 500 U.S. 916* ; *United States v. Morton (1984) 467 U.S. 822, 834, 831-833, 104 S. Ct. 2769, 81 L. Ed. 2d 680]* .

[d] Fulfillment of Requirements of Statute Waiving Immunity

The final consideration on the liability of a federal agency as a garnishee is whether the requirements, if any, of the statute waiving immunity, and any regulations promulgated under it, have been met [*see, e.g., Millard v. U.S. (Fed. Cir. 1990) 916 F.2d 1, 9-10 , reh'g granted, 500 U.S. 916* ; *United States v. Morton (1984) 467 U.S. 822, 831-833, 104 S. Ct. 2769, 81 L. Ed. 2d 680]* . For example, the statute permitting garnishment actions against the United States for alimony or child support obligations absolves the United States from liability to its employee for honoring a writ of garnishment that is regular on its face, provided that payment is made in accordance with the statute and regulations issued thereunder [*United States v. Morton (1984) 467 U.S. 822, 836, 104 S. Ct. 2769, 81 L. Ed. 2d 680* ; *see 42 U.S.C. § 659(f)*; 5 C.F.R. pt. 581]. Nevertheless, even if an agency fails to meet the statutory or regulatory requirements, it is not automatically liable for honoring or not honoring a writ of garnishment. Liability depends on a further analysis of the significance of the violation and the extent to which an employer would be liable under state law. For example, in one case, a delay in notifying an employee of garnishment until after amounts were withheld from his wages was found not to have prejudiced the employee's opportunity to contest the writ of garnishment. Moreover, the delay would not have subjected a private employer to liability under California law, which allows notification after wage withholding has already begun. Therefore, the federal agency was not liable to the employee for amounts paid to the garnishor [*Millard v. U.S. (Fed. Cir. 1990) 916 F.2d 1, 10, 11 , reh'g denied, 500 U.S. 916]* .

[2] Liability of State or Local Government

Under California law, sovereign immunity is waived with respect to garnishment proceedings against earnings owed to an employee [*Code Civ. Proc. §§ 706.011(a), (c), (d), 708.720(a)*] or other money owed to a judgment debtor [*see Code Civ. Proc. § 708.720(a), (c)*] by a public entity. A "public entity" includes the state and any political subdivision of the state [*Code Civ. Proc. § 708.710(b)*]. For discussion of the garnishment of earnings, see *§ 276.14* et seq. For discussion of the garnishment of other money, see *§ 276.60* et seq.

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§ 276.14 Wage Garnishment

By far the most frequent form of garnishment and the property most associated with the procedure is wage garnishment. The garnishment of wages has been the subject of a number of court opinions [*see § 276.15*] and of a significant body of state and federal legislation [*see Code Civ. Proc. § 706.010 et seq.* (California's Wage Garnishment Law); *15 U.S.C. §§ 1671-1677* (federal wage garnishment laws); *see also* Brunn, *Wage Garnishment in California: A Study and Recommendations, 53 Calif. L. Rev. 1214 (1965)*].

Legal Topics:

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§ 276.15 No Prejudgment Wage Garnishment

Since the United States Supreme Court decision in *Sniadach v. Family Finance Corp. (1969) 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349* , and *Sniadach's* California progeny [*see McCallop v. Carberry (1970) 1 Cal. 3d 903, 83 Cal. Rptr. 666, 464 P.2d 122* ; *Cline v. Credit Bureau of Santa Clara Valley (1970) 1 Cal. 3d 908, 83 Cal. Rptr. 669, 464 P.2d 125* ; *see also Randone v. Appellate Dep't of Superior Court (1971) 5 Cal. 3d 536, 96 Cal. Rptr. 709, 488 P.2d 13* , *cert. denied 407 U.S. 924]* , there has been no prejudgment wage garnishment in California. Following the rationale of the United States Supreme Court decision in *Sniadach*, the California Supreme Court determined that the California prejudgment wage garnishment procedure (former *Code Civ. Proc. §§ 542, 543*) violated procedural due process by depriving an alleged debtor of a substantial property interest since his or her wages could be withheld for a lengthy period of time before a hearing could be held on the merits of the creditor's claim. The Court recognized that the withholding of wages until the hearing might cause substantial hardships to an alleged debtor and his or her family [*McCallop v. Carberry (1970) 1 Cal. 3d 903, 904-907, 83 Cal. Rptr. 666, 464 P.2d 122]* .

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§ 276.16 Federal Consumer Credit Protection Act

[1] Enactment

In 1968, Congress enacted federal wage garnishment laws (*15 U.S.C. §§ 1671-1677*) as part of the Consumer Credit Protection Act (*15 U.S.C. § 1601 et seq.*) to regulate the garnishment of wages. It found that the unrestricted garnishment of wages under the laws of the different states encouraged predatory extensions of credit, frequently resulted in a loss of employment by debtors, and, because of the great disparities among the laws of the states relating to garnishment, in effect destroyed the uniformity of the bankruptcy laws in their application in many areas of the country [*see 15 U.S.C. § 1671(a)*].

[2] Restrictions on Amount Garnished

[a] In General

Under the federal law, an individual's maximum aggregate earnings subject to garnishment may not, except as noted below, exceed (1) 25 percent of his or her disposable earnings (earnings after deducting taxes and other normal withholdings [*15 U.S.C. § 1672(b)*]) for that week, or (2) the amount by which his or her disposable earnings for that week exceed 30 times the federal minimum hourly wage prescribed by *29 U.S.C. § 206(a)(1)*, whichever is less [*15 U.S.C. § 1673(a)*]. Excepted from these restrictions are (1) court support orders, (2) bankruptcy court orders, and (3) debts due for federal or state taxes [*15 U.S.C. § 1673(b)*].

[b] Support Orders

Federal law sets forth a different maximum amount of earnings subject to garnishment for support [*15 U.S.C. § 1673(b)(2)*]. Under this law, the maximum of the aggregate disposable earnings subject to garnishment to enforce a support order is determined by whether or not the employee is supporting a spouse or dependent child other than a spouse or child with respect to whose support the order is used, and by whether the support order is for current or past support. Past support is support for a period that is prior to the 12-week period that ends with the beginning of the workweek subject to the garnishment [*15 U.S.C. § 1673(b)(2)*].

If the employee is supporting a spouse or child, the maximum is 50 percent for current support and 55 percent for past support [*15 U.S.C. § 1673(b)(2)*]. If the employee is not supporting a spouse or child, the maximum is 60 percent for current support and 65 percent for past support [*15 U.S.C. § 1673(b)(2)*].

[3] Protection of Employees Against Discharge

Federal law prohibits an employer from discharging any employee by reason of the fact that his or her earnings have been subjected to garnishment for any one indebtedness [*15 U.S.C. § 1674(a)*]. It further provides that whoever willfully violates this provision shall be fined not more than $1,000, imprisoned for not more than one year, or both [*15 U.S.C. § 1674(b)*].

An employee discharged in violation of *15 U.S.C. § 1674(a)* does not have a private right of action for civil remedies under *15 U.S.C. § 1674(a)* [*Le Vick v. Skaggs Cos. (9th Cir. 1983) 701 F.2d 777, 780* (repudiating contrary holding of *Stewart v. Travelers Corp. (9th Cir. 1974) 503 F.2d 108, 109-114* that civil remedies must be implied for *15 U.S.C. § 1674(a)* violations)].

[4] Effect on State Laws

No federal or state court and no state or officer or agency of a state may make, execute, or enforce any order or process in violation of *15 U.S.C. § 1673* [*15 U.S.C. § 1673(c)*]. The United States Secretary of Labor, however, is authorized to exempt, by regulation, from the provisions of *15 U.S.C. § 1673(a)* and *(b)(2)* garnishments issued under the laws of any state if the Secretary determines that the laws of that state provide restrictions on garnishment that are substantially similar to those provided in *15 U.S.C. § 1673(a)* and *(b)(2)* [*15 U.S.C. § 1675*]. Moreover, the federal wage garnishment law (*15 U.S.C. §§ 1671-1677*) does not annul, alter, affect, or exempt any person from complying with the laws of any state that prohibits garnishment or provides for more limited garnishments than are allowed under the federal law or that prohibits the discharge of any employee by reason of the fact that his or her earnings have been subjected to garnishments for more than one indebtedness [*15 U.S.C. § 1677*].

[5] California Restrictions on Amount Compared

[a] In General

Under California law, the amount of earnings exempt from an earnings withholding order is stated to be that amount that may not be withheld from the judgment debtor's earnings under *15 U.S.C. § 1673(a)* [*Code Civ. Proc. § 706.050*; *see discussion under § 276.16[2]*].

[b] Withholding Order for Support

In the case of support orders, California law provides that, except as provided in *Code Civ. Proc. § 706.052(b)*, relating to an equitable division of a judgment debtor's earnings (*see §§ 276.121, 276.122*), one half of the judgment debtor's disposable earnings plus any amount withheld from the judgment debtor's earnings pursuant to any earnings assignment for support (defined in *Code Civ. Proc. § 706.011(b)*) is exempt from levy if the earnings withholding order is for support under *Code Civ. Proc. § 706.030* (which, among other things, defines a "withholding order for support") [*Code Civ. Proc. § 706.052(a)*]. Under *Code Civ. Proc. § 706.052(c)*, an order made under *Code Civ. Proc. § 706.052(b)* may not authorize the withholding of an amount in excess of the amount that may be withheld for support under *15 U.S.C. § 1673*. On the priority of earnings assignments for support, see *Code Civ. Proc. § 706.031* and § 276.20[10][d].

[c] State Tax Liability

Garnishment of wages to satisify a state tax liability is governed by *Code Civ. Proc. §§ 706.070-706.084* (*see § 276.138*

). Unless a lesser amount is specified in a withholding order for taxes (defined in *Code Civ. Proc. § 706.072(a)*) issued by the state, the amount to be withheld by the employer each pay period is the amount required to be withheld under *15 U.S.C. § 1673(a)* and is not subject to the exception provided in *15 U.S.C. § 1673(b)*; *see § 276.16[2]* [*Code Civ. Proc. § 706.074(b)*]. A withholding order for taxes may, however, be issued by a court requiring the taxpayer's employer to withhold an amount in excess of the amount that may be required to be withheld pursuant to an order issued under *Code Civ. Proc. § 706.074* [*Code Civ. Proc. § 706.076(a)*]. In such case, the court after hearing will issue a withholding order for taxes requiring the employer to withhold and pay over all of the taxpayer's earnings other than the amount the taxpayer proves is exempt under *Code Civ. Proc. § 706.051* (portion necessary for support of employee or employee's family), but in no event less than the amount permitted by *Code Civ. Proc. § 706.050, discussed under § 276.16[2]* [*Code Civ. Proc. § 706.076(e)*].

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§ 276.17 Federal Alimony and Child Support Enforcement Law

The wages of federal public employees, including members of the armed services, are subject to garnishment for alimony or child support obligations [*42 U.S.C. § 659(a)*; *see also* discussion in *§ 276.13*]. The law applies to funds for remuneration of employment [*42 U.S.C. § 659(a)*; *see 5 C.F.R. §§ 581.102(i), 581.103*], which include retirement benefits if garnishment of such funds would be available under state law [*see 5 C.F.R. § 581.103(c)*; *see, e.g., In re Marriage of Sandy (1980) 113 Cal. App. 3d 724, 729-730, 169 Cal. Rptr. 747]* . Funds that are exempted from garnishment against the United States include amounts paid pursuant to the Federal Torts Claims Act [*5 C.F.R. § 581.104(a)*; *see 28 U.S.C §§ 2671 et seq., 1346(b)*]; pension or disability payments from the Veterans Administration [*5 C.F.R. §§ 581.103(c)(6)(iii), (iv)*, 581.104(b)]; refunds or payments made for overpaid or erroneously paid income taxes [*5 C.F.R. § 581.104(c)*]; and certain educational benefits [*5 C.F.R. § 581.104(d)-(f)*], contract payments [*5 C.F.R. § 581.104(g)*], and reimbursements or allowances for employment-related expenses [*5 C.F.R. § 581.104(h), (i)*].

To obtain or contest the garnishment of wages due from, or payable by, the United States, an individual must follow the procedures and comply with the requirements of the general statute [*see 42 U.S.C. § 659*] and regulations promulgated thereunder [*see* 5 C.F.R. pt. 581]. In addition, the particular federal agency involved may have its own specific procedures [*see, e.g.*, 20 C.F.R. pt. 350 (railroad retirement fund); 32 C.F.R. pts. 63 (uniformed services retirement pay), 734 (wages of naval personnel)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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PART II. LEGAL BACKGROUND
B. Garnishment of Wages or Salary

23-276 California Forms of Pleading and Practice--Annotated § 276.18

§ 276.18 California Wage Garnishment Law

The procedures for garnishing the wages or earnings of a judgment debtor are set forth in *Code Civ. Proc. § 706.010 et seq.*, known as the Wage Garnishment Law [*Code Civ. Proc. § 706.010*].

If a judgment creditor seeks to garnish money other than earnings owed by a public entity to a judgment debtor, the procedures set forth in *Code Civ. Proc. § 708.710 et seq.* (*see § 276.60*) must be followed [*see Code Civ. Proc. § 708.720(a), (c)*]. A judgment creditor desiring to garnish the earnings of an employee of a public entity, however, must follow the procedures set forth in *Code Civ. Proc. § 706.010 et seq.* [*see Code Civ. Proc. § 708.720(b)*].

Legal Topics:

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

[1] Terms Defined by Statute

A number of terms used in the California Wage Garnishment Law, including those set forth below, are defined in that law or in the federal statutes, or both (*see Code Civ. Proc. § 706.011*; *15 U.S.C. § 1672*).

[2] Earnings

The term "earnings" means compensation payable by an employer to an employee for personal services performed by the employee, whether denominated as wages, salary, commission, bonus, or otherwise [*Code Civ. Proc. § 706.011(a)*]. As used in the federal restrictions on garnishment (*15 U.S.C. §§ 1671-1677*), the term "earnings" also includes periodic payments pursuant to a pension or retirement plan [*15 U.S.C. § 1672(a)*].

[3] Disposable Earnings

The term "disposable earnings" means that part of the earnings of an individual remaining after the deduction from those earnings of any amounts required by law to be withheld [*15 U.S.C. § 1672(b)*].

[4] Employee

The term "employee" means a public officer and any individual who performs services subject to the right of the employer to control what will be done and how it will be done [*Code Civ. Proc. § 706.011(c)*].

[5] Employer

The term "employer" means a person for whom an individual performs services as an employee [*Code Civ. Proc. § 706.011(d)*].

[6] Levying Officer for Earnings Withholding Order for Support

When a local child support agency issues a withholding order for support, a reference in the Wage Garnishment Law (*Code Civ. Proc. § 706.010 et seq.*) to a levying officer is deemed to mean the local child support agency who issues the withholding order for support [*Code Civ. Proc. § 706.030(b)(1)*].

[7] Person

The term "person" includes an individual, a corporation, a partnership or other incorporated association, a limited liability company, and a public entity [*Code Civ. Proc. § 706.011(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 276.20 Execution Against Earnings

[1] Time for Enforcing Judgment

A party in whose favor a money judgment has been entered may enforce the judgment at any time within 10 years after the judgment was entered or renewed [*see Code Civ. Proc. §§ 683.010-683.030, 683.120*; *see also Fam. Code §§ 290, 4500, 5100 et seq.* (enforcement of judgment, order, or decree for support within 10 years or other statutory period)].

[2] Writ of Execution

Enforcement of a money judgment may be secured by the levy of a writ of execution [*see Code Civ. Proc. § 699.010*]. The writ is issued by the court clerk on application of the judgment creditor and is directed to the levying officer in the county where the levy is to be made and to any registered process server [*Code Civ. Proc. § 699.510(a)*]. The writ will require the levying officer to whom it is directed to enforce the money judgment [*Code Civ. Proc. § 699.520*].

The writ must include the following information [*Code Civ. Proc. § 699.520*]:

- The date the writ is issued.
- The title of the court in which the judgment is entered.
- The cause and number of the action.
- The judgment creditor's name and address.
- The judgment debtor's name and last known address.
- The date the judgment and any subsequent renewals were entered, and where entered in the court's records.

- The total amount of the judgment entered or renewed, together with costs thereafter added to the judgment pursuant to *Code Civ. Proc. § 685.090* and the accrued interest [*see Code Civ. Proc. § 685.010*] on the judgment from the date of entry or renewal to the date the writ is issued, reduced by any partial satisfactions and by any amounts no longer enforceable.

- The amount required to satisfy the judgment on the date the writ is issued.

- The amount of interest accruing daily on the principal amount of the judgment from the date the writ is issued.

- Whether any person has requested notice of sale under the judgment and, if so, the name and mailing address of the person [*Code Civ. Proc. § 699.520*].

- The sum of fees and costs that are added to the judgment pursuant to *Gov. Code § 6103.5* and that are in addition to the amount owing to the judgment creditor on the judgment.

- Whether the writ of execution includes any additional names of the judgment debtor pursuant to an affidavit of identity, as defined in *Code Civ. Proc. § 680.135*.

For a form for a writ of execution on a money judgment, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.

A writ of execution is a prerequisite to the issuance of an earnings withholding order for the garnishment of a judgment debtor's earnings [*see Code Civ. Proc. §§ 706.102(a), 706.108(a)*]. However, the duration of a writ of execution is limited [*see Code Civ. Proc. § 699.560(a)*] and, therefore, it may expire and be returned to the court before the earnings withholding order has terminated [*see Code Civ. Proc. § 699.560(d)*]. Nevertheless, the earnings withholding order will continue in effect [*see Code Civ. Proc. §§ 699.560(d), 706.033*]. At the time the withholding order terminates, the levying officer must make a supplemental return on the writ [*Code Civ. Proc. §§ 699.560(d), 706.033*].

[3] Garnishment of Earnings

A levy of execution on the earnings of an employee is made by service of an earnings withholding order on the employer based on the writ of execution and an application by the judgment creditor [*Code Civ. Proc. §§ 706.021, 706.102, 706.108*].

An earnings withholding order may not be issued against the earnings of the judgment debtor's spouse except by court order on noticed motion [*Code Civ. Proc. § 706.109*].

[4] Application for Earnings Withholding Order

A wage garnishment is initiated by the filing of an application [§ 276.124] by a judgment creditor with a levying officer or a registered process server who issues an earnings withholding order [§§ 276.125, 276.126] ordering an employer to withhold earnings and to pay them over to the levying officer or registered process server [*Code Civ. Proc. §§ 706.102(a), 706.108(a)*].

[5] Time to Apply for Earnings Withholding Order

An application for an earnings withholding order must be made prior to expiration of 180 days from the date the writ of execution was issued [*Code Civ. Proc. §§ 706.102(a), 706.108(a); see also Code Civ. Proc. § 699.530(b)*].

If an earnings withholding order is terminated by the court, unless the court otherwise orders or unless there is a material change of circumstances, a creditor may not apply for another order directed to the same employer with respect to the same judgment debtor for a period of 100 days following service of the earnings withholding order or 60 days after the date of termination of the order, whichever is later [*Code Civ. Proc. § 706.105(h)*]. *Code Civ. Proc. § 706.105(h)* does not apply, however, to applications for earnings withholding orders for support or for taxes [*Code Civ. Proc. § 706.105(k)*].

[6] Issuance of Earnings Withholding Order

If 180 days from the date the writ of execution was issued have not expired and application was made to a levying officer for an earnings withholding order, the levying officer will promptly issue an earnings withholding order on the judgment creditor's application [*Code Civ. Proc. §§ 699.530(b), 706.102(a), 706.125*; §§ 276.125, 276.126]. If 180 days from the date the writ of execution was issued have not expired and application was made to a registered process server for an earnings withholding order, the registered process server may issue an earnings withholding order [*Code Civ. Proc. §§ 699.530(b), 706.108(a)*; Forms 6, 7]. The reverse side of the order sets out instructions to the employer [*see Code Civ. Proc. §§ 706.103(b), 706.108(c), 706.127*; *see also §§ 276.125, 276.126*(forms)].

A local child support agency may issue a withholding order for support [*Code Civ. Proc. § 706.030(b)(1)* (reference to "levying officer" under the Wage Garnishment Law [*Code Civ. Proc. § 706.010 et seq.*] is deemed to include the local child support agency who issues withholding order for support)]. For further discussion and forms, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* .

[7] Service of Earnings Withholding Order

An earnings withholding order is served by the levying officer on the employer by delivery of the order to any of the persons listed in *Code Civ. Proc. § 706.101(a)(1)* or *(2)*, in a manner specified in *Code Civ. Proc. § 706.101(b)-(d)* [*Code Civ. Proc. §§ 706.021, 706.101, 706.103(a)(1)*; *see § 276.126*]. An earnings withholding order may also be served on an employer by a registered process server whether or not the earnings withholding order was issued by a levying officer or by a registered process server [Code Civ. Proc. § 706.180(c)]. The local child support agency is required to serve on the employer a withholding order for support [*Code Civ. Proc. § 706.030(b)(3)*]. For further discussion and forms relating to withholding orders for support, *see* Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* .

No earnings withholding order may be served on an employer, however, after expiration of the time specified in *Code Civ. Proc. § 699.530(b)* [*Code Civ. Proc. §§ 706.103(c), 706.108(c)*].

At the same time the earnings withholding order is served, the levying officer will also serve on the employer a copy of the employer's instructions (which appear on the reverse side of the order; *see §§ 276.125, 276.126*), a form for notice to the employee of earnings withholding (§ 276.127, Employee Instructions), and a form for the employer's return (§ 276.129) [*see Code Civ. Proc. §§ 706.103(a), (b)* 706.122, 706.126].

If the order is served by a registered process server, the registered process server must serve on the designated employer all of the following [*Code Civ. Proc. § 706.108(c)*]:

- The original and one copy of the earnings withholding order.
- The form for the employer's return.
- The notice to employee of earnings withholding order.

- A copy of the employer's instructions referred to in *Code Civ. Proc. § 706.127*, except as otherwise prescribed in rules adopted by the Judicial Council.

Within five court days after service, the registered process server must file' all of the following with the levying officer [*Code Civ. Proc. § 706.108(d)*]:

- The writ of execution, if it is not already in the hands of the levying officer.
- Proof of service on the employer of the papers listed in *Code Civ. Proc. § 706.108(c)*.
- Instructions in writing, as required by the provisions of *Code Civ. Proc. § 687.010*.

If the registered process server has issued the earnings withholding order, he or she, before serving the earnings withholding order, must deposit with the levying officer a copy of the writ of execution, the application for issuance of an earnings withholding order, and a copy of the earnings withholding order. The registered process server must also pay the fee provided by *Gov. Code § 26750* [*Code Civ. Proc. § 706.108(b)*].

When a local child support agency serves on the employer a withholding order for support, the local child support agency must also serve a notice informing the support obligor of the effect of the order and of his or her right to hearings and remedies provided in the Wage Garnishment Law (*Code Civ. Proc. § 706.010 et seq.*), and in the Family Code [*see Code Civ. Proc. § 706.030(b)(3)*]. For further discussion, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* .

If the fee provided by *Gov. Code § 26750* has been paid, the levying officer must perform all other duties required by the provisions of Code Civ. Proc. §§ 706.010-706.154 as if the levying officer had served the earnings withholding order. If the registered process server does not comply with *Code Civ. Proc. § 706.108(b)*, when applicable, and *Code Civ. Proc. § 706.108(d)*, the service of the earnings withholding order is ineffective and the levying officer is not required to perform any duties under the order. The levying officer may also terminate the order and release any withheld earnings to the judgment debtor [*Code Civ. Proc. § 706.108(e)*].

The fee for services of a registered process server under § 706.108 must be allowed as a recoverable cost pursuant to *Code Civ. Proc. § 1033.5* [*Code Civ. Proc. 706.108(f)*].

[8] Service of Order as Creating Lien

Service of an earnings withholding order creates a lien on the earnings of the judgment debtor in the amount required to be withheld pursuant to the order. The lien continues for a period of one year from the date the earnings of the judgment debtor become payable unless the amount required to be withheld pursuant to the order is paid as required by law [*Code Civ. Proc. § 706.029*].

[9] Withholding Period

The withholding period commences on the 10th day after service on the employer of an earnings withholding order and continues until the earliest of the following: (1) the date the employer has withheld the full amount required to satisfy the order; (2) the date specified in a court order served on the employer; (3) the date specified in a notice of termination served on the employer by the levying officer; or (4) the date a dormant or suspended earnings withholding order terminates [*Code Civ. Proc. § 706.022(a)*; *see Code Civ. Proc. § 706.032* (dormant or suspended order)]. An earnings withholding order becomes dormant or suspended if the withholding ceases because the judgment debtor's employment is terminated or his or her earnings become subject to an order or assignment of higher priority [*see Code Civ. Proc. §§ 706.022(a)(4), 706.032(a)*]. If the employment is terminated, the withholding order will terminate at the end of a

continuous 180-day period, during which no amounts are withheld under the order [*Code Civ. Proc. § 706.032(a)(1)*]. If an order or assignment of higher priority takes effect, the withholding order will terminate at the end of a continuous two-year period, during which no amounts are withheld under the order [*Code Civ. Proc. § 706.032(a)(2)*].

A withholding order for support is governed by these time limitations except that it automatically terminates one year after the employment of the employee by the employer terminates [*Code Civ. Proc. § 706.030(c)(1)*].

[10] Employer's Duty to Withhold

[a] In General

Except as otherwise provided by statute, an employer must withhold the amounts required by an earnings withholding order from all earnings payable for any pay period that ends within the withholding period [*Code Civ. Proc. § 706.022(b)*]. Unless the earnings withholding order is ineffective [*see Code Civ. Proc. § 706.104(b)* and *discussion under § 276.20[12]*], the employer will begin withholding wages in accordance with the order.

[b] Multiple Orders

Except as otherwise provided in the Wage Garnishment Law, if an employer is served with two or more earnings withholding orders with respect to earnings of the same employee, the employer is required to comply with the first order served [*Code Civ. Proc. § 706.023(a)*]. If, however, the employer is served with two or more orders on the same day, the employer is required to comply with the order issued pursuant to the judgment first entered. If orders served on the employer on the same day are based on judgments entered on the same day, the employer is required to comply with whichever one of the orders the employer selects [*Code Civ. Proc. § 706.023(b)*]. If an order is served during the period that an employer is required to comply with another order with respect to the earnings of the same employee, the subsequent order is ineffective and the employer is not permitted to withhold earnings pursuant to the subsequent order [*Code Civ. Proc. § 706.023(c)*; *but see Code Civ. Proc. §§ 706.030, 706.031* (*discussed under § 276.20[10][c], [d]*)].

[c] Priority of Withholding Orders for Support

A withholding order for support is an earnings withholding order issued on a writ of execution to collect delinquent amounts payable under a judgment for the support of a child, spouse, or former spouse of the judgment debtor and must be so denoted on its face [*Code Civ. Proc. § 706.030(a)*]. A withholding order for support has priority over any other earnings withholding order, and the employer is required to comply with it, notwithstanding the requirements of another earnings withholding order [*Code Civ. Proc. § 706.030(c)(2)*]. The employer is, however, required to withhold earnings pursuant to both a withholding order for support and another earnings withholding order simultaneously, subject to the provisions of *Code Civ. Proc. §§ 706.030(c)(2)*, and *706.050-706.052* (*discussed under §§ 276.16[5], 276.22*) [*Code Civ. Proc. § 706.030(c)(3)*].

[d] Priority of Earning Assignment Orders for Support

An earnings assignment order for support is an order, made pursuant to *Fam. Code § 5200 et seq.* or *Prob. Code § 3088*, that requires an employer to withhold earnings for child or spousal support [*see Code Civ. Proc. § 706.011(b)*]. For a discussion of these provisions and the procedure for securing an earnings assignment order, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* . Nothing in the Wage Garnishment Law affects an earnings assignment order for support [*Code Civ. Proc. § 706.031(a)*].

An earnings assignment order for support has priority over any earnings withholding order [*Code Civ. Proc. § 706.031(b)*]. Subject to this provision and to *Code Civ. Proc. § 706.031(d)* and *(e)*, an employer is required to withhold earnings of an employee pursuant to both an earnings assignment order for support and an earnings withholding order [*Code Civ. Proc. § 706.031(c)*]. With respect to an earnings withholding order, the employer is required to withhold

only to the extent that the sum of the amount withheld pursuant to any earnings assignment order for support and the amount withheld pursuant to the earnings withholding order does not exceed the amount that may be withheld under *Code Civ. Proc. §§ 706.050-706.052* (*discussed under §§ 276.16[5], 276.22*) [*Code Civ. Proc. § 706.031(d)*]. With respect to an earnings withholding order for taxes, the employer is required to withhold only to the extent that the sum of the amount withheld pursuant to any earnings assignment order for support and the amount withheld pursuant to the earnings withholding order for taxes does not exceed the amount that may be withheld under *Code Civ. Proc. §§ 706.070-706.084*, relating to earnings withholding orders for taxes [*Code Civ. Proc. § 706.031(e)*; *see § 276.136*]. An earnings assignment order for support made in family law proceedings has priority over any attachment, execution, or other assignment [*Fam. Code § 5243*]. A wage assignment for spousal support made under *Prob. Code § 3008(e)* (conservatee spouse) has priority over any execution or other assignment unless otherwise ordered by the court or unless the other assignment is a child support wage assignment [*Prob. Code § 3088(e)* (referring to former *Civ. Code § 4701* for wage assignments, which was repealed by its own terms on January 1, 1991; *now see Civ. Code § 4390 et seq.* (operative until January 1, 1994); *Fam. Code § 5200 et seq.* (operative on and after January 1, 1994))].

An employer on whom an earnings assignment order for support is served is required to notify the levying officer that a supervening wage assignment is in effect [*Code Civ. Proc. § 706.031(b)*].

For further discussion of earnings assignments and forms for use in obtaining them, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* .

[11] Notice to Employee

Within 10 days from the date of service of an earnings withholding order, the employer is required to deliver to the employee a copy of the withholding order [§§ 276.125, 276.126] and the notice to employee of earnings withholding (§ 276.127, Employee Instructions), unless the employee is no longer employed by the employer and the employer does not owe the employee any earnings [*Code Civ. Proc. § 706.104(a)*].

The employer is not subject to civil liability for failure to comply with *Code Civ. Proc. § 706.104(a)*, but nothing in that section limits the power of a court to hold the employer in contempt of court for failure to comply [*Code Civ. Proc. § 706.104(a)*].

For discussion of the particular notice and other documents that *Code Civ. Proc. § 706.030(b)(3)* requires an employer to deliver to a support obligor under a withholding order for support, including applicable civil penalties, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* .

[12] Employer's Return

Within 15 days from the date of service of the earnings withholding order, the employer is required to complete the employer's return [§ 276.128] and send it by first-class, postage prepaid mail to the levying officer [*Code Civ. Proc. § 706.104(b)*].

If the order is ineffective, the employer is required to state in the return that it will not be complied with for this reason and return the order to the levying officer with the employer's return [*Code Civ. Proc. § 706.104(b)*].

If a dormant or suspended earnings withholding order terminates [*see Code Civ. Proc. § 706.032(a)*;§ 276.20[9]], the employer must return the order to the levying officer. The returned order must be accompanied by a statement of the reasons for the return [*Code Civ. Proc. § 706.032(b)*].

[13] Payment of Amounts Withheld to Levying Officer

The amount withheld must be paid monthly to the levying officer not later than the fifteenth day of each month. The initial monthly payment must include all the amounts required to be withheld during the preceding calendar month up to the close of the employee's pay period ending closest to the last day of that month. Each monthly payment thereafter must include amounts withheld from the employee's earnings for services rendered in the interim up to the close of the employee's pay period ending closest to the last day of the preceding calendar month [*Code Civ. Proc. § 706.025(a)*].

The employer may, however, elect to pay more frequently than monthly. If this is done, payment of the amount withheld for each pay period must be made not later than 10 days after the close of the pay period [*Code Civ. Proc. § 706.025(b)*].

[14] Employer Deduction for Each Payment

The employer may deduct $1.50 from the employee's earnings for each payment made in accordance with an earnings withholding order under the Wage Garnishment Law [*Code Civ. Proc. § 706.034*].

[15] Duty of Levying Officer to Receive and Pay Over Money

The levying officer is required to receive and account for all amounts paid by the employer pursuant to Code Civ. Proc. § 706.025, *above* , and to pay the amounts so received over to the person entitled to them at least once every 30 days [*Code Civ. Proc. § 706.026(a)*]. At least once every two years, the levying officer must account to the court for all amounts collected under the order, including costs and interest added to the amount due [*Code Civ. Proc. § 706.026(b)*].

[16] Satisfaction

The amount required to satisfy an earnings withholding order is the total amount required to satisfy the writ of execution on the date the order is issued, with the following additions and subtractions [*Code Civ. Proc. § 706.024(a)*]: (1) the addition of the statutory fee for service of the order and any other statutory fees for performing duties under the order; (2) the addition of costs [*see Code Civ. Proc. § 685.090*]; (3) the subtraction of the amount of any partial satisfactions; and (4) the addition of daily interest accruing after issuance of the order, as adjusted for partial satisfactions.

The levying officer must compute and collect the costs and interest required to satisfy the order, including any additional interest or costs not entered on the writ [*Code Civ. Proc. § 685.050(b)*]. If costs are added to the judgment while the earnings withholding order is outstanding [*see Code Civ. Proc. § 685.090(a)*; *see also* Ch. 174, *Costs and Attorney's Fees*], the levying officer must add the costs to the amount to be collected pursuant to the order, provided that the officer receives either of the following before the order is returned: (1) a certified copy of the court order allowing the costs; or (2) a certificate from the court clerk that the costs have been added to the judgment after a memorandum of costs [*see Code Civ. Proc. § 685.070*] was filed and that no motion to tax was made within the time allowed for such a motion [*Code Civ. Proc. § 685.090(c)*].

The levying officer has discretion to give written notice from time to time to the employer of the amount required to satisfy the earnings withholding order. The employer must determine the withholding amount based on the notice, regardless of whether the order originally served states a different amount [*Code Civ. Proc. § 706.024(b)*].

After the full amount required to satisfy the order is withheld, interest ceases to accrue on that amount [*Code Civ. Proc. § 706.024(c)*; *see Code Civ. Proc. § 685.030(a)(2)*]. At that time, the levying officer must return the writ or, if the writ is no longer outstanding, must make a supplemental return to the court [*Code Civ. Proc. §§ 699.560(a)(2), (d), 706.033*].

[17] Final Earnings Withholding Order for Costs and Interest

After payment of the amount stated in the order, if any costs and interest remain unsatisfied, the judgment creditor may obtain a final earnings withholding order. A final order is issued after the earlier order has been returned satisfied, and it may authorize the collection only of unsatisfied costs and interests that were not collected under the prior order [*Code Civ. Proc. § 706.028(a)*, *(b)*]. On the date the final order is issued, interest ceases to accrue, and no additional costs may be added except statutory fees for serving the order and performing duties under the order [*Code Civ. Proc. § 706.028(d)*; *see Code Civ. Proc. § 685.030(a)(2)*]. The final earnings withholding order is enforceable in the same manner as other earnings withholding orders [*Code Civ. Proc. § 706.028(c)*]. Satisfaction of the amount stated as owing in the final order is equivalent to satisfaction of the money judgment [*Code Civ. Proc. § 706.028(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 276.21 Equitable Division of Earnings for Support

If the earnings withholding order is for support, the court will, on the motion of any interested party [§ 276.120], make an equitable division of the judgment debtor's earnings, taking into account the needs of all the persons the judgment debtor is required to support, by an order determining the amount to be withheld from earnings pursuant to the withholding order for support [*Code Civ. Proc. § 706.052(b)*; *see § 276.121*]. The order may not, however, authorize the withholding of an amount in excess of the amount that may be withheld for support under *15 U.S.C. § 1673* (*discussed under § 276.16[2][b]*) [*Code Civ. Proc. § 706.052(c)*; *see also § 276.121*]. No findings are required in court proceedings under the Wage Garnishment Law [*Code Civ. Proc. § 706.106*].

Legal Topics:

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23-276 California Forms of Pleading and Practice--Annotated § 276.22

§ 276.22 Exempt Earnings

In addition to the restrictions on withholding (*see discussion under § 276.16[5]*), the portion of earnings the judgment debtor proves is necessary for his or her support or for the support of his or her family supported in whole or in part by the judgment debtor is exempt from levy under the Wage Garnishment Law unless (1) the debt was incurred for the common necessaries of life furnished to the judgment debtor or to his or her family; (2) the debt was incurred for personal services rendered by an employee or former employee of the judgment debtor; (3) the order is a withholding order for support under *Code Civ. Proc. § 706.030*; or *(4)* the order is one governed by *Code Civ. Proc. §§ 706.070-706.084*, relating to withholding orders for taxes [*Code Civ. Proc. § 706.051(b), (c)*]. As used in the foregoing provisions, "family" includes the spouse or former spouse of the judgment debtor [*Code Civ. Proc. § 706.051(a)*].

Although the term "necessaries," as applied to the requisites of life, is a relative term not confined to what is absolutely essential to life and when used in the broad sense encompasses many of the conveniences of a refined society, *Code Civ. Proc. § 706.051(c)(1)* does not refer to "necessaries" in the broad sense. On the contrary, the phrase "necessaries of life" is preceded by the word "common," which connotes such things as are ordinarily required for the sustenance of all people [*Ratzlaff v. Portillo (1971) 14 Cal. App. 3d 1013, 1015-1016, 92 Cal. Rptr. 722* (construing predecessor statute and holding that car is not a common necessary of life because of availability of public transportation, home delivery service, and neighborhood shopping centers)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23-276 California Forms of Pleading and Practice--Annotated § 276.23

§ 276.23 Claim of Exemption

[1] When Claim Is Available and Procedure

A judgment debtor may, except as noted below, claim an exemption under *Code Civ. Proc. § 706.051* (*discussed under § 276.22*) under either of the following circumstances: (1) no prior hearing has been held with respect to the earnings withholding order; or (2) there has been a material change in circumstances since the time of the last prior hearing on the earnings withholding order [*Code Civ. Proc. § 706.105(a)*]. The claim is made by filing with the levying officer the original and one copy of (1) the judgment debtor's claim of exemption [*see § 276.130*] and (2) the judgment debtor's financial statement [*see § 276.131*] [*Code Civ. Proc. § 706.105(b)*]. The levying officer will then, by first-class mail, postage prepaid, send the following to the judgment creditor: (1) a copy of the claim; (2) a copy of the financial statement; and (3) a notice of the filing of the claim of exemption [§ 276.132] [*Code Civ. Proc. § 706.105(c)*].

The foregoing procedure does not apply, however, to an earnings withholding order for support or taxes [*Code Civ. Proc. § 706.105(k)*].

[2] Contents of Claim

A judgment debtor's claim of exemption [*see § 276.131*] is required to be executed under oath and indicate how much the judgment debtor believes should be withheld from his or her earnings each pay period by the employer pursuant to the earnings withholding or der and state the judgment debtor's present mailing address [*Code Civ. Proc. § 706.123*].

[3] Disposition Without Hearing

The employee may claim that all earnings are exempt or may agree to the withholding of a portion of earnings [*see Code Civ. Proc. § 706.123*]. The judgment creditor may oppose the claim of exemption or, by taking no action, in effect agree to the terms of the employee's claim [*see Code Civ. Proc. § 706.105(d), (f)*]. If the levying officer does not receive a notice of opposition to the claim of exemption within 10 days after the date the notice of claim of exemption was mailed and a notice of hearing not later than 10 days after the notice of opposition to the claim of exemption was filed (see discussion § 276.23[4]), the levying officer is required to serve on the employer either a notice that the order has

been terminated if all the employee's earnings were claimed to be exempt or, if only a portion of the earnings were claimed to be exempt, a modified earnings withholding order which reflects the amount of earnings so claimed [*Code Civ. Proc. § 706.105(f)*; *see § 276.136*].

[4] Creditor's Opposition to Claim

A judgment creditor who desires to contest a claim of exemption must, within 10 days after the date the notice of claim of exemption [§ 276.132] was mailed, file with the levying officer a notice of opposition to the claim [*Code Civ. Proc. § 706.105(d)*; *see § 276.132*]. Within the same 10-day period, the judgment creditor must file a notice of motion for an order determining the claim of exemption [*Code Civ. Proc. § 706.105(e)*; *see § 276.133*]. Failure to file these papers within the specified period may result in a waiver by the judgment creditor of his or her right to object to the claim of exemption [*see Westervelt v. Robertson (1981) 122 Cal. App. 3d Supp. 1, 8-10 , 176 Cal. Rptr. 94* (involving former Code Civ. Proc. § 723.105(d), (e) (*now Code Civ. Proc. § 706.105(d), (e)*))].

[5] Service and Filing of Papers and Hearing on Claim

If the papers are timely, the hearing on the motion is held within 30 days from the date the notice of motion was filed unless continued by the court for good cause [*Code Civ. Proc. § 706.105(e)*]. At least 16 court days prior to the hearing, the judgment creditor must give written notice of the hearing to the levying officer [*Code Civ. Proc. §§ 706.105(e), 1005(b)*; *see Code Civ. Proc. § 1005(a)(3)*]. If service is by mail, the 16-day period is increased by the following time periods: 5 calendar days if the place of mailing and address are within California; 10 calendar days if either the place of mailing or address is outside California, but within the United States; 20 calendar days if either the place of mailing or address is outside the United States; and 2 calendar days if service is by fax, Express Mail, or other overnight delivery method [*Code Civ. Proc. § 1005(b)*; *see Code Civ. Proc. §§ 706.105(e), 1005(a)(3)*]. However, the court or judge may prescribe a shorter time [*Code Civ. Proc. § 1005(b)*; *see Code Civ. Proc. §§ 706.105(e), 1005(a)(3)*].

The judgment creditor must also serve a notice of hearing [*see § 276.134*] on the judgment debtor and, if the claim of exemption so requests, on the judgment debtor's attorney [*Code Civ. Proc. § 706.105(e)*]. Service must be made at least 16 court days prior to the hearing with additional time if service is by mail, as discussed *above* [*Code Civ. Proc. § 1005(b)*; *see Code Civ. Proc. §§ 706.105(e), 1005(a)(3)*]. Service is deemed made when the notice of hearing and a copy of the notice of opposition are deposited in the mail, postage prepaid, addressed to the judgment debtor at the address stated in the claim of exemption, and if requested, to the judgment debtor's attorney at the address stated in the claim [*Code Civ. Proc. § 706.105(e)*]. The judgment creditor is required to file proof of the service with the court [*Code Civ. Proc. § 706.105(e)*].

After receiving the notice of the hearing and before the date set for the hearing, the levying officer is required to file the claim of exemption and the notice of opposition with the court [*Code Civ. Proc. § 706.105(e)*]. The judgment creditor may fill out the Judicial Council form of notice of hearing [Judicial Council Form WG-010 (also numbered Form EJ-175); § 276.135] to indicate that he or she will not appear at the hearing and will be submitting the issue on the papers filed. In turn, the judgment debtor may elect not to appear and the matter will be determined on the papers filed [*see § 276.127*].

[6] Findings and Order

No findings are required in court proceedings under the Wage Garnishment Law [*Code Civ. Proc. § 706.106*].

If, after hearing, the court orders that the earnings withholding order be modified or terminated, the clerk will promptly transmit a certified copy of the order to the levying officer who will promptly serve on the employer a copy of the modified earnings withholding order or a notice that the earnings withholding order has been terminated. The court may order that the earnings withholding order be terminated as of a date which precedes the date of hearing [*Code Civ. Proc.*

§ 706.105(g)].

If the court determines that any amount withheld pursuant to the earnings withholding order is to be paid to the judgment debtor, it will make an order directing the person who holds such amount to pay it promptly to the judgment debtor [*Code Civ. Proc. § 706.105(g)*].

If the employer has withheld and paid over amounts pursuant to an order after the date of termination of the order but prior to receipt of the notice of termination, the judgment debtor may recover such amounts only from the levying officer if the levying officer still holds the amounts. If the levying officer has paid the amounts to the judgment creditor the judgment debtor may recover them from the creditor. If the employer has withheld earnings after termination of the order but has not paid them over to the levying officer, the employer is required to pay them promptly to the judgment debtor [*Code Civ. Proc. § 706.105(i)*].

[7] Appeal

An appeal lies from any court order under *Code Civ. Proc. § 706.105* denying a claim of exemption or modifying or terminating an earnings withholding order. The appeal is taken in the manner provided for appeals in the court in which the proceeding is had. An appeal by the judgment creditor does not stay the order modifying or terminating the earnings withholding order. Until such time as the order is set aside or modified, the order allowing the claim of exemption in whole or in part is given the same effect as if the appeal had not been taken [*Code Civ. Proc. § 706.105(j)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23-276 California Forms of Pleading and Practice--Annotated § 276.24

§ 276.24 Employer Violations

In addition to the criminal penalties provided for wrongful discharge under federal law [*discussed under § 276.16[3]*], an employer may incur civil and criminal penalties for violation of the Wage Garnishment Law (*Code Civ. Proc. §§ 706.010-706.154*).

For example, an employer who fails to withhold or pay over the amount required to be withheld and paid over pursuant to the Wage Garnishment Law may be sued in a civil action by the judgment creditor to recover the amount [*Code Civ. Proc. § 706.154(a)* (which provides that this remedy is not exclusive)]. However, an employer is not subject to any civil or criminal penalty for complying with any written order or written notice which purports to be given or served in accordance with the provisions of the Wage Garnishment Law unless the employer has actively participated in a fraud [*Code Civ. Proc. § 706.154(b)*].

As another example, employers are prohibited from deferring or accelerating any payment of earnings to an employee with the intent to defeat or diminish the judgment creditor's rights under an earnings withholding order [*Code Civ. Proc. § 706.153(a)*; *see §§ 276.125, 276.126* (Employer's Instructions, pointing out that employee's pay period must not be changed to prevent order from taking effect)]. An employer who violates this provision may be sued in a civil action by the judgment creditor to recover the amount that would have been withheld and paid over if the order had been complied with [*Code Civ. Proc. § 706.153(b)* (which provides that this remedy is not exclusive)].

An employer who withholds earnings pursuant to the Wage Garnishment Law and, with the intent to defraud either the judgment creditor or the judgment debtor, fails to pay the withheld earnings over to the levying officer is guilty of a misdemeanor [*Code Civ. Proc. § 706.152*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23-276 California Forms of Pleading and Practice--Annotated § 276.25

§ 276.25 Garnishment of Other Personal Property

[1] Prejudgment Garnishment

The procedures for the prejudgment garnishment of personal property, other than wages or salary, are governed by the attachment statutes (*see generally Code Civ. Proc. §§ 481.010-492.090*). For a detailed discussion of these procedures and forms for obtaining and serving a writ of attachment, see Ch. 62, *Attachment* .

[2] Postjudgment Garnishment

The garnishment of property, other than wages or salary, in postjudgment proceedings is part of the statutory scheme for the enforcement of judgments by means of a writ of execution (*see generally Code Civ. Proc. §§ 700.010-700.200*), but a copy of the writ of execution and a notice of levy are served on the third person [*see, e.g., Code Civ. Proc. §§ 700.040* (tangible personal property), 700.060 (goods in bailee's possession), 700.140 (deposit account), 700.150 (property in safe deposit box), 700.170 (accounts receivable or general intangibles)]. Further, there are special supplementary proceedings by which a third person, after a hearing and examination, may be compelled to surrender property belonging to the judgment debtor (see *Code Civ. Proc. §§ 708.120(a), 708.180, 708.205, 708.210*). For a more detailed discussion of these procedures and forms for use on execution and in proceedings supplementary to execution, see Ch. 254, *Executions and Enforcement of Judgments* .

Legal Topics:

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

§§ 276.26[Reserved]

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23-276 California Forms of Pleading and Practice--Annotated § 276.40

§ 276.40 Deposit Account or Property in Safe Deposit Box Standing in Name of Third Person

[1] Special Procedures Required

If the personal property sought to be levied on is a deposit account or in a safe deposit box, levy is made, subject to *Code Civ. Proc. § 700.160*, on the financial institution with which the deposit account or safe deposit box is maintained. The levying officer must personally serve a copy of the writ of execution and a notice of levy on the financial institution or personally serve the writ of execution and notice of levy to a centralized location within California designated by the financial institution [*Code Civ. Proc. §§ 700.140(a), 700.150(a)*]. The levying officer must also serve, personally or by mail, a copy of the writ of execution and a notice of levy on any third person in whose name the deposit account or safe deposit stands at the time of levy or promptly thereafter [*Code Civ. Proc. §§ 700.140(b), 700.150(b)*].

If a deposit account or safe-deposit box stands in the name of a person other than the judgment debtor, either alone or together with other third persons, except as provided in *Code Civ. Proc. § 700.160(b)*, it is not subject to levy under *Code Civ. Proc. § 700.140* or *700.150* unless the levy is authorized by court order. The levying officer must serve a copy of the court order on the third person at the time the copy of the writ of execution and the notice of levy are served on the third person [*Code Civ. Proc. § 700.160(a)*].

A court order is not required to levy on a deposit account or safe-deposit box standing in the name of any of the following [*Code Civ. Proc. § 700.160(b)*]:

- The judgment debtor, whether alone or together with third persons [*Code Civ. Proc. § 700.160(b)(1)*].

- The judgment debtor's spouse, whether alone or together with other third persons [*Code Civ. Proc. § 700.160(b)(2)*].

- A fictitious business name if an unexpired fictitious business name statement filed pursuant to *Bus. & Prof. Code §§ 17900-17930* lists as the persons doing business under the fictitious business name

either the judgment debtor, the judgment debtor's spouse, or the judgment debtor and the judgment debtor's spouse, but does not list any other person [*Code Civ. Proc. § 700.160(b)(3)*].

- The additional name of a judgment debtor listed on the writ of execution pursuant to an Affidavit of Identity [*see Code Civ. Proc. 680.135*], whether alone or together with third persons.

If the deposit account or safe deposit box stands in the name of the judgment debtor's spouse, an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) showing that the person in whose name the account stands is the judgment debtor's spouse must be delivered to the financial institution at the time of levy [*Code Civ. Proc. § 700.160(b)(2)*].

If the deposit account or safe deposit box stands in the name of a fictitious business as described by *Code Civ. Proc. § 700.160(b)(3)*, a copy of a fictitious business name statement, certified as provided in *Bus. & Prof. Code § 17926*, that satisfies the requirements of *Code Civ. Proc. § 700.160(b)(3)* must be delivered to the financial institution at the time of levy; and if a person other than the defendant is listed in the statement, an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) showing that the other person is the judgment debtor's spouse must also be delivered to the financial institution at the time of levy [*Code Civ. Proc. § 700.160(b)(3)*].

[2] Responsibility of Financial Institution

In any case in which a deposit account in the name of a person other than the judgment debtor, whether alone or together with the judgment debtor, is levied on, the financial institution must not pay to the levying officer the amount levied on until notified to do so by the levying officer. The levying officer may not require the financial institution to pay the amount levied on until the expiration of 15 days after service of notice of levy on the third person [*Code Civ. Proc. § 700.160(c)*].

If a deposit account is levied on, during the time the execution lien is in effect the financial institution will not honor a check or other order for the payment of money drawn against the deposit account, and will not pay a withdrawal from the deposit account that would reduce the deposit account to an amount less than the amount levied on. In determining the amount of the deposit account, the financial institution will not include the amount of items deposited to the credit of the account that are in the process of being collected [*Code Civ. Proc. § 700.140(c)*]. If the property in a safe deposit box is levied on, during the time the execution is in effect the financial institution shall not permit the removal of any of the contents of the safe deposit box except pursuant to the levy [*Code Civ. Proc. § 700.150(c)*].

[3] Nonliability of Financial Institution

During the time the execution lien is in effect, the financial institution is not liable to any person for any of the following [*Code Civ. Proc. § 700.140(d)*]:

(1) Performance of the duties of a garnishee under the levy;

(2) Nonpayment of a check or other order for the payment of money drawn or presented against the deposit account when nonpayment is pursuant to the requirements of *Code Civ. Proc. § 700.140(c)*; or

(3) Refusal to pay a withdrawal from the deposit account when refusal is pursuant to the requirements of *Code Civ. Proc. § 700.140(c)*.

[4] Expenses of Forcibly Opening Safe Deposit Box

The financial institution may refuse to permit the forcible opening of the safe deposit box to permit the removal of the property levied on unless the judgment creditor pays in advance the cost of forcibly opening the box and repairing any

damage caused by it [*Code Civ. Proc. § 700.150(d)*].

Legal Topics:

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

§§ 276.41[Reserved]

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§ 276.60 Manners of Garnishing Public Entity's Obligation

The procedure for garnishing money owed to a judgment debtor by a public entity other than money owed as wages or salary is covered by *Code Civ. Proc. §§ 708.710-708.795*. A "public entity" is defined as meaning the state, a county, city, district, public authority, public agency, and any other political subdivision in the state [*Code Civ. Proc. § 708.710(b)*].

A public entity's obligation to pay money to a judgment debtor may be applied to the satisfaction of the judgment against the judgment debtor only in the manners provided in *Code Civ. Proc. §§ 706.010-706.154* (wage garnishment), 708.410-708.480 (lien in pending action or proceeding), or 708.710-708.795 (money owed other than as wages or salary) [*Code Civ. Proc. § 708.720(a)*]. These procedures are mutually exclusive. Thus, the earnings of a public officer or employee may not be withheld for the payment of a money judgment pursuant to *Code Civ. Proc. §§ 708.710-708.795*, but only pursuant to *Code Civ. Proc. §§ 706.010-706.154*, the Wage Garnishment Law, discussed *above* [*Code Civ. Proc. § 708.720(b)*]. Nor does the procedure set forth in *Code Civ. Proc. §§ 708.710-708.795* apply to a public entity's obligation to pay the judgment debtor money which is the subject of a pending action or special proceeding; rather, an obligation of this nature may be applied to the satisfaction of the money judgment against the judgment debtor only in the manner provided in Code Civ. Proc. §§ 708.4l0-708.480 (see discussion and *forms in Ch. 318, Judgments, § 318.90* et seq.) [*Code Civ. Proc. § 708.720(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23-276 California Forms of Pleading and Practice--Annotated § 276.61

§ 276.61 Money Other Than Wages or Salary

[1] Governing Statutes

The procedure for garnishing money other than wages or salary owed by a public entity to a judgment debtor is governed by *Code Civ. Proc. §§ 708.710-708.795*.

[2] Purpose

The purpose of providing a special garnishment procedure where public entities are involved is to shift to the court the burden of adjudicating any claims of exemption which may arise and to insulate the public entities from liability for wrongful payments to garnishing creditors [*McDaniel v. City & County of San Francisco (1968) 259 Cal. App. 2d 356, 363, 66 Cal. Rptr. 384]* .

[3] Creation of Lien

When money is owing and unpaid to a judgment debtor by a public entity, the judgment creditor may file an abstract, or a certified copy, of the money judgment, together with an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) stating (1) that the judgment creditor desires the relief provided by *Code Civ. Proc. §§ 708.710-708.795* and *(2)* the exact amount then required to satisfy the judgment [*Code Civ. Proc. § 708.730(a)*; *see §§ 276.122, 276.123*]. The judgment creditor may state in the affidavit (declaration) any fact tending to establish the identity of the judgment debtor [*Code Civ. Proc. § 708.730(a)*]. The papers should be filed with the appropriate state agency or local officer [*see Code Civ. Proc. §§ 708.740, 708.750, discussed under § 276.61[6], [7]*; *see Code Civ. Proc. § 708.785(a)* (filing fee)].

The filing of the papers creates a lien on the money owing and unpaid to the judgment debtor by the public entity in an amount equal to that which may properly be applied to the satisfaction of the money judgment under *Code Civ. Proc. §§ 708.710-708.795* [*Code Civ. Proc. § 708.780*].

[4] Notice to Judgment Debtor

Promptly after filing the abstract or certified copy of the judgment and affidavit (declaration) with the public entity, the judgment creditor must personally or by mail serve notice of the filing on the judgment debtor [*Code Civ. Proc. § 708.730(b)*].

[5] Nonliability of Public Officer When Judgment Debtor Not Identifiable

No public officer or employee will be liable for failure to perform a duty imposed by *Code Civ. Proc. §§ 708.710-708.795* unless sufficient information is furnished by the abstract or certified copy of the judgment together with the affidavit (declaration) to enable the officer or employee in the exercise of reasonable diligence to ascertain the identity of the judgment debtor therefrom and from the papers and records on file in the office in which the officer or employee works [*Code Civ. Proc. § 708.790*]. "Office" in this context does not include any branch or subordinate office located in a different city [*Code Civ. Proc. § 708.790*].

[6] Money Owed by State Agency

If the money is owing and unpaid to the judgment debtor by a state agency, the judgment creditor must file the abstract or certified copy of the judgment and affidavit (declaration) with the state agency owing the money before the state agency presents the judgment debtor's claim to the State Controller [*Code Civ. Proc. § 708.740(a)*]. "State agency" in this context means a California state office, officer, department, division, bureau, board, commission, or agency claims against which are paid by warrants drawn by the State Controller [*Code Civ. Proc. § 708.710(c), (d)*].

If this is done, the state agency will, when presenting the judgment debtor's claim to the Controller, (1) note the fact of the filing of the abstract or certified copy of the judgment and the affidavit (declaration); (2) state the amount required to satisfy the judgment as shown by the affidavit (declaration); and (3) state any amounts advanced to the judgment debtor by the state, or owed by the judgment debtor to the state, for expenses or for any other purpose [*Code Civ. Proc. § 708.740(b)*].

[7] Money Owed by Other Public Entity

If the money is owing and unpaid to the judgment debtor by a public entity other than a state agency, the judgment creditor must file the abstract or certified copy of the judgment and affidavit (declaration) with the auditor of the public entity or, if there is no auditor, with the official whose duty corresponds to that of auditor [*Code Civ. Proc. § 708.750*].

[8] Money Owed to Contractor on Public Work

If the judgment debtor is a contractor on a public work, the cost of which is to be paid out of public moneys voted, appropriated, or otherwise set apart for such purpose, only so much of the contract price will be deemed owing and unpaid within the meaning of *Code Civ. Proc. § 708.740* or *708.750, discussed under § 276.61[6], [7],* as may remain payable under the terms of the contract, on its completion, after deducting sums due and to become due to persons described in *Civ. Code § 3181* (persons entitled to serve stop notices). In ascertaining the sums due or to become due, only claims filed in accordance with the provisions of *Civ. Code §§ 3179-3214* (stop notices on public works) will be considered [*Code Civ. Proc. § 708.760(a)*]. For a discussion of stop notices on public works, see Ch. 481, *Public Works* .

[9] Money Owed in Installments as Lottery Prize

Pursuant to *Code Civ. Proc. § 708.755*, a judgment creditor pursuant to *Code Civ. Proc. § 708.710 et seq.*(collection when judgment debtor is creditor of public entity) may create a lien against "a lottery prize" that is to be paid in annual installments. The lien continues until the judgment lien is paid or expires, whichever occurs first [*Code Civ. Proc. § 708.755(a)*]. To create and continue the lien, the creditor must do all of the following:

- Starting with the second installment against which the creditor's lien is asserted, the creditor must file annually with the lottery agency an affidavit stating that the judgment has not been satisfied, including the amount of the unsatisfied judgment with interest and costs, if any. The annual affidavit must be filed with the lottery not less than 45, nor more than 90 days, from the due date of the annual installment subject to the lien [*Code Civ. Proc. § 708.755(a)(1)*].

- If the judgment lien is renewed, the creditor must file with the lottery a certified copy of the renewal application authorized under *Code Civ. Proc. § 683.110 et seq.*, not less than 45, nor more than 90 days, from the due date of the annual installment subject to the lien [*Code Civ. Proc. § 708.755(a)(2)*].

If the judgment creditor fails to file the annual statement, renewal of judgment, or renewal of abstact, the lien expires. This does not preclude the judgment creditor from pursuing new procedures under *Code Civ. Proc. § 708.710 et seq.* to the extent that the judgment remains enforceable under applicable law [*Code Civ. Proc. § 708.755(b)*].

[10] Discharge by Public Entity of Judgment Debtor's Claim

To discharge the judgment debtor's claim against a public entity, the State Controller, in the case of a claim against a state agency, and the auditor or other official in the case of a claim against a public entity other than a state agency, will deduct an amount sufficient to reimburse the state or other public entity for any amounts advanced by it to the judgment debtor or owed to it by the judgment debtor and then (1) deposit with the court, by a warrant or check payable to the court, the amount due the judgment debtor that is required to satisfy the money judgment as shown by the affidavit (declaration) in full or to the greatest extent and (2) pay any balance to the judgment debtor [*Code Civ. Proc. §§ 708.740(c), 708.755*].

If the judgment debtor is a contractor on a public work, the State Controller, auditor, or other public disbursing officer whose duty it is to make payments under the provisions of the contract may not deposit an amount with the court until the contract is completed, but may deposit an amount with the court to satisfy the claim of the judgment debtor before the payments specified in *Code Civ. Proc. § 708.760(a)* (*discussed under § 276.61[8]*) are made so long as a sufficient amount is retained for the satisfaction of the claims of persons described in *Civ. Code § 3181* (persons entitled to file stop notices) [*Code Civ. Proc. § 708.760(b)*].

[11] Procedure on Claim of Exemption

Promptly after the public entity makes the deposit with the court, the court clerk will cause a notice of the deposit to be served on the judgment debtor personally or by mail [*Code Civ. Proc. § 708.770(a)*]. Within 10 days after the service, the judgment debtor who claims an exemption must (1) file with the court a claim of exemption containing all the matters set forth in *Code Civ. Proc. § 703.520(b)* (contents of claim of exemption) and a notice of motion for an order determining the claim and (2) serve on the judgment creditor personally or by mail a copy of the notice of motion, the claim of exemption, and a notice of hearing on the motion [*Code Civ. Proc. 708.770(b)*]. Failure to make a claim of exemption under *Code Civ. Proc. § 708.770* constitutes a waiver of the exemption [*Code Civ. Proc. § 708.770(f)*].

The hearing on the motion must be held not later than 30 days from the date the notice of motion was filed with the court unless continued by the court for good cause [*Code Civ. Proc. § 708.770(c)*]. The claim of exemption is subject to the provisions of *Code Civ. Proc. §§ 703.580(a)-(d)* (hearing determining claim), 703.590 (extensions of time), and 703.600 (appeal) [*Code Civ. Proc. § 708.770(e)*].

Within 10 days after the judgment creditor is served under *Code Civ. Proc. § 708.770(b)*, the judgment creditor must, if he or she opposes the motion, (1) file with the court a notice of opposition to the claim of exemption containing all the matters set forth in *Code Civ. Proc. § 703.560* (contents of notice of opposition to claim of exemption) and executed under oath and (2) serve a copy of the notice of opposition on the judgment debtor personally or by mail [*Code Civ.*

Proc. § 708.770(d)].

For further discussion and forms for filing and opposing a claim of exemption, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.

[12] Payment by Court of Nonexempt Portion of Money Deposited

After expiration of the period allowed for claiming an exemption under *Code Civ. Proc. § 708.770* if no exemption has been claimed, or after determination of the claim of exemption if an exemption was claimed, the court will pay the nonexempt portion of the money deposited to which the judgment creditor is entitled to the judgment creditor and any balance to the judgment debtor, unless some other disposition is required by law [*Code Civ. Proc. § 708.775*].

[13] Tax Refund and Lottery Winnings Intercept to Enforce Support Obligation

In the case of a judgment for child, spousal, or family support and related costs, the Code of Civil Procedure contains special procedures by which the judgment creditor-obligee may intercept the judgment debtor-obligor's state tax refund and state lottery winnings [*see Code Civ. Proc. § 708.730(c)-(e)* (*Code Civ. Proc. § 708.730(d)* became inoperative as of December 31, 2000); *see also Code Civ. Proc. §§ 708.740(d)-(i), 708.770(g), 708.780(b)-(d)*]. *Code Civ. Proc. § 708.780(c)* is currently operative through December 31, 2001. Tax refunds may not be intercepted for any other collection purpose except to enforce an obligation of support [*Code Civ. Proc. § 708.795*]. For discussion and forms relating to these procedures, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 276.80 Federal Statutes

[1] Garnishment Statutes

Congressional findings and purpose of federal wage garnishment laws. *15 U.S.C. § 1671*

Federal wage garnishment laws. *15 U.S.C. §§ 1671-1677*

"Earnings," "disposable earnings," and "garnishment" defined. *15 U.S.C. § 1672*

Restrictions on amount of earnings subject to garnishment. *15 U.S.C. § 1673*

Exceptions to federal restrictions on amount of earnings subject to garnishment set forth in *15 U.S.C. § 1673(a)*. *15 U.S.C. § 1673(b)*

Prohibition against discharging employee by reason of garnishment for one indebtedness; penalty for violation. *15 U.S.C. § 1674*

Authority of Secretary of Labor by regulation to exempt garnishments issued under laws of state that provide restrictions substantially similar to those provided by federal law. *15 U.S.C. § 1675*

Duty of Secretary of Labor to enforce provisions of *15 U.S.C. §§ 1671-1677*. *15 U.S.C. § 1676*

Effect of federal wage garnishment laws on state laws. *15 U.S.C. § 1677*

Garnishment as means of enforcing alimony and child-support obligations against wages of federal employees. *42 U.S.C. § 659*

[2] Federal Tax Obligations

Actions to garnish wages for federal taxes. *I.R.C. § 6332*

[3] Servicemembers Civil Relief Act

Title of act. *50 U.S.C. App. § 501*

Definitions. *50 U.S.C. App. § 511*

Application of act to states. *50 U.S.C. App. § 512(a)*

Additional persons protected. *50 U.S.C. App. §§ 514, 516*

Vacation or stay of garnishment. *50 U.S.C. App. § 524*

Suspension of statutes of limitation during period of military service. *50 U.S.C. App. § 526*

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For related research and practice materials, see the following legal topics:
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§ 276.81 State Statutes

[1] Attachment

Procedures for obtaining writ of attachment. *Code Civ. Proc. §§ 481.010-493.060*

[2] Earnings Assignment Orders for Support

Earnings assignment orders to secure child, spousal, or family support in family law proceedings. *Fam. Code § 5200 et seq.*

Support of conservatee spouse. *Prob. Code § 3088(e)*

[3] Enforcement Procedures

Enforcement of judgments. *Code Civ. Proc. §§ 680.010-724.260*

Liens on property for amount required to satisfy money judgments. *Code Civ. Proc. §§ 697.010-697.920*

Writ of execution and notice of levy. *Code Civ. Proc. §§ 699.010-701.830*

Exemptions of property from execution. *Code Civ. Proc. §§ 703.010-704.210*

Written interrogatories to judgment debtor. *Code Civ. Proc. §§ 708.010-708.020*

Examination proceedings. *Code Civ. Proc. §§ 708.110-708.205*

Creditors' suits. *Code Civ. Proc. §§ 708.210-708.320*

Lien on pending action or proceeding. *Code Civ. Proc. §§ 708.410-708.480*

Assignment to judgment creditor of right to payment due or to become due to judgment debtor. *Code Civ. Proc. §§ 708.510-708.560*

Appointment of receiver to enforce judgment. *Code Civ. Proc. §§ 708.610-708.630*

Garnishment of money owed judgment debtor by public entity. *Code Civ. Proc. §§ 708.710-708.795*

Enforcement of judgment against franchise. *Code Civ. Proc. §§ 708.910-708.930*

[4] Military Service

Vacation or stay of garnishment in action or proceeding against service member. *Mil. & Vet. Code § 403(c)(2)*

[5] Wage Garnishment

Wage Garnishment Law. *Code Civ. Proc. §§ 706.010-706.154*

Authority of levying officer to adjust amount to be collected under earnings withholding order for costs and interest. *Code Civ. Proc. §§ 685.050(b)(2), 685.090(c), 706.024(b)*

Continuation of earnings withholding order and supplemental return after expiration of writ of execution. *Code Civ. Proc. §§ 699.560, 706.033*

Definitions. *Code Civ. Proc. § 706.011*

Wage garnishment as made only pursuant to Wage Garnishment Law. *Code Civ. Proc. §§ 706.020, 706.021, 708.720(b)*

"Withholding period" defined; duty of employer to withhold. *Code Civ. Proc. § 706.022*

Satisfaction of earnings withholding order. *Code Civ. Proc. § 706.024*

Priorities of withholding orders and wage assignments for support when two or more orders or assignments served. *Code Civ. Proc. §§ 706.023, 706.030(c)(2), 706.031*

Payment of withheld wages to levying officer. *Code Civ. Proc. § 706.025*

Duty of levying officer to pay amounts received over to person entitled. *Code Civ. Proc. § 706.026*

Termination of earnings withholding order on satisfaction of judgment. *Code Civ. Proc. § 706.027*

Final earnings withholding order for costs and interest. *Code Civ. Proc. § 706.028*

Creation and duration of lien on earnings. *Code Civ. Proc. § 706.029*

Withholding order for support. *Code Civ. Proc. § 706.030*

Dormant or suspended earnings withholding order. *Code Civ. Proc. § 706.032*

Restrictions on earnings withholding. *Code Civ. Proc. §§ 706.050-706.052*

Earnings withholding orders for taxes. *Code Civ. Proc. §§ 706.070-706.084*

Procedure for wage garnishment and exemption claims. *Code Civ. Proc. § 706.100 et seq.*

Forms required for wage garnishment. *Code Civ. Proc. §§ 706.120-706.129*

Administration and enforcement of Wage Garnishment Law. *Code Civ. Proc. §§ 706.151-706.154*

Applicability of Wage Garnishment Law to earnings of public officer or employee. *Code Civ. Proc. § 708.720(a), (b)*

Legal Topics:

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

[1] Abuse of Process

Garnishing exempt wages to coerce judgment debtor into paying debt as abuse of process. *Czap v. Credit Bureau of Santa Clara Valley (1970) 7 Cal. App. 3d 1, 5-6, 86 Cal. Rptr. 417*

[2] Constitutionality of Garnishment Laws

Wisconsin prejudgment wage garnishment laws as violating procedural due process by depriving alleged debtor of substantial property interest without debtor's having prior opportunity to be heard. *Sniadach v. Family Finance Corp. (1969) 395 U.S. 337, 339-342, 89 S. Ct. 1820, 23 L. Ed. 2d 349*

Under rationale of *Sniadach*, California's prejudgment wage garnishment procedures (now repealed) as denial of procedural due process since California law deprives alleged debtor of substantial property interest without prior hearing. *Cline v. Credit Bureau of Santa Clara Valley (1970) 1 Cal. 3d 908, 909, 83 Cal. Rptr. 669, 464 P.2d 125* ; *McCallop v. Carberry (1970) 1 Cal. 3d 903, 904-907, 83 Cal. Rptr. 666, 464 P.2d 122*

Requirement of former *Code Civ. Proc. § 690.50* (*now see Code Civ. Proc. §§ 703.030, 703.520*) that debtors file claim of exemption with respect to funds that are exempt by statute as reasonable; thus levy by judgment creditor on plaintiffs' joint checking account consisting of funds that were exempt from execution under former Code Civ. Proc. § 680.18(a) subject to filing valid claim of exemption as lawful and plaintiffs as not entitled to notice and judicial hearing prior to levy. *Phillips v. Bartolomie (1975) 46 Cal. App. 3d 346, 349-352, 354, 121 Cal. Rptr. 56*

Former *Code Civ. Proc. §§ 690.6* and *690.50* (*now see Code Civ. Proc. §§ 703.510-703.601*), governing postjudgment garnishment of wages, which require judgment debtor to apply for and prove right to exemption after seizure, as not violative of constitutional due process. *Raigoza v. Sperl (1973) 34 Cal. App. 3d 560, 562-569, 110 Cal. Rptr. 296*

[3] Exemptions

[a] In General

Earnings of self-employed certified public accountant as not within exemption of *Code Civ. Proc. § 706.020* because not encompassed by definition of *Code Civ. Proc. § 706.011* in that self-employed accountant is not subject to control of clients. *Moses v. DeVersecy (1984) 157 Cal. App. 3d 1071, 1074, 203 Cal. Rptr. 906*

Debtor as not entitled to full claim of exemption when his itemization of expenses included unexplained costs for installment contracts and incidentals and he failed to prove that all his earnings were necessary for support of his family. *Perfection Paint Products v. Johnson (1958) 164 Cal. App. 2d 739, 742, 330 P.2d 829*

Judgment debtor as bearing burden of proving his or her right to exemption. *Perfection Paint Products v. Johnson (1958) 164 Cal. App. 2d 739, 741, 330 P.2d 829*

Debtor as not entitled to count child who reaches legal age of majority as dependent unless child is poor and unable to maintain himself or herself. *Diamond v. Bent (1957) 157 Cal. App. 2d Supp. 857, 859 , 320 P.2d 621*

Expenses of putting child through university as necessary expense since parents have duty to support, maintain, and educate their children. *Diamond v. Bent (1957) 157 Cal. App. 2d Supp. 857, 859 , 320 P.2d 621*

[b] Support of Family

Basic theory of exemption from levy of debtor's earnings necessary for support of debtor and his or her family as being that they, regardless of debtor's improvidence, will retain sufficient funds to maintain basic standard of living in order that debtor may have fair chance to remain productive member of community. *California State Employees' Assn. v. State of California (1988) 198 Cal. App. 3d 374, 377, 243 Cal. Rptr. 602* ; *Perfection Paint Products v. Johnson (1958) 164 Cal. App. 2d 739, 741, 330 P.2d 829*

Trial court as invested with wide discretion in determining what is necessary for use of debtor's family since individual situations will vary. *Perfection Paint Products v. Johnson (1958) 164 Cal. App. 2d 739, 741, 330 P.2d 829*

Automobile as not a common necessary of life within meaning of former *Code Civ. Proc. § 690*.ll (now *Code Civ. Proc. § 706.051*); hence, debt incurred for purchase of car as not limiting debtor's right to exempt from execution all earnings necessary for support of family. *Ratzlaff v. Portillo (1971) 14 Cal. App. 3d 1013, 1014-1016, 92 Cal. Rptr. 722*

Purpose of distinction in former *Code Civ. Proc. § 690.6* (*now see Code Civ. Proc. § 706.051(c)(1)*) between debts incurred for common necessaries of life and those incurred for other items as being to assure to poor persons ability to acquire necessities of life by giving creditors who advance such supplies a preference over those who sell nonessentials on credit. *Thayer v. Madigan (1975) 52 Cal. App. 3d 16, 18-20, 125 Cal. Rptr. 28*

Judgment debtor as not entitled to exemption for all earnings necessary for support in relation to debt that was incurred for hospital services which are common necessaries of life within meaning of former Code Civ. Proc. § 723.051 (now *Code Civ. Proc. § 706.051*). *J.J. MacIntyre Co. v. Duren (1981) 118 Cal. App. 3d Supp. 16, 19 , 173 Cal. Rptr. 715*

[4] Federal Laws

[a] Bankruptcy

Petition in bankruptcy as operating as stay to all other proceedings so that employer making payment under writ of execution to marshal should cease payments, and marshal, on obtaining notice of bankruptcy proceedings, should cease receiving payments. *In re Ducich (C.D. Cal. 1974) 385 F. Supp. 1287, 1289-1291*

[b] Federal Tax Obligations

Payment to United States government pursuant to federal levy as complete defense against any action against garnishee on account of debt despite lack of conformity by federal government to California procedures for levying on wages of debtor. *Hoye v. United States (S.D. Cal. 1958) 169 F. Supp. 474, 478-479*

California statutes respecting garnishment procedures to be followed by judgment creditor to execute on judgment for payment of money as inapplicable to levy by United States government on comptroller of city against accrued wages of city employee who was delinquent in his federal taxes, since obligations enforced by federal government are not judgments. *Hoye v. United States (S.D. Cal. 1958) 169 F. Supp. 474, 475-478*

[c] Federal Wage Garnishment Laws

Violation of *15 U.S.C. § 1674(a)*, which forbids dismissal of employee because his or her wages have been garnished for one indebtedness, as not giving rise to any private civil remedy by employee against employer. *Le Vick v. Skaggs Cos. (9th Cir. 1983) 701 F.2d 777, 779-780* (declining to follow contrary holding in *Stewart v. Travelers Corp. (9th Cir. 1974) 503 F.2d 108, 109-114)*

Employers who discharged employees for incurring multiple garnishments of their wages as not in violation of *15 U.S.C. § 1674(a)* when they counted garnishments incurred before, as well as after, passage of Consumer Credit Protection Act, since Congress did not incorporate any garnishment amnesty when it passed act. *Hodgson v. Consolidated Freightways, Inc. (9th Cir. 1974) 503 F.2d 797, 798-800*

Employer's policy of discharging employee after employer had been garnished several times for judgments against employee, although neutral on its face, as deemed discriminatory when it bore no reasonable relationship to job performance and affected disproportionate number of minority group members. *Johnson v. Pike Corporation of America (C.D. Cal. 1971) 332 F. Supp. 490, 492-496*

[5] Garnishment Defined

Garnishment as attachment by third person of debts owing attachment debtor by garnishee. Los Angeles County Employees Union, Local 434 v. *County of Los Angeles (1973) 33 Cal. App. 3d 269, 272, 109 Cal. Rptr. 46*

[6] Levy on Public Entities

Liability of federal government entity as depending on whether sovereign immunity bars garnishment action, whether entity would be liable under state garnishment laws, and whether entity has met statutory requirements, if any. *Millard v. U.S. (Fed. Cir. 1990) 916 F.2d 1, 3*

Trial court in creating exception to exemption statute not found in statute itself and in failing to follow rules established by courts of superior jurisdiction and to adhere to exclusive procedure for reaching debts owed by government to third parties as set forth in former *Code Civ. Proc. § 710* (*now see Code Civ. Proc. § 708.750*) as error in excess of its jurisdiction. *Miller v. Superior Court (1968) 69 Cal. 2d 14, 15-17, 69 Cal. Rptr. 583, 442 P.2d 663*

Purpose of former *Code Civ. Proc. §§ 710* and *710a* (now *Code Civ. Proc. §§ 708.710-708.795*) in providing special procedure for garnishing funds in hands of governmental unit owed to judgment debtors as being to shift to court burden of adjudicating any claims of exemption which may arise and to insulate governmental units from liability for wrongful payments to garnishing creditors. *McDaniel v. City & County of San Francisco (1968) 259 Cal. App. 2d 356, 363, 66 Cal. Rptr. 384*

No duty on part of public officials to notify judgment debtor of garnishment pursuant to former *Code Civ. Proc. § 710* (now *Code Civ. Proc. §§ 708.740, 708.750*). *McDaniel v. City & County of San Francisco (1968) 259 Cal. App. 2d 356, 363, 66 Cal. Rptr. 384*

Due to early discharge from employment with city, appellant's retirement contributions as owed to him by city and therefore sub ject to garnishment by his creditor. *McDaniel v. City & County of San Francisco (1968) 259 Cal. App. 2d 356, 361, 66 Cal. Rptr. 384*

[7] Precedence of Wage Garnishment Law

Specific provisions of attachment law (*Code Civ. Proc. § 481.010 et seq.*) and wage garnishment law (*Code Civ. Proc. § 706.010 et seq.*) as taking precedence over general provisions of *Gov. Code § 17051* (procedure for payment of warrant drawn against state when validity or amount is in question); hence, state's planned deduction from salaries of state medical facility employees in order to recoup prior alleged overpayments as improper where deductions did not accord with attachment and wage garnishment laws. *California State Employees' Assn. v. State of California (1988) 198 Cal. App. 3d 374, 378, 243 Cal. Rptr. 602*

[8] State Tax Refund Intercepts

State income tax refund intercept program for delinquent child support as meeting constitutional requirements of due process. *Wightman v. Franchise Tax Board (1988) 202 Cal. App. 3d 966, 978, 249 Cal. Rptr. 207*

[9] Use of Mandate to Enforce Execution Against Public Entities

Mandate to enforce execution under former *Code Civ. Proc. § 710* (now *Code Civ. Proc. §§ 708.710-708.795*) when judgment debtor purportedly assigned to bank his right to money owed to him by city as inappropriate remedy to deal with situations where, before writ may properly issue, determination must first be made whether assignment of debt was

fraudulent transfer or merely created subordinate security interest. *Eilken v. Morrison (1969) 3 Cal. App. 3d 25, 28-29, 83 Cal. Rptr. 336*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 276.83 Law Revision Commission

Cal. L. Rev. Comm'n, *Tentative Recommendation Proposing the Enforcement of Judgments* (1980)

Cal. L. Rev. Comm'n, *Recommendation Relating to Wage Garnishment Procedure* (1975)

Cal. L. Rev. Comm'n, *Recommendation Relating to Wage Garnishment Exemptions* (1974)

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§ 276.84 Law Reviews

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Comment, *Wage Garnishment: Still Driving the Wage-Earning Family to the Wall, 17 Santa Clara L. Rev. 631 (1977)*

Note, *The Evolving Definition of Procedural Due Process in Debtor-Creditor Relations: From Sniadach To North Georgia Finishing, 8 Loy. L.A. L. Rev. 339 (1975)*

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Comment, *Attachment and Garnishment in California--In Need of Reform, 4 U.C. Davis L. Rev. 57 (1971)*

Symposium, *Legal Problems of Consumer Credit, 4 U.C. Davis L. Rev. 1 (1971)*

Comment, *What Has Happened to California Debt Collection Since the Supreme Court Decision in the Sniadach Case? 5 Lincoln L. Rev. 56 (1969)*

Brunn, *Wage Garnishment in California: A Study and Recommendations, 53 Cal. L. Rev. 1214 (1965)*

Legal Topics:

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§ 276.85 Text References

Debt Collection Practice in California, ch. 10, *Wage Garnishments* (Cal. C.E.B. 2d ed. 1999)

Witkin, California Procedure, vol. 8, *Enforcement of Judgments*, § 130 (4th ed. 1997)

Witkin, Summary of California Law, vol. 7, *Constitutional Law*, § 638 et seq. (10th ed. 2005)

Legal Topics:

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PART IV. PROCEDURAL CHECKLIST

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§ 276.100 Procedural Checklist

[1] Garnishment

NOTE:

The following is a checklist of the procedures commonly used in situations involving writs of execution. The checklist particularly covers the garnishment of wages for the payment of money judgments pursuant to the Wage Garnishment Law (*Code Civ. Proc. §§ 706.010-706.154*), other than for payment of delinquent taxes [*see* *Code Civ. Proc. §§ 706.070-706.084*], and the levying on a deposit account or property in a safe deposit box standing in the name of a third person or in the names of both the judgment debtor and a third person [*Code Civ. Proc. § 700.160(a)*]. Also covered is the separate procedure for the garnishment of funds other than wages or salary owed by a public entity to a judgment debtor [*Code Civ. Proc. §§ 708.710-708.795*]. The Wage Garnishment Law applies to the garnishment of earnings of judgment debtors employed by a public entity as well as to the garnishment of the earnings of judgment debtors employed by private employers [*Code Civ. Proc. § 708.720(b)*]. For other procedures not covered in this checklist, see the Procedural Checklist in Ch. 254, ***Executions and Enforcement of Judgments***, § 254.40 et seq.

1. Memorandum of costs.

If not previously done, counsel for judgment creditor prepares, serves, and files a memorandum of costs [*Code Civ. Proc. §§ 685.070, 685.090(a)(2)*; *Cal. Rules of Ct., Rule 3.1700*].

NOTE:

Filing a memorandum of costs is an alternative procedure to obtaining a court order allowing costs to be added to the judgment [*see* *Code Civ. Proc. § 685.090(a)*]. For procedure and forms, see Ch. 174, ***Costs and Attorney's Fees*** .

If a writ or earnings withholding order is issued before costs are added to the judgment, a certified copy of the court order or a certificate from the clerk court with regard to the filed memorandum should be delivered to the levying officer before the writ or withholding order is returned. The officer will then add the costs to the amount to be collected [*Code Civ. Proc. § 685.090(c)*]. If the order is returned satisfied before the costs are collected, counsel for the judgment creditor may still obtain collection through a final earnings withholding order [*Code Civ. Proc. § 706.028*].

2. Writ of execution.

Counsel for judgment creditor obtains a writ of execution [*see Code Civ. Proc. §§ 699.510*; 699.520]. For more discussion, a procedural checklist, and forms for use in obtaining writs of execution, including writs to enforce installment and other judgments, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.

3. Levy on debtor's earnings.

a. Counsel for judgment creditor prepares an application for an earnings withholding order [§ 276.124] and files the application, with the writ of execution, with the levying officer in the county where the judgment debtor's employer is to be served [*Code Civ. Proc. §§ 706.102(a), 706.121, 706.125*]. At this time counsel will normally be required to pay the levying officer's fees and any other deposits that may be required [*see Code Civ. Proc. § 685.100(a)(1)* (deposit of money sufficient to pay costs)].

NOTE:
The application must be filed with the levying officer within 180 days from the date the writ of execution was entered [*Code Civ. Proc. § 706.102(a)*; *see also* *Code Civ. Proc. § 699.530(b)*].

On the issuance and service of the order, see *§ 276.20[6], [7]*.

b. If the order is returned satisfied, but costs and interest remain unsatisfied, counsel for judgment creditor prepares an application for a final earnings withholding order [§ 276.124] and files it in the same manner as for the original order [*see Code Civ. Proc. § 706.028*].

4. Levy on deposit account or safe deposit box [*Code Civ. Proc. §§ 700.140, 700.150, 700.160*].

a. If deposit account or safe deposit box stands in name of a person other than the judgment debtor, either alone or together with other third persons, obtain a court order for levy unless exempted by *Code Civ. Proc. § 700.160(b)* [*Code Civ. Proc. § 700.160(a)*; *see* discussion in *§ 276.40*].

b. Counsel for judgment creditor prepares instructions to the sheriff or other levying officer, directing the levying officer to levy on the financial institution holding the deposit account or having the safe deposit box. For a form of instructions to the levying officer, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.

c. Counsel mails or delivers the writ of execution, undertaking, and instructions to the sheriff or other levying officer. At this time counsel will normally be required to pay the levying officer's fees and any other deposits that may be required [*see Code Civ. Proc. § 685.100(a)(1)* (deposit of money sufficient to pay costs)].

NOTE:
A financial institution may refuse to permit the forcible opening of a safe deposit

box to permit the removal of the property levied on unless the judgment creditor pays in advance the cost of the forcible opening and of repairing any damage caused [*Code Civ. Proc. § 700.150(d)*].

[2] Motion for Equitable Division of Earnings Subject to Garnishment

Counsel for an interested party who wishes to move for an equitable division of the judgment debtor's earnings subject to garnishment and for a court determination of the amount to be withheld from the earnings pursuant to a withholding order for support, prepares, serves, and files a notice of motion for the order [§ 276.120], together with a supporting declaration and memorandum of points and authorities [*see Code Civ. Proc. §§ 706.052(b), 1003, 1005, 1005.5, 1010, 2009*; *Cal. Rules of Ct., Rule 3.1113*; *see §§ 276.21*, 276.121[2], and 276.122[2]].

[3] Claiming Exemption of Earnings From Earnings Withholding Order and Opposing Claim

1. Counsel for judgment debtor prepares the judgment debtor's claim of exemption and financial declaration [*see §§ 276.129, 276.130*] and files the original and one copy of each completed form with the levying officer [*Code Civ. Proc. § 706.105(b)*].

NOTE:
The judgment debtor may claim an exemption under *Code Civ. Proc. § 706.051* if no prior hearing has been held with respect to the earnings withholding order or there has been a material change in circumstances since the time of the last prior hearing on the earnings withholding order [*Code Civ. Proc. § 706.105(a)*]. On receipt of the papers, the levying officer will promptly, by first-class mail, postage prepaid, send to the judgment creditor (1) a copy of the claim of exemption, (2) a copy of the financial declaration, and (3) a notice of the claim of exemption [*Code Civ. Proc. § 706.105(c)*; *see §§ 276.131 -276.133*].

2. If the judgment creditor contests the claim of exemption, his or her counsel must do the following:

a. Within 10 days after the date the notice of claim of exemption was mailed, file with the levying officer a notice of opposition to the claim of exemption [*Code Civ. Proc. § 706.105(d)*; *see § 276.132*].

b. Within the same 10-day period, file with the court a notice of motion for an order determining the claim of exemption [*Code Civ. Proc. § 706.105(e)*; *see § 276.133*].

c. At least 16 court days before the hearing of the motion, give written notice of the hearing to the levying officer [*Code Civ. Proc. §§ 706.105(e), 1005(b)*; *see Code Civ. Proc. § 1005(a)(3)*; *see also § 276.134*].

NOTE:
If service is by mail, the 16-day period is increased by the following time periods: 2 calendar days if service is by fax or by express mail or other overnight delivery method; 5 calendar days if the place of mailing and address are within California; 10 calendar days if either the place of mailing or address is outside California, but within the United States; and 20 calendar days if either the place of mailing or address is outside the United States [*Code Civ. Proc. § 1005(b)*; *see* *Code Civ. Proc. §§ 706.105(e), 1005(a)(3)*]. Nevertheless, the court or judge may prescribe a shorter time [*Code Civ. Proc. § 1005(b)*; *see* *Code Civ. Proc. §§ 706.105(e), 1005(a)(3)*].

The hearing on the motion must be held not later than 30 days from the date the notice of motion was filed unless continued by the court for good cause [*Code Civ. Proc. § 706.105(e)*].

d. At least 16 court days before the hearing (additional time if service is by mail, as discussed in NOTE, *above*), serve on the judgment debtor and, if the claim of exemption so requested, on the judgment debtor's attorney a notice of the hearing and a copy of the notice of opposition to the claim of exemption [*Code Civ. Proc. §§ 706.105(e), 1005(b)*; *see Code Civ. Proc. § 1005(a)(3)*].

NOTE:

Service is deemed made when the notice of the hearing and a copy of the notice of opposition to the claim of exemption are deposited in the mail, postage prepaid, addressed to the judgment debtor at the address stated in the claim of exemption and, if service on the judgment debtor's attorney was requested in the claim of exemption, to the attorney at the address stated in the claim [*Code Civ. Proc. § 706.105(e)*].

e. File proof of service with the court [*Code Civ. Proc. § 706.105(e)*].

NOTE:

If the levying officer does not receive a notice of opposition to the claim of exemption within the 10-day period after the date of mailing of the notice of claim of exemption and a notice of the hearing not later than 10 days after the filing of the notice of opposition to the claim of exemption, the levying officer will serve on the employer a notice terminating the earnings withholding order or a modified earnings withholding order if only a portion of the earnings are claimed to be exempt [*Code Civ. Proc. § 706.105(f)*].

3. Counsel for the prevailing party normally prepares, serves, and files a notice of the court's order. For a discussion of what may be included in the order, see *§ 276.23[6]*.

NOTE:

If the court, after hearing, orders that the earnings withholding order be terminated or modified [*see § 276.135*], the clerk will promptly transmit a certified copy of the order to the levying officer, who will promptly serve on the judgment debtor's employer either a copy of the modified earnings withholding order or a notice that the earnings withholding order has been terminated [*Code Civ. Proc. § 706.105(g)*; ***see*** *§ 276.137*]. For the requirement that notice of the court's order be given by prevailing counsel, see *Code Civ. Proc. §§ 664.5* and *1019.5(a)*. For discussion and a form of notice of the court's order, see Ch. 372, ***Motions and Orders*** .

4. Appeal from adverse ruling.

NOTE:

Orders under *Code Civ. Proc. § 706.105* may be appealed by the usual procedure for appeals from the court that made the order [*Code Civ. Proc. § 706.105(j)*]. An appeal by a judgment creditor from an order modifying or terminating an earnings withholding order does not stay the order from which the appeal is taken and, notwithstanding the appeal, until such time as the order modifying or terminating the earnings withholding order is set aside or modified, the order allowing the claim of exemption in whole or in part will be given the same effect as if the appeal had not been taken [*Code Civ. Proc. § 706.105(j)*].

5. Exempt property other than judgment debtor's earnings or wages.

For the procedure for claiming an exemption from levy on money, other than wages or salary, owed a judgment debtor by a public entity, see D(6), *below.* Other forms and procedures for claiming an exemption of property other than the judgment debtor's earnings or wages are *set forth in Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.

[4] Levy on Money Other Than Wages or Salary Owed Judgment Debtor by Public Entity

NOTE:

If money, other than wages or salary (*see* *Code Civ. Proc. § 708.720(b)*), is owing and unpaid to the judgment debtor by a public entity, the judgment creditor may file with the public entity an abstract or certified copy of the money judgment, together with an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) stating that the judgment creditor desires the relief provided by *Code Civ. Proc. §§ 708.710-708.795* [*Code Civ. Proc. § 708.730(a)*].

1. Prepare Abstract or Copy of Money Judgment for Issuance or Certification by Court Clerk.

NOTE:

An abstract of a judgment requiring the payment of money will, on request, be certified by the clerk of the court where the judgment was entered and must contain the matter specified in *Code Civ. Proc. § 674*[*Code Civ. Proc. § 674*]. For a discussion and the Judicial Council mandatory form of abstract of judgment, see *Ch. 318, Judgments*, *§ 318.90* et seq. The clerk will also on request certify a copy of the money judgment [*Code Civ. Proc. § 674*]. A fee is charged for these services [see *Gov. Code §§ 26833, 26837*].

2. Prepare and file a memorandum of credits, accrued interest, and costs.

NOTE:

At the same time the clerk issues an abstract of judgment or certifies a judgment, the attorney for the creditor may also file a memorandum of credits, accrued interest, and costs after judgment [*see* *Code Civ. Proc. §§ 685.010-685.090*]. For forms of memoranda of credits, accrued interest, and costs after judgment, see Ch. 174, ***Costs and Attorney's Fees*** . The information as to credits and accrued interest and costs may also be incorporated in the affidavit (declaration) accompanying the abstract or certified copy of the judgment (***see*** *§§ 276.123, 276.124*).

3. Prepare affidavit (declaration) for filing with abstract or certified copy of judgment.

NOTE:

The affidavit (declaration) must state the exact amount then required to satisfy the judgment and may state any fact tending to establish the identity of the judgment debtor [*Code Civ. Proc. § 708.730(a)*; *see* *§§ 276.122, 276.123*; for further discussion of the need to adequately identify the judgment debtor, ***see*** *§ 276.61[5]*].

4. File papers with the appropriate state agency or, in the case of other public entities, with the public entity's auditor or equivalent officer, and pay filing fee [*Code Civ. Proc. § 708.740(a), 708.750, 708.785(a) (fee)*; *see* discussion in *§§ 276.61[6], [7]*].

NOTE:

Filing the abstract or certified copy of the judgment and affidavit (declaration) with the appropriate officer creates a lien on the money owing and unpaid by the public entity in an amount equal to that which may properly be applied to the satisfaction of the judgment [*Code Civ. Proc. § 708.780*].

5. Serve notice of the filing on the judgment debtor personally or by mail promptly after the filing [*Code Civ. Proc. § 708.730(b)*].

NOTE:

The State Controller or the auditor or equivalent financial officer will, after deducting the advances made to the judgment debtor or debts owed the public entity by the judgment debtor, deposit with the court a warrant or check payable to the court in the amount required to satisfy the money judgment as shown by the affidavit (declaration) in full or to the greatest extent [*Code Civ. Proc. §§ 708.740(c), 708.750*]. Promptly after deposit with the court by the public entity, the court clerk will cause a notice of the deposit to be served personally or by mail on the judgment debtor [*Code Civ. Proc. § 708.770(a)*].

6. If the money levied on is exempt from execution, counsel for the judgment debtor within 10 days after service of the notice of deposit prepares and files a claim of exemption and a notice of motion for an order determining the claim of exemption and serves on the judgment creditor a copy of the claim of exemption and of the notice of motion, and a notice of hearing [*Code Civ. Proc. § 708.770(b)*].

NOTE:

Failure of the judgment debtor to make a claim of exemption within 10 days constitutes a waiver of the exemption [*see* *Code Civ. Proc. § 708.770(f)*]. The hearing on the motion must be held not later than 30 days from the date the notice of motion was filed unless continued by the court for good cause [*Code Civ. Proc. § 708.770(b)(2), (c)*].

7. If the judgment creditor opposes the claim of exemption, his or her counsel, within 10 days from the date the claim of exemption was served, files a notice of opposition (which must be executed under oath and contain all the matters set forth in *Code Civ. Proc. § 703.560*) and serve a copy of it personally or by mail on the judgment debtor [*Code Civ. Proc. § 708.770(d)*].

NOTE:

Code Civ. Proc. §§ 703.580(a)-(d)* (hearing on claim of exemption), 703.590 (extensions of time), and 703.600 (right of appeal) apply to a claim of exemption made pursuant to *Code Civ. Proc. § 708.770* [*Code Civ. Proc. § 708.770(e)*]. For a discussion of these provisions and forms for use in claiming an exemption and opposing a claim of exemption, see *Ch. 254, Executions and Enforcement of Judgments*, *§ 254.40 et seq.

8. Payment by court of nonexempt money deposited.

NOTE:

After expiration of the period allowed for claiming an exemption if no exemption has been claimed, or after determination of the claim of exemption if an exemption is timely claimed, the court will pay the nonexempt portion of the money deposited to which the judgment creditor is entitled to the judgment creditor and any balance to the judgment debtor, unless some other disposition is required by law [*Code Civ.*

***Proc. § 708.775*]**.

It appears that in most courts the court clerk will automatically disburse to the judgment creditor or to the judgment creditor's attorney the money deposited by the public entity with the court once the 10-day period for filing a claim of exemption has passed and no claim is filed. Some courts, however, may require that an application for disbursement and order be first secured. Consequently, counsel should check local court rules and practice to ascertain the procedure required.

9. File additional levies, if necessary.

NOTE:

A levy pursuant to *Code Civ. Proc. §§ 708.710-708.795* may only garnish money already due and owing to the judgment debtor. Consequently, it may be necessary to file additional levies as additional moneys become due the judgment debtor and unpaid in order to obtain complete satisfaction of a judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesProvisional RemediesGarnishmentsLabor & Employment LawWage & Hour LawsAssignments, Deductions & Garnishments

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Volume 23: Fraud and Deceit thru Good Faith Improver of Real Property-Chs. 269-279
Chapter 276 GARNISHMENT
PART V. FORMS

23-276 California Forms of Pleading and Practice--Annotated § 276.120

§ 276.120 Proceedings for Equitable Division of Earnings Subject to Earnings Withholding Order for Support [Code Civ. Proc. § 706.052(b)]--Notice of Motion [Code Civ. Proc. § 1010]

[1] FORM Proceedings for Equitable Division of Earnings Subject to Earnings Withholding Order for Support [Code Civ. Proc. § 706.052(b)]--Notice of Motion [Code Civ. Proc. § 1010]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NOTICE OF MOTION FOR ORDER EQUITABLY
_____ [*name*],	)	DIVIDING EARNINGS SUBJECT TO WITH-
Defendant.	)	HOLDING ORDER FOR SUPPORT
	)	[*Code Civ. Proc. § 706.052(b)*]
	)	

To _____ [*names of all persons who may be affected by the order*] and to his/her/their attorney(s) of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ _____.M., or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____[*city*], _____ [*specify party, e.g.,* plaintiff] will move the court for an order equitably dividing the wages and earnings of _____ [*judgment debtor, e.g.,* defendant _____ (*name*)], taking into account the needs of all persons whom _____ [*judgment debtor, e.g.,* defendant] is required to support, and determining the amount to be withheld from _____ [*judgment debtor's, e.g.,* defendant's] earnings under the withholding order for support issued pursuant to the writ of execution in the above-entitled action.

The motion will be made on the ground that _____ [*specify, e.g.*, the amount of disposable earnings subject to levy is less than the amounts sought to be levied on pursuant to a wage assignment for support and the withholding order for support and that because of the needs of _____ (*judgment debtor's, e.g.*, defendant's) present family substantially less of _____(*judgment debtor's, e.g.*, defendant's) disposable earnings than that allowed by federal law is available for garnishment)].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, on the records, and file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____ [*date*].

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for_____ [*party's status and name*]

CAUTION:
A memorandum must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see* Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, ***Points and Authorities* .

[2] Use of Form

This form is for use by any interested party to move for an order equitably dividing a judgment debtor's earnings subject to garnishment and determining the amount to be withheld from those earnings pursuant to an earnings withholding order for support [*Code Civ. Proc. § 706.052(b)*]. If the motion is made in a family law proceeding, the Judicial Council form of notice of motion must be used [Cal. Rules of Ct., Rule 1285.10; *see* Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*].

[3] Equitable Division of Earnings

Code Civ. Proc. § 706.052(a) provides that, except as provided in *Code Civ. Proc. § 706.052(b)*, one half of the judgment debtor's disposable earnings (as defined by *15 U.S.C. § 1672, see also § 276.19[3]*), plus any amount withheld from the judgment debtor's earnings pursuant to any earnings assignment order (*see Fam. Code § 5200 et seq.* (court-ordered child, spousal, or family support)), is exempt from levy under the Wage Garnishment Law if the earnings withholding order is a withholding order for support under *Code Civ. Proc. § 706.030*.

Code Civ. Proc. § 706.052(b) provides that, on motion of any interested party, the court shall make an equitable division of the judgment debtor's earnings that takes into account the needs of all the persons the judgment debtor is required to support and shall effectuate such division by an order determining the amount to be withheld from the judgment debtor's earnings pursuant to the withholding order for support. An order made under *Code Civ. Proc. § 706.052(b)*, however, may not authorize the withholding of an amount in excess of the amount that may be withheld for support under *15 U.S.C. § 1673* (*see also § 276.16[2][b]*) [*Code Civ. Proc. § 706.052(c)*].

[4] California Law Revision Commission Comment

The California Law Revision Commission has commented on *Code Civ. Proc. § 706.052* as follows [15 Cal. Law Rev. Comm. Report 2445-2446 (1980)]:

Code Civ. Proc. § 706.052(a) prescribes the exemption applicable to a wage garnishment for the collection of delinquent child or spousal support payments except in cases where the court has made an equitable division pursuant to *Code Civ. Proc. § 706.052(b)*. The judgment debtor's earnings that are subject to the 50 percent exemption under *Code Civ. Proc. § 706.052(a)* are "disposable earnings" as defined by *15 U.S.C. § 1672*. Unlike federal law, however, *Code Civ. Proc. § 706.052(a)* protects the same amount of earnings regardless of whether the judgment debtor is supporting a present and a former spouse or is more than 12 weeks delinquent. Federal law permits garnishment of 50 percent of the employee's earnings if the employee is supporting a spouse or dependent other than the person who caused the garnishment and 60 percent if the employee is not supporting such additional persons; these percentages are increased to 55 percent and 65 percent, respectively, if the support payments are more than 12 weeks delinquent. See *15 U.S.C. § 1673(b)(2)*.

Code Civ. Proc. § 706.052(a) also makes clear that, in applying the 50 percent exemption, the amount withheld from the judgment debtor's earnings pursuant to any earnings assignment order for support (defined in *Code Civ. Proc. § 706.011(b)*) is included in computing the 50 percent of the judgment debtor's earnings that may be withheld. For example, if 30 percent of the judgment debtor's earnings are withheld pursuant to an earnings assignment order for support, an additional 20 percent may be withheld pursuant to the earnings withholding order for the collection of delinquent amounts payable for child or spousal support.

Code Civ. Proc. § 706.052(b) makes the 50 percent standard provided by *Code Civ. Proc. § 706.052(a)* subject to the power of the court to make an order that more or less of the judgment debtor's earnings be withheld where the earnings withholding order is issued to collect delinquent child or spousal support payments. *Code Civ. Proc. § 706.052(c)* makes clear that the court may not order the withholding of an amount in excess of that permitted by federal law. This maximum amount varies depending on whether the judgment debtor is supporting more than one person or is more than 12 weeks delinquent. The authority of the court to make an equitable division of the judgment debtor's earnings between, for example, the debtor and a former spouse, or between a former spouse and a present family, is based on decisions under a former statute (citing *Rankins v. Rankins (1942) 52 Cal. App. 2d 231, 126 P.2d 125*).

[5] Cross References

For forms of declarations under penalty of perjury, see Ch. 15, *Affidavits, Certificates, and Declarations*

For discussion and alternative and related forms for use in making motions generally, see Ch. 372, *Motions and Orders*

[6] State Statutes

Withholding order for support defined. *Code Civ. Proc. § 706.030(a)*

Priority of withholding order for support. *Code Civ. Proc. § 706.030(c)*

Priority of wage assignment for support. *Code Civ. Proc. § 706.031*

Motion for equitable division of earnings subject to earnings withholding order for support. *Code Civ. Proc. § 706.052(b)*

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23-276 California Forms of Pleading and Practice--Annotated § 276.121

§ 276.121 Proceedings for Equitable Division of Earnings Subject to Earnings Withholding Order for Support [Code Civ. Proc. § 706.052(b)]--Order Determining Amount to Be Withheld From Earnings

[1] FORM Proceedings for Equitable Division of Earnings Subject to Earnings Withholding Order for Support [Code Civ. Proc. § 706.052(b)]--Order Determining Amount to Be Withheld From Earnings

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	ORDER
_____ [*name*],	)	
Defendant.	)	
	)	
	)	

The motion of _____ [*name of moving party*] for an order equitably dividing the earnings of _____ [*judgment debtor, e.g.,* defendant _____ (name)] and determining the amount of _____'s [*judgment debtor's, e.g.,* defendant's] earnings to be withheld pursuant to the earnings withholding order for support issued in the above-entitled action came on regularly for hearing by the court _____ [this date *or* on _____ (*date*)]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*] [; _____(*name of other interested party*) appeared by counsel _____ (*name*)]. On proof made to the satisfaction of the court after taking into account the needs of all the persons the _____ [*judgment debtor, e.g.,* defendant] is required to support,

IT IS HEREBY ORDERED that _____ [*specify amount to be withheld per pay period or formula for determining amount to be withheld*] be withheld from the earnings of _____ [*judgment debtor, e.g.,*

defendant _____ (*name*)] pursuant to the earnings withholding order for support.

IT IS FURTHER ORDERED that the above-specified amount(s) be paid to _____ [*name and title of levying officer*] each month and that _____ [*name and title of levying officer*] distribute the amounts as follows: _____ [*specify names of creditors and amount to be distributed to each creditor*].

_____ [IT IS FURTHER ORDERED that the above amounts be withheld and paid as set forth above for the period specified in the earnings withholding order for support *or set forth earlier termination date*.]
Dated: _____.

_____[*signature*]
Judge of the_____ Court

[2] Use of Form

This form is for use as an order determining the amount to be withheld by the employer from the judgment debtor's earnings pursuant to an earnings withholding order for support [*Code Civ. Proc. § 706.052(b), (c)*].

The order may be submitted to the judge for signature following the hearing on the motion [§ 276.120]. If this is done, the courtroom clerk would normally conform the copies, retain the original, and return the conformed copies to counsel. If, instead of ruling on the motion at the hearing, the court takes the matter under submission, the court clerk will notify the parties of the court's order when made.

For the required service by counsel of notice of the court's order, see *Code Civ. Proc. §§ 664.5* and *1019.5*. For procedure and a form of notice, see Ch. 372, *Motions and Orders* .

[3] State Statutes

Order determining amount to be withheld from judgment debtor's earnings pursuant to withholding order for support. *Code Civ. Proc. § 706.052(b), (c)*

Findings as not required in court proceedings under Wage Garnishment Law. *Code Civ. Proc. § 706.106*

[4] Cross Reference

For discussion and alternative forms of orders on motions, see Ch. 372, *Motions and Orders*

For a related form, *see § 276.120*.

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23-276 California Forms of Pleading and Practice--Annotated § 276.122

§ 276.122 Proceedings for Levy on Funds Other Than Wages or Salary Owed Judgment Debtor by Public Entity [Code Civ. Proc. §§ 708.710-708.795]--Statement of Exact Amount Required to Satisfy Judgment and Request for Statutory Relief [Code Civ. Proc. § 708.730(a)]--Declaration [Code Civ. Proc. § 2015.5] by Attorney

[1] FORM Proceedings for Levy on Funds Other Than Wages or Salary Owed Judgment Debtor by Public Entity [Code Civ. Proc. §§ 708.710-708.795]--Statement of Exact Amount Required to Satisfy Judgment and Request for Statutory Relief [Code Civ. Proc. § 708.730(a)]--Declaration [Code Civ. Proc. § 2015.5] by Attorney

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	REQUEST FOR RELIEF UNDER Code Civ. Proc.
vs.	)	§§
_____ [*name*],	)	708.710-708.795
Defendant.	)	[*Code Civ. Proc. § 708.730(a)*]
	)	
	)	

_____

I, _____ [*name*], declare:

I am an attorney, duly admitted to practice law in California, and am the attorney of record for the _____ [*specify party, e.g.,* plaintiff _____ (*name*)] in the above-entitled action. In making this declaration, I am acting on behalf of and pursuant to the authority of the _____ [*e.g.,* plaintiff].

As shown by the _____ [abstract *or* certified copy] of the judgment filed herewith, a judgment was entered in this action by the above-entitled court on _____ [*date*], in favor of _____ [*specify party, e.g.,* plaintiff _____(*name*)] against _____ [*specify party, e.g.,*

defendant _____ (*name*)] (hereinafter judgment debtor) in the sum of $_____ together with costs in the sum of $_____.

The exact amount now required to satisfy this judgment is the sum of $_____, all of which is due, owing, and unpaid. [This sum consists of _____ (*specify, e.g.,* the principal amount of the judgment, accrued interest to date, accrued costs, the fee for (issuance of) the _____ (abstract *or* certified copy) of the judg-ment, and the fee for filing it and this declaration, after deducting all payments made on and credits allowed against the judgment).]

There is money now due, owing, and unpaid by _____ [*name of public entity*] to _____ [*name*], the judgment debtor herein, for _____ [*specify reason money is owed, showing that money is not owed for wages or salary*]. [_____(*Set forth any fact or facts tending to identify the judgment debtor as the person to whom the public entity owes money, such as his/her social security number*).] The judgment creditor desires to avail himself/herself of the provisions of *Sections 708.710-708.795 of the Code of Civil Procedure* and requests that the money due, owing, and unpaid by _____ [*name of public entity*] to the judgment debtor, or enough of it as is required to satisfy the judgment in the above-entitled action, be paid into the above-entitled court.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date and place*]
_____ [*signature*]
Attorney for Judgment
Creditor

CAUTION:

An abstract or certified copy of the money judgment must be filed with the foregoing declaration [*Code Civ. Proc. § 708.730(a)*]. These papers must be filed with the appropriate public official under *Code Civ. Proc. § 708.740* or *708.750* (*see § 276.61[6], [7]*). For a form of abstract of judgment, see *Ch. 318, Judgments*, *§ 318.90* et seq.

[2] Use of Form

The foregoing declaration is for use to request the relief provided by *Code Civ. Proc. §§ 708.710-708.795*, that is, the garnishment of money, other than salary or wages, owing and unpaid by a public entity to a judgment debtor. The declaration must state the exact amount then required to satisfy the judgment. The judgment creditor may additionally state in the declaration any fact tending to establish the identity of the judgment debtor [*Code Civ. Proc. § 708.730(a)*].

For forms for use for the garnishment of the earnings of a public officer or employee, see *§§ 276.125 -276.129*.

[3] Declaration in Lieu of Affidavit

Although *Code Civ. Proc. § 708.730(a)* requires the filing of an affidavit, *Code Civ. Proc. § 2015.5* authorizes the use of a declaration under penalty of perjury as in the above form, in lieu of an affidavit.

[4] Memorandum of Credits

A memorandum of credits, accrued interest, and costs after judgment may be filed with the abstract or certified copy of the judgment and accompanying declaration [*see, generally, Code Civ. Proc. §§ 685.010-685.090, 1033.7*]. The purpose of the memorandum is to document the additional costs which are incurred after judgment in the collection processes.

Since it is frequently necessary to make repeated levies on public entities to satisfy a judgment in full, it seems to be the practice to serve and file the memorandum when the abstract is issued or the copy of the judgment is certified since the repeated levies cause additional costs for filing and other related expenses. For forms for use in claiming costs, see Ch. 174, *Costs and Attorney's Fees* .

[5] Nonliability of Public Officer or Employee When Judgment Debtor Insufficiently Identified

The judgment creditor may state in the declaration any fact or facts tending to establish the identity of the judgment debtor [*Code Civ. Proc. § 708.730(a)*]. No public officer or employee will be liable for failure to perform any duty imposed by *Code Civ. Proc. §§ 708.710-708.795* unless sufficient information is furnished by the abstract or certified copy of the judgment and the affidavit (declaration) which enables the officer, in the exercise of reasonable diligence, to identify the judgment debtor from the information filed by the judgment creditor and from the papers and records on file in the office in which the officer or employee works. The term "office" does not include any branch or subordinate office located in a different city [Code Civ. Proc. § 709.790].

[6] Filing Fee

On the filing of the abstract or certified copy of the judgment and affidavit (declaration), the judgment creditor must pay a fee to the public entity with which the papers are filed [*Code Civ. Proc. § 708.785*].

[7] Cross References

For additional and alternative forms of affidavits and declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

[8] State Statutes

Procedure for levying on obligation of public entity to pay money to judgment debtor which is subject of pending action or special proceeding. *Code Civ. Proc. §§ 708.410-708.480, 708.720(a), (c)*

Filing abstract of judgment and supporting affidavit with public entity. *Code Civ. Proc. § 708.730(a)*

Procedure for levying on state agency. *Code Civ. Proc. § 708.740*

Procedure for levying on public entity other than state agency. *Code Civ. Proc. § 708.750*

Determination of amount deemed owing and unpaid by public entity to judgment debtor who is contractor on public work. *Code Civ. Proc. § 708.760*

Distribution of nonexempt portion of money deposited in court pursuant to *Code Civ. Proc. § 708.740* or *708.750*. *Code Civ. Proc. § 708.775*

Nonliability of public officer or employee when papers filed by judgment creditor do not sufficiently identify judgment debtor. *Code Civ. Proc. § 708.790*

Funds not subject to filing under *Code Civ. Proc. §§ 708.710-708.795*. *Code Civ. Proc. § 708.795*

[9] Decisions

Trial court in creating exception to exemption statute not found in statute itself and in failing to follow rules established by courts of superior jurisdiction and to adhere to exclusive procedure for reaching debts owed by government to third parties as set forth in former *Code Civ. Proc. § 710* (*now see Code Civ. Proc. § 708.750*) as error in excess of its jurisdiction. *Miller v. Superior Court (1968) 69 Cal. 2d 14, 15-17, 69 Cal. Rptr. 583, 442 P.2d 663*

Purpose of former *Code Civ. Proc. §§ 710* and *710a* (*now see Code Civ. Proc. §§ 708.710-708.795*) in providing special procedure for garnishing funds in hands of governmental unit owed to judgment debtors as being to shift to court burden of adjudicating any claims of exemption which may arise and to insulate governmental units from liability for wrongful payments to garnishing creditors. *McDaniel v. City & County of San Francisco (1968) 259 Cal. App. 2d 356, 363, 66 Cal. Rptr. 384*

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23-276 California Forms of Pleading and Practice--Annotated § 276.123

§ 276.123 Proceedings for Levy on Funds Other Than Wages or Salary Owed Judgment Debtor by Public Entity [Code Civ. Proc. §§ 708.710-708.795]--Statement of Exact Amount Required to Satisfy Judgment and Request for Statutory Relief [Code Civ. Proc. § 708.730(a)]--Declaration [Code Civ. Proc. § 2015.5] by Judgment Creditor

[1] FORM Proceedings for Levy on Funds Other Than Wages or Salary Owed Judgment Debtor by Public Entity [Code Civ. Proc. §§ 708.710-708.795]--Statement of Exact Amount Required to Satisfy Judgment and Request for Statutory Relief [Code Civ. Proc. § 708.730(a)]--Declaration [Code Civ. Proc. § 2015.5] by Judgment Creditor

[*Caption. See § 276.122[1].*]

I, the undersigned, say:

I am the _____ [*specify party, e.g.,* plaintiff] _____ [*name*] and judgment creditor in the above-entitled action. As shown by the _____ [abstract *or* certified copy] of the judgment filed herewith, a judgment was entered in this action by the above-entitled court on _____ [*date*], in my favor against _____ [*specify party, e.g.,* defendant _____(*name*)] (hereinafter judgment debtor) in the sum of $_____ together with costs in the sum of $_____. The exact amount now required to satisfy this judgment is the sum of $_____, all of which is due, owing, and unpaid. [This sum consists of _____(*specify, e.g.,* the principal amount of the judgment, accrued interest to date, accrued costs, the fee for (issuance of) the _____ [abstract *or* certified copy] of the judgment, and the fee for filing it and this declaration, after deducting all payments made on and credits allowed against the judgment).]

There is money now due, owing, and unpaid by _____ [*name of public entity*] to _____ [*name*], the judgment debtor herein, for _____ [*specify reason money is owed, showing that money is not owed for wages or salary*]. To have that money used to satisfy the judgment, I desire to avail myself of the provisions of *Sections 708.710-708.795 of the Code of Civil Procedure* and request that the money due, owing, and unpaid by _____ [*name of public entity*] to the judgment debtor, or enough of it as is

required to satisfy the judgment in the above-entitled action, be paid into the above-entitled court.

[_____ (*Set forth any fact or facts tending to identify the judgment debtor as the person to whom the public entity owes money, such as his/her social security number*).]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date and place*]
_____ [*signature*]
Judgment Creditor

CAUTION:
An abstract or certified copy of the money judgment must be filed with the foregoing declaration [*Code Civ. Proc. § 708.730(a)*]. These papers must be filed with the appropriate public official under *Code Civ. Proc. § 708.740* or *708.750* (*see § 276.61[6], [7]*). For a form of abstract of judgment, see *Ch. 318, Judgments*, *§ 318.90* et seq.

[2] Use of Form

This declaration is for use to request the relief provided by *Code Civ. Proc. § 708.710 et seq.*, that is, the garnishment of money, other than salary or wages, owing and unpaid by a public entity to a judgment debtor. The declaration must state the exact amount then required to satisfy the judgment. The judgment creditor may additionally state in the declaration any fact tending to establish the identity of the judgment debtor [*Code Civ. Proc. §§ 708.730(a), 2015.5*].

[3] Cross Reference

For a related form, see *§ 276.122*

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23-276 California Forms of Pleading and Practice--Annotated § 276.124

§ 276.124 Application for Earnings Withholding Order [Code Civ. Proc. § 706.121]--Judicial Council Form WG-001

[1] FORM Application for Earnings Withholding Order [Code Civ. Proc. § 706.121]--Judicial Council Form WG-001

Click here to view image.

[2] Use of Form

This form of application for an earnings withholding order is an illustrative, filled-in reproduction of Judicial Council Form WG-001, adopted by the Judicial Council for mandatory use [*Code Civ. Proc. § 706.120*; *Cal. Rules of Ct., Rule 1.30 et seq.*].

The form is for use by a judgment creditor to apply for an earnings withholding order [*see §§ 276.125, 276.126*], other than a withholding order for taxes. The application may be made when a writ of execution has been issued to the county in which the judgment debtor's employer is to be served and 180 days have not elapsed from the date the writ was issued [*Code Civ. Proc. §§ 706.102(a), 706.108(a)*; *see also Code Civ. Proc. § 699.530(b)*]. The form has been filled in to illustrate how the form might be used (1) when the amounts withheld are to be paid to the plaintiff's attorney or to the judgment creditor proceeding without an attorney, (2) the amount to be collected is that specified in the writ of execution, and (3) no previous earnings withholding order has been obtained.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents of Application

The application is required to contain the following: (1) the judgment debtor's (employee's) name, last known address, and, if known, social security number [*Code Civ. Proc. § 706.121(a)*]; (2) the judgment creditor's name and address [*Code Civ. Proc. § 706.121(b)*]; (3) the court where the judgment was entered and the date it was entered [*Code Civ.*

Proc. § 706.121(c)]; (4) the date the writ of execution was issued to the county where the earnings withholding order is sought [*Code Civ. Proc. § 706.121(d)*]; (5) the total amount required to satisfy the order on the date of issuance, which may not exceed the amount required to satisfy the writ of execution, plus the levying officer's statutory fee for service of the order [*Code Civ. Proc. § 706.121(e)*]; (6) the name and address of the employer to whom the order will be directed [*Code Civ. Proc. § 706.121(f)*]; and (7) the name and address of the person to whom the withheld money is to be paid by the levying officer [*Code Civ. Proc. § 706.121(g)*].

This Judicial Council form complies with the foregoing requirements, except that it does not include space for filling in the date the writ of execution was issued as required by *Code Civ. Proc. § 706.121(d)*. (No earnings withholding order may be served on an employer after 180 days from the date the writ of execution was issued [*Code Civ. Proc. §§ 706.103(c), 706.108(c)*; *see also Code Civ. Proc. § 699.530(b)*].) Nevertheless, the form is deemed to comply with Code Civ. Proc. § 706.121 [*see Code Civ. Proc. § 706.120*]. Also, the form does not contain a direction that the judgment creditor's address be set forth as required by *Code Civ. Proc. § 706.121(b)*. However, there appears to be enough room on the blank line in Paragraph 1 to type the address after the judgment creditor's name, and it would appear that the better practice would be to do so.

[4] Execution of Application

The application must be executed (signed) under oath [*Code Civ. Proc. § 706.121*]. The declaration under penalty of perjury set out in the form complies with this requirement [*see Code Civ. Proc. § 2015.5*].

[5] Filing Application

The application is filed with a levying officer in the county to which the writ of execution has been issued [*Code Civ. Proc. § 706.102(a)*]. Alternatively, the application may be delivered to a registered process server [*Code Civ. Proc. § 706.108(a)*].

[6] Final Order for Unsatisfied Costs and Interest

After the amount stated as owing in the order is paid and the order is returned as satisfied, the judgment creditor may apply for issuance of a final earnings withholding order for collection only of unsatisfied costs and interest that were not collected under the prior order [*Code Civ. Proc. § 706.028(a), (b)*].

[7] Satisfaction of Judgment

If the judgment is satisfied prior to the termination of the order pursuant to *Code Civ. Proc. § 706.022* (withholding period), the judgment creditor is required to notify the levying officer who promptly terminates the order by serving a notice of termination [*see § 276.136*] on the employer [*Code Civ. Proc. § 706.027*].

[8] Cross References

For procedure for obtaining and a form of writ of execution, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.

[9] State Statutes

Authority of levying officer to adjust amount to be collected under earnings withholding order for costs and interest. *Code Civ. Proc. §§ 685.050(b)(2), 685.090(c), 706.024(b)*

Satisfaction of earnings withholding order. *Code Civ. Proc. § 706.024*

Notice to levying officer of satisfaction of judgment. *Code Civ. Proc. § 706.027*

Final earnings withholding order for costs and interest. *Code Civ. Proc. § 706.028*

Judicial Council is authorized to provide by rule for practice and procedure under Wage Garnishment Law. *Code Civ. Proc. § 706.100*

Service of earnings withholding order. *Code Civ. Proc. §§ 706.101, 706.108*

Filing application for earnings withholding order with levying officer. *Code Civ. Proc. § 706.102*

Judicial Council forms deemed to comply with Wage Garnishment Law. *Code Civ. Proc. § 706.120*

Contents of application for earnings withholding order. *Code Civ. Proc. § 706.121*

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23-276 California Forms of Pleading and Practice--Annotated § 276.125

§ 276.125 Earnings Withholding Order [Code Civ. Proc. §§ 706.022, 706.108, 706.125]--Judicial Council Form WG-002

[1] FORM Earnings Withholding Order [Code Civ. Proc. §§ 706.022, 706.108, 706.125]--Judicial Council Form WG-002

Click here to view image.

[2] Use of Form

This form of earnings withholding order is an illustrative reproduction of Judicial Council Form WG-002, adopted by the Judicial Council for mandatory use [*Code Civ. Proc. § 706.120*; *Cal. Rules of Ct., Rule 1.30 et seq.*]. The second page of the form consists of instructions to the employer.

The form is for use by a levying officer or registered process server to order the withholding of earnings of a judgment debtor other than for support or taxes [*Code Civ. Proc. § 706.102*]. A separate form for use when the earnings withholding order is for support [*see Code Civ. Proc. § 706.030(a)*] is *set out in § 276.126*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Issuance of Order

If a writ of execution has been issued to the county where the judgment debtor's employer is to be served and 180 days from the date the writ was issued have not expired, the levying officer in such county is required to issue promptly an earnings withholding order on the filing with him or her of an application by the judgment creditor [*Code Civ. Proc. § 706.102(a)*; *see also Code Civ. Proc. § 699.530(b)*].

A registered process server may also issue an earnings withholding order if the judgment creditor delivers the application for issuance of an earnings withholding order to him or her within the same 180-day time frame [*Code Civ.*

Proc. § 706.108(a)].

[4] Contents of Order

The contents of the earnings withholding order, which are prescribed by statute [*see Code Civ. Proc. § 706.125*], are as follows:

(1) The judgment debtor's (employee's) name, address, and, if known, social security number;

(2) The name and address of the employer to whom the order is directed;

(3) The court where the judgment was entered, the date it was entered, and the name of the judgment creditor;

(4) The date the writ of execution was issued;

(5) The total amount required to satisfy the order on the date of issuance, which may not exceed the amount required to satisfy the writ of execution, plus the levying officer's statutory fee for service of the order and an $10 processing fee for each disbursement of money collected under the writ of execution [*see Gov. Code §§ 26746, 26750*];

(6) A description of the withholding period and an order to withhold from the judgment debtor's earnings for each pay period the amount required to be withheld under *Code Civ. Proc. § 706.050* (exempt earnings under federal law) or the amount specified in the order subject to *Code Civ. Proc. § 706.024* (satisfaction of order), as the case may be, for the pay periods ending during the withholding period;

(7) An order to the employer to pay over to the levying officer at a specified address the amount required to be withheld and paid over pursuant to the order in the manner and within the times provided by law;

(8) An order that the employer fill out the "employer's return" [§ 276.128] and return it by first-class mail, postage prepaid, to the levying officer at a specified address within 15 days after service of the earnings withholding order;

(9) An order that the employer deliver to the judgment debtor (employee) a copy of the earnings withholding order and the "notice to employee of earnings withholding order" (that is, Employee Instructions; *see § 276.127*) within 10 days after service of the earnings withholding order, unless the judgment debtor (employee) is no longer employed by the employer and the employer does not owe the employee any earnings, in which case the employer is not required to make such delivery; and

(10) The levying officer's name and address.

The Judicial Council form set out above complies with these requirements, except that it does not include space for filling in the date the writ of execution was issued, as required by *Code Civ. Proc. § 706.125(d)*. Nevertheless, the form is deemed to comply with *Code Civ. Proc. § 706.125* [*see Code Civ. Proc. § 706.120*].

[5] Instructions to Employer

In addition to the matters contained in the order, the Judicial Council has prepared instructions to the employer [*Code Civ. Proc. § 706.127(a)*], which are required to be delivered to the employer when the earnings withholding order is served [*see Code Civ. Proc. § 706.103(b)*], and appear on the reverse side of the order. The instructions set out the

employer's duties [*see Code Civ. Proc. § 706.127(b)*]. They also include information and a chart on the computation of the permissible amounts to be withheld and warnings on the effect of what amounts to a violation of the Wage Garnishment Law set out in *Code Civ. Proc. §§ 706.010-706.154*. For discussion of these duties, computations, and violations, see *§ 276.10* et seq.

The amount to be withheld ties into the federal minimum wage [*see 15 U.S.C. § 1673(a)*].

[6] Papers Served

The following papers are required to be served on the designated employer [*Code Civ. Proc. § 706.103(a)*]:

(1) The original and one copy of the earnings withholding order;

(2) The form for the employer's return [§ 276.128]; and

(3) The notice to employee [§ 276.127] of the earnings withholding order.

[7] Person to Be Served

An earnings withholding order is served on the employer by delivery of the order to any of the following: (1) the managing agent or person in charge, at the time of service, of the branch or office where the employee works or the office from which the employee is paid (in the case of a state employee, the office from which the employee is paid does not include the State Controller's office unless the employee works directly for that office); or (2) any person to whom a copy of the summons and complaint may be delivered to make service on the employer under *Code Civ. Proc. § 416.10 et seq.* (persons on whom summons may be served) [*Code Civ. Proc. § 706.101(a)*].

[8] Method of Service

[a] In General

Service of an earnings withholding order is made by personal delivery [*see Code Civ. Proc. §§ 415.10, 415.20*] or by registered or certified mail, postage prepaid, with return receipt requested [*Code Civ. Proc. § 706.101(b)*]. Except as provided in *Code Civ. Proc. 706.101(b), (c)*, service of any notice or document may be made by first-class mail, postage prepaid. If service is made on the employer after the employer's return has been received by the levying officer, the service must be made by first-class mail, postage prepaid, on the person designated in the employer's return to receive notices and at the address indicated in the employer's return, whether or not that address is within the county. This does not preclude service by personal delivery on the employer before the employer's return has been received by the levying officer or on the person designated in the employer's return after its receipt [*Code Civ. Proc. § 706.101(d)*]. The judgment creditor may request service by personal delivery [*Code Civ. Proc. § 706.101(e)*].

[b] Service by Registered Process Server

An earnings withholding order also may be served by any person registered as a process server pursuant to *Bus. & Prof. Code §§ 22350-22360*[*Code Civ. Proc. § 706.108(a)*]. A registered process server may serve an earnings withholding order on an employer whether or not the earnings withholding order was issued by a levying officer or by a registered process server. An earnings withholding order may not be served after the expiration of 180 days from the date the writ of execution was issued [*Code Civ. Proc. §§ 699.530(b)*, 706.180(c)].

If the registered process server has issued the earnings withholding order, before serving the earnings withholding order, he or she shall deposit with the levying officer a copy of the writ of execution, the application for issuance of an earning withholding order, and a copy of the earnings withholding order. The registered process server shall also pay the fee

provided by *Gov. Code § 26750* [*Code Civ. Proc. § 706.108(b)*].

The fee for services of a registered process server under *Code Civ. Proc. § 706.108* must be allowed as a recoverable cost pursuant to *Code Civ. Proc. § 1033.5* [*Code Civ. Proc. 706.108(f)*].

For a discussion of what must be served on the designated employer and filed with the levying officer, see *§ 276.20[7]*.

[9] State Statutes

Authority of levying officer to adjust amount to be collected under earnings withholding order for costs and interest. *Code Civ. Proc. §§ 685.050(b)(2), 685.090(c), 706.024(b)*

Withholding period for execution against earnings. *Code Civ. Proc. § 706.022(a)*

Satisfaction of earnings withholding order. *Code Civ. Proc. § 706.024*

Final earnings withholding order for costs and interest. *Code Civ. Proc. § 706.028*

Issuance and service of earnings withholding order. *Code Civ. Proc. §§ 706.101, 706.102, 706.108*

Papers to be served with order. *Code Civ. Proc. §§ 706.103, 706.108(c)*

Instructions to employer regarding earnings withholding order. *Code Civ. Proc. §§ 706.103(b), 706.127*

Use of Judicial Council form. *Code Civ. Proc. § 706.120*

Contents of earnings withholding order. *Code Civ. Proc. § 706.125*

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23-276 California Forms of Pleading and Practice--Annotated § 276.126

§ 276.126 Earnings Withholding Order for Support [Code Civ. Proc. § 706.030] and Instructions to Employer [Code Civ. Proc. § 706.127]--Judicial Council Form WG-004

[1] FORM Earnings Withholding Order for Support [Code Civ. Proc. § 706.030] and Instructions to Employer [Code Civ. Proc. § 706.127]--Judicial Council Form WG-004

Click here to view image.

[2] Use of Form

This form of earnings withholding order for support is an illustrative, filled-in reproduction of Judicial Council Form WG-004, adopted by the Judicial Council for mandatory use [*Code Civ. Proc. § 706.120*; *Cal. Rules of Ct., Rule 1.30 et seq.*]. The second page of the form consists of instructions to the employer.

The form is for use by a levying officer or registered process server to order the garnishment of wages in spousal and child support cases [*Code Civ. Proc. §§ 706.030(a), 706.108(a)*]. Blanks have been filled in to illustate how the form may be completed. For a discussion of earnings withholding orders generally, see the comments to § 276.125.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] State Statutes

"Withholding order for support" defined and requirement that order be so denoted on its face. *Code Civ. Proc. § 706.030(a)*

Priority of withholding order for support. *Code Civ. Proc. § 706.030(c)*

Priority of wage or earnings assignment for support. *Code Civ. Proc. § 706.031*

[4] Cross Reference

For detailed discussion and forms relating to wage and earnings assignments for support, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*

For a related form, see *§ 276.125*

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23-276 California Forms of Pleading and Practice--Annotated § 276.127

§ 276.127 Employee Instructions [Code Civ. Proc. § 706.122]--Judicial Council Form WG-003

[1] FORM Employee Instructions [Code Civ. Proc. § 706.122]--Judicial Council Form WG-003

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Judicial Council Form WG-003, which sets out instructions to an employee subject to an earnings withholding order [*see Cal. Rules of Ct., Rule 1.30 et seq.*]. The statutes refer to these instructions as the "notice to employee of earnings withholding order" [*see, e.g., Code Civ. Proc. §§ 706.103(a)(3), 706.104(a), 706.122*].

The employee instructions are served on the employer by the levying officer with the earnings withholding order [*Code Civ. Proc. § 706.103(a)(3)*]. The same instructions are used whether the order is an earnings withholding order [*see § 276.125*] or an earnings withholding order for support [*see § 276.126*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents of Instructions

The instructions are required to contain a statement that informs the employee in simple terms of the nature of a wage garnishment, the right to an exemption, and the procedure for claiming an exemption [*Code Civ. Proc. § 706.122*]. *Code Civ. Proc. § 706.122* further requires that the instructions contain any other information the Judicial Council determines would be useful to the employee and appropriate for inclusion, including all of the following:

1. The fact that the named employer has been ordered to withhold from the judgment debtor's earnings the amounts required to be withheld under *Code Civ. Proc. § 706.050* (amount of earnings exempt from levy of earnings withholding order), or such other amounts as are specified in the earnings withholding order, and to pay these amounts

over to the levying officer for transmittal to the person specified in the order in payment of the judgment described in the order [*Code Civ. Proc. § 706.122(a)*];

2. The manner of computing the amounts required to be withheld pursuant to *Code Civ. Proc. § 706.050* [*Code Civ. Proc. § 706.122(b)*];

3. The fact that the judgment debtor may be able to keep more or all of his or her earnings if he or she proves that the additional earnings are necessary for his or her support or the support of his or her family supported in whole or in part by him or her [*Code Civ. Proc. § 706.122(c)*];

4. If the judgment debtor wishes a court hearing to prove that amounts should not be withheld from the judgment debtor's earnings because they are necessary for support as described in the foregoing paragraph, the judgment debtor shall file with the levying officer an original and one copy of the "judgment debtor's claim of exemption" [*see § 276.129*] and an original and one copy of the "judgment debtor's financial statement" [*see § 276.130*]. The notice is also required to advise the judgment debtor that the claim of exemption form and the financial statement form may be obtained without charge at the office of the levying officer [*Code Civ. Proc. § 706.122(d)*].

This Judicial Council form complies with these requirements.

[4] State Statutes

Service on employer of "notice to employee of earnings withholding order." *Code Civ. Proc. § 706.103(a)(3)*

Duty of employer to deliver "notice to employee of earnings withholding order" to judgment debtor. *Code Civ. Proc. § 706.104(a)*

Contents of notice to employee of earnings withholding order. *Code Civ. Proc. § 706.122*

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23-276 California Forms of Pleading and Practice--Annotated § 276.128

§ 276.128 Employer's Return [Code Civ. Proc. § 706.126]--Judicial Council Form WG-005

[1] FORM Employer's Return [Code Civ. Proc. § 706.126]--Judicial Council Form WG-005

Click here to view image.

[2] Use of Form

This form of employer's return is an illustrative, filled-in reproduction of Judicial Council Form WG-005, adopted by the Judicial Council for mandatory use [*Code Civ. Proc. § 706.120*; *Cal. Rules of Ct., Rule 1.30 et seq.*].

The form is served on the employer with the earnings withholding order [*Code Civ. Proc. § 706.103(a)(2)*]. Except as noted below, it is to be completed by the employer and mailed by first-class mail, postage prepaid, to the levying officer within 15 days from the date of service [*Code Civ. Proc. § 706.104(b)*]. Blanks have been filled in to illustrate how the form might be used in conjunction with the application for an earnings withholding order and the earnings withholding order in §§ 276.124 and 276.125 when the employer has not received any other earnings withholding order or wage assignment for the same employee.

The form must be executed under oath or, as indicated in the foregoing Judicial Council form, by a declaration under penalty of perjury [*Code Civ. Proc. §§ 706.126(a), 2015.5*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents of Form

The employer's return is required to state the following information [*Code Civ. Proc. § 706.126(a)*]:

(1) The name and address of the levying officer to whom the form is to be returned;

(2) A direction that the form be mailed to the levying officer by first-class, postage-prepaid mail no later than 15 days after the date of service of the earnings withholding order; and

(3) The name, address, and if known, social security number of the judgment debtor.

In addition, the form must require the employer to supply the following information [*Code Civ. Proc. § 706.126(b)*]:

(1) The date the order was served on the employer;

(2) Whether the judgment debtor is employed by the employer or whether the employer otherwise owes earnings to the employee;

(3) If the judgment debtor is employed by the employer or the employer otherwise owes earnings to the employee, the amount of the employee's earnings for the last pay period and the length of this pay period;

(4) Whether the employer was required on the date of service to comply with an earlier order, and, if so, the name of the judgment creditor who secured the earlier order, the levying officer who served the earlier order, the date it was served, the court case number, the total amount to be withheld excluding the levying officer assessment (which determines when the order will expire), and which order has priority;

(5) Whether the employer was required, on the date of service, to comply with a wage assignment for support and, if so, the court that issued the order, the date it was issued, and any other information the Judicial Council determines is needed to identify the order; and

(6) The name and address of the person to whom notices to the employer are to be sent.

This Judicial Council form complies with the foregoing requirements, except for (1) the inclusion of information in the return regarding a judgment debtor who is no longer employed but to whom the employer owes earnings, and (2) the name of the judgment creditor who received the earlier order [*Code Civ. Proc. § 706.126(b)(2)-(4)*]. Nevertheless, the form is deemed to comply with *Code Civ. Proc. § 706.126* [*see Code Civ. Proc. §§ 681.030(b), 706.120*].

[4] Procedure if Order Is Ineffective

If the earnings withholding order is ineffective, the employer is required to state in the employer's return that the order will not be complied with for this reason and return the order to the levying officer with the employer's return [*Code Civ. Proc. § 706.104(b)*].

[5] State Statutes

Judicial Council form deemed to comply with statutes. *Code Civ. Proc. §§ 681.030(b), 706.120*

Continuation of earnings withholding order after expiration of writ of execution. *Code Civ. Proc. §§ 699.560, 706.033*

Return of terminated dormant or suspended earnings withholding order. *Code Civ. Proc. § 706.032*

Employer's return form required to be served on employer with earnings withholding order. *Code Civ. Proc. § 706.103*

Employer required to complete and mail return to levying officer within 15 days of service. *Code Civ. Proc. § 706.104(b)*

Procedure if earnings withholding order is ineffective. *Code Civ. Proc. § 706.104(b)*

Contents of employer's return. *Code Civ. Proc. § 706.126*

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23-276 California Forms of Pleading and Practice--Annotated § 276.129

§ 276.129 Claim of Exemption [Code Civ. Proc. § 706.123]--Judicial Council Form WG-006

[1] FORM Claim of Exemption [Code Civ. Proc. § 706.123]--Judicial Council Form WG-006

Click here to view image.

[2] Use of Form

This form of claim of exemption is an illustrative, filled-in reproduction of Judicial Council Form WG-006, adopted by the Judicial Council for mandatory use [*Code Civ. Proc. § 706.120*; *Cal. Rules of Ct., Rule 1.30 et seq.*]. The levying officer is required to have copies of the form available at his or her office for distribution without charge to a person who desires to make a claim of exemption under *Code Civ. Proc. § 706.051* [*Code Civ. Proc. § 706.129*].

The form is for use by an employee to claim that his or her otherwise nonexempt earnings [*see Code Civ. Proc. § 706.050*] which his or her employer intends to withhold pursuant to an earnings withholding order are exempt from garnishment on the ground that they are necessary for the support of the employee or the employee's family [*see Code Civ. Proc. §§ 706.051(b), 706.105*; *see also §§ 276.22, 276.23*]. Blanks have been filled in to illustrate how the form might be used by a judgment debtor claiming that all of his or her earnings are necessary for support.

For the procedure for securing a court order determining the amount to be withheld from a judgment debtor's earnings pursuant to a withholding order for support when a motion for equitable division of earnings pursuant to *Code Civ. Proc. § 706.052(b)* is made, see *§§ 276.120, 276.121*, and see discussion in *§ 276.21*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] When Claim May Be Made

The claim may be made if no prior hearing has been held with respect to the earnings withholding order or there has been a material change in circumstances since the time of the last prior hearing on the earnings withholding order [*Code*

Civ. Proc. § 706.105(a)].

[4] How Claim of Exemption Is Made

A claim of exemption is made by filing with the levying officer an original and one copy of (1) the claim of exemption and (2) the judgment debtor's financial statement [*see § 276.130*] [*Code Civ. Proc. § 706.105(b)*].

[5] Contents and Execution of Claim

The claim of exemption is required (1) to indicate how much the judgment debtor believes should be withheld from the judgment debtor's earnings each pay period by the employer pursuant to the earnings withholding order and (2) to state the judgment debtor's present mailing address [*Code Civ. Proc. § 706.123*].

[6] Execution of Claim

The claim must be executed under oath or by declaration under penalty of perjury [*Code Civ. Proc. §§ 706.123, 2015.5*].

[7] Restrictions on Claim of Exemption

There are exceptions to the exemption provided for under *Code Civ. Proc. § 706.051(b)* [*see Code Civ. Proc. § 706.051(c), see also § 276.22*].

[8] Cross References

For a discussion of the procedure and forms for use in making motions generally, see Ch. 372, *Motions and Orders*

[9] State Statutes

Exempt earnings. *Code Civ. Proc. § 706.050*

Exemption of otherwise nonexempt earnings necessary for support. *Code Civ. Proc. § 706.051(b)*

Restrictions on claim of exemption under *Code Civ. Proc. § 706.051(b). Code Civ. Proc. §§ 706.051(c), 706.105(k)*

Procedure for making claim of exemption. *Code Civ. Proc. § 706.105*

Contents of claim of exemption. *Code Civ. Proc. § 706.123*

Forms of claim of exemption required to be available from levying officer. Code Civ. Proc. § 703.129

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23-276 California Forms of Pleading and Practice--Annotated § 276.130

§ 276.130 Financial Statement [Code Civ. Proc. §§ 703.530, 706.105(b), 706.124]--Judicial Council Form WG-007

[1] FORM Financial Statement [Code Civ. Proc. §§ 703.530, 706.105(b), 706.124]--Judicial Council Form WG-007

Click here to view image.

[2] Use of Form

This form of financial statement is an illustrative, filled-in reproduction of Judicial Council Form WG-007 (also numbered EJ-165), adopted by the Judicial Council for mandatory use [*Code Civ. Proc. § 706.120*; *Cal. Rules of Ct., Rule 1.30 et seq.*]. The levying officer is required to have copies of the form available at his or her office for distribution without charge to a person who desires to make a claim of exemption under *Code Civ. Proc. § 706.051* [*Code Civ. Proc. § 706.129*].

The form is for use by a judgment debtor to support his or her claim that all or a portion of the earnings sought to be garnished are necessary for the support of the judgment debtor and his or her family [*see Code Civ. Proc. § 706.051(b)*]. Blanks have been filled in to illustrate how the form might be used to support the claim of exemption in § 276.129.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents and Execution of Statement

The financial statement is required to include the following information:

(1) The name of the judgment debtor's spouse [*Code Civ. Proc. §§ 703.530(b)(1), 706.124*];

(2) The name, age, and relationship of all persons dependent on the judgment debtor or on the judgment debtor's spouse for support [*Code Civ. Proc. §§ 703.530(b)(2), 706.124*];

(3) All sources and the amounts of earnings and other income of the judgment debtor and of his or her spouse and dependents [*Code Civ. Proc. §§ 703.530(b)(3), 706.124*];

(4) A list of the judgment debtor's assets and of the assets of his or her spouse and dependents and their value [*Code Civ. Proc. §§ 703.530(b)(4), 706.124*];

(5) All of the outstanding obligations of the judgment debtor and those of his or her spouse and dependents [*Code Civ. Proc. §§ 703.530(b)(5), 706.124*];

(6) Whether any earnings withholding orders are in effect with respect to the earnings of the judgment debtor or of his or her spouse or dependents [*Code Civ. Proc. § 706.124(a)*]; and

(7) Whether any wage assignments for support are in effect with respect to the earnings of the judgment debtor or of his or her spouse or dependents [*Code Civ. Proc. § 706.124(b)*].

The financial statement must be executed under oath (declaration under *Code Civ. Proc. § 2015.5*) of the judgment debtor and, unless the spouses are living separate and apart, by the judgment debtor's spouse [*Code Civ. Proc. §§ 703.530(c), 706.124*].

This Judicial Council form complies with these requirements.

[4] State Statutes

Contents and execution of financial statement. *Code Civ. Proc. §§ 703.530(b), (c), 706.124*

Filing financial statement. *Code Civ. Proc. § 706.105(b)*

Requirement that financial statement forms be available from levying officer. *Code Civ. Proc. § 706.129*

[5] Cross Reference

For a related form, see *§ 276.129*

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23-276 California Forms of Pleading and Practice--Annotated § 276.131

§ 276.131 Notice of Filing of Claim of Exemption [Code Civ. Proc. §§ 706.105(c)(3), 1005(b)]--Judicial Council Form WG-008

[1] FORM Notice of Filing of Claim of Exemption [Code Civ. Proc. §§ 706.105(c)(3), 1005(b)]--Judicial Council Form WG-008

Click here to view image.

[2] Use of Form

This form of notice of filing of a claim of exemption is an illustrative reproduction of Judicial Council Form WG-008, adopted by the Judicial Council for mandatory use [*Code Civ. Proc. § 706.120*; *Cal. Rules of Ct., Rule 1.30 et seq.*].

The form is for use by the levying officer to notify the judgment creditor that a claim of exemption has been filed [*see Code Civ. Proc. § 706.105(c)*]. The levying officer is required promptly on the filing of the claim of exemption to mail a notice of claim of exemption, together with a copy of the claim of exemption [*see § 276.129*] and a copy of the financial statement [*see § 276.130*], to the judgment creditor [*Code Civ. Proc. § 706.105(c)*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Content of Notice

The notice is required to state that a claim of exemption has been filed and that the earnings withholding order will be terminated, or modified to reflect the amount of earnings claimed to be exempt in the claim of exemption, unless the judgment creditor, within 10 days after the date the notice of claim of exemption is mailed, files with the levying officer a notice of opposition [*see § 276.132*] to the claim of exemption [*Code Civ. Proc. § 706.105(c)(3)*]. This Judicial Council form complies with these requirements. The form also includes instructions to the judgment creditor on the procedure to follow to oppose the claim of exemption.

[4] Hearing to Oppose Claim

If a judgment creditor opposes the claim of exemption, he or she may contact the clerk of the court to set a date, time, and place for a hearing on the objection. The date of the hearing must be not more than 30 days after the date the judgment creditor files his or her notices of opposition and hearing with the court [*Code Civ. Proc. § 706.105(e)*]. The judgment creditor must serve notice on the levying officer and the judgment debtor as prescribed in *Code Civ. Proc. § 1005(b)* [*Code Civ. Proc. § 706.105(e)*; for discussion of service requirements under *Code Civ. Proc. § 1005(b), see* Ch. 518, *Service of Summons and Papers*].

[5] State Statutes

Notice to judgment creditor that employee has filed claim of exemption. *Code Civ. Proc. § 706.105(c)(3)*

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23-276 California Forms of Pleading and Practice--Annotated § 276.132

§ 276.132 Notice of Opposition to Claim of Exemption [Code Civ. Proc. §§ 706.105(d), 706.128]--Judicial Council Form WG-009

[1] FORM Notice of Opposition to Claim of Exemption [Code Civ. Proc. §§ 706.105(d), 706.128]--Judicial Council Form WG-009

Click here to view image.

[2] Use of Form

This form of notice of opposition to a claim of exemption is an illustrative, filled-in reproduction of Judicial Council Form WG-009, adopted by the Judicial Council for mandatory use [*Code Civ. Proc. § 706.120*; *Cal. Rules of Ct., Rule 1.30 et seq.*].

The form is for use by the judgment creditor to give notice of his or her opposition to the judgment debtor's claim of exemption made pursuant to *Code Civ. Proc. § 706.051(b)* [*Code Civ. Proc. § 706.105(d)*]. Blanks have been filled in to illustrate how the form may be used to oppose the claim of exemption *set out in § 276.129*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents of Form

The notice of opposition is required to include the following: (1) the judgment debtor's name, last known address, and if known, social security number; (2) the judgment creditor's name and address; (3) the date the notice of claim of exemption [§ 276.131] was mailed; (4) the amount of the judgment debtor's claim of exemption which the judgment creditor claims is not exempt; and (5) the factual and legal grounds for the judgment creditor's opposition to the claim of exemption [*Code Civ. Proc. § 706.128*].

The notice is required to be executed under oath or by declaration under penalty of perjury [*Code Civ. Proc. §§ 706.128*

, 2015.5].

This Judicial Council form complies with the foregoing requirements.

[4] Time for Filing Notice

The notice of opposition to the claim of exemption is required to be filed with the levying officer within 10 days after the date the notice of claim of exemption was mailed [*Code Civ. Proc. § 706.105(d)*].

[5] Waiver of Opposition

Failure to comply with the statutory time limits may result in a waiver of the judgment creditor's right to oppose the claim of exemption [*see Westervelt v. Robertson (1981) 122 Cal. App. 3d Supp. 1, 8-10 , 176 Cal. Rptr. 94]* .

[6] Procedure if No Notice of Opposition Filed

If the levying officer does not receive a notice of opposition to the claim of exemption within the 10-day period after the date the claim of exemption was mailed and a notice of the hearing [§ 276.134] not later than 10 days after the notice of opposition to the claim of exemption was filed, the levying officer will serve on the employer either (1) a notice that the earnings withholding order has been terminated if all of the judgment debtor's earnings were claimed to be exempt or (2) a modified earnings withholding order which reflects the amount of earnings claimed to be exempt in the claim of exemption if only a portion of the judgment debtor's earnings was claimed to be exempt [*Code Civ. Proc. § 706.105(f)*; *see § 276.136*].

[7] State Statutes

Notice of opposition filed with levying officer within 10 days after mailing notice of claim of exemption. *Code Civ. Proc. § 706.105(d)*

Service of notice of opposition with notice of hearing on judgment debtor. *Code Civ. Proc. §§ 706.105(e), 1005(b)*

Contents of notice of opposition to claim of exemption. *Code Civ. Proc. § 706.128*

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23-276 California Forms of Pleading and Practice--Annotated § 276.133

§ 276.133 Notice of Motion [Code Civ. Proc. § 1010] for Order Determining Claim of Exemption [Code Civ. Proc. § 706.105(e)]

[1] FORM Notice of Motion [Code Civ. Proc. § 1010] for Order Determining Claim of Exemption [Code Civ. Proc. § 706.105(e)]

MUNICIPAL COURT OF CALIFORNIA, COUNTY OF
_____ JUDICIAL DISTRICT

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION FOR ORDER DETERMIN-
Defendant.	)	ING CLAIM OF EXEMPTION
	)	
	)	

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to _____ his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* plaintiff] will move the court for an order determining the claim of exemption filed by the _____ [*judgment debtor, e.g.,* defendant] herein with the levying officer.

The motion will be made on the ground that _____ [*specify, e.g.*, the judgment entered herein is for common necessaries of life, as that term is used in the Wage Garnishment Law, and that therefore, the exemption claimed is not available].

The motion will be based on this notice of motion, on the memorandum of points and authorities served and filed herewith, on the records and file herein, on the claim of exemption and the notice of opposition to the claim of exemption which will be filed herein by the levying officer, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*party's status and name name*]

[2] Use of Form

This form of notice of motion is for use by the judgment creditor to secure a hearing to determine the claim of exemption [*see § 276.129*] made pursuant to *Code Civ. Proc. § 706.051(b)* [*see Code Civ. Proc. § 706.105(e)*].

[3] Supporting Memorandum

A supporting memorandum must accompany notices of motion in law and motion proceedings as defined in *Cal. Rules of Ct., Rule 3.1103(a)* [*Cal. Rules of Ct., Rule 3.1113(a)*]. Although the definition in Rule 3.1103(a) does not extend to the motion noticed in the form, it is better practice to support the motion. For further discussion and forms, see Ch. 417, *Points and Authorities* .

[4] Right to Hearing on Claim of Exemption

If the judgment creditor files with the levying officer a notice of opposition to the judgment debtor's claim of exemption [*see § 276.132*] within 10 days after the levying officer mailed the notice of filing of claim of exemption [*see § 276.131*] to the judgment creditor, the judgment creditor is entitled to a hearing on the claim [*Code Civ. Proc. § 706.105(e)*]. The procedure for securing a hearing is set forth in *Code Civ. Proc. § 706.105(e)*, see discussion in *§ 276.23[4]*.

[5] Duplication of Notice

Code Civ. Proc. § 706.105(e), discussed in *§ 276.23[4]*, apparently contemplates both the filing of a notice of motion and the service of a notice of the hearing [*see § 276.134*], with the subsequent filing of a proof of service on the judgment debtor and his or her attorney, if any. The procedure seems duplicative. The double notice may be justified, however, for the following reasons: (1) the levying officer is required to be given written notice of the hearing so that he or she can file the necessary papers with the court before the hearing [*Code Civ. Proc. § 706.105(e)*], and the notice of motion would be neither given to, nor served on, the levying officer; (2) the requirement that the notice of hearing be served on the judgment debtor as well as on his or her attorney if so requested in the claim of exemption assures that the judgment debtor will have notice of the hearing; notices of motion are normally served on parties only when they have no attorney of record [*see Code Civ. Proc. § 1015*].

[6] Cross References

For additional forms of notices of motion and a procedural guide for use on a noticed motion, see Ch. 372, *Motions and Orders*

For procedure and forms of proof of service of papers, see Ch. 518, *Service of Summons and Papers*

[7] State Statutes

Notice of motion for order determining claim of exemption. *Code Civ. Proc. § 706.105(e)*

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23-276 California Forms of Pleading and Practice--Annotated § 276.134

§ 276.134 Notice of Hearing on Claim of Exemption [Code Civ. Proc. § 706.105(e)]--Judicial Council Form WG-010

[1] FORM Notice of Hearing on Claim of Exemption [Code Civ. Proc. § 706.105(e)]--Judicial Council Form WG-010

Click here to view image.

[2] Use of Form

This form of notice of hearing is an illustrative, filled-in reproduction of Judicial Council Form WG-010 (also numbered EJ-175), adopted by the Judicial Council for mandatory use [*Code Civ. Proc. § 706.120*; *Cal. Rules of Ct., Rule 1.30 et seq.*].

The form is for use by the judgment creditor to give the judgment debtor and the levying officer notice of the date of the hearing on the claim of exemption [*see Code Civ. Proc. § 706.105(e)*]. Blanks have been filled in to illustrate how the form might be used in conjunction with the Notice of Opposition to Claim of Exemption and Notice of Motion for Order Determining Claim of Exemption *set out in §§ 276.132* and *276.133*, respectively.

The notice must be served at least 16 court days prior to the hearing with additional time if service is by mail [*Code Civ. Proc. §§ 706.105(e), 1005(b)*; *see Code Civ. Proc. § 1005(a)(3)*; *see also § 276.23[5]*)].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] State Statutes

Notice of hearing on opposition to claim of exemption. *Code Civ. Proc. § 706.105(e)*

Time for service of notice of hearing on opposition to claim of exemption. *Code Civ. Proc. § 1005(b)*; *see Code Civ. Proc. §§ 706.105(e), 1005(a)(3)*

[4] Cross Reference

For related forms, *see §§ 276.131 -276.133*

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23-276 California Forms of Pleading and Practice--Annotated § 276.135

§ 276.135 Order Determining Claim of Exemption [Code Civ. Proc. § 706.105(g)]--Judicial Council Form WG-011

[1] FORM Order Determining Claim of Exemption [Code Civ. Proc. § 706.105(g)]--Judicial Council Form WG-011

Click here to view image.

[2] Use of Form

This form of order determining a claim of exemption is an illustrative, filled-in reproduction of Judicial Council Form WG-011, adopted by the Judicial Council for mandatory use [*Code Civ. Proc. § 706.120*; *Cal. Rules of Ct., Rule 1.30 et seq.*].

The order is for use to set out the court's determination of the judgment debtor's claim of exemption [*see § 276.129*] made pursuant to *Code Civ. Proc. § 706.051(b)* [*see Code Civ. Proc. § 706.105(g)*]. Blanks have been filled in to illustrate how the form may be used when the claim of exemption is sustained. The attorney's block at the top of the form has been left blank, since court orders normally do not contain this information.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Modification or Termination of Earnings Withholding Order

If, after hearing, the court orders that the earnings withholding order be modified or terminated, the clerk promptly transmits a certified copy of the order to the levying officer. The levying officer then promptly serves on the judgment debtor's employer (1) a copy of the modified earnings withholding order or (2) a notice that the earnings withholding order has been terminated [*Code Civ. Proc. § 706.105(g)*; *see § 276.136*].

[4] Liability for Amounts Withheld

If the court determines that any amount withheld pursuant to the earnings withholding order shall be paid to the judgment debtor, the court will make an order directing the person who holds the amount to pay it promptly to the judgment debtor [*Code Civ. Proc. § 706.105(g)*].

When the date of termination of an earnings withholding order is made retroactive, the employer may have already withheld and paid over money pursuant to the earnings withholding order prior to receipt of the notice of termination. *Code Civ. Proc. § 706.022(c)* makes clear that the employer is not liable to the debtor for these amounts. In such event, the judgment debtor may recover the amounts only from the levying officer if he or she still has them or, if they have been paid over to the judgment creditor, from the judgment creditor [*Code Civ. Proc. § 706.105(i)*].

[5] State Statutes

Order determining claim of exemption. *Code Civ. Proc. § 706.105(g)*

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Volume 23: Fraud and Deceit thru Good Faith Improver of Real Property-Chs. 269-279
Chapter 276 GARNISHMENT
PART V. FORMS

23-276 California Forms of Pleading and Practice--Annotated § 276.136

§ 276.136 Notice of Termination or Modification of Earnings Withholding Order [Code Civ. Proc. § 706.105(f), (g)]--Judicial Council Form WG-012

[1] FORM Notice of Termination or Modification of Earnings Withholding Order [Code Civ. Proc. § 706.105(f), (g)]--Judicial Council Form WG-012

Click here to view image.

[2] Use of Form

This form of claim of notice of termination or modification of an earnings withholding order is an illustrative reproduction of Judicial Council Form WG-012, adopted by the Judicial Council for mandatory use [*see Code Civ. Proc. § 706.120*; *Cal. Rules of Ct., Rule 1.30 et seq.*].

The notice of termination or modification is for use by the levying officer to notify the employer of changes in an earnings withholding order. This notice is used: (1) when the judgment is satisfied [*Code Civ. Proc. § 706.027*]; (2) when a claim of exemption was filed and the judgment creditor did not oppose it [*Code Civ. Proc. § 706.105(f)*]; or (3) when a court orders the withholding order terminated or modified [*Code Civ. Proc. § 706.105(g)*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] State Statutes

Authority of levying officer to adjust amount to be collected under earnings withholding order for costs and interest. *Code Civ. Proc. §§ 685.050(b)(2), 685.090(c), 706.024(b)*

Satisfaction of earnings withholding order. *Code Civ. Proc. § 706.024*

Termination of earnings withholding order when judgment is satisfied. *Code Civ. Proc. § 706.027*

Termination of dormant or suspended earnings withholding order. *Code Civ. Proc. § 706.032*

Earnings withholding order as terminated or modified if no opposition to claim of exemption is made. *Code Civ. Proc. § 706.105(f)*

Earnings withholding order as terminated or modified if court so orders. *Code Civ. Proc. § 706.105(g)*

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23-276 California Forms of Pleading and Practice--Annotated § 276.137

§ 276.137 Tax Garnishment Claim of Exemption and Financial Declaration [Code Civ. Proc. §§ 706.076, 706.081]--Judicial Council Form WG-026

[1] FORM Tax Garnishment Claim of Exemption and Financial Declaration [Code Civ. Proc. §§ 706.076, 706.081]--Judicial Council Form WG-026

Click here to view image.

[2] Use of Form

This form of claim of exemption and financial declaration is an illustrative reproduction of Judicial Council Form WG-026, adopted by the Judicial Council for mandatory use [*see Code Civ. Proc. § 706.120*; *Cal. Rules of Ct., Rule 1.30 et seq.*].

The form is for use by a taxpayer to claim that wages otherwise subject to garnishment for a state tax liability (defined in *Code Civ. Proc. § 706.070(b)*) are exempt under *Code Civ. Proc. § 706.051(b)* (amount necessary for support), discussed in *§ 276.22*, and in the comments to § 276.129. The form is for use where the state has applied to a court for issuance of a withholding order for taxes to garnish the taxpayer's earnings in an amount in excess of that allowed by *15 U.S.C. § 1673(a)* (discussed in *§ 276.16[2]*) in payment of a tax liability [*see Code Civ. Proc. §§ 706.074(b), 706.076(e)*; *see also § 276.137[7][b]*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] "State Tax Liability" Defined

A withholding order for taxes is issued to collect a state tax liability, which is defined as the amount for which the state has a tax lien as defined in *Gov. Code § 7162*, excluding a state tax lien created pursuant to the Fish and Game Code [*Code Civ. Proc. § 706.070(b)*].

Gov. Code § 7162 provides that a state tax lien is one created pursuant to *Fish & Game Code § 8048*; *Pub. Res. Code § 3423* (oil and gas production taxes and assessments) or 3772 (charges and penalties imposed on development of geothermal resources); *Rev. & Tax. Code §§ 6757* (sales and use taxes), 7872 (motor vehicle fuel license tax), 8996 (use fuel tax), 13610 (personal representative's failure to pay tax), 16063 (gift tax), 16810 (generation skipping transfer tax), 19221 (personal income tax and bank and corporation tax), 30322 (cigarette tax), 32363 (alcoholic beverage tax), or 38532 (timber yield tax); or *Unemp. Ins. Code § 1703* (delinquent payments or employee and employer contributions to unemployment and disability insurance funds, taxes, and penalties).

[4] Applicability of Wage Garnishment Law

The provisions of the Wage Garnishment Law (*Code Civ. Proc. §§ 706.010-706.154*) govern the procedures and proceedings except as otherwise provided in *Code Civ. Proc. §§ 706.070-706.084* (specifically dealing with withholding orders for taxes) [*Code Civ. Proc. § 706.073*].

[5] Conditions for Issuance of Withholding Orders for Taxes

Withholding orders for taxes may be issued only if (1) the existence of the state tax liability appears on the face of the taxpayer's return (including a case in which the tax liability is disclosed from the taxpayer's return after errors in mathematical computation in the return have been corrected), or (2) the state tax liability has been assessed or determined and the taxpayer had notice of the proposed assessment or determination and had available an opportunity to have the proposed assessment or determination reviewed by appropriate administrative procedures [*Code Civ. Proc. § 706.072(b)*]. A withholding order for taxes may be issued whether or not the state tax liability has been reduced to judgment [*Code Civ. Proc. § 706.072(d)*].

[6] Priority of Earnings Withholding Orders and Pay Periods

Specific priorities apply to withholding orders for taxes (*Code Civ. Proc. § 706.077*) and special provisions regulate the pay periods from which wages may be withheld. For example, wages are not to be withheld from any pay period which ends prior to the 10th day after the service of the order [*Code Civ. Proc. § 706.078*].

[7] Manners in Which Withholding Orders for Taxes May Be Issued

[a] Issuance by State

There are two ways in which a withholding order for taxes may be issued. The first is issuance of the withholding order by the state itself [*Code Civ. Proc. § 706.074(a)*]. An order issued by the state must specify the total amount required to be withheld pursuant to the order (unpaid tax liability including any penalties, accrued interest, and costs) [*Code Civ. Proc. § 706.074(a)*]. Unless a lesser amount is specified in the order, the amount to be withheld by the employer is the amount required to be withheld under *15 U.S.C. § 1673(a)* and is not subject to the exception provided in *15 U.S.C. § 1673(b)* [*Code Civ. Proc. § 706.074(b)*; *see § 276.16[2]*]. The specific state agency seeking to collect a state tax liability is in such case the levying officer [*Code Civ. Proc. § 706.073*].

[b] Issuance by Court

The second way is for the state, when it wishes to garnish an amount greater than that allowed under *Code Civ. Proc. § 706.074(b)*, to apply for a court order pursuant to the provisions of *Code Civ. Proc. § 706.076*. This section provides that pursuant to its provisions the court may issue a withholding order for taxes requiring the employer to withhold an amount in excess of that which may be required to be withheld pursuant to an order issued under *Code Civ. Proc. § 706.074* [*Code Civ. Proc. § 706.076(a)*]. This form is for use in such a proceeding, when the taxpayer seeks to have a portion or all of the excess amount declared exempt from garnishment.

The application for the withholding order, which must include a statement under oath that the state has served on the taxpayer a copy of the application and a notice informing the taxpayer of the purpose of the application and the taxpayer's right to appear at the court hearing on the application, is filed in a court of record (*i.e.*, a municipal or superior court (*Cal. Const., art. I, § 6*)) in the county where the taxpayer was last known to reside [*Code Civ. Proc. § 706.076(b), (c)*]. On the filing of the application, the court will immediately set the matter for hearing and the court clerk will at least 10 days before the day set for the hearing send a notice of the time and place of hearing by first-class mail, postage prepaid, to the state and the taxpayer [*Code Civ. Proc. § 706.076(d)*]. After hearing, the court will issue a withholding order for taxes which will require the taxpayer's employer to withhold and pay over all earnings of the taxpayer other than that amount which the taxpayer proves is exempt under *Code Civ. Proc. § 706.051(b)*, but in no event may the amount to be withheld be less than that permitted to be withheld under *Code Civ. Proc. § 706.050* (discussed in *§ 276.16[5]*) [*Code Civ. Proc. § 706.076(e)*].

If the state intends to apply for such an order and has determined that collection will be jeopardized if a temporary holding order is not issued, it may issue a temporary holding order which expires 15 days after service on the employer unless extended by the court [*Code Civ. Proc. § 706.076(f)*].

[8] State Statutes

Code Civ. Proc. § 706.051(b) exemption and *Code Civ. Proc. § 706.105* procedures for claiming exemption as not applicable in case of withholding order for taxes. *Code Civ. Proc. §§ 706.051(b), 706.105(k)*

"State" and "tax liability" defined. *Code Civ. Proc. § 706.070*

Effect of *Code Civ. Proc. §§ 706.070-706.084* on state's right to collect taxes. *Code Civ. Proc. § 706.071*

Conditions for issuance of withholding order for taxes. *Code Civ. Proc. § 706.072*

Applicability of other provisions of Wage Garnishment Law to withholding orders for taxes and "levying officer" defined. *Code Civ. Proc. § 706.073*

Right of state to issue earnings withholding order for taxes. *Code Civ. Proc. § 706.074*

Documents to be served on employer and taxpayer. *Code Civ. Proc. § 706.075*

Procedure to secure court order to withhold excess earnings. *Code Civ. Proc. § 706.076*

Priority of earnings withholding orders. *Code Civ. Proc. § 706.077*

Jeopardy withholding order for taxes. *Code Civ. Proc. § 706.078*

Methods of service. *Code Civ. Proc. § 706.080*

Forms to be prescribed by state. *Code Civ. Proc. § 706.081*

Nonreviewability of taxpayer's tax liability by court. *Code Civ. Proc. § 706.082*

Other documents deemed to be withholding order for taxes. *Code Civ. Proc. § 706.084*

[9] Cross Reference

For a related form, see *§ 276.121*

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23-276 California Forms of Pleading and Practice--Annotated § 276.138

§ 276.138 Application for and Order Staying Enforcement of Earnings Withholding Order Taken Against Party During Period of Military Service [Mil. & Vet. Code § 402(d)]

[1] FORM Application for and Order Staying Enforcement of Earnings Withholding Order Taken Against Party During Period of Military Service [Mil. & Vet. Code § 402(d)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	APPLICATION FOR ORDER STAYING
_____ [*name*],	)	EARNINGS WITHHOLDING ORDER;
Plaintiff,	)	DECLARATION
vs.	)	
	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	

I, the undersigned, _____ [*identify party, e.g.,* Defendant] _____ [*name*], hereby apply for an order pursuant to *Military and Veterans Code Section 402(d)* staying enforcement of the earnings withholding order described below and, in support of this application, declare:

1. I am _____ [*identify declarant, e.g.,* the defendant named in this action].

2. As shown by the records of this court, of which the court is requested to take judicial notice, this action was filed on _____ [*date*], and _____ [*specify proceeding leading to earnings withholding order from which relief is sought, e.g.,* the summons was served on _____ (*date*), and defendant's default was entered on _____ (*date*), a default judgment against the defendant was entered on _____ (*date*), and an earnings withholding order was entered on _____ (*date*)].

[*EITHER*]

3. On _____ [*date*], I was called to active _____ [*specify* state *or* federal] military service as _____ [*specify, e.g.,* an enlisted member of the National Guard] by the _____ [*specify* Governor of the State of California pursuant to the provisions of Section _____ (*specify* 143 *or* 146) of the Military and Veterans Code *or* the President of the United States of America pursuant to Title _____ (*specify* 10 *or* 12) of the United States Code].

[*OR*]

3. On _____ [*date*], I was called to full-time active duty as a reservist of the United States Army Reserve.

[*CONTINUE*]

4. As shown by the attached certificate, of which the court is requested to take judicial notice, from _____ [*date*] _____ [*date*], I was in full-time active _____ [*specify* state *or* federal] service as defined in *Section 400(b) of the Military and Veterans Code*.

5. As shown by Paragraphs 2 through 4, above, the earnings withholding order from which relief is sought was entered during a period of military service governed by *Section 402(d) of the Military and Veterans Code*.

6. A stay of enforcement is needed _____ [*state grounds for stay, e.g.,* because I was prejudiced by reason by military service in making my defense to this action, because _____ [*specify facts showing prejudice*], and I have a _____ [*specify* meritorious *or* legal] defense to _____ [*specify* all *or* part] of the action, which is _____ [*specify*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

MEMORANDUM

[*Add memorandum supporting application*]

ORDER

Good cause appearing therefor,

IT IS ORDERED that the application for a stay of enforcement be, and is, granted and that enforcement of the above-described earnings withholding order entered herein is stayed until _____ [*date*] [on the following terms: _____ (*specify any terms*)].

_____ [*date*].

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of notice of application, supporting declaration and order is for use by a party seeking a stay of the enforcement of an earnings withholding order taken against him or her during or within 30 days after a period of military service after being called or ordered into active state service as an officer or enlisted member of the National Guard by the Governor pursuant *Mil. & Vet. Code §§ 143* or *146* or into active federal service by the President pursuant to Title 10 or 12 of the United States Code or as a reservist of the United States Military Reserve called to full-time active duty [*Mil. & Vet. Code §§ 400(a), (b), 402(d)*], who was prejudiced by reason of military service in making a defense to the action.

For discussion of relief from judgments obtained during a period of military service, see discussion in Ch. 489, *Relief from Judgments and Orders* .

[3] Supporting Memorandum

A supporting memorandum must be served and filed with the notice of motion if the motion is subject to the Civil Law and Motion Rules [*Cal. Rules of Ct., Rule 3.1113(a)*; for motions subject to the Civil Law and Motion Rules, see *Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(2)*], or if required by local court rule. The better practice is to prepare, serve, and file points and authorities in support of any noticed motion, unless excluded expressly or by implication from the Civil Law and Motion Rules or by local court rule. For discussion and forms relating to points and authorities, see Ch. 417, *Points and Authorities* .

[4] Cross References

Relief from judgments entered during period of military service. *Mil. & Vet. Code § 402(d)*

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Chapter 277 GAS AND ELECTRICITY

23-277 California Forms of Pleading and Practice--Annotated 277.syn

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§ 277.56 Termination of Service Through Individual Meter in Multiunit Residence

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[1] FORM

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§ 277.151 Complaint for Damages for Wrongful Death of Worker [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a)]--By Entitled Person(s) Against Electric Company--Death Caused by Electrocution

[1] FORM

[2] Use of Form

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§ 277.152 Complaint for Damages for Wrongful Death [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a)]--By Parents of Child Against Electric Company--Death Caused by Touching Down Wire

[1] FORM

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§ 277.153 Complaint for Damages [Civ. Code § 3333] for Personal and Property Damage Based on Negligence [Civ. Code § 1714(a)]--By Automobile Driver Against Electric Company--Injury Caused by Hitting Negligently Installed Power Pole Which Broke

[1] FORM

[2] Use of Form

[3] Cross References

[4] Decisions

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[2] Use of Form

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[5] Decisions

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§ 277.156 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Strict Liability--By Purchaser Against Manufacturer, Wholesaler, and Retailer

[1] FORM

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[3] Cross References

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§ 277.170 Complaint for Damages [Civ. Code § 3333] Based on Termination of Utility Service While Residential Unit Occupied--Against Owner, Manager, or Operator of Master Metered, Multiunit Housing by Residential Occupant [Pub. Util. Code §§ 777.1(f), 10009.1(f), 12822.1(f), 16481.1(f)]

[1] FORM

[2] Use of Form

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Chapter 277 GAS AND ELECTRICITY
PART I. SCOPE

23-277 California Forms of Pleading and Practice--Annotated § 277.01

§ 277.01 Scope of Chapter

This chapter discusses liability for injuries caused by gas. It includes forms of complaints and allegations for use in actions against gas companies [*see §§ 277.130 -277.132*], a form of complaint for use in an action against supplier of butane gas [*see § 277.133*], forms of complaints for use in actions against landlords and possessors of land [*see §§ 277.134, 277.135*], and a form of complaint for use in a products liability action involving gas [*see § 277.136*].

This chapter also discusses liability for injuries caused by electricity. It contains forms of complaints for use in actions against electric companies for negligence [*see §§ 277.150 -277.153*], forms of complaints for use in actions against landlords and possessors of land [*see §§ 277.154, 277.155*], a form of complaint for use in a strict liability action involving an electric appliance [*see § 277.156*], and a form of complaint for use in an action against electric contractors [*see § 277.158*].

This chapter also discusses rights and remedies in connection with the termination of public utility service. It contains a form of complaint for damages against an owner or operator of master metered, multiunit housing by a residential occupant resulting from a termination of residential utility service while the resident's unit was occupied [*see § 277.170*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsInherently Dangerous ActivitiesTortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsGeneral Overview

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§ 277.02 Cross References

For forms for use if fires are involved, see Ch. 267, *Fires*

For forms for use in landlord-tenant actions, see Ch. 332, *Landlord and Tenant: The Tenancy* , and Ch. 334, *Landlord and Tenant: Claims for Damages*

For forms for use for injuries on defendant's property, see Ch. 421, *Premises Liability*

For forms for use if gas appliances or electrical products are involved, see Ch. 460, *Products Liability*

For forms for use in negligence actions generally, see Ch. 380, *Negligence*

For discussion regarding and forms forpractice before the Public Utilities Commission, see Ch. 480, *Public Utilities*

For additional discussion of practice before administrative agencies, see Ch. 473, *Public Agency Adjudication* , et seq.

Legal Topics:

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

§§ 277.03[Reserved]

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23-277 California Forms of Pleading and Practice--Annotated § 277.10

§ 277.10 General Duty of Care

Gas is an inherently and highly dangerous commodity and therefore a high degree of care is required in handling it [*Ambriz v. Petrolane Ltd. (1957) 49 Cal. 2d 470, 477, 319 P.2d 1]* . This rule has been applied to natural gas [*Lewis v. Bjornestad (1952) 111 Cal. App. 2d 409, 412, 244 P.2d 497* ; *see Ambriz v. Petrolane Ltd. (1957) 49 Cal. 2d 470, 477, 319 P.2d 1]* , butane gas [*Ambriz v. Petrolane Ltd. (1957) 49 Cal. 2d 470, 477, 319 P.2d 1* ; *Signorelli v. Potter (1954) 43 Cal. 2d 541, 543, 275 P.2d 449]* and gas heaters that, if defective, emit carbon monoxide [*Dow v. Holly Mfg. Co. (1958) 49 Cal. 2d 720, 727-728, 321 P.2d 736]* .

Liability for carelessly handling dangerous instrumentalities arises from failure to use due care; such failure arises when the circumstances show that the actor had reason to know that his or her act was likely to produce injury to any person in the lawful pursuit of his or her business and exercising reasonable care. When human life is at stake, the rule of due care and diligence requires that, without regard to difficulties or expense, every precaution must be taken reasonably to assure the safety and security of any person lawfully coming into the immediate proximity of the dangerous agency or device which is a peril to others. One who causes the use of a dangerous instrument in a negligent manner or under such circumstances that he or she has reason to know that it is likely to produce injury is responsible for the natural and probable consequences of his or her act to any person not at fault [*Hall v. Macco Corp. (1961) 198 Cal. App. 2d 415, 422, 18 Cal. Rptr. 273]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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23-277 California Forms of Pleading and Practice--Annotated § 277.11

§ 277.11 Gas Company's Duty Regarding Customer's Pipes

As a general rule, a gas company has no duty to inspect a customer's pipes once service has been established, and is not liable for injuries caused by a gas leak from defective house pipes, absent some notice of the leak [*see Sawyer v. Southern California Gas Co. (1929) 206 Cal. 366, 372, 206 Cal. 366, 372, 274 P. 544]* . The company has sufficient notice of a leak for purposes of liability if it has inspected inside gas valves in previous years and either found leaks or, as an expert in the propensities of gas, should have known that the valves were inadequate to prevent leaks [*see Ambriz v. Petrolane Ltd. (1957) 49 Cal. 2d 470, 476, 480, 319 P.2d 1]* . In addition, if a gas company is in possession of facts that would suggest to a person of ordinary care and prudence that the pipes in the building are leaking or are otherwise unsafe for transporting gas, the company is under a duty to make the same inspection or investigation as a person of ordinary care and prudence, similarly situated and handling such dangerous material, would make to ascertain the safety of the pipes, before the company furnishes or continues to furnish gas through them [*Ambriz v. Petrolane Ltd. (1957) 49 Cal. 2d 470, 478, 319 P.2d 1]* .

A gas company has an affirmative duty to make inquiry or investigation to satisfy itself that all openings in the pipes inside the customer's building are closed before it turns on the gas [*Sawyer v. Southern Cal. Gas. Co. (1929) 206 Cal. 366, 372, 274 P. 544]* . Therefore, the company may be liable when it either directs its employees to turn on a gas meter or authorizes the person applying for gas to turn it on and an explosion occurs because of an escape of gas through a house pipe connected with the meter that was uncapped or severed at the time the meter was turned on [*Sawyer v. Southern Cal. Gas. Co. (1929) 206 Cal. 366, 372, 274 P. 544]* .

In addition, it has been held that a gas supplier has a duty to check all lines leading from a tank to the inside of the dwelling for leaks, either by visual inspection of lines and pipes inside the house or by use of a pressure gauge at the tank to determine if there are any leaks in the pipe, when the supplier first delivers gas to premises for either a new or existing hookup [*Mendoza v. Easton Gas Co. (1988) 197 Cal. App. 3d 781, 787, 243 Cal. Rptr. 136]* . When gas is delivered on a seasonal basis, delivery of gas at the beginning of new season is the "first delivery" imposing on supplier this duty to check for gas leaks inside the dwelling [*Mendoza v. Easton Gas Co. (1988) 197 Cal. App. 3d 781, 788, 243 Cal. Rptr. 136]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawUtility CompaniesLiability

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§ 277.12 Proximate Cause

A defendant cannot be held liable for a fire when it cannot be proved that the defendant's negligence with regard to a gas pipe proximately caused the fire [*Union Inv. Co. v. San Francisco Gas & Elec. Co. (1914) 168 Cal. 58, 62-63, 141 P. 807]* .

When the defendant was negligent in allowing a large amount of gas to leak and in not ascertaining what happened to it, the intervening negligence of the decedent's employer is not a superseding cause which relieves the liability of the gas company if one of the following circumstances exists: (1) the original actor at the time of his or her negligent conduct should have realized the a third person might act negligently; (2) a reasonable person knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person so acted; or (3) the intervening act is a normal response to a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent [*Ewart v. Southern Cal. Gas Co. (1965) 237 Cal. App. 2d 163, 171, 46 Cal. Rptr. 631]* .

Nor will a gas company be held liable for a plaintiff's respiratory injuries caused by an alleged methane gas leak when the defendant provides competent declaratory evidence showing that methane gas could not have caused or exacerbated the ailments from which plaintiff suffered and the declaration of plaintiff's expert is insufficient to create a triable issue of fact as to probable cause [*Ochoa v. Pacific Gas & Elec. Co. (1998) 61 Cal. App. 4th 1480, 1485, 72 Cal. Rptr. 2d 232* (plaintiff's expert's declaration stated that leak of some unspecified gas probably aggravated plaintiff's respiratory problems because expert did not know of any more medically probable cause)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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23-277 California Forms of Pleading and Practice--Annotated § 277.13

§ 277.13 Res Ipsa Loquitur

[1] General Rule

The doctrine of res ipsa loquitur has often been raised in gas cases. Its application requires the following three factual conditions [*Reynolds v. Natural Gas Equip., Inc. (1960) 184 Cal. App. 2d 724, 731, 7 Cal. Rptr. 879]* :

- The accident must be of a kind that ordinarily does not occur in the absence of someone's negligence;
- It must be caused by an agency or instrumentality within the exclusive control of the defendant; and
- It must not have been due to any voluntary action or contribution on the part of the plaintiff.

The exclusive control requirement is met if, after the defendant relinquished control of the instrumentality, it has not been changed or mishandled [*Reynolds v. Natural Gas Equip., Inc. (1942) 184 Cal. App. 2d 724, 732-734, 7 Cal. Rptr. 879]* .

[2] Situations Where Applicable

Res ipsa loquitur has been applied to the following situations:

- An explosion caused by gas that leaked into a manhole when the defendant's pipeline was adjacent [*Chutuk v. Southern Counties Gas Co. (1942) 21 Cal. 2d 372, 375-378, 132 P.2d 193]* .
- An explosion in a burner that had recently been converted to gas by the defendant [*Reynolds v. Natural Gas Equip., Inc. (1960) 184 Cal. App. 2d 724, 731-736, 7 Cal. Rptr. 879]* .
- A death by asphyxiation when the heater was maintained by the landlord defendant [*Black v. Partridge (1953) 115 Cal. App. 2d 639, 645-647, 252 P.2d 760]* .

- An explosion caused by gas that leaked from an exposed capped service pipe owned by the defendant [*Chutuk v. Southern Cal. Gas Co. (1933) 218 Cal. 395, 398-400, 23 P.2d 285]* .

- A death by asphyxiation when the defendant gas company had recently changed the burner in the furnace [*Roy v. Smith (1933) 134 Cal. App. 240, 243-245, 25 P.2d 251]* .

- An explosion in a pit containing gas pipes and maintained by the defendant gas company [*Smith v. Southern Counties Gas Co. (1928) 89 Cal. App. 81, 85, 264 P. 532]* .

- An explosion and fire that occurred when the defendant's employee was attempting to repair the gas pipes [*Willard v. Valley Gas & Fuel Co. (1919) 180 Cal. 561, 563-565, 182 P. 32* ; *Willard v. Valley Gas & Fuel Co. (1915) 171 Cal. 9, 13-14, 151 P. 286]* .

[3] Situations Where Not Applicable

Res ipsa loquitur was not applicable in the following situations:

- The defendant had installed the gas equipment two years before the explosion, and since the installation, it had been in the exclusive control of another [*Brooks v. Parkhill-Wade Inc. (1954) 122 Cal. App. 2d 819, 821-822, 266 P.2d 128]* .

- The gas that caused the explosion could have escaped from another entity's pipes as well as the defendant's pipes and the defendant's pipes were found to be gastight [*Gerhart v. Southern Cal. Gas Co. (1942) 56 Cal. App. 2d 425, 431-436, 132 P.2d 874]* .

- No proof existed that the fire was started by defendant's broken pipe since the pipe could have been broken by the fire [*Union Inv. Co. v. San Francisco Gas & Elec. Co. (1914) 168 Cal. 58, 62, 141 P. 807]* .

- There was no proof that the gas that caused the injury came from defendant's refinery [*Brocato v. Standard Oil Co. (1958) 164 Cal. App. 2d 749, 756-759, 331 P.2d 111]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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23-277 California Forms of Pleading and Practice--Annotated § 277.14

§ 277.14 Negligence Per Se

Installation of a gas device that violates a state law or city ordinance is negligence per se and requires a presumption that the installer was negligent [*see Evid. Code § 669*; *Smith v. Kile (1956) 147 Cal. App. 2d 314, 316-318, 304 P.2d 1034]* . Likewise, a landlord who violates a statute requiring the maintenance of gas appliances in good repair is presumed to be negligent [*Ewing v. Balan (1959) 168 Cal. App. 2d 619, 621-622, 336 P.2d 561]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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23-277 California Forms of Pleading and Practice--Annotated § 277.15

§ 277.15 Sale to Independent Contractor No Defense

Since gas is intrinsically dangerous, a seller of gas cannot escape liability for its own negligence by selling the gas to an independent contractor for delivery [*Ambriz v. Petrolane Ltd. (1957) 49 Cal. 2d 470, 481-482, 319 P.2d 1]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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23-277 California Forms of Pleading and Practice--Annotated § 277.16

§ 277.16 Liability of Gas Company for Misrepresentation

Pub. Util. Code § 532 forbids rebates on public utility charges for services. It does not, however, bar a complaint against a gas company for fraudulent misrepresentation of the amount of gas that the plaintiff's development would use because the misrepresentation did not concern a published rate [*Empire West v. Southern California Gas Co. (1974) 12 Cal. 3d 805, 808-812, 117 Cal. Rptr. 423, 528 P.2d 31]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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23-277 California Forms of Pleading and Practice--Annotated §§ 277.17-277.29

[Reserved]

§§ 277.17[Reserved]

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23-277 California Forms of Pleading and Practice--Annotated § 277.30

§ 277.30 Standard of Care

The standard of care for one maintaining wires carrying electricity is to exercise the care that a person of ordinary prudence would exercise under the circumstances. Among the circumstances are the well-known dangerous character of electricity and the inherent risk of injury to persons or property if it escapes. Hence, the care used must be commensurate with and proportionate to that danger [*Dunn v. Pacific Gas & Elec. Co. (1954) 43 Cal. 2d 265, 273, 272 P.2d 745* ; *Polk v. City of Los Angeles (1945) 26 Cal. 2d 519, 525, 159 P.2d 931]* .

Legal Topics:

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23-277 California Forms of Pleading and Practice--Annotated § 277.31

§ 277.31 General Duties

[1] Duty to Insulate

Wires carrying electricity must be carefully and properly insulated by those maintaining them at all places where there is a reasonable probability of injury to persons or property there from [*Dunn v. Pacific Gas & Elec. Co. (1954) 43 Cal. 2d 265, 273, 272 P.2d 745* ; *Polk v. City of Los Angeles (1945) 26 Cal. 2d 519, 525, 159 P.2d 931]* . Uninsulated wires must be located so as to be comparatively harmless [*McCormick v. Great W. Power Co. (1932) 214 Cal. 658, 663, 8 P.2d 145* ; *Scally v. Pacific Gas & Elec. Co. (1972) 23 Cal. App. 3d 806, 815-816, 100 Cal. Rptr. 501]* . However, even one who maintains so dangerous an instrumentality as a high power line need not anticipate its peril every possible fortuitous circumstance under which someone may make contact with the wires causing injury; care, commensurate with and proportionate to reasonably foreseeable consequences, not insurance against every possible accident, is the measure of liability [*Perrine v. Pacific Gas & Elec. Co. (1960) 186 Cal. App. 2d 442, 449, 9 Cal. Rptr. 45]* .

[2] Duty to Inspect

An electric company has the duty to reasonably and promptly inspect the wires and appliances and to be diligent therein. They must keep the insulation safe by such inspection [*Polk v. City of Los Angeles (1945) 26 Cal. 2d 519, 525-528, 159 P.2d 931]* . The electric company also has the duty to inspect its rights of way over which the wires run to make sure they are safe and clear from dangerous conditions [*Irelan-Yuba Gold Quartz Mining Co. v. Pacific Gas & Elec. Co. (1941) 18 Cal. 2d 557, 565-567, 116 P.2d 611* ; *Roberts v. Pacific Gas & Elec. Co. (1929) 102 Cal. App. 422, 431-432, 283 P. 353* ; *see Scally v. Pacific Gas & Elec. Co. (1972) 23 Cal. App. 3d 806, 817-818, 100 Cal. Rptr. 501* (no duty to denude land beneath wires to prevent fires)].

[3] Duty to Maintain Streetlights

An electric company owes no duty to the public to maintain its streetlights and keep them operable. Consequently, the company is not liable to persons injured in a motor vehicle collision caused partly by an inoperative streetlight if (1) the installation of the streetlight was not necessary to obviate a dangerous condition; (2) the failure to maintain an installed

streetlight did not create a risk greater than the risk created by the total absence of a streetlight; and (3) the injured party did not in some manner rely on the operation of the streetlight and forgo other protective actions (for example, a pedestrian choosing a particular route home in reliance on available streetlights if the pedestrian would have chosen a different route or a different means of transportation in the absence of lighting). The burden on electric companies of imposing liability (costs and disruption of existing rate schedules) would far exceed the slight benefit to motorists; because vehicles are driven with headlights, a single inoperable streetlight is unlikely to be a substantial factor in causing a collision, and insurance is available to cover damages [*White v. Southern Cal. Edison Co. (1994) 25 Cal. App. 4th 442, 445, 451, 30 Cal. Rptr. 2d 431]* .

[4] Duty With Regard to Poles

An electric company is liable for negligence in placing a power pole where it is a hazard to traffic [*George v. City of Los Angeles (1938) 11 Cal. 2d 303, 311-313, 79 P.2d 723* ; *Norton v. City of Pomona (1935) 5 Cal. 2d 54, 61, 53 P.2d 952]* . Even if a pole did not endanger traffic when it was installed, the company has a continuing duty to prevent it from becoming a traffic hazard under changed conditions and circumstances. However, an electric company is not liable if the county places a stop sign where it is partially obscured by a power pole [*Schauf v. Southern Cal. Edison Co. (1966) 243 Cal. App. 2d 450, 459-461, 52 Cal. Rptr. 518]* .

[5] Duty as Possessor of Property

As a possessor of real or personal property, an electric company is liable to persons injured on or by the property if in the management of its property, it has not acted as a reasonable person in view of the probability of injury to others. Although the plaintiff's status as a trespasser, licensee, or invitee may have some bearing on the question of liability, this status is not determinative. If the occupier of land or the owner of personal property such as a street lamp is aware of a concealed condition involving, in the absence of precautions, an unreasonable risk of harm to those coming in contact with it, a failure to warn or to repair the condition constitutes negligence [*Mark v. Pacific Gas & Elec. Co. (1972) 7 Cal. 3d 170, 177, 101 Cal. Rptr. 908, 496 P.2d 1276* ; *see Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561]* .

Legal Topics:

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23-277 California Forms of Pleading and Practice--Annotated § 277.32

§ 277.32 Res Ipsa Loquitur

[1] Three Conditions

The application of the doctrine of res ipsa loquitor requires that the following three conditions be met: (1) the accident must be of a kind that ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff [*Scally v. Pacific Gas & Elec. Co. (1972) 23 Cal. App. 3d 806, 820, 100 Cal. Rptr. 501]* .

[2] Rule Applicable

Res ipsa loquitur has been applied in the following situations: (1) fire caused by defendant's independent contractor electricians for which defendant was liable due to control of the premises [*Pappas v. Carson (1975) 50 Cal. App. 3d 261, 268-269, 123 Cal. Rptr. 343]* ; (2) an automobile accident caused by a falling electric wire [*Taylor v. Pacific Gas & Elec. Co. (1943) 57 Cal. App. 2d 11, 14-16, 134 P.2d 12]* ; (3) death by electrocution from a sagging telephone line that had become charged by electricity [*Langazo v. San Joaquin Light & Power Corp. (1939) 32 Cal. App. 2d 678, 695-696, 90 P.2d 825]* ; (4) fire started by a short circuit from high powered electric lines [*Phillips v. Southern Cal. Edison Co. Ltd. (1937) 23 Cal. App. 2d 222, 224-225, 72 P.2d 769]* ; (5) an injury caused by the fall of a portion of a glass globe from an electrolier [*Helms v. Pacific Gas & Elec. Co. (1937) 21 Cal. App. 2d 711, 713-714, 70 P.2d 247]* ; and (6) an injury caused by the fall of power wires [*Vertson v. City of Los Angeles (1931) 116 Cal. App. 114, 122-124, 2 P.2d 411]* .

[3] Rule Not Applicable

Courts have refused to instruct on the doctrine of res ipsa loquitur in the following situations: (1) where an injury was caused by the fall of a power pole but there was evidence that an external force burned the pole partially through [*Rodela v. Southern Cal. Edison Co. (1957) 148 Cal. App. 2d 708, 712-713, 307 P.2d 436]* ; and (2) where a fire occurred under a hot plate installed and turned on by plaintiff [*Valentine v. Ratner (1951) 105 Cal. App. 2d 358, 361-362, 233 P.2d 667]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 277.33 Negligence Per Se

Negligence is presumed if the condition that caused the injury was a violation of statute, public utility rule, or safety order [*Evid. Code § 669*; *Stasulat v. Pacific Gas & Elec. Co. (1937) 8 Cal. 2d 631, 636, 67 P.2d 678* ; *see Williams v. Pacific Gas & Elec. Co. (1960) 181 Cal. App. 2d 691, 700-702, 5 Cal. Rptr. 585* (safety orders)]. This rule has been applied to violations involving clearance of wires [*Stasulat v. Pacific Gas & Elec. Co. (1937) 8 Cal. 2d 631, 636, 67 P.2d 678]* , the duty to remove an abandoned telephone pole [*Langazo v. San Joaquin Light & Power Corp. (1939) 32 Cal. App. 2d 678, 682-684, 90 P.2d 825]* , and the failure to raise a wire to the proper height in a reasonable time after the ground under it has been raised [*Dunn v. Pacific Gas & Elec. Co. (1954) 43 Cal. 2d 265, 277, 272 P.2d 745]* . An employer is presumed to be liable for erecting a building too close to power lines without asking the electric company to raise them [*Bickham v. Southern Cal. Edison Co. (1953) 120 Cal. App. 2d 815, 820-821, 263 P.2d 32]* . However, compliance with the general orders of the Public Utility Commission does not establish due care by an electric company; it merely relieves it of the presumption of negligence [*Nevis v. Pacific Gas & Elec. Co. (1954) 43 Cal. 2d 626, 630, 275 P.2d 761* ; *Perrine v. Pacific Gas & Elec. Co. (1960) 186 Cal. App. 2d 442, 448, 9 Cal. Rptr. 45]* . The duty to obey the rules of the Public Utility Commission is not delegable to an independent contractor, and therefore an electric company is liable for injury caused by its independent contractor's not setting a pole deep enough in the ground [*Snyder v. Southern Cal. Edison Co. (1955) 44 Cal. 2d 793, 799-802, 285 P.2d 912]* .

A plaintiff is presumed to be negligent if his or her conduct violates a statute such as *Penal Code § 385*, which prohibits the operation of machinery within six feet of a high voltage line. This presumption is rebuttable and may be overcome by evidence of justification or excuse [*Kingery v. Southern Cal. Edison Co. (1961) 190 Cal. App. 2d 625, 638, 12 Cal. Rptr. 173* , quoting *Alarid v. Vanier (1958) 50 Cal. 2d 617, 621, 327 P.2d 897]* . Nonnegligent ignorance of the facts that bring such a statute into operation will support a finding that the violation is civilly excusable [*Nevis v. Pacific Gas & Elec. Co. (1954) 43 Cal. 2d 626, 633, 275 P.2d 761]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 277.34 Proximate Cause

A plaintiff must establish that the negligence of the defendant was the proximate cause of the injury to the plaintiff [*Polk v. City of Los Angeles (1945) 26 Cal. 2d 519, 543, 159 P.2d 931]* . Proximate cause is not established if the defendant's sagging wires were moved from their place by an intervening agent [*Stasulat v. Pacific Gas & Elec. Co. (1937) 8 Cal. 2d 631, 636-638, 67 P.2d 678]* , if the defendant's wire was only touched by the plaintiff swinging a long pole out from a building being constructed [*Sweatman v. Los Angeles Gas & Elec. Corp. (1929) 101 Cal. App. 318, 326-327, 281 P. 677]* , or if the defendant's down wires were moved and concealed by a third party [*Polloni v. Ryland (1915) 28 Cal. App. 51, 53-56, 151 P. 296]* . However, the fact that the electricity that caused the injury may have arrived at the dangerous instrumentality through another's property and negligence does not necessarily mean that the negligence in maintaining the instrumentality was not the proximate cause of the injury [*Satterberg v. Pacific Gas & Elec. Co. (1943) 58 Cal. App. 2d 296, 301-302, 136 P.2d 43]* . Also, if the injury is caused by the concurrent negligence of two parties, both are liable [*Lacy v. Pacific Gas & Elec. Co. (1934) 220 Cal. 97, 98-99, 29 P.2d 781]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawUtility CompaniesLiabilityTortsNegligenceCausationProximate CauseGeneral OverviewTortsNegligenceCausationProximate CauseConcurrent CausationTortsNegligenceCausationProximate CauseIntervening Causation

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§ 277.35 Negligence of Plaintiff

In all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured does not bar recovery, but the damages awarded are diminished in proportion to the amount of negligence attributable to the person recovering [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226* ; *see* generally Ch. 380, *Negligence*]. Cases prior to *Li* involving contributory negligence are, however, instructive insofar as they illustrate what is or is not negligent conduct on the part of the plaintiff. For example, if a person is warned to keep away from a high voltage wire and not to touch it and is fully informed of the danger of doing so, he or she is negligent if he or she voluntarily touches the wire [*Rojas v. Southern Cal. Edison Co. (1951) 105 Cal. App. 2d 258, 259, 233 P.2d 141]* . However, whether forgetfulness of a known danger constitutes negligence is a question for the trier of fact even though there is not a sudden disturbance or peril confronting the plaintiff and causing the lapse of memory; to forget is not negligence unless it shows want of ordinary care [*Austin v. Riverside Portland Cement Co. (1955) 44 Cal. 2d 225, 237, 282 P.2d 69]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawUtility CompaniesLiabilityTortsNegligenceDefensesContributory NegligenceGeneral Overview

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§ 277.36 Not Ultrahazardous Activity

The maintenance of electric power lines does not constitute an ultrahazardous activity [*Pierce v. Pacific Gas & Elec. Co. (1985) 166 Cal. App. 3d 68, 85, 212 Cal. Rptr. 283* ; *McKenzie v. Pacific Gas & Elec. Co. (1962) 200 Cal. App. 2d 731, 736, 19 Cal. Rptr. 628 , disapproved on other grounds*, Di Mare v. Cresci (1962) *58 Cal. 2d 292, 299, 23 Cal. Rptr. 772, 373 P.2d 860]* . Therefore, an electric company is not liable to a person injured as a proximate result of such activity unless negligence or some other basis of liability can be established [*see Pierce v. Pacific Gas & Elec. Co. (1985) 166 Cal. App. 3d 68, 85-86, 212 Cal. Rptr. 283* ; *McKenzie v. Pacific Gas & Elec. Co. (1962) 200 Cal. App. 2d 731, 736, 19 Cal. Rptr. 628 , disapproved on other grounds, DiMare v. Cresci (1962) 58 Cal. 2d 292, 23 Cal. Rptr. 772, 373 P.2d 860]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawTransportation & PipelinesElectricity TransmissionEnergy & Utilities LawUtility CompaniesLiabilityReal Property LawTortsInherently Dangerous ActivitiesTortsNegligenceGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsGeneral Overview

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§ 277.37 Strict Liability in Tort

A commercial supplier of electricity is subject to strict liability in tort for damages caused by delivery of electricity at dangerously high voltage due to a defective transformer [*Stein v. Southern Cal. Edison Co. (1992) 7 Cal. App. 4th 565, 568-571, 8 Cal. Rptr. 2d 907* (property damage); *Pierce v. Pacific Gas & Elec. Co. (1985) 166 Cal. App. 3d 68, 83-84, 212 Cal. Rptr. 283* (personal injuries)]. For strict liability to apply, the electricity must actually be in the "stream of commerce" and must be expected to be at a marketable voltage [*Pierce v. Pacific Gas & Elec. Co. (1985) 166 Cal. App. 3d 68, 83-84, 212 Cal. Rptr. 283]* . Although the court in *Pierce* declined to draw a "bright line" at any particular point, it held that in most cases the electricity that causes the injury must be delivered to the customer's premises, and to the point where it is metered (although the mere fact that a meter is unplugged does not necessarily exempt the utility company from liability) [*Pierce v. Pacific Gas & Elec. Co. (1985) 166 Cal. App. 3d 68, 84, 84 n. 9, 212 Cal. Rptr. 283* ; *see § 277.156*.5].

Strict liability does not apply if a fire is caused by contact between power lines, because the electricity in such a case is neither in the stream of commerce nor in marketable form [*United Pac. Ins. Co. v. Southern Cal. Edison Co. (1985) 163 Cal. App. 3d 700, 707-708, 209 Cal. Rptr. 819]* . A utility company also cannot be held strictly liable if lightning causes damage through power lines, because in such cases the utility has not marketed a product, but rather has provided a connecting medium through which a force of nature enters the plaintiff's home and causes injury [*see Pierce v. Pacific Gas & Elec. Co. (1985) 166 Cal. App. 3d 68, 84 n. 10, 212 Cal. Rptr. 283]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawTransportation & PipelinesElectricity TransmissionEnergy & Utilities LawUtility CompaniesLiabilityTortsStrict LiabilityGeneral Overview

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[Reserved]

§§ 277.38[Reserved]

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§ 277.50 Governing Law

The termination of public utility service is governed primarily by provisions in the Public Utilities Code. If the public utility is a privately owned electrical, gas, heat, or water corporation furnishing residential utility service, the utility is regulated by the Public Utilities Commission and limits on termination are set forth in *Pub. Util. Code §§ 777-780*. The termination of residential light, heat, water, or power utility service furnished by a government owned public utility is governed as follows: municipal corporations are governed by *Pub. Util. Code §§ 10009-10011*, municipal utility districts are governed by Pub. Util. Code §§ 12822.5-12824, and public utility districts are governed by *Pub. Util. Code §§ 16481-16483*.

In addition to statutory regulation, restrictions on the termination of public utilities are found in ordinances or regulations adopted by the governing bodies of government-owned public utilities, and in tariffs adopted by the Public Utilities Commission for privately-owned public utilities. Decisions by the Public Utilities Commission are reported in the Public Utilities Reports.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawUtility CompaniesService Terminations

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§ 277.51 Utility's Right to Terminate Service

The state has no power to compel the continued operation of a public utility at a loss, when the owner of that utility is willing to and does in fact abandon to the public all its property that has been devoted to the public use. Such an order would be a taking of property without compensation, and therefore would violate *U.S. Const. amend. XIV* [*Lyon & Hoag v. Railroad Comm'n (1920) 183 Cal. 145, 146-147, 190 P. 795]* .

The customer's right to continued utility service is conditioned on payment of the charges properly due [*see Memphis Light, Gas & Water Div. v. Craft (1978) 436 U.S. 1, 11, 98 S. Ct. 1554, 56 L. Ed. 2d 30]* . Therefore, the nonpayment of charges properly due may justify a discontinuance of service [*Schultz v. Lakeport (1936) 5 Cal. 2d 377, 383, 54 P.2d 1110, 55 P.2d 485]* . The determination of which charges are "properly due," however, is to be made in light of traditional due process standards [*Perez v. City of San Bruno (1980) 27 Cal. 3d 875, 890, 168 Cal. Rptr. 114, 616 P.2d 1287]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawSubstantive Due ProcessEconomic InterestsEnergy & Utilities LawUtility CompaniesService Terminations

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23-277 California Forms of Pleading and Practice--Annotated § 277.52

§ 277.52 Due Process Considerations

[1] Government-Owned Utilities

The United States Supreme Court has held that when state law precludes the termination of utility service other than for good cause, there arises a legitimate claim of entitlement within the protection of the Due Process Clause requiring that a constitutionally adequate notice and hearing procedure be afforded prior to termination. The purpose of this protection is to afford reasonable assurance against erroneous or arbitrary withholding of essential services [*Memphis Light, Gas & Water Div. v. Craft (1978) 436 U.S. 1, 11-18, 98 S. Ct. 1554, 56 L. Ed. 2d 30* ; *see* *Perez v. City of San Bruno (1980) 27 Cal. 3d 875, 893, 168 Cal. Rptr. 114, 616 P.2d 1287]* . Under California law, termination of utility service is not permitted without good cause, and thus federal due process protections apply [*see* *Schultz v. Lakeport (1936) 5 Cal. 2d 377, 381-382, 54 P.2d 1110, 55 P.2d 485]* .

The form of notice required in such cases is one which is reasonably calculated to inform customers of the availability of an opportunity to present their objections to their bills. The necessary hearing is one that provides an opportunity for the presentation to a designated employee of a customer's complaint that he or she is being overcharged or charged for services not rendered [*Memphis Light, Gas & Water Div. v. Craft (1978) 436 U.S. 1, 14, 16, 98 S. Ct. 1554, 56 L. Ed. 2d 30]* .

The California Supreme Court has held that unified billing of all city services accompanied by cessation of water service on failure to pay the unified billing in full may be applied in a manner consistent with due process guarantees under both the federal and state constitutions. In *Perez v. City of San Bruno*, the Supreme Court upheld an order sustaining the city's demurrer against a resident's complaint which alleged that cessation of water service to enforce payment of a unified, but itemized, municipal services bill was unconstitutional when the only portion of the bill that remained unpaid was that relating to municipal garbage collection [*Perez v. City of San Bruno (1980) 27 Cal. 3d 875, 888-893, 168 Cal. Rptr. 114, 616 P.2d 1287]* .

[2] Privately-Owned Utilities

A privately-owned public utility is not subject to the due process requirements of *U.S. Const, amend. XIV*. The United

States Supreme Court has held that there is no state action in the case of a privately-owned corporation holding a certificate of public convenience issued by the state public utilities commission empowering it to deliver electricity to city residents, even though the utility is subject to a form of extensive regulation by the state in a way that most business enterprises are not [*see Jackson v. Metropolitan Edison Co. (1974) 419 U.S. 345, 358-359, 95 S. Ct. 449, 42 L. Ed. 2d 477]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewEnergy & Utilities LawUtility CompaniesService Terminations

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§ 277.53 Definitions

As used in the following discussion, the term "corporation" includes a corporation, a company, an association, and a joint stock association [*Pub. Util. Code § 204*]. The terms "electrical corporation," "gas corporation," and "heat corporation" include every corporation or person owning, controlling, operating, or managing any electric, gas, or heating plant for compensation within California, except when the electricity, gas, or heat is produced on or distributed by the producer through private property alone solely for his or her own use or the use of his or her tenants and not for sale to others [*see Pub. Util. Code §§ 218, 222, 224*]. The term "water corporation" includes every corporation or person owning, controlling, operating, or managing any water system for compensation in California [*Pub. Util. Code § 241*].

For the purposes of this discussion, an electrical, gas, heat, or water corporation, or a municipal corporation or a municipal or public utility district furnishing light, heat, water, or power to residential occupants, will hereinafter be referred to as the "utility," unless the discussion requires that the specific nature of the entity be stated. The Public Utilities Commission will hereinafter be referred to as the "Commission."

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawElectric Power IndustryState RegulationGeneral OverviewEnergy & Utilities LawUtility CompaniesGeneral OverviewEnergy & Utilities LawUtility CompaniesOwnership & Restructuring

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§ 277.54 Termination of Residential Service

[1] Notice Before Termination

[a] In General

No utility may terminate residential service for nonpayment of a delinquent account unless the utility first gives notice of the delinquency and impending termination, as provided by statute and discussed in *§ 277.54[1][b]* and *[c]*. This requirement applies to electrical, gas, heat, or water corporations; municipal corporations and utility districts furnishing light, water, power, or heat; and public utility districts furnishing its inhabitants with light, water, power, heat, or means for the disposition of garbage, sewage, or refuse matter [*Pub. Util. Code §§ 779(a), 779.1(g)* (electrical, gas, heat, water corporations), 10010(a), 10010.1(f) (municipal corporations), 12823(a), 12823.1(f) (municipal utility districts), 16482(a), 16482.1(f) (public utility districts)].

Any service wrongfully terminated must be restored without charge for the restoration of service, and a notation of the restoration must be mailed to the customer at his or her billing address [*Pub. Util. Code §§ 779.1(g), 10010.1(f), 12823.1(f), 16482.1(f)*].

Additionally, every electrical, gas, heat, or water corporation must allow every residential customer at least 19 days from the date of mailing its bill for services, postage prepaid, for payment of the charges demanded [*Pub. Util. Code § 779.1(a)*].

[b] Notice by Mail

The utility may not terminate residential service for nonpayment of a delinquent account unless the utility first gives notice of the delinquency and impending termination, at least 10 days prior to the proposed termination, by means of a notice mailed, postage prepaid, to the customer to whom the service is billed, not earlier than 19 days from the date of mailing the utility's bill for services. The 10-day period does not commence until five days after the mailing of the notice [*Pub. Util. Code §§ 779.1(a), 10010.1(a), 12823.1(a), 16482.1(a)*].

The notice of termination must include all of the following information, and all written notices must be in a clear and legible format [*see Pub. Util. Code §§ 779.1(d), 10010.1(d), 12823.1(d), 16482.1(d)*]:

- The name and address of the customer whose account is delinquent;
- The amount of the delinquency;
- The date by which payment or arrangements for payment is required in order to avoid termination;
- The procedure by which the customer may initiate a complaint or request an investigation concerning service or charges, except that, with regard to municipal corporations, municipal utility districts, and public utility districts, if the bill for service contains a description of that procedure, the notice is not required to contain that information;
- The procedure by which the customer may request amortization of the unpaid charges;
- The procedure for the customer to obtain information on the availability of financial assistance, including private, local, state, or federal sources, if applicable; and
- The telephone number of a representative of the corporation who can provided additional information or institute arrangements for payment.

When the notice of delinquency and impending termination is given by an electric, gas, heat, or water corporation, the notice must also contain the telephone number of the Commission to which inquiries by the customer may be directed [*Pub. Util. Code § 779.1(d)(8)*].

[c] Attempt to Contact Prior to Termination

Utilities are also required to make a reasonable attempt to contact an adult person residing at the premises of the customer by telephone or personal contact at least 24 hours prior to any termination of service [*Pub. Util. Code §§ 779.1(b), 10010.1(b), 12823.1(b), 16482.1(b)*]. Whenever telephone or personal contact cannot be accomplished, however, a utility is required to give a notice of termination of service at least 48 hours prior to termination of service [*Pub. Util. Code §§ 779.1(b), 10010.1(b), 12823.1(b), 16482.1(b)*].

In the case of an electric, gas, heat, or water corporation, the corporation must give the 48-hour notice of termination of service either by mail or in person [*Pub. Util. Code § 779.1(b), (d)*]. The notice must contain all of the items listed in § 277.54[1][b] [*see Pub. Util. Code § 779.1(d)*].

In the case of a municipal corporation, municipal utility district, or public utility district, the government owned utility must give the 48-hour notice of termination of service either by mail, in person, or by posting in a conspicuous location at the premises [*Pub. Util. Code §§ 10010.1(b), 12823.1(b), 16482.1(b)*]. The notice must contain all of the items listed in § 277.54[1][b], except those stated in the fourth and fifth paragraphs of that list relating to initiation of complaints or investigations and amortization of unpaid charges [*see Pub. Util. Code §§ 10010.1(b), (d), 12823.1(b), (d), 16482.1(b), (d)*].

[d] Notification of Third Party for Seniors or Dependent Adults

Every utility is required to make available to its residential customers who are 65 years of age or older, or who are dependent adults (as defined in *Welf. & Inst. Code § 15610.23*), a third-party notification service, whereby the utility will attempt to notify a person designated by the customer to receive notification when the customer's account is past

due and subject to termination. The notification must include information on what is required to prevent termination of service. The residential customer must make a request for third-party notification on a form provided by the utility, and must include the written consent of the designated third party. The third-party notification does not obligate the third party to pay the overdue charges, nor does it prevent or delay termination of service [*Pub. Util. Code §§ 779.1(c), 10010.1(c), 12823.1(c), 16482.1(c)*].

[e] Notice After Noncompliance With Amortization Agreement

If a residential customer fails to comply with an amortization agreement, the utility must not terminate service without giving notice to the customer at least 48 hours prior to termination of the conditions the customer is required to meet to avoid termination. This notice, however, does not entitle the customer to further investigation by the utility [*Pub. Util. Code §§ 779.1(f), 10010.1(e), 12823.1(e), 16482.1(e)*; *see § 277.54[2]* regarding when amortization agreements are permitted].

[2] Statutory Limits on Termination

No utility may terminate residential service for nonpayment in any of the following situations [*Pub. Util. Code §§ 779(b), 10010(b), 12823(b), 16482(b)*]:

- During the pendency of an investigation by the utility of a customer or subscriber dispute or complaint;

- When a customer has been granted an extension of the period for payment of a bill; or

- On certification of a licensed physician and surgeon that to do so will be life threatening to the customer and the customer is financially unable to pay for service within the normal payment period and is willing to enter into an amortization agreement with the corporation under Pub. Util. Code §§ 779(e), 10010(e), 12823(e), 16482(e).

Any customer meeting the medical certification requirements must be permitted to amortize, over a period not to exceed 12 months, the unpaid balance of any bill asserted to be beyond the means of the customer to pay within the normal period for payment [*Pub. Util. Code §§ 779(e), 10010(e), 12823(e), 16482(e)*; *see § 277.54[2][c]* regarding notice requirements if a customer fails to perform the terms of an amortization agreement].

Additionally, no electrical, gas, heat, telephone, or water corporation may terminate residential service for nonpayment of any delinquent account or other indebtedness owed by the customer or subscriber to any other person or corporation, or when the obligation represented by the delinquent account or other indebtedness was incurred with a person or corporation other than the corporation demanding payment therefor [*Pub. Util. Code § 779.2(a)*]. However, this restriction does not apply to a telephone corporation operating within service areas that furnishes billing services to the subscribers of a telephone corporation operating between service areas under tariffs on file with the commission providing for the furnishing of those billing services. The commission must require that these tariffs also provide for adequate subscriber notice, review, and appeal procedures prior to any termination of service for nonpayment of a delinquent account [*Pub. Util. Code § 779.2(b)*]. The restriction also does not apply to any privately owned or publicly owned public utility that collects sanitation or sewerage charges for a public agency pursuant to an agreement under *Gov. Code § 54346.2* or *Health & Safety Code § 5472.5* [*Pub. Util. Code § 779.2(c)*].

No utility shall, by reason of delinquency in the payment of its charges, cause cessation of services on any Saturday, Sunday, legal holiday, or at any time during which the business offices of the utility are not open to the public [*Pub. Util. Code §§ 780* (no electrical, gas, heat, or water corporation shall "terminate service"), 10011, 12824, 16483].

[3] Review by Utility

When the utility is a municipal corporation or a municipal or public utility district, any residential customer who has initiated a complaint or requested an investigation within five days of receiving the disputed bill, or who has, within 13 days of mailing of the notice of the delinquency and impending termination [*see § 277.54[b]*], made a request for extension of the payment period of a bill asserted to be beyond the means of the customer to pay in full within the normal period for payment, must be given an opportunity for review of the complaint, investigation, or request by a review manager of the utility [*Pub. Util. Code §§ 10010(c), 12823(c), 16482(c)*]. When the utility is an electrical, gas, heat, or water corporation, the residential customer must have initiated his or her complaint or requested the investigation as provided above, or must have made a request for extension of the payment period before termination of the service [*Pub. Util. Code § 779(c)*].

The review must include consideration of whether the customer shall be permitted to amortize the balance of the delinquent account over a reasonable period of time, not to exceed 12 months. No termination of service shall be effected for any customer complying with an amortization agreement, if the customer also keeps the account current as charges accrue in each subsequent billing period [*Pub. Util. Code §§ 779(c), 10010(c), 12823(c), 16482(c)*; *see § 277.54[2][c]* regarding notice requirements if a customer fails to perform the terms of an amortization agreement].

[4] Administrative Appeal

Any customer whose complaint or request for an investigation to the utility has resulted in an adverse determination by the utility may appeal the determination to the appropriate regulatory agency. If the utility is an electrical, gas, heat or water corporation, the appeal is to be made to the Commission [*Pub. Util. Code § 779(d)*]. If the utility is a municipal corporation, the appeal is to be made to its governing body [*Pub. Util. Code § 10010(d)*]. If the utility is a district, the appeal is to be made to the board of directors [*Pub. Util. Code §§ 12823(d), 16482(d)*].

Any subsequent appeal of the dispute or complaint to the regulatory agency is not subject to *Pub. Util. Code §§ 779, 10010, 12823, 16482* [*Pub. Util. Code §§ 779(d), 10010(d), 12823(d), 16482(d)*].

For a discussion of proceedings before the Public Utility Commission and judicial review of those proceedings, see Ch. 480, *Public Utilities* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthorityEnergy & Utilities LawUtility CompaniesGeneral OverviewEnergy & Utilities LawUtility CompaniesService Terminations

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§ 277.55 Termination of Service Through Master Meter in Multiunit Housing

[1] In General

Statutory provisions ensure that utility service to a resident of multiunit housing, who is not the utility's customer, is not terminated due to the customer's nonpayment unless the utility has made every reasonable effort to continue service to the residential occupant [*see Pub. Util. Code §§ 777.1(i)* (electrical, gas, heat, water corporations), 10009.1(i) (municipal corporations), 12822.1(i) (municipal utility districts), 16481.1(i) (public utility districts)].

Whenever an electrical, gas, heat or water corporation furnishes residential service, or whenever a municipal corporation, municipal utility district, or public utility district furnishes light, heat, water, or power to residential occupants, through a master meter in a multiunit residential structure, mobilehome park, or permanent residential structures in a labor camp (as defined in Health & Safety Code § 17008), when the owner, manager, operator, is listed by the utility as the customer of record, no termination of service may be effected without compliance with statutory requirements [*see Pub. Util. Code §§ 777.1(a), (h), 10009.1(a), (h), 12822.1(a), (h), 16481.1(a), (h)*].

The utility (or the Commission, in the case of electrical, gas, heat, or water corporations) is required to adopt rules and regulations (or orders, in the case of the Commission) necessary to implement the statutory provisions, and must liberally construe the provisions to accomplish their purpose. The rules and regulations or orders must include guidelines for assistance to actual users in enforcing the provisions [*see Pub. Util. Code §§ 777.1(i), 10009.1(i), 12822.1(i), 16481.1(i)*]. The Commission is also required to adopt rules and orders that include reasonable penalties for violations of *Pub. Util. Code § 777.1* [*Pub. Util. Code § 777.1(i)*].

However, nothing in the above provisions broadens or restricts any authority of a local agency that existed prior to January 1, 1989, to adopt an ordinance protecting a residential occupant from the involuntary termination of residential public utility service [*Pub. Util. Code §§ 777.1(j), 10009.1(j), 12822.1(j), 16481.1(j)*]. Counsel should review any local ordinances, or public agency resolutions, rules, regulations, and orders, or private utility tariffs, that may be applicable to the particular utility that is the subject of the dispute.

Any service wrongfully terminated must be restored without any charge to the residential occupants or customer for the restoration of service [*Pub. Util. Code §§ 777.1(h), 10009.1(h), 12822.1(h), 16481.1(h)*].

In addition, certain causes of action are available by statute when there has been a wrongful termination of utility service [*see Pub. Util. Code §§ 777.1(f)-(h), 10009.1(f)-(h), 12822.1(f)-(h), 16481.1(f)-(h)*; *see also § 277.55[5]*].

Several acts specified in the statutes may be performed on behalf of residential occupants by "the representative of residential occupants." The acts include: the assumption of subsequent charges to a utility account when the owner, manager, or operator of the premises is in arrears [*Pub. Util. Code §§ 777.1(b), 10009.1(b), 12822.1(b), 16481.1(b)*], and commencement of a civil action against the owner, manager, or operator [*Pub. Util. Code §§ 777.1(f), 10009.1(f), 12822.1(f), 16481.1(f)*], or against the utility [*Pub. Util. Code §§ 777.1(h), 10009.1(h), 12822.1(h), 16481.1(h)*]. However, for the purposes of the statutes, "representative of the residential occupants" does not include a tenants' association [*Pub. Util. Code §§ 777.1(l), 10009.1(l), 12822.1(l), 16481.1(l)*].

[2] Notice of Termination

The utility must make every good faith effort to inform the residential occupants, by means of a written notice posted on the door of each residential unit at least 15 days prior to termination, when the account is in arrears, that service will be terminated on a date specified in the notice [*see Pub. Util. Code §§ 777.1(a), 10009.1(a), 12822.1(a), 16481.1(a)*].

If it is not reasonable or practicable to post the notice on the door of each residential unit, the utility must post two copies of the notice in each accessible common area and at each point of access to the structure or structures [*Pub. Util. Code §§ 777.1(a), 10009.1(a), 12822.1(a), 16481.1(a)*].

The notice must further inform the residential occupants that they have the right to become utility customers, to whom the service will then be billed, without being required to pay the amount due on the delinquent account. The notice also must specify, in plain language, what the residential occupants are required to do in order to prevent the termination or reestablish service; the estimated monthly cost of service; the title, address, and telephone number of a representative of the utility who can assist the residential occupants in continuing service; and the address and telephone number of a legal services project (as defined in *Bus. & Prof. Code § 6213*), which has been recommended by the local county bar association. The notice must be in English, Spanish, Chinese, Tagalog, Vietnamese, and Korean [*Pub. Util. Code §§ 777.1(a), 10009.1(a), 12822.1(a), 16481.1(a)*; *see Civ. Code § 1632*].

The utility (or the Commission, in the case of electrical, gas, heating, or water corporations) must include in its rules and regulations (or orders, in the case of the Commission) requirements for the notice, including, but not limited to, clear wording, large and boldface type, and comprehensive instructions to ensure full notice to the residents [*Pub. Util. Code §§ 777.1(i), 10009.1(i), 12822.1(i), 16481.1(i)*].

[3] Assumption of Subsequent Service Charges by Residents

[a] Agreement to Terms of Service

The utility is not required to make service available to the residential occupants unless each residential occupant or a representative of the residential occupants agrees to the terms and conditions of service, and meets the requirements of law and the utility's rules (and, in the case of electrical, gas, heat, or water corporations, tariffs) [*Pub. Util. Code §§ 777.1(b), 10009.1(b), 12822.1(b), 16481.1(b)*].

However, if one or more of the residential occupants or the representative of the residential occupants are willing and able to assume responsibility for subsequent charges to the account to the satisfaction of the utility, or if there is a physical means, legally available to the utility, of selectively terminating service to those residential occupants who

have not met the requirements of the utility's rules (and, in the case of electrical, gas, heat, or water corporations, tariffs) or for whom the representative of the residential occupants is not responsible, the utility must make service available to those residential occupants who have met those requirements or on whose behalf those requirements have been met [*Pub. Util. Code §§ 777.1(b), 10009.1(b), 12822.1(b), 16481.1(b)*].

[b] Demonstration of Credit Worthiness

When prior service for a period of time or other demonstration of credit worthiness is a condition for establishing credit with the utility, residence and proof of prompt payment of rent or other credit obligation during that period of time acceptable to the utility is a satisfactory equivalent [*Pub. Util. Code §§ 777.1(c), 10009.1(c), 12822.1(c), 16481.1(c)*].

[c] Deduction of Service Charges From Rent

Any residential occupant who becomes a customer of the utility under *Pub. Util. Code §§ 777.1, 10009.1, 12822.1*, and *16481.1* and whose periodic payments, such as rental payments, include charges for residential electrical, gas, heat or water service (when the utility is an electrical, gas, heat, or water corporation), or light, heat, water, or power (when the utility is a municipal corporation, municipal utility district, and public utility district), when those charges are not separately stated, may deduct from the periodic payment each payment period all reasonable charges paid to the corporation for those services during the preceding payment period [*Pub. Util. Code §§ 777.1(d), 10009.1(d), 12822.1(d), 16481.1(d)*].

[4] Statutory Limits on Termination

The utility may not terminate service in any of the following situations [*see Pub. Util. Code §§ 777.1(e), 10009.1(e), 12822.1(e), 16481.1(e)*]:

- During the pendency of an investigation by the utility of a customer dispute or complaint;

- When the customer has been granted an extension of the period for payment of a bill;

- In the case of an electrical, gas, heat, or water corporation, for an indebtedness owed by the customer to any other person or corporation, or when the obligation represented by the delinquent account or other indebtedness was incurred with a person or corporation other than the electrical, gas, heat, or water corporation demanding payment therefore. In the case of a municipal corporation or municipal or public utility district, for an indebtedness owed by the customer to any other public agency or when the obligation represented by the delinquent account or other indebtedness was incurred with any public agency other than the government owned public utility;

- When a delinquent account relates to another property owned, managed, or operated by the customer; or

- When a public health or building officer certifies that termination would result in a significant threat to the health or safety of the residential occupants or the public.

[5] Civil Actions

[a] Termination While Residential Unit Occupied

[i] By Occupant

Notwithstanding any other provision of law, and in addition to any other remedy provided by law, if the owner

manager, or operator, by any act or omission, directs, permits, or fails to prevent termination of service while any residential unit is occupied, the residential occupant, or the representative of the residential occupants, may commence an action for the recovery of all of the following [*Pub. Util. Code §§ 777.1(f), 10009.1(f), 12822.1(f), 16481.1(f)*]:

- Reasonable costs and expenses incurred by the residential occupant or the representative of the residential occupants related to restoration of service;

- Actual damages related to the termination of service; and

- Reasonable attorney's fees of the residential occupants, the representative of the residential occupants, or each of them, incurred in the enforcement of *Pub. Util. Code §§ 777.1, 10009.1, 12822.1*, or *16481.1*, including, but not limited to, enforcement of a lien.

For a form of complaint for damages against an owner, manager, or operator of multiunit housing for termination of utility service while a residential unit is occupied, *see § 277.170*.

An abstract of any money judgment entered in the action must be recorded under *Code Civ. Proc. § 697.310* (creation and duration of judgment lien based on money judgment) [*Pub. Util. Code §§ 777.1(g), 10009.1(g), 12822.1(g), 16481.1(g)*].

[ii] By Utility

Under these circumstances, the utility may also commence an action against an owner, manager, or operator of the same type of premises for the recovery of delinquent charges accruing prior to the expiration of the notice prior to termination prescribed by *Pub. Util. Code §§ 777.1(a), 10009.1(a), 12822.1(a)*, or *16481.1(a)* [*see § 277.56[1]*], reasonable costs incurred by the utility related to the restoration of service, and reasonable attorney's fees of the utility incurred in enforcement or in the collection of delinquent charges, including, but not limited to, enforcement of a lien [*see Pub. Util. Code §§ 777.1(g), 10009.1(g), 12822.1(g), 16481.1(g)*].

If, however, the court finds that the owner, manager, or operator has paid the amount in arrears prior to termination, the court can not allow recovery of any charges, costs, damages, expenses, or fees under *Pub. Util. Code §§ 777.1(g), 10009.1(g), 12822.1(g)*, or *16481.1(g)* from the owner, manager, or operator [*Pub. Util. Code §§ 777.1(g), 10009.1(g), 12822.1(g), 16481.1(g)*].

Any statute or ordinance permitting punitive damages against any owner, manager, or operator on account of an involuntary termination of residential public utility service is preempted by *Pub. Util. Code §§ 777.1, 10009.1, 12822.1*, and *16481.1*. Those sections also preempt any statute or ordinance permitting the recovery of costs associated with the formation, maintenance, and termination of a tenant's association [*Pub. Util. Code §§ 777.1(k), 10009.1(k), 12822.1(k), 16481.1(k)*].

An abstract of any money judgment entered in the action must be recorded under *Code Civ. Proc. § 697.310* (creation and duration of judgment lien based on money judgment) [*Pub. Util. Code §§ 777.1(g), 10009.1(g), 12822.1(g), 16481.1(g)*].

[b] Wrongful Termination by Utility

In cases involving residential service through a master meter to multiunit residential structure, mobilehome park, or permanent residential structures in a labor camp (as defined in *Health & Safety Code § 17008*), no termination of service may be effected without compliance with *Pub. Util. Code § 777.1, 10009.1, 12822.1*, or *16481.1*. In the event of a wrongful termination by the utility, the utility will be liable to the residential occupants or customer for actual

damages resulting from the termination. The utility will also be liable for the costs of enforcement, including, but not limited to reasonable attorney's fees, if the residential occupants or the representative of the residential occupants make a good-faith effort to have the service continued without interruption [*Pub. Util. Code §§ 777.1(h), 10009.1(h), 12822.1(h), 16481.1(h)*].

If the utility defendant is a municipal corporation or municipal or public utility district, the plaintiff is required to comply with the claim provisions of the Tort Claims Act (*Gov. Code § 810 et seq.*) [*see Gov. Code §§ 900.2* (definition of "board"), 900.4 (definition of "local public entity"), 905 (claims for money or damages against local public entity), 911.2 (time for presentation of claim)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesDamagesCompensatory DamagesEnergy & Utilities LawUtility CompaniesLiabilityEnergy & Utilities LawUtility CompaniesService Terminations

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§ 277.56 Termination of Service Through Individual Meter in Multiunit Residence

[1] Notice of Termination

Whenever an electrical, gas, heat or water corporation furnishes individually metered residential service to residential occupants through individual meters in a detached single-family dwelling, a multiunit residential structure, mobilehome park, or permanent residential structure in a labor camp (as defined in *Health & Safety Code § 17008*), when the owner, manager, or operator is listed by the corporation as the customer of record, the corporation is required to make every good faith effort to inform the residential occupants, by means of a written notice, when the account is in arrears, that service will be terminated at least 10 days prior to termination. The written notice must further inform the residential occupants that they have the right to become customers, to whom the service will then be billed, without being required to pay any amount that may be due on the delinquent account [*Pub. Util. Code § 777(b)*--notice to be in English, Spanish, Chinese, Tagalog, Vietnamese, and Korean; *see Civ. Code § 1632*]. Effective July 1, 2010, this provision applies only if there is a landlord-tenant relationship between the residential occupants and the owner, manager, or operator of the dwelling [*Pub. Util. Code § 777(a), (g)*].

In the case of a detached single-family dwelling, an electrical, gas, heat, or water corporation may give notice of termination at least seven days prior to the proposed termination of service, notwithstanding the 10-day notice period described above [*Pub. Util. Code § 777(f)(1)*]. In addition, in the case of a detached single-family dwelling, in order for the amount due on a delinquent account to be waived, the corporation may require an occupant who becomes a customer to verify that the delinquent account customer of record is or was the landlord, manager, or agent of the dwelling. Verification may include, but is not limited to, a lease or rental agreement, rent receipts, a government document indicating that the occupant is renting the property, or information disclosed pursuant to *Civ. Code § 1962* [*Pub. Util. Code § 777(f)(2)*].

Similar notice is required whenever a municipal corporation, municipal utility district, or public utility district furnishes individually metered residential light, heat, water, or power to residential occupants in the same types of dwellings [*see Pub. Util. Code §§ 10009* (municipal corporations), 12822 (municipal utility districts), 16481 (public utility districts)].

[2] Assumption of Subsequent Service Charges by Residents of Individually Metered Units

[a] Agreement to Terms of Service

The utility is not required to make service available to the residential occupants unless each residential occupant agrees to the terms and conditions of service, and meets the requirements of law and the utility's rules (and, in the case of electrical, gas, heat, or water corporations, tariffs) [*Pub. Util. Code §§ 777(c), 10009(c), 12822(c), 16481(c)*].

However, if one or more of the residential occupants are willing and able to assume responsibility for the entire account to the satisfaction of the utility, or if there is a physical means, legally available to the utility, of selectively terminating service to those residential occupants who have not met the requirements of the utility's rules (and, in the case of electrical, gas, heat, or water corporations, tariffs), the utility must make service available to those residential occupants who have met those requirements [*Pub. Util. Code §§ 777(c), 10009(c), 12822(c), 16481(c)*].

[b] Credit Worthiness

When prior service for a period of time is a condition for establishing credit with the utility, residence and proof of prompt payment of rent or other obligation acceptable to the utility for that period of time is a satisfactory equivalent [*see Pub. Util. Code §§ 777(d)* (proof of prompt payment of other "credit obligation"), 10009(d), 12822(d), 16481(d)].

[c] Deduction From Rent

Any residential occupant who becomes a customer of the utility under the above provisions whose periodic payments, such as rental payments, include charges for residential light, heat, water, or power (or residential electrical, gas, heat, or water service, in the case of electrical, gas, heat, or water corporations), when these charges are not separately stated, may deduct from the periodic payment each payment period all reasonable charges paid to the utility for those services during the preceding payment period [*Pub. Util. Code §§ 777(e), 10009(e), 12822(e), 16481(e)*].

[3] Civil Liability

The statutes governing termination of utility service that is furnished through individual meters to residents of multiple unit housing do not indicate what recourse a residential occupant may have when service is wrongfully terminated [*see Pub. Util. Code §§ 777, 10009, 12822, 16481*].

A residential occupant, may, however, be able to bring an action in tort when the utility has violated the statutes. In one case, the court of appeal considered the issue of when, if ever, a public utility company becomes tortiously liable to the actual users of utility services for violating the notice requirements specified in *Pub. Util. Code § 777*. The court held that there can be no tort liability for failure to give the notice required by the statute, whether the failure is in providing a defective notice or in giving no notice whatsoever, unless the breach of the utility company's statutory duty causes the damage sustained by the users whose utility service was terminated. When the public utility does not initiate the termination, even if it would have terminated service had a delinquent account gone unpaid, but acts only at the direction of its master customer, absent something to suggest a collusive agreement between the public utility company and the master customer to circumvent the statutory notice requirements, any deficiency in the notice provided by the public utility company cannot be the cause of the user's damages, and the company is not liable in tort. The user's remedy is against the individual or entity directing the termination [*Tovar v. Southern Cal. Edison Co. (1988) 201 Cal. App. 3d 606, 614, 247 Cal. Rptr. 281]* .

It is not certain whether the plaintiffs in this case were furnished utility service through individual meters or through a master meter. The opinion used the term "master customer" to mean either the named customer/subscriber of record controlling a master meter account or individually metered accounts billed to a single central customer, and was decided prior to the 1988 amendment that deleted the reference in the statutes to service through a master meter [*see Tovar v. Southern Cal. Edison Co. (1988) 201 Cal. App. 3d 606, 609 n.2, 247 Cal. Rptr. 281* ; *see also* 1988 Stats, ch. 1533, § 1].

Master metered residential service is now governed by *Pub. Util. Code §§ 777.1*, *10009.1*, *12822.1*, and *16481.1*. Apparently, however, the case may continue to provide some basis for an action in tort under *Pub. Util. Code § 777*, *10009*, *12822*, or *16481* when utility service furnished to residential occupants of individually metered multiple unit housing is terminated in violation of these sections.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawUtility CompaniesLiabilityEnergy & Utilities LawUtility CompaniesService TerminationsTortsNegligenceProofViolations of LawStatutes

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§ 277.57 Nonstatutory Actions

Injunction is the proper remedy to restrain the shutting off of water when there is a just dispute. The availability of this relief is based on the ground that an action at law for damages is inadequate [*Schultz v. Lakeport (1936) 5 Cal. 2d 377, 383, 54 P.2d 1110, 55 P.2d 485* ; *Fellows v. Los Angeles (1907) 151 Cal. 52, 90 P. 137]* .

The availability of injunctive relief does not imply, however, that a plaintiff may not resort to the theoretically less adequate remedy and recover damages if his or her conduct otherwise has not foreclosed that right [*Schultz v. Lakeport (1936) 5 Cal. 2d 377, 383, 54 P.2d 1110, 55 P.2d 485]* . In addition, when a utility undertakes to supply electricity to a customer, the utility obligates itself to exercise reasonable care toward the customer, and failure to exercise such care has the characteristics of both a breach of contract and a tort [*Langley v. Pacific Gas & Elec. Co. (1953) 41 Cal. 2d 655, 662, 262 P.2d 846]* .

A utility may raise by way of affirmative defense that it had at all times followed its rules with respect to its action in discontinuing the utility service and that its rules were adopted in accordance with law [*see Carpenter v. L.A. Gas & Elec. Corp. (1940) 41 Cal. App. 2d 369, 372, 106 P.2d 916]* . Further, no electrical or gas corporation that reduces or discontinues service in accordance with any order of the commission issued pursuant to *Pub. Util. Code § 2771 et seq.* (governing priorities among customers) will be liable for any damages to any person or property resulting from such reduction or discontinuance [*Pub. Util. Code § 2775*].

Legal Topics:

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

§§ 277.58[Reserved]

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23-277 California Forms of Pleading and Practice--Annotated § 277.70

§ 277.70 Forms of Discovery

For forms of interrogatories for use in actions against gas companies, see Bender's Forms of Discovery, Ch. 97, *Gas & Gas Companies*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesFormEnergy & Utilities LawGas IndustryGeneral Overview

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§ 277.71 State Statutes

Liability for negligence or tort *Civ. Code § 1714(a)*

Presumption of negligence from violation of statute. *Evid. Code § 669*

Gas company property may be posted. *Penal Code § 554*

Gas plant defined. *Pub. Util. Code § 221*

Injuries to gas company property. *Pub. Util. Code §§ 7951-7953*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 277.72 Administrative Regulations

Fuel gas piping. 24 Cal. Code Reg §§ P1201-P1215

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§ 277.73 Decisions

[1] Defense

Landlord as not responsible for condition of gas heater brought on premises by tenants. *Schwartz v. McGraw-Edison Co. (1971) 14 Cal. App. 3d 767, 782-783, 92 Cal. Rptr. 776 , disapproved on other grounds, Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 136 Cal. Rptr. 574, 560 P.2d 3*

[2] Duties

Gas as inherently and highly dangerous commodity and therefore a high degree of care is required in handling it. *Ambriz v. Petrolane Ltd. (1957) 49 Cal. 2d 470, 477, 319 P.2d 1* ; *Signorelli v. Potter (1954) 43 Cal. 2d 541, 543, 275 P.2d 449*

Standard of care required in handling dangerous instrumentalities. *Hall v. Macco Corp. (1961) 198 Cal. App. 2d 415, 422, 18 Cal. Rptr. 273*

Gas companies' duty to make sure all openings in pipes are closed when gas is turned on. *Ambriz v. Petrolane Ltd. (1957) 49 Cal. 2d 470, 479-480, 319 P.2d 1* ; *Sawyer v. Southern Cal. Gas Co. (1929) 206 Cal. 366, 371-372, 274 P. 544*

[3] Fraudulent Misrepresentation

Gas company as liable for fraudulent misrepresentation as to amount of gas that a development would use. *Empire West v. Southern California Gas Co. (1974) 12 Cal. 3d 805, 808-812, 117 Cal. Rptr. 423, 528 P.2d 31*

[4] Independent Contractor

A seller of gas as not insulated from liability for its negligence by selling the gas to an independent contractor for delivery. *Ambriz v. Petrolane Ltd. (1957) 49 Cal. 2d 470, 481-482, 319 P.2d 1*

[5] Negligence

[a] Liability for Personal Injuries

Duty of landowner to warn person working on land with excavating equipment of buried pipeline. *Smith v. Kern County Land Co. (1959) 51 Cal. 2d 205, 206-207, 331 P.2d 645*

Liability of gas company for condition of customer's pipes when gas company had knowledge of defects in pipes. *Ambriz v. Petrolane Ltd. (1957) 49 Cal. 2d 470, 477-478, 319 P.2d 1*

Liability of general contractor for installation of defective heater which caused deaths by asphyxiation. *Dow v. Holly Mfg. Co. (1958) 49 Cal. 2d 720, 722-724, 321 P.2d 736*

Liability of gas company for not turning off gas after notice of condition where gas pipes might be affected by a washout. *Gerdes v. Pacific Gas & Elec. Co. (1933) 219 Cal. 459, 469-471, 27 P.2d 365*

Liability for starting fire on bridge with blowtorch where fire reached a gas line and caused an explosion. *Hall v. Macco Corp. (1961) 198 Cal. App. 2d 415, 418-421, 18 Cal. Rptr. 273*

Liability of owner of premises for injuries sustained by a customer from an explosion when owner had prior knowledge of gas leak. *Ingledue v. Davidson (1929) 102 Cal. App. 697, 701-702, 283 P. 837*

Liability for negligent installation of gas oven which exploded and caused injury. *Tietke v. Forrest (1923) 64 Cal. App. 364, 365-366, 221 P. 681*

[b] Liability for Property Damage

Caused of action as stated where plaintiff alleged defendant permitted pipeline to be buried shallowly when bulldozer struck line and burned. *Lambert v. Southern Counties Gas Co. (1959) 52 Cal. 2d 347, 349-350, 340 P.2d 608*

Liability for installing cylinders of propane and not properly checking for leaks when fire started from gas shortly after the installation. *Webb v. Standard Oil Co. (1957) 49 Cal. 2d 509, 511-512, 319 P.2d 621*

Liability for allowing butane to escape while filling tank despite owner's negligence in maintaining tank near a house because explosion probably would have happened if tank had been proper distance from house. *Signorelli v. Potter (1954) 43 Cal. 2d 541, 543-544, 275 P.2d 449*

Gas company as responsible for risk of liability in damages for loss suffered by fire only when it enters into express contract with consumer for such specific risks; gas company as therefore not liable to consumers for failing to shut off flow of gas to its pipes and house meters when it is aware that rapidly spreading fire is approaching neighborhood because it had not expressly contracted therefor. *Lowenschuss v. Southern Cal. Gas Co. (1992) 11 Cal. App. 4th 496, 14 Cal. Rptr. 2d 59*

Liability of tenant for turning on gas negligently and causing explosion and fire. *Lewis v. Bjornestad (1952) 111 Cal. App. 2d 409, 410-412, 244 P.2d 497*

[6] Negligence Per Se

Violation of statute requiring that gas appliances be kept in good repair as requiring presumption of negligence on the part of the landlord. *Ewing v. Balan (1959) 168 Cal. App. 2d 619, 621-622, 336 P.2d 561*

Installation of gas device that violated a state law as negligence per se which requires a presumption that the installer was negligent. *Smith v. Kile (1956) 147 Cal. App. 2d 314, 316-318, 304 P.2d 1034*

[7] Nuisance

Gas company as a nuisance. *Judson v. Los Angeles Suburban Gas Co. (1910) 157 Cal. 168, 169-171, 106 P. 581*

[8] Proximate Cause

No liability as present when it cannot be proved that defendant's negligence was the proximate cause of the damage. *Union Inv. Co. v. San Francisco Gas & Elec. Co. (1914) 168 Cal. 58, 62-63, 141 P. 807*

Tests for when interviewing negligence is not a superseding cause which relieves the liability of the original negligent person. *Ewart v. Southern Cal. Gas Co. (1965) 237 Cal. App. 2d 163, 171, 46 Cal. Rptr. 631*

[9] Res Ipsa Loquitur

[a] Exclusive Control

Res ipsa loquitur doctrine as applicable if defendant had exclusive control of the gas system even if not of the areas into which gas escaped. *Chutuk v. Southern Counties Gas Co. (1942) 21 Cal. 2d 372, 375-376, 132 P.2d 193*

Res ipsa loquitur doctrine as applicable if, after defendant relinquished control of the instrumentality, it had not been changed or mishandled. *Reynolds v. Natural Gas Equip., Inc. (1960) 184 Cal. App. 2d 724, 732-734, 7 Cal. Rptr. 879*

[b] Rule Applicable

Application of res ipsa loquitur to explosion in a burner that had recently been converted to gas by defendant. *Reynolds v. Natural Gas Equip., Inc. (1960) 184 Cal. App. 2d 724, 731-736, 7 Cal. Rptr. 879* .

Application of res ipsa loquitur to death by asphyxiation where the heater was maintained by the defendant landlord. *Black v. Partridge (1953) 115 Cal. App. 2d 639, 645-647, 252 P.2d 760*

Application of res ipsa loquitur to explosion by gas that leaked into manhole when defendant's pipe was adjacent. *Chutuk v. Southern Counties Gas Co. (1942) 21 Cal. 2d 372, 375-378, 132 P.2d 193*

Application of res ipsa loquitur to explosion caused by gas that leaked from exposed capped service pipe owned by defendant. *Chutuk v. Southern Cal. Gas Co. (1933) 218 Cal. 395, 398-400, 23 P.2d 285*

Application of res ipsa loquitur to death by asphyxiation where the defendant gas company had recently changed the burner in the furnace. *Roy v. Smith (1933) 134 Cal. App. 240, 243-245, 25 P.2d 251*

Application of res ipsa loquitur to explosion in a pit containing gas pipes and maintained by defendant. *Smith v. Southern Counties Gas Co. (1928) 89 Cal. App. 81, 85, 264 P. 532*

Application of res ipsa loquitur to explosion and fire that occurred when the defendant's employee was attempting to repair the gas pipes. *Willard v. Valley Gas & Fuel Co. (1919) 180 Cal. 561, 563-564, 182 P. 32* ; *Willard v. Valley Gas & Fuel Co. (1915) 171 Cal. 9, 13-14, 151 P. 286*

[c] Rule Not Applicable

Res ipsa loquitur as not applicable where there was no proof that gas that caused injury came from defendant's refinery. *Brocato v. Standard Oil Co. (1958) 164 Cal. App. 2d 749, 756-759, 331 P.2d 111*

Res ipsa loquitur as not applicable when the gas equipment had been in control of another since its installation by defendant two years before the accident. *Brooks v. Parkhill-Wade Inc. (1954) 122 Cal. App. 2d 819, 821-822, 266 P.2d 128*

Res ipsa loquitur as not applicable when gas that caused explosion could have escaped from another person's gas pipes and defendant's pipes were found to be gastight. *Gerhart v. Southern Cal. Gas Co. (1942) 56 Cal. App. 2d 425, 431-436, 132 P.2d 874*

Res ipsa loquitur as not applicable when no proof existed that fire was caused by defendant's broken pipe since the pipe could have been broken by the fire. *Union Inv. Co. v. San Francisco Gas & Elec. Co. (1914) 168 Cal. 58, 62, 141 P. 807*

[d] Requirements

Requirements for application of res ipsa loquitur. *Reynolds v. Natural Gas Equip., Inc. (1960) 184 Cal. App. 2d 724, 731, 7 Cal. Rptr. 879*

[10] Statutory Violations

Demurrer by public utility company in action by tenants for violation of *Pub. Util. Code § 777* (requiring 10-day notice of pending termination of services for nonpayment by master customer) was properly sustained when pleadings showed utility terminated services at specific direction of master customer, not for delinquency in payments and, therefore, pleadings failed to show statutory violation was proximate cause of damages suffered by tenants. *Tovar v. Southern Cal. Edison Co. (1988) 201 Cal. App. 3d 606, 608-610, 247 Cal. Rptr. 281*

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawUtility CompaniesLiabilityReal Property LawTortsInherently Dangerous ActivitiesTortsNegligenceCausationProximate CauseGeneral OverviewTortsNegligenceProofViolations of LawStatutesTortsNegligenceStandards of CareSpecial CareGeneral Overview

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Witkin, Summary of California Law, Vol. 6, *Torts*, § 922 (10th ed. 2005)

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23-277 California Forms of Pleading and Practice--Annotated § 277.90

§ 277.90 Forms of Discovery

For forms of interrogatories for use in actions involving electricity, see Bender's Forms of Discovery, Ch. 70, *Electricity*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 277.91 State Statutes

[1] Crimes

Misdemeanor to operate machinery within six feet of power line. *Penal Code § 385*

Misdemeanor to injure electric power line. *Penal Code §§ 591, 593*

Misdemeanor to climb electric pole or tower. *Penal Code § 593b*

Misdemeanor to injure hydroelectric equipment. *Penal Code § 607*

Property used for electrical purposes may be posted. *Penal Code § 554*

[2] Negligence

Liability for negligence or tort. *Civ. Code § 1714(a)*

Presumption of negligence from violation of statute. *Evid. Code § 669*

[3] Regulation

Electric plant defined. *Pub. Util. Code § 217*

Electric corporation defined. *Pub. Util. Code § 218*

Rights granted by municipal electric franchise and duty to comply with ordinances. *Pub. Util. Code §§ 6265, 6294*

Injuries to electric company property. *Pub. Util. Code §§ 7951-7953*

Standards for electric line construction. *Pub. Util. Code §§ 8001-8057*

Fee as levied on electrical utility companies to fund dissemination of information to pilots to increase awareness of wire hazards. *Pub. Util. Code §§ 21504, 21505*

Utilities as required to mark wires and supporting structures. *Pub. Util. Code § 21506*

Legal Topics:

For related research and practice materials, see the following legal topics:
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23-277 California Forms of Pleading and Practice--Annotated § 277.92

§ 277.92 Administrative Regulations

Electrical Safety Orders. *8 Cal. Code Reg §§ 2299-2974*

Basic electrical building regulations. 24 Cal. Code Reg §§ E100-1-E800-10

Legal Topics:

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

[1] Duties

[a] Foreseeability

Electric company as not having duty to anticipate every possible peril, only those that are reasonably foreseeable. *Perrine v. Pacific Gas & Elec. Co. (1960) 186 Cal. App. 2d 442, 449, 9 Cal. Rptr. 45*

[b] Inspection

Duty to inspect wires and appliances. *Polk v. City of Los Angeles (1945) 26 Cal. 2d 519, 525-528, 159 P.2d 931*

Duty to inspect rights of way. *Irelan-Yuba Gold Quartz Mining Co. v. Pacific Gas & Elec. Co. (1941) 18 Cal. 2d 557, 565-567, 116 P.2d 611* ; *Roberts v. Pacific Gas & Elec. Co. (1929) 102 Cal. App. 422, 431-432, 283 P. 353*

Defendant as having no duty to denude land beneath highpowered wires to prevent fires. *Scally v. Pacific Gas & Elec. Co. (1972) 23 Cal. App. 3d 806, 817-818, 100 Cal. Rptr. 501*

City as having duty to inspect sidewalk where it might reasonably be expected to result in dangerous condition from electrical equipment underneath sidewalk. *Aguirre v. City of Los Angeles (1956) 46 Cal. 2d 841, 843-844, 299 P.2d 862*

Electric company as having continuing duty to inspect pole to prevent it from becoming traffic hazard but no liability if county places stop sign where it is partially obscured by power pole. *Schauf v. Southern Cal. Edison Co. (1966) 243 Cal. App. 2d 450, 459-461, 52 Cal. Rptr. 518*

[c] Not Ultrahazardous Activity

Maintenance of electric power lines as not ultrahazardous activity, and therefore electric company as not liable unless its negligence can be established. *McKenzie v. Pacific Gas & Elec. Co. (1962) 200 Cal. App. 2d 731, 736 19 Cal. Rptr. 628 , disapproved on other grounds, DiMare v. Cresci (1962) 58 Cal. 2d 292, 23 Cal. Rptr. 772, 373 P.2d 860*

[d] Possessor of Property

Possessor of property as having duty to warn trespasser of concealed condition containing unreasonable risk of harm, such as street light with a powerful current that could be reached from plaintiff's apartment, if the electric company knew the light had been previously tampered with. *Mark v. Pacific Gas & Elec. Co. (1972) 7 Cal. 3d 170, 177-178, 101 Cal. Rptr. 908, 496 P.2d 1276*

Electric company as having no duty to public to maintain streetlights. *White v. Southern Cal. Edison Co. (1994) 25 Cal. App. 4th 442, 445, 451, 30 Cal. Rptr. 2d 431*

[e] Wires

Standard of care for those maintaining electrical wires. *Dunn v. Pacific Gas & Elec. Co. (1954) 43 Cal. 2d 265, 273, 272 P.2d 745* ; *Polk v. Los Angeles (1945) 26 Cal. 2d 519, 525, 159 P.2d 931*

Duty to insulate electrical wires. *Dunn v. Pacific Gas & Elec. Co. (1954) 43 Cal. 2d 265, 273, 272 P.2d 745* ; *Polk v. City of Los Angeles (1945) 26 Cal. 2d 519, 525, 159 P.2d 931*

Duty to locate uninsulated wires where they are comparatively harmless. *McCormick v. Great W. Power Co. (1932) 214 Cal. 658, 663, 8 P.2d 145* ; *Scally v. Pacific Gas & Elec. Co. (1972) 23 Cal. App. 3d 806, 815-816, 100 Cal. Rptr. 501*

Duty to locate high power wires where they will not cause unreasonable danger to workers on building being constructed. *McCormick v. Great W. Power Co. (1932) 214 Cal. 658, 662-665, 8 P.2d 145*

[2] Electric Company Not Negligent

Electric company as not liable to motorist injured in collision at intersection where streetlight was inoperative. *White v. Southern Cal. Edison Co. (1994) 25 Cal. App. 4th 442, 445, 451, 30 Cal. Rptr. 2d 431*

Electric company as not liable if the power line met all applicable standards and plaintiff contacted the wire with a 30 foot steel rod. *Perrine v. Pacific Gas & Elec. Co. (1960) 186 Cal. App. 2d 442, 444-450, 9 Cal. Rptr. 45*

Electric company as not liable if it had no reason to know crane was being operated near its lines. *Lewis v. Pacific Gas & Elec. Co. (1949) 95 Cal. App. 2d 60, 62-63, 212 P.2d 243*

Electric company as not liable if it was not informed that plaintiff would blast where wires were otherwise safe. *Pascoe v. Southern Cal. Edison Co. (1951) 102 Cal. App. 2d 254, 256-258, 227 P.2d 555*

[3] Liability for Failure to Advise That Power Is Off

Electric company as liable for failure to tell customer that power was off after promising to do so. *Langley v. Pacific*

Gas & Elec. Co. (1953) 41 Cal. 2d 655, 661-663, 262 P.2d 846

[4] Liability for Negligence

[a] Contractor

Company servicing electric signs as liable for fire that started in sign the first time it was turned on after the servicing. *Alhambra Bowl, Inc. v. Ledbetter Sign Co. (1963) 211 Cal. App. 2d 777, 780-781, 27 Cal. Rptr. 680*

Contractor as liable for defective installation of electric equipment that caused fire. *Smith v. Shasta Elec. Co. (1961) 190 Cal. App. 2d 728, 730, 12 Cal. Rptr. 167*

[b] Electric Company

Electric company as liable for maintaining wires in such a condition that fire was caused when a tree fell and put electric wires in contact with telephone wires. *Beresford v. Pacific Gas & Elec. Co. (1955) 45 Cal. 2d 738, 745, 290 P.2d 498*

Electric company as liable for failure to maintain its wires over fields at a height sufficient to permit the safe operation of farm machinery. *Nevis v. Pacific Gas & Elec. Co., (1954) 43 Cal. 2d 626, 630-632, 275 P.2d 761*

Electric company as liable to tree trimmer for not keeping wires properly insulated. *Polk v. City of Los Angeles (1945) 26 Cal. 2d 519, 523-526, 159 P.2d 931*

Electric company as liable for placing power pole where it is a hazard to traffic. *George v. City of Los Angeles (1938) 11 Cal. 2d 303, 311-313, 79 P.2d 723* ; *Norton v. City of Pomona (1935) 5 Cal. 2d 54, 61, 53 P.2d 952*

Electric company as liable for injuries to children from broken wire that was allowed to remain on the ground for several hours. *Martin v. Pacific Gas & Elec. Co. (1928) 203 Cal. 291, 293-298, 264 P. 246*

Electric company as liable for failure to remove trespassing wire from over house plaintiff was constructing. *Young v. Vallejo Elec. Light & Power Co. (1927) 202 Cal. 638, 639-641, 262 P. 327*

Electric company and tree-trimming company as liable for injuries sustained by avocado picker whose pole contacted electric line that was too close to the tree. *San Diego Gas & Elec. Co. v. Davey Tree Surgery Co. (1970) 11 Cal. App. 3d 1096, 1099, 96 Cal. Rptr. 889*

Electric company as liable to tenant who fell on unlighted stairs for negligent adjustment of timing switch that turned on lights in apartment's common areas. *Burke v. Zanes (1961) 193 Cal. App. 2d 773, 776-778, 14 Cal. Rptr. 619*

Electric company as liable for expenses of fighting fire caused by company's negligence in allowing power line to touch telephone line. *County of Ventura v. So. Cal. Edison Co. (1948) 85 Cal. App. 2d 529, 531-533, 193 P.2d 512*

Electric company as liable for fire caused by defective condition of service wires leading to plaintiff's house. *Holmes v. Southern California Edison Co. (1947) 78 Cal. App. 2d 43, 47-49, 177 P.2d 32*

Liability of electric company for maintaining wires where it should have foreseen that injury might result from movement of light towers. *Lozano v. Pacific Gas & Elec. Co. (1945) 70 Cal. App. 2d 415, 421-424, 161 P.2d 74*

Liability of electric company for damages caused when it failed to turn off electricity within reasonable time after request to do so. *Pacific Brick Co. v. Southern Cal. Edison Co. (1941) 46 Cal. App. 2d 538, 540, 116 P.2d 131*

Liability of electric company for maintaining uninsulated high power wire three feet off ground when it should have known workmen would have to enter transformer yard to clear weeds. *Monroe v. San Joaquin Light & Power Corp. (1941) 42 Cal. App. 2d 641, 647-649, 109 P.2d 720*

[c] Landlord

Liability of landlord that was electric company for injuries caused by leaving live wires which protruded in the premises. *Couch v. Pacific Gas & Elec. Co. (1947) 80 Cal. App. 2d 857, 864-865, 183 P.2d 91*

[d] Owner

Liability of owner of premises to employees of independent contractor working on premises with crane for not deenergizing overhead line and for not providing adequate light. *Austin v. Riverside Portland Cement Co. (1955) 44 Cal. 2d 225, 231-233, 282 P.2d 69*

Liability of owner to contractor who received severe shock when cutting wires that the owner had stated were dead. *Rhodes v. Amor (1953) 119 Cal. App. 2d 98, 99-100, 259 P.2d 35*

Liability of possessor of land for not warning invitee of hidden danger from charged conductor bar. *Young v. Bates Valve Bag Corp. (1942) 52 Cal. App. 2d 86, 88-89, 125 P.2d 840*

[5] Negligence Per Se

Negligence as presumed from the failure to raise a wire to the proper height in a reasonable time after the ground under it has been raised. *Dunn v. Pacific Gas & Elec. Co. (1954) 43 Cal. 2d 265, 277, 272 P.2d 745*

Negligence as presumed when condition that caused injury was violation of statute, public utility rule, or safety order such as those prescribing the clearance of wires. *Stasulat v. Pacific Gas & Elec. Co. (1937) 8 Cal. 2d 631, 636, 67 P.2d 678*

Immunity granted by *Civ. Code § 846* for injuries to recreational users of land applied to shield electric company from liability for negligence per se (negligence presumed to exist by virtue of electric company's alleged violation of duties imposed by Public Utilities Code). *Jackson v. Pac. Gas & Elec. Co. (2001) 94 Cal. App. 4th 1110, 1119-1121, 114 Cal. Rptr. 2d 831*

Negligence as presumed from violation of electric orders. *Williams v. Pacific Gas & Elec. Co. (1960) 181 Cal. App. 2d 691, 700-702, 5 Cal. Rptr. 585*

Negligence of employer as presumed for erecting a building too close to power lines without asking the electric company to raise them. *Bickham v. Southern Cal. Edison Co. (1953) 120 Cal. App. 2d 815, 820-821, 263 P.2d 32*

Negligence as presumed from violation of regulation requiring the removal of abandoned telephone poles. *Langazo v. San Joaquin Light & Power Corp. (1939) 32 Cal. App. 2d 678, 682-683, 90 P.2d 825*

Duty to obey rules of Public Utility Commission as nondelegable. *Snyder v. Southern Cal. Edison Co. (1955) 44 Cal.*

2d 793, 799-802, 285 P.2d 912

Nonnegligent ignorance of facts which bring a statute into operation as supporting a finding that the violation is civilly excusable. *Nevis v. Pacific Gas & Elec. Co. (1954) 43 Cal. 2d 626, 633, 275 P.2d 761*

Presumption of plaintiff's negligence from violation of statute as rebuttable by evidence of justification or excuse. *Kingery v. Southern Cal. Edison Co. (1961) 190 Cal. App. 2d 625, 638, 12 Cal. Rptr. 173*

Compliance with general orders of the Public Utility Commission as not establishing due care but merely relieving an electric company of the presumption of negligence. *Nevis v. Pacific Gas & Elec. Co. (1954) 43 Cal. 2d 626, 630, 275 P.2d 761* ; *Perrine v. Pacific Gas & Elec. Co. (1960) 186 Cal. App. 2d 442, 448, 9 Cal. Rptr. 45*

[6] Plaintiff's Negligence

[a] Found Negligent

Person who is warned to keep away from a high voltage wire and is fully informed of the danger of touching it as negligent if he or she voluntarily touches it. *Rojas v. Southern Cal. Edison Co. (1951) 105 Cal. App. 2d 258, 259, 233 P.2d 141*

Plaintiff as negligent when he manipulated a guy wire near what he knew was a high power line. *Martin v. Pacific Gas & Elec. Co. (1962) 204 Cal. App. 2d 316, 333, 22 Cal. Rptr. 291*

Plaintiff as negligent when he knew of the existence of dangerous wires and contacted them with a steel rod as he was working on a building. *Benard v. Vorlander (1948) 87 Cal. App. 2d 436, 448-449, 197 P.2d 42*

Plaintiff as negligent when he grasped a cable that he knew had just touched a live wire and was connected to a boom that was touching a live wire. *Bartuluci v. San Joaquin Light & Power Corp. (1937) 21 Cal. App. 2d 376, 386-388, 69 P.2d 440*

[b] Not Negligent

Forgetfulness of known danger as not necessarily negligence on the part of a plaintiff. *Austin v. Riverside Portland Cement Co. (1955) 44 Cal. 2d 225, 237, 282 P.2d 69*

Plaintiff as not negligent when he was injured pruning a tree and might not have seen that the insulation was rubbed from the wires running through the tree. *Polk v. City of Los Angeles (1945) 26 Cal. 2d 519, 529-532, 159 P.2d 931*

Plaintiff as not negligent when he touched electric wires which he had been told were not energized. *Rhodes v. Amor (1953) 119 Cal. App. 2d 98, 101, 259 P.2d 35*

Plaintiff as not negligent when he put his hand on a conductor which did not resemble a conductor. *Young v. Bates Valve Bag Corp. (1942) 52 Cal. App. 2d 86, 94-95, 125 P.2d 840*

[7] Proximate Cause

When injury sustained by decedent was precisely and directly result to be expected when person trimming tree on residential property is exposed to uninsulated power line, and decedent indisputably shown to be in class of persons

exposed to danger by defendant deliberately permitting uninsulated line to remain in proximity to tree, no factual issue on superseding cause based on decedent's negligence as existing. *Pappert v. San Diego Gas & Elec. Co. (1982) 137 Cal. App. 3d 205, 209-211, 186 Cal. Rptr. 847*

Proximate cause as established even though the electricity that charged the dangerous instrumentality created by the defendant came through another's property. *Satterberg v. Pacific Gas & Elec. Co. (1943) 58 Cal. App. 2d 296, 301-302, 136 P.2d 43*

Proximate cause as not being established when defendant's sagging wires had been moved and concealed from their place by an intervening agent. *Stasulat v. Pacific Gas & Elec. Co. (1937) 8 Cal. 2d 631, 636-638, 67 P.2d 678*

Proximate cause as not established where the defendant's wire was only touched by the plaintiff swinging a long pole out from a building being constructed. *Sweatman v. Los Angeles Gas & Elec. Corp. (1929) 101 Cal. App. 318, 326-327, 281 P. 677*

Proximate cause as not established where the defendant's down wires were moved and concealed by a third party. *Polloni v. Ryland (1915) 28 Cal. App. 51, 53-56, 151 P. 296*

Both parties as liable if injury is caused by their concurrent negligence. *Lacy v. Pacific Gas & Elec. Co. (1934) 220 Cal. 97, 98-99, 29 P.2d 781*

[8] Res Ipsa Loquitur

[a] Rule Applicable

Application of res ipsa loquitur to fire caused by defendant's overloading of electrical circuits or by negligence of defendant's independent contractor for which defendant was liable due to control of the premises. *Pappas v. Carson (1975) 50 Cal. App. 3d 261, 268-269, 123 Cal. Rptr. 343*

Application of res ipsa loquitur to automobile accident caused by falling electric wire. *Taylor v. Pacific Gas & Elec. Co. (1943) 57 Cal. App. 2d 11, 14-16, 134 P.2d 12*

Application of res ipsa loquitur to death resulting from a sagging telephone line that had become charged with electricity. *Langazo v. San Joaquin Light & Power Corp. (1939) 32 Cal. App. 2d 678, 695-696, 90 P.2d 825*

Application of res ipsa loquitur to fire started by short circuit from high powered electric lines. *Phillips v. Southern Cal. Edison Co. Ltd. (1937) 23 Cal. App. 2d 222, 224-225, 72 P.2d 769*

Application of res ipsa loquitur to injury caused by fall of a portion of a glass globe from an electrolier. *Helms v. Pacific Gas & Elec. Co. (1937) 21 Cal. App. 2d 711, 713-714, 70 P.2d 247*

Application of res ipsa loquitur to injury caused by the fall of power wires. *Vertson v. City of Los Angeles (1931) 116 Cal. App. 114, 122-124, 2 P.2d 411*

[b] Rule Not Applicable

Res ipsa loquitur doctrine not applicable to injury caused by the fall of a power pole where there was substantial evidence that the pole was burned partially through by an external force. *Rodela v. Southern Cal. Edison Co. (1957) 148 Cal. App. 2d 708, 712-713, 307 P.2d 436*

Res ipsa loquitur as not applicable to a fire that occurred under a hot plate installed and turned on by plaintiff. *Valentine v. Ratner (1951) 105 Cal. App. 2d 358, 361-362, 233 P.2d 667*

[9] Strict Liability in Tort

Electricity as becoming "product" not when wires cross plaintiff's property line but rather when electricity has been metered; when fire occurs in defectively insulated wires before electricity reaches meter, electricity as still in distribution line and not in stream of commerce for purposes of strict liability. *Fong v. Pacific Gas & Elec. Co. (1988) 199 Cal. App. 3d 30, 38, 245 Cal. Rptr. 436*

Strict products liability doctrine as applicable when personal injuries result from delivery of electricity at dangerously high voltage because of defective transformer. *Pierce v. Pacific Gas & Elec. Co. (1985) 166 Cal. App. 3d 68, 83-84, 212 Cal. Rptr. 283*

Doctrine of strict liability in tort for defective products as inapplicable to injury caused by defect in facilities used by public utility for transmission of electric energy, when electricity was not placed in stream of commerce. *United Pac. Ins. Co. v. Southern Cal. Edison Co. (1985) 163 Cal. App. 3d 700, 707-709, 209 Cal. Rptr. 819*

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§ 277.94 Law Reviews

Comment, *Liability of Electric Utilities for Unintended Power Outages, 23 U.S.F. L. Rev. 75 (1988)*

Comment, *Shocks, Shorts and Sparks--Strict Liability for Electric Utilities? 20 Loy. L.A. L. Rev. 973 (1987)*

Comment, *Torts of Electric Companies: Can Strict Liability Be Plugged In? 11 Loy. L.A. L. Rev. 775 (1978)*

Shain, *Res Ipsa Loquitur, 17 So. Cal. L. Rev. 187 (1944)*

Note, *Electricity: Conflicting Rights of Telegraph and Power Companies: Inductive Interference as Nuisance, 16 Cal. L. Rev. 331 (1928)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Tort Guide, Ch. 7 *Electricity* (Cal. CEB 3d ed. 2000)

Witkin, Summary of California Law, Vol. 6, *Torts*, § 919 (10th ed. 2005)

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C. Termination of Utility Service

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§ 277.110 California Torts

For discussion of the requirements for filing claims prior to bringing actions against public entities, see Levy, Golden, Sacks, California Torts, Ch. 62

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 23: Fraud and Deceit thru Good Faith Improver of Real Property-Chs. 269-279
Chapter 277 GAS AND ELECTRICITY
PART III. RESEARCH GUIDE
C. Termination of Utility Service

23-277 California Forms of Pleading and Practice--Annotated § 277.111

§ 277.111 Federal Statutes

State natural gas and electric utility retail policies under Public Utilities Regulatory Act of 1978. *15 U.S.C. §§ 3201-3211*; *16 U.S.C. §§ 2611-2642*

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawCogeneration & Independent Power CompaniesPublic Utility Regulatory Policies ActGeneral Overview

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23-277 California Forms of Pleading and Practice--Annotated § 277.112

§ 277.112 State Statutes

[1] Discontinuance Pursuant to Commission Order

Utility as not liable for damages to person or property for discontinuance made pursuant to order of Public Utilities Commission under *Pub. Util. Code § 2771 et seq.* (governing priorities among customers). *Pub. Util. Code § 2775*

[2] Termination of Residential Service

Termination of residential utility service to multiunit housing furnished through individual meters. *Pub. Util. Code §§ 777, 10009, 12822, 16481*

Termination of residential service furnished by electrical, gas, heat, or water corporation. *Pub. Util. Code §§ 777-780*

Termination of residential utility service to multiunit housing furnished through master meters. *Pub. Util. Code §§ 777.1, 10009.1, 12822.1, 16481.1*

Termination of residential service. *Pub. Util. Code §§ 779-779.2, 10010, 10010.1, 12823, 12823.1, 16482, 16482.1*

Termination of residential light, heat, water, or power by municipal corporation. *Pub. Util. Code §§ 10009-10011*

Termination of residential light, heat, water, or power by municipal district. *Pub. Util. Code §§ 12822-12824*

Termination of residential light, heat, water, or power by public utility district. *Pub. Util. Code §§ 16481-16483*

Legal Topics:

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

Energy & Utilities LawUtility CompaniesService Terminations

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23-277 California Forms of Pleading and Practice--Annotated § 277.113

§ 277.113 State Administrative Regulations

Rules of practice and procedure before Public Utilities Commission. *20 Cal. Code Reg. §§ 1-88*

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral Overview

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23-277 California Forms of Pleading and Practice--Annotated § 277.114

§ 277.114 Decisions

[1] Damages

Damages as available in action based on discontinuance of water supply. *Schultz v. Lakeport (1936) 5 Cal. 2d 377, 383, 54 P.2d 1110, 55 P.2d 485*

[2] Due Process Limits on Termination

Legitimate claim of entitlement under Due Process Clause as arising when state law precludes termination of utility service other than for good cause; constitutionally adequate notice and hearing procedure as required prior to termination. *Memphis Light, Gas & Water Div. v. Craft (1978) 436 U.S. 1, 11-12, 98 S. Ct. 1554, 56 L. Ed. 2d 30*

No state action as present in case of privately owned corporation holding certificate of public convenience issued by the state public utilities commission empowering it to deliver electricity to city residents, even though the utility is subject to form of extensive regulation by state in way that most business enterprises are not. *Jackson v. Metropolitan Edison Co. (1974) 419 U.S. 345, 358-359, 95 S. Ct. 449, 42 L. Ed. 2d 477*

Determination of which charges are "properly due" to utility as to be made in light of traditional due process standards. *Perez v. City of San Bruno (1980) 27 Cal. 3d 875, 890, 168 Cal. Rptr. 114, 616 P.2d 1287*

Due process guarantees under both federal and state constitution as permitting application of unified billing of all city services accompanied by cessation of water service on failure to pay unified billing in full. *Perez v. City of San Bruno (1980) 27 Cal. 3d 875, 893, 168 Cal. Rptr. 114, 616 P.2d 1287*

Termination of utility service as not permitted without good cause under California law. *Schultz v. Lakeport (1936) 5 Cal. 2d 377, 381-382, 54 P.2d 1110, 55 P.2d 485*

[3] Injunction

Injunction as proper remedy to restrain shutting off of water when there is just dispute. *Schultz v. Lakeport (1936) 5 Cal. 2d 377, 383, 54 P.2d 1110, 55 P.2d 485*

[4] Nonstatutory Actions

When utility undertakes to supply electricity to customer, utility as under obligation to exercise reasonable care toward customer, and failure to exercise such care has characteristics of both breach of contract and tort. *Langley v. Pacific Gas & Elec. Co. (1953) 41 Cal. 2d 655, 662, 262 P.2d 846*

[5] Termination of Residential Service to Individually Metered Multiunit Housing

Failure to give notice required by *Pub. Util. Code § 777* as not resulting in tort liability, whether failure is in providing defective notice or in giving no notice whatsoever, unless breach of utility company's statutory duty causes damage sustained by users whose utility service was terminated. *Tovar v. Southern Cal. Edison Co. (1988) 201 Cal. App. 3d 606, 614, 247 Cal. Rptr. 281*

[6] Utility's Right to Terminate Service

Customer's right to continued utility service as conditioned on payment of charges properly due. *Memphis Light, Gas & Water Div. v. Craft (1978) 436 U.S. 1, 11, 98 S. Ct. 1554, 56 L. Ed. 2d 30*

Nonpayment of charges properly due as justification for discontinuance of service. *Schultz v. Lakeport (1936) 5 Cal. 2d 377, 383, 54 P.2d 1110, 55 P.2d 485*

Order compelling privately owned public utility company to operate at loss as taking of property without compensation and violation of *U.S. Const. amend XIV*. Lyon & *Hoag v. Railroad Comm'n (1920) 183 Cal. 145, 146-147, 190 P. 795*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewConstitutional LawSubstantive Due ProcessGeneral OverviewEnergy & Utilities LawUtility CompaniesService TerminationsTortsNegligenceStandards of CareReasonable CareGeneral Overview

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23-277 California Forms of Pleading and Practice--Annotated § 277.115

§ 277.115 Text References

53 Cal. Jur. 3d, *Public Utilities*, §§ 114-116

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawElectric Power IndustryElectricity Distribution & TransmissionGeneral OverviewEnergy & Utilities LawGas IndustryGeneral OverviewEnergy & Utilities LawUtility CompaniesGeneral OverviewEnergy & Utilities LawUtility CompaniesLiability

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23-277 California Forms of Pleading and Practice--Annotated §§ 277.116-277.129

[Reserved]

§§ 277.116[Reserved]

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23-277 California Forms of Pleading and Practice--Annotated § 277.130

§ 277.130 Complaint for Damages [Civ. Code § 3333] for Personal Injuries and Property Damage Based on Negligence [Civ. Code § 1714(a)]--By Homeowner Against Gas Company--Homeowner Injured by Gas Explosion

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries and Property Damage Based on Negligence [Civ. Code § 1714(a)]--By Homeowner Against Gas Company--Homeowner Injured by Gas Explosion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*(*s*)],	)	(Negligence)
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name of gas company*] is, and at all times herein mentioned was, a domestic corporation with its principal place of business at _____ [*address*], _____ [*city*], California [*or allege other capacity and residence*]. It is engaged in the business of supplying and distributing gas to residents and consumers in the City of _____, County of _____, California, and elsewhere.

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of

said fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by said negligence.)]

3. At all times mentioned herein, defendant supplied gas to the residence of plaintiff at _____ [*address*], _____ [*city*], California. Defendant owns and is responsible for the maintenance of the pipes, meter, and equipment connecting plaintiff's residence to the main gas line.

4. Defendant negligently installed and maintained the gas pipes, meter, and equipment described above and negligently failed to properly inspect them to insure that they were in good condition. As a proximate result of this negligent installation, maintenance, and failure to inspect _____ [*describe events leading to plaintiff's injuries, e.g.*, gas leaked from the defendant's pipes, meter, and equipment. This gas accumulated in the basement of plaintiff's residence and around the outside of his/her house and ignited causing an explosion and fire].

5. As a proximate result of the negligence of defendant[s, and each of them], plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her body and shock and injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has suffered general damages.

[*EITHER*]

6. As a further proximate result of defendant's negligence herein alleged, plaintiff has been required to expend money and incur obligations, and will continue to expend money and incur obligations, for medical services, X-rays, drugs, and sundries reasonably required in the treatment and relief of the injuries herein alleged, plaintiff has been damaged thereby.

[*OR*]

6. As a further proximate result of the negligence of defendant[s, and each of them], plaintiff has incurred, and will continue to incur, medical and related expenses.

[*EITHER*]

7. As a further proximate result of the negligence of defendant[s, and each of them], plaintiff was prevented from attending to his/her usual occupation as a _____ [*state occupation*] for a period _____ [of _____ (*specify*) *or* to the date of the filing of this complaint] and thereby lost earnings [to his/her damage].

[*OR*]

7. As a further proximate result of the negligence of defendant[s, and each of them], plaintiff's earning capacity has been greatly impaired, both in the past and at present.

8. As a proximate result of the negligence of defendant[s, and each of them], plaintiff's _____ [*describe real and personal property*] was _____ [*describe damage, e.g.*, destroyed beyond repair, all to plaintiff's damage in the sum of $ _____ *or* damaged]. [*If property was not destroyed, add* :

Plaintiff has expended $ _____ for repair of _____ (*describe real and personal property*), which is a reasonable sum for such repair.]

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

1. For general damages;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form of complaint is for use in an action by a homeowner against a gas company where a leak in the gas company's pipes caused an explosion which injured plaintiff and damaged his or her house.

[3] Venue

In an action for personal injuries and property damages from a wrongful act or negligence, either the county where the injury occurs or the county where the defendants, or some of them, reside at the commencement of the action is a proper county for the trial of the action [*Code Civ. Proc. § 395*].

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[5] Specifying Amount of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see *Ch. 177, Damages, § 177.40* et seq., and Ch. 205, *Defaults and Default Judgments* .

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For forms for use in negligence actions generally, see Ch. 380, *Negligence*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification*

[8] Decisions

Gas is inherently and highly dangerous commodity and therefore high degree of care is required in handling it. *Ambriz v. Petrolane Ltd. (1957) 49 Cal. 2d 470, 477, 319 P.2d 1* ; *Signorelli v. Potter (1954) 43 Cal. 2d 541, 543, 275 P.2d 449*

Res ipsa loquitur is applicable if defendant had exclusive control of gas system even if not of areas into which gas escaped. *Reynolds v. Natural Gas Equip. Inc. (1960) 184 Cal. App. 2d 724, 732-734, 7 Cal. Rptr. 879*

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23-277 California Forms of Pleading and Practice--Annotated § 277.131

§ 277.131 Allegation of Gas Company's Negligence--Negligence in Repairing and Adjusting Gas Appliance

[1] FORM Allegation of Gas Company's Negligence--Negligence in Repairing and Adjusting Gas Appliance

1. On _____ [*date*], plaintiff requested that defendant _____ [*name of gas company*] inspect and adjust plaintiff's gas furnace. On _____ [*date*], an employee of defendant, _____ [*name*], came to plaintiff's residence to make such inspection and adjustment. As defendant's employee was making the inspection and adjustment, an explosion and fire occurred in the furnace as a proximate result of the negligence of defendant's employee.

[2] Use of Form

This form is an allegation of the negligence of an employee of a gas company in inspecting and adjusting plaintiff's furnace. It may be used in place of Paragraph 4 of the *form in § 277.130*.

[3] Decisions

Application of res ipsa loquitur to explosion and fire that occurred when defendant's employee was attempting to repair gas pipes. *Willard v. Valley Gas & Fuel Co. (1919) 180 Cal. 561, 563-564, 182 P. 32* ; *Willard v. Valley Gas & Fuel Co. (1915) 171 Cal. 9, 13-14, 151 P. 286*

[4] Cross References

For a related form, see *§ 277.130*

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23-277 California Forms of Pleading and Practice--Annotated § 277.132

§ 277.132 Complaint for Damages for Wrongful Death of Worker [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a)]--By Entitled Person(s) Against Gas Company--Death Caused by Asphyxiation in Excavation

[1] FORM Complaint for Damages for Wrongful Death of Worker [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a)]--By Entitled Person(s) Against Gas Company--Death Caused by Asphyxiation in Excavation

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*],	)	
Plaintiff(s),	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Wrongful Death)
[and Does I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff(s) allege(s):

1. _____ [Plaintiff(s) *or* The person(s) listed below] is/are entitled to bring an action for the wrongful death of _____ [*name of decedent*] (hereinafter "decedent") pursuant to *Code of Civil Procedure Section 377.60*, based on his/her/their relationship to decedent, as follows:

Name(s)	Relationship(s) to Decedent
_____	_____

_____
_____ _____
_____
_____ _____
_____

[_____ (*If one or more persons are required to establish additional facts, such as that there is no surviving spouse, domestic partner, child, or issue of deceased child, or that the person was dependent on decedent, in order to be entitled to bring a wrongful death action under Code Civ. Proc. § 377.60, specify facts that satisfy applicable requirement*).]

[*ADD, if decedent's personal representative is maintaining action on behalf of one or more entitled persons*]

Plaintiff _____ [*name*] is the duly appointed, qualified, and acting personal representative of the estate of decedent, and brings this action on behalf of _____ [all of the above-listed persons entitled to bring a cause of action for the wrongful death of decedent *or* the following person(s) entitled to bring an action for the wrongful death of decedent: _____ (*specify person(s) on whose behalf personal representative is maintaining action*)].

[*CONTINUE*]

[2. *Capacity of defendant. See § 277.130, Paragraph 1.*]

[3. *Fictitious name allegation, if appropriate. See § 277.130, Paragraph 2.*]

4. At all times herein mentioned, decedent was employed by _____ [*name*] and engaged in the excavation and construction of a sewer and tunnel along _____ [*street*] near its intersection with _____ [*street*] in _____ [*specify city and/or county*].

5. On _____ [*date*], defendant owned and operated pipelines and mains carrying natural gas in and about the area in which the accident hereinafter described occurred.

6. On or before _____ [*date*], defendant _____ [*describe defendant's negligence causing death of decedent, e.g.*, so carelessly and negligently operated, maintained, managed, controlled, and inspected gas lines running in and adjacent to _____ (*street*) near its intersection with _____ (*street*) in _____ (*location*) that dangerous and excessive amounts of gas escaped from defendant's gas lines and into the area where decedent was working, causing his death by asphyxiation on _____ (*date*)].

7. At the time of the events described herein and prior thereto, decedent was gainfully employed as _____ [*specify*], was earning an average monthly income in excess of $ _____. Furthermore, at the above-mentioned time, decedent was _____ [*describe relationship between decedent and entitled person(s), e.g.*, the sole support of plaintiff(s) _____ (*name(s)*), and was a faithful and dutiful husband and father].

8. By reason of all of the foregoing, _____ [plaintiff(s) *or* the person(s) specified in Paragraph 1] has/have been deprived of the support, cohabitation, comfort, protection, and society of _____ [*name of decedent*] and has/have been thereby damaged.

9. By reason of all of the foregoing and the death of _____ [*name of decedent*], plaintiff _____ [*name*] has incurred funeral and burial expenses.

WHEREFORE plaintiff(s) pray for judgment against defendant as follows:

1. For general damages according to proof;

2. For funeral and burial expenses according to proof;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff(s)

[*Verification, if desired. See § 277.130.*]

[2] Use of Form

This form of complaint is for use in an action for the wrongful death of a worker who died from asphyxiation caused by gas escaping from a gas company's lines. An action for wrongful death of a decedent may be brought by persons entitled by statute to a wrongful death cause of action, or by the personal representative of the decedent's estate on behalf of those entitled persons [*Code Civ. Proc. § 377.60*].

Under *Code Civ. Proc. § 377.60*, the decedent's surviving spouse, domestic partner, children, and issue of deceased children, or if the decedent leaves no surviving issue, the persons, including the surviving spouse or domestic partner, who would be entitled to take the decedent's property under intestate succession, may bring a wrongful death action without qualification. Under specified circumstances, others may bring a wrongful death action under *Code Civ. Proc. § 377.60*. For forms of allegations establishing that specific classes of persons are entitled to bring a wrongful death action, including allegations that are required of plaintiffs who are not the decedent's surviving spouse, domestic partner, children, or issue of deceased children, see Ch. 181, *Death and Survival Actions* . If a plaintiff is a minor, a guardian ad litem must be appointed for the purposes of the action, unless the minor already has a guardian [*see Code Civ. Proc. § 372*]. For discussion and forms relating to appointment of a guardian ad litem generally, see Ch. 291, *Guardians ad Litem* .

The damages recovered in a wrongful death action may not include any damages recoverable in a survival action [*Code Civ. Proc. § 377.61*]. Damages for medical expenses incurred before death, for example, are recoverable in a survival action [*see Code Civ. Proc. § 377.34* (survival action damages); *Follansbee v. Benzenberg (1954) 122 Cal. App. 2d*

466, 473-474, 265 P.2d 183] . A survival action may be joined with a wrongful death action if both actions arise out of the same wrongful act or neglect [*Code Civ. Proc. § 377.62(a)*]. For further discussion and additional forms, see Ch. 181, *Death and Survival Actions* .

[3] Cross References

For forms for use in appointing a guardian or guardian ad litem, see Ch. 291, *Guardians ad Litem*

For a related form, see *§ 277.130*

[4] State Statutes

Survival of actions. *Code Civ. Proc. §§ 377.20 et seq., 377.30 et seq.*

Wrongful death actions. *Code Civ. Proc. § 377.60 et seq.*

[5] Decisions

Application of res ipsa loquitur to explosion by gas that leaked into manhole when defendant's pipe was adjacent. *Chutuk v. Southern Counties Gas Co. (1942) 21 Cal. 2d 372, 375, 378, 132 P.2d 193*

Res ipsa loquitur not applicable because gas that caused explosion could have escaped from another person's gas pipes and defendant's pipes were found to be gastight. *Gerhart v. Southern Cal. Gas Co. (1942) 56 Cal. App. 2d 425, 432-436, 132 P.2d 874*

Application of res ipsa loquitur to explosion in pit containing gas pipes and maintained by defendant. *Smith v. Southern Counties Gas Co. (1928) 89 Cal. App. 81, 85, 264 P. 532*

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23-277 California Forms of Pleading and Practice--Annotated § 277.133

§ 277.133 Complaint for Damages [Civ. Code § 3333] for Personal Injuries and Property Damage Based on Negligence [Civ. Code § 1714(a)]--By Property Owner Against Supplier of Butane Gas

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries and Property Damage Based on Negligence [Civ. Code § 1714(a)]--By Property Owner Against Supplier of Butane Gas

[*Caption. See § 277.130.*]

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a domestic corporation with its principal place of business at _____ [*address*], _____ [*city*], California [*or allege other capacity and residence*]. It is engaged in the business of supplying and distributing butane gas to consumers in _____ County, California.

2. [Plaintiff is informed and believes and thereon alleges that] [A]t all times herein mentioned defendant _____ [*name*] was the agent and employee of defendant _____ [*name of supplier*] and in doing the things hereinafter alleged was acting in the scope of such agency and with the permission and consent of his/her codefendant.

[3. *Fictitious name allegation, if appropriate. See § 277.130, Paragraph 2.*]

4. On or about _____ [*date*], defendant _____ [*name of supplier*] installed on plaintiff's premises at _____ [*address*], _____ [*city*], California a tank for holding butane gas and pipes. It was installed in plaintiff's _____ [*specify, e.g.,* home *or* cabin] to conduct the butane gas to plaintiff's appliances. At that time, defendant _____ [*name of supplier*] agreed to inspect and maintain the tank and to supply plaintiff with butane gas. A copy of the agreement is attached hereto as Exhibit A and made a part hereof.

5. On _____ [*date*], defendant _____ [*name of employee*] was filling plaintiff's butane tank. As a proximate result of the negligence of defendant _____ [*name of employee*] in filling the tank and the negligence of both defendants in installing, inspecting, and maintaining the butane tank and pipes into plaintiff's _____ [*specify, e.g.,* home *or* cabin], butane gas escaped, leaked into plaintiff's _____ [*specify, e.g.,* home *or* cabin], ignited, and exploded, causing fire and plaintiff's injuries and damages as hereinafter described.

[6-9. *Damages allegations. See § 277.130, Paragraphs 5-8.*]

[*Prayer. See § 277.130.*]

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

[*Verification, if desired. See § 277.130.*]

[2] Use of Form

This form of complaint is for use in an action against a gas company and its employee for negligence in installing and filling a butane tank, which negligence allowed butane gas to escape and explode.

[3] Decisions

Liability for installing cylinders of propane and not properly checking for leaks when fire started from gas shortly after installation. *Webb v. Standard Oil Co. (1957) 49 Cal. 2d 509, 511-512, 319 P.2d 621*

Liability of gas company for negligence in not checking to see that all outlets were closed after filling butane tank for first time in season. *Ambriz v. Petrolane Ltd. (1957) 49 Cal. 2d 470, 477-478, 319 P.2d 1*

Liability for allowing butane to escape while filling tank despite owner's negligence in maintaining tank near house because explosion probably would have happened if tank had been proper distance from house. *Signorelli v. Potter (1954) 43 Cal. 2d 541, 543-544, 275 P.2d 449*

Res ipsa loquitur not applicable because propane equipment had been in control of another since its installation by defendant two years before accident. *Brooks v. Parkhill-Wade Inc. (1954) 122 Cal. App. 2d 819, 819-822, 266 P.2d 128*

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Chapter 277 GAS AND ELECTRICITY
PART IV. FORMS
A. Gas

23-277 California Forms of Pleading and Practice--Annotated § 277.134

§ 277.134 Complaint for Damages for Wrongful Death of Tenant [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a)]--By Entitled Person(s) Against Landlord--Tenant's Death by Asphyxiation

[1] FORM Complaint for Damages for Wrongful Death of Tenant [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a)]--By Entitled Person(s) Against Landlord--Tenant's Death by Asphyxiation

[*Caption. See § 277.132.*]

Plaintiff alleges:

FIRST COUNT
(Negligence)

[1. *Capacity of plaintiff(s). See § 277.132, Paragraph 1.*]

2. At all times herein mentioned, defendant _____ [*name*] owned, operated, maintained, serviced, and equipped the premises at _____ [*address*], _____ [*city*], California, wherein he/she offered apartments for rent. Decedent rented Apartment No. _____ and occupied it.

3. On or before _____ [*date*], defendant and his/her employees, servants, and agents acting in the scope of their agency, negligently operated, maintained, serviced, and equipped the above-described apartment _____ [*describe dangerous condition, e.g.,* as to furnish to decedent a dangerous, defective, and hazardous gas heater for the purpose of heating the apartment. The heater's venting apparatus was broken and plugged so that it did not operate and allowed deadly fumes to be emitted, creating a deadly hazard for the occupant of the apartment].

4. _____ [*Describe manner in which decedent was killed, e.g.,* On _____ (*date*),

while occupying the above-described apartment, decedent turned on the above-described heater and because he/she was unaware of its defective condition, was overcome by the deadly fumes emitted by the heater, and died from the effects thereof].

[5-7. *Damages allegations. See § 277.132, Paragraphs 7-9.*]

SECOND COUNT

8. Plaintiff(s) refer(s) to and herein incorporate(s) Paragraphs 1-7, inclusive, of the First Count.

9. On or before _____ [*date*], the condition of the above-described gas heater with a broken or plugged vent was in violation of the following ordinances, regulations, and statutes: _____ [*specify, including text*].

[*Prayer. See § 277.132.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff(s) _____ [*name(s)*]

[*Verification, if desired. See § 277.130.*]

[2] Use of Form

This form is a complaint for wrongful death of an adult killed by asphyxiation caused by a defective gas heater. The complaint is for use against a landlord in a situation in which a tenant was killed by the defective condition of the heater.

An action for wrongful death of a decedent may be brought by persons entitled by statute to a wrongful death cause of action, or by the personal representative of the decedent's estate on behalf of those entitled persons [*Code Civ. Proc. § 377.60*]. *Code Civ. Proc. § 377.60* permits the decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to take the decedent's property under intestate succession, to bring a wrongful death action without qualification, and permits others to bring action under specified circumstances. For forms of allegations establishing that specific classes of persons are entitled to bring a wrongful death action, including allegations that are required of plaintiffs who are not the decedent's surviving spouse, children, or issue of deceased children, see Ch. 181, *Death and Survival Actions* . If a plaintiff is a minor, a guardian ad litem must be appointed for the purposes of the action, unless the minor already has a guardian [*see Code Civ. Proc. § 372*]. For discussion and forms relating to appointment of a guardian ad litem generally, see Ch. 291, *Guardians ad Litem* .

The damages recovered in a wrongful death action may not include any damages recoverable in a survival action [*Code Civ. Proc. § 377.61*]. Damages for medical expenses incurred before death, for example, are recoverable in a survival action [*see Code Civ. Proc. § 377.34* (survival action damages); *Follansbee v. Benzenberg (1954) 122 Cal. App. 2d*

466, 473-474, 265 P.2d 183] . A survival action may be joined with a wrongful death action if both actions arise out of the same wrongful act or neglect [*Code Civ. Proc. § 377.62(a)*]. For further discussion and additional forms, see Ch. 181, *Death and Survival Actions* .

[3] Allegations

This complaint sets forth two counts as the basis for recovery for wrongful death. The first count alleges that the death was caused by the negligence of defendant and his or her agents. The second count is based on negligence per se and alleges that the defective heater that caused the death was maintained in violation of an ordinance, regulation, or statute [*see Evid. Code § 669*; *Ewing v. Balan (1959) 168 Cal. App. 2d 619, 621-622, 336 P.2d 561]* .

[4] Basis of Landlord's Liability

Civ. Code § 1714 provides that a person is liable for an injury occasioned to another by his or her want of ordinary care in the management of his or her property or person, except so far as the latter has willfully or by want of ordinary care brought the injury upon himself or herself. This rule has been applied by the Supreme Court to actions by a social guest against a tenant [*Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561]* and by a court of appeal to an action by a tenant against a landlord not in possession [*Brennan v. Cockrell Inv., Inc. (1973) 35 Cal. App. 3d 796, 800-802, 111 Cal. Rptr. 122* ; *see* *Mark v. Pacific Gas & Elec. Co. (1972) 7 Cal. 3d 170, 183, 101 Cal. Rptr. 908, 496 P.2d 1276* (dictum)]. The liability of landlords to their tenants is further discussed in Ch. 332, *Landlord and Tenant: The Tenancy* , and Ch. 334, *Landlord and Tenant: Claims for Damages* .

[5] Cross References

For discussion of wrongful death actions, including form allegations for the entitlement of specific persons to a wrongful death cause of action, see Ch. 181, *Death and Survival Actions*

For discussion and forms relating to appointment of a guardian ad litem generally, see Ch. 291, *Guardians ad Litem*

For forms for actions against landlords by tenants, see Ch. 332, *Landlord and Tenant: The Tenancy* , and Ch. 334, *Landlord and Tenant: Claims for Damages*

For related forms, see *§§ 277.130, 277.132*

[6] State Statutes

Liability for negligence. *Civ. Code § 1714(a)*

Negligence presumed from violation of statute. *Evid. Code § 669*

[7] Decisions

Landlord's liability for injuries to tenants. *Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561* (action involving tenant's guest against tenant); *Brennan v. Cockrell Inv., Inc. (1973) 35 Cal. App. 3d 796, 800, 111 Cal. Rptr. 122*

Application of res ipsa loquitur to death by asphyxiation where the heater was maintained by the defendant landlord. *Black v. Partridge (1953) 115 Cal. App. 2d 639, 645-647, 252 P.2d 760*

Violation of statute requiring that gas appliances be kept in good repair as requiring presumption of negligence on the part of the landlord. *Ewing v. Balan (1959) 168 Cal. App. 2d 619, 621-622, 336 P.2d 561*

Installation of gas device that violated a state law as negligence per se which requires a presumption that the installer was negligent. *Smith v. Kile (1956) 147 Cal. App. 2d 314, 316-318, 304 P.2d 1034*

Landlord as not responsible for condition of gas heater brought on premises by tenants. *Schwartz v. McGraw-Edison Co. (1971) 14 Cal. App. 3d 767, 782-783, 92 Cal. Rptr. 776 , disapproved on other grounds, Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 136 Cal. Rptr. 574, 560 P.2d 3*

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23-277 California Forms of Pleading and Practice--Annotated § 277.135

§ 277.135 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Possessor of Land--Injury by Gas Explosion

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Possessor of Land--Injury by Gas Explosion

[*Caption. See § 277.130.*]

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a domestic corporation with its principal place of business at _____ [*address*], _____ [*city*], California [*or allege other capacity and residence*].

[2. *Fictitious name allegation, if appropriate. See § 277.130, Paragraph 2.*]

3. Defendant owns and possesses the following premises: _____ [*describe, e.g.,* a restaurant at _____ (*address*), _____ (*city*), California].

4. On _____ [*date*], plaintiff was lawfully present in the above-described premises _____ [*describe basis for plaintiff's presence on the premises, e.g.,* sitting at the counter eating a meal that was ordered from defendant's employee].

5. While plaintiff was present in the defendant's premises, _____ [*describe event that caused plaintiff's injury, e.g.,* an explosion occurred in defendant _____'s (*name*) gas oven, which explosion knocked plaintiff from the counter onto the floor and caused debris to strike plaintiff].

6. The above-described explosion was caused by the negligence of defendant in that _____ [*describe*

defendant's negligence, e.g., defendant's agents and employees negligently maintained and failed to inspect the oven and defendant's agents and employees knew or should have known that the oven was leaking gas and failed to have the condition corrected].

[*Prayer. See § 277.130.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 277.130.*]

[2] Use of Form

This form of complaint is for use to recover for injuries suffered on defendant's premises.

[3] Basis of Premises Liability

The basis of the liability of the possessor of real property is *Civ. Code § 1714*, which provides that a person is liable for an injury occasioned to another by his or her want of ordinary care in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself [*Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561]* . However, the status of the plaintiff as an invitee, licensee, or trespasser while not determinative as to duties of care, may in light of the facts giving rise to such status have some bearing on the question of liability [*Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561]* .

Premises liability is discussed more extensively in Ch. 421, *Premises Liability*.

[4] Cross References

For a related form, see *§ 277.130*

[5] State Statutes

Liability for negligence. *Civ. Code § 1714*

[6] Decisions

Basis for liability of possessor of land. *Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561*

Duty of landowner to warn person working on land with excavating equipment of buried pipeline. *Smith v. Kern County Land Co. (1959) 51 Cal. 2d 205, 206-207, 331 P.2d 645*

Liability of owner of premises for injuries sustained by a customer from a gas explosion when owner had prior knowledge of gas leak. *Ingledue v. Davidson (1929) 102 Cal. App. 697, 701-702, 283 P. 837*

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23-277 California Forms of Pleading and Practice--Annotated § 277.136

§ 277.136 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Strict Liability and Negligence [Civ. Code § 1714]--By Purchaser Against Manufacturer, Wholesaler, and Retailer

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Strict Liability and Negligence [Civ. Code § 1714]--By Purchaser Against Manufacturer, Wholesaler, and Retailer
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*],	)	NO. _____
Plaintiff, vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	(Strict Liability and Negligence)
Defendants.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST COUNT
(Strict Liability)

1. Defendant _____ [*name of manufacturer*], hereinafter referred to as manufacturer, is and at all times herein mentioned was, a domestic corporation with its principal place of business at _____ [*address*], _____ [*city*], California [*or allege other capacity and residence*].

2. At all times herein mentioned, defendant manufacturer was engaged in manufacturing and distributing for

consideration certain _____ [*describe product if possible using trade name, e.g.,* gas furnaces under the trade name of _____ (*specify*)] for resale to and use by members of the general public in _____ [*describe product's use, e.g.,* heating their homes].

3. Defendant _____ [*name of wholesaler*], hereinafter referred to as wholesaler, is and at all times herein mentioned was, a domestic corporation with its principal place of business at _____ [*address*], _____ [*city*], California [*or allege other capacity and residence*].

4. At all times herein mentioned, defendant wholesaler was engaged in the business of distributing, supplying, and selling certain _____ [*describe product using trade name if possible, e.g.,* gas furnaces under the trade name of _____ (*specify*)] or defendant manufacturer to retail stores including the store of _____ [*name of retailer*], for resale to and use by members of the general public in _____ [*describe products use, e.g.,* heating their homes].

5. Defendants _____ [*name*] and _____ [*name*], hereinafter referred to as retailers, owned and operated a retail store known as _____ [*name*], located at _____ [*address*], _____ [*city*], California, and were engaged in the business of selling and installing _____ [*describe product line, e.g.,* furnace products], including manufacturer's _____ [*describe product using trade name if possible, e.g.,* gas furnaces under the trade name of _____ (*specify*)] to members of the general public for _____ [*describe product's use, e.g.,* heating their homes].

[6. *Fictitious name allegation, if appropriate. See § 277.130, Paragraph 2.*]

7. On or about _____ [*date*], at the retail store of defendant retailer, plaintiff purchased _____ [*name of product, e.g.,* a gas furnace] of defendant manufacturer which _____ [*name of product*] had been sold to defendant retailer by defendant wholesaler. On or about _____ [*date*], defendant retailer's employees delivered the _____ [*name of product, e.g.,* gas furnace] to plaintiff's house and installed it therein.

8. Defendants, and each of them, knew that the _____ [*name of product, e.g.,* gas furnace] as purchased by plaintiff would be purchased from defendant retailer, installed, and used by members of the general public, such as plaintiff, without inspection for defects by such members of the general public.

9. At the time of plaintiff's purchase of defendant manufacturer's _____ [*name of product, e.g.* gas furnace], it was defective, dangerous, and unsafe for its intended purpose in that _____ [*specify*].

10. As a result of the above-described defect, on _____ [*date*], the above-described _____ [*name of product, e.g.,* gas furnace] exploded and started a fire, which caused plaintiff the injuries and damages hereinafter described.

11. As a proximate result of the defective product described above, plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her body and shock and injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has suffered general damages.

[*EITHER*]

12. As a further proximate result of the defective product described above, plaintiff has been required to expend money and incur obligations, and will continue to expend money and incur obligations, for medical services, X-rays, drugs, and sundries reasonably required in the treatment and relief of the injuries herein alleged, plaintiff has been damaged thereby.

[*OR*]

12. As a further proximate result of the defective product described above, plaintiff has incurred, and will continue to incur, medical and related expenses.

[*EITHER*]

13. As a further proximate result of the defective product described above, plaintiff was prevented from attending to his/her usual occupation as a _____ [*state occupation*] for a period _____ [of _____ (*specify*) *or* to the date of the filing of this complaint] and thereby lost earnings [to his/her damage].

[*OR*]

13. As a further proximate result of the defective product described above, plaintiff's earning capacity has been greatly impaired, both in the past and at present.

14. As a further proximate result of the defective product described above, plaintiff's _____ [*describe real and personal property*] was _____ [*describe damage, e.g.*, destroyed beyond repair, all to plaintiff's damage in the sum of $ _____ *or* damaged]. [*If property was not destroyed, add* : Plaintiff has expended $ _____ for repair of such _____ (*describe real and personal property*), which is a reasonable sum for such repair.]

SECOND COUNT

(Negligence)

1. Plaintiff refers to and herein incorporated Paragraphs 1-7 of the First Count.

2. On and before _____ [*date*], defendants, and each of them, so negligently manufactured, sold, assembled, delivered, installed, serviced, inspected, and put into operation the above-described _____ [*name of product, e.g.*, furnace] as to proximately cause gas to leak from the _____ [*name of product, e.g.*, gas furnace] and as to proximately cause an explosion of the gas and fire, which caused the plaintiff the injuries and damages hereinabove described.

[3-6. *Damages allegations. See § 277.130, Paragraphs 5-7.*]

[*Prayer. See § 277.130.*]

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 277.130.*]

[2] Use of Form

This form of complaint is for use in an action for damages based on strict liability in tort and negligence against a manufacturer, wholesaler, and retailer of gas appliances.

[3] Allegations

This complaint sets forth two counts as a basis of recovery. The first count is based on strict liability in tort and alleges that the injury was caused by a defect in the product. The second count is based on negligence and alleges that the negligence of the defendants in manufacturing, selling, servicing, and installing the product caused the damages. One reason to include a cause of action based on negligence is that the proof might show that negligent installation, rather than a defect in the product, caused the damage.

[4] Cross References

For forms for use in products liability actions generally, see Ch. 460, *Products Liability*

For a related form, see *§ 277.130*

[5] Decisions

Standards for application of strict liability in tort. *Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 127-135, 104 Cal. Rptr. 433, 501 P.2d 1153* (defect in truck); *Luque v. McLean (1972) 8 Cal. 3d 136, 141-149, 104 Cal. Rptr. 443, 501 P.2d 1163* (defect in power mower)

Liability of general contractor for installation of defective heater which caused deaths by asphyxiation. *Dow v. Holly Mfg. Co. (1958) 49 Cal. 2d 720, 722-724, 321 P.2d 736*

Liability for negligent installation of gas oven which exploded and caused injury. *Tietke v. Forrest (1923) 64 Cal. App. 364, 365-366, 221 P. 681*

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[Reserved]

§§ 277.137[Reserved]

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B. Electricity

23-277 California Forms of Pleading and Practice--Annotated § 277.150

§ 277.150 Complaint for Damages [Civ. Code § 3333] for Personal Injuries and Property Damage Based on Negligence [Civ. Code § 1714(a)]--By Homeowner Against Electric Company--Homeowner Injured in Fire Caused by Down Wires

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries and Property Damage Based on Negligence [Civ. Code § 1714(a)]--By Homeowner Against Electric Company--Homeowner Injured in Fire Caused by Down Wires

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Negligence)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name of electric company*] is, and at all times herein mentioned was, a domestic corporation with its principal place of business at _____ [*address*], _____ [*city*], California, engaged in the business to supplying and distributing electricity to residents and consumers in the City of _____, County of _____, California.

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege

their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of said fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by said negligence.)]

3. At all times herein mentioned, defendant supplied electricity to the residence of plaintiff at _____ [*address*], _____ [*city*], California, through wires which run down _____ Street and then to plaintiff's residence. Defendant owns and maintains those wires, the poles on which they are strung, and the appliances on the poles.

4. Defendant so negligently installed and maintained the above-described wires, poles, and appliances that _____ [*describe events which led to plaintiff's injuries*, *e.g.*, on _____ (*date*), the wires fell from the pole, short-circuited, and set plaintiff's residence on fire].

5. As a proximate result of the negligence of defendant[s, and each of them], plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her body and shock and injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has suffered general damages.

[*EITHER*]

6. As a [further] proximate result of defendant's negligence herein alleged, plaintiff has been required to expend money and incur obligations, and will continue to expend money and incur obligations, for medical services, X-rays, drugs, and sundries reasonably required in the treatment and relief of the injuries herein alleged, plaintiff has been damaged thereby.

[*OR*]

6. As a further proximate result of the negligence of defendant[s, and each of them], plaintiff has incurred, and will continue to incur, medical and related expenses.

[*EITHER*]

7, As a further proximate result of the negligence of defendant[s, and each of them], plaintiff was prevented from attending to his/her usual occupation as a _____ [*state occupation*] for a period _____ [of _____ (*specify*) *or* to the date of the filing of this complaint] and thereby lost earnings.

[*OR*]

7. As a further proximate result of the negligence of defendant[s, and each of them], plaintiff's earning capacity has been greatly impaired, both in the past and at present.

8. As a proximate result of the negligence of defendant[s, and each of them], plaintiff's _____ [*describe real and personal property*] was _____ [*describe damage*, *e.g.*, destroyed beyond repair, all to plaintiff's damage in the sum of $ _____ *or* damaged]. [*If property was not destroyed*, *add* :

Plaintiff has expended $ _____ for repair of such _____ (*describe real and personal property*), which is a reasonable sum for such repair.]

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION [*Code Civ. Proc. §§ 446, 2015.5*]

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form of complaint is for use in an action by a homeowner against an electric company where the electric company's wires fell and caused a fire in his or her house, which caused personal injuries and property damage.

[3] Venue

In an action for personal injuries and property damage from a wrongful act or negligence, either the county where the injury occurs or the county where the defendants, or some of them, reside at the commencement of the action is a proper county for the trial of the action [*Code Civ. Proc. § 395*]. If venue is based on the situs of the wrongful act or negligence, then Paragraph 1 alleging the residence of the defendants is not needed.

[4] Specifying Amount of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[6] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For forms for use in negligence actions generally, see Ch. 380, *Negligence*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification*

[7] Decisions

Standard of care for those maintaining electrical wires. *Dunn v. Pacific Gas & Elec. Co. (1954) 43 Cal. 2d 265, 273, 272 P.2d 745*

Duty to inspect wires and appliances. *Polk v. City of Los Angeles (1945) 26 Cal. 2d 519, 525-528, 159 P.2d 931*

Application of res ipsa loquitur to fire started by short circuit from high powered electric lines. *Phillips v. Southern Cal. Edison Co. Ltd. (1937) 23 Cal. App. 2d 222, 224-225, 72 P.2d 769*

Application of res ipsa loquitur to injury caused by fall of power wires. *Vertson v. City of Los Angeles (1931) 116 Cal. App. 114, 122-124, 2 P.2d 411*

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23-277 California Forms of Pleading and Practice--Annotated § 277.151

§ 277.151 Complaint for Damages for Wrongful Death of Worker [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a)]--By Entitled Person(s) Against Electric Company--Death Caused by Electrocution

[1] FORM Complaint for Damages for Wrongful Death of Worker [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a)]--By Entitled Person(s) Against Electric Company--Death Caused by Electrocution

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Wrongful Death)
	)	[Amount demanded _____
[and Does I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff(s) allege(s):

FIRST COUNT
(Negligence)

1. _____ [Plaintiff(s) *or* The person(s) listed below] is/are entitled to bring an action for the wrongful death of _____ [*name of decedent*] (hereinafter "decedent") pursuant to *Code of Civil Procedure*

Section 377.60, based on his/her/their relationship to decedent, as follows:

Name(s)	Relationship(s) to Decedent
_____	_____
_____	_____
_____	_____

[_____ (*If one or more persons are required to establish additional facts, such as that there is no surviving spouse, domestic partner, child, or issue of deceased child, or that the person was dependent on decedent, in order to be entitled to bring a wrongful death action under Code Civ. Proc. § 377.60, specify facts that satisfy applicable requirement*).]

[*ADD, if decedent's personal representative is maintaining action on behalf of one or more entitled persons*]

Plaintiff _____ [*name*] is the duly appointed, qualified, and acting personal representative of the estate of decedent, and brings this action on behalf of _____ [all of the above-listed persons entitled to bring a cause of action for the wrongful death of decedent *or* the following person(s) entitled to bring an action for the wrongful death of decedent: _____ (*specify person(s) on whose behalf personal representative is maintaining action*)].

[*CONTINUE*]

[2. *Capacity of defendant. See § 277.150, Paragraph 1.*]

[3. *Fictitious name allegation, if appropriate. See § 277.150, Paragraph 2.*]

4. At all times herein mentioned, decedent was employed by _____ [*name*] and _____ [*describe what decedent was doing when he/she was killed, e.g.,* was engaged in the construction of a building at _____ (*address*), _____ (*city*), California].

5. On _____ [*date*], defendant _____ [*describe negligent acts, e.g.,* owned, maintained, and operated insulated high voltage electric power lines carrying in excess of _____ volts in the vicinity of the above-described building under construction. The power lines were negligently placed in that defendant knew or should have known that they were placed where they were hazardous to the safety of persons working on the above-described building who might reasonably be expected to be in the vicinity of the wires].

6. On _____ [*date*], as a proximate result of the negligence of defendant, _____ [*describe how decedent was injured, e.g.,* the crane on which decedent was sitting came in contact with defendant's wires and decedent received a severe electric shock, causing his death].

7. _____ [*Describe relationship between decedent and entitled person(s), e.g.,* Prior to decedent's

death, _____ (plaintiff(s) *or* the person(s) specified in Paragraph 1) lived with decedent and was/were totally dependent on him/her for his/her/their support and maintenance, and decedent was a faithful and dutiful _____ (*specify, e.g.,* husband and father *or* wife and mother) to _____ (plaintiff(s) *or* the person(s) specified in Paragraph 1)].

8. As a proximate result of the negligence of defendant and the resulting death of decedent, _____ [plaintiff(s) *or* the person(s) specified in Paragraph 1] has/have sustained pecuniary loss resulting from the loss of the society, comfort, attention, services, and support of decedent.

9. As a further proximate result of the negligence of defendant and the death of decedent, plaintiff _____ [*name of person incurring expense*] has incurred funeral and burial expenses.

SECOND COUNT
(Negligence Per Se)

10. Plaintiff(s) refer(s) to and incorporate(s) herein Paragraphs 1 through 4 and Paragraphs 6 through 9 of the First Count.

11. On _____ [*date*], the position and condition of the defendant's wires in the vicinity of _____ [*address*], _____ [*city*], California, were in violation of the following ordinances, regulations, and statutes: _____ [*specify, including text*].

WHEREFORE, plaintiff(s) pray(s) for damages [against defendants, and each of them] as follows:

1. For general damages according to proof;

2. For funeral and burial expenses according to proof;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff(s) _____ [*name(s)*]

[*Verification, if desired. See § 277.150.*]

[2] Use of Form

This form of complaint is for use in an action for the wrongful death of a worker who died from electrocution caused by a downed electric wire. An action for wrongful death may be brought by persons entitled by statute to bring a wrongful death cause of action, or by the personal representative of the decedent's estate on behalf of those entitled persons [*Code Civ. Proc. § 377.60*]. *Code Civ. Proc. § 377.60* permits decedent's surviving spouse, domestic partner, children, and

issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to take the decedent's property under intestate succession, to bring a wrongful death action without qualification, and permits others to bring action under specified circumstances. For forms of allegations establishing that specific classes of persons are entitled to bring a wrongful death action, including allegations that are required of plaintiffs who are not the decedent's surviving spouse, domestic partner, children, or issue of deceased children, see Ch. 181, *Death and Survival Actions* . If a plaintiff is a minor, a guardian ad litem must be appointed for the purposes of the action, unless the minor already has a guardian [*see Code Civ. Proc. § 372*]. For discussion and forms relating to appointment of a guardian ad litem generally, see Ch. 291, *Guardians ad Litem* .

The damages recovered in a wrongful death action may not include any damages recoverable in a survival action [*Code Civ. Proc. § 377.61*]. Damages for medical expenses incurred before death, for example, are recoverable in a survival action [*see Code Civ. Proc. § 377.34* (survival action damages); *Follansbee v. Benzenberg (1954) 122 Cal. App. 2d 466, 473-474, 265 P.2d 183]* . A survival action may be joined with a wrongful death action if both actions arise out of the same wrongful act or neglect [*Code Civ. Proc. § 377.62(a)*]. For further discussion and additional forms, see Ch. 181, *Death and Survival Actions* .

[3] Allegations

This complaint contains a first count based on defendant's negligence in placement of the electric wires. The second count is based on defendant's violation of law that creates a presumption of negligence [*see Evid. Code § 669*].

[4] Cross References

For discussion of wrongful death actions, including alternative forms of allegations of standing to bring a wrongful death cause of action, see Ch. 181, *Death and Survival Actions*

For discussion and forms relating to appointment of a guardian ad litem generally, see Ch. 291, *Guardians ad Litem*

For a related form, see *§ 277.150*

[5] State Statutes

Survival of actions. *Code Civ. Proc. §§ 377.20 et seq., 377.30 et seq.*

Wrongful death actions. *Code Civ. Proc. § 377.60 et seq.*

[6] Decisions

Negligence presumed if condition that caused injury was violation of statute, public utility rule, or safety order such as those prescribing clearance of wires. *Stasulat v. Pacific Gas & Elec. Co. (1937) 8 Cal. 2d 631, 636, 67 P.2d 678*

Duty to locate high power wires where they will not cause unreasonable danger to workers on building being constructed. *McCormick v. Great W. Power Co. (1932) 214 Cal. 658, 662-665, 8 P.2d 145*

Negligence of employer presumed for erecting building too close to power lines without asking electric company to raise them. *Bickham v. Southern Cal. Edison Co. (1953) 120 Cal. App. 2d 815, 820-821, 263 P.2d 32*

Plaintiff negligent because he knew of existence of dangerous wires and contacted them with steel rod while he was

working on building. *Benard v. Vorlander (1948) 87 Cal. App. 2d 436, 448-449, 197 P.2d 42*

Proximate cause as not established because defendant's wire was only touched by plaintiff swinging long pole out from building being constructed. *Sweatman v. Los Angeles Gas & Elec. Corp. (1929) 101 Cal. App. 318, 326-327, 281 P. 677*

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23-277 California Forms of Pleading and Practice--Annotated § 277.152

§ 277.152 Complaint for Damages for Wrongful Death [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a)]--By Parents of Child Against Electric Company--Death Caused by Touching Down Wire

[1] FORM Complaint for Damages for Wrongful Death [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a)]--By Parents of Child Against Electric Company--Death Caused by Touching Down Wire

[*Caption. See § 277.151.*]

Plaintiffs allege:

1. Plaintiffs _____ [*names*] are the parents of _____ [*name*], deceased, hereinafter referred to as "decedent," who is not survived by a spouse or children or issue of a deceased child. Plaintiffs are entitled to decedent's property under the laws of intestate succession, as set forth in *Probate Code Section 6402(b)*.

[2. *Capacity of defendant. See § 277.150, Paragraph 1.*]

[3. *Fictitious name allegation, if appropriate. See § 277.150, Paragraph 2.*]

4. On and before _____ [*date*], defendant so negligently installed and maintained its power lines, poles, and appliances on _____ [*street*] that, as a proximate result of defendant's negligence, the wires broke and fell to the ground, where decedent came in contact with them while they were live, received a severe electrical shock, and died as a result thereof.

5. As a proximate result of the negligence of defendant and the death of decedent, plaintiffs have sustained pecuniary loss resulting from the loss of the society, comfort, attention, and services of the decedent.

6. As a further proximate result of the negligence of defendant and the death of decedent, plaintiffs have incurred funeral and burial expenses.

[*Prayer. See § 277.151.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiffs _____ [*names*]

[*Verification, if desired. See § 277.150.*]

[2] Use of Form

This form of complaint is for use in a wrongful death action against an electric company by the parents of a child who was killed by contact with a down live wire. An action for wrongful death of a decedent may be brought by persons entitled by statute to bring a wrongful death cause of action, or by the personal representative of the decedent's estate on behalf of those entitled persons [*Code Civ. Proc. § 377.60*]. *Code Civ. Proc. § 377.60(a)* permits a decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to take the decedent's property under intestate succession, to bring action without qualification. Parents of the decedent may not bring a wrongful death action unless they would be entitled to succeed to the decedent's property under the laws of intestate succession, that is, if there is no surviving spouse, domestic partner, child, or issue of a deceased child [*see Code Civ. Proc. § 377.60(a)*; *Prob. Code § 6402(b)*].

The damages recovered in a wrongful death action may not include any damages recoverable in a survival action [*Code Civ. Proc. § 377.61*]. Damages for medical expenses incurred before death, for example, are recoverable in a survival action [*see Code Civ. Proc. § 377.34* (survival action damages); *Follansbee v. Benzenberg (1954) 122 Cal. App. 2d 466, 473-474, 265 P.2d 183]* . A survival action may be joined with a wrongful death action if both actions arise out of the same wrongful act or neglect [*Code Civ. Proc. § 377.62(a)*]. For further discussion and additional forms, see Ch. 181, *Death and Survival Actions* .

[3] Decisions

Duty to inspect wires and appliances. *Polk v. City of Los Angeles (1945) 26 Cal. 2d 519, 525-528, 159 P.2d 931*

Liability of electric company for injuries to children from broken wire that was allowed to remain on ground for several hours. *Martin v. Pacific Gas & Elec. Co. (1928) 203 Cal. 291, 293-298, 264 P. 246*

Application of res ipsa loquitur to injury caused by fall of power wires. *Vertson v. City of Los Angeles (1931) 116 Cal. App. 114, 122-124, 2 P.2d 411*

[4] Cross References

For related forms, see *§§ 277.150, 277.151*

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23-277 California Forms of Pleading and Practice--Annotated § 277.153

§ 277.153 Complaint for Damages [Civ. Code § 3333] for Personal and Property Damage Based on Negligence [Civ. Code § 1714(a)]--By Automobile Driver Against Electric Company--Injury Caused by Hitting Negligently Installed Power Pole Which Broke

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal and Property Damage Based on Negligence [Civ. Code § 1714(a)]--By Automobile Driver Against Electric Company--Injury Caused by Hitting Negligently Installed Power Pole Which Broke

[*Caption. See § 277.150.*]

Plaintiff alleges:

[1. *Capacity of defendant. See § 277.150, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 277.150, Paragraph 2.*]

3. On _____ [*date*], at _____ [*time*], plaintiff was operating his/her automobile in a safe and careful manner on _____ [*street*], _____ [*city*], California, near its intersection with _____ [*street*]. [*Describe circumstances of accident, e.g.,* At this point _____ [*street*] narrows from 4 to 2 lanes. Plaintiff was driving in the outside lane and due to poor visibility was unable to see that the street narrowed until it was too late to avoid hitting the power pole that was placed in the middle of the area where the street narrowed. The proximate cause of the accident was the negligent placement of the pole by defendant where it was a danger to motorists and the fact that defendant negligently failed to illuminate the pole so that it was visible at night. When plaintiff's automobile hit the pole, it was in such a condition due to negligent installation and maintenance by defendant that it fell over and caused live electric wires to fall on plaintiff's automobile, which caused plaintiff further injuries.]

[4-7. *Damages allegations. See § 277.150, Paragraphs 5-8.*]

[*Prayer. See § 277.150.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiffs _____ [*names*]

[*Verification, if desired. See § 277.150.*]

[2] Use of Form

This form of complaint is for use in an action by an automobile driver for injuries suffered when he or she ran into a negligently placed electric pole, which broke and caused wires to fall on plaintiff's car.

[3] Cross References

For forms for use in actions involving automobiles generally, see Ch. 80, *Automobiles : Overview* through Ch. 92, *Automobiles: Drivers' Licenses*

For a related form, see *§ 277.150*

[4] Decisions

Liability of electric company for placing power pole where it is hazard to traffic. *George v. City of Los Angeles (1938) 11 Cal. 2d 303, 311-313, 79 P.2d 723* ; *Norton v. City of Pomona (1935) 5 Cal. 2d 54, 61, 53 P.2d 952*

Continuing duty of electric company to inspect pole to prevent it from becoming traffic hazard, but no liability if county places stop sign where it is partially obscured by power pole. *Schauf v. Southern Cal. Edison Co. (1966) 243 Cal. App. 2d 450, 459-461, 52 Cal. Rptr. 518*

Application of res ipsa loquitur to automobile accident caused by falling electric wire. *Taylor v. Pacific Gas & Elec. Co. (1943) 57 Cal. App. 2d 11, 14-16, 134 P.2d 12*

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23-277 California Forms of Pleading and Practice--Annotated § 277.154

§ 277.154 Complaint for Damages [Civ. Code § 3333] for Property Damage--Based on Negligence [Civ. Code § 1714]--By Tenant Against Landlord

[1] FORM Complaint for Damages [Civ. Code § 3333] for Property Damage--Based on Negligence [Civ. Code § 1714]--By Tenant Against Landlord

[*Caption. See § 277.150.*]

Plaintiff alleges:

FIRST COUNT
(Negligence)

1. At all times herein mentioned, defendant owned, operated, maintained, serviced, equipped the premises at _____ [*address*], _____ [*city*], California, wherein he/she offered apartments for rent. Plaintiff rented and occupied Apartment No. _____.

[2. *Fictitious name allegation, if appropriate. See § 277.150, Paragraph 2.*]

3. _____ [*Describe negligence of landlord that caused damage, e.g.,* On or before _____ (*date*), defendant and his/her employees, servants, and agents acting in the scope of their agency, negligently installed, maintained, serviced, and operated the electrical system and wires of the above-described apartment so that it was unsafe and equipped with faulty, improper, unapproved, and illegal wiring and fixtures. Prior to _____ (*date*), plaintiff had complained to defendant and his/her agents of the condition of the electrical system on the above-described premises. Therefore, defendant knew of the defective condition of the electrical system.]

4. _____ [*Describe how plaintiff's damage occurred, e.g.,* On _____ (*date*), as a proximate result of the negligence of defendant, a fire started in the electrical system in the above-described apartment and destroyed it.]

[5. *Damages allegations. See § 277.150, Paragraph 8.*]

SECOND COUNT
(Negligence Per Se)

1. Plaintiff refers to and herein incorporates Paragraphs 1-5 of the First Count.

2. On _____ [*date*], the condition of the electrical system on the above-described electrical system and wires were in violation of the following ordinances, regulations, and statutes: _____ [*specify, including text*].

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages according to proof;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court deems proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 277.150.*]

[2] Use of Form

This form of complaint is for use in an action to recover for a tenant's damages to personal property from a fire caused by the landlord's negligent installation and maintenance of the electrical system.

[3] Allegations

This complaint contains a first count based on negligence in installing and maintaining the electrical system. The second count is based on the presumption of negligence arising from the landlord's violation of law [*Evid. Code § 669*].

[4] Cross References

For forms for use in actions against landlords in general, see Ch. 334, *Landlord and Tenant: Claims for Damages*

For a related form, see *§ 277.150*

[5] Decisions

Liability of landlord for injuries caused by leaving live wires that protruded into premises. *Couch v. Pacific Gas & Elec. Co. (1947) 80 Cal. App. 2d 857, 864-865, 183 P.2d 91*

Negligence presumed if condition that caused injury was violation of statute, public utility rule, or safety order. *Stasulat v. Pacific Gas & Elec. Co. (1937) 8 Cal. 2d 631, 636, 67 P.2d 678*

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§ 277.155 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714]--Against Possessor of Land--Workman Injured by Contact With Live Wire

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714]--Against Possessor of Land--Workman Injured by Contact With Live Wire

[*Caption. See § 277.150.*]

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a domestic corporation with its principal place of business at _____ [*address*], _____ [*city*], California [*or allege other capacity and residence*].

[2. *Fictitious name allegation, if appropriate. See § 277.150, Paragraph 2.*]

3. Defendant owns and possesses the following premises: _____ [*describe, e.g.*, a manufacturing plant at _____ (*address*), _____ (*city*), California].

4. On _____ [*date*], plaintiff was lawfully present in the above-described premises _____ [*describe basis for plaintiff's presence on the premises, e.g.*, installing equipment purchased by defendant from plaintiff's employer _____ (*name*)].

5. While plaintiff was present in the defendant's premises, _____ [*describe event that caused plaintiff's injury, e.g.*, plaintiff, in the course of his/her work, grasped a metal bar, which was charged with electricity. Plaintiff received a severe shock which injured plaintiff and caused him/her to fall to the floor, which fall caused him/her further injury.

6. The above-described occurrence was proximately caused by the negligence of defendant in that _____ [*describe defendant's negligence, e.g.*, defendant's agents and employees negligently allowed the bar to be charged with electricity, failed to warn plaintiff that the bar was charged with electricity, failed to insulate the bar or post signs stating that it was charged, and directed plaintiff to work in close proximity to the charged bar.

[7-10. *Damages allegations. See § 277.150, Paragraphs 5-8.*]

[*Prayer. See § 277.150.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiffs _____ [*names*]

[*Verification, if desired. See § 277.150.*]

[2] Use of Form

This form of complaint is for use in an action by a workman injured while installing equipment on defendant's premises.

[3] Cross References

For forms for use in actions against possessors of land in general, see Ch. 421, *Premises Liability*

For a related form, see *§ 277.150*

[4] Decisions

Duty of possessor of property to warn trespasser of concealed condition containing unreasonable risk of harm. *Mark v. Pacific Gas & Elec. Co. (1972) 7 Cal. 3d 170, 177, 101 Cal. Rptr. 908, 496 P.2d 1276*

Liability of owner of premises to employees of independent contractor working on premises with crane for not deenergizing overhead line and for not providing adequate light. *Austin v. Riverside Portland Cement Co. (1955) 44 Cal. 2d 225, 231-233, 282 P.2d 69*

Liability of possessor of land for not warning invitee of hidden danger from charged conductor bar. *Young v. Bates Valve Bag Corp. (1942) 52 Cal. App. 2d 86, 88-89, 125 P.2d 840*

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23-277 California Forms of Pleading and Practice--Annotated § 277.156

§ 277.156 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Strict Liability--By Purchaser Against Manufacturer, Wholesaler, and Retailer

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Strict Liability--By Purchaser Against Manufacturer, Wholesaler, and Retailer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	(Strict Liability)
Defendants.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name of manufacturer*], hereinafter referred to as manufacturer, is and at all times herein mentioned was, a domestic corporation with its principal place of business at _____ [*address*], _____ [*city*], California [*or allege other capacity and residence*].

2. At all times herein mentioned, manufacturer was engaged in manufacturing and distributing for consideration certain _____ [*describe product if possible using trade name, e.g.*, microwave ovens under the trade name of _____ (*specify*)] for resale to and use by members of the general public in _____ [*describe product's use, e.g.*, cooking food].

3. Defendant _____ [*name of wholesaler*], hereinafter referred to as wholesaler, is and at all times herein mentioned was, a domestic corporation with its principal place of business at _____ [*address*], _____ [*city*], California [*or allege other capacity and residence.*]

4. At all times here mentioned, wholesaler was engaged in the business of distributing, supplying, and selling certain _____ [*describe product using trade name if possible, e.g.*, microwave ovens under the trade name of _____ (*specify*)] of manufacturer to retail stores including the store of _____ [*name of retailer*], for resale to and use by members of the general public in _____ [*describe product's use, e.g.*, cooking food].

5. Defendant _____ [*name of retailer*], hereinafter referred to as retailer, is and at all times herein mentioned was, a domestic corporation with its principal place of business at _____ [*address*], _____ [*city*], California [*or allege other capacity and residence*].

6. At all times herein mentioned, retailer owned and operated a retail store known as _____ [*name*], located at _____ [*address*], _____ [*city*], California, and was engaged in the business of selling _____ [*describe product line, e.g.*, electrical appliances], including manufacturer's _____ [*describe product using trade name if possible, e.g.*, microwave ovens under the trade name of _____ (*specify*)] to members of the general public for _____ [*describe product's use, e.g.*, cooking food].

[7. *Fictitious name allegation, if appropriate. See § 277.150, Paragraph 2.*]

8. On or about _____ [*date*], at retailer's store, plaintiff purchased _____ [*name of product, e.g.*, a microwave oven] of manufacturer that had been sold to retailer by wholesaler.

9. Defendants, and each of them, knew that the _____ [*name of product, e.g.*, microwave oven] as purchased by plaintiff would be purchased from retailer and used by members of the general public, such as plaintiff, without inspection for defects by such members of the general public.

10. At the time of plaintiff's purchase of manufacturer's _____ [*name of product, e.g.*, microwave oven] it was defective, dangerous, and unsafe for its intended purpose in that _____ [*specify*].

11. As a result of the above-described defect, on _____ [*date*], plaintiff received a severe electric shock from the _____ [*name of product, e.g.*, microwave oven] which caused the plaintiff the injuries and damages hereinafter described.

12. As a proximate result of the defective product described above, plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her body and shock and injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has suffered general damages.

[*EITHER*]

13. As a [further] proximate result of the defective product described above, plaintiff has been required to expend money and incur obligations, and will continue to expend money and incur obligations, for medical services, X-rays, drugs, and sundries reasonably required in the treatment and relief of the injuries herein alleged, plaintiff has been damaged thereby.

[*OR*]

13. As a further proximate result of the defective product de scribed above, plaintiff has incurred, and will continue to incur, medical and related expenses. [The full amount of such expenses is not known to plaintiff at this time, and plaintiff will move to amend this complaint to state such amount when the same becomes known to him/her, or on proof thereof.]

[*EITHER*]

14. As a further proximate result of the defective product described above, plaintiff was prevented from attending to his/her usual occupation as a _____ [*state occupation*] for a period _____ [of _____ (*specify*) *or* to the date of the filing of this complaint] and thereby lost earnings.

[*OR*]

14. As a further proximate result of the defective product described above, plaintiff's earning capacity has been greatly impaired, both in the past and present.

[*Prayer. See § 277.150.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 277.150.*]

[2] Use of Form

This form of complaint is for use in an action for damages based on strict liability in tort and negligence against a manufacturer, wholesaler, and retailer of electric appliances.

[3] Cross References

For forms for use in products liability actions generally, see Ch. 460, *Products Liability*

For a related form, see *§ 277.150*

[4] Decisions

Standards for application of strict liability in tort. *Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 127-135, 104 Cal. Rptr. 433, 501 P.2d 1153* (defect in truck); *Luque v. McLean (1972) 8 Cal. 3d 136, 141-149, 104 Cal. Rptr. 443, 501 P.2d 1163* (defect in power mower)

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B. Electricity

23-277 California Forms of Pleading and Practice--Annotated § 277.157

§ 277.157 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Strict Liability--By Person Injured Because of Delivery of Electricity at Dangerously High Voltage Against Commercial Supplier of Electricity

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Strict Liability--By Person Injured Because of Delivery of Electricity at Dangerously High Voltage Against Commercial Supplier of Electricity

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Strict Liability)
[and DOES 1 through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Defendant _____ [*name of supplier of electricity*] is and at all times herein mentioned was _____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a corporation duly organized and existing under the laws of the State of California, with its principal place of business in _____ (*city*), _____ County, California].

2. Defendant _____ [*name of supplier of electricity*] is and at all times herein mentioned was engaged in the business of supplying electrical power to consumers.

[3. *Fictitious name allegation, if appropriate. See § 277.150, Paragraph 2.*]

4. The _____ [*describe place supplied with electricity by defendant, e.g.,* house at _____ (*address*), _____ (*city*)] is, and at all times herein mentioned was, supplied with electricity by defendant.

5. Plaintiff at all times herein mentioned expected to receive a marketable voltage of electricity from defendant.

6. On or about _____ [*date*], defendant's electrical transmission system delivered a dangerously high voltage to the electrical system of _____ [*describe place specified in Paragraph 4*]. [Plaintiff is informed and believes, and thereon alleges, that] [T]he delivery of the dangerously high voltage was caused by a defect in the defendant's _____ [*specify defective component if possible, e.g.,* transformer *or describe system generally if specificity is impossible, e.g.,* transmission system].

7. As a proximate result of the delivery of the dangerously high voltage described above, plaintiff _____ [*specify personal injuries suffered, e.g.,* suffered burns where he/she touched metal that would not ordinarily have been electrified]. As a result of these injuries, plaintiff has suffered general damages.

8. As a further proximate result of the delivery of the dangerously high voltage described above, _____ [*specify nature of any additional damages suffered*].

[*Prayer. See § 277.150.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[*Verification, if desired. See § 277.150.*]

[2] Use of Form

This form of complaint is for use in an action for damages based on strict liability in tort against a commercial supplier of electricity. Such an action is proper when delivery of electricity at dangerously high voltage causes personal injury and the electricity is actually in the stream of commerce and expected to be at a marketable voltage [*Pierce v. Pacific Gas & Elec. Co. (1985) 166 Cal. App. 3d 68, 83-84, 212 Cal. Rptr. 283]* .

[3] Cross References

For forms for use in products liability actions generally, see Ch. 460, *Products Liability*

For a related form, see *§ 277.150*

[4] Decisions

Although electricity may be considered "sold" on its passing through customer's meter, strict liability in tort appropriate if electricity left control of utility in other ways; electricity as effectively passing from utility's lines into customer's house when meter exploded because of high voltage surge. *Stein v. Southern Cal. Edison Co. (1992) 7 Cal. App. 4th 565, 571, 8 Cal. Rptr. 2d 907*

Commercial supplier of electricity subject to strict liability in tort for personal injuries caused by delivery of electricity at dangerously high voltage due to defective transformer, because electricity is in stream of commerce and expected to be at marketable voltage. *Pierce v. Pacific Gas & Elec. Co. (1985) 166 Cal. App. 3d 68, 83-84, 212 Cal. Rptr. 283*

Strict liability in torts not applicable if injury or damage caused by contact with power line; electricity transmitted in power line not in stream of commerce. *Pierce v. Pacific Gas & Elec. Co. (1985) 166 Cal. App. 3d 68, 84, 212 Cal. Rptr. 283* ; *United Pac. Ins. Co. v. Southern Cal. Edison Co. (1985) 163 Cal. App. 3d 700, 707-708, 209 Cal. Rptr. 819*

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Chapter 277 GAS AND ELECTRICITY
PART IV. FORMS
B. Electricity

23-277 California Forms of Pleading and Practice--Annotated § 277.158

§ 277.158 Complaint for Damages [Civ. Code § 3300] for Breach of Contract--By Owner Against Electrical Contractor--Negligent Installation and Breach of Warranty

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Contract--By Owner Against Electrical Contractor--Negligent Installation and Breach of Warranty

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Breach of Contract)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a domestic corporation with its principal place of business at _____ [*address*], _____ [*city*], California [*or allege other capacity and residence*].

[2. *Fictitious name allegation, if appropriate. See § 277.150, Paragraph 2.*]

3. On _____ [*date*], plaintiff and defendant entered into a contract whereby defendant agreed to install certain electric equipment and wiring in a building at _____ [*address*], _____ [*city*], California owned by plaintiff. A copy of the contract is attached hereto as Exhibit A and made a part hereof.

4. Defendant has at all times failed, refused, and neglected and continues to fail, refuse, and neglect to perform the terms of the contract described above in accordance with the terms thereof and the plans and specifications referred to therein, in that defendant negligently and carelessly _____ [*specify negligent labor performed or defective materials furnished, e.g.*, used undersized wire, installed defective switches and switch breakers, and failed to fully insulate the wires].

5. As a direct and proximate result of defendant's breach of contract described above, on _____ [*date*], a fire broke out on plaintiff's premises. The breach of contract and fire resulted in damage to plaintiff as follows: _____ [*specify, e.g.*, $ _____ to repair plaintiff's premises and $ _____ loss of profits resulting from the closing of plaintiff's business while the repairs were being made].

WHEREFORE plaintiff prays judgment as follows:

1. For general damages in the sum of $ _____;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 277.150.*]

[2] Use of Form

This form of complaint is for use in an action against an electrical contractor who breached a contract by installing defective wiring which caused a fire.

[3] Tortious Breach of Contract

The same act may be both a tort and a breach of contract. Even where there is a contractual relationship between the parties, a cause of action in tort may sometimes arise out of the negligent manner in which the contractual duty is performed or out of a failure to perform such duty [Zurich Ins. Co. v. Kings Indus., Inc. 1967) *255 Cal. App. 2d 919, 923, 63 Cal. Rptr. 585]* .

[4] Attorney's Fees

If the contract sued on provides for recovery of attorney's fees in an action to enforce the contract, the party determined by the court to be the prevailing party under the terms of *Civ. Code § 1717* is entitled to reasonable attorney's fees as fixed by the court. Such fees are an item of the costs of suit, and are not an element of damages, so that they should not be alleged in the complaint, but instead be included as an item of cost in the prayer [*see Civ. Code § 1717*].

In an action seeking relief in addition to that based on contract, if the court awards noncontract-based damages against the party prevailing on the contract, the amounts awarded under *Civ. Code § 1717* to that party are deducted from any damages awarded in favor of the party who did not prevail on the contract. If the amount awarded under *Civ. Code §*

1717 exceeds the amount of damages awarded the party not prevailing on the contract, judgment may be entered in favor of the party prevailing on the contract for the net amount [*Civ. Code § 1717(c)*].

For discussion of attorney's fees under *Civ. Code § 1717.5* in certain contract actions based on a book account as defined in *Code Civ. Proc. § 337a*, see Ch. 8, *Accounts Stated and Open Accounts* , and Ch. 174, *Costs and Attorney's Fees* .

[5] Cross References

For forms for actions involving building contracts in general, see Ch. 104, *Building Contracts*

For a related form, see *§ 277.150*

[6] Decisions

Liability of contractor for defective installation of electric equipment that caused fire. *Smith v. Shasta Elec. Co. (1961) 190 Cal. App. 2d 728, 730, 12 Cal. Rptr. 167*

Liability of company that serviced electric signs when fire started in sign the first time it was turned on after the servicing. *Alhambra Bowl, Inc. v. Ledbetter Sign Co. (1963) 211 Cal. App. 2d 777, 780-781, 27 Cal. Rptr. 680*

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23-277 California Forms of Pleading and Practice--Annotated §§ 277.159-277.169

[Reserved]

§§ 277.159[Reserved]

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PART IV. FORMS
C. Termination of Utility Service

23-277 California Forms of Pleading and Practice--Annotated § 277.170

§ 277.170 Complaint for Damages [Civ. Code § 3333] Based on Termination of Utility Service While Residential Unit Occupied--Against Owner, Manager, or Operator of Master Metered, Multiunit Housing by Residential Occupant [Pub. Util. Code §§ 777.1(f), 10009.1(f), 12822.1(f), 16481.1(f)]

[1] FORM Complaint for Damages [Civ. Code § 3333] Based on Termination of Utility Service While Residential Unit Occupied--Against Owner, Manager, or Operator of Master Metered, Multiunit Housing by Residential Occupant [Pub. Util. Code §§ 777.1(f), 10009.1(f), 12822.1(f), 16481.1(f)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	[Amount demanded _____
[and DOES 1 through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendants.	)	[LIMITED CIVIL CASE]
	)	
	)	

Plaintiff alleges:

[1. _____ [*Allege identity, capacity, and residence or plaintiff, e.g.,* Plaintiff _____ (*name*) is, and at all times herein mentioned was, a resident of _____ County, California.]

[2. _____ [*Allege identity, capacity, and residence of defendant(s), e.g.,* Defendant _____ (*name*) is, and at all times herein mentioned was, a resident of _____ County, California.]

[3. Defendants DOES 1 through _____, inclusive, are sued herein under fictitious names, their true names and capacities being unknown to plaintiff. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in the same manner for the occurrences herein alleged and that plaintiff's damages as herein alleged were proximately caused by such defendants.]

4. Defendant is, and at all times herein mentioned was, the _____ [owner *or* manager *or* operator, *or any appropriate combination thereof*] of a _____ [multiunit residential structure *or* mobilehome park *or* permanent residential structure in a labor camp], [known as _____ (*specify name of premises, if applicable, e.g.,* The Willows,] located at _____ [*street address*] in _____ [*city*], _____ County, California (hereinafter "the premises").

5. The utility service was furnished by _____ [*state name and nature of utility company, e.g.,* Western Gas & Electric Company (hereinafter "the utility company"), a gas corporation within the meaning of *Section 777.1 of the Public Utilities Code*], through a master meter located on the premises.

6. [Plaintiff is informed and believes and thereon alleges that] (D)efendant is, and at all times herein mentioned was, listed by the Utility Company as the customer of record for the premises.

7. Plaintiff became a residential occupant of the premises on _____ [*date*] and at all material times mentioned herein has been residing in _____ [*identify plaintiff's residential dwelling unit, e.g.,* apartment number 3]. Beginning with that date, plaintiff was provided residential _____ [*specify, e.g.,* gas] utility service.

8. On or about _____ [*date*], while plaintiff was occupying his/her residential unit and receiving the utility service herein described, defendant _____ [directed *or* permitted *or* failed to prevent *or any appropriate combination thereof*] the termination of the utility service by _____ [*specify act or omission, e.g.,* allowing the account with the utility company to become delinquent]. [The utility service was not restored until _____ (*date*)].

9. As a proximate result of the termination of utility service, plaintiff has suffered and is suffering general damages in the amount of $ _____.

10. As a further proximate result of the termination of utility service, plaintiff _____ [*specify any special detriment sustained and the amount of damages claimed*].

11. As a further proximate result of the defendant's _____ [acts *or* omissions], the plaintiff has incurred reasonable costs and expenses related to restoration of service in the amount of $ _____.

12. As a further proximate result of the defendant's _____ [acts *or* omissions], the plaintiff is entitled to reasonable attorney's fees incurred in the enforcement of _____ [*cite code section, e.g., Section 777.1(f)(3) of the Public Utilies Code*].

WHEREFORE, plaintiff prays judgment against defendant(s) as follows:

1. For general damages in the sum of $_____;

2. For _____ [*specify special damages, if any*] [according to proof *or* in the sum of $ _____];

3. For reasonable costs and expenses related to restoration of utility service in the sum of $ _____;

4. For reasonable attorney's fees incurred in the enforcement of _____ [*cite statute, e.g., Section 777.1(f)(2) of the Public Utilities Code*];

5. For costs of suit herein incurred; and

6. For such other and further relief as the court deems proper.

_____ [*signature*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This is a form of complaint for damages against an owner, manager, or operator of a master metered, multiunit residential structure, mobile home park, or permanent residential structure in a labor camp by a residential occupant, when the damages are a result of a termination of residential utility service to an occupied residential unit [*see Pub. Util. Code §§ 777.1(f), 10009.1(f), 12822.1(f), 16481.1(f)*].

The action may be brought by either a residential occupant or a representative of the residential occupants [*Pub. Util. Code §§ 777.1(f), 10009.1(f), 12822.1(f), 16481.1(f)*]. However, for the purposes of *Pub. Util. Code § 777.1, 10009.1, 12822.1,* or *16481.1*, "representative of the residential occupants" does not include a tenants' association [*Pub. Util. Code §§ 777.1(l), 10009.1(l), 12822.1(l), 16481.1(l)*]. If the action is brought by a representative of the residential occupants, the form should be modified to set forth appropriate allegations.

The form may also be modified for use in an action by a utility against an owner, manager, or operator of the premises for delinquent charges, reasonable costs related to restoration of the service, and reasonable attorneys fees related to enforcement, under *Pub. Util. Code § 777.1(g), 10009.1(g), 12822.1(g),* or *16481.1(g)*. For further discussion of this type of action, see *§ 277.55[5]*.

[3] Allegations

This complaint sets forth initial optional paragraphs that allege the identity, capacity, and residence of the plaintiff and defendant (Paragraphs 1, 2), and fictitiously named defendants (Paragraph 3). The complaint then alleges that:

- The defendant is either the owner, manager, or operator of a certain multiunit residential structure, mobilehome park, or permanent residential structure in a labor camp (as defined in *Health & Safety Code § 17008*) (Paragraph 4) [*see Pub. Util. Code §§ 777.1(a), (f), 10009.1(a), (f), 12822.1(a), (f), 16481.1(a), (f)*].

- The utility service was provided either by an electrical, gas, heat, or water corporation furnishing residential service, or by a municipal corporation, municipal utility district, or public utility district furnishing light, heat, water, or power service to residential occupants, and that the service was furnished through a master meter (Paragraph 5) [*see Pub. Util. Code §§ 777.1(a), 10009.1(a), 12822.1(a), 16481.1(a)*].

- The defendant is listed by the utility company as the customer of record (Paragraph 6) [*see Pub. Util. Code §§ 777.1(a), 10009.1(a), 12822.1(a), 16481.1(a)*].

- The defendant by an act or omission directed, permitted, or failed to prevent a termination of service while a residential unit receiving that service was occupied, and that the plaintiff is the residential occupant of the unit so affected (Paragraphs 7, 8) [*see Pub. Util. Code §§ 777.1(f), 10009.1(f), 12822.1(f), 16481.1(f)*].

- The plaintiff is entitled to actual damages related to the termination of service (Paragraphs 9, 10) [*see Pub. Util. Code §§ 777.1(f)(2), 10009.1(f)(2), 12822.1(f)(2), 16481.1(f)(2)*].

- The plaintiff has incurred reasonable costs and expenses related to restoration of service (Paragraph 11) [*see Pub. Util. Code §§ 777.1(f)(1), 10009.1(f)(1), 12822.1(f)(1), 16481.1(f)(1)*].

- The plaintiff is entitled to reasonable attorney's fees incurred in the enforcement of the applicable sections (Paragraph 12) [*see Pub. Util. Code §§ 777.1(f)(3), 10009.1(f)(3), 12822.1(f)(3), 16481.1(f)(3)*].

[4] Preemption of Punitive Damages or Tenant's Association Costs

Any statute or ordinance permitting punitive damages against any owner, manager, or operator on account of an involuntary termination of residential public utility service, or permitting recovery of costs associated with the formation, maintenance, and termination of a tenant's association, is preempted by the governing statutes [*see Pub. Util. Code §§ 777.1(k), 10009.1(k), 12822.1(k), 16481.1(k)*].

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[6] Cross References

For discussion and form relating to interruption and termination of utility service under *Civ. Code § 789.3(a)*, see Ch. 334, *Landlord and Tenant: Claims for Damages*

[7] State Statutes

Residential occupant as permitted to commence action against utility customer of record who is owner, manager, or operator of master metered, multiunit residence for termination of utility service while residential was occupied. *Pub. Util. Code §§ 777.1, 10009.1, 12822.1, 16481.1*

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Chapter 278 GIFTS

23-278 California Forms of Pleading and Practice--Annotated 278.syn

§ 278.syn Synopsis to Chapter 278: GIFTS

§ 278.01 Scope of Chapter

§ 278.02 Cross References

§§ 278.03through 278.09 [Reserved]

§ 278.10 Definition

§ 278.11 Gifts Causa Mortis or Inter Vivos

§ 278.12 Essential Elements

[1] Overview

[2] Intent

[3] Delivery

[4] Acceptance

[5] Surrender of Dominion and Control

§ 278.13 Revocation of Gift Inter Vivos Not Permitted

§ 278.14 Gifts Causa Mortis

[1] In General

[2] Revocation

[3] Effect of Will

§ 278.15 Proof of Completed Gift

§ 278.16 Types of Gifts

[1] Gifts With Reservations of Rights

[2] Conditional Gifts

[3] Oral Gifts

[4] Gifts in Contemplation of Marriage

§ 278.17 Relief Based on Rescission

§ 278.18 Restitution Because of Fraud or Mistake

§ 278.19 Restitution Because of Undue Influence

[1] Availability of Remedy

[2] Rebuttal of Presumption of Undue Influence

[3] Effect of Family Relationship

§ 278.20 Actions to Impose a Trust

[1] Nature of Remedy

[2] Creation of a Trust

[3] Distinction Between Gift and Trust

[4] Imperfect Gift Not Necessarily Creating Trust

§ 278.21 Uniform Transfers to Minors Act

[1] In General

[2] Removal of Custodian or Imposition of Bond Requirement

[3] Accounting

[4] Claims Related to Custodial Property

§§ 278.22through 278.39 [Reserved]

§ 278.40 California Legal Forms

§ 278.41 State Statutes

[1] Actions for Relief

[2] Gifts

[3] Uniform Transfers to Minors Act

§ 278.42 Decisions

[1] Actions to Create a Trust

[2] Imperfect Gift Does Not Necessarily Create Trust

[3] Essential Elements of Gifts

[a] In General

[b] Acceptance

[c] Delivery

[d] Intent

[e] Surrender of Dominion and Control

[4] Gift Taxes on Rescinded Gift

[5] Gifts Causa Mortis

[a] Making Gift Causa Mortis

[b] Revocation of Gift Causa Mortis

[6] Gifts in General

[7] Proof of Completed Gift

[8] Restitution

[a] Recession Based on Fraud

[b] Rescission Based on Undue Influence

[9] Revocation of Gift Inter Vivos

[10] Types of Gifts

[a] Conditional Gifts

[b] Gifts in Contemplation of Marriage

[c] Gifts With Reservations of Rights

[d] Oral Gifts

[11] Uniform Gifts to Minors Act

§ 278.43 Attorney General Opinions

§ 278.44 Law Reviews

§ 278.45 Text References

§§ 278.46through 278.59 [Reserved]

§ 278.60 Complaint For Declaratory Relief [Code Civ. Proc. § 1060] as to Validity of Gift--By Donee--Against Donor General Form

[1] FORM

[2] Use of Form

[3] Declaratory Relief

[4] Verification

[5] Cross References

[6] California Legal Forms

[7] State Statutes

[8] Decisions

[a] Essential Elements of Gifts

[b] Acceptance

[c] Delivery

[c] Intent

[d] Surrender of Dominion and Control

[9] Text References

§ 278.61 Complaint To Recover Gift Causa Mortis--By Plaintiff-Donee--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Decisions

[5] Cross References

§ 278.62 Complaint for Restitution of Gift and for Damages--Induced by Fraud--By Donor Against Donee--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Decisions

[5] Text References

[6] Cross Referencesd

§ 278.63 Complaint for Restitution of Gifts Induced by Undue Influence and for an Accounting--By Representative of the Estate Against Donee

[1] FORM

[2] Use of Form

[3] Allegations

[4] Decisions

[5] Text References

[6] Cross References

§ 278.64 Complaint for Removal of Custodian [Prob. Code § 3918(f)] and for Accounting [Prob. Code § 3919] Under Uniform Transfers to Minors Act [Prob. Code §§ 3900-3925]--By Minor [Fam. Code § 6601] and Guardian

[1] FORM

[2] Use of Form

[3] Allegations

[4] Notice of Hearing to Remove Custodian

[5] State Statutes

[6] Text References

[7] Cross Reference s

§ 278.65 Complaint By Donor Against Donee for Recovery of Gifts Made in Contemplation of Marriage [Civ. Code § 1590]

[1] FORM

[2] Use of Form

[3] Cross References

[3] State Statutes

[4] Decisions

[5] Law Reviews

[6] Cross References

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Chapter 278 GIFTS
PART I. SCOPE

23-278 California Forms of Pleading and Practice--Annotated § 278.01

§ 278.01 Scope of Chapter

This chapter discusses gifts by donors to donees and the elements necessary to make a complete gift. It also discusses theories upon which gifts may be recovered and the Uniform Transfers to Minors Act (*Prob. Code §§ 3900-3925*). The forms contained in the chapter are:

- A complaint for declaratory relief as to the validity of a gift [*see § 278.60*].
- A complaint by a donee to recover a gift causa mortis which is held by a third party and claimed by the estate of the deceased donor [*see § 278.61*].
- A complaint by a donor to recover a gift obtained by fraud [*see § 278.62*].
- A complaint by the representative of the estate of a deceased donor to recover a gift obtained through undue influence [*see § 278.63*].
- A complaint by a minor asking for the removal of and an accounting by the custodian of the property of the minor [*see § 278.64*].
- A complaint for recovery of gifts made in contemplation of marriage [*see § 278.65*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPersonal GiftsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsElements of Valid GiftsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGifts Causa MortisEstate, Gift & Trust LawPersonal GiftsGifts to MinorsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGifts to MinorsUniform Acts

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PART I. SCOPE

23-278 California Forms of Pleading and Practice--Annotated § 278.02

§ 278.02 Cross References

For discussion of the procedural steps to obtain declaratory relief, see Ch. 182, *Declaratory Relief* .

For forms and a discussion of the elements of resulting trusts and constructive trusts, see Ch. 560, *Trusts* .

For a discussion and forms of complaints for resulting and constructive trust, see Ch. 560, *Trusts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewEstate, Gift & Trust LawTrustsConstructive TrustsEstate, Gift & Trust LawTrustsResulting Trusts

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PART I. SCOPE

23-278 California Forms of Pleading and Practice--Annotated §§ 278.03through 278.09

[Reserved]

§§ 278.03[Reserved]

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PART II. LEGAL BACKGROUND

23-278 California Forms of Pleading and Practice--Annotated § 278.10

§ 278.10 Definition

A gift is defined by statute as a transfer of personal property, made voluntarily and without consideration [*Civ. Code § 1146*]. It is also clear that real property may be the subject of a gift [*see Gordon v. Barr (1939) 13 Cal. 2d 596, 601-603, 91 P.2d 101* ; *Andreotti v. Andreotti (1964) 224 Cal. App. 2d 533, 538-540, 36 Cal. Rptr. 709]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPersonal GiftsGeneral Overview

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PART II. LEGAL BACKGROUND

23-278 California Forms of Pleading and Practice--Annotated § 278.11

§ 278.11 Gifts Causa Mortis or Inter Vivos

There are two types of gifts: a gift inter vivos or a gift causa mortis.

The statutes refer to a gift causa mortis as a "gift in view of impending death" [*See Civ. Code § 1148*; *Prob. Code § 5702*]. A gift causa mortis is a gift made in contemplation, fear, or peril of impending death, whether from illness or other cause, and with the intent that it will be revoked if the giver recovers from the illness or escapes from the peril [*Prob. Code § 5702(a)*]. Such a gift is, in effect, a will substitute [*see § 278.14*]. A reference in a statute to a gift in view of death means a gift in view of impending death [*Prob. Code § 5702(b)*].

An inter vivos gift is made under ordinary circumstances and is irrevocable [*Civ. Code § 1148*]. The only distinction between the gift inter vivos and the gift causa mortis is that the latter, being in its nature testamentary, is subject to the donor's revocation if he or she lives [*Civ. Code § 1148*; *Prob. Code § 5702*; *Berl v. Rosenberg (1959) 169 Cal. App. 2d 125, 129-130, 336 P.2d 975]* . In other respects, all the essential elements for making a gift must be met by both classes of gifts [*Berl v. Rosenberg (1959) 169 Cal. App. 2d 125, 129-130, 336 P.2d 975]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPersonal GiftsGifts Causa MortisEstate, Gift & Trust LawPersonal GiftsLifetime Gifts

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§ 278.12 Essential Elements

[1] Overview

The essentials of a valid completed gift are [*Bank of America v. Cottrell (1962) 201 Cal. App. 2d 361, 363, 20 Cal. Rptr. 126* ; *Connelly v. Bank of America (1956) 138 Cal. App. 2d 303, 307, 291 P.2d 501]* :

- Competency of the donor to contract.
- A voluntary intent on the part of the donor to make a gift.
- Delivery, either actual or symbolic.
- Acceptance, actual or imputed.
- Complete divestment of all dominion and control by the donor.
- Lack of consideration for the gift.

[2] Intent

In ascertaining the validity of a gift, the intent with which delivery was made is an essential element. Intention is a question of fact to be determined by the trial court from all the evidence, and the circumstances of the transaction and the words and acts of the donor enter into the establishment of the fact [*Matson v. Jones (1969) 272 Cal. App. 2d 826, 829, 77 Cal. Rptr. 717]* . A person incapable of entertaining the necessary intent cannot make a gift. Thus, it was held that no gift had been made because of the lack of intention when the defendant was a serious and habitual alcoholic, had no memory of having signed a deed conveying real property, and stated that he must have been drunk when he signed the deed involved since he had no intention of giving the property to his wife [*see* *Jones v. Jones (1960) 183 Cal. App. 2d 468, 472-473, 6 Cal. Rptr. 819]* .

The donor's intent must be to give a present interest [*Estate of Franco (1975) 50 Cal. App. 3d 374, 385, 122 Cal.*

Rptr. 661, 123 Cal. Rptr. 458 , modified at 50 Cal. App. 3d 374, 123 Cal. Rptr. 458 ; *Brown v. Meredith (1963) 220 Cal. App. 2d 762, 765, 34 Cal. Rptr. 153]* . For example, when the decedent wrote a letter giving a sum of money to plaintiffs which was never sent but was found among her personal effects after her death six years after the date on the letter, the court ruled that there was no gift inter vivos or causa mortis since the decedent had not transferred the title immediately or relinquished control over the money or the letter [*see In re F.P. Newport Corp. (S.D. Cal. 1961) 194 F. Supp. 757, 761]* .

[3] Delivery

In order to make a gift, the donor's intention must be executed by a complete and unconditional delivery by the donor [*Blonde v. Estate of Jenkins (1955) 131 Cal. App. 2d 682, 685-686, 281 P.2d 14]* to the donee [*Turnbull v. Thomsen (1959) 171 Cal. App. 2d 779, 784, 341 P.2d 69]* or to a third party on behalf of the donee [*Berl v. Rosenberg (1959) 169 Cal. App. 2d 125, 131, 336 P.2d 975]* . If there is no delivery by the donor to the donee, the gift becomes merely an unexecuted and unenforceable promise to make a future gift [*Blonde v. Estate of Jenkins (1955) 131 Cal. App. 2d 682, 686, 281 P.2d 14]* . Thus, when the decedent told plaintiff that he was going to give her certain stocks and securities and was going to have them made over to her but instead retained the shares and never made any effort to have them made over to plaintiff, there was no valid gift, merely an unenforceable promise [*Rolinson v. Rolinson (1955) 132 Cal. App. 2d 387, 390, 282 P.2d 98* ; *Blonde v. Estate of Jenkins (1955) 131 Cal. App. 2d 682, 686, 281 P.2d 14]* .

Delivery, either actual or symbolic, may be made to a third person on behalf of the donee, and if the donor parts with dominion and control, such a gift will be effective [*Berl v. Rosenberg (1959) 169 Cal. App. 2d 125, 131, 336 P.2d 975]* .

For example, when the deceased sent a written letter to his brokers directing that the securities owned by him and held by them should be given to the donee in joint tenancy with the deceased, a valid gift was created since the letter clearly indicated the donor's intent to make a gift, and the delivery of the letter to the brokers constituted a valid delivery of the securities [*Berl v. Rosenberg (1959) 169 Cal. App. 2d 125, 133, 336 P.2d 975]* .

[4] Acceptance

Acceptance by the donee is essential to a valid gift [*Jones v. Jones (1960) 183 Cal. App. 2d 468, 472, 6 Cal. Rptr. 819* ; *Marshall v. Marshall (1956) 140 Cal. App. 2d 475, 479, 295 P.2d 131]* . Under California law, it is presumed that a gift beneficial to the donee is accepted by the donee [*Kropp v. Sterling Sav. & L. Ass'n (1970) 9 Cal. App. 3d 1033, 1046, 88 Cal. Rptr. 878]* . The presumption, however, is disputable and is a question of fact for the trial court [*Jones v. Jones (1960) 183 Cal. App. 2d 468, 472, 6 Cal. Rptr. 819]* .

[5] Surrender of Dominion and Control

The surrender of dominion and control over the gift is essential for the completion of a valid gift [*Rolinson v. Rolinson (1955) 132 Cal. App. 2d 387, 390, 282 P.2d 98]* . For instance, there was no such surrender when a decedent gave the plaintiff his bankbook to hold but continued to make withdrawals and deposits in the account by requesting on several occasions that the bankbook be given to him and then returning it to plaintiff. It was determined that decedent had retained substantial dominion and control over the account [*Estate of Alberts (1940) 38 Cal. App. 2d 42, 46-47, 100 P.2d 538]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 278.13 Revocation of Gift Inter Vivos Not Permitted

Once a gift inter vivos has been delivered and accepted, a donor is unable to revoke the gift [*Civ. Code § 1148*; *Marshall v. Marshall (1956) 140 Cal. App. 2d 475, 478-480, 295 P.2d 131]* . For example, when plaintiff had executed and recorded a deed granting real property to several donees without their knowledge, after which two of them learned of the conveyance and did not repudiate the gift, a completed gift had been made and the donor was unable to revoke the gift, notwithstanding the fact that the donees had only belatedly learned of the gift [*Marshall v. Marshall (1956) 140 Cal. App. 2d 475, 478-480, 295 P.2d 131]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 278.14 Gifts Causa Mortis

[1] In General

A gift in view of death impending death is one that is made in contemplation, fear, or peril of impending death, whether from illness or other cause, and with the intent that it will be revoked if the giver recovers from the illness or escapes from the peril [*Prob. Code § 5702(a)*]. A reference in a statute to a gift in view of death means a gift in view of impending death [*Prob. Code § 5702(b)*]. A gift made during the last illness of the giver or under circumstances which would naturally impress the giver with an expectation of speedy death is presumed to be a gift in view of impending death [*Prob. Code § 5703*]. For example, it was inferable that decedent, an osteopathic surgeon, as a physician would know what ailed him and would know that death might soon occur. Hence, when he stated in several letters that he was a very sick man it was inferable that gifts made at that time were made in contemplation of death [*Rosenberg v. Broy (1961) 190 Cal. App. 2d 591, 596, 12 Cal. Rptr. 103]* .

When a donor makes a gift in view of impending death, the donor is, in effect, making the functional equivalent of a testamentary distribution of property. In other words, a gift in view of impending death is, as a practical matter, essentially a will substitute. The governing statutes therefore treat such gifts in a significantly different manner than other gifts with respect to their revocability [*see Civ. Code § 1148* (ordinary rule of irrevocability inapplicable to gifts in view of impending death), *Prob. Code § 5704*; *see also* discussion in *§ 278.14[2]*].

[2] Revocation

A gift in view of impending death is revoked by the giver's recovery from the illness, or escape from the peril, under the presence of which it was made, or by the death of the donee before the death of the giver [*Prob. Code § 5704(a)*]. The gift may be revoked by the giver at any time, or by the giver's will, if the will expresses an intention to revoke the gift [*Prob. Code § 5704(b)*]. Unlike the making of a gift, there are no essential elements or requirements that must be met to revoke a gift causa mortis [*Rosenberg v. Broy (1961) 190 Cal. App. 2d 591, 596, 12 Cal. Rptr. 103]* . Thus, when it was inferable from the circumstances that decedent had made gifts in contemplation of death, a telephone call to his brokers revoking a previous letter to sell his securities and distribute the proceeds among his relatives was sufficient to revoke the gift [*Rosenberg v. Broy (1961) 190 Cal. App. 2d 591, 598, 12 Cal. Rptr. 103]* .

Notwithstanding the provisions governing revocation, when the gift has been delivered to the donee, the rights of a purchaser or encumbrancer, acting before the revocation in good faith, for a valuable consideration, and without knowledge of the conditional nature of the gift, are not affected by the revocation [*Prob. Code § 5704(d)*].

[3] Effect of Will

A gift in view of death is not affected by a previous will of the giver [*Prob. Code § 5704(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPersonal GiftsGifts Causa Mortis

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§ 278.15 Proof of Completed Gift

The donee has the burden to prove a completed gift [*Blonde v. Estate of Jenkins (1955) 131 Cal. App. 2d 682, 686, 281 P.2d 14]* . In one situation, ample evidence proving a gift to donee was given when the donee showed that the donor had repeatedly refused payments on a note owed by the donee to her, had informed the donee that she did not want the donee to pay back the money, and had given a irrevocable letter of instruction to her attorney instructing that the note be given to the donee upon the donor's death [*Bank of America v. Cottrell (1962) 201 Cal. App. 2d 361, 363-364, 20 Cal. Rptr. 126]* . However, in another situation, plaintiff failed to show a gift had been made to him where evidence indicated that the plaintiff's father had given him permission to remain on and manage the family ranch, that plaintiff had made rent payments to his sister and brother, and that in several business transactions had treated the ranch as though it still belonged to his father [*Andreotti v. Andreotti (1964) 224 Cal. App. 2d 533, 539-540, 36 Cal. Rptr. 709]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 278.16 Types of Gifts

[1] Gifts With Reservations of Rights

A completed gift may be made despite the fact that the donor reserves the right to the income or interest from the property during his or her lifetime [*Gordon v. Barr (1939) 13 Cal. 2d 596, 602, 91 P.2d 101* ; *Connelly v. Bank of America (1956) 138 Cal. App. 2d 303, 306-307, 291 P.2d 501]* . For instance, when the donor returned the donee's note evidencing a debt to the donor with the reservation that the installment payments be continued during the donor's lifetime, a valid gift had been made [*Connelly v. Bank of America (1956) 138 Cal. App. 2d 303, 306-307, 291 P.2d 501]* .

[2] Conditional Gifts

If a conditional gift is made and there has been no substantial performance of the conditions, then there is no binding enforceable obligation [*Fritz v. Thompson (1954) 125 Cal. App. 2d 858, 862-863, 271 P.2d 205]* . For instance, when decedent promised to give plaintiff $5,000 towards the cost of building a new house if the plans, site, and other conditions could be approved by himself and no substantial steps were taken to meet these conditions before his death, the gift failed because of the lack of substantial performance [*Fritz v. Thompson (1954) 125 Cal. App. 2d 858, 862-863, 271 P.2d 205]* .

[3] Oral Gifts

An oral gift is not valid unless the means of obtaining possession and control of the thing are given. Such a gift also is not valid if it is capable of delivery unless there is an actual or symbolical delivery of the thing to the donee [*Civ. Code § 1147*]. No particular language or terminology is necessary for the creation of an alleged oral gift; however, plaintiff must establish the oral gift by full, clear, and convincing evidence [*Andreotti v. Andreotti (1964) 224 Cal. App. 2d 533, 539, 36 Cal. Rptr. 709* ; *Gonzalez v. Riis (1959) 171 Cal. App. 2d 473, 476, 340 P.2d 1015]* . Such evidence exists when the gift of a chose in action such as a debt is evidenced by writing. For example, when the donor told the donee that the donee would not have to make any further payments on a debt if the donor died and gave the donee the signed note evidencing the obligation, a valid oral gift of a chose in action had been made [*Connelly v. Bank of America (1956) 138 Cal. App. 2d 303, 306, 291 P.2d 501]* . Such evidence does not exist and an oral gift of real

property will be foreclosed by the statute of frauds unless it is established that possession of the property is given to and taken by the donee who, in reliance on the oral gift, places valuable and permanent improvements upon the realty, makes substantial expenditures in connection with the property, or otherwise so acts in relation to the gift as to make it unjust to deprive him of the property by reason of an imperfect transfer [*Andreotti v. Andreotti (1964) 224 Cal. App. 2d 533, 538, 36 Cal. Rptr. 709]* .

[4] Gifts in Contemplation of Marriage

When either party to a contemplated marriage makes a gift of money or property to the other on the basis or assumption that the marriage will take place, in the event that the donee refuses to enter into the marriage as contemplated or that it is given up by mutual consent, the donor may recover the gift or that part of its value as may, under all of the circumstances of the case, be found by a court or jury to be just [*Civ. Code § 1590*]. Thus, when a donee accepts many expensive gifts from a donor that have been given in the expectation of marriage and then refuses to marry the donor, the donor is entitled to recover the gifts of real and personal property given donee [*Shaw v. Shaw (1964) 227 Cal. App. 2d 159, 161-166, 38 Cal. Rptr. 520* ; *Stienback v. Halsey (1953) 115 Cal. App. 2d 213, 219-220, 251 P.2d 1008]* . Property that may be recovered in an action under *Civ. Code § 1590* includes an automobile, silverware, cash advanced, and wedding rings, [*see Stienback v. Halsey (1953) 115 Cal. App. 2d 213, 218-220, 251 P.2d 1008]* , as well as real and personal property acquired with one party's own funds and placed jointly in the name of the party and the person to whom the party was engaged [*Shaw v. Shaw (1964) 227 Cal. App. 2d 159, 164-165, 38 Cal. Rptr. 520]* .

Property may be recovered in an action under *Civ. Code § 1590* only if the parties mutually consent not to marry or the donee refuses to go through with the marriage as contemplated at the time the gifts were made. A donee of personal property is entitled to retain possession of the property when the marriage contract is breached by a donor without any fault on the part of the donee [*Simonian v. Donoian (1950) 96 Cal. App. 2d 259, 262, 215 P.2d 119* (donor not permitted to recover engagement ring from donee when donor refuses to go through with marriage plans)]. In addition, an action to recover gifts made in contemplation of marriage may be maintained only by the parties to the contemplated marriage and not by other persons making gifts to one of the parties to the contemplated marriage [*Simonian v. Donoian (1950) 96 Cal. App. 2d 259, 262, 215 P.2d 119* (no cause of action in parent giving diamond-set wristwatch to son's financee)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 278.17 Relief Based on Rescission

While there is no explicit statutory authority, it appears that gifts may be rescinded and restitution of property made when there has been a mistake, fraud, or undue influence in the procurement of the gift [*see Earl v. Saks & Co. (1951) 36 Cal. 2d 602, 609, 226 P.2d 340* ; *Estate of Bliss (1962) 199 Cal. App. 2d 630, 639-640, 18 Cal. Rptr. 821* ; *Stepanek v. Stepanek (1961) 193 Cal. App. 2d 760, 768, 14 Cal. Rptr. 793]* . It also seems probable that a donor who successfully rescinds a gift could also obtain damages in keeping with the general principles for relief based on rescission which state that a claim for damages is not inconsistent with a claim for relief based on recission [*see Civ. Code § 1692*] and that an aggrieved party may be rewarded complete relief, including restitution of any benefits conferred by him or her as a result of the transaction as well as any consequential damages to which he or she is entitled [*see Civ. Code § 1692*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 278.18 Restitution Because of Fraud or Mistake

A person is entitled to restitution from another to whom he or she has given a gift gratuitously and induced by fraud, misrepresentation, or mistake of fact [*Earl v. Saks & Co. (1951) 36 Cal. 2d 602, 609, 226 P.2d 340* ; *Stepanek v. Stepanek (1961) 193 Cal. App. 2d 760, 768, 14 Cal. Rptr. 793]* . In one situation, the donee and the seller entered into a secret agreement by which the donee would pay part of the price of an expensive fur coat. They thereby deceived the donor into believing that the coat was being purchased entirely by him so that it could be given in its entirety as a gift. The donor was entitled to rescind the gift because of the fraud [*Earl v. Saks & Co. (1951) 36 Cal. 2d 602, 609, 226 P.2d 340]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 278.19 Restitution Because of Undue Influence

[1] Availability of Remedy

Restitution of a gift on the grounds of undue influence in its procurement is another form of relief available [*see Estate of Franco (1975) 50 Cal. App. 3d 374, 122 Cal. Rptr. 661* , modified at *50 Cal. App. 3d 374, 123 Cal. Rptr. 458* ; *Estate of Bliss (1962) 199 Cal. App. 2d 630, 18 Cal. Rptr. 821* ; *McDonald v. Hewlett (1951) 102 Cal. App. 2d 680, 228 P.2d 83]* . The three elements that give rise to a presumption of undue influence are [*Estate of Bliss (1962) 199 Cal. App. 2d 630, 639-640, 18 Cal. Rptr. 821]* :

- A confidential relationship.
- Undue profit by the gift.
- Active participation in the procurement of the gift.

[2] Rebuttal of Presumption of Undue Influence

The existence of a confidential relationship between the parties to a gift does not dictate the ultimate conclusion that a gift was obtained by undue influence. The presumption may be overcome by proof by the donee that the transaction was fair and free from undue influence [*Church of Merciful Saviour v. Volunteers of America (1960) 184 Cal. App. 2d 851, 861, 8 Cal. Rptr. 48* ; *Camperi v. Chiechi (1955) 134 Cal. App. 2d 485, 504, 286 P2d 399]* . For example, in one situation a charitable organization was able to rebut a charge that it used fraud and undue influence to obtain real property when it showed that the donor clearly had a desire to give the land to the organization to be used for whatever purpose it thought best and that the donor had been informed that the organization never took restricted or conditional gifts [*Church of Merciful Saviour v. Volunteers of America (1960) 184 Cal. App. 2d 851, 861-862, 8 Cal. Rptr. 48]* .

In another situation, when evidence showed that the donor conceived the idea of giving real property to his daughter and conducted the transactions with the attorney without the guidance or knowledge of his daughter, and was unsolicited and unprompted by anyone, the presumption of undue influence was rebutted [*Camperi v. Chiechi (1955) 134 Cal. App. 2d 485, 504, 286 P.2d 399]* .

[3] Effect of Family Relationship

The solitary fact of family relationship will not by itself establish the existence of a fiduciary or confidential relationship raising a presumption of undue influence. Whether or not such a relation exists between members of the same family depends on all the facts and circumstances of the case, and unless one party actually dominates the other so that the other depends on him or her for advice and guidance, a confidential relation does not exist even though the parties are closely related by family ties [*Peters v. Papoulacos (1963) 218 Cal. App. 2d 791, 794, 32 Cal. Rptr. 689]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 278.20 Actions to Impose a Trust

[1] Nature of Remedy

In some actions involving the validity of a gift, a cause of action to impress a trust over the disputed property also has been sought [*see Camperi v. Chiechi (1955) 134 Cal. App. 2d 485, 510, 286 P.2d 399* ; *American Trust Co. v. Fitzmaurice (1955) 131 Cal. App. 2d 382, 387, 280 P.2d 545* ; *Fritz v. Thompson (1954) 125 Cal. App. 2d 858, 864-865, 271 P.2d 205]* . It would appear that the attempts involved in these three cases concerned the creation of either a resulting trust [*see Civ. Code § 2223*] or a constructive trust [*see Civ. Code § 2224*], but the distinctions between these two types of trusts do not appear to have been carefully made. For discussion of the distinction between resulting trusts and constructive trusts as well as complaints to create a resulting trust as well as forms of complaints to create a constructive trust, see Ch. 560, *Trusts* .

[2] Creation of a Trust

In order for one who owns property to make himself or herself a trustee of that property for another while retaining legal title, it is necessary that he or she use words or do acts which clearly denote the intention to relinquish his or her present interest in the property and to hold it for the benefit of another. In addition, there must be a specific property to be held in trust by the trustor, as the trustee, and an absolute parting by him or her with that beneficial interest which had been his or hers until the declaration of the trust [*Fritz v. Thompson (1954) 125 Cal. App. 2d 858, 864, 271 P.2d 205]* .

[3] Distinction Between Gift and Trust

The important difference between a gift and a voluntary trust is that in the case of a gift, the property itself passes to the donee. In the case of a trust, the actual, beneficial, or equitable title passes to the trust while the legal title either is transferred to a third person or may be retained by the person creating it to hold for the purpose of the trust [*Estate of Alberts (1940) 38 Cal. App. 2d 42, 46, 100 P.2d 538]* .

[4] Imperfect Gift Not Necessarily Creating Trust

Despite the fact that a claim of trust has often been raised in connection with a gift suit, frequently both claims will fail

since, if the elements necessary for the creation of a gift are missing, then the elements necessary for creating a trust are also missing [*see Gonzalez v. Riis (1959) 171 Cal. App. 2d 473, 476-477, 340 P.2d 1015* ; *Fritz v. Thompson (1954) 125 Cal. App. 2d 858, 863, 271 P.2d 205* ; *Estate of Alberts (1940) 38 Cal. App. 2d 42, 46, 100 P.2d 538]* . Equity will not perfect an imperfect gift by enforcing a trust merely because of the imperfection since, to do so, would be to give effect to an intention never contemplated by the donor [*Fritz v. Thompson (1954) 125 Cal. App. 2d 858, 863, 271 P.2d 205* ; *Estate of Alberts (1940) 38 Cal. App. 2d 42, 46, 100 P.2d 538]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 278.21 Uniform Transfers to Minors Act

[1] In General

The California Uniform Transfers to Minors Act (*Prob. Code §§ 3900-3925*) sets forth procedures that may be followed in making a gift of property to a minor. The Act does not, however, create the sole means by which a gift can be made to a minor [*Prob. Code § 3925*].

By making a transfer under the Act, the transferor incorporates in the disposition all the provisions of the Act [*Prob. Code § 3911(b)*]. All gifts made under the Act are irrevocable [*Prob. Code §§ 3904, 3911(a)(3)*]. The Act contains specific directions for the creation of a gift under the Act which depend on the type of property involved [*see Prob. Code § 3909*]. Under the Act, gifts to minors are cared for by a "custodian," who, like a trustee, manages the property [*see Prob. Code § 3912*], makes certain distributions for the benefit of the minor [*see Prob. Code § 3914*], and ultimately distributes the custodial property to the the minor, usually when the minor turns 18 [*Prob. Code § 3920*]. The Act contains a comprehensive set of rules which govern such matters as the rights, duties, and powers of the custodian [*see Prob. Code §§ 3912-3915*]; termination of the custodianship [see *Prob. Code §§ 3918*]; and certain specified rights of action which are discussed in *§ 278.21[2] -[4]*.

In addition to gifts, the Act covers transfers from estates, trusts, and guardianships [*see Prob. Code § 3904*]. Gifts made under the California Uniform Gifts to Minors Act prior to January 1, 1985, are governed by the current Act except insofar as the application of the current Act impairs constitutionally vested rights [*Prob. Code § 3923(c)*].

For forms related to the conveyance of property to a minor under the provisions of the Act, see California Legal Forms, Ch. 60A, *Gifts*.

[2] Removal of Custodian or Imposition of Bond Requirement

A transferor or his or her representative, an adult member of the minor's family, a guardian of the person of the minor, the conservator of the minor, or the minor if he or she has attained the age of 14, may bring an action to remove the custodian for cause and to designate a successor custodian or to require the custodian to post bond [*Prob. Code § 3918(f)*].

At least 15 days before the hearing on the petition, the petitioner must serve notice by mail or personal delivery on the minor, the minor's parent or parents, and the transferor [*Prob. Code § 3918(g)*].

[3] Accounting

A minor who has attained the age of 14, the minor's guardian of the person or legal representative, an adult member of the minor's family, a transferor, or a transferor's legal representative, may bring an action for an accounting by the custodian or the legal representative of the custodian [*Prob. Code § 3919(a)*]. In addition, a successor custodian may petition the court for an accounting by the predecessor custodian [*Prob. Code § 3919(b)*].

The court, in a proceeding under the Act, or in any other proceeding may require or permit the custodian or the custodian's legal representative to account [*Prob. Code § 3919(c)*]. If a custodian is removed under *Prob. Code § 3918(f)*, the court must order [*Prob. Code § 3919(d)*]:

- An accounting.
- Delivery of the custodial property and records to the successor custodian.
- The execution of all instruments required for transfer of the custodial property [*Prob. Code § 3919(d)*].

The right of a party to petition for an accounting continues for one year after the filing of a final accounting by the custodian or the custodian's legal representative and delivery of the custodial property to the minor or the minor's estate [*Prob. Code § 3919(e)*].

[4] Claims Related to Custodial Property

Claims based on obligations, contracts, or torts related to the custodial property may be asserted against the custodial property in an action against the custodian in the custodial capacity [*Prob. Code § 3917(a)*]. In such actions, liability of both the minor and the custodian in a personal capacity are limited by the Act [*Prob. Code § 3917(b), (c)*]. A minor who has attained the age of 14, the minor's guardian of the person or legal representative, an adult member of the minor's family, a transferor or a transferor's legal representative, may petition the court for a determination of responsibility, as between the custodial property and the custodian personally, for claims against the custodial property unless the responsibility was adjudicated in a prior action under *Prob. Code § 3917* to which the minor or the minor's legal representative was a party [*Prob. Code § 3919(a)*].

The California Uniform Transfers to Minors Act contains provisions relating to jurisdiction, choice of law, and venue [*Prob. Code §§ 3902, 3921*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGifts to MinorsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGifts to MinorsCustodial Duties & RightsEstate, Gift & Trust LawPersonal GiftsGifts to MinorsUniform ActsEstate, Gift & Trust LawPersonal GiftsLifetime Gifts

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[Reserved]

§§ 278.22[Reserved]

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23-278 California Forms of Pleading and Practice--Annotated § 278.40

§ 278.40 California Legal Forms

For discussion and related forms, see California Legal Forms, Ch. 60A, *Gifts*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPersonal GiftsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsLifetime Gifts

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23-278 California Forms of Pleading and Practice--Annotated § 278.41

§ 278.41 State Statutes

[1] Actions for Relief

Resulting trust defined. *Civ. Code § 2223*

Damages for relief based on rescission. *Civ. Code § 1692*

Constructive trust defined. *Civ. Code § 2224*

Recovery of gifts given in contemplation of marriage. *Civ. Code § 1590*

[2] Gifts

Gifts defined. *Civ. Code § 1146*

Elements of an oral gift. *Civ. Code § 1147*

No revocation of gifts other than gift causa mortis. *Civ. Code § 1148*

Gifts causa mortis defined. *Prob. Code § 5702*

Revocation of gifts in view of impending death. *Prob. Code § 5704*

Effect of will on gift causa mortis. *Prob. Code § 5702(c)*

[3] Uniform Transfers to Minors Act

Uniform Transfers to Minors Act. *Prob. Code §§ 3900-3925*

Definitions. *Prob. Code § 3901*

Nomination of custodian. *Prob. Code § 3903*

Methods of conveyance. *Prob. Code § 3909*

Duties of custodian. *Prob. Code § 3912*

Rights and powers of custodian. *Prob. Code §§ 3913, 3914*

Reimbursement of custodian. *Prob. Code § 3915*

Dealings by third persons with custodian. *Prob. Code § 3916*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPersonal GiftsGifts Causa MortisEstate, Gift & Trust LawPersonal GiftsGifts to MinorsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsLifetime GiftsEstate, Gift & Trust LawTrustsConstructive TrustsEstate, Gift & Trust LawTrustsResulting Trusts

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23-278 California Forms of Pleading and Practice--Annotated § 278.42

§ 278.42 Decisions

[1] Actions to Create a Trust

Distinction between gift and trust is that, in case of gift, the property passes to donee, whereas in a trust title passes to third person or may be retained by the settlor. *Estate of Alberts (1940) 38 Cal. App. 2d 42, 46, 100 P.2d 538*

No resulting or constructive trust created when executrix had not obligated herself to part with sum of money. *Fritz v. Thompson (1954) 125 Cal. App. 2d 858, 864-865, 271 P.2d 205*

Creation of trust requires use of words or acts that clearly indicate intention of settlor to relinquish his or her present interest, to hold it for the benefit of another, and to place specific property in the trust. *Fritz v. Thompson (1954) 125 Cal. App. 2d 858, 864, 271 P.2d 205*

Actions to impress a trust over imperfect gifts. *Camperi v. Chiechi (1955) 134 Cal. App. 2d 485, 510, 286 P.2d 399* ; *American Trust Co. v. Fitzmaurice (1955) 131 Cal. App. 2d 382, 387, 280 P.2d 545* ; *Fritz v. Thompson (1954) 125 Cal. App. 2d 858, 864-865, 271 P.2d 205*

Plaintiff has burden of proving constructive trust. *Manti v. Gunari (1970) 5 Cal. App. 3d 442, 452-453, 85 Cal. Rptr. 366*

Parol evidence admissible to show intention and realities of ownership over property which defendant urged was a gift and plaintiff urged was a trust. *American Trust Co. v. Fitzmaurice (1955) 131 Cal. App. 2d 382, 387, 280 P.2d 545*

Despite fact that donor had told plaintiff that the bankbook was a gift to her, by retaining the power to request the

bankbook and to withdraw and deposit funds at will in account, donor does not create valid gift but a revocable trust. *Estate of Alberts (1940) 38 Cal. App. 2d 42, 46, 100 P.2d 538*

[2] Imperfect Gift Does Not Necessarily Create Trust

Equity will not perfect imperfect gift by enforcing trust because of imperfection since, to do so, would be to give effect to an intention never contemplated by donor. *Fritz v. Thompson (1954) 125 Cal. App. 2d 858, 863, 271 P.2d 205* ; *Estate of Alberts (1940) 38 Cal. App. 2d 42, 46, 100 P.2d 538*

Frequently, if elements necessary for gift are missing, then elements necessary to create trust also are missing. *Gonzalez v. Riis (1959) 171 Cal. App. 2d 473, 476-477, 340 P.2d 1015* ; *Fritz v. Thompson (1954) 125 Cal. App. 2d 858, 863, 271 P.2d 205* ; *Estate of Alberts (1940) 38 Cal. App. 2d 42, 46, 100 P.2d 538*

[3] Essential Elements of Gifts

[a] In General

Essential elements of a valid gift. *Bank of America v. Cottrell (1962) 201 Cal. App. 2d 361, 363, 20 Cal. Rptr. 126* ; *Connelly v. Bank of America (1956) 138 Cal. App. 2d 303, 307, 291 P.2d 501*

Essential elements for making a gift apply to both gift inter vivos and gift causa mortis. *Berl v. Rosenberg (1959) 169 Cal. App. 2d 125, 129-130, 336 P.2d 975*

Distinction between gift causa mortis and gift inter vivos is that former is revocable. *Berl v. Rosenberg (1959) 169 Cal. App. 2d 125, 129-130, 336 P.2d 975*

Real property may be the subject of a gift. *Gordon v. Barr (1939) 13 Cal. 2d 596, 91 P.2d 101* ; *Andreotti v. Andreotti (1964) 224 Cal. App. 2d 533, 538-540, 36 Cal. Rptr. 709*

[b] Acceptance

No conscious acceptance was made when plaintiff could not remember the circumstances surrounding the delivery of a deed to her and was not aware of the contents of the piece of paper she put away for safekeeping. *Jones v. Jones (1960) 183 Cal. App. 2d 468, 472-473, 6 Cal. Rptr. 819*

Presumption of acceptance by donee disputable. *Jones v. Jones (1960) 183 Cal. App. 2d 468, 472, 6 Cal. Rptr. 819*

Presumption of acceptance of gift beneficial to donee. *Kropp v. Sterling Sav. & L. Ass'n (1970) 9 Cal. App. 3d 1033, 1046, 88 Cal. Rptr. 878*

Acceptance by donee is essential for valid gift. *Jones v. Jones (1960) 183 Cal. App. 2d 468, 472, 6 Cal. Rptr. 819* ; *Marshall v. Marshall (1956) 140 Cal. App. 2d 475, 479, 295 P.2d 131*

Delivery of gift is completed where donor executed and recorded deed granting real property to five joint tenants without their knowledge and two of the donees subsequently learned of the conveyance because acceptance by one or more was acceptance by all. *Marshall v. Marshall (1956) 140 Cal. App. 2d 475, 479, 295 P.2d 131*

[c] Delivery

Gift was valid when deceased sent written letter to brokers directing that securities owned by him and held by them should be given to donee. *Berl v. Rosenberg (1959) 169 Cal. App. 2d 125, 133, 336 P.2d 975*

Actual or symbolic delivery of gift to third persons. *Berl v. Rosenberg (1959) 169 Cal. App. 2d 125, 131, 336 P.2d 975*

Gift was incomplete when decedent told plaintiff that he was going to give her securities and was going to the bank to have them made over to her, but instead retained the shares and never had them made over to plaintiff. *Rolinson v. Rolinson (1955) 132 Cal. App. 2d 387, 390, 282 P.2d 98* ; *Blonde v. Estate of Jenkins (1955) 131 Cal. App. 2d 682, 686, 281 P.2d 14*

Gift held to be an unexecuted and unenforceable promise to make a future gift without delivery. *Blonde v. Estate of Jenkins (1955) 131 Cal. App. 2d 682, 686, 281 P.2d 14*

Donee is entitled to proceeds of bank account in joint tenancy when donor delivered endorsed check which made up funds in account to donee as gift in the presence of witness. *Turnbull v. Thomsen (1959) 171 Cal. App. 2d 779, 784, 341 P.2d 69*

Examination of donor's acts and declarations to determine if delivery was made. *Bank of America v. Cottrell (1962) 201 Cal. App. 2d 361, 363, 20 Cal. Rptr. 126* ; *Marshall v. Marshall (1956) 140 Cal. App. 2d 475, 479, 295 P.2d 131*

Necessity of an unconditional delivery for completed gift. *Blonde v. Estate of Jenkins (1955) 131 Cal. App. 2d 682, 685-686, 281 P.2d 14*

[d] Intent

Intent requires conveyance of present interest. *Estate of Franco (1975) 50 Cal. App. 3d 374, 385, 122 Cal. Rptr. 661, 123 Cal. Rptr. 458* , modified at *50 Cal. App. 3d 374, 123 Cal. Rptr. 458* ; *Brown v. Meredith (1963) 220 Cal. App. 2d 762, 765, 34 Cal. Rptr. 153*

Person incapable of forming an intent is incapable of making a gift. *Jones v. Jones (1960) 183 Cal. App. 2d 468, 472-473, 6 Cal. Rptr. 819*

Intent of donor is determined from the circumstances of the transaction and the words and acts of the donor. *Matson v. Jones (1969) 272 Cal. App. 2d 826, 829, 77 Cal. Rptr. 717*

Letter found among deceased's effects does not constitute a gift causa mortis or inter vivos since no present interest is being conveyed. *In re F.P. Newport Corp. (SD Cal. 1961) 194 F. Supp. 757, 761*

[e] Surrender of Dominion and Control

Surrender of dominion and control over gift is essential for valid gift. *Rolinson v. Rolinson (1955) 132 Cal. App. 2d 387, 390, 282 P.2d 98*

Gift was incomplete when decedent gave plaintiff his bankbook but continued to make withdrawal and deposits in account at will; decedent had retained substantial dominion and control over account. *Estate of Alberts (1940) 38 Cal. App. 2d 42, 46-47, 100 P.2d 538*

[4] Gift Taxes on Rescinded Gift

Suit for refund of gift taxes by conservator of estate who had recovered gifts given by donor declared incompetent was barred by statute of limitations and by delay on part of conservator in pressing claim. *Southern Cal. First Nat'l Bank v. United States (SD Cal. 1969) 298 F. Supp. 1249, 1252-1253*

[5] Gifts Causa Mortis

[a] Making Gift Causa Mortis

Gift made during last illness of donor or under circumstances which would impress donor with expectation of death is presumed to be gift in view of death. *Civ. Code § 1150*

Gifts made by ailing decedent were inferably as gifts causa mortis since decedent, a physician, presumed to know extent and seriousness of his illness. *Rosenberg v. Broy (1961) 190 Cal. App. 2d 591, 596, 12 Cal. Rptr. 103*

Elements of gift causa mortis were present when decedent, who was about to enter hospital, gave package of money to donee stating he was to use money for decedent's bills, and, if decedent died, to keep the balance. *Odone v. Marzocchi (1949) 34 Cal. 2d 431, 437, 211 P.2d 297*

[b] Revocation of Gift Causa Mortis

Telephone call by donor was sufficient to revoke letter giving gifts in view of death. *Rosenberg v. Broy (1961) 190 Cal. App. 2d 591, 598, 12 Cal. Rptr. 103*

No special requirements exist for revocation of gift causa mortis. *Rosenberg v. Broy (1961) 190 Cal. App. 2d 591, 596, 12 Cal. Rptr. 103*

[6] Gifts in General

Gifts first asserted after death of alleged donor are regarded with suspicion by the court because of great opportunities

for fraud. *Blonde v. Estate of Jenkins (1955) 131 Cal. App. 2d 682, 685, 281 P.2d 14*

Suicide by donor does not invalidate a gift if all other essential elements are met. *Berl v. Rosenberg (1959) 169 Cal. App. 2d 125, 130, 336 P.2d 975*

Although property was purchased from community funds, evidence was sufficient to show valid gift when husband executed quitclaim deed to wife for his half-interest in property. *Odone v. Marzocchi (1949) 34 Cal. 2d 431, 435-436, 211 P.2d 297*

When spouse makes gift of community property unbeknownst to other spouse, gift is valid as to one-half of the amount; other half, however, belongs to surviving spouse. *Odone v. Marzocchi (1949) 34 Cal. 2d 431, 438-440, 211 P.2d 297*

When one party executed a promissory note for second without any consideration which was to be presented to estate of first upon his death, gift was incomplete since second was not vested with an absolute, unconditional present interest in gift. *Ogden v. Title Ins. & Trust Co. (1954) 129 Cal. App. 2d 26, 27, 276 P.2d 146*

Letter sent to third parties possessing securities of donor in the normal course of business which was sufficient to cause delivery of one-half interest in securities was gift to donee. *Berl v. Rosenberg (1959) 169 Cal. App. 2d 125, 133, 336 P.2d 975*

Testamentary disposition rather than present gift was created when decedent placed names of himself and sister in joint tenancy on shares of stock but retained dominion and control over shares and invested proceeds without consulting sister. *Estate of Franco (1975) 50 Cal. App. 3d 374, 385, 122 Cal. Rptr. 661, 123 Cal. Rptr. 458* , modified at *50 Cal. App. 3d 374, 123 Cal. Rptr. 458* ; *De Puy v. Sullivan (1959) 168 Cal. App. 2d 292, 295-296, 335 P.2d 750*

Article XIII, § 25, of the California Constitution prohibits Legislature from making gift or authorizing making of gift of any public money or thing of value to any individual, municipality, or other corporation whatever; constitutional inhibition applyies to gifts to county, although it is not a municipal corporation or corporation of any kind. *Golden Gate Bridge & Highway Dist. v. Luehring (1970) 4 Cal. App. 3d 204, 207, 84 Cal. Rptr. 291*

To escape prohibition of *Cal. Const., Art XIII, § 25*, appropriation of public money by one governmental entity to another governmental entity must be used in furtherance of particular public purpose of transferring governmental entity. *Golden Gate Bridge & Highway Dist. v. Luehring (1970) 4 Cal. App. 3d 204, 208, 84 Cal. Rptr. 291*

Complaint alleging right to share of profits of business based on letter evidencing gift states cause of action. *Jaffe v. Carroll (1973) 35 Cal. App. 3d 53, 59-61, 110 Cal. Rptr. 435*

Gift is not complete until accepted by donee, but defendant's signature on bank signature card that he and another were owners of bank account was an acceptance. *Manti v. Gunari (1970) 5 Cal. App. 3d 442, 450, 85 Cal. Rptr. 366*

Power to revest title in donor results in incomplete gift. *Keck v. Cranston (1965) 236 Cal. App. 2d 39, 47, 45 Cal. Rptr. 634*

[7] Proof of Completed Gift

Burden of proof on donee. *Blonde v. Estate of Jenkins (1955) 131 Cal. App. 2d 682, 686, 281 P.2d 14*

Evidence of gift was ample when donee showed that donor had repeatedly refused payments on note owed by donee to her, had informed donee that she did not want the donee to repay money, and had given an irrevocable letter of instruction to her attorney instructing that the note be given to the donee upon the donor's death. *Bank of America v. Cottrell (1962) 201 Cal. App. 2d 361, 363-364, 20 Cal. Rptr. 126*

Plaintiff failed to show completed gift of family ranch from father when plaintiff's own actions indicated that he thought ranch still belonged to father. *Andreotti v. Andreotti (1964) 224 Cal. App. 2d 533, 539-540, 36 Cal. Rptr. 709*

[8] Restitution

[a] Recession Based on Fraud

Rescission and restitution obtainable for gift induced by fraud or material misrepresentation by donee or third person or by mistake as to basic fact. *Earl v. Saks & Co. (1951) 36 Cal. 2d 602, 609, 226 P.2d 340*

Donor permitted to rescind gift when donee and seller entered into secret agreement that donee would pay part of the price of a fur coat but let donor believe that coat had been purchased by himself in its entirety. *Earl v. Saks & Co. (1951) 36 Cal. 2d 602, 609, 226 P.2d 340*

Husband who makes substantial improvements on separate property of wife makes gift not subject to restitution on ground of mistake due to subsequent annulment. *Hultin v. Taylor (1970) 6 Cal. App. 3d 802, 804-806, 86 Cal. Rptr. 285*

[b] Rescission Based on Undue Influence

Restitution based on rescission is available to recover gift obtained through undue influence. *Estate of Bliss (1962) 199 Cal. App. 2d 630, 639-640, 18 Cal. Rptr. 821* ; *McDonald v. Hewlett (1951) 102 Cal. App. 2d 680, 686, 228 P.2d 83*

Three elements leading to presumption of undue influence are (1) confidential relationship, (2) undue profit by gift, and (3) active participation in the procurement of the gift. *Estate of Bliss (1962) 199 Cal. App. 2d 630, 639-640, 18 Cal. Rptr. 821*

Fact of family relationship is insufficient to prove confidential relationship. *Peters v. Papoulacos (1963) 218 Cal. App. 2d 791, 794, 32 Cal. Rptr. 689*

Nurse-patient relationship, unusual gift of $76,000, and donee's active participation in obtaining decedent's securities from safe deposit box led to presumption of undue influence. *Estate of Bliss (1962) 199 Cal. App. 2d 630, 640-641, 18 Cal. Rptr. 821*

Presumption of undue influence was rebutted when donor, unsolicited and unprompted by anyone, conceived of idea of giving real property to his daughter and conducted the transactions with the attorney without guidance or knowledge of daughter. *Camperi v. Chiechi (1955) 134 Cal. App. 2d 485, 504, 286 P.2d 399*

Presumption of undue influence was rebutted when church showed donor had clearly desired to give the land to church and had been informed that church never took gifts with restrictions. *Church of Merciful Saviour v. Volunteers of America (1960) 184 Cal. App. 2d 851, 861-862, 8 Cal. Rptr. 48*

Donee has burden of proof to rebut presumption of undue influence. *Church of Merciful Saviour v. Volunteers of America (1960) 184 Cal. App. 2d 851, 861, 8 Cal. Rptr. 48* ; *Camperi v. Chiechi (1955) 134 Cal. App. 2d 485, 504, 286 P.2d 399* ; *McDonald v. Hewlett (1951) 102 Cal. App. 2d 680, 228 P.2d 83* ; *Pfingst v. Goetting (1950) 96 Cal. App. 2d 293, 297, 215 P.2d 93*

[9] Revocation of Gift Inter Vivos

When plaintiff executed and recorded deed granting real property of several donees without their knowledge but subsequently two of them learned of the gift and did not repudiate it, donee was unable to revoke gift. *Marshall v. Marshall (1956) 140 Cal. App. 2d 475, 478-480, 295 P.2d 131*

[10] Types of Gifts

[a] Conditional Gifts

No substantial performance occurred when decedent promised plaintiff $5,000 towards cost of building a new house if the plans, site, and other conditions could be approved by him, but no substantial steps were taken to meet conditions before decedent's death. *Fritz v. Thompson (1954) 125 Cal. App. 2d 858, 862-863, 271 P.2d 205*

No binding enforceable obligation exists without substantial performance for conditional gift. *Fritz v. Thompson (1954) 125 Cal. App. 2d 858, 862-863, 271 P.2d 205*

[b] Gifts in Contemplation of Marriage

Donor is entitled to recover gifts given in contemplation of marriage of real and personal property when donee refuses to marry. *Shaw v. Shaw (1964) 227 Cal. App. 2d 159, 161-166, 38 Cal. Rptr. 520* ; *Stienback v. Halsey (1953) 115 Cal. App. 2d 213, 219-220, 251 P.2d 1008*

[c] Gifts With Reservations of Rights

Reservations of rights by donor do not bar complete gift. *Gordon v. Barr (1939) 13 Cal. 2d 596, 602, 91 P.2d 101* ; *Connelly v. Bank of America (1956) 138 Cal. App. 2d 303, 306-307, 291 P.2d 501*

Gift valid when donor returned donee's note evidencing a debt to donor with the reservation that the installment payments be continued during donor's lifetime. *Connelly v. Bank of America (1956) 138 Cal. App. 2d 303, 306-307, 291 P.2d 501*

[d] Oral Gifts

Oral gift of real property is foreclosed by statute of frauds unless possession is established and detrimental reliance is shown. *Andreotti v. Andreotti (1964) 224 Cal. App. 2d 533, 538, 36 Cal. Rptr. 709*

Donor's delivery of the promissory note to donee sufficient proof of oral gift. *Connelly v. Bank of America (1956) 138 Cal. App. 2d 303, 306, 291 P.2d 501*

Oral gift of chose in action must be evidenced by a writing. *Connelly v. Bank of America (1956) 138 Cal. App. 2d 303, 306, 291 P.2d 501*

Clear and convincing evidence is necessary to establish oral gift. *Andreotti v. Andreotti (1964) 224 Cal. App. 2d 533, 539, 36 Cal. Rptr 709* ; *Gonzalez v. Riis (1959) 171 Cal. App. 2d 473, 476, 340 P.2d 1015*

[11] Uniform Gifts to Minors Act

Cause of action to recover on promissory note payable to custodian or minor under Uniform Gifts to Minors Act is held by minor, not guardian, and statute of limitations on action is tolled during minor's minority. *Epstein v. Frank (1981) 125 Cal. App. 3d 111, 121-122, 177 Cal. Rptr. 831*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPersonal GiftsGifts Causa MortisEstate, Gift & Trust LawPersonal GiftsGifts to MinorsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsLifetime GiftsEstate, Gift & Trust LawTrustsConstructive TrustsEstate, Gift & Trust LawTrustsResulting Trusts

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§ 278.43 Attorney General Opinions

Pursuant to California's Uniform Gifts to Minors Act, *Civ. Code §§ 1154-1165*, custodian is required to transfer control of gift to donee on donee's 21st birthday if custodian first held gift prior to March 7, 1973; if gift first held on or after March 7, 1973, control of gift must be transferred at donee's 18th birthday. *57 Ops. Cal. Att'y Gen. 481 (1974)*

Insured credit unions are eligible depositories under California Uniform Gifts to Minors Act [*Civ. Code §§ 1155-1162*]. *55 Ops. Cal. Att'y Gen. 98 (1972)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPersonal GiftsGifts to MinorsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGifts to MinorsCustodial Duties & Rights

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§ 278.44 Law Reviews

Comment, *It Pays to Give it Away--Sometimes: Inter Vivos Charitable Remainder Unitrusts in Estate Planning, 15 Pepperdine L. Rev. 367 (1988)*

Comment, *What to Give Away, 18 Real Prop. Prob. & Tr. J. 678 (1983)*

Comment, *A Uniform Theory for Determining Whether a Donor Has Taxable Income on a Net Gift, 16 U.S.F. L. Rev. 95 (1981)*

Jackson, "Gifts of Remainder Interests to Charity," 47 State B.J. 22 (1972)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPersonal GiftsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGifts to MinorsCustodial Duties & RightsEstate, Gift & Trust LawTrustsGeneral Overview

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Volume 23: Fraud and Deceit thru Good Faith Improver of Real Property-Chs. 269-279
Chapter 278 GIFTS
PART III. RESEARCH GUIDE

23-278 California Forms of Pleading and Practice--Annotated § 278.45

§ 278.45 Text References

Witkin, Summary of California Law, vol. 13, *Personal Property*, § 124 et seq. (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPersonal GiftsGeneral Overview

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Volume 23: Fraud and Deceit thru Good Faith Improver of Real Property-Chs. 269-279
Chapter 278 GIFTS
PART III. RESEARCH GUIDE

23-278 California Forms of Pleading and Practice--Annotated §§ 278.46through 278.59

[Reserved]

§§ 278.46[Reserved]

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Volume 23: Fraud and Deceit thru Good Faith Improver of Real Property-Chs. 269-279
Chapter 278 GIFTS
PART IV. FORMS

23-278 California Forms of Pleading and Practice--Annotated § 278.60

§ 278.60 Complaint For Declaratory Relief [Code Civ. Proc. § 1060] as to Validity of Gift--By Donee--Against Donor General Form

[1] FORM Complaint [Code Civ. Proc. § 425.10]--For Declaratory Relief [Code Civ. Proc. § 1060] as to Validity of Gift--By Donee--Against Donor--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR
_____ [*name*],	)	DECLARATORY RELIEF
Defendant.	)	
	)	
	)	

Plaintiff alleges:

1. Defendant _____[*name*] is, and at all times herein mentioned was, a resident of _____ County, California.

2. On or about _____[*date*], _____[*donor*] gave to plaintiff _____[*description of property*].

3. A dispute has arisen and a controversy exists between plaintiff and defendant relating to the validity of the gift, in that defendant claims no valid gift exists because _____[*set forth reasons*] whereas plaintiff claims there is a valid gift because _____[*set forth reasons*]. Plaintiff desires a declaration of this court concerning the validity of the gift.

WHEREFORE, plaintiff prays judgment as follows:

1. For a declaration as to the validity of the gift;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION [*Code Civ. Proc. §§ 446, 2015.5*]

I, _____[*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form above may be used to obtain declaratory relief when a donee and a donor are contesting the validity of a gift. The complaint asks that the court declare the rights of the parties over the disputed property.

[3] Declaratory Relief

When an actual controversy exists as to the respective rights and duties of two or more persons under the terms of a written instrument or contract, any one or more of those persons may commence an action for declaratory relief [*Code Civ. Proc. § 1060*]. The action may be commenced by complaint or cross-complaint [*Code Civ. Proc. § 1060*]. Any kind of written instrument may be the subject of an action for declaratory relief, except a will or trust [*Code Civ. Proc. § 1060*].

The plaintiff or cross-complainant may ask for a declaration of rights or duties, either alone or with other relief, and the court may make a binding declaration of these rights or duties, regardless of whether further relief is or could be claimed at the time [*Code Civ. Proc. § 1060*]. The court's declaration may be either affirmative or negative in form and effect, and the declaration, when granted, will have the force of a final judgment [*Code Civ. Proc. § 1060*].

An action for declaratory relief, with exceptions not relevant here, is properly commenced in the superior court as a case of unlimited jurisdiction [*Code Civ. Proc. § 1060*; *see Code Civ. Proc. §§ 85, 85.1, 86(a)(7)(A)*].

For discussion of actions for declaratory relief, see Ch. 182, *Declaratory Relief* .

[4] Verification

Verification of this complaint is not required, but verification of the complaint requires that defendant file a verified answer [*Code Civ. Proc. § 446(a)*] and precludes a general denial [*Code Civ. Proc. § 431.30*].

[5] Cross References

For a discussion of the procedures to be followed in an action for declaratory relief, see Ch. 182, *Declaratory Relief*

[6] California Legal Forms

For a discussion of the elements of and related forms for the making of gifts, see California Legal Forms, Ch. 60A, *Gifts*

[7] State Statutes

Action for declaratory relief. *Code Civ. Proc. § 1060*

Gifts defined. *Civ. Code § 1146*

Elements of an oral gift. *Civ. Code § 1147*

No revocation of gifts other than gift causa mortis. *Civ. Code § 1148*

Gift in view of impending death (gift "causa mortis"). *Prob. Code § 5702*

[8] Decisions

[a] Essential Elements of Gifts

Essential elements of a valid gift. *Bank of America v. Cottrell (1962) 201 Cal. App. 2d 361, 363, 20 Cal. Rptr. 126* ; *Connelly v. Bank of America (1956) 138 Cal. App. 2d 303, 307, 291 P.2d 501*

Essential elements for making a gift are applicable to gift inter vivos and to gift causa mortis. *Berl v. Rosenberg (1959) 169 Cal. App. 2d 125, 129-130, 336 P.2d 975*

Distinction between gift causa mortis and gift inter vivos is that former is revocable. *Berl v. Rosenberg (1959) 169 Cal. App. 2d 125, 129-130, 336 P.2d 975*

Real property can be the subject of a gift. *Gordon v. Barr (1939) 13 Cal. 2d 596, 91 P.2d 101* ; *Andreotti v. Andreotti (1964) 224 Cal. App. 2d 533, 36 Cal. Rptr. 709*

[b] Acceptance

No conscious acceptance occurred when plaintiff could not remember the circumstances surrounding the delivery of a deed to her and was not aware of the contents of the piece of paper she put away for safe-keeping. *Jones v. Jones (1960) 183 Cal. App. 2d 468, 472-473, 6 Cal. Rptr. 819*

A presumption of acceptance exists for a gift beneficial to the donee. *Kropp v. Sterling Sav. & L. Ass'n (1970) 9 Cal. App. 3d 1033, 1046, 88 Cal. Rptr. 878*

Acceptance by one or more joint tenants is acceptance for all. *Marshall v. Marshall (1956) 140 Cal. App. 2d 475, 479, 295 P.2d 131*

[c] Delivery

Gift was valid when deceased sent written letter to brokers directing that securities owned by deceased and held by brokers should be given to donee. *Berl v. Rosenberg (1959) 169 Cal. App. 2d 125, 133, 336 P.2d 975*

Actual or symbolic delivery of gifts to third persons. *Berl v. Rosenberg (1959) 169 Cal. App. 2d 125, 131, 336 P.2d 975*

Gift was incomplete when decedent told plaintiff that he was going to give plaintiff securities and was going to the bank to have them made over to plaintiff, but instead retained the shares and never made them over to plaintiff. *Rolinson v. Rolinson (1955) 132 Cal. App. 2d 387, 390, 282 P.2d 98* ; *Blonde v. Estate of Jenkins (1955) 131 Cal. App. 2d 682, 686, 281 P.2d 14*

Without delivery, gift is an unexecuted and unenforceable promise. *Blonde v. Estate of Jenkins (1955) 131 Cal. App. 2d 682, 686, 281 P.2d 14*

Examination of donor's acts and declarations to determine if delivery was made. *Bank of America v. Cottrell (1962) 201 Cal. App. 2d 361, 363, 20 Cal. Rptr. 126* ; *Marshall v. Marshall (1956) 140 Cal. App. 2d 475, 479, 295 P.2d 131*

Necessity of an unconditional delivery for a completed gift. *Blonde v. Estate of Jenkins (1955) 131 Cal. App. 2d 682, 685-686, 281 P.2d 14*

[c] Intent

Intent requires conveyance of present interest. *Estate of Franco (1975) 50 Cal. App. 3d 374, 385, 122 Cal. Rptr. 661, 123 Cal. Rptr. 458* , modified at *50 Cal. App. 3d 374, 123 Cal. Rptr. 458* ; *Brown v. Meredith (1963) 220 Cal. App. 2d 762, 765, 34 Cal. Rptr. 153*

A person incapable of forming an intent is incapable of making a gift. *Jones v. Jones (1960) 183 Cal. App. 2d 468,*

472-473, 6 Cal. Rptr. 819

Intent of donor is determined from the circumstances of the transaction and the words and acts of the donor. *Matson v. Jones (1969) 272 Cal. App. 2d 826, 829, 77 Cal. Rptr. 717*

Letter found among deceased's effects did not constitute a gift causa mortis or inter vivos since no present interest conveyed. *In re F.P. Newport Corp. (SD Cal. 1961) 194 F. Supp. 757, 761*

[d] Surrender of Dominion and Control

Surrender of dominion and control over gift is essential for a valid gift. *Rolinson v. Rolinson (1955) 132 Cal. App. 2d 387, 390, 282 P.2d 98*

Gift was incomplete when decedent gave plaintiff his bankbook but continued to make withdrawal and deposits in account at will since decedent had retained substantial dominon and control over the acount. *Estate of Alberts (1940) 38 Cal. App. 2d 42, 46-47, 100 P.2d 538*

[9] Text References

Witkin, Summary of California Law, vol. 13, *Personal Property*, §§ 124-147 (10th ed. 2005)

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PART IV. FORMS

23-278 California Forms of Pleading and Practice--Annotated § 278.61

§ 278.61 Complaint To Recover Gift Causa Mortis--By Plaintiff-Donee--General Form

[1] FORM Complaint [Code Civ. Proc. § 425.10]--To Recover Gift Causa Mortis--By Plaintiff-Donee--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], Personal Repres-	)	COMPLAINT TO RECOVER
entative of	)	PROPERTY
_____ [*name*], Deceased,	)	[Amount demanded _____
and	)	(exceeds *or* does not exceed) $10,000]
_____ [*name*],	)	[LIMITED CIVIL CASE]
Defendants.	)	
	)	

_____

Plaintiff alleges:

1. Defendant _____[*name of executor or administrator*] is the duly appointed, qualified, an acting _____[*name of executor or administrator*] of the estate of _____[*name of decedent-donor*].

[*EITHER*]

2. Defendant _____[*name of third-party defendant, e.g.,* bank *or other insitution*] is, and at all times

herein mentioned was, a corporation duly organized and existing under the laws of the State of California, _____[*state functions or duties, e.g.*, and is authorized by law to engage in the banking business, especially as a savings bank]. Its principal place of business is in _____ County, California [, in the _____ (*name*) _____ (Municipal Court *or* Judicial) District].

[*OR*]

2. Defendant _____[*name of third-party defendant*] is, and at all times herein mentioned was _____[*state relationship with decedent-donor, e.g.*, the attorney *or* stock brokers] for _____[*name of decedent-donor*] and had his/her principal place of business in _____ County, California [, in the _____ (*name*) _____ (Municipal Court *or* Judicial) District].

[*EITHER*]

3. _____ [*Specify actions of donor constituting transfer of gift to third-party defendant, e.g.*, _____ (*Name of decedent-donor*) from time to time deposited money with defendant _____ (*name of bank or other institution*) in a savings account in the aggregate sum of $_____, with interest accruing from _____ (*date*). The account was evidenced by a passbook in the name of _____ (*name of decedent-donor*) numbered _____ (*number of book*)].

[*OR*]

3. _____ [*Specify actions of donor constituting transfer of gift to third-party defendant, e.g.*, On _____ (*date*), _____ (*name of decedent-donor*) entrusted to defendant _____ (*name of third-party defendant*) 100 shares of stock].

4. On or about _____[*date*], during his/her last illness, _____[*name of decedent-donor*] gave and delivered to plaintiff a gift of _____ [*specify nature of gift, e.g.*, all the money contained in his/her savings account with _____ (*name of bank or other institution*), to wit: $_____ with interest accuring from _____ (*date*), and gave and delivered to plaintiff the passbook No. _____ (*number*) evidencing the money deposited with defendant _____ (*name of bank or other institution*)].

5. On or about _____[*date*], _____[*name of decedent-donor*] died without having revoked the gift of _____[*specify nature of gift*] given to plaintiff. At all of the times mentioned above, and prior to his/her death, decedent intended and desired, to make, and did make, a valid gift of _____[*specify nature of gift*] to plaintiff.

6. Plaintiff is now the lawful owner of _____[*specify nature of gift*] now in the possession of _____[*name of third-party defendant*]. Plaintiff is entitled to possession of the above-mentioned gift.

7. Defendant _____[*name of executor or administrator*] as _____[executor *or* administrator] of the estate of _____[*name of decedent-donor*] claims and asserts an interest in the above-mentioned _____[*specify nature of gift, e.g.*, savings account *or* shares of stock] presently in the possession of _____[*name of third-party defendant*]. Defendant _____'s [*name of*

executor or administrator] interest is adverse to the interests of plaintiff, and the claim is without any right whatever. Defendant _____[*name of executor or administrator*], as _____[executor *or* administrator], has no right, claim, or interest in the gift.

8. After the death of _____[*name of decedent-donor*] and prior to the commencement of this action, plaintiff presented a claim to defendant _____[*name of third-party defendant*] and demanded that it/he/she/they transfer the above-mentioned gift to plaintiff. Defendant _____[*name of third-party defendant*] refused to and continues to refuse to give plaintiff possession of the gift of _____[*specify nature of gift*] because of the adverse claim of defendant _____[*name of executor or administrator*] as _____[executor *or* administrtor] of the estate of _____[*name of decedent-donor*].

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For an order transferring the gift of _____[*specify nature of gift*] from the possession of _____[*name of third-party defendant*] to plaintiff;

2. For costs of suit herein incurred; and

3. For such other a further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired, See § 278.60.*]

[2] Use of Form

The form above may be used by a plaintiff-donee seeking to recover possession of property which is in the possession of a third party and which is claimed by the estate of the deceased. With appropriate modifications, this complaint may be used for recovery of any gift causa mortis of property which is claimed by the estate of the deceased and held by third party [see *Turnbull v. Thomsen (1959) 171 Cal. App. 2d 779, 784, 341 P.2d 69* (savings account held by bank); *Berl v. Rosenberg (1959) 169 Cal. App. 2d 125, 131, 336 P.2d 975* (securities held by brokers); and *Donovan v. Hibernia Sav. & L. Soc'y (1928) 90 Cal. App. 489, 499-504* (savings account held by bank)].

This form is based on the facts set forth in *Donovan v. Hibernia Sav. & L. Soc'y (1928) 90 Cal. App. 489, 265 P. 995* .

[3] Allegations

This complaint alleges:

- That plaintiff was given a gift of property by decedent-donor during his or her last illness (Paragraph 4).

- That the property is presently in the possession of a third-party defendant (Paragraph 3).

- That the executor or administrator of the estate of the deceased also claims the property (Paragraph 7).

- That the defendant has refused to give plaintiff the property because of the adverse claim of the estate (Paragraph 8).

[4] Decisions

Letter sent to brokers possessing securities of donor in the normal course of business sufficient to cause delivery of one-half interest in securities was gift to donee. *Berl v. Rosenberg (1959) 169 Cal. App. 2d 125, 133, 336 P.2d 975*

Requirements for gift causa mortis were fulfilled so that donee was entitled to contents of savings account. *Turnbull v. Thomsen (1959) 171 Cal. App. 2d 779, 784, 341 P.2d 69* ; *Donovan v. Hibernia Sav. & L. Soc'y (1928) 90 Cal. App. 489, 499-504*

[5] Cross References

See also Comments and References to § 278.60

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23-278 California Forms of Pleading and Practice--Annotated § 278.62

§ 278.62 Complaint for Restitution of Gift and for Damages--Induced by Fraud--By Donor Against Donee--General Form

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Restitution of Gift and for Damages--Induced by Fraud--By Donor--Against Donee--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR RESTITUTION
vs.	)	OF GIFT AND
_____ [*name(s)*],	)	DAMAGES
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Capacity and residence of defendant. See § 278.60, Paragraph 1.*]

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

[3. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the scope of such agency.]

4. On or about _____[*date*], in _____[*city*], _____ County, California, defendant falsely and fraudulently represented to plaintiff that _____[*set forth the statements that induced plaintiff to make gift*].

5. The representations by defendant were in fact false and the true facts were _____[*set forth true facts*].

6. When defendant made the false statements and representations, plaintiff was ignorant of their falsity but believed them to be true and relied on them. In reliance thereon, plaintiff was induced to and did give to defendant as a gift _____[*describe property which was given as a gift*].

7. When the defendant made the misrepresentations into plaintiff, he/she knew them to be false. The statements were made by defendant to induce plaintiff to give him/her the above-mentioned _____[*property which was given as a gift*].

8. As a result of the false and fraudulent representations of defendant, plaintiff was damaged in the following way; _____[*set forth facts showing how plaintiff was damaged*].

9. By reason of the facts alleged plaintiff has been damaged and suffered monetary and other losses in the sum of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For rescission of the gift of _____[*property which was given as a gift*];

2. For general damages in the sum of $_____;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 278.60.*]

[2] Use of Form

The form above is a complaint is for rescission [*Civ. Code §§ 1689, 1692, 1693*] of a gift [*Civ. Code § 1146*] induced by fraud and for damages [*Civ. Code § 3333*; see *Earl v. Saks & Co. (1951) 36 Cal. 2d 602, 609, 226 P.2d 340* (rescission of gift of fur coat)].

[3] Allegations

The complaint alleges:

- That defendant donee made false statements and representations to plaintiff donor (Paragraph 4).
- That at all times defendant donee knew that the statements and representations were false (Paragraph

7).

- That plaintiff donor was ignorant of the falsity of the statements and, in reliance on them, gave defendant donee a gift of property (Paragraph 6).

- That as a result of the false statements plaintiff donor was damaged (Paragraph 8).

[4] Decisions

Sections 26 and 39 of the Restatement on Restitutions adopted by court as basis for restitution for rescission based on fraud. *Earl v. Saks & Co. (1951) 36 Cal. 2d 602, 609, 226 P.2d 340*

Donor was entitled to restitution when donee and seller conspired to deceive him as to price of fur coat. *Earl v. Saks & Co. (1951) 36 Cal. 2d 602, 609, 226 P.2d 340*

[5] Text References

Witkin, Summary of California Law (9th ed. 1987), vol. 13, *Personal Property*, § 151 (10th ed. 2005)

[6] Cross Referencesd

See also Comments and References to § 278.60

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23-278 California Forms of Pleading and Practice--Annotated § 278.63

§ 278.63 Complaint for Restitution of Gifts Induced by Undue Influence and for an Accounting--By Representative of the Estate Against Donee

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Restitution of Gifts Induced by Undue Influence and for an Accounting--By Representative of the Estate--Against Donee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR RESTITUTION OF
vs.	)	GIFT AND
_____[*name(s)*],	)	DAMAGES AND
Defendant(s).	)	FOR ACCOUNTING
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff is the duly appointed, qualified, and acting _____[executor *or* administrator] of the estate of _____[*name of decedent-donor*].

[2. *Capacity and residence of defendant. See § 278.60, Paragraph 1.*]

[3. *Fictitious name allegation, if appropriate. See § 278.62 Paragraph 2.*]

[4. *Agency allegation, if appropriate. See see § 278.62*, Paragraph 3.]

5. At the time of his/her death, _____[*name of decedent-donor*] was approximately _____[*age*] years old and for a period of _____[*number*] of years prior to his/her death had been ill, weak, bedridden, and partially blind. He/she was incompetent to manage his/her property or take care of himself/herself and was generally in a weak and debilitated condition.

6. Defendant _____[*name of donee*], who was the _____[*relationship of donor-donee, e.g.*, nephew *or* attorney for many years] of the decedent, was at the time of the death of _____[*name decedent-donor*] approximately _____[*number*] years old and was strong in body and able in mind, and was experienced and knowledgeable in business matters because _____[*set forth supporting facts*]. _____ [*Set forth facts showing how donee gained undue influence over decedent-donor, e.g.*, About _____ (*number*) years prior to decedent's death, the defendant caused decedent to be removed to his/her home and thereafter, and until the death of decedent, kept the decedent in his/her home and would not permit any of the relatives or friends of the decedent to see the decedent except in the presence of the defendant].

7. _____ [*Set forth description of property owned by decedent-donor, if known, which is the subject of this action, e.g.*, At or about the time of the removal of _____ (*name of decedent-donor*) to the home of defendant, he/she had on deposit in one or more banks a large sum of money, the exact amount of which is unknown to plaintiff, but is known to defendant and which, plaintiff is informed and believes and on such information and belief alleges to be $_____ more or less; the name of the bank or banks in which money was deposited is unknown to plaintiff but is known to defendant. In addition, plaintiff is informed and believes, and on information and belief alleges, that at or about the time of the above-mentioned removal, decedent also owned personal property of _____ (*set forth description of personal property*) the exact nature and quantities of which are unknown to plaintiff but are known to defendant.]

8. During the period beginning approximately on or about _____[*date*], up until the death of _____[*name of decedent-donor*], the defendant dominated and controlled the decedent by reason of the decedent's feeble physical and mental condition, and secured the decedent's trust and confidence and influenced his/her mind and actions to such an extent that the decedent, during the above-mentioned period, did whatever defendant instructed him/her to do. Defendant, by taking advantage of the trust and confidence of decedent, induced the decedent to transfer, assign, and make over to defendant _____[*specify property, if known, e.g.*, all of decedent's bank accounts and the contents of decedent's safety deposit boxes]. Defendant exerted undue influence over decedent in order to obtain the above-mentioned properties by _____[*set forth supporting facts, e.g.*, substituting his/her will for the will of decedent until decedent made, executed, and delivered to defendant a power of attorney, wherein the decedent purported to appoint defendant his/her attorney in fact, to act for him/her in all matters of business and particularly to act for him/her with reference to the withdrawal, transfer, deposit, and handling of all money and matters connected with the bank account in which the money was deposited. Therafter and until the death of decedent, defendant, acting under the authority of the power of attorney, deposited and withdrew money in the bank accounts at will and had full control over the money without any further action whatsoever on the part of the decedent. Defendant also had full power to manage, control, and dispose of the above-mentioned personal property of decedent].

9. All the above-mentioned transfers of property were made while defendant dominated and controlled the decedent and while the decedent was ill, weak, bedridden, partially blind, and mentally incompetent.

10. Demand has been made by plaintiff on defendant for full and complete accounting and for delivery to plaintiff, as _____[executor *or* administrator] of the estate of _____[*name of decedent-donor*], of all property to decedent, but defendant has failed and refused, and still fails and refuses, to make any kind of accounting to plaintiff, or to deliver to plaintiff any of the property of the decedent, all to plaintiff's damage in the sum of $_____.

11. Defendant claims and asserts an interest in the property adverse to that of plaintiff in that he/she claims the property came into his/her possession by way of gift from decedent. The claim of defendant is without any right whatsoever, and defendant does not have any estate, right, title, or interest in the property, money, or any part thereof.

WHEREFORE, plaintiff prays judgment as follows:

1. For a full and complete accounting of any and all of defendant's transactions with the money [and property] of decedent;

2. For judgment against and restitution by defendant for any amount which in the accounting shall be found to be due the estate;

3. For damages in the sum of $_____;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 278.60.*]

[2] Use of Form

The form above may be used by the representative of an estate of a donor to recover gifts from a donee which were procured by undue influence [see *Estate of Bliss (1962) 199 Cal. App. 2d 630, 640-641, 18 Cal. Rptr. 821]* .

[3] Allegations

This complaint alleges:

- That plaintiff is the representative of the estate of the decedent (Paragraph 1).
- That decedent was elderly, ill, and incompetent to manage his or her property (Paragraph 5).
- That defendant donee was in a confidential relationship with decedent (Paragraph 6).
- That while under defendant's influence, decedent gave all of his or her money and property to defendant (Paragraph 8).
- That decedent's gifts were the result of undue influence (Paragraph 8).

[4] Decisions

Restitution based on rescission is available to recover gift obtained through undue influence. *Estate of Bliss (1962) 199 Cal. App. 2d 630, 639-640, 18 Cal. Rptr. 821* al. Rptr. 821; *McDonald v. Hewlett (1951) 102 Cal. App. 2d 680, 686, 228 P.2d 83*

Three elements leading to presumption of undue influence are (1) confidential relationship, (2) undue profit by gift, and (3) active participation in the procurement of the gift. *Estate of Bliss (1962) 199 Cal. App. 2d 630, 639-640, 18 Cal. Rptr. 821*

Fact of family relationship is insufficient to prove confidential relationship. *Peters v. Papoulacos (1963) 218 Cal. App. 2d 791, 794, 32 Cal. Rptr. 689*

Nurse-patient relationship and unusual gift of $76,000, and donee's active participation in obtaining decedent's securities from safe deposit box led to presumption of undue influence. *Estate of Bliss (1962) 199 Cal. App. 2d 630, 640-641, 18 Cal. Rptr. 821*

Presumption of undue influence is rebuttable by donee. *Church of Merciful Saviour v. Volunteers of America (1960) 184 Cal. App. 2d 851, 861, 8 Cal. Rptr. 48* ; *Camperi v. Chiechi (1955) 134 Cal. App. 2d 485, 504, 286 P.2d 399* ; *Pfingst v. Goetting (1950) 96 Cal. App. 2d 293, 297, 215 P.2d 93*

[5] Text References

Witkin, Summary of California Law (9th ed), vol. 13, *Personal Property*, § 152 (10th ed. 2005)

[6] Cross References

See also Comments and References to §§ 278.60 and 278.62

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Chapter 278 GIFTS
PART IV. FORMS

23-278 California Forms of Pleading and Practice--Annotated § 278.64

§ 278.64 Complaint for Removal of Custodian [Prob. Code § 3918(f)] and for Accounting [Prob. Code § 3919] Under Uniform Transfers to Minors Act [Prob. Code §§ 3900-3925]--By Minor [Fam. Code § 6601] and Guardian

[1] FORM Complaint for Removal of Custodian [Prob. Code § 3918(f)] and for Accounting [Prob. Code § 3919] Under Uniform Transfers to Minors Act [Prob. Code §§ 3900-3925]--By Minor [Fam. Code § 6601] and Guardian

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT BY MINOR FOR REMOVAL OF
vs.	)	CUSTODIAN AND
_____ [*name(s)*],	)	ACCOUNTING
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff _____[*name*], a minor, through his/her guardian [ad litem], alleges:

1. Plaintiff _____[*name*] is a minor child of the age of _____ years and at all times hereinafter mentioned was of the age of _____ years.

[*EITHER*]

2. [On _____ (*date*), _____ (*name*) was, by order duly made in the above-entitled court, appointed guardian of the person of plaintiff _____ (*name*), and ever since has been, and now is,

the guardian of plaintiff.]

[*OR*]

2. [For purposes of this action, _____ (*name*) was duly appointed by order of the above-entitled court, and now is, guardian ad litem of plaintiff _____ (*name*).]

3. [*Capacity and residence of defendant. See § 278.60. Paragraph 1.*]

4. Defendant is the custodian of property belonging to plaintiff. As custodian for plaintiff, defendant has the duty to manage and care for _____ [*describe property, e.g.*, stocks, bonds, and securities *or* real property consisting of an apartment building located at _____ (*address*), _____ (*city*), _____ County, California] which was given to plaintiff and bestowed in the care and management of defendant pursuant to the provisions of the Uniform Transfers to Minors Act, *Sections 3900-3925 of the Probate Code.*

5. Defendant has violated his/her fiduciary duty to plaintiff and is unfit to care for and manage the above-mentioned property on plaintiff's behalf because _____[*set forth reasons*].

6. Upon removal of defendant as custodian, plaintiff will petition the Court to appoint a successor custodian to fulfill the duties of custodian of plaintiff's property.

WHEREFORE, plaintiff prays judgment as follows:

1. For the removal of defendant as custodian of the property of plaintiff;

2. For an order compelling defendant to account fully for all custodial property and surcharging him/her for all amounts found to be due to plaintiff;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court deems proper.
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired, See § 278.60.*]

[2] Use of Form

The form above is for use by a minor who has attained the age of 14 or by a guardian of the person of a minor to obtain the removal of a custodian for cause and for an accounting under the California Uniform Transfers to Minors Act [*Prob. Code §§ 3918(f), 3919*]. With minor modifications, the form may be used by other persons authorized to bring this type of action including a transferor or his or her representative, an adult member of the minor's family, and the conservator of the minor [*Prob. Code § 3918(f)*]. For further discussion, see *§ 278.21[2]*.

[3] Allegations

This complaint alleges:

- The name and age of the minor to whom the custodial property belongs (Paragraph 1) [*see Prob. Code § 3918(f)*].

- Either that a named party is the guardian of the person of the minor and the date that such party was appointed, or that a named party was duly appointed guardian ad litum of the minor plaintiff (Paragraph 2) [*see Fam. Code § 6601*; *Prob. Code § 3918(f)*].

- The capacity and residence of the defendant (Paragraph 3) [*see Prob. Code § 3921* (venue)].

- That defendant is custodian of named property transfered to the minor pursuant to the Uniform Transfers to Minors Act (Paragraph 4).

- That defendant violated his or her fiduciary duty as custodian of the minor's property by committing certain specified acts (Paragraph 5) [*see Prob. Code § 3912*].

- That on removal of the defendant as custodian, plaintiff will petition the court to appoint a successor custodian (Paragraph 6).

[4] Notice of Hearing to Remove Custodian

At least 15 days before the hearing on a petition to remove a custodian, the petitioner must serve notice by mail or personal delivery on the minor, the minor's parent or parents, and the transferor [*Prob. Code § 3918(g)*].

[5] State Statutes

Uniform Transfers to Minors Act. *Prob. Code §§ 3900-3925*

Powers, duties, and responsibilities of custodian. *Prob. Code §§ 3912, 3913*

Compensation of custodian. *Prob. Code § 3915*

Protection for third parties dealing with custodian. *Prob. Code § 3917*

Minor's right to petition for accounting by custodian. *Prob. Code § 3919*

Venue. *Prob. Code § 3921*

[6] Text References

Witkin, Summary of California Law, vol. 13, *Personal Property*, §§ 139-147 (10th ed. 2005)

[7] Cross Reference s

For a discussion of the law regarding the appointment of a guardian ad litum for a minor, see Ch. 291, *Guardians ad Litem*

See also Comments and References to § 278.60

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23-278 California Forms of Pleading and Practice--Annotated § 278.65

§ 278.65 Complaint By Donor Against Donee for Recovery of Gifts Made in Contemplation of Marriage [Civ. Code § 1590]

[1] FORM Complaint By Donor Against Donee for Recovery of Gifts Made in Contemplation of Marriage [Civ. Code § 1590]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR
Plaintiff,	)	POSSESSION OF GIFT[S]
vs.	)	MADE IN CONTEMPLATION
_____ [*name*],	)	OF MARRIAGE AND FOR
Defendant.	)	DAMAGES
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Capacity and residence of defendant. See § 278.60, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 278.60, Paragraph 2.*]

3. On or about _____[*date*], at _____[*city*], California, plaintiff and defendant mutually engaged to marry one another.

4. Thereafter, on or about _____[*date*], on the _____[basis *or* assumption] that a marriage would take place between plaintiff and defendant, plaintiff made a gift to defendant of _____ [*describe or list each item of property claimed by plaintiff and its value or itemize money given by plaintiff, e.g.*, a diamond engagement ring, weighing _____ (*number*) carats and having a value of (approximately) $_____]. Plaintiff's gift[s] of the _____[money *or* property] described above was accepted by defendant as a gift made in contemplation of the parties' marriage.

[*EITHER*]

5. On or about _____[*date*], defendant refused to enter into the contemplated marriage with plaintiff by _____[*specify acts of donee refuting contemplated marriage, e.g.*, informing plaintiff that he/she no longer desired to continue the engagement and regarded the marriage plans as terminated].

[*OR*]

5. On or about _____[*date*], plaintiff and defendant gave up the contemplated marriage by their mutual consent by _____[*specify acts refuting contemplated marriage, e.g.*, agreeing never to see one another again].

[*CONTINUE*]

6. Thereafter [, on _____ (*date*)], plaintiff demanded that defendant return the gift[s] of _____[money *or* property] described above. Defendant _____[refused *or* failed] to return the _____[money *or* property] and continues to withhold possession of it from plaintiff in violation of plaintiff's right to immediate and exclusive possession of it.

7. As a proximate result of defendant's wrongful possession and detention of the gift[s] of _____[money *or* property] described above, plaintiff has suffered the loss of the use and enjoyment of his/her _____[money *or* property] to his/her damage in the sum of $_____.

WHEREFORE, plaintiff prays judgment as follows:

[1. For the possession of the gift(s) of property described above or, if the property cannot be delivered, for its value (in the sum of $_____);]

2. For damages in the sum of $_____;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 278.60.*]

[2] Use of Form

The form above is for use by a donor of a gift of money or property made in contemplation of marriage to recover the money or property from the donee when the marriage plans are terminated by the donee or by both parties [*see Civ. Code § 1590*].

Civ. Code § 1590 provides that a donor may recover gifts made in contemplation of marriage when the donee refuses to enter into the marriage as contemplated as well as when the parties mutually consent to give up their marriage plans. Refusal of the donee to enter into a marriage, which some courts have considered as a breach of a marriage contract [*see, e.g., Simonian v. Donoian (1950) 96 Cal. App. 2d 259, 262, 215 P.2d 119]* may be shown by any words or conduct which give rise to the inference that the donee does not intend to consummate the wedding as planned. Thus, there need not be a verbal or written refusal to marry. For instance, the cessation of intimate communications and visits without explanation is sufficient to show a refusal [*Simonian v. Donoian (1950) 96 Cal. App. 2d 259, 261, 215 P.2d 119]* .

[3] Cross References

For discussion and forms relating to actions for the possession of personal property, see Ch. 119, *Claim and Delivery*

For discussion and forms relating to breaches of contract generally, see Ch. 140, *Contracts*

For discussion and forms relating to antenuptual agreements and marital obligations, see Ch. 359, *Marriage*

[3] State Statutes

Donor's action to recover gifts of property or money from donee when gifts were made in contemplation of marriage between donor and donee. *Civ. Code § 1590*

[4] Decisions

Time limitations on length of engagement is immaterial in action under *Civ. Code § 1590*. *Shaw v. Shaw (1964) 227 Cal. App. 2d 159, 165, 38 Cal. Rptr. 520*

Civ. Code § 1590 authorized action to recover gifts by donor who is a party to the contemplated marriage but not by donors who are not parties to the contemplated marriage. *Simonian v. Donoian (1950) 96 Cal. App. 2d 259, 262, 215 P.2d 119*

Resulting trust was imposed on dwelling, furnishings, cash, and engagement ring given by married man, who was separated from his wife, to another woman in contemplation of their eventual marriage. *Norman v. Burks (1949) 93 Cal. App. 2d 687, 689-690, 209 P.2d 815*

[5] Law Reviews

Note, "Gifts: Recovery of Engagement Gifts: *California Civil Code Section 1590*," *38 Cal. L. Rev. 529 (1950)*

[6] Cross References

For discussion and forms relating to actions for the possession of personal property, see Ch. 119, *Claim and Delivery*

For discussion and forms relating to breaches of contract generally, see Ch. 140, *Contracts*

For discussion and forms relating to antenuptual agreements and marital obligations, see Ch. 359, *Marriage*

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§ 279.syn Synopsis to Chapter 279: GOOD FAITH IMPROVER OF REAL PROPERTY

§ 279.01 Scope

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§§ 279.03through 279.09 [Reserved]

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§ 279.11 "Good Faith Improver" and "Person" Defined

§ 279.12 Alternative Actions Distinguished

[1] Judicial Remedy Is Prohibited When Related Statutory Remedy Would Result in Substantial Justice

[a] In General

[b] Right to Setoff

[c] Right to Remove Improvements

[i] Basic Right and Related Limitations

[ii] Defendants; Lis Pendens; Costs

[iii] Interlocutory Judgment

[iv] Protection of Lienholders

[d] Comparison of Related Statutory Remedies

[2] Adverse Possession and Easements by Prescription

§ 279.13 Limitations on Applicability of Judicial Remedy

[1] Encroachments

[2] Public Entities

§ 279.14 Jurisdiction

§ 279.15 Statute of Limitations

§ 279.16 Equitable Jurisdiction of Court

§ 279.17 Relief Available

[1] Discretion of Court

[2] Possible Remedies

§ 279.18 Drafting Considerations

[1] Complaint

[2] Answer or Cross Complaint

§ 279.19 No Right to Jury Trial

§ 279.20 Burden of Proof

§ 279.21 Factors Considered

[1] Negligence of Good Faith Improver

[2] Expenses Incurred by Owner

[3] Owner's Plans Respecting Property

[4] Continuation of Work of Improvement After Knowledge of Trespass

§ 279.22 Availability of Lis Pendens

§§ 279.23through 279.29 [Reserved]

§ 279.30 Related Matthew Bender Publications

§ 279.31 State Statutes

§ 279.32 Decisions

[1] Good Faith Improver

[2] Selection of Appropriate Relief

[3] Court as Trier of Fact

[4] Possession of Mistaken Occupier Adverse

§ 279.33 Text References

§§ 279.34through 279.39 [Reserved]

§ 279.40 Complaint for Equitable Relief [Code Civ. Proc. § 871.3]--By Good Faith Improver of Real Property Against Owner

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction

[6] Venue

[7] Cross References

§§ 279.41through 279.49 [Reserved]

§ 279.50 Complaint to Remove Improvement Mistakenly Affixed to Land of Another [Civ. Code § 1013.5]--Mistake of Fact as to Location of Boundary

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction and Venue

[6] Cross References

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23-279 California Forms of Pleading and Practice--Annotated § 279.01

§ 279.01 Scope

This chapter focuses on the judicial remedies available to a "good faith improver" who has improved real property under the good faith but mistaken belief that he or she owned the land. It also considers the following related remedies: (1) the right of a good faith improver to a setoff; and (2) the right to remove improvements affixed on the land of another on payment of related damages.

The chapter includes a complaint for equitable relief by a good faith improver [*see § 279.40*] and a complaint to enforce the right to remove an improvement mistakenly affixed to the land of another [*see § 279.50*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefReal Property LawFixtures & ImprovementsGeneral Overview

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23-279 California Forms of Pleading and Practice--Annotated § 279.02

§ 279.02 Cross References

- For discussion and forms relating to litigation between adjoining landowners over property issues, see Ch. 11, *Adjoining Landowners* .

- For discussion and forms for use in actions to establish title by adverse possession, see Ch. 13, *Adverse Possession* .

- For discussion and forms for use in moving for an order transferring a case from a court lacking to a court having subject matter jurisdiction, see Ch. 324, *Jurisdiction: Subject Matter* .

- For discussion and forms for use in recording a lis pendens, see Ch. 348, *Lis Pendens* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewReal Property LawAdjoining LandownersGeneral OverviewReal Property LawAdverse PossessionGeneral OverviewReal Property LawPriorities & RecordingLis Pendens

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[Reserved]

§§ 279.03[Reserved]

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23-279 California Forms of Pleading and Practice--Annotated § 279.10

§ 279.10 Governing Statutes

An action or cross action for judicial relief by a "good faith improver" is authorized and governed by *Code Civ. Proc. §§ 871.1-871.7*. The time within which the action must be commenced is prescribed by *Code Civ. Proc. § 340(e)*. The right of a good faith improver to a setoff against damages claimed by the property owner for the withholding of the property is set forth in *Code Civ. Proc. § 741*. Finally, *Civ. Code § 1013.5* governs the right to remove improvements affixed to the land of another on the payment of related damages.

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23-279 California Forms of Pleading and Practice--Annotated § 279.11

§ 279.11 "Good Faith Improver" and "Person" Defined

"Good faith improver," as used in *Code Civ. Proc. § 871.1 et seq.*, means a person who makes an improvement to land in good faith and under the erroneous belief, because of a mistake of law or fact, that he or she is the owner of the land [*Code Civ. Proc. § 871.1(a)*; *see Gilardi v. Hallam (1981) 30 Cal. 3d 317, 325, 178 Cal. Rptr. 624, 636 P.2d 588* ; *Powell v. Mayo (1981) 123 Cal. App. 3d 994, 997-998, 177 Cal. Rptr. 66]* . The term also includes a successor in interest of a good faith improver [*Code Civ. Proc. § 871.1(b)*]. The definition is limited to a person who believes that he or she is the owner of the land, and does not include licensees, tenants, and conditional vendors of chattels [*see* Law Revision Commission Comment to *Code Civ. Proc. § 871.1*].

The word "person," as used in *Code Civ. Proc. § 871.1 et seq.*, includes a corporation and an unincorporated association, as well as a natural person [*see Code Civ. Proc. §§ 17* (first paragraph), 871.2; *see also* Law Revision Commission Comment to *Code Civ. Proc. § 871.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFixtures & ImprovementsGeneral Overview

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§ 279.12 Alternative Actions Distinguished

[1] Judicial Remedy Is Prohibited When Related Statutory Remedy Would Result in Substantial Justice

[a] In General

The court may not grant relief under *Code Civ. Proc. § 871.1 et seq.* if it determines that substantial justice to the parties under the circumstances of the particular case would result by the good faith improver's exercise of either of the following rights [*Code Civ. Proc. § 871.4*]:

- The right of setoff under *Code Civ. Proc. § 741* [*see* [b], *below*].
- The right to remove the improvement under *Civ. Code § 1013.5* [*see* [c], *below*].

In determining whether removal of the improvement would result in substantial justice to the parties under the circumstances of the particular case, the court must take into consideration any plans the owner of the land may have for the use or development of the land on which the improvement was made and the owner's need for the land on which the improvement was made in connection with the use or development of other property owned by the owner [*Code Civ. Proc. § 871.4*; *see Gilardi v. Hallam (1981) 30 Cal. 3d 317, 325, 178 Cal. Rptr. 624, 636 P.2d 588]* .

[b] Right to Setoff

In an action for the recovery of property, when damages are claimed for withholding the property recovered, and improvements have been made on the property by the defendant or his or her predecessor as a good faith improver, the amount by which the improvements enhance the value of the land must be allowed as a setoff against the damages. For these purposes, "good faith improver" has the meaning given that term by *Code Civ. Proc. § 871.1* [*Code Civ. Proc. § 741*; *see § 279.11*].

[c] Right to Remove Improvements

[i] Basic Right and Related Limitations

When any person affixes improvements to the land of another, the person (or his or her successor in interest) has the right to remove the improvements, provided both of the following are satisfied [*Civ. Code § 1013.5(a)*]:

- The person must have affixed the improvements while acting in good faith and erroneously believing (because of a mistake either of law or fact) that he or she had a right to affix the improvements.

- The person (or his or her successor in interest) must pay the owner of the land, and any other person having an interest in the land who acquired the interest for value after the commencement of the work of improvement and in reliance on that work, as their interests appear, for all of their damages proximately resulting from the affixing and removal of the improvements.

This rule does not affect or qualify the law regarding the circumstances under which a court of equity will refuse to compel removal of an encroachment [*Civ. Code § 1013.5(e)*; *see* Ch. 11, *Adjoining Landowners*].

For discussion and a complaint to remove an improvement mistakenly affixed to the land of another, see *§ 279.50*.

[ii] Defendants; Lis Pendens; Costs

In any action brought to enforce the right to remove improvements under *Civ. Code § 1013.5(a)*, the following requirements apply [*Civ. Code § 1013.5(b)*]:

- The owner of the land and encumbrancers of record must be named as defendants.

- A notice of pendency of the action must be recorded before trial.

- The owner of the land will be entitled to recover his or her costs of suit and a reasonable attorney's fee to be fixed by the court.

Code Civ. Proc. § 871.5 plainly provides that a party granted relief as a good faith improver must protect the landowner from *any* pecuniary loss incurred in litigating the matter, including attorneys' fees and costs "incurred in the action in which relief" as a good faith improver is sought. Therefore, the statute does not limit the landowner's recovery to losses incurred in litigating the cross-complaint of the party seeking relief as a good faith improver. Rather, the landowner must also be reimbursed for any expenses incurred in bringing the action that precipitated the cross-complaint [*Tremper v. Quinones (2004) 115 Cal. App. 4th 944, 949, 9 Cal. Rptr. 3d 672]* .

[iii] Interlocutory Judgment

If it appears to the court that the total amount of damages cannot readily be ascertained before the removal of the improvements, or that it is otherwise in the interests of justice, the court may order an interlocutory judgment authorizing the removal of the improvements, provided the plaintiff first pays into court the estimated total damages, as found by the court or as stipulated [*Civ. Code § 1013.5(c)*].

[iv] Protection of Lienholders

If the court finds that the holder of any lien on the property acquired his or her lien in good faith and for value after the commencement of the work of improvement and in reliance on that work, or that as a result of the making or affixing of the improvements there is any lien against the property under *Cal. Const., art. XIV, § 3* (mechanics' liens), the final or interlocutory judgment authorizing removal cannot be given unless the holder of each lien consents to the removal of the improvements. This consent must be in writing and filed with the court [*Civ. Code § 1013.5(d)*].

[d] Comparison of Related Statutory Remedies

Unlike *Code Civ. Proc. § 741* and Civ. Code § 1013.5, Code Civ. Proc. § 871.5 vests the court with broad equitable powers to fashion a remedy consistent with substantial justice to the parties [*see §§ 279.16, 279.17*]. However, unlike *Civ. Code § 1013.5* but like *Code Civ. Proc. § 741*, relief under *Code Civ. Proc. § 871.1 et seq.* is available only to those improvers who acted under the good faith belief that they owned the land in question [*see Civ. Code § 1013.5(a)*; *Code Civ. Proc. §§ 741(a), 871.1(a)*; *Gilardi v. Hallam (1981) 30 Cal. 3d 317, 325, 178 Cal. Rptr. 624, 636 P.2d 588* ; *Okuda v. Superior Court (1983) 144 Cal. App. 3d 135, 139, 192 Cal. Rptr. 388* ; *Southern Pac. Transportation Co. v. Superior Court (1976) 58 Cal. App. 3d 433, 436-437, 129 Cal. Rptr. 912]* .

[2] Adverse Possession and Easements by Prescription

An action under *Code Civ. Proc. § 871.1 et seq.* is to be distinguished from an action by an adverse possessor or user to secure title to the land or to an easement. The elements necessary to establish title by adverse possession are payment of the taxes levied and assessed on the land, and open and notorious use or possession for the prescribed period [*see* Code *Civ. Proc. § 325*]. The possession or use may have been intentional or, like the good faith improver statutes [*see Code Civ. Proc. § 871.1(a)*], by mistake, but it must have been continuous and uninterrupted, hostile to the true owner, and under a claim of title. A prescriptive easement requires establishment of the same elements except that payment of taxes is required only if the easement has been separately assessed [*Gilardi v. Hallam (1981) 30 Cal. 3d 317, 321-322, 178 Cal. Rptr. 624, 636 P.2d 588]* .

When enacting the good faith improver statutes, the Legislature did not repeal or substantially modify the statutes governing adverse possession. Thus, there is nothing to indicate a legislative intent that the good faith improver statutes were intended to supplant or modify the adverse possession doctrine. Unlike the adverse possession doctrine, *Code Civ. Proc. § 871.1 et seq.* are not predicated on length of occupancy. Insofar as the policy set forth in these statutes is predicated on mistake by the occupant, they reflect an intent to grant relief to the mistaken occupier, not to repudiate or reduce his or her rights under the adverse possession doctrine. While some of the equities reflected by *Code Civ. Proc. § 871.1 et seq.* underlie California's rule protecting the mistaken adverse possession, the legislative recognition of those equities points to adherence to the mistake doctrine, first enunciated in *Woodward v. Faris (1895) 109 Cal. 12, 16-17, 41 P. 781* and affirmed in *Sorensen v. Costa (1948) 32 Cal. 2d 453, 459-461, 196 P.2d 900* , as it applies to the doctrine of adverse possession. Hence, the possession of an occupier who enters land mistakenly believing that he or she is the owner is adverse unless it is established by substantial evidence that he or she recognized the potential claim of the record owner and expressly or impliedly reflected an intent to claim the disputed land only if record title was determined in his or her favor [*Gilardi v. Hallam (1981) 30 Cal. 3d 317, 325-326, 178 Cal. Rptr. 624, 636 P.2d 588* (disapproving any implication to the contrary in *Berry v. Sbragia (1978) 76 Cal. App. 3d 876, 880, 143 Cal. Rptr. 318*)]. For further discussion of adverse possession and prescriptive easements, see Ch. 13, *Adverse Possession* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesLis PendensGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityLiensReal Property LawAdverse PossessionGeneral OverviewReal Property LawFixtures & ImprovementsGeneral Overview

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§ 279.13 Limitations on Applicability of Judicial Remedy

[1] Encroachments

Code Civ. Proc. § 871.1 et seq. do not affect the rules of law that determine the relief, if any, to be granted when a person constructs on his or her own land an improvement that encroaches on adjoining land [*Code Civ. Proc. § 871.6*]. *Code Civ. Proc. § 871.6* was enacted because other provisions of law empower the courts to deal appropriately with encroachments; thus, there is no necessity for relief under *Code Civ. Proc. § 871.1 et seq.* in encroachment cases [*see* Law Revision Commission Comment to *Code Civ. Proc. § 871.6*]. For complete coverage of the remedies for encroachment, see *Ch. 11, Adjoining Landowners, §§ 11.20* et seq. (discussion) and 11.70 et seq. (forms).

[2] Public Entities

Code Civ. Proc. § 871.1 et seq. do not apply when (1) the improver is a public entity, or (2) the improvement is made to land owned or possessed by a public entity [*Code Civ. Proc. § 871.7(a)*]. The term "public entity," as used in *Code Civ. Proc. § 871.7*, includes the United States, a state, county, city and county, city, district, public authority, public agency, or any other political subdivision or a public corporation [*Code Civ. Proc. § 871.7(a)*].

In addition, *Code Civ. Proc. § 871.1 et seq.* do not apply when the owner of the land on which the improvement is constructed has appropriated the land to a public use and could have acquired the land for that use by exercising the power of eminent domain [*Code Civ. Proc. § 871.7(b)*]. The purpose of *Code Civ. Proc. § 871.7* is to make sure that *Code Civ. Proc. § 871.1 et seq.* would have no effect on the law relating to eminent domain, inverse condemnation, and encroachments on public lands [*see* Legislative Committee Comment (Assembly) to *Code Civ. Proc. § 871.7*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEminent Domain ProceedingsGeneral OverviewReal Property LawAdjoining LandownersEncroachmentsReal Property LawEminent Domain ProceedingsConstitutional Limits & RightsPublic UseReal Property LawFixtures & ImprovementsGeneral Overview

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§ 279.14 Jurisdiction

An action for relief under *Code Civ. Proc. § 871.1 et seq.* will be treated as an unlimited civil case, regardless of the amount in controversy and regardless of whether a defendant cross-complains for relief. Any other case in which a defendant cross-complains for relief under *Code Civ. Proc. § 871.1 et seq.* must be treated as a limited civil case if the cross-complaint is defensive and the case otherwise satisfies the amount in controversy and other requirements under *Code Civ. Proc. § 85* (governing action or special proceeding treated as limited civil case) [*Code Civ. Proc. § 871.3(a)*; *see* Ch. 324, *Jurisdiction: Subject Matter*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewReal Property LawFixtures & ImprovementsGeneral Overview

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§ 279.15 Statute of Limitations

An action by a good faith improver of real property for relief under *Code Civ. Proc. § 871.1 et seq.* must be commenced within one year from the date on which the good faith improver discovers that he or she is not the owner of the land on which the improvements have been made [*Code Civ. Proc. § 340(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawFixtures & ImprovementsGeneral Overview

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23-279 California Forms of Pleading and Practice--Annotated § 279.16

§ 279.16 Equitable Jurisdiction of Court

Subject to *Code Civ. Proc. § 871.4* [*see § 279.12[1][a]*], the court may effect an adjustment of the rights, equities, and interests of the good faith improver, the owner of the land, and other interested parties (including, but not limited to, lessees, lienholders, and encumbrancers) as is consistent with substantial justice to the parties under the circumstances of the particular case [*Code Civ. Proc. § 871.5*; *see* Powell v. Mayo (1981) 123 Cal. App. 3d 994, 998, *123 Cal. App. 3d 994, 177 Cal. Rptr. 66]* . This provision vests the court with broad equitable jurisdiction to effect an adjustment of the rights, equities, and interests of the parties consistent with substantial justice [*Okuda v. Superior Court (1983) 144 Cal. App. 3d 135, 139, 192 Cal. Rptr. 388* ; *see* Legislative Committee Comment (Assembly) to *Code Civ. Proc. § 871.5*].

The fact that the plaintiff might seek damages as well as equitable relief in such a case does not dilute the court's broad equitable jurisdiction under *Code Civ. Proc. § 871.5* [*Okuda v. Superior Court (1983) 144 Cal. App. 3d 135, 140-141, 192 Cal. Rptr. 388]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefReal Property LawFixtures & ImprovementsGeneral Overview

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§ 279.17 Relief Available

[1] Discretion of Court

Under *Code Civ. Proc. § 871.5*, discussed in *§ 279.16*, the court has considerable discretion to select appropriate relief from the full range of equitable and legal remedies [*Southern Pac. Transportation Co. v. Superior Court (1976) 58 Cal. App. 3d 433, 437, 129 Cal. Rptr. 912]* . The relief granted must protect the owner of the land on which the improvement was constructed against any pecuniary loss, but avoid, insofar as possible, enriching him or her unjustly at the expense of the good faith improver [*Code Civ. Proc. § 871.5*; *see Powell v. Mayo (1981) 123 Cal. App. 3d 994, 998, 177 Cal. Rptr. 66]* .

[2] Possible Remedies

In commenting on *Code Civ. Proc. § 871.5*, discussed in *§ 279.16*, the California Law Revision Commission provided several examples of appropriate remedies. For example, if the landowner desires the land as improved, the court might order, as the trial court did in *Taliaferro v. Colasso (1956) 139 Cal. App. 2d 903, 294 P.2d 774* , that title be quieted in the owner on condition that he or she pay to the improver the value of the improvements or some lesser amount. On the other hand, when the landowner does not desire the land as improved and removal of the improvement is not economically possible, the court might order that title be quieted in the improver on the condition that he or she pay to the landowner the value of the unimproved land, or, in the alternative, that a judicial sale be made. It would also be appropriate for the court to credit the landowner with the value of the improver's use and occupation of the land and for the expenses the landowner has incurred in the action to resolve the matter. Under appropriate circumstances, the judgment might provide for deferred payments and for an equitable lien to secure the payments. The situation of the landowner, however, might require a completely different form of relief. The court should deny the improver any relief in a case where no remedy can be devised that can fully protect the landowner against pecuniary loss [8 Cal. L. Revision Comm'n. Reports 1373, 1383 (1967); for a more detailed discussion of alternatives available to the court in administering *Code Civ. Proc. § 871.5*, the foregoing source refers to Merryman, *Improving the Lot of the Trespassing Improver, 11 Stan. L. Rev. 456, 483*-489 (1959), reprinted in 8 Cal. L. Revision Comm'n. Reports 801, 848-854 (1967)].

It has further been pointed out that the legislative committee comment to *Code Civ. Proc. § 871.5* provides some insight

into the kinds of relief contemplated by the statute's authors [*Okuda v. Superior Court (1983) 144 Cal. App. 3d 135, 139, 192 Cal. Rptr. 388]* . The legislative comment parallels to some extent the California Law Revision Commission's comment, *above*. The legislative committee comment, as quoted in *Okuda*, stated that, under the section, the judgment might permit the landowner to make installment payments and give the improver an equitable lien to secure the payments. On the other hand, when the landowner does not desire the land as improved and removal of the improvement is not economically possible, the court might order that title be quieted in the improver on the condition that he or she pay to the landowner not less than the value of the unimproved land for its highest and best use at the time of trial or, in the alternative, that a judicial sale be made and the landowner be paid not less than such amount [*Okuda v. Superior Court (1983) 144 Cal. App. 3d 135, 139, 192 Cal. Rptr. 388* ; for full text, see Legislative Committee Comment (Assembly) to *Code Civ. Proc. § 871.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefCivil ProcedureRemediesDamagesCompensatory DamagesReal Property LawFixtures & ImprovementsGeneral OverviewReal Property LawNonmortgage LiensEquitable Liens

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23-279 California Forms of Pleading and Practice--Annotated § 279.18

§ 279.18 Drafting Considerations

[1] Complaint

By filing an action under *Code Civ. Proc. § 871.3*, a plaintiff invokes the equitable powers of the court. That is, the plaintiff invites the court to exercise its powers under *Code Civ. Proc. § 871.5* to "effect an adjustment of the rights, equities, and interests" of the parties as is consistent with substantial justice [*see § 279.15*]. Because of the broad powers of the courts and the wide range of judicial relief available, counsel for plaintiff should, in drafting the complaint, include in the prayer a request for the specific relief sought by the plaintiff, and in the body of the complaint allege the facts that would support the award of that relief [*see § 279.40*].

[2] Answer or Cross Complaint

The defendant may desire to do no more than merely deny the material allegations of the complaint or allege new matter constituting a defense that is not alleged in the complaint [*see Code Civ. Proc. § 431.30(b)(2)*]. But if he or she wishes to seek alternative affirmative relief, such as damages for trespass, counsel should prepare, serve, and file a cross complaint, because affirmative relief may not be claimed in the answer [*see Code Civ. Proc. § 431.30(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsCross-ComplaintsReal Property LawFixtures & ImprovementsGeneral Overview

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§ 279.19 No Right to Jury Trial

There is no right to a jury trial in an action by a good faith improver under *Code Civ. Proc. § 871.1 et seq.* [*Southern Pac. Transportation Co. v. Superior Court (1976) 58 Cal. App. 3d 433, 437-438, 129 Cal. Rptr. 912]* . This is true even though the plaintiff may seek recovery of damages only. Because of the wide range of equitable and legal relief authorized by *Code Civ. Proc. § 871.5*, it would be an impossible task for a jury to determine the appropriate relief and to resolve the rights, equities, and interests of all the parties. Consequently, it is the function of the court and not the jury to be the trier of fact in a good faith improver action [*Southern Pac. Transportation Co. v. Superior Court (1976) 58 Cal. App. 3d 433, 437-438, 129 Cal. Rptr. 912* ; quoted with approval in *C & K Engineering Contractors v. Amber Steel Co. (1978) 23 Cal. 3d 1, 11, 151 Cal. Rptr. 323, 587 P.2d 1136]* .

For a discussion of the right to trial by jury and forms for use in moving for a jury trial when the right is not guaranteed, see Ch. 322, *Juries and Jury Selection* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefCivil ProcedureTrialsJury TrialsRight to Jury TrialReal Property LawFixtures & ImprovementsGeneral Overview

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§ 279.20 Burden of Proof

In every case for relief under *Code Civ. Proc. § 871.1 et seq.*, the burden is on the good faith improver to establish that he or she is entitled to relief under these sections [*Code Civ. Proc. § 871.3(b)*; *see Gilardi v. Hallam (1981) 30 Cal. 3d 317, 325, 178 Cal. Rptr. 624, 636 P.2d 588* ; *Powell v. Mayo (1981) 123 Cal. App. 3d 994, 998, 177 Cal. Rptr. 66]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFixtures & ImprovementsGeneral Overview

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§ 279.21 Factors Considered

[1] Negligence of Good Faith Improver

The degree of negligence of the good faith improver should be taken into account by the court in determining whether the improver acted in good faith and in determining the relief, if any, that is consistent with substantial justice to the parties under the circumstances of the particular case [*Code Civ. Proc. § 871.3(b)*; *see Gilardi v. Hallam (1981) 30 Cal. 3d 317, 325, 178 Cal. Rptr. 624, 636 P.2d 588* ; *Powell v. Mayo (1981) 123 Cal. App. 3d 994, 998, 177 Cal. Rptr. 66]* .

Code Civ. Proc. § 871.3(b), discussed *above*, has introduced a new element into the traditional concept of "good faith." In its traditional sense, good faith connotes a moral quality; it is equated with honesty of purpose, freedom from fraudulent intent, and faithfulness to duty or obligation. By requiring that the good faith improver's degree of negligence be taken into account, *Code Civ. Proc. § 871.3(b)* calls for a measure of care as well as honesty and, without evoking conventional choices between ordinary and gross negligence, the statute, by calling for consideration of the "degree" of negligence, invites consideration of varying intensities of negligence [*Raab v. Casper (1975) 51 Cal. App. 3d 866, 872, 124 Cal. Rptr. 590]* .

However, negligence on the part of the improver does not necessarily preclude all relief. The degree of negligence is merely a factor to be taken into account in determining whether the improver acted in good faith and in determining the relief that is consistent with substantial justice [*Powell v. Mayo (1981) 123 Cal. App. 3d 994, 999, 177 Cal. Rptr. 66]* .

[2] Expenses Incurred by Owner

In protecting the owner of the land against pecuniary loss, the court must take into consideration the expenses the owner of the land has incurred in the action in which relief under *Code Civ. Proc. §§ 871.3-871.5* is sought, including, but not limited to, reasonable attorney's fees [*Code Civ. Proc. § 871.5*; *see Gilardi v. Hallam (1981) 30 Cal. 3d 317, 325, 178 Cal. Rptr. 624, 636 P.2d 588]* .

[3] Owner's Plans Respecting Property

In determining the appropriate form of relief, the court must take into consideration any plans the owner of the land may have for the use or development of the land on which the improvement was made, as well as his or her need for the land on which the improvement was made in connection with the use or development of other property owned by him or her [*Code Civ. Proc. § 871.5*; *see Gilardi v. Hallam (1981) 30 Cal. 3d 317, 325, 178 Cal. Rptr. 624, 636 P.2d 588]* .

[4] Continuation of Work of Improvement After Knowledge of Trespass

The good-faith improver legislation gives the improver something akin to a private power of eminent domain, and the greater the improver's investment, the greater his or her potential appeal to the court's conscience. Consequently, an improver should not be permitted to worsen the true owner's position after the latter has warned the improver of a possible trespass, and deliberate augmentation of an initial investment after a warning of trespass is, therefore, a legally significant factor for the trial court. In weighing the grant, denial, or apportionment of relief, a trial court should consider any interim warning, the character and relative cost of the improvements made before and after the warning, and the unitary or separable character of the improvements [*Raab v. Casper (1975) 51 Cal. App. 3d 866, 874, 124 Cal. Rptr. 590]* .

In commenting on *Code Civ. Proc. § 871.1(a)*, discussed in *§ 279.11*, the California Law Revision Commission noted that under this section a person is not a good faith improver as to any improvement made after he or she becomes aware of facts that preclude him or her from acting in good faith. It gave the following example: a person who builds a house on a lot owned by another may obtain relief under *Code Civ. Proc. § 871.1 et seq.* if he or she acted in good faith under the erroneous belief, because of a mistake of law or fact, that he or she was the owner of the land. However, if the same person makes an additional improvement after discovering that he or she is not the owner of the land, he or she would not be entitled to relief under *Code Civ. Proc. § 871.1 et seq.* with respect to the additional improvement [*see* Law Revision Commission Comment to *Code Civ. Proc. § 871.1*].

This comment was criticized by the court in *Raab*. The court stated that the law should recognize that a unitary improvement cannot be chopped in half with one half being entitled to statutory relief and the other not, and that despite the California Law Revision Commission's comment, it is not practical to fasten separate findings of good and bad faith on separate physical parts of an indivisible physical project. Rather, the improver's intransigence should be considered as part of the improver's degree of negligence in determining his or her good faith and in shaping the relief [*Raab v. Casper (1975) 51 Cal. App. 3d 866, 872, 874, 124 Cal. Rptr. 590]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefReal Property LawFixtures & ImprovementsGeneral Overview

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§ 279.22 Availability of Lis Pendens

Code Civ. Proc. § 405.20 provides that a party to an action who asserts a real property claim may record a lis pendens. As a matter of law, a good faith improver under *Code Civ. Proc. § 871.1 et seq.* is authorized to record a lis pendens [*Okuda v. Superior Court (1983) 144 Cal. App. 3d 135, 140, 192 Cal. Rptr. 388]* . For a general discussion of these actions, see Ch. 348, *Lis Pendens* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewReal Property LawFixtures & ImprovementsGeneral OverviewReal Property LawPriorities & RecordingLis Pendens

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[Reserved]

§§ 279.23[Reserved]

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§ 279.30 Related Matthew Bender Publications

For forms of interrogatories for use in actions involving encroachments and nuisances, see Bender's Forms Of Discovery, Ch. 158, *Real Property*, Subpart I, *Adjoining Landowners*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesFormReal Property LawAdjoining LandownersEncroachmentsReal Property LawTortsNuisanceGeneral Overview

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23-279 California Forms of Pleading and Practice--Annotated § 279.31

§ 279.31 State Statutes

Right to remove improvements mistakenly affixed to another's land; action to enforce right. *Civ. Code § 1013.5*

Time within which action by good faith improver for judicial relief must be commenced. *Code Civ. Proc. § 340(e)*

Right of good faith improver, in action by landowner for damages for withholding land, to set off amount by which value of improved land was enhanced. *Code Civ. Proc. § 741*

Actions and cross actions for judicial relief by good faith improver. *Code Civ. Proc. § 871.1 et seq.*

"Good faith improver" defined. *Code Civ. Proc. § 871.1*

"Person" includes corporations and unincorporated associations. *Code Civ. Proc. § 871.2*

Action by good faith improver of land; burden of proof. *Code Civ. Proc. § 871.3*

When court may not grant relief. *Code Civ. Proc. § 871.4*

Relief available. *Code Civ. Proc. § 871.5*

Limitations on applicability of remedy. *Code Civ. Proc. §§ 871.6, 871.7*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsCross-ComplaintsGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawFixtures & ImprovementsGeneral Overview

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§ 279.32 Decisions

[1] Good Faith Improver

"Good faith improver," as used in *Code Civ. Proc. § 871.1 et seq.*, is person who makes improvement to land in good faith and under erroneous belief, because of mistake of law or fact, that he or she is owner of that land. *Gilardi v. Hallam (1981) 30 Cal. 3d 317, 325, 178 Cal. Rptr. 624, 636 P.2d 588* ; *Okuda v. Superior Court (1983) 144 Cal. App. 3d 135, 139, 192 Cal. Rptr. 388* ; *Powell v. Mayo (1981) 123 Cal. App. 3d 994, 997-998, 177 Cal. Rptr. 66*

[2] Selection of Appropriate Relief

In every case for relief under *Code Civ. Proc. § 871.1 et seq.*, burden is on good faith improver to establish that he or she is entitled to relief under these sections; degree of negligence of good faith improver should be taken into account by court in determining whether improver acted in good faith and in determining relief, if any, that is consistent with substantial justice to parties under circumstances of particular case. Gilardi v. Hallam (1981) 30 Cal. 3d 317, 325, *30 Cal. 3d 317, 178 Cal. Rptr. 624, 636 P.2d 588* ; *Powell v. Mayo (1981) 123 Cal. App. 3d 994, 998, 177 Cal. Rptr. 66* ; *Raab v. Casper (1975) 51 Cal. App. 3d 866, 872, 124 Cal. Rptr. 590*

Relief granted to owner of land on which improvement was erroneously placed by good faith improver must (1) protect owner against any pecuniary loss, but (2) avoid, insofar as possible, enriching him or her unjustly at expense of good faith improver. *Powell v. Mayo (1981) 123 Cal. App. 3d 994, 998, 177 Cal. Rptr. 66*

Court has considerable discretion under *Code Civ. Proc. § 871.5* to select appropriate relief from full range of equitable and legal remedies. *Southern Pac. Transportation Co. v. Superior Court (1976) 58 Cal. App. 3d 433, 437, 129 Cal. Rptr. 912*

[3] Court as Trier of Fact

No right to jury trial in action by good faith improver under *Code Civ. Proc. § 871.1 et seq.*; it is function of court and not jury to be trier of fact in good faith improver action. *C & K Engineering Contractors v. Amber Steel Co. (1978) 23 Cal. 3d 1, 11, 151 Cal. Rptr. 323, 587 P.2d 1136* ; *Southern Pac. Transportation Co. v. Superior Court (1976) 58 Cal. App. 3d 433, 437-438, 129 Cal. Rptr. 912*

[4] Possession of Mistaken Occupier Adverse

Possession of occupier who enters land mistakenly believing that he or she is owner is adverse unless it is established by substantial evidence that he or she recognized potential claim of record owner and expressly or impliedly reflected intent to claim disputed land only if record title was determined in his or her favor. *Gilardi v. Hallam (1981) 30 Cal. 3d 317, 325-326, 178 Cal. Rptr. 624, 636 P.2d 588* (disapproving any implication to the contrary in *Berry v. Sbragia (1978) 76 Cal. App. 3d 876, 880, 143 Cal. Rptr. 318*)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 279.33 Text References

Witkin, Summary of California Law, vol. 12, *Real Property*, §§ 41-47 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFixtures & ImprovementsGeneral Overview

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[Reserved]

§§ 279.34[Reserved]

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PART IV. FORMS
A. Actions Under Code Civ. Proc. § 871.1 et seq.

23-279 California Forms of Pleading and Practice--Annotated § 279.40

§ 279.40 Complaint for Equitable Relief [Code Civ. Proc. § 871.3]--By Good Faith Improver of Real Property Against Owner

[1] FORM Complaint for Equitable Relief [Code Civ. Proc. § 871.3]--By Good Faith Improver of Real Property Against Owner
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], and DOES I through _____, Defendants.	)))))))	NO. _____ COMPLAINT FOR EQUITABLE RELIEF (Good Faith Improver of Real Property)

Plaintiff alleges:

1. _____ [*Capacity of plaintiff, if other than a natural person suing in an individual capacity, e.g.,* Plaintiff is, and at all times in mentioned in this complaint was, a corporation, organized and existing under the laws of California, with its principal place of business in _____ County, California].

2. Defendant _____ [*name*] is, and at all times in mentioned in this complaint was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a resident of _____ County, California *or* a corporation duly organized under the laws of the State of California,

with its principal place of business in _____ [*city*], _____ County, California].

3. [*Specify names and interests in the land of any defendant lessees, lienholders, encumbrancers, and/or others, or state as follows:* Plaintiff is ignorant of the true names and capacities of defendants sued in this complaint as DOES I-_____, inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes, and on that basis alleges, that each of the fictitiously named defendants claims some interest in the real property described in this complaint].

4. At all times mentioned in this complaint [, except as otherwise expressly specified], the following described real property, called "the property" in this complaint, was and is _____ [*specify, e.g.,* an unimproved parcel, consisting of approximately 10 acres *or* a city lot] situated in [the City of _____,] _____ County, California: _____ [*legal description*].

5. _____ [*Specify facts showing basis for belief that plaintiff owned the land, e.g.:* On or about _____ (*date*), plaintiff, who had never been involved in any real estate transaction prior to that time, entered into a contract of sale whereby plaintiff purchased the property from defendant on the representation and in the belief that defendant was the owner of the property. A copy of the contract is attached to this complaint as Exhibit A and made a part of this complaint. At the time the contract was entered into, defendant showed plaintiff a copy of a grant deed by which the property had been conveyed to defendant some years before. Pursuant to the terms of the contract, plaintiff, on or about _____ (*date*), paid defendant the full purchase price of $_____, which was the fair market value of the property at the time, and defendant executed a grant deed that defendant then caused to be recorded in the office of the Recorder of _____ County, California. Immediately after execution of the contract and payment of the purchase price, plaintiff went into possession of the property].

6. _____ [*Specify nature of improvement made on land, when it was made, and its cost, e.g.,* Immediately after taking possession of the property, plaintiff, between _____ (*date*), and _____ (*date*), had a single-family residence, called "the residence" in this complaint, constructed on the property at a total cost of $_____].

7. _____ [*Specify discovery of true facts, e.g.,* In anticipation of the subsequent resale of the property, plaintiff, on or about _____ (*date within one year of time this action is filed*), obtained a title report on the property and for the first time learned that defendant corporation at the time of the purported sale was and is the owner of the property, and that defendant, by quitclaim deed, had conveyed the property to defendant corporation on or about _____ (*date*). A copy of this report is attached to this complaint as Exhibit B and made a part of this complaint].

8. _____ [*Specify in this and subsequently numbered paragraphs any additional facts relative to the circumstances of the particular case, e.g.,* On or about _____ (*date*), plaintiff informed defendant in writing of the above discovery and requested defendant to cause defendant corporation to execute a grant deed of the property to plaintiff. A copy of this notice is attached to this complaint as Exhibit C and made a part of this complaint. However, defendant failed and refused, and continues to fail and refuse, to cause defendant corporation to execute the deed, or any deed of the property to plaintiff, and has advised plaintiff that defendant corporation plans to have plaintiff evicted from the property].

9. The current market value of the property without the residence is $_____, whereas the current market value of the property with the residence is $_____.

[10. As alleged in Paragraph 2, above, defendant is the sole shareholder in defendant corporation and there exists, and at all times mentioned in this complaint has existed, a unity of interest and ownership between defendant and defendant

corporation such that any individuality and separateness between them have ceased, and defendant corporation is the alter ego of defendant.]

11. _____ [*Specify infeasibility of removing improvement, e.g.,* Plaintiff owns no other property and has no present prospect for obtaining any property to which the residence could be economically removed].

WHEREFORE, plaintiff prays judgment as follows:

[*SET FORTH any specific relief requested, e.g.,*]

1. That it be declared that defendant corporation is the alter ego of defendant and that the grant deed executed by defendant was in law a grant deed executed by defendant corporation, or, in the alternative,

2. That defendant corporation be ordered to execute and deliver to plaintiff a sufficient conveyance of the property, or, in the alternative,

3. That title to the property be quieted in defendant corporation on the condition that defendant corporation reimburse plaintiff for the construction costs of the residence, or, in the alternative,

[*CONTINUE*]

4. That the court otherwise effect an adjustment of the rights, equities, and interests of the parties as is consistent with substantial justice to the parties under the circumstances of this case.

5. For costs of suit incurred in this complaint.

6. For other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a complaint for use by a person who made an improvement to land in good faith and under the erroneous belief, because of a mistake of law or fact, that he or she was the owner of the land [*see Code Civ. Proc. §§ 871.1(a), 871.3*]. In a case with facts similar to those used for illustration in this complaint, counsel might join a separate cause of action against the individual defendant for damages for fraud together with this cause of action. For discussion of fraud claims and forms that may be adapted for this use, see Ch. 269, *Fraud and Deceit* . If plaintiff has satisfied the requirements necessary to establish title to the property by adverse possession [*see § 279.12[2]* (adverse possession and easements by prescription)], counsel may wish to join a separate cause of action to quiet title with the cause of action in this complaint, or to entirely substitute a quiet title action by adverse possession for this complaint. For discussion and forms for use in these actions, see Ch. 13, *Adverse Possession* .

With appropriate modifications, this form may be used as a cross complaint in a pending action [*see Code Civ. Proc. § 871.3*; § 279.14[2]].

For discussion of who may bring an action under *Code Civ. Proc. § 871.1 et seq.*, see *§§ 279.13* and *279.14*. For coverage of the equitable jurisidiction of the court in these matters, see *§ 279.16*. Finally, for discussion of factors considered by the court when handling this type of case, see *§ 279.21*.

[3] Allegations

The complaint in [1], *above*, alleges the following:

- The names and capacities and interests of plaintiff and defendant (Paragraph 1 and 2).

- The names and interests in the land of any defendant lessees, lienholders, encumbrancers, and/or others, or if neither these persons nor their interests are known, fictitious names (Paragraph 3) [*see Code Civ. Proc. § 871.5*].

- A description and the location of the land (Paragraph 4) [*see Code Civ. Proc. §§ 871.1, 871.5*].

- Facts showing that the plaintiff, or plaintiff's predecessor in interest, because of a mistake of law or fact, erroneously believed that he or she owned the land (Paragraph 5) [*see Code Civ. Proc. § 871.1*].

- That the plaintiff, or plaintiff's predecessor in interest, made an improvement to the land, the nature of the improvement, when the improvement was made, and the cost of the improvement (Paragraph 6) [*see Code Civ. Proc. §§ 871.1, 871.5*].

- That the land is owned by the defendant or one or more of the defendants (Paragraph 7) [*see Code Civ. Proc. § 871.5*].

- Additional facts that may aid the court in adjusting the rights, equities, and interests of the parties (Paragraphs 8-11) [*see Code Civ. Proc. § 871.5*].

If the improvement was made by plaintiff's predecessor in interest, the manner in which plaintiff succeeded to that interest should also be alleged in this complaint [*see Code Civ. Proc. § 871.1(b)*].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Jurisdiction

An action for relief under *Code Civ. Proc. § 871.1 et seq.* is treated as an unlimited civil case, regardless of the amount in controversy and regardless of whether a defendant cross-complains for relief under this chapter. Any other case in which a defendant cross-complains for relief under *Code Civ. Proc. § 871.1 et seq.* will be treated as a limited civil case if the cross-complaint is defensive and the case otherwise satisfies the requirements, including the amount in controversy, of a limited civil case [*Code Civ. Proc. § 871.3(a)*; *see Code Civ. Proc. § 85*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

[6] Venue

Subject to the power of the court to transfer actions and proceedings as provided in *Code Civ. Proc. §§ 392-402*, the superior court in the county where the subject real property, or some part of it, is situated is the proper court for the trial of an action for the recovery of real property, or of an estate or interest in the real property, or for the determination in any form of the right or interest in real property, and for injuries to the real property [*Code Civ. Proc. § 392(a)(1)*].

[7] Cross References

For discussion and forms of complaints concerning encroachments, lateral support, and party walls of adjoining landowners, see Ch. 11, *Adjoining Landowners*

For forms of complaints for use in actions relating to adverse possession, see Ch. 13, *Adverse Possession*

For forms for use in recording a lis pendens, see Ch. 348, *Lis Pendens*

For forms for use in actions to quiet title, see Ch. 482, *Quieting Title*

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Volume 23: Fraud and Deceit thru Good Faith Improver of Real Property-Chs. 269-279
Chapter 279 GOOD FAITH IMPROVER OF REAL PROPERTY
PART IV. FORMS
A. Actions Under Code Civ. Proc. § 871.1 et seq.

23-279 California Forms of Pleading and Practice--Annotated §§ 279.41through 279.49

[Reserved]

§§ 279.41[Reserved]

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Volume 23: Fraud and Deceit thru Good Faith Improver of Real Property-Chs. 269-279
Chapter 279 GOOD FAITH IMPROVER OF REAL PROPERTY
PART IV. FORMS
B. Other Actions

23-279 California Forms of Pleading and Practice--Annotated § 279.50

§ 279.50 Complaint to Remove Improvement Mistakenly Affixed to Land of Another [Civ. Code § 1013.5]--Mistake of Fact as to Location of Boundary

[1] FORM Complaint to Remove Improvement Mistakenly Affixed to Land of Another [Civ. Code § 1013.5]--Mistake of Fact as to Location of Boundary
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], Defendant(s).	)	COMPLAINT TO REMOVE IMPROVEMENT
	)	(Improvement Mistakenly Affixed to Land)
	)	

Plaintiff alleges:

1. Plaintiff is, and at all times mentioned in this complaint was, the owner and in possession and control of the real property situated in _____ County, known as _____ [*street address*], _____ [*city*], California, more particularly described as _____ [*legal description*].

2. Defendant _____ [*name*] is, and at all times mentioned in this complaint was, the owner and in possession and control of that real property situated in _____ County, known as _____ [*street address*], _____ [*city*], California, more particularly described as _____ [*legal description*].

[3. Defendants _____ (*name of each encumbrancer*) are encumbrancers of record of the property of defendant _____ (*name*) described in this complaint.]

4. The respective properties of plaintiff and defendant _____ [*name*] adjoin each other by a common boundary at plaintiff's _____ [*e.g.*, north] and defendant's _____ [*e.g.*, south] property lines.

5. On or about _____ [*date*], based on _____ [*specify, e.g.*, a survey conducted by a licensed surveyor] plaintiff believed that his/her _____ [*e.g.*, north] boundary line commenced at _____ [*specify landmark*] and ran from that point in a _____ [*e.g.*, westerly] direction until it intersected plaintiff's _____ [*e.g.*, west] line at _____ [*specify landmark*].

6. Based on his/her belief, and acting on the belief in good faith, plaintiff _____ [*describe improvement, e.g.*, planted a row of 25 walnut trees along and within five feet of the supposed boundary line].

7. Plaintiff is now informed and believes and therefore alleges that the true boundary line between the respective properties of plaintiff and defendant _____ [*name*] is located as follows: _____ [*describe*], and that the previously mentioned _____ [*e.g.*, trees, and each of them,] are situated on the defendant's land and property, constituting improvements of the property. Plaintiff placed the _____ [*e.g.*, trees] on the defendant's land and property under the mistaken belief that the land belonged to plaintiff.

8. On or about _____ [*date*], plaintiff notified defendant _____ [*name*] that plaintiff desired to remove the _____ [*e.g.*, trees] from the defendant's property and offered to pay compensation for any damage caused by the removal of the _____ [*e.g.*, trees]. Defendant _____ [*name*] refused and still refuses to permit plaintiff to remove _____ [*e.g.*, trees] from the defendant's property.

9. Plaintiff elects to remove the _____ [*e.g.*, trees] from defendant _____'s [*name*] property under *Civil Code Section 1013.5*, and in so electing offers to pay defendant _____ [*name*] all damages proximately caused by the _____ [*e.g.*, planting and removal of the trees], together with the defendant's costs of suit including a reasonable attorney's fee fixed by the court. Plaintiff is informed and believes and therefore alleges that defendant _____ [*name*] will suffer _____ [*either* no damages *or* damages in the sum of no more than $_____] because of the _____ [*e.g.*, planting of the trees on, and the removal of the trees from,] defendant's land and property.

[10. *If any defendant is a lienholder for value of the improved property who acted in reliance on the improvements or has a mechanics' lien resulting from the improvements, allege:* Defendant _____ (*name*) is a lienholder as to the property of defendant _____ (*name*) who acquired the lien _____ (in good faith and for value after the above-described improvements were made by plaintiff and in reliance on that *or* as a result of the making of the improvements, pursuant to *Article XX, Section 15 of the California Constitution*). This defendant has given his/her written consent to removal of the improvements by plaintiff. A copy of the consent is attached to, and made a part of, this complaint as Exhibit "A."]

WHEREFORE, plaintiff prays judgment against defendant(s) [, and each of them,] as follows:

1. That plaintiff be permitted to enter on defendant _____'s [*name*] property and to remove the improvements from the property on payment of any and all damages and costs to defendant _____ [*name*].

2. For any other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

[*Verification, if desired. See § 11.70[1].*]

[2] Use of Form

The form in [1], *above*, is a complaint for use in an action under *Civ. Code § 1013.5* to remove improvements mistakenly made on the land of another landowner. Although this form assumes that the plaintiff and defendant are adjoining landowners, the statutory remedy is not limited to adjoining landowners, as discussed below.

A person who, acting in good faith and erroneously believing (due to a mistake of fact or law) that he or she has a right to do so, affixes improvements to the land of another, has a right to remove the improvements on payment of any damages proximately caused by the affixing and removal of the improvements [*Civ. Code § 1013.5(a)*]. If an action is brought to enforce that right, the owner of the land and encumbrancers of record must be named as defendants. Further, a notice of the pendency of the action must be recorded before trial [*see* Ch. 348, *Lis Pendens* (for forms)]. The owner of the land may recover his or her costs of suit and a reasonable attorney's fee fixed by the court [*Civ. Code § 1013.5(b)*].

If there is any issue as to whether the improvements were made on land belonging to plaintiff, plaintiff may wish to combine an action to quiet title with the form in [1], *above* [*Code Civ. Proc. §§ 760.010-764.070*]. For coverage of quiet title actions, see Ch. 482, *Quieting Title* .

If removal of the improvements would not afford the parties "substantial justice," an action may be brought for relief under *Code Civ. Proc. § 871.1 et seq.* (action by good faith improver). For a complaint seeking this relief, see *§ 279.40*.

For additional coverage of the right to remove improvements, see *§ 279.12[1][c]*.

[3] Allegations

The complaint in [1], *above*, alleges the following: (1) descriptions and ownership of respective adjoining properties (Paragraphs 1, 2, and 4); (2) that plaintiff made the improvements on defendant's land in the good faith belief, because of a mistake of fact, that he or she had a right to do so (Paragraphs 5-7); and (3) plaintiff's election to remove the improvements on payment of damages and costs to defendant (Paragraph 9) [*see Civ. Code § 1013.5(a), (b)*].

The complaint names the owner of the land on which the improvements were made and all encumbrancers as parties defendant (Paragraph 3) [*see Civ. Code § 1013.5(b)*]. If any encumbrancer is a lienholder who acquired his or her lien in good faith and for value after the commencement of the work of improvement and in reliance on that, or if he or she is a mechanics' lienholder under *Cal. Const., art. XIV, § 3* as a result of making the improvements, the complaint should allege that the written consent of the lienholder was obtained (Optional Paragraph 10) [*see Civ. Code § 1013.5(d)*].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

An action under *Civ. Code § 1013.5* is within the jurisdiction of the superior court and is not a limited civil case [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

For coverage of issues relating to venue, see *§ 279.40[6]*.

[6] Cross References

For a complete discussion of jurisdiction and related issues, see Ch. 323, *Jurisdiction: Personal* and Ch. 324, *Jurisdiction: Subject Matter* .

For forms of lis pendens, see Ch. 348, *Lis Pendens* .

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Volume 24: Guardianship and Conservatorship thru Guardians ad Litem-Chs. 280-291
Chapter 280 GUARDIANSHIP AND CONSERVATORSHIP: APPOINTMENT OF GUARDIANS

24-280 California Forms of Pleading and Practice--Annotated 280.syn

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§ 280.01 Scope of Chapter

§ 280.02 Cross References

§§ 280.03-280.09 [Reserved]

§ 280.10 Governing Statutes

§§ 280.11-280.19 [Reserved]

§ 280.20 Jurisdiction to Appoint Guardian

[1] General Jurisdiction

[2] Juvenile Court Dependency Jurisdiction

[3] Status Affecting Jurisdiction

[a] Custodial Claimant Outside California

[b] Native American Child

[c] Married Minor

§ 280.21 Determining Whether Guardianship Is Appropriate

[1] Necessary-or-Convenient Standard

[2] Burden of Proof

[3] Guardianship Is Not Preferred

§ 280.22 Relationship to Other Custody Proceedings

[1] Juvenile Court Dependency

[2] Adoption

[a] Guardianship as Alternative to Adoption

[b] When Agency Has Legal Custody

[c] Guardianship Does Not Foreclose Adoption

[3] Termination of Parental Rights

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§ 280.23 Visitation Rights in Guardianship Proceeding

§ 280.24 Annual Status Report

§§ 280.25-280.29 [Reserved]

§ 280.30 Necessary-and-Convenient Standard for Appointment

§ 280.31 Alternatives to Guardian of the Estate

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§ 280.40 Choosing Guardian of the Person

[1] Applicability of Family Code

[2] Order of Preference Under Family Code

[3] Detriment to Child

[4] Religious and Cultural Matching

§ 280.41 Considerations in Appointing Guardian of the Estate

§ 280.42 Nonresident Guardian

§ 280.43 Nonprofit Charitable Corporation as Guardian

§ 280.44 Appointment of Public Guardian

§ 280.44A Appointment of a Professional Fiduciary

§ 280.45 Nomination of Guardian

[1] Authority to Make Nomination

[2] Effect of Nomination

[3] Manner of Making Nomination

[4] When Nomination Is Effective

[5] Powers of Nominated Guardian

[6] Nomination of Director of Developmental Services

[7] Nomination Under Prior Law

§ 280.46 Joint Guardians

[1] Appointment of Joint Guardians Generally

[2] Custodial Parent With Terminal Condition

§ 280.47 Single Guardian for Several Wards

§§ 280.48-280.59 [Reserved]

§ 280.60 Who May Petition

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§ 280.61 Appointment of Temporary Guardian

§ 280.62 Notice

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[2] Notice to Particular Public Officials

[a] In General

[b] When Proposed Ward Is Developmentally Disabled

[3] When Notice Is Not Required

[4] Notice of Request for Independent Powers

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§ 280.63 Appointment of Counsel for Proposed Ward

§ 280.64 Investigation of Case

[1] Requirement of Investigation

[2] Report Requirements

[3] Access to Minor's Records

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[5] Screening by Child Protective Services

[6] Additional Investigation in Nonrelative Guardianships

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§ 280.65 Conduct of Hearing

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[2] No Right to Jury Trial

[3] Objection to Petition

[4] Standard of Proof

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§ 280.66 Bond Requirement

§ 280.67 Oath

§ 280.67A Acknowledgment of Receipt of Duties of Guardian Form

§ 280.68 Issuance of Letters of Guardianship

§ 280.69 Appeal

§ 280.70 Appointment of Successor Guardian

§ 280.71 Vexatious Litigant Determination in Guardianship Proceeding

§ 280.72 Professional Fiduciaries Act

§ 280.73 Guardian's Subsequent Adoption of Minor

§§ 280.74-280.79 [Reserved]

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§ 280.81 Federal Statutes

§ 280.82 State Statutes

[1] Appeal

[2] Appointment of Guardian

[3] Definitions

[4] When Guardianship Not Necessary

[5] Jurisdiction and Venue

[6] Nomination of Guardian

[7] Nonrelative Guardianship

[8] Oaths, Bonds, and Letters

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§ 280.82A California Rules of Court

§ 280.83 Local Court Rules

[1] Alameda County

[2] Contra Costa County

[3] Los Angeles County

[4] Orange County

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§ 280.84 Decisions

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§ 280.100 Client Interview--Facts and Documents

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[a] Facts Regarding Minor

[b] Facts Regarding Proposed Guardian (Petitioner)

[2] Documents to Be Obtained

§ 280.101 Obtaining Appointment of Guardian

§§ 280.102-280.109 [Reserved]

§ 280.110 Petition for Appointment of Guardian of Minor--Judicial Council Form GC-210 [Prob. Code § 1510]

[1] FORM

[2] Use of Form

[3] Jurisdiction and Venue

[a] In General

[b] Uniform Child Custody Jurisdiction and Enforcement Act

[4] Contents of Petition

[a] In General

[b] Bonds

[c] Independent Powers for Guardian of Estate

[d] Additional Conditions for Care of Person and Estate

[e] Nonprofit Charitable Corporation as Guardian

[f] Guardianship Petition--Child Information Attachment

[g] Professional Fiduciary

[5] Verification

[6] Notice of Hearing

[a] Required Period and Persons

[b] Jurisdictional Notice to Parents

[c] Additional Notice

[d] Notice of Request for Independent Powers

[e] Notice Not to Be Given

[f] Notice Not Required

[g] Form of Notice

[h] Proof of Notice

[7] Cross References

§ 280.110A Confidential Guardian Screening Form--Judicial Council Form GC-212

[1] FORM

[2] Use of Form

[3] Confidentiality

§ 280.110B Petition for Appointment of Guardian of the Person--Judicial Council Form GC-210(P) [Prob. Code § 1510]

[1] FORM

[2] Use of Form

§ 280.110C Guardianship Petition--Child Information Attachment--Judicial Council Form GC-210(CA) [Prob. Code § 1510]

[1] FORM

[2] Use of Form

[3] Contents of Attachment

[a] In General

[b] Native American Ancestry

[c] Public Assistance

[d] Other Proceedings

[e] Status as Patient in State Institution

[f] Intent to Adopt

§ 280.110D Professional Fiduciary Attachment to Petition for Appointment of Guardian or Conservator--Judicial Council Form GC-210(A-PF)/GC-310(A-PF) [Prob. Code § 1821]

[1] FORM

[2] Use of Form

§ 280.111 Consent of Proposed Guardian, Nomination of Guardian [Prob. Code §§ 1500-1502], and Waiver of Notice [Prob. Code § 1260]--Judicial Council Form GC-211

[1] FORM

[2] Use of Form

§ 280.112 Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act [Fam. Code § 3429]--Judicial Council Form FL-105/GC-120

[1] FORM

[2] Use of Form

[3] Contents of Declaration

[4] Continuing Duty to Inform Court of Proceedings

§ 280.113 Objection to Petition for Appointment of Guardian [Prob. Code §§ 1510, 1514]

[1] FORM

[2] Use of Form

[3] Contents of Objection

[a] In General

[b] Award to Nonparent

[4] Standing to Object

[5] Grounds for Objection

§ 280.114 Order Denying Petition for Appointment of Guardian [Prob. Code §§ 1510, 1514]

[1] FORM

[2] Use of Form

[3] Contents

[4] Statement of Decision

§ 280.115 Order Appointing Guardian of Minor [Prob. Code § 1514]--Judicial Council Form GC-240

[1] FORM

[2] Use of Form

[3] Contents of Order-Appearances

[4] Statement of Decision

[5] Notice

[6] Independent Powers

[7] Attorney's Fees of Appointed Counsel

[8] Court-Appointed Investigator

[9] Bonds

[10] Additional Conditions for Care of the Person and Estate

[11] Appointing Guardian Nominated by Parent

[a] Guardian of the Person

[b] Guardian of the Estate

[12] Appointment of Probate Referee

[13] Ineffectiveness of Appointment Until Letters Have Issued

§ 280.115A Duties of Guardian and Acknowledgment of Receipt--Judicial Council Form GC-248

[1] FORM

[2] Use of Form

§ 280.116 Letters of Guardianship [Prob. Code §§ 2310, 2311]--Judicial Council Form GC-250

[1] FORM

[2] Use of Form

[3] Contents of Letters

[a] Independent Powers

[b] Additional Conditions

[4] Guardian Nominated by Parent

[a] Guardian of the Person

[b] Guardian of the Estate

[5] Oath

[6] Cross References

§ 280.117 Confidential Guardianship Status Report [Prob. Code § 1513.2]--Judicial Council Form GC-251

[1] FORM

[2] Use of Form

[3] Contents of Report

[4] Failure to Comply With Report Requirements

[5] Confidentiality of Report

§ 280.118 Certification of Attorney Concerning Qualifications for Court Appointment [Prob. Code § 1456, 1470, 1471]--Judicial Council Forms GC-010 and GC-011

[1] FORMS

[2] Use of Forms

[3] Certification Requirement

[4] Qualifications for Private Counsel (Paragraph 3)

[5] Qualifications of Deputy Public Defenders (Paragraph 4)

[6] Exemption for Small Courts (Paragraph 5)

[7] Continuing Education

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Chapter 280 GUARDIANSHIP AND CONSERVATORSHIP: APPOINTMENT OF GUARDIANS
PART I. SCOPE

24-280 California Forms of Pleading and Practice--Annotated § 280.01

§ 280.01 Scope of Chapter

This chapter discusses the appointment of a guardian of a minor under the Probate Code and sets forth the procedures for appointment of a guardian.

This chapter considers when a guardianship is the appropriate proceeding in which to determine the custody of a child and discusses eligibility and preferences in selecting the guardian. The focus of this chapter is primarily on the use of a guardianship of the person as a way of obtaining the legal custody of a child, but guardians of the estate are discussed briefly. The chapter contains the following forms:

- A petition for appointment of guardian of minor [*see Prob. Code § 1510*] (Judicial Council Form GC-210) [*see § 280.110*].

- The Judicial Council's Confidential Guardian Screening Form (Judicial Council Form GC-212) [*see § 280.110A*].

- A petition for appointment of a guardian of the person (Judicial Council Form GC-210(CA) [*see § 280.110B*].

- The Judicial Council's Child Information Attachment to the guardianship petition (Judicial Council Form GC-210(P) [*see § 280.110C*].

- A form combining the consent of the proposed guardian, nomination of the guardian [*see Prob. Code §§ 1500-1502*], and waiver of notice [*see Prob. Code § 1260*] (Judicial Council Form GC-211) [*see § 280.111*].

- A declaration under the Uniform Child Custody Jurisdiction and Enforcement Act [*see Fam. Code § 3429*] (Judicial Council Form MC-150) [*see § 280.112*].

- A form for an objection to a petition for appointment of a guardian [*see § 280.113*].

- A form for an order denying a petition for appointment for a guardian [*see § 280.114*].

- An order appointing a guardian of a minor [*see Prob. Code § 1514*] (Judicial Council Form GC-240) [*see § 280.115*].

- A "Duties of Guardian" form (Judicial Council Form GC-248) [*see § 280.115A*].

- Letters of guardianship [*see Prob. Code §§ 2310, 2311*] (Judicial Council Form GC-250) [*see § 280.116*].

- Confidential guardianship status report [*see Prob. Code § 1513.2*] (Judicial Council Form GC-251) [*see § 280.117*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointmentFamily LawGuardiansDuties & Rights

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24-280 California Forms of Pleading and Practice--Annotated § 280.02

§ 280.02 Cross References

For discussion and forms pertaining to guardianship estate management, see the following chapters:

- Ch. 286, *Guardianship and Conservatorship: Inventory and Appraisal*.
- Ch. 287, *Guardianship and Conservatorship: General Management Powers*.
- Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers*.
- Ch. 289, *Guardianship and Conservatorship: Management of Community Property*.
- Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee*.
- Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment*.
- Ch. 290B, *Guardianship and Conservatorship: Substituted Judgment*.
- Ch. 290C, *Guardianship and Conservatorship: Actions and Disputed Claims*.
- Ch. 290D, *Guardianship and Conservatorship: Actions Against Guardian or Conservator*.
- Ch. 290E, *Guardianship and Conservatorship: Accounts*.
- Ch. 290F, *Guardianship and Conservatorship: Compensation of Guardian or Conservator*.

For discussion of other custody proceedings, see Ch. 12, *Adoptions: Nature and Effect* , through Ch. 12E, *Adoptions: Attack on Decree* , and Ch. 394, *Parent and Child* .

For discussion of the general standards for custody determinations and the best interests of the child, see Ch. 223,

Dissolution of Marriage: Child Custody .

For discussion of the appointment of a guardian ad litem to represent a minor in litigation, see Ch. 291, *Guardians ad Litem* .

For discussion of alternatives to the appointment of a guardian of the estate, see Ch. 364, *Minors: Claims and Property of Minors* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionGeneral OverviewFamily LawChild CustodyGeneral OverviewFamily LawGuardiansGeneral OverviewFamily LawParental Duties & RightsGeneral OverviewReal Property LawOwnership & TransferNatural Persons

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24-280 California Forms of Pleading and Practice--Annotated §§ 280.03-280.09

[Reserved]

§§ 280.03[Reserved]

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A. Governing Statutes

24-280 California Forms of Pleading and Practice--Annotated § 280.10

§ 280.10 Governing Statutes

Guardianship is governed principally by Division 4 of the Probate Code [*Prob. Code § 1400 et seq.*]. In addition, the general standards for determining the custody of a child in a family law proceeding [*Fam. Code §§ 3020 et seq., 3040 et seq.*] govern the court in a personal guardianship proceeding [*see Prob. Code § 1514(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsEstate, Gift & Trust LawConservators & GuardiansGuardians for Missing & Undetermined HeirsEstate, Gift & Trust LawConservators & GuardiansTestamentary GuardiansFamily LawGuardiansGeneral Overview

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[Reserved]

§§ 280.11[Reserved]

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24-280 California Forms of Pleading and Practice--Annotated § 280.20

§ 280.20 Jurisdiction to Appoint Guardian

[1] General Jurisdiction

Generally the superior court has jurisdiction to appoint a guardian of the person of a minor [*Prob. Code § 2200*; *see Fam. Code § 6500* (minor is person under age 18)].

[2] Juvenile Court Dependency Jurisdiction

Proceedings for the appointment of a guardian for a minor who has been adjudged a dependent child of the juvenile court [*see Welf. & Inst. Code § 300 et seq.*] must be conducted by the juvenile court. If the court finds that legal guardianship is the appropriate permanent plan for the minor [*see Welf. & Inst. Code § 366.26(d)*], the court must appoint a guardian and issue letters of guardianship [*Welf. & Inst. Code § 366.26(d)*; *see Welf. & Inst. Code § 366.3* (continuing juvenile court jurisdiction over dependent child who has legal guardian)].

The provisions of the Probate Code relating to the establishment and termination of guardianships [*see Prob. Code § 1500 et seq.*] do not apply to a guardianship resulting from the selection and implementation of a permanent plan by the juvenile court for the care of the minor [*Prob. Code § 1517*; *see Welf. & Inst. Code § 366.26(c)(4)*]. In that case, proceedings to establish guardianship are governed exclusively by applicable sections of the Welfare and Institutions Code and California Rules of Court [*Prob. Code § 1517*; *see Welf. & Inst. Code § 366.26* (if child was declared dependent of juvenile court after 1988); *Cal. Rules of Ct., Rule 5.501 et seq.*]. If no specific provision of the Welfare and Institutions Code or the California Rules of Court applies, the provisions applicable to the administration of guardianship estates under *Prob. Code § 2100 et seq.* govern, as far as they apply in like situations [*Prob. Code § 1517*; *see Welf. & Inst. Code § 366.4*].

[3] Status Affecting Jurisdiction

[a] Custodial Claimant Outside California

The federal Parental Kidnapping Prevention Act (PKPA) [*28 U.S.C. § 1738A*] and California's Uniform Child Custody

Jurisdiction and Enforcement Act (UCCJEA) [*Fam. Code § 3400 et seq.*] apply to any proceeding in which the custody of a child is at issue, including a guardianship proceeding [*Guardianship of Ariana K. (2004) 120 Cal. App. 4th 690, 702, 15 Cal. Rptr. 3d 817* ; *Adoption of Zachariah K. (1992) 6 Cal. App. 4th 1025, 1034, 8 Cal. Rptr. 2d 423* ; *Guardianship of Donaldson (1986) 178 Cal. App. 3d 477, 487-489, 223 Cal. Rptr. 707]* . Those laws must be considered if a parent (or another person with a custodial right or claim) lives outside California [*see In re Gloria F. (1989) 212 Cal. App. 3d 576, 584, 260 Cal. Rptr. 706* (requirements apply whether or not actual jurisdictional conflict exists)]. A court has subject matter jurisdiction over guardianship proceedings when a petition is filed concerning a child whose home state is California or a child who has lived in California for six months before the petition is filed [*Fam. Code §§ 3402(g), 3421(a)(1)*; *Guardianship of Ariana K. (2004) 120 Cal. App. 4th 690, 703, 15 Cal. Rptr. 3d 817]* . Once the court has acquired subject matter jurisdiction, it retains the authority to consider subsequent custody and visitation disputes concerning the child [*Guardianship of Ariana K. (2004) 120 Cal. App. 4th 690, 703, 15 Cal. Rptr. 3d 817]* .

For detailed discussion of the PKPA and the UCCJEA, see Ch. 394, *Parent and Child* . The Hague Convention on the Civil Aspects of International Child Abduction [*42 U.S.C. § 11601 et seq.*] does not deprive a California court of subject matter jurisdiction to adjudicate a guardianship dispute [*Guardianship of Ariana K. (2004) 120 Cal. App. 4th 690, 706-707, 15 Cal. Rptr. 3d 817* (remedies established by Convention are in addition to remedies available under other laws)].

[b] Native American Child

In a case involving a Native American child, the Indian Child Welfare Act (ICWA) [*25 U.S.C. § 1901 et seq.*] governs to the extent that California law is inconsistent with the ICWA [*see Prob. Code § 2112*; *see also Cal. Rules of Court, Rule 7.1015* (Indian Child Welfare Act in guardianship and certain conservatorship proceedings)]. The ICWA is discussed in California Family Law Practice and Procedure, 2nd Edition, Ch. 176, *Indian Child Welfare Act* (Matthew Bender 2d ed.).

[c] Married Minor

A guardian of the person cannot be appointed for a minor who is married or whose marriage has been dissolved, unless the marriage was adjudged a nullity [*Prob. Code § 1515*; *Guardianship of Melissa W. (2002) 96 Cal. App. 4th 1293, 1300, 118 Cal. Rptr. 2d 42* ; *see* Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights*]. However, a conservator of the person may be appointed for a minor who is married or whose marriage has been dissolved, if the court determines that it is the least restrictive alternative [*Prob. Code § 1800.3(a)(2), (b)*; *see Prob. Code § 1801(a)*]. For discussion of appointment of conservators, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyEnforcementUniform Child Custody Jurisdiction & Enforcement ActFamily LawChild CustodyInterferenceParental Kidnapping Prevention ActFamily LawChild CustodyJurisdictionSubject Matter JurisdictionFamily LawDelinquency & DependencyDependency ProceedingsFamily LawGuardiansAppointment

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24-280 California Forms of Pleading and Practice--Annotated § 280.21

§ 280.21 Determining Whether Guardianship Is Appropriate

[1] Necessary-or-Convenient Standard

A guardian of the person of a minor may be appointed whenever it appears to the court that a guardian is necessary or convenient [*Prob. Code § 1514(a)*]. Although this standard is facially broad, the actual authority of the probate court to appoint aguardian for a minor is limited by the constitutional right of parents to have custody of their children [*see Stanley v. Illinois (1972) 405 U.S. 645, 649-659, 92 S. Ct. 1208, 31 L. Ed. 2d 551]* . Moreover, a nonparent may not be awarded custody of a child over the opposition of a parent unless the court finds that parental custody is detrimental [*see Fam. Code § 3041*; *see also Guardianship of Kentera (1953) 41 Cal. 2d 639, 642, 262 P.2d 317* ; *Guardianship of Olivia J. (2000) 84 Cal. App. 4th 1146, 1153-1154, 101 Cal. Rptr. 2d 364* ; *Guardianship of Z.C.W. (1999) 71 Cal. App. 4th 524, 527, 84 Cal. Rptr. 2d 48]* . In numerous other proceedings it is preferable to make custody determinations [*see* Ch. 394, *Parent and Child*], particularly juvenile court dependency jurisdiction in the case of neglected or abused children [*see Welf. & Inst. Code § 300 et seq.*]. For further discussion of the relationship of guardianship to other custody proceedings, see *§ 280.22*.

[2] Burden of Proof

A court may not appoint a guardian over the objection of a natural parent, except on clear and convincing evidence that (1) being in the parent's custody would be detrimental to the child and (2) appointment the prospective guardian is in the child's best interest [*Guardianship of Stephen G. (1995) 40 Cal. App. 4th 1418, 1431, 47 Cal. Rptr. 2d 409* ; *Guardianship of Jenna G. (1998) 63 Cal. App. 4th 387, 394, 74 Cal. Rptr. 2d 47* ; *cf. Guardianship of Simpson (1998) 67 Cal. App. 4th 914, 930-933, 79 Cal. Rptr. 2d 389]* .

[3] Guardianship Is Not Preferred

Guardianship is not a preferred method of determining custody. For example, if a child has been relinquished to an agency for adoption, appointment of a guardian is neither necessary nor convenient unless the adoption agency is unfit to have temporary custody of the child, or it is improbable that the child will be adopted [*San Diego County Dep't of Public Welfare v. Superior Court of San Diego County (1972) 7 Cal. 3d 1, 11-14, 101 Cal. Rptr. 541, 496 P.2d 453* ;

Guardianship of Henwood (1958) 49 Cal. 2d 639, 645, 320 P.2d 1] .

Guardianship proceedings as a means of providing a person responsible for the person and welfare of a child [*see Prob. Code § 2351*] generally should be begun only if no parent is otherwise filling that role. Guardianship is appropriate if the child's parents are dead [*see Guardianship of Hall (1962) 200 Cal. App. 2d 508, 509, 19 Cal. Rptr. 426* ; *Guardianship of Walsh (1950) 100 Cal. App. 2d 194, 195, 223 P.2d 322]* , or to give legal validity to a de facto custodial arrangement (for example, if the parents have left the child to be cared for by a friend or relative) [*see Guardianship of Pankey (1974) 38 Cal. App. 3d 919, 928-929, 113 Cal. Rptr. 858* ; *Guardianship of Marino (1973) 30 Cal. App. 3d 952, 954, 106 Cal. Rptr. 655]* .

Guardianship has been used as a means to provide consent for a minor to obtain medical treatment when the parents will not consent [*see Guardianship of Phillip B. (1983) 139 Cal. App. 3d 407, 417-419, 188 Cal. Rptr. 781]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewFamily LawChild CustodyGeneral OverviewFamily LawGuardiansAppointmentFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral Overview

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24-280 California Forms of Pleading and Practice--Annotated § 280.22

§ 280.22 Relationship to Other Custody Proceedings

[1] Juvenile Court Dependency

Guardianship is not the proper proceeding for a nonparent to attempt to take custody of a child away from a parent whom the nonparent considers to be unfit. To remove a child from parental custody, there must first be sufficient facts of parental misconduct to bring the matter within the dependency jurisdiction of the juvenile court [*see Welf. & Inst. Code § 300 et seq.*]. There must also be clear and convincing evidence of one or more of the standards on which a child may be removed from the home under *Welf. & Inst. Code § 361(c)*. A less stringent standard under the Family Code (made applicable to guardianships by *Prob. Code § 1514(b)*) may not be applied to remove a child from parental custody [*see In re James T. (1987) 190 Cal. App. 3d 58, 65-67, 235 Cal. Rptr. 127* ; *see also Prob. Code § 1513(c)* (allegations of parental unfitness must be referred to agency designated to investigate potential dependencies, and guardianship proceedings must be abated); § 280.64[4]].

The above rule may not be absolute, and there may be some circumstances under which a guardianship may be used to remove a child from parental custody. In one case, nonparent guardians were appointed [*Guardianship of Phillip B. (1983) 139 Cal. App. 3d 407, 419-424, 426, 188 Cal. Rptr. 781]* even though juvenile court jurisdiction had been previously denied on essentially the same facts [*see In re Phillip B. (1979) 92 Cal. App. 3d 796, 802-803, 156 Cal. Rptr. 48]* . The case was highly publicized and involved parents who refused to authorize a life-extending operation for their child, who had Down's syndrome. Because the child was institutionalized rather than living with the parents, it is questionablewhether the case supports the proposition that a change of the actual physical custody from a parent to a nonparent can be accomplished through a guardianship without facts sufficient to bring the child under juvenile court dependency jurisdiction.

Once a child has been adjudged a dependent child of the juvenile court [*see Welf. & Inst. Code § 360(d)*], no other division of any superior court may hear proceedings regarding the child's custody [*Welf. & Inst. Code § 304*]. Therefore, a guardianship under the Probate Code may not be used to obtain custody of a child who is currently a dependent child of the juvenile court [*see § 280.20[2]*].

[2] Adoption

[a] Guardianship as Alternative to Adoption

Because guardianship does not terminate the parental rights of the birth parents [*cf. Fam. Code § 8617*], guardianship is an alternative to adoption if a parent is unable to have custody of a child, but consent to adoption is required and cannot be obtained [*see Guardianship of Pankey (1974) 38 Cal. App. 3d 919, 930-935, 113 Cal. Rptr. 858]* . Furthermore, unlike adoption [*see Prob. Code § 6451*], guardianship does not affect rights of intestate succession between a child and natural parents [*Prob. Code § 6451(a)*]. However, the security and permanence of adoption makes it a preferred arrangement to guardianship [*Guardianship of Henwood (1958) 49 Cal. 2d 639, 645, 320 P.2d 1* ; *see Jones T. v. Superior Court (1989) 215 Cal. App. 3d 240, 250-251, 264 Cal. Rptr. 4* ; *see also* [3], *below*].

[b] When Agency Has Legal Custody

If a child has been relinquished to an agency for adoptive placement, the agency has the legal custody of the child [*Fam. Code § 8704(a)*]. In such a case, adoption and guardianship provisions of the law cannot both operate to control the custody of the same child at the same time. However, guardianship proceedings may be begun as a challenge to the propriety of the adoption proceedings and to transfer custody from the agency to the guardian [*San Diego County Dep't of Public Welfare v. Superior Court of San Diego County (1972) 7 Cal. 3d 1, 12-13, 101 Cal. Rptr. 541, 496 P.2d 453* ; *Guardianship of Henwood (1958) 49 Cal. 2d 639, 644-646, 320 P.2d 1]* . The adoption and guardianship proceedings must be consolidated [*Fam. Code § 8714(e)*].

If the child is in the custody of an adoption agency, the appointment of a guardian generally is neither necessary nor convenient unless the agency is unfit to have the temporary custody of the child, or it is improbable that the child will be adopted [*see Guardianship of Henwood (1958) 49 Cal. 2d 639, 644-646, 320 P.2d 1]* . However, there may be extraordinary factors altering the course of the normal agency procedure that would make a guardianship appropriate [*see San Diego County Dep't of Public Welfare v. Superior Court of San Diego County (1972) 7 Cal. 3d 1, 12-13, 101 Cal. Rptr. 541, 496 P.2d 453* (birth mother relinquished child to agency that was investigating independent adoption petition of persons with whom child had always lived)].

[c] Guardianship Does Not Foreclose Adoption

The existence of a guardianship does not foreclose the possibility of adoption by someone other than the guardian [*Guardianship of Minnicar (1956) 141 Cal. App. 2d 703, 710, 297 P.2d 105]* . If the child is adopted, the guardianship terminates [*Prob. Code § 1600(b)*; *see Adoption of McDonnell (1947) 77 Cal. App. 2d 805, 813, 176 P.2d 778* (if adoption petition is granted, necessity for appointment of guardian disappears)].

It is not clear whether the appointment of a guardian terminates the right of a birth parent to relinquish the child to an adoption agency. Once a guardianship is established, the guardian has the right to custody of the child [*see Prob. Code § 2351(a)*]. The adoption statutes imply, but do not expressly provide, that a parent's right to relinquish the child to an agency depends on the parent having the right to custody [*see Fam. Code § 8700(a)*; *cf. Guardianship of Minnicar (1956) 141 Cal. App. 2d 703, 707, 297 P.2d 105* (mother relinquished child while child was in foster care; court did not address issue of whether mother without custody could validly relinquish child)]. The statutes do provide that adoption proceedings may not be begun by an agency that has the custody of an orphaned minor for whom a guardian of the person has been appointed under a testamentary nomination [*see Fam. Code § 8705*; *see also § 280.45* (nomination)].

[3] Termination of Parental Rights

Because adoption is preferred to guardianship, a court is not required to consider appointing a guardian if grounds exist to terminate parental rights so that the child may be adopted [*see Jones T. v. Superior Court (1989) 215 Cal. App. 3d 240, 250-251, 264 Cal. Rptr. 4]* . It is possible to terminate parental rights (free a child from parental "custody and control") under *Fam. Code § 7800 et seq.* even if there is no adoption pending or proposed [*see In re Marcel N. (1991)*

235 Cal. App. 3d 1007, 1011-1013, 1 Cal. Rptr. 2d 240] . If the court declares a minor free from the custody and control of both parents, or of one parent if the other no longer has custody and control, the court must at the same time either appoint a guardian of the minor or refer the minor to a licensed adoption agency for adoptive placement [*Fam. Code § 7893(a)*]. After referral of the minor to an adoption agency, no petition for guardianship may be filed without the agency's consent [*Fam. Code § 7893(b)(2)*]. For further discussion of termination of parental rights, see Ch. 12A, *Adoptions: Termination of Parental Rights* .

[4] Dissolution of Marriage

A court has no jurisdiction to appoint a guardian of the person if a court inanother California county retains continuing jurisdiction over custody of a child based on a custody award in a proceeding for the dissolution of a marriage [*Greene v. Superior Court (1951) 37 Cal. 2d 307, 310-312, 231 P.2d 821]* . Thereafter, disputes between the parents over the custody of a minor are within the continuing, exclusive jurisdiction of the family law court that first determined the custody question [*Greene v. Superior Court (1951) 37 Cal. 2d 307, 309-313, 231 P.2d 821]* .

However, if a dissolution of marriage proceeding is properly before the court, a nonparent who has or claims custody of the child may apply to be joined as a party [*see Cal. Rules of Ct., Rule 5.154* (expressly applicable to proceedings for dissolution of marriage, nullity of marriage, or legal separation); *see also Cal. Rules of Ct., Rule 5.10(c)* (definition of "proceeding")]. Custody may then be awarded to the nonparent on a finding that parental custody would be detrimental to the child under *Fam. Code § 3041*, and according to the order of preference in *Fam. Code § 3040* [*see In re Marriage of Valle (1975) 53 Cal. App. 3d 837, 842-843 n.5, 126 Cal. Rptr. 38* ; *Bookstein v. Bookstein (1970) 7 Cal. App. 3d 219, 221, 86 Cal. Rptr. 495* ; *see also Stever v. Stever (1936) 6 Cal. 2d 166, 168-170, 56 P.2d 1229]* . Alternatively, a nonparent may petition to be appointed guardian, and move to consolidate the guardianship and family law proceedings [*see Guardianship of Paduano (1989) 215 Cal. App. 3d 346, 350, 351, 263 Cal. Rptr. 589* (consolidation of guardianship proceeding begun by nonparent with pending family law proceeding is appropriate if custody of minor child of marriage is object of both proceedings)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawAdoptionProceduresAgency AdoptionFamily LawDelinquency & DependencyDependency ProceedingsFamily LawGuardiansAppointmentFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral Overview

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§ 280.23 Visitation Rights in Guardianship Proceeding

In a guardianship proceeding, the court has inherent power to grant visitation rights to a relative or another person [*see Guardianship of Martha M. (1988) 204 Cal. App. 3d 909, 911, 251 Cal. Rptr. 567]* . Further, the predecessor statute to *Fam. Code § 3100* (former *Civ. Code § 4601*), which provides for visitation rights to any person having an interest in the welfare of the child, has been held to apply in guardianship proceedings [*see Guardianship of Martha M. (1988) 204 Cal. App. 3d 909, 911-913, 251 Cal. Rptr. 567]* . A petition for visitation rights may be considered at any time during the pendency of the guardianship under the court's continuing jurisdiction [*Guardianship of Martha M. (1988) 204 Cal. App. 3d 909, 913-914, 251 Cal. Rptr. 567* ; *see also Guardianship of Reynolds (1943) 60 Cal. App. 2d 669, 677, 141 P.2d 498]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawChild CustodyVisitationAwardsGeneral OverviewFamily LawGuardiansGeneral Overview

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24-280 California Forms of Pleading and Practice--Annotated § 280.24

§ 280.24 Annual Status Report

To the extent resources are available, courts must implement procedures to ensure that every guardian completes and returns to the court an annual status report [*Prob. Code § 1513.2(a)*; for mandatory Judicial Council Form, *see § 280.117*]. The report must include information about the status of the guardianship, including the guardian's present address, the name and birth date of the child under guardianship, the name of the school in which the child is enrolled, and information about the person with whom the child is residing if the child is not in the guardian's home and why the child was moved [*Prob. Code § 1513.2(b)*]. It is a misdemeanor for a guardian to submit willfully any material information required by the form that the guardian knows to be false [*Prob. Code 1513.2(a)*].

At least one month before the date the guardian is required to return the status report, the clerk of the court must mail to the guardian a notice informing the guardian that he or she is required to complete and return the report to the court [*Prob. Code § 1513.2(a)*]. The clerk must enclose a blank status report form for the guardian to complete and return by mail [*Prob. Code § 1513.2(a)*]. If the guardian does not complete and return the status report, or if the court finds after the guardian has returned the report that further information is needed, the court must attempt to obtain this information from the guardian or other sources [*Prob. Code § 1513.2(a)*]. If the court is unable to obtain this information within 30 days after the date the status report is due, the court must either order the guardian to make himself or herself available to the court's investigator for purposes of investigation of the guardianship or to show cause why the guardian should not be removed [*Prob. Code § 1513.2(a)*].

The status report is confidential and may only be made available to persons who have been served in the proceedings or their attorneys [*Prob. Code § 1513.2(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewFamily LawGuardiansDuties & Rights

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[Reserved]

§§ 280.25[Reserved]

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§ 280.30 Necessary-and-Convenient Standard for Appointment

The superior court may appoint a guardian of the estate of a minor whenever the appointment appears to the court to be necessary and convenient [*Prob. Code §§ 1514(a), 2200*]. Although the statutory language may seem to be the same for appointment of a guardian of the estate as for a guardian of the person [*see § 280.21*], there are significantly different considerations. Because a parent is the natural guardian of a child [*Odell v. Lutz (1947) 78 Cal. App. 2d 104, 106, 177 P.2d 628]* , usually there is no need to appoint a guardian of the person of a minor who is in parental custody. In contrast, a parent has no natural right to control the property of a minor child [*Fam. Code § 7502*; *see Emery v. Emery (1955) 45 Cal. 2d 421, 432, 289 P.2d 218]* . Accordingly, a guardian of a minor's estate may be appointed in any case in which the minor owns property [*see Guardianship of Kentera (1953) 41 Cal. 2d 639, 643, 262 P.2d 317]* . Conversely, it is neither necessary nor proper to appoint a guardian of the estate of a minor who has noproperty [*Guardianship of Minnicar (1956) 141 Cal. App. 2d 703, 706-707, 297 P.2d 105]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansGeneral OverviewFamily LawGuardiansAppointment

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24-280 California Forms of Pleading and Practice--Annotated § 280.31

§ 280.31 Alternatives to Guardian of the Estate

In some situations, a guardianship of the estate, and the attendant costs of appointment and administration, may be avoidable. The availability of alternatives may affect the court's finding as to the necessity of the appointment of a guardian of the estate. For example, a minor's parent may hold, in trust, property belonging to the minor if the minor's total estate does not exceed $5,000 [*Prob. Code § 3400 et seq.*]. A court may order any of several alternative dispositions of the money if a minor's sole asset is money [*Prob. Code § 3410 et seq.*].

If a minor's only asset is a cause of action, a guardian ad litem, appointed under *Code Civ. Proc. §§ 372, 373*, may pursue the action on the minor's behalf, without the need for appointment of a guardian of the minor's estate. If a minor is to receive money or property under a compromise or judgment terminating litigation, the court may order any of several alternative dispositions of the money, including but not limited to, appointment of a guardian of the estate [*Prob. Code §§ 3600 et seq., 3610 et seq.*].

For discussion of these alternatives, see Ch. 364, *Minors: Claims and Property of Minors* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGuardiansEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsEstate, Gift & Trust LawTrustsCreationFamily LawGuardiansGeneral Overview

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[Reserved]

§§ 280.32[Reserved]

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24-280 California Forms of Pleading and Practice--Annotated § 280.40

§ 280.40 Choosing Guardian of the Person

[1] Applicability of Family Code

In appointing a guardian of the person of a minor, the court is governed by the provisions of Chapter 1 [*Fam. Code § 3020 et seq.*] and Chapter 2 [*Fam. Code § 3040 et seq.*] of Division 8 of the Family Code, relating to the custody of a minor [*Prob. Code § 1514(b)*]. These standards are considered in detail in Ch. 223, *Dissolution of Marriage: Child Custody* . Because a guardianship is used to grant custody to a nonparent, the order of preference of *Fam. Code § 3040* and the detriment test of *Fam. Code § 3041* are particularly pertinent to guardianship proceedings [*see* [2], [3], *below*].

[2] Order of Preference Under Family Code

Fam. Code § 3040 sets forth the constitutionally compelled principle of parental preference in making a custody determination [*see Stanley v. Illinois (1972) 405 U.S. 645, 649-659, 92 S. Ct. 1208, 31 L. Ed. 2d 551]* . The statute provides that custody should be granted in the following order of preference according to the best interests of the child:

- To both parents jointly or to either parent [*Fam. Code § 3040(a)(1)*].

- If to neither parent, then to the person or persons in whose home the child has been living in a wholesome and stable environment [*Fam. Code § 3040(a)(2)*].

- To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child [*Fam. Code § 3040(a)(3)*].

If the court determines that custody should be granted to a nonparent, it must consider and give due weight to a parent's nomination of a guardian of the person of the child under the Probate Code [*Fam. Code § 3043*; *see § 280.45*]. It would appear that this rule requires the court to consider a parent's nomination for guardian even if the child currently has a different nonparent custodian who would otherwise have a preferential right to custody [*cf. Guardianship of Chandler (1959) 170 Cal. App. 2d 606, 610, 339 P.2d 183* (it was within court's discretion to refuse to remove nonparent guardians, with whom child had been living for 13 months, and appoint father's nominee)].

[3] Detriment to Child

Before a court makes any order granting custody to a person or persons other than a parent, over a parent's objection, the court must find that being in the custody of a parent would be detrimental to the child, and that the grant to a nonparent is required to serve the best interest of the child [*Fam. Code § 3041(a)*]. Further, if a court finds that granting custody to a parent would be detrimental and granting custody to a nonparent would be in the child's best interests, the court may grant custody to the nonparent without further balancing the parent's constitutionally protected interest in an opportunity to form a relationship with the child [*Adoption of Daniele G. (2001) 87 Cal. App. 4th 1392, 1408, 105 Cal. Rptr. 2d 341]* . The detriment test focuses on the needs of the child rather than on the character of the parent; it does not require a finding that the parent is unfit [*In re B.G. (1974) 11 Cal. 3d 679, 694-698, 114 Cal. Rptr. 444, 523 P.2d 244]* . Similarly, no allegation of serious abuse, neglect, or abandonment by the parent is necessary to sustain an allegation that parental custody is detrimental to the child [*Guardianship of Olivia J. (2000) 84 Cal. App. 4th 1146, 1153-1154, 101 Cal. Rptr. 2d 364]* . The detriment standard is considered in detail in Ch. 223, *Dissolution of Marriage: Child Custody* .

"Detriment to the child" includes the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of the child's parent, fulfilling both the child's physical needs and psychological needsfor care and affection, and who has assumed that role for a substantial period of time [*Fam. Code § 3041(c)*].

A finding that parental custody would be detrimental to the child must ordinarily be supported by clear and convincing evidence [*Fam. Code § 3041(b)*]. However, if the court finds by a preponderance of the evidence that the person to whom custody may be given is a person described in *Fam. Code § 3041(c)*, this finding is deemed a finding that the custody is in the child's best interest and that parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary [*Fam. Code § 3041(d)*].

In the case of an Indian child, before making an order granting custody to a nonparent over the objection of a parent, the court must apply the evidentiary standards specified in the Indian Child Welfare Act [*25 U.S.C. § 1912(d), (e), (f)*] and *Welf. & Inst. Code §§ 224.6* and *361.7*, and the placement preferences and standards specified in the Indian Child Welfare Act [*25 U.S.C. § 1922*] and *Welf. & Inst. Code § 361.31* [*Fam. Code § 3041(e)*].

[4] Religious and Cultural Matching

It is desirable that the religious belief of a guardian of the person of a child be in harmony with that of the child's family. It is therefore a factor to be taken into account in appointing a guardian; however, it is not a decisive consideration. The weight to be given to this factor is essentially for the trial court's determination, taking into account all relevant facts touching on the family's religious beliefs and practices [*Guardianship of Chandler (1959) 170 Cal. App. 2d 606, 611, 339 P.2d 183* ; *see Guardianship of Walsh (1950) 100 Cal. App. 2d 194, 198-199, 223 P.2d 322]* . The same standard applies to ethnic background and age [*Guardianship of Minnicar (1956) 141 Cal. App. 2d 703, 709-710, 297 P.2d 105]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointmentFamily LawParental Duties & RightsGeneral Overview

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§ 280.41 Considerations in Appointing Guardian of the Estate

Subject to the effect of a parental nomination [*see § 280.45*], in appointing a guardian of the estate, the court is to be guided by what appears to be in the best interest of the proposed ward, taking into account the proposed guardian's ability to manage and to preserve the estate as well as the proposed guardian's concern for and interest in the welfare of the proposed ward [*Prob. Code § 1514(e)(1)*]. If the proposed ward is of sufficient age to form an intelligent preference as to the person to be appointed as guardian of the estate, the court must give consideration to that preference [*Prob. Code § 1514(e)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-280 California Forms of Pleading and Practice--Annotated § 280.42

§ 280.42 Nonresident Guardian

Because there is no statutory bar, a nonresident guardian may be appointed. However, such appointments are not favored, and a resident guardian is preferred unless there is some very strong reason for the appointment of a nonresident [*Guardianship of Brown (1976) 16 Cal. 3d 326, 336, 128 Cal. Rptr. 10, 546 P.2d 298* ; *Estate of Rosin (1964) 226 Cal. App. 2d 166, 172, 37 Cal. Rptr. 830]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointment

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24-280 California Forms of Pleading and Practice--Annotated § 280.43

§ 280.43 Nonprofit Charitable Corporation as Guardian

A nonprofit charitable corporation may be appointed as guardian of the person, estate, or both if all of the following apply [*Prob. Code § 2104(a)*]:

- It is incorporated in California.
- Its articles of incorporation specifically authorize it to accept appointments as guardian.
- It has been providing, at the time of appointment, care, counseling, or financial assistance to the proposed ward under the supervision of a registered social worker certified by the Board of Behavioral Science Examiners of California.

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-280 California Forms of Pleading and Practice--Annotated § 280.44

§ 280.44 Appointment of Public Guardian

The public guardian (a county officer) may apply for appointment as any person's guardian if there is no one else who is qualified and willing to actand whose appointment would be in the person's best interest [*see Prob. Code § 2920 et seq.*; *see generally Gov. Code § 27430 et seq.*; *Prob. Code § 2900 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-280 California Forms of Pleading and Practice--Annotated § 280.44A

§ 280.44A Appointment of a Professional Fiduciary

A licensed professional fiduciary may be appointed as a guardian. Professional fiduciaries are required to be licensed under the Professional Fiduciaries Act [*Bus. & Prof. Code § 6500 et seq.*], which requires private professional guardians to meet specified qualifications. Persons who meet the statutory definition of "professional fiduciary" must be properly licensed in order to act in that capacity [*Bus. & Prof. Code § 6530*; *Prob. Code §§ 60.1(b), 2340*]. For additional discussion of the application of the Professional Fiduciaries Act to guardians, see *§ 280.72*. For detailed discussion of the licensing and regulation of professional fiduciaries under the Act, see *Ch. 281, Guardianship and Conservatorship: Appointment of Conservators, § 281.66*. For an allegation seeking removal of a guardian or conservator for failure to comply with the licensing requirements of the Professional Fiduciaries Act, see *Ch. 290G, Guardianship and Conservatorship: Removal or Resignation of Guardians or Conservators, § 290G.37A*.

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24-280 California Forms of Pleading and Practice--Annotated § 280.45

§ 280.45 Nomination of Guardian

[1] Authority to Make Nomination

"Nomination" of a guardian refers to a designation of a person whom the nominator wishes to be appointed guardian of a child. The Probate Code recognizes two kinds of nominations. A parent may nominate a guardian of the person or estate, or both, of a minor child in either of the following cases:

- The other parent nominates, or consents in writing to the nomination of, the same guardian for the same child [*Prob. Code § 1500(a)*].

- At the time the petition for appointment of the guardian is filed, the other parent either is dead or lacks legal capacity to consent to the nomination, or the consent of the other parent would not be required for an adoption of the child [*Prob. Code § 1500(b)*; *see* Ch. 12A, *Adoptions: Termination of Parental Rights* (when consent to adoption is required)].

A parent or any other person may nominate a guardian for property that a minorreceives from or by designation of the nominator (whether before, at the time of, or after the nomination). The right includes, but is not limited to, property that is received by the minor by gift, deed, trust, will, succession, insurance, or benefits of any kind [*Prob. Code § 1501*].

[2] Effect of Nomination

A person duly nominated must be considered by the court, but the court is not required to appoint the nominee [*see Fam. Code § 3043*; *Prob. Code § 1514(c), (d)*].

The court must consider and give due weight to the nomination of a guardian of the person of the child by a parent [*Fam. Code § 3043*; *cf. In re Vanessa P. (1995) 38 Cal. App. 4th 1763, 1769-1770, 45 Cal. Rptr. 2d 760* (nominee is entitled to *de facto* parent status in juvenile court and standing to participate fully in proceedings as party)]. The right of nomination is structured so that a custody battle between one parent's nominee and the other parent is unlikely. Before a

parental nomination is allowed, the other parent must agree, be deceased, be incompetent, or be subject to statutory standards allowing termination of parental rights [*Prob. Code § 1500*]. Under the Family Code, consideration of the nominee is required only if it is first determined that no parent is able to have custody or that parental custody would be detrimental to the child [*see Fam. Code §§ 3040(a), 3043*; *see also § 280.40[2], [3]*].

With regard to a parent's nominee for guardian of the estate, or a nominee with regard to property under *Prob. Code § 1501*, the statutory effect is somewhat more directive. The court must appoint the nominee unless it determines that the nominee is unsuitable [*Prob. Code § 1514(d)*].

[3] Manner of Making Nomination

A nomination of a guardian may be made in the petition for the appointment of the guardian, at the hearing on the petition, or in a writing signed either before or after the petition for the appointment of the guardian is filed [*Prob. Code § 1502(a)*]. Nominations commonly are made by will. Nominations also may be made in a trust instrument if the trust property might vest in a beneficiary during minority. The Judicial Council form to nominate a guardian is *set forth in § 280.111*. Use of the Judicial Council form is required [*see Cal. Rules of Court, Rule 1.31*].

[4] When Nomination Is Effective

The nomination of a guardian is effective when made, except that a written nomination may provide that the nomination becomes effective only on the occurrence of specified conditions stated in the writing. These conditions may include, but are not limited to, the subsequent legal incapacity or death of the nominator [*Prob. Code § 1502(b)*]. Unless the writing making the nomination expressly provides otherwise, a nomination remains effective notwithstanding the subsequent legal incapacity or death of the nominator [*Prob. Code § 1502(c)*].

The fact that a nomination is effective does not give the nominee the authority to act as guardian. It merely means that the person is to be treated as a nominee should the court be asked to appoint a guardian. Appointment and letters are still required to give the nominee the authority to act as guardian.

[5] Powers of Nominated Guardian

If the court appoints a nominee as guardian, the nominee may exercise authority more independently of court supervision than if the appointee is not a nominee. Unless the court for good cause determines otherwise, if the court appoints a parent's nominee for guardian of the minor's person, the guardian must be granted in the order of appointment, to the extent provided in the nomination, the same authority with respect to the person of the ward as a parent having legal custody of a child. The guardian may exercise this authority without notice or hearing, or without court authorization, instructions, approval, or confirmation, in the same manner as if the authority were exercised by a parent having legal custody of a child [*Prob. Code § 2108(a)*].

Except to the extent that the court for good cause determines otherwise, if a court appoints a nominee as guardian of the minor's estate or as guardian for property under *Prob. Code § 1501* [*see* [1], *above*], the court must grant to the guardian in the order of appointment, to the extent provided in the nomination, the right to exercise any of the independent powers listed in *Prob. Code § 2591* [*Prob. Code § 2108(b)*; *but see Prob. Code §§ 2593-2595* (withdrawal of powers; requirement that letters list powers; power to petition for instructions or confirmation notwithstanding independent powers)]. The guardian may exercise those powers without notice, hearing, or court authorization, instructions, approval, or confirmation, in the same manner as if the authority were granted by order of the court under *Prob. Code § 2590* [*Prob. Code § 2108(b)*], which generally gives the court the power to grant independent powers to the guardian. In the case of a nominee with regard to property under *Prob. Code § 1501*, the additional authority is limited to the property covered by the nomination [*Prob. Code § 2108(b)*].

[6] Nomination of Director of Developmental Services

The Director of Developmental Services may be appointed guardian for a developmentally disabled minor on the nomination of the minor, or of a parent, relative, or friend, or of the minor's guardian when nominating a successor [*Health & Safety Code § 416.5*]. However, only the director may petition for appointment as guardian based on such a nomination [*Health & Safety Code § 416.6*; *Guardianship of Smith (1980) 100 Cal. App. 3d 882, 892, 161 Cal. Rptr. 335* ; *see generally Health & Safety Code § 416 et seq.*]. For a further discussion of the Director of Developmental Services as guardian, and treatment of developmentally disabled persons generally, see *Ch. 304, Insane and Other Incompetent Persons, § 304.70* et seq.

[7] Nomination Under Prior Law

A signed writing made before 1981 and "appointing" a person to serve as the guardian of the person, estate, or both, of a minor, or as a guardian of the property that a minor receives from or by designation of the person making the appointment, will be deemed to be a nomination of a guardian, if the requirements of *Prob. Code § 1500* or *1501* are met [*Prob. Code § 1489*]. This provision applies whether or not the signed writing is a will or deed, as long as the person signing the writing, at the time the writing was signed, had sufficient capacity to form an intelligent preference [*Prob. Code § 1489*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 280.46 Joint Guardians

[1] Appointment of Joint Guardians Generally

The court, in its discretion, may appoint two or more joint guardians of the person, estate, or both, each of whom must qualify in the same manner as a sole guardian [*Prob. Code § 2105(a), (b)*]. If there are two joint guardians, both must concur to exercise a power; if there are more than two, a majority must concur [*Prob. Code § 2105(c)*].

If one of the joint guardians dies or is removed or resigns, the powers and duties continue in the remaining joint guardians until further appointment is made by the court [*Prob. Code § 2105(d)*].

If one or more of the joint guardians is absent from the state and unable to act, otherwise unable to act, or legally disqualified from serving, the court may, by order made with or without notice, authorize the remaining joint guardians to act as to all matters embraced within its order [*Prob. Code § 2105(e)*].

[2] Custodial Parent With Terminal Condition

The Legislature has established a special joint guardianship by which a parent with a terminal health condition may make arrangements for the joint care, custody, and control of his or her children so as to minimize the emotional stress of, and disruption for, the children when the parent becomes incapacitated or dies. The purpose of the procedure is to avoid the need to provide a temporary guardian or place the children in foster care pending appointment of a guardian, which might be required otherwise [*see Prob. Code § 2105(f)*].

If a custodial parent has been diagnosed as having a terminal condition, as evidenced by a declaration executed by a licensed physician, the court may appoint the custodial parent and a person nominated by the custodial parent as joint guardians of a minor [*Prob. Code § 2105(f)*]. A custodial parent is one who either has been granted sole legal and physical custody of the child in another proceeding, or with whom the child resides if there is no operative custody order [*Prob. Code § 1419.5*]. A terminal condition is an incurable and irreversible condition that, without the administration of life-sustaining treatment, will, within reasonable medical judgment, result in death [*Prob. Code § 2105(f)*].

The appointment may not be made over the objection of a noncustodial parentunless there is a finding that granting custody to the noncustodial parent would be detrimental to the child [*Prob. Code § 2105(f)*; *see Fam. Code § 3041*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-280 California Forms of Pleading and Practice--Annotated § 280.47

§ 280.47 Single Guardian for Several Wards

The court, in its discretion, may appoint one guardian for several wards. The request for such an appointment may be made in the initial petition filed in the proceeding or may be made subsequently in a petition filed in the same proceeding and noticed and heard with respect to the newly proposed ward in the same manner as an initial petition for appointment of a guardian [*Prob. Code § 2106*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointment

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24-280 California Forms of Pleading and Practice--Annotated §§ 280.48-280.59

[Reserved]

§§ 280.48[Reserved]

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§ 280.60 Who May Petition

A relative or another person on behalf of the minor may file a petition for appointment of a guardian of the minor. An "other person on behalf of the minor" under *Prob. Code § 1510(a)* is a person who pleads ultimate facts demonstrating financial misconduct or alleges other information sufficient to warrant court intervention in the management of the minor's money or other property [*Prob. Code § 1510(a)*; *Suleman v. Superior Court (2010) 180 Cal. App. 4th 1287, 1299, 1302-1303, 103 Cal. Rptr. 3d 651]* . A minor who is at least 12 years old may file a petition for the appointment of a guardian for himself or herself [*Prob. Code § 1510(a)*]. The Judicial Council form to petition for the appointment of a guardian is *set forth in § 280.110*. Use of the Judicial Council form is required [*see Cal. Rules of Court, Rule 1.31*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointment

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24-280 California Forms of Pleading and Practice--Annotated § 280.60A

§ 280.60A Guardian Screening Form

A proposed guardian, except a public guardian, or a bank or other entity entitled to conduct the business of a trust company, must submit to the court with the petition for appointment of guardian a completed Confidential Guardian Screening Form (Form GC-212) [*Cal. Rules of Ct., Rule 7.1001(a)*; *see § 280.110A*]. The information on the form will be used by the court and by persons or agencies designated by the court to assist in determining whether a proposed guardian should be appointed [*Cal. Rules of Ct., Rule 7.1001(b)*]. The form and the information contained on it are confidential. The clerk's office must maintain the forms in a manner that will protect and preserve their confidentiality [*Cal. Rules of Ct., Rule 7.1001(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-280 California Forms of Pleading and Practice--Annotated § 280.61

§ 280.61 Appointment of Temporary Guardian

On or after the filing of a petition for appointment of a guardian, any person entitled to petition for appointment of the guardian may file a petition for appointment of a temporary guardian of the person or estate or both [*Prob. Code § 2250(a)*]. A temporary guardian also may be appointed if the court suspends powers of the guardian [*see Prob. Code § 2250(i)*], or if a vacancy occurs for any reason [*see Prob. Code § 2250(j)*]. Temporary guardianships are discussed in Ch. 282, *Guardianship and Conservatorship: Temporary Guardians and Conservators* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointment

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24-280 California Forms of Pleading and Practice--Annotated § 280.62

§ 280.62 Notice

[1] Basic Notice Requirements

Notice of the time and place of the hearing on the petition for appointment of a guardian, together with a copy of the petition, must be given at least 15 days before the hearing. The court may not shorten the time for giving this notice of hearing [*Prob. Code § 1511(a)*].

Notice must be served on the following persons [*Prob. Code § 1511(b)*]:

- The proposed ward, if he or she is at least 12 years old.
- Any person having legal custody of the proposed ward or serving as guardian of the estate of the proposed ward.
- The parents of the proposed ward.
- Any person nominated as a guardian for the proposed ward [*see Prob. Code §§ 1500, 1501*].

Notice to the above persons must be given in the manner provided in *Code Civ. Proc. § 415.10* (personal service) or *Code Civ. Proc. § 415.30* (service by mail), or in any manner authorized by the court [*Prob. Code § 1511(b)*]. The court's authority to order another manner of service applies if neither personal service nor service by mail, with reasonable diligence, can be given. If service is made by mail under *Prob. Code § 1511(b)*, it must be made according to *Code Civ. Proc. § 415.30* because *Prob. Code § 1511(b)* does not authorize the court to order any other service by mail [*Guardianship of Debbie V. (1986) 182 Cal. App. 3d 781, 783-788, 227 Cal. Rptr. 554]* .

Notice also must be given to the following persons [*Prob. Code § 1511(c)*]:

- The spouse named in the petition.

- The relatives named in the petition (except that if the petition is for a guardian of the estate only, the court may dispense with notice to any one or more or all of the relatives).

- The person having care of the proposed ward, if other than the person having legal custody of the proposed ward.

Notice to the above persons must be given by mail sent to the addresses stated in the petition, or in any manner authorized by the court [*Prob. Code § 1511(c)*].

If the court determines that the notice required by *Prob. Code § 1511*, *above*, is insufficient in the particular circumstances, the court may require that further or additional notice, including a longer period of notice, be given [*Prob. Code § 1202*].

The requirement of notice to the parents is jurisdictional. An order of appointment made without notice, if a parent's address was known, is void and subject to be set aside at any time [*Guardianship of Debbie V. (1986) 182 Cal. App. 3d 781, 787-788, 227 Cal. Rptr. 554* ; *Guardianship of Kerns (1946) 74 Cal. App. 2d 862, 869, 169 P.2d 975]* .

If the case involves a petition for guardianship of the person, the petitioner must mail a notice of the hearing and a copy of the petition, at least 15 days before the hearing, to the local agency designated by the board of supervisors to investigate guardianships for the court [*Prob. Code § 1516(a)*; *see § 280.64*].

The Parental Kidnapping Prevention Act [*28 U.S.C. § 1738A(e)*] and the Uniform Child Custody Jurisdiction and Enforcement Act [*Fam. Code § 3408*] also contain notice requirements that might have to be complied with. For further discussion, see Ch. 394, *Parent and Child* .

Notice in guardianship proceedings is further discussed in Ch. 284, *Guardianship and Conservatorship: Notice* .

[2] Notice to Particular Public Officials

[a] In General

Various statutes of the Probate Code require 15 days notice to particular public agencies in certain cases. *Prob. Code § 1461(b)* requires notice to the Director of Mental Health or the Director of Developmental Services if the ward is, or has been during the guardianship proceeding, a patient in, or on leave from, a state hospital [*see Prob. Code §§ 1461(a), 1511(d)*]. *Prob. Code § 1542* requires notice to the Director of Social Services and to the local agency designated to investigate guardianships for the court if the petition proposes that a nonrelative guardian of the person be appointed [*see Prob. Code § 1511(d)*]. *Prob. Code § 1461.5* requires that notice be given to the Department of Veterans Affairs if the estate consists, wholly or in part, of veteran's benefits [*see Prob. Code § 1511(e)*].

[b] When Proposed Ward Is Developmentally Disabled

If the proposed ward is developmentally disabled, the petitioner must mail orpersonally serve a notice of the hearing and a copy of the petition on the director of the regional center for the developmentally disabled at least 30 days before the day of the hearing in any case in which all of the following conditions exist [*Prob. Code § 1461.4(a)*]:

- The proposed ward has developmental disabilities.

- The proposed guardian is not the natural parent of the proposed ward.

- The proposed guardian is a provider of board and care, treatment, habilitation, or other services to persons with developmental disabilities or is a spouse or employee of a provider.

- The proposed guardian is not a public entity.

In these cases, the regional center must file a written report and recommendation with the court regarding the suitability of the petitioners to meet the needs of the proposed ward [*Prob. Code § 1461.4(b)*].

[3] When Notice Is Not Required

Notice need not be given to any person who joins in the petition [*Prob. Code § 1201*]. Further, a person may waive notice by a writing signed by the person or the person's attorney and filed in the proceeding [*see § 280.111*].

Unless the court orders otherwise, notice is not to be given to the parents or other relatives of a proposed ward who has been relinquished to a licensed adoption agency, or to the parents of a proposed ward who has been judicially declared free from parental custody and control [*Prob. Code § 1511(f)*].

Notice need not be given to any person if the court so orders on a determination that the person cannot with reasonable diligence be given the notice or that the giving of notice would be contrary to the interest of justice [*Prob. Code § 1511(g)*].

If the petition is for guardianship of the estate only, the court may dispense with notice to any one or more of the relatives required to be named in the petition under *Prob. Code § 1511(c)(2)* [*Prob. Code § 1511(c)(2)*]. However, the court may not dispense with notice to the minor's parents or to any other relative who has legal custody of the proposed ward, or to any relative nominated as guardian [*see Prob. Code § 1511(b)*].

The Judicial Council form for a petition for appointment of a guardian includes space for requesting that the court dispense with notice to persons listed in an attachment to the petition [*see § 280.110[1]*, P 15].

[4] Notice of Request for Independent Powers

If the petition for appointment of a guardian of the estate includes a request for an order granting independent powers [*see Prob. Code § 2590*], the notice of hearing on the petition must so state and must list the specific power or powers requested [*Prob. Code § 2592(b)*].

[5] Proof of Notice

Before a guardian is appointed, proof must be made to the court that each person entitled to notice under *Prob. Code § 1511* has been given the required notice, or that notice to a specified person cannot be given with reasonable diligence or would be contrary to the interests of justice [*Prob. Code § 1511(h)*]. If a person entitled to notice has waived it, the court must so find in its order [*Prob. Code § 1260(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointment

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24-280 California Forms of Pleading and Practice--Annotated § 280.63

§ 280.63 Appointment of Counsel for Proposed Ward

The court may appoint private legal counsel for a proposed ward who is not otherwise represented by counsel if the court determines that the appointment would be helpful to the resolution of the matter or is necessary to protect the proposed ward's interests [*Prob. Code § 1470(a)*]. Each attorney appointed or eligible for appointment by a court before January 1, 2008, including deputy public defenders, was required to certify to the court by April 1, 2008, that he or she satisfies the qualifications to be eligible for a new appointment on or after April 1, 2008. Beginning March 1, 2008, each counsel must certify that he or she is qualified before becoming eligible for an appointment. Beginning January 1, 2009, each appointed counsel must certify to the court before the end of March of each year that he or she has completed the continuing education required for the preceding calendar year [*see Cal. Rule of Ct. Rule 7.1101, see also § 280.118* (Judicial Council Form GC-010, Certification of Attorney Concerning Qualifications For Court Appointment in Conservatorships/Guardianships)]. A report to the court by appointed counsel may not be withheld from the parties, and a judge's failure to allow the spouse of a conservatee to see the report violated the spouse's due process rights [*Convervatorship of Schaeffer (2002) 98 Cal. App. 4th 159, 165, 119 Cal. Rptr. 2d 547]* .

If counsel is appointed, on conclusion of the matter the court must fix a reasonable sum for compensation and expenses of counsel. In the discretion of the court, the sum may include compensation for services rendered and expenses incurred before the date of the order appointing counsel [*Prob. Code § 1470(b)*].

The court must order the attorney's fees to be paid by a parent or the parents of the minor or from the minor's estate, or any combination of those sources, in any proportions the court deems just [*Prob. Code § 1470(c)(2)*]. If a ward or proposed ward is furnished legal counsel, then the court, on its own motion or that of a party, must determine whether a parent or parents of the ward or proposed ward, or the estate of the ward or proposed ward, is financially unable to pay all or a portion of the cost of appointed counsel [*Prob. Code § 1470(c)(3)*]. Any portion of the cost of counsel that the court finds the parents or parents or the estate of the ward or proposed ward is unable to pay, must be paid by the county [*Prob. Code § 1470(c)(3)*]. However, an order for parental payment may be made only after the parent or parents, as the case may be, had notice and the opportunity to be heard on whether the order would be just under the circumstances of the case [*Prob. Code § 1470(d)*]. For purposes of this rule, a nonparent, such as a grandparent, does not qualify as a parent and cannot be compelled to pay a minor's guardianship attorney's fees and costs [*Guardianship of Elan E.*

(2000) 85 Cal. App. 4th 998, 1001, 102 Cal. Rptr. 2d 528] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselAppointmentsEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointment

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24-280 California Forms of Pleading and Practice--Annotated § 280.64

§ 280.64 Investigation of Case

[1] Requirement of Investigation

Unless waived by the court, a court investigator, probation officer, or domestic relations investigator may make an investigation and file with the court a report and recommendation concerning each proposed guardianship of the person or estate. If the proposed guardian is a relative, the investigation must be made by a court investigator; if the proposed guardian is a nonrelative, the investigation must be made by the county agency designated to investigate potential dependency [*Prob. Code § 1513(a)*]. The investigation required by the Probate Code is inapplicable to guardianships established in juvenile court for a dependent child [*Prob. Code § 1513(f)*]. For purposes of the requirements of *Prob. Code § 1513*, the term "relative" means a person who is a spouse, parent, step-parent, brother, sister, step-brother, step-sister, half-brother,half-sister, uncle, aunt, niece, nephew, first cousin, or any person denoted by the prefix "grand" or "great," or the spouse of any of those persons, even after the marriage has been terminated by death or dissolution [*Prob. Code § 1513(g)*].

[2] Report Requirements

The report for the guardianship of the person must include, but need not be limited to, an investigation and discussion of all of the following [*Prob. Code § 1513(a)*]:

- A social history of the guardian.

- A social history of the proposed ward, including, to the extent feasible, an assessment of any identified developmental, emotional, psychological, or educational needs of the proposed ward and the capability of the petitioner to meet those needs.

- The relationship of the proposed ward to the guardian, including the duration and character of the relationship, if applicable, the circumstances under which physical custody of the proposed ward was acquired by the guardian, and a statement of the proposed ward's attitude concerning the proposed guardianship, unless the statement of the attitude is affected by the proposed ward's developmental,

physical, or emotional condition.

- The anticipated duration of the guardianship and the plans of both natural parents and the proposed guardian for the stable and permanent home for the child. The court may waive this requirement for cases involving relative guardians.

In an Indian child custody proceeding, the person making the investigation and report is required to consult with the Indian child's tribe and include any information provided by the tribe in the report [*Prob. Code § 1513 (h)*].

The report must be kept confidential and will be made available only to persons who have been served in the proceedings, or their attorneys. The clerk of the court must make provisions for the limitation of the report exclusively to persons entitled to receive it [*Prob. Code § 1513(d)*]. However, court may not a limit access to the report by the litigants and their attorneys [*Tracy A. v. Superior Court (2004) 117 Cal. App. 4th 1309, 1317-1318, 12 Cal. Rptr. 3d 684* (court must furnish litigants and their attorneys with copy of report a sufficient time before hearing, and may not restrict them to merely viewing report in court and making notes of its contents)]. For discussion of the use of the report at trial, see *§ 280.65[5]*.

[3] Access to Minor's Records

For the purposes of writing the report, the person who makes the investigation and report must have access to the proposed ward's school records, probation records, and public and private social services records, and to an oral or written summary of the proposed ward's medical records and psychological records prepared by any physician, psychologist, or psychiatrist who made or who is maintaining those records. The physician, psychologist, or psychiatrist must be available to clarify information regarding these records pursuant to the investigator's responsibility to gather and provide information for the court [*Prob. Code § 1513(e)*].

A family law court must provide to a court hearing a guardianship proceeding, on that court's request, all available information the court deems necessary to make a determination regarding the best interest of the proposed ward. The family law court must also release this information to the guardianship investigator, as provided in *Prob. Code § 1513(a)* [*Prob. Code § 1514.5*; *see Fam. Code § 3111(b)*]. Any released information that is confidential under any other provision of law remains confidential. Confidential family law mediation and confidential dependency mediation records are exempt from the disclosure requirement. No shared records may be disclosed to any party in a case unless the party requests the agency or court that originates the record to release the record and the request is granted [*Prob. Code § 1514.5*].

The guardianship investigator may also inspect the proposed ward's juvenile court case file, if any [*see Welf. & Inst. Code § 827(a)(1)(L)*].

[4] Case of Alleged Parental Unfitness

If the investigation finds that any party to the proposed guardianship alleges that the minor's parent is unfit, so as to potentially bring the child within the dependency jurisdiction of the juvenile court under *Welf. & Inst. Code § 300*, the case must be referred to the county agency designated to investigate potential dependencies. The guardianship proceedings may not be completed until a dependency investigation [*see Welf. & Inst. Code §§ 328, 329*] is completed and a report is provided to the court in which the guardianship proceeding is pending [*Prob. Code § 1513(c)*].

It appears that if the investigation discloses grounds for dependency jurisdiction based on the conduct of custodial parents, the guardianship proceeding must be dismissed or abated once dependency proceedings are begun under *Welf. & Inst. Code § 300*. It has been held that a child may not be removed from parental custody in a proceeding such as a guardianship under any lesser standard of proof and without the procedural protections of the juvenile court dependency

law [*see In re James T. (1987) 190 Cal. App. 3d 58, 65-67, 235 Cal. Rptr. 127]* .

[5] Screening by Child Protective Services

In cases involving a petition for guardianship of the person, the local social services agency providing child protection services must screen the name of the guardian for prior referrals of neglect or abuse of minors. The results of this screening must be provided to the court [*Prob. Code § 1516(a)*]. This requirement is inapplicable to guardianships established in juvenile court for a dependent child [*Prob. Code § 1516(b)*].

[6] Additional Investigation in Nonrelative Guardianships

If the proposed guardian is a nonrelative, the investigation must be made by the county agency designated to investigate potential dependency [*Prob. Code § 1513(a)*]. The general rule that the court has discretion to waive the investigation [*Prob. Code § 1513(a)*] apparently is inapplicable to nonrelative guardianships. *Prob. Code § 1543* (discussed *below*) eliminates the court's discretion to dispense with the investigation [*Prob. Code § 1543(a)*; *see 64 Ops. Cal. Att'y Gen. 455, 461, 463 (1981)]* . *Prob. Code§ 1543* also appears to require a second investigation and report by a different agency [*see 64 Ops. Cal. Att'y Gen. 455, 456 n.2 (1981)]* . A nonrelative guardianship is essentially one in which the petition requests that a private party who is not a relative of the proposed ward be appointed guardian of the person [*see Prob. Code § 1540*].

If the petition (as filed or as amended) states that an adoption petition has been filed, a report with respect to the suitability of the proposed guardian for guardianship must be filed with the court by the agency investigating the adoption [*Prob. Code § 1543(a)*]. This report should be of the same comprehensive nature as the suitability report that the adoption agency must file in the adoption proceeding *[64 Ops. Cal. Att'y Gen. 455, 461 (1981)]* .

If no adoption petition has been filed, the local agency designated by the board of supervisors to provide public social services must file a report with the court with respect to the proposed guardian of the same character required to be made with regard to an applicant for a foster family home license [*Prob. Code § 1543(a)*]. This report is less comprehensive than the suitability study required if an adoption proceeding is also pending *[64 Ops. Cal. Att'y Gen. 455, 462-463 (1981)]* .

The report filed with the court is confidential, and it will be made available only to the persons who have been served in the proceeding and the persons who have appeared in the proceeding, or to their attorneys [*Prob. Code § 1453(b)*]. For discussion of the use of the report at the hearing, see *§ 280.65[5]*.

[7] Assessment of Investigation Costs

Each year, the court or county must assess (1) the parent, parents, or other person charged with the support and maintenance of the proposed, ward and (2) the guardian, proposed guardian, or the proposed ward's estate, for court or county expenses for any investigation or review incurred pursuant to *Prob. Code § 1513* [*Prob. Code § 1513.1(a)*]. A court may order reimbursement to the court or the county in the amount of the assessment, unless the court finds that all or any part of the assessment would impose a hardship on the ward or on his or her estate [*Prob. Code § 1513.1(a)*]. A county may waive any or all of an assessment against the guardianship on the basis of hardship [*Prob. Code § 1513.1(a)*]. There is a rebuttable presumption that the assessment would impose a hardship if the ward is receiving Medi-Cal benefits [*Prob. Code § 1513.1(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawDelinquency & DependencyDependency ProceedingsFamily

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§ 280.65 Conduct of Hearing

[1] Appearance of Petitioner

A local court rule may require the person named in the petition and seeking appointment as guardian to appear at the hearing.

[2] No Right to Jury Trial

There is no right to trial by jury at the hearing on a petition for appointment of a guardian [*see Prob. Code § 1452*].

[3] Objection to Petition

Any interested person may appear and make a response or objection in writing at or before a hearing [*Prob. Code § 1043(a)*; *see Prob. Code §§ 1040, 2100*]. A form for use to object to the appointment is *set forth in § 280.113*. A form for use as a court order denying the appointment is *set forth in § 280.114*.

The meaning of "interested person" under the Probate Code may vary and must be determined according to the particular purpose of the proceeding and the matter involved [*Prob. Code § 48(b)*]. In a guardianship proceeding, anyone who is entitled to notice and opposes the proposed guardianship has standing to object. It is not necessary that the person should seek to be appointed guardian or otherwise seek custody [*see Guardianship of Pankey (1974) 38 Cal. App. 3d 919, 926-927, 113 Cal. Rptr. 858]* .

An interested person may also appear and respond orally at the hearing. The court, in its discretion, must either hear and determine the response or objection or grant a continuance for the purpose of allowing a response or objection to be made in writing [*Prob. Code § 1043(b)*]. A request for a continuance for the purpose of making a written response or objection is not itself considered as a response or objection. Nor is the failure to make a response or objection during the time allowed to be considered as a response or objection [*Prob. Code § 1043(c)*].

[4] Standard of Proof

All issues of fact in probate matters are required to be tried in conformity with the rules of practice in civil actions [*Prob. Code § 1000*]. The standard rules of evidence are applicable, and the burden of proof technically is on the petitioner as the person asserting the claim for relief [*see Evid. Code § 500*]. In reality, a person with a lower custodial preference under *Fam. Code § 3040* [*see § 280.40[2]*] probably has the burden of proving that the court should reject the claim of the person with a higher preference.

If the contest is between a parent and a nonparent, a finding that parental custody would be detrimental to the child must be supported by clear and convincing evidence [*Fam. Code § 3041(b)*; *see Fam. Code § 3041(d)* (exception when nonparent has assumed role of child's parent)]. In other cases, since no standard of proof applicable to guardianship proceedings is specified in the Probate Code, proof by a preponderance of the evidence should satisfy the petitioner's burden [*see Evid. Code § 115*].

In the case of an Indian child, before making an order granting custody to a nonparent over the objection of a parent, the court must apply the evidentiary standards specified in the Indian Child Welfare Act [*25 U.S.C. § 1912(d), (e), (f)*] and *Welf. & Inst. Code §§ 224.6* and *361.7*, and the placement preferences and standards specified in the Indian Child Welfare Act [*25 U.S.C. § 1922*] and *Welf. & Inst. Code § 361.31* [*Fam. Code § 3041(e)*].

[5] Evidence

The court must read and consider the investigator's report before ruling on the petition for guardianship, and the report must be reflected in the minutes of the court. The person preparing the report may be called and examined by any party to the proceeding [*Prob. Code § 1513(b)*]. Due process requires that a party be given anopportunity to cross examine the investigator and to subpoena and examine persons whose hearsay statements are contained in the report, and be permitted to introduce rebuttal evidence [*see Wheeler v. Wheeler (1973) 34 Cal. App. 3d 239, 242, 109 Cal. Rptr. 782* (involving custody investigation report in family law proceeding)].

Any additional report in the case of a nonrelative guardianship may also may be considered by the court. It may be received in evidence on stipulation of counsel for all such persons who are present at the hearing or, if the person is present but unrepresented, on consent of the person [*Prob. Code § 1543(b)*]. The statutory provision for "consideration" of the report without qualification, but "receipt" into evidence only on stipulation, is parallel to the statute regarding court-ordered reports in contested custody cases under the Family Code [*see Fam. Code § 3111*]. In this context, it seems reasonably clear that a stipulation is not required before the court may treat the report as evidence [*see Forslund v. Forslund (1963) 225 Cal. App. 2d 476, 494-495, 37 Cal. Rptr. 489]* . For further discussion, see Ch. 223, *Dissolution of Marriage: Child Custody* . In any case, due process requirements protect a party from improper reliance on the report [*see Wheeler v. Wheeler (1973) 34 Cal. App. 3d 239, 242, 109 Cal. Rptr. 782]* .

If the proposed ward is of sufficient age to form an intelligent preference as to the person to be appointed as guardian, the court must consider that preference [*Prob. Code § 1514(e)(2)*]. The proposed ward may testify as to other issues arising in the proceedings as long as the minor is capable of expressing himself or herself concerning the matter so as to be understood and is capable of understanding the duty of a witness to tell the truth [*see Evid. Code §§ 700, 701(a)*].

[6] Findings and Statement of Decision

Findings of fact in guardianship proceedings are governed by the provisions of *Code Civ. Proc. § 632* [*Guardianship of Brown (1976) 16 Cal. 3d 326, 332, 128 Cal. Rptr. 10, 546 P.2d 298* (decided prior to 1981 amendment of *Code Civ. Proc. § 632*); *see Prob. Code §§ 1000, 2100*; *Cal. Rules of Ct., Rule 3.1590*]. Thus, the court is required to issue a statement of decision, explaining the factual and legal basis for its decision on each of the principal controverted issues if the petition was disputed and a proper request for the statement was made. The request must be made within 10 days after the court announces its tentative decision, unless the trial is concluded within one calendar day or in less than eight

hours over more than one day, in which case the request must be made before submission of the matter for decision. The request must specify the controverted issues for which the party is requesting a statement of decision [*Code Civ. Proc. § 632*]. For further discussion and forms, see Ch. 529, *Statement of Decision* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury TrialEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewFamily LawGuardiansAppointment

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§ 280.66 Bond Requirement

One appointed as guardian of the person need not file a bond unless required by the court [*Prob. Code § 2322*]. A person appointed guardian of the estate generally must give a bond approved by the court before letters are issued [*Prob. Code § 2320(a)*]. The bond is conditioned on the guardian's faithful execution of the duties of the office according to law, for the benefit of the ward and persons interested in the guardianship estate [*Prob. Code § 2320(b)*].

A nominee under *Prob. Code § 1500* or *1501* who is appointed guardian of the estate is not required to file a bond if the person making the nomination has waived it, unless it is required by the court [*Prob. Code § 2324*]. The court may also dispense with the bond requirement if it appears likely that, for the duration of the guardianship, all of the following will be true [*Prob. Code §§ 2323*, 2628(a)]:

- The net value of the estate, excluding the ward's residence, will be less than $15,000.
- The monthly income of the estate, excluding public benefit payments, will be less than $2,000.
- All income of the estate, if not retained, will be spent for the benefit of the ward.

Bonds in guardianship proceedings are considered further in Ch. 283, *Guardianship and Conservatorship: Bonds*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointment

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§ 280.67 Oath

The appointment of a guardian does not become effective until the guardian takes an oath to perform the duties of the office according to law. The oath must be attached to or endorsed on the letters of guardianship [*Prob. Code § 2300*]. The oath is contained in the Judicial Council form for letters of guardianship [*see § 280.116*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointment

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§ 280.67A Acknowledgment of Receipt of Duties of Guardian Form

Before the court issues letters, each guardian must execute and file an acknowledgment of receipt of the Duties of Guardian and Acknowledgment of Receipt (Form GC-248) [*Cal. Rules of Ct., Rule 7.1002*; *see § 280.115A*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointmentFamily LawGuardiansDuties & Rights

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24-280 California Forms of Pleading and Practice--Annotated § 280.68

§ 280.68 Issuance of Letters of Guardianship

After the oath is taken and the bond requirement is satisfied, the letters of guardianship may be issued [*see Prob. Code § 2300*]. The taking of the oath and filing of the bond are evidenced by the court clerk's issuance of the letters [*Prob. Code § 2310*]. The Judicial Council form for letters of guardianship is *set forth in § 280.116*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointmentGovernmentsCourtsClerks of Court

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24-280 California Forms of Pleading and Practice--Annotated § 280.69

§ 280.69 Appeal

An order granting or denying a guardianship petition is appealable [*Prob. Code § 1301(a)*]. The appeal is taken from the order alone and not from the issuance of letters [*see Guardianship of Donaldson (1986) 178 Cal. App. 3d 477, 485, 223 Cal. Rptr. 707* (failure to issue letters does not foreclose appeal of order)].

An appeal generally will stay the operation and effect of the order [*Prob. Code § 1310(a)*]. In a proceeding for guardianship of the person, however, an appeal will not stay any provisions of the order that award, change, or otherwise affect the custody of the minor, although the trial court has discretion to stay the execution of those provisions pending the appeal, or for any other period it deems appropriate [*Prob. Code § 1310(c)*; *see Code Civ. Proc. § 917.7*; *Guardianship of Melissa W. (2002) 96 Cal. App. 4th 1293, 1298, 118 Cal. Rptr. 2d 42* (absent stay, court's order onguardianship petition is immediately effective and binding on parties)]. Further, the trial court, to prevent injury or loss to a person or property, may appoint a temporary guardian or direct the exercise of the powers of the guardian notwithstanding the appeal [*Prob. Code § 1310(b)*].

Additionally, in the absence of a writ or other order of the reviewing court providing otherwise, the provisions of any judgment or order allowing or eliminating restrictions against removal of the minor from the state are stayed by operation of law for a period of seven days from entry of judgment in a dependency proceeding, and 30 days from entry of judgment in other cases. The stay may be extended by order of the trial court [*Prob. Code § 1310(c)*; *see Code Civ. Proc. § 917.7*].

In one case, a minor's grandparents, whose petition for guardianship was denied, were immediately bound by the trial court's judgment absent an applicable stay. Thus, when the grandparents flew the minor to the Bahamas where the minor was married, the court dismissed the grandparents' appeal because they had sabotaged the judgment being appealed and had made the issue moot [*Guardianship of Melissa W. (2002) 95 Cal. App. 4th 1433, 1438-1439, 116 Cal. Rptr. 2d 577]* .

An appeal does not stay the operation and effect of the judgment or order if the court requires an undertaking and the undertaking is not given, in any of the following cases [*Prob. Code § 1310(d)*; *see Code Civ. Proc. § 917.9*]:

- The appellant is found to possess money or other property of the respondent;
- The appellant is required to perform an act for the respondent's benefit; or
- The judgment against the appellant is solely for costs awarded under *Code Civ. Proc. § 1021 et seq.*

An appeal also does not stay the operation and effect of a judgment for money or an order directing payment of money, unless one of the following applies [*Prob. Code § 1310(e)*]:

- A bond is posted as provided in *Code Civ. Proc. § 917.1*; or
- The payment is to be made from a decedent's estate being administered under *Prob. Code § 7000 et seq.* or from the estate of a person who is subject to a guardianship or conservatorship of the estate under *Prob. Code § 1400 et seq.*

However, a court may require an undertaking as provided in *Prob. Code § 1310(d)*, discussed *above* [*Prob. Code § 1310(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointment

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24-280 California Forms of Pleading and Practice--Annotated § 280.70

§ 280.70 Appointment of Successor Guardian

If for any reason a vacancy occurs in the office of guardian, the court may appoint a successor after notice and hearing as in the case of an original appointment [*Prob. Code § 2670*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointment

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24-280 California Forms of Pleading and Practice--Annotated § 280.71

§ 280.71 Vexatious Litigant Determination in Guardianship Proceeding

A person who files a petition for visitation, termination of the guardianship, or instruction to the guardian that is unmeritorious, or intended to harass or annoy the guardian, and who has previously filed pleadings in the guardianship proceedings that were unmeritorious or intended to harass or annoy the guardian, may be determined to be a vexatious litigant for the purposes of the vexatious litigant statutes (*Code Civ. Proc. § 391 et seq.*) [*Prob. Code § 1611*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsVexatious LitigantsEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointment

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24-280 California Forms of Pleading and Practice--Annotated § 280.72

§ 280.72 Professional Fiduciaries Act

Guardians who meet the statutory definition of "professional fiduciary" are required to comply with the Professional Fiduciaries Act [*Bus. & Prof. Code § 6500 et seq.*; *see Bus. & Prof. Code § 6530(a), Prob. Code §§ 60.1, 2340*]. In the context of guardians and conservators, a "professional fiduciary" is anyone who acts as a conservator or guardian for two or more persons at the same time who are not related to the professional fiduciary or to each other by blood, adoption, marriage, or registered domestic partnership [*Bus. & Prof. Code § 6501(f)*; for discussion of the definition of "professional fiduciary" in the context of trustees, *see Ch. 560, Trusts, § 560.74*].

The following are specifically exempted from the licensing requirements [*Bus. & Prof. Code § 6501(f)(4), 6530(b)-(d)*]:

- Trust companies [*see Prob. Code § 83* (definition)].

- FDIC-insured institutions, or their holding companies, subsidiaries or affiliates.

- Any public agency, including the public guardian, public conservator, or other agency of the State of California, a county of California, or any regional center for persons with developmental disabilities as defined in *Welf. & Inst. Code § 4620*.

- Any person who is employed by a trust company, an FDIC-insured institution or its holding companies, subsidiaries or affiliates, or a public agency who is acting in the course and scope of that employment, and in the instance of a public officer of a public agency, acting in the course and scope of official duties.

- Any person whose sole activity as a professional fiduciary is as a broker-dealer, broker-dealer agent, investment adviser representative registered and regulated under the Corporate Securities Law of 1968 [*Corp. Code § 25000 et seq.*], the Investment Advisers Act of 1940 [*15 U.S.C. 80b-1 et seq.*], or the Securities Exchange Act of 1934 [*15 U.S.C. 78a et seq.*], or involves serving as a trustee to a company regulated by the Securities and Exchange Commission under the Investment Company Act of 1940 [*15*

U.S.C. 80a-1 et seq.].

- Any licensed attorney.
- Any licensed certified public accountant;
- Any Internal Revenue Service agent acting within the scope of practice.

No person may act or hold himself or herself out to the public as a professional fiduciary unless he or she is licensed as a professional fiduciary under the Act [*Prob. Code § 60.1(b)*]. Persons previously required to register with the statewide registry under *Prob. Code § 2850 et seq.* (inoperative 7/1/2008, repealed eff. 1/1/2009), and persons required to file information with the clerk of thecourt under the former version of *Prob. Code § 2340 et seq.* (inoperative 7/1/2008; repealed eff. 1/1/2009) are required to obtain a professional fiduciary license. Additionally, as of July 1, 2008, no court may appoint a person to carry out the duties of a professional fiduciary unless he or she holds a valid, unexpired, unsuspended professional fiduciary license [*Prob. Code § 2340*]. (In other words, after July 1, 2008, professional fiduciaries may not be appointed in any new guardianship or conservatorship matters until they obtain a license under the Professional Fiduciaries Act. However, professional fiduciaries already appointed in specific matters prior to July 1, 2008, may continue to act in those matters until January 1, 2009, by which time they are required to be licensed under the Professional Fiduciaries Act.) For an allegation seeking removal of a conservator or guardian for failure to comply with the licensing requirements of the Professional Fiduciaries Act, see *Ch. 290G, Guardianship and Conservatorship: Removal or Resignation of Guardians or Conservators, § 290G.37A.*

For more detailed discussion of the licensing requirements of the Professional Fiduciaries Act and the qualifications of professional fiduciaries, see *Ch. 281, Guardianship and Conservatorship: Appointment of Conservators, § 281.66.*

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§ 280.73 Guardian's Subsequent Adoption of Minor

A proceeding to have a child declared free from the custody and control of one or both parents may be brought in the guardianship proceeding under *Fam. Code § 7800 et seq.*, if all of the following requirements are satisfied [*Prob. Code § 1516.5(a)*]:

- Neither parent has legal custody of the child.
- The child has been in the guardian's physical custody for at least two years.
- The court finds that the child would benefit from being adopted by the guardian. In making this determination, the court must consider all factors relating to the child's best interest, including, but not limited to, the nature and extent of the relationship between the child and the birth parent, the child and the guardian (and the guardian's family members), and the child and any siblings or half-siblings.

The court must appoint a court investigator or other qualified professional to investigate each of these factors, and the investigator's or professional's findings on these issues must be included in the written report required by *Fam. Code § 7851* [*Prob. Code § 1516.5(b)*].

The rights afforded a parent, including the rights to notice and counsel, provided by *Fam. Code § 7800 et seq.*, apply in the proceeding [*Prob. Code § 1516.5(c)*].

These provisions do not apply if the child is a dependent of the juvenile court, or to any Indian child [*Prob. Code § 1516.5(d)*].

Despite challenges to the constitutionality of *Prob. Code § 1516.5*, the California Supreme Court has upheld the statute as facially constitutional and consistent with due process [*Guardianship of Ann S. (2009) 45 Cal. 4th 1110, 1118, 90 Cal. Rptr. 3d 701, 202 P.3d 1089* ; *In re Charlotte D. (2009) 45 Cal. 4th 1140, 1142-1143, 90 Cal. Rptr. 3d 724, 202 P.3d 1109*]. A showing of current unfitness is not necessary when a court terminates parental rights under *Prob. Code §*

1516.5 based on the child's best interest, but parents may challenge the constitutionality of the statute as applied to them individually [*In re Charlotte D. (2009) 45 Cal. 4th 1140, 1147, 90 Cal. Rptr. 3d 724, 202 P.3d 1109*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawAdoptionConsentLegal GuardiansFamily LawGuardiansDuties & Rights

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[Reserved]

§§ 280.74[Reserved]

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24-280 California Forms of Pleading and Practice--Annotated § 280.80

§ 280.80 Related Matthew Bender Publications

For memoranda of points and authorities relating to the appointment of a guardian, see California Points and Authorities, Ch. 106, *Guardianship and Conservatorship*

For transactional forms relating to the nomination and appointment of a guardian, see California Legal Forms, Ch. 66, *Guardianships*, and Ch. 66A, *Conservatorships*

For discussion of the Indian Child Welfare Act, see California Family Law Practice and Procedure, 2nd edition, Ch. 176, *Indian Child Welfare Act*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointmentGovernmentsNative AmericansIndian Child Welfare Act

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24-280 California Forms of Pleading and Practice--Annotated § 280.81

§ 280.81 Federal Statutes

Parental Kidnapping Prevention Act (PKPA). *28 U.S.C. § 1738A*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyInterferenceParental Kidnapping Prevention Act

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24-280 California Forms of Pleading and Practice--Annotated § 280.82

§ 280.82 State Statutes

[1] Appeal

Appealability of order granting or revoking (or refusing to grant or revoke) letters of guardianship. *Prob. Code § 1301(a)*

Power of court to appoint temporary guardian pending appeal. *Prob. Code § 1310(b)*

[2] Appointment of Guardian

Professional Fiduciaries Act. *Bus. & Prof. Code § 6500 et. seq.*

Right to custody of minor child. *Fam. Code § 3020 et seq.*

Director of Developmental Services may be guardian for developmentally disabled minor. *Health & Safety Code § 416 et seq.*

"Custodial parent" defined. *Prob. Code § 1419.5*

Nomination of guardian by parent. *Prob. Code § 1500*

Investigation on order of court. *Prob. Code § 1513*

Considerations in appointment of guardian. *Prob. Code § 1514*

Nonprofit charitable corporation as guardian. *Prob. Code § 2104*

Joint guardians. *Prob. Code § 2105*

One guardian for multiple wards. *Prob. Code § 2106*

Nonresident ward. *Prob. Code § 2107*

Powers to be granted in appointment of guardian nominated by parent. *Prob. Code § 2108*

Temporary guardianship pending final determination on petition for appointment of guardian. *Prob. Code § 2250*

Private professional guardian. *Prob. Code § 2340 et seq.*

Successor guardian. *Prob. Code § 2670*

Registration of guardians with Department of Justice. *Prob. Code § 2850 et seq.*

Public guardian. *Prob. Code § 2900 et seq.*

[3] Definitions

Minor. *Fam. Code § 6500 et seq.*

Court. *Prob. Code § 1418*

Court investigator. *Prob. Code § 1419*

Interested person. *Prob. Code § 1424*

Petition. *Prob. Code § 1430*

[4] When Guardianship Not Necessary

Consent to medical care of minor. *Fam. Code § 6910 et seq.*

Consent to medical care by minor. *Fam. Code § 6920 et seq.*

Enlistment of minor in armed forces. *Fam. Code § 6950*

Married minor is not subject to guardianship. *Prob. Code § 1515*

Parent's duty to account to minor for property held during minority. *Prob. Code § 3300*

Delivery of money or other property to parent of minor with total estate of less than $5,000. *Prob. Code §§ 3400-3402*

Alternative dispositions for minor's estate consisting entirely of money. *Prob. Code §§ 3410-3413*

Compromise of minor's disputed claim by parent. *Prob. Code § 3500*

Alternative dispositions for money or other property owed to minor under court-approved compromise, covenant not to sue, or judgment. *Prob. Code §§ 3600-3612*

Removal of property of nonresident by foreign fiduciary. *Prob. Code §§ 3800-3803*

[5] Jurisdiction and Venue

Jurisdiction. *Prob. Code § 2200*

Venue. *Prob. Code §§ 2201, 2202*

Priority in case of multiple guardianship proceedings. *Prob. Code § 2203*

Change of venue. *Prob. Code §§ 2210-2217*

[6] Nomination of Guardian

Nomination of Director of Developmental Services as guardian for developmentally disabled minor. *Health & Safety Code §§ 416-416.23*

Effectiveness of appointment of guardian by parent or other person under prior law as *Prob. Code § 1500* or *1501* nomination. *Prob. Code § 1489*

Nomination by parent. *Prob. Code §§ 1500, 1502*

Nomination by person from whom minor receives property. *Prob. Code §§ 1501, 1502*

Manner of making and effect of nomination. *Prob. Code § 1502*

[7] Nonrelative Guardianship

When applicable. *Prob. Code § 1540*

Additional contents required in petition for appointment of nonrelative guardian. *Prob. Code § 1541*

Investigation report requirement. *Prob. Code § 1543*

[8] Oaths, Bonds, and Letters

Requirement of oath and bond. *Prob. Code § 2300*

Letters. *Prob. Code § 2310 et seq.*

Bonds of guardians and conservators. *Prob. Code § 2320 et seq.*

[9] Related Custody Proceedings

Proceeding to declare minor child free from parent's custody and control for purposes of adoption may be brought in guardianship proceeding. *Prob. Code § 1516.5*

Guardianship rules of Probate Code are inapplicable to guardianships resulting from selection and implementation of permanent plans under Welfare and Institutions Code. *Prob. Code § 1517*

Selection and implementation of permanent plans. *Welf. & Inst. Code § 366.26*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointmentFamily LawGuardiansDuties & Rights

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§ 280.82A California Rules of Court

Ex parte communications in proceedings under the Probate Code and certain other proceedings. *Cal. Rules of Court, Rule 7.10*

Guardian screening form. *Cal. Rules of Ct., Rule 7.1001*

Acknowledgment of receipt of Duties of Guardian form. *Cal. Rules of Ct., Rule 7.1002*

Confidential guardianship status report form. *Cal Rules of Ct., Rule 7.1003*

Termination of guardianship. *Cal. Rules of Ct., Rule 7.1004*

Service of final account or report after guardian's resignation or removal. *Cal. Rules of Ct., Rule 7.1005*

Service of final account on termination of guardianship. *Cal. Rules of Ct., Rule 7.1006*

Settlement of accounts and release by former minor. *Cal. Rules of Ct., Rule 7.1007*

Indian Child Welfare Act in guardianship and certain conservatorship proceedings. *Cal. Rules of Court, Rule 7.1015*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointmentFamily LawGuardiansDuties & Rights

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24-280 California Forms of Pleading and Practice--Annotated § 280.83

§ 280.83 Local Court Rules

[1] Alameda County

Petition for appointment; notice and hearing. Alameda Co. Super. Ct. Rules, Rule 12.14.1 et seq.

Contested guardianship. Alameda Co. Super. Ct. Rules, Rule 12.14.2 et seq.

[2] Contra Costa County

Appointment of guardian for minor; notice and other preliminary matters. Contra Costa Co. Prob. Pol. Man., § 801

Consolidation of multiple custody proceedings concerning minor pending in other department of superior court. Contra Costa Co. Prob. Pol. Man., § 803

[3] Los Angeles County

Department number and date of hearing must be on first page of document filed after hearing set. Los Angeles Co. Super. Ct. Rules, Rule 10.10

Verification requirement for all pleadings in guardianship. Los Angeles Co. Super. Ct. Rules, Rules 10.12, 10.146

Contents of petition for appointment of nonprofit corporation as guardian. Los Angeles Co. Super. Ct. Rules, Rule 10.148

Procedure for appointment of general guardian. Los Angeles Co. Super. Ct. Rules, Rule 10.157

Appointment of temporary guardian. Los Angeles Co. Super. Ct. Rules, Rule 10.159

Consolidation with habeas corpus or custody proceedings pending in other department of superior court. Los Angeles Co. Super. Ct. Rules, Rule 10.163

Court assignment if adoption proceeding is pending simultaneous to a petition for guardianship. Los Angeles Co. Super. Ct. Rules, Rule 10.164

Procedure for filing petitions under *Prob. Code § 3500 et seq.* Los Angeles Co. Super. Ct. Rules, Rule 10.166

[4] Orange County

Appointment of general guardian. Orange Co. Super. Ct. Rules, Rule 610.04

Form of notice. Orange Co. Super. Ct. Rules, Rule 610.06

Petition for appointment of nonprofit corporation as guardian. Orange Co. Super. Ct. Rules, Rule 610.10

Bond requirement. Orange Co. Super. Ct. Rules, Rule 610.15

[5] Sacramento County

Appointment of guardian of minor. Sacramento Co. Super. Ct. Rules, Rule 15.88

Ex parte appointment of permanent guardian prohibited. Sacramento Co. Super. Ct. Rules, Rule 15.88(A)

Nonrelative guardianship of person. Sacramento Co. Super. Ct. Rules, Rule 15.90

Effect of other proceedings. Sacramento Co. Super. Ct. Rules, Rule 15.91

[6] San Diego County

Petition for appointment of guardian; jurisdiction. San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.150

Nomination by minor. San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.151

Spouse of proposed guardian. San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.152

Requested waiver of notice. San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.153

Investigation. San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.154

[7] San Francisco

Appearance required. San Francisco Uniform Local Ct. Rules, Rule 14.3

Content and notice (including ex parte) requirements of petition for appointment. San Francisco Uniform Local Ct. Rules, Rules 14.10, 14.105

Report of investigator. San Francisco Uniform Local Ct. Rules, Rule 14.105(B)

Required affidavits and declarations. San Francisco Uniform Local Ct. Rules, Rule 14.105(D)

Procedures relating to multiple wards. San Francisco Uniform Local Ct. Rules, Rule 14.105(E)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansGeneral OverviewFamily LawGuardiansAppointmentGovernmentsCourtsRule Application & Interpretation

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24-280 California Forms of Pleading and Practice--Annotated § 280.84

§ 280.84 Decisions

Prob. Code § 1516.5 is facially constitutional and consistent with due process and does not require a showing of current unfitness when parent rights are terminated based on the child's best interest. *Guardianship of Ann S. (2009) 45 Cal. 4th 1110, 1118, 1129-1130, 90 Cal. Rptr. 3d 701, 202 P.3d 1089*

A showing of current unfitness is not necessary when a court terminates parental rights under *Prob. Code § 1516.5* based on the child's best interest, but parents maychallenge the constitutionality of the statute as applied to them individually. *In re Charlotte D. (2009) 45 Cal. 4th 1140, 1147, 90 Cal. Rptr. 3d 724, 202 P.3d 1109*

An "other person on behalf of the minor" under *Prob. Code § 1510(a)* is a person who pleads ultimate facts demonstrating financial misconduct or alleges other information sufficient to warrant court intervention in the management of the minor's money or other property [*Suleman v. Superior Court (2010) 180 Cal. App. 4th 1287, 1299, 1302-1303, 103 Cal. Rptr. 3d 651*

Statutory exception to adoption under *Welf. & Inst. Code § 366.26(c)(1)(D)* [*see now Welf. & Inst. Code § 366.26(c)(1)(B)(iv)*] for exceptional circumstances does not apply to maternal grandmother who was able and willing to adopt although she expressed a preference for guardianship; juvenile court's task is to select the plan that best serves the child's interest and guardianship does not provide the same level of stability as adoption. *In re Xavier G. (2007) 157 Cal. App. 4th 208, 214, 68 Cal. Rptr. 3d 478*

After minor's grandparents' petition for guardianship was denied and grandparents flew minor to the Bahamas where she was married, appellate court dismissed grandparents' appeal of denial because they had sabotaged judgment being appealed and had made issue moot. *Guardianship of Melissa W. (2002) 95 Cal. App. 4th 1433, 1438-1439, 116 Cal. Rptr. 2d 577*

If court finds that granting custody to parent would be detrimental and granting custody to nonparent would be in child's best interests, court may grant custody to nonparent without further balancing parent's constitutionally protected interest in opportunity to form a relationship with child. *Adoption of Daniele G. (2001) 87 Cal. App. 4th 1392, 1408,*

105 Cal. Rptr. 2d 341

Trial court improperly granted guardianship petition because, although California was minors' "home state" under former *Civ. Code § 5152(1)(a)*, Illinois had "significant connection" jurisdiction over minors under former *Civ. Code § 5152(1)(b)* (*now see Fam. Code § 3403(b)*), and California court knew of pending Illinois guardianship proceeding but failed to contact Illinois court as provided by former *Civ. Code §§ 5155(3), 5168* (*now see Fam. Code § 3400 et seq.*). *Guardianship of Donaldson (1986) 178 Cal. App. 3d 477, 489-493, 223 Cal. Rptr. 707*

Order granting letters of guardianship of minors to their aunt was appealable under *Prob. Code § 2750*, despite aunt's failure to obtain actual letters of guardianship. *Guardianship of Donaldson (1986) 178 Cal. App. 3d 477, 485, 223 Cal. Rptr. 707*

In guardianship proceeding involving child with Down's syndrome, parents were not entitled to be present at pretrial psychological examination when their need for accurate report was adequately safeguarded through discovery, cross examination, and production of other expert testimony. *Guardianship of Phillip B. (1983) 139 Cal. App. 3d 407, 418, 188 Cal. Rptr. 781*

Before making award of custody to nonparent in guardianship proceeding, court is required to make finding that custody by parents would be detrimental to child and that custody by nonparents would be in child's best interest. *Guardianship of Phillip B. (1983) 139 Cal. App. 3d 407, 419, 188 Cal. Rptr. 781*

Guardianship was properly awarded to de facto parents without any requirement of full-time residency with child. *Guardianship of Phillip B. (1983) 139 Cal. App. 3d 407, 420-421, 188 Cal. Rptr. 781*

Guardianship was properly awarded to nonparents when parents of child with Down's syndrome had emotionally abandoned child by refusing to allow child's education, training, medical treatment for heart defect, and contact with couple with whom he had developed close relationship. *Guardianship of Phillip B. (1983) 139 Cal. App. 3d 407, 421-424, 188 Cal. Rptr. 781*

In guardianship proceeding, evidence of parents' past conduct was properly admitted since it indicated possible future conduct as it pertained to child's welfare. *Guardianship of Phillip B. (1983) 139 Cal. App. 3d 407, 427, 188 Cal. Rptr. 781*

Use of prohibition or mandate to review jurisdiction of superior court in guardianship proceeding. *San Diego County Dep't of Public Welfare v. Superior Court of San Diego County (1972) 7 Cal. 3d 1, 9, 101 Cal. Rptr. 541, 496 P.2d 453*

Right of person named in petition and filing objections to appeal from order appointing guardian even though not seeking to be named guardian. *Guardianship of Pankey (1974) 38 Cal. App. 3d 919, 925-927, 113 Cal. Rptr. 858*

Finding of unfitness is not necessary to deny parent custody under former *Civ. Code § 4600* (*now see Fam. Code § 3020 et seq.*); finding that parental custody would be detrimental to child is necessary. *In re B.G. (1974) 11 Cal. 3d 679, 114 Cal. Rptr. 444, 523 P.2d 244* (custody order under *Juvenile Court Law); Guardianship of Marino (1973) 30 Cal. App. 3d 952, 958-961, 106 Cal. Rptr. 655*

Guardian is not required to have same religious affiliation as parents of minor. *Guardianship of Minnicar (1956) 141 Cal. App. 2d 703, 709, 710, 297 P.2d 105*

Court has no jurisdiction over guardianship when another California court has jurisdiction over custody under divorce. *Greene v. Superior Court (1951) 37 Cal. 2d 307, 311-312, 231 P.2d 821*

Effect on guardianship proceeding of relinquishment of child for adoption. *San Diego County Dep't of Public Welfare v. Superior Court of San Diego County (1972) 7 Cal. 3d 1, 10-15, 101 Cal. Rptr. 541, 496 P.2d 453* ; *Guardianship of Henwood (1958) 49 Cal. 2d 639, 643-646, 320 P.2d 1*

Probate court has exclusive jurisdiction of guardianship proceedings and, after appointment of guardian, probate court has continuous jurisdiction over guardian and administration of ward's affairs. *Guardianship of Tulley (1978) 83 Cal. App. 3d 698, 705, 146 Cal. Rptr. 266*

Requirement that appointment of guardian be necessary or convenient is prerequisite to appointment despite nomination of guardian by minor. *Guardianship of Kentera (1953) 41 Cal. 2d 639, 642-643, 262 P.2d 317*

Former Prob. Code § 1407 (*now see Prob. Code § 1514*), which provided for parental preference in choice of guardian without distinguishing between guardians of person and of estate, did not preclude appointment of nonparent as guardian of minor's estate over parent's objections on basis that parental preference was primarily concerned with the appointment of a guardian of the person. *Estate of Rosin (1964) 226 Cal. App. 2d 166, 170-171, 37 Cal. Rptr. 830*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointment

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24-280 California Forms of Pleading and Practice--Annotated § 280.85

§ 280.85 Law Reviews

Beauchamp, *Review of Selected 2000 California Legislation: Estates and Trusts Chapter 565: One More Law to Reform Conservatorships and Guardianships; But Is It Needed?, 32 McGeorge L. Rev. 647 (2001)*

Frolik, *Guardianship Reform: When the Best Is the Enemy of the Good, 9 Stan. L. & Pol'y Rev. 347 (1998)*

Note, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases, 50 Stan. L. Rev. 1609 (1998)*

Review of Selected 1995 California Legislation: Family; Guardians and Conservators--Removal of Two-Year Requirement of Pending Death or Terminal Condition, 27 Pac. L.J. 799 (1996)

Rosenfeld, *Developments in Custody Options for HIV-Positive Parents, 11 Berkeley Women's L.J. 194 (1996)*

Comment, *Where Have All the Children Gone? Due Process and Judicial Criteria forRemoving Children From Their Parents' Homes in California, 21 Sw. U. L. Rev. 125 (1992)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansGeneral OverviewFamily LawGuardiansAppointmentFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral Overview

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§ 280.86 Text References

Witkin, Summary of California Law, vol. 10, *Parent and Child*, §§ 359, 362, 364-374; vol. 14, *Wills and Probate*, §§ 901, 903-907, 909-913, 915-930, 944, 960-966, 975-976, 979-986, 988, *1020*, 1059, *1062-1069*, 1073-1076 (10th ed. 2005)

Legal Topics:

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

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[Reserved]

§§ 280.87[Reserved]

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PART IV. PROCEDURAL CHECKLIST

24-280 California Forms of Pleading and Practice--Annotated § 280.100

§ 280.100 Client Interview--Facts and Documents

[1] Facts to Be Ascertained

[a] Facts Regarding Minor

☐ Full name.

☐ Address where currently residing.

☐ Name and relationship of person with legal custody of minor, and, if that person does not have care of minor, name and relationship or person having care of minor.

☐ Name and address of all persons claiming custody or visitation rights with respect to minor.

☐ Date and place of birth.

☐ Names and addresses of both parents.

☐ Names and addresses of all persons or institutions who have had care or custody of minor.

☐ Dates and places where such persons or institutions had care or custody of minor.

☐ Information regarding all legal proceedings, pending or past, involving minor, including the following:

- ☐ Parent's divorce or dissolution proceedings.
- ☐ Adoption proceedings.
- ☐ Guardianship proceedings.
- ☐ Habeas corpus proceedings.
- ☐ Juvenile court proceedings.

☐ Names, ages, and addresses of all brothers and sisters of minor.

☐ Names and addresses of persons having care of minor's brothers and sisters.

☐ Information regarding all legal proceedings involving custody of minor's brothers and sisters.

☐ Names, addresses, and relationship of all known relatives of minor within the second degree.

☐ Information about all assets of minor including the following:

- ☐ Cash.
- ☐ Stocks and bonds.
- ☐ Other personal property.
- ☐ Rights as beneficiary of trusts or wills.
- ☐ Real property.
- ☐ Potential claims or causes of action.
- ☐ Receipt of, or eligibility to receive, benefits from Department of Veterans Affairs.

☐ Location and custody of all property of minor.

☐ Physical or mental health problems of minor.

☐ Names and addresses of persons treating minor for past or present physical or mental health

problems.

☐ Preferences of minor with regard to choice of guardian.

☐ Facts indicating minor has need of guardian of person, estate, or both.

[b] Facts Regarding Proposed Guardian (Petitioner)

☐ Full name.

☐ Name of spouse.

☐ Address.

☐ Relationship to minor, if any.

☐ Basis on which proposed guardian has care of minor.

☐ Pending or past legal proceedings in which proposed guardian was involved that might relate to his or her fitness, including any petition for adoption of proposed ward regardless of where filed.

☐ Marital history.

☐ Names and addresses of children.

☐ Other facts that might be raised in opposition to his or her appointment.

☐ Facts about potential opposition to appointment.

☐ Facts about ability to care for minor or his or her estate.

[2] Documents to Be Obtained

☐ Minor's birth certificate.

☐ All court orders relating to custody of minor.

☐ Any documents signed by parents relating to custody of minor, such as consent to adoption or nomination of guardian.

☐ Relevant documents relating to property of minor, including any nomination of a guardian of the

estate.

☐ Copies of wills or trusts under which minor has rights.

☐ Consent of proposed guardian, if not same person as petitioner.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointment

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24-280 California Forms of Pleading and Practice--Annotated § 280.101

§ 280.101 Obtaining Appointment of Guardian

☐ Prepare petition for guardianship and have it executed and verified by petitioner [*Prob. Code §§ 1021, 1510*]. Form: See *§ 280.110*.

☐ Prepare and file Confidential Guardian Screening Form (GC-212) [*Cal. Rules of Ct., Rule 7.1001*]. Form: See *§ 280.110A*.

☐ If certain relatives of minor are willing to waive notice of hearing, have waiver of notice executed. Form: See *§ 280.111*.

☐ Prepare order setting time for hearing and either directing notice to be given or dispensing with notice. Unless court dispenses with notice to particular persons, notice must be served on the following [*Prob. Code §§ 1511, 1512*; *see § 280.110[6]*]:

- ☐ Proposed ward if at least 12 years old.
- ☐ Person having legal custody of proposed ward or serving as guardian of the estate of the proposed ward.
- ☐ Parents of the proposed ward.
- ☐ Any person nominated as guardian under *Prob. Code § 1500* or *1501*.
- ☐ Spouse named in the petition.

☐ Relatives named in the petition.

☐ Director of Mental Health, Director of Developmental Services, Director of Social Services, and/or the Department of Veterans Affairs, and local agency designated by board of supervisors to investigate guardianships for court, if applicable [*Prob. Code §§ 1461, 1461.5, 1511(e), 1542*].

☐ Prepare notices of hearing to be served on persons specified in order [*Prob. Code § 1511*].

NOTE:
The notice must be in the form prescribed by the Judicial Council [*Prob. Code § 1001(b)*]. See Ch. 284, *Guardianship and Conservatorship: Notice* .

☐ File petition and have court execute and file order setting date for hearing and prescribing and/or dispensing with notice. For forms relating to notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

NOTE:
The clerk must set a date that allows time for the notices to be served. If there is to be an investigation by the probation officer [*see Prob. Code § 1513*], it may not be possible to set the date until the report is completed.

☐ If minor's welfare will be imperiled if he or she remains in custody of person having custody, prepare declaration to that effect and order granting temporary custody to proposed guardian. Have judge sign order and take steps to obtain custody of minor. For forms relating to appointment of temporary guardians, see Ch. 282, *Guardianship and Conservatorship: Temporary Guardians and Conservators* .

☐ Have notice served on persons specified in order in manner specified in order.

☐ Prepare order appointing guardian. Form: See *§ 280.115*.

☐ File proofs of service.

☐ Appear with petitioner and minor at hearing.

NOTE:
Actual appearance of the petitioner may be required by local rules. If the minor is of sufficient age to form an intelligent preference, that preference must be considered [*Fam. Code § 3042(a)*; *Prob. Code § 1514*].

☐ Have order appointing guardian executed by court.

☐ If ward is at least 12 years old, mail copy of order appointing guardian to ward.

☐ File bond, if required, and prepare oath and letters of guardianship for issuance by the clerk. Form: See *§ 280.116[1]*. For further discussion and forms related to bonds, see Ch. 283, *Guardianship and Conservatorship: Bonds* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointment

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24-280 California Forms of Pleading and Practice--Annotated §§ 280.102-280.109

[Reserved]

§§ 280.102[Reserved]

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24-280 California Forms of Pleading and Practice--Annotated § 280.110

§ 280.110 Petition for Appointment of Guardian of Minor--Judicial Council Form GC-210 [Prob. Code § 1510]

[1] FORM Petition for Appointment of Guardian of Minor--Judicial Council Form GC-210 [Prob. Code § 1510]

Click here to view image.

[2] Use of Form

CAUTION:
This petition must be amended to reveal other custody proceedings within 10 days of the petitioner's learning of any proceeding affecting the custody of the proposed ward not disclosed in the original petition, including any adoption, juvenile court, marriage dissolution, domestic relations, or other similar proceeding [*Prob. Code § 1512*].

The form in [1], *above*, is an illustrative, filled-in reproduction of Cal. Judicial Council Form GC-210, for use in petitioning for the appointment of a guardian for a minor.

Use of the Judicial Council form is mandatory when the petitioner is seeking a guardianship of the estate or of the person and estate [*see Cal. Rules of Ct., Rules 1.31, 7.101*; page 1 of form]. If the petitioner is seeking only a guardianship of the person, either this form or Judicial Council Form GC-210(P) [*see § 280.110B*] may be used [*see* page 1 of form]. This form should not be used for a temporary guardianship [*see* page 1 of form; *see also Ch. 282, Guardianships: Temporary Guardians and Conservators, §§ 282.80, 282.80A* (forms)]. The form illustrated here has been filled in to illustrate completion when the petitioner is seeking a guardian of both the person and of the estate.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Jurisdiction and Venue

[a] In General

The superior court has jurisdiction of guardianship proceedings [*Prob. Code § 2200*]. If the proposed ward is a California resident, venue lies in the county in which the proposed ward resides or in such other county as may be in the best interests of the proposed ward [*Prob. Code § 2201*]. If the proposed ward is not a resident of California, venue on a petition for guardianship of the person or estate lies in the county where the proposed ward is temporarily living or such other county as may be in the best interests of the proposed ward. If the petition is for guardianship of the estate, venue may lie in any county in which the proposed ward has property [*Prob. Code § 2202*].

If proceedings for guardianship of the estate are begun in more than one county, the guardianship first granted, including a temporary guardianship, governs and extends to all of the ward's property within California, and the other proceeding must be dismissed [*Prob. Code § 2203(a)*]. Conflict between multiple proceedings for guardianship of the person are resolved in the same manner [*Prob. Code § 2203(b)*]. If a proceeding for guardianship of the person is begun in one county, and a proceeding for guardianship of the estate is begun in another county, the court first granting aguardianship may find that it is in the best interests of the ward that the guardianship of both the person and the estate be maintained in that county or in such other county as the court determines. Thereafter, the guardianship proceeding in the court of the county found by the court to be in the best interests of the ward will govern and extend to all of the ward's property in California, and the other proceeding must be dismissed [*Prob. Code § 2203(c)*].

Change of venue in guardianship proceedings is governed by *Prob. Code §§ 2210-2217*. For a discussion of change of venue and forms that may be adapted to guardianship proceedings, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* .

[b] Uniform Child Custody Jurisdiction and Enforcement Act

The jurisdiction of California courts to make a determination of child custody in a proceeding to appoint a guardian of the person for a minor is governed by the Uniform Child Custody Jurisdiction and Enforcement Act (*Fam. Code § 3400 et seq.*). For a discussion of that act, see Ch. 394, *Parent and Child* .

Every party in a child custody proceeding is required to disclose information relating to the child's custody in his or her first pleading or an attached affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) [*Fam. Code § 3429*; *see Guardianship of Donaldson (1986) 178 Cal. App. 3d 477, 489, 223 Cal. Rptr. 707]* . For a discussion of the information required to be disclosed and a form of declaration in lieu of the required affidavit, see *§ 280.112*.

If the jurisdiction asserted by the California court is consistent with the Parental Kidnapping Prevention Act [*28 U.S.C. § 1738A*], the child custody determination made by the court will be entitled to full faith and credit in sister-state courts and will be subject to modification by those courts only as provided by federal law [*see 28 U.S.C. § 1738A*]. For a discussion of that act, see Ch. 394, *Parent and Child* .

[4] Contents of Petition

[a] In General

The petition must request that a guardian of the person or estate, or both, of the minor be appointed (Paragraphs 1a, 1b), state that the appointment is necessary and convenient (Paragraph 8), and specify the name and address of the proposed guardian (Paragraphs 1a, 1b) and the name and date of birth of the proposed ward (Paragraph 2) [*Prob. Code § 1510(b)*].

[b] Bonds

The form provides space for requesting that no bond be required or stating the amount of bond to be fixed (Paragraph 1c). Unless required by the court, a bond need not be filed by one appointed as guardian of the person and, if the

nominator waives bond, by a guardian nominated under *Prob. Code § 1500* or *1501* [*Prob. Code §§ 2322, 2324*].

The form also includes space to request approval of deposits of property with a trust company or financial institution that may allow the amount of the bond to be reduced (Paragraph 1c). If the petitioner or proposed guardian makes these deposits before the appointment of a guardian, on the condition that withdrawal of the money, securities, or other property and any earnings thereon can be made only on the court's authorization, the court may exclude the money, securities, or other property in determining the amount of the required bond or may reduce the bond to be required in respect to the money, securities, or other property to an amount determined by the court to be reasonable [*Prob. Code § 2328(a), (b)*].

The petitioner or proposed guardian must obtain and file with the court a written receipt including the agreement of the bank, trust company, or insured savings and loan association that withdrawal from the account requires court authorization [*Prob. Code § 2328(c)*]. Accordingly, the form contains a statement that receipts will be filed (Paragraph 1c). For a discussion and forms relating to bonds, see Ch. 283, *Guardianship and Conservatorship: Bonds* .

[c] Independent Powers for Guardian of Estate

The form includes an entry that the petitioner may use to request any one or more of the powers listed in *Prob. Code § 2591*, relating to administration of estates, to be exercised without prior court approval pursuant to *Prob. Code § 2590*. The specific powers that are requested must be listed in the petition, and the form provides for the list as an attachment to the petition (Paragraphs 1c, 9) [*Prob. Code § 2592*]. For a discussion of the independent administration of estates and a list of *Prob. Code § 2591* powers, see Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers* .

[d] Additional Conditions for Care of Person and Estate

The form provides for a request for orders relating to the powers and duties of the proposed guardian of the person under *Prob. Code §§ 2351-2358*, which deal with the care, custody, control, education, and medical treatment of wards. The orders requested are to be listed in an attachment to the petition (Paragraph 1e). If a guardian is appointed, the court, with the guardian's consent, may impose conditions not otherwise obligatory providing for the care, treatment, education, and welfare of the ward or for the care and custody of the ward's property, or both. The performance of any conditions imposed by the court is a part of the duties of the guardian for the faithful performance of which the guardian and the sureties on the bond are responsible [*Prob. Code §§ 2358, 2402*]. The form does not provide any specific space for entering a request for additional conditions relating to the care and custody of the ward's property. It is suggested that the entry be made under the paragraph for requesting other orders that provides for the specific order requested to be set out in an attachment (Paragraph 1g).

For a further discussion of *Prob. Code §§ 2351-2358*, see Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee* .

[e] Nonprofit Charitable Corporation as Guardian

A petition for appointment of a nonprofit charitable corporation as guardian must include in the caption the name of a responsible corporate officer who will act for thecorporation for the purposes of *Prob. Code § 1400 et seq.* (Guardian-Conservatorship Law)]. If the officer so named ceases to act as the responsible corporate officer, the corporation must file notice with the court naming a successor and the date the successor will become the responsible corporate officer [*Prob. Code § 2104*].

[f] Guardianship Petition--Child Information Attachment

Judicial Council Form GC-210(CA) [*see § 280.110C*], the Judicial Council's child information attachment form, must be attached to this form.

[g] Professional Fiduciary

If the proposed guardian is a professional fiduciary within the meaning of the Professional Fiduciaries Act, the proposed guardian must complete the Professional Fiduciary Attachment to the Petition for Appointment of Guardian [*see § 280.110D*, Judicial Council Form GC-210(A-PF)/GC-310(A-PF)] (Paragraph 4d).

[5] Verification

The petition must be verified [*Prob. Code § 1021(a)*]. Except as otherwise specified, all petitions, reports, and objections or responses filed pursuant to *Prob. Code § 1400 et seq.* (Guardian-Conservatorship Law) must be verified [*Prob. Code § 1021*; *Cal. Rules of Ct., Rule 7.103(b), (c)*].

An affidavit or verified petition must be received as evidence if offered in any uncontested probate proceeding [*Prob. Code § 1022*].

[6] Notice of Hearing

[a] Required Period and Persons

Notice of the time and place of the hearing on the petition for appointment of a guardian, together with a copy of the petition, must be served at least 15 days before the hearing. The 15-day period cannot be shortened [*Prob. Code § 1511(a)*]. Notice must be served in the manner provided in *Code Civ. Proc. §§ 415.10* (personal service) or 415.30 (service by mail) on the following persons [*Prob. Code § 1511(b)*]:

- The proposed ward if at least 12 years old.
- The person having legal custody of the proposed ward or serving as guardian of the estate of the proposed ward.
- The parents of the proposed ward.
- Any person nominated as guardian for the proposed ward under *Prob. Code § 1500* or *1501*.

In addition, notice must be served by mail sent to the addresses stated in the petition, or in any manner authorized by the court, to the following persons [*Prob. Code § 1511(c)*]:

- The spouse named in the petition.
- The relatives named in the petition (but if the petition is for a guardian of the estate only, the court may dispense with that notice).
- The person having care of the proposed ward if other than the person having legal custody of the proposed ward.

If the case involves a petition for guardianship of the person, the petitioner must mail a notice of the hearing and a copy of the petition, at least 15 days before the hearing, to the local agency designated by the board of supervisors to investigate guardianships for the court. The local social services agency providing child protection services must screen the name of the guardian for prior referrals of neglect or abuse of minors. The results of this screening must be provided to the court [*Prob. Code § 1516*].

If the proposed ward is a patient in or on leave from a state hospital under the jurisdiction of the Department of Mental Health or the Department of Developmental Services, the director of the appropriate department must be served notice by mail at his or her office in Sacramento [*Prob. Code §§ 1461, 1511(d)*].

If the petition is for a nonrelative guardianship [*see Prob. Code § 1540*], the petitioner must mail a notice of the hearing and a copy of the petition to the Director of Social Services at his or her office in Sacramento and to the local agency designated by the board of supervisors to investigate guardianships for the court [*Prob. Code §§ 1511(d), 1542*]. For a discussion of applicability of nonrelative guardianship provisions, see *§ 280.64*. Notice must also be mailed to the Department of Veterans Affairs office having jurisdiction over the area in which the court is located, if the petition states that the proposed ward is receiving or is entitled to receive benefits from the Department of Veterans Affairs [*Prob. Code §§ 1461.5, 1511(e)*].

[b] Jurisdictional Notice to Parents

The requirement of notice to the parents is jurisdictional, and an order of appointment made without the notice when the parent's address was known is void and subject to be set aside at any time [*Guardianship of Kerns (1946) 74 Cal. App. 2d 862, 869, 169 P.2d 975]* .

[c] Additional Notice

If the court determines that the notice required by *Prob. Code § 1511* is insufficient in the particular circumstances, the court may require that further or additional notice, including a longer period of notice, be given [*Prob. Code § 1202*].

[d] Notice of Request for Independent Powers

If the petition for appointment of a guardian includes a request for an order granting independent powers under *Prob. Code § 2590* (administration of estates), the notice of hearing on the petition must so state and must list the specific power or powers requested [*Prob. Code § 2592*]. For a discussion and forms relating to the independent exercise in the administration of estates, see Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers* .

[e] Notice Not to Be Given

Unless the court orders otherwise, notice is not to be given to the parents or other relatives of a proposed ward who has been relinquished to a licensed adoption agencyor to the parents of a proposed ward who has been judicially declared free from their custody and control [*Prob. Code § 1511(f)*].

[f] Notice Not Required

If the court so orders, notice need not be given to any person on a determination that the person cannot with reasonable diligence be given the notice or that giving notice would be contrary to the interest of justice [*Prob. Code § 1511(g)*].

In addition to the possibility of dispensing with notice under *Prob. Code § 1511(g)*, if the petition is for guardianship of the estate only, the court may dispense with the giving of notice to any one or more of the relatives named in the petition [*Prob. Code § 1511(c)*].

This form includes space for requesting that the court dispense with notice to persons listed in an attachment to the petition (Paragraphs 1g, 15). For a form for an order dispensing with notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[g] Form of Notice

Use of the form for notice prescribed by the Judicial Council is mandatory [*Prob. Code § 1001(b)*]. For a reproduction of that form, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[h] Proof of Notice

Before the appointment of a guardian is made, proof must be made to the court that each person entitled to notice under *Prob. Code § 1511* has received notice or that the court has dispensed with notice under *Prob. Code § 1511(g)* [*Prob. Code § 1511(h)*].

A finding by the court that notice has been waived by a party entitled to it also satisfies the requirement that proof of notice be made at the hearing and that the court find that notice was regularly given or waived. This finding should also be made in the order appointing the guardian so that the order will be conclusive on all persons when it becomes final [*Prob. Code § 1260*; *see § 280.115*].

[7] Cross References

For a further discussion and forms relating to notice, see Ch. 284, *Guardianship and Conservatorship: Notice*

For a memorandum of points and authorities in support of a petition for appointment of a guardian, see California Points and Authorities, Ch. 106, *Guardianship and Conservatorship* (Matthew Bender)

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24-280 California Forms of Pleading and Practice--Annotated § 280.110A

§ 280.110A Confidential Guardian Screening Form--Judicial Council Form GC-212

[1] FORM Confidential Guardian Screening Form--Judicial Council Form GC-212

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative filled-in reproduction of Cal. Judicial Council Form GC-212, for use by a proposed probate guardian to be used by the court and by persons or agencies designated by the court to assist the court in determining whether a proposed guardian should be appointed [*Cal. Rules of Ct., Rule 7.1001(b)*].

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Confidentiality

The Confidential Guardian Screening Form and the information contained in it are confidential. The clerk's office must maintain the forms in a manner that will protect and preserve their confidentiality [*Cal. Rules of Ct., Rule 7.1001(c)*].

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24-280 California Forms of Pleading and Practice--Annotated § 280.110B

§ 280.110B Petition for Appointment of Guardian of the Person--Judicial Council Form GC-210(P) [Prob. Code § 1510]

[1] FORM Petition for Appointment of Guardian of the Person--Judicial Council Form GC-210(P) [Prob. Code § 1510]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative filled-in reproduction of Cal. Judicial Council Form GC-210(P), for use in petitioning for the appointment of a guardian of the person of a minor. Either this form or Form GC-210 [*see § 280.110*] may be used to petition for the appointment of a guardian of the person of a minor. Use of one or the other of these forms is mandatory [*see Cal. Rules of Court, Rules 1.31, 7.101*; page 1 of Form]. This form should not be used to petition for a guardian of the estate or of the person and estate. Form GC-210 must be used in those cases [*see* page 1 of Form].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Judicial Council Form GC-210(CA) [*see § 280.110C*], the Judicial Council's child information attachment form, must be attached to this form.

For additional information on the use and content of this form, see *§ 280.110[2]*.

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24-280 California Forms of Pleading and Practice--Annotated § 280.110C

§ 280.110C Guardianship Petition--Child Information Attachment--Judicial Council Form GC-210(CA) [Prob. Code § 1510]

[1] FORM Guardianship Petition--Child Information Attachment--Judicial Council Form GC-210(CA) [Prob. Code § 1510]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative filled-in reproduction of Cal. Judicial Council Form GC-210(CA), for use in petitioning for the appointment of a guardian of a minor. The form provides basic information about the circumstances of the minor and other parties involved in the proceeding. This form must be attached to the petition for appointment of a guardian, either Cal. Judicial Council Form GC-210 [*see § 280.110*], or the alternative mandatory form, Cal. Judicial Council Form GC-210(P) [*see § 280.110B*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents of Attachment

[a] In General

A separate copy of this form must be completed for each child for whom a guardianship is sought, and must contain the following information:

- The name, birthdate, current address, and additional personal information of the proposed ward (Section 1).
- The names and addresses of the child's relatives and other persons (Section 2).

- Information about the proposed guardian (Section 3).
- Explanation as to why the proposed guardian would be best for the child (Section 4).
- Whether or not the child's parents agree to the appointment of the proposed guardian (Section 5).
- Suitability for guardianship (Section 6).

[b] Native American Ancestry

If the minor has Native American ancestry, information required by the Indian Child Welfare Act [25 U.S.C. § 1900 et. seq.] must be provided (Section 1(c)).

[c] Public Assistance

If the minor is receiving public assistance, including any veterans' benefits, Section 1(d) must be completed by the petitioner [*Prob. Code § 1510(e)*].

[d] Other Proceedings

If the petitioner knows of any pending proceedings for the adoption, marriage,dissolution, domestic relations, or custody, or other similar proceedings or juvenile court proceeding, affecting the proposed ward, the petition must disclose the pending proceeding (Section 1(h)) [*Prob. Code § 1510(f)*].

[e] Status as Patient in State Institution

If the petitioner knows that the proposed ward is a patient in or on leave from a state institution, under the jurisdiction of the Department of Mental Health or the Department of Developmental Services, Section 1(i) must be completed [*Prob. Code § 1510(d)*].

[f] Intent to Adopt

If the petitioner has accepted or intends to accept physical care or custody of the child with intent to adopt, whether the intent was formed at the time of placement or subsequently, Section 6(c) must be completed. [*Prob. Code § 1510(g)*].

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24-280 California Forms of Pleading and Practice--Annotated § 280.110D

§ 280.110D Professional Fiduciary Attachment to Petition for Appointment of Guardian or Conservator--Judicial Council Form GC-210(A-PF)/GC-310(A-PF) [Prob. Code § 1821]

[1] FORM Professional Fiduciary Attachment to Petition For Appointment of Guardian or Conservator--Judicial Council Form GC-210(A-PF)/GC-310(A-PF) [Prob. Code § 1821]

Click here to view image.

[2] Use of Form

The form in [1] *above*, is a reproduction of a Cal. Judicial Council Form GC-210(A-PF)/GC-310(A-PF), Professional Fiduciary Attachment to Petition for Appointment of Guardian or Conservator. If the proposed guardian or conservator is a professional fiduciary, this form must be attached to the petition for appointment of Guardian of Minor (Form GC-210). Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct Rules 1.31, 7.101*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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24-280 California Forms of Pleading and Practice--Annotated § 280.111

§ 280.111 Consent of Proposed Guardian, Nomination of Guardian [Prob. Code §§ 1500-1502], and Waiver of Notice [Prob. Code § 1260]--Judicial Council Form GC-211

[1] FORM Consent of Proposed Guardian, Nomination of Guardian [Prob. Code §§ 1500-1502], and Waiver of Notice [Prob. Code § 1260]--Judicial Council Form GC-211

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative, filled-in reproduction of Cal. Judicial Council Form GC-211, for use in nominating a guardian. The form may also be used by the proposed guardian to consent to being appointed and by persons entitled to notice of the proceedings to waive notice and to consent to the appointment.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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24-280 California Forms of Pleading and Practice--Annotated § 280.112

§ 280.112 Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act [Fam. Code § 3429]--Judicial Council Form FL-105/GC-120

[1] FORM Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act [Fam. Code § 3429]--Judicial Council Form FL-105/BC-120

Click here to view image.

[2] Use of Form

The form in [1], above, is an illustrated, filled-in reproduction of Cal. Judicial Council Form FL-105/GC-120, Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act. This form addresses informational requirements of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) [*Fam Code § 3400 et seq.*] that are applicable in all proceedings in which legal or physical custody of a child is at issue, including guardianship proceedings [*see Fam. Code § 3402(d)*]. Under the UCCJEA, each party to the proceeding is required to provide specified information in its first pleading or in an attached affidavit [*see Fam. Code § 3429*; see also *Prob. Code §§ 1510(f), 1512* (information regarding other proceedings)].

The Judicial Council has designated this form as optional [*see Cal Rules of Court, Rules 1.30(b), 1.35*], which means that it *may* be used by the parties to satisfy the preceding requirements and must be accepted for filing by all courts [*Cal. Rules of Court, Rule 1.35(a)*]. However, the Rules of Court's Probate Rules provide that in actions to which the Probate Code applies, if the Judicial Council has adopted a form for a petition, order, or other document, that form *must* be used [*Cal. Rules of Court, Rule 7.101*; *see Cal. Rules of Court, Rule 7.2* (application of probate rules)]; thus, it appears that in guardianship proceedings use of this form is in fact mandatory.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The caption on the form is designed for use in child custody proceedings incident to a marital dissolution, so the form should be modified by inserting the title of the guardianship action as it appears on the petition and other pleadings.

[3] Contents of Declaration

Every party in a custody proceeding, in his or her first pleading or in an affidavit attached to that pleading, must give information under oath as to the child's present address, the places the child has lived for the past five years, and the names and present addresses of the persons with whom the child lived during that period. However, if there are allegations of domestic violence or child abuse, any addresses of the party alleging abuse and of the child that are unknown to the other party are confidential and may not be disclosed in the pleading or affidavit [*Fam. Code § 3429(a)*]. Every party must also declare under oath in the pleading or affidavit whether [*Fam. Code § 3429(a)*]:

- He or she has participated, as a party, witness, or otherwise, in any other proceeding concerning custody of or visitation with the child and, if so,identify the court, the case number, and the date of the child custody determination, if any.

- He or she knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions and, if so, identify the court, the case number, and the nature of the proceeding [*see also Prob. Code § 1510(f)* (requirement for disclosure of other proceedings), *Prob. Code § 1512* (amendment to disclose other proceedings)].

- He or she knows the names and addresses of any persons not a party to the proceeding who has physical custody of the child or claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the names and addresses of those persons.

If the declaration as to any of these items is affirmative, the declarant must give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and as to other matters pertinent to the court's jurisdiction and the disposition of the case [*Fam. Code § 3429(c)*]. A declaration under penalty of perjury may be used instead of an affidavit [*Code Civ. Proc. § 2015.5*]. If the required information is not provided, the court, on motion of any party or its own motion, may stay the proceeding until the information is furnished [*Fam. Code § 3429(b)*].

[4] Continuing Duty to Inform Court of Proceedings

The party filing this declaration is under a continuing duty to inform the court of any proceeding in California or in any other state that could affect the proceeding in which the declaration is filed [*Fam. Code § 3429(d)*].

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24-280 California Forms of Pleading and Practice--Annotated § 280.113

§ 280.113 Objection to Petition for Appointment of Guardian [Prob. Code §§ 1510, 1514]

[1] FORM Objection to Petition for Appointment of Guardian

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Guardianship of the _____	)	[Hearing set for _____ (*date*), at
[Person *or* Estate *or* Person and Estate] of	)	_____ (*time*), in Dept. No. _____]
_____ [*name*], Ward.	)	OBJECTION TO PETITION FOR APPOINTMENT OF GUARDIAN

_____

Objector _____[*name*] respectfully represents:

1. Objector is _____ [*allege standing to object, e.g.*, the sister of the minor's deceased mother (that is, the maternal aunt of the minor) and is a person interested in the proposed guardianship of the minor].

2. Objector objects to the appointment of _____[*name*] as guardian on the grounds that _____ [*set forth grounds, e.g.*, the appointment is not in the best interests of the minor, the appointment would be detrimental to the minor, and the minor has repeatedly expressed a preference for adoption by petitioner rather than by _____ (*name of proposed guardian*)]. _____ [A copy of a petition for the appointment of objector as guardian of the person and estate of the minor is attached as Exhibit _____ and made a part of this objection.]

WHEREFORE, objector prays that the petition of _____[*name*] for appointment of _____[*name*] as guardian be denied _____ [*set forth additional relief desired, if any, e.g.*,, that the petition of objector for his/her appointment as guardian of the person and estate of the minor be granted,]

and for such other and further relief as the court may deem proper.
Dated: _____

_____ [*signature*]
_____ [*typed name*]
Objector
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Objector

VERIFICATION

I, _____[*name*], am the objector in this proceeding. I have read the foregoing objection and know the contents thereof. The same is true of my own knowledge, except as to those matters that are stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is for use to object to a petition for the appointment of a guardian. Grounds for objection are discussed under [5], *below*.

The statutory form of pleading for opposing a petition under the Probate Code is a response or an objection, unless otherwise specified [*see Prob. Code § 1043*]. Apparently, the objection must be made in writing, even though provision is made in the Probate Code for oral objection at a hearing [*see Prob. Code §§ 1021(a)(2), 1043(a), (b)* (objections are required to be verified; interested person is permitted to appear and respond or to object in writing at or before hearing or orally at hearing)]. Counsel should consult local practice for the form and content of, and procedural matters related to, an objection.

[3] Contents of Objection

[a] In General

The department number and hearing date should appear immediately below the case number when required by local court rule [*see, e.g.*, Los Angeles Co. Super Ct. Rules, Rule 10.10].

An objection should set forth the objector's standing to object (Paragraph 1), the substance and grounds of the objection (Paragraph 2), and the relief sought.

[b] Award to Nonparent

On a petition for guardianship of the person of a minor, before custody of the minor can be awarded to a nonparent, the court must find that being in the custody of a parent would be detrimental to the child and that the award to a nonparent

is required in the best interests of the child [*Fam. Code § 3041*; *Prob. Code § 1514(b)*; *In re B.G. (1974) 11 Cal. 3d 679, 698-699, 114 Cal. Rptr. 444, 523 P.2d 244* (applying former *Civ. Code § 4600* in context of juvenile court proceedings); *Guardianship of Oliva J. (2000) 84 Cal. App. 4th 1146, 1153-2013, 1154, 101 Cal. Rptr. 2d 364* ; *Guardianship of Z.C.W. (1999) 71 Cal. App. 4th 524, 527, 84 Cal. Rptr. 2d 48]* . Accordingly, an objection to a petition for guardianship of the person should expressly state that the award of custody to a parent would be detrimental to the child and that the award to the nonparent is in the child's best interests. Further, if a court finds that granting custody to a parent would be detrimental and granting custody to a nonparent would be in the child's best interests, the court may grant custody to the nonparent without further balancing the parent's constitutionally protected interest in an opportunity to form a relationship with the child [*Adoption of Daniele G. (2001) 87 Cal. App. 4th 1392, 1408, 105 Cal. Rptr. 2d 341]* .

Even though former Prob. Code § 1409, providing that a parent who abandoned a minor lost the right to guardianship, was repealed by Stats. 1979, ch. 726, § 1, an appellate court has held that a parent's neglect or indifference toward a child has a bearing on the parent's fitness and may be considered by the court in determining custody. Moreover, it may be difficult to distinguish between facts that render a parent unfit and facts showing that parental custody would be detrimental to the minor [*Guardianship of Pankey (1974) 38 Cal. App. 3d 919, 933-934, 113 Cal. Rptr. 858]* . Therefore, statements of fact in an objection regarding abandonment should continue to be pertinent in determining whether a nonparent should be appointed guardian in preference to a parent.

[4] Standing to Object

Although the Probate Code does not specify who may object to a petition for the appointment of a guardian, anyone entitled to notice of the petition would seem to be a proper objector. The party objecting does not have to seek custody of the proposed ward [*see* *Guardianship of Pankey (1974) 38 Cal. App. 3d 919, 926-927, 113 Cal. Rptr. 858]* .

[5] Grounds for Objection

Neither the Probate Code generally nor the Guardianship-Conservatorship Law specifically sets forth grounds for objecting to a petition to appoint a guardian. Nevertheless, objection can apparently be made on a variety of substantive and procedural grounds, including the jurisdiction of the court, the necessity for a guardianship, and the suitability or fitness of the proposed guardian. It is also possible that, although no objection is made to the fact of guardianship or the proposed guardian, objection will be made to the powers to be granted the proposed guardian [*see, e.g., Prob. Code § 2590 et seq.* (scope and exercise of independent powers by guardian)].

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24-280 California Forms of Pleading and Practice--Annotated § 280.114

§ 280.114 Order Denying Petition for Appointment of Guardian [Prob. Code §§ 1510, 1514]

[1] FORM Order Denying Petition for Appointment of Guardian

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
Guardianship of the _____	)	NO. _____
[Person *or* Estate *or* Person and Estate] of	)	ORDER
_____ [*name*], Ward.	)	
_____		

The petition of _____[*name*] for appointment of _____ [himself/herself *or name*] as guardian of the _____ [person and estate *or* person *or* estate] of the above-named minor [and the objection of _____ (*name*)] came on regularly for hearing by the court on this date. Petitioner appeared by counsel, _____[*name*] _____[, and objector appeared by counsel, _____ (*name*)]. _____[*Specify other appearance(s), if any.*]

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. The appointment of _____[*name*] as guardian of the _____ [person and estate *or* person *or* estate] of the minor is not in the best interests of the minor.

WHEREFORE IT IS ORDERED that:

1. The petition of _____[*name*] for appointment of _____ [himself/herself *or name*]

as guardian of the _____ [person and estate *or* person *or* estate] of the minor, _____[*name*], is denied.

2. _____ [*state disposition of minor, e.g.,* The minor is returned to the personal care, custody, and control of _____ (*name*), his/her natural father].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use when the court denies a petition for appointment of a guardian [*see Prob. Code § 1510*]. The Judicial Council has not promulgated a form of order for use when the petition is denied. Therefore, counsel must draft an order.

[3] Contents

If it appears to the satisfaction of the court that notice has been regularly given or that the party entitled to notice has waived it, the court must so find in the order [*Prob. Code § 1260(b)*]. Except as otherwise provided in the Probate Code, an order made in a proceeding under the code need not recite the existence of facts or the performance of acts on which jurisdiction depends. The order need only contain the matters ordered [*Prob. Code § 1047*].

[4] Statement of Decision

A statement of decision explaining the factual and legal basis for its decision on each of the principal controverted issues must be prepared by the court when a proper request for the statement is made. The request must specify the controverted issues for which the party is requesting a statement of decision [*Code Civ. Proc. § 632*; *see Prob. Code §§ 1000, 1002, 2100*; *Cal. Rules of Ct., Rule 3.1590*; *see also Guardianship of Brown (1976) 16 Cal. 3d 326, 332, 128 Cal. Rptr. 10, 546 P.2d 298* (decided prior to 1981 amendment of *Code Civ. Proc. § 632*)]. For further discussion, see Ch. 529, *Statement of Decision* .

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24-280 California Forms of Pleading and Practice--Annotated § 280.115

§ 280.115 Order Appointing Guardian of Minor [Prob. Code § 1514]--Judicial Council Form GC-240

[1] FORM Order Appointing Guardian of Minor [Prob. Code § 1514]--Judicial Council Form GC-240

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative, filled-in reproduction of Cal. Judicial Council Form GC-240, for use in appointing a guardian.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents of Order-Appearances

A local court rule may require the person or persons named in the petition and seeking appointment as guardian to appear at the hearing [*see, e.g.,* Orange Co. Super. Ct. Rules, Div. VI, Rule 610.04], and the form provides space to indicate whether the petitioner, his or her attorney, and the attorney for the minor were personally present (Paragraphs 1c-1e).

[4] Statement of Decision

A statement of decision, explaining the factual and legal basis for its decision on each of the principal controverted issues, must be prepared by the court when a proper request for the statement is made. The request must specify the controverted issues for which the party is requesting a statement of decision [*Code Civ. Proc. § 632*; *see Prob. Code §§ 1000, 1002, 2100*; *Cal. Rules of Ct., Rule 3.1590*; *see also Guardianship of Brown (1976) 16 Cal. 3d 326, 332, 128 Cal. Rptr. 10, 546 P.2d 298* (decided prior to 1981 amendment of *Code Civ. Proc. § 632*)]. For further discussion, see Ch. 529, *Statement of Decision* .

[5] Notice

Before a guardian is appointed, proof must be made to the court that each person entitled to notice under *Prob. Code § 1511* has been given notice as required or that notice cannot with reasonable diligence be given or would be contrary to the interest of justice (Paragraphs 2a, 2b, 8) [*Prob. Code § 1511(g), (h)*]. If it appears to the satisfaction of the court that notice has been regularly given or that the party entitled to notice has waived it, the court must so find in the order, and the order when it becomes final is conclusive on all persons (Paragraph 2a) [*Prob. Code § 1260(b), (c)*].

[6] Independent Powers

The petition for appointment of a guardian may include a request that the court exercise its discretion under *Prob. Code § 2590* to grant the guardian any of the powers enumerated in *Prob. Code § 2591*, relating to the administration of the ward's estate, to be exercised without court supervision. A list of the specific powers granted by the court must be attached to the order (Paragraphs 4, 11) [*Prob. Code § 2592*]. For a discussion and forms relating to the independent exercise of powers and a list of the powers that may be granted, see Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers* .

[7] Attorney's Fees of Appointed Counsel

If the court appointed private legal counsel for the proposed ward pursuant to *Prob. Code § 1470(a)*, the court, on conclusion of the matter, must fix a reasonable sum for compensation and expenses of counsel, which may include, in the court's discretion, compensation for services rendered, and expenses incurred, before the date of the order appointing counsel (Paragraphs 5, 10) [*Prob. Code § 1470(b)*]. The court is to order the sum so fixed to be paid by a parent or the parents of the minor or from the minor's estate, or any combination of these sources, in such proportions as the court deems just, but payment by a parent or parents of the minor can be made only after the parent or parents, as the case may be, had notice and the opportunity to be heard on whether the order would be just under the circumstances of the case [*Prob. Code § 1470(c), (d)*]. If a ward or proposed ward is furnished legal counsel, then the court, on its own motion or that of a party, must determine whether a parent or parents of the ward or proposed ward or the estate of the ward or proposed ward is financially unable to pay all or a portion of the cost of appointed counsel [*Prob. Code § 1470(c)(3)*]. Any portion of the cost of counsel that the court finds the parents or parents or the estate of the ward or proposed ward is unable to pay, must be paid by the county [*Prob. Code § 1470(c)(3)*]. For purposes of this rule, a nonparent, such as a grandparent, does not qualify as a parent and cannot be compelled to pay a minor's guardianship attorney's fees and costs [*Guardianship of Elan E. (2000) 85 Cal. App. 4th 998, 1001, 102 Cal. Rptr. 2d 528]* .

[8] Court-Appointed Investigator

The court investigator, probation officer, or domestic relations investigator in the county in which the petition for appointment of a guardian is pending must make an investigation whenever requested to do so by the court [*Prob. Code § 1513(a)*]. The form includes space for the name of the court-appointed investigator, probation officer, or domestic relations investigator, although there does not appear to be any statutory requirement that the investigator be named in the order (Paragraph 6).

The court may order repayment to the county by the parent or parents or other person charged with the support of the minor, or from the estate of the proposed ward for the expense of the investigation and report. If a hearing is requested, an order for repayment of investigation and report expenses may be made only after a hearing on such notice as the court may require [*Prob. Code § 1513*; *see also Prob. Code § 1454* (qualifications and appointment of court investigator)].

[9] Bonds

Unless required by the court, a bond is not necessary if a guardian of the person is appointed or if the guardian was

nominated under *Prob. Code § 1500* or *1501* and the nominator waived bond (Paragraph 9a) [*Prob. Code §§ 2322, 2324*]. If a bond will be necessary, the form provides space to enter the amount and to order that deposits of estate assets be made at a specified financial institution to reduce the amount of bond (Paragraphs 9b, 9c). The amount of the bond and reduction of the amount by depositing assets in a financial institution subject to court supervision of withdrawals are governed by *Prob. Code §§ 2320, 2323, 2326-2328*, and *Code Civ. Proc.§§ 995.710-995.770*. In addition, the court may provide that the guardian is not authorized to take possession of money or any other property without a specific court order (Paragraph 9d). For further discussion and forms relating to bonds, see Ch. 283, *Guardianship and Conservatorship: Bonds* .

[10] Additional Conditions for Care of the Person and Estate

When a guardian is appointed, the court, with the guardian's consent, may insert in the order of appointment conditions not otherwise obligatory providing for the care, treatment, education, and welfare of the ward, for the care and custody of the ward's property, or for both. The form provides for lists specifying any additional orders to be attached to the order (Paragraphs 12, 13). The performance of such conditions is a part of the duties of the guardian, for the faithful performance of which the guardian and the sureties on the bond are responsible [*Prob. Code §§ 2358, 2402*].

[11] Appointing Guardian Nominated by Parent

[a] Guardian of the Person

Except to the extent that the court for good cause determines otherwise, a guardian of the person nominated pursuant to *Prob. Code § 1500* is to be granted, in the order of appointment, the same authority with respect to the person of the ward as that of a parent having legal custody of a child. The guardian may exercise that authority without court supervision in the same manner as if that authority were exercised by a parent having legal custody of a child [*Prob. Code § 2108(a)*]. The terms are to be set out in an attachment to the order (Paragraph 14).

[b] Guardian of the Estate

If the court appoints a guardian of the estate nominated pursuant to *Prob. Code § 1500* or a guardian of property nominated pursuant to *Prob. Code § 1500* or a guardian of property nominated in a will pursuant to *Prob. Code § 1501*, the order of appointment must grant the guardian the right to exercise any of the powers listed in *Prob. Code § 2591*, relating to the independent administration of estates, without court supervision in the same manner as if that authority were granted by order of the court under *Prob. Code § 2590*. The court can refuse to grant those powers for good cause. If the powers are granted, they are subject to *Prob. Code §§ 2593-2595* (withdrawal of powers; letters are required to list powers; power to petition for instruction or confirmation notwithstanding independent powers). In the case of a guardian nominated under *Prob. Code § 1501*, any additional authority must be limited to the property covered by the nomination [*Prob. Code § 2108(b)*]. A list of specific powers granted is to be attached to the order (Paragraph 11). For a further discussion and forms relating to the independent administration of estates under *Prob. Code §§ 2590-2595*, see Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers* .

[12] Appointment of Probate Referee

The guardian must file an inventory and appraisal of the estate within 90 days after appointment or within such further time as the court may allow for reasonable cause. The property described in the inventory must be appraised in the same manner as provided for the inventory and appraisal of estates of decedents, which requires the appointment of a probate referee to appraise any property other than currency, cash items, bank accounts and amounts on deposit with any financial institution, and the proceeds of life insurance policies and retirement plans payable on death in lump-sum amounts, all of which are to appraised by the guardian. The referee must also appraise any such items that the guardian believes to have a fair market value different from ostensible value or specified amount [*Prob. Code §§ 2610, 8850-8902*]. Accordingly, provision is made for appointment of a probate referee (Paragraph 15). For a discussion and

forms relating to the inventory and appraisal of estates, see Ch. 286, *Guardianship and Conservatorship: Inventory and Appraisal* .

[13] Ineffectiveness of Appointment Until Letters Have Issued

The appointment of a guardian, the taking of the guardian's oath, and the filing of the guardian's bond, if required, must thereafter be evidenced by the issuance of letters by the clerk of the court [*Prob. Code § 2310(a)*]. The order appointing the guardian must state in capital letters on the first page of the order, in at least 12-point type, the following: "WARNING: THIS APPOINTMENT IS NOT EFFECTIVE UNTIL LETTERS HAVE ISSUED" [*Prob. Code § 2310(b)*].

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24-280 California Forms of Pleading and Practice--Annotated § 280.115A

§ 280.115A Duties of Guardian and Acknowledgment of Receipt--Judicial Council Form GC-248

[1] FORM

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative filled-in reproduction of Cal. Judicial Council Form GC-248, for use in providing the guardian with a summary statement of the guardian's duties [*Cal. Rules of Ct., Rule 7.1002*].

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms,* which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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24-280 California Forms of Pleading and Practice--Annotated § 280.116

§ 280.116 Letters of Guardianship [Prob. Code §§ 2310, 2311]--Judicial Council Form GC-250

[1] FORM Letters of Guardianship [Prob. Code §§ 2310, 2311]--Judicial Council Form GC-250

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of Cal. Judicial Council Form GC-250. It should be prepared by the attorney and issued by the clerk.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The appointment, taking of the oath, and filing of the bond, if any, are evidenced by letters of guardianship issued by the clerk of the court [*Prob. Code § 2310*]. The letters are to be in substantially the same form as letters of administration, except as otherwise required by the court making the appointment [*Prob. Code § 2311*].

[3] Contents of Letters

[a] Independent Powers

The petition for appointment of a guardian may include a request that the court exercise its discretion under *Prob. Code § 2590* to grant the guardian any of the powers enumerated in *Prob. Code § 2591*, relating to the administration of the ward's estate, to be exercised without court supervision [*Prob. Code § 2592*]. If the court grants any such powers, the letters of guardianship must state the specific powers granted and the restrictions, conditions, or limitations, if any, prescribed in the order, and must refer to Article 11, Chapter 6, Division 4 of the Probate Code (Paragraph 2a) [*Prob. Code §§ 2590-2595*].

If the powers are subsequently withdrawn, restricted, conditioned, or limited, new letters must be issued accordingly [*Prob. Code § 2594*].

For a further discussion of the independent administration of estates under *Prob. Code §§ 2590-2595* and a list of the powers enumerated in *Prob. Code § 2591*, see Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers* .

[b] Additional Conditions

When a guardian is appointed, the court, with the guardian's consent, may insert in the order of appointment conditions not otherwise obligatory providing for the care, treatment, education, and welfare of the ward, for the care and custody of the property of the ward, or for both. Any such condition must be included in the letters of guardianship, and the performance of such conditions is a part of the duties of the guardian, for the faithful performance of which the guardian and the sureties on the bond are responsible (Paragraphs 2b, 2c) [*Prob. Code §§ 2358, 2402*]. In addition, the court may provide that the guardian is not authorized to take possession of money or any other property without a specific court order (Paragraph 3).

[4] Guardian Nominated by Parent

[a] Guardian of the Person

If the court appoints a guardian of the person nominated by the minor's parent under *Prob. Code § 1500*, and grants the guardian the same authority with respect to the person of the ward as a parent having legal custody of a child, exercisable without notice, hearing, or court authorization, instructions, approval, or confirmation, the letters must include the terms of the order granting that authority (Paragraph 2d) [*Prob. Code § 2108*].

[b] Guardian of the Estate

If the court appoints a guardian of the estate nominated under *Prob. Code § 1500* by a parent or under *Prob. Code § 1501* by a person from whom the minor receives property, and grants the guardian the right to exercise any of the powers listed in *Prob. Code § 2591* without notice, hearing, or court authorization, instructions, approval, or confirmation, in the same manner as if that authority were granted by order of the court under *Prob. Code § 2590*, the letters must include the terms of the order granting that authority. In the case of a guardian nominated under *Prob. Code § 1501*, any such additional authority must be limited to the property covered by the nomination (Paragraph 2a) [*Prob. Code § 2108*]. If a person nominated under *Prob. Code § 1501* is appointed solely as guardian of the property covered by the nomination, the letters must so indicate (Paragraph 2d) [*Prob. Code § 1514(d)*].

[5] Oath

A guardian must take an oath to perform the duties of the office according to law, and the oath must be attached to or endorsed on the letters of guardianship [*Prob. Code § 2300*].

[6] Cross References

For a discussion of bonds and forms that may be adapted for use in guardianship proceedings, see Ch. 283, *Guardianship and Conservatorship: Bonds*

For discussion personal and corporate surety bonds, see Ch. 446, *Probate: Bonds--Increase and Decrease During Administration*

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24-280 California Forms of Pleading and Practice--Annotated § 280.117

§ 280.117 Confidential Guardianship Status Report [Prob. Code § 1513.2]--Judicial Council Form GC-251

[1] FORM

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of Cal. Judicial Council Form GC-251, for use by a guardian in providing an annual status report to the court [*see Prob. Code § 1513.2*].

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

At least one month before the date the guardian is required to return the status report, the clerk of the court must mail to the guardian a notice informing the guardian that he or she must complete and return the report to the court [*Prob. Code § 1513.2(a)*]. The clerk must enclose a blank status report form for each child under guardianship in the same case for the guardian to complete and return by mail [*Prob. Code § 1513.2(a)*; *Cal. Rules of Ct., Rule 7.1003(b)* (clerk must fill in due date for report)].

[3] Contents of Report

Every guardian must complete and return to the court an annual status report [*Prob. Code § 1513.2(a)*]. The report must include information about the status of the guardianship, including the guardian's present address (Paragraph 1(b)), the name and birth date of the child under guardianship (Paragraph 2(a) and (b)), the name of the school in which the child is enrolled (Paragraph 3(a)), and information about the person with whom the child is residing if the child is not in the guardian's home and why the child was moved (Paragraph 2(c)-(e)) [*Prob. Code § 1513.2(b)*].

[4] Failure to Comply With Report Requirements

If the guardian does not complete and return the status report, or if the court finds after the guardian has returned the report that further information is needed, the court must attempt to obtain this information from the guardian or other sources [*Prob. Code § 1513.2(a)*]. If the court is unable to obtain this information within 30 days after the date the status report is due, the court must either order the guardian to make himself or herself available to the court's investigator for purposes of investigation of the guardianship or to show cause why the guardian should not be removed [*Prob. Code § 1513.2(a)*].

It is a misdemeanor for a guardian to submit willfully any material information required by the form that the guardian knows to be false [*Prob. Code § 1513.2(a)*].

[5] Confidentiality of Report

The status report is confidential and may only be made available to persons who have been served in the proceedings or their attorneys [*Prob. Code § 1513.2(c)*].

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24-280 California Forms of Pleading and Practice--Annotated § 280.118

§ 280.118 Certification of Attorney Concerning Qualifications for Court Appointment [Prob. Code § 1456, 1470, 1471]--Judicial Council Forms GC-010 and GC-011

[1] FORMS Certification of Attorney Concerning Qualifications For Court Appointment [Prob. Code § 1456, 1470, 1471]--Judicial Council Form GC-010

Click here to view image.
Annual Certification of Court-Appointed Attorney [Prob. Code § 1456, 1470, 1471]--Judicial Council Form GC-011

Click here to view image.

[2] Use of Forms

The form in [1], *above*, is a reproduction of Cal. Judicial Council Forms GC-010 and GC-011, used for certification of an attorney concerning qualifications for court appointment in both conservatorships and guardianships [*see* [3], *below*]. Use of the Judicial Council forms are mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. These forms are available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Counsel Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Certification Requirement

Each attorney appointed or eligible for appointment by a court before January 1, 2008, including deputy public defenders, was required to certify to the court by April 1, 2008, that he or she satisfies the qualifications to be eligible for a new appointment on or after April 1, 2008. Beginning March 1, 2008, each counsel must certify that he or she is qualified before becoming eligible for an appointment. Beginning January 1, 2009, each appointed counsel must certify to the court before the end of March of each year that he or she has completed the continuing education required for the preceding calendar year [*Cal. Rules of Ct., Rule 7.1101*; *see* form GC-011 in [1], *above*].

[4] Qualifications for Private Counsel (Paragraph 3)

An attorney in private practice appointed by the court on or after January 1, 2008, must be an active member of the State Bar of California for at least three years immediately before the date of appointment, with no discipline imposed within the 12 months immediately preceding any date of availability for appointment after January 1, 2008 [*Cal. Rules of Ct., Rule 7.1101(b)*]. Private counsel also must be covered by professional liability insurance satisfactory to the court, in the amount of at least $100,000 per claim and $300,000 per year.

Additionally, for an appointment to represent a minor in a guardianship [*Cal. Rules of Ct., Rule 7.1101(b)*]:

- Within the five years immediately before the date of first availability for appointment after January 1, 2008, the attorney must have represented at least three wards or proposed wards in probate guardianships, three children in juvenile court dependency or delinquency proceedings, or three children in custody proceedings under the Family Code; or

- At the time of appointment, must be qualified for appointments to represent children in juvenile dependency proceedings under Rule 5.660 and the court's local rules governing court-appointed juvenile court dependency counsel; or for appointments to represent children in custody proceedings under the Family Code under Rule 5.242, including the alternative experience requirements of Rule 5.242(g).

- Counsel must satisfy the continuing education requirements in addition to the education or training requirements.

For an appointment to represent a conservatee or a proposed conservatee [*Cal. Rules of Ct., Rule 7.1101(b)*]:

- Within the five years immediately before the date of first availability for appointment after January 1, 2008, the attorney must have represented at least three conservatees or proposed conservatees in either probate or LPS conservatorships; or

- Completed any three of the following five tasks:

  - Represented petitioners for the appointment of a conservator at commencement of three probate conservatorship proceedings, from initial contact with the petitioner through the hearing and issuance of Letters of Conservatorship.

  - Represented a petitioner, a conservatee or a proposed conservatee, or an interested third party in two contested probate or LPS conservatorship matters. A contested matter that qualifies under this item and also qualifies under the preceding criteria may be applied toward satisfaction of both criteria.

  - Represented a party for whom the court could appoint legal counsel in a total of three matters described in *Prob. Code §§ 1470, 1471, 1954, 2356.5, 2357, 2620.2, 3140,* or *3205*.

  - Represented fiduciaries in three separate cases for settlement of a court-filed account and report, through filing, hearing, and settlement, in any combination of probate conservatorships or guardianships, decedent's estates, or trust proceedings under Division 9 of the Probate Code.

  - Prepared five wills or trusts, five durable powers of attorney for health care, and five durable powers of attorney for asset management.

Private counsel must also be covered by professional liability insurance satisfactory to the court in the amount of at least $100,000 per claim and $300,000 per year, unless exempted under *Cal. Rules of Ct. Rule 7.1101(e)(2)* [*see 280.118 [6]*].

[5] Qualifications of Deputy Public Defenders (Paragraph 4)

Beginning January 1, 2008, each county deputy public defender with direct responsibility for the performance of legal services in a particular case on the appointment of the county public defender under *Prob. Code §§ 1470, 1471* must be an active member of the State Bar of California for at least three years immediately before the date of appointment and either satisfy the experience requirements for private counsel [*see § 280.118[4]*] or have a minimum of three years' experience representing minors in juvenile dependency or delinquency proceedings or patients in postcertification judicial proceedings or conservatorships under the Lanterman-Petris-Short Act [*Cal. Rules of Ct., Rule 7.1101(c)*].

A deputy public defender must be covered by professional liability insurance satisfactory to the court in the amount of at least $100,000 per claim and $300,000 per year, or be covered for professional liability at an equivalent level by a self-insurance program for the professional employees of his or her county [*Cal. Rules of Ct., Rule 7.1101(c)*].

A deputy public defender who is not qualified under this rule may periodically substitute for a qualified deputy public defender with direct responsibility for the performance of legal services in a particular case. In that event, the county public defender or his or her designee, who may be the qualified supervisor, must certify to the court that the substitute deputy is working under the direct supervision of a deputy public defender who is qualified under this rule [*Cal. Rules of Ct., Rule 7.1101(c)*].

[6] Exemption for Small Courts (Paragraph 5)

The qualifications for an attorney appointed by a court in a guardianship or conservatorship may waived by a court with four or fewer authorized judges if it cannot find qualified counsel or for other grounds of hardship [*Cal. Rules of Ct., Rule 7.1101(e)(1)*]. A court may appoint counsel in private practice who does not satisfy the insurance requirements without a waiver if counsel demonstrates to the court they are adequately self-insured [*Cal. Rules of Court, Rule 7.1101(e)(2)*]. However, it may not waive or disregard the self-insurance requirements applicable to deputy public defenders [*Cal. Rules of Court, Rule 7.1101(e)(3)*]. A court waiving the qualifications of counsel must make express written findings showing the circumstances supporting the waiver and disclosing all alternatives considered, including appointment of qualified counsel from adjacent counties and other alternatives not selected [*Cal. Rules of Court, Rule 7.1101(e)(4)*].

[7] Continuing Education

Beginning January 1, 2008, counsel appointed by the court must complete three hours of education each calendar year that qualifies for minimum continuing legal education credit for State Bar-certified specialists in estate planning, trust, and probate law [*Cal. Rules of Ct., Rule 7.1101(f)*; *see* form GC-011 in [1], *above*]. A court may establish higher qualification or continuing education requirements, including insurance requirements; require initial education or training; and impose other requirements, including an application by private counsel [*Cal. Rules of Ct., Rule 7.1101(g)*].

Additionally, on or before January 1, 2010, a public conservator must also comply with the continuing education requirements that are established by the California State Association of Public Administrators, Public Guardians, and Public Conservators [*Prob. Code § 1456.2*].

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24-281 California Forms of Pleading and Practice--Annotated 281.syn

§ 281.syn Synopsis to Chapter 281: GUARDIANSHIP AND CONSERVATORSHIP: APPOINTMENT OF CONSERVATORS

§ 281.01 Scope of Chapter

§ 281.02 Cross References

§§ 281.03-281.09 [Reserved]

§ 281.10 Governing Statutes

§§ 281.11-281.19 [Reserved]

§ 281.20 Legislative Purpose of Establishment of Conservatorship

§ 281.21 Grounds for Appointment

[1] Conservator of Person or Estate

[2] Conservator of Estate for Absentee

[3] Conservator of Person or Estate of Nonresident

[4] Conservator of Estate of Missing Person

[a] Applicable Law

[b] Required Findings

[5] Limited Conservatorship for Developmentally Disabled Adult

§ 281.22 Jurisdiction and Venue

[1] California Resident

[2] Nonresident of California

[3] Proceedings Begun in More Than One County

§ 281.23 Transfer of Proceedings

§§ 281.24-281.29 [Reserved]

§ 281.30 Petition for Appointment of Conservator

§ 281.30A Conservator Screening Form and Supplemental Information Statement

§ 281.31 Nomination of Conservator

[1] Nomination by Proposed Conservatee or by Relatives

[2] Pre-1981 Nomination of Guardian

§ 281.32 Preference in Appointing Conservator

[1] Nominee of Proposed Conservatee

[2] Spouse of Absentee

[3] Domestic Partner of Conservatee

[4] Best Interests of Conservatee

[5] Appointment of Counsel for Conservatee

§ 281.33 Appointment of Nonprofit Charitable Corporation

§ 281.34 Appointment of a Professional Fiduciary

§ 281.35 Multiple Conservators or Conservatees

§ 281.36 Assessment of Developmentally Disabled Conservatee

[1] Consensual Assessment

[2] Report to Court

§ 281.37 Investigation by Court Investigator

[1] Scope of Investigation

[2] Investigator's Report

[a] Report Required

[b] Confidentiality of Report

[3] When Investigation and Report Not Required

[4] Limited Investigation

[5] Assessment of Investigation Costs

[6] Immunity of Investigator From Liability

§ 281.38 Notice of Hearing

[1] General Requirements

[a] Time for Notice: Content

[b] Who Is Entitled to Notice

[2] Conservatorship for Absent or Missing Person

§§ 281.39-281.49 [Reserved]

§ 281.50 Conduct of Hearing in General; Jury Trial

§ 281.51 Attendance of Proposed Conservatee at Hearing

§ 281.52 Informing Proposed Conservatee of Rights

[1] In General

[2] Waiver of Advisement

§ 281.53 Consultation With Proposed Conservatee

§ 281.54 Hearing on Petition for Appointment of Limited Conservatorship

§ 281.55 Notice of Conservatee's Rights

§§ 281.56-281.59 [Reserved]

§ 281.60 Oath, Letters, and Bond

§ 281.61 Statement of Conservator's Duties

§ 281.62 Handbook for Private Conservators

§ 281.63 Recording Letters of Conservatorship of Estate

§ 281.64 Appeal

§ 281.65 Periodic Review of Conservatorship

[1] Nature of Review

[2] Assessment of Review Costs

§ 281.66 Professional Fiduciaries Act

[1] Professional Fiduciary

[2] Licensing Requirements

[3] Qualifications for Licensure

[4] License Renewal

[5] Initial and Annual Statement

[6] Suspension, Revocation, Denial, and Disciplinary Action

§ 281.67 Unwarranted Petitions

§§ 281.68-281.69 [Reserved]

§ 281.70 Related Matthew Bender Publications

§ 281.71 State Statutes

[1] Appeal

[2] Appointment of Conservators

[3] Definitions

[4] Investigations

[5] Jurisdiction and Venue

[6] Oath and Letters

[7] Procedure for Appointment

[8] Transfer of Proceedings

§ 281.71A California Rules of Court

§ 281.72 Local Court Rules

[1] Alameda County

[2] Contra Costa County

[3] Los Angeles County

[4] Orange County

[5] Sacramento County

[6] San Diego County

[7] San Francisco

§ 281.73 Decisions

[1] Constitutional Limitations

[2] Grounds for Appointment

[3] Hearing

[4] Jurisdiction

§ 281.74 Law Reviews

§ 281.75 Text References

§§ 281.76-281.89 [Reserved]

§ 281.90 Client Interview--Facts and Documents

[1] Facts to Be Ascertained

[a] As to Proposed Conservatee

[b] As to Petitioner

[2] Documents to Be Obtained

§ 281.91 Obtaining Appointment of Conservator

§§ 281.92-281.99 [Reserved]

§ 281.100 Petition for Appointment of Conservator [Prob. Code §§ 1820, 1821]--Judicial Council Form GC-310

[1] FORM

[2] Use of Form

[3] Contents of Petition

[a] Request for Appointment

[b] Supplemental Information

[c] Names and Addresses of Relatives

[d] Other Orders

[e] Assent of Proposed Conservatee

[f] Deposits to Reduce Bond

[4] Petition for Limited Conservator

[5] Petition for Conservator of Absentee

[6] Petition for Appointment of Nonprofit Charitable Corporation

[7] Notice

[8] Verification

[9] Jurisdiction and Venue

[10] Professional Fiduciary

§ 281.100A Confidential Conservator Screening Form--Judicial Council Form GC-314

[1] FORM

[2] Use of Form

[3] Confidentiality

§ 281.101 Confidential Supplemental Information [Prob. Code § 1821(a)]--Judicial Council Form GC-312

[1] FORM

[2] Use of Form

[3] When Supplemental Information Is Not Required

[4] Required Contents

[5] Confidentiality

§ 281.101A Ex Parte Application for Order Authorizing Completion of Capacity Declaration [Prob. Code §§ 1220, 1825, 1890, 1893, 2356.5]--Judicial Council Form GC-333

[1] FORM

[2] Use of Form

§ 281.101B Ex Parte Order Re Completion of Capacity Declaration [Prob. Code §§ 1220, 1825, 1890, 1893, 2356.5]--Judicial Council Form GC-334

[1] FORM

[2] Use of Form

§ 281.102 Capacity Declaration--Conservatorship [Prob. Code §§ 811, 813, 1801, 1825, 1881, 1910, 2356.5]--Judicial Council Form GC-335

[1] FORM

[2] Use of Form

[3] Inability to Attend Hearing

[4] Cross References

§ 281.102A Dementia Attachment to Capacity Declaration--Conservatorship [Prob. Code §§ 811, 813, 1801, 1825, 1881, 1910, 2356.5]--Judicial Council Form GC-335A

[1] FORM

[2] Use of Form

§ 281.103 Citation for Conservatorship [Prob. Code §§ 1823, 1824]--Judicial Council Form GC-320

[1] FORM

[2] Use of Form

[3] Issuance of Citation

[4] Contents of Citation

[5] Service of Citation

§ 281.104 Order Appointing Court Investigator [Prob. Code § 1826]--Judicial Council Form GC-330

[1] FORM

[2] Use of Form

[3] Subsequent Investigation

§ 281.105 Objection to Appointment of Conservator [Prob. Code § 1829]--By Proposed Conservatee, Spouse, Domestic Partner, Relative, Friend, or Interested Person

[1] FORM

[2] Use of Form

[3] Who May Object

[4] Demand for Jury Trial

[5] Verification

§ 281.106 Order Appointing Probate Conservator [Prob. Code § 1830]--Judicial Council Form GC-340

[1] FORM

[2] Use of Form

[3] Contents of Order

[4] Order Appointing Limited Conservator

§ 281.107 Order Denying Petition for Conservatorship

[1] FORM

[2] Use of Form

[3] Statement of Decision

§ 281.108 Petition for Transfer of Proceedings [Prob. Code § 2211]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Notice

[5] Verification

§ 281.109 Objection to Transfer [Prob. Code § 2215]

[1] FORM

[2] Use of Form

[3] Who May Object

[4] Verification

§ 281.110 Order Granting or Denying Petition for Transfer of Proceedings [Prob. Code § 2215]

[1] FORM

[2] Use of Form

[3] Best Interests Standard

[4] Transmittal of Order and Papers

[5] Fees

§ 281.111 Duties of Conservator and Acknowledgment of Receipt of Statement and Handbook for Conservators [Prob. Code § 1834(a)]--Judicial Council Form GC-348

[1] FORM

[2] Use of Form--In General

[3] Signature

[4] Birth Date or Driver's License Numbers

§ 281.112 Letters of Conservatorship [Prob. Code § 1834]--Judicial Council Form GC-350

[1] FORM

[2] Use of Form

[3] Content of Letters

[4] Form of Letters

[5] Recording of Letters

§ 281.113 Notice of Conservatee's Rights [Prob. Code § 1830]--Judicial Council Form GC-341

[1] FORM

[2] Use of Form

§ 281.114 Ex Parte Order Authorizing Disclosure of (Proposed) Conservatee's Health Information to Court Investigator--HIPAA [Prob. Code §§ 1801, 1821, 1826]--Judicial Council Form GC-336

[1] FORM

[2] Use of Form

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Volume 24: Guardianship and Conservatorship thru Guardians ad Litem-Chs. 280-291
Chapter 281 GUARDIANSHIP AND CONSERVATORSHIP: APPOINTMENT OF CONSERVATORS
PART I. SCOPE

24-281 California Forms of Pleading and Practice--Annotated § 281.01

§ 281.01 Scope of Chapter

This chapter discusses the requirements for the appointment of conservators under the Probate Code, including limited conservators. It sets forth the procedures for appointment of a conservator. The chapter contains the following forms:

- A petition for appointment of a conservator [*see Prob. Code §§ 1820, 1821*] (Judicial Council Form GC-310) [*see § 281.100*], and confidential conservator screening form [*see § 281.100A*].

- A form for confidential supplemental information [*see Prob. Code § 1821(a)*] (Judicial Council Form GC-312) [*see § 281.101*].

- Forms for an ex parte application and order authorizing completion of a capacity declaration [see *§§ 281.101A, 281.101B*].

- A capacity declaration [*see Prob. Code §§ 811, 813, 1801, 1825, 1881, 1910, 2356.5*] (Judicial Council Form GC-335) [*see § 281.102*].

- A dementia attachment to the capacity declaration [*see Prob. Code §§ 811, 813, 1801, 1825, 1881, 1910, 2356.5*] (Judicial Council Form GC-335A) [*see § 281.102A*].

- A citation to the proposed conservatee [*see Prob. Code §§ 1823, 1824*] (Judicial Council Form GC-320) [*see § 281.103*].

- An order appointing a court investigator [*see Prob. Code § 1826*] (Judicial Council Form GC-330) [*see § 281.104*].

- An objection to appointment of a conservator [*see § 281.105*].

- An order appointing a conservator [*see Prob. Code § 1830*] (Judicial Council Form GC-340) [*see § 281.106*].

- An order denying a petition for conservatorship [*see § 281.107*].
- A petition for transfer of proceedings [*see § 281.108*].
- An objection to transfer [*see § 281.109*].
- An order granting or denying a petition for transfer of the proceedings [*see § 281.110*].
- A statement of duties of conservator and acknowledgment of receipt of statement and handbook for conservators [*see Prob. Code § 1834(a)*] (Judicial Council Form GC-348) [*see § 281.111*].
- Letters of conservatorship [*see Prob. Code § 2310*] (Judicial Council Form GC-350) [*see § 281.112*].
- A form for giving notice of the conservatee's rights [*Prob. Code § 1830*] (Judicial Council Form GC-341) [*see § 281.113*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & Termination

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24-281 California Forms of Pleading and Practice--Annotated § 281.02

§ 281.02 Cross References

For discussion and forms pertaining to conservatorship estate management, see the following chapters:

- Ch. 286, *Guardianship and Conservatorship: Inventory and Appraisal*.
- Ch. 287, *Guardianship and Conservatorship: General Management Powers*.
- Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers*.
- Ch. 289, *Guardianship and Conservatorship: Management of Community Property*.
- Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee*.
- Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment*.
- Ch. 290B, *Guardianship and Conservatorship: Substituted Judgment*.
- Ch. 290C, *Guardianship and Conservatorship: Actions and Disputed Claims*.
- Ch. 290D, *Guardianship and Conservatorship: Actions Against Guardian or Conservator*.
- Ch. 290E, *Guardianship and Conservatorship: Accounts*.
- Ch. 290F, *Guardianship and Conservatorship: Compensation of Guardian or Conservator*.

For discussion of the rules for determining whether an individual suffering from a deficit in medical functions has the capacity to consent to medical treatment, see Ch. 304, *Insane and Incompetent Persons* .

For discussion and forms relating to administration of the estate of a person missing and presumed dead, see Ch. 368,

Missing Persons .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & Termination

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24-281 California Forms of Pleading and Practice--Annotated §§ 281.03-281.09

[Reserved]

§§ 281.03[Reserved]

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A. Governing Statutes

24-281 California Forms of Pleading and Practice--Annotated § 281.10

§ 281.10 Governing Statutes

The law governing the appointment of conservators is found in *Prob. Code §§ 1800-1849.5*, *2100-2112*, *2200-2216*, and *2300-2313*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointment

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24-281 California Forms of Pleading and Practice--Annotated §§ 281.11-281.19

[Reserved]

§§ 281.11[Reserved]

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§ 281.20 Legislative Purpose of Establishment of Conservatorship

It was the intent of the legislature in enacting *Prob. Code § 1800 et seq.*, which covers the establishment of conservatorships, to do the following [*Prob. Code § 1800*]:

- Protect the rights of persons who are placed under conservatorship.

- Provide that an assessment of the needs of the person is performed to determine the appropriateness and extent of a conservatorship and to set goals for increasing the conservatee's functional abilities to whatever extent possible.

- Provide that the health and psychosocial needs of the proposed conservatee are met.

- Provide that community-based services are used to the greatest extent in order to allow the conservatee to remain as independent in the least restrictive setting as possible.

- Provide that the periodic review of the conservatorship by the court investigator must consider the best interest of the conservatee.

- Ensure that the conservatee's basic needs for physical health, food, clothing, and shelter are met.

- Provide for the proper management and protection of the conservatee's real and personal property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointment

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24-281 California Forms of Pleading and Practice--Annotated § 281.21

§ 281.21 Grounds for Appointment

[1] Conservator of Person or Estate

A conservator of the person or estate, or both, may be appointed for an adult, and a conservator of the person may be appointed for a minor who is married or whose marriage has been dissolved [*Prob. Code § 1800.3(a)*]. A conservator of the person may be appointed for a person who is unable to provide properly for his or her own personal needs for physical health, food, clothing, or shelter [*Prob. Code § 1801(a)*].

A conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence [*Prob. Code § 1801(b)*; *see Guardianship of Brown (1976) 16 Cal. 3d 326, 128 Cal. Rptr. 10, 546 P.2d 298* (incapacity due to stroke); *Conservatorship of Harvey (1970) 3 Cal. 3d 646, 91 Cal. Rptr. 510, 477 P.2d 742* (mental incompetence, brain tumor); *Estate of Stewart (1969) 276 Cal. App. 2d 211, 80 Cal. Rptr. 738* (heart attack); *Guardianship of Mosier (1966) 246 Cal. App. 2d 164, 54 Cal. Rptr. 447* (old age, disease, weakness of mind)]. Substantial inability cannot be proved solely by isolated incidents of negligence or improvidence [*Prob. Code § 1801(b)*].

A conservator of the person and estate may be appointed for a person to whom both of the above conditions apply [*Prob. Code § 1801(a)-(c)*].

A conservator of the person or estate, or both, also may be appointed for a person who voluntarily requests and establishes good cause for the appointment [*Prob. Code § 1802*; *see Conservationship of Gray (1970) 12 Cal. App. 3d 513, 90 Cal. Rptr. 776* (ill health and desire not to be burdened with business affairs); *Hillman v. Stults (1968) 263 Cal. App. 2d 848, 70 Cal. Rptr. 295* (incarceration)].

No conservatorship of the person or of the estate may be granted unless the court makes an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee [*Prob. Code § 1800.3(b)*].

[2] Conservator of Estate for Absentee

A conservator of the estate may be appointed for a person who is an absentee [*Prob. Code § 1803*]. "Absentee" means either (1) a member of a uniformed service, covered by *37 U.S.C. §§ 551-559*, who is determined by the secretary for that service or by an authorized delegate to be in missing status under those statutory provisions, or (2) an employee of the federal government or one of its agencies, covered by *5 U.S.C. §§ 5561-5568*, who is determined by the head of the employing department or agency or by an authorized delegate to be in missing status under those statutory provisions [*Prob. Code § 1403*]. The uniformed services referred to are the Army, Navy, Air Force, Marine Corps, Coast Guard, National Oceanic and Atmospheric Administration, and Public Health Service [*37 U.S.C. § 101(3)*]. The agencies of the federal government covered by *5 U.S.C. §§ 5561-5568* include the Departments of the Army, the Navy, the Air Force, State, the Treasury, Defense, Justice, Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, Education, Veterans' Affairs, and Homeland Security [*see 5 U.S.C. §§ 101, 102, 105, 5561*].

[3] Conservator of Person or Estate of Nonresident

A conservatorship of the person or estate may be established for a person who is not a resident of California. The current statutes regarding appointment of conservators do not place any specific limitations on the appointment of conservators for nonresidents [*see Prob. Code § 1800.3* (court may appoint conservator if "the need therefor is established to the satisfaction of the court and the other requirements of this chapter are satisfied")]. Rather, they impose limitations on the circumstances under which a California conservator of the person or estate can exercise powers over the person or property of a nonresident conservatee. Specifically, a conservator of the person of a nonresident normally has the same powers and duties as a conservator of the personof a resident *while the nonresident is in California* [*Prob. Code § 2107(a)*]. Similarly, a conservator of the estate of a nonresident has the same powers and duties as a conservator of the estate of a resident *with respect to the property of the nonresident within California*. The responsibility of a conservator of the estate with regard to inventory, accounting, and disposal of the estate is confined to the property that comes into the hands of the guardian or conservator in California [*Prob. Code § 2107(b)*].

For several years prior to 2001, special rules applied to the establishment of a conservatorship of the person of a nonresident for whom a conservatorship had been established in another state. However, these rules became inoperative by their own terms on January 1, 2001, and were repealed in 2007 [*see* former *Prob. Code § 1800.3(b), (c)* (repealed by Stats. 2007 ch. 553 § 6, eff. 1/1/08)].

[4] Conservator of Estate of Missing Person

[a] Applicable Law

The Probate Code provides for the appointment of a conservator of the estate of a missing person [*see Prob. Code §§ 1804, 1845-1849.5*]. Except as otherwise provided in *Prob. Code §§ 1845-1849.5*, a conservator of an estate of a person who is missing is appointed as provided in *Prob. Code §§ 1820-1830*, the provisions governing the appointment of conservators generally [*Prob. Code § 1845(a)*]. The provisions of *Prob. Code §§ 1845-1849.5* do not apply, however, when the proposed conservatee is an absentee as defined in *Prob. Code § 1403* [*Prob. Code § 1845(b)*].

A petition may be filed under *Prob. Code §§ 1845-1849.5* regardless of when the proposed conservatee became missing or how long the proposed conservatee has been missing [*Prob. Code § 1849.5(a)*]. If a trustee of the estate of a missing person was appointed pursuant to former *Prob. Code § 262*, the provisions of former *Prob. Code § 260 et seq.* continue to apply to the case unless, on a petition filed under *Prob. Code §§ 1845-1849.5*, the trustee is replaced by a conservator [*Prob. Code § 1849.5(b)*].

For discussion and forms relating to administration of the estate of a person missing and presumed dead, see Ch. 368, *Missing Persons* .

[b] Required Findings

A conservator of the estate of a missing person may be appointed only if the court finds all of the following [*Prob. Code § 1849*]:

- The proposed conservatee owns or is entitled to the possession of real or personal property situated in the state of California.
- The proposed conservatee remains missing, whereabouts unknown.
- The estate of the proposed conservatee requires attention, supervision, and care.

[5] Limited Conservatorship for Developmentally Disabled Adult

If an adult person is developmentally disabled, a limited conservator of the person or estate, or both, may be appointed [*Prob. Code § 1801(d)*]. However, limited conservatorships may be used only as necessary to promote and protect the well-being of the individual, must be designed to encourage the development of maximum self-reliance and independence of the individual, and must be ordered only to the extent necessitated by the individual's proved mental and adaptive limitations [*Prob. Code § 1801(d)*].

A "developmental disability" is a disability that originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial handicap for the individual [*Prob. Code § 1420*]. "Developmental disability" includes mental retardation, cerebral palsy, epilepsy, autism, and handicapping conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but does not include other handicaps that are solely physical in nature [*Prob. Code § 1420*].

The conservatee of a limited conservator is not presumed to be incompetent and retains all legal and civil rights except those that have been designated as legal disabilities by court order and have been specifically granted to the limited conservator [*Prob. Code § 1801(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointment

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24-281 California Forms of Pleading and Practice--Annotated § 281.22

§ 281.22 Jurisdiction and Venue

[1] California Resident

A conservatorship proceeding for a resident of California is properly begun in the superior court in either the county where the proposed conservatee resides or any other county that may be in the best interests of the proposed conservatee [*Prob. Code §§ 2200, 2201*].

Thus, even though the place of residence is in dispute, the court may determine that venue is proper, thereby avoiding the need to litigate the issue of residence if continuance of the proceeding in the county where it was filed is in the best interests of the conservatee [*see Guardianship-Conservatorship Law*, 15 Cal. L.Revision Comm'n Reports 451, 661 (1980)].

[2] Nonresident of California

A proceeding to establish a conservatorship of the person for a nonresident of California is properly begun in the superior court in either the county where the proposed conservatee is temporarily living or such other county as may be in the best interests of the proposed conservatee [*Prob. Code §§ 2200, 2202(a)*]. Thus, for example, if a conservatorship of the person is necessary in California, the court of the county where the property of the conservatee is located may determine that venue is proper with respect to the person as well as the estate if it is in the best interests of the conservatee, even though the conservatee is not living in that county [*see Guardianship-Conservatorship Law*, 15 Cal. L. Revision Comm'n Reports 451, 662 (1980)].

A proceeding to appoint a conservator of the estate for a nonresident of California may be begun in the superior court in the county where the proposed conservatee is temporarily living, any county in which the proposed conservatee has property, or any other county that may be in the best interests of the proposed conservatee [*Prob. Code §§ 2200, 2202(b)*].

[3] Proceedings Begun in More Than One County

If proceedings for a conservatorship of the person or estate are begun in more than one county, the conservatorship first granted, including a temporary conservatorship, governs, and the other proceeding must be dismissed [*Prob. Code § 2203(a), (b)*]. The conservatorship of the estate first granted extends to all property of the conservatee within California [*Prob. Code § 2203(a)*].

If a proceeding for the conservatorship of the person is begun in one county and a proceeding for the conservatorship of the estate is begun in another, the court first granting the conservatorship, whether of the person or of the estate, may find that it is in the best interests of the conservatee that the conservatorship of both the person and the estate be maintained in the same county, whether that county or another, as determined by the court. The conservatorship proceeding in the court of the county found to be in the conservatee's best interests then governs and extends to all of the conservatee's property within California, and the other proceeding must be dismissed [*Prob. Code § 2203(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureVenueGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointment

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§ 281.23 Transfer of Proceedings

On petition by the conservator or proposed conservator, the conservatee or proposed conservatee, the spouse or domestic partner [as defined by *Prob. Code § 37*; *Fam. Code § 297 et seq.*], a relative, or a friend of the conservatee or proposed conservatee, or any interested person, the court in which a conservatorship proceeding is pending may transfer the proceeding to another county within California if the court determines that the transfer will be for the best interests of the conservatee or proposed conservatee [*Prob. Code §§ 2211, 2212, 2215(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointment

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[Reserved]

§§ 281.24[Reserved]

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24-281 California Forms of Pleading and Practice--Annotated § 281.30

§ 281.30 Petition for Appointment of Conservator

A petition for the appointment of a conservator may be filed by the proposed conservatee, his or her spouse or domestic partner, a relative, any other interested person or friend, or by any interested state or local entity or agency or one of its officers or employees [*Prob. Code § 1820(a)*; *see § 281.100* (petition for appointment of conservator)].

A Domestic Partnership is formed when two persons who meet specific requirements complete and file a Declaration of Domestic Partnership with the Secretary of State. In order to file a valid declaration, the two parties must meet the following requirements:

- Both must have a common residence;
- Both agree to be jointly responsible for each other's basic living expenses incurred during the domestic partnership;
- Neither is married or a part of another domestic partnership;
- Neither is related by blood in a way that would prevent them from being married in the state of California;
- Both are over 18;
- Both are either of the same sex or one or both meet the eligibility criteria under Title II of the Social Security Act for old-age insurance benefits [*42 U.S.C. § 1381*]. Persons of opposite sexes may not form a valid domestic partnership unless at least one is 62 years of age;
- Both are capable of consenting to a domestic partnership;
- Neither has previously filed a Declaration of Domestic Partnership with the Secretary of State which

has not been terminated; and

- Both must file the Declaration of Domestic Partnership with the Secretary of State [*Fam. Code § 297*].

A creditor of the proposed conservatee may not file a petition for the appointment of a conservator unless the creditor is also within the class of persons described above [*Prob. Code § 1820(c)*].

If the proposed conservatee is a minor, the petition may be filed during his or her minority so that the appointment of a conservator may be made effective immediately after the minor attains majority. An existing guardian of a minor may be appointed as conservator when the minor attains majority, whether or not the guardian's accounts have been settled [*Prob. Code § 1820(b)*]. For a discussion of accounts, see Ch. 290E, *Guardianship and Conservatorship: Accounts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentFamily LawCohabitationDomestic PartnersGeneral Overview

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24-281 California Forms of Pleading and Practice--Annotated § 281.30A

§ 281.30A Conservator Screening Form and Supplemental Information Statement

A proposed conservator, other than a bank or other entity entitled to conduct the business of a trust company, must submit to the court with the petition for appointment of conservator a completed Confidential Conservator Screening Form (GC-314) and a completed Confidential Supplemental Information Statement (GC-312) [*Cal. Rules of Ct., Rule 7.1050(a)*]. The information on the Confidential Conservator Screening Form will be used by the court and by persons or agencies designated by the court to assist in determining whether a proposed conservator should be appointed [*Cal. Rules of Ct., Rule 7.1050(b)*]. Both forms and the information contained in them are confidential. The clerk's office must maintain the forms in a manner that will protect and preserve their confidentiality [*Cal. Rules of Ct., Rule 7.1050(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointment

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24-281 California Forms of Pleading and Practice--Annotated § 281.31

§ 281.31 Nomination of Conservator

[1] Nomination by Proposed Conservatee or by Relatives

If the proposed conservatee has sufficient capacity at the time to form an intelligent preference, he or she may nominate a conservator in the petition or in a writing signed either before or after the petition is filed [*Prob. Code § 1810*]. An individual may nominate, by a durable power of attorney, a conservator of the person or the estate or both, for consideration by the court if protective proceedings for the individual's person or estate are thereafter commenced [*Prob. Code § 4126(a)*; *see Prob. Code § 4124* (durable power of attorney)].

Subject to the provisions for preference in appointing a spouse as conservator [*Prob. Code § 1813*], the spouse or domestic partner [as defined by *Family Code § 297 et seq.*], or an adult child, parent, brother, or sister of the proposed conservatee may nominate a conservator in the petition or at the hearing on the petition [*Prob. Code § 1811(a)*]. Also subject to the provisions for preference in appointing a spouse as conservator [*Prob. Code § 1813*], the spouse or domestic partner [as defined by *Prob. Code § 37*; *Fam. Code § 297 et seq.*], or a parent of the proposed conservatee may nominate a conservator in a writing either before or after the petition is filed. The written nomination remains effective notwithstanding the subsequent legal incapacity or the death of the spouse or parent [*Prob. Code § 1811(b)*].

[2] Pre-1981 Nomination of Guardian

If an adult, in a writing before 1981, nominated a person to serve as his or her guardian in case such an appointment should become necessary, the nomination is deemed to be a nomination of a conservator. This rule applies whether or not the signed writing was executed in the same manner as a witnessed will, as long as the person signing the writing had at the time the writing was signed sufficient capacity to form an intelligent preference [*Prob. Code § 1488*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointment

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24-281 California Forms of Pleading and Practice--Annotated § 281.32

§ 281.32 Preference in Appointing Conservator

[1] Nominee of Proposed Conservatee

The court must appoint the nominee of the proposed conservatee as conservator unless the court finds that such an appointment is not in the best interests of the proposed conservatee [*Prob. Code § 1810*]. This preference is to be given to the most-recent written nomination executed in accordance with *Prob. Code § 1810*, whether or not the writing is a durable power of attorney [*Prob. Code § 4305*; *see § 281.31*].

A finding that a particular individual should be appointed as conservator necessarily includes a finding that the appointment is in the conservatee's best interests; no separate finding is required [*Conservatorship of Ramirez (2001) 90 Cal. App. 4th 390, 400-401, 108 Cal. Rptr. 2d 581]* .

[2] Spouse of Absentee

The spouse of a proposed conservatee may not petition for the appointment of a conservator for that spouse or be appointed as conservator of the person or estate of the proposed conservatee unless the spouse alleges in the petition, and the court finds, that the spouse is not a party to any action or proceeding against the proposed conservatee for legal separation, dissolution of marriage, annulment, or adjudication of nullity of their marriage [*Prob. Code § 1813(a)*]. However, if the court finds by clear and convincing evidence that the appointment of the spouse, who is a party to an action or proceeding against the proposed conservatee for legal separation, dissolution, separation, annulment, adjudication of nullity of their marriage, or has obtained a judgment in any of these proceedings, is in the best interests of the proposed conservatee, the court may appoint the spouse. Before making this appointment, the court must appoint counsel to consult with and advise the conservatee, and to report to the court his or her findings concerning the suitability of appointing the spouse as conservator [*Prob. Code § 1813(a)*].

The spouse of a conservatee must disclose to the conservator or, if the spouse is the conservator, must disclose to the court, the filing of any action or proceeding against the conservatee for legal separation, dissolution of marriage, annulment,or adjudication of nullity of marriage, within 10 days of the filing of the action or proceeding. Disclosure is made by filing a notice with the court and serving the notice according to the notice procedures required for

appointment of a conservator. The court may, on receipt of the notice, set the matter for hearing on an order to show cause why the appointment of the spouse as conservator, if the spouse is the conservator, should not be terminated and a new conservator appointed by the court [*Prob. Code § 1813(b)*].

[3] Domestic Partner of Conservatee

Under *Prob. Code § 37*, the term "domestic partner" as used in the Probate Code does not refer to simply any cohabitant, but rather is narrowly defined to mean one of two persons who has filed a Declaration of Domestic Partnership with the Secretary of State under *Fam. Code § 297 et seq.*, provided that the domestic partnership has not been terminated [*Prob. Code § 37(a)*; *see Fam. Code § 299* (termination of domestic partnerships)]. For detailed discussion of the formation and termination of domestic partnerships, and the rights and obligations of domestic partners, under the California Domestic Partner Rights and Responsibilities Act of 2003 [*Fam. Code §§ 297-299.3*], see the General Introduction to Ch. 387, *Nonmarital Cohabitation*.

The domestic partner of a proposed conservatee may not petition for the appointment of a conservator for a domestic partner or be appointed as conservator of the person or estate of the proposed conservatee unless the domestic partner alleges in the petition, and the court finds, that the domestic partner has not terminated and is not intending to terminate the domestic partnership as provided in *Fam. Code § 299*. However, if the court finds by clear and convincing evidence that the appointment of a domestic partner who has terminated or is intending to terminate the domestic partnership is in the best interests of the proposed conservatee, the court may appoint the domestic partner [*Prob. Code § 1813.1(a)(1)*]. Before making this appointment, the court must appoint counsel to consult with and advise the conservatee, and to report to the court his or her findings concerning the suitability of appointing the domestic partner as conservator [*Prob. Code § 1813.1(a)(2)*].

The domestic partner of a conservatee must disclose to the conservator, or if the domestic partner is the conservator, must notify the court, of the termination of a domestic partnership as provided in *Fam. Code § 299* within 10 days of its occurrence. The court, upon receipt of the notice, may set the matter for hearing on an order to show cause why the appointment of the domestic partner as conservator, if the domestic partner is the conservator, should not be terminated and a new conservator appointed by the court [*Prob. Code § 1813.1(b)*].

[4] Best Interests of Conservatee

Subject to the preference for the nominee of the proposed conservatee and the provisions concerning the appointment of the spouse of an absentee, the selection of a conservator is solely in the discretion of the court [*Prob. Code § 1812(a)*]. In making the selection, the court is to be guided by what appears to be in the best interests of the proposed conservatee [*Prob. Code § 1812(a)*]. A resident conservator is preferred unless there is some very strong reason for the appointment of a nonresident [*see Guardianship of Brown (1976) 16 Cal. 3d 326, 336, 128 Cal. Rptr. 10* P.2d298; *Guardianship of Mosier (1966) 246 Cal. App. 2d 164, 177, 54 Cal. Rptr. 447]* .

Among persons equally qualified in the opinion of the court to be appointed as conservator, preference is to be given as follows [*Prob. Code § 1812(b)*]:

- First, to the spouse or domestic partner [as defined by *Prob. Code § 37*; *Fam. Code § 297 et seq.* [*see* [3], *above*] of the proposed conservatee or to the nominee of the spouse or domestic partner.

- Next, to an adult child of the proposed conservatee or to the nominee of the child.

- Next, to a parent of the proposed conservatee or to the nominee of the parent.

- Next, to a brother or sister of the proposed conservatee or to the nominee of the brother or sister.

- Last, to any other person or entity eligible for appointment as a conservator under the Probate Code or, if there is no such person or entity willing to act as a conservator, to a person or entity eligible under the Welfare and Institutions Code [*see Prob. Code §§ 2920-2922* (public guardian as conservator); *Welf. & Inst. Code § 7284* (State Department of Mental Health as conservator)].

The preference for any child, parent, brother, or sister is subordinate to the preference for any other child, parent, brother, or sister in the same class [*Prob. Code § 1812(c)*].

[5] Appointment of Counsel for Conservatee

A court may appoint private legal counsel for a conservatee or a proposed conservatee if the conservatee or proposed conservatee is not otherwise represented by legal counsel, and the appointment of legal counsel would be helpful to the resolution of the matter or it is necessary to protect the person's interests [*Prob. Code § 1470(a)*]. The court will fix a reasonable sum for compensation and expenses of counsel, which can include compensation for services rendered, and expenses incurred, before the date of the order appointing counsel [*Prob. Code § 1470(b)*]. The court will order compensation to be paid from the estate of the person if the conservatee or proposed conservatee is an adult, or from the parent, parents, or minor's estate or any combination thereof, if the conservatee or proposed conservatee is a minor [*Prob. Code § 1470(b)*].

A court will appoint the public defender or private counsel to represent a conservatee, proposed conservatee, or person alleged to lack legal capacity, if that person is unable to retain legal counsel and requests the appointment of counsel to assist in the following proceedings [*Prob. Code § 1471(a)*]:

- A proceeding to establish a conservatorship or to appoint a proposed conservator.
- A proceeding to terminate the conservatorship.
- A proceeding to remove the conservator.
- A proceeding for a court order affecting the legal capacity of the conservatee.
- A proceeding to obtain an order authorizing removal of a temporary conservatee from the temporary conservatee's place of residence.

If a conservatee or proposed conservatee does not plan to retain legal counsel and has not requested the court to appoint legal counsel, the court will appoint the public defender or private counsel to represent the person's interests in any proceeding listed above if, based on information contained in the court investigator's report or obtained from any other source, the court determines that the appointment would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee or proposed conservatee [*Prob. Code § 1471(b)*].

In any proceeding to establish a limited conservatorship, if the proposed limited conservatee has not retained legal counsel and does not plan to retain legal counsel, the court must immediately appoint the public defender or private counsel to represent the proposed limited conservatee [*Prob. Code § 1471(c)*]. The proposed limited conservatee must pay the cost for this legal service if able [*Prob. Code § 1471(c)*].

Every attorney appointed or eligible for appointment by a court under *Prob. Code §§ 1470* and *1471* before January 1, 2008, including deputy public defenders, was required to certify to the court by April 1, 2008, that he or she satisfies the qualifications to be eligible for a new appointment on or after April 1, 2008. Beginning March 1, 2008, each counsel must certify that he or she is qualified before becoming eligible for an appointment. Beginning January 1, 2009, each

appointed counsel must certify to the court before the end of March of each year that he or she has completed the continuing education required for the preceding calendar year [*see Cal. Rules of Ct., Rule 7.1101, see also § 280.118* (Judicial Council Form GC-010, Certification of Attorney Concerning Qualifications For Court Appointment in Conservatorships/Guardianships)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentFamily LawCohabitationDomestic PartnersDuties & RightsFamily LawMarital Duties & RightsGeneral Overview

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24-281 California Forms of Pleading and Practice--Annotated § 281.33

§ 281.33 Appointment of Nonprofit Charitable Corporation

A nonprofit charitable corporation may be appointed as conservator of the person or estate, or both, if the corporation is incorporated in California, its articles of incorporation specifically authorize it to accept appointments as conservator, and the corporation has been providing, at the time of the appointment, care, counseling, or financial assistance to the proposed ward or conservatee under the supervision of a registered social worker certified by the Board of Behavioral Science Examiners [*Prob. Code § 2104(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointment

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24-281 California Forms of Pleading and Practice--Annotated § 281.34

§ 281.34 Appointment of a Professional Fiduciary

A licensed professional fiduciary may be appointed as a conservator. Professional fiduciaries are required to be licensed under the Professional Fiduciaries Act [*Bus. & Prof. Code § 6500 et seq.*], which requires private professional guardians to meet specified qualifications. Persons who meet the statutory definition of "professional fiduciary" must be properly licensed in order to act in that capacity [*Bus. & Prof. Code § 6530*; *Prob. Code §§ 60.1(b), 2340*]. For detailed discussion of the licensing and regulation of professional fiduciaries under the Act, see *§ 281.66*. For an allegation seeking removal of a conservator or guardian for failure to comply with the licensing requirements of the Professional Fiduciaries Act, see *Ch. 290G, Guardianship and Conservatorship: Removal or Resignation of Guardians or Conservators, § 290G.37A.*

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§ 281.35 Multiple Conservators or Conservatees

The court, in its discretion, may appoint two or more joint conservators for the person or estate, or both, of a conservatee [*Prob. Code § 2105(a)*].

If joint conservators are appointed, each must qualify in the same manner as a sole conservator [*Prob. Code § 2105(b)*].

Subject to the exceptions below, if there are two conservators, both must concur to exercise a power. If there are more than two, a majority must concur to exercise a power [*Prob. Code § 2105(c)*]. If one of the joint conservators dies, is removed, or resigns, the powers and duties continue in the remaining joint conservators until further appointment is made by the court [*Prob. Code § 2105(d)*]. If joint conservators have been appointed and one or more is absent from the state and unable to act, otherwise unable to act, or legally disqualified from serving, the court, by order made with or without notice, may authorize the remaining joint conservators to act as to all matters embraced within its order [*Prob. Code § 2105(e)*].

The court, in its discretion, may appoint one conservator for several conservatees [*Prob. Code § 2106(a)*]. The appointment of one conservator for several conservatees may be requested in the initial petition filed in the proceeding or may be requested subsequently in a petition filed in the same proceeding and noticed and heard with respect to the newly proposed conservatee in the same manner as an initial petition for the appointment of a conservator [*Prob. Code § 2106(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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24-281 California Forms of Pleading and Practice--Annotated § 281.36

§ 281.36 Assessment of Developmentally Disabled Conservatee

[1] Consensual Assessment

In the case of a proceeding to establish a limited conservatorship for a person with developmental disabilities, within 30 days after the filing ofa petition for limited conservatorship, a proposed limited conservatee, with his or her consent, must be assessed at a regional center, as provided in *Welf. & Inst. Code § 4620 et seq.* The regional center must submit a written report of its findings and recommendations to the court [*Prob. Code § 1827.5(a)*].

In the case of a proceeding to establish a general conservatorship for a person with developmental disabilities, the regional center, with the consent of the proposed conservatee, may prepare an assessment as provided in *Welf. & Inst. Code § 4620 et seq.* If an assessment is prepared, the regional center must submit its findings and recommendations to the court [*Prob. Code § 1827.5(b)*].

[2] Report to Court

A report prepared in the case of a proceeding to establish either a limited conservatorship or a general conservatorship for a person with developmental disabilities must include a description of the specific areas, nature, and degree ofdisability of the proposed conservatee or limited conservatee. The findings and recommendations of the regional center are not binding on the court. In a proceeding in which the petitioner (1) is a provider of board and care, treatment, habilitation, or other services to developmentally disabled persons, or is a spouse or employee of a provider, (2) is not the natural parent of the proposed conservatee or limited conservatee, and (3) is not a public entity, the regional center must include a recommendation in its report concerning the suitability of the petitioners to meet the needs of the proposed conservatee or limited conservatee [*Prob. Code § 1827.5(c)*].

At least five days before the hearing on the petition, the regional center must mail a copy of the report assessing the proposed limited conservatee to each of the following [*Prob. Code § 1827.5(d)*]:

- The proposed limited conservatee.

- The attorney, if any, for the proposed limited conservatee.

- The attorney for the petitioner if the petitioner is not the proposed limited conservatee, or the petitioner if the petitioner does not have an attorney.

- Any other person, as the court may order.

The regional center's report assessing the proposed limited conservatee is confidential and will be made available only to the proposed limited conservatee and his or her attorney, the petitioner and the petitioner's attorney, and such other persons as thecourt orders to receive the report [*Prob. Code § 1827.5(e)*]. The report can be made available to persons other than those specified if the court, in its discretion, determines that the release of the report would serve the interests of the proposed conservatee. The clerk of the court must make provision for limiting disclosure of the report exclusively to persons who are entitled to it by statute [*Prob. Code § 1827.5(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentFamily LawFamily Protection & WelfareDependent & Disabled AdultsServices

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§ 281.37 Investigation by Court Investigator

[1] Scope of Investigation

Regardless of whether the proposed conservatee attends the hearing [*see § 281.51*], the court investigator must do all of the following [*Prob. Code § 1826(a)-(j)*]:

- Personally interview the proposed conservatee.

- Interview the petitioner and the proposed conservator, if the proposed conservator is different from the petitioner.

- Interview the proposed conservatee's spouse or registered domestic partner and relatives within the first degree; or, if the proposed conservatee does not have a spouse, registered domestic partner, or relatives within the first degree, to the greatest extent possible, the proposed conservatee's relatives within the second degree.

- Interview, to the greatest extent possible, the proposed conservatee's relatives within the second degree [*see Prob. Code § 1821(a)(4)*], neighbors, and close friends if known, before the hearing.

- Inform the proposed conservatee of the contents of the citation; of the nature, purpose, and effect of the proceeding; and of the proposed conservatee's right to oppose the proceeding, to attend the hearing, to have the matter tried by jury, to be represented by legal counsel, and to have legal counsel appointed if the proposed conservatee is unable to retain counsel.

- Determine whether the proposed conservatee is unable to attend the hearing, and if able, whether the proposed conservatee is willing to attend the hearing.

- Review the allegations of the petition as to why the appointment of the conservator is required and

refer to the supplemental information form which addresses each of the categories specified in *Prob. Code § 1821(a)(1)-(5)* regarding the necessity for the conservatorship.

- Consider whether he or she believes the proposed conservatee suffers from any of the mental function deficits listed in *Prob. Code § 811* that significantly impairs the proposed conservatee's ability to understand and appreciate the consequences of his or her actions in connection with any of the functions described in *Prob. Code § 1801(b)* and identify the observations that support that belief.

- Determine whether the proposed conservatee wishes to contest the establishment of the conservatorship.

- Determine whether the proposed conservatee objects to the proposed conservator or prefers another person to act as conservator.

- Determine whether the proposed conservatee wishes to be represented by legal counsel, and if so, whether the proposed conservatee has retained counsel, and if not, the name of an attorney the proposed conservatee wishes to retain; as well as whether the proposed conservatee wishes legal counsel to be appointed and whether the appointment of legal counsel would help to resolve the matter or is necessary to protect the proposed conservatee's interests.

- Determine whether the proposed conservatee is capable of completing an affidavit of voter registration.

Any investigation by a court investigator related to a temporary conservatorship also may be a part of the investigation for the general petition for conservatorship, but the court investigator must make a second visit to the proposed conservatee and the report must include the effect of the temporary conservatorship on the proposed conservatee [*Prob. Code § 1826(q)*].

For further discussion of temporary conservators, see Ch. 282, *Temporary Guardians and Conservators* .

[2] Investigator's Report

[a] Report Required

The court investigator must report to the court in writing at least five days before the hearing concerning all of the issues listed in [1], *above*, particularly regarding the issues of representation by counsel and the proposed conservatee's willingness to attend the hearing, whether he or she wishes to contest the establishment of the conservatorship and to object to the proposed conservator, or whether he or she prefers another person to act as conservator [*Prob. Code § 1826(k)*]. At least five days before the hearing, the investigator must mail copies of this report to the petitioner's attorney, if any, the proposed conservatee's attorney, if any, the proposed conservatee, the spouse, registered domestic partner, and relatives within the first degree of the proposed conservatee who are required to be named in the petition for appointment of the conservator, unless the court determines that the mailing will result in harm to the conservator, and any other persons as ordered by the court [*Prob. Code § 1826*(*l*)].

[b] Confidentiality of Report

The investigator's report is confidential and may be made available only to parties, persons to whom a copy of the report is required to be mailed [*see Prob. Code § 1826*(*l*), discussed in [a], *above*], persons given notice of the petition who have requested the report or who have appeared in the proceedings, their attorneys, and the court. The court has discretion at any other time to release the report, however, if it would serve the interests of the conservatee [*Prob. Code*

§ 1826(n)]. The court investigator also has discretion to release the report to the public conservator, interested public agencies, and the long-term-care ombudsman [*Prob. Code § 1826(m)*].

[3] When Investigation and Report Not Required

The investigation and report requirements do not apply to a proposed conservateewho has personally executed the petition for conservatorship or nominated his or her own conservator, if he or she attends the hearing [*Prob. Code § 1826(o)*]. If the proposed conservatee is a person who is missing and whose whereabouts are unknown, the court investigator is not required to perform the duties set out in *Prob. Code § 1826* [*Prob. Code § 1848(d)*].

[4] Limited Investigation

If the court investigator has performed an investigation within the preceding six months and furnished a report to the court, the court may order, on good cause shown, that another investigation is not necessary or that a more limited investigation may be performed [*Prob. Code § 1826(p)*].

[5] Assessment of Investigation Costs

If the investigation is conducted by a court investigator, the court in which the conservatee's estate is located is required to assess the estate for the cost of the investigation [*Prob. Code § 1851.5*]. The court may order that it be reimbursed out of the conservatee's estate for the cost of the investigation unless the court finds that the assessment would pose a hardship to the estate [*Prob. Code § 1851.5*]. There is a rebuttable presumption that the assessment would impose a hardship if the conservatee is receiving Medi-Cal benefits [*Prob. Code § 1851.5*].

[6] Immunity of Investigator From Liability

The court investigator is a quasi-judicial officer entitled to absolute judicial immunity from liability for acts arising out of the conduct of the investigation pursuant to *Prob. Code §§ 1454* and *1826*. The investigator is immunized because he or she performs judicial functions that include gathering evidence about the proposed conservatee leading to the appointment of a conservator and imparting information to a conservatee who is unable to attend the appointment hearing that the judge would impart to the conservatee if he or she were able to attend the hearing [*Fisher v. Pickens (1990) 225 Cal. App. 3d 708, 712, 714-715, 275 Cal. Rptr. 487]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentGovernmentsCourtsJudicial ImmunityTortsPublic Entity LiabilityImmunityJudicial Immunity

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§ 281.38 Notice of Hearing

[1] General Requirements

[a] Time for Notice: Content

Notice of the time and place of the hearing on a petition for the appointment of a conservator must be given at least 15 days before the hearing. The notice must be accompanied by a copy of the petition. The court may not shorten the time for giving the notice of hearing on a petition for the appointment of a conservator [*Prob. Code § 1822(a)*]. For a form for giving notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

If the petition includes an application for an order granting the conservator independent powers under *Prob. Code § 2590*, the notice of hearing on the petition must include a statement that the petition includes an application for the grant of one or more independent powers and must list the specific powers requested [*Prob. Code § 2592*]. For a discussion of orders under *Prob. Code § 2590*, see Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers* .

[b] Who Is Entitled to Notice

Notice must be mailed to the spouse or domestic partner [as defined by *Prob. Code § 37*; *Fam. Code § 297 et seq.*] and relatives of the proposed conservatee named in the petition at the addresses stated in the petition [*Prob. Code § 1822(b)*].

If the conservatee is or has been during the conservatorship proceeding a patient in or on leave from a state hospital under the jurisdiction of the State Departments of Mental Health or Developmental Services and notice is required by *Prob. Code § 1461* to be given to the Director of Mental Health or the Director of Developmental Services, notice must be mailed as so required [*Prob. Code § 1822(c)*; *see Prob. Code § 1461*; Ch. 284, *Guardianship and Conservatorship: Notice*].

If the petition states that the proposed conservatee is receiving or is entitled to receive benefits from the Department of Veterans Affairs, notice must also be mailed to the department [*Prob. Code § 1822(d)*; *see Prob. Code § 1461.5*].

If the proposed conservatee is a person with developmental disabilities, at least 30 days before the day of the hearing on the petition, the petitioner must mail notice of the time and place of the hearing, together with a copy of the petition, to the regional center that is required to prepare an assessment pursuant to *Prob. Code § 1827.5* [*Prob. Code § 1822(e)*; *see § 281.36*].

If the petition states that the petitioner and the proposed conservator have no prior relationship with the proposed conservatee and are not nominated by a family member, friend, or other person with a relationship to the proposed conservatee, notice must be mailed to the public guardian of the county in which the petition is filed [*Prob. Code § 1822(f)*].

[2] Conservatorship for Absent or Missing Person

If the proposed conservatee is an absentee, notice of the time and place of the hearing and a copy of the petition also must be mailed to the persons and entities to whom notice of hearing is required under *Prob. Code § 1822*, to the appropriate uniformed service secretary or to the head of the federal department or agency concerned at least 15 days before the hearing. Notice must also be published in a newspaper of general circulation in the county in which the hearing will be held [*Prob. Code § 1842*; *see Gov. Code § 6061* (notice publication requirements)].

In addition to the persons and entities to whom notice of hearing is required under *Prob. Code § 1822* [*see* [1][b], *above*], if the proposed conservatee is a missing person, whereabouts unknown, the following notice provisions apply [*Prob. Code § 1847*]:

- A copy of the petition for appointment of a conservator and a notice of the time and place of the hearing on the petition must be mailed at least 15 days before the hearing to the proposed conservatee at the last known address of the proposed conservatee.

- Notice of the time and place of the hearing must also be published pursuant to*Gov. Code § 6061* in a newspaper of general circulation in the county in which the proposed conservatee was last known to reside if the proposed conservatee's last known address is in California.

- Pursuant to *Prob. Code § 1202*, the court may require that further or additional notice of the hearing be given.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointment

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[Reserved]

§§ 281.39[Reserved]

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§ 281.50 Conduct of Hearing in General; Jury Trial

The court must hear and determine the matter of the establishment of a conservatorship according to the law and procedure relating to the trial of civil actions, including trial by jury, if demanded by the proposed conservatee [*Prob. Code § 1827*].

Because the proposed conservatee's right to a jury trial is statutory rather than constitutional [*see Conservatorship of Mary K. (1991) 234 Cal. App. 3d 265, 271, 285 Cal. Rptr. 618* (Lanterman-Petris-Short Act conservatorship); *Conservatorship of Maldonado (1985) 173 Cal. App. 3d 144, 147, 218 Cal. Rptr. 796* (Lanterman-Petris-Short Act conservatorship)], the proposed conservatee's personal waiver of a jury trial, made in court and on the record, is not required [*Conservatorship of Mary K. (1991) 234 Cal. App. 3d 265, 271, 285 Cal. Rptr. 618]* . Counsel may validly waive the conservatee's right to a jury trial by oral consent in open court without a personal explicit waiver by the proposed conservatee [*Conservatorship of Mary K. (1991) 234 Cal. App. 3d 265, 271, 285 Cal. Rptr. 618* (proceeding to establish Lanterman-Petris-Short Act conservatorship in which counsel stated to court that he discussed waiver with his client and that she wished to waive jury trial, and proposed conservatee did not contend that counsel lacked actual authority to waive jury trial); *see also Conservatorship of Tian L. (2007) 149 Cal. App. 4th 1022, 103, 57 Cal. Rptr. 3d 382* (conservatee's due process rights were adequately protected under Lanterman-Petris-Short Act when conservatee received copy of petition for reestablishment of conservatorship and accompanying medical statement, conservatee was aware of proposed placement and disabilities, conservatee received at least two written notices of right to hearing and jury trial, and conservatee's attorney met with conservatee in person and signed an affidavit attesting to conservatee's agreement to reestablishment of conservatorship without a hearing)].

When a conservatee stipulates to the appointment of a conservator, the court is still required to consult with the conservatee on the record to instruct the conservatee on the consequences of the stipulation and to obtain his or her express consent to it [*see Conservatorship of Christopher A (2006) 139 Cal. App. 4th 604, 613, 43 Cal. Rptr. 3d 427]* . To allow a conservatee's attorney to waive the right to a hearing and agree to conservatorship without the express consent of the conservatee is contrary to the principles of due process [*see Conservatorship of Christopher A (2006) 139 Cal. App. 4th 604, 613, 43 Cal. Rptr. 3d 427]* .

The standard of proof for the appointment of a conservator is clear and convincing evidence [*Prob. Code § 1801(e)*]. The proposed conservatee, the spouse or domestic partner [as defined by *Prob. Code § 37*; *Fam. Code § 297 et seq.*] of the proposed conservatee, a relative of the proposed conservatee, and anyinterested person or friend of the proposed conservatee may appear at the hearing to support or oppose the petition [*Prob. Code § 1829*; *see § 281.105* (objection to appointment of conservator)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury TrialEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointment

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24-281 California Forms of Pleading and Practice--Annotated § 281.51

§ 281.51 Attendance of Proposed Conservatee at Hearing

The proposed conservatee must be produced at the hearing unless he or she is out of the state when served and is not the petitioner, or is unable to attend the hearing because of medical inability [*Prob. Code § 1825(a)(1), (2)*]. Medical inability generally must be established by the affidavit or certificate of a licensed medical practitioner. If the proposed conservatee is an adherent of a religion whose tenets and practices call for reliance on prayer alone for healing and is under treatment by an accredited practitioner of that religion, medical inability may be established by the affidavit of the practitioner [*Prob. Code § 1825(b)*].

Emotional or psychological instability is not good cause for the absence of the proposed conservatee from the hearing unless, by reason of the inability, attendance at the hearing is likely to cause serious and immediate physiological damage to the proposed conservatee [*Prob. Code § 1825(c)*].

The proposed conservatee also is not required to be produced if the court investigator has reported to the court that the proposed conservatee has expressly communicated that he or she is not willing to attend the hearing, does not wish to contest the establishment of the conservatorship, and does not object to the proposed conservator or prefer that another person act as conservator, and the court orders that the proposed conservatee need not attend the hearing [*Prob. Code § 1825(a)(3)*; *see Conservatorship of Deidre B. (2010) 180 Cal. App. 4th 1306, 1309, 103 Cal. Rptr. 3d 825* (trial court did not err when it accepted stipulation of appellant's appointed counsel stating that appellant consented to reestablishment of conservatorship of her person and waived her right to a formal hearing)].

If the proposed conservatee is an absentee, his or her inability to attend the hearing is established by an official written report or record complying with *Evid. Code § 1283*, which requires any court in the state to receive an official written report or record made by an authorized federal government employee as evidence that a person is missing [*Prob. Code § 1844*].

If the proposed conservatee is a missing person, whereabouts unknown, the proposed conservatee is not required to be produced at the hearing pursuant to *Prob. Code § 1825* [*Prob. Code § 1848(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointment

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§ 281.52 Informing Proposed Conservatee of Rights

[1] In General

Unless the conservatee is absent from the hearing and is not required to attend under the provisions of *Prob. Code § 1825* [*see § 281.51*], and any showing required by *Prob. Code § 1825* has been made, the court is required to inform the proposed conservatee, before the establishment of a conservatorship, of the nature and purpose of the proceeding; of the identity of the proposed conservator; of the nature and effect on the conservatee's basic rights of any order requested under *Prob. Code § 1870 et seq.*, which concern the conservatee's capacity to bind or obligate the estate, to give informed consent for medical treatment, or to marry; and, in the case of an allegedly developmentally disabled adult, of the specific effects of each limitation requested in the order [*Prob. Code § 1828(a)*]. For discussion of orders under *Prob. Code § 1870 et seq.*, see Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee* .

The court must also inform the proposed conservatee that the establishment of a conservatorship is a legal adjudication of the conservatee's inability to provide properly for his or her personal needs or to manage his or her own financial resources, or both, and must inform the proposed conservatee of the effect of an adjudication on his or her basic rights. In addition, the court must inform the proposed conservatee that he or she may be disqualified from voting if incapable of completing an affidavit of voter registration, and that he or she has the right to oppose the proceeding, to have the matter of the establishment of the conservatorship tried by jury, to be represented by counsel, and to have legal counsel appointed by the court if unable to retain legal counsel [*Prob. Code § 1828(a)*].

[2] Waiver of Advisement

The attorney for the proposed conservatee, by oral consent in open court, may validly waive the court's advisement of the rights and information discussed above without a personal explicit waiver by the proposed conservatee [*Conservatorship of Mary K. (1991) 234 Cal. App. 3d 265, 271, 272, 285 Cal. Rptr. 618* (proceeding to establish Lanterman-Petris-Short Act conservatorship in which proposed conservatee did not contend that her attorney was without actual authority to waive advisement and in which no evidence of incompetent counsel existed)]. Furthermore, the court is not required to voir dire the proposed conservatee to determine whether he or she understood those rights when his or her attorney waived advisement of them. Absent, for example, evidence of incompetence of counsel in

waiving advisement, the waiver is valid without judicial voir dire [*Conservatorship of Mary K. (1991) 234 Cal. App. 3d 265, 271-272, 285 Cal. Rptr. 618]* .

When a conservatee stipulates to the appointment of a conservator, the court is still required to consult with the conservatee on the record to instruct the conservatee on the consequences of the stipulation and to obtain his or her express consent to it [*see* *Conservatorship of Christopher A (2006) 139 Cal. App. 4th 604, 613, 43 Cal. Rptr. 3d 427]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 281.53 Consultation With Proposed Conservatee

After advising the proposed conservatee pursuant to *Prob. Code § 1828* and before appointing a conservator, the court must consult the proposed conservatee to determine his or her opinion concerning the establishment of the conservatorship, the appointment of the proposed conservator, any order requested under *Prob. Code § 1870 et seq.*, and, in the case of an allegedly developmentally disabled adult, each limitation requested in the order [*Prob. Code § 1828(b)*].

The governing statute does not require any record of the consultation with the proposed conservatee or that the consultation be made on an individual basis. A detailed explanation given to an assembled group of proposed conservatees of thenature of the conservatorship and the rights and disabilities attending its imposition, together with an admonition that they were entitled to present evidence and to testify on their own behalf and to have any questions answered by the court, has been held to substantially comply with the statute [*Conservatorship of Forsythe (1987) 192 Cal. App. 3d 1406, 1412-1413, 238 Cal. Rptr. 77* (Lanterman-Petris-Short Act conservatorship)]. Regardless of whether it is on the record or off the record, the consultation requirement does not encompass the right to an attorney, to confront witnesses, or to a jury trial [*Conservatorship of Mary K. (1991) 234 Cal. App. 3d 265, 270, 285 Cal. Rptr. 618* . (Lanterman-Petris-Short Act conservatorship)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-281 California Forms of Pleading and Practice--Annotated § 281.54

§ 281.54 Hearing on Petition for Appointment of Limited Conservatorship

At the hearing on a petition for the appointment of a limited conservator for an alleged developmentally disabled adult, the court must inquire into the nature and extent of the general intellectual functioning of the proposed conservatee, evaluate the extent of the impairment of his or her adaptive behavior, ascertain his or her capacity to care for himself or herself and his or her property, and inquire into the qualifications, abilities, and capabilities of the person seeking appointment as limited conservator [*Prob. Code § 1828.5(a)*].

If a report by the regional center has not been filed because the proposed limited conservatee withheld his or her consent to assessment [*see § 281.36*], the court is required to determine the reason for withholding consent [*Prob. Code § 1828.5(a)*; *see Prob. Code § 1827.5*].

If the court finds that the proposed limited conservatee possesses the capacity to care for himself or herself and to manage his or her property as a reasonably prudent person, the court must dismiss the petition for the appointment of a limited conservator [*Prob. Code § 1828.5(b)*]. Otherwise, the court must appoint a conservator as follows:

- If the court finds that the proposed limited conservatee lacks the capacity to perform some, but not all, of the tasks necessary to provide properly for his or her own personal needs for physical health, food, clothing, or shelter, or to manage his or her own financial resources, the court must appoint a limited conservator for the person or the estate, or both, and must define the powers and duties of the limited conservator so as to permit the limited conservatee to care for himself or herself or to manage his or her financial resources commensurate with his or her ability to do so [*Prob. Code § 1828.5(c), (e)*].

- If the court finds that the proposed limited conservatee lacks the capacity to perform all of the tasks necessary to provide properly for his or her own personal needs for physical health, food, clothing, or shelter, or to manage his or her own financial resources, the court must appoint either a conservator or a limited conservator for the person or estate or both [*Prob. Code § 1828.5(d)*].

Before appointing a limited conservator, the court must inform the proposed limited conservatee of the nature and

purpose of the limited conservatorship proceeding, that the appointment of a limited conservator will result in the transfer of certain rights set forth in the petition, and of the effect of that transfer. The court must also inform the proposed limited conservatee of the identity of the person who has been nominated as his or her limited conservator, that he or she has a right to oppose the proceeding, and that he or she has a right to have the matter tried by jury. After communicating this information to the proposed limited conservatee, and before appointing a limited conservator, the court must consult the person to determine his or her opinionconcerning the appointment [*Prob. Code § 1828.5(f)*; *see Prob. Code § 1828(b)*; *see also §§ 281.52, 281.53*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-281 California Forms of Pleading and Practice--Annotated § 281.55

§ 281.55 Notice of Conservatee's Rights

An information notice of the rights of conservatee must be attached to the order appointing a conservator [*Prob. Code § 1830(c)*]. The conservator must mail the order and the information notice to the conservatee and the conservatee's relatives, as specified in *Prob. Code § 1821(b)* [*Prob. Code § 1830(c)*; *see § 281.100[3][c]* for the persons listed in *Prob. Code § 1821(b)*]. Effective January 1, 2008, Judicial Council Form GC-341 must be used in providing notice of the conservatee's rights [*see § 281.113*].

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[Reserved]

§§ 281.56[Reserved]

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24-281 California Forms of Pleading and Practice--Annotated § 281.60

§ 281.60 Oath, Letters, and Bond

The appointment of a conservator is not effective unless the conservator takes an oath (or affirmation [*Code Civ. Proc. § 2015.6*]) to perform the duties of the office according to law. The oath (or affirmation [*Code Civ. Proc. § 2015.6*]) must be attached to or endorsed on the letters of conservatorship [*Prob. Code § 2300(a)*; for an illustration of the form for letters of conservatorship, see *§ 281.112*].

The conservator must also file a bond, if a bond is required [*Prob. Code § 2300(b)*; *see* Ch. 283, *Guardianship and Conservatorship: Bonds*].

Before letters of conservatorship can be issued, the conservator (other than a trust company or a public conservator) must file with the court an acknowledgment of receipt of (1) a statement of duties and liabilities of the office of conservator, and (2) a copy of the conservatorship information required under *Prob. Code § 1835* [*see Prob. Code § 1834(a)*; §§ 281.61, 281.62].

The appointment, the taking of the oath (or affirmation [*Code Civ. Proc. § 2015.6*]), and the filing of the bond if required, are evidenced by the issuance of letters of conservatorship by the clerk of the court [*Prob. Code § 2310*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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24-281 California Forms of Pleading and Practice--Annotated § 281.61

§ 281.61 Statement of Conservator's Duties

In the case of the appointment of a private conservator, a prerequisite to the issuance of letters is that the conservator file with the court, prior to the issuanceof letters, an acknowledgment of receipt of a statement of the duties and liabilities of the office of conservator [*see Prob. Code § 1834(a)*; for an illustration of the form for the statement, *see § 281.111*]. Both the acknowledgment and the statement are drafted by the Judicial Council. The statement does not supersede the law on which it is based [*Prob. Code § 1834(c)*].

By local rule, the court may require the acknowledgment to include the conservator's birth date and driver's license number, if any, provided that the court ensures the confidentiality of this information [*Prob. Code § 1834(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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24-281 California Forms of Pleading and Practice--Annotated § 281.62

§ 281.62 Handbook for Private Conservators

Before letters of conservatorship can be issued, the conservator must file with the court a Judicial Council form for acknowledgment of receipt of a handbook for conservators [*Prob. Code § 1834(a)*; for an illustration of the form, *see § 281.111*].

Every superior court must provide all private conservators with written information concerning their rights, duties, limitations, and responsibilities under *Prob. Code § 1400 et seq.* [*Prob. Code § 1835(a)*]. The information is provided in a handbook for conservators that is drafted by the Judicial Council for statewide use, and also in a supplement to that handbook, prepared by each county superior court for local use [*see Prob. Code §§ 1834(a), 1835(c)*; *see also Prob. Code § 1835(b)(4)* (provision of material to conservators on how to use community-based services to meet conservatees' needs)]. Each court may charge private conservators a fee to cover the court's costs of providing the handbook and the local supplement [*Prob. Code § 1835(f)*].

The information in the handbook and local supplement includes, but is not limited to, the following [*Prob. Code § 1835(b)*]:

- The rights, duties, limitations, and responsibilities of a conservator.
- The rights of a conservatee.
- How to assess the needs of the conservatee.
- How to use community-based services to meet the needs of the conservatee.
- How to ensure that the conservatee is provided with the least restrictive possible environment.
- The court procedures and processes relevant to conservatorships.

- The procedures for inventory and appraisals, and the filing of accounts.

The failure of any court to provide this information to a conservator does not relieve the conservator of any of the conservator's duties as required by *Prob. Code § 1400 et seq.* No court, or employee or agent of a court, is liable in either a personal or an official capacity for damages to the conservatee, the conservator, the conservatorship, or any other person or entity [*Prob. Code § 1835(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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§ 281.63 Recording Letters of Conservatorship of Estate

Except in the case of temporary conservatorships, a conservator of the estate is required to record a certified copy of the letters with the county recorder's office in each county in which the conservatee owns an interest in real property, including a security interest. The conservator must record the letters as soon as practicable after issuance, but no later than 90 days after he or she is appointed. A temporary conservator of the estate may, but need not, record the letters if he or she deems it appropriate [*Prob. Code § 2313*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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24-281 California Forms of Pleading and Practice--Annotated § 281.64

§ 281.64 Appeal

An appeal may be taken from an order granting or revoking letters of conservatorship, except letters of temporary conservatorship [*Prob. Code § 1301(a)*; *see Guardianship of Donaldson (1986) 178 Cal. App. 3d 477, 485, 223 Cal. Rptr. 707* (appeal isfrom order, not from administrative act of issuance of letters, so that failure to actually issue letters does not foreclose appeal)].

An appeal generally will stay the operation and effect of the order [*Prob. Code § 1310(a)*]. Pending the appeal, however, the trial court may direct the exercise of the fiduciary's powers, or appoint a temporary conservator of the person or estate, or both, for the purpose of preventing injury or loss to a person or property [*Prob. Code § 1310(b)*; *see Gold v. Superior Court (1970) 3 Cal. 3d 275, 281-282, 90 Cal. Rptr. 161, 475 P.2d 193* ; *see also* Ch. 282, *Guardianship and Conservatorship: Temporary Guardians and Conservators*]. All acts of the conservator or temporary conservator pursuant to the directions of the court are valid, regardless of the result of the appeal [*Prob. Code § 1310(b)*]. Further, an appeal cannot stay the directions [*Prob. Code § 1310(b)*].

An appeal will not stay the operation and effect of the judgment or order if the court requires an undertaking and the undertaking is not given, in any of the following cases [*Prob. Code § 1310(d)*; *see Code Civ. Proc. § 917.9*]:

- The appellant is found to possess money or other property of the respondent;
- The appellant is required to perform an act for the respondent's benefit; or
- The judgment against the appellant is solely for costs awarded under *Code Civ. Proc. § 1021 et seq.*

An appeal also will not stay the operation and effect of a judgment for moneyor an order directing payment of money, unless one of the following applies [*Prob. Code § 1310(e)*]:

- A bond is posted as provided in *Code Civ. Proc. § 917.1*; or

- The payment is to be made from a decedent's estate being administered under *Prob. Code § 7000 et seq.* or from the estate of a person who is subject to a guardianship or conservatorship of the estate under *Prob. Code § 1400 et seq.*

However, a court may require an undertaking as provided in *Prob. Code § 1310(d)*, discussed above [*Prob. Code § 1310(e)*].

If an order appointing a conservator is reversed on appeal for error, all lawful acts of the conservator performed after issuance of letters and prior to the reversal are as valid as though the order were affirmed [*Prob. Code § 1311*].

The appellate court must uphold the findings of the trial court if there is any substantial evidence that, together with all of the inferences to be reasonably drawn from it, tends to support the judgment [*Guardianship of Walters (1951) 37 Cal. 2d 239, 245, 231 P.2d 473* ; *Katz v. Superior Court (1977) 73 Cal. App. 3d 952, 980, 141 Cal. Rptr. 234* ; *Guardianship of Mosier (1966) 246 Cal. App. 2d 164, 169, 54 Cal. Rptr. 447]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsStandards of ReviewSubstantial EvidenceGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointment

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§ 281.65 Periodic Review of Conservatorship

[1] Nature of Review

The court must review every conservatorship at the expiration of six months after the initial appointment of the conservator [*Prob. Code 1850(a)(1)*], again one year after the appointment of the conservator, and annually thereafter [*Prob. Code 1850(a)(2)*]. At the review conducted one year after the appointment of the conservator, the court may set the next review in two years if the court determines that the conservator is acting in the best interests of the conservatee [*Prob. Code § 1850(a)(2)*]. In addition, the court, on its own motion or on request by any interested person, may take appropriate action, including ordering a review of the conservatorship and ordering the conservator to present an accounting of the assets of the estate [*Prob. Code § 1850(b)*]. These requirements do not apply to conservatorships for absentees or conservatorships of the estate for a nonresident when the conservatee is not present in California [*Prob. Code § 1850*].

The court must review each limited conservatorship for a developmentally disabled adult [*see Prob. Code § 1801(d)*] one year after the appointment of the conservator, and biennially thereafter [*Prob. Code § 1850.5(a)*]. In addition, the court, on its own motion or on request by any interested person, may take appropriate action, including ordering a review of the limited conservatorship [*Prob. Code § 1850.5(b)*].

The court investigator must visit the conservatee at the time the court review is required. This visit must be without prior notice to the conservatee, except as ordered by the court for necessity or to prevent harm to the conservatee [*Prob. Code § 1851(a)*; for a form for an order appointing court investigator, *see § 281.104*]. The investigator also may personally visit the conservator and other persons, as necessary, to determine whether the conservator is acting in the best interests of the conservatee [*Prob. Code § 1851(d)*]. The investigator must inform the conservatee personally that the conservatee is under a conservatorship, and must give the conservatee the name of the conservator. The investigator must determine whether the conservatee wishes to petition the court for termination of the conservatorship, whether the conservator is acting in the best interests of the conservatee, and whether the conservatee is capable of completing an affidavit of voter registration. In determining whether the conservator is acting in the best interests of the conservatee, the court investigator's evaluation must include an examination of the conservatee's placement, the quality of care, and

the conservatee's finances [*Prob. Code § 1851(a)*]. To the extent practicable, the investigator must review the accounting with a conservatee who has sufficient capacity [*Prob. Code § 1851(a)*]. If feasible, each court must coordinate investigations with the filing of accountings so that investigators can review accountings before visiting conservatee [*Prob. Code § 1851.2*]. If the court has made an order regarding the legal capacity of the conservatee under *Prob. Code § 1870 et seq.*, the court investigator must determine whether the condition of the conservatee is such that the terms of the order should be modified or the order revoked [*Prob. Code § 1851(a)*]. On request of the court investigator, the conservator must make available to the court investigator during the investigation, for inspection and copying all books and records, including receipts and any expenditures, of the conservatorship [*Prob. Code § 1850(a)*].

The findings of the court investigator, including the facts on which the findings are based, must be certified in writing to the court not less than 15 days before the date of the review. A copy of the report must be mailed to the conservator and to the attorneysof record for the conservator and conservatee at the time it is certified to the court [*Prob. Code § 1851(b)*]. A copy of the report also must be mailed to the conservatee's spouse or registered domestic partner, the conservatee's relatives in the first degree, and if there are no such relatives, to the next closest relative, unless the court determines that the mailing will result in harm to the conservatee [*Prob. Code § 1851(b)*]. Confidential medical information and confidential information from the California Law Enforcement Telecommunications System must be in a separate attachment to the report and may not be provided in copies sent to the conservatee's spouse or registered domestic partner, and relatives [*Prob. Code § 1851(b)*].

In the case of a limited conservatee, the court investigator must make a recommendation regarding the continuation or termination of the limited conservatorship [*Prob. Code § 1851(c)*].

The investigator's report must be kept confidential. The report may be made available only to the parties, the persons to whom a copy of the report is required to be mailed [*see Prob. Code § 1851(b)*, discussed *above*], persons given notice of the petition for appointment who have requested the report or who have appeared in the proceeding, their attorneys, and the court. The court has discretion at any other time to release the report if it would serve the interests of the conservatee. The clerk of the court is required to make provision for limiting disclosure of the report exclusively to persons entitled to it by statute [*Prob. Code § 1851(e)*].

[2] Assessment of Review Costs

If the investigation is conducted by a court investigator, the court in which the conservatee's estate is located is required to assess the estate for the cost of the investigation [*Prob. Code § 1851.5*]. The court may order that it be reimbursed out of the conservatee's estate for the cost of the investigation unless the court finds that the assessment would pose a hardship to the estate [*Prob. Code § 1851.5*]. There is a rebuttable presumption that the assessment would impose a hardship if the conservatee is receiving Medi-Cal benefits [*Prob. Code § 1851.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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§ 281.66 Professional Fiduciaries Act

[1] Professional Fiduciary

Conservators who are professional fiduciaries are required to comply with the Professional Fiduciaries Act [*Bus. & Prof. Code § 6500 et seq.*; *see Bus. & Prof. Code § 6530(a), Prob. Code §§ 60.1, 2340*]. In the context of conservators and guardians, a "professional fiduciary" is anyone who acts as a conservator or guardian for two or more persons at the same time who are not related to the professional fiduciary or to each other by blood, adoption, marriage, or registered domestic partnership [*Bus. & Prof. Code § 6501(f)*; for discussion of the definition of "professional fiduciary" in the context of trustees, *see Ch. 560, Trusts, § 560.74*].

The following are specifically exempted from the licensing requirements [*Bus. & Prof. Code § 6501(f)(4), 6530(b)-(d)*]:

- Trust companies [*see Prob. Code § 83* (definition)].

- FDIC-insured institutions, or their holding companies, subsidiaries, or affiliates.

- Any public agency, including the public guardian, public conservator, or other agency of the State of California, a county of California, or any regional center for persons with developmental disabilities as defined in *Welf. & Inst. Code § 4620*.

- Any person who is employed by a trust company, an FDIC-insured institution or its holding companies, subsidiaries or affiliates, a public agency, who is acting in the course and scope of that employment, and in the instance of a public officer of a public agency, acting in the course and scope of official duties.

- Any person whose sole activity as a professional fiduciary is as a broker-dealer, broker-dealer agent, investment adviser representative registered and regulated under the Corporate Securities Law of 1968 [*Corp. Code § 25000 et seq.*], the Investment Advisers Act of 1940 [*15 U.S.C. 80b-1 et seq.*], or the

Securities Exchange Act of 1934 [*15 U.S.C. 78a et seq.*], or involves serving as a trustee to a company regulated by the Securities and Exchange Commission under the Investment Company Act of 1940 [*15 U.S.C. 80a-1 et seq.*].

- Any licensed attorney.
- Any licensed certified public accountant;
- Any Internal Revenue Service agent acting within the scope of practice.

[2] Licensing Requirements

No person may act or hold himself or herself out to the public as a professional fiduciary unless he or she is licensed as a professional fiduciary under the Act [*Prob. Code § 60.1(b)*]. Persons previously required to register with the statewide registry under *Prob. Code § 2850 et seq.* (inoperative 7/1/2008, repealed eff. 1/1/2009), and persons required to file information with the clerk of the court under the former version of *Prob. Code § 2340 et seq.* (inoperative 7/1/2008; repealed eff. 1/1/2009) are required to obtain a professional fiduciary license [*Bus. & Prof. Code § 6502*]. Additionally, as of July 1, 2008, no court may appoint a person to carry out the duties of a professional fiduciary unless he or she holds a valid, unexpired, unsuspended professional fiduciary license [*Prob. Code § 2340*]. (In other words, after July 1, 2008, professional fiduciaries may not be appointed in any new conservatorship or guardianship matters until they obtain a license under the Professional Fiduciaries Act. However, professional fiduciaries already appointed in specific matters prior to July 1, 2008, may continue to act in those matters until January 1, 2009, by which time they are required to be licensed under the Professional Fiduciaries Act.) For an allegation seeking removal of a conservator or guardian for failure to comply with the licensing requirements of the Professional Fiduciaries Act, see *Ch. 290G, Guardianship and Conservatorship: Removal or Resignation of Guardians or Conservators, § 290G.37A.*

The Professional Fiduciaries Bureau is responsible for administering the licensing and regulatory program established under the Act, approving classes for prelicense andcontinuing education, and preparing and administering licensing exams [*Bus. & Prof. Code § 6518*; *see Bus. & Prof. Code §§ 6510, 6511* (creation of Bureau)]. Applications for a professional fiduciary license can be obtained online, through the California Department of Consumer Affairs, at http://www.fiduciary.ca.gov/. The Bureau may investigate an applicant's qualifications, and must approve applicants who meet the required qualifications [*Bus. & Prof. Code § 6536*].

[3] Qualifications for Licensure

Applicants must meet the following qualifications in order to obtain a professional fiduciary license [*Bus. & Prof. Code § 6533(a)-(k)*]:

- Be at least 21 years old.
- Be a United States citizen or legally admitted to the United States.
- Have not committed any acts that are grounds for denial of a license under *Bus. & Prof. Code §§ 480, 6536* [*see below*].
- Submit fingerprints for the purpose of obtaining criminal offender record information [*see Bus. & Prof. Code § 6533.5*].
- Have completed 30 hours of prelicensing education [*see Bus. & Prof. Code § 6538*].

- Have passed the licensing exam [*see Bus. & Prof. Code § 6539*].
- Have a least one of the following:
  - A B.A. or B.S. degree from a college or university;
  - An A.A./A.S. degree from a college or university and at least five years experience with substantive fiduciary responsibilities working as a professional fiduciary, public agency, or financial institution acting as a conservator, guardian, trustee, personal representative, or agent under a power of attorney; or
  - Experience of not less than three years, prior to July 1, 2008, with substantive fiduciary institution acting as a conservator, guardian, trustee, personal representative, or agent under a power of attorney.
- Agree to adhere to the Professional Fiduciaries Code of Ethics [*see Bus. & Prof. Code § 6520*] and to all statutes and regulations.
- Consent to the bureau conducting a credit check.
- File a completed application.
- Pay the nonrefundable application fee.

The Bureau must deny a license if the applicant [*see Bus. & Prof. Code § 6536(a)-(e)*]:

- Does not meet the qualifications for licensure [*see Bus. & Prof. Code § 6533(a)-(k), above*];
- Has been convicted of a crime substantially related to the qualifications, functions, or duties of a fiduciary;
- Has engaged in fraud or deceit in applying for a license;
- Has engaged in dishonesty, fraud, or gross negligence in performing the functions or duties of a fiduciary; or
- Has been removed as a fiduciary by a court for breach of trust committed intentionally, with gross negligence, in bad faith, or with reckless indifference, or has demonstrated a pattern of negligent conduct (including a removal prior to January 1, 2009), and all appeals have been taken or the time to file an appeal has expired.

[4] License Renewal

A professional fiduciary license is valid for one year [*Bus. & Prof. Code § 6541(a)*]. To renew the license, a professional fiduciary must file a renewal application, continuing education compliance, and the renewal fee [*see Bus. & Prof. Code §§ 6561, 6538(b), 6541(b)*]. Conduct that would result in a refusal of a license renewal is similar to the conduct that would result in a license denial, and includes the following [*Bus. & Prof. Code § 6541(b)*]:

- Conviction of a crime substantially related to the qualifications, functions, or duties of a fiduciary.

- Fraud or deceit in obtaining a license.

- Dishonesty, fraud, or gross negligence in performing the functions or duties of a professional fiduciary.

- Removal as a fiduciary by a court for breach of a fiduciary duty.

[5] Initial and Annual Statement

A professional fiduciary must keep complete and accurate records of client accounts, and must make them available for audit by the Bureau [*Bus. & Prof. Code § 6560*]. A professional fiduciary also must submit a statement, initially and annually thereafter [*Bus. & Prof. Code § 6561(a)*]. The annual statement must be filed with the Bureau 60 days prior to expiration of the fiduciary's license [*Bus. & Prof. Code § 6562*], and must include the following information [*Bus. & Prof. Code § 6561(a)*]:

- The fiduciary's business address, phone, and fax number.

- Whether or not the fiduciary has been removed as conservator, guardian, trustee, or personal representative for cause.

- The case names, court locations, and case numbers for all matters in which the fiduciary has been appointed by the court.

- Whether the fiduciary has been found by a court to have breached a fiduciary duty.

- Whether the fiduciary has reassigned or settled a matter in which a complaint has been filed, along with the case number and a statement of the issues and facts pertaining to the allegations.

- Any licenses or professional certificates held.

- Any ownership or beneficial interests in any businesses or other enterprises held by the fiduciary or by a family member who receives or has received payment from a client of the fiduciary.

- Whether the fiduciary has ever filed for bankruptcy or held a controlling financial interest in a business that filed for bankruptcy.

- The name of any persons or entities that have an interest in the fiduciary's professional fiduciary business.

- Whether the fiduciary has been convicted of a crime.

[6] Suspension, Revocation, Denial, and Disciplinary Action

The Bureau has the authority to investigate the actions of any professional fiduciary [*Bus. & Prof. Code § 6580(a)*]. Sanctions may include administrative citations and fines, license suspension or probation, or license revocation [*Bus. & Prof. Code § 6580(b)*]. A license may be suspended, revoked, or denied, or other disciplinary action may be imposed for one or more of the following [*Bus. & Prof. Code § 6584*]:

- Conviction of any felony or misdemeanor, if the misdemeanor is substantially related to the

functions and duties of a professional fiduciary.

- Failure to notify the bureau of a conviction [*see Bus. & Prof. Code § 6561(a)(10)*].

- Fraud or misrepresentation in obtaining a license.

- Fraud, dishonesty, corruption, willful violation of duty, gross negligence or incompetence in practice, or unprofessional conduct in, or related to, the practice of a professional fiduciary.

- Failure to comply with, or to pay a monetary sanction imposed by a court for failure to provide timely reports.

- Failure to pay a civil penalty relating to the licensee's professional fiduciary duties.

- The revocation of, suspension of, or other disciplinary action against, any other professional license by the State of California or by another state; violation of *Bus. Prof. Code § 6500 et seq.*, *Probate Code § 4000 et seq.*, *Probate Code § 4600 et seq.*, *Probate Code § 5000 et seq.*, or any of the statutes, rules, or regulations pertaining to the duties or functions of a professional fiduciary.

The Bureau has adopted a Professional Fiduciaries Code of Ethics that is available on the bureau's Internet website and is provided to all applicants [*see Bus. & Prof. Code § 6520*; www.fiduciary.ca.gov].

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§ 281.67 Unwarranted Petitions

Unwarranted petitions, applications, or motions other than discovery motions after a conservatorship has been established, create an environment that may be harmful to the conservatee and are inconsistent with the goal of protecting the conservatee [*Prob. Code § 1970(a)*]. Therefore, if a person other than the conservatee files a petition for termination of the conservatorship, or instruction to the conservator, that is unmeritorious or intended to harass or annoy the conservator, and the person has previously filed pleadings in the conservatorship proceeding that were unmeritorious or intended to harass or annoy the conservator, the petition will be grounds for the court to determine the person a vexatious litigant [*Prob. Code § 1970(b)* (applies notwithstanding general criteria in *Code Civ. Proc. § 391* for determining who is a vexatious litigant)].

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[Reserved]

§§ 281.68[Reserved]

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§ 281.70 Related Matthew Bender Publications

For memoranda relating to the appointment of a conservator, see California Points and Authorities, Ch. 106, *Guardianship and Conservatorship*

For transactional forms relating to the nomination and appointment of a conservator, see California Legal Forms, Ch. 66A, *Conservatorships*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointment

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§ 281.71 State Statutes

[1] Appeal

Appealability of order granting or revoking (or refusing to grant or revoke) letters of conservatorship. *Prob. Code § 1301(a)*

Power of court to appoint temporary conservator pending appeal. *Prob. Code § 1310(b)*

[2] Appointment of Conservators

Professional Fiduciaries Act. *Bus. & Prof. Code § 6500 et seq.*

Legislative purpose for establishment of conservatorships. *Prob. Code § 1800*

Persons for whom conservator may be appointed. *Prob. Code §§ 1800.3, 1802, 1803*

Grounds for appointment of conservator. *Prob. Code § 1801*

Appointment of conservator for estate of absentee. *Prob. Code §§ 1803, 1840 et seq.*

Appointment of conservator of estate of missing person whose whereabouts are unknown. *Prob. Code §§ 1804, 1845 et seq.*

Guidelines and preferences in appointing conservator. *Prob. Code §§ 1812, 1813, 1813.1*

[3] Definitions

"Absentee" defined. *Prob. Code § 1403*

"Conservatee" includes limited conservatee. *Prob. Code § 29*

"Conservator" includes limited conservator. *Prob. Code § 30*

"Developmental disability" defined. *Prob. Code § 1420*

"Domestic partner" defined. *Prob. Code § 37*

"Interested person" defined. *Prob. Code § 1424*

"Proceedings to establish a limited conservatorship" defined. *Prob. Code § 1431*

[4] Investigations

Disclosure of medical information to probate court investigator, probation officer, or domestic relations investigator. *Civ. Code § 56.10(c)(12)*

Qualifications of court investigator. *Prob. Code § 1454*

Investigation required. *Prob. Code § 1826*

Investigation for periodic review of conservatorship. *Prob. Code § 1851*

Investigation of conservatee's unwillingness or inability to attend hearing regarding order relating to medical consent. *Prob. Code § 1894*

[5] Jurisdiction and Venue

Jurisdiction and venue. *Prob. Code § 2200 et seq.*

[6] Oath and Letters

Statement of conservator's duties and handbook for conservators. *Prob. Code §§ 1834, 1835*

Oath of conservator. *Prob. Code § 2300*

Issuance of letters of conservatorship. *Prob. Code § 2310*

Form of letters of conservatorship. *Prob. Code § 2311*

Recording letters. *Prob. Code § 2313*

Powers enumerated in letters. *Prob. Code § 2594*

[7] Procedure for Appointment

Notice. *Prob. Code §§ 1461.4, 1822*

Appointment of counsel. *Prob. Code §§ 1470, 1471*

Nomination of conservator. *Prob. Code §§ 1810, 1811*

Petition for appointment of conservator. *Prob. Code §§ 1820, 1821*

Citation to proposed conservatee. *Prob. Code §§ 1823, 1824*

Attendance of proposed conservatee at hearing. *Prob. Code § 1825*

Procedure as in trial of civil actions, including trial by jury. *Prob. Code § 1827*

Assessment of proposed developmentally disabled conservatee. *Prob. Code § 1827.5*

Information to be given to proposed conservatee by court. *Prob. Code § 1828*

Persons who may appear at hearing. *Prob. Code § 1829*

Order appointing conservator. *Prob. Code § 1830*

Certain acts not required when proposed conservatee is missing person. *Prob. Code § 1848*

Right to jury trial. *Prob. Code § 1863(a)*

[8] Transfer of Proceedings

Petition for transfer. *Prob. Code § 2211*

Who may petition. *Prob. Code § 2212*

Contents of petition for transfer. *Prob. Code § 2213*

Notice. *Prob. Code § 2214*

Order for transfer of proceeding. *Prob. Code § 2215(b)*

Transmittal of order for transfer. *Prob. Code § 2216(a)*

Fee for transfer of proceeding. *Prob. Code § 2216(b)*

Petition for transfer to another state. *Prob. Code § 2802 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 281.71A California Rules of Court

Conservator screening form and supplemental information statement. *Cal. Rules of Ct., Rule 7.1050*

Acknowledgment of receipt of Duties of Conservator form. *Cal. Rules of Ct., Rule 7.1051*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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§ 281.72 Local Court Rules

[1] Alameda County

Notice requirements on petition for appointment of conservator. Alameda Co. Super. Ct. Rules, Rule 12.15.1

Contested conservatorships. Alameda Co. Super. Ct. Rules, Rule 12.15.2

Court investigator. Alameda Co. Super. Ct. Rules, Rule 12.15.3

[2] Contra Costa County

Notice requirements. Contra Costa Co. Prob. Pol. Man., §§ 209, 210

Appointment of conservator. Contra Costa Co. Prob. Pol. Man., § 811

[3] Los Angeles County

Appointment of conservator. Los Angeles Co. Super. Ct. Rules, Rule 10.167

Appointment of professional conservator. Los Angeles Co. Super. Ct. Rules, Rule 10.168

Notice requirements. Los Angeles Co. Super. Ct. Rules, Rule 10.170

Successor conservator. Los Angeles Co. Super. Ct. Rules, Rule 10.172

[4] Orange County

Appointment of conservators. Orange Co. Super. Ct. Rules, Rules 611.01-611.03

Petition for appointment of nonprofit corporation as conservator. Orange Co. Super. Ct. Rules, Rule 611.04

Limited conservatorships. Orange Co. Super. Ct. Rules, Rule 611.05

[5] Sacramento County

Multiple conservatees. Sacramento Co. Super. Ct. Rules, Rule 15.97

[6] San Diego County

Appointment of conservators. San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.128

Registration of private professional conservators. San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.128.1

Court investigator's report. San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.132

Limited conservatorships. San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.133

[7] San Francisco

Hearings and appearances. San Francisco Uniform Local Ct. Rules, Rules 14.3, 14.4

Conservatorship special requirements. San Francisco Uniform Local Ct. Rules, Rule 14.106(A)

Notice. San Francisco Uniform Local Ct. Rules, Rule 14.106(G)

Legal Topics:

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

[1] Constitutional Limitations

Appointment of parents as temporary conservators for adult children is violation of children's constitutional rights of freedom of religion and freedom of association. *Katz v. Superior Court (1977) 73 Cal. App. 3d 952, 983-989, 141 Cal. Rptr. 234*

[2] Grounds for Appointment

More than poor business judgment is required to show inability to manage own property. *Guardianship of Waite (1939) 14 Cal. 2d 727, 731, 97 P.2d 238*

Conveyance of property to son for inadequate consideration is not evidence of inability to manage own property. *Estate of Watson (1917) 176 Cal. 342, 344, 168 P. 341*

Formal guardianship proceeding is not required to be begun for purpose of deciding whether to discontinue life-sustaining treatment of comatose adult; conduct of family in requesting discontinuation of treatment is not made unlawful by failure to institute proceedings. *Barber v. Superior Court (1983) 147 Cal. App. 3d 1006, 1020-1021, 195 Cal. Rptr. 484*

Conservatorship is appropriate for management of property of prison inmate. *Hillman v. Stults (1968) 263 Cal. App. 2d 848, 873-874, 70 Cal. Rptr. 295*

[3] Hearing

Trial court did not err when it accepted a stipulation of appellant's appointed counsel stating that appellant consented to the reestablishment of a conservatorship of her person and waived her right to a formal hearing. *Conservatorship of*

Deidre B. (2010) 180 Cal. App. 4th 1306, 1309, 103 Cal. Rptr. 3d 825

Conservatee's due process rights were adequately protected under Lanterman-Petris-Short Act when conservatee received copy of petition for reestablishment of conservatorship and accompanying medical statement, conservatee was aware of proposed placement and disabilities, conservatee received at least two written notices of right to hearing and jury trial, and conservatee's attorney met with conservatee in person and signed an affidavit attesting to conservatee's agreement to reestablishment of conservatorship without a hearing. *Conservatorship of Tian L. (2007) 149 Cal. App. 4th 1022, 1031, 57 Cal. Rptr. 3d 382*

Requirements of *Prob. Code 1825(a)* were met, and conservatee's due process rights were not violated, when counsel communicated proposed conservatee's waiver of his presence in an LPS proceeding. *Conservatorship of John L. (2007) 154 Cal. App. 4th 1090, 1102, 65 Cal. Rptr. 3d 393*

Before accepting a stipulation for appointment of conservator, court must consult with conservatee on record to instruct conservatee of consequences of the stipulation and obtain conservatee's consent to it. *Conservatorship of Christopher A (2006) 139 Cal. App. 4th 604, 613, 43 Cal. Rptr. 3d 427*

Report to court by counsel appointed for conservatee may not be withheld from parties, and judge's failure to allow conservatee's spouse to see report violated her due process rights. *Convervatorship of Schaeffer (2002) 98 Cal. App. 4th 159, 165, 119 Cal. Rptr. 2d 547*

Proposed conservatee is entitled to trial by jury. *Le Jeune v. Superior Court (1963) 218 Cal. App. 2d 696, 697, 32 Cal. Rptr. 390*

[4] Jurisdiction

Notice to alleged incompetent of hearing for appointment of guardian is jurisdictional for court to adjudicate question of incompetency. *Snyder v. Superior Court (1929) 206 Cal. 346, 349, 274 P. 337*

Personal jurisdiction over alleged incompetent is required to appoint guardian of person. *Grinbaum v. Superior Court (1923) 192 Cal. 566, 568, 221 P. 651*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of AssociationConstitutional LawBill of RightsFundamental FreedomsFreedom of ReligionGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointment

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§ 281.74 Law Reviews

Friedman & Savage, *Taking Care: The Law of Conservatorship in California, 61 S. Cal. L. Rev. 273 (1988)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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§ 281.75 Text References

Witkin, Summary of California Law, Vol. 124 *Wills and Probate*, §§ 933-950, 979-981 (10th ed. 2005)

Legal Topics:

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

§§ 281.76[Reserved]

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Volume 24: Guardianship and Conservatorship thru Guardians ad Litem-Chs. 280-291
Chapter 281 GUARDIANSHIP AND CONSERVATORSHIP: APPOINTMENT OF CONSERVATORS
PART IV. PROCEDURAL CHECKLIST

24-281 California Forms of Pleading and Practice--Annotated § 281.90

§ 281.90 Client Interview--Facts and Documents

[1] Facts to Be Ascertained

[a] As to Proposed Conservatee

☐ Full name.

☐ Address or institution where person is hospitalized, if applicable.

NOTE:
Determine the ability of the proposed conservatee to live in his or her residence while under conservatorship, unless the petitioner is a bank or another entity authorized to conduct the business of a trust company [*Prob. Code § 1821(a)(2)*].

☐ In case of missing person: last known residence.

☐ Name and address of person having care of proposed conservatee, if any.

☐ Date and place of birth.

☐ Name and address of spouse, if any.

☐ Names and addresses of all relatives within second degree.

☐ Name and address of state institution from which patient is on leave of absence, if any.

☐ Dates and locations of prior legal proceedings concerning proposed conservatee's competency or need for conservatorship, if any.

☐ Facts indicating proposed conservatee's inability to care for self or estate and need for conservator, including:

☐ Prior conservatorship or prior adjudications of incompetency or insanity.

☐ Acts indicating inability to provide for personal needs or to manage financial resources or to resist fraud or undue influence.

☐ Names and addresses of witnesses to above acts.

☐ Names and addresses of doctors who will testify as to proposed conservatee's inability.

☐ Names and addresses of other persons who can testify as to proposed conservatee's inability.

☐ Whether proposed conservatee will consent to conservatorship.

☐ In case of limited conservatorship, nature and degree of alleged disability.

NOTE:
Ascertain the proposed conservatee's ability to properly provide for his or her needs for physical health, food, clothing, and shelter, unless the petitioner is a bank or other entity authorized to conduct the business of a trust company [*Prob.Code § 1821(a)(1)*]. Isolated instances of negligence or improvidence are insufficient [*Prob. Code § 1801*].

☐ In case of limited conservatorship: specific proposed duties and powers for limited conservator and proposed limitations of limited conservatee's civil and legal rights.

☐ In case of absentee:

☐ Last known military rank or grade and social security account number [*Prob. Code § 1841(a)*].

☐ Whether absentee's spouse has commenced any action or proceeding against absentee for judicial or legal separation, dissolution of marriage, annulment, or adjudication of nullity of marriage [*Prob. Code § 1841(b)*].

☐ Facts indicating that proposed conservatee is absentee as defined in *Prob. Code § 1403*.

☐ In case of missing person [*Prob. Code § 1846*]:

☐ Time and circumstance of disappearance.

☐ Names of persons most likely to hear from missing person, their relationship to him or her, and facts showing that missing person has not been heard from by these persons.

☐ Facts indicating that whereabouts of missing person are unknown to persons most likely to hear from him or her.

☐ Facts indicating any search or inquiry made concerning whereabouts of missing person.

☐ Description of estate that requires attention, supervision, and care.

☐ Information about all assets of proposed conservatee including:

☐ Cash.

☐ Stocks and bonds.

☐ Other personal property.

☐ Rights as beneficiary of trusts or wills.

☐ Real property.

☐ Potential claims or causes of action.

☐ Department of Veterans Affairs benefits.

☐ Location and custody of all property of proposed conservatee.

☐ Health or social services provided to proposed conservatee within year preceding filing of petition for conservatorship [*Prob. Code § 1821(a)(4)* (information is not necessary if petitioner is bank or other entity authorized to conduct business of trust company)].

[b] As to Petitioner

NOTE:
This guide assumes that the petitioner is petitioning to have himself or herself appointed

conservator.

☐ Full name.

☐ Address.

☐ Relationship to proposed conservatee.

☐ Facts about petitioner's ability to care for proposed conservatee and/or his or her estate.

☐ Facts about potential opposition to appointment of petitioner.

☐ In case of missing person, facts showing that whereabouts of missing person are unknown to petitioner.

☐ Alternatives to conservatorship considered by petitioner and reasons why those alternatives are not available [*Prob. Code § 1821(a)(3)* (information is not necessary if petitioner is bank or other entity authorized to conduct business of trust company)].

☐ Information on whether petitioner is a bank or other entity authorized to conduct the business of a trust company [*Prob. Code § 1821(a)*].

[2] Documents to Be Obtained

☐ Pleadings in previous proceedings involving proposed conservatee's competency or need for conservatorship.

☐ Any documents nominating conservator for proposed conservatee.

☐ Relevant documents concerning property of proposed conservatee.

☐ Any doctor's reports or hospital records concerning competency or inability of proposed conservatee to care for self or estate.

☐ In case of absentee: official written report or record complying with *Evid. Code § 1283* showing that proposed conservatee is absentee [*Prob. Code § 1844*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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24-281 California Forms of Pleading and Practice--Annotated § 281.91

§ 281.91 Obtaining Appointment of Conservator

☐ Prepare petition for conservatorship and supplemental information form pursuant to *Prob. Code § 1821* (unless petitioner is bank or other entity authorized to conduct business of trust company) and have them executed and verified by petitioner [*Prob. Code §§ 1021(a), 1821*]. Form: See *§ 281.100*.

☐ Prepare and file Confidential Conservator Screening Form (GC-314), if proposed conservator is someone other than a bank or other entity entitled to conduct the business of a trust company [*Cal. Rules of Ct., Rule 7.1050*]. Form: See *§ 281.100A*.

☐ Except in case of absentee or missing person, prepare citation to be served on proposed conservatee [*Prob. Code §§ 1823, 1843, 1848(a), (b)*]. Form:See*§ 281.103*.

☐ File petition and have clerk set hearing and, except in case of absentee or missing person, have clerk issue citation [*Prob. Code §§ 1822, 1823, 1843, 1848(a), (b)*].

NOTE:
The clerk must set a date that allows at least 15 days for the notices to be served [*see Prob. Code § 1822*]. If the proposed conservatee is a person with developmental disabilities, the clerk must set a date that allows at least 30 days for the notice to be served [*see Prob. Code § 1822(e)*].

☐ Except in case of absentee or missing person [*Prob. Code § 1848(b)*], have citation and copy of petition served on proposed conservatee at least 15 days before hearing in manner provided in *Code Civ. Proc. § 415.10* or *415.30* [*Prob. Code § 1824*].

☐ Except in case of absentee or missing person [*Prob. Code § 1848(c)*], if conservatee is unable to

attend hearing, obtain affidavit to that effect from certified medical or accredited practitioner or medical director or superintendent of state hospital where confined [*Prob. Code § 1825*].

☐ Except in case of absentee or missing person [*Prob. Code § 1848(d)*], file affidavit and make sure that court investigator interviews proposed conservatee completes the investigation, and files his or her report at least five days before hearing [*Prob. Code § 1826*].

☐ Prepare and mail notices of hearing to relatives named in petition at least 15 days before hearing date [*Prob. Code § 1822(b)*].

☐ Prepare and mail notices of hearing at least 15 days before hearing date to Director of Mental Health or Director of Developmental Services if proposed conservatee is patient in or on leave from state hospital [*Prob. Code § 1822(c)*; *see Prob. Code § 1461*].

☐ Prepare and mail notices of hearing at least 15 days before hearing date to appropriate office of the Department of Veterans Affairs if petition states that proposed conservatee is receiving or is entitled to receive benefits from Department of Veterans Affairs [*Prob. Code § 1822(d)*; *see Prob. Code § 1461.5*].

☐ Prepare and mail notices of hearing at least 15 days before hearing date to public guardian of the county in which the petition is filed, if petition states that petitioner and proposed conservator have no prior relationship with proposed conservatee and are not nominated by a family member, friend, or other person with a relationship to proposed conservatee [*Prob. Code § 1822(f)*].

☐ In case of absentee, prepare and mail additional notice at least 15 days before hearing date to secretary concerned or to head offederal department or agency concerned, and prepare additional notice and publish pursuant to *Gov. Code § 6061* in newspaper of general circulation in county of hearing [*Prob. Code § 1842*].

☐ In case of missing person:

☐ Prepare and mail additional notice along with copy of petition at least 15 days before hearing date to last known address of proposed conservatee.

☐ Prepare additional notice and publish pursuant to *Gov. Code § 6061* in newspaper of general circulation in county of last known residence of missing person if last known residence was in California.

☐ Comply with additional notice requirements that court may require pursuant to *Prob. Code § 1202* [*Prob. Code § 1847(a)-(c)*].

☐ Prepare order appointing conservator. See *§ 281.106*.

NOTE:
In most counties, the proposed order must be filed before the hearing for review by the

court or commissioner.

☐ Appear at hearing and present proof of need for conservatorship.

☐ Obtain bond, if required, in appropriate amount [*Prob. Code §§ 2300, 2320*; *see* Ch. 283, *Guardianship and Conservatorship: Bonds*].

☐ Obtain and direct conservator (other than trust company or public conservator) to read Judicial Council's duties-of-conservator form and handbook for conservators [*Prob. Code §§ 1834(a), 1835*]. Form: See *§ 281.111*.

☐ Prepare letters of conservatorship for issuance by clerk [*Prob. Code § 2310*]. Form: See *§ 281.112*.

☐ Have conservator execute oath (or affirmation [*Code Civ. Proc. § 2015.6*]) attached to or endorsed on letters of conservatorship [*Prob. Code § 2300(a)*].

☐ Have conservator (other than trust company or public conservator) complete acknowledgment of receipt of duties-of-conservator form and handbook for conservators [*Prob. Code § 1834(a)*]. Form: See *§ 281.111*.

☐ File bond and acknowledgments of receipt, request that clerk issue letters of conservatorship, and obtain sufficient conformed copies of letters of conservatorship to obtain possession of property, transfer securities, and perform similar acts.

☐ No later than 90 days after conservator's appointment, record certified copy of letters of conservatorship of estate with countyrecorder's office in each county in which conservatee owns interest in real property [*Prob. Code § 2313*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedureRemediesBondsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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[Reserved]

§§ 281.92[Reserved]

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§ 281.100 Petition for Appointment of Conservator [Prob. Code §§ 1820, 1821]--Judicial Council Form GC-310

[1] FORM Petition for Appointment of Conservator [Prob. Code §§ 1820, 1821]--Judicial Council Form GC-310

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of Cal. Judicial Council Form GC-310, for use in petitioning for the appointment of a conservator or limited conservator.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents of Petition

[a] Request for Appointment

The petition must request that a conservator be appointed for the person (Paragraph 1a) or estate (Paragraph 1b), or both, must specify the names, addresses, and telephone numbers of the proposed conservator and proposed conservatee (Paragraphs 1 and 2), and must state the reasons why a conservatorship is necessary [*Prob. Code § 1821(a)*].

[b] Supplemental Information

As a general rule, the petitioner must also file supplemental information as to why the appointment is required (Paragraph 5e). The supplemental information is to be provided on a form that is separate and distinct from the petition [*Prob. Code § 1821(a)*; *see § 281.101*]. The supplemental information need not be provided when the petitioner is a bank or other entity authorized to conduct the business of a trust company, or when the conservatorship is filed pursuant to *Health & Safety Code § 416 et seq.* and the conditions of *Prob. Code § 1821(j)* are met [*see Prob. Code § 1821(a), (j)*

].

[c] Names and Addresses of Relatives

The petition must set forth, as far as they are known to the petitioner, the names and addresses of the spouse or domestic partner [as defined by *Prob. Code § 37*; *Fam. Code § 297 et seq.*] and relatives of the proposed conservatee within the second degree. If there are none, the petition must so state. If no spouse or domestic partner of the proposed conservatee, or relatives of the proposed conservatee within the second degree, be known to the petitioner, the petition must set forth, as far as they are known to the petitioner, the names and addresses of the following persons who, for the purposes of *Prob. Code § 1822* (relating to notice of hearing), will all be deemed to be relatives (Paragraph 11) [*Prob. Code § 1821(b)*]:

- A spouse or domestic partner of a predeceased parent of a proposed conservatee.
- The children of a predeceased spouse or domestic partner of a proposed conservatee.
- The siblings of the proposed conservatee's parents, if any; if none, then the natural and adoptive children of the proposed conservatee's parents' siblings.
- The natural and adoptive children of the proposed conservatee's siblings.

Unless the petition for appointment of a temporary guardian or a temporary conservator is filed together with a petition for appointment of a guardian or a conservator, if the petitioner is a licensed under the Professional Fiduciaries Act [*Bus. & Prof. Code § 6500 et seq.*], the petition must include a statement of the petitioner's license information and a statement explaining who engaged the petitioner or how the petitioner was engaged to file the petition for appointment of a conservator, and what prior relationship the petitioner had with the proposed conservatee or the proposed conservatee's family or friends [*Prob. Code § 1821(c)*].

If the petition is filed by a person other than the proposed conservatee, the petition must include a declaration of due diligence showing either the efforts to find the proposed conservatee's relatives or why it was not feasible to contact any of them, and either the preferences of the propose conservatee concerning the appointment of a conservator and the appointment of the proposed conservator or why it was not feasible to ascertain those preferences [*Prob. Code § 1821(d)*].

If the petition is filed by a person other than the proposed conservatee, the petition must state whether the petitioner is a creditor or debtor, or the agent of a creditor or debtor, of the proposed conservatee (Paragraph 3b) [*Prob. Code § 1821(e)*].

If either the petitioner or the proposed conservator is the spouse of the proposed conservatee, the petitioner must indicate whether the spouse is a party to any action or proceeding against the proposed conservatee for legal separation, dissolution of marriage, annulment, or adjudication of nullity of their marriage. If the spouse is a party to an action or proceeding against the proposed conservatee for legal separation, dissolution, separation, annulment, adjudication of nullity of their marriage, or has obtained a judgment in any of these proceedings, the petitioner must state whether is in the best interests of the proposed conservatee that a conservator be appointed or that the spouse be appointed as the conservator (Paragraph 6) [*Prob. Code § 1813*]. If the petitioner or the proposed conservator is the domestic partner of the proposed conservatee, Paragraph 7 must be completed.

If the petitioner knows that the proposed conservatee is a patient in or on leave of absence from a state institution under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services, the petition must state that fact and name the institution (Paragraph 4a) [*Prob. Code § 1821(f)*]. The petition must state, as

far as is known to the petitioner, whether the proposed conservatee is receiving or is entitled to receive benefits from the Department of Veterans Affairs and the estimated amount of the monthly benefit payable by the Department of Veterans Affairs for the proposed conservatee (Paragraph 4b) [*Prob. Code § 1821(g)*]. The petition must also state whether the proposed conservatee is capable of completing an affidavit of voter registration (Paragraph 4c) [*see Prob. Code § 1826*; *see also Prob. Code § 1823*].

[d] Other Orders

The petition may include an application for any order authorized by the Probate Code provisions governing conservatorships (Paragraphs 1d-1g, 1 *l*), including, but not limited to, orders under *Prob. Code § 1870 et seq.* regarding the conservatee's capacity to bind or obligate the estate, to give informed consent to medical treatment, and to marry [*Prob. Code § 1821(h)*]. For discussion of orders affecting the conservatee's legal capacity, see Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee* , and Ch. 287, *Guardianship and Conservatorship: General Management Powers* .

The form provides space (in Paragraph 1k) for a request that orders related to dementia treatment or placement be granted, as requested in Form GC-313 (Attachment Requesting Special Orders Regarding Dementia) [*see Prob. Code § 2356.5*]. If this box is checked, Form GC-313 should be attached. For discussion of that form, see Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee* .

[e] Assent of Proposed Conservatee

The petition may also include a statement that the proposed conservatee either is willing to attend the hearing on the petition or is not willing to attend the hearing, does not wish to contest the establishment of the conservatorship, and does not object to the proposed conservator or prefer that another person act as conservator (Paragraph 8) [*Prob. Code § 1821(i)*].

[f] Deposits to Reduce Bond

The petition for appointment may contain an allegation that deposits have been or will be made into a blocked account, to reduce the amount of the bond (Paragraph 1c) [*Prob. Code § 2328*; *see* Ch. 283, *Guardianship and Conservatorship: Bonds*].

[4] Petition for Limited Conservator

In the case of a petition to establish a limited conservatorship for an allegedly developmentally disabled adult, the petition must state the nature and degree of the alleged disability (Paragraph 5f), the specific duties and powers requested by or for the limited conservator (Paragraphs 1h, 1i), the limitations of civil and legal rights requested to be included in the court's order of appointment (Paragraph 1j), and whether the proposed limited conservatee is or is alleged to be developmentally disabled (Paragraph 5f) [*Prob. Code § 1821(j)*].

[5] Petition for Conservator of Absentee

If the proposed conservatee is an absentee, the petition, and any required notice, must also set forth the last known military rank or grade and the social security number of the proposed conservatee [*Prob. Code § 1841(a)*]. In addition, the petition must state whether the absentee's spouse has commenced any action or proceeding against the absentee for judicial or legal separation, divorce or dissolution of marriage, annulment, or adjudication of nullity of their marriage [*Prob. Code § 1841(b)*]. This information may be added to the "Name of Conservatee" answer (Paragraph 2), or in Attachment 2.

[6] Petition for Appointment of Nonprofit Charitable Corporation

The petition for appointment of a nonprofit charitable corporation as conservator must include in the caption the name of a responsible corporate officer who will act for the corporation for the purposes of the conservatorship. If for any reason the officer sonamed ceases to act as the responsible corporate officer for the purposes of the conservatorship, the corporation must file with the court a notice containing the name of the successor responsible corporate officer and the date the successor becomes the responsible corporate officer [*Prob. Code § 2104(b)*].

[7] Notice

Notice of the hearing on a petition for the appointment of a conservator must be given at least 15 days before the hearing [*Prob. Code § 1822(a)*]. For a form of notice, see Ch. 284, *Guardianship and Conservatorship: Notice* . For a discussion of the persons entitled to notice, see *§ 281.38*.

[8] Verification

All petitions, reports, and accounts, and objections to petitions, reports, and accounts in conservatorship proceedings must be verified [*Prob. Code § 1021*; *Cal. Rules of Ct., Rule 7.103(b), (c)*]. A verified petition may be used as evidence in uncontested proceedings [*Prob. Code § 1022*].

[9] Jurisdiction and Venue

A proceeding for the appointment of a conservator must be filed in the superior court [*Prob. Code § 2200*]. Proper venue is based on the proposed conservatee's residence, the location of the proposed conservatee's property, and the best interests of the proposed conservatee [*see Prob. Code §§ 2201, 2202*]. For a discussion of venue requirements, see *§ 281.22*.

[10] Professional Fiduciary

If the proposed conservator is a professional fiduciary within the meaning of the Professional Fiduciaries Act, the proposed guardian must complete the Professional Fiduciary Attachment to the Petition for Appointment of Conservator [*see* Ch. 280, *Guardanship and Conservatorship : Appointment of Guardians*, § 280.110D (Judicial Council Form GC-210(A-PF)/GC-310(A-PF))] (paragraphs 3b-3d).

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24-281 California Forms of Pleading and Practice--Annotated § 281.100A

§ 281.100A Confidential Conservator Screening Form--Judicial Council Form GC-314

[1] FORM Confidential Conservator Screening Form--Judicial Council Form GC-314

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a filled-in reproduction of Cal. Judicial Council Form GC-314, for use by a proposed conservator to be used by the court and by personsor agencies designated by the court to assist the court in determining whether a proposed conservator should be appointed [*Cal. Rules of Ct., Rule 7.1050(b)*].

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Confidentiality

The Confidential Conservator Screening Form and the information contained in it are confidential. The clerk's office must maintain the forms in a manner that will protect and preserve their confidentiality [*Cal. Rules of Ct., Rule 7.1050(c)*].

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24-281 California Forms of Pleading and Practice--Annotated § 281.101

§ 281.101 Confidential Supplemental Information [Prob. Code § 1821(a)]--Judicial Council Form GC-312

[1] FORM

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a filled-in reproduction of Cal. Judicial Council Form GC-312, for use by a petitioner other than a bank or other entity entitled to conduct the business of a trust company to provide supplemental information as to why a conservatorship is necessary [*Prob. Code § 1821(a)*; *Cal. Rules of Ct., Rule 7.1050(a)*].

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] When Supplemental Information Is Not Required

Supplemental information is not required when the petitioner is a bank or other entity authorized to conduct the business of a trust company [*Prob. Code § 1821(a)*]. A conservatorship for a developmentally disabled person filed pursuant to *Health & Safety Code § 416 et seq.*, in which the Director of the State Department of Developmental Services is named as conservator, is also exempt from providing the supplemental information, as long as the guidelines adopted by the Department for its regional assessment and training centers require the same information as required by *Prob. Code § 1821(a)* [*Prob. Code § 1821(j)*].

[4] Required Contents

The supplemental information must include a brief statement of facts addressed to each of the following matters [*Prob. Code § 1821(a)(1)-(5)*]:

- The inability of the proposed conservatee properly to provide for his or her needs for physical health, food, clothing, and shelter (Paragraph 2).

- The inability of the proposed conservatee to substantially manage his or her own financial resources, or to resist fraud or undue influence (Paragraph 3).

- The location and residence of the proposed conservatee and the ability of the proposed conservatee to live in the residence while under conservatorship (Paragraphs 4a--c).

- Health or social services or estate management assitance provided to the proposed conservatee during the year preceding the filing of the petition, if the petitioner has information as to those services (Paragraph 6).

- Alternatives to conservatorship considered by the petitioner and reasons why those alternatives are not available (Paragraph 5).

The illustrative form in [1], *above*, indicates that information about alternatives isset forth in an attachment. This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The required facts must be set forth by the petitioner when he or she has knowledge of the facts or by the declarations or affidavits of other persons having knowledge of those facts (Paragraph 7). If any of the matters listed above would not apply to the proposed conservatorship, the petitioner must so indicate and state on the supplemental information form the reasons why (Paragraph 8) [*Prob. Code § 1821(a)*].

[5] Confidentiality

The supplemental information statement must be separate and distinct from the form for the petition. The supplemental information must be confidential and must be made available only to parties, persons given notice of the petition who have requested this supplemental information or who have appeared in the proceedings, their attorneys, and the court. The court has discretion at any other time to release the supplemental information to other persons if to do so serves the interests of the conservatee. The clerk of the court is required to make provision for limiting disclosure of the supplemental information exclusively to the persons described in this paragraph, inasmuch as they are the only persons who are entitled by statute to disclosure [*Prob. Code § 1821(a)*; *Cal. Rules of Ct., Rule 7.1050(b), (c)*].

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24-281 California Forms of Pleading and Practice--Annotated § 281.101A

§ 281.101A Ex Parte Application for Order Authorizing Completion of Capacity Declaration [Prob. Code §§ 1220, 1825, 1890, 1893, 2356.5]--Judicial Council Form GC-333

[1] FORM

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a filled-in reproduction of California Judicial Council Form GC-333, which may be used to request an order requiring the completion of a Capacity Declaration [*see § 281.102* (capacity declaration form)] regarding a proposed conservatee. A Capacity Declaration must be submitted to the court if it is contended that:

- The proposed conservatee will be unable to attend the hearing for medical reasons [*see Prob. Code §§ 1825(b), 1893(b)*]. This inability must be established by the affidavit or certificate of a licensed medical practitioner [*Prob. Code §§ 1825(b), 1893(b)*].

- The proposed conservatee lacks the capacity to give informed consent to medical treatment and the proposed conservator should be given the exclusive authority to make health care decisions for the conservatee [*see Prob. Code §§ 1880, 2355*]. Such an order may only be granted if the petition for appointment of a conservator is supported by a declaration executed by a licensed physician (or a licensed psychologist), stating that the proposed conservatee lacks the capacity to give an informed consent for any form of medical treatment and the reasons therefore [*Prob. Code § 1890(c)*].

- The proposed conservatee suffers from dementia and the proposed conservator requests the special powers set forth in *Prob. Code § 2356.5*, including the authority to place the conservatee in a secured perimeter residential care facility. The petition in such a case must be supported by a declaration of a licensed physician (or licensed psychologist) regarding each of the findings required to be made for the powers requested [*Prob. Code § 2356.5(f)(3)*].

Use of this form is mandatory [*Cal. Rules Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic

format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The appropriate boxes in Item 2 of the form should be checked to indicate the orders requested. The name of each licensed physician (or licensed psychologist) who is requested to complete a Capacity Declaration must be set forth in Item 3 of the form.

This form should be submitted to the court, along with the Ex Parte Order re Completion of Capacity Declaration [*see § 281.101B*].

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24-281 California Forms of Pleading and Practice--Annotated § 281.101B

§ 281.101B Ex Parte Order Re Completion of Capacity Declaration [Prob. Code §§ 1220, 1825, 1890, 1893, 2356.5]--Judicial Council Form GC-334

[1] FORM

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a filled-in reproduction of California Judicial Council Form GC-334, which may be used to order that a Capacity Declaration be completed [*see § 281.102* (form for capacity declaration)] regarding a proposed conservatee. Use of this form is mandatory [*see Cal. Rules Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The name of each licensed physician (or licensed psychologist) who is ordered to complete a Capacity Declaration must be set forth in Item 5 of the form. The appropriate boxes in Item 6 of the form should be checked to indicate the orders being made.

This form should be submitted to the court along with the Ex Parte Application for Order Authorizing Completion of Capacity Declaration [*see § 281.101A*].

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24-281 California Forms of Pleading and Practice--Annotated § 281.102

§ 281.102 Capacity Declaration--Conservatorship [Prob. Code §§ 811, 813, 1801, 1825, 1881, 1910, 2356.5]--Judicial Council Form GC-335

[1] FORM

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a filled-in reproduction of Cal. Judicial Council Form GC-335, a multipurpose form that may be used to assist the court in determining any of the following with respect to the conservatee or proposed conservatee:

- Whether he or she is able to attend a court hearing to determine whether a conservator should be appointed.

- Whether he or she has the capacity to give informed consent to medical treatment.

- Whether he or she has dementia and, if so, whether he or she needs to be placed in an appropriate facility, and/or whether he or she needs or would benefit from dementia medications.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The filled-in form reproduced here illustrates a fact pattern in which the proposed conservatee is physically unable to attend the court hearing to establish a conservatorship. Thus, Item 5 has been completed, while Items 6 and 7 have been left blank.

If the form is used in connection with a determination of an individual's capacity to give informed consent to medical treatment, Items 6 and 7 should be completed, with Item 5 left blank. For discussion of the procedures for obtaining

exclusive authority to make medical decisions for a conservatee under *Prob. Code §§ 1880-1898*, and the use of this form in that context, see Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee* .

If this form is used in connection with a determination relating to dementia, Item 6 should be completed, with Items 5 and 7 left blank. The Judicial Council form, Dementia Attachment to Capacity Declaration--Conservatorship (GC-335A) should also be completed [*see § 281.102A*]. For discussion of the procedures regarding the placement of conservatees suffering from dementia in a secure perimeter residential care facility under *Prob. Code § 2356.5*, and the use of this form in that context, see Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee* .

[3] Inability to Attend Hearing

The inability to attend must be evidenced by a declaration of a duly licensed medical practitioner or an accredited practitioner of a religion. The declaration isevidence only of the proposed conservatee's inability toattend the hearing and may not be considered in determining the issue of need for the establishment of a conservatorship [*Prob. Code § 1825(b)*].

[4] Cross References

For detailed discussion of *Prob. Code §§ 810-813*, setting forth rules for determining whether an individual suffering from a deficit in medical functions has capacity to consent to medical treatment, see Ch. 304, *Insane and Incompetent Persons*

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24-281 California Forms of Pleading and Practice--Annotated § 281.102A

§ 281.102A Dementia Attachment to Capacity Declaration--Conservatorship [Prob. Code §§ 811, 813, 1801, 1825, 1881, 1910, 2356.5]--Judicial Council Form GC-335A

[1] FORM Dementia Attachment to Capacity Declaration--Conservatorship [Prob. Code §§ 811, 813, 1801, 1825, 1881, 1910, 2356.5]--Judicial Council Form GC-335A

Click here to view image.

[2] Use of Form

The form in [1], *above* is an illustration of Judicial Council Form GC--335A, the mandatory Judicial Council form that must be used as an attachment to the Judicial Council form of Capacity Declaration--Conservatorship [*see § 281.102*] when the proposed conservatee has dementia.

Item 9(a) should be completed if the proposed conservatee requires placement in a secured--perimeter residential care facility. Item 9(b) should be completed if the proposed conservatee requires psychotropic medications.

This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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24-281 California Forms of Pleading and Practice--Annotated § 281.103

§ 281.103 Citation for Conservatorship [Prob. Code §§ 1823, 1824]--Judicial Council Form GC-320

[1] FORM § 281.103.1 Citation for Conservatorship [Prob. Code §§ 1823, 1824]--Judicial Council Form GC-320

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative filled-in reproduction of Cal. JudicialCouncil Form GC-320, for use in giving notice to the proposed conservatee of the petition for appointment of a conservator or limited conservator.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Issuance of Citation

If the petition is filed by a person other than the proposed conservatee, the clerk of the court must issue a citation directed to the proposed conservatee setting forth the time and place of hearing [*Prob. Code § 1823(a)*]. In a proceeding to appoint a conservator of the estate of a missing person, whereabouts unknown, the issuance of a citation to the proposed conservatee pursuant to *Prob. Code § 1823* is not required [*Prob. Code § 1848(a)*]. In addition, no citation to the proposed conservatee is required under *Prob. Code § 1823* if the proposed conservatee is an absentee [*Prob. Code § 1843*].

[4] Contents of Citation

The citation must include a statement of the legal standards by which the need for a conservatorship is adjudged (Paragraph 2) [*Prob. Code § 1823(b)*; *see Prob. Code § 1801*]. The citation must also state the following [*Prob. Code § 1823(b)*]:

- The proposed conservatee may be adjudged unable to provide for personal needs or to manage financial resources and, therefore, a conservator may be appointed for the person or estate, or both (Paragraph 1).

- The adjudication may affect or transfer to the conservator the proposed conservatee's right to contact, in whole or in part, to manage and control property, to give informed consent for medical treatment, and to fix his or her own residence (Paragraph 3).

- The proposed conservatee may be disqualified from voting if not capable of completing an affidavit of voter registration (Paragraph 3).

- The court or a court investigator will explain the nature, purpose, and effect of the proceeding to the proposed conservatee and will answer questions concerning the explanation (Paragraph 3).

- The proposed conservatee has the right to appear at the hearing and to oppose the petition (Paragraph 4), and in the case of an allegedlydevelopmentally disabled adult, to oppose the petition in part, byobjecting to any or all of the requested duties or powers of the limited conservator (Paragraph 5).

- The proposed conservatee has the right to choose and be represented by legal counsel and has the right to have legal counsel appointed by the court (Paragraph 4).

- The proposed conservatee has the right to a jury trial if desired (Paragraph 4).

[5] Service of Citation

The citation and a copy of the petition must be served on the proposed conservatee at least 15 days before the hearing in the manner provided by *Code Civ. Proc. § 415.10* for personal service or by *Code Civ. Proc. § 415.30* for service by mail, or in the manner authorized by the court. If the proposed conservatee is outside California, service may be made in the manner provided by *Code Civ. Proc. § 415.40* for service outside the state [*Prob. Code § 1824*]. The court may provide by rule for service of the citation by first-class mail, complete on deposit [*Conservatorship of Wyatt (1987) 195 Cal. App. 3d 391, 394-395, 240 Cal. Rptr. 632]* . No citation is required if the proposed conservatee is an absentee [*Prob. Code § 1843*]. Service of a citation and petition pursuant to *Prob. Code § 1824* is not required in a proceeding to appoint a conservator of the estate of a missing person, whereabouts unknown [*Prob. Code § 1848(b)*].

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24-281 California Forms of Pleading and Practice--Annotated § 281.104

§ 281.104 Order Appointing Court Investigator [Prob. Code § 1826]--Judicial Council Form GC-330

[1] FORM Order Appointing Court Investigator [Prob. Code § 1826]--Judicial Council Form GC-330

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative, filled-in reproduction of Cal. Judicial Council Form GC-330, for use in appointing a court investigator to interview the proposed conservatee and to make a report before the hearing on a petition for theappointment of a conservator [*see Prob. Code § 1826*].

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

CAUTION:

The current version of Cal. Judicial Council Form GC-330 does not include the statutory requirement that the investigator consider whether he or she believes that the proposed conservatee suffers from any of the mental function deficits, listed in *Prob. Code § 811*, that could impair the proposed conservatee's ability to understand the consequences of his or her actions in connection with any of the functions described in *Prob. Code § 1801*, and that the investigator identify the observations that support that belief [*see Prob. Code § 1826(d)(2)*]. The practitioner should ascertain local rules or practice regarding this requirement, and proceed accordingly.

This form may also be used to appoint a court investigator to interview a conservatee with respect to an order relating to medical consent, which may be requested in the petition for the appointment of a conservator or in a subsequent petition [*see Prob. Code §§ 1880, 1890, 1894*]. No court order relating to medical consent may be granted unless it is supported by the declaration of a licensed physician or psychologist acting within the scope of his or her license and stating that the proposed conservatee or the conservatee, as the case may be, lacks the capacity to give an informed consent for any

form of medical treatment and the reasons therefor [*Prob. Code § 1890(c)*].

This form may also be used to appoint a court investigator for the review of a conservatorship [*see Prob. Code §§ 1850-1853*].

[3] Subsequent Investigation

If the court investigator has performed an investigation within the preceding six months and furnished a report to the court on that investigation, the court may order, on good cause shown, that another investigation is not necessary or that a more limited investigation may be performed [*Prob. Code § 1826(p)*].

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24-281 California Forms of Pleading and Practice--Annotated § 281.105

§ 281.105 Objection to Appointment of Conservator [Prob. Code § 1829]--By Proposed Conservatee, Spouse, Domestic Partner, Relative, Friend, or Interested Person

[1] FORM Objection to Appointment of Conservator--By Proposed Conservatee, Spouse, Relative, Friend, or Interested Person

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Conservatorship *or* Limited Conservatorship] of the _____ [Person *or* Estate *or* Person and Estate] of _____ [*name*], Conservatee.	))))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] OBJECTION TO PETITION FOR APPOINTMENT OF CONSERVATOR

_____

Objector,_____[*name*], respectfully represents:

1. Objector is _____ [the proposed conservatee *or specify relationship, e.g.,* the spouse of the proposed conservatee *or* an interested person with regard to the proposed conservatee].

2. Objector objects to the appointment of a conservator on the ground that _____ [*specify, e.g.,* the proposed conservatee is able to provide properly for his or her personal needs and to manage his or her own financial resources].

WHEREFORE, objector prays the petition be denied and for such other and further relief as the court may deem proper.

_____ [Objector demands a trial by jury in the above-captioned proceeding.]

Dated: _____.

_____ [*signature*]

_____ [*typed name*]

Objector

_____ [*date*]

[*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Objector

VERIFICATION

I,_____[*name*], am the objector in the above proceeding. I have read the foregoing objection and know the contents thereof. The same is trueof my own knowledge, except as to those matters that are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated:_____[*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is for use in objecting to a petition for the appointment of a conservator. However, there is no statutory requirement that a written pleading be filed.

[3] Who May Object

The proposed conservatee, the spouse or domestic partner [as defined by *Prob. Code § 37*; *Fam. Code § 297 et seq.*] of the proposed conservatee, a relative of the proposed conservatee, and any interested person or friend of the proposed conservatee may appear at the hearing to support or oppose the petition [*Prob. Code § 1829*].

[4] Demand for Jury Trial

The demand for jury trial should be used when the proposed conservatee wants the issue of competency to be tried by a jury [*see Prob. Code §§ 1827, 1829*]. Some counties require the use of specific printed form for demanding a jury trial. Local practice should be consulted.

[5] Verification

The objection must be verified [*Prob. Code § 1021*]. The form of verification shown here complies with the requirements of *Code Civ. Proc. §§ 446* and *2015.5*.

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24-281 California Forms of Pleading and Practice--Annotated § 281.106

§ 281.106 Order Appointing Probate Conservator [Prob. Code § 1830]--Judicial Council Form GC-340

[1] FORM Order Appointing Probate Conservator [Prob. Code § 1830]--Judicial Council Form GC-340

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of Cal. Judicial Council Form GC-340, for use in appointing a conservator.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents of Order

The order appointing the conservator must include the names, addresses, and telephone numbers of the conservator (Paragraph 18), the conservatee's attorney, if any (Paragraph 1e), and the court investigator, if any (Paragraph 12) [*Prob. Code § 1830(a)*].

After indicating the appearances made in the proceeding (Paragraph 1), the order must contain a statement of decision prepared by the court when a proper request has been made under *Cal. Rules of Ct., Rule 3.1590(b)* [*Code Civ. Proc. § 632*; *see Prob. Code §§ 1000, 1022, 2100*; *Guardianship of Brown (1976) 16 Cal. 3d 326, 332, 128 Cal. Rptr. 10, 546 P.2d 298]* .

The order must specify whether the conservator is the conservatee's spouse. If so, the order must state whether the conservator is a party to any action or proceeding against the conservatee for legal separation, dissolution of marriage, annulment, or adjudication of nullity of their marriage. If the conservator is a party to an action or proceeding against the conservatee for legal separation, dissolution, separation, annulment, adjudication of nullity of their marriage, the order must state that it is in the conservatee's best interests to appoint the spouse as conservator (Paragraph 16) [*Prob.*

Code § 1813].

The amounts of the bond and of the deposits in a blocked account are included in the order (Paragraph 20) [*Prob. Code § 2320 et seq.*; *see* Ch. 283, *Guardianship and Conservatorship: Bonds*]. The order also fixes the amount of attorney's fees and designates the payer (Paragraph 21) [*see Prob. Code § 2640 et seq.*]. Orders regarding the powers and duties of the conservator and the legal capacity of the conservatee are set out in attachments to the form (Paragraphs 20-29) [*Prob. Code §§ 1870 et seq., 2350 et seq., 2590 et seq.* (legal capacity of conservatee; powers and duties of conservator of the person; independent exercise of powers); *see* Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee* ; Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers*].

The appointment of a conservator, the taking of the conservator's oath, and the filing of the conservator's bond, if required, are thereafter evidenced by theissuance of letters by the clerk of the court [*Prob. Code § 2310(a)*]. The order appointing the conservator must state in capital letters on the first page of the order, in at least 12-point type, the following: "WARNING: THIS APPOINTMENT IS NOT EFFECTIVE UNTIL LETTERS HAVE ISSUED" [*Prob. Code § 2310(b)*].

[4] Order Appointing Limited Conservator

In the case of a limited conservatorship, any order the court makes must include the findings of the court specified in *Prob. Code § 1828.5*, regarding the extent of impairment and the limited conservatee's capacity to take care of himself or herself and his or her property [*Prob. Code § 1830(b)*].

The order must specify the powers granted to and duties imposed on the limited conservator (Paragraphs 31-33), and the powers and duties may not exceed the powers and duties applicable to a conservator under the Probate Code [*Prob. Code § 1830(b)*].

The order must also specify all of the following [*Prob. Code § 1830(b)*]:

- The properties belonging to the limited conservatee of which the limited conservator is entitled to possession and management, giving a description of the properties that will be sufficient to identify them.

- The debts, rentals, wages, or other claims due to the limited conservatee that the limited conservator is entitled to collect, or to file suit with respect to, if necessary, and to possess and manage.

- The contractual or other obligations that the limited conservator may incur on behalf of the limited conservatee.

- The claims against the limited conservatee that the limited conservator may pay, compromise, or defend, if necessary.

- Any other powers, limitations, or duties with respect to the care of the limited conservatee or the management of his or her property by the limited conservator that the court may specifically and expressly grant.

An information notice of the rights of the conservatee must be attached to the order.

The conservator must mail the order and the attached information notice to the conservatee and specified relatives of the conservatee within 30 days of the issuance of the order [*Prob. Code 1830(c)*; *see Prob. Code § 1821(b)* (relatives who must be notified) and discussion in *§ 281.100[3][c]*].

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24-281 California Forms of Pleading and Practice--Annotated § 281.107

§ 281.107 Order Denying Petition for Conservatorship

[1] FORM Order Denying Petition for Conservatorship

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Conservatorship *or* Limited Conservatorship] of the _____ [Person *or* Estate *or* Person and Estate] of _____ [*name*], Conservatee.	)))))))	NO. _____ ORDER

_____

The petition of_____[*name*] for appointment of _____ [himself/herself *or name*] as conservator of the _____ [person and estate *or* person *or* estate] of the above-named proposed conservatee [and the objection of _____ (*name*)] came on regularly for hearing by the court on this date. Petitioner appeared by counsel,_____[*name*] _____ [, and objector appeared by counsel, _____ (*name*)]._____[*Specify other appearance(s), if any.*]

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____ [, including special notice to _____ (*name*)].

2. The appointment of_____[*name*] as conservator of the _____ [person and estate *or* person *or* estate] of the proposed conservatee is not in the best interests of the proposed conservatee.

WHEREFORE IT IS ORDERED that the petition of_____[*name*] for appointment of _____ [himself/herself *or name*] as conservator of the _____ [person and estate *or* person *or* estate] of_____[*name*], is denied.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is an order denying the petition for conservatorship, after a hearing without a jury. For a form for a judgment on a jury verdict, which may be adapted for use in a conservatorship proceeding after a jury trial, see Ch. 318, *Judgments* .

[3] Statement of Decision

A statement of decision explaining the factual and legal basis for its decision on each of the principal controverted issues must be prepared by the court when a proper request is made. The request must specify those controverted issues for which the partyis requesting a statement of decision [*Code Civ. Proc. § 632*; *Prob. Code§§ 1000, 1002, 2100*; *Cal. Rules of Ct., Rule 3.1590*; *see Guardianship of Brown (1976) 16 Cal. 3d 326, 332, 128 Cal. Rptr. 10, 546 P.2d 298* (decided before 1981 amendment to *Code Civ. Proc. § 632*)]. For further discussion, see Ch. 529, *Statement of Decision* .

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24-281 California Forms of Pleading and Practice--Annotated § 281.108

§ 281.108 Petition for Transfer of Proceedings [Prob. Code § 2211]

[1] FORM Petition for Transfer of Proceedings

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Conservatorship *or* Limited Conservatorship] of the _____ [Person *or* Estate *or* Person and Estate] of _____ [*name*], Conservatee.	)))))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION TO TRANSFER PROCEEDINGS

Petitioner,_____[*name*], respectfully represents:

1. Petitioner is _____ [*specify, e.g.,* the duly appointed, qualified, and acting conservator of the _____ (person and estate *or* person *or* estate) of _____ (*name*), conservatee].

2. The conservatee resides at_____[*address*], California.

3. The character, value, and location of the property of the conservatee is as follows:_____[*description, value, and location of each item*].

4. Petitioner is petitioning to transfer this proceeding to the Superior Court of _____ County, California for the following reasons: _____ [*specify, e.g.,* the conservatee desires to move to _____ County to live with her son, and petitioner believes that it would be in the best interests of the conservatee for her to do that].

5. The names, residence addresses, and relationships of the spouse and all relatives within the second degree of the conservatee as far as known to petitioner are:_____[*name, relationship, and address of each person*].

6. A request for special notice has _____ [not been filed *or* been filed and waived by _____ (*name*) *or* been filed by _____ (*name*) and notice of the time and place of hearing on this petition will be given as required by law].

[7. The conservator of the _____ (person and estate *or* person *or* estate) of _____ (*name of conservatee*) is _____ (*name*), whose address is _____.]

WHEREFORE, petitioner prays that this proceeding be transferred to the Superior Court of _____ County, California, and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

Petitioner

_____ [*date*]

[*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I,_____[*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is for use in petitioning to have the conservatorship proceedings transferred to another county [*Prob. Code § 2211*].

[3] Contents of Petition

The petition for transfer should indicate that the petitioner has standing to petition (Paragraph 1) [*see Prob. Code § 2212* (who may petition for transfer)]. The petition must set forth all of the following [*Prob. Code § 2213*]:

- The county to which the proceeding is to be transferred (Paragraph 4).
- The name and address of the conservatee (Paragraph 2).
- A brief description of the character, value, and location of the property of the conservatee (Paragraph 3).
- The reasons for the transfer (Paragraph 4).
- The names and addresses, as far as they are known to the petitioner, of the spouse or domestic partner [as defined by *Prob. Code § 37*; *Fam. Code § 297 et seq.*], and relatives of the conservatee within the second degree (Paragraph 5).
- The name and address of the conservator, if other than the petitioner (Paragraph 7).

[4] Notice

Notice of the hearing on the petition for transfer must be given for the period and in the manner provided in *Prob. Code §§ 1460-1469*. For a discussion of notice provisions, see Ch. 284, *Guardianship and Conservatorship: Notice* . In addition, the petitioner is required to mail, at least 15 days before the date set for the hearing, a notice of the time and place of the hearing and a copy of the petition to all persons required to be listed in the petition [*Prob. Code § 2214*].

[5] Verification

The petition must be verified [*Prob. Code § 1021(a)*].

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24-281 California Forms of Pleading and Practice--Annotated § 281.109

§ 281.109 Objection to Transfer [Prob. Code § 2215]

[1] FORM Objection to Transfer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Conservatorship *or* Limited Conservatorship] of the _____ [Person *or* Estate *or* Person and Estate] of _____ [*name*], Conservatee.	)))))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] OBJECTION TO TRANSFER OF PROCEEDINGS

Objector,_____[*name*], respectfully represents:

1. Objector is _____ [*specify relationship, e.g.,* the spouse of the conservatee *or* a creditor of the conservatee *or* an interested person *or* the conservatee *or* the conservator].

2. Objector objects to the proposed transfer on the following grounds: _____ [*specify, e.g.,* the best interests of the conservatee require that he remain in this county, where his friends and relatives are and where he can be most adequately cared for].

WHEREFORE, objector prays that the petition for transfer be denied and for such other and further orders as the court may deem proper.

[*Signature and verification. See § 281.105.*]

[2] Use of Form

The form in [1], *above*, is for use in objecting to a petition for transfer of conservatorship proceedings to another county [*see § 281.108*].

[3] Who May Object

Any person required to be listed in the petition, any creditor of the conservatee or of the estate, or any other interested person may appear at the hearing to support or oppose the petition and may file written objections to the petition [*Prob. Code § 2215(a)*].

[4] Verification

The objection must be verified [Prob. Code § 1450].

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24-281 California Forms of Pleading and Practice--Annotated § 281.110

§ 281.110 Order Granting or Denying Petition for Transfer of Proceedings [Prob. Code § 2215]

[1] FORM Order Granting or Denying Petition for Transfer of Proceedings

[*Caption. See § 281.107.*]

The petition of_____[*name*] for transfer of conservatorship proceedings [and the objection of _____ (*name*)] came on regularly for hearing by the court on this date. Petitioner appeared by counsel,_____[*name*] _____ [, and objector appeared by counsel, _____ (*name*)]._____[*Specify other appearance(s), if any.*]

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____ [, including special notice to _____ (*name*)].

2. The proposed transfer _____ [is *or* is not] in the best interests of the proposed conservatee.

WHEREFORE IT IS ORDERED that _____ [all proceedings in the matter of the conservatorship of _____ (*name*) be forthwith transferred to the Superior Court of _____ County *or* the petition is denied].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use in disposing of a petition for transfer of conservatorship proceedings to another county [*see Prob. Code § 2211*; for the related form of petition, *see § 281.108*].

In most counties the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Best Interests Standard

If the court determines that the transfer requested in the petition will be in the best interests of the conservatee, the court is required to make an order transferring the proceeding to the other county [*Prob. Code § 2215(b)*].

[4] Transmittal of Order and Papers

If a transfer is ordered by the court, the clerk must transmit to the clerk of the court to which the proceeding is transferred a certified or exemplified copy of the order, together with all papers in the proceeding on file with the clerk [*Prob. Code § 2216(a)*].

[5] Fees

The clerk of the court from which the transfer is made may receive no fee for the transfer, but may be paid out of the estate all expenses incurred by the transfer. The clerk of the court to which the proceeding is transferred is entitled to the fees that are payable on the filing of an original proceeding [*Prob. Code § 2216(b)*].

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24-281 California Forms of Pleading and Practice--Annotated § 281.111

§ 281.111 Duties of Conservator and Acknowledgment of Receipt of Statement and Handbook for Conservators [Prob. Code § 1834(a)]--Judicial Council Form GC-348

[1] FORM Duties of Conservator and Acknowledgment of Receipt of Statement and Handbook for Conservators [Prob. Code § 1834(a)]--Judicial Council Form GC-348

Click here to view image.

[2] Use of Form--In General

The form in [1], *above*, is an illustrative reproduction of Cal. Judicial Council Form GC-348, for use in providing the conservator (other than a trust company or public conservator) with a summary statement of the duties of the conservator. It is also to be used by the conservator (other than a trust company or public conservator) to acknowledge receipt of the statement and of the Judicial Council's handbook for conservators [*Prob. Code § 1834(a), (b)*; *Cal. Rules of Ct., Rule 7.1051*].

Use of this form is mandatory [*Cal. Rules Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The statement contained in this form does not supersede the law on which it is based [*Prob. Code § 1834(c)*]. The handbook for conservators, available for purchase from local superior courts, is not an official Judicial Council form.

[3] Signature

Even though the signature lines on page 4 of this form are labeled for the petitioner, the statute requires the form to be signed by the proposed conservator [*Prob. Code § 1834(a), (b)*].

[4] Birth Date or Driver's License Numbers

If local rules require the acknowledgment of receipt to include the conservator's birth date and driver's license number, the court must ensure the confidentiality of this information [*Prob. Code § 1834(b)*].

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24-281 California Forms of Pleading and Practice--Annotated § 281.112

§ 281.112 Letters of Conservatorship [Prob. Code § 1834]--Judicial Council Form GC-350

[1] FORM Letters of Conservatorship [Prob. Code § 1834]--Judicial Council Form GC-350

Click here to view image.

[2] Use of Form

The form in [1], *above*, is reproduction of Cal. Judicial Council Form GC-350, letters of conservatorship.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*].

This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Before letters of conservatorship can be issued to a conservator other than a trust company or a public conservator, the conservator must file with the court an acknowledgment of receipt of the Judicial Council's duties-of-conservator form and handbook for conservators [*Prob. Code § 1834(a)*; for an illustration of the form, *see § 281.111*].

[3] Content of Letters

The oath (or affirmation [*Code Civ. Proc. § 2015.6*]) of the conservator must be attached to or endorsed on the letters of conservatorship [*Prob. Code § 2300(a)*]. If the conservator is granted any of the powers enumerated in *Prob. Code §§ 2590, 2591*, the letters of conservatorship must state the powers granted and the restrictions, conditions, or limitations, if any, and must refer to the statutory provisions under which the powers are granted (Paragraph 3b) [*Prob. Code § 2594(a)*]. When powers are granted by a subsequent order, new letters must be issued [*Prob. Code § 2594(b)*]. If powers are withdrawn, restricted, conditioned, or limited by a subsequent order after they are granted, new letters must be issued accordingly [*Prob. Code § 2594(c)*].

If an order has been made under *Prob. Code § 1880* giving the conservator the authority to give consent for and to

require the conservatee to receive medical treatment, the letters of conservatorship must state that the conservator has that authority (Paragraph 3a) [*Prob. Code § 1880*]. If authority has been granted under *Prob. Code § 2356.5(b)* to place the conservatee in a care or nursing facility, or under *Prob. Code § 2356.5(c)* to authorize the administration of medications appropriate for the care and treatment of dementia, the appropriate finding should be checked on the form (Paragraphs 3b, 3c). For discussion of the conservator's authority regarding medical treatment, see Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee* .

If conditions providing for the care and custody of the conservatee's property which are not otherwise obligatory have been inserted in the order of appointment, those conditions must be included in the letters of conservatorship (Paragraph 3e) [*Prob. Code § 2402*]. For discussion of conditions regarding care and custody ofthe conservatee's property, see Ch. 287, *Guardianship and Conservatorship: General Management Powers* . The letters must also include conditions relating to the care, treatment, education, and welfare of the conservatee which are not otherwise obligatory that have been inserted in the order of appointment (Paragraph 3f) [*Prob.Code § 2358*]. For discussion of conditions relating to care of the conservatee, see Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee* .

In the case of a limited conservatorship, powers granted to the limited conservator in the order of appointment must also be specified in the letters (Paragraphs 3g, 3h) [*Prob. Code §§ 1830(b), 2351.5*]. For discussion of the powers of limited conservators, see Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee* , and Ch. 287, *Guardianship and Conservatorship: General Management Powers* .

[4] Form of Letters

Unless otherwise required by the order of appointment, the letters must be in substantially the same form as letters of administration [*Prob. Code § 2311*].

[5] Recording of Letters

No later than 90 days after appointment, a conservator of the estate is required to record a certified copy of the letters with the county recorder's office in each county in which the conservatee owns an interest in real property, including a security interest [*see Prob. Code § 2313*].

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24-281 California Forms of Pleading and Practice--Annotated § 281.113

§ 281.113 Notice of Conservatee's Rights [Prob. Code § 1830]--Judicial Council Form GC-341

[1] FORM Notice of Conservatee's Rights [Prob. Code § 1830]--Judicial Council Form GC-341

Click here to view image.

[2] Use of Form

The form in [1] *above*, is a filled-in reproduction of Cal. Judicial Council Form GC-341, Notice of Conservatee's Rights. Effective January 1, 2008, when an order appointing a conservator is issued, the information notice of the rights of the conservatee (this form) must be attached to the order, and the conservator must mail the order and the information notice to the conservatee and the conservatee's relatives, as specified in *Prob. Code § 1821(b)* [*Prob. Code § 1830(c)*; *see § 281.100[3][c]* for the persons listed in *Prob. Code § 1821(b)*]. If additional space is necessary due to the number of parties to whom notice must be given, Judicial Council Form GC-341(MA)--Attachment to Notice of Conservatee's Rights, may be used to show additional names and address of each person to whom notice was mailed.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct. Rules 1.31, 7.101*].

This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Counsel Forms, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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24-281 California Forms of Pleading and Practice--Annotated § 281.114

§ 281.114 Ex Parte Order Authorizing Disclosure of (Proposed) Conservatee's Health Information to Court Investigator--HIPAA [Prob. Code §§ 1801, 1821, 1826]--Judicial Council Form GC-336

[1] FORM Ex Parte Order Authorizing Disclosure of (Proposed) Conservatee's Health Information to Court Investigator--HIPAA [Prob. Code §§ 1801, 1821, 1826]--Judicial Council Form GC-336

Click here to view image.

[2] Use of Form

The form in [1] *above*, is a reproduction of a Cal. Judicial Council Form GC-336, Ex Parte Order Authorizing Disclosure of (Proposed) Conservatee's Health Information to Court Investigator, in accordance with the federal Health Insurance Portability and Accountability Act of 1997 [Pub. L. 104-191]. It authorizes the conservatee's health care provider to disclose confidential medical information about the proposed conservatee to a court investigator in connection with conservatorship proceedings [*Prob. Code § 1826(r)*; *see Prob. Code §§ 1801, 1821*]. Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct Rules 1.31, 7.101*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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24-282 California Forms of Pleading and Practice--Annotated 282.syn

§ 282.syn Synopsis to Chapter 282: GUARDIANSHIP AND CONSERVATORSHIP: TEMPORARY GUARDIANS AND CONSERVATORS

§ 282.01 Scope of Chapter

§ 282.02 Cross References

§§ 282.03-282.09 [Reserved]

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§§ 282.11-282.19 [Reserved]

§ 282.20 Grounds for Temporary Appointment

[1] Pending Appointment of Guardian or Conservator

[2] Vacancy in Office of Guardian or Conservator

[3] Suspension of Guardian's or Conservator's Powers

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§ 282.21 Petition for Appointment

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§ 282.30 General Powers and Duties

§ 282.31 Sale of Conservatee's Property

[1] Conservatee's Residence

[2] Other Property of Conservatee

§ 282.32 Change of Conservatee's Residence

[1] Nonemergency Change of Residence

[a] Written Request

[b] Approval of Request

[c] Notice

[d] Court Investigation

[e] Attendance of Conservatee at Hearing

[f] Establishing Medical Inability to Attend

[g] Conservatee's Rights at Hearing

[2] Emergency Change of Residence

[a] Removal Permitted

[b] Written Request for Authorization

§ 282.33 Effect of Appointment on Capacity of Conservatee

§ 282.34 Visitation Orders Granted Before Filing of Petition

§ 282.35 Inventory and Appraisal

§ 282.36 Account

§ 282.37 Termination of Powers

§ 282.38 Suspension, Removal, Resignation, and Discharge

[1] Grounds for Removal

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§§ 282.39-282.49 [Reserved]

§ 282.50 Related Matthew Bender Publications

§ 282.51 State Statutes

§ 282.52 Local Court Rules

[1] Alameda County

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§ 282.55 Law Reviews

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§§ 282.57-282.69 [Reserved]

§ 282.70 Appointment of Temporary Guardian or Conservator

§§ 282.71-282.79 [Reserved]

§ 282.80 Petition for Appointment of Temporary Guardian [Prob. Code § 2250]--Judicial Council Form GC-110

[1] FORM

[2] Use of Form

[3] Contents of Petition

[a] Grounds for Appointment

[b] Bonds

[c] Additional Powers

[d] Other Orders

[e] Notice

[4] Verification

§ 282.80A Petition for Appointment of Temporary Guardian of Person [Prob. Code § 2250]--Alternative Form--Judicial Council Form GC-110(P)

[1] FORM

[2] Use of Form

§ 282.80B Petition for Appointment of Temporary Conservator [Prob. Code § 2250]--Judicial Council Form GC-111

[1] FORM

[2] Use of Form

[3] Contents of Petition

[a] Grounds for Appointment

[b] Bonds

[c] Additional Powers

[d] Change of Conservatee's Residence

[e] Other Orders

[f] Notice

[4] Verification

§ 282.81 Order Appointing Temporary Guardian [Prob. Code §§ 2250-2254]--Judicial Council Form GC-140

[1] FORM

[2] Use of Form

[3] Contents of Order

[a] Notice

[b] Termination of Appointment

§ 282.81A Order Appointing Temporary Conservator [Prob. Code §§ 2250-2254]--Judicial Council Form GC-141

[1] FORM

[2] Use of Form

[3] Contents of Order

[a] Notice

[b] Termination of Appointment

[c] Change of Conservatee's Residence

§ 282.82 Letters of Temporary Guardianship or Conservatorship [Prob. Code § 2251]--Judicial Council Form GC-150

[1] FORM

[2] Use of Form

[3] Issuance and Purpose of Letters

[4] Contents of Letters

§ 282.83 Ex Parte Application for Good Cause Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator and Declaration in Support of Ex Parte Application for Good Cause Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator [Prob. Code § 2250] --Judicial Council Forms GC-112, GC-112(A-1), and GC-112(A-2)

[1] FORM

[2] Use of Form

[3] Immediate and Substantial Harm

[4] Required Documentation

§ 282.84 Order on Ex Parte Application for Good Cause Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator [Prob. Code § 2250]--Judicial Council Form GC-115

[1] FORM

[2] Use of Form

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24-282 California Forms of Pleading and Practice--Annotated § 282.01

§ 282.01 Scope of Chapter

This chapter discusses proceedings involving temporary guardians and temporary conservators. The chapter contains the following forms:

- A petition for appointment of a temporary guardian or conservator [*see Prob. Code § 2250*] (Judicial Council Form GC-110) [*see § 282.80*].

- An order appointing a temporary guardian or conservator [*see Prob. Code § 2250*] (Judicial Council Form GC-140) [*see § 282.81*].

- Letters of temporary guardianship or conservatorship [*see Prob. Code § 2251*] (Judicial Council Form GC-150) [*see § 282.82*].

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24-282 California Forms of Pleading and Practice--Annotated § 282.02

§ 282.02 Cross References

- For discussion and forms pertaining to appointment of a guardian, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* .

For discussion and forms pertaining to appointment of a conservator, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* .

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[Reserved]

§§ 282.03[Reserved]

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A. Appointment

24-282 California Forms of Pleading and Practice--Annotated § 282.10

§ 282.10 Governing Statutes

The law governing temporary guardians and conservators is set forth in *Prob. Code §§ 2250-2258*.

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24-282 California Forms of Pleading and Practice--Annotated §§ 282.11-282.19

[Reserved]

§§ 282.11[Reserved]

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A. Appointment

24-282 California Forms of Pleading and Practice--Annotated § 282.20

§ 282.20 Grounds for Temporary Appointment

[1] Pending Appointment of Guardian or Conservator

The court may appoint a temporary guardian or conservator of the person, estate, or both, to serve pending the final determination on the petition for appointment of a guardian or conservator, on a petition stating facts establishing good cause for the appointment or on such other showing as the court may require [*Prob. Code § 2250(b)*].

What constitutes good cause depends largely on the circumstances of each case. It calls for a factual exposition of a reasonable ground for the order sought [*Conservatorship of Gray (1970) 12 Cal. App. 3d 513, 521, 90 Cal. Rptr. 776]* .

[2] Vacancy in Office of Guardian or Conservator

If for any reason a vacancy occurs in the office of guardian or conservator, the court, on a petition filed under *Prob. Code § 2250(a)* or on its own motion, may appoint a temporary guardian or conservator to exercise the powers of the office until a new guardian or conservator is appointed [*Prob. Code § 2250(i)*].

[3] Suspension of Guardian's or Conservator's Powers

Appointment of a temporary guardian or conservator when the court suspends the guardian's or conservator's powers under *Prob. Code § 2334* (relating to the sufficiency of the security) or *Prob. Code § 2654* (relating to removal of the guardian or conservator), or any other provision of *Prob. Code §§ 1400-3803*, appears to be discretionary with the court [*see Prob. Code § 2250(i)*]. The temporary guardian or conservator exercises the suspended powers until the powers are restored to the guardian or conservator or until a new guardian or conservator is appointed [*Prob. Code § 2250(i)*].

[4] Pending Appeal

Although an appeal generally stays the operation and effect of the order [*Prob. Code § 1310(a)*], the trial court, to

prevent injury or loss to a person or property, may appoint a temporary conservator or guardian or direct the exercise of the powers of the conservator or guardian notwithstanding the appeal [*Prob. Code § 1310(b)*].

All acts of the guardian or conservator under the court's directions are valid, irrespective of the results of the appeal [*Prob. Code § 1310(b)*].

An appeal does not stay the operation and effect of the judgment or order if the court requires an undertaking and the undertaking is not given, in any of the following cases [*Prob. Code § 1310(d)*; *see Code Civ. Proc. § 917.9*]:

- The appellant is found to possess money or other property of the respondent;
- The appellant is required to perform an act for the respondent's benefit; or
- The judgment against the appellant is solely for costs awarded under *Code Civ. Proc. § 1021 et seq.*

An appeal also does not stay the operation and effect of a judgment for money or an order directing payment of money, unless one of the following applies [*Prob. Code § 1310(e)*]:

- A bond is posted as provided in *Code Civ. Proc. § 917.1*; or
- The payment is to be made from a decedent's estate being administered under *Prob. Code § 7000 et seq.* or from the estate of a person who is subject to a guardianship or conservatorship of the estate under *Prob. Code § 1400 et seq.*

However, a court may require an undertaking as provided in *Prob. Code § 1310(d)*, discussed above [*Prob. Code § 1310(e)*].

If an order appointing a conservator or guardian is reversed on appeal for error, all acts of the conservator or guardian performed after the issuance of letters and before the reversal are as valid as if the order had been affirmed [*Prob. Code § 1311*].

Before a temporary guardian or conservator can be appointed, there must be an affirmative showing in the trial court of extraordinary circumstances involving potential injury or loss to the person or property of the ward or conservatee clearly requiring direction by the court for the sole purpose of avoiding that injury or loss [*Gold v. Superior Court (1970) 3 Cal. 3d 275, 281-285, 90 Cal. Rptr. 161, 475 P.2d 193* (construing former *Prob. Code § 2102*)].

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A. Appointment

24-282 California Forms of Pleading and Practice--Annotated § 282.21

§ 282.21 Petition for Appointment

A petition for the appointment of a temporary guardian or conservator [*see § 282.80*] may be filed on or after the filing of a petition for appointment of a guardian or conservator, and may be filed by any person entitled to petition for appointment of the guardian or conservator [*Prob. Code § 2250(a)*; *see §§ 280.60* (who may petition for appointment of guardian), 281.30 (who may petition for appointment of conservator)]. The petition must state facts that establish good cause for appointment of the temporary guardian or conservator [*Prob. Code § 2250(b)*]. If the petitioner is a private professional conservator under *Prob. Code § 2341* or licensed under the Professional Fiduciaries Act [*Bus. & Prof. Code § 6500 et seq.*], the petition must include a statement of the petitioner's registration or license information, and a statement explaining who engaged the petitioner or how the petitioner was engaged to file the petition and what prior relationship the petitioner had with the proposed conservatee or proposed conservatee's family or friends, unless that information is included in a petition for appointment of a general conservator filed at the same time [*Prob. Code § 2250(c)*]. If the petition is filed by a party other than the proposed conservatee, the petition must include a declaration of due diligence showing the efforts to find the proposed conservatee's relatives named in the petition or why it was not feasible to contact any of them, and the preferences of the proposed conservatee concerning the appointment of a temporary conservator and the appointment of the proposed temporary conservator, or why it was not feasible to ascertain those preferences [*Prob. Code § 2250(d)*].

The Judicial Council has approved separate forms for use in petitioning for appointment of a guardian [*see Ch. 280, Guardianship and Conservatorship: Appointment of Guardians, § 280.110*] or a conservator [*see Ch. 281, Guardianship and Conservatorship: Appointment of Conservators, § 281.100*] or a temporary guardian or conservator [*see § 282.80*].

In proceedings for the appointment of a temporary conservator for a person who is gravely disabled as a result of mental disorder or impairment by chronic alcoholism [*see Welf. & Inst. Code § 5350*], any person entitled to petition for appointment of the conservator may file a petition for appointment of a temporary conservator of the person or estate or both [*Prob. Code § 2250.2*], and the general provisions governing the petition [*see Prob. Code § 2250*], attendance of the conservatee at the hearing [*see Prob. Code § 2250.4*], and the duties of the court investigator [*see Prob. Code §*

2250.6], as discussed above and in § 282.23, do not apply [*Prob. Code § 2250.8*].

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§ 282.22 Notice of Proposed Appointment

Unless the court for good cause orders otherwise, not less than five days before the appointment of the temporary guardian or conservator, notice of the proposed appointment must be personally delivered to the proposed ward, if he or she is at least 12 years old, or conservatee, to the natural parent or parents if the proposed ward is a minor, and to any person having a valid visitation order with the proposed ward that was effective at the time of the filing of the petition. In a proceeding for temporary guardianship of the person, evidence that the custodial parent has died or become incapacitated and that the petitioner is the nominee of the custodial parent may constitute good cause for the court to order that notice not be given [*Prob. Code § 2250(e)*; *see also Cal. Rules of Court, Rules 7.1012, 7.1062, see* Ch. 284, *Guardianship and Conservatorship: Notice*]. If the proposed ward is under 12 years of age, a notice of hearing must not be delivered to the proposed ward [*Prob. Code § 2250(e)(1)*].

Notice of the hearing also must be personally delivered to the proposed conservatee, and served on the persons required to be named in the petition for appointment of conservator [*Prob. Code § 2250(e)(2)*]. If the petition states that the petitioner and the proposed conservatee have no prior relationship with the proposed conservatee and has not been nominated by a family member, friend or other person with a relationship to the proposed conservatee, notice of hearing must be served on the public guardian of the county in which the petition is filed [*Prob. Code § 2250(e)(2)*]. A copy of the petition for temporary guardianship must be served with the notice of hearing [*Prob. Code § 2250(e)(3)*].

A public guardian's practice of requesting a waiver of notice under *Prob. Code § 2250(c)* in all applications for temporary conservatorships was held to violate the potential conservatees' right to due process [*Edward W. v. Lamkins (2002) 99 Cal. App. 4th 516, 543-545, 122 Cal. Rptr. 2d 1]* . The appointment of a temporary conservator affects a conservatee's liberty, personal autonomy, and dignitary interests in receiving notice and an opportunity to be heard [*Edward W. v. Lamkins (2002) 99 Cal. App. 4th 516, 530, 533-535, 538-539, 122 Cal. Rptr. 2d 1]* . There is also a substantial risk of erroneous ex parte decisionmaking in the mental health context. When a temporary conservatorship is established without notice to the proposed conservatee, the court often will be acting on incomplete information, because the proposed conservatee is given no opportunity to present his or her side of the story [*Edward W. v. Lamkins (2002) 99 Cal. App. 4th 516, 535-536, 122 Cal. Rptr. 2d 1]* . Finally, the costs associated with providing notice

in most cases are generally minimal [*Edward W. v. Lamkins (2002) 99 Cal. App. 4th 516, 544, 122 Cal. Rptr. 2d 1]* . The notice requirement of *Prob. Code § 2250(c)* may be departed from only on a showing of good cause, *i.e.,* an individualized showing of exigent circumstances in a particular case; a blanket statement of reasons offered as a matter of routine policy does not constitute good cause [*Edward W. v. Lamkins (2002) 99 Cal. App. 4th 516, 541-545, 122 Cal. Rptr. 2d 1]* .

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§ 282.23 Hearing

If the temporary guardianship was granted ex parte, and the hearing on the general guardianship is not to be held within 30 days, the court must set a hearing within 30 days to reconsider the temporary guardianship, and give notice of the hearing for reconsideration as provided in *Prob. Code § 1511* [*Prob. Code § 2250(f)*]. For good cause, the court may shorten the time for notice of the hearing [*Prob. Code § 2250(f)*].

If a temporary conservatorship is granted ex parte, and a petition to terminate the temporary conservatorship is filed more than 15 days before the first hearing on the general petition for appointment of conservator, the court must set a hearing within 15 days of the filing of the petition for termination of the temporary conservatorship to reconsider the temporary conservatorship [*Prob. Code § 2250(h)*].

The court investigator must interview the proposed conservatee prior to the hearing for a temporary conservator, and complete an investigation prior to the hearing [*Prob. Code § 2250.6* (detailed investigation requirements)].

A proposed temporary conservatee must attend the hearing except in the following instances [*Prob. Code § 2250.4*]:

- The proposed temporary conservatee is out of state when served and is not the petitioner.
- The proposed temporary conservatee is unable to attend due to medical inability.
- The court investigator has visited the proposed conservatee and has reported to the court that the proposed temporary conservatee has expressly communicated that:
    - The proposed conservatee is not willing to attend the hearing;
    - The proposed conservatee does not wish to contest the establishment of the temporary conservator; and

- The proposed conservatee does not object to the proposed temporary conservator or prefer another person act as a temporary conservator.

- The court determines that the proposed conservatee is unable or unwilling to attend the hearing and holding the hearing without the proposed conservatee is necessary to protect the conservatee from substantial harm.

In proceedings for the appointment of a temporary conservator for a person who is gravely disabled as a result of mental disorder or impairment by chronic alcoholism [*see Welf. & Inst. Code § 5350*], the general provisions governing attendance of the conservatee at the hearing [*see Prob. Code § 2250.4*], and the duties of the court investigator [*see Prob. Code § 2250.6*], as discussed above, do not apply [*Prob. Code § 2250.8*].

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§ 282.24 Appellate Review

An order granting letters of temporary guardianship or conservatorship is not appealable [*Prob. Code § 1301(a)*]. Review of the appointment of a temporary guardian or conservator may, however, be possible by writ of mandamus or prohibition [*see 60 Ops. Cal. Att'y Gen. 382, 388 (1977)]* .

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[Reserved]

§§ 282.25[Reserved]

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§ 282.30 General Powers and Duties

A temporary guardian or conservator has only those powers and duties that are necessary to provide for the ward's or conservatee's temporary care, maintenance, and support, and that are necessary to conserve and protect the ward's or conservatee's property from loss or injury [*Prob. Code § 2252(a)*]. In appropriate cases, these powers may include the power to receive AFDC-FC benefits on behalf of the ward or conservatee, if he or she is in need of those benefits [*see Timmons v. McMahon (1991) 235 Cal. App. 3d 512, 515-517, 286 Cal. Rptr. 620]* .

Unless the court orders otherwise, a temporary guardian of the person has the medical treatment powers and duties specified in *Prob. Code § 2353*, and a temporary conservator of the person has the medical treatment powers and duties specified in *Prob. Code § 2354* [*Prob. Code § 2252(b)*; *see* Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee*].

The temporary guardian or conservator has such additional powers and duties as the court may provide in the order of appointment or by subsequent order [*Prob. Code § 2252(c)*]. The additional powers and relief may include relief granted under *Prob. Code §§ 2580-2586*, which authorize the court to permit or require the conservator to take action for certain purposes specified in *Prob. Code § 2580* [*Prob. Code § 2252(c)*]. However, any relief granted under those sections must be requested in a separate petition and not in the petition for appointment of the temporary conservator [*Prob. Code § 2252(c)*].

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§ 282.31 Sale of Conservatee's Property

[1] Conservatee's Residence

A temporary conservator is not permitted to sell or relinquish, on the conservatee's behalf, any lease or estate in real or personal property that is used as or within the conservatee's place of residence, without specific court approval. Approval is to be granted only if both of the following conditions have been met [*Prob. Code § 2252(e)*]:

- Notice of the hearing has been personally delivered to the conservatee, unless the court for good cause orders otherwise.

- The court finds that the conservatee will be unable to return to the residence and exercise dominion over it and that the sale or relinquishment is necessary to avert irreparable harm to the conservatee.

[2] Other Property of Conservatee

A temporary conservator is not permitted to sell or relinquish on the conservatee's behalf any estate or interest in other real or personal property without specific court approval, which may be granted only on a finding that the sale or relinquishment is necessary to avert irreparable harm to the conservatee. A finding of irreparable harm as to real property may be based on a reasonable showing that the real property is vacant, that it cannot reasonably be rented, and that it is impossible or impractical to obtain fire or liability insurance on the property [*Prob. Code § 2252(e)*].

Whether approval of a sale of the conservatee's property is sought in the petition for appointment of the temporary conservator, or in a separate request, the request must be verified [*Prob. Code §§ 1021(a), 1430*].

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§ 282.32 Change of Conservatee's Residence

[1] Nonemergency Change of Residence

[a] Written Request

If a temporary conservator of the person proposes to fix the residence of the conservatee at a place other than where the conservatee resided before the commencement of the proceedings, the power to do so must be requested of the court in writing, unless the change of residence is required by a prior court order. The request is to be filed with the petition for temporary conservatorship or, if a temporary conservatorship has already been established, separately [*Prob. Code § 2253(a)*]. The request must be verified [*Prob. Code §§ 1430*, 1450]. For a discussion of the information which must be included in the request and the findings the court must make to grant the request, see Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee* .

[b] Approval of Request

The court cannot approve a request to remove a conservatee from his or her place of residence unless the court finds that a change of residence is required to prevent irreparable harm to the conservatee and that no means less restrictive of the conservatee's liberty will suffice to prevent that harm. Moreover, the temporary conservator cannot be authorized to remove the conservatee from California unless it is additionally shown that the removal is required to permit the performance of specified nonpsychiatric medical treatment, consented to by the conservatee, which is essential to the conservatee's physical survival [*Prob. Code § 2253(g)*]. A temporary conservator who willfully removes the conservatee from California without court authorization is guilty of a felony [*Prob. Code § 2253(g)*].

[c] Notice

When the request to change the conservatee's residence is filed separately after the temporary conservatorship is established, counsel for the temporary conservator must at least give notice of the hearing to those persons who have filed requests for special notice of petitions filed in the temporary conservatorship proceedings under *Prob. Code §*

2700 [*Prob. Code § 2702*; *see Prob. Code § 2700(a), (b), (c)(1)*]. Further, *Prob. Code § 2253(a)* can be read to contain an implied general notice requirement for separate filing of the request. Under that reading, counsel should follow the notice requirements of *Prob. Code § 1460*, which governs the manner of giving notice when notice of a hearing is required but the applicable provision does not fix the manner of giving notice [*see Prob. Code § 1460*]. For further discussion of general and special notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[d] Court Investigation

Unless the court for good cause orders otherwise, the court investigator must do all of the following [*Prob. Code § 2253(b)*]:

- Interview the conservatee personally.

- Inform the conservatee of the nature, purpose, and effect of the request made under *Prob. Code § 2253(a)*, and of the right of the conservatee to oppose the request, to attend the hearing, to be represented by legal counsel if the conservatee so chooses, and to have legal counsel appointed by the court if he or she is unable to obtain legal counsel.

- Determine whether the conservatee is unable to attend the hearing because of medical inability and, if able to attend, whether the conservatee is willing to attend the hearing.

- Determine whether the conservatee wishes to oppose the request.

- Determine whether the conservatee wishes to be represented by legal counsel at the hearing and, if so, whether the conservatee has retained legal counsel, or, if not, the name of an attorney the proposed conservatee wishes to retain or whether the conservatee desires the court to appoint legal counsel.

- If the conservatee does not plan to retain legal counsel and has not requested the appointment of legal counsel by the court, determine whether the appointment of legal counsel would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee.

- Determine whether the proposed change of place of residence is required to prevent irreparable harm to the conservatee and whether no means less restrictive of the conservatee's liberty will suffice to prevent that harm.

- Report to the court in writing, at least two days before the hearing, concerning all of the foregoing, including the conservatee's express communications concerning representation by legal counsel and whether the conservatee is not willing to attend the hearing and does not wish to oppose the request.

For a form for an order appointing a court investigator, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* .

[e] Attendance of Conservatee at Hearing

The conservatee must be present at the hearing except in the following cases [*Prob. Code § 2253(d)*]:

- The conservatee is unable to attend the hearing by reason of medical inability. Emotional or psychological instability is not good cause for the absence of the conservatee from the hearing unless, if by reason of the instability, attendance at the hearing is likely to cause serious and immediate physiological damage to the conservatee.

- The court investigator has reported to the court that the conservatee has expressly communicated that the conservatee is not willing to attend the hearing and does not wish to oppose the request, and the court makes an order that the conservatee need not attend the hearing.

[f] Establishing Medical Inability to Attend

Medical inability to attend the hearing must be established in either of the following ways [*Prob. Code § 2253(e)*]:

- By the affidavit or certificate (or declaration [*Code Civ. Proc. § 2015.5*]) of a licensed medical practitioner.

- If the conservatee is an adherent of a religion whose tenets and practices call for reliance on prayer alone for healing and is being treated by an accredited practitioner of that religion: by the affidavit of the practitioner.

The affidavit or certificate is evidence only of the conservatee's inability to attend the hearing and may not be considered in determining the issue of need for the establishment of a conservatorship [*Prob. Code § 2253(e)*]. For a declaration of a medical or an accredited practitioner, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* .

[g] Conservatee's Rights at Hearing

At the hearing, the conservatee has the right to be represented by counsel and the right to confront and cross-examine any witness presented by or on behalf of the temporary conservator and to present evidence on his or her own behalf [*Prob. Code § 2253(f)*].

[2] Emergency Change of Residence

[a] Removal Permitted

Notwithstanding *Prob. Code § 2253* (requiring court authorization to change the residence of the conservatee), a temporary conservator may remove a conservatee from the conservatee's place of residence without court authorization if an emergency exists.

An emergency exists if the conservatee's place of residence is unfit for habitation. An emergency also exists if the temporary conservator determines in good faith based on medical advice that an emergency case exists in which removal from the place of residence is required to provide medical treatment needed to alleviate severe pain or to diagnose or treat a medical condition which, if not immediately diagnosed and treated, will lead to serious disability or death [*Prob. Code § 2254(a)*].

[b] Written Request for Authorization

No later than one judicial day after the emergency removal of the conservatee, the temporary conservator must file a written request pursuant to *Prob. Code § 2253* for authorization to fix the residence of the conservatee at a place other than the conservatee's previous place of residence [*Prob. Code § 2254(b)*].

Nothing in the Probate Code relating to temporary guardians and conservators (*Prob. Code §§ 2250-2258*) prevents a temporary conservator from removing a conservatee from the place of residence to a health facility for treatment without court authorization when the conservatee has given informed consent to the removal, or from removing a conservatee without court authorization from one health facility where the conservatee is receiving medical care to

another health facility where the conservatee will receive medical care [*Prob. Code § 2254(c), (d)*].

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§ 282.33 Effect of Appointment on Capacity of Conservatee

A temporary conservatorship deprives the conservatee of the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate [*see Prob. Code § 1872(a)*; *O'Brien v. Dudenhoeffer (1993) 16 Cal. App. 4th 327, 332, 19 Cal. Rptr. 2d 826]* . In one case, the court of appeal directed that judgment be entered voiding a gift transfer of real property by a person who was under a temporary conservatorship at the time [*O'Brien v. Dudenhoeffer (1993) 16 Cal. App. 4th 327, 335-336, 19 Cal. Rptr. 2d 826]* .

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§ 282.34 Visitation Orders Granted Before Filing of Petition

Visitation orders with the proposed ward that were granted before the filing of a petition for temporary guardianship remain in effect, unless the court for good cause orders otherwise [*Prob. Code § 2250(g)*].

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§ 282.35 Inventory and Appraisal

A temporary guardian or conservator of the estate may inventory the estate in the final account, without the necessity for an appraisal of the estate, if the final account is filed within 90 days after his or her appointment [*Prob. Code § 2255(b)*]. Otherwise, an inventory and appraisal of the estate must be filed by the temporary guardian or conservator of the estate as required by *Prob. Code §§ 2610-2616* relating to guardians and conservators generally [*Prob. Code § 2255(a)*].

For a further discussion and forms relating to inventory and appraisal, see Ch. 286, *Guardianship and Conservatorship: Inventory and Appraisal* .

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§ 282.36 Account

If the temporary guardian or conservator of the estate is appointed as guardian or conservator of the estate, he or she may account for the administration as temporary guardian or temporary conservator in the first regular account [*Prob. Code § 2256(b)*]. Otherwise, the temporary guardian or conservator must present an account to the court for settlement and allowance within 90 days after the appointment of a guardian or conservator of the estate or within such other time as the court may fix [*Prob. Code § 2256(a)*].

Accounts of temporary guardians and conservators are subject to *Prob. Code §§ 2621-2626, 2630-2633,* and *2640-2642* governing accounts generally, accounts on termination of the relationship of guardian and ward or conservator and conservatee, and compensation of guardians, conservators, and attorneys [*Prob. Code § 2256(c)*].

For a further discussion and forms relating to accounts, see Ch. 290E, *Accounts* .

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§ 282.37 Termination of Powers

Unless extended or shortened by court order as provided in *Prob. Code § 2257(b)*, the powers of a temporary guardian or conservator terminate (except for the rendering of the account) at the earlier of the following times [*Prob. Code § 2257(a)*]:

- The time the temporary guardian or conservator has notice that a guardian or conservator is appointed and qualified.

- Thirty days after the appointment of the temporary guardian or conservator or such earlier time as the court may specify in the order of appointment.

With or without notice as the court may require, the court for good cause may order that the time for the termination of the powers of the temporary guardian or conservator be extended pending final determination by the court of the petition for appointment of a guardian or conservator, or pending the final decision on appeal from that determination, or for other cause. The order that extends the time for termination must fix the time when the powers of the temporary guardian or conservator terminate except for the rendering of the account [*Prob. Code § 2257(b)*].

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§ 282.38 Suspension, Removal, Resignation, and Discharge

[1] Grounds for Removal

A temporary guardian or conservator is subject to the provisions governing the suspension, removal, resignation, and discharge of a guardian or conservator [*Prob. Code § 2258*]. The grounds for removal are [*Prob. Code § 2650*]:

- Failure to use ordinary care and diligence in the management of the estate.
- Failure to file an inventory or an account within the time allowed by law or by court order.
- Continued failure to perform duties or incapacity to perform duties suitably.
- Conviction of a felony, whether before or after appointment.
- Gross immorality.
- Having such an interest adverse to the faithful performance of duties that there is an unreasonable risk that the guardian or conservator will fail to perform duties faithfully.
- In the case of a guardian of the person or a conservator of the person, acting in violation of any provision concerning sterilization, or administration of experimental drugs or convulsive treatment [*see Prob. Code § 2356*].
- In the case of a guardian of the estate or a conservator of the estate, insolvency or bankruptcy of the guardian or conservator.

In any case, the court may in its discretion determine that removal is in the best interests of the ward or conservatee [

Prob. Code § 2650(i)].

For a discussion of removal generally, see Ch. 290G, *Guardianship and Conservatorship: Removal or Resignation of Guardian or Conservator* . For a discussion of suspension and removal in a proceeding to require a guardian or conservator to furnish further security [*see Prob. Code § 2334*], see Ch. 283, *Guardianship and Conservatorship: Bonds* .

[2] Appellate Review

An order revoking temporary letters of guardianship or conservatorship is not appealable [*Prob. Code § 1301(a)*].

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[Reserved]

§§ 282.39[Reserved]

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§ 282.50 Related Matthew Bender Publications

For discussion of guardianship, see California Family Law Practice and Procedure 2d ed., Ch. 34, *Establishing Guardianship*

For memoranda of points and authorities relating to the appointment of a guardian or conservator, see California Points And Authorities, Ch. 106, *Guardianship and Conservatorship*

For transactional forms relating to the nomination and appointment of a guardian or conservator, see California Legal Forms, Ch. 66, *Guardianships and Conservatorship Planning*

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§ 282.51 State Statutes

Order granting or revoking letters of temporary guardianship or conservatorship is not appealable. *Prob. Code § 1301(a)*

Appointment of temporary guardian or conservator. *Prob. Code § 2250*

Letters. *Prob. Code §§ 2251, 2252(d), 2311*

Powers and duties generally. *Prob. Code § 2252*

Power to consent to medical treatment. *Prob. Code §§ 2252(b), (d), 2353, 2354*

Sale of property. *Prob. Code § 2252(e)*

Change of conservatee's residence. *Prob. Code §§ 2253, 2354*

Inventory and appraisal. *Prob. Code § 2255*

Account. *Prob. Code § 2256*

Termination of powers of temporary guardian or conservator. *Prob. Code §§ 2257, 2258*

Issuance and form of letters. *Prob. Code §§ 2251, 2300-2312*

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§ 282.52 Local Court Rules

[1] Alameda County

Appointment of temporary conservator. Alameda Co. Super. Ct. Rules, Rule 12.15.4

[2] Contra Costa County

Appointment of temporary conservator. Contra Costa Co. Prob. Pol. Man., § 812

Temporary guardianships and conservatorships. Contra Costa Co. Prob. Pol. Man., § 822

[3] Los Angeles County

Bond for temporary conservators and temporary guardians. Los Angeles Co. Super. Ct. Rules, Rule 10.149

Appointment of temporary guardian. Los Angeles Co. Super. Ct. Rules, Rule 10.159

[4] Orange County

Appointment of temporary guardian. Orange Co. Super. Ct. Rules, Rules 610.02, 610.03

Appointment of temporary conservator. Orange Co. Super. Ct. Rules, Rule 611.02

[5] San Francisco

Temporary guardianships and conservatorships. San Francisco Uniform Local Ct. Rules, Rule 14.104

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§ 282.53 Decisions

Finding that conservatee resides in another county and transfer of proceeding to that county do not render appointment of temporary conservator null and void. *Conservatorship of Oliver (1962) 203 Cal. App. 2d 678, 683-684, 22 Cal. Rptr. 111*

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§ 282.54 Attorney General Opinions

Appointment of temporary conservator to consent to medical treatment of conservatee. *60 Ops. Cal. Att'y Gen. 382 (1977)*

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§ 282.55 Law Reviews

Friedman & Savage, *Taking Care: The Law of Conservatorship in California, 61 S. Cal. L. Rev. 273 (1988).*

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§ 282.56 Text References

Witkin, Summary of California Law, Vol. 12, *Wills and Probate*, §§ 901-903 (9th ed. 1990)

Marshall, California Probate Procedure, Vol. 1, Ch. 22, *Conservatorships*, § 2211 (4th ed.)

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[Reserved]

§§ 282.57[Reserved]

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24-282 California Forms of Pleading and Practice--Annotated § 282.70

§ 282.70 Appointment of Temporary Guardian or Conservator

☐ Prepare petition for appointment of temporary guardian or conservator and have it executed and verified by petitioner [*Prob. Code §§ 1021, 2250*]. Form: See *§ 282.80*.

☐ Prepare notice of hearing in form prescribed by Judicial Council [*Prob. Code § 1001(b)*; *see* Ch. 284, *Guardianship and Conservatorship: Notice*] and effect service on following person(s) [*Prob. Code § 2250(e)*]. Form: *see § 282.22*.

☐ For temporary conservatorship: on proposed conservatee.

☐ For temporary guardianship:

☐ On proposed ward if at least 12 years old.

☐ On natural parent or parents of proposed ward.

☐ On any person having valid visitation order with proposed ward.

☐ On public guardian of county in which petition is filed, if petition states that petitioner and proposed conservatee have no prior relationship with proposed conservatee and has not been nominated by a family member, friend or other person with a relationship to proposed conservatee [*Prob. Code § 2250(e)(2)*].

☐ File petition and have court execute and file order setting date for hearing and prescribing and/or dispensing with

notice [*see* Ch. 284, *Guardianship and Conservatorship: Notice*].

☐ Prepare order appointing temporary guardian or conservator. See *§ 282.81[1]*.

NOTE:
In most counties, the proposed order must be filed before the hearing.

☐ If requesting authority to move proposed conservatee from his or her place of residence, prepare attachment ordering temporary conservator to take all reasonable steps to preserve status quo concerning conservatee's place of residence [*Prob. Code § 2253(h)*].

☐ File proofs of service.

☐ Appear with petitioner and proposed ward or conservatee at hearing.

☐ Have order appointing temporary guardian or conservator executed by court.

☐ Mail copy of order appointing temporary conservator to conservatee; if ward is at least 12 years old, mail copy of order appointing temporary guardian to ward.

☐ File bond, if required [*see* Ch. 283, *Guardianship and Conservatorship: Bonds*], and prepare oath and letters of temporary guardianship or conservatorship for issuance by the clerk. See *§ 282.82[1]*.

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24-282 California Forms of Pleading and Practice--Annotated §§ 282.71-282.79

[Reserved]

§§ 282.71[Reserved]

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24-282 California Forms of Pleading and Practice--Annotated § 282.80

§ 282.80 Petition for Appointment of Temporary Guardian [Prob. Code § 2250]--Judicial Council Form GC-110

[1] FORM Petition for Appointment of Temporary Guardian or Conservator [Prob. Code § 2250]--Judicial Council Form GC-110

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative filled-in reproduction of Cal. Judicial Council Form GC-110, for use in petitioning for the appointment of a temporary guardian.

Use of the Judicial Council form is mandatory when the petitioner is seeking a temporary guardianship of the estate or of the person and estate [*see Cal. Rules of Ct., Rules 1.31, 7.101*; page 1 of form]. If the petitioner is seeking only a temporary guardianship of the person, either this form or Judicial Council Form GC-110(P) [*see § 282.80A*] may be used [*see* page 1 of form].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents of Petition

[a] Grounds for Appointment

To establish grounds for a temporary appointment, the petition calls for a statement that the temporary guardianship is required in one of the following situations (Paragraph 4):

- Pending the hearing on the petition for a general guardian [*Prob. Code § 2250(b)*].

- During the suspension of powers of the guardian [*Prob. Code § 2250(i)*].

- Pending an appeal [*Prob. Code § 1310(b)*].

The petition must state facts establishing good cause for the appointment of the temporary guardian [*Prob. Code § 2250(b)*]. To satisfy this requirement, the form adopts the language of *Prob. Code § 2252(a)* relating to the powers of a temporary guardian and calls for a statement of reasons why the ward or conservatee requires a temporary guardian or conservator with those powers (Paragraph 3).

For a discussion of *Prob. Code § 2252(a)* powers, see *§ 282.30*.

In addition, if for any reason a vacancy occurs in the office of guardian, the court, on a petition filed under *Prob. Code § 2250(a)* or on its own motion, may appoint a temporary guardian to exercise the guardian's or conservator's powers until a new guardian or conservator is appointed [*Prob. Code § 2250(i)*].

[b] Bonds

To indicate the manner in which bond requirements will be complied with, the form includes space to enter a request that bond not be required or that it be fixed in a specified amount (Paragraph 1c) [*see Prob. Code §§ 2320-2324*]. Data relating to estate assets is required for the computation of the bond (Paragraph 5). Space is also provided to request that deposits at a specified financial institution be allowed, a procedure that permits the court to reduce the amount of bond required (Paragraph 1c) [*see Prob. Code § 2328*].

For a discussion of bond requirements, see Ch. 283, *Guardianship and Conservatorship: Bonds* .

[c] Additional Powers

The court may order that the temporary guardian have additional powers, and the form includes a request for such additional powers (Paragraph 1e) [*Prob. Code § 2252(c)*; *see § 282.30*]. If the temporary guardian intends to pursue a particular course of action regarding the person or property of the proposed ward or conservatee, the express power to undertake such an action could be sought in Attachment 1e.

[d] Other Orders

A request for other orders, such as the following, may be included in the petition (Paragraph 1f):

- That the temporary guardian not have the power to consent to medical treatment for the ward [*Prob. Code § 2252(b)*; *see § 282.30*].

- That the powers of the temporary guardian will terminate in less than 30 days [*Prob. Code § 2257(a)(2)*; *see § 282.36*].

[e] Notice

The form includes space to request for an exception to notice of the hearing for good cause (Paragraph 1d) [*see § 282.83*]. Unless the court for good cause orders otherwise, not less than five days before the appointment of the temporary guardian, notice of the proposed appointment must be personally delivered to the proposed ward, if at least 12 years old, to the natural parent or parents if the proposed ward is a minor, and to any person having a valid visitation order with the proposed ward that was effective at the time of the filing of the petition [*Prob. Code § 2250(c)*; *see also Cal. Rules of Court, Rules 7.1012, 7.1062, see § 282.22*]. If the proposed ward is under 12 years of age, a notice of hearing must not be delivered to the proposed ward [*Prob. Code § 2250(e)(1)*].

A copy of the petition for guardianship must be serves with the notice of hearing [*Prob. Code § 2250(e)(3)*].

For forms relating to notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[4] Verification

The petition must be verified [*see Prob. Code § 1021(a)*; *Cal. Rules of Ct., Rule 7.103(b), (c)*].

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24-282 California Forms of Pleading and Practice--Annotated § 282.80A

§ 282.80A Petition for Appointment of Temporary Guardian of Person [Prob. Code § 2250]--Alternative Form--Judicial Council Form GC-110(P)

[1] FORM Petition for Appointment of Temporary Guardian or Conservator of Person [Prob. Code § 2250]--Alternative Form--Judicial Council Form GC-110(P)

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative filled-in reproduction of California Judicial Council Form GC-110(P), for use in petitioning for the appointment of a temporary guardian of the person. Either this form or Form GC-110 [*see § 282.80*] may be used to petition for the appointment of a guardian of the person a minor. Use of one or the other of these forms is mandatory [*see Cal. Rules of Court, Rules 1.31, 7.101*; page 1 of Form]. This form should not be used to petition for a temporary guardian of the estate or of the person and estate, or for a temporary conservator. Form GC-110 must be used in those cases [*see* page 1 of Form].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

For additional information on the use and content of this form, see *§ 282.80*.

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24-282 California Forms of Pleading and Practice--Annotated § 282.80B

§ 282.80B Petition for Appointment of Temporary Conservator [Prob. Code § 2250]--Judicial Council Form GC-111

[1] FORM Petition for Appointment of Temporary Conservator [Prob. Code § 2250]--Judicial Council Form GC-111

Click here to view image.

[2] Use of Form

The form in [1] *above*, is an illustrative filled-in reproduction of Cal. Judicial Council Form GC-111 for use in petitioning for the appointment of a temporary conservator.

Use of this Judicial Council form is mandatory [*see Cal. Rules of Ct., Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format is also available at *www.lexisone.com* at no charge.

[3] Contents of Petition

[a] Grounds for Appointment

To establish grounds for a temporary appointment, the petition calls for a statement that the temporary conservator is required in one of the following situations (Paragraph 4):

- Pending the hearing on the petition for general conservator [*Prob. Code § 2250(b)*].
- Pending an appeal [*Prob. Code § 1310(b)*].
- During the suspension of powers of the conservator [*Prob. Code § 2250(i)*].

The petition must state facts establishing good cause for the appointment of a temporary conservator [*Prob. Code § 2250 (b)*]. To satisfy this requirement, the form adopts the language of *Prob. Code § 2252(a)* relating to the powers of a temporary conservator and calls for a statement of reasons why the conservatee requires a temporary conservator with those powers (Paragraph 3). For a discussion of powers under *Prob. Code § 2252(a)*, see *§ 282.30*.

If the petitioner is a private professional conservator under *Prob. Code § 2341* or licensed under the Professional Fiduciaries Act [*Bus. & Prof. Code § 6500 et seq.*], the petition must include a statement of the petitioner's registration or license information, and a statement explaining who engaged the petitioner or how the petitioner was engaged to file the petition and what prior relationship the petitioner had with the proposed conservatee or proposed conservatee's family or friends, unless that information is included in a petition for appointment of a general conservator filed at the same time (Paragraph 7) [*Prob. Code § 2250(c)*]. If the petition is filed by a party other than the proposed conservatee, the petition must include a declaration of due diligence showing the efforts to find the proposed conservatee's relatives named in the petition or why it was not feasible to contact any of them, and the preferences of the proposed conservatee concerning the appointment of a temporary conservator and the appointment of the proposed temporary conservator, or why it was not feasible to ascertain those preferences (Paragraph 8) [*Prob. Code § 2250(d)*].

In addition, if for any reason a vacancy occurs in the office of conservator, the court, on a petition filed under *Prob. Code § 2250(a)* or on its own motion, may appoint a temporary conservator to exercise the guardian's or conservator's powers until a new guardian or conservator is appointed [*Prob. Code § 2250(i)*].

[b] Bonds

To indicate the manner in which bond requirements will be complied with, the form includes space to enter a request that bond not be required or that it be fixed in a specified amount (Paragraph 1c) [*see Prob. Code § 2320-2324*]. Data relating to estate assets is required for the computation of the bond (Paragraph 5). Space is also provided to request that deposits at a specified financial institution be allowed, a procedure that permits the court to reduce the amount of bond required (Paragraph 1c) [*see Prob. Code § 2328*].

For a discussion of bond requirements, see Ch. 283, *Guardianships and Conservatorships: Bonds* .

[c] Additional Powers

The court may order that the temporary conservator have additional powers, and the form includes a request for additional powers (Paragraph 1e) [*Prob. Code § 2252(c)*; *see § 282.30*]. If the temporary conservator intends to pursue a particular course of action regarding the person or property of the proposed conservatee, the express power to undertake such an action could be sought in Attachment 1e.

[d] Change of Conservatee's Residence

If a change of a conservatee's residence is requested, the petition must specify in particular the place to which the temporary conservator proposes to move the conservatee, the precise reasons why it is believed that the conservatee will suffer irreparable harm if the change of residence is not permitted, and why no means less restrictive of the conservatee's liberty will suffice to prevent that harm (Paragraph 6a) [*Prob. Code § 2253(a)*]. In addition, removal from California is limited to instances when it is necessary to permit the performance of specified nonpsychiatric medical treatment, consented to by the conservatee, which is essential to his or her physical survival (Paragraph 6b) [*Prob. Code § 2253(g)*].

For a further discussion of changing the conservatee's residence, see *§ 282.32*.

To show compliance with the requirement that the conservatee attend the hearing unless unable or unwilling to do so, the form includes statements relating to the attendance of the conservatee at the hearing and to the attachment of a medical affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) if he or she is unable to attend because of medical inability (Paragraph 6c) [*Prob. Code § 2253(d), (e)*; *see § 282.32[1][f]*. Space is also provided to call the court's attention to the fact that a proposed order appointing a court investigator is attached to the petition (Paragraph 6d) [*see Prob. Code § 2253(b)*; *see also Prob. Code § 1454* (qualifications of court investigator)].

For forms for a medical declaration and a proposed order appointing a court investigator, see Ch. 281 *Guardianship and Conservatorship: Appointment of Conservators* .

[e] Other Orders

A request for other orders, such as the following, may be included in the petition (Paragraph 1f):

- That the temporary conservator not have the power to consent to medical treatment for the ward or conservatee [*Prob. Code § 2252(b)*; *see § 282.30*].

- That the temporary conservator be allowed to sell or relinquish real or personal property on the conservatee's behalf [*Prob. Code § 2252(e)*; *see § 282.31*].

- That the powers of the temporary conservator will terminate in less than 30 days [*Prob. Code § 2257(a)(2)*; *see § 282.36*].

[f] Notice

The form includes space to request for an exception to notice of the hearing for good cause (Paragraph 1d) [*see § 282.83*]. Unless the court, for good cause, orders otherwise, not less than five days before the appointment of the temporary conservator, notice of the proposed appointment must be personally delivered to proposed conservatee [*Prob. Code § 2250(c)*]; *see also Cal. Rules Ct., Rules 7.1012, 7.1062, see § 282.22*].

Notice of the hearing also must be personally delivered to the proposed conservatee, and served on the persons required to be named in the petition for appointment of conservator [*Prob. Code § 2250(e)(2)*]. If the petition states that the petitioner and the proposed conservator have no prior relationship with the proposed conservatee and have not been nominated by a family member, friend, or other person with a relationship to the proposed conservatee, notice of hearing must be served on the public guardian of the county in which the petition is filed [*Prob. Code § 2250(e)(2)*].

A copy of the petition for guardianship must be serves with the notice of hearing [*Prob. Code § 2250(e)(3)*].

For forms relating to notice, see Ch. 284, Guardianship and Conservatorship: Notice.

[4] Verification

The petition must be verified [*see Prob. Code § 1021(a)*; *Cal. Rules Ct., Rule 7.103(b), (c)*].

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24-282 California Forms of Pleading and Practice--Annotated § 282.81

§ 282.81 Order Appointing Temporary Guardian [Prob. Code §§ 2250-2254]--Judicial Council Form GC-140

[1] FORM Order Appointing Temporary Guardian or Conservator [Prob. Code § 2250]--Judicial Council Form GC-140

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative filled-in reproduction of Cal. Judicial Council Form GC-140, for use in appointing a temporary guardian.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents of Order

[a] Notice

If it appears to the satisfaction of the court that notice has been regularly given or that notice was modified or dispensed with [*see §§ 282.83, 282.84*] (Paragraph 2), the court must so find in its order, and the order, when it becomes final is conclusive on all persons [*Prob. Code § 1260 (b), (c)*].

For further discussion of proof and findings relating to notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[b] Termination of Appointment

The court may order that the appointment terminate at any time less than 30 days from the time of appointment

(Paragraph 9) [*Prob. Code § 2257(a)*; *see § 282.36*].

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24-282 California Forms of Pleading and Practice--Annotated § 282.81A

§ 282.81A Order Appointing Temporary Conservator [Prob. Code §§ 2250-2254]--Judicial Council Form GC-141

[1] FORM Order Appointing Temporary Conservator [Prob. Code §§ 2250-2254]--Judicial Council Form GC-141

Click here to view image.

[2] Use of Form

The form in [1] *above*, is an illustrative filled-in reproduction of Cal. Judicial Council Form GC-141, for use in appointing a temporary conservator.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rule 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format is also available at *www.lexisone.com* at no charge.

[3] Contents of Order

[a] Notice

If it appears to the satisfaction of the court that notice has been regularly given or that notice was modified or dispensed with [*see §§ 282.83, 282.84*] (Paragraph 2) the court must so find in its order, and the order, when it becomes final is conclusive on all persons [*Prob. Code § 1260(b), (c)*].

For further discussion on proof and findings related to notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[b] Termination of Appointment

The court may order that the appointment terminate at any time less than 30 days from the date of the appointment

(Paragraph 14) [*Prob. Code § 2257(a)*; *see § 282.36*].

[c] Change of Conservatee's Residence

Findings that change of residence is required to prevent irreparable harm to the conservatee and that no means less restrictive of the conservatee's liberty will prevent irreparable harm are required in order for the court to approve a request to remove the conservatee from his or her place of residence (Paragraph 4) [*Prob. Code § 2253(g)*]. Moreover, before the temporary conservator can be authorized to remove the conservatee from California, it must be shown that the removal is required to permit the performance of specified nonpsychiatric medical treatment, consented to by the conservatee, which is essential to the conservatee's physical survival (Paragraph 5) [*Prob. Code § 2253(g)*].

The conservatee generally must attend the hearing on a change of residence, but need not attend if the court investigator has reported to the court that the conservatee has expressly communicated that the conservatee is not willing to attend the hearing and does not wish to oppose the request, and the court orders that the conservatee need not attend the hearing [*Prob. Code § 2253(d)*]. This forms includes both a finding (Paragraph 6) and an order (Paragraph 11) that the conservatee need not attend the hearing.

If the order authorizes a temporary conservator to remove the conservatee from his or her place of residence, the order must state the specific place where the temporary conservator is authorized to place the conservatee (Paragraphs 9, 10) [*Prob. Code § 2253(g)*].

In addition, subject to the power of the court to approve the sale of the conseravtee's residential property [*see Prob. Code § 2252(e)*; *see also § 282.31*], if the court approves a request to move the conservatee from his or her previous place of residence, it must order the temporary conservator to take all reasonable steps to preserve the status quo concerning the conservatee's previous place of residence [*Prob. Code § 2253(h)*]. This order is not printed on the form, and it is suggested that it can be specified in Attachment 12 (Paragraph 12).

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24-282 California Forms of Pleading and Practice--Annotated § 282.82

§ 282.82 Letters of Temporary Guardianship or Conservatorship [Prob. Code § 2251]--Judicial Council Form GC-150

[1] FORM Letters of Temporary Guardianship or Conservatorship [Prob. Code § 2251]--Judicial Council Form GC-150

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of Cal. Judicial Council Form GC-150, letters of temporary guardianship or conservatorship.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Issuance and Purpose of Letters

Before the appointment of a temporary guardian or conservator is effective, he or she must take an oath (or affirmation [*Code Civ. Proc. § 2015.6*]) to perform the duties of the office according to law and file the bond, if bond is required. The appointment, taking of the oath, and filing of any required bond are thereafter evidenced by the issuance of letters by the clerk [*Prob. Code §§ 2251, 2300, 2310*].

[4] Contents of Letters

The oath (or affirmation [*Code Civ. Proc. § 2015.6*]) must be attached to or endorsed on the letters [*Prob. Code §§ 2251, 2300*]. The letters must indicate the termination date of the temporary appointment (Paragraph 3) [*Prob. Code §*

2251].

The letters must also include the terms of any order restricting the temporary guardian's or conservator's power relating to medical treatment of the ward or conservatee under *Prob. Code § 2252(b)* or granting such additional powers and duties as the court may order in the order of appointment or in a subsequent order under *Prob. Code § 2252(c)* [*Prob. Code § 2252(d)*; *see § 282.30*].

The seal of the court must be affixed to the letters [*Code Civ. Proc. § 153*; *Prob. Code §§ 2251, 2311, 8405*].

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24-282 California Forms of Pleading and Practice--Annotated § 282.83

§ 282.83 Ex Parte Application for Good Cause Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator and Declaration in Support of Ex Parte Application for Good Cause Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator [Prob. Code § 2250] --Judicial Council Forms GC-112, GC-112(A-1), and GC-112(A-2)

[1] FORM Ex Parte Application for Good Cause Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator and Declaration in Support of Ex Parte Application for Good Cause Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator [Prob. Code § 2250] --Judicial Council Forms GC-112, GC-112(A-1), and GC-112(A-2)

Click here to view image.

Click here to view image.

Click here to view image.

[2] Use of Form

The forms in [1] *above*, are illustrative reproductions of Cal. Judicial Council Forms GC-112, GC-112(A-1), and GC-112(A-2), for use in an ex parte application for good cause exception for a notice of hearing on a petition for appointment of a temporary conservator.

Use of this Judicial Council form is optional [*see Cal. Rules Ct., Rule 1.35*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format is also available at *www.lexisone.com* at no charge.

[3] Immediate and Substantial Harm

Good cause for an exception to the notice required by *Prob. Code § 2250(e)* must be based on a showing that the

exception is necessary to protect the proposed conservatee or his or her estate from immediate and substantial harm (Paragraph 2) [*Cal. Rules Ct., Rule 7.1062*].

[4] Required Documentation

The ex parte application must also be accompanied by the Applicant's Petition for Appointment of Temporary Conservator [*see § 282.80B*], supporting declarations, and proposed order [*see § 282.84, see also Cal. Rules Ct., Rule 7.1062*] (Paragraph 6).

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Chapter 282 GUARDIANSHIP AND CONSERVATORSHIP: TEMPORARY GUARDIANS AND CONSERVATORS
PART V. FORMS

24-282 California Forms of Pleading and Practice--Annotated § 282.84

§ 282.84 Order on Ex Parte Application for Good Cause Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator [Prob. Code § 2250]--Judicial Council Form GC-115

[1] FORM Order on Ex Parte Application for Good Cause Exception to Notice of Hearing on Petition for Appointment of Temporary Conservator [Prob. Code § 2250]--Judicial Council Form GC-115

Click here to view image.

[2] Use of Form

The form in [1] *above*, is an illustrative reproduction of Cal. Judicial Council Form GC-115 for use as an order in an ex parte application for good cause exception for notice of hearing on petition for appointment of a temporary conservator.

Use of this Judicial Council form is optional [*see Cal. Rules Ct., Rule 1.35*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format is also available at *www.lexisone.com* at no charge.

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24-283 California Forms of Pleading and Practice--Annotated 283.syn

§ 283.syn Synopsis to Chapter 283: GUARDIANSHIP AND CONSERVATORSHIP: BONDS

§ 283.01 Scope of Chapter

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§§ 283.03-283.09 [Reserved]

§ 283.10 Governing Statutes

§ 283.11 Definitions

[1] Admitted Surety Insurer

[2] Surety

§§ 283.12-283.19 [Reserved]

§ 283.20 Bond Required Unless Exception Applies

[1] Guardian or Conservator of the Estate

[2] Guardian or Conservator of the Person

[3] Deposit in Lieu of Bond

§ 283.21 Bonds of Joint Guardians or Conservators

§ 283.22 Waiver of Bond

[1] Conservator

[2] Guardian

§ 283.23 Dispensing With Bond for Small Estate

§ 283.24 Contents of Bond

[1] In General

[2] Declaration of Personal Surety

§§ 283.25-283.29 [Reserved]

§ 283.30 Determination of Amount

[1] Bond of Admitted Surety Insurer

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§ 283.31 Sureties

[1] Number of Sureties

[2] Substitution and Discharge of Surety

[3] Liability of Surety

[a] Nature and Extent

[b] Statute of Limitations

[c] Accounting Prerequisite to Action Against Surety

§ 283.32 Bond Reduction by Deposit in Blocked Account

[1] Effect on Amount of Bond

[2] Establishing Blocked Account

[3] Filing of Receipt

§§ 283.33-283.39 [Reserved]

§ 283.40 Application to Reduce Bond

§ 283.41 Additional Bond for Real Property Sale or Mortgage

§ 283.42 Motion for Further Security

§ 283.43 Ex Parte Application to Increase Bond

§§ 283.44-283.49 [Reserved]

§ 283.50 Related Matthew Bender Publications

§ 283.51 State Statutes

[1] Bond

[2] Objections

[3] Reduction or Increase in Bond

[4] Sureties

§ 283.52 Local Court Rules

[1] Alameda County

[2] Contra Costa County

[3] Los Angeles County

[4] Orange County

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[6] San Diego County

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§ 283.53 Decisions

[1] Amount of Bond

[2] Liability of Surety

§ 283.54 Text References

§§ 283.55-283.59 [Reserved]

§ 283.60 Obtaining Original Bond for Guardian or Conservator

[1] Facts to Be Ascertained

[2] Preliminary Determinations

[a] Use of Blocked Accounts

[b] Obtaining Bond

§ 283.61 Proceedings to Reduce or Increase Bond

[1] Papers to Draft

[2] Proceedings

§§ 283.62-283.69 [Reserved]

§ 283.70 Notice of Motion to Reduce Bond [Code Civ. Proc. § 996.030; Prob. Code §§ 2328, 2329]

[1] FORM

[2] Use of Form

[3] Reduction of Bond

[4] Notice

§ 283.71 Declaration Supporting Motion to Reduce Bond [Code Civ. Proc. §§ 996.030; Prob. Code §§ 2328, 2329]

[1] FORM

[2] Use of Form

§ 283.72 Order Reducing Bond [Prob. Code §§ 2328, 2329]

[1] FORM

[2] Use of Form

§ 283.73 Receipt for Property Deposited [Prob. Code § 2328]

[1] FORM

[2] Use of Form

§ 283.74 Notice of Motion to Require Further Security [Code Civ. Proc. § 996.010; Prob. Code § 2334]

[1] FORM

[2] Use of Form

§ 283.75 Declaration Supporting Motion to Require Further Security [Code Civ. Proc. §§ 996.010, 2015.5; Prob. Code § 2334]

[1] FORM

[2] Use of Form

§ 283.76 Order Requiring Further Security [Prob. Code § 2334]

[1] FORM

[2] Use of Form

[3] Time Allowed for Furnishing of Further Security

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24-283 California Forms of Pleading and Practice--Annotated § 283.01

§ 283.01 Scope of Chapter

This chapter discusses bonds of guardians and conservators. The chapter contains the following forms:

- A notice of motion to reduce the amount of the bond [*see § 283.70*], with a supporting declaration setting forth the condition of the estate [*see § 283.71*], and an order reducing the bond [*see § 283.72*].

- A receipt for property deposited, to reduce the amount of the bond [*see § 283.73*].

- A notice of motion to require further security [*see § 283.74*], with a supporting declaration [*see § 283.75*], and an order requiring further security [*see § 283.76*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewFamily LawGuardiansGeneral Overview

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24-283 California Forms of Pleading and Practice--Annotated § 283.02

§ 283.02 Cross References

For discussion and forms pertaining to actions against guardians and conservators, see Ch. 290D, *Guardianship and Conservatorship: Action Against Guardian or Conservator* .

For discussion and forms pertaining to memoranda of points and authorities, see Ch. 417, *Points and Authorities* .

For related forms involving bonds in probate proceedings, see Ch. 446, *Probate: Bonds--Increase and Decrease During Administration* .

For a discussion of the sufficiency of personal sureties and admitted surety insurers, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-283 California Forms of Pleading and Practice--Annotated §§ 283.03-283.09

[Reserved]

§§ 283.03[Reserved]

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24-283 California Forms of Pleading and Practice--Annotated § 283.10

§ 283.10 Governing Statutes

The law governing bonds of guardians and conservators is found in *Prob. Code § 2320 et seq.* The Bond and Undertaking Law, which governs bonds and undertakings in civil matters generally, applies to guardianship and conservatorship bonds [*Prob. Code § 2320(e)*]. The Bond and Undertaking Law is codified in *Code Civ. Proc. § 995.010 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-283 California Forms of Pleading and Practice--Annotated § 283.11

§ 283.11 Definitions

[1] Admitted Surety Insurer

An "admitted surety insurer" is a corporate insurer or a reciprocal or interinsurance exchange to which the Insurance Commissioner has issued a certificate of authority to transact surety insurance in California [*Code Civ. Proc. § 995.120(a)*; *see Ins. Code § 105* (surety insurance)]. An admitted surety insurer must be accepted as surety on a bond without further acknowledgment if the bond is executed in the name of the surety insurer under penalty of perjury or the fact of execution of the bond is duly acknowledged before an officer authorized to take and certify acknowledgments, and either one of the following conditions, at the option of the surety insurer, is satisfied [*Code Civ. Proc. § 995.630*]:

- A copy of the transcript or record of the unrevoked appointment, power of attorney, bylaws, or other instrument, duly certified by the proper authority and attested by the seal of the insurer entitling or authorizing the person who executed the bond to do so for and in behalf of the insurer, is filed in the office of the clerk of the county in which the court or officer is located.

- A copy of a power of attorney is attached to the bond.

[2] Surety

Anyone promising to answer for the debt, default, or miscarriage of another, or hypothecating property as security for such a promise, is a "surety" [*Civ. Code § 2787*; *Code Civ. Proc. § 995.185(a)*]. A surety includes a personal surety and an admitted surety insurer [*Code Civ. Proc. § 995.185(a)*]. A corporation cannot be accepted or approved as surety on a bond unless specified conditions are met [*Cal. Rules of Court, Rule 3.1130*; *see* Ch. 538, *Suretyship, Bonds, and Undertakings*].

Legal Topics:

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

§§ 283.12[Reserved]

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24-283 California Forms of Pleading and Practice--Annotated § 283.20

§ 283.20 Bond Required Unless Exception Applies

[1] Guardian or Conservator of the Estate

Before the appointment of a guardian or conservator is effective and letters are issued, the guardian or conservator must file a bond if a bond is required [*Prob. Code §§ 2300(b), 2320(a)*]. Except in special cases [*see Ch. 282, Guardianship and Conservatorship: Temporary Guardians and Conservators, §§ 282.22, 282.23*], a bond is required, and the guardian or conservator must give a bond approved by the court [*Prob. Code § 2320(a)*]. The bond is for the benefit of the ward or conservatee and all persons interested in the guardianship or conservatorship estate, and must be conditioned on the faithful execution of the guardian's or conservator's duties according to law [*Prob. Code § 2320(b)*]. In case of a breach of a condition of the bond, an action may be brought against the sureties on the bond for the use and benefit of the ward or conservatee or of any person interested in the estate [*Prob. Code § 2333(a)*]. Every bond given by a guardian or conservator must be filed and preserved in the office of the court clerk [*Code Civ. Proc § 995.340*; *see Prob. Code § 2320(e)*].

If the guardian or conservator is a nonprofit corporation, the surety on the bond must be an admitted surety insurer [*Prob. Code § 2325*; *see Prob. Code § 2104*; *see also Code Civ. Proc. § 995.120(a)*].

[2] Guardian or Conservator of the Person

One appointed as guardian or conservator of the person need not file a bond, unless required to do so by the court [*Prob. Code § 2322*].

[3] Deposit in Lieu of Bond

As an alternative to filing the required surety bond, the guardian or conservator may file any of the following with the court clerk [*see Code Civ. Proc. § 995.710(a)*; *see also Code Civ. Proc. § 995.160*]:

- Lawful money of the United States.

- Bearer bonds or bearer notes of the United States or the State of California.
- Certificates of deposit issued by banks or savings and loan associations.
- Savings accounts, assigned to the court clerk, with evidence of deposit.
- Investment certificates or share accounts assigned to the court clerk.
- Certificates for funds or share accounts assigned to the court clerk.

The deposit must be in an amount or have a face value equal to, or in excess of, the amount that would be required to be secured by the bond if the bond were given by an admitted surety insurer. Bearer bonds or notes must have a market value equal to, or in excess of, this amount [*Code Civ. Proc. § 995.710(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-283 California Forms of Pleading and Practice--Annotated § 283.21

§ 283.21 Bonds of Joint Guardians or Conservators

If joint guardians or conservators are appointed, the court may order that separate bonds or a joint bond or a combination be furnished [*Prob. Code § 2326(a)*]. If a joint bond is furnished, the liability on the bond is joint and several [*Prob. Code § 2326(b)*]. If the proceeding involves more than one ward, the court may order separate bonds or a single bond or a combination [*Prob. Code § 2327(b)*]. If the proceeding involves more than one conservatee, the court must order a separate bond for each conservatee. However, if the assets of the conservatees are commingled, the court may provide a combined bond that covers all of the assets [*Prob. Code § 2327(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-283 California Forms of Pleading and Practice--Annotated § 283.22

§ 283.22 Waiver of Bond

[1] Conservator

The court in a conservatorship proceeding may not waive the filing of a bond, or reduce the amout of the bond, without good cause. Good cause may not be established merely by the conservator having filed a bond in another or prior proceeding [*Prob. Code § 2321(a)*]. Good cause must include a determination by the court that the conservatee will not suffer harm as a result of the waiver or reduction of the bond [*Prob. Code § 2321(a)*].

If the conservatee, having sufficient capacity to do so, has waived the filing of a bond, the court in its discretion may permit the filing of a bond in an amount less than would otherwise be required [*Prob. Code § 2321*; *see Prob. Code § 2320*].

[2] Guardian

If the person making the nomination has waived the filing of a bond, a guardiannominated under *Prob. Code § 1500* (nomination by parent) or *Prob. Code § 1501* (nomination by person from whom minor receives property) need not file a bond unless required to do so by the court [*Prob. Code § 2324*]. For discussion of nomination of guardians, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-283 California Forms of Pleading and Practice--Annotated § 283.23

§ 283.23 Dispensing With Bond for Small Estate

The court may dispense with the requirement of a bond if it appears likely that, for the duration of the guardianship or conservatorship, the estate will satisfy the conditions of *Prob. Code § 2628(a)* governing small estates [*Prob. Code § 2323(a)*]. However, if it appears at any time that the estate does not satisfy the conditions of *Prob. Code § 2628(a)*, the court may require the filing of a bond [*Prob. Code § 2323(a)*].

To qualify as a small estate, all of the following conditions must be satisfied [*Prob. Code § 2628(a)*]:

- At the beginning and end of a period for which an account is otherwise required, the estate must consist of property of a total net value of less than $15,000.

- The income of the estate for each month of the accounting period, exclusive of public benefit payments must have been less than $2,000.

- All income of the estate during the accounting period, if not retained, must have been spent for the benefit of the ward or conservatee.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 283.24 Contents of Bond

[1] In General

The bond must be written, signed by the sureties under oath, and must include all of the following [*Code Civ. Proc. § 995.320(a)*]:

- A statement that the sureties are jointly and severally liable on the obligations of the statute providing for the bond.

- The address at which the principal and sureties may be served with notices, papers, and other documents under this chapter.

- If the amount of the bond is based on the value of property or an interest in property, a description of the property or interest, and the principal's estimate of the value of the property or interest or, if given pursuant to the estimate of the beneficiary or court, the value as so estimated.

[2] Declaration of Personal Surety

A bond executed by personal sureties must be accompanied by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of qualifications of each surety [*Code Civ. Proc. § 995.520(a)*]. The affidavit must contain all of the following information [*Code Civ. Proc. § 995.520(b)*]:

- The name, occupation, residence address, and business address (if any) of the surety.

- A statement that the surety is a resident, and either an owner of real property or householder, within the state.

- A statement that the surety is worth the amount of the bond in real or personal property, or both, situated in California, over and above all debts and liabilities, exclusive of property exempt from

enforcement of a money judgment.

If the amount of the bond exceeds $5,000, the affidavit must contain additional information concerning the property of the surety and its value and title [*Code Civ. Proc. § 995.520(c)*]. For a discussion of the sufficiency of personal sureties, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-283 California Forms of Pleading and Practice--Annotated §§ 283.25-283.29

[Reserved]

§§ 283.25[Reserved]

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24-283 California Forms of Pleading and Practice--Annotated § 283.30

§ 283.30 Determination of Amount

[1] Bond of Admitted Surety Insurer

Unless the court increases or decreases the amount on a showing of good cause, the amount of a bond given by an admitted surety insurer [*see Code Civ. Proc. § 995.120*; *see also § 283.11*], must be the sum of the following [*Prob. Code § 2320(c)*]:

- The value of the personal property of the estate,
- The probable annual gross income of all of the property of the estate, and
- The sum of the probable annual gross payments from:
  - State public assistance [*Welf. & Inst. Code § 11000 et seq.*], state services for the care of children [*Welf. & Inst. Code § 16000 et seq.*], or county aid and relief to indigents [*Welf. & Inst. Code § 17000 et seq.*].
  - Federal supplemental security income for the aged, blind, or disabled [*42 U.S.C. §§ 1382-1382g*].
  - Any other public entitlements of the ward or conservatee.

- Unless otherwise provided by statute, every conservator or guardian of the estate must furnish a bond that includes a reasonable amount for the cost of recovery to collect on the bond under *Prob. Code § 2320 (c)(4)* [*Cal. Rule Ct., Rule 7.207*]. The attorney's fees and costs incurred in a successful action for surcharge against a conservator or guardian for breach of his or her duties will be a surcharge against the conservator or guardian and, if unpaid, will be recovered against the surety on the bond [*Prob. Code § 2320(c)(4)*; *see also Cal. Rule Ct., Rule 7.207*].

[2] Bond of Personal Surety

If the bond is given by a personal surety, the amount of the bond must be twice the amount required for a bond given by an admitted surety insurer [*Prob. Code § 2320(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-283 California Forms of Pleading and Practice--Annotated § 283.31

§ 283.31 Sureties

[1] Number of Sureties

The bond must be executed by two or more sufficient personal sureties, by one sufficient admitted surety insurer, or by any combination of sufficient personal sureties and admitted surety insurers [*Code Civ. Proc. § 995.310*; *see Code Civ. Proc. § 995.610(a)* (one sufficient admitted surety insurer may be sole surety on bond)].

If the amount of the bond exceeds $10,000, and the bond is executed by more than two personal sureties, the worth of a personal surety may be less than the amount of the bond as long as the aggregate worth of all sureties executing the bond is twice the amount of the bond [*Code Civ. Proc. § 995.510(b)*].

For discussion of the sufficiency of personal sureties and admitted surety insurers, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[2] Substitution and Discharge of Surety

A surety on a bond may apply to the court at any time for an order that the surety be released from liability on the bond [*Code Civ. Proc. § 996.110(a)*]. If the surety applies for release from liability on a bond, the conservator or guardian may apply to the court for an order that another surety be substituted for the original surety [*see Code Civ. Proc. § 996.110(b)*]. An account must be filed with the application. The court may not order a substitution of sureties unless the account is approved [*Prob. Code § 2335*].

On hearing the application, the court must determine whether the injury to the estate of the conservatee would result from the substitution or release of the surety. If the court determines that the release would not reduce the amount of the bond [*see § 283.30*] or the number of sureties [*see* [1], *above*] below the minimum required, substitution of a sufficient surety is not required, and the court must order the release of the surety. If the court determines that no injury would result from the substitution of the surety, the court must order the substitution of a sufficient surety within such time as appears reasonable [*see Code Civ. Proc. § 996.120*].

For forms for use in applying for release from liability, see *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.40* et seq.

[3] Liability of Surety

[a] Nature and Extent

The bond of a guardian or conservator is conditioned on the faithful execution of the duties of the office according to law [*Prob. Code § 2320*]. If there is a breach of a condition of the bond of a guardian or conservator, an action may be brought against the sureties on the bond for the use and benefit of the ward or conservatee or of any person interested in the estate [*Prob. Code § 2333(a)*].

The surety is liable only for injury done to the estate by the guardian or conservator while performing an act in his or her official capacity. The surety is not liable for the guardian's or conservator's personal acts or schemes [*see Hornaday v. Hornaday (1949) 95 Cal. App. 2d 384, 396-397, 213 P.2d 91]* .

The sureties signing the bond are jointly and severally liable on the obligations of the bond [*Code Civ. Proc. § 995.320(b)*]. If two or more admitted surety insurers are sureties on a bond by having executed the same or separate bonds for amounts aggregating the required amount of the bond, each admitted surety insurer is jointly and severally liable to the extent of the amount of the liability assumed by it [*Code Civ. Proc. § 995.620*].

[b] Statute of Limitations

No action may be maintained against the sureties on the bond unless commenced within four years from the discharge or removal of the guardian or conservator or within four years from the date the order surcharging the guardian or conservator becomes final, whichever is later [*Prob. Code § 2333(b)*].

When a judgment or order in a guardianship or conservatorship proceeding becomes final, it releases the sureties from all claims of the ward or conservatee based on an act or omission directly authorized, approved, or confirmed in the judgment or order [*Prob. Code § 2103(a)*]. This rule does not apply when the judgment or order is obtained by fraud, conspiracy, or misrepresentation [*Prob. Code § 2103(b)*]. However, in any case, and notwithstanding *Prob. Code § 2103(b)*, no action may be maintained against the sureties on the bond unless the action commences within six years from the date the judgment under *Prob. Code § 2103* or the later of the orders under *Prob. Code § 2333(b)* becomes final [*Prob. Code § 2333(c)*].

Even though *Code Civ. Proc. § 337*, which applies to actions based on written contracts, is broad enough to encompass an action on a surety bond, *Prob. Code § 2333* is the statute of limitations applicable to an action against the surety on the bond for injury done to the estate by a guardian or conservator in the performance of acts in his or her official capacity, because *Prob. Code § 2333* is more specifically applicable to the claim than is *Code Civ. Proc. § 337* [*see Estate of Mason (1990) 224 Cal. App. 3d 634, 638, 274 Cal. Rptr. 61* (*Prob. Code § 2333* was expressly applicable to claim against guardian brought by former ward on surety bond for guardian's performance)].

When *Prob. Code § 2333* applies, it is arguable that in the situation in which discharge or removal does not or cannot occur, a former ward or conservatee could indefinitely delay obtaining a surcharge order, thereby providing no outside limit on the liability of the surety on the bond. The doctrine of laches, however, could be invoked to ensure that wards and conservatees exercise reasonable diligence in procuring settlement of their guardians' or conservators' accounts [*see Estate of Mason (1990) 224 Cal. App. 3d 634, 640, 274 Cal. Rptr. 61]* .

[c] Accounting Prerequisite to Action Against Surety

An action, except an action based on fraud, will not lie against a guardian's or conservator's surety until after an

accounting has been had between the guardian and the ward or the conservator and conservatee [*see Richardson v. Royal Indemnity Co. (1943) 21 Cal. 2d 557, 560, 134 P.2d 1* ; *Smith v. Fidelity & Deposit Co. (1933) 130 Cal. App. 45, 51, 19 P.2d 1018]* . The probate court has exclusive jurisdiction of the accounting, and the accounting is a prerequisite to the maintenance of an action on the bond [*Smith v. Fidelity & Deposit Co. (1933) 130 Cal. App. 45, 51-52, 19 P.2d 1018* ; *see Price v. Fireman's Fund Ins. Companies (1987) 193 Cal. App. 3d 1536, 1541, 239 Cal. Rptr. 158* (action for conversion)].

When an action based on fraud is brought after the final accounting in the probate proceeding, it is not necessary to obtain a court order determining liability of the principal before an action on the bond can be brought against the surety. The liability of both the principal and the surety can be adjudicated in one proceeding [*see Alexandrou v. Alexander (1974) 37 Cal. App. 3d 306, 311-313, 112 Cal. Rptr. 307* (estate administration case)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-283 California Forms of Pleading and Practice--Annotated § 283.32

§ 283.32 Bond Reduction by Deposit in Blocked Account

[1] Effect on Amount of Bond

In any proceeding to determine the amount of the bond of a guardian or conservator (whether at the time of appointment or subsequently), if the estate includes property that has been or will be deposited with a trust company or a financial institution pursuant to *Prob. Code §§ 2453-2456* (governing deposits of funds, property, and securities), on the condition that the property, including any earnings, will not be withdrawn except on authorization of the court, then the court, in its discretion, with or without notice, may exclude the deposited property in determining the amount of the required bond or may reduce the amount of the bond to an amount that it determines is reasonable [*Prob. Code § 2328(a)(1)*].

If a bond has already been furnished or the amount has been fixed, the court may reduce the amount to an amount it determines is reasonable [*Prob. Code § 2328(a)(2)*; for a form for an order, *see § 283.72*].

[2] Establishing Blocked Account

To establish a blocked account, the petitioner for letters, or the proposed guardian or conservator in advance of appointment, may take any the following steps [*Prob. Code § 2328(b)*]:

- Deliver personal property of the estate in his or her possession to a trust company.
- Deliver money in his or her possession for deposit in an insured account in a financial institution in California.
- Allow a trust company to retain personal property already in its possession.
- Allow a financial institution in California to retain money of the estate already invested with it.

In thus receiving and retaining property on deposit, the trust company or financial institution is protected to the same

extent as though it received the property on deposit from a person to whom letters had been issued [*Prob. Code § 2328(d)*].

[3] Filing of Receipt

Once property is deposited or segregated to be retained, the petitioner or proposed guardian or conservator must obtain and file with the court a written receipt including the agreement of the trust company or financial institution that the property deposited, and any earnings, will not be allowed to be withdrawn except on authorization of the court [*Prob. Code § 2328(c)*; for a form for a receipt, *see § 283.73*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-283 California Forms of Pleading and Practice--Annotated §§ 283.33-283.39

[Reserved]

§§ 283.33[Reserved]

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24-283 California Forms of Pleading and Practice--Annotated § 283.40

§ 283.40 Application to Reduce Bond

A guardian or conservator may apply to the court for reduction in the amount of the bond by filing a noticed motion supported by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) that sets forth the condition of the estate [*Prob. Code § 2329(a)*; *see Code Civ. Proc. § 996.030*; for forms, *see §§ 283.70, 283.71*]. Except on a showing of good cause, the amount of the bond must not be reduced below the amount determined pursuant to *Prob. Code § 2320*, whichgoverns the amount of guardianship and conservatorship bonds [*Prob. Code § 2329(b)*; *see § 283.30*]. Nothing in *Prob. Code § 2329* limits the authority of the court to reduce the amount of the bond, with or without notice under *Prob. Code § 2328* [*Prob. Code § 2329(c)*].

The general procedures for the determination of an excessive bond are set forth in the Bond and Undertaking Law (*Code Civ. Proc. § 995.010* et seq.) [*see Code Civ. Proc. § 996.030*; *see also Code Civ. Proc. § 995.020(a)*]. On hearing the motion, the court may reduce the amount of the bond to an amount that the court, in its discretion, determines is proper under the circumstances [*Code Civ. Proc. § 996.030(a)*]. The guardian or conservator may give a bond for the reduced amount. The sureties may be the same sureties as on the original bond [*see Code Civ. Proc. § 996.030(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-283 California Forms of Pleading and Practice--Annotated § 283.41

§ 283.41 Additional Bond for Real Property Sale or Mortgage

On the confirmation of the sale of any real property of an estate or on the authorization of any mortgage or deed of trust with respect to real property of an estate, by which money is to be raised, the guardian or conservator must furnish an additional bond in order to make the sum of the bonds furnished by the guardian or conservator equal to the amount determined pursuant to *Prob. Code § 2320* (amount of bond), taking into account the proceeds of the sale or mortgage or deed of trust, unless the court makes an express finding stating the reason why the bond should not be increased [*Prob. Code § 2330*; *see § 283.30*]. If a bond or additional bond is required, the order confirming the sale of real property of the estate or authorizing the borrowing of money secured by a mortgage or deed of trust on real property of the estate is not effective and may not be filed by the court until the additional bond is filed [*Prob. Code § 2330*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-283 California Forms of Pleading and Practice--Annotated § 283.42

§ 283.42 Motion for Further Security

A guardian or conservator may be ordered to post a bond when no bond was originally required, or may be ordered to furnish an additional bond because the original bond has become insufficient [*see Code Civ. Proc. § 996.010*; *Prob. Code § 2334*], on an appropriate motion for further security [for forms, *see §§ 283.74, 283.75*]. If the court determines that the bond is insufficient, it must order that a sufficient, new, additional, or supplemental bond be given within a reasonable time, not less than five days [*Code Civ. Proc. § 996.010(c)*]. If a sufficient bond is not given within the time required by the court order, all rights obtained by giving the original bond will immediately cease, and the court, on ex parte motion, must so order [*Code Civ. Proc. § 996.010(d)*].

If a party requests an order that a guardian or conservator be required to give a bond when no bond was originally required, or an objection is made to the sufficiency of a bond, and the notice of motion or affidavit (or declaration under *Code Civ. Proc. § 2015.5*) supporting the objection shows that the guardian or conservator is failing to use ordinary care in the management of the estate, the court, by order, may suspend the power of the guardian or conservator until the matter can be heard and determined [*Prob. Code § 2334*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-283 California Forms of Pleading and Practice--Annotated § 283.43

§ 283.43 Ex Parte Application to Increase Bond

If a guardian or conservator has knowledge of facts from which he knows or should know that the bond posted is less than the amount required by statute, the guardian or conservator, and the attorney, if any, are required to make an ex parte application for an order increasing the bond to the required amount [*Prob. Code § 2320.1*; *Cal. Rules of Ct., Rules 7.204(a), (b), 7.501(b)*]. The application must show the value of the estate's personal property, the probable annual gross income of all property of the estate, and the sum of the probable annual gross payments of the public benefits of the ward or conservatee identified in *Prob. Code § 2320(c)(3)* [*Cal. Rules of Ct., Rule 7.204(c)(2)*]. After January 1, 2008, the amount of the bond must include the reasonable amount for the cost of recovery to collect on the bond, including attorney's fees and costs [*Prob. Code § 2320(c)(4)*]. The attorney's fees and costs incurred in a successful action for surcharge against a conservator or guardian for breach of his or her duties will be a surcharge against the conservator or guardian and if unpaid, will be recovered against the surety on the bond [*Prob. Code § 2320(c)(4)*; *see also Cal. Rule Ct., Rule 7.207*]. If the guardian or conservator of the estate has authority to sell estate real property without court confirmation, the application must also show the amount of the equity in estate real property [*Cal. Rules of Ct., Rule 7.204(c)(3)*]. If the court requires additional bond upon hearing the account, the additional bond must be filed before the order approving the account and related matters, including fees, is filed by the court and becomes effective [*Prob. Code § 2320.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-283 California Forms of Pleading and Practice--Annotated §§ 283.44-283.49

[Reserved]

§§ 283.44[Reserved]

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24-283 California Forms of Pleading and Practice--Annotated § 283.50

§ 283.50 Related Matthew Bender Publications

For forms relating to the waiver of bonds, see California Legal Forms, Ch. 66, *Guardianships*, and Ch. 66A, *Conservatorships* (Matthew Bender)

Legal Topics:

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

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24-283 California Forms of Pleading and Practice--Annotated § 283.51

§ 283.51 State Statutes

[1] Bond

Bond and Undertaking Law. *Code Civ. Proc. § 995.010 et seq.*

Execution and filing of bond. *Code Civ. Proc. §§ 995.310-995.380*

Deposit in lieu of bond. *Code Civ. Proc. §§ 995.710-995.770*

Bond requirement. *Prob. Code §§ 2320, 2322*

Increase in bond. *Prob. Code §§ 2320.1, 2320.2*

Waiver of bond. *Prob. Code §§ 2321, 2324*

Dispensing with bond for small estate. *Prob. Code § 2323*

Surety on bond of nonprofit charitable corporation. *Prob. Code § 2325*

Bond for joint guardians or conservators. *Prob. Code § 2326*

Bond for multiple wards or conservatees. *Prob. Code § 2327*

Deposit of property in blocked account to reduce bond. *Prob. Code § 2328*

Additional bond on sale of real property. *Prob. Code § 2330*

[2] Objections

Objection to bond. *Code Civ. Proc. §§ 995.910-995.960*

[3] Reduction or Increase in Bond

Insufficient and excessive bonds. *Code Civ. Proc. §§ 996.010-996.030*; *Prob. Code §§ 2329, 2334*

New, additional, and supplemental bonds. *Code Civ. Proc. §§ 996.210-996.250*

Notice of hearing. *Prob. Code §§ 1460, 2329(b)*

[4] Sureties

Personal sureties. *Code Civ. Proc. §§ 995.510-995.520*

Admitted surety insurers. *Code Civ. Proc. § 995.610-995.660*

Release and substitution of sureties. *Code Civ. Proc. §§ 996.110-996.150*; *Prob. Code § 2335*

Cancellation of bonds or withdrawal of sureties. *Code Civ. Proc. §§ 996.310-996.360*

Liability of principal and sureties on bonds. *Code Civ. Proc. § 996.410 et seq.*

Action on bond against surety of guardian or conservator. *Prob. Code § 2333*

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-283 California Forms of Pleading and Practice--Annotated § 283.52

§ 283.52 Local Court Rules

[1] Alameda County

Bond of guardian. Alameda Co. Super. Ct. Rules, Rule 12.14.11

Bond of conservator. Alameda Co. Super. Ct. Rules, Rule 12.15.11

[2] Contra Costa County

Bonds of conservators and guardians. Contra Costa Co. Prob. Pol. Man., Rule 824

[3] Los Angeles County

Bond for temporary conservators or temporary guardians. Los Angeles Co. Super. Ct. Rules, Rule 10.149

Bond on appointment of conservator. Los Angeles Co. Super. Ct. Rules, Rule 10.167(b)

[4] Orange County

Bonds of guardians. Orange Co. Super. Ct. Rules, Rule 610.15

Bonds of conservators. Orange Co. Super. Ct. Rules, Rule 611.09

[5] Sacramento County

Deposit of property for reduction of bond. Sacramento Co. Super. Ct. Rules, Rule 15.26

Guardian's and conservator's bonds. Sacramento Co. Super. Ct. Rules, Rule 15.79

[6] San Diego County

Bond requirements in conservatorships. San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.134

[7] San Francisco

Reducing bond through use of blocked accounts. San Francisco Uniform Local Ct. Rules, Rule 14.49

Conservatorship bond. San Francisco Uniform Local Ct. Rules, Rule 14.106(P)

Legal Topics:

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§ 283.53 Decisions

[1] Amount of Bond

Trial court has no discretion to allow or disallow amount of public guardian's bond fee, or to surcharge public guardian for fee. *Conservatorship of Cooper (1993) 16 Cal. App. 4th 414, 420, 20 Cal. Rptr. 2d 84*

[2] Liability of Surety

Action for accounting and surcharge order against guardian is prerequisite to action against surety on guardian's bond in absence of any recognized exception to this requirement. *Price v. Fireman's fund Ins. Companies (1987) 193 Cal. App. 3d 1536, 1541, 239 Cal. Rptr. 158*

Guardian's failure to appear and avoidance of service of process in action for conversion of estate assets did not relieve ward of necessity of obtaining accounting and surcharge order against guardian before suing surety on guardian's bond. *Price v. Fireman's Fund Ins. Companies (1987) 193 Cal. App. 3d 1536, 1541, 239 Cal. Rptr. 158*

Surety is not liable for personal acts or schemes of guardian. *Hornaday v. Hornaday (1949) 95 Cal. App. 2d 384, 396-397, 213 P.2d 91*

Surety is liable for interest up to face amount of bond; surety is liable for interest beyond face amount only for its own default in failure to make payment when due. *Burns v. Massachusetts Bonding etc. Ins. Co. (1944) 62 Cal. App. 2d 972, 975-976, 146 P.2d 29*

Statute of limitations for bringing action against guardians does not begin to run on death of guardian. *Maloney v. Mass. Bonding & Ins. Co. (1942) 20 Cal. 2d 1, 10, 123 P.2d 449*

Action for fraudulent concealment of assets after final settlement of account was timely when brought within statutory period after discovery of fraud. *Miller v. Ash (1909) 156 Cal. 544, 562-564, 105 P. 600*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 283.54 Text References

Witkin, Summary of California Law, vol. 12, *Wills and Probate, §§ 422-424* (9th ed. 1990)

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24-283 California Forms of Pleading and Practice--Annotated §§ 283.55-283.59

[Reserved]

§§ 283.55[Reserved]

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24-283 California Forms of Pleading and Practice--Annotated § 283.60

§ 283.60 Obtaining Original Bond for Guardian or Conservator

[1] Facts to Be Ascertained

☐ Estimated value of all personal property.

☐ Probable gross income of the estate.

☐ Sum of probable annual gross payment from specified public entitlements of ward or conservatee.

NOTE:
The public entitlement payments that must be taken into account are those made under *42 U.S.C. § 1382 et seq.* (supplementary security income for aged, blind, or disabled), and under *Welf. & Inst. Code §§ 11000 et seq., 16000 et seq.*, and *17000 et seq.* (public assistance, state services for the care of children, and county aid and relief to indigents).

[2] Preliminary Determinations

[a] Use of Blocked Accounts

☐ Ascertain value of cash, securities, and personal property available for deposit in trust company or financial institution, subject to withdrawal only by court order [*see Prob. Code § 2328*]; property that may be deposited includes [*Code Civ. Proc. § 995.710(a)*]:

☐ Lawful money of the United States (which must be maintained in an interest-bearing trust account).

☐ Bearer bonds or bearer notes of the United States or the State of California.

☐ Certificates of deposit, not exceeding the federally insured amount, issued by banks or savings associations authorized to do business in California and insured by the Federal Deposit Insurance Corporation.

☐ Savings accounts, not exceeding the federally insured amount, together with evidence of the deposit in the savings accounts with banks authorized to do business in California and insured by the Federal Deposit Insurance Corporation.

☐ Investment certificates or share accounts, not exceeding the federally insured amount, issued by savings associations authorized to do business in California and insured by the Federal Deposit Insurance Corporation.

☐ Certificates for funds or share accounts, not exceeding the guaranteed amount, issued by a credit union.

NOTE:
If a deposit into a blocked account is made, the amount of bond necessary will be reduced by the amount deposited. A receipt for the deposit must be obtained from the institution [*Prob. Code § 2328*]. For a form, see *§ 283.73*.

☐ Ascertain amount of premium to be saved annually be excluding property deposited in blocked account from amount of bond.

☐ Ascertain charge for blocked account.

☐ If determination is made to deposit property in blocked account:

☐ Collect assets for deposit.

☐ If depository does not have its own receipt form, prepare original and copies of receipt [*see § 283.73* (form)].

☐ Deliver property to depository and have authorized officer sign the receipt.

[b] Obtaining Bond

☐ Determine whether to obtain bond in appropriate amount from admitted surety insurer, or from two or more sufficient personal sureties [*see Code Civ. Proc. § 995.310*].

☐ If personal sureties are being used, prepare bond and declarations.

NOTE:
If an admitted surety insurer is being used, ordinarily the bond will be prepared by the admitted surety

insurer. Arrange with a broker or bonding company to have the bond available on the date of the hearing. Many brokers and bonding companies will leave the amount blank to be filled in when the order is made.

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-283 California Forms of Pleading and Practice--Annotated § 283.61

§ 283.61 Proceedings to Reduce or Increase Bond

[1] Papers to Draft

☐ Motion to reduce [*see § 283.70* (form)] or increase [*see § 283.74* (form)] bond.

☐ Supporting declaration setting forth condition of estate [for forms, *see § 283.71* (reduce), 283.75 (increase)].

☐ Order reducing [*see § 283.72* (form)] or increasing bond [*see § 283.76* (form)].

[2] Proceedings

☐ File motion and supporting declaration.

☐ Give notice of time and place of hearing to all persons, or their attorneys, who have appeared in proceeding or requested special notice [*see* Ch. 284, *Guardianship and Conservatorship: Notice*].

☐ Attend hearing and present receipts of depositories, if any.

☐ Present order for signature and obtain certified copies for depositories if applicable.

☐ Obtain increased or reduced bond and file new bond with court [*see Code Civ. Proc. § 995.340*].

NOTE:
The surety on the increased or reduced bond may be the same as on the earlier bond [*Code Civ. Proc. §*

996.030(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-283 California Forms of Pleading and Practice--Annotated §§ 283.62-283.69

[Reserved]

§§ 283.62[Reserved]

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24-283 California Forms of Pleading and Practice--Annotated § 283.70

§ 283.70 Notice of Motion to Reduce Bond [Code Civ. Proc. § 996.030; Prob. Code §§ 2328, 2329]

[1] FORM Notice of Motion to Reduce Bond

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship *or* Limited Conservatorship] of the _____ [Estate *or* Person and Estate] of _____ [*name*], _____ [Ward *or* Conservatee].	)))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] NOTICE OF MOTION FOR ORDER TO REDUCE BOND, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM OF POINTS AND AUTHORITIES

_____

To _____ [*specify parties, e.g.*, _____ (*name*) the conservatee], and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], _____[*name of guardian or conservator*] as _____ [guardian *or* conservator] of the [person and] estate of _____[*name of ward or conservatee*] will move for an order to reduce his/her liability on the bond previously filed with this court. The motion will be made on the ground that the bond is excessive because:

1. At the time of his/her appointment, the moving party filed a surety bond in the sum of $_____;

2. The estimated value of the assets of the estate currently held by the moving party is $_____;

[*EITHER*]

3. The moving party _____ [has deposited *or* proposes to deposit] the sum of $_____ in a blocked account at _____[*name and address of authorized institution*];

[*OR*]

3. The estimated value of the assets when the bond was filed was $_____ and, as appears above, this total has been reduced to $_____ by reason of _____ [*specify, e.g.,* the use of the principal to provide necessary support for the conservatee];

[*CONTINUE*]

4. Therefore, the total sum required for the bond is now $_____[, if the value of the deposited assets is excluded in determining the amount of the renewal bond].

[5. Moving party desires that the income from the securities deposited and interest from the money deposited be paid to the moving party. The income is required to provide for the care and support of the _____ (ward *or* conservatee).]

[6. A request for special notice has _____ (not been filed in this matter *or* been filed and waived by _____ (*name*) *or* been filed in this matter by _____ (*name*) and notice of the time and place of hearing on this motion will be given).]

The motion will be based on this notice of motion, on the declaration of _____[*name of guardian or conservator*], setting forth the condition of the estate [and on the declaration(s) of _____ (*specify names of additional declarants, if any*)], on the memorandum of points and authorities served and filed herewith, on the papers and records on file herein, [including a deposit receipt signed by an authorized agent of _____ (*name of depository*),] and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party*]

[*Append supporting declaration. See § 283.71[1].*]

[*Append memorandum of points and authorities.*]

[2] Use of Form

The notice of motion in [1], *above*, is for use in obtaining an order reducing the required bond because certain assets have been deposited in a blocked account or because the estate of the ward or conservatee has been reduced [*see Prob. Code §§ 2328, 2329*].

If assets are deposited in a blocked account at the time of the petition for appointment of the guardian or conservator, allegations regarding reduction of thebond may be contained in the petition for appointment [*see* Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* ; Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators*].

A memorandum must be served and filed with the notice of motion [*see Code Civ. Proc. §§ 1005(b), 1010*; *see also Prob. Code § 2329*; *Cal. Rules of Ct., Rule 3.1113*].

For a form for a declaration that may be used to support this motion, see *§ 283.71*; for the related form of order, *see § 283.72*.

[3] Reduction of Bond

A guardian or conservator may apply to the court for reduction of the amount of the bond by serving and filing a notice of motion supported by an affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) that sets forth the condition of the estate [*Prob. Code § 2329(a)*]. On hearing the motion, the court may reduce the amount of the bond to such an amount as the court in its discretion determines is proper under the circumstances [*Code Civ. Proc. § 996.030(a)*; *see § 283.40*].

The governing statute does not limit the authority of the court to reduce the amount of the bond with or without notice under *Prob. Code § 2328* [*Prob. Code § 2329(c)*]. Property deposited with the agreement of the depository that withdrawal will not be allowed except on authorization of the court can be excluded from the computation of the amount of the bond [*Prob. Code § 2328*; *see § 283.32*].

[4] Notice

It appears that service of the notice of motion is governed by the Bond and Undertaking Law [*see Code Civ. Proc. §§ 995.950, 996.030, 996.010*; *Prob. Code § 2320(e)*].

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24-283 California Forms of Pleading and Practice--Annotated § 283.71

§ 283.71 Declaration Supporting Motion to Reduce Bond [Code Civ. Proc. §§ 996.030; Prob. Code §§ 2328, 2329]

[1] FORM Declaration Supporting Motion to Reduce Bond

DECLARATION OF _____ [*name*]

I, _____[*name of guardian or conservator*], declare:

1. I am the _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee].

2. The total value of the assets, excluding real property, of the estate of _____[*name of ward or conservatee*] is $_____. The assets of the estate are valued as follows:

Real property: $_____
Annual income from real property: $_____
Personal property: $_____
Annual income from personal property: $_____

3. At the time of my appointment, I filed a surety bond for the amount of $_____.

[*EITHER*]

4. I _____ [have deposited *or* propose to deposit] the sum of $_____ in a blocked account at _____[*name and address of authorized institution*].

[*OR*]

4. Since the amount of the bond was originally set, the total personal property and annual income of the property has been reduced from $_____ to $_____ by reason of _____ [*specify, e.g.*, the use of the principal to provide necessary support for the conservatee].

[*CONTINUE*]

5. Therefore, the total sum required for the bond is now $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is a declaration setting forth the condition of the estate [*Prob. Code § 2329(a)*; *see Code Civ. Proc. § 2015.5*]. It is to be used to support a notice of motion to reduce the required bond because the guardian or conservator has deposited certain assets in a blocked account[*see Prob. Code § 2328*] or because the estate of the ward or conservatee has been reduced [*see Prob. Code § 2329*; *see also Code Civ. Proc. § 996.030*].

The form may be appended to a notice of motion to reduce the guardian's or conservator's bond [for a form of notice of motion, *see § 283.70*].

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24-283 California Forms of Pleading and Practice--Annotated § 283.72

§ 283.72 Order Reducing Bond [Prob. Code §§ 2328, 2329]

[1] FORM Order Reducing Bond

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [Guardianship *or*	)	NO. _____
Conservatorship] of the _____	)	ORDER
[Person *or* Estate *or* Person and Estate] of	)	
_____ [*name*],	)	
_____ [Ward *or* Conservatee].	)	

_____

The motion of _____[*name*], as _____ [guardian *or* conservator] of the [person and] estate of _____[*name of ward or conservatee*], for reduction of liability on his/her bond came on regularly for hearing by the court this date. Moving party appeared by counsel _____[*name*]. _____[*Specify other appearance, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

[2. The assets listed below should be deposited in an account from which withdrawals are allowed only on court order.]

3. A liability of $_____ is sufficient on the bond of the _____ [guardian *or* conservator] for future acts.

IT IS ORDERED:

[1. Moving party shall deposit with _____ (*name of authorized depository*), subject to withdrawal or release only on specific written order of this court, the following assets: _____ (*specify*). (The income from securities deposited and interest from the money deposited are to be paid to the moving party as _____ (guardian *or* conservator) of the (person and) estate of _____ (*name of ward or conservatee*).).]

2. Liability on the bond filed in this matter on _____[*date*], is reduced to the sum of $_____ for the future acts of _____ [*name of guardian or conservator*], and the surety is released from liability on the bond for future acts of _____ [*name of guardian or conservator*] in excess of the sum of $_____, _____ [effective _____ (*date*) *or* effective the date the deposit receipt listing all of the above assets, signed by an authorized agent of _____ (*name of depository*), is filed].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use when the court grants a motion to reduce the amount of guardian's or conservator's bond [*Prob. Code § 2328*; for the related form of notice of motion, see *§ 283.70*].

The form contains optional provisions for use when the motion is based on the deposit of assets in a blocked account. In accordance with the general preference of the sureties and the court [*see, e.g.,* Alameda Co. Super. Court Rules, Rule 12.15.11.4], the order reduces the liability on the original bond and does not substitute a new bond.

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

An order for the reduction of the bond based on the deposit of assets in a blocked account pursuant to *Prob. Code § 2328* can also be included in the order appointing a guardian or conservator [*see* Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* ; Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators*].

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24-283 California Forms of Pleading and Practice--Annotated § 283.73

§ 283.73 Receipt for Property Deposited [Prob. Code § 2328]

[1] FORM Receipt for Property Deposited

RECEIPT OF DEPOSIT

This is to acknowledge that the undersigned _____ [bank *or* financial institution] has on deposit the following: _____[*specify*].

[*EITHER*]

The property is deposited in the name of _____[*name of ward or conservatee*] and is impounded pursuant to an agreement with _____[*name of guardian or conservator*] as the _____ [guardian *or* conservator] of _____[*name of ward or conservatee*] (appointment pending) in the Superior Court of California, County of _____. Withdrawals cannot be made except as authorized by the court.

[*OR*]

The property is impounded pursuant to an order of the Superior Court of California, County of _____, in the matter styled _____ [Guardianship *or* Conservatorship] of the [Person and] Estate of _____[*name*], _____ [Ward *or* Conservatee], No. _____, dated _____, that withdrawals are to be made from the impounded account only on order of the court.

[*CONTINUE*]

Dated: _____.

_____ [*name of bank or financial institution*]

By: _____ [*signature*]

_____ [*typed name*]

_____ [*title*]

[2] Use of Form

The receipt in [1], *above*, is used to acknowledge receipt of deposits in impounded accounts for the purpose of reducing the bond [*see Prob. Code § 2328*].

The first alternative is used when the deposit is made before the appointment of the guardian or conservator [*see* Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* ; Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators*]. The second is used when the deposit is made after the appointment of the guardian or conservator pursuant to court order.

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24-283 California Forms of Pleading and Practice--Annotated § 283.74

§ 283.74 Notice of Motion to Require Further Security [Code Civ. Proc. § 996.010; Prob. Code § 2334]

[1] FORM Notice of Motion to Require Further Security

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship *or* Limited Conservatorship] of the _____ [Estate *or* Person and Estate] of _____ [*name*], _____ [Ward *or* Conservatee].	))))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] NOTICE OF MOTION FOR FURTHER SECURITY, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM OF POINTS AND AUTHORITIES

To _____ [*identify parties, e.g.,* _____ (*name*), guardian] and to _____[*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], _____[*name of moving party*], _____ [*identify party, e.g.,* the brother of the ward], will move for an order requiring _____[*name of guardian or conservator*], as _____ [guardian *or* conservator] of the [person and] estate of _____[*name of ward or conservatee*], to furnish an additional bond in the amount of $_____. The motion will be made on the ground that the original bond filed with the court is insufficient because:

1. At the time of his/her appointment, the _____ [guardian *or* conservator] _____[

name] filed a surety bond for the amount of $_____.

2. The estimated value of the assets of the estate concurrently held by the _____ [guardian *or* conservator] _____[*name*] is $_____.

3. The bond is now insufficient because _____ [*specify circumstances giving rise to insufficiency, e.g.*, real property belonging to the conservatee's estate has been sold, thereby increasing the assets of the estate].

4. Therefore, the total sum required for the bond is now $_____, and an additional bond in the amount of $_____ must be furnished.

[A request for special notice has _____ (not been filed *or* been filed and waived by _____ (*name*) *or* been filed by _____ (*name*) and notice of the time and place of hearing on this petition will be given).]

The motion will be based on this notice of motion, on the declaration of _____[*name*] and the memorandum of points and authorities served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party*]

[*Append supporting declaration. See § 283.75[1]*.]

[*Append memorandum of points and authorities.*]

[2] Use of Form

The form in [1], *above*, is for use in moving for an order requiring a guardian or conservator to furnish further security [*see Prob. Code § 2334*; *see also Code Civ. Proc. § 996.010*].

Even though the governing statute refers to a petition procedure, it appears that an application to require further security should be made by noticed motion. In enacting the Bond and Undertaking Law (*Code Civ. Proc. § 995.010 et seq.*), the Legislature intended to standardize the procedures regarding bonds and undertakings [*see Code Civ. Proc. § 995.020*]. This law provides that objections to insufficient and excessive bonds are to be made by noticed motion [*Code Civ. Proc. §§ 996.010(b), 996.030(b)*]. In addition, *Prob. Code § 2329(a)* refers to a motion in discussing the procedure when a guardian or conservator desires to reduce the bond. It is doubtful that a guardian or conservator would proceed by notice of motion in order to decrease the bond, but proceed by petition and notice of hearing in order to increase the bond [*see Prob. Code §§ 1460-1469* (notice of hearing)]. Thus, it appears that the application must be made by noticed motion, supported by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) or on the court's own motion [*see Code Civ. Proc. § 996.010(b)*]. The notice of motion must specify the precise grounds on which the motion is made, must state the reasons for the insufficiency in the amount of the bond, and must include an estimate of the amount that would be

sufficient [*Code Civ. Proc. § 996.010(b)*; *see Code Civ. Proc. § 996.030(a)*].

If the court determines that the bond is insufficient, it must order that a sufficient new, additional, or supplemental bond be given within a reasonable time, not less than five days [*see Code Civ. Proc. § 996.010(c)*]. If a sufficient bond is not given within the time required by the court order, all rights obtained by giving the original bond will immediately cease, and the court, on ex parte motion, must so order [*Code Civ. Proc. § 996.010(d)*].

For a form of declaration that may be used to support this motion, see *§ 283.75*; for the related form of order, see *§ 283.75*.

For further discussion of a motion to require further security, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

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24-283 California Forms of Pleading and Practice--Annotated § 283.75

§ 283.75 Declaration Supporting Motion to Require Further Security [Code Civ. Proc. §§ 996.010, 2015.5; Prob. Code § 2334]

[1] FORM Declaration Supporting Motion to Require Further Security

DECLARATION OF _____ [*name*]

I, _____[*name*], declare:

1. I am _____ [*specify interest of declarant, e.g.,* the brother of _____ (*name*), the conservatee].

2. _____[*name*] is the _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee].

3. The total value of the assets, excluding real property, of the estate of _____[*name of ward or conservatee*] is $_____. The assets of the estate are valued as follows:

Real property: $_____
Annual income from real property: $_____
Personal property: $_____
Annual income from personal property: $_____

4. At the time of the appointment of _____[*name*] as _____ [guardian *or* conservator], he/she filed a surety bond for the amount of $_____.

5. _____ [*State facts that show why the bond is insufficient, e.g.,* Since the amount of the bond was originally set, the total personal property and annual income of the property has increased from $_____ to $_____ as a result of _____ (*specify*)].

[6. *State facts, if any, showing that the guardian or conservator is failing to exercise ordinary care and diligence in the managment of the estate*.]

7. Therefore, the total sum required for the bond is now $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is for use in supporting a motion to require further security. For a form for a notice of motion, *see § 283.74*.

Optional Paragraph 6 may be used if the guardian or conservator is failing to exercise ordinary care and diligence in managing the estate. If that is the case, the court may suspend the powers of the guardian or conservator until the matter is heard and determined [*Prob. Code § 2334*].

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24-283 California Forms of Pleading and Practice--Annotated § 283.76

§ 283.76 Order Requiring Further Security [Prob. Code § 2334]

[1] FORM Order Requiring Further Security

[*Caption. See § 283.72[1].*]

The motion of _____[*name*] for an order requiring _____[*name*], _____ [guardian *or* conservator] of the [person and] estate of _____[*name of ward or conservatee*], to furnish further security came on regularly for hearing by the court this date. Moving party appeared by counsel _____. [*Specify other appearance, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____ [, including special notice to _____ (*name*)].

2. The _____ [bond *or* security] in the amount of $_____ furnished by the _____ [guardian *or* conservator] is insufficient because _____ [*specify, e.g.,* the sureties on the bond have become insolvent].

IT IS ORDERED that _____[*name of guardian or conservator*] shall furnish further security in the amount of $_____ by _____[*date*].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use when the court grants a motion to require the guardian or conservator to furnish further security [for the related form of notice of motion, *see § 283.74*].

In most counties the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Time Allowed for Furnishing of Further Security

The court must order the guardian or conservator to furnish any further security within a reasonable time, which must not be less than five days [*Code Civ. Proc. § 996.010(c)*]. If sufficient or additional security is not given within the time fixed by the court, the court must remove the guardian or conservator and revoke the letters of guardianship or conservatorship [*Code Civ. Proc. § 996.010(d)*].

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24-284 California Forms of Pleading and Practice--Annotated 284.syn

§ 284.syn Synopsis to Chapter 284: GUARDIANSHIP AND CONSERVATORSHIP: NOTICE

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§ 284.02 Cross References

§§ 284.03-284.09 [Reserved]

§ 284.10 Governing Law

§§ 284.11-284.19 [Reserved]

§ 284.20 Application of General Notice Requirements

§ 284.21 Notice to Director of Mental Health or Director of Developmental Services

[1] Requirements for Notice

[2] Tolling of Statute of Limitations

[3] Waiver of Notice

§ 284.22 Notice to U.S. Department of Veterans Affairs

§ 284.23 Special Notice

[1] Written Request for Special Notice

[2] Service of Request for Special Notice

[3] Manner of Giving Special Notice

[4] Proof of Giving Special Notice

[5] Modification or Withdrawal of Request for Special Notice

§ 284.24 Modification of Notice Requirements by Court

§ 284.25 Rules Governing Notice by Mail

§ 284.26 Proof of Giving Notice

§ 284.27 Notice Unnecessary After Continuance of Hearing

§§ 284.28-284.39 [Reserved]

§ 284.40 Appointment of Conservator or Guardian

§ 284.41 Change of Venue

§ 284.42 Temporary Conservatorship or Guardianship

§ 284.43 Guardian's or Conservator's Bond

§ 284.44 Care of Ward or Conservatee

[1] Powers of Conservator

[2] Medical Treatment

[3] Capacity of Conservatee

[4] Fixing Residence Outside of California

[5] Instruction or Confirmation of Acts of Guardian or Conservator

§ 284.45 Estate Management

[1] Instruction or Confirmation of Acts

[2] Independent Exercise of Powers

[3] Support of Ward or Conservatee

[4] Annuities and Insurance

[5] Partition Action

[6] Acceptance of Deed in Lieu of Foreclosure

[7] Compromise of Claims

[8] Conveyance and Transfer of Property Under Existing Contract

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[14] Substituted Judgment

[15] Transfer of Property to Foreign Guardian or Conservator

§ 284.46 Management of Community Property

[1] In General

[2] Authorization of Transaction Concerning Community Property

[a] Nonpetitioning Spouse

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[3] Vacation of Order Authorizing Transaction

[4] Supplemental Petition

§ 284.47 Inventories and Appraisals

[1] Filing of Inventory and Appraisal

[2] Waiver of Appraisal

[3] Objection to Appraisal

[4] Request for Order To File Inventory and Appraisal

[5] Examination Regarding Assets

§ 284.48 Filing of Accounts

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[2] Small Estates

[3] Petition for Order Compelling Account

§ 284.49 Compensation of Guardian or Conservator and Attorney

§ 284.50 Removal and Resignation of Guardian or Conservator

§ 284.51 Termination of Guardianship or Conservatorship

§ 284.52 Termination of Limited Conservatorship

§§ 284.53-284.59 [Reserved]

§ 284.60 State Statutes

§ 284.61 California Rules of Court

§ 284.62 Local Court Rules

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[2] Los Angeles County

[3] Orange County

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§ 284.63 Decisions

§§ 284.64-284.69 [Reserved]

§ 284.70 Notice of Hearing in Guardianship or Conservatorship Proceeding [Prob. Code §§ 1264, 1460-1469, 1511, 1822]--Judicial Council Form GC-020

[1] FORM

[2] Use of Form

[3] Notice Accompanied by Copy of Petition or Other Paper

§ 284.70A Attachment to Notice of Hearing of Proof of Service by Mail--Judicial Council Form GC-020(MA)

[1] FORM

[2] Use of Form

§ 284.70B Clerk's Certificate of Posting Notice of Hearing [Code Civ. Proc. § 2015.3; Prob. Code §§ 1230, 1263, 1460, 2543]--Judicial Council Form GC-020(C)

[1] FORM

[2] Use of Form

§ 284.70C Proof of Personal Service of Notice of Hearing [Prob. Code §§ 1216, 1264, 1460-1469, 1511, 1822]--Judicial Council Form GC-020(P)

[1] FORM

[2] Use of Form

§ 284.71 Order Prescribing Notice in Guardianship or Conservatorship Proceeding [Prob. Code §§ 1001(b), 1460]--Judicial Council Form GC-022

[1] FORM

[2] Use of Form

§ 284.72 Order Dispensing With Notice in Guardianship and Conservatorship Proceedings [Prob. Code §§ 1460(e), 1511(g)]--Judicial Council Form GC-021

[1] FORM

[2] Use of Form

[3] Contents of Order

§ 284.73 Request for Special Notice and Proof and Admission of Service [Prob. Code § 2700]--Judicial Council Form GC-035

[1] FORM

[2] Use of Form

§ 284.74 Modification or Withdrawal of Request for Special Notice [Prob. Code § 2701]

[1] FORM

[2] Use of Form

§ 284.75 Waiver of Notice or Special Notice of Hearing [Prob. Code §§ 1204, 1260(b)]

[1] FORM

[2] Use of Form

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PART I. SCOPE

24-284 California Forms of Pleading and Practice--Annotated § 284.01

§ 284.01 Scope of Chapter

This chapter discusses notice provisions generally applicable in guardianship and conservatorship proceedings. The chapter contains the following forms:

- A notice of hearing in a guardianship or conservatorship proceeding [*Prob. Code §§ 1001(b), 1460*] (Judicial Council Form GC-020) [*see § 284.70*].

- An order dispensing with notice in a guardianship and conservatorship proceeding [*Prob. Code §§ 1460(e), 1511(g)*] (Judicial Council Form GC-021) [*see § 284.71*].

- An order prescribing notice in a guardianship or conservatorship proceeding (Judicial Council Form GC-022) [*see § 284.72*].

- A request for special notice [*Prob. Code § 2700(c)*] (Judicial Council Form GC-035) [*see § 284.73*].

- A form for modification or withdrawal of a request for special notice [*Prob. Code § 2701*;*see § 284.74*].

- A waiver of notice or special notice of a hearing [*Prob. Code § 1260(b)*;*see § 284.75*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral Overview

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24-284 California Forms of Pleading and Practice--Annotated § 284.02

§ 284.02 Cross References

- For discussion and forms pertaining to notice concerning applications and hearings on the bond of a guardian or conservator, see Ch. 283, *Guardianship and Conservatorship: Bonds* , and Ch. 538, *Suretyship, Bonds, and Undertakings* , § 538.40 et seq.

- For discussion and forms pertaining notice of hearings of sales of property and other aspects of estate management, see Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment* , Ch. 455, *Probate: Sale of Estate Property* , and Ch. 456, *Probate: Management of Estate Assets* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersSales of Assets

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24-284 California Forms of Pleading and Practice--Annotated §§ 284.03-284.09

[Reserved]

§§ 284.03[Reserved]

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24-284 California Forms of Pleading and Practice--Annotated § 284.10

§ 284.10 Governing Law

The law governing notice in guardianship and conservatorship proceedings is generally set forth in *Prob. Code §§ 1460 et seq.* and *2700 et seq.* Notice in guardianship and conservatorship proceedings is also governed by the notice provisions applicable to probate proceedings generally [*see Prob. Code § 1200(a)*; *see also Prob. Code §§ 1202, 1203(a), 1205, 1215, 1216(a), 1260 et seq.*]. When notice of a hearing is required but no other period or manner is prescribed by statute, then unless the period or manner of giving the notice is ordered by the court or judge, the notice must be given for the period and in the manner provided in *Prob. Code § 1220* [*see Prob. Code § 1221*]. Additional requirements for notices are set forth in *Cal. Rules of Ct., Rules 7.50-7.55*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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24-284 California Forms of Pleading and Practice--Annotated §§ 284.11-284.19

[Reserved]

§§ 284.11[Reserved]

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24-284 California Forms of Pleading and Practice--Annotated § 284.20

§ 284.20 Application of General Notice Requirements

Some provisions in the Guardianship-Conservatorship Law specify particular notice requirements for hearings on particular matters. When notice of a hearing is required under *Prob. Code § 1400 et seq.*, but the provision requiring notice does not fix the manner of giving notice, the general notice requirements of *Prob. Code § 1460* apply [*Prob. Code § 1460(a)*]. In addition, many provisions expressly require that notice be given pursuant to *Prob. Code § 1460*.

Subject to *Prob. Code §§ 1202* and *1203* (concerning shortening and lengthening the notice period), at least 15 days before the day of a hearing, the person filing any petition, report, or account must cause notice of the hearing to be mailed to the following persons [*Prob. Code § 1460(a), (b)*]:

- The guardian or conservator.

- The ward, if at least 14 years old, or the conservatee.

- The spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*] of the ward or conservatee.

- Any interested person who has appeared in the particular matter to which the hearing relates.

- The persons described in *Prob. Code § 1510* (concerning a petition for appointment of a guardian), if the hearing is on a petition to terminate a guardianship or to accept the resignation of, or to remove, the guardian.

- The persons described in *Prob. Code § 1821* (concerning a petition for appointment of a conservator), if the hearing is on a petition to terminate a conservatorship or to accept the resignation of, or to remove, the conservator.

However, the court may, for good cause, dispense with the notice otherwise required to be given to any of the persons

listed above [*Prob. Code § 1460(d),(e)*;*see § 284.24*].

Notice must also be given to any person who has properly requested special notice [*see Prob. Code §§ 1460(d), 2700 et seq.*;*see also § 284.23*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & Termination

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24-284 California Forms of Pleading and Practice--Annotated § 284.21

§ 284.21 Notice to Director of Mental Health or Director of Developmental Services

[1] Requirements for Notice

If, during the guardianship or conservatorship proceeding, the ward or conservatee is or has been a patient in or on leave from a state hospital under the jurisdiction of the Department of Mental Health or the Department of Developmental Services, then when a petition, report, or account is filed with respect to the following matters, 15 days notice of the time and place of the hearing must be given by mail to the director of the department having jurisdiction over the hospital [*Prob. Code § 1461(a), (b)*]:

- Appointment of a guardian [*Prob. Code § 1510*].
- Appointment of a conservator [*Prob. Code § 1820*].
- Termination of a conservatorship [*Prob. Code § 1861*].
- Change of venue [*Prob. Code § 2212*].
- Instruction or confirmation of acts of the guardian or conservator of the estate [*Prob. Code § 2403*].
- Payment of an allowance to the ward or conservatee [*Prob. Code § 2421*].
- Support from the estate notwithstanding a third person's support obligation [*Prob. Code § 2422*].
- Distribution of surplus income of a conservatee's estate [*Prob. Code § 2423*].
- Sale of estate property [*Prob. Code § 2540 et seq.*].
- Substituted judgment [*Prob. Code § 2580*].

- Independent administration of the estate [*Prob. Code § 2592*].

- Periodic accounts [*Prob. Code § 2620*], except in some cases involving a very small estate (see below).

- Appointment of a successor guardian or conservator [*Prob. Code § 2670 et seq.*].

- Enforcement of spousal support for a conservatee [*Prob. Code §§ 3080, 3088*].

- Transactions involving community or homestead property [*Prob. Code § 3100 et seq.*].

A copy of the petition, report, or account must be mailed with the notice [*Prob. Code § 1461(b)*].

Notice is not required in the case of an accounting pursuant to *Prob. Code § 2620* if the total guardianship or conservatorship assets are less than $1,500, the gross annual income, exclusive of any public assistance income, is less than $6,000, and the ward or conservatee is not a patient in, or on leave or on outpatient status from, a state hospital at the time of the filing of the petition [*Prob. Code § 1461(b)(2)*].

[2] Tolling of Statute of Limitations

The statute of limitations does not run against any claim of the Department of Mental Health or the Department of Developmental Services against the estate of the ward or conservatee for board, care, maintenance, or transportation with respect to an account that is settled without giving the notice required by *Prob. Code § 1461* [*Prob. Code § 1461(d)*].

[3] Waiver of Notice

If the ward or conservatee has been discharged from the state hospital, the director having jurisdiction over the hospital, on ascertaining the facts, may file with the court a certificate stating that the ward or conservatee is not indebted to the state and waiving the right to further notices under *Prob. Code § 1461*. Compliance with the notice requirements of *Prob. Code § 1461* is not required after the director files the certificate, unless the certificate is revoked by the director and notice of the revocation is filed with the court [*Prob. Code § 1461(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTollingPublic Health & Welfare LawHealthcareMental Health ServicesGeneral Overview

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24-284 California Forms of Pleading and Practice--Annotated § 284.22

§ 284.22 Notice to U.S. Department of Veterans Affairs

Notice of the time and place of hearing on any petition, report, or account, and notice of the filing of an inventory, with respect to any of the following matters must be mailed to the office of the Department of Veterans Affairs having jurisdiction over the area in which the court is located if the guardianship or conservatorship estate consists or will consist, wholly or in part, of money received from the Department of Veterans Affairs, revenue or profit from that money or from property acquired wholly or in part from that money, or property acquired wholly or in part with that money or from that property [*Prob. Code § 1461.5*]:

- Appointment of a guardian [*Prob. Code § 1510*].
- Termination of a guardianship [*Prob. Code § 1601*].
- Appointment of a conservator [*Prob. Code § 1820*].
- Termination of a conservatorship [*Prob. Code § 1861*].
- Modification of the legal capacity of a conservatee [*Prob. Code § 1874*].
- Support from the estate notwithstanding a third person's support obligation [*Prob. Code § 2422*].
- Distribution of surplus income of a conservatee's estate [*Prob. Code § 2423*].
- Sale of estate property [*Prob. Code § 2540 et seq.*].
- Substituted judgment [*Prob. Code § 2580*].
- Investments [*Prob. Code § 2570*].

- Purchase of a home [*Prob. Code § 2571*].
- Independent administration of the estate [*Prob. Code § 2592*].
- The original or any supplemental inventory and appraisal [*Prob. Code §§ 2610, 2613*].
- Periodic accounts [*Prob. Code § 2620*].
- Compensation of a guardian, conservator, or attorney [*Prob. Code § 2640 et seq.*].
- Appointment of successor guardian or conservator [*Prob. Code § 2670 et seq.*].
- Enforcement of spousal support for a conservatee [*Prob. Code §§ 3080, 3088*].
- Transactions involving homestead or community property [*Prob. Code § 3100 et seq.*].

The notice must be given 15 days before the hearing or within 15 days after the inventory is filed and must be accompanied by a copy of the petition, report, account, or inventory [*Prob. Code § 1461.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewMilitary & Veterans LawVeteransVeterans Affairs

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24-284 California Forms of Pleading and Practice--Annotated § 284.23

§ 284.23 Special Notice

[1] Written Request for Special Notice

At any time after the issuance of letters of guardianship or conservatorship, the ward, if at least 14 years old, or the conservatee, the spouse of the ward or the spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*] of the conservatee, any relative or creditor of the ward or conservatee, or any other interested person, in person or by attorney, may file with the court clerk a written request for special notice [*Prob. Code § 2700(a)*]. The request for special notice must be so entitled and set forth the name of the person and the address to which notices will be sent [*Prob. Code § 2700(b)*; for form,*see § 284.73*]. Special notice may be requested for any of the following matters [*Prob. Code § 2700(c)*]:

- Petitions filed in the guardianship or conservatorship proceeding.
- Inventories and appraisals of property in the estate, including any supplemental inventories and appraisals.
- Accounts of the guardian or conservator.
- Proceedings for the termination of the guardianship or conservatorship proceeding.

By requesting special notice, a person entitled to notice under *Prob. Code § 1460(b)* can ensure that he or she will receive notice of the matters listed above even when the court dispenses with notice [*see Prob. Code § 1460(d), (e)*].

[2] Service of Request for Special Notice

A copy of the request must be personally delivered or mailed to the guardian or conservator or to the attorney for the guardian or conservator. If personally delivered, the request is effective when it is delivered. If mailed, the request is effective when it is received [*Prob. Code § 2700(e)*]. When the original of the request is filed with the court clerk, it must be accompanied by a written acknowledgment or proof of service [*Prob. Code § 2700(f)*; for form,*see § 284.73*].

[3] Manner of Giving Special Notice

Unless the court makes an order dispensing with the notice, if a request has been made for special notice of a hearing, the person filing any petition, account, or other paper must give written notice of the filing, together with a copy of the petition, account, or other paper, and the time and place set for the hearing. The notice must be given by mail to the person named in the request at the address set forth in the request, at least 15 days before the time set for the hearing [*Prob. Code § 2702(a)*].

If a request has been made for special notice of the filing of an inventory and appraisal of the estate or of the filing of any other paper that does not require a hearing, the inventory and appraisal or other paper must be mailed not later than 15 days after the inventory and appraisal or other paper is filed with the court [*Prob. Code § 2702(b)*].

[4] Proof of Giving Special Notice

Proof of giving special notice must be made to the satisfaction of the court at or before the hearing [*Prob. Code § 1260(a)*]. If it appears to the satisfaction of the court that special notice has been regularly given or that the person entitled to the notice has waived it, the court must so find in its order [*Prob. Code § 1260(b)*]. Such a finding, when the order becomes final, is conclusive on all persons [*Prob. Code § 1260(c)*].

[5] Modification or Withdrawal of Request for Special Notice

A request for special notice may be modified or withdrawn in the same manner as provided for the making of the initial request. It is also automatically deemed withdrawn at a date three years from the date it was served on the guardian, conservator, or the attorney for the guardian or conservator. A new request for special notice, however, may be served and filed atany time as provided in the case of an initial request [*Prob. Code § 2701*; for form,*see § 284.74*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewFamily LawGuardiansGeneral Overview

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24-284 California Forms of Pleading and Practice--Annotated § 284.24

§ 284.24 Modification of Notice Requirements by Court

If the court determines that the notice otherwise required is insufficient in the circumstances, the court may require a longer period of notice or further or additional notice [*Prob. Code § 1202*;*see § 284.71*]. Furthermore, unless a particular provision governing the notice of a hearing otherwise provides, the court may, for good cause, shorten the time for giving a notice of hearing [*Prob. Code § 1203(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-284 California Forms of Pleading and Practice--Annotated § 284.25

§ 284.25 Rules Governing Notice by Mail

If a notice or other paper is required or permitted to be mailed to a person, the notice or other paper must be mailed or personally delivered [*Prob. Code § 1215(a)*; *see Prob. Code § 1216* (personal delivery)]. If mailed, the notice or other paper must be sent by first-class mail (which includes certified, registered, and express mail) to an address within the United States, or by airmail to an address outside the United States [*Prob. Code § 1215(b)*].

The notice or other paper must be deposited for collection in the U.S. mail, in a sealed envelope, with postage paid, addressed to the person to whom it is mailed [*Prob. Code § 1215(c)*]. The notice or other paper must be addressed to the person at the person's place of business or place of residence [*Prob. Code § 1215(d)*]. If the person's address is not known, however, notice may be given in a manner that is reasonably calculated to give actual notice to the person. Proof of service may be made as prescribed by the court [*see Code Civ. Proc. § 413.30*; *Prob. Code § 1212*].

When the notice or other paper is deposited in the mail, mailing is complete, and the period of notice is not extended [*Prob. Code § 1215(e)*]. If service of a summons is made by mail in the manner authorized by *Code Civ. Proc. § 415.30*, the service is complete on the date a written acknowledgment of receipt is executed [*Prob. Code § 1467*].

Except as otherwise permitted in the Probate Code, a notice sent by mail under *Prob. Code § 1220* must be mailed individually and directly to the person entitled to notice [*Cal. Rules of Ct., Rule 7.51(a)(1)*]. A notice mailed to a person in care of another person is insufficient unless the person entitled to notice is an adult, and has directed the party giving notice, in writing, to send the notice in care of that other person [*Cal. Rules of Ct., Rule 7.51(a)(2)*]. Notices mailed to two or more persons in the same household must be sent separately to each person [*Cal. Rules of Ct., Rule 7.51(a)(3)*].

If a notice is required or permitted to be given to a person who is represented by an attorney of record in the proceeding, the notice must be sent to that attorney [*Prob. Code § 1214*; *Cal. Rules of Ct., Rule 7.51(b)*]. If a guardian or conservator has been appointed for a person entitled to notice, the notice must be sent to the guardian or conservator and, unless the court has dispensed with this notice, to the ward or conservatee [*Cal. Rules of Ct., Rule 7.51(c)*]. Notice to a minor must be sent directly to the minor, except as permitted in *Prob. Code § 1460.1* for guardianships, conservatorships, and certain protective proceedings [*Cal. Rules of Ct., Rule 7.51(d)*]. A separate copy of the notice

must be sent to the persons having legal custody of the minor with whom the minor resides [*Cal. Rules of Ct., Rule 7.51(d)*].

If a person who is entitled to notice cannot be located after a diligent search, the court may prescribe the manner of giving notice to that person or may dispense with notice to that person [*Cal. Rules of Ct., Rule 7.52(c)*]. The petitioner must file a declaration describing the efforts made to locate the person before the court will prescribe an alternate form of notice or dispense with notice [*Cal. Rules of Ct., Rule 7.52(a)*]. The declaration must state the name of the person whose address is unknown, the person's last known address, the approximate date on which the person was last known to reside there, the efforts made to locate the person, and any facts explaining why the person's address cannot be obtained [*Cal. Rules of Ct., Rule 7.52(a)*]. The declaration must describe the attempts to learn of the person's business and residences by: (1) inquiry of the relatives, friends, acquaintances, and employers of the person entitled to notice and of the person who is the subject of the proceeding; (2) review of appropriate city telephone directories and directory assistance; and (3) search of the real and personal property indexes in the recorder's and assessor's offices for the county in which the person was last known or believed to reside [*Cal. Rules of Ct., Rule 7.52(a)*]. Mailing notice to a person at a county seat is not a manner of giving notice that is reasonably calculated to give actual notice [*Cal. Rules of Ct., Rule 7.52(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessMethodsMailCivil ProceduresPleading & PracticeService of ProcessMethodsSpecial Court OrdersEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewFamily LawGuardiansGeneral Overview

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24-284 California Forms of Pleading and Practice--Annotated § 284.26

§ 284.26 Proof of Giving Notice

If notice of a hearing is required, proof of giving notice of the hearing must be made to the satisfaction of the court at or before the hearing [*Prob. Code § 1260(a)*]. If it appears to the satisfaction of the court that notice has been regularly given or that the party entitled to notice has waived it, the court must so find in its order [*Prob. Code § 1260(b)*]. This finding, when the order becomes final, is conclusive on all persons [*Prob. Code § 1260(c)*].

Proof of mailing may be made in the manner prescribed in *Code Civ. Proc. § 1013a*, which governs proof of service in civil actions generally [*Prob. Code § 1261*]. Proof of publication may be made by the affidavit of the publisher or printer, or the foreperson or principal clerk of the publisher or printer, showing the time and place of publication [*Prob. Code § 1262*]. Proof of posting may be made by the affidavit of the person who postedthe notice [*Prob. Code § 1263*]. Proof of notice by personal delivery may be made by the affidavit of the person making the delivery showing the time and place of delivery and the name of the person to whom delivery was made [*Prob. Code § 1264*].

Proof of notice, however given, may be made by evidence presented at the hearing [*Prob. Code § 1265*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessProofGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewFamily LawGuardiansGeneral Overview

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24-284 California Forms of Pleading and Practice--Annotated § 284.27

§ 284.27 Notice Unnecessary After Continuance of Hearing

The court may continue or postpone any hearing, from time to time, in the interest of justice [*Prob. Code § 1045*]. If a hearing is continued or postponed, no further notice of the continued or postponed hearing is required unless ordered by the court [*Prob. Code § 1205*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewFamily LawGuardiansGeneral Overview

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24-284 California Forms of Pleading and Practice--Annotated §§ 284.28-284.39

[Reserved]

§§ 284.28[Reserved]

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24-284 California Forms of Pleading and Practice--Annotated § 284.40

§ 284.40 Appointment of Conservator or Guardian

Notice of hearing on a petition for appointment of a conservator [*see Prob. Code § 1820*] is governed by *Prob. Code §§ 1822, 1824, 1827.5, 1842,* and *1847* [*see* Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators*], by *Prob. Code § 1461* for notice to the Director of Mental Health or Director of Developmental Services [*see § 284.21*], and by *Prob. Code § 1461.5* for notice to the Department of Veterans Affairs [*see § 284.22*]. Notice of hearing on a petition for appointment of a successor conservator [*see Prob. Code § 2681*] is governed by *Prob. Code §§ 2683* and *2689* [*see* Ch. 290G, *Guardianship and Conservatorship: Removal or Resignation of Guardian or Conservator*].

Notice of hearing on a petition for appointment of a guardian [*see Prob. Code § 1510*] or a successor guardian [*see Prob. Code § 2670*] is governed by *Prob. Code §§ 1511, 1516,* and *1542* [*see* Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians*]. Notice to the Department of Veterans Affairs [*see Prob. Code § 1461.5*] is discussed in *§ 284.22*.

Notice of hearing on a petition to add a conservatee to an existing conservatorship or a ward to an existing guardianship is governed by *Prob. Code § 2106* [*see* Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* ; Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentFamily LawGuardiansAppointmentMilitary & Veterans LawVeteransVeterans AffairsPublic Health & Welfare LawHealthcareMental Health ServicesGeneral Overview

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24-284 California Forms of Pleading and Practice--Annotated § 284.41

§ 284.41 Change of Venue

Notice of hearing on a petition to transfer pending conservatorship or guardianship proceedings to another county [*see Prob. Code § 2211*] is governed by *Prob. Code § 1460* [*see § 284.20*] and by *Prob. Code § 2214*, which requires notice to all persons required to be listed in the petition at least 15 days before the date set for the hearing [*see Prob. Code § 2214*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewFamily LawGuardiansGeneral Overview

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24-284 California Forms of Pleading and Practice--Annotated § 284.42

§ 284.42 Temporary Conservatorship or Guardianship

Notice of hearing on a petition for appointment of a temporary conservator or guardian is governed by *Prob. Code § 2250*. Notice of hearing on a petition to sell or otherwise relinquish certain specified residential property of the conservatee is governed by *Prob. Code § 2252(e)*. Notice of hearing on a request to change the residence of a conservatee [*see Prob. Code § 2253*] is governed by *Prob. Code § 2250* when the request is part of a petition for appointment of a temporary conservator or by *Prob. Code § 2253* when the request stands alone [*see also §§ 284.20, 284.23*].

Notice provisions applicable to proceedings involving the filing of inventories and accounts in temporary guardianships and conservatorships are the same as those applicable to proceedings involving the filing of inventories [*see § 284.47*] and accounts [*see § 284.48*] in regular guardianships and conservatorships.

An order under *Prob. Code § 2252(c)* granting a temporary guardian or conservator powers in addition to those stated in *Prob. Code § 2252(a)* and *(b)* can be made with or without notice, as the court may require [*see Prob. Code § 2252(c)*]. An order under *Prob. Code § 2257(b)* extending or shortening the time for termination of the powers of a temporary guardian or conservator can be made with or without notice [*see Prob. Code § 2257(b)*].

Notice requirements for a temporary guardianship or conservatorship are discussed further in Ch. 282, *Guardianship and Conservatorship: Temporary Guardians and Conservators*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & Termination

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24-284 California Forms of Pleading and Practice--Annotated § 284.43

§ 284.43 Guardian's or Conservator's Bond

The general notice requirements [*see § 284.20*] and the Bond and Undertaking Law [*see generally Code Civ. Proc. § 995.010 et seq.*] govern the following:

- Notice of a guardian's or conservator's motion for a reduction in the amount of the bond [*Prob. Code § 2329*].

- Notice of a motion either to require bond to be given when no bond was originally required or to increase the amount of bond already given [*Prob. Code § 2334*].

- Notice of the hearing on a guardian or conservator's application [*see generally Code Civ. Proc. § 996.110(b)*] for a substitution and release of a surety [*Prob. Code § 2335*].

Notice requirements for proceedings involving the bond of a guardian or conservator are discussed further in Ch. 283, *Guardianship and Conservatorship: Bonds*, and Ch. 538, *Suretyship, Bonds, and Undertakings*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral Overview

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24-284 California Forms of Pleading and Practice--Annotated § 284.44

§ 284.44 Care of Ward or Conservatee

[1] Powers of Conservator

Notice of the hearing on a petition to limit the powers of a conservator, or to modify or revoke such an order [*see Prob. Code § 2351*], is governed by *Prob. Code § 2351(c)* and the general notice provisions [*see § 284.20*]. When the order is sought in a petition to appoint a conservator [*see Prob. Code § 1820*], the notice requirements for the hearing on the petition for appointment apply [*see § 284.40*].

Notice of the hearing on a petition to modify a limited conservatorship [*see Prob. Code § 2351.5*] is governed by *Prob. Code § 2351.5(c)* and the general notice provisions [*see § 284.20*].

Notice requirements for proceedings concerning the care of the ward or conservatee are discussed further in Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee*.

[2] Medical Treatment

Notice of the hearing on a petition for an order that a conservatee lacks the capacity to give informed consent for medical treatment and giving the conservator of the person the powers specified in *Prob. Code § 2355* [*see Prob. Code § 1891*] is governed by *Prob. Code § 1892* and the general notice provisions [*see § 284.20*].

Notice of the hearing on a conservator or guardian's petition to authorize specified medical treatment for a ward or conservatee and to authorize the guardian or conservator to consent to the treatment on behalf of the ward or conservatee [*see Prob. Code § 2357(b)*] is governed by *Prob. Code § 2357(e)-(g)*.

Notice of the hearing on a ward's, conservatee's, or other interested person's petition under *Prob. Code § 2357(i)* to require a guardian or conservator to obtain and consent to, or obtain or consent to, specified medical treatment to be performed on the ward or conservatee is governed by the general notice provisions [*see § 284.20*].

[3] Capacity of Conservatee

Notice of the hearing on a petition under *Prob. Code § 1873* to authorize the conservatee to enter into specified transactions, or to broaden or restrict the conservatee's capacity to enter into specified transactions, is governed by *Prob. Code § 1874(b)* and the general notice provisions [*see § 284.20*]. When the order is sought in a petition to appoint a conservator [*see Prob. Code § 1820*], the notice requirements for the hearing on the petition for appointment apply [*see § 284.40*].

Notice of the hearing on a petition or judicial determination of the conservatee's capacity to marry or to enter into a registered domestic partnership [*see Prob. Code § 1901(b)*] is governed by *Prob. Code § 1901(c)* and the general notice provisions [*see § 284.20*].

[4] Fixing Residence Outside of California

Notice of the filing of a petition under *Prob. Code § 2352*, and of the hearing, if any, to fix the residence of a ward or conservatee outside of California is governed by the general notice provisions [*see § 284.20*].

[5] Instruction or Confirmation of Acts of Guardian or Conservator

Notice of the hearing on a petition for instruction on or confirmation of the acts of a conservator or guardian of the person [*see Prob. Code § 2359*] is governed by *Prob. Code § 2359(b)* and the general notice provisions [*see § 284.20*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & RightsFamily LawMarriageCapacity to MarryHealthcare LawTreatmentPatient ConsentConsent by Guardians & Parents

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24-284 California Forms of Pleading and Practice--Annotated § 284.45

§ 284.45 Estate Management

[1] Instruction or Confirmation of Acts

The general notice provisions [*see § 284.20*] govern notice of the hearing on a petition for instruction on or confirmation of the acts of a conservator or guardian of the estate [*see Prob. Code § 2403(b)*] and notice of the hearing on a petition to limit the authority of a guardian or conservator to exercise powers or duties without court authorization [*see Prob. Code § 2450(b)*].

[2] Independent Exercise of Powers

The general notice provisions [*see § 284.20*] govern notice of the hearing on a petition under *Prob. Code § 2592* for a grant of independent powers to a guardian or conservator, when the petition is filed after the filing of the petition for appointment of the guardian or conservator [*see Prob. Code § 2592(c)*;*see also* Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers*].

When a grant of independent powers under *Prob. Code § 2592* is sought in the petition for appointment of the guardian or conservator, notice of the hearing on the request for the grant is governed by the statutory provisions governing notice of the hearing on the petition for appointment [*see § 284.40*].

The general notice provisions [*see § 284.20*] also govern notice of the hearing on an interested person's petition for withdrawal of a grant of independent powers to, or imposition of restrictions, conditions, and limitations on the exercise of independent powers by, a guardian or conservator [*Prob. Code § 2593(b)*].

[3] Support of Ward or Conservatee

The general notice provisions [*see § 284.20*] govern notice of the hearing on a petition directing the payment of a debt, expense, or charge of the estate or compelling the provision of specified support from the estate to the ward or conservatee [*see Prob. Code § 2404(b)*], notice of the hearing on a petition authorizing the payment of an allowance to a ward or conservatee [*see Prob. Code § 2421(b)*], notice of the hearing on a petition for specified support of a ward or

conservatee from the estate, regardless of the obligation of a third person to provide that support [*see Prob. Code § 2422(b)*], and notice of the hearing on a petition for authority to distribute surplus income of the estate [*see Prob. Code § 2423(c)*].

The general notice provisions [*see § 284.20*] govern notice of the hearing on a petition under *Prob. Code § 3080* for the enforcement of a conservatee's spousal support from community property [*see Prob. Code § 3081(a)*], provided that if the other spouse is not the conservator, notice of the hearing and a copy of the petition must be served on that spouse [*Prob. Code § 3081(b)*].

Notice of the hearing on a petition under *Prob. Code § 3088* for modification or vacation of an order enforcing a conservatee's support from community property is governed by *Prob. Code § 3088(f)*, which requires that at least 15 days before the hearing on the petition to modify or vacate the order, notice of the time and place of the hearing on the petition, accompanied by a copy of the petition, must be mailed to the other spouse. Notice to any other person is governed by the general notice provisions [*see § 284.20*].

Notice requirements for proceedings concerning the management of community property are discussed further in Ch. 289, *Guardianship and Conservatorship: Management of Community Property*.

[4] Annuities and Insurance

The general notice provisions [*see § 284.20*] govern notice of the hearing on a petition for authority for a guardian to use estate funds to effect or maintain in force specified contracts for annuities and life and disability insurance entered into by a minor ward [*see Prob. Code § 2459(e)*].

[5] Partition Action

The general notice provisions [*see § 284.20*] govern notice of the filing of a petition and of the hearing for authorization for a guardian or conservator to commence an action for partition of estate property under *Prob. Code § 2463*.

[6] Acceptance of Deed in Lieu of Foreclosure

The general notice provisions [*see § 284.20*] govern notice of the hearing on a petition for authorization for a guardian or conservator to accept a deed to property that is subject to a mortgage or a trust deed in lieu of foreclosure of the mortgage or sale under the trust deed [*see Prob. Code § 2464(b)*].

[7] Compromise of Claims

The general notice provisions [*see § 284.20*] govern notice of the hearing on a petition to limit a guardian's or conservator's authority to compromise claims by or against, or to extend, renew, and otherwise modify obligations owing to or running in favor of, a ward, conservatee, or the estate [*see Prob. Code § 2500(c)*], as well as notice of the hearing on a petition for court approval of any compromise, settlement, extension, renewal, or modification of any claim [*see Prob. Code § 2506*; *see also Prob. Code §§ 2501-2504* (claims for which court approval is required)]. These proceedings are discussed further in Ch. 290C, *Guardianship and Conservatorship: Actions and Disputed Claims*.

[8] Conveyance and Transfer of Property Under Existing Contract

Notice of the hearing on a petition under *Prob. Code § 850* (*see below*) is governed by *Prob. Code § 851*. At least 30 days before the hearing, notice of the hearing and a copy of the petition must be served on the guardian or conservator and each person claiming an interest in, or having title to or possession of, the affected property [*Prob. Code § 851(a)*]. The general notice provisions [*see § 284.20*] govern notice to all other persons [*Prob. Code § 851(b)*. The time for giving notice of a hearing on the petition may not be shortened [*Prob. Code § 851(c)*; *see Prob. Code § 1203(a)*].

Under *Prob. Code § 850*, the guardian or conservator or any claimant may file a petition requesting that the court make an order concerning the transfer of title to property in any of the following cases:

- The conservatee is bound by a contract in writing to convey real property or to transfer personal property, executed by the conservatee while competent or executed by the conservatee's predecessor in interest, and the contract is one that can be specifically enforced.

- The minor has succeeded to the interest of a person bound by a contract in writing to convey real property or to transfer personal property, and the contract is one that can be specifically enforced.

- The guardian or conservator or the minor or conservatee is in possession of, or holds title to, real or personal property, and the property or some interest in it is claimed to belong to another.

- The minor or conservatee has a claim to real or personal property the title to or possession of which is held by another.

[9] Confirmation of Sale

The general notice provisions [*see § 284.20*] govern notice of the hearing on a report of sale and petition for confirmation of the sale of real or personal property [*see Prob. Code §§ 1220, 1469, 2543, 10260(c), 10308(c)*]. In addition, notice must be given to the purchasers named in the petition and posted as provided in *Prob. Code § 1230*.

[10] Borrowing Money

The general notice provisions [*see § 284.20*] govern notice of the hearing on a petition for an order authorizing a guardian or conservator to borrow money for specified purposes and secure the loan with specified estate property [*Prob. Code § 2551(b)*].

[11] Leases

The general notice provisions [*see § 284.20*] govern notice of the hearing on a petition for an order authorizing a guardian or conservator to execute a lease covering estate property [*Prob. Code § 2553(b)*].

[12] Conveyance, Dedication, or Exchange of Real Property

The general notice provisions [*see § 284.20*] govern notice of the hearing on a petition for an order authorizing a guardian or conservator to convey or dedicate real property, easements over real property, or other access rights to real property [*Prob. Code § 2556(b)*], and notice of the hearing on a petition for an order authorizing a guardian or conservator to exchange property for other property [*Prob. Code § 2557(c)*]. However, if the petition is for authorization to exchange stocks, bonds, or other securities [*see Prob. Code § 10200* ("securities" defined)] for different stocks, bonds, or other securities, then on a showing of good cause, the court may order that the notice be given for a shorter period or be dispensed with [*Prob. Code § 2557(d)*].

[13] Investments

The general notice provisions [*see § 284.20*] govern notice of the hearing on a petition for an order authorizing a guardian or conservator to invest money of the estate [*see Prob. Code § 2570*], purchase real property for specified purposes [*see Prob. Code §§ 2571, 2572*], or select among specified government bonds for investment [*Prob. Code § 2570(c)*; *see Prob. Code § 2573*]. The court may order that notice be dispensed with [*Prob. Code § 2570(c)*].

[14] Substituted Judgment

Notice of the hearing on a petition for an order authorizing a conservator or other interested person to take a proposed action under the substituted-judgment doctrine is governed by *Prob. Code § 2581*. Notice of the hearing of the petition must be given, pursuant to the general notice provisions [*see § 284.20*], to all of the following persons, regardless of age, in addition to those otherwise required to be given notice [*Prob. Code § 2581*]:

- The persons required to be named in a petition for the appointment of a conservator.

- The beneficiaries, as far as the petitioner knows, under any document executed by the conservatee that may have testamentary effect, unless the court for good cause dispenses with notice.

- The persons who, as far as the petitioner knows, would be the conservatee's heirs under the laws of intestate succession if the conservatee were to die immediately, unless the court for good cause dispenses with notice.

- Other persons as the court may order.

[15] Transfer of Property to Foreign Guardian or Conservator

Notice of the hearing on a petition for authority to transfer personal property to a foreign guardian or conservator in a jurisdiction outside California [*see Prob. Code § 2802*] is governed by *Prob. Code §§ 2804* and *2808(b)*. Notice of the hearing and a copy of the petition must be mailed at least 30 days before the hearing to each person required to be listed in the petition, at the address stated in the petition [*Prob. Code § 2804*].

The guardianship or conservatorship may be terminated if the court's order provides for the transfer of all of the property of the estate to the foreign guardian or conservator. The court may order termination on settlement of the final account and the filing with the clerk of the court of a receipt for the property, executed by the foreign guardian or conservator. Unless notice is waived, a copy of the final account of the guardian or conservator and of the petition for discharge, together with a notice of the hearing, must be mailed at least 30 days before the date of the hearing to all persons required to be listed in the petition for transfer, including the foreign guardian or conservator [*Prob. Code § 2808*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawAnnuitiesGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsReal Property LawFinancingMortgages & Other Security InstrumentsDeed in Lieu of ForeclosureReal Property LawOwnership & TransferGeneral Overview

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24-284 California Forms of Pleading and Practice--Annotated § 284.46

§ 284.46 Management of Community Property

[1] In General

Notice of the hearing on a petition under *Prob. Code § 3054* for inclusion of community property in the conservatorship estate of a married person is governed by the general notice provisions [*see § 284.20*]. Notice of the hearing on a petition under *Prob. Code § 3111* for authorization of a proposed transaction concerning community property [*see Prob. Code § 3100 et seq.*] is governed by *Prob. Code §§ 3130, 3131* [*see* [2], *below*].

Notice requirements for obtaining support for a conservatee from community property are discussed in *§ 284.45[3]*. Notice requirements for proceedings concerning the management of community property are discussed further in Ch. 289, *Guardianship and Conservatorship: Management of Community Property*.

[2] Authorization of Transaction Concerning Community Property

[a] Nonpetitioning Spouse

Under *Prob. Code § 3130*, if a nonpetitioning spouse is alleged to lack legal capacity for the proposed transaction and has no conservator, he or she must be served with a citation and a copy of the petition at least 15 days before the hearing [*Prob. Code § 3130(a)*]. If the spouse has a conservator, then unless the court orders otherwise, no citation to the spouse is required, and the conservator must be served with notice of the time and place of the hearing on the petition, accompanied by a copy of the petition, at least 15 days before the hearing [*Prob. Code § 3130(b)*; *see Prob. Code § 3130(c)*; *see also Code Civ. Proc. §§ 415.10, 415.30, 415.40* (manner of service)].

Any nonpetitioning spouse not alleged to lack capacity must be served with notice of the time and place of the hearing on the petition, accompanied by a copy of the petition, at least 15 days before the hearing [*Prob. Code § 3131(a)*; *see Prob. Code § 3131(b)*; *see also Code Civ. Proc. §§ 415.10, 415.30, 415.40* (manner of service)].

[b] Others Named in Petition

At least 15 days before the hearing on the petition, notice of the time and place of the hearing on the petition must be mailed to the persons required to be named in the petition, at the addresses set forth in the petition [*Prob. Code § 3131(c)*].

[3] Vacation of Order Authorizing Transaction

Notice of the hearing on a petition under *Prob. Code § 3154(a)* for vacation of an order authorizing a proposed transaction under *Prob. Code § 3100 et seq.* is governed by *Prob. Code § 3154(a)*, which provides that notice to the parties to the transaction must be given as the court directs.

[4] Supplemental Petition

Notice of the hearing on a supplemental petition for an order authorizing another sale or encumbrance of property under *Prob. Code § 3100 et seq.* [*see Prob. Code § 3154(b)*] is governed by *Prob. Code §§ 3130, 3131* [*see* [2], *above*], except that no further citation is required, and a copy of the supplemental petition and a notice of the time and place of the hearing must be served on any person who has appeared as representative of a nonpetitioning spouse and served on counsel of record for a nonpetitioning spouse or as otherwise directed by the court [*Prob. Code § 3154(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental PleadingsEstate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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24-284 California Forms of Pleading and Practice--Annotated § 284.47

§ 284.47 Inventories and Appraisals

[1] Filing of Inventory and Appraisal

Notice of the hearing, if any, on an ex parte petition for an extension of time within which to file an inventory and appraisal of the estate, as well as notice of the filing of the inventory and appraisal [*see Prob. Code § 2610(a)*], or supplemental inventory and appraisal [*see Prob. Code § 2613*], is governed by the special notice provisions [*see Prob. Code § 2700 et seq.*;*see also § 284.23*]. In addition, a copy of the inventory and appraisal, or supplemental inventory and appraisal, must be mailed to the county assessor if a timely request is made [*Prob. Code § 2612*], and to the director of the Department of Mental Health or the Department of Developmental Services if required [*Prob. Code § 2611*;*see § 284.21* (when notice is required)].

Notice requirements for proceedings concerning the filing of inventories and appraisals are discussed further in Ch. 286, *Guardianship and Conservatorship: Inventory and Appraisal*.

[2] Waiver of Appraisal

Notice of the hearing on a petition for a waiver of appraisal by the probate referee is governed by *Prob. Code § 8903(c)* and the general notice provisions [*see § 284.20*].

[3] Objection to Appraisal

Notice of the hearing on objections under *Prob. Code § 2614(a)* to any appraisal is governed by the general notice provisions [*see § 284.20*]. In addition, if the appraisal was made by a probate referee, notice of the hearing and a copy of the objection must be mailed to the probate referee at least 15 days before the time set for the hearing [*see Prob. Code § 2614(b)*].

[4] Request for Order To File Inventory and Appraisal

Notice of the filing of a request for an order that a guardian or conservator file an inventory and appraisal or show cause

why he or she should not be removed [*see Prob. Code § 2614.5*], together with notice of any hearing thereon, is governed by the provisions for special notice [*see Prob. Code § 2700 et seq.*;*see also § 284.23*]. In addition, notice must be served on the guardian or conservator by personal delivery, mail, or as otherwise ordered by the court [*Prob. Code § 2614.5(a)*; *see Code Civ. Proc. §§ 415.10, 415.30*].

[5] Examination Regarding Assets

Notice of the filing of a petition to require an examination of a person regarding estate assets [*see Prob. Code §§ 2616-2619.5*], together with notice of any hearing thereon, is governed by the provisions for special notice [*see Prob. Code § 2700 et seq.*;*see also § 284.23*]. If the petition is granted, a citation must issue to the person to be examined [*Prob. Code § 2616(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & Inventories

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24-284 California Forms of Pleading and Practice--Annotated § 284.48

§ 284.48 Filing of Accounts

[1] In General

Notice of hearing on the account of the guardian or conservator [*see Prob. Code § 2620*] is governed by the general notice provisions [*see § 284.20*] [*Prob. Code § 2621*]. In addition, notice may be required to be given to the director of the Department of Mental Health or the Department of Developmental Services [*see Prob. Code §§ 1461, 2621*;*see also § 284.21*].

Notice requirements for proceedings concerning the filing of accounts are discussed further in Ch. 290E, *Guardianship and Conservatorship: Accounts*.

[2] Small Estates

The provisions for special notice [*see Prob. Code § 2700 et seq.*;*see also § 284.23*] govern the filing of an ex parte petition for an order dispensing with the accounting in a small estate [*see Prob. Code § 2628(a)*], together with notice of any hearing. Notice of the filing of a petition for an order requiring an accounting in a small estate [*see Prob. Code § 2628(b)*], together with notice of any hearing, is to be given as required by the court [*Prob. Code § 2628(b)*].

[3] Petition for Order Compelling Account

Notice of the filing of an ex parte petition by a successor guardian or conservator for an order compelling the attorney for a deceased, incapacitated, or absconding guardian or conservator to file an account of the latter's administration [*see Prob. Code § 2632(c)*], together with notice of any hearing thereon, is governed by the provisions for special notice [*see Prob. Code § 2700 et seq.*;*see also § 284.23*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators &

GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAccountingEstate, Gift & Trust LawProbateSmall Estates

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24-284 California Forms of Pleading and Practice--Annotated § 284.49

§ 284.49 Compensation of Guardian or Conservator and Attorney

The general notice provisions [*see § 284.20*] govern the following [*Prob. Code § 2640(b)*]:

- Notice of the hearing on the petition by a guardian or conservator of the estate for compensation for services rendered [*see Prob. Code § 2640(a)*].

- Notice of the hearing on the petition by a guardian or conservator of the person for compensation for services rendered [*see Prob. Code § 2641*].

- Notice of the hearing on the petition by an attorney for a guardian or conservator of the estate or person for compensation for services rendered [*see Prob. Code § 2642(a)*].

- Notice of the hearing on the petition by a guardian or conservator of the estate or person for periodic payments to statutorily specified persons for services rendered [*Prob. Code § 2643(b)*].

- Notice of the hearing on the petition of a guardian or conservator of the estate for authorization to contract with an attorney for a contingent fee for the attorney's services [*see Prob. Code § 2644*].

Notice requirements for proceedings concerning the compensation of a guardian or conservator and the attorney are discussed further in Ch. 290F, *Guardianship and Conservatorship: Compensation of Guardian or Conservator*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & Rights

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24-284 California Forms of Pleading and Practice--Annotated § 284.50

§ 284.50 Removal and Resignation of Guardian or Conservator

The general notice provisions [*see § 284.20*] govern notice of the hearing on a petition for removal of a guardian or conservator or for suspension of his or her powers or surrender of the estate pending hearing on the petition [*see Prob. Code §§ 2651, 2652, 2654*], as well as notice of the hearing on a petition tendering the resignation of a guardian or conservator [*see Prob. Code § 2660*].

Notice requirements for proceedings concerning the removal and resignation of a guardian or conservator are discussed further in Ch. 290G, *Guardianship and Conservatorship: Removal or Resignation of Guardian or Conservator*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationFamily LawGuardiansRemoval & Termination

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24-284 California Forms of Pleading and Practice--Annotated § 284.51

§ 284.51 Termination of Guardianship or Conservatorship

The general notice provisions [*see § 284.20*] govern notice of the hearing on a petition for termination of a guardianship [*see Prob. Code § 1601*] and notice of the hearing on a petition for termination of a conservatorship [*see Prob. Code §§ 1861, 1862*].

Notice requirements for proceedings concerning the termination of a guardianship or conservatorship are discussed further in Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationFamily LawGuardiansRemoval & Termination

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24-284 California Forms of Pleading and Practice--Annotated § 284.52

§ 284.52 Termination of Limited Conservatorship

Notice of the hearing on a petition under *Prob. Code § 1860.5* for termination of a limited conservatorship is governed by *Prob. Code § 1860.5(d)*, which provides, in part, that the notice requirements are the same as for appointment of a limited conservator. If the limited conservator is not the petitioner or has not joined in the petition, he or she must be served with a notice of the time and place of the hearing accompanied by a copy of the petition at least five days before the hearing [*Prob. Code § 1860.5(d)*]. Service must be made by personal delivery or mail or as otherwise ordered by the court [*Prob. Code § 1860.5(d)*; *see Code Civ. Proc. §§ 415.10, 415.30*]. However, if the limited conservator cannot, with reasonable diligence, be served with notice, the court may dispense with notice [Prob. Code § 1869.5(d)].

Notice requirements for proceedings concerning the termination of limited conservatorships are discussed further in Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & Termination

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24-284 California Forms of Pleading and Practice--Annotated §§ 284.53-284.59

[Reserved]

§§ 284.53[Reserved]

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24-284 California Forms of Pleading and Practice--Annotated § 284.60

§ 284.60 State Statutes

Further notice on court order. *Prob. Code § 1202*

Order shortening time for giving notice. *Prob. Code § 1203(a)*

Notice of continued or postponed hearing. *Prob. Code § 1205*

Procedure for giving notice when address is not known. *Prob. Code § 1212*

Manner of mailing notice; when mailing is complete. *Prob. Code § 1215*

Personal delivery in lieu of mailing. *Prob. Code § 1216*

Proof of notice of hearing; conclusiveness of proof. *Prob. Code § 1260*

Proof of mailing. *Prob. Code § 1261*

Proof of publication. *Prob. Code § 1262*

Proof of posting. *Prob. Code § 1263*

Proof of notice by personal delivery. *Prob. Code § 1264*

Mode of proof of notice. *Prob. Code § 1265*

Notice of time and place of hearing. *Prob. Code § 1460*

Exceptions to notice requirements for children under 12 years of age. *Prob. Code § 1460.1*

Notice to Department of Mental Health or Department of Developmental Services. *Prob. Code § 1461*

Notice to regional center for developmentally disabled. *Prob. Code § 1461.4*

Notice to Department of Veterans Affairs. *Prob. Code § 1461.5*

When service by mail is deemed complete. *Prob. Code § 1467*

Reference to *Prob. Code § 1220* is deemed to be reference to general notice requirements of Prob. Code *§ 1460 et seq.Prob. Code* § 1469

Special notice provisions. *Prob. Code § 2700 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-284 California Forms of Pleading and Practice--Annotated § 284.61

§ 284.61 California Rules of Court

Description of pleading in notice of hearing. *Cal. Rules of Ct., Rule 7.50*

Service of notice of hearing. *Cal. Rules of Ct., Rule 7.51*

Service of notice on person whose address is unknown. *Cal. Rules of Ct., Rule 7.52*

Notice of hearing of amended or supplemented pleading. *Cal. Rules of Ct., Rule 7.53*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental PleadingsCivil ProcedurePleading & PracticeService of ProcessMethodsResidential ServiceEstate, Gift & Trust LawConservators & GuardiansGeneral Overview

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24-284 California Forms of Pleading and Practice--Annotated § 284.62

§ 284.62 Local Court Rules

[1] Contra Costa County

Notice requirements and procedures. Contra Costa Co. Prob. Pol. Man., §§ 209, 210

[2] Los Angeles County

Notice requirements and procedures. Los Angeles Co. Super. Ct. Rules, Rules 10.25, 10.26

[3] Orange County

General notice requirements. Orange Co. Super. Ct. Rules, Div. VI, Rule 602.01 et seq.

[4] Sacramento County

Notice procedures. Sacramento Co. Super. Ct. Rules, Rule 15.14 et seq.

[5] San Diego County

Notice procedures. San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.18 et seq.

[6] San Francisco

Notice requirements. San Francisco Uniform Local Ct. Rules, Rules 14.29, 14.30

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-284 California Forms of Pleading and Practice--Annotated § 284.63

§ 284.63 Decisions

Failure to attach petition to special notice was not jurisdictional defect when notified person appeared at hearing with counsel, obtained continuance, and waived further notice. *Guardianship of Jacobson (1947) 30 Cal. 2d 326, 331-332, 182 P.2d 545*

Failure to notice hearing properly, to prove notice, and to find in order that proper notice was given opened interim order to collateral attack for jurisdictional defect. *Guardianship of Slakmon (1978) 83 Cal. App. 3d 224, 233-235, 147 Cal. Rptr. 777*

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-284 California Forms of Pleading and Practice--Annotated §§ 284.64-284.69

[Reserved]

§§ 284.64[Reserved]

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24-284 California Forms of Pleading and Practice--Annotated § 284.70

§ 284.70 Notice of Hearing in Guardianship or Conservatorship Proceeding [Prob. Code §§ 1264, 1460-1469, 1511, 1822]--Judicial Council Form GC-020

[1] FORM Notice of Hearing in Guardianship or Conservatorship Proceeding [Prob. Code §§ 1264, 1460-1469, 1511, 1822]--Judicial Council Form GC-020

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative, filled-in reproduction of Cal. Judicial Council Form GC-020, for use in giving notice of hearings in guardianship and conservatorship proceedings.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rule 1.35*; *but see Cal. Rules of Court, Rules 7.2(a), 7.101* (Judicial Council forms must be used in proceedings governed by Probate Code when appropriate)]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

If notice by posting is desired, a copy of GC-020(C), Clerk's Certificate of Posting Notice of Hearing, should be attached to this form. For an illustration of Form GC-020(C), and discussion, see *§ 284.70B*.

The notice of hearing must state the complete title of the pleading to which the notice relates [*Cal. Rules of Ct., Rule 7.50*]. An amended pleading (or an amendment to a pleading) requires the same notice of hearing, including publication, as the pleading it amends [*Cal. Rules of Ct., Rule 7.53(a)*]. A supplement to a pleading does not require additional notice of hearing, but a copy of the supplement must be served if service of a copy of the pleading was required, unless the court waives service [*Cal. Rules of Ct., Rule 7.53(b)*].

[3] Notice Accompanied by Copy of Petition or Other Paper

In many instances, the notice must be accompanied by a copy of the petition, report, account, or objection to which it

relates [*see, e.g., Prob. Code §§ 1511, 2614* (petition for appointment of guardian; objections to inventory and appraisal)]. When notice is required to be given to the Director of Mental Health, the Director of Developmental Services, or the Department of Veterans Affairs, a copy of the related petition, report, or account must be served with the notice [*see Prob. Code §§ 1461, 1461.5*;*see also §§ 284.21, 284.22*].

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24-284 California Forms of Pleading and Practice--Annotated § 284.70A

§ 284.70A Attachment to Notice of Hearing of Proof of Service by Mail--Judicial Council Form GC-020(MA)

[1] FORM Attachment to Notice of Hearing of Proof of Service by Mail--Judicial Council Form GC-020(MA)

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a filled-in reproduction of California Judicial Council Form GC-020(MA), which may be used as an attachment to the Notice of Hearing [*see § 284.70*] to set forth the name and address of each person to whom notice was mailed. Use of this form is optional [*see Cal. Rules of Ct., Rule 1.35*; *but see Cal. Rules of Court, Rules 7.2(a), 7.101* (Judicial Council forms must be used in proceedings governed by Probate Code when appropriate)]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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24-284 California Forms of Pleading and Practice--Annotated § 284.70B

§ 284.70B Clerk's Certificate of Posting Notice of Hearing [Code Civ. Proc. § 2015.3; Prob. Code §§ 1230, 1263, 1460, 2543]--Judicial Council Form GC-020(C)

[1] FORM Clerk's Certificate of Posting Notice of Hearing [Code Civ. Proc. § 2015.3; Prob. Code §§ 1230, 1263, 1460, 2543]--Judicial Council Form GC-020(C)

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of California Judicial Council Form GC-020(C). If notice by posting is desired or required [*see Prob. Code § 2543*], a copy of this notice should be attached to the Notice of Hearing [*see § 284.70*]. The court clerk will then complete the form and post it at the courthouse where the proceedings are pending [*see Prob. Code § 1230*]. The form reproduced here is not filled in because the form indicates that it is for court use only; however, the attorney may want to check local practice with regard to completion and submission of the form.

At least 15 days before the hearing, the court clerk must post the notice of hearing at the courthouse where the proceedings are pending [*Prob. Code § 1230(a)*]. The posted notice of hearing must state the name of the estate, the name of the petitioner, the nature of the petition, and the time and place of the hearing on the petition [*Prob. Code § 1230(b)*]. Proof of the posting may be made by the affidavit of the person who posted the notice [*Prob. Code § 1263*].

The Judicial Council has designated this form as optional [*see Cal. Rules of Ct., Rule 1.35*; *but see Cal. Rules of Court, Rules 7.2(a), 7.101* (Judicial Council forms must be used in proceedings governed by Probate Code when appropriate)]; however, the Notice of Hearing form [*see § 284.70*] indicates that it should be attached to the notice when notice by posting is required. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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24-284 California Forms of Pleading and Practice--Annotated § 284.70C

§ 284.70C Proof of Personal Service of Notice of Hearing [Prob. Code §§ 1216, 1264, 1460-1469, 1511, 1822]--Judicial Council Form GC-020(P)

[1] FORM Proof of Personal Service of Notice of Hearing [Prob. Code §§ 1216, 1264, 1460-1469, 1511, 1822]--Judicial Council Form GC-020(P)

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a filled-in reproduction of California Judicial Council Form GC-020(P), which may be used as proof of personal service of the Notice of Hearing [*see § 284.70*]. The name and address of each person who was personally served with notice should be stated. If more than four individuals were personally served, Judicial Council Form GC-020(PA), Attachment to Notice of Hearing--Proof of Personal Service (not illustrated here), should be used to set forth the names and addresses of the additional persons who were served. A separate form must be completed for each person who personally served a copy of the notice.

Use of this form is optional [*see Cal. Rules of Ct., 1.35*; *but see Cal. Rules of Court, Rules 7.2(a), 7.101* (Judicial Council forms must be used in proceedings governed by Probate Code when appropriate)]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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24-284 California Forms of Pleading and Practice--Annotated § 284.71

§ 284.71 Order Prescribing Notice in Guardianship or Conservatorship Proceeding [Prob. Code §§ 1001(b), 1460]--Judicial Council Form GC-022

[1] FORM Order Prescribing Notice in Guardianship or Conservatorship Proceeding [Prob. Code §§ 1001(b), 1460]--Judicial Council Form GC-022

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative filled-in reproduction of Cal. Judicial Council Form GC-022, for use in prescribing notice in guardianship and conservatorship matters. The form may be used in guardianship or conservatorship matters in any of the following situations:

- The notice period is to be shortened or additional notice is to be prescribed [*Prob. Code §§ 1202, 1203(a)*;*see § 284.24*].

- A provision requires notice to be given as prescribed by the court [*see, e.g., Prob. Code § 3054*].

- The manner of notice is being changed under a section which requires notice to be served in a specified manner, but alternatively allows notice in such other manner as the court may authorize [*see, e.g., Prob. Code § 1511*].

In most guardianship and conservatorship situations in which this form is used, it will be necessary to specify in Paragraph 1f the nature of the petition, report, or account that is the subject of the notice.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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24-284 California Forms of Pleading and Practice--Annotated § 284.72

§ 284.72 Order Dispensing With Notice in Guardianship and Conservatorship Proceedings [Prob. Code §§ 1460(e), 1511(g)]--Judicial Council Form GC-021

[1] FORM Order Dispensing With Notice in Guardianship and Conservatorship Proceedings [Prob. Code §§ 1460(e), 1511(g)]--Judicial Council Form GC-021

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative filled-in reproduction of Cal. Judicial Council Form GC-021, for use in dispensing with notice in guardianship and conservatorship proceedings.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents of Order

This form can provide for dispensing with notice of a hearing on a petition so that notice would be required to be given only to persons who filed requests for special notice (Paragraphs 1d, 2a, and 2b) [*see Prob. Code §§ 1260(a), 1460(b), (d), (e), 2359, 2700 et seq.*]. The form also can provide specifically for dispensing with notice to particular persons who would be entitled to notice of a hearing on a petition for the appointment of a guardian (Paragraphs 1a and 1b) [*Prob. Code § 1511(g)*]. There are several situations in addition to appointment of guardians in which notice may be dispensed with if it cannot be given with reasonable diligence (Paragraph 1a). However, because Paragraph 1b of the form is limited to guardianships, Paragraph 1d should be used if notice is to be dispensed with in a conservatorship proceeding. Miscellaneous instances when the court may dispense with notice, such as notice to relatives named in a petition for appointment of a guardian of the estate, may also be entered on the form (Paragraph 1d) [*see Prob. Code § 1511(c)(2)*].

Regardless of the basis for dispensing with notice, Paragraph 2 of the form should be filled out, listing the persons who

will not receive notice (Paragraph 2b) and, if applicable, stating that no notice is required except to persons who filed requests for special notice (Paragraph 2a). Even though the court dispenses with notice to a person under *Prob. Code § 1460(e)*, the person is entitled to notice if he or she has filed a request for special notice under *Prob. Code § 2700 et seq.* [*Prob. Code § 1460(d)*].

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24-284 California Forms of Pleading and Practice--Annotated § 284.73

§ 284.73 Request for Special Notice and Proof and Admission of Service [Prob. Code § 2700]--Judicial Council Form GC-035

[1] FORM Request for Special Notice and Proof and Admission of Service [Prob. Code § 2700]--Judicial Council Form GC-035

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative filled-in reproduction of Cal. Judicial Council Form GC-035, for use in requesting special notice in guardianship and conservatorship proceedings. If the request is for notice of all of the matters referred to in *Prob. Code § 2700(c)*, Paragraph 2a(1) should be checked. If, however, the request is for notice of only some of the matters set forth in *Prob. Code § 2700(c)*, the appropriate boxes in Paragraph 2a should be checked. Special notice is discussed further in § 284.23.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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24-284 California Forms of Pleading and Practice--Annotated § 284.74

§ 284.74 Modification or Withdrawal of Request for Special Notice [Prob. Code § 2701]

[1] FORM Modification or Withdrawal of Request for Special Notice

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship *or* Limited Conservatorship] of the _____ [Person *or* Estate *or* Person and Estate] of _____ [*name*], _____ [Ward *or* Conservatee].	))))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] _____ [MODIFICATION *or* WITHDRAWAL] OF REQUEST FOR SPECIAL NOTICE

The undersigned, _____[*name*], is _____ [*specify status in proceeding, e.g.*, the ward in the above-entitled proceeding].

The undersigned _____ [modifies *or* withdraws] his/her request that special notice of _____ [all the matters listed in *Probate Code Section 2700 or list specific matters of which special notice was requested*] be given to _____[*name*] at _____[*address*] in accordance with *Probate Code Section 2700 et seq.*

_____ [*Add, if modifying request:* The undersigned now requests that special notice of _____ (all the matters listed in *Probate Code Section 2700 or list specific matters of which special notice is desired*) be given to _____ (*name*) at _____ (*address*) in accordance with *Probate Code Section 2700 et seq.*]
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

ACKNOWLEDGMENT OF SERVICE

Service of this _____ [Modification of Request *or* Withdrawal of Request] for Special Notice on _____[*date*] is acknowledged.

_____ [*signature*]

_____ [*typed name*]

_____ [Guardian *or* Conservator *or* Attorney for Guardian *or* Attorney for Conservator]

[2] Use of Form

The form in [1], *above*, is for use in modifying or withdrawing a request for special notice pursuant to *Prob. Code § 2701*. For discussion, see *§ 284.23[5]*.

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24-284 California Forms of Pleading and Practice--Annotated § 284.75

§ 284.75 Waiver of Notice or Special Notice of Hearing [Prob. Code §§ 1204, 1260(b)]

[1] FORM Waiver of Notice or Special Notice of Hearing

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship *or* Limited Conservatorship] of the _____ [Person *or* Estate *or* Person and Estate] of _____ [*name*], _____ [Ward *or* Conservatee].	))))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] WAIVER OF NOTICE

I, _____[*name*], waive my right to _____ [notice *or* special notice under *Probate Code Section 2700 et seq.*] as to the hearing on the _____ [petition *or* report *or* account *or* proceeding] for _____ [*specify the petition, report, account, or proceeding involved, e.g.,* authorization and instruction of the guardian of the person filed in the above-entitled proceeding] on _____[*date*].

This waiver is limited to the _____ [petition *or* report *or* account *or* proceeding] described above.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is for use by a person entitled to notice of particular matters in a guardianship or conservatorship proceeding, to waive that notice [*see Prob. Code §§ 1204, 1260(b)*].

The form may also be used by a person who has filed a request for special notice under *Prob. Code § 2700* to waive a special notice [*see Prob. Code § 1260(b)*].

The form can be used if notice was not given on time. The form can also be used to hold a hearing sooner than the time required for the giving of notice if everyone entitled to notice waives that notice.

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24-285 California Forms of Pleading and Practice--Annotated 285.syn

§ 285.syn Synopsis to Chapter 285: GUARDIANSHIP AND CONSERVATORSHIP: CARE OF WARD OR CONSERVATEE

§ 285.01 Scope of Chapter

§ 285.02 Cross References

§§ 285.03-285.09 [Reserved]

§ 285.10 Governing Statutes

§§ 285.11-285.19 [Reserved]

§ 285.20 Duty of Care, Custody, and Control

[1] In General

[2] Guardian

[3] Conservator

[a] Limitation on Conservatee's Activity

[b] Duty to Refrain From Neglect and Abuse

[4] Limited Conservator of Person

[a] In General

[b] Powers Specifically Granted by Court

[5] Petition for Instruction or Confirmation

§ 285.21 Additional Conditions

§ 285.22 Limitations on Powers and Duties of Conservator

§ 285.23 Residence of Ward or Conservatee

[1] Residence in California

[2] Residence Outside California

[3] Notice of Change in Residence

§ 285.24 Funds for Support, Maintenance, and Education

[1] No Duty of Support

[2] Source of Funds for Support

§ 285.25 Conservatee's Capacity to Marry or Register as Domestic Partner

§ 285.26 Disqualification From Voting

§§ 285.27-285.39 [Reserved]

§ 285.40 Consent to Medical Treatment in Guardianships

§ 285.41 Consent to Medical Treatment in Conservatorships

[1] Conservatee Not Adjudicated as Unable to Consent

[2] Conservatee Lacking Capacity to Consent

[a] Order for Conservator to Make Health Care Decisions

[b] Basis for Conservator's Decision

[c] Authority to Withhold or Withdraw Consent to Treatment

§ 285.42 Court Authorization of Medical Treatment

[1] Petition by Guardian or Conservator

[2] Petition by Ward, Conservatee, or Interested Person

[3] Procedure on Hearing of Petition

[a] Who May Appear

[b] Information to Conservatee

[4] Order Authorizing Guardian or Conservator to Give Consent

[a] Required Findings

[b] Basis for Determining Incapacity to Consent

§ 285.43 Mental Health Treatment

[1] Placement in Mental Health Facility

[2] Convulsive Treatments

§ 285.44 Special Treatment of Conservatee With Dementia

[1] Circumstances Under Which Permitted

[2] Conservatee With Certain Religious Beliefs

[3] Contents of Petition

[4] Court Investigation

§ 285.45 Withdrawal of Nutrition and Hydration

§ 285.46 Use of Experimental Drugs

§ 285.47 Sterilization

§§ 285.48-285.59 [Reserved]

§ 285.60 Related Matthew Bender Publications

§ 285.61 State Statutes

[1] In General

[2] Medical Treatment

[3] Procedural Matters

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[2] Los Angeles County

[3] Orange County

[4] Sacramento County

[5] San Diego County

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§ 285.70 Petition to Limit Powers of Conservator of the Person [Prob. Code § 2351(b),(c)]

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[2] Use of Form

[3] Who May Petition

[4] Contents of Petition

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§ 285.71 Petition to Modify or Remove Limitations on Powers of Conservator of the Person [Prob. Code § 2351(b),(c)]

[1] FORM

[2] Use of Form

§ 285.72 Petition to Modify Limited Conservatorship [Prob. Code § 2351.5]

[1] FORM

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[4] Contents of Petition

[5] Notice

[6] Procedure at Hearing

[7] Order

§ 285.73 Petition to Fix Residence Outside California [Prob. Code § 2352]--Judicial Council Form GC-085

[1] FORM

[2] Use of Form

§ 285.74 Order Fixing Residence Outside California [Prob. Code § 2352]--Judicial Council Form GC-090

[1] FORM

[2] Use of Form

§ 285.75 Pre-Move Notice of Proposed Change of Personal Residence of Conservatee or Ward [Prob. Code § 2353]--Judicial Council Form GC-79

[1] FORM

[2] Use of Form

§ 285.75A Post-Move Notice of Change of Residence of Conservatee or Ward [Prob. Code § 2353]--Judicial Council Form GC-80

[1] FORM

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§ 285.76 Petition for Authorization and Instruction or Approval and Confirmation of Acts of Guardian or Conservator [Prob. Code § 2359]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Notice

§ 285.77 Order Authorizing and Instructing or Approving and Confirming Acts of Guardian or Conservator [Prob. Code § 2359]

[1] FORM

[2] Use of Form

§§ 285.78-285.89 [Reserved]

§ 285.90 Petition for Exclusive Authority to Consent to Medical Treatment of Conservatee [Prob. Code §§ 1880, 1890, 1891]--Judicial Council Form GC-380

[1] FORM

[2] Use of Form

[3] Who May Petition

[4] Contents of Petition

[a] General Requirements

[b] Declaration of Physician or Psychologist

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§ 285.91 Attachment to Petition for Exclusive Authority to Consent to Medical Treatment--Request for Special Orders Regarding Dementia [Prob. Code § 2356.5]--Judicial Council Form GC-313

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[3] Contents of Attachment

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§ 285.92 Order Authorizing Conservator to Consent to Medical Treatment [Prob. Code §§ 1880, 1890, 1898]--Judicial Council Form GC-385

[1] FORM

[2] Use of Form

§ 285.93 Petition for Order Authorizing Medical Treatment of Ward or Conservatee [Prob. Code § 2357]--By Guardian or Conservator

[1] FORM

[2] Use of Form

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[a] In General

[b] Interested Persons

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PART I. SCOPE

24-285 California Forms of Pleading and Practice--Annotated § 285.01

§ 285.01 Scope of Chapter

This chapter discusses the powers and duties of a guardian of the person to provide for the care of the ward and the powers and duties of a conservator of the person to provide for the care of the conservatee [*see § 285.20* et seq.], including powers and procedures for consenting to medical treatment [*see* § 285.30 et seq.].

The chapter contains the following forms:

- A petition to impose limitations on powers of the conservator of the person [*Prob. Code § 2351(b),(c)*; *see § 285.70*].

- A petition to modify or remove limitations on powers of the conservator of the person [*Prob. Code § 2351(b),(c)*; *see § 285.71*].

- A petition to modify a limited conservatorship [*Prob. Code § 2351.5*; *see § 285.72*].

- A petition to fix the residence of a ward or conservatee outside California [*Prob. Code § 2352*] (Judicial Council Form GC-085) [*see § 285.73*].

- An order fixing residence outside the California [*Prob. Code § 2352*] (Judicial Council Form GC-090) [*see § 285.74*].

- Notices of change of residence [*Prob. Code § 2352*] (Judicial Council Form GC-080) Form GC-79 [*see § 285.75*] and Judicial Council Form GC-80 [*see § 285.75A*]).

- A petition [*see § 285.76*] and an order [*see § 285.77*] for authorization and instruction or approval and confirmation of the acts of a guardian or conservator, and an order authorizing and instructing or approving and confirming acts of a guardian or conservator [*Prob. Code § 2359*].

- A petition for exclusive authority to give consent for medical treatment of a conservatee [*Prob. Code*

§§ 1880, 1890, 1891] (Judicial Council Form GC-380) [*see § 285.90*].

- An attachment requesting special orders regarding dementia [*Prob. Code § 2356.5*] (Judicial Council Form GC-313) [*see § 285.91*].

- An order authorizing a conservator to give consent for medical treatment [*Prob. Code §§ 1880, 1890, 1898*] (Judicial Council Form GC-385) [*see § 285.92*].

- A petition by a guardian or conservator for an order authorizing medical treatment of a ward or conservatee [*Prob. Code §§ 2353, 2354, 2357*; *see § 285.93*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & RightsHealthcare LawTreatmentPatient ConsentConsent by Guardians & Parents

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24-285 California Forms of Pleading and Practice--Annotated § 285.02

§ 285.02 Cross References

- For discussion of the appointment of a guardian ad litem, see Ch. 291, *Guardians ad Litem* .
- For discussion and forms pertaining to inspection of a patient's health records, see Ch. 295, *Hospitals* .
- For discussion and forms pertaining to mentally ill persons generally, see Ch. 304, *Insane and Other Incompetent Persons* .
- For a general form of order, see Ch. 372, *Motions and Orders* .
- For discussion and forms pertaining to the support of minors, see Ch. 394, *Parent and Child* .
- For discussion and forms pertaining to memoranda of points and authorities, see Ch. 417, *Points and Authorities* .
- For discussion and forms pertaining to powers of attorney for health care, see Ch. 427, *Principal and Agent* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawGuardiansAppointmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsGeneral Overview

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24-285 California Forms of Pleading and Practice--Annotated §§ 285.03-285.09

[Reserved]

§§ 285.03[Reserved]

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24-285 California Forms of Pleading and Practice--Annotated § 285.10

§ 285.10 Governing Statutes

The law governing the powers and duties of a guardian of the person or conservator of the person to provide for the care of the ward or conservatee is set forth in *Prob. Code § 2350 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & Rights

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24-285 California Forms of Pleading and Practice--Annotated §§ 285.11-285.19

[Reserved]

§§ 285.11[Reserved]

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24-285 California Forms of Pleading and Practice--Annotated § 285.20

§ 285.20 Duty of Care, Custody, and Control

[1] In General

A guardian of the person or conservator of the person, but not a limited conservator, has the care, custody, and control of the ward or conservatee and has charge of his or her education [*Prob. Code § 2351(a)*]. Statutory provisions regulate and limit the powers and duties of the guardian or conservator in regard to fixing the residence [*see § 285.23*] and consenting to medical treatment [*see §§ 285.40, 285.41*] for the ward or conservatee [*see Prob. Code §§ 2352-2357*]. Other statutes provide in general terms for imposing limitations on the power of a conservator and for imposing additional duties on a conservator or guardian [*see Prob. Code §§ 2351, 2358*; *see also Cal. Rules of Court, Rule 7.1009* (standards of conduct for the guardian of the estate) and Rule 7.1059 (standards of conduct for the conservator of the estate), *see also § 285.21*].

[2] Guardian

Since a guardian's ward is a minor, the guardian has a special and personal duty of watchfulness, care, and discipline, which the guardian cannot delegate to others [*Guardianship of Howard (1933) 218 Cal. 607, 610, 24 P.2d 486]* .

[3] Conservator

[a] Limitation on Conservatee's Activity

A conservator can limit the conservatee's activities in a reasonable manner for the conservatee's own benefit, for example, by limiting his or her visitors and mail, but the conservator may not deny the conservatee the freedom essential to his or her welfare without good cause [*Browne v. Superior Court (1940) 16 Cal. 2d 593, 599-601, 107 P.2d 1]* .

[b] Duty to Refrain From Neglect and Abuse

In the case of a conservatee who is elderly or a dependent adult, the conservator has a duty to refrain from neglecting

the conservatee and from subjecting the conservatee to physical or financial abuse. These duties are implicit in *Welf. & Inst. Code § 15657*, under which a conservator can be held civilly liable for the physical abuse, neglect, or financial abuse of a conservatee who is elderly or a dependent adult [*see Welf. & Inst. Code §§ 15610.23* ("dependent adult" defined), 15610.27 ("elder" defined), 15610.30 ("financial abuse" defined), 15610.57 ("neglect" defined), 15610.63 ("physical abuse" defined)]. For further discussion of an action under *Welf. & Inst. Code § 15657*, particularly in the context of fiduciary abuse, see Ch. 290D, *Guardianship and Conservatorship: Actions Against Guardian or Conservator* .

[4] Limited Conservator of Person

[a] In General

A limited conservator has the care, custody, and control of the conservatee [*Prob. Code § 2351.5(a)(1)*]. The limited conservator must secure for the conservatee such habilitation or treatment, training, education, medical and psychological services, and social and vocational opportunity as may be appropriate and as will assist the conservatee in the development of maximum self-reliance and independence [*Prob. Code § 2351.5(a)(2)*].

[b] Powers Specifically Granted by Court

A limited conservator does not have any of the following powers or controls over the conservatee, unless these powers or controls are specifically requested in the petition for appointment of a limited conservator and granted by the court in its order appointing the limited conservator [*Prob. Code § 2351.5(b)*]:

- To fix the residence or specific dwelling of the conservatee.
- Access to the confidential records and papers of the conservatee.
- To consent or withhold consent to the marriage of, or the entrance into a registered domestic partnership by, the conservatee.
- Power over the right of the conservatee to contract.
- Control over the power of the conservatee to give or withhold medical consent.
- Control over the conservatee's right to control his or her own social and sexual contacts and relationships.
- Control over decisions concerning the education of the conservatee.

The limited conservator or the conservatee or any relative or friend of the conservatee may apply by petition to the superior court of the county in which the proceedings are pending, to have the limited conservatorship modified by theelimination or addition of any of the powers that have beenspecifically granted to the limited conservator. The granting or elimination of these powers is discretionary with the court [*Prob. Code § 2351.5(c)*]. For a form of petition to modify a limited conservatorship, see *§ 285.72*.

[5] Petition for Instruction or Confirmation

The guardian or the ward, the conservator or the conservatee, or any interested person, may petition the court for an order authorizing and instructing or approving and confirming the acts of the guardian or conservator [*Prob. Code § 2359(a)*]. When the order becomes final, it releases the guardian or conservator, and the sureties, from all claims of the ward or conservatee and of any other person based on any act or omission directly authorized or confirmed in the order [

Prob. Code § 2103(a)]. The protective provisions of *Prob. Code § 2103(a)*, however, do not apply when the order has been obtained by fraud or misrepresentation contained in the petition or order as to any material fact. In this context, misrepresentation includes omission of a material fact [*Prob. Code § 2103(b)*; *see Conservatorship of Coffey (1986) 186 Cal. App. 3d 1431, 1437-1438, 231 Cal. Rptr. 421]* .

When a conservator provides medical or other care for the conservatee, fixes the conservatee's residence, and supervises the conservatee's visitors, mail, or other personal activities in accordance with instructions of the court that appointed the conservator, the exclusive continuing jurisdiction of that court prevents the use of habeas corpus proceedings in any other California court to review the propriety of the care that the conservator provides for the conservatee [*Browne v. Superior Court (1940) 16 Cal. 2d 593, 598-601, 107 P.2d 1]* .

A conservator who petitions for the approval of a purchase, lease, or rental of real or personal property from the estate of a conservatee must provide a statement disclosing any family or affiliate relationship between the conservator and the purchaser, lessee, or renter of the property, and the family or affiliate relationship between the conservator and any agent hired by the conservator [*Prob. Code § 2359(c)(1)*]. For this purpose, "family" means a person's spouse or domestic partner (as defined by *Prob. Code § 37*; *Fam. Code § 297*), or relatives within the second degree of lineal or collateral consanguinity of a person or that person's spouse. Further, "affiliate" means an entity that is under the direct control, indirect control, or common control of the conservator [*Prob. Code § 2359(c)(2)*].

A violation of these requirements will result in the rescission of the purchase, lease, or rental of the property. Any losses incurred by the conservatee's estate because the property was sold or leased at less than fair market value will be deemed as charges against the conservator under *Prob. Code §§ 2401.3* and *2401.5*. Further, the court must assess a civil penalty equal to three times the charges against the conservator or other person in violation of these rules, and may assess punitive damages as itdeems proper. If the estate does not incur losses as a result of the violation, the court must instead order the conservator or other person in violation of these rules to pay a fine of up to $5,000 for each violation. These fines and penalties are in addition to any other rights and remedies provided by law [*Prob. Code § 2359(c)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansDuties & Rights

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24-285 California Forms of Pleading and Practice--Annotated § 285.21

§ 285.21 Additional Conditions

If the guardian or conservator consents, when the court appoints the guardian or conservator, it may include in the order of appointment conditions not otherwise obligatory, for the care, treatment, education, and welfare of the ward or conservatee. The performance of those conditions is a part of the duties of the guardian or conservator, for the faithful performance of which the guardian or conservator and the sureties on the bond are responsible [*Prob. Code § 2358*]. The conditions may include, for example, visitation rights for relatives or religious upbringing in a particular faith [*see Guardianship of Davis (1967) 253 Cal. App. 2d 754, 760, 61 Cal. Rptr. 297]* . The court at any time may consider granting visitation rights to an interested nonrelative of a ward [*Guardianship of Martha M. (1988) 204 Cal. App. 3d 909, 912-914, 251 Cal. Rptr. 567]* . The court has continuing jurisdiction to impose regulations on the guardian relating to custody of the ward [*Guardianship of Reynolds (1943) 60 Cal. App. 2d 669, 676, 677, 141 P.2d 498* (visitation rights)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansAppointmentFamily LawGuardiansDuties & Rights

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24-285 California Forms of Pleading and Practice--Annotated § 285.22

§ 285.22 Limitations on Powers and Duties of Conservator

When the court determines that it is appropriate in the circumstances, it may, in its discretion, limit the powers and duties of a conservator by an order stating the following [*Prob. Code § 2351(b)*]:

- The specific powers that the conservator does not have with respect to the conservatee's person (reserving the powers so specified to the conservatee).

- The specific powers and duties the conservator has with respect to the conservatee's person (reserving to the conservatee all other rights with respect to the conservatee's person, which the conservator would otherwise have).

An order limiting the conservator's powers may be included in the order appointing the conservator or may be made, modified, or revoked on a petition subsequently filed when notice of the hearing on the petition has been given as required [*Prob. Code § 2351(c)*]. For forms for petitions imposing, modifying, or removing limitations on a conservator's powers, see *§§ 285.70* and *285.71*.

In exercising his or her duties, a conservator may not hire or refer any business to an entity in which he or she has a financial interest, except with court authorization after written disclosure of the interest to the cour [*Prob. Code § 2351(d)*]. A "financial interest" means any of the following [*Prob. Code § 2351(d)*]:

- An ownership interest in a sole proprietorship, partnership, or closely held corporation;

- An ownership interest of greater than 1 percent of the outstanding shares in a publicly traded corporation; or

- Being an officer or a director of a corporation.

The prohibition against the referral of business to an entity in which the conservator has a financial interest applies only

to conservators required to register with the Statewide Registry under *Prob. Code §§ 2850-2856* [*Prob. Code § 2351(d)*].

The Professional Fiduciaries Act [Stats. 2006 ch. 491; *see Bus. & Prof. Code § 6500 et seq.*] replaced former requirements with respect to the licensing of professional fiduciaries, operative July 1, 2008. The Professional Fiduciaries Act creates the Professional Fiduciaries Bureau in the Department of Consumer Affairs, and requires the Bureau to license and regulate professional fiduciaries. As of January 1, 2009, all professional fiduciaries must be licensed under the Professional Fiduciaries Act [*Bus. & Prof. Code § 6530 et seq.*]. Former Probate Code provisions governing professional fiduciaries became inoperative as of July 1, 2008, and are repealed effective January 1, 2009 [*Prob. Code §§ 2345, 2856*]. For a detailed discussion on the Professional Fiduciaries Act, see *Ch. 281, Guardianship and Conservatorship: Appointment of Conservators, § 281.66*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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24-285 California Forms of Pleading and Practice--Annotated § 285.23

§ 285.23 Residence of Ward or Conservatee

[1] Residence in California

A guardian may fix the residence of the ward at any place in California, without first obtaining the permission of the court [*Prob. Code § 2352*]. A conservator has the same power, except in the case of a conservatee who has retained the right to fix his or her own residence pursuant to an order under *Prob. Code § 2351*.

In fixing the residence, the guardian or conservator must select the least restrictive appropriate setting that is available and necessary to meet the needs of the ward or conservatee and is in the best interests of the ward or conservatee. [*Prob. Code § 2352(b)*]. It is presumed that the personal residence of a conservatee at the time of the commencement of the proceeding is the least restrictive appropriate residence for the conservatee [*Prob. Code § 2352.5*]. If a conservator is seeking an order to sell the personal residence of the conservatee, the conservator must demonstrate that the terms of the sale are in the best interest of the conservatee [*Prob. Code § 2591.5*].

[2] Residence Outside California

A guardian or conservator must first obtain a court order to fix the residence of the ward or conservatee at any place outside California [*Prob. Code § 2352*; for forms for a petition and an order, *see §§ 285.73* and *285.74*]. An order permitting the residence of the ward or conservatee to be fixed outside California must require the guardian or conservator either to return the ward or conservatee to California or to cause a guardianship or conservatorship proceeding or its equivalent to be commenced in the place of the new residence after the ward or conservatee has resided in the place of new residence for four months, or such a longer or shorter period as is specified in the order [*Prob. Code § 2352(d)*].

When the guardian or conservator seeks court permission to fix the residence of the ward or conservatee outside California, counsel for the guardian or conservator must give notice of the hearing to all persons who have filed requests for special notice of petitions filed in the guardianshipor conservatorship proceedings under *Prob. Code § 2700* [*Prob. Code § 2702*; *see Prob. Code § 2700(a), (b), (c)(1)*]. For discussion and forms relating to special notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[3] Notice of Change in Residence

The guardian or conservator must file a notice of change of residence with the court within 30 days of the date of the change [*Prob. Code § 2352(e)(1), see also Cal. Rules Ct, Rules. 7.1013, 7.1063*]. The conservator must include in the notice of change of residence a declaration stating that the conservatee's change of residence is consistent with the standard provided in *Prob. Code § 2352(b)* [*Prob. Code § 2352(e)(1)*; for form, *see § 285.75A*]. If the guardian or conservator proposes to remove the ward or conservatee from his or her personal residence, the guardian or conservator must mail a notice of his or her intention to change the residence of the ward or conservatee to all persons entitled to notice under *Prob. Code § 1511(b)* and *Prob. Code § 1822(b)*, except as provided in *Prob. Code § 2352(c)* [*Prob. Code § 2352(e)(3), see also Cal. Rules Ct, Rules 7.1013, 7.1063*]. In the absence of an emergency, notice must be mailed at least 15 days prior to the proposed removal of the ward or conservatee from his or her personal residence [*Prob. Code § 2352(e)(3)*]. If the notice is served less than 15 days prior to the proposed removal of the ward or conservatee, the guardian or conservatee must provide the basis for the emergency in the notice [*Prob. Code § 2352(e)(3)*; for form, *see § 285.75*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & Rights

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24-285 California Forms of Pleading and Practice--Annotated § 285.24

§ 285.24 Funds for Support, Maintenance, and Education

[1] No Duty of Support

Neither a guardian nor a conservator is under a duty to pay for the care and education of a ward or conservatee [*see Prob. Code §§ 2404, 2466* (proceeding against guardian or conservator of estate to compel payment for support, maintenance, or education from estate; reimbursement of guardian or conservator by estate for advances); *cf. Guardianship of Reynolds (1943) 60 Cal. App. 2d 669, 676, 141 P.2d 498* (dictum)].

[2] Source of Funds for Support

The primary duty to support a minor rests on the minor's parents, and the minor's estate can be resorted to only when the parents are unable to fulfill theobligation in whole or in part [*In re Carboni (1941) 46 Cal. App. 2d 605, 613, 116 P.2d 453* ; *see Fam. Code § 3900 et seq.*]. For further discussion and forms relating to the enforcement of a parent's duty of support, see Ch. 394, *Parent and Child* .

On the other hand, because conservatees are adults or married or previously married minors [*Prob. Code § 1800.3(a)*], the primary burden of their support generally falls on their own estates [*see Prob. Code § 2466*]. However, spouses have a mutual duty of support, and a child must support his or her parent when in need [*Fam. Code §§ 4300 et seq., 4400 et seq.*]. For a discussion and forms relating to the possible duties of support between parents and adult children, see Ch. 394, *Parent and Child* . If one spouse has a conservator and the other spouse has the management or control of the community property, the spouse who has the management or control of the community property may be required to apply the income or principal of the community property to the support and maintenance of the conservatee [*see Prob. Code § 3080 et seq.*; *see also* Ch. 289, *Guardianship and Conservatorship: Management of Community Property*].

Notwithstanding the existence of another person legally obligated to provide support, maintenance, and education for a ward or conservatee, the court may for good cause order the ward or conservatee to be wholly or partially supported, maintained, or educated out of his or her own estate, on the petition of the guardian, conservator, ward, conservatee, or other interested person [*Prob. Code § 2422*]. The guardian or conservator of the estate has a duty to apply the assets of the estate to the support, maintenance, and education of the ward or conservatee, which may be enforced by petitioning

the court [*Prob. Code §§ 2404, 2420*]. For further discussion and forms related to obtaining funds for support, maintenance, and education from the guardian or conservator of the estate, see Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & RightsFamily LawMarital Duties & RightsDuty of SupportFamily LawParental Duties & RightsDutiesSupport of Children

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24-285 California Forms of Pleading and Practice--Annotated § 285.25

§ 285.25 Conservatee's Capacity to Marry or Register as Domestic Partner

The appointment of a conservator does not affect the capacity of the conservatee to marry or enter into a registered domestic partnership [*Prob. Code § 1900*]. The conservatee, conservator, any relative or friend of the conservatee, or any interested person may petition for an order to determine whether the conservatee has the capacity to enter into a valid marriage as provided in *Fam. Code § 300 et seq.*, or to enter into a registered domestic partnership as provided in *Fam. Code § 297*, at the time the order is made [*Prob. Code § 1901(a), (b)*]. Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 1901(c)*; *see* Ch. 284, *Guardianship and Conservatorship: Notice*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawCohabitationDomestic PartnersRegistrationFamily LawMarriageCapacity to Marry

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24-285 California Forms of Pleading and Practice--Annotated § 285.26

§ 285.26 Disqualification From Voting

If the court determines that the conservatee is not capable of completing an affidavit of voter registration in accordance with *Elec. Code § 2150*, the court must disqualify the conservatee from voting pursuant to *Elec. Code § 2208* or *Elec. Code § 2209* [*Prob. Code § 1910*; *see* Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElections

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[Reserved]

§§ 285.27[Reserved]

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24-285 California Forms of Pleading and Practice--Annotated § 285.40

§ 285.40 Consent to Medical Treatment in Guardianships

Generally, the guardian has the same right as a parent having legal custody of a child to give consent to medical treatment of the ward and to require the ward to receive medical treatment [*Prob. Code § 2353(a)*]. If the ward is at least 14 years old, however, no surgery can be performed on the ward unless both the guardian and the ward consent or a court order authorizing the treatment is obtained pursuant to *Prob. Code § 2357* [*Prob. Code § 2353(b)*; *see § 285.42*; for a form for a petition, *see § 285.93*]. This requirement is subject to the exception that the guardian's consent alone to surgery is sufficient if the guardian determines in good faith based on medical advice that a case is an emergency in which the ward faces loss of life or serious bodily injury if the surgery is not performed. In such a case, the guardian may require the ward to receive surgery, and no person is liable because the surgery is performed without the ward's consent [*Prob. Code § 2353(c)*].

Nothing in *Prob. Code § 2353* requires the guardian's consent when the ward alone may consent to medical or surgical treatment under other provisions of law [*Prob. Code § 2353(d)*], such as Family Code provisions covering general medical or dental care, mental health treatment or counseling or residential shelter services, treatment for communicable disease, rape, or sexual assault, and drug or alcohol treatment [*see Fam. Code §§ 6920, 6924, 6926-6929*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawGuardiansDuties & RightsHealthcare LawTreatmentEnd-of-Life DecisionsAdvance DirectivesHealthcare LawTreatmentPatient ConsentConsent by Guardians & Parents

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24-285 California Forms of Pleading and Practice--Annotated § 285.41

§ 285.41 Consent to Medical Treatment in Conservatorships

[1] Conservatee Not Adjudicated as Unable to Consent

The fact that a patient has a conservator does not necessarily preclude the patient from giving valid consent to medical treatment. In fact, the opposite is true. Unless the conservatee has been adjudicated to lack the capacity to give informed consent to medical treatment [*see* discussion below; *see also* [2], *below*], the conservatee may consent to his or her own medical treatment and consent of the conservator is not required [*Prob. Code § 2354(a)*; *but see Prob. Code§ 2354(b)* (consent of conservator is sufficient, notwithstanding refusal of conservatee, if conservator obtains order under *Prob. Code § 2357*)].

Prob. Code § 1880 authorizes the court to make a general determination that the conservatee lacks the capacity to consent to any form of medical treatment. If the statutory criteria for such a determination are satisfied [*see Prob. Code §§ 811, 1881*], the court, following a hearing [*see Prob. Code §§ 1892, 1895* (procedures for hearing and determination)], may issue an order to that effect and grant the conservator of the person the power to consent to medical treatment as specified in *Prob. Code § 2355* [*Prob. Code §§ 1880, 1896*; *see* [2], *below*]. *Prob. Code § 2355* requires that the conservator make health care decisions for the conservatee in accordance with the conservatee's health care instructions and other wishes, to the extent known, and otherwise in accordance with the conservator's determination of the conservatee's best interest. Special rules apply to certain types of drugs and treatment, such as experimental drugs, convulsive treatment, and placement of persons suffering from dementia in a secured facility [*see Prob. Code §§ 2356, 2356.5*].

In addition, *Prob. Code § 2357* provides a procedure by which a conservator may obtain a court order authorizing medical treatment for an existing or continuing medical condition if that treatment is not otherwise authorized by the applicable statutes, and permitting the conservator to consent to that medical treatment on behalf of the conservatee. A conservator who obtains an order under *Prob. Code § 2357* may require the conservatee to receive medical treatment specifically authorized by that order, whether or not the conservatee consents to the treatment [*Prob. Code § 2354(b)*]. For additional discussion of *Prob. Code § 2357*, see *§ 285.42*.

In the absence of authorization under *Prob. Code § 1880 et seq.* or *Prob. Code § 2357* as described above, a conservator has the power to give consent to medical treatment for the conservatee, but only if the conservatee does not object to the treatment [*Prob. Code § 2354(a)*], or if an emergency exists as described in *Prob. Code § 2354(c)*.

If the conservatee has designated an agent under a power of attorney for health care, that agent, if known to the health care provider to be reasonably available and willing to make health care decisions, has priority over any other person in making health care decisions for the principal [*Prob. Code § 4685*]. The Law Revision Commission comments to *Prob. Code § 4685* make it clear that this section was intended to give an agent priority over a conservator or a statutory surrogate [2000 Health Care Decisions Law and Revised Power of Attorney Law, 30 Cal. L. Revision Comm'n Reports at 82 (Mar. 2000)]. Based on the Law Revision Commission comment, it appears that this provision in *Prob. Code § 4685* overrides language in *Prob. Code § 2355* stating that if a conservatee has been adjudicated to lack capacity to make health care decisions, the conservator has "exclusive" authority to make health care decisions for the conservatee [*Prob. Code § 2355(a)*]. For discussion of the Health Care Decisions Law, see Ch. 427, *Principal and Agent* .

[2] Conservatee Lacking Capacity to Consent

[a] Order for Conservator to Make Health Care Decisions

In the order appointing the conservator or on a subsequent petition, if the court determines that the conservatee lacks capacity to make health care decisions, the court must so adjudge. At the same time, the court must by order give the conservator of the person exclusive authority to make the health care decisions for the conservatee that the conservator determines, in good faith based on medical advice, to be necessary. The order must also give the conservator the power to require the conservatee to receive that health care, whether or not the conservatee objects [*Prob. Code §§ 1880, 1890, 2355*; for an illustration of the Judicial Council form of order, *see § 285.92*].

Any request for such an order must be supported by the written declaration of a licensed physician or psychologist stating that the conservatee lacks the capacity to give an informed consent for any form of medical treatment and the reasons for that conclusion. The declaration must be filed at or before the hearing on the request [*Prob. Code § 1890(c)*].

If the conservator has these powers, his or her consent alone is sufficient, and no person is liable because the health care is performed on the conservatee without the conservatee's consent [*Prob. Code § 2355(a)*].

[b] Basis for Conservator's Decision

The conservator must make health care decisions for the conservatee in accordance with the conservatee's "individual health care instruction," if any [*see Prob. Code § 4623*], and other known wishes of the conservatee [*Prob. Code § 2355(a)*]. Otherwise, the conservator must make health care decisions in accordance with his or her determination of the conservatee's best interests [*Prob. Code § 2355(a)*]. In determining the conservatee's best interests, the conservator must consider the conservatee's known personal values [*Prob. Code § 2355(a)*].

If, before the establishment of the conservatorship, the conservatee was an adherent of a religion the tenets and practices of which call for reliance on prayer alone for healing, then treatment required by the conservator under the provisions of *Prob. Code § 2355* must be by an accredited practitioner of that religion [*Prob. Code § 2355(b)*].

[c] Authority to Withhold or Withdraw Consent to Treatment

Under *Prob. Code § 2355*, a conservator may withhold or withdraw consent to health care as well as give consent. This power permits a decision to forgo life-sustaining treatment in the case of a conservatee who is comatose with no reasonable possibility of regaining cognitive life. Further, the power supports a decision to withdraw nutrition and hydration from the conservatee [*Conservatorship of Drabick (1988) 200 Cal. App. 3d 185, 200-204, 245 Cal. Rptr.*

840 ; *see* *Barber v. Superior Court (1983) 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484]* . This authority extends to the withholding of nutrition and hydration from a conservatee who is conscious but severely mentally and physically disabled, but a conservator claiming statutory authority for withholding life-sustaining treatment in accordance with the conservatee's wishes must present clear and convincing evidence of those wishes [*Conservatorship of Wendland (2001) 26 Cal. 4th 519, 110 Cal. Rptr. 2d 412, 28 P.3d 151]* . A person's right to determine the scope of his or her own medical treatment, and to refuse treatment if it is not desired, is grounded both in the constitutional right of privacy and in common law [*Conservatorship of Drabick (1988) 200 Cal. App. 3d 185, 206, 245 Cal. Rptr. 840* ; *see* *Bouvia v. Superior Court (1986) 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297* ; *Bartling v. Superior Court (1984) 163 Cal. App. 3d 186, 209 Cal. Rptr. 220]* . The right survives incompetence and must be exercised by the conservator on behalf of the conservatee if the conservatee is incapable of exercising the right [*Conservatorship of Drabick (1988) 200 Cal. App. 3d 185, 207-208, 245 Cal. Rptr. 840]* .

In exercising the right, the conservator must act in good faith and in the best interests of the conservatee. The conservatee's prior informal statements concerning a particular course of treatment may be relevant to the exercise of the right, but the conservator is not absolutely bound by them, nor is discontinuance foreclosed in a case in which the conservatee did not disclose his or her wishes while competent [*Conservatorship of Drabick (1988) 200 Cal. App. 3d 185, 210-212, 245 Cal. Rptr. 840]* . In the case of a conservatee who is conscious but severely mentally and physically disabled, a conservator claiming statutory authority for withholding life-sustaining treatment in accordance with the conservatee's wishes must present clear and convincing evidence of the conservatee's wishes [*Conservatorship of Wendland (2001) 26 Cal. 4th 519, 110 Cal. Rptr. 2d 412, 28 P.3d 151]* .

The conservator may elect to discontinue or refuse treatment without first seeking court approval. If the matter comes before the court on a petition for instructions [*see Prob. Code § 2359(a)*], the standard for judicial review is whether the conservator has acted in good faith to determine whether treatment is necessary, based on medical advice. The concept of good faith precludes a decision affected by a material conflict of interest and requires the conservator to consider the available information relevant to the conservatee's best interests [*Conservatorship of Drabick (1988) 200 Cal. App. 3d 185, 216, 245 Cal. Rptr. 840]* .

In the case of a decision to forgo life-sustaining treatment, including the withholding of nutrition and hydration, the conservator's decision must be based on the prognosis that there is no reasonable possibility that the conservatee will return to cognitive, sapient life. However, such a prognosis does not compel the conservator to forgo life-sustaining treatment [*Conservatorship of Drabick (1988) 200 Cal. App. 3d 185, 217, 245 Cal. Rptr. 840]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsHealthcare LawTreatmentEnd-of-Life DecisionsAdvance DirectivesHealthcare LawTreatmentPatient ConsentConsent by Guardians & Parents

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24-285 California Forms of Pleading and Practice--Annotated § 285.42

§ 285.42 Court Authorization of Medical Treatment

[1] Petition by Guardian or Conservator

If a ward or conservatee would benefit from medical treatment for an existing or continuing medical condition, and treatment cannot be authorized under the guardian's or conservator's existing power to consent [*see Prob. Code §§ 2352-2355*], and the ward or conservatee is unable to give an informed consent to the medical treatment, the guardian or conservator may petition the court for an order authorizing the medical treatment and authorizing the guardian or conservator to consent on behalf of the ward or conservatee [*Prob. Code § 2357(b)*; for a form of petition, *see § 285.93*].

When a petition to authorize medical treatment is filed by the guardian or conservator, and the ward or conservatee has no attorney of record, the court must appoint the public defender or private counsel under *Prob. Code § 1471* to consult with and represent the ward or conservatee at the hearing on the petition. If an appointment is made, the court must fix a sum as reasonable compensation for counsel, payable by the person or estate of the person who is furnished with counsel, to the extent of his or her ability, or by the county, or both, pursuant to *Prob. Code § 1472* [*Prob. Code § 2357(d)*].

[2] Petition by Ward, Conservatee, or Interested Person

The ward or conservatee, or an interested person, may petition the court for an order under *Prob. Code § 2357* requiring the conservator to obtain or consent to, or obtain and consent to, specified medical treatment to be performed on the ward or conservatee [*Prob. Code § 2357(i)*]. The contents of the petition are not prescribed, but it should contain substantially the same allegations as a petition by the guardian or conservator [for form, see *§ 285.93*].

General notice of the hearing on the petition must be given for the period and in the manner set forth in *Prob. Code § 1460 et seq.* [*Prob. Code § 2357(i)*]. Special notice of the filing of the petition, when requested, must be given for the period and in the manner set forth in *Prob. Code § 2702* [*Prob. Code § 2702*; *see Prob. Code § 2700 et seq.* (requests for special notice)]. For discussion and forms relating to general and special notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

When a ward or conservatee, or an interested person, files a petition pursuant to *Prob. Code § 2357(i)*, to compel the guardian or conservator to obtain and consent to medical treatment for the ward or conservatee, the court may appoint private legal counsel for the ward or conservatee, if not otherwise represented by counsel, provided the appointment would be helpful to the resolution of the matter or necessary to protect the interests of the ward or conservatee [*Prob. Code § 1470*].

[3] Procedure on Hearing of Petition

[a] Who May Appear

The conservatee, the spouse or domestic partner and any relative or friend of the conservatee, the conservator, and any other interested person, may appear at the hearing to support or oppose the petition [*Prob. Code § 1895(a)*].

A Domestic Partnership is formed when two persons who meet specific requirements complete and file a Declaration of Domestic Partnership with the Secretary of State. In order to file a valid declaration, the two parties must meet the following requirements:

- Both must have a common residence;
- Both agree to be jointly responsible for each other's basic living expenses incurred during the domestic partnership;
- Neither is married or a part of another domestic partnership;
- Neither is related by blood in a way that would prevent them from being married in the state of California;
- Both are over 18;
- Both are either of the same sex or one or both meet the eligibility criteria under Title II of the Social Security Act for old-age insurance benefits [*42 U.S.C. § 1381*]. Persons of opposite sexes may not form a valid domestic partnership unless at least one is 62 years of age;
- Both are capable of consenting to a domestic partnership;
- Neither has previously filed a Declaration of Domestic Partnership with the Secretary of State which has not been terminated; and
- Both must file the Declaration of Domestic Partnership with the Secretary of State [*Family Code § 297*].

[b] Information to Conservatee

Unless the conservatee is absent from the hearing pursuant to *Prob. Code § 1893*, the court, before granting the petition, must inform the conservatee of the following [*Prob. Code § 1895(b)*]:

- The nature and purpose of the proceeding.
- The nature and effect of the order requested on the conservatee's basic rights.

- The conservatee's right to oppose the petition, to be represented by legal counsel if he or she so chooses, and to have legal counsel appointed by the court if unable to retain legal counsel.

Before granting the petition, the court must consult the conservatee to determine the conservatee's opinion concerning the order requested in the petition [*Prob. Code § 1895(c)*].

If an affidavit or certificate of the conservatee's medical inability to attend the hearing was filed, it is evidence only on that issue, and cannot be considered in determining the issue of the conservatee's legal capacity [*Prob. Code § 1893(b)*]. For further discussion of the presence of the conservatee at the hearing, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* .

[4] Order Authorizing Guardian or Conservator to Give Consent

[a] Required Findings

The court may authorize the recommended course of medical treatment and may authorize the guardian or conservator to give consent to the recommended course of medical treatment on behalf of the ward or conservatee if the court determines, from the evidence, all of the following [*Prob. Code § 2357(h)*]:

- The existing or continuing medical condition of the ward or conservatee requires the recommended course of medical treatment.

- There is a probability that if the condition is left untreated, it will become life-endangering or will result in a serious threat to the physical or mental health of the ward or conservatee.

- The ward or conservatee is unable to give an informed consent to the recommended course of treatment [*see* [b], *below*].

[b] Basis for Determining Incapacity to Consent

A conservatee is deemed unable to give informed consent to any form of medical treatment if the conservatee is unable to respond knowingly and intelligently to queries about medical treatment or is unable to participate in treatment decisions by a rational thought process [*Prob. Code § 1881(a)*]. For a court to determine that a conservatee is unable to respond knowingly and intelligently to queries about his or her medical treatment or is unable to participate in treatment decisions by means of a rational thought process, the court must determine that, for all medical treatments, the conservatee is unable to understand at least one of the following items of minimum basic medical treatment information [*Prob. Code § 1881(b)*]:

- The nature and seriousness of any illness, disorder, or defect that the conservatee has or may develop.

- The nature of any medical treatment that is being or may be recommended by the conservatee's health care providers.

- The probable degree and duration of any benefits and risks of any medical intervention that is being or may be recommended by the conservatee's health care providers, and the consequences of lack of treatment.

- The nature, risks, and benefits of any reasonable alternatives.

In addition, the court must determine that one or more of the mental functions of the conservatee described in *Prob. Code § 811(a)* is impaired, and that there is a link between the deficit or deficits and the conservatee's inability to give informed consent [*Prob. Code § 1881(b)(2)*]. This requirement does not apply, however, if the conservatee, after notice by the court of his or her right to object (which must include, at least, an interview by a court investigator before the hearing on the petition), does not object to the proposed finding of incapacity, or waives any objections [*Prob. Code § 1881(e)*].

Prob. Code § 810 et seq. set forth the rules for determining whether an individual who is suffering from a deficit in medical functions has the capacity to consent to medical treatment. For detailed discussion of these rules, see Ch. 304, *Insane and Incompetent Persons* . A deficit in the mental functions listed in *Prob. Code § 811(a)* may be considered only if the deficit, by itself or in combination with one or more of the other mental function deficits, significantly impairs the conservatee's ability to understand the consequences of his or her decisions regarding medical care [*Prob. Code § 1881(c)*]. In determining whether a conservatee's mental functioning is so severely impaired that the conservatee lacks the capacity to give informed consent to any form of medical treatment, the court may take into consideration the frequency, severity, and duration of periods of impairment [*Prob. Code § 1881(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawCohabitationDomestic PartnersRegistrationFamily LawGuardiansDuties & RightsHealthcare LawTreatmentPatient ConsentConsent by Guardians & Parents

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24-285 California Forms of Pleading and Practice--Annotated § 285.43

§ 285.43 Mental Health Treatment

[1] Placement in Mental Health Facility

No ward or conservatee can be involuntarily placed in a mental health treatment facility under the provisions of the Guardianship-Conservatorship Law [*Prob. Code § 1400 et seq.*]. Involuntary civil placement of a ward or conservatee in a mental health treatment facility may be obtained only pursuant to the Lanterman-Petris-Short Act [*Prob. Code § 2356(a)*; *see Welf. & Inst. Code § 5150 et seq.* (involuntary treatment for dangerous or gravely disabled persons); *Welf. & Inst. Code § 5350 et seq.* (conservatorship for gravely disabled persons)]. A guardian, however, may apply for the placement of the ward in a state hospital as provided in *Welf. & Inst. Code § 6000* [*Prob. Code § 2356(a)*]. For a discussion of voluntary admissions under *Welf. & Inst. Code § 6000* and of involuntary civil commitment proceedings, see Ch. 304, *Insane and Other Incompetent Persons* , Pt. I.

[2] Convulsive Treatments

Convulsive treatments cannot be performed on a ward or conservatee under the provisions of the Guardianship-Conservatorship Law [*Prob. Code § 1400 et seq.*] but may be performed only as provided in the Lanterman-Petris-Short Act [*Prob. Code § 2356(c)*; *see Welf. & Inst. Code § 5325 et seq.* (rights of involuntarily detained dangerous or gravely disabled persons); *Conservatorship of Fadley (1984) 159 Cal. App. 3d 440, 446, 205 Cal. Rptr. 572* ; *see also Welf. & Inst. Code §§ 5326.7, 5326.8* (when guardian or conservator may consent to convulsive treatment)]. The standard of proof in a hearing to determine whether the conservatee has the capacity to give informed consent to convulsive treatment is clear and convincing evidence [*Lillian F. v. Superior Court (1984) 160 Cal. App. 3d 314, 324, 206 Cal. Rptr. 603]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawFamily Protection & WelfareInvoluntary CommitmentFamily LawGuardiansDuties & RightsHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health

ServicesCommitmentInvoluntary Commitment of Adults

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24-285 California Forms of Pleading and Practice--Annotated § 285.44

§ 285.44 Special Treatment of Conservatee With Dementia

[1] Circumstances Under Which Permitted

A conservator may in specified circumstances authorize the placement of the conservatee in a secured perimeter residential care facility for the elderly or a locked and secured nursing facility that specializes in the care and treatment of people with dementia [*Prob. Code § 2356.5(b)*; *see Health & Safety Code § 1569.698* (residential care facility for elderly); *Health & Safety Code § 1569.691* (locked and secured nursing facility)]. The conservator also may authorize the administration of medication appropriate for the care and treatment of dementia [*Prob. Code § 2356.5(c)*]. However, the conservator may authorize these things only upon the court's finding, by clear and convincing evidence, of all of the following [*Prob. Code § 2356.5(b),(c)*]:

- The conservatee has dementia, as defined in the last published edition of the Diagnostic and Statistical Manual of Mental Disorders.

- The conservatee lacks the capacity to give informed consent to the placement or the administration of medication, or both, as the case may be.

- The conservatee has at least one mental function deficit pursuant to *Prob. Code § 811(a)*, and this deficit significantly impairs the conservatee's ability to understand and appreciate the consequences of his or her actions pursuant to *Prob. Code § 811(b)*. For discussion of *Prob. Code § 811*, see Ch. 304, *Insane and Other Incompetent Persons* , Pt. V.

- The conservatee needs or would benefit from a restricted and secure environment or from appropriate medication, or both, as the case may be, as demonstrated by evidence presented in a supporting declaration by a licensed physician or psychologist with at least two years of experience in diagnosing dementia and acting within the scope of his or her license [*see Prob. Code § 2356.5(f)(3)*].

The court must also find that proposed placement in a locked facility is the least restrictive placement appropriate to the

conservatee's needs [*Prob. Code § 2356.5(b)(4)*]. A literal reading of *Prob. Code § 2356.5(b)(4)* would seem to require that the court make this finding when authority is sought to authorize the placement of the conservatee in a secured perimeter residential care facility for the elderly as well as when authority is sought to place the conservatee in a locked and secured nursing facility [*see Prob. Code § 2356.5(b)(4)*]. Logically, however, it would seem that the finding should be required only when authority is sought for placement in the locked facility.

Further, a conservatee who is to be placed in a secured perimeter or locked facility as described above may not be placed in a mental health rehabilitation center as described in *Welf. & Inst. Code § 5675* or an institution for mental disease as described in Welf. & Inst. Code § 2356.5(e) [*Prob. Code § 2356.5(e)*].

[2] Conservatee With Certain Religious Beliefs

If the conservatee is an adherent of a religion the tenets and practices of which call for reliance on prayer alone for healing, the conservatee must be treated by an accredited practitioner of that religion in lieu of the administration of medication [*Prob. Code § 2356.5(d)*].

[3] Contents of Petition

A petition seeking authority for the placement or treatment described above is governed by the usual rules for petitions for medical treatment of wards and conservatees [*see Prob. Code § 2357* (medical treatment for existing or continuing condition); *see also § 285.42*], except that the following are required [*Prob. Code § 2356.5(f)*]:

- The conservatee must be represented by an attorney [*see Prob. Code § 1470 et seq.* (appointment of legal counsel)].

- The conservatee must be produced at the hearing, unless properly excused [*see Prob. Code § 1893* (presence of conservatee at hearing and grounds for excusing conservatee from being present at hearing)].

- The petition must be supported by a declaration of a licensed physician or psychologist with at least two years of experience in diagnosing dementia and acting within the scope of his or her license, and the declaration must support each of the findings required to be made by the court [*see Prob. Code § 1890(c)* (declaration); *see also Prob. Code § 2356.5(b),(c)* (findings)].

- The petition may be filed by the conservator, the conservatee, or the spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*], or any relative or friend of the conservatee [*see Prob. Code § 1891(b)* (persons who may file petition)].

[4] Court Investigation

The court investigator is required to investigate every year and to report to the court every two years if the conservator is authorized to act under *Prob. Code § 2356.5* [*Prob. Code § 2356.5(g)*; *see Prob. Code § 1850* (review at six months, at end of first year, and every two years thereafter); *see also Prob. Code § 1851* (investigation by court investigator)]. In addition to the other advice that the court investigator is required to give the conservatee [*see Prob. Code § 1851*; *see also* Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators*], the investigator is required to advise the conservatee that he or she has the right to object to the powers granted to the conservator under *Prob. Code § 2356.5* [*Prob. Code § 2356.5(g)*]. The investigator's report must include whether the powers granted under that section are warranted [*Prob. Code § 2356.5(g)*]. If the conservatee objects to those powers, or if the investigator determines that some change in those powers is warranted, the court must provide a copy of the report to the conservatee's attorney, and the attorney must, within 30 days after receiving the report, file a petition with the court regarding the conservatee's

status or file a written report with the court stating that the attorney has met with the conservatee and has determined that the petition would be inappropriate [*Prob. Code § 2356.5(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral Overview

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C. Consent to Medical Treatment

24-285 California Forms of Pleading and Practice--Annotated § 285.45

§ 285.45 Withdrawal of Nutrition and Hydration

The conservator can authorize removal of a nasogastric tube from a conservatee who is in a persistent vegetative state [*see Conservatorship of Drabick (1988) 200 Cal. App. 3d 185, 205, 216-217, 245 Cal. Rptr. 840* ; *see also Prob. Code § 2355(a)*; *but see Cruzan v. Director, Mo. Health Dept. (1990) 497 U.S. 261, 284-285, 110 S. Ct. 2841, 111 L. Ed. 2d 224* (state may constitutionally require clear and convincing evidence of conservatee's wishes)]. However, a physician with moral objections cannot be compelled to remove a nasogastric tube if the conservatee can be transferred to the care of another physician who will carry out the direction [*Conservatorship of Morrison (1988) 206 Cal. App. 3d 304, 308-312, 253 Cal. Rptr. 530]* .

If the conservatee is conscious but severely mentally and physically disabled, a conservator claiming statutory authority for withholding life-sustaining treatment in accordance with the conservatee's wishes must present clear and convincing evidence of those wishes [*Conservatorship of Wendland (2001) 26 Cal. 4th 519, 110 Cal. Rptr. 2d 412, 28 P.3d 151]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsHealthcare LawTreatmentEnd-of-Life DecisionsLife Support

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24-285 California Forms of Pleading and Practice--Annotated § 285.46

§ 285.46 Use of Experimental Drugs

No experimental drug may be prescribed for or administered to a ward or conservatee under the Guardianship-Conservatorship Law [*Prob. Code § 2356(b)*; *see Health & Safety Code § 111515* ("experimental drug" defined)]. Such a drug may be prescribed for or administered to a ward or conservatee only as provided in *Health & Safety Code §§ 111515-111545* [*Prob. Code § 2356(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewHealthcare LawTreatmentGeneral Overview

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24-285 California Forms of Pleading and Practice--Annotated § 285.47

§ 285.47 Sterilization

The Probate Code sets forth procedures by which a conservator, or a person authorized to petition for conservatorship, may file a petition for the appointment of a limited conservator authorized to consent to the sterilization of an adult with developmental disabilities [*see Prob. Code § 1950 et seq.*]. These procedures do not apply to a person who has the ability to consent to his or her sterilization [*see Prob. Code § 1951(a)*]. The statutes set forth detailed procedural protections intended to ensure that no individual will be sterilized solely by reason of a developmental disability and that no one who knowingly opposes his or her own sterilization will be involuntarily sterilized [*see Prob. Code § 1950*; *see also Conservatorship of Angela D. (1999) 70 Cal. App. 4th 1410, 83 Cal. Rptr. 2d 411]* . Minors may not be sterilized under the laws governing guardianship and conservatorship [*see Prob. Code § 2356(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsHealthcare LawTreatmentPatient ConsentConsent by Guardians & Parents

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24-285 California Forms of Pleading and Practice--Annotated §§ 285.48-285.59

[Reserved]

§§ 285.48[Reserved]

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24-285 California Forms of Pleading and Practice--Annotated § 285.60

§ 285.60 Related Matthew Bender Publications

For transactional forms related to medical services, medical consents, and advance health care directives, see California Legal Forms, Ch. 104, *Health Care Transactions, Consents, and Directives* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentGeneral OverviewHealthcare LawTreatmentPatient ConsentGeneral Overview

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24-285 California Forms of Pleading and Practice--Annotated § 285.61

§ 285.61 State Statutes

[1] In General

Capacity to vote. *Elec. Code §§ 2208, 2209*

Assessment of limited conservatee's disabilities by regional center. *Prob. Code § 1827.5*

Conservatee's capacity to marry or enter into registered domestic partnership. *Prob. Code § 1900*

Court determination of conservatee's capacity to marry or enter into registered domestic partnership. *Prob. Code § 1901*

Court order disqualifying conservatee from voting. *Prob. Code § 1910*

Powers and duties of guardian or conservator of person. *Prob. Code § 2351*

Powers of limited conservator. *Prob. Code § 2351.5*

Residence of ward or conservatee. *Prob. Code § 2352*

Power of court with consent of guardian or conservator to make orders respecting care and treatment of ward or conservatee. *Prob. Code § 2358*

Authorization or confirmation of guardian's or conservator's actions. *Prob. Code § 2359*

Court order for support of ward or conservatee when guardian or conservator fails to furnish support. *Prob. Code § 2404*

Support and maintenance of ward or conservatee and dependents. *Prob. Code § 2420 et seq.*

[2] Medical Treatment

Consent to medical treatment by conservator for conservatee lacking capacity. *Prob. Code §§ 1880, 2355*

Petition to make, modify, or revoke *Prob. Code § 1880* order granting conservator authority to consent to medical treatment for conservatee. *Prob. Code §§ 1890, 1891*

Notice. *Prob. Code §§ 1890(b), 1892*

Attendance of conservatee at hearing. *Prob. Code §§ 1893, 1894*

Appearances and procedures at hearing. *Prob. Code § 1895*

Effective period of order. *Prob. Code §§ 1896(b), 1897*

Procedure on petition to modify or revoke *Prob. Code § 1880* order. *Prob. Code § 1898*

Sterilization. *Prob. Code § 1950 et seq.*

Consent to medical treatment for ward. *Prob. Code § 2353*

Consent to medical treatment for conservatee. *Prob. Code §§ 2354, 2355*

Restrictions on power of guardian or conservator to consent to medical treatment for ward or conservatee. *Prob. Code § 2356*

Dementia and placement in secured facility. *Prob. Code § 2356.5*

Petition to authorize or compel medical treatment. *Prob. Code § 2357*

Advance health care directives/powers of attorney for health care. *Prob. Code § 4600 et seq.*

Abuse of elderly and other dependent adults. *Welf. & Inst. Code § 15600 et seq.*

Adult protective services. *Welf. & Inst. Code § 15750 et seq.*

[3] Procedural Matters

Patient access to health records. *Health & Safety Code § 123100 et seq.*

Verification. *Prob. Code § 1021(a)*

Appointment of counsel for limited conservatee. *Prob. Code § 1471(c)*

Notice. *Prob. Code §§ 1822, 2351(c), 2351.5(c)*

Citation of proposed conservatee. *Prob. Code §§ 1823, 1824*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawFamily Protection & WelfareDependent & Disabled AdultsServicesFamily LawGuardiansDuties & RightsFamily LawMarriageCapacity to MarryGovernmentsState & Territorial GovernmentsElectionsHealthcare LawTreatmentPatient ConsentConsent by Guardians & ParentsPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsProtection From Abuse & Neglect

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24-285 California Forms of Pleading and Practice--Annotated § 285.62

§ 285.62 Local Court Rules

[1] Alameda County

Notice to court investigator of conservatee's change of residence. Alameda Co. Super. Ct. Rules, Rule 12.15.3.4

[2] Los Angeles County

Notice of change of address. Los Angeles Co. Super. Ct. Rules, Rule 10.175

[3] Orange County

Capacity to give informed consent for medical treatment. Orange Co. Super. Ct. Rules, Rule 611.06

[4] Sacramento County

Notice regarding petition for dementia powers. Sacramento Co. Super. Ct. Rules, Rule 15.103

[5] San Diego County

Dementia authority. San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.129.1

Change of conservatee's residence. San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.142

Legal Topics:

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

Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsHealthcare LawTreatmentPatient ConsentConsent by Guardians & Parents

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24-285 California Forms of Pleading and Practice--Annotated § 285.63

§ 285.63 Decisions

Hearing pursuant to *Welf. & Inst. Code § 5326.7(f)* is limited to issue of whether patient has capacity to give informed consent to convulsive treatment; court's review of need for treatment was improper, but harmless error. *Conservatorship of Fadley (1984) 159 Cal. App. 3d 440, 446, 205 Cal. Rptr. 572*

Daughter, whose out-of-state guardianship appointment was not recognized by court, had right under *Welf. & Inst. Code § 11054* to apply for social services benefits for incompetent parents. *Holiway v. Woods (1983) 143 Cal. App. 3d 1006, 1011-1012, 192 Cal. Rptr. 445*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawGuardiansDuties & RightsHealthcare LawTreatmentPatient ConsentInformed ConsentPublic Health & Welfare LawSocial ServicesMentally Ill & Mentally Retarded IndividualsGeneral Overview

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24-285 California Forms of Pleading and Practice--Annotated § 285.64

§ 285.64 Law Reviews

Costello, *Making Kids Take Their Medicine: The Privacy and Due Process Rights of De Facto Competent Minors, 31 Loy. L.A. L. Rev. 907 (1998)*

Comment, *The Right to Refuse Life Sustaining Medical Treatment and the Noncompetent Nonterminally Ill Patient: An Analysis of Abridgment and Anarchy, 17 Pepp. L. Rev. 461 (1990)*

Note, *Barber v. Superior Court: Removing Food and Water From a Terminally Ill, Comatose Patient--Who Decides? 17 Sw. U. L. Rev. 109 (1987)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationPatient ConfidentialityGeneral OverviewHealthcare LawTreatmentEnd-of-Life DecisionsLife SupportHealthcare LawTreatmentEnd-of-Life DecisionsLifesaving Treatment

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24-285 California Forms of Pleading and Practice--Annotated § 285.65

§ 285.65 Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, §§ 989-996 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral Overview

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24-285 California Forms of Pleading and Practice--Annotated §§ 285.66-285.69

[Reserved]

§§ 285.66[Reserved]

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24-285 California Forms of Pleading and Practice--Annotated § 285.70

§ 285.70 Petition to Limit Powers of Conservator of the Person [Prob. Code § 2351(b),(c)]

[1] FORM Petition to Limit Powers of Conservator of the Person

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Conservatorship *or* Limited Conservatorship] of the _____ [Person *or* Person and Estate] of _____ [*name*], Conservatee.	)))))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION TO LIMIT POWERS OF CONSERVATOR

Petitioner, _____[*name*], respectfully represents:

1. Petitioner is _____ [the conservator of the _____ (person *or* person and estate) of _____ (*name*) *or* the conservatee in this proceeding, appearing by his/her guardian ad litem, _____ (*name*) *or specify relationship to conservatee, e.g.*, the sister of _____ (*name*), the conservatee].

[*EITHER*]

2. The order of this court dated _____, appointing _____ [petitioner *or name of conservator*] as conservator of the _____ [person *or* person and estate] of _____[*name*], did not limit the powers and duties of the conservator over the care, custody, control, or

education of the conservatee, nor has any such limitation been imposed by subsequent order of the court.

[*OR*]

2. The powers and duties of _____ [petitioner *or name of conservator*] as conservator of the [person *or* person and estate] of _____[*name*] were limited by the order of _____[*date*], which provided that _____[*set forth existing limitations*].

[*CONTINUE*]

3. _____ [*Facts showing why order limiting or further limiting conservator's powers should be made, e.g.,* The conservator has arbitrarily prevented the relatives of the conservatee from communicating with the conservatee, by censoring the conservatee's mail, telephone calls, and visitors, all without good cause]. The powers and duties of the conservator of the _____ [person *or* person and estate] should be limited by an order providing that _____ [*specify limitations, e.g.,* the conservator does not have the power to censor the conservatee's mail, telephone calls, or visitors, or otherwise to interfere with communication between the conservatee and his family].

WHEREFORE, petitioner prays for an order providing that _____[*name*], as conservator of the _____ [person *or* person and estate] of _____[*name*], does not have the power _____ [*specify limitation, e.g.,* to censor mail, telephone calls, or visits of relatives with _____ (*name of conservatee*) or otherwise to interfere with communication between the conservatee and his relatives], and for such other orders as the court may deem proper.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

Petitioner

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is for use in petitioning the court for an order imposing limitations or further limitations on the powers and duties of a conservator of the person or person and estate regarding the care, custody, control, or education of the conservatee [*see Prob. Code § 2351(b),(c)*].

The form may not be used in a guardianship [*see Prob. Code § 2351(b),(c)*].

[3] Who May Petition

Although *Prob. Code § 2351* provides that an order limiting the powers of a conservator of the person may be made in an order appointing him or her, or may be made, modified, or revoked in a subsequent order, the statute does not specify who may petition for such a subsequent order. This form has been drafted based on the assumption that the same person who may petition for appointment of a conservator may petition to impose, modify, or revoke limitations on a conservator's powers (Paragraph 1). Since there is no specific authority for the conservatee to file the petition, however, if a conservatee does file it, he or she probably must do so by a guardian ad litem [*see Code Civ. Proc. § 372*; *Prob. Code § 2351*; *Guardianship of Boxley (1953) 115 Cal. App. 2d 483, 486, 252 P.2d 348* (guardian ad litem is required when no statute expressly allows incompetent to petition)].

[4] Contents of Petition

The contents of a petition to impose limitations on the power and duties of a conservator of the person are not specified by statute. The petition should state the standing of the petitioner (Paragraph 1) and any existing limitations on the conservator's powers (Paragraph 2). Because the powers and duties of a conservator of the person may be limited if the court determines that it is appropriate in the circumstances of the particular conservatee, the petition should state the reasons why the limitations on the conservator's powers should be imposed, along with the terms of any limitations to be imposed (Paragraph 3) [*Prob. Code § 2351(b)*].

[5] Verification

The petition must be verified [*see Prob. Code § 1021(a)*].

[6] Notice

Notice of the hearing on the petition must be given as provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2351(c)*]. For discussion and forms, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[7] Order

If the court orders limitations on the conservator's powers, the order must set out the specific powers that the conservator does not have with respect to the conservatee's person, and reserve the powers so specified to the conservatee; or set out the specific powers and duties the conservator has with respect to the conservatee's person, and reserve to the conservatee all other rights with respect to the conservatee's person, which the conservator otherwise would have [*Prob. Code § 2351(b)*].

The order must include a finding that notice was regularly given or waived by the party entitled to notice, if it so appears to the satisfaction of the court. The order will thus be conclusive as to all persons when it becomes final [*Prob. Code § 1260(b),(c)*].

For a general form of order, see Ch. 372, *Motions and Orders* .

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24-285 California Forms of Pleading and Practice--Annotated § 285.71

§ 285.71 Petition to Modify or Remove Limitations on Powers of Conservator of the Person [Prob. Code § 2351(b),(c)]

[1] FORM Petition to Modify or Remove Limitations on Powers of Conservator of the Person

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Conservatorship *or* Limited Conservatorship] of the _____ [Person *or* Person and Estate] of _____ [*name*], Conservatee.	)))))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION TO MODIFY OR REMOVE LIMITATIONS ON POWERS OF CONSERVATOR

Petitioner, _____[*name*], respectfully represents:

1. [*Capacity of petitioner. See § 285.70[1], Paragraph 1.*]

2. The powers and duties of _____ [petitioner *or* name of conservator] as conservator of the _____ [person *or* person and estate] of _____[*name*] were limited by the order of _____[*date*], which provided that _____ [*set forth the existing limitations, e.g.,* the conservator did not have the power to fix the residence of the conservatee; that power was reserved to the conservatee].

3. The limitations on the powers and duties of _____ [petitioner *or* the conservator] should be _____ [removed *or* modified] because _____ [*state facts showing why revocation or modification required, e.g.,* the conservatee adamantly refuses to give up her home, although advancing senility has

rendered her incapable of safely living alone, so that the conservator needs the power to fix the residence of the conservatee at a place where she can receive proper supervision].

WHEREFORE, petitioner prays for an order _____ [removing *or* modifying] the limitations on the power of _____[*name*] as conservator of the _____ [person *or* person and estate] of _____[*name*], _____ [*specify modified limitations, if applicable, e.g.,* so that the conservator does have the power to fix the residence of the conservatee outside San Diego County], and for such other and further relief as the court may deem proper.

[*Signature and verification. See § 285.70.*]

[2] Use of Form

The form in [1], *above*, is for use in petitioning the court for an order modifying or removing limitations on the powers and duties of a conservator of the person regarding the care, custody, control, or education of the conservatee [*see Prob. Code § 2351(b),(c)*].

The form may not be used in a guardianship [*see Prob. Code § 2351(b),(c)*].

For additional discussion relevant to this form, see *§ 285.70[3]* et seq.

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A. Care in General

24-285 California Forms of Pleading and Practice--Annotated § 285.72

§ 285.72 Petition to Modify Limited Conservatorship [Prob. Code § 2351.5]

[1] FORM Petition to Modify Limited Conservatorship

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Limited Conservatorship of the _____ [Person *or* Person and Estate] of _____ [*name*], Conservatee.	))))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION TO MODIFY LIMITED CONSERVATORSHIP

Petitioner, _____[*name*], respectfully represents:

1. Petitioner is _____ [*specify status of petitioner, e.g.,* the sister of the conservatee].

2. On _____[*date*], _____[*name*], conservatee, was found to be developmentally disabled, and _____ [*name or* petitioner] was appointed limited conservator of the _____ [person *or* person and estate] of _____[*name*] and granted the following power(s): _____[*specify*].

3. Petitioner is informed and believes that _____ [*set forth facts establishing that powers listed in Prob. Code § 2351.5(a) should be granted to or withdrawn from limited conservator, e.g.,* the conservatee has attained a state of maturity that enables him to control his own social and sexual contact and relationships, as is more fully set out in the declaration of _____ (*name of doctor, social worker, or other person with knowledge of relevant facts*), a copy of which is attached as Exhibit A].

[*EITHER*]

4. Because the conservatee has the capacity to _____ [*specify subject matter of powers to be withdrawn, e.g.,* control his own social and sexual contacts and relationships], the following powers of _____ [petitioner *or* the limited conservator] should be withdrawn: _____ [*list powers to be revoked*].

[*OR*]

4. Because the conservatee lacks the capacity to _____ [*specify subject matter of power(s) to be granted, e.g.,* control his own social and sexual contacts and relationships], the following powers should be granted to _____ [petitioner *or* the limited conservator]: _____ [*list powers to be granted*].

[*CONTINUE*]

WHEREFORE, petitioner prays for an order that the following power(s) be _____ [granted to *or* withdrawn from] _____ [petitioner *or name of limited conservator*], as limited conservator of _____[*name*]: _____[*list powers*], and for such other and further relief as the court may deem proper.

[*Signature and verification. See § 285.70.*]

[2] Use of Form

The form in [1], *above*, is for use in petitioning the court to modify a limited conservatorship by the grant or withdrawal of powers that must be specifically granted to the limited conservator [*see Prob. Code § 2351.5(a),(b)*].

[3] Modification of Limited Conservatorship

A limited conservator or the conservatee or any relative or friend of the conservatee may apply by verified petition to the superior court in which the proceedings are pending, to have the limited conservatorship modified by the grant or withdrawal of any of the powers that must be specifically granted to the limited conservator [*Prob. Code § 2351.5(b)*; for discussion of those powers, *see § 285.20[4][b]*]. The grant or withdrawal of such powers is discretionary with the court [*Prob. Code § 2351.5(c)*].

[4] Contents of Petition

The petition must state the facts alleged to establish that the limited conservatorship should be modified (Paragraphs 3 and 4) [*Prob. Code § 2351.5(c)*; *see Prob. Code § 1828.5*]. The affidavit of a social worker or other person is not required but may be included if it is desired to provide more factual background to the court than is set out in the petition. Although *Prob. Code § 2351.5* does not specify the remaining contents of the petition, the petition should state the status of the petitioner to show that a proper person is petitioning the court (Paragraph 1) [*see Prob. Code § 2351.5*]; the date the conservatee was found to be developmentally disabled and the limited conservatorship was established, and the powers that were granted to the limited conservator (Paragraph 2); and the specific powers to be granted or withdrawn (Paragraph 4) [*see Prob. Code § 1821(j)*].

[5] Notice

The petition must be set for hearing and notice must be given in the same manner as is provided for a petition for the appointment of a limited conservator [*see Prob. Code § 2351.5(c)*]. In addition, the limited conservator, if he or she is not the petitioner or has not joined in the petition, must be served with notice of the time and place of the hearing, along with a copy of the petition, at least five days before the hearing. Service must be made in the manner provided in *Code Civ. Proc. § 415.10* or *415.30* (personal service or service by mail), or in a manner authorized by the court. For discussion and forms, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[6] Procedure at Hearing

The limited conservator or any relative or friend of the conservatee may appear and oppose the petition. The court must hear and determine the matter according to the laws and procedures relating to the trial of civil actions, including trial by jury if demanded [*Prob. Code § 2351.5(d)*].

If any powers are granted or withdrawn, then new letters of limited conservatorship must be issued reflecting the change in the limited conservator's powers [*Prob. Code § 2351.5(d)*].

Procedures relating to the establishment of limited conservatorships may be applicable because "proceeding to establish a limited conservatorship" is defined to include proceedings to modify or revoke the powers or duties of a limited conservator [*Prob. Code § 1431*; *see* Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators*].

[7] Order

The order must include a finding that notice was regularly given or waived by the party entitled to notice, if it so appears to the satisfaction of the court. The order will thus be conclusive as to all persons when it becomes final [*Prob. Code § 1260(b),(c)*].

For a general form of order, see Ch. 372, *Motions and Orders* .

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24-285 California Forms of Pleading and Practice--Annotated § 285.73

§ 285.73 Petition to Fix Residence Outside California [Prob. Code § 2352]--Judicial Council Form GC-085

[1] FORM Petition to Fix Residence Outside California [Prob. Code § 2352]--Judicial Council Form GC-085

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative filled-in reproduction of Cal. Judicial Council Form GC-085, for use when a guardian or conservator needs to change the ward's or conservatee's residence to another state [*see Prob. Code § 2352*]. For discussion, *see § 285.23[2]*. For the related form of order, see *§ 285.74*.

Use of this form is mandatory in all counties [*see Prob. Code § 1834(a)*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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24-285 California Forms of Pleading and Practice--Annotated § 285.74

§ 285.74 Order Fixing Residence Outside California [Prob. Code § 2352]--Judicial Council Form GC-090

[1] FORM Order Fixing Residence Outside California [Prob. Code § 2352]--Judicial Council Form GC-090

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative filled-in reproduction of Cal. Judicial Council Form GC-090, for use when the court grants a petition to fix the residence of the ward or conservatee outside California. For discussion, *see § 285.23[2]*. For the related form of petition, see *§ 285.73*.

Use of this form is mandatory [*Cal. Rules of Court, Rule 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Although the court is directed to require the guardian or conservator to return the ward or conservatee to California, or to cause a guardianship or conservatorship proceeding or its equivalent to be commenced in the place of the new residence, when the ward or conservatee will reside in the place of new residence for a period of four months, the court has discretion to specify a longer or shorter period [*Prob. Code § 2352(d)*].

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24-285 California Forms of Pleading and Practice--Annotated § 285.75

§ 285.75 Pre-Move Notice of Proposed Change of Personal Residence of Conservatee or Ward [Prob. Code § 2353]--Judicial Council Form GC-79

[1] FORM Pre-Move Notice of Proposed Change of Personal Residence of Conservatee or Ward [Prob. Code § 2353]--Judicial Council Form GC-79

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a filled-in reproduction of Cal. Judicial Council Form GC-79, used to give notice of a proposed changed of the personal residence of a conservator or ward. If the guardian or conservator proposes to remove the ward or conservatee from his or her personal residence, the guardian or conservator must mail a notice of his or her intention to change the residence of the ward or conservatee to all persons entitled to notice under *Prob. Code § 1511(b)* and *Prob. Code § 1822(b)*, except as provided in *Prob. Code § 2352(c)* [*Prob. Code § 2352(e)(3), see also Cal. Rules Ct., Rules 7.1013, 7.1063*]. In the absence of an emergency, notice must be mailed at least 15 days prior to the proposed removal of the ward or conservatee from his or her personal residence [*Prob. Code § 2352(e)(3)*]. If the notice is served less than 15 days prior to the proposed removal of the ward or conservatee, the guardian or conservatee must provide the basis for the emergency in the notice [*Prob. Code § 2352(e)(3)*]. If additional space is necessary due to the number of parties to whom notice must be given, Judicial Council Form GC-79(MA)--Attachment to Pre-Move Notice of Proposed Change of Personal Residence of Conservator or Ward, may be used to show additional names and address of each person to whom notice was mailed [*see* [1], *above*].

Use of this Judicial Council form is mandatory [*see Cal. Rules of Ct. Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Counsel Forms, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

Notice also must be given at least 30 days after the move [*Prob. Code § 2352(e)(1), see also Cal. Rules Ct, Rules. 7.1013, 7.1063*]. For a post-move notice of change of residence, see *§ 285.75A.*

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24-285 California Forms of Pleading and Practice--Annotated § 285.75A

§ 285.75A Post-Move Notice of Change of Residence of Conservatee or Ward [Prob. Code § 2353]--Judicial Council Form GC-80

[1] FORM Post-Move Notice of Change of Residence of Conservatee or Ward [Prob. Code § 2353]--Judicial Council Form GC-80

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a filled-in reproduction of Cal. Judicial Council Form GC-80, used to give notice of a change in residence of a conservator or ward. The guardian or conservator must file a notice of change of residence with the court within 30 days of the date of the change [*Prob. Code § 2352(e)(1), see also Cal. Rules Ct., Rules 7.1013, 7.1063*]. The conservator must include in the notice of change of residence a declaration stating that the conservatee's change of residence is consistent with the standard provided in *Prob. Code § 2352(b)* [*Prob. Code § 2352(e)(1)*]. If additional space is necessary, given the number of parties to whom notice must be given, Judicial Council Form GC-80(MA)--Attachment to Post-Move Notice of Change of Residence of Conservator or Ward, may be used to show additional names and address of each person to whom notice was mailed.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Counsel Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

In addition to this notice, notice of a proposed move must be given at least 15 days before the date of a proposed move [*Prob. Code § 2352(e)(3)*]. For a pre-move notice of change of residence, see *§ 285.75*.

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24-285 California Forms of Pleading and Practice--Annotated § 285.76

§ 285.76 Petition for Authorization and Instruction or Approval and Confirmation of Acts of Guardian or Conservator [Prob. Code § 2359]

[1] FORM Petition for Authorization and Instruction or Approval and Confirmation of Acts of Guardian or Conservator

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship] of the _____ [Person *or* Estate *or* Person and Estate] of _____ [*name*], _____ [Ward *or* Conservatee.	)))))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION FOR _____ [AUTHORIZATION *or* APPROVAL]

Petitioner, _____[*name*], respectfully represents:

1. [*Capacity of petitioner. See § 285.70[1], Paragraph 1.*]

[*EITHER*]

2. Petitioner requests _____ [authorization *and/or* instruction] regarding _____ [*specify particular course of action relating to care, custody, control, or education of ward or conservatee that petitioner desires to have authorized or alternative courses of action available and circumstances underlying situation*

in which petitioner desires instruction and authorization, e.g., enrollment of the ward in _____ (*name and address of school*) for vocational training in the skills of automobile mechanics].

[*OR*]

2. _____ [Petitioner *or* name], as _____ [guardian *or* conservator] of the _____ [person *or* person and estate] of _____[*name*], has _____ [*relate actions taken by guardian or conservator, e.g.,* enrolled the ward in _____ (*name and address of school*) for vocational training in the skills of automobile mechanics)], which petitioner desires the court to approve and confirm.

[*CONTINUE*]

3. A request for special notice has _____ [not been filed *or* been filed by _____ (*name*), and notice of the time and place of hearing on this petition will be given as required by law *or* been filed and waived by _____ (*name*)].

WHEREFORE, petitioner prays for an order _____ [authorizing and instructing *or* approving and confirming the acts of] _____[*name*], as _____ [guardian *or* conservator] of _____[*name*], in regard to _____ [*specify subject matter, e.g.,* the ward's education], as described above, and for such other and further relief as the court may deem proper.

[*Signature and verification. See § 285.70.*]

[2] Use of Form

The form in [1], *above,* is for use in petitioning the court for authorization and instruction, or approval and confirmation of a guardian's or conservator's acts, relating to the care, custody, control, or education of the ward or conservatee [*see Prob. Code § 2359(a)*]. This form need not be used for routine matters but would be used when the relatives of the ward or conservatee disagree, or the matter is extraordinary, or the guardian or conservator reasonably needs the protection of a court order.

For the related form of order, see *§ 285.77*.

[3] Contents of Petition

On petition of the guardian or conservator, or the ward or conservatee, or any interested person, the court may authorize and instruct the guardian or conservator, or approve and confirm the acts of the guardian or conservator [*Prob. Code § 2359(a)*]. The contents of the petition are not specified in the statute. The petition should include the status of the petitioner as a proper person to petition the court (Paragraph 1) [*Prob. Code § 2359(a)*] along with either a request for authorization and instruction, including a suggested course of action, or a statement of the acts already undertaken, which are to be approved and confirmed (Paragraph 2).

If the petition is for approval of a purchase, lease, or rental of real or personal property from the estate of a conservatee, the petitioner must provide a statement disclosing any family or affiliate relationship between the conservator and the purchaser, lessee, or renter of the property, and the family or affiliate relationship between the conservator and any agent hired by the conservator [*Prob. Code § 2359(c)*].

[4] Notice

Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2359(b)*]. A petition filed pursuant to *Prob. Code § 2359* is also subject to the special notice requirements of *Prob. Code § 2700 et seq.*; accordingly, the petition should state whether any request for special notice has been filed and, if so, should represent that proper notice will be given (Paragraph 3) [*Prob. Code § 1260*]. For further discussion and forms relating to notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

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24-285 California Forms of Pleading and Practice--Annotated § 285.77

§ 285.77 Order Authorizing and Instructing or Approving and Confirming Acts of Guardian or Conservator [Prob. Code § 2359]

[1] FORM Order Authorizing and Instructing or Approving and Confirming Acts of Guardian or Conservator
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [Guardianship *or*	)	NO. _____
Conservatorship] of the _____	)	ORDER
[Person *or* Estate *or* Person and Estate] of	)	
_____ [*name*],	)	
_____ [Ward *or* Conservatee].	)	
_____		

The petition of _____[*name*], for an order _____ [authorizing and instructing *or* approving and confirming the acts of] _____ [petitioner *or name*], as _____ [guardian *or* conservator] of the _____ [person *or* person and estate] of _____[*name*], came on regularly for hearing by the court on this date. The petitioner appeared by counsel _____[*name*]. _____[*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. _____ [*Set forth specific findings on merits as relevant, e.g.,* The _____ (ward *or* conservatee) should be enrolled in _____ (*name and address of school*) for vocational training in the

skills of automobile mechanics].

[*EITHER*]

IT IS ORDERED that _____[*name*], as _____ [guardian *or* conservator] of the _____ [person *or* person and estate] of _____[*name*], be authorized to _____ [*specify authorization and instruction, e.g.,* enroll _____ (*name*) in _____ (*name and address of school*) for vocational training in the skills of automobile mechanics].

[*OR*]

IT IS ORDERED that the acts of _____[*name*], as _____ [guardian *or* conservator] of _____[*name*], in _____ [*specify acts to be approved and confirmed, e.g.,* enrolling _____ (*name*) at _____ (*name and address of school*) for vocational training in the skills of automobile mechanics] be approved and confirmed.

[*CONTINUE*]

Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use when the court has granted a petition for authorization or approval of the acts of a guardian or conservator [for the related form of petition, *see § 285.76*]. In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

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[Reserved]

§§ 285.78[Reserved]

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B. Consent to Medical Treatment

24-285 California Forms of Pleading and Practice--Annotated § 285.90

§ 285.90 Petition for Exclusive Authority to Consent to Medical Treatment of Conservatee [Prob. Code §§ 1880, 1890, 1891]--Judicial Council Form GC-380

[1] FORM Petition for Exclusive Authority to Consent to Medical Treatment of Conservatee [Prob. Code §§ 1880, 1890, 1891]--Judicial Council Form GC-380

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative filled-in reproduction of Cal. Judicial Council Form GC-380, for use in petitioning the court to issue, modify, or revoke an order declaring that a conservatee lacks capacity to consent to medical treatment and conferring on the conservator the exclusive power to consent to medical treatment for the conservatee [*see Prob. Code §§ 1880, 1890, 1891*].

Use of this form is mandatory in all counties [*see Prob. Code § 1834(a)*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Who May Petition

The petition may be filed by the conservator, the conservatee, or the spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*], or any relative or friend of the conservatee [*Prob. Code § 1891*].

[4] Contents of Petition

[a] General Requirements

This form requests that [*Prob. Code §§ 1880, 2355*].

- The conservatee be adjudged to lack capacity to give informed consent for medical treatment (Paragraph 1a).

- The conservator be granted exclusive authority to consent to medical treatment that he or she in good faith determines to be necessary based on medical advice (Paragraph 1b).

- New letters of conservatorship be issued including a statement of the powers granted pursuant to the petition (Paragraph 1g).

If, before the establishment of the conservatorship, the conservatee was an adherent of a religion the tenets and practices of which call for reliance on prayer alone for healing, the treatment required by the conservator under *Prob. Code § 2355* must be by an accredited practitioner of that religion [*Prob. Code § 2355(b)*]. In recognition of this requirement, the form provides for a request that the medical treatment be performed either by a licensed medical practitioner or by an accredited practitioner of a religion that relies on prayer alone for healing (Paragraph 1c) and also includes a statement that the conservatee is or is not an adherent of such a religion (Paragraph 4).

The form provides space for a request that orders related to dementia treatment or placement be granted (Paragraph 1d), as requested in an attachment [*see* for an illustration of the Judicial Council form of attachment, *see § 285.91*]. The form also provides space to request a modification or revocation of an order adjudging a conservatee to lack capacity to give informed consent and conferring on a conservator the exclusive power to give consent under *Prob. Code § 2355* (Paragraph 1e) [*Prob. Code §§ 1880, 1891*].

[b] Declaration of Physician or Psychologist

A request for a court order under *Prob. Code § 1880* must be supported by a declaration, filed at or before the hearing on the request, executed by a licensed physician, or a licensed psychologist within the scope of his or her license, and stating that the conservatee lacks the capacity to give an informed consent for any form of medical treatment and the reasons for that conclusion (Paragraph 3) [*Prob. Code § 1890(c)*]. Cal. Judicial Council Form GC-335 may be used to make this declaration; for a filled-in reproduction of that form, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* .

[5] Attendance of Conservatee at Hearing

The form includes a statement of whether the conservatee will attend the hearing and, if not, the reason for his or her nonattendance (Paragraph 5). The conservatee must be produced at the hearing on the petition unless one of the following conditions applies [*Prob. Code § 1893*]:

- The conservatee is outside California when served and is not the petitioner (Paragraph 5d).

- The conservatee is unable to attend the hearing because of medical inability established by the affidavit of a licensed medical practitioner or, if the conservatee is an adherent of a religion that relies on prayer alone for healing, the affidavit of an accredited practitioner of that religion (Paragraph 5c) [*see* Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators*].

- The court investigator reports to the court that the conservatee has expressly communicated that the conservatee is not willing to attend the hearing and does not wish to contest the petition, and the court makes an order that the conservatee need not attend the hearing (Paragraph 5b).

[6] Report by Court Investigator

If the petition alleges that the conservatee is not willing to attend the hearing, or on receipt of an affidavit or certificate attesting to the conservatee's medical inability to attend, the court investigator must interview the conservatee and make a report to the court [*Prob. Code § 1894*]. This form provides space to state that a proposed order appointing a court investigator and specifying the investigator's duties has been filed with the petition (Paragraph 7) [*see Prob. Code § 1454* (qualifications of court investigator); *see also* Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators*].

[7] Notice

Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 1892*]. For a discussion of these requirements, see Ch. 284, *Guardianship and Conservatorship: Notice* . This form states whether special notice has been requested (Paragraph 6) [*see Prob. Code § 2700(c)(1)*].

If the order that is sought relates to a limited conservatee, the petition must be made, noticed, and heard by the court in the manner provided by *Prob. Code § 1820 et seq.*, relating to establishment of conservatorships [*Prob. Code § 1890(b)*; *see* Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* ; Ch. 284, *Guardianship and Conservatorship: Notice*].

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24-285 California Forms of Pleading and Practice--Annotated § 285.91

§ 285.91 Attachment to Petition for Exclusive Authority to Consent to Medical Treatment--Request for Special Orders Regarding Dementia [Prob. Code § 2356.5]--Judicial Council Form GC-313

[1] FORM Attachment to Petition for Exclusive Authority to Consent to Medical Treatment--Request for Special Orders Regarding Dementia [Prob. Code § 2356.5]--Judicial Council Form GC-313

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of Cal. Judicial Council Form GC-313, an attachment to Cal. Judicial Council Form GC-380 [for an illustration of that form, *see § 285.90*], for use when the conservatee has dementia, as defined in the current edition of Diagnosis and Statistical Manual of Mental Disorders [*see Prob. Code § 2356.5*]. (It also may be attached to Cal. Judicial Council Form GC-310, the petition for appointment of a conservator [*see* Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators*].) The attachment specifies the orders sought by the petitioner regarding options for the treatment of the conservatee in such a case, and the bases for the diagnosis. If the attachment is used, the appropriate box on the face of the petition should be checked.

Use of this form is mandatory in all counties [*see Prob. Code § 1834(a)*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents of Attachment

The attachment includes requests for authorization to place the conservatee in a secure perimeter residential care facility for the elderly, as defined in *Prob. Code § 2356.5* (Paragraph 1a), as well as the assertion that the conservatee or proposed conservatee has dementia (Paragraph 2), supported by a medical declaration (Paragraph 3), and that the conservatee needs or would benefit from that placement, which is the least restrictive placement appropriate to the conservatee's needs (Paragraph 4) [*see Prob. Code § 2356.5(b)*].

The attachment also includes a request to authorize the administration of medication appropriate for the care and treatment of dementia (Paragraph 1b), and an assertion that the conservatee needs or would benefit from the medication, and that the conservatee lacks capacity to give informed consent to the administration of the medication (Paragraph 5) [*see Prob. Code § 2356.5(c)*].

[4] Supplemental Declaration by Physician or Psychologist

A petition under *Prob. Code § 2356.5* must be supported by a declaration of a licensed physician, or a licensed psychologist acting within the scope of his or her license and having at least two years experience in diagnosing dementia, regarding each of the findings required to be made under that section for any power requested in the petition [*Prob. Code § 2356.5(f)(3)*]. Cal. Judicial Council Form GC-335 may be used to make this declaration; for a filled-in reproduction of that form, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* .

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24-285 California Forms of Pleading and Practice--Annotated § 285.92

§ 285.92 Order Authorizing Conservator to Consent to Medical Treatment [Prob. Code §§ 1880, 1890, 1898]--Judicial Council Form GC-385

[1] FORM Order Authorizing Conservator to Consent to Medical Treatment [Prob. Code §§ 1880, 1890, 1898]--Judicial Council Form GC-385

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative filled-in reproduction of Cal. Judicial Council Form GC-385, for use when the court grants a petition for a conservator to have exclusive authority to give consent for medical treatment of the conservatee. For an illustration of the Judicial Council form of petition, see *§ 285.90*.

Use of this form is mandatory in all counties [*see Prob. Code § 1834(a)*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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24-285 California Forms of Pleading and Practice--Annotated § 285.93

§ 285.93 Petition for Order Authorizing Medical Treatment of Ward or Conservatee [Prob. Code § 2357]--By Guardian or Conservator

[1] FORM Petition for Order Authorizing Medical Treatment of Ward or Conservatee--By Guardian or Conservator

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship] of the _____ [Person *or* Estate *or* Person and Estate] of _____ [*name*], _____ [Ward *or* Conservatee.	)	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION TO AUTHORIZE MEDICAL TREATMENT OF _____ [WARD *or* CONSERVATEE]

_____

Petitioner, _____[*name*], respectfully represents:

1. Petitioner is the _____ [guardian *or* conservator] of the _____ [person *or* person and estate] of _____[*name*].

2. Petitioner is informed, believes, and alleges that _____[*name*] suffers from _____[*specify medical condition that requires treatment*], which, without the course of treatment recommended by _____[*name of physician*], will _____ [become life-endangering *or* result in a serious threat to his/her health, *or* both], as is more fully set out in the declaration of _____[*name of physician*], attached as Exhibit A.

3. The probable outcome of the recommended course of treatment will be _____ [*specify extent of recovery, e.g.*, that _____ (*name*) will regain partial use of her leg], and the recommended course of treatment is more appropriate than any of the medically available alternatives listed in Exhibit A.

4. The recommended course of treatment is not authorized to be performed on the _____ [ward under *Probate Code Section 2252* or *2353 or* conservatee under *Probate Code Section 2252, 2354*, or *2355*].

5. _____[*Name of physician*] has attempted to explain the _____ [ward's *or* conservatee's] medical condition and the recommended course of treatment, together with its probable benefits and risks, to the _____ [ward *or* conservatee] on several occasions, but the _____ [ward *or* conservatee] has not understood the implications of his/her condition or the recommended course of treatment and is unable to give an informed consent.

6. The names and addresses of the persons entitled to notice are as follows: _____ [*names and addresses of persons entitled to notice under Prob. Code § 2357(e)*].

[7. The recommended course of treatment for the medical condition of _____ (*name*) must commence within _____ (*specify time, e.g.*, one week) in order to avoid _____ (*specify detriment to health of ward or conservatee if treatment is not promptly commenced, e.g.*, permanent paralysis of the _____ (ward's *or* conservatee's) lower extremities). Petitioner believes that a hearing on this petition should be held no later than _____ (*date*) on _____ (*number*) days' notice to _____ (*list persons to whom notice is to be given*).]

WHEREFORE, petitioner prays for an order authorizing the recommended course of treatment of the _____ [ward *or* conservatee] and authorizing the _____ [guardian *or* conservator] to consent on behalf of the _____ [ward *or* conservatee] to the recommended course of treatment, and an order setting the hearing on this petition for a date not later than _____ (*date*), and prescribing the notice to be given], and for such other and further relief as the court may deem proper.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

Petitioner

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is for use by a guardian or conservator in petitioning the court for an order authorizing medical treatment for a ward or conservatee and authorizing the guardian or conservator to consent to the medical treatment on behalf of the ward or conservatee. The form is for use when the ward or conservatee needs medical treatment for an existing or continuing medical condition, which is not authorized to be performed on the ward or conservatee under the guardian's or conservator's existing power to consent [*see Prob. Code §§ 2352-2355*].

[3] Contents of Petition

[a] In General

This form states the status of the petitioner as a guardian or conservator (Paragraph 1) [*Prob. Code § 2357(b)*] and the following facts to show that the court should make an order authorizing medical treatment for the ward or conservatee:

- That the ward or conservatee suffers from an existing or continuing medical condition requiring a recommended course of medical treatment; that, if the condition is left untreated, there is a probability that the condition will become life-endangering or seriously threaten the ward or conservatee's physical or mental health; and that the ward or conservatee is unable to give informed consent to the recommended course of treatment (Paragraph 2) [*Prob. Code § 2357(h)(1)-(3)*].

- The predictable or probable outcome of the recommended course of treatment, and the medically available alternatives, if any, to the recommended course of treatment (Paragraph 3) [*Prob. Code § 2357(c)(4), (5)*].

- That the recommended course of treatment is not authorized to be performed on the ward or conservatee under *Prob. Code §§ 2352-2355* (Paragraph 4) [*Prob. Code § 2357(b)*].

- That the ward or conservatee is unable to give informed consent to the recommended course of treatment (Paragraph 5) [*Prob. Code § 2357(h)(3)*].

- The names and addresses of interested persons, to the extent known to petitioner [*see Prob. Code §§ 1510(c), 1821(b), 2357(c)(7)*].

[b] Interested Persons

A petition by a conservator must include the names and addresses of the conservatee's spouse and relatives within the second degree. If the petitioner knows of no spouse nor any relatives within the second degree, the petition must include names and addresses of the following [*Prob. Code § 1821(b)*]:

- A spouse of a predeceased parent of the conservatee.
- The children of a predeceased spouse of the conservatee.
- The siblings of the conservatee's parents or, if none, their natural and adoptive children.
- The natural and adoptive children of the conservatee's siblings.

A petition by a guardian must include the names and addresses of the following persons [*Prob. Code § 1510(c)*]:

- The ward's parents.
- The person having legal custody of the ward and the person having the care of the ward.
- The ward's relatives within the second degree.
- Any person nominated as guardian of the ward [*see Prob. Code §§ 1500, 1501*].

[4] Notice

Notice of the time and place for the hearing must be given, and a copy of the petition must be personally served on the ward, if 12 years old or older, or the conservatee, and on the attorney for the ward or conservatee at least 15 days before the hearing [*Prob. Code § 2357(e)(1)*]. Notice of the time and place for the hearing must be given, and a copy of the petition must be mailed to the conservatee's spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*], if any, and all relatives named in the petition, at least 15 days before the hearing [*Prob. Code § 2357(e)(2)*]. The court may shorten or waive the notice requirements for good cause [*Prob. Code § 2357(f)*]. In determining the appropriate notice period, the court must consider the medical circumstances as set forth in the medical affidavit accompanying the petition, and the desirability, when the condition of the ward or conservatee permits, of giving adequate notice to the interested parties [*Prob. Code § 2357(f)*]. Accordingly, this form includes an optional statement regarding when the hearing on the petition should be held in light of the condition of the ward or conservatee, and suggesting the persons, if any, to whom notice should be given (Paragraph 7).

In relation to giving notice to interested persons, counsel may wish to bring requests for special notice under *Prob. Code § 2700* to the court's attention. This is not necessary, however, because the kinds of petitions for which special notice may be requested do not include petitions pursuant to *Prob. Code § 2357* [*see Prob. Code §§ 2357(e), (f), 2700*].

Notwithstanding the above notice provisions [*see Prob. Code § 2357(e), (f)*], a petition for an order under *Prob. Code § 2357* may be submitted for the determination of the court on medical affidavits or declarations if the attorney for the petitioner and the attorney for the conservatee so stipulate and further stipulate no issue of fact remains to be determined [*Prob. Code § 2357(g)*]. If the matter is to be decided on affidavits or declarations, the stipulation to that effect should be prepared and submitted to the court, and the language of this form relating to urgency (Paragraph 7) should be omitted.

[5] Medical Affidavit

A medical affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) attached to the petition must set forth all of the following as far as may be known to the petitioner at the time the petition is filed [*Prob. Code § 2357(c)*]:

- The nature of the medical condition of the ward or conservatee that requires treatment.
- The recommended course of medical treatment that is considered to be medically appropriate.
- The threat to the health of the ward or conservatee if authorization to consent to the recommended course of treatment is delayed or denied by the court.
- The predictable or probable outcome of the recommended course of treatment.
- The medically available alternatives, if any, to the course of treatment recommended.
- The efforts made to obtain an informed consent from the ward or conservatee.
- The names and addresses, to the extent known by the petitioner, of interested persons listed in *Prob. Code § 1510(c)* (for guardians) or *Prob. Code § 1821(b)* (for conservators) [*see* [3][b], *above*].

Alternatively, this information may be included in the petition [*Prob. Code § 2357(c)*].

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24-286 California Forms of Pleading and Practice--Annotated 286.syn

§ 286.syn Synopsis to Chapter 286: GUARDIANSHIP AND CONSERVATORSHIP: INVENTORY AND APPRAISAL

§ 286.01 Scope of Chapter

§ 286.02 Cross References

§§ 286.03-286.09 [Reserved]

§ 286.10 Governing Statutes

§ 286.11 Inventory

[1] Filing Requirements

[2] Oath Requirement

§ 286.12 Appraisal

[1] In General

[2] By Guardian or Conservator

[3] By Probate Referee

[4] Oath Requirement

[5] Referee's Commission and Expenses

[6] Persons to Receive Copies

§ 286.13 Later Discovery or Acquisition of Property

§ 286.14 Failure to File

§ 286.15 Objections to Appraisals

§ 286.16 Examination of a Person Regarding Assets

[1] Who May Petition

[2] Citation

[3] Scope of Examination

[4] Expenses Chargeable to Petitioner

[5] Liability for Wrongful Taking, Concealing, or Disposing of Property

§ 286.17 Notification to Court by Institutions

[1] When Guardian or Conservator Takes Possession of Asset

[2] When Guardian or Conservator Opens or Changes Account or Safe Deposit Box

§§ 286.18-286.29 [Reserved]

§ 286.30 State Statutes

[1] Appraisal

[2] Examination Concerning Assets of Estate

[3] Filing

[4] Inventory

§ 286.31 Local Court Rules

[1] Alameda County

[2] Los Angeles County

[3] Orange County

[4] Sacramento County

[5] San Diego County

§ 286.32 Decisions

§ 286.33 Text References

§§ 286.34-286.39 [Reserved]

§ 286.40 Request for Appointment of Probate Referee in Guardianship or Conservatorship [Prob. Code §§ 450-453, 2610, 8902]

[1] FORM

[2] Use of Form

[3] Cross References

§ 286.41 Order Appointing Referee [Prob. Code §§ 450-453, 2610, 8902]

[1] FORM

[2] Use of Form

§ 286.42 Ex Parte Request for Order and Order Requiring Guardian or Conservator to File Inventory and Appraisal or to Show Cause Why He or She Should Not Be Removed [Prob. Code § 2614.5]

[1] FORM

[2] Use of Form

[3] Verification

[4] Local Court Practice

§ 286.43 Application for Additional Time to File Inventory and Appraisal [Prob. Code § 2610(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 286.44 Order Extending Time for Filing of Inventory and Appraisal [Prob. Code § 2610(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 286.45 Inventory and Appraisal by Guardian or Conservator [Prob. Code §§ 2610, 8900-8901]--Judicial Council Forms GC-040, GC-041

[1] FORM

[2] Use of Form

[3] Time for Filing

[4] Copies to State Department of Health and County Assessor

[5] Community Property

[6] Attachment Number 1

[7] Attachment Number 2

[8] Waiver of Probate Referee

[9] Cross References

§ 286.45A Notice of Filing of Inventory and Appraisal and How to Object to the Inventory or the Appraised Value of Property [Prob. Code §§ 2610, 2614]--Judicial Council Form GC-042

[1] FORM

[2] Use of Form

§ 286.46 Objection to Inventory and Appraisal [Prob. Code § 2614]--Attorney-Drafted Form

[1] FORM

[2] Use of Form

[3] Time for Filing

[4] Who May File

[5] Verification

[6] Notice

[7] Independent Appraisal

[8] Cross References

§ 286.46A Objections to Inventory and Appraisal of Conservator or Guardian [Prob. Code §§ 2610, 2614]--Judicial Council Form GC-45

[1] FORM

[2] Use of Form

§ 286.47 Petition for Examination of Person Regarding Estate Assets [Prob. Code §§ 2616-2619.5]

[1] FORM

[2] Use of Form

[3] Who May Petition

[4] Contents of Petition

[5] Verification

[6] Cross References

§ 286.48 Citation for Examination of Person Regarding Estate Assets [Prob. Code § 2616 et seq.]

[1] FORM

[2] Use of Form

[3] Cross References

§ 286.49 Notice of Taking Possession or Control of an Asset of Minor or Conservatee [Prob. Code § 2890]--Judicial Council Form GC-050

[1] FORM

[2] Use of Form

[3] Time for Filing

[4] Cross References

§ 286.50 Notice of Opening or Changing a Guardianship or Conservatorship Account or Safe Deposit Box [Prob. Code § 2892]--Judicial Council Form GC-051

[1] FORM

[2] Use of Form

[3] Cross References

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PART I. SCOPE

24-286 California Forms of Pleading and Practice--Annotated § 286.01

§ 286.01 Scope of Chapter

This chapter discusses the inventory and appraisal of the ward's or conservatee's property. Filing and oath requirements for inventory are *covered in § 286.11*, appraisal is *covered in §§ 286.12 -286.15*, and examination of a person regarding assets is discussed in *§ 286.16*.

This chapter also provides a research guide [*see § 286.30* et seq.] and includes the following forms:

- Request [*see § 286.40*] and order [*see § 286.41*] for appointment of a probate referee.
- Ex parte request for an order requiring a guardian or conservator to file an inventory and appraisal [*see § 286.42*].
- Application [*see § 286.43*] and order [*see § 286.44*] for extension of time to file the inventory and appraisal.
- The Judicial Council form for inventory and appraisal [*see § 286.45*].
- Objections to an inventory and appraisal [*see §§ 286.46*, 286.46A].
- Petition [*see § 286.47*] and citation [*see § 286.48*] to compel an examination of a person regarding estate assets.
- The Judicial Council form for notice by an institution that a guardian or conservator has taken possession or control of a minor's or conservatee's asset [*see § 286.49*].
- The Judicial Council form for notice by a financial institution that a guardian or conservator has opened or changed the name on an account or a safe deposit box [*see § 286.50*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & Inventories

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24-286 California Forms of Pleading and Practice--Annotated § 286.02

§ 286.02 Cross References

Additional information regarding inventory and appraisal may be found in Ch. 451, *Probate: Inventory and Appraisal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & Inventories

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[Reserved]

§§ 286.03[Reserved]

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PART II. LEGAL BACKGROUND

24-286 California Forms of Pleading and Practice--Annotated § 286.10

§ 286.10 Governing Statutes

The inventory and appraisal of the ward's or conservatee's property is governed by *Prob. Code §§ 450-453, 2610-2616, 8850-8907*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & Inventories

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24-286 California Forms of Pleading and Practice--Annotated § 286.11

§ 286.11 Inventory

[1] Filing Requirements

Within 90 days after appointment, or such further time as the court for reasonable cause on ex parte petition may allow, the guardian or conservator of the estate must file with the clerk of the court an inventory and appraisal of the estate, made as of the date of the appointment [*Prob. Code § 2610(a)*; for forms for an application and order for additional time to file inventory and appraisal, *see §§ 286.43* and *286.44*, for the form for inventory and appraisal, *see § 286.45*]. The guardian or conservator must also mail the inventory and appraisal of the estate, and a notice of how to file an objection, to the conservatee, the attorneys of record for the ward or conservatee, the conservatee's spouse or registered domestic partner, the conservatee's relatives in the first degree, or the next closest relatives, unless the court determines that mailing this information would result in harm to the conservatee [*Prob. Code § 2610 (a)*; for form, *see § 286.45A*].

The inventory, including partial and supplemental inventories, must include all property in the ward's or conservatee's estate [*Prob. Code § 8850(a)*]. All property, including any out-of-state property, must be accounted for [*see Conservatorship of Hume (2006) 139 Cal. App. 4th 393, 397, 42 Cal. Rptr. 3d 796]* . The inventory must specify the following property [*Prob. Code § 8850(b)*]:

- Money owed to the ward or conservatee, including debts, bonds, and notes, with the name of each debtor, the date, the sum originally payable, and the endorsements, if any, with their dates. The inventory must also specify security for the payment of money to the ward or conservatee, including mortgages and deeds of trust. If security for the payment of money is real property, the inventory must include the recording reference or, if not recorded, a legal description of the real property [*Prob. Code § 8850(b)(1)*].

- A statement of the interest of the ward or conservatee in a partnership, appraised as a single item [*Prob. Code § 8850(b)(2)*].

- All money and other cash items, as defined in *Prob. Code § 8901*, of the ward or conservatee [*Prob. Code § 8850(b)(3)*; for discussion of what constitutes cash items, *see § 286.12[2]*].

Before 1981, the inventory had to include and designate which portion of theestate was community property and which portion was separate property. However, since January 1, 1981, community property is not part of the conservatorship estate when the conservatee's spouse has legal capacity [*Prob. Code § 3051(b)*]. Thus, although some courts may still require inclusion in the inventory of the conservatee's interest in community property, *Prob. Code § 3051(b)* implies that the conservator need only include the conservatee's separate property if the conservatee's spouse has legal capacity. Local practice should be consulted.

[2] Oath Requirement

The guardian or conservator must endorse on or annex to the inventory an oath that the inventory contains a true statement of the entire estate of the ward or conservatee of which the guardian or conservator has possession or knowledge. The oath must be endorsed on or annexed to the inventory [*Prob. Code § 2610(b)*; for the form for an inventory and appraisal, *see § 286.45*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & Inventories

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24-286 California Forms of Pleading and Practice--Annotated § 286.12

§ 286.12 Appraisal

[1] In General

The appraisal, made as of the date of the appointment of the guardian or conservator, must be performed in the manner provided for the inventory and appraisal of decedents' estates [*Prob. Code § 2610(a), (c)*; *see Prob. Code §§ 8900-8903*].

[2] By Guardian or Conservator

The guardian or conservator must appraise the following property, excluding items whose fair market value is, in the opinion of the guardian or conservator, an amount different from the face value of the property [*Prob. Code § 8901*; *see Prob. Code § 2610(c)*]:

- Money and other cash items. A "cash item" is a check, draft, money order, or similar instrument that can be immediately converted to cash [*see Prob. Code § 8901(a)*]. However, wages or salaries for employment during the guardianship or conservatorship are not part of the ward's or conservatee's estate, and the guardian or conservator is not accountable for them [*Prob. Code § 2601(a)*].

- Refund checks, including tax and utility refunds, and Medicare, medical insurance, and other health care reimbursements and payments [*see Prob. Code § 8901(b)(2)*].

- Accounts in financial institutions [*Prob. Code § 8901(c)*]. An "account" includes a checking account, savings account, certificate of deposit, share account, mutual capital certificate, and other like arrangements [*Prob. Code § 21*]. A "financial institution" is a state or national bank, state or federal savings and loan association or credit union, or like organization [*Prob. Code § 40*].

- Cash deposits and money market mutual funds, as defined in *Prob. Code § 9730*, whether in a financial institution or otherwise, including a brokerage cash account. All other mutual funds, stocks, bonds, and other securities must be appraised pursuant to *Prob. Code §§ 8902-8909*.

- Proceeds of life and accident insurance policies and retirement plans and annuities payable on death in lump-sum amounts [*Prob. Code § 8901(e)*].

If the conservatorship is initiated pursuant to the Lanterman-Petris-Short Act (*Welf. & Inst. Code § 5000 et seq.*) and no sale of the estate will occur, all the property may be appraised by the conservator; there is no need for a probate referee [*Prob. Code § 2610(d)*]. There also is no need for a referee if the entire estate consists of cash and similar items that may be appraised by the guardian or conservator [*see Prob. Code §§ 2610(c), 8901*].

[3] By Probate Referee

All property not appraised by the guardian or conservator must be appraised by a probate referee [*Prob. Code § 8902(b)*; for forms for request and order for appointment of referee, *see §§ 286.40, 286.41*]. On designation by the court, the probate referee has all the powers of a referee of the superior court and all other powers provided in *Prob. Code §§ 450-453* (powers of probate referee) [*Prob. Code § 450*]. For appraisal purposes, the referee may require, and may issue a (deposition), subpoena to compel, the appearance of the guardian or conservator, an interested person, or anyone the referee has reason to believe has knowledge of the ward's or conservatee's property [*Prob. Code § 451*; *see Code Civ. Proc. §§ 2020.020-2020.510*]. The referee may examine and take the testimony under oath of a person appearing before the referee, or require, and issue a (deposition) subpoena to compel, the person to produce any document in the person's possession or control, concerning the value of any property in the estate [*Prob. Code § 452*; *see Code Civ. Proc. §§ 2020.020-2020.510*]. For forms for subpoenas, see Ch. 193, *Discovery: Depositions* .

On petition of a person required to appear before the referee, the court may make a protective order to protect the person from annoyance, embarrassment, or oppression. The petitioner must mail notice of the hearing on the petition to the referee and to the personal representative, the guardian or conservator, or other fiduciary, at least 15 days before the date set for the hearing. Any subpoena issued by the referee is stayed during the pendency of the petition [*Prob. Code § 453(a)*]. For a form for a notice of motion for a protective order restricting deposition testimony, see Ch. 193, *Discovery: Depositions* .

On petition of the referee, the court may make an order to show cause why a person who is required, but fails, to appear before the referee should not be required to do so. The referee must mail notice of the hearing on the petition to the person at least 15 days before the date set for the hearing [*Prob. Code § 453(b)*]. For a general form for an order to show cause, see Ch. 372, *Motions and Orders* .

[4] Oath Requirement

The person who appraises the ward's or conservatee's property, whether the guardian or conservator, probate referee, or independent expert, must sign the appraisal with respect to the property he or she appraised, and must take and subscribe an oath that he or she has truly, honestly, and impartially appraised the property to the best of his or her ability [*Prob. Code § 8905*].

[5] Referee's Commission and Expenses

The commission and expenses provided for the services of a probate referee are paid from the ward's or conservatee's estate [*Prob. Code § 8960(a)*]. The referee may not withhold the appraisal until the commission and expenses are paid, but must deliver the appraisal to the guardian or conservator promptly on completion [*Prob. Code § 8960(b)*].

Compensation for probate referee appraisal services is the following [*Prob. Code § 8961*]:

- A commission of one-tenth of 1 percent of the total value of the estate property, excluding property appraised by the guardian or conservator or by an independent expert; and

- The actual and necessary expenses for the appraisal. The referee must file with, or list on, the inventory and appraisal a verified account of the referee's expenses [*Prob. Code § 8961(a)*].

The probate referee's commission may in no event be less than $75 or more than $10,000 [*Prob. Code § 8963(a)*]. However, on the referee's application, the court may allow a commission in excess of $10,000 if it determines that the reasonable value of the referee's services exceeds that amount [*Prob. Code § 8963(b)*]. Notice of the hearing must be given as provided in *Prob. Code § 1220* to all of the following persons [*Prob. Code § 8963(b)*]:

- Each person listed in *Prob. Code § 1220*;

- Each known heir whose interest in the estate would be affected by the petition;

- Each known devisee whose interest in the estate would be affected by the petition;

- The Attorney General, at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the petition; and

- Each person who has requested special notice of petitions filed in the proceeding.

If more than one probate referee appraises or participates in the appraisal of property in the estate, each is entitled to the share of the commission agreed on by the referees or, absent an agreement, that the court allows. In no case may the total commission for all referees exceed the maximum commission that would be allowable for a single referee [*Prob. Code § 8964*].

[6] Persons to Receive Copies

If a timely request is made, the court clerk is required to mail a copy of the inventory and appraisal to the county assessor [*Prob. Code § 2612*].

If the ward or conservatee is or has been, during the guardianship or conservatorship, a patient in a state hospital under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services, a copy of the inventory and appraisal must be mailed to the director of the appropriate department, at the director's office in Sacramento, not later than 15 days after the inventory and appraisal is filed with the court, unless an unrevoked certificate described in *Prob. Code § 1461(c)* is on file with the court [*Prob. Code § 2611*; for discussion of *Prob. Code § 1461*, *see* Ch. 284, *Guardianship and Conservatorship: Notice*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & Inventories

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24-286 California Forms of Pleading and Practice--Annotated § 286.13

§ 286.13 Later Discovery or Acquisition of Property

Whenever any property of the ward or conservatee is discovered that was not included in the inventory, or whenever any other property is received by the ward or conservatee or by the guardian or conservator on behalf of the ward or conservatee (other than by the actions of the guardian or conservator in the investment and management of the estate), the guardian or conservator must file a supplemental inventory and appraisal for that property, and the same procedure must be followed as in the case of an original inventory, except that the appraisal must be made as of the date the property was so discovered or received [*Prob. Code § 2613*]. The same forms are used for the supplemental inventory and appraisal as are used for the original inventory [for an illustration of the Judicial Council form for inventory and appraisal, *see § 286.45*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & Inventories

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§ 286.14 Failure to File

If the guardian or conservator fails to file an inventory and appraisal within the time allowed by law or by court order, on request of the ward or conservatee, the spouse of the ward or the spouse or domestic partner [as defined by *Prob. Code § 37*; *Fam. Code § 297*] of the conservatee, any relative or friend of the ward or conservatee, or any interested person, the court must order the guardian or conservator to file the inventory and appraisal within such time as the order prescribes or to show cause why the guardian or conservator should not be removed. The person who requested the order must serve it on the guardian or conservator in the manner provided in *Code Civ. Proc. § 415.10* or *415.30* or in such manner as is ordered by the court [*Prob. Code § 2614.5(a)*].

If the guardian or conservator fails to file the inventory and appraisal as required by the order within the time prescribed in the order, unless good cause is shown for not doing so, the court, on its own motion or on petition, may remove the guardian or conservator, revoke the letters of guardianship or conservatorship, and enter judgment accordingly, and order the guardian or conservator to file an account and to surrender the estate to the person legally entitled to it [*Prob. Code § 2614.5(b)*]. The procedure provided by *Prob. Code § 2614.5* is optional and does not preclude the use of any other remedy or sanction when an inventory and appraisal is not timely filed [*Prob. Code § 2614.5(c)*].

If a guardian or conservator fails to file any inventory required by this article within the time prescribed by law or by court order, the guardian or conservator is liable for damages for any injury to the estate or to any interested person directly resulting from the failure to file the inventory in a timely manner. Damages awarded pursuant to this section are a personal liability of the guardian or conservator and a liability on the bond, if any [*Prob. Code § 2615*].

For a form for compelling filing of an account, see *§ 286.42*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & Inventories

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24-286 California Forms of Pleading and Practice--Annotated § 286.15

§ 286.15 Objections to Appraisals

The guardian or conservator or any creditor or other interested person may file written objections to any or all appraisals within 30 days after the inventory and appraisal is filed [for forms for an objection, *see §§ 286.46* (attorney-drafted form), 286.46A (Judicial Council form)]. The clerk is required to set the objections for hearing not less than 15 days after the filing of these objections [*Prob. Code § 2614(a)*].

Notice of the hearing, together with a copy of the objections, must be given for the period and in the manner provided in *Prob. Code §§ 1460-1469*. If the appraisal was made by a probate referee, the person objecting must also mail notice of the hearing and a copy of the objection to the probate referee at least 15 days before the time set for the hearing [*Prob. Code § 2614(b)*]. For a general discussion of notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

The court will determine the objections and may fix the true value of any item to which objection has been filed. The court may have an independent appraisal made at the expense of the estate, or, if the objecting party is not the guardian or conservator and the objection is rejected by the court, the court may assess the cost of the additional appraisal against the objecting party [*Prob. Code § 2614(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & Inventories

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24-286 California Forms of Pleading and Practice--Annotated § 286.16

§ 286.16 Examination of a Person Regarding Assets

[1] Who May Petition

A petition may be filed to examine a person concerning the assets of an estate by any one or more of the following [*Prob. Code § 2616(a)*; for a petition, *see § 286.47*]:

- The guardian or conservator;
- The ward or conservatee;
- A creditor or other interested person, including persons having only an expectancy or prospective interest in the estate.

[2] Citation

On the filing of such a petition, the court may order a citation to be issued to a person to answer interrogatories or to appear before the court and be examined under oath, or both [*Prob. Code § 2616(b)*; for a form for this citation, *see § 286.48*]. Interrogatories and their answers must be in writing. The answers must be signed under penalty of perjury by the person cited. The interrogatories and answers must be filed with the court [*Prob. Code § 2617*].

If the person must appear before the court, the court and the petitioner may examine the person under oath on the matters recited in the petition. The citation may include a requirement for this person to produce documents and other personal property specified in the citation [*Prob. Code § 2616(c)*].

Disobedience of a citation may be punished as a contempt of the court issuing it [*Prob. Code § 2616(d)*].

[3] Scope of Examination

The person cited may be examined concerning any of the following allegations made in the petition [*Prob. Code § 2616(b)*:

- The person has wrongfully taken, concealed, or disposed of property of the ward or conservatee.
- The person has knowledge or possession of any one or more of the following:
  - A deed, conveyance, bond, contract, or other writing that contains evidence of or tends to disclose the right, title, interest, or claim of the ward or conservatee to property.
  - An instrument in writing belonging to the ward or conservatee.
- The person asserts a claim against the ward or conservatee or the estate.
- The estate asserts a claim against the person.

An "instrument in writing" referred to above is an instrument the guardian or conservator is entitled to possess as an estate asset or as evidence of the ward's or conservatee's title to property [*Conservatorship of DuNah (1980) 106 Cal. App. 3d 517, 519-522, 165 Cal. Rptr. 170* (construing former Prob. Code § 1903; "instrument in writing" does not encompass will, and court does not have jurisdiction to order custodian of will to deliver it to conservator)].

At a court examination, witnesses may be produced and examined at either side [*Prob. Code § 2618(a)*. If, on examination, the allegations of the petition appear to be true, the court may order the person to disclose his or her knowledge of the facts [*Prob. Code § 2618(b)*].

[4] Expenses Chargeable to Petitioner

If the allegations of the petition appear not to be true, the person's necessary expenses, including reasonable attorney's fees, must be charged against the petitioner or allowed out of the estate, in the discretion of the court [*Prob. Code § 2618(c)*].

[5] Liability for Wrongful Taking, Concealing, or Disposing of Property

A person who in bad faith has wrongfully taken, concealed, or disposed of property in the estate of the ward or conservatee is liable for twice the value of the property, recoverable in an action by the guardian or conservator for the benefit of the estate [*Prob. Code § 859*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesFormEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & Inventories

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24-286 California Forms of Pleading and Practice--Annotated § 286.17

§ 286.17 Notification to Court by Institutions

[1] When Guardian or Conservator Takes Possession of Asset

When a guardian or conservator takes possession or control of any asset of the ward or conservatee held by an institution, the institution must file with the court a statement containing the following information [*Prob. Code § 2890(a)*]:

- The name of the ward or conservatee.
- The name of the guardian or joint guardians or conservator or joint conservators.
- The court case number.
- The name of the institution.
- The address of the institution.
- The account number of the account, if any, in which the asset was held by the ward or conservatee.
- A description of the asset or assets held by the institution. If an asset is a life insurance policy or annuity, the description must include the policy number, if available. If the asset is a security listed on a public exchange, the description must include the name and reference number, if available.
- The value, if known, or if unknown, the estimated value, of the asset on the date the letters were issued by the court to the guardian or conservator, to the extent this value is routinely provided in the statements from the institution to the owner.

For purposes of this requirement, taking possession or control of an asset includes changing title to the asset, withdrawing all or any portion of the asset, or transferring all or any portion of an asset from the institution [*Prob. Code*

§ 2890(b)]. An institution is an insurance company, insurance broker, insurance agent, investment company, investment bank, securities broker-dealer, investment adviser, financial planner, financial adviser, or any other person who takes, holds, or controls an asset subject to a conservatorship or guardianship [*Prob. Code § 2890(c)*].

The statement required to be filed under *Prob. Code § 2890* is an affidavit by a person having authority to make the statement on behalf of the institution, and must include that fact in the statement [*Prob. Code § 2891(a)*]. If the affidavit and any accompanying information also contains the ward or conservatee's social security number or any other personal information, including financial information regarding the ward or conservatee that would not be disclosed in an accounting, inventory and appraisal, or any other nonconfidential pleading, the information must be kept confidential and may be disclosed only upon court order [*Prob. Code § 2891(b)*]. The court must not charge a fee for filing the affidavit or related information [*Prob. Code § 2891(d)*].

The affidavit need not be filed in a proceeding more than once for each asset. However, all assets held by institutions may be listed in a single affidavit filed with the court [*Prob. Code § 2891(e)*]. Further, when a guardian or conservator takes possession or control of an asset in an institution, the institution may then file an affidavit as to any or all other assets of the ward or conservatee held in the institution [*Prob. Code § 2891(f)*].

The affidavit requirement does not apply to any trust arrangement described in *Prob. Code § 82(b)*, except that it does apply to assets held in Totten trust (*see Prob. Code § 82(b)(4)*) [*Prob. Code § 2891(c)*].

Additionally, when taking possession or control of an asset held by an institution in the name of a ward or conservatee, a temporary or general guardian, or temporary, general, or limited conservator of the estate must provide the following [*Cal. Rules Ct., Rules 7.1011, 7.1061*]:

- A certified copy of the guardian's Letters of Temporary Guardianship or Conservatorship [*see § 282.82* (Judicial Council Form GC-150)], or Letters of Guardianship [*see § 280.116* (Judicial Council Form GC-250)] / Letters of Conservatorship [*see § 281.112* (Judicial Council Form GC-350)] containing the Notice to Institutions and Financial Institutions on the second page; and

- A blank copy of a Notice of Taking Possession or Control of an Asset of Minor or Conservatee [*see § 286.49* (Judicial Council Form GC-050)].

These rules apply to Totten trust accounts but do not apply to any other trust arrangements described in *Prob. Code § 82(b)* [*Cal. Rules Ct., Rules 7.1011, 7.1061*].

For a form for giving notice of taking possession or control of a minor's or conservatee's asset, see *§ 286.49*.

[2] When Guardian or Conservator Opens or Changes Account or Safe Deposit Box

When a guardian or conservator opens or changes the name to an account or safe deposit box in a financial institution, the financial institution must send to the court a statement containing the following information [*Prob. Code § 2892(a)*]:

- The name of the person with whom the account or safe deposit box is opened or changed.

- The account number or reference number.

- The date the account or safe deposit box was opened or changed ownership pursuant to letters of guardianship or conservatorship.

- If the asset is held in an account in a financial institution, the balance as of the date the account was

opened or changed.

- If the asset is held in a safe deposit box, and the financial institution has been given access to the safe deposit box, a list of its contents, including, for example, currency, coins, jewelry, tableware, insurance policies or certificates, stock certificates, bonds, deeds, and wills.

- The name and address of the financial institution in which the asset is maintained.

A financial institution subject to this requirement is a bank, trust, savings and loan association, savings bank, industrial bank, or credit union [*Prob. Code § 2891(b)*].

The written statement required by *Prob. Code § 2892* must be in the form of an affidavit signed by an officer of the financial institution, and the officer must provide his or her name and title in the affidavit [*Prob. Code § 2893(a)*]. The affidavit need not be filed in a proceeding more than once for each asset. However, all assets held by the financial institution may be listed in a single affidavit filed with the court [*Prob. Code § 2893(d)*].

The affidavit is subject to disclosure under the circumstances described in *Gov. Code § 7480(l)* [*Prob. Code § 2893(b)*]. However, if the affidavit and any accompanying information contains the ward or conservatee's social security number or any other personal information, including financial information regarding the ward or conservatee that would not be disclosed in an accounting, inventory and appraisal, or any other nonconfidential pleading, the information must be kept confidential and may be disclosed only upon court order [*Prob. Code § 2893(e)*].

The affidavit requirement does not apply to any trust arrangement described in *Prob. Code § 82(b)*, except that it does apply to assets held in Totten trust (*see Prob. Code § 82(b)(4)*) [*Prob. Code § 2893(c)*].

Additionally, when opening or changing the name on an account or a safe deposit box in a financial institution, the temporary or general guardian, or temporary, general, or limited conservator of the estate must provide the following [*Cal. Rules Ct., Rules 7.1011, 7.1061*]:

- A certified copy of the guardian's Letters of Temporary Guardianship or Conservatorship [*see § 282.82* (Judicial Council Form GC-150)], or Letters of Guardianship [*see § 280.116* (Judicial Council Form GC-250)]/Letters of Conservatorship [*see § 281.112* (Judicial Council Form GC-350)] containing the Notice to Institutions and Financial Institutions on the second page; and

- A blank copy of a Notice of Notice of Opening or Changing a Guardianship or Conservatorship Account or Safe-Deposit Box [*see § 286.50* (Judicial Council Form GC-051)].

These rules apply to Totten trust accounts, but do not apply to any other trust arrangements described in *Prob. Code § 82(b)* [*Cal. Rules Ct., Rules 7.1011, 7.1061*].

For a form for a notice that a guardian or conservator has opened or changed the name on an account or a safe deposit box, see *§ 286.50*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & Inventories

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[Reserved]

§§ 286.18[Reserved]

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PART III. RESEARCH GUIDE

24-286 California Forms of Pleading and Practice--Annotated § 286.30

§ 286.30 State Statutes

[1] Appraisal

Appraisal in manner provided for inventory and appraisal of decedents' estates (*see Prob. Code §§ 8850-8903*). *Prob. Code § 2610(c)*

Grounds and procedures for objecting to appraisal. *Prob. Code § 2614*

Notification to court by institutions. *Prob. Code § 2890 et seq.*

Appraisal requirements. *Prob. Code § 8900 et seq.*

[2] Examination Concerning Assets of Estate

Wrongful taking of property; liability. *Prob. Code § 859*

Who may file petition; contents; citation to appear; failure to appear considered contempt of court. *Prob. Code § 2616*

Interrogatories. *Prob. Code § 2617*

Examination. *Prob. Code § 2618*

Citation to appear; disobedience punishable as contempt of court. *Prob. Code § 2619*

[3] Filing

Failure to file timely inventory and appraisal. Prob. Code §§ 2415.5, *2615*

Allowable time for filing inventory and appraisal. *Prob. Code § 2610(a)*

[4] Inventory

Public administrator, government official, law enforcement agency, hospital or institution in which decedent died, or decedent's employer is authorized to deliver decedent's tangible personal property in its possession, including keys to decedent's residence, to conservator or guardian of estate acting in that capacity at time of death without necessity of waiting 40 days after death. *Prob. Code § 330*

Wages of ward or conservatee are not part of estate. *Prob. Code § 2601(a)*

Required oath by guardian or conservator that inventory contains entire estate. *Prob. Code § 2610(b)*

Filing of supplemental inventory required for later discovered or acquired property. *Prob. Code § 2613*

Procedures and grounds for citation and examination of person regarding estate assets. *Prob. Code § 2616*

Community property not part of estate. *Prob. Code § 3051(b)(2)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesFormEstate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & Inventories

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24-286 California Forms of Pleading and Practice--Annotated § 286.31

§ 286.31 Local Court Rules

[1] Alameda County

Inventory and appraisal. Alameda Co. Unified Super. Ct. Rules, Rule 12.6

[2] Los Angeles County

Inventory and appraisals. Los Angeles Co. Super. Ct. Rules, Rules 10.154, 10.161 (guardianships)

[3] Orange County

Probate referees, inventories and appraisals. Orange Co. Super. Ct. Rules, Rule 604.01 et seq.

[4] Sacramento County

Appointment of probate referee. Sacramento Co. Local Ct. Rules, Rules 15.80

[5] San Diego County

Inventories and appraisals. San Diego Co. Super. Ct. Rules, Div. IV, Rules 1.90 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesAppointmentsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & Inventories

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§ 286.32 Decisions

Guardian may properly employ an accountant to perform acts involving professional skills not possessed by guardian, but may not delegate all responsibility. *Clark v. State Bar (1952) 39 Cal. 2d 161, 173, 246 P.2d 1*

All property, including any out-of-state property, must be included in inventory and accounting. *Conservatorship of Hume (2006) 139 Cal. App. 4th 393, 397, 42 Cal. Rptr. 3d 796*

Failure or delay in filing inventory are not grounds for removal of guardian in absence of loss to estate. *Estate of Meyers (1955) 130 Cal. App. 2d 145, 150, 278 P.2d 471*

Court has discretion regarding discharge of guardian for failure to timely file inventory. *Guardianship of Whittaker (1937) 19 Cal. App. 2d 373, 375, 65 P.2d 373*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAccountingEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & Inventories

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24-286 California Forms of Pleading and Practice--Annotated § 286.33

§ 286.33 Text References

Witkin, Summary of California Law, vol. 12, *Wills and Probate*, §§ 950-960 (9th ed. 1990)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral Overview

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24-286 California Forms of Pleading and Practice--Annotated §§ 286.34-286.39

[Reserved]

§§ 286.34[Reserved]

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24-286 California Forms of Pleading and Practice--Annotated § 286.40

§ 286.40 Request for Appointment of Probate Referee in Guardianship or Conservatorship [Prob. Code §§ 450-453, 2610, 8902]

[1] FORM Request for Appointment of Probate Referee in Guardianship or Conservatorship

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship *or* Limited Conservatorship] of the _____ [Person *or* Estate *or* Person and Estate] of _____ [*name*], _____ [Ward *or* Conservatee].	)))))))	NO. _____ [Hearing set for _____ [*date*], at _____ [*time*] in Dept. No. _____] REQUEST FOR APPOINTMENT OF REFEREE

IT IS HEREBY REQUESTED that a duly appointed, qualified, and acting probate referee for _____ County be appointed referee for the purpose of appraising the property of the estate of _____[*name*].
The approximate value of the property is $_____.
Dated: _____.

_____ [*signature*]

Attorney for _____ [Guardian *or* Conservator]

[2] Use of Form

The form in [1], *above,* is used in obtaining the appointment of a referee to appraise the estate of a ward or conservatee [*Prob. Code §§ 450-453, 2610, 8902*]. It is used when there is no local court form and when the referee was not appointed when the guardian or conservator was appointed [*see* Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators*].

[3] Cross References

For a discussion of when appointment of a referee is necessary, see *§ 286.12*

For an order appointing a referee, see *§ 286.41*

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24-286 California Forms of Pleading and Practice--Annotated § 286.41

§ 286.41 Order Appointing Referee [Prob. Code §§ 450-453, 2610, 8902]

[1] FORM Order Appointing Referee

[*Caption. See § 286.40[1].*]

On proof made to the satisfaction of the court that the request for appointment of a referee should be granted,

IT IS ORDERED that _____[*name*], one of the probate referees appointed by law, is appointed referee to appraise the estate of the above-named _____ [ward *or* conservatee].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use when the court grants the request for appointment of a probate referee to appraise the noncash assets of the ward's or conservatee's estate [for a form of request for appointment of probate referee, *see § 286.40*]. The order should be entitled: ORDER APPOINTING REFEREE. In most counties the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

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24-286 California Forms of Pleading and Practice--Annotated § 286.42

§ 286.42 Ex Parte Request for Order and Order Requiring Guardian or Conservator to File Inventory and Appraisal or to Show Cause Why He or She Should Not Be Removed [Prob. Code § 2614.5]

[1] FORM Ex Parte Request for Order and Order Requiring Guardian or Conservator to File Inventory and Appraisal or to Show Cause Why He or She Should Not Be Removed

[*Caption. See § 286.40[1].*]

Petitioner _____[*name*] respectfully represents:

1. Petitioner is the _____ [ward *or* conservatee *or* _____ (*specify relationship, e.g.,* wife of _____ (*name of ward or conservatee*))].

2. _____[*Name of guardian or conservator*] was appointed _____ [guardian *or* conservator] of the [person and] estate of _____[*name*] and qualified, and letters of _____ [guardianship *or* conservatorship] were duly issued to him/her on _____[*date*]. At all times since the letters issued, he/she has been acting as _____ [guardian *or* conservator].

3. _____[*Name of guardian or conservator*] has failed to file an inventory and appraisal for the above-entitled estate within _____ [*specify number of months or years, e.g.,* one year from the time of his/her appointment as _____ (guardian *or* conservator)] as _____ [required by law *or* ordered by the court].

WHEREFORE, petitioner prays for an order as follows:

1. That _____[*name of guardian or conservator*] file his/her inventory and appraisal in the _____ [Guardianship *or* Conservatorship] of the Estate of _____[*name*], _____ [ward *or* conservatee], on or before _____[*date*].

2. That, if _____[*name of guardian or conservator*] does not file his/her inventory and appraisal by _____[*date*], he/she must appear in court to show cause why he/she should not be removed as _____ [guardian *or* conservator] of the above-referenced estate.

3. For such other orders as the court deems proper.
Dated: _____.

_____ [*signature*] Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

ORDER REQUIRING _____ [GUARDIAN *or* CONSERVATOR] TO FILE INVENTORY AND APPRAISAL OR TO SHOW CAUSE WHY HE OR SHE SHOULD NOT BE REMOVED [*Prob. Code § 2614.5*]

On proof being made to the satisfaction of the court that the foregoing application should be granted,

IT IS HEREBY ORDERED that _____[*name of guardian or conservator*] file his/her inventory and appraisal in the _____ [Guardianship *or* Conservatorship] of the Estate of _____[*name*] on or before _____[*date*].

IT IS FURTHER ORDERED that, if _____[*name of guardian or conservator*] does not file his/her inventory and appraisal by _____[*date*], he/she must appear in [_____ (Department *or* Division) _____ of] this court, located at _____[*address*], _____[*city*], on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, then and there to show cause, if he/she has any, why he/she should not be removed as _____ [guardian *or* conservator] of the above-referenced estate.

IT IS FURTHER ORDERED that the service of this order and a copy of the declaration of _____[*name of ward or conservatee, spouse or relative of ward or conservatee, or interested person*] be served on _____[*name of guardian or conservator*] at least _____[*leave blank for court to fill in*] days before the date and time set for the hearing on this order to show cause.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The ex parte request for an order in [1], *above*, is for use by the ward or conservatee, a spouse, relative, or friend of the ward or conservatee, or any interested person in requesting the court to order the guardian or conservator to file an inventory and appraisal when the guardian or conservator has failed to do so [*Prob. Code § 2614.5*]. It includes the order granting the request and an order to show cause why the guardian or conservator should not be removed that is pertinent when the guardian or conservator does not file the account within the time specified by the court in the order. The form should be entitled: EX PARTE REQUEST FOR ORDER AND ORDER REQUIRING _____ [GUARDIAN *or* CONSERVATOR] TO FILE ACCOUNT OR TO SHOW CAUSE WHY HE OR SHE SHOULD NOT BE REMOVED.

Local court procedure should be consulted for the format of papers used for obtaining ex parte orders.

This procedure is optional and does not preclude the use of any other remedy or sanction when an account is not timely filed [*Prob. Code § 2614.5(c)*].

For further discussion of this procedure, see *§ 286.14*.

[3] Verification

A petition must be verified [*see Prob. Code § 1021*]. Because a petition may include an application or request in the nature of a petition, it is recommended that the request for an order completeing the filing of an inventory an appraisal be verified [*see Prob. Code § 1430*].

The form of the verification used in this form complies with the requirements of *Code Civ. Proc. §§ 446* and *2015.5*.

[4] Local Court Practice

Since *Prob. Code § 2614.5(c)* does not explicitly state the procedure to be followed in obtaining the order to file the account or to show cause why the guardian or conservator should not be removed, counsel should ascertain local court practice to determine whether a particular court requires a noticed motion, an order to show cause, or an ex parte application.

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24-286 California Forms of Pleading and Practice--Annotated § 286.43

§ 286.43 Application for Additional Time to File Inventory and Appraisal [Prob. Code § 2610(a)]

[1] FORM Application for Additional Time to File Inventory

[*Caption. See § 286.40[1].*]

IT IS HEREBY REQUESTED that the time for filing the initial inventory and appraisal in this proceeding be extended to _____[*date*]. This extension is necessary because it is impractical to complete the inventory and appraisal by _____[*date*], in that _____ [*set forth facts justifying the extension, e.g.,* the _____ (ward's *or* conservatee's) estate is extensive and is located in several different counties in California as well as out-of-state. Certain assets, including real property and valuable personal property, were not located until _____ (*date*), which does not leave sufficient time to have them appraised by _____ (*date*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

Attorney for _____

[Guardian *or* Conservator]

[2] Use of Form

The form in [1], *above,* is for use in obtaining an extension of time to file the inventory and appraisal because the appraisal cannot be completed in time [*see Prob. Code § 2610(a)*]. It should be entitled: EX PARTE APPLICATION FOR ADDITIONAL TIME TO FILE INVENTORY AND APPRAISAL. It is made under penalty of perjury because it also serves as a declaration of the facts on which the application is based. When the facts on which the application is

based are not within the knowledge of counsel, this form should be modified and accompanied by a declaration from the guardian or conservator.

[3] Cross References

For order extending time to file inventory and appraisal, see *§ 286.44*

California Conservatorships (Cal. CEB 1968), Ch. 4, *First Steps: Inventory and Appraisal*, § 4.64

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24-286 California Forms of Pleading and Practice--Annotated § 286.44

§ 286.44 Order Extending Time for Filing of Inventory and Appraisal [Prob. Code § 2610(a)]

[1] FORM Order Extending Time for Filing of Inventory and Appraisal

[*Caption. See § 286.40[1].*]

On proof made to the satisfaction of the court that the application for additional time to file inventory and appraisal should be granted,

IT IS ORDERED that the time for filing the inventory and appraisal of the property of the above-named _____ [ward *or* conservatee] is extended to _____[*date*].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use with the *form in § 286.43[1]* (application for additional time to file inventory. The order should be entitled: ORDER EXTENDING TIME FOR FILING OF INVENTORY AND APPRAISAL. In most counties the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Cross References

For discussion and references of use of application for additional time to file inventory, see *§ 286.43[2], [3]*

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24-286 California Forms of Pleading and Practice--Annotated § 286.45

§ 286.45 Inventory and Appraisal by Guardian or Conservator [Prob. Code §§ 2610, 8900-8901]--Judicial Council Forms GC-040, GC-041

[1] FORM Inventory and Appraisal by Guardian or Conservator [Prob. Code §§ 2610, 8900-8901]--Judicial Council Forms GC-040, GC-041

Click here to view image.

[2] Use of Form

The form and attachments in [1], *above*, are illustrative filled-in reproductions of forms approved by the Judicial Council for optional use in the guardian or conservator's inventory and appraisal of the ward or conservatee's estate [*see Prob. Code § 2610*]. They are Cal. Judicial Council Forms GC-040 (inventory and appraisal) and GC-041 (attachments).

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form must be accompanied by the official Judicial Council form for notice of filing of the inventory and appraisal and how to file an objection [Cal. Judicial Council Form GC-045; *see Prob. Code § 6210(a)*], which is illustrated and discussed in *§ 286.45A*.

[3] Time for Filing

This form must be filed within 90 days of the appointment of the guardian or conservator unless the court grants an extension [*see Prob. Code § 2610(a)*; for forms for an application and order for additional time to file the inventory and appraisal, *see §§ 286.43, 286.44*].

[4] Copies to State Department of Health and County Assessor

If the ward or conservatee, during the guardianship or conservatorship, is or has been a patient in a state hospital under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services, the guardian or conservator must mail a copy of the inventory and appraisal to the director of the appropriate department at the director's office in Sacramento not later than 15 days after the inventory and appraisal is filed with the court [*Prob. Code § 2611*].

If a timely request is made, the court clerk must mail a copy of the inventory and appraisal to the county assessor [*Prob. Code § 2612*].

[5] Community Property

As of January 1, 1981, community property is not part of a conservatorship estate if the conservatee's spouse has legal capacity [*Prob. Code § 3051(b)(2)*]. However, *Prob. Code § 2610(b)* requires that the guardian or conservator take and subscribe to an oath that the inventory contains "a true statement of all of the estate of the ward or conservatee of which the guardian or conservator has possession or knowledge." Therefore, it is suggested that the conservatee's interest in community property assets be listed separately on the inventory and appraisal and designated as community property that is not included in the conservatorship estate if the ward's or conservatee's spouse has legal capacity. Local practice should be consulted.

In attachment 2 to this form, a one-half interest in real estate owned in joint tenancy by the conservatee and her spouse has been listed as a part of the conservatee's estate [*see* item 6]. It has not been separately listed as community property, as suggested above. This is because property acquired by the spouses in joint tenancy during marriage is presumed to be community property only on division of the property on dissolution of marriage or legal separation [*see Fam. Code § 2580*]. Thus, unless the marriage has been dissolved or the parties are legally separated, each spouse, while living, owns a one-half separate property interest in the jointly held property.

[6] Attachment Number 1

This form is used to list the cash-type assets which are appraised by the guardian or conservator [*Prob. Code §§ 2610(c), 8901(a)*].

[7] Attachment Number 2

This form is used to list the noncash-type assets that must be appraised by the probate referee appointed by the court [*Prob. Code §§ 2610(c), 8901(b)-(e)*].

[8] Waiver of Probate Referee

The court, for good cause, may waive appraisal by a probate referee [*Prob. Code § 8903(a)*]. The guardian or conservator may apply for a waiver together with the petition for appointment of the guardian or conservator, or together with another petition. The guardian or conservator may also apply for a waiver in a separate petition, but the application may not be made later than the time the guardian or conservator delivers the inventory to the probate referee, if a probate referee has been designated. A copy of the proposed inventory and appraisal and a statement that sets forth the good cause cause that justifies the waiver must be attached to the petition [*Prob. Code § 8903(b)*].

The hearing on the waiver may not be held sooner than 15 days after the petition is filed. At least 15 days before the time set for the hearing, notice of the hearing, together with copies of the petition and the proposed inventory and appraisal, must be given as provided in *Prob. Code § 1460 et seq.* and also to the following persons [*Prob. Code § 8903(c)*; *see Prob. Code § 1469*]:

- Each known heir whose interest in the estate will be affected by the waiver;
- Each known devisee whose interest in the estate will be affected by the waiver;
- The Attorney General, at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the State of California and its interest in the estate would be affected by the waiver; and
- The probate referee, if one has been designated.

Special notice of the hearing on the waiver must be given to all persons who have filed requests, under *Prob. Code § 2700*, for special notice of either petitions filed in the guardianship or conservatorship proceedings or inventories and appraisals of property in the estate [*Prob. Code § 2702*; *see Prob. Code §§ 2700-2701*].

[9] Cross References

For discussion and forms relating to general and special notice, see Ch. 284, *Guardianship and Conservatorship: Notice*

For a list of additional assets that might be included in the attachments and further suggestions for the format used in listing them, see Ch. 451, *Probate: inventory and Appraisal* , § 451.50 et seq.

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24-286 California Forms of Pleading and Practice--Annotated § 286.45A

§ 286.45A Notice of Filing of Inventory and Appraisal and How to Object to the Inventory or the Appraised Value of Property [Prob. Code §§ 2610, 2614]--Judicial Council Form GC-042

[1] FORM Notice of Filing of Inventory and Appraisal and How to Object to the Inventory or the Appraised Value of Property [Prob. Code §§ 2610, 2614]--Judicial Council Form GC-42

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a filled-in reproduction of Cal. Judicial Council Form GC-42, a mandatory Judicial Council form which is used to give notice of a filing of inventory and appraisal and how to object to the inventory or the appraised value of property. The notice must be mailed with the inventory and appraisal of the estate, to the conservatee, the attorneys of record for the ward or conservatee, the conservatee's spouse or registered domestic partner, and the conservatee's relatives in the first degree or, if there are no such relatives, to the next closest relative, unless the court determines that mailing this information would result in harm to the conservatee [*Prob. Code § 2610(a)*]. If additional space is necessary, given the number of parties to whom notice must be given, Judicial Council Form GC-42(MA)--Attachment to Notice of Filing of Inventory and Appraisal and How to Object to the Inventory or the Appraised Value of Property, may be used to show additional names and address of each person to whom notice was mailed.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct. Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Counsel Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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24-286 California Forms of Pleading and Practice--Annotated § 286.46

§ 286.46 Objection to Inventory and Appraisal [Prob. Code § 2614]--Attorney-Drafted Form

[1] FORM Objection to Inventory and Appraisal

[*Caption. See § 286.40[1].*]

_____[*Name*], as _____ [guardian of *or* conservator of *or* a creditor of *or* a person interested in] the above-entitled estate, objects to the appraisal of the estate filed on _____[*date*], on the basis of the following:

1. The referee has appraised the conservatee's _____ [*specify asset, e.g.,* 1950 Mercedes automobile] at _____[*specify appraised value*].

2. Objector contends that the appraised value of the _____[*specify asset*] is not accurate because _____ [*set out basis of objection, e.g.,* it does not truly reflect the age and restored condition of the automobile]. [Objector is informed and believes that the true value of the _____ (*specify asset*) is $_____.]

WHEREFORE, objector prays for an order as follows:

[1. That the court order an independent appraisal of _____ (*specify asset*);]

2. That the court fix the true value of _____[*specify asset*]; and

3. For such other orders as the court may deem proper.
Dated: _____.

_____ [*signature*]
Objector

_____ [*signature*]
Attorney for Objector

VERIFICATION

I, _____[*name*], am the _____ [guardian of *or* conservator of *or* a creditor of or a person interested in] the above-entitled estate. I have read the foregoing objection to appraisal and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is for use in objecting to any of the appraised values assigned to any asset in an inventory and appraisal [*Prob. Code § 2614*]. It should be entitled OBJECTION TO APPRAISAL. If objection is to be made to the appraisal of more than one asset, the objector would repeat paragraphs similar to Paragraphs 1 and 2 for each additional asset.

This form is an attorney-drafted notice of objection. As an alternative to this forms, attorneys may use optional Judicial Council Form GC-045, the Judicial Council's notice form, which is illustrated and discussed in *§ 286.46A*.

[3] Time for Filing

The written objections must be filed within 30 days after the inventory and appraisal is filed [*Prob. Code § 2614(a)*].

[4] Who May File

Objections may be filed by the guardian or conservator or any creditor or other interested person [*Prob. Code § 2614(a)*].

[5] Verification

The objection must be verified [*Prob. Code § 1021(a)(2)*]. The form of verification shown here complies with the requirements of *Code Civ. Proc. §§ 446* and *2015.5*.

[6] Notice

Notice of the hearing, together with a copy of the objections, must be given for the period and in the manner provided in *Prob. Code §§ 1460-1469*. If the appraisal was made by a probate referee, the person objecting must also mail notice of the hearing and a copy of the objection to the probate referee at least 15 days before the time set for the hearing [*Prob. Code § 2614(b)*]. See Ch. 284, *Guardianship and Conservatorship: Notice* .

[7] Independent Appraisal

The court may have one or more independent appraisals performed by at least one additional appraiser at the expense of the estate or, if the objecting party is not the guardian or conservator and the objection is rejected by the court, the court may assess the cost of any such additional appraisals against the objecting party [*Prob. Code § 2614(c)*].

[8] Cross References

For more discussion of objections to appraisals, see *§ 286.15*

Witkin, Summary of California Law (8th ed), Vol. 7, *Wills and Probate*, § 677A

Marshall, California Probate Procedure (4th ed), Vol. 1, Ch. 21, *Guardianships*, § 2121

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24-286 California Forms of Pleading and Practice--Annotated § 286.46A

§ 286.46A Objections to Inventory and Appraisal of Conservator or Guardian [Prob. Code §§ 2610, 2614]--Judicial Council Form GC-45

[1] FORM Objections to Inventory and Appraisal of Conservator or Guardian [Prob. Code §§ 2610, 2614]--Judicial Council Form GC-045

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of Cal. Judicial Council Form GC-45, used to object to an inventory and appraisal of a conservator or ward. The written objections must be filed within 30 days after the inventory and appraisal is filed [*Prob. Code § 2614(a)*]. Use of the Judicial Council form is optional [*see Cal. Rules of Ct. Rules 1.35*]. Attorneys who prefer to use a custom-drafted objection form may use a form such as the one that is illustrated and discussed in *§ 286.46*. For general information on the requirements for objecting to an inventory and appraisal, see *§ 286.46[2] -[7]*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Counsel Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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24-286 California Forms of Pleading and Practice--Annotated § 286.47

§ 286.47 Petition for Examination of Person Regarding Estate Assets [Prob. Code §§ 2616-2619.5]

[1] FORM Petition for Examination of Person Regarding Estate Assets

[*Caption. See § 286.40[1].*]

Petitioner, _____[*name*], alleges:

1. Petitioner is _____ [the conservator of the estate *or* the guardian of the estate *or* the ward or the conservatee *or* a creditor of the estate] in the above-entitled proceeding.

[*EITHER*]

2. _____[*Name of person to be examined*] is suspected of having _____ [embezzled *or* concealed *or* smuggled *or* falsely or fraudulently obtained *or* wrongfully disposed of] property of the _____ [ward *or* conservatee].

[*OR*]

2. _____[*Name of person to be examined*] has _____ [in his/her possession *or* knowledge of] an instrument in writing belonging to the _____ [ward *or* conservatee].

[*OR*]

2. _____[*Name of person to be examined*] asserts a claim against the _____ [ward *or* conservatee *or* estate].

[*OR*]

2. The above-entitled estate asserts a claim against _____[*name of person to be cited*].

3. _____ [*Allege facts showing basis for examination, e.g.,* _____ (*Name of person to be examined*) told me he/she bought a car with money he/she persuaded the conservatee to give to him/her].

WHEREFORE, petitioner prays that _____[*name of person to be examined*] be cited to appear before this court to be examined on the matters recited in this petition.
Dated: _____.

_____ [*signature*]
Petitioner

_____ [*signature*]
Attorney for Petitioner

[*Verification. See § 286.46[1].*]

[2] Use of Form

The form in [1], *above*, is for use in petitioning the court to cite someone or examination who is suspected of having embezzled, concealed, smuggled, falsely or fraudulently obtained, or wrongfully disposed of any property of the ward or conservatee; who has in his or her possession, or has knowledge of, any instrument in writing belonging to the ward or conservatee; who asserts a claim against the ward, conservatee, or estate; or against whom the estate asserts a claim [*Prob. Code §§ 2616-2619.5*]. The petition should be entitled: PETITION FOR EXAMINATION OF PERSON REGARDING ESTATE ASSETS.

[3] Who May Petition

The petition may be filed by the guardian or conservator, the ward or conservatee, or a creditor or other interested person, including persons having only an expectancy or prospective interest in the estate [*Prob. Code § 2616(a)*].

[4] Contents of Petition

The status of the petitioner permitting him or her to file the petition should be alleged [*Prob. Code § 2616(a)*]. An allegation of the specific statutory grounds for citing the person to be examined should also be included [*Prob. Code § 2616(b)*]. Although not expressly required by statute, it is suggested that the petition include factual allegations supporting the statutory grounds for citing the person to be examined.

[5] Verification

The petition must be verified [*Prob. Code § 1021*].

[6] Cross References

For discussion of examination of person regarding assets, see *§ 286.16*

For a form for a citation for examination of person regarding estate assets, see *§ 286.48*

Witkin, Summary of California Law (8th ed), Vol. 7, *Wills and Probate, §§ 407*, 677A

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24-286 California Forms of Pleading and Practice--Annotated § 286.48

§ 286.48 Citation for Examination of Person Regarding Estate Assets [Prob. Code § 2616 et seq.]

[1] FORM Citation for Examination of Person Regarding Estate Assets

[*Caption. See § 286.40[1].*]

THE PEOPLE OF THE STATE OF CALIFORNIA to _____[*name*]:

By order of the court you are cited and required to appear personally at a hearing in this court on _____[*date*], at _____[*time*], in Dept. No. _____, located at _____[*address and city*] and to be examined regarding

[*EITHER*]

your alleged _____ [embezzlement *or* concealment *or* smuggling *or* false or fraudulent obtaining *or* wrongful disposition] of _____ [*specify asset, e.g.,* a gold Rolex watch] belonging to the above-named _____ [ward *or* conservatee].

[*OR*]

your alleged _____ [possession *or* knowledge] of _____ [*identify written instrument, e.g.,* the partnership agreement between the _____ (ward *or* conservatee) and Sally Jones].

[*OR*]

the claim you allegedly are asserting against the _____ [ward *or* conservatee *or* estate] for

_____ [*specify nature of claim, e.g.,* the sum of $_____ arising from an alleged breach of contract for the sale of a gold Rolex watch].

[*OR*]

the claim the _____ [ward *or* conservatee or estate] is asserting against you for _____ [*specify nature of claim, e.g.,* the sum of $_____ arising from an alleged breach of contract for the sale of a gold Rolex watch].

[*AND/OR*]

You are further required to produce documents [and other personal property] at the hearing as follows: _____[*specify the documents and personal property to be produced*].
Dated: _____.

Clerk, by _____ [*signature*],

Deputy Clerk

[*SEAL*]

[2] Use of Form

The form for a citation in [1], *above,* is for use with a petition for examination of a person regarding estate assets [*see Prob. Code § 2616(c)*; for the form for a petition, *see § 286.47*]. The citation should be entitled: CITATION FOR EXAMINATION OF PERSON REGARDING ESTATE ASSETS.

The form includes an optional paragraph for requiring the person cited to produce specified documents and personal property at the hearing, pursuant to *Prob. Code § 2616(c)*.

[3] Cross References

For discussion of citation for examination of person regarding assets, see *§ 286.16[2]*

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24-286 California Forms of Pleading and Practice--Annotated § 286.49

§ 286.49 Notice of Taking Possession or Control of an Asset of Minor or Conservatee [Prob. Code § 2890]--Judicial Council Form GC-050

[1] FORM Notice of Taking Possession or Control of an Asset of Minor or Conservatee [Prob. Code § 2890]--Judicial Council Form GC-050

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of Cal. Judicial Council Form GC-050, for use by an institution to notify the court that a guardian or conservator has taken possession or control of a minor's or conservatee's asset.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Time for Filing

This form must be filed when a guardian or conservator takes possession or control of any asset of the ward or conservatee held by an institution [*Prob. Code § 2890(a)*].

[4] Cross References

For discussion of the requirement of notice of taking possession or control of a minor's or conservatee's asset, see *§ 286.17[a]*

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24-286 California Forms of Pleading and Practice--Annotated § 286.50

§ 286.50 Notice of Opening or Changing a Guardianship or Conservatorship Account or Safe Deposit Box [Prob. Code § 2892]--Judicial Council Form GC-051

[1] FORM Notice of Opening or Changing a Guardianship or Conservatorship Account or Safe Deposit Box [Prob. Code § 2892]--Judicial Council Form GC-051

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of Cal. Judicial Council Form GC-051, for use by a financial institution to notify the court that a guardian or conservator has opened or changed the name on an account or a safe deposit box.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Cross References

For discussion of the requirement of notice of the opening or changing the name on an account or a safe deposit box, see *§ 286.17[b]*

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[1] FORM

[2] Use of Form

[3] Duration, Modification, or Revocation of Order

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[5] Cross References

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§ 287.01 Scope of Chapter

This chapter discusses the general powers and duties of the guardian or conservator of the estate [*see §§ 287.11, 287.12*], the supervisorial power of the court [*see § 287.13*], and the exercise of powers without court authorization [*see § 287.14*].

The chapter also discusses the liability of a joint guardian for breach of duty by another [*see § 287.15*] and when a joint guardian is authorized to act alone [*see § 287.16*].

The chapter discusses the management powers of a guardian or conservator of a nonresident [*see § 287.17*], a guardian nominated by will [*see § 287.18*], and a guardian for a particular property [*see § 287.19*].

This chapter also covers the capacity of the conservatee to bind the estate [*see § 287.20*] and the durable power of attorney [*see § 287.21*].

The forms provided in this chapter are:

- A petition for authorization and instructions as to the management of estate property [*see § 287.40*].
- An objection to the petition [*see § 287.41*].
- An order authorizing and instructing the guardian or conservator as to the management of estate property [*see § 287.42*].
- A petition and an order for approval and confirmation of acts by guardian or conservator in management of estate property [*see §§ 287.43, 287.44*].
- A petition and order to broaden or restrict a conservatee's power to enter into transactions binding the estate [*see §§ 287.45, 287.46*].

This chapter also includes a Research Guide [*see § 287.30* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawPowers of AttorneyDurable Powers

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§ 287.02 Cross References

Additional discussion and forms relating to the management of the ward's or conservatee's property may be found in the following chapters:

- For discussion and forms relating to the independent exercise of powers, see Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers* .

- For discussion and forms relating to the maintenance of estate property and payment of debts and expenses, see Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee* .

- For discussion and forms relating to the disposition of estate property, see Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment* .

- For discussion and forms relating to actions and the resolution of disputed claims involving the estate, see Ch. 290C, *Guardianship and Conservatorship: Actions and Disputed Claims* .

- For discussion and forms relating to the capacity of minors to contract, see Ch. 365, *Minors: Contract Actions* .

- For discussion and forms relating to the management of property in decedents' estates, see Ch. 456, *Probate: Management of Estate Assets* .

- For discussion and forms relating to instructions to the personal representative of a decedent, see Ch. 457, *Probate: Instructions to Personal Representative* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAgeEstate, Gift & Trust LawConservators & GuardiansGeneral

OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral Overview

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[Reserved]

§§ 287.03[Reserved]

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§ 287.10 Governing Statutes

Statutes governing the general principles and procedures for management of the ward's or conservatee's estate are set forth as follows in statutory numerical order:

- Capacity to bind or obligate the conservatorship estate [*Prob. Code § 1870 et seq.*].
- General provisions relating to guardianships and conservatorships [*Prob. Code §§ 2100-2103*].
- Joint guardians or conservators [*Prob. Code §§ 2105, 2105.5*].
- Nonresident wards or conservatees and nominated guardians [*Prob. Code §§ 2107-2109*].
- General provisions relating to the powers and duties of guardians and conservators [*Prob. Code §§ 2401-2403*].
- Exercise of powers without court authorization [*Prob. Code § 2450*].
- Duty after the death of wards or conservatees [*Prob. Code § 2467*].
- Independent exercise of powers [*Prob. Code § 2590 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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§ 287.11 Overview of Responsibilities

The guardian or conservator, or limited conservator to the extent specifically and expressly provided in the appointing court's order, has the management and control of the estate of the ward or conservatee [*Prob. Code § 2401(a)*]. The guardian or conservator is given certain powers to carry out this responsibility. These include:

- The powers to represent the ward or conservatee in actions and proceedings and to compromise or otherwise to settle disputed claims [*see Prob. Code §§ 2405-2406, 2462, 2500-2507*, discussed in Ch. 290C, *Guardianship and Conservatorship: Actions and Disputed Claims*].

- The powers to support the ward or conservatee and any dependents, to pay debts and expenses, to collect debts, to make deposits and withdrawals, and otherwise to handle and maintain estate assets [*see Prob. Code §§ 2420-2423, 2430, 2431, 2450 et seq.*, discussed in Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee*].

- The powers to sell, encumber, convey, exchange, invest, purchase, and otherwise to dispose of estate property [*see Prob. Code §§ 850 et seq., 2540 et seq., 2550 et seq., 2570 et seq., 2580 et seq.*, discussed in Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment*].

- The power to request additional independent powers [*see Prob. Code § 2590 et seq.*; Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers*].

The guardian or conservator continues to have the duty of custody and conservation of the estate after the death of the ward or conservatee, pending the delivery of the estate to the personal representative of the ward's or conservatee's estate or other disposition according to law [*Prob. Code § 2467(a)*]. The guardian or conservator has such powers granted by statute as are necessary for the performance of this duty [*Prob. Code § 2467(b)*].

Legal Topics:

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

Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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§ 287.12 Standard of Care

The guardian or conservator must use ordinary care and diligence in managing and controlling the estate. What constitutes the use of ordinary care and diligence is determined by all the circumstances of the particular estate [*Prob. Code § 2401(a)*]. A professional guardian or conservator is held to a greater standard of care based on its presumed expertise than is a lay guardian or conservator [*see Estate of Beach (1975) 15 Cal. 3d 623, 635, 125 Cal. Rptr. 570, 542 P.2d 994* (bank executor); *Estate of Collins (1977) 72 Cal. App. 3d 663, 673, 139 Cal. Rptr. 644* (dictum stating rule applicable to corporate trustees); *Coberly v. Superior Court (1965) 231 Cal. App. 2d 685, 689, 42 Cal. Rptr. 64* (bank trustee)].

The guardian or conservator must (1) exercise a power to the extent that ordinary care and diligence require that the power be exercised; and (2) not exercise a power to the extent that ordinary care and diligence require that the power not be exercised [*Prob. Code § 2401(b)*].

The guardian or conservator also must use ordinary care and diligence to determine whether the ward or conservatee owns real property in a foreign jurisdiction and to preserve and protect that property [*Prob. Code §§ 2401.1*].

The performance of conditions, not otherwise obligatory, that have been inserted in the order of appointment providing for the care and custody of the property of the ward or conservatee is a part of the duties of the guardian or conservator. He or she is responsible for the faithful performance of any of these conditions [*Prob. Code § 2402*].

The relationship of guardian and ward and of conservator and conservatee is a fiduciary relationship that is governed by the law of trusts, except as provided in *Prob. Code §§ 1400-3925* [*Prob. Code § 2101*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersFiduciary ResponsibilitiesEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of Care

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§ 287.13 Supervisorial Power of Court

[1] In General

A guardian or conservator is subject to the regulation and control of the court in the performance of the duties of the office [*Prob. Code § 2102*; *see Bank of America v. Superior Court (1986) 181 Cal. App. 3d 705, 718, 226 Cal. Rptr. 685* (probate court had exclusive jurisdiction to consider whether guardian improperly invested guardianship funds during pendency of guardianship)].

[2] Petition for Instructions

The general supervisorial power of the court under *Prob. Code § 2102* includes the power to instruct the guardian or conservator. On petition of the guardian or conservator, the ward or conservatee, a creditor, or other interested person, the court may authorize and instruct the guardian or conservator, or approve and confirm the acts of the guardian or conservator, in the administration, management, investment, disposition, care, protection, operation, or preservation of the estate, or in the incurring or payment of costs, fees, or expenses in connection with it [*Prob. Code § 2403(a)*; *see §§ 287.40* (petition for authorization and instructions as to management of estate property), 287.41 (objection to petition), 287.42 (order authorizing and instructing guardian or conservator), 287.43 (petition for approval and confirmation of acts by guardian or conservator), 287.44 (order approving and confirming acts of guardian or conservator)].

A conservator who petitions for the approval of a purchase, lease, or rental of real or personal property from the estate of a conservatee must provide a statement disclosing any family or affiliate relationship between the conservator and the purchaser, lessee, or renter of the property, and the family or affiliate relationship between the conservator and any agent hired by the conservator [*Prob. Code § 2403(c)(1)*]. For this purpose, "family" means a person's spouse or domestic partner [as defined by *Prob. Code § 37*; *Fam. Code § 297*], or relatives within the second degree of lineal or collateral consanguinity of a person or that person's spouse. Further, "affiliate" means an entity that is under the direct control, indirect control, or common control of the conservator [*Prob. Code § 2403(c)(2)*].

A violation of these requirements will result in the rescission of the purchase, lease, or rental of the property. Any losses incurred by the conservatee's estate because the property was sold or leased at less than fair market value will be deemed as charges against the conservator under *Prob. Code §§ 2401.3* and *2401.5*. Further, the court must assess a

civil penalty equal to three times the charges against the conservator or other person in violation of these rules, and may assess punitive damages as it deems proper. If the estate does not incur losses as a result of the violation, the court must instead order the conservator or other person in violation of these rules to pay a fine of up to $5,000 for each violation. These fines and penalties are in addition to any other rights and remedies provided by law [*Prob. Code § 2403(c)(3)*].

[3] Finality of Orders

Unless reversed on appeal, a judgment, order, or decree made pursuant to the Probate Code provisions governing guardianships and conservatorships, including the provisions governing the management of estate property, is final. It releases the guardian or conservator and the sureties from all claims of the ward or conservatee and of any persons affected thereby based on any act or omission directly authorized, approved, or confirmed in the judgment, order, or decree [*Prob. Code § 2103(a)*; *see, e.g., Conservatorship of Harvey (1970) 3 Cal. 3d 646, 650-652, 91 Cal. Rptr. 510, 477 P.2d 742]* .

Nevertheless, the judgment, order, or decree is not final and does not operate as a release when it is obtained by fraud or conspiracy or by misrepresentation as to any material fact contained in the petition or account or in the judgment, order, or decree. Misrepresentation includes, but is not limited to, the omission of a material fact [*Prob. Code § 2103(b)*; *Conservatorship of Coffey (1986) 186 Cal. App. 3d 1431, 1437-1438, 231 Cal. Rptr. 421* (omission of material fact); *see Bank of America v. Superior Court (1986) 181 Cal. App. 3d 705, 715, 226 Cal. Rptr. 685* (acknowledging proposition but finding no misrepresentation)]. Intermediate orders also are denied res judicata effect when rendered in ex parte proceedings before a commissioner or when hearing and notice requirements are not followed and the orders fail to recite that proper notice has been given [*Guardianship of Slakmon (1978) 83 Cal. App. 3d 224, 231-235, 147 Cal. Rptr. 777* (applying former code provision that only gave conclusive effect to intermediate conservatorship orders)].

[4] Referral of Business to Entity in Which Conservator Has a Financial Interest

In exercising his or her duties, a conservator may not hire or refer business to an entity in which he or she has a financial interest, except with court authorization after written disclosure of the interest to the court [*Prob. Code § 2401(c)*]. A "financial interest" means any of the following [*Prob. Code § 2401(c)*]:

- An ownership interest in a sole proprietorship, partnership, or closely held corporation;
- An ownership interest of greater than 1 percent of the outstanding shares in a publicly traded corporation; or
- Being an officer or a director of a corporation.

The prohibition against the referral of business to an entity in which the conservator has a financial interest applies only to conservators required to register with the Statewide Registry under *Prob. Code §§ 2850-2856* [*Prob. Code § 2401(c)*].

The Professional Fiduciaries Act ("Act") [Stats. 2006 ch. 491; *see Bus. & Prof. Code § 6500 et seq.*] replaced former requirements with respect to the licensing of professional fiduciaries, operative July 1, 2008. The Act creates the Professional Fiduciaries Bureau ("Bureau") in the Department of Consumer Affairs, and requires the Bureau to license and regulate professional fiduciaries. As of January 1, 2009, all professional fiduciaries must be licensed under the Act [*Bus. & Prof. Code § 6500 et seq.*]. Former Probate Code provisions governing professional fiduciaries became inoperative as of July 1, 2008, and are repealed effective January 1, 2009 [*Prob. Code § 2345, 2856*]. For a detailed discussion on the Professional Fiduciaries Act, see *Ch. 281, Guardianship and Conservatorship: Appointment of Conservators, § 281.66.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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§ 287.14 Exercise of Powers Without Court Authorization

[1] In General

Unless *Prob. Code § 2451 et seq.* (discussed in Chs. 290, *Maintenance of Ward or Conservatee* , and 290C, *Guardianship and Conservationship: Actions and Disputed Claims*) specifically provide for a proceeding to obtain court authorization or to require court authorization, the routine estate management powers and duties set forth in these sections may be exercised or performed by the guardian or conservator without court authorization, instruction, approval, or confirmation [*Prob. Code § 2450(a)*]. Other powers also exercisable without court authorization include the powers, as discussed in Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee*, to support, maintain, and educate a ward or conservatee and dependents [*Prob. Code § 2420(d)*], to pay debts [*Prob. Code § 2430*], and to pay wage claims [*Prob. Code § 2431*]; to compromise claims or extend obligations [*Prob. Code § 2500(a)*], as discussed in Ch. 290C, *Guardianship and Conservatorship: Actions and Disputed Claims* ; and, as discussed in Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment* , to sell listed stocks and bonds [*Prob. Code § 2544(a)*], to sell or exchange tangible personal property [*Prob. Code § 2545(a)*], to lease real property [*Prob. Code § 2555*], and to invest in listed securities [*Prob. Code § 2574(a)*].

The relationship of guardian and ward and of conservator and conservatee, however, is a fiduciary relationship that is governed by the law of trusts [*Prob. Code § 2101*]. These principles may sometimes require that the guardian or conservator obtain court authorization for particular transactions despite the fact that he or she has the statutory authority to act independently [*see, e.g., Prob. Code § 16004(a)* (duty not to use trust property for trustee's own profit)]. Moreover, nothing precludes the guardian or conservator from seeking court authorization, instructions, approval, or confirmation when he or she is doubtful as to the proper action to take [*Prob. Code § 2450(a)*]. It should also be noted that sales, purchases, or other transactions not previously authorized by the court are subject to review on the next succeeding account [*Prob. Code § 2625*, discussed in Ch. 290E, *Guardianship and Conservatorship: Accounts*].

For discussion and forms for obtaining independent powers, see Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers* .

[2] Limitation of Authority

The court may also limit the authority of the guardian or conservator to exercise or perform any particular powers or duties without court authorization. Such an order may be obtained by petition of the ward or conservatee, a creditor, or any other interested person, or on the court's own motion [*Prob. Code § 2450(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersFiduciary ResponsibilitiesEstate, Gift & Trust LawTrustsTrusteesDuties & PowersLimitations

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§ 287.15 Liability of Joint Guardian or Conservator for Breach of Duty by Another

In general, when there are multiple guardians or conservators of an estate, one guardian or conservator is not liable for a breach of fiduciary duty committed by another guardian or conservator [*Prob. Code § 2105.5(a)*]. Nevertheless, one guardian or conservator will be liable for such a breach by another when the guardian or conservator acts in any of the following ways [*Prob. Code § 2105.5(b)*]:

- Participates in a breach of fiduciary duty committed by the other guardian or conservator;
- Improperly delegates the administration of the estate to the other guardian or conservator;
- Approves, knowingly acquiesces in, or conceals a breach of fiduciary duty committed by the other guardian or conservator;
- Negligently enables the other guardian or conservator to commit a breach of fiduciary duty; or
- Knows or has information from which he or she reasonably should have known of the breach of fiduciary duty by the other guardian or conservator and fails to take reasonable steps to compel the other guardian or conservator to redress the breach.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsTortsIntentional TortsBreach of Fiduciary DutyGeneral OverviewTortsMalpractice & Professional LiabilityProfessional ServicesTortsProcedureMultiple DefendantsJoint & Several Liability

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§ 287.16 Joint Guardian or Conservator Acting Alone

When joint guardians or conservators have been appointed and one or more are absent from the state and unable to act, otherwise unable to act, or legally disqualified from serving, the court, by order made with or without notice, may authorize the remaining joint guardians or conservators to act as to all matters embraced within its order [*Prob. Code § 2105(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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§ 287.17 Guardian or Conservator of Nonresident

A guardian or conservator of the estate of a nonresident has the same powers and duties, with respect to the property of the nonresident within California, as a guardian or conservator of the estate of a California resident. The responsibility of such a guardian or conservator with regard to disposal of the estate is confined to the property that comes into the hands of the guardian or conservator in California [*Prob. Code § 2107(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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§ 287.18 Guardian Nominated by Will

If a guardian of the estate or guardian for particular property is nominated by will and appointed by the court, he or she will be granted in the order of appointment, to the extent provided in the will, the right to exercise any one or more of the powers listed in *Prob. Code § 2591* (additional independent powers). Those powers may then be exercised without notice, hearing, or court authorization, instructions, approval, or confirmation in the same manner as if the authority were granted by court order. The additional authority of a guardian for particular property nominated by will is limited to the property covered by the nomination. In addition, the grant of the powers may be otherwise determined by the court for good cause and is subject to *Prob. Code §§ 2593-2595*, discussed in Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers* [*Prob. Code § 2108(b)*]. The terms of any order granting these additional powers must be included in the letters of guardianship [*Prob. Code § 2108(c)*].

The court is not precluded from granting a guardian nominated in a will additional powers under the independent exercise of powers provisions even though these powers were not granted in the will [*see Prob. Code §§ 2590-2592*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansTestamentary Guardians

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24-287 California Forms of Pleading and Practice--Annotated § 287.19

§ 287.19 Guardian for Particular Property

Subject to *Prob. Code § 2108*, discussed in *§ 287.18*, a guardian for particular property, nominated under *Prob. Code § 1501* (nomination as to particular property) and appointed under *Prob. Code § 1514(d)*, has the same powers and duties as a guardian of the estate, with respect to that particular property. The responsibility of such a guardian with regard to disposal of the estate is confined to the property covered by the nomination [*Prob. Code § 2109(a)*].

When a guardian is appointed in this manner for particular property and there is also an appointed guardian of the estate, the guardian appointed for the property covered by the nomination manages and controls that property and the guardian of the estate manages and controls the balance of the guardianship estate [*Prob. Code § 2109(b)(1)*; *see Guardianship of Joaquin (1959) 168 Cal. App. 2d 99, 101, 335 P.2d 507]* . Either guardian may petition the court in which the guardianship of the estate proceeding is pending for instructions concerning how the duties that are imposed by law on the guardian of the estate are to be allocated between the two guardians [*Prob. Code § 2109(b)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansTestamentary Guardians

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24-287 California Forms of Pleading and Practice--Annotated § 287.20

§ 287.20 Legal Capacity of Conservatee

[1] In General

The establishment of a conservatorship does not deny a conservatee the right to do any of the following [*Prob. Code § 1871*; *Conservatorship of Bookasta (1989) 216 Cal. App. 3d 445, 450, 265 Cal. Rptr. 1* (capacity to make will); *Estate of Mann (1986) 184 Cal. App. 3d 593, 602-606, 229 Cal. Rptr. 225* (same)]:

- Control an allowance provided to him or her under *Prob. Code § 2421*.
- Control wages or salary paid to him or her as provided in *Prob. Code § 2601*.
- Make a will.
- Enter into transactions to the extent reasonable to provide the necessaries of life to the conservatee and the spouse and minor children of the conservatee and to provide the basic living expenses, as defined in *Fam. Code § 297*, to the conservatee's domestic partner [*see Fam. Code § 297* (defining domestic partners and domestic partnership; filing declarations of domestic partnership)].

Nevertheless, except as otherwise provided by court order, the appointment of a conservator of the estate is an adjudication that the conservatee lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate [*Prob. Code § 1872(a)*; *see Hellman Commercial T. & S. Bk. v. Alden (1929) 206 Cal. 592, 604-605, 275 P. 794]* . The appointment of a limited conservator, however, does not limit the limited conservatee's legal capacity to enter into certain transactions unless otherwise provided in the court order appointing the limited conservator [*Prob. Code § 1872(b)*].

It has been held that, pursuant to *Prob. Code § 1872(a)*, an order appointing a temporary conservator constitutes an adjudication that the conservatee lacks the capacity to give away his or her real property [*O'Brien v. Dudenhoeffer (1993) 16 Cal. App. 4th 327, 330, 19 Cal. Rptr. 2d 826]* . However, a transaction that affects any real property of the conservatorship estate, entered into by a person acting in good faith, for a valuable consideration, and without

knowledge of the establishment of the conservatorship, is not affected by any provision of or any order made under *Prob. Code §§ 1870-1876* (governing the conservatee's legal capacity), unless a notice of the establishment of the conservatorship or temporary conservatorship has been recorded prior to the transaction in the county in which the property is located [*Prob. Code § 1875*].

The statutes governing the legal capacity of a conservatee to bind or obligate the conservatorship estate, and any court order broadening that capacity, do not displace, but are supplemented by, general principles of law and equity relating to transactions. These principles include, but are not limited to, capacity to contract, joinder or consent requirements, estoppel, fraud, misrepresentation, duress, coercion, mistake, or other validating or invalidating causes [*Prob. Code § 1876*].

As used in *Prob. Code § 1870 et seq.*, unless the context otherwise requires, the term "transaction" includes, but is not limited to, making a contract, sale, transfer, or conveyance, incurring a debt or encumbering property, making a gift, delegating a power, and waiving a right [*Prob. Code § 1870*].

[2] Modification of Capacity

The court, by order, may authorize the conservatee, subject to general principles of law and equity relating to transactions, to enter into such transactions or types of transactions as may be appropriate in the circumstances of the particular conservatee and conservatorship estate. Further, the court may by order modify the legal capacity that a conservatee would otherwise have by broadening or restricting the power of the conservatee to enter into any transactions or types of transactions that may be appropriate in the circumstances of the particular conservatee and conservatorship estate [*Prob. Code § 1873(a)*; *see Conservatorship of Bookasta (1989) 216 Cal. App. 3d 445, 451-452, 265 Cal. Rptr. 1]* .

These orders can be made either in the order appointing the conservator or on a petition filed after the appointment of a conservator [*Prob. Code § 1873(a)*]. A petition requesting the orders may be filed by the conservator, the conservatee, the spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*], or any relative or friend of the conservatee [*Prob. Code § 1874(a)*; *see §§ 287.45* (petition to broaden or restrict power of conservatee to enter into transactions binding estate) 287.46 (order broadening or restricting power of conservatee to enter into transactions binding estate)].

In the order, the court may include such limitations or conditions on the exercise of the authority granted to the conservatee as the court determines to be appropriate. These include, but are not limited to, the following [*Prob. Code § 1873(b)*]:

- A requirement that, for specific types of transactions or for all transactions authorized by the order, the conservatee obtain prior approval of the transaction by the court or conservator before exercising the authority granted by the order.

- A provision that the conservator has the right to avoid any transaction made by the conservatee pursuant to the authority of the order if the transaction is not one into which a reasonably prudent person might enter.

The court, in its discretion, may also provide in the order that unless extended by subsequent order of the court, the order or specific provisions of the order terminate at a time specified in the order [*Prob. Code § 1873(c)*]. The order continues in effect until the time (1) specified in the order, if any, (2) the order is modified or revoked, or (3) the conservatorship of the estate is terminated, whichever time is earlier [*Prob. Code § 1873(d)*].

An order affecting the legal capacity of the conservatee may be modified or revoked on petition filed by the

conservator, the conservatee, the spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*], of the conservatee, any relative or friend of the conservatee, or any interested person. Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 1873(e)*; *see* discussion in Ch. 284, *Guardianship and Conservatorship: Notice*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesMental CapacityEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawCohabitationDomestic PartnersRegistration

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24-287 California Forms of Pleading and Practice--Annotated § 287.21

§ 287.21 Durable Power of Attorney

[1] Creation

A durable power of attorney may be created by a writing that shows the principal's intent that the authority conferred be exercisable notwithstanding the principal's subsequent incapacity [*see Prob. Code §§ 4018, 4124*]. For further discussion of the creation of durable powers of attorney generally, see Ch. 427, *Principal and Agent* .

In addition, the conservatee may execute a power of attorney for health care [*see Prob. Code §§ 4600-4805*]. Effective July 1, 2000, powers of attorney for health care are governed separately from durable powers of attorney [*see Prob. Code §§ 4050(a)(1), 4600-4805*]. For further discussion of durable powers of attorney for health care, see Ch. 427, *Principal and Agent* ; see also California Legal Forms, Ch. 104, *Health Care Transactions, Consents, and Directives* (Matthew Bender) for a detailed discussion of the execution requirements for advance health care directives, including powers of attorney for health care.

[2] Authority of Attorney in Fact

Acts done by the attorney in fact pursuant to a durable power of attorney during a period of incapacity of the principal are as binding as if the principal were competent [*Prob. Code § 4125*]. If a court appoints a conservator of the estate following execution of a durable power of attorney, the attorney in fact is accountable to the fiduciary as well as to the principal [*Prob. Code § 4206(a)*].

[3] Authority of Conservator

[a] Regarding Property

When both a durable power of attorney and a conservatorship exist at the same time, it is unclear whether the power of the attorney in fact over the property to which the power relates is exclusive or if the attorney in fact and the conservator have concurrent powers over the property [*see Prob. Code §§ 4124, 4206(a)*].

[b] Revocation and Amendment

A conservator of the estate who is appointed by a California court can revoke or amend a durable power of attorney only if the court in which the conservatorship proceeding is pending has first made an order authorizing or requiring the fiduciary to modify or revoke the durable power of attorney and the modification or revocation is in accord with the order [*Prob. Code § 4206(b)*; *see §§ 287.40* (petition for authorization and instructions as to management of estate property), 287.42 (order authorizing and instructing guardian or conservator)].

[c] Petition for Relief

[i] Purposes

Subject to limits under *Prob. Code § 4503*, the conservator of the person or estate of the principal may file a petition for any one or more of the following purposes [*Prob. Code §§ 4540(e), 4541*]:

- To determine whether the power of attorney is still effective or has terminated.
- To pass on the acts or proposed acts of the attorney in fact.
- To compel an accounting by the attorney in fact.
- To declare the power of attorney terminated.
- To approve the resignation of the attorney in fact.
- To compel a third person to honor the authority of the attorney in fact.

A power of attorney can only be terminated in this manner if the court determines that the attorney in fact has violated or is unfit to perform the fiduciary duties under the power of attorney, that the principal lacks capacity to give or revoke a power of attorney at the time the court is making its determination, and that the termination is in the best interest of the principal or the principal's estate [*Prob. Code § 4541(d)*]. The terms of the power of attorney cannot preclude the principal's conservator from bringing a petition for any of these purposes [*Prob. Code § 4503(b)*].

[ii] Venue

The proper court for filing the petition is determined in the following order of priority [*Prob. Code § 4523*]:

- The county in which the principal resides.
- The county in which the attorney in fact resides.
- A county in which property subject to the power of attorney is located.
- Any other county that is in the principal's best interest.

[4] Termination

Two methods may exist to terminate a durable power of attorney after a conservator has been appointed for the principal. One method is by obtaining authorization to revoke the power in the conservatorship proceeding or by petitioning the superior court to terminate the power in an independent proceeding. Alternatively, the statutes may be construed as requiring the conservator to obtain an order in the conservatorship proceeding under *Prob. Code § 4206(b)* authorizing or requiring him or her to revoke the power, and then to petition the superior court in an independent

proceeding under *Prob. Code §§ 4540* and *4541* actually to terminate the power.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueIndividual DefendantsEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawPowers of AttorneyDurable PowersEstate, Gift & Trust LawPowers of AttorneyRevocation & Termination

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[Reserved]

§§ 287.22[Reserved]

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§ 287.30 State Statutes

[1] Appeal

Appealable orders in any proceeding under Probate Code. *Prob. Code § 1300*

Appealable orders with respect to guardianships, conservatorships, and other protective proceedings. *Prob. Code § 1301*

Effect of appeal. *Prob. Code § 1310*

[2] Instructions

Petition for instructions or confirmation. *Prob. Code § 2403*

[3] Legal Capacity of Conservatee

Scope of and petition to modify conservatee's legal capacity. *Prob. Code § 1870 et seq.*

[4] Management Power

Petition by joint guardian or conservator to act. *Prob. Code § 2105(g)*

Liability of one joint guardian or conservator for breach of fiduciary duty by another. *Prob. Code § 2105.5*

Guardian or conservator of nonresident. *Prob. Code § 2107*

Guardian nominated by will. *Prob. Code § 2108*

Guardian for particular property. *Prob. Code § 2109*

Power to manage and control estate. *Prob. Code § 2401(a)*

Powers exercised without court authorization. *Prob. Codes § 2450, 2451.5*

Care of estate after ward's or conservatee's death. *Prob. Code § 2467*

[5] Related Statutes

Applicability of rules for decedent's estates. *Prob. Code § 2100*

Applicability of federal Indian law. *Prob. Code § 2112*

[6] Standard of Care

Fiduciary relationship of conservator and conservatee, guardian and ward. *Prob. Code § 2101*

Use of ordinary care in estate management. *Prob. Code § 2401*

Faithful performance of additional conditions. *Prob. Code § 2402*

[7] Supervision by Court

Regulation and control by court. *Prob. Code § 2102*

Res judicata and release effect of court authorization. *Prob. Code § 2103*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersFiduciary ResponsibilitiesEstate, Gift & Trust LawProbateProcedures in ProbateJudicial ReviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of Care

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§ 287.31 Local Court Rules

[1] Alameda County

Form of papers. Alameda Co. Super. Ct. Rules, Rule 12.1.10

[2] Contra Costa County

Duties of conservator. Contra Costa Co. Prob. Pol. Man., § 811 et seq.

Petitions must be signed and verified by guardian or conservator. Contra Costa Co. Prob. Pol. Man., § 820

[3] Los Angeles County

Petitions signed and verified by guardian or conservator. Los Angeles Co. Super. Ct. Rules, Rule 10.12

[4] San Francisco City and County

Verification of petitions. San Francisco Uniform Local Ct. Rules, Rule 14.25

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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24-287 California Forms of Pleading and Practice--Annotated § 287.32

§ 287.32 Decisions

Guardian or conservator of estate has right to possess and control estate property. *DeGreayer v. Superior Court (1897) 117 Cal. 640, 642-647, 49 P. 983* (guardian)

Temporary conservatee lacks capacity to make gift of real property. *O'Brien v. Dudenhoeffer (1993) 16 Cal. App. 4th 327, 330, 19 Cal. Rptr. 2d 826*

Ability to transact routine business is incorrect legal standard for determining validity of testamentary acts permitted to conservatees by *Prob. Code § 1871(c)*. *Conservatorship of Bookasta (1989) 216 Cal. App. 3d 445, 449-451, 265 Cal. Rptr. 1*

Existence of legal guardianship does not establish incompetency of ward to make a will. *Estate of Wood (1973) 32 Cal. App. 3d 862, 881, 108 Cal. Rptr. 522*

Use of petition to obtain instructions concerning which assets should be consumed first. *Guardianship of Cuen (1956) 142 Cal. App. 2d 258, 262, 298 P.2d 545*

Guardian does not have right to take possession of trust of which ward was trustee. *Katz v. Greeninger (1950) 96 Cal. App. 2d 245, 248-249, 215 P.2d 121*

Unity of possession in joint tenancy property of ward is not destroyed by possession of guardian. *Estate of Zaring (1949) 93 Cal. App. 2d 577, 580, 209 P.2d 642*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawWill ContestsTestamentary CapacityTestsReal Property

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§ 287.33 Law Reviews

Selected 1979 California Legislation, 11 Pac. L.J. 271-288 (1980)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral Overview

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§ 287.34 Text References

California Conservatorships, ch. 6 (Cal. C.E.B. 1983)

Witkin, Summary of California Law, vol. 12, *Wills and Probate*, §§ 884, 885, 920, 925 (9th ed. 1990)

Legal Topics:

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

§§ 287.35[Reserved]

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24-287 California Forms of Pleading and Practice--Annotated § 287.40

§ 287.40 Petition for Authorization and Instructions as to Management of Estate Property [Prob. Code § 2403]--General Form

[1] FORM Petition for Authorization and Instructions as to Management of Estate Property--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship *or* Limited Conservatorship] of the _____ [Person *or* Estate *or* Person and Estate] of _____ [*name*], _____ [Ward *or* Conservatee].	))))))	NO. _____ [Hearing set for _____ [*date*], at _____ [*time*] in Dept. No. _____] PETITION FOR INSTRUCTIONS

Petitioner _____[*name*] respectfully represents:

[*EITHER*]

1. Petitioner is the duly appointed, qualified, and acting _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee].

[*OR*]

1. Petitioner is _____ [the ward of *or* the conservatee of *or* a creditor of *or* a person interested in] the above-entitled estate. [*If petition is filed by interested person, describe nature of interest.*] _____[*name*] is the _____ [guardian *or* conservator] of the [person and] estate, and was appointed by the court on _____[*date*].

[*CONTINUE*]

2. _____ [*Describe matters about which authorization and instructions are sought, e.g.,* _____ (*name of alleged creditor*) has presented a bill in the amount of $_____ to _____ (petitioner *or* name) as _____ (guardian *or* conservator) of the estate for _____ (*describe services claimed to have been provided*), which services he/she claims to have provided the _____ (ward *or* conservatee) on _____[*date*], after establishment of the _____ (guardianship *or* conservatorship). _____ (Petitioner *or name of guardian or conservator*) has refused to pay the bill on the grounds that the alleged services were not for the necessaries of life of the _____ (ward *or* conservatee) and that the debt is not reasonable.]

3. Petitioner is in doubt and seeks clarification from the court on how _____ [he/she *or* the guardian *or* the conservator] should manage the estate under these circumstances. Petitioner believes that the court should authorize and instruct _____ [petitioner *or* the guardian *or* the conservator] as follows: _____ [*set forth recommended instructions, e.g.,* _____ (*name*), as guardian or conservator, must not pay the bill presented by _____ (*name*) because the services rendered were not for necessaries of life of the _____ (ward *or* conservatee) and the amount is not reasonable].

4. A request for special notice has _____ [not been filed herein *or* been filed herein by _____ (*name*), and notice of the time and place of hearing on this petition will be given as required by law *or* been filed herein and waived by _____ (*name*)].

WHEREFORE, petitioner prays for an order authorizing and instructing _____ [him/her *or* the guardian *or* the conservator] as to the matters described above and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____[*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein represented on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

[2] Use of Form

The petition in [1], *above*, is for use by the guardian or conservator, the ward or conservatee, a creditor, or other interested person in obtaining authorization and instructions in the administration, management, investment, disposition, care, protection, operation, or preservation of the estate, or the incurring or payment of costs, fees, or expenses in connection with it [*Prob. Code § 2403(a)*].

[3] Contents of Petition

Although not expressly required by statute, a petition under *Prob. Code § 2403* should state the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2403(a)*].
- The matters on which instructions are sought (Paragraph 2) [*see Prob. Code § 2403(a)*].
- The authorization and instructions that the petitioner seeks from the court (Paragraph 3) [*see Prob. Code §§ 2401(a)* (duty to manage using ordinary care and diligence), 2403(a)].
- Whether a request for special notice has been filed and, if so, that proper notice will be given or has been waived (Paragraph 4) [*see Prob. Code §§ 1260(a), 2700, 2701*].

[4] Verification

Except as otherwise specifically provided, all petitions filed pursuant to the Guardianship-Conservatorship Law must be verified [*Prob. Code § 1021*; *see Prob. Code § 1430* (the term "petition" includes an application or a request in the nature of a petition)]. Verification enables a petition to be used as evidence in uncontested proceedings [*Prob. Code § 1022*].

The form of verification shown here complies with the requirements of *Code Civ. Proc. §§ 446* and *2015.5*.

[5] Notice

Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2403(b)*], which generally requires that notice be mailed to specified persons at least 15 days before the day of the hearing [*Prob. Code § 1460(a), (b)*]. Additionally, special notice must be given to those persons who have filed a written request under *Prob. Code § 2700 et seq.* [*Prob. Code §§ 1460(d), 1260(a), 2700, 2701*]. For further discussion and a form for notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[6] Cross References

For discussion on supervisorial power of court, see *§ 287.13*

For objection to petition filed in guardianship or conservatorship matters, see *§ 287.41*

For order authorizing and instruction guardian or conservator, see *§ 287.42*

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24-287 California Forms of Pleading and Practice--Annotated § 287.41

§ 287.41 Objection to Petition--General Form

[1] FORM Objection to Petition--General Form

[*Caption. See § 287.40.*]

Objector _____[*name*] objects to the petition of _____[*name and status of petitioner*] for _____[*set forth purpose of petition*] on the following grounds:

1. Objector is a person interested in the estate in that he/she is _____[*describe interest*].

2. [*Set forth bases of objection in consecutively numbered paragraphs.*]

WHEREFORE, objector prays that the petition be denied.

_____ [*signature*]

Objector

_____ [*signature*]

Attorney for Objector

VERIFICATION

I, _____[*name*], am the objector in the above-entitled proceeding. I have read the foregoing objection and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

[2] Use of Form

The objection in [1], *above*, is a general form for use to object to petitions filed in guardianship or conservatorship matters [*see Prob. Code § 1043*]. The objection should be entitled OBJECTION TO PETITION FOR _____ [*specify, e.g.*, INSTRUCTIONS].

The statutory form of pleading for opposing a petition under the Probate Code, unless otherwise specified, is a response or an objection [*see Prob. Code § 1043*]. Apparently, the objection must be made in writing, even though provision is made in the Probate Code for oral objection at a hearing [*see Prob. Code §§ 1021(a)(2)* (objections required to be verified), 1043(a), (b) (interested person permitted to appear and to respond or object in writing at or before hearing or orally at hearing)]. Counsel should consult local practice for the form and content of, and procedural matters related to, an objection.

[3] Verification

An objection or response filed pursuant to the Probate Code to a petition, report, plan, or account must be verified [*Prob. Code § 1021(a)(2)*; *see Prob. Code § 1021(b)(3)* (who can verify)]. The form of verification shown here complies with the requirements of *Code Civ. Proc. §§ 446* and *2015.5*.

[4] Cross Reference

For petition for authorization and instructions as to management of estate property, see *§ 287.40*

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24-287 California Forms of Pleading and Practice--Annotated § 287.42

§ 287.42 Order Authorizing and Instructing Guardian or Conservator as to Management of Estate Property [Prob. Code § 2403]--General Form

[1] FORM Order Authorizing and Instructing Guardian or Conservator as to Management of Estate Property

[*Caption. See § 287.40.*]

The petition of _____[*name*], as _____ [guardian of *or* conservator of *or* ward of *or* conservatee of *or* a creditor of *or* a person interested in] the above-entitled estate for authorization and instructions as to _____ [*describe general subject matter, e.g.,* the claim of _____ (*name*)] came on regularly for hearing by the court on this date. Petitioner appeared by counsel _____[*name*]. [*Specify other appearances, if any.*]

The court finds from proof made to the satisfaction of the court as follows:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived].

2. _____ [*Set forth specific findings as relevant, e.g.,* The services rendered to the _____ (ward *or* conservatee) and the claim based on them were not a reasonable debt and did not provide necessaries of life to him/her.]

IT IS ORDERED that _____[*name*], as _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee], is authorized and instructed _____ [*specify instruction, e.g.,* not to pay the claim of _____ (*name*)].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is an order under *Prob. Code § 2403(a)* for use with the general form of petition for authorization and instruction under *Prob. Code § 2403(a)* [*see § 287.40*], and specific forms for petitions for authorization to expend money pursuant to *Prob. Code § 2420(a)* for the support, maintenance, or education of a ward or conservatee or those legally entitled thereto from the ward or conservatee [*see Ch. 290, Guardianship and Conservatorship: Maintenance of Ward or Conservatee, §§ 290.50* (petition to authorize payment for support, maintenance, or education of ward or conservatee), 290.51 (petition to authorize payment for support, maintenance, or education of ward's or conservatee's dependents)]. The order should be entitled ORDER _____ [AUTHORIZING *or* INSTRUCTING] _____ [GUARDIAN *or* CONSERVATOR] AS TO _____ [*specify*].

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Required Finding of Notice

The order must state that notice, including special notice, if requested, has been regularly given or that the party entitled to notice has waived it (Finding 1) [*Prob. Code §§ 1260* (notice), 2700 et seq. (special notice)].

[4] Appealability of Order

An order authorizing or instructing a guardian or conservator is appealable [*Prob. Code § 1300(c)*]. Similarly appealable are orders directing or allowing payment of a debt, claim, or cost and orders directing, authorizing, approving, or modifying payments, whether for support, maintenance, or education of the ward or conservatee or for a person legally entitled to support, maintenance, or education from the ward or conservatee [*Prob. Code §§ 1300(d), 1301(c)*; for forms of petitions to authorize payment for support, maintenance, or education of a ward or conservatee or for support, maintenance, or education of ward's or conservatee's dependents *see Ch. 290, Guardianship and Conservatorship: Maintenance of Ward or Conservatee, §§ 290.50, 290.51*, respectively]. For a discussion of the effect of a final order under *Prob. Code § 2403*, see *§ 287.13[3]*.

[5] Cross References

For discussion of the court's supervisorial power, see *§ 287.13*

For petition for authorization and instructions as to management of estate property, see *§ 287.40*

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Chapter 287 GUARDIANSHIP AND CONSERVATORSHIP: GENERAL MANAGEMENT POWERS
PART IV. FORMS

24-287 California Forms of Pleading and Practice--Annotated § 287.43

§ 287.43 Petition for Approval and Confirmation of Acts by Guardian or Conservator in Management of Estate Property [Prob. Code § 2403]--General Form

[1] FORM Petition for Approval and Confirmation of Acts by Guardian or Conservator in Management of Estate Property

[*Caption. See § 287.40.*]

Petitioner _____[*name*] respectfully represents:

1. [*Status of petitioner. See § 287.40, Paragraph 1.*]

2. On _____[*date*], _____ [petitioner *or* the guardian *or* the conservator] _____ [*describe action for which confirmation is sought, e.g.,* sold shares of _____ (*name of stock*) at a price of $_____ per share and reinvested the proceeds in _____ shares of _____ (*name of stock*) at a price of $_____ per share].

3. The actions described above should be approved and confirmed in that _____ [*describe reasons, e.g.,* petitioner had been informed by _____ (*name*), a stock broker, that the stock that was sold was likely to decline in value and that the stock that was purchased was a safer investment that would probably provide a higher return].

4. [*Special notice allegation. See § 287.40, Paragraph 4.*]

WHEREFORE, petitioner prays for an order approving and confirming the actions described above and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[*Verification. See § 287.40.*]

[2] Use of Form

The petition in [1], *above*, is for use by the guardian or conservator, the ward or conservatee, a creditor, or other interested person in obtaining approval and confirmation of acts by the guardian or conservator in the administration, management, investment, disposition, care, protection, operation, or preservation of the estate, or the incurring or paying of costs, fees, or expenses in connection with it [*Prob. Code § 2403(a)*]. The petition should be entitled PETITION FOR CONFIRMATION OF ACTS.

[3] Contents of Petition

Although not expressly required by statute, a petition under *Prob. Code § 2403* should state the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2403(a)*].

- The actions for which approval and confirmation are sought (Paragraph 2) [*see Prob. Code § 2403(a)*].

- Why the actions should be approved and confirmed (Paragraph 3) [*see Prob. Code §§ 2401(a)* (duty to manage using ordinary care and diligence), 2403(a)].

- Whether or not a request for special notice has been filed and, if so, that proper notice will be given or has been waived (Paragraph 4) [*see Prob. Code §§ 1260, 2700, 2701*].

[4] Verification

The petition must be verified [*Prob. Code § 1021*; *see § 287.40[4]*].

[5] Cross References

For discussion of supervisorial power of court, see *§ 287.13*

For petition for authorization and instructions as to management of estate property, see *§ 287.40*

For objection that can be filed in proceeding, see *§ 287.41*

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24-287 California Forms of Pleading and Practice--Annotated § 287.44

§ 287.44 Order Approving and Confirming Acts of Guardian or Conservator in Management of Estate Property [Prob. Code § 2403]--General Form

[1] FORM Order Approving and Confirming Acts of Guardian or Conservator in Management of Estate Property

[*Caption. See § 287.40.*]

The petition of _____[*name*], as _____ [guardian of *or* conservator of *or* ward of *or* conservatee of *or* a creditor of *or* a person interested in] the above-entitled estate, for approval and confirmation of _____ [*describe action to be confirmed in general terms, e.g.,* the sale and purchase of stock] came on regularly for hearing by the court on this date. Petitioner appeared by counsel _____[*name*]. [*Specify other appearances, if any.*]

The court finds from proof made to the satisfaction of the court as follows:

1. [*Finding that notices have been duly given. See § 287.42[1], Finding 1.*]

2. The actions of _____ [guardian *or* conservator] on _____[*date*], in _____ [*describe actions to be confirmed, e.g.,* selling shares of _____ (*name of stock*) at a price of $_____ per share and purchasing _____ shares of _____ (*name of stock*) at a price of $_____ per share] were in the best interests of the _____ [ward *or* conservatee] and his/her estate.

IT IS ORDERED that the following actions of _____[*name*], as _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee], are approved and confirmed: _____[*describe actions*].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, approving or confirming the acts of the guardian and conservator in the management of the estate is for use with the petition in § 287.43 [*see Prob. Code § 2403*]. The order should be entitled ORDER CONFIRMING ACTIONS.

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Appealability of Order

An order confirming (or refusing to confirm) the acts of a guardian or conservator is appealable [*Prob. Code § 1300(c)*]. For a discussion of the effect of a final order under *Prob. Code § 2403*, see *§ 287.13[3]*.

[4] Cross References

For discussion of supervisorial power of court, see *§ 287.13*

For order authorizing and instructing guardian or conservator, see *§ 287.42*

For petition for approval and confirmation of acts by guardian or conservator in management of estate property, see *§ 287.43*

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24-287 California Forms of Pleading and Practice--Annotated § 287.45

§ 287.45 Petition to Broaden or Restrict Power of Conservatee to Enter Into Transactions Binding Estate [Prob. Code §§ 1873, 1874]

[1] FORM Petition to Broaden or Restrict Power of Conservatee to Enter Into Transactions Binding Estate

[*Caption. See § 287.40.*]

Petitioner _____[*name*] respectfully represents:

1. Petitioner is _____ [the duly appointed, qualified, and acting conservator *or* the conservatee *or* the spouse of the conservatee *or* the _____ (*specify family relationship to conservatee*) of the conservatee *or* a friend of the conservatee] in the above-entitled proceeding.

2. _____[*name*], conservatee, is under a conservatorship of the estate.

[*EITHER*]

3. The conservatee presently lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate, including the power _____ [*specify transactions sought to be authorized, e.g.,* to make gifts of estate property not exceeding $_____ to members of the conservatee's family].

[*OR, if the petitioner seeks to modify powers that the conservatee already possesses*]

3. The conservatee presently has the power _____ [*specify transactions that bind or obligate estate into which conservatee has the capacity to enter, e.g.,* to make a gift of his/her wages under *Probate Code Section 1871(b)*].

[*CONTINUE*]

4. It is appropriate to _____ [broaden *or* restrict] the power of the conservatee to _____[*specify power*] because _____[*state circumstances of the conservatee and conservatorship estate that make modification appropriate*].

[5. *If seeking specific limitations on additional powers, add the following:* It is appropriate to _____ (limit *or* condition) the power of the conservatee to _____ (*specify additional power)* by _____ (*state limitations or conditions sought, e.g.,* requiring the conservatee to obtain prior court approval of the transaction described above before exercising the power to enter into the transaction) because _____ (*specify circumstances that make imposition of limitations or conditions appropriate*).]

[6. It is appropriate to terminate the power of the conservatee to _____ (*specify power to be terminated*) on _____[*date*], because _____ (*specify circumstances that make termination of authorization on a specified date appropriate*).]

7. [*Special notice allegation. See § 287.40[1], Paragraph 4.*]

WHEREFORE, petitioner prays for an order _____ [broadening *or* restricting] the power of the conservatee to enter into the _____ [transactions *or* types of transactions] described above that bind the estate, and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 287.40[1].*]

[2] Use of Form

The petition in [1], *above,* is for use in obtaining an order to broaden or restrict the power the conservatee would otherwise have to enter into transactions or types of transactions that bind or obligate the conservatorship estate [*Prob. Code § 1873(a)*]. The petition should be entitled PETITION TO _____ [BROADEN *or* RESTRICT] POWER OF CONSERVATEE TO ENTER INTO TRANSACTIONS. The petition may be filed by the conservator, the conservatee, or the spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*], or any relative or friend of the conservatee [*Prob. Code § 1874(a)*].

[3] Contents of Petition

Although not expressly required by statute, a petition under *Prob. Code §§ 1873* and *1874*, should state the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*Prob. Code § 1874(a)*].

- That the conservatee is under a conservatorship of the estate (Paragraph 2) [*see Prob. Code §§ 1872, 1873(a)*].

- The transactions or types of transactions to be affected by the proposed order (Paragraph 3) [*see Prob. Code § 1873(a)*].

- The circumstances of the particular conservatee and conservatorship estate that show it is appropriate for the court to broaden or restrict the power of the conservatee to enter into transactions that bind the estate (Paragraph 4) [*see Prob. Code § 1873(a)*].

- If desired, the facts that show it is appropriate for the court to limit or condition the exercise of authority granted to the conservatee (Paragraph 5) [*see Prob. Code § 1874(b)*].

- If appropriate, that the order or specific provisions of it terminate at a time specified in the order (Paragraph 6) [*see Prob. Code § 1873(c)*].

- Whether a request for special notice has been filed and, if so, that proper notice will be given or has been waived (Paragraph 7) [*see Prob. Code §§ 1260(a), 2700, 2701*].

[4] Verification

The petition must be verified [*Prob. Code § 1021*; *see § 287.40[4]*].

[5] Notice

Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 1874(b)*], which generally requires that notice by mail be given to specified persons at least 15 days before the day of the hearing [*Prob. Code § 1460(a), (b)*]. Additionally, special notice must be given to those persons who have filed a written request under *Prob. Code § 2700 et seq.* [*Prob. Code §§ 1460(d), 2700, 2701*]. For further discussion and a form for notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[6] Cross References

For discussion of legal capacity of conservatee, see *§ 287.20*

For order broadening or restricting power of conservatee to enter into transactions binding estate, see *§ 287.46*

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24-287 California Forms of Pleading and Practice--Annotated § 287.46

§ 287.46 Order Broadening or Restricting Power of Conservatee to Enter Into Transactions Binding Estate [Prob. Code § 1873]

[1] FORM Order Broadening or Restricting Power of Conservatee to Enter Into Transactions Binding Estate

[*Caption. See § 287.40[1].*]

The petition of _____[*name*], _____ [conservator *or* conservatee *or* spouse of the conservatee *or* _____ (*specify family relationship to conservatee*) of the conservatee *or* friend of the conservatee] in the above-entitled proceeding, to _____ [broaden *or* restrict] the power of the conservatee to enter into certain _____ [transactions *or* types of transactions] that bind the estate came on regularly for hearing by the court on this date. Petitioner appeared by counsel _____[*name*]. [*Specify other appearances, if any.*]

The court finds from proof made to the satisfaction of the court as follows:

1. [*Finding that notices have been duly given. See § 287.42[1], Finding 1.*]

2. It is appropriate, in the circumstances of the conservatee and conservatorship estate, that the power of the conservatee to _____[*specify power of conservatee to bind or obligate the estate that is sought to be authorized or modified*] be _____ [broadened *or* restricted] as ordered below.

[3. *If limitations on the additional power are granted, add:* It is appropriate in the circumstances of the conservatee and conservatorship estate that the authorized power of the conservatee described above be _____ (limited *or* conditioned) as ordered below.]

[4. *If automatic termination of order is granted, add:* It is appropriate in the circumstances of the conservatee and conservatorship estate that, unless extended by subsequent order of this court, _____ (this order *or* the specific provision(s) of this order requiring _____ (*specify provisions to be automatically terminated*))

be terminated on _____ (*date*).]

IT IS ORDERED as follows:

1. The power(s) of the conservatee to bind or obligate his/her estate is _____ [broadened *or* restricted] as follows: _____[*describe*].

[2. *If limitations on the additional powers are granted, add:* The authorized powers described above are _____ (limited *or* conditioned) in that _____ (*specify method of limiting or conditioning the powers, e.g.,* the conservatee must obtain prior approval of all authorized transactions by the court or conservator before exercising the granted authority).]

[3. *If automatic termination of order is granted, add:* Unless extended by subsequent order of this court, _____ (this order *or* the provisions of this order requiring _____ (*specify provisions of the order*)) terminate(s) on _____ (*specify date of termination*).]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above,* broadening or restricting the power of the conservatee to enter into specified transactions, is for use with the petition in § 287.45 [*see Prob. Code § 1873*]. The order should be entitled ORDER _____ [BROADENING *or* RESTRICTING] POWER OF CONSERVATEE TO ENTER INTO TRANSACTIONS.

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Duration, Modification, or Revocation of Order

The order continues in effect until the time (1) specified in the order, if any, (2) the order is modified or revoked, or (3) the conservatorship of the estate is terminated, whichever time is earliest [*Prob. Code § 1873(d)*].

For discussion of when and how the order may be modified or revoked, see *§ 287.20[2]*.

[4] Appealability of Order

An appeal may be taken from the making of, or the refusal to make, an order affecting the legal capacity of the conservatee pursuant to *Prob. Code § 1870 et seq.* [*Prob. Code § 1301(e)*]. For a discussion of the effect of a final order under *Prob. Code § 1873*, see *§ 287.13[3]*.

[5] Cross References

For discussion of legal capacity of conservatee, see *§ 287.20*

For order authorizing and instructing guardian or conservator, see *§ 287.42*

For petition to broaden or restrict power of conservatee to enter into transactions binding estate, see *§ 287.45*

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24-288 California Forms of Pleading and Practice--Annotated 288.syn

§ 288.syn Synopsis to Chapter 288: GUARDIANSHIP AND CONSERVATORSHIP: INDEPENDENT EXERCISE OF POWERS

§ 288.01 Scope of Chapter

§ 288.02 Cross References

§§ 288.03-288.09 [Reserved]

§ 288.10 Governing Statutes

§ 288.11 Order Granting Independent Powers

[1] Court's Discretion

[a] General Standard: Advantage, Benefit, and Best Interest of Estate

[b] Mandatory Empowerment of Nominated Guardian

[c] Empowerment of LPS Act Conservator

[2] Guardian's or Conservator's Authority

[a] After Issuance of Order

[b] In Absence of Order

[3] Appealability of Order

§ 288.12 Independent Powers

[1] Estate Property Generally

[2] Real Property

[a] Powers Generally

[b] Sale of Conservatee's Primary Residence

[3] Sales by Public Guardian as Conservator

[4] Money and Investments

§ 288.13 Issuance of Order and Letters

[1] Application for Order

[a] Included in Petition for Appointment

[b] Subsequent Application

[2] Notation of Powers in Letters

§ 288.14 Effect on Subsequent Petition for Court's Oversight

§ 288.15 Order Modifying or Rescinding Grant of Powers

[1] Issuance of Order

[2] Issuance of New Letters

[3] Appealability of Order

§§ 288.16-288.19 [Reserved]

§ 288.20 Related Matthew Bender Publications

§ 288.21 State Statutes

§ 288.22 Local Court Rules

[1] Alameda County

[2] Contra Costa County

[3] Fresno County

[4] Los Angeles County

[5] Marin County

[6] Orange County

[7] Riverside County

[8] Sacramento County

[9] San Diego County

[10] San Francisco

§ 288.23 Text References

§§ 288.24-288.29 [Reserved]

§ 288.30 Petition for Independent Powers [Prob. Code § 2592]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Notice

§ 288.31 Order Granting Independent Powers [Prob. Code § 2590]

[1] FORM

[2] Use of Form

§ 288.32 Petition for Modification or Rescission of Grant of Independent Powers [Prob. Code § 2593]

[1] FORM

[2] Use of Form

[3] Contents of Petition

§ 288.33 Order Modifying or Rescinding Grant of Independent Powers [Prob. Code § 2593]

[1] FORM

[2] Use of Form

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Chapter 288 GUARDIANSHIP AND CONSERVATORSHIP: INDEPENDENT EXERCISE OF POWERS
PART I. SCOPE

24-288 California Forms of Pleading and Practice--Annotated § 288.01

§ 288.01 Scope of Chapter

This chapter discusses procedures under the Probate Code for obtaining a grant of independent powers to a guardian or conservator of the estate [*see § 288.11* et seq.]. It also discusses the procedures for obtaining modification or rescission of the grant of powers [*see § 288.15*]. The chapter contains the following forms:

- A petition for independent powers [*see § 288.30*].
- An order granting independent powers [*see § 288.31*].
- A petition for modification or rescission of the grant of independent powers [*see § 288.32*].
- An order modifying or rescinding the grant of independent powers [*see § 288.33*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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24-288 California Forms of Pleading and Practice--Annotated § 288.02

§ 288.02 Cross References

For discussion and forms pertaining to estate management, see the following chapters:

- Ch. 286, *Guardianship and Conservatorship: Inventory and Appraisal.*
- Ch. 287, *Guardianship and Conservatorship: General Management Powers.*
- Ch. 289, *Guardianship and Conservatorship: Management of Community Property.*
- Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee*.
- Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment*.
- Ch. 290B, *Guardianship and Conservatorship: Substituted Judgment*.
- Ch. 290C, *Guardianship and Conservatorship: Actions and Disputed Claims*.
- Ch. 290D, *Guardianship and Conservatorship: Actions Against Guardian or Conservator*.
- Ch. 290E, *Guardianship and Conservatorship: Accounts*.
- Ch. 290F, *Guardianship and Conservatorship: Compensation of Guardian or Conservator*.

For discussion of a conservatorship under the Lanterman-Petris-Short Act, see *Ch. 304, Insane and Incompetent Persons, § 304.30* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & Inventories

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24-288 California Forms of Pleading and Practice--Annotated §§ 288.03-288.09

[Reserved]

§§ 288.03[Reserved]

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PART II. LEGAL BACKGROUND

24-288 California Forms of Pleading and Practice--Annotated § 288.10

§ 288.10 Governing Statutes

The granting of powers to be exercised by a guardian or conservator independently (that is, without obtaining the court's approval in each instance), for the management of the ward's or conservatee's estate, is governed by *Prob. Code § 2590 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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24-288 California Forms of Pleading and Practice--Annotated § 288.11

§ 288.11 Order Granting Independent Powers

[1] Court's Discretion

[a] General Standard: Advantage, Benefit, and Best Interest of Estate

The court, in its discretion, may make an order granting the guardian or conservator of an estate any or all of the powers specified in *Prob. Code § 2591* [*see § 288.12*], if the court determines that, in the circumstances of the particular guardianship or conservatorship, it would be to the advantage, benefit, and best interest of the estate to do so [*Prob. Code § 2590(a)*].

Subject only to any requirements, conditions, or limitations that are specifically and expressly provided, either directly or by reference, in the order granting the powers, the guardian or conservator may exercise the granted powers without notice, hearing, or court authorization, instructions, approval, or confirmation, in the same manner as could the ward or conservatee if possessed of legal capacity *Prob. Code § 2590(a)*]. A guardian does not have any powers provided by *Prob. Code § 2591* without authorization by a court [*Prob. Code § 2590(b)*].

The purpose of *Prob. Code § 2590 et seq.* is to provide a means for empowering an experienced and qualified guardian or conservator of an estate, when the nature of the estate will entail repeated transactions of the same kind. An order granting power to engage in the transactions without the usual court oversight would spare the guardian or conservator the trouble of repeatedly obtaining the court's approval, and the estate would be spared the attendant expenses. It is to be expected that the court would exercise adequate oversight when reviewing the guardian's or conservator's periodic accounts [*see Prob. Code § 2625* (any transaction "not previously authorized, approved, or confirmed by the court is subject to review by the court upon the next succeeding account of the guardian or conservator occurring after the transaction"); *see generally* Ch. 290E, *Guardianship and Conservatorship: Accounts*]. Having power to act without obtaining the court's specific prior approval would not excuse the guardian or conservator from adhering to other, normal standards and requirements, such as the requirement to use ordinary care and diligence in managing the estate [*see Prob. Code § 2401*].

A request for independent powers should be regarded as an unusual step, which might be taken only in a rare case. Local court rules indicate that courts are inclined to exercise their discretion sparingly [*see § 288.22*].

[b] Mandatory Empowerment of Nominated Guardian

In the case of a guardian of the estate for a minor, if the guardian was nominated under *Prob. Code § 1500* by a parent [*see* Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians*], and the nomination provided for the right to exercise any of the powers listed in *Prob. Code § 2591* without notice, hearing, or court authorization, instructions, approval, or confirmation, then the court normally is required to grant the independent powers in the order of appointment, to the extent provided in the nomination, in the same manner as if granting powers by an order under *Prob. Code § 2590*. This mandate is subject to the proviso that the court may for good cause determine otherwise [*Prob. Code § 2108(b)*].

The court likewise must make a mandatory empowering order in the case of a guardian for property received by a minor, if the guardian was nominated under *Prob. Code § 1501* by the transferor of the property [*see* Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians*]; however, in this case, the order must be limited to the property covered by the nomination [*Prob. Code § 2108(b)*].

The terms of a mandatory order granting independent powers must be included in the letters of guardianship [*Prob. Code § 2108(b)*].

A mandated grant of powers is subject to *Prob. Code §§ 2593-2595* [*Prob. Code § 2108(b)*], which provide for the rescission or modification of a grant of powers [*see § 288.15*], the notation of granted powers in the letters [*see § 288.13[2]*], the guardian's right to exercise statutory powers in the absence of a grant of independent powers [*see § 288.11[2][b]*], and court approval of the guardian's acts on the guardian's petition for approval [*see § 288.14*].

[c] Empowerment of LPS Act Conservator

A conservator of the estate for a person who is gravely disabled as a result of mental disorder or impairment by chronic alcoholism--that is, a conservator appointed under the Lanterman-Petris-Short Act [*see Welf. & Inst. Code § 5350 et seq.*; *see generally Ch. 304, Insane and Other Incompetent Persons, § 304.30* et seq.]--"shall have" the powers specified in *Prob. Code § 2591* "as the court may designate" [*Welf. & Inst. Code § 5357*].

The court is not required, but is merely authorized, to grant independent powers to the LPS conservator [*cf. Board of Regents v. Davis (1975) 14 Cal. 3d 33, 42, 120 Cal. Rptr. 407, 533 P.2d 1047* (dictum that *Welf. & Inst. Code § 5357* provides for LPS conservator to have general powers of probate conservator "and such additional powers, *if any*, that a court could grant under probate conservatorships" pursuant to former *Prob. Code § 1853*, which provided for "additional" powers, now independent powers listed in *Prob. Code § 2591*; emphasis added)].

The required report of the court investigator [*see Welf. & Inst. Code §§ 5352, 5356*; *see generally Ch. 304, Insane and Other Incompetent Persons, § 304.30* et seq.] must set forth which, if any, of the independent powers the investigator recommends [*Welf. & Inst. Code § 5357*].

[2] Guardian's or Conservator's Authority

[a] After Issuance of Order

Nothing in *Prob. Code § 2400 et seq.* (governing the powers and duties of guardians and conservators) limits or restricts any authority granted to a guardian or conservator pursuant to *Prob. Code § 2590 et seq.* to administer the estate [*Prob. Code § 2408*].

[b] In Absence of Order

When authority exists under other provisions of law, either general or specific, for the guardian or conservator to do any

act or to enter into any transaction described in *Prob. Code § 2591*, the guardian or conservator may proceed under the other provisions of law and is not required to obtain an order granting independent powers [*Prob. Code § 2595(b)*]. For discussions of powers under other provisions of law, see the chapters listed in § 288.02.

[3] Appealability of Order

An order granting independent powers is not one of the orders listed in *Prob. Code § 1301* as appealable orders in guardianship and conservatorship proceedings. However, it appears that such an order may be appealable as an order authorizing a fiduciary, under *Prob. Code § 1300(c)*. Alternatively, since an application for an order granting independent powers may be made either in the initial petition for appointment of a guardian or conservator or in a later petition [*Prob. Code § 2590(a)(b)*; *see also § 288.13*], and since letters of guardianship or conservatorship must reflect any independent powers that have been granted [*see Prob. Code § 2594*; *see also § 288.13[2]*], it may be argued that an order granting independent powers is part of the order granting letters and, as such, is appealable under *Prob. Code § 1301(a)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbateProcedures in ProbateJudicial Review

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§ 288.12 Independent Powers

[1] Estate Property Generally

The powers referred to in *Prob. Code § 2590* comprise powers concerning real property [*see* [2][a], *below*], powers concerning money and investments [*see* [4], *below*], and the following powers:

- To operate, for a period longer than 45 days, at the risk of the estate a business, farm, or enterprise constituting an asset of the estate [*Prob. Code § 2591(a)*].

- To grant and take options [*Prob. Code § 2591(a)*].

- To sell at public or private sale personal property of the estate, other than the personal residence of the conservatee [*Prob. Code § 2591(c)(1)*].

- To sell property of the estate on credit if any unpaid portion of the selling price is adequately secured [*Prob. Code § 2591*(*l*); *see* [3], *below* (sale by public guardian)].

- To purchase personal real or property [*Prob. Code § 2591(g)*].

- To exchange property of the estate [*Prob. Code § 2591(k)*].

- To commence and maintain an action for partition [*Prob. Code § 2591(m)*].

- To pay, collect, compromise, arbitrate, or otherwise adjust claims, debts, or demands on the guardianship or conservatorship [*Prob. Code § 2591(p)*].

The powers of a guardian or conservator with respect to the sale of estate property are limited to a degree by *Prob. Code § 2541*, which provides that a guardian or conservator may sell real or personal property of the estate in any of the following cases:

- When the income of the estate is insufficient for the comfortable and suitable support, maintenance, and education of the ward or conservatee (including care, treatment, and support of the ward or conservatee if a patient in a state hospital under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services) or of those legally entitled to support, maintenance, or education from the ward or conservatee.

- When the sale is necessary to pay the debts referred to in *Prob. Code §§ 2430* and *2431*.

- When the sale is for the advantage, benefit, and best interest of (1) the ward or conservatee, (2) the estate, or (3) the ward or conservatee and those legally entitled to support, maintenance, or education from the ward or conservatee.

[2] Real Property

[a] Powers Generally

The powers referred to in *Prob. Code § 2590* include the following powers concerning real property:

- To sell at public or private sale real property of the estate, other than the personal residence of the conservatee [*Prob. Code § 2591(c)(1)*].

- To sell at public or private sale the personal residence of conservatee as described in *Prob. Code § 2591.5*, subject to the requirements of *Prob. Code §§ 2352.5* (discussed in [b], *below*) and 2541 (discussed in [1], *above*) [*Prob. Code § 2591(c)(2)*].

- To create, by grant or otherwise, easements and servitudes [*Prob. Code § 2591(d)*].

- To purchase real property [*Prob. Code § 2591(g)*].

- To alter, improve, and repair or raze, replace, and rebuild property of the estate [*Prob. Code § 2591(h)*].

- To let or lease property of the estate, or extend, renew or modify a lease of real property, for which the monthly rental or lease term exceeds the maximum specified in *Prob. Code §§ 2501* and *2555* for any purpose (including exploration for and removal of gas, oil, and other minerals and natural resources) and for any period, including a term commencing at a future time [*Prob. Code § 2591(i)*].

[b] Sale of Conservatee's Primary Residence

Sales of real or personal property of a conservatorship estate ordinarily are subject to authorization, confirmation, or direction of the court [*see Prob. Code § 2540(a)*; *see generally* Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment*]. There is a special provision for the sale of the conservatee's personal residence [*see Prob. Code § 2540(b)*]; however, that provision does not apply when the court has made an order under *Prob. Code § 2590* granting the conservator the power to sell real property of the estate [*Prob. Code § 2540(b)*]. *Prob. Code § 2352.5* creates a presumption that the conservatee's personal residence at the time of commencement of the proceeding is the least restrictive appropriate residence for the conservatee [*Prob. Code § 2352.5(a)*]. The conservatee, at the time of appointment, is required to determine the appropriate level of care for the conservatee. If the conservatee is not residing at his or her personal residence, the conservator must provide either a plan to return the conservatee to his or her personal residence, or an explanation of the limitations or restrictions on a return of the conservatee to his or her

personal residence in the foreseeable future [*Prob. Code § 2352.5(b)*].

[3] Sales by Public Guardian as Conservator

When the public guardian is the conservator of an estate and seeks authority pursuant to *Prob. Code § 2590* to sell the conservatee's real property valued in excess of $10,000, or an item of personal property (other than an investment security) valued in excess of $10,000, that property must be appraised by a probate referee [*Prob. Code § 2543(b)*]. Sales of estate property in general are discussed in Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment* .

[4] Money and Investments

The powers referred to in *Prob. Code § 2590* include the following powers concerning money and investments:

- To borrow money and give security for repayment [*Prob. Code § 2591(e)*].
- To lend money on adequate security [*Prob. Code § 2591(j)*].
- To exercise stock rights and stock options [*Prob. Code § 2591(n)*].
- To participate in and become subject to, and to consent to the provisions of, a voting trust or a reorganization, consolidation, merger, dissolution, liquidation, or other modification or adjustment affecting estate property [*Prob. Code § 2591(o)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsReal Property LawEstatesConcurrent OwnershipPartition ActionsReal Property LawOwnership & TransferAgents & Fiduciaries

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§ 288.13 Issuance of Order and Letters

[1] Application for Order

[a] Included in Petition for Appointment

The guardian or conservator may apply by petition for an order granting independent powers [*Prob. Code § 2592(a)*]. Alternatively, any petition to grant a guardian or conservator any power or authority under the Probate Code division governing guardians and conservators, which may be filed by a guardian or conservator, may be filed by a person who petitions for the appointment of a guardian or conservator [*Prob. Code § 1455*]. The application for independent powers may be included in the petition for the appointment of the guardian or conservator. In that case, the notice of hearing on the petition must include a statement that the petition includes an application for the grant of powers under *Prob. Code § 2590 et seq.* and must list the specific powers applied for [*Prob. Code § 2592(b)*].

The Judicial Council form "Petition for Appointment of Guardian of Minor" includes an entry that the petitioner may use to request any of the powers listed in *Prob. Code § 2591*; the form provides for the list of specific powers that are requested to be attached to the petition [*see* Cal. Judicial Council Form GC-210, PP 1e, 14]. The Judicial Council form "Order Appointing Guardian of Minor" likewise provides for an attachment listing the powers granted [*see* Cal. Judicial Council Form GC-240, PP 4, 11]. For illustrations of those forms and further discussion, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* .

The Judicial Council form "Petition for Appointment of Probate Conservator" includes an entry that the petitioner may use to request any of the powers listed in *Prob. Code § 2591*; the form provides for the list of specific powers that are requested to be attached to the petition [*see* Cal. Judicial Council Form GC-310, P 7]. The Judicial Council form "Order Appointing Probate Conservator" likewise provides for an attachment listing the powers granted [*see* Cal. Judicial Council Form GC-340, PP 6, 21]. For illustrations of those forms and further discussion, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* .

[b] Subsequent Application

If the application for the order is made by petition filed after the filing of the petition for the appointment of the

guardian or conservator, then only the guardian or conservator may apply for the order [*see Prob. Code §§ 1455, 2592(a)*]. For a form for a petition, see *§ 288.30*.

Notice of the hearing on a petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2592(c)*; *see § 288.30[4]*; *see generally* Ch. 284, *Guardianship and Conservatorship: Notice*].

[2] Notation of Powers in Letters

When the court grants any power to be exercised independently, which is requested in the petition for appointment of a guardian or conservator, the letters of guardianship or conservatorship must state the powers granted and any restrictions, conditions, or limitations prescribed in the order; and the letters must refer to *Prob. Code § 2590 et seq.* [*Prob. Code § 2594(a)*].

When the court grants such a power by a subsequent order, as well, new letters must be issued, following the same form [*Prob. Code § 2594(b)*].

The Judicial Council form "Letters of Guardianship" provides for an attachment listing the granted powers [*see* Cal. Judicial Council Form GC-250, P 2a]. For an illustration of the form and further discussion, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* .

The Judicial Council form "Letters of Conservatorship" likewise provides for an attachment [*see* Cal. Judicial Council Form GC-350, P 3d]. For an illustration of the form and further discussion, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawConservators & GuardiansGuardians for Minors

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§ 288.14 Effect on Subsequent Petition for Court's Oversight

A grant of independent powers pursuant to *Prob. Code § 2590* does not affect the right of the guardian or conservator to petition the court for authorization, instruction, approval, or confirmation [*see Prob. Code § 2403*], or for any other result obtainable under provisions of the Probate Code, as to a particular transaction or matter, in the same manner as if the independent powers had not been granted [*Prob. Code § 2595(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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§ 288.15 Order Modifying or Rescinding Grant of Powers

[1] Issuance of Order

The court, on its own motion or on the petition of any interested person, when it appears to be for the best interests of the ward or conservatee or the estate, may withdraw independent powers previously granted or may impose restrictions, conditions, or limitations on the exercise of the powers by the guardian or conservator [*Prob. Code § 2593(a)*].

Notice of the hearing on a petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2593(b)*; *see § 288.30[4]*; *see generally* Ch. 284, *Guardianship and Conservatorship: Notice*].

[2] Issuance of New Letters

If independent powers are withdrawn, restricted, conditioned, or limited by a subsequent order after being granted, then new letters must be issued accordingly [*Prob. Code § 2594(c)*].

[3] Appealability of Order

An order modifying or rescinding a grant of independent powers is not one of the orders listed in *Prob. Code § 1301* as appealable orders in guardianship and conservatorship proceedings. However, it appears that such an order may be appealable as an order refusing to authorize a fiduciary, under *Prob. Code § 1300(c)*. Alternatively, since new letters of guardianship or conservatorship must reflect any modification or rescission of the grant of independent powers [*see Prob. Code § 2594(c)*], it may be argued that the order is part of an order granting letters and, as such, is appealable under *Prob. Code § 1301(a)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbateProcedures in ProbateJudicial Review

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[Reserved]

§§ 288.16[Reserved]

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PART III. RESEARCH GUIDE

24-288 California Forms of Pleading and Practice--Annotated § 288.20

§ 288.20 Related Matthew Bender Publications

For transactional forms relating to a guardianship or conservatorship, including forms relating to the nomination of a guardian, see California Legal Forms, ch. 66, *Guardianships and Conservatorship Planning* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansTestamentary Guardians

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24-288 California Forms of Pleading and Practice--Annotated § 288.21

§ 288.21 State Statutes

Appealable orders in proceeding under Probate Code. *Prob. Code § 1300*

Appealable orders with respect to guardianships, conservatorships, and other protective proceedings. *Prob. Code § 1301*

Effect of appeal. *Prob. Code § 1310*

Procedure to obtain or withdraw authority for independent exercise of powers. *Prob. Code § 2590 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbateProcedures in ProbateJudicial Review

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24-288 California Forms of Pleading and Practice--Annotated § 288.22

§ 288.22 Local Court Rules

[1] Alameda County

Independent exercise of powers. Alameda Co. Super. Ct. Unified Rules, Rules 12.14.5, 12.15.5

[2] Contra Costa County

Independent exercise of powers. Contra Costa Co. Prob. Pol. Man., § 827

[3] Fresno County

Independent powers of guardians and conservators. Fresno Co. Super. Ct. Rules, Rule 82.3

[4] Los Angeles County

Independent powers of guardians and conservators. Los Angeles Co. Super. Ct. Rules, Rule 10.153

[5] Marin County

Independent powers of conservators. Marin Co. Super. Ct. Rules, Rule 5.68(C)

[6] Orange County

Independent powers of guardians. Orange Co. Super. Ct. Rules, Rule 610.14

Independent powers of conservators. Orange Co. Super. Ct. Rules, Rule 611.07

[7] Riverside County

Independent powers of guardians. Riverside Co. Super. Ct. Rules, Rule 6.1105

Independent powers of conservators. Riverside Co. Super. Ct. Rules, Rule 6.1204

[8] Sacramento County

Independent powers of guardians and conservators. Sacramento Co. Super. Ct. Rules, Rule 15.85

[9] San Diego County

Independent powers of conservators. San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.130

[10] San Francisco

Independent powers of conservators. San Francisco Uniform Local Ct. Rules, Rule 14.106(D)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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§ 288.23 Text References

Witkin, Summary of California Law, vol. 12, *Wills and Probate*, §§ 947-949 (9th ed. 1990)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral Overview

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[Reserved]

§§ 288.24[Reserved]

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PART IV. FORMS

24-288 California Forms of Pleading and Practice--Annotated § 288.30

§ 288.30 Petition for Independent Powers [Prob. Code § 2592]

[1] FORM Petition for Independent Powers

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship] of the _____ [Estate *or* Person and Estate] of _____ [*name*], _____ [Ward *or* Conservatee].	))))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION FOR INDEPENDENT POWERS

_____

Petitioner _____[*name*] respectfully represents:

1. Petitioner is the duly appointed, qualified, and acting _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee].

2. Petitioner requests that he/she be granted the following powers authorized by *Probate Code Sections 2590* and *2591*: _____ [*list powers sought, e.g.,* the power to employ investment counsel and to pay resulting fees and charges from the estate].

3. Granting the powers described above will be to the advantage, benefit, and best interest of the estate because _____ [*set forth reasons, e.g.,* the estate is large and varied, as appears in the inventory and appraisal filed _____ (*date*), the petitioner is not qualified to choose the proper investments for the assets of the estate, and the petitioner will avoid the expense of repeatedly obtaining court instructions and authorization for future investments].

4. A request for special notice has _____ [not been filed *or* been filed by _____ (*name*), and notice of the time and place of hearing on this petition will be given as required by law *or* been filed and waived by _____ (*name*)].

WHEREFORE, petitioner prays for an order granting him/her the powers described above and for such other and further orders as the court may deem proper.

Respectfully submitted,

_____ [*signature*]

Petitioner

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The petition in [1], *above*, is for use by a guardian or conservator in applying for independent powers specified in *Prob. Code § 2591*, after the guardian or conservator has been appointed [*see Prob. Code §§ 2590, 2592(a)*].

[3] Contents of Petition

The petition should state the following:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2592(a)*].
- The powers to be exercised independently (Paragraph 2) [*see Prob. Code § 2591*].

- Circumstances showing that it would be to the advantage, benefit, and best interest of the estate to grant the requested powers (Paragraph 3) [*see Prob. Code § 2590*].

- Whether a request for special notice has been filed and, if so, that proper notice will be given or has been waived (Paragraph 4) [*see Prob. Code §§ 1260(a), 2700, 2701*].

The petition must be verified [*see Prob. Code § 1021(a)(1)*] by the petitioner [*see Prob. Code § 1021(b)(1)*].

[4] Notice

Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.*, when the petition is filed after the filing of the petition for the appointment of the guardian or conservator [*Prob. Code § 2592(c)*]. Generally, notice by mail must be given to specified persons at least 15 days before the day of the hearing [*Prob. Code § 1460(a),(b)*]. Additionally, special notice must be given to persons who have filed a written request under *Prob. Code § 2700 et seq.* [*Prob. Code §§ 1260(a), 1460(d), 2700, 2701*]. Notice may not need to be given to the ward if he or she is not at least 12 years old [*see Prob. Code § 1460.1*]. Notice may have to be given to the state Director of Mental Health and the U.S. Department of Veterans Affairs [*see Prob. Code §§ 1461, 1461.5*]. For further discussion and a form of notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

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PART IV. FORMS

24-288 California Forms of Pleading and Practice--Annotated § 288.31

§ 288.31 Order Granting Independent Powers [Prob. Code § 2590]

[1] FORM Order Granting Independent Powers
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship] of the _____ [Estate *or* Person and Estate] of _____ [*name*], _____ [Ward *or* Conservatee].	))))))	NO. _____ ORDER

_____

The petition of _____[*name*], as _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee], for a grant of powers pursuant to *Probate Code Section 2590* came on regularly for hearing by the court on this date. Petitioner appeared by counsel _____[*name*]. _____[*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. It is to the advantage, benefit, and best interest of the estate that the powers listed below be granted to _____[*name*], as _____ [guardian *or* conservator].

IT IS ORDERED:

1. _____[*name*], as _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee], be granted the following powers: _____ [*describe, e.g.,* the power to retain investment counsel and to pay any resulting fees and charges from the estate].

2. The powers described above may be exercised without notice, hearing, or court authorization, instructions, approval, or confirmation _____ [, provided: _____ (*describe requirements, restrictions, conditions, or limitations, e.g.,* the annual fees of retaining investment counsel shall not exceed $_____)].

3. New letters of _____ [guardianship *or* conservatorship] be issued to the _____ [guardian *or* conservator], stating the powers granted [and the foregoing proviso], and referring to *Probate Code Sections 2590 through 2595*.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use when the court grants a petition for independent powers filed by the guardian or conservator [*see Prob. Code § 2590*]. For a form of petition, *see § 288.30*.

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

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24-288 California Forms of Pleading and Practice--Annotated § 288.32

§ 288.32 Petition for Modification or Rescission of Grant of Independent Powers [Prob. Code § 2593]

[1] FORM Petition for Modification or Rescission of Grant of Independent Powers

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship] of the _____ [Estate *or* Person and Estate] of _____ [*name*], _____ [Ward *or* Conservatee].	))))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION FOR _____ [MODIFICATION *or* RESCISSION] OF GRANT OF INDEPENDENT POWERS

Petitioner _____[*name*] respectfully represents:

1. Petitioner is a person interested in the _____ [guardianship *or* conservatorship] estate of _____[*name*], in that _____[*describe nature of interest*].

2. On _____[*date*], this court granted to the _____ [guardian *or* conservator] the following powers set forth in *Probate Code Section 2591*: _____[*specify*].

3. It is in the best interests of the _____ [ward *or* conservatee] that the above-described powers be _____ [withdrawn *or* restricted *or* conditioned *or* limited] because _____ [*set forth reasons, e.g.,* the power is no longer necessary *or* the _____ (guardian *or* conservator) has been abusing the power by _____ (*specify*)].

4. A request for special notice has _____ [not been filed *or* been filed by _____ (

name), and notice of the time and place of hearing on this petition will be given as required by law *or* been filed and waived by _____ (*name*)].

WHEREFORE, petitioner prays for an order _____ [withdrawing *or* restricting *or* conditioning *or* limiting] the powers described above and for such other and further orders as the court may deem proper.

[*Signature and verification. See § 288.30[1].*]

[2] Use of Form

The petition in [1], *above*, is for use by any interested person in obtaining the withdrawal of independent powers or the imposition of restrictions, conditions, or limitations on the exercise of those powers granted to a guardian or conservator [*Prob. Code § 2593(a)*]. For a discussion of notice, see *§ 288.30[4]*.

[3] Contents of Petition

The petitioner must show that it is in the best interest of the ward or conservatee or the estate to withdraw powers previously granted or to impose restrictions, conditions, or limitations on the exercise of those powers by the guardian or conservator (Paragraph 3) [*see Prob. Code § 2593(a)*].

Additionally, the petition should state the following:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2593(a)*].

- The independent powers previously granted to the guardian or conservator pursuant to *Prob. Code § 2590* (Paragraph 2) [*see Prob. Code § 2591*].

- Whether a request for special notice has been filed and, if so, that proper notice will be given or has been waived (Paragraph 4) [*see Prob. Code §§ 1260(a), 2700, 2701*].

The petition must be verified [*see Prob. Code § 1021(a)(1)*]. The verification ordinarily must be by the petitioner [*see Prob. Code § 1021(b)(1)*], but, if the petitioner is not the guardian or conservator and is absent or from some other cause is unable to verify it, the petition may be verified by the petitioner's attorney [*see Prob. Code §§ 1021(b), 1023*].

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24-288 California Forms of Pleading and Practice--Annotated § 288.33

§ 288.33 Order Modifying or Rescinding Grant of Independent Powers [Prob. Code § 2593]

[1] FORM Order Modifying or Rescinding Grant of Independent Powers

[*Caption. See § 288.31[1].*]

The petition of _____[*name*], as a person interested in the _____ [guardianship *or* conservatorship] estate of _____[*name*], for the _____ [withdrawal of powers *or* imposition of _____ (restrictions *or* conditions *or* limitations) on the exercise of powers] previously granted to the _____ [guardian *or* conservator], came on regularly for hearing by the court on this date. Petitioner appeared by counsel _____[*name*]. _____[*Specify other appearance, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. It is in the best interest of the _____ [ward *or* conservatee] that certain independent powers of the _____ [guardian *or* conservator] be _____ [withdrawn *or* restricted *or* conditioned *or* limited].

IT IS ORDERED:

1. The following powers previously granted to _____[*name*], as _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee], by this court on _____[*date*], be _____ [withdrawn *or* restricted *or* conditioned *or* limited]: _____[*describe powers and specify any restrictions, conditions, or limitations*].

2. New letters of _____ [guardianship *or* conservatorship] be issued to the _____ [guardian *or* conservator], _____ [omitting *or* stating the foregoing _____ (restrictions *or* conditions *or* limitations) on the exercise of] the powers described above.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use when the court grants a petition seeking the withdrawal, restriction, conditioning, or limitation of independent powers granted to a guardian or conservator [*see Prob. Code § 2593(a)*]. For a form of petition, *see § 288.32*.

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

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§ 289.syn Synopsis to Chapter 289: GUARDIANSHIP AND CONSERVATORSHIP: MANAGEMENT OF COMMUNITY PROPERTY

§ 289.01 Scope of Chapter

§ 289.02 Cross References

§§ 289.03-289.09 [Reserved]

§ 289.10 Governing Statutes

§ 289.11 Definitions

§ 289.12 Determining Character of Property

[1] By Court After Hearing

[2] Proceeds of Community Property

§ 289.13 Legal Capacity of Spouse

§ 289.14 Management Powers of Spouse or Conservator

[1] Community Property

[2] Enforcement of Spouse's Duty Regarding Management and Control

[3] Conservator's Duty Towards Property Included in Estate

[4] Terminating Inclusion of Property in Estate

§ 289.15 Joinder or Consent Requirements

[1] In General

[2] Authorization for Joinder or Consent

[3] Manner of Effecting Joinder or Consent

[4] Effect of Estate on Good Faith Purchase of Real Property

§ 289.16 Proceeding to Authorize or Determine Legal Capacity for Transaction

[1] In General

[2] Determining Character of Property

[3] Subject Transactions

[4] Who May Petition

[5] Contents of Petition

[6] Notice and Citation

[7] Appearance by Representative

[8] Appointment of Legal Counsel

[9] Presence of Spouse Alleged to Lack Legal Capacity at Hearing

[10] Informing Spouse Alleged to Lack Legal Capacity of Legal Rights

[11] Order Determining Legal Capacity

[12] Order Authorizing Transaction

[13] Bond

[14] Execution, Recordation, and Receipt of Documents

[15] Effect of Documents Made Pursuant to Order

[16] Subsequent Proceedings

§ 289.17 Enforcement of Support of Conservatee Spouse

[1] Petition for Support from Community Property

[2] Notice of Hearing

[3] Obligations of Spouse on Filing of Petition

[a] Citation and Examination of Spouse

[b] Declarations to Be Filed

[4] Permitted Orders Pending Determination

[a] Order for Payment of Support Pending Determination

[b] Ex Parte Orders Enjoining and Reporting Use of Property

[c] Continuances

[5] Determination of Amount and Findings

[6] Permitted Orders After Determination

[a] Order for Application of Community Property to Support

[b] Order for Periodic Payments

[c] Assignment of Wages

[7] Modification or Revocation of Order

[8] Order for Division of Community Property

[9] Enforcement of Orders

§§ 289.18-289.29 [Reserved]

§ 289.30 State Statutes

[1] Definitions

[2] Enforcement of Support of Conservatee Spouse

[3] Joinder or Consent Substitutes

[4] Legal Capacity of Spouse

[5] Management and Disposition of Community or Separate Property

[6] Proposed Transactions Involving Community Property

[a] In General

[b] Citation and Notice

[c] Consummation of Transaction

[d] Hearing

[e] Order

[f] Petition

[7] Status of Property or Proceeds

§ 289.31 Decisions

§ 289.32 Text References

§§ 289.33-289.39 [Reserved]

§ 289.40 Petition for Authority to Include Community Property in Estate of One Spouse Pursuant to Agreement [Prob. Code § 3051(e)]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Jurisdiction and Venue

[5] Verification

[6] Notice

[7] Cross References

§ 289.41 Order Granting Authority to Include Community Property in Estate of One Spouse Pursuant to Agreement [Prob. Code § 3051(e)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 289.42 Petition to Terminate Inclusion of Community Property in Spouse's Estate [Prob. Code § 3054(b), (c)]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Jurisdiction and Venue

[5] Verification

[6] Notice

[7] Determination

[8] Cross References

§ 289.43 Order Terminating Inclusion of Community Property in Spouse's Estate [Prob. Code § 3054(b), (c)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 289.44 Petition to Authorize and Instruct Guardian or Conservator to Join or Consent to Disposition of Community Property [Prob. Code §§ 2403, 3072]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Transactions Requiring Joinder or Consent

[5] Verification

[6] Notice

[7] Manner of Joinder or Consent

[8] Cross References

§ 289.45 Order Authorizing and Instructing Guardian or Conservator to Join in or Consent to Disposition of Community Property [Prob. Code §§ 2403, 3072]

[1] FORM

[2] Use of Form

[3] Cross References

§ 289.46 Petition to Authorize Proposed Transaction Involving Community Property When Spouse Has or Is Declared to Have Legal Capacity for Transaction [Prob. Code §§ 3100-3131, 3143(a), 3144]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Justification and Venue

[5] Verification

[6] Notice

[7] Cross References

§ 289.47 Order Authorizing Proposed Transaction Involving Community Property When Spouse Has or Is Declared to Have Legal Capacity for Transaction [Prob. Code §§ 3100-3131, 3143(a), 3144]

[1] FORM

[2] Use of Form

[3] Contents of Order

[4] Bond

[5] Cross References

§ 289.48 Petition to Authorize Proposed Transaction Involving Community Property When Spouse Alleged to Lack Legal Capacity [Prob. Code §§ 3100-3131, 3144]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Verification

[5] Cross References

§ 289.49 Citation to Nonpetitioning Spouse Alleged to Lack Legal Capacity Giving Notice of Hearing on Petition to Deal with Community Property [Prob. Code § 3130]

[1] FORM

[2] Use of Form

[3] Issuance and Service

[4] Cross References

§ 289.50 Order Authorizing Proposed Transaction Involving Community Property When Spouse Alleged to Lack Legal Capacity [Prob. Code §§ 3100-3131, 3144]

[1] FORM

[2] Use of Form

[3] Contents of Order

[4] Cross References

§ 289.51 Petition for Enforcement of Support of Conservatee Spouse From Community Property [Prob. Code § 3080]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Jurisdiction and Venue

[5] Verification

[6] Notice

[7] Cross References

§ 289.52 Ex Parte Order Pending Determination of Petition for Enforcement of Support--Restraining Disposition of Property--Requiring Notification of Proposed Extraordinary Expenditures [Prob. Code § 3085]

[1] FORM

[2] Use of Form

[3] Cross References

§ 289.53 Order for Payment of Support Pending Determination of Petition for Enforcement of Support of Conservatee Spouse [Prob. Code § 3083]

[1] FORM

[2] Use of Form

[3] Cross References

§ 289.54 Citation to Spouse for Examination Concerning Community Property [Prob. Code § 3082]

[1] FORM

[2] Use of Form

[3] Service of Citation

[4] Cross References

§ 289.55 Order for Enforcement of Support of Conservatee Spouse [Prob. Code § 3088]

[1] FORM

[2] Use of Form

[3] Order for Assignment of Wages

[4] Findings

[5] Cross References

§ 289.56 Application for Division of Community and Quasi-Community Property [Prob. Code § 3089]

[1] FORM

[2] Use of Form

[3] Contents of Application

[4] Verification

[5] Notice

[6] Cross References

§ 289.57 Order for Division of Community and Quasi-Community Property [Prob. Code § 3089]

[1] FORM

[2] Use of Form

[3] Cross References

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§ 289.01 Scope of Chapter

This chapter discusses the determination of the character of property when one or both spouses have a conservator [*see § 289.12*], the legal capacity of a spouse who has a conservator [*see § 289.13*], and the management powers of the spouse and the conservator [*see § 289.14*].

The chapter also discusses joinder or consent requirements for certain transactions involving community property [*see § 289.15*], proceedings to authorize or determine legal capacity of the spouse for transactions [*see § 289.16*], and enforcement of support for the conservatee spouse from community property [*see § 289.17*].

The chapter includes a Research Guide [*see § 289.30* et seq.] and the following forms:

- A petition and an order to authorize the inclusion of community property in one spouse's estate pursuant to an agreement [*see §§ 289.40, 289.41*].

- A petition and an order to terminate the inclusion of community property in a spouse's estate [*see §§ 289.42, 289.43*].

- A petition and an order to authorize a guardian or conservator to join in or consent to the disposition of community property [*see §§ 289.44, 289.45*].

- A petition and an order to authorize a proposed transaction involving community property when a spouse has or is declared to have legal capacity for the transaction [*see §§ 289.46, 289.47*].

- A petition, a citation, and an order to authorize a proposed transaction involving community property when a spouse is alleged to lack legal capacity for the transaction [*see §§ 289.48 -289.50*].

- Petitions, citations, and orders to use for the enforcement of support for a conservatee spouse from community property when the other spouse has management or control of the community property [*see §§ 289.51 -289.57*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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24-289 California Forms of Pleading and Practice--Annotated § 289.02

§ 289.02 Cross References

Additional discussion and forms relating to the determination of a spouse's rights in community property, may be found in Ch. 122, *Community Property* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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[Reserved]

§§ 289.03[Reserved]

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24-289 California Forms of Pleading and Practice--Annotated § 289.10

§ 289.10 Governing Statutes

Statutes governing the management of community property by the guardian or conservator are contained in *Fam. Code §§ 1100*, 1202, and *Prob. Code §§ 3000-3012, 3020-3023, 3051-3057, 3070-3074, 3080-3092, 3100-3102, 3110-3113, 3120-3123, 3130, 3131, 3140-3145*, and *3150-3154*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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§ 289.11 Definitions

Unless the provision or context requires otherwise, the definitions discussed below and used in this chapter govern the construction of *Prob. Code § 3000 et seq.* [*Prob. Code § 3000*].

The term "community property" means community real and personal property. Community property includes, but is not limited to, a community property business that is or was under the primary management and control of one of the spouses. However, community property does not include that which is in a revocable trust, as described in *Fam. Code § 761* (transfer of community property into trust by spouse) [*Prob. Code § 3002*].

The term "conservator" means conservator of the estate, or limited conservator of the estate to the extent that the powers and duties of the limited conservator are specifically and expressly provided by the order appointing him or her, and includes the guardian of the estate of a married minor [*Prob. Code § 3004*].

The term "conservatorship estate" includes the guardianship estate of a married minor [*Prob. Code § 3006*].

The term "conservatorship proceeding" means a conservatorship of the estate proceeding and includes a guardianship of the estate proceeding of a married minor [*Prob. Code § 3008*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-289 California Forms of Pleading and Practice--Annotated § 289.12

§ 289.12 Determining Character of Property

[1] By Court After Hearing

When one or both of the spouses has a conservator, the court in which any of the conservatorship proceedings is pending may hear and determine, when the issue is raised, the validity of a homestead and whether or not the property is community property or the separate property of either spouse [*Prob. Code § 3023(a)*]. However, any person having or claiming title to or an interest in the property, at or prior to the hearing on the issue, may object to the hearing if, under any other provision of law, the court is not the proper court for the trial of an action to determine the issue. If the objection is established, the court must not hear and determine the issue [*Prob. Code § 3023(b)*]. In addition if a civil action is pending with respect to the issue and jurisdiction has been obtained in the court hearing the action, on request of any party to the action, the court must discontinue the hearing until the conclusion of the action [*Prob. Code § 3023(c)*]. The court need not abate the hearing, however, if it determines that the civil action was filed for the purpose of delay [*Prob. Code § 3023(d)*].

[2] Proceeds of Community Property

The proceeds, rents, issues, and profits of community property dealt with or disposed of under the statutes governing guardianships and conservatorships [*Prob. Code § 1400 et seq.*], and any property taken in exchange for the community property or acquired with the proceeds, are community property [*Prob. Code § 3020(a)*]. Except as provided for the management, control, and disposition of community property as discussed in this part, nothing alters the rights of the spouses in community property or its proceeds, rents, issues, or profits [*Prob. Code § 3020(b)*]. For discussion of spouses' rights in community property, see Ch. 122, *Community Property* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Duties & RightsProperty RightsCharacterizationSeparate PropertyFamily LawMarital Duties & RightsProperty RightsHomestead Rights

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§ 289.13 Legal Capacity of Spouse

A spouse who has a conservator of the estate lacks legal capacity to manage and control community property, including the legal capacity to dispose of community property and to join in or consent to a transaction involving community property [*Prob. Code § 3012(a), (b)*].

A spouse also lacks legal capacity [*Prob. Code § 3012(b)*]:

- To manage and control community property, including legal capacity to dispose of it, if he or she is substantially unable to manage or control the community property; and

- To join in or consent to a transaction involving community property if he or she does not have legal capacity for the particular transaction measured by principles of law otherwise applicable to the particular transaction.

However, nothing in *Prob. Code § 3012* may be construed to deny a spouse any of the following, whether or not he or she lacks legal capacity [*Prob. Code § 3012(c)*]:

- The right to control an allowance provided under *Prob. Code § 2421* [for discussion of allowances, *see* Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee*].

- The right to control wages or salary to the extent provided in *Prob. Code § 2601* [for discussion of wages, *see* Ch. 286, *Guardianship and Conservatorship: Inventory and Appraisal*].

- The right to make a will.

- The right to enter into transactions to the extent reasonable to provide the necessities of life to the spouse, the other spouse, and the minor children of the spouses.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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24-289 California Forms of Pleading and Practice--Annotated § 289.14

§ 289.14 Management Powers of Spouse or Conservator

[1] Community Property

The right of a spouse to manage and control community property, including the right to dispose of it, is not affected by the lack or alleged lack of legal capacity of the other spouse [*Prob. Code § 3051(a)*; for discussion of legal capacity of spouse, *see § 289.13*].

If one spouse has legal capacity and the other has a conservator, the spouse with legal capacity has the exclusive management and control of the community property, including the exclusive power to dispose of that property. Further, the community property is not part of the conservatorship estate [*Prob. Code § 3051(b)*]. However, the spouse with legal capacity may consent, by a writing filed in the proceeding, that all or part of that property be included in and managed, controlled, and disposed of as a part of the conservatorship estate [*Prob. Code § 3051(c)*].

If both spouses have conservators, an undivided one-half interest in the community property must be included in and managed, controlled, and disposed of as a part of the conservatorship estate of each spouse [*Prob. Code § 3051(d)*]. Nevertheless, when authorized by order of the court in which any of the conservatorship proceedings is pending, the conservators may agree in writing that all or specific parts of the community property be included in the conservatorship estate of one or the other of the spouses and be managed, controlled, and disposed of as a part of that estate [*Prob. Code § 3051(e)*; *see §§ 289.40, 289.41* (petition and order for authorization to include community property in estate of one spouse pursuant to agreement)].

The right to manage, control, and dispose of community property is limited by *Prob. Code § 3071*, which applies when joinder or consent would be required for a transaction if both spouses had legal capacity [*Prob. Code § 3051*; *see § 289.15*].

[2] Enforcement of Spouse's Duty Regarding Management and Control

The Probate Code provides that, when one spouse has a conservator and the other spouse is managing or controlling community property, the conservator has the duty to remain reasonably informed concerning the management and control, including the disposition, of the property. The Probate Code further provides that if the conservator has

knowledge or reason to believe that the conservatee's rights in the property are being prejudiced, the conservator may bring an action on the conservatee's behalf to enforce the fiduciary duty imposed by *Fam. Code §§ 721* and *1100* [*see Prob Code § 3057*]. If a spouse lacks legal capacity and does not have a conservator, the Probate Code also provides that any interested person who has knowledge or reason to believe that the spouse's rights are being prejudiced may also bring an enforcement action [*Prob. Code § 3057(a)*].

Except as otherwise provided in specified sections of the Probate Code [*see Prob. Code §§ 143, 144, 146, 16040, 16047*], a husband and wife, in transactions between themselves, are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relationships with one another [*Fam. Code § 721(b)*; *see Fam Code § 1100(e)*]. This confidential relationship includes a duty of the highest good faith and fair dealing with one another, and neither is permitted to take any unfair advantage of the other [*Fam. Code § 721(b)*]. The relationship is a fiduciary relationship subject to the same rights and duties of nonmarital business partners, and includes (but is not limited to) the following [*Fam. Code § 721(b)*; *see Fam Code § 1100(e)*]:

- Providing each spouse access at all times to any books kept regarding a transaction for the purposes of inspection and copying.

- Rendering on request, true and full information of all things affecting any transaction which concerns the community property. Nothing in this section is intended to impose a duty for either spouse to keep detailed books and records of community property transactions.

- Accounting to the spouse, and holding as a trustee, any benefit or profit derived from any transaction by one spouse without the consent of the other spouse which concerns the community property.

With respect to these requirements, *Fam. Code § 721* refers to the duties imposed under the Uniform Partnership Act, specifically *Corp. Code §§ 16403* (disclosure of books, records, and other information to business partner), 16404 (partner's fiduciary duty), and 16503 (transfer of partnership interest). For discussion, see Ch. 400, *Partnerships: Governing Law* .

[3] Conservator's Duty Towards Property Included in Estate

When community property is included in a conservatorship estate for the purpose of management, control, and disposition, the conservator has the same powers and duties with respect to management and control of the property as he or she has with respect to other property of the estate [*Prob. Code § 3056*; for discussion of powers and duties, *see* Ch. 287, *Guardianship and Conservatorship: General Management Powers*]. However, limitations on dispositions are imposed by *Prob. Code § 3071*, discussed in *§ 289.15*, and by other provisions [*see, e.g., Prob. Code §§ 3020* (community property interests not affected), 3054 (authority of court), 3055 (effect on consent of death or subsequent lack of legal capacity)].

[4] Terminating Inclusion of Property in Estate

When community property is included in or proposed to be included in the conservatorship estate of a spouse, the court in which the conservatorship proceeding is pending, on its own motion or on petition of a spouse having legal capacity or the conservator of either spouse, and on such notice to such persons as the court prescribes, may do any of the following [*Prob. Code § 3054*; *see §§ 289.42, 289.43*]:

- Determine that the inclusion of some or all of that property that is proposed to be included in the estate is not in the best interest of the spouses or their estates and order that the property not be included.

- Permit revocation of a written consent for inclusion of property in the estate, with or without terms

or conditions.

- Determine that the continued inclusion of some or all of that property in the estate is not in the best interest of the spouses or their estates and order that the inclusion be terminated, with or without terms or conditions.

- Make such other orders as may be appropriate for the orderly administration of the estate or to protect the interests of the spouses.

If consent is given that community property be included in a spouse's estate, the death of either spouse also terminates the consent [*Prob. Code § 3055(a)*].

If a spouse consents that community property be included in the other spouse's estate, the subsequent lack of legal capacity of the consenting spouse has no effect on the property's inclusion in the other spouse's estate. However, the appointment of a conservator for the consenting spouse terminates the consent [*Prob. Code § 3055(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedFiduciary RelationshipsFiduciary ResponsibilitiesEstate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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Volume 24: Guardianship and Conservatorship thru Guardians ad Litem-Chs. 280-291
Chapter 289 GUARDIANSHIP AND CONSERVATORSHIP: MANAGEMENT OF COMMUNITY PROPERTY
PART II. LEGAL BACKGROUND

24-289 California Forms of Pleading and Practice--Annotated § 289.15

§ 289.15 Joinder or Consent Requirements

[1] In General

Certain transactions involving community property require the joinder or consent of both spouses [*see, e.g., Fam. Code §§ 1100* (gift of community personal property and disposition of property used as family dwelling, home furnishings, and clothing), 1202 (disposition of community real property)]. When one spouse has legal capacity for the transaction and the other spouse has a conservator, the joinder or consent requirement of any such statute is satisfied if the joinder or consent of both the spouse having legal capacity and of the other spouse's conservator are obtained [*Prob. Code §§ 3070, 3071(b)*]. When both spouses have conservators, the requirement is satisfied by the joinder or consent of each conservator [Prob. Code §§ 3070, 3071(c); for discussion of the manner of obtaining court authorization for conservator's joinder or consent, *see* [2], *below*].

In any case, the requirement of joinder or consent is satisfied if the transaction is authorized by a court order obtained in a proceeding pursuant to *Prob. Code §§ 3100-3154* [*Prob. Code § 3071(d)*; *see § 289.16*].

[2] Authorization for Joinder or Consent

Generally, a conservator may join in or consent to a transaction only after authorization by court order obtained in a conservatorship proceeding on a petition for [*Prob. Code § 3072(a)(1)*]:

- Instructions under *Prob. Code § 2403* [*see §§ 289.44, 289.45*].

- Approval or confirmation of sales under *Prob. Code §§ 2540-2548* [*see* Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment*];

- Authority to take a proposed action by a conservator under the substituted judgment doctrine contained in *Prob. Code §§ 2580-2586* [*see* Ch. 290B, *Guardianship and Conservatorship: Substituted Judgment*].

That authority may also be obtained in a proceeding pursuant to *Prob. Code § 3100 et seq.* to authorize a proposed

transaction when a spouse lacks legal capacity [*Prob. Code § 3072(a)(2)*; *see § 289.16*].

However, a conservator may consent without court authorization to a sale, conveyance, or encumbrance of home furnishings or clothing which are community personal property requiring consent under *Civ. Code § 5125(c)* if the conservator could sell or transfer the property under *Prob. Code § 2545* (sales of tangible personal property not in excess of $5,000 per year) without authorization if it were a part of the estate [*Prob. Code § 3072(b)*; for discussion of *Prob. Code § 2545, see* Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment*].

[3] Manner of Effecting Joinder or Consent

The joinder or consent of a conservator must be made in the same manner as that of a spouse joining in or consenting to the transaction under the governing statute [*Prob. Code § 3073(b)*]. The conservator must execute the joinder or consent, which must refer to the court order authorizing the conservator to join in or consent to the transaction, if such an order is required [*Prob. Code § 3073(b)*].

A spouse having legal capacity must join in or consent to a transaction in such manner as complies with *Civ. Code §§ 5125*, *5127*, or any other statute that applies to the transaction [*Prob. Code § 3073(a)*; for discussion of *Civ. Code §§ 5125* and *5127, see* Ch. 122, *Community Property*].

[4] Effect of Estate on Good Faith Purchase of Real Property

Notwithstanding *Prob. Code §§ 3070-3073* [*see* [2], [3], *above*], a transaction that affects real property, entered into by a person acting in good faith and for a valuable consideration, is not affected by the fact that one or both spouses have conservators unless a notice of the establishment of the conservatorship or conservatorships, as the case may be, has been recorded prior to the transaction in the county in which the property is located [*Prob. Code § 3074*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyReal Property LawEstatesPresent EstatesMarital EstatesCommunity Property

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PART II. LEGAL BACKGROUND

24-289 California Forms of Pleading and Practice--Annotated § 289.16

§ 289.16 Proceeding to Authorize or Determine Legal Capacity for Transaction

[1] In General

A special proceeding may be brought under *Prob. Code § 3100 et seq.* for a court order authorizing a proposed transaction that involves community real or personal property, tangible or intangible, or an interest in or a lien or encumbrance on that property [*Prob. Code §§ 3100, 3101(a)*]. To bring the proceeding, both of the following conditions must be satisfied, whether or not the proposed transaction is one that otherwise would require the joinder or consent of both spouses [*Prob. Code § 3101(a)*]:

- One of the spouses must be alleged to lack legal capacity for the proposed transaction, whether that spouse has a conservator or not.

- The other spouse must either have legal capacity for the proposed transaction or have a conservator.

A proceeding may also be brought under *Prob. Code § 3100 et seq.* for a court order declaring that one or both spouses has legal capacity for a proposed transaction [*Prob. Code § 3101(b)*]. Alternatively, a single proceeding may be brought for a declaration of legal capacity and for authorization for a proposed transaction [*Prob. Code § 3101(c)*]. The existence or lack of legal capacity is determined according to the standard in *Prob. Code § 3012* [*see § 289.13*].

When both spouses have conservators of the estate, or if one spouse has legal capacity and the other has a conservator, the procedure described above is available to obtain court authorization for the joinder or consent of a conservator as an alternative to the procedures under *Prob. Code § 3072* [*Prob. Code § 3072(a)(2)*; *see § 289.15*]. This procedure is permissive and cumulative for the transactions to which it applies [*Prob. Code § 3101(e)*].

For forms that may be used to authorize a proposed transaction and to determine legal capacity, see *§§ 289.46*, 289, 47 (petition and order to authorize transaction when spouse has or is declared to have legal capacity) and 289.48-289.50 (petition and order to authorize transaction when spouse alleged to lack legal capacity).

[2] Determining Character of Property

In a proceeding under *Prob. Code §§ 3100-3154*, the court may determine whether or not the property that is the subject of the proposed transaction is subject to a valid homestead and whether or not it is community property or the separate property of either spouse. However, such a determination may not be made if the court determines that in the interest of justice the determination must be made in a civil action [*Prob. Code § 3101(d)*].

[3] Subject Transactions

The transactions that may be the subject of the proceedings described above include, but are not limited to, the following [*Prob. Code § 3102*]:

(a) A sale, conveyance, assignment, transfer, exchange, conveyance pursuant to a preexisting contract, encumbrance by security interest, by deed of trust, by mortgage, or otherwise, a lease, including but not limited to a lease for the exploration for and production of oil, gas, minerals, or other substances, or unitization or pooling with other property for or in connection with such exploration and production;

(b) An assignment, transfer, or conveyance, in whole or in part, in compromise or settlement of an indebtedness, demand, or proceeding to which the property may be subject;

(c) A dedication or conveyance, with or without consideration, of the property or an interest therein to a public entity (including but not limited to the United States or an agency or instrumentality thereof) for any purpose, or of an easement over the property to any person for any purpose;

(d) A conveyance, release, or relinquishment to a public entity, with or without consideration, of any access rights to a street, highway, or freeway from the property;

(e) Consenting as a lienholder to a dedication, conveyance, release, or relinquishment under paragraphs (c) or (d), *above*, by the owner of property subject to the lien; and

(f) A conveyance or transfer, without consideration, to provide gifts for such purposes, and to such charities, relatives (including one of the spouses), friends, or other objects of bounty, as would be likely beneficiaries of gifts from the spouses.

[4] Who May Petition

Either spouse, whether or not the spouse has legal capacity, or the conservator of either spouse may file or join in a petition under *Prob. Code §§ 3100-3154* [*Prob. Code § 3111(a)*].

However, if the petition requests approval of a proposed action, at least one of the petitioners must be either a conservator or a spouse having legal capacity for the transaction [*Prob. Code § 3111(b)*].

If a proceeding is brought by the conservator of a spouse, or by a spouse having legal capacity for the proposed transaction, a conservator does not have to be appointed for the other spouse [*Prob. Code § 3113*].

[5] Contents of Petition

Several proposed transactions may be included in one petition and proceeding [*Prob. Code § 3120(a)*]. The petition may contain inconsistent allegations and may request relief in the alternative [*Prob. Code § 3120(b)*].

The petition must set forth all the following information [*Prob. Code § 3121*]:

- The name, age, and residence of each spouse.

- If one or both spouses are alleged to lack legal capacity for the proposed transaction, a statement that the spouse has a conservator or a statement of the facts on which the allegation is based.

- If there is a conservator of a spouse, the name and address of the conservator, the county in which the conservatorship proceeding is pending, and the court number of the proceeding.

- If a spouse alleged to lack legal capacity for the proposed transaction is a patient in or on leave of absence from a state institution under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services, the name and address of the institution.

- The names and addresses of the adult relatives within the second degree of each spouse alleged to lack legal capacity for the proposed transaction, if known to the petitioner [*see Prob. Code §§ 251-253* (second degree relations)].

- A sufficient description of the property that is the subject of the proposed transaction;

- An allegation of the status of the property, whether community property, community property subject to a homestead, or separate property subject to a homestead.

- The estimated value of the property.

- The terms and conditions of the proposed transaction, including the names of all parties to it.

- The relief requested.

If the proceeding is brought for a court order authorizing a proposed transaction, the petition must set forth, in addition to the information required by *Prob. Code § 3121* as discussed above, all of the following [*Prob. Code § 3122*]:

- An allegation that one of the spouses has a conservator or facts establishing lack of legal capacity of the spouse for the proposed transaction.

- An allegation that the other spouse has legal capacity for the proposed transaction or has a conservator.

- An allegation that each spouse either (1) joins in or consents to the proposed transaction, (2) has a conservator, or (3) is substantially unable to manage his or her financial resources or resist fraud or undue influence.

- Facts that may be relied on to show that the authorization sought is for one or more of the following purposes: (1) the advantage, benefit, or best interests of the spouses or their estates; (2) the care and support of either spouse or of such persons as either spouse may be legally obligated to support; (3) the payment of taxes, interest, or other encumbrances or charges for the protection and preservation of the homestead or community property; or (4) the providing of gifts for such purposes, and to such charities, relatives (including one of the spouses), friends, or other objects of bounty as would be likely beneficiaries of gifts from the spouses.

If the proceeding is brought for a court order declaring that one or both spouses have legal capacity for a proposed transaction, the petition must set forth, in addition to the information required by *Prob. Code § 3121* as discussed above,

an allegation of the legal capacity of such spouse or spouses for the proposed transaction [*Prob. Code § 3123*].

[6] Notice and Citation

At least 15 days before the hearing on the petition, the petitioner must cause a notice of the time and place of the hearing and a copy of the petition to be served on any nonpetitioning spouse who is not alleged to lack legal capacity for the proposed transaction [*Prob. Code § 3131(a)*]. For additional notice requirements, see *§ 289.46[6]*. For a form for giving this notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

Generally, on the filing of the petition, the clerk must issue a citation to each nonpetitioning spouse alleged to lack legal capacity for the proposed transaction, setting forth the time and place of hearing. The citation and a copy of the petition must be served on the spouse at least 15 days before the hearing [*Prob. Code § 3130(a)*]. For a form for this citation and additional discussion of citation requirements, see *§ 289.49*.

[7] Appearance by Representative

If a petitioning spouse's legal capacity for the proposed transaction is to be determined in the proceeding, the court may permit the spouse to appear without a representative, appoint a guardian ad litem for the spouse, or take such other action as the circumstances warrant [Prob. Code § 3112(a)]. If a petitioning spouse lacks legal capacity for the proposed transaction, the court may require the spouse to be represented by his or her conservator, or may appoint a guardian ad litem for him or her [*Prob. Code § 3112(b)*; for discussion of guardians ad litem, *see* Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians*].

A conservator who is served a notice of the hearing and a copy of the petition must appear at the hearing and represent a spouse alleged to lack legal capacity for the proposed transaction. The Director of Mental Health or the Director of Developmental Services given notice pursuant to *Prob. Code § 1461* may also appear and represent such a spouse [*Prob. Code § 3140(a)*; for discussion of *Prob. Code § 1461*, *see* Ch. 284, *Guardianship and Conservatorship: Notice*]. If a spouse alleged to lack legal capacity is not otherwise represented, the court may in its discretion appoint the public guardian, public administrator, or a guardian ad litem to represent the spouse's interests [*Prob. Code § 3140(c)*].

[8] Appointment of Legal Counsel

If a spouse alleged to lack legal capacity is unable to retain legal counsel, on his or her request, the court must appoint the public defender or private counsel under *Prob. Code § 1471* to represent the spouse, with payment of such counsel governed by *Prob. Code § 1472* [*Prob. Code § 3140(d)(1)*]. If the petition proposes a transfer of substantial assets to the petitioner from the other spouse and the court determines that the spouse has not competently retained independent counsel for the proceeding, the court, in its discretion, may appoint counsel for the other spouse if the court determines that appointment would be helpful to resolve the matter or necessary to protect the interests of the other spouse [*Prob. Code § 3140(d)(2)*]. Except for an appointed public defender or private counsel, the court may fix a reasonable fee, to be paid out of the proceeds of the transaction or otherwise as the court may direct, for all services rendered by privately engaged counsel, the public guardian, public administrator, or guardian ad litem, and by counsel for those persons [*Prob. Code § 3140(e)*].

[9] Presence of Spouse Alleged to Lack Legal Capacity at Hearing

If a spouse is alleged to lack legal capacity for the proposed transaction and has no conservator, the spouse must be produced at the hearing unless unable to attend [*Prob. Code § 3141(a)*]. If the spouse is unable to attend because of medical inability, the inability must be established by the affidavit or certificate of a licensed medical practitioner or, if the spouse is an adherent of a religion whose tenets and practices call for reliance on prayer alone for healing and is under treatment by an accredited practitioner of the religion, by the affidavit of the practitioner [*Prob. Code § 3141(b)*]. Emotional or psychological instability is not good cause for absence of the spouse from the hearing unless, by reason of

that instability, attendance is likely to cause serious and immediate physiological damage [*Prob. Code § 3141(c)*].

[10] Informing Spouse Alleged to Lack Legal Capacity of Legal Rights

If a spouse is alleged to lack legal capacity for the proposed transaction and has no conservator, the court, before commencement of the hearing on the merits, must inform the spouse of all the following [*Prob. Code § 3142(a)*]:

- A determination of lack of legal capacity for the proposed transaction may result in approval of the proposed transaction.

- The spouse has the right to legal counsel of the spouse's own choosing, including the right to have legal counsel appointed by the court if unable to retain counsel.

However, the information need not be provided if the spouse is absent from the hearing and is not required to attend and any showing in inability to attend required by *Prob. Code § 3141* has been made [*Prob. Code § 3142(b)*].

[11] Order Determining Legal Capacity

If the petition requests an order declaring a spouse to have legal capacity for the proposed transaction and the court determines that the spouse has such capacity, the court must so order [*Prob. Code § 3143(a)*]. If the petition alleges that a spouse having no conservator lacks legal capacity for the proposed transaction and the court determines that the spouse has such capacity, the court must make an order so declaring [*Prob. Code § 3143(b)*]. A determination that a spouse lacks legal capacity for the proposed transaction affects the spouse's legal capacity for that transaction alone and has no effect on his or her legal capacity for any other purposes [*Prob. Code § 3145*].

[12] Order Authorizing Transaction

The court may authorize a proposed transaction if it determines all of the following [*Prob. Code § 3144(a)*]:

- The property that is the subject of the proposed transaction is community property of the spouses and, if the proposed transaction involves property in which a spouse also has a separate property interest, that there is good cause to include that separate property interest in the transaction.

- One of the spouses has a conservator or otherwise lacks legal capacity for the proposed transaction.

- The other spouse either has legal capacity for the proposed transaction or has a conservator.

- Each of the spouses either joins in or consents to the proposed transaction, has a conservator, or is substantially unable to manage his or her own financial resources or resist fraud or undue influence. Substantial inability may not be proved by isolated incidents of negligence or improvidence.

- The proposed transaction is one that should be authorized under *Prob. Code §§ 3100-3154*.

If the court determines that the transaction should be authorized, it must so order and may authorize the petitioner to do and perform all acts and to execute and deliver all papers, documents, and instruments necessary to effectuate the order [*Prob. Code § 3144(c)*]. The court may also prescribe such terms and conditions as it determines in its discretion to be appropriate, including but not limited to requiring joinder or consent of another person [*Prob. Code § 3144(d)*].

If the proposed transaction is to provide gifts to likely beneficiaries of the spouses under *Prob. Code § 3102(f)* [*see* [3], *above*], the court may authorize the transaction only if it satisfies the requirements of the substituted judgment doctrine

contained in *Prob. Code §§ 2580-2586* [*Prob. Code § 3144(b)*; *see* Ch. 290B, *Guardianship and Conservatorship: Substituted Judgment*].

[13] Bond

Unless the court for good cause dispenses with the bond, the court must require the petitioner to give a bond, in the amount fixed by the court, conditioned on the duty of the petitioner to account for and apply the proceeds of the transaction to be received by the petitioner only as the court may by order direct [*Prob. Code § 3150(a)*]. Unless the court for good cause fixes the amount of the bond in a lesser amount, if given by an authorized surety company, the bond must be in an amount not less than the value of the personal property (including cash and any notes) to be received by the petitioner, as determined by the court [*Prob. Code § 3150(b)*]. If the sureties on the bond are individual sureties, the bond must be approved by the court and must be for twice the amount required for a bond given by an authorized surety company [*Prob. Code § 3150(c)*]. The general bond requirements for guardians or conservators in *Prob. Code §§ 2328*, *2329*, *2331*, *2334*, *2335*, and 2336 are applicable to this bond [*Prob. Code § 3150(d)*; *see* Ch. 283, *Guardianship and Conservatorship: Bonds*].

[14] Execution, Recordation, and Receipt of Documents

The petitioner, on receipt of the consideration for them, must execute, acknowledge, and deliver any necessary instruments or documents as directed by the court, stating in them that they are made by authority of the order [*Prob. Code § 3151(a)*]. The petitioner must cause a certified copy of the order to be recorded in the office of the recorder of each county in which any real property affected by the order or any real property on which there is a lien or encumbrance affected by the order is situated [*Prob. Code § 3151(b)*]. If a sale is made on a credit pursuant to the order, the petitioner must take the note of the person to whom the sale is made for the amount of the unpaid balance of the purchase money, with such security for the payment of it as the court approves by order. The note must be made payable to the petitioner or, if the petition was made by a conservator, to the petitioner as conservator [*Prob. Code § 3151(c)*].

[15] Effect of Documents Made Pursuant to Order

A sale, conveyance, assignment, transfer, exchange, encumbrance, security interest, mortgage, deed of trust, lease, dedication, release, or relinquishment, and any instrument or document, made pursuant to the court's order, is as valid and effectual as if the property affected by it were the sole and absolute property of the person making it [*Prob. Code § 3152*]. Notes, encumbrances, security interests, mortgages, leases, or deeds of trust, executed by a petitioning conservator, create no personal liability against the conservator so executing, unless the conservator is one of the spouses and then only to the extent that personal liability would have resulted had both spouses had legal capacity for the transaction and joined in the execution [*Prob. Code § 3153*].

[16] Subsequent Proceedings

If any party to the transaction, other than the petitioner, does not consummate an authorized transaction, the court, on application of the petitioner and after such notice to the parties to the transaction as the court directs, may vacate the order authorizing the transaction [*Prob. Code § 3154(a)*].

If the order authorized the sale or encumbrance of property, the petitioner may, by supplemental petition, apply to the court for an order authorizing any other sale or encumbrance of the property to the advantage, benefit, or best interests of the spouses or their estates. The supplemental petition and a notice of the time and place of the hearing must be served and mailed as provided in *Prob. Code §§ 3130* and *3131*. However, no further citation may be issued. Additionally, a copy of the supplemental petition and a notice of the time and place of the hearing must be served on any person who has appeared as representative of a nonpetitioning spouse, on counsel of record for a nonpetitioning spouse, or as the court may otherwise direct [*Prob. Code § 3154(b)*]. If it appears to the court that the other sale or

encumbrance is to the advantage, benefit, or best interests of the spouses or their estates and that the request in the supplemental petition that the transaction be authorized should be granted, the court may so order and may authorize the petitioner to perform acts and to execute and deliver all papers, documents, and instruments necessary to effectuate the order [*Prob. Code § 3154(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesMental CapacityEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Duties & RightsProperty RightsCharacterizationSeparate PropertyFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawOwnership & TransferGeneral Overview

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Chapter 289 GUARDIANSHIP AND CONSERVATORSHIP: MANAGEMENT OF COMMUNITY PROPERTY
PART II. LEGAL BACKGROUND

24-289 California Forms of Pleading and Practice--Annotated § 289.17

§ 289.17 Enforcement of Support of Conservatee Spouse

[1] Petition for Support from Community Property

If one spouse has a conservator and the other spouse has the management or control of the community property, the court in which the conservatorship proceeding is pending may, on petition, make an order requiring the spouse who has the management or control of the community property to apply the income or principal, or both, of the community property to the support and maintenance of the conservatee, including the care, treatment, and support of a conservatee who is a patient in a state hospital under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services [*Prob. Code §§ 3080, 3088(a)*; *see § 289.51* (petition for enforcement of support of conservatee spouse)]. The petition may be filed by the conservator, the conservatee, a relative or friend of the conservatee, or any interested person [*Prob. Code § 3080*].

The procedure for obtaining such an order is set forth in *Prob. Code §§ 3080-3092*. These provisions for the enforcement of support of a conservatee spouse do not affect or limit the right of the conservator or any interested person to institute an action against any person to enforce the duty otherwise imposed by law to support a conservatee spouse. The provisions of *Prob. Code §§ 3080-3092* are permissive and in addition to any other procedure otherwise available to enforce the obligation of support [*Prob. Code § 3092*].

[2] Notice of Hearing

Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob. Code §§ 1460-1469* [*Prob. Code § 3081(a)*; for a further discussion of and forms relating to notice, see Ch. 284, *Guardianship and Conservatorship: Notice*].

If the spouse who has the management or control of the community property is not the conservator, the petitioner must also cause notice of the hearing and a copy of the petition to be served on the spouse in accordance with *Code Civ. Proc. §§ 410.10-418.10* [*Prob. Code § 3081(b)*; for further discussion of service, see Ch. 518, *Service of Summons and Papers*].

[3] Obligations of Spouse on Filing of Petition

[a] Citation and Examination of Spouse

On the filing of the petition, the court may cite the spouse who has the management or control of the community property to appear before the court, and the court and the petitioner may examine the spouse under oath concerning the community property and other matters relevant to the petition [*Prob. Code § 3082*; *see § 289.54*]. On examination, the court may make an order requiring the person cited to disclose his or her knowledge of the community property and other matters relevant to the petition. If the person cited refuses to appear and submit to an examination, or appears and refuses to comply with an order requiring disclosure, the court may commit the person to the county jail in accordance with Prob. Code § 614 [*Prob. Code § 3082*].

[b] Declarations to Be Filed

When a petition is filed for the enforcement of support of a conservatee spouse, the spouse having the management or control of the community property must serve and file a current income and expense declaration and a current property declaration on the forms prescribed by the Judicial Council for use in family law proceedings [*Prob. Code § 3084*]. For illustrative filled-in reproductions of these forms, see Ch. 221, *Dissolution of Marriage: Procedure* . Copies suitable for reproduction may be found in California Forms Of Pleading And Practice, Judicial Council Forms, Part F.

[4] Permitted Orders Pending Determination

[a] Order for Payment of Support Pending Determination

The court, after notice and hearing, may order the spouse who has the management or control of the community property to pay from the community property the amount the court determines is necessary to the support and maintenance of the conservatee spouse pending the determination of the petition [*Prob. Code § 3083*; *see § 289.53* for an order for payment of support; for a discussion of and forms relating to notice, see Ch. 284, *Guardianship and Conservatorship: Notice*]. An order for the payment of support pending the determination does not prejudice the rights of the spouses or other interested parties with respect to any subsequent order in the proceeding and may be modified or revoked at any time except as to any amount that may have accrued prior to the date of filing of the petition to modify or revoke the order [*Prob. Code § 3083*].

[b] Ex Parte Orders Enjoining and Reporting Use of Property

During the pendency of a proceeding for the enforcement of support of a conservatee spouse, the court, on application of the petitioner, may issue ex parte orders for the following purposes [*Prob. Code § 3085*]:

- To restrain the spouse who has the management or control of the community property from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, except in the usual course of business or for the necessities of life; or

- To require the spouse who has the management or control of the community property to notify the petitioner of any proposed extraordinary expenditures and to account to the court for all such extraordinary expenditures.

For a form for a petition requesting the above relief, and a form for an order granting that relief, see *§§ 289.51* and *289.52*, respectively.

[c] Continuances

Any person interested in the proceeding for the enforcement of support of a conservatee spouse may request time for

filing a response to the petition, for discovery proceedings, or for other preparation for the hearing, and the court is required to grant a continuance for a reasonable time for any such purpose [*Prob. Code § 3086*].

[5] Determination of Amount and Findings

In determining the amount to be ordered for support and maintenance, the court must consider the following circumstances of the spouses [*Prob. Code § 3088(b)*]:

- The earning capacity and needs of each spouse.
- The obligations and assets, including the separate property, of each spouse.
- The duration of the marriage.
- The age and health of the spouses.
- The standard of living of the spouses.
- Any other relevant factors that it considers just and equitable.

At the request of any interested person, the court must make appropriate findings on the circumstances [*Prob. Code § 3088(c)*].

The court may hear and determine whether property is community property or the separate property of either spouse if the issue is raised in the proceeding [*Prob. Code § 3087*].

[6] Permitted Orders After Determination

[a] Order for Application of Community Property to Support

After determining the amount to be ordered for support and maintenance as provided by *Prob. Code § 3088(b)*, the court may order the spouse who has the management or control of the community property to apply the income or principal, or both, of the community property to the support and maintenance of the conservatee [*Prob. Code § 3088(a)*; *see § 289.55* for order for enforcement of support of conservatee spouse].

[b] Order for Periodic Payments

The court may order the spouse who has the management or control of the community property to make a specified monthly or other periodic payment to the conservatee's conservator of the person or to any other person designated in the order. The court may also order the spouse required to make the periodic payments to give reasonable security for them [*Prob. Code § 3088(d)*; *see § 289.55* for order for enforcement of support of conservatee spouse].

[c] Assignment of Wages

The court may order the spouse required to make periodic payments to assign, to the person designated in the order to receive the payments, the portion of the earnings of the spouse, due or to be due in the future, that will be sufficient to pay the amount ordered by the court for the support and maintenance of the conservatee. The order operates as an assignment and is binding on any existing or future employer on whom a copy of the order is served. The order must be in the form for an order assigning salary or wages prescribed by the Judicial Council for use in family law proceedings. The employer may deduct the sum of $1.50 for each payment made pursuant to the order. An assignment made pursuant to court order has priority over any execution or other assignment unless otherwise ordered by the court or unless the

other assignment is made pursuant to *Fam. Code § 5200 et seq.* An employer may not use any such assignment as grounds for dismissal of the employee-spouse [*Prob. Code § 3088(e)(1)*]. The term "employer" includes the United States government and any public entity defined in *Gov. Code § 811.2*. These provisions apply to the money and benefits described in *Code Civ. Proc. §§ 704.110* and *704.113* to the extent they are subject to a wage assignment for support under *Code Civ. Proc. § 703.010 et seq.* [*Prob. Code § 3088(e)(2)*].

For a further discussion and a form for assignment of wages, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* .

[7] Modification or Revocation of Order

The court retains jurisdiction to modify or to vacate an order for the enforcement of support of a conservatee spouse when justice so requires; it does not retain jurisdiction as to any amount that may have accrued prior to the date of the filing of the petition to modify or revoke the order. At the request of any interested person, the order of modification or revocation must include findings of fact and may be made retroactive to the date of the filing of the petition to revoke or modify, or to any subsequent date. At least 15 days before the hearing on the petition to modify or vacate the order, the petitioner must mail a notice of the time and place of the hearing, accompanied by a copy of the petition, to the spouse who has the management or control of the community property. Notice must also be given for the period, in the manner, and to the persons specified in *Prob. Code §§ 1460-1469* [*Prob. Code § 3088(f)*; for further discussion, *see* Ch. 284, *Guardianship and Conservatorship: Notice*].

In a proceeding for dissolution of marriage pursuant to *Civ. Code § 4500 et seq.*, the court has jurisdiction to modify or vacate an order made under *Prob. Code § 3088* for the enforcement of support of a conservatee spouse to the same extent as it has jurisdiction to modify or vacate an order in a dissolution proceeding [*Prob. Code § 3088(g)*]. For further discussion, see Ch. 221, *Dissolution of Marriage: Procedure* , and Ch. 225, *Dissolution of Marriage: Spousal Support* .

[8] Order for Division of Community Property

If the spouse who has the management or control of the community property refuses to comply with any order made under *Prob. Code § 3080 et seq.* or an order made in a separate action to provide support for the conservatee spouse, the court, in its discretion, on request of the petitioner or other interested person, may divide the community property and the quasi-community property of the spouses, as it exists at the time of division, equally, in the same manner as when a marriage is dissolved. If the property is so divided, the property awarded to each spouse is the separate property of that spouse and the court is required to order that the property awarded to the conservatee spouse be transferred or paid over to the conservator of the estate of that spouse to be included in and managed, controlled, and disposed of as a part of the conservatorship estate. The fact that property has been divided pursuant to *Prob. Code § 3089* has no effect on the nature of property thereafter acquired by the spouses, and the determination of whether thereafter-acquired property is community or separate property must be made without regard to the fact that the property has been divided [*Prob. Code § 3089*; *see §§ 289.56* (application for division of community and quasi-community property), 289.57 (order for division of community and quasi-community property)].

[9] Enforcement of Orders

Any order made under *Prob. Code § 3080 et seq.* for the enforcement of support of a conservatee spouse may be enforced by the court by execution, the appointment of a receiver, contempt, or by such other orders as the court in its discretion may deem necessary [*Prob. Code § 3090*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawConservators &

GuardiansConservatorsGeneral OverviewFamily LawMarital Duties & RightsDuty of SupportFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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[Reserved]

§§ 289.18[Reserved]

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24-289 California Forms of Pleading and Practice--Annotated § 289.30

§ 289.30 State Statutes

[1] Definitions

Effect of definitions. *Prob. Code § 3000*

Community property. *Prob. Code § 3002*

Conservator. *Prob. Code § 3004*

Conservatorship estate. *Prob. Code § 3006*

Conservatorship proceeding. *Prob. Code § 3008*

[2] Enforcement of Support of Conservatee Spouse

Petition for payment of support from community property. *Prob. Code § 3080*

Notice. *Prob. Code § 3081*

Citation of spouse having management or control of community property. *Prob. Code § 3082*

Payment of support pending determination. *Prob. Code § 3083*

Declarations to be filed. *Prob. Code § 3084*

Ex parte orders concerning community property. *Prob. Code § 3085*

Continuances. *Prob. Code § 3086*

Determination of community property or separate property. *Prob. Code § 3087*

Order for payment of support from community property. *Prob. Code § 3088(a)*

Determination of amount. *Prob. Code § 3088(b)*

Findings. *Prob. Code § 3088(c)*

Periodic payments. *Prob. Code § 3088(d)*

Assignment of wages. *Prob. Code § 3088(e)*

Modification or revocation of orders. *Prob. Code § 3088(f),(g)*

Division of community property. *Prob. Code § 3089*

Enforcement of orders. *Prob. Code § 3090*

Other remedies not affected. *Prob. Code § 3092*

[3] Joinder or Consent Substitutes

Written consent of one spouse is required before other can make gift of, or dispose of for less than fair and reasonable value, community personal property, unless gift is mutually given by both spouses to third party or gift is given by one spouse to the other. *Civ. Code § 5125(b)*

Written consent of one spouse is required before other can sell, convey, or encumber property used as family dwelling, home furnishings, or clothing that is community personal property. *Civ. Code § 5125(c)*

Satisfaction of joinder or consent requirements when spouse lacks legal capacity. *Prob. Code §§ 3070, 3071*

Authorization for conservator to join in or consent to transaction. *Prob. Code § 3072*

Manner of joinder or consent. *Prob. Code § 3073*

Effect of good faith purchase of real property for value consideration. *Prob. Code § 3074*

[4] Legal Capacity of Spouse

Standard for determining spouse's legal capacity to deal with community property. *Prob. Code § 3012*

[5] Management and Disposition of Community or Separate Property

Effect of spouse's lack of legal capacity on management of community property. *Prob. Code § 3051*

Court authority to prevent or revoke inclusion of community property in conservatorship estate. *Prob. Code § 3054*

Termination of spouse's consent to include community property in conservatorship estate. *Prob. Code § 3055*

Conservator's powers and duties over community property included in conservatorship estate. *Prob. Code § 3056*

Action to enforce spouse's duty of good faith in management of community property. *Prob. Code § 3057*; *but see Civ. Code § 5125(e)* (on which *Prob. Code § 3057* is based and which articulates a fiduciary, rather than a good faith, duty)

[6] Proposed Transactions Involving Community Property

[a] In General

"Transaction" defined. *Prob. Code § 3100*

Proceeding to propose transaction when one spouse lacks legal capacity or has conservator. *Prob. Code § 3101*

Determination of property status. *Prob. Code § 3101(d)*

Some transactions which may be proposed. *Prob. Code § 3102*

Proposed transaction is available without necessity of appointing conservator for other spouse. *Prob. Code § 3113*

[b] Citation and Notice

Notice when ward or conservatee is or was a state hospital patient. *Prob. Code § 1461(b)(2)*

Notice to Veterans Administration. *Prob. Code § 1461.5*

Issuance and service of citation. *Prob. Code § 3130*

Service of petition and notice of hearing. *Prob. Code § 3131*

[c] Consummation of Transaction

Procedure is permissive and cumulative for subject transaction. *Prob. Code § 3101(e)*

Execution and delivery of documents. *Prob. Code § 3151*

Effect of transaction and instrument or document made pursuant to court order. *Prob. Code § 3152*

Personal liability of conservator. *Prob. Code § 3153*

Vacating order authorizing transaction. *Prob. Code § 3154(a)*

Supplemental petition authorizing other transaction. *Prob. Code § 3154(b)*

[d] Hearing

Appearance of petitioning spouse when determining his or her legal capacity. *Prob. Code § 3112*

Representation of spouse alleged to lack legal capacity. *Prob. Code § 3140*

Attendance of spouse alleged to lack legal capacity. *Prob. Code § 3141*

Information required to be given spouse alleged to lack legal capacity. *Prob. Code § 3142*

[e] Order

Appeal of order authorizing or refusing to authorize proposed transaction involving community property. *Prob. Code § 1301(g)*

Required court findings when determining legal capacity of spouse. *Prob. Code § 3143*

Required court findings and terms of order when authorizing proposed transaction. *Prob. Code § 3144*

Determination of lack of legal capacity affects only proposed transaction. *Prob. Code § 3145*

Order to require bond. *Prob. Code § 3150*

[f] Petition

Proposal of several transactions, inconsistent allegations, and request for alternative relief is permitted in petition. *Prob. Code § 3120*

General contents of petition. *Prob. Code § 3121*

Additional content requirements in petition to authorize proposed transaction. *Prob. Code § 3122*

Additional content requirements in petition to declare legal capacity for transaction. *Prob. Code § 3123*

[7] Status of Property or Proceeds

Proceeds from community property are community property. *Prob. Code § 3020*

Court authority to determine validity of status of property as community property in conservatorship proceeding. *Prob. Code § 3023*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewFamily LawMarital Duties & RightsDuty of SupportFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawEstatesPresent EstatesMarital EstatesSeparate PropertyReal Property LawOwnership & TransferGeneral Overview

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24-289 California Forms of Pleading and Practice--Annotated § 289.31

§ 289.31 Decisions

Proceeds of sale may not be used to repay competent spouse for providing support for incompetent spouse. *Estate of Risse (1957) 156 Cal. App. 2d 412, 419-422, 319 P.2d 789*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewFamily LawMarital Duties & RightsDuty of SupportFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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§ 289.32 Text References

California Conservatorships and Guardianships, ch. 3 (Cal. C.E.B. 1990)

Witkin, Summary of California Law, vol. 11, *Community Property*, §§ 130-140 (9th ed. 1988)

Legal Topics:

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

§§ 289.33[Reserved]

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24-289 California Forms of Pleading and Practice--Annotated § 289.40

§ 289.40 Petition for Authority to Include Community Property in Estate of One Spouse Pursuant to Agreement [Prob. Code § 3051(e)]

[1] FORM Petition for Authority to Include Community Property in Estate of One Spouse Pursuant to Agreement

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship *or* Limited Conservatorship] of the _____ [Person *or* Estate *or* Person and Estate] of _____ [*name*], _____ [Ward *or* Conservatee].	))))))	NO. _____ [Hearing set for _____ [*date*], at _____ [*time*] in Dept. No. _____] PETITION FOR AUTHORITY TO INCLUDE COMMUNITY PROPERTY IN ESTATE

Petitioner _____[*name*] respectfully represents:

1. Petitioner is the duly appointed, qualified, and acting _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee].

2. The _____ [ward *or* conservatee] is the _____ [husband *or* wife] of _____[*name*], who is also under a _____ [guardianship *or* conservatorship]. His/Her duly appointed, qualified, and acting _____ [guardian *or* conservator] of the estate is _____[*name*]. His/Her _____ [guardianship *or* conservatorship] proceeding is pending in the Superior Court of _____ County, California, case number _____.

3. The spouses are owners of _____ [real *or* personal] property [*if real property, add:* located in _____ County, California], described as follows: _____[*give legal description, if possible*].

4. The property is owned by the spouses as community property.

5. Petitioner and _____[*name of guardian or conservator of ward's or conservatee's spouse*] propose to enter into a written agreement by which this property will be included in and managed, controlled, and disposed of as a part of the _____ [guardianship *or* conservatorship] estate of _____[*name of spouse indicated in agreement*]. A copy of the proposed agreement is attached as Exhibit A and incorporated by reference.

6. Petitioner believes that the inclusion of the property into one estate according to the proposed agreement should be authorized because _____ [*specify reasons, e.g.*, administration fees will be reduced, the property will be better managed since the _____ (guardian *or* conservator) of the estate into which the property is proposed to be included has more experience in managing property of this kind than the representative of the other estate, and the property will thus produce more net income for both spouses].

WHEREFORE, petitioner prays for an order authorizing him/her to enter into the agreement described above with _____[*name of guardian or conservator of ward's or conservatee's spouse*], and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____[*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is for use by a guardian or conservator of a spouse, if both spouses are under a guardianship or conservatorship, in obtaining authority to enter into a written agreement that all or specific parts of the community property be included in and managed, controlled, or disposed of as a part of the guardianship or conservatorship estate of one spouse. Even if the agreement is authorized, the management, control, and disposition of the property remains subject to the requirements of joinder or consent for certain transactions under *Prob. Code § 3071* [*Prob. Code § 3051(e)*; *see Prob. Code § 3004* ("conservator" defined)].

[3] Contents of Petition

Although not expressly required by statute, a petition under *Prob. Code § 3051(e)* should state the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 3051(e)*].

- The name and address of the guardian or conservator of the estate of the ward's or conservatee's spouse and the location and case number of that guardianship or conservatorship proceeding (Paragraph 2).

- A property description and the manner of holding title (Paragraphs 3-4) [*see Prob. Code § 3002* ("community property" defined)].

- A description and incorporation by reference of a copy of the proposed written agreement (Paragraph 5) [*see Prob. Code § 3051(e)*].

- Any reasons why the petitioner believes the property should be included in one estate (Paragraph 6) [*see Prob. Code § 3051(e)*].

[4] Jurisdiction and Venue

The petition may be filed in the court in which any of the guardianship or conservatorship proceedings are pending.

[5] Verification

Except as otherwise specifically provided, all petitions filed pursuant to the guardianship and conservatorship law must be verified [*Prob. Code § 1021*; *see also Prob. Code § 1430* ("petition" includes application or request in nature of petition)]. A verified petition must be received as evidence when offered in any uncontested probate proceedings [*Prob. Code § 1022*].

The form of verification shown here complies with the requirements of *Code Civ. Proc. §§ 446* and *2015.5*.

[6] Notice

Although there are no express notice requirements contained in *Prob. Code § 3051(e)*, it is suggested that notice of the hearing be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* as is required for a petition for authorization and instructions in the management of the estate [*see Prob. Code §§ 1460, 2403*]. These sections generally require that notice be given by mail to specified persons at least 15 days before the day of the hearing [*Prob. Code § 1460(a),(b)*]. For further discussion and a form of notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[7] Cross References

For discussion of conservator's duty regarding community property included in estate, see *§ 289.14*

For order granting authority to include community property in estate of one spouse pursuant to agreement, see *§ 289.41*

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24-289 California Forms of Pleading and Practice--Annotated § 289.41

§ 289.41 Order Granting Authority to Include Community Property in Estate of One Spouse Pursuant to Agreement [Prob. Code § 3051(e)]

[1] FORM Order Granting Authority to Include Community Property in Estate of One Spouse Pursuant to Agreement

[*Caption. See § 289.40.*]

The petition of _____[*name*], as _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee], for an order granting authority to include community property owned by both spouses in the _____ [guardianship *or* conservatorship] estate of one of the spouses came on regularly for hearing by the court on this date. Petitioner appeared by counsel _____[*name*]. [*Specify other appearances, if any.*]

The court finds from proof made to the satisfaction of the court as follows:

1. All notices of hearing have been _____ [given as required by law *or* waived].

2. _____[*name*], the spouse of the _____ [ward *or* conservatee] in the above-entitled proceeding, is subject to a _____ [guardianship *or* conservatorship]. _____[*name*] is the _____ [guardian *or* conservator] of the estate of _____[*name of spouse*].

3. The spouses own the _____ [real *or* personal] property described as follows: _____[*give legal description, if possible*]. They own the property as community property.

4. The petition for authority to enter into the proposed written agreement, a copy of which is attached hereto, by which the property described above will be included in and managed, controlled, and disposed of as a part of the _____ [guardianship *or* conservatorship] estate of _____[*name of spouse indicated in agreement*] should be granted.

IT IS ORDERED that _____[*name*], as _____ [guardian *or* conservator] of the estate of _____[*name of ward or conservatee in the above-entitled proceeding*], and _____[*name*], as _____ [guardian *or* conservator] of the estate of _____[*name of ward's or conservatee's spouse*], are authorized to enter into the written agreement attached hereto and made a part hereof by which the property described above will be included in and managed, controlled, and disposed of as a part of the _____ [guardianship *or* conservatorship] estate of _____[*name*].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use with the petition in § 289.40. The order should be entitled ORDER GRANTING AUTHORITY TO INCLUDE COMMUNITY PROPERTY IN ESTATE. In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Cross References

For discussion of conservator's duty regarding community property included in estate, see *§ 289.14*

For petition for authority to include community property in estate of one spouse pursuant to agreement, see *§ 289.41*

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24-289 California Forms of Pleading and Practice--Annotated § 289.42

§ 289.42 Petition to Terminate Inclusion of Community Property in Spouse's Estate [Prob. Code § 3054(b), (c)]

[1] FORM Petition to Terminate Inclusion of Community Property in Spouse's Estate

[*Caption. See § 289.40.*]

Petitioner _____[*name*] respectfully represents:

[*EITHER*]

1. Petitioner is the spouse of _____[*name*], _____ [ward *or* conservatee], and has the legal capacity to manage and control their community property. _____[*name*] is the _____ [guardian *or* conservator] of the _____ [ward's *or* conservatee's] estate.

[*OR*]

1. Petitioner is the duly appointed, qualified, and acting _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee]. The spouse of the _____ [ward *or* conservatee] is _____[*name*]. He/She _____ [has legal capacity *or* is subject to a _____ (guardianship *or* conservatorship); _____ (*name*) is the _____ (guardian *or* conservator) of his/her estate].

[*CONTINUE*]

2. [*Allegation of property ownership and description. See § 289.40[1], Paragraph 3.*]

3. [*Allegation of spouses' ownership interests. See § 289.40[1], Paragraph 4.*]

[*EITHER*]

4. On _____[*date*], _____[*name of spouse with legal capacity*] consented by a writing [filed in the above-entitled proceeding] that _____ [all *or* part] of the property described above be included in and managed, controlled, and disposed of as a part of the _____ [guardianship *or* conservatorship] estate of _____[*name*].

[*OR*]

4. _____[*name*], as _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee], petitioned for and obtained a court order authorizing the estate representatives of both spouses to execute a written agreement that _____ [all *or* part] of the property described above be included in and managed, controlled, and disposed of as a part of the _____ [guardianship *or* conservatorship] estate of _____[*name*]. A copy of the written agreement is attached as Exhibit A and incorporated by reference.

5. The continued inclusion of the property described above in the _____ [guardianship *or* conservatorship] estate is not in the best interests of the spouses or their estates because _____[*specify reasons*].

WHEREFORE, petitioner prays for an order:

1. [Permitting revocation by _____ (*name of spouse with legal capacity*) of his/her written consent for inclusion of the property described above in the estate];

2. Terminating the inclusion of the property described above in the estate; and

3. For such other and further orders as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[*Verification. See § 289.40[1].*]

[2] Use of Form

The form in [1], *above*, is for use by a spouse having legal capacity or by the conservator of either spouse in obtaining an order terminating the inclusion, or permitting revocation of the consent for inclusion, of community property in the guardianship or conservatorship estate of a spouse. The court may also terminate the inclusion on its own motion [*Prob.*

Code § 3054; *see Prob. Code § 3004* (conservator defined)].

[3] Contents of Petition

The petition should be entitled: PETITION TO TERMINATE INCLUSION OF COMMUNITY PROPERTY IN ESTATE.

A petition under *Prob. Code § 3054* should state the following to assist the court in its determination:

- The petitioner's status as a party entitled to bring the petition, and the names of all estate representatives (Paragraph 1) [*see Prob. Code § 3054*].

- A property description and the manner of holding title (Paragraphs 2-3) [*see Prob. Code § 3002* (community property defined)].

- The manner in which the property was included in the estate (Paragraph 4) [*see Prob. Code § 3051(c), (e)* (consent or authorization to include community property)].

- Why the inclusion of property is not in the best interests of the spouses or their estates (Paragraph 5) [*see Prob. Code § 3054*].

[4] Jurisdiction and Venue

The petition must be filed in the court in which the guardianship or conservatorship of the spouse's estate that includes or is proposed to include the property is pending [*Prob. Code § 3054*].

[5] Verification

The petition must be verified [*Prob. Code § 1021*; *see § 289.40[5]*].

[6] Notice

The petition is given on such notice to such persons as the court prescribes [*Prob. Code § 3054*]. For discussion and a form of order prescribing notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[7] Determination

The court may revoke written consent for inclusion or terminate the continued inclusion of property in the estate with or without terms or conditions [*Prob. Code § 3054(b), (c)*]. It may also make such other orders as may be appropriate for the orderly administration of the guardianship or conservatorship estate or to protect the interests of the spouses [*Prob. Code § 3054(d)*].

[8] Cross References

For discussion on terminating inclusion of community property in estate, see *§ 289.14[4]*

For petition and order for authority to include community property in spouse's estate pursuant to agreement, see *§§ 289.40, 289.41*

For order terminating inclusion of community property in spouse's estate, see *§ 289.43*

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Chapter 289 GUARDIANSHIP AND CONSERVATORSHIP: MANAGEMENT OF COMMUNITY PROPERTY
PART IV. FORMS

24-289 California Forms of Pleading and Practice--Annotated § 289.43

§ 289.43 Order Terminating Inclusion of Community Property in Spouse's Estate [Prob. Code § 3054(b), (c)]

[1] FORM Order Terminating Inclusion of Community Property in Spouse's Estate

[*Caption. See § 289.40[1].*]

The petition of _____[*name*] [, as _____ (guardian *or* conservator) of _____ (*name*), _____ (ward *or* conservatee),] for an order [permitting him/her to revoke his/her written consent for inclusion of property in the estate and] terminating the inclusion of property in the _____ [guardianship *or* conservatorship] estate of _____[*name*], came on regularly for hearing by the court on this date. Petitioner appeared by counsel _____[*name*]. _____[*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court as follows:

1. All notices of hearing have been given as prescribed by the court.

[*EITHER*]

2. Petitioner is the spouse of _____[*name*], _____ [ward *or* conservatee], and has legal capacity. _____[*name*] is the _____ [guardian *or* conservator] of the _____ [ward's *or* conservatee's] estate.

[*OR*]

2. Petitioner is the _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee]. The _____ [ward's *or* conservatee's] spouse is

_____[*name*]. He/She _____ [has legal capacity *or* is also subject to a _____ (guardianship *or* conservatorship); _____ (*name*) is the _____ (guardian *or* conservator) of his/her estate].

[*CONTINUE*]

3. [*Finding of spouses' ownership interests and description of property. See § 289.41[1], Finding 3.*]

4. On _____[*date*], _____ [the estate representative of each spouse executed a written agreement *or* _____ (*name of spouse with legal capacity*) consented by a writing] that the property described above be included in and managed, controlled, and disposed of as a part of the _____ [guardianship *or* conservatorship] estate of _____[*name*].

5. The continued inclusion in the estate of the property described above is not in the best interests of the spouses or their estates.

IT IS ORDERED as follows:

1. The continued inclusion of the property described above in the _____ [guardianship *or* conservatorship] estate of _____[*name*], [ward *or* conservatee], is terminated. _____[*Specify any terms or conditions on termination*].

2. Petitioner is authorized to do and perform all acts and execute and deliver all papers, documents, and instruments necessary to effectuate the transaction described above.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use with the petition in § 289.42. It should be entitled: ORDER TERMINATING INCLUSION OF COMMUNITY PROPERTY IN SPOUSE'S ESTATE [*see § 289.40[1]*]. In most counties the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Cross References

For discussion on terminating inclusion of community property in estate, see *§ 289.14[4]*

For petition and order for authority to include community property in spouse's estate pursuant to agreement, see *§§ 289.40, 289.41*

For petition to terminate inclusion of community property in spouse's estate, see *§ 289.43*

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24-289 California Forms of Pleading and Practice--Annotated § 289.44

§ 289.44 Petition to Authorize and Instruct Guardian or Conservator to Join or Consent to Disposition of Community Property [Prob. Code §§ 2403, 3072]

[1] FORM Petition to Authorize and Instruct Guardian or Conservator to Join or Consent to Disposition of Community Property

[*Caption. See § 289.40[1].*]

Petitioner _____[*name*] respectfully represents:

1. [*Allegation of petitioner's status. See § 289.40[1], Paragraph 1.*]

[*EITHER*]

2. _____[*name*], the _____ [ward's *or* conservatee's] spouse, has legal capacity to manage their community property.

[*OR*]

2. _____[*name*], the _____ [ward's *or* conservatee's] spouse, is under a _____ [guardianship *or* conservatorship]. The duly appointed, qualified, and acting _____ [guardian *or* conservator] of his/her estate is _____[*name*]. His/Her _____ [guardianship *or* conservatorship] proceeding is pending in the Superior Court of _____ County, California, case number _____.

[*CONTINUE*]

3. The _____ [spouses *or* husband *or* wife] _____ [are *or* is] the owner(s) of certain _____ [real *or* personal] property [*if real property, add:* located in _____ County, California], described as follows: _____[*give legal description*].

4. The property is owned by the spouses as community property.

5. _____ [The guardian *or* The conservator *or name of spouse with legal capacity*] proposes to _____ [*specify transaction, e.g.,* lease] the property described above to _____[*name*] on the terms and conditions set forth in the _____ [*specify document, e.g.,* lease] attached as Exhibit A and incorporated by reference.

6. Petitioner believes that he/she should be authorized to _____ [join in *or* consent to] the proposed _____ [*specify transaction, e.g.,* lease] because _____ [*specify, e.g.,* the terms of the proposed lease are favorable to the estate, the proposed rental is comparable with that generally received for similar property, and the proceeds of the lease are needed for the support and maintenance of the spouses].

7. [*If income is generated by the transaction, add:* Petitioner has given a bond in the amount of $_____. On completion of the transaction described above, the value of the personal property and the probable annual income from all the property belonging to the (ward's *or* conservatee's) estate will be $_____. An additional bond is _____ (not required *or* required in the sum of $_____)].

8. A request for special notice has _____ [not been filed herein *or* been filed herein by _____ (*name*) and notice of the time and place of hearing on this petition will be given as required by law *or* been filed herein and waived by _____ (*name*)].

WHEREFORE, petitioner prays for an order authorizing him/her to _____ [join in *or* consent to] the proposed transaction described above, and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 289.40[1].*]

[2] Use of Form

The form in [1], *above*, is for use by the guardian or conservator in obtaining authority to join in or consent to a transaction involving community property [*Prob. Code §§ 2403, 3070, 3072(a)(1)*; *see Prob. Code §§ 3002* (community property defined), 3004 (conservator defined)]. The order is obtained from the court in which the guardianship or conservatorship of the estate is pending [*Prob. Code §§ 3008, 3072(a)(1)*].

If the petitioner seeks authority to join in or consent to a sale of the property, the petition must conform to the

requirements of *Prob. Code §§ 2540-2548* [*Prob. Code § 3072(a)(1)*; *see* discussion and form in Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment*]. For the transaction to accomplish one of the purposes within the substituted judgment doctrine, the petition must conform to the requirements of *Prob. Code §§ 2580-2586* [*Prob. Code § 3072(a)(1)*; *see* discussion and form in Ch. 290B, *Guardianship and Conservatorship: Substituted Judgment*]. Authority to join in or consent to a proposed transaction involving such property may also be obtained through a proceeding pursuant to *Prob. Code §§ 3100 et seq.* [*see § 289.16*].

A conservator may consent without court authorization to a sale, conveyance, or encumbrance of property used as the family dwelling or the home furnishings or clothing which is community personal property [*see Civ. Code § 5125(c)*] if the property could be sold or transferred under *Prob. Code § 2545* without authorization if it were part of the estate [*Prob. Code § 3072(b)*; *see § 289.15[2]*]. A good-faith purchase or encumbrance of real property for a valuable consideration is not affected by the fact that a spouse has a conservator unless a notice of the establishment of the conservatorship has been recorded prior to the transaction in the county in which the property is located [*Prob. Code § 3074*].

[3] Contents of Petition

The petition should be entitled: PETITION FOR AUTHORITY TO JOIN IN DISPOSITION OF COMMUNITY PROPERTY.

Although not expressly required by statute, a petition under *Prob. Code §§ 2403* and *3072(a)(1)* should state the following to assist the court in its determination:

- The petitioner's status as a party entitled to bring the petition, and the names of the spouses and representatives (Paragraphs 1-2) [*see Prob. Code §§ 2403, 3072(a)*].

- A legal description of the property and manner of ownership (Paragraph 3-4) [*see Prob. Code § 3002*].

- A description of the proposed transaction and an attachment of any documents setting forth its terms (Paragraph 5) [*see Civ. Code §§ 5125, 5127*; *Prob. Code § 3071*; *see also* [4], *below*].

- The reasons why the proposed transaction should be authorized (Paragraph 6) [*see Prob. Code § 2403* (petition for instructions)].

- If income is generated by the transaction, whether or not an additional bond is required (Paragraph 7) [*see Prob. Code §§ 2328, 2330*].

- Whether or not a request for special notice has been filed and, if so, that proper notice will be given or has been waived (Paragraph 8) [*see Prob. Code §§ 1260(a), 2700, 2701*].

[4] Transactions Requiring Joinder or Consent

Transactions that require the joinder or consent of both spouses if they had legal capacity include the following:

- A gift, or disposition for less than fair and reasonable value, of community personal property, unless the gift is mutually given by both spouses to a third party or the gift is given by one spouse to the other spouse [*Civ. Code § 5125(b)*].

- The sale, conveyance, or encumbrance of a family dwelling, home furnishings, or clothing that is

community personal property [*Civ. Code § 5125(c)*].

- The lease (if longer than one year), sale, encumbrance, or conveyance of community real property [*Civ. Code § 5127*].

For a general discussion of these sections, see Ch. 122, *Community Property* .

[5] Verification

The petition must be verified [*Prob. Code § 1021*; *see § 289.40[5]*].

[6] Notice

Notice of the hearing must be given for the period and in the manner provided in *Prob. Code §§ 1460-1469* [*Prob. Code § 2403(b)*]. These sections generally require that notice by mail be given to certain persons at least 15 days before the day of the hearing [*Prob. Code § 1460(a), (b)*]. Special notice must also be given to any person who has filed a request under *Prob. Code §§ 2700-2703* [*Prob. Code §§ 1460(d), 2700(a)(1), (4)*]. For further discussion and a form for giving notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[7] Manner of Joinder or Consent

The joinder or consent of a guardian or conservator, and of the spouse having legal capacity, must be in a manner that complies with the following procedures as set out in *Prob. Code § 3073*, or any other statute applicable to the transaction:

- Written consent to make a gift of (except for a gift mutually given by both spouses to a third party or a gift given by one spouse to the other), to effect a disposition for less than fair and reasonable value of, or to sell, convey, or encumber community personal property used as a family dwelling, or home furnishings or clothing that is community personal property [*Civ. Code § 5125(b), (c)*].

- Execution of any instrument by which community real property is leased for a period longer than one year, or is sold, conveyed, or encumbered [*Civ. Code § 5127*].

The joinder or consent of a guardian or conservator must also be executed by him or her and must refer to the court order, if one is required, authorizing the joinder or consent [*Prob. Code § 3073(b)*; *see Prob. Code § 2111*].

[8] Cross References

For discussion on joinder or consent requirements, see *§ 289.15*

For order authorizing and instruction guardian or conservator to join in or consent to disposition of community property, see *§ 289.45*

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24-289 California Forms of Pleading and Practice--Annotated § 289.45

§ 289.45 Order Authorizing and Instructing Guardian or Conservator to Join in or Consent to Disposition of Community Property [Prob. Code §§ 2403, 3072]

[1] FORM Order Authorizing and Instructing Guardian or Conservator to Join in or Consent to Disposition of Community Property

[*Caption. See § 289.40[1].*]

The petition of _____[*name*], as _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee], for an order authorizing and instructing petitioner to _____ [join in *or* consent to] the _____ [*specify transaction, e.g.,* lease] of the community property described below by _____[*name of spouse, spouse's guardian, or spouse's conservator*], came on regularly for hearing by the court on this date. Petitioner appeared by counsel _____[*name*]. _____[*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court as follows:

1. All notices of hearing have been _____ [given as required by law *or* waived] [including special notice to _____ (*name*)].

2. The spouses own, as community property, the _____ [real *or* personal] property described as follows: _____[*give legal description*].

3. Petitioner should be authorized to _____ [join in *or* consent to] the _____ [*specify transaction, e.g.,* lease] of the property described above on the terms and conditions in the _____ [*specify document, e.g.,* lease] attached hereto and made a part hereof.

[*EITHER*]

4. An additional bond is not required of _____[*name*] as _____ [guardian *or* conservator].

[*OR*]

4. _____[*name*], as _____ [guardian *or* conservator], should give an additional bond in the sum of $_____.

[*CONTINUE*]

5. [*State additional findings as appropriate, depending on transaction involved*].

IT IS ORDERED as follows:

1. Petitioner, as _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee], is authorized to _____ [join in *or* consent to] the _____ [*specify transaction, e.g.,* lease] of the property described above with _____[*name*], the _____ [ward's spouse *or* conservatee's spouse *or* guardian of the _____ (ward's *or* conservatee's) spouse *or* conservator of the _____ (ward's *or* conservatee's) spouse] on the terms and conditions set forth in the _____[*specify document, e.g.,* lease] attached hereto and made a part hereof.

2. [*Authorization to execute necessary documents. See § 289.43[1], Order 2.*]

3. [_____ (*Name*), as _____ (guardian *or* conservator), must give an additional bond in the amount of $_____].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use with the petition in § 289.44. The order should be entitled: ORDER AUTHORIZING JOINDER IN DISPOSITION OF COMMUNITY PROPERTY. In most counties the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

The findings shown are those suggested for an order obtained pursuant to a petition for instructions under *Prob. Code § 2403* authorizing the guardian or conservator to join in or consent to a transaction involving community property [*Prob. Code § 3072(a)(1)*]. Additional findings are required if the petition is filed pursuant to *Prob. Code §§ 2540-2548* for authority to join in or consent to a sale of that property, or pursuant to *Prob. Code §§ 2580-2586* for authority to accomplish one of the purposes within the substituted judgment doctrine [*Prob. Code § 3072(a)(1)*; *see* discussions and forms in Ch. 290B, *Guardianship and Conservatorship: Substituted Judgment*].

A certified copy of an order authorizing or directing a conveyance, lease, mortgage of, or deed of trust on real property must be recorded in the office of the county recorder in each county in which any portion of the real property is located

[*Prob. Code § 2111(c)*].

[3] Cross References

For discussion on joinder or consent requirements, see *§ 289.15*

For petition to authorize and instruct guardian or conservator to join or consent to disposition of community property, see *§ 289.44*

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§ 289.46 Petition to Authorize Proposed Transaction Involving Community Property When Spouse Has or Is Declared to Have Legal Capacity for Transaction [Prob. Code §§ 3100-3131, 3143(a), 3144]

[1] FORM Petition to Authorize Proposed Transaction Involving Community Property When Spouse Has or Is Declared to Have Legal Capacity for Transaction

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*EITHER*] _____ [Guardianship of the Estate *or* Conservatorship of the (Person and) Estate] of _____ [*name*], _____ [Ward *or* Conservatee]. [*OR*] In the Matter of the Petition of _____ [*name*], _____ [Guardian *or* Conservator] of the Estate of _____ [*name*], _____ [Ward *or* Conservatee].	))))	NO. _____ PETITION FOR AUTHORITY TO _____ [*specify transaction e.g.,* SELL] COMMUNITY PROPERTY [AND TO DECLARE LEGAL CAPACITY OF SPOUSE]

_____

Petitioner _____[*name*] respectfully represents:

1. Petitioner is the duly appointed, qualified, and acting _____ [guardian *or* conservator] of the estate

of _____[*name*], _____ [ward *or* conservatee]. Petitioner resides at _____[*address*], _____[*city*], California. The _____ [guardianship *or* conservatorship] proceeding is pending in the Superior Court of _____ County, California, case number _____.

2. The _____ [ward *or* conservatee] is _____ years of age and resides at _____[*address*], _____[*city*], California. _____ [*Add, if applicable:* He/She is _____ (a patient at *or* on leave of absence from) _____ (*name of state institution*) at _____ (*address*), _____ (*city*), California].

3. _____[*name*] is the _____ [ward's *or* conservatee's] spouse. He/She is _____ years of age and resides at _____[*address*], _____[*city*], California.

4. The names and addresses of the _____ [ward's *or* conservatee's] adult relatives within the second degree, so far as known to petitioner, are as follows:

NAME	RELATIONSHIP	ADDRESS
_____	_____	_____
_____	_____	_____
_____	_____	_____

5-6.-[*Description of property and allegation of status of property. See § 289.40[1], Paragraphs 3-4.*]

[*EITHER*]

7. The estimated value of the property described above is $_____.

[*OR*]

7. On _____[*date*], the property described above was appraised at the value of $_____.

[*CONTINUE*]

8. Petitioner proposes to _____ [*specify transaction, e.g.,* sell] the property described above to _____[*name*] on the terms and conditions set forth in the _____ [*specify, e.g.,* contract of sale] attached as Exhibit A and incorporated by reference

9. _____[*Name of ward's or conservatee's spouse*] has legal capacity to _____ [*describe proposed transaction, e.g.,* sell] the community property described above. He/She _____ [joins in *or* consents to] the proposed transaction.

[*EITHER*]

10. The proposed _____ [*specify transaction, e.g.,* sale] is for the advantage, benefit, and best interests of the spouses and their estates in that _____ [*state facts showing that authorization sought for this purpose, e.g.,* the present annual income of the property described above is approximately $_____; if sold, the property's proceeds could be reinvested in _____ (*specify, e.g.,* certificates of deposit) so as to generate a higher annual return of approximately $_____].

[*OR*]

10. The proposed _____ [*specify transaction, e.g.,* sale] is to provide for the care and support of the _____[*name(s) of spouse(s)*] [and of _____ (*name(s)*), _____ (his/her *or* their) legal dependant(s)] in that [*state facts showing that authorization sought for this purpose, e.g.,* the monthly income and cash assets are insufficient to provide for _____ (his/her *or* their) daily expenses, as is shown more fully in the copy of the account of the estate attached as Exhibit B and incorporated by reference].

[*OR*]

10. The proposed _____ [*specify transaction, e.g.,* encumbrance] is required to pay the following _____ [taxes *or* interest payment(s) *or other encumbrance(s) or charge(s)*]: _____[*describe each charge, including amount and date payment due*]. _____ [This *or* These] payment(s) _____ [is *or* are] for the protection and preservation of the community property in that _____ [*state facts showing that authorization sought for this purpose, e.g.,* the payment is now due and owing, but the estate lacks sufficient cash assets at this time to make the payment].

[*OR*]

10. The proposed _____ [*specify transaction, e.g.,* conveyance] is intended as a gift to _____[*name*], _____ [who *or* which] is a likely beneficiary of gifts from the spouses in that _____ [*specify facts showing recipient is likely beneficiary, e.g.,* he/she is the only grandchild of the spouses, he/she is in need of $_____ for college tuition expenses, and they have given him/her the sum of $_____ as a gift in the past to assist him/her with educational expenses].

[*CONTINUE*]

WHEREFORE, petitioner prays for an order:

1. [*If petition seeks declaration of spouse's legal capacity for the proposed transaction, add:* Declaring that _____ (*name of ward's or conservatee's spouse*) has legal capacity for the proposed transaction set forth above];

2. Authorizing the proposed transaction as set forth above;

3. Authorizing petitioner to do and perform all acts and to execute and deliver all papers, documents, and instruments necessary to consummate the transaction; and

4. Granting such other and further orders as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 289.40[1].*]

[2] Use of Form

The form in [1], *above*, is for use by a guardian or conservator in obtaining an order authorizing a proposed transaction involving community property when the ward's or conservatee's spouse has or is declared to have legal capacity and joins in or consents to the transaction [*Prob. Code §§ 3101(a), (b), (c), 3111(a)(2)*; *see Prob. Code § 3004* (conservator defined)]. Generally, either spouse, whether or not he or she has legal capacity, or the guardian or conservator of either spouse, may file or join in the petition [*Prob. Code § 3111(a)*]. However, when seeking to authorize a transaction, at least one of the petitioners must be a guardian, a conservator, or a spouse having legal capacity for the transaction [*Prob. Code §§ 3004, 3111(b)*].

In the proceeding, the court may determine whether or not the property that is the subject of the proposed transaction is community property or is the separate property of either spouse. This determination may not be made, however, if the court finds that the interest of justice requires that the determination be made in a civil action [*Prob. Code § 3101(d)*].

Local rules may affect the transaction being authorized. The attorney should determine whether or not any such rules are applicable to the transaction being contemplated.

[3] Contents of Petition

The first alternative case title shown in the caption should be used if the petition is filed in the court in which the guardianship or conservatorship proceeding is pending; otherwise, the second alternative should be used.

Transactions which may be proposed include those listed in *Prob. Code § 3102* [*see § 289.16[3]*]. Several proposed transactions may be included in one petition and proceeding [*Prob. Code § 3120(a)*]. The petition may also contain inconsistent allegations and may request relief in the alternative [*Prob. Code § 3120(b)*].

A petition to authorize a proposed transaction when a spouse has legal capacity must state the following:

- The petitioner's status as the guardian or conservator, his or her name and address, the county in which the guardianship or conservatorship proceeding is pending, and the court number of the proceeding (Paragraph 1) [*Prob. Code §§ 3111, 3121(b), (c), 3122(a), (c)*].

- The name, age, and residence of each spouse, and, if the ward or conservatee is a patient in or on leave of absence from a state institution under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services, the name and address of the institution (Paragraphs 2, 3) [*Prob. Code § 3121(a),(d)*].

- The names and addresses of the adult relatives within the second degree of the ward or conservatee, if known to the petitioner (Paragraph 4) [*Prob. Code § 3121(e)*].

- A sufficient description of the subject property and an allegation of its status (Paragraphs 5-6) [*Prob. Code § 3121(f), (g)*].

- The estimated value of the property (Paragraph 7) [*Prob. Code § 3121(h)*].

- The terms and conditions of and the names of all parties to the proposed transaction (Paragraph 8) [*Prob. Code § 3121(i), (j)*].

- An allegation that the ward's or conservatee's spouse has legal capacity for the proposed transaction, and that he or she joins in or consents to it (Paragraph 9) [*Prob. Code §§ 3122(b), (c), 3123*].

- Facts that may be relied on to show that the authorization sought is for one or more of the permitted purposes (Paragraph 10) [*Prob. Code § 3122(d)*].

See *§ 289.16[5]* for a general discussion of content requirements.

[4] Justification and Venue

The petition must be filed in the superior court [*Prob. Code § 3110(a)*].

The proper county for commencement of the proceeding is the county in which a conservatorship proceeding of one of the spouses is pending. If a conservatorship proceeding is not pending, then the proper county is either the county in which one or both of the spouses resides or any other county that may be in the best interests of the spouses [*Prob. Code § 3110(b)*].

[5] Verification

The petition must be verified [*Prob. Code § 1021*; *see § 289.40[5]*].

[6] Notice

At least 15 days before the hearing on the petition, the petitioner must cause a notice of the time and place of the hearing and a copy of the petition to be served on any nonpetitioning spouse not alleged to lack legal capacity for the proposed transaction [*Prob. Code § 3131(a)*]. Service on any such spouse must be made in the manner provided in *Code Civ. Proc. §§ 415.10* (personal service) or 415.30 (service by mail) or in such other manner as may be authorized by the court. If the person to be served is outside this state, service may also be made in the manner provided in *Code Civ. Proc. § 415.40* [*Prob. Code § 3131(b)*; for discussion of service, *see* Ch. 518, *Service of Summons and Papers*].

At least 15 days before the hearing on the petition, the petitioner must mail a notice of the time and place of the hearing to the adult relatives named in the petition at the addresses set forth in the petition [*Prob. Code § 3131(c)*].

For a form of notice for use in guardianship and conservatorship proceedings, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[7] Cross References

For discussion of proceeding to authorize or determine legal capacity for transaction, see *§ 289.16*

For order authorizing proposed transaction involving community property when spouse has or is declared to have legal capacity, see *§ 289.47*

For petition, citation, order authorizing proposed transaction involving community property when spouse is alleged to lack legal capacity, see *§§ 289.48 -289.50*

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§ 289.47 Order Authorizing Proposed Transaction Involving Community Property When Spouse Has or Is Declared to Have Legal Capacity for Transaction [Prob. Code §§ 3100-3131, 3143(a), 3144]

[1] FORM Order Authorizing Proposed Transaction Involving Community Property When Spouse Has or Is Declared to Have Legal Capacity for Transaction

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*EITHER*] _____ [Guardianship of the Estate *or* Conservatorship of the (Person and) Estate] of _____ [*name*], _____ [Ward *or* Conservatee]. [*OR*] In the Matter of the Petition of _____ [*name*], _____ [Guardian *or* Conservator] of the Estate of _____ [*name*], _____ [Ward *or* Conservatee].	))))	NO. _____ ORDER AUTHORIZING _____ [*specify transaction, e.g.,* SALE] OF COMMUNITY PROPERTY [AND DECLARING LEGAL CAPACITY OF SPOUSE]

_____

The petition of _____[*name*], as [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee], for an order authorizing petitioner to _____ [*specify transaction, e.g.,* sell] the community property described below, [and declaring the

legal capacity of the _____ (ward's *or* conservatee's) spouse for the transaction,] came on regularly for hearing by the court this date. Petitioner appeared by counsel _____[*name*]. _____[*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court as follows:

1. [*Finding that notices duly given. See § 289.45[1], Finding 1.*]

2. [*Finding of property's status and legal description. See § 289.45[1], Finding 2.*]

3. Petitioner is the duly appointed, qualified, and acting _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee].

4. _____[*Name of ward's or conservatee's spouse*] has legal capacity to _____ [*describe proposed transaction, e.g.,* sell the property described above].

5. _____[*Name of ward's or conservatee's spouse*] _____ [joins in *or* consents to] the proposed transaction.

6. [*If proposed transaction is to provide gifts for such purposes and to such objects of bounty as would likely be beneficiaries of gifts from the spouses, add:* The _____ (ward *or* conservatee) is _____ (not opposed to the proposed transaction *or* lacks legal capacity for the proposed transaction). Considering the age, physical condition, standards of living, and all other relevant circumstances of the _____ (ward *or* conservatee) and of his/her legal dependents, _____ (the proposed transaction will have no adverse effect on the estate *or* the estate remaining after the proposed transaction is taken will be adequate to provide for their needs and support)].

[*EITHER*]

[7. The proposed _____ (*describe transaction, e.g.,* sale) of the property described above is for the advantage, benefit, and best interests of the spouses and their estates.]

[*OR*]

[7. The proposed _____ (*describe transaction, e.g.,* sale) of the property described above is to provide for the care and support of _____ (*name of spouse(s)*) and of _____ (*name(s)*), _____ (his/her *or* their) legal dependent(s).]

[*OR*]

[7. The proposed _____ (*describe transaction, e.g.,* encumbrance) of the property described above is to provide for the payment of _____ (taxes *or* interest *or describe other encumbrances or charges*) to protect and preserve the property.]

[*OR*]

[7. The proposed _____ (*describe transaction, e.g.,* conveyance) is for the purpose of providing a gift to _____ (*name*) as a likely beneficiary of gifts from the spouses.]

[*CONTINUE*]

8. The proposed _____ [*describe transaction, e.g.,* sale] of the property described above should be authorized under *Probate Code Section 3100 et seq.* [on the terms and conditions in the _____ (*specify document, e.g.,* contract of sale) attached hereto and incorporated by reference herein].

[*EITHER*]

9. [*If petitioner will receive proceeds from the transaction, add:* Petitioner will receive proceeds from the transaction in the amount of $_____. A bond is required in the amount of $_____ (*amount may not be less than value of personal property, including cash and any notes, to be received*) if given by an admitted surety insurer, or, if approved by the court, in the amount of $_____ (*amount must be twice that required from admitted surety insurer*) if the sureties are personal sureties, conditioned on petitioner's duty to account for and apply the proceeds received as directed by the court].

[*OR*]

9. [*If petitioner will receive proceeds from the transaction, add:* Good cause has been shown to _____ [reduce the amount of bond required from the amount of $_____ to the amount of $_____ *or* dispense with the bond].

[*CONTINUE*]

IT IS ORDERED as follows:

1. [*If petitioner seeks declaration of spouse's legal capacity for the proposed transaction, add:* _____ (*Name of spouse*) is declared to have legal capacity to _____ (*describe transaction, e.g.,* sell) the community property described above].

2. Petitioner, as _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee], is authorized to _____ [*describe transaction, e.g.,* sell] the property described above to _____[*name*] on the terms and conditions set forth in the _____ [*specify document, e.g.,* contract of sale] attached hereto and made a part hereof.

[*EITHER*]

3. [*If petitioner will receive proceeds from the transaction, add:* Before executing any _____ (*specify instrument, e.g.,* conveyance) of the property described above, petitioner shall give a bond in the amount of $_____ (conditioned on his/her duty to account for and apply the proceeds received from the transaction as directed below by the court from _____ (an admitted surety insurer *or names of personal sureties*)].

[*OR*]

3. [*If petitioner will receive proceeds from the transaction, add:* The requirement of a bond is dispensed with].

[*CONTINUE*]

4. [*If proceeds are generated by the transaction and conditions are placed on their application, add:* Petitioner must apply the net proceeds from the _____ (*specify, e.g.*, sale) amounting to $_____ as follows: _____ (*specify any sums to be paid for the continuing care of the ward or conservatee, for investment in other property, for deposit to an account, or for other disposition*].

5. [*Authorization to execute necessary documents. See § 289.43[1], Order 2.*]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use with the petition in § 289.46[1]. In most counties the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Contents of Order

The court may authorize the proposed transaction if it determines all of the following:

- The subject property is community property of the spouses and, if the proposed transaction involves property in which a spouse also has a separate property interest, that there is good cause to include that separate property interest in the transaction (Finding 2) [*Prob. Code § 3144(a)(1)*].

- One of the spouses has a guardian or conservator, as in this form, or otherwise lacks legal capacity for the proposed transaction (Finding 3) [*Prob. Code § 3144(a)(2)*].

- The other spouse either has legal capacity for the proposed transaction, as in this form, or has a guardian or conservator (Finding 4) [*Prob. Code § 3144(a)(3)*].

- Each of the spouses either joins in or consents to the proposed transaction, or has a guardian or conservator (Findings 3, 5) [*Prob. Code § 3144(a)(4)*].

- The proposed transaction is one that should be authorized (Finding 8) [*Prob. Code §§ 3122(d), 3144(a)(5)*].

If the proposed transaction is to provide gifts to likely beneficiaries of gifts from the spouses, the court may authorize the transaction if it would be authorized under the substituted judgment doctrine contained in *Prob. Code §§ 2580-2586* (Finding 6) [*Prob. Code §§ 2582, 3144(b)*; for discussion of doctrine, *see* Ch. 290B, *Guardianship and Conservatorship: Substituted Judgment*].

If the petition requests that the court make an order declaring a spouse to have legal capacity for the proposed transaction and the court determines that the spouse has capacity, the court must so order (Order 1) [*Prob. Code § 3143(a)*].

[4] Bond

Generally, the court requires the petitioner to give a bond, in the amount fixed by the court (Order 3) [*Prob. Code § 3150(a)*]. If given by an admitted surety insurer, the bond is usually in an amount not less than the value of the personal property (including cash and any notes) to be received by the petitioner, as determined by the court [*Prob. Code § 3150(b)*]. If the sureties on the bond are personal sureties, the bond must be approved by the court and must be for twice the amount required for a bond given by an admitted surety insurer [*Prob. Code § 3150(c)*].

The court for good cause shown may either dispense with the bond or, if given by an admitted surety insurer, fix the amount of the bond in a lesser amount [*Prob. Code § 3150(a),(b)*]. The bond may also be conditioned on the petitioner's duty to account for and apply the proceeds of the transaction to be received by the petitioner only as the court directs (Order 4) [*Prob. Code § 3150(a)*].

Prob. Code § 2328, regarding the exclusion of funds in a blocked account from the determination of the amount of the bond, is applicable to the bond [*see Prob. Code § 3150(d)*].

[5] Cross References

For discussion of proceeding to authorize or determine legal capacity for transaction, see *§ 289.16*

For petition to authorize proposed transaction involving community property when spouse has or is declared to have legal capacity, see *§ 289.46*

For petition, citation, order authorizing proposed transaction involving community property when spouse is alleged to lack legal capacity, see *§§ 289.48 -289.50*

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24-289 California Forms of Pleading and Practice--Annotated § 289.48

§ 289.48 Petition to Authorize Proposed Transaction Involving Community Property When Spouse Alleged to Lack Legal Capacity [Prob. Code §§ 3100-3131, 3144]

[1] FORM Petition to Authorize Proposed Transaction Involving Community Property When Spouse Alleged to Lack Legal Capacity

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*EITHER*] _____ [Guardianship of the Estate *or* Conservatorship of the (Person and) Estate] of _____ [*name*], _____ [Ward *or* Conservatee]. [*OR*] In the Matter of the Petition of _____ [*name*], _____ [Guardian *or* Conservator] of the Estate of _____ [*name*], _____ [Ward *or* Conservatee].	))))	NO. _____ PETITION FOR AUTHORITY TO _____ [*specify transaction, e.g.,* SELL] COMMUNITY PROPERTY

_____

1. [*Allegation of petitioner's status and address, and location and number of guardianship or conservatorship proceeding. See § 289.46[1], Paragraph 1.*]

2. [*Ward's or conservatee's age and address. See 289.46[1], Paragraph 2.*]

3. _____[*name*] is the _____ [ward's *or* conservatee's] spouse. He/She is _____ years of age and resides at _____[*address*], _____[*city*], California. [*Add if applicable:* He/She is _____ (a patient at *or* on leave of absence from) _____ (*name of state institution*) at _____ (*address*), _____ (*city*), California].

4. The names and addresses of the adult relatives within the second degree of _____[*name of ward's or conservatee's spouse*], so far as known to petitioner, are as follows:

NAME	RELATIONSHIP	ADDRESS
_____	_____	_____
_____	_____	_____
_____	_____	_____

5-6.[*Description of property and allegation of status of property. See § 289.40[1], Paragraphs 3-4.*]

7. [*Estimated value of property. See § 289.46[1], Paragraph 7.*]

8. [*Terms and conditions of and parties to proposed transaction. See § 289.46[1], Paragraph 8.*]

9. _____[*Name of ward's or conservatee's spouse*] lacks legal capacity for the transaction proposed above in that _____ [*describe facts establishing lack of capacity, e.g.,* he/she is suffering from a mental disability diagnosed as _____ (*describe*) by _____ (*name*), M.D., whose declaration stating his/her medical opinion of the condition of _____ (*name*) is attached as Exhibit B and incorporated by reference]. Because of his/her condition, _____[*name*] is substantially unable to manage his/her financial resources or resist fraud or undue influence.

10. [*Statement of facts showing purpose of proposed transaction. See § 289.46[1], Paragraph 10.*]

WHEREFORE, petitioner prays for an order:

1. Determining that _____[*name of ward's or conservatee's spouse*] lacks legal capacity for the proposed transaction set forth above;

2. Authorizing the proposed transaction as set forth above;

3. Authorizing petitioner to do and perform all acts and to execute and deliver all papers, documents, and instruments necessary to consummate the transaction; and

4. Granting such other and further orders as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 289.40[1].*]

[2] Use of Form

The form in [1], *above*, is for use by a guardian or conservator in obtaining an order authorizing a proposed transaction involving community property when the ward's or conservatee's spouse is alleged to lack legal capacity for the transaction [*Prob. Code §§ 3101(a), 3111(a)(2)*; *see Prob. Code § 3004* (conservator defined)]. Generally, either spouse, whether or not he or she has legal capacity, or the guardian or conservator of either spouse, may file or join in the petition [*Prob. Code § 3111(a)*]. However, when seeking to authorize a transaction, at least one of the petitioners must be a guardian, a conservator, or a spouse having legal capacity for the transaction [*Prob. Code §§ 3004, 3111(b)*].

Local court rules may affect the transaction being authorized. The attorney should determine whether or not any such rules are applicable to the transaction being contemplated.

See discussion of jurisdiction and venue requirements in Ch. 289.46[4].

[3] Contents of Petition

The first alternative case title shown in the caption should be used if the petition is filed in the court in which the guardianship or conservatorship proceeding is pending; otherwise, the second alternative should be used.

Transactions which may be proposed include those listed in *Prob. Code § 3102* and discussed in *§ 289.16[3]*. Several proposed transactions may be included in one petition and proceeding [*Prob. Code § 3120(a)*]. The petition may also contain inconsistent allegations and may request relief in the alternative [*Prob. Code § 3120(b)*].

A petition to authorize a proposed transaction when a spouse is alleged to lack legal capacity must state the following:

- The petitioner's status as the guardian or conservator, his or her name and address, and the location and number of the guardianship or conservatorship proceeding (Paragraph 1) [*Prob. Code §§ 3111, 3121(b), (c), 3122(a), (c)*].

- The name, age, and residence of each spouse, and, if either one is a patient in or on leave of absence from a state institution under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services, the name and address of the institution (Paragraphs 2, 3) [*Prob. Code § 3121(a), (d)*].

- The names and addresses of the adult relatives within the second degree of the spouse alleged to lack legal capacity, if known to petitioner (Paragraph 4) [*Prob. Code § 3121(e)*].

- A sufficient description of the subject property and an allegation of its status (Paragraphs 5-6) [*Prob. Code § 3121(f), (g)*].

- The estimated value of the property (Paragraph 7) [*Prob. Code § 3121(h)*].

- The terms and conditions of the proposed transaction, including the names of all the parties to the transaction (Paragraph 8) [*Prob. Code § 3121(i),(j)*].

- A statement of the facts establishing the lack of legal capacity of the spouse (Paragraph 9) [*Prob. Code §§ 3121(b), 3122(a)*].

- An allegation that the ward's or conservatee's spouse is substantially unable to manage his or her financial resources or resist fraud or undue influence (Paragraph 9) [*Prob. Code § 3122(c)*].

- Facts that may be relied on to show that the authorization sought is for one or more of the permitted purposes (Paragraph 10) [*Prob. Code § 3122(d)*].

See *§ 289.16[5]* for a general discussion of content requirements.

[4] Verification

The petition must be verified [*Prob. Code § 1021*; *see § 289.40[5]*].

See discussion of notice requirements in § 289.46[6].

[5] Cross References

For discussion of proceeding to authorize or determine legal capacity for transaction, see *§ 289.16*

For petition to authorize proposed transaction involving community property when spouse has or is declared to have legal capacity, see *§ 289.46*

For citation to nonpetitioning spouse alleged to lack legal capacity, see *§ 289.49*

For order authorizing proposed transaction involving community property when spouse is alleged to lack legal capacity, see *§ 289.50*

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24-289 California Forms of Pleading and Practice--Annotated § 289.49

§ 289.49 Citation to Nonpetitioning Spouse Alleged to Lack Legal Capacity Giving Notice of Hearing on Petition to Deal with Community Property [Prob. Code § 3130]

[1] FORM Citation to Nonpetitioning Spouse Alleged to Lack Legal Capacity Giving Notice of Hearing on Petition to Deal with Community Property

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*EITHER*] _____ [Guardianship of the Estate *or* Conservatorship of the (Person and) Estate] of _____ [*name*], _____ [Ward *or* Conservatee]. [*OR*] In the Matter of the Petition of _____ [*name*], _____ [Guardian *or* Conservator] of the Estate of _____ [*name*], _____[Ward *or* Conservatee]	))))	NO. _____ CITATION

_____

THE PEOPLE OF THE STATE OF CALIFORNIA to _____[*name*]:

NOTICE IS HEREBY GIVEN that _____[*name*], _____ [guardian *or* conservator]

of the estate of _____[*name*], _____ [ward *or* conservatee], has filed a verified petition, a copy of which is attached hereto, praying for an order authorizing him/her to _____ [*specify, e.g.,* sell] the community property described in the petition.

You are cited and required to appear at a hearing in this court, at the time and place specified below, to show cause why the order should not be made.

Date and time of court appearance:

_____ [*time*]; _____ [*date*].

Dept. _____

Address of court: _____

Dated: _____.
[*SEAL*]

_____
Clerk
By _____ [*signature*]
Deputy Clerk

[2] Use of Form

The form of citation in [1], *above*, is for use with the petition in § 289.48 to notify the nonpetitioning spouse alleged to lack legal capacity of the hearing [*Prob. Code § 3130*].

[3] Issuance and Service

On the filing of the petition, the clerk must issue a citation to each nonpetitioning spouse alleged to lack capacity for the proposed transaction, setting forth the time and place of hearing. The citation and a copy of the petition must be served on the spouse at least 15 days before the hearing [*Prob. Code § 3130(a)*].

However, unless the court orders otherwise, if a spouse alleged to lack legal capacity for the proposed transaction has a guardian or conservator, no citation to the spouse need be issued, and the petitioner must cause a notice of the time and place of the hearing on the petition, accompanied by a copy of the petition, to be served on the guardian or conservator at least 15 days before the hearing [*Prob. Code § 3130(b)*; *see Prob. Code § 3004* (conservator includes guardian of estate of married minor); for form of notice, *see* Ch. 284, *Guardianship and Conservatorship: Notice*].

Service of the citation (or the alternative notice) must be made in the manner provided in *Code Civ. Proc. § 415.10* (personal service) or 415.30 (service by mail) or in such other manner as may be authorized by the court. If the person to be served is outside this state, service may also be made in the manner provided in *Code Civ. Proc. § 415.40* [*Prob. Code § 3130(c)*; for discussion of service, *see* Ch. 284, *Guardianship and Conservatorship: Notice* and Ch. 518, *Service of Summons and Papers*].

[4] Cross References

For discussion of proceeding to authorize or determine legal capacity for transaction, see *§ 289.16*

For petition and order to authorize proposed transaction involving community property when spouse has or is declared to have legal capacity, see *§§ 289.46*, *289.47*

For petition and order authorizing proposed transaction involving community property when spouse is alleged to lack legal capacity, see *§§ 289.48*, *289.50*

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24-289 California Forms of Pleading and Practice--Annotated § 289.50

§ 289.50 Order Authorizing Proposed Transaction Involving Community Property When Spouse Alleged to Lack Legal Capacity [Prob. Code §§ 3100-3131, 3144]

[1] FORM Order Authorizing Proposed Transaction Involving Community Property When Spouse Alleged to Lack Legal Capacity

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*EITHER*] _____ [Guardianship of the Estate *or* Conservatorship of the (Person and) Estate] of _____ [*name*], _____ [Ward *or* Conservatee]. [*OR*] In the Matter of the Petition of _____ [*name*], _____ [Guardian *or* Conservator] of the Estate of _____ [*name*], _____ [Ward *or* Conservatee].	))))	NO. _____ ORDER AUTHORIZING _____ [*specify transaction, e.g.,* SALE] OF COMMUNITY PROPERTY

_____

The petition of _____[*name*], as _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee], for an order authorizing petitioner to

_____ [*specify transaction, e.g.,* sell] the community property described below, came on regularly for hearing by the court this date. Petitioner appeared by counsel _____[*name*]. _____[*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court as follows:

1. [*Finding that notices duly given. See § 289.45[1], Finding 1.*]

2. [*Finding of property's status and legal description. See § 289.45[1], Finding 2.*]

3. [*Finding of petitioner's status as guardian or conservator. See § 289.47[1], Finding 3.*]

4. _____[*name*], the _____ [ward's *or* conservatee's] spouse, lacks legal capacity to _____ [*describe transaction, e.g.,* sell] the _____ [community *or* homestead] property described above.

5. _____[*name*], the _____ [ward's *or* conservatee's] spouse, is substantially unable to manage his/her own financial resources or resist fraud or undue influence.

6. [*Finding required if proposed transaction is to provide gifts to likely beneficiaries from spouses. See § 289.47[1], Finding 6.*]

7. [*Finding of purpose for proposed transaction. See § 289.47[1], Finding 7.*]

8. [*Finding that proposed transaction should be authorized. See § 289.47[1], Finding 8.*]

9. [*Finding determining amount of or dispensing with bond. See § 289.47[1], Finding 9.*]

IT IS ORDERED as follows:

1. Petitioner, as _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee], is authorized to _____ [*describe transaction, e.g.,* sell] the property described above to _____[*name*] on the following terms and conditions: _____[*specify*].

2. [*Order determining amount of bond. See § 289.47[1], Order 3.*]

3. [*Order directing application of proceeds received by petitioner. See § 289.47[1], Order 4.*]

4. [*Authorization to execute necessary documents. See § 289.43[1], Order 2.*]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use with the petition in § 289.48. In most counties the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Contents of Order

The court may authorize the proposed transaction when one spouse lacks legal capacity if it determines all of the following:

- The subject property is community property of the spouses and, if the proposed transaction involves property in which a spouse also has a separate property interest, that there is good cause to include that separate property interest in the transaction (Finding 2) [*Prob. Code § 3144(a)(1)*].

- One of the spouses lacks legal capacity for the proposed transaction (Finding 4) [*Prob. Code § 3144(a)(2)*].

- The other spouse (the petitioner in this form) has a guardian or conservator (Finding 3) [*Prob. Code § 3144(a)(3)*].

- Each of the spouses has a guardian or conservator, or is substantially unable to manage his or her own financial resources or resist fraud or undue influence (Findings 3, 5) [*Prob. Code § 3144(a)(4)*].

- The proposed transaction should be authorized (Finding 8) [*Prob. Code § 3144(a)(5)*].

If the petition alleges that a spouse having no conservator lacks legal capacity for the proposed transaction and the court determines that the spouse has capacity, the court must make an order so declaring [*Prob. Code § 3143(b)*].

If the proposed transaction is to provide gifts to likely beneficiaries of gifts from the spouses, the court may authorize the transaction if it would be authorized under the substituted judgment doctrine contained in *Prob. Code §§ 2580-2586* (*see § 289.47[1]*, Finding 6) [*Prob. Code §§ 2582, 3144(b)*; for discussion of doctrine, *see* Ch. 290B, *Guardianship and Conservatorship: Substituted Judgment*].

See discussion of bond requirements in § 289.47[4].

[4] Cross References

For discussion of proceeding to authorize or determine legal capacity for transaction, see *§ 289.16*

For petition and order to authorize proposed transaction involving community property when spouse has or is declared to have legal capacity, see *§§ 289.46, 289.47*

For petition for authorization proposed transaction involving community property when spouse is alleged to lack legal capacity, see *§ 289.48*

For citation to nonpetitioning spouse alleged to lack legal capacity, see *§ 289.49*

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24-289 California Forms of Pleading and Practice--Annotated § 289.51

§ 289.51 Petition for Enforcement of Support of Conservatee Spouse From Community Property [Prob. Code § 3080]

[1] FORM Petition for Enforcement of Support of Conservatee Spouse From Community Property

[*Caption. See § 289.40[1].*]

Petitioner _____[*name*] respectfully represents:

[*EITHER*]

1. Petitioner is the _____ [*specify relationship, e.g.,* sister] of the _____ [ward *or* conservatee] herein.

[*OR*]

1. Petitioner is a _____ [friend of *or* person interested in] the _____ [ward *or* conservatee] herein.

[*OR*]

1. Petitioner is the _____ [guardian *or* conservator] herein.

[*OR*]

1. Petitioner is the _____ [ward *or* conservatee] herein.

[*CONTINUE*]

2. On _____[*date*], _____ [petitioner *or name*] was appointed _____ [guardian *or* conservator] of the _____ [person and estate *or* person *or* estate] of _____[*name of ward or conservatee*] and is now the duly appointed, qualified, and acting _____ [guardian *or* conservator].

3. _____[*Name of ward or conservatee*] and his/her spouse, _____[*name*], have community property consisting of the following: _____ [*list community property assets, e.g.,* a residence located at _____ (*address*), the salary of _____ (*name of spouse of ward or conservatee*), and a savings account at _____ (*name of financial institution*)].

4. _____[*Name of spouse of ward or conservatee*] has the management or control of the spouses' community property.

5. In order to enforce the duty of support, this court should order that the _____ [income *and/or* principal] of the spouses' community property must be applied to the support of _____[*name of ward or conservatee*] because _____ [*specify, e.g.,* _____ (*name of spouse of ward or conservatee*) has refused to contribute to the _____ (ward's *or* conservatee's) support].

[*EITHER*]

6. The court should order that _____[*name of spouse of ward or conservatee*] pay $_____ to _____ [the _____ (guardian *or* conservator) of _____ (*name of ward or conservatee*) *or name of provider of necesities, care, or treatment*] for _____[*specify matters of support and maintenance for which payment is required*].

[*OR*]

6. The court should order _____[*name of spouse of ward or conservatee*] to pay the support to _____ [the _____ (guardian *or* conservator) of _____ (*name of ward or conservatee*) *or name of provider of necessities, care, or treatment*] in periodic payments of $_____ per _____ [month *or other period of time*] [and to give reasonable security therefor].

[7. The court should order _____ (*name of spouse having management or control of community property*) to assign to _____ (*name*) that amount of his/her earnings equal to the required periodic payment because _____ (*specify, e.g.,* his/her earnings are the only source of community property available for support without necessitating the sale of other community property assets and he/she has refused to contribute voluntarily any portion of his/her earnings for support).]

[8. This court should issue an order restraining _____ (*name of spouse having management or control of community property*) from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, except in the usual course of business or for the necessities of life during the pendency of this proceeding because _____ (*specify, e.g.,* he/she

has attempted to transfer the spouses' community property to other members of his/her family as gifts).]

[9. This court should issue an order requiring _____ (*name of spouse having management or control of community property*) to notify petitioner of any proposed extraordinary expenditures and to account to the court for all such extraordinary expenditures during the pendency of this proceeding because _____ (*specify, e.g.,* on several occasions he/she has used large sums of community property funds for expenditures that he/she is unable to explain).]

[10. This court should order _____ (*name of spouse having management or control of community property*) to pay the amount of $_____ per _____ (month *or other period of time*) for the support and maintenance of _____ (*name of ward or conservatee*) pending the determination of this petition because _____ (*specify, e.g.,* _____ (*name of ward or conservatee*) has no other source of support).]

11. A request for special notice has _____ [not been filed herein *or* been filed herein by _____ (*name*), and notice of the time and place of hearing on this petition will be given as required by law *or* been filed herein and waived by _____ (*name*)].

WHEREFORE, petitioner prays for an order and judgment as follows:

[1. Restraining _____ (*name of spouse having management or control of community property*) from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, except in the usual course of business or for the necessities of life during the pendency of this proceeding;]

[2. Requiring _____ (*name of spouse having management or control of community property*) to notify petitioner of any proposed extraordinary expenditures and to account to the court for all such extraordinary expenditures during the pendency of this proceeding;]

[3. Requiring _____ (*name of spouse having management or control of community property*) to pay the amount of $_____ per _____ (month *or other period of time*) for the support of _____ (*name of ward or conservatee*) pending the determination of this petition;]

4. Requiring _____[*name of spouse having management or control of community property*] to apply the _____ [income and principal *or* income *or* principal] of the community property to the support and maintenance of _____[*name of ward or conservatee*] _____ [in the amount of $_____ *or* in periodic payments in the amount of $_____ per _____ (month *or other period of time*) (and to give reasonable security therefor)]; [and]

[5. Compelling _____ (*name of spouse having management or control of community property*) to assign to _____ (*name*) that amount of his/her earnings equal to the required periodic payment; and]

6. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 289.40[1].*]

[2] Use of Form

The form in [1], *above*, is for use in obtaining an order requiring the spouse of a conservatee to apply the income or principal of the spouses' community property to the support of the conservatee and an order, if desired, for the assignment of wages [*see Prob. Code § 3080*]. Because "conservator," "conservatorship estate," and "conservatorship proceeding" are defined to include the guardianship of a married minor, the form may also be used when one spouse is a minor for whom a guardian of the estate has been appointed [*see Prob. Code §§ 3004-3008*].

[3] Contents of Petition

The petition should be entitled: PETITION FOR ENFORCEMENT OF SUPPORT [AND ASSIGNMENT OF WAGES].

The petition should allege:

- That the petitioner has standing to file the petition as either conservator, conservatee, relative or friend of the conservatee, or interested person [*see Prob. Code § 3080*] (Paragraph 1).

- That one spouse has a conservator or, in the case of a married minor, a guardian of the estate, that the spouses have community property, and that the spouse who does not have a conservator or guardian has the management or control of the community property [*see Prob. Code § 3080*] (Paragraphs 2-4).

- An order enforcing the duty of support is necessary [*see Prob. Code § 3088(a)*] (Paragraph 5).

- The amount of support to be paid, including the frequency of payments if periodic support payments are sought, and since the court may order the payments to be made to the conservator of the person or to any other person, the name of the person to receive the payment should also be included [*see Prob. Code § 3088(d)*] (Paragraph 6).

- If periodic payments are sought, that the spouse required to make the payments should be required to give security for them [*see Prob. Code § 3088(d)*] (Optional Paragraph 6).

- If the court orders periodic payments for support, the necessity for a wage assignment and specifying the person to whom the wages are to be assigned [*Prob. Code § 3088(e)*] (Optional Paragraph 7).

- If such orders are deemed necessary, the necessity for ex parte orders to restrain the spouse who has the management or control of the community property from disposing of community property and to require notification of proposed extraordinary expenditures [*see Prob. Code § 3085*] (Optional Paragraphs 8, 9).

- The necessity for the payment of support during the pendency of the proceeding [*see Prob. Code § 3083*] (Optional Paragraph 10).

- Whether or not special notice is required, because special notice may be requested for a petition for the enforcement of support of a conservatee spouse [*see Prob. Code § 2700(a)*] (Paragraph 11).

[4] Jurisdiction and Venue

The petition must be filed in the court in which the conservatorship proceeding or, in the case of a married minor, the guardianship proceeding, is pending [*Prob. Code § 3080*].

[5] Verification

The petition must be verified [Prob. Code § 1450(a); see *§ 289.40[5]*].

[6] Notice

Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob. Code §§ 1460-1469* [*Prob. Code § 3081(a)*; for a further discussion of notice, see Ch. 284, *Guardianship and Conservatorship: Notice*]. If the spouse who has the management or control of the community property is not the conservator, the petitioner must also cause notice of the hearing and a copy of the petition to be served on that spouse in accordance with *Code Civ. Proc. §§ 410.10-418.10* [*Prob. Code § 3081(b)*].

[7] Cross References

For discussion of enforcement of support of conservatee spouse from community property, see *§ 289.17*

For ex parte order pending determination of petition for enforcement of support, see *§ 289.52*

For order for payment of support pending determination of petition for enforcement of support, see *§ 289.53*

For citation to spouse for examination concerning community property, see *§ 289.54*

For order for enforcement of support of conservatee spouse, see *§ 289.55*

For application and order for division of community and quasi-community property, see *§§ 289.56, 289.57*

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24-289 California Forms of Pleading and Practice--Annotated § 289.52

§ 289.52 Ex Parte Order Pending Determination of Petition for Enforcement of Support--Restraining Disposition of Property--Requiring Notification of Proposed Extraordinary Expenditures [Prob. Code § 3085]

[1] FORM Ex Parte Order Pending Determination of Petition for Enforcement of Support--Restraining Disposition of Property--Requiring Notification of Proposed Extraordinary Expenditures

[*Caption. See § 289.40[1].*]

_____[*name*] has filed a verified petition for the enforcement of support of _____[*name*], the _____ [ward *or* conservatee] herein. On the application of petitioner for ex parte orders, it appears that the court should _____ [restrain the disposition of any property *and/or* require notification of and accounting for any extraordinary expenditures].

IT IS ORDERED that, during the pendency of this proceeding, _____[*name of spouse having management or control of community property*] is _____ [restrained from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, except in the usual course of business or for the necessities of life *and/or* required to notify the petitioner of any proposed extraordinary expenditures and to account to the court for all such extraordinary expenditures].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is an ex parte order issued during the pendency of a proceeding for the enforcement of support of a conservatee spouse restricting the use and disposition of property by the spouse who has the management and

control of the community property [*see Prob. Code § 3085*]. It should be entitled: ORDER _____ [RESTRAINING DISPOSITION OF PROPERTY *and/or* REQUIRING NOTIFICATION OF EXTRAORDINARY EXPENDITURES]. The court may issue ex parte orders on the application of the petitioner [*Prob. Code § 3085*]. For a form of application for ex parte orders included in a petition for the enforcement of support of a conservatee spouse, see *§ 289.51*.

[3] Cross References

For discussion of enforcement of support of conservatee spouse from community property, see *§ 289.17*

For petition for enforcement of support of conservatee spouse, see *§ 289.51*

For order for payment of support pending determination of petition for enforcement of support, see *§ 289.53*

For citation to spouse for examination concerning community property, see *§ 289.54*

For order for enforcement of support of conservatee spouse, see *§ 289.55*

For application and order for division of community and quasi-community property, see *§§ 289.56, 289.57*

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24-289 California Forms of Pleading and Practice--Annotated § 289.53

§ 289.53 Order for Payment of Support Pending Determination of Petition for Enforcement of Support of Conservatee Spouse [Prob. Code § 3083]

[1] FORM Order for Payment of Support Pending Determination of Petition for Enforcement of Support of Conservatee Spouse

[*Caption. See § 289.40[1].*]

_____[*name*] has filed a verified petition for the enforcement of support of _____[*name*], the _____ [ward *or* conservatee] herein, and for the payment of support pending the determination of the petition. The issue of payment pending the determination of the petition came on regularly for hearing this date. Petitioner appeared by counsel _____[*name*]. _____[*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court:

1. Notice of the time and place of hearing has been given as required by law; and

2. An order for the payment of support in the amount of $_____ per _____ [month *or other period of time*] for _____[*name of ward or conservatee*] during the pendency of this proceeding is necessary.

IT IS ORDERED that, during the pendency of this proceeding, _____[*name of spouse having management or control of community property*] shall pay to _____[*name*] the amount of $_____ per _____ [month *or other period of time*] for the support and maintenance of _____[*name of ward or conservatee*].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is an order for the payment of support pending the determination of a petition for the enforcement of support of a conservatee spouse [*see Prob. Code § 3083*]. It should be entitled: ORDER FOR PAYMENT OF SUPPORT PENDING DETERMINATION OF PETITION FOR ENFORCEMENT OF SUPPORT. For a form of allegation seeking the payment of support during the pendency of the proceeding that may be included in a petition for the enforcement of support of a conservatee spouse, see *§ 289.51*.

[3] Cross References

For discussion of enforcement of support of conservatee spouse from community property, see *§ 289.17*

For petition for enforcement of support of conservatee spouse, see *§ 289.51*

For ex parte order pending determination of petition for enforcement of support, see *§ 289.52*

For citation to spouse for examination concerning community property, see *§ 289.54*

For order for enforcement of support of conservatee spouse, see *§ 289.55*

For application and order for division of community and quasi-community property, see *§§ 289.56, 289.57*

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24-289 California Forms of Pleading and Practice--Annotated § 289.54

§ 289.54 Citation to Spouse for Examination Concerning Community Property [Prob. Code § 3082]

[1] FORM Citation to Spouse for Examination Concerning Community Property

[*Caption. See § 289.40[1]* .]

THE PEOPLE OF THE STATE OF CALIFORNIA to _____[*name of spouse having management or control of community property*]:

By order of the court you are cited and required to appear personally at a hearing in this court on _____[*date*], at _____[*time*], in Dept. No. _____, located at _____[*address and city*] and to be examined under oath concerning your community property and other matters relevant to the petition filed herein on _____[*date*], for the enforcement of support of _____[*name of ward or conservatee*].
Dated:_____.

_____, Clerk

By _____ [*signature*],

Deputy Clerk

[*SEAL*]

[2] Use of Form

The form in [1], *above*, is for use in a proceeding on a petition for the enforcement of support of a conservatee spouse to compel the spouse having management or control of the community property to appear and be examined by the court and the petitioner concerning the community property and other matters relevant to the petition [*see Prob. Code § 3082*;

see also discussion in *§ 289.17[3][a]*]. It should be entitled: CITATION FOR EXAMINATION CONCERNING COMMUNITY PROPERTY.

[3] Service of Citation

The citation must be served in the same manner as a summons in a civil action, at least five days before the return day [*Prob. Code §§ 1207, 2100*; *see Code Civ. Proc. §§ 415.10-415.50*]. For a further discussion, see Ch. 518, *Service of Summons and Papers* .

[4] Cross References

For discussion of enforcement of support of conservatee spouse from community property, see *§ 289.17*

For petition for enforcement of support of conservatee spouse, see *§ 289.51*

For ex parte order pending determination of petition for enforcement of support, see *§ 289.52*

For order for payment of support pending determination of petition for enforcement of support, see *§ 289.53*

For order for enforcement of support of conservatee spouse, see *§ 289.55*

For application and order for division of community and quasi-community property, see *§§ 289.56, 289.57*

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24-289 California Forms of Pleading and Practice--Annotated § 289.55

§ 289.55 Order for Enforcement of Support of Conservatee Spouse [Prob. Code § 3088]

[1] FORM Order for Enforcement of Support of Conservatee Spouse

[*Caption. See § 289.40[1].*]

The petition of _____[*name*] for an order for the enforcement of support of _____[*name*], the _____ [ward *or* conservatee] herein, came on regularly for hearing by the court on this date. Petitioner appeared by counsel _____[*name*]. _____[*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court as follows:

1. All notices of the hearing have been duly given as required by law [including special notice to _____ (*name*), in accordance with the request filed herein].

2. _____[*name*] is the spouse of _____[*name*], the _____ [ward *or* conservatee] herein, and has the management or control of the spouses' community property, which consists of _____ [*specify, e.g.,* his/her earnings], having a value of $_____.

3. _____[*Name of spouse having management or control of community property*] has a duty to support _____[*name of ward or conservatee*].

4. _____[*Name of ward or conservatee*] is entitled to have the community property of the spouses applied to his/her support.

5. [*If requested, state findings concerning the circumstances of the parties on which the amount of support is based in consecutively numbered paragraphs.*]

6. An amount of $_____ per _____ [month *or other period of time*] is appropriate for the support and maintenance of _____[*name of ward or conservatee*].

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

1. _____[*Name of spouse who has management or control of community property*] is required to apply the _____ [income and principal *or* income *or* principal] of _____ [*specify community property, e.g.,* his/her earnings] to the support and maintenance of _____[*name of ward or conservatee*].

2. _____[*Name of spouse having management or control of community property*] is required to make periodic payments for support and maintenance of $_____ per _____ [month *or other period of time*] to _____[*name*] [and shall give security therefor in the amount of $_____].

[3. _____ (*Name of spouse having management or control of community property*) shall assign to _____ (*name*) that portion of his/her earnings equal to the required periodic payment in accordance with the Order Re Assignment of Wages filed herewith.]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use with the petition in § 289.51 to enforce the duty of support for a conservatee spouse [*see Prob. Code § 3088(a)*]. It contains an optional provision for the assignment of wages [*see Prob. Code § 3088(e)*]. The form should be entitled: ORDER FOR ENFORCEMENT OF SUPPORT [AND ASSIGNMENT OF WAGES].

[3] Order for Assignment of Wages

The court may order the spouse required to make periodic payments to assign to the person designated in the order to receive the payments that portion of the earnings of the spouse due or to be due in the future as will be sufficient to pay the amount ordered by the court for the support and maintenance of the conservatee [*Prob. Code § 3088(d)*]. The order must be in the form for an order assigning salary or wages prescribed by the Judicial Council for use in family law proceedings [*Prob. Code § 3088(e)*; *see* discussion in *§ 289.17[6][c]*].

[4] Findings

At the request of any interested person, the court is required to make appropriate findings on the circumstances of the spouses that were considered in determining the amount of support and maintenance [*Prob. Code § 3088(c)*].

[5] Cross References

For discussion of enforcement of support of conservatee spouse from community property, see *§ 289.17*

For petition for enforcement of support of conservatee spouse, see *§ 289.51*

For ex parte order pending determination of petition for enforcement of support, see *§ 289.52*

For order for payment of support pending determination of petition for enforcement of support, see *§ 289.53*

For citation to spouse for examination concerning community property, see *§ 289.54*

For application and order for division of community and quasi-community property, see *§§ 289.56, 289.57*

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24-289 California Forms of Pleading and Practice--Annotated § 289.56

§ 289.56 Application for Division of Community and Quasi-Community Property [Prob. Code § 3089]

[1] FORM Application for Division of Community and Quasi-Community Property

[*Caption. See § 289.40[1].*]

Applicant _____[*name*] respectfully represents:

[*EITHER*]

1. Applicant petitioned the court in this proceeding for an order to enforce support of the _____ [ward *or* conservatee] herein from community property.

[*OR*]

1. Applicant is a person interested in the _____ [ward *or* conservatee] herein.

2. Pursuant to an order of _____ [this court *or specify other court entering support order*] dated _____, _____[*name of spouse who has management or control of community property*], spouse of the _____ [ward *or* conservatee] herein, is required to provide for the support of _____[*name of ward or conservatee*] by _____ [*specify, e.g.,* paying the amount of $_____ per month to _____ (*name*)]. A copy of the order is attached as Exhibit A and incorporated by reference.

3. _____[*Name of spouse who has management or control of community property*] has refused to comply with the order of _____[*date*], in that _____ [*specify, e.g.,* he/she has not made any payments to _____ (*name*) for the support of _____ (*name of ward or*

conservatee) in the past _____ months].

4. The community and quasi-community property of the spouses consist of _____[*specify amount of money and type and value of real and personal property*].

5. The court should divide the community and quasi-community property of the spouses in order to provide for the support of _____[*name of ward or conservatee*].

[6. A request for special notice has _____ (not been filed herein *or* been filed herein by _____ (*name*)) and notice of the time and place of hearing on this application _____ (will be given as required by law *or* has been filed herein and waived by _____ (*name*))].

WHEREFORE, applicant prays for an order dividing the community and quasi-community property of the spouses equally between them and for such other and further relief as the court may deem proper.
Dated: _____.

_____ [*signature*]

Applicant

_____ [*signature*]

Attorney for Applicant

[*Verification. See § 289.40[1].*]

[2] Use of Form

The form in [1], *above*, is for use in requesting the division between spouses of community and quasi-community property when the spouse who has the management or control of the community property has refused to comply with an order to provide support for the conservatee spouse [*see Prob. Code § 3089*; for further discussion, see *§ 289.17[8]*]. The form should be entitled: APPLICATION FOR DIVISION OF COMMUNITY AND QUASI-COMMUNITY PROPERTY.

[3] Contents of Application

The application should allege the following:

- The capacity of the applicant as the petitioner in a proceeding for the enforcement of support of the conservatee spouse or as some other interested person [*see Prob. Code § 3089*] (Paragraph 1).

- Since the court may divide the community and quasi-community property if the spouse who has management or control to the community property refuses to comply with an order made under *Prob. Code §§ 3080-3092* for the enforcement of support of the conservatee spouse or an order made in a separate action to provide support, that an order to provide support was made and should identify the proceeding in which it was made [*see Prob. Code § 3089*] (Paragraph 2).

- That the spouse having the management or control of the community property has refused to comply with the order to provide support [*see Prob. Code § 3089*] (Paragraph 3).

- Although not specifically required by statute, a description of the community and quasi-community property of the spouses (Paragraph 4) and that the property should be divided to provide support (Paragraph 5).

- Because special notice may be requested for a petition filed pursuant to *Prob. Code §§ 3080-3092*, whether or not a request of special notice has been filed or filed and waived, even though it is not technically a petition [*see Prob. Code § 2700(a)*] (Paragraph 6). Local practice should be consulted for the applicability of special notice to the application.

[4] Verification

The petition must be verified [Prob. Code § 1450(a); see *§ 289.40[5]*].

[5] Notice

Prob. Code § 3089, which authorizes division of community property when a spouse with management or control of community property refuses to comply with an order to provide support for his or her conservatee spouse, does not expressly require notice of a request for division of community property, nor does it expressly authorize a proceeding without notice [*see Prob. Code § 3089*]. If counsel wishes to give notice of the application, see Ch. 284, *Guardianship and Conservatorship: Notice* , for a discussion of general notice requirements under *Prob. Code § 1460* in guardianship and conservatorship proceedings and for a mandatory form of notice.

[6] Cross References

For discussion of enforcement of support of conservatee spouse from community property, see *§ 289.17*

For petition for enforcement of support of conservatee spouse, see *§ 289.51*

For ex parte order pending determination of petition for enforcement of support, see *§ 289.52*

For order for payment of support pending determination of petition for enforcement of support, see *§ 289.53*

For citation to spouse for examination concerning community property, see *§ 289.54*

For order for enforcement of support of conservatee spouse, see *§ 289.55*

For order dividing community and quasi-community property, see *§ 289.57*

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24-289 California Forms of Pleading and Practice--Annotated § 289.57

§ 289.57 Order for Division of Community and Quasi-Community Property [Prob. Code § 3089]

[1] FORM Order for Division of Community and Quasi-Community Property

[*Caption. See § 289.40[1].*]

The petition of _____[*name*] for an order dividing the community and quasi-community property of _____[*name of spouse who has management or control of community property*] and _____[*name*], the _____ [ward *or* conservatee] herein, came on regularly for hearing this date. Petitioner appeared by counsel _____[*name*]. _____[*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court as follows:

1. All notices of the hearing have been duly given as required by law [including special notice to _____ (*name*), in accordance with the request filed herein].

2. Pursuant to an order of _____ [this court *or specify other court*] dated _____, _____[*name of spouse having management or control of community property*] is required to provide for the support of _____[*name of ward or conservatee*].

3. _____[*Name of spouse having management or control of community property*] has refused to comply with the order of _____[*date*].

4. The community and quasi-community property of the spouses consists of _____[*specify amount of money and type and value of real and personal property*].

WHEREFORE, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

1. The community and quasi-community property of the spouses shall be divided as follows: _____[*specify*].

2. The property awarded to _____[*name of ward or conservatee*] shall be transferred or paid over to _____[*name*], the _____ [guardian *or* conservator] of the estate of _____[*name of ward or conservatee*] to be included in, managed, controlled, and disposed of as a part of the _____ [guardianship *or* conservatorship] estate.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use with the application in § 289.56 for dividing the community and quasi-community property of the spouses when the spouse who has the management or control of the community property has refused to comply with an order to provide for the support of the conservatee spouse [*see Prob. Code § 3089*; for further discussion, see *§ 289.17[8]*]. The form should be entitled: ORDER FOR DIVISION OF COMMUNITY AND QUASI-COMMUNITY PROPERTY.

[3] Cross References

For discussion of enforcement of support of conservatee spouse from community property, see *§ 289.17*

For petition for enforcement of support of conservatee spouse, see *§ 289.51*

For ex parte order pending determination of petition for enforcement of support, see *§ 289.52*

For order for payment of support pending determination of petition for enforcement of support, see *§ 289.53*

For citation to spouse for examination concerning community property, see *§ 289.54*

For order for enforcement of support of conservatee spouse, see *§ 289.55*

For application for division of community and quasi-community property, see *§ 289.56*

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24-290 California Forms of Pleading and Practice--Annotated 290.syn

§ 290.syn Synopsis to Chapter 290: GUARDIANSHIP AND CONSERVATORSHIP: MAINTENANCE OF WARD OR CONSERVATEE

§ 290.01 Scope of Chapter

§ 290.02 Cross References

§§ 290.03-290.09 [Reserved]

§ 290.10 Governing Statutes

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§ 290.12 Payments for Support

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[2] Third-Party Obligation

[3] Care Received in State or County Hospital

[4] Enforcement of Support Obligations

§ 290.13 Home Maintenance

§ 290.14 Personal Allowance

§ 290.15 Advancement of Funds

§ 290.16 Payment of Debts

§ 290.17 Wage Claims

§ 290.18 Enforcement of Judgments

§ 290.19 Enforcement of Obligations

§ 290.20 Taxes

§ 290.21 Collection of Debts and Benefits

[1] General Rules

[2] Acceptance of Deed in Lieu of Foreclosure or Sale

§ 290.22 Deposits and Withdrawals

[1] Cash

[2] Personal Property

[3] Securities

[4] Blocked Accounts

§ 290.23 Maintenance of Insurance Policies, Plans, and Benefits

[1] Medical, Disability, and Property Insurance

[2] Life Insurance, Annuities, and Other Plans Affecting Conservatee

[3] Minor's Contracts for Annuities and Insurance

§ 290.24 Voting Rights of Shares, Membership, or Property

§§ 290.25-290.39 [Reserved]

§ 290.40 State Statutes

[1] Allowance and Advancement of Funds

[2] Debt Collection and Payments

[3] Deposits and Withdrawals

[4] Home Maintenance

[5] Policies, Plans, and Benefits

[6] Support

[7] Taxes

[8] Voting Rights of Shares or Other Assets

§ 290.41 Local Court Rules

[1] Alameda County

[2] Contra Costa County

[3] Los Angeles County

[4] Orange County

[5] Sacramento County

[6] City and County of San Francisco

§ 290.42 Federal Administrative Regulations

§ 290.43 Decisions

§ 290.44 Text References

§§ 290.45-290.49 [Reserved]

§ 290.50 Petition to Authorize Payments for Support, Maintenance, or Education of Ward or Conservatee [Prob. Code §§ 2403, 2420(a), (e)]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Verification

[5] Notice

[6] Cross References

§ 290.51 Petition to Authorize Payment for Support, Maintenance, or Education of Ward's or Conservatee's Dependents [Prob. Code §§ 2403, 2420(a),(e)]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Verification

[5] Cross References

§ 290.52 Petition to Authorize Payment for Support, Maintenance, or Education Despite Obligation of Third Party [Prob. Code § 2422]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Verification

[5] Notice

[6] Cross References

§ 290.53 Order Authorizing Payment for Support, Maintenance, or Education Despite Obligation of Third Party [Prob. Code § 2422]

[1] FORM

[2] Use of Form

[3] Appealability of Order

[4] Cross References

§ 290.54 Petition to Direct Guardian or Conservator to Furnish Suitable Support, Maintenance, or Education [Prob. Code § 2404]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Verification

[5] Notice

[6] Cross References

§ 290.55 Order Directing Guardian or Conservator to Furnish Suitable Support, Maintenance, or Education [Prob. Code § 2404]

[1] FORM

[2] Use of Form

[3] Appealability of Order

[4] Cross References

§ 290.56 Petition to Authorize Payment of Allowance to Ward or Conservatee [Prob. Code § 2421]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Verification

[5] Notice

[6] Cross References

§ 290.57 Order Authorizing Payment of Allowance to Ward or Conservatee [Prob. Code § 2421]

[1] FORM

[2] Use of Form

[3] Appealability of Order

[4] Cross References

§ 290.58 Petition to Direct Guardian or Conservator to Pay Debt, Expense, or Charge [Prob. Code § 2404]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Verification

[5] Cross References

§ 290.59 Order Directing Payment of Debt, Expense, or Charge [Prob. Code § 2404]

[1] FORM

[2] Use of Form

[3] Appealability of Order

[4] Cross References

§ 290.60 Petition for Authority to Accept Deed in Lieu of Foreclosure of Mortgage or Sale Under Trust Deed [Prob. Code § 2464]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Verification

[5] Notice

[6] Cross References

§ 290.61 Order Authorizing Acceptance of Deed in Lieu of Foreclosure of Mortgage or Sale Under Trust Deed [Prob. Code § 2464]

[1] FORM

[2] Use of Form

[3] Appealability of Order

[4] Cross References

§ 290.62 Petition for Authority to Withdraw Assets From Blocked Account [Prob. Code §§ 2403, 2456]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Verification

[5] Notice

[6] Bond

[7] Cross References

§ 290.63 Order Authorizing Withdrawal of Assets From Blocked Account [Prob. Code §§ 2403, 2456]

[1] FORM

[2] Use of Form

[3] Appealability of Order

[4] Cross References

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24-290 California Forms of Pleading and Practice--Annotated § 290.01

§ 290.01 Scope of Chapter

This chapter discusses the obligations of the guardian or conservator of the estate to support the ward or conservatee or his or her dependents [*see § 290.12*], to pay debts [*see § 290.16*], to collect debts [*see § 290.21*], and to pay wage claims [*see § 290.17*].

It also discusses powers to advance funds [*see § 290.15*], to pay a personal allowance [*see § 290.14*], to pay taxes [*see § 290.20*], to maintain homes [*see § 290.13*], to make withdrawals and deposits [*see § 290.22*], to maintain policies, plans, and benefits [*see § 290.23*], and to exercise voting rights of shares, memberships, or property [*see § 290.24*].

The chapter also discusses the enforcement of judgments [*see § 290.18*] and obligations [*see § 290.19*].

The chapter includes a Research Guide [*see § 290.40*] and the following forms:

- A petition to authorize payment for the support, maintenance, or education of a ward or a conservatee [*see § 290.50*].

- A petition to authorize payment for the support, maintenance, or education of a ward's or a conservatee's dependents [*see § 290.51*].

- A petition and an order to authorize payment for the support, maintenance, or education of a ward or a conservatee despite the obligation of a third party [*see §§ 290.52, 290.53*].

- A petition and an order to direct the guardian or conservator to furnish suitable support, maintenance, or education [*see §§ 290.54, 290.55*].

- A petition and an order to authorize an allowance to the ward or conservator [*see §§ 290.56, 290.57*].

- A petition and an order to direct the guardian or conservator to pay a debt, expense, or charge [*see §§ 290.58, 290.59*].

- A petition and an order to authorize the acceptance of a deed in lieu of foreclosure of mortgage or sale under the trust deed [*see §§ 290.60, 290.61*].

- A petition and an order for authority to withdraw assets from a blocked account [*see §§ 290.62, 290.63*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & Rights

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§ 290.02 Cross References

Additional information regarding support and maintenance of wards and conservatees may be found in the following chapters:

- For discussion and forms relating to the duty to support children or parents, see Ch. 394, *Parent and Child* .

- For a discussion and forms relating to the collection of estate assets in probate, see Ch. 450, *Probate: Collecting Assets*

- For a discussion and forms relating to claims against an estate in probate, see Ch. 454, *Probate: Claims Against the Estate*

- For a discussion and forms relating to the management of estate assets in probate, see Ch. 456, *Probate: Management of Estate Assets*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewFamily LawParental Duties & RightsDutiesGeneral OverviewFamily LawParental Duties & RightsDutiesSupport of Children

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[Reserved]

§§ 290.03[Reserved]

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§ 290.10 Governing Statutes

The power of the guardian or conservator of the estate to make payments for the support of the ward or conservatee or his or her dependents, to pay debts, to collect debts, to deposit and withdraw assets, and otherwise to handle and maintain assets is governed by the following statutes:

- *Prob. Code §§ 23* and *1446* (definitions).
- *Prob. Code § 2404* (order for support or other payment).
- *Prob. Code § 2420 et seq.* (support and maintenance).
- *Prob. Code § 2430* (payment of debts).
- *Prob. Code § 2431* (wage claims).
- *Prob. Code § 2451* (collection of debts).
- *Prob. Code §§ 2452-2461* (cash, deposits, insurance, investments, and taxes).
- *Prob. Code § 2464* (acceptance of deed in lieu of foreclosure).
- *Prob. Code § 2466* (advancements of funds). *Welf. & Inst. Code § 7279* (hospitalization in state or county hospital).

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & Rights

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§ 290.11 Definitions

The phrase "account in an insured savings and loan association" means a savings account or mutual capital certificate of either of the following [*Prob. Code § 23(a)*]:

- A federal association; or
- A savings association doing business in California that is an "insured institution" as defined in Title IV of the National Housing Act [*see* former *12 U.S.C. § 1724* (*now see 12 U.S.C. §§ 1813-1815*)].

As used in *Prob. Code § 23*, the following definitions apply [*Prob. Code § 23(b)*]:

- "Federal association" has the same meaning as defined in *Fin. Code § 5102(b)*;
- "Mutual capital certificate" has the same meaning as defined in *Fin. Code § 5111*;
- "Savings account" has the same meaning as defined in *Fin. Code § 5116*; and
- "Savings association" has the same meaning as defined in *Fin. Code § 5102(a)*.

"Account in an insured credit union" means a share account in a credit union, either federally chartered or state licensed, that is insured under Title II of the Federal Credit Union Act (*12 U.S.C. § 1781 et seq.*) [*Prob. Code § 22*].

The phrase "single-premium deferred annuity" means an annuity offered by an admitted life insurer for the payment of a one-time, lump-sum premium and for which the insurer neither assesses any initial charges or administrative fees against the premium paid nor exacts or assesses any penalty for withdrawal of any funds by the annuitant after a period of five years [*Prob. Code § 1446*; *see Ins. Code §§ 23, 24*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsCertificates of Deposit & Savings AccountsBanking LawDepository InstitutionsCredit UnionsBanking LawDepository InstitutionsFederal Savings AssociationsBanking LawDepository InstitutionsState Savings AssociationsEstate, Gift & Trust LawAnnuitiesGeneral Overview

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§ 290.12 Payments for Support

[1] General Rules

Subject to the obligations of third parties to provide support [*Prob. Code § 2422*; *see* [2], *below*], the guardian or conservator must apply income from the estate, so far as necessary, to the comfortable and suitable support, maintenance, and education of the ward or conservatee and of those legally entitled to support, maintenance, or education from the ward or conservatee. In applying the estate income, the guardian or conservator must take into account the value of the estate and the condition of life of the persons required to be furnished with support, maintenance, or education [*Prob. Code § 2420(a)*].

If the income from the estate is insufficient to provide comfortable and suitable support, maintenance, and education, the guardian or conservator may sell or give a security interest in or other lien on any personal property of the estate, or may sell, mortgage, or give a deed of trust on any real property of the estate [*Prob. Code § 2420(b)*; *see* discussion and forms relating to sales and security interests in Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment*].

The guardian or conservator is not ordinarily required to obtain court authorization before making any support payments. Nevertheless, authorization must be obtained when otherwise required for a particular transaction [*Prob. Code § 2420(d)*]. For example, authorization is required for certain sales of estate property when the income is insufficient to provide support [*see* discussion in *Ch. 290A, Guardianship and Conservatorship: Asset Management and Investment, § 290A.15*] and when a third party is obligated to provide support [*see* [2], *below*]. Even when court authorization is not required, the guardian or conservator is not precluded from seeking court authorization, instructions, or approval and confirmation [*Prob. Code § 2420(e)*; *see §§ 290.50* (petition to support ward or conservatee), 290.51 (petition to support dependents)].

The guardian or conservator should keep proper vouchers or other proof of payments in order to be allowed credit when the accounts are settled [*see Prob. Code § 2420(c)*; *see also* Ch. 290F, *Guardianship and Conservatorship: Compensation of Guardian or Conservator*].

[2] Third-Party Obligation

A husband and wife owe obligations of mutual support toward each other [*see Civ. Code § 5100*; *see* also *Civ. Code § 242* (spousal, parental, and filial duties of support)]. While living together, each spouse must support the other spouse out of his or her separate property when there is no community or quasi-community property [*Civ. Code § 5132*; *see Estate of Risse (1957) 156 Cal. App. 2d 412, 419-422, 319 P.2d 789* (under former Prob. Code § 1505, husband with ability to support may not resort to incompetent wife's estate)].

Every individual must also support his or her child [*Civ. Code § 242*; *see Civ. Code §§ 196* (parental support obligation), 206 (duty to support indigent parent or child)]. However, a court may direct that an allowance be made to a parent from a child's property for the child's past or future support and education, on such conditions as may be proper, whenever it is for the child's benefit [*Civ. Code § 201*]. Thus, a parent unable to provide support may resort to a minor's estate [*In re Carboni (1941) 46 Cal. App. 2d 605, 613, 116 P.2d 453]* . A parent may also use the income from a minor's estate to supplement his or her contribution for support so that the minor enjoys a higher standard of living [*Armstrong v. Armstrong (1976) 15 Cal. 3d 942, 947-949, 126 Cal. Rptr. 805, 544 P.2d 941* (parents invading testamentary trust)].

Finally, it is the duty of the father, the mother, and the child of any person in need who is unable to maintain himself or herself by work to maintain that person to the extent of their ability. The promise of an adult child to pay for necessaries previously furnished by a third person to an indigent parent is binding. A person who is receiving aid to the aged is deemed to be a person in need who is unable to maintain himself or herself by work [*Civ. Code § 206*].

Notwithstanding the existence of a third party legally obligated to provide support, maintenance, or education, the court may for good cause order a ward or conservatee to be supported, maintained, or educated, wholly or partially, out of the estate. The order may be obtained by petition of the guardian or conservator, the ward or conservatee, or any other interested person. It may be made for a limited period of time, but, if not so limited, it continues in effect until modified or revoked [*Prob. Code § 2422(a)*; *see §§ 290.52* (petition to authorize support despite obligation of third party), 290.53 (order authorizing support payment despite obligation of third party)].

[3] Care Received in State or County Hospital

The duty of the guardian or conservator to apply the estate income for support includes providing for the care, treatment, and support of a ward or conservatee who is a patient in a state hospital under the jurisdiction of the State Department of Mental Health [*Prob. Code § 2420(a)*; Welf. & Inst. Code § 7279(a); *see Welf. & Inst. Code §§ 4025* (limits on charges for care and treatment), 7275-7277 (liability for care and determination and collection of charges), 7280-7283 (property and support of patients)] or the State Department of Developmental Services [*Prob. Code § 2420(a)*; *Welf. & Inst. Code § 7513*; *see Welf. & Inst. Code §§ 4431* (limits on charges for care and treatment), 7513.1, 7513.2 (costs of care and treatment)], or who is a patient at a county mental hospital [*see Welf. & Inst. Code § 7106*].

If a ward or conservatee is committed to a state mental hospital and at any time his or her estate does not have sufficient money on hand to pay the claim of the hospital for his or her care, support, maintenance, and expenses while a patient, the court may, on petition of the guardian or conservator of the estate or, if the guardian or conservator fails, refuses, or neglects to apply, on the petition of the department with jurisdiction over the hospital, make an order directing the guardian or conservator to sell so much of the other personal or real property, or both, of the ward or conservatee as is necessary to pay for the care. From the proceeds of the sale, the guardian or conservator must pay the amount due for the care and also such other charges as are allowed by law [*Welf. & Inst. Code § 7279(b)*]. Payment for the care, support, maintenance, and expenses may not be extracted, however, from a person who has no more than $500 of assets [*Welf. & Inst. Code 7279(c)*].

[4] Enforcement of Support Obligations

If the guardian or conservator fails, neglects, or refuses to furnish comfortable and suitable support, maintenance, or education for the ward or conservatee as required, the court, on petition or on its own motion, must order the guardian or conservator to do so from the estate [*Prob. Code § 2404(a)*]. The petition may be filed by the ward or conservatee, a creditor, or any other interested person [*Prob. Code § 2404(b)*; *see §§ 290.54* (petition to direct guardian or conservator to furnish support), 290.55 (order directing guardian or conservator to furnish support)].

If a ward or conservatee is a patient in a state mental hospital, the guardian or conservator may be ordered by the judge of the superior court in which the guardianship or conservatorship proceedings are pending, to pay, to the extent of the estate, for the ward's or conservatee's care, support, maintenance, and for necessary expenses at the hospital. The order may be obtained by petition of the department with jurisdiction over the hospital showing that the guardian or conservator has failed, refused, or neglected to pay for these costs. The order may be enforced in the same manner as are other court orders [*Welf. & Inst. Code § 7279(a)*].

The provisions of *Welf. & Inst. Code § 7275* that hold a patient committed to a state hospital pursuant to *Penal Code § 1026* (directing involuntary confinement in a treatment facility on a finding that a criminal defendant was insane at the time of committing an offense) responsible for the costs of his or her institutional care, support, and maintenance have successfully withstood attack on constitutional grounds [*see Department of Developmental Services v. Ladd (1990) 224 Cal. App. 3d 128, 132-133, 273 Cal. Rptr. 485]* . These provisions neither impermissibly tax one class of individuals with institutional costs associated with the protection of society nor violate the equal protection provisions of the federal and state constitutions [*Department of Developmental Services v. Ladd (1990) 224 Cal. App. 3d 128, 139, 143, 273 Cal. Rptr. 485*]. Although *Ladd* was not a guardianship or conservatorship case, its holding and rationale appear applicable to wards or conservatees in similar circumstances.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & RightsFamily LawMarital Duties & RightsDuty of SupportFamily LawParental Duties & RightsDutiesSupport of ChildrenPublic Health & Welfare LawHealthcareMental Health ServicesCosts

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§ 290.13 Home Maintenance

The guardian or conservator may maintain in good condition and repair without court authorization the home or other dwelling of either or both of the following [*Prob. Code §§ 2450(a), 2457*]:

- The ward or conservatee; or
- The persons legally entitled to the maintenance and repair of their home or other dwelling from the ward or conservatee.

This power of maintenance and repair, however, does not include the power to add improvements. The guardian or conservator, however, may petition the court for the additional power to alter, improve, and repair or to raze, replace, and rebuild property of the estate [*Prob. Code §§ 2590, 2591(h)*]. For discussion of additional powers, see Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & Rights

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§ 290.14 Personal Allowance

The court may authorize the guardian or conservator to pay to the ward or conservatee out of the estate a reasonable allowance for the ward's or conservatee's personal use. The authorization may be obtained by petition of the guardian or conservator or the ward or conservatee. The allowance must be in such amount as the court may determine to be for the best interests of the ward or conservatee [*Prob. Code § 2421(a)*; *see §§ 290.56* (petition to authorize allowance), 290.57 (order authorizing allowance)].

The guardian or conservator is not required to account for the allowance other than to establish that it has been paid to the ward or conservatee. The funds so paid are subject to the sole control of the ward or conservatee [*Prob. Code § 2421(c)*]. However, the amount of any payments for the ward's or conservatee's debts incurred during the guardianship or conservatorship for necessaries of life may be deducted from the allowance [*Prob. Code § 2430(a)(2)*; *see also § 290.16*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & Rights

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§ 290.15 Advancement of Funds

The guardian or conservator may advance his or her own funds for the benefit of the ward or conservatee or the estate, and may reimburse the advances out of the income and principal of the estate first available [*Prob. Code § 2466*]. These advancements and reimbursements may be made without court authorization [*Prob. Code § 2450(a)*].

With court authorization or approval, interest on the amount advanced may be allowed at the legal rate payable on judgments [*Prob. Code § 2466*; *see Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.12[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & Rights

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§ 290.16 Payment of Debts

The guardian or conservator must pay the debts incurred by the ward or conservatee before creation of the guardianship or conservatorship, from any principal and income of the estate, giving priority to wage claims to the extent required by *Prob. Code § 2431*, discussed in *§ 290.17* [*Prob. Code § 2430(a)(1)*].

The guardian or conservator must also pay from any principal and income of the estate the debts incurred during the guardianship or conservatorship by the ward or conservatee to provide the necessaries of life to the ward or conservatee and to the spouse and minor children of the ward or conservatee, to the extent the debts are reasonable. The conservator must also pay the debts reasonably incurred by the conservatee during the conservatorship to provide the basic living expenses, as defined in *Fam. Code § 297*, to the domestic partner of the conservatee. The guardian or conservator may deduct the amount of any payments for the debts from any allowance otherwise payable to the ward or conservatee [*Prob. Code § 2430(a)(2)*; *see § 290.14*].

A Domestic Partnership is formed when two persons who meet specific requirements complete and file a Declaration of Domestic Partnership with the Secretary of State. In order to file a valid declaration, the two parties must meet the following requirements:

- Both must have a common residence;
- Both agree to be jointly responsible for each other's basic living expenses incurred during the domestic partnership;
- Neither is married or a part of another domestic partnership;
- Neither is related by blood in a way that would prevent them from being married in the state of California;
- Both are over 18;

- Both are either of the same sex or one or both meet the eligibility criteria under Title II of the Social Security Act for old-age insurance benefits [*42 U.S.C. § 1381*]. Persons of opposite sexes may not form a valid domestic partnership unless at least one is 62 years of age;

- Both are capable of consenting to a domestic partnership;

- Neither has previously filed a Declaration of Domestic Partnership with the Secretary of State which has not been terminated; and

- Both must file the Declaration of Domestic Partnership with the Secretary of State [*Family Code § 297*].

In conservatorship proceedings, the conservator must pay from any principal and income of the estate any other debt incurred by the conservatee during the conservatorship only if the transaction resulting in the debt is one that the court would have authorized the conservatee to enter into pursuant to *Prob. Code § 1873(a)* [*Prob. Code § 2430(a)(3)*; *see Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.18*]. These payments are not required to be made to the extent that they would impair the ability to provide necessaries of life to the conservatee and his or her spouse and minor children, and to provide the basic living expenses, as defined in *Fam. Code § 297*, of the domestic partner [as defined by Prob. Code § 37, Family Code § 297] of the conservatee. [*Prob. Code § 2430(b)*].

Finally, the guardian or conservator must pay from any principal and income of the estate the reasonable expenses incurred in the collection, care, and administration of the estate. Nevertheless, court authorization is required for payments of compensation to the guardian or conservator of the person or estate or both, to an attorney for the guardian or conservator of the person or estate or both, to an attorney for the ward or conservatee, to an attorney for the estate, or to a public guardian for his or her costs or fees pursuant to *Prob. Code § 2902* [*Prob. Code § 2430(a)(4)*]. For discussion and referral to forms for use in obtaining authorization, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.12[2]*.

When there is doubt as to whether any of the debts discussed above should be paid, the guardian or conservator can petition the court for instructions under *Prob. Code § 2403* [*Prob. Code § 2430(c)*]. For discussion of petitions for instructions, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.12[2]*. He or she should also consider the availability of procedures to submit a disputed claim to summary determination or arbitration, or to compromise a claim or to extend, renew, or modify an obligation [*see Prob. Code §§ 2405* (summary determination), 2406 (arbitration), 2500 et seq. (compromise or extension); *see also Ch. 290C, Guardianship and Conservatorship: Actions and Disputed Claims, §§ 290C.11, 290C.12*]. The possibility of obtaining the additional independent power to pay, collect, compromise, arbitrate, or otherwise to adjust claims, debts, or demands on the guardianship or conservatorship should also be considered [*see Prob. Code § 2591(p)*, discussed in Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawCohabitationDomestic PartnersRegistrationFamily LawGuardiansDuties & Rights

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§ 290.17 Wage Claims

The guardian or conservator must promptly pay wage claims for work done or services rendered for the ward or conservatee within 30 days prior to the date that the petition for appointment of the guardian or conservator was filed. The payments may not exceed $900 to each claimant. If there is insufficient money to pay all the claims up to $900, the money available must be distributed among the claimants in proportion to the amount of their respective claims [*Prob. Code § 2431(b)*].

After payments of the 30-day claims have been made, the guardian or conservator must pay other wage claims for work done or services rendered for the ward or conservatee within 90 days prior to the date the petition for appointment of the guardian or conservator was filed. The payments may not exceed $1100 to each claimant, and, if there is insufficient money to pay all the claims up to this amount, the money available must be distributed among the claimants in proportion to the amounts of their respective claims [*Prob. Code § 2431(c)*].

The guardian or conservator may require sworn claims to be presented. If there is reasonable cause to believe that the claim is not valid, the guardian or conservator may refuse to pay the claim in whole or in part, but must pay any part of it that is not disputed, without prejudice to the claimant's rights as to the balance of the claim. The guardian or conservator must withhold sufficient money to cover the disputed portion until the claimant has had a reasonable opportunity to establish the validity of the claim by bringing an action, either in the claimant's own name or through an assignee, against the guardian or conservator [*Prob. Code § 2431(d)*].

Subject to the foregoing procedure on sworn claims, the guardian or conservator may petition the court for instructions when there is doubt as to whether a wage claim should be paid [*Prob. Code § 2431(a)*]. For discussion and forms, see Ch. 287, *Guardianship and Conservatorship: General Management Powers* .

If the guardian or conservator neglects or refuses to pay all or any part of a claim that is not in dispute, the court must order payment on the informal application of any wage claimant or the assignee or representative of the claimant [*Prob. Code § 2431(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & Rights

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24-290 California Forms of Pleading and Practice--Annotated § 290.18

§ 290.18 Enforcement of Judgments

Property in a guardianship or conservatorship estate is not subject to enforcement of a money judgment by the normal procedures for enforcement of money judgments set out in *Code Civ. Proc. § 695.010 et seq.* Instead, the judgment creditor may apply to the court in which the guardianship or conservatorship proceeding is pending under *Prob. Code § 1400 et seq.* for an order requiring payment of the judgment [*Code Civ. Proc. § 709.030*; *see §§ 290.58* (petition to direct guardian or conservator to pay debt, expense, or charge), 290.59 (order directing payment of debt, expense, or charge)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewFamily LawGuardiansGeneral Overview

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24-290 California Forms of Pleading and Practice--Annotated § 290.19

§ 290.19 Enforcement of Obligations

If the guardian or conservator fails, neglects, or refuses to pay a debt, expense, or charge lawfully due and payable by the ward or conservatee or by the estate, the court, on petition or on its own motion, must order the guardian or conservator to make payment from the estate [*Prob. Code § 2404(a)*]. Nevertheless, the court does not have the authority to adjudicate the validity of a disputed debt that has not been established to be due and payable in a prior independent action [*Stevenson v. Superior Court (1970) 9 Cal. App. 3d 904, 907, 88 Cal. Rptr. 462]* .

The petition may be filed by the ward or conservatee, the creditor, or any other interested person [*Prob. Code § 2404(b)*; *see §§ 290.58* (petition to direct guardian or conservator to pay debt, expense, or charge), 290.59 (order directing payment of debt, expense, or charge)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & Rights

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24-290 California Forms of Pleading and Practice--Annotated § 290.20

§ 290.20 Taxes

The guardian or conservator may prepare, execute, and file tax returns for the ward or conservatee and for the estate. He or she may also exercise options and elections and claim exemptions for the ward or conservatee and for the estate under the applicable tax laws [*Prob. Code § 2461(a)*].

Additionally, the guardian or conservator may pay, contest, and compromise taxes, penalties, and assessments on the property of the estate and income and other taxes payable or claimed to be payable by the ward or conservatee or the estate. This power is not subject to *Prob. Code § 2502*, which requires court approval of compromises in excess of $25,000 [*Prob. Code § 2461(b)*].

The guardian or conservator can exercise these powers regarding taxes without court authorization or approval [*Prob. Code § 2450(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & RightsTax LawState & Local TaxesEstate & Gift TaxEstate TaxImposition of Tax

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24-290 California Forms of Pleading and Practice--Annotated § 290.21

§ 290.21 Collection of Debts and Benefits

[1] General Rules

The guardian or conservator, without court authorization, may collect debts and benefits due to the ward or conservatee and the estate [*Prob. Code §§ 2450(a), 2451*]. For forms for use in collecting estate assets in probate, which are adaptable to guardianships or conservatorships, see Ch. 450, *Probate: Collecting Assets* . Whenever there is a question concerning the propriety of initiating a lawsuit to collect the debt, however, the guardian or conservator should obtain instructions from the court [*see Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.12[2]*].

[2] Acceptance of Deed in Lieu of Foreclosure or Sale

If an obligation secured by a mortgage or deed of trust is an asset of the estate and becomes delinquent, the guardian or conservator may seek to collect the debt by foreclosing through judicial process or through a trustee's sale [*see Prob. Code § 2451*]. Nevertheless, if it is to the advantage of the estate to accept a deed to property that is subject to a mortgage or deed of trust in lieu of foreclosure of the mortgage or sale under the deed of trust, the guardian or conservator may accept a deed conveying the property to the ward or conservatee. The acceptance must be authorized by court order and be on such terms and conditions as may be imposed by the court [*Prob. Code § 2464(a)*]. To obtain the order, the guardian or conservator must file a petition showing the advantage to the estate of accepting the deed [*Prob. Code § 2464(b)*; *see §§ 290.60* (petition for authority to accept deed in lieu of foreclosure), 290.61 (order authorizing acceptance of dee in lieu of foreclosure)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & RightsReal Property LawFinancingMortgages & Other Security InstrumentsDeed in Lieu of Foreclosure

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24-290 California Forms of Pleading and Practice--Annotated § 290.22

§ 290.22 Deposits and Withdrawals

[1] Cash

The guardian or conservator may endorse and cash or deposit, without court authorization or approval, any checks, warrants, or drafts payable to the ward or conservatee that constitute property of the estate [*Prob. Code §§ 2450(a), 2452(a)*]. Note that checks for allowances and wages are not property of the estate [*Prob. Code §§ 2421* (allowances), 2601 (wages)].

If it appears likely that the estate will satisfy the conditions for dispensing with accounting for small estates under *Prob. Code § 2628(b)* (discussed in Ch. 290E, *Guardianship and Conservatorship: Accounts*), the court may order that the guardian or conservator be the designated payee for public assistance payments received pursuant to *Welf. & Inst. Code § 11000 et seq.* (aid and medical assistance) or 16000 et seq. (services for care of children) [*Prob. Code § 2452(b)*].

The guardian or conservator may deposit money belonging to the estate in an insured account in a financial institution in California without court authorization or approval [*Prob. Code §§ 2450(a), 2453*; *see Prob. Code § 46* ("insured account in financial institution" as including insured bank, credit union, and savings and loan association accounts, to extent insured)]. Unless otherwise provided by court order, money so deposited (pursuant to *Prob. Code § 2453*) may be withdrawn without a court order [*Prob. Code § 2453*; *see Prob. Code §§ 22* ("account in insured credit union" defined), 23 ("account in insured savings and loan assocation" defined)].

Subject to *Prob. Code § 2453.5(b)*, if a trust company is a guardian or conservator and, in the exercise of reasonable judgment, deposits money of the estate in an account in any department of the corporation or association of which it is a part, the trust company is chargeable with interest on the deposit at the rate of interest prevailing among banks of the locality on such deposits [*Prob. Code § 2453.5(a)*]. When it is to the advantage of the estate, the amount of cash that is reasonably necessary for the orderly administration of the estate may be deposited in a non-interest-bearing checking account maintained in a department of the corporation or association of which the trust company is a party [*Prob. Code § 2453.5(b)*].

[2] Personal Property

Court authorization or approval is not required for a guardian or conservator to deposit personal property of the estate with a trust company authorized to transact a trust business in this state as provided in *Prob. Code § 2328* (procedure for deposits subject to court control) or in *Fin. Code § 99 et seq.* (applicability and definitions) [*Prob. Code §§ 2450(a), 2454*; *see Fin. Code §§ 600, 1500 et seq.* (trust company authorization); *see also Prob. Code § 83* ("trust company" defined)]. Unless otherwise provided by court order, the personal property may be withdrawn without order of the court [*Prob. Code § 2454*].

[3] Securities

A trust company serving as guardian or conservator may deposit securities that constitute all or part of the estate in a securities depository as provided in *Fin. Code § 1592* [*Prob. Code § 2455(a)*]. If the securities have been deposited with a trust company pursuant to *Prob. Code § 2328* (exclusion of funds in blocked account from determination of bond amount) or 2454 (deposit of estate personal property for safekeeping), the trust company may deposit the securities in a securities depository in the same manner [*Prob. Code § 2455(b)*]. The securities depository may hold securities deposited with it in the manner authorized by *Fin. Code § 775* (authorizing manner of custody, name of holder, and merging of certificates) [*Prob. Code § 2455(c)*].

[4] Blocked Accounts

On application of the guardian or conservator, the court, with or without notice, may order that money or other personal property be deposited pursuant to *Prob. Code § 2453* (deposit of estate funds in insured account in financial institution in California) or 2454 (deposit of estate personal property with trust company for safekeeping), and be subject to withdrawal only on court authorization [*Prob. Code § 2456(a)*]. The guardian or conservator must deliver a copy of the court order to the financial institution or trust company at the time the deposit is made [*Prob. Code § 2456(b)*]. No financial institution or trust company accepting a deposit pursuant to *Prob. Code § 2453* or *2454* is on notice of the existence of an order that the money or other property is subject to withdrawal only on court authorization, unless it has *actual notice* of the order [*Prob. Code § 2456(c)*].

This application may be appropriate, for example, when the guardian or conservator seeks to dispose of the balance of money and other property received pursuant to a compromise or judgment for the ward or conservatee after payment of expenses [*see Prob. Code § 3602(b)*; *see also Ch. 290C, Guardianship and Conservatorship: Actions and Disputed Claims, § 290C.13[3]*]. The application may also be used to deposit property in a blocked account in a trust company or insured account in a financial institution in this state in order to exclude the property from the determination of the bond or to reduce the amount of the bond [*see Prob. Code § 2328*; Ch. 283, *Guardianship and Conservatorship: Bonds*].

For forms for a petition and order to deposit money or personal property in blocked accounts that may be adapted for use in this context, see Ch. 283, *Guardianship and Conservatorship: Bonds* . For forms for a petition and order to withdraw assets from blocked accounts, see *§§ 290.62, 290.63*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesSecuritiesTrust Investment ServicesEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & Rights

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24-290 California Forms of Pleading and Practice--Annotated § 290.23

§ 290.23 Maintenance of Insurance Policies, Plans, and Benefits

[1] Medical, Disability, and Property Insurance

The guardian or conservator may obtain, continue, renew, modify, terminate, or otherwise deal in any of the following, without court authorization or approval, for the purpose of providing protection to the ward or conservatee or to a person legally entitled to support from the ward or conservatee [*Prob. Code §§ 2450(a), 2459(a)*]:

- Medical, hospital, and other health care policies, plans, or benefits.
- Disability policies, plans, or benefits.

The power to maintain policies, plans, and benefits does not limit the guardian's or conservator's power to make investments as otherwise authorized [*Prob. Code § 2459(f)*]. For discussion of investments, see Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment* .

The guardian or conservator may also insure, without court authorization [*Prob. Code §§ 2450(a), 2460*]:

- Property of the estate against loss or damage.
- The ward or conservatee, the guardian or conservator, and all or any part of the estate against liability to third persons.

[2] Life Insurance, Annuities, and Other Plans Affecting Conservatee

The conservator may continue in force, without court authorization or approval, any of the following in which the conservatee, or a person legally entitled to support, maintenance, or education from the conservatee, has or will have an interest [*Prob. Code §§ 2450(a), 2459(b)*]:

- Life insurance policies, plans, or benefits.

- Annuity policies, plans, or benefits.
- Mutual fund and other dividend reinvestment plans.
- Retirement, profit-sharing, and employee welfare plans or benefits.

The conservator's right to elect benefit or payment options, to terminate, to change beneficiaries or ownership, to assign rights, to borrow, or to receive cash value in return for a surrender of rights, or to take similar actions under any of the policies, plans, or benefits, generally may be exercised only after authorization or direction of the court [*Prob. Code § 2459(c)*]. However, the conservator may without court authorization borrow on the loan value of an insurance policy to pay the current premiums to keep the policy in force if the conservatee followed that prior before establishment of the conservatorship [*Prob. Code § 2459(d)*]. Similarly, the conservator may sell mutual funds held without designation of a beneficiary without authorization, confirmation, or direction of the court [*Prob. Code § 2544.5*].

[3] Minor's Contracts for Annuities and Insurance

A minor is not, by reason of minority alone, deemed incompetent to contract for and exercise contractual rights under certain annuity contracts and life and disability insurance policies. If the contract is made by a minor under 16 years of age, however, a parent or guardian must provide written consent to the contract and to the exercise of rights under it. Further, all such contracts made by a minor that may result in any personal liability for assessment must have the written assumption of any such liability by a parent or guardian in consideration of the issuance of the contract [*Ins. Code § 10112*]. The guardian may give the consent without authorization of the court, but he or she must obtain court authorization to be able to use estate funds to effect or maintain in force a contract entered into by the ward under *Ins. Code § 10112*. To obtain the order, the guardian, ward, or any other interested person must file a petition showing that it is in the best interest of the ward or of the guardianship estate to use estate funds for such an insurance policy. Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2459(e)*; *see* discussion in *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.12[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawAnnuitiesGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & RightsInsurance LawDisability InsuranceGeneral Overview

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24-290 California Forms of Pleading and Practice--Annotated § 290.24

§ 290.24 Voting Rights of Shares, Membership, or Property

With respect to any shares of stock of a domestic or foreign corporation held in the estate, any membership in a nonprofit corporation held by the estate, or any other property held in the estate, a guardian or conservator may do any or all of the following without court authorization [*Prob. Code §§ 2450(a), 2458*; *see Corp. Code §§ 702(a), 705(a)* (powers to vote shares and give proxies)]:

- Vote in person, and give proxies to exercise, any voting rights with respect to the shares or memberships or property.

- Waive notice of any meeting or give consent to the holding of any meeting.

- Authorize, ratify, approve, or confirm any action that could be taken by shareholders, members, or property owners.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersMeetings & VotingGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & Rights

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[Reserved]

§§ 290.25[Reserved]

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24-290 California Forms of Pleading and Practice--Annotated § 290.40

§ 290.40 State Statutes

[1] Allowance and Advancement of Funds

Allowance for personal use. *Prob. Code § 2421*

Advancement of guardian's or conservator's funds. *Prob. Code § 2466*

[2] Debt Collection and Payments

Enforcement of debt obligations. *Prob. Code § 2404*

Payment of debts, expenses, and wage claims. *Prob. Code §§ 2430, 2431*

Power to collect debts and benefits. *Prob. Code § 2451*

Acceptance of deed in lieu of foreclosure or trustee's sale. *Prob. Code § 2464*

[3] Deposits and Withdrawals

Responsibility of banks over estate assets in court-ordered blocked accounts. *Fin. Code §§ 1592, 1593, 1586*

Administrators, executors, custodians, conservators, and guardians are empowered to invest funds in savings accounts without court order. *Fin. Code § 7000(a)*

Powers to cash, deposit, or withdraw checks, money, securities, or personal property. *Prob. Code §§ 2452-2456*

Requirement that trust company-guardian/conservator that deposits estate money in any department of corporation or

association of which it is part be chargeable with interest on that money. *Prob. Code § 2453.5*

[4] Home Maintenance

Duty to maintain home. *Prob. Code § 2457*

[5] Policies, Plans, and Benefits

Powers to deal with policies, plans, and benefits. *Prob. Code §§ 2459, 2460*

[6] Support

Allowance to parent out of child's property for past or future support. *Civ. Code § 201*

Duty to support indigent parent or child. *Civ. Code § 206*

Duty of spouse or parent to provide support. *Civ. Code §§ 242, 5100, 5132*

Appeal. *Prob. Code § 1301(c)*

Enforcement of support obligations. *Prob. Code § 2404*

Duty to support, maintain, and educate. *Prob. Code §§ 2420, 2422*

Authority to sell or encumber estate property. *Prob. Code § 2420(b)*

Care and support of person committed to state mental hospital or state hospital for mentally disordered. *Welf. & Inst. Code §§ 7275, 7279, 7280, 7282, 7282.1*

[7] Taxes

Power to prepare tax returns and to pay taxes. *Prob. Code § 2461*

[8] Voting Rights of Shares or Other Assets

Powers to vote, to waive notice, and otherwise to act with respect to shares, memberships, or property. *Prob. Code § 2458*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & RightsFamily LawMarital Duties & RightsDuty of SupportFamily LawParental Duties & RightsDutiesSupport of ChildrenReal Property LawFinancingMortgages & Other Security InstrumentsDeed in Lieu of Foreclosure

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24-290 California Forms of Pleading and Practice--Annotated § 290.41

§ 290.41 Local Court Rules

[1] Alameda County

Petition to obtain authority to expend funds for support of ward. Alameda Co. Super. Ct. Rules, Rule 12.14.9

[2] Contra Costa County

Primary liability of parents for support of minor. Contra Costa Co. Prob. Pol. Man., § 805

[3] Los Angeles County

Obligation of parents to support child. Los Angeles Co. Super. Ct. Rules, Rule 10.160

[4] Orange County

Primary liability of parents for support of minor. Orange Co. Super. Ct. Rules, Rule 610.11

Request for withdrawal of impounded funds. Orange Co. Super. Ct. Rules, Div. VI, Rules 613.02(b), 613.04, 613.05, 613.07, 613.09

[5] Sacramento County

Petition for withdrawal of funds. Sacramento Co. Super. Ct. Rules, Rule 10.03

Primary liability of parents for support of minor. Sacramento Co. Super. Ct. Rules, Rule 15.92

[6] City and County of San Francisco

Use of minor's assets for support in guardianship cases. San Francisco Uniform Local Ct. Rules, Rule 14.105(J)

Request for withdrawal of blocked funds. San Francisco Uniform Local Ct. Rules, Rule 14.105(L)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & RightsFamily LawParental Duties & RightsDutiesSupport of Children

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24-290 California Forms of Pleading and Practice--Annotated § 290.42

§ 290.42 Federal Administrative Regulations

Penalty for early withdrawal of time deposit at savings association as not applicable if withdrawal made after judicial or administrative finding of incompetency of account owner. 12 C.F.R. § 563.7(d)(1)(ii)

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsLiabilityBanking LawDepository InstitutionsFederal Savings Associations

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24-290 California Forms of Pleading and Practice--Annotated § 290.43

§ 290.43 Decisions

Use of income from minor's estate is appropriate to supplement parent's contribution for support so that minor enjoys higher standard of living. *Armstrong v. Armstrong (1976) 15 Cal. 3d 942, 947-949, 126 Cal. Rptr. 805, 544 P.2d 941* (parents invading testamentary trust)

Estate is in custody of law and therefore is not subject to execution. *McCracken v. Lott (1935) 3 Cal. 2d 164, 165-166, 44 P.2d 355* ; *Stevenson v. Superior Court (1970) 9 Cal. App. 3d 904, 907-908, 88 Cal. Rptr. 462*

Conservator, as fiduciary, has duty to make payment of maintenance and support of conservatee and those legally entitled to conservatee's support; court permitted to enforce obligation by ordering payment. *Poag v. Winston (1987) 195 Cal. App. 3d 1161, 1180, 241 Cal. Rptr. 330*

Estate liable for state hospital charges computed in accordance with statute and regulations, absent showing of error due to miscalculation or arbitrary or discriminatory acts. *Guardianship of Gridley (1973) 32 Cal. App. 3d 1053, 1062-1065, 108 Cal. Rptr. 200*

Probate court is without jurisdiction to adjudicate validity of disputed claim not established to be due and payable in prior independent action. *Stevenson v. Superior Court (1970) 9 Cal. App. 3d 904, 907, 88 Cal. Rptr. 462*

Court is able to declare lien on incompetent's estate for care at state hospital. *Estate of Mims (1962) 202 Cal. App. 2d 332, 342, 345, 20 Cal. Rptr. 667*

Incompetent spouse's estate is usable to provide for support when spouse is unable to fulfill obligation to support. *Estate of Risse (1957) 156 Cal. App. 2d 412, 420-422, 319 P.2d 789* ; *Guardianship of Thrasher (1951) 105 Cal. App. 2d 768, 776-778, 234 P.2d 230* (cases decided under former Prob. Code § 1505, which authorized husband unable to provide support to defray expenses from incompetent wife's estate)

Minor's estate usable to provide for support when parents were unable to fulfill their obligation to support. *In re*

Carboni (1941) 46 Cal. App. 2d 605, 613, 116 P.2d 453

Advances of de facto guardian for care and support is compensable as credit after appointment. *Guardianship of Giambastiani (1934) 1 Cal. App. 2d 639, 644-646, 37 P.2d 142*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbateProcedures in ProbateJurisdiction & VenueGeneral OverviewFamily LawGuardiansDuties & RightsFamily LawMarital Duties & RightsDuty of SupportFamily LawParental Duties & RightsDutiesSupport of Children

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24-290 California Forms of Pleading and Practice--Annotated § 290.44

§ 290.44 Text References

California Conservatorships, ch. 6 (Cal. C.E.B. 1983)

Witkin, Summary of California Law, vol. 12, *Wills and Probate*, §§ 922-924, 926-928, 942, 943 (9th ed. 1990)

Marshall and Garb, California Probate Procedure, ch. 21, § 2118 (Parker & Son 5th ed. 1991)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWillsGeneral Overview

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24-290 California Forms of Pleading and Practice--Annotated §§ 290.45-290.49

[Reserved]

§§ 290.45[Reserved]

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PART IV. FORMS

24-290 California Forms of Pleading and Practice--Annotated § 290.50

§ 290.50 Petition to Authorize Payments for Support, Maintenance, or Education of Ward or Conservatee [Prob. Code §§ 2403, 2420(a), (e)]

[1] FORM Petition to Authorize Payment for Support, Maintenance, or Education of Ward or Conservatee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship *or* Limited Conservatorship] of the _____ [Person *or* Estate *or* Person and Estate] of _____ [*name*], _____ [Ward *or* Conservatee].	))))))	NO. _____ [Hearing set for _____ [*date*], at _____ [*time*] in Dept. No. _____] PETITION FOR AUTHORITY TO EXPEND MONEY FOR _____ [SUPPORT *and/or* MAINTENANCE *and/or* EDUCATION]

Petitioner _____[*name*] respectfully represents:

1. Petitioner is the duly appointed, qualified, and acting _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee].

2. The following expenses are incurred monthly for the _____ [support *and/or* maintenance *and/or* education] of the _____ [ward *or* conservatee]: _____[*specify*]. _____[*State conditions of the ward's or conservatee's life which show his or her standard of living*].

3. As appears from the inventory and appraisal filed herein on _____[*date*], the value of the _____ [guardianship *or* conservatorship] estate is approximately $_____. The annual income from the estate is approximately $_____.

4. Petitioner should be authorized to expend the sum of $_____ per month for the comfortable and

suitable _____ [support *and/or* maintenance *and/or* education] of the _____ [ward *or* conservatee] until _____ [further order of this court *or specify date*].

5. A request for special notice has _____ [not been filed herein *or* been filed herein by _____ (*name*), and notice of the time and place of hearing on this petition will be given as required by law *or* been filed herein and waived by _____ (*name*)].

WHEREFORE, petitioner prays for an order authorizing petitioner as _____ [guardian *or* conservator] of the _____ [person and] estate of _____[*name*], _____ [ward *or* conservatee], to expend the sum of $_____ per month for the comfortable and suitable _____ [support *and/or* maintenance *and/or* education] of the _____ [ward *or* conservatee] until _____ [further order of this court *or specify date*] and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____[*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein represented on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The petition in [1], *above*, is for use by the guardian or conservator to obtain authorization, pursuant to *Prob. Code § 2403(a)*, to expend a sum each month for the support, maintenance, or education of the ward or conservatee, when authorization has not been sought in the petition for appointment of the guardian or conservator [*Prob. Code §§ 2403, 2420(a)*]. Alternatively, counsel may wish to obtain authorization in the petition for appointment since it is often advantageous to obtain the authorization at the commencement of the guardianship or conservatorship rather than to obtain approval of expenditures made in the annual accounting.

Although court authorization is not required by statute to expend funds for the support, maintenance, or education of the ward or conservatee [*Prob. Code § 2420(d)*], authorization may be mandated by local rule [*see, e.g.,* Alameda Co. Unified Super. Ct. Rules, Rule 12.14.9 (court approval should be sought to spend more than $1,000 per month for conservatee's support, especially if there is a probablility that the estate will be entirely consumed by the payments)].

When local rule mandates court authorization, nothing in *Prob. Code § 2420* dispenses with the need to obtain that authorization [*Prob. Code § 2420(d)*].

For a discussion of the payment of costs for the care, support, maintenance, and expenses of a ward or conservatee committed to a state mental hospital, see *§ 290.12[3]*.

For a form of order adaptable for use with this form, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.42*.

[3] Contents of Petition

Although not expressly required by statute, a petition under *Prob. Code §§ 2403* and *2420(e)* should state the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2420(e)*].
- The monthly expenses necessary for the comfortable and suitable support, maintenance, or education of the ward or conservatee (Paragraph 2) [*see Prob. Code § 2420(a)*].
- The total value and annual income of the estate (Paragraph 3) [*see Prob. Code § 2420(a)*].
- That those expenditures should be authorized (Paragraph 4) [*see Prob. Code §§ 2403, 2420(a)*].
- Whether a request for special notice has been filed and, if so, that proper notice will be given or has been waived (Paragraph 5) [*see Prob. Code §§ 1260(a), 2700, 2701*].

[4] Verification

Except as otherwise specifically provided, all petitions filed pursuant to the Guardianship-Conservatorship Law must be verified [*Prob. Code § 1021*; *see Prob. Code § 1430* (the term "petition" includes an application or a request in the nature of a petition)]. Verification enables a petition to be used as evidence in uncontested proceedings [*Prob. Code § 1022*].

The verification shown in this form complies with the requirements of *Code Civ. Proc. §§ 446* and *2015.5*.

[5] Notice

Notice must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code §§ 2403(b), 2420(e)*], which generally requires that notice be mailed to specified persons at least 15 days before the day of the hearing [*Prob. Code § 1460(a),(b)*]. Special notice must be given to those persons who have filed a written request under *Prob. Code § 2700 et seq.* [*Prob. Code §§ 1460(d), 2700, 2701*]. For further discussion and a form for giving notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[6] Cross References

For discussion of general rules for payments for support, see *§ 290.12[1]*

For petition to authorize payment for support, maintenance, or education of ward's or conservatee's dependents, see *§ 290.51*

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24-290 California Forms of Pleading and Practice--Annotated § 290.51

§ 290.51 Petition to Authorize Payment for Support, Maintenance, or Education of Ward's or Conservatee's Dependents [Prob. Code §§ 2403, 2420(a),(e)]

[1] FORM Petition to Authorize Payment for Support, Maintenance, or Education of Ward's or Conservatee's Dependents

[*Caption. See § 290.50[1].*]

Petitioner _____[*name*] respectfully represents:

1. [*Allegation of petitioner's status. See § 290.50[1], Paragraph 1.*]

2. The _____ [ward *or* conservatee] is legally obligated _____ [to support *and/or* to maintain *and/or* to educate] the following person(s): _____[*set forth name(s), age(s), and address(es) of person(s) legally entitled to support*].

3. The following expenses are incurred monthly for the _____ [support *and/or* maintenance *and/or* education] of the above-named person(s): _____[*list*]. _____[*State other conditions of lives of dependent(s) that show standard of living*].

4. Other than _____ [support *and/or* maintenance *and/or* education] from the _____ [ward *or* conservatee], the sum of $_____, consisting of _____ [*specify, e.g.*, social security payments], is available for the _____ [support *and/or* maintenance *and/or* education] of the above-named person(s).

5. The following expenses are incurred monthly for the _____ [support *and/or* maintenance *and/or* education] of the _____ [ward *or* conservatee]: _____[*list*].

6. As appears from the inventory and appraisal filed herein on _____[*date*], the

_____ [ward *or* conservatee] has property in his/her estate with a value of $_____. This property produces income of $_____ per month. After payment of the costs of the _____ [ward's *or* conservatee's] _____ [support *and/or* maintenance *and/or* education] [and allowance], the net monthly income from the estate is approximately $_____.

7. The sum of $_____ per month should be expended from the _____ [ward's *or* conservatee's] estate for the comfortable and suitable _____ [support *and/or* maintenance *and/or* education] of _____[*name(s) of person(s) entitled thereto*].

8. [*Special notice allegation. See § 290.50[1], Paragraph 5.*]

WHEREFORE, petitioner prays for an order authorizing and directing petitioner, as _____ [guardian *or* conservator] of the _____ [person and] estate of _____[*name*], _____ [ward *or* conservatee], to pay $_____ per month for the _____ [support *and/or* maintenance *and/or* education] of the above-named person(s) to _____[*name of person(s) to receive payment*] until _____ [further order of the court *or date*], and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 290.50[1].*]

[2] Use of Form

The petition in [1], *above*, is for use by the guardian or conservator, pursuant to *Prob. Code § 2403(a)*, in obtaining authorization to support, maintain, or educate persons legally entitled to support, maintenance, or education from the ward or conservatee [*Prob. Code §§ 2403, 2420(a)*; *see also Guardianship of Talbot (1958) 156 Cal. App. 2d 816, 821, 320 P.2d 20* (permission to support ward's family and amounts required as matters within sound discretion of trial court)].

For a form of order that may be adapted for use with this form, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.42*.

[3] Contents of Petition

The petition should be entitled PETITION TO AUTHORIZE PAYMENT FOR _____ [SUPPORT *and/or* MAINTENANCE *and/or* EDUCATION] OF DEPENDENTS.

Although not expressly required by statute, a petition under *Prob. Code §§ 2403* and *2420(e)* to support a ward's or conservatee's legal dependents should state the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2420(e)*].

- The persons legally entitled to receive support, maintenance, or education from the ward or conservatee (Paragraph 2) [*see Prob. Code § 2420(a)*].

- The dependent's monthly expenses for support, maintenance, or education, any other facts indicating his or her condition of life, and the estate property available for these expenses after payment of the ward's or conservatee's other expenses (Paragraphs 3-6) [*see Prob. Code § 2420(a)*].

- That these expenses should be paid from the estate (Paragraph 7) [*see Prob. Code §§ 2403, 2420(a)*].

- Whether a request for special notice has been filed and, if so, that proper notice will be given or has been waived (Paragraph 8) [*see Prob. Code §§ 1260(a), 2700, 2701*].

[4] Verification

The petition must be verified [*Prob. Code § 1021*; *see § 290.50[4]*].

[5] Cross References

For discussion of general rules for payments for support, see *§ 290.12[1]*

For petition to authorize payment for support, maintenance, or education of ward or conservatee, see *§ 290.50*

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24-290 California Forms of Pleading and Practice--Annotated § 290.52

§ 290.52 Petition to Authorize Payment for Support, Maintenance, or Education Despite Obligation of Third Party [Prob. Code § 2422]

[1] FORM Petition to Authorize Payment for Support, Maintenance, or Education Despite Obligation of Third Party

[*Caption. See § 290.50[1].*]

Petitioner _____[*name*] respectfully represents:

[*EITHER*]

1. Petitioner is the duly appointed, qualified, and acting _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee].

[*OR*]

1. Petitioner is _____ [the ward *or* the conservatee *or* a person interested] in the above-entitled proceeding [in that _____ (*specify nature of interest if appropriate*)]. _____[*name*] is the _____ [guardian *or* conservator] of the [person and] estate in the proceeding and was appointed by the court on _____[*date*].

[*CONTINUE*]

2. [*Monthly expenses allegation. See § 290.50[1], Paragraph 2.*]

3. _____[*name*], _____ [*specify status of third party obligated to provide support, e.g.,* the mother] of the _____ [ward *or* conservatee], who is legally obligated to provide support, is unable to pay more than $_____ of the _____ [ward's *or* conservatee's] monthly expenses because _____ [*specify, e.g.,* her monthly income has been reduced from $_____ to $_____ by reason of her partial disability due to back injury. Her assets, which total $_____, are not sufficient to continue completely to support the _____ (ward *or* conservatee) in the manner to which he/she is accustomed. The _____ (ward's *or* conservatee's) father is deceased and his/her mother has not remarried].

4. As appears from the inventory and appraisal filed herein on _____[*date*], the estate has income [and assets] sufficient to provide for the _____ [ward's *or* conservatee's] _____ [support *and/or* maintenance *and/or* education] in the amount of $_____ per month.

5. [*Special notice allegation. See § 290.50[1], Paragraph 5.*]

WHEREFORE, petitioner prays for an order authorizing _____[*name*], _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee], to expend the sum of $_____ per month from the _____ [ward's *or* conservatee's] estate for his/her _____ [support *and/or* maintenance *and/or* education] until _____ [further order of the court *or specify date*], and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 290.50[1].*]

[2] Use of Form

The petition in [1], *above,* is for use in obtaining an order requiring that the ward or conservatee be wholly or partially supported, maintained, or educated out of the estate notwithstanding the existence of a third party legally obligated to provide that support. The order may be obtained by the guardian or conservator, the ward or conservatee, or any other interested person [*Prob. Code § 2422(a)*].

[3] Contents of Petition

The petition should be entitled PETITION TO AUTHORIZE PAYMENT FOR _____ [SUPPORT *and/or* MAINTENANCE *and/or* EDUCATION] DESPITE THIRD PARTY OBLIGATION.

The petitioner must show good cause why the ward or conservatee should be supported, maintained, or educated from the estate despite the liability of a third party (Paragraphs 2-4) [*Prob. Code § 2422(a)*]. Although not expressly required by statute, a petition under *Prob. Code § 2422* should also state the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2422(a)*].

- Whether a request for special notice has been filed and, if so, that proper notice will be given or has been waived (Paragraph 5) [*see Prob. Code §§ 1260(a), 2700, 2701*].

[4] Verification

The petition must be verified [*Prob. Code § 1021*; *see § 290.50[4]*].

[5] Notice

Notice must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2422(b)*], which generally requires that notice be mailed to specified persons at least 15 days before the day of the hearing [*Prob. Code § 1460(a), (b)*]. Special notice must be given to those persons who have filed a written request under *Prob. Code § 2700 et seq.* [*Prob. Code §§ 1460(d), 2700, 2701*]. For further discussion and a form for giving notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[6] Cross References

For discussion of third-party obligations, see *§ 290.12[2]*

For order authorizing payment for support, maintenance, or education despite obligation of third party, see *§ 290.53*

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24-290 California Forms of Pleading and Practice--Annotated § 290.53

§ 290.53 Order Authorizing Payment for Support, Maintenance, or Education Despite Obligation of Third Party [Prob. Code § 2422]

[1] FORM Order Authorizing Payment for Support, Maintenance, or Education Despite Obligation of Third Party [Prob. Code § 2422]

[*Caption. See § 290.50[1].*]

The petition of _____[*name*], the _____ [guardian of *or* conservator of *or* ward of *or* conservatee of *or* a creditor of *or* a person interested in] the above-entitled estate, for authorization to expend the sum of $_____ per month from the _____ [ward's *or* conservatee's] estate for his/her _____ [support *and/or* maintenance *and/or* education], despite the obligation of _____[*name*] to do so, came on regularly for hearing by the court on this date. Petitioner appeared by counsel _____[*name*]. [*Specify other appearances, if any.*]

The court finds from proof made to the satisfaction of the court as follows:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived].

2. The reasonable monthly expenses for the _____ [support *and/or* maintenance *and/or* education] of the _____ [ward *or* conservatee] are as follows: _____[*specify*].

3. The estate has adequate income [and assets] to provide for these expenses in the amount of $_____ per month.

4. _____[*name*], _____ [*specify status of obligated third party, e.g.,* the mother] of the _____ [ward *or* conservatee] is legally obligated _____ [to support *and/or* to maintain *and/or* to educate] the _____ [ward *or* conservatee].

5. Good cause exists for granting the petition in that _____[*name of obligated third party*] is unable to pay more than $_____ of the _____ [ward's *or* conservatee's] monthly expenses because _____ [*specify, e.g.,* her monthly income has been reduced from $_____ to $_____ by reason of her partial disability due to back injury. Her assets, which total $_____, are not sufficient to continue completely to _____ (support *and/or* maintain *and/or* educate) the _____ (ward *or* conservatee) in the manner to which he/she is accustomed. The _____ (ward's *or* conservatee's) father is deceased and his/her mother has not remarried].

IT IS ORDERED that _____[*name*], _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee], is authorized to expend the sum of $_____ per month from the _____ [ward's *or* conservatee's] estate for his/her _____ [support *and/or* maintenance *and/or* education] until _____ [further order of the court *or date*].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above,* authorizes the guardian or conservator to support, maintain, or educate the ward or conservatee, wholly or partially, out of the estate, notwithstanding the existence of a third party legally obligated to provide support, maintenance, or education. It is for use with the petition in § 290.52. The order should be entitled ORDER AUTHORIZING _____ [SUPPORT *and/or* MAINTENANCE *and/or* EDUCATION] DESPITE THIRD PARTY OBLIGATION. The order can be made for a limited period of time. If it is not so limited, it continues in effect until it is modified or revoked [*Prob. Code § 2422(a)*].

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Appealability of Order

An order directing, authorizing, approving, or modifying payments for the support, maintenance, or education of a ward or conservatee is appealable [*Prob. Code § 1301(c)*]. For a discussion of the effect of a final order under *Prob. Code § 2422,* see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.12[3]*.

[4] Cross References

For discussion of third-party obligations, see *§ 290.12[2]*

For local court rules regarding support obligations, see *§ 290.41*

For petition to authorize payment for support, maintenance, or education despite obligation of third party, see *§ 290.52*

For discussion of order authorizing and instructing guardian or conservator as to management of estate property, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.42*

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24-290 California Forms of Pleading and Practice--Annotated § 290.54

§ 290.54 Petition to Direct Guardian or Conservator to Furnish Suitable Support, Maintenance, or Education [Prob. Code § 2404]

[1] FORM Petition to Direct Guardian or Conservator to Furnish Suitable Support, Maintenance, or Education

[*Caption. See § 290.50[1].*]

Petitioner _____[*name*] respectfully represents:

1. Petitioner is _____ [the ward *or* the conservatee *or* a creditor of the estate *or* a person interested] in the above-entitled proceeding [in that _____ (*specify nature of interest if appropriate*)].

2. _____[*name*] is the duly appointed, qualified, and acting _____ [guardian *or* conservator] of the estate of _____ [ward *or* conservatee].

3. [Estate value allegation. See *§ 290.50[1]*, Paragraph 3.]

4. The reasonable expenses for the comfortable and suitable _____ [support *and/or* maintenance *and/or* education] of the _____ [ward *or* conservatee] are approximately as follows: _____[*specify*].

5. The estate of the _____ [ward *or* conservatee] has adequate income [and assets] for the payment of a monthly sum for _____ [support *and/or* maintenance *and/or* education], but the _____ [guardian *or* conservator] of the estate has failed, neglected, and refused and continues to fail, neglect, and refuse to pay _____ [any sum *or* any sum greater than $_____ per month] out of the estate or otherwise to furnish comfortable and suitable _____ [support *and/or* maintenance *and/or* education] to the _____ [ward *or* conservatee].

6. [*Special notice allegation. See § 290.50[1], Paragraph 5.*]

WHEREFORE, petitioner prays for an order directing _____[*name*], as _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee], to furnish comfortable and suitable _____ [support *and/or* maintenance *and/or* education] for the _____ [ward *or* conservatee] and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 290.50[1].*]

[2] Use of Form

The petition in [1], *above*, is for use to have the guardian or conservator of the estate provide comfortable and suitable support, maintenance, and/or education for the ward or conservatee [*Prob. Code § 2404(a)*]. The petition can be filed by the ward or conservatee, the creditor, or any other interested person [*Prob. Code § 2404(b)*]. The court can also make the order on its own motion [*Prob. Code § 2404(a)*].

[3] Contents of Petition

The petition should be entitled PETITION FOR ORDER DIRECTING PAYMENT FOR _____ [SUPPORT *and/or* MAINTENANCE *and/or* EDUCATION].

Although not expressly required by statute, a petition under *Prob. Code § 2404* should state the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2404(b)*].

- The name of the guardian or conservator of the estate and the total value and annual income of the estate (Paragraphs 2-3).

- The reasonable expenses for the comfortable and suitable support, maintenance, or education of the ward or conservatee, and the continuing failure of the guardian or conservator to furnish a sufficient sum towards these expenses (Paragraphs 4, 5) [*see Prob. Code §§ 2404(a), 2420(a)*].

- Whether a request for special notice has been filed and, if so, that proper notice will be given or has been waived (Paragraph 6) [*see Prob. Code §§ 1260(a), 2700, 2701*].

[4] Verification

The petition must be verified [*Prob. Code § 1021*; *see § 290.50[4]*].

[5] Notice

Notice must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2404(b)*], which generally requires that notice be mailed to specified persons at least 15 days before the day of the hearing [*Prob. Code § 1460(a),(b)*]. Special notice must be given to those persons who have filed a written request under *Prob. Code § 2700 et seq.* [*Prob. Code §§ 1460(d), 2700, 2701*]. For further discussion and a form for giving notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[6] Cross References

For discussion of enforcement of support obligations, see *§ 290.12[4]*

For order directing guardian or conservator to furnish suitable support, maintenance, or education, see *§ 290.55*

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24-290 California Forms of Pleading and Practice--Annotated § 290.55

§ 290.55 Order Directing Guardian or Conservator to Furnish Suitable Support, Maintenance, or Education [Prob. Code § 2404]

[1] FORM Order Directing Guardian or Conservator to Furnish Suitable Support, Maintenance, or Education

[*Caption. See § 290.50[1].*]

The petition of _____[*name*], as _____ [ward *or* conservatee *or* a creditor of the estate *or* a person interested] in the above-entitled proceeding, for an order directing _____[*name*], as _____ [guardian *or* conservator] of the estate, to furnish comfortable and suitable _____ [support *and/or* maintenance *and/or* education] for the _____ [ward *or* conservatee] came on regularly for hearing by the court on this date. Petitioner appeared by counsel _____[*name*]. [*Specify other appearance, if any.*]

The court finds from proof made to the satisfaction of the court as follows:

1. [*Finding that notices have been duly given. See § 290.53[1], Finding 1.*]

2. The reasonable monthly expenses for the _____ [support *and/or* maintenance *and/or* education] of the _____ [ward *or* conservatee] are as follows: _____[*specify*].

3. The estate has adequate income [and assets] to provide for the expenses listed above in the amount of $_____ per month.

4. _____[*name*], as _____ [guardian *or* conservator] of the estate, has failed, neglected, and refused to pay _____ [any sum *or* any sum greater than $_____ per month] for the expenses listed above.

5. The _____ [guardian *or* conservator] should pay the sum of $_____ from the

estate for the _____ [support *and/or* maintenance *and/or* education] of the _____ [ward *or* conservatee].

IT IS ORDERED that _____[*name*], as _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee], pay to the _____[*name(s) of person(s) to receive payment*], out of the estate, for the comfortable and suitable _____ [support *and/or* maintenance *and/or* education] of the _____ [ward *or* conservatee], the sum(s) of _____ [$_____ per month or *specify sums to be received by each person*], commencing on _____[*date*], and continuing until _____ [further order of this court *or specify date*].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, directing the guardian or conservator to furnish comfortable and suitable support, maintenance, or education for the ward or conservatee is for use with the *form in § 290.54*. The order should be entitled ORDER TO FURNISH _____ [SUPPORT *and/or* MAINTENANCE *and/or* EDUCATION].

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Appealability of Order

An order directing, authorizing, approving, or modifying payments for the support, maintenance, or education of a ward or conservatee is appealable [*Prob. Code § 1301(c)*]. For a discussion of the effect of a final order under *Prob. Code § 2404*, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.12[3]*.

[4] Cross References

For discussion of enforcement of obligations, see *§ 290.12[4]*

For petition to direct guardian or conservator to furnish suitable support, maintenance, or education, see *§ 290.54*

For discussion of orders authorizing and instructing guardian or conservator as to management of estate property, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.42*

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24-290 California Forms of Pleading and Practice--Annotated § 290.56

§ 290.56 Petition to Authorize Payment of Allowance to Ward or Conservatee [Prob. Code § 2421]

[1] FORM Petition to Authorize Payment of Allowance to Ward or Conservatee

[*Caption. See § 290.50[1].*]

Petitioner _____[*name*] respectfully represents:

[*EITHER*]

1. Petitioner is the duly appointed, qualified, and acting _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee].

[*OR*]

1. Petitioner is the _____ [ward *or* conservatee] in the above-entitled proceeding. _____[*name*] is the duly appointed, qualified, and acting _____ [guardian *or* conservator] of the [person and] estate of petitioner.

[*CONTINUE*]

2. As appears from the inventory and appraisal filed herein on _____[*date*], the estate has a value of approximately $_____, and the annual income from the estate is approximately $_____. After payment of the costs of the _____ [ward's *or* conservatee's] support and maintenance, the net annual income from the estate is approximately $_____.

3. It is in the _____ [ward's *or* conservatee's *or* petitioner's] best interests that _____ [he/she *or* petitioner] receive from the estate a reasonable allowance of $_____ per month for personal use in that _____ [*specify, e.g.,* this will provide a degree of independence necessary for _____ (his/her *or* petitioner's) physical and mental well-being]. _____ [The ward *or* The conservatee *or* Petitioner] has, in petitioner's opinion, the capacity to manage his/her own financial affairs to the extent of managing the above sum in that _____ [*describe reasons, e.g.,* _____ (the ward *or* the conservatee *or* petitioner) recognizes the continued need for a _____ (guardian *or* conservator) of the (person and) estate, and desires only to be able to provide for personal needs and occasionally to make small gifts to friends and relatives].

4. [*Special notice allegation. See § 290.50[1], Paragraph 5.*]

WHEREFORE, petitioner prays for an order authorizing payment from the estate in the sum of $_____ per month for _____ [the ward's *or* the conservatee's *or* petitioner's] personal use until _____ [further order of the court *or specify date*] and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 290.50[1].*]

[2] Use of Form

The petition in [1], *above*, is for use by the guardian or conservator or the ward or conservatee in obtaining an order authorizing payment of an allowance to the ward or conservatee for his or her personal use [*Prob. Code § 2421*].

[3] Contents of Petition

The petition should be entitled PETITION TO AUTHORIZE PAYMENT FOR ALLOWANCE.

Although not expressly required by statute, a petition under *Prob. Code § 2421* should state the following to assist the court in its determination:

- The petitioner's standing to file the petiton (Paragraph 1) [*see Prob. Code § 2421(a)*].
- The approximate value and annual income of the estate (Paragraph 2).
- Why it is in the best interests of the ward or conservatee that he or she receive a reasonable allowance for his or her personal use (Paragraph 3) [*see Prob. Code § 2421(a)*].
- Whether a request for special notice has been filed and, if so, that proper notice will be given or has been waived (Paragraph 4) [*see Prob. Code §§ 1260(a), 2700, 2701*].

[4] Verification

The petition must be verified [*Prob. Code § 1021*; *see § 290.50[4]*].

[5] Notice

Notice must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2421(b)*], which generally requires that notice be mailed to specified persons at least 15 days before the day of the hearing [*Prob. Code § 1460(a),(b)*]. Special notice must be given to those persons who have filed a written request under *Prob. Code § 2700 et seq.* [*Prob. Code §§ 1460(d), 2700, 2701*]. For further discussion and a form for giving notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[6] Cross References

For discussion of payment of personal allowance, see *§ 290.14*

For petition to authorize payment for support, maintenance, or education of ward or conservatee, see *§ 290.50*

For order to authorize payment of allowance to ward or conservatee, see *§ 290.57*

For petition for authorization and instructions as to management of estate property, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.40*

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24-290 California Forms of Pleading and Practice--Annotated § 290.57

§ 290.57 Order Authorizing Payment of Allowance to Ward or Conservatee [Prob. Code § 2421]

[1] FORM Order Authorizing Payment of Allowance to Ward or Conservatee

[*Caption. See § 290.50[1].*]

The petition of _____[*name*], the _____ [guardian of *or* conservator of *or* ward of *or* conservatee of] the above-entitled estate, for an order authorizing payment from the estate in the sum of $_____ per month for _____ [the ward's *or* the conservatee's *or* petitioner's] personal use came on regularly for hearing by the court on this date. Petitioner appeared by counsel _____[*name*]. [*Specify other appearances, if any.*]

The court finds from proof made to the satisfaction of the court as follows:

1. [*Finding that notices have been duly given. See § 290.53[1], Finding 1.*]

2. It is in the _____ [ward's *or* conservatee's *or* petitioner's] best interests that _____ [he/she *or* petitioner] receive from the estate a reasonable allowance of $_____ per month.

3. The estate has adequate income [and assets] to provide for these expenses in the amount of $_____ per month.

IT IS ORDERED that _____[*name*], as _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee], is authorized to pay from the estate the sum of $_____ per month for _____ [the ward's *or* the conservatee's *or* petitioner's] personal use until _____ [further order of the court *or specify date*].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, authorizing the payment of an allowance out of the estate to the ward or conservatee for the ward's or conservatee's personal use is for use with the petition in § 290.56 [*see Prob. Code § 2421(a)*]. The order should be entitled ORDER AUTHORIZING PAYMENT OF ALLOWANCE.

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Appealability of Order

An appeal may be taken from an order directing, authorizing, approving, or modifying (or refusing to authorize, approve, or modify) payments for the support, maintenance, or education of a ward or conservatee [*Prob. Code § 1301(c)*]. For a discussion of the effect of a final order under *Prob. Code § 2421*, see the Ch. 287, *Guardianship and Conservatorship: General Management Powers*, § 287.12[3].

[4] Cross References

For discussion of payment of personal allowance, see *§ 290.14*

For petition to authorize payment of allowance to ward or conservatee, see *§ 290.56*

For discussion of orders authorizing and instructing guardian or conservator as to management of estate property, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.42*

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24-290 California Forms of Pleading and Practice--Annotated § 290.58

§ 290.58 Petition to Direct Guardian or Conservator to Pay Debt, Expense, or Charge [Prob. Code § 2404]

[1] FORM Petition to Direct Guardian or Conservator to Pay Debt, Expense, or Charge [Prob. Code § 2404]

[*Caption. See § 290.50[1].*]

Petitioner _____[*name*] respectfully represents:

1-2. [*Allegations of petitioner's status and guardian's or conservator's identity. See § 290.54, Paragraphs 1, 2.*]

3. _____ [*Describe debt, expense, or charge incurred, e.g.,* On _____ (*date*), a judgment was entered in the case of _____ (*describe case including name, court, and number*), adjudging that _____ (*name of ward or conservatee*) was liable to _____ (*name*) in the amount of $_____ with interest thereon from _____ (*date*), at the legal rate.]

4. The _____ [guardian *or* conservator] has failed, neglected, and refused to pay any part of this _____ [*specify, e.g.,* judgment], and it is now due, owing, and unpaid.

5.§[*Special notice allegation. See § 290.50[1], Paragraph 5.*]

WHEREFORE, petitioner prays for an order directing _____[*name*], as _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee], to pay to _____[*name*] the sum of $_____ with interest thereon at the legal rate from _____[*date*], and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 290.50[1].*]

[2] Use of Form

The petition in [1], *above*, is for use in obtaining an order directing the guardian or conservator of the estate to pay a debt, expense, or charge lawfully due and payable by the ward or conservatee or the estate [*Prob. Code § 2404(a)*]. The petition can be filed by the ward or conservatee, the creditor, or any other interested person [*Prob. Code § 2404(b)*]. The court can also make the order on its own motion [*Prob. Code § 2404(a)*]. A judgment creditor is expressly authorized by *Code Civ. Proc. § 709.030* to apply to the court in which the guardianship or conservatorship proceeding is pending for an order requiring payment of the judgment from estate property [*Code Civ. Proc. § 709.030*; for discussion of enforcement of judgments, *see § 290.18*].

[3] Contents of Petition

The petition should be entitled PETITION FOR ORDER DIRECTING PAYMENT OF _____ [DEBT *or* EXPENSE *or* CHARGE].

Although not expressly required by statute, a petition under *Prob. Code § 2404* to compel a guardian or conservator to pay debts, expenses, or charges should state the following to assist the court in its determination:

- The petitioner's standing to file the petition and the name of the guardian or conservator of the estate (Paragraphs 1 and 2) [*see Prob. Code § 2404(b)*].

- The nature of the debt, expense, or charge and the the guardian's or conservator's failure to pay the debt (Paragraphs 3 and 4) [*see Prob. Code § 2404(a)*].

- Whether a request for special notice has been filed and, if so, that proper notice will be given or has been waived (Paragraph 5) [*see Prob. Code §§ 1260(a), 2700, 2701*].

[4] Verification

The petition must be verified [*Prob. Code § 1021*; *see § 290.50[4]*].

[5] Cross References

For discussion of payment of debts and wage claims, see *§§ 290.16, 290.17*

For order directing payment of debt, expense, or charge, see *§ 290.59*

For discussion of petition to direct guardian or conservator to furnish suitable support, maintenance, or education, see *§ 290.54*

For discussion of petition for authorization and instructions as to management of estate property, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.40*

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24-290 California Forms of Pleading and Practice--Annotated § 290.59

§ 290.59 Order Directing Payment of Debt, Expense, or Charge [Prob. Code § 2404]

[1] FORM Order Directing Payment of Debt, Expense, or Charge

[*Caption. See § 290.50[1].*]

The petition of _____[*name*], as _____ [ward *or* conservatee *or* a creditor of the estate *or* a person interested] in the above-entitled proceeding, for an order directing _____[*name*], _____ as [guardian *or* conservator], to pay a lawful _____ [debt *or* expense *or* charge] to _____[*name*] came on regularly for hearing by the court on this date. Petitioner appeared by counsel _____[*name*]. [*Specify other appearances, if any.*]

The court finds from proof made to the satisfaction of the court as follows:

1. [*Finding that notices have been duly given. See § 290.53[1], Finding 1.*]

2. [_____ (*Describe debt, expense, or charge, e.g.,* On _____ (*date*), a judgment was entered in the case of _____ (*describe case including name, court, and number*) adjudging that _____ (*name of ward or conservatee*) was liable to _____ (*name*) in the amount of $_____ with interest thereon from _____ (*date*), at the legal rate.)]

3. The _____ [guardian *or* conservator] has failed, neglected, and refused to pay any part of this _____ [*specify, e.g.,* judgment].

IT IS ORDERED that _____[*name*], as _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee], pay to _____[*name*] out of the estate the sum of $_____ with interest thereon at the legal rate from _____[*date*].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, directing the guardian or conservator to pay a debt, expense, or charge lawfully due and payable by the ward, the conservatee, or the estate is for use with the petition in § 290.58 [*see Prob. Code § 2404(a)*]. The order should be entitled ORDER TO PAY _____ [DEBT *or* EXPENSE *or* CHARGE].

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Appealability of Order

An appeal may be taken from an order directing or allowing (or refusing to direct or allow) payment of a debt, claim, or cost [*Prob. Code § 1300(d)*]. For a discussion of the effect of a final order under *Prob. Code § 2404*, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.12[3]*.

[4] Cross References

For discussion of payment of debts and wage claims, see *§§ 290.16, 290.17*

For petition to direct guardian or conservator to pay debt, expense, or charge, see *§ 290.58*

For discussion of orders authorizing and instructing guardian or conservator as to management of estate property, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.42*

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24-290 California Forms of Pleading and Practice--Annotated § 290.60

§ 290.60 Petition for Authority to Accept Deed in Lieu of Foreclosure of Mortgage or Sale Under Trust Deed [Prob. Code § 2464]

[1] FORM Petition for Authority to Accept Deed in Lieu of Foreclosure of Mortgage or Sale Under Trust Deed

[*Caption. See § 290.50[1].*]

Petitioner _____[*name*] respectfully represents:

1. [*Allegation of petitioner's status. See § 290.50[1], Paragraph 1.*]

2. Among the assets of the estate listed in the inventory and appraisal filed herein on _____[*date*], is a certain promissory note indicating a secured indebtedness to the _____ [ward *or* conservatee] made by _____[*name*], dated _____[*date*], in the original amount of $_____, with interest at _____ percent per annum, and payable _____[*describe terms of payment*].

3. The indebtedness is secured by a _____ [deed of trust to *or* mortgage on] real property recorded in the Official Records of the County of _____, Book _____, page _____. The real property subject to the _____ [deed of trust *or* mortgage] is described as follows: _____[*give legal description*].

4. There is a balance of principal and interest on the indebtedness due and unpaid in the sum of $_____. The owner of the encumbered property and maker of the note, _____[*name*], offers to make a deed to the _____ [ward *or* conservatee] in consideration of the cancellation and release of the full remaining indebtedness as payment of the claim of the estate in full on the following terms and conditions: _____[*specify*].

5. It is to the advantage of the estate for petitioner to accept a deed of the property on these terms and conditions in lieu

of _____ [a sale under the deed of trust *or* foreclosing the mortgage] because _____ [*specify reasons, e.g.,* acceptance of the deed will save the expense of the foreclosure and will expedite the estate's receipt of the unencumbered property, which then can be used as security for a further loan].

WHEREFORE, petitioner prays for an order authorizing him/her to accept a deed of the property on the terms and conditions stated above and to do all acts and execute all documents necessary or convenient to consummate the same, and for such other and further orders as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 290.50[1].*]

[2] Use of Form

The petition in [1], *above,* is for use by the guardian or conservator in obtaining authority to accept a deed to real property that is subject to a mortgage or a trust deed, in lieu of foreclosing on the mortgage or selling the property under the deed of trust [*Prob. Code § 2464(a), (b)*]. The petitioner must show the advantage to the estate of accepting the deed by clear and convincing evidence [*see Prob. Code § 2464(c)*].

[3] Contents of Petition

The petition should be entitled PETITION FOR AUTHORITY TO ACCEPT DEED IN LIEU OF _____ [FORECLOSURE OF MORTGAGE *or* SALE UNDER DEED OF TRUST].

The petitioner must show the advantage to the estate of accepting the deed in lieu of foreclosure or sale (Paragraph 5) [*Prob. Code § 2464(b)*]. Although not expressly required by statute, the petition should also state the following:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2464(b)*].

- The debt and the deed of trust or mortgage securing the debt and a legal description of the real property subject to the security device (Paragraphs 2, 3) [*see Prob. Code § 2464(a)*].

- The debtor's offer to deed the property to the ward or conservatee in lieu of foreclosure or sale (Paragraph 4) [*see Prob. Code § 2464(a)*].

[4] Verification

The petition must be verified [*Prob. Code § 1021*; *see § 290.50[4]*].

[5] Notice

Notice must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2464(b)*], which generally requires that notice be mailed to specified persons at least 15 days before the day of the hearing [*Prob. Code § 1460(a),(b)*]. For further discussion and a form for giving notice, see Ch. 284, *Guardianship and*

Conservatorship: Notice .

[6] Cross References

For discussion on acceptance of deed in lieu of foreclosure or sale, see *§ 290.21[2]*

For order authorizing acceptance of deed in lieu of foreclosure of mortgage or sale under trust deed, see *§ 290.61*

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24-290 California Forms of Pleading and Practice--Annotated § 290.61

§ 290.61 Order Authorizing Acceptance of Deed in Lieu of Foreclosure of Mortgage or Sale Under Trust Deed [Prob. Code § 2464]

[1] FORM Order Authorizing Acceptance of Deed in Lieu of Foreclosure of Mortgage or Sale Under Trust Deed

[*Caption. See § 290.50[1].*]

The petition of _____[*name*], as _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee], for an order authorizing petitioner to accept a deed conveying property to the _____ [ward *or* conservatee], in lieu of _____ [foreclosing on the mortgage on the property *or* selling the property under a deed of trust] came on regularly for hearing by the court on this date. Petitioner appeared by counsel _____[*name*]. [*Specify other appearances, if any.*]

The court finds from proof made to the satisfaction of the court as follows:

1. [*Finding that notices have been duly given. See § 290.53, Finding 1.*]

2. Among the assets of the estate is a secured indebtedness, secured by a _____ [deed of trust to *or* mortgage on] real property recorded in the Official Records of the County of _____, Book _____, page _____. The real property subject to the _____ [trust deed *or* mortgage] is described as follows: _____[*give legal description*]. It is advantageous to the estate for petitioner to accept a deed to that real property described as follows: _____[*give legal description*].

3. It is advantageous to the estate that _____[*name*], as _____ [guardian *or* conservator] of the estate, accept a deed to the property in lieu of _____ [foreclosing the mortgage on the property *or* selling the property under the deed of trust], in that _____ [*describe advantage, e.g.,* acceptance of the deed will save the expense of the foreclosure and will expedite the estate's receipt of the unencumbered property which then can be used as security for a further loan].

4. Petitioner has shown the advantage to the estate by clear and convincing evidence.

IT IS ORDERED that _____[*name*], as _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee], is authorized to accept a deed of the property on the following terms and conditions: _____[*Set forth conditions*].

IT IS FURTHER ORDERED that _____[*name*], as _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee], be authorized to do all acts and execute all documents necessary or convenient to consummate the the above-described transaction.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above,* authorizing the guardian or conservator to accept a deed to property in which the estate holds a security interest, in lieu of foreclosing on a mortgage on the property or selling the property under a deed of trust, is for use with the petition in § 290.60. The order should be entitled ORDER AUTHORIZING ACCEPTANCE OF DEED IN LIEU OF _____ [FORECLOSURE ON MORTGAGE *or* SALE UNDER TRUST DEED].

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Appealability of Order

An order granting or denying a petition for authority to accept a deed to property in lieu of foreclosing on the mortgage on the property or selling the property under a deed of trust is not one of the orders listed in *Prob. Code § 1301* as appealable orders in guardianship and conservatorship proceedings. However, such an order may be appealable as an order authorizing, instructing, or directing a fiduciary under *Prob. Code § 1300(c)*. For a discussion of the effect of a final order under *Prob. Code § 2464*, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.12[3]*.

[4] Cross References

For discussion on acceptance of deed in lieu of foreclosure or sale, see *§ 290.21[2]*

For petition to authorize acceptance of deed in lieu of foreclosure or sale under trust deed, see *§ 290.60*

For discussion of order authorizing and instructing guardian or conservator as to management of estate property, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.42*

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24-290 California Forms of Pleading and Practice--Annotated § 290.62

§ 290.62 Petition for Authority to Withdraw Assets From Blocked Account [Prob. Code §§ 2403, 2456]

[1] FORM Petition for Authority to Withdraw Assets From Blocked Account

[*Caption. See § 290.50[1].*]

Petitioner _____[*name*] respectfully represents:

1. [*Allegation of petitioner's status. See § 290.50[1], Paragraph 1.*]

2. Pursuant to order of this court dated _____[*date*], there was deposited with _____[*name of depository*] in account number _____ the _____ [sum of $_____ *or* the following personal property: _____ (*describe*)]. Withdrawals from this account can only be made on further order of the court.

3. It is necessary to withdraw the _____ [sum *or* personal property] described in Paragraph 2, above, from this account because _____ [*specify reasons, e.g.,* the money is needed to pay for medical care for the _____ (ward *or* conservatee)].

[*EITHER*]

4. Petitioner has executed a bond for the amount of $_____, which has been given by _____ [personal sureties *or* an admitted surety insurer]. After withdrawal of the _____ [sum *or* personal property] described in Paragraph 2, above, the value of the personal property plus the value of the probable annual gross income of all of the property of the estate [plus the sum of the probable annual gross payments from any public entitlements of the _____ (ward *or* conservatee)] will be $_____. An additional bond is _____ [not required *or* required in the sum of $_____].

[*OR*]

4. Bond for petitioner has been _____ [waived pursuant to _____ (*Probate Code Section 2321 or Probate Code Section 2324*) *or* dispensed with pursuant to *Probate Code Section 2323(a)*].

[*CONTINUE*]

5. [*Special notice allegation. See § 290.50[1], Paragraph 5.*]

WHEREFORE, petitioner prays for an order that petitioner as _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee], be authorized to withdraw the _____ [money *or* personal property] described above from account number _____ in _____[*name of depository*], and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 290.51[1].*]

[2] Use of Form

The petition in [1], *above*, is for use by the guardian or conservator of the estate in obtaining authorization to withdraw estate assets deposited subject to withdrawal only on court order [*see Prob. Code § 2403* (petition for authorization and instructions)]. The assets may have been deposited in a blocked account pursuant to an order determining the bond [*see Prob. Code § 2328*], an order determining the application of a guardian or conservator to deposit funds or personal property in a blocked account [*see Prob. Code § 2456*], or an order determining the disposition of property paid or delivered for the benefit of a minor or person with a disability pursuant to a compromise or judgment [*see Prob. Code § 3602(b)*].

[3] Contents of Petition

The petition should be entitled PETITION FOR AUTHORITY TO WITHDRAW ASSETS FROM BLOCKED ACCOUNT.

Although not expressly required by statute, a petition to authorize the withdrawal of assets from a blocked account should state the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code §§ 2403(a), 2456*].
- The deposits previously made subject to withdrawal only on court order (Paragraph 2) [*see Prob.*

Code §§ 2328, 2456, 3602(b)].

- Reasons why it is necessary to withdraw the assets as an exercise of ordinary care and diligence in managing the estate (Paragraph 3) [*see Prob. Code §§ 2401, 2403*].

- The effect of withdrawing assets on the bond (Paragraph 4) [*see Prob. Code §§ 2320, 2328*].

- Whether a request for special notice has been filed and, if so, that proper notice will be given or has been waived (Paragraph 5) [*see Prob. Code §§ 1260(a), 2700, 2701*].

[4] Verification

The petition must be verified [*Prob. Code § 1021*; *see § 290.50[4]*].

[5] Notice

Notice must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2403(b)*], which generally requires that notice be mailed to specified persons at least 15 days before the day of the hearing [*Prob. Code § 1460(a),(b)*]. Special notice must be given to those persons who have filed a written request under *Prob. Code § 2700 et seq.* [*Prob. Code §§ 1460(d), 2700, 2701*]. For further discussion and a form for giving notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[6] Bond

If the withdrawal increases the amount of personal property held by the guardian or conservator so that the bond is insufficient, a larger bond must be procured [*see Prob. Code § 2320*]. For further discussion of bond requirements, see Ch. 283, *Guardianship and Conservatorship: Bonds* .

[7] Cross References

For discussion of withdrawals from blocked accounts, see *§ 290.22[4]*

For local court rules regarding withdrawals, see *§ 290.41*

For order authorizing withdrawal of assets from blocked account, see *§ 290.63*

For a discussion and a form for use in withdrawing a minor's funds from a blocked account, see Ch. 364, *Minors: Claims and Property of Minors*

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§ 290.63 Order Authorizing Withdrawal of Assets From Blocked Account [Prob. Code §§ 2403, 2456]

[1] FORM Order Authorizing Withdrawal of Assets From Blocked Account

[*Caption. See § 290.50[1].*]

The petition of _____[*name*], the _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee], for authority to withdraw _____ [funds *or specify other property*] of the _____ [ward *or* conservatee] from a blocked account came on regularly for hearing by the court on this date. Petitioner appeared by counsel _____[*name*]. [*Specify other appearances, if any.*]

The court finds from proof made to the satisfaction of the court as follows:

1. [*Finding that notices have been duly given. See § 290.53, Finding 1.*]

2. The following property has been deposited with _____[*name of depository*] in account number _____ subject to withdrawal only on the order of this court: _____[*describe sum of money, personal property, or securities so deposited*].

3. It is necessary and desirable that the petitioner be authorized to withdraw the property described above from the account.

4. An additional bond is [not] required.

IT IS ORDERED that petitioner, as _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee], is authorized to withdraw the _____ [sum of $_____ *or* _____ (*describe other property*)] from _____[*name of depository*], account number _____. [Petitioner shall give an

additional bond in the amount of $_____].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, authorizing the guardian or conservator to withdraw money or other personal property of the estate from a blocked account is for use with the petition in § 290.62 [*see Prob. Code §§ 2403* (petition for authorization or instructions), 2456 (deposits into and withdrawals from blocked accounts)]. The order should be entitled ORDER FOR RELEASE OF ASSETS.

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted. The signed order must be presented to the depository to obtain the withdrawal.

[3] Appealability of Order

An order authorizing or instructing (or refusing to authorize or instruct) a guardian or conservator is appealable [*Prob. Code § 1300(c)*]. For a discussion of the effect of a final order under *Prob. Code § 2403*, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.12[3]*.

[4] Cross References

For discussion of withdrawals from blocked accounts, see *§ 290.22[4]*

For petition for authority to withdraw assets from blocked account, see *§ 290.62*

For discussion of order authorizing and instructing guardian or conservator as to management of estate property, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.42*

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§ 290A.syn Synopsis to Chapter 290A: GUARDIANSHIP AND CONSERVATORSHIP: ASSET MANAGEMENT AND INVESTMENT

§ 290A.01 Scope of Chapter

§ 290A.02 Cross References

§§ 290A.03-290A.09 [Reserved]

§ 290A.10 Governing Statutes

§ 290A.11 Asset Management Generally

[1] Effect of Independent Powers

[2] Abandonment of Valueless Property

[3] Limitations on Instrument Making Transfer to Conservator

[4] Prohibition Against Transactions Between Estate and Court Personnel

§ 290A.12 Distributions of Property

[1] Distribution of Surplus Income in Conservatorships

[2] Transfer by Conservator Under California Uniform Transfers to Minors Act

§ 290A.13 Partition Action

§ 290A.14 Conveyance or Transfer of Real or Personal Property Pursuant to Contract or Claim

[1] Grounds for Order

[2] Continuance of Hearing

[3] Abatement of Proceeding

[4] Effect of Order

[5] Appealability of Order

§ 290A.15 Sale of Real or Personal Property

[1] Purposes for Sale

[2] When Court Authorization Is Required

[a] In General

[b] Sale of Conservatee's Residence

[3] Procedure for Sale

[a] Application of Probate Procedural Rules

[b] Notice of Sale

[c] Conduct of Sale

[d] Sale of Securities and Like Property

[e] Sale of Tangible Personal Property

[f] Terms of Sale

[4] Confirmation Order for Real Property Sale

[a] Effect of Order

[b] Additional Bond

[5] Appealability of Order

[6] Action for Recovery of Property Sold

§ 290A.16 Encumbrances and Exchanges

[1] Borrowing Money and Giving Security

[a] Grounds for Order

[b] Effect of Order

[c] No Deficiency Judgment

[d] Appealability of Order

[2] Lease of Real Property

[a] In General

[b] Joint Ownership

[c] Effect of Lease

[d] Appealability of Order

[3] Dedication or Conveyance of Real Property

[4] Exchange of Real or Personal Property

§ 290A.17 Investments and Purchases

[1] Proceeds of Sale and Other Money

[2] Home for Ward, Conservatee, or Dependents

[3] Joint Purchase of Real Property

[4] State and Local Bonds

[5] Securities

§ 290A.18 Transfer of Assets Out of State

[1] When California Proceeding Is Pending

[a] Procedure to Obtain Order

[b] Objections to Petition

[c] Effect of Order

[2] When No California Proceeding Is Pending

§ 290A.19 Notice of Opening or Changing Bank Account or Safe Deposit Box

§§ 290A.20-290A.29 [Reserved]

§ 290A.30 Related Matthew Bender Publications

§ 290A.31 State Statutes

[1] In General

[2] Completion of Conveyance or Transfer of Property

[3] Investments and Purchases

[4] Sales

[5] Transactions Involving Real Property

§ 290A.32 Local Court Rules

[1] Alameda County

[2] Contra Costa County

[3] Los Angeles County

[4] Orange County

[5] Sacramento County

[6] San Diego County

[7] San Francisco

§ 290A.33 Decisions

§ 290A.34 Text References

§§ 290A.35-290A.39 [Reserved]

§ 290A.40 Petition for Authority to Distribute Surplus Income in Conservatorship [Prob. Code § 2423]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Notice

§ 290A.41 Order Authorizing Distribution of Surplus Income in Conservatorship [Prob. Code § 2423]

[1] FORM

[2] Use of Form

[3] Conditions and Considerations

§ 290A.42 Petition for Ex Parte Order Authorizing Partition Action [Prob. Code § 2463(a)]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Notice

§§ 290A.43-290A.49 [Reserved]

§ 290A.50 Petition for Authority to Convey or Transfer Property to Complete Sale Contract [Prob. Code § 850(a)(1)(A), (B)]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Notice

[5] Lis Pendens

§ 290A.51 Order Authorizing Conveyance or Transfer of Property to Complete Sale on Contract [Prob. Code §§ 850(a)(1)(A), (B), 2527]

[1] FORM

[2] Use of Form

[3] Recordation of Order

§ 290A.52 Petition for Conveyance or Transfer of Property Under Claim of Right [Prob. Code § 850(a)(1)(C), (D)]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Notice

§ 290A.53 Order Authorizing Conveyance or Transfer of Property Under Claim of Right [Prob. Code §§ 850(a)(1)(C), (D), 2527]

[1] FORM

[2] Use of Form

[3] Recordation of Order

§§ 290A.54-290A.59 [Reserved]

§ 290A.60 Report of Sale and Petition for Order Confirming Sale of Real Property [Prob. Code §§ 2540-2543]--Judicial Council Form GC-060

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Time of Filing

[5] Notice

§ 290A.61 Order Confirming Sale of Real Property [Prob. Code §§ 2540-2543]--Judicial Council Form GC-065

[1] FORM

[2] Use of Form

[3] Recording Order

§ 290A.62 Petition for Confirmation of Sale of Personal Property [Prob. Code §§ 2540-2543]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Time of Filing

[5] Notice

[6] Cross References

§ 290A.63 Ex Parte Petition for Authority to Sell Securities and Order [Prob. Code §§ 2540-2543]--Judicial Council Form GC-070

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Notice

§ 290A.64 Ex Parte Petition for Approval of Sale of Perishable or Depreciable Personal Property and Order [Prob. Code §§ 2540-2543]--Judicial Council Form GC-075

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Notice

§ 290A.65 Petition for Authority to Sell Residence of Conservatee [Prob. Code § 2540(b)]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Notice

§ 290A.66 Order Authorizing Sale of Residence of Conservatee [Prob. Code § 2540(b)]

[1] FORM

[2] Use of Form

§§ 290A.67-290A.79 [Reserved]

§ 290A.80 Petition for Authority to Borrow Money on Security of Estate Property [Prob. Code §§ 2550, 2551]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Notice

§ 290A.81 Order Authorizing Guardian or Conservator to Borrow Money on Security of Estate Property [Prob. Code §§ 2550, 2551]

[1] FORM

[2] Use of Form

[3] Subject-Matter Jurisdiction

[4] Recordation of Order

§ 290A.82 Petition for Authority to Execute Lease of Real Property [Prob. Code §§ 2550, 2553]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Notice

§ 290A.83 Order Authorizing Execution of Lease of Real Property [Prob. Code §§ 2550, 2553]

[1] FORM

[2] Use of Form

[3] Subject-Matter Jurisdiction

[4] Terms of Lease

[5] Recordation of Order

§ 290A.84 Petition for Authority to Convey or Dedicate Property, Easement, or Access Rights [Prob. Code §§ 2550, 2556]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Notice

§ 290A.85 Order Authorizing Conveyance or Dedication of Property, Easement, or Access Rights [Prob. Code §§ 2550, 2556]

[1] FORM

[2] Use of Form

[3] Recordation of Order

§ 290A.86 Petition for Authority to Exchange Property [Prob. Code §§ 2550, 2557]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Notice

§ 290A.87 Order Authorizing Exchange of Property [Prob. Code §§ 2550, 2557]

[1] FORM

[2] Use of Form

[3] Recordation of Order

§§ 290A.88-290A.99 [Reserved]

§ 290A.100 Petition for Authority to Invest Funds--Personal Property [Prob. Code § 2570]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Notice

§ 290A.101 Allegation--Investment in Government Bonds [Prob. Code § 2573]

[1] FORM

[2] Use of Form

§ 290A.102 Order Authorizing Investment of Funds--Personal Property [Prob. Code §§ 2570, 2573]

[1] FORM

[2] Use of Form

§ 290A.103 Petition for Authority to Invest Funds--Real Property [Prob. Code §§ 2570-2572]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Notice

§ 290A.104 Order Authorizing Investment of Funds--Real Property [Prob. Code §§ 2570-2572]

[1] FORM

[2] Use of Form

§§ 290A.105-290A.109 [Reserved]

§ 290A.110 Petition for Authority to Transfer Personal Property Out of State When California Proceeding Is Pending [Prob. Code § 2803]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Notice

§ 290A.111 Order Authorizing Transfer of Personal Property Out of State When California Proceeding Is Pending [Prob. Code § 2806]

[1] FORM

[2] Use of Form

[3] Required Findings

§ 290A.112 Petition for Authority to Remove Nonresident's Property From State When No California Proceeding Is Pending [Prob. Code § 3800]

[1] FORM

[2] Use of Form

[3] Jurisdiction and Venue

[4] Contents of Petition

[5] Accompanying Certificates

[6] Notice

§ 290A.113 Order Authorizing Removal of Nonresident's Property From State When No California Proceeding Is Pending [Prob. Code § 3803]

[1] FORM

[2] Use of Form

[3] Required Findings

§ 290A.120 Notice of Opening or Changing a Guardianship or Conservatorship Account or Safe Deposit Box [Prob. Code § 2892]--Judicial Council Form GC-051

[1] FORM

[2] Use of Form

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24-290A California Forms of Pleading and Practice--Annotated § 290A.01

§ 290A.01 Scope of Chapter

This chapter discusses management and investment of the estate property of a ward or conservatee [*see § 290A.10* et seq.]. It includes the following forms:

- A petition [*see § 290A.40*] and an order [*see § 290A.41*] to distribute surplus income to a conservatee's spouse or relatives.

- A petition and ex parte order to commence an action for partition of property [*see § 290A.42*].

- Petitions [*see §§ 290A.50, 290A.52*] and orders [*see §§ 290A.51, 290A.53*] to convey or transfer property pursuant to an existing contract or claim.

- A petition [*see § 290A.60*] and an order [*see § 290A.61*] to confirm a sale of real property.

- A petition [*see § 290A.62*] and an order to sell securities [*see § 290A.63*] or personal property [*see § 290A.64*].

- A petition [*see § 290A.65*] and an order [*see § 290A.66*] to sell a conservatee's residence.

- A petition [*see § 290A.80*] and an order [*see § 290A.81*] to borrow money and give security.

- A petition [*see § 290A.82*] and an order [*see § 290A.83*] to lease real property.

- A petition [*see § 290A.84*] and an order [*see § 290A.85*] to convey or dedicate property, easements, or access rights.

- A petition [*see § 290A.86*] and an order [*see § 290A.87*] to exchange property.

- Petitions [*see §§ 290A.100, 290A.101, 290A.103*] and orders [*see §§ 290A.102, 290A.104*] to invest

estate funds in personal or real property.

- A petition [*see § 290A.110*] and an order [*see § 290A.111*] to transfer assets out of the state.

- A petition [*see § 290A.112*] and an order [*see § 290A.113*] to remove a nonresident's property from the state.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsReal Property LawEstatesConcurrent OwnershipPartition ActionsReal Property LawOwnership & TransferAgents & FiduciariesReal Property LawPurchase & SaleContracts of SaleGeneral Overview

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24-290A California Forms of Pleading and Practice--Annotated § 290A.02

§ 290A.02 Cross References

- For discussion and forms pertaining to various aspects of estate management, see the following chapters:
  - Ch. 286, *Guardianship and Conservatorship: Inventory and Appraisal*.
  - Ch. 287, *Guardianship and Conservatorship: General Management Powers*.
  - Ch. 289, *Guardianship and Conservatorship: Management of Community Property*.
  - Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee*.
  - Ch. 290C, *Guardianship and Conservatorship: Actions and Disputed Claims*.
  - Ch. 290D, *Guardianship and Conservatorship: Actions Against Guardian or Conservator*.
  - Ch. 290E, *Guardianship and Conservatorship: Accounts*.
  - Ch. 290F, *Guardianship and Conservatorship: Compensation of Guardian or Conservator*.
- For discussion and forms for use in commencing and maintaining a partition action, see Ch. 397, *Partition* .
- For discussions and forms relating to dispositions of property in probate proceedings, see Ch. 455, *Probate: Sale of Estate Property* .
- For discussion and forms relating to various aspects of managing property of a decedent's estate

(such as borrowing money, investing money, leasing property, dedicating or conveying an easement, exchanging property, conveying or transferring property, and partitioning property) in probate proceedings, see Ch. 456, *Probate: Management of Estate Assets* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & RightsReal Property LawEstatesConcurrent OwnershipPartition Actions

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[Reserved]

§§ 290A.03[Reserved]

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24-290A California Forms of Pleading and Practice--Annotated § 290A.10

§ 290A.10 Governing Statutes

Provisions governing asset management and investment of the ward's or conservatee's estate are contained mainly in the following statutes:

- *Prob. Code § 2420 et seq.*, governing support and maintenance of the ward or conservatee and dependents.
- *Prob. Code § 850 et seq.*, governing conveyances or transfers of property claimed to belong to the ward or conservatee or another person.
- *Prob. Code § 2540 et seq.*, governing sales.
- *Prob. Code § 2550 et seq.*, governing notes, mortgages, leases, conveyances, and exchanges.
- *Prob. Code § 2570 et seq.*, governing investments and purchases.
- *Prob. Code § 2800 et seq.*, governing transfers of personal property out of the state.
- *Prob. Code § 3800 et seq.*, governing removal of a nonresident's property from the state.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & RightsReal Property LawOwnership & TransferAgents & Fiduciaries

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§ 290A.11 Asset Management Generally

[1] Effect of Independent Powers

The guardian or conservator may apply for a court order authorizing him or her to exercise management powers independently without notice or specific authorization or approval, as the ward or conservatee could do if possessed of legal capacity [*Prob. Code § 2590*; *see* Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers*]. To the extent that the guardian or conservator has obtained this authority, he or she would not be required to use procedures discussed in this chapter for any of the following [*see Prob. Code § 2591*]:

- To grant and take options.
- To sell, at public or private sale, real or personal property other than the personal residence of the conservatee of the estate.
- To create, by grant or otherwise, easements and servitudes.
- To borrow money and to give security for repayment.
- To purchase real or personal property.
- To let or lease estate property for any purpose and period, including a term commencing at a future time.
- To exchange estate property.
- To sell estate property on credit (if the unpaid balance is adequately secured).
- To commence and maintain a partition action.

[2] Abandonment of Valueless Property

The guardian or conservator may dispose of or abandon valueless property without court authorization [*Prob. Code §§ 2450(a), 2465*].

[3] Limitations on Instrument Making Transfer to Conservator

Generally, no provision of any instrument is valid to make a donative transfer to any person who has a fiduciary relationship with the transferor, including a conservator, and who transcribes the instrument or causes it to be transcribed [*Prob. Code § 21350(a)(4)*].

This rule does not apply if the instrument is reviewed by an independent attorney who counsels the transferor about the nature and consequences of the intended transfer, attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and signs and delivers a certificate of independent review as prescribed by statute [*Prob. Code § 21351(b)*]. The rule also does not apply if, after full disclosure of the relationships of the persons involved, the court approves the instrument by order under *Prob. Code § 2580 et seq.* [*Prob. Code § 21351(c)*; *see* Ch. 290B, *Guardianship and Conservatorship: Substituted Judgment*].

For further discussion, see Ch. 444, *Probate: Will Contests* , and Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

[4] Prohibition Against Transactions Between Estate and Court Personnel

Every court official or employee who has duties or responsibilities related to the appointment of a guardian or conservator, or the processing of any document related to a guardian or conservator, and every person who is related by blood or marriage to a court official or employee who has these duties, is prohibited from purchasing, leasing, or renting any real or personal property from the estate of the ward or conservatee whom the guardian or conservator represents. "Persons related by blood or marriage" include (1) spouses or domestic partners [as defined by *Prob. Code § 37*; *Family Code § 297*], and (2) relatives within the second degree of lineal or collateral consanguinity of a person or a person's spouse [*Prob. Code § 2111.5(a)*]. Those persons are not prohibited, however, from purchasing real or personal property from the estate of the ward or conservatee if the purchase is made under terms and conditions of a public sale of the property [*Prob. Code § 2111.5(b)*].

A violation of the prohibition will result in the rescission of the purchase, lease, or rental of the property. Further, any losses incurred by the estate of the ward or conservatee because the property was sold or leased at lessthan fair market value will be deemed as charges against the guardian or conservator under the provisions of *Prob. Code §§ 2401.3* and *2401.5* [*Prob. Code § 2111.5(c)*]. The court must also assess a civil penalty equal to three times the charges against the guardian, conservator, or other person in violation of the prohibition, and may assess punitive damages as it deems proper. If the estate does not incur losses as a result of the violation, the court instead must order the guardian, conservator, or other person in violation of the prohibition to pay a fine of up to $5,000 for each violation. These fines and penalties are in addition to any other rights and remedies provided by law [*Prob. Code § 2111.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsReal Property LawEstatesConcurrent OwnershipPartition ActionsReal Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawOwnership & TransferAgents & Fiduciaries

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§ 290A.12 Distributions of Property

[1] Distribution of Surplus Income in Conservatorships

The court may, by order, authorize or direct a conservator to pay and distribute surplus income of the estate or any part of the surplus income to the conservatee's spouse and to relatives within the second degree whom the conservatee would, in the court's judgment, have aided but for the existence of the conservatorship. Income is not considered to be surplus if it is needed for the support, maintenance, and education of the conservatee and of persons legally entitled to support, maintenance, or education from the conservatee. The order may be issued on the petition of the conservator, the conservatee, or the conservatee's spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*], or relative within the second degree [*Prob. Code § 2423(a)*; for form of petition, *see § 290A.40*].

An order granting or denying a petition for distribution of surplus income under *Prob. Code § 2423* is appealable [*Prob. Code § 1301(d)*].

For a discussion of gifts to persons other than the conservatee's spouse and relatives and gifts of principal as well as income under the doctrine of substituted judgment, see Ch. 290B, *Guardianship and Conservatorship: Substituted Judgment* .

[2] Transfer by Conservator Under California Uniform Transfers to Minors Act

Under the Uniform Transfers to Minors Act [*see Prob. Code § 3900 et seq.*; *see generally* Ch. 278, *Gifts*], a conservator may make an irrevocable transfer of a minor's property to another adult or to a trust company as custodian for the benefit of the minor [*Prob. Code § 3906(b)*]. The transfer may be made, however, only if all of the following requirements are met [*Prob. Code § 3906(c)*]:

- The conservator considers the transfer to be in the minor's best interests.

- The transfer is not prohibited by or inconsistent with provisions of the applicable will, trust agreement, or other governing instrument. For this purpose, a spendthrift provision [*see Prob. Code § 15300*] will not prohibit or be inconsistent with the transfer.

- The transfer is authorized by the court, if it exceeds $10,000 in value. Court authorization is not required when the transfer is to a trust company or to an individual designated as a trustee by a trust instrument that does not require a bond.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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§ 290A.13 Partition Action

A guardian or conservator may bring an action for partition of any property in which the ward or conservatee has an undivided interest, if the court has first made an order authorizing him or her to do so [*Prob. Code § 2463(a)*; *see § 290A.42*].

A guardian or conservator may consent and agree, without an action, to a partition of the property and to the part of the property to be set off to the estate, and may execute deeds or conveyances to the owners of the remaining interests of the parts to which they may be respectively entitled, if the court has made an order under *Prob. Code § 2500 et seq.* (compromise of claims) authorizing the transaction [*Prob. Code § 2463(b)*; *see generally* Ch. 290C, *Guardianship and Conservatorship: Actions and Disputed Claims*].

An order granting or denying a petition for authority to commence a partition action is not one of the orders listed in *Prob. Code § 1301* as appealable orders in guardianship and conservatorship proceedings. However, such an order may be appealable as an order authorizing, instructing, or directing a fiduciary, under *Prob. Code § 1300(c)*.

If the ward or conservatee, or the guardian or conservator in his or her official capacity, is made a defendant in a partition action, the guardian or conservator may defend the action without authorization of the court [*Prob. Code § 2463(c)*]. For a discussion of the requirements for a partition action, see Ch. 397, *Partition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsReal Property LawEstatesConcurrent OwnershipPartition Actions

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§ 290A.14 Conveyance or Transfer of Real or Personal Property Pursuant to Contract or Claim

[1] Grounds for Order

If the court is satisfied that a conveyance, transfer, or other order should be made, it may authorize and direct the guardian or conservator or other person having title to or possession of property to execute a conveyance or transfer to the person entitled to it, or may grant other appropriate relief, in any of the following circumstances [*Prob. Code §§ 850(a), 856*]:

- The conservatee is bound by a contract in writing to convey real property or to transfer personal property, executed by the conservateewhile competent or executed by the conservatee's predecessor in interest, and the contract is one that can be specifically enforced.

- The ward has succeeded to the interest of a person bound by a contract in writing to convey real property or to transfer personal property, and the contract is one that can be specifically enforced.

- The guardian or conservator or the minor or conservatee is in possession of, or holds title to, real or personal property, and the property or some interest in it is claimed to belong to another.

- The minor or conservatee has a claim to real or personal property, the title to or possession of which is held by another.

To obtain the order, the guardian or conservator or any claimant may file a petition requesting the conveyance or transfer [*Prob. Code § 850(a)*; *see §§ 290A.50, 290A.52*]. The action may include claims, causes of action, or matters that are normally raised in a civil action to the extent the matters are related factually to the subject matter of the petition [*Prob. Code § 855*].

If the conservatee or minor on whose behalf the action is brought dies during the pendency of the proceeding, the personal representative of the conservatee or minor's estate, or other successor in interest, may proceed with the matter and the existing proceeding may not be dismissed by reason of the death of the conservatee or minor [*Prob. Code § 858*

].

The provisions of *Civ. Code § 3384 et seq.* governing actions for specific performance apply to proceedings on executory contracts. Thus, standards of inadequacy of legal remedies, fairness and certainty of terms, and all other equitable requirements must be satisfied [*see generally* Ch. 528, *Specific Performance*].

[2] Continuance of Hearing

Any interested person may request time for filing a response to the petition, for discovery proceedings, or for other preparation for the hearing, and the court must grant a continuance for a reasonable time for any of these purposes [*Prob. Code § 852*].

[3] Abatement of Proceeding

If a civil action is pending with respect to the petition's subject matter, and jurisdiction has been obtained in the court in which the civil action is pending, then on the request of any party to the civil action, the court must abate the probate proceeding until the conclusion of the civil action. The court need not abate the proceeding, however, if the court determines that the civil action was filed for the purpose of delay [*Prob. Code § 854*].

Even though the predecessor to *Prob. Code § 854* required identity of subject matter as between the two actions, it does not require precise identities of parties and causes of action for abatement of a probate action pending resolution of a civil action concerning the same subject matter [*Conservatorship of Pacheco (1990) 224 Cal. App. 3d 171, 176-177, 273 Cal. Rptr. 522* (requiring abatement of probate proceeding when sought by party to pending civil action concerning same subject matter as probate proceeding)].

Any person having or claiming title to or an interest in the subject property may, at or before the hearing, object to the hearing if the petition is not filed in the proper court under any provisions affecting civil actions for such relief [*see generally* Ch. 571, *Venue*]. The court may not grant the petition if the objection is established [*Prob. Code § 853*]. The court also may not grant the petition if it determines that the matter should be determined by a civil action [*Prob. Code § 856.5*].

[4] Effect of Order

The guardian or conservator or other person ordered to execute a conveyance or transfer under *Prob. Code § 856* must execute the conveyance or transfer according to the terms of the order, and the court may enforce its order by process [*Prob. Code §§ 857(a), 1049, 2111(b)*; *see Code Civ. Proc. § 17(b)(6)* (defining "process" in civil proceedings); *see also* Ch. 254, *Executions and Enforcement of Judgments*].

After entry of an order that the guardian or conservator or other person execute a conveyance or transfer, the person entitled under the order has the right to the possession of the property, and the right to hold the property, according to the terms of the order, as if the property had been conveyed or transferred in accordance with the terms of the order [*Prob. Code § 857(b)*].

A conveyance of real property must state that it is made by authority of the order and give the date of the order [*Prob. Code § 2111(c)*]. A conveyance or transfer of estate property carried out in accordance with the order has the same effect as if the ward or conservatee had carried it out while having legal capacity to do so [*Prob. Code § 2111(d)*].

An order authorizing or refusing to authorize a guardian or conservator to transfer property pursuant to a contract or claim is appealable [*Prob. Code § 1300(k)*].

[5] Appealability of Order

An order adjudicating or refusing to adjudicate the merits of a claim to property held or claimed by the ward or conservatee under *Prob. Code § 850 et seq.* is appealable [*Prob. Code § 1301(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersContinuancesEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewReal Property LawOwnership & TransferAgents & FiduciariesReal Property LawPurchase & SaleContracts of SaleGeneral Overview

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Volume 24: Guardianship and Conservatorship thru Guardians ad Litem-Chs. 280-291
Chapter 290A GUARDIANSHIP AND CONSERVATORSHIP: ASSET MANAGEMENT AND INVESTMENT
PART II. LEGAL BACKGROUND

24-290A California Forms of Pleading and Practice--Annotated § 290A.15

§ 290A.15 Sale of Real or Personal Property

[1] Purposes for Sale

A guardian or conservator may sell real or personal property of the estate in any of the following situations [*Prob. Code § 2541*]:

- The income of the estate is insufficient for the comfortable and suitable support, maintenance, and education of the ward or conservatee (including care, treatment, and support of the ward or conservatee who is a patient in a state hospital under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services) or of persons legally entitled to support, maintenance, or education from the ward or conservatee [*see Prob. Code § 2420*; *see also* Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee*].

- The sale is necessary to pay the debts referred to in *Prob. Code §§ 2430* and *2431* (debts payable from principal and income; wage claims) [*see generally* Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee*].

- The sale is for the advantage, benefit, and best interests of the ward or conservatee, the estate, or the ward or conservatee and persons legally entitled to support, maintenance, or education from the ward or conservatee.

The guardian or conservator must apply the proceeds of any sale to the purposes for which the sale was made, as far as necessary. The residue, if any, must be managed as other property of the estate [*Prob. Code § 2547*].

[2] When Court Authorization Is Required

[a] In General

Sales of real or personal property of the estate are subject to authorization, confirmation, or direction of the court except as otherwise provided for sales of listed securities or tangible personal property and except for the sale of a

conservatee's residence, which is subject to specific authorization as set forth in *Prob. Code § 2540(b)* [*Prob. Code § 2540*].

Prob. Code § 2543, governing the conduct of a sale of estate property, does not apply to sales of securities under *Prob. Code § 2544* [*Prob. Code § 2544(b)*].

The guardian or conservator may sell or exchange tangible personal property of the estate without authorization, confirmation, or direction of the court. This power, however, is subject to *Prob. Code § 2541*, discussed under [1], *above* [*Prob. Code § 2545(a)*]. Further, the aggregate of the sales or exchanges made without court authorization during any calendar year may not exceed $5,000 [*Prob. Code § 2545(b)*]. Finally, a sale or exchange of personal effects or of furniture or furnishings used for personal, family, or household purposes may be made without court authorization only in the following circumstances [*Prob. Code § 2545(c)*]:

- In the case of a guardianship, if the ward is under the age of 14 or consents to the sale or exchange.

- In the case of a conservatorship, if the conservatee either consents to the sale or exchange or does not have legal capacity to give the consent.

Failure to observe these limitations on the aggregate amount of sales or on sales of personal effects does not invalidate the title of, or impose any liability on, a third person who acts in good faith and without actual notice of the guardian's or conservator's lack of authority [*Prob. Code § 2545(d)*].

[b] Sale of Conservatee's Residence

Unless the conservator has been granted independent powers pursuant to *Prob. Code § 2590* [*see* Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers*], a conservator seeking authorization to sell a conservatee's present or former residence must notify the court that the residence is proposed to be sold and that the conservator has discussed the proposed sale with the conservatee. In addition, the conservator must inform the court whether the conservatee supports or opposes the proposed sale, and the conservator must describe the circumstances that necessitate the sale, including whether the conservatee has the ability to live in the residence. Furthermore, in seeking an order authorizing the sale of the conservatee's personal residence, the conservator must demonstrate to the court that the terms of the sale, including the price for which the property is to be sold and the commission to be paid from the estate, are in all respects in the best interests of the conservatee [*Prob. Code § 2591.5*]. The court in its discretion may require the court investigator to discuss the proposed sale with the conservatee [*Prob. Code § 2540(b)*]. For a form for a petition for authorization for sale of the conservatee's residence, see *§ 290A.65*.

[3] Procedure for Sale

[a] Application of Probate Procedural Rules

Generally, the following transactions and proceedings concerning a guardianship or conservatorship estate must conform, as nearly as may be, to *Prob. Code § 10000 et seq.* governing sales by personal representatives of property in decedents' estates (exclusive of sales under the Independent Administration of Estates Act contained in *Prob. Code § 10400 et seq.*) [*Prob. Code § 2543(b)*]:

- All proceedings concerning real property sales by guardians or conservators.

- Giving notice of sale.

- Reselling the same property.

- Return of sale and application for confirmation of the sale.
- Notice and hearing of the application.
- Making orders authorizing sales, or rejecting or confirming sales and reports of sales.
- Ordering and making conveyances of property sold.
- Allowance of commissions.

The sale of mining property is conducted under the provisions for sale of real property generally [*see Prob. Code §§ 2543(b), 10300 et seq.*].

Any person interested in the estate may file written objections to the confirmation of the sale of real property, may be heard at the hearing, and may produce witnesses in support of his or her objections [*Prob. Code §§ 2543(b), 10310(c)*]. For a general form for an objection to a petition, see Ch. 287, *Guardianship and Conservatorship: General Management Powers* .

For discussion and forms relating to real property sales by administrators of decedents' estates, see Ch. 455, *Probate: Sale of Estate Property* .

[b] Notice of Sale

Giving notice of the time and place of sale is governed by *Prob. Code §§ 10250-10255* [*Prob. Code § 2543(b)*]. Any reference, however, to *Prob. Code § 1220* concerning notice provisions applicable to personal representatives is deemed to be a reference to *Prob. Code § 1460 et seq.*, the general notice provisions for guardianships and conservatorships [*Prob. Code §§ 1469, 2543(b)*]. For a form for a notice of sale, see Ch. 455, *Probate: Sale of Estate Property* .

[c] Conduct of Sale

If estate property is required or permitted to be sold, the guardian or conservator may use discretion on which property to sell first, sell the entire interest of the estate in the property or any lesser interest in it, and sell the property either at public auction or private sale [*Prob. Code § 2543(a)*].

A written offer to purchase the property may be made to the court at the hearing on the petition for confirmation of the sale. For a form for overbid at sale, see Ch. 455, *Probate: Sale of Estate Property* . If the new bid is at least 10 percent more than the amount stated in the report made to the court, the court in its discretion may accept the new bid and confirm the sale to the offeror, or may order a new sale, if all of the following conditions are satisfied [*Prob. Code §§ 2543(b), 10262(a)*]:

- The original bid as stated in the report to the court is more than $100 or, if the original bid is less than $100, the new bid is at least $100 more than the original bid.
- The new bid is made by a responsible person.
- The new bid complies with all provisions of law.

If, however, there is more than one offer that satisfies the above requirements, the court must either accept the highest offer and confirm the sale to the offeror or order a new sale [*Prob. Code §§ 2543(b), 10262(b)*]. These requirements do

not apply to a sale of property described in *Prob. Code § 10259* (perishable or depreciable personal property, personal propertywhose sale is necessary for payment of a family allowance, or personal property sold at public auction) [*Prob. Code §§ 2543(b), 10262(c)*].

[d] Sale of Securities and Like Property

Except as specifically limited by order of the court, and subject to *Prob. Code § 2541* [*see* [1], *above*], the guardian or conservator may sell the following securities without authorization, confirmation, or direction of the court [*Prob. Code § 2544(a)*]:

- Securities that are sold on an established stock or bond exchange.

- Any security designated as a national market system security on an interdealer quotation system or subsystem by the National Association of Securities Dealers (Nasdaq) sold through a broker-dealer registered under the Securities Exchange Act of 1934 during the regular course of business of the broker-dealer.

- Securities that are directly redeemed by the issuer.

Prob. Code § 2543, governing the conduct of sale of estate property, does not apply to a sale of securities that meets any of these conditions [*Prob. Code § 2544(b)*].

If the court authorizes a sale of securities, the order must fix the terms and conditions of sale [*Prob. Code §§ 2543(b), 10200(c)*; *see § 290A.63*]. No notice of a sale of securities need be given if the securities are to be sold on an established stock exchange or through Nasdaq, or if a minimum selling price is fixed by the court [*see Prob. Code §§ 2543(b), 10200(e)*].

Other special exemptions from notice may be applicable to dispositions of savings accounts, mutual capital certificates of savings or federal association, credit union share accounts and certificates, and subscription rights to purchase additional securities [*see Prob. Code §§ 2543(b), 10201(b), (c), 10202*].

[e] Sale of Tangible Personal Property

Generally, sales of personal property of the estate are subject to authorization, confirmation, or direction of the court [*Prob. Code § 2540*]. However, sales of tangible personal property not exceeding $5,000 a year may be made without court authorization [*Prob. Code § 2545*].

[f] Terms of Sale

All sales must be for cash or for a combination of cash and deferred payments. The terms of the sale are subject to court approval [*Prob. Code § 2542(a)*].

If real property is sold partly for deferred payments, the guardian or the conservator must take the note of the purchaser for the unpaid portion of the purchase money, with a mortgage or deed of trust on the propertyto secure payment of the note. The mortgage or deed of trust is subject only to encumbrances existing at the date of sale and such other encumbrances as the court may approve [*Prob. Code § 2542(b)*].

If real property sold partly for deferred payments consists of an undivided interest, a joint tenancy interest, or any other interest less than the entire ownership, and the owners of the remaining interests in the property join in the sale, the note and deed of trust or mortgage may be made to the ward or conservatee and the other owners [*Prob. Code § 2542(c)*].

[4] Confirmation Order for Real Property Sale

[a] Effect of Order

An order authorizing or directing the conveyance of real property must be carried out in accordance with the order's terms. Only then will the transaction have the same effect as if the ward or conservatee had carried it out while having capacity to do so [*see Prob. Code § 2111(b), (d)*].

A conveyance of real property executed by a guardian or conservator must set forth in the instrument that it is made by authority of the order authorizing or directing the transaction and must give the date of the order [*Prob. Code § 2111(c)*].

[b] Additional Bond

On confirmation of the sale of any real property of an estate, the guardian or conservator must furnish such additional bond as is required by the court in order to make the sum of the bonds equal to the amount determined pursuant to *Prob. Code § 2320*, taking into account the proceeds of the sale [*Prob. Code § 2330*]. If a bond or additional bond is required, the order confirming the sale of real property is not effective and may not be filed by the court until the additional bond is filed [*Prob. Code § 2330*]. For further discussion, see Ch. 283, *Guardianship and Conservatorship: Bonds* .

[5] Appealability of Order

An order directing, authorizing, or approving (or refusing to direct, authorize, or approve) the sale of property is appealable [*Prob. Code § 1300(a)*].

[6] Action for Recovery of Property Sold

No action for the recovery of any property sold by a guardian or conservator may be maintained by the ward or conservatee or by any person claiming under the ward or conservatee unless the action is commenced within either (whichever is later) three years after the termination of the guardianship of conservatorship or three years after the removal of any legal disability to sue by reason of minority or otherwise that exists at the time the cause of action accrues [*Prob. Code § 2548*].

For discussion of actions against guardians and conservators, see Ch. 290D, *Guardianship and Conservatorship: Actions Against Guardian or Conservator* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersSales of AssetsEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewReal Property LawOwnership & TransferAgents & Fiduciaries

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§ 290A.16 Encumbrances and Exchanges

[1] Borrowing Money and Giving Security

[a] Grounds for Order

The court may authorize a guardian or conservator to borrow money on a note, either unsecured or to be secured by a security interest or other lien on the personal property of the estate or any part of the personal property or to be secured by a mortgage or deed of trust on the real property of the estate or any part of the real property [*Prob. Code §§ 2550, 2551(a)*]. To obtain authority to borrow money or to give security, the guardian or conservator, the ward or conservatee, or any other interested person must file a petition with the court [*Prob. Code § 2551(b)*; *see § 290A.80*].

An application to authorize the guardian or conservator to borrow money and give security may be made when any of the following conditions exists [*Prob. Code § 2551(a)*; *see Prob. Code § 2541*; *see also § 290A.15*]:

- The estate income is insufficient for the support of the ward or conservatee or his or her legal dependents.

- The personal property of the estate and the income from the real property of the estate is insufficient to pay debts.

- It is in the best interests of the ward or conservatee, the estate, and any legal dependents.

The court may require additional proof of the fairness and feasibility of the transaction [*Prob. Code § 2551(c)*].

An application to authorize a security interest or other lien on personal property or a mortgage or deed of trust on real property is also available for the following purposes [*Prob. Code §§ 2551(a), 2552(a)*]:

- To pay, reduce, extend, or renew a security interest, lien, mortgage, or deed of trust already existing on property of the estate.

- To improve, use, operate, or preserve the property proposed to be mortgaged or subjected to a deed of trust, or some part of that property.

If estate property consists of an undivided interest in real or personal property, or any other interest in it less than the entire ownership, then on a showing that it would be to the advantage of the estate to borrow money to improve, use, operate, or preserve the property jointly with the owners of the other interests in it, or to pay, reduce, extend, or renew asecurity interest, lien, mortgage, or deed of trust already existing on all of the property, the guardian or conservator may be authorized to join with the other owners in borrowing money and executing a joint and several note and any security interest, lien, mortgage, or deed of trust that may be required to secure the payment of the note. The note may be for whatever sum is required for the purpose [*Prob. Code § 2552(b)*].

[b] Effect of Order

The note or notes and the mortgage or deed of trust, if any, must be signed by the guardian or conservator [*Prob. Code § 2551(d)*]. The borrowed money must be applied to the purposes specified in the order authorizing the loan [*Prob. Code § 2551(a)*].

The court's jurisdiction conclusively inures to the benefit of the owner of the security interest or lien, mortgagee named in the mortgage, or trustee and beneficiary named in the deed of trust, and their heirs and assigns. No omission, error, or irregularity in the proceedings impairs or invalidates the proceedings or the note, security interest, lien, mortgage, or deed of trust given pursuant to the order [*Prob. Code § 2552(e)*].

Whenever the court authorizes the creation of a mortgage, deed of trust, security interest, or other lien, the transaction must be carried out by the guardian or conservator in accordance with the terms of the order [*Prob. Code § 2111(b)*]. The creation of a security interest in personal property of the estate by a guardian or conservator in compliance with a court order has the same effect as if created by the ward or conservatee while having legal capacity to do so [*Prob. Code § 2111(d)*].

On authorization to borrow money secured by a mortgage or deed of trust on real property of the estate, the guardian or conservator must furnish such additional bond as is required by the court to make the sum of the bonds equal to the amount determined pursuant to *Prob. Code § 2320*, taking into account the proceeds of the mortgage or deed of trust [*Prob. Code § 2330*]. If a bond or additional bond is required, the order authorizing the borrowing of money secured by a mortgage or deed of trust on estate real property is not effective and may not be filed by the court until the additional bond is filed [*Prob. Code § 2330*]. For further discussion, see Ch. 283, *Guardianship and Conservatorship: Bonds* .

[c] No Deficiency Judgment

On any foreclosure or sale under a security interest, lien, mortgage, or deed of trust, if the proceeds of the sale of the encumbered property are insufficient to pay the note, the security interest, lien, mortgage, or deed of trust, and costs or expenses of sale, then no judgment or claim for any deficiency can be had or allowed against the ward or conservatee or the estate [*Prob. Code § 2551(f)*].

[d] Appealability of Order

An appeal make be taken from an order directing or authorizing (or refusing to direct or authorize) the guardian or conservator to encumber property [*Prob. Code § 1300(a)*].

[2] Lease of Real Property

[a] In General

A guardian or conservator may grant a lease on estate real property without authorization of the court when the rent does not exceed $1,500 a month and the term does not exceed two years or, regardless of the amount of the rent, when the lease is from month to month [*Prob. Code § 2555*]. Otherwise, leases of estate property can be executed by the guardian or conservator only after authorization by court order [*Prob. Code §§ 2550, 2553(a)*].

To obtain an order authorizing a lease under *Prob. Code § 2553*, the guardian or conservator or any interested person may file a petition with the court [*Prob. Code § 2553(b)*; *see § 290A.82*]. At the hearing, the court must entertain and consider any other offer made in good faith at the hearing to lease the same property on more favorable terms [*Prob. Code § 2553(c)*].

A lease of real property executed by a guardian or conservator must set forth in the instrument that it is made by authority of the order authorizing the transaction and must give the date of the order [*Prob. Code § 2111(c)*]. For the purpose of *Prob. Code § 2550 et seq.*, if a lease gives the lessee the right to extend the term of the lease, the length of the term must be considered as though the right to extend had been exercised [*Prob. Code § 2552.5*].

[b] Joint Ownership

If the lease covers additional property owned by other persons or an undivided or other interest of the ward or conservatee less than the entire ownership in the property, the lease may provide for division of rent and royalties in the proportion that the land or interest of each owner bears to the total area of the land or total interests covered by the lease [*Prob. Code § 2554(c)*].

[c] Effect of Lease

Whenever the court authorizes a lease of real property, the transaction must be carried out by the guardian or conservator of the estate in accordance with the terms of the order [*Prob. Code § 2111(b)*]. Such a lease carried out by a guardian or conservator in accordance with the order has the same effect as if the ward or conservatee had carried out the transaction while having legal capacity to do so [*Prob. Code § 2111(d)*].

[d] Appealability of Order

An appeal may be taken from an order directing or authorizing (or refusing to direct or authorize) the guardian or conservator to lease property [*Prob. Code § 1300(a)*].

[3] Dedication or Conveyance of Real Property

If it is for the advantage, benefit, and best interests of the estate and those interested in the estate, the guardian or conservator, after authorization by court order, may do any of the following, either with or without consideration [*Prob. Code §§ 2550, 2556(a)*]:

- Dedicate or convey real property of the estate for any purpose to the State of California, any public entity in California, the United States, or any agency or instrumentality of the United States.

- Dedicate or convey an easement over any real property of the estate to any person for any purpose.

- Convey, release, or relinquish to the State of California or to any public entity in California any access rights to any street, highway, or freeway from any real property of the estate.

- Consent as a lienholder to a dedication, conveyance, release, or relinquishment, as described above, by the owner of property subject to the lien.

To obtain the order, the guardian or conservator or any other interested person may file a petition with the court [*Prob. Code § 2556(b)*; *see § 290A.84*].

Whenever the court authorizes a conveyance of real property, the transaction must be carried out by the guardian or conservator in accordance with the order's terms [*Prob. Code § 2111(b)*]. If it is, the transaction has the same effect as if the ward or conservatee had carried out the transaction while having legal capacity to do so [*Prob. Code § 2111(d)*]. A conveyance of real property executed by a guardian or conservator must set forth in the instrument that it is made by authority of the order authorizing the transaction and must give the date of the order [*Prob. Code § 2111(c)*].

An appeal may be taken from an order directing or authorizing (or refusing to direct or authorize) the guardian or conservator to sell, convey, or exchange property [*Prob. Code § 1300(a)*].

[4] Exchange of Real or Personal Property

Whenever it is for the advantage, benefit, and best interests of the ward or conservatee and those legally entitled to support, maintenance, or education from the ward or conservatee, the guardian or conservator, after authorization by order of the court, may exchange any property of the estate for other property on whatever terms and conditions are prescribed by the court. To obtain the order, the guardian or conservator or any interested person may file a petition with the court [*Prob. Code § 2557(a)*; *see § 290A.86*]. The terms and conditions prescribed by the court may include the payment or receipt of part cash by the guardian or conservator [*Prob. Code §§ 2550, 2557(a)*].

The guardian or conservator may exchange tangible personal property of the estate without court authorization, subject to an annual $5,000 maximum value and other limitations [*Prob. Code § 2545*].

After authorization by order of the court, the guardian or conservator may effect a conveyance or transfer to the person with whom the exchange is made [*Prob. Code § 2557(e)*]. No omission, error, or irregularity in the proceedings impairs or invalidates the proceedings or the exchange made pursuant to the order [*Prob. Code § 2557(f)*].

An appeal make be taken from an order directing or authorizing (or refusing to direct or authorize) the guardian or conservator to exchange property [*Prob. Code § 1300(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLimited Use RightsEasementsCreationGeneral OverviewReal Property LawOwnership & TransferAgents & FiduciariesReal Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral Overview

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§ 290A.17 Investments and Purchases

[1] Proceeds of Sale and Other Money

The guardian or conservator, after authorization by order of the court, may invest the proceeds of sales and any other money of the estate as provided in the order [*Prob. Code § 2570(a)*]. To obtain an order of the court authorizing an investment, the guardian or conservator, the ward or conservatee, or any other interested person may file a petition with the court [*Prob. Code § 2570(b)*; *see §§ 290A.100, 290A.103*].

The court may require such proof of the fairness and feasibility of the transaction as the court determines is necessary [*Prob. Code § 2570(d)*]. If the required showing is made, the court may make an order authorizing the transaction and may prescribe in the order the terms and conditions on which the transaction must be made [*Prob. Code § 2570(e)*].

An order granting or denying a petition for authority to invest funds in specified real or personal property is not one of the orders listed in *Prob. Code § 1301* as appealable orders in guardianship and conservatorship proceedings. However, such an order may be appealable as an order authorizing, instructing, or directing a fiduciary under *Prob. Code § 1300(c)*.

For discussion of the guardian's or conservator's role in managing money that the ward or conservatee receives as the result of a judgment or court-approved settlement [*see Prob. Code § 3600 et seq.*], see Ch. 290C, *Guardianship and Conservatorship: Actions and Disputed Claims* .

Except as otherwise provided by statute, a guardian or conservator may lend money of the estate only after authorization by order of the court [Prob.Code § 2550]. No statute specifically governs obtaining such an order. Since a loan would be an investment, the guardian or conservator, or an interested person, may adapt the prescribed procedure for obtaining authorization to invest in state and local bonds [*see* [4], *below*].

[2] Home for Ward, Conservatee, or Dependents

When authorized by court order, a guardian or conservator may purchase real property in California as a home for the ward or conservatee if the purchase is for the advantage, benefit, and best interest of the ward or conservatee [*Prob.*

Code § 2571(a)]. The guardian or conservator may also purchase real property as a home for persons legally entitled to support and maintenance from the ward or conservatee if the purchase is for the advantage, benefit, and best interest of the ward or conservatee and of those persons [*Prob. Code § 2571(b)*]. For a form of petition for authority to invest in real property, see *§ 290A.103*.

[3] Joint Purchase of Real Property

An order authorizing the guardian or conservator to purchase real property may authorize the guardian or conservator to join with the spouse of the ward or the spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*], of the conservatee or with any other person or persons in the purchase of the real property, or an interest, equity, or estate in the property, in severalty, in common, in community, or in joint tenancy, for cash or on credit or for part cash and part credit [*Prob. Code § 2572*]. For a form of petition for authority to invest in real property, see *§ 290A.103*.

[4] State and Local Bonds

When authorized by court order, the guardian or conservator may invest in bonds issued by any state or by any city, county, city and county, political subdivision, public corporation, district, or special district of any state. In the order, the court may further authorize the guardian or conservator to select from among bonds issued by any such issuer, without specifying any particular issuer or issue of bonds, if the type of issuer is designated in general terms and the order specifies a minimum bond-quality rating as shown in a recognized investment service, a minimum interest coupon rate, a minimum yield to maturity, and the date of maturity within a five-year range [*Prob. Code § 2573*]. For a form of petition, see *§§ 290A.100* and *290A.101*.

[5] Securities

The guardian or conservator, without authorization of the court, may invest funds of the estate in any of the following [*Prob. Code § 2574(a)*]:

- Direct obligations of the United States or of the State of California maturing not later than five years from the date of making the investment.

- U.S. Treasury bonds redeemable at par value on the death of the holder for payment of federal estate taxes, regardless of maturity date.

- Securities listed on an established stock or bond exchange in the United States that are purchased on that exchange.

- Eligible securities for the investment of surplus state money as provided in *Gov. Code § 16430*.

- An interest in a money market mutual fund registered under the Investment Company Act of 1940 [*see 15 U.S.C. § 80a-1 et seq.*] or an investment vehicle authorized for the collective investment of trust funds pursuant to *12 C.F.R. § 9.18* (describing collective investment funds in which a national bank may invest assets that it holds as fiduciary), the portfolios of which are limited to U.S. government obligations maturing not later than five years from the date of investment and to repurchase agreements fully collateralized by U.S. government obligations.

- Units of a common trust fund described in *Fin. Code § 1564*, provided that the common trust fund has the objective of investing in primarily short term fixed income obligations and is permitted to value investments at cost pursuant to regulations of the appropriate regulatory authority.

In making and retaining investments made under *Prob. Code § 2574*, the guardian or conservator must take into consideration the circumstances of the estate, indicated cash needs, and, if reasonably ascertainable, the date of the prospective termination of the guardianship or conservatorship [*Prob. Code § 2574(b)*]. Nothing in *Prob. Code § 2574* limits the authority of the guardian or conservator to seek court authorization for any investment or to make other investments with court authorization, as provided in the Guardianship-Conservatorship Law [*Prob. Code § 2574(c)*]. Investments by guardians and conservators, as such, are not governed by the Uniform Prudent Investor Act [*see Prob. Code § 16045 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsGovernmentsLocal GovernmentsFinanceGovernmentsState & Territorial GovernmentsFinanceReal Property LawOwnership & TransferAgents & FiduciariesSecurities LawBlue Sky LawsBonds & Debentures

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24-290A California Forms of Pleading and Practice--Annotated § 290A.18

§ 290A.18 Transfer of Assets Out of State

[1] When California Proceeding Is Pending

[a] Procedure to Obtain Order

The court in which a guardianship or conservatorship proceeding is pending may order the transfer of some or all of the personal property of the estate to a foreign guardian or conservator in another jurisdiction where the ward or conservatee resides at the time the petition for the orderis filed [*Prob. Code § 2801*]. Before ordering the transfer, the court must determine each of the following [*Prob. Code § 2806*]:

- The transfer will promote the best interests of the ward or conservatee and the estate.

- The substantial rights of creditors or claimants in California will not be materially impaired by the transfer.

- The foreign guardian or conservator is qualified, willing, and able to administer the assets to be transferred.

The term "foreign guardian or conservator" means a guardian, conservator, committee, or comparable fiduciary in the other jurisdiction [*Prob. Code § 2800*]. The foreign guardian or conservator may, but need not be, the person appointed as guardian or conservator in California [*Prob. Code § 2803(a)(1)*].

To obtain an order authorizing a transfer, the guardian or conservator of the estate, the ward or conservatee, or the foreign guardian or conservator may file a petition [*Prob. Code § 2802*; *see § 290A.110*].

[b] Objections to Petition

Any of the following may appear and file written objections to the petition [*Prob. Code § 2805*]:

- Any person required to be listed in the petition, which includes the foreign or California guardian or

conservator, the ward or conservatee, the spouse of the ward or the spouse or domestic partner [as defined by *Prob. Code § 37*; *Fam. Code § 297*], of the conservatee, and relatives within the second degree [*see Prob. Code § 2803(a), (b)*].

- Any creditor of the ward or conservatee or of the estate.
- The spouse or any relative or friend of the ward or conservatee.
- Any other interested person.

Grounds for objection are not expressly specified by statute; however, lack of evidentiary support for one or more of the findings that the court is required to make to grant the petition [*see Prob. Code § 2806*; *see also* [a], *above*] may be a ground for objection.

[c] Effect of Order

An order authorizing or refusing to authorize a guardian or conservator to transfer property belonging to a ward or conservatee to a fiduciary in another jurisdiction is appealable [*Prob. Code § 1300(c), (h)*].

If the court's order provides for the transfer of all of the property of the estate to the foreign guardian or conservator, the court, on settlement of the final account, must order the guardianship or conservatorship of the estate terminated on the filing with the court clerk of a receipt for the property executed by the foreign guardian or conservator [Prob. Code § 2808(a)]. For discussion of final accounts, see Ch. 290E, *Guardianship and Conservatorship: Accounts* .

Unless notice is waived, a copy of the final account of the guardian or conservator and of the petition for discharge, together with a notice of the hearing on it, must be mailed at least 30 days before the date set for hearing to all persons required to be listed in the petition for transfer [*see § 290A.110*], including the foreign guardian or conservator [*Prob. Code § 2808(b)*].

[2] When No California Proceeding Is Pending

If a nonresident individual has a duly appointed, qualified, and acting guardian, conservator, committee, or comparable fiduciary in his or her place of residence, and no proceeding for guardianship or conservatorship of the individual is pending or contemplated in California, then the non-California fiduciary may petition to have California property owned by the individual removed to the place of residence [*Prob. Code § 3800(a)*; *see § 290A.112*].

The court must grant the petition if required certificates are filed and the court determines that the removal will not conflict with any restriction or limitation on the property or impair the right of the individual to the property or the rights of creditors or claimants in California, unless good cause to the contrary is shown [*Prob. Code §§ 3802, 3803*].

The order provides the fiduciary with authority to sue for and receive the property in his or her own name for the use and benefit of the nonresident [*Prob. Code § 3803(b)*]. Additionally, the order is a discharge of the person in whose possession the property may be at the time the order is made and of the person obligated to pay a debt, to perform an obligation, or to issue a security to the nonresident or the estate of the nonresident, on filing with the clerk of the court that heard the petition the receipt of the nonresident fiduciary for the property and transmitting a duplicate receipt, or a certified copy of the receipt, to the court, if any, from which the nonresident fiduciary received his or her appointment [*Prob. Code § 3803(c)*].

An order authorizing or refusing to authorize a guardian or conservator to transfer property of a ward or conservatee to another jurisdiction is appealable [*Prob. Code § 1300(c), (h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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24-290A California Forms of Pleading and Practice--Annotated § 290A.19

§ 290A.19 Notice of Opening or Changing Bank Account or Safe Deposit Box

When a guardian or conservator opens or changes the name to an account or safe deposit box in a financial institution, that institution must send the court a statement containing the name of the person with whom the account or safe deposit box is opened or changed, the account numberor reference number, the date the account or safe deposit box was opened or changed ownership, the balance as of the date the account was open or changed if the asset is held in an account, a list of the contents of the safe deposit box if the financial institution has been given access to the box, and the name and address of the financial institution [*Prob. Code § 2892(a)*; *see § 290A.120* (form for notice)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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[Reserved]

§§ 290A.20[Reserved]

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24-290A California Forms of Pleading and Practice--Annotated § 290A.30

§ 290A.30 Related Matthew Bender Publications

For transactional forms relating to purchases and exchanges of real property, see California Legal Forms, ch. 23, *Real Property Sales Agreements*, and ch. 24, *Exchanges of Real Property*

For transactional forms relating to encumbrances on real property, see California Legal Forms, ch. 25A, *Security Instruments for Real Property Financing*, and ch. 28A, *Easements and Licenses*

For transactional forms relating to certain nonsale conveyances of real property, see California Legal Forms, ch. 27A, *Dedication*, and ch. 34B, *Residential Leases*

For transactional forms relating to private loans, see California Legal Forms, ch. 97, *Private Loans and Annuities*

For transactional forms relating to money and property belonging to a minor, see California Legal Forms, ch. 100A, *Personal Affairs of Minors*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsResidential LeasesReal Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral Overview

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24-290A California Forms of Pleading and Practice--Annotated § 290A.31

§ 290A.31 State Statutes

[1] In General

Consent by guardian or conservator to appointment of referee in partition action. *Code Civ. Proc. § 873.040*

Filing of lis pendens. *Prob. Code § 1004*

Appeals from orders in probate proceedings. *Prob. Code § 1300(a)*

Distribution of surplus income to conservatee's relatives. *Prob. Code § 2423*

Abandonment or disposition of valueless property. *Prob. Code § 2465*

Procedure to transfer assets out-of-state to foreign guardian or conservator. *Prob. Code § 2800 et seq.*

Procedure to remove nonresident's property when no California guardianship or conservatorship is pending. *Prob. Code § 3800 et seq.*

Uniform Transfers to Minors Act. *Prob. Code § 3900 et seq.*

[2] Completion of Conveyance or Transfer of Property

Petition for order authorizing conveyance or transfer of estate property to complete sale on contract. *Prob. Code §§ 850, 856*

Request for continuance by interested person. *Prob. Code § 852*

Venue objection. *Prob. Code § 853*

Abatement when civil action pending. *Prob. Code § 854*

Inclusion of civil claims. [*Prob. Code § 855*].

When civil action required. *Prob. Code § 856.5*

Execution and effect of conveyance. *Prob. Code § 857*

Effect of death of conservatee or minor. [*Prob. Code § 858*].

Requirements for and effect of order authorizing conveyance, lease, or transfer of estate property. *Prob. Code § 2111*

[3] Investments and Purchases

Petition to invest estate money. *Prob. Code § 2570*

Purchase of home or real property. *Prob. Code §§ 2571, 2572*

Investment in stocks, government bonds, certain securities, interests in money market mutual funds, or units of common trust fund. *Prob. Code §§ 2573, 2574*

[4] Sales

Court supervision of sale of real or personal property. *Prob. Code § 2540*

Authorized purposes for sale of property. *Prob. Code § 2541*

Terms of sale of property. *Prob. Code § 2542*

General procedure for sales. *Prob. Code § 2543*

Sales of listed securities. *Prob. Code § 2544*

Restricted sale or exchange of tangible personal property. *Prob. Code § 2545*

Disposition of sale proceeds. *Prob. Code § 2547*

Action to recover sold property. *Prob. Code § 2548*

[5] Transactions Involving Real Property

Additional bond on real property transaction. *Prob. Code § 2330*

Ex parte petition for authority to commence partition action. *Prob. Code § 2463(a)*

Partition of property by action or pursuant to compromise or extension. *Prob. Code § 2463*

Petition to borrow money and give security. *Prob. Code §§ 2550, 2551*

Refinancing, improving, or repairing solely or jointly owned property. *Prob. Code § 2552*

Petition to lease estate property. *Prob. Code § 2553*

Terms and conditions of lease. *Prob. Code § 2554*

Lease without court authorization. *Prob. Code § 2555*

Petition to dedicate or convey real property, easement, or access right. *Prob. Code § 2556*

Petition to exchange estate property. *Prob. Code § 2557*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesAppointmentsEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawPersonal GiftsGifts to MinorsUniform ActsEstate, Gift & Trust LawProbateProcedures in ProbateJudicial ReviewReal Property LawEstatesConcurrent OwnershipPartition ActionsReal Property LawPurchase & SaleGeneral Overview

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§ 290A.32 Local Court Rules

[1] Alameda County

Sales by personal representatives. Alameda Co. Super. Ct. Unified Rules, Rule 12.8.1 et seq.

[2] Contra Costa County

Allegations concerning bond in petition to borrow. Contra Costa Co. Prob. Pol. Man., § 207

Sales of real property. Contra Costa Co. Prob. Pol. Man., § 501 et seq.

Sales of tangible personal property. Contra Costa Co. Prob. Pol. Man., § 507

Investments by guardian or conservator. Contra Costa Co. Prob. Pol. Man. § 828

[3] Los Angeles County

Probate sales. Los Angeles Co. Super. Ct. Rules, Rule 10.88 et seq.

Standards for authorized investments by guardians and conservators. Los Angeles Co. Super. Ct. Rules, Rule 10.151

Petition for authority to invest or spend money. Los Angeles Co. Super. Ct. Rules, Rule 10.152

[4] Orange County

Probate sales. Orange Co. Super. Ct. Rules, Rule 606.01 et seq.

Standards for authorized investments by guardians and conservators. Orange Co. Super. Ct. Rules, Rules 610.16, 611.10

[5] Sacramento County

Probate sales. Sacramento Co. Super. Ct. Rules, Rule 15.55 et seq.

Standards for authorized investments by guardians and conservators. Sacramento Co. Super. Ct. Rules, Rule 15.82

[6] San Diego County

Probate sales. San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.74 et seq.

Standards for authorized investments by guardians and conservators. San Diego Co. Super. Ct. Rules, Div. IV, Rules 1.138, 1.157

[7] San Francisco

Probate sales. San Francisco Uniform Local Ct. Rules, Rules 14.64-14.73

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersSales of AssetsReal Property LawOwnership & TransferAgents & Fiduciaries

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24-290A California Forms of Pleading and Practice--Annotated § 290A.33

§ 290A.33 Decisions

Court could authorize gifts from excess income for charitable and religious purposes with object of carrying out presumed wishes of ward. *Harris v. Harris (1962) 57 Cal. 2d 367, 370-371, 19 Cal. Rptr. 793, 369 P.2d 481*

Court could distribute surplus income for specified purposes to next of kin who is also guardian of person and estate. *Guardianship of Hall (1947) 31 Cal. 2d 157, 165-166, 187 P.2d 396*

Court could distribute excess income to next of kin on reasonable conditions, such as that distribution be considered advancement against any inheritance. *Guardianship of Hudelson (1941) 18 Cal. 2d 401, 403-408, 115 P.2d 805*

Under former *Civ. Code § 2261(c)* (*now see Prob. Code § 16225*), conservator bank was permitted to deposit trust fund with itself at interest; however, since bank had duty to maximize trust assets consistent with safety and other relevant considerations, bank bore burden of proving that circumstances justified investment in low-interest passbook account, rather than higher-interest 30-day account. *Conservatorship of Pelton (1982) 132 Cal. App. 3d 496, 501-503, 183 Cal. Rptr. 188*

Court could authorize gifts to conservatee's next of kin. *Conservatorship of Wemyss (1971) 20 Cal. App. 3d 877, 880, 98 Cal. Rptr. 85*

Court could authorize gifts of excess funds to relatives to reduce estate taxes. *Estate of Christiansen (1967) 248 Cal. App. 2d 398, 424-427, 56 Cal. Rptr. 505*

Court had jurisdiction to approve prior distribution of surplus income. *Estate of Jacobson (1942) 56 Cal. App. 2d 255, 261-262, 132 P.2d 229*

Legal Topics:

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

Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawPersonal GiftsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGifts to MinorsGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateJurisdiction & VenueGeneral Overview

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§ 290A.34 Text References

Witkin, Summary of California Law, vol. 12, *Wills and Probate*, §§ 933-943 (9th ed. 1990)

Marshall & Garb, California Probate Procedure, vol. 2, ch. 21 (Parker & Sons 5th ed. 1991)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWillsGeneral Overview

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[Reserved]

§§ 290A.35[Reserved]

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PART IV. FORMS
A. Division and Distribution of Property

24-290A California Forms of Pleading and Practice--Annotated § 290A.40

§ 290A.40 Petition for Authority to Distribute Surplus Income in Conservatorship [Prob. Code § 2423]

[1] FORM Petition for Authority to Distribute Surplus Income in Conservatorship [Prob. Code § 2423]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Conservatorship of the [Person and] Estate of	)	[Hearing set for _____ (*date*), at
_____	)	_____ (*time*), in Dept. No. _____]
[*name*], Conservatee.	)	PETITION TO DISTRIBUTE SURPLUS INCOME

_____

Petitioner _____[*name*] respectfully represents:

1. Petitioner is the _____ [conservator *or* conservatee *or* spouse of the conservatee *or specify relationship to conservatee within second degree*].

2. The inventory and appraisal filed _____[*date*] shows that the value of the conservatorship estate is approximately $_____, and the annual income from the estate is approximately $_____.

3. Annual expenses for the _____ [support *and/or* maintenance *and/or* education] of the conservatee [and persons legally entitled to _____ (support *and/or* maintenance *and/or* education) from the conservatee], including taxes and costs of management and administration of the estate, are approximately as follows: _____[*itemize expenses and state total*].

4. There is surplus income to the estate, not used or required for the support, maintenance, or education of the

conservatee or his/her dependents, of approximately $_____ per year.

5. _____ [Petitioner *or* The conservatee] has a _____ [spouse *or* relative within the second degree] whom the conservatee would aid but for the existence of the conservatorship, to wit: _____ [*set forth facts showing proposed recipient's name and relationship to conservatee and circumstances and condition of life of conservatee and each proposed recipient, e.g.,* _____ (*name*) is the only brother of the conservatee, is in ill health, and needs financial assistance to pay for required medical care. The conservatee assisted her brother in the past for this purpose and desires that this aid be continued].

6. Petitioner proposes that surplus income of the estate be distributed, subject to court approval, to _____[*name*] in the sum of $_____ [*specify date or method of distribution, e.g.,* per year, payable at the rate of $_____ on the first day of each month and continuing until further order of the court].

7. If the conservatee had the capacity to act, he/she would impose the following conditions on the requested payments: _____ [*specify, e.g.,* that the distribution of surplus income constitutes an advancement against any inheritance that _____ (*name*) might receive on the conservatee's death].

8. A request for special notice has _____ [not been filed *or* been filed by _____ (*name*), and notice of the time and place of hearing on this petition will be given as required by law *or* been filed and waived by _____ (*name*)].

WHEREFORE, petitioner prays for an order directing _____[*name*], as conservator of the estate of _____[*name*], conservatee, to distribute the surplus income of the estate to _____[*name*] in the amount described above or in such amounts as may be appropriate and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

Petitioner

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The petition in [1], *above*, is for use in obtaining court authorization to distribute surplus income of a conservatorship estate to the spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*] or to a relative within the second degree of the conservatee. The petition can be filed by the conservator, the conservatee, the spouse or domestic partner of the conservatee, or a relative within the second degree of the conservatee [*Prob. Code § 2423(a)*].

[3] Contents of Petition

A petition under *Prob. Code § 2423* should state the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2423(a)*].

- The value and annual income of the estate, the annual expenses of the conservatee and his or her legal dependents, and the surplus income to the estate per year (Paragraphs 2-4) [*see Prob. Code § 2423(a), (b)(1)*].

- The proposed recipient and his or her relationship to the conservatee, the circumstances and condition of life to which the conservatee and recipient have been accustomed, and the amount that the conservatee would have allowed but for the conservatorship (Paragraphs 5, 6) [*see Prob. Code § 2423(a), (b)(2), (3)*].

- Any desired conditions on the proposed distribution that the conservatee would have imposed if he or she had the capacity to act (Paragraph 7) [*see Prob. Code § 2423(a)*].

- Whether a request for special notice has been filed and, if so, that proper notice will be given or has been waived (Paragraph 8) [*see Prob. Code §§ 1260(a), 2700, 2701*].

The petition must be verified [*Prob. Code § 1021*].

[4] Notice

Notice must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2423(c)*]. Generally notice must be mailed to specified persons at least 15 days before the day of the hearing [*Prob. Code § 1460(a), (b)*]. Special notice must be given to persons who have filed a written request under *Prob. Code § 2700 et seq.* [*Prob. Code §§ 1460(d), 2700*]. For further discussion and a form for giving notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

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A. Division and Distribution of Property

24-290A California Forms of Pleading and Practice--Annotated § 290A.41

§ 290A.41 Order Authorizing Distribution of Surplus Income in Conservatorship [Prob. Code § 2423]

[1] FORM Order Authorizing Distribution of Surplus Income in Conservatorship [Prob. Code § 2423]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Conservatorship of the [Person and] Estate of	)	ORDER
_____	)	
[*name*], Conservatee.		

_____

The petition of _____[*name*], as _____ [conservator *or* conservatee *or* spouse of the conservatee *or specify relationship within second degree to conservatee*] in the above-entitled proceeding, for an order _____ [authorizing *or* directing] the conservator to distribute surplus income of the estate to _____[*name of spouse of conservatee or relative within second degree of conservatee*] came on regularly for hearing by the court on this date. The petitioner appeared by counsel _____[*name*]. _____[*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. The annual income of the estate is as follows: _____[*specify*].

3. The annual expenses for _____ [support *and/or* maintenance *and/or* education] of the conservatee

[and persons legally entitled to _____ (support *and/or* maintenance *and/or* education) from the conservatee], including taxes and costs of management and administration of the estate, are as follows: _____[*specify*].

4. There is surplus income to the estate in the amount of $_____ per year, not used or required for the comfortable and proper _____ [support *and/or* maintenance *and/or* education] of the conservatee or his/her legal dependents.

5. The conservatee, but for the existence of the conservatorship, would have allowed _____[*name*] the amount of $_____ per _____[*specify*], considering his/her and the conservatee's circumstances and condition of life to which they have been accustomed.

6. If the conservatee had the capacity to act, he/she would impose the following conditions on the payment: _____ [*specify, e.g.,* that the distribution described above constitutes an advancement against any inheritance that _____ (*name*) might receive on the conservatee's death].

IT IS ORDERED:

1. _____[*name*], as conservator of the estate of _____[*name*], conservatee, distribute to _____[*name*], from the income of the estate, the sum of $_____, to be paid on the first day of each month and continuing until further order of the court.

2. _____ [*Specify any conditions, e.g.,* The distribution of income described above shall constitute an advancement against any inheritance that _____ (*name*) might receive on the conservatee's death].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use when the court grants a petition [*see § 290A.40*] to authorize or direct the conservator to distribute surplus income of the estate to the conservatee's spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*], or relatives within the second degree whom the conservatee, in the court's judgment, would have aided but for the existence of the conservatorship [*Prob. Code § 2423(a)*]. In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Conditions and Considerations

The court may impose conditions that it determines the conservatee would impose if the conservatee had the capacity to act [*Prob. Code § 2423(a)*].

The granting of the petition and the amounts and proportions of the payments are discretionary with the court, but the court must consider all of the following [*Prob. Code § 2423(b)*]:

- The amount of surplus income available after adequate provision has been made for the comfortable and suitable support, maintenance, and education of the conservatee and of his or her dependents.

- The circumstances and condition of life to which the conservatee and the conservatee's spouse and relatives within the second degree have been accustomed.

- The amount that the conservatee would, in the court's judgment, have allowed the spouse and relatives but for the existence of the conservatorship.

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PART IV. FORMS
A. Division and Distribution of Property

24-290A California Forms of Pleading and Practice--Annotated § 290A.42

§ 290A.42 Petition for Ex Parte Order Authorizing Partition Action [Prob. Code § 2463(a)]

[1] FORM Petition for Ex Parte Order Authorizing Partition Action [Prob. Code § 2463(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship of the [Person and] Estate of _____ [*name*], _____ [Ward *or* Conservatee].	)))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION FOR EX PARTE ORDER AUTHORIZING PARTITION ACTION

Petitioner _____[*name*] respectfully represents:

1. Petitioner is the duly appointed, qualified, and acting _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee].

2. The inventory and appraisal filed _____[*date*] shows that one of the assets of the estate is an undivided _____ [*specify, e.g.,* half] interest in real property in _____ County, California, the legal description of which is as follows: _____[*set forth legal description*].

3. The property should be partitioned because _____ [*describe reasons for partition, e.g.,* the _____ (ward's *or* conservatee's) interest in the property could be sold to provide funds for his/her support and maintenance].

4. Petitioner has attempted but failed to reach an agreement with the co-owners of the property to partition the property.

Therefore, it is necessary to commence an action to partition the property.

5. A request for special notice has _____ [not been filed *or* been filed by _____ (*name*) *or* been filed and waived by _____ (*name*)].

WHEREFORE, petitioner prays for an order authorizing petitioner to commence a partition action and for such other and further relief as the court may deem proper.

[*Signature and verification. See § 290A.40.*]

ORDER

On _____[*date*], petitioner _____[*name*], the _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee] appeared ex parte and presented his/her petition foran order authorizing him/her to commence an action against _____[*names*] for partition of specified estate property.

The court finds from proof made to the satisfaction of the Court:

1. A request for special notice has _____ [not been filed *or* been filed by _____ (*name*) *or* been filed and waived by _____ (*name*)].

2. One of the assets of the estate is an undivided _____ [*specify, e.g.*, half] interest in real property in _____ County, California, the legal description of which is as follows: _____[*specify*].

3. Petitioner has attempted but failed to reach an agreement with the co-owners of the property to partition the property.

4. Commencement of a partition action as requested in the petition is proper.

IT IS ORDERED that petitioner may commence an action for partition of the property.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The petition and ex parte order in [1], *above*, are for use by the guardian or conservator in obtaining court authorization to commence and prosecute an action for partition of real or personal property, or both, of which the ward or conservatee is a co-owner [*Prob. Code § 2463(a)*].

[3] Contents of Petition

A petition under *Prob. Code § 2463(a)* should state the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2463(a)*].

- A description of the property and why the property should be partitioned (Paragraphs 2-4) [*see Prob. Code §§ 2401(a), 2463(a)*].

- Whether special notice has been requested and waived (Paragraph 5) [*see Prob. Code §§ 1460(d), 2700, 2701*].

The petition must be verified [*Prob. Code § 1021*].

[4] Notice

Prob. Code § 2463(a) authorizes the court to make the order ex parte. Local court rules should be consulted to determine whether notice is required in a particular county. Special notice may be required to be given to any person who has filed a request under *Prob. Code § 2700*; if it is required, the order must include a finding that it has been regularly given or waived [*Prob. Code §§ 1260(a), 2700, 2701*]. For further discussion and a form of notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

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[Reserved]

§§ 290A.43[Reserved]

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PART IV. FORMS
B. Completion of Existing Contracts

24-290A California Forms of Pleading and Practice--Annotated § 290A.50

§ 290A.50 Petition for Authority to Convey or Transfer Property to Complete Sale Contract [Prob. Code § 850(a)(1)(A), (B)]

[1] FORM Petition for Authority to Convey or Transfer Property to Complete Sale Contract [Prob. Code § 850(a)(1)(A), (B)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship of the [Person and] Estate of _____ [*name*], _____ [Ward *or* Conservatee].	)))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION FOR AUTHORITY TO COMPLETE SALE CONTRACT

Petitioner _____[*name*] respectfully represents:

1. _____ [Petitioner *or name*] is the duly appointed, qualified, and acting _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee]. [*If petitioner is not guardian or conservator, add:* Petitioner claims the _____ (real *or* personal) property described below in that petitioner entered into a written contract to purchase the property from _____ (the conservatee *or* _____ (*name*), predecessor in interest of the ward).]

2. The assets of the estate include _____ [personal property described as follows: _____ (*description*) *or* real property located at _____ (*address*), _____ (*city*), California, and described as follows: _____ (*legal description*)].

[*EITHER*]

3. Before the conservatee was adjudged incompetent on _____[*date*], he/she executed and delivered, on or about _____[*date*], a contract in writing by which he/she agreed to sell to _____[*name of purchaser or petitioner*], and _____[*name of purchaser or petitioner*] agreed to purchase, the _____ [real *or* personal] property described above. A copy of this contract of sale and purchase is attached as Exhibit A.

[*OR*]

3. On _____[*date*], the ward succeeded to the interest of _____[*name*], who had agreed to sell to _____[*name of purchaser or petitioner*], and _____[*name of purchaser or petitioner*] had agreed to buy, the _____ [real *or* personal] property described above. A copy of this contract of sale and purchase is attached as Exhibit A.

[*CONTINUE*]

[*EITHER, if contract is for sale of real property or interest in real property or goods to be severed from real property*]

4. The contract _____ [was recorded on _____ (*date*), in the official records of the County of _____, Book _____, page _____ *or* has not been recorded].

[*OR, if contract is for sale of unique personal property*]

4. The property is unique in that _____[*describe uniqueness*]. If the contract were not performed, _____[*name of purchaser or petitioner*] would have no plain, speedy, or adequate remedy in the ordinary course of law, and damages could not be properly ascertained and would be inadequate to compensate _____[*name of purchaser or petitioner*] for the detriment suffered by him/her.

[*CONTINUE*]

5. At the time the contract was entered into, the property was reasonably worth $_____. The contract is just, fair, and reasonable as to _____ [the ward *or* the conservatee *or name of purchaser*], and the consideration is adequate.

6. _____[*Name of purchaser or Petitioner*] has duly performed all the conditions, covenants, duties, and obligations of the contract on his/her part to be performed[, except for _____ (*specify uncompleted performance*), which he/she is now, ready, willing, and able to do]. _____[*Name of purchaser or Petitioner*] has demanded performance from _____ [petitioner *or* the guardian *or* the conservator] in the following manner: _____[*specify*].

[*EITHER*]

7. _____ [Petitioner *or* The guardian *or* The conservator] has executed a bond for the amount of $_____, which has been given by _____ [personal sureties *or* an admitted surety insurer]. After _____ [conveyance *or* transfer] of the property, the value of all personal property plus the probable annual gross income of all of the property of the estate [plus the sum of the probable annual gross payments from public entitlements of the _____ (ward *or* conservatee)] will be $_____. An additional bond is _____ [not required *or* required in the sum of $_____].

[*OR*]

7. Bond for _____ [petitioner *or* the guardian *or* the conservator] has been _____ [waived pursuant to _____ (*Probate Code Section 2321 or Probate Code Section 2324*) *or* dispensed with pursuant to *Probate Code Section 2323(a)*].

[*CONTINUE*]

8. A request for special notice has _____ [not been filed *or* been filed by _____ (*name*), and notice of the time and place of hearing on this petition will be given as required by law *or* been filed and waived by _____ (*name*)].

WHEREFORE, petitioner prays for an order authorizing and directing _____ [petitioner *or* the guardian *or* the conservator] to perform the contract described above by executing and delivering a _____ [conveyance *or* transfer] of the _____ [real *or* personal] property to _____[*name of purchaser or petitioner*], [on performance by _____ (the purchaser *or* petitioner) of the remaining acts to be performed by _____ (him/her *or* petitioner),] and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

Petitioner

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The petition in [1], *above*, is for use by the guardian or conservator or a claimant in obtaining an order authorizing and directing the guardian or conservator to execute a conveyance of real property or transfer of personal property pursuant to a written, specifically enforceable contract executed by the conservatee while competent or by the minor's predecessor in interest [*Prob. Code §§ 850(a)(1), (2), 856*].

[3] Contents of Petition

The petition must set forth the facts on which the claim is based [*Prob. Code § 850(b)*]. Because the contract must be one that can be specifically enforced [*Prob. Code § 850(a)(1), (2)*], the petition must allege a cause of action for specific performance (Paragraphs 3-6) [*see Civ. Code § 3384 et seq.*; *see also* Ch. 528, *Specific Performance*]. The petition should contain the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 850(a)*].

- Whether the contract was recorded (Paragraph 4) [*see Civ. Code §§ 18, 19* (actual or constructive notice)].

- Whether additional bond will be required on execution of the conveyance or transfer (Paragraph 7) [*see Prob. Code §§ 2320, 2334*].

- Whether special notice has been requested and, if so, that proper notice will be given or has been waived (Paragraph 8) [*see Prob. Code §§ 1460(d), 2700 et seq.*].

The petition must be verified [*Prob. Code § 1021*].

[4] Notice

Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 851(b)*]. Generally notice by mail must be given to specified persons at least 15 days before the day of the hearing [*Prob. Code § 1460(a), (b)*]. Special notice must be given to any person who has filed a request under *Prob. Code § 2700 et seq.* [*Prob. Code §§ 1460(d), 2700, 2701*]. For further discussion and a form of notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

At least 30 days before the date set for hearing, the petitioner must also cause notice of the hearing and a copy of the petition to be served, in accordance with *Code Civ. Proc. § 413.10 et seq.* (service of summons in civil actions), on the guardian or conservator, the ward or conservatee, and each person claiming an interest in, or having title to or possession of, the property [*Prob. Code § 851(a)*].

The court may not shorten the time for giving the notice of hearing [*Prob. Code § 851(c)*].

[5] Lis Pendens

In any proceeding under the Probate Code that affects the title to or the right of possession of real property, notice of the pendency of the proceeding may be filed, in accordance with *Code Civ. Proc. §§ 405-405.61* [*Prob. Code § 1004*]. For discussion and forms, see Ch. 348, *Lis Pendens* .

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24-290A California Forms of Pleading and Practice--Annotated § 290A.51

§ 290A.51 Order Authorizing Conveyance or Transfer of Property to Complete Sale on Contract [Prob. Code §§ 850(a)(1)(A), (B), 2527]

[1] FORM Order Authorizing Conveyance or Transfer of Property to Complete Sale on Contract [Prob. Code §§ 850(a)(1)(A), (B), 2527]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [Guardianship *or*	)	ORDER
Conservatorship of the [Person and] Estate of	)	
_____ [*name*],		
_____ [Ward *or* Conservatee].		
_____		

The petition of _____[*name*], as _____ [the guardian of *or* the conservator of *or* a claimant of property in] the above-entitled estate, for an order authorizing a _____ [conveyance *or* transfer] of specified estate property pursuant to a contract, came on regularly for hearing by the court on this date. The petitioner appeared by counsel _____[*name*]. _____[*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. The assets of the _____ [guardianship *or* conservatorship] estate include the following

_____ [real *or* personal] property: _____[*describe sufficiently to distinguish property from all other property of estate, and for real property, set forth legal description*].

3. Venue in this court would be proper for the trial of a civil action seeking the same relief as is sought in the petition in this matter.

4. _____ [*Finding concerning status of pending civil action, e.g.,* No civil action was pending with respect to the subject matter of the petition in this matter before the date the petition was filed].

5. This matter should not be determined by a civil action.

[*EITHER*]

6. Before the conservatee was adjudged incompetent on _____[*date*], he/she executed and delivered, on or about _____[*date*], a contract in writing by which he/she agreed to sell to _____[*name of purchaser or petitioner*], and _____[*name of purchaser or petitioner*] agreed to purchase, the _____ [real *or* personal] property described above.

[*OR*]

6. On _____[*date*], the _____ [ward *or* conservatee] succeeded to the interest of _____[*name*], who had agreed to sell to _____[*name of purchaser or petitioner*], and _____[*name of purchaser or petitioner*] had agreed to buy, the _____ [real *or* personal] property described above.

[*EITHER, if contract is for sale of real property or interest in real property or goods to be severed from real property*]

7. The contract _____ [was recorded on _____ (*date*) in the official records of the County of _____, Book _____, page _____ *or* has not been recorded].

[*OR, if contract is for sale of unique personal property*]

7. The property is unique. If the contract were not performed, _____[*name of purchaser or petitioner*] would have no plain, speedy, or adequate remedy in the ordinary course of law, and damages could not be properly ascertained and would be inadequate to compensate _____[*name of purchaser or petitioner*] for the detriment suffered by him/her.

[*CONTINUE*]

8. _____[*Name of purchaser or Petitioner*] has duly performed all the conditions, covenants, duties, and obligations of the contract on his/her part to be performed[, except for _____ (*specify uncompleted performance*), which he/she is now, ready, willing, and able to do]. _____[*Name of purchaser or Petitioner*] has duly demanded performance from _____ [petitioner *or* the guardian *or* the conservator].

9. An additional bond is [not] required.

IT IS ORDERED:

1. The _____ [guardian *or* conservator] immediately _____ [convey title *or* transfer title *or* deliver possession *or* convey title and deliver possession *or* transfer title and deliver possession] of the above property to _____ [petitioner *or* _____ (*name*), the purchaser named in the contract of sale].

2. The _____ [guardian *or* conservator] execute all documents that may be necessary to accomplish this _____ [conveyance *or* transfer].

[3. _____ (*Specify any acts required of claimant to perform fully under contract or to complete transaction*).]

[4. _____ (Petitioner *or* The guardian *or* The conservator) give an additional bond in the amount of $_____.]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use when the court grants a petition [*see § 290A.50*] to authorize the guardian or conservator to convey or transfer property in the estate to a claimant whose right to the property has been established and to deliver the property to the claimant [*see Prob. Code §§ 850(a)(1)(A), (B), 856*]. If the court is satisfied that a conveyance, transfer, or other order should be made, the court must make an order authorizing and directing the guardian or conservator or other person having title to or possession of the property to execute a conveyance or to transfer to the person entitled to the property or granting other appropriate relief [*Prob. Code § 856*].

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Recordation of Order

A certified copy of an order authorizing the conveyance of real property must be recorded in the county recorder's office in each county in which any portion of the real property is located [*Prob. Code § 2111(c)*].

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24-290A California Forms of Pleading and Practice--Annotated § 290A.52

§ 290A.52 Petition for Conveyance or Transfer of Property Under Claim of Right [Prob. Code § 850(a)(1)(C), (D)]

[1] FORM Petition for Conveyance or Transfer of Property Under Claim of Right [Prob. Code § 850(a)(1)(C), (D)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship of the [Person and] Estate of _____ [*name*], _____ [Ward *or* Conservatee].	)))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION FOR _____ [CONVEYANCE *or* TRANSFER] UNDER CLAIM OF RIGHT

_____

Petitioner _____[*name*] respectfully represents:

1. _____ [Petitioner *or name*] is the duly appointed, qualified, and acting _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee]. [*If petitioner is not guardian or conservator, add:* Petitioner claims the _____ (real *or* personal) property described below.]

[*EITHER, if guardian or conservator or claimant is seeking to have estate property conveyed or transferred to claimant*]

2. Among the assets of the estate is certain _____ [real *or* personal] property situated in _____[*city*], _____ County, California, consisting of _____[*describe*].

[*OR, if ward or conservatee claims property held by another*]

2. _____[*name*] has _____ [title to *or* possession of] certain _____ [real *or* personal] property situated in _____[*city*], _____ County, California, consisting of _____[*describe*].

[*CONTINUE*]

3. _____ [*Name of claimant or* Petitioner *or* The ward *or* The conservatee] claims _____ [*specify interest claimed, e.g.,* ownership] of the property.

4. The claim of _____ [*name of claimant or* petitioner *or* the ward *or* the conservatee] is based on _____ [*set forth facts on which claim is based, e.g.,* the fact that the conservatee, claimant's father, bought the car for claimant, gave it to him, but never transferred title to him].

5. [*Bond allegation. See § 290A.50, Paragraph 7.*]

6. [*Special-notice allegation. See § 290A.50, Paragraph 8.*]

WHEREFORE, petitioner prays for an order authorizing and directing _____ [petitioner *or* the guardian *or* the conservator *or name of person with title or possession of property*] to execute the necessary documents of _____ [conveyance *or* transfer] of the property and to deliver _____ [a conveyance of the real property *or* the personal property] to _____ [*name of claimant or* petitioner as claimant *or* petitioner as guardian *or* petitioner as conservator], [on performance by him/her of _____ (*specify acts remaining to be performed or performance of which is decreed as condition of conveyance or transfer*),] and for such other and further orders as the court may deem proper.

[*Signature and verification. See § 290A.50.*]

[2] Use of Form

The petition in [1], *above*, is for use by the guardian or conservator or a claimant in obtaining an order authorizing and directing the guardian or conservator to execute a conveyance or transfer of real or personal property to the claimant [*Prob. Code §§ 850(a)(1)(C), 856*]. It may also be used by the guardian or conservator to obtain an order authorizing and directing a person who has title to or possession of real or personal property claimed by the ward or conservatee to execute a conveyance or transfer of the property to the ward or conservatee [*Prob. Code §§ 850(a)(1)(D), 2527*].

[3] Contents of Petition

The petition must set forth the facts on which the claim is based [*Prob. Code § 850(b)*]. The petition should include the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 850(a)*].

- Whether additional bond will be required on conveyance or transfer (Paragraph 5) [*see Prob. Code §§ 2320, 2334*].

- Whether special notice has been requested and, if so, that proper notice will be given or has been waived (Paragraph 6) [*see Prob. Code §§ 1460(d), 2700 et seq.*].

The petition must be verified [*Prob. Code § 1021*].

[4] Notice

For discussion of the notice requirements for this petition *see Prob. Code § 851*], see *§ 290A.50[4]*.

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24-290A California Forms of Pleading and Practice--Annotated § 290A.53

§ 290A.53 Order Authorizing Conveyance or Transfer of Property Under Claim of Right [Prob. Code §§ 850(a)(1)(C), (D), 2527]

[1] FORM Order Authorizing Conveyance or Transfer of Property Under Claim of Right [Prob. Code §§ 850(a)(1)(C), (D), 2527]

[*Caption. See § 290A.51.*]

The petition of _____[*name*], _____ [the guardian of *or* the conservator of *or* a claimant of property in] the above-entitled estate, for an order authorizing a _____ [conveyance *or* transfer] of specified estate property, came on regularly for hearing by the court on this date. The petitioner appeared by counsel _____[*name*]. _____[*Specify other appearances, if any.*]

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. [*Finding concerning venue. See § 290A.51, Finding 2.*]

3. [*Finding concerning status of pending civil action. See § 290A.51, Finding 3.*]

[*EITHER, if guardian or conservator or claimant is seeking to have estate property conveyed or transferred to claimant*]

4. Among the assets of the estate is certain _____ [real *or* personal] property situated in _____[*city*], _____ County, California, consisting of _____[

describe].

[*OR, if ward or conservatee claims property held by another*]

4. _____[*name*] has _____ [title to *or* possession of] certain _____ [real *or* personal] property situated in _____[*city*], _____ County, California, consisting of _____[*describe*].

[*CONTINUE*]

5. _____ [*Name of claimant or* Petitioner *or* The ward *or* The conservatee] has _____ [*specify interest claimed, e.g.,* ownership] of the property.

6. An additional bond is [not] required.

WHEREFORE, IT IS ORDERED:

1. The _____ [petitioner *or* guardian *or* conservator] immediately _____ [convey title *or* transfer title *or* deliver possession *or* convey title and deliver possession *or* transfer title and deliver possession] of the above property to the _____ [guardian *or* conservator *or* petitioner].

2. The _____ [petitioner *or* guardian *or* conservator] execute all documents that may be necessary to accomplish the _____ [conveyance *or* transfer].

[3. _____ (Petitioner *or* The guardian *or* The conservator) give an additional bond in the amount of $_____.]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use when the court grants a petition [*see § 290A.52*] to authorize and direct the guardian or conservator to execute a conveyance or transfer of real or personal property to a claimant of an interest in all or some of the property [*Prob. Code §§ 850(a)(1)(C), 2527*]. It may also be used to authorize and direct a person who has title to or possession of real or personal property claimed by the ward or conservatee to execute a conveyance or transfer of the property to the ward or conservatee [*Prob. Code §§ 850(a)(1)(D), 856*].

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Recordation of Order

A certified copy of an order authorizing the conveyance of real property must be recorded in the county recorder's office in each county in which any portion of the real property is located [*Prob. Code § 2111(c)*].

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24-290A California Forms of Pleading and Practice--Annotated §§ 290A.54-290A.59

[Reserved]

§§ 290A.54[Reserved]

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24-290A California Forms of Pleading and Practice--Annotated § 290A.60

§ 290A.60 Report of Sale and Petition for Order Confirming Sale of Real Property [Prob. Code §§ 2540-2543]--Judicial Council Form GC-060

[1] FORM Report of Sale and Petition for Order Confirming Sale of Real Property [Prob. Code §§ 2540-2543]--Judicial Council Form GC-060

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative, filled-in copy of Cal. Judicial Council Form GC-060, for use in reporting and petitioning for confirmation of the sale of real property of the estate [*Prob. Code §§ 2540, 2543(b), 10308*]. The sale must be reported to and confirmed by the court before title to the property can pass [*Prob. Code §§ 2543(b), 10308*].

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31*, 7.101]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

If a conservator is seeking to sell the conservatee's present or former residence, there are different requirements for authorization [*see Prob. Code § 2540(b)*]. For a form of petition to request authorization to sell the conservatee's residence, see *§ 290A.65*.

[3] Contents of Petition

The petition must contain the following:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2541*].
- The legal description of the property (Paragraph 2).

- The appraisal or reappraisal value (Paragraph 3) [*see Prob. Code §§ 2543(b)*, c, *10309* (bid at private sale must be at least 90 percent of appraised value)].

- The manner and terms of sale (Paragraph 4) [*see Prob. Code §§ 2542, 2543, 10305, 10306* (terms; manner; public auction; private sale); *see also Prob. Code §§ 10302, 10304*].

- Whether a commission contract was entered into with a broker (Paragraphs 1c and 5b) [*see Prob. Code §§ 10150, 10161(a), 10164(c)*].

- Whether an additional bond is required and whether the sale proceeds will be placed in a blocked account (Paragraphs 1d and 6c) [*see Prob. Code §§ 2320, 2328, 2330*].

- The manner of giving notice of sale (Paragraph 7) [*see Prob. Code §§ 10300, 10301, 10304, 10305, 10312* (published notice of sale; posted notice of sale; contents of notice of sale; sale at public auction; proof of notice of sale)].

- The manner of giving notice of hearing, including special notice (Paragraph 8) [*see Prob. Code §§ 1460 et seq., 2543(b)*, (d), *2700 et seq., 10308(c)*].

- The purpose of the sale (Paragraph 9) [*see Prob. Code § 2541*].

- The required amount for an overbid (Paragraph 10) [*see Prob. Code §§ 10161-10162, 10166, 10311, 10313* (agent or broker compensa tion in overbid situations; bid condition requiring payment of percentage of bid to agent or broker; overbid made at confirmation hearing; confirmation of sale to overbidder)].

- Marketing efforts (Paragraph 11) [*see Prob. Code §§ 10310(b), 10313* (court inquiry into marketing efforts; court findings on confirmation)].

The petition must be verified [*Prob. Code § 1021*].

[4] Time of Filing

The report and a petition for the confirmation of the sale must be made within 30 days after the sale. If the guardian or the conservator fails to file the report and a petition for confirmation of the sale within 30 days after the sale, the purchaser at the sale may file the report and petition for confirmation [*see Prob. Code §§ 2543(b), 10308(b)*].

[5] Notice

Any references to *Prob. Code § 1220* (mailed notice of hearing by personal representatives) in the statutory provisions governing sales of property that are incorporated into the Guardianship-Conservatorship Law are deemed to be references to *Prob. Code § 1460 et seq.* [*Prob. Code §§ 1469, 2543(b)*]. Thus, the petitioner must provide mailed or personally delivered notice of hearing for the period and in the manner required by *Prob. Code § 1460 et seq.* Additionally, the clerk of the court must post notice of the time and place of hearing at least 15 days before the day of the hearing [*Prob. Code § 10308(c)* (notice requirements on petition to confirm sale of real property); *see Prob. Code § 2543(c)* (posted notice of hearing on confirmation petition); *see also Prob. Code §§ 1220, 1230, 1460(c)* (mailed notice of hearing; posted notice of hearing)]. For further discussion and a form of notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

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24-290A California Forms of Pleading and Practice--Annotated § 290A.61

§ 290A.61 Order Confirming Sale of Real Property [Prob. Code §§ 2540-2543]--Judicial Council Form GC-065

[1] FORM Order Confirming Sale of Real Property [Prob. Code §§ 2540-2543]--Judicial Council Form GC-065

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a copy of Cal. Judicial Council Form GC-065, for use in a proceeding to confirm the sale of real property pursuant to *Prob. Code §§ 2540* and *2543(b)* [*see § 290A.60*].

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31*, 7.101]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

There are different requirements for the sale of a conservatee's residence [*see Prob. Code § 2540(b)*]. For an order authorizing a conservator to sell the conservatee's residence, see *§ 290A.66*.

[3] Recording Order

A certified copy of an order to convey real property must be recorded in the county recorder's office in each county in which any portion of the real property is located [*Prob. Code § 2111(c)*].

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24-290A California Forms of Pleading and Practice--Annotated § 290A.62

§ 290A.62 Petition for Confirmation of Sale of Personal Property [Prob. Code §§ 2540-2543]

[1] FORM Petition for Confirmation of Sale of Personal Property [Prob. Code §§ 2540-2543]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship of the [Person and] Estate of _____ [*name*], _____ [Ward *or* Conservatee].	)))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION FOR CONFIRMATION OF SALE OF PERSONAL PROPERTY

Petitioner _____[*name*] respectfully represents:

1. Petitioner is the duly appointed, qualified, and acting _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee].

2. On _____[*date*], petitioner sold at a _____ [private *or* public] sale, subject to confirmation by the court, the following personal property of the estate: _____[*describe property*]. Notice of the time and place of the sale was posted as shown by the declaration of posting on file. The property was purchased by _____[*name*], for the sum of $_____, _____ [cash *or* under the following terms: _____ (*specify terms*)]. This was the highest and best bid made.

[*EITHER*]

3. The sale was made because the income of the estate is insufficient for the comfortable and suitable support, maintenance, and education of _____ [the ward *or* the conservatee *or* _____ (*names*), persons legally entitled to support, maintenance, and education from the _____ (ward *or* conservatee)].

[*OR*]

3. The sale was made because the personal property of the estate and the income from real property of the estate is insufficient to pay the following debts of the _____ [ward *or* conservatee]: _____[*specify debts meeting requirements of Prob. Code §§ 2430 and 2431*].

[*OR*]

3. The sale is for the advantage, benefit, and best interests of _____ [the ward *or* the conservatee *or* the estate], in that _____[*specify*].

[*OR*]

3. The sale is for the advantage, benefit, and best interests of the _____ [ward *or* conservatee] and _____[*names*], persons entitled to support, maintenance, and education from the _____ [ward *or* conservatee], in that _____[*specify*].

[*CONTINUE*]

4. Before the sale, and on _____[*date*], the property was appraised at the value of $_____.

5. The sale was legally made and fairly conducted, and the sum so offered is not disproportionate to the value of the property at the time of the sale.

[*EITHER*]

6. Petitioner has executed a bond for the amount of $_____, which has been given by _____ [personal sureties *or* an admitted surety insurer]. After transfer of the property, the value of all personal property plus the probable annual gross income of all of the property of the estate [plus the sum of the probable annual gross payments from public entitlements of the _____ (ward *or* conservatee)] will be $_____. An additional bond is _____ [not required *or* required in the sum of $_____].

[*OR*]

6. Bond for petitioner has been _____ [waived pursuant to _____ (*Probate Code Section 2321 or Probate Code Section 2324*) *or* dispensed with pursuant to *Probate Code Section 2323(a)*].

[*CONTINUE*]

7. A request for special notice has _____ [not been filed *or* been filed by _____ (*name*), and notice of the time and place of hearing on this petition will be given as required by law *or* been filed and waived by _____ (*name*)].

WHEREFORE, petitioner prays for an order confirming the sale, and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

Petitioner

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The petition in [1], *above*, is for use by the guardian or conservator to obtain confirmation of a private or public sale of personal property [*Prob. Code §§ 2540, 2543(b), 10250, 10251, 10253-10255, 10259, 10260*]. Personal property that may be the subject of this petition includes tangible personal property sold during any calendar year that is valued in excess of $5,000 [*see Prob. Code § 2545*]; any other personal property, excluding securities [*see Prob. Code §§ 2543(b), 2544, 10200(a)*; *see also § 290A.63* (petition to authorize securities sale)]; and perishable or depreciable personal property [*see Prob. Code §§ 2543(b), 10252(c), 10259*; *see also § 290A.64* (petition to approve sale of perishable or depreciable personal property)].

[3] Contents of Petition

The petition should state the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2543*].

- The date of sale, a description of the property sold, and the notice and terms of sale (Paragraph 2) [*see Prob. Code §§ 2542, 2543, 10250 et seq.*].

- The purpose of the sale (Paragraph 3) [*see Prob. Code § 2541*; *see also § 290A.15*].

- The property's appraised value (Paragraph 4), which may be required by a local rule [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 10.96].

- Conformance with required sale procedures (Paragraph 5) [*see Prob. Code §§ 2543(b), 10250-10255, 10259* (notice of sale; passage of title without court confirmation)].

- Whether a request for special notice has been filed and, if so, that proper notice will be given or has been waived (Paragraph 6) [*see Prob. Code §§ 1260(a), 2700 et seq.*].

The petition must be verified [*Prob. Code § 1021*].

[4] Time of Filing

A verified report of sale and petition for confirmation of the sale must be made within 30 days after the sale. If the guardian or conservator fails to file the report and a petition for confirmation of the sale within 30 days after the sale, then the purchaser at the sale may file the report and petition for confirmation of the sale [*see Prob. Code §§ 2543(b), 10260(b)*].

[5] Notice

Notice of hearing must be given for the period and in the manner required by *Prob. Code § 1460 et seq.* [*Prob. Code §§ 1469, 2543(b)*]. The clerk of the court must cause notice to be posted pursuant to *Prob. Code § 2543(b)* only if posting of notice of hearing is required on a petition for the confirmation of a sale of real or personal property of the estate, or if posting of notice of a sale governed by *Prob. Code § 10250* (sales of personal property of decedents' estates) is required or authorized, or in any case in which posting of notice is ordered by the court [*Prob. Code § 2543(c)*]. For further discussion and a form for this notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[6] Cross References

For forms for orders that can be adapted for use with the petition in [1], *above*, see Ch. 287, *Guardianship and Conservatorship: General Management Powers* , and Ch. 455, *Probate: Sale of Estate Property*

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24-290A California Forms of Pleading and Practice--Annotated § 290A.63

§ 290A.63 Ex Parte Petition for Authority to Sell Securities and Order [Prob. Code §§ 2540-2543]--Judicial Council Form GC-070

[1] FORM Ex Parte Petition for Authority to Sell Securities and Order [Prob. Code §§ 2540-2543]--Judicial Council Form GC-070

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative, filled-in copy of Cal. Judicial Council Form GC-070, for use in petitioning for authority to sell securities [*Prob. Code §§ 2543(b), 10200*; *but see Prob. Code § 2544* (when court authorization is not required for sale)].

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31*, 7.101]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Once authorization is obtained, the securities may be sold or may be surrendered for redemption or conversion, and title to them can pass without the necessity for confirmation [*Prob. Code §§ 2543(b), 10200(b)*].

[3] Contents of Petition

The petition must contain the following information:

- Petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code §§ 2541, 10200*].
- The necessity for the sale (Paragraphs 2c and 2d) [*see Prob. Code § 2541*; *see also § 290A.15*.

- Whether special notice is required or has been waived (Paragraph 2e) [*see Prob. Code §§ 1469, 2543, 2700, 2702*].

- A description of the securities, recent bids and asking prices, and the minimum selling price (*see* "List of Securities" on the reverse side of form), which may be required by a local rule [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 10.103(b) (recent bids and asking prices required only for unlisted securities)].

[4] Notice

The court may order that notice of the hearing be dispensed with [*Prob. Code §§ 2543(b), 10200(d)*]. If notice is not dispensed with, it must be given for the period and in the manner required by *Prob. Code § 1460 et seq.* or for a shorter period as ordered by the court [*Prob. Code §§ 1469, 2543(b), 10200(d)*]. Additionally, the clerk must post a notice of the time and place of hearing on a petition to sell stocks or bonds, at least 15 days before the date set for hearing, giving the name of the estate, the name of the petitioner and the nature of the application, referring to the petition for further particulars, and stating the time at which the application will be heard [*see Prob. Code §§ 1230, 1460(c),* 2543(d), *10200(d)*]. For further discussion and a form of notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

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24-290A California Forms of Pleading and Practice--Annotated § 290A.64

§ 290A.64 Ex Parte Petition for Approval of Sale of Perishable or Depreciable Personal Property and Order [Prob. Code §§ 2540-2543]--Judicial Council Form GC-075

[1] FORM Ex Parte Petition for Approval of Sale of Perishable or Depreciable Personal Property and Order [Prob. Code §§ 2540-2543]--Judicial Council Form GC-075

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative, filled-in copy of Cal. Judicial Council Form GC-075, for use in petitioning for approval of the sale of perishable, depreciable, and other personal property that will incur losses or expenses by being kept [*Prob. Code §§ 2543(b), 10252(c), 10259*].

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31*, 7.101]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents of Petition

This form must contain the following information:

- Petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code §§ 2541, 10252(c), 10259*].

- The purpose for the sale (Paragraphs 2b and 2e(3)) [*see Prob. Code §§ 2541, 10252(c), 10259*; *see also § 290A.15*].

- Whether special notice has been requested (Paragraphs 2e(1) and 2e(2)) [*see Prob. Code §§ 1260(a), 2700, 2701*].

- A description of the property and terms of sale (see "Property Sold" on the reverse side of the form) [*see Prob. Code §§ 10252(c), 10259*].

The petition must be verified [*Prob. Code § 1021*].

[4] Notice

Prob. Code §§ 10252, 10259, governing the sale of perishable and depreciable personal property, do not require notice of the sale or a noticed hearing on a petition to approve the sale, although notice of sale is permitted at the discretion of the personal guardian or conservator [*see Prob. Code § 10252*]. Local court rules may require that all applications for ex parte orders must contain an allegation that no special notice has been requested or that any such notice has been waived [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 10.38(a)].

The court clerk must post a notice of hearing when ordered by the court [*Prob. Code § 2543(d)(3)*].

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24-290A California Forms of Pleading and Practice--Annotated § 290A.65

§ 290A.65 Petition for Authority to Sell Residence of Conservatee [Prob. Code § 2540(b)]

[1] FORM Petition for Authority to Sell Residence of Conservatee [Prob. Code § 2540(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Conservatorship of the [Person and] Estate of	)	[Hearing set for _____ (*date*), at
_____ [*name*],	)	_____ (*time*), in Dept. No. _____]
Conservatee.	)	PETITION FOR AUTHORITY TO SELL RESIDENCE

_____

Petitioner _____[*name*] respectfully represents:

1. Petitioner is the duly appointed, qualified, and acting conservator of the [person and] estate of _____[*name*], conservatee.

2. Petitioner proposes that the conservatee's _____ [present *or* former] residence at _____[*street address*], _____[*city*], the legal description of which is attached as Exhibit A, be sold for the following reasons: _____[*set forth reasons*].

3. The conservatee _____ [has *or* does not have] the ability to live in the residence. Other alternatives are not available because _____ [*state why other alternatives, including but not limited to in-home care services, are not available*].

4. Petitioner has discussed the proposed sale of the conservatee's residence with the conservatee. The conservatee

_____ [supports *or* opposes] the proposed sale.

WHEREFORE, petitioner prays for an order authorizing petitioner to sell the residence of the conservatee, and for such other and further orders as the court may deem proper.

[*Signature and verification. See § 290A.62.*]

[2] Use of Form

The petition in [1], *above*, is for use by a conservator in obtaining authorization to sell the present or former residence of the conservatee if the conservator has not been granted independent power to sell real property pursuant to *Prob. Code § 2590* [*see Prob. Code § 2540(b)*]. A court hearing the petition, in its discretion, may require the court investigator to discuss the proposed sale with the conservatee [*see Prob. Code § 2540(b)*].

Prob. Code § 2540(b) requires the conservator to "notify" the court of specified facts, but does not prescribe a means of notification [*see Prob.Code § 2540(b)*]. Apparently, the required notification may be made by petition.

[3] Contents of Petition

The petition must state the following [*Prob. Code § 2540(b)*]:

- That the conservator proposes to sell the conservatee's residence (Paragraph 2).
- The circumstances that necessitate the proposed sale, including whether the conservatee has the ability to live in the residence and why other alternatives, including, but not limited to, in-home care services, are not available. (Paragraphs 2 and 3).
- That the conservator has discussed the proposed sale with the conservatee (Paragraph 4).
- Whether the conservatee opposes or supports the proposed sale (Paragraph 4).

Local rules should be consulted for additional content requirements.

The petition must be verified [*Prob. Code § 1021*].

[4] Notice

Prob. Code § 2540(b) does not contain a notice requirement for seeking court authorization to sell the conservatee's residence. Therefore, petitioner could apparently proceed ex parte. Nevertheless, because of the seriousness of this type of sale, it is recommended that the petitioner proceed on notice, to give all interested persons a chance to object. Notice of the hearing on the petition may be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* Generally notice should be mailed to specified persons at least 15 days before the day of the hearing [*Prob. Code § 1460(a), (b)*]. In any event, special notice must still be given to persons who have filed a written request for notice under *Prob. Code § 2700 et seq.* [*Prob. Code §§ 1460(d), 2700*]. For further discussion and a form for this notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

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24-290A California Forms of Pleading and Practice--Annotated § 290A.66

§ 290A.66 Order Authorizing Sale of Residence of Conservatee [Prob. Code § 2540(b)]

[1] FORM Order Authorizing Sale of Residence of Conservatee [Prob. Code § 2540(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Conservatorship of the [Person and] Estate of	)	ORDER
_____ [*name*],	)	
Conservatee.		

_____

The petition of _____[*name*], as conservator in the above-entitled proceeding, for authorization to sell the residence of the conservatee _____[*name*], came on regularly for hearing by the court on this date. The petitioner appeared by counsel _____[*name*]. _____[*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. The following order is in the best interests of the conservatee and his/her estate.

IT IS ORDERED that _____[*name*], as conservator of the [person and] estate of _____[*name*], sell the conservatee's residence at _____[*street address*], _____[*city*], the legal description of which is as follows: _____[*specify*].

Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use when the court grants a petition [*see § 290A.65*] for authorization to sell the conservatee's current or former residence [*see Prob. Code § 2540(b)*].

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[Reserved]

§§ 290A.67[Reserved]

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24-290A California Forms of Pleading and Practice--Annotated § 290A.80

§ 290A.80 Petition for Authority to Borrow Money on Security of Estate Property [Prob. Code §§ 2550, 2551]

[1] FORM Petition for Authority to Borrow Money on Security of Estate Property [Prob. Code §§ 2550, 2551]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship of the [Person and] Estate of _____ [*name*], _____ [Ward *or* Conservatee].	)))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION FOR AUTHORITY TO BORROW MONEY

Petitioner _____[*name*] respectfully represents:

1. Petitioner is the duly appointed, qualified, and acting _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee].

2. The inventory and appraisal filed on _____[*date*] shows that the estate includes _____ [*if interest is less than entire ownership, specify, e.g.,* an undivided one-third interest as tenant in common in] the _____ [real *or* personal] property situated in _____[*city*], _____ County, California, and described as follows: _____[*give general description*]. [*If estate's interest is less than entire ownership, add:* The owner of the remaining interest in the property is _____ (*name*).]

[3. *If seeking to modify an existing security interest, add:* The property is subject to a _____ (security interest *or* lien *or* mortgage *or* deed of trust), a copy of which is attached as Exhibit A.]

4. The _____ [personal *or* real *or* interest in the personal *or* interest in the real] property is appraised at the value of $_____. [*If real property, specify rental income, e.g.,* The annual rental income is $_____.]

[*EITHER*]

5. It is _____ [to the advantage of the _____ (ward *or* conservatee) and his/her estate *or* necessary] to borrow money and to execute a _____ [security agreement on the personal property *or* mortgage on the real property *or* deed of trust on the real property] because _____ [*specify purpose and expected advantage, e.g.,* the estate income is insufficient to continue the _____ (ward's *or* conservatee's) education and care and to perform needed care and maintenance on theproperty. Borrowing money is preferable to selling the property because the property is appreciating in value, the loan can be repaid from the rental income, and the need for additional funds is temporary].

[*OR*]

5. It is _____ [to the advantage of the _____ (ward *or* conservatee) and his/her estate] that petitioner join with _____[*name of co-owner*] to borrow money and execute a _____ [security agreement *or* lien *or* mortgage *or* deed of trust] on the property _____ [*specify purpose, e.g.,* to improve the property *or* to pay off a deed of trust on the property].

[*CONTINUE*]

6. Petitioner proposes that he/she [and _____ (*name of co-owner*)] will borrow $_____ from _____[*name of lender*], with interest at the rate of _____ percent per annum, the interest and principal to be payable over a period of _____[*specify period*] in payments of $_____ per _____ [*specify payment period, e.g.,* month].

7. Petitioner proposes that he/she [and _____ (*name of co-owner*)] will make a note to evidence the indebtedness, in the form attached as Exhibit B, and will execute a _____ [security agreement covering the personal property *or* mortgage on the real property *or* deed of trust covering the real property] to secure the note, in the form attached as Exhibit C.

[*EITHER*]

8. Petitioner has executed a bond for the amount of $_____, which has been given by _____ [personal sureties *or* an admitted surety insurer]. After transfer of the property, the value of all personal property plus the probable annual gross income of all of the property of the estate [plus the sum of the probable annual gross payments from public entitlements of the _____ (ward *or* conservatee)] will be $_____. An additional bond is _____ [not required *or* required in the sum of $_____].

[*OR*]

8. Bond for petitioner has been _____ [waived pursuant to _____ (*Probate Code Section 2321 or Probate Code Section 2324*) *or* dispensed with pursuant to *Probate Code Section 2323(a)*].

[*CONTINUE*]

9. A request for special notice has _____ [not been filed *or* been filed by _____ (*name*), and notice of the time and place of hearing on this petition will be given as required by law *or* been filed and waived by _____ (*name*)].

WHEREFORE, petitioner prays for an order authorizing petitioner [along with _____ (*name of co-owner*)] to borrow the sum of $_____ and to evidence and secure the loan by executing a note and _____ [security agreement *or* mortgage *or* deed of trust], and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

Petitioner

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The petition in [1], *above*, is for use by the guardian or conservator in obtaining authorization to borrow money on a

note or notes secured by a security interest or other lien on all or part of the estate's personal property or by a mortgage or deed of trust on all or part of the estate's real property [*Prob. Code §§ 2550, 2551(a), (b)*; *see § 290A.16*]. The form may be adapted for use in obtaining authorization for an unsecured loan [*Prob. Code § 2551(a)*].

[3] Contents of Petition

The petition must state the following:

- A general description of the property proposed to be mortgaged or subjected to a deed of trust or other lien, including any co-owners or existing security interests (Paragraphs 2-4) [*Prob. Code §§ 2551(b), 2552(b)*].

- The purpose for which the order is sought and the advantage to accrue from the order (Paragraph 5) [*Prob. Code §§ 2541, 2551(a), (b), 2552*].

- The amount of money proposed to be borrowed, the rate of interest to be paid, and the length of time the note is to run (Paragraph 6) [*Prob. Code § 2551(b)*].

The petition should include the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2551(b)*].

- A description of the note and security instrument proposed, which are attached (Paragraph 7) [*see Prob. Code § 2551(a)*].

- Whether additional bond is required (Paragraph 8) [*see Code Civ. Proc. § 996.010*; *Prob. Code §§ 2320, 2330, 2334*].

- Whether a request for special notice has been filed and, if so, that proper notice will be given or has been waived (Paragraph 9) [*see Prob. Code §§ 1260(a), 2700 et seq.*].

The petition must be verified [*Prob. Code § 1021*].

[4] Notice

Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2551(b)*]. Generally notice by mail must be given to specified persons at least 15 days before the day of the hearing [*Prob. Code § 1460(a), (b)*]. Special notice must also be given to any person who has filed a request under *Prob. Code § 2700 et seq.* [*Prob. Code §§ 1460(d), 2700, 2702*]. For further discussion and a form for giving notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

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24-290A California Forms of Pleading and Practice--Annotated § 290A.81

§ 290A.81 Order Authorizing Guardian or Conservator to Borrow Money on Security of Estate Property [Prob. Code §§ 2550, 2551]

[1] FORM Order Authorizing Guardian or Conservator to Borrow Money on Security of Estate Property [Prob. Code §§ 2550, 2551]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship of the [Person and] Estate of _____ [*name*], _____ [Ward *or* Conservatee].	))))	NO. _____ ORDER

The petition of _____[*name*], the _____ [guardian *or* conservator] the above-entitled estate, for an order authorizing a loan on the security of estate property and an encumbrance of the property, came on regularly for hearing by the court on this date. The petitioner appeared by counsel _____[*name*]. _____[*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. The _____ [guardianship *or* conservatorship] estate includes _____ [*if interest is less than entire ownership, specify, e.g.,* an undivided one-third interest as tenant in common in] the

_____ [real *or* personal] property situated in _____[*city*], _____ County, California, and described as follows: _____[*general description*]. [*If estate's interest is less than entire ownership, add:* The owner of the remaining interest in the property is _____ (*name*)].

[3. *If petition seeks to modify existing security interest, add:* The property is subject to a _____ (security interest *or* lien *or* mortgage *or* deed of trust).]

4. The _____ [personal *or* real *or* interest in the personal *or* interest in the real] property is appraised at the value of $_____. _____ [*If real property, specify rental income, e.g.,* The annual rental income is $_____].

5. _____ [Petitioner has *or* Petitioner and _____ (*name of co-owner*) have] arranged to borrow the sum of $_____ from _____[*name of lender*], with interest at the rate of _____ percent per annum, interest and principal payable over a period of _____[*specify period*].

6. _____ [Petitioner has *or* Petitioner and _____ (*name of co-owner*) have] further arranged to make a note to evidence the indebtedness and to execute a _____ [security agreement on the personal property *or* mortgage on the real property *or* deed of trust on the real property] to secure the note.

7. The purpose of the proposed loan is _____ [*specify purpose authorized by Prob. Code § 2541 or 2552, e.g.,* to increase estate income to continue the _____ (ward's *or* conservatee's) education and care and to perform needed care and maintenance on the property *or* to improve the property *or* to pay off a deed of trust on the property].

8. The proposed loan and encumbrance are to the advantage of the estate in that _____ [*describe advantage, e.g.,* borrowing the money is preferable to selling the property because the property is appreciating in value, the loan can be repaid from rental income, and the need for additional funds is temporary].

9. An additional bond is [not] required.

IT IS ORDERED:

1. _____[*name*], as _____ [guardian *or* conservator] of the estate, [along with _____ (*name of co-owner*),] borrow the sum of $_____ from _____ [*name of lender*], with interest at the _____[maximum] rate of _____ percent per annum, the interest and principal to be payable over a period of _____ [*specify period*].

2. _____[*name*], as _____ [guardian *or* conservator] of the estate, [along with _____ (*name of co-owner*),] evidence and secure the loan by executing a note and _____ [security agreement *or* mortgage *or* deed of trust].

[3. Petitioner give an additional bond in the amount of $_____.]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use when the court grants a petition [*see § 290A.80*] to authorize the guardian or conservator to borrow money on the security of estate property and to execute an instrument encumbering the property for that purpose [*Prob. Code §§ 2550, 2551*].

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

If the required showing is made, the court may make an order authorizing the transaction. The court in its order may do any of the following [*Prob. Code § 2551(c)*]:

- Order that the amount specified in the petition, or a lesser amount, be borrowed.
- Prescribe the maximum rate of interest and the period of the loan.
- Require that the interest and the whole or any part of the principal be paid from time to time out of the estate or any part of it.
- Require that the personal property used as security, or any buildings on real property to be mortgaged or subjected to the deed of trust, be insured for the further security of the lender, and that the premiums be paid out of the estate.
- Specify the purpose for which the money to be borrowed is to be applied.
- Prescribe such other terms and conditions concerning the transaction as the court determines to be to the advantage of the estate.

[3] Subject-Matter Jurisdiction

Jurisdiction of the court to administer the estate of the ward or conservatee is effectual to vest the court with jurisdiction to make the order for the note or notes and for the security interest, lien, mortgage, or deed of trust [*Prob. Code § 2551(e)*].

[4] Recordation of Order

A certified copy of the order must be recorded in the office of the county recorder in each county in which any portion of the real property is located [*Prob. Code § 2111(c)*].

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24-290A California Forms of Pleading and Practice--Annotated § 290A.82

§ 290A.82 Petition for Authority to Execute Lease of Real Property [Prob. Code §§ 2550, 2553]

[1] FORM Petition for Authority to Execute Lease of Real Property [Prob. Code §§ 2550, 2553]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship of the [Person and] Estate of _____ [*name*], _____ [Ward *or* Conservatee].	)))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION FOR AUTHORITY TO EXECUTE LEASE

Petitioner _____[*name*] respectfully represents:

1. [*Status of petitioner. See § 290A.80, Paragraph 1.*]

2. The inventory and appraisal filed on _____[*date*] shows that the _____ [ward *or* conservatee] has real property in _____[*city or county*], the description of which is as follows: _____[*general description*].

3. It is to the advantage of the _____ [ward *or* conservatee] and his/her estate to lease the property in that _____ [*specify reasons, e.g.,* the lease will provide income from the property sufficient to support the _____ (ward *or* conservatee)].

4. Petitioner proposes to lease the property to _____[*name*] for a term of _____[*specify term*], commencing _____[*date*] and ending _____[

date], at a rent of $_____ per _____ [*specify, e.g.,* month], payable in advance on _____ [*specify, e.g.,* the first of each month] and under the further terms and conditions set forth in the proposed lease, which is attached as Exhibit A.

[5. *If proposed term of lease is longer than 10 years, add:* A lease for a term of _____ years is necessary and advantageous to the estate because _____ (*state additional facts showing need for longer term and its advantage to estate*).]

6. [*Bond allegation. See § 290A.80, Paragraph 8.*]

7. [*Special-notice allegation. See § 290A.80, Paragraph 9.*]

WHEREFORE, petitioner prays for an order authorizing petitioner to execute a lease of the property in accordance with the terms and conditions of the proposed lease, and for such other and further orders as the court may deem proper.

[*Signature and verification. See § 290A.80.*]

[2] Use of Form

The petition in [1], *above*, is for use by the guardian or conservator in obtaining authorization to lease real property of the estate [*Prob. Code § 2553*]. Since *Prob. Code § 2553* is not limited to leases of real property, the form may be adapted for use to lease personal property of the estate.

Real property may be leased without court authorization when the rent does not exceed $5,000 per month and the term does not exceed two years or, regardless of the amount of the rent, when the lease is from month to month [*Prob. Code § 2555*].

[3] Contents of Petition

The petition must state the following:

- A general description of the property proposed to be leased (Paragraph 2) [*Prob. Code § 2553(b)*].
- The advantage to the estate to accrue from giving the lease (Paragraph 3) [*Prob. Code § 2553(b)*].
- The term, rent, and general conditions of the proposed lease (Paragraph 4) [*Prob. Code § 2553(b)*].
- If the lease is proposed to be for a term longer than 10 years, additional facts showing the need for the longer lease and its advantage to the estate (Paragraph 5) [*Prob. Code § 2553(b)*].

The petition should include the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2553(b)*].
- Whether additional bond will be required on execution of the lease (Paragraph 6) [*see Prob. Code §§ 2321, 2323, 2324*].
- Whether a request for special notice has been filed and, if so, that proper notice will be given or has been waived (Paragraph 7) [*see Prob. Code §§ 1260(a), 2700, 2701*].

The petition must be verified [*Prob. Code § 1021*].

[4] Notice

Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2553(b)*]. Generally notice by mail must be given to specified persons at least 15 days before the day of the hearing [*Prob. Code § 1460(a), (b)*]. Special notice must also be given to any person who has filed a request under *Prob. Code § 2700 et seq.* [*Prob. Code §§ 1460(d), 2700(a)*]. For further discussion and a form of notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

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24-290A California Forms of Pleading and Practice--Annotated § 290A.83

§ 290A.83 Order Authorizing Execution of Lease of Real Property [Prob. Code §§ 2550, 2553]

[1] FORM Order Authorizing Execution of Lease of Real Property [Prob. Code §§ 2550, 2553]

[*Caption. See § 290A.81*.]

The petition of _____[*name*], the _____ [guardian *or* conservator] of the above-entitled estate, for an order authorizing a lease of real property of the estate, came on regularly for hearing by the court on this date. The petitioner appeared by counsel _____[*name*]. _____[*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. The _____ [ward *or* conservatee] has real property in _____[*city or county*], California, the description of which is as follows: _____[*general description*].

3. Petitioner proposes to lease the property to _____[*name*] for a term of _____[*specify term*], commencing _____[*date*] and ending _____[*date*], at a rent of $_____ per _____ [*specify, e.g.,* month], payable in advance on _____ [*specify, e.g.,* the first of each month] and under the further terms and conditions set forth in the proposed lease.

4. It is to the advantage of the estate to lease the property in that _____ [*describe advantage, e.g.,* the lease will provide income from the property sufficient to support the _____ (ward *or* conservatee)].

[5. *If proposed term of lease is longer than 10 years, add:* It is necessary and to the advantage of the estate to lease the property for a term of _____ years because _____ (*describe necessity and advantage*).]

6. An additional bond is [not] required.

IT IS ORDERED:

1. _____[*name*], as _____ [guardian *or* conservator] of the estate, execute a lease of the above-described property of the estate to _____[*name of lessee*] for a term of _____[*specify term*], commencing _____[*date*] and ending _____[*date*], at a minimum rent of $_____ per _____ [*specify, e.g.,* month], payable in advance on _____ [*specify, e.g.,* the first of each month] and under the further terms and conditions set forth in the proposed lease.

[2. *Set forth other terms and conditions of lease as required by court.*]

[3. The rental income received under the lease be divided between the _____ [guardian *or* conservator] and _____ (*name of other person holding interest in property*) in the following proportions: _____ percent to the _____ [guardian *or* conservator] and _____ percent to _____ (*name*).]

[4. Petitioner give an additional bond in the amount of $_____.]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use when the court grants a petition [*see § 290A.82*] to authorize the guardian or conservator to execute a lease of real property of the estate [*see Prob. Code §§ 2550, 2553*].

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

If the court is satisfied that it will be to the advantage of the estate, it must make an order authorizing the guardian or conservator to make the lease to the person and on the terms stated in the order. The court cannot authorize a lease to any person other than the lessee named in the petition unless an offer made at the hearing on the petition for authorization is acceptable to the guardian or conservator [*Prob. Code § 2553(c)*].

[3] Subject-Matter Jurisdiction

Jurisdiction of the court to administer the estate of the ward or conservatee is effectual to vest the court with jurisdiction to make the order for the lease. The jurisdiction conclusively inures to the benefit of the lessee and the lessee's heirs and assignees. An omission, error, or irregularity in the proceedings will not impair or invalidate the proceedings or the lease made pursuant to an order made under this article of the Probate Code [*Prob. Code § 2553(d)*].

[4] Terms of Lease

An order authorizing the execution of a lease must set forth the minimum rent or royalty or both and the period of the lease, which must be for such time as the court may authorize [*Prob. Code § 2554(a)*]. The order may also authorize other terms and conditions [*Prob. Code § 2554(b)*].

An order authorizing the execution of a lease for the purpose of exploration for or production or removal of minerals, oil, gas, other hydrocarbon substances, or geothermal energy may authorize a provision for any of the following [*Prob. Code § 2554(b)*]:

- The payment of rent and royalties to a depositary.
- The appointment of a common agent to represent the interests of all lessors.
- The payment of a compensatory royalty in lieu of rent and in lieu of drilling and producing operations on the land covered by the lease.
- Empowering the lessee to enter into any agreement authorized by *Pub. Res. Code § 3301* (agreements for cooperative development) with respect to the land covered by the lease.
- A community oil lease or pooling or unitization by the lessee.

The lease may also be for a fixed period and any of the following [*Prob. Code § 2554(d)*]:

- As long as minerals, oil, gas, other hydrocarbon substances, or geothermal energy are produced in paying quantities from the property leased, or mining or drilling operations are conducted on the property.
- If the lease provides for the payment of a compensatory royalty: as long as the compensatory royalty is paid.
- If the land covered by the lease is included in an agreement for cooperative development authorized by *Pub. Res. Code § 3301*: as long as oil, gas, or other hydrocarbon substances are produced in paying quantities from any of the lands included in any such agreement, or as long as drilling operations are conducted on the lands.

[5] Recordation of Order

A certified copy of an order authorizing the lease of real property must be recorded in the office of the county recorder in each county in which any portion of the property is located [*Prob. Code § 2111(c)*].

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24-290A California Forms of Pleading and Practice--Annotated § 290A.84

§ 290A.84 Petition for Authority to Convey or Dedicate Property, Easement, or Access Rights [Prob. Code §§ 2550, 2556]

[1] FORM Petition for Authority to Convey or Dedicate Property, Easement, or Access Rights [Prob. Code §§ 2550, 2556]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship of the [Person and] Estate of _____ [*name*], _____ [Ward *or* Conservatee].	)))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION FOR AUTHORITY TO _____ [CONVEY *or* DEDICATE] _____ [PROPERTY *or* EASEMENT]

_____

Petitioner _____[*name*] respectfully represents:

1. [*Status of petitioner. See § 290A.80, Paragraph 1.*]

2. [*Description of property. See § 290A.82, Paragraph 2.*]

3. It is for the advantage, benefit, and best interests of the _____ [ward *or* conservatee] and the estate to _____ [dedicate *or* convey] _____ [a portion of *or* an easement over *or* access rights from] the real property to _____[*name*] for the purpose of _____ [*specify purpose, e.g.,* street improvement], in that _____ [*describe why it is to estate's advantage, e.g.,* such a

dedication will enable the property to be developed].

4. The legal description of the _____ [portion of *or* easement over *or* access rights from] the real property to be _____ [dedicated *or* conveyed] is as follows: _____[*specify*].

[5. The estate will receive the sum of $_____ as consideration for the _____ (dedication *or* conveyance), which sum is reasonable consideration for the _____ (dedication *or* conveyance).]

6. [*Bond allegation. See § 290A.80, Paragraph 8.*]

7. [*Special notice allegation. See § 290A.80, Paragraph 9.*]

WHEREFORE, petitioner prays for an order authorizing petitioner to _____ [dedicate *or* convey] to _____[*name*] the _____ [portion of *or* easement over *or* access rights from] the above-described real property of the _____ [ward *or* conservatee], and for such other and further orders as the court may deem proper.

[*Signature and verification. See § 290A.80.*]

[2] Use of Form

The petition in [1], *above*, is for use by the guardian or conservator in obtaining authorization to dedicate or convey real property to the State of California, any public entity in California, the United States, or any agency or instrumentality of the United States; to dedicate or convey an easement over real property to any person; or to convey, release, or relinquish access rights to streets from real property to any public entity [*Prob. Code §§ 2556(a)(1)-(3), 2556(b)*]. The form may be adapted for use to obtain authority to consent as a lienholder to a dedication, conveyance, release, or relinquishment described above by the owner of property subject to the lien [*Prob. Code § 2556(a)(4)*].

[3] Contents of Petition

A petition under *Prob. Code § 2556* should state the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2556(b)*].

- A legal description of the real property and of that portion of it being dedicated or conveyed (Paragraphs 2, 4) [*see Prob. Code § 2556(a)*].

- How it would be to the advantage, benefit, and best interests of the estate and interested persons to effect the dedication or conveyance (Paragraph 3) [*see Prob. Code § 2556(a)*].

- If consideration is provided, the amount of consideration (Paragraph 5) [*see Prob. Code § 2556(a)*].

- Whether additional bond will be required if the court authorizes the dedication or conveyance (Paragraph 6) [*see Prob. Code §§ 2321, 2323, 2324*].

- Whether special notice has been requested and, if so, that proper notice will be given or has been waived (Paragraph 7) [*see Prob. Code §§ 1260(a), 2700, 2701*].

The petition must be verified [*Prob. Code § 1021*].

[4] Notice

Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2556(b)*]. Generally notice by mail must be given to specified persons at least 15 days before the day of the hearing [*Prob. Code § 1460(a), (b)*]. Special notice must also be given to any person who has filed a request under *Prob. Code § 2700 et seq.* [*Prob. Code §§ 1460(d), 2700*]. For further discussion and a form of notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

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24-290A California Forms of Pleading and Practice--Annotated § 290A.85

§ 290A.85 Order Authorizing Conveyance or Dedication of Property, Easement, or Access Rights [Prob. Code §§ 2550, 2556]

[1] FORM Order Authorizing Conveyance or Dedication of Property, Easement, or Access Rights [Prob. Code §§ 2550, 2556]

[*Caption. See § 290A.81.*]

The petition of _____[*name*], the _____ [guardian *or* conservator] of the above-entitled estate, for an order authorizing _____ [conveyance *or* dedication] of _____ [a portion of *or* an easement over *or* access rights from] certain real property, came on regularly for hearing by the court on this date. The petitioner appeared by counsel _____[*name*]. _____[*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. One of the assets of the estate is real property located in _____ County, California, the legal description of which is as follows: _____[*set forth description*].

3. It is for the advantage, benefit, and best interests of the estate and those interested in it that petitioner _____ [dedicate *or* convey] _____ [a portion of *or* an easement over *or* access rights from] the real property to _____[*name*], in that _____ [*describe advantage, e.g.,* dedication will enable the property to be developed].

4. The legal description of the _____ [portion of *or* easement over *or* access rights from] the real

property to be _____ [dedicated *or* conveyed] is as follows: _____[*set forth description*].

5. An additional bond is [not] required.

IT IS ORDERED:

1. Petitioner _____ [dedicate *or* convey] to _____[*name*] the _____ [portion of *or* easement over *or* access rights from] the above-described real property of the _____ [ward *or* conservatee] for the purpose of _____ [*specify purpose, e.g.*, street improvement]

[2. The estate receive the sum of $_____ as consideration for the _____ (dedication *or* conveyance).]

[3. Petitioner give an additional bond in the sum of $_____.]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use when the court grants a petition [*see § 290A.84*] seeking authorization for the guardian or conservator todedicate or convey property, an easement, or access rights of estate property [*Prob. Code §§ 2550, 2556*].

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Recordation of Order

A certified copy of the order must be recorded in the county recorder's office in each county where any portion of the real property is located [*Prob. Code § 2111(c)*].

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24-290A California Forms of Pleading and Practice--Annotated § 290A.86

§ 290A.86 Petition for Authority to Exchange Property [Prob. Code §§ 2550, 2557]

[1] FORM Petition for Authority to Exchange Property [Prob. Code §§ 2550, 2557]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship of the [Person and] Estate of _____ [*name*], _____ [Ward *or* Conservatee].	)))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION FOR AUTHORITY TO EXCHANGE PROPERTY

Petitioner _____[*name*] respectfully represents:

1. [*Status of petitioner. See § 290A.80, Paragraph 1.*]

2. The assets of the estate include _____ [certain personal property described as follows: _____ (*specify*) *or* real property located at _____ (*address*), _____ (*city*), California, and described as follows: _____ (*specify*)].

3. _____[*name*] is the owner of _____ [real *or* personal] property situated in _____[*city*], _____ County, California, described as follows: _____[*specify*].

4. The property in the estate is reasonably worth $_____ [and is subject to the following encumbrances: _____ (*specify*)]. The property owned by _____[*name*] is reasonably

worth $_____ [and is subject to the following encumbrances: _____ (*specify*)].

5. _____[*Name of offeror*] has offered an exchange of the two properties described above under the following terms and conditions: _____[*specify*].

6. It is for the advantage, benefit, and best interests of the _____ [ward *or* conservatee] and persons legally entitled to support, maintenance, or education from the _____ [ward *or* conservatee] to exchange the property of the estate for the property of _____[*name*] on the terms and conditions specified above, for the following reasons: _____[*specify*].

7. [*Bond allegation. See § 290A.80, Paragraph 8.*]

8. [*Special notice allegation. See § 290A.80, Paragraph 9.*] [*If seeking to exchange securities defined in Prob. Code § 10200 for other securities, add if appropriate:* Notice of the hearing should be dispensed with because _____ (*show good cause for request*)].

WHEREFORE, petitioner prays for an order authorizing petitioner to exchange the above-described property of the estate for the above-described property of _____[*name*] under the terms and conditions set forth above [and dispensing with notice of the hearing], and for such other and further orders as the court may deem proper.

[*Signature and verification. See § 290A.80.*]

[2] Use of Form

The petition in [1], *above*, is for use by the guardian or conservator to obtain court authorization to exchange any property of the estate for other property [*Prob. Code §§ 2550, 2557*]. Limited exchanges of tangible personal property of the estate may be made without court authorization [*see Prob. Code § 2545*].

[3] Contents of Petition

The petition must contain the following [*Prob. Code § 2557(b)*]:

- A description of the property (Paragraph 3).
- The terms and conditions of the proposed exchange (Paragraph 5).
- A showing that the proposed exchange is for the advantage, benefit, and best interest of the ward or conservatee and persons legally entitled to support, maintenance, or education from the ward or conservatee (Paragraph 6).

The petition should include the following information:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2557(b)*].
- The location and value of, and any encumbrances on, the properties proposed to be exchanged (Paragraphs 2-4) [*see Prob. Code § 2557(a)*].
- Whether additional bond is required (Paragraph 7) [*Prob. Code §§ 2320, 2334*].
- Whether special notice has been requested and, if so, that proper notice will be given or has been

waived (Paragraph 8) [*see Prob. Code §§ 1460(d), 2557(c), 2700 et seq.*].

- If seeking to exchange particular securities as defined by *Prob. Code § 10200*: facts showing good cause to order that notice be given for a shorter period or to dispense with notice (Paragraph 8) [*Prob. Code § 2557(d)*].

The petition must be verified [*Prob. Code § 1021*].

[4] Notice

Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2557(c)*]. Generally notice by mail must be given to specified persons at least 15 days before the day of the hearing [*Prob. Code § 1460(a), (b)*]. Special notice must also be given to any person who has filed a request under *Prob. Code § 2700 et seq.* [*Prob. Code §§ 1460(d), 2700*]. For further discussion and a form of notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

If the petition is for authorization to exchange stocks, bonds, or other securities, as defined in *Prob. Code § 10200*, for different stocks, bonds, or other securities, the court, on a showing of good cause, may order that notice be dispensed with [*Prob. Code § 2557(d)*].

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24-290A California Forms of Pleading and Practice--Annotated § 290A.87

§ 290A.87 Order Authorizing Exchange of Property [Prob. Code §§ 2550, 2557]

[1] FORM Order Authorizing Exchange of Property [Prob. Code §§ 2550, 2557]

[*Caption. See § 290A.81*.]

The petition of _____[*name*], the _____ [guardian *or* conservator] of the above-entitled estate, for an order authorizing an exchange of property of the estate for other property, came on regularly for hearing by the court on this date. The petitioner appeared by counsel _____[*name*]. _____[*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. The assets of the estate include the following _____ [real *or* personal] property: _____[*specify*].

3. _____[*name*] is the owner of _____ [real *or* personal] property situated in _____[*city*], _____ County, California, described as follows: _____[*describe*].

4. The above-described property held by the estate is reasonably worth $_____ [and is subject to the following encumbrances: _____ (*specify*)]. The above-described property owned by _____[*name*] is reasonably worth $_____ [and is subject to the following encumbrances: _____ (*specify*)].

5. It is for the advantage, benefit, and best interests of the _____ [ward *or* conservatee] and persons legally entitled to support, maintenance, or education from the _____ [ward *or* conservatee] to exchange the property of the estate described above for the property of _____[*name*] described above.

6. An additional bond is [not] required.

IT IS ORDERED:

1. Petitioner exchange the above-described property of the estate for the above-described property of _____[*name*] under the following terms and conditions: _____[*describe*].

[3. Petitioner give an additional bond in the sum of $_____.]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use when the court grants a petition [*see § 290A.86*] to authorize the guardian or conservator to exchange real or personal property of the estate for other real or personal property [*Prob. Code § 2557*]. The court may prescribe any terms and conditions of the exchange it deems proper in the order, including the payment or receipt of part cash by the guardian or conservator [*Prob. Code § 2557(a)*].

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Recordation of Order

A certified copy of an order authorizing the conveyance of real property must be recorded in the county recorder's office in each county in which any portion of the real property is located [*Prob. Code § 2111(c)*].

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[Reserved]

§§ 290A.88[Reserved]

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24-290A California Forms of Pleading and Practice--Annotated § 290A.100

§ 290A.100 Petition for Authority to Invest Funds--Personal Property [Prob. Code § 2570]

[1] FORM Petition for Authority to Invest Funds--Personal Property [Prob. Code § 2570]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship of the [Person and] Estate of _____ [*name*], _____ [Ward *or* Conservatee].	)))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION FOR AUTHORITY TO INVEST FUNDS

Petitioner _____[*name*] respectfully represents:

1. Petitioner is the duly appointed, qualified, and acting _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee].

2. There are _____ [proceeds from the sale of estate property *or* funds in the estate] of the _____ [ward *or* conservatee] in the sum of $_____. The inventory and appraisal filed on _____[*date*] shows that the total income of the estate is approximately $_____, and monthly expenses for support total approximately $_____, leaving the above-described funds available for investment.

3. Petitioner proposes that, subject to the court's approval, the sum of $_____ be invested in the following: _____ [*describe personal property; if stocks or bonds, specify amount to be invested in each*].

4. The investments listed above are prudent and in keeping with the size and character of the _____ [ward's *or* conservatee's] estate, and should be authorized in that _____ [*specify reasons, e.g.*, the amount of investments constitutes _____ percent of the total value of the estate, the investments will result in reasonable diversification of the estate assets so as to distribute any potential risk of loss, and an investigation indicates that an increase in the investment property's value in the sum of $_____ per year may be expected].

5. A request for special notice has _____ [not been filed *or* been filed by _____ (*name*), and notice of the time and place of hearing on this petition will be given as required by law *or* been filed and waived by _____ (*name*)].

WHEREFORE, petitioner prays for an order authorizing petitioner to invest the _____ [ward's *or* conservatee's] funds as described above and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

Petitioner

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The petition in [1], *above*, is for use by the guardian or conservator in obtaining authority to invest estate funds pursuant to *Prob. Code § 2570* in personal property. Although court authorization is not required for investments in certain U.S.

government obligations and Treasury bonds, and in listed stocks, bonds, certain securities, interests in money market mutual funds, and units of a common trust fund, this form may be adapted for use by the guardian or conservator in making these investments if he or she desires authorization before acting [*see Prob. Code § 2574(c)*].

[3] Contents of Petition

A petition under *Prob. Code § 2570* should state the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2570(b)*].
- The amount of estate funds available for investment (Paragraph 2) [*see Prob. Code § 2570(a)*].
- The personal property and the amount proposed to be invested (Paragraph 3).
- Why the petitioner believes it to be prudent to make the investments (Paragraph 4).
- Whether a request for special notice has been filed and, if so, that proper notice will be given or has been waived (Paragraph 5) [*see Prob. Code §§ 1260(a), 2700, 2701*].

The petition must be verified [*Prob. Code § 1021*].

[4] Notice

If the court does not order that notice of the hearing be dispensed with, it must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2570(c)*], which generally requires that notice be mailed to specified persons at least 15 days before the day of the hearing [*Prob. Code § 1460(a), (b)*]. Special notice must be given to those persons who have filed a written request under *Prob. Code § 2700 et seq.* [*Prob. Code §§ 1460(d), 2700(a)*]. For further discussion and a form of notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

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24-290A California Forms of Pleading and Practice--Annotated § 290A.101

§ 290A.101 Allegation--Investment in Government Bonds [Prob. Code § 2573]

[1] FORM Allegation--Investment in Government Bonds [Prob. Code § 2573]

1. Petitioner proposes that the sum of $_____ be invested in government bonds selected by petitioner and issued by _____ [*designate issuer in general terms, e.g.,* the State of California or any city, county, city and county, district, or other political subdivision of the State of California], with a minimum quality rating of _____[*specify*] as shown in _____[*name of recognized investment service*], a minimum interest coupon rate of _____[*specify*], a minimum yield to maturity of _____[*specify*], and a date of maturity on or before _____[*specify date within five years*].

[2] Use of Form

The allegation in [1], *above*, may be used in place of Paragraph 3 in the petition in § 290A.100, to obtain authority for the guardian or conservator to select from among bonds issued by any state or by any city, county, city and county, political subdivision, public corporation, district, or special district of any state, without specifying any particular issuer or issue of bonds. The type of issuer must be designated in general terms, and the order must specify a minimum bond-quality rating as shown in a recognized investment service, a minimum interest coupon rate, a minimum yield to maturity, and the date of maturity within a five-year range [*Prob. Code § 2573*].

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24-290A California Forms of Pleading and Practice--Annotated § 290A.102

§ 290A.102 Order Authorizing Investment of Funds--Personal Property [Prob. Code §§ 2570, 2573]

[1] FORM Order Authorizing Investment of Funds--Personal Property [Prob. Code §§ 2570, 2573]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [Guardianship *or*	)	ORDER
Conservatorship of the [Person and] Estate of	)	
_____ [*name*],		
_____ [Ward *or* Conservatee].		
_____		

The petition of _____[*name*], as _____ [guardian *or* conservator] of the above-entitled estate, for authorization to invest estate funds in personal property, came on regularly for hearing by the court on this date. The petitioner appeared by counsel _____[*name*]. _____[*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. The following order is in the best interests of the _____ [ward *or* conservatee] and his/her estate.

[*EITHER*]

IT IS ORDERED that _____[*name*], as _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee], invest the sum of $_____ in the following: _____[*describe personal property; if stocks or bonds, specify amount to be invested in each*].

[*OR*]

IT IS ORDERED that _____[*name*], as _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee], select and invest the sum of $_____ in bonds issued by _____[*designate issuer in general terms*], with a minimum quality rating of _____[*specify*] as shown in _____[*name of recognized investment service*], a minimum interest coupon rate of _____[*specify*], a minimum yield to maturity of _____[*specify*], and a date of maturity _____[*specify date within five years*].

[*CONTINUE*]

Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use when the court grants a petition [*see § 290A.100*] for authorization for the guardian or conservator to invest estate funds in personal property [*see Prob. Code §§ 2570, 2573*].

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

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24-290A California Forms of Pleading and Practice--Annotated § 290A.103

§ 290A.103 Petition for Authority to Invest Funds--Real Property [Prob. Code §§ 2570-2572]

[1] FORM Petition for Authority to Invest Funds--Real Property [Prob. Code §§ 2570-2572]

[*Caption. See § 290A.100.*]

Petitioner _____[*name*] respectfully represents:

1. [*Status of petitioner. See § 290A.100, Paragraph 1.*]

2. [*Availability of funds. See § 290A.100, Paragraph 2.*]

3. Petitioner proposes that the sum of $_____ be invested, subject to the approval of the court, in the purchase of real property located at _____[*street address*], _____[*city*], the legal description of which is as follows: _____[*set forth legal description*].

4. The real property was appraised on _____ (*date*), at the value of $_____, by the appraiser regularly appointed by the court. A copy of the appraisal is attached as Exhibit A.

[*EITHER*]

5. Petitioner proposes that the investment in the real property described above be made according to the terms and conditions _____ [in the proposed contract attached as Exhibit B *or* as follows: _____ (*set forth terms and conditions*)].

[*OR*]

5. Petitioner proposes that the real property described above be purchased as a home for _____ [the ward *or* the conservatee *or* names of legal dependents] according to the terms and conditions _____ [in the proposed contract of purchase attached as Exhibit B *or* as follows: _____ (*set forth terms and conditions*)].

[*OR*]

5. Petitioner proposes that he/she join with _____[*name*] in the purchase of [an interest in *or* an equity in *or* an estate in] the real property described above, in _____ [severalty *or* common *or* community *or* joint tenancy], _____ [for cash *or* on credit *or* for cash in the sum of $_____ and on credit for the remainder of the purchase price], and according to the additional terms and conditions _____ [in the proposed contract of purchase attached as Exhibit B *or* as follows: _____ (*set forth terms and conditions*)].

[*CONTINUE*]

6. This investment is prudent and in keeping with the size and character of the estate and _____ [should be authorized *or, if for purchase of home,* is to the advantage, benefit, and best interests of the _____ (ward *or* conservatee) *or* is to the advantage, benefit, and best interest of the _____ (ward *or* conservatee) and _____ (*names*), who are legally entitled to support and maintenance from the _____ (ward *or* conservatee)], in that _____[*describe reasons*].

7. [*Special notice allegation. See § 290A.100, Paragraph 5.*]

WHEREFORE, petitioner prays for an order authorizing petitioner to invest the sum of $_____ in the real property described above under the terms and conditions set forth above, and for such other and further orders as the court may deem proper.

[*Signature and verification. See § 290A.100.*]

[2] Use of Form

The petition in [1], *above*, is for use by the guardian or conservator in obtaining authority to invest estate funds in real property [*Prob. Code § 2570*]. The real property may be purchased as a home for the ward or conservatee if it is in California, or for persons legally entitled to support and maintenance from the ward or conservatee [*Prob. Code § 2571*]. The guardian or conservator may also join with the spouse of the ward or the spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*], of the conservatee or with any other persons in the purchase of the real property, or in an interest, equity, or estate in the property, in severalty, in common, in community, or in joint tenancy, for cash, on credit, or for part cash and part credit [*Prob. Code § 2572*].

[3] Contents of Petition

A petition under *Prob. Code §§ 2570-2572* should state the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2570(b)*].

- The amount of estate funds available for investment (Paragraph 2) [*see Prob. Code § 2570(a)*].

- A description of the real property and the amount proposed to be invested (Paragraph 3) [*see Prob. Code § 2570(a)*].

- The appraised value, which may be required by local rule [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 10.151(c)], with a copy of the appraisal attached as an exhibit to the petition (Paragraph 4).

- Proposed terms and conditions of the transaction (Paragraph 5) [*Prob. Code § 2570(e)*], including, when appropriate, that the property is purchased as a home for the ward or conservatee or his or her legal dependents [*see Prob. Code § 2571*] or that the guardian or conservator is joining with others in the purchase [*see Prob. Code § 2572*].

- Reasons why the investment should be authorized or, if it involves the purchase of a home, that it is in the best interests of the ward orconservatee or his or her legal dependents (Paragraph 6) [*Prob. Code § 2571*].

- Whether a request for special notice has been filed and, if so, that proper notice will be given or has been waived (Paragraph 7) [*see Prob. Code §§ 1260(a), 2700, 2701*].

The petition must be verified [*Prob. Code § 1021*].

[4] Notice

For discussion of the notice requirements for this petition *see Prob. Code § 2570(c)*], see *§ 290A.100[4]*.

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24-290A California Forms of Pleading and Practice--Annotated § 290A.104

§ 290A.104 Order Authorizing Investment of Funds--Real Property [Prob. Code §§ 2570-2572]

[1] FORM Order Authorizing Investment of Funds--Real Property [Prob. Code §§ 2570-2572]

[*Caption. See § 290A.102.*]

The petition of _____[*name*], as _____ [guardian *or* conservator] of the above-entitled estate, for authorization to invest estate funds in real property, came on regularly for hearing by the court on this date. The petitioner appeared by counsel _____[*name*]. _____[*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

[*EITHER*]

2. The petition for authority to invest the sum of $_____ from the estate in the purchase of real property should be granted as set forth in the following order.

[*OR*]

2. It is for the advantage, benefit, and best interests of the _____ [ward *or* conservatee] [and of _____ (*names of legal dependents*)] to invest the sum of $_____ in the purchase of real property [*if for ward or conservatee, add:* in California] as a home for _____ [the ward *or* the

conservatee *and/or names of legal dependents*] as set forth in the following order.

[*OR*]

2. The petition for authority to join with _____[*names*] in the purchase of real property should be granted as set forth in the following order.

[*CONTINUE*]

3. The real property in which the _____ [guardian *or* conservator] should be authorized to invest is described as follows: _____[*set forth legal description*].

4. The real property was appraised on _____ (*date*), at the value of $_____, by the appraiser appointed by the court.

IT IS ORDERED:

1. _____[*name*], as _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee], invest the sum of $_____ from the estate in the purchase of real property described above.

[*EITHER*]

2. The purchase be made according to the terms and conditions _____ [in the proposed contract of purchase attached to this order and incorporated by reference *or* as follow: _____ (*specify*)].

[*OR*]

2. The property be purchased as a home for _____ [the ward *or* the conservatee *or names of legal dependents*] according to the terms and conditions _____ [in the proposed contract of purchase attached to this order and incorporated by reference *or* that follow: _____ (*set forth terms and conditions*)].

[*OR*]

2. _____[*name*], as _____ [guardian *or* conservator], join with _____[*names*] in the purchase of [an interest in *or* an equity in *or* an estate in] the property, in _____ [severalty *or* common *or* community *or* joint tenancy], _____ [for cash *or* on credit *or* for cash in the sum of $_____ and on credit for the remainder of the purchase price], and according to the additional terms and conditions _____ [in the proposed contract of purchase attached to this order and incorporated by reference *or* as follows: _____ (*set forth terms and conditions*)].

[*CONTINUE*]

Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use when the court grants a petition [*see § 290A.103*] for authorization for the guardian or conservator to invest estate funds in real property [*see Prob. Code §§ 2570-2572*].

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

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24-290A California Forms of Pleading and Practice--Annotated §§ 290A.105-290A.109

[Reserved]

§§ 290A.105[Reserved]

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Volume 24: Guardianship and Conservatorship thru Guardians ad Litem-Chs. 280-291
Chapter 290A GUARDIANSHIP AND CONSERVATORSHIP: ASSET MANAGEMENT AND INVESTMENT
PART IV. FORMS
F. Transactions With Out-of-State Persons

24-290A California Forms of Pleading and Practice--Annotated § 290A.110

§ 290A.110 Petition for Authority to Transfer Personal Property Out of State When California Proceeding Is Pending [Prob. Code § 2803]

[1] FORM Petition for Authority to Transfer Personal Property Out of State When California Proceeding Is Pending [Prob. Code § 2803]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship of the [Person and] Estate of _____ [*name*], _____ [Ward *or* Conservatee].	)))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION FOR AUTHORITY TO TRANSFER PROPERTY OUT OF CALIFORNIA

Petitioner, _____[*name*], respectfully represents:

1. Petitioner is the duly appointed, qualified, and acting _____[foreign] _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee].

2. This petition is made for the purpose of obtaining an order to transfer personal property of the estate described below to _____[*name*] as _____ [guardian *or* conservator] in _____ [*foreign jurisdiction or* _____ County, State of _____].

3. The foreign _____ [guardian *or* conservator] resides at _____[*address*], _____[*city*], _____[*state or country*]. The _____ [ward *or*

conservatee], _____[*name*], resides at _____[*address*], _____[*city*], _____[*state or country*].

4. The names, ages, and addresses of the _____ [ward's *or* conservatee's] [spouse and] relatives within the second degree, as far as petitioner knows, are as follows: _____[*specify*].

5. The character, condition, value and location of the personal property comprising the assets sought to be transferred are as follows: _____[*specify*].

6. _____[*Name of foreign guardian or conservator*] has agreed to accept the transfer of personal property. A copy of the acceptance is attached as Exhibit A.

7. _____[*Name of foreign guardian or conservator*] was appointed _____ [guardian *or* conservator] of the [person and] estate of _____[*name*] on _____[*date*], on the petition of _____[*name*] in the _____ Court of _____ [the County of _____, State of _____ *or specify other jurisdictional unit*]. He/She has the following qualifications to act as _____ [guardian *or* conservator]: _____[*state briefly*].

8. _____[*Name of foreign guardian or conservator*] is now managing and controlling an estate of the _____ [ward *or* conservatee] containing the following personal property: _____[*specify briefly nature and value of assets*].

9. _____[*Name of foreign guardian or conservator*] has [not] furnished a bond [in the amount of $_____].

[10. _____ (*Name of foreign guardian or conservator*) is under the jurisdiction of _____ (*specify court*) *or* The accounts of _____ (*name of foreign guardian*) are under the jurisdiction of _____ (*specify court*) *or* Proceedings with respect to the _____ (guardianship *or* conservatorship) may be had in _____ (*specify court*) if the personal property is transferred.]

[*EITHER*]

11. No civil action is pending in California against the _____ [guardian *or* conservator *or* ward *or* conservatee *or* estate].

[*OR*]

11. A civil action is pending against the _____ [guardian *or* conservator *or* ward *or* conservatee *or* estate] in the _____ Court of _____ County, California, for _____[*describe briefly relief sought*]. The title of the action is _____[*specify*], and the case number is _____. The following pleadings and papers have been filed, and proceedings have been held in the action: _____[*specify*].

[*CONTINUE*]

12. The names, addresses, and claims of creditors and claimants of the estate in California, as far as petitioner knows, are as follows: _____[*specify*].

13. The inventory and appraisal filed on _____[*date*] shows that there will [not] be personal property of the estate remaining in California after transfer of the assets described above.

14. The reasons for transferring the personal property of the estate described above to _____[*name of foreign guardian or conservator*] in _____[*name of state or foreign jurisdiction*] are as follows: _____[*specify*].

15. A request for special notice has _____ [not been filed *or* been filed by _____ (*name*), and notice of the time and place of hearing on this petition will be given as required by law *or* been filed and waived by _____ (*name*)].

WHEREFORE, petitioner prays for an order to transfer the personal property of the estate described above to _____[*name of foreign guardian or conservator*], _____ [guardian *or* conservator], in _____ [*foreign jurisdiction or* the County of _____, State of _____], and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

Petitioner

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The petition in [1], *above*, is for use in obtaining an order authorizing the transfer of some or all of the personal property of the guardianship or conservatorship estate to a foreign guardian or conservator in another state or country where the ward or conservatee resides at the time the petition to transfer is filed [*Prob. Code § 2801*]. The phrase "foreign guardian or conservator" means a guardian, conservator, committee, or comparable fiduciary in another jurisdiction [*Prob. Code § 2800*].

[3] Contents of Petition

The petition must state all the following:

- The name and address of the foreign guardian or conservator (who may be, but need not be, the guardian or conservator appointed in California), the ward or conservatee, and the California guardian or conservator (Paragraph 3) [*Prob. Code § 2803(a)*].

- The names, ages, and addresses, as far as they are known to the petitioner, of the spouse of the ward or the spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*], of the conservatee and the relatives of the ward or conservatee and of the relatives of the ward or conservatee within the second degree (Paragraph 4) [*Prob. Code § 2803(b)*.

- A brief description of the character, condition, value, and location of the personal property sought to be transferred (Paragraph 5) [*Prob. Code § 2803(c)*].

- Whether the foreign guardian or conservator has agreed to accept the transfer of the personal property; if he or she has agreed, the acceptance must be attached as an exhibit to the petition or otherwise filed with the court (Paragraph 6) [*Prob. Code § 2803(d)*].

- The manner in which the foreign guardian or conservator was appointed, who appointed him or her, and a general statement of his or her qualifications (Paragraph 7) [*Prob. Code § 2803(e), (f)*].

- The general nature and value of the ward's or conservatee's assets already under the foreign guardian's or conservator's management or control (Paragraph 8) [*Prob. Code § 2803(h)*].

- The amount of bond, if any, of the foreign guardian or conservator (Paragraph 9) [*Prob. Code § 2803(g)*].

- The name of the court having jurisdiction of the foreign guardian or conservator or of his or her accounts or, if none, the court in which a proceeding may be had with respect to the guardianship or conservatorship if the personal property is transferred (Paragraph 10) [*Prob. Code § 2803(i)*].

- Whether any civil action is pending in California against the guardian or conservator, the ward or conservatee, or the estate (Paragraph 11) [*Prob. Code § 2803(j)*].

- The reasons for the transfer (Paragraph 14) [*Prob. Code § 2803(k)*].

The petition should include the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2802*].

- A general description of the petition's purpose (Paragraph 2) [*see Prob. Code § 2801*].

- A general description of creditors and claimants of the estate (Paragraph 12) [*see Prob. Code § 2806(b)*].

- Whether any estate property will remain in California after the transfer (Paragraph 13) [*see Prob. Code § 2808*].

- Whether special notice has been requested (Paragraph 15).

The petition must be verified [*Prob. Code § 1021*].

[4] Notice

At least 30 days before the hearing, the petitioner must mail a notice of the time and place of the hearing and a copy of the petition to each person required to be listed in the petition at the address stated in the petition [*Prob. Code § 2804*]. These persons include the foreign and California guardian or conservator, the ward or conservatee, and the the spouse of the ward or the spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*], of the conservatee and the relatives of the ward or conservatee within the second degree [*Prob. Code § 2803(a), (b)*]. Special notice must be given to persons who have filed a written request under *Prob. Code § 2700 et seq.* [*Prob. Code §§ 1460(d), 2700 et seq.*]. For further discussion and a form of notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

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24-290A California Forms of Pleading and Practice--Annotated § 290A.111

§ 290A.111 Order Authorizing Transfer of Personal Property Out of State When California Proceeding Is Pending [Prob. Code § 2806]

[1] FORM Order Authorizing Transfer of Personal Property Out of State When California Proceeding Is Pending [Prob. Code § 2806]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship of the [Person and] Estate of _____ [*name*], _____ [Ward *or* Conservatee].	))))	NO. _____ ORDER

The petition of _____[*name*], the _____ [guardian *or* conservator] of the above-entitled estate, for an order authorizing the transfer of personal property of the estate to _____[*name of foreign guardian or conservator*] as foreign _____ [guardian *or* conservator] in _____ [*name of foreign jurisdiction or* _____ County, State of _____], came on regularly for hearing by the court on this date. The petitioner appeared by counsel _____[*name*]. _____[*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. The property proposed to be transferred to the foreign _____ [guardian *or* conservator] is as follows: _____[*specify character, condition, value, and location of property*].

3. The proposed transfer of property will promote the best interests of the _____ [ward *or* conservatee] and the estate.

4. _____[*Name of foreign guardian or conservator*], as proposed transferee of the property, is qualified, willing, and able to administer the property.

5. The proposed transfer of property will not materially impair any substantial rights of California creditors of the _____ (ward *or* conservatee *and/or* estate) or claimants to the property.

IT IS ORDERED that _____[*name*], as _____ [guardian *or* conservator], transfer the above-described personal property to _____[*name*], as foreign _____ [guardian *or* conservator].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use when the court grants a petition [*see § 290A.110*] for authorization for the guardian or conservator to transfer some or all of the personal property of the ward or conservatee to a guardian or conservator in another state or country [*see Prob. Code § 2806*].

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Required Findings

The court may grant the petition and order the transfer if it determines all of the following [*Prob. Code § 2806*]:

- The transfer will promote the best interests of the ward or conservatee and the estate.

- The substantial rights of creditors or claimants in California will not be materially impaired by the transfer.

- The foreign guardian or conservator is qualified, willing, and able to administer the assets to be transferred.

If a transfer is ordered, the court may direct the manner of transfer and impose such terms and conditions as may be just [*Prob. Code § 2807*].

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24-290A California Forms of Pleading and Practice--Annotated § 290A.112

§ 290A.112 Petition for Authority to Remove Nonresident's Property From State When No California Proceeding Is Pending [Prob. Code § 3800]

[1] FORM Petition for Authority to Remove Nonresident's Property From State When No California Proceeding Is Pending [Prob. Code § 3800]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	[Hearing set for _____ (*date*),
Matter of _____ [*name*].	)	at _____ (*time*), in Dept. No.
	)	_____]
	)	PETITION FOR AUTHORITY TO
	)	REMOVE PROPERTY OF
	)	NONRESIDENT
_____		

Petitioner _____[*name*] respectfully represents:

1. Petitioner is the duly appointed, qualified, and acting _____ [guardian *or* conservator *or* committee *or specify other fiduciary capacity*] in _____[*state or foreign country*] of the [person and] estate of _____[*name*], a nonresident _____ [ward *or* conservatee *or specify other designation*].

2. Petitioner resides at _____[*address*], _____[*city*], _____[*state or foreign country*]. The _____ [ward *or* conservatee *or specify other designation*] resides at _____[*address*], _____[*city*], _____[*state or foreign country*].

[*EITHER*]

3. The _____ [ward *or* conservatee *or specify other designation*] _____ [is *or* has been] temporarily present in this county.

[*OR*]

3. The _____ [ward *or* conservatee *or specify other designation*] owns the property described below, _____ [all *or* the principal part] of which is situated in this county.

[*CONTINUE*]

4. Petitioner requests the court's permission to remove the following property of the _____ [ward *or* conservatee *or specify other designation*]: _____[*describe each item of property and state location and approximate value*].

5. As far as petitioner knows, the removal of the property described above does not conflict with any restriction or limitation on the property, or impair the right of the _____ [ward *or* conservatee *or specify other designation*] to the property or the rights of creditors or claimants in California.

6. As far as petitioner knows, no proceeding for guardianship or conservatorship pertaining to the _____ [ward *or* conservatee *or specify other designation*] is pending or contemplated in California.

[*EITHER*]

7. Attached as Exhibit A is a certificate, under the hand of the clerk and the seal of the _____[*specify court*], from which petitioner's appointment as _____ [guardian *or* conservator *or* committee *or specify other fiduciary capacity*] was derived, showing (1) a transcript of the record of his/her appointment, (2) that he/she has entered on the discharge of his/her duties, and (3) that he/she is entitled, by the laws of the place of his/her appointment, to the possession of the estate of the _____ [ward *or* conservatee *or specify other designation*].

[*OR*]

7. Attached as Exhibit A is a certificate, under the hand of the clerk and the seal of _____[*specify court*], which is the _____ [court in the _____ (ward's *or* conservatee's *or specify other designation*) place of residence having jurisdiction of estates of persons that have a guardian, conservator, committee, or comparable fiduciary *or* highest court in the _____ (ward's *or* conservatee's *or specify other designation*) place of residence], showing that petitioner is entitled, by the laws of _____[*name of nonresident ward's or conservatee's place of residence*], to custody of the estate of the _____ [ward *or* conservatee *or specify other designation*], without the appointment of any court.

[*CONTINUE*]

[8. Exhibit B is a final statement that accompanies the certificate described above and certifies the genuineness of the signature and official position of the _____ (court clerk making the original certificate *or* foreign official who has certified the signature and position of the _____ [court clerk *or specify other appropriate foreign official involved in chain of certifications*]).]

WHEREFORE, petitioner prays for an order granting him/her permission to remove the property of the _____ [ward *or* conservatee *or specify other designation*] described above and situated in California, to the place of residence of the _____ [ward *or* conservatee *or specify other designation*], and for such other and further orders as the court may deem proper.

[*Signature and verification. See § 290A.110.*]

[2] Use of Form

The petition in [1], *above*, is for use by a duly appointed, qualified, and acting nonresident guardian, conservator, committee, or comparable fiduciary, in obtaining court authorization to remove property owned by a nonresident to the owner's place of residence [*Prob. Code § 3800(a)*].

[3] Jurisdiction and Venue

The petition must be filed in the superior court in the county in which the nonresident is or has been temporarily present or in which his or her property, or the principal part of it, is located [*Prob. Code § 3800(b)*].

[4] Contents of Petition

A petition under *Prob. Code § 3800* should state the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 3800(a)*].
- The residence of the fiduciary and owner (Paragraph 2) [*see Prob. Code § 3800(a)*].
- The county where the owner has been temporarily present or in which all or the principal part of his or her property is located (Paragraph 3) [*see Prob. Code § 3800(b)*].
- A general description of the property, including its approximate value if available or required or suggested by the court or local rules (Paragraph 4).
- That the removal will not conflict with restrictions on the property or impair the rights of the nonresident or of creditors in California (Paragraphs 5 and 6) [*see Prob. Code §§ 3800(a), 3803(a)*].
- That a certificate showing the petitioner's right to possess or have custody of the estate is attached, along with a final statement of certification if the owner's place of residence is in a foreign country (Paragraphs 7 and 8) [*see Prob. Code § 3802*].

The petition must be verified [*Prob. Code § 1021*].

[5] Accompanying Certificates

The nonresident fiduciary must produce and file a certificate that the fiduciary is entitled, by the laws of the place of appointment of the fiduciary, to the possession of the estate of the nonresident. The certificate must be under the hand of the clerk and the seal of the court from which the appointment of the fiduciary was derived and must show a transcript

of the record of appointment and that the fiduciary has entered on the discharge of his or her duties [*Prob. Code § 3802(a)*].

Alternatively, the nonresident fiduciary may produce and file a certificate that the fiduciary is entitled, by the laws of the place of residence, to custody of the estate of the nonresident without the appointment of any court. The certificate must be under the hand of the clerk and the seal of either the highest court in the place of residence or the court in the place of residence having jurisdiction of estates of persons that have a guardian, conservator, committee, or comparable fiduciary [*Prob. Code § 3802(a)*].

If the place of residence is in a foreign country, the certificate must be accompanied by a final statement certifying the genuineness of the signature and official position of either the court clerk making the original certificate or any foreign official who has certified either the genuineness of the signature and official position of the court clerk making the original certificate, or the genuineness of the signature and official position of another foreign official who has executed a similar certificate in a chain of such certificates (beginning with a certificate of the genuineness of the signature and official position of the clerk making the original certificate). The final statement may be made only by a secretary of an embassy or legation, consul general, consul, vice-consul, or consular agent of the United States, or by a diplomatic or consular official of the foreign country assigned or accredited to the United States [*Prob. Code § 3802(b)*].

[6] Notice

The petition must be made on 15 days' notice, by mail or personal delivery, to the guardian or conservator or other person in whose possession the property may be and all persons in California, known to the petitioner, who are obligated to pay a debt, to perform an obligation, or to issue a security to the nonresident or his or her estate [*Prob. Code § 3801(a)*]. The court may order additional notice [*Prob. Code § 3801(b)*].

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24-290A California Forms of Pleading and Practice--Annotated § 290A.113

§ 290A.113 Order Authorizing Removal of Nonresident's Property From State When No California Proceeding Is Pending [Prob. Code § 3803]

[1] FORM Order Authorizing Removal of Nonresident's Property From State When No California Proceeding Is Pending [Prob. Code § 3803]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Matter of _____ [*name*].	)	ORDER
	)	

_____

The petition of _____[*name*], as the nonresident _____ [guardian *or* conservator *or* committee *or specify other fiduciary capacity*] of the [person and] estate of _____[*name*], a nonresident _____ [ward *or* conservatee *or specify other designation*], for permission to remove property of the _____ [ward *or* conservatee *or specify other designation*] to the place of his/her residence, came on regularly for hearing by the court on this date. The petitioner appeared by counsel _____[*name*]. _____[*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. Petitioner is the duly appointed, qualified, and acting _____ [guardian *or* conservator *or* committee *or specify other fiduciary capacity*] in _____[*name of state or foreign country*] of the [person and]

estate of _____[*name*], a nonresident _____ [ward *or* conservatee *or specify other designation*].

3. Petitioner has filed the certificate required by law to establish his/her fiduciary position and the fact that he/she is entitled to the _____ [possession *or* custody] of the estate. [He/She has also filed the final statement required by law that certifies the genuineness of the signature and official position of the original certifying officer.]

4. Petitioner resides at _____[*address*], _____[*city*], _____[*state or foreign country*], and the _____ [ward *or* conservatee *or specify other designation*] resides at _____[*address*], _____[*city*], _____[*state or foreign country*].

[*EITHER*]

5. The _____ [ward *or* conservatee *or specify other designation*] _____ [has been temporarily present in this county *and/or* owns property situated in this county, as described below].

[*OR*]

5. The _____ [ward *or* conservatee *or specify other designation*] owns property, _____ [all of which is situated in this county *or* the principal part of which is situated in this county with the remainder situated in the County of _____], and which is described below.

[*CONTINUE*]

6. The removal of the property described below from California to the owner's place of residence will not conflict with any restriction or limitation on the property or impair the right of the nonresident owner to the property or the rights of creditors or claimants in California.

7. No proceeding for guardianship or conservatorship of the nonresident property owner is pending in California.

IT IS ORDERED that _____[*name*], as _____ [guardian *or* conservator *or specify other fiduciary capacity*] in _____[*name of state or foreign country*] of the [person and] estate of _____[*name*], a _____ [ward *or* conservatee *or specify other designation*] residing in _____[*name of state or foreign nation*], may remove from California to the place of residence of the _____ [ward *or* conservatee *or specify other designation*] the following property: _____[*give location and description*].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use when the court grants a petition [*see § 290A.112*] for authorization to remove property of a nonresident who has a guardian, conservator, committee, or other comparable fiduciary in the nonresident's place of residence [*see Prob. Code § 3803*].

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Required Findings

If the court determines that removal of the property will not conflict with any restriction or limitation on the property or impair the right of the nonresident to the property or the rights of creditors or claimants in California, the court must make an order granting to the nonresident fiduciary leave to remove the property of the nonresident to the place of residence unless good cause to the contrary is shown [*Prob. Code § 3803(a)*].

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PART IV. FORMS
G. Opening or Changing Bank Account or Safe Deposit Box

24-290A California Forms of Pleading and Practice--Annotated § 290A.120

§ 290A.120 Notice of Opening or Changing a Guardianship or Conservatorship Account or Safe Deposit Box [Prob. Code § 2892]--Judicial Council Form GC-051

[1] FORM Notice of Opening or Changing a Guardianship or Conservatorship Account or Safe Deposit Box [Prob. Code § 2892]--Judicial Council Form GC-051

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a filled-in reproduction of California Judicial Council Form GC-051, which a financial institution must submit to the court when a guardian or conservator opens or changes the name to an account or safe deposit box in the institution [*see Prob. Code § 2892(a)*]. The notice must state all of the following [*Prob. Code § 2892(a)*]:

- The name of the person with whom the account or safe deposit box is opened or changed.
- The account number or reference number
- The date the account or safe deposit box was opened or changed ownership.
- The balance as of the date the account was open or changed if the asset is held in an account.
- A list of the contents of the safe deposit box if the financial institution has been given access to the box.
- The name and address of the financial institution.

Use of this form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at

www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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24-290B California Forms of Pleading and Practice--Annotated 290B.syn

§ 290B.syn Synopsis to Chapter 290B: GUARDIANSHIP AND CONSERVATORSHIP: SUBSTITUTED JUDGMENT

§ 290B.01 Scope of Chapter

§ 290B.02 Cross References

§§ 290B.03-290B.09 [Reserved]

§ 290B.10 Governing Statutes

§ 290B.11 Grounds for Substituted Judgment

§ 290B.12 Proposed Actions

§ 290B.13 Court's Determination

[1] Standards

[2] Effect of Order

[3] Appealability of Order

§ 290B.14 Production of Estate Plan Documents

§§ 290B.15-290B.29 [Reserved]

§ 290B.30 Related Matthew Bender Publications

§ 290B.31 State Statutes

§ 290B.32 Decisions

§ 290B.33 Text References

§§ 290B.34-290B.39 [Reserved]

§ 290B.40 Petition to Authorize Proposed Action Pursuant to Substituted Judgment Doctrine [Prob. Code § 2580]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Notice

§ 290B.41 Order Authorizing Proposed Action Pursuant to Substituted Judgment Doctrine [Prob. Code § 2584]

[1] FORM

[2] Use of Form

[3] Required Findings

[4] Recordation of Order

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PART I. SCOPE

24-290B California Forms of Pleading and Practice--Annotated § 290B.01

§ 290B.01 Scope of Chapter

This chapter discusses the substituted judgment doctrine [*see § 290B.10* et seq.]. The chapter includes a petition [*see § 290B.40*] and an order [*see § 290B.41*] to act pursuant to the substituted judgment doctrine.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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PART I. SCOPE

24-290B California Forms of Pleading and Practice--Annotated § 290B.02

§ 290B.02 Cross References

For discussion and forms pertaining to various aspects of estate management, see the following chapters:

- Ch. 286, *Guardianship and Conservatorship: Inventory and Appraisal.*
- Ch. 287, *Guardianship and Conservatorship: General Management Powers.*
- Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers.*
- Ch. 289, *Guardianship and Conservatorship: Management of Community Property.*
- Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee.*
- Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment.*
- Ch. 290C, *Guardianship and Conservatorship: Actions and Disputed Claims.*
- Ch. 290D, *Guardianship and Conservatorship: Actions Against Guardian or Conservator.*
- Ch. 290E, *Guardianship and Conservatorship: Accounts.*
- Ch. 290F, *Guardianship and Conservatorship: Compensation of Guardian or Conservator.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & Inventories

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Chapter 290B GUARDIANSHIP AND CONSERVATORSHIP: SUBSTITUTED JUDGMENT
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24-290B California Forms of Pleading and Practice--Annotated §§ 290B.03-290B.09

[Reserved]

§§ 290B.03[Reserved]

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24-290B California Forms of Pleading and Practice--Annotated § 290B.10

§ 290B.10 Governing Statutes

The substituted judgment doctrine is governed by *Prob. Code § 2580 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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24-290B California Forms of Pleading and Practice--Annotated § 290B.11

§ 290B.11 Grounds for Substituted Judgment

A court is authorized to substitute its judgment for that of the conservatee under *Prob. Code § 2580 et seq.* [*Conservatorship of McElroy (2002) 104 Cal. App. 4th 536, 552, 128 Cal. Rptr. 2d 485]* . Accordingly, the court has the power and authority to determine whether to authorize transfers of the conservatee's property for the purpose of avoiding unnecessary estate or inheritance taxes or expenses of administration, and to authorize this action when it appears from all of the circumstances that the conservatee, if competent, as a reasonably prudent person, would so plan his or her estate, there being no substantial evidence of a contrary intent [*Conservatorship of McElroy (2002) 104 Cal. App. 4th 536, 552, 128 Cal. Rptr. 2d 485]* . The court need not find that the conservatee would have acted as proposed. Instead, an objective, prudent person standard applies, which contemplates substitution of the court's judgment for that of the conservatee [*Conservatorship of McDowell (2004) 125 Cal. App. 4th 659, 665, 23 Cal. Rptr. 3d 10* ; *Conservatorship of McElroy (2002) 104 Cal. App. 4th 536, 552, 128 Cal. Rptr. 2d 485]* . The court may make an order authorizing or requiring the conservator to take the proposed action [*see* [2], *below*] for any one or more of the following purposes [*Prob. Code § 2580(a)*]:

- To benefit the conservatee or the estate.

- To minimize current or prospective taxes or expenses of administration of the conservatorship estate or of the estate on the death of the conservatee.

- To provide gifts for any purposes, and to any charities, relatives (including the conservatee's spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*]), friends, or other objects of bounty, that would be likely beneficiaries of gifts from the conservatee.

The conservator or any other interested person may file a petition to obtain the order [*Prob. Code § 2580(a)*; *see § 290B.40*]. The statutory provisions governing substituted judgment do not, however, impose any duty on the conservator to propose any action, and the conservator is not liable for failure to propose any action under these provisions [*Prob. Code § 2585*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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24-290B California Forms of Pleading and Practice--Annotated § 290B.12

§ 290B.12 Proposed Actions

In the petition the conservator may propose any action; in particular, the conservator may propose to do any of the following [*Prob. Code § 2580(b)*]:

- Make gifts of principal or income, or both, of the estate, outright or in trust.
- Convey or release the conservatee's contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety.
- Exercise or release the conservatee's powers as a donee of a power of appointment.
- Enter into contracts.
- Create, for the benefit of the conservatee or others, revocable or irrevocable trusts of the property of the estate, which trusts may extend beyond the conservatee's disability or life.
- Transfer to a trust created by the conservator or conservatee any property unintentionally omitted from the trust.
- Exercise the conservatee's options to purchase or exchange securities or other property.
- Exercise the conservatee's rights to elect benefit or payment options under:
    - Life insurance policies, plans, or benefits.
    - Annuity policies, plans, or benefits.
    - Mutual fund and other dividend investment plans.

- Retirement, profit sharing, and employee welfare plans and benefits.

- Exercise the conservatee's rights to terminate any such policy, plan, or benefit; to change beneficiaries or ownership; to assign rights; to borrow; or to receive cash value in return for a surrender of rights.

- Exercise the conservatee's right to elect to take under or against a will.

- Exercise the conservatee's right to disclaim any interest that may be disclaimed under *Prob. Code § 260 et seq.* (concerning the disclaimer of testamentary and other interests).

- Make an election referred to in *Prob. Code § 13502* or an election and agreement referred to in *Prob. Code § 13503* (concerning probate of certain property).

- Make a will [*see Prob. Code §§ 6100(b), 6100.5(c)*].

- Exercise the conservatee's right to revoke a revocable trust or to surrender the right to revoke a revocable trust.

The court may not authorize or require the conservator to revoke, or to surrender the right to revoke, a revocable trust if the instrument governing the trust evidences an intent to reserve the right exclusively to the conservatee, or provides expressly that a conservator may not revoke the trust, or otherwise evidences an intent that would be inconsistent with authorizing or requiring the conservator to exercise the right [*Prob. Code § 2580(b)(11)*].

If, after the conservatee's death, property is discovered that has been unintentionally omitted from a trust created by the conservator or the conservatee, the conservator has control of the property pending its disposition according to law [*Prob. Code § 2580(b)(6)*; *see* Cal. Law Revision Comm'n Comment to *Prob. Code § 2580*; *see also Prob. Code §§ 2467, 2630* (conservator's duty of custody and conservation of estate after conservatee's death; continuing jurisdiction of court)].

A special needs trust for money paid pursuant to a compromise or judgment for a conservatee can be established only under *Prob. Code § 3600 et seq.* [*see* Ch. 290C, *Guardianship and Conservatorship: Actions and Disputed Claims*], not under *Prob. Code § 2580 et seq.* [*Prob. Code § 2580(b)(5)*; *see* Cal. Law Revision Comm'n Comment to *Prob. Code § 2580*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsRevocable Living TrustsEstate, Gift & Trust LawWillsBeneficiariesElections

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24-290B California Forms of Pleading and Practice--Annotated § 290B.13

§ 290B.13 Court's Determination

[1] Standards

In determining whether to authorize or require a proposed action under this article, the court must take into consideration all the relevant circumstances, which may include, but are not limited to, the following [*Prob. Code § 2583*]:

- Whether the conservatee has legal capacity for the proposed transaction and, if not, the probability of the conservatee's recovery of legal capacity.
- The past donative declarations, practices, and conduct of the conservatee.
- The traits of the conservatee.
- The relationship and intimacy of the prospective donees with the conservatee, their standards of living, and the extent to which they would be natural objects of the conservatee's bounty by any objective test based on such relationship, intimacy, and standards of living.
- The wishes of the conservatee.
- Any known estate plan of the conservatee, including, but not limited to:
    - The conservatee's will.
    - Any trust of which the conservatee is the settlor or beneficiary.
    - Any power of appointment created by or exercisable by the conservatee.
    - Any contract, transfer, or joint ownership arrangement with provisions for payment

or transfer of benefits or interests at the conservatee's death to another or others which the conservatee may have originated.

- The manner in which the estate would devolve on the conservatee's death, giving consideration to the age and the mental and physical condition of the conservatee, the prospective devisees or heirs of the conservatee, and the prospective donees.

- The value, liquidity, and productiveness of the estate.

- The minimization of current or prospective income, estate, inheritance, or other taxes or expenses of administration.

- Changes of tax laws and other laws that would likely have motivated the conservatee to alter the conservatee's estate plan.

- The likelihood from all the circumstances that the conservatee as a reasonably prudent person would take the proposed action if the conservatee had the capacity to do so.

- Whether any beneficiary is a person described in *Prob. Code § 21350(b)(1)*, that is, the conservatee's spouse.

- Whether a beneficiary has committed physical abuse, neglect, false imprisonment, or fiduciary abuse against the conservatee after the conservatee was substantially unable to manage his or her financial resources, or resist fraud or undue influence, and the conservatee's disability persisted throughout the time of the hearing on the proposed substituted judgment.

A matter not listed above may be significant in a particular case. For example, the conservatee may have received property from a parent with the understanding that the conservatee would leave the property to the descendants of that parent. That understanding would be a circumstance that the court should consider along with other relevant circumstances [*see* Cal. L. Revision Comm'n Comments to *Prob. Code § 2583*]. Another example is the ability of a court, under the substituted judgment doctrine, to establish a special needs trust, provided that the conservatee is not opposed to the order, or, if opposed, lacks legal capacity [*see Conservatorship of Kane (2006) 137 Cal. App. 4th 400, 404, 40 Cal. Rptr. 3d 378]* .

The court is not required to conduct an evidentiary hearing when the verified petition for substituted judgment makes a sufficient showing of the statutory circumstances to justify granting the petition [*Conservatorship of McElroy (2002) 104 Cal. App. 4th 536, 555, 128 Cal. Rptr. 2d 485]* . The court has the discretion to determine if the petition is sufficient or to decide that it needs further information in order to be in a position analogous to the conservatee or a reasonably prudent person [*Conservatorship of McElroy (2002) 104 Cal. App. 4th 536, 555, 128 Cal. Rptr. 2d 485]* .

[2] Effect of Order

A conveyance, lease, or mortgage of, or deed of trust on, real property executed by a conservator must state that it is made by authority of the court order authorizing the transaction and must give the date of the order [*Prob. Code § 2111(c)*].

A conveyance or transfer of estate property authorized or directed by the court must be carried out by the conservator in accordance with the terms of the order. The transaction will have the same effect as if the conservatee had carried it out while having legal capacity to do so [*Prob. Code § 2111(b), (d)*].

[3] Appealability of Order

An order authorizing or refusing to authorize a conservator to take action under the substituted judgment doctrine of *Prob. Code § 2580 et seq.* is appealable [*Prob. Code § 1301(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewReal Property LawOwnership & TransferAgents & Fiduciaries

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24-290B California Forms of Pleading and Practice--Annotated § 290B.14

§ 290B.14 Production of Estate Plan Documents

Notwithstanding the lawyer-client privilege [*Evid. Code § 950 et seq.*], the court, in its discretion, may order that any person having possession of any document constituting all or part of the estate plan of the conservatee must deliver the document to the court for examination by the court. The court, in the court's discretion, may permit examination by the attorneys for the persons who have appeared in the proceedings, in connection with the petition filed to authorize proposed actions [*Prob. Code § 2586(b)*]. The phrase "estate plan of the conservatee" includes but is not limited to [*Prob. Code § 2586(a)*]:

- The conservatee's will.
- Any trust of which the conservatee is the settlor or beneficiary.
- Any power of appointment created by or exercisable by the conservatee.
- Any contract, transfer, or joint ownership arrangement originated by the conservatee that contains provisions for payment or transfer of benefits or interests at the conservatee's death to another person.

Unless the court otherwise orders, no person who examines any document ordered to be produced pursuant *Prob. Code § 2586* may disclose the contents of the document to any other person. If unauthorized disclosure is made, the court may adjudge the person making the disclosure to be in contempt of court [*Prob. Code § 2586(c)*]. For discussion of contempt proceedings, see Ch. 135, *Contempt* .

For good cause, the court may order that documents constituting all or part of the estate plan of the conservatee, whether or not produced pursuant to *Prob. Code § 2586*, be delivered for safekeeping to a custodian designated by the court [*Prob. Code § 2586(d)*]. The court may impose any conditions it determines appropriate for holding and safeguarding the documents [*Prob. Code § 2586(d)*]. It may authorize the conservator to take any action that a depositor of estate plan documents may take under *Prob. Code § 700 et seq.* (concerning deposit of estate planning documents with attorney) [*Prob. Code § 2586(d)*].

The procedure for obtaining a production order is not expressly set out, but one procedure that may be adopted by the courts is to make an ex parte application for a citation and order to show cause directing thecustodian to appear and show cause why he or she should not be ordered to produce the estate plan documents [*see, e.g.,* *Mastick v. Superior Court (1892) 94 Cal. 347, 348, 29 P. 869* ; *Vigne v. Superior Court (1940) 37 Cal. App. 2d 346, 348, 99 P.2d 589* ; *see also* Ch. 372, *Motions and Orders*]. Local practice should be followed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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24-290B California Forms of Pleading and Practice--Annotated §§ 290B.15-290B.29

[Reserved]

§§ 290B.15[Reserved]

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24-290B California Forms of Pleading and Practice--Annotated § 290B.30

§ 290B.30 Related Matthew Bender Publications

For contracts and other transactional forms relating to actions that could be taken under the substituted judgment doctrine, see generally California Legal Forms (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral Overview

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24-290B California Forms of Pleading and Practice--Annotated § 290B.31

§ 290B.31 State Statutes

Petition to authorize proposed action in conservatorship. *Prob. Code § 2580*

Notice. *Prob. Code § 2581*

Determination by court. *Prob. Code §§ 2582-2584*

No duty to propose any action. *Prob. Code § 2585*

Production of estate plan documents. *Prob. Code § 2586*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawProbateGeneral Overview

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24-290B California Forms of Pleading and Practice--Annotated § 290B.32

§ 290B.32 Decisions

Court could authorize gifts from excess income for charitable and religious purposes with object of carrying out presumed wishes of ward. *Harris v. Harris (1962) 57 Cal. 2d 367, 370-371, 19 Cal. Rptr. 793, 369 P.2d 481*

Collateral estoppel prevented beneficiary from bringing action for fraud and undue influence relating to trust and testamentary instruments when issues of fraud and undue influence were necessarily adjudicated and decided in a prior substituted judgment proceeding. *Murphy v. Murphy (2008) 164 Cal. App. 4th 376, 405, 78 Cal. Rptr. 3d 784*

Under substituted judgment doctrine, court may establish special needs trust, provided that conservatee is not opposed to order or, if opposed, lacks legal capacity. *Conservatorship of Kane (2006) 137 Cal. App. 4th 400, 404, 40 Cal. Rptr. 3d 378*

Court is not required to conduct evidentiary hearing when verified petition for substituted judgment makes sufficient showing of statutory circumstances to justify granting petition. *Conservatorship of McElroy (2002) 104 Cal. App. 4th 536, 555, 128 Cal. Rptr. 2d 485*

Remand for reconsideration was required when trial court was misinformed on relevant circumstances affecting gifts made pursuant to *Prob. Code § 2580 et seq.* *Conservatorship of Hart (1991) 228 Cal. App. 3d 1244, 1251, 1265-1270, 279 Cal. Rptr. 249*

Prob. Code § 2580 does not permit conservatee's will to be made and executed by conservator or attorney or probate court. *Conservatorship of Romo (1987) 190 Cal. App. 3d 279, 284-285, 235 Cal. Rptr. 377*

Court could authorize gifts to conservatee's next of kin. *Conservatorship of Wemyss (1971) 20 Cal. App. 3d 877, 880, 98 Cal. Rptr. 85*

Court could authorize gifts of excess funds to relatives to reduce estate taxes. *Estate of Christiansen (1967) 248 Cal. App. 2d 398, 424-427, 56 Cal. Rptr. 505*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawPersonal GiftsGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawWillsExecution

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24-290B California Forms of Pleading and Practice--Annotated § 290B.33

§ 290B.33 Text References

Witkin, Summary of California Law, vol. 12, *Wills and Probate*, §§ 944-946 (9th ed. 1990)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawWillsGeneral Overview

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[Reserved]

§§ 290B.34[Reserved]

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PART IV. FORMS

24-290B California Forms of Pleading and Practice--Annotated § 290B.40

§ 290B.40 Petition to Authorize Proposed Action Pursuant to Substituted Judgment Doctrine [Prob. Code § 2580]

[1] FORM Petition to Authorize Proposed Action Pursuant to Substituted--Judgment Doctrine

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Conservatorship of the [Person and] Estate of	)	[Hearing set for _____ (*date*), at
_____ [*name*],	)	_____ (*time*), in Dept. No. _____]
Conservatee.	)	PETITION TO AUTHORIZE PROPOSED ACTION

_____

Petitioner _____[*name*] respectfully represents:

1. Petitioner is _____ [the duly appointed, qualified, and acting conservator of *or* a person interested in] the [person and] estate of _____[*name*], conservatee[, in that _____ (*specify nature of interest if appropriate*)].

2. The inventory and appraisal filed _____[*date*] shows that the value of the conservatee's estate is approximately $_____, including cash and _____[*identify other liquid assets*] valued at approximately $_____. The estate produces annual income of approximately $_____.

3. The expenses of the support and maintenance of the conservatee, together with the expenses of administration and management of the estate, taxes, and an appropriate contingency reserve, require annual income of $_____.

4. Petitioner proposes that _____ [he/she, as conservator, or the conservator] be _____ [authorized *or* required] to _____ [*specify action proposed, e.g.*, make a gift of $5,000 from the principal of the estate outright to the conservatee's only grandchild for the purpose of assisting her in furthering her education].

5. The conservatee _____ [is not opposed to the proposed action *or* lacks legal capacity for the proposed action].

6. _____ [The proposed action will have no adverse effect on the estate *or* The estate remaining after the proposed action is taken will be adequate to provide for the needs of the conservatee and for the support of persons legally entitled to support, maintenance, and education from the conservatee] in that _____[*specify relevant circumstances*].

7. A request for special notice has _____ [not been filed *or* been filed by _____ (*name*), and notice of the time and place of hearing on this petition will be given as required by law *or* been filed and waived by _____ (*name*)].

WHEREFORE, petitioner prays for an order _____ [authorizing *or* requiring] _____ [petitioner, as conservator, *or* the conservator] to take the proposed action described above, and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

Petitioner

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The petition in [1], *above*, is for use by a conservator or any interested person in obtaining a court order authorizing or requiring the conservator to take a proposed action under the substituted judgment doctrine [*Prob. Code § 2580*]. For the related form of order, see *§ 290B.41*

[3] Contents of Petition

A petition under *Prob. Code § 2580* should state all relevant circumstances [*see Prob. Code § 2583*; *see also § 290B.13*]; in particular, the petition should state the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2580(a)*].

- The value of the estate, its annual income, and the expenses for the support and maintenance of the conservatee and for administration of the estate (Paragraphs 2, 3) [*see Prob. Code § 2583(h)*].

- The proposed action and its intended purpose (Paragraph 4) [*see Prob. Code § 2580(a), (b)*].

- Whether the conservatee is opposed to the proposed action and, if so, that the conservatee lacks legal capacity for the action (Paragraph 5) [*see Prob. Code § 2582(a)*].

- Either that the proposed action will have no adverse effect on the estate, or that the remaining estate will be adequate for the needs of the conservatee or his or her legal dependents (Paragraph 6) [*see Prob. Code § 2582(b)*].

- Whether a request for special notice has been filed and, if so, that proper notice will be given or has been waived (Paragraph 8) [*see Prob. Code §§ 1460(d), 2700, 2701*].

The petition must be verified [*Prob. Code § 1021*].

[4] Notice

Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* to all the following [*Prob. Code § 2581*]:

- The persons required to be given notice under the general notice provisions of the Guardianship-Conservatorship Law [*see Prob. Code §§ 1460(b), 1461, 1461.5*].

- The persons required to be named in a petition for the appointment of a conservator [*see Prob. Code § 1821(a), (b), (f), (g)*].

- Beneficiaries under any document executed by the conservatee that may have testamentary effect, unless the court for good cause dispenses with notice to them.

- Persons who, if the conservatee were to die immediately, would be the conservatee's heirs under the laws of intestate succession, unless the court for good cause dispenses with notice to them.

- Such other persons as the court may order.

The petitioner must also comply with the requirements for notice to a person who has requested special notice [*Prob. Code §§ 1460(d), 2701, 2702*]. For further discussion and a form for giving notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

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24-290B California Forms of Pleading and Practice--Annotated § 290B.41

§ 290B.41 Order Authorizing Proposed Action Pursuant to Substituted Judgment Doctrine [Prob. Code § 2584]

[1] FORM Order Authorizing Proposed Action Pursuant to Substituted Judgment Doctrine

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Conservatorship of the [Person and] Estate of	)	ORDER
_____ [*name*],	)	
Conservatee.		
_____		

The petition of _____[*name*], as _____ [conservator of *or* a person interested in] the [person and] estate of _____[*name*], conservatee, for an order _____ [authorizing *or* requiring] the conservator to _____ [*specify proposed action in general terms, e.g.,* to make a gift of estate property], came on regularly for hearing by the court on this date. The petitioner appeared by counsel _____[*name*]. _____[*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. The conservatee _____ [is not opposed to the proposed action *or* lacks legal capacity for the proposed action].

3. _____ [The proposed action will have no adverse effect on the estate *or* The estate remaining after the proposed action is taken will be adequate to provide for the needs of the conservatee and for the support of persons

legally entitled to support, maintenance, and education from the conservatee].

4. The purposes of the proposed action are to _____ [*specify permitted purposes; see Prob. Code § 2580(a)*].

IT IS ORDERED that _____[*name*], as conservator of the estate of _____[*name*], conservatee, _____[*specified proposed action to be taken*].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use when the court grants a petition [*see § 290B.40*] to authorize or require a conservator to take action under the substituted judgment doctrine. After hearing, the court in its discretion may approve, modify and approve, or disapprove the proposed action and may authorize or direct the conservator to transfer or dispose of assets or to take other action as provided in the court's order [*Prob. Code § 2584*].

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be followed.

[3] Required Findings

The court may make an order authorizing or requiring the proposed action only if the court determines both of the following [*Prob. Code § 2582*]:

- The conservatee either is not opposed to the proposed action or, if opposed, lacks legal capacity for it.

- Either the proposed action will have no adverse effect on the estate or the estate remaining after the proposed action is taken will be adequate to provide for the needs of the conservatee and for the support of persons legally entitled to support, maintenance, and education from the conservatee, taking into account the age, physical condition, standards of living, and all other relevant circumstances of the conservatee and of the persons legally entitled to support, maintenance, and education from the conservatee.

[4] Recordation of Order

A certified copy of an order to convey or execute a lease on, a mortgage of, or a deed of trust on real property must be recorded in the county recorder's office in each county in which any portion of the property is located [*Prob. Code § 2111(c)*].

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24-290C California Forms of Pleading and Practice--Annotated 290C.syn

§ 290C.syn Synopsis to Chapter 290C: GUARDIANSHIP AND CONSERVATORSHIP: ACTIONS AND DISPUTED CLAIMS

§ 290C.01 Scope of Chapter

§ 290C.02 Cross References

§§ 290C.03-290C.09 [Reserved]

§ 290C.10 Governing Statutes

§ 290C.11 Representation in Actions

§ 290C.12 Submission of Disputed Claims

[1] Summary Determination

[2] Arbitration

§ 290C.13 Compromise of Claims and Extension of Obligations

[1] General Rules

[2] Court-Approved Compromises, Settlements, Extensions, Renewals, or Modifications

[a] When Required

[b] Filing the Petition

§ 290C.14 Receipt of Property Pursuant to Compromise or Judgment

[1] Conditions Precedent

[2] Payment of Expenses, Costs, and Fees

[3] Disposition of Remaining Balance

[4] Enforcement of Judgment Against Conservatee

[5] Special Needs Trust

[a] Definition

[b] Requirements for Payment to the Trust

[c] Termination of Trust

§§ 290C.15-290C.19 [Reserved]

§ 290C.20 State Statutes

[1] Arbitration of Disputed Claims

[2] Actions

[3] Compromise of Claims and Extension of Obligations

[4] Property Received Pursuant to Compromise or Judgment

[5] Summary Determination of Disputed Claims

§ 290C.21 [Reserved]

§ 290C.22 Local Court Rules

[1] Alameda County

[2] Los Angeles County

[3] Orange County

[4] Sacramento County

[5] Third Appellate District Superior Courts

§ 290C.23 Decisions

§ 290C.24 Text References

§§ 290C.25-290C.29 [Reserved]

§ 290C.30 Petition for Approval of Compromise of Claim by Estate [Prob. Code § 2506]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Verification

[5] Notice

[6] Venue

[7] Cross References

§ 290C.31 Order Approving Compromise of Claim by Estate [Prob. Code §§ 2501-2505]

[1] FORM

[2] Use of Form

[3] Appealability of Order

[4] Cross References

§ 290C.32 Petition for Approval of Compromise of Claim Against Estate [Prob. Code § 2506]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Verification

[5] Cross References

§ 290C.33 Order Approving Compromise of Claim Against Estate [Prob. Code §§ 2501-2505]

[1] FORM

[2] Use of Form

[3] Cross References

§ 290C.34 Petition to Exclude Funds From Estate and to Deposit Funds in Blocked Account [Prob. Code § 3602(c)]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Verification

[5] Notice

[a] Ex Parte Petition by Guardian or Conservator

[b] Noticed Petition by Interested Person

[6] Cross References

§ 290C.35 Order Excluding Funds From Estate and Directing Deposit of Funds in Blocked Account [Prob. Code § 3602(c)]

[1] FORM

[2] Use of Form

[3] Appealability of Order

[4] Cross References

§ 290C.36 Petition to Exclude Funds From Estate and to Direct Payment to Special Needs Trust [Prob. Code §§ 3602(d), (f), 3604(b)]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Verification

[5] Notice of Hearing

[6] Cross References

§ 290C.37 Order Excluding Funds From Estate and Directing Payment to Special Needs Trust [Prob. Code §§ 3602(d), 3604(b)]

[1] FORM

[2] Use of Form

[3] Appealability of Order

[4] Cross References

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24-290C California Forms of Pleading and Practice--Annotated § 290C.01

§ 290C.01 Scope of Chapter

This chapter discusses and contains forms relating to the powers of the guardian or conservator of the estate to represent the ward or conservatee in actions [*see § 290C.11*], to submit or compromise disputed claims [*see §§ 290C.12, 290C.13*], and to handle property received pursuant to a compromise of judgment [*see § 290C.14*].

Included are a research guide [*see § 290C.20* et seq.] and the following forms:

- Petitions and orders to use in obtaining approval of compromises of claims by and against the estate [*see §§ 290C.30 -290C.33*].

- Petitions and orders to use in obtaining authority to exclude funds received pursuant to a compromise or judgment from the estate and to deposit them in blocked accounts or to direct payment to special needs trusts [*see §§ 290C.34 -290C.37*].

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§ 290C.02 Cross References

Additional discussion and forms regarding actions and disputed claims may be found in the following chapters:

- For discussion and forms relating to civil actions by and against mentally disordered persons, see *Ch. 304, Insane and Other Incompetent Persons, § 304.110* et seq.

- For discussion and forms relating to tort and contract actions by and against minors, see Ch. 365, *Minors: Contract Actions* , and Ch. 367A, *Minors, Tort Actions* , respectively.

- For discussion and forms relating to the compromise of a minor's disputed claims and disposition of property received pursuant to a compromise or judgment, see Ch. 364, *Minors: Claims and Property of Minors* .

- For discussion and forms relating to the resolution of claims against an estate in probate, see Ch. 458D, *Probate: Claims Against the Estate*

- For forms for use in distribution of estates to minors, see Ch. 458E, *Probate: Accounts, Final Distribution, and Compensation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionReal Property LawOwnership & TransferNatural Persons

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[Reserved]

§§ 290C.03[Reserved]

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24-290C California Forms of Pleading and Practice--Annotated § 290C.10

§ 290C.10 Governing Statutes

Statutes governing general principles and procedures for representation in actions and resolution of disputed claims are set forth in *Code Civ. Proc. § 372* (appointment of guardian ad litem) and in *Prob. Code §§ 2405* (disputed claims against ward or conservatee), 2406 (court approval of disposition of disputed claims), 2450(a) (powers exercisable by guardian or conservator without court authorization), 2462 (commencement and defense of civil actions), 2500 et seq. (compromise of claims and extension, renewal, or modification of obligations), and 3600 et seq. (money or property paid or delivered pursuant to compromise or judgment for ward or conservatee).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureParties Capacity of PartiesGuardiansEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral Overview

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§ 290C.11 Representation in Actions

Unless another person is appointed for that purpose, the guardian or conservator of the estate may do all of the following [*Prob. Code § 2462*]:

- Institute and maintain actions and proceedings for the benefit of the ward or conservatee or the estate.

- Defend actions and proceedings against the ward or conservatee or the estate.

- File a petition in bankruptcy under *11 U.S.C. § 1 et seq.* (reorganization) on behalf of the ward or conservatee.

The power to represent the ward or conservatee in actions and proceedings may generally be exercised without court authorization or approval [*see Prob. Code § 2450(a)*]. Court authorization, however, is required to commence and prosecute actions for partition [*Prob. Code § 2462, 2463(a)*; *see* discussion in *Ch. 290A, Guardianship and Conservatorship: Asset Management and Investment, § 290A.13*].

When a minor, an person with a disability, or a person for whom a conservator has been appointed is a party to an action, that person must appear either by a guardian or conservator of the estate or by a guardian ad litem appointed by the court in which the action is pending. A guardian ad litem may be appointed to represent the minor, person with a disability, or person for whom a conservator has been appointed in any case when it is deemed expedient by the court in which the action or proceeding is prosecuted, notwithstanding the fact that the person may have a guardian or conservator of the estate and may have appeared by the guardian or conservator of the estate [*Code Civ. Proc. § 372(a)*]. For example, a guardian or conservator should not represent the ward or conservatee in an action in which he or she has an interest adverse to that of the ward orconservatee [*In re Haas (1893) 97 Cal. 232, 234, 31 P. 893, 32 P. 327* ; *see* Ch. 291, *Guardians Ad Litem*].

The guardian or conservator of the estate or guardian ad litem so appearing has the power, with the approval of the court in which the action or proceeding is pending, to compromise the action or proceeding, to agree to the order or judgment

to be entered for or against the ward or conservatee, and to satisfy any judgment or order in favor of the ward or conservatee or to release or discharge any claim of the ward or conservatee pursuant to a compromise. Any money or other property to be paid or delivered pursuant to the order or judgment for the benefit of a minor, person with a disability, or person for whom a conservator has been appointed must be paid and delivered as provided in *Prob. Code § 3600 et seq.* [*Code Civ. Proc. § 372(a)*]. For a discussion of payment and delivery of property in a guardianship or conservatorship, see *§ 290C.14*.

A conservator of the person and estate of a mentally disabled person who is unable to communicate his or her wishes does not have the authority to bring a proceeding for the dissolution of the conservatee's marriage, but may bring a proceeding for legal separation if necessary to protect the assets of the estate and subject to the probate court's approval [*Michael J. v. Superior Court (2004) 120 Cal. App. 4th 37, 41-44, 15 Cal. Rptr. 3d 196]* . Although a conservator of the estate is authorized to act to the extent necessary to protect the conservatee's property interests, it is not necessary to sever the marital relationship between the conservatee and his or her spouse to accomplish this result. In an action for legal separation, the court may settle financial issues between the spouses, including a division of community property and community liabilities, as well as a determination of support [*Michael J. v. Superior Court (2004) 120 Cal. App. 4th 37, 44, 15 Cal. Rptr. 3d 196]* .

A conservator has the authority to bring an action for elder abuse committed against the conservatee by caregivers and others. In such an action, the conservator may recover damages for the conservatee's pain and suffering and punitive damages [*Conservatorship of Kayle (2005) 134 Cal. App. 4th 1, 5-6, 35 Cal. Rptr. 3d 671]* . When a conservator has been appointed, the probate court has jurisdiction over any claims made under the Elder Abuse and Dependent Adult Civil Protection Act (*Welf. & Inst. Code § 15600 et seq.*) [*Welf. & Inst. Code § 15657.3(a)*; *Conservatorship of Kayle (2005) 134 Cal. App. 4th 1, 6, 35 Cal. Rptr. 3d 671]* . The probate court may transfer a case to the general civil calendar if it determines the case should be determined as a civil action [*Welf. & Inst. Code § 15657.3(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGuardiansEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & Neglect

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§ 290C.12 Submission of Disputed Claims

[1] Summary Determination

The guardian or conservator, or the limited conservator to the extent specifically and expressly provided in the order appointing the limited conservator, has two procedures available for summary determination if there is a dispute relating to the estate between the guardian or conservator and a third person [*Prob. Code § 2405*].

Under one method, the guardian, conservator, or limited conservator may enter into a written agreement to refer the dispute to a temporary judge designated in the agreement. The agreement must be filed with the clerk, who then must, with the approval of the court, enter an order referring the matter to the designated person. The temporary judge must proceed promptly to hear and determine the matter in controversy by summary procedure, without any pleadings, discovery, or jury trial. Thetemporary judge's decision is subject to *Code Civ. Proc. § 632* (when statement of decision is required). Judgment must be entered on the decision and is as valid and effective as if rendered by a judge of the court in an action against the guardian, conservator, or third person commenced by ordinary process [*Prob. Code § 2405(a)*]. For further discussion of reference procedures, see Ch. 38, *Reference* .

Alternatively, the guardian, conservator, or limited conservator may enter into a written agreement with the third person that a judge of the court, pursuant to the agreement and with the judge's written consent (both filed with the clerk within the time for bringing an independent action on the matter in dispute; *see Prob. Code §§ 9353, 9354*), may hear and determine the dispute pursuant to the procedure set forth above in *Prob. Code § 2405(a)* [*Prob. Code § 2405(b)*].

The guardian or conservator may also petition for the additional power to compromise, arbitrate, or otherwise to adjust claims, debts, or demands on the guardianship or conservatorship without court authorization or approval [*see Prob. Code §§ 2590, 2591(p)*, discussed in Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers*].

[2] Arbitration

If there is a dispute relating to the estate between the guardian or conservator and a third person, the guardian or conservator may enter into an agreement in writing with the third person to submit the dispute to arbitration under *Code Civ. Proc. § 1280 et seq.* The agreement, however, is not effective unless it has first been approved by the court and a

copy of the approved agreement is filed with the court [*Prob. Code § 2406*]. For further discussion of arbitration procedures and a form for an arbitration agreement, see Ch. 32, *Contractual Arbitration: Agreement and Compelling Arbitration* .

The guardian or conservator may also petition for the additional power to arbitrate or otherwise to adjust claims, debts, or demands on the guardianship or conservatorship without court authorization or approval [*see Prob. Code §§ 2590, 2591(p)*, discussed in Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedureJudicial OfficersReferencesEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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§ 290C.13 Compromise of Claims and Extension of Obligations

[1] General Rules

If it is to the advantage of the estate, the guardian or conservator generally may do any or all of the following [*Prob. Code § 2500(a)*]:

- Compromise or settle a claim, action, or proceeding by or for the benefit of, or against, the ward or conservatee, the guardian or conservator, or the estate, including the giving of a covenant not to sue.

- Extend, renew, or, in any manner, modify the terms of an obligation owing to or running in favor of the ward or conservatee or the estate.

Unless court approval is otherwise required by statute, the guardian or conservator may exercise or perform these powers without court authorization, instruction, approval, or confirmation. Nevertheless, nothing precludes the guardian or conservator from petitioning the court for authorization, instructions, approval, or confirmation under *Prob. Code § 2403* [*Prob. Code § 2500(b)*; *see Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.12[2]*].

Even if court approval is required, the guardian or conservator may petition for the additional power to compromise or otherwise to adjust claims, debts, or demands on the guardianship or conservatorship without court authorization or approval [*see Prob. Code §§ 2590, 2591(p)*, discussed in Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers*].

On petition of the ward or conservatee, a creditor, or any interested person, or on the court's own motion, the court may limit the authority of the guardian or conservator to compromise claims or extend obligations. Notice of hearing on the petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2500(c)*].

[2] Court-Approved Compromises, Settlements, Extensions, Renewals, or Modifications

[a] When Required

Court approval is generally required for a compromise, settlement, extension, renewal, or modification that affects (1) title to real property, (2) an interest in real property or a lien or encumbrance on real property, or (3) an option to purchase real property or an interest in real property [*Prob. Code § 2501(a)*]. Court approval, however, is not required for an extension, renewal, or modification of a lease of real property having an unexpired term of two years or less when, under the lease as extended, renewed, and modified, (1) the rental does not exceed $5000 a month and the term does not exceed two years, or (2) regardless of the amount of the rental, the lease is from month to month [*Prob. Code § 2501(b)*].

A compromise or settlement of a matter involving a transaction that requires the transfer or encumbrance of property of the estate or the creation of an unsecured liability of the estate, or both, in an amount or value in excess of $25,000 must receive court approval [*Prob. Code § 2502*].

Because of the potential conflicts of interest, court approval is also required for [*Prob. Code § 2503*]:

- A compromise or settlement of a claim by the ward or conservatee against the guardian or conservator or against the attorney for the guardian or conservator, whether or not the claim arises out of the administration of the estate.

- An extension, renewal, or modification of the terms of a debt or similar obligation of the guardian or conservator, or of the attorney for the guardian or conservator, owing to or running in favor of the ward or conservatee or the estate.

Finally, court approval is required for the compromise or settlement of any of the following [*Prob. Code § 2504*]:

- A claim for the support, maintenance, or education of the ward or conservatee, or a person whom the ward or conservatee is legally obligated to support, maintain, or educate, against any other person (including, but not limited to, the spouse or parent of the ward or the spouse, or domestic partner [as defined by *Prob. Code § 37*; *Fam. Code § 297*], parent, or adult child of the conservatee).

- A claim of the ward or conservatee for wrongful death.

- A claim of the ward or conservatee for physical or nonphysical harm to the person.

[b] Filing the Petition

When approval of the court in which the guardianship or conservatorship proceeding is pending is required, the guardian or conservator must file a petition with the court showing the advantage of the compromise, settlement, extension, renewal, or modification to the ward or conservatee and the estate [*Prob. Code § 2506*; *see §§ 290C.30, 290C.31* (petition and order for approval of compromise of claim by estate), 290C.32, 290C.33 (petition and order for approval of compromise of claim against estate)]. The probate court is only authorized to approve the compromise of valid claims and cannot approve a compromise based on an unenforceable agreement [*Guardianship of Carlon (1941) 43 Cal. App. 2d 204, 207-208, 110 P.2d 488]* .

Regardless of these statutory provisions requiring court approval, whenever another statute requires, provides a procedure for, or dispenses with court approval of a compromise, settlement, extension, renewal, or modification, the provisions of the other statute govern any case to which it applies [*Prob. Code § 2507(a)*]. For example, the guardian or conservator of the estate or guardian ad litem appearing for any minor, person with a disability, or person for whom a conservator has been appointed who is a party in an action or proceeding has the power, with the approval of the court in which the action or proceeding is pending, to compromise the action or proceeding, to agree to the order or judgment

to be entered in it for or against the ward or conservatee, and to satisfy any judgment or order in favor of the ward or conservatee or to release or discharge any claim of the ward or conservatee pursuant to the compromise [*see Code Civ. Proc. § 372*]. Parents also have the right to compromise a minor child'sdisputed claim when there is no guardian of the estate and no pending action [*see Prob. Code § 3500*; *see also* Ch. 364, *Minors: Claims and Property of Minors*].

Additionally, whenever another statute provides that a compromise or settlement of an administrative proceeding is not valid unless approved in that proceeding, the approval is governed by that statute, and approval in the guardianship or conservatorship proceeding is not required [*Prob. Code § 2507*; *see, e.g., Lab. Code § 5001* (compromise of worker's compensation proceeding)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedureSettlementsOffers of JudgmentGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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§ 290C.14 Receipt of Property Pursuant to Compromise or Judgment

[1] Conditions Precedent

The procedures set forth in *Prob. Code §§ 3601-3605* (discussed *below*) governing the receipt of property apply whenever both of the following conditions exist [*Prob. Code § 3600*]:

- A court (1) approves a compromise of, or the execution of a covenant not to sue on or of a covenant not to enforce judgment on, a minor's disputed claim; (2) approves a compromise of a pending action or proceeding to which a minor or person with a disability is a party; or (3) gives judgment for a minor or person with a disability.

- The compromise, covenant, or judgment provides for the payment or delivery of money or other property for the benefit of the minor or person with a disability.

A "person with a disability" is a person for whom a conservator may be appointed [*Prob. Code § 3603(a)*]. The term also includes a person who meets the definition of disability under various provisions of the federal law, and a person with a developmental disability under *Welf. & Inst. Code § 4512*; however, a court may not make an order or give a judgment under *Prob. Code §§ 3600-3602* with respect to an adult who has the legal capacity under *Prob. Code § 812* to consent to the order and who has no conservator of the estate with authority to make that decision, without that person's express consent [*Prob. Code §§ 3603(b), 3613*].

[2] Payment of Expenses, Costs, and Fees

The court approving a compromise or giving the judgment under *Prob. Code § 3600*, as a part of the order or judgment, must make a further order authorizing and directing that such reasonable expenses (medical or otherwise and including reimbursement to a parent, guardian, or conservator), costs, and attorney's fees as the court approves and allows must be paid from the money or other property to be paid or delivered for the benefit of the minor or person with a disability [*Prob. Code § 3601(a)*]. This further order may be directed to [*Prob. Code § 3601(b)*]:

- A parent of the minor, the guardian ad litem, or the guardian of the estate of minor or the conservator

of the estate of the person with a disability.

- Anyone who pays money pursuant to the compromise, covenant, or judgment for the benefit of the minor or person with a disability.

[3] Disposition of Remaining Balance

If there is a guardianship of the estate of the minor or a conservatorship of the estate of the person with a disability, the remaining balance of the money and other property received pursuant to a compromise or judgment (after payment of expenses, costs, and fees) must be paid or delivered to the guardian or conservator of the estate. On application of the guardian or conservator, the court that approves the compromise or gives judgment or the court in which the guardianship or conservatorship proceeding is pending may, with or without notice, make an order that all or part of the money paid or remaining to be paid to the guardian or conservator be deposited or invested, pursuant to *Prob. Code § 2456*, in an insured account in a California financial institution or in a trust company, subject to withdrawal only on court authorization [*Prob. Code § 3602(b)*; *see Prob. Code §§ 46*, *83* ("insured account in financial institution" and "trust company" defined, respectively); *see also* discussion of deposit in withdrawal from these accounts, in the Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee*, § 290.20[4]].

Despite the requirement that the remaining balance of money and other property received pursuant to a compromise or judgment be paid or delivered to the guardian or conservator of the estate, the court, on a showing of good cause, may order any or all of the following [*Prob. Code § 3602(c)*]:

- First, the court may order that all or part of the remaining balance of money not become a part of the guardianship or conservatorship estate, but that it be deposited in an insured account in a California financial institution or in a single-premium deferred annuity, subject to withdrawal only on court authorization [*Prob. Code § 3602(c)(1)*; *see Prob. Code §§ 46*, *1446* ("insured account in financial institution" and "single-premium deferred annuity" defined, respectively)].

- Second, the court may order that all or any part of the money be transferred to a custodian for the benefit of the minor under the California Uniform Transfers to Minors Act (*Prob. Code § 3900 et seq.*) [*Prob. Code § 3602(c)(2)*].

- Third, the court may order that all or part of the money be transferred to the trustee of a trust created by or approved in the court's judgment [*Prob. Code § 3602(c)(3)*; *see Prob. Code § 3600* (judgment described)]. The trust must be revocable by the minor upon reaching the age of 18 years, and the governing instrument must contain termsand conditions necessary to protect the minor's interests, including terms and conditions concerning trustee's accounts and the trustee's bond [*Prob. Code § 3602(c)(3)*]. Unless the court orders otherwise for good cause shown, the trust instrument must:

  (1) Not contain no-contest provisions;

  (2) Prohibit modification or revocation without court approval;

  (3) Clearly identify the trustee and any other person with authority to direct the trustee to make disbursements;

  (4) Prohibit investments by the trustee other than those permitted under *Prob. Code § 2574*;

  (5) Require the trustee and any other person with authority to direct the trustee to make

disbursements to post bond in the amount required under *Prob. Code § 2320 et seq.*;

(6) Require the trustee to file accounts and reports for court approval;

(7) Require court approval of changes in trustees and a court order appointing any successor trustee; and

(8) Require compensation of the trustee or the trustee's attorney to be in just and reasonable amounts fixed and allowed by the court [*Cal. Rules of Ct., Rule 7.903(c)*].

The requirements of items (5)-(8) do not apply to trusts that will have total assets of $20,000 or less unless the court orders otherwise for good cause shown [*Cal. Rules of Ct., Rule 7.903(d)*]. The order creating or approving the funding of the trust must provide that it is subject to the court's continuing jurisdiction over trust proceedings under *Prob. Code § 15000 et seq.* [*Cal. Rules of Ct., Rule 7.903(a)(2), (b)*]. The order may also provide that the trust is subject to court supervision under the Probate Code, *i.e.*, the court may require prior court approval or subsequent confirmation of the trustee's actions [*Cal. Rules of Ct., Rule 7.903(a)(3), (b)*].

The good-cause showing discussed above can be made on the ex parte petition of the guardian or conservator or on the noticed petition of any person interested in the guardianship or conservatorship estate [*Prob. Code § 3602(c)*; *see §§ 290C.34, 290C.35* (petition and order to exclude funds from estate and to deposit funds into blocked account)]. These procedures eliminate the need to increase the guardian's or conservator's bond [*see Prob. Code § 2328*]. These procedures also may help to keep the value of a minor's estate below a specified minimum so that the estate may be transferred to a parent [*see Prob. Code §§ 3400(b)(2), 3401(b)*] or terminated if the sole asset is money [*see Prob. Code §§ 3410(b)(2), 3412*; *see also* Ch. 364, *Minors: Claims and Property of Minors*].

[4] Enforcement of Judgment Against Conservatee

Property in a guardianship or conservatorship estate is not subject to enforcement of a money judgment by the enforcement procedures set forth in the Code of Civil Procedure; instead, the judgment creditor must apply to the court in which the guardianship or conservatorship proceeding is pending for an order requiring payment of the judgment [*Code Civ. Proc. § 709.030*]. This must be done even when the judgment was obtained before the commencement of the guardianship or conservatorship proceedings. For purposes of this rule, property is deemed to be in a guardianship or conservatorship estate as soon as the court appoints the guardian or conservator, and it is not necessary to wait until letters are issued [*Neiman Marcus v. Tait (1995) 33 Cal. App.4th 271, 274, 39 Cal. Rptr.2d 143]* .

[5] Special Needs Trust

[a] Definition

On the noticed petition of the guardian, conservator, or any person interested in the guardianship or conservatorship estate, the court that approves a compromise or covenant or gives judgment may order that all or part of the remaining balance of money received pursuant to the compromise, covenant, or judgment not be made part of the guardianship or conservatorship estate but instead be paid to a "special needs trust" established under *Prob. Code § 3604* for the benefit of a disabled minor ward or person with a disability [*Prob. Code § 3602(d), (f)*; *see §§ 290C.36, 290C.37* (petition and order to exclude funds from estate and to direct payment to special needs trust)].

A special needs trust is a form of discretionary spendthrift trust designed to preserve public assistance benefits for a disabled beneficiary. The trust instrument typically provides that the trust is an emergency backup fund secondary to

public resources, and directs the trustee to seek out and obtain available public benefits, particularly social security benefits and Medi-Cal. If these benefits are unavailable or insufficient, the trust instrument authorizes the trustee to supplement the benefits for the beneficiary's health, safety, and welfare. Examples of special needs not normally provided by social security or Medi-Cal that the trust may provide include dental care; special equipment such as a wheelchair, ramp access, vehicle modification for the disabled; and programs for the handicapped such as independence training and recreational programs. If the trust is properly drawn, the existence of trust assets generally should not disqualify the beneficiary from receiving public benefits [*Special Needs Trust for Disabled Minor or Incompetent Person*, 22 Cal. L. Revision Comm'n Reports 989, 993 (1992)].

[b] Requirements for Payment to the Trust

If the court orders that money of a minor or person with a disability be paid to a special needs trust, the trust is subject to the continuing jurisdiction of the court and also to supervision by the court to the extent the court deems necessary [*Prob. Code § 3604(a)*; *see Prob. Code § 17005* (transfer of proceedings)]. The terms of the trust must satisfy the requirements set forth in *Prob. Code § 3604*, and the court must review and approve the terms [*Prob. Code § 3604(a)*]. A court may order the establishment or permit the continuation of a special needs trust only if it determines *all* of the following:

- That the minor or person with a disability has a disability that substantially impairs the individual's ability to provide for the individual's own care or custody and constitutes a substantial handicap [*Prob. Code § 3604(b)(1)*];

- That the minor or person with a disability is likely to have special needs that will not be met without the trust [*Prob. Code § 3604(b)(2)*]; and

- That the money to be paid to the trust does not exceed the amount that appears reasonably necessary to meet the special needs of the minor or person with a disability [*Prob. Code § 3604(b)(3)*].

An order for the payment of a money to a special needs trust must include a provision that all statutory liens in favor of the State Department of Health Services, the State Department of Mental Health, the State Department of Developmental Services, a county, or a city and county within California first be satisfied [*Prob. Code § 3604(d)*].

[c] Termination of Trust

The State Department of Health Services, the State Department of Mental Health, the State Department of Developmental Services, or a county or a city and county within California may petition the court for an order terminating the trust if it appears at any time that (1) any one of the above three requirements is not satisfied or the trustee refuses without good cause to make payments from the trust for the special needs of the beneficiary, and (2) the department, county, or city and county has a claim against trust property [*Prob. Code § 3604(c)*].

The existence of a special needs trust established on or after January 1, 1993, tolls the statute of limitations otherwise applicable to claims of the State Department of Health Services, the State Department of Mental Health, the State Department of Developmental Services, or a county or a city and county within California. Nevertheless, the trust property is subject to those claims to the extent authorized by law on the death of the special needs beneficiary or on termination of the trust, regardless of any provision in the trust to the contrary [*Prob. Code § 3605(a), (b)*]. The trustee must give notice in the manner provided in *Prob. Code § 1215* of the death of the special needs beneficiary or of the termination of the special needs trust to the directors of the State Department of Health Services, the State Department of Mental Health, the State Department of Developmental Services, and to any county or city and county within California that has made a written request for notice [Prob. Code § 3605(c)]. Failure to give notice in the prescribed manner prevents the running of the statute of limitations against the claim [*Prob. Code § 3605(d)*].

The State Department of Health Services, State Department of Mental Health, State Department of Developmental Services, or a county or city and county within California must make a claim with the trustee within four months after notice of death of the special needs beneficiary or termination of the trust [*Prob. Code § 3605(e)*]. If the trustee refuses the claim, that department, county, or city and county may petiton the court for an order under *Prob. Code § 17200 et seq.* directing the trustee to pay the claim, and it must be paid prior to any other distribution [*Prob. Code § 3605(e)*]. If there is insufficient trust property to pay all of the claims arising under *Prob. Code § 3605(e)*, the trustee must petition the court for instructions and the court will, in its discretion, determine the payment of the claims from the trust property [*Prob. Code § 3605(e)*].

If the special needs trust property is distributed before the expiration of the four-month period without payment of a claim to the State Department of Health Services, State Department of Mental Health, State Department of Developmental Services, or a county or a city and county within California, that department, county, or city and county has a claim against the distributees either (1) to the full extent of the claim that was filed with the trustee or (2) in the amount of each distributee's share or trust property, whichever is less. The claim against the distributees includes interest from the date of distribution or the date of filing the claim with the trustee, whichever is later [*see Gov. Code § 16480 et seq.* for computation of interest], plus other accruing costs as in the case of enforcement of a money judgment [*Prob. Code § 3605(f)*].

For detailed discussion of special needs trusts, see California Wills & Trusts, Ch. 118, *Special Needs Trusts* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsReleases From LiabilityGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsModification & Termination

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Chapter 290C GUARDIANSHIP AND CONSERVATORSHIP: ACTIONS AND DISPUTED CLAIMS
PART II. LEGAL BACKGROUND

24-290C California Forms of Pleading and Practice--Annotated §§ 290C.15-290C.19

[Reserved]

§§ 290C.15[Reserved]

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PART III. RESEARCH GUIDE

24-290C California Forms of Pleading and Practice--Annotated § 290C.20

§ 290C.20 State Statutes

[1] Arbitration of Disputed Claims

Agreement to submit disputed claim to arbitration. *Prob. Code § 2406*

[2] Actions

Appearance of guardian, conservator, or guardian ad litem in action. *Code Civ. Proc. § 372*

Duty of guardian or conservator served in probate proceeding. *Prob. Code § 1210*

Power to commence or defend civil actions. *Prob. Code §§ 2450(a), 2462*

Contingent fee contract with attorney. *Prob. Code § 2644*

[3] Compromise of Claims and Extension of Obligations

Guardian, conservator, or guardian ad litem appearing in action as authorized to enter court-approved compromise. *Code Civ. Proc. § 372*

Authority to compromise claims and to extend obligations. *Prob. Code § 2500(a)(1), (2)*

Limiting authority to compromise claims or extend obligations. *Prob. Code § 2500(c)*

When approval required and procedure to obtain approval. *Prob. Code §§ 2501-2506*

Application of conflicting statutory provisions. *Prob. Code § 2507*

[4] Property Received Pursuant to Compromise or Judgment

Required procedure for receipt of money or other property in action. *Code Civ. Proc. § 372*

Procedure to receive property as applicable after compromise or judgment awarding property to minor or person with a disability. *Prob. Code § 3600*

Payment of expenses, costs, and fees from property received. *Prob. Code § 3601*

Deposit of remaining estate funds in blocked accounts. *Prob. Code § 3602(b)*

Exclusion of remaining balance from estate. *Prob. Code § 3602(c)*

Deposit of remaining funds in special needs trust. *Prob. Code § 3602(d), (f)*

Requirements for establishment and termination of special needs trust. *Prob. Code § 3604*

Claims against special needs trust. *Prob. Code 3605*

Applicability of statute of limitations to claims against special needs trust. *Prob. Code 3605(a), (b), (d)*

Notice requirements on death of special needs beneficiary or on termination of special needs trust. *Prob. Code 3605(c)*

Claims against special needs trust. *Prob. Code 3605(e), (f)*

[5] Summary Determination of Disputed Claims

Agreement to refer disputed claim. *Prob. Code § 2405(a), (b)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedureJudicial OfficersReferencesCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureSettlementsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral Overview

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24-290C California Forms of Pleading and Practice--Annotated § 290C.21

[Reserved]

§ 290C.21[Reserved]

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24-290C California Forms of Pleading and Practice--Annotated § 290C.22

§ 290C.22 Local Court Rules

[1] Alameda County

Content and procedural requirements for petition and order to compromise claim pursuant to *Code Civ. Proc. § 372*. Alameda Co. Super. Ct. Rules, Rule 13.0 et seq.

[2] Los Angeles County

Content and procedural requirements for petition filed pursuant to *Prob. Code § 3500 et seq.*Los Angeles Co. Super. Ct. Rules, Rule 10.166

[3] Orange County

General information on blocked accounts. Orange Co. Super. Ct. Rules, Rule 613.02

Deposit of minor's funds. Orange Co. Super. Ct. Rules, Rule 613.03

Withdrawal of funds of former minor now 18 years or older. Orange Co. Super. Ct. Rules, Rule 613.04

Withdrawals during minority. Orange Co. Super. Ct. Rules, Rule 613.05

Deposit of funds of guardianship estate. Orange Co. Super. Ct. Rules, Rule 613.06

Withdrawal of guardianship estate funds. Orange Co. Super. Ct. Rules, Rule 613.07

Deposit of conservatee's estate funds in blocked account. Orange Co. Super. Ct. Rules, Rule 613.08

Withdrawal of conservatee's estate funds. Orange Co. Super. Ct. Rules, Rule 613.09

[4] Sacramento County

Procedural requirements to compromise claim pursuant to *Code Civ. Proc. § 372*. Sacramento Co. Local Ct. Rules, Rules 10.01

[5] Third Appellate District Superior Courts

Content and other procedural requirements for petition to compromise claim pursuant to *Code Civ. Proc. § 372*. Third App. Dist. Super. Ct. Uniform Rules, Rule 7.8

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral Overview

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24-290C California Forms of Pleading and Practice--Annotated § 290C.23

§ 290C.23 Decisions

For purposes of determining reasonableness of attorneys' fees under *Prob. Code § 3601(a)* in settlement of minor's medical malpractice claim, reasonable value of services performed for plaintiff on contingent fee basis by medical-legal consulting firm reduces fee otherwise payable to plaintiff's attorneys if firm's services included work for which no reasonable attorney would separately bill client. *Ojeda v. Sharp Cabrillo Hospital (1992) 8 Cal. App. 4th 1, 17-23, 10 Cal. Rptr. 2d 230*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateCosts & ExpensesTortsMalpractice & Professional LiabilityHealthcare Providers

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24-290C California Forms of Pleading and Practice--Annotated § 290C.24

§ 290C.24 Text References

California Conservatorships, ch. 6 (Cal. C.E.B. 1983)

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, §§ 998, 1012-1014 (10th ed. 2005)

Marshall and Garb, California Probate Procedure, ch. 21, § 2118 (Parker & Son 5th ed. 1991)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWillsGeneral Overview

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24-290C California Forms of Pleading and Practice--Annotated §§ 290C.25-290C.29

[Reserved]

§§ 290C.25[Reserved]

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24-290C California Forms of Pleading and Practice--Annotated § 290C.30

§ 290C.30 Petition for Approval of Compromise of Claim by Estate [Prob. Code § 2506]

[1] FORM Petition for Approval of Compromise of Claim by Estate

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship *or* Limited Conservatorship] of the _____ [Person *or* Estate *or* Person and Estate] of _____ [*name*], *or* _____ [Ward *or* Conservatee].	))))))	NO. _____ [Hearing set for _____ [*date*], at _____ [*time*] in Dept. No. _____] PETITION FOR APPROVAL OF COMPROMISE OF CLAIM BY ESTATE

Petitioner _____[*name*] respectfully represents:

1. Petitioner is the duly appointed, qualified, and acting _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee].

2. The _____ [ward *or* conservatee] has a claim for _____ [*specify type of claim, e.g.,* damages for physical harm to his/her person] against _____[*name*] in the amount of $_____ based on _____ [*specify basis for claim, e.g.,* an automobile accident caused by the negligence of _____ (*name*)].

3. _____ [*Set forth reason why compromise is necessary, e.g.,* _____ (*name*) disputes the claim on the basis that the accident was not caused by his/her negligence, but was instead caused by the negligence of the _____ (ward *or* conservatee)].

[4. *If suit has been filed on the claim in a federal court, sister state court, or court outside the United States, add:* On

_____ (*date*), petitioner filed an action on the claim in the _____ (*name of court*), entitled _____ (*set forth title*) and numbered _____. The complaint is for _____ (*specify, e.g.*, damages in the amount of $_____). Defendant has filed an answer to the complaint based on _____ (*specify, e.g.*, his/her denial of any negligence and allegation of comparative negligence of the _____ (ward *or* conservatee)). The present calendar status of the case is _____ (*specify*).]

5. Petitioner and _____[*name*] propose to dispose of the claim by compromise and settlement, subject to approval of the court, for the amount of $_____. A copy of the agreement of compromise and settlement signed by _____[*name*] is attached as Exhibit A and incorporated by reference.

6. It is to the advantage of the _____ [ward *or* conservatee] and the estate to compromise the claim in that _____ [*specify, e.g.*, it would avoid the time, expense, and uncertainties of litigation and would provide immediate funds for the _____ (ward's *or* conservatee's) support that are needed by the estate].

[7. *If petitioning for approval of compromise of ward's disputed claim or of pending action or proceeding to which ward or conservatee is a party and compromise provides for payment or delivery of money or other property for benefit of ward or conservatee, add:* Petitioner proposes to pay the following expenses, costs, and attorney's fees from the moneys received: _____ (*specify person(s) to whom expenses will be paid and describe expenses*).]

8. A request for special notice has _____ [not been filed herein *or* been filed herein by _____ (*name*), and notice of the time and place of hearing on this petition will be given as required by law *or* been filed herein and waived by _____ (*name*)].

WHEREFORE, petitioner prays that the court approve the compromise and settlement of the claim against _____[*name*], authorize petitioner to do all acts and to execute all documents necessary or convenient to consummate the compromise and settlement, and make such other and further orders as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____[*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein represented on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

[2] Use of Form

The form of petition in [1], *above*, is for use by a guardian or conservator in obtaining approval of a compromise and settlement of a ward's orconservatee's claim when approval of the court in which the guardianship or conservatorship proceeding is pending is required [*Prob. Code § 2506*]. For a discussion of when court approval is required to compromise claims, to settle actions, or to extend, renew, or modify obligations, see *§ 290C.13[2]*.

[3] Contents of Petition

The petitioner must show that the compromise or settlement is to the advantage of the ward or conservatee and the estate (Paragraph 6) [*Prob. Code § 2506*]. Although there are no other express content requirements for a petition under *Prob. Code § 2506*, the petition should also state the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2506*].

- A description of the ward's or conservatee's claim for which court approval of the compromise is sought (Paragraph 2) [*see Prob. Code §§ 2501-2504*].

- The assertions of the opposing party that form the basis of the dispute (Paragraph 3).

- If the claim is the subject of a pending action or proceeding that is not brought in a court of this state, the present status of the action (Paragraph 4) [*see Prob. Code § 2505(c)*].

- A description of the written compromise agreement, a copy of which should be attached and incorporated by reference (Paragraph 5).

- How the petitioner proposes to pay any expenses, costs, and attorney's fees from the moneys received if seeking court approval of a compromise of a ward's disputed claim or of a pending action or proceeding to which the ward or the conservatee is a party and if the compromise provides for the payment or delivery of money or other property for the benefit of the ward or the conservatee (Paragraph 7) [*see Prob. Code §§ 3600, 3601(a)*; *see also § 290C.14[2]*].

- Whether or not a request for special notice has been filed and, if so, that proper notice will be given (Paragraph 8) [*see Prob. Code §§ 1260(a), 2700, 2701*].

[4] Verification

Except as otherwise specifically provided, all petitions filed pursuant to the Guardianship-Conservatorship Law must be verified [*Prob. Code § 1021*; *see Prob. Code § 1430* (the term "petition" includes an application or a request in the nature of a petition)]. Verification enables a petition to be used as evidence in uncontested proceedings [*Prob. Code § 1022*].

The form of verification shown here complies with the requirements of *Code Civ. Proc. §§ 446* and *2015.5*.

[5] Notice

Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2506*], which generally requires that notice by mail be given to specified persons at least 15 days before the day of the hearing [*Prob. Code § 1460(a),(b)*]. The petitioner must also comply with the requirements for

notice to a person who has requested special notice [*Prob. Code §§ 1460(d), 1260(a), 2700, 2701*]. For further discussion and a form of notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[6] Venue

When the claim or matter is the subject of a pending action or proceeding brought in a court of this state, any required court approval must be obtained from the court in which the action or proceeding is pending [*Prob. Code § 2505(a)*].

When the claim or matter is not the subject of a pending action or proceeding, any required court approval must be obtained from the following [*Prob. Code § 2505(b)*]:

- The court in which the guardianship or conservatorship proceeding is pending;
- The superior court of the county where the ward or conservatee or guardian or conservator resides at the time the petition for approval is filed; or
- The superior court of any county where a suit on the claim or matter could be properly brought.

When the claim or matter is the subject of a pending action or proceeding that is not brought in a court of this state, any required court approval must be obtained from either (1) the court in which the action or proceeding is pending, or (2) the court in which the guardianship or conservatorship proceeding is pending [*Prob. Code § 2505(c)*]. Courts not of this state include federal courts, sister-state courts, and courts outside the United States [*Guardianship-Conservatorship Law*, 15 Cal. L. Revision Comm'n Reports 451, 741-742 (1980)].

[7] Cross References

For order approving compromise of claim by estate, see *§ 290C.31*

For petition for authorization and instructions as to management of estate property, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.40*

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24-290C California Forms of Pleading and Practice--Annotated § 290C.31

§ 290C.31 Order Approving Compromise of Claim by Estate [Prob. Code §§ 2501-2505]

[1] FORM Order Approving Compromise of Claim by Estate

[*Caption. See § 290C.30[1].*]

The petition of _____[*name*] as _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee], for approval of the compromise of a[n] _____ [claim *or* action] by the estate against _____[*name*] based on _____[*specify*] came on regularly for hearing by the court on this date. Petitioner appeared by counsel _____[*name*]. [*Specify other appearances, if any.*]

The court finds from proof made to the satisfaction of the court as follows:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived].

2. Among the assets of the estate is a claim against _____[*name*] for _____[*specify nature of claim*] in the sum of $_____. [Petitioner has instituted an action on the claim in the _____ (*name of court*), entitled _____ (*specify*) and numbered _____ (*specify*).]

3. Petitioner and _____[*name*] have negotiated an agreement of compromise and settlement of the claim, subject to approval of the court.

4. It is to the advantage of the [ward *or* conservatee] and the estate that the compromise and settlement be approved.

[5. *If approving compromise of ward's disputed claim or of pending action or proceeding to which ward or conservatee is a party and compromise provides for payment or delivery of money or other property for benefit of ward or conservatee, add:* The expenses, costs, and attorney's fees should be paid from the moneys received to the persons

specified as ordered below.]

IT IS ORDERED as follows:

1. The compromise and settlement of the claim by the estate of _____[*name*], _____ [ward *or* conservatee], against [*name*] for _____[*specify claim*], is approved as follows: _____[*specify terms of agreement*].

2. Petitioner, as _____ [guardian *or* conservator] of the estate of the _____ [ward *or* conservatee], is authorized [to execute the agreement of compromise and settlement and] to do all _____[other] acts and to execute all _____[other] documents necessary or convenient to consummate the compromise and settlement.

[3. *If approving compromise of ward's disputed claim or of pending action or proceeding to which ward or conservatee is a party and if compromise provides for payment or delivery of money or other property for benefit of ward or conservatee, add:* Petitioner shall pay the following expenses, costs, and attorney's fees to the persons specified: _____ (*specify person(s) to whom expenses will be paid and describe expenses*).]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, approving the compromise of a claim by the guardianship or conservatorship estate is for use with the petition in § 290C.30 [*see Prob. Code §§ 2501-2505*]. It should be entitled ORDER APPROVING COMPROMISE OF CLAIM BY ESTATE. If the order approves a compromise of the ward's disputed claim or of a pending action or proceeding to which the ward or conservatee is a party and the compromise provides for payment or delivery of money or other property for the benefit of the ward or the conservatee, the court must make a further order authorizing and directing payment of specified expenses, costs, and attorney's fees (optional Finding 5 and Order 3) [*Prob. Code § 3601(a)*; *see Prob. Code § 3600*]. For further discussion of these payments, see *§ 290C.14[2]*.

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted. In certain counties, the order should set out the terms of the compromise rather than refer to a separate document [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 10.37(d)].

[3] Appealability of Order

The grant or refusal to grant an order adjudicating the merits of a claim under *Prob. Code § 2500 et seq.* is appealable [*Prob. Code § 1301(f)*]. For a discussion of the effect of a final order under *Prob. Code § 1873*, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.12[3]*.

[4] Cross References

For discussion of when court approval is required to compromise claims, to settle actions, or to extend, renew, or modify obligations, see *§ 290C.13[2]*

For petition approving compromise of claim by estate, see *§ 290C.30*

For order for authorization and instructions as to management of estate property, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.42*

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24-290C California Forms of Pleading and Practice--Annotated § 290C.32

§ 290C.32 Petition for Approval of Compromise of Claim Against Estate [Prob. Code § 2506]

[1] FORM Petition for Approval of Compromise of Claim Against Estate

[*Caption. See § 290C.30[1].*]

Petitioner _____[*name*] respectfully represents:

1. [*Status of petitioner. See § 290C.30[1], Paragraph 1.*]

2. A claim is being asserted against the _____ [ward *or* conservatee] and the estate by _____[*name*] for _____ [*specify, e.g.,* the value of services in completing the construction of a house for the _____ (ward *or* conservatee), for which claimant asserts $40,000 is due and owing as of _____ (*date*)].

[3. *If suit has been filed against the ward or conservatee to collect the claim in a federal court, sister-state court, or court outside the United States, add:* On _____ (*date*), _____ (*name of claimant*) filed an action on the claim against the _____ (ward *or* conservatee) in _____ (*name of court*), entitled _____ (*specify*) and numbered _____ (*specify*), for $_____. Petitioner answered the complaint on behalf of the _____ (ward *or* conservatee) and alleged that the amount claimed is not due and owing because of claimant's breach in failing to repair and reroof the house according to the parties' prior agreement.]

4. Petitioner and _____[*name of claimant*] propose to dispose of the claim by compromise and settlement, subject to approval of the court, for the amount of $_____. A copy of the agreement of compromise and settlement is attached as Exhibit A and incorporated by reference.

5. As appears from the inventory and appraisal filed herein on _____[*date*], the _____ [ward *or* conservatee] has funds and other property in the estate appraised at a total of

$_____, and it is feasible to consummate the proposed compromise and settlement.

6. It is to the advantage of the _____ [ward *or* conservatee] and the estate to compromise the claim in that _____ [*specify, e.g.*, petitioner has investigated and considered the merits of the claim and has concluded that the claimant's services were rendered to the _____ (ward *or* conservatee) and compensation should be paid, but that claimant did not complete the house construction according to the plans and specifications, thereby reducing the value of services to $_____. A settlement of $_____ would thus be fair and would avoid the time, expense, and uncertainties of litigation].

7. [*Special notice allegation. See § 290C.30[1], Paragraph 8.*]

WHEREFORE, petitioner prays that the court approve the compromise and settlement of the claim by _____[*name of claimant*] and authorize petitioner to do all acts and to execute all documents necessary or convenient to consummate the same, and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 290C.30[1].*]

[2] Use of Form

The petition in [1], *above*, is for use by a guardian or conservator in obtaining approval of a compromise of a claim against a ward or conservatee when approval of the court in which the guardianship or conservatorship proceeding is pending is required [*see Prob. Code § 2506*; *but see Guardianship of Carlon (1941) 43 Cal. App. 2d 204, 207-208, 110 P.2d 488* (court as having no jurisdiction to approve compromise of claim based on unenforceable agreement)]. The petition should be entitled PETITION FOR APPROVAL OF COMPROMISE OF CLAIM AGAINST ESTATE.

[3] Contents of Petition

The petition must show that the compromise or settlement is to the advantage of the ward or conservatee and the estate (Paragraph 6) [*Prob. Code § 2506*]. Although there are no other express content requirements for a petition under *Prob. Code § 2506*, the petition should also state the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 2506*].

- A description of the claim against the estate which requires court approval to be compromised (Paragraph 2) [*see Prob. Code §§ 2501, 2502*].

- If the claim is the subject of a pending action or proceeding that is not brought in a court of this state, the present status of the action (Paragraph 3) [*see Prob. Code § 2505(c)*].

- That the disputing parties have entered into a written compromise agreement, a copy of which is

attached and incorporated by reference (Paragraph 4).

- That the estate has sufficient funds to consummate the proposed compromise (Paragraph 5).

- Whether a request for special notice has been filed and, if so, that proper notice will be given or has been waived (Paragraph 7) [*see Prob. Code §§ 1260(a), 2700, 2701*].

[4] Verification

The petition must be verified [*Prob. Code § 1021*; *see § 290C.30[4]*].

[5] Cross References

For discussion of when court approval is required to compromise claims, to settle actions, or to extend, renew, or modify obligations, see *§ 290C.13[2]*

For petition approving compromise of claim by estate, see *§ 290C.30*

For order approving compromise of claim against estate, see *§ 290C.33*

For petition for authorization and instructions as to management of estate property, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.40*

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24-290C California Forms of Pleading and Practice--Annotated § 290C.33

§ 290C.33 Order Approving Compromise of Claim Against Estate [Prob. Code §§ 2501-2505]

[1] FORM Order Approving Compromise of Claim Against Estate

[*Caption. See § 290C.30[1].*]

The petition of _____[*name*], as [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee], for approval of the compromise of a[n] _____ [claim *or* action] by _____[*name*] against the _____ [ward *or* conservatee] based on _____[*specify nature of claim*] came on regularly for hearing by the court on this date. Petitioner appeared by counsel _____[*name*]. [*Specify other appearances, if any.*]

The court finds from proof made to the satisfaction of the court as follows:

1. [*Finding that notices have been duly given. See § 290C.31[1], Finding 1.*]

2. _____[*name*] has asserted a claim against the _____ [ward *or* conservatee] for _____[*specify*] in the sum of $_____. [_____ (*name*) has instituted a suit on the claim in _____ (*name of court*) entitled _____ (*specify*) and numbered _____ (*specify*).]

3. [*Finding of negotiation of compromise. See § 290C.31[1], Finding 3.*]

4. [*Finding of advantage to ward or conservatee. See § 290C.31[1], Finding 4.*]

IT IS ORDERED as follows:

1. The compromise and settlement of the claim against _____[*name*], _____ [ward *or* conservatee], and the estate for _____[*specify claim*] is approved as follows: _____[

specify terms of agreement].

2. [*Order to execute agreement and document. See § 290C.31[1], Order 2.*]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, approving the compromise of a claim against the guardianship or conservatorship estate is for use with the petition in § 290C.32 [*see Prob. Code §§ 2501-2505*]. This form should be entitled ORDER APPROVING COMPROMISE OF CLAIM AGAINST ESTATE.

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. In certain counties, the order should set out the terms of the compromise rather thanrefer to a separate document therefor [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 10.37(d)]. Local court rules and practice should be consulted.

[3] Cross References

For discussion of when court approval is required to compromise claims, to settle actions, or to extend, renew, or modify obligations, see *§ 290C.13[2]*

For order approving compromise of claim by estate, see *§ 290C.31*

For petition approving compromise of claim against estate, see *§ 290C.32*

For order for authorization and instructions as to management of estate property, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.42*

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24-290C California Forms of Pleading and Practice--Annotated § 290C.34

§ 290C.34 Petition to Exclude Funds From Estate and to Deposit Funds in Blocked Account [Prob. Code § 3602(c)]

[1] FORM Petition to Exclude Funds From Estate and to Deposit Funds in Blocked Account

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [Title of case as on papers previously filed in action or proceeding]	)))))	NO. _____ PETITION TO EXCLUDE FUNDS FROM ESTATE AND TO DEPOSIT IN BLOCKED ACCOUNT

_____

Petitioner _____[*name*] respectfully represents:

[*EITHER*]

1. Petitioner is the duly appointed, qualified, and acting _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee].

[*OR*]

1. Petitioner is a person interested in the estate of _____[*name*], _____ [ward *or* conservatee], in that _____[*describe nature of interest*]. _____[*name*] is the _____ [guardian *or* conservator] of the [person and] estate, and was appointed by the court on

_____[*date*].

[*CONTINUE*]

2. On _____[*date*], this court _____ [approved a compromise of this _____ (action *or* proceeding) *or* gave judgment for the _____ (ward *or* conservatee)]. The _____ [compromise *or* judgment] provides for the payment of $_____ to the _____ [ward *or* conservatee], from which amount this court has authorized and directed that the sum of $_____ be deducted and paid for reasonable expenses, costs, and attorney's fees. This leaves a balance of $_____.

3. Petitioner proposes that the sum of $_____[*specify all or part of the remaining balance from Paragraph 2*] not become part of the _____ [guardianship *or* conservatorship] estate but instead be deposited in _____[*name of authorized depository*] under the name of _____[*name of account holder*], subject to withdrawal only on authorization of the court.

4. Good cause exists for depositing the money as described in Paragraph 3, in that _____ [*set forth relevant circumstances that justify request,e.g.*, deposit of the money will keep the value of the minor's total estate at $_____ (*specify sum less than $5,000*), thus permitting the transfer of the assets of the guardianship estate to _____ (*name of parent entitled to custody of minor*) under *Probate Code Sections 3400(b)(2)* and *3401(c)* and preventing further reduction of the estate by administrative costs and fees of the guardian].

5. [*Special notice allegation. See § 290C.30[1], Paragraph 8.*]

WHEREFORE, petitioner prays for an order that $_____ not become part of the _____ [guardianship *or* conservatorship] estate but instead be deposited in _____[*name of authorized depository*] under the name of _____[*name*], subject to withdrawal only on authorization of the court and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 290C.30[1].*]

[2] Use of Form

The petition in [1], *above*, may be used to request a court order requiring that all or part of the money received pursuant to a compromise or judgment in favor of the ward or conservatee that is remaining after payment of expenses not become a part of the guardianship or conservatorship estate but instead be deposited in a blocked account [*see Prob. Code § 3602(c)(1)*]. For good cause shown, the court, upon ex parte petition of the guardian or conservator or upon petition of any person interested in the guardianship or conservatorship estate, may order that all or part of the remaining balance of money not become a part of the guardianship or conservatorship estate but instead be deposited in

or transferred to one or more of the following [*Prob. Code § 3602(c)*]:

- An insured account in a financial institution in this state, or a single-premium deferred annuity, subject to withdrawal only upon authorization of the court.

- A custodian for the benefit of the minor under the California Uniform Transfers to Minors Act [*Prob. Code § 3900 et seq.*], if there is a guardianship of the minor's estate.

- The trustee of a trust which is either created by or approved of in the court's order or judgment. This trust must be revocable by the minor on attaining the age of 18 years and must contain other terms and conditions (including, but not limited to, terms and conditions concerning the trustee's accounts and bond) that the court determines to be necessary to protect the minor's interest.

For discussion of what constitutes an authorized depository, *see § 290C.14[3]*.

[3] Contents of Petition

The petitioner must show good cause for an order requiring that the money received pursuant to the compromise or judgment be deposited in a blocked account (Paragraph 4) [*Prob. Code § 3602(c)*]. Although there are no other express content requirements for a petition under *Prob. Code § 3602(c)*, the petition should also state the following to assist the court in its determination:

- The petitioner's standing to file the petition (Paragraph 1) [*see Prob. Code § 3602(c)*].

- A description of the compromise or judgment that provides for the payment of money for the benefit of the minor or person with a disability (Paragraph 2) [*see Prob. Code § 3600*].

- A description of the proposed exclusion and deposit into a blocked account (Paragraph 3) [*see Prob. Code § 3602(c)*].

[4] Verification

The petition must be verified [*Prob. Code § 1021*; *see § 290C.30[4]*].

[5] Notice

[a] Ex Parte Petition by Guardian or Conservator

The guardian or conservator may file the petition ex parte [*Prob. Code § 3602(c)*]. The petitioner, however, must still comply with the requirements for giving notice to a person who has requested special notice [*Prob. Code §§ 1460(d), 1260(a), 2700 et seq.*]. For further discussion and a form of notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

Even though the petition is filed ex parte, local rule may require that notice be given under certain circumstances apart from special notice considerations. Local court rules may require that all applications for ex parte orders must contain an allegation that no special notice has been requested or that any such notice has been waived [*see, e.g.*, Los Angeles Co. Super. Ct. Rules, Rule 10.38(a)].

[b] Noticed Petition by Interested Person

If the petitioner is an interested person, the petition must be filed with notice given in accordance with *Prob. Code §*

1460 et seq., which generally requires that notice be mailed to specified persons at least 15 days before the day of the hearing [*Prob. Code § 3602(e)*]. For further discussion and a form of notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[6] Cross References

For discussion of disposition of remaining balance, see *§ 290C.14[3]*

For order excluding funds from estate and directing deposit of funds in blocked account, see *§ 290C.35*

For a discussion and forms relating to deposits after the compromise of a minor's disputed claim, see Ch. 364, *Minors: Claims and Property of Minors*

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24-290C California Forms of Pleading and Practice--Annotated § 290C.35

§ 290C.35 Order Excluding Funds From Estate and Directing Deposit of Funds in Blocked Account [Prob. Code § 3602(c)]

[1] FORM Order Excluding Funds From Estate and Directing Deposit of Funds in Blocked Account

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*Title of case as on papers previously filed in action or proceeding*]	)))))	NO. _____ ORDER EXCLUDING FUNDS FROM ESTATE AND DIRECTING DEPOSIT IN BLOCKED ACCOUNT

_____

The petition of _____[*name*], as _____ [guardian of *or* conservator of *or* a person interested in] the [person and] estate of _____[*name*], _____ [ward *or* conservatee], for an order excluding funds received pursuant to a _____ [compromise *or* judgment] from the _____ [guardianship *or* conservatorship] estate and directing that the funds be deposited in a blocked account came on regularly for hearing by the court on this date. Petitioner appeared by counsel _____[*name*]. [*Specify other appearances, if any*.]

The court finds from proof made to the satisfaction of the court as follows:

1. [*Finding that notices have been duly given. See § 290C.31[1], Finding 1*.]

2. The sum of $_____ is the remaining balance, after payment of all expenses, costs, and fees, of the money provided for the benefit of the _____ [ward *or* conservatee] pursuant to the _____ [approval of compromise *or* judgment] entered in this court on _____[*date*].

3. Good cause has been shown that $_____[*specify all or part of the remaining balance in Paragraph 2*] should not become part of the _____ [guardianship *or* conservatorship] estate, but that it should be deposited in a blocked account as provided in *Probate Code Section 2456*.

IT IS ORDERED that the sum of $_____ provided for the _____ [ward *or* conservatee] in the _____ [approval of compromise *or* judgment] entered in the above-entitled _____ [action *or* proceeding] not become part of the estate of _____[*name*], _____ [ward *or* conservatee], and that this sum instead be deposited in _____[*name of authorized depository*] under the name of _____[*name*], subject to withdrawal only on authorization of this court.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, excluding funds from the estate and directing their deposit in a blocked account is for use with the petition in § 290C.34 [*see Prob. Code § 3602(c)*].

In most counties, the proposed order must be filed at some time before the hearing for review by the court if the petition is made on notice. Local practice should be consulted.

[3] Appealability of Order

An order excluding funds from the estate and directing their deposit in a blocked account is not one of the orders listed in *Prob. Code § 1301* as appealable orders in guardianship and conservatorship proceedings. However, such an order may be appealable as an order authorizing, instructing, or directing a fiduciary under *Prob. Code § 1300(c)*. For a discussion of the effect of a final order under *Prob. Code § 1873*, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.12[3]*.

[4] Cross References

For discussion of disposition of remaining balance, see *§ 290C.14[3]*

For petition to exclude funds from estate and to deposit funds in blocked account, see *§ 290C.34*

For order for authorization and instructions as to management of estate property, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.42*

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24-290C California Forms of Pleading and Practice--Annotated § 290C.36

§ 290C.36 Petition to Exclude Funds From Estate and to Direct Payment to Special Needs Trust [Prob. Code §§ 3602(d), (f), 3604(b)]

[1] FORM Petition to Exclude Funds From Estate and to Direct Payment to Special Needs Trust

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*Title of case as on papers previously filed in action or proceeding*]	)))))	NO. _____ PETITION TO EXCLUDE FUNDS FROM ESTATE AND TO DIRECT PAYMENT TO SPECIAL NEEDS TRUST

_____

Petitioner _____[*name*] respectfully represents:

[*EITHER*]

1. Petitioner is the duly apppointed, qualified, and acting _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee].

[*OR*]

1. Petitioner is a person interested in the estate of _____[*name*], _____ [ward *or* conservatee] in that _____[*describe nature of interest*]. _____[*name*] is the [guardian *or* conservator] of the [person and] estate and was appointed by the court on _____[*date*].

[*CONTINUE*]

2. On _____[*date*], this court _____ [approved a compromise of this _____ (action *or* proceeding) *or* gave judgment for the _____ (ward *or* conservatee)]. The _____ [compromise *or* judgment] provides for the payment of $_____ to the _____ [ward *or* conservatee], from which amount this court has authorized and directed that the sum of $_____ be deducted and paid for reasonable expenses, costs, and attorney's fees. This leaves a balance of $_____.

3. Petitioner proposes that the sum of $_____[*specify all or part of the remaining balance from Paragraph 2*] not become part of the _____ [guardianship *or* conservatorship] estate but instead be paid to a special needs trust established under *Probate Code Section 3604* for the benefit of the _____ [ward *or* conservatee].

4. The establishment of a special needs trust is to the advantage of the _____ [ward *or* conservatee] and appropriate for the following reasons:

a. The _____ [ward *or* conservatee] has a disability that substantially impairs his/her ability to provide for his/her own care or custody and constitutes a substantial handicap, in that _____ [*describe nature of disability*];

b. The _____ [ward *or* conservatee] is likely to have special needs that will not be met without the trust, in that _____ [*describe special needs of ward or conservatee and necessity of special needs trust to meet those needs*];

c. The money to be paid to the trust does not exceed the amount that appears reasonably necessary to meet the special needs of the _____ [ward *or* conservatee], in that _____ [*estimate amount reasonably needed to meet ward's or conservatee's special needs, which is an amount equal to or greater than amount from Paragraph 2*].

5. Notice of the time and place of hearing on this petition and a copy of the petition _____ [have been *or* will be] given to the State Director of Health Services, the Director of Mental Health, and the Director of Developmental Services as required by law.

WHEREFORE, petitioner prays for an order that $_____ not become part of the _____ [guardianship *or* conservatorship] estate but instead be paid to a special needs trust for the benefit of _____[*name*], _____ [ward *or* conservatee], and for such other and further orders as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 290C.30[1]*.]

[2] Use of Form

The petition in [1], *above*, is for use by a guardian or a conservator or by a person interested in the guardianship or conservatorship estate to obtain an order that all or part of the money received under a compromise or judgment in favor of a disabled minor or person with a disability that is remaining after payment of expenses be excluded from the guardianship estate of the minor or the conservatorship estate of the person with a disability and paid to a special needs trust for the benefit of the minor or person with a disability [*Prob. Code § 3602(d)*]. A special needs trust is a form of discretionary spendthrift trust designed to preserve public assistance benefits for a disabled beneficiary [*Special Needs Trust for Disabled Minor or Incompetent Person*, 22 Cal. L. Revision Comm'n Reports 989, 993 (1992)]. For further discussion of this type of trust, see *§ 290C.14[5]*; see also California Wills & Trusts, Ch. 118, *Special Needs Trusts* (Matthew Bender).

[3] Contents of Petition

Although there are no express statutory content requirements for the petition, the petition should state all of the following, since a court may not order the establishment or permit the continuation of a special needs trust unless it determines all of these circumstances apply [*Prob. Code § 3604(b)*]:

- The minor or person with a disability has a disability that substantially impairs the individual's ability to provide for the individual's own care or custody and constitutes a substantial handicap (Paragraph 4a);

- The minor or person with a disability is likely to have special needs that will not be met without the trust (Paragraph 4b);

- The money to be paid to the trust does not exceed the amount that appears reasonably necessary to meet the special needs of the minor or person with a disability (Paragraph 4c).

[4] Verification

The petition must be verified [*Prob. Code § 1021*; *see § 290C.30[4]*].

[5] Notice of Hearing

Notice of the time and place of hearing on the petition and a copy of the petition must be mailed to the State Director of Health Services, the Director of Mental Health, and the Director of Developmental Services at the office of each director in Sacramento, at least 15 days before the hearing [*Prob. Code § 3602(f)*]. The petitioner must also comply with the requirements for giving notice to any person who has requested special notice [*Prob. Code §§ 1460(d), 1260(a), 2700 et seq.*]. For further discussion and a form for giving notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[6] Cross References

For state statutes regarding special needs trusts, see *§ 290C.20[4]*

For order excluding funds from estate and directing payment to special needs trust, see *§ 290C.37*

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24-290C California Forms of Pleading and Practice--Annotated § 290C.37

§ 290C.37 Order Excluding Funds From Estate and Directing Payment to Special Needs Trust [Prob. Code §§ 3602(d), 3604(b)]

[1] FORM Order Excluding Funds From Estate and Directing Payment to Special Needs Trust [Prob. Code §§ 3602(d), 3604(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*Title of case as on papers previously filed in action or proceeding*]	)))))	NO. _____ ORDER EXCLUDING FUNDS FROM ESTATE AND DIRECTING PAYMENT TO SPECIAL NEEDS TRUST

_____

The petition of _____[*name*], as _____ [guardian of *or* conservator of *or* a person interested in] the [person and] estate of _____[*name*], _____ [ward *or* conservatee], for an order excluding funds received pursuant to a _____ [compromise *or* judgment] from the _____ [guardianship *or* conservatorship] estate and directing that the funds be paid to a special needs trust came on regularly for hearing by the court on this date. Petitioner appeared by counsel _____[*name*]. [*Specify other appearances, if any.*]

The court finds from proof made to the satisfaction of the court as follows:

1. [*Finding that notices have been duly given. See § 290C.31[1], Finding 1.*]

2. The sum of $_____ is the remaining balance, after payment of all expenses, costs, and fees, of the money provided for the benefit of the _____ [ward *or* conservatee] pursuant to the

_____ [approval of compromise *or* judgment] entered in this court on _____[*date*].

3. The _____ [ward *or* conservatee] has a disability that substantially impairs his/her ability to provide for his/her own care or custody and constitutes a substantial handicap.

4. The _____ [ward *or* conservatee] is likely to have special needs that will not be met without the trust.

5. The money to be paid to the trust does not exceed the amount that appears reasonably necessary to meet the special needs of the _____ [ward *or* conservatee].

IT IS ORDERED that the sum of $_____ provided for the _____ [ward *or* conservatee] in the _____ [approval of compromise *or* judgment] entered in the above-entitled _____ [action *or* proceeding] not become part of the estate of _____[*name*], _____ [ward *or* conservatee], but that this sum instead be paid to a special needs trust for the benefit of the _____[*name*], _____ [ward *or* conservatee].
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

The order in [1], *above*, excluding funds from the estate and directing payment to a special needs trust is for use with the petition in § 290C.36 [*see Prob. Code §§ 3602(d), 3604(b)*]. If the court orders that money of a minor or person with a disability be paid to a special needs trust, the trust is subject to the continuing jurisdiction of the court and also to supervision by the court to the extent the court deems necessary [*Prob. Code § 3604(a)*; *see Prob. Code § 17005* for transfer of proceedings]. The terms of the trust must satisfy the requirements set forth in *Prob. Code § 3604*, and the court must review and approve the terms [*Prob. Code § 3604(a)*].

In most counties, the proposed order must be filed at some time before the hearing for review by the court if the petition is made on notice. Local practice should be consulted.

[3] Appealability of Order

An order excluding funds from the estate and directing payment to a special needs trust is not one of the orders listed in *Prob. Code § 1301* as appealable orders in guardianship and conservatorship proceedings. However, such an order may be appealable as an order authorizing, instructing, or directing a fiduciary under *Prob. Code § 1300(c)*. For discussion of the effect of a final order under *Prob. Code § 1873*, see *Ch. 287, Guardianship and Conservatorship: General Management Powers, § 287.12[3]*.

[4] Cross References

For discussion on special needs trusts, see *§ 290C.14[5]*

For petition to exclude funds from estate and to direct payment to special needs trust, see *§ 290C.36*

For order for authorization and instructions as to management of estate property, see *Ch. 287, Guardianship and*

Conservatorship: General Management Powers, § 287.42

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24-290D California Forms of Pleading and Practice--Annotated 290D.syn

§ 290D.syn Synopsis to Chapter 290D: GUARDIANSHIP AND CONSERVATORSHIP: ACTIONS AGAINST GUARDIANS, CONSERVATORS, AND SURETIES

§ 290D.01 Scope of Chapter

§ 290D.02 Cross References

§§ 290D.03-290D.09 [Reserved]

§ 290D.10 Governing Statutes

§ 290D.11 Liability of Guardian or Conservator of the Person for Acts of Ward or Conservatee

§ 290D.12 Liability of Guardian or Conservator in Management of Estate

[1] Fiduciary Relationship

[a] Obligations

[b] Breach of Duty

[2] Standard of Care in Management of Estate

[3] Acts Authorized by Court

[4] Failure to File Timely Inventory

[5] Surcharge on Account

[6] Fraudulent Concealment of Assets on Final Account

[7] Fiduciary Abuse of Elderly or Dependent Adult Conservatee

[a] In General

[b] Attorney's Fees and Costs

[c] Jurisdiction

[d] Conduct Actionable Under Statutory Provisions

[8] Acts of Agent

[9] Acts of Joint Guardian or Conservator

§ 290D.13 Liability of Surety

[1] Nature and Extent

[2] Statute of Limitations

§ 290D.14 Extent of Liability

§ 290D.15 Accounting by Probate Court as Prerequisite to Action Against Guardian, Conservator, or Surety

§ 290D.16 Jurisdiction

§ 290D.17 Venue

§§ 290D.18-290D.29 [Reserved]

§ 290D.30 Related Titles From LEXIS Publishing

§ 290D.31 State Statutes

§ 290D.32 Decisions

[1] Liability of Guardian or Conservator in Management of Estate

[a] In General

[b] Acts of Agent

[c] No Liability Incurred

[d] Amount of Liability

[e] Fraudulent Concealment of Assets

[f] Attorney's Fees and Costs

[2] Liability of Surety

§§ 290D.33-290D.39 [Reserved]

§ 290D.40 Complaint Against Former Guardian or Conservator and Surety--By Former Ward or Conservatee--To Recover Money Surcharged to Guardian or Conservator on Final Account

[1] FORM

[2] Use of Form

[3] Contents of Complaint

[4] Jurisdiction

[5] Venue

[6] Verification

[7] Cross References

§ 290D.41 Complaint Against Former Guardian or Conservator and Surety--By Former Ward or Conservatee--Conversion of Estate Assets

[1] FORM

[2] Use of Form

[3] Contents of Complaint

[4] Measure of Damages

[5] Cross References

§ 290D.42 Complaint Against Former Guardian or Conservator and Surety--By Former Ward or Conservatee--For Damages for Fraudulent Concealment of Assets on Final Account

[1] FORM

[2] Use of Form

[3] Contents of Complaint

[4] Measure of Damages

[5] Cross References

§ 290D.43 Demurrer--For Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--No Allegation of Judicial Decree That Guardian or Conservator Is Liable to Ward or Conservatee--Notice of Hearing [Cal. Rules of Ct., Rules 3.1320(c)]

[1] FORM

[2] Use of Form

[3] Rules of Court

[4] Cross References

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PART I. SCOPE

24-290D California Forms of Pleading and Practice--Annotated § 290D.01

§ 290D.01 Scope of Chapter

This chapter discusses circumstances under which a guardian or conservator may incur liability for the acts of a ward or conservatee [*see § 290D.11*] and in the management of the ward's estate [*see § 290D.12*]. It discusses actions against the guardian or conservator and his or her sureties after the termination of the relationship of guardian and ward or conservator and conservatee [*see §§ 290D.12- 290D.17*].

This chapter contains a Research Guide [*see § 290D.30* et seq.] and the following forms:

- A complaint for use in an action against a former guardian or conservator and his or her surety to recover money surcharged on the final account [*see § 290D.40*].

- A complaint for use in an action for conversion of estate assets after settlement of the final account [*see § 290D.41*].

- A complaint for damages for fraudulent concealment of assets on the final account [*see § 290D.42*].

- A demurrer based on the failure of a complaint to allege that there is a judicial decree that the guardian or conservator is liable to the ward or conservatee [*see § 290D.43*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewFamily LawGuardiansGeneral OverviewTortsBusiness TortsFraud & MisrepresentationNondisclosureGeneral OverviewTortsIntentional TortsConversionGeneral OverviewTortsMalpractice & Professional LiabilityProfessional Services

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§ 290D.02 Cross References

General forms for actions against sureties may be found in for, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

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

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[Reserved]

§§ 290D.03[Reserved]

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24-290D California Forms of Pleading and Practice--Annotated § 290D.10

§ 290D.10 Governing Statutes

The liability of guardians, conservators, and sureties is governed by *Prob. Code §§ 2101, 2103, 2333, 2401, 2615,* and *16000 et seq.* (duties of trustees), and by *Code Civ. Proc. § 996.410 et seq.* (liability of principal and sureties).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesLiabilityEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview

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24-290D California Forms of Pleading and Practice--Annotated § 290D.11

§ 290D.11 Liability of Guardian or Conservator of the Person for Acts of Ward or Conservatee

A guardian or conservator has the care, custody, and control of, and has charge of the education of, his or her ward or conservatee [*Prob. Code § 2351(a)*]. A guardian who has the custody and control of a minor may be liable for civil damages for any act or willful misconduct of the minor that results in injury or death to another person or injury to the property of another [*Civ. Code § 1714.1*]. However, the amount of this liability for a minor's willful misconduct is limited by law, and the dollar amount of liability is adjusted every two years in odd-numbered years by the Judicial Council to reflect any increases in the cost of living in California [*see Civ. Code § 1714.1(c)*]. As of January 1, 2007, the joint and several liability of the parent or guardian having custody and control of a minor may not exceed $34,735 for each tort of the minor, and in the case of injury to a person, imputed liability is further limited to medical, dental and hospital expenses incurred by the injured person, not to exceed $34,735 [*Civ. Code § 1714.1(a),(b)*; California Rules of Court, Appendix B (adjustment formula and computation of most recent adjustment)]. This liability is in addition to any liability otherwise imposed by law [*Civ. Code § 1714.1(a)*]. Similarly, any act of willful misconduct of a minor that results in the defacement of someone else's property with paint or a similar substance (e.g., graffiti) is imputed to the custodial parent or guardian for all purposes of civil damages, including court costs, and attorney's fees, to the prevailing party, and the custodial parent or guardian is jointly and severally liable with the minor for any damages resulting from the willful misconduct, not to exceed $34,735 for each tort of the minor [*Civ. Code § 1714.1(a),(b)*; California Rules of Court, Appendix B (adjustment formula and computation of most recent adjustment)]. The maximum liability imposed by *Civ. Code § 1714.1* is the maximum liability authorized under that section at the time that the act of willful misconduct was committed [*Civ. Code § 1714.1(d)*].

A guardian having the custody and control of a minor also may be liable for any injury to the person or property of another proximately caused by the discharge of a firearm by the minor, if the guardian either permitted the minor to have the firearm or left the firearm in a place accessible to the minor. This additional liability is limited to $30,000 for the injury or death of one person as a result of any one occurrence or, subject to the limit as to one person, to $60,000 for injury or death of all persons as a result of any one such occurrence [*Civ. Code § 1714.3*; for further discussion, *see* Ch. 394, *Parent and Child*].

Furthermore, a guardian or conservator of the person may be liable for the actions of the ward or conservatee according

to basic tort principles under which one who takes charge of a person whom he or she knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the person to prevent him or her from doing harm to others [*see Poncher v. Brackett (1966) 246 Cal. App. 2d 769, 772-773, 55 Cal. Rptr. 59* ; Restatement (Second) of Torts § 319].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansGeneral OverviewTortsProcedureMultiple DefendantsJoint & Several LiabilityTortsVicarious LiabilityFamily MembersGeneral Overview

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24-290D California Forms of Pleading and Practice--Annotated § 290D.12

§ 290D.12 Liability of Guardian or Conservator in Management of Estate

[1] Fiduciary Relationship

[a] Obligations

The relationship of guardian and ward and of conservator and conservatee is a fiduciary relationship that is governed by the law of trusts, except as provided in *Prob. Code §§ 1400-3925* [*Prob. Code § 2101*]. The trustee has a duty to administer the trust solely in the interest of the beneficiaries [*Prob. Code § 16002(a)*]. A violation by the trustee of any duty that the trustee owes the beneficiary is a breach of trust [*Prob. Code § 16400*]. Moreover, the trustee has a duty to keep the trust property separate from other property not subject to the trust and to see that the trust property is designated as property of the trust [*Prob. Code § 16009*; *see also Prob. Code § 16440* (measure of liability for breach of trust)]. Liability may be incurred for commingling real property as well as money, such as when a guardian or conservator willfully and unnecessarily takes title to real property belonging to the estate in his or her individual name, or when the guardian or conservator takes a note with a mortgage as security for money belonging to the estate [*see In re Guardianship of Bane (1898) 120 Cal. 533, 537, 52 P. 852]* .

[b] Breach of Duty

A guardian or conservator who breaches a fiduciary duty is chargeable with any of the following that is appropriate under the circumstances [*Prob. Code § 2401.3(a)*]:

- Any loss or depreciation in value of the estate resulting from the breach of duty, with interest.
- Any profit made by the guardian or conservator through the breach of duty, with interest.
- Any profit that would have accrued to the estate if the loss of profit is the result of the breach of duty.

The amount of interest for which a guardian or conservator may be liable is the greater of (1) the amount of interest that

accrues at the legal rate on judgments, or (2) the amount of interest actually received [*Prob. Code § 2401.5(a)*]. Any surcharge so incurred may not be paid by or offset against future fees or wages to be provided by the estate to the guardian or conservator [*Prob. Code § 2401.6*].

If the guardian or conservator has acted reasonably and in good faith under the circumstances as known to the guardian or conservator, the court, in its discretion, may excuse the guardian or conservator in whole or in part from liability for losses or for interest if it would be equitable to do so [*Prob. Code §§ 2401.3(b), 2401.5(b)*]. Furthermore, unless otherwise provided in the instrument or in the guardianship and conservatorship law (*Prob. Code § 1400 et seq.*), a guardian or conservator generally is not personally liable on a note, mortgage, deed of trust, or other contract properly entered into in the guardian's or conservator's fiduciary capacity in the course of the guardianship or conservatorship unless the guardian or conservator fails to reveal his or her representative capacity or identify the guardianship or conservatorship estate in the instrument [*Prob. Code § 2110*].

The Probate Code provisions governing liability of a guardian or conservator for breach of a fiduciary duty do not prevent resort to any other remedy available against the guardian or conservator under the statutory or common law [*Prob. Code § 2401.7*].

[2] Standard of Care in Management of Estate

The guardian or conservator of the estate must use ordinary care and diligence in the management and control of the estate [*Prob. Code § 2401*]. Failure to use ordinary care and diligence may not only render the guardian or conservator liable for loss that results to the estate because of the failure, but may also be cause for removal of the guardian or conservator [*see Prob. Code § 2650*; for discussion of removal of a guardian or conservator, *see* Ch. 290G, *Guardianship and Conservatorship: Removal or Resignation of Guardian or Conservator*].

What constitutes use of ordinary care and diligence is determined by all the circumstances of the particular estate [*Prob. Code § 2401*]. If there is no showing of bad faith, carelessness, negligence, or imprudence, a guardian or conservator who has acted in good faith with ordinary care and diligence incurs no liability for a mistake in judgment [*see Estate of Schandoney (1901) 133 Cal. 387, 394, 65 P. 877* ; *Guardianship of Blair (1956) 139 Cal. App. 2d 832, 835-836, 294 P.2d 521]* . A professional fiduciary, such as a bank, is held to a more stringent standard in the management of an estate than a nonprofessional and must exercise the skill and knowledge ordinarily possessed by professional fiduciaries [*Estate of Beach (1975) 15 Cal. 3d 623, 631, 635, 125 Cal. Rptr. 570, 542 P.2d 994* (executor)].

[3] Acts Authorized by Court

When a judgment or order becomes final, it releases the guardian or conservator and the sureties from all claims of the ward or conservatee and of any persons affected thereby based on any act or omission directly authorized, approved, or confirmed in the judgment or order [*Prob. Code § 2103(a)*; *but see Conservatorship of Coffey (1986) 186 Cal. App. 3d 1431, 1437-1438, 231 Cal. Rptr. 421* (*Prob. Code § 2103* not applicable when judgment, order, or decree obtained by fraud, conspiracy, or misrepresentation)]. Thus, for example, in a case in which a conservator obtained an order from the probate court authorizing her to advance necessary travel expenses to her attorney for a trip to Scotland in order to locate relatives of the conservatee, the conservator was released from liability for the expenses incurred, and the administrator of the conservatee's estate could not have the order set aside when the conservator's final account was settled [*Conservatorship of Harvey (1970) 3 Cal. 3d 646, 651, 91 Cal. Rptr. 510, 477 P.2d 742]* .

[4] Failure to File Timely Inventory

If a guardian or conservator fails to file any inventory within the time prescribed by law or by court order, the guardian or conservator is liable for damages for any injury to the estate, or to any interested person, directly resulting from the failure to file the inventory on time [*Prob. Code § 2615*; *see* Ch. 286, *Guardianship and Conservatorship: Inventory*

and Appraisement]. Any damages awarded are a personal liability of the guardian or conservator and a liability on the bond, if any [*Prob. Code § 2615*]. Failure to file an inventory may also be cause for removal of a guardian or conservator [*Prob. Code § 2650*; *see* Ch. 290G, *Guardianship and Conservatorship: Removal or Resignation of Guardian or Conservator*].

[5] Surcharge on Account

A guardian or conservator is required to present accounts periodically to the court for settlement and allowance [*Prob. Code § 2620*; *see* Ch. 290E, *Guardianship and Conservatorship: Accounts*]. The termination of the relationship of guardian and ward or of conservator and conservatee by the death of either, by the ward attaining majority, by the determination of the court that the guardianship or conservatorship is no longer necessary, by the removal or resignation of the guardian or conservator, or for any other reason does not cause the court to lose jurisdiction of the proceeding for the purpose of settling the accounts of the guardian or conservator or for any other purpose incident to the enforcement of the judgments and order of the court on the account or on the termination of the relationship [*Prob. Code § 2630*]. The province of the probate court in settling a guardian's or conservator's account includes the power to surcharge the guardian or conservator and to determine all necessarily incidental issues [*see Guardianship of Wood (1961) 193 Cal. App. 2d 260, 267, 14 Cal. Rptr. 147* ; for a complaint to recover money surcharged to guardian or conservator on final account, *see § 290D.40*].

[6] Fraudulent Concealment of Assets on Final Account

When a judgment or order made pursuant to the guardianship and conservatorship law (*Prob. Code § 1400 et seq.*) becomes final, it releases the guardian or conservator and the sureties from all claims of the ward or conservatee and of any persons affected thereby based on any act or omission directly authorized, approved, or confirmed in the judgment or order. "Order" includes an order settling an account of the guardian or conservator, whether an intermediate or final account [*Prob. Code § 2103(a)*; *Conservatorship of Harvey (1970) 3 Cal. 3d 646, 651, 652, 91 Cal. Rptr. 510, 477 P.2d 742* ; *but see Conservatorship of Tobias (1989) 208 Cal. App. 3d 1031, 1034-1036, 256 Cal. Rptr. 525]* .

Prob. Code § 2103 does not apply, however, if the judgment or order is obtained by fraud or conspiracy or by misrepresentation contained in the petition or account or in the judgment or order as to any material fact. Misrepresentation includes, but is not limited to, the omission of a material fact [*Prob. Code § 2103(b)*; *Conservatorship of Coffey (1986) 186 Cal. App. 3d 1431, 1437-1438, 231 Cal. Rptr. 421* ; *see Bank of America v. Superior Court (1986) 181 Cal. App. 3d 705, 715, 226 Cal. Rptr. 685]* . Intrinsic fraud, such as perjury, does not constitute a sufficient basis for equitable relief against a judgment settling a final account of a guardian or conservator [*see Adams v. Martin (1935) 3 Cal. 2d 246, 248-249, 44 P.2d 572]* .

A guardian or conservator will be liable, however, despite the prior settlement of an account, when relief is sought on the basis of extrinsic fraud, such as concealing and failing to account for property of the ward or conservatee [*see Lataillade v. Orena (1891) 91 Cal. 565, 576, 27 P. 924* ; for complaints to recover damages on the basis of fraud, *see §§ 290D.41* (conversion of estate assets), 290D.42 (concealment of assets)].

The "fraud" specified in *Prob. Code § 2103(b)* is fraud in the obtaining of a court order that is otherwise subject to the effect of res judicata. Thus, if the fraud does not prevent the ward or conservatee from attending the hearing to settle the account and to litigate any claims of wrongdoing against the guardian or conservator, the fraud is not considered extrinsic [*see Bank of America v. Superior Court (1986) 181 Cal. App. 3d 705, 714-715, 226 Cal. Rptr. 685* (no extrinsic fraud established)]. A former conservator's failure to inform the probate court of the lapse of a life insurance policy constituted omission of a material fact under *Prob. Code § 2103(b)* [*see Conservatorship of Coffey (1986) 186 Cal. App. 3d 1431, 1437-1438, 231 Cal. Rptr. 421]* .

An action for relief on the ground of fraud must be brought within three years of the discovery of the facts constituting

the fraud [*Code Civ. Proc. § 338(d)*; *see Miller v. Ash (1909) 156 Cal. 544, 562-564, 105 P. 600]* .

In any case, and notwithstanding *Prob. Code § 2103(b)*, no action may be maintained against the sureties on the bond unless the action commences within six years from the date the judgment under *Prob. Code § 2103*, or the later of the orders under *Prob. Code § 2333(b)*, becomes final [*Prob. Code § 2333(c)*].

[7] Fiduciary Abuse of Elderly or Dependent Adult Conservatee

[a] In General

A person or entity that takes, secretes, appropriates, or retains, or assists in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both, or by undue influence, may be held liable for "fiduciary abuse" [*Welf. & Inst. Code §§ 15657, 15610.30(a)*]. A person or entity is deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, or retains possession when the person or entity knew or should have known that this conduct was likely to be harmful to the elder or dependent adult's [*Welf. & Inst. Code § 15610.30(b)*]. A person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an elder or dependent adult [*Welf. & Inst. Code § 15610.30(c)*]. For purposes of these provisions, a "representative" is a person or entity that is either a conservator, trustee, or other representative of the estate of an elder or dependent adult, or an attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney [*Welf. & Inst. Code § 15610.30(d)*].

[b] Attorney's Fees and Costs

When it is proven by clear and convincing evidence that a conservator (or other responsible person) is liable for physical abuse or neglect and that he or she has been guilty of recklessness, oppression, fraud, or malice in the commission of that abuse, the court must award the plaintiff reasonable attorney's fees and costs [*Welf. & Inst. Code § 15657(a)*]. For this purpose, "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of the claim for fiduciary abuse [*Welf. & Inst. Code § 15657(a)*]. If, however, the liability of the conservator (or other responsible person) is based on the acts of an employee, the requirements of *Civ. Code § 3294(b)* must be satisfied before any damages or attorney's fees may be awarded [*Welf. & Inst. Code § 15657(c)*]. *Civ. Code § 3294(b)* generally provides that an employer cannot be held liable for punitive or exemplary damages unless the employer (1) had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others, (2) authorized or ratified the wrongful conduct for which the damages are awarded, or (3) was personally guilty of oppression, fraud, or malice [*Civ. Code § 3294(b)*].

When it is proven by a preponderance of the evidence that a conservator (or other responsible person) is liable for financial abuse, in addition to all other remedies provided by law, the court must award the plaintiff reasonable attorney's fees and costs; the term "costs" includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of the claim for financial abuse [*Welf. & Inst. Code § 15657.5(a)*]. When it is proven by a preponderance of the evidence that the defendant is liable for financial abuse, and it is also proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse, the limitations imposed by *Code Civ. Proc. § 377.34* on the recoverable damages do not apply [*Welf. & Inst. Code § 15657.5(b)*]. The standards in *Civ. Code § 3294(b)* regarding the imposition of punitive damages on an employer based upon the acts of an employee must be satisfied before any punitive damages may be imposed against an employer found liable for financial abuse [*Welf. & Inst. Code § 15657.5 (c)*]. These provisions do not affect any award of punitive damages under *Civ. Code § 3294* [*Welf. & Inst. Code § 15657.5(d)*].

The award of attorney's fees is based on all factors relevant to the value of the services rendered, including, but not

limited to, the factors set forth in *Cal. Rules Prof. Conduct, Rule 4-200,* and all of the following [*Welf. & Inst. Code § 15657.1*]:

- The value of the abuse-related litigation in terms of the quality of life of the elder or dependent adult, and the results obtained.

- Whether the defendant took reasonable and timely steps to determine the likelihood and extent of liability.

- The reasonableness and timeliness of any written offer in compromise made by a party to the action.

The value of the estate is also an appropriate factor to consider in setting fees [*Conservatorship of Levitt (2001) 93 Cal. App. 4th 544, 550, 113 Cal. Rptr. 2d 294]* .

[c] Jurisdiction

Jurisdiction over the action for fiduciary abuse lies with the department of the superior court having jurisdiction over probate conservatorships if (1) a conservator has been appointed for the plaintiff before initiation of the action, and (2) the court decides that the matter should not be determined in a civil action [*see Welf. & Inst. Code § 15657.3(a), (b)*]. If the court decides that the matter should be determined in a civil action, the matter must be transferred to the general civil calendar of the superior court. However, the court need not abate any proceeding for relief if it determines that the civil action was filed for the purpose of delay [*see Welf. & Inst. Code § 15657.3(b)*].

The death of the conservatee will not deprive the court of jurisdiction of a claim for fiduciary abuse [*see Welf. & Inst. Code § 15657.3(c)*]. On petition after the conservatee's death, the right to maintain an action will be transferred either to the decedent's personal representative or to the person or persons entitled to succeed to the decedent's estate [*see Welf. & Inst. Code § 15657.3(d)*]. Further, when it is proven by clear and convincing evidence that the conservator (or other responsible person) was guilty of recklessness, oppression, fraud, or malice in the commission of the fiduciary abuse, the conservatee's personal representative or successor in interest will probably be able to claim damages for pain or suffering sustained by the conservatee, notwithstanding the provisions of *Code Civ. Proc. § 377.34*. That section generally provides that, in an action prosecuted by a deceased person's personal representative or successor in interest, there can be no recovery for pain, suffering, or disfigurement. However, *Welf. & Inst. Code §§ 15657(b)* and *15657.5(b)(1)*, which apply to actions for fiduciary abuse, provides that the limitations imposed by Code Civ. Proc. § 337.34 "on the damages recoverable shall not apply" when the defendant has been guilty of recklessness, oppression, fraud, or malice.

[d] Conduct Actionable Under Statutory Provisions

Actionable conduct under *Welf. & Inst. Code § 15610.30* (financial abuse) generally is also actionable conduct under *Prob. Code §§ 2101* and *16000 et seq.* (fiduciary duties of conservators) and other appropriate statutory provisions [*see, e.g., Civ. Code § 3336* (conversion)] as a breach of the conservator's fiduciary duty. It appears that the only advantage to proceeding under *Welf. & Inst. Code § 15657.5* is that attorney's fees are recoverable thereunder.

[8] Acts of Agent

When a guardian or conservator delegates the administration of the estate to another, the guardian or conservator becomes liable for the actions of the person to whom the duties were delegated [*see Gaver v. Early (1923) 191 Cal. 123, 127, 215 P. 394]* . Although a guardian or conservator may employ attorneys or agents, according to the usual course of business, the guardian's or conservator's personal duties of disposition and management are not to be delegated [*see Gaver v. Early (1923) 191 Cal. 123, 127, 215 P. 394]* .

[9] Acts of Joint Guardian or Conservator

A guardian or conservator is not strictly liable for the acts or omissions of a coguardian or coconservator that occurred prior to July 1, 1987, to which he or she consented, or that, by his or her negligence, he or she enabled the coguardian or coconservator to commit [*see Prob. Code § 2101*; *Prob. Code § 16402*; *see also Blackmon v. Hale (1970) 1 Cal. 3d 548, 559, 83 Cal. Rptr. 194, 463 P.2d 418* (trust case)].

A guardian or conservator is not liable to the ward or conservatee for a breach of duty occurring on or after July 1, 1987, that is committed by a coguardian or coconservator, except in circumstances in which [*Prob. Code § 16402*]:

- The guardian or conservator participates in a breach of duty committed by the coguardian or coconservator;

- The guardian or conservator improperly delegates the administration of the estate to the coguardian or coconservator;

- The guardian or conservator approves, knowingly acquiesces in, or conceals a breach of duty committed by the coguardian or coconservator;

- The guardian or conservator negligently enables the coguardian or coconservator to commit a breach of duty; or

- The guardian or conservator neglects to take reasonable steps to compel the coguardian or coconservator to redress a breach of duty in a case in which the guardian or conservator reasonably should have known of the breach.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & InventoriesEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of CareTortsBusiness TortsFraud & MisrepresentationNondisclosureGeneral OverviewTortsIntentional TortsBreach of Fiduciary DutyGeneral OverviewTortsMalpractice & Professional LiabilityProfessional ServicesTortsVicarious LiabilityAgentsGeneral Overview

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24-290D California Forms of Pleading and Practice--Annotated § 290D.13

§ 290D.13 Liability of Surety

[1] Nature and Extent

The bond of a guardian or conservator is conditioned on the faithful execution of the duties of the office according to law [*Prob. Code § 2320*]. If there is a breach of a condition of the bond of a guardian or conservator, an action may be brought against the sureties on the bond for the use and benefit of the ward or conservatee or of any person interested in the estate [*Prob. Code § 2333(a)*].

The surety is liable only for injury done to the estate by the guardian or conservator while performing an act in his or her official capacity; the surety is not liable for the guardian's or conservator's personal acts or schemes [*see Hornaday v. Hornaday (1949) 95 Cal. App. 2d 384, 396-397, 213 P.2d 91]* .

[2] Statute of Limitations

Even though *Code Civ. Proc. § 337*, which applies to actions based on written contracts, is broad enough to encompass an action on a surety bond, *Prob. Code § 2333* is the statute of limitations applicable to an action against the surety on the bond for injury done to the estate by a guardian or conservator in the performance of acts in his or her official capacity, because *Prob. Code § 2333* is more specifically applicable to the claim than is *Code Civ. Proc. § 337* [*see Estate of Mason (1990) 224 Cal. App. 3d 634, 638, 274 Cal. Rptr. 61* (*Prob. Code § 2333* expressly applicable to claim against guardian brought by former ward on surety bond for guardian's performance)]. Under *Prob. Code § 2333*, no action may be maintained against the sureties on the bond unless commenced within four years from the discharge or removal of the guardian or conservator or within four years from the date the order surcharging the guardian or conservator becomes final, whichever is later [*Prob. Code § 2333(b)*].

When a judgment or order in a guardianship or conservatorship proceeding becomes final, it releases the sureties from all claims of the ward or conservatee based on an act or omission directly authorized, approved, or confirmed in the judgment or order [*Prob. Code § 2103(a)*]. This rule does not apply when the judgment or order is obtained by fraud, conspiracy, or misrepresentation [*Prob. Code § 2103(b)*]. However, in any case, and notwithstanding *Prob. Code § 2103(b)*, no action may be maintained against the sureties on the bond unless the action commences within six years

from the date the judgment under *Prob. Code § 2103* or the later of the orders under *Prob. Code § 2333(b)* becomes final [*Prob. Code § 2333(c)*].

When *Prob. Code § 2333* applies, it is arguable that in the situation in which discharge or removal does not or cannot occur, a former ward or conservatee could indefinitely delay obtaining a surcharge order, thereby providing no outside limit on the liability of the surety on the bond. The doctrine of laches, however, could be invoked to ensure that wards and conservatees exercise reasonable diligence in procuring settlement of their guardians' or conservators' accounts [*see Estate of Mason (1990) 224 Cal. App. 3d 634, 640, 274 Cal. Rptr. 61]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesLiabilityContracts LawDefensesStatutes of LimitationsEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral Overview

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24-290D California Forms of Pleading and Practice--Annotated § 290D.14

§ 290D.14 Extent of Liability

The liability of the guardian or conservator is not limited to the penal amount of the bond [*Code Civ. Proc. § 996.470(a)*]. A guardian or conservator who uses or disposes of estate property in an unauthorized manner is chargeable with any of the following that are appropriate under the circumstances [*see Prob. Code §§ 2101* (relationship subject to law relating to trusts), 16440 (measure of liability for trustees), 16441 (interest)]:

- Any loss or depreciation in the value of the estate resulting from the breach of duty, with interest.
- Any profit made by the guardian or conservator through the breach of duty, with interest.
- Any profit that would have accrued to the estate if the loss of profit is the result of the breach of duty.

If a guardian or conservator has been negligent, but has not willfully or intentionally breached his or her duty, he or she is liable only for simple, rather than compound, interest on the amount due [*see Estate of Cousins (1896) 111 Cal. 441, 452, 44 P. 182]* . If, however, the guardian or conservator has willfully misappropriated assets from the estate or commingled the funds of the estate with his or her own, the guardian or conservator is liable for the principal sum plus compound interest on the amount due, unless it is shown that a larger sum was realized from the unauthorized use of the estate property [*see Gaver v. Early (1923) 191 Cal. 123, 125-126, 215 P. 394* ; *Glassell v. Glassell (1905) 147 Cal. 510, 512-513, 82 P. 42]* .

Notwithstanding *Civ. Code § 2845*, a judgment of liability on a bond must be in favor of the beneficiary and against the guardian or conservator and the sureties. The judgment will obligate the guardian or conservator and the sureties jointly and severally [*see Code Civ. Proc. § 996.460(a)*]. The aggregate liability of a surety to all persons for breach of the condition of the bond is limited to the amount of the bond [*see Code Civ. Proc. § 996.470(a)*]. If, however, the beneficiary makes a claim for payment on the bond after the liability of the guardian or conservator has been established and the surety fails to make payment, the surety is liable for costs incurred in obtaining a judgment against him or her, including reasonable attorney's fees, and interest on the judgment from the date of the claim [*see Code Civ. Proc. §*

996.480(a)(2); *see also Burns v. Massachusetts Bonding etc. Ins. Co. (1944) 62 Cal. App. 2d 972, 975-976, 146 P.2d 29* (decided under former *Prob. Code § 554*)].

A judgment that does not exhaust the full amount of the bond decreases the amount of the bond, but does not discharge the bond. The liability on the bond may be enforced thereafter from time to time until the amount of the bond is exhausted [*Code Civ. Proc. § 996.460(c)*]. For further discussion of the liability of principals and sureties on a bond, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-290D California Forms of Pleading and Practice--Annotated § 290D.15

§ 290D.15 Accounting by Probate Court as Prerequisite to Action Against Guardian, Conservator, or Surety

An action, except an action based on fraud, will not lie against a guardian or conservator or against his or her sureties until after an accounting has been had between the guardian and the ward or the conservator and conservatee [*see Richardson v. Royal Indemnity Co. (1943) 21 Cal. 2d 557, 560, 134 P.2d 1* ; *Smith v. Fidelity & Deposit Co. (1933) 130 Cal. App. 45, 51, 19 P.2d 1018]* . The probate court has exclusive jurisdiction of the accounting, and the accounting is a prerequisite to the maintenance of an action on the bond [*Smith v. Fidelity & Deposit Co. (1933) 130 Cal. App. 45, 51-52, 19 P.2d 1018* ; *see Price v. Fireman's Fund Ins. Companies (1987) 193 Cal. App. 3d 1536, 1541, 239 Cal. Rptr. 158* (action for conversion)]. When an action based on fraud is brought after the final accounting in the probate proceeding, it is not necessary to obtain a court order determining liability of the principal before an action on the bond can be brought against the surety; the liability of both the principal and the surety can be adjudicated in one proceeding [*see Alexandrou v. Alexander (1974) 37 Cal. App. 3d 306, 311-313, 112 Cal. Rptr. 307* (estate administration case)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesLiabilityEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAccounting

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§ 290D.16 Jurisdiction

The superior court has jurisdiction of an action against a guardian or conservator as an unlimited civil case or as a limited civil case [*Code Civ. Proc. §§ 85, 86(a)(1)*]. An action is a limited civil case if the amount in controversy, exclusive of interest, is $25,000 or less, and the relief sought is exclusively of a type that described in one or more statutes that classify an action or proceeding as a limited civil case [*Code Civ. Proc. §§ 85(b),(c), 86(a)(1)*]. For further discussion of subject matter jurisdiction, see Ch. 324, *Jurisdiction: Subject Matter* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateJurisdiction & VenueGeneral Overview

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§ 290D.17 Venue

When a defendant is sued in an official capacity as guardian or conservator on a claim for the payment of money or for the recovery of personal property, the county which has jurisdiction of the estate which the defendant represents is the proper county for the trial of the action, except as otherwise provided in *Prob. Code § 17005* pertaining to trustees [*Code Civ. Proc. § 395.1*; *see Prob. Code § 17005* (proceeding under *Prob. Code § 15000 et seq.* generally (Trust Law)); *see also Prob. Code §§ 82* (definition of trust), 17300-17302 (testamentary trust subject to continuing court jurisdiction)]. Thus, for example, an action by a third party against a ward and his or her guardian to recover personal property after termination of the guardianship, but prior to the delivery of the estate to the ward and the discharge of the guardian, is properly brought in the county having jurisdiction of the estate [*Haines v. Lamb (1962) 24 Cal. Rptr. 146* ; *see also Abbey v. Schaefer (1952) 108 Cal. App. 2d 554, 556, 239 P.2d 44* (action against executrix for recovery of funds held by her and claimed as part of decedent's estate, and not alleging misappropriation by her or conversion to her own use, as properly brought in county having jurisdicition of the estate)].

However, it would appear that the general venue provisions for civil actions apply for an action against a former guardian or conservator and his or her surety by the former ward or conservatee after removal of the guardian or conservator or termination of the guardianship or conservatorship proceeding and settlement of the account by the probate court [*see Code Civ. Proc. §§ 395, 395.5*]. Except as otherwise provided by law and subject to the power of the court to transfer actions, the county in which the defendants, or some of them, reside at the commencement of the action is the proper county for the trial of the action [*Code Civ. Proc. § 395(a)*]. Subject to the power of the court to change the place of trial as in other cases, a corporation may be sued in the county where [*Code Civ. Proc. § 395.5*]:

- The contract is made or is to be performed;
- The obligation or liability arises or the breach occurs; or
- The principal place of business of the corporation is situated.

For further discussion, see Ch. 571, *Venue* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueCorporationsCivil ProcedureVenueIndividual DefendantsEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateJurisdiction & VenueGeneral Overview

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[Reserved]

§§ 290D.18[Reserved]

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§ 290D.30 Related Titles From LEXIS Publishing

For memoranda of points and authorities relating to forms in this part, see California Points and Authorities, Ch. 106, *Guardianships and Conservatorships* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 290D.31 State Statutes

Statute of limitations for fraud. *Code Civ. Proc. § 338(d)*

Liability of principal and surety on bonds. *Code Civ. Proc. § 996.410 et seq.*

Fiduciary relation between guardian and ward or conservator and conservatee. *Prob. Code § 2101*

Res judicata effect of judgments and orders in guardianship and conservatorship proceedings. *Prob. Code § 2103*

Nonprofit charitable corporation as guardian or conservator. *Prob. Code § 2104*

Surety on bond of nonprofit charitable corporation. *Prob. Code § 2325*

Action on bond against surety of guardian or conservator. *Prob. Code § 2333*

Statute of limitations for action against surety of guardian or conservator. *Prob. Code § 2333*

Standard of ordinary care and diligence in management of estate. *Prob. Code § 2401*

Liability of guardian or conservator for failure to file timely inventory. *Prob. Code § 2615*

Jurisdiction of probate court after termination of relationship of guardian and ward or conservator and conservatee. *Prob. Code § 2630*

Fiduciary obligations of trustees. *Prob. Code § 16000 et seq.*

Liability of cofiduciary. *Prob. Code § 16402*; *see* former *Civ. Code § 2239* (governing occurrences prior to July 1,

1987)

Civil action for fiduciary abuse of elderly or dependent adult conservatee. *Welf. & Inst. Code § 15657 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataCivil ProcedureRemediesBondsSuretiesLiabilityEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & InventoriesEstate, Gift & Trust LawProbateProcedures in ProbateJurisdiction & VenueGeneral OverviewTortsProcedureStatutes of LimitationsGeneral Overview

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PART III. RESEARCH GUIDE

24-290D California Forms of Pleading and Practice--Annotated § 290D.32

§ 290D.32 Decisions

[1] Liability of Guardian or Conservator in Management of Estate

[a] In General

"Trust property" as used in former *Civ. Code § 2236* (*now see Prob. Code § 16009*) includes real property as well as money, so that willfully and unnecessarily taking title to real property belonging to trust in individual name of trustee or taking note with mortgage as security for money belonging to trust constitutes commingling trust property with trustee's own. *In re Guardianship of Bane (1898) 120 Cal. 533, 537, 52 P. 852*

Guardian's liability for loss to estate depends on circumstances under which loss occurred. *In re Guardianship of Curtis (1898) 121 Cal. 468, 472, 53 P. 936*

Guardian is liable for loss on investments made on inadequate security without advice and consent of court. *In re Guardianship of Carver (1897) 118 Cal. 73, 74, 50 P. 22*

Trust beneficiary's civil actions against conservators of trustor's person and estate did not violate no-contest clause in trust because actions made no claim against assets of trust or trustor's testamentary or conservatorship estate and sought damages from conservators personally rather than from conservatorship estate. *Poag v. Winston (1987) 195 Cal. App. 3d 1161, 1176-1179, 241 Cal. Rptr. 330*

Conservator, as fiduciary, is subject to rules governing trustees and owes duty of loyalty requiring that he or she act in highest good faith; conservator is liable for any breach of fiduciary duty. *Poag v. Winston (1987) 195 Cal. App. 3d 1161, 1176-1177, 1180, 241 Cal. Rptr. 330*

Under former *Civ. Code § 2261(c)* (*now see Prob. Code § 16225*, operative July 1, 1987), conservator bank was permitted to deposit trust funds with itself at interest; however, since bank has duty to maximize trust assets consistent with safety and other relevant considerations, bank bore burden of proving that circumstances justified investment in

low-interest passbook account, rather than higher interest 30-day account. *Conservatorship of Pelton (1982) 132 Cal. App. 3d 496, 501-503, 183 Cal. Rptr. 188*

Province of probate court in settling guardian's account includes power to surcharge guardian and determine all necessarily incidental issues. *Guardianship of Wood (1961) 193 Cal. App. 2d 260, 267, 14 Cal. Rptr. 147*

[b] Acts of Agent

Guardians who delegated duties of administration of guardianship estate to attorney were liable for loss due to attorney's misappropriation of estate assets. *Gaver v. Early (1923) 191 Cal. 123, 126-127, 215 P. 394*

[c] No Liability Incurred

Conservator is released from liability for actions authorized or approved by court unless order obtained by fraud, conspiracy, or misrepresentation of material fact. *Conservatorship of Harvey (1970) 3 Cal. 3d 646, 651, 91 Cal. Rptr. 510, 477 P.2d 742*

Guardian who invested money of ward in mortgage of real property pursuant to court order was not liable for loss; failure to foreclose mortgage was error in judgment, but not negligence constituting liability. *Estate of Schandoney (1901) 133 Cal. 387, 390, 394, 65 P. 877*

Guardian of estate of incompetent widow who acts in good faith with ordinary diligence and prudence in maintaining ward from her own estate and not seeking widow's allowance was not liable for mistake in judgment. *Guardianship of Blair (1956) 139 Cal. App. 2d 832, 835-836, 294 P.2d 521*

[d] Amount of Liability

Limit of liability of guardian is return of principal sum with legal interest compounded annually when misappropriation of funds was willful, rather than careless, and it is not shown that a larger sum was realized from the misappropriation. *Gaver v. Early (1923) 191 Cal. 123, 125-126, 215 P. 394* ; *Guardianship of O'Connor (1938) 28 Cal. App. 2d 527, 529-530, 83 P.2d 65*

Guardian is liable for compound interest for commingling funds of ward with own. *Glassell v. Glassell (1905) 147 Cal. 510, 512-513, 82 P. 42*

Guardian is liable only for simple, rather than compound, interest when there has been no willful breach of duty or any intentional violation of obligations of trust. *Estate of Cousins (1896) 111 Cal. 441, 452, 44 P. 182*

[e] Fraudulent Concealment of Assets

Perjury, being intrinsic fraud, does not constitute sufficient basis for equitable relief against judgment settling final account of guardian. *Adams v. Martin (1935) 3 Cal. 2d 246, 248-249, 44 P.2d 572*

Guardian is liable for fraudulent concealment of assets of state despite prior final settlement of account. *Lataillade v. Orena (1891) 91 Cal. 565, 576, 27 P. 924*

Prob. Code § 2103(b)'s "fraud" exception as referring to extrinsic fraud and does not include claim that guardian

fraudulently misrepresented its skill and improperly invested guardianship funds when investment losses were disclosed in accounting and alleged fraud had no effect on ward's ability to attend accounting hearing or to litigate claim. *Bank of America v. Superior Court (1986) 181 Cal. App. 3d 705, 714-715, 226 Cal. Rptr. 685*

[f] Attorney's Fees and Costs

Value of estate is appropriate factor to consider in setting attorney's fees under *Welf. & Inst. Code § 15657.1*. *Conservatorship of Levitt (2001) 93 Cal. App. 4th 544, 550, 113 Cal. Rptr. 2d 294*

[2] Liability of Surety

Statute of limitations for bringing action against guardians does not begin to run on death of guardian. *Maloney v. Mass. Bonding & Ins. Co. (1942) 20 Cal. 2d 1, 10, 123 P.2d 449*

Action for fraudulent concealment of assets after final settlement of account is timely when brought within statutory period after discovery of fraud. *Miller v. Ash (1909) 156 Cal. 544, 562-564, 105 P. 600*

Action for accounting and surcharge order against guardian is prerequisite to action against surety on guardian's bond in absence of any recognized exception to this requirement. *Price v. Fireman's Fund Ins. Companies (1987) 193 Cal. App. 3d 1536, 1541, 239 Cal. Rptr. 158*

Guardian's failure to appear and avoidance of service of process in action for conversion of estate assets does not relieve ward of necessity of obtaining accounting and surcharge order against guardian before suing surety on guardian's bond. *Price v. Fireman's Fund Ins. Companies (1987) 193 Cal. App. 3d 1536, 1541, 239 Cal. Rptr. 158*

Surety is not liable for personal acts or schemes of guardian. *Hornaday v. Hornaday (1949) 95 Cal. App. 2d 384, 396-397, 213 P.2d 91*

Surety is liable for interest up to face amount of bond; surety is liable for interest beyond face amount only for its own default in failure to make payment when due. *Burns v. Massachusetts Bonding etc. Ins. Co. (1944) 62 Cal. App. 2d 972, 975-976, 146 P.2d 29*

Settlement of guardian's account is conclusive against guardian's sureties. *Smith v. Fidelity & Deposit Co. (1933) 130 Cal. App. 45, 52, 55, 19 P.2d 1018*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesLiabilityEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewTortsBusiness TortsFraud & MisrepresentationNondisclosureGeneral OverviewTortsIntentional TortsBreach of Fiduciary DutyGeneral OverviewTortsMalpractice & Professional LiabilityProfessional ServicesTortsVicarious LiabilityAgentsGeneral Overview

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24-290D California Forms of Pleading and Practice--Annotated §§ 290D.33-290D.39

[Reserved]

§§ 290D.33[Reserved]

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PART IV. FORMS

24-290D California Forms of Pleading and Practice--Annotated § 290D.40

§ 290D.40 Complaint Against Former Guardian or Conservator and Surety--By Former Ward or Conservatee--To Recover Money Surcharged to Guardian or Conservator on Final Account

[1] FORM Complaint Against Former Guardian or Conservator and Surety--By Former Ward or Conservetee--To Recover Money Surcharged to Guardian or Conservator on Final Account

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO RECOVER MONEY SUR-
_____ [*names*], Defendants.	)	CHAGED TO _____ [GUARDIAN
	)	OR CONSERVATOR]
	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____[*name*] was appointed _____ [guardian *or* conservator] of the [person and] estate of plaintiff on _____[*date*], in proceeding No. _____ in the Superior Court of California, County of _____. Defendant _____[*name*] qualified and served as _____ [guardian *or* conservator] until _____ [*specify, e.g.*, the ward's majority on _____ (*date*)].

[*EITHER*]

2. Defendant _____[*name of individual guardian or conservator*] is a resident of _____ County, California [, in the _____ (*name*) _____ (Municipal Court *or* Judicial) District].

[*OR*]

2. Defendant _____[*name of corporate guardian or conservator*] is, and at all times mentioned herein was, a nonprofit charitable corporation duly organized and existing under the laws of the State of California with its principal place of business in _____[*city*], _____ County, California [, in the _____ (*name*) _____ (Municipal Court *or* Judicial) District *or allege other basis of venue as appropriate*].

[*EITHER*]

3. Defendant _____[*name of individual surety*] is a resident of _____ County, California [, in the _____ (*name*) _____ (Municipal Court *or* Judicial) District *or allege other basis of venue as appropriate*].

[*OR*]

3. Defendant _____[*name of corporate surety*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of _____, authorized to engage and engaged in the surety insurance business in the State of California with its principal place of business in this State in _____[*city*], _____ County, California [, in the _____ (*name*) _____ (Municipal Court *or* Judicial) District *or allege other basis of venue as appropriate*].

[*CONTINUE*]

4. Defendant _____[*name*], as principal, and defendant _____[*name*], as surety, duly executed, acknowledged, and filed their bond in the sum of $_____ with the clerk of the Superior Court of _____ County on _____[*date*], conditioned on the faithful performance by defendant _____[*name*] of his/her duties as _____ [guardian *or* conservator] of the estate of plaintiff. A copy of the bond is attached as Exhibit A and incorporated by reference.

5. On _____[*date*], defendant _____[*name*] filed a final account in the aforementioned _____ [guardianship *or* conservatorship] proceeding and plaintiff filed objections thereto. On _____[*date*], the court settled the final account and surcharged the amount of $_____ to defendant _____[*name*]. A copy of the order settling the account and surcharging the defendant is attached as Exhibit B and incorporated by reference.

6. Defendant _____[*name*] has not paid the surcharged amount of $_____ to plaintiff and continues to refuse to pay the amount to plaintiff, so that the surcharged amount is still due and owing.

WHEREFORE, plaintiff prays for judgment against defendants, and each of them, as follows:

1. For the surcharged amount of $_____;

2. For interest on this sum at _____ percent per annum from _____[*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____[*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

[2] Use of Form

The complaint in [1], above, is for use by a former ward or conservatee to recover from the former guardian or conservator and surety money surcharged to the guardian or conservator on the final account.

[3] Contents of Complaint

No action may be maintained against the sureties on the bond unless commenced within four years from the discharge or removal of the guardian or conservator or within four years from the date the order surcharging the guardian or conservator becomes final, whichever is later [*Prob. Code § 2333(b)*].

In the case of a judgment or order based on fraud, conspiracy, or misrepresentation, no action may be maintained against the sureties on the bond unless it is commenced within six years from the date that the judgment under *Prob. Code § 2103* or the later of the orders under *Prob. Code § 2333(b)* becomes final [*Prob. Code § 2333(c)*]. Accordingly, the complaint should state in order to establish that the action is being brought within the statute of limitations:

- When the guardian or conservator was removed or when the guardianship or conservatorship was terminated (Paragraph 1).

- When the final judgment or order, or order surcharging the guardian or conservator was rendered (Paragraph 5).

The complaint should also allege:

- The defendant's status as surety on the bond (Paragraphs 3, 4).
- That the guardian or conservator has been surcharged on the final account (Paragraph 5).
- That the surcharged amount has not been paid and is due and owing (Paragraph 6) [*see Smith v. Fidelity & Deposit Co. (1933) 130 Cal. App. 45, 51-52, 19 P.2d 1018* (accounting as condition precedent to maintenance of action on bond; probate court as having exclusive jurisdiction of accounting)].

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[5] Venue

Venue is governed by the general venue provisions for civil actions [*see Code Civ. Proc. §§ 395* (venue in county of defendant's residence), 395.5 (venue for corporations or associations); *see also § 290D.17*].

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

The verification shown here complies with the requirements of *Code Civ. Proc. §§ 446* and *2015.5*.

[7] Cross References

For discussion of surcharge on account, see *§ 290D.12[5]*

For memoranda of points and authorities supporting and opposing a demurrer to a complaint against a surety on the bond of a guardian or conservator, see California Points and Authorities, Ch. 106, *Guardianship and Conservatorship* (Matthew Bender)

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PART IV. FORMS

24-290D California Forms of Pleading and Practice--Annotated § 290D.41

§ 290D.41 Complaint Against Former Guardian or Conservator and Surety--By Former Ward or Conservatee--Conversion of Estate Assets

[1] FORM Complaint Against Former Guardian or Conservator and Surety--By Former Ward or Conservatee--Conversion of Estate Assets

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR CONVER-
_____ [*names*],	)	SION OF ESTATE ASSETS
Defendants.	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. [*Defendant's status as former guardian or conservator. See § 290D.40[1], Paragraph 1.*]

2. [*Defendant's residence and status as nonprofit corporation. See § 290D.40[1], Paragraph 2.*]

3. [*Defendant's status as surety. See § 290D.40[1], Paragraph 3.*]

4. [*Allegations regarding existence of bond. See § 290D.40[1], Paragraph 4.*]

5. On _____[*date*], defendant _____[*name*] filed a final account in the

_____ [guardianship *or* conservatorship] proceeding. On _____[*date*], the court settled the account and ordered defendant to deliver to plaintiff the following assets of the estate: _____[*specify*]. A copy of the order is attached as Exhibit B and incorporated by reference.

6. Defendant _____[*name*] has failed to deliver the assets to plaintiff and, although plaintiff has demanded delivery, defendant continues to so refuse and has converted the assets to his/her own use. The reasonable value of the assets is $_____.

[7. Between the time of the court order attached hereto and the filing of this action, plaintiff _____ (*describe time spent and expenses properly incurred in pursuit of converted property*), all to plaintiff's damage in the sum of $_____.]

WHEREFORE, plaintiff prays for judgment against defendants, and each of them, as follows:

1. For the value of the assets converted in the sum of $_____;

2. For interest on this sum at _____ percent per annum from and after _____[*date*];

[3. For damages for time and money expended in pursuit of the converted assets in the sum of $_____;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification. See § 290D.40[1].*]

[2] Use of Form

The complaint in [1], above, is for use by a former ward or conservatee to recover damages for the conversion of estate assets by the former guardian or conservator.

[3] Contents of Complaint

The complaint should include the following allegations:

- The defendants' status as the former guardian or conservator and the surety on the bond (Paragraphs 1-4) [*see § 290D.40[3]*].

- The plaintiff's right to possession of certain identifiable assets (Paragraph 5).

- The value of the assets, plaintiff's demand for delivery, defendant's conversion of the assets (Paragraph 6).

- Damages (Paragraph 7).

For further discussion and forms, see Ch. 150, *Conversion* .

[4] Measure of Damages

The measure of damages for conversion is [*Civ. Code § 3336*]:

- The value of the property at the time of the conversion, with the interest from that time, or an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable, and proximate result of the wrongful act complained of and which a proper degree of prudence on his or her part would not have averted.

- A fair compensation for the time and money properly expended in pursuit of the property. Although the scope of proper expenditures is not defined by statute or case law, it has been held that *Civ. Code § 3336* does not allow for the recovery of attorney's fees [*see Viner v. Untrecht (1945) 26 Cal. 2d 261, 272, 158 P.2d 3]* .

Exemplary damages may also be available in an action for conversion [*see Civ. Code § 3294*]. For discussion and a form for an allegation, see Ch. 150, *Conversion* .

[5] Cross References

For discussion and petition to recover money sucharged to guardian or conservator on final account, see *§ 290D.40*

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24-290D California Forms of Pleading and Practice--Annotated § 290D.42

§ 290D.42 Complaint Against Former Guardian or Conservator and Surety--By Former Ward or Conservatee--For Damages for Fraudulent Concealment of Assets on Final Account

[1] FORM Complaint Against Former Guardian or Conservator and Surety--By Former Ward or Conservatee--For Damages for Fraudulent Concealment of Assets on Final Account

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*], Defendants.	)	COMPLAINT FOR DAMAGES FOR FRAUDU-
	)	LENT CONCEALMENT OF ASSETS
	)	

Plaintiff alleges:

1. _____[*Defendant's status as former guardian or conservator. See § 290D.40[1], Paragraph 1.*]

2. _____[*Defendant's residence and status as nonprofit corporation. See § 290D.40[1], Paragraph 2.*]

3. _____[*Defendant's status as surety. See § 290D.40[1], Paragraph 3.*]

4. _____[*Allegations regarding existence of bond. See § 290D.40[1], Paragraph 4.*]

5. On _____[*date*], defendant _____[*name*] filed a final account in the _____ [guardianship *or* conservatorship] proceeding, and the account was settled on _____[*date*]. Defendant _____[*name*] paid the assets of the estate listed in the final

account to plaintiff, and defendant _____[*name*] was discharged as _____ [guardian *or* conservator] on _____[*date*]. Copies of the orders settling the final account and discharging defendant _____[*name*] are attached as Exhibits B and C, respectively, and incorporated by reference.

6. At the time the final account was settled, defendant _____[*name*] represented that the final account included all of the assets of the estate which he/she was required to account for and to deliver to plaintiff.

7. On or about _____[*date*], plaintiff first learned that defendant _____[*name*] had concealed the following assets of the _____ [guardianship *or* conservatorship] estate and failed to include them in the final account: _____[*specify*]. Prior to that time, plaintiff was not aware of the omission of the assets from the final account because _____ [*specify, e.g.,* defendant _____ (*name*) concealed the existence of the assets from plaintiff when they were acquired by the estateand failed to include them in the _____ [inventory *or* inventories] and accounts rendered in the _____ (guardianship *or* conservatorship) proceeding]. [*If assets are property other than money, add:* The reasonable value of the assets is $_____.]

8. The actions of defendant _____[*name*] regarding the assets were fraudulent in that _____ [*specify, e.g.,* defendant _____ (*name*) knew that the assets belonged to the estate, failed to include them in the final account as he/she was required to do, represented that all of the estate assets were included in the final account, and concealed their existence from plaintiff, the court, and plaintiff's relatives].

9. Because of the actions of defendant _____[*name*] regarding the assets, plaintiff justifiably thought that all of the estate assets had been accounted for and delivered to him/her and did not object to the settlement of the final account and the discharge of defendant _____[*name*].

10. As a proximate result of the fraudulent actions of defendant _____[*name*], plaintiff _____ [*allege facts showing allowable damages, e.g.,* has been deprived of $_____ belonging to the estate and interest on that amount for _____ months], by reason of which plaintiff has been damaged in the sum of $_____.

WHEREFORE, plaintiff prays for judgment against defendants, and each of them, as follows:

1. For the value of the assets fraudulently concealed in the sum of $_____;

2. For damages for _____ [*specify, e.g.,* interest] in the sum of $_____;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification. See § 290D.40[1].*]

[2] Use of Form

The complaint in [1], above, is for use by a former ward or conservatee to recover damages for assets fraudulently concealed by the former guardian or conservator and omitted from the final account. It should be noted that the facts involved in a case of fraudulent concealment may also constitute the basis for other causes of action, such as conversion. For allegations regarding conversion of assets, see *§ 290D.41[1]*.

[3] Contents of Complaint

The complaint in [1], *above*, alleges:

- The defendants' status as former guardian or conservator and surety (Paragraphs 1-3).
- The existence of the bond (Paragraph 4).
- Defendant's failure to disclose the existence of assets which he or she was required to include in the final account (Paragraphs 6, 7).
- Defendant's fraudulent intent (Paragraph 8).
- Plaintiff's justifiable reliance and damages (Paragraphs 9, 10).

The suppression of a fact by one who is bound to disclose it may constitute a deceit which is the basis for a cause of action for damages [*see Civ. Code §§ 1709, 1710*; for further discussion, *see* Ch. 269, *Fraud and Deceit*]. Because an action for relief on the ground of fraud must be brought within three years of the discovery of the facts constituting fraud [*see Code Civ. Proc. § 338(d)*]. In addition, and in any case, no action may be maintained against the sureties on the bond unless the action commences within six years from the date that the judgment or order under *Prob. Code § 2103* or the later of the orders under *Prob. Code § 2333(b)* (orders for discharge or removal or surcharge of guardian or conservator) becomes final [*Prob. Code § 2333(c)*]. Therefore, the complaint should state the date on which the fraudulent concealment was discovered (Paragraph 7).

[4] Measure of Damages

The measure of damages in an action for fraudulent concealment of assets is governed by the statutory provisions for compensatory damages for deceit [*see Civ. Code §§ 1709, 3333*]. One who willfully deceives another with intent to induce that person to alter his or her position to his or her injury or risk is liable for any damages which the injured party suffers [*Civ. Code § 1709*]. The measure of damages for the breach of an obligation not arising from contract, except when otherwise provided by the Civil Code, is the amount which will compensate for all the detriment proximately caused by the breach, whether it could have been anticipated or not [*Civ. Code § 3333*]. Exemplary damages may also be available in an action based on fraud and deceit [*see Civ. Code § 3294*]. For further discussion of damages and forms for allegations, see Ch. 269, *Fraud and Deceit* .

[5] Cross References

For discussion of fraudulent concealment of assets on final account, see *§ 290D.12[6]*

For discussion and petition to recover money sucharged to guardian or conservator on final account, see *§ 290D.40*

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24-290D California Forms of Pleading and Practice--Annotated § 290D.43

§ 290D.43 Demurrer--For Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--No Allegation of Judicial Decree That Guardian or Conservator Is Liable to Ward or Conservatee--Notice of Hearing [Cal. Rules of Ct., Rules 3.1320(c)]

[1] FORM Demurrer--For Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--No Allegation of Judicial Decree That Guardian or Conservator Is Liable to Ward or Conservatee--Notice of Hearing [Cal. Rules of Ct., Rules 3.1320(c)]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*], Defendants.	)	DEMURRER TO COMPLAINT AND NOTICE OF HEARING
	)	
	)	

_____

Defendant _____[*name*] demurs to the complaint herein on the following ground:

The complaint fails to state facts sufficient to constitute a cause of action against this defendant in that there is no allegation that there has been a judicial decree that the _____ [guardian *or* conservator] is liable to the _____ [ward *or* conservatee] and of the extent of that liability, and no allegations that the _____ [guardian *or* conservator] fraudulently concealed and failed to include assets in his/her final account.

NOTICE IS HEREBY GIVEN that this demurrer has been set for hearing on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [Department

_____ of] the above-entitled court, located at _____[*street address*], in _____[*city*], _____ County, California.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

The demurrer in [1], above, is for use when the plaintiff fails to allege in a cause of action against a former guardian or conservator or his or her surety on the bond that there has been a prior judicial decree that theguardian or conservator is liable to the ward or conservatee and the extent of that liability [*Code Civ. Proc. §§ 430.10, 430.60*; *see Richardson v. Royal Indemnity Co. (1943) 21 Cal. 2d 557, 560, 134 P.2d 1* ; *see also § 290D.15*].

[3] Rules of Court

The California Rules of Court governing civil law and motion rules do not apply to an application for an order before trial under the Probate Code, except for discovery matters [*see Cal. Rules of Ct., Rules 3.100, 3.1103*]. *Cal. Rules of Ct., Rule 3.1103* states that the rules do apply to demurrers, unless the context or subject matter otherwise require [*see Cal. Rules of Ct., Rule 3.1113* for format regarding memoranda of points and authorities].

[4] Cross References

For discussion and petition to recover money sucharged to guardian or conservator on final account, see *§ 290D.40*

For other grounds of demurrer, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

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24-290E California Forms of Pleading and Practice--Annotated 290E.syn

§ 290E.syn Synopsis to Chapter 290E: GUARDIANSHIP AND CONSERVATORSHIP: ACCOUNTS

§ 290E.01 Scope of Chapter

§ 290E.02 Cross References

§§ 290E.03-290E.09 [Reserved]

§ 290E.10 Governing Statutes

§ 290E.11 Definitions

§§ 290E.12-290E.19 [Reserved]

§ 290E.20 When Account Must Be Presented

§ 290E.21 Accounts of Temporary Guardians or Conservators

§ 290E.22 Dispensing With Accounting for Small Estates

[1] Order Dispensing With Accounts

[2] Petition to Require Accounting

§ 290E.23 Failure to File Account or Set for Hearing Within Time Required

[1] Notice to Guardian or Conservator

[2] Procedure on Failure to File After Notice

[a] Actions Available to Court

[b] Removal

[c] Citation

[d] Appointment of Temporary Conservator or Guardian

[e] Appointment of Legal Counsel

[f] Extension of Time to File Account

§ 290E.24 Items for Which Guardian or Conservator Is Not Accountable

§§ 290E.25-290E.29 [Reserved]

§ 290E.30 Financial Statement and Report

[1] General Requirement

[2] Standard Account

[3] Simplified Account

§ 290E.31 Summary

[1] Content of Summary

[a] In General

[b] When Guardianship or Conservatorship Terminates Before Filing of Inventory

[2] Format of Summary

§ 290E.32 Schedules

§ 290E.33 Verification

§§ 290E.34-290E.39 [Reserved]

§ 290E.40 Notice of Hearing

§ 290E.41 Objections to Account

§ 290E.42 Review of Transactions Not Previously Authorized

§§ 290E.43-290E.49 [Reserved]

§ 290E.50 Termination on Exhaustion of Estate

§ 290E.51 Settlement of Account After Ward Reaches Majority

§ 290E.52 Guardian or Conservator Dies, Becomes Incapacitated, or Absconds

[1] Legal Representative Is Appointed for Guardian or Conservator

[2] Legal Representative Is Not Appointed for Guardian or Conservator

[3] Preparation of Final Account by Legal Representative or Attorney

§ 290E.53 Death of Ward or Conservatee

[1] Expenses of Last Illness and Disposition of Remains

[2] Transfer of Assets

§ 290E.54 Continuing Jurisdiction on Termination

§ 290E.55 Finality of Accounts

[1] Release of Claims

[2] Res Judicata Effect

§§ 290E.56-290E.59 [Reserved]

§ 290E.60 Related Matthew Bender Publications

§ 290E.61 State Statutes

§ 290E.62 Local Court Rules

[1] Alameda County

[2] Contra Costa County

[3] Los Angeles County

[4] Orange County

[5] Riverside County

[6] Sacramento County

[7] San Francisco

§ 290E.63 Decisions

[1] Accounts Generally

[2] Expenses and Disbursements

[3] Objections to Account

[4] Settlement of Account

§ 290E.64 Text References

§§ 290E.65-290E.69 [Reserved]

§ 290E.70 Citation to Guardian or Conservator to Show Cause [Prob. Code §§ 1240-1242, 2620.2(c)(2)]

[1] FORM

[2] Use of Form

[a] In General

[b] Contents and Service of Citation

[3] Punishment for Contempt and Removal From Office

§ 290E.71 Account and Report of Guardian or Conservator [Prob. Code §§ 1060-1064, 2620] and Petition for Fees [Prob. Code § 2640]

[1] FORM

[2] Use of Form

[3] Fees of Guardian or Attorney

[4] Contents of Petition for Approval of Account

[5] Summary and Schedules

[6] Verification

§ 290E.71A Summary of Account--Standard and Simplified Accounts [Prob. Code §§ 1060-1064, 2620]--Judicial Council Form GC-400(SUM)/GC-405(SUM)

[1] FORM

[2] Use of Form

§ 290E.71B Schedules A and C for Simplified Accounts [Prob. Code §§ 1060-1064, 2620]--Judicial Council Forms GC-405(A) and GC-405(C)

[1] FORM

[2] Use of Form

[3] Additional Schedules for Simplified Accounts

§ 290E.71C Schedules for Standard Accounts [Prob. Code §§ 1060-1064, 2620]--Judicial Council Forms GC-400(A-1) through GC-400(DIST)/GC-405(DIST)

[1] FORM

[2] Use of Form

[3] Schedules for Standard Accounts

§ 290E.71D Receipts and Disbursements Worksheet for Schedules A and C--Standard Accounts [Prob. Code §§ 1060-1064, 2620]--Judicial Council Form GC-405(A)(C)

[1] FORM

[2] Use of Form

§ 290E.72 Objections to Account [Prob. Code § 2622]

[1] FORM

[2] Use of Form

[3] Verification

§ 290E.73 Order Settling Account and Report of Guardian or Conservator and Allowing Fees [Prob. Code §§ 2620, 2640]

[1] FORM

[2] Use of Form

§ 290E.74 Petition to Compel Attorney to Render Final Account--Absconding, Deceased, or Incapacitated Guardian or Conservator--By Successor Guardian or Conservator [Prob. Code § 2632(c)]

[1] FORM

[2] Use of Form

[3] Verification

§ 290E.75 Order Compelling Attorney to Render Account

[1] FORM

[2] Use of Form

§ 290E.76 Petition for Discharge on Final Account and Report of Guardian or Conservator [Prob. Code §§ 1060-1064, 2620, 2640]

[1] FORM

[2] Use of Form

[3] Waiver of Account

§ 290E.77 Order Settling Final Account of Guardian or Conservator and Discharging Guardian or Conservator

[1] FORM

[2] Use of Form

§ 290E.78 Declaration and Order for Final Discharge of Guardian or Conservator

[1] FORM

[2] Use of Form

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PART I. SCOPE

24-290E California Forms of Pleading and Practice--Annotated § 290E.01

§ 290E.01 Scope of Chapter

This chapter discusses the accounts filed by guardians or conservators of the estate. This chapter contains the following forms:

- A citation to appear and show cause why a guardian or conservator should not be punished for contempt for failing to file an account or to set it for a hearing [*Prob. Code §§ 1240-1242, 2620.2(b), 2620.2(c)(2)*] [*see § 290E.70*].

- A form for a first or current account and a petition for fees [*Prob. Code § 2640*] [*see § 290E.71*].

- Judicial Council forms for the summary of account [*see § 290E.71A*], schedules of charges and credits for use with either a simplified account [*see § 290E.71B*] or a standard account [*see § 290E.71C*], and a worksheet for use calculating credits and disbursements for a standard account [*see § 290E.71D*].

- An objection to an account [*Prob. Code § 2622*] [*see § 290E.72*].

- An order settling an account [*Prob. Code §§ 2620, 2640*] [*see § 290E.73*].

- A petition by a successor guardian or conservator for an order compelling an absconding, deceased, or incapacitated guardian's or conservator's attorney to render a final account, and an order compelling the attorney to render such an account [*Prob. Code § 2632(c)*] [*see §§ 290E.74, 290E.75*].

- A final account and petition for discharge and an order settling the final account and discharging the guardian or conservator [*Prob. Code §§ 1060-1064, 2620, 2640*] [*see §§ 290E.76, 290E.77*].

- A declaration and order for the final discharge of a guardian or conservator [*see § 290E.78*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAccounting

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24-290E California Forms of Pleading and Practice--Annotated § 290E.02

§ 290E.02 Cross References

- For discussion and forms pertaining to compensation of a guardian or conservator, see Ch. 290F, *Guardianship and Conservatorship: Compensation* .

- For discussion and forms pertaining to memoranda of points and authorities, see Ch. 417, *Points and Authorities* .

- For discussion and forms pertaining to compensation in probate proceedings, see Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-290E California Forms of Pleading and Practice--Annotated §§ 290E.03-290E.09

[Reserved]

§§ 290E.03[Reserved]

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24-290E California Forms of Pleading and Practice--Annotated § 290E.10

§ 290E.10 Governing Statutes

Prob. Code §§ 1060-1064 prescribe rules that must be met whenever an account is filed with the court in any proceeding subject to the Probate Code [*Prob. Code § 1060*].

The laws governing the interim accounts of guardians or conservators of the estate are set forth in *Prob. Code §§ 2620-2628*, and the law governing accounts of temporary guardians or conservators is set forth in *Prob. Code § 2256*.

Prob. Code §§ 2630-2633 contain the law governing accounts on the termination of the relationship between guardian and ward or between conservator and conservatee.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAccounting

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24-290E California Forms of Pleading and Practice--Annotated § 290E.11

§ 290E.11 Definitions

As used in this chapter, the term "guardian" refers to guardian of the estate and the term "conservator" refers to conservator of the estate. Conservator also includes limited conservators of the estate to the extent that the limited conservator's powers and duties are specifically and expressly provided by the order appointing him or her [*see Prob. Code § 2600(a)* (definition of "conservator" as used in *Prob. Code §§ 2600-2633*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-290E California Forms of Pleading and Practice--Annotated §§ 290E.12-290E.19

[Reserved]

§§ 290E.12[Reserved]

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24-290E California Forms of Pleading and Practice--Annotated § 290E.20

§ 290E.20 When Account Must Be Presented

The guardian or conservator of the estate must present an account to the court for settlement and allowance at the expiration of one year from the time of appointment and thereafter not less frequently than biennially, unless ordered otherwise by the court [*Prob. Code § 2620(a)*; for a form of account, *see § 290E.71*]. Although two years is generally the longest period allowable between accounts, accounts should be presented more frequently when the guardianship or conservatorship has been active, or when the guardian or conservatorship has independent powers and the court is not required to authorize specific acts. Frequent accounting will help to limit the guardian's or conservator's liability by submitting his or her acts to the court for review and approval without undue delay [*see Prob. Code § 2103*].

A guardian or conservator does not comply with the account requirement by presenting an account that is so inaccurate that investigation by a referee becomes necessary [*Clark v. State Bar (1952) 39 Cal. 2d 161, 173, 246 P.2d 1* (guardianship)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-290E California Forms of Pleading and Practice--Annotated § 290E.21

§ 290E.21 Accounts of Temporary Guardians or Conservators

A temporary guardian or conservator of the estate who is not subsequently appointed guardian or conservator of the estate must present his or her account to the court for settlement and allowance within 90 days of the appointment of the guardian or conservator or within such other time as the court may fix [*Prob. Code § 2256(a)*]. If the temporary guardian or conservator of the estate is appointed guardian or conservator of the estate, the guardian or conservator may account for his or her administration as temporary guardian or conservator in his or her first regular account [*Prob. Code § 2256(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAccounting

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24-290E California Forms of Pleading and Practice--Annotated § 290E.22

§ 290E.22 Dispensing With Accounting for Small Estates

[1] Order Dispensing With Accounts

The court may make an order that the guardian or conservator need not present the accounts otherwise required if all of the following conditions are satisfied [*Prob. Code § 2628(a)*]:

- At the beginning and end of a period for which an account is otherwise required the estate consisted of property, exclusive of the residence of the ward or conservatee, of a total net value of less than $15,000.

- The income of the estate for each month of the accounting period, exclusive of public benefit payments, was less than $2,000.

- All income of the estate during the accounting period, if not retained, was spent for the benefit of the ward or conservatee.

For any accounting period during which all of these conditions are not satisfied, the guardian or conservator must present the account as otherwise required [*Prob. Code § 2628(c)*].

[2] Petition to Require Accounting

Even if a court has made an order dispensing with accounting, the ward or conservatee or any interested person may petition the court for an order requiring the guardian or conservator to present an account as otherwise required, or the court on its own motion may make such an order. This order may be made ex parte or on such notice of hearing as the court in its discretion requires [*Prob. Code § 2628(b)*].

Legal Topics:

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

Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAccountingEstate, Gift & Trust LawProbateSmall Estates

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24-290E California Forms of Pleading and Practice--Annotated § 290E.23

§ 290E.23 Failure to File Account or Set for Hearing Within Time Required

[1] Notice to Guardian or Conservator

Whenever a guardian or conservator has failed to file a required account, the court must require that written notice be given to the guardian or conservator and the attorney of record for the guardianship or conservatorship directing the guardian or conservator to file an account and to set the account for hearing before the court within 30 days of the date of the notice or, if the guardian or conservator is a public agency, within 45 days of the date of notice [*Prob. Code § 2620.2(a)*]. The court, upon cause shown, may grant an additional 30 days to file the accounting [*Prob. Code § 2620.2(a)*].

[2] Procedure on Failure to File After Notice

[a] Actions Available to Court

Failure to file the account within the time specified in the notice and any additional time allowed by the court under *Prob. Code § 2620.2(a)*, or within 45 days of actual receipt of the notice, whichever is later, constitutes a contempt of the authority of the court under Code Civ. Pro. § 1209 [*Prob. Code § 2620.2(b)*].

If the conservator or guardian does not file an account and set the account for hearing as required by *Prob. Code § 2620* the court is required to take one or more of the actions specified below *in § 290E.23[2][b] -[f]*, and must report that action to the Professional Fiduciaries Bureau [*Prob. Code § 2620.2(c)*; *see Bus. & Prof. Code § 6510* (creation of Bureau)].

[b] Removal

If the conservator or guardian does not file an account and set the account for hearing as required by *Prob. Code § 2620* the court may remove the conservator or guardian as provided under *Prob. Code § 2650 et seq.* [*Prob. Code § 2620.2(c)(1)*].

[c] Citation

If the conservator or guardian does not file an account and set the account for hearing as required by *Prob. Code § 2620* the court may issue and serve a citation requiring the guardian or conservator to appear and show cause why he or she should not be punished for contempt. If the guardian or conservator purposely evades personal service of the citation, the guardian or conservator must be removed from office [*Prob. Code § 2620.2(c)(2)*].

[d] Appointment of Temporary Conservator or Guardian

If the conservator or guardian does not file an account and set the account for hearing as required by *Prob. Code § 2620*, the court may suspend the powers of the conservator or guardian and appoint a temporary conservator or guardian, who must take possession of the conservatorship or guardianship assets, investigate the actions of the conservator or guardian, and petition for surcharge if in the best interest of the ward or conservatee. Compensation for the temporary conservator or guardian, and counsel for the temporary conservator or guardian, is treated as a surcharge against the conservator or guardian, and if unpaid is a breach of condition of the bond, unless for good cause shown the court finds that the temporary conservator or guardian, and counsel for the temporary conservator or guardian, are to be compensated from the estate [*Prob. Code § 2620.2(c)(3)*].

[e] Appointment of Legal Counsel

If the conservator or guardian does not file an account and set the account for hearing as required by *Prob. Code § 2620* the court may appoint legal counsel to represent the ward or conservatee if the court has not suspended the powers of the conservator or guardian and appoint a temporary conservator or guardian. Compensation for the appointed counsel is treated as a surcharge against the conservator, and if unpaid is considered a breach of a condition on the bond, unless for good cause shown the court finds that counsel for the ward or conservatee is to be compensated according to *Prob. Code § 1470*. The court must order the legal counsel to do one or more of the following:

- Investigate the actions of the conservator or guardian, and petition for surcharge if it is in the best interest of the ward or conservatee.

- Recommend to the court whether the conservator or guardian should be removed.

- Recommend to the court whether money or other property in the estate should be deposited pursuant to *Prob. Code §§ 2453, 2453.5, 2454*, or *2455* to be subject to withdrawal only upon authorization of the court [*Prob. Code § 2620.2(c)(4)(A)*].

After resolution of the matters for which legal counsel was appointed, the court must terminate the appointment of legal counsel, unless it determines that continued representation of the ward or conservatee and the estate is necessary and reasonable [*Prob. Code § 2620.2(c)(4)(B)*].

[f] Extension of Time to File Account

If the conservator or guardian does not file an account and set the account for hearing as required by *Prob. Code § 2620* the court may grant, upon ex parte application or such notice as it may require, time to file the account, not to exceed an additional 30 days after the expiration of the original deadline, if the court finds there is good cause and the estate is adequately bonded. After expiration of anysuch extensions, if the account has not been filed, the court must take other action [*Prob. Code § 2620.2(c)(5)*].

Legal Topics:

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

Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAccounting

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24-290E California Forms of Pleading and Practice--Annotated § 290E.24

§ 290E.24 Items for Which Guardian or Conservator Is Not Accountable

The court may authorize the guardian or conservator to pay the ward or conservatee a reasonable allowance for his or her personal use. The allowance will be in an amount that the court determines to be in the best interest of the ward or conservatee, and it will be paid out of the estate [*Prob. Code § 2421(a)*]. Once paid, the allowance is subject to the sole control of the ward or conservatee. The guardian or conservator is not required to account for any such allowance, other than to establish that it has been paid to the ward or conservatee [*Prob. Code § 2421(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAccounting

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24-290E California Forms of Pleading and Practice--Annotated §§ 290E.25-290E.29

[Reserved]

§§ 290E.25[Reserved]

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24-290E California Forms of Pleading and Practice--Annotated § 290E.30

§ 290E.30 Financial Statement and Report

[1] General Requirement

The account must include a financial statement and a report of administration as provided in *Prob. Code §§ 1060-1064* [*see Prob. Code § 2620(a)*]. *Prob. Code §§ 1060-1064* govern all accounts to be filed with the court and, except as specifically provided elsewhere in the Probate Code, or unless good cause is shown, no information in addition to that required in *Prob. Code §§ 1060-1064* need be in an account [*Prob. Code § 1060*].

As part of the first accounting required to be filed after appointment, the guardian or conservator must submit both of the following to the court [*Prob. Code § 2620(c)(2)-(5)*]:

- All account statements showing the account balance as of the closing date of the accounting period of the court accounting.

- If the court accounting is the first court accounting, all account statements showing the account balance immediately preceding the date of appointment and all account statements showing the account balance as of the closing date of the first court accounting.

- If the guardian or conservator is a private professional or licensed guardian or conservator, all original account statements, showing the balance as of all periods covered by the accounting.

- The original, closing escrow statement received showing the charges and credits for any sale of real property of the estate.

- If the ward or conservatee is in a residential care facility or a long-term care facility, the original bill statements for the facility.

The preceding requirements do not apply to the public guardian if the money belonging to the estate is pooled with

money belonging to other estates under *Prob. Code §§ 2940, 7640 et seq.* [*Prob. Code § 2620(c)(6)*].

If any document to be filed with the court contains the ward or conservatee's social security number, or any other personal information regarding the ward or conservatee that ordinarily would not be disclosed in a court accounting, inventory and appraisal, or other nonconfidential pleadings, the statement must be attached to a separate affidavit describing the character of the document in proper form for filing, captioned "CONFIDENTIAL FINANCIAL STATEMENT" in capital letters. Except as otherwise ordered by the court, the clerk of the court is required to keep the document confidential except to the court and subject to disclosure only upon court order [*Prob. Code § 2620(c)(7)*].

Courts may provide by local rule that the court will retain all documents lodged with it until the court's determination of the account has become final, at which time all supporting documents must be returned to the depositing guardian or conservator or delivered to any successor appointed by the court [*Prob. Code § 2620(c)(8)*].

However, the court is not precluded from taking any other appropriate action in response to a failure to file a proper accounting in a timely manner [*Prob. Code § 2620.2(d)*].

Any account may be filed as a standard account. If specified criteria are met, an option exists to file a simplified account instead of a standard account [*see Cal. Rules of Court, Rule 7.575*; *see also* [2] and [3], *below*]. All accounts, whether standard or simplified, must provide all information in account schedules and a summary of account as required by *Prob. Code §§ 1060-1063*, and must provide all information required by *Prob. Code § 1064* in the petition for approval of their account or the report accompanying their account [*see Cal. Rules of Court, Rule 7.575(f), see also §§ 290E.71A -290E.71C*].

As of January 1, 2008, all accounts must be submitted on Judicial Council forms [*Prob. Code § 2620(a)*; *see Prob. Code §§ 1060-1064*; *see also forms in §§ 290E.71A -290E.71D*]. In practice, this means that all accounts must use the standard Judicial Council Summary of Account form [Cal. Judicial Council Form GC-400(SUM)/GC-405(SUM); *see § 290E.71A*], and simplified accounts also must use the Judicial Council forms for Schedules A and C (receipts and disbursement) as well [*see* Cal. Judicial Council Forms GC-405(A) and GC-405(C), reproduced in § 290E.71B]. However, in the case of standard accounts, use of the Judicial Council schedules (as opposed to the summary) is optional [*see § 290E.71C* (schedules for standard account)]. For more detailed discussion of the use of the summary and schedules, see discussion in *§§ 290E.31, 20.32*.

[2] Standard Account

A standard account lists receipts and disbursements in subject matter categories, with each receipt and disbursement category subtotaled [*Cal. Rules of Court, Rule 7.575(a)*]. A conservator or guardian may file any account required or authorized by *Prob. Code § 2620* as a standard account, and *must* file a standard account in any of the following circumstances [*Cal. Rules of Court, Rule 7.575(b)*]:

- The estate contains income real property.

- The estate contains a whole or partial interest in a trade or business.

- The appraised value of the estate is $500,000 or more, exclusive of the conservatee's or ward's personal residence.

- Schedule A (receipts) or Schedule C (disbursements) prepared in a simplified account format exceeds five pages in length [subject to *Cal. Rules of Court, Rule 7.575(c)*].

- The court directs that a standard account be filed.

[3] Simplified Account

A simplified account lists receipts and disbursements chronologically, by receipt or payment date, without subject matter categories [*Cal. Rules of Court, Rule 7.575(a)*]. A conservator or guardian may file a simplified account in all cases not specified in [2], *above* [*Cal. Rules of Court, Rule 7.575(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-290E California Forms of Pleading and Practice--Annotated § 290E.31

§ 290E.31 Summary

[1] Content of Summary

[a] In General

Every account must state the period that it covers and contain a summary showing all of the following, to the extent applicable [*Prob. Code § 1061(a)*]:

- Property on hand at the beginning of the account period.
- The value of any assets received during the account period that are not assets on hand as of the commencement of that period.
- The amount of any receipts of income or principal, excluding items listed under the first two categories above, or receipts from a trade or business.
- Net income from a trade or business.
- Gains on sales.
- The amount of disbursements, excluding disbursements for a trade or business or distributions.
- Losses on sales.
- Net loss from a trade or business.
- Distributions to the ward or conservatee.
- Property on hand at the end of the account period, stated at its carry value.

[b] When Guardianship or Conservatorship Terminates Before Filing of Inventory

When the guardianship or conservatorship terminates before an inventory of theestate has been filed, the court may relieve the guardian or conservator of the duty to file an inventory and appraisal, and permit the guardian or conservator to file an account covering only those assets of the estate of which the guardian or conservator has possession or control [*Prob. Code § 2633*].

[2] Format of Summary

As of January 1, 2008, all summaries of account (both standard and simplified accounts) must be submitted on the official Judicial Council Summary of Account form [*Prob. Code § 2620(a)*; Cal. Judicial Council Form GC-400(SUM)/GC-405(SUM); *see § 290E.71A*]. The summary must show all of the charges and credits to which the guardian or conservator is entitled for the account period, and the charges and credits must be supported by detailed schedules [*Prob. Code § 1061(b)*].

Specified categories of items must be included, unless they are inapplicable [*Prob. Code § 1061(b)*]:

- CHARGES:
  - Property on hand at the beginning of the account period (or inventories).
  - Additional property received (or supplemental inventories).
  - Receipts.
  - Gains on sales or other dispositions.
  - Net income from a trade or business.
  - Total charges.
- CREDITS:
  - Disbursements.
  - Losses on sales or other dispositions.
  - Net loss from a trade or business.
  - Distributions.
  - Property on hand at the close of the account.
  - Total Credits.

Amounts must be shown for each of the categories in dollars [*Prob. Code § 1061(b)*]. "Net income" and "net loss" must be determined in accordance with general accounting principles and need not be the same as the "net income" and "net loss" reported on the tax returns for the account period [*Prob. Code § 1061(d)*]. The total charges must equal the total credits [*Prob. Code § 1061(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-290E California Forms of Pleading and Practice--Annotated § 290E.32

§ 290E.32 Schedules

The summary of account must be supported by detailed schedules [*Prob. Code § 1062*].

For a simplified account, Schedule A (Receipts) (Judicial Council Form GC-405(A)) and Schedule C (Disbursements) (Judicial Council Form GC-405(C)) must be completed [*see § 290E.71B* (forms)]. Schedule A must contain noncapital items by the estate of the conservatee or ward, and Schedule C must contain payments from the estate of the conservatee or ward. When a simplified account is made, use of the California Judicial Council forms for Schedules A and C is mandatory as of January 1, 2008 [*see Prob. Code § 2620(a)*; Cal. Judicial Council Forms GC-405(A) and GC-405(C), reproduced in § 290E.71B]. Some of the optional schedules used for standard accounts also may be used for simplified accounts in appropriate cases, as discussed *below*.

For a standard account, the Judicial Council has prescribed a series of detailed schedules, which are listed below [*see § 290E.71C* for forms]. While *Prob. Code § 2620(a)* requires that as of January 1, 2008, all accounts must be submitted on Judicial Council forms [*Prob. Code § 2620(a)*], use of the Judicial Council schedules (as opposed to the summary of account) is nevertheless optional in the case of standard accounts. This means, for example, that software-generated forms for the various schedules may be used for a standard account, as long as they conform to the numbering scheme and content that must appear on the Judicial Council's mandatory summary of account form [*see § 290E.31*].

When a zero has been included on the summary of account form for a particular category, the corresponding schedule for that category need not be included. However, the remaining schedules should not be relabeled or redesignated.

The following schedules and Judicial Council forms are prescribed for standard accounts (and, as noted, may also be used for simplified accounts):

- Schedule A is for standard accounts for receipts for dividends, interest, pensions, annuities and other periodic payments, rent, social security, veterans, or other public benefits, and other receipts. Schedule A is subdivided into the following sub-schedules, each with its own form:

- Judicial Council Form GC-400(A)(1) is used for receipts from dividends.

- Judicial Council Form GC-400(A)(2) is used for receipts from interest.

- Judicial Council Form GC-400(A)(3) is used for receipts from pensions, annuities, and other regular periodic payments.

- Judicial Council Form GC-400(A)(4) is used for receipts from rent.

- Judicial Council Form GC-400(A)(5) is used for receipts from social security, veterans' benefits, and other public benefits.

- Judicial Council Form GC-400(A)(6) is used for other receipts.

- Schedule B (Judicial Council Form GC-400(B)/GC-405(B)) is for both standard and simplified accounts for gains on sales.

- Schedule C is for standard accounts for disbursements for conservatee's caregiver expenses, residential or long-term care facility expenses, ward's educational expenses, fiduciary and attorney fees, general administration expenses, investment expenses, living expenses, medical expenses, property sale expenses, rental property expenses, and other expenses. Schedule C is subdivided into the following sub-schedules, each with its own form:

  - Judicial Council Form GC-400(C)(1) is used for disbursements for caregiver expenses.

  - Judicial Council Form GC-400(C)(2) is used for disbursements for the conservatee's residential or long-term care facility expenses.

  - Judicial Council Form GC-400(C)(3) is used for disbursements for a ward's education expenses.

  - Judicial Council Form GC-400(C)(4) is used for disbursements for fiduciary and attorney's fees.

  - Judicial Council Form GC-400(C)(5) is used for disbursements for general administration expenses.

  - Judicial Council Form GC-400(C)(6) is used for disbursements for investment expenses.

  - Judicial Council Form GC-400(C)(7) is used for disbursements for living expenses.

  - Judicial Council Form GC-400(C)(8) is used for disbursements for medical expenses.

  - Judicial Council Form GC-400(C)(9) is used for disbursements for property sale expenses.

  - Judicial Council Form GC-400(C)(10) is used for disbursements for rental property expenses.

- Judicial Council Form GC-400(C)(11) is used for disbursements for other expenses.

- Schedule D (Judicial Council Form GC-400(D)/GC-405(D)) is for both standard and simplified accounts for losses on sale.

- Schedule E is for both standard and simplified accounts for cash and non-cash assets on hand at end of account period. Schedule E is subdivided into the following sub-schedules, each with its own form:

  - Judicial Council Form GC-400(E)(1)/GC-405(E)(1) is used for cash assets on hand at the end of the account period.

  - Judicial Council Form GC-400(E)(1)/GC-405(E)(2) is used for non-cash assets on hand at the end of the account period.

- Schedule F (Judicial Council Form GC-400(F)/GC-405(F)) is for both standard and simplified accounts for changes in form of assets.

- Schedule G (Judicial Council Form GC-400(G)/GC-405(G)) is for both standard and simplified accounts for liabilities at end of account period.

- Additional schedules for standard accounts:

  - Judicial Council Form GC-400(NI) is used to report net income from a trade or business.

  - Judicial Council Form GC-400(NL) is used to report net loss from a trade or business.

- Additional schedules for both standard and simplified accounts:

  - Judicial Council Form GC-400(OCH)/GC-405(OCH) is used to report other charges.

  - Judicial Council Form GC-400(OCR)/GC-405(OCR) is used to report other credits.

  - Judicial Council Form GC-400(PH)(1)/GC-405(PH)(1) is used to report cash assets on hand at the beginning of the account period.

  - Judicial Council Form GC-400(PH)(2)/GC-405(PH)(2) is used to report non-cash assets on hand at the beginning of the account period.

  - Judicial Council Form GC-400(AP)/GC-405(AP) is used to report additional property received during the period of account.

  - Judicial Council Form GC-400(DIST)/GC-405(DIST) is used to report Distributions to the conservatee or ward.

Judicial Council Form GC-400(A)(C) [*see § 290E.71D*] is a worksheet that can be used to help organize and calculate receipts and disbursements and assist in determining which of the sub-schedules listed above need to be filed in a given case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAccounting

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24-290E California Forms of Pleading and Practice--Annotated § 290E.33

§ 290E.33 Verification

The account must be verified by the guardian or conservator [*Prob. Code § 1021(a)(1), (b)(2)*]. If there are two or more guardians or conservators, it may be verified by any one of them [*Prob. Code § 1021(b)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAccounting

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[Reserved]

§§ 290E.34[Reserved]

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24-290E California Forms of Pleading and Practice--Annotated § 290E.40

§ 290E.40 Notice of Hearing

Notice of the hearing on the account of the guardian or conservator must begiven for the period and in the manner provided in the general notice provisions set forth in *Prob. Code §§ 1460-1469* [*Prob. Code § 2621*; *see* Ch. 284, *Guardianship and Conservatorship: Notice*].

If notice is required to be given to the Director of Mental Health or the Director of Developmental Services pursuant to *Prob. Code § 1461*, the account cannot be settled or allowed unless notice has been given as provided in *Prob. Code § 1461* [*Prob. Code § 2621*; *see* Ch. 284, *Guardianship and Conservatorship: Notice*]. The statute of limitations does not run against any claim of the State Department of Mental Health or the State Department of Developmental Services against the estate of the ward or conservatee for board, care, maintenance, or transportation with respect to an account that is settled without giving the notice required by *Prob. Code § 1461* [*Prob. Code § 1461(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-290E California Forms of Pleading and Practice--Annotated § 290E.41

§ 290E.41 Objections to Account

Written objections to the account may be filed by the ward or conservatee, the spouse of the ward or the spouse or domestic partner (as defined by *Prob. Code § 37*; *Fam. Code § 297*) of the conservatee, or any relative or friend of the ward or conservatee, or any creditor or other interested person [*Prob. Code § 2622*; *see Conservatorship of Key (2005) 134 Cal. App. 4th 254, 256-258, 35 Cal. Rptr. 3d 859* (objections to final account and report of public guardian with respect to conservatorship estate filed by executor of conservatee's estate)].

An objection must state the item of the account to which objection is made and the basis for the objection [*Prob. Code § 2622*].

If the court determines that the objections were without reasonable cause and in bad faith, it may order the objector to pay the compensation and costs of the conservator or guardian and other expenses and costs of litigation, including attorney's fees, incurred to defend the account. The objector will be personally liable to the guardianship or conservatorship estate for the amount ordered [*Prob. Code § 2622.5(a)*; *see Guardianship of K.S. (2009) 177 Cal. App. 4th 1525, 1535, 100 Cal. Rptr. 3d 78* (trial court did not abuse its discretion in awarding compensatory costs to guardian of trust beneficiaries based on findings of bad faith and objective unreasonableness)].

If the court determines that opposition to the objections was without reasonable cause and in bad faith, it may award the objector costs and other expenses, including attorney's fees, incurred to contest the account. The amount awarded is a charge against the compensation of the guardian or conservator, and the guardian or conservator is liable personally and on the bond, if any, for any amount that remains unsatisfied [*Prob. Code § 2622.5(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAccountingEstate, Gift & Trust LawProbateProcedures in ProbateCosts & Expenses

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24-290E California Forms of Pleading and Practice--Annotated § 290E.42

§ 290E.42 Review of Transactions Not Previously Authorized

Any sale or purchase of property or other transaction not previously authorized, approved, or confirmed by the court is subject to review by the court on the next succeeding accounting of the guardian or conservator occurring after the transaction [*Prob. Code § 2625*]. The court may approve or confirm a transaction either at the time of a subsequent accounting or on a petition for confirmation and approval pursuant to *Prob. Code § 2403* (petition for confirmation of acts), even though the particular transaction required prior court authorization that the guardian or conservator had not obtained [*Guardianship-Conservatorship Law*, 15 Cal. L. Revision Comm'n Reports 451, 796-797 (1980) (comment to *Prob. Code § 2625*); *see Place v. Trent (1972) 27 Cal. App. 3d 526, 530, 103 Cal. Rptr. 841 , disapproved on other grounds, Board of Regents v. Davis (1975) 14 Cal. 3d 33, 120 Cal. Rptr. 407, 533 P.2d 1047* (conservator may sue to cancel conveyance by conservatee although conservator did not obtain prior court authorization to do so)]. However if he or she does not obtain prior authorization, the guardian or conservator risks the possibility that the court may not approve and confirm the transaction at the time of the accounting [*see Guardianship-Conservatorship Law*, 15 Cal. L. Revision Comm'n Reports 451, 796-797 (1980) (comment to *Prob. Code § 2625*)].

On such an account and review, the court may hold the guardian or conservator liable for any violation of duties in connection with the sale, purchase, or other transaction, although the validity of the sale, purchase, or transaction is not affected. Nothing in *Prob. Code § 2625* affects the validity of any sale or purchase or other transaction [*Prob. Code § 2625*]. The court may surcharge the guardian or conservator for money owed to the estate by the guardian or conservator or for other pecuniary harm caused to the estate [*Guardianship of Vucinich (1935) 3 Cal. 2d 235, 243, 44 P.2d 567* ; *Guardianship of Wood (1961) 193 Cal. App. 2d 260, 267, 14 Cal. Rptr. 147* (surcharge may be made at final account); *Estate of Joslin (1958) 165 Cal. App. 2d 330, 347, 332 P.2d 151* (surcharge may be made at intermediate account)]. The probate court has the power to surcharge a conservator for the benefit of a third party, such as the beneficiary of a conservatee's life insurance policy, if the conservator breaches his or her duty and allows the policy to lapse [*see Conservatorship of Coffey (1986) 186 Cal. App. 3d 1431, 1437-1438, 231 Cal. Rptr. 421]* .

Legal Topics:

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

Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAccounting

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[Reserved]

§§ 290E.43[Reserved]

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24-290E California Forms of Pleading and Practice--Annotated § 290E.50

§ 290E.50 Termination on Exhaustion of Estate

If it appears on settlement of any account that the estate has been exhausted through expenditures or disbursements that are approved by the court, the court, on settlement of the account, must order the guardianship or conservatorship terminated and the guardian or conservator discharged. The court may continue the proceeding, however, if it determines that there is a reason to do so, such as when the estate will be replenished by receiving new assets [*Prob. Code § 2626*; *Guardianship-Conservatorship Law*, 15 Cal. L. Revision Comm'n Reports 451, 796 (1980) (comment to *Prob. Code § 2626*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAccounting

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24-290E California Forms of Pleading and Practice--Annotated § 290E.51

§ 290E.51 Settlement of Account After Ward Reaches Majority

After a ward has reached majority, the ward may settle accounts with the guardian and give the guardian a release that is valid if obtained fairly and without undue influence [*Prob. Code § 2627(a)*]. The burden is on the guardian to prove that the release was just and fair [*Smith v. Fidelity & Deposit Co. (1933) 130 Cal. App. 45, 56-57, 19 P.2d 1018]* .

Except as otherwise provided by the Probate Code, a guardian is not entitled to a discharge until one year after the ward has attained majority [*Prob. Code § 2627(b)*; *see Prob. Code §§ 1600, 1601, 2650-2654* (termination; removal of guardian)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & Termination

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24-290E California Forms of Pleading and Practice--Annotated § 290E.52

§ 290E.52 Guardian or Conservator Dies, Becomes Incapacitated, or Absconds

[1] Legal Representative Is Appointed for Guardian or Conservator

If a guardian or conservator dies or becomes incapacitated and a legal representative is appointed for the deceased or incapacitated guardian or conservator, the legal representative must, not later than 60 days after appointment unless the court extends the time, file an account of the administration of the deceased or incapacitated guardian or conservator [*Prob. Code § 2632(b)*]. "Incapacitated" means lack of capacity to serve as guardian or conservator. "Legal representative" means the personal representative of a deceased guardian or conservator or the conservator of the estate of an incapacitated guardian or conservator [*Prob. Code § 2632(a)*].

[2] Legal Representative Is Not Appointed for Guardian or Conservator

If a guardian or conservator dies or becomes incapacitated and no legal representative is appointed for the deceased or incapacitated guardian or conservator, or if the guardian or conservator absconds, the court may compel the attorney for the deceased, incapacitated, or absconding guardian or conservator or the attorney of record in the guardianship or conservatorship proceeding to file an account of the administration of the deceased, incapacitated, or absconding guardian or conservator [*Prob. Code § 2632(c)*; for forms for a petition and an order, *see §§ 290E.74, 290E.75*].

[3] Preparation of Final Account by Legal Representative or Attorney

The legal representative or attorney must exercise reasonable diligence in preparing the account. Verification of the account may be made on information and belief. The court must settle the account as in other cases. The court must allow reasonable compensation to the legal representative or the attorney for preparing the account. The amount allowed is a charge against the estate that was being administered by the deceased, incapacitated, or absconding guardian or conservator. Legal services for which compensation must be allowed to the attorney include those services rendered by any paralegal performing the services under the direction and supervision of an attorney. The petition or application for compensation must set forth the hours spent and services performed by the paralegal [*Prob. Code § 2632(d)*; *see Prob. Code § 2642*; for a form for a petition, *see § 290E.74*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAccounting

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24-290E California Forms of Pleading and Practice--Annotated § 290E.53

§ 290E.53 Death of Ward or Conservatee

[1] Expenses of Last Illness and Disposition of Remains

On the death of the ward or conservatee, the guardian or conservator may contract for and pay a reasonable sum for the expenses of the last illness and the disposition of the remains of the deceased ward or conservatee and for unpaid court-approved attorney's fees, and may pay the unpaid expenses of the guardianship or conservatorship accruing before or after the death of the ward or conservatee, in full or in part, to the extent reasonable, from any personal property of the deceased ward or conservatee that is under the control of the guardian or conservator [*Prob. Code § 2631(a)*]. If, after payment of these expenses, the total market value of the remaining estate of the decedent does not exceed $100,000 [*see Prob. Code § 13100*], the guardian or conservator may petition the court for an order permitting the guardian or conservator to liquidate the decedent's estate. The guardian or conservator may petition even though there is a will of the decedent in existence if the will does not appoint an executor or if the named executor refuses to act. No notice of the petition need be given. If the order is granted, the guardian or conservator may sell personal property of the decedent, withdraw money of the decedent in an account in a financial institution, and collect a debt, claim, or insurance proceeds owed to the decedent or the decedent's estate, and a person having possession or control must pay or deliver the money or property to the guardian or conservator [*Prob. Code § 2631(b)*].

[2] Transfer of Assets

If, after payment of expenses, the value of the remaining property of the ward or conservatee in California does not exceed $100,000 [*see Prob. Code § 13100*], it may be transferred to the persons who would be entitled to it under the Probate Code provisions for the transfer of small estates without administration [*Prob. Code § 2631(c)*; *see Prob. Code § 13000 et seq.* (collection or transfer of small estate without administration)]. To determine whether the value of the remaining property qualifies for transfer under these provisions, it is necessary to exclude all of the property described in *Prob. Code § 13050*. For discussion of the transfer of small estates without administration, see Ch. 441, *Probate: Disposition Without Administration.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAccountingEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersSales of Assets

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§ 290E.54 Continuing Jurisdiction on Termination

The court does not lose jurisdiction of the guardianship or conservatorship for the purpose of settling the accounts of the guardian or conservator or for any other purpose incident to the enforcement of the judgments and orders of the court on these accounts or on the termination of the relationship if the relationship of guardian and ward or conservator and conservatee terminates for any reason [*Prob. Code § 2630*; *see Conservatorship of O'Connor (1996) 48 Cal. App. 4th 1076, 1088-1089, 56 Cal. Rptr. 2d 386]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAccountingEstate, Gift & Trust LawProbateProcedures in ProbateJurisdiction & VenueGeneral Overview

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24-290E California Forms of Pleading and Practice--Annotated § 290E.55

§ 290E.55 Finality of Accounts

[1] Release of Claims

When a judgment or order made pursuant to the guardianship and conservatorship provisions of the Probate Code [*see Prob. Code § 1400 et seq.*] becomes final, it releases the guardian or conservator and the sureties from all claims of the ward or conservatee and of any persons affected thereby based on any act or omission directly authorized, approved, or confirmed in the judgment or order. "Order" includes an order settling an account of the guardian or conservator, whether an intermediate or final account [*Prob. Code § 2103(a)*; *Conservatorship of Harvey (1970) 3 Cal. 3d 646, 651-652, 91 Cal. Rptr. 510, 477 P.2d 742* (protection given to conservator's attorney); *but see Conservatorship of Tobias (1989) 208 Cal. App. 3d 1031, 1034-1036, 256 Cal. Rptr. 525* (conservator was not released from liability when trial court vacated language in final accounting approving conservator's acts and transactions)].

Prob. Code § 2103 does not apply if the judgment or order is obtained by fraud or conspiracy or by misrepresentation contained in the petition or account or in the judgment or order as to any material fact. Misrepresentation includes, but is not limited to, the omission of a material fact [*Prob. Code § 2103(b)*; *Conservatorship of Coffey (1986) 186 Cal. App. 3d 1431, 1437-1438, 231 Cal. Rptr. 421* (omission of material fact); *see Bank of America v. Superior Court (1986) 181 Cal. App. 3d 705, 715, 226 Cal. Rptr. 685]* . Moreover, the rule of finality does not apply when the order is issued by a commissioner who has failed to comply with the jurisdictional notice and hearing requirements [*Guardianship of Slakmon (1978) 83 Cal. App. 3d 224, 232-235, 147 Cal. Rptr. 777]* .

[2] Res Judicata Effect

A probate court's order approving a final accounting of a guardianship, when not attacked by appeal or any other proper proceeding, is res judicataand conclusive even against the ward [*E. & J. Gallo Winery v. Gallo Cattle Co. (9th Cir. 1992) 967 F. 2d 1280, 1287* ; *Adams v. Martin (1935) 3 Cal. 2d 246, 44 P. 2d 572]* . However, extrinsic fraud is an exception to the res judicata effect of a final accounting [*E. & J. Gallo Winery v. Gallo Cattle Co. (9th Cir. 1992) 967 F. 2d 1280, 1287* ; *Barker v. Carver (1956) 144 Cal. App. 2d 487, 301 P. 2d 307]* .

Legal Topics:

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

§§ 290E.56[Reserved]

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24-290E California Forms of Pleading and Practice--Annotated § 290E.60

§ 290E.60 Related Matthew Bender Publications

For discussion of guardianship, see California Family Law Practice and Procedure, Ch. 34, *Establishing Guardianship* (Matthew Bender 2d ed.)

For memoranda of points and authorities relating to the appointment of a guardian or conservator, see California Points and Authorities, Ch. 106, *Guardianship and Conservatorship* (Matthew Bender)

For forms relating to the nomination and appointment of a guardian or conservator, see California Legal Forms, Ch. 66, *Guardianships*, and Ch. 66A *Conservatorships* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 290E.61 State Statutes

Verification of petitions, accounts, objections, and responses. *Prob. Code § 1021*

Verified petition is evidence in uncontested proceeding. *Prob. Code § 1022*

Accounts filed under Probate Code. *Prob. Code §§ 1060-1064*

Summary of account. *Prob. Code § 1061*

Detailed schedules supporting summary. *Prob. Code § 1062*

Additional schedules. *Prob. Code § 1063*

Petition for approval or accompanying report. *Prob. Code § 1064*

Citations in guardianship and conservatorship proceedings. *Prob. Code §§ 1240-1242*

Guardian or conservator released by final judgment. *Prob. Code § 2103*

Accounts of temporary guardians and conservators. *Prob. Code § 2256*

Guardian or conservator not required to account for allowance paid to ward or conservatee. *Prob. Code § 2421(c)*

Time for presentation of accounts of guardian or conservator. *Prob. Code § 2620*

Failure to file account. *Prob. Code § 2620.2*

Notice of hearing. *Prob. Code § 2621*

Written objections. *Prob. Code § 2622*

Sanctions for bad faith objections or opposition to objections. *Prob. Code § 2622.5*

Compensation for expenses, services, and disbursements. *Prob. Code § 2623*

Review of sales, purchases, and transactions not previously authorized, approved, or confirmed. *Prob. Code § 2625*

Discharge of guardian or conservator when estate exhausted. *Prob. Code § 2626*

Settlement of accounts when relationship terminated. *Prob. Code § 2630*

Expenses of last illness and disposition of remains of ward or conservatee. *Prob. Code § 2631*

Account on death or incapacity of guardian or conservator, or when guardian or conservator absconds. *Prob. Code § 2632*

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-290E California Forms of Pleading and Practice--Annotated § 290E.62

§ 290E.62 Local Court Rules

[1] Alameda County

Form of papers presented for filing. Alameda Co. Super. Ct. Rules, Rule 12.1.10

Accounts in guardianship proceedings. Alameda Co. Super. Ct. Rules, Rule 12.14.8 et seq.

Allowance of fees in guardianship proceedings. Alameda Co. Super. Ct. Rules, Rule 12.14.10

Accounts in conservatorship proceedings. Alameda Co. Super. Ct. Rules, Rule 12.15.8 et seq.

Allowance of fees in conservatorship proceedings. Alameda Co. Super. Ct. Rules, Rule 12.15.10

[2] Contra Costa County

Accounts, fees, and distribution. Contra Costa Co. Prob. Pol. Man., § 601 et seq.

Final account of guardian. Contra Costa Co. Prob. Pol. Man., § 806

Accounts of conservator. Contra Costa Co. Prob. Pol. Man., § 815

Accounts and bonds in guardianships and conservatorships. Contra Costa Co. Prob. Pol. Man., § 825

[3] Los Angeles County

Accounts and reports of guardians and conservators. Los Angeles Co. Super. Ct. Rules, Rule 10.155

Appraisals and accounts in guardianships. Los Angeles Co. Super. Ct. Rules, Rule 10.161

Final account of guardian. Los Angeles Co. Super. Ct. Rules, Rule 10.162

Form of guardian's accounts. Los Angeles Co. Super. Ct. Rules, Rule 10.165

Conservator's accounts. Los Angeles Co. Super. Ct. Rules, Rule 10.180.1

[4] Orange County

Accounts, compensation, and distribution in probate proceedings. Orange Co. Super. Ct. Rules, Rule 608.01 et seq.

Guardians' accounts. Orange Co. Super. Ct. Rules, Rule 610.12

Conservators' accounts. Orange Co. Super. Ct. Rules, Rule 611.11

[5] Riverside County

Accounts, fees, and distributions. Riverside Co. Consol. Ct. Rules, Rule 6.1001 et seq.

Guardian's accounts. Riverside Co. Consol. Ct. Rules, Rule 6.1104

Conservator's accounts. Riverside Co. Consol. Ct. Rules, Rule 6.1205

[6] Sacramento County

Waiver of account. Sacramento Co. Local Ct. Rules, Rule 15.84

Guardianship and conservator accounts. Sacramento Co. Local Ct. Rules, Rule 15.86

Accounting for more than one ward or conservatee required to be separate. Sacramento Co. Local Ct. Rules, Rule 15.86(B)

Final accounts of guardians or conservators. Sacramento Co. Super. Ct. Rules, Rules 15.93, 15.100

[7] San Francisco

Accounts in general. San Francisco Uniform Local Ct. Rules, Rules 14.75, 14.76

Multiple wards. San Francisco Uniform Local Ct. Rules, Rule 14.105(E)

Guardianship accounts and reports. San Francisco Uniform Local Ct. Rules, Rule 14.105(F)

Waiver of guardianship accounts. San Francisco Uniform Local Ct. Rules, Rule 14.105(F)(2)

Conservatorship accounts and reports. San Francisco Uniform Local Ct. Rules, Rule 14.106(I)

Waiver or deferral of conservatorship account. San Francisco Uniform Local Ct. Rules, Rule 14.106(I)(5)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAccountingEstate, Gift & Trust LawProbateProcedures in ProbateCosts & Expenses

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24-290E California Forms of Pleading and Practice--Annotated § 290E.63

§ 290E.63 Decisions

[1] Accounts Generally

Burden is on guardian to justify items in account. *Guardianship of Cookingham (1955) 45 Cal. 2d 367, 375, 289 P.2d 16*

Jurisdiction to determine accounts of guardians is exclusively in probate court. *Adams v. Martin (1935) 3 Cal. 2d 246, 248, 44 P.2d 572*

Court has power and duty to scrutinize account, to correct all errors therein, to reject all items of credit appearing to be illegal or excessive, and generally to inquire into truthfulness and accuracy of charges and credits and of facts set forth in accompanying report. *In re Guardianship of Boyes (1907) 151 Cal. 143, 148, 90 P. 454*

Trial court had discretion in awarding compensatory costs to guardian of trust beneficiaries under *Prob. Code § 2622.5* based on its findings of bad faith and objective unreasonableness, when trustee day traded with trust funds and paid himself for services. *Guardianship of K.S. (2009) 177 Cal. App. 4th 1525, 1535, 100 Cal. Rptr. 3d 78*

Prob. Code § 2630 jurisdiction to enforce orders on conservatorship accounts implies power to rule on conservator's authority to take specific actions that affect account, and to set aside grant deed after conservatee's death. *Conservatorship of Starr (1989) 215 Cal. App. 3d 1390, 1394-1395, 264 Cal. Rptr. 80*

Former conservator has no right to jury trial in proceeding to reopen final account and to surcharge for losses resulting from breach of duty, and doctrine of comparative fault is not applicable to proceeding. *Conservatorship of Coffey (1986) 186 Cal. App. 3d 1431, 1438-1443, 231 Cal. Rptr. 421* (applying *Prob. Code §§ 2103, 2625*)

Settlement of guardian's account is proceeding in rem. *Guardianship of Levi (1943) 61 Cal. App. 2d 644, 646, 143 P.2d 719*

Accounts may be rendered and settled without personal presence of representative. *In re Guardianship of Price*

(1934) 136 Cal. App. 257, 260, 28 P.2d 717

[2] Expenses and Disbursements

Household and living expenses are not chargeable against estate when liberal monthly allowance to guardian was made expressly for those purposes. *Guardianship of Hall (1947) 31 Cal. 2d 157, 166, 187 P.2d 396*

Court did not abuse discretion by disallowing claimed credits by guardian for sums spent for support of ward's mother when account was not itemized and not supplemented by other evidence, no attempt was made to show nature of expenditures, no vouchers were furnished, and proof generally was not such as court was entitled to have presented and should require in matters of accounting. *Estate of Jacobson (1942) 56 Cal. App. 2d 255, 260-261, 132 P.2d 229*

Professional fees paid to guardian's sister were accounted for and not concealed when court found that fees were set forth in either lumber company's statement of income and expense or its profit and loss statements and expert witnesses testified that good accounting practice does not require indication that fees were paid to guardian's sister. *Guardianship of Hexberg (1968) 268 Cal. App. 2d 590, 594-595, 74 Cal. Rptr. 218*

[3] Objections to Account

Exceptions to account, as used in former Prob. Code § 927 [*now see Prob. Code §§ 11001-11003*; *see also Prob. Code § 2622* (objections to guardian's or conservator's accounts)], include exceptions not only to what is affirmatively stated in account but also to what is omitted. *Estate of McMillin (1956) 46 Cal. 2d 121, 128, 292 P.2d 881*

Heirs of deceased incompetent may contest account as owners of deceased ward's estate since they were real parties in interest and their interest was opposed to guardian's claims. *In re Guardianship of Clanton (1915) 171 Cal. 381, 383, 153 P. 459*

Court denied objections to final account and report of public guardian with respect to conservatorship estate filed by executor of conservatee's estate, finding that *Prob. Code § 7642(b)*, which provides that excess income from pooled accounts managed by the public guardian must be deposited in the county general fund, is not unconstitutional; conservatorship estates do not have a property interest in the "excess interest" either under the *takings clause of the Fifth Amendment* or by statute and, therefore, due process does not require that estates receive notice and an opportunity to be heard before the interest earned on a pooled trust account is allocated. *Conservatorship of Key (2005) 134 Cal. App. 4th 254, 258-260, 35 Cal. Rptr. 3d 859*

Creditors of ward may take exception to guardian's account when no provision has been made for payment of their claims. *Hartford Acci. & Indem. Co. v. Crawford (1962) 204 Cal. App. 2d 557, 560, 22 Cal. Rptr. 424*

Court's failure to recite in order that it had considered objections was not fatal when record reflected that person had filed written objections, had appeared at hearing, and had made objections known, court took matter under submission, and had obviously considered objections since certain items claimed by conservators were disallowed. *Conservatorship of Oliver (1962) 203 Cal. App. 2d 678, 684, 22 Cal. Rptr. 111*

[4] Settlement of Account

Probate court's decree settling account and discharging guardian from his trust was not final and conclusive if guardian intentionally and fraudulently concealed from court and ward the fact that ward had interest in certain property. *Lataillade v. Orena (1891) 91 Cal. 565, 576, 27 P. 924*

Guardian has duty of presenting final account of guardianship, making settlement, and delivering all property in his or her possession to ward when ward reaches majority. *In re Allgier (1884) 65 Cal. 228, 229, 3 P. 849*

Conservator is not released from liability under *Prob. Code § 2103* when, pursuant to *Code Civ. Proc. § 473* (clerical error), trial court vacates language in final accounting approving conservator's acts and transactions. *Conservatorship of Tobias (1989) 208 Cal. App. 3d 1031, 1036-1037, 256 Cal. Rptr. 525*

"Fraud" exception to res judicata effect of order settling account pursuant to *Prob. Code § 2103(b)* does not include claim that guardian fraudulently misrepresented skill and improperly invested guardianship funds when investment losses were disclosed in accounting and alleged fraud had no effect on ward's ability to attend accounting hearing or to litigate claim. *Bank of America v. Superior Court (1986) 181 Cal. App. 3d 705, 714-715, 226 Cal. Rptr. 685*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAccountingEstate, Gift & Trust LawProbateProcedures in ProbateJurisdiction & VenueGeneral Overview

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§ 290E.64 Text References

Witkin, Summary of California Law, Vol. 12, *Wills and Probate*, §§ 950-953 (9th ed. 1990)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawWillsGeneral Overview

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[Reserved]

§§ 290E.65[Reserved]

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24-290E California Forms of Pleading and Practice--Annotated § 290E.70

§ 290E.70 Citation to Guardian or Conservator to Show Cause [Prob. Code §§ 1240-1242, 2620.2(c)(2)]

[1] FORM Citation to Guardian or Conservator to Show Cause [Prob. Code §§ 1240-1242, 2620.2(b), 2629(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [Guardianship *or*	)	
Conservatorship] of the _____	)	NO. _____
[Estate *or* Person and Estate] of	)	CITATION
_____	)	
_____ [*name*],	)	
_____[Ward *or*	)	
Conservatee].	)	

_____

THE PEOPLE OF THE STATE OF CALIFORNIA to _____[*name*]:

You are cited and required to appear personally at a hearing in this court on _____[*date*], at _____[*time*], in Dept. No. _____, located at _____[*address and city*], to show cause why you should not be punished for contempt for failing to file and set for hearing by _____[*date*], an account for the above-named _____ [ward *or* conservatee] as required by _____ [the written notice given to you and your attorney of record pursuant to *Probate Code Section 2620.2(a) or* the order of this court, dated _____ (*date*)].

[*CONTINUE*]

Dated: _____

_____ [*name*],

Clerk
By _____ [*signature*]
Deputy Clerk

[2] Use of Form

[a] In General

The citation form in [1], *above*, is directed to a guardian or conservator who has failed to file a required account and to set it for hearing either within the time period set forth in *Prob. Code § 2620.2(a)* or by the time set by court order extending that time period [*see Prob. Code § 2620.2(c)(2)*]. The citation directs the guardian or the conservator to appear and show cause why he or she should not be punished for contempt for failure tofile the account or for failure to file the account and set it for hearing [*Prob. Code § 2620.2(c)(2)*].

[b] Contents and Service of Citation

The citation may be issued on application by any party by the clerk without a court order [*Prob. Code §§ 1240, 2620.2(c)(2)*; *see also Prob. Code § 1241* (contents of citations generally)]. The citation must be served on the guardian or conservator in the manner provided in *Code Civ. Proc. § 413.10 et seq.* It must be served at least five days before the day specified for its return [*see Prob. Code § 1242*].

[3] Punishment for Contempt and Removal From Office

The guardian or conservator who purposely evades personal service of a *Prob. Code § 2620.2(c)(2)* citation must be removed from office [*Prob. Code § 2620.2(c)(2)*]. The guardian or conservator who does not appear and file a required account after being duly cited with a citation is subject to one or more court actions. For further discussion, see *§ 290E.23* .

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24-290E California Forms of Pleading and Practice--Annotated § 290E.71

§ 290E.71 Account and Report of Guardian or Conservator [Prob. Code §§ 1060-1064, 2620] and Petition for Fees [Prob. Code § 2640]

[1] FORM Account and Report of Guardian or Conservator and Petition for Fees

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship] of the _____ [Estate *or* Person and Estate] of _____ _____ [*name*], _____[Ward *or* Conservatee].	)))))))	NO. _____ _____ [*Number, e.g.,* FIRST] ACCOUNT AND REPORT OF _____ [GUARDIAN or CONSERVATOR] OF [PERSON AND] ESTATE, PETITION FOR APPROVAL, AND PETITION FOR ALLOWANCE OF ATTORNEY FEES Date: _____ Time: _____ Dept. No.: _____

_____

Petitioner, _____[*name*], respectfully represents:

1. Petitioner was appointed _____ [guardian *or* conservator] of the [person and] estate of _____ [*name*], by order of this court dated _____, and letters of _____ [guardianship *or* conservatorship] of the [person and] estate were duly issued to Petitioner on _____ [*specify date more than 90 days before filing date of this account and report*]. At all times since letters were issued, Petitioner has been acting as _____ [guardian *or* conservator] of the [person and] estate.

2. This account and report covers the period from _____, to _____ [*dates*], inclusive.

3. Petitioner submits his/her _____ [*number of account, e.g.,* first *or* second current, *etc.*] account and report for settlement and allowance. A complete, true, and correct account of the charges and credits to which petitioner is entitled is attached to this report.

4. During the account period, all of the cash in petitioner's possession as _____ [guardian *or* conservator] has been invested and maintained in interest bearing accounts or in investments authorized by law, except for an amount of cash that is reasonably necessary for the orderly administration of the estate. [The original bank statement[s] showing the balance in this/these account[s] on _____ (*date*) with a reconciliation of (each) account is attached.]

[*EITHER*]

5. During the account period, petitioner has not hired any person who has a relationship to petitioner or to petitioner's attorney.

[*OR*]

5. During the account period, petitioner hired _____ [*name*], who is _____ [*describe relationship to guardian or conservator or attorney, e.g.,* the son of the petitioner *or* the spouse of the attorney, _____(*name*)] to _____ [*describe capacity in which person was hired, or duties person performed, e.g.,* act as a bookkeeper or act as a real estate broker for the purpose of selling real estate belonging to the _____ (ward *or* conservatee)].

[*EITHER*]

6. Petitioner is entitled to compensation for services rendered as _____ [guardian *or* conservator] during the account period in the total amount of $_____. This is reasonable compensation and is computed as follows: _____ [*specify*]. Petitioner has _____ [not received any of this compensation during the account period *or* received a payment _____ (of *or* on account of his/her) compensation in the sum of $_____, without prior court order, leaving a balance due of $_____].

[*OR*]

6. Petitioner waives his/her right to a fee.

[*CONTINUE*]

7. During the period of this account and in the course of management and administration of the estate, it was necessary for Petitioner to employ the services of _____ [*name of attorney*], as Petitioner's attorney. _____ [*Name of attorney*] has rendered services to the _____ [ward *or* conservatee] as set forth in Exhibit A attached to this report and incorporated by reference]. The reasonable value of the legal services rendered by _____ [*name of attorney*] is $_____. Petitioner's attorney has

_____ [not received any of this compensation during the account period *or* received a payment _____ (of *or* on account of his/her) compensation in the sum of $_____, without prior court order, leaving a balance due of $_____].

8. On _____ [*date*], bond was fixed by order of court for $_____. [On _____ (*date*), the court ordered the posting of an additional bond of $_____.] [Bond was reduced to _____ by court order on _____ (*date*).] Bond is sufficient.

9. A request for special notice has _____ [not been filed in this proceeding *or* been filed in this proceeding by _____ (*name*) and notice of the time and place of hearing on this petition will be given as required by law or been filed in this proceeding and waived by _____ (*name*)].

WHEREFORE, petitioner prays for an order as follows:

1. For settlement and allowance of this account and report and approval and confirmation of the acts of petitioner as _____ [guardian or conservator].

2. Authorizing petitioner to pay to his/her attorney _____ [*name*] the amount of $_____ for legal services rendered to the _____ [Guardian *or* Conservator] of the [person and] estate during the period of this account.

[3. For $_____ as compensation to the _____ (guardian *or* conservator) of the person for his/her services to the _____ (ward *or* conservatee) during the period of this account.]

4. For such other orders as the court deems proper.
Dated: _____

_____ [*signature*]
Petitioner

Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on _____ [*date*], at _____ [*city*], California.

_____ [*signature*]
[*typed name*]

[2] Use of Form

The form in [1], *above*, is a report and current account of the guardian or conservator of the estate [*Prob. Code § 2620*] and a petition to obtain fees for the guardian or conservator and the attorney [*Prob. Code § 2640*]. The filing of an account is deemed to include a petition requesting its approval [*Prob. Code § 1064(b)*].

[3] Fees of Guardian or Attorney

The form may be adapted for use as a petition for fees by a guardian or conservator of the person, who may file a petition for fees separate from the account of the guardian or conservator of the estate [*see Prob. Code § 2641*]. For the court to allow compensation for the guardian or conservator or the attorney, it must be shown that the inventory and appraisal have been filed and, unless good cause is shown for a different period of time, that at least 90 days have expired since the issuance of letters [*Prob. Code § 2640(a)*]. If the petition is filed before 90 days have elapsed since letters were issued, the form should be modified to state facts showing good cause for petitioning for compensation at this time. For further discussion of compensation, see Ch. 290F, *Guardianship and Conservatorship: Compensation* .

[4] Contents of Petition for Approval of Account

The petition for approval of the account must include all of the following [*Prob. Code § 1064(a)*]:

- A description of all sales, purchases, changes in the form of assets, or other transactions occurring during the period of the account that are not otherwise readily understandable from the schedules.

- An explanation of any unusual items appearing in the account.

- A statement of all compensation paid from the assets subject to the account to the guardian or conservator or the attorney, other than pursuant to a prior court order (Paragraphs 6 and 7).

- A statement disclosing any family or affiliate relationship between the guardian or conservator and any agent hired by the guardian or conservator during the account period (Paragraph 5); and for this purpose, "family" means a relationship created by blood or marriage, and "affiliate" means an entity that, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the guardian or conservator.

- An allegation disclosing whether all of the cash has been invested and maintained in interest-bearing accounts or in investments authorized by law or the governing instrument, except for an amount of cash that is reasonably necessary for the orderly administration of the estate (Paragraph 4).

The petition may include additional petitions for authorization, instruction or confirmation authorized by the Probate Code, including, but not limited to, a request for an order for compensation of the fiduciary and the attorney for the fiduciary [*Prob. Code § 1064(b)*].

Paragraph 8 of this form contains a statement as to the amount and sufficiency of the guardian's or conservator's bond. Most California courts, by local court rule, require that such a statement be included in the report [*see, e.g.*, Marin Co. Super. Ct. Rules, Rule 5.43; San Diego Co. Super. Ct. Rules, Rules 4.18.17 (conservatorships), 4.19.6 (guardianships); San Francisco Uniform Local Ct. Rules, Rule 14.75]. Counsel should consult local rules before filing this form to determine this and any other applicable local requirements.

[5] Summary and Schedules

Every account must contain a summary showing all of the items prescribed by statute [*Prob. Code § 1061(a)*]. For further discussion of the contents of the summary, see *§ 290E.31*. The summary of account must be supported by detailed schedules [*Prob. Code § 1062*]. For further discussion of the required schedules, see *§ 290E.32*.

As of January 1, 2008, all accounts must be submitted on the Judicial Council form [*Prob. Code § 2620(a)*]. This means that all accounts, both standard and simplified accounts, must be submitted using the standard Judicial Council summary of account form, which is illustrated in § 290E.71A. The summary is referenced in Paragraph 3 of this form.

For a simplified account, use of the California Judicial Council forms for Schedules A and C is mandatory as of January 1, 2008 [*see Prob. Code § 2620(a)*; Cal. Judicial Council Forms GC-405(A) and GC-405(C), reproduced in § 290E.71B]. For discussion and illustrations of the schedules for a simplified account, see *§ 290E.71B*.

For a standard account, the Judicial Council has prescribed a series of detailed schedules, which are discussed and illustrated in § 290E.71C. Use of the Judicial Council schedules (as opposed to the summary of account) is optional in the case of standard accounts.

[6] Verification

The petition must be verified by the petitioner or, if there are two or more petitioners, by any one of them [*Prob. Code § 1021(a)(1), (b)(1), (2)*]. A verified petition must be received as evidence when offered in an uncontested proceeding [*Prob. Code § 1022*].

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24-290E California Forms of Pleading and Practice--Annotated § 290E.71A

§ 290E.71A Summary of Account--Standard and Simplified Accounts [Prob. Code §§ 1060-1064, 2620]--Judicial Council Form GC-400(SUM)/GC-405(SUM)

[1] FORM Summary of Account--Standard and Simplified Accounts

Click here to view image.

[2] Use of Form

The form in [1] *above*, is a reproduction of Cal. Judicial Council Form GC-400(SUM)/GC-405(SUM). This form contains a summary of the charges and credits that are itemized in greater detail in the various schedules that must be attached to the form [*see §§ 290E.71B* (schedules for simplified account), 290E.71C (schedules for standard account)]. This form must be used for both standard and simplified accounts. An account may be filed as a standard account or a simplified account, depending on the assets involved [*see Cal. Rules of Court, Rule 7.575*; for discussion, *see § 290E.31*].

As of January 1, 2008, all summaries of account (both standard and simplified accounts) must be submitted on the official Judicial Council Summary of Account form [*Prob. Code § 2620(a)*; Cal. Judicial Council Form GC-400(SUM)/GC-405(SUM); *see § 290E.71A*]. Use of this form is mandatory [*see Cal. Rules of Ct. Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Counsel Forms, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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24-290E California Forms of Pleading and Practice--Annotated § 290E.71B

§ 290E.71B Schedules A and C for Simplified Accounts [Prob. Code §§ 1060-1064, 2620]--Judicial Council Forms GC-405(A) and GC-405(C)

[1] FORM Schedules A and C for Simplified Accounts

Click here to view image.

Click here to view image.

[2] Use of Form

The forms in [1] *above*, are a reproduction of Cal. Judicial Council Form(s) GC-405(A) and GC-405(C), used in filing Schedules A and C, respectively, of a simplified account. Schedule A must list receipts of noncapital items by the estate of the conservatee or ward, and Schedule C must list payments from the estate of the conservatee or ward. As of January 1, 2008, use of these Judicial Council forms is mandatory [*see* Prob. Code § 2196(a); *Cal. Rules of Ct. Rules 1.31, 7.101*]. These forms are available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Counsel Forms, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

Additional pages may be used if necessary, but if either Schedule A or Schedule C exceeds five pages, that schedule must be prepared in standard account format; for the sub-schedules used for Schedules A and C in standard account format, see *§ 290E.71C*.

[3] Additional Schedules for Simplified Accounts

In addition to Schedules A and C illustrated in this form, a number of other schedules may be necessary for simplified accounts in appropriate cases:

- Schedule B (Judicial Council Form GC-400(B)/GC-405(B)) is for both standard and simplified accounts for gains on sales.

- Schedule D (Judicial Council Form GC-400(D)/GC-405(D)) is for both standard and simplified accounts for losses on sale.

- Schedule E is for both standard and simplified accounts for cash and non-cash assets on hand at end of account period. Schedule E is subdivided into the following sub-schedules, each with its own form:

  - Judicial Council Form GC-400(E)(1)/GC-405(E)(1) is used for cash assets on hand at the end of the account period.

  - Judicial Council Form GC-400(E)(1)/GC-405(E)(2) is used for non-cash assets on hand at the end of the account period.

- Schedule F (Judicial Council Form GC-400(F)/GC-405(F)) is for both standard and simplified accounts for changes in form of assets.

- Schedule G (Judicial Council Form GC-400(G)/GC-405(G)) is for both standard and simplified accounts for liabilities at end of account period.

- Judicial Council Form GC-400(OCH)/GC-405(OCH) is used to report other charges.

- Judicial Council Form GC-400(OCR)/GC-405(OCR) is used to report other credits.

- Judicial Council Form GC-400(PH)(1)/GC-405(PH)(1) is used to report cash assets on hand at the beginning of the account period.

- Judicial Council Form GC-400(PH)(2)/GC-405(PH)(2) is used to report non-cash assets on hand at the beginning of the account period.

- Judicial Council Form GC-400(AP)/GC-405(AP) is used to report additional property received during the period of account.

- Judicial Council Form GC-400(DIST)/GC-405(DIST) is used to report Distributions to the conservatee or ward.

The above forms are illustrated in the standard account schedules illustrated in § 290E.71C, and are discussed there. Note that unlike the forms illustrated in [1], *above*, those Judicial Council forms have been designated as optional rather than mandatory.

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24-290E California Forms of Pleading and Practice--Annotated § 290E.71C

§ 290E.71C Schedules for Standard Accounts [Prob. Code §§ 1060-1064, 2620]--Judicial Council Forms GC-400(A-1) through GC-400(DIST)/GC-405(DIST)

[1] FORM Schedules for Standard Accounts

Click here to view image.

[2] Use of Form

The forms in [1] *above*, are a reproduction of the California Judicial Council schedules for used in filing a standard account. For a complete list of these forms, *see* [2], *below*. Some of these individual forms also may be used, if appropriate, when filing a simplified account [*see* [2], *below*; *see also § 290E.71B[3]* for a separate list of the forms that may be used in filing a simplified account]. For alternative forms for Schedules A and C for use with a simplified account; see *§ 290E.71B.*

While *Prob. Code § 2620(a)* requires that as of January 1, 2008, all accounts must be submitted on Judicial Council forms [*Prob. Code § 2620(a)*], use of the Judicial Council schedules (as opposed to the summary of account) is nevertheless optional in the case of standard accounts. This means, for example, that software-generated forms for the various schedules may be used for a standard account in place of the Judicial Council forms, as long as they conform to the numbering scheme and content that must appear on the Judicial Council's mandatory summary of account form [*see § 290E.71A*].

These forms are available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Counsel Forms, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

When a zero has been entered in a category of charge or credit on the summary of account form, the corresponding schedule form should not be included. In other words, schedules should be included only for those categories of charges or credits that actually exist. However, the schedules that are included should not be relabeled or relettered.

Judicial Council Form GC-400(A)(C) [*see § 290E.71D*] is an optional worksheet that can be used to help organize and

calculate receipts and disbursements and assist in determining which of the sub-schedules to Schedules A and C listed in [3], *below*, need to be filed in a given case.

[3] Schedules for Standard Accounts

The Judicial Council has issued the following schedules for a standard account, all of which are reproduced above in the order listed:

- Schedule A is for standard accounts for receipts for dividends, interest, pensions, annuities and other periodic payments, rent, social security, veterans, or other public benefits, and other receipts. Schedule A is subdivided into the following sub-schedules, each with its own form:
  - Judicial Council Form GC-400(A)(1) is used for receipts from dividends.
  - Judicial Council Form GC-400(A)(2) is used for receipts from interest.
  - Judicial Council Form GC-400(A)(3) is used for receipts from pensions, annuities, and other regular periodic payments.
  - Judicial Council Form GC-400(A)(4) is used for receipts from rent.
  - Judicial Council Form GC-400(A)(5) is used for receipts from social security, veterans' benefits, and other public benefits.
  - Judicial Council Form GC-400(A)(6) is used for other receipts.
- Schedule B (Judicial Council Form GC-400(B)/GC-405(B)) is for both standard and simplified accounts for gains on sales.
- Schedule C is for standard accounts for disbursements for conservatee's caregiver expenses, residential or long-term care facility expenses, ward's educational expenses, fiduciary and attorney fees, general administration expenses, investment expenses, living expenses, medical expenses, property sale expenses, rental property expenses, and other expenses. Schedule C is subdivided into the following sub-schedules, each with its own form:
  - Judicial Council Form GC-400(C)(1) is used for disbursements for caregiver expenses.
  - Judicial Council Form GC-400(C)(2) is used for disbursements for the conservatee's residential or long-term care facility expenses.
  - Judicial Council Form GC-400(C)(3) is used for disbursements for a ward's education expenses.
  - Judicial Council Form GC-400(C)(4) is used for disbursements for fiduciary and attorney's fees.
  - Judicial Council Form GC-400(C)(5) is used for disbursements for general administration expenses.

- Judicial Council Form GC-400(C)(6) is used for disbursements for investment expenses.

- Judicial Council Form GC-400(C)(7) is used for disbursements for living expenses.

- Judicial Council Form GC-400(C)(8) is used for disbursements for medical expenses.

- Judicial Council Form GC-400(C)(9) is used for disbursements for property sale expenses.

- Judicial Council Form GC-400(C)(10) is used for disbursements for rental property expenses.

- Judicial Council Form GC-400(C)(11) is used for disbursements for other expenses.

- Schedule D (Judicial Council Form GC-400(D)/GC-405(D)) is for both standard and simplified accounts for losses on sale.

- Schedule E is for both standard and simplified accounts for cash and non-cash assets on hand at end of account period. Schedule E is subdivided into the following sub-schedules, each with its own form:

  - Judicial Council Form GC-400(E)(1)/GC-405(E)(1) is used for cash assets on hand at the end of the account period.

  - Judicial Council Form GC-400(E)(1)/GC-405(E)(2) is used for non-cash assets on hand at the end of the account period.

- Schedule F (Judicial Council Form GC-400(F)/GC-405(F)) is for both standard and simplified accounts for changes in form of assets.

- Schedule G (Judicial Council Form GC-400(G)/GC-405(G)) is for both standard and simplified accounts for liabilities at end of account period.

- Additional schedules for standard accounts:

  - Judicial Council Form GC-400(NI) is used to report net income from a trade or business.

  - Judicial Council Form GC-400(NL) is used to report net loss from a trade or business.

- Additional schedules for both standard and simplified accounts:

  - Judicial Council Form GC-400(OCH)/GC-405(OCH) is used to report other charges.

  - Judicial Council Form GC-400(OCR)/GC-405(OCR) is used to report other credits.

  - Judicial Council Form GC-400(PH)(1)/GC-405(PH)(1) is used to report cash assets on hand at the beginning of the account period.

- Judicial Council Form GC-400(PH)(2)/GC-405(PH)(2) is used to report non-cash assets on hand at the beginning of the account period.

- Judicial Council Form GC-400(AP)/GC-405(AP) is used to report additional property received during the period of account.

- Judicial Council Form GC-400(DIST)/GC-405(DIST) is used to report Distributions to the conservatee or ward.

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24-290E California Forms of Pleading and Practice--Annotated § 290E.71D

§ 290E.71D Receipts and Disbursements Worksheet for Schedules A and C--Standard Accounts [Prob. Code §§ 1060-1064, 2620]--Judicial Council Form GC-405(A)(C)

[1] FORM Receipts and Disbursements Worksheet for Schedules A and C--Standard Accounts [Prob. Code §§ 1060-1064, 2620]--Judicial Council Form GC-405(A)(C)

Click here to view image.

[2] Use of Form

The form in [1] *above*, is a reproduction of Judicial Council Form GC-400(A)(C). This form is a worksheet that can be used to help organize and calculate receipts and disbursements in connection with a standard account and assist in determining which of the sub-schedules to Schedules A and C [*see § 290E.71C*] need to be filed in a given case. Use of this form is entirely optional, and it should not be filed with the actual account.

This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Counsel Forms, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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24-290E California Forms of Pleading and Practice--Annotated § 290E.72

§ 290E.72 Objections to Account [Prob. Code § 2622]

[1] FORM Objections to Account

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship] of the _____ [Estate *or* Person and Estate] of _____ _____ [*name*], _____[Ward *or* Conservatee].	))))))))	NO. _____ OBJECTIONS TO ACCOUNT

_____[*name*], as _____ [*specify capacity of objector, e.g.,* a relative within the second degree of the ward], objects to the account of the _____ [guardian *or* conservator] and would show:

1. Objector _____[*name*] is a person interested in the estate in that he/she is a _____ [*specify basis for interest entitling objector to contest account, e.g.,* relative of the ward].

2. The account was filed on _____[*date*], and covers the period from _____[*date*], to _____[*date*], inclusive.

3. [*In separately numbered paragraphs, set out exceptions to account, e.g.,* The total amount of interest collected on Inventory Item No. _____, as set forth in Schedule A of the guardian's account, fails to reflect the actual amount of interest paid].

WHEREFORE, objector prays:

1. That the account not be settled and allowed as filed;

2. That the exceptions stated above be sustained;

3. That the _____ [guardian *or* conservator] forthwith render a true, correct, and legally sufficient verified account; and

4. For such other orders as the court deems proper.
Dated: _____

Respectfully submitted, _____ [*signature*]
Objector
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Objector

VERIFICATION

I, _____[*name*], am the objector in this proceeding. I have read the foregoing pleading and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is for use by the ward or conservatee, or the spouse of the ward or the spouse or domestic partner [as defined by *Prob. Code § 37*; *Fam. Code § 297*] of the conservatee, or any relative, or friend of the ward or conservatee, or any creditor or other interested person, in objecting to an account filed by a guardian or conservator.

An objection must state the item of the account to which is objection is made and the basis for the objection [*Prob. Code § 2622*]. If the court determines that the objections were without reasonable cause and in bad faith, it may order the objector to pay the compensation and costs of the conservator or guardian and other expenses and costs of litigation, including attorney's fees, incurred to defend the account [*Prob. Code § 2622.5(a)*]. If the court determines that the opposition to the objections was without reasonable cause and in bad faith, it may award the objector costs and other expenses, including attorney's fees, incurred to contest the account [*Prob. Code § 2622.5(b)*]. For further discussion, see *§ 290E.41*.

[3] Verification

An objection filed pursuant to the Probate Code must be verified [*see Prob. Code § 1021(a)(2)*].

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24-290E California Forms of Pleading and Practice--Annotated § 290E.73

§ 290E.73 Order Settling Account and Report of Guardian or Conservator and Allowing Fees [Prob. Code §§ 2620, 2640]

[1] FORM Order Settling Account and Report of Guardian or Conservator and Allowing Fees

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship] of the _____ [Estate *or* Person and Estate] of _____ _____ [*name*], _____[Ward *or* Conservatee].	))))))))	NO. _____ ORDER

The petition and account of _____[*name*], _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee], came on regularly for hearing by the court on this date. Petitioner appeared by counsel, _____[*name*]. _____[*Specify other appearance, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. The statements in the petition and account are true and correct and the account should be settled.

3. _____[*name*], as _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee], has in his/her possession, after deducting the credits to which he/she is entitled, a balance of property on hand of $_____, _____ [consisting entirely of cash *or* of which $_____ is cash], belonging to the estate of the _____ [ward *or* conservatee].

IT IS ORDERED:

1. The _____ [first *or specify number*] account be approved, allowed, and accepted, and the acts of the _____ [guardian *or* conservator] be approved and confirmed.

2. The _____ [guardian *or* conservator] pay himself/herself $_____ for his/her fees and pay his/her attorney $_____ for services to the _____ [guardian *or* conservator] and the estate during the period of this account [and pay _____ (*name of guardian or conservator of person*) $_____ for his/her services as _____ (guardian *or* conservator) of the person].
Dated: _____

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use when the court settles an interim account of a guardian or conservator and allows fees.

In most counties, a proposed order must be submitted before the hearing. Local practice should be consulted.

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24-290E California Forms of Pleading and Practice--Annotated § 290E.74

§ 290E.74 Petition to Compel Attorney to Render Final Account--Absconding, Deceased, or Incapacitated Guardian or Conservator--By Successor Guardian or Conservator [Prob. Code § 2632(c)]

[1] FORM Petition to Compel Attorney to Render Final Account--Absconding, Deceased, or Incapacitated Guardian or Conservator--By Successor Guardian or Conservator

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship] of the _____ [Estate *or* Person and Estate] of _____ _____ [*name*], _____[Ward *or* Conservatee].	))))))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION TO COMPEL FINAL ACCOUNT

Petitioner _____[*name*] respectfully represents:

1. Petitioner was appointed _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee] on _____[*date*], and since that date has been and still is the duly appointed, qualified, and acting _____ [guardian *or* conservator] of the _____ [ward *or* conservatee].

2. Before petitioner was appointed _____ [guardian *or* conservator], _____[*name of former guardian or conservator*] was the _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee].

3. On or about _____[*date*], _____[*name of former guardian or conservator*] _____ [absconded *or* became incapacitated, and no legal representative has been appointed for him/her *or* died, and no legal representative has been appointed for him/her]. No final account and report concerning his/her administration as _____ [guardian *or* conservator] has been filed.

4. _____[*name of attorney*], whose address is _____[*street address*], _____[*city*], California, is an attorney licensed to practice law in California. Before _____[*name of former guardian or conservator*] _____ [absconded *or* became incapacitated *or* died], _____[*name of attorney*] was the _____ [attorney for the _____ (guardian *or* conservator) *or* attorney of record in the _____ (guardianship *or* conservatorship) proceeding]. Petitioner is informed and believes and thereon alleges that _____[*name of attorney*] has certain records or information available to him/her regarding the administration of _____[*name of former guardian or conservator*].

5. Petitioner cannot render an inventory of the estate of the _____ [ward *or* conservatee] or fully complete the obligations of his/her trust until a final account of the previous _____ [guardian *or* conservator] has been rendered and approved. _____[*name of attorney*] has _____ [failed *or* refused] to render an account on behalf of _____[*name of former guardian or conservator*].

WHEREFORE, petitioner prays:

1. For a final account to be rendered by _____[*name of attorney*], _____ [attorney for the _____ (guardian *or* conservator) *or* attorney of record in the _____ (guardianship *or* conservatorship) proceeding], on behalf of _____[*name of former guardian or conservator*] as _____ [guardian *or* conservator] of the [person and] estate of the _____ [ward *or* conservatee].

2. For such other orders as the court deems proper.

[*Signature and verification. See § 290E.71.*]

[2] Use of Form

The form in [1], *above*, is a petition is for use by a guardian or conservator in obtaining an order compelling either the attorney for the former guardian or conservator or the attorney of record in the guardianship or conservatorship proceeding to render a final account on behalf of the former guardian or conservator who has absconded, died, or become incapacitated [*see Prob. Code § 2632(c)*; *see also § 290E.52*].

The attorney must exercise reasonable diligence in preparing the account. Verification of the account may be made on information and belief. The court must settle the account as in other cases. The court must allow reasonable compensation to the attorney for preparing the account. The amount allowed will be a charge against the estate that was being administered by the deceased, incapacitated, or absconding guardian or conservator. Legal services for which compensation will be allowed to the attorney include those services rendered by any paralegal performing the services under the direction and supervision of an attorney. The petition or application for compensation must set forth the hours spent and services performed by the paralegal [*Prob. Code § 2632(d)*].

[3] Verification

This petition must be verified [*see Prob. Code § 1021*].

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24-290E California Forms of Pleading and Practice--Annotated § 290E.75

§ 290E.75 Order Compelling Attorney to Render Account

[1] FORM Order Compelling Attorney to Render Account

[*Caption. See § 290E.73* .]

The petition of _____[*name*], as _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee], to compel _____[*name of attorney*], _____ [attorney for the _____ (guardian *or* conservator) *or* attorney of record in the _____ (guardianship *or* conservatorship) proceeding] to render a final account of _____[*name of former guardian or conservator*] of his/her administration of the estate of _____ [ward *or* conservatee] was presented to the court on this date.

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. The allegations of the petition are true.

IT IS ORDERED that _____[*name of attorney*], _____ [attorney for the _____ (guardian *or* conservator) *or* attorney of record in the _____ (guardianship *or* conservatorship) proceeding] render a final account of _____[*name of former guardian or conservator*] as _____ [guardian *or* conservator] of the [person and] estate of _____[*name of ward or conservatee*].
Dated: _____

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use when the court grants a petition to compel the attorney for the former guardian or conservator or the attorney of record in the guardianship or conservatorship proceeding to render a final account on behalf of a guardian or conservator who has absconded, died, or become incapacitated [*see Prob. Code § 2632(c),(d)*; *see also § 290E.52*].

In most counties the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

The court must allow reasonable compensation to the attorney and his or her paralegal for preparing the account [*see Prob. Code § 2632(c)*]. The attorney may petition the court for an order fixing and allowing for compensation of services rendered to that time [*see Prob. Code § 2642*; *see also* Ch. 290F, *Guardianship and Conservatorship: Compensation*].

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24-290E California Forms of Pleading and Practice--Annotated § 290E.76

§ 290E.76 Petition for Discharge on Final Account and Report of Guardian or Conservator [Prob. Code §§ 1060-1064, 2620, 2640]

[1] FORM Petition for Discharge on Final Account and Report of Guardian or Conservator [Prob. Code

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship] of the _____ [Estate *or* Person and Estate] of _____ _____ [*name*], _____[Ward *or* Conservatee].	))))))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION FOR DISCHARGE ON FINAL ACCOUNT

Petitioner [*name*] respectfully represents:

1. [*Capacity of petitioner. See § 290E.71, Paragraph 1.*]

2. [*Period of account. See § 290E.71, Paragraph 2.*]

3. [*Submission of account. See § 290E.71, Paragraph 3.*]

4. [*Allegation of cash in interest-bearing account. See § 290E.71, Paragraph 4.*]

5. [*Hiring of any agent who has relationship to petitioner or attorney. See § 290E.71, Paragraph 5.*]

6. [*Compensation of petitioner. See § 290E.71, Paragraph 6.*]

7. [*Compensation of petitioner's attorney. See § 290E.71, Paragraph 7.*]

[*EITHER, if ward or conservatee died*]

8. On _____ [*date*], the _____ [ward *or* conservatee] died. At the time of death, the _____ [ward *or* conservatee] was a resident of _____ County, California, and, on _____ [*date*], _____[*name*] was appointed as personal representative of the estate of the _____ [ward *or* conservatee] and ever since has been acting as such. By reason of the death, the relation of _____ [guardian and ward *or* conservator and conservatee] is terminated, and petitioner has no further function to perform as _____ [guardian *or* conservator] other than to render his/her final account and to turn over the assets in his/her possession to the personal representative of the _____ [ward *or* conservatee].

[*OR, if conservatee was restored to capacity*]

8. On _____ [*date*], the conservatee was restored to capacity. By reason thereof, the relation of conservator and conservatee is terminated,and petitioner has no further function to perform as conservator other than to render his/her final account and to turn over the assets in his/her possession to the conservatee.

[*OR, if ward has reached age of majority*]

8. On _____ [*date*], the ward reached the age of majority. By reason thereof, the relation of guardian and ward is terminated, and petitioner has no further function to perform as guardian other than to render his/her final account and to turn over the assets in his/her possession to the ward.

[*OR, if guardian or conservator resigned or was removed*]

8. On _____ [*date*], the petitioner _____ [resigned *or* was removed and his/her letters of _____ (guardianship *or* conservatorship) were revoked]. By reason thereof, the relation of _____ [guardian and ward *or* conservator and conservatee] is terminated, and petitioner has no further function to perform as _____ [guardian *or* conservator] other than to render his/her final account and to turn over the assets in his/her possession to _____ [*name*] as successor _____ [guardian *or* conservator].

[*CONTINUE*]

9. [*Special notice allegation. See § 290E.71, Paragraph 8.*]

WHEREFORE, petitioner prays for an order as follows:

1. For settlement and allowance of this account and report and approval and confirmation of the acts of petitioner as _____ [guardian *or* conservator].

2. For $_____ as compensation to [*name of attorney*] for legal services rendered to the _____ [guardian *or* conservator] and estate during the period of this account.

[3. For $_____ as compensation to the _____ (guardian *or* conservator) of the person for his/her services to the _____ (ward *or* conservatee) during the period of this account.]

4. To be discharged as _____ [guardian *or* conservator] and authorized to turn over all of the assets of the estate remaining in his/her hands to _____ [*specify person to whom assets are to be turned over, e.g.,* the ward *or* the personal representative of the estate of the conservatee].

5. For such other orders as the court may deem proper.

[*Signature and verification. See § 290E.71*.]

[2] Use of Form

The form in [1], *above*, is for use in filing the final account of a guardian or conservator, obtaining fees for the guardian or conservator and the attorney, and petitioning for discharge [*Prob. Code §§ 2620, 2623, 2640*].

The requirements for a final account are the same as those for a current account, except that a final account should contain a statement giving the reason that the final account is being filed (Paragraph 8). For a discussion of the contents of an account, see *§§ 290E.30 -290E.32*.

A petition for compensation must be filed after the filing of the inventory and appraisal, but not before the expiration of 90 days from the issuance of letters unless good cause is shown [*Prob. Code § 2640(a)*].

Every account must contain a summary showing all of the items prescribed by statute [*Prob. Code § 1061(a)*]. For further discussion of the contents of the summary, see *§ 290E.31*. The summary of account must be supported by detailed schedules [*Prob. Code § 1062*]. For further discussion of the required schedules, see *§ 290E.32*. For an illustration of the mandatory Judicial Council form for a summary of account, see *§ 290E.71A*. The Judicial Council forms for a simplified account are discussed and illustrated in § 290E.71B. The Judicial Council forms for a standard account are discussed and illustrated in § 290E.71C. For additional discussion of these forms, see *§ 290E.71[5]*.

[3] Waiver of Account

An accounting in a guardianship or conservatorship proceeding may be waived only by court order on a showing that the conditions for waiver specified in *Prob. Code § 2628* (relating to small estates) have been satisfied [*Prob. Code § 2628(a)*]. For further discussion of the waiver of an accounting for a small estate, see *§ 290E.22*.

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24-290E California Forms of Pleading and Practice--Annotated § 290E.77

§ 290E.77 Order Settling Final Account of Guardian or Conservator and Discharging Guardian or Conservator

[1] FORM Order Settling Final Account of Guardian or Conservator and Discharging Guardian or Conservator

[*Caption. See § 290E.73.*]

The petition and final account of _____[*name*], _____ [guardian *or* conservator] of the [person and] estate of _____ [*name*], _____ [ward *or* conservatee], came on regularly for hearing by the court on this date. Petitioner appeared by counsel _____ [*name*]. _____ [*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. The allegations in the petition and the account are true and correct and the account should be settled.

3. _____ [*name*], as _____ [guardian *or* conservator] of the [person and] estate of _____ [*name*], _____ [ward *or* conservatee], has in his/her possession, after deducting the credits to which he/she is entitled, a balance of property on hand of $_____, _____ [consisting entirely of cash *or* of which $_____ is cash], belonging to the estate of the _____ [ward *or* conservatee].

IT IS ORDERED:

1. The final account be approved, allowed, and accepted, and the acts of the _____ [guardian *or* conservator] be approved and confirmed.

2. The _____ [guardian *or* conservator] pay himself/herself $_____ for his/her fees and pay his/her attorney $_____ for services to the _____ [guardian *or* conservator] and the estate during the period of this account [and _____ (*name of guardian or conservator of person*) $_____ for his/her services to the _____ (ward *or* conservatee)].

3. The _____ [guardian *or* conservator] pay over, transfer, and deliver forthwith to _____ [*specify person to whom assets are to be turned over, e.g.*, the ward] all the balance of the property on hand after paying and deducting the authorized fees.

4. On filing a receipt for the balance of property on hand [and at the end of one year after the ward's majority], the _____ [guardian *or* conservator] be discharged.
Dated: _____

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use when the court has granted a petition to settle the guardian's or conservator's final account and discharge the guardian or conservator.

In most counties, a proposed order must be submitted before the hearing. Local practice should be consulted.

The guardian of a minor cannot be discharged until one year after the ward has attained majority [*Prob. Code § 2627(b)*; *see § 290E.51*].

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Volume 24: Guardianship and Conservatorship thru Guardians ad Litem-Chs. 280-291
Chapter 290E GUARDIANSHIP AND CONSERVATORSHIP: ACCOUNTS
PART IV. FORMS

24-290E California Forms of Pleading and Practice--Annotated § 290E.78

§ 290E.78 Declaration and Order for Final Discharge of Guardian or Conservator

[1] FORM Declaration and Order for Final Discharge of Guardian or Conservator

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship] of the _____ [Estate *or* Person and Estate] of _____ _____ [*name*], _____[Ward *or* Conservatee].	))))))))	NO. _____ DECLARATION AND ORDER

DECLARATION

_____[*name*] declares:

I am the _____ [guardian *or* conservator] of the [person and] estate of _____[*name of ward or conservatee*]. I have paid all money due from me as _____ [guardian *or* conservator] and have delivered all of the property of the estate as set forth in the final account previously filed. The receipt of _____ [*specify person to whom assets were delivered, e.g.,* the ward] for the property has been filed. I have performed all acts lawfully required of me as _____ [guardian *or* conservator].
_____ [*Add, if applicable:* The ward attained majority more than one year ago, on _____ (*date*).]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____

_____ [*signature*]
_____ [*typed name*]
_____ [Guardian *or* Conservator]

ORDER

It appears to the court that all acts of _____[*name of guardian or conservator*] as _____ [guardian *or* conservator] of the [person and] estate have been performed as required by law and that the _____ [guardian *or* conservator] has paid all money due from him/her and delivered all of the property of the estate to _____ [*specify, e.g.*, the ward].

IT IS ORDERED that _____[*name of guardian or conservator*] be discharged as _____ [guardian *or* conservator] and that he/she and his/her sureties be released from liability for all acts subsequent hereto.
Dated: _____

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The declaration and order in [1], *above*, are for use in acknowledging that the guardian or conservator has complied with the order of the court settling his or her final account, by paying any money due from him or her and delivering the property of the estate to the ward, conservatee, successor guardian or conservator, or personal representative of the estate of the ward or conservatee. Since a declaration and order are not specifically required by the Probate Code, local practice regarding use of this form should be consulted. This form is adapted from a Sacramento County form.

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24-290F California Forms of Pleading and Practice--Annotated 290F.syn

§ 290F.syn Synopsis to Chapter 290F: GUARDIANSHIP AND CONSERVATORSHIP: COMPENSATION OF GUARDIAN OR CONSERVATOR

§ 290F.01 Scope of Chapter

§ 290F.02 Cross References

§§ 290F.03-290F.09 [Reserved]

§ 290F.10 Governing Statutes

§ 290F.11 Definitions

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[a] Reasonable Expenses

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[4] Compensation and Costs Charged to Estate

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§ 290F.41 Petition by Guardian or Conservator

[1] Guardian or Conservator of the Estate

[2] Guardian or Conservator of the Person

§ 290F.42 Petition by Attorney

[1] Compensation for Attorney's Services

[2] Paralegal Services

§ 290F.43 Notice of Hearing and Order

§ 290F.44 Periodic Payments on Account

[1] Advantages of Periodic Payments

[2] Petition for Periodic Payments

[3] Notice

[4] Order for Periodic Payments

§ 290F.45 No Advance Payments

§§ 290F.46-290F.49 [Reserved]

§ 290F.50 Related Matthew Bender Publications

§ 290F.51 State Statutes

§ 290F.52 California Rules of Court

§ 290F.53 Local Court Rules

[1] Alameda County

[2] Contra Costa County

[3] Los Angeles County

[4] Orange County

[5] Sacramento County

[6] San Francisco

[7] Santa Clara County

§ 290F.54 Decisions

[1] Attorney Fees

[2] Compensation

§ 290F.55 Text References

§§ 290F.56-290F.59 [Reserved]

§ 290F.60 Petition for Periodic Payments to Guardian, Conservator, or Attorney [Prob. Code § 2643]

[1] FORM

[2] Use of Form

[3] Verification

§ 290F.61 Order Authorizing Periodic Payments to Guardian, Conservator, or Attorney [Prob. Code § 2643]

[1] FORM

[2] Use of Form

§ 290F.62 Petition for Attorney's Fees for Services to Guardian or Conservator [Prob. Code § 2642]

[1] FORM

[2] Use of Form

[3] Verification

§ 290F.63 Order Allowing Attorney's Fees [Prob. Code § 2642]

[1] FORM

[2] Use of Form

§ 290F.64 Petition for Compensation and Attorney's Fees--Unsuccessful Petitioner for Appointment as Conservator [Prob. Code § 2640.1]

[1] FORM

[2] Use of Form

[3] Notice

[4] Just and Reasonable Compensation

[5] Payment

[6] Verification

§ 290F.65 Order Allowing Compensation and Attorney's Fees [Prob. Code § 2640.1]

[1] FORM

[2] Use of Form

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24-290F California Forms of Pleading and Practice--Annotated § 290F.01

§ 290F.01 Scope of Chapter

This chapter discusses the compensation of guardians, conservators, and attorneys for services rendered, when that compensation is sought without the filing of an account. This chapter contains the following forms:

- A petition for periodic payments to the conservator, guardian, or attorney [*see Prob. Code § 2643*] and an order authorizing those payments [*see §§ 290F.60, 290F.61*].

- A petition for attorney's fees for services to a guardian or conservator [*see Prob. Code § 2642*] and an order allowing attorney's fees [*see §§ 290F.62, 290F.63*].

- A petition for compensation for a person who petitioned for appointment as conservator but was not appointed, and for that person's attorney's fees [*see Prob. Code § 2640.1*] and an order authorizing the compensation and fees [*see §§ 290F.64, 290F.65*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateCosts & Expenses

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24-290F California Forms of Pleading and Practice--Annotated § 290F.02

§ 290F.02 Cross References

- For discussion and forms pertaining to accounts and compensation sought in connection with the filing of an account, see Ch. 290E, *Guardianship and Conservatorship: Accounts* .

- For discussion and forms pertaining to memoranda of points and authorities, see Ch. 417, *Points and Authorities* .

- For discussion and forms pertaining to compensation in probate proceedings, see Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAccountingEstate, Gift & Trust LawProbateProcedures in ProbateCosts & Expenses

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[Reserved]

§§ 290F.03[Reserved]

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24-290F California Forms of Pleading and Practice--Annotated § 290F.10

§ 290F.10 Governing Statutes

The compensation of a guardian, conservator, or attorney is governed by *Prob. Code §§ 2640-2647* and by *Cal. Rules of Ct., Rules 7.750-7.756*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral Overview

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24-290F California Forms of Pleading and Practice--Annotated § 290F.11

§ 290F.11 Definitions

As used in this chapter, the term "guardian" refers to a guardian of the estate and the term "conservator" refers to conservator of the estate [*see Prob. Code § 2600*]. Conservator also includes limited conservators of the estate to the extent that the limited conservator's powers and duties are specifically and expressly provided by the order of appointment [*see Prob. Code § 2600(a)* (definition of "conservator" as used in *Prob. Code §§ 2600-2633*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & Rights

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24-290F California Forms of Pleading and Practice--Annotated §§ 290F.12-290F.19

[Reserved]

§§ 290F.12[Reserved]

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24-290F California Forms of Pleading and Practice--Annotated § 290F.20

§ 290F.20 Allowance for Expenses of Guardian or Conservator

[1] Expenses Allowed

[a] Reasonable Expenses

The guardian or conservator must be allowed the amount of the reasonable expenses incurred in the exercise of powers and the performance of duties. These expenses include, but are not limited to, the cost of any surety bond furnished, reasonable attorney's fees, and compensation for services rendered by the guardian or conservator of the person as the court determines is just and reasonable [*Prob. Code § 2623(a)(1), (2)*].

The guardian or conservator will not be compensated for any costs or fees incurred in unsuccessfully opposing a petition, or other request or action, made by or on behalf of the ward or conservatee, unless the court determines that the opposition was made in good faith, based on the best interests of the ward or conservatee [*Prob. Code § 2623(b)*].

[b] Accountant's Fees

A guardian or conservator may employ an accountant to perform acts involving professional skills not possessed by the guardian or conservator, whose fees may properly be paid out of the estate [*Guardianship of Hexberg (1968) 268 Cal. App. 2d 590, 596, 74 Cal. Rptr. 218]* . The guardian or conservator may not, however, delegate all responsibility to the accountant, and must reasonably check the entries in the account as prepared by the accountant [*Clark v. State Bar (1952) 39 Cal. 2d 161, 173, 246 P.2d 1* (guardianship case)]. The expense of auditing an accounting will not be allowed as a proper charge if the audit is made necessary by the guardian's or conservator's carelessness and neglect [*Guardianship of Stallings (1948) 85 Cal. App. 2d 443, 447, 193 P.2d 114 , disapproved on other grounds, Guardianship of Cookingham (1955) 45 Cal. 2d 367, 373, 289 P.2d 16]* .

[2] Disbursements Made Before Appointment

The guardian or conservator must be allowed all reasonable disbursements made before appointment as guardian or

conservator [*Prob. Code § 2623(a)(3)*].

[3] Disbursements Made After Termination but Before Discharge

If the conservatorship or guardianship terminates for reasons other than the death of the ward or conservatee, the guardian or conservator will be allowed all reasonable disbursements made after the termination of the guardianship or conservatorship but before the discharge of the guardian or conservator by the court [*Prob. Code § 2623(a)(4)*]. If the guardianship or conservatorship terminates because of the death of the ward or conservatee, all reasonable expenses incurred by the guardian or conservator before being discharged by the court, for the custody and conservation of the estate of the deceased ward or conservatee, and its delivery to the personal representative of the estate, or in making other disposition of the estate as provided for by law, will be allowed [*Prob. Code § 2623(a)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-290F California Forms of Pleading and Practice--Annotated § 290F.21

§ 290F.21 Compensation for Services Rendered by Guardian or Conservator

[1] Just and Reasonable Requirement

The guardian or conservator will be allowed compensation for services rendered, as the court determines to be just and reasonable [*Prob. Code § 2623(a)(2)*; *see also Cal. Rules of Ct., Rule 7.756*]. The right of the guardian or conservator to compensation for services rendered is subject to the same considerations as the right of a trustee to compensation for services rendered. Thus, the guardian or conservator is entitled to compensation only for services that he or she believed in good faith were necessary or appropriate to carry out the purpose of the guardianship or conservatorship, and only if the guardian's or conservator's belief in that regard was reasonable [*Conservatorship of Lefkowitz (1996) 50 Cal. App. 4th 1310, 1314, 58 Cal. Rptr. 2d 299]* . For example, a conservator is entitled to compensation for his or her time in unsuccessfully opposing a petition for his or her removal as conservator only if his or her decision to oppose the petition was motivated by a good faith belief that it would be in the best interests of the conservatee if the petition were defeated, and only if that belief was objectively reasonable [*Conservatorship of Lefkowitz (1996) 50 Cal. App. 4th 1310, 1315, 58 Cal. Rptr. 2d 299]* .

[2] Size of Estate as Affecting Compensation

[a] Guardian or Conservator Other Than Nonprofit Corporation

The size of the estate may be a factor in the court's determination of compensation [*see Prob. Code § 2104(c)(2)*; *see* [b], *below*]. For example, in San Francisco, an annual fee for a guardian or a conservator ordinarily is not to exceed 1 percent of the value of the assets at the end of the accounting period. Alternatively, a fee of 6 percent of income may be allowed in the court's discretion. The court will accept an allegation in the verified petition for fees as to market values of the assets of the guardianship or conservatorship to support the fees requested according to these guidelines. These market values, however, must be those as of the end of the accounting period [San Francisco Uniform Local Ct. Rules, Rule 14.111].

[b] Compensation for Nonprofit Corporation and Its Attorney

The compensation of a nonprofit corporation as guardian or conservator is allowed only for services actually rendered [*Prob. Code § 2104(c)(1)*]. Any fee allowed for an attorney for a nonprofit corporation must also be for services actually rendered [*Prob. Code § 2104(c)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-290F California Forms of Pleading and Practice--Annotated § 290F.22

§ 290F.22 Compensation for Unsuccessful Conservatorship--Petitioner and Attorney

[1] Compensation Authorized

A person who petitions for appointment of a conservator may obtain compensation for services rendered and costs incurred in connection with the petition if the petition is not granted but, while it is still pending, the court appoints another person to act as conservator, provided that the court determines the petition was filed in the best interests of the conservatee [*Prob. Code § 2640.1*]. The person's attorney may also obtain compensation and reimbursement of costs under these circumstances [*Prob. Code § 2640.1*]. For a form for a petition, see *§ 290F.64*.

This procedure is available only for conservatorships; no similar procedure is available for guardianships [*see Prob. Code § 2640.1*].

[2] Filing of Petition for Compensation

The petition cannot be filed before the expiration of 90 days from the appointment of the conservator [*Prob. Code § 2640.1(a)*]. Notice of the hearing on the petition must be given 15 days before hearing in the manner provided by *Prob. Code §§ 1460-1469* [*Prob. Code §§ 1460(a), 2640.1(b)*; *see* Ch. 284, *Guardianship and Conservatorship: Notice*].

[3] Compensation Must Be Just and Reasonable

The compensation and costs allowed must be determined to be just and reasonable by the court [*Prob. Code § 2640.1(c)*].

[4] Compensation and Costs Charged to Estate

The compensation and costs allowed are charged to the estate of the conservatee. If a conservator of the estate is not appointed, but a conservator of the person is appointed, the compensation and costs allowed are paid from property belonging to the conservatee, whether held outright, in trust, or otherwise [*Prob. Code § 2640.1(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-290F California Forms of Pleading and Practice--Annotated § 290F.23

§ 290F.23 Attorney's Fees

[1] Fees Incurred by Guardian or Conservator

A guardian or conservator is allowed reasonable attorney's fees incurred in the exercise of the powers and the performance of the duties of the guardian or conservator [*Prob. Code § 2623(a)(1)*]. Attorney's fees also may be awarded to the attorney of a person who petitions in good faith to be appointed conservator, even if someone else is appointed [*Prob. Code § 2640.1*; *see § 290F.22*].

[2] Fees for Services Outside Routine Administration

Attorney's fees may be allowed for services other than routine advice to the guardian or conservator concerning administration of the estate. For example, attorney's fees have been awarded for services on appeal from an order settling an account [*Riley v. Superior Court (1957) 49 Cal. 2d 305, 311-312, 316 P.2d 956* (guardianship case)]. Attorney's fees also have been awarded to an attorney for services rendered in an unsuccessful opposition to a ward's petition for restoration to capacity when that opposition was conducted in good faith [*Guardianship of Cookingham (1955) 45 Cal. 2d 367, 375-376, 289 P.2d 16]* .

[3] Fees for Rendering of Final Account

The attorney for the guardian or conservator is entitled to fees when he or she renders the final account because the guardian or conservator dies, absconds, or becomes incompetent [*Prob. Code § 2632(d)*; *see* Ch. 290E, *Guardianship and Conservatorship: Accounts*]. The amount allowed is charged against the estate that was being administered by the deceased, incapacitated, or absconding guardian or conservator. Attorney's fees for rendering the final account include fees of a paralegal who performs services under the direction and supervision of an attorney, and the petition for compensation must set forth the hours spent and services performed by the paralegal [*Prob. Code § 2632(d)*].

[4] Fees for Services to Ward or Conservatee

Attorney's fees may be awarded from the estate only for services rendered to the guardian or conservator and not for services rendered directly to the ward or conservatee, except when the proceeding involved is one that may be begun by the ward or conservatee, such as termination of conservatorship proceedings [*see Prob. Code § 1861(a)(2)*; *Guardianship of Boxley (1953) 115 Cal. App. 2d 483, 486, 252 P.2d 348* ; *see also* Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships*].

[5] No Attorney's Fees Paid Without Prior Court Order

No attorney's fees may be paid from the estate of the ward or conservatee without prior court order [*Prob. Code § 2647*]. The estate of the ward or conservatee is not obligated to pay attorney's fees established by any engagement agreement or other contract until it has been approved by the court [*Prob. Code § 2647*]. However, this rule does not preclude an award of fees by the court pursuant to *Prob. Code §§ 2640-2646* even if the contractual obligations would be unenforceable under *Prob. Code § 2647* [*see Prob. Code § 2647*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral Overview

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24-290F California Forms of Pleading and Practice--Annotated § 290F.24

§ 290F.24 Compensation for Attorney Related to Guardian or Conservator

[1] Court Approval Required

No parent, child, sibling, or spouse of a person who is a guardian or conservator, and no law partnership or corporation whose partner, shareholder, or employee is serving as a guardian or conservator, may receive any compensation for legal services performed for the guardian or conservator unless the court specifically approves the right to compensation and finds that it is to the advantage, benefit, and best interests of the ward or conservatee [*Prob. Code § 2645(b)*].

No attorney who is a guardian or conservator can receive any compensation from the guardianship or conservatorship estate for legal services performed for the guardian or conservator unless the court specifically approves the right to the compensation and finds that it is to the advantage, benefit, and best interests of the ward or conservatee [*Prob. Code § 2645(a)*].

The Court of Appeal for the Fourth District has held that this language requires a showing that representation provided by the attorney seeking compensation, *as opposed to representation otherwise available from other attorneys,* benefitted the conservatorship estate [*Brown v. Brown (In re Estate of Bryant) (1996) 45 Cal. App. 4th 117, 122-123*]. It is not sufficient merely to show that the guardianship or conservatorship estate (or the ward or conservatee) derived some benefit from the representation [*Brown v. Brown (In re Estate of Bryant) (1996) 45 Cal. App. 4th 117, 120*]. Rather, the services rendered by the attorney in question must provide some benefit that would not otherwise be available to the conservatorship estate [*Brown v. Brown (In re Estate of Bryant) (1996) 45 Cal. App. 4th 117, 122, 52 Cal. Rptr. 2d 755]* .

The provisions of *Prob. Code § 2645* do not apply if the guardian or conservator is related by blood or marriage, or is a cohabitant with the ward or conservatee [*Prob. Code § 2645(c)*].

[2] Disclosure of Relationship Required

The court, in its discretion, may approve the right to compensation, after fulldisclosure of the relationships of all

persons to receive compensation [*Prob. Code 2645(d)*].

[3] When Compensation May Be Ordered

The court may order compensation at any time, including during the pendency of an order appointing the guardian or conservator, settling any account, or approving a separate petition [*Prob. Code 2645(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral Overview

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24-290F California Forms of Pleading and Practice--Annotated § 290F.25

§ 290F.25 Contingent Fee Contract for Attorney's Services

[1] Contingent Fee May Be Permitted

When it is to the ward's, conservatee's or estate's advantage, benefit, and best interest, the guardian or conservator of the estate may contract with an attorney for a contingent fee for the attorney's services in representing the ward or conservatee or the estate in connection with a matter that is of a type that is customarily the subject of a contingent fee contract. The contract is valid, however, only if the contract is made pursuant to a court order authorizing the guardian or conservator to execute the contract, or if the contract is approved by court order [*Prob. Code § 2644(a)*; *Cal. Rules of Ct., Rules 7.753, 7.703(d)(1)* (agreement must be in writing and must comply with *Bus. & Prof. Code § 6147*)].

[2] Petition for Approval of Contingent Fee Contract

To obtain the court order, the guardian or conservator must file a petition with the court showing the advantage, benefit, and best interest to the ward or conservatee or to the estate of the contingent fee contract. A copy of the contract must be attached to the petition [*Prob. Code § 2644(b)*]. Notice of the hearing on the petition must be given 15 days before hearing, in the manner provided by *Prob. Code §§ 1460-1469* [*Prob. Code §§ 1460(a), 2644(c)*; *see* Ch. 284, *Guardianship and Conservatorship: Notice*].

[3] Court That May Authorize Contract

The court that authorizes the contract must be either the court in which the guardianship or conservatorship proceeding is pending or, when the contract is in connection with a matter in litigation, the court in which the litigation is pending [*Prob. Code § 2644(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewEstate, Gift & Trust

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24-290F California Forms of Pleading and Practice--Annotated §§ 290F.26-290F.39

[Reserved]

§§ 290F.26[Reserved]

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24-290F California Forms of Pleading and Practice--Annotated § 290F.40

§ 290F.40 Court Authorization Required

Court authorization is required for payment of compensation to the guardian or conservator, an attorney for the guardian or conservator, an attorney for the ward or conservatee, or a public guardian, for costs or fees pursuant to *Prob. Code § 2902* [*Prob. Code § 2430(a)(4)*].

All petitions for orders fixing and allowing compensation must comply with the requirements of *Cal. Rules of Ct., Rule 7.702* concerning petitions for extraordinary compensation in decedents' estates, to the extent applicable to guardianships and conservatorships, except that the best interest of the ward or conservatee is to be considered rather than the interest of the beneficiaries of the estate [*Cal. Rules of Ct., Rule 7.751(b)*]. Thus, the petition must include, or be accompanied by, a statement of the facts on which the petition is based showing the nature and difficulty of the tasks performed, the results achieved, and the benefit of the services to the ward or conservatee, and the amount requested for each category of service performed, the hourly rate of each person who performed the services and the hours spent by each of them, and a description of the services rendered [*Cal. Rules of Ct., Rule 7.702*].

The court may order the guardian or conservator to file an accounting before or at the time the petition is filed or heard [*Cal. Rules of Ct., Rule 7.752*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateCosts & Expenses

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24-290F California Forms of Pleading and Practice--Annotated § 290F.41

§ 290F.41 Petition by Guardian or Conservator

[1] Guardian or Conservator of the Estate

At any time after filing the inventory and appraisal, but not before the expiration of 90 days from the issuance of letters or any other period of time as the court for good cause orders, the guardian or conservator of the estate may petition the court for an order fixing and allowing his or her compensation, or compensation to the guardian or conservator of the person, or compensation to an attorney for services rendered up to the time of filing the petition for compensation [*Prob. Code § 2640(a)*; for form, *see § 290F.60*], including compensation for services rendered before the date of the order of appointment as guardian or conservator [*see Prob. Code § 2640(c)*; *Cal. Rules of Ct., Rule 7.751(a)* (petition must show facts demonstrating necessity for preappointment services)]. Allowable legal services include services rendered by any paralegal performing legal services under the direction and supervision of an attorney, and the petition or application for compensation must set forth the hours spent and services performed by the paralegal [*Prob. Code § 2640(c)*; *Cal. Rules of Ct., Rules 7.754, 7.703(e)*].

The guardian or conservator will not be compensated for any costs or fees incurred in unsuccessfully opposing a petition, or other request or action, made by or on behalf of the ward or conservatee, unless the court determines that the opposition was made in good faith, based on the best interests of the ward or conservatee [*Prob. Code § 2640(d)*].

[2] Guardian or Conservator of the Person

The guardian or conservator of the person may petition the court for an order fixing and allowing compensation for services rendered up to the time of the petition [*Prob. Code § 2641(a)*], including compensation for services rendered before the date of the order of appointment [*see Prob. Code § 2641(b)*; *Cal. Rules of Ct., Rule 7.751(a)* (petition must show facts demonstrating necessity for preappointment services)].

Legal Topics:

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

Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewFamily LawGuardiansGeneral Overview

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24-290F California Forms of Pleading and Practice--Annotated § 290F.42

§ 290F.42 Petition by Attorney

[1] Compensation for Attorney's Services

An attorney who has rendered legal services to the guardian or conservator of the person or estate or both, including services rendered under *Prob. Code § 2632* (rendering the account of a dead, incapacitated, or absconding guardian or conservator), may petition the court for an order fixing and allowing compensation for services rendered up to the time of the petition [*Prob. Code § 2642(a)*; for form, *see § 290F.62*].

[2] Paralegal Services

Legal services for which the attorney may apply to the court for compensation include services rendered by any paralegal performing legal services under the direction and supervision of the attorney. The petition or application for compensation must set forth the hours spent and services performed by the paralegal [*Prob. Code § 2642(a)*; for form, *see § 290F.62*]. It must also describe the paralegal's qualifications (including education, certification, continuing education, and experience), state why it was appropriate to use the paralegal's services in the particular case, state the hourly rate requested for the paralegal's services, and demonstrate that the total amount requested for the services of the attorney and the paralegal does not exceed the amount appropriate if the attorney had performed the services without the paralegal's assistance [*Cal. Rules of Ct., Rules 7.703(e), 7.754*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral Overview

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24-290F California Forms of Pleading and Practice--Annotated § 290F.43

§ 290F.43 Notice of Hearing and Order

Notice of the hearing must be given 15 days before the hearing, in the manner provided in *Prob. Code §§ 1460-1469* [*Prob. Code §§ 1460(a), 2640(b), 2642(a)*; *see* Ch. 284, *Guardianship and Conservatorship: Notice*]. After the hearing, the court must make an order allowing:

- The compensation requested in the petition, which the court determines is just and reasonable, for the guardian or conservator of the estate for services rendered in that capacity or to the guardian or conservator of the person for services rendered, or to both [*Prob. Code §§ 2640(c), 2641(a)*].

- The compensation requested in the petition, which the court determines is reasonable, for the attorney for services rendered to the guardian or conservator of the person or estate or both. The compensation so allowed is charged to the estate [*Prob. Code §§ 2640(c), 2641(b), 2642(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-290F California Forms of Pleading and Practice--Annotated § 290F.44

§ 290F.44 Periodic Payments on Account

[1] Advantages of Periodic Payments

An order authorizing periodic payments on account pursuant to *Prob. Code § 2643* may be useful when the estate is large and there are tax advantages from making periodic payments of compensation. Periodic payments also may be needed when the guardian or conservator of the person is compensated and devotes substantial time to the care of the ward or conservatee. Periodic payments also avoid problems that may arise if payment is delayed. Periodic payments provide funds to cover out-of-pocket expenses in connection with services, avoid the need to determine questions that depend on the value of the loss of use of money caused by delay in payment, and protect against the effects of variations in the value of money. When services are rendered on a periodic basis, periodic payments provide a means of avoiding frequent accountings or petitions merely to permit payment of compensation to the guardian, conservator, or attorney [*Guardianship-Conservatorship Law*, 15 Cal. L. Revision Comm'n Reports 451, 807-808 (1980) (comment to *Prob. Code § 2643*)].

[2] Petition for Periodic Payments

On petition by the guardian or conservator of the person or estate, or both, the court, by order, may authorize periodic payments on account to the guardian or conservator of the person, the guardian or conservator of the estate, and the attorney for a guardian or conservator [*Prob. Code § 2643(a)*; *Cal. Rules of Ct., Rule 7.755(b)* (petition must show ongoing need for legal services); for form, *see § 290F.60*]. The petition must describe the services to be rendered on a periodic basis and state why authority to make periodic payments is requested [*Prob. Code § 2643(c)*].

[3] Notice

Notice of the hearing on the petition must be given 15 days before the hearing, in the manner provided in *Prob. Code §§ 1460-1469* [*Prob. Code §§ 1460(a), 2643(b)*; *see* Ch. 284, *Guardianship and Conservatorship: Notice*].

[4] Order for Periodic Payments

The court, in fixing the amount of the periodic payment, must take into account the services to be rendered on a periodic basis and the reasonable value of theservices. The guardian or conservator of the estate may make the periodic payments authorized by the order only if the services described in the petition are actually rendered. The payments made pursuant to the order are subject to review by the court on the next succeeding account of the guardian or conservator of the estate, to determine that the services were actually rendered and that the amount paid on account was not unreasonable [*see* Ch. 290E, *Guardianship and Conservatorship: Accounts*]. The court must make an appropriate order if it determines that the amount paid on account was either excessive or inadequate in view of the services actually rendered [*Prob. Code § 2643(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral Overview

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24-290F California Forms of Pleading and Practice--Annotated § 290F.45

§ 290F.45 No Advance Payments

A guardian or conservator may not pay or receive, and the attorney for a guardian or conservator may not receive, any payment from the estate of the ward or conservatee for services rendered in advance of a court order authorizing the payment [*Cal. Rules of Ct., Rule 7.755(a)*]. If an advance payment is made or received, the court may surcharge the guardian or conservator, in addition to removing the guardian or conservator or imposing any other sanction authorized by law on the guardian or conservator or on the attorney [*Cal. Rules of Ct., Rules 7.755(a), 7.700(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral Overview

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24-290F California Forms of Pleading and Practice--Annotated §§ 290F.46-290F.49

[Reserved]

§§ 290F.46[Reserved]

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24-290F California Forms of Pleading and Practice--Annotated § 290F.50

§ 290F.50 Related Matthew Bender Publications

For discussion of guardianship, see California Family Law Practice and Procedure 2d Edition, Ch. 34, *Establishing Guardianship*

For memoranda relating to the appointment of a guardian or conservator, see California Points and Authorities, Ch. 106, *Guardianship and Conservatorship*

For transactional forms relating to the nomination and appointment of a guardian or conservator, see California Legal Forms, Ch. 66, *Guardianships*, and Ch. 66A, *Conservatorships*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointment

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24-290F California Forms of Pleading and Practice--Annotated § 290F.51

§ 290F.51 State Statutes

Verification of petitions, accounts, objections, and responses. *Prob. Code § 1021*

Verified petition is evidence in uncontested proceeding. *Prob. Code § 1022*

Petition for compensation or guardian or conservator of estate and attorney. *Prob. Code § 2640*

Petition for compensation of person not appointed as conservator and attorney. *Prob. Code § 2640.1*

Petition for compensation of guardian or conservator of person and attorney. *Prob. Code § 2641*

Petition for compensation by attorney. *Prob. Code § 2642*

Periodic payments on account of compensation for guardian, conservator, or attorney. *Prob. Code § 2643*

Contingent fee contract with attorney. *Prob. Code § 2644*

Compensation for attorney who is guardian or conservator. *Prob. Code § 2645*

Determination of fees payable from state of ward or conservatee. *Prob. Code § 2646*

Payment of attorney fees for estate of conservatee *Prob. Code § 2647*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewEstate, Gift & Trust

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24-290F California Forms of Pleading and Practice--Annotated § 290F.52

§ 290F.52 California Rules of Court

Petitions for order allowing compensation for guardians or conservators and their attorneys. *Cal. Rules of Ct., Rule 7.751*

Order for accounting before or at time petition is filed or heard. *Cal. Rules of Ct., Rule 7.752*

Contingency fee agreements in guardianships and conservatorships. *Cal. Rules of Ct., Rule 7.753*

Use of paralegals in performance of legal services for guardian or conservator. *Cal. Rules of Ct., Rule 7.754*

Advance payments prohibited. *Cal. Rules of Ct., Rule 7.755(a)*

Compensation of conservators and guardians. *Cal. Rules of Ct., Rules 7.756*

Periodic payments on showing of ongoing need for legal services. *Cal. Rules of Ct., Rule 7.755(b)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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24-290F California Forms of Pleading and Practice--Annotated § 290F.53

§ 290F.53 Local Court Rules

[1] Alameda County

Allowance of fees in guardianship proceedings. Alameda Co. Super. Ct. Rules, Rule 12.14.10

Allowance of fees in conservatorship proceedings. Alameda Co. Super. Ct. Rules, Rule 12.15.10

Compensation of private, professional conservators. Alameda Co. Super. Ct. Rules, Rule 12.15.16.2

[2] Contra Costa County

Fiduciary's compensation, attorney's fees, and costs. Contra Costa Co. Prob. Pol. Man., Rule 826

[3] Los Angeles County

Compensation for guardians, conservators, and attorneys. Los Angeles Co. Super. Ct. Rules, Rule 10.144

[4] Orange County

Accounts, compensation, and distribution in probate proceedings. Orange Co. Super. Ct. Rules, Rule 608.01 et seq.

[5] Sacramento County

Allowance of fees and costs in guardianships or conservatorships. Sacramento Co. Super. Ct. Rules, Rule 15.81

[6] San Francisco

Compensation for trustees, guardians and conservators. San Francisco Uniform Local Ct. Rules, Rule 14.109

Compensation for guardians and conservators of the person. San Francisco Uniform Local Ct. Rules, Rule 14.110

Compensation guidelines for management of estate. San Francisco Uniform Local Ct. Rules, Rule 14.111

Attorney's fees in conservatorships and guardianships. San Francisco Uniform Local Ct. Rules, Rule 14.114

Contingency fee contracts. San Francisco Uniform Local Ct. Rules, Rule 14.115

Time for allowing compensation. San Francisco Uniform Local Ct. Rules, Rule 14.116(B)

Procedure for obtaining compensation. San Francisco Uniform Local Ct. Rules, Rule 14.117

[7] Santa Clara County

Compensation for guardians, conservators, trustees, and their counsel, and for counsel for conservatee or ward. Santa Clara Co. Super. Ct. Rules, Rule 5.9(G)

No compensation without court orders. Santa Clara Co. Super. Ct. Rules, Rule 5.9(H)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateCosts & ExpensesEstate, Gift & Trust LawTrustsTrusteesDuties & PowersCompensation

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24-290F California Forms of Pleading and Practice--Annotated § 290F.54

§ 290F.54 Decisions

[1] Attorney Fees

Provision of *Cal. Rules of Court, Rule 3.1702* (formerly Rule 870.2) that in civil cases a notice of motion for attorney's fees must be filed and served within 60 days of entry of judgment, does not apply to probate court proceedings. *Hollaway v. Edwards (1998) 68 Cal. App. 4th 94, 80 Cal. Rptr. 2d 166*

Court order awarding public conservator's costs and attorney's fees from estates consisting solely of social security income was not in conflict with federal anti-attachment statute [*42 U.S.C. § 407*, which immunizes social security income from attachment or other legal process. *Conservatorship of Lambert (1983) 143 Cal. App. 3d 239, 242, 191 Cal. Rptr. 725*

Attorney who sought order confirming fees nunc pro tunc became party to proceedings leading to orders fixing and allowing compensation to attorney for services rendered to guardian although guardian brought original petition for fees so that attorney could be ordered to return excess funds awarded. *Guardianship of Slakmon (1978) 83 Cal. App. 3d 224, 236-237, 147 Cal. Rptr. 777*

Award of $6,000 fee to conservatorship attorney was within court's discretion when attorney spent 250 to 300 hours working on estate's affairs and estate had value in excess of $1 million. *Conservatorship of Wemyss (1971) 20 Cal. App. 3d 877, 883, 98 Cal. Rptr. 85*

Since attorney's fees for services rendered to guardian on ward's and estate's behalf are proper expenses of guardian to be paid out of guardianship assets, filing claim for fees in deceased ward's estate in order to protect right to enforce claim for services in guardianship proceedings was unnecessary. *Estate of Ehle (1968) 267 Cal. App. 2d 24, 29, 72 Cal. Rptr. 474*

When ward had died and assets of ward's estate had been transferred to administrator of estate or to executor of ward's will, court was permitted to impose lien on assets in hands of administrator or executor in order to secure payment for

attorney's services. *Estate of Ehle (1968) 267 Cal. App. 2d 24, 28, 72 Cal. Rptr. 474*

Premature filing of petition for attorney's fees does not preclude award of fees when no plea in abatement was filed in trial court. *Conservatorship of Oliver (1962) 203 Cal. App. 2d 678, 22 Cal. Rptr. 111*

Guardian was not permitted to recover attorney's fees incurred in attempt to remove him or her as guardian. *Hornaday v. Hornaday (1949) 95 Cal. App. 2d 384, 396, 213 P.2d 91*

[2] Compensation

Conservator is entitled to compensation for time in unsuccessfully opposing petition for removal only if (1) decision to oppose petition was motivated by good faith belief that it would be in best interests of conservatee if petition were defeated and (2) belief was objectively reasonable. *Conservatorship of Lefkowitz (1996) 50 Cal. App. 4th 1310, 1315, 58 Cal. Rptr. 2d 299* .

Court did not err in denying compensation to guardian when guardian converted wards' money to his own use and intermingled it with his own. *Glassell v. Glassell (1905) 147 Cal. 510, 512-513, 82 P. 42*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateCosts & Expenses

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24-290F California Forms of Pleading and Practice--Annotated § 290F.55

§ 290F.55 Text References

Witkin, Summary of California Law, Vol. 12, *Wills and Probate*, §§ 950-953 (9th ed. 1990)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawWillsGeneral Overview

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24-290F California Forms of Pleading and Practice--Annotated §§ 290F.56-290F.59

[Reserved]

§§ 290F.56[Reserved]

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PART IV. FORMS

24-290F California Forms of Pleading and Practice--Annotated § 290F.60

§ 290F.60 Petition for Periodic Payments to Guardian, Conservator, or Attorney [Prob. Code § 2643]

[1] FORM Petition for Periodic Payments to Guardian, Conservator, or Attorney [Prob. Code § 2643]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship *or* Limited Conservatorship] of the Conservatorship *or* Limited Conservatorship] of the _____ [Person *or* Estate *or* Person and Estate] of _____ [*name*], _____ [Ward *or* Conservatee.	))))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION FOR COMPENSATION TO _____ [GUARDIAN *or* CONSERVATOR *or* ATTORNEY]

_____

Petitioner _____[*name*] respectfully represents:

1. Petitioner is the _____ [guardian *or* conservator] of the [person and] estate of _____[*name*], _____ [ward *or* conservatee].

2. [*If an account has been filed and approved,* Petitioner filed the _____ (first *or specify number*) account current of _____ (*name of ward or conservatee*) on _____ (*date*). It was approved and settled by the court's order dated _____.]

3. _____ [Petitioner *or name*] will periodically perform the following services for the _____ [ward *or* conservatee *or* guardian *or* conservator]: _____ [*describe services, e.g.,* drive her all places she wishes to or needs to go, including doctor and dentist appointments, church, social

activities, and visits to relatives; buy groceries and ensure that meals are prepared for her; buy clothing and other personal items needed by her; and arrange for the upkeep of her house].

4. _____ Petitioner requests _____ [authority *or* that the _____ (guardian *or* conservator) of the estate be given the authority] to make periodic payments for the above-described services because _____ [*specify, e.g.*, petitioner is devoting substantial time and funds to taking care of the daily needs of the ward and needs funds to cover the day-to-day expenses associated with the ward's care].

[5. A request for special notice has _____ (not been filed in this matter *or* been filed and waived by _____ (*name*) *or* been filed in this matter by_____ (*name*) and notice of the time and place of hearing on this motion will be given).]

WHEREFORE, petitioner prays:

1. For periodic payments on account to _____[*name*] for services rendered during the period covered by each payment.

2. For such other orders as the court deems proper.
Dated: _____ [*date*]

_____ [*signature*]

_____ [*typed name*]

Petitioner

_____ [*date*]

[*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____[*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The petition in [1], *above*, is for use by the guardian or conservator of the person or estate or both in requesting that the court authorize periodic payments on account to the guardian or conservator of the person or estate or both or the attorney for a guardian or conservator, for services rendered during the period covered by each payment [*Prob. Code § 2643(a)*; for further discussion, *see § 290F.44*].

The petition must describe the services to be rendered on a periodic basis (Paragraph 3) and the reason why authority to make periodic payments is requested (Paragraph 4) [*Prob. Code § 2643(c)*].

[3] Verification

The petition must be verified [*see Prob. Code § 1021(a)*; *Cal. Rules of Ct., Rule 7.103(b), (c)*].

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24-290F California Forms of Pleading and Practice--Annotated § 290F.61

§ 290F.61 Order Authorizing Periodic Payments to Guardian, Conservator, or Attorney [Prob. Code § 2643]

[1] FORM Order Authorizing Periodic Payments to Guardian, Conservator, or Attorney [Prob. Code § 2643]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship] of the _____ [Person *or* Estate *or* Person and Estate] of _____ [*name*], _____ [Ward *or* Conservatee.	))))))	NO. _____ ORDER

The petition of _____[*name*], as _____ [guardian *or* conservator] of the [person and] estate of _____[*name of ward or conservatee*], for an order authorizing periodic payments on account to _____ [himself *or* herself *or name of payee*] came on regularly for hearing by the court this date. The petitioner appeared by counsel _____[*name*]. _____[*Specify other appearance, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____ [, including special notice to _____ (*name*)].

2. The facts stated in the petition are true.

IT IS ORDERED that the petitioner is authorized to pay from the _____ [guardianship *or*

conservatorship] estate to _____ [himself *or* herself *or name of payee*] the sum of $_____ per month for services beginning _____[*date*] and continuing for a period not to exceed _____ months, or until further order of this court.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use when the court grants a petition for an order authorizing periodic payments on account to a guardian, conservator, or the attorney for a guardian or conservator.

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

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PART IV. FORMS

24-290F California Forms of Pleading and Practice--Annotated § 290F.62

§ 290F.62 Petition for Attorney's Fees for Services to Guardian or Conservator [Prob. Code § 2642]

[1] FORM Petition for Attorney's Fees for Services to Guardian or Conservator [Prob. Code § 2642]

[*Caption. See § 290F.60.*]

Petitioner _____[*name*] respectfully represents:

1. At all times mentioned herein, petitioner was and now is an attorney at law, duly licensed in the State of California, with an office at _____[*address*], _____[*city*], California.

2. As an attorney and at the request of _____[*name*], duly appointed, qualified, and acting _____ [guardian *or* conservator] of the _____ [person *or* estate *or* person and estate] of _____[*name*], _____ [ward *or* conservatee], petitioner rendered services to the _____ [guardian *or* conservator] from _____[*date*] to _____[*date*], inclusive, as follows: _____[*specify*].

3. The reasonable value of the above-described services is $_____.

[4. A request for special notice has _____ (not been filed in this matter *or* been filed and waived by _____ (*name*) *or* been filed in this matter by _____ (*name*) and notice of the time and place of hearing on this motion will be given).]

WHEREFORE, petitioner prays that compensation be allowed and fixed for legal services rendered by him/her to the _____ [guardian *or* conservator] from _____[*date*], to _____[*date*], inclusive, and for such other orders as the court may deem proper.

[*Signature and verification. See § 290F.60.*]

[2] Use of Form

The form in [1], *above*, is for use by an attorney in petitioning for fees for services to a guardian or conservator [*Prob. Code § 2642*]. Although such a petition is permitted by statute, some local court rules express reluctance to allow attorney's fees before the first account [*see, e.g.,* Alameda Co. Super. Ct. Rules, Rules 12.14.10, 12.15.10]. In such counties, the petition should state why fees should be allowed before the first account, such as expensive litigation at the commencement of the guardianship or conservatorship.

A petition for compensation must be filed after the filing of the inventory and appraisal, but not before the expiration of 90 days from the issuance of letters unless good cause is shown [*Prob. Code § 2640(a)*]. If the petition is filed before 90 have elapsed since letters were issued, this form should be modified to state facts showing good cause for petitioning for compensation at this time [*see Prob. Code § 2640(a)*].

[3] Verification

The petition must be verified [*see Prob. Code § 1021(a)*; *Cal. Rules of Ct., Rule 7.103(b), (c)*].

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24-290F California Forms of Pleading and Practice--Annotated § 290F.63

§ 290F.63 Order Allowing Attorney's Fees [Prob. Code § 2642]

[1] FORM Order Allowing Attorney's Fees [Prob. Code § 2642]

[*Caption. See § 290F.61.*]

The petition of _____[*name*], attorney for the _____ [guardian *or* conservator] of the _____ [person *and/or* estate] of _____[*name of ward or conservatee*], for attorney's fees for services to the _____ [guardian *or* conservator] came on regularly for hearing by the court on this date. Petitioner represented himself/herself. _____[*Specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____ [, including special notice to _____ (*name*)].

2. The facts stated in the petition are true.

IT IS ORDERED that _____[*name*], as _____ [guardian *or* conservator] of the estate of _____[*name*], _____ [ward *or* conservatee], pay to _____[*name*] $_____ for legal services rendered to the _____ [guardian *or* conservator].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use when the court grants a petition for attorney's fees by an attorney who performed services for a guardian or conservator [for the form of petition, *see § 290F.62*].

Most counties require that the proposed order be submitted before the hearing. Local practice should be consulted.

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24-290F California Forms of Pleading and Practice--Annotated § 290F.64

§ 290F.64 Petition for Compensation and Attorney's Fees--Unsuccessful Petitioner for Appointment as Conservator [Prob. Code § 2640.1]

[1] FORM Petition for Compensation and Attorney's Fees--Unsuccessful Petitioner for Appointment as Conservator [Prob. Code § 2640.1]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Limited Conservatorship] of the _____ [Person *or* Estate *or* Person and Estate] of _____ [*name*], Conservatee.	)))))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION FOR COMPENSATION

_____

Petitioner _____[*name*] respectfully represents:

1. On _____[*date*], petitioner filed a petition in this court requesting appointment as conservator of the _____ [person *and/or* estate] of the above-named conservatee.

2. On _____[*date*], and while the petition described in Paragraph 1 was pending, this court made and entered its order appointing _____[*name*] as conservator of the _____ [person *and/or* estate] of the conservatee. Letters of conservatorship were issued to _____[*name*] on _____[*date, which may not be more than 90 days before filing date of this petition*].

3. Petitioner has rendered services in connection with the petition described in Paragraph 1 and to facilitate the appointment of a conservator of the _____ [person *and/or* estate] of the conservatee, for which no compensation has been received. Those services included the following: _____ [*describe services, e.g.,* investigating the needs of the conservatee for care, assistance, and protection, and the most suitable legal procedures available to meet those needs; obtaining the services of an attorney to represent the petitioner in preparing and filing the petition described in Paragraph 1; consulting with and arranging for the attendance of witnesses at the hearing of the petition; making arrangements for necessary medical care to be rendered to the conservatee; making arrangements for the proper care and conservation of the estate of the conservatee].

4. The reasonable value of the services described in Paragraph 3 is $_____.

5. Petitioner has incurred costs in the amount of $_____ in connection with the petition described in Paragraph 1 and the services described in Paragraph 3, as follows: _____[*describe costs*].

6. _____[*name of attorney*] has rendered legal services in connection with the petition described in Paragraph 1 and to facilitate the appointment of a conservator of the _____ [person *and/or* estate] of the conservatee, for which no compensation has been received. Those services included the following: _____[*describe services*].

7. The reasonable value of the services described in Paragraph 6 is $_____.

8. _____[*name of attorney*] incurred costs in the amount of $_____ in connection with the petition described in Paragraph 1 and the legal services described in Paragraph 6, as follows: _____[*describe costs*].

WHEREFORE, petitioner prays:

1. For an order fixing and allowing compensation in the amount of $_____ and costs in the amount of $_____ to petitioner;

2. For an order fixing and allowing compensation in the amount of $_____ and costs in the amount of $_____ to _____[*name of attorney*].

3. For an order that the compensation and costs be _____ [charged against the estate of the conservatee *or* paid from property belonging to the conservatee, whether held outright, in trust, or otherwise].

4. For such other orders as the court deems just and proper.

[*Signature and verification. See § 290F.60.*]

[2] Use of Form

The form in [1], *above*, is for use by a person who filed a petition for appointment as conservator, when the petition was not granted and another person was appointed as conservator while the original petition was pending [*Prob. Code § 2640.1(a)*; for the related form of order, *see § 290F.65*]. In such a case, the person who petitioned for the appointment of a conservator but was not appointed and that person's attorney may petition the court for an order fixing and allowing compensation and reimbursement of costs. The petition must be filed within 90 days after the issuance of letters [*Prob. Code § 2640.1(a)*].

This procedure is available for a person who unsuccessfully filed a petition for appointment as conservator. The Probate

Code does not authorize a similar procedure for a person who unsuccessfully filed a petition for appointment as guardian [*Prob. Code § 2640.1*].

[3] Notice

Notice of the hearing must be given for the period and in the manner provided in *Prob. Code §§ 1460-1469*. For a form of notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[4] Just and Reasonable Compensation

Upon the hearing, the court must make an order allowing the petitioner such compensation for services rendered in connection with the petition and to facilitate the appointment of a conservator as the court determines to be just and reasonable [*Prob. Code § 2640.1(c)*]. The court must also allow the petitioner's attorney just and reasonable compensation for services rendered by the attorney in connection with and to facilitate the appointment of a conservator, and costs incurred in connection with those services [*Prob. Code § 2640.1(c)*].

[5] Payment

The compensation and costs normally must be charged to the estate of the conservatee. However, if the court has appointed a conservator of the person but not a conservator of the estate, the court must order that the compensation and costs be paid from property belonging to the conservatee, whether held outright, in trust, or otherwise [*Prob. Code § 2640.1(c)*].

[6] Verification

The petition must be verified [*see Prob. Code § 1021(a)*; *Cal. Rules of Ct., Rule 7.103(b), (c)*].

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24-290F California Forms of Pleading and Practice--Annotated § 290F.65

§ 290F.65 Order Allowing Compensation and Attorney's Fees [Prob. Code § 2640.1]

[1] FORM Order Allowing Compensation and Attorney's Fees [Prob. Code § 2640.1]

[*Caption. See § 290F.61.*]

The petition of _____[*name*], for compensation and for attorney's fees for services rendered in connection with his/her petition for the appointment of a conservator for _____[*name of conservatee*] came on regularly for hearing by the court on this date. The petitioner appeared by counsel _____[*name*]. _____[*Specify other appearance, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____ [, including special notice to _____ (*name*)].

2. The facts stated in the petition are true.

IT IS ORDERED that:

1. _____[*name*], as conservator of the _____ [person *and/or* estate] of _____[*name*], conservatee, pay to _____[*name of petitioner*], $_____ for the services rendered in facilitating the establishment of the conservatorship and costs.

2. _____[*name*], as conservator of the _____ [person *and/or* estate] of _____[*name*], conservatee, pay to _____[*name*] $_____ for legal services rendered to _____[*name*] and for costs incurred.

3. The amounts to be paid are to be _____[*specify whether amounts are to be charged against estate of the conservatee or paid from other property*].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use when the court grants a petition for compensation and costs by a person who had filed a petition for appointment as conservator, when that petition for appointment was not granted and another person was appointed as conservator while the original petition was pending [*see Prob. Code § 2640.1*; for the form of petition, *see § 290F.64*].

Most counties require that the proposed order be submitted before the hearing. Local practice should be consulted.

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24-290G California Forms of Pleading and Practice--Annotated 290G.syn

§ 290G.syn Synopsis to Chapter 290G: GUARDIANSHIP AND CONSERVATORSHIP: REMOVAL OR RESIGNATION OF GUARDIANS AND CONSERVATORS

§ 290G.01 Scope of Chapter

§ 290G.02 Cross References

§§ 290G.03-290G.09 [Reserved]

§ 290G.10 Governing Statutes

§ 290G.11 Removal

[1] Grounds

[2] Right to Jury Trial

[3] Petition

[a] Who May File

[b] Petition After Court Investigation of Conservatorship

[4] Notice and Hearing

[a] Notice Requirements

[b] Who May Appear

[5] Suspension Pending Hearing

[6] Order

§ 290G.12 Resignation

§ 290G.13 Joint Guardians or Conservators

§ 290G.14 Appointment of Successor

[1] Guardian

[2] Conservator

[a] Standing to File Petition

[b] Contents of Petition

[c] Notice of Hearing

[d] Investigation and Report

[e] Who May Appear at Hearing

[f] Duty to Inform and Consult Conservatee

[g] Selection of Successor

[h] Contents of Order

[i] Letters of Conservatorship

§ 290G.15 Final Account

[1] Guardian

[2] Conservator

§§ 290G.16-290G.19 [Reserved]

§ 290G.20 Related Matthew Bender Publications

§ 290G.21 State Statutes

§ 290G.22 Local Rules

§ 290G.23 Decisions

§ 290G.24 Text References

§§ 290G.25-290G.29 [Reserved]

§ 290G.30 Petition for Removal of Guardian or Conservator [Prob. Code §§ 2650, 2654]--Failure to Use Ordinary Care and Diligence in Management of Estate [Prob. Code § 2650(a)]--General Form

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Notice

[5] Verification

§ 290G.31 Allegations of Grounds for Removal--Failure to File Inventory or to Render Account [Prob. Code § 2650(b)]

[1] FORM

[2] Use of Form

[3] Ground for Removal

§ 290G.32 Allegations of Grounds for Removal--Continued Failure to Perform Duties or Incapacity to Perform Duties Suitably [Prob. Code § 2650(c)]

[1] FORM

[2] Use of Form

§ 290G.33 Allegations of Grounds for Removal--Conviction of Felony [Prob. Code § 2650(d)]

[1] FORM

[2] Use of Form

§ 290G.34 Allegations of Grounds for Removal--Interest Adverse to Faithful Performance of Duties [Prob. Code § 2650(f)]

[1] FORM

[2] Use of Form

§ 290G.35 Allegations of Grounds for Removal--Violation of Probate Code [Prob. Code § 2650(g)]

[1] FORM

[2] Use of Form

§ 290G.36 Allegations of Grounds for Removal--Insolvency or Bankruptcy [Prob. Code § 2650(h)]

[1] FORM

[2] Use of Form

§ 290G.37 Allegations of Grounds for Removal--Removal Is in Best Interest of Ward or Conservatee [Prob. Code § 2650(i)]

[1] FORM

[2] Use of Form

§ 290G.37A Allegations of Grounds for Removal--Failure to Qualify As Licensed Fiduciary

[1] FORM

[2] Use of Form

[3] Licensing of Professional Fiduciaries

§ 290G.38 Order Suspending Powers of Guardian or Conservator Pending Hearing on Removal

[1] FORM

[2] Use of Form

§ 290G.39 Order Removing Guardian or Conservator [Prob. Code § 2653]

[1] FORM

[2] Use of Form

§ 290G.40 Petition by Guardian or Conservator for Leave to Resign [Prob. Code § 2660]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Notice

[5] Appointment of Successor Guardian or Conservator

[6] Verification

§ 290G.41 Order Granting Guardian or Conservator Leave to Resign [Prob. Code § 2660]

[1] FORM

[2] Use of Form

[3] Effective Date of Resignation

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PART I. SCOPE

24-290G California Forms of Pleading and Practice--Annotated § 290G.01

§ 290G.01 Scope of Chapter

This chapter discusses the removal, suspension, and resignation of guardians and conservators. The chapter contains the following forms:

- A petition for removal of a guardian or conservator [*see § 290G.30*].
- Allegations concerning various grounds for removal [*see § 290G.31*-290G.37A].
- An order suspending the powers of a guardian or conservator [*see § 290G.38*].
- An order removing a guardian or conservator [*see § 290G.39*].
- A petition by a guardian or conservator for leave to resign [see *§ 290G.40*] and an order granting the guardian or conservator leave to resign [*see § 290G.41*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationFamily LawGuardiansRemoval & Termination

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PART I. SCOPE

24-290G California Forms of Pleading and Practice--Annotated § 290G.02

§ 290G.02 Cross References

- For discussion and forms relating to appointment of guardians, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* .

- For discussion and forms relating to appointment of conservators, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* .

- For discussion and forms relating to temporary guardians and conservators, see Ch. 282, *Guardianship and Conservatorship: Temporary Guardians & Conservators* .

- For discussion and forms relating to notice in guardianship and conservatorship proceedings generally, see Ch. 284, *Guardianship and Conservatorship: Notice* .

- For discussion and forms relating to powers and duties and guardians and conservators generally, see the following chapters:

  - Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee.*

  - Ch. 286, *Guardianship and Conservatorship: Inventory and Appraisal.*

  - Ch. 287, *Guardianship and Conservatorship: General Management Powers.*

  - Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers.*

  - Ch. 289, *Guardianship and Conservatorship: Management of Community Property.*

  - Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee.*

- Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment.*
- Ch. 290B, *Guardianship and Conservatorship: Substituted Judgment.*

- For discussion and forms relating to actions against a guardian or conservator, including for breach of duty, see Ch. 290D, *Guardianship and Conservatorship: Actions Against Guardian or Conservator* .

- For discussion and forms relating to termination of a guardianship or conservatorship, see Ch. 290H, *Guardianship and Conservatorship : Termination of Guardianships and Conservatorships.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansAppointmentFamily LawGuardiansDuties & Rights

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[Reserved]

§§ 290G.03[Reserved]

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PART II. LEGAL BACKGROUND

24-290G California Forms of Pleading and Practice--Annotated § 290G.10

§ 290G.10 Governing Statutes

The law governing the removal, suspension, and resignation of guardians and conservators is set forth in *Prob. Code §§ 2650-2660*.

A temporary guardian or temporary conservator is also subject to the provisions of *Prob. Code §§ 1400-3803* governing the suspension, removal, resignation, and discharge of a guardian or conservator [*Prob. Code § 2258*]. For discussion of temporary guardians and conservators generally, see Ch. 282, *Guardianship and Conservatorship: Temporary Guardians & Conservators* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationFamily LawGuardiansRemoval & Termination

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24-290G California Forms of Pleading and Practice--Annotated § 290G.11

§ 290G.11 Removal

[1] Grounds

A guardian or conservator may be removed for any of the following reasons [*Prob. Code § 2650*]:

- Failure to use ordinary care and diligence in the management of the estate [*see Guardianship of Russell (1943) 21 Cal. 2d 767, 772, 135 P.2d 369* ; *see also* Ch. 287, *Guardianship and Conservatorship: General Management Powers*].

- Failure to file an inventory or an account [*see* Ch. 286, *Guardianship and Conservatorship: Inventory and Appraisal ;* Ch. 290E, *Guardianship and Conservatorship: Accounts*] within the time allowed by law or by court order [*see Guardianship of Whittaker (1937) 19 Cal. App. 2d 373, 375, 65 P.2d 373* ; *see also Prob. Code § 2614.5* (removal pursuant to petition to compel filing of inventory and appraisal or account)].

- Continued failure to perform duties or incapacity to perform duties suitably [*see Guardianship of Howard (1933) 218 Cal. 607, 610, 24 P.2d 486] .*

- Conviction of a felony, whether before or after appointment as guardian or conservator.

- Gross immorality.

- Having such an interest adverse to the faithful performance of duties that there is an unreasonable risk that the guardian or conservator will fail to perform duties faithfully [*see Estate of Howard (1955) 133 Cal. App. 2d 535, 540-541, 284 P.2d 966* ; *Guardianship of Leach (1947) 30 Cal. 2d 297, 305, 182 P.2d 529] .*

- In the case of a guardian of the person or a conservator of the person: acting in violation of any

provision of *Prob. Code § 2356*, regarding placement of the ward or conservatee in a mental health facility, prohibited drugs, and treatment.

- In the case of a guardian of the estate or a conservator of the estate: insolvency or bankruptcy of the guardian or conservator.

In all cases the court has discretion to determine, on some other ground, that removal is in the best interests of the ward or conservatee; but in considering the best interests of the ward, if the guardian was nominated under *Prob. Code §§ 1500* or *1501* the court must take that fact into consideration [*Prob. Code § 2650(i)*].

[2] Right to Jury Trial

There is no right to trial by jury in proceedings for the removal of a guardian or conservator [*see Prob. Code § 1452*].

[3] Petition

[a] Who May File

The ward or conservatee, the spouse of the ward, the spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*] of the conservatee, any relative or friend of the ward or conservatee, or any interested person may apply by petition to the court in which the guardianship or conservatorship proceeding is pending, to have the guardian or conservator removed [*Prob. Code § 2651*; *see § 290G.30*].

It may be necessary for the court to appoint a guardian ad litem in order for the ward or conservatee to petition for removal. A guardian ad litem may be appointed for a minor, an incompetent person, or a person for whom a conservator has been appointed when the court deems it expedient to make the appointment [*see Code Civ. Proc. § 372*]. Under prior guardianship law, an appellate court, noting that there was no statutory provision authorizing the ward to start a removal proceeding, held that a guardian ad litem was required to petition for removal on behalf of the ward [*Guardianship of Boxley (1953) 115 Cal. App. 2d 483, 486, 252 P.2d 348]* .

[b] Petition After Court Investigation of Conservatorship

The court must notify the attorney of record for the conservatee, if any, or appoint the public defender or private counsel, to file a petition for removal and to represent the conservatee at the trial or hearing if, after the court investigator's six-month, annual, or biennial review of a conservatorship [*see generally Prob. Code §§ 1850-1853*; *see also* Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators*], any of the following conditions exists [*Prob. Code § 1852*]:

- The conservatee wishes to petition the court for termination of the conservatorship or for removal of the conservator.

- The conservatee wishes to petition the court for the making, modification, or revocation of a court order under *Prob. Code §§ 1870-1901* regarding the legal capacity of the conservatee.

- The conservatee wishes to petition the court for restoration of the right to register to vote.

- Based on information contained in the court investigator's report or obtained from any other source, the court determines that a trial or hearing for termination of the conservatorship or removal of the existing conservator is in the best interests of the conservatee.

[4] Notice and Hearing

[a] Notice Requirements

Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2652*; *see* Ch. 284, *Guardianship and Conservatorship: Notice*].

[b] Who May Appear

The guardian or conservator, the ward or conservatee, the spouse of the ward or the spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*] of the conservatee, or any relative or friend of the ward or conservatee, and any interested person may appear at the hearing and support or oppose the petition [*Prob. Code § 2653(a)*].

[5] Suspension Pending Hearing

Whenever it appears that the ward or conservatee or the estate may suffer loss or injury during the time required for notice and hearing, the court, on its own motion or on petition, may do either or both of the following [*Prob. Code § 2654*]:

- Suspend the powers of the guardian or conservator pending notice and hearing to whatever extent the court deems necessary.

- Compel the guardian or conservator to surrender the estate to a custodian designated by the court.

For a form for an order, see *§ 290G.38*.

[6] Order

If the court determines that cause exists for removal of the guardian or conservator, the court may remove the guardian or conservator, revoke the letters of guardianship or conservatorship, and enter judgment accordingly [*Prob. Code § 2653(b)*].

In the case of a guardianship or conservatorship of the estate, the court may also order the guardian or conservator to file an account [*see* Ch. 290E, *Guardianship and Conservatorship: Accounts*] and to surrender the estate to the person legally entitled to it [*Prob. Code § 2653(b)*]. If the guardian or conservator fails to file the account as ordered, the court may compel the accounting pursuant to *Prob. Code § 2620.2* [*Prob. Code § 2653(b)*].

If the court removes the guardian or conservator for cause [*Prob. Code § 2653(c)*]:

- The court must award the petitioner the costs of the petition and other expenses and costs of litigation, unless the court determines that the guardian or conservator acted in good faith, based on the best interests of the ward or conservatee; and

- The guardian or conservator may not deduct the costs of litigation from the estate, or charge them to the estate, and is personally liable for those costs and expenses.

For a form for an order, see *§ 290G.39*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationFamily

LawGuardiansRemoval & Termination

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24-290G California Forms of Pleading and Practice--Annotated § 290G.12

§ 290G.12 Resignation

A guardian or conservator may file a petition tendering his or her resignation at any time [*Prob. Code § 2660*; for form, *see § 290G.34*].

Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2660*; *see* Ch. 284, *Guardianship and Conservatorship: Notice*].

If the resignation appears proper, the court must allow it to take effect at the time fixed by the court [*Prob. Code § 2660*; *see Guardianship of Vierra (1953) 115 Cal. App. 2d 869, 872, 253 P.2d 55]* . The court may make any order necessary to deal with the guardianship or conservatorship during the period before the appointment of a new guardian or conservator and the settlement of the accounts of the resigning guardian or conservator [*Prob. Code § 2660*; *see Estate of Mims (1962) 202 Cal. App. 2d 332, 337-342, 20 Cal. Rptr. 667]* .

For a form for an order, see *§ 290G.41*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationFamily LawGuardiansRemoval & Termination

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24-290G California Forms of Pleading and Practice--Annotated § 290G.13

§ 290G.13 Joint Guardians or Conservators

If one of two or more joint guardians or conservators dies, is removed, or resigns, the powers and duties continue in the remaining joint guardians or conservators until further appointment is made by the court [*Prob. Code § 2105(c)*]. If joint guardians or conservators have been appointed, and one or more be absent from the state and unable to act, otherwise unable to act, or legally disqualified from serving, the court, by order made with or without notice, may authorize the remaining joint guardians or conservators to act as to all matters embraced within its order [*Prob. Code § 2105(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationFamily LawGuardiansDuties & RightsFamily LawGuardiansRemoval & Termination

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24-290G California Forms of Pleading and Practice--Annotated § 290G.14

§ 290G.14 Appointment of Successor

[1] Guardian

When for any reason a vacancy occurs in the office of a guardian, the court may appoint a successor after notice and hearing, as in the case of an original appointment [*Prob. Code § 2670*; *see Guardianship of Kimball (1947) 80 Cal. App. 2d 884, 887, 182 P.2d 612]* . For a discussion of and forms for appointment, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* .

[2] Conservator

[a] Standing to File Petition

When for any reason a vacancy occurs in the office of a conservator, the court may appoint a successor conservator in the manner provided in *Prob. Code § 2680 et seq.*, discussed below [*Prob. Code § 2680*]. For a discussion of and forms for an original appointment, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* . A petition for the appointment of a successor conservator may be filed by any of the following [*Prob. Code § 2681*]:

- The conservatee.
- The conservatee's spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*].
- A relative of the conservatee.
- Any interested state or local entity or agency of California or any of its officers or employees.
- Any other interested person or friend of the conservatee.

For a form of petition for the appointment of a conservator that may be adapted for use in petitioning for the appointment of a successor conservator, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators*

. In adapting the form, counsel should specify that the petition is for the appointment of a successor, rather than for an original appointment [*see Prob. Code § 2682(a)*].

[b] Contents of Petition

The petition must request that a successor conservator be appointed for the person, the estate, or both, and must specify the names and addresses of the proposed successor conservator and the conservatee [*Prob. Code § 2682(a)*]. The petition must set forth, as far as they are known to the petitioner, the names and addresses of the spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*], and the relatives of the conservatee within the second degree [*Prob. Code § 2682(b)*]. If the petition is filed by someone other than the conservatee, the petition must state whether the petitioner is a creditor or debtor of the conservatee [*Prob. Code § 2682(c)*]. The petition must state whether the conservatee will be present at the hearing [*Prob. Code § 2682(f)*].

If the conservatee is a patient in or on leave of absence from a state institution under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services and that fact is known to the petitioner, the petition must state that fact and the name of the institution [*Prob. Code § 2682(d)*]. The petition must also state, as far as is known to the petitioner, whether the conservatee is receiving or is entitled to receive benefits from the Department of Veterans Affairs and, if so, the estimated amount of the monthly benefits payable by the Department of Veterans Affairs for the conservatee [*Prob. Code § 2682(e)*].

If the conservatee is an absentee [*see Prob. Code § 1403*], the petition must set forth the last known military rank or grade and the social security number of the conservatee [*Prob. Code § 2689(a)*; *see Prob. Code § 1841(a)*]. A petition for the appointment of a successor conservator for an absentee must also state whether the absentee's spouse has commenced any action or proceeding against the absentee for judicial or legal separation, dissolution of marriage, annulment, or adjudication of nullity of marriage [*Prob. Code § 2689(a)*; *see Prob. Code § 1841(b)*]. For discussion of conservatorships for absentees generally, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* .

Although *Prob. Code § 2680 et seq.* do not require that the petition contain allegations of the powers to be granted to the conservator, the value of the estate, and the amount of the bond to be required, which are included in the petition for an original appointment, it would appear that those allegations should be included in addition to the allegations required by *Prob. Code § 2682*, since letters of conservatorship, which must state the powers granted and a bond, will be issued to the successor on the basis of the order appointing the successor.

[c] Notice of Hearing

Notice of the time and place of the hearing on a petition for the appointment of a successor conservator, accompanied by a copy of the petition, must be given at least 15 days before the hearing [*Prob. Code § 2683(a)*]. Notice must be mailed to the persons designated in *Prob. Code § 1460* and to the relatives named in the petition [*Prob. Code § 2683(b)*]. For discussion of notice under *Prob. Code § 1460* and a form of notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

Notice must also be mailed to the Director of Mental Health or the Director of Developmental Services if required by *Prob. Code § 1461* [*Prob. Code § 2683(c)*]. Notice also must be given to the Department of Veterans Affairs if required by *Prob. Code § 1461.5* [*Prob. Code § 2683(d)*]. For a discussion of the requirements of *Prob. Code §§ 1461* and *1461.5*, see Ch. 284, *Guardianship and Conservatorship: Notice* .

Special notice must be given to any person who has filed a written request for special notice [*see Prob. Code § 2700(a)*; Ch. 284, *Guardianship and Conservatorship: Notice*].

If the conservatee is an absentee [*see Prob. Code § 1403*], notice need not be given to the conservatee, but a copy of the petition and notice of the time and place of the hearing must be mailed at least 15 days before the hearing to the appropriate uniformed-service secretary or to the head of the federal department or agency concerned. Notice also must be published pursuant to *Gov. Code § 6061* in a newspaper of general circulation in the county in which the hearing will be held [*Prob. Code § 2689(b)*; *see Prob. Code § 1842*].

[d] Investigation and Report

Unless the petition states that the conservatee will be present at the hearing, the court investigator must do all of the following [*Prob. Code § 2684*]:

- Interview the conservatee personally.

- Inform the conservatee of the nature of the proceeding to appoint a successor conservator, and of the conservatee's right to appear personally at the hearing, to object to the person proposed as successor conservator, to nominate a person to be appointed successor conservator, to be represented by legal counsel if he or she so chooses, and to have legal counsel appointed by the court if he or she is unable to retain legal counsel.

- Determine whether the conservatee objects to the person proposed as successor conservator or prefers another person to be appointed.

- If the conservatee is not represented by legal counsel: determine whether the conservatee wishes to be represented by legal counsel and, if so, whether the conservatee wishes to retain a particular attorney or to have legal counsel appointed by the court.

- If the conservatee does not plan to retain legal counsel and has not requested the appointment of legal counsel by the court, determine whether the appointment of legal counsel would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee.

- Report to the court in writing, at least five days before the hearing, concerning the investigation, including the conservatee's express communications concerning representation by legal counsel and whether he or she objects to the person proposed as successor conservator or prefers that some other person be appointed.

- Mail, at least five days before the hearing, a copy of the report of the investigation to the attorney, if any, for the petitioner, the attorney, if any, for the conservatee, and any persons as ordered by the court.

For a form of order appointing a court investigator, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* .

If the conservatee is an absentee [*see Prob. Code § 1403*], an interview and report by the court investigator is not required [*Prob. Code § 2689(c)*].

[e] Who May Appear at Hearing

The conservatee, the conservatee's spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*], any relative or friend of the conservatee, or any other interested person may appear at the hearing to support or oppose the petition [*Prob. Code § 2687*].

[f] Duty to Inform and Consult Conservatee

If the conservatee is present at the hearing, before making an order appointing a successor conservator, the court must do all of the following [*Prob. Code § 2685*]:

- Inform the conservatee of the nature and purpose of the proceeding.

- Inform the conservatee that he or she has the right to object to the person proposed as successor conservator, to nominate a person to be appointed successor conservator, and, if not represented by legal counsel, to be represented by legal counsel if he or she so chooses, and to have legal counsel appointed by the court if he or she is unable to retain legal counsel.

- After so informing the conservatee, consult him or her to determine his or her opinion of who should be appointed successor conservator.

If the petition states that the conservatee will be present at the hearing and the conservatee fails to appear, the court must continue the hearing and direct the court investigator to conduct an investigation and render a report as specified in *Prob. Code § 2684* [*Prob. Code § 2686*; *see* [d], *above*].

[g] Selection of Successor

The court must determine who should be appointed successor conservator in accordance with the provisions of *Prob. Code § 1810 et seq.*, regarding the order of preference in selecting a conservator [*Prob. Code § 2688(a)*; *see* Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators*].

[h] Contents of Order

The order appointing a successor conservator must contain the names, addresses, and telephone numbers of the successor conservator, the conservatee's attorney, if any, and the court investigator, if any [*Prob. Code § 2688(b)*]. For a form of order appointing a conservator that may be adapted for the appointment of a successor conservator, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* .

[i] Letters of Conservatorship

The appointment of a conservator must be evidenced by letters of conservatorship that include the conservator's oath (or affirmation [*Code Civ. Proc. § 2015.6*]) to perform the duties of the office according to law [*Prob. Code § 2310*]. The appointment of a successor conservator therefore requires the issuance of new letters of conservatorship. For a discussion of and a form for letters of conservatorship, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsMailEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawProbateProcedures in ProbatePleadingsFamily LawGuardiansAppointment

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24-290G California Forms of Pleading and Practice--Annotated § 290G.15

§ 290G.15 Final Account

[1] Guardian

A guardian of the estate who has resigned or been removed must serve a copy of the guardian's final account or report and petition for its settlement, with the notice of hearing that must be served on the successor guardian of the estate under *Prob. Code § 1460(b)(1)*, unless the court dispenses with service [*Cal. Rules of Ct., Rule 7.1005*].

[2] Conservator

A conservator of the estate who has resigned or been removed must serve a copy of the conservator's final account and petition for its settlement, with the notice of hearing that must be served on the successor conservator of the estate under *Prob. Code § 1460(b)(1)*, unless the court dispenses with service [*Cal. Rules of Ct., Rule 7.1053*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationFamily LawGuardiansRemoval & Termination

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[Reserved]

§§ 290G.16[Reserved]

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PART III. RESEARCH GUIDE

24-290G California Forms of Pleading and Practice--Annotated § 290G.20

§ 290G.20 Related Matthew Bender Publications

For discussion of guardianship, see California Family Law Practice and Procedure, Ch. 34, *Establishing Guaridanship* (Matthew Bender 2d ed.)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewFamily LawGuardiansGeneral Overview

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§ 290G.21 State Statutes

Suspension, removal, resignation, and discharge of temporary guardians and conservators. *Prob. Code § 2258*

Grounds for removal of guardian or conservator. *Prob. Code § 2650*

Petition for removal. *Prob. Code § 2651*

Notice of hearing and service of petition for removal. *Prob. Code § 2652*

Hearing on petition for removal and order. *Prob. Code § 2653*

Suspension of powers or surrender of estate pending hearing for removal. *Prob. Code § 2654*

Resignation of guardian or conservator. *Prob. Code § 2660*

Appointment of adult to make educational decisions for minor ward or conservatee. *Prob. Code § 2662*

Appointment of responsible adult to make education decisions. *Prob. Code § 2662*

Appointment of successor guardian. *Prob. Code § 2670*

Appointment of successor conservator. *Prob. Code § 2680 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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GuardiansConservatorsRemoval & TerminationFamily LawGuardiansAppointmentFamily LawGuardiansRemoval & Termination

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24-290G California Forms of Pleading and Practice--Annotated § 290G.22

§ 290G.22 Local Rules

Removal of conservator or guardian. Los Angeles Co. Super. Ct. Rules, Rule 10.156

Appointment of successor conservator. Los Angeles Co. Super. Ct. Rules, Rule 10.172

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationFamily LawGuardiansAppointmentFamily LawGuardiansRemoval & Termination

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24-290G California Forms of Pleading and Practice--Annotated § 290G.23

§ 290G.23 Decisions

Guardian's acquisition of corporation owned by wards constituted adverse interest and ground for removal. *Guardianship of Leach (1947) 30 Cal. 2d 297, 305, 182 P.2d 529*

Failure to cancel trust deed that encumbered ward's property, to include certain personal property in inventory, and to promptly lease ward's property constituted grounds for removal of guardian on basis of mismanagement and continued failure to perform duties. *Guardianship of Russell (1943) 21 Cal. 2d 767, 772, 135 P.2d 369*

Guardian's seven-month stay abroad, while ward was without care and attention of anyone legally authorized to supervise him, constituted continued failure to perform duties and grounds for removal. *Guardianship of Howard (1933) 218 Cal. 607, 610-611, 24 P.2d 486*

In conservatorship proceeding in which court denied petition by conservatee's wife for removal of conservator, court violated wife's right to due process by reading and considering report prepared by conservatee's appointed counsel, but refusing to allow wife or her attorney to review report. *Convervatorship of Schaeffer (2002) 98 Cal. App. 4th 159, 165, 119 Cal. Rptr. 2d 547*

Appointment of mother as guardian ad litem for children in litigation involving trust was improper because of adverse interest since mother was income beneficiary and children were remainder beneficiaries. *Estate of Lacy (1975) 54 Cal. App. 3d 172, 185, 126 Cal. Rptr. 432*

Fact that one has preferred right to be appointed as guardian does not constitute cause for removal of another who has been duly appointed. *Guardianship of Brock (1957) 154 Cal. App. 2d 431, 433, 316 P.2d 3* ; *Estate of Walsh (1952) 114 Cal. App. 2d 82, 84, 249 P.2d 578*

Purchase of jewelry belonging to ward's estate by guardian through third party constituted adverse interest and ground for removal. *Estate of Howard (1955) 133 Cal. App. 2d 535, 540-541, 284 P.2d 966*

Resignation of guardian is subject to court approval. *Guardianship of Vierra (1953) 115 Cal. App. 2d 869, 872, 253 P.2d 55*

Removal of guardian is prerequisite to appointment of successor. *Guardianship of Kimball (1947) 80 Cal. App. 2d 884, 887, 182 P.2d 612*

Wealth or poverty of guardian cannot be determinative of competency. *Guardianship of Sturges (1939) 30 Cal. App. 2d 477, 489, 86 P.2d 905*

Physical weakness, lack of mental capacity or training, or moral deficiency would constitute incapacity of guardian. *In re Guardianship of Sturges (1939) 30 Cal. App. 2d 477, 502, 86 P.2d 905*

Failure of guardian to file inventory and appraisal or any account for more than five years after appointment constitutes ground for removal. *Guardianship of Whittaker (1937) 19 Cal. App. 2d 373, 374, 65 P.2d 373*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationFamily LawGuardiansAppointmentFamily LawGuardiansRemoval & Termination

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24-290G California Forms of Pleading and Practice--Annotated § 290G.24

§ 290G.24 Text References

Witkin, Summary of California Law, vol. 12, *Wills and Probate*, §§ 966-969 (9th ed. 1990)

Marshall & Garb, California Probate Procedure, ch. 21, *Guardianships and Conservatorships*, § 2126 (6th ed.)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWillsGeneral Overview

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[Reserved]

§§ 290G.25[Reserved]

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PART IV. FORMS

24-290G California Forms of Pleading and Practice--Annotated § 290G.30

§ 290G.30 Petition for Removal of Guardian or Conservator [Prob. Code §§ 2650, 2654]--Failure to Use Ordinary Care and Diligence in Management of Estate [Prob. Code § 2650(a)]--General Form

[1] FORM Petition for Removal of Guardian or Conservator [Prob. Code §§ 2650, 2654]--Failure to Use Ordinary Care and Diligence in Management of Estate [Prob. Code § 2650(a)]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship *or* Limited Conservatorship] of the _____ [Person *or* Estate *or* Person and Estate] of _____ [*name*], _____ [Ward *or* Conservatee].	)))))))))	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION FOR REMOVAL OF _____ [GUARDIAN *or* CONSERVATOR]

_____

Petitioner _____[*name*] respectfully represents:

1. Petitioner is _____ [the _____ (*specify relationship, e.g.,* sister) of the _____ (ward *or* conservatee) *or* a _____ (friend of *or* person interested in) the _____ (ward *or* conservatee) *or* the _____ (ward *or* conservatee)].

2. On _____[*date*], _____[*name*] was appointed _____ [guardian *or* conservator] of the _____ [person and estate *or* person *or* estate] of the _____ [ward

or conservatee] and is now the acting _____ [guardian *or* conservator].

3. The _____ [ward *or* conservatee] is _____ years old and resides at _____[*address*], _____[*city*], California.

4. _____ [*Allege ground(s) for removal, e.g.,* The _____ (guardian *or* conservator) has failed to use ordinary care and diligence in the management of the estate by _____ (*specify, e.g.,* commingling the funds of the estate and personal funds, not keeping the estate funds in interest-bearing accounts, and not obtaining adequate rents on the real property in the estate)].

5. Pending the hearing on this petition, the following powers of the _____ [guardian *or* conservator] should be suspended, in the best interest of the _____ [ward *or* conservatee] _____ [and the estate]: _____ [*specify, e.g.,* the power to sell any of the estate property].

6. There is a continuing need for the _____ [guardianship *or* conservatorship] of the _____ [ward *or* conservatee]. After ordering removal of the _____ [guardian *or* conservator], the court should appoint _____[*name*] as _____ [guardian *or* conservator] of the _____ [person and estate *or* person *or* estate] of the _____ [ward *or* conservatee] _____ [and compel the removed _____ (guardian *or* conservator) to surrender the estate to the new _____ (guardian *or* conservator)].

7. A request for special notice has _____ [not been filed *or* been filed by _____ (*name*) and notice of the time and place of hearing on this petition will be given as required by law *or* been filed and waived by _____ (*name*)].

[*If appointment of successor conservator is requested, add paragraphs 8 through 12.*]

8. _____[*Name of proposed successor conservator*] resides at _____[*address*], _____[*city*], California.

[9. _____ (*If petitioner is not conservatee, add:* Petitioner is (not) a _____ (creditor *or* debtor) of the conservatee).]

[10. The conservatee is a patient _____ (in *or* on leave of absence from) _____ (*name of state institution under jurisdiction of Department of Mental Health or Department of Developmental Services*).]

[11. The conservatee _____ (is not entitled to receive benefits *or* is _____ (entitled to receive *or* receiving) benefits in the amount of $_____ per month) from the Department of Veterans Affairs.]

12. The conservatee _____ [will *or* will not] be present at the hearing.

WHEREFORE, petitioner prays:

1. For suspension of the powers of the _____ [guardian *or* conservator] as described above, pending the hearing on removal of the _____ [guardian *or* conservator].

2. For removal of the _____ [guardian *or* conservator] and revocation of his/her letters of

_____ [guardianship *or* conservatorship].

3. For appointment of a new _____ [guardian *or* conservator] for the _____ [ward *or* conservatee].

[4. For surrender of the estate of the _____ (ward *or* conservatee) to the new _____ (guardian *or* conservator).]

5. For such other and further orders as the court may deem proper.

Respectfully submitted,_____ [*signature*]
Petitioner
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____[*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is for use in petitioning for removal of a guardian or conservator for failure to use ordinary care and diligence in the management of the estate, and for suspension of the guardian's or conservator's powers pending hearing.

For a form of temporary order for suspension of powers pending hearing on the petition to remove the guardian or conservator, see *§ 290G.38*.

For a form of order removing guardian or conservator, see *§ 290G.33*.

[3] Contents of Petition

The petition should indicate that the petitioner has standing to file a petition for removal of the guardian or conservator (Paragraph 1). The ward or conservatee, the spouse of the ward or the spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*] of the conservatee, or or a relative or friend of the ward or conservatee, or any interested person may petition the court for removal of the guardian or conservator [*Prob. Code § 2651*; *see Prob. Code § 1852*].

The petition should allege the cause for removal [*see Prob. Code § 2650*] and state facts showing the cause for removal

(Paragraph 5) [*Prob. Code § 2651*]. For discussion of the grounds for removal, see *§ 290G.11*. For forms of allegations of additional grounds for removal, see *§§ 290G.31 -290G.37*.

In most situations, the petition for removal should also request the appointment of a new guardian or conservator (Paragraph 7). When, for any reason, a vacancy occurs in the office of guardian or conservator, the court may appoint a successor, after notice and hearing [*see Prob. Code § 2670 et seq.*; *see also § 290G.14*].

[4] Notice

Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2652*]. For a general discussion of notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[5] Verification

The petition must be verified [*Prob. Code § 1021*]. A verified petition must be received as evidence when offered in any uncontested probate proceeding [*Prob. Code § 1022*].

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24-290G California Forms of Pleading and Practice--Annotated § 290G.31

§ 290G.31 Allegations of Grounds for Removal--Failure to File Inventory or to Render Account [Prob. Code § 2650(b)]

[1] FORM Allegations of Grounds for Removal--Failure to File Inventory or to Render Account [Prob. Code § 2650(b)]

The _____ [guardian *or* conservator] has failed to _____ [file an inventory and appraisal (and) *or* render an account, which should have been filed on _____ (*date*)].

[2] Use of Form

The form in [1], *above*, is an allegation that the guardian or conservator of the estate failed to file an inventory or to render an account, or both, which are causes for removal [*see Prob. Code § 2650(b)*]. It can be used in place of Paragraph 4 in the petition in § 290G.30.

[3] Ground for Removal

If the guardian or conservator fails to file an inventory and appraisal within the time allowed by law or by court order, the ward or conservatee, the spouse of the ward or the spouse or domestic partner [as defined by *Prob. Code § 37*; *Fam. Code § 297*] of the conservatee, or any relative or friend of the ward or conservatee, or any interested person may petition the court to order the guardian or conservator to file the inventory and appraisal or to show cause why the guardian or conservator should not be removed [*Prob. Code § 2614.5(a)*]. If the guardian or conservator thereafter fails to file the inventory and appraisal, the court may remove the guardian or conservator [*Prob. Code § 2614.5(b)*]. This procedure is optional and does not preclude the use of any other remedy or sanction when an inventory and appraisal is not timely filed [*Prob. Code § 2614.5(c)*]. For further discussion, see Ch. 286, *Guardianship and Conservatorship: Inventory and Appraisal* , and Ch. 290E, *Guardianship and Conservatorship: Accounts* .

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24-290G California Forms of Pleading and Practice--Annotated § 290G.32

§ 290G.32 Allegations of Grounds for Removal--Continued Failure to Perform Duties or Incapacity to Perform Duties Suitably [Prob. Code § 2650(c)]

[1] FORM Allegations of Grounds for Removal--Continued Failure to Perform Duties or Incapacity to Perform Duties Suitably [Prob. Code § 2650(c)]

The _____ [guardian *or* conservator] _____ [has continually failed to perform his/her duties *or* is incapable of performing his/her duties suitably] in that _____ [*specify, e.g.,* he/she has failed to support the _____ (ward *or* conservatee) properly, has failed to manage the estate properly, and has left the _____ (ward *or* conservatee) for extended periods of time without adequate supervision and care].

[2] Use of Form

The form in [1], *above,* is an allegation that the guardian or conservator has continually failed to perform his or her duties or is incapable of performing his or her duties suitably, or both, which are causes for removal [*see Prob. Code § 2650(c)*]. It can be used in place of Paragraph 4 in the petition in § 290G.30.

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24-290G California Forms of Pleading and Practice--Annotated § 290G.33

§ 290G.33 Allegations of Grounds for Removal--Conviction of Felony [Prob. Code § 2650(d)]

[1] FORM Allegations of Grounds for Removal--Conviction of Felony [Prob. Code § 2650(d)]

The _____ [guardian *or* conservator] was convicted of the felony of _____[*specify*] on _____[*date*], in case number _____, in the _____ [*specify court, e.g.,* Superior Court of the County of _____, California].

[2] Use of Form

The form in [1], *above*, is an allegation that the guardian or conservator was convicted of a felony, which is cause for removal whether the conviction was before or after appointment as guardian or conservator [*see Prob. Code § 2650(d)*]. It can be used in place of Paragraph 4 in the petition in § 290G.30.

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24-290G California Forms of Pleading and Practice--Annotated § 290G.34

§ 290G.34 Allegations of Grounds for Removal--Interest Adverse to Faithful Performance of Duties [Prob. Code § 2650(f)]

[1] FORM Allegations of Grounds for Removal--Interest Adverse to Faithful Performance of Duties [Prob. Code § 2650(f)]

The _____ [guardian *or* conservator] has such an interest adverse to the faithful performance of his/her duties that there is an unreasonable risk that he/she will fail to perform his/her duties faithfully in that _____ [*specify, e.g.,* he/she purchased an interest in a business owned by the estate through an intermediary without disclosing to the court the fact that he/she was the purchaser].

[2] Use of Form

The form in [1], *above*, is an allegation that the guardian or conservator has an interest adverse to the faithful performance of his or her duties such that there is an unreasonable risk that he or she will fail to perform his or her duties faithfully, which is cause for removal [*see Prob. Code § 2650(f)*]. This allegation can be used in place of Paragraph 4 in the petition in § 290G.30.

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24-290G California Forms of Pleading and Practice--Annotated § 290G.35

§ 290G.35 Allegations of Grounds for Removal--Violation of Probate Code [Prob. Code § 2650(g)]

[1] FORM Allegations of Grounds for Removal--Violation of Probate Code [Prob. Code § 2650(g)]

The _____ [guardian *or* conservator] of the person [and estate] has violated the provisions of *Probate Code Section 2356* in that _____ [*specify, e.g.*, he/she had the _____ (ward *or* conservatee) involuntarily placed in a mental health facility, _____ (*name and address of institution*), on _____ (*date*)].

[2] Use of Form

The form in [1], *above*, is an allegation that the guardian or conservator of the person has violated a provision of *Prob. Code § 2356*, which is cause for removal [*see Prob. Code § 2650(g)*]. It can be used in place of Paragraph 4 in the petition in § 290G.30.

Prob. Code § 2356(d), relating to sterilization, was found unconstitutional in *Conservatorship of Valerie N. (1985) 40 Cal. 3d 143, 161, 167-168, 219 Cal. Rptr. 387, 707 P.2d 760* . The case, however, was decided before legislation that limits *Prob. Code § 2356(d)* to minors and adds *Prob. Code § 1950 et seq.* to authorize sterilization of adult wards or conservatees in some instances.

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24-290G California Forms of Pleading and Practice--Annotated § 290G.36

§ 290G.36 Allegations of Grounds for Removal--Insolvency or Bankruptcy [Prob. Code § 2650(h)]

[1] FORM Allegations of Grounds for Removal--Insolvency or Bankruptcy [Prob. Code § 2650(h)]

The _____ [guardian *or* conservator] of the [person and] estate is _____ [insolvent *or* bankrupt] as evidenced by _____ [*specify, e.g.*, an adjudication of bankruptcy in case No. _____ in the U.S. Bankruptcy Court for the _____ District of _____, on _____ (*date*)].

[2] Use of Form

The form in [1], *above*, is an allegation that the guardian or conservator of the estate is either insolvent or bankrupt, which are both causes for removal [*see Prob. Code § 2650(h)*]. It can be used in place of Paragraph 4 in the petition in § 290G.30.

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24-290G California Forms of Pleading and Practice--Annotated § 290G.37

§ 290G.37 Allegations of Grounds for Removal--Removal Is in Best Interest of Ward or Conservatee [Prob. Code § 2650(i)]

[1] FORM Allegations of Grounds for Removal--Removal Is in Best Interest of Ward or Conservatee [Prob. Code § 2650(i)]

It is in the best interest of the _____ [ward *or* conservatee] that the _____ [guardian *or* conservator] be removed in that _____ [*specify, e.g.,* the _____ (guardian and ward *or* conservator and conservatee) have developed a mutual dislike and distrust, which is detrimental to the health of the _____ (ward *or* conservatee) and makes the _____ (guardian's *or* conservator's) duties impossible to perform properly].

[2] Use of Form

The form in [1], *above,* is an allegation that removal of the guardian or conservator is in the best interest of the ward or conservatee, which is cause for removal [*see Prob. Code § 2650(i)*]. It can be used in place of Paragraph 4 in the petition in § 290G.30. If the guardian was nominated under *Prob. Code § 1500* (nomination by parent) or *Prob. Code § 1501* (nomination by person from whom minor receives property), the court, in considering the best interests of the ward, must take that fact into consideration.

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24-290G California Forms of Pleading and Practice--Annotated § 290G.37A

§ 290G.37A Allegations of Grounds for Removal--Failure to Qualify As Licensed Fiduciary

[1] FORM Allegations of Grounds for Removal--Failure to Qualify As Licensed Fiduciary

The _____ [guardian *or* conservator] has failed to _____ [obtain *or* renew] a professional fiduciary's license issued by the Professional Fiduciaries Bureau as required by the Professional Fiduciaries Act and is not licensed under that Act as required by law.

[2] Use of Form

The form in [1], *above*, is an allegation that a guardian or conservator has failed to obtain or renew a professional fiduciary's license as required by the Professional Fiduciaries Act [*Bus. & Prof. Code § 6500 et seq.*]. It can be used in place of Paragraph 4 in the petition in § 290G.30.

[3] Licensing of Professional Fiduciaries

Effective January 1, 2009, no person may act or hold himself or herself out to the public as a professional fiduciary unless he or she is licensed as a professional fiduciary under the Act [*Prob. Code § 60.1(b)*]. Additionally, as of July 1, 2008, no court may appoint a person to carry out the duties of a professional fiduciary unless he or she holds a valid, unexpired, unsuspended professional fiduciary license [*Prob. Code § 2340*]. (In other words, after July 1, 2008, professional fiduciaries may not be appointed in any new conservatorship or guardianship matters until they obtain a license under the Professional Fiduciaries Act. However, professional fiduciaries already appointed in specific matters prior to July 1, 2008, may continue to act in those matters until January 1, 2009, by which time they are required to be licensed under the Professional Fiduciaries Act [*see also Bus. & Prof. Code § 6502*].) Furthermore, a professional fiduciary is not permitted to operate with an expired, suspended, or revoked license [*Bus. & Prof. Code § 6531*], and therefore cannot lawfully continue to perform the duties of a guardian or conservator. Continued failure to perform duties, or incapacity to perform duties suitably, is grounds for removal under *Prob. Code § 2650(c).*

For detailed discussion of the definition of "professional fiduciary" and the licensing and regulation of professional fiduciaries under the Professional Fiduciaries Act, see *Ch. 281, Guardianship and Conservatorship: Appointment of*

Conservators, § 281.66.

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24-290G California Forms of Pleading and Practice--Annotated § 290G.38

§ 290G.38 Order Suspending Powers of Guardian or Conservator Pending Hearing on Removal

[1] FORM Order Suspending Powers of Guardian or Conservator Pending Hearing on Removal

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship *or* Limited Conservatorship] of the _____ [Person *or* Estate *or* Person and Estate] of _____ [*name*], _____ [Ward *or* Conservatee].	))))))	NO. _____ ORDER

On the verified petition of _____[*name*], for removal of _____ as _____ [guardian *or* conservator] of the [person and] estate of _____[*name of ward or conservatee*] _____ and for _____ [suspension of the powers of the _____ (guardian *or* conservator) *and/or* surrender of the estate] pending the hearing on removal, it appears to the court that the _____ [ward *or* conservatee *and/or* estate] may suffer loss or injury during the time required for notice and hearing of the petition, and the court deems it necessary to _____ [suspend the powers of the _____ (guardian *or* conservator) *and/or* require surrender of the estate].

IT IS ORDERED that effective immediately _____ [the following powers of _____ (*name*), as _____ (guardian *or* conservator) of the _____ (person and estate *or* person *or* estate) of _____ (*name of ward or conservatee*), be suspended until the hearing on the petition for removal: _____ (*specify powers*) *and/or* the _____ (guardian *or* conservator)

forthwith surrender the estate of the _____ (ward *or* conservatee) to _____ (*name of custodian*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use when the court grants a request, in a verified petition for removal of a guardian or conservator, to suspend the powers of the guardian or conservator or require surrender of the estate pending the hearing on removal, or both. The court may suspend the guardian's or conservator's powers or require surrender of the estate either on petition or on its own motion [*Prob. Code § 2654*; *see § 290G.11[5]*].

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24-290G California Forms of Pleading and Practice--Annotated § 290G.39

§ 290G.39 Order Removing Guardian or Conservator [Prob. Code § 2653]

[1] FORM Order Removing Guardian or Conservator [Prob. Code § 2653]

[*Caption. See § 290G.38.*]

The petition of _____ [*name of petitioner*] for removal of _____ [*name of guardian or conservator*] as _____ [guardian *or* conservator] of the _____ [person and estate *or* person *or* estate] of _____[*name of ward or conservatee*] came on regularly for hearing this date. Petitioner appeared by counsel _____[*name*]. _____[*Specify other appearance, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. _____ [s *ubstantive findings, e.g.,* The _____ (guardian *or* conservator) has failed to file an inventory and appraisal, which should have been filed on or before _____ (*date*), and an account, which should have been filed on or before _____ (*date*). This failure has seriously prejudiced the interests of the _____ (ward *or* conservatee) and the estate, and the _____ (guardian *or* conservator) should be removed].

IT IS ORDERED:

1. _____[*name*] be removed forthwith as _____ [guardian *or* conservator] of the _____ [person and estate *or* person *or* estate] of _____[*name of ward or conservatee*], and the letters of _____ [guardianship *or* conservatorship] be revoked.

2. _____[*name of guardian or conservator*] file a final account of the estate on or before _____[*date*], and on settlement of the account, surrender the assets of the estate to _____[*name*].

3. Petitioner may recover his/her costs from _____[*name*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use when the court grants a petition for removal of a guardian or conservator [for the form of petition, *see § 290G.30*].

In most counties, the proposed order must be filed before the hearing for review by the court or probate commissioner. Local practice should be consulted.

If the guardian or conservator fails to file the account as ordered, the court may compel the account pursuant to *Prob. Code § 2620.2(c)* [*Prob. Code § 2653(b)*].

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24-290G California Forms of Pleading and Practice--Annotated § 290G.40

§ 290G.40 Petition by Guardian or Conservator for Leave to Resign [Prob. Code § 2660]

[1] FORM Petition by Guardian or Conservator for Leave to Resign [Prob. Code § 2660]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Guardianship *or* Conservatorship *or* Limited Conservatorship] of the _____ [Person *or* Estate *or* Person and Estate] of _____ [*name*], _____ [Ward *or* Conservatee].	)	NO. _____ [Hearing set for _____ (*date*), at _____ (*time*), in Dept. No. _____] PETITION FOR LEAVE TO RESIGN

Petitioner _____[*name*] respectfully represents:

1. Petitioner is the duly appointed, qualified, and acting _____ [guardian *or* conservator] of the _____ [person and estate *or* person *or* estate] of _____[*name of ward or conservatee*].

2. Petitioner has been serving as _____ [guardian *or* conservator] since _____[*date*].

3. It is necessary that petitioner resign as _____ [guardian *or* conservator] because _____ [*specify, e.g.*, petitioner intends to remove his place of residence from California to _____ (*place*)].

4. There is continuing need for a _____ [guardianship *or* conservatorship] of the _____ [person and estate *or* person *or* estate] of _____[*name of ward or conservatee*]. [Petitioner has given notice of the necessity for resignation to the following relatives of the _____ (ward *or* conservatee): _____ (*name, relationship, and address of each person to whom notice was given*)].

[*EITHER*]

5. In order to apprise the court of the current status of the estate, petitioner files with this petition a current account and report of petitioner's acts as _____ [guardian *or* conservator]. On the granting of leave to resign, petitioner will render a final account and report and will pay over, transfer, and deliver the assets of the estate as directed by the court.

[*OR*]

5. Petitioner files with this petition a final account and report of petitioner's acts as _____ [guardian *or* conservator].

[*CONTINUE*]

6. A request for special notice has _____ [not been filed *or* been filed by _____ (*name*) and notice of the time and place of hearing on this petition will be given as required by law *or* been filed and waived by _____ (*name*)].

WHEREFORE, petitioner prays for leave to resign as _____ [guardian *or* conservator].
Dated: _____.

Respectfully submitted,
_____ [*signature*]
Petitioner
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[*Verification. See § 290G.30.*]

[2] Use of Form

The form in [1], *above*, is for use in obtaining leave of court to resign as guardian or conservator [for discussion, *see § 290G.12*; for the related form of order, *see § 290G.41*].

[3] Contents of Petition

Although there are no express statutory requirements regarding the contents of the petition, the petition should state facts showing that it would be proper for the court to grant the guardian or conservator leave to resign (Paragraph 3) [

see Prob. Code § 2660], and the need for continuing the guardianship or conservatorship (Paragraph 4). It is also good practice for the guardian or conservator to give notice of the necessity for resignation to the relatives of the ward or conservatee (Paragraph 4), so that a successor can be appointed.

[4] Notice

Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 2660*]. Special notice must be given in accordance with *Prob. Code § 2702* to anyone who has requested it [*see Prob. Code § 2700(a)*]. For further discussion and forms relating to notice, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[5] Appointment of Successor Guardian or Conservator

When for any reason a vacancy occurs in the office of guardian or conservator, the court may appoint a successor, after notice and hearing [*see Prob. Code § 2670 et seq.* For discussion, see *§ 290G.14*.

[6] Verification

The petition must be verified [*see Prob. Code § 1021*].

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24-290G California Forms of Pleading and Practice--Annotated § 290G.41

§ 290G.41 Order Granting Guardian or Conservator Leave to Resign [Prob. Code § 2660]

[1] FORM Order Granting Guardian or Conservator Leave to Resign [Prob. Code § 2660]

[*Caption. See § 290G.38.*]

The petition of _____[*name*], the _____ [guardian *or* conservator] of the _____ [person and estate *or* person *or* estate] of _____[*name of ward or conservatee*] for an order granting leave to resign as _____ [guardian *or* conservator] came on regularly for hearing by the court this date. Petitioner appeared by counsel _____[*name*]. _____[*Specify other appearance, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. It is proper to allow the petitioner to resign as requested.

IT IS ORDERED:

1. Leave be granted to _____[*name*] to resign as _____ [guardian *or* conservator] of the _____ [person and estate *or* person *or* estate] of _____[*name of ward or conservatee*], and the resignation be accepted effective _____ [*specify, e.g.,* when the final account has been approved].

[2. *When guardian or conservator of the estate is resigning, add:* _____ (*name*) render a final account and report of his/her acts as _____ (guardian *or* conservator) on or before _____ (

date) and, on settlement and allowance of the account, pay over, transfer, and deliver the assets of the estate _____ (to _____ (*name*) *or* as ordered by the court).]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use when the court grants a petition for leave to resign as guardian or conservator [for the form of petition, *see § 290G.34*]. The optional second paragraph should be used when a guardian or conservator of the estate is resigning.

In most counties the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

[3] Effective Date of Resignation

The resignation takes effect at the time fixed by the court [*Prob. Code § 2660*].

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24-290H California Forms of Pleading and Practice--Annotated 290H.syn

§ 290H.syn Synopsis to Chapter 290H: GUARDIANSHIP AND CONSERVATORSHIP: TERMINATION OF GUARDIANSHIPS AND CONSERVATORSHIPS

§ 290H.01 Scope of Chapter

§ 290H.02 Cross References

§§ 290H.03-290H.09 [Reserved]

§ 290H.10 Governing Statutes

§ 290H.11 Termination of Guardianship

[1] Majority, Death, or Marriage of Ward

[2] Court Order

[3] Estate Exhausted

[4] All Assets Transferred

[5] Juvenile Court Dependency Proceeding Filed

[6] Visitation Rights of Guardian

§ 290H.12 Termination of Limited Conservatorship

[1] Grounds

[2] Petition for Termination

[a] Who May Petition

[b] Contents

[c] Notice

[d] Hearing

§ 290H.13 Termination of Conservatorship

[1] Grounds

[a] Death or Court Order

[b] Periodic Review and Court Investigation

[c] Removal of Conservator

[d] Estate Exhausted or All Assets Transferred

[2] Conservatorship of Absentee

[3] Who May Petition

[4] Procedure

§§ 290H.14-290H.19 [Reserved]

§ 290H.20 Related Matthew Bender Publications

§ 290H.21 State Statutes

§ 290H.22 Local Court Rules

[1] Alameda County

[2] Orange County

[3] Sacramento County

[4] San Francisco

§ 290H.23 Decisions

§ 290H.24 Text References

§§ 290H.25-290H.29 [Reserved]

§ 290H.30 Receipt and Release by Ward [Prob. Code § 2627]

[1] FORM

[2] Use of Form

[3] Discharge of Guardian

§ 290H.31 Petition for Termination of Guardianship [Prob. Code § 1601]--Judicial Council Form GC-255

[1] FORM

[2] Use of Form

[3] Termination of Guardianship by Event

[a] Ward Dies or Reaches Majority

[b] Ward Is Adopted or Becomes Emancipated

[4] Notice Requirements

[a] In General

[b] Special Notice

[c] Service of Final Account

§ 290H.32 Order Terminating Guardianship [Prob. Code § 1601]--Judicial Council Form GC-260

[1] FORM

[2] Use of Form

§ 290H.33 Petition for Termination of Guardianship of the Estate and Deposit of Estate in Blocked Account [Prob. Code § 3412(a)]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Verification

§ 290H.34 Order Terminating Guardianship of the Estate and Ordering Deposit of Estate in Blocked Account [Prob. Code § 3412(a)]

[1] FORM

[2] Use of Form

§§ 290H.35-290H.39 [Reserved]

§ 290H.40 Petition for Termination of Conservatorship [Prob. Code § 1861]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Notice of Hearing

[5] Court Approval of Final Account

[6] Verification

§ 290H.41 Order Terminating Conservatorship [Prob. Code § 1863]

[1] FORM

[2] Use of Form

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24-290H California Forms of Pleading and Practice--Annotated § 290H.01

§ 290H.01 Scope of Chapter

This chapter discusses the termination of guardianships and conservatorships. It contains the following forms:

- A receipt and release by the ward [*see § 290H.30*].

- A petition for termination of guardianship (Judicial Council Form GC-255) [*see § 290H.31*] and an order terminating guardianship (Judicial Council Form GC-260) [*see § 290H.32*].

- A petition for termination of a guardianship of the estate and deposit of the estate in a blocked account [*see § 290H.33*] and an order terminating the guardianship of the estate and ordering deposit of the estate in a blocked account [*see § 290H.34*].

- A petition for the termination of a conservatorship [*see § 290H.40*] and an order terminating the conservatorship [*see § 290H.41*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationFamily LawGuardiansRemoval & Termination

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24-290H California Forms of Pleading and Practice--Annotated § 290H.02

§ 290H.02 Cross References

For discussion and forms relating to appointment of guardians, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* .

For discussion and forms relating to appointment of conservators, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* .

For discussion and forms relating to temporary guardians and conservators, see Ch. 282, *Guardianship and Conservatorship: Temporary Guardians & Conservators* .

For discussion and forms relating to notice in guardianship and conservatorship proceedings generally, see Ch. 284, *Guardianship and Conservatorship: Notice* .

For discussion and forms relating to powers and duties and guardians and conservators generally, see the following chapters:

- Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee.*
- Ch. 286, *Guardianship and Conservatorship: Inventory and Appraisal.*
- Ch. 287, *Guardianship and Conservatorship: General Management Powers.*
- Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers.*
- Ch. 289, *Guardianship and Conservatorship: Management of Community Property.*
- Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee.*

- Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment.*
- Ch. 290B, *Guardianship and Conservatorship: Substituted Judgment.*

For discussion and forms relating to actions against a guardian or conservator, including for breach of duty, see Ch. 290D, *Guardianship and Conservatorship: Actions Against Guardian or Conservator* .

For discussion and forms relating to removal, suspension or resignation of a guardian or conservator, see Ch. 290G, *Guardianship and Conservatorship: Removal or Resignation of Guardian or Conservator* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansAppointmentFamily LawGuardiansDuties & Rights

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24-290H California Forms of Pleading and Practice--Annotated §§ 290H.03-290H.09

[Reserved]

§§ 290H.03[Reserved]

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24-290H California Forms of Pleading and Practice--Annotated § 290H.10

§ 290H.10 Governing Statutes

The law governing the termination of guardianships and conservatorships is set forth in *Prob. Code §§ 1600, 1601*, and *1852-1865*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationFamily LawGuardiansRemoval & Termination

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24-290H California Forms of Pleading and Practice--Annotated § 290H.11

§ 290H.11 Termination of Guardianship

[1] Majority, Death, or Marriage of Ward

A guardianship of the person or estate, or both, terminates when the ward attains majority, is adopted, or dies [*Prob. Code § 1600(a)*]. A guardianship of the person terminates on the adoption of the ward or the emancipation of the ward under *Fam. Code § 7002* [*Prob. Code § 1600(b)*]. A person under the age of 18 years is emancipated under *Fam. Code § 7002* if any of the following is true [*Fam. Code § 7002*]:

- He or she has entered into a valid marriage (whether or not the marriage has been dissolved).
- He or she is on active duty with the armed forces of the United States.
- He or she has received a judicial declaration of emancipation, which requires that he or she must be [*Fam. Code §§ 7120, 7122*].
    - At least 14 years of age;
    - Willingly living separate and apart from his or her parents or guardian with the consent or acquiescence of the parents or guardian;
    - Managing his or her own financial affairs; and
    - Not deriving any of his or her income from criminal activity.

The termination of the guardianship of the person on any of these grounds occurs by operation of law, and the guardian need not file a petition for termination [*Cal. Rules of Ct., Rule 7.1004(b)*]. A guardian of the estate must file and obtain the court's approval of a final account or report of administration [*Cal. Rules of Ct., Rule 7.1004(c)*]. The guardian must serve a copy of the final account and petition for its settlement on the minor, unless the court dispenses with service [

Cal. Rules of Ct., Rule 7.1006(a)]. If the minor is deceased, the guardian must serve a notice of hearing and a copy of the final account and petition for its settlement on the personal representative of the deceased minor's estate, unless the court dispenses with service [*Cal. Rules of Ct., Rule 7.1006(b)*]. If there is no personal representative, service must be made on the persons entitled to succeed to the estate, unless the court dispenses with service [*Cal. Rules of Ct., Rule 7.1006(c)*].

After a ward has reached majority, the ward may settle accounts with the guardian and give the guardian a release [*Prob. Code § 2627(a)*; *Cal.Rules of Ct., Rule 7.1007*; for a form, *see § 290H.30*]. The release is valid if obtained fairly and without undue influence [*Prob. Code § 2627(a)*; *see Smith v. Fidelity & Deposit Co. (1933) 130 Cal. App. 45, 56-57, 19 P.2d 1018]* . Except as otherwise provided by the Probate Code, a guardian is not entitled to a discharge until one year after the ward has attained majority [*Prob. Code § 2627(b)*].

[2] Court Order

On petition of the guardian, a parent, or the ward, the court may make an order terminating the guardianship if the court determines that it is in the ward's best interest to terminate the guardianship [*Prob. Code § 1601*; *Cal. Rules of Ct., Rule 7.1004(a)*; *see Guardianship of L.V. (2006) 136 Cal App. 4th 481, 491, 38 Cal. Rptr. 3d 894* , *Guardianship of Romine (1949) 91 Cal. App. 2d 389, 392-393, 205 P.2d 733* ; *Guardianship of Case (1943) 57 Cal. App. 2d 844, 847-848, 135 P.2d 681* ; for form, *see* § 290H.37].

Notice of the hearing on the petition must be given for the period and in the manner provided in *Prob. Code § 1460 et seq.* [*Prob. Code § 1601*; *see* Ch. 284, *Guardianship and Conservatorship: Notice*]. The person seeking termination has the burden of showing that the guardianship is no longer necessary [*Guardianship of Davis (1967) 253 Cal. App. 2d 754, 761, 61 Cal. Rptr. 297* ; *Guardianship of Furr (1959) 167 Cal. App. 2d 604, 605, 334 P.2d 936]* .

In the case of a guardianship of the estate, if the sole asset of the estate is money, either the guardian or a parent entitled to custody of the ward may file a petition requesting the court to order that the guardianship be terminated and the estate be deposited in a blocked account in accordance with *Prob. Code § 3412* [*Prob. Code §§ 3410, 3411*; for form, *see* § 290H.38]. The court may order that the guardianship be terminated and, in its discretion, may also order any one or more of the following [*Prob. Code § 3412*]:

- That the money be deposited in an insured account in a financial institution in California, or in a single premium, deferred annuity, subject to withdrawal only with court authorization.

- If the estate does not exceed $20,000, that the money be held on any other conditions the court in its discretion determines to be in the best interests of the ward.

- If the estate does not exceed $5,000, that all or any part of the money be paid to a parent of the ward, without bond, on the terms and under the conditions specified in *Prob. Code §§ 3400-3402* (delivery of estate less than $5,000 to parent of minor), discussed in Ch. 366, *Minors: Claims and Property of Minors* .

- That all or any part of the money be transferred to a custodian for the benefit of the minor under the California Uniform Transfers to Minors Act [*see Prob. Code § 3900 et seq.*; *see also* Ch. 278, *Gifts*].

- That the remaining balance of any money paid or to be paid be deposited with the county treasurer under the terms and conditions set forth in *Prob. Code § 3412(e)*.

A guardian of the estate must file and obtain the court's approval of a final account or report of administration [*Cal. Rules of Ct., Rule 7.1004(c)*]. The guardian must serve a copy of the final account and petition for its settlement on the

minor, unless the court dispenses with service [*Cal. Rules of Ct., Rule 7.1006(a)*]. If the minor is deceased, the guardian must serve a notice of hearing and a copy of the final account and petition for its settlement on the personal representative of the deceased minor's estate, unless the court dispenses with service [*Cal. Rules of Ct., Rule 7.1006(b)*]. If there is no personal representative, service must be made on the persons entitled to succeed to the estate, unless the court dispenses with service [*Cal. Rules of Ct., Rule 7.1006(c)*].

[3] Estate Exhausted

If it appears on the settlement of any account that the guardianship estate has been exhausted through expenditures or disbursements approved by the court, the court, on settlement of the account, must order the guardianship of the estate terminated and the guardian of the estate discharged unless the court determines that there is reason to continue the guardianship [*Prob. Code § 2626*].

[4] All Assets Transferred

If the court orders the transfer of all of the property of the estate to a foreign guardian, the court, on settlement of the final account, must order the guardianship of the estate terminated on the filing with the clerk of the court of a receipt for the property executed by the foreign guardian [*Prob. Code § 2808(a)*]. Unless notice is waived, a copy of the final account of the guardian and of the petition for discharge, together with a notice of the hearing on the petition, must be mailed at least 30 days before the date of the hearing to all persons required to be listed in the petition for transfer, including the foreign guardian [*Prob. Code § 2808(b)*].

[5] Juvenile Court Dependency Proceeding Filed

The juvenile court may terminate a guardianship of the person of a minor previously established under the Probate Code if the minor is the subject of dependency proceedings under *Welf. & Inst. Code §§ 300, 601,* or *602* [*Welf. & Inst. Code § 728(a)*]. The juvenile court must inform the probate court of the pending termination of the guardianship [*Welf. & Inst. Code § 728(b)*]. It has the authority to terminate the guardianship at any stage of the dependency proceedings, including at the detention hearing or the jurisdictional hearing [*In re Merrick V. (2004) 122 Cal. App. 4th 235, 248, 19 Cal. Rptr. 3d 490]* . Reunification services need not be offered to theguardian in the juvenile court proceedings before that court may terminate the guardianship [*In re Merrick V. (2004) 122 Cal. App. 4th 235, 243, 249, 19 Cal. Rptr. 3d 490]* .

[6] Visitation Rights of Guardian

A court may grant reasonable visitation rights to a person who previously served as the legal guardian of a child if the court determines that such visitation is in the child's best interest [*Fam. Code § 3105(b)*]. A guardian may request the court to order visitation at the time of termination of the guardianship, either in the guardian's petition for termination or in the guardian's objections or other pleading filed in response to the petition of another party for termination [*Cal. Rules of Ct., Rule 7.1008(a)*].

In the absence of a court order granting or denying visitation between a former legal guardian and his or her former minor ward, and if a dependency proceeding is not pending, the former guardian may maintain an independent action under the Family Code for visitation with the former ward [*Fam. Code § 3105(c)*; *Cal. Rules of Ct., Rule 7.1008(b)(1)*]. If the child does not have a least one living parent, visitation may not be determined in a proceeding under the Family Code, but must instead be determined in a guardianship proceeding under the Probate Code that may be initiated for that purpose [*Fam. Code § 3105(c)*; *Cal. Rules of Ct., Rule 7.1008(b)(2)*].

A guardian or former guardian who is requesting visitation must file Judicial Council Form FL-105/GC-120, Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), with his or her request for visitation [*Cal. Rules of Ct., Rule 7.1008(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationFamily LawGuardiansRemoval & TerminationFamily LawParental Duties & RightsEmancipation of Minors

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24-290H California Forms of Pleading and Practice--Annotated § 290H.12

§ 290H.12 Termination of Limited Conservatorship

[1] Grounds

A limited conservatorship continues until the authority of the conservator is terminated by one of the following:

- Death of the conservator or conservatee.
- An order appointing a fully empowered conservator.
- An order stating that the limited conservatorship is no longer necessary and terminating the limited conservatorship [*Prob. Code § 1860.5(a)*].

[2] Petition for Termination

[a] Who May Petition

The conservator or conservatee, or any relative or friend of the conservatee, may file a petition for the termination of the limited conservatorship [*Prob. Code § 1860.5(b)*].

[b] Contents

The petition must state the facts showing that the limited conservatorship is no longer required [*Prob. Code § 1860.5(c)*].

[c] Notice

The petition must be set for hearing, and notice must be given to the persons in the same manner as provided for a petition for the appointment of a limited conservator [*Prob. Code § 1860.5(d)*; *see* Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators*].

The conservator, if he or she is not the petitioner or has not joined in the petition, must be served with a notice of the time and place of the hearing, accompanied by a copy of the petition, at least five days before the hearing. Service must be made in the same manner provided for in *Code Civ. Proc. § 415.10* for personal service, in *Code Civ. Proc. § 415.30* for service by mail, or in any other manner authorized by the court. If the conservator, with reasonable diligence, cannot be served with notice, the court may dispense with notice [*Prob. Code § 1860.5(d)*].

[d] Hearing

The court must hear and determine the matter according to the laws and procedures relating to the trial of civil actions, including trial by jury if demanded [*Prob. Code § 1860.5(e)*]. The conservator or any relative or friend of the conservatee may appear and oppose the petition [*Prob. Code § 1860.5(e)*].

If it is determined that the limited conservatorship is no longer required, the conservatorship must cease. If the petition alleges and the court determines that the conservatee is able to care properly for himself or herself and for his or her property, the court must make that finding and enter judgment accordingly. The conservator, at the hearing or thereafter on further notice and hearing, may be discharged, and his or her bond will be exonerated, on the settlement and approval of the final account by the court [*Prob. Code § 1860.5(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessMethodsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationEstate, Gift & Trust LawProbateProcedures in ProbatePleadings

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24-290H California Forms of Pleading and Practice--Annotated § 290H.13

§ 290H.13 Termination of Conservatorship

[1] Grounds

[a] Death or Court Order

A conservatorship continues until terminated by the death of the conservatee or by order of the court if the court determines that a conservatorship is no longer required [*Prob. Code § 1860(a)*; *Cal. Rules of Ct., Rule 7.1052(a)*]. A conservatorship of the person terminates by operation of law when the conservatee dies, and the conservator need not file a petition for termination [*Cal. Rules of Ct., Rule 7.1052(b)*]. If a conservatorship of the person is established for a married minor, the conservatorship does not terminate if the marriage is dissolved or adjudged a nullity [*Prob. Code § 1860(b)*].

[b] Periodic Review and Court Investigation

Each conservatorship must be reviewed six months after the appointment of the conservator, again one year after appointment of the conservator, and biennially thereafter [*see* Ch. 6, *Appointment of Conservators*]. When review is required, the court investigator must visit the conservatee, and the findings of the investigator must be certified in writing to the court [*Prob. Code § 1851*]. The court investigator also may personally visit the conservator and other persons as necessary to determine whether the conservator is acting in the best interests of the conservatee [*Prob. Code § 1851(d)*].

If the court investigator is unable to locate the conservatee, the court must order the court investigator to serve notice on the conservator of the person, or on the conservator of the estate if there is no conservator of the person, in the manner provided in *Code Civ. Proc. § 415.10* for personal service, in *Code Civ. Proc. § 415.30* for service by mail, or in any other manner ordered by the court, to make the conservatee available for the purposes of periodic review to the court investigator within 15 days of the receipt of the notice or to show cause why the conservatorship should not be terminated [*Prob. Code § 1853(a)*].

If the conservatee is not made available within the time prescribed, unless good cause is shown for not doing so, the

court must make a finding and enter judgment terminating the conservatorship and, in case of a conservatorship of the estate, must order the conservator to file an account and surrender the estate to the person legally entitled to it. At the hearing, or thereafter on further notice and hearing, the conservator may be discharged, and the bond given by the conservator may be exonerated, on the settlement and approval of the conservator's final account by the court [*Prob. Code § 1853(b)*].

Termination of the conservatorship does not preclude new proceedings for the appointment of a conservator [*Prob. Code § 1853(c)*]. Nothing in *Prob. Code § 1853* limits the power of a court to appoint a temporary conservator [*Prob. Code § 1853(c)*].

[c] Removal of Conservator

The court must notify the attorney of record for the conservatee, if any, or appoint the public defender or private counsel, to file a petition for removal and to represent the conservatee at the trial or hearing if, after the court investigator's annual or biennial review of a conservatorship, any of the following conditions exists [*Prob. Code § 1852*]:

- The conservatee wishes to petition the court for termination of the conservatorship or for removal of the conservator.

- The conservatee wishes to petition the court for the making, modification, or revocation of a court order under *Prob. Code §§ 1870-1901* regarding the legal capacity of the conservatee.

- The conservatee wishes to petition the court for restoration of the right to register to vote.

- Based on information contained in the court investigator's report or obtained from any other source, the court determines that a trial or hearing for termination of the conservatorship or removal of the existing conservator is in the best interests of the conservatee.

[d] Estate Exhausted or All Assets Transferred

A conservatorship of the estate, like a guardianship of the estate, may be terminated when the estate has been exhausted [*Prob. Code § 2626*] or the court has ordered all of the estate assets transferred to a foreign conservator [*Prob. Code § 2808*; *see § 290H.11[3], [4*].

[2] Conservatorship of Absentee

In a conservatorship of an absentee, if the petition states and the court determines that the absentee has returned to the controllable jurisdiction of the military department or civilian department or agency concerned, or is deceased, the court must order the conservatorship terminated. An official written report or record of the military or civilian department or agency that the absentee has returned to its controllable jurisdiction or is deceased must be received as evidence of that fact [*Prob. Code § 1864(b)*].

[3] Who May Petition

A petition for the termination of the conservatorship may be filed by any of the following [*Prob. Code § 1861(a)*; for form, *see § 290H.40*]:

- The conservator.

- The conservatee.

- The spouse or domestic partner [as defined by *Prob. Code § 37*; *Fam. Code § 297*] of the conservatee.

- Any interested person, relative, or friend of the conservatee.

In the case of the conservatorship of an absentee [*see* [2], *above*], the petition to terminate the conservatorship may also be filed by any officer or agency of the State of California or of the United States or by an authorized delegate [*Prob. Code § 1864(a)*].

[4] Procedure

The petition must state facts showing that the conservatorship is no longer required [*Prob. Code § 1861(b)*; for form, *see § 290H.40*].

The court must hear and determine the matter according to the law and procedure relating to the trial of civil actions, including trial by jury if demanded by the conservatee. The conservator, the conservatee, the spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*], or any relative or friend of the conservatee may appear and support or oppose the petition [*Prob. Code § 1863(a)*].

If the court determines that the conservatorship is no longer required or that grounds for establishment of the conservatorship of the person or estate, or both, no longer exist, the court must make that finding and enter judgment terminating the conservatorship accordingly [*Prob. Code § 1863(b)*].

At the hearing, or thereafter on further notice and hearing, the conservator may be discharged, and the bond given by the conservator may be exonerated, on the settlement and approval of the conservator's final account by the court [*Prob. Code § 1863(c)*].

A conservator of the estate whose administration is terminated by operation of law or by court order must file and obtain the court's approval of a final account [*Cal. Rules of Ct., Rule 7.1052(c)*]. After termination of the conservatorship, the conservator must serve copies of the final account and petition for its settlement with the notices of hearing that must be served on the former conservatee and on the spouse or domestic partner of the former conservatee under *Prob. Code § 1460(b)(2)* and *(3)* [*Cal. Rules of Ct., Rule 7.1054*].

Termination of the conservatorship does not preclude new proceedings for appointment of a conservator on the same or other grounds [*Prob. Code § 1863(d)*].

If the conservatee has been disqualified from voting pursuant to *Elec. Code §§ 2208* or *2209*, on termination of the conservatorship the court is required to notify the county elections official of the county of residence of the conservatee that the conservatee's right to register to vote is restored [*Prob. Code § 1865*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationEstate, Gift & Trust LawProbateProcedures in ProbatePleadings

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[Reserved]

§§ 290H.14[Reserved]

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24-290H California Forms of Pleading and Practice--Annotated § 290H.20

§ 290H.20 Related Matthew Bender Publications

For discussion of guardianship, see California Family Law Practice and Procedure, Ch. 34, *Establishing Guardianship* (Matthew Bender 2d ed.)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewFamily LawGuardiansGeneral Overview

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24-290H California Forms of Pleading and Practice--Annotated § 290H.21

§ 290H.21 State Statutes

Termination of guardianship by majority, adoption, death, or marriage. *Prob. Code § 1600*

Termination of guardianship by court order. *Prob. Code § 1601*

Termination of conservatorship at time of periodic review. *Prob. Code §§ 1852, 1853*

Termination of conservatorship. *Prob. Code § 1860*

Termination of limited conservatorship. *Prob. Code § 1860.5*

Petition for termination. *Prob. Code § 1861*

Notice of hearing and service of petition for termination. *Prob. Code § 1862*

Hearing on petition for termination. *Prob. Code § 1863*

Termination of conservatorship of absentee. *Prob. Code § 1864*

Restoration of voting rights. *Prob. Code § 1865*

Termination of guardianship or conservatorship when estate is exhausted. *Prob. Code § 2626*

Resignation of guardian or conservator. *Prob. Code § 2660*

Appointment of successor guardian or conservator. *Prob. Code § 2670 et seq.*

Termination of guardianship or conservatorship when all assets are transferred. *Prob. Code § 2808*

Termination of guardianship and deposit of estate. *Prob. Code § 3412*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationEstate, Gift & Trust LawProbateProcedures in ProbatePleadingsFamily LawGuardiansAppointmentFamily LawGuardiansRemoval & Termination

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24-290H California Forms of Pleading and Practice--Annotated § 290H.22

§ 290H.22 Local Court Rules

[1] Alameda County

Termination of conservatorship. Alameda Co. Coordinated Local Ct. Rules, Rule 12.15.15

[2] Orange County

Petitions to terminate conservatorship. Orange Co. Super. Ct. Rules, Rule 611.13

[3] Sacramento County

Termination of guardianship. Sacramento Co. Super. & Munic. Ct. Rules, Rule 15.94

Termination of conservatorship. Sacramento Co. Super. & Munic. Ct. Rules, Rule 15.99

[4] San Francisco

Discharge of guardian. San Francisco Uniform Local Ct. Rules, Rule 14.105(g)

Petitions for termination of conservatorship. San Francisco Uniform Local Ct. Rules, Rule 14.106A(6)

Resignation of conservator. San Francisco Uniform Local Ct. Rules, Rule 14.106S

Legal Topics:

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

Estate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationFamily LawGuardiansRemoval & Termination

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24-290H California Forms of Pleading and Practice--Annotated § 290H.23

§ 290H.23 Decisions

Guardianship continues until validity of ward's marriage is established. *Guardianship of Jacobson (1947) 30 Cal. 2d 312, 322, 182 P.2d 537*

Wel. & Inst. Code § 388 petition was not proper vehicle for terminating probate guardianship in juvenile court. *In re Angel S. (2007) 156 Cal App 4th 1202, 1207, 67 Cal. Rptr. 3d 792*

Best interest of child is sole criterion for termination of a guardianship. *Guardianship of L.V. (2006) 136 Cal. App. 4th 481, 491, 38 Cal. Rptr. 3d 894*

Evidence supported termination of guardianship and restoration of custody to parent. *Guardianship of M.S.W. (1982) 136 Cal. App. 3d 708, 711-712, 186 Cal. Rptr. 430* .

Creditor has no standing to object to termination of conservatorship. *Estate of Stewart (1969) 276 Cal. App. 2d 211, 214-215, 80 Cal. Rptr. 738*

Person seeking termination has burden of showing that guardianship is no longer necessary. *Guardianship of Davis (1967) 253 Cal. App. 2d 754, 761, 61 Cal. Rptr. 297* ; *Guardianship of Furr (1959) 167 Cal. App. 2d 604, 605, 334 P.2d 936*

Changed circumstances are basis for determination that guardianship is no longer necessary and for restoration of custody to parent. *Guardianship of Romine (1949) 91 Cal. App. 2d 389, 392-393, 205 P.2d 733* ; *Guardianship of Case (1943) 57 Cal. App. 2d 844, 847-848, 135 P.2d 681*

Guardian has burden of proving that release obtained from ward is just and fair. *Smith v. Fidelity & Deposit Co. (1933) 130 Cal. App. 45, 56-57, 19 P.2d 1018*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationFamily LawGuardiansRemoval & Termination

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24-290H California Forms of Pleading and Practice--Annotated § 290H.24

§ 290H.24 Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, §§ 930, 951-952 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawWillsGeneral Overview

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[Reserved]

§§ 290H.25[Reserved]

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24-290H California Forms of Pleading and Practice--Annotated § 290H.30

§ 290H.30 Receipt and Release by Ward [Prob. Code § 2627]

[1] FORM Receipt and Release by Ward [Prob. Code § 2627]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Guardianship of the _____	)	RECEIPT AND RELEASE
[Person *or* Estate *or* Person and Estate] of	)	BY WARD
_____ [*name*], Ward.	)	
	)	

_____

I, _____[*name*], reached majority on _____[*date*]. On _____[*date*] I made a full and final settlement with my guardian _____[*name*], in accordance with the order approving the guardian's final account, dated _____.

I acknowledge receipt of the following property described in the final account: _____[*specify*].

I fully release _____[*name*] from all liability for the handling of my estate.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

Ward

[2] Use of Form

The form in [1], *above*, is for use in guardianship proceedings as a receipt and release by a ward when the ward reaches the age of majority. After a ward has reached majority, the ward may settle accounts with the guardian and give the guardian a release, which is valid if obtained fairly and without undue influence [*Prob. Code § 2627(a)*; *Cal. Rules of Ct., Rule 7.1007(a)*].

[3] Discharge of Guardian

The receipt and release does not operate as a discharge of the guardian, which is done by court order and cannot be made until one year after the ward has reached majority [Prob. Code § 2727(b)]. The court may require the ward's personal appearance at the hearing on the final account or report [*Cal. Rules of Ct., Rule 7.1007(b)*].

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24-290H California Forms of Pleading and Practice--Annotated § 290H.31

§ 290H.31 Petition for Termination of Guardianship [Prob. Code § 1601]--Judicial Council Form GC-255

[1] FORM Petition for Termination of Guardianship [Prob. Code § 1601]--Judicial Council Form GC-255

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative filled-in reproduction of Cal. Judicial Council Form GC-255, for use in terminating a guardianship.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

On petition by the guardian, a parent, or the ward, a court may order termination of a guardianship if the court determines that it is in the ward's best interest to terminate the guardianship [*Prob. Code § 1601*].

For the related form for an order, see *§ 290H.32*.

[3] Termination of Guardianship by Event

[a] Ward Dies or Reaches Majority

A guardianship of the person or estate terminates automatically when the ward reaches the age of majority (18 years) or dies [*Prob. Code § 1600(a)*]. When a guardianship is terminated by one of these events, no petition or court order is necessary, and this form does not have to be filed [*see Cal. Rules of Ct., Rule 7.1004(b)*]. However, in the case of a guardianship of the estate, termination of the guardianship does not eliminate the requirement that an account be filed [

see Prob. Code §§ 1600, 2627, 2630; *Cal. Rules of Ct., Rules 7.1004(c), 7.1006*].

[b] Ward Is Adopted or Becomes Emancipated

A guardianship of the person terminates on the adoption or emancipation of the ward [*Prob. Code § 1600(b)*]. A minor is emancipated if the minor enters into a valid marriage, is on active duty with the U.S. armed forces, or has received a judicial declaration of emancipation [*see Fam. Code §§ 7002, 7122*; *see also Fam. Code § 7050* (emancipated minor is considered adult for all purposes)]. Neither the statute nor the Judicial Council's form expressly states whether a petition to terminate a guardianship of the person must be filed in this situation. However, because *Prob. Code § 1600(b)* simply provides that the guardianship terminates on occurrence of the specified event and does not mention any need for judicial action to terminate the guardianship, presumably termination is automatic, and it is unnecessary to file a petition to terminate the guardianship.

A guardianship of the estate, on the other hand, does not terminate automatically on the adoption or emancipation of the ward [*see Prob. Code § 1600(b)* (specifically limiting termination on occurrence of these events to guardianships of person)].

[4] Notice Requirements

[a] In General

Notice of the hearing on the petition must be given in the time and manner provided in *Prob. Code § 1460 et seq.* Notice of the time and place of the hearing must be given at least 15 days before the hearing date. The petitioner is required to mail notice of the hearing to each of the following persons [*Prob. Code § 1460(b)*]:

- The guardian (Paragraph 9(a)).
- The ward (Paragraph 9(b)).
- The spouse of the ward, if the ward has a spouse, or the domestic partner of the ward, if the ward has a domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*].
- Any person who has requested special notice of the matter, as provided in *Prob. Code § 2700* (Paragraph 6) [*see* [b], *below*].
- The parents of the ward (Paragraphs 9(c) and (d)) [*Prob. Code §§ 1460(b)(5), 1510(c)(1)*].
- The person having legal custody of the ward and, if that person does not have the care of the ward, the person having the care of the ward [*Prob. Code §§ 1460(b)(5), 1510(c)(2)*].
- The relatives of the proposed ward within the second degree (Paragraphs 9(e)-(k)) [*Prob. Code §§ 1460(b)(5), 1510(c)(3)*].
- Any person nominated as guardian for the ward under *Prob. Code §§ 1500* or *1501* [*Prob. Code §§ 1460(b)(5), 1510(c)(5)*].
- In the case of a guardianship of the person involving an Indian child, any Indian custodian and the Indian child's tribe [*Prob. Code § 1510(c)(6)*].

For good cause, the court may dispense with the notice otherwise required to be given to a person listed above

(Paragraph 7) [*Prob. Code § 1460(e)*]. In any event, notice is not required to any child under 12 years old if the court determines that notice was properly given to a parent, guardian, or other person having legal custody of the minor, with whom the minor resides, or the petition is brought by a parent, guardian, or other person having legal custody of the minor, with whom the minor resides [*Prob. Code § 1460.1*].

Additional notice requirements apply if the ward, during the guardianship proceeding, has been a patient in, or on leave from, a state hospital under the jurisdiction of the State Department of Mental Health or the State Department of Developmental Services [*see Prob. Code § 1461*]. For additional discussion and forms, see Ch. 284, *Guardianship and Conservatorship: Notice* .

[b] Special Notice

Notice of the hearing to terminate a guardianship must be given to any person who has requested special notice under *Prob. Code § 2700* [*Prob. Code § 1460(b)(4)*]. Any interested person, in person or by attorney mayfile with the court clerk a written request for special notice [*Prob. Code § 2700(a)*].

If a request for special notice has been made, the person filing a petition, account, or other paper must give written notice of the filing, together with a copy of the petition, account, or other paper, and the time and place set for the hearing by mail to the person named in the request at the address set forth in the request, at least 15 days before the time set for the hearing. However, the court has the power to make an order dispensing with the notice [*Prob. Code § 2702(a)*].

[c] Service of Final Account

A guardian of the estate must file and obtain the court's approval of a final account or report of administration [*Cal. Rules of Ct., Rule 7.1004(c)*]. The guardian must serve a copy of the final account and petition for its settlement on the minor, unless the court dispenses with service [*Cal. Rules of Ct., Rule 7.1006(a)*]. If the minor is deceased, the guardian must serve a notice of hearing and a copy of the final account and petition for its settlement on the personal representative of the deceased minor's estate, unless the court dispenses with service [*Cal. Rules of Ct., Rule 7.1006(b)*]. If there is no personal representative, service must be made on the persons entitled to succeed to the estate, unless the court dispenses with service [*Cal. Rules of Ct., Rule 7.1006(c)*].

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24-290H California Forms of Pleading and Practice--Annotated § 290H.32

§ 290H.32 Order Terminating Guardianship [Prob. Code § 1601]--Judicial Council Form GC-260

[1] FORM Order Terminating Guardianship [Prob. Code § 1601]--Judicial Council Form GC-260

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative filled-in reproduction of Cal. Judicial Council Form GC-260, for use in conjunction with a petition to terminate a guardianship of the person and/or estate [*see Prob. Code § 1601*; for an illustration of the petition, *see § 290H.31*].

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

In most counties, the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

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24-290H California Forms of Pleading and Practice--Annotated § 290H.33

§ 290H.33 Petition for Termination of Guardianship of the Estate and Deposit of Estate in Blocked Account [Prob. Code § 3412(a)]

[1] FORM Petition for Termination of Guardianship of the Estate and Deposit of Estate in Blocked Account [Prob. Code § 3412(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Guardianship of the _____	)	PETITION FOR TERMINATION
[Person *or* Estate *or* Person and Estate] of	)	OF GUARDIANSHIP
_____ [*name*], Ward.	)	
	)	

_____

Petitioner _____[*name*] respectfully represents:

1. Petitioner is the _____ [parent entitled to custody *or* guardian of the estate] of _____[*name of ward*].

2. On _____[*date*], _____ [petitioner *or name of guardian*] was appointed guardian of the estate of _____ [*name of ward*] and is now the duly appointed, qualified, and acting guardian of the estate.

3. The sole asset of the estate is money in the amount of $_____.

4. Petitioner proposes that the guardianship be terminated and the money be placed in an interest bearing account in _____[*name of authorized depository*] subject to withdrawal only on court order. _____ [*specify reason, e.g.,* The money is not needed for the ward's support, and the deposit would save guardian's fees, attorney's fees, and surety's fees].

5. A request for special notice has _____ [not been filed *or* been filed by _____ (*name*) and notice of the time and place of hearing on this petition will be given as required by law *or* been filed and waived by _____ (*name*)].

WHEREFORE, petitioner prays:

1. For termination of the guardianship.

2. For deposit of the assets of the estate into an interest-bearing account in _____[*name of authorized depository*] located at _____[*address*], _____[*city*], California, in the name of _____[*name of ward*], to be withdrawn only on order of the court.

3. For such other and further orders as the court may deem proper.

Respectfully submitted,

_____ [*signature*]

Petitioner

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is for use in petitioning to have a guardianship of the estate terminated when its sole asset is money [*see Prob. Code § 3412(a)*].

[3] Contents of Petition

The petition should indicate that the petitioner has standing to petition for the termination of the guardianship by deposit of the estate in that he or she is either a parent of the ward entitled to custody of the ward or the guardian of the estate (Paragraph 1) [*see Prob. Code § 3411*]. The petition should also state the amount of money in the estate (Paragraph 3).

The court may order that the guardianship be terminated and the money be deposited in an insured account in a financial institution in California, or single-premium deferred annuity subject to withdrawal only on court order [*Prob. Code § 3412(a)*]. The court may order that all or any part of the money be transferred to a custodian for the benefit of the minor under the California Uniform Transfers to Minors Act [*Prob. Code § 3412(b)*]. If the estate does not exceed $20,000, the court may order that the money be held on other conditions that are in the best interests of the ward [*Prob. Code § 3412(c)*]. If the estate does not exceed $5,000, the court may order that the money be paid to a parent of the ward pursuant to *Prob. Code § 3401* (delivery of minor's money to parent) [*Prob. Code § 3412(d)*]. The court may also order that the remaining balance of any money paid or to be paid be deposited with the county treasurer under specified terms and conditions [*Prob. Code § 3412(e)*]. For further discussion, see *§ 290H.11[2]*.

[4] Verification

The petition must be verified [*see Prob. Code § 1021*].

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24-290H California Forms of Pleading and Practice--Annotated § 290H.34

§ 290H.34 Order Terminating Guardianship of the Estate and Ordering Deposit of Estate in Blocked Account [Prob. Code § 3412(a)]

[1] FORM Order Terminating Guardianship of the Estate and Ordering Deposit of Estate in Blocked Account [Prob. Code § 3412(a)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
Guardianship of the _____	)	NO. _____
[Person *or* Estate *or* Person and Estate] of	)	ORDER
_____ [*name*], Ward.	)	

The verified petition of _____[*name*] for termination of the guardianship of the estate of _____[*name of ward*] and deposit of the estate came on regularly for hearing by the court this date. Petitioner appeared by counsel _____[*name*]. _____[*Specify other appearance, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. _____[*Name*] is the duly appointed, qualified, and acting guardian of the estate of _____ [*name of ward*].

3. The sole asset of the estate is money in the amount of $_____.

4. The guardianship should be terminated and the money belonging to the estate should be deposited in an authorized depository, subject to withdrawal only on order of the court.

IT IS ORDERED:

1. The guardianship of the estate of _____ [*name of ward*] be terminated.

2. The assets of the estate be deposited forthwith in an interest-bearing account in _____[*name of depository*] at _____[*address*], _____[*city*], California, subject to withdrawal only on order of the court until the date the ward reaches majority, whereupon all money in the account shall be paid to the ward without further court order.

3. The guardian be discharged on the filing of a final account and the receipt for the above deposit.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use with the form of petition in § 290H.33 to have a guardianship of the estate terminated when its sole asset is money [*see Prob. Code § 3412(a)*].

In most counties the proposed order must be filed at some time before the hearing for review by the court or probate commissioner. Local practice should be consulted.

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[Reserved]

§§ 290H.35[Reserved]

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24-290H California Forms of Pleading and Practice--Annotated § 290H.40

§ 290H.40 Petition for Termination of Conservatorship [Prob. Code § 1861]

[1] FORM Petition for Termination of Conservatorship [Prob. Code § 1861]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	[Hearing set for _____
Conservatorship of the _____	)	(*date*), at _____
[Person *or* Estate *or* Person and Estate] of	)	(*time*), in Dept. No. _____]
_____ [*name*],	)	PETITION FOR TERMINATION
Conservatee.	)	OF CONSERVATORSHIP
	)	
	)	

_____

Petitioner _____[*name*] respectfully represents:

1. Petitioner is _____ [the duly appointed, qualified, and acting conservator of the _____ (person and estate *or* person *or* estate) of _____ (*name of conservatee*) *or* the conservatee *or* the _____ (*specify relationship, e.g.,* brother) of the conservatee *or* _____ (a friend of *or* a person interested in) the conservatee].

2. The conservatorship was established by order of this court on _____[*date*].

3. The conservatee resides at _____[*address*], _____[*city*], California.

4. The conservatorship is no longer required in that the conservatee is now able to _____ [provide properly for his/her personal needs for physical health, food, clothing, or shelter *and/or* manage his/her financial resources *and/or* resist fraud or undue influence]. The facts supporting this petition are _____ [*specify, e.g.*, the conservatee has completely recovered from the heart attack that necessitated the establishment of the conservatorship and is now able to resume normal activities, as evidenced by the declaration of _____ (*name*), the conservatee's personal physician, which is attached as Exhibit A].

5. A request for special notice has _____ [not been filed *or* been filed by _____ (*name*) and notice of the time and place of hearing on this petition will be given as required by law *or* been filed and waived by _____ (*name*)].

WHEREFORE, petitioner prays for termination of the conservatorship of the _____ [person and estate *or* person *or* estate] of _____[*name of conservatee*] and for such other and further orders as the court may deem proper.
Dated: _____.

Respectfully submitted,_____ [*signature*]

Petitioner

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is for use in petitioning for the termination of a conservatorship. For the related form of order, see *§ 290H.41*.

[3] Contents of Petition

The petition must state facts showing that the conservatorship is no longer required (Paragraph 5) [*Prob. Code § 1861(b)*]. The petition should also indicate that the petitioner has standing to petition for termination of the conservatorship in that he or she is the conservator, the conservatee, the spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297*], a relative or friend of the conservatee, or a person interested in the conservatorship (Paragraph 1) [*see Prob. Code § 1861(a)*].

[4] Notice of Hearing

Notice of hearing on the petition must be given for the period and in the manner provided in *Prob. Code §§ 1460 et seq.* [*Prob. Code § 1862*]. For a discussion of these requirements, see Ch. 284, *Guardianship and Conservatorship: Notice* . Special notice must be given in accordance with *Prob. Code § 2702* to anyone who has requested it [*see Prob. Code § 2700(a)*].

[5] Court Approval of Final Account

A conservator of the estate whose administration is terminated by operation of law or by court order must file and obtain the court's approval of a final account [*Cal. Rules of Ct., Rule 7.1052(c)*]. After termination of the conservatorship, the conservator must serve copies of the final account and petition for its settlement with the notices of hearing that must be served on the former conservatee and on the spouse or domestic partner of the former conservatee under *Prob. Code § 1460(b)(2)* and *(3)* [*Cal. Rules of Ct., Rule 7.1054*].

[6] Verification

The petition must be verified [*see Prob. Code § 1021*].

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24-290H California Forms of Pleading and Practice--Annotated § 290H.41

§ 290H.41 Order Terminating Conservatorship [Prob. Code § 1863]

[1] FORM Order Terminating Conservatorship [Prob. Code § 1863]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [Conservatorship *or* Limited Conservatorship] of the _____ [Person *or* Estate *or* Person and Estate] of _____ [*name*], Conservatee.	)	NO. _____ ORDER

The verified petition of _____[*name*] for termination of the conservatorship of _____[*name of conservatee*] came on regularly for hearing on this date. Petitioner appeared by counsel _____[*name*]. _____[*Specify other appearance, if any*].

The court finds from proof made to the satisfaction of the court:

1. All notices of the hearing have been _____ [duly given as required by law *or* waived] _____[, including special notice to _____ (*name*)].

2. The conservatorship is no longer required because _____[*name of conservatee*] is now able to _____ [provide properly for his/her personal needs for physical health, food, clothing, or shelter, *and/or* manage his/her financial resources *and/or* resist fraud or undue influence].

IT IS ORDERED:

1. The conservatorship of the _____ [person and estate *or* person *or* estate] of _____[*name of conservatee*] be terminated [subject only to accounting and distribution of the assets of the conservatorship estate].

[2. *If conservatorship of the estate is terminated, add:* _____ (*name*), conservator of the _____ (person and) estate, file a final account and report of his/her acts as conservator by _____ (*date*), and on settlement of the account, surrender the assets of the estate to the conservatee.]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use with the petition in § 290H.40 to terminate a conservatorship [*Prob. Code § 1863*].

In most counties the proposed order must be filed before the hearing for review by the court or probate commissioner. Local practice should be consulted.

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24-291 California Forms of Pleading and Practice--Annotated 291.syn

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[4] Compromise and Settlement

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[5] Employment of Attorney

[a] Non-Attorney Cannot Appear in Propria Persona

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[i] Minors

[ii] Incompetent Persons

§ 291.16 Disposition of Money or Property Recovered on Behalf of Minor or Incompetent

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[2] Balance of Money or Property Due Minor or Incompetent

§§ 291.17-291.29 [Reserved]

§ 291.30 Related Matthew Bender Publications

§ 291.31 State Statutes

[1] Attorney's Fees

[2] Disposition of Proceeds

[3] General Provisions

[4] Particular Proceedings

§ 291.32 Local Court Rules

§ 291.33 Decisions

[1] Appointment of Guardian ad Litem

[2] Appeal of Order Appointing or Terminating Guardian ad Litem

[3] Power and Duties of Guardian ad Litem

[4] Attorney-Client Relationship

§ 291.34 Law Reviews

§ 291.35 Text References

§§ 291.36-291.39 [Reserved]

§ 291.40 Appointment of Guardian ad Litem

§§ 291.41-291.49 [Reserved]

§ 291.50 Application and Order for Appointment of Guardian ad Litem--Civil [Code Civ. Proc. § 373]--Judicial Council Form CIV-010

[1] FORM

[2] Use of Form

[3] Caption

[4] Minor

[a] Use of Form When Minor Is Party

[b] Contents of Application

[5] Incompetent Person or Conservatee

[a] Use of Form When Incompetent Person or Conservatee Is Party

[b] Contents of Application

[c] Time of Petition

[6] Consent of Nominee

[7] Notice

[a] Appointment by Ex Parte Order

[b] Declaration Regarding Notice

[8] Cross References

§ 291.51 Petition for Appointment of Guardian ad Litem Under the Probate Code [Code Civ. Proc. § 373; Prob. Code § 1003]--Judicial Council Form DE-350, GC-100

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Signing and Verification

[5] Cross References

§ 291.51A Order Appointing Guardian Ad Litem--Judicial Council Form DE-351, GC-101

[1] FORM

[2] Use of Form

[3] Cross References

§ 291.52 Petition for Approval of Contract With Attorney [Fam. Code § 6602]--By Parent or Friend

[1] FORM

[2] Use of Form

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24-291 California Forms of Pleading and Practice--Annotated § 291.01

§ 291.01 Scope of Chapter

This chapter discusses [*see § 291.10* et seq.] and contains forms for use in the appointment of guardians ad litem. The forms include:

- Cal. Judicial Council Form CIV-010 application for appointment of a guardian ad litem in a civil action [*see § 291.50*].

- Cal. Judicial Council Form DE-350, GC-100, petition for appointment of a guardian ad litem in a proceeding under the Probate Code [*see § 291.51*] and Cal. Judicial Council Form DE-351, GC-101, order appointing guardian ad litem [*see § 291.51A*].

- Petition for approval of a contract for attorney's fees for litigation services provided on behalf of a minor [*see § 291.52*].

The chapter also includes a Research Guide [*see § 291.30* et seq.] and a Procedural Checklist [*see § 291.40*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewFamily LawGuardiansAppointment

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24-291 California Forms of Pleading and Practice--Annotated § 291.02

§ 291.02 Cross References

For forms for use in appointing guardians ad litem for minor trust beneficiaries in being, unborn issue, and unborn or unascertained heirs, see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts*

For forms for use in compromising minors' claims and disposing of funds or property owed to minors, see Ch. 366, *Minors: Claims and Property of Minors*

For forms for use in disaffirming a judgment entered against a minor who was not represented by a guardian ad litem, see Ch. 367A, *Minors: Disaffirmation of Judgments*

For forms for use in distribution of estates to minors, see Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGuardiansEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewFamily LawGuardiansGeneral Overview

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24-291 California Forms of Pleading and Practice--Annotated §§ 291.03-291.09

[Reserved]

§§ 291.03[Reserved]

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24-291 California Forms of Pleading and Practice--Annotated § 291.10

§ 291.10 Governing Statutes

The appointment of guardians ad litem is governed by *Code Civ. Proc. §§ 372-373.5*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGuardiansEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewFamily LawGuardiansAppointment

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24-291 California Forms of Pleading and Practice--Annotated § 291.11

§ 291.11 When Appointment of Guardian ad Litem Is Required

[1] Required for Minors and Incompetent Persons

When a minor, an incompetent person, or a person for whom a conservator has been appointed is a party to a civil action, he or she must appear either by a guardian or conservator of his or her estate, or by a guardian ad litem appointed by the court in which the action is pending [*Code Civ. Proc. § 372*; *see In re Josiah Z. (2005) 36 Cal. 4th 664, 678, 31 Cal. Rptr. 3d 472, 115 P.3d 1133* (*Code Civ. Proc. § 372* represents recognition by legislature that when minor is involved in litigation, minor's rights cannot be protected unless guardian ad litem or similar representative acts for minor); *Poaster v. Superior Court (1993) 20 Cal. App. 4th 948, 950, 24 Cal. Rptr. 2d 582* (minor defendant cannot appear in civil action except by guardian of estate or guardian ad litem); *see also Transamerica Homefirst, Inc. v. Superior Court (1999) 69 Cal. App. 4th 577, 580, 81 Cal. Rptr. 2d 705* (appearance of incompetent through conservator)]. This requirement is subject to the exceptions for minors noted in [3], *below.*

A guardian ad litem may be appointed in any case when the court in which the action or proceeding is prosecuted deems it expedient to appoint a guardian ad litem, notwithstanding the fact that the minor, incompetent person, or conservatee may have a guardian or conservator of the estate and may have appeared by him or her [*Code Civ. Proc. § 372*].

The essential difference between a general guardian and a guardian ad litem is that a general guardian is usually appointed to take care of the person or property of a minor, not for the purpose of prosecuting a lawsuit, while a guardian ad litem is appointed specifically to prosecute or defend a suit, and may be appointed even if the minor has a general guardian [*J.W. v. Superior Court (1993) 17 Cal. App. 4th 958, 964, 22 Cal. Rptr. 2d 527]* .

The court does not have a duty to appoint a guardian ad litem for a person who is not a party to the action [*In re Emily R. (2000) 80 Cal. App. 4th 1344, 1356, 96 Cal. Rptr. 2d 285* (no duty to appoint guardian ad litem for minor alleged father who had not appeared in dependency proceedings)].

[2] "Incompetent Person" Defined

The term "incompetent person" includes a person for whom a conservator may be appointed [*Code Civ. Proc. § 372*; *see Prob. Code § 1801* (when conservator may be appointed), discussed in Ch. 281, *Guardianship and Conservatorship:*

Appointment of Conservators]. A guardian ad litem can also be appointed for an incompetent person without any prior finding of incompetency in an independent proceeding [*Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 11-13, 118 Cal. Rptr. 21, 529 P.2d 53* (court may determine individual's incompetency based on application for appointment and supporting declarations)].

Regarding the appointment of a guardian ad litem for an adult parent in the context of a dependency proceeding, the basis for appointment is incompetence of the parent for whose benefit it is to be made; the test for incompetence in this context is whether the party has the capacity to understand the nature or consequences of the proceeding, and is able to assist counsel in preparation of the case [*In re Daniel S. (2004) 115 Cal. App. 4th 903, 913, 9 Cal. Rptr. 3d 646* ; *In re Jessica G. (2001) 93 Cal. App. 4th 1180, 1186, 113 Cal. Rptr. 2d 714* , relying on *In re Sara D. (2001) 87 Cal. App. 4th 661, 667, 104 Cal. Rptr. 2d 909]* . For example, a court need not appoint a guardian ad litem for a mentally disabled adult when the evidence shows that the adult understands the nature of the proceedings and is able to cooperate with his or her attorney in representing his or her interests [*In re R.S. (1985) 167 Cal. App. 3d 946, 978-980, 213 Cal. Rptr. 690* ; *see* *In re C.G. (2005) 129 Cal. App. 4th 27, 33, 27 Cal. Rptr. 3d 872* (incompetency was not shown by evidence that individual suffered from cerebral palsy, had developmental disabilities, and was seeing psychiatrist); *In re Daniel S. (2004) 115 Cal. App. 4th 903, 913, 9 Cal. Rptr. 3d 646* (incompetency was shown by evidence that individual was a chronic paranoid schizophrenic who was unable to "process anything," and who was agitated, angry, aggressive, and unstable, despite being on medication)].

[3] When Guardian ad Litem Is Not Required

[a] Guardian or Conservator of Estate May Appear

A guardian or conservator of the estate also has the power to appear in an action or proceeding to which the minor or conservatee is a party, but such power does not preclude appointment of a guardian ad litem [*Code Civ. Proc. § 372*].

[b] Settlement When No Action Is Pending

If a minor who has a disputed claim for damages, money, or other property does not have a guardian of the estate, either parent, if the parents are not living separate and apart, or the parent having the care, custody, or control of the minor, has the right to compromise the claim, or to execute a convenant not to sue or not to enforce judgment on the claim, unless the claim is against that parent. Such a compromise or convenant requires court approval, but appointment of a guardian ad litem is not necessary if no action is pending on the claim [*Prob. Code § 3500*; *see* "Guardianship-Conservatorship Law," 15 Cal. L. Rev. Comm. Reports 451, 884 (1980)].

For further discussion and forms relating to the compromise of a minor's claims by his or her parents, see Ch. 366, *Minors: Claims and Property of Minors* .

The guardian of the estate of a minor or the conservator of the estate of an adult has powers to compromise the claims of a ward of conservatee under the general provisions pertaining to guardianship and conservatorship [*Prob. Code §§ 2500-2507*].

[c] Protective Orders

A minor 12 years of age or older may appear in court without a guardian, counsel, or a guardian ad litem, to request or oppose a request for any of the following [*Code Civ. Proc. § 372(b)*]:

- An injunction or temporary restraining order or both to prohibit harassment pursuant to *Code Civ. Proc. § 527.6*].

- An injunction or temporary restraining order or both against violence or a credible threat of violence

in the workplace pursuant to *Code Civ. Proc. § 527.8*].

- A protective order pursuant to *Fam. Code § 6200 et seq.*].
- A protective order pursuant to *Fam. Code §§ 7710* and *7720*].

In these proceedings the court may appoint a guardian ad litem, subject to special guidelines stated in *Code Civ. Proc. § 372(b)(1)* [*Code Civ. Proc. § 372(b)(1)*].

A minor under 12 years of age must appear though a guardian ad litem in these types of case, but the minor and guardian ad litem may appear without counsel [*Code Civ. Proc. § 374*].

For further discussion, see Ch. 293, *Harassment and Domestic Violence* .

[d] Submission of Dispute Between Guardian or Conservator and Third Person to Alternative Dispute Resolution

Disputes relating to the estate between the guardian or conservator of an estate and a third person may be resolved by submission to a temporary or permanent judge pursuant to written agreement [*see Prob. Code § 2405*]. Similarly, such disputes may be submitted to arbitration pursuant to a written agreement, provided that the agreement has been approved by the court [*Prob. Code § 2406*].

For a discussion and forms relating to powers of guardians and conservators of estates, see Ch. 287, *Guardianship and Conservatorship: General Management Powers*, through Ch. 290C, *Guardianship and Conservatorship: Actions and Disputed Claims*.

[e] Minor Is Parent to Child Subject to Certain Proceedings

Notwithstanding *Code Civ. Proc. § 372(a)*, a minor may appear in court without a guardian ad litem in the following proceedings if the minor is a parent of the child who is the subject of the proceedings:

- Family Court proceedings pursuant to *Fam. Code § 7600 et seq.* [*Code Civ. Proc. § 372(c)(1)(a)*];
- Dependency proceedings pursuant to *Welf. & Inst. Code § 200 et seq.* [*Code Civ. Proc. § 372(c)(1)(b)*];
- Guardianship proceedings for a minor child pursuant to *Prob. Code § 1500 et seq.* [*Code Civ. Proc. § 372(c)(1)(c)*];
- Any other proceedings concerning child custody, visitation, or support [*Code Civ. Proc. § 372(c)(1)(d)*].

If the court finds that the minor parent is unable to understand the nature of the proceedings or to assist counsel in preparing the case, the court must, upon its own motion or upon a motion by the minor parent or the minor parent's counsel, appoint a guardian ad litem [*Code Civ. Proc. § 372(c)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGuardiansEstate, Gift & Trust LawConservators & GuardiansGuardians for

MinorsFamily LawGuardiansAppointment

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§ 291.12 Effect of Failure to Appoint

The court must appoint a guardian ad litem for a minor or insane or incompetent person, and the action cannot proceed without an appointment [*In re Josiah Z. (2005) 36 Cal. 4th 664, 678, 31 Cal. Rptr. 3d 472, 115 P.3d 1133* (minor); *In re Daniel S. (2004) 115 Cal. App. 4th 903, 912, 9 Cal. Rptr. 3d 646* (incompetent)]. For forms of demurrer and affirmative defense based on failure to appoint a guardian ad litem for a minor plaintiff, see *Ch. 3, Abatement of Actions, § 3.30* et seq.

A judgment taken against a minor or an insane or incompetent person who is not represented by a guardian or guardian ad litem can be disaffirmed and vacated [*In re Charles T. (2002) 102 Cal. App. 4th 869, 876, 125 Cal. Rptr. 2d 868* ; *Briggs v. Briggs (1958) 160 Cal. App. 2d 312, 318-319, 325 P.2d 219* ; *Keane v. Penha (1946) 76 Cal. App. 2d 693, 696, 173 P.2d 835]* . However, failure to appoint a guardian ad litem is not jurisdictional and the court may decline to set aside a judgment if the minor's interests were not substantially prejudiced and there is no claim that there was a defense to the action [Pacific Coast etc. v. *Clausen (1937) 8 Cal. 2d 364, 366, 65 P.2d 352]* . Because the failure to appoint a guardian ad litem is not jurisdictional, when the minor is the plaintiff, a guardian ad litem can be appointed at any time during the proceedings and, if one is not appointed and the minor has not reached majority and affirmed the proceedings prior to judgment, a defendant may attack the judgment as erroneous, but not void [*In re Charles T. (2002) 102 Cal. App. 4th 869, 876, 125 Cal. Rptr. 2d 868]* .

Tolling will be allowed under *Gov. Code 911.4(c)(3)* if the minor is adjudged to be a dependent child of the juvenile court under the Arnold-Kennick Juvenile Court Law [*Welf. & Inst. Code § 200 et seq.*], if the minor is without a guardian ad litem or conservator for purposes of filing civil actions [*see County of Los Angeles v. Superior Court (2001) 91 Cal. App. 4th 1303, 1313, 111 Cal. Rptr. 2d 471]* .

For further discussion and forms relating to vacating a judgment against a minor who was not represented by a guardian ad litem, see Ch. 367A, *Minors: Disaffirmation of Judgments* .

Legal Topics:

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

Civil ProcedurePartiesCapacity of PartiesGuardiansEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointmentGovernmentsLegislationStatutes of LimitationsTolling

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§ 291.13 Conflict of Interest

In determining whether to appoint a particular guardian ad litem, the court must consider whether the guardian and the minor or incompetent have divergent interests [*Code Civ. Proc. §§ 372(b)(1), 374*]. It is improper to appoint a guardian ad litem who, however well intentioned, inevitably is in an adverse position to the ward for whom he or she purports to act. An adverse interest is grounds for removal of a guardian ad litem [*Estate of Lacy (1975) 54 Cal. App. 3d 172, 185, 126 Cal. Rptr. 432* (improper appointment of income beneficiary as guardian ad litem for remaindermen in litigation involving trust)].

The selection of the guardian ad litem is within the court's discretion, and (with respect to a minor) is not subject to any parental or other preference [*D.G. v. Superior Court (1979) 100 Cal. App. 3d 535, 545-546, 161 Cal. Rptr. 117* ; *Estate of Trego (1978) 81 Cal. App. 3d 530, 535-536, 146 Cal. Rptr. 664]* . If there is no other responsible guardian, the court may appoint the public guardian of the county to be the guardian ad litem for a minor defendant [*Poaster v. Superior Court (1993) 20 Cal. App. 4th 948, 952-954, 24 Cal. Rptr. 2d 582]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGuardiansEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewFamily LawGuardiansAppointment

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24-291 California Forms of Pleading and Practice--Annotated § 291.14

§ 291.14 Procedure for Appointment of Guardian ad Litem

[1] Ex Parte Application

A guardian ad litem can be appointed on an ex parte application [*Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 12-13, 118 Cal. Rptr. 21, 529 P.2d 53]* . An application for appointment of a guardian ad litem may also be made orally in open court, but it is better practice to apply by written petition [*Emeric v. Alvarado (1884) 64 Cal. 529, 594, 2 P. 418]* .

[2] For Minor

[a] As Plaintiff

The appointment of a guardian ad litem for a plaintiff who is a minor must be made before the summons is issued, on the application of the minor, if the minor is 14 years of age or older, or if under that age, on the application of a relative or friend of the minor [*Code Civ. Proc. § 373(a)*].

The appointment of a guardian ad litem should be obtained before the complaint is filed so that the complaint can allege the appointment of the guardian ad litem [*see City of Los Angeles v. Superior Court (1968) 264 Cal. App. 2d 766, 772, 70 Cal. Rptr. 826]* .

Appointment of independent counsel (IC) for dependent minors does not take the place of the appointment of an actual guardian ad litem to oversee the work of the IC [*County of Los Angeles v. Superior Court (2001) 91 Cal. App. 4th 1303, 1312, 111 Cal. Rptr. 2d 471]* .

[b] As Defendant

The appointment of a guardian ad litem for a defendant who is a minor is made in the following manner [*Code Civ. Proc. § 373(b)*]:

- On the application of the minor, if the minor is 14 years of age or older and the minor applies within

10 days after service of the summons, or,

- If under that age or if the minor neglects to apply, then on the application of one of the following:
  - A relative or friend of the minor.
  - Any other party to the action.
  - The court on its own motion.

[3] For Incompetent Person

The appointment of a guardian ad litem for an insane or incompetent person who is a party to an action or proceeding is made on the application of one of the following [*Code Civ. Proc. § 373(c)*]:

- A relative or friend of the insane or incompetent person.
- Any other party to the action or proceeding.
- The court on its own motion.

In the case of an insane or incompetent person, the court is required to appoint a guardian ad litem whenever the need for one is brought to the court's attention [*In re Marriage of Caballero (1994) 27 Cal. App. 4th 1139, 1149, 33 Cal. Rptr. 2d 46]* . However, a guardian ad litem may not be appointed for a party until that party has been properly served [*In re Daniel S. (2004) 115 Cal. App. 4th 903, 912, 9 Cal. Rptr. 3d 646]* .

In a dependency court proceeding, if the adult parent's counsel believes that a guardian ad litem should be appointed for the parent, that attorney has two alternative courses to follow [*In re Jessica G. (2001) 93 Cal. App. 4th 1180, 1187, 113 Cal. Rptr. 2d 714* , relying on *In re Sara D. (2001) 87 Cal. App. 4th 661, 668, 104 Cal. Rptr. 2d 909]* :

- Approach the client and ask for consent, and if consent is given, due process is served since the parent will have participated in the decision; or
- If the client does not consent, or is not consulted, the attorney should approach the court directly.

This second option requires notice and a hearing, although a formal noticed motion with attendant briefing is not required. What is required is that the court or counsel explain to the parent/client the purpose of the guardian ad litem appointment, the authority the guardian will have (and the authority the parent will not have) in the litigation, and why the attorney believes the appointment should be made. At the hearing, the parent should be given the opportunity to respond. At a minimum, the court should make an inquiry sufficient to satisfy it that the parent is, or is not, competent, and the court's decision on this issue should be stated on the record [*In re Jessica G. (2001) 93 Cal. App. 4th 1180, 1187-1188, 113 Cal. Rptr. 2d 714* , relying on *In re Sara D. (2001) 87 Cal. App. 4th 661, 672, 104 Cal. Rptr. 2d 909]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGuardiansEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansAppointment

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24-291 California Forms of Pleading and Practice--Annotated § 291.15

§ 291.15 Powers of Guardian ad Litem

[1] Status as Representative

A guardian ad litem is not a party to an action but merely a party's representative [*Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 13, 118 Cal. Rptr. 21, 529 P.2d 53* ; *Regency Health Services, Inc. v. Superior Court (1998) 64 Cal. App. 4th 1496, 1499, 76 Cal. Rptr. 2d 95* ; *In re Christina B. (1993) 19 Cal. App. 4th 1441, 1453, 23 Cal. Rptr. 2d 918* ; *Estate of Cochems (1952) 110 Cal. App. 2d 27, 29-30, 242 P.2d 56]* . For that reason, a judgment may not be rendered for or against a guardian ad litem, but only for or against the party he or she represents [*First Security Bank v. Paquet (2002) 98 Cal. App. 4th 468, 474, 119 Cal. Rptr. 2d 787* ; *Estate of Cochems (1952) 110 Cal. App. 2d 27, 242 P.2d 56]* .

[2] Scope and Nature of Powers and Duties

The guardian ad litem has the right to control the litigation on the minor's (or incompetent's) behalf, subject to the court's approval. This includes the right to compromise or settle the action, to control the procedural steps incident to conducting the litigation, and, with the court's approval, to make stipulations or concessions that bind the minor (or incompetent), as long as they are not prejudicial to the minor's (or incompetent's) interests. The guardian ad litem may make tactical and even fundamental decisions affecting the litigation, but always with the interests of the minor (or incompetent) in mind [*In re Josiah Z. (2005) 36 Cal. 4th 664, 678, 31 Cal. Rptr. 3d 472, 115 P.3d 1133* ; *In re Daniel S. (2004) 115 Cal. App. 4th 903, 914, 9 Cal. Rptr. 3d 646* (guardian ad litem may not compromise incompetent's fundamental rights, such as right to trial, unless there is some benefit to incompetent)]. The guardian ad litem has the power to assent to procedural steps that will facilitate a determination of the minor's (or incompetent's) case, subject to fiduciary duties owed to the minor (or incompetent) and the requirement that court approval be obtained for certain acts [*J.W. v. Superior Court (1993) 17 Cal. App. 4th 958, 965, 22 Cal. Rptr. 2d 527]* . A guardian ad litem must have court approval to waive a minor's (or incompetent's) fundamental rights [*Estate of Cibulk (1998) 67 Cal. App. 4th 690, 692, 79 Cal. Rptr. 2d 168]* .

A guardian ad litem may voluntarily dismiss the minor's (or incompetent's) action without prejudice without first obtaining a court order authorizing the dismissal [*Zapanta v. Universal Care, Inc. (2003) 107 Cal. App. 4th 1167, 1174-1175, 132 Cal. Rptr. 2d 842]* . The guardian ad litem, not the minor's (or incompetent's) attorney, has the authority

to seek dismissal of the minor's (or incompetent's) appeal after evaluating the minor's (or incompetent's) interests [*In re Josiah Z. (2005) 36 Cal. 4th 664, 678, 31 Cal. Rptr. 3d 472, 115 P.3d 1133]* .

Although an attorney hired by the guardian ad litem has the primary responsibility for pursuing the minor's (or incompetent's) claim, hiring the attorney does not relieve the guardian of all responsibility for pursuing the claim. The guardian owes the minor (or incompetent) a duty to take an active role in pursuing the claim and in overseeing the attorney to ensure that all appropriate actions are being taken [*Brandon G. v. Gray (2003) 111 Cal. App. 4th 29, 41-42, 3 Cal. Rptr. 3d 330]* .

[3] Admissions and Stipulations

A guardian ad litem may bind the ward in regard to procedural steps not affecting the ward's substantial rights, such as waiver of jury trial [*Cloud v. Market S. R. Co. (1946) 74 Cal. App. 2d 92, 101-103, 168 P.2d 191* ; *see De Los Santos v. Superior Court (1980) 27 Cal. 3d 677, 684, 166 Cal. Rptr. 172, 613 P.2d 233* (dicta)].

A guardian ad litem may, with the court's approval, make stipulations or concessions that are binding on the minor or incompetent, provided thay are not prejudicial to the latter's interests [*In re Christina B. (1993) 19 Cal. App. 4th 1441, 1453-1454, 23 Cal. Rptr. 2d 918* (waiver of trial and privilege against self-incrimination exceeded scope of powers); *see De Santos v. Superior Court (1980) 27 Cal. 3d 677, 684, 166 Cal. Rptr. 172, 613 P.2d 233* (dicta)]. A minor is not, however, bound by the actions or admissions of a guardian ad litem which mean the sacrifice or giving away of the ward's property or rights, such as the right to a trial, and the court may set aside or disregard concessions which were improvidently made by the guardian and which have not already been judicially approved [*In re Christina B. (1993) 19 Cal. App. 4th 1441, 1453-1454, 23 Cal. Rptr. 2d 918* ; *Estate of Armstrong (1966) 241 Cal. App. 2d 1, 8, 50 Cal. Rptr. 339* ; *Berry v. Chaplin (1946) 74 Cal. App. 2d 652, 657-658, 169 P.2d 442]* . However, a stipulation by a guardian ad litem that was approved by the court after an inquiry into its fairness and that might have been beneficial as well as detrimental to the interests of the minor has been held binding [*Robinson v. Wilson (1974) 44 Cal. App. 3d 92, 99-105, 118 Cal. Rptr. 569]* .

[3A] Discovery

Every litigant has a legal obligation to comply with the Civil Discovery Act [*Code Civ. Proc. § 2016 et seq.*]. No exemption is provided for litigants represented by guardians [*Regency Health Services, Inc. v. Superior Court (1998) 64 Cal. App. 4th 1496, 1498, 1504-1505, 76 Cal. Rptr. 2d 95]* . Thus, a ward has no general right to evade discovery [*Regency Health Services, Inc. v. Superior Court (1998) 64 Cal. App. 4th 1496, 1504, 76 Cal. Rptr. 2d 95]* . Accordingly, a ward has a legal obligation to respond to interrogatories. Ensuring that interrogatories are properly answered is one of the duties of a guardian ad litem [*Regency Health Services, Inc. v. Superior Court (1998) 64 Cal. App. 4th 1496, 1498, 76 Cal. Rptr. 2d 95]* . A guardian ad litem has the authority, subject to the court's ultimate supervision, to verify proper responses to interrogatories on behalf of the ward [*Regency Health Services, Inc. v. Superior Court (1998) 64 Cal. App. 4th 1496, 1504-1505, 76 Cal. Rptr. 2d 95]* .

[4] Compromise and Settlement

A guardian ad litem appearing for a minor, incompetent person, or conservatee in any action or proceeding has the power, with the approval of the court in which the action or proceeding is pending, to compromise it, to agree to the order or judgment to be entered for or against the ward, and to satisfy any judgment or order in favor of the ward or conservatee or to release or discharge any claim of the ward or conservatee pursuant to the compromise [*Code Civ. Proc. § 372*].

A guardian ad litem's settlement of the minor's (or incompetent's) claims is not final or binding until the settlement agreement is approved by the court in which the claims were brought. The settlement agreement is voidable at the

election of the minor (or incompetent) through the guardian ad litem unless and until the court approves the agreement [*Scruton v. Korean Air Lines Co. (1995) 39 Cal. App. 4th 1596, 1602-1603, 1605-1606, 46 Cal. Rptr. 2d 638]* . If the guardian ad litem repudiates the settlement agreement, the court may not enforce it unilaterally without first determining whether, in rejecting the agreement, the guardian ad litem acted contrary to the minor's (or incompetent's) best interests [*Scruton v. Korean Air Lines Co. (1995) 39 Cal. App. 4th 1596, 1608, 46 Cal. Rptr. 2d 638]* .

Any money or other property to be paid or delivered for the benefit of a minor, incompetent person, or conservatee pursuant to the order or judgment must be paid and delivered in the manner and on the terms and conditions specified in *Prob. Code § 3600 et seq.* [*Code Civ. Proc. § 372*; for discussion, *see § 291.16*].

[4A] Dismissal

A guardian ad litem may voluntarily dismiss a minor's action without prejudice without first obtaining a court order authorizing the dismissal; although the court retains the power to rescind or modify an action taken on behalf of a ward by a guardian ad litem that is inimical to the interests of the ward, nothing in *Code Civ. Proc. § 372* expressly precludes dismissal of an action without prejudice by a guardian ad litem [*Zapanta v. Universal Care, Inc. (2003) 107 Cal. App. 4th 1167, 1174-1175, 132 Cal. Rptr. 2d 842]* .

[5] Employment of Attorney

[a] Non-Attorney Cannot Appear in Propria Persona

A guardian ad litem who is not an attorney may not act in propria persona to represent the minor or incompetent in legal proceedings, as this would constitute a violation of the prohibition against the unauthorized practice of law [*see J.W. v. Superior Court (1993) 17 Cal. App. 4th 958, 969, 22 Cal. Rptr. 2d 527* (in Uniform Parentage Act proceeding, although minor was a necessary party, indigent mother appointed guardian ad litem could not represent minor in pro per); *see also Mossanen v. Monfared (2000) 77 Cal. App. 4th 1402, 1409, 92 Cal. Rptr. 2d 459* (guardian ad litem was powerless to oppose motion for summary judgment without counsel)].

[b] Hiring of Attorney Limited When Guardian ad Litem Is Attorney

If the guardian ad litem is an attorney, the estate of the minor or incompetent cannot be charged with the expense of employing an attorney without proof that there was need for assistance [*In re Price (1923) 61 Cal. App. 592, 600, 215 P. 710]* .

[c] Court Approval of Contract for Attorney's Fees

[i] Minors

A contract for attorney's fees for services in litigation, made by or on behalf of a minor, is void unless the contract is approved by the court in which the litigation is pending or the court having jurisdiction of the guardianship estate of the minor. Any interested person may petition for approval. If no contract has been approved and a judgment is recovered by or on behalf of a minor, the court rendering the judgment must fix the attorney's fees chargeable against the minor [*Fam. Code § 6602*; *Prob. Code § 3601*].

For a form for a petition, see *§ 291.52*.

[ii] Incompetent Persons

Although *Fam. Code § 6602* [*see* [i], *above*] expressly authorizes approval of contracts for attorney's fees only in cases involving minors, the California Supreme Court indicated in *Stafford v. Superior Court* that its antecedent, former Prob.

Code § 1509, applied to guardians ad litem of incompetents as well as to general guardians [*Stafford v. Superior Court (1934) 1 Cal. 2d 321, 324, 325, 34 P.2d 998]* . In *Stafford*, however, part of the court's rationale was that former Prob. Code § 1509 was codified with the general guardianship provisions in the Probate Code, which is no longer true since former Prob. Code § 1509 was recodified, in a chapter of the Probate Code that deals only with minors, as former *Prob. Code § 3302* (which has now been reenacted without substantive change as *Fam. Code § 6602*).

Counsel should, nonetheless, consider submitting the contract for attorney's fees to the court for approval in light of *Stafford* and of the similarity between cases involving appointment of a guardian ad litem for minors and for incompetents.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureParties Capacity of PartiesGuardiansCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewFamily LawGuardiansDuties & Rights

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24-291 California Forms of Pleading and Practice--Annotated § 291.16

§ 291.16 Disposition of Money or Property Recovered on Behalf of Minor or Incompetent

[1] Expenses, Costs, and Attorney's Fees

Reasonable expenses, costs, and attorney's fees may be awarded to a guardian ad litem out of money or other property to be paid or delivered for the benefit of a minor or incompetent person pursuant to a judgment or to a compromise of a pending action or proceeding to which a minor or incompetent person is a party, or in the case of a minor only, to the compromise or execution of a covenant not to sue or not to enforce judgment on the minor's claim [*Prob. Code § 3601*].

[2] Balance of Money or Property Due Minor or Incompetent

The disposition of the balance of the money or other property after payment of the expenses, costs, and attorney's fees [*see Prob. Code §§ 3602-3612*] is discussed in Ch. 366, *Minors: Claim and Property of Minors . Guardianship and Conservatorship: Asset Management and Investment,* and in Ch. 364, *Minors: Claims and Property of Minors*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGuardiansEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateCosts & ExpensesFamily LawGuardiansGeneral Overview

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[Reserved]

§§ 291.17[Reserved]

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§ 291.30 Related Matthew Bender Publications

For memoranda regarding vacation of judgments against wards when no guardian ad litem was appointed, see California Points and Authorities, Ch. 106, *Guardianship and Conservatorship*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGuardiansCivil ProcedureJudgmentsRelief From JudgmentPrior Judgment ReversedEstate, Gift & Trust LawConservators & GuardiansGeneral Overview

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§ 291.31 State Statutes

[1] Attorney's Fees

Attorney's fees for services provided to minor. *Fam. Code § 6602*

[2] Disposition of Proceeds

Disposition of money or property recovered on behalf of minor or incompetent. *Prob. Code § 3600 et seq.*

[3] General Provisions

Requirement that guardian conduct action for minor. *Fam. Code § 6601*

Requirement that minor, incompetent person, or conservatee be represented by guardian or conservator in actions and proceedings. *Code Civ. Proc. § 372*

Powers of guardian ad litem. *Code Civ. Proc. § 372*

Procedure for appointment of guardian ad litem. *Code Civ. Proc. § 373*

Guardian ad litem for unborn or unascertained persons. *Code Civ. Proc. § 373.5*

[4] Particular Proceedings

Appearance of minor 12 or older without guardian ad litem in cases of harassment and domestic violence. *Code Civ. Proc. § 372(b)*

Appearance of minor under 12 with guardian ad litem in cases of harassment and domestic violence. *Code Civ. Proc. § 374*

Appointment of guardian ad litem in proceeding to declare minor free from custody and control of parents. *Fam. Code § 7804*

Appointment of guardian ad litem for insane spouse in action for dissolution on ground of respondent's insanity. *Fam. Code § 2332*

Action for support, maintenance, or education of minor by guardian ad litem. *Fam. Code § 4000*

Appointment of guardian ad litem for minor who is party to action under Uniform Parentage Act (*Fam. Code § 7600 et seq.*). *Fam. Code § 7635*

Appointment of guardian ad litem in action for partition. *Code Civ. Proc. § 872.520(c)*

Appointment of guardian ad litem in worker's compensation proceedings. *Lab. Code §§ 5307.5, 5408*

Appointment of guardian ad litem by probate court. *Prob. Code §§ 1003, 1003.5*

Appointment of guardian ad litem in proceeding to authorize transaction involving community or homestead property. *Prob. Code §§ 3112, 3140*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 291.32 Local Court Rules

Guardian ad litem. Alameda Co. Super. Ct. Rules, Rule 12.11.10.2

Guardian ad litem. Fresno Co. Super. Ct. Rules, Rule 6.2.6

Guardian ad litem. Los Angeles Co. Super. Ct. Rules, Rule 2.5(d)

Guardian ad litem. Sacramento Co. Super. Ct. Rules, Rule 10.00

Guardian ad litem. San Diego Co. Super. Ct. Rules, Rule 2.4.6

Guardian ad litem. San Francisco Co. Super. Ct. Rules, Rule 6.9

Legal Topics:

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

[1] Appointment of Guardian ad Litem

In probate proceedings, a guardian ad litem may be appointed by the court at any stage of a proceeding to represent the interest of a minor, if the court determines that representation of the interest otherwise would be inadequate. The guardian or guardian ad litem is not a party to the action; instead, he or she is a representative of record of a party who lacks capacity to sue. The guardian ad litem's powers include the right to compromise or settle the action, to control the procedural steps incident to the conduct of the litigation, and, with the approval of the court, to make stipulations or concessions that are binding on the minor, provided they are not prejudicial to the latter's interests. *Safai v. Safai (2008) 164 Cal. App. 4th 233, 244, 78 Cal. Rptr. 3d. 759* In a parental rights termination case, a juvenile court's failure to appoint a guardian ad litem for a minor mother was not harmless error where the mother's rights were compromised at key hearings as a result of the failure to appoint a guardian ad litem. *In re M.F. (2008) 161 Cal. App. 4th 673, 678, 74 Cal. Rptr. 3d 383* A judgment against a minor for whom the court failed to appoint a guardian ad litem is voidable by the minor on reaching majority. *In re Charles T. (2002) 102 Cal. App. 4th 869, 876, 125 Cal. Rptr. 2d 868*

In a dependency court proceeding, if the adult parent's counsel believes that a guardian ad litem should be appointed for the parent, that attorney has two alternative courses to follow: (1) approach the client and ask for consent, and if consent is given, due process is served since the parent will have participated in the decision; or (2) if the client does not consent, or is not consulted, the attorney should approach the court directly; second option requires notice and a hearing, although a formal noticed motion with attendant briefing is not required; court or counsel must explain to the parent/client the purpose of the guardian ad litem appointment, the authority the guardian will have (and the authority the parent will not have) in the litigation, and why the attorney believes the appointment should be made; at the hearing, the parent should be given the opportunity to respond, and at a minimum, the court should make an inquiry sufficient to satisfy it that the parent is, or is not, competent, and the court's decision on this issue should be stated on the record. *In re Jessica G. (2001) 93 Cal. App. 4th 1180, 1187-1188, 113 Cal. Rptr. 2d 714* , relying on *In re Sara D. (2001) 87 Cal. App. 4th 661, 672, 104 Cal. Rptr. 2d 909*

To become a party within meaning of *Code Civ. Proc. § 372*, alleged father in dependency proceeding must enter appearance; court has no duty to appoint guardian ad litem for alleged father who has not appeared in dependency

proceeding. *In re Emily R. (2000) 80 Cal. App. 4th 1344, 1356, 1358, 96 Cal. Rptr. 2d 285 , 96 Cal. Rptr. 2d 285*

Person who is attorney in fact and nominee for appointment as conservator is presumptively entitled to appointment as guardian ad litem. *In re Marriage of Caballero (1994) 27 Cal. App. 4th 1139, 1152, 33 Cal. Rptr. 2d 46*

Court is authorized *Prob. Code § 2920* to appoint public guardian as guardian ad litem under appropriate circumstances. *Poaster v. Superior Court (1993)20 Cal. App. 4th 948, 953, 24 Cal. Rptr. 2d 582* (*but see* subsequently enacted *Prob. Code § 1003.5*)

Failure to appoint guardian ad litem is not jurisdictional defect. *Medical Legal Consulting Services, Inc. v. Covarrubias (1991) 234 Cal. App. 3d 80, 87-89, 285 Cal. Rptr. 559* ; *Briggs v. Briggs (1958) 160 Cal. App. 2d 312, 319, 325 P.2d 219*

Appointment of a guardian ad litem pursuant to *Code Civ. Proc. §§ 372, 373* required for developmentally disabled or mentally ill parent who is incapable of understanding juvenile dependency proceedings involving his or her child. *In re Lisa M. (1986) 177 Cal. App. 3d 915, 918-919, 225 Cal. Rptr. 7*

Selection of guardian ad litem is not subject to any parental or other preference, but resides in discretion of court. *D.G. v. Superior Court (1979) 100 Cal. App. 3d 535, 545-546, 161 Cal. Rptr. 117*

Guardian ad litem is not required to swear oath, post bond, or receive letters. *Estate of Trego (1978) 81 Cal. App. 3d 530, 535, 146 Cal. Rptr. 664*

Order appointing guardian ad litem is ineffective when order neither signed nor filed. *Briggs v. Briggs (1958) 160 Cal. App. 2d 312, 319, 325 P.2d 219*

Probate court has power to appoint guardian ad litem pursuant to *Code Civ. Proc. §§ 372-373.5*. *Estate of Corotto (1954) 125 Cal. App. 2d 314, 321-323, 270 P.2d 498*

[2] Appeal of Order Appointing or Terminating Guardian ad Litem

Order appointing guardian ad litem is not subject to appeal. *Estate of Corotto (1954) 125 Cal. App. 2d 314, 324, 270 P.2d 498*

Order terminating authority and capacity of guardian ad litem, standing alone, is not subject to appeal. *Estate of Emery (1962) 199 Cal. App. 2d 22, 26, 18 Cal. Rptr. 86*

[3] Power and Duties of Guardian ad Litem

A guardian ad litem may voluntarily dismiss a minor's action without prejudice without first obtaining a court order authorizing the dismissal; although the court retains the power to rescind or modify an action taken on behalf of a ward by a guardian ad litem that is inimical to the interests of the ward, nothing in *Code Civ. Proc. § 372* expressly precludes dismissal of an action without prejudice by a guardian ad litem. *Zapanta v. Universal Care, Inc. (2003) 107 Cal. App. 4th 1167, 1174-1175, 132 Cal. Rptr. 2d 842*

The guardian ad litem has the right to control the litigation on behalf of the minor, subject to the court's approval, and the guardian ad litem's powers include the right to compromise or settle the action, to control the procedural steps incident to the conduct of the litigation, and, with the approval of the court, to make stipulations or concessions that are binding on the minor, provided they are not prejudicial to the latter's interests--guardian ad litem's role is more than an

attorney's but less than a party's, in that the guardian oversees any attorney representing a minor's litigation-related interests and may make tactical and even fundamental decisions affecting the litigation, but always with the interest of the child in mind. *County of Los Angeles v. Superior Court (2001) 91 Cal. App. 4th 1303, 1312, 111 Cal. Rptr. 2d 471*

Guardian ad litem has power to bring action for dissolution on behalf of spouse who has conservator if spouse is found to have capacity to consent to dissolution. *In re Marriage of Higgason (1973) 10 Cal. 3d 476, 483-485, 110 Cal. Rptr. 897, 516 P.2d 289 , overruled on other grounds in In re Marriage of Dawley (1976) 17 Cal. 3d 342, 349-352, 131 Cal. Rptr. 3, 551 P.2d 323*

Minor's mother who sued in her individual capacity and as guardian ad litem for her son in medical malpractice action could not represent minor's interest without counsel and thus was powerless to oppose motion for summary judgment; court erred in allowing minor's counsel to withdraw when it was known that defendant was about to file summary judgment motion. *Mossanen v. Monfared (2000) 77 Cal. App. 4th 1402, 1409-1410, 92 Cal. Rptr. 2d 459*

Authority of guardian ad litem continues through appeal, even though judgment appealed from includes order removing the guardian ad litem. *Estate of Emery (1962) 199 Cal. App. 2d 22, 26, 18 Cal. Rptr. 86*

[4] Attorney-Client Relationship

Attorney representing minor through guardian ad litem in tort action may not withdraw as counsel of record without prior court approval. *Torres v. Friedman (1985) 169 Cal. App. 3d 880, 884-888, 215 Cal. Rptr. 604*

Lawyer-client privilege protects minor's statements to guardian ad litem for transmission to attorney. *De Los Santos v. Superior Court (1980) 27 Cal. 3d 677, 682-685, 166 Cal. Rptr. 172, 613 P.2d 233*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGuardiansEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewFamily LawGuardiansAppointmentFamily LawGuardiansDuties & RightsFamily LawGuardiansRemoval & Termination

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§ 291.34 Law Reviews

Note, *Broadening Anachronistic Notions of "Family" in Proxy Decisionmaking for Unmarried Adults, 41 Hastings L.J. 1029 (1990)*

Comment, *The Best Interests of Incompetent Patients: The Capacity for Interpersonal Relationships as a Standard for Decisionmaking, 76 Calif. L. Rev. 897 (1988)*

Weinberg, *Whose Right Is It Anyway? Individualism, Community, and the Right to Die: A Commentary on the New Jersey Experience, 40 Hastings L.J. 119 (1988)*

Comment, *The Guardian Ad Litem and Civil Liability in California Child Maltreatment Cases, 12 U.C.D. L. Rev. 700 (1979)*

Fraser, *Independent Representation for the Abused and Neglected Child: The Guardian Ad Litem, 13 Cal. West. L. Rev. 16 (1977)*

Rodda, *About Guardians Ad Litem, 41 L.A. Bar B. 237 (1966)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGuardiansEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewFamily LawGuardiansGeneral Overview

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§ 291.35 Text References

Witkin, California Procedure, vol. 4, *Pleading*, §§ 60-73 (4th ed. 1997)

Legal Topics:

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

§§ 291.36[Reserved]

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§ 291.40 Appointment of Guardian ad Litem

☐ Determine the following facts regarding the necessity for appointment of guardian ad litem [for discussion, *see § 291.11*].

☐ Service of summons on minor or incompetent person or person for whom a conservator has been appointed.

☐ Existence of a cause of action on which suit should be filed on behalf of minor or incompetent person or person for whom a conservator has been appointed.

☐ Whether minor or incompetent person already has a guardian or conservator of the estate.

☐ If minor or incompetent person has a guardian or conservator of the estate, whether that guardian may have a conflict of interest with respect to the litigation.

☐ Assess limitations on timing for filing petition.

☐ If the plaintiff is a minor, the appointment must be made before summons is issued [*Code Civ. Proc. § 373(a)*] and should be made before the complaint is filed so that the complaint can allege the appointment of the guardian ad litem.

☐ If the minor, incompetent person, or person for whom a conservator has been appointed is a defendant, the appointment should be made promptly so that a default will not be taken.

☐ Determine remaining facts necessary for drafting petition.

☐ Name and address of minor, incompetent person, or person for whom a conservator has been appointed.

☐ If minor, age of minor.

☐ Names and addresses of:

☐ Parents or general guardians of minor, or

☐ Conservator, if any, of incompetent person.

☐ Name, address, qualifications, and relationship of person proposed to be guardian ad litem.

☐ Determine who will petition to have guardian ad litem appointed, including their name, address, and relationship [for discussion, *see § 291.14*]:

☐ The minor.

☐ A relative or friend.

☐ Another party to the action.

☐ Prepare petition for appointment of guardian ad litem on either:

☐ Cal. Judicial Council Form CIV-010 Application and Order for Appointment of Guardian ad Litem--Civil [for form *see § 291.50*].

☐ Cal. Judicial Council Form DE-350, GC-100 Petition for Appointment of Guardian ad Litem Under the Probate Code [for form, *see § 291.52*] and Cal. Judicial Council Form DE-351, GC-101, order appointing guardian ad litem [for form, *see § 291.51A*].

NOTE:

Approval of Contract for Attorney's Fees. Consider whether to petition simultaneously for approval of contract with attorney [*Fam. Code § 6602*; for discussion, *see § 291.15[5*]; for form, *see 291.52*].

☐ Determine method for filing petition [for discussion, *see § 291.14*].

☐ Ex parte application.

☐ Written notice followed by hearing is required in the case of an incompetent person who refuses to consent to appointment of guardian ad litem.

☐ Oral motion in open court, if circumstances compel it.

☐ File petition, have order executed by judge, file order, and obtain conformed copies of petition and order.

☐ If the minor or incompetent person or person for whom a conservator has been appointed is a defendant, serve copy of petition and order on plaintiff's attorney.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureParties Capacity of PartiesGuardiansCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewFamily LawGuardiansAppointment

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[Reserved]

§§ 291.41[Reserved]

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§ 291.50 Application and Order for Appointment of Guardian ad Litem--Civil [Code Civ. Proc. § 373]--Judicial Council Form CIV-010

[1] FORM Application and Order for Appointment of Guardian ad Litem--Civil [Code Civ. Proc. § 373]--Judicial Council Form CIV-010

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustration of the mandatory Judicial Council form for use in petitioning to have a guardian ad litem appointed in a civil action [Cal. Judicial Council Form CIV-010].

The form must be used in cases in which a minor [*see* 4, *below*] or an incompetent person or person for whom a conservator has been appointed [*see* 5, *below*] is a party.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format is also available at *www.lexisone.com* at no charge.

A supporting memorandum is not required with the application, but an applicant may submit one or the court may order one if it would further the interests of justice [*Cal Rules Ct, Rule 3.1114*].

[3] Caption

The title of the case should be the same as that of the proposed or pending action. Therefore, if a minor, incompetent, or conservatee is a plaintiff, the caption should include the statement that he or she is a plaintiff represented by his or her guardian ad litem. This should be omitted if the minor is a defendant in the action. For alternative forms of caption, see Ch. 108, *Captions and Introductions* .

[4] Minor

[a] Use of Form When Minor Is Party

This form is used to appoint a guardian ad litem for a minor who has either [*see Code Civ. Proc. §§ 372, 373*; *Fam. Code § 6601*]:

- A cause of action which should be brought on his or her behalf, or
- Been served with a summons in a suit which should be defended.

[b] Contents of Application

In **Paragraph 1,** the applicant's name must be entered and the appropriate box checked to state the relationship of the applicant to the minor to show that the applicant is a proper person to apply for appointment of a guardian ad litem for the minor [*see Code Civ. Proc. § 373(a), (b)*].

If the minor has a cause of action to assert as plaintiff and is 14 years of age or older, the minor must apply for the appointment of a guardian ad litem before any summons is issued. If the minor is under 14, a relative or friend must make the application [*Code Civ. Proc. § 373(a)*].

If the minor has been served with a summons and is 14 years of age or older, the minor may apply for appointment of a guardian ad litem within 10 days after the service. If the minor neglects to do so, or if the minor is under 14, a relative or friend of the minor or any other party to the action may make the application. or the court may make the appointment on its own motion [*Code Civ. Proc. § 373(b)*].

Appointment of guardian ad litem for a defendant minor is void if made prior to service of process [*Weisfeld v. Superior Court (1952) 110 Cal. App. 2d 148, 152, 242 P.2d 29]* .

In **Paragraph 2,** the applicant must identify the proposed guardian ad litem.

In **Paragraph 3,** the minor is to be identified, with his or her date of birth entered in **Paragraph 4.a.**

Paragraph 5 states the grounds for appointing a guardian ad litem. If the minor has a cause of action that should be pursued, check box a. and describe the action. If the minor needs to defend an action, check box b. Check box c unless the minor has a guardian of the estate. If the minor has a guardian of the estate, that guardian would have the power to prosecute or defend a civil action for the minor's benefit [*Code Civ. Proc. § 372(a)*; *Prob. Code § 2462*]. Thus, if box c is not checked, check box d and explain why it is necessary to appoint a guardian ad litem. The court may appoint a guardian ad litem whenever it is expedient, even if there is a guardian of the estate [*Code Civ. Proc. § 372(a)*].

Paragraph 6 must explain the relationship of the proposed guardian ad litem to the minor.

Paragraph 7 contains a representation that the proposed guardian is competent to serve as guardian ad litem and has no interests adverse to the minor's interests) [*see Estate of Lacy (1975) 54 Cal. App. 3d 172, 185, 126 Cal. Rptr. 432* (improper to appoint as guardian ad litem a person who has a conflict of interest with the minor)].

In Sacramento County, if the nominee for appointment is a plaintiff in the same action with the minor or was a participant in the transaction or occurrence giving rise to the injury, the petition must be accompanied by a declaration under penalty of perjury setting forth facts establishing that no other parent, relative, or friend can or will accept the appointment of guardian ad litem for the minor in the action; and a declaration under penalty of perjury by the attorney for the nominee stating that the attorney, having investigated the circumstances, has represented to the nominee and represents to the court that there is no conflict of interest between the nominee and the minor if the nominee is

appointed the guardian ad litem [*see* Sacramento Co. Super. Ct. Rules, Rule 10.00].

[5] Incompetent Person or Conservatee

[a] Use of Form When Incompetent Person or Conservatee Is Party

This form is used to appoint a guardian ad litem to prosecute a cause of action for an incompetent person or a person for whom a conservator has been appointed. The appointment should be made before the complaint is filed, and the complaint should contain an allegation that the guardian ad litem has been appointed.

[b] Contents of Application

In **Paragraph 1,** the applicant's name must be entered and the appropriate box checked to state the relationship of the applicant to the incompetent person or conservatee to show that the applicant is a proper person to apply for appointment of a guardian ad litem for the minor [*see Code Civ. Proc. § 373(c)*; *see Olivera v. Grace (1942) 19 Cal. 2d 570, 577, 122 P.2d 564* (duty of plaintiff who knows defendant is incompetent to so inform court)].

In **Paragraph 2,** the applicant must identify the proposed guardian ad litem.

In **Paragraph 3,** the incompetent person or conservatee is to be identified, with his or her status as an incompetent person or conservatee entered in **Paragraph 4.b or 4.c.**

Paragraph 5 states the grounds for appointing a guardian ad litem. If the incompetent person or conservatee has a cause of action that should be pursued, check box a and describe the action. If the incompetent person or conservatee needs to defend an action, check box b. Check box c if the incompetent person or conservatee does not have a conservator of the estate. If the conservatee has a conservator of the estate (as opposed to a conservator of the person), that guardian would have the power to prosecute or defend a civil action for the conservatee's benefit [*Code Civ. Proc. § 372(a)*; *Prob. Code § 2462*]. Thus, if box c is not checked, check box d and explain why it is necessary to appoint a guardian ad litem. The court may appoint a guardian ad litem whenever it is expedient, even if there is a guardian of the estate [*Code Civ. Proc. § 372(a)*]. For example, if the conservator of the estate has a conflict of interest with the conservatee, it would be expedient to appoint a guardian ad litem.

Paragraph 6 must explain the relationship of the proposed guardian ad litem to the incompetent person or conservatee.

Paragraph 7 contains a representation that the proposed guardian is competent to serve as guardian ad litem and has no interests adverse to the interests of the incompetent person or conservatee.

[c] Time of Petition

The petition for appointment of a guardian ad litem for an incompetent orconservatee may be filed at any time prior to the initiation of the action or proceeding or while it is pending [*Code Civ. Proc. § 373(c)*].

[6] Consent of Nominee

The person nominated as guardian ad litem in the application signs the Consent to Act as Guardian ad Litem on page two.

[7] Notice

[a] Appointment by Ex Parte Order

Appointment of a guardian ad litem may be by ex parte order [*Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 12-13, 118 Cal. Rptr. 21, 529 P.2d 53* (incompetent person); *Scott v. Family Ministries (1976) 65 Cal. App. 3d 492, 509, 135 Cal. Rptr. 430* (minor)].

Notice to the incompetent person on whose behalf the application for appointment of guardian ad litem is being made is not necessary [*Briggs v. Briggs (1958) 160 Cal. App. 2d 312, 318, 325 P.2d 219]* .

[b] Declaration Regarding Notice

Cal. Rules of Ct., Rule 3.1200 et seq. requires, as a prerequisite to granting an ex parte application, that it be accompanied by an affidavit or declaration that notice of the application has been given to the other party, that notice could not be given to the other party, or that notice should not be required. For a form of declaration, see Ch. 372, *Motions and Orders* .

[8] Cross References

For a form of petition for approval of a contract for attorney's fees for litigation services on behalf of a minor, see *§ 291.52*

For discussion of and procedure for ex parte applications, see Ch. 372, *Motions and Orders*

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Volume 24: Guardianship and Conservatorship thru Guardians ad Litem-Chs. 280-291
Chapter 291 GUARDIANS AD LITEM
PART V. FORMS

24-291 California Forms of Pleading and Practice--Annotated § 291.51

§ 291.51 Petition for Appointment of Guardian ad Litem Under the Probate Code [Code Civ. Proc. § 373; Prob. Code § 1003]--Judicial Council Form DE-350, GC-100

[1] FORM Petition for Appointment of Guardian ad Litem Under the Probate Code [Code Civ. Proc. § 373; Prob. Code § 1003]--Judicial Council Form DE-350, GC-100

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustration of the mandatory Judicial Council form for use in petitioning to have a guardian ad litem appointed for a minor or incapacitated person under the Probate Code [Cal. Judicial Council Form CIV-010; *see Code Civ. Proc. § 372*; *Prob. Code § 1003*].

The form must be used in cases in which a minor or an incapacitated person requires a guardian ad litem in proceedings under the Probate Code, except for compromise of an action to which a minor or incapacitated person is a party.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format is also available at *www.lexisone.com* at no charge.

A supporting memorandum is not required with the application, but an applicant may submit one or the court may order one if it would further the interests of justice [*Cal Rules Ct, Rule 3.1114*].

[3] Contents of Petition

In **Paragraph 1,** the petitioner's name must be entered and the appropriate box checked to state the relationship of the applicant to the person for whom the guardian ad litem is to be appointed to show that the petitioner is a proper person to apply for the appointment [*see Code Civ. Proc. § 1003(a)*].

In **Paragraph 2,** the petitioner must identify the proposed guardian ad litem.

In **Paragraph 3,** the person whose interests the guardian ad litem is to represent is to be identified, with his or her status checked off in **Paragraph 4.**

Paragraph 5 states that the grounds for appointing a guardian ad litem relate to [*Prob. Code § 1003(a)*]:

- Execution of a disclaimer under *Prob. Code § 277* [for discussion and forms, *see* Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation*].

- Representation of the interests of a spouse alleged to lack legal capacity [*see Prob. Code § 3112, 3140*; for discussion and forms, *see* Ch. 289, *Guardianship and Conservatorship: Management of Community Property*].

- Consent to modification or termination of a trust [*see Prob. Code § 15405*; for discussion and forms, *see* Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts*].

- Approval and settlement of claims against a deceased settlor [*see Prob. Code § 19029*; for discussion and forms, *see* Ch. 454, *Probate: Claims Against the Estate*].

- Representation in a proceeding under the Probate Code of any of theinterest of any of following if the court determines that representation of the interest otherwise would be inadequate:

  - A minor.

  - An incapacitated person.

  - An unborn person.

  - An unascertained person.

  - A person whose identity or address is unknown.

  - A designated class of persons who are not ascertained or are not in being.

- Other reasons the petitioner may present.

[4] Signing and Verification

The petitioner must sign and verify the petition [*Prob. Code § 1021(a)*; *see Prob. Code § 1021(a)* (limited circumstances in which petitioner's attorney may sign or verify petition)]. A verified petition must be received as evidence when offered in any uncontested probate proceeding [*see Prob. Code § 1022*].

[5] Cross References

For the corresponding order appointing a guardian ad litem, see *§ 291.51A*

For a discussion and forms relating to probate proceedings, Ch. 280, *Guardianship and Conservatorship: Appointment of Guardian*, through Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships;* Ch. 441, *Probate: Procedure*, and Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts*

For discussion of and procedure for ex parte applications, see Ch. 372, *Motions and Orders*

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24-291 California Forms of Pleading and Practice--Annotated § 291.51A

§ 291.51A Order Appointing Guardian Ad Litem--Judicial Council Form DE-351, GC-101

[1] FORM Order Appointing Guardian Ad Litem--Judicial Council Form DE-351, GC-101

Click here to view image.

[2] Use of Form

The form of order in [1], *above*, is an illustration of Judicial Council Form DE-351, GC-101 and is the mandatory form to be used by the party who has requested and been granted an appointment of a guardian ad litem [*see Prob. Code § 1003*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Cross References

For an illustration of the petition for appointment of a guardian ad litem, see *§ 291.51*

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24-291 California Forms of Pleading and Practice--Annotated § 291.52

§ 291.52 Petition for Approval of Contract With Attorney [Fam. Code § 6602]--By Parent or Friend

[1] FORM Petition for Approval of Contract With Attorney [Fam. Code § 6602]--By Parent or Friend

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
a Minor, by _____ [*name*],	)	
his/her Guardian ad Litem,	)	
Plaintiff,	)	No _____
vs.	)	EX PARTE PETITION FOR APPROVAL OF CON-
_____ [*name(s)*],	)	TRACT _____ [BY *or* ON BE-
Defendant(s).	)	HALF OF] MINOR FOR ATTORNEY'S FEES AND
	)	SUPPORTING DECLARATION OF
	)	_____ [*name*]

_____

Petitioner _____[*name*] respectfully represents:

1.Petitioner is _____ [*specify relationship to minor, e.g.*, a parent *or* a friend] of _____[*name*], a minor.

2.The minor was born on _____[*date*], and is _____ years of age.

[*EITHER, if minor is plaintiff*]

3.The minor has a cause of action against the above-named defendant(s) on which a suit should be brought. The cause of action arises out of _____ [*specify facts giving rise to cause of action, e.g.*, an automobile collision

occurring on or about _____ (*date*), at or near the intersection of _____ (*specify*) in _____ (*city*), California, in which an automobile driven by defendant _____ (*name*) and owned by defendant _____ (*name*) negligently collided with the rear of an automobile in which the minor was riding, causing the minor injuries and damages].

[*OR if minor is defendant*]

3.The minor has been served with summons as a defendant in the above-entitled action alleging that _____ [*specify facts alleged against minor, e.g.*, the minor caused an automobile collision occurring on or about _____ (*date*), causing the plaitniff injuries and damages].

[*CONTINUE*]

4.Petitioner has contracted, subject to the approval of this court, with _____ [*name* (*s*)], attorney(s) at law with an office at _____[*street address*], _____[*city*], California, to _____ [defend *or* prosecute the cause of action for] the minor under anagreement whereby _____ [*name* (*s*) *of attorney* (*s*)] is/are to be paid _____ [*specify terms of fee agreement, e.g.*, a fee of $_____ per hour *or* a contingent fee of _____ (*specify percent or, if variable with amount of work, various percentages*). A copy of the agreement is attached as Exhibit A and made a part hereof.

WHEREFORE, petitioner prays that the above-described agreement for attorney's fees be approved], and for such other and further relief as the court may deem proper.

_____ [*signature*]
Petitioner
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein represented on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form of petition in [1], *above*, is for use in petitioning for approval of a contract for attorney's fees when the contract was made by or on behalf of a minor for litigation services [*see Fam. Code § 6602*].

The petition may be made by any interested person [*see Fam. Code § 6602*].

The petition is directed to the court in which the litigation is pending or to the court having jurisdiction of the guardianship of the minor's estate [*see Fam. Code § 6602*].

The contract is void unless the court approves it. If the contract is not approved, and judgment is recovered on the minor's behalf, the court rendering the judgment will set the attorney's fees chargeable against the minor [*see Fam. Code § 6602*].

Local court rules are likely to provide guidelines for the amount that will be approved [*see, e.g.*, Orange Co. Super. Ct. Rules, Rule 368; Sacramento Co. Super. Ct. Rules, Rule 10.02].

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
Chapter 292 HABEAS CORPUS

25-292 California Forms of Pleading and Practice--Annotated 292.syn

§ 292.syn Synopsis to Chapter 292: HABEAS CORPUS

§ 292.01 Scope of Chapter

§ 292.02 Cross References

§§ 292.03-292.09 [Reserved]

§ 292.10 Governing Law

§ 292.11 Availability of Writ

§ 292.12 Proper Court

§ 292.13 Petition

[1] Purpose

[2] Contents of Petition

[3] Action on Petition; Time Limit

[4] Request for Informal Response

[5] Criteria for Appellate Court Grant or Denial of Petition

[6] Statement of Reasons for Denial of Petition

§ 292.14 Issuance and Service of Writ

§ 292.15 Issuance of Order to Show Cause

§ 292.16 Issuance of Warrant

§ 292.17 Return

[1] When Required

[2] Contents of Return

[a] Statutory Requirements

[b] Judicial Requirement of Specificity

[i] General Rules

[ii] Exception When Information Unavailable to Respondent

§ 292.18 Traverse or Denial

[1] Contents

[2] Time Limit for Filing Denial

§ 292.19 Hearing

[1] In General

[2] Appointment of Referee by Appellate Court

§ 292.20 Writ or Order to Show Cause Made Returnable Before Lower Court

§ 292.21 Custody of Petitioner

§ 292.22 Discharge or Remand

§ 292.23 Extension or Shortening of Time Limits

§ 292.24 Appeal or Reapplication

§ 292.25 Child Custody

[1] Enforcing Right to Custody

[2] Enforcing Previous Court Order

[3] Illegitimate Children

§ 292.26 Mental Patients

[1] Right to Petition

[2] Order to Show Cause

[3] Rights in Confinement

§ 292.27 Other Uses of Writ

§§ 292.28-292.39 [Reserved]

§ 292.40 California Criminal Defense Practice

§ 292.41 California Points and Authorities

§ 292.42 Federal Constitution

§ 292.43 State Constitution

§ 292.44 State Statutes

[1] Writ Procedures

[a] Petition

[b] Writ

[c] Subsequent Pleadings

[d] Hearing

[e] Disposition of Person Detained

[f] Appeal

[g] Warrant Procedures

[h] Penalties for Disobedience of Writ

[2] Uses of the Writ

[a] Child Custody

[b] Mentally Disordered Persons

[c] Mentally Retarded Persons

§ 292.45 California Rules of Court

§ 292.46 Decisions

[1] Appeal and Reapplication

[2] Child Custody

[a] Determination of Right to Custody

[b] Right of Parent

[c] Enforcement of Court Order

[3] Exhaustion of Remedies

[4] Insane Persons

[a] Release

[b] Conditions of Confinement

[5] Procedure

[a] Pleadings

[b] Proper Court

[c] Orders and Hearing

[6] Release From State Hospital

§ 292.47 Law Reviews

§ 292.48 Text References

§§ 292.49-292.59 [Reserved]

§ 292.60 Petitioner's Checklist

[1] Facts to Be Ascertained

[2] Preliminary Determinations

[3] Essential Allegations of the Petition

[4] Preparation of Petition and Supporting Documents

[5] Issuance of Writ or of Order to Show Cause

[6] Issuance of Warrant in Lieu of Writ or Order to Show Cause

[7] Receipt of Return to Writ by Petitioner

[8] Traverse

[9] Hearing

§ 292.61 Respondent's Checklist

[1] Facts to Be Ascertained

[2] Essential Allegations of the Return

[3] Draft and Prepare Return

[4] Hearing

§§ 292.62-292.79 [Reserved]

§ 292.80 Petition for Writ of Habeas Corpus [Penal Code § 1474]--General Form--Superior Court

[1] FORM

[2] Use of Form

[3] Allegations

[4] Points and Authorities

[5] Signing and Verification

[6] Copies

[7] Service

[8] Endorsement

[9] Jurisdiction and Venue

[10] Prayer

[11] Time Limit for Acting on Petition

[12] California Criminal Defense Practice

[13] State Constitution

[14] State Statutes

[15] California Rules of Court

[16] Decisions

[17] Text References

[18] Cross References

§ 292.81 Petition for Writ of Habeas Corpus--Release From or Modification of Institutional Custody Imposed Under Process of State Court--Cal. Judicial Council Form MC-275

[1] FORM

[2] Use of Form

[3] Prayer

[4] Supporting Memorandum

[5] Signing and Verification by Petitioner

[6] California Criminal Defense Practice

[7] State Statutes

[8] California Rules of Court

[9] Decisions

[10] Cross Reference

§ 292.82 Petition for Writ of Habeas Corpus--Release From or Modification of Institutional Custody Imposed Under Process of State Court--Petition Submitted by Attorney or by Leave of Court

[1] FORM

[2] Use of Form

[3] Institutional Confinement Under State Court Process

[a] Petition Submitted on Other Than Judicial Council Form

[b] Filing of Non-Conforming Petition on Good Cause

[4] Allegations

[5] Supporting Memorandum

[6] Signing and Verification

[7] Cross Reference

§ 292.83 Captions and Allegations--Petition for Writ of Habeas Corpus--Court of Appeal

[1] FORM

[2] Use of Form

[3] Allegations

[4] Copies

[5] Format

[6] State Constitution

[7] State Statutes

[8] California Rules of Court

[9] Decisions

[10] Cross References

§ 292.84 Captions and Allegations--Petition for Writ of Habeas Corpus--Supreme Court

[1] FORM

[2] Use of Form

[3] Allegations

[4] Copies

[5] Format

[6] Cross Reference

§ 292.85 Petition for Writ of Habeas Corpus [Penal Code § 1474]--To Enforce Child Custody Order

[1] FORM

[2] Use of Form

[3] Allegations

[4] Points and Authorities

[5] Decisions

[6] Cross References

§ 292.86 Petition for Writ of Habeas Corpus [Penal Code § 1474]--To Recover Custody of Minor Child From Party Not Entitled to Custody

[1] FORM

[2] Use of Form

[3] Decisions

[a] Custody

[b] Procedure

[4] Cross Reference

§ 292.87 Order Granting Writ of Habeas Corpus [Penal Code § 1476]--General Form

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Text References

[5] Cross Reference

§ 292.88 Writ of Habeas Corpus [Penal Code § 1477]--General Form

[1] FORM

[2] Use of Form

[3] Service

[4] Formal Defects in Writ

[5] State Statutes

[6] Decisions

[7] Cross Reference

§ 292.89 Order to Show Cause--Habeas Corpus Proceeding--General Form

[1] FORM

[2] Use of Form

[3] California Rules of Court

[4] Decisions

[5] Cross Reference

§ 292.90 Proceedings for Warrant in Lieu of Writ of Habeas Corpus [Penal Code § 1497]--Petition--General Form

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross Reference

§ 292.91 Proceedings for Warrant in Lieu of Writ of Habeas Corpus [Penal Code § 1497]--Order That Warrant Issue

[1] FORM

[2] Use of Form

§ 292.92 Proceedings for Warrant in Lieu of Writ of Habeas Corpus [Penal Code § 1497]--Warrant

[1] FORM

[2] Use of Form

[3] Execution

[4] Return and Hearing

[5] State Statutes

[6] Cross Reference

§ 292.93 Return--Either to Writ of Habeas Corpus [Penal Code § 14 80]--Or to Order to Show Cause--Or to Warrant in Lieu of Writ [Penal Code § 1500]--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Signature and Verification

[5] Accompanying Documents; Points and Authorities

[6] State Statutes

[7] California Rules of Court

[8] Decisions

[9] Cross Reference

§ 292.94 Allegation--Return to Writ of Habeas Corpus [Penal Code § 1480]--Custody of Child

[1] FORM

[2] Use of Form

[3] Points and Authorities and Declarations

[4] State Statutes

[5] Decisions

[6] Text References

[7] Cross Reference

§ 292.95 Traverse to Return to Writ of Habeas Corpus [Penal Code § 1484]--General Form

[1] FORM

[2] Use of Form

[3] Petition Treated as Traverse

[4] Traverse as Answer

[5] Traverse as Demurrer

[6] Time Limit for Filing Traverse to Return

[7] Verification

[8] Points and Authorities and Other Documents

[9] State Statutes

[10] California Rules of Court

[11] Decisions

[12] Cross Reference

§ 292.96 Declaration [Code Civ. Proc. § 2015.5] of Attorney for Order of Attachment [Penal Code § 1479]--Proceedings on Disobedience of Writ of Habeas Corpus

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

§ 292.97 Order That Warrant of Attachment Issue--Proceedings on Disobedience of Writ of Habeas Corpus [Penal Code § 1479]

[1] FORM

[2] Use of Form

[3] Cross Reference

§ 292.98 Warrant of Attachment [Penal Code § 1479]--Proceedings on Disobedience of Writ of Habeas Corpus

[1] FORM

[2] Use of Form

[3] Cross Reference

§ 292.99 Complaint for Damages for Disobedience of Writ of Habeas Corpus [Penal Code § 1505]

[1] FORM

[2] Use of Form

[3] Jurisdiction and Venue

[4] Statute of Limitations

[5] Verification

[6] Cross References

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Chapter 292 HABEAS CORPUS
PART I. SCOPE

25-292 California Forms of Pleading and Practice--Annotated § 292.01

§ 292.01 Scope of Chapter

This chapter discusses and contains forms for use in civil proceedings on the writ of habeas corpus. It includes forms of petition and allegations for the writ of habeas corpus and appropriate captions for use in the court of appeal and Supreme Court [*see* §§ 292.80-292.86], an order granting the writ of habeas corpus [*see § 292.87*], a form of writ of habeas corpus [*see § 292.88*], an order to show cause why the writ of habeas corpus should not issue [*see § 292.89*], forms for proceedings for a warrant in lieu of the writ of habeas corpus [*see* §§ 292.90-292.92], a form and allegations for the return to the writ of habeas corpus [*see §§ 292.93, 292.94*], a form of traverse to the return [*see § 292.95*], forms for proceedings on disobedience of the writ of habeas corpus [*see* §§ 292.96-292.98], and a complaint for damages for disobedience of the writ of habeas corpus [*see § 292.99*].

This chapter discusses and contains forms relating only to the civil uses of the writ of habeas corpus such as use of the writ to regain custody of a child or to test a civil commitment. It does not cover the ways in which the writ may be used in connection with criminal proceedings and with custody in prisons and jails. For a discussion of uses of the writ of habeas corpus by criminal defendants, see Erwin, Millman, Monroe, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 102 (Matthew Bender).

This chapter also does not discuss the use of habeas corpus to review contempt proceedings. For a discussion and forms pertaining to that use of habeas corpus, see Ch. 135, *Contempt* .

The Judicial Council has approved a general petition for writ of habeas corpus, Cal. Judicial Council Form MC-275, Petition for Writ of Habeas Corpus, which is set out and discussed in *§ 292.81*. The Judicial Council has also approved two additional forms of petition for writ of habeas corpus for use in proceedings relating to mental health commitments: Cal. Judicial Council Form MC-265, Petition for Writ of Habeas Corpus--LPS Act (Mental Health), and Cal. Judicial Council Form MC-270, Petition for Writ of Habeas Corpus--Penal Commitment (Mental Health) [*see Cal. Rules of Ct., Rule 1.35*; *see also* Cal. Rules of Ct., Appen. A]. For further discussion and an illustrative copy of Cal. Judicial Council Form MC-265, See Ch. 304, *Insane and Other Incompetent Persons* . This form and other California Judicial Council Forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyEnforcementHabeas Corpus ReliefFamily LawChild CustodyVisitationEnforcementHabeas Corpus ReliefImmigration LawJudicial ReviewHabeas CorpusGeneral OverviewPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentGeneral Overview

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§ 292.02 Cross References

For discussion and forms relating to relief by writ of habeas corpus from judgments and orders of contempt, see Ch. 135, *Contempt* .

For discussion of the law and procedures relating to the detention of mental patients and incompetent persons, see Ch. 304, *Insane and Other Incompetent Persons* .

For discussion and forms relating to custody of children, see Ch. 394, *Parent and Child* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptCivil ContemptFamily LawChild CustodyGeneral OverviewPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentGeneral Overview

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[Reserved]

§§ 292.03[Reserved]

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§ 292.10 Governing Law

The writ of habeas corpus generally is governed by *Cal. Const., art. I, § 11, art. VI, § 10* and by *Penal Code §§ 1473-1508*. Certain acts in disobedience of the writ are misdemeanors under *Penal Code §§ 362-364*. Procedural rules governing habeas corpus proceedings are set forth in *Cal. Rules of Ct., Rules 4.550-4.552*.

Use of the writ by persons being held in mental hospitals is governed by *Welf. & Inst. Code §§ 5275-5277*, and use of the writ by persons committed to institutions as developmentally disabled (mentally retarded) persons is governed by *Welf. & Inst. Code §§ 4800-4804*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawCongressional Duties & PowersSuspension ClauseCriminal Law & ProcedureHabeas CorpusProcedureGeneral OverviewPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentGeneral Overview

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§ 292.11 Availability of Writ

Every person unlawfully imprisoned or restrained of his or her liberty may seek a writ of habeas corpus to inquire into the cause of the imprisonment or restraint [*Penal Code § 1473(a)*]. The function of the writ is to provide a speedy method of inquiring into the legality of an alleged unlawful restraint, but its availability does not depend on actual physical detention of the petitioner [*In re Petersen (1958) 51 Cal. 2d 177, 181, 331 P.2d 24]* . The writ is available to test the constitutionality of the legislation under which the petitioner is confined [*In re Harris (1968) 69 Cal. 2d 486, 488 72 Cal. Rptr. 340, 446 P.2d 148]* . Additionally, a person lawfully in custody is entitled to a writ of habeas corpus to vindicate the rights to which he or she is entitled even in confinement [*In re Allison (1967) 66 Cal. 2d 282, 285, 57 Cal. Rptr. 593, 425 P.2d 193 , cert. denied, 389 U.S. 876, 88 S. Ct. 172, 19 L. Ed. 2d 163]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureHabeas CorpusCustody RequirementIn-Custody Requirement

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§ 292.12 Proper Court

The Supreme Court, courts of appeal, and superior courts have original jurisdiction in habeas corpus proceedings [*Cal. Const., Art VI, § 10*; *see In re Elias (1962) 209 Cal. App. 2d 262, 264, 25 Cal. Rptr. 739]* . However, an appellate court has discretion to refuse to issue a writ of habeas corpus when application has not been made therefor in a lower court in the first instance [*In re Hillery (1962) 202 Cal. App. 2d 293, 294, 20 Cal. Rptr. 759]* . In general, habeas corpus proceedings should be tried first in superior court rather than in an appellate court when there are factual issues to be resolved [*see In re Richard M. (1975) 14 Cal. 3d 783, 789, 122 Cal. Rptr. 531, 537 P.2d 363* ; *In re Wren (1957) 48 Cal. 2d 159, 165, 308 P.2d 329* ; *In re Elias (1962) 209 Cal. App. 2d 262, 264, 25 Cal. Rptr. 739* ; *In re Hillery (1962) 202 Cal. App. 2d 293, 294, 20 Cal. Rptr. 759]* . An appellate court may also, in lieu of declining to issue the writ, issue a writ or order to show cause that is returnable before the superior court [*Penal Code § 1508(a), (b)*; *In re Hochberg (1970) 2 Cal. 3d 870, 873-874, 87 Cal. Rptr. 681, 471 P.2d 1* ; *see § 292.20*].

A habeas corpus petition filed in superior court generally must be heard and resolved in the court in which it is filed [*Cal. Rules of Ct., Rule 4.552(a)*; *see Cal. Rules of Ct., Rule 4.552(d)* (petition filed in superior court must be decided by single judge and must not be considered by appellate division of superior court)]. However, the superior court in which the petition is filed must determine, based on the allegations of the petition, whether the matter should be heard by it or in the superior court of another county [*Cal. Rules of Ct., Rule 4.552(b)(1)*]. If the court determines that the matter may be more properly heard by the superior court of another county, it may nonetheless retain jurisdiction in the matter; or it may, without first determining whether a prima facie case for relief exists, order the matter transferred to the other county [*Cal. Rules of Ct., Rule 4.552(b)(2)*]. A transfer may be ordered in the following circumstances [*Cal. Rules of Ct., Rule 4.552(b)(2)*]:

> (1) If the petition challenges the terms of a judgment, the matter may be transferred to the county in which judgment was rendered. However, transfer is mandatory if the petition challenges the denial of parole or the petitioner's suitability for parole and is filed in a superior court other than the court that rendered the underlying judgment. In such a case the court must transfer the matter before determining whether the petition states a prima facie case for relief, and the court must specify in the order of transfer the reason for the transfer [*Cal. Rules of Ct., Rule 4.552(c)*; *see In re Roberts (2005) 36 Cal. 4th 575, 586-593, 31 Cal. Rptr. 3d 458, 115 P.3d 1121]* .

(2) If the petition challenges the conditions of an inmate's confinement, it may be transferred to the county in which the petitioner is confined [*see Cal. Rules of Ct., Rule 4.552(b)(2)(B)* (change in institution of confinement that effects change in conditions of confinement may constitute good cause to deny petition)].

The transferring court must specify in the order of transfer the reason for the transfer [*Cal. Rules of Ct., Rule 4.552(b)(3)*]. If the receiving court determines that the reason for the transfer is inapplicable, the receiving court must, within 30 days after receiving the case, order the case returned to the transferring court, which must then resolve the matter [*Cal. Rules of Ct., Rule 4.552(b)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewConstitutional LawThe JudiciaryJurisdictionGeneral OverviewCriminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionJurisdiction

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§ 292.13 Petition

[1] Purpose

Application for the writ is made by petition signed and verified either by the party for whose relief it is intended or by some person in his or her behalf [*Penal Code § 1474*]. The function of the petition is to obtain issuance of the writ [*In re Egan (1944) 24 Cal. 2d 323, 330, 149 P.2d 693 , cert. denied, 323 U.S. 785]* .

[2] Contents of Petition

The petition must state that the person in whose behalf the writ is applied for is imprisoned or otherwise restrained in his or her liberty. It must also specify the officer or person by whom he or she is confined or restrained and the place of confinement [*see Penal Code § 1474(1)*]. If the imprisonment is alleged to be illegal, the petition must also state the nature of the alleged illegality [*see Penal Code § 1474(2)*].

The petition should do both of the following [*People v. Duvall (1995) 9 Cal. 4th 464, 474, 37 Cal. Rptr. 2d 259, 886 P.2d 1252]* :

- State fully and with particularity the facts on which relief is sought [*People v. Karis (1988) 46 Cal. 3d 612, 656, 250 Cal. Rptr. 659, 758 P.2d 1189]* .

- Include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations [*In re Harris (1993) 5 Cal. 4th 813, 827 n.5, 21 Cal. Rptr. 2d 373, 855 P.2d 391* ; *In re Clark (1993) 5 Cal. 4th 750, 781 n.16, 21 Cal. Rptr. 2d 509, 855 P.2d 729]* .

Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, nor will they support the holding of an evidentiary hearing on the pleading [*People v. Karis (1988) 46 Cal. 3d 612, 656, 250 Cal. Rptr. 659, 758 P.2d 1189* ; *see People v. Duvall (1995) 9 Cal. 4th 464, 474, 37 Cal. Rptr. 2d 259, 886 P.2d 1252]* .

Special requirements apply when the petition is filed by an attorney. For example, the petition need not be on the

official form (Judicial Council Form MC-275; *see § 292.81*), but it must be typewritten or produced on a computer, and it must contain the information requested in that form and must comply with *Cal. Rules of Ct., Rule 8.40(b),(c)* (cover requirements), and *Cal. Rules of Ct., Rule 8.204(a), (b)* (contents and form of briefs) [*Cal. Rules of Ct., Rule 8.384(a)(1)*]. Any memorandum accompanying the petition must comply with *Cal. Rules of Ct., Rule 8.204(a), (b)* [*Cal. Rules of Ct., Rule 8.384(a)(2)*]. Except in habeas corpus proceedings related to sentences of death, any memorandum must also comply with the length limits in *Cal. Rules of Ct., Rule 8.204(c)* [*Cal. Rules of Ct., Rule 8.384(a)(2)*]. The petition must be accompanied by a copy of any petition, excluding exhibits, pertaining to the same judgment and petitioner that was previously filed in any state court or any federal court; however, if such documents have previously been filed in the same court of appeal as the present petition, or in the Supreme Court, and the petition so states and identifies the documents by case name and number, copies of those documents need not be included in the supporting documents [*Cal. Rules of Ct., Rule 8.384(b)(1)*]. If the petition asserts a claim that was the subject of an evidentiary hearing, the petition must be accompanied by a certified transcript of that hearing [*Cal. Rules of Ct., Rule 8.384(b)(2)*]. Any supporting documents accompanying the petition must comply with *Cal. Rules of Ct., Rule 8.486(c)(1), (2)* [*Cal. Rules of Ct., Rule 8.384(b)(3)*]. The petition and any accompanying memorandum must support any reference to a matter in the supporting documents by a citation to its index tab and page [*Cal. Rules of Ct., Rule 8.384(a)(3)*]. The attorney must file the number of copies of the petition and supporting documents required by *Cal. Rules of Ct., Rule 8.44(b)* [*Cal. Rules of Ct., Rule 8.384(c)*]. Finally, if the attorney's petition fails to comply with any of the foregoing requirements, the clerk must file the petition, but the court may notify the attorney that it may strike the petition or impose a lesser sanction if the petition is not brought into compliance within a stated reasonable time of not less than five days [*Cal. Rules of Ct., Rule 8.384(d)*].

For forms of petitions, see *§ 292.80 et seq.*

[3] Action on Petition; Time Limit

Any court or judge authorized to grant the writ must grant the writ without delay if it appears that the writ should be issued [*Penal Code § 1476*]. In some cases, however, the court may issue an order to show cause why the writ should not be issued [*see § 292.15*], request an informal response to the petition [*see § 292.13[4]*], or issue a warrant [*see § 292.16*], instead of the writ itself.

On the filing of a petition for a writ of habeas corpus in the superior court, the clerk of the court must immediately deliver the petition to the presiding judge or his or her designee [*Cal. Rules of Ct., Rule 4.551(a)(3)(A)*]. The court must rule on the petition within 60 days after the petition is filed, either by issuing an order to show cause, denying the petition, or requesting an informal response [*Cal. Rules of Ct., Rule 4.551(a)(3)(A), (a)(4)*].

If the court fails to rule on the petition within 60 days of its filing, the petitioner may file a notice and request for a ruling [*Cal. Rules of Ct., Rule 4.551(a)(3)(B)*]. The petitioner's notice and request for a ruling must include a declaration stating the date the petition was filed and the date of the notice and request for ruling, and indicating that the petitioner has not received a ruling on the petition. A copy of the original petition must be attached to the notice and request for ruling [*Cal. Rules of Ct., Rule 4.551(a)(3)(B)(i)*]. If the presiding judge or his or her designee determines that the notice is complete and the court has failed to rule, the presiding judge, or his or her designee, must assign the petition to a judge and calendar the matter for a decision without appearances within 30 days of the filing of the notice and request for ruling. If the judge assigned by the presiding judge rules on the petition prior to the date the petition is calendared for decision, the matter may be taken off calendar [*Cal. Rules of Ct., Rule 4.551(a)(3)(B)(ii)*].

A petition for a writ of habeas corpus filed in the superior court must be decided by a single judge; it must not be considered by the appellate division of the superior court [*Cal. Rules of Ct., Rule 4.552(d)*].

[4] Request for Informal Response

Before passing on a petition for habeas corpus, a superior court may request an informal response from the respondent or real party in interest. The court may also request an informal response from the custodian of any record pertaining to the petitioner's case, directing the custodian to produce the record or a certified copy to be filed with the clerk of the court. A copy of the request must be sent to the petitioner [*Cal. Rules of Ct., Rule 4.551(b)(1), (2)*].

The informal response, if any, must be served on the petitioner by the party of whom the request is made. The informal response must be in writing and must be served and filed within 15 days. If the informal response consists of records or copies of records, a copy of every record and document furnished to the court must be furnished to the petitioner [*Cal. Rules of Ct., Rule 4.551(b)(2)*].

If any informal response is filed, the court must notify the petitioner that he or she may reply to the informal response within 15 days from the date of service of the response upon the petitioner [*Cal. Rules of Ct., Rule 4.551(b)(2)*]. The court may not deny the petition until the petitioner has filed a timely reply to the informal response or the 15-day reply period has expired [*Cal. Rules of Ct., Rule 4.551(b)(3)*]. Within 45 days after receipt of the informal response, the court must issue an order to show cause or deny the petition [*Cal. Rules of Ct., Rule 4.551(a)(5)*].

[5] Criteria for Appellate Court Grant or Denial of Petition

If the petition is presented to an appellate court, the court evaluates the petition by asking whether, assuming the petition's factual allegations were true, the petitioner would be entitled to relief [*People v. Duvall (1995) 9 Cal. 4th 464, 474-475, 37 Cal. Rptr. 2d 259, 886 P.2d 1252* ; *In re Clark (1993) 5 Cal. 4th 750, 769 n.9, 21 Cal. Rptr. 2d 509, 855 P.2d 729]* . If no prima facie case is stated, the court will summarily deny the petition. If the court finds that the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an order to show cause [*People v. Duvall (1995) 9 Cal. 4th 464, 475, 37 Cal. Rptr. 2d 259, 886 P.2d 1252* ; *In re Clark (1993) 5 Cal. 4th 750, 781 n.16, 21 Cal. Rptr. 2d 509, 855 P.2d 729]* , which requires the custodian of the confined person to file a return [*see § 292.17[1]*].

[6] Statement of Reasons for Denial of Petition

Any superior court order denying a petition for a writ of habeas corpus must contain a brief statement of the reasons for the denial. An order only declaring the petition to be "denied" is insufficient [*Cal. Rules of Ct., Rule 4.551(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionPleadingsCriminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionTime LimitationsFiling DateCriminal Law & ProcedureHabeas CorpusReviewStandards of ReviewGeneral Overview

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§ 292.14 Issuance and Service of Writ

The court or judge must endorse on the petition the hour and date of its presentation and the hour and date of the granting or denial of the writ [*Penal Code § 1476*]. If the writ is issued, it may be issued and served on any day, at any time [*Penal Code § 1502*] and must be issued by the clerk of the court, sealed with the seal of the court [*Penal Code § 1503*]. The writ must be directed to the person having custody of the person on whose behalf the application for the writ was made and must command him or her to have the body of the person before the court or judge before whom the writ is returnable at the time and place specified in the writ [*Penal Code § 1477*].

The writ must be served forthwith [*Penal Code § 1503*], and it may be served on any day or at any time [*Penal Code § 1502*] in accordance with procedures for service found in *Penal Code § 1478*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionGeneral Overview

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§ 292.15 Issuance of Order to Show Cause

Although it is not expressly provided for by statute, the Supreme Court and the courts of appeal have developed the practice of ordering the custodian to show cause why the relief sought should not be granted. This practice has developed because, although the Supreme Court and appellate courts exercise original habeas corpus jurisdiction, appellate courts are not equipped to have prisoners brought before them and to conduct testimonial hearings on disputed issues of fact. Many issues cognizable on habeas corpus can be resolved on the basis of documentary evidence or stipulated facts without bringing the body of the petitioner before the court [*In re Hochberg (1970) 2 Cal. 3d 870, 873-874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1]* . Thus, the order to show cause has developed as an appropriate means by which to initiate a hearing and disposition of a petition on behalf of a person in custody without bringing the petitioner before the court [*In re Lawler (1979) 23 Cal. 3d 190, 194, 151 Cal. Rptr. 833, 588 P.2d 1257]* .

The order to show cause will be issued when it initially appears from the allegations of the petition and from any matter of record pertaining to the case that the petitioner is entitled to relief [*see Cal. Rules of Ct., Rule 8.385(d)*; *People v. Duvall (1995) 9 Cal. 4th 464, 475, 37 Cal. Rptr. 2d 259, 886 P.2d 1252* ; *In re Hochberg (1970) 2 Cal. 3d 870, 874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1]* .

The California Rules of Court prescribe a similar procedure for habeas corpus petitions in superior court [*Cal. Rules of Ct., Rule 4.551(c)*; *see Inre Hochberg (1970) 2 Cal. 3d 870, 873-874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1* (even before adoption of *Cal. Rules of Ct., Rule 4.551(c)*, many superior courts, especially in counties where there are large state prisons and therefore many habeas corpus filings, had developed practice of issuing orders to show cause); *see also People v. Duvall (1995) 9 Cal. 4th 464, 475, 37 Cal. Rptr. 2d 259, 886 P.2d 1252]* . In such a case, the superior court must issue an order to show cause if the petitioner has made a prima facie showing that he or she is entitled to relief [*Cal. Rules of Ct., Rule 4.551(c)(1)*; *see Cal. Rules of Ct., Rule 4.550(b)(2)*]. To determine whether the petitioner has made a prima facie showing, the court takes the petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if those factual allegations were proved. If so, the court must issue an order to show cause [*Cal. Rules of Ct., Rule 4.551(c)(1)*].

On issuing an order to show cause, the court must appoint counsel for any unrepresented petitioner who desires but cannot afford counsel [*Cal. Rules of Ct., Rule 4.551(c)(2)*]. The Rules of Court specify that, although an order to show

cause may be referred to as "granting the writ," it does not grant the relief sought in the petition. Rather, an order to show cause is simply a determination that the petitioner has made a showing that he or she may be entitled to relief, and an order directing the respondent to file a return [*Cal. Rules of Ct., Rules 4.550(b)(2), 4.551(c)(3); see Cal. Rules of Ct., Rule 4.550(b)(6)* (order granting or denying relief sought by petitioner is called "order on writ of habeas corpus")].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureHabeas CorpusEvidentiary HearingsGeneral OverviewCriminal Law & ProcedureHabeas CorpusProcedureGeneral Overview

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§ 292.16 Issuance of Warrant

When it appears to the court or judge authorized by law to issue the writ that anyone is illegally held in custody, confinement, or restraint, and that there is reason to believe that the person will be carried out of the jurisdiction of the court or judge before whom the application is made or that the person will suffer some irreparable injury before compliance with a writ of habeas corpus can be enforced, the court or judge may cause a warrant to be issued, reciting the facts and directed to any peace officer, commanding the peace officer to take the person held into custody, confinement, or restraint, and bring him or her immediately before the court or judge to be dealt with according to law [*Penal Code § 1497*]. The court or judge may also insert in the warrant a command for the apprehension of the person charged with the illegal detention and restraint [*Penal Code § 1498*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureAccusatory InstrumentsWarrantsGeneral OverviewCriminal Law & ProcedureHabeas CorpusProcedureGeneral Overview

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§ 292.17 Return

[1] When Required

If the court issues a writ of habeas corpus, an order to show cause, or a warrant, the custodian of the confined person files a responsive pleading called a return [*see Penal Code §§ 1480, 1500, 1503*; *Cal. Rules of Ct., Rule 4.550(b)(3)* ("return" is respondent's statement of reasons that court should not grant relief requested by petitioner); *People v. Duvall (1995) 9 Cal. 4th 464, 475, 37 Cal. Rptr. 2d 259, 886 P.2d 1252* ; *In re Hochberg (1970) 2 Cal. 3d 870, 873-874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1]* . For forms of returns, see *§ 292.93* and *292.94*.

The Penal Code provides that the return must be made "forthwith, unless the court or judge shall specify a particular time for any such return" [*Penal Code § 1503*]. The writ or order to show cause will generally specify the time within which the written return must be filed.

In superior court, the respondent may file a return within 30 days after the court issues an order to show cause. The return must be served on the petitioner [*Cal. Rules of Ct., Rule 4.551(d)*].

[2] Contents of Return

[a] Statutory Requirements

The Penal Code provides that the person on whom the writ is served must state the following, plainly and unequivocally, in his or her return:

- Whether or not he or she has the party in his or her custody, or under his or her power or restraint [*Penal Code § 1480(1)*].

- If he or she has the party in his or her custody or power, or under his or her restraint, the authority and cause of the imprisonment or restraint [*Penal Code § 1480(2)*].

- If the person on whom the writ is served had the party in his or her power or custody, or under

> restraint, at any time before or after the date of the writ, but has transferred custody or restraint to another person, the name of the person to whom custody or restraint was transferred to, the time and place of the transfer, and the cause and authority for the transfer [*Penal Code § 1480(4)*].

If the person is detained by authority of any writ, warrant, or other written authority, a copy of that written authority must be attached to the return, and the original must be produced and exhibited to the court or judge at the hearing of the return [*Penal Code § 1480(3)*]. The return must be signed by the person making the return and, unless made by a sworn public officer acting in his or her official capacity, must be verified under oath [*Penal Code § 1480(5)*].

[b] Judicial Requirement of Specificity

[i] General Rules

Because of the importance of the return in defining the factual issues that the court must determine, the courts have required more of the return than just compliance with the literal requirements of *Penal Code § 1480*. Thus, the courts have held that the return must allege facts tending to establish the legality of the petitioner's detention [*People v. Duvall (1995) 9 Cal. 4th 464, 476, 37 Cal. Rptr. 2d 259, 886 P.2d 1252* ; *In re Saunders (1970) 2 Cal. 3d 1033, 1047, 88 Cal. Rptr. 633, 472 P.2d 921]* . The factual allegations of the return must respond to the allegations of the petition that form the basis of the petitioner's claim that the confinement is unlawful [*People v. Duvall (1995) 9 Cal. 4th 464, 476, 37 Cal. Rptr. 2d 259, 886 P.2d 1252* ; *People v. Romero (1994) 8 Cal. 4th 728, 738, 35 Cal. Rptr. 2d 270, 883 P.2d 388]* . Furthermore, the return should also, when appropriate, provide documentary evidence, affidavits, or other materials that will enable the court to determine which issues are truly disputed [*People v. Duvall (1995) 9 Cal. 4th 464, 476, 37 Cal. Rptr. 2d 259, 886 P.2d 1252* ; *In re Lewallen (1979) 23 Cal. 3d 274, 278 n.2, 152 Cal. Rptr. 528, 590 P.2d 383]* .

Because the respondent is generally required to affirmatively plead facts responding to the petitioner's allegations regarding the illegality of the confinement, a return consisting solely of general denials of the allegations of the petition is generally insufficient [*see People v. Duvall (1995) 9 Cal. 4th 464, 479-481, 37 Cal. Rptr. 2d 259, 886 P.2d 1252* ; *In re Lewallen (1979) 23 Cal. 3d 274, 278 n.2, 152 Cal. Rptr. 528, 590 P.2d 383]* .

Any material allegation of the petition not controverted by the return is deemed admitted for purposes of the habeas corpus proceeding [*Cal. Rules of Ct., Rule 4.551(d)*]. If the return effectively admits the material factual allegations of the petition (and the traverse) by not disputing them, and the facts admitted justify the relief sought by the petitioner, the court may resolve the issues and grant the relief sought without ordering an evidentiary hearing [*see In re Sixto (1989) 48 Cal. 3d 1247, 1252, 259 Cal. Rptr. 491, 774 P.2d 164* ; *In re Saunders (1970) 2 Cal. 3d 1033, 1048, 88 Cal. Rptr. 633, 472 P.2d 921* ; *see also People v. Duvall (1995) 9 Cal. 4th 464, 477, 479, 37 Cal. Rptr. 2d 259, 886 P.2d 1252]* .

[ii] Exception When Information Unavailable to Respondent

In cases in which critical information necessary to counter the allegations of the petition is unavailable to the respondent, the return will be sufficient if it sets forth the following with specificity [*see People v. Duvall (1995) 9 Cal. 4th 464, 485, 37 Cal. Rptr. 2d 259, 886 P.2d 1252]* :

- Why information is not readily available.
- The steps that were taken to try to obtain it.
- Why a party believes in good faith that certain alleged facts in the petition are untrue.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionPleadingsCriminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionTime LimitationsFiling Date

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25-292 California Forms of Pleading and Practice--Annotated § 292.18

§ 292.18 Traverse or Denial

[1] Contents

The party brought before the court or judge (usually the petitioner) may deny or controvert any of the material facts or other matters set forth in the return or allege any facts to show either that his or her imprisonment or detention is unlawful or that he or she is otherwise entitled to discharge. The petitioner may also except to the sufficiency of the return [*Penal Code § 1484*]. This response to the return (called the "denial" in the California Rules of Court) is often referred to as the "traverse" [*see, e.g., Cal. Rules of Ct., Rule 4.550(b)(4), People v. Duvall (1995) 9 Cal. 4th 464, 476, 37 Cal. Rptr. 2d 259, 886 P.2d 1252]* and is analogous to the answer in a civil proceeding. The petition may also be treated as the traverse by stipulation [*In re Saunders (1970) 2 Cal. 3d 1033, 1047, 88 Cal. Rptr. 633, 472 P.2d 921* ; *see People v. Duvall (1995) 9 Cal. 4th 464, 477, 37 Cal. Rptr. 2d 259, 886 P.2d 1252]* . When the petition is treated as a traverse by stipulation, the petition has the same effect as a traverse [*In re Egan (1944) 24 Cal. 2d 323, 330, 149 P.2d 693 , cert. denied, 323 U.S. 785]* .

Any material allegation of the return that is not denied in the traverse is deemed admitted for purposes of the habeas corpus proceeding [*Cal. Rules of Ct., Rule 4.551(e)*; *see also People v. Duvall (1995) 9 Cal. 4th 464, 477, 37 Cal. Rptr. 2d 259, 886 P.2d 1252* ; *In re Lawler (1979) 23 Cal. 3d 190, 194, 151 Cal. Rptr. 833, 588 P.2d 1257]* . The issues are joined by the return and the traverse, and any new matter alleged in the traverse is deemed denied and must be proved by the party alleging it (i.e., the petitioner) [*In re Saunders (1970) 2 Cal. 3d 1033, 1047-1048, 88 Cal. Rptr. 633, 472 P.2d 921* ; *In re Egan (1944) 24 Cal. 2d 323, 330, 149 P.2d 693 , cert. denied, 323 U.S. 785, 65 S. Ct. 272, 89 L. Ed. 626]* . If the petition is by stipulation treated as a traverse, the respondent need not file, in addition to the return, a pleading specifically denying the affirmative allegations of the petition [*In re Masching (1953) 41 Cal. 2d 530, 533, 261 P.2d 251]* .

When the petitioner excepts to the sufficiency of the return in the traverse, questions of law are raised in a manner analogous to a demurrer to a complaint [*People v. Duvall (1995) 9 Cal. 4th 464, 477, 37 Cal. Rptr. 2d 259, 886 P.2d 1252* ; *In re Saunders (1970) 2 Cal. 3d 1033, 1048, 88 Cal. Rptr. 633, 472 P.2d 921]* .

Although the traverse may allege additional facts in support of the claim on which an order to show cause has issued,

the traverse may not expand the scope of the proceeding by introducing additional claims or wholly different fact bases for those claims. The scope of the proceeding will be limited to the claims that the court initially determined to have stated a prima facie case for relief [*see In re Clark (1993) 5 Cal. 4th 750, 781 n.16, 21 Cal. Rptr. 2d 509, 855 P.2d 729* ; *see also People v. Duvall (1995) 9 Cal. 4th 464, 478, 37 Cal. Rptr. 2d 259, 886 P.2d 1252]* .

[2] Time Limit for Filing Denial

Cal. Rules of Ct., Rule 4.551(e), provides that the petitioner may serve on respondent and file with the court a denial within 30 days after service and filing of a return to an order to show cause. Because Rule 4.551 appears in the portion of the California Rules of Court that governs the superior courts, this time limit is apparently inapplicable to habeas corpus proceedings in appellate courts.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionPleadingsCriminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionTime LimitationsFiling Date

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§ 292.19 Hearing

[1] In General

The court or judge before whom the writ is returned must, immediately after the return, proceed to hear and examine the return and other matters that are properly submitted to their hearing and consideration [*Penal Code § 1483*]. On traverse to the return, the court or judge must summarily proceed to hear the proof that is produced against and in favor of the detention and to dispose of the person restrained as the justice of the case requires. The court or judge has full power and authority to require and compel the attendance of witnesses and to perform all other acts necessary to a full and fair hearing and determination of the case [*Penal Code § 1484*].

In habeas corpus proceedings in superior court, within 30 days after the filing of any denial or, if none is filed, within 30 days after the expiration of the time for filing a denial, the court must either grant or deny the relief sought by the petition or order an evidentiary hearing [*Cal. Rules of Ct., Rule 4.551(f)*]. An evidentiary hearing is required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds that (1) there is a reasonable likelihood that the petitioner may be entitled to relief, and (2) the petitioner's entitlement to relief depends on the resolution of an issue of fact [*Cal. Rules of Ct., Rule 4.551(f)*]. The petitioner must be produced at the evidentiary hearing unless the court, for good cause, directs otherwise [*Cal. Rules of Ct., Rule 4.551(f)*].

[2] Appointment of Referee by Appellate Court

If an order to show cause is made returnable before the appellate court and issues of fact requiring an evidentiary hearing are framed, the court may appoint a referee to conduct the hearing and to report his or her findings and conclusions. The appellate court would then make an independent examination of the evidence taken before the referee and, giving respect to but not being bound by the referee's findings and conclusions, make its own determinations of fact [*In re Hochberg (1970) 2 Cal. 3d 870, 874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1]* .

Legal Topics:

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

Civil ProcedureJudicial OfficersRefereesAppointmentsCriminal Law & ProcedureHabeas CorpusEvidentiary HearingsGeneral OverviewCriminal Law & ProcedureHabeas CorpusReviewGeneral Overview

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§ 292.20 Writ or Order to Show Cause Made Returnable Before Lower Court

A writ or order to show cause issued by the Supreme Court or a judge thereof may be made returnable before the issuing judge or his or her court, before any court of appeal or judge thereof, or before any superior court or judge thereof. A writ or order to show cause issued by a court of appeal or judge thereof may be made returnable before the issuing judge or his or her court or before any superior court or judge thereof located in that appellate district [*see Penal Code § 1508*; *Cal. Rules of Ct., Rule 8.385(e), (f)*; *In re Hochberg (1970) 2 Cal. 3d 870, 873-874, 87 Cal. Rptr. 681, 471 P.2d 1]* . When an appellate court makes a writ or order to show cause returnable before a lower court, that court must decide the issues before it and dispose of the petitioner as the justice of the case requires. When the appellate court makes the writ or order to show cause returnable before the superior court, the appellate court does more than simply transfer the petition to the superior court, or simply afford petitioner an opportunity to present evidence in support of the allegations of the petition; it also institutes a proceeding in which issues of fact are to be framed and decided. When an appellate court issues a writ or order to show cause returnable before a lower court, however, the appellate court's preliminary determination that the petitioner has stated grounds which if proved would entitle him or her to habeas corpus relief is not equivalent to a final appellate court decision on questions of law in favor of petitioner [*In re Hochberg (1970) 2 Cal. 3d 870, 875-876 n. 4, 87 Cal. Rptr. 681, 471 P.2d 1]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureHabeas CorpusCognizable IssuesGeneral OverviewCriminal Law & ProcedureHabeas CorpusProcedureGeneral Overview

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§ 292.21 Custody of Petitioner

The person to whom the writ is directed must bring the body of the party in custody or under restraint as commanded in the writ [*Penal Code § 1481*], except as provided by *Penal Code § 1482*.

Until judgment is given on the return, the court or judge before whom any party may be brought on the writ may commit him or her to the custody of the sheriff of the county, or place him or her in such care or under such custody as his or her age or circumstances require [*Penal Code § 1494*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureHabeas CorpusCustody RequirementGeneral Overview

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§ 292.22 Discharge or Remand

If no legal cause is shown for the continuation of the imprisonment or restraint, the court must discharge the party from the custody or restraint under which he or she is held [*Penal Code § 1485*]. The court must remand the party if it appears that he or she is detained in custody by virtue of the process issued by a court or judge of the United States in a case in which that court or judge has exclusive jurisdiction [*Penal Code § 1486(1)*]. If a party is not entitled to discharge, the court or judge must remand him or her to custody or place him or her under the restraint from which he or she was taken, if the person under whose custody or restraint the party was is legally entitled to custody [*Penal Code § 1492*]. In cases in which the party is held under illegal restraint or custody or in which any other person is entitled to custody of the party, the judge or court may order the party to be committed to the restraint or custody of the person entitled by law to custody [*Penal Code § 1493*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureAppealsRemands & RemittitursCriminal Law & ProcedureHabeas CorpusCustody RequirementConsequences of Release

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§ 292.23 Extension or Shortening of Time Limits

On the motion of any party or on the court's own motion, the superior court may for good cause shorten or extend the time for doing any act under the rule governing habeas corpus procedures [*Cal. Rules of Ct., Rule 4.551(h)*]. The court's order must state the good cause for shortening or extending the time, and a copy of the order must be mailed to each party [*Cal. Rules of Ct., Rule 4.551(h)*]. For discussion of and forms for use in obtaining a court order extending or shortening time limits, see Ch. 524, *Shortening and Extension of Time* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCriminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionTime LimitationsGeneral Overview

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§ 292.24 Appeal or Reapplication

When an application for a writ has been made by or on behalf of any person other than a defendant in a criminal case, an appeal may be taken to the court of appeal from a final order of a superior court granting all or any part of the relief sought. When the application has been heard and determined by a court of appeal, either on application filed in that court or on appeal from a superior court, and any or all of the relief sought has been granted, an application may be made for a hearing in the Supreme Court. The court that granted the relief or the court in which the appeal or petition for hearing is pending may stay the execution of the order pending final determination of the matter [*Penal Code § 1507*].

When the superior court denies the writ, its decision is nonappealable, but the petitioner may seek the same relief by instituting a new habeas corpus proceeding in the appellate court. The new proceeding is not a review of the superior court determination, nor are the doctrines of res judicata or collateral estoppel applicable to preclude reassertion of arguments rejected in the prior proceedings [*In re Richard M. (1975) 14 Cal. 3d 783, 789-790, 122 Cal. Rptr. 531, 537 P.2d 363]* .

After denial by the court of appeal of the writ or relief sought, the petitioner may apply to the Supreme Court by petition for writ of habeas corpus just as after the denial of the writ by a superior court petitioner may reapply for the writ to the court of appeal [*see In re Michael E. (1975) 15 Cal. 3d 183, 193 n.15, 123 Cal. Rptr. 103, 538 P.2d 231]* . The Supreme Court has, however, stated that it disapproves of this procedure because rebriefing is wasteful and because a published opinion from the court of appeal denying the writ may remain on the books even though the Supreme Court would have granted a hearing. The Court has stated that it would therefore prefer that the petitioner apply to the Supreme Court for a hearing after denial of the writ, rather than filing with the Court a new petition for the writ of habeas corpus [*see In re Michael E. (1975) 15 Cal. 3d 183, 193 n.15, 123 Cal. Rptr. 103, 538 P.2d 231]* .

Nevertheless, appellate courts recognize that when habeas corpus is used to assert child custody rights rather than to secure relief from criminal prosecution, the superior court's determination of the issues will be given some weight. In these cases appellate courts recognize an exception to the general rule giving full res judicata effect to a superior court order and hold that the order denying the writ is not res judicata in the broad sense that it bars further proceedings for the custody of the child, but in the very narrow sense that a petitioner for a writ cannot again litigate the issues of fact

decided in the superior court unless after the hearing in the superior court there is a change of circumstances which affects the right to custody. Nor does a decision by the superior court, which is merely a decision on a question of law rather than fact bar the petitioner from presenting the same question of law to the court of appeal on an application for a writ of habeas corpus filed with that court. Included in the category of questions of law is the determination of whether there is substantial evidence to support the trial court's findings of fact [*In re Richard M. (1975) 14 Cal. 3d 783, 790-791, 122 Cal. Rptr. 531, 537 P.2d 363]* .

When an appellate court makes an order to show cause returnable before the superior court and that court denies the writ of habeas corpus, the petitioner may again apply to the reviewing court for the writ, and the reviewing court will make its independent examination and appraisal of the evidence that was taken in the superior court [*In re Hochberg (1970) 2 Cal. 3d 870, 874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureHabeas CorpusAppealsGeneral OverviewCriminal Law & ProcedureHabeas CorpusSuccessive PetitionsReview of DenialsFamily LawChild CustodyEnforcementHabeas Corpus Relief

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§ 292.25 Child Custody

[1] Enforcing Right to Custody

The person entitled to the physical custody of a child is entitled to enforce the right to custody as against one wrongfully withholding the child by a petition for a writ of habeas corpus [*In re Richard M. (1975) 14 Cal. 3d 783, 789, 122 Cal. Rptr. 531, 537 P.2d 363* ; *In re Croze (1956) 145 Cal. App. 2d 492, 495, 302 P.2d 595]* . Habeas corpus may be used (1) to enforce an existing right to physical custody established by prior order; (2) to determine physical custody in the first instance when no previous custody order has issued (that is, when habeas corpus is not brought as a collateral attack); (3) to modify a modifiable order; (4) in a proceeding brought by a parent to protect a child from imminent danger; (5) in an original proceeding in habeas corpus brought by a natural parent lacking physical custody when his or her consent to an adoption was required but not obtained; and (6) to attack a prior order collaterally when the court issuing the prior order lacked jurisdiction [*see Adoption of Alexander S. (1988) 44 Cal. 3d 857,866-867, 44 Cal. 3d 857, 867, 245 Cal. Rptr. 1, 750 P.2d 778]* . Habeas corpus is not available, however, to attack a final, nonmodifiable judgment collaterally in an adoption-related action when the trial court had jurisdiction to render a final judgment in the action [*Adoption of Alexander (1988) 44 Cal. 3d 857, 859, 245 Cal. Rptr. 1, 750 P.2d 778]* .

[2] Enforcing Previous Court Order

The writ may be used to restore custody and possession of a child to the person entitled to custody by court order [*In re Barr (1952) 39 Cal. 2d 25, 27, 243 P.2d 787]* . For example, where the decree of a competent tribunal has awarded custody of a child to one parent, the writ may be used to compel delivery of the child to the parent entitled to custody [*Rose v. Superior Court (1948) 86 Cal. App. 2d 173, 177-178, 194 P.2d 568]* . The parent who is entitled to custody pursuant to a valid court order may use the writ to enforce that right against another parent who refuses to return the child after a visit [*In re Kyle (1947) 77 Cal. App. 2d 634, 641, 176 P.2d 96]* , and the writ may also be used to enforce court ordered visitation rights [*see In re Taylor (1950) 100 Cal. App. 2d 292, 293, 223 P.2d 317]* .

The party who is not entitled to custody pursuant to a court order has several defenses to use of the writ of habeas corpus by the parent entitled to custody. One such defense is the lack of jurisdiction of the court which rendered the previous decree [*In re Saunders (1946) 76 Cal. App. 2d 635, 638, 173 P.2d 818]* . Courts have also refused to enforce out-of-state decrees which attempted to affect custody lawfully held by a resident of California [*Ferreira v. Ferreira*

(1973) 9 Cal. 3d 824, 836 n. 12, 109 Cal. Rptr. 80, 512 P.2d 304 ; *In re Walker (1964) 228 Cal. App. 2d 217, 222, 39 Cal. Rptr. 243]* . Additionally, if there is an allegation that the child's health or safety will be jeopardized by enforcement of a previous court order, the court on writ of habeas corpus may properly refuse to return custody to the parent claiming custody pursuant to the previous decree and may grant temporary custody to the other parent [*Ferreira v. Ferreira (1973) 9 Cal. 3d 824, 830, 836-837, 109 Cal. Rptr. 80, 512 P.2d 304* ; *In re Inman (1939) 32 Cal. App. 2d 130, 133-134, 89 P.2d 421]* .

The issue of the proper use of the writ of habeas corpus to enforce or seek a modification of a previous custody order often arises in the case of enforcement of an out-of-state custody order by a parent who is not a resident of California. In such cases, regardless of how the issue of modification of the previous decree arises, whether on petition for writ of habeas corpus or on modification of the previous order, the trial court employs the same standards and procedures [*Ferreira v. Ferreira (1973) 9 Cal. 3d 824, 834, 109 Cal. Rptr. 80, 512 P.2d 304]* . For further discussion of the right of a parent entitled to custody pursuant to an out-of-state decree to enforce that decree against a parent residing in California, see Ch. 394, *Parent and Child* .

[3] Illegitimate Children

The writ of habeas corpus was available to the mother of an illegitimate child to enforce her right to custody of the child and its service and earnings pursuant to former *Civ. Code § 200* [*see* *In re Croze (1956) 145 Cal. App. 2d 492, 495, 302 P.2d 595]* . The mother's right to custody pursuant to former *Civ. Code § 200* could be denied on her petition for a writ of habeas corpus where it could be shown that the mother had abandoned the child or was unfit to have custody and control [*In re Croze (1956) 145 Cal. App. 2d 492, 495, 302 P.2d 595* ; *In re Harmon (1953) 121 Cal. App. 2d 646, 648-649, 263 P.2d 649]* or where the father of the child had legitimated the child pursuant to former *Civ. Code § 230*, in which case the father acquired custody rights in the child equal to those of the mother and the father was entitled to custody where the court found that to be in the best interests of the child [*In re Richard M. (1975) 14 Cal. 3d 783, 801, 122 Cal. Rptr. 531, 537 P.2d 363]* .

The Legislature has repealed former *Civ. Code §§ 200* and *230* [Stats. 1975, ch. 1244]. The right to custody and therefore the possibility of relief by writ of habeas corpus is now governed by *Fam. Code § 3010* which provides that the mother of an unmarried minor child is entitled to its custody, services, and earnings, and that the father of the child, if presumed to be the father under *Fam. Code § 7611*, is equally entitled to the custody, services, and earnings of the unmarried minor [*see Fam. Code § 3010*]. Where there is no presumed father under *Fam. Code § 7611*, the mother should still be able to recover custody of her child by writ of habeas corpus. Where the child is in the custody of a man claiming to be a presumed father under *Fam. Code § 7611* and the mother disputes this presumption, the use of the writ should be allowed since courts in the past have determined the issue of paternity and proper custody on a writ of habeas corpus. Moreover, the writ is a proper means of determining the right to custody of minor children generally [*Estate of Bauman (1947) 82 Cal. App. 2d 359, 360, 186 P.2d 154]* , and it has been used to determine such factual issues as whether the father of an illegitimate child has legitimated the child pursuant to former *Civ. Code § 230*, a determination similar to that of whether a man is the presumed father of the child pursuant to *Fam. Code § 7611* [*see* *In re Richard M. (1975) 14 Cal. 3d 783, 791-800, 122 Cal. Rptr. 531, 537 P.2d 363]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyEnforcementHabeas Corpus ReliefFamily LawParental Duties & RightsNonmarital ChildrenGeneral Overview

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§ 292.26 Mental Patients

[1] Right to Petition

Any person who has been committed is entitled to a writ of habeas corpus on a proper application made by the Department of Health, by the person committed, or by a relative or friend in the person's behalf to the judge of the superior court in which the hospital is located [*Welf. & Inst. Code § 7250*]. Persons held in hospitals and other institutions have a remedy by writ of habeas corpus even in the absence of such a statute, however, since the right to have determined by habeas corpus whether a person is in fact subject to commitment or whether a person has recovered from the condition which justified the commitment is secured by *Cal. Const., art I, § 11*, which provides that the writ of habeas corpus may not be suspended unless required by public safety in cases of rebellion or invasion [*In re De La O (1963) 59 Cal. 2d 128, 142-143, 28 Cal. Rptr. 489, 378 P.2d 793]* .

A person who is detained by certification for intensive treatment [*see Welf. & Inst. Code §§ 5250-5268*] as mentally disordered or as dangerous or impaired by inebriation [*see Welf. & Inst. Code §§ 5150-5258*] has a right to a hearing by writ of habeas corpus for release after the person detailed or a person acting on his or her behalf has made a request for release [*Welf. & Inst. Code § 5275*]. The staff member to whom the request for release is made must promptly provide the person making the request a copy of a form provided for by *Welf. & Inst. Code § 5275* and must inform the superior court for the county in which the facility is located of the request as soon as possible [*Welf. & Inst. Code § 5275*]. Judicial review must be in the superior court for the county in which the treatment facility is located or in the county in which 72-hour evaluation was conducted if the patient or a person acting in his or her behalf informs the professional staff of the facility in writing that judicial review will be sought. No patient may be transferred from the county providing evaluation services to a different county for intensive treatment if the staff of the evaluation facility has been informed in writing that a judicial review will be sought, until the completion of the judicial review. The person must be informed of his or her right to counsel and to appointed counsel if necessary [*Welf. & Inst. Code § 5276*].

The court must either release the person or order an evidentiary hearing to be held within two judicial days after the petition is filed [*Welf. & Inst. Code § 5276*]. If the person is alleged to be a danger to himself or herself or to others, or is gravely disabled as a result of mental disorder or impairment by chronic alcoholism, the district attorney must appear and defend the certification allegations in the habeas corpus hearings regardless of whether the person is confined in a

public or a private hospital [*St. Joseph Hospital v. Kuyper (1983) 146 Cal. App. 3d 1086, 1089-1090, 194 Cal. Rptr. 876]* . If the court finds that the person requesting release is not, as a result of mental disorder or impairment by chronic alcoholism, either a danger to othe rs or to himself or herself, or gravely disabled; that he or she had not been advised of, or had accepted, voluntary treatment; or that the facility providing intensive treatment is not equipped and staffed to provide treatment or is not designated by the county to provide intensive treatment, then the person must be released immediately [*Welf. & Inst. Code § 5276*].

The Lanterman-Petris-Short Act [*Welf. & Inst. Code § 5000 et seq.*] authorizes a process for the detention of the mentally disordered that is somewhat more medical than the former civil commitment procedures that it repealed; nevertheless, the provisions of the act, requiring notice of the 14-day certification for involuntary intensive treatment to be given to the superior court and to the various attorneys, among others, and the express specification of the rights of the patient who requests release to have counsel appointed and to seek habeas corpus, demonstrate the concern of the Legislature that the patient's rights receive full protection at all times [*Thorn v. Superior Court (1970) 1 Cal. 3d 666, 674, 83 Cal. Rptr. 600, 464 P.2d 56]* . A superior court acted within its jurisdiction in safeguarding those rights by holding that a patient's refusal to consent to voluntary treatment is tantamount to a request for release and triggers the patient's right to counsel and to seek habeas corpus. The court properly ordered that on certification for intensive treatment each patient so certified be promptly visited by counsel [*Thorn v. Superior Court (1970) 1 Cal. 3d 666, 675, 83 Cal. Rptr. 600, 464 P.2d 56]* .

However, a conservatee under an LPS conservatorship who is not subject to involuntary intensive treatment may not ordinarily utilize the habeas corpus writ to obtain a less restrictive treatment placement [*see In re Gandolfo (1984) 36 Cal. 3d 889, 897, 206 Cal. Rptr. 149, 686 P.2d 669]* . Nevertheless, habeas corpus directed to the court in the county of treatment may be an appropriate remedy for an unreasonable denial of such freedom as is essential to the conservatee's welfare, or for unreasonable consequences that might flow from limitations of the statutory review mechanism [*see In re Gandolfo (1984) 36 Cal. 3d 889, 898, 206 Cal. Rptr. 149, 686 P.2d 669]* .

Additionally, if the proper statutory procedures are not strictly followed for commitment of a person to a mental hospital, the person confined may petition the court for a writ of habeas corpus [*In re Michael E. (1975) 15 Cal. 3d 183, 192-193, 123 Cal. Rptr. 103, 538 P.2d 231]* . Where commitment procedures are set up by statute and are in the nature of special civil proceedings unknown to the com mon law, jurisdiction to enter an order of commitment pursuant to the statutory scheme depends on strict compliance with each of the specific statutory prerequisites for maintenance of the proceeding. Procedures for civil commitment of persons in mental hospitals are of this type of statutory procedure [*In re Raner (1963) 59 Cal. 2d 635, 639-640, 30 Cal. Rptr. 814, 381 P.2d 638* (commitment for narcotics addiction); *In re Hofmann (1955) 281 P.2d 96]* .

[2] Order to Show Cause

An order to show cause to inquire into the detention and confinement of a person in the hospital may be issued by an appellate court and directed to the medical director of a state mental hospital [*see In re L. L. (1974)39 Cal. App. 3d 205, 207, 114 Cal. Rptr. 11]* or to test the conditions of confinement in the hospital [see *In re Cirino (1972) 28 Cal. App. 3d 1009, 1011, 105 Cal. Rptr. 194]* . For a discussion of issuing an order to show cause in lieu of a writ of habeas corpus, see *§ 292.15*.

[3] Rights in Confinement

The Lanterman-Petris-Short Act also guarantees the person confined in a mental hospital certain rights, such as the right to wear his or her own clothes, to have reasonable access to a telephone to make and receive confidential calls, and to refuse shock treatment and psychosurgery [*see Welf. & Inst. Code §§ 5325-5326.95*]. The denial of these rights would seem to be an appropriate subject for review by habeas corpus, since the writ may be sought by one lawfully in custody for the purpose of vindicating rights to which he or she is entitled even in confinement [*In re Allison (1967) 66 Cal.*

2d 282, 285, 57 Cal. Rptr. 593, 425 P.2d 193 , cert. denied, 389 U.S. 876, 88 S. Ct. 172, 19 L. Ed. 2d 163 ; *but see In re Gandolfo (1984) 36 Cal. 3d 889, 898, 206 Cal. Rptr. 149, 686 P.2d 669* (habeas corpus relief limited to unreasonable denial of freedom essential to conservatee's welfare, or unreasonable consequences flowing from limitations of statutory review mechanism)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawCongressional Duties & PowersSuspension ClauseHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentGeneral OverviewPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentDischarge & Release of Adults

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§ 292.27 Other Uses of Writ

The writ may also be used to test the validity of criminal convictions or restraint after conviction; to attack commitment as a mentally disordered sex offender [*In re Leyva (1970) 8 Cal. App. 3d 404, 406, 87 Cal. Rptr. 265]* ; to challenge the validity of a Department of Corrections rule regarding inmate labor and wages [In re van *Geldern (1971) 5 Cal. 3d 832, 834, 97 Cal. Rptr. 698, 489 P.2d 578]* ; to enforce an inmate's right to confidential correspondence with attorneys [*In re Jordan (1972) 7 Cal. 3d 930, 932-934, 103 Cal. Rptr. 849, 500 P.2d 873]* ; to test the validity of juvenile court proceedings [see *In re Michael E. (1975) 15 Cal. 3d 183, 123 Cal. Rptr. 103, 538 P.2d 231* ; *In re Butterfield (1967) 253 Cal. App. 2d 794, 61 Cal. Rptr. 874]* ; to test the restraint of a person placed under quarantine for disease [*In re Martin (1948) 83 Cal. App. 2d 164, 169, 188 P.2d 287* (decided under former Civ. Code § 2554, *see now Civ. Code § 3110*)]; to test the imposition of guardianship on an incompetent person or to test the restraint imposed by the guardian [*Browne v. Superior Court of San Francisco, (1940) 16 Cal. 2d 593, 598-599, 107 P.2d 1]* ; to protect against prosecutorial vindictiveness [*see* *In re Bower (1985) 38 Cal. 3d 865, 873, 215 Cal. Rptr. 267, 700 P.2d 1269]* ; or to test a commitment for contempt of court [*In re Carvallo (1973) 29 Cal. App. 3d 983, 985, 105 Cal. Rptr. 925* ; for further discussion and forms, *see* Ch. 35, *Contempt*]. It should be noted, though, that a list cannot validly include all the possible uses of the writ since every person unlawfully imprisoned or restrained under any pretense whatever may prosecute the writ to inquire into the cause of the imprisonment or restraint [*Penal Code § 1473*].

For discussion and forms relating to use of the writ of habeas corpus in criminal proceedings, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 102, *Extraordinary Writs* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureHabeas CorpusCognizable IssuesGeneral Overview

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[Reserved]

§§ 292.28[Reserved]

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§ 292.40 California Criminal Defense Practice

For discussion and forms relating to use of the writ of habeas corpus in criminal proceedings, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 102, *Extraordinary Writs* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureHabeas CorpusProcedureGeneral Overview

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§ 292.41 California Points and Authorities

For memoranda of points and authorities concerning the writ of habeas corpus in cases involving custody of children, quarantine, mental patients, and incompetent persons, see California Points and Authorities, Ch. 110, *Habeas Corpus ;* Ch. 117, *Insane and Incompetent Persons* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyEnforcementHabeas Corpus ReliefPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentGeneral Overview

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§ 292.42 Federal Constitution

Privilege of the writ of habeas corpus as not allowed to be suspended unless, when in cases of rebellion or invasion, the public safety requires it. U.S. Const., art. I, § 9

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawCongressional Duties & PowersSuspension Clause

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§ 292.43 State Constitution

Habeas corpus not allowed to be suspended unless required by public safety in cases of rebellion or invasion. *Cal. Const., Art I, § 11* Supreme Court, courts of appeal, superior courts, and their judges as having original jurisdiction in habeas corpus proceedings. *Cal. Const., art VI, § 10*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawCongressional Duties & PowersSuspension ClauseConstitutional LawThe JudiciaryJurisdictionGeneral OverviewCriminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionJurisdiction

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§ 292.44 State Statutes

[1] Writ Procedures

[a] Petition

Supreme Court justices, court of appeal justices, and superior court judges are authorized to grant at chambers all orders and writs which are usually granted in first instance on ex parte application. *Code Civ. Proc. §§ 165, 166(a)*

Court commissioners are authorized to hear and determine ex parte motions for writs of habeas corpus. *Code Civ. Proc. § 259(a)*

Provisions requiring service of applications for writs is not applicable to petitions for writs of habeas corpus. *Code Civ. Proc. § 1107*

No fee is allowed to be charged in proceedings on habeas corpus. *Gov. Code § 6101*

Every person unlawfully imprisoned or restrained of his or her liberty, under any pretense whatever, is entitled to prosecute writ of habeas corpus, to inquire into cause of such imprisonment or restraint. *Penal Code § 1473*

Application for writ of habeas corpus is to be made by petition, and contents of the petition specified. *Penal Code § 1474*

Application for writ of habeas corpus is required to be verified and to state whether any prior application has been made for writ regarding same detention or restraint and if so a brief statement of all proceedings had on those writs.

Penal Code § 1475

When person applying for writ is held by any officer of any court of this state or by peace officer, copy of application for writ is required to be served on district attorney of the county in which person is held. *Penal Code § 1475*

Court or judge to whom petition is presented as required to endorse on petition hour and date of its presentation and hour and date of granting or denial of writ and as required to grant writ without delay if it should issue. *Penal Code § 1476*

[b] Writ

Writ as required to be directed to person having custody of or restraining person on whose behalf application is made and as required to command him or her to have body of such person before court or judge before whom writ is returnable at time and place specified. *Penal Code § 1477*

Writ as required to be delivered to sheriff and be served by him or her without delay; writ as allowed to be served by delivery to place of residence where person to whom it is directed cannot be found. *Penal Code § 1478*

If person to whom the writ is directed refuses after service to obey writ, court as required on affidavit to issue an attachment against person. *Penal Code § 1479*

[c] Subsequent Pleadings

Contents of return to writ. *Penal Code § 1480*

Other party as allowed to deny or controvert any of the material facts or matters set forth in return, or except sufficiency thereof, or allege any fact to show either that his or her imprisonment or detention is unlawful or that he or she is entitled to discharge. *Penal Code § 1484*

[d] Hearing

Person to whom writ is directed, if it is served, as required to bring body of party in his or her custody or under his or her restraint. *Penal Code § 1481*

Hearing on writ as allowed to proceed without production of body when, from sickness or infirmity of person to be produced, he or she cannot, without danger, be brought before the court and person in whose custody he or she is states that fact in his or her return to writ, verified by affidavit. *Penal Code § 1482*

Court to whom writ is returned as required to immediately after return proceed to hear and examine return and other matters within its hearing and consideration. *Penal Code § 1483*

Court as required to proceed in summary way to hear proof on return and traverse. *Penal Code § 1484*

Writ and process as allowed to be issued and served on any day or at any time. *Penal Code § 1502*

Writ of habeas corpus issued by a superior court or judge therof as allowed to be made returnable before issuing judge or his or her court. *Penal Code § 1508*

Writ of habeas corpus issued by Supreme Court or judge thereof as permitted to be made returnable before issuing judge or his or her court, before any court of appeal or judge thereof, or before any superior court or judge thereof. *Penal Code § 1508(a)*

Writ issued by court of appeal as allowed to be made returnable before issuing judge, his or her court, or before any superior court or judge thereof located in that appellate district. *Penal Code § 1508(b)*

[e] Disposition of Person Detained

Grounds for discharge of person in custody by virtue of process from a court of this state or judge of the court. *Penal Code § 1487*

Where party is held under illegal restraint or custody, or any other person is entitled to custody of person, judge as allowed to order person to be committed to custody or restraint of person entitled thereto. *Penal Code § 1493*

Until judgment is given on return, court as allowed to commit party who maybe brought before court on writ to custody of sheriff or place him or her under such care and custody as his or her age and circumstances require. *Penal Code § 1494*

[f] Appeal

Where application for a writ of habeas corpus has been made by or on behalf of any person other than criminal defendant, appeal as allowed to be taken to the court of appeal from final order granting all or part of relief sought; appeal as allowed to be taken to Supreme Court from order of court of appeal granting relief. *Penal Code § 1507*

[g] Warrant Procedures

Issuance of and procedures on warrant in lieu of writ where there is reason to believe that person illegally held in custody will be carried out of jurisdiction of the court or will suffer some irreparable injury. *Penal Code §§ 1497-1501*

[h] Penalties for Disobedience of Writ

Person who disobeys writ recommits person discharged by writ on same cause, or evades service of writ of habeas corpus as guilty of misdemeanor. *Penal Code §§ 362-364*

No writ of habeas corpus as allowed to be disobeyed for defect in form if it appears from writ in whose custody or under whose restraint party imprisoned or restrained is, officer or person detaining him or her, and the court before

whom he or she is to be brought. *Penal Code § 1495*

Officer or person to whom a writ of habeas corpus is directed who refuses obedience to command of writ as liable to person aggrieved for not more than $10,000. *Penal Code § 1505*

[2] Uses of the Writ

[a] Child Custody

Mother of an unmarried minor child as entitled to its custody, services, and earnings; father of child, if presumed to be father under *Fam. Code § 7611* as equally entitled to custody, services, and earnings of unmarried minor. *Fam. Code § 3010*

Uniform Parentage Act. *Fam. Code § 7600 et seq.*

[b] Mentally Disordered Persons

Information and advice and explanation of right to judicial review by habeas corpus and to counsel and court-appointed counsel as required to be explained to person being certified for intensive treatment. *Welf. & Inst. Code § 5254.1*

Every person detained by certification for intensive treatment as having right to hearing by writ of habeas corpus for release after person detained or any person acting on his or her behalf has made request for release to either person delivering copy of notice of certification or to any member of treatment staff. *Welf. & Inst. Code § 5275*

Jurisdiction, venue, and procedures for judicial review of certification for intensive treatment. *Welf. & Inst. Code § 5276*

Any person who has been committed as entitled to writ of habeas corpus on proper application made by State Department of Health, by person, or by relative or friend on his or her behalf. *Welf. & Inst. Code § 7250*

[c] Mentally Retarded Persons

Every adult admitted or committed as developmentally disabled patient as having right to hearing by writ of habeas corpus for release after he or she or any person acting on his or her behalf makes request for release to any member of the staff. Health & Safety Code § 38450

Venue, right to counsel, procedure, and grounds for release in hearing on writ of habeas corpus for person admitted or committed as developmentally disabled patient. Health & Safety Code § 38451

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 292.45 California Rules of Court

Appeal from order granting all or part of relief sought in petition for writ of habeas corpus generally subject to rules governing criminal appeals. *Cal. Rules of Ct., Rule 8.388(a)*

Contents of record on appeal from order granting all or part of relief sought in petition for writ of habeas corpus. *Cal. Rules of Ct., Rule 8.388(a)*

Petition to reviewing court for writ of habeas corpus seeking release or modification of conditions of custody of one confined in state or local penal institution, hospital, narcotics treatment facility, or other institution must be on form approved by Judicial Council unless court, for good cause, permits otherwise, or unless petition is filed by attorney. *Cal. Rules of Ct., Rules 8.380(a), 8.384(a)(1)*

Reviewing court may, before passing on petition for writ of habeas corpus, order custodian of record to produce record and file it with clerk of reviewing court or to request informal response from respondent; requirements of informal response. *Cal. Rules of Ct., Rule 8.385(a), (b)*

Habeas corpus procedure in superior court. *Cal. Rules of Ct., Rules 4.550-4.552*

Petition for writ of habeas corpus filed in superior court must be on form approved by Judicial Council, unless petitioner shows good cause, or petition is submitted by attorney. *Cal. Rules of Ct., Rule 4.551(a)(1), (2)*

Form of papers on applications for writ of habeas corpus in appellate or supreme court. *Cal. Rules of Ct., Rules 8.40, 8.204*

Legal Topics:

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

[1] Appeal and Reapplication

Final order of superior court granting writ of habeas corpus in child custody case is made appealable by *Penal Code § 1507*. *In re Richard M. (1975) 14 Cal. 3d 783, 789 n.3, 122 Cal. Rptr. 531, 537 P.2d 363*

Decision of superior court denying writ of habeas corpus is nonappealable, but petitioner may seek same relief by instituting habeas corpus proceedings in appellate court. *In re Richard M. (1975) 14 Cal. 3d 783, 789, 122 Cal. Rptr. 531, 537 P.2d 363* ; *In re Bruegger (1928) 204 Cal. 169, 170, 267 P. 101*

Doctrines of res judicata and collateral estoppel do not preclude reassertion of arguments rejected in prior proceeding in which lower court denied writ of habeas corpus relief. *In re Richard M. (1975) 14 Cal. 3d 783, 789-790, 122 Cal. Rptr. 531, 537 P.2d 363*

Decision by superior court which constitutes merely decision of question of law rather than of fact as not bar to petitioner presenting same question of law rather than fact to court of appeal on an application for writ of habeas corpus filed in that court. *In re Richard M. (1975) 14 Cal. 3d 783, 791, 122 Cal. Rptr. 531, 537 P.2d 363*

Appellate courts as recognizing that where habeas corpus is used to assert custody rights, rather than to secure relief from confinement resulting from criminal prosecution, principle and public policy require that the superior court's determinations be given some weight. *In re Richard M. (1975) 14 Cal. 3d 783, 790, 122 Cal. Rptr. 531, 537 P.2d 363*

Where the writ is used to assert custody rights rather than to secure relief from criminal prosecution, superior court's determination of issues as given some weight by the appellate court on reapplication there for the writ; res judicata as applicable only to bar litigation of the issues of fact already decided unless there are changed circumstances; questions

of law, including question of substantial evidence, as considered by appellate court. *In re Richard M. (1975) 14 Cal. 3d 783, 790-791, 122 Cal. Rptr. 531, 537 P.2d 363*

Superior court order denying writ of habeas corpus as not res judicata in broad sense that it bars further proceedings for custody of child, but in very narrow sense that petitioner for writ cannot, in court of appeal, again litigate issues of fact decided in superior court unless after hearing in superior court there is change of circumstances which affects right to custody. *In re Richard M. (1975) 14 Cal. 3d 783, 790-791, 122 Cal. Rptr. 531, 537 P.2d 363*

Where petitioner applies to appellate court for writ of habeas corpus after 3denial of writ by superior court, new proceeding as not review of superior court determination, doctrines of res judicata and collateral estoppel as not applicable to preclude reassertion of arguments rejected in prior proceeding. *In re Richard M. (1975) 14 Cal. 3d 783, 789-790, 122 Cal. Rptr. 531, 537 P.2d 363* ; *In re Bruegger (1928) 204 Cal. 169, 170, 267 P. 101*

Question of whether there is substantial evidence to support trial court's findings of fact as question of law which may be presented to appellate court on an application for writ of habeas corpus filed in that court. *In re Richard M. (1975) 14 Cal. 3d 783, 791, 122 Cal. Rptr. 531, 537 P.2d 363*

Appellate court as empowered to issue writ of prohibition restraining improper issuance of writ of habeas corpus by superior court. *Browne v. Superior Court (1940) 16 Cal. 2d 593, 597, 107 P.2d 1*

Where habeas corpus proceedings have been prosecuted in superior court and that court has made findings of fact, its order as res judicata of issues tendered, tried, and decided by superior court; petitioner, in absence of change in circumstances, as estopped from again trying those issues on petition in court of appeal for writ of habeas corpus. *In re Croze (1956) 145 Cal. App. 2d 492, 494, 302 P.2d 595*

Superior court order denying writ of habeas corpus as not res judicata in broad sense that it bars further proceedings for custody of child, but in very narrow sense that petitioner for writ cannot in court of appeal again litigate issues of fact decided in superior court unless after hearing there is change of circumstances affecting right to custody and except that questions of law may be presented to court of appeal. *In re Croze (1956) 145 Cal. App. 2d 492, 495, 302 P.2d 595*

Mother of illegitimate child seeking to have consent to adoption revoked and child returned to her custody from its adoptive parents as bringing petition for writ of habeas corpus first in superior court, then, when that writ was discharged, in appellate court. *In re Barents (1950) 99 Cal. App. 2d 748, 749, 222 P.2d 488*

Where an appeal had already been taken from guardianship proceeding appointing child's mother as guardian, father of child as not entitled to obtain review of issue of his right to custody of child on an application to appellate court for writ of habeas corpus. *In re Gianoli (1943) 58 Cal. App. 2d 160, 162-163, 136 P.2d 343*

Where mother of an illegitimate child petitioned for writ of habeas corpus to have custody of child restored to her from child's grandparents, writ as properly granted and facts heard by referee of appellate court where superior court had denied writ but without making any findings of fact regarding proper custody. *In re White (1942) 54 Cal. App. 2d 637, 638-639, 129 P.2d 706*

[2] Child Custody

[a] Determination of Right to Custody

Proceeding on writ of habeas corpus as not available to attack collaterally final nonmodifiable judgment in adoption-related action as long as trial court had jurisdiction to render final judgment. *Adoption of Alexander (1988) 44 Cal. 3d 857, 859, 245 Cal. Rptr. 1, 750 P.2d 778*

Where there is substantial evidence to support trial court's determination that father legitimated an illegitimate child pursuant to *Civ. Code § 230*, father as acquiring custody rights in child equal to those of the mother; mother under these circumstances where trial court has granted custody to father as not entitled to writ of habeas corpus from appellate court returning child to her custody. *In re Richard M. (1975) 14 Cal. 3d 783, 801, 122 Cal. Rptr. 531, 537 P.2d 363*

Writ of habeas corpus as proper even against party who no longer has possession of child, if he or she has hidden child in anticipation of writ and it appears that child may be produced. *Rose v. Superior Court (1948) 86 Cal. App. 2d 173, 177, 194 P.2d 568*

Habeas corpus as proper means of determining rights of custody to minor children. *Estate of Bauman (1947) 82 Cal. App. 2d 359, 360, 186 P.2d 154*

[b] Right of Parent

Petitioner father's custody of child as properly denied on writ of habeas corpus where father had repeatedly been adjudged an unfit custodian for child in various proceedings, although child was residing with an aunt. *In re Application of Britt (1917) 176 Cal. 177, 180-182*

"Parent" as used in former *Civ. Code § 4600* (*now see Fam. Code § 3040 et seq.*) on preference for child custody as including father of an illegitimate child. *In re Reyna (1976) 55 Cal. App. 3d 288, 297, 126 Cal. Rptr. 138*

Persons who assume rules of parents by raising child in their home as in time acquiring an interest in companionship, custody, and management of child; persons with whom child has been living in wholesome and stable environment as de facto parents with recognized status under former *Civ. Code § 4600* (*now see Fam. Code § 3020 et seq.*) *In re Reyna (1976) 55 Cal. App. 3d 288, 304-305, 126 Cal. Rptr. 138*

Father of illegitimate child whose mother has placed it for adoption as bringing proceeding in habeas corpus to regain custody of child from prospective adoptive parents. *In re Reyna (1976) 55 Cal. App. 3d 288, 291-292, 126 Cal. Rptr. 138*

Question of fitness as between third parties and natural parent as putting on nonparent burden of proving parent's unfitness. *In re Miller (1966) 244 Cal. App. 2d 454, 458, 53 Cal. Rptr. 211*

Where natural parent is fit parent, court's grant of writ of habeas corpus returning custody of child to natural parent

from third parties as proper. *In re Miller (1966) 244 Cal. App. 2d 454, 459, 53 Cal. Rptr. 211*

Where trial court found in habeas corpus proceeding that petitioner mother of an illegitimate child was fit person to have custody of child, that best interests of child would be served by being in care of petitioner, that petitioner did not abandon child, petitioner as entitled under *Civ. Code § 200* to custody of child. *In re Salazar (1962) 205 Cal. App. 2d 102, 105, 22 Cal. Rptr. 770*

An offer to permit adoption of child, making arrangements for placement, acquiescence in support by others, or failure to pay for maintenance when no demand is made for it or no ability to provide is shown as not by itself proving an intent to abandon child; acts of temporary nature as not sufficient to show permanent abandonment. *In re Salazar (1962) 205 Cal. App. 2d 102, 107, 22 Cal. Rptr. 770*

Mother of an illegitimate, unmarried minor as entitled to his or her custody, service, and earnings pursuant to *Civ. Code § 200*, and as entitled to enforce her right to custody by petition for writ of habeas corpus. *In re Croze (1956) 145 Cal. App. 2d 492, 495, 302 P.2d 595*

Court in proceedings on writ of habeas corpus by mother of an illegitimate minor to enforce her right to custody as entitled to deny writ if it finds as fact that mother has abandoned child or finds as fact that petitioner is unfit to have custody and control. *In re Croze (1956) 145 Cal. App. 2d 492, 495, 302 P.2d 595*

Writ of habeas corpus as granted returning custody of child to its natural parents and taking custody from grandparents in absence of finding that parents were unfit or had abandoned child. *In re Harmon (1953) 121 Cal. App. 2d 646, 648-649, 263 P.2d 649*

Parent of child as not absolutely entitled to custody nor to issuance of writ of habeas corpus to regain custody; right of custody as dependent on what is for best interests of child and fitness of parents. *In re Martin (1947) 79 Cal. App. 2d 584, 586, 180 P.2d 383*

Writ of habeas corpus as discharged and custody as denied to child's father where child's grandparents had raised child, had been appointed its guardians although letters had been revoked and that judgment appealed from by grandparents, and where father had not cared for child at all and child wished to stay with grandparents. *In re De Leon (1943) 59 Cal. App. 2d 510, 515, 139 P.2d 109*

Writ of habeas corpus as properly granted to return custody of child to its mother from its paternal grandparents where child had been awarded to father in divorce proceeding but had been left with father's parents for some years, and where mother was fit parent and did not abandon child. *In re White (1942) 54 Cal. App. 2d 637, 639-640, 129 P.2d 706*

[c] Enforcement of Court Order

Habeas corpus as properly granted to return custody of child to parent having custody of child before granting of modification order, where modification order was stayed by an appeal and therefore did not operate to change right to custody. *In re Barr (1952) 39 Cal. 2d 25, 27-28, 243 P.2d 787*

Person entitled to custody of child as entitled to force right thereto against one wrongfully withholding child by petition for writ of habeas corpus. *In re M. (1975) 14 Cal. 3d 783, 789, 122 Cal. Rptr. 531, 537 P.2d 363* ; *In re Croze (1956) 145 Cal. App. 2d 492, 495, 302 P.2d 595*

In custody actions involving children of divorced parents, writ of habeas corpus as proper remedy when person entitled to custody of child is denied possession. *In re Barr (1952) 39 Cal. 2d 25, 27, 243 P.2d 787*

Where petitioner was entitled to custody of his natural children pursuant to an Oregon decree and no court having jurisdiction had found him to be an unfit person to have their custody, petitioner, natural father of children was entitled to have their custody returned to him from their maternal grandparents who had detained children in *California. In re Barker (1965) 232 Cal. App. 2d 628, 630, 43 Cal. Rptr. 82*

Where wife filed for divorce in Michigan but husband removed their child from that state to California, court as properly returning custody of child to mother, where this was in child's best interest, on father's petition for writ of habeas corpus. *In re Kennedy (1958) 162 Cal. App. 2d 82, 84, 328 P.2d 508*

Where it appears that foreign state court granted decree of custody of three children to father, and where that court had jurisdiction of persons and subject matter, and there has been no change of circumstances since that decree was entered, court of California on petition for writ of habeas corpus as required to order that children be delivered to father. *In re Bergmann (1955) 133 Cal. App. 2d 323, 283 P.2d 1063*

Perfected appeal in proceeding for custody of child as automatically constituting stay of proceedings and precluding a trial court from interfering in custody as it existed at time of appeal, but appeal as not operating to undo action taken before appeal. *In re Orlando (1954) 124 Cal. App. 2d 594, 596, 269 P.2d 45*

Habeas corpus as not available to return custody of child to its mother, where mother had appealed from an order changing custody of child to father but had not perfected appeal before order was executed, so that appeal did not stay change of custody. *In re Orlando (1954) 124 Cal. App. 2d 594, 596, 269 P.2d 45*

Perfected appeal in an action for custody of child as automatically suspending power of trial court to enforce the order modifying custody provisions of divorce decree, but court in exercise of its appellate jurisdiction as having power in custody matters to protect children; without showing that serious evils threaten the welfare of children, status quo at time appeal was taken as not disturbed on application for writ of habeas corpus. *In re Robelet (1953) 121 Cal. App. 2d 598, 600, 263 P.2d 486*

Only ground on which person who has been denied custody of child in sister state but has physical possession in this state may prevail over writ of habeas corpus brought by person entitled to possession in sister state as to present proof of changed circumstances warranting modification of custody order. *In re Swindall (1949) 90 Cal. App. 2d 177, 179, 202 P.2d 845*

Writ of habeas corpus as properly available where custody of child has been awarded by decree of competent tribunal to compel delivery of child to one declared entitled to custody. *Rose v. Superior Court (1948) 86 Cal. App. 2d 173,*

177-178, 194 P.2d 568

Habeas corpus as proper procedure to release an infant from all kinds of illegal restraint and to determine matters of custody; writ as available to determine whether one who has custody without authority of legal proceedings is entitled to custody and to release child if restraint is found unlawful. *Rose v. Superior Court (1948) 86 Cal. App. 2d 173, 177, 194 P.2d 568*

Custody of child as properly returned to father on writ of habeas corpus where father was entitled to custody pursuant to valid Oklahoma decree and mother had wrongfully brought child to California and there were no changed circumstances entitling mother to modification of Oklahoma decree. *Estate of Bauman (1947) 82 Cal. App. 2d 359, 360, 186 P.2d 154*

Where child is brought into California in defiance of decree of another state awarding custody to one parent, other parent as entitled to regain custody of child by writ of habeas corpus until respondent to writ shows that welfare of child would be jeopardized by such custody in petitioner. *In re Memmi (1947) 80 Cal. App. 2d 295, 300, 181 P.2d 885*

Ordinarily where child is within jurisdiction of California courts, these courts as empowered to inquire into and determine what will promote welfare of a child despite existence of decree of another state. *In re Memmi (1947) 80 Cal. App. 2d 295, 300, 181 P.2d 885*

In absence of any showing that since entry of decree under which petitioner for writ of habeas corpus was granted custody of his child, he has become an unfit or unsafe person to have custody, or that changed circumstances affecting welfare of child have arisen, California courts as required to recognize right of peti tioner pursuant to sister state decree to obtain custody of child. *In re Memmi (1947) 80 Cal. App. 2d 295, 299, 181 P.2d 885*

As between two parents, both residents of California, parent who has custody of child under valid decree of another state as entitled to enforce his right to custody against other parent who has child for temporary visit and refuses to return him, in absence of allegations supported by proof that welfare of child will be jeopardized. *In re Kyle (1947) 77 Cal. App. 2d 634, 641, 176 P.2d 96*

Writ of habeas corpus sought by petitioner pursuant to sister state judgment of custody of child obtained without notice to respondent as properly discharged and relief denied. *In re Saunders (1946) 76 Cal. App. 2d 635, 638, 173 P.2d 818*

When child of marriage is legally in custody of parent entitled to custody by last valid court order, habeas corpus as not proper remedy to try issue of custody of child unless child is in some imminent danger as to its safety, health, morals, or reasonable comfort. *In re Inman (1939) 32 Cal. App. 2d 130, 133-134, 89 P.2d 421*

Where mother of child had brought child into California and established residence there without violating Colorado court order giving custody of child to its mother, writ of habeas corpus as properly denied to father of child who sought to base his right to custody on modification of Colorado decree obtained after mother had become resident of California and therefore without jurisdiction. *In re Inman (1939) 32 Cal. App. 2d 130, 133, 89 P.2d 421*

[3] Exhaustion of Remedies

Habeas corpus is generally not available as second appeal, and matters that could have been, but were not, raised on appeal are not cognizable on habeas corpus absent special circumstances warranting departure from that rule; but, if reference to matters outside record is necessary to establish that defendant has been denied fundamental constitutional right, resort to habeas corpus is not only appropriate, but required. *In re Bower (1985) 38 Cal. 3d 865, 872, 215 Cal. Rptr. 267, 700 P.2d 1269*

Failure to exhaust appellate remedies as bar to relief by habeas corpus as merely discretionary policy governing exercise of reviewing court's jurisdiction to issue writ and as excused where special circumstances are shown. *In re Wallace (1970) 3 Cal. 3d 289, 292, 90 Cal. Rptr. 176, 475 P.2d 208*

Petitioner California Rehabilitation Center committee is not required to exhaust administrative remedies in seeking relief on habeas corpus petition when relief sought is based on theory of equal protection, which brings petitioner within several stated exceptions to exhaustion doctrine. *In re Mabie (1984) 159 Cal. App. 3d 301, 304-305, 205 Cal. Rptr. 528*

Rule that litigant will not be afforded judicial relief in courts unless and until he or she has exhausted available administrative remedies as applicable to habeas corpus relief. *In re Muszalski (1975) 52 Cal. App. 3d 500, 503-508, 125 Cal. Rptr. 286*

Habeas corpus is unavailable when appeal constitutes plain, speedy, and adequate remedy, but is available when appeal constitutes an alternate method of review but does not constitute plain, speedy, and adequate remedy. *In re Solis (1969) 274 Cal. App. 2d 344, 348, 78 Cal. Rptr. 919*

[4] Insane Persons

[a] Release

Writ of habeas corpus as issued discharging petitoner from custody where petitioner was committed to mental hospital without following of proper statutory procedures by juvenile court, appointment of conservator. *In re Michael E. (1975) 15 Cal. 3d 183, 192-193, 123 Cal. Rptr. 103, 538 P.2d 231*

Superior court as acting within its jurisdiction in granting an order that legal staff of nonprofit legal services organization visit each patient in mental hospital being detained for 14-day intensive treatment under Lanterman-Petris-Short Act; court as ordering habeas corpus to have persons being treated brought before court on refusal of hospital to admit attorneys. *Thorn v. Superior Court (1970) 1 Cal. 3d 666, 668-669, 83 Cal. Rptr. 600, 464 P.2d 56*

Superior court as acting within its jurisdiction in safeguarding rights of those confined in mental hospitals by ordering that attorneys automatically visit each person involuntarily certified for 14-day intensive treatment and that writs of habeas corpus issue for all those not visited. *Thorn v. Superior Court (1970) 1 Cal. 3d 666, 675, 83 Cal. Rptr. 600, 464 P.2d 56*

When proceedings are commenced under statutes providing for other than emergency apprehensions, person against

whom they have been commenced as entitled to notice and hearing. *In re Burhans (1966) 65 Cal. 2d 233, 237, 53 Cal. Rptr. 409, 418 P.2d 1*

Petition for writ of habeas corpus as denied where petitioner was detained in mental hospital pending hearing on existence of mental illness as required under governing statutes, where petitioner was an escapee from another state's hospital. *In re Burhans (1966) 65 Cal. 2d 233, 240, 53 Cal. Rptr. 409, 418 P.2d 1*

Where commitment procedures are set up by statute and are in nature of civil proceedings unknown at common law, jurisdiction to enter an order of commitment depends on strict compliance with each of specific statutory requirements for maintenance of proceeding, and court may direct release on habeas corpus where procedures are not substantially, if not strictly, followed. *In re Raner (1963) 59 Cal. 2d 635, 639, 30 Cal. Rptr. 814, 381 P.2d 638*

Cal. Const., Art I, § 11, as guaranteeing person committed to writ of habeas corpus remedy to determine whether person is subject to commitment or has recovered from condition. *In re De La O (1963) 59 Cal. 2d 128, 142-143, 28 Cal. Rptr. 489, 378 P.2d 793*

Court in habeas corpus proceeding concerning guardianship as properly determining only the issue of whether or not applicant is being unlawfully deprived of liberty because competent. *Browne v. Superior Court (1940) 16 Cal. 2d 593, 598, 107 P.2d 1*

Allegation in petition for writ of habeas corpus that petitioner is competent person improperly restrained under guardianship as entitling court to determine issue of competency and release from restraint. *Browne v. Superior Court (1940) 16 Cal. 2d 593, 598, 107 P.2d 1*

Commitment of person to hospital for insane as not authorizing commitment after person has become sane when statutes provide that such person may be discharged from any further custody after examination on habeas corpus proceedings; person alleging that he has regained his sanity as entitled to preliminary writ of habeas corpus to try the issue of sanity. *Matter of Application of Clary (1906) 149 Cal. 732, 738, 87 P. 580*

Court as issuing an order to show cause why writ of habeas corpus should not issue in case involving minor confined to state mental hospital. *In re L. L. (1974) 39 Cal. App. 3d 205, 207, 114 Cal. Rptr. 11* ; *In re Cirino (1972) 28 Cal. App. 3d 1009, 1011-1012, 105 Cal. Rptr. 194*

Order to show cause as discharged and writ of habeas corpus as granted where minor ward of juvenile court was committed to mental hospital without following proper statutory procedures. *In re L. L. (1974) 39 Cal. App. 3d 205, 215-217, 114 Cal. Rptr. 11*

Writ of habeas corpus as properly issued directing release of person held in mental hospital after evidence had clearly established sanity in court hearing in superior court but superior court had declined to make proper order for person's release. *In re Perkins (1958) 165 Cal. App. 2d 73, 81-82, 331 P.2d 712*

Petitioner confined in sanitarium as mental patient as entitled to release on writ of habeas corpus when statutory

procedures for commitment were not followed and there was not substantial compliance with these procedures in that petitioner was deprived of the right to counsel. *In re Hofmann (1955) 131 Cal. App. 2d 758, 762, 281 P.2d 96*

On writ of habeas corpus, evidence as insufficient to justify discharge from mental hospital when petitioner was worse at time of application than at admission to hospital and was unable to care for herself. *In re Cloutman (1941) 47 Cal. App. 2d 77, 78, 117 P.2d 378*

Petitioner as entitled to discharge from state hospital on writ of habeas corpus when statutory procedures requiring that she be informed of the right to make defense and to produce witnesses were not followed. *In re Wright (1939) 31 Cal. App. 2d 166, 168, 88 P.2d 186*

[b] Conditions of Confinement

Habeas corpus proceedings creates procedure by which prisoners may vindicate rights regarding conditions of confinement and release, which may be utilized as alternative to actions for declaratory or injunctive relief and/or mandamus; *Code Civ. Proc. § 1021.5* authorizes award of attorney fees to counsel who initiated habeas corpus proceedings on behalf of prison inmates to vindicate their work furlough rights. *In re Head (1986) 42 Cal. 3d 223, 229, 232, 228 Cal. Rptr. 184, 721 P.2d 65*

Person lawfully in custody as entitled to writ of habeas corpus to vindicate rights to which he is entitled even in confinement. *In re Allison (1967) 66 Cal. 2d 282, 285, 57 Cal. Rptr. 593, 425 P.2d 193*

When guardian took ward away from satisfactory residence without authorization from court, unjustifiably confined or imprisoned ward, and deprived ward of medical care, restraints as subject to inquiry on writ of habeas corpus. *Browne v. Superior Court (1940) 16 Cal. 2d 593, 600-601, 107 P.2d 1*

When guardian acting under instructions of court in confining and limiting freedom of ward and court has jurisdiction of guardianship, habeas corpus as improper remedy to test reasonableness of restraints imposed on ward. *In re Gandolfo (1984) 36 Cal. 3d 889, 898, 206 Cal. Rptr. 149, 686 P.2d 669* ; *Browne v. Superior Court (1940) 16 Cal. 2d 593, 601, 107 P.2d 1*

Writ of habeas corpus as available to person who is lawfully confined in order to challenge an assertedly improper condition of confinement when condition assaulted involves denial of some basic or fundamental right. *In re Cirino (1972) 28 Cal. App. 3d 1009, 1012, 105 Cal. Rptr. 194*

Right of person confined to mental hospital pursuant to *Penal Code § 1026* (governing court-ordered confinement of persons judged not guilty by reason of insanity) to grounds privileges while confined in the hospital as basic right while in lawful confinement, which may be protected by writ of habeas corpus. *In re Cirino (1972) 28 Cal. App. 3d 1009, 1012, 105 Cal. Rptr. 194*

[5] Procedure

[a] Pleadings

Appellate court lacked jurisdiction to treat untimely appeal of adoption-related judgment as petition for writ of habeas corpus when appellant offered no excuse for failure to file timely appeal, "petition" was not verified, and opposing party was never given opportunity to file return. *Adoption of Alexander (1988) 44 Cal. 3d 857, 859, 865, 245 Cal. Rptr. 1, 750 P.2d 778* (claim arising from petition to withdraw consent to adoption under former *Civ. Code § 226a* (*now see Fam. Code § 8815*))

Return to writ or order to show cause as to allege facts tending to establish the legality of challenged detention and as analogous to complaint in civil proceeding. *In re Lewallen (1979) 23 Cal. 3d 274, 277, 152 Cal. Rptr. 528, 590 P.2d 383* ; *In re Saunders (1970) 2 Cal. 3d 1033, 1047, 88 Cal. Rptr. 633, 472 P.2d 921*

Factual allegations of return as deemed true unless petitioner, in traverse, denies truth of allegations and either realleges facts set out in petition or, by stipulation, petition is treated as traverse. *In re Lawler (1979) 23 Cal. 3d 190, 194, 151 Cal. Rptr. 833, 588 P.2d 1257*

Response to return as called "traverse" and as analogous to answer in civil proceedings; petition as properly treated as traverse by stipulation or acquiescence. *In re Saunders (1970) 2 Cal. 3d 1033, 1047, 88 Cal. Rptr. 633, 472 P.2d 921*

Petitioner as allowed to except to the sufficiency of return in procedure analogous to demurrer. *In re Saunders (1970) 2 Cal. 3d 1033, 1048, 88 Cal. Rptr. 633, 472 P.2d 921*

New matter alleged in traverse (or petition) as deemed denied and required to be proved by party alleging it, petitioner. *In re Saunders (1970) 2 Cal. 3d 1033, 1047-1048, 88 Cal. Rptr. 633, 472 P.2d 921* ; *In re Egan (1944) 24 Cal. 2d 323, 149 P.2d 693 , cert. denied, 323 U.S. 785, 65 S. Ct. 272, 89 L. Ed. 626*

Relief sought of habeas corpus as properly granted without hearing on factual issues where return acknowledges or admits allegations in petition or traverse which, if true, justify relief sought. *In re Saunders (1970) 2 Cal. 3d 1033, 1048, 88 Cal. Rptr. 633, 472 P.2d 921*

Respondent as not required to file, in addition to return, pleading denying affirmative allegations of traverse (or petition where treated as traverse). *In re Masching (1953) 41 Cal. 2d 530, 533, 261 P.2d 251*

Function of petition for writ of habeas corpus as to obtain writ. *In re Egan (1944) 24 Cal. 2d 323, 330, 149 P.2d 693 , cert. denied, 323 U.S. 785, 65 S. Ct. 272, 89 L. Ed. 626*

Where petition is treated as traverse, petition as having same effect as traverse. *In re Egan (1944) 24 Cal. 2d 323, 330, 149 P.2d 693 , cert. denied, 323 U.S. 785, 65 S. Ct. 272, 89 L. Ed. 626*

Allegations of petition for writ of habeas corpus brought by mother of an illegitimate child to regain custody of child from third parties. *In re Croze (1956) 145 Cal. App. 2d 492, 493-494, 302 P.2d 595*

Petition of mother of children for writ of habeas corpus for their custody as properly denied when merits of case can be more thoroughly considered and proper determination made on hearing of petition for custody modification in superior court. *In re Elliott (1953) 115 Cal. App. 2d 536, 538, 254 P.2d 135*

Appellate court as granting writ of habeas corpus when lower court improperly decided that it had jurisdiction to grant warrant in lieu of writ of habeas corpus to father of child to gain its custody from mother in one county, when mother, resident of another county, had already filed petition for guardianship of child, who resided with her, in county of her residence. *In re Kosh (1951) 105 Cal. App. 2d 418, 421-425, 233 P.2d 598*

When one California county had exclusive jurisdiction of issue of custody of child, issuance of warrant in lieu of writ of habeas corpus by another California county as within that court's jurisdiction only for purposes of ordering child brought before court for its protection. *In re Kosh (1951) 105 Cal. App. 2d 418, 425, 233 P.2d 598*

Respondent to writ of habeas corpus who wishes to attack validity of sister state decree of custody on grounds that there was no jurisdiction over the child as required to allege affirmatively lack of jurisdiction. *In re Kyle (1947) 77 Cal. App. 2d 634, 640, 176 P.2d 96*

Pleading sister state decree valid on its face awarding custody to petitioner for writ of habeas corpus as sufficient to overcome a demurrer on ground that petition did not allege that sister state court had jurisdiction to render the judgment. *In re Kyle (1947) 77 Cal. App. 2d 634, 636, 176 P.2d 96*

Demurrer to return to writ of habeas corpus as admitting material facts alleged in return to be true for purposes of determining sufficiency of return. *In re Landry (1943) 61 Cal. App. 2d 230, 233, 142 P.2d 432*

When petition is, by stipulation, deemed a traverse to return, petition that fails to deny allegations of return as possibly admitting those allegations, but such stipulation as possibly construed to provide that allegations of return should be deemed denied. *In re De Leon (1943) 59 Cal. App. 2d 510, 513, 139 P.2d 109*

[b] Proper Court

Territorial restrictions on jurisdiction of superior courts to entertain petitions for and grant relief in habeas corpus matters that existed prior to 1966, pursuant to *Cal. Const., Art VI, § 5*, as eliminated by *Cal. Const., Art VI, § 10*, which provided only that superior courts and their judges have original jurisdiction in habeas corpus proceedings. *Griggs v. Superior Court (1976) 16 Cal. 3d 341, 346, 128 Cal. Rptr. 223, 546 P.2d 727*

Appellate as well as superior courts as having jurisdiction to issue writ of habeas corpus. *In re Richard M. (1975) 14 Cal. 3d 783, 789, 122 Cal. Rptr. 531, 537 P.2d 363*

When factual questions are involved, petitioner as generally required to seek relief first in superior court by habeas corpus rather than in an appellate court. *In re Richard M. (1975) 14 Cal. 3d 783, 789, 122 Cal. Rptr. 531, 537 P.2d 363* ; *In re Wren (1957) 48 Cal. 2d 159, 165, 308 P.2d 329*

Where an appellate court makes an order to show cause returnable before superior court and superior court denies writ, petitioner as entitled to again apply to appellate court, which will make an independent examination of evidence taken in superior court. *In re Hochberg (1970) 2 Cal. 3d 870, 874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1*

Referee's findings of fact as not binding on appellate court but as entitled to great weight when supported by ample, credible evi dence. *In re Branch (1969) 70 Cal. 2d 200, 203 n. 1, 74 Cal. Rptr. 238, 449 P.2d 174*

Appellate courts as commonly appointing a referee when disputed questions of fact exist on writ of habeas corpus. *In re Mooney (1937) 10 Cal. 2d 1, 15, 73 P.2d 554 , cert. denied, 305 U.S. 598, 59 S. Ct. 61, 83 L. Ed. 379*

Cal. Const., Art VI, § 10 as granting identical original jurisdiction in habeas corpus proceedings to both court of appeal and superior courts, so that both court of appeal and superior court have statewide jurisdiction. *In re Van Heflin (1976) 58 Cal. App. 3d 131, 135, 128 Cal. Rptr. 257*

[c] Orders and Hearing

Petitioner normally bears burden of proving facts on which claim for relief is based, but if possibility that increased or additional charges violating due process supporting charge of prosecutorial vindictiveness is at issue, petitioner only needs to demonstrate facts giving rise to presumption of vindictiveness at which time, even on habeas corpus, burden shifts to people to rebut presumption. *In re Bower (1985) 38 Cal. 3d 865, 872, 215 Cal. Rptr. 267, 700 P.2d 1269*

Although not expressly provided for by statute, order to show cause as developed by courts as appropriate means by which to initiate hearing and disposition of petition for writ of habeas corpus on behalf of person in custody without bringing petitioner before court. *In re Lawler (1979) 23 Cal. 3d 190, 194, 151 Cal. Rptr. 833, 588 P.2d 1257*

Court as permitted to dispose of petition without evidentiary hearing when there are no disputed material factual allegations. *In re Lawler (1979) 23 Cal. 3d 190, 194, 151 Cal. Rptr. 833, 588 P.2d 1257*

Courts as having developed practice of ordering custodian t o show cause why relief sought by writ of habeas corpus should not be granted. *In re Hochberg (1970) 2 Cal. 3d 870, 874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1*

When appellate court makes a writ or order to show cause returnable before lower court, appellate court as instituting proceeding in which issues of fact are both framed and decided. *In re Hochberg (1970) 2 Cal. 3d 870, 875-876 n.4, 87 Cal. Rptr. 681, 471 P.2d 1*

When appellate court issues writ or order to show cause returnable before lower court, appellate court's preliminary determination that petitioner has stated grounds which if proved would entitle him or her to habeas corpus relief as not equivalent to final appellate court decision on questions of law in favor of petitioner. *In re Hochberg (1970) 2 Cal. 3d 870, 875-876 n. 4, 87 Cal. Rptr. 681, 471 P.2d 1*

Court as able to appoint referee to conduct a hearing when an order to show cause why writ should not issue is made returnable before appellate court. *In re Hochberg (1970) 2 Cal. 3d 870, 874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1*

County counsel is required under *Welf. & Inst. Code § 5114* to appear and present certification allegations in habeas corpus hearings since hearings are independent review of allegations set forth in certification notice. *St. Joseph Hospital v. Kuyper (1983) 146 Cal. App. 3d 1086, 1089-1090, 194 Cal. Rptr. 876*

Superior Court as having jurisdiction to entertain an application for writ of habeas corpus for purpose of obtaining custody of minor child. *Rose v. Superior Court (1948) 86 Cal. App. 2d 173, 177, 194 P.2d 568*

When the issue of whether or not petitioner for writ of habeas corpus, parent of child, is fit person to have custody is before trial court pursuant to pending proceeding for letters of guardianship by proposed adoptive parents who have custody of child, appellate court as properly refusing to issue writ since issue is best determined by trial court. *In re Martin (1947) 79 Cal. App. 2d 584, 587, 180 P.2d 383*

[6] Release From State Hospital

Writ of habeas corpus as denied when regional center supported release of developmentally disabled person from state hospital to community placement, but person, family, and hospital director were opposed, and when evidence supported that person was able to make competent choice regarding living arrangement. *In re Borgogna (1981) 121 Cal. App. 3d 937, 940-949, 175 Cal. Rptr. 588*

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For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataCriminal Law & ProcedureHabeas CorpusAppealsGeneral OverviewCriminal Law & ProcedureHabeas CorpusExhaustion of RemediesGeneral OverviewFamily LawChild CustodyEnforcementHabeas Corpus ReliefFamily LawParental Duties & RightsGeneral OverviewPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentGeneral Overview

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Note, *The Federal Interest Approach to State Waiver of the Exhaustion Requirement in Federal Habeas Corpus, 97 Harv. L. Rev. 511 (1983).*

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Note, *Infants--Custody and Protection--Jurisdiction of Courts, 27 So. Cal. L. Rev. 486 (1954).*

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Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 292.48 Text References

California Civil Writ Practice (Cal. CEB 3d ed. 2000)

Witkin, California Procedure, vol. 8, *Extraordinary Writs*, §§ 21, 24 (4th ed. 1997)

Legal Topics:

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

California Forms of Pleading and Practice--Annotated

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
Chapter 292 HABEAS CORPUS
PART III. RESEARCH GUIDE

25-292 California Forms of Pleading and Practice--Annotated §§ 292.49-292.59

[Reserved]

§§ 292.49[Reserved]

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
Chapter 292 HABEAS CORPUS
PART IV. PROCEDURAL CHECKLIST

25-292 California Forms of Pleading and Practice--Annotated § 292.60

§ 292.60 Petitioner's Checklist

NOTE:
The following checklist is illustrative only of the basic points which counsel for a petitioner in a proceeding for writ of habeas corpus should cover.

[1] Facts to Be Ascertained

NOTE:
Not all of the following facts will be ascertainable from the client in the initial interview. Subsequent interviews may be required or it may be necessary to ascertain the facts from other persons.

1. Facts relating to petitioner.

a. Name, address, and telephone number of petitioner and relationship of petitioner, if any, to person in whose behalf relief is sought.

b. Name and address of place where petitioner or person in whose behalf the writ is sought is confined, and, where appropriate, restrictions from which he or she seeks relief.

c. Name and title of person or persons having custody of petitioner or other person. If the name of the person is now known, description of the person by title or other designation.

d. Name and address of court under whose process, if any, petitioner is confined or restrained, together with the case or action number in that court, and the proceedings which have occurred in that court to date, including any judgments or orders made, by date and terms.

e. Whether any appeal has been taken and, if so, the title, the court, and the case number

on appeal; the current status or result of the appeal; and the date of judgment on appeal, if any, and citation to written opinion of court, if any, published in official reports.

f. Whether any other applications, petitions, or motions have been filed by petitioner or on his or her behalf in regard to the same detention now complained of and, if so, the title, the court, and the case of the proceedings; the result of the proceedings; and the date of any judgment or order in such proceedings; including citation to written opinions of court, if any, published in official reports.

g. Names of counsel, in any, who represented petitioner or person in whose behalf relief is now sought at each stage of the proceeding leading to commitment or custody complained of and on appeal on other later remedies.

2. Facts relating to respondents.

a. Any threats or other indications that respondent will remove petitioner or the person in whose behalf the writs is sought from the jurisdiction of the court or that petitioner will suffer irreparable harm, indicating the need to proceed for a warrant in lieu of writ of habeas corpus [*see Penal Code §§ 1497-1500*]. See *§ 292.60[6]*.

b. In the case of a child custody proceeding, the length of time the child has been in the custody of respondent; whether respondent is providing the child with a stable home; the relationship of respondent to the child, if any [*see Civ. Code § 4600*]; the fitness or unfitness of respondent to have custody and control of the child; and how respondent obtained custody or possession of the child.

[2] Preliminary Determinations

1. Grounds for writ of habeas corpus. See discussions in *§§ 292.11*, *292.46[2]*, *292.26*, and *292.27*.

2. The proper court for filing the petition. See discussion in *§ 292.46[5][b]*; see also § 292.80-292.85.

3. Whether the applicant or some other person in his or her behalf will sign and verify the petition.

[3] Essential Allegations of the Petition

NOTE:

Counsel should first determine whether the Judicial Council of California Form of Petition for Release From or Modification of Custody should be used. If so, it is the usual practice for counsel to prepare a petition setting forth all relevant material required by the Judicial Council form but prepared entirely by counsel. See *§ 292.81* and *292.81*.5.

A petition for a writ of habeas corpus must allege the following [see *§ 292.80*]:

1. Name of the person unlawfully restrained [*Penal Code § 1474*];

2. That the person is restrained of his or her liberty or, if the person is a minor child, that he or she is wrongfully in the custody of respondent [*Penal Code § 1474*];

3. The name and position of the person or officer by whom the person is restrained [*Penal Code § 1474*];

4. The place of the restraint, including its address and name, if any [*Penal Code § 1474*];

5. The relationship of petitioner to the person restrained, if appropriate [*see In re Harrell (1970) 2 Cal. 3d 675, 689, 87 Cal. Rptr. 504, 470 P.2d 640]* ;

6. The illegality of the restraint or of the conditions of confinement and supporting facts [*Penal Code § 1474*; *In re Kyle (1947) 77 Cal. App. 2d 634, 639, 176 P.2d 96]* ;

7. What proper custody would be in petitioner's case, if appropriate or, if the petition is in behalf of a child, why custody should vest in petitioner;

8. That petitioner has no other plain, adequate, and speedy remedy, where appropriate [*In re Wallace (1970) 3 Cal. 3d 289, 292, 90 Cal. Rptr. 176, 475 P.2d 208]* ;

9. Exhaustion of administrative remedies, if required and if any are available [*In re Muszalski (1975) 52 Cal. App. 3d 500, 503-504, 125 Cal. Rptr. 286]* ;

10. Whether or not prior application for the writ has been made with regard to the same restraint and custody and, if so, a statement of all proceedings had on prior applications, including final orders on appeal or otherwise [*Penal Code § 1475*]; and

11. If the writ is sought in the first instance in a court of appeal or the Supreme Court, the reason why it was not first sought in the superior court [*In re Hillery (1962) 202 Cal. App. 2d 293, 294, 20 Cal. Rptr. 759]* .

[4] Preparation of Petition and Supporting Documents

1. Prepare petition as described in §§ 292.80-292.84.

2. Prepare copies as required. See §§ 292.80-292.84.

3. Have the petition signed and verified by the petitioner [*Penal Code §§ 1474, 1474(3)*].

4. Serve copies of the petition as required. See §§ 292.80-292.84.

5. Present the original petition and appropriate copies to the clerk of the court for filing, together with proof of service when service is required. No fee may be charged in proceedings on habeas corpus [*Gov. Code § 6101*].

6. Where time and circumstances allow, present with the petition a memorandum of points and authorities supporting the granting of the relief sought in the petition. See California Points and Authorities, Ch. 110, *Habeas Corpus* .

7. Request the clerk to present the petition and supporting documents to the court or judge and to obtain and order granting the writ. See *§ 292.87*.

[5] Issuance of Writ or of Order to Show Cause

NOTE:

The petition may be summarily denied by the court [*see* *Cal. Rules of Ct., Rule 4.551(a)(4)(b)*], in which case an order is prepared and entered by the court. A copy of this order will be delivered to the attorney for petitioner. Any superior court order denying a petition for a writ of habeas corpus must contain a brief statement of the reasons for the denial. An order only declaring the petition to be "denied" is insufficient [*Cal. Rules of Ct., Rule 4.551(g)*].

1. Time limit for acting on petition.

If the petition is filed in superior court, the court must rule on the petition within 60 days after it is filed, either by issuing an order to show cause, denying the petition, or requesting an informal response [*Cal. Rules of Ct., Rule 4.551(a)(3)(A), (a)(4)*]. If the court fails to rule on the petition within 60 days of its filing, the petitioner may file a notice and request for a ruling [*Cal. Rules of Ct., Rule 4.551(a)(3)(B)*]. The 60-day time limit apparently does not apply when the petition is filed in an appellate court.

2. Issuance of writ. See *§ 292.14*.

Any court or judge authorized to grant the writ must grant the writ without delay if it appears that the writ should be issued [*Penal Code § 1476*]. The writ will be served on respondent by the sheriff or marshall without delay, unless the writ is directed to the sheriff or other ministerial officer of the court out of which it issues, in which case it must be delivered by the clerk to the officer without delay [*Penal Code § 1478*]. If the person to whom the writ is directed cannot be found, or refuses admittance to the officer or person serving or delivering the writ, the writ may be served or delivered by leaving it at the residence of the person to whom it is directed, or by affixing it to some conspicuous place on the outside either of his or her dwelling house or the place where the party is confined or under restraint [*Penal Code § 1478*]. No fee may be cha rged in proceedings on habeas corpus [*Gov. Code § 6101*].

3. Issuance of order to show cause. See *§ 292.15*.

The court will generally issue an order to show cause that is prepared by the court itself; however, when petitioner is represented by counsel, counsel may be directed to serve the order and a copy of the petition on respondent.

4. Request for Informal Response. See *§ 292.13[4]*.

Before passing on a petition filed in superior court, the court may request an informal response from the respondent or real party in interest, or from the custodian of any record pertaining to the petitioner's case [*Cal. Rules of Ct., Rule 4.551(b)(1)*]. A copy of the request and any response must be sent to the petitioner, who will be given 15 days to reply to the response [*Cal. Rules of Ct., Rule 4.551(b)(2)*]. Within 45 days after receipt of the informal response, the court must issue an order to show cause or deny the petition [*Cal. Rules of Ct., Rule 4.551(a)(5)*].

[6] Issuance of Warrant in Lieu of Writ or Order to Show Cause

See generally § 292.90-292.92 and *§ 292.16*.

[7] Receipt of Return to Writ by Petitioner

Counsel for petitioner should examine the return to determine whether it contains any material facts or matters that petitioner should deny or controvert [*Penal Code § 1484*]. See § 292.93-292.95.

[8] Traverse

1. Prepare the traverse to the return [*see Cal. Rules of Ct., Rule 8.386(d)(2)*; *see also § 292.95*] in the same number of copies required for the petition. See § 292.80-292.84.

2. Serve copies of the traverse as required for the petition (see § 292.80-292.84) and present the original and any required copies, together with proof of service, if required, to the clerk of the court for filing [*see Cal. Rules of Ct., Rule 8.386(d)(4)*].

3. If an order to show cause has been issued by a superior court, the traverse (or "denial," as it is called in the California Rules of Court) must be served on respondent and filed with the court within 30 days after service and filing of the return [*Cal. Rules of Ct., Rule 4.551(e)*].

4. In a court of appeal or the Supreme Court, unless the court orders otherwise, file the traverse within 30 days after filing of the return [*Cal. Rules of Ct., Rule 8.386(d)(1)*].

[9] Hearing

Attend the hearing at the time and place fixed by the court and present oral argument and evidence in support of the requested relief.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionPleadingsCriminal Law & ProcedureHabeas CorpusReviewGeneral Overview

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25-292 California Forms of Pleading and Practice--Annotated § 292.61

§ 292.61 Respondent's Checklist

NOTE:
The following checklist is illustrative only of the basic points that counsel for a respondent in a habeas corpus proceeding should cover.

[1] Facts to Be Ascertained

NOTE:
Not all of the following facts will be ascertainable from the client in the initial interview. Subsequent interviews may be required, or it may be necessary to ascertain the facts from others, including the petitioner.

1. Facts relating to respondent.

a. Name, address, and telephone number of respondent.

b. Capacity of respondent (individual, public entity, private hospital, incorporated or not, or other).

c. Additional facts related to respondent's right to retain custody of petitioner or other person in whose behalf the writ is sought, including court orders, commitment documents, or, if the person is a child in the custody of person not the natural parents, whether the child has been living with respondents in a wholesome and stable environment [*see Fam. Code § 3040(a)(2)*], or whether the respondent is the natural or presumed parent of the child [*Fam. Code §§ 3010, 7611*].

2. Facts required for the return.

a. Date, manner, and place of service of the writ, and by whom served.

b. Contents of the petition.

c. Facts regarding lawfulness of petitioner's confinement or respondent's right to custody, including, but not limited to, the following:
(1) Valid court orders pertaining to the confinement or custody.

(2) Adherence to statutory procedures pertaining to the confinement or custody.

(3) In child custody cases, facts showing that respondent's continued custody of child is in child's best interests under statutory standards [*see generally Fam. Code § 3000 et seq.*; Ch. 223, *Dissolution of Marriage: Child Custody*; Ch. 394, *Parent and Child*].

(4) Other facts responding to the factual allegations of the petition [*see People v. Duvall (1995) 9 Cal. 4th 464, 476, 37 Cal. Rptr. 2d 259, 886 P.2d 1252* ; *see also § 292.17[2][b]*].

[2] Essential Allegations of the Return

The essential allegations of a return [*see* Forms 13, 14] to a petition for a writ of habeas corpus are:

1. Whether or not respondent has the person in custody or under his or her power or restraint [*Penal Code § 1480(1)*].

2. If respondent has the party in custody, or under his or her restraint, the authority and cause of that imprisonment or restraint [*Penal Code § 1480(2)*].

3. Facts tending to establish the legality of the petitioner's detention, including allegations that specifically respond to the allegations of the petition that form the basis of the petitioner's claim that the confinement is unlawful [*People v. Duvall (1995) 9 Cal. 4th 464, 476, 37 Cal. Rptr. 2d 259, 886 P.2d 1252* ; *People v. Romero, (1994) 8 Cal. 4th 728, 738, 35 Cal. Rptr. 2d 270, 883 P.2d 388* ; *In re Saunders (1970) 2 Cal. 3d 1033, 1047, 88 Cal. Rptr. 633, 472 P.2d 921* ; *see § 292.17[2][b]*]. NOTE: A return consisting solely of general denials of the allegations of the petition is generally insufficient [*see People v. Duvall (1995) 9 Cal. 4th 464, 479-481, 37 Cal. Rptr. 2d 259, 886 P.2d 1252* ; *In re Lewallen (1979) 23 Cal. 3d 274, 278 n.2, 152 Cal. Rptr. 528, 590 P.2d 383]* . Any material allegation of the petition not controverted by the return is deemed admitted for purposes of the habeas corpus proceeding [*Cal. Rules of Ct., Rule 4.551(d)*].

4. Documentary evidence, affidavits, or other materials that will enable the court to determine which issues are truly disputed [*People v. Duvall (1995) 9 Cal. 4th 464, 476, 37 Cal. Rptr. 2d 259, 886 P.2d 1252* ; *In re Lewallen (1979) 23 Cal. 3d 274, 278 n.2, 152 Cal. Rptr. 528, 590 P.2d 383]* .

5. If the person on whom the writ is served has transferred custody of the party to another person, the following information [*Penal Code § 1480(4)*]:

a. The name of the transferee.

b. The time and place of transfer.

c. The cause and authority for the transfer.

6. In child custody cases, facts showing that respondent's continued custody of child is in child's best interests under statutory standards [*see generally Fam. Code § 3000 et seq.*; Ch. 223, *Dissolution of Marriage: Child Custody*; Ch. 394, *Parent and Child*].

[3] Draft and Prepare Return

1. Format [*see Cal. Rules of Ct., Rule 8.386(c)*]. *See § 292.60[4]*.

2. Copies [*see Cal. Rules of Ct., Rule 8.386(b)(2)*]. *See § 292.60[4]*.

3. If the party is detained by virtue of any writ, warrant, or other written authority, a copy of the written authority must be annexed to the return, and the original produced and exhibited to the court or judge on the hearing of the return [*Penal Code § 1480(3)*].

4. Have the return signed and verified by respondent [*Penal Code § 1480(5)*].

5. Serve and present the return for filing [*see Cal. Rules of Ct., Rule 8.386(b)(1)*].

6. If time and circumstances allow, present with the return a memorandum supporting the position of respondent and opposing the granting of the relief sought by petitioner. *See generally* California Points and Authorities, Ch. 110, *Habeas Corpus* (Matthew Bender).

7. Obtain the original of any writ, warrant, or other written authority by virtue of which petitioner is detained to be produced and exhibited to the court or judge on the hearing of the return [*Penal Code § 1480(3)*].

[4] Hearing

1. Attend the hearing at the time and place fixed by the court and present oral argument and evidence in opposition to the relief requested by petitioner.

2. Produce the originals of any writs, warrants, or other written authority, by virtue of which the party is detained, for the court or judge at the hearing on the return [*see Penal Code § 1480(3)*].

3. Produce the body of petitioner or the person in whose behalf the writ was sought before the court, if ordered in the writ or other process, at the time and place specified by the court in the writ or process.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionPleadings

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25-292 California Forms of Pleading and Practice--Annotated §§ 292.62-292.79

[Reserved]

§§ 292.62[Reserved]

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PART V. FORMS

25-292 California Forms of Pleading and Practice--Annotated § 292.80

§ 292.80 Petition for Writ of Habeas Corpus [Penal Code § 1474]--General Form--Superior Court

[1] FORM Petition for Writ of Habeas Corpus [Penal Code § 1474]--General Form--Superior Court
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the Application	)	
of _____ [*name*],	)	NO. _____
Petitioner,	)	PETITION FOR WRIT OF HABEAS CORPUS
[in Behalf of _____ (*name*),]	)	
for Writ of Habeas Corpus.	)	
	)	

_____

[*EITHER*]

TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE [CITY AND] COUNTY OF _____:

[*OR*]

TO THE HONORABLE _____ [*name*], JUDGE OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE CITY [AND COUNTY] OF _____:

Petitioner alleges:

1. _____ [*Name*] is unlawfully restrained of his/her liberty [and imprisoned, detained, and confined] by _____ [*name and official position, if applicable, of person exercising custody or control, or description if name is not known*], at _____ [*address or location of confinement*], _____ County, California.

[2. Petitioner is the _____ (*specify relationship*) of _____ (*name*), the person for whom this petition has been filed.]

3. _____ [*Name*] purports to restrain and keep custody of _____ [*name*] [by authority of and pursuant to] _____ [*allege cause, pretext, and particular facts of restraint*].

4. The illegality of the _____ [custody *or* imprisonment *or* detention *or* restraint *or* confinement] of _____ [*name*] consists in the following: _____ [*allege facts showing the illegality, attaching and incorporating appropriate court orders, process, appeals, points and authorities, and other documents to support the allegations*].

5. _____ [*Allege where appropriate:* Petitioner is at this time entitled to custody and physical possession of _____ (*name of minor child*) because, _____ (*allege, in child custody cases, reasons why custody should be vested in petitioner*)].

[*EITHER*]

6. Petitioner has no other plain, speedy, or adequate remedy at law, [having exhausted his/her remedy at law by _____ (*allege facts showing exhaustion of remedies*)].

[*OR*]

6. Petitioner is without remedy except on application for writ of habeas corpus because _____ [*specify reason(s)*].

7. _____ [*Allege, where appropriate:* Petitioner has exhausted his/her administrative remedies with regard to the alleged _____ (custody *or* detention *or* imprisonment *or* restraint *or* confinement) by _____ (*specify proceedings and dispositions*)].

8. Prior application _____ [has *or* has not] been made for a writ of habeas corpus in regard to this _____ [custody *or* imprisonment *or* detention *or* restraint *or* confinement]. [The following proceedings were had on prior application for writ of habeas corpus with regard to this detention: _____ (*allege brief statement of all prior proceedings, including title of petition, date, court in which filed, disposition and date of disposition, and final order(s) on appeal or otherwise*). _____ (*Allege facts showing that a second application should be granted, e.g.,* The court in the above-alleged application for writ of habeas corpus denied the writ and relief sought, and petitioner is without other means of review of this decision of the court).]

WHEREFORE, petitioner prays judgment as follows:

1. That a writ of habeas corpus be granted, directed to _____ [*name and title, if any, of custodian*], commanding him/her to have the body of _____ [petitioner *or name of person in whose behalf the writ is sought*], together with the authority for his/her _____ [custody *or* imprisonment *or* detention *or*

restraint *or* confinement] [and the conditions or length of time or place thereof], before _____ [this Court *or* Your Honor] at a specified time;

2. That _____ [petitioner *or name of person in whose behalf writ is sought*] be _____ [*specify precise relief desired, e.g.*, restored to the custody of petitioner]; and

3. For other and further relief as the court may deem proper.
Dated: _____.

_____ [*signature*]

_____ [*name of petitioner*]

Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the petition above and know its contents. The same is true of my own knowledge, except as to those matters which are alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

CAUTION:

Cal. Judicial Council form MC-275 must be used for a petition for a writ of habeas corpus. There are two exceptions to this requirement: One is that for good cause, the court may accept for filing a petition that is not on the Judicial Council form. The other exception is that a petition submitted by an attorney need not be on the Judicial Council form [*Cal. Rules of Ct., Rule 4.551(a)(1), (2)*; for an illustration of that form, *see* *§ 292.81*]. It is recommended that the Judicial Council form be used rather than this form in any event.

[2] Use of Form

This general form of petition is for use in a proceeding to obtain the writ of habeas corpus to inquire into the cause of the custody or detention of the person in whose behalf the petition is brought or of the petitioner [*Penal Code § 1473*].

For discussion of the various situations in which a petition for writ of habeas corpus may be used, particularly with respect to civil commitments rather than criminal detentions, see the Introduction [*see, e.g.*, discussion *§ 292.27*].

For a form of petition for use to enforce a child custody order, see *§ 292.85*. For a form of petition for use to recover custody of a child from a person who is not entitled to custody, see *§ 292.86*.

[3] Allegations

This petition alleges:

- The name of the person unlawfully restrained (Paragraph 1) [*Penal Code § 1474*].
- That the person is restrained of his or her liberty (Paragraph 1) [*Penal Code § 1474*].
- The name and position of the officer or person by whom he/she is restrained (Paragraph 1) [*Penal Code § 1474*].
- The place of the restraint (Paragraph 1) [*Penal Code § 1474*].
- The relationship of the petitioner to the person restrained, if appropriate (Paragraph 2).
- The cause or pretext of the restraint (Paragraph 3) [*Penal Code § 1473*].
- The illegality of the restraint and supporting facts (Paragraph 4) [*Penal Code § 1474*].
- Why custody should vest in petitioner, if appropriate (Paragraph 5).
- That petitioner has no other plain, adequate, and speedy remedy, when appropriate (Paragraph 6) [*In re Wallace (1970) 3 Cal. 3d 289, 292, 90 Cal. Rptr. 176, 475 P.2d 208]* .
- Exhaustion of administrative remedies, when appropriate (Paragraph 7) [*In re Muszalski (1975) 52 Cal. App. 3d 500, 503-508, 125 Cal. Rptr. 286]* .
- That a prior application for the writ has or has not been made with regard to the same restraint and, if so, a statement of all proceedings had on prior applications, including final orders on appeal or otherwise (Paragraph 8) [*Penal Code § 1475*].

[4] Points and Authorities

This petition is not required to be accompanied by points and authorities supporting it. The better practice, however, when time and circumstances allow, is to include points and authorities supporting the granting of the writ in general and supporting the allegation that the commitment or detention alleged is illegal.

[5] Signing and Verification

The petition must be signed by the party for whose relief it is intended or some person in his or her behalf [*Penal Code § 1474*] and must be verified by the oath or affirmation of the party making the application [*Penal Code §§ 1474(3), 1475*].

[6] Copies

The following copies of the petition should be prepared:

(1) Original for filing;

(2) Copy for service on the district attorney where the person is held in custody by an officer of the court

or a peace officer or is held for violation of an ordinance;

(3) Copy for service on the city attorney where a city ordinance violation is involved;

(4) Copy for client;

(5) Copy for office file; and

(6) Additional copies as desired.

[7] Service

When the person applying for the writ is held in custody by an officer of a court or by a peace officer, a copy of the petition must be served on the district attorney of the county in which the person applying is held in custody at least 24 hours before the time at which the writ is made returnable, and no application for the writ can be heard without proof of service in cases where service is required [*Penal Code § 1475*]. Normal practice would seem to indicate that in a case not covered by the above rule a copy of the petition should be served on counsel for respondent or on the person in charge of the facility or institution, if any, in which petitioner is held. An order to show cause issued in lieu of the writ (see *§ 292.89*) may direct service of the petition and the order to show cause on the opposing parties.

[8] Endorsement

Any court or judge authorized to grant the writ, to whom a petition is presented, must endorse on the petition the hour and date of its presentation and the hour and date of the granting or denial of the writ [*Penal Code § 1476*].

[9] Jurisdiction and Venue

Superior courts and their judges have original jurisdiction in habeas corpus proceedings [*Cal. Const., art. VI, § 10*]. Territorial limits on the jurisdiction of the superior courts to entertain petitions and grant relief in habeas corpus proceedings were eliminated by the constitutional revision of 1966 which eliminated the express provision that superior courts could act only within their respective counties. However, the court must determine whether to hear the matter on the merits or transfer it to a court better situated to conduct an evidentiary hearing should that be necessary [*Griggs v. Superior Court (1976) 16 Cal. 3d 341, 344-347, 128 Cal. Rptr. 223, 546 P.2d 727]* .

A habeas corpus petition filed in superior court generally must be heard and resolved in the court in which it is filed [*Cal. Rules of Ct., Rule 4.552(a)*; *see Cal. Rules of Ct., Rule 4.552(d)* (petition filed in superior court must be decided by single judge and must not be considered by appellate division of superior court)]. However, the superior court in which the petition is filed must determine, based on the allegations of the petition, whether the matter should be heard by it or by the superior court of another county [*Cal. Rules of Ct., Rule 4.552(b)(1)*]. If the court determines that the matter may be more properly heard by the superior court of another county, it may nonetheless retain jurisdiction in the matter; or it may, without first determining whether a prima facie case for relief exists, order the matter transferred to the other county [*Cal. Rules of Ct., Rule 4.552(b)(2)*]. A transfer may be ordered in the following circumstances [*Cal. Rules of Ct., Rule 4.552(b)(2)*]:

(1) If the petition challenges the terms of a judgment, the matter may be transferred to the county in which judgment was rendered. However, transfer is mandatory if the petition challenges the denial of parole or the petitioner's suitability for parole and is filed in a superior court other than the court that rendered the underlying judgment. In such a case the court must transfer the matter before determining whether the petition states a prima facie case for relief, and the court must specify in the order of transfer the reason for the transfer [*Cal. Rules of Ct., Rule 4.552(c)*; *see In re Roberts (2005) 36 Cal. 4th 575,*

586-593, 31 Cal. Rptr. 3d 458, 115 P.3d 1121] .

(2) If the petition challenges the conditions of an inmate's confinement, it may be transferred to the county in which the petitioner is confined [*see Cal. Rules of Ct., Rule 4.552(b)(2)(B)* (change in institution of confinement that effects change in conditions of confinement may constitute good cause to deny petition)].

The transferring court must specify in the order of transfer the reason for the transfer [*Cal. Rules of Ct., Rule 4.552(b)(3)*]. If the receiving court determines that the reason for the transfer is inapplicable, the receiving court must, within 30 days after receiving the case, order the case returned to the transferring court, which must then resolve the matter [*Cal. Rules of Ct., Rule 4.552(b)(4)*].

[10] Prayer

The prayer should indicate the precise relief sought, since a court that has issued the writ of habeas corpus is not limited to either discharging petitioner from or remanding petitioner to custody, but may dispose of petitioner as the justice of the case may require [*In re Crow (1971) 4 Cal. 3d 613, 619, 94 Cal. Rptr. 254, 483 P.2d 1206]* .

[11] Time Limit for Acting on Petition

The superior court must rule on a habeas corpus petition within 60 days after it is filed, either by issuing an order to show cause, denying the petition, or requesting an informal response [*Cal. Rules of Ct., Rule 4.551(a)(3)(A), (a)(4)*; *see* § 292.87-292.89]. If the court fails to rule on the petition within 60 days of its filing, the petitioner may file a notice and request for a ruling [*Cal. Rules of Ct., Rule 4.551(a)(3)(B)*; *see § 292.13[3]*].

[12] California Criminal Defense Practice

For a form of petition for a writ of habeas corpus for use by criminal defendants, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 102 (Matthew Bender)

[13] State Constitution

Supreme Court, courts of appeal, and superior courts as having original jurisdiction in habeas corpus proceedings. *Cal. Const., art. VI, § 10*

[14] State Statutes

Petition for writ of habeas corpus. *Penal Code § 1474*

Petition for writ as required to be verified, and as required to contain a statement of whether or not any previous applications have been made. *Penal Code § 1475*

Endorsement of time and date of granting or denial of writ on the petition. *Penal Code § 1476*

[15] California Rules of Court

Superior court required to rule on petition (either by issuing order to show cause, denying petition, or requesting informal response) within 60 days after petition is filed. *Cal. Rules of Ct., Rule 4.551(a)(3)(A), (a)(4)*

[16] Decisions

Territorial limitations on jurisdiction of superior courts to entertain petitions for writs of habeas corpus and to grant relief as eliminated by *Cal. Const., art. VI, § 10.* *Griggs v. Superior Court (1976) 16 Cal. 3d 341, 346, 128 Cal. Rptr. 223, 546 P.2d 727*

When factual questions are involved, petitioner as generally required to seek relief by habeas corpus, first in the superior court. *In re Richard M. (1975) 14 Cal. 3d 783, 789, 122 Cal. Rptr. 531, 537 P.2d 363* ; *In re Wren (1957) 48 Cal. 2d 159, 165, 308 P.2d 329*

Having issued a writ of habeas corpus, court's power as not limited to either discharging the petitioner from, or remanding the petitioner to custody, but as extending to disposing of petitioner as the justice of the case may require. *In re Crow (1971) 4 Cal. 3d 613, 619, 94 Cal. Rptr. 254, 483 P.2d 1206*

Failure to exhaust appellate remedies as a bar to relief by habeas corpus as merely a discretionary policy governing the exercise of the reviewing court's jurisdiction to issue the writ. *In re Wallace (1970) 3 Cal. 3d 289, 292, 90 Cal. Rptr. 176, 475 P.2d 208*

Writ as properly sought by one lawfully in custody for the purpose of vindicating rights to which he or she is entitled even in confinement. *In re Allison (1967) 66 Cal. 2d 282, 285, 57 Cal. Rptr. 593 , cert. denied, 389 U.S. 876*

Function of petition for writ of habeas corpus as to obtain issuance of the writ. *In re Egan (1944) 24 Cal. 2d 323, 330, 149 P.2d 693 , cert. denied, 323 U.S. 785, 65 S. Ct. 272, 89 L. Ed. 626*

Both courts of appeal and superior courts as having statewide jurisdiction in habeas corpus proceedings. *In re Van Heflin (1976) 58 Cal. App. 3d 131, 135, 128 Cal. Rptr. 257*

Requirement of exhaustion of administrative remedies as applicable to habeas corpus relief. *In re Muszalski (1975) 52 Cal. App. 3d 500, 503-508, 125 Cal. Rptr. 286*

Habeas corpus as unavailable when appeal constitutes a plain, speedy, and adequate remedy, but available when appeal is an alternate method of review but does not constitute a plain, speedy, and adequate remedy. *In re Solis (1969) 274 Cal. App. 2d 344, 348, 78 Cal. Rptr. 919*

Allegations showing that petitioner has been awarded custody of a child and that the child is being held by respondent as sufficient to satisfy the requirement that the petition for the writ allege that the child is unlawfully imprisoned or restrained of his or her liberty. *In re Kyle (1947) 77 Cal. App. 2d 634, 639, 176 P.2d 96*

[17] Text References

Witkin, California Procedure, Vol. 8, *Extraordinary Writs*, §§ 21, 24 (4th ed. 1997)

[18] Cross References

For alternative forms of caption and introductions, see Ch. 108, *Captions and Introductions*

For a form of petition for a writ of habeas corpus in contempt proceedings, see Ch. 135, *Contempt*

For related petitions, *see* §§ 292.81-292.84

California Forms of Pleading and Practice--Annotated

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
Chapter 292 HABEAS CORPUS
PART V. FORMS

25-292 California Forms of Pleading and Practice--Annotated § 292.81

§ 292.81 Petition for Writ of Habeas Corpus--Release From or Modification of Institutional Custody Imposed Under Process of State Court--Cal. Judicial Council Form MC-275

[1] FORM Petition for Writ of Habeas Corpus--Release From or Modification of Institutional Custody Imposed Under Process of State Court--Cal. Judicial Council Form MC-275

Click here to view image.

[2] Use of Form

A petition for a writ of habeas corpus must be on this form of petition, adopted by the Judicial Council [*Cal. Rules of Ct., Rules 8.380(a), 4.551(a)(1)*]. This requirement does not apply, however, to a petition submitted by an attorney [*Cal. Rules of Ct., Rules 8.380(b), 4.551(a)(2)*].

For a form of petition for writ of habeas corpus for use in cases involving institutional confinement under state court process, when the petition is drafted and submitted by an attorney, see *§ 292.82*.

For good cause, a court may accept for filing a petition that is not on the Judicial Council form. However, a petition that is not on the Judicial Council form must comply with statutory requirements [*see Penal Code § 1474*] and must contain the pertinent information specified in the Judicial Council form, including the information required regarding other petitions, motions, or applications filed in any court with respect to the conviction, commitment, or issue [*Cal. Rules of Ct., Rule 4.551(a)(2)*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Prayer

The attorney may wish to add to this approved form a prayer indicating the precise relief sought by petitioner. Since the court that issued the writ of habeas corpus is not limited to either discharging the petitioner from or remanding the

petitioner to custody, but may dispose of petitioner as the justice of the case may require [*In re Crow (1971) 4 Cal. 3d 613, 619, 94 Cal. Rptr. 254, 483 P.2d 1206]* , the prayer should indicate the precise relief sought.

[4] Supporting Memorandum

Although a supporting memorandum is not required in support of the petition [*Cal. Rules of Ct., Rules 8.380(b)*], a memorandum supporting the allegations of the petition and the propriety of the relief sought may be of value, particularly when the petition and attached documents will be used as traverse to the return to the writ or the order to show cause [*see § 292.18*]. Any supporting documents accompanying the petition must comply with *Cal. Rules of Ct., Rule 8.486(c)(1), (2)* [*Cal. Rules of Ct., Rules 8.384(b)(3)*].

[5] Signing and Verification by Petitioner

In general, an application for a writ, although prepared by another, should be signed, verified, and filed by the inmate seeking relief. The courts will generally refuse to entertain a petition made by an inmate other than the one for whom relief is sought. Only in very exceptional circumstances will a "next friend" application be entertained, and the complaint must in that case set forth some reason or explanation satisfactory to the court showing why the detained person does not sign and verify the petition and who the "next friend" is [*In re Harrell (1970) 2 Cal. 3d 675, 689, 87 Cal. Rptr. 504, 470 P.2d 640]* .

[6] California Criminal Defense Practice

For allegations to be used in completing the foregoing petition, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 102

[7] State Statutes

Petition for writ of habeas corpus. *Penal Code § 1474*

Verification and allegations required in petition for writ of habeas corpus. *Penal Code § 1475*

[8] California Rules of Court

Petition for writ of habeas corpus to be on approved form, unless the petitioner shows good cause or the petition is submitted by an attorney. *Cal. Rules of Ct., Rules 8.380(a), 8.384(a)(1)*

[9] Decisions

Having issued the writ of habeas corpus, court as not limited to either discharging the petitioner from or remanding the petitioner to custody, but as allowed to dispose of the petitioner as the justice of the case may require. *In re Crow (1971) 4 Cal. 3d 613, 619, 94 Cal. Rptr. 254, 483 P.2d 1206*

Courts as generally refusing to entertain a petition made by an inmate other than the one for whom relief is sought; "next friend" application as entertained only in exceptional circumstances and complaint in that case as required to set forth some reason or explanation for the failure of the person detained to sign and who the "next friend" is. *In re Harrell (1970) 2 Cal. 3d 675, 689, 87 Cal. Rptr. 504, 470 P.2d 640*

[10] Cross Reference

For related petitions, *see §§ 292.80*, 292.82-292.84

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
Chapter 292 HABEAS CORPUS
PART V. FORMS

25-292 California Forms of Pleading and Practice--Annotated § 292.82

§ 292.82 Petition for Writ of Habeas Corpus--Release From or Modification of Institutional Custody Imposed Under Process of State Court--Petition Submitted by Attorney or by Leave of Court

[1] FORM Petition for Writ of Habeas Corpus--Release From or Modification of Institutional Custody Imposed Under Process of State Court--Petition Submitted by Attorney or by Leave of Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____

[*or other as appropriate*]

	)	
In the Matter of the Application	)	
of _____ [*name*],	)	NO. _____
Petitioner,	)	
[in Behalf of _____ (*name*),]	)	
for Writ of Habeas Corpus.	)	
	)	

_____

PETITION FOR WRIT OF HABEAS CORPUS TO THE _____ [SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE (CITY AND) COUNTY OF _____ *or other court, as appropriate*]:

Petitioner alleges:

1. This petition concerns _____ [a conviction or a sentence or jail or prison conditions or parole or credits or prison discipline or _____ (*state other ground for petition*)].

[2. _____ (*Set forth relationship of petitioner to person for whom petition is submitted. See § 292.80, Paragraph 2*)].

3. This petition concerns _____ [*name*], _____ [*set forth identification number of person who is in custody under state order of civil commitment or detention*]. _____ [*name*] is unlawfully restrained of his/her liberty [and imprisoned, detained, and confined] by _____ [*name and official position, if applicable, of person exercising custody or control, or description if name is not known*], at _____ [*address or location of confinement*], _____ County, California.

4. The custody of _____ [*name*] is a result of a civil commitment.

5. The custody was ordered by _____ [*state the name and location of sentencing/committing court and case number*].

6. The commitment was made on _____ [*date*] pursuant to _____ [*statute on which custody was based*].

7. _____ [*name*] was committed because _____ [*state reason for civil commitment*].

8. The expected release date is _____ [*date*].

[*EITHER*]

9. _____ [*name*] was represented by the following counsel in the trial court that ordered the custody: _____ [state the attorney's name and address].

[*OR*]

9. _____ [*name*] was not represented by counsel in the trial court that ordered the custody.

[*CONTINUE*]

10. Petitioner submits this claim for relief on the ground(s) that _____ [state briefly the grounds on which the claim for relief is based, e.g., petitioner is not incompetent and is unlawfully by his/her appointed guardian].

11. The illegality of the custody consists in the following: _____ [allege facts, not conclusions, showing the illegality; if available, attach and incorporate appropriate declarations, relevant records, transcripts, or other documents supporting claim].

12. _____ [*name*] _____ [did not appeal the commitment or appealed the commitment to _____ (identify court, e.g., the Court of Appeal or Appellate Department of the Superior Court). [He/She was represented by _____ (state name and address of attorney).] [The following issues were raised in the appeal: _____ (briefly set forth issues before court). On

_____ (*date*), the reviewing court issued is decision, _____ (*provide the case number, docket number, or citation of the opinion*), _____ (*describe the result of the appeal, e.g., affirming the trial court's decision to impose confinement*)].

13. _____ [*Name*] _____ [did not seek review in the California Supreme Court *or* sought review in the California Supreme Court]. [The following issues were raised in the appeal: _____ (*briefly set forth issues before Court*).] On _____ (*date*), the Supreme Court issued its decision, _____ (*provide the docket number, or citation of the opinion*), _____ (*describe the result of review by Supreme Court*)].

[14. _____ (*If the petition makes a claim regarding the person's commitment that the person or his/her attorney did not make on appeal, explain why the claim was not made on appeal*)].

[15. _____ (*If the petition concerns conditions of confinement or other claims for which there are administrative remedies, explain what administrative review was sought, or explain why administrative review was not sought; attach documents showing that administrative remedies have been exhausted*)].

[*EITHER*]

16. _____ [*name*] has not previously filed any petitions, applications, or motions with respect to his/her _____ [conviction *or* commitment *or* issue][, other than direct appeal].

[*OR*]

16. _____ [*name*] has previously filed the following petitions, applications, or motions with respect to his/her commitment[, other than direct appeal]: _____ [*Identify previous filing, e.g.*, Habeas corpus petition] was filed in _____ (*identify court*). The following issues were raised _____ (*briefly set forth issues before court*). [On _____ (*date*), a hearing _____ (*describe nature of hearing*).] On _____ [*date*], the court issued is decision, _____ [*provide the case number, docket number, or citation of the opinion*], _____ [*describe the result*]. [_____ (*As necessary, set forth other previous filings as above*)].

[*CONTINUE*]

[17. _____ (*Explain any delay in the discovery of the claimed grounds for relief and in raising the claims to the petition*)].

18. _____ [*name*] _____ [is presently represented by _____ (*state name and address of attorney, if known*) *or* is not presently represented by counsel].

19. _____ [There are no petitions, appeals, or other matters pending in any court or the following matter is pending _____ (*set forth explanation*)].

[20. _____ [*If petition might lawfully have been made to a lower court, state circumstances justifying application to this court*].

[*Prayer. See § 292.80.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. § 292.80.*]

[2] Use of Form

This form of petition is for use by an attorney representing a petitioner who seeks to obtain release from, or modifications of the conditions of, custody in a state or local penal institution, hospital, narcotics treatment facility, or other institution [*Cal. Rules of Ct., Rule 8.384(a)(1) see Cal. Rules of Ct., Rule 4.551(a)(2)*]. If the petitioner is proceeding without representation, he or she should use California Judicial Council Form MC-275 [*see § 292.81*], unless the court for good cause accepts the filing of a petition that is not on the Judicial Council form [*Cal. Rules of Ct., Rule 8.380(a) see Cal. Rules of Ct., Rule 4.551(a)(1)*].

[3] Institutional Confinement Under State Court Process

[a] Petition Submitted on Other Than Judicial Council Form

California Judicial Council Form MC-275 ordinarily must be used for a petition for a writ of habeas corpus, unless the petition is submitted by an attorney or the court for good cause accepts the filing of a petition that is not on the Judicial Council form [*Cal. Rules of Ct., Rules 8.380(a), 8.384(a)(1)*]. A petition that is not on the Judicial Council form must contain the information requested in that form [*Cal. Rules of Ct., Rule 8.384(a)(1)*]. This form allows for inclusion of the pertinent information specified in the Judicial Council form, which is set out in *§ 292.81*.

[b] Filing of Non-Conforming Petition on Good Cause

For good cause, the court may permit a petitioner proceeding without representation to file a petition that is not on the Judicial Council form [*Cal. Rules of Ct., Rule 8.380(a) see Cal. Rules of Ct., Rule 4.551(a)(1)*]. A petitioner who modifies this form to proceed without an attorney should therefore include an explanation of why the Judicial Council form has not been used.

[4] Allegations

This petition alleges pertinent information specified in Cal. Judicial Council Form MC-275, seeking relief from a civil (rather than criminal) commitment:

- Information related to the custody (Paragraphs 1-3; *see* Cal. Judicial Council Form MC-275, Introductory Paragraph, Paragraphs 1-3).

- Information related to the proceedings in the trial court (Paragraph 5-7; *see* Cal. Judicial Council Form MC-275, Paragraphs 3-5).

- The expected release date (Paragraph 8; *see* Cal. Judicial Council Form MC-275, Paragraph 3, h).

- Information regarding representation in the trial court (Paragraphs 9; *see* Cal. Judicial Council Form MC-275, Paragraph 3, i).

- Grounds and facts on which the petition is based (Paragraphs 10 and 11; *see* Cal. Judicial Council Form MC-275, Paragraph 6).

- Information related to prior review (Paragraphs 12-15; *see* Cal. Judicial Council Form MC-275, Paragraphs 8-11).

- Information related to any previously filed any petitions, applications, or motions (Paragraph 16; *see* Cal. Judicial Council Form MC-275, Paragraphs 12-14).

- Explanation of any delay in discovering and raising the claimed grounds for relief (Paragraph 17; *see* Cal. Judicial Council Form MC-275, Paragraphs 15).

- Information regarding current representation (Paragraph 18; *see* Cal. Judicial Council Form MC-275, Paragraph 16).

- Explanation of any matters pending (Paragraph 19; *see* Cal. Judicial Council Form MC-275, Paragraph 17).

- If petition might lawfully have been made to a lower court, statement of circumstances justifying application to present court (Paragraph 20; *see* Cal. Judicial Council Form MC-275, Paragraph 18).

See *§ 292.81* for additional discussion of these allegations.

[5] Supporting Memorandum

This petition is not required to be accompanied by a supporting memorandum. The better practice, however, when time and circumstances permit, is to include a memorandum supporting the granting of the writ in general and supporting the allegation that the detention alleged is illegal or that the conditions of the detention are illegal.

[6] Signing and Verification

This petition must be signed by the party for whose relief it is intended or some person in his or her behalf [*Penal Code § 1474*] and must be verified by the oath or affirmation of the party making the application [*Penal Code §§ 1474(3), 1475*].

[7] Cross Reference

For additional petitions, *see* §§ 292.80-292.81, 292.84-292.85.

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
Chapter 292 HABEAS CORPUS
PART V. FORMS

25-292 California Forms of Pleading and Practice--Annotated § 292.83

§ 292.83 Captions and Allegations--Petition for Writ of Habeas Corpus--Court of Appeal

[1] FORM Captions and Allegations--Petition for Writ of Habeas Corpus--Court of Appeal

[*Cover.*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
_____ APPELLATE DISTRICT

	)	
In re _____ [*name*]	)	NO. _____
on Habeas Corpus	)	
	)	

_____

PETITION FOR WRIT OF HABEAS CORPUS [AND MEMORANDUM OF POINTS AND AUTHORITIES]

_____ [*name*]

_____ [*street address*]

_____ [*city and state*]

_____ [*telephone*]

_____ [*California State Bar No.*]

Attorney for Petitioner _____ [*name*]

[*Start new page.*]

[*Include topical index of contents.*]

[*Start new page.*]

[*Include table of authorities, separately listing cases, statutes, court rules, constitutional provisions, and other authorities.*]

[*Start new page.*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
_____ APPELLATE DISTRICT [,
DIVISION _____]

	)	
In re _____ [*name*]	)	NO. _____
on Habeas Corpus.	)	
	)	

PETITION FOR WRIT OF HABEAS CORPUS [AND MEMORANDUM OF POINTS AND AUTHORITIES]

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA:

Petitioner alleges:

[*Allegation where writ is first sought in appellate court:* This petition was not filed in the superior court because _____ (*specify*)].

CAUTION:

California Judicial Council Form MC-275 [*see* *§ 292.81*] ordinarily must be used for a petition for a writ of habeas corpus if the petitioner seeks release from, or modifications of the conditions of, custody in a state or local penal institution, hospital, narcotics treatment facility, or other institution. However, the Judicial Council form need not be used if the petition is submitted by an attorney or the court for good cause accepts the filing of a petition that is not on the Judicial Council form [*Cal. Rules of Ct., Rules 8.380(a), 8.384(a)(1)*].

[2] Use of Form

This form of caption and allegation is for use in adapting the petition for writ of habeas corpus *set out in § 292.80* for use in a court of appeal.

[3] Allegations

The allegation of the reasons why the petition is not filed with the superior court is required if the petition is filed in the first instance with the court of appeal rather than the superior court. The court of appeal has discretion to deny the writ on the ground that application was not made to the lower court if no extraordinary reason exists for action by the court of appeal [*In re Hillery (1962) 202 Cal. App. 2d 293, 294, 20 Cal. Rptr. 759]* .

[4] Copies

The following copies of the petition should be prepared:

(1) Original, plus one set of any separately bound supporting documents, for filing with court of appeal [*Cal. Rules of Ct., Rules 8.44(b)(2), (3), (5), 8.380(c), 8.384(c)*];

(2) Unless petitioner is proceeding without an attorney, four additional copies for filing with court of appeal [*Cal. Rules of Ct., Rules 8.44(b)(3), (5), 8.384(c)*];

(3) Copy for service on district attorney, if required [*Penal Code § 1475*];

(4) Copy for service on city attorney, if required [*Penal Code § 1475*];

(5) Office copy;

(6) Copy for client, if desired; and

(7) Additional copies as desired.

[5] Format

The petition must conform to *Cal. Rules of Ct., Rule 8.204(b)*, which mandates the binding, print size, margins, and form of headings for appellate briefs [*see Cal. Rules of Ct., Rule 8.40*; for further discussion, *see* Ch. 50, *Appeal: Briefs*]. Although the rule requiring an index of contents and table of authorities in an appellate brief does not apply to a writ petition, this form of petition includes these useful features [*see Cal. Rules of Ct., Rules 8.10(7), 8.204(a)(1)*].

The cover of the petition in this form is in the format required for a printed petition [*see Cal. Rules of Ct., Rules 8.204(b)(10)*]. The cover of any writ petition should be red, so far as practicable [*Cal. Rules of Ct., Rule 8.40(b)(1)*].

For other format requirements that may be imposed by particular courts of appeal, counsel should contact the court's staff attorney who handles petitions for writs of habeas corpus.

[6] State Constitution

Supreme Court, courts of appeal, and superior courts as having original jurisdiction in habeas corpus proceedings. *Cal. Const., art. VI, § 10*

[7] State Statutes

When writ may be issued by superior court, court of appeal, or Supreme Court after writ has been granted and denied by lower court. *Penal Code § 1475*

Where writ returnable. *Penal Code § 1508*

[8] California Rules of Court

Form and filing of petition filed with appellate courts. *Cal. Rules of Ct., Rule 8.40*

When use of Judicial Council form is required. *Cal. Rules of Ct., Rules 8.380(a), 8.384(a)(1)*

Recycled paper required for briefs or other paper filed with reviewing court or served on other parties. *Cal. Rules of Ct., Rule 8.204(b)*

Reviewing court as permitted, before passing on petition for writ of habeas corpus, to order custodian of record to produce record and file it with clerk of reviewing court or to request informal response from respondent; requirements of informal response. *Cal. Rules of Ct., Rule 8.385(a),(b)*

[9] Decisions

Decision of superior court denying writ as nonappealable but petitioner as allowed to seek writ again in court of appeal. *In re Richard M. (1975) 14 Cal. 3d 783, 789-790, 122 Cal. Rptr. 531, 537 P.2d 363*

Doctrine of res judicata as not precluding reassertion of arguments rejected in a prior proceeding in which a lower court denied the relief sought on habeas corpus. *In re Richard M. (1975) 14 Cal. 3d 783, 789-790, 122 Cal. Rptr. 531, 537 P.2d 363*

Decision by the superior court which is merely a decision of a question of law rather than of fact as not a bar to a petition presenting the same question of law to the appellate court. *In re Richard M. (1975) 14 Cal. 3d 783, 791, 122 Cal. Rptr. 531, 537 P.2d 363*

Appellate courts as well as superior courts as having jurisdiction to issue writs of habeas corpus. *In re Richard M. (1975) 14 Cal. 3d 783, 789, 122 Cal. Rptr. 531, 537 P.2d 363*

Appellate courts as having developed the practice of ordering the custodian to show cause why the writ should not be granted. *In re Hochberg (1970) 2 Cal. 3d 870, 874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1*

Court as able to appoint a referee to conduct a hearing where a writ of order to show cause is returnable before an appellate court. *In re Hochberg (1970) 2 Cal. 3d 870, 874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1*

Habeas corpus as available where appeal is available but appeal does not constitute a plain, adequate, and speedy remedy. *In re Solis (1969) 274 Cal. App. 2d 344, 348, 78 Cal. Rptr. 919*

Court of appeal as having discretion to refuse to issue the writ of habeas corpus as an exercise of original jurisdiction on the ground that application has not been made in a lower court in the first instance. *In re Hillery (1962) 202 Cal. App. 2d 293, 294, 20 Cal. Rptr. 759*

Petition to the appellate court as properly denied where the merits of the case can be more thoroughly considered on a hearing in the superior court for custody modification. *In re Elliott (1973) 115 Cal. App. 2d 536, 538, 254 P.2d 135*

[10] Cross References

For discussion and forms for appellate court practice, see Ch. 50, *Appeal: Briefs*

For alternative forms of captions, introductions, and addresses, see Ch. 108, *Captions and Introductions*

For related petitions, *see §§ 292.80, 292.81, 292.84, 292.85*.

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25-292 California Forms of Pleading and Practice--Annotated § 292.84

§ 292.84 Captions and Allegations--Petition for Writ of Habeas Corpus--Supreme Court

[1] FORM Captions and Allegations--Petition for Writ of Habeas Corpus--Supreme Court

[*Cover.*]

SUPREME COURT OF CALIFORNIA

In re _____ [*name in capital letters*] on Habeas Corpus.	))))	NO. _____

_____

PETITION FOR WRIT OF HABEAS CORPUS [AND SUPPORTING MEMORANDUM]

_____ [*name*]

_____ [*street address*]

_____ [*city and state*]

_____ [*telephone*]

_____ [*California State Bar. No.*]

Attorney for Petitioner _____ [*name*]

[*Start new page.*]

[*Include topical index of contents.*]

[*Start new page.*]

[*Include table of authorities, separately listing cases, statutes, court rules, constitutional provisions, and other authorities.*]

[*Start new page.*]

SUPREME COURT OF CALIFORNIA

In re _____ [*name in capital letters*] on Habeas Corpus.	))))	NO. _____

PETITION FOR WRIT OF HABEAS CORPUS [AND SUPPORTING MEMORANDUM]

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

[*Allegation where writ is first sought in the Supreme Court:* This petition was not filed in the superior court or court of appeal because _____ (*specify*)].

CAUTION:

California Judicial Council Form MC-275 [*see* *§ 292.81*] ordinarily must be used for a petition for a writ of habeas corpus if the petitioner seeks release from, or modifications of the conditions of, custody in a state or local penal institution, hospital, narcotics treatment facility, or other institution. However, the Judicial Council form need not be used if the petition is submitted by an attorney or the court for good cause accepts the filing of a petition that is not on the Judicial Council form [*Cal. Rules of Ct., Rules 8.380(a), 8.384(a)(1)*].

[2] Use of Form

This form of caption and allegation is for use in adapting the petition for writ of habeas corpus in *§ 292.80* for use in the

Supreme Court.

[3] Allegations

The allegation of the reasons why the petition is not filed with the superior court or with a court of appeal is required when the petition is filed in the first instance with the Supreme Court rather than with one of the appellate courts or a superior court. The Supreme Court has discretion to deny the writ on the ground that application was not made to a lower court where no extraordinary reason exists for action by it [*see In re Hillery (1962) 202 Cal. App. 2d 293, 294, 20 Cal. Rptr. 759]* .

[4] Copies

The following copies of the petition should be prepared:

- Original for filing with the Supreme Court.
- Ten copies for filing with the Supreme Court, plus an original and two copies of any supporting document accompanying the petition, unless the Court orders otherwise [*Cal. Rules of Ct., Rules 8.44(b)(2), (3), 8.380(c), 8.384(c)*].
- Copy for service on district attorney, if required [*Penal Code § 1475*].
- Copy for service on city attorney, if required [*Penal Code § 1475*].
- Office copy.
- Copy for client, if desired.
- Additional copies as desired.

[5] Format

The petition must conform to *Cal. Rules of Ct., Rule 8.204(b)*, which mandates the binding, print size, margins, and form of headings for appellate briefs [*see Cal. Rules of Ct., Rule 8.40*; for further discussion, *see* Ch. 50, *Appeal: Briefs*].

The cover of the petition in the form is in the format required for a printed petition [*see Cal. Rules of Ct., Rules 8.204(b)(10)*]. The cover of any writ petition should be red, so far as practicable [*Cal. Rules of Ct., Rule 8.40(b)(1)*]. A petition for writ of habeas corpus filed with the Supreme Court is usually presented to the court in the form of a brief, with a statement of the facts of the case and with argument, and should usually be accompanied by points and authorities.

[6] Cross Reference

For related petitions, *see §§ 292.80* and *292.83*.

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Chapter 292 HABEAS CORPUS
PART V. FORMS

25-292 California Forms of Pleading and Practice--Annotated § 292.85

§ 292.85 Petition for Writ of Habeas Corpus [Penal Code § 1474]--To Enforce Child Custody Order

[1] FORM Petition for Writ of Habeas Corpus [Penal Code § 1474]--To Enforce Child Custody Order

[*Caption and address. See § 292.80, 3, or 4 as appropriate.*]

Petitioner alleges:

1. Petitioner is the _____ [*relationship*] of _____ [*name*], on whose behalf this petition is brought, a minor child of petitioner and respondent herein [*or other as appropriate*]. The child is a boy/girl, born on _____ [*date*], and is now _____ years of age.

2. Petitioner is at this time entitled to the physical custody and possession of the above-named child.

3. On _____ [*date*], in the _____ [*specify*] Court of _____ [*state*], _____ County, in an action entitled _____ [*specify*], the Honorable _____ [*name*], Judge of the above-named court, made an order awarding custody of the child to petitioner herein and ordering that respondent deliver the child to the custody of petitioner herein, a copy of which order is attached, marked Exhibit A, and incorporated herein.

4. _____ [*Allege facts showing unlawful detention of the child by respondent, e.g.*, Prior to, and on _____ [*date*], when the above-described order was entered, respondent _____ (*name*) had physical custody and possession of the child at his/her home located at _____ (*address*), _____ (*city*), _____ County, California. On that date, petitioner appeared at the home of respondent with _____ (*name and position, e.g.*, police officer _____ [*name*], Badge No. _____ [*specify*], of the police department of _____ California) and served on respondent a certified copy of the attached order and demanded that respondent deliver possession of the child to him/her, but respondent then refused and still refuses to deliver the child to petitioner herein and still keeps physical possession of the child at the above-named address].

5. _____ [*Allege further circumstances, e.g.,* At that time, respondent herein ordered petitioner herein to leave his/her property and stated in the presence of the police officer and petitioner that he/she did not intend to obey the court order attached].

6. [*Allegation of previous applications. See § 292.80, Paragraph 8.*]

7. [*Allegation of no speedy and adequate remedy at law. See § 292.80, Paragraph 6.*]

8. [*Allegation of reasons why appellate court should issue writ on first application, if appropriate. See § 292.83.*]

WHEREFORE, petitioner prays judgment as follows:

1. That a writ of habeas corpus issue directed to respondent _____[*name*], commanding him/her to produce the body of _____ [*name of child*] before the court at the time and place designated in the writ;

2. That respondent show cause, if any exists, why the child is detained by respondent and not delivered to petitioner as of right;

3. That the child be taken from respondent and delivered to the custody of petitioner; and

4. For such other and further relief as the court may deem proper.
Dated: _____

_____ [*signature*]

_____ [*name of petitioner*]

Petitioner

[*Verification. See § 292.80.*]

[2] Use of Form

This form of petition is for use in a proceeding for the writ of habeas corpus to obtain custody of a child pursuant to a valid court order, when the child is withheld by one not entitled under the order to custody.

[3] Allegations

The petition alleges:

- The relationship of the petitioner to the child whose custody is in question (Paragraph 1).

- That petitioner is entitled to custody of the child (Paragraphs 2, 3) [*In re Richard M. (1975) 14 Cal. 3d 783, 789, 122 Cal. Rptr. 531, 537 P.2d 363* ; *In re Croze (1956) 145 Cal. App. 2d 492, 495, 302 P.2d 595]* .

- Illegal detention of the child by respondent (Paragraphs 4, 5) [*Penal Code §§ 1473, 1474(2)*].

- The place of illegal detention and name of person detaining child, if known (Paragraph 4) [*Penal Code § 1474(1)*].

[4] Points and Authorities

For a memorandum of points and authorities supporting the issuance of a writ of habeas corpus seeking return of the custody of a child, see California Points and Authorities, Ch. 110, *Habeas Corpus* (Matthew Bender)

[5] Decisions

Person entitled to the physical custody of a child as entitled to enforce the right to custody against one wrongfully withholding the child by a petition for writ of habeas corpus. *In re Richard M. (1975) 14 Cal. 3d 783, 789, 122 Cal. Rptr. 531, 537 P.2d 363* ; *In re Croze (1956) 145 Cal. App. 2d 492, 495, 302 P.2d 595*

Proper use for the writ of habeas corpus as to restore custody and possession of a child to the parent entitled to custody when the child is in the custody of the other parent. *In re Barr (1952) 39 Cal. 2d 25, 27, 243 P.2d 787*

Persons assuming roles of parents by raising a child in their home as acquiring an interest in custody of the child recognizable on proceeding by natural parent for writ of habeas corpus. *In re Reyna (1976) 55 Cal. App. 3d 288, 304-305, 126 Cal. Rptr. 138*

Court on petition for writ of habeas corpus as required to order that child be delivered to parent entitled to custody pursuant to valid sister state decree in absence of changed circumstances justifying modification of the order. *In re Bergmann (1955) 133 Cal. App. 2d 323, 323, 283 P.2d 1063* ; *Estate of Bauman (1947) 82 Cal. App. 2d 359, 360, 186 P.2d 154* ; *In re Memmi (1947) 80 Cal. App. 2d 295, 300, 181 P.2d 885*

Writ as proper to compel delivery of a child to one who has been awarded custody by decree of a competent tribunal. *Rose v. Superior Court (1948) 86 Cal. App. 2d 173, 177-178, 194 P.2d 568*

Allegations showing that petitioner has been awarded custody of a child and that the child is being held by respondent in violation of that order of custody as sufficient to satisfy the requirement that the petition for the writ of habeas corpus should allege that the child is unlawfully imprisoned or restrained of his liberty. *In re Kyle (1947) 77 Cal. App. 2d 634, 639, 176 P.2d 96*

[6] Cross References

For discussion and forms for other proceedings with regard to custody of minor children, see Ch. 394, *Parent and Child*

For additional petitions, *see §§ 292.80, 292.83, 292.84, 292.85*.

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25-292 California Forms of Pleading and Practice--Annotated § 292.86

§ 292.86 Petition for Writ of Habeas Corpus [Penal Code § 1474]--To Recover Custody of Minor Child From Party Not Entitled to Custody

[1] FORM Petition for Writ of Habeas Corpus [Penal Code § 1474]--To Recover Custody of Minor Child From Party Not Entitled to Custody

[*Caption and address. See § 292.80, 3, or 4, as appropriate.*]

Petitioner alleges:

1. [*Name, relationship, and age of child. See § 292.85, Paragraph 1.*]

2. The above-named child resided with petitioner until _____ [*date*], at which time [*allege facts showing wrongful detention by another, e.g.*, petitioner left the child in the care of _____ (*name*), respondent herein, because petitioner was at that time ill and temporarily unable to care for the child himself/herself. On _____ [*date*], having recovered his/her health, petitioner demanded of respondent that respondent return physical possession and custody of the child to petitioner, but respondent did then and at this time still does refuse to return custody of the child, against the wishes and demands of petitioner].

3. The above-named child is presently restrained and de tained, against the wishes of petitioner, by respondent _____ [*name*] at _____ [*address*], _____ [*city*], _____ County, California.

4. The above-named child has not been committed, detained, nor his/her custody determined in any way whatsoever by virtue of any judgment, decree, order, or award of any kind by any court or other competent tribunal whatsoever.

5. Petitioner is a fit and proper parent and custodian for the above-named child, and petitioner has not abandoned the child in that petitioner _____ [*allege facts showing no abandonment of the child, e.g.*, has continuously demanded the return of the child from respondent].

6. Respondent _____ [*name*] is not a fit and proper person to have custody of the above-named child, because _____ [*allege specific facts showing unfitness as a custodian*].

7. [*Allegation regarding previous applications for the writ, if appropriate. See § 292.80, Paragraph 8.*]

8. [*Allegation of no speedy and adequate remedy at law. See § 292.80, Paragraph 6.*]

9. [*Allegation of reasons why appellate court should issue writ on first application, if appropriate. See § 292.83.*]

[*Prayer. See § 292.85.*]

Dated: _____.

_____ [*signature*]

_____ [*name of petitioner*]

Petitioner

[*Verification. See § 292.80.*]

[2] Use of Form

This petition for a writ of habeas corpus is for use in a proceeding by a parent entitled by law to custody of a child to regain custody from a third party forcibly withholding the child without authority.

[3] Decisions

[a] Custody

Persons who assume the roles of parents by raising a child in their home as in time acquiring an interest in the custody of the child recognized by former *Civ. Code § 4600* (*now see Fam. Code § 3020 et seq.*). *In re Reyna (1976) 55 Cal. App. 3d 288, 304-305, 126 Cal. Rptr. 138*

Court's order on writ of habeas corpus returning custody of child from third party to natural parent as proper where natural parent was a fit parent. *In re Miller (1966) 244 Cal. App. 2d 454, 459, 53 Cal. Rptr. 211*

Parent of a child as not absolutely entitled to custody nor to the issuance of a writ of habeas corpus to regain custody; right to custody as properly dependent on best interests of child. *In re Martin (1947) 79 Cal. App. 2d 584, 586, 180 P.2d 383*

Custody of child as properly remaining with a child's grandparents where the grandparents had raised the child and been appointed the child's guardians. *In re De Leon (1943) 59 Cal. App. 2d 510, 515, 139 P.2d 109*

[b] Procedure

Writ as properly sought first from the superior court rather than the appellate court where factual issues of child custody are involved. *In re Richard M. (1975) 14 Cal. 3d 783, 789, 122 Cal. Rptr. 531, 537 P.2d 363* ; *In re Martin (1947) 79 Cal. App. 2d 584, 587, 180 P.2d 383*

[4] Cross Reference

For related petitions, *see §§ 292.80*, 292.83-292.85.

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25-292 California Forms of Pleading and Practice--Annotated § 292.87

§ 292.87 Order Granting Writ of Habeas Corpus [Penal Code § 1476]--General Form

[1] FORM Order Granting Writ of Habeas Corpus [Penal Code § 1476]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the Application of	)	NO. _____
_____ [*name*],	)	ORDER GRANTING WRIT
Petitioner,	)	OF HABEAS CORPUS
on Behalf of _____ [*name*].	)	

_____

[*or other caption as appropriate.*]

On reading and filing the petition of _____ [*name*], duly signed and verified by _____ [*name*], [in behalf of _____ (*name*),] whereby it appears that _____ [*name*] is illegally _____ [detained *or* imprisoned *or* restrained *or* confined] of his/her liberty by _____ [*name*], at _____ [*address*], _____ [*city*], _____ County, California, and stating of what the illegality consists, from which it appears that a writ of habeas corpus ought to issue,

IT IS HEREBY ORDERED, that a writ of habeas corpus be issued by the Clerk of, and under the seal of _____ [*specify court*] of the State of California, directed to _____ [*name*], commanding him/her to have the body of _____ [*name*] before _____ [*specify judge or court*] in the _____ [*specify courtroom, department, or other*] of the above-named court, on _____ [*date*], at _____[*time*], of that day, then and there to do and receive what shall be considered concerning the alleged illegal _____ [custody *or* detention *or* imprisonment *or* restraint *or* confinement].

Dated: _____.

_____ [*signature*]

Judge of Superior Court

[*Seal attached by Clerk.*]

[2] Use of Form

This form of order directs the writ of habeas corpus to issue. It is for use in a proceeding for writ of habeas corpus when the court grants the writ and when there is no printed superior court form available in the county. Many counties have printed forms for the order granting the writ and for the writ itself. The courts of appeal and Supreme Court draft their own orders. Counsel may wish to include this form of order if it will be used, at the end of the petition; if so, the fact of inclusion would be properly indicated in the caption.

[3] State Statutes

Court or judge as required, if it appears that the writ ought to issue, to grant the writ without delay. *Penal Code § 1476*

Writ as allowed to issue and be served on any day or at any time. *Penal Code § 1502*

Justices of the Supreme Court and courts of appeal as authorized to grant in chambers writs usually granted on an ex parte application. *Code Civ. Proc. § 165*

Superior court judges are authorized to grant in chambers writs usually granted on ex parte application. *Code Civ. Proc. § 166(a)*

[4] Text References

24 Cal. Jur. 2d, *Habeas Corpus*, § 81

[5] Cross Reference

For related petitions, *see §§ 292.80, 292.81, 292.85, 292.86*.

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25-292 California Forms of Pleading and Practice--Annotated § 292.88

§ 292.88 Writ of Habeas Corpus [Penal Code § 1477]--General Form

[1] FORM Writ of Habeas Corpus [Penal Code § 1477]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the Application of	)	NO. _____
_____ [*name*],	)	WRIT OF HABEAS CORPUS
Petitioner,	)	
[on Behalf of _____ [*name*], for a	)	
Writ of Habeas Corpus.]		

_____

THE PEOPLE OF THE STATE OF CALIFORNIA TO: _____ [*name and title*] or to any other person having the custody of _____ [*name*].

Whereas by an order of this Court in the above proceedings on _____ [*date*], it was ordered that a Writ of Habeas Corpus be issued and directed to you,

We command you that you have the body of _____ [*name*] by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name _____ [*name*] shall be called or charged, before _____ [the Superior Court for the County of _____, California, in Department No. _____ *or* the Honorable _____ (*name*), Judge of the Superior Court for the County of _____, California], on _____ [*date*], at _____[*time*], to do and receive what may then and there be considered concerning _____ [*name of person detained*], and have you then and there this writ.

By order of the court.

Attest my hand and the seal of this Court _____ [*date*].

_____ [*name*]

Clerk of the Superior Court

By _____ [*signature*]

Deputy Clerk

[*Seal*]

[2] Use of Form

This form of writ of habeas corpus is for use where the writ has been granted in a county which does not use a printed form of writ of habeas corpus supplied by the county clerk or court. Counsel should determine local practice before drafting such a writ. The courts of appeal and Supreme Court frequently grant an order to show cause why the writ should not issue rather than granting the writ itself. Many superior courts, especially in counties in which there are large state prisons and, therefore, many habeas corpus filings, have developed a similar practice [*In re Hochberg (1970) 2 Cal. 3d 870, 874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1]* . When a court of appeal or the Supreme Court grants the writ rather than an order to show cause, the court will draft the writ.

The writ may be issued on any day or at any time [*Penal Code § 1502*]. It must be issued by the clerk of the court and sealed with the seal of the court [*Penal Code § 1503*]. The writ must be directed to the person having custody of the person on whose behalf the application for the writ was made and must command him or her to have the body of the person before the court or judge before whom the writ is returnable at the time and place specified in the writ [*Penal Code § 1477*].

[3] Service

The writ may be served on any day or at any time [*Penal Code § 1502*]. If the writ is directed to the sheriff or other ministerial officer of the court out of which it issues, it must be delivered by the clerk to the officer without delay, as other writs are delivered for service. If it is directed to any other person, it must be delivered to the sheriff or marshall and be served by him or her on the person to whom it is directed by delivering a copy to him or her without delay. The officer serving the writ must make his or her return of service on the original to the court of issuance. If the person to whom the writ is directed cannot be found or refuses service, the writ may be served or delivered by leaving it at the residence of the person to whom it is directed, or by affixing it to some conspicuous place on the outside of either his or her dwelling house or of the place where the party is confined or under restraint [*Penal Code § 1478*]. The writ must be served forthwith [*Penal Code § 1503*].

[4] Formal Defects in Writ

No writ of habeas corpus can be disobeyed for defect of form if it sufficiently appears from the writ in whose custody or under whose restraint the party imprisoned or restrained is, the officer or person detaining him or her, and the court or judge before whom he or she is to be brought [*Penal Code § 1495*].

[5] State Statutes

No fee as allowed to be charged for performance of services on writ of habeas corpus. *Gov. Code § 6101*

Court as required to grant the writ without delay where it appears it ought to issue. *Penal Code § 1476*

Contents of writ. *Penal Code § 1477*

Delivery and service of writ. *Penal Code § 1478*

No writ as allowed to be disobeyed for defect in form. *Penal Code § 1495*

Writ as allowed to be issued and served on any day or at any time. *Penal Code § 1502*

Writ as required to be issued by clerk, sealed with the seal of the court, and served and returned forthwith. *Penal Code § 1503*

Action for damages for disobedience of writ. *Penal Code § 1505*

Issuance and return of writ. *Penal Code § 1508*

Court as required either to release person being certified for intensive treatment who applies for judicial review by habeas corpus or to order an evidentiary hearing to be held, within two judicial days after the petition is filed. *Welf. & Inst. Code § 5276*

[6] Decisions

Courts of appeal, Supreme Court, and superior courts in some counties in which a large number of petitions for the writ are filed as having developed the practice of issuing an order to show cause why the writ should not be granted, instead of the writ. *In re Hochberg (1970) 2 Cal. 3d 870, 874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1*

[7] Cross Reference

For related petitions and proceedings, *see* §§ 292.89-292.90.

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25-292 California Forms of Pleading and Practice--Annotated § 292.89

§ 292.89 Order to Show Cause--Habeas Corpus Proceeding--General Form

[1] FORM Order to Show Cause--Habeas Corpus Proceeding--General Form

[*Caption. See § 292.80.*]

On reading and filing the petition of _____ [*name*] [, in behalf of _____ (*name*)],

IT IS ORDERED that _____ [*name*], respondent, show cause before this court, in [_____ (Department *or* Division) _____ of] the above-entitled court, located at _____ [*name of building or street address or both*], in _____ [*city*], _____ County, California, on _____ [*date*], at _____[*time*], why the relief prayed for should not be granted.

The written return is to be served and filed on or before _____ [*date*].

[Pending final disposition of this proceeding, petitioner is _____ (*specify change of custody or release from custody, if any*).]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form of order to show cause is for use in a proceeding for a writ of habeas corpus in which the judge issues an order to show cause why the writ of habeas corpus should not be granted rather than directly issuing the writ [see *In re Hochberg (1970) 2 Cal. 3d 870, 873-874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1]* . See the discussion of procedure on order

to show cause in *§ 292.15*.

The superior court or appellate court issuing the order to show cause will normally use a printed form. Counsel should ascertain the relevant local or appellate procedures.

[3] California Rules of Court

Issuance of order to show cause by superior court in habeas corpus proceeding. *Cal. Rules of Ct., Rule 4.551(c)*

[4] Decisions

Courts of appeal and Supreme Court have developed practice of issuing order to show cause why writ of habeas corpus should not be granted, rather than issuing writ itself. *In re Hochberg (1970) 2 Cal. 3d 870, 874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1*

[5] Cross Reference

For related petitions, *see* §§ 292.80-292.84.

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25-292 California Forms of Pleading and Practice--Annotated § 292.90

§ 292.90 Proceedings for Warrant in Lieu of Writ of Habeas Corpus [Penal Code § 1497]--Petition--General Form

[1] FORM Proceedings for Warrant in Lieu of Writ of Habeas Corpus [Penal Code § 1497]--Petition--General Form

[*Caption, address, and introduction. See Forms 1, 3, or 4 as appropriate.*]

1. [*Place and other facts of illegal restraint or detention. See § 292.80, Paragraph 1; § 292.85, Paragraphs 3, 4.*]

2. [*Relationship of petitioner and person detained, if appropriate. See § 292.80, Paragraph 2; § 292.85, Paragraph 1.*]

3. [*Facts showing illegality of detention. See § 292.80, Paragraph 4; § 292.85, Paragraphs 3-5.*]

4. [*Purported authority of detention or restraint, if appropriate. See § 292.80, Paragraph 3.*]

5. [*Reason why custody should be vested in petitioner, if appropriate. § 292.80, Paragraph 5; § 292.85, Paragraphs 1-4. In child custody cases, particular unfitness or dangerousness of respondent. See § 292.85, Paragraph 5; § 292.86, Paragraph 6.*]

6. _____ [*Facts showing that person confined will be carried out of the jurisdiction or will suffer irreparable injury, including specific facts constituting any alleged threats, e.g.*, On or about _____ [*date*], respondent has threatened to remove _____ (*name of person confined*) from the jurisdiction of this court and of any court which may attempt to adjudicate the status of _____ (petitioner *or other*), and has further threatened to carry _____ (petitioner *or other*) out of _____ County and out of the State of California, if need be, to prevent _____ (petitioner from acquiring custody of the child *or other, as appropriate*). These threats were made _____ (*allege specific instances and exact circumstances*].

WHEREFORE, petitioner prays judgment as follows:

1. That a warrant be issued to _____ [*specify peace officer, e.g.,* Sheriff of _____ County], commanding that officer to take _____[*name of petitioner or of other person in whose behalf writ is sought*] into custody and forthwith bring him/her/them before this court, to be dealt with according to law; and

2. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*signature*]

_____ [*name of petitioner*]

Petitioner

[*Verification. See § 292.80.*]

CAUTION:
This form of petition for warrant in lieu of writ of habeas corpus should, if time permits, be accompanied by a memorandum of points and authorities supporting the issuance of the warrant and the propriety of the relief which would have been sought on writ of habeas corpus. It should also be accompanied by affidavits and by other supporting documents as necessary.

[2] Use of Form

This form of petition is for use in a proceeding for the issuance of a warrant in lieu of a writ of habeas corpus when it appears to the court or judge authorized by law to issue the writ that the one held in custody, confinement, or restraint may be carried out of the jurisdiction of the court or judge or that the person will suffer some irreparable injury before compliance with the writ can be enforced [*Penal Code § 1497*]. The court or judge may also insert in the warrant a command for the apprehension of the person charged with the illegal detention [*Penal Code § 1498*].

[3] State Statutes

Issuance of warrant in lieu of writ of habeas corpus. *Penal Code § 1497*

Warrant procedure generally. *Penal Code §§ 1497-1501*

[4] Decisions

Allegations of petition for warrant in lieu of writ of habeas corpus in a child custody case. *In re Kosh (1951) 105 Cal. App. 2d 418, 420, 233 P.2d 598*

Superior court of one county as having jurisdiction on warrant in lieu of habeas corpus only to order a child brought before it for its protection, where another county has jurisdiction over the question of guardianship of the child. *In re Kosh (1951) 105 Cal. App. 2d 418, 425, 233 P.2d 598*

[5] Cross Reference

For related petitions and proceedings, *see §§ 292.80*, 292.83-292.86, *292.92*, *292.93*.

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25-292 California Forms of Pleading and Practice--Annotated § 292.91

§ 292.91 Proceedings for Warrant in Lieu of Writ of Habeas Corpus [Penal Code § 1497]--Order That Warrant Issue

[1] FORM Proceedings for Warrant in Lieu of Writ of Habeas Corpus [Penal Code § 1497]--Order That Warrant Issue

[*Caption. See § 292.80.*]

It appears to the court, on reading and filing the Petition for Warrant in Lieu of Habeas Corpus filed by _____ [*name*], petitioner, that _____ [*name*], respondent, is _____ [*allege facts showing that petitioner or person on whose behalf relief is sought is about to be removed from the jurisdiction or will suffer irreparable harm, e.g.,* _____ (*name*), a child, is about to be removed from the jurisdiction by _____ (*name*), respondent, who holds the above-named child unlawfully in custody, and the above-named child will suffer irreparable injury before compliance with the writ of habeas corpus can be enforced]. Therefore,

IT IS HEREBY ORDERED that a warrant of attachment issue, pursuant to the provisions of *Section 1497 of the Penal Code*, to bring _____ [*name of petitioner or other*] [and _____ (*name of respondent*)] before this court on _____ [*date*], at _____[*time*], to be dealt with according to law.

IT IS FURTHER ORDERED that respondent show cause before this court why _____ [*relief sought should not be granted, e.g.,* custody should not be granted to petitioner at that time and place].

IT IS FURTHER ORDERED that a copy of the petition herein and a copy of this order be served on _____ [*name*], respondent, at the time the above-mentioned warrant is executed or at any time thereafter.
Dated: _____.

_____ [*signature*]

Judge

[2] Use of Form

This form of order is for use in a proceeding for issuance of a warrant in lieu of a writ of habeas corpus. The court may use printed forms available from the clerk. Counsel should determine current local practice before drafting such an order.

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25-292 California Forms of Pleading and Practice--Annotated § 292.92

§ 292.92 Proceedings for Warrant in Lieu of Writ of Habeas Corpus [Penal Code § 1497]--Warrant

[1] FORM Proceedings for Warrant in Lieu of Writ of Habeas Corpus [Penal Code § 1497]--Warrant

[*Caption. See § 292.80.*]

THE PEOPLE OF THE STATE OF CALIFORNIA,

To _____ [*specify peace officer, e.g.,* the Sheriff of _____ County], Greeting:

WHEREAS, it appears that _____ [*name*], respondent, is about to remove _____ [petitioner *or person on whose behalf the warrant is sought*] from the jurisdiction and that _____ [petitioner *or other*] will suffer irreparable injury before compliance with the writ of habeas corpus can be enforced. Therefore,

YOU ARE HEREBY COMMANDED, forthwith, to attach the body of _____ [*name of petitioner or other*] and bring him/her before the court, pursuant to the provisions of *Section 1497 of the Penal Code*, there to be dealt with according to law;

[And to attach the body of _____ (*name of person having custody*) and bring him/her before this court.]

Given under my hand, with the seal of the above-entitled court affixed on _____ [*date*].

BY ORDER OF COURT

_____ [*signature*]

Judge

[2] Use of Form

This form of warrant of attachment in lieu of writ of habeas corpus is for use in a proceeding for a warrant in lieu of the writ of habeas corpus. Many counties have their own printed forms of warrant for use in this proceeding. Counsel should determine current local practice before drafting this warrant.

The court or judge issuing the warrant may insert in the warrant a command for the apprehension of the person charged with the illegal detention [*Penal Code § 1498*].

[3] Execution

The officer to whom the warrant is delivered must execute it by bringing the person named in the warrant before the court or judge who directed the issuing of the warrant. [*Penal Code § 1499*].

[4] Return and Hearing

The person alleged to have the party under illegal confinement or restraint may make return to the warrant as in the case of a writ of habeas corpus, and the return may likewise be denied, and the same allegations, proofs, and trial may be had on the denial as may be had on a return to a writ of habeas corpus [*Penal Code § 1500*].

[5] State Statutes

Court or judge as allowed to cause a warrant to issue reciting the facts and directed to the any peace officer, commanding the officer to take the person restrained into custody and bring him or her before the court to be dealt with according to law. *Penal Code § 1497*

Court or judge as allowed to insert in the warrant a command for the apprehension of the person charged with the illegal detention. *Penal Code § 1498*

Execution of warrant. *Penal Code § 1499*

Return and hearing on warrant. *Penal Code § 1500*

Discharge or remand, on warrant in lieu of writ of habeas corpus, of person held in custody. *Penal Code § 1501*

[6] Cross Reference

For related petitions and procedings, *see §§ 292.80, 292.90, 292.91*.

California Forms of Pleading and Practice--Annotated

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
Chapter 292 HABEAS CORPUS
PART V. FORMS

25-292 California Forms of Pleading and Practice--Annotated § 292.93

§ 292.93 Return--Either to Writ of Habeas Corpus [Penal Code § 14 80]--Or to Order to Show Cause--Or to Warrant in Lieu of Writ [Penal Code § 1500]--General Form

[1] FORM Return--Either to Writ of Habeas Corpus [Penal Code § 14 80]--Or to Order to Show Cause--Or to Warrant in Lieu of Writ [Penal Code § 1500]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*Use other title of court as appropriate. See §§ 292.83, 292.84*]

	)	
	)	NO. _____
In the Matter of the Application	)	[*EITHER*]
of _____ [*name*],	)	RETURN TO WRIT OF HABEAS CORPUS
Petitioner,	)	[*OR*]
[in behalf of _____ (*name*)],	)	RETURN TO ORDER TO SHOW CAUSE
for the Writ of Habeas Corpus.	)	[*OR*]
	)	RETURN TO WARRANT IN LIEUOF WRIT OF
	)	HABEAS CORPUS

_____

[*Use other caption as appropriate. See §§ 292.83, 292.84]*

I, the undersigned, _____ [*name*], [on behalf of (respondent) _____ (*name*),] do

hereby make this return to the _____ [writ of habeas corpus *or* order to show cause *or* warrant issued in lieu of a writ of habeas corpus] issued by this court in the above-entitled proceeding, as follows:

[*EITHER, if writ of habeas corpus was issued*]

1. On or about _____ [*date*], a writ of habeas corpus issued by _____ [*specify court or judge*] was delivered to _____ [*name*] at _____ [*place*], commanding me to bring the person of [petitioner] _____ [*name*] before this court at _____ [*place*], on _____ [*date*] at _____ [*time*].

[*OR, if order to show cause was issued*]

1. On or about _____ [*date*], an order to show cause issued by _____ [*specify court or judge*] was delivered to _____ [*name*] at _____ [*place*], commanding me to appear before this court at _____ [*place*], on _____ [*date*] at _____ [*time*], and to show cause why a writ of habeas corpus should not be issued for the release of [petitioner] _____ [*name*] from my custody and control.

[*OR, if warrant was issued in lieu of writ of habeas corpus*]

[*OR, if warrant was issued in lieu of writ*]

1. On or about _____ [*date*], a warrant issued by _____ [*specify court or judge*] was delivered to _____ [*name of peace officer*] at _____ [*place*], commanding him/her to remove [petitioner] _____ [*name*] from my custody and control and to bring the person of [petitioner] _____ [*name*] before this court at _____ [*place*], on _____ [*date*] at _____ [*time*]. This warrant was executed by _____ [*name of peace officer*] on _____ [*date*] at _____ [*place*].

[*EITHER, if respondent has custody of petitioner or person on whose behalf petition was filed*]

2. On or about _____ [*date*], I had in my custody, and still do have in my custody, [petitioner] _____ [*name*].

[*OR, if respondent had custody of petitioner or person on whose behalf petition was filed, but later transferred custody to another person*]

2. I had [petitioner] _____ [*name*] in my custody and control from _____ [*date*] until _____ [*date*]. However, on _____ [*date*] at _____ [*place*], I transferred custody and control of [petitioner] _____ [*name*] to _____ [*name of new custodian*]. The transfer of custody was made by authority of _____ [*specify authority for transfer*], because _____ [*specify reason for transfer*].

[*OR, if respondent never had custody of petitioner or person on whose behalf petition was filed*]

2. I do not now have, nor have I at any time in the past had, custody or control of [petitioner] _____ [*name*].

[*CONTINUE*]

3. _____ [*Allege facts justifying and showing the legality of the custody or restraint, or of the manner of custody or restraint, as appropriate, and showing that respondent is the proper person to have custody of the person for whom the writ or other process was issued, e.g.*, I have custody of _____ (*name*) by virtue of a judgment rendered by the _____ Court of the State of _____. A certified copy of the judgment is attached as Exhibit A and incorporated herein].

4. _____ [*Allege additional facts that specifically respond to the allegations of the petition that form the basis of the petitioner's claim that the confinement is unlawful*].

[*ADD, if specific facts needed to respond to the allegations of the petition are unavailable to respondent*]

5. The petition in this proceeding [also] alleges [in part] as follows: _____ [*set forth allegation(s) that respondent wishes to respond to*].

6. Based on the information that I currently have, I believe that this/these allegation(s) are untrue because _____ [*set forth reasons why respondent believes in good faith that allegations are not true*].

7. In order to [fully] respond to this/these allegation(s), I need the following [additional] information: _____ [*specify*]. This information is not readily available to me at this time because _____ [*specify reasons why information is not available to respondent*].

8. I have made the following efforts to obtain this information: _____ [*specify steps taken to obtain information*].

[*CONTINUE*]

WHEREFORE, I respectfully request that the court enter judgment as follows:

1. That the relief sought in the petition for writ of habeas corpus be denied; and

2. For such other and further relief as the court may deem proper.
Dated: _____.

Respectfully submitted,

_____ [*signature*]

[*typed name*]

Respondent

VERIFICATION

I, _____ [*name*], am the respondent in the above-entitled proceeding. I have read the foregoing return and know its contents. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of return is for use in responding to any of the following:

- A writ of habeas corpus [*see Penal Code § 1480*].

- An order to show cause (OSC) issued in lieu of a writ of habeas corpus [*see People v. Duvall (1995) 9 Cal. 4th 464, 475-476, 37 Cal. Rptr. 2d 259, 886 P.2d 1252* ; *In re Saunders (1970) 2 Cal. 3d 1033, 1047, 88 Cal. Rptr. 633, 472 P.2d 921]* .

- A warrant issued in lieu of a writ of habeas corpus [*see Penal Code § 1500*].

The return should allege facts tending to establish the legality of the challenged detention and is analogous to the complaint in a civil proceeding [*In re Saunders (1970) 2 Cal. 3d 1033, 1047, 88 Cal. Rptr. 633, 472 P.2d 921* ; *see People v. Duvall (1995) 9 Cal. 4th 464, 476, 37 Cal. Rptr. 2d 259, 886 P.2d 1252]* . The return should also deny any material allegations of the petition that are not true, since any material allegation of the petition that is not controverted by the return is deemed admitted for purposes of the habeas corpus proceeding [*Cal. Rules of Ct., Rule 4.551(d)*]. When the return acknowledges or admits allegations in the petition or traverse, that, if true, justify the relief sought, the relief may be properly granted without a hearing on the factual issues [*In re Saunders (1970) 2 Cal. 3d 1033, 1048, 88 Cal. Rptr. 633, 472 P.2d 921* ; *see People v. Duvall (1995) 9 Cal. 4th 464, 477, 479, 37 Cal. Rptr. 2d 259, 886 P.2d 1252]* .

[3] Allegations

This return alleges:

- The service or delivery of the writ, OSC, or warrant (Alternative Paragraphs 1).

- Whether or not the respondent presently has the person in his or her custody, or whether respondent previously had the person in custody, but subsequently transferred custody to another person, and if so, the name of the transferee and the time, place, reason, and authority for the transfer (Alternative Paragraphs 2) [*see Penal Code § 1480(1), (4)*].

- Facts regarding the authority and justification for the custody or restraint, incorporating any written authority for the custody or restraint by reference (Paragraph 3) [*see Penal Code § 1480(2), (3)*].

- Any additional facts that specifically respond to the allegations of the petition that form the basis of the petitioner's claim that the confinement is unlawful (Paragraph 4) [*see People v. Duvall (1995) 9 Cal. 4th 464, 476, 37 Cal. Rptr. 2d 259, 886 P.2d 1252* ; *People v. Romero, (1994) 8 Cal. 4th 728, 738, 35 Cal. Rptr. 2d 270, 883 P.2d 388]* .

- If specific facts needed to respond to some of the allegations of the petition are presently unavailable to respondent (Optional Paragraphs 5-8) [*see People v. Duvall (1995) 9 Cal. 4th 464, 485, 37 Cal. Rptr. 2d 259, 886 P.2d 1252]* :

  - The nature of the additional information needed.

  - The reasons why the additional information is presently unavailable to respondent.

  - The steps taken by respondent to obtain the additional information.

  - The reasons why respondent believes in good faith that the specified facts alleged in the petition are untrue.

For further discussion of the required contents of the return, see *§ 292.17[2]*.

[4] Signature and Verification

The return must be signed by the party making the return and, except when the party making the return is a public officer making the return in his or her official capacity, verified under oath [*Penal Code § 1480(5)*].

The form of verification is governed by *Code Civ. Proc. §§ 446* and *2015.5*. For discussion, see Ch. 572, *Verification* .

[5] Accompanying Documents; Points and Authorities

If the party is detained by virtue of any writ, warrant, or other written authority, a copy of the writing must be annexed to the return. The original must be produced and exhibited to the court or judge at the hearing of the return [*Penal Code § 1480(3)*]. The return should also, when appropriate, provide documentary evidence, affidavits, or other materials that will enable the court to determine which issues are truly disputed [*People v. Duvall (1995) 9 Cal. 4th 464, 476, 37 Cal. Rptr. 2d 259, 886 P.2d 1252* ; *In re Lewallen (1979) 23 Cal. 3d 274, 278 n.2, 152 Cal. Rptr. 528, 590 P.2d 383]* .

It is also good practice to prepare a memorandum of points and authorities supporting the legality of custody by respondent and the denial of the relief sought to accompany the foregoing return. For forms of points and authorities supporting a return to a writ of habeas corpus or OSC, see California Points and Authorities, Ch. 110, *Habeas Corpus* (Matthew Bender).

[6] State Statutes

Contents, signing, and verification of the return. *Penal Code § 1480*

Return to warrant to be as in case of return to a writ of habeas corpus. *Penal Code § 1500*

[7] California Rules of Court

Material allegation of petition in superior court not controverted by return as deemed admitted for purposes of habeas corpus proceeding. *Cal. Rules of Ct., Rule 4.551(d)*

[8] Decisions

General pleading requirements for return; proscription against general denials; pleading requirements when facts needed to respond to petition are not available to respondent. *People v. Duvall (1995) 9 Cal. 4th 464, 475-477, 479-481, 483-485, 37 Cal. Rptr. 2d 259, 886 P.2d 1252*

Appellate courts' and Supreme Court's practice of issuing an order to show cause directing respondent custodian to serve and file a written return. *In re Hochberg (1970) 2 Cal. 3d 870, 874 n.2, 87 Cal. Rptr. 681, 471 P.2d 1*

Return to the writ or order to show cause should allege facts tending to establish the legality of the challenged detention and custody and is analogous to the complaint in a civil proceeding. *In re Saunders (1970) 2 Cal. 3d 1033, 1047, 88 Cal. Rptr. 633, 472 P.2d 921*

Relief sought may be properly granted without a hearing when the return acknowledges or admits allegations in the petition or traverse that, if true, justify the relief sought. *In re Saunders (1970) 2 Cal. 3d 1033, 1048, 88 Cal. Rptr. 633, 472 P.2d 921*

Writ of habeas corpus requires a return by the office or other person having custody of the person detained. *In re Stafford (1958) 160 Cal. App. 2d 110, 113, 324 P.2d 967*

[9] Cross Reference

For related petitions and proceedings, see *§§ 292.80, 292.81, 292.83, 292.84, 292.89, 292.90*.

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
Chapter 292 HABEAS CORPUS
PART V. FORMS

25-292 California Forms of Pleading and Practice--Annotated § 292.94

§ 292.94 Allegation--Return to Writ of Habeas Corpus [Penal Code § 1480]--Custody of Child

[1] FORM Allegation--Return to Writ of Habeas Corpus [Penal Code § 1480]--Custody of Child

1. Respondent, who now has custody and physi cal possession of the child _____ [*name*], has such custody by virtue of the fact that the child _____ [*name*] was placed in the custody of respondent by _____ [*specify, e.g.*, petitioner, the child's _____ (*specify, e.g.*, mother), on _____ with instructions that the child be raised as one of respondent's family]. This child has been, and now is, in the custody of respondent and has been, and now is, living in respondent's home in a wholesome and stable environment. During the period of the last _____ years, the child has resided in the home of respondent. Respondent is a fit and suitable person to have custody of the child, and the best interests of the child require that his/her custody remain with respondent.

[2. Petitioner has abandoned the child who is the subject of this writ and has refused the custody of the child, as appears from the following instances in which petitioner _____ (*specify*).]

3. _____ [*If petitioner is parent, allege:* An award of custody of the child to petitioner would be detrimental to the child *or if petitioner is not parent, allege:* Petitioner is an unfit person to care for and have the custody of the child who is the subject of this writ, because _____ (*specify facts known to respondent, if appropriate*) (Respondent attaches and incorporates Exhibits A- _____, the declarations of _____ (*name*) and _____ (*name*) in support of his/her contentions.)].

[2] Use of Form

These allegations are for use in a return to a writ of habeas corpus seeking custody of a child who is in the custody and possession of respondent. The allegations state facts showing how respondent obtained custody of the child, that respondent is a fit and proper person to retain custody, that the child's best interests require continued custody with respondent, and that respondent is a person in whose home the child has been living in a wholesome and stable environment [*Fam. Code § 3040(a)(2)*].

Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of

the parents, it must make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child. Allegations that parental custody would be detrimental to the child, other than a statement of ultimate fact, may not appear in the pleadings [*Fam. Code § 3041*].

For full discussion of standards governing child custody orders, see Ch. 223, *Dissolution of Marriage: Child Custody* , and Ch. 394, *Parent and Child* ,

[3] Points and Authorities and Declarations

Respondent should attach supporting declarations and submit the foregoing return supported by points and authorities.

[4] State Statutes

Order of preference, and award to nonparent of custody of a child. *Fam. Code § 3040 et seq.*

Mother and father of minor child as equally entitled to custody. *Fam. Code § 3010*

Uniform Parentage Act. *Fam. Code §§ 7600 et seq.*

[5] Decisions

Court's grant of the writ of habeas corpus returning custody of the child to the natural parent from third parties is proper, when the natural parent is a fit parent. *In re Miller (1966) 244 Cal. App. 2d 454, 459, 53 Cal. Rptr. 211*

Writ of habeas corpus properly granted to return custody of a child to its natural parents and take custody from the grandparents in the absence of a finding that the parents had abandoned the child. *In re Harmon (1953) 121 Cal. App. 2d 646, 648-649, 263 P.2d 649*

Habeas corpus is the proper procedure for determining whether one who has custody without legal proceedings is entitled to retain custody. *Rose v. Superior Court (1948) 86 Cal. App. 2d 173, 177, 194 P.2d 568*

[6] Text References

Kirkland, Lurvey, and Richmond, California Family Law Practice and Procedure, 2d Ed., Chs. 33, 142 (Matthew Bender)

[7] Cross Reference

For related petitions, see *§§ 292.85, 292.86*.

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25-292 California Forms of Pleading and Practice--Annotated § 292.95

§ 292.95 Traverse to Return to Writ of Habeas Corpus [Penal Code § 1484]--General Form

[1] FORM Traverse to Return to Writ of Habeas Corpus [Penal Code § 1484]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*Use other title of court as appropriate. See §§ 292.83, 292.84*]

In the Matter of the Application of _____ [*name*], Petitioner, [in behalf of_____ (*name*)], for Writ of Habeas Corpus.	)))))))	NO. _____ TRAVERSE TO RETURN TO WRIT OF HABEAS CORPUS

_____

[*Use other caption as appropriate. See §§ 292.83, 292.84]*

[*Address, if desired. See §§ 292.80, 292.83, 292.84]*

Petitioner traverses the return herein as follows:

1. Petitioner denies each and every allegation set forth in respondent's return to the writ of habeas corpus, except what is herein expressly admitted.

2. Petitioner admits the following allegation(s) set forth in respondent's return: _____ [*specify*].

3. Petitioner excepts to the sufficiency of respondent's return to the writ of habeas corpus in that _____ [*specify, e.g.*, respondent herein does not state the authority and cause of the _____ (imprisonment *or* restraint *or* confinement *or* detention) of _____ (*name of petitioner or other person*), as required by *Penal Code Section 1480(2)*]. Petitioner attaches and incorporates herein a memorandum of points and authorities and a declaration in support of the insufficiency of respondent's return to the writ of habeas corpus.

4. _____ [Petitioner pleads the petition and each and every allegation contained in that petition for writ of habeas corpus herein as a traverse to respondent's return. A copy of the petition is attached as Exhibit A and made a part hereof *or allege other facts affirmatively showing that the detention is unlawful and that petitioner is entitled to release or other relief requested*].

WHEREFORE, petitioner prays judgment as follows:

1. That the court entertain evidence and do and hear such other matters as may be appropriate;

2. That _____ [*name of petitioner or other person*] be _____ [*specify exact relief sought, e.g.*, discharged from custody and restraint by _____ (*name of respondent or other as appropriate*)]; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner_____

[*Verification. See § 292.80.*]

[2] Use of Form

This form of traverse is for use in answering the return to a writ of habeas corpus or the return to an order to show cause or to a warrant issued in lieu of the writ. In the traverse, the petitioner may deny or controvert any of the material facts or matters set forth in the return, may except to the sufficiency of the return, or may allege any fact to show either that his or her imprisonment or detention is unlawful or that he or she is otherwise entitled to discharge [*Penal Code § 1484*]. Any material allegation of the return that is not denied in the traverse is deemed admitted for purposes of the habeas corpus proceeding [*see Cal. Rules of Ct., Rule 4.551(e)*]. The court or judge must on the response to the return (the traverse) proceed in a summary way to hear such proof as may be produced against the imprisonment or detention and in favor of it, and to dispose of the party as the justice of the case requires [*Penal Code § 1484*].

[3] Petition Treated as Traverse

By stipulation or acquiescence, the petition for the writ may be treated as a traverse to the return [*In re Saunders (1970) 2 Cal. 3d 1033, 1047, 88 Cal. Rptr. 633, 472 P.2d 921* ; *see People v. Duvall (1995) 9 Cal. 4th 464, 477, 37 Cal. Rptr. 2d 259, 886 P.2d 1252]* , in which case the petition and its allegations have the same effect as if they were in the traverse [*In re Egan (1944) 24 Cal. 2d 323, 330, 149 P.2d 693* , *cert. denied, 323 U.S. 785]* . It is the general practice for the parties to stipulate at the hearing that the petition may be treated as a traverse. [*In re Strafford (1958) 160 Cal. App. 2d 110, 113, 324 P.2d 967]* .

When the petition is deemed a traverse to the return, the danger exists that a petition that fails to deny the specific allegations of the return will admit those allegations not so denied [*In re De Leon (1943) 59 Cal. App. 2d 510, 513, 139 P.2d 109]* . Counsel should be aware of this possible danger when deciding whether to have the petition treated as a traverse by stipulation or to file a prepared traverse to the return.

[4] Traverse as Answer

The traverse to the return is analogous to the answer in a civil proceeding [*In re Saunders (1970) 2 Cal. 3d 1033, 1047, 88 Cal. Rptr. 633, 472 P.2d 921]* . The petitioner may deny or controvert any of the material facts or matters set forth in the return or may allege any fact to show either that his or her imprisonment or detention is unlawful or that he or she is entitled to discharge [*Penal Code § 1484*].

A simple general denial of the allegations of the return is arguably inadequate as a traverse because the return, to which the traverse is an answer, must be verified [*Penal Code § 1480(5)*], and because the filing of a verified complaint in a civil action, to which the return is analogous [*see In re Saunders (1970) 2 Cal. 3d 1033, 1047, 88 Cal. Rptr. 633, 472 P.2d 921]* , precludes the filing of a general denial for the answer [*see Code Civ. Proc. § 431.30*]. By analogy to a civil action, the traverse, as the answer to the return, should not consist of a general denial.

[5] Traverse as Demurrer

When traversing the return to the writ, the petitioner may also except to the sufficiency of the return in a procedure analogous to a demurrer [*Penal Code § 1484*; *In re Saunders (1970) 2 Cal. 3d 1033, 1048, 88 Cal. Rptr. 633, 472 P.2d 921* ; *see People v. Duvall (1995) 9 Cal. 4th 464, 477, 37 Cal. Rptr. 2d 259, 886 P.2d 1252]* .

[6] Time Limit for Filing Traverse to Return

In superior court, if an order to show cause has been issued, the traverse (or "denial," as it is called in the California Rules of Court) must be served on respondent and filed with the court within 30 days after service and filing of the return to the order to show cause [*Cal. Rules of Ct., Rule 4.551(e)*]. It is unclear whether this time limit applies when the writ has been issued, rather than an order to show cause.

[7] Verification

Because the return must be verified [*see Penal Code § 1480(5)*], it appears that the traverse must also be verified, by analogy to the rule applicable to answers to verified complaints in civil actions in superior court [*see Code Civ. Proc. § 446(a)*; for discussion, see Ch. 572, *Verification*].

[8] Points and Authorities and Other Documents

The traverse should be accompanied by a memorandum of points and authorities that supports the contentions raised in opposition to the return and the petitioner's right to the relief requested. Other documents, such as declarations, court orders, and judgments should be attached and incorporated as necessary.

For points and authorities supporting a traverse to a return to a writ of habeas corpus or OSC, see California Points and Authorities, Ch. 110, *Habeas Corpus* (Matthew Bender).

[9] State Statutes

Answer to verified complaint as required to be verified. *Code Civ. Proc. § 446(a)*

Traverse to return to writ of habeas corpus. *Penal Code § 1484*

Traverse to return when warrant issued in lieu of habeas corpus as to follow procedures as on writ of habeas corpus. *Penal Code § 1500*

[10] California Rules of Court

Material allegations of return not denied in traverse as deemed admitted for purposes of habeas corpus proceeding in superior court. *Cal. Rules of Ct., Rule 4.551(e)*

Time limit for filing traverse in superior court. *Cal. Rules of Ct., Rule 4.551(e)*

[11] Decisions

Response to return is called "traverse" and is analogous to answer in civil proceeding; petition properly treated as traverse by stipulation or acquiescence. *In re Saunders (1970) 2 Cal. 3d 1033, 1047, 88 Cal. Rptr. 633, 472 P.2d 921*

Petitioner allowed to except to sufficiency of return in proceeding like demurrer. *In re Saunders (1970) 2 Cal. 3d 1033, 1048, 88 Cal. Rptr. 633, 472 P.2d 921*

New matter alleged in traverse deemed denied and required to be proved by petitioner. *In re Saunders (1970) 2 Cal. 3d 1033, 1047-1048, 88 Cal. Rptr. 633, 472 P.2d 921*

Parties generally stipulating at hearing that petition be treated as traverse. *In re Stafford (1958) 160 Cal. App. 2d 110, 113, 324 P.2d 967*

Demurrer to return to writ of habeas corpus admits material facts alleged in return for purposes of determining the sufficiency of return. *In re Landry (1943) 61 Cal. App. 2d 230, 233, 142 P.2d 432*

When petition deemed a traverse to the return by stipulation, petition that fails to deny the specific allegations of return may possibly be construed as admitting those allegations not so denied, but stipulation may be construed to provide that the allegations of the return be deemed denied. *In re De Leon (1943) 59 Cal. App. 2d 510, 513, 139 P.2d 109*

[12] Cross Reference

For related petitions and procedings, see *§§ 292.80*, *292.83*, *292.84*, *292.93*, *292.94*.

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25-292 California Forms of Pleading and Practice--Annotated § 292.96

§ 292.96 Declaration [Code Civ. Proc. § 2015.5] of Attorney for Order of Attachment [Penal Code § 1479]--Proceedings on Disobedience of Writ of Habeas Corpus

[1] FORM Declaration [Code Civ. Proc. § 2015.5] of Attorney for Order of Attachment [Penal Code § 1479]--Proceedings on Disobedience of Writ of Habeas Corpus

[*Caption. See Forms 1, 4.*]

I, _____ [*name*], declare:

I am the attorney of petitioner herein.

On _____ [*date*], in the _____ [*court*] of the State of California, by the Honorable _____ [*name of judge or justice*], an order granting a writ of habeas corpus to petitioner was duly made. The writ of habeas corpus was served on _____ [*name and position of person having custody*] by _____ [*name and position*], on _____ [*date*], at _____ [*time*], wherein it was commanded that the person on whom the writ was served have the body of _____ [petitioner *or other person*] before this court on _____ [*date*], at _____ [*time*], together with the time and cause of the restraint and detention of _____ [petitioner *or other person*].

Respondent has neglected and refused to obey the writ of habeas corpus and has not produced the body of _____ [petitioner *or other person*] nor made a return to the writ within the time allowed, notwithstanding respondent's knowledge of the writ and his/her ability to comply with it.

This disobedience on the part of respondent has been willful and with intent to frustrate the processes of the above court and to deprive petitioner of the benefits of the writ of habeas corpus.

WHEREFORE, I pray that an Order of Attachment be issued out of this court, commanding the _____ [sheriff *or* coronor] to apprehend _____ [*name*], respondent, and bring him/her immediately before

this court and show cause why he/she should not be committed to _____ [*specify name of jail*] until he/she makes due return to the writ or is otherwise legally discharged.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

Attorney for Petitioner

CAUTION:
Proof of service of the writ on respondent should be attached if not previously filed [see *Penal Code § 1479*].

[2] Use of Form

The foregoing form of declaration is for use by the attorney for petitioner in obtaining a warrant of attachment of the respondent to a writ of habeas corpus where the respondent has not produced the body of the petitioner or other person in whose behalf the writ is sought and has not made return to the writ [see *Penal Code § 1479*].

[3] State Statutes

Declaration under penalty of perjury in lieu of affidavit. *Code Civ. Proc. § 2015.5*

Disobedience of writ as misdemeanor. *Penal Code § 362*

Proceedings on disobedience of writ of habeas corpus. *Penal Code § 1479*

Writ as not allowed to be disobeyed for defeat in form. *Penal Code § 1495*

Civil damages for disobedience of writ. *Penal Code § 1505*

[4] Decisions

Failure of sheriff to produce the body required by the writ as a contempt committed in the face of the court, and no affidavit as necessary to give the court knowledge of the facts. *Ex parte Sternes (1888) 77 Cal. 156, 163, 19 P. 275*

[5] Cross References

For alternate forms of affidavits and certificates, see Ch. 15, *Affidavits, Certificates, and Declarations*

For related petitions and procedings, see *§§ 292.80*, *292.83*, *292.84*, 292.93-292.99.

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25-292 California Forms of Pleading and Practice--Annotated § 292.97

§ 292.97 Order That Warrant of Attachment Issue--Proceedings on Disobedience of Writ of Habeas Corpus [Penal Code § 1479]

[1] FORM Order That Warrant of Attachment Issue--Proceedings on Disobedience of Writ of Habeas Corpus [Penal Code § 1479]

[*Caption. See § 292.80.*]

It appears to the court, on reading and filing the declaration of _____ [*name*], that _____ [*name*], respondent herein, is in contempt of this court in that he/she has not obeyed the command of the writ of habeas corpus granted by the court and duly served on respondent. Therefore,

IT IS HEREBY ORDERED that a warrant of attachment issue, pursuant to the provisions of *Section 1479 of the Penal Code*, to bring _____ [*name*], respondent, before this court on _____ [*date*], at _____ [*time*], to answer charge and to show cause why he/she should not be committed to _____[*specify name of jail*] until he/she makes due return to the writ or is otherwise legally discharged.

IT IS FURTHER ORDERED that a copy of the declaration of _____ [*name*] be served on _____ [*name*], respondent, at the time of his/her arrest under the warrant.
Dated: _____.

_____ [*signature*]

Judge

[2] Use of Form

The foregoing order that a warrant of attachment issue is for use in proceedings on disobedience of the writ of habeas

corpus. Many courts will have their own printed forms of order or will issue and draft their own orders. Counsel should determine local or appellate practice before drafting the foregoing order.

[3] Cross Reference

For related forms, see *§§ 292.80*, *292.96*, *292.98*, *292.99*.

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25-292 California Forms of Pleading and Practice--Annotated § 292.98

§ 292.98 Warrant of Attachment [Penal Code § 1479]--Proceedings on Disobedience of Writ of Habeas Corpus

[1] FORM Warrant of Attachment [Penal Code § 1479]--Proceedings on Disobedience of Writ of Habeas Corpus

[*Caption. See § 292.80.*]

THE PEOPLE OF THE STATE OF CALIFORNIA,

To the _____ [Sheriff *or* Coronor] of _____ County, California, Greetings:

YOU ARE HEREBY COMMANDED, forthwith, to attach the body of _____ [*name*] and bring him/her before the _____ [*court*], State of California, to answer for a contempt of court for failure to obey a writ of habeas corpus heretofore issued by this court in the above-entitled proceeding, as per mandate of this court.

Given under my hand, with the seal of this court affixed this day of _____ [*date*].

BY ORDER OF COURT

_____ [*signature*]

Judge

[2] Use of Form

The foregoing form of warrant of attachment is for use in a proceeding for writ of habeas corpus on disobedience of the writ by respondent. Many counties and the appellate courts will have their own printed forms of warrant on which they will issue the warrant of attachment. The attorney should determine local or appellate practice before drafting this warrant.

[3] Cross Reference

For related forms, see *§§ 292.80*, *292.95*, *292.97*, *292.99*.

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25-292 California Forms of Pleading and Practice--Annotated § 292.99

§ 292.99 Complaint for Damages for Disobedience of Writ of Habeas Corpus [Penal Code § 1505]

[1] FORM Complaint for Damages for Disobedience of Writ of Habeas Corpus [Penal Code § 1505]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR DISOBEDI-
_____ [*name*],	)	ENCE OF WRIT
Respondent.	)	OF HABEAS CORPUS
	)	Amount demanded does not exceed $10,000
	)	[Limited Civil Case]

Plaintiff alleges:

1. The cause of action herein stated arose in _____ County, California, wherein defendant _____ [*specify acts in disobedience of the writ of habeas corpus*].

2. [Plaintiff is informed and believes and thereon alleges that at all times herein-mentioned defendant _____ (*name*) was authorized and empowered by defendant _____ (*name of principal*) to act and did act as the agent of defendant _____ (*principal*), and each and all of the things herein alleged to have been done by him/her were done in the capacity of and as agent for defendant _____ (*principal*).]

3. On _____ [*date*], in the _____ Court of the State of California [in the County of _____], Honorable _____ [*judge or justice*] presiding, an order was duly made granting a writ of habeas corpus to plaintiff, directed to defendant _____ [*name*] herein.

4. On _____ [*date*], the above-alleged writ of habeas corpus was served on defendant by _____ [*name*], wherein it was commanded that the respondent named in the writ have the body of plaintiff herein before the court named in the writ on _____ [*date*], at _____ [*time*], together with the time and cause of the restraint and detention. A copy of the writ is attached as Exhibit A and incorporated herein.

5. Defendant neglected and refused to obey the attached writ of habeas corpus and did not produce the body of plaintiff before the court at the time and place as commanded by the writ, and defendant neglected and refused to make a return to the writ within the time allowed, notwithstanding defendant's knowledge of the writ and his/her ability to comply with the writ.

6. The disobedience of defendant to the writ has been willful on the part of defendant and with intent to frustrate the processes of the court and to deprive plaintiff of the benefits of the writ of habeas corpus.

7. Plaintiff brings this action under the provisions of *Section 1505 of the Penal Code*.

8. As a consequence of defendant's wrongful acts, plaintiff has been damaged in the sum of _____.

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of _____; and

2. For other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 292.80.*]

[2] Use of Form

This form of complaint is for use in an action for damages for failure to obey the writ of habeas corpus. If the person to whom a writ of habeas corpus is directed refuses obedience to the command of the writ, he or she forfeits and pays to the person aggrieved a sum not exceeding $10,000, to be recovered in any court of competent jurisdiction [*Penal Code § 1505*].

[3] Jurisdiction and Venue

The superior court has jurisdiction of unlimited civil cases as well as limited civil cases (*i.e.*, actions in which,

generally, the amount in controversy, exclusive of interest, is $25,000 or less) [*Code Civ. Proc. §§ 85, 86(a)(1)*]. In a limited civil case, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9),(10)*].

The county in which the case or some part of it arose is the proper county, subject to the power of the courts to transfer actions, for the trial of an action for the recovery of a penalty or forfeiture imposed by statute [*Code Civ. Proc. § 393(a)*]. and, therefore, for an action pursuant to *Penal Code § 1505* [*Ah Fong v. Sternes (1889) 79 Cal. 30, 31-32, 21 P. 381]* .

[4] Statute of Limitations

An action on a statute for a forfeiture or penalty, when the action is given to an individual, or to an individual and the state, must be commenced within one year [*Code Civ. Proc. § 340(a)*].

[5] Verification

Verification of this complaint is not required, and because the action is a limited civil case, verification of the complaint will not require the defendant to verify the answer [*Code Civ. Proc. §§ 92(b), 446*], or preclude a general denial unless the cause of action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[6] Cross References

For alternative forms of allegations of agency, see Ch. 20 *Allegations Commonly Used*

For procedures and forms of allegations where a public officer or entity is made a defendant, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

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§ 293.syn Synopsis to Chapter 293: HARASSMENT AND DOMESTIC VIOLENCE

§ 293.01 Scope of Chapter

§ 293.02 Cross References

§§ 293.03-293.09 [Reserved]

§ 293.10 Governing Statutes

§ 293.11 Civil Harassment and Related Remedies Distinguished

§ 293.12 Harassment Defined

§ 293.13 Relief Available

§ 293.14 Petition for Relief and Response

§ 293.15 Seeking Pendente Lite Relief

[1] Application for and Issuance of Temporary Restraining Order

[a] Application

[b] Issuance of Order

[2] Duration of Temporary Restraining Order

§ 293.16 Service of Papers

[1] In General

[2] Service by Law Enforcement Officer at Scene of Incident

§ 293.17 Hearing and Order

[1] Timing and Scope of Hearing

[2] Representation by Counsel

[3] Support Persons

[4] Evidence Required

[5] No Undertaking Generally Required

[6] Duration of Injunction

[7] Registration With Law Enforcement Agencies

[8] Costs and Attorney's Fees

[9] Prohibition Against Firearms

§ 293.18 Willful Disobedience as Crime

§§ 293.19-293.29 [Reserved]

§ 293.30 Governing Statutes

§ 293.31 Nature of Remedy and Definitions

[1] Right of Employer to Seek Injunctive Relief

[a] Grounds for Relief

[b] Other Duties of Employer Unaffected

[2] Definitions

§ 293.32 Petition for Relief and Response

[1] Application for and Issuance of Temporary Restraining Order

[2] Duration of Temporary Restraining Order

§ 293.33 Service of Papers

§ 293.34 Hearing and Order

[1] Timing and Scope of Hearing

[2] Representation by Counsel

[3] Evidence Required

[4] No Undertaking Generally Required

[5] Duration of Injunction

[6] Registration With Law Enforcement Agencies

[7] Prohibition Against Firearms

§ 293.35 Willful Disobedience as Crime

§§ 293.36-293.49 [Reserved]

§ 293.50 Governing Statutes

§ 293.51 Definitions

§ 293.52 Relief Available in General

[1] Types of Orders

[a] Protective Orders in General

[b] Limitations on Custody Orders

[c] Data Base Search Required

[2] Who May Apply for Order

[a] Abuse Victims in General

[b] Minors

[3] Jurisdiction and Venue

[4] Filing Fees

[5] Relief From Meeting With Abuser

[6] Support Person

[7] Need for Interpreter and Translation of Orders

[8] Prohibition Against Firearms

[a] Purchasing or Receiving Firearms

[b] Owning or Possessing Firearms

§ 293.53 Ex Parte Protective Orders Issued by Court

[1] Available Orders

[2] Additional Showing for Dwelling Exclusion

[3] Mutual Orders

[4] Prohibition Against Purchase or Receipt of Firearms

[5] Order to Show Cause

[6] Reissuance of Protective Order

§ 293.54 Ex Parte Emergency Protective Orders Requested by Peace Officers

[1] Persons Authorized to Issue Orders

[2] Available Emergency Protective Orders

[3] Grounds and Findings for Issuance

[4] Requirements for Emergency Protective Order

[5] Service on Protected and Restrained Parties

[6] Enforcement

[7] Expiration

[8] Ex Parte Emergency Protective Order for Endangered Child

§ 293.55 Protective Orders on Notice and Hearing Against Domestic Violence

[1] Generally

[2] Duration of Order

[3] Limitations on Enjoined Parent's Visitation Rights

§ 293.56 Enforcement of Orders Against Domestic Violence

[1] Notice to Be Printed on Orders

[2] Notification and Authority of Law Enforcement Agencies

[3] Willful Violation as Crime

[4] Appointment of Counsel

[5] Contempt

[6] Out-of-State Protection Orders

§ 293.57 Domestic Violence Incident Report

§ 293.58 Enforcement of Foreign Protection Orders Under Uniform Interstate Enforcement of Domestic Violence Protection Orders Act

[1] Introduction

[2] Protection Orders Defined

[3] California's Enforcement Responsibilities

[4] Requirements for Valid Foreign Order

[5] Enforcement of Mutual Orders

[6] Registration of Order in California

[7] Other Remedies Unaffected

[8] Construction of Act to Promote Uniform Application

§§ 293.59-293.69 [Reserved]

§ 293.70 Criminal Sanctions for Abuse of Spouse or Cohabitant

[1] Current Spouse or Cohabitant

[2] Noncohabiting Former Spouse and Others

§ 293.71 Family Code Remedies for Attempted Murder of Spouse

§ 293.72 Suit for Damages

[1] Injuries from Domestic Violence Generally

[2] Tort of Domestic Violence

[3] Gender Violence

§ 293.73 Federal Criminal Remedy

§ 293.74 Denial of Spousal Support to Abusive Spouse

§§ 293.75-293.79 [Reserved]

§ 293.80 Related Matthew Bender Publications

[1] California Family Law

[2] California Criminal Defense Practice

[3] California Torts

[4] California Employment Law

[5] California Points and Authorities

§ 293.81 Federal Statutes

§ 293.82 State Statutes

[1] Civil Harassment

[a] Attorney's Fees

[b] Nature and Scope of Relief Against Civil Harassment

[c] Criminal Penalties

[2] Workplace Violence

[a] Nature and Scope of Relief Against Workplace Violence

[b] Criminal Penalties

[3] Domestic Violence

[a] Appointment of Counsel

[b] Nature and Scope of Relief Against Domestic Violence

[c] Civil Action for Damages

[d] Criminal Penalties

[e] Evidence

[f] Forms and Filing Fees

[g] Information for Domestic Violence Victims

[h] Law Enforcement Agencies

[4] Elderly and Dependent Adult Abuse

[5] Immunity of Psychotherapist

§ 293.83 California Rules of Court

§ 293.84 Local Court Rules

[1] Bay Area

[2] Los Angeles County

[3] San Francisco City and County

§ 293.85 Decisions

[1] Civil and Workplace Harassment

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§ 293.86 Law Reviews

§ 293.87 Text References

§§ 293.88-293.99 [Reserved]

§ 293.100 Request for Orders to Stop Harassment--Cal. Judicial Council Form CH-100 [Code Civ. Proc. §§ 527.6, 527.9]

[1] FORM

[2] Use of Form

[3] Service on Defendant

[4] Filling in Request

[5] Cross References

§ 293.101 Notice of Hearing (Civil Harassment) and Temporary Restraining Order (CLETS)--Cal. Judicial Council Form CH-120 [Code Civ. Proc. §§ 527.6, 527.9]

[1] FORM

[2] Use of Form

[3] Procedure When Courts Grants Temporary Restraining Order

§ 293.102 Proof of Service (Civil Harassment)--Cal. Judicial Council Forms CH-130, CH-131 [Code Civ. Proc. § 527.6(g)]

[1] FORMS

[2] Use of Forms

[3] When Service Required and Who May Serve

§ 293.103 Answer to Request for Orders to Stop Harassment--Cal. Judicial Council Form CH-110 [Code Civ. Proc. §§ 527.6, 527.9]

[1] FORM

[2] Use of Form

[3] Filling In Answer

§ 293.104 Restraining Order After Hearing to Stop Harassment (CLETS)--Cal. Judicial Council Form CH-140 [Code Civ. Proc. §§ 527.6, 527.9]

[1] FORM

[2] Use of Form

§ 293.105 Reissue Temporary Restraining Order (Civil Harassment)--Cal. Judicial Council Form CH-125 [Code Civ. Proc. §§ 527.6, 527.9]

[1] FORM

[2] Use of Form

§ 293.106 Proof of Firearms Turned In or Sold--Cal. Judicial Council Form CH-145 [Code Civ. Proc. § 527.9]

[1] FORM

[2] Use of Form

§ 293.107 Request and Order for Free Service of Restraining Order--Cal. Judicial Council Form CH-101/DV-290 [Code Civ. Proc. § 527.6; Fam. Code § 6222]

[1] FORM

[2] Use of Form

§§ 293.108-293.129 [Reserved]

§ 293.130 Petition of Employer for Injunction Prohibiting Violence or Threats of Violence Against Employee (Workplace Violence) and Application for Temporary Restraining Order--Cal. Judicial Council Form WV-100 [Code Civ. Proc. §§ 527.8, 527.9]

[1] FORM

[2] Use of Form

§ 293.131 Response to Petition of Employer for Injunction Prohibiting Violence or Threats of Violence Against Employee (Workplace Violence)--Cal. Judicial Council Form WV-110 [Code Civ. Proc. § 527.8]

[1] FORM

[2] Use of Form

§ 293.132 Order to Show Cause and Temporary Restraining Order (CLETS)--Cal. Judicial Council Form WV-120 [Code Civ. Proc. §§ 527.8, 527.9; Penal Code § 273.6(a)]

[1] FORM

[2] Use of Form

§ 293.133 Proof of Service (Workplace Violence)--Cal. Judicial Council Forms WV-130, WV-131, WV-132 [Code Civ. Proc. §§ 527.8, 527.9]

[1] FORMS

[2] Use of Forms

§ 293.134 Order After Hearing on Petition of Employer for Injunction Prohibiting Violence or Threats Against Employee (Workplace Violence) (CLETS)--Cal. Judicial Council Form WV-140 [Code Civ. Proc. §§ 527.8, 527.9; Penal Code § 273.6(a)]

[1] FORM

[2] Use of Form

§ 293.135 Proof of Sale of Firearms/Turning In of Firearms--Cal. Judicial Council Form EA-145/WV-145 [Code Civ. Proc. § 527.9]

[1] FORM

[2] Use of Form

§§ 293.136-293.149 [Reserved]

§ 293.150 Request for Order, with Custody, Visitation and Support Request and Request for Order: No Travel with Children (Domestic Violence)--Cal. Judicial Council Forms DV-100, DV-105, DV-108 [Fam. Code § 6200 et seq.]

[1] FORMS

[2] Use of Forms

[3] Service on Respondent

[4] Completion of Forms

[a] Application and Declaration

[b] Attachment for Custody, Visitation, or Support

[c] Request for Order: No Travel With Children

[5] Cross References

§ 293.150A Notice of Court Hearing (Domestic Violence)--Cal. Judicial Council Form DV-109 [Fam. Code § 242]

[1] FORM

[2] Use of Form

§ 293.151 Temporary Restraining Order (CLETS) (Domestic Violence)--Cal. Judicial Council Form DV-110 [Fam. Code § 6200 et seq.]

[1] FORM

[2] Use of Form

[3] Service

[4] Notification of Law Enforcement Agency

[5] Number of Copies

§ 293.151A Waiver of Hearing on Denied Request for Temporary Restraining Order (Domestic Violence)--Cal. Judicial Council Form DV-112 [Fam. Code § 6320.5]

[1] FORM

[2] Use of Form

§ 293.152 Proof of Service (Family Law, Domestic Violence, Uniform Parentage)--Cal. Judicial Council Forms DV-200, DV-250

[1] FORMS

[2] Use of Forms

[3] Filing Proof of Service

[4] Number of Copies

[5] Cross References

§ 293.153 Answer to Temporary Restraining Order (Domestic Violence)--Cal. Judicial Council Form DV-120 [Fam. Code § 6200 et seq.]

[1] FORM

[2] Use of Form

[3] Filling in Form

§ 293.154 Restraining Order After Hearing (CLETS) [Fam. Code § 6200 et seq.], and Child Custody and Visitation Order, Supervised Visitation Order, No Travel with Children Order, Child Support Order, and Other Orders--Cal. Judicial Council Forms DV-130, DV-140, DV-145, DV-150, DV-160, DV-170

[1] FORMS

[2] Use of Forms

[3] Delivery to Law Enforcement Agencies

[4] Cross References

§ 293.154A Request to Renew Restraining Order and Notice of Hearing to Renew Restraining Order (CLETS) (Domestic Violence)--Cal. Judicial Council Forms DV-700, DV-710

[1] FORMS

[2] Use of Forms

§ 293.155 Reissue Notice of Court Hearing and Temporary Restraining Order--Cal. Judicial Council Form DV-125 [Fam. Code § 245]

[1] FORM

[2] Use of Form

[3] Number of Copies

§ 293.156 Application by Peace Officer for Emergency Protective Order and Emergency Protective Order--Cal. Judicial Council Form EPO-001 [Fam. Code §§ 6250 et seq., 6270 et seq.]

[1] FORM

[2] Use of Form

[3] Filling Out Form

[4] Service of Order

§ 293.157 Register Out-of-State Restraining Order (CLETS)--Cal. Judicial Council Form DV-600

[1] FORM

[2] Use of Form

§ 293.158 Application For and Appointment of Guardian Ad Litem of Minor--Cal. Judicial Council Form FL-935

[1] FORM

[2] Use of Form

[3] Cross References

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PART I. SCOPE

25-293 California Forms of Pleading and Practice--Annotated § 293.01

§ 293.01 Scope of Chapter

This chapter discusses court orders that prohibit harassment and that restrain persons from acts of workplace or domestic violence. Part II discusses the substantive legal requirements for obtaining temporary restraining orders and injunctions against civil harassment (subpt. A), workplace violence (subpt. B), and domestic violence (subpt. C) [*see Code Civ. Proc. §§ 527.6, 527.8*; *Fam. Code § 6200 et seq.*]. Part III contains a research guide, and Part IV provides forms.

Although not reproduced in this chapter, the Judicial Council's Instructions for Orders Prohibiting Domestic Violence [Cal. Judicial Council Form DV-150] and Instructions for Petitions to Prohibit Workplace Violence [Cal. Judicial Council Form WV-150] may be helpful to persons who are applying for domestic violence or workplace violence orders without the assistance of counsel. The Instructions may be obtained from any county clerk or on the California Courts web site. Judicial Council Form CH-150, Can a Civil Harassment Restraining Order Help Me, and Judicial Council Form CH-151, How Can I Answer a Request for Orders to Stop Harassment, may be helpful to persons who are applying for, or responding to a request for, civil harassment restraining orders. These forms may also be obtained from any county clerk or on the California Courts web site.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsTemporary Restraining OrdersFamily LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & NeglectLabor & Employment LawWorkplace Violence

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25-293 California Forms of Pleading and Practice--Annotated § 293.02

§ 293.02 Cross References

For discussion and forms relating to temporary restraining orders and injunctions generally, see Ch. 303, *Injunctions* . For discussion and forms relating to civil actions based on childhood sexual abuse, and abuse of elderly persons and dependent adults, see Ch. 5, *Abuse of Minors and Elderly* . For discussion and forms pertaining to actions for damages for wrongful termination or discipline of an employee, see Ch. 249, *Employment Law: Termination and Discipline* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectLabor & Employment LawWrongful TerminationGeneral Overview

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[Reserved]

§§ 293.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Civil Harassment

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§ 293.10 Governing Statutes

The statutory provisions governing temporary restraining orders and injunctions prohibiting harassment generally are contained in *Code Civ. Proc. § 527.6*. The law governing the general availability of preliminary injunctive relief, except for orders covered by *Fam. Code § 240 et seq.* is contained in *Code Civ. Proc. § 527*. Modification or dissolution of a civil injunction or temporary restraining order is generally governed by *Code Civ. Proc. § 533*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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PART II. LEGAL BACKGROUND
A. Civil Harassment

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§ 293.11 Civil Harassment and Related Remedies Distinguished

The Code of Civil Procedure and Family Code provide a number of remedies for victims of harassment or domestic violence. When an aggrieved person seeks to obtain direct relief against the offending party, the remedies provided under *Code Civ. Proc. § 527.6* (the general civil harassment statute) and under *Fam. Code § 6200 et seq.* (the Domestic Violence Prevention Act) must be reviewed for their applicability, as discussed immediately below. In addition, if actual or threatened violence against a person in the workplace is involved, an employer may seek to obtain injunctive relief against the offending party under *Code Civ. Proc. § 527.8* to prevent the occurrence or reoccurrence of such violence, as discussed in subpt. B.

In bringing a direct action, the person seeking relief must initially identify whether the general harassment statute (*Code Civ. Proc. § 527.6*) or the Domestic Violence Prevention Act (*Fam. Code § 6200 et seq.*) applies. A person may seek restraining orders prohibiting harassment under Civ. Code § 527.6 when relief *is not* available under the Domestic Violence Prevention Act (*Fam. Code § 6200 et seq.*) or the Fair Debt Collections Practices Act (*see Civ. Code § 1788 et seq.*) [*Code Civ. Proc. § 527.6(k)*]. A person must seek relief under the Fair Debt Collections Practices Act, not *Code Civ. Proc. § 527.6*, when the offending party is a debt collector or claims that a debt is owed [*see* Code Civ. Proc. § 1788 et seq.]. Furthermore, relief must be sought under the Domestic Violence Prevention Act, not Civ. Code § 527.6, when the party seeking relief and the offending party:

- Are married, formerly married or related by blood, marriage or adoption;
- Are living together or have lived together;
- Have had a dating or engagement relationship; or
- Have a minor child in common who is the subject of an action under the Uniform Parentage Act (*Fam. Code § 7600 et seq.*) [*see Fam. Code § 6221* (application of Domestic Violence Prevention Act)]. See discussion in subpt. C., *below.*

In addition, a person must seek relief under the Domestic Violence Prevention Act, not Civ. Code § 527.6, when he or she is:

- A child who is a juvenile court dependent;

- A child of a party to an action under the Domestic Violence Prevention Act; or

- A child who is the subject of an action under the Uniform Parentage Act and whose male parent is his or her presumed father [*see Fam. Code § 6221* (application of Domestic Violence Prevention Act)]. See discussion in subpt. C., *below.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionLiabilityCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersFamily LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & Neglect

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PART II. LEGAL BACKGROUND
A. Civil Harassment

25-293 California Forms of Pleading and Practice--Annotated § 293.12

§ 293.12 Harassment Defined

Harassment, for the purposes of *Code Civ. Proc. § 527.6*, is unlawful violence, a credible threat of violence, or a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and it must actually cause substantial emotional distress to the petitioner [*Code Civ. Proc. § 527.6(b)*; *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc. (2005) 129 Cal. App. 4th 1228, 1257-1258, 29 Cal. Rptr. 3d 521* (liability is based on defendant's credible threats of violence and defendant's lack of intent to actually carry out threats is immaterial)]. *Code Civ. Proc. § 527.6* does not define "substantial emotional distress," but it may be properly compared to "severe emotional distress" in the tort context of intentional infliction of emotional distress. In that context, "severe emotional distress" means highly unpleasant mental suffering or anguish from socially unacceptable conduct, which entails such intense, enduring, and nontrivial emotional distress that no reasonable person in a civilized society should be expected to endure it. Therefore, not all actions that give rise to some emotional distress will constitute conduct that "cause[s] a reasonable person to suffer substantial emotional distress" within the meaning of *Code Civ. Proc. § 527.6*, particularly if the distress is but transitory in nature [*see Schild v. Rubin (1991) 232 Cal. App. 3d 755, 762-763, 283 Cal. Rptr. 533]* .

As used in harassment statute, "unlawful violence" is any assault or battery, or stalking as prohibited by *Penal Code § 646.9*, but does not include lawful acts of self defense or defense of others. "Credible threat of violence" is a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or for the safety of that person's immediate family, and that serves no legitimate purpose [*Code Civ. Proc. § 527.6(b)*].

A course of conduct is a pattern of conduct composed of a series of acts over time, however short, evidencing a continuity of purpose, includingfollowing or stalking an individual, making harassing telephone calls, or sending harassing correspondence by any means, including, but not limited to, the use of public or private mail, fax, or computer e-mail [*Code Civ. Proc. § 527.6(b)*]. The course of conduct must be ongoing at the time the injunction is sought [*Volpicelli v. Jared Sydney Torrance Memorial Hosp. (1980) 109 Cal. App. 3d 242, 251, 167 Cal. Rptr. 610]* .

A single incident of harassment is not a course of conduct [*Leydon v. Alexander (1989) 212 Cal. App. 3d 1, 4, 260*

Cal. Rptr. 253] . Moreover, constitutionally protected activity, such as the right to petition administrative, executive, or judicial agencies, is not included within the meaning of a course of conduct [*Code Civ. Proc. § 527.6(b)*; *see, e.g., Leydon v. Alexander (1989) 212 Cal. App. 3d 1, 5, 260 Cal. Rptr. 253* ; *Smith v. Silvey (1983) 149 Cal. App. 3d 400, 406-407, 197 Cal. Rptr. 15]* .

In addition, conduct that is outside the definition of "harassment" cannot be enjoined under the summary procedures of *Code Civ. Proc. § 527.6* even if it might ultimately be enjoined under normal injunctive procedures after full development of the facts and law. This statute is not intended to supplant normal injunctive procedures applicable to cases concerning conduct other than "harassment" as defined in the statute [*Byers v. Cathcart (1997) 57 Cal. App. 4th 805, 811-812, 67 Cal. Rptr. 2d 398]* .

A lesser standard of proof is required to show harassment in a proceeding for civil harassment than is required to show a criminal threat under *Penal Code § 422*, which specifies that the threat must be so unequivocal, unconditional, immediate, and specific as to convey a gravity of purpose and an immediate prospect of the execution of a crime resulting in death or great bodily injury [*Brekke v. Wills (2005) 125 Cal. App. 4th 1400, 1413, 23 Cal. Rptr. 3d 609]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsCoercionElements

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25-293 California Forms of Pleading and Practice--Annotated § 293.13

§ 293.13 Relief Available

A person who has suffered harassment may seek a temporary restraining order and an injunction prohibiting harassment [*Code Civ. Proc. § 527.6(a)*]. In certain cases in which harassment takes place in the context of stalking, an emergency protective order is also potentially available, as discussed in *§ 293.54* [*see Fam. Code § 6274*; *Penal Code § 646.91*]. The summary procedures of *Code Civ. Proc. § 527.6* only apply to natural persons, not to corporations, partnerships, or other entities [*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc. (2005) 129 Cal. App. 4th 1228, 1258, 29 Cal. Rptr. 3d 521* ; *Diamond View Limited v. Herz (1986) 180 Cal. App. 3d 612, 616-617, 225 Cal. Rptr. 651]* .

Special rules apply to minor children who seek or oppose an order prohibiting harassment, with respect to the need for appointment of a guardian ad litem, as discussed in *§ 293.52[2][b]* [*see Code Civ. Proc. §§ 372(b), 374, 374.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsViolation of Protective OrdersApplication & Issuance

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25-293 California Forms of Pleading and Practice--Annotated § 293.14

§ 293.14 Petition for Relief and Response

A person who seeks an injunction to prohibit harassment must file a petition [*see Code Civ. Proc. § 527.6(c)*] in the superior court with proper venue [*see Code Civ. Proc. § 395(a)*; *see § 293.100*].

The defendant may file a response that explains, excuses, justifies, or denies the alleged harassment, or may file a cross complaint [*see Code Civ. Proc. § 527.6(d)*]. The response must be filed and delivered to the plaintiff or plaintiff's attorney no later than 48 hours before the hearing [*Cal. Rules of Ct., Rule 3.1152(d)*; *see § 293.103*]. If the defendant seeks an injunction against the plaintiff or a mutual injunction, a cross complaint must be filed and served. A statement in the response that the defendant would not object to a mutual injunction on the court's own motion is insufficient to meet due process requirements [*Kobey v. Morton (1991) 228 Cal. App. 3d 1055, 1060, 278 Cal. Rptr. 530]* . If the defendant wishes to obtain an injunction against the plaintiff, the defendant must file a cross-complaint seeking injunctive relief and present clear and convincing evidence of harassment by the plaintiff [*Nora v. Kaddo (2004) 116 Cal. App. 4th 1026, 1029, 10 Cal. Rptr. 3d 862]* .

A defendant may also file a special motion to strike under *Code Civ. Proc. § 425.16*, challenging the petition for injunctive relief; such a motion may not be used, however, to challenge an application for an interim restraining order issued pending a hearing on the petition for injunctive relief [*City of Los Angeles v. Animal Defense League (2006) 135 Cal. App. 4th 606, 37 Cal. Rptr. 3d 632* ; *Thomas v. Quintero (2005) 126 Cal. App. 4th 635, 643, 646-653, 24 Cal. Rptr. 3d 619]* .

A malicious prosecution action cannot be based on an unsuccessful civil harassment petition. The defendant's remedy is to seek sanctions for the filing of a frivolous petition [*Siam v. Kizilbash (2005) 130 Cal. App. 4th 1563, 1567, 1571-1574, 31 Cal. Rptr. 3d 368]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureRemediesInjunctionsGeneral OverviewCivil

ProcedureSanctionsBaseless FilingsFrivolous LawsuitsTortsIntentional TortsMalicious ProsecutionElementsGeneral Overview

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25-293 California Forms of Pleading and Practice--Annotated § 293.15

§ 293.15 Seeking Pendente Lite Relief

[1] Application for and Issuance of Temporary Restraining Order

[a] Application

In the same petition requesting an injunction to prohibit harassment, a plaintiff may also seek a temporary restraining order [*see Code Civ. Proc. § 527.6(c)*; *see § 293.100[1]*]. Unless otherwise ordered, no memorandum of points and authorities is required [*Cal. Rules of Ct., Rule 3.1150(b)*].

[b] Issuance of Order

The plaintiff may obtain a temporary restraining order in accordance with the provisions of *Code Civ. Proc. § 527*, except to the extent that *Code Civ. Proc. § 527.6* provides a rule that is inconsistent with *Code Civ. Proc. § 527*. *Code Civ. Proc. § 527* authorizes the granting of an injunction at any time before judgment [*Code Civ. Proc. § 527.6(c)*]. A temporary restraining order may be issued, with or without notice, on the basis of an affidavit (or declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) that, to the satisfaction of the court, shows reasonable proof that (1) the respondent is harassing the petitioner, and (2) great or irreparable harm would result to the petitioner if the harassment is not restrained [*Code Civ. Proc. § 527.6(c)*].

In the discretion of the court, and on a showing of good cause, a temporary restraining order issued under *Code Civ. Proc. § 527.6* may include other named family or household members who reside with the petitioner [*Code Civ. Proc. § 527.6(c)*].

The order must prohibit the defendant from taking any action to obtain the address or location of the plaintiff or the plaintiff's family members, caretakers, or guardian, unless there is good cause not to make this order [*Code Civ. Proc. § 527.10(a)*].

[2] Duration of Temporary Restraining Order

A temporary restraining order issued under *Code Civ. Proc. § 527.6* remains in effect, at the court's discretion, for no longer than 15 days, or, if the court extends the time for hearing under *Code Civ. Proc. § 527.6(d)*, not to exceed 22 days, unless otherwise modified or terminated by the court [*Code Civ. Proc. § 527.6(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsTemporary Restraining Orders

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§ 293.16 Service of Papers

[1] In General

On the filing of a petition for an injunction under *Code Civ. Proc. § 527.6*, the respondent must be personally served with a copy of the petition and any temporary restraining order [*Code Civ. Proc. § 527.6(g)*; *Cal. Rules of Ct., Rule 3.1152(c)*], the notice of hearing of the petition [*Code Civ. Proc. § 527.6(g)*], and the order to show cause [*Cal. Rules of Ct., Rule 3.1152(c)*]. Service must be made at least five days before the hearing. The court may for good cause, on motion of the applicant or on its own motion, shorten the time for service on the opposing party [*Code Civ. Proc. § 527.6(g)*].

Service must be made in the manner provided by law for personal service ofsummons in civil actions [*Cal. Rules of Ct., Rule 3.1152(c)*]. For additional discussion of procedural requirements for service in civil harassment actions and of papers that must be served, see *§ 293.100[2]*. For discussion of personal service of summons in civil actions, see Ch. 518, *Service of Summons and Papers* .

[2] Service by Law Enforcement Officer at Scene of Incident

An injunctive order issued under *Code Civ. Proc. § 527.6* must, on the plaintiff's request, be served on the defendant, whether or not the defendant has been taken into custody, by any law enforcement officer who is present at the scene of reported harassment involving the parties to the proceeding. The plaintiff must provide the officer with an endorsed copy of the order and a proof of service that the officer must complete and send to the issuing court [*Code Civ. Proc. § 527.6(h)*]. In addition, on receiving information at the scene of an incident of harassment that a protective order has been issued under *Code Civ. Proc. § 527.6*, or that a person who has been taken into custody is the subject of such an order, if the protected person cannot produce a certified copy of the order, a law enforcement officer must immediately *attempt to verify* the existence of the order. If the law enforcement officer determines that a protective order has been issued, but not served, the officer must immediately notify the defendant of the terms of the order and at that time also enforce the order. Verbal (that is, oral) notice of the terms of the order will constitute service of the order and is sufficient notice for the purposes of *Code Civ. Proc. § 527.6*, and for the purposes of *Penal Code §§ 273.6* and *12021(g)* (governing punishment for violation of court order and for possession of firearm while subject to protective order) [

Code Civ. Proc. § 527.6(h)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProceduresPleading & PracticeService of ProcessTime LimitationsGeneral OverviewCivil ProceduresRemediesInjunctionsGeneral Overview

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25-293 California Forms of Pleading and Practice--Annotated § 293.17

§ 293.17 Hearing and Order

[1] Timing and Scope of Hearing

A hearing on the petition for an injunction against harassment sought under *Code Civ. Proc. § 527.6* must be held within 15 days after the petition is filed, or, if good cause appears to the court, within 22 days from the date the temporary restraining order is issued [*Code Civ. Proc. § 527.6(d)*; *Cal. Rules of Ct., Rule 3.1152(a)*]. At the hearing, the judge must receive any testimony that is relevant and may make an independent inquiry [*Code Civ. Proc. § 527.6(d)*; *Nora v. Kaddo (2004) 116 Cal. App. 4th 1026, 1028-1029, 10 Cal. Rptr. 3d 862* (judge must allow parties to present testimony if they desire to do so)].

The judge may not grant the defendant's oral request at the hearing for mutual restraining orders. If the defendant wishes to obtain an injunction against the plaintiff, the defendant must file a cross-complaint seeking injunctive relief and present clear and convincing evidence of harassment by the plaintiff [*Nora v. Kaddo (2004) 116 Cal. App. 4th 1026, 1029, 10 Cal. Rptr. 3d 862]* .

[2] Representation by Counsel

Either party may be represented by private counsel or may appear on his or her own (i.e., the party's own) behalf [*Code Civ. Proc. § 527.6(e)*].

[3] Support Persons

A support person may accompany a party in court if there are allegations or threats of domestic violence. If the party is not represented by an attorney, the support person may sit with the party at the table generally reserved for the party and the party's attorney [*Code Civ. Proc. § 527.6(f)*].

The support person is present to provide moral and emotional support for a party who alleges that he or she is a victim of domestic violence. The support person is not present as a legal adviser and may not give legal advice. The support person assists the party who alleges he or she is a victim of domestic violence in feeling more confident that he or she

will not be injured or threatened by the other person during the proceedings when the party who alleges he or she is a victim of domestic violence and the other party must be present in close proximity. Nothing precludes the court from exercising its discretion to remove the support person from the courtroom if the court believes the support person is prompting, swaying, or influencing the party assisted by the support person [*Code Civ. Proc. § 527.6(f)*].

[4] Evidence Required

If the court finds clear and convincing evidence that unlawful harassment exists, it must issue an injunction prohibiting the harassment [*Code Civ. Proc. § 527.6(d)*].

[5] No Undertaking Generally Required

A court, on granting an injunction, must generally order the applicant for the injunction to post an undertaking pending a hearing on the merits of the action [*see Code Civ. Proc. § 529(a)*; *Cal. Rules of Ct., Rule 3.1150*]. However, as discussed hereafter, it appears that an undertaking will not be routinely required in connection with injunctions against harassment because of the nature of the proceeding and relief afforded.

The Code of Civil Procedure's general undertaking requirement contains express exemptions for certain persons, including, among others, spouses in marital dissolution or legal separation proceedings, and applicants for orders under *Fam. Code § 6200 et seq.* (the Domestic Violence Prevention Act, discussed in Part II, *below*). Significantly, applicants for injunctions against harassment are not among those exempted by statute [*see Code Civ. Proc. § 529(b)*]. A literal construction of the harassment and undertaking statutes could lead to the conclusion that, because harassment injunctions are not expresslyexempted, the undertaking requirements automatically apply [*see Code Civ. Proc. §§ 527.6, 529*].

However, several reasons may be advanced against this interpretation, and the more appropriate view appears to be that, while the court has the authority to order an undertaking on granting an injunction against harassment, none is *necessarily* required in such actions. In support of this view are the following reasons: (1) the scheme underlying the harassment injunction does not appear to contemplate that an undertaking should routinely be required given the type of relief afforded, which consists largely of restraints on personal conduct that are arguably similar to those under the Domestic Violence Prevention Act, applicants for which are exempt from the undertaking requirement [*see Code Civ. Proc. § 529(b)*]; (2) the injunctive relief involved is not such that the restrained person would normally suffer monetary damages (apart from any emotional hardship) as a result of complying with the injunction; and (3) the Judicial Council forms of Notice of Hearing and Temporary Restraining Order [§ 293.101[1]] and Restraining Order After Hearing to Stop Harassment [§ 293.104[1]] make no reference to an undertaking. Note, however, that the Judicial Council response form [§ 293.103[1]] permits the respondent to request that a court order attorney fees and costs, as well as "additional relief as may be proper" [*see § 293.103[1]*. Counsel should also keep in mind that the reported decisions have not ruled on this issue, and it thus remains subject to further judicial or statutory clarification.

For further discussion of undertakings in connection with injunctions, see Ch. 303, *Injunctions* .

[6] Duration of Injunction

An injunction issued pursuant to *Code Civ. Proc. § 527.6* cannot last more than three years. At any time within the three months before the expiration of the injunction, the plaintiff may apply for a renewal of the injunction by filing a new petition for an injunction under *Code Civ. Proc. § 527.6* [*Code Civ. Proc. § 527.6(d)*].

The injunction may be issued for a shorter period than three years. For example, a court that issued an injunction on the request of the mother of a 16-year-old daughter, requiring the daughter's 15-year-old boyfriend to stay away from the daughter, provided that the injunction would expire on the daughter's 18th birthday [*Brekke v. Wills (2005) 125 Cal.*

App. 4th 1400, 1415, 23 Cal. Rptr. 3d 609] .

Note also that the Code of Civil Procedure provides for the modification or dissolution of an injunction or temporary restraining order based on a showing of a material change in the facts or law on which the injunction or order was granted, or that the ends of justice would be served by modifying or dissolving the injunction or order [*Code Civ. Proc. § 533*].

[7] Registration With Law Enforcement Agencies

The court must order the plaintiff or the plaintiff's attorney to deliver a copy of each temporary restraining order or injunction, or modification or termination thereof, to the law enforcement agencies within the court's discretion as requested by the plaintiff. The copy should be transmitted by the close of the business day on which the order was granted. Each appropriate law enforcement agency must make available information as to the existence and current status of these orders to law enforcement officers who respond to the scene of reported harassment [*Code Civ. Proc. § 527.6(h)*]. For discussion of service of an order under *Code Civ. Proc. § 527.6* by a law enforcement officer who is present at the scene of a reported incident of harassment, see *§ 293.16[2]*.

[8] Costs and Attorney's Fees

The prevailing party in any action brought under *Code Civ. Proc. § 527.6* may be awarded court costs and attorney's fees, if any [*Code Civ. Proc. § 527.6(i)*]. A party who successfully seeks an injunction is the prevailing party even if the injunction is mutually binding against both parties [*see Elster v. Friedman (1989) 211 Cal. App. 3d 1439, 1443-1444, 260 Cal. Rptr. 148]* . A court may award attorney's fees to a prevailing defendant even if the action was not frivolous or brought in bad faith [*Krug v. Maschmeier (2009) 172 Cal. App. 4th 796, 798, 91 Cal. Rptr. 3d 452]* .

[9] Prohibition Against Firearms

A person who is subject to a protective order issued under *Code Civ. Proc. § 527.6* is prohibited from owning, possessing, purchasing, receiving, or attempting to purchase or receive a firearm while the protective order is in effect [*Code Civ. Proc. § 527.6(k)(1)*]. The court must order the person to relinquish any firearms he or she owns or possesses in accordance with *Code Civ. Proc. § 527.9* [*Code Civ. Proc. § 527.6(k)(2)*]. A person who owns, possesses, purchases, or receives, or attempts to purchase or receive a firearm while the protective order is in effect is guilty of a public offense punishable by imprisonment or a fine, or both under *Penal Code § 12021(g)* [*Code Civ. Proc. § 527.6(k)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesEnglish RuleCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofClear & Convincing ProofFamily LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & Neglect

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§ 293.18 Willful Disobedience as Crime

Willful disobedience of any temporary restraining order or injunction granted under *Code Civ. Proc. § 527.6* is a misdemeanor punishable by a fine, imprisonment in the county jail, or both [*Code Civ. Proc. § 527.6(j)*; *Penal Code § 273.6(a)*; *see also Penal Code §§ 868.5* (attendance of persons for support of prosecuting witness), 1387(a)(3) (exception to double jeopardy if complaining witness fails to appear)]. If a violation of *Penal Code § 273.6(a)* results in a physical injury, the violator is subject to fine or imprisonment in the county jail for a specified time [*see Penal Code § 273.6(b)*]. The Penal Code provides for further penalties on the occurrence of additional convictions for violating a temporary restraining order or injunction [*see Penal Code § 273.6(d), (e)*]. For further discussion of criminal proceedings against violators, see California Criminal Defense Practice (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsContemptCivil ProcedureSanctionsContemptCriminal ContemptCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptPenalties

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[Reserved]

§§ 293.19[Reserved]

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25-293 California Forms of Pleading and Practice--Annotated § 293.30

§ 293.30 Governing Statutes

The issuance of injunctions and temporary restraining orders against workplace violence is governed by *Code Civ. Proc. § 527.8*. *Code Civ. Proc. § 527* contains general provisions on the issuance of injunctive orders that apply when there is not a more specific provision within *Code Civ. Proc. § 527.8*. *Lab. Code § 350* contains general definitions of "employer" and "employee." *Penal Code § 646.9* contains the applicable definition of "unlawful violence" that is used within *Code Civ. Proc. § 527.8*, and *Penal Code § 273.6* sets forth criminal penalties for violation of an injunctive order under *Code Civ. Proc. § 527.8*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptPenaltiesLabor & Employment LawWorkplace Violence

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25-293 California Forms of Pleading and Practice--Annotated § 293.31

§ 293.31 Nature of Remedy and Definitions

[1] Right of Employer to Seek Injunctive Relief

[a] Grounds for Relief

Any *employer*, whose employee has suffered unlawful violence or a credible threat of violence from any individual that can reasonably be construed to be carried out or to have been carried out at the workplace, may seek a temporary restraining order and an injunction on behalf of the employee and, at the court's discretion, any number of other employees at the workplace, and, if appropriate, other employees at other workplaces of the employer [*Code Civ. Proc. § 527.8(a)*]. Thus, unlike the general civil harassment statute, which provides a right of action to an aggrieved individual who has experienced actual or threatened harassment, *Code Civ. Proc. § 527.8* provides for an employer to take legal action on behalf of an employee [*compare Code Civ. Proc. § 527.6 with Code Civ. Proc. § 527.8*; *see § 293.11*].

An injunction under *Code Civ. Proc. § 527.8* may only be issued against individuals, not against groups, associations, or corporate entities [*City of Los Angeles v. Animal Defense League (2006) 135 Cal. App. 4th 606, 37 Cal. Rptr. 3d 632]* .

For definitions of "employer," "employee," and related terms, see [2], *below*.

[b] Other Duties of Employer Unaffected

Although *Code Civ. Proc. § 527.8* provides a right of action to an employer to seek injunctive relief on behalf of an employee, nothing in that section may be construed as expanding, diminishing, altering, or modifying the duty, if any, of an employer to provide a safe workplace for employees and other persons [*Code Civ. Proc. § 527.8(k)*].

[2] Definitions

Code Civ. Proc. § 527.8 sets forth definitions of key terms used within that statute. "Employer" and "employee" mean

persons defined in *Lab. Code § 350*. "Employer" also includes a federal agency, the state, a state agency, a city, county, or district, and a private, public, or quasi-public corporation, or any public agency thereof or therein. "Employee" also includes the members of boards of directors of private, public, and quasi-public corporations and elected and appointed public officers."Employee," for purposes of *Code Civ. Proc. § 527.8* only, also includes a volunteer or independent contractor who performs services for the employer at the employer's worksite [*Code Civ. Proc. § 527.8(d)*].

In addition, under *Code Civ. Proc. § 527.8*, "unlawful violence" is any assault or battery, or stalking as prohibited in *Penal Code § 646.9*, but does not include lawful acts of self-defense or defense of others. "Credible threat of violence" is a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose. "Course of conduct" is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an employee to or from the place of work; entering the workplace; following an employee during hours of employment; making telephone calls to an employee; or sending correspondence to an employee by any means, including, but not limited to, the use of the public or private mails, interoffice mail, fax, or computer e-mail [*Code Civ. Proc. § 527.8(b)*]. These definitions closely parallel those used in the context of civil harassment [*see Code Civ. Proc. § 527.6(b)*; § 293.12].

Nothing in *Code Civ. Proc. § 527.8*, however, is to be construed as permitting a court to issue a temporary restraining order or injunction prohibiting speech or other activities that are constitutionally protected, or otherwise protected by *Code Civ. Proc. § 527.3* (relating to labor disputes) or any other provision of law [*Code Civ. Proc. § 527.8(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersLabor & Employment LawWorkplace Violence

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§ 293.32 Petition for Relief and Response

[1] Application for and Issuance of Temporary Restraining Order

A employer who seeks to obtain injunctive relief against workplace violence on behalf of an employee must file a petition in the superior court with proper venue [*Code Civ. Proc. § 527.8(e)*; *see Code Civ. Proc. § 395(a)*]. In addition, on filing the petition, a plaintiff may obtain a temporary restraining order in accordance with *Code Civ. Proc. § 527(a)*, if the plaintiff also files an affidavit (or declaration) that, to the satisfaction of the court, shows reasonable proof that (1) an employee has suffered unlawful violence or a credible threat of violence by the defendant, and (2) great or irreparable harm would result to an employee [*Code Civ. Proc. § 527.8(e)*; *see Code Civ. Proc. § 2015.5* (declaration requirements)]. In the discretion of the court, and on a showing of good cause, a temporary restraining order issued under this *Code Civ. Proc. § 527.8* may include other named family or household members who reside with the employee, or other persons employed at his or her workplace or workplaces [*Code Civ. Proc. § 527.8(e)*].

A defendant may file a response that explains, excuses, justifies, or denies the alleged unlawful violence or credible threats of violence or may file a cross-complaint under *Code Civ. Proc. § 527.8* [*Code Civ. Proc. § 527.8(f)*]. A defendant may also file a special motion to strike under *Code Civ. Proc. § 425.16*, challenging the petition for injunctive relief; such a motion may not be used, however, to challenge an application for an interim restraining order issued pending a hearing on the petition for injunctive relief [*City of Los Angeles v. Animal Defense League (2006) 135 Cal. App. 4th 606, 37 Cal. Rptr. 3d 632]* .

No filing fee is required to be paid at the time of filing a petition or response relating to an injunction against workplace violence [*see Code Civ. Proc. § 527(h)*]. However, it appears that a court may order a party to pay fees [*see* Cal. Judicial Council Form WV-100 (noting that court may require fee payment if petition is unfounded)].

The temporary restraining order or injunction must prohibit the defendant from taking any action to obtain the address or location of the plaintiff or the plaintiff's family members, caretakers, or guardian, unless there is good cause not to make this order [*Code Civ. Proc. § 527.10(a)*].

A temporary restraining order or injunction relating to harassment or domestic violence issued by a court under *Code Civ. Proc. § 527.8* must be issued on Judicial Council forms that have been approved by the California Department of Justice (DOJ) [*see Fam. Code § 6380(i)*]. However, a failure to strictly comply with the forms requirement does not, by itself, make the order or injunction unenforceable [*see Code Civ. Proc. § 527.8(m)*].

For Judicial Council forms of petition, response, and order to show cause (with temporary restraining order) and related instructions, see *§§ 293.130 -293.132* [*see* Cal. Judicial Council Forms WV-100, WV-110, WV-120].

[2] Duration of Temporary Restraining Order

A temporary restraining order granted under *Code Civ. Proc. § 527.8* will remain in effect, at the court's discretion, for a period not to exceed 15 days, unless otherwise modified or terminated by the court [*Code Civ. Proc. § 527.8(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsTemporary Restraining OrdersLabor & Employment LawWorkplace Violence

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§ 293.33 Service of Papers

On the filing of a petition for an injunction under *Code Civ. Proc. § 527.8*, the defendant must be personally served with a copy of the petition, temporary restraining order, if any, and notice of hearing of the petition (which is incorporated within the order to show cause form), and any other papers ordered served by the court. Service must be made at least five days before the hearing. The court may, for good cause, on motion of the plaintiff or on its own motion, shorten the time for service on the defendant [*Code Civ. Proc. § 527.8(h)*; *see* Cal. Judicial Council Form WV-120 (providing for service of blank response form); § 293.132[2] (comments to form)]. For a Judicial Council form of proof of personal service, see *§ 293.133* [Cal. Judicial Council Form WV-130].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersLabor & Employment LawWorkplace Violence

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§ 293.34 Hearing and Order

[1] Timing and Scope of Hearing

A hearing must be held within 15 days of the filing of a petition for injunctive relief against workplace harassment. At the hearing, the judge must receive any testimony that is relevant, and may make an independent inquiry. Moreover, if the defendant is a current employee of the employer that is requesting the injunction, the judge must receive evidence concerning that employer's decision to retain, terminate, or otherwise discipline the defendant [*Code Civ. Proc. § 527.8(f)*].

[2] Representation by Counsel

In a matter coming within *Code Civ. Proc. § 527.8*, a party may choose to either appear *pro se* (self-represented), or to appear through private counsel [*see Code Civ. Proc. § 527.8(g)*].

[3] Evidence Required

At a hearing on a petition against workplace violence, a judge must find by *clear and convincing evidence* that the defendant engaged in unlawful violence or made a credible threat of violence in order to issue injunction issue prohibiting such activity or threats [*Code Civ. Proc. § 527.8(f)*]. The petitioner must also establish a nexus between the unlawful violence or credible threat of violence and his or her workplace [*City of Los Angeles v. Animal Defense League (2006) 135 Cal. App. 4th 606, 37 Cal. Rptr. 3d 632]* .

[4] No Undertaking Generally Required

Despite the general rule that a court, on granting an injunction, must order the applicant for the injunction to post an undertaking pending a hearing on the merits of the action [*see Code Civ. Proc. § 529(a)*; *Cal. Rules of Ct., Rule 3.1150*], it appears that an undertaking will not be routinely required in connection with injunctions against workplace violence because of the nature of the proceedingand relief afforded. For related discussion, see *§ 293.17[5]*.

[5] Duration of Injunction

An injunction issued pursuant to *Code Civ. Proc. § 527.8* has a duration of not more than three years. At any time within the three months before the expiration of the injunction, the plaintiff may apply for a renewal of the injunction by filing a new petition for an injunction [*Code Civ. Proc. § 527.8(f)*].

[6] Registration With Law Enforcement Agencies

A court that issue a temporary restraining order or injunction against workplace violence must order the plaintiff, or the attorney for the plaintiff, to deliver a copy of each temporary restraining order or injunction, or modification or termination thereof, by the close of the business day on which the order was granted, to the law enforcement agencies within the court's discretion as are requested by the plaintiff [*Code Civ. Proc. § 527.8(i)(1)*].

Each appropriate law enforcement agency must make available information as to the existence and current status of these orders to law enforcement officers responding to the scene of reported unlawful violence or a credible threat of violence [*Code Civ. Proc. § 527.8(i)(1)*].

Procedures for service of the order on the defendant are specified by statute [see *Code Civ. Proc. § 527.8(i)(2)-(4)*].

In addition, information on any temporary restraining order or injunction relating to harassment or domestic violence issued by a court under *Code Civ. Proc. § 527.8* must be transmitted to the Department of Justice in accordance with *Fam. Code § 6380(b)* [*Code Civ. Proc. § 527.8(o)*].

[7] Prohibition Against Firearms

A person who is subject to a protective order issued under *Code Civ. Proc. § 527.8* is prohibited from owning, possessing, purchasing, receiving, or attempting to purchase or receive, a firearm while the protective order is in effect [*Code Civ. Proc. § 527.8(j)(1)*]. The court must order the person to relinquish any firearms he or she owns or possesses in accordance with *Code Civ. Proc. § 527.9* [*Code Civ. Proc. § 527.8(j)(2)*]. A person who owns, possesses, purchases, or receives, or attempts to purchase or receive, a firearm while the protective order is in effect is guilty of a public offense punishable by imprisonment or a fine, or both under *Penal Code § 12021(g)* [*Code Civ. Proc. § 527.8(j)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofClear & Convincing ProofLabor & Employment LawWorkplace Violence

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§ 293.35 Willful Disobedience as Crime

Any intentional disobedience of any temporary restraining order orinjunction granted under *Code Civ. Proc. § 527.8* is a crime, punishable pursuant to *Penal Code § 273.6* [*Code Civ. Proc. § 527.8(k)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsContemptCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptPenaltiesLabor & Employment LawWorkplace Violence

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[Reserved]

§§ 293.36[Reserved]

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1. Domestic Violence Prevention Act

25-293 California Forms of Pleading and Practice--Annotated § 293.50

§ 293.50 Governing Statutes

The issuance of injunctions against domestic violence is governed by the Domestic Violence Prevention Act [*Fam. Code § 6200 et seq.*]. The Act was part of the Code of Civil Procedure until January 1, 1994, when it became part of the newly created Family Code [*see* former *Code Civ. Proc 540 et seq.*; *see also* Stats. 1992, ch. 162]. Ex parte protective orders issued under the Act are governed by *Fam. Code § 240 et seq.* [*see Fam. Code § 6327*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewFamily LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & Neglect

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§ 293.51 Definitions

Domestic violence orders under the Domestic Violence Prevention Act (DVPA) are designed to prevent the recurrence of broadly defined acts of "abuse" against victims, including former or separated spouses or cohabitants, and to resolve their underlying causes [*Fam. Code §§ 6211(a), (b), 6220*; *Keith R. v. Superior Court (2009) 174 Cal. App. 4th 1047, 1054, 96 Cal. Rptr. 3d 298]* . These orders are broader than civil harassment orders and do not require as high a burden of proof [*Keith R. v. Superior Court (2009) 174 Cal. App. 4th 1047, 1054, 96 Cal. Rptr. 3d 298]* .

"Abuse," as used in the DVPA, means intentionally or recklessly causing or attempting to cause bodily injury, committing sexual assault, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself or another [*Fam. Code § 6203(a)-(c)*]. "Abuse" additionally includes engaging in any behavior that has been or could be enjoined pursuant to *Fam. Code § 6320* [*Fam. Code § 6203(d)*]. *Fam. Code § 6320* authorizes injunctive relief against a wide array of abusive conduct, from physical attack, threats, and stalking, to annoying telephone calls, vandalism, and similar actions, as discussed in *§ 293.53[1]*. An applicant is not required to allege actual infliction of physical injury or assault to be entitled to a restraining order [*In re Marriage of Nadkarni (2009) 173 Cal. App. 4th 1483, 1494, 93 Cal. Rptr. 3d 723* ; *Conness v. Satram (2004) 122 Cal. App. 4th 197, 202, 18 Cal. Rptr. 3d 577]* . Nonviolent conduct, such as contacting the applicant and disturbing the applicant's peace can constitute abuse, which can include accessing, reading, and publicly disclosing the applicant's confidential e-mails [*In re Marriage of Nadkarni (2009) 173 Cal. App. 4th 1483, 1494, 93 Cal. Rptr. 3d 723]* .

"Domestic violence" means abuse perpetrated against any of the following persons:

1. A spouse, former spouse;

2. A cohabitant or former cohabitant [*see Fam. Code § 6209*];

3. A person with whom the respondent is having or has had a dating or engagement relationship [*Fam. Code § 6210* (defining "dating relationship"); *Oriola v Thaler (2000) 84 Cal. App. 4th 397, 100 Cal.*

Rptr. 2d 822 (defining "dating relationship")];

4. A person with whom the respondent has had a child, where the presumption applies that the male parent is the father of the child of the female parent [*see Fam. Code § 7600 et seq.* (Uniform Parentage Act)];

5. A child of a party or a child who is the subject of an action under theUniform Parentage Act, where the presumption applies that the male parent is the father of the child to be protected [*see Fam. Code § 7600 et seq.*]; or

6. Any other person related by consanguinity or affinity within the second degree [*Fam. Code § 6211*].

"Cohabitant" means a person who resides regularly in the household. "Former cohabitant" means a person who formerly resided regularly in the household [*Fam. Code § 6209*]. The term "cohabitant" does not include, however, persons who simply sublet different rooms in a common home, if they otherwise are not part of the same household or do not have some close interpersonal relationship, such as, for example, a romantic attachment. Although the DVPA has a broad protective purpose, it does not cover such a residential arrangement, which might exist purely by happenstance [*O'Kane v. Irvine (1996) 47 Cal. App. 4th 207, 209, 212, 54 Cal. Rptr. 2d 549]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & Neglect

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§ 293.52 Relief Available in General

[1] Types of Orders

[a] Protective Orders in General

The Domestic Violence Prevention Act authorizes a court to issue protective orders and *emergency* protective orders [*Fam. Code §§ 6250, 6320 et seq., 6340*]. A "protective order" means an order that includes specific restraining orders, whether issued ex aparte, after notice and hearing, or in a judgment [*Fam. Code § 6218*; *see Fam. Code §§ 6218, 6320, 6321, 6322*]. An emergency protective order is a protective order issued by a judicial officer on the request of an law enforcement officer who believes there is an immediate and present danger of domestic violence or child abuse as defined by the Act [*see Fam. Code § 6250 et seq.*; *see also Fam. Code §§ 6203, 6211*]. These remedies are in addition to any other remedies, either civil or criminal, that may be available to petitioner [*Fam. Code § 6227*].

[b] Limitations on Custody Orders

Although child custody and visitation orders are among those that a court may grant in DVPA proceedings [*see Fam. Code §§ 6323, 6340*], such orders may only be granted to a party who has established a parent and child relationship under *Fam. Code § 6323(a)(2)* [*Fam. Code § 6323(a)(1)*; *Gonzalez v. Munoz (2007) 156 Cal. App. 4th 413, 422-423, 67 Cal. Rptr. 3d 317]* . A party may establish a parent and child relationship for that purpose only by offering proof of the following [*Fam. Code § 6323(a)(2)(B)*]:

1. The party gave birth to the child;

2. The child is conclusively presumed to be a child of the marriage between the parties under *Fam. Code § 7540*, or a court has determined that the party is the child's parent under *Fam. Code § 7541*;

3. Legal adoption or pending legal adoption of the child by the party;

4. The party has signed a valid voluntary declaration of paternity, which has been in effect more than 60 days before issuance of the restraining order, and the declaration has not been rescinded or set aside;

5. A determination by the juvenile court that there is a parent and child relationship between the party offering the proof and the child;

6. A determination of paternity made in a proceeding brought under *Fam. Code § 17404* [*see Fam. Code § 3021(g)*];

7. The party has been determined to be the child's parent in a proceeding under the Uniform Parentage Act (UPA--*Fam. Code §§ 7600-7730*); or

8. Both parties stipulate, in writing or on the record, for purposes of this proceeding that they are the child's parents.

In determining the child's best interests and in order to limit the child's exposure to potential domestic violence and to ensure the safety of all family members, if the party who has obtained the restraining order has established a parent and child relationship and the other party has not done so, the court may award temporary sole legal and physical custody to the party to whom the restraining order was issued and may order no visitation to the other party pending the establishment of a parent and child relationship [*Fam. Code § 6323(a)(2)(A)*]. A court may make custody and visitation orders under the Uniform Parentage Act, after notice and a hearing, when a party who has requested custody or visitation has not established a parent and child relationship but has taken steps to do so by filing an action under the UPA [*Fam. Code § 6346*].

A domestic violence order under the DVPA is not a permanent custody determination. Although a finding of domestic violence changes the burden of persuasion as to the best-interest test, it does not eliminate the best-interest requirement [*Keith R. v. Superior Court (2009) 174 Cal. App. 4th 1047, 1054, 96 Cal. Rptr. 3d 298]* .

For related discussion of custody and visitation orders in DVPA proceedings, see *§§ 293.53[1], 293.55[1]*.

[c] Data Base Search Required

Before a hearing on the issuance or denial of a protective order, the court must ensure that a search is (or has been) conducted to determine if the subject of the proposed order (1) has any prior criminal conviction for a violent felony specified in *Penal Code § 667.5* or a serious felony specified in *Penal Code § 1192.7*; (2) has any misdemeanor conviction involving domestic violence, weapons, or other violence; (3) has any outstanding warrant; (4) is currently on parole or probation; or (5) has any prior restraining order or any violation of a prior restraining order [*Fam. Code § 6306(a)*]. The court must consider any such information obtained as a result of the search [*Fam. Code § 6306(b)(1)*].

A search must be conducted of all records and data bases readily available andreasonably accessible to the court, including, but not limited to (1) the Violent Crime Information Network (VCIN), (2) the Supervised Release File, (3) state summary criminal history information maintained by the Department of Justice under *Penal Code § 11105, (4)* the FBI's nationwide data base, and (5) locally maintained criminal history records or data bases [*Fam. Code § 6306(a)*]. A record or data base need not be searched if the information available in that record or data base can be obtained by a search conducted in another record or data base [*Fam. Code § 6306(a)*]. The court may not consider information obtained as a result of the search that does not involve a conviction as described above [*Fam. Code § 6306(b)(2)*].

After ruling, the court must advise the parties that they may request the foregoing information on which the court relied, and must admonish the party seeking the order that it is unlawful, under *Penal Code §§ 11142* and *13303*, to willfully release the information except as authorized by law [*Fam. Code § 6306(c)(1)*]. On a party's request, the court must

release the information to the party or the party's attorney [*Fam. Code § 6306(c)(2)*]. The party seeking the order may release the information to his or her attorney, court personnel, and court-appointed mediators for the purpose of seeking judicial review of the court's order or for purposes of court proceedings under *Welf. & Inst. Code § 213.5* [*Fam. Code § 6306(c)(3)*].

Any information obtained as a result of the search that the court relies on must be maintained in a confidential case file and may not become part of the public file in the proceeding or any other civil proceeding [*Fam. Code § 6306(d)*]. The contents of the confidential case file may be disclosed to the court-appointed mediator assigned to the case or to a child custody evaluator appointed by the court under *Fam. Code § 3111* or *Evid. Code § 730* [*Fam. Code § 6306(d)*]. All court-appointed mediators and child custody evaluators who receive information from the search are subject to, and must comply with, the California Law Enforcement Telecommunications System policies, practices, and procedures adopted under *Gov. Code § 15160* [*Fam. Code § 6306(d)*].

If the results of the search indicate that there is an outstanding warrant against the subject of the order, the court must order the clerk of the court to immediately notify, by the most effective means available, appropriate law enforcement officials of the issuance and contents of any protective order and of any other information obtained through the search that the court determines is appropriate [*Fam. Code § 6306(e)*]. The law enforcement officials so notified must take all actions necessary to execute any outstanding warrants or any other actions with respect to the restrained person, as appropriate and as soon as practicable [*Fam. Code § 6306(e)*].

If the results of the search indicate that the subject of the order is currently on parole or probation, the court must order the clerk of the court to immediately notify, by the most effective means available, the appropriate parole or probation officer of the issuance and contents of any protective order issued by the court and of any other information obtained through the search that the court determines is appropriate [*Fam. Code § 6306(f)*]. This officer must take all actions necessary to revoke any parole or probation, or any other actions, with respect to the restrained person, as appropriate and as soon as practicable [*Fam. Code § 6306(f)*].

A court need not delay granting an application for an order that the court may otherwise grant without the information resulting from a data base search [*Fam. Code § 6306(g)*]. If the court finds that a protective order should be granted based on the affidavit presented with the petition, the court may issue the protective order and then ensure that a data base search is conducted before the hearing [*Fam. Code § 6306(g)*].

[2] Who May Apply for Order

[a] Abuse Victims in General

A protective order may be granted to any person specified in *Fam. Code § 6211* (*see § 293.51*) against whom abuse is perpetrated [*Fam. Code § 6301(a)*; *see Fam. Code § 6203* (defining "abuse")]. The right to petition for relief may not be denied because the petitioner has vacated the household to avoid abuse. If the parties are married, the fact that no petition for legal separation, nullity of marriage, or dissolution of marriage has been filed is not a basis for denial of the petition for a temporary restraining order against domestic violence [*Fam. Code § 6301(b)*; *see Quintana v. Guijosa (2003) 107 Cal. App. 4th 1077, 1078-1080, 132 Cal. Rptr. 2d 538* (judge improperly denied wife's request for protective order against husband on ground she was not entitled to protection because children were in Mexico; case decided on facts irrelevant to DVPA; reversed and remanded)].

[b] Minors

In general, a minor for whom a guardian has not otherwise been appointed may appear of record in a civil action or proceeding only by a guardian ad litem [*see Code Civ. Proc. § 372(a)*; Ch. 291, *Guardians Ad Litem*]. However, special rules govern the ability of minors to seek or oppose protective orders pertaining to harassment or domestic violence. A

minor *12 years of age* or older may appear in court *without* a guardian, counsel, or guardian ad litem, for the purpose of requesting or opposing a request for any of the following [*Code Civ. Proc. § 372(b)(1)*]:

1. An injunction or temporary restraining order or both to prohibit harassment pursuant to *Code Civ. Proc. § 527.6*;

2. An injunction or temporary restraining order or both against violence ora credible threat of violence in the workplace pursuant to *Code Civ. Proc. § 527.8*;

3. A protective order pursuant to *Fam. Code § 6200 et seq.*; or

4. A protective order pursuant to *Fam. Code §§ 7710, 7720*.

However, in the discretion of the court, or on motion, the court may appoint a guardian ad litem to assist a minor aged 12 or over in obtaining or opposing the above orders, but it must first consider reasonable objections by the minor to the appointment of specific individuals, and the appointment must not delay the issuance or denial of the order being sought. In making the appointment, the court must consider whether the minor and the guardian have divergent interests [*Code Civ. Proc. § 372(b)(1)*; *see Cal. Rules of Ct., Rule 3.1153*].

If the court issues a injunction or protective order under this authority with respect to a minor aged 12 or older who initially appeared in court seeking an order without a guardian or guardian ad litem, and that minor lives with a parent or guardian, the court must send a copy of the order to at least one parent or guardian designated by the minor, unless, in the discretion of the court, notification of a parent or guardian would be contrary to the best interest of the minor. The court is not required to send the order to more than one parent or guardian [*Code Civ. Proc. § 372(b)(2)*].

If the minor is *under* 12 years of age, he or she can appear in court without counsel in order to request or oppose any of the orders listed above, but only if *accompanied by* a duly appointed and acting guardian ad litem. As in the case of older minors for whom a guardian ad litem is appointed, in appointing a guardian ad litem for a minor under age 12, a court must consider whether the minor and the guardian have divergent interests [*Code Civ. Proc. § 374*; *see Cal. Rules of Ct., Rule 3.1153*].

If a minor (of any age) previously has been declared a dependent child or ward of the juvenile court, the juvenile court with jurisdiction over the minor must hear the minor's application for or opposition to the granting of any of the orders set forth above. When there has been no dependency or wardship established over the minor, the matter will be heard in the court that is otherwise assigned to hear those proceedings [*Code Civ. Proc. § 374.5*].

[3] Jurisdiction and Venue

The Act does not specify which court has jurisdiction and venue to grant a protective order. Nevertheless, the superior court has express jurisdiction in proceedings under the Family Code [*Fam. Code § 200*], and proceedings under the Act come within the Family Code's provisions [*Fam. Code § 6200 et seq.*].

Venue is determined under *Code Civ. Proc. § 395(a)*. See Ch. 221, *Dissolution of Marriage: Procedure* , for a detailed discussion of venue.

[4] Filing Fees

No filing fee is required for an application, a responsive pleading, or an order to show cause that seeks to obtain, modify, or enforce a protective order or other order authorized by the DVPA when the request for the other order is necessary to obtain or give effect to a protective order [*Fam. Code § 6222*]. There is also no filing fee for a subpoena

filed in connection with the application, responsive pleading, or order to show cause [*Fam. Code § 6222*].

[5] Relief From Meeting With Abuser

A party who has been subjected to domestic violence may obtain relief from having to meet with the other party for court-ordered custody investigations [*Fam. Code § 3110 et seq.*], mediation [*Fam. Code § 3175 et seq.*], or parent counseling [*Fam. Code § 3192*; *cf. Fam. Code § 3170(b)* (requiring separate protocol for handling domestic violence cases by Family Court Services)]. Court-ordered custody investigations and mediation sessions sessions must be held separately at separate times if (1) there has been a history of domestic violence between the parties [*Fam. Code §§ 3113, 3181(a)*; *see Fam. Code § 6211* ("domestic violence" defined); *see also* discussion in *§ 293.51*]; or (2) there is a protective order against domestic violence in effect [*Fam. Code §§ 3113, 3181(a)*; *see Fam. Code §§ 2045(b), 6320, 6321, 7710*]. The party who is protected by the restraining order or who alleges a history of domestic violence must make the request for separate custody investigations and separate mediation sessions [*Fam. Code §§ 3113, 3181(a)*]. If no restraining order is in effect, this request must be made by written declaration under penalty of perjury [*Fam. Code §§ 3113, 3181(a)*].

Parent counseling sessions may be held separately at separate times if there is a history of abuse by either parent against the child or by one parent against the other parent and a protective order against domestic violence is in effect [*Fam. Code § 3192*; *see Fam. Code §§ 2045(b), 6223*, 6318, *6320, 6321, 6323, 7710*]. If the court orders separate counseling, each party must bear the cost of his or her own counseling unless there is good cause for a different apportionment. The costs associated with a minor child participating in counseling must be apportioned in accordance with *Fam. Code § 4062* [*Fam. Code § 3192*].

[6] Support Person

A special statute permits a "support person" to accompany a petitioning or responding party to any proceeding to obtain a protective order. As stated in the statute, the role of a "support person" is to provide moral and emotional support for a person who alleges that he or she is a victim of domestic violence. The support person assists the party in feeling more confident that he or she will notbe injured or threatened by the other party during proceedings in which the person and the other party must be present in close proximity. A party may select any individual to act as a support person, and this person is not required to have any certification, training, or other special qualifications [*Fam. Code § 6303(a)*].

When the party who is accompanied by a support person is not represented by an attorney, the support person may sit with the party at the table that is generally reserved for the party and the party's attorney [*Fam. Code § 6303(b), (d)*]. A support person may not act as a legal advisor, however, and must not give legal advice [*Fam. Code § 6303(a)*]. A court may exercise its discretion to remove a person from the courtroom whom it believes is prompting, swaying, or influencing the party protected by the order, or when it would be in the interests of justice to do so [*Fam. Code § 6303(e)*].

If a court has issued a protective order, a support person may accompany a party protected by the order during any mediation session held pursuant to a proceeding for dissolution of marriage, nullity of marriage, legal separation, an action for exclusive custody, or a proceeding to determine custody or visitation under the DVPA [*Fam. Code § 6200 et seq.*] or the Uniform Parentage Act [*Fam. Code § 6303(c)*; *see Fam. Code § 7600 et seq.*].

[7] Need for Interpreter and Translation of Orders

In any action or proceeding under the DVPA, the Uniform Parentage Act [*see Fam. Code §§ 6200 et seq., 7600 et seq.*], or for dissolution or nullity of marriage or legal separation of the parties in which a protective order has been granted or is being sought under *Fam. Code § 6221* and in which a party does not proficiently speak or understand English, and that party is present, an interpreter must be present to interpret the proceedings for that party, and to assist

communication between the party and his or her attorney [*Evid. Code § 755(a)*]. The interpreter must be certified in accordance with the Government Code, unless the court in its discretion appoints a noncertified interpreter. When an interpreter is required under the above provisions, the court must not commence proceedings until the interpreter is present and situated near the party and his or her attorney [*Evid. Code § 755(a), (c)*].

However, a court may issue an ex parte order under *Fam. Code §§ 2045, 6320 et seq.*, and *7710*, without the presence of an interpreter [*Evid. Code § 755(a)*]. Furthermore, even when an interpreter is otherwise required under *Evid. Code § 755*, the court is not prohibited from doing any of the following [*Evid. Code § 755(c)*]:

1. Issuing an order when the necessity for the order outweighs the necessity for an interpreter;

2. Extending the duration of a previously issued temporary order if an interpreter is not readily available; or

3. Issuing a permanent order when a party who requires an interpreter *fails to make appropriate arrangements* for an interpreter after receiving proper notice of the hearing with information about obtaining an interpreter.

The requirement of having an interpreter present does not preclude the presence of any other person to assist a party [*Evid. Code § 755(d)*; *see* [6], *above*].

The fees of interpreters utilized under the above requirements must be paid as provided under the Government Code. However, these fees must be waived for a party who needs an interpreter and appears in forma pauperis [*Evid. Code § 755(b)*; *see Gov. Code §§ 68092*, 68630-68641].

Los Angeles and two other counties are participating in a pilot project under which, in any child custody proceeding, including mediation and certain other proceedings, the court must appoint an interpreter, at court expense, to interpret proceedings if (1) one or both of parties cannot participate fully in proceeding due to lack of English proficiency, and (2) the party needing an interpreter appears in forma pauperis or the court otherwise determines that the parties are financially unable to pay for interpreter. Statute provides exceptions for issuing or continuing urgent orders, and for the failure of a needy party to properly arrange for an interpreter after proper notice of availability [*see Fam. Code § 3032*].

Apart from the above provisions, courts may provide an unofficial translation of a domestic violence order in a language other than English [*Code Civ. Proc. § 185(a)*]. The Judicial Council must also make available to all courts translations of domestic violence protective order forms in languages other than English, as the Judicial Council deems appropriate [*Code Civ. Proc. § 185(b)*].

[8] Prohibition Against Firearms

[a] Purchasing or Receiving Firearms

Any person who purchases or receives, or attempts to purchase or receive, a firearm knowing that he or she is subject to a protective order as defined by *Fam. Code § 6218* or *Penal Code § 136.2*, or a temporary restraining order or injunction issued pursuant to *Code Civ. Proc. §§ 527.6* or *527.8*, is guilty of a public offense punishable by imprisonment or fine or both [*Fam. Code § 6389(a)*; *Penal Code § 12021(g)(1)*]. This does not apply unless the copy of the restraining order personally served on the person against whom the restraining order is issued contains a notice in bold print containing the both of the following, or a court has provided actual verbal notice of the firearm prohibition and penalty as provided in *Fam. Code § 6304* [*Penal Code § 12021(g)*]:

1. A statement that the person is prohibited from purchasing or receiving orattempting to purchase or

receive a firearm.

2. A specification of the penalties for violating *Penal Code § 12021(g)*.

Whenever a court grants a protective order in a proceeding where both parties are present, the court must inform the parties of this prohibition and the penalty for violating it [*Fam. Code § 6304*].

[b] Owning or Possessing Firearms

Any person subject to a protective order as defined in *Fam. Code § 6218* may not own, possess, purchase, or receive a firearm while subject to that order [*see Fam. Code 6389(a)*]. On the issuance of a protective order, the court must order the respondent to relinquish any firearm in his or her immediate possession or control, or subject to his or her immediate possession or control [*Fam. Code § 6389(c)(1)*]. The respondent must immediately surrender the firearm in a safe manner, on the request of any law enforcement officer, to the control of the officer, after being served with the protective order. If no request is made by a law enforcement officer, the respondent must relinquish the firearm within 24 hours of being served with the order, by either surrendering it in a safe manner to the control of local law enforcement officials or by selling the firearm to a licensed gun dealer [*Fam. Code § 6389(c)(2)*]. The law enforcement officer or licensed gun dealer taking possession of the firearm must issue a receipt to the respondent at the time of relinquishment. The respondent must file with the court, within 48 hours after being served with the protective order, the receipt showing that the firearm was surrendered to a local law enforcement agency or sold to a licensed gun dealer. A failure to file a receipt in a timely manner constitutes a violation of the protective order [*Fam. Code § 6389(c)(2)*]. A relinquishment order may last for the duration of the order or for a shorter time period specified by the court [*Fam. Code § 6389(g)*].

On all forms providing notice that a protective order has been requested or granted, the Judicial Council must include a notice that, on service of the order, the respondent must be ordered to relinquish possession or control of any firearms, and may not purchase or receive, or attempt to purchase or receive, any firearms for a period not to exceed the duration of the restraining order [*Fam. Code § 6389(b)*].

For a related discussion, see *§ 293.53[4]*.

Every person who owns or possesses a firearm knowing that he or she is prohibited from owning or possessing a firearm by the provisions of a protective order as defined in *Fam. Code § 6218* or *Penal Code § 136.2*, or a temporary restraining order or injunction issued pursuant to *Code Civ. Proc. §§ 527.6* or *527.8*, is guilty of a public offense punishable by imprisonment, a fine, or both [*Fam. Code § 6389(a)*]. This does not apply unless a copy of the restraining order personally served on the person against whom the restraining order is issued contains a notice in bold print stating both of the following, or a court has provided actual verbal notice of thefirearm prohibition and penalty as provided in *Fam. Code § 6304* [*Penal Code § 12021(g)(2)*]:

1. Stating that the person is prohibited from owning or possessing or attempting to own or possess a firearm.

2. Specifying the penalties for violating *Penal Code § 12021(g)*].

The Judicial Council must provide notice on all protective orders that the respondent is prohibited from owning, possessing, purchasing, or receiving a firearm while the protective order is in effect and that the firearm must be relinquished to the local law enforcement agency for that jurisdiction or sold to a licensed gun dealer, and that proof of surrender or sale must be filed within a specified time of receipt of the order. The order must also state on its face the expiration date for relinquishment [*Penal Code § 12021(g)(3)*]. If probation is granted on conviction of a violation of *Penal Code § 12021(g)*, the court must impose probation consistent with the provisions of *Penal Code § 1203.097*,

providing for batter's treatment programs [*Penal Code § 12021(g)(4)*].

A court may allow a peace officer who is subject to a domestic violence protective order to continue to carry a firearm, after a psychological evaluation, on a finding by a preponderance of the evidence that the officer poses no threat of harm, and that the officer needs the weapon in the performance of his or her duties [*Fam. Code § 6389(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsViolation of Protective OrdersApplication & IssuanceFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & Neglect

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§ 293.53 Ex Parte Protective Orders Issued by Court

[1] Available Orders

Under the DVPA, a protective order may be granted *without notice* to restrain any person in order to prevent a recurrence of domestic violence and ensure a separation of the persons involved, if an affidavit (or declaration [*see Code Civ. Proc. 2015.5*]), or, if necessary, an affidavit and any additional information provided to the court under *Fam. Code § 6306*, shows, to a court's satisfaction, reasonable proof of a past act or acts of abuse [*Fam. Code § 6300*]. No protective order will be granted without notice to the opposite party, however, unless it appears from the supporting facts that great or irreparable injury would result to the applicant before the matter can be heard on notice [*Fam. Code §§ 241, 6320 et seq.*]. For discussion of electronic data base searches that a court must perform pursuant to *Fam. Code § 6306* before issuing or denying a protective order, see *§ 293.52[1][c]*.

A court may issue ex parte any of the following protective orders [*see Fam. Code § 6320 et seq.*]:

1. An order enjoining a party from contacting; molesting; attacking; striking; stalking; threatening; sexually assaulting; battering; harassing; telephoning; destroying personal property of; contacting, either directly or indirectly, by mail or otherwise; coming within a specified distance of or disturbing the peace of the other party and in the discretion of the court, on a showing of good cause, of other named family and household members [*see Fam. Code § 6320(a)*; *see also Penal Code § 653(m)*];

2. An order excluding a party from the family dwelling; the dwelling of the other party; the common dwelling of both parties; or the dwelling of the person who has care, custody, and control of a child to be protected from domestic violence for the period of time and on the conditions the court determines, regardless of which party holds legal or equitable title or is the lessee of the dwelling [*see Fam. Code § 6321*];

3. An order enjoining a party from specified behavior that the court determines is necessary to effectuate

orders under *Fam. Code §§ 6320* or *6321* [*see* (1)-(2), *above*];

4. Subject to *Fam. Code § 3064* (general showing for granting an ex parte custody order), an order establishing temporary custody of children and visitation rights with respect to a child, concerning whom the moving party has established a parent-child relationship as prescribed by the Family Code (*see § 293.52[1][b]*) [*Fam. Code § 6323*; *Gonzalez v. Munoz (2007) 156 Cal. App. 4th 413, 422-423, 67 Cal. Rptr. 3d 317]* ;

5. An order determining temporary use and control of the parties' property [*Fam. Code § 6324*]; and

6. An order restraining a married person from specified acts in relation to community, quasi-community, and separate property [*Fam. Code § 6324*; *see Fam. Code § 2045*; *see also* Ch. 221, *Dissolution of Marriage: Procedure*].

The order must also prohibit the enjoined party from taking any action to obtain the address or location of a protected party or a protected party's family members, caretakers, or guardians, unless there is good cause not to make this order [*Fam. Code § 6322.7*].

On a showing of good cause, the court may include in a protective order a grant to the petitioner of the exclusive care, possession, or control of any animal owned, possessed, leased, kept, or held by either the petitioner or the respondent or a minor child residing in the residence or household of either the petitioner or the respondent [*Fam. Code § 6320(b)*]. The court may order the respondent to stay away from the animal and forbid the respondent from taking, transferring, encumbering, concealing, harming, or otherwise disposing of the animal [*Fam. Code § 6320(b)*].

When allegations of domestic violence have been made and a protective or restraining order is in effect, a court may impose ex parte certain specific conditions on custody or visitation including orders for precise arrangements for transfer of the child to ensure safety of all family members, and orders to prevent disclosure of the shelter or confidential location where the parent is staying; determining whether any custody or visitation must be supervised, suspended, or denied altogether [*see Fam. Code §§ 3031(b), (c), 3100, 6323(b), (c)*; *see also Fam. Code § 3030* (prohibition on granting custody or visitation when person convicted of specified offenses, including murdering other parent)].

In addition, in proceedings under the Uniform Interstate Family Support Act (UIFSA-- *Fam. Code § 4900 et seq.*), a court may issue an ex parte order prohibiting disclosure of the address or other identifying information of a party, child, parent, guardian, or other caretaker of a child [*Fam. Code § 6322.5*; *see Fam. Code §§ 4926, 4977*]. For a complete discussion of UIFSA, see Ch. 260, *Family Law Enforcement: Foreign Judgments* .

Finally, in accordance with federal law, on the request of a victim of domestic violence who is seeking a domestic violence restraining order, a judge issuing the order may include a provision in the order that permits the victim to record any prohibited communication made to the victim by the perpetrator [*Penal Code § 633.6(a)*; *see Penal Code § 633.6(b)* (Judicial Council must amend its domestic violence prevention application and order forms to incorporate this provision)].

[2] Additional Showing for Dwelling Exclusion

The court may issue an ex parte protective order excluding one party from a residence or dwelling only if the affidavit in support of the application for the order affirmatively shows facts sufficient for the court to ascertain that the petitioner has a right under color of law to possession of the premises [*Fam. Code § 6321(b)(1)*].

[3] Mutual Orders

The court may grant mutual orders enjoining the parties from specific acts of abuse as described in *Fam. Code § 6320*. A mutual restraining order may be issued, however, only if (a) both parties personally appear and each party presents written evidence of abuse or domestic violence, and (b) the court makes detailed findings of fact indicating that both parties acted primarily as aggressors and that neither party acted primarily in self-defense [*Fam. Code § 6305*; *see Fam. Code §§ 6203, 6211* (defining "abuse" and "domestic violence," respectively); *Conness v. Satram (2004) 122 Cal. App. 4th 197, 204, 18 Cal. Rptr. 3d 577* (written findings are necessary to ensure that mutual restraints are imposed only after court carefully considers evidence by court)]. A court that does not make these detailed findings acts in excess of its jurisdiction by entering a mutual restraining order [*Monterroso v. Moran (2006) 135 Cal. App. 4th 732, 37 Cal. Rptr. 3d 694]* .

[4] Prohibition Against Purchase or Receipt of Firearms

When making a protective order [*see Fam. Code §§ 6218, 6320, 6321, 6322*], where both parties are present in court, the court must inform both the petitioner and respondent of the terms of the order, including notice that the respondent is prohibited from owning, possessing, purchasing or receiving to attempting to purchase or receive a firearm, and include notice of the penalty for violation [*Fam. Code § 6304*; *see PenalCode § 12021(g)*]. This prohibition is enforceable if thecourt provides actual verbal notice of the prohibition and the penalty for violation [*Penal Code § 12021(g)*; *see Fam. Code § 6304*] or if the restraining order personally served on the restrained party contains a notice in bold print stating the prohibition and specifying the penalties for violation [*Penal Code § 12021(g)*]. The prohibition does not apply, however, with respect to a firearm received as part of a community property disposition. Violation of the prohibition is a public offense punishable by imprisonment, a fine, or both [*Penal Code § 12021(g)*].

A person subject to a protective order as defined by *Fam. Code § 6218*, including ex parte protective orders, may not own or possess a firearm while that protective order is in effect when an order to relinquish firearms is issued by the court pursuant to *Fam. Code § 6389* [*Fam. Code § 6389(a)*].

For further discussion of provisions prohibiting a respondent from purchasing, receiving, owning, or possessing firearms, see *§ 293.52[8]*.

[5] Order to Show Cause

If a protective order of the kind described in *Fam. Code § 240* is issued, it must be made returnable on an order requiring cause to be shown why a permanent order should not be granted [*see § 293.132* (order to show cause)]. Unless the parties expressly stipulate to a continuance, the matter must be heard on the earliest day that the business of the court will permit, but not later than 20 days or, if good cause appears to the court, 25 days from the date the temporary restraining order is granted [*Fam. Code § 242(a)*].

At least five days prior to the hearing--if the order was issued *without notice* pending the hearing--the petitioner must have personally served on the opposing party [*see Fam. Code § 243(b)*] a copy of the order to show cause and temporary restraining order, an application and declaration, a blank responsive declaration, and any other items that the court may require [*see Fam. Code § 243(b)*; §§ 293.150[1], 293.151[1], 293.153[1]]. If the order was issued *with notice* pending the hearing, the applicant must have served on the respondent the above documents at least 15 days before the hearing [*Fam. Code § 243(c)*]. The court may, on petitioner's or its own motion, shorten the time for service of the order to show cause on the respondent [*Fam. Code § 243(f)*]. There is a rebuttable presumption that the proof of service was signed on the date of service [*Fam. Code § 6383(c)*].

If the restrained person receives actual notice of the existence and substance of the order through personal appearance in court to hear the terms of the order from the court, no additional proof of service is required for enforcement [*Fam. Code § 6384*]. The face of the order must indicate that both parties were personally present, and a statement to that

effect must be included on the temporary restraining order [*Fam. Code § 6385(a)*; *see § 293.132*].

If a law enforcement officer is present at the scene of reported domestic violence (at which the respondent is still present), the petitioner can request that the officer personally serve the respondent with the temporary restraining order, and thereby obtain enforcement of the order as of the time of its service [*see Fam. Code § 6383*; *see also* Cal. Rules of Ct., Rule 1296.10]. If the petitioner requests service on the respondent at the scene, the officer must do so whether or not the respondent is taken into custody [*Fam. Code § 6383(a)*]. A petitioner who requests service by the officer must provide the officer with a copy of the order and a proof of service form [*see* Cal. Judicial Council Form DV-200], which the officer must complete and transmit to the court [*see Fam. Code § 6383*].

If a petitioner protected by a TRO cannot produce an endorsed copy of the order, the officer must immediately contact the Department of Justice Domestic Violence Protective Order Registry to verify the existence of the order. If an order has been issued, but not served, the officer must immediately verbally notify the respondent of the terms of the order and advise the respondent to go to the locate court to obtain a copy of the order containing its full terms and conditions [*Fam. Code § 6383(d), (e)*; *see also Fam. Code § 6380* (requires counties to establish procedure for electronic transmission of data to statewide registry of domestic violence protective orders by July 1, 1996)]. Verbal notice of the terms of the order by the officer is sufficient notice to and service on the respondent. Furthermore, no additional proof of service is required for enforcement [*Fam. Code § 6385(a)*]. For further explanation of the enforcement of orders, see *§ 293.56*.

[6] Reissuance of Protective Order

On the filing of an affidavit by the petitioner that the respondent could not be served on time, the court may reissue any ex parte protective order previously issued pursuant to *Fam. Code § 6320 et seq.* and dissolved by the court for failure to serve the respondent. Any order so reissued under *Fam. Code § 245* must state on its face the date of the order's expiration. No fee will be charged for the reissuance unless the order was previously dissolved three times [*Fam. Code § 245*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsTemporary Restraining OrdersCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsViolation of Protective OrdersApplication & IssuanceFamily LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & Neglect

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§ 293.54 Ex Parte Emergency Protective Orders Requested by Peace Officers

[1] Persons Authorized to Issue Orders

A designated judicial officer may orally issue emergency protective orders against domestic violence at the request of certain peace officers, regardless of whether the court is in session [*see Fam. Code §§ 6241, 6250*]. A "judicial officer" includes a judge, commissioner, or referee [*Fam. Code §§ 6240(a), 6241*]. A "law enforcement officer" means a police or sheriff's officer, or any of several other categories of peace officers [*see Fam. Code § 6240(b)* (which, inaddition to police and sheriff's officers, includes peace officers of certain other public agencies and organizations); *see also Penal Code § 830.2*]. The presiding judge in the superior court of each county must designate at least one judge, commissioner, or referee to be reasonably available at all times to issue emergency protective orders, either orally, by telephone, or otherwise [*Fam. Code § 6241*].

[2] Available Emergency Protective Orders

The order may consist of any of the protective orders set forth in *Fam. Code § 6218* [*Fam. Code § 6252(a)*; *see Fam. Code §§ 6320* (enjoining specific acts of abuse), *Fam. Code § 6321* (excluding a person from a dwelling), and *Fam Code § 6322* (enjoining other specified behavior necessary to effectuate other orders)]. The order also may determine the temporary care and control of (1) any minor child who is in danger of being abducted [*Fam. Code § 6252(d)*], (2) any minor children of the endangered person and the person against whom the order is sought [*Fam. Code § 6252(b)*], and (3) an endangered child and any other minor children in the family or household with the parent or guardian of the endagered child who is not a restrained party [*Fam. Code § 6252(c)*; *see Welf. & Inst. Code § 213.5*]. The order must also prohibit the enjoined party from taking any action to obtain the address or location of a protected party or a protected party's family members, caretakers, or guardians, unless there is good cause not to make this order [*Fam. Code § 6252.5*]. Finally, in order to prevent the occurrence or reoccurrence of stalking, the order may include a civil harassment or workplace violence protective order [*Fam. Code § 6274*; *Penal Code § 646.91(a), (d)*; *see Code Civ. Proc. §§ 527.6, 527.8*]. The order must be issued without prejudice to any party [*Fam. Code § 6255*].

The availability of an emergency protective order is not affected by the fact that the endangered person has vacated the

household to avoid abuse [*Fam. Code § 6254*].

[3] Grounds and Findings for Issuance

A judicial officer may issue an ex parte emergency protective order upon the request of a law enforcement officer [*Fam. Code § 6250*]. A "judicial officer" includes a designated judge, commissioner, or referee [*Fam. Code §§ 6240(a), 6241*]. A "law enforcement officer" means a police or sheriff's officer or other peace officer as set forth by statute [*Fam. Code § 6240(b)*; *see Penal Code § 830.2(g)*].

The judicial officer may issue an ex parte emergency protective order when a law enforcement officer asserts reasonable grounds to believe any of the following [*Fam. Code §§ 6250, 6274*; *Penal Code § 646.91*]:

1. A person is in immediate and present danger of domestic violence, based on a recent incident of abuse or threat of abuse by the person against whom the order is sought.

2. A child is immediate and present danger of abuse by a family or household member, based on an allegation of a recent incident of abuse or threat of abuse by the family or household member.

3. A child is in immediate and present danger of being abducted by a parent or relative, based on a reasonable belief that a person has the intent to abduct or flee with the child from the jurisdiction, or based on an allegation of a recent threat to abduct or flee with the child from the jurisdiction.

4. A person is in immediate and present danger of stalking, based on that person's allegation that he or she has been willfully, maliciously, and repeatedly followed or harassed by another person who has made a credible threat with the intent of placing the person who is the target of the threat in reasonable fear for his or her safety, or the safety of his or her immediate family.

The judicial officer must specifically find that reasonable grounds have been asserted to believe that an immediate and present danger of domestic violence exists or that a child is in immediate and present danger of abuse or abduction, and that an emergency protective order is necessary to prevent the occurrence or recurrence of domestic violence, child abuse, or child abduction [*Fam. Code § 6251*]. In the case of orders to prevent stalking, the judicial officer must specifically find that (1) reasonable grounds have been asserted to believe that an immediate and present danger of stalking, as defined in *Penal Code § 646.9* exists, and (2) an emergency protective order is necessary to prevent the occurrence or reoccurrence of the stalking activity [*Penal Code § 646.91(c)*]. For a form of application for emergency protective order and the emergency protective order, see *§ 293.156[1]*.

[4] Requirements for Emergency Protective Order

The law enforcement officer requesting the emergency protective order must reduce it to writing and sign it [*Fam. Code § 6270*]. The contents of the order are prescribed by statute [*Fam. Code § 6253*].

The Judicial Council prescribes the form of all orders and other documents required under the Domestic Violence Prevention Act, and must promulgate forms and instructions for applying for these orders [*see Fam. Code § 6226*]. The officer who requests the emergency protective order must carry copies of the order while on duty [*Fam. Code § 6273*].

For a form of emergency protective order, see *§ 293.156[1]*.

[5] Service on Protected and Restrained Parties

The emergency protective order must be served on the restrained party by the law enforcement officer who requested it

if the restrained party can reasonably be located [*Fam. Code § 6271(a)*]. A copy must be given to the protected party [*Fam. Code § 6271(b)*]. A copy must also be filed with the court as soon as practicable after issuance [*Fam. Code § 6271(c)*].

[6] Enforcement

A law enforcement officer must use every reasonable means to enforce an emergency protective order [*Fam. Code § 6272(a)*]. Officers who act pursuant to this subdivision are not held civilly or criminally liable if the action is in good faith with regard to the order [*Fam. Code § 6272(b)*].

[7] Expiration

An emergency protective order expires (1) at the close of judicial business on the fifth court day following the day of its issuance, or (2) on the seventh calendar day following the day of its issuance, whichever is earlier [*Fam. Code § 6256*].

[8] Ex Parte Emergency Protective Order for Endangered Child

A judicial officer designated pursuant to *Fam. Code § 6241* may issue an ex parte emergency protective order if a law enforcement officer asserts reasonable grounds to believe that a child is in immediate and present danger of abuse by a family or household member, or of abduction by a parent or relative. The assertion must be based on an allegation of a recent incident of abuse or threat of abuse by that family or household member [*Fam. Code § 6250(b)*], or based on a reasonable belief that a person has an intent to abduct the child or flee with the child from the jurisdiction (or based on an allegation of a recent threat to do so), respectively [*Fam. Code § 6250(c)*].

The procedure for issuance and enforcement is the same as for ex parte emergency protective orders for domestic violence [*see Fam. Code § 6250 et seq.*; *see* [4], *above*]. However, the order must contain a statement that incorporates the provisions of *Fam. Code § 6253(e), (f)*, in addition to that required for a domestic violence emergency protective order [*Fam. Code § 6253(e)*].

In addition, to service on a restrained party, a copy of the order must be given to any parent or legal guardian of the child who is not a restrained party, if he or she can be reasonably located, or to a person having temporary custody of the child [*Fam. Code § 6271(a), (b)*]. A copy must also be filed with the court as soon as practicable after issuance [*Fam. Code § 6271(c)*].

In addition to the orders available under *Fam. Code § 6218*, the order may consist of any of the orders authorized in *Welf. & Inst. Code § 213.5*. It may require placement of the temporary care and control of the endangered child and any other minor children in the family or household with the child's parent or legal guardian who is not restrained [*Fam. Code § 6252(c)*]. The order may also determine the temporary care and control of any minor children of the endangered person and the person against whom the order is sought [*Fam. Code § 6252(b)*], as well as the temporary care and control of any minor who is in danger of being abducted [*Fam. Code § 6252(d)*].

The order must expire no later than the close of business on the second day of judicial business following the day of its issuance, and it must be issued without prejudice to any party *Welf. & Inst. Code § 213.5* sets forth orders that may be issued during the pendency of any proceeding to declare a child to be a dependent of the court [*see Welf. & Inst. Code § 213.5(a)*]. Other restraining orders also are authorized during dependency proceedings [*see, e.g., Welf. & Inst. Code §§ 304, 362.4* (when child has been adjudged dependent of court or on termination of dependency jurisdiction when a minor is under age 18 and other statutory requirements are met)]. For further discussion of restraining orders that may be authorized in connection with dependency proceedings, see Ch. 328, *Juvenile Courts: Dependency Proceedings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsViolation of Protective OrdersApplication & IssuanceFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & Neglect

California Forms of Pleading and Practice--Annotated

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§ 293.55 Protective Orders on Notice and Hearing Against Domestic Violence

[1] Generally

A protective order may be granted upon notice and hearing, to restrain any person based on an affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) or, if necessary, an affidavit and any additional information provided to the court under *Fam. Code § 6306*, which, to the satisfaction of the court, shows reasonable proof of a past act or acts of abuse. The purpose of the protective order is to prevent a recurrence of domestic violence and to assure a period of separation of the persons involved for a period sufficient to enable these persons to seek a resolution of the causes of the violence [*Fam. Code §§ 6220, 6300*; *see Gdowski v. Gdowski (2009) 175 Cal. App. 4th 128, 136, 95 Cal. Rptr. 3d 799* (*Fam. Code § 6300* requires showing of past abuse, not threat of future harm, and court may issue protective order simply on basis of affidavit showing past abuse)]. For discussion of electronic data base searches that a court must perform pursuant to *Fam. Code § 6306* before issuing or denying a protective order, see *§ 293.52[1][c]*.

The protective order may be granted to any person described in *Fam. Code § 6211* [*Fam. Code § 6301(a)*; *see § 293.51*]. The right to petition for relief may not be denied because petitioner has vacated the household to avoid abuse. If the parties are married, the fact that no petition for legal separation, nullity of marriage, or dissolution of marriage has been filed is no basis for denial of the petition for a temporary restraining order against domestic violence [*Fam. Code § 6301(b), (c)*].

The court may also grant a *mutual* protective order enjoining specified personalconduct. A mutual protective order may be issued only if both parties personally appear and each party presents written evidence of abuse or domestic violence as defined in *Fam. Code § 6320*. However, written evidence is not required if both parties agree that the requirement shall not apply [*see Fam. Code § 6305*].

The petition, the temporary order, and the order after a hearing will be valid and enforceable without explicitly stating the address or place of residence, school, or employment of the petitioner, or the place where the petitioner's child is provided child care services or attends school [*Fam. Code § 6225*].

When the protective order is sought with notice, the petitioner must have personally served on the opposing party a copy of the application and declaration, the order to show cause and temporary restraining order, a blank responsive declaration, and any other supporting papers filed with the court [*see §§ 293.150 -293.153*]. Service must be made in the manner provided by law for personal service of summons in civil actions. For discussion of personal service of summons in civil actions, see Ch. 518, *Service of Summons and Papers* .

The respondent is entitled as a matter of right to a continuance of the hearing on the petitioner's request for a permanent protective order when the temporary protective order was issued without notice; the respondent does not have a right to an automatic continuance of the hearing if the court issued the TRO only after notice was given to the respondent [*Fam. Code § 243(e)*; *Ross v. Figueroa (2006) 139 Cal. App. 4th 856, 863, 43 Cal. Rptr. 3d 289]* .

After notice and a hearing, the court may issue any of the following orders:

- Ex parte orders enjoining specific acts of abuse [*see Fam. Code § 6320*] or specific behavior necessary to effectuate other orders [*Fam. Code § 6322*]. When determining whether to make such an order, the court must consider whether the failure to make the order may jeopardize the safety of the petitioner and the children for whom the custody or visitation orders are sought [*Fam. Code § 6340(a)*].

- If there is a minor child of the petitioner and the respondent, an order determining the temporary custody or visitaion of the child, provided that the moving party has established a parent-child relationship as provided by *Fam. Code § 6323(a)* (*see § 293.52[1][b]*) [*Fam. Code § 6323(a)(1)*].

- An order excluding one party from the common dwelling of both parties or from the dwelling of the other party, but only on a finding that physical or emotional harm would otherwise result to the other party, any person under the care, custody, or control of the other party, or any minor child of the parties or of the other party [*Fam. Code §§ 6321, 6340(b)*].

- If a presumption exists that the respondent is the natural father of any minor child pursuant to *Fam. Code § 7611*, and the child is in the petitioner's custody, an order that a party pay any amount necessary for the support and maintenance of the child, if the order would otherwise be authorized in an action brought pursuant to *Fam. Code § 7600 et seq.* (Uniform Parentage Act) and provided that the order is without prejudice in the action [*Fam. Code § 6341(a)*; *see generally* Ch. 412, *Paternity*]. When determining whether to make such an order, the court must consider whether the failure to make the order may jeopardize the safety of the petitioner and the children for whom child support is requested, including safety concerns related to the financial needs of the petitioner and the children [*Fam. Code § 6341(a), (b)*].

- An order that the respondent pay spousal support if the parties are married to each other and no spousal support order exists. When determining whether to make such an order, the court must consider whether the failure to make the order may jeopardize the safety of the petitioner, including safety concerns related to the financial needs of the petitioner. This order is without prejudice in a proceeding for dissolution, nullity, or legal separation [*Fam. Code § 6341(c), (d)*].

- An order that restitution be paid to the petitioner for loss of earnings and out-of-pocket expenses including, but not limited to, expenses for medical care and temporary housing, incurred as a direct result of the abuse inflicted by the respondent or any actual physical injuries sustained from the abuse [*Fam. Code § 6342(a)(1)*].

- An order that restitution be paid by the petitioner for out-of-pocket expenses incurred by a party as a

result of an ex parte order that is found by the court to have been issued on facts shown at a noticed hearing to be insufficient to support the order [*Fam. Code § 6342(a)(2)*].

- An order that restitution be paid by the respondent to any public or private agency for the reasonable cost of providing services to the petitioner required as a direct result of the abuse inflicted by the respondent or any actual injuries sustained therefrom [*Fam. Code § 6342(a)(3)*].

- An order requiring the restrained party to participate in batterer's treatment counseling [*Fam. Code § 6343(a)*].

- An order for the payment of attorney's fees and costs of the prevailing party [*Fam. Code § 6344(a)*]. If the petitioner is the prevailing party and cannot afford to pay for the attorney's fees and costs, the court must, if appropriate based on the parties' respective abilities to pay, order that the respondent pay the petitioner's attorney's fees and costs for commencing and maintaining the proceeding. Whether the respondent should be ordered to pay the prevailing petitioner's attorney's fees and costs, and theamount to be paid, must be determined based on the parties' respective incomes and needs, and any factors that affect their respective abilities to pay [*Fam. Code § 6344(b)*].

In addition, in accordance with federal law, on the request of a victim of domestic violence who is seeking a domestic violence restraining order, a judge issuing the order may include a provision in the order that permits the victim to record any prohibited communication made to the victim by the perpetrator [*Penal Code § 633.6(a)*; *see Penal Code § 633.6(b)* (Judicial Council must amend its domestic violence prevention application and order forms to incorporate this provision)].

After notice and a hearing, the court may order the restrained party to participate in a batterer's program approved by the probation department as provided in *Penal Code § 1203.097* [*Fam. Code § 6343(a)*]. In consultation with local domestic violence shelter and programs, the courts are required to develop a resource list of referrals to appropriate community domestic violence programs and services to be provided to each applicant for an order under this statute [*Fam. Code § 6343(b)*].

If a request for separate counseling is made by a party who alleges domestic violence (in a written declaration under penalty of perjury) or who is protected by the order, the parties must participate in counseling separately and at separate times, provided that there has been a history of domestic violence between the parties, or if a protective order is in effect [*Fam. Code § 6343(b)*].

The court may grant a mutual order enjoining the parties from contacting, molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, contacting repeatedly by mail with the intent to annoy or harass, destroying personal property, or disturbing the peace of the other party, and, in the discretion of the court, on a showing of good cause, of other named family or household members [*Fam. Code §§ 6305, 6320, 6340*; *see Penal Code § 653(m)*]. A mutual restraining order may be issued, however, only if (a) both parties personally appear and each party presents written evidence of abuse or domestic violence, and (b) the court makes detailed findings of fact indicating that both parties acted primarily as aggressors and that neither party acted primarily in self-defense [*Fam. Code §§ 2047(b), 6305*; *Conness v. Satram (2004) 122 Cal. App. 4th 197, 204, 18 Cal. Rptr. 3d 577* (written findings are necessary to ensure that mutual restraints are imposed only after court carefully considers evidence); *see § 293.53[3]*].

As part of a protective order issued under *Fam. Code § 6340* [*see* Fam. Code §§ 6318, *6320-6323*], the court may prohibit the restrained party from owning, possessing, purchasing or receiving, or attempting to purchase or receive a firearm [*Penal Code § 12021(g)*; *see § 293.53[4]*]. If both parties are present in court and the court includes this prohibition in the protective order, the court is required to inform the parties of the terms of the order, the firearm

prohibition, and the penalty for violation [*Fam. Code § 6304*].

[2] Duration of Order

The duration of orders issued under the DVPA after notice and a hearing depends on the type of order. Subject to the court's discretion, *personal conduct, stay-away, and residence exclusion* orders may not exceed three years in duration, subject to termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party. These orders may be renewed, on the request of a party, either for three years or permanently, without a showing of any further abuse since the issuance of the original order, subject to termination or modification by further order of the court either on written stipulation filed with the court or on the motion of a party [*Fam. Code § 6345(a)*].

The duration of any other DVPA orders that are also issued after notice and a hearing, including, but not limited to, orders for *custody, visitation, support, and disposition of property* is governed by the law relating to those specific subjects [*Fam. Code § 6345(b)*].

The failure to state the expiration date on the face of the court order creates an order with a duration of three years from the date of issuance [*Fam. Code § 6345(c)*].

When a restrained party applies for termination of the order, that party has the burden of showing by a preponderance of the evidence that (1) there has been a material change in the facts on which the order was issued, (2) the law on which the order was issued has changed, or (3) the ends of justice would be served by terminating the order [*Loeffler v. Medina (2009) 174 Cal. App. 4th 1495, 1504, 95 Cal. Rptr. 3d 343* (court must apply standards applicable to motions to dissolve injunctions under *Code Civ. Proc. § 533*)]. The court has the discretion to determine that the changed circumstances alleged by the restrained party are not material and, therefore, do not present a reason for terminating the order [*Loeffler v. Medina (2009) 174 Cal. App. 4th 1495, 1506, 95 Cal. Rptr. 3d 343]* . It may also award attorney's fees and costs under *Fam. Code § 6344(a)* to the party who prevails in defeating an application to terminate the order [*Loeffler v. Medina (2009) 174 Cal. App. 4th 1495, 1508, 95 Cal. Rptr. 3d 343]* .

[3] Limitations on Enjoined Parent's Visitation Rights

In making an award of temporary custody of a child pursuant to the Domestic Violence Prevention Act, the court must consider whether visitation should be restricted when an order directed to the child's parent has also been issued pursuant to one of the following:

- Nullity, dissolution and legal separation [*Fam. Code § 2049*; *see Fam. Code § 2049* (injunctions included in judgment), *Fam. Code §§ 6218, 6320* (injunction against certain physical conduct), *Fam. Code § 6321* (exclusion from family or household dwelling), *Fam. Code § 6322* (injunction against behavior as necessary to give effect to other orders)].

- The Uniform Parentage Act [*Fam. Code §§ 6218, 6320* (injunction against certain physical conduct), *Fam. Code § 6321* (exclusion from family or household dwelling), *Fam. Code § 6322* (injunction against behavior as necessary to give effect to other orders), *Fam. Code §§ 7710, 7720, 7730* (injunctions included in judgment)].

- The Domestic Violence Prevention Act [*Fam. Code § 6320 et seq.* (ex parte orders), *Fam. Code § 6340* (orders after hearing)].

That is, the court must consider whether the best interests of the child require that any visitation granted to the restrained parent with respect to the child be supervised, suspended, or denied. The authority of the court to limit

visitation in these cases to situations in which a third person, specified by the court, is present, is commonly known as "supervised" visitation.

These provisions apply to any protective order issued in connection with:

- A DVPA proceeding [*Fam. Code §§ 6320 et seq.* (ex parte orders), *Fam. Code § 6340* (orders after hearing)].

- A proceeding for marital dissolution, legal separation, or nullity of marriage [*Fam. Code § 2045(b)*; *see Fam. Code §§ 2049* (injunctions included in judgment), *Fam. Code § 6218, 6320* (injunction against certain physical conduct), *Fam. Code § 6321* (exclusion from family or household dwelling), *Fam. Code § 6322* (injunction against behavior as necessary to give effect to other orders)],

- A parentage proceeding under the Uniform Parentage Act [*Fam. Code §§ 3100(b), 6218, 6320* (injunction against certain physical conduct), *Fam. Code § 6321* (exclusion from family or household dwelling), *Fam. Code § 6322* (injunction against behavior as necessary to give effect to other orders), *Fam. Code §§ 7710, 7720, 7730* (injunctions included in judgment)].

In determining the best interest of the child, the court must consider the factors specified in *Fam. Code § 3011*, which relate to the child's health, safety, and welfare. For discussion of these factors, see Ch. 221, *Dissolution of Marriage: Procedure* . The court must also take into account the nature of the acts from which the parent was enjoined and the time that has elapsed since that order. A parent may submit to the court the name of a person that he or she deems suitable to be present during visitation [*Fam. Code § 3100(b)*; *see Fam. Code § 6223*].

A court may not grant child custody or unsupervised visitation to any person who has committed certain criminal offenses or is required to be registered as a sex offender unless the court finds there is no significant risk to the child [*see Fam. Code §§ 3030(a)(1), 3100(b), (c), 3031(a)-(b)*]. A court may also not grant child custody or unsupervised visitation to a person if anyone residing in the person's household is required, as a result of a felony conviction in which the victim was a minor, to register as a sex offender under *Penal Code § 290*, unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record [*Fam. Code § 3030(a)(2)*]. The child may not be placed in a home in which that person resides, nor be permitted to have unsupervised visitation with that person, unless the court states the reasons for its findings in writing or on the record [*Fam. Code § 3030(a)(1), (2)*]. The fact that a child is permitted unsupervised contact with a person who is required to register as a sex offender is prima facie evidence that the child is at significant risk. This prima facie evidence constitutes a presumption affecting the burden of producing evidence, but the presumption does not apply if there are factors mitigating against its application, including whether the party seeking custody or visitation is also required, as the result of a felony conviction in which the victim was a minor, to register as a sex offender [*Fam. Code § 3030(a)(3)*].

A court may not grant custody or visitation to any person who has been convicted of rape under *Penal Code § 261* and the child was conceived as a result of that crime [*Fam. Code § 3030(b)*]. In addition, the court may not grant custody of, or unsupervised visitation with, a child if that person has been convicted of the first degree murder of the child's other parent, unless the court finds that there is no risk to the child's health, safety, and welfare, and sets forth its reasons for its finding in writing or on the record [*Fam. Code § 3030(c)*; *see* Ch. 223, *Dissolution of Marriage: Child Custody*].

When visitation is ordered in a case in which domestic violence is alleged and an emergency protective order, protective order, or other restraining order is in effect, the visitation order must specify the time, day, plan, and manner of transfer of the child, in order to preserve consistency with the restraining orders, limit the child's exposure to potential domestic conflict or violence, and ensure the safety of all family members. If a criminal protective order has been issued under *Penal Code § 136.2*, the visitation order must refer to, and acknowledge the precedence of enforcement of, any appropriate criminal protective order [*Fam. Code § 3100(c)*]. If one of parties to the proceeding is staying at a domestic

violence shelter, the order must designate the time, day, place, and manner of transfer of the child for visitation in a manner that prevents disclosure of the shelter location or other confidential information about where the parent is staying [*Fam. Code § 3100(c), (d)*].

If a petition requests a determination of temporary custody of a minor child and indicates that the issue is contested [*see Fam. Code §§ 3020 et seq., 3060 et seq., 3100*], the matter must be set for mediation of the contested issues prior to or concurrent with the setting of the matter for hearing [*Fam. Code § 3170*; *see also Fam. Code § 3140* (circumstances in which child's birth certificate must be submitted to court)].

A party who has been subjected to domestic violence may obtain relief from having to meet with the other party for court-ordered mediation [*Fam. Code § 3160 et seq.*].

Mediation in domestic violence cases must be handled by Family Court Services in accordance with the protocol adopted by the Judicial Council [*Fam. Code § 3170(b)*; *Cal. Rules of Ct., Rule 5.215*]. At the time of the hearing on the protective order, the court must give the parties the notice set forth in *Fam. Code § 3044(f)*--that a domestic violence finding against a party will adversely affect the party in custody determinations--only if the parties are entering into custody mediation [*Sabbah v. Sabbah (2007) 151 Cal. App. 4th 818, 823-825, 60 Cal. Rptr. 3d 175*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsTemporary Restraining OrdersCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsViolation of Protective OrdersApplication & IssuanceFamily LawChild CustodyVisitationRestrictionsFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & Neglect

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§ 293.56 Enforcement of Orders Against Domestic Violence

[1] Notice to Be Printed on Orders

Any order issued pursuant to the Domestic Violence Prevention Act must state on its face the date of expiration of the order and a notice in substantially the following form:

"This order is effective when made. The law enforcement agency shall enforce it immediately on receipt. It is enforceable anywhere in California by any law enforcement agency that has received the order or is shown a copy of the order. If proof of service on the restrained person has not been received, the law enforcement agency shall advise the restrained person of the terms of the order and then shall enforce it" [*Fam. Code § 6224*; *see Fam. Code § 6302* (requiring protective orders to contain notice that court may grant order lasting for up to three years if respondent does not appear)].

NOTE:

This notice requirement has not been amended to reflect *Fam. Code § 6381*, which provides that a law enforcement agency may also enforce an order under the DPVPA when an officer has verified the existence and contents of an order through the Department of Justice Domestic Violence Protective Order Registry [*Fam. Code § 6381(b), (c)*; *see also Fam. Code § 6380(a)* (requiring counties to develop procedures for electronically transmitting data on protective orders to the Domestic Violence Protective Order Registry)].

[2] Notification and Authority of Law Enforcement Agencies

Effective January 1, 1995, the Department of Justice must maintain a Domestic Violence Restraining Order System and make specific information regarding registered protective orders, including ex parte protective orders, available to court clerks and law enforcement personel, through computer access, including the California Law Enforcement Telecommunications Systems (CLETS). In turn, court clerks and law enforcement agencies must immediately notify the Department of Justice when any protective order has been issued, served, modified, extended, or terminated. However,

each county in California has until July 1, 1996, to establish a procedure for the electronic transmission of the required information to the Department [*Fam. Code §§ 6380, 6385*; *see Fam. Code § 6380(b)* (listing types of protective, restraining, injunctive, criminal court, and out-of-state orders concerning which a report must be made to the Registry)]. Pursuant to this requirement, all data with respect to criminal court protective orders issued, modified, extended, or terminated under *Penal Code § 136.2*, and all data filed with the court on the required Judicial Council forms with respect to protective orders (including their issuance, modification, extension, or termination to which the DVPA applies), must be transmitted by the court or its designee within one business day to law enforcement personnel by either transmitting a physical copy of the order to a local law enforcement agency that is authorized to enter orders into CLETS, or by entering the order into CLETS directly (with California Department of Justice approval) [*see Fam. Code § 6380(a)*; *see also Fam. Code § 6380(d)* (duty of law enforcement officer or court clerk to notify Department of Justice on receipt of proof of service of service of protective or restraining order within one business day)].

Each law enforcement agency is required to make available to any law enforcement officer responding to the scene of reported domestic violence information concerning the existence, terms, and current status of protective orders issued under DVPA. However, this requirement apparently may be met by making this information available through the statewide registry [*see Fam. Code § 6382*].

The inability of a law enforcement agency or a court clerk to provide all categories of information required does not delay entry of the information available [*see Fam. Code § 6380(b)*]. Furthermore, failure to provide the Department of Justice with personal descriptive information on the person restrained as required by *Fam. Code § 6385(b)* does not invalidate the restraining order [*Fam. Code § 6385(b)*].

Any law enforcement agency in the state may enforce the terms of a protective order issued under the DVPA if the agency has received a copy of the order or if a law enforcement officer enforcing the order has been shown a copy of the order or has verified the existence and contents of the order through the Domestic Violence Restraining Order System maintained by the Department of Justice [*Fam. Code § 6381(b)*].

When a court issues or modifies a protective order, it must order the county clerk to provide to the petitioner, without cost, five certified, stamped, and endorsed copies of the order, extension, modification, or termination of the order [*Fam. Code § 6387*]. Prior law also required the court to order the petitioner to deliver or the county clerk to mail a certified copy of any protective order to specified law enforcement agencies by the close of the business day on which an order, extension, modification, or termination was granted [*see* former *Fam. Code § 6380*]. Although this is no longer statutorily required, the Judicial Council forms of Temporary Restraining Order and Notice of Hearing (CLETS--Cal. Judicial Council Form DV-110) [*see § 293.151[1]*] and Restraining Order After Hearing (CLETS--Cal. Judicial Council Form DV-130) [*see § 293.154[1]*] still provide for the court to require delivery of protective or restraining orders to law enforcement agencies. A law enforcement agency must enforce a protective order, whether or not it has been registered, if the law enforcement agency has received a copy of the order [*see Fam. Code § 6381(b)*].

A protective order is enforceable without additional proof of service if bothparties personally appeared at the hearing during which the order was issued. The parties are deemed to have received actual notice of the existence and substance of the order from the court [*see Fam. Code § 6384(a)*; *see also Fam. Code § 6380(c)*]. The judicial forms for orders must indicate that the parties were present, and the order must contain a statement that no additional proof of service is required [*see Fam. Code §§ 6384(b), 6385(a)*].

If a person named in a temporary restraining order or emergency protective order is personally served with the order and notice of hearing, but *does not* appear at the hearing (either in person or by an attorney), and the terms and conditions of the restraining order or protective order issued after the hearing are identical to the previously issued temporary or emergency order (except for its duration), then the restraining order or protective order may be served on the person by first-class mail sent to that person at his or her most current address available to the court [*Fam. Code § 6384(a)*]. The order must state that the person will be served by mail at the address specified in the order and that if that address is not

correct or the person wishes to verify that the temporary or emergency order was made permanent without substantive change, the person should call the clerk of the court [*Fam. Code § 6384(b)*].

A protective order is also enforceable without additional proof of service if the order was served by a law enforcement officer at the scene of reported domestic violence pursuant to *Fam. Code § 6383* [*Fam. Code § 6385(a)*]. A law enforcement officer responding to the scene of reported domestic violence must attempt to verify the existence of a protective order by contacting the statewide registry of domestic violence protective orders if the protected person cannot provide an endorsed copy of the order [*Fam. Code § 6383(d)*; *see also Fam. Code § 6380* (each county required to establish procedure for electronic transmission of data to statewide registry of domestic violence protective orders)].

If the respondent was not present at the hearing where the order was issued [*see Fam. Code §§ 6384, 6385(a)* (no proof of service required if party personally appeared at hearing)], and the order has not yet been served, the petitioner may request the law enforcement officer who is present at the scene of reported domestic violence to serve the order on the respondent, whether or not the respondent has been taken into custody. The petitioner must provide the officer with an endorsed copy of the order and a proof of service form, which the officer must complete and transmit to the issuing court [*Fam. Code § 6383(a), (b)*]. There is a rebuttable presumption that the proof of service was signed on the date of service [*Fam. Code § 6383(c)*]. If a law enforcement officer present at the scene of reported domestic violence is informed that a protective order exists or that a person taken into custody is the respondent to a protective order, and the protected person cannot provide an endorsed copy of the order, the law enforcement officer must contact the statewide registry to verify its existence. If the order has been issued, but not served, the officer must immediately serve the order by verbally notifying the respondent of the terms of the order and advising the respondent to go to the local court to obtain a copy of the order [*Fam. Code § 6383*]. If the officer accomplishes service in this manner, no additional proof of service is required [*Fam. Code §§ 6383(e), 6385(a)*].

A peace officer is immune from civil liability for an arrest made under a protective or restraining order that is regular on its face, as long as the officer acted in good faith and had reasonable cause to believe that the person against whom the order was issued had notice of the order and had committed an act in violation of it. This provision does not afford immunity from liability for the unreasonable use of force by a peace officer in enforcing the order. A peace officer may also be immune from liability by virtue of other statutes, including *Gov. Code §§ 820.2, 820.4* [*Fam. Code § 6383(h)*].

When there is more than one civil order regarding the same parties, the peace officer must enforce the order that was issued last. If both civil and criminal orders have been issued, the officer must enforce the criminal order that was issued last, subject to the provisions of *Penal Code § 136.2* [*Fam. Code § 6383(h)*]. *Penal Code § 136.2(c)* provides that an emergency protective order issued under the DVPA or under *Penal Code § 646.91* (issuance of emergency protective order on immediate and present danger of stalking) have precedence in enforcement over any other restraining or protective order, provided the emergency protective order meets specified requirements. *Penal Code § 136.2(e)(2)* provides that a restraining order or protective order against a defendant issued by a criminal court in a proceeding under *Penal Code § 13700* (crime of domestic violence) has precedence in enforcement over any civil court order against the defendant, unless a court issues an emergency protective order under the DVPA or under *Penal Code § 646.91*. In such event, the emergency protective order has precedence in enforcement over any other restraining or protective order, provided it meets specified requirements [*Penal Code § 136.2(e)(2)*]. If custody and visitation with respect to the defendant and his or her minor children is ordered after a criminal protective order has been issued, the custody or visitation order must refer to and acknowledge the precedence of enforcement of any appropriate criminal protective order [*Penal Code § 136.2(e)(3)*].

[3] Willful Violation as Crime

A willful (intentional) and knowing violation of a protective order, as defined in *Fam. Code § 6218*, is a crime punishable under *Penal Code § 273.6* [*Fam. Code § 6388*; *see Penal Code § 868.5* (prosecuting witness entitled to attendance of supporting persons during testimony)]. For further discussion of criminal proceedings against violators,

see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice (Matthew Bender).

[4] Appointment of Counsel

The court may, in its discretion, appoint counsel to represent the petitioner in any proceeding to enforce the terms of a protective order [*see Fam. Code §§ 6218, 6386(a)*]. If private counsel is appointed, the court may order the respondent to pay reasonable costs and attorney's fees incurred by the petitioner [*Fam. Code § 6386(b)*].

[5] Contempt

A district attorney or city attorney may initiate and pursue a court action for contempt against a party for failing to comply with a court order entered under the DVPA [*Code Civ. Proc. § 1218(d)*]. Any attorney's fees and costs ordered by the court against a party adjudged guilty of contempt is payable to the Office of Emergency Services' account established for the purpose of funding domestic violence shelter service providers under *Penal Code § 13823.15(f)* [*Code Civ. Proc. § 1218(d)*].

Notwithstanding any other law, a court may not imprison or otherwise confine or place in custody a victim of domestic violence for contempt when the contempt consists of refusing to testify concerning that domestic violence [*Code Civ. Proc. § 1219(b), (c)(2)*].

[6] Out-of-State Protection Orders

Enforcement of out-of-state "protection orders" is now governed by the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act, which is set forth in *Fam. Code § 6400 et seq.* For discussion of enforcement under this Act, see *§ 293.58*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsTemporary Restraining OrdersCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsViolation of Protective OrdersApplication & IssuanceCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptPenaltiesFamily LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & Neglect

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§ 293.57 Domestic Violence Incident Report

Each state and local law enforcement agency must provide, without charging a fee, one copy of any domestic violence incident report face sheet or a domestic violence incident report, or both, to a victim of domestic violence, or to his or her representative (as defined in *Fam. Code § 6228(g)*) if the victim is deceased, on request [*Fam. Code § 6228(a)*]. For purposes of this provision, the term "domestic violence" has the definition given in *Fam. Code § 6211* [*Fam. Code § 6228(a)*]. The victim or the victim's representative must present the law enforcement agency with identification at the time of making the request [*Fam. Code § 6228(d), (g)(2)*]. If the person making the request is the victim's representative, he or she must also present a certified copy of the death certificate or other satisfactory evidence of the death of the victim at the time a request is made [*Fam. Code § 6228(d), (g)(2)*].

A copy of the domestic violence incident report face sheet must be made available during regular business hours to a victim of domestic violence or the victim's representative within 48 hours after the victim or representative requests a copy, unless the law enforcement agency informs the victim or representative of the reasons why, for good cause, the face sheet is unavailable. In such event, the law enforcement agency must furnish a copy to the victim or representative within five working days of the victim's request [*Fam. Code § 6228(b)*].

A copy of the domestic violence incident report must be made available during regular business hours to a victim of domestic violence or his or her representative within five working days after the victim or representative requests a copy, unless the law enforcement agency informs the victim or to the victim's representative of the reasons why, for good cause, the report is unavailable. In such event, the law enforcement agency must furnish a copy to the victim or representative within 10 working days of the victim's request [*Fam. Code § 6228(c)*].

The domestic violence incident report must note the following [*Penal Code § 13730(c)*]:

> 1. If the officers who responded to the domestic violence call observed any signs that the alleged abuser was under the influence of alcohol or a controlled substance.

2. If the officers determined if any law enforcement agency had previously responded to a domestic violence call at the same address involving the same alleged abuser or victim.

3. If the officers found it necessary, for the protection of themselves or other persons present, to inquire of the victim, the alleged abuser, or both, if a firearm or other deadly weapon was present at the location. Any firearm or other deadly weapon discovered by an officer at the scene of a domestic violence incident must be confiscated.

For these purposes, a representative of the victim means any of the following [*Fam. Code § 6228(g)(1)*]:

- The surviving spouse.
- A surviving child of the decedent who has attained 18 years of age.
- A domestic partner, as defined in *Fam. Code § 297(a)*.
- A surviving parent of the decedent.
- A surviving adult relative.
- The public administrator if one has been appointed.

A representative of the victim does not include any person who has been convicted of murder in the first degree [*see Penal Code § 189*], of the victim, or any person identified in the incident report face sheet as a suspect [*Fam. Code § 6228(g)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsDomestic OffensesGeneral OverviewFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & Neglect

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§ 293.58 Enforcement of Foreign Protection Orders Under Uniform Interstate Enforcement of Domestic Violence Protection Orders Act

[1] Introduction

A person authorized by California law to seek enforcement of a protection ordermay seek enforcement of a valid foreign protection order in a California tribunal under the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act (the Act) (*Fam. Code § 6400 et seq.*) [*Fam. Code § 6402(a)*; *see Fam. Code § 6401(1)* ("foreign protection order" is protection order issued by tribunal of another state), (7) ("state" includes Indian tribe or any branch of United States military with jurisdiction to issue protection orders), (8) ("tribunal" means court, agency, or other entity authorized by law to issue or modify protection orders)]. The Act applies to protection orders issued before January 1, 2002, and to continuing actions for enforcement of foreign protection orders begun before January 1, 2002 [*Fam. Code § 6409*]. A request for enforcement of a foreign protection order made on or after January 1, 2002, for violations of the order occurring before January 1, 2002, is also governed by the Act [*Fam. Code § 6409*].

[2] Protection Orders Defined

A "protection order" is an injunction or other order, issued by a tribunal under the domestic violence or family violence laws of the issuing state, to prevent an individual from engaging in violent or threatening acts against, harassment of, contact or communication with, or physical proximity to, another individual [*Fam. Code § 6401(5)*].

[3] California's Enforcement Responsibilities

A California tribunal must enforce the terms of a foreign protection order, including terms that provide relief that a California tribunal would lack power to provide absent this statutory authority. The tribunal must enforce the order, whether it was obtained by independent action or in another proceeding, if it is an order issued in response to a complaint, petition, or motion filed by or on behalf of an individual seeking protection. In a proceeding to enforce a foreign protection order, the tribunal must follow the California procedures for the enforcement of protection orders [*Fam. Code § 6402(a)*].

However, a California tribunal may not enforce a foreign protection order issued by a tribunal of a state that does not recognize the standing of a protected individual, that is, an individual protected by a protection order [*Fam. Code § 6401(4)*] to seek enforcement of the order [*Fam. Code § 6402(b)*].

A California tribunal must enforce the provisions of a valid foreign protection order that governs child custody and visitation if the order was issued in accordance with the jurisdictional requirements governing the issuance of custody and visitation orders in the issuing state [*Fam. Code § 6402(c)*]. A California tribunal may not enforce a provision of a foreign protection order with respect to support under the Act [*Fam. Code § 6402(d)*].

[4] Requirements for Valid Foreign Order

A foreign protection order is valid if it meets all of the following criteria [*Fam. Code § 6402(e)*]:

1. Identifies the protected individual and the respondent, that is, the individual against whom enforcement of the order is sought [*Fam. Code § 6401(6)*].

2. Is currently in effect.

3. Was issued by a tribunal that had jurisdiction over the parties and the subject matter under the law of the issuing state.

4. Was issued after the respondent was given reasonable notice and had an opportunity to be heard within a reasonable time after the order was issued, consistent with the respondent's right to due process.

A foreign protection order that is valid on its face is prima facie evidence of its validity [*Fam. Code § 6402(f)*]. The absence of any of the criteria for validity of a foreign protection order is an affirmative defense in an action seeking enforcement of the order [*Fam. Code § 6402(g)*].

[5] Enforcement of Mutual Orders

A California tribunal may enforce the provisions of a mutual foreign protection order [*Fam. Code § 6401(3)* (defining "mutual foreign protection order")] that favors a respondent only if the respondent filed a written pleading seeking a protection order from the tribunal of the issuing state and the tribunal of the issuing state made specific findings in the respondent's favor [*Fam. Code § 6402(h)*].

[6] Registration of Order in California

Any foreign protection order must, on request of the person in possession of the order, be registered with a court of this state in order to be entered in the Domestic Violence Restraining Order System [*Fam. Code § 6404(a)*]. There is no fee for the registration of a foreign protection order, and the court clerk must provide all Judicial Council forms required by the Act to a person in possession of a foreign protection order free of charge [*Fam. Code § 6404(b)*].

[7] Other Remedies Unaffected

A protected individual who pursues remedies under the Act is not precluded from pursuing other legal or equitable remedies against the respondent [*Fam. Code § 6406*].

[8] Construction of Act to Promote Uniform Application

In applying and construing the Act, courts must give consideration to the needto promote uniformity of the law with

respect to its subject matter among states that have also adopted the Act [*Fam. Code § 6407*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsTemporary Restraining OrdersCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsViolation of Protective OrdersGeneral OverviewFamily LawFamily Protection & WelfareChildrenChild Abuse Prevention & Treatment ActFamily LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & Neglect

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[Reserved]

§§ 293.59[Reserved]

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§ 293.70 Criminal Sanctions for Abuse of Spouse or Cohabitant

[1] Current Spouse or Cohabitant

Along with remedies discussed in this chapter for enjoining domestic violence under the Domestic Violence Prevention Act [*see Fam. Code § 6200 et seq.*], criminal sanctions also exist. Some of these sanctions are discussed in this chapter in connection with specific domestic violence prevention orders (*see §§ 293.52[8], 293.53[6], 293.56[4]*). In addition, specific criminal penalties are provided for acts of domestic violence that result in corporal-physical injury to a spouse or unmarried cohabitant. Under *Penal Code § 273.5*, any person who willfully inflicts corporal injury resulting in a traumatic condition [*see Penal Code § 273.5(c)*] on any of the following persons is guilty of a felony [*Penal Code § 273.5(a)*; *see People v. Vega (1995) 33 Cal. App. 4th 706, 709, 39 Cal. Rptr. 2d 479* ; *People v. Gutierrez (1985) 171 Cal. App. 3d 944, 949-951, 217 Cal. Rptr. 616]* :

1. The spouse of the perpetrator;

2. Any person with whom the perpetrator is cohabiting; or

3. The person who is the mother or father of the perpetrator's child.

For purposes of *Penal Code § 273.5*, the victim and perpetrator need not hold themselves out as husband and wife in order for "cohabitation" to exist. In fact, there is no longer a requirement under the statute that the cohabiting parties even be of the opposite sex [*Penal Code § 273.5(a)* (version operative January 1, 1995)]. In addition, although the statute provides that a person is considered the father or mother of another person's child--that is, of the perpetrator's child--if the "alleged male parent is presumed the natural father under [*Fam. Code §§ 7611, 7612*]" [*Penal Code § 273.5(d)*], the elements needed to establish parentage for criminal culpability are not as rigorous as those to formally establish parentage under the Family Code. Thus, in one court's view, *any substantial evidence* establishing that the victim is the mother or father of the perpetrator's child is sufficient to sustain a conviction under *Penal Code § 273.5*, given the diverse purposes of the parentage and criminal statutes [*People v. Vega (1995) 33 Cal. App. 4th 706, 709, 39*

Cal. Rptr. 2d 479 ; for discussion of establishing parentage under the Family Code, *see* Ch. 412, *Paternity*]. In addition, a biological father may be convicted under *Penal Code § 273.5* of battering the mother of his child, even if the father's and mother's parental rights over the child were terminated before the offense occurred. The historical fact of paternity is all that is required to justify punishing a father for battering the mother of his child [*People v. Mora (1996) 51 Cal. App. 4th 1349, 1356, 59 Cal. Rptr. 2d 801]* .

The Penal Code also contains special provisions for the prosecution of spousal abusers, and treatment programs for batterers [*see Penal Code §§ 273.8 et seq., 1000.93 et seq., 1203.097*; *see People v. Cates (2009) 170 Cal. App. 4th 545, 549-550, 87 Cal. Rptr. 3d 919* (*Penal Code § 1203.097* requires court to impose several conditions of probation, including participation in batterer's counseling program, and applies to defendants convicted of any crime of "abuse," as long as victim is person identified in *Fam. Code § 6211*)]. For further discussion of criminal proceedings related to domestic violence, see California Criminal Defense Practice, Ch. 142 (Matthew Bender).

In a prosecution for domestic violence, the judge may not instruct the jury that it may consider charged domestic violence offenses as evidence of the defendant's criminal propensity in connection with other domestic violence charges joined for trial [*People v Quintanilla (2005) 132 Cal. App. 4th 572, 583, 33 Cal. Rptr. 3d 782]* .

[2] Noncohabiting Former Spouse and Others

Special criminal sanctions exist for battery against a noncohabiting former spouse, fiance, fiancee, or person with whom the defendant currently has, or previously had, a dating relationship. These sanctions include a fine, imprisonment, or both. Prescribed conditions are imposed if probation is granted, or if the execution of sentence is suspended, including the requirement that a convicted batterer participate in an approved treatment or counseling program [*see Penal Code § 243(e)*; *see also Penal Code § 243(f)(11)* (defining "dating relationship")].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptPenaltiesFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & Neglect

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§ 293.71 Family Code Remedies for Attempted Murder of Spouse

A spouse who is injured as the result of a murder attempt by the other spouse is entitled to an award of 100 percent of the community property interest in the retirement and pension benefits of the injured spouse. In other words, the injured spouse is entitled to retain all of his or her retirement and pension benefits, even if the other spouse would otherwise have a community property interest in the benefits. For this provision to be applicable, the culpable spouse must have been convicted of attempted murder. This remedy is provided in addition to any other that may be available [*see Fam. Code § 782.5*; *Penal Code § 664*; *see also Fam. Code § 4324* (defining "injured spouse")].

For a complete discussion of this retirement benefits award and related remedies pertaining to attorney's fees and an exemption from paying support to the culpable spouse, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & NeglectFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationRetirement BenefitsGeneral Overview

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§ 293.72 Suit for Damages

[1] Injuries from Domestic Violence Generally

A person who has been injured as the result of domestic violence is not limited to injunctive orders and associated remedies provided under the Family Code, but may also pursue any other available remedy [*see Fam. Code § 6227*]. In an appropriate case, this could include a civil action for damages [*see generally Ch. 177, Damages, § 177.40* et seq.].

However, a special statute of limitations provides that such an action must be commenced within three years from the date of the last act of domestic violence that gave rise to the cause of action, or within three years from the date the plaintiff discovered (or reasonably should have discovered) the injury or illness resulting from the act of domestic violence by the defendant against the plaintiff [*Code Civ. Proc. § 340.15*].

For a complete discussion of bringing actions for damages, see Ch. 123, *Complaints and Cross Complaints* , Ch. 177, *Damages* , § 177.40 et seq., and Levy, Golden & Sacks, California Torts, Ch. 40 et seq. (Matthew Bender).

[2] Tort of Domestic Violence

A person who commits an act of domestic violence on another is liable to that person for damages, including, but not limited to, general damages, special damages, and punitive damages pursuant to *Civ. Code § 3294* [*Civ. Code § 1708.6(b)*]. The court may grant a prevailing plaintiff equitable relief, an injunction, costs, and any other relief the court deems proper, including reasonable attorney's fees [*Civ. Code § 1708.6(c)*]. The rights and remedies provided in *Civ. Code § 1708.6* are in addition to any other rights and remedies provided by law [*Civ. Code § 1708.6(d)*].

A person is liable for the tort of domestic violence if the plaintiff proves both of the following elements [*Civ. Code § 1708.6(a)*]:

1. The infliction of injury on the plaintiff resulting from abuse, as defined in *Penal Code § 13700(a)*.

2. The abuse was committed by the defendant, a person having a relationship with the plaintiff as defined in *Penal Code § 13700(b)*.

An action for damages for the tort of domestic violence must be commenced within three years from the date of the last act of domestic violence that gave rise to the cause of action, or within three years from the date the plaintiff discovered or reasonably should have discovered the injury or illness resulting from the act of domestic violence by the defendant against the plaintiff [*Civ. Code § 1708.6(e)*; *Code Civ. Proc. § 340.15*].

For a complete discussion of actions for damages based on intentional acts, see Ch. 58, *Assault and Battery* . For discussion of actions for damages generally, see Ch. 123, *Complaints and Cross Complaints* , Ch. 177, *Damages* , § 177.40 et seq. For discussion of torts and tort actions generally, see Golden & Sacks, California Torts, Ch. 40 et seq. (Matthew Bender).

[3] Gender Violence

Any person subjected to gender violence may bring a civil action for damages against any responsible party. The plaintiff may seek actual damages, compensatory damages, punitive damages, injunctive relief, any combination of those, or any other appropriate relief. A prevailing plaintiff may also be awarded attorney's fees and costs [*Civ. Code § 52.4(a)*]. Notwithstanding any other laws that may establish the liability of an employer for the acts of an employee, *Civil Code section 52.4* does not establish civil liability of a person because of his or her status as an employer, unless the employer personally committed an act of gender violence [*Civ. Code § 52.4(d)*]. For these purposes, "gender violence," is a form of sex discrimination and means any of the following [*Civ. Code § 52.4(c)*]:

1. One or more acts that would constitute a criminal offense under state law that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, committed at least in part based on the gender of the victim, whether or not those acts have resulted in criminal complaints, charges, prosecution, or conviction [for criminal sanctions for abuse of a spouse or cohabitant, *see § 293.70*].

2. A physical intrusion or physical invasion of a sexual nature under coercive conditions, whether or not those acts have resulted in criminal complaints, charges, prosecution, or conviction.

An action for damages based on gender violence must be commenced within three years of the act, or if the victim was a minor when the act occurred, within eight years after the date the plaintiff attains the age of majority or within three years after the date the plaintiff discovers or reasonably should have discovered the psychological injury or illness occurring after the age of majority that was caused by the act, whichever date occurs later [*Civ. Code § 52.4(b)*].

For a complete discussion of actions for damages based on intentional acts, see Ch. 58, *Assault and Battery* . For discussion of actions for damages generally, see Ch. 123, *Complaints and Cross Complaints* , Ch. 177, *Damages* , § 177.40 et seq. For discussion of torts and tort actions generally, see Golden & Sacks, California Torts, Ch. 40 et seq. (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & NeglectTortsIntentional TortsAssault & BatteryRemedies

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§ 293.73 Federal Criminal Remedy

The federal Violence Against Women Act of 1994 (VAWA) provides a federalcriminal remedy to punish a person who travels across a state line (or enters or leaves Indian country) "with the intent to injure, harass, or intimidate that person's spouse or intimate partner and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury" to that spouse or intimate partner [*see 18 U.S.C. § 2261(a)(1)*]. However, a separate portion of the VAWA, which provided a federal civil action to victims of violent crimes that were committed because of gender or on the basis of gender, was found unconstitutional in 2000 by the U.S. Supreme Court [*United States v. Morrison (2000) 529 U.S. 598* (holding *42 U.S.C. § 13981* unconstitutional)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawCivil Rights ActsViolence Against Women ActCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsDomestic OffensesGeneral Overview

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§ 293.74 Denial of Spousal Support to Abusive Spouse

In any dissolution proceeding in which one spouse has been convicted of committing an act of domestic violence against the other spouse within five years before the filing of the dissolution proceeding, or at any time thereafter, there is a rebuttable presumption affecting the burden of proof that an award of temporary or permanent spousal support to the abusive spouse should not be made [*Fam. Code § 4325(a)*]. The court may consider documented evidence of a convicted spouse's history as a victim of domestic violence perpetrated by the other spouse, or any other factors the court deems just and equitable, as conditions for rebutting the presumption [*Fam. Code § 4325(b)*]. The presumption may be rebutted by a preponderance of the evidence [*Fam. Code § 4325(c)*]. The court is not required to consider the factors outlined in *Fam. Code § 4320* in making its determination under *Fam. Code § 4325* [*In re Marriage of Cauley (2006) 138 Cal. App. 4th 1100, 1102, 41 Cal. Rptr. 3d 902]* . The presumption of *Fam. Code § 4325* applies even when the parties' settlement agreement provides that spousal support is not subject to modification or termination [*In re Marriage of Cauley (2006) 138 Cal. App. 4th 1100, 1106-1109, 41 Cal. Rptr. 3d 902]* .

In ordering spousal support, the court must consider documented evidence of any history of domestic violence between the parties, including, but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party [*Fam. Code § 4320(i)*]. The criminal conviction of an abusive spouse must be considered in reducing or denying a spousal support award [*Fam. Code § 4320(m)*]. For additional discussion of factors in determining spousal support, see Ch. 225, *Dissolution of Marriage: Spousal Support* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & NeglectFamily LawMarital Termination & Spousal SupportSpousal SupportModification & TerminationGeneral Overview

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[Reserved]

§§ 293.75[Reserved]

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§ 293.80 Related Matthew Bender Publications

[1] California Family Law

For discussion of injunctive relief against domestic violence, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2d ed., Ch. 96

[2] California Criminal Defense Practice

For discussion of crimes against persons, see California Criminal Dfense Practice, Ch. 142

For discussion of crimes against property, see California Criminal Dfense Practice, Ch. 143

For discussion of crimes against public order, see California Criminal Dfense Practice, Ch. 144

[3] California Torts

For discussion of liability for assault and battery, see Levy, Golden, and Sacks, California Torts, Ch. 41

For discussion of liability for false imprisonment, see Levy, Golden, and Sacks, California Torts, Ch. 42

For discussion of liability for intentional infliction of emotional distress, see Levy, Golden, and Sacks, California Torts, Ch. 44

[4] California Employment Law

For discussion of employer liability to third parties for conduct of employees, see Wilcox, California Employment Law, Ch. 30

For discussion of employer liability for wrongful termination or discipline, see Wilcox, California Employment Law, Ch. 60

[5] California Points and Authorities

For memoranda of points and authorities relating to assault and battery, generally, see California Points and Authorities, Ch. 21, *Assault and Battery*

For memoranda of points and authorities relating to intentional infliction of emotional distress, see California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsGeneral OverviewFamily LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & NeglectLabor & Employment LawWrongful TerminationGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral Overview

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§ 293.81 Federal Statutes

Child Abuse Prevention and Treatment Act. *42 U.S.C. § 5101 et seq.*

Family Violence Prevention and Services Act. *42 U.S.C. § 10401 et seq.*

Violence Against Women Act. *18 U.S.C. § 2261*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawCivil Rights ActsViolence Against Women ActFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & Neglect

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25-293 California Forms of Pleading and Practice--Annotated § 293.82

§ 293.82 State Statutes

[1] Civil Harassment

[a] Attorney's Fees

Availability of costs and attorney's fees in harassment proceeding. *Code Civ. Proc. § 527.6(i)*

[b] Nature and Scope of Relief Against Civil Harassment

Minor's right to seek or oppose injunctive relief. *Code Civ. Proc. §§ 372(b), 374, 374.5*

Availability of temporary restraining order and injunction prohibiting harassment. *Code Civ. Proc. § 527.6(a)*

Definitions. *Code Civ. Proc. § 527.6(b)*

Duration of temporary restraining order; extension of duration. *Code Civ. Proc. § 527.6(c)*

Procedures. *Code Civ. Proc. § 527.6(c), (d), (g)*

Duration and renewal of injunction. *Code Civ. Proc. § 527.6(d)*

Representation by counsel. *Code Civ. Proc. § 527.6(e)*

Support persons. *Code Civ. Proc. § 527.6(f)*

Transmittal of information to law enforcement agencies. *Code Civ. Proc. § 527.6(h)*

Prohibition on possession of firearm. *Code Civ. Proc. § 527.6(k)*

Proceedings to which harassment injunction procedure does not apply. *Code Civ. Proc. § 527.6(l)*

Judicial Council as required to promulgate forms. *Code Civ. Proc. § 527.6(m)*

[c] Criminal Penalties

Willful (intentional) disobedience as punishable pursuant to *Penal Code § 273.6. Code Civ. Proc. § 527.6(j)*

[2] Workplace Violence

[a] Nature and Scope of Relief Against Workplace Violence

Right of employer to seek temporary restraining order and injunction on behalf of employee who has suffered unlawful violence or credible threat of violence, carried out in workplace. *Code Civ. Proc. § 527.8(a)*

Definitions of "employer," "employee," "credible threat of violence," and "course of conduct." *Code Civ. Proc. § 527.8(b), (d)*

Plaintiff's right to obtain temporary restraining order against workplace violence. *Code Civ. Proc. § 527.8(e)*

Clear and convincing evidence of unlawful violence or credible threat of violence as required to issue injunction against workplace violence. *Code Civ. Proc. § 527.8(f)*

Duration of injunction against workplace violence as not exceeding three years, subject to right to apply for renewal. *Code Civ. Proc. § 527.8(f)*

Prohibition on possession of firearm. *Code Civ. Proc. § 527.8(j)*

[b] Criminal Penalties

Intentional disobedience of injunction against workplace violence as punishable under *Penal Code § 273.6. Code Civ. Proc. § 527.8(k)*

[3] Domestic Violence

[a] Appointment of Counsel

Appointment of counsel for enforcement proceedings. *Fam. Code § 6386*

[b] Nature and Scope of Relief Against Domestic Violence

Reissuance of dissolved temporary restraining orders. *Fam. Code § 245*

Limitations on enjoined parent's visitation rights. *Fam. Code §§ 3020 et seq., 3100, 6223*

Domestic Violence Prevention Act. *Fam. Code § 6200 et seq.*

Protective orders to prevent domestic violence. *Fam. Code §§ 6218, 6300 et seq.*

Order as stating expiration date and notice for enforcement by law enforcement officers. *Fam. Code § 6224*

Remedies as not exclusive. *Fam. Code § 6227*

Oral issuance of emergency protective orders at request of police or sheriff's officer when court is not in session. *Fam. Code § 6240 et seq.*

Emergency protective orders for endangered child. *Fam. Code §§ 6250(b), 6251(b)*

Mutual restraining orders. *Fam. Code § 6305*

Ex parte protective orders. *Fam. Code § 6320 et seq.*

Orders issued after noticed hearing. *Fam. Code § 6340 et seq.*

Duration of protective order. *Fam. Code § 6345*

Enforcement of foreign protection orders under Uniform Interstate Enforcement of Domestic Violence Protection Orders Act. *Fam. Code § 6400 et seq.*

[c] Civil Action for Damages

Limitations period for commencing civil action for damages resulting from domestic violence. *Code Civ. Proc. § 340.15*

[d] Criminal Penalties

Violation of certain types of restraining orders as crime. *Fam. Code § 6388*

Criminal sanction for battery against noncohabiting former spouse, fiancee, or person in dating relationship. *Penal Code § 243(e)*

Criminal sanction for corporal injury on spouse, cohabitant, or person who is father or mother of respondent's child. *Penal Code § 273.5*

Malicious disclosure without authorization of domestic violence shelter. *Penal Code § 273.7*

Acquisition of firearm by person with knowledge that he or she is subject to domestic violence restraining order as crime. *Penal Code § 12021(g)*

[e] Evidence

Punishment for contempt against victim of domestic violence who refuses to testify. *Code Civ. Proc. §§ 128(e),* 1219(b)

Domestic violence victim-counselor privilege. *Evid. Code §§ 1037-1037.7*

[f] Forms and Filing Fees

No filing fee for petition or response relating to protective order, restraining order, or permanent injunction restraining violence or threats of violence. *Fam. Code § 6222*

Judicial Council forms for use under Act. *Fam. Code § 6226*

[g] Information for Domestic Violence Victims

Responsibility of superior court clerk to distribute informational pamphlet to domestic violence victims. *Penal Code § 13711*

[h] Law Enforcement Agencies

Notifying Department of Justice of orders; maintenance of Domestic Violence Restraining Order Registry. *Fam. Code §§ 6380, 6385*

Employees of local law enforcement agencies, courts, or Department of Justice as immune from civil liability for injury to person due to court's failure in hearing on restraining order to notify parties of firearm prohibition and penalties for violation. *Fam. Code § 6385(c)*

Law enforcement officer assigned to case of rape or other sex crime as required to provided victim with "Victims of Domestic Violence" card. *Penal Code §§ 264.2(a), 13701(i)(5)*

Probation officer, or parole officer or agent, as authorized to serve process with regard to temporary restraining order or other protective order issued against person committed to care of that officer or agent. *Penal Code § 1203.11*

Law enforcement agencies as required to develop, adopt, and implement policies and standards for response to domestic violence calls and for provision of informational statements and "Victims of Domestic Violence" card to victim at scene. *Penal Code §§ 13701, 13702*

[4] Elderly and Dependent Adult Abuse

Abuse of elderly and dependent adults. *Welf. & Inst. Code § 15600 et seq.*

Award of attorney's fees as available in civil action for abuse of elderly or dependent adult. *Welf. & Inst. Code §§ 15657(a), 15657.1*

[5] Immunity of Psychotherapist

Psychotherapist as having limited immunity from civil action based on failure to warn of and protect from patient's threatened violent behavior. *Civ. Code § 43.92*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptPenaltiesFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectLabor & Employment LawWorkplace Violence

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§ 293.83 California Rules of Court

Scheduling of hearing on petition to enjoin harassment. *Cal. Rules of Ct., Rule 3.1152(a)*

Points and authorities as not required unless otherwise ordered. *Cal. Rules of Ct., Rule 3.1152(b)*

Service of petition and order. *Cal. Rules of Ct., Rule 3.1152(c)*

Response by respondent. *Cal. Rules of Ct., Rule 3.1152(d)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsAnswersCivil ProceduresPleading & PracticeService of ProcessGeneral OverviewCivil ProceduresRemediesInjunctionsGeneral Overview

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§ 293.84 Local Court Rules

[1] Bay Area

NOTE:
The Bay Area Superior Court Bay Area Super. Ct. Dom. Rel. Rules (for Alameda, Contra Costa, Marin, San Francisco, San Mateo, Solano, and Sonoma Counties) have been superseded by local rules in some, but not all, Bay Area counties [*see, e.g.,* San Francisco County, in [3], ***below***].

Ex parte orders in domestic relations cases. Bay Area Super. Ct. Dom. Rel. Rules, Rule I(D)

[2] Los Angeles County

Procedures regarding ex parte matters in Family Law proceedings. Los Angeles Co. Super. Ct. Rules, Rule 14.2

[3] San Francisco City and County

Ex parte orders. San Francisco Uniform Local Ct. Rules, Rule 11.8

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareChildrenChild Abuse Prevention & Treatment ActFamily LawFamily Protection & WelfareChildrenProceedingsFamily LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & Neglect

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25-293 California Forms of Pleading and Practice--Annotated § 293.85

§ 293.85 Decisions

[1] Civil and Workplace Harassment

Single incident of harassment as not "course of conduct" within meaning of *Code Civ. Proc. § 527.6(b)*. *Leydon v. Alexander (1989) 212 Cal. App. 3d 1, 5, 260 Cal.Rptr. 253*

In harassment case, determination of prevailing party as within trial court's discretion, and person may be "prevailing party" even if he or she is included in terms of restraining order. *Elster v. Friedman (1989) 211 Cal. App. 3d 1439, 1443-1444, 260 Cal. Rptr. 148*

Trial court in harassment proceeding as not permitted arbitrarily to limit evidence presented to written testimony if relevant oral testimony is offered, and both sides may offer evidence by deposition, affidavit, or oral testimony, all of which court must receive, subject to necessary and reasonable limitations to conserve expeditious nature of harassment procedure as set forth by statute. *Schraer v. Berkeley Property Owners Assn. (1989) 207 Cal. App. 3d 719, 732 n.6, 255 Cal. Rptr. 453*

Noise from intermittent backyard basketball playing and "verbal chatter" of players as not constituting unlawful harassment. *Schild v. Rubin (1991) 232 Cal. App. 3d 755, 762-763, 283 Cal. Rptr. 533*

Term "substantial emotional distress" in *Code Civ. Proc. § 527.6(b)* as properly comparable to "severe emotional distress" in the tort context of intentional infliction of emotional distress. *Schild v. Rubin (1991) 232 Cal. App. 3d 755, 762-763, 283 Cal. Rptr. 533*

[2] Domestic Violence

Domestic relations exception to diversity jurisdiction (*see 28 U.S.C. § 1332*) as inapplicable to suit involving alleged torts by former spouse and companion against petitioner's children; domestic relations exception as encompassing only cases involving issuance of divorce, alimony, or child custody decree. *Ankenbrandt v. Richards (1992) 504 U.S. 689,*

701-704, 112 S. Ct. 2206, 119 L. Ed. 2d 468

State protective services agency as having no duty, as a matter of due process under *U.S. Const., amend. XIV*, to intervene to protect minor child from violent father, despite agency's prior knowledge of father's abusive behavior and prior removal of child from his custody. *DeShaney v. Winnebago County Dep't of Social Servs. (1989) 489 U.S. 189, 195-198*

No "special relationship" was properly alleged for purposes of federal due process pursuant to *42 U.S.C. § 1983* between city police agency and woman abused and harassed by estranged husband, despite existence of restraining order and agency's knowledge of order and ongoing violent acts; however, dismissal of entire complaint with prejudice was abuse of discretion when woman could plausibly amend complaint to state equal protection claim. *Balistreri v. Pacifica Police Dep't (9th Cir. 1990) 901 F.2d 696, 700-702*

When court has issued ex parte custody and visitation orders at request of one party, it must elicit evidence under *Fam. Code § 6340(a)* as to whether other party can demonstrate parent-child relationship with minor children and, if so, whether earlier custody and visitation orders should be modified to ensure mutual safety of children and party having custody. *Gonzalez v. Munoz (2007) 156 Cal. App. 4th 413, 422-423, 67 Cal. Rptr. 3d 317*

Named person protected under domestic violence injunctive order as unable validly to effect personal service of order on respondent in action. *Caldwell v. Coppola (1990) 219 Cal. App. 3d 859, 865*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & NeglectLabor & Employment LawWorkplace Violence

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§ 293.86 Law Reviews

Note, *Federal Enclaves and Local Law: Carving Out a Domestic Violence Exception to Exclusive Legislation Jurisdiction, 100 Yale L.J. 189 (1990)*

Note, *Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why, 34 Stan. L. Rev. 513 (1982)*

Freeman, *But if You Can't Rape Your Wife, Who[m] Can You Rape?: The Marital Rape Exemption Reexamined*, 15 Fam. L.Q. 1 (1981)

Marcus, *Conjugal Violence: The Law of Force and the Force of Law, 69 Cal. L. Rev. 16 (1981)*

Note, *The Battered Wife's Dilemma: To Kill or to Be Killed, 32 Hastings L.J. 895 (1981)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsExclusive JurisdictionCriminal Law & ProcedureDefensesSelf-DefenseFamily LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & Neglect

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§ 293.87 Text References

California Civil Actions--Pleading & Practice, Ch. 40 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral Overview

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[Reserved]

§§ 293.88[Reserved]

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25-293 California Forms of Pleading and Practice--Annotated § 293.100

§ 293.100 Request for Orders to Stop Harassment--Cal. Judicial Council Form CH-100 [Code Civ. Proc. §§ 527.6, 527.9]

[1] FORM Petition for Injunction Prohibiting Harassment and Application for Temporary Restraining Order--Cal. Judicial Council Form CH-100 [Code Civ. Proc. § 527.6]

Click here to view image.

[2] Use of Form

This form is an illustrative version of the mandatory Judicial Council form of Request for Orders to Stop Harassment under the civil harassment statutes [*see Code Civ. Proc. §§ 527.6, 527.9*; Cal. Judicial Council Form CH-100]. The form may be obtained from any superior court county clerk. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form of request is for use by the plaintiff to obtain an injunction against harassment [*see Code Civ. Proc. § 527.6*]. The plaintiff may also use this form to apply for a temporary restraining order prior to the hearing on the injunction. Unless otherwise ordered, no memorandum of points and authorities is required [*Cal. Rules of Ct., Rule 3.1152(b)*].

In filing this form, counsel must also include a Judicial Council form of Civil Case Cover Sheet, which is required for statistical purposes in all civil actions, except those filed in small claims court, or filed under the Family Code, Probate Code, or Welfare and Institutions Code. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Form* s, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

At least three copies of the request should be made: an original to file with the court, a copy for each defendant, and a copy for the files of the plaintiff's attorney. A copy may also be made for the plaintiff.

If a temporary restraining order is granted, the plaintiff's attorney should make copies for each law enforcement agency listed in Paragraph 13 and deliver them to the agencies [*see Code Civ. Proc. § 527.6(h)*].

[3] Service on Defendant

On the filing of a Request for Orders to Stop Harassment under *Code Civ. Proc. §§ 527.6, 527.9*, the defendant must be personally served with a copy of the request and any Temporary Restraining Order [*Code Civ. Proc. § 527.6(g)*; *Cal. Rules of Ct., Rule 3.1152(c)*; *see § 293.101[1]*], the Notice of Hearing of the request--which is incorporated in the request [*Code Civ. Proc. § 527.6(g)*], and the Order to Show Cause--which is incorporated with the temporary restraining order [*Cal. Rules of Ct., Rule 3.1152(c)*; *see § 293.101[1]*]. A blank Judicial Council form of Answer to Request for Orders to Stop Harassment [§ 293.103[1]] must also be served.

Service of these papers must be made at least five days before the hearing. However, the court may for good cause, on motion of the applicant or on its own motion, shorten the time for service on the opposing party[*Code Civ. Proc. § 527.6(g)*]. For further discussion of orders shortening time, see Ch. 524, *Shortening and Extension of Time* .

Service must be made in the manner provided by law for personal service of summons in civil actions [*Cal. Rules of Ct., Rule 3.1152(c)*; *see* Form 3]. The person who performs service should complete the Judicial Council's approved form of Proof of Personal Service (Civil Harassment) [Cal. Judicial Council Form CH-130; *see § 293.102[1]*. For discussion of personal service of summons in civil actions, see Ch. 518, *Service of Summons and Papers* .

[4] Filling in Request

In Paragraph 1, the name(s) of each person asking for protection should be set forth. Paragraph 2 should be completed by indicating the defendant's name and identifying information, along with the defendant's home and work address if known. The names of all other persons who need protection should be listed in Paragraph 3, including their ages and relationship to the plaintiff. One of the three boxes in Paragraph 4 should be checked to indicate proper venue for the proceeding. The venue provisions of the *Code Civ. Proc. § 395(a)* will determine the proper superior court in which to file the application because no action is pending. The Judicial Council seems to be treating the proceeding as a tort action and following the second sentence of *Code of Civ. Proc. § 395(b)*, since Box 4(b) indicates that the action may be filed in the county where defendant caused plaintiff physical or emotional injury.

Paragraph 5 should explain how it came to be that the applicant knows the defendant. The harassment should be described with specificity in Paragraph 6. If more space is needed under this paragraph, the appropriate box may be checked and additional pages appended as Attachment 6.

The appropriate boxes in Paragraphs 7 and 8 should be checked to indicate the orders requested. The appropriate boxes in Paragraph 9 should be checked to indicate whether or not others should also be covered by the requested orders. Paragraph 11 should be completed if other orders are requested.

If a temporary restraining order is requested, Box 12 should be checked, and an explanation should be given concerning why the order is needed before a court hearing. Paragraph 13 should list all law enforcement agencies to receive a copies of orders made as a result of the petition.

Paragraph 14 should be completed to indicate whether or not the applicant has ever requested restraining orders against the defendant. If the defendant cannot be served with the Request and supporting papers at least five days before the hearing, an explanation of the reasons why more time is needed for service mustbe set forth in Paragraph 15. The box in Paragraph 16 should be checked if a waiver of the filing fee is sought. If the applicant is eligible for a waiver of the fee for service of the order, the box in Paragraph 17 should be checked, and a Request and Order for FreeService of Restraining Order (Cal. Judicial Council Form CH-101) should be filed with the petition [*see § 293.107*]. Paragraph 18

should be checked if attorney's fees and costs are sought, and the costs should be specified.

The form must be signed by both the attorney and the applicant.

[5] Cross References

For discussion of orders shortening time, see Ch. 524, *Shortening and Extension of Time*

For discussion of personal service of summons in civil actions, see Ch. 518, *Service of Summons and Papers*

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25-293 California Forms of Pleading and Practice--Annotated § 293.101

§ 293.101 Notice of Hearing (Civil Harassment) and Temporary Restraining Order (CLETS)--Cal. Judicial Council Form CH-120 [Code Civ. Proc. §§ 527.6, 527.9]

[1] FORM Order to Show Cause (Civil Harassment) and Temporary Restraining Order (CLETS)--Cal. Judicial Council Form CH-120 [Code Civ. Proc. § 527.6]

Click here to view image.

[2] Use of Form

This form is an illustrative version of the mandatory Judicial Council form of Notice of Hearing and Temporary Restraining Order (CLETS) under the civil harassment statutes [*see Code Civ. Proc. §§ 527.6, 527.9*; Cal. Judicial Council Form CH-120]. The form may be obtained from any superior court clerk. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form of notice of hearing is for use by plaintiff to notify defendant to appear at the hearing, and of the contents of any temporary restraining order granted until the time of hearing. If desired, plaintiff or his or her attorney may request a temporary restraining order that prohibits harassment prior to the hearing [*see Code Civ. Proc. § 527.6(c)*; § 293.100[1] (Request for Orders to Stop Harassment)].

[3] Procedure When Courts Grants Temporary Restraining Order

If the court grants a temporary restraining order, plaintiff should file the original with the court clerk and have the copies stamped. Plaintiff should make sure that the appropriate law enforcement agencies are notified so that they will enforce the order. In the order, the court will specify who is responsible for delivering a copy of the order and any proof of service to the law enforcement agencies listed in the order. Generally, the court will require plaintiff or plaintiff's attorney to deliver a copy of the order to the appropriate law enforcement agencies [*see Code Civ. Proc. § 527.6(h)*; *see also § 293.17[7]*].

Plaintiff or plaintiff's attorney should make arrangements to have the defendant personally served with copies of the following: (1) the Request for Orders to Stop Harassment [§ 293.100[1]]; (2) the above notice of hearing and temporary restraining order [*see Code Civ. Proc. § 527.6(g)*]; and (3) a blank form of the Answer to Request for Orders to Stop Harassment [§ 293.103[1]]. For discussion on personal service and proof of service, see §§ 292.100[2], *293.102[2]*.

The following copies will be needed: an original to file with the court, a copy for each defendant, a copy for each law enforcement agency that is to be notified if a temporary restraining order is issued, a copy for the files of the plaintiff's attorney, and a copy for the plaintiff, if desired.

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25-293 California Forms of Pleading and Practice--Annotated § 293.102

§ 293.102 Proof of Service (Civil Harassment)--Cal. Judicial Council Forms CH-130, CH-131 [Code Civ. Proc. § 527.6(g)]

[1] FORMS Proof of Service (Civil Harassment)--Cal. Judicial Council Forms CH-130, CH-131 [Code Civ. Proc. § 527.6(g)]

Click here to view image.

[2] Use of Forms

Illustrated are reproductions of the Judicial Council forms of Proof of Personal Service (Civil Harassment) and Proof of Service by Mail (Civil Harassment) [Cal. Judicial Council Forms CH-130, CH-131]. Each form is optional for use, but its use is strongly recommended. These forms may be obtained from any superior court county clerk. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The first illustrated form is for use by plaintiff to prove that the correct forms have been personally served on defendant, as required by *Code Civ. Proc. § 527.6(g)* and *Cal. Rules of Ct., Rule 3.1152(c)*. It should be filled in by the person who completes personal service on defendant, and the original should be filed with the court.

Cal. Judicial Council Form CH-131, the second illustrated form, may be used by a defendant to establish proof of service by mail of the completed response form or other documents.

Judicial Council Form CH-135, What Is "Proof of Service," may be helpful to persons who are applying for civil harassment restraining orders without the assistance of counsel. It explains the requirements for and the mechanics of service. It may be obtained from any county clerk or on the California Courts web site.

[3] When Service Required and Who May Serve

On filing a request for orders to stop harassment under *Code Civ. Proc. § 527.6* (civil harassment statute), the defendant must be personally served with a copy of the request [Cal. Judicial Council Form CH-100; *see § 293.100[1]*] and various other papers, as discussed in *§ 293.100[2]*.

Under the law governing personal service in civil actions, service may be made by any person over 18 years of age other than the plaintiff, including a licensed process server, or by the sheriff's department [*see Code Civ. Proc. § 414.10*]. For further discussion of procedures involved in effecting personal service, see Ch. 518, *Service of Summons and Papers* .

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25-293 California Forms of Pleading and Practice--Annotated § 293.103

§ 293.103 Answer to Request for Orders to Stop Harassment--Cal. Judicial Council Form CH-110 [Code Civ. Proc. §§ 527.6, 527.9]

[1] FORM Response to Petition for Injunction Prohibiting Civil Harassment--Cal. Judicial Council Form CH-110 [Code Civ. Proc. § 527.6(d)]

Click here to view image.

[2] Use of Form

This form is a reproduction of the mandatory Judicial Council form of Answer to Request for Orders to Stop Harassment under the civil harassment statutes [*see Code Civ. Proc. §§ 527.6, 527.9*; Cal. Judicial Council Form CH-110]. The form may be obtained from any superior court county clerk. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The answer is for use by defendant to explain, excuse, justify, or deny the alleged harassment [*see Code Civ. Proc. § 527.6(d)*]. A copy of the answer must be served on plaintiff or plaintiff's attorney no later than 48 hours before the hearing [*see Cal. Rules of Ct., Rule 3.1152(d)*].

[3] Filling In Answer

Box 3 should be checked if plaintiff requested a restraining order; and the appropriate additional box in that paragraph should be checked to reflect the degree of defendant's consent, if any, to the request. Similarly, Box 4 should be checked if plaintiff requested a stay-away order, and the appropriate additional box should be checked accordingly.

Box 5 should be checked, and the appropriate additional box in that paragraph should also be checked, to indicate that the defendant does not own, possess, or control any firearms; or if the defendant *does* own, possess, or control any firearms whether or not the defendant consents to the order regarding relinquishment of firearms requested in the

petition.

If there are other orders, Box 6 should be checked, and the corresponding Box 6(a), (b), or (c) checked to indicate consent or lack of consent. If Box 6(c) is checked, the specific orders to which defendant consents should be specified.

Paragraph 7 should be filled in if plaintiff has not suffered emotional distress, if a reasonable person in plaintiff's position would not have suffered such distress, or if plaintiff's alleged distress is not the result of defendant's alleged acts [*see Code Civ. Proc. § 527.6(b)*]. All three boxes may be checked if appropriate.

If the defendant's acts were not intentional, Box 8 should be checked. If the defendant denies doing all or some of the acts alleged in the Request, the appropriate box in Paragraph 9 should be checked, and Paragraphs 10 and 11 should be completed.

Box 12 should be marked to indicate that defendant is not required to pay a fee for filing the answer. However, a fee may be required if the court finds that violence occurred or threats of violence were made. If defendant requests fees or costs [*see Code Civ. Proc. § 527.6(i)*], Paragraph 13 should so indicate. Box 14 should be checked if the defendant requests other relief.

The form must be signed by both the attorney and the defendant.

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25-293 California Forms of Pleading and Practice--Annotated § 293.104

§ 293.104 Restraining Order After Hearing to Stop Harassment (CLETS)--Cal. Judicial Council Form CH-140 [Code Civ. Proc. §§ 527.6, 527.9]

[1] FORM Restraining Order After Hearing to Stop Harassment--Cal. Judicial Council Form CH-140 [Code Civ. Proc. §§ 527.6, 527.9]

Click here to view image.

[2] Use of Form

This form is a reproduction of the mandatory Judicial Council form of Restraining Order After Hearing to Stop Harassment (CLETS) under the civil harassment statutes [*see Code Civ. Proc. §§ 527.6, 527.9*; Cal. Judicial Council Form CH-140]. The form may be obtained from any superior court county clerk. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is for use by plaintiff to set forth the court's injunction prohibiting harassment, after a hearing. If the judge finds by clear and convincing evidence that harassment exists, he or she must issue an injunction prohibiting the harassment [*see Code Civ. Proc. § 527.6(d)*]. The order should be completed and presented to the judge for his or her signature. After it is signed, it should be filed with the clerk. In the order, the court will require plaintiff or plaintiff's attorney to deliver a copy of the order to the appropriate law enforcement agencies [*see Code Civ. Proc. § 527.6(h)*; *see also § 293.17[7]*]. If defendant did not appear at the hearing, defendant should be served personally with the copies of the order.

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25-293 California Forms of Pleading and Practice--Annotated § 293.105

§ 293.105 Reissue Temporary Restraining Order (Civil Harassment)--Cal. Judicial Council Form CH-125 [Code Civ. Proc. §§ 527.6, 527.9]

[1] FORM Reissue Temporary Restraining Order (Civil Harassment)--Cal. Judicial Council Form CH-125 [Code Civ. Proc. §§ 527.6, 527.9]

Click here to view image.

[2] Use of Form

This form is a filled-in reproduction of the Judicial Council's approved form of Reissue Temporary Restraining Order (Civil Harassment) [*see Code Civ. Proc. §§ 527.6, 527.9*; Cal. Judicial Council Form CH-125]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Primary grounds for seeking a reissuance of the temporary restraining order include the plaintiff's inability to effect service on the defendant as required before the original hearing date, and the continuance of the original hearing because of the parties' referral to dispute resolution services or another mediation provider [*see Code Civ. Proc. § 527(d)(5)*].

The form should be completed and presented to the judge for signature, after which a copy (an "endorsed-filed" copy) must be attached to the notice of hearing and other papers (as listed in the notice of hearing) and then served on the defendant. As in the case of the original notice of hearing, a copy of the signed order for reissuance of the temporary restraining order (and any proof of service) must be delivered to the law enforcement agency or agencies listed in the original notice of hearing [*see Code Civ. Proc. § 527.6(g), (h)*]. For related comments on service and copies to prepare, see *§ 293.100[2]*.

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25-293 California Forms of Pleading and Practice--Annotated § 293.106

§ 293.106 Proof of Firearms Turned In or Sold--Cal. Judicial Council Form CH-145 [Code Civ. Proc. § 527.9]

[1] FORM Proof of Firearms Turned In or Sold--Cal. Judicial Council Form CH-145 [Code Civ. Proc. § 527.9]

Click here to view image.

[2] Use of Form

This form is a reproduction of the approved Judicial Council form of Proof of Firearms Turned In or Sold under the civil harassment statutes [*see Code Civ. Proc. §§ 527.6, 527.9*; Cal. Judicial Council Form CH-145]. This form may be obtained from any superior court clerk. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is for use by a defendant in a civil harassment action to report to the court that the defendant has sold or turned in any firearms owned or possessed by the defendant.

A defendant who is subject to a protective order under *Code Civ. Proc. § 527.6* is prohibited from owning, possessing, purchasing, receiving, or attempting to purchase or receive a firearm while the protective order is in effect [*Code Civ. Proc. § 527.6(k)(1)*]. The court must order the defendant to relinquish under *Code Civ. Proc. § 527.9* any firearms the defendant owns or possesses [*Code Civ. Proc. §§ 527.6(k)(2), 527.9(a)*].

On the issuance of a protective order, the court must order the defendant to relinquish any firearm in his or her immediate possession or control, or subject to his or her immediate possession or control, within 24 hours of being served with the order, either by surrendering the firearm to the control of local law enforcement officials, or by selling the firearm to a licensed gun dealer [*Code Civ. Proc. § 527.9(b)*]. The defendant must file with the court a receipt showing that the firearm was surrendered to the local law enforcement agency or sold to a licensed gun dealer within 48 hours after receiving the order [*Code Civ. Proc. § 527.9(b)*]. This form may be used for this purpose.

Items 1 through 3 and 6 through 8 of the form must be completed by the defendant, who must also sign the form. The

form must then be submitted to the law enforcement agency or licensed gun dealer for completion of item 4 or item 5 of the form. The fully completed form is then filed with the court.

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25-293 California Forms of Pleading and Practice--Annotated § 293.107

§ 293.107 Request and Order for Free Service of Restraining Order--Cal. Judicial Council Form CH-101/DV-290 [Code Civ. Proc. § 527.6; Fam. Code § 6222]

[1] FORM

Click here to view image.

[2] Use of Form

The form set out in [1], above, is a reproduction of the mandatory Judicial Council form of Request and Order for Free Service of Restraining Order adopted for use in civil harassment and domestic violence cases [Cal. Judicial Council Form CH-101/DV-290; *see Code Civ. Proc. § 527.6(q)(2)*]. A copy suitable for reproduction also may be found in the Judicial Council Forms volume of this set. This form is also available in Spanish [Cal. Judicial Council Form CH-101/DV-290 S] and Chinese [Cal. Judicial Council Form CH-101/DV-290 C].

An Application for Waiver of Court Fees and Costs [Cal. Judicial Council Form FW-001] must be completed and filed with the request for free service.

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25-293 California Forms of Pleading and Practice--Annotated §§ 293.108-293.129

[Reserved]

§§ 293.108[Reserved]

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25-293 California Forms of Pleading and Practice--Annotated § 293.130

§ 293.130 Petition of Employer for Injunction Prohibiting Violence or Threats of Violence Against Employee (Workplace Violence) and Application for Temporary Restraining Order--Cal. Judicial Council Form WV-100 [Code Civ. Proc. §§ 527.8, 527.9]

[1] FORM Petition of Employer for Injunction Prohibiting Violence or Threats of Violence Against Employee (Workplace Violence) and Application for Temporary Restraining Order--Cal. Judicial Council Form WV-100 [Code Civ. Proc. § 527.8]

Click here to view image.

[2] Use of Form

This form is an illustration of the mandatory Judicial Council form of Petition for Injunction Prohibiting Violence or Threats of Violence Against Employee (Workplace Violence) and Application for Temporary Restraining Order [Cal. Judicial Council Form WV-100]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is for use by an employer in seeking injunctive relief on behalf of its employee, based on the employee having been the victim of actual violence or a credible threat of violence in the workplace [*see Code Civ. Proc. § 527.8*]. The form permits the plaintiff to seek a temporary restraining order, as well as an injunction after notice and a hearing. A temporary restraining order may only be granted, however, on a showing of reasonable proof that the employee has suffered unlawful violence or a credible threat of violence and that great or irreparable harm will result to the employee unless the order is granted [*Code Civ. Proc. § 527.8(e)*]. If a temporary restraining order is being sought, the box entitled "Application for Temporary Restraining Order" must be marked below the form title, as well as the box for Item 7, and the boxes in Items 9 and 10 indicating that the application is for an order that would apply "now and [be] effective until the hearing." For additional discussion and a combined form of Order to Show Cause and Temporary Restraining Order (CLETS) that is used in Workplace Violence matters, see *§ 293.132[1]* [*see* Cal. Judicial Council Form WV-120].

The employer is the plaintiff and must be listed as such in the caption. The employee is to be listed in the caption opposite the word "Employee." The individual who has carried out or threatened workplace violence is the party defendant. Note that if the defendant is also an employee, he or she is still only listed as the defendant, but the status of the defendant as an employee must be disclosed in Item 3 of the petition.

Identifying information for the plaintiff, employee, and the defendant, is to be set forth in Items 1, 2, and 3 of the petition, respectively, with a venue allegation required in Item 4. If the plaintiff has asked, or is asking, for restraining orders against the defendant in another action, this must be disclosed by marking the check-off boxes in Item 5. Item 6 contains check-off boxes that must be marked, as appropriate, to allege the basis for injunctive relief under *Code Civ. Proc. § 527.8*. As part of Item 6, the plaintiff must set forth facts describing the nature of the harassment. If space on the form is inadequate, an additional page should be attached. If the plaintiff lacks direct knowledge of the underlying facts, an additional declaration (under penalty of perjury) from a person with directknowledge--such as the employee--must be attached. Plaintiff must alsodisclose whether the petition is based on personal knowledge or on the basis of information and belief.

The orders being sought are to be indicated by marking the appropriate check-off boxes. Personal conduct and "stay away" orders are set out in Items 9 and 10. Note that on a showing of good cause, and in the discretion of the court, injunctive relief may be granted not only on behalf of the employee, but on behalf of the employee's family or household members who reside with the employee, or other persons employed at his or her workplace or workplaces [*Code Civ. Proc. § 527.8(e)*]. Therefore, if orders in favor of family or household members, or co-workers, are requested these should be indicated by marking the boxes designated.

Item 11 sets forth the request for an order prohibiting the defendant from owning or possessing a firearm while the protective order is in effect, and requiring the defendant to relinquish any firearms.

Any associated orders to help implement other orders sought, may be requested by marking the box in Item 12. Orders for notification of law enforcement agencies should be set out in Item 13, and for shortening time for service of the Order to Show Cause (*see § 293.132*) should be set out in item 14.

If the plaintiff requests costs, Item 15 should be completed. If the plaintiff is not required to pay a filing fee, Item 17 should be checked.

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25-293 California Forms of Pleading and Practice--Annotated § 293.131

§ 293.131 Response to Petition of Employer for Injunction Prohibiting Violence or Threats of Violence Against Employee (Workplace Violence)--Cal. Judicial Council Form WV-110 [Code Civ. Proc. § 527.8]

[1] FORM Response to Petition of Employer for Injunction Prohibiting Violence or Threats of Violence Against Employee--Cal. Judicial Council Form WV-110 [Code Civ. Proc. § 527.8]

Click here to view image.

[2] Use of Form

This form is an illustration of the mandatory Judicial Council form of Response to Petition of Employer for Injunction Prohibiting Violence or Threats of Violence Against Employee (Workplace Violence) [Cal. Judicial Council Form WV-110]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Form* s, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is for use by defendant in an action for injunctive relief against workplace violence to respond to a petition (*see § 293.130[1]*) filed in that action [*see Code Civ. Proc. § 527.8*]. Items 1, 2, and 5 of the form contain check-off boxes by which the defendant may indicate whether he or she consents to injunctive orders that have been sought by the plaintiff, or alternatively, whether the defendant consents to some variation on those orders. If the defendant denies doing all of the actions alleged in the petition, the check-off box in item 3.a. should be marked. If the defendant denies doing some, but not all, of the actions alleged, the check-off box in item 3.b. should be marked and the actions specifically denied set forth.

A defendant who claims legal justification or excuse for actions alleged in the petition may state that claim by marking the appropriate check-off boxes in Item 4, and setting forth the reasons why the actions served a legitimate purpose or were constitutionally protected.

In Item 6, the defendant may make a request for an award of costs, and "additional relief as may be proper," as well as for the expenses incurred "as the result of the issuance of a temporary restraining order without sufficient supporting

facts."

In Item 7, the defendant may indicate additional reasons why the injunctive relief sought should not be granted. An attached declaration made under penalty of perjury should be appended if the space provided on this form is inadequate for this purpose.

If the defendant is not required to pay a filing fee, Item 8 should be checked.

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25-293 California Forms of Pleading and Practice--Annotated § 293.132

§ 293.132 Order to Show Cause and Temporary Restraining Order (CLETS)--Cal. Judicial Council Form WV-120 [Code Civ. Proc. §§ 527.8, 527.9; Penal Code § 273.6(a)]

[1] FORM Order to Show Cause (Workplace Violence) and Temporary Restraining Order (CLETS)--Cal. Judicial Council Form WV-120 [Code Civ. Proc. § 527.8]

Click here to view image.

[2] Use of Form

This form is an illustration of the approved Judicial Council form of Order to Show Cause (Workplace Violence) and Temporary Restraining Order (CLETS) (Workplace Violence) [Cal. Judicial Council Form WV-120]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is used to set forth the terms of a temporary restraining order against workplace violence involving a named defendant, as well as to notify the defendant of the time and place of a hearing on an underlying petition against workplace violence [*Code Civ. Proc. § 527.8*]. A temporary restraining order may be issued only on a showing of reasonable proof of an employee having suffered unlawful violence or a credible threat of violence, and that great or irreparable harm would result to the employee. In the court's discretion, the order may also be made applicable to the employee's family or household members who reside with the employee, on a showing of good cause, or other persons employed at his or her workplace or workplaces [*Code Civ. Proc. § 527.8(e)*; *see 293.32[1]*].

This form, together with the completed petition (*see § 293.130[1]*) and a blank response form (*see § 293.131[1]*), must be personlly served on the defendant [*see Code Civ. Proc. § 527.8(h)*]. For a form of proof of service that is to be used, see *§ 293.133[1]* [Cal. Judicial Council Form WV-130].

The form is to be completed by the plaintiff, except for the hearing information and times for service and for filing proof of service (Items 2 and 4, filled in, *above*, for illustration only)--which will be completed by the clerk of the court

who assigns show cause hearing dates--and then submitted to the assigned judge for review and signature. The terms of the temporary injunctive order that are directed to the defendant must be set forth in Items 6-10. Law enforcement agencies to whom the plaintiff (or plaintiff's attorney) must deliver a copy of the order and any proof of service of the order, must be specified in Item 13 [*see Code Civ. Proc. § 527.8(i)*]. If an order shortening time for service of the order to show cause is granted, the check-off box for Item 12 must be marked and terms of that order described in the space provided.

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25-293 California Forms of Pleading and Practice--Annotated § 293.133

§ 293.133 Proof of Service (Workplace Violence)--Cal. Judicial Council Forms WV-130, WV-131, WV-132 [Code Civ. Proc. §§ 527.8, 527.9]

[1] FORMS Proof of Service (Workplace Violence)--Cal. Judicial Council Forms WV-130, WV-131, WV-132 [Code Civ. Proc. § 527.8]

Click here to view image.

[2] Use of Forms

These forms are illustrations of the approved Judicial Council forms of Proof of Personal Service (Workplace Violence) and Proof of Service of Completed Response (Workplace Violence)--with separate forms for service by mail and by personal delivery) [Cal. Judicial Council Forms WV-130, WV-131, WV-132]. These forms are available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The first illustrated form, Proof of Personal Service (Workplace Violence) [Cal. Judicial Council Form WV-130], is primarily intended for use to reflect service of the Petition and related moving papers in an action for injunctive relief against workplace violence [*see Code Civ. Proc. § 527.8(h)*; Cal. Judicial Council Forms WV-100, WV-120; §§ 293.130[1] (petition), 293.132[1] (order to show cause and temporary restraining order); *see also* Cal. Judicial Council Form WV-110 (response, a blank copy of which must also be served on the defendant; § 293.131[1])]. It may, however, be used to reflect personal service of other forms, as indicated in Item 2.

The second illustrated form, Proof of Service of Completed Response (Workplace Violence) [Cal. Judicial Council Form WV-131], is intended for use to reflect service by mail of the Response [*see* Cal. Judicial Council Form WV-110; § 293.131[1]] and any associated papers on the plaintiff in an action for injunctive relief against workplace violence [*Code Civ. Proc. § 527.8*]. An unsigned copy of this form must be attached to and served with the other papers served.

The third illustrated form, which bears the same title as the second but a different form number [Cal. Judicial Council

Form WV-132], is also for service of a completed Response to Petition of Employer for Injunction Prohibiting Violence or Threats fo Violence Against Employee [*see* Cal. Judicial Council Form WV-110]. However, it is designed for use when service by *personal delivery* of the Response and associated forms has been effected. An unsigned copy of the proof of service form must be attached to and served the other papers served.

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25-293 California Forms of Pleading and Practice--Annotated § 293.134

§ 293.134 Order After Hearing on Petition of Employer for Injunction Prohibiting Violence or Threats Against Employee (Workplace Violence) (CLETS)--Cal. Judicial Council Form WV-140 [Code Civ. Proc. §§ 527.8, 527.9; Penal Code § 273.6(a)]

[1] FORM Order After Hearing on Petition of Employer for Injunction Prohibiting Violence or Threats Against Employee (Workplace Violence) (CLETS)--Cal. Judicial Council Form WV-140 [Code Civ. Proc. § 527.8]

Click here to view image.

[2] Use of Form

This form is an illustration of the approved Judicial Council form of Order After Hearing on Petition of Employer for Injunction Prohibiting Violence or Threats of Violence Against of Employee (Workplace Violence) (CLETS) [Cal. Judicial Council Form WV-140]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is used to set forth a court order enjoining workplace violence after a hearing on an underlying petition for an injunction prohibiting such violence [*see Code Civ. Proc. § 527.8*]. In addition to information about when and where the hearing took place and the persons in attendance (Items 2-4), the form requires a listing of the order's expiration date (Item 1), along with descriptions of the defendant and the protected employee and any other persons (Item 5), the specific injunctive orders (Items 6-8), any other orders (Item 9), and the names and addresses of law enforcement agencies who are to receive a copy of the order and proof of service of the order (Item 10).

An injunction issued under *Code Civ. Proc. § 527.8* can be effective up to three years, but any time within three months before the expiration of the injunction, the plaintiff may apply to a renewal by filing a new petition [*see Code Civ. Proc. § 527.8(f)*].

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25-293 California Forms of Pleading and Practice--Annotated § 293.135

§ 293.135 Proof of Sale of Firearms/Turning In of Firearms--Cal. Judicial Council Form EA-145/WV-145 [Code Civ. Proc. § 527.9]

[1] FORM Proof of Sale of Firearms/Turning In of Firearms--Cal. Judicial Council Form EA-145/WV-145 [Code Civ. Proc. § 527.9]

Click here to view image.

[2] Use of Form

This form is a reproduction of the approved Judicial Council form of Proof of Sale of Firearms/Turning In of Firearms under the workplace violence statutes [*see Code Civ. Proc. §§ 527.8, 527.9*; Cal. Judicial Council Form EA-145/WV-145]. This form may be obtained from any superior court clerk. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is for use by a defendant in a workplace violence action to report to the court that the defendant has sold or turned in any firearms owned or possessed by the defendant.

A defendant who is subject to a protective order under *Code Civ. Proc. § 527.8* is prohibited from owning, possessing, purchasing, receiving, or attempting to purchase or receive a firearm while the protective order is in effect [*Code Civ. Proc. § 527.8(j)(1)*]. The court must order the defendant to relinquish under *Code Civ. Proc. § 527.9* any firearms the defendant owns or possesses [*Code Civ. Proc. §§ 527.8(j)(2), 527.9(a)*].

Items 1, 3, and 4 must be completed by the defendant, who must also sign the form. The form must then be submitted to the law enforcement agency or licensed gun dealer for completion of Item 2 of the form. The fully completed form is then filed with the court.

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[Reserved]

§§ 293.136[Reserved]

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25-293 California Forms of Pleading and Practice--Annotated § 293.150

§ 293.150 Request for Order, with Custody, Visitation and Support Request and Request for Order: No Travel with Children (Domestic Violence)--Cal. Judicial Council Forms DV-100, DV-105, DV-108 [Fam. Code § 6200 et seq.]

[1] FORMS Request for Order, with Custody, Visitation and Support Request (Domestic Violence)--Cal. Judicial Council Forms DV-100, DV-105 [Fam. Code § 6200 et seq.]

Click here to view image.

[2] Use of Forms

Illustrated are reproductions of the mandatory forms of Request for Order (Domestic Violence), Child Custody, Visitation, and Support Request and Request for Order: No Travel With Children (Domestic Violence) adopted by the Judicial Council [Cal. Judicial Council Forms DV-100, DV-105, DV-108]. These forms are available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The Request for Order (DV-100) form is intended for use in obtaining orders restraining domestic violence, including a temporary restraining order. An optional form, Description of Abuse [Cal. Judicial Council Form DV-101], may be attached to the Request for Order form [Cal. Judicial Council Form DV-100], if more space is needed to describe the abuse for which the orders are sought (see Item 22 of Request for Order form). The Child Custody, Visitation, and Support Request form (DV-105) is a mandatory attachment to the application and is intended for use in obtaining related temporary orders for the custody, visitation, or support of children [*see Fam. Code § 6200 et seq.*]. When this attachment is used, a standard form Declaration under the Uniform Child Custody Jurisdiction Act (Cal. Judicial Council form FL-105) must also be completed and attached. If attorney's fees and costs or child support is being requested, related financial declarations must also be filed and served [*see* [3], *below*]. The Request for Order: No Travel With Children [Cal. Judicial Council Form DV-108] is a mandatory attachment to Cal. Judicial Council Form DV-105, Paragraph 13. It can be used to obtain orders restraining or restricting the other parent from traveling with the child.

At least three copies of these forms should be made: an original to file with the court, a copy for the respondent, and a copy for the files of petitioner's attorney. A copy also may be made for the petitioner.

[3] Service on Respondent

Although the statute is not explicit regarding the manner of service, the respondent should be personally served [*see Fam. Code §§ 6383, 6384, 6385*; *see also § 293.152[2]*] with copies of all required forms. At a minimum, this would include the illustrated application and declaration, the Order to Show Cause and Temporary Restraining Order [*see § 293.151[1]*], and a blank copy of the Responsive Declaration (Domestic Violence) [*see § 293.153[1]*].

If child custody, visitation, or child support is being sought, a completed version of the request illustrated (DV-105) must also be served, along (inthe case of custody or visitation matters) with a completed Declaration under the Uniform Child Custody Jurisdiction and Enforcement Act. Completed and blank incomeand expense declarations must also be served when support, attorney's fees and costs, or restitution is sought [*see* Cal. Judicial Council Form FL-150 (income and expense declaration)]. For illustrations of these forms, see Ch. 221, *Dissolution of Marriage: Procedure* .

[4] Completion of Forms

[a] Application and Declaration

Paragraphs 1 and 3 should name all persons to be protected by the order. Paragraph 2 should name the person to be restrained and provide the person's date of birth, race, and other personal descriptive information [*see Fam. Code §§ 6385(a), 6380(b)*]. This information will be provided to the Department of Justice by the court or local law enforcement officials. However, failure to provide it will not invalidate an order [*see Fam. Code § 6385(b)*]. Paragraph 5 should be filled in if the applicant has been involved in other court actions with the person to be restrained in which restraining orders were issued. If known, the case number and county where that other order was issued should be set forth, with a copy of the order attached.

At least one of the boxes in Paragraph 4 should be checked to indicate the relationship of petitioner and respondent. To obtain an order prohibiting domestic violence, the parties must stand in a relationship specified in *Fam. Code § 6211* [*see Fam. Code § 6301*]. This includes the following: a spouse, former spouse, cohabitant, former cohabitant, any other adult person related by consanguinity or affinity within the second degree, a person with whom the respondent has had a dating or engagement relationship, or a person who is the parent of a child and the presumption applies that the male parent is the father of any child of the female parent pursuant to the Uniform Parentage Act (*Fam. Code § 7600 et seq.*) [*see Fam. Code § 6211*; *see also Fam. Code § 6209* (defining "cohabitant" and "former cohabitant")]. Paragraph 4 of the form describes the categories in more detail.

If petitioner seeks an order for custody, visitation, or support, he or she must check Paragraph 9 and complete the companion form, Child Custody, Visitation, and Support Request (DV-105), described under [b], *below*. For additional forms required in such cases, see [3], *above*.

Paragraphs 6 through 20 should be checked according to the temporary orders sought and whether or not they are requested to be effective in advance of, and until, a hearing [*see Fam. Code §§ 6320 et seq., 6340 et seq.*]. Paragraph 21 is prechecked for an order requiring the person to be restrained to sell or turn in any guns or firearms he or she has or controls and asks for a description of any use or threatened use of firearms inParagraph 22. Facts in support of the relief requested, and those facts, in particular, that detail incidents of abuse, should be set forth in Paragraph 22. If insufficient room exists on the form to present this information, the Description of Abuse form (DV-101) should be used.

Paragraph 20 may be used to request other orders, including any orders to extend or modify the restraining orders

granted at the hearing.

If petitioner requests that time for serving the order to show cause and accompanying papers be lengthened, he or she should check the box in Paragraph 19 and should indicate the number of days desired. Facts supporting this request that are not apparent from the information set out in Paragraph 22 should be listed under Paragraph 19.

Note also that Paragraph 18 is prechecked to waive the fees payable to a law enforcement agency for serving restraining orders on the person to be restrained. If the petitioner is eligible for a waiver of the fee for service of the order, a Request and Order for Free Service of Restraining Order (Cal. Judicial Council Form DV-290) should be filed with the petition.

[b] Attachment for Custody, Visitation, or Support

If the applicant (petitioner) has indicated on the Application and Declaration for Order (DV-100) that he or she is seeking an order for child custody, visitation, or support, the form entitled Child Custody, Visitation, and Support Request (DV-105) must be completed.

Paragraph 3 should be filled out if there is a current custody or visitation order that the requesting person would like changed, including a description of the current and why the change is desired. If no change is desired, Box 4 should be checked and the rest of the form skipped. A copy of the current order should be attached.

Paragraphs 5 and 10 of the attachment contain a variety of possible custody and visitation requests, including a detailed visitation schedule; Paragraphs 11 through 13 contain provisions for supervised visitation, transportation details, and a restraint on removal of the child from the state or specific counties, respectively.

Paragraph 14 may be checked if there is a risk of child abduction by the other parent. If Paragraph 14 is checked, the Judicial Council form of Request for Order: No Travel With Children [Cal. Judicial Council Form DV-108] must be completed and attached. Paragraph 15 of the attachment concerns child support, and requires the petitioner to indicate if he or she is receiving or has applied for public assistance, whether he or she is requesting child support, and whether there is an existing support order he or she wants changed.

For discussion of additional forms that must be filed along with the attachment when custody, visitation, or support are requested, see [3], *above*.

[c] Request for Order: No Travel With Children

Paragraphs 1 and 2 of the Judicial Council Form of Request for Order: NoTravel With Children [Cal. Judicial Council Form DV-108] ask for the names of the requesting parent and other parent, respectively. Paragraph 3 requests information on where the requesting parent believes the other parent may take the child. In Paragraph 4, the requesting parent must state reasons for why he or she believes the other parent may take the child without permission. Paragraphs 5 to 12 should be checked according to the orders being sought.

[5] Cross References

For an illustration of income and expense and property declarations, see Ch. 221, *Dissolution of Marriage: Procedure*

For a form of Declaration Under the Uniform Child Custody Jurisdiction Act that may be adapted for use, see Ch. 221, *Dissolution of Marriage: Procedure*

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25-293 California Forms of Pleading and Practice--Annotated § 293.150A

§ 293.150A Notice of Court Hearing (Domestic Violence)--Cal. Judicial Council Form DV-109 [Fam. Code § 242]

[1] FORM Notice of Court Hearing (Domestic Violence)--Cal. Judicial Council Form DV-109 [Fam. Code § 242]

Click here to view image.

[2] Use of Form

This form is an illustration of the mandatory form of Notice of Court Hearing adopted by the Judicial Council of California for use in domestic violence cases [Cal. Judicial Council Form DV-109]. The form may be obtained from any superior court clerk.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

When the court has issued a temporary restraining order [*see Fam. Code § 240*], the matter must be made returnable on an order requiring cause to be shown why the court should not grant a permanent order, on the earliest day that the business of the court will permit, but not later than 20 days or, for good cause, 25 days from the date of the order [*Fam. Code § 242(a)*]. If a hearing is not held within this time limit, the court may still hear the matter, but the order is not enforceable unless it is reissued under *Fam. Code § 245* [*Fam. Code § 242(b)*].

The court's rulings with respect to temporary restraining orders should be specified in item 4 of the form. Service of the Notice of Court Hearing and related forms must be made as specified in item 5.

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25-293 California Forms of Pleading and Practice--Annotated § 293.151

§ 293.151 Temporary Restraining Order (CLETS) (Domestic Violence)--Cal. Judicial Council Form DV-110 [Fam. Code § 6200 et seq.]

[1] FORM Temporary Restraining Order (CLETS) (Domestic Violence)--Cal. Judicial Council Form DV-110 [Fam. Code § 6200 et seq.]

Click here to view image.

[2] Use of Form

This form is an illustration of the mandatory form of Temporary Restraining Order (CLETS) adopted by the Judicial Council of California for use in domestic violence cases [Cal. Judicial Council Form DV-110]. The form may be obtained from any superior court clerk.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form of temporary restraining order is for use by petitioner in obtaining a temporary restraining order prohibiting domestic violence and related custody, property control, and firearm restriction orders [*see Fam. Code §§ 6300, 6320 et seq., 6340 et seq.; see also Fam. Code § 6389(b)*].

However, if custody and visitation orders are involved, the box in Paragraph 8 must be marked, and counsel must attach separate Child Custody and Visitation Order and Supervised Visitation Order forms [Cal. Judicial Council Forms DV-140, DV-150]. Illustrations of these forms are *set forth in § 293.154[1]*.

[3] Service

After obtaining the judge's signature on the temporary restraining order and obtaining a hearing date, petitioner should file the original with the court clerk. Petitioner should then have respondent personally served with copies of the order [

see Fam. Code §§ 241-243, 6300, 6301; *see also § 293.152[1]* (proof of service form)], together with copies of the Request for Order (DV-100), a blank Answer to Temporary Restraining Order (DV-120), and Notice of Court Hearing (DV-109) [*see § 293.150A*]. In addition, if an order for child custody or visitation is involved, the restrained person must also be served with the Child Custody and Visitation Order and Supervised Visitation Order [Cal. Judicial Council Form DV-140, DV-150], Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act (FL-105) Request (DV-105). This latter attachment (DV-105) would also need to be served if child support were being sought [*see § 293.150[1]*].

Further, if child support, attorney's fees and costs, resititution, or other authorized monetary payment is being sought from the respondent, filled-in and blank versions of the Judicial Council forms of Financial Statement (Simplified) [Cal. Judicial Council Form FL-155] or Income and Expense Declaration [Cal. Judicial Council Form FL-150] must be served.

[4] Notification of Law Enforcement Agency

The form contemplates a continuation of the practice of physically delivering a copy of the order and proof of its service to law enforcmentpersonnel, for entry of the order into the California Law Enforcement Telecommunications System (CLETS) and Domestic Violence Protective Order Registry. In general, if the petitioner is represented by counsel, the court will order counsel to deliver a copy of the order, together with proof of service, to each listed law enforcement agency. An unrepresented petitioner will normally be ordered to deliver the order and proof of service.

However, note that the law enforcement officer or court clerk has a statutory duty to notify the *Department of Justice* of the proof of service of a protective or restraining order [*Fam. Code § 6380(d)*]. In addition, all data with respect to *criminal* court protective orders issued, modified, extended, or terminated under *Penal Code § 136.2*, and all data filed with the court on the required Judicial Council forms with respect to protective orders (including their issuance, modification, extension, or termination to which the DVPA applies), must be transmitted by "the court or its designee" within one business day to law enforcement personnel by either transmitting a physical copy of the order to a local law enforcement agency that is authorized to enter orders into CLETS, or by entering the order into CLETS directly (with California Department of Justice approval) [*Fam. Code § 6380(a)*]. These provisions are not referred to in the form, and apparently do not relieve counsel (or the party) from the obligation of delivering a copy of the order and proof of service to the affected law enforcement agencies. For further discussion of the notification of local law enforcement agencies and the Department of Justice, see *§ 293.56[2]*.

[5] Number of Copies

The following "endorsed-filed" copies will be needed in addition to an original to file with the court: a copy for the respondent, one copy for each law enforcement agency that the petitioner desires to notify, a copy for the files of the petitioner's attorney, and a copy for the petitioner.

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25-293 California Forms of Pleading and Practice--Annotated § 293.151A

§ 293.151A Waiver of Hearing on Denied Request for Temporary Restraining Order (Domestic Violence)--Cal. Judicial Council Form DV-112 [Fam. Code § 6320.5]

[1] FORM Waiver of Hearing on Denied Request for Temporary Restraining Order (Domestic Violence)--Cal. Judicial Council Form DV-112 [Fam. Code § 6320.5]

Click here to view image.

[2] Use of Form

This form is an illustration of the optional form of Waiver of Hearing on Denied Request for Temporary Restraining Order adopted by the Judicial Council of California for use in domestic violence cases [Cal. Judicial Council Form DV-112; *see Fam. Code § 6320.5(d)*]. The form may be obtained from any superior court clerk.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

When the court has denied an ex parte restraining order under *Fam. Code § 6320*, the petitioner has the option of waiving his or her right to a noticed hearing under *Fam. Code § 6320.5(b)* [*Fam. Code § 6320.5(c)*]. A petitioner who waives the right to a noticed hearing is not precluded from refilling a new petition without prejudice at a later time [*Fam. Code § 6320.5(c)*].

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25-293 California Forms of Pleading and Practice--Annotated § 293.152

§ 293.152 Proof of Service (Family Law, Domestic Violence, Uniform Parentage)--Cal. Judicial Council Forms DV-200, DV-250

[1] FORMS Proof of Service (Family Law, Domestic Violence, Uniform Parentage)--Cal. Judicial Council Form DV-200, DV-250

Click here to view image.

Click here to view image.

[2] Use of Forms

These forms are illustrations of the optional forms of Proof of Service (In Person) and Proof of Service by Mail (CLETS) (Domestic Violence Prevention) approved by the Judicial Council [Cal. Judicial Council Forms DV-200, DV-250]. The form may be obtained from any superior court clerk.

These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The forms are designed for use as a declaration of service of pleadings and papers in domestic violence in which a protective or restraining order is being sought (or has been granted). DV-200 is to be used when personal service has been effected, and DV-250 when service was effected by mail. Each form includes check-off boxes listing Judicial Council forms that potentially would be served in these proceedings, along with a check-off box for any "other" forms served that are not listed. Preprinted instructions [DV-210] educate the user as to personal service.

The form should be completed and signed by the person who effected service of a copy of the papers involved--who, necessarily, cannot be a party or someone protected under a court order obtained in the case [*see Code. Civ. Proc. § 414.10*; *Caldwell v. Coppola (1990) 219 Cal. App. 3d 859, 865, 268 Cal. Rptr. 453* (protected person under restraining order is considered to have status of party for purposes of service of process)]. For a general discussion of service of

summons and other documents in civil actions, see Ch. 518, *Service of Summons and Papers* .

[3] Filing Proof of Service

When service has been made and the person serving has completed the Proof of Service, the party must file the original Proof of Service form with the court clerk [*see Fam. Code §§ 241, 243(b)*]. In addition, counsel (or the party, if the party is unrepresented) should also deliver an "endorsed-filed" copy of the proof of service of any protective or restraining order to each law enforcement or other agency specified in the order. The preprinted orders in check-off boxes in the forms for temporary restraining order and order after hearing still require such delivery [*see §§ 293.151[1], 293.154[1]*].

Pursuant to statute, the law enforcement officer or court clerk also has a duty "immediately upon receipt of proof of service," to notify the Department of Justice by electronic transmission of service of the order [*see* Fam. Code. § 6380(d); *see also* Fam. Code. § 6380(a) (requiring court clerk, or designee, to transmit data on certain criminal court protective orders)].

[4] Number of Copies

The following "endorsed-filed" copies will be needed in addition to an original to file with the court: a copy for the files of the party's attorney, and a copy for theparty. In addition, the petitioner will need one copy for each law enforcement agency that the petitioner desires to notify of the issuance of the restraining order [*see Fam. Code § 6380*].

[5] Cross References

For illustration of income and expense declaration and property declaration, see Ch. 221, *Dissolution of Marriage: Procedure*

For general discussion of service of summons and other documents in civil actions, see Ch. 518, *Service of Summons and Papers*

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25-293 California Forms of Pleading and Practice--Annotated § 293.153

§ 293.153 Answer to Temporary Restraining Order (Domestic Violence)--Cal. Judicial Council Form DV-120 [Fam. Code § 6200 et seq.]

[1] FORM Answer to Temporary Restraining Order (Domestic Violence)--Judicial Council Form DV-120 [Fam. Code §§ 6200 et seq.]

Click here to view image.

[2] Use of Form

This form is an illustration of the mandatory form of Answer to Temporary Restraining Order (Domestic Violence) adopted by the Judicial Council of California [Cal. Judicial Council Form DV-120]. The form may be obtained from any superior court clerk.

These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form of response is for use by a respondent to consent to or oppose orders requested by the petitioner or to request his or her own court orders. In addition to the answer, the respondent may file and serve declarations signed by persons who have personal knowledge of the facts.

After the answer has been filed with the county clerk, a copy must be delivered by mail or by personal delivery to the petitioner or the petitioner's attorney [*see* Instructions for Orders Prohibiting Domestic Violence]. For a form of proof of service that may be used to show service of the Responsive Declaration and any accompanying forms, see *§ 293.152[1]*.

At least three copies of the answer should be made: an original to file with the court, an "endorsed-filed" copy for the petitioner or petitioner's attorney, and a copy for the files of the respondent's attorney. A copy may also be made for the respondent.

[3] Filling in Form

Paragraphs 3-16 should be filled in to indicate whether respondent consents or does not consent to the order requested. If respondent wants to request other child custody or visitation orders, these orders should be indicated by checking Box (c) in Paragraph 6 and Box (b) in Paragraph 7 and stating the content of the order desired. If the respondent agrees to pay the guideline child support, he or she should check Box (b) in Paragraph 8.

If the respondent wants his or her attorney's fees paid if he or she prevails [*see Fam. Code § 6344*], Paragraph 18(a) should be checked. Paragraph 18(b) should be filled in if the respondent wants petitioner to pay the respondent's out-of-pocket expenses incurred because of an ex parte temporary restraining order issued without sufficient supporting facts [*see Fam. Code § 6342(a)(2)*].

If additional orders are desired, Paragraph 19 should be checked and a statement attached with "DV-120, Item 19--More Information" at the top. The statement should also include whether the respondent wants any orders to which he or she has consented extended for a period not to exceed three years [*see Fam. Code § 6345*]. Any supporting information should be included the attached statement as indicated in Paragraph 19.

In addition, the responding party should attach a completed financial declaration if support, fees, restitution, or other payments are at issue. For examples of, and instructions on completing, the Judicial Council forms of Financial Statement (Simplified) [Cal. Judicial Council Form FL-155] and the Income and Expense Declaration [Cal. Judicial Council Forms FL-150], see Ch. 221, *Dissolution of Marriage: Procedure* .

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25-293 California Forms of Pleading and Practice--Annotated § 293.154

§ 293.154 Restraining Order After Hearing (CLETS) [Fam. Code § 6200 et seq.], and Child Custody and Visitation Order, Supervised Visitation Order, No Travel with Children Order, Child Support Order, and Other Orders--Cal. Judicial Council Forms DV-130, DV-140, DV-145, DV-150, DV-160, DV-170

[1] FORMS Restraining Order After Hearing (CLETS) [Fam. Code § 6200 et seq.], and Child Custody and Visitation Order, Supervised Visitation Order, Child Support Order, and Other Orders--Cal. Judicial Council Forms DV-130, DV-140, DV-150, DV-160, DV-170

Click here to view image.

[2] Use of Forms

These forms are illustrations of the mandatory Judicial Council forms of Restraining Order After Hearing and Child Custody and Visitation Order, Supervised Visitation Order, No Travel with Children Order, Child Support Order,and Other Orders forms for use in domestic violence prevention proceedings [Cal. Judicial Council Forms DV-130, DV-140, DV-145, DV-150, DV-160, DV-170]. These forms may be obtained from the superior court clerk.

These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The Restraining Order After Hearing form addresses personal conduct restraints in detail (Paragraph 6), and contains a series of check-off boxes that summarize additional orders by category--with the details of those orders to be set forth in still other, more particularized, forms. Accordingly, if orders for child custody and visitation are made, the boxes for Paragraph 9 should be marked to show that either or both of the following forms are attached: Child Custody and Visitation Order [Cal. Judicial Council Form DV-140], and Supervised Visitation Order [Cal. Judicial Council Form DV-150]. If an order for child support has been made, the boxes for Paragraph 10 should be marked to show that the Child Support Order and Information Sheet on Changing a Child Support Order [Cal. Judicial Council Form DV-160] is attached. If other orders are made, such as orders for property control, debt payment, property restraint attorney's fees and costs, restitution, or other orders, Paragraph 17 should be marked to show that the Other Orders form [Cal. Judicial

Council Form FL-170] is attached.

Orders restraining the person from owning, possessing, having, buying or trying to buy, receiving or trying to receive or in any way get a gun or firearm, and requiring the person to turn in or sell guns or firearms are prechecked at Paragraphs 13. An order to require the person to participate in a batterer intervention program should be checked at Paragraph 15. The box in Paragraph 14 should be checked if the court permits the protected person to record prohibited communications from the restrained person.

The Restraining Order form also may be used with the Judicial Council form of Findings and Order After Hearing [Cal. Judicial Council Form FL-340], if the court makes additional orders. For an illustrative version of that form, see Ch. 221, *Dissolution of Marriage: Procedure* .

When the hearing is completed, the judge will usually announce what orders are granted. The wording on the order should conform to the judge's oral order, and any changes should be made on the order and all copies. The judge may, however, take the matter under submission. In this event, petitioner should complete the Application and Order for Reissuance of Order to Show Cause [*see § 293.155[1]*] to continue the temporary restraining orders pending a decision.

[3] Delivery to Law Enforcement Agencies

The Restraining Order After Hearing is designed to simplify the task of local law enforcement agencies in recording the issuance of the order and a description of the restrained person in the statewide California Law Enforcement Telecommunications System (CLETS).

[4] Cross References

For further discussion of findings and orders after hearing, see Ch. 221, *Dissolution of Marriage: Procedure*

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25-293 California Forms of Pleading and Practice--Annotated § 293.154A

§ 293.154A Request to Renew Restraining Order and Notice of Hearing to Renew Restraining Order (CLETS) (Domestic Violence)--Cal. Judicial Council Forms DV-700, DV-710

[1] FORMS Request to Renew Restraining Order and Notice of Hearing to Renew Restraining Order (CLETS) (Domestic Violence)--Cal. Judicial Council Form DV-700

Click here to view image.

[2] Use of Forms

These forms are illustrations of the mandatory form of Request to Renew Restraining Order and Notice of Hearing to Renew Restraining Order (CLETS) (Domestic Violence) adopted by the Judicial Council of California foruse in domestic violence cases [Cal. Judicial Council Forms DV-700, DV-710]. The forms may be obtained from any superior court clerk.

These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

DV-700 is used to request the court to renew a previously issued restraining order, which was issued after a hearing [*see* Cal. Judicial Council Form DV-130, illustrated at § 293.154[1]]. Information about the restraining order should be entered in Item 3, and the reason for the request should be checked in Item 4.

DV-710 is used to provide notice of the hearing on the request to renew the restraining order. It provides that the current orders stay in effect until the hearing date, as well as informing the person restrained that at the hearing the judge can make the orders permanent. The date and time of the hearing should be indicated in Item 3.

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25-293 California Forms of Pleading and Practice--Annotated § 293.155

§ 293.155 Reissue Notice of Court Hearing and Temporary Restraining Order--Cal. Judicial Council Form DV-125 [Fam. Code § 245]

[1] FORM Reissue Notice of Court Hearing and Temporary Restraining Order--Cal. Judicial Council Form DV-125 [Fam. Code § 245]

Click here to view image.

[2] Use of Form

This form is an illustration of the mandatory form of Reissue Notice of Court Hearing and Temporary Restraining Order adopted by the Judicial Council of California for use in domestic violence cases [Cal. Judicial Council Form DV-125].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. This form is also available in several languages other than English (Chinese, Korean, Spanish, and Vietnamese), but the English version is the official one.

This form should be used to continue any temporary restraining orders and to obtain a new hearing date if petitioner has been unable to serve the respondent before the original hearing date. The court may reissue a temporary restraining order on the filing of an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) that respondent could not be served on time [*Fam. Code § 245(a)*; *see Fam. Code § 6326*]. For a form for proof of service of the order for reissuance, see *§ 293.152[1]*.

The order set forth in this form will expire on the date and time set forth unless otherwise extended by the court. No fees will be charged for issuance of this order unless the order has been dissolved three times previously [*see Fam. Code § 245(b), (c)*]. Immediately after the order is reissued, the county must notify the Department of Justice, by electronic transmission, of the terms of the reissuance. The information will be placed in the statewide registry of domestic violence protective orders [*see Fam. Code §§ 6320, 6340, 6380(f)*]. For further discussion, see *§ 293.56[2]*.

[3] Number of Copies

The following "endorsed-filed" copies will be needed in addition to an original to file with the court: a copy for the respondent, one copy for each law enforcement agency that the petitioner desires to notify of the reissuance of the order, a copy for the files of petitioner's counsel, and a copy for the petitioner.

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25-293 California Forms of Pleading and Practice--Annotated § 293.156

§ 293.156 Application by Peace Officer for Emergency Protective Order and Emergency Protective Order--Cal. Judicial Council Form EPO-001 [Fam. Code §§ 6250 et seq., 6270 et seq.]

[1] FORM Application by Peace Officer for Emergency Protective Order and Emergency Protective Order--Cal. Judicial Council Form 1295.90 [Fam. Code §§ 6250 et seq., 6270 et seq.]

Click here to view image.

[2] Use of Form

This form is a filled-in reproduction of the mandatory Judicial Council Emergency Protective Order [Cal. Judicial Council Form EPO-001]. This form may be obtained from any county clerk; however, it is for use by law enforcement officers, not by attorneys or parties. Note that this form is also available in several languages other than English (Chinese, Korean, Spanish, and Vietnamese), but the English version remains the official one.

This form may be used to obtain an ex parte emergency protective order against domestic violence, regardless of whether the court is in session [*see Fam. Code §§ 6241, 6250 et seq.*]. A police officer, sheriff, or other authorized peace officer must assert reasonable grounds to believe that a person is in immediate and present danger of domestic violence. That assertion must be based on the person's allegation of a recent incident of abuse or threat of abuse [*see Fam. Code § 6250(a)*]. The order may consist of any of the orders set forth in *Fam. Code § 6218*, as well as a temporary child custody order [*see Fam. Code § 6252*]. It must be issued without prejudice to any party [*see Fam. Code § 6255*]. This form also may be used to obtain an emergency protective order against stalking, and may include related orders against civil harassment and workplace violence, based on a peace officer's assertion of reasonable grounds to believe that a person is in immediate and present danger of stalking [*see Fam. Code § 6274*; *Penal Code § 646.91(a), (d)*].

Alternatively, this form may be used to obtain an ex parte protective order to prevent child abuse or child abduction. The judge, commissioner, or referee may issue such an order on finding that reasonable grounds have been asserted to believe that a child is in immediate and present danger of abuse or abduction and that the order is necessary to prevent the occurrence or recurrence of abuse or abduction [*Fam. Code § 6250(b)*].

Although this form is to be used by law enforcement officers, attorneys should be aware of the ex parte emergency order procedure to assist persons who need immediate protection from domestic violence, child abuse, child abduction, or stalking. For further discussion of the procedure, see *§ 293.54*.

[3] Filling Out Form

The law enforcement officer should fill in the application portion of the emergency protective order because, by statute, the officer, not the person to be protected, is authorized to apply for the order [*see Fam. Code §§ 6250, 6270*].

The portion of the form that contains the order should be completed when the order is issued. The expiration date set forth in the order must not extend beyond the fifth day of judicial business, or the seventh calendar day, following the date of its issue [*see Fam. Code § 6256*].

[4] Service of Order

The officer must serve the order on the restrained party if he or she canreasonably be located. A copy must be given to the protected party, as well as to any parent or legal guardian of an endangered child who is not a restrained party, if he or she can be reasonably located, or to any person having temporary custody of the endangered child. A copy must also be filed with the court as soon as practicable after issuance [*Fam. Code § 6271*]. The officer must use every reasonable means to enforce the order [*Fam. Code § 6272*] and must carry a copy of the requested emergency protective order while on duty [*Fam. Code § 6273*].

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25-293 California Forms of Pleading and Practice--Annotated § 293.157

§ 293.157 Register Out-of-State Restraining Order (CLETS)--Cal. Judicial Council Form DV-600

[1] FORM Register Out-of-State Restraining Order (CLETS)--Cal. Judicial Council Form DV-600

Click here to view image.

[2] Use of Form

This form is a filled-in reproduction of the Register Out-of-State Restraining Order (CLETS) form, adopted for mandatory use by the Judicial Council [Cal. Judicial Council Form DV-600]. The form may be obtained from any superior court county clerk. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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25-293 California Forms of Pleading and Practice--Annotated § 293.158

§ 293.158 Application For and Appointment of Guardian Ad Litem of Minor--Cal. Judicial Council Form FL-935

[1] FORM Application For and Appointment of Guardian Ad Litem of Minor--Cal. Judicial Council Form FL-935

Click here to view image.

[2] Use of Form

This form is an illustrative, filled-in version of the Judicial Council form of Application For and Appointment of Guardian Ad Litem of Minor [Cal. Judicial Council Form FL-935]. It has been approved for optional use in all family law proceedings, except dissolution proceedings, including those brought for the prevention of domestic violence or to determine parentage, and regardless of whether only private individuals or a governmental agency is involved. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Page one of the form contains the essential allegations of the application. Paragraph 1 requires that the name and standing of petitioner for the guardian ad litem be listed. In a given case, the petitioner might be the minor, the minor's parent, or another interested person [*see Code Civ. Proc. § 372 et seq.*]. The name, address, and telephone number of the proposed guardian ad litem must be set out in Paragraph 2. Paragraph 3 requires a statement of the relationship of the proposed guardian ad litem to the minor. Paragraph 4 provides limited space within which to state why appointment of a guardian ad litem is necessary. An attachment should be used if insufficient space on the form exists to explain this. Paragraph 5 consists of a preprinted statement (allegation) that the proposed guardian is fully competent to understand and protect the rights of the minor and has no adverse interest [*see Code Civ. Proc. § 372 et seq.*].

Two consent statements are set out on page two. The first consists of a general statement of consent to the appointment as guardian ad litem and must be signed by the proposed guardian ad litem.

The second consent statement is entitled "Consent to Guardian by Minor 14 Years of Age or Older. It contains language

by which a minor who is a petitioner, and who is at least 14 year of age, nominates an individual as his or her guardian ad litem. If this statement applies, the minor's name and age must be set forth, as well as the name of the proposed guardian--who would be the same person as the nominee listed on page one of the form.

Page two also includes a form of court order, which requires that the minor's name and the name of the guardian ad litem be set forth in the spaces provided. This information should be filled in before submitting the form to the court. The form would ordinarily be submitted on an ex parte basis [*see Code Civ. Proc. §§ 372(b)(1), 373(a)*; *Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 12-13, 118 Cal. Rptr. 21, 529 P.2d 53]* .

[3] Cross References

For discussion of a minor's right to obtain or oppose protective orders, see *§ 293.52[2][b]*. For a general discussion of guardians ad litem, see Ch. 291, *Guardians Ad Litem* .

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[1] Support Orders; Surplus Equity

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[2] Proceeds From Sale of Dwelling

[3] Spouses Residing in Separate Homesteads

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§ 294.52 Amount of Homestead Exemption

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[4] Constitutional Authorization for Homestead Exemption

[5] Creation of Homestead

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[7] Execution on Homestead

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[10] Liberal Construction

[a] In General

[b] Of Homestead Declaration

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§ 294.100 Declaration of Homestead by Owner or Representative [Code Civ. Proc. § 704.930]

[1] FORM

[2] Use of Form

[3] Contents of Homestead Declaration

[4] Acknowledgment

[5] Recording

[6] Selection of Property

[7] California Legal Forms

[8] California Real Estate Law and Practice

[9] State Statutes

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[b] Liberal Construction of Homestead Declaration

[c] Invalid Homesteads

[d] Residence Requirement

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[1] FORM

[2] Use of Form

[3] State Statutes

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[1] FORM

[2] Use of Form

[3] Contents of Application

[4] Time for Making Application

[5] Judgment Rendered in Another County

[6] Verification

[7] State Statutes

[8] California Rules of Court

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[10] Cross References

§ 294.103 Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. §§ 704.710-704.850]--Order to Show Cause Why Order of Sale of Dwelling Should Not Be Made [Code Civ. Proc. § 704.770]

[1] FORM

[2] Use of Form

[3] Service

[4] State Statutes

[5] Cross References

[6] Cross Reference

§ 294.104 Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. §§ 704.710-704.850]--Notice of Hearing on Right to Homestead Exemption [Code Civ. Proc. § 704.770(b)]--Judicial Council Form EJ-180

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 294.105 Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. §§ 704.710-704.850]--Order Granting Application for Order of Sale of Dwelling [Code Civ. Proc. § 704.780(b)]

[1] FORM

[2] Use of Form

[3] When Judgment Debtor Owns Less than Full Interest

[4] Costs of Proceeding

[5] State Statutes

[6] Cross Reference

§ 294.106 Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. §§ 704.710-704.850]--Declaration for Rehearing on Homestead Exemption [Code Civ. Proc. § 704.790]--Judicial Council Form EJ-182

[1] FORM

[2] Use of Form

[3] Second Hearing

[4] State Statutes

§ 294.107 Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. § 704.710 et seq.]--Notice of Motion [Code Civ. Proc. § 1010] for Order Granting Permission to Accept Highest Bid [Code Civ. Proc. § 704.800(b)]

[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

§ 294.108 Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. § 704.710 et seq.]--Declaration [Code Civ. Proc. § 2015.5] in Support of Motion for Order Granting Permission to Accept Highest Bid [Code Civ. Proc. § 704.800(b)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 294.109 Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. § 704.710 et seq.]--Order [Code Civ. Proc. § 1003] Granting Permission to Accept Highest Bid [Code Civ. Proc. § 704.800(b)]

[1] FORM

[2] Use of Form

[3] Cross Reference

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25-294 California Forms of Pleading and Practice--Annotated § 294.01

§ 294.01 Scope of Chapter

This chapter discusses the procedures for making a declared homestead, the procedures to abandon a homestead, the procedures by which a judgment creditor may apply for an order for sale of a dwelling, and the procedures relating to a court hearing on the application. The procedures for the enforcement of a judgment against a dwelling that is personal property are discussed in Ch. 254, *Executions and Enforcement of Judgments* . The forms in this chapter include:

- A form for making a declaration of homestead [*see § 294.100*].
- A form for abandonment of a homestead [*see § 294.101*].
- Forms for proceedings to subject the surplus value of a declared homestead, or a dwelling in which the judgment debtor claims a homestead exemption, to execution [*see* §§ 294.102-294.109].

For discussion of probate homesteads, see Ch. 449, *Probate: Exempt Personal Property and Probate Homesteads* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsEstate, Gift & Trust LawEstate AdministrationAllowancesHomesteadsReal Property LawHomestead Exemptions

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§ 294.02 Cross References

For discussion, forms, and procedures related to executions in general, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.

For discussion and forms related to probate homesteads, see Ch. 449, *Probate: Exempt Personal Property and Probate Homesteads* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesHomesteads

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[Reserved]

§§ 294.03[Reserved]

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PART II. LEGAL BACKGROUND
A. In General

25-294 California Forms of Pleading and Practice--Annotated § 294.10

§ 294.10 Governing Law

Protection for homesteads and other property of heads of families from forced sale is governed by *Cal. Const., art. XX, § 1.5*. The procedural and substantive requirements for declaring a homestead on a residence are governed by *Code Civ. Proc. §§ 704.910-704.995*. The procedural and substantive requirements for an application for an order of sale of a dwelling and for claiming a homestead exemption are set forth in *Code Civ. Proc. §§ 704.710-704.850*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsReal Property LawHomestead Exemptions

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25-294 California Forms of Pleading and Practice--Annotated § 294.11

§ 294.11 Homestead Exemption and Declared Homestead

[1] Compared

Under California law, a homeowner who has had a judgment lien attach to a real property dwelling that is the homeowner's or his or her spouse's actual residence may claim a homestead exemption pursuasnt to *Code Civ. Proc. §§ 704.710* and *704.720*.

The homestead exemption may be claimed regardless of whether or not the property is a declared homestead as provided by *Code Civ. Proc. §§ 704.910-704.995*.

The fact that the dwelling is a declared homestead affects the extent to which a judgment lien attaches to the property and the extent to which the proceeds from a voluntary sale of the declared homestead are protected [*see § 294.85[6]*].

For discussion of declared homesteads, see Subpart B, *below*; for discussion of homestead exemptions, see Subpart C, *below*.

The interest of a natural person in a real property dwelling, whether or not it is subject to a declared homestead, cannot be sold to enforce a money judgment without an order by the court for its sale [*Code Civ. Proc. § 704.740(a)*; *see § 294.53*].

A debtor may have homestead exemption rights, or declared homestead rights, or both, or neither. There is no overlap between these two sets of rights [*In re Kelley (B.A.P., 9th Cir. 2003) 300 B.R. 11, 21]* .

[2] Homestead in Personal Property

Claims for the homestead exemption of personal property used as a dwelling, such as a mobilehome not attached to land or a boat, that has been levied on are now governed by *Code Civ. Proc. §§ 703.510-703.610* [*Code Civ. Proc. § 704.740(b)*]. Personal property may not be made a declared homestead [*see Code Civ. Proc. §§ 704.910(a), (c), 704.920*]. For discussion and forms relating to execution and sale of property generally, see Ch. 254, *Executions and*

Enforcement of Judgments .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsReal Property LawHomestead Exemptions

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A. In General

25-294 California Forms of Pleading and Practice--Annotated § 294.12

§ 294.12 Purpose and Policy Underlying Homestead Law

[1] Purpose

The California Constitution requires the Legislature to enact laws to protect a certain portion of the homestead and other property of all heads of families from forced sale [*Cal. Const., art. XX, § 1.5*]. The Legislature has implemented the constitutional requirement with the homestead exemption provisions as enacted in *Code Civ. Proc. § 704.710 et seq.* The courts have upheld the constitutionality of previously enacted homestead statutes based on the constitutional requirement [*see Taylor v. Madigan (1975) 53 Cal. App. 3d 943, 951-961, 126 Cal. Rptr. 376* ; *see also San Diego County Carpenters Group v. Lorea (1980) 112 Cal. App. 3d 221, 225, 169 Cal. Rptr. 157]* .

[2] Policy

The policy underlying all homestead legislation is to provide a place where family members may reside and enjoy the comforts of a home, free from any anxiety that it may be taken from them against their will, either because of their own necessity or improvidence, or from the importunity of their creditors [*see Estate of Kachigian (1942) 20 Cal. 2d 787, 791, 128 P.2d 865* ; *Estate of Vannucci (1980) 103 Cal. App. 3d 175, 180, 163 Cal. Rptr. 11]* .

[3] Liberal Construction

The courts have ruled that the homestead laws, as previously enacted, were to be given a most liberal construction in order to advance their beneficial objects and to carry out the manifest purpose of the Legislature [*see Estate of Kachigian (1942) 20 Cal. 2d 787, 791, 128 P.2d 865* ; *Schoenfeld v. Norberg (1970) 11 Cal. App. 3d 755, 764, 90 Cal. Rptr. 47]* . For discussion relating to the rule of liberal construction as applied to the declaration creating a homestead, see *§ 294.34*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement &

ExecutionExemptionsGovernmentsLegislationInterpretationReal Property LawHomestead Exemptions

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25-294 California Forms of Pleading and Practice--Annotated § 294.13

§ 294.13 Homestead and Bankruptcy Law

The State of California has not authorized the use of the exemptions provided for in *11 U.S.C. § 522(d)* [*Civ. Proc. Code § 703.130*; *In re Watts (9th Cir. 2002) 298 F.3d 1077, 1080* ; *In re Rabin (B.A.P., 9th Cir. 2006) 359 B.R. 242, 245* ; *In re Rolland (Bankr., C.D. Cal. 2004) 317 B.R. 402, 412]* . Consequently, those residents of California who file bankruptcy are limited to the exemptions allowable to California residents under non-bankruptcy law [*In re Rabin (B.A.P., 9th Cir. 2006) 359 B.R. 242, 245]* . As such, in bankruptcy actions, the federal courts decide the merits of state exemptions, but the validity of the claimed state exemption is controlled by the applicable California law [*In re Kelley (B.A.P. 9th Cir. 2003) 300 B.R. 11, 16* ; *In re La Fortune (9th Cir. 1981) 652 F.2d 842, 846]* .

Declared homestead rights to not apply to forced sales in a bankruptcy proceeding [*In re Kelley (B.A.P., 9th Cir. 2003) 300 B.R. 11, 20-21]* .

In contrast, California's homestead exemption applies in cases of forced sales in bankruptcy cases [*In re Kelley (B.A.P., 9th Cir. 2003) 300 B.R. 11, 19]* , which occurs upon the filing of a bankruptcy petition [*In re Kelley (B.A.P., 9th Cir. 2003) 300 B.R. 11, 17* ; *In re Pike (B.A.P. 9th Cir. 1999) 243 B.R. 66, 70]* .

For additional discussion of homestead in bankruptcy, see *Ch 94, Bankruptcy, §§ 94.80, 94.82*.

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[Reserved]

§§ 294.14[Reserved]

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B. Declared Homesteads

25-294 California Forms of Pleading and Practice--Annotated § 294.30

§ 294.30 Definitions

[1] Declared Homestead

The term "declared homestead" means a dwelling described in a homestead declaration [*Code Civ. Proc. § 704.910(a)*].

[2] Declared Homestead Owner

The term "declared homestead owner" includes both the owner of an interest in the declared homestead who is named as a declared homestead owner in a homestead declaration recorded pursuant to *Code Civ. Proc. § 704.910 et seq.* and the declarant and his or her spouse who is named in a declaration of homestead recorded prior to July 1, 1983, pursuant to former *Civ. Code §§ 1237-1304* [*Code Civ. Proc. § 704.910(b)*]. By extension, a declared homestead owner may also include a surviving spouse or member of the declared homestead owner's family to whom the owner's interest in a dwelling passes on his or her death [*Code Civ. Proc. § 704.995*; *see § 294.35[6]*].

[3] Dwelling

The term "dwelling," as used in relation to declared homesteads, means any interest in real property, (whether present or future, vested or contingent, legal or equitable), that is a "dwelling" as defined in *Code Civ. Proc. § 704.710* [*see § 294.50[1]*]. The term does not include a leasehold estate with an unexpired term of less than two years or the interest of a beneficiary of a trust [*Code Civ. Proc. § 704.910(c)*].

[4] Homestead Declaration

The term "homestead declaration" includes both a homestead declaration recorded pursuant to *Code Civ. Proc. § 704.910 et seq.* and a declaration of homestead recorded prior to July 1, 1983, pursuant to former *Civ. Code §§ 1237-1304* [*Code Civ. Proc. § 704.910(d)*].

[5] Spouse

The term "spouse," as used in relation to a declared homestead, does not include a married person following entry of a judgment decreeing legal separation of the parties, or an interlocutory judgment of dissolution of the marriage, unless the married persons still reside together in the same dwelling [*Code Civ. Proc. § 704.910(e)*; *see Code Civ. Proc. § 704.710(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead Exemptions

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§ 294.31 Creation of Declared Homestead

An owner of a dwelling in which the owner or his or her spouse resides may declare a homestead on the dwelling by recording a homestead declaration pursuant to *Code Civ. Proc. § 704.910 et seq.* in the county recorder's office in the county in which the dwelling is located [*Code Civ. Proc. § 704.920*]. From that time on, the dwelling is a declared homestead unless the facts claimed in the declaration were not true at the time the declaration was made and recorded [*see Rich v. Ervin (1948) 86 Cal. App. 2d 386, 392, 194 P.2d 809]* . If the validity of a declared homestead is at issue, the truth of recitals contained in the declaration of homestead must be proved by independent evidence [*see Valley Title Co. v. Parish Egg Basket, Inc. (1973) 31 Cal. App. 3d 776, 779, 107 Cal. Rptr. 717]* .

The contents of the homestead declaration are prescribed by *Code Civ. Proc. § 704.930(a)*. For a form of homestead declaration, see *§ 294.100*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead Exemptions

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25-294 California Forms of Pleading and Practice--Annotated § 294.32

§ 294.32 Execution and Acknowledgment

The homestead owner or his or her spouse must execute and acknowledge the homestead declaration in the same manner as an acknowledgment of a conveyance of real property. A guardian or conservator, or other person authorized to act on behalf of the declared homestead owner or his or her spouse may also execute and acknowledge the homestead declaration [*Code Civ. Proc. § 704.930(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead Exemptions

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§ 294.33 Property Constituting Declared Homestead

As discussed in *§ 294.50[1]*, a dwelling for purposes of a declared homestead must be real property [*Code Civ. Proc. § 704.910(c)*]. Thus, a boat, a mobilehome not attached to land, or an unexpired leasehold of less than two years, which may qualify as a dwelling for the purposes of a homestead exemption under *Code Civ. Proc. § 704.710 et seq.*, cannot be a declared homestead. For a discussion of property that may be the subject of a homestead exemption, see *§ 294.53*. In addition, a dwelling cannot qualify as a homestead unless the judgment debtor or the debtor's spouse resides in the dwelling [*Code Civ. Proc. § 704.920*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead ExemptionsReal Property LawMobilehomes & Mobilehome ParksExemptions

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25-294 California Forms of Pleading and Practice--Annotated § 294.34

§ 294.34 Liberal Construction of Declarations

The courts have applied the rule of liberal construction to a declaration of homestead in construing the terms of the writing [*see Viotti v. Giomi (1964) 230 Cal. App. 2d 730, 736, 41 Cal. Rptr. 345* ; *Oktanski v. Burn (1956) 138 Cal. App. 2d 419, 421, 291 P.2d 954]* . As a result, declarations that may contain minor defects or discrepancies but that also contain the facts or the essence of the statutory requirements have been upheld [*Johnson v. Brauner (1955) 131 Cal. App. 2d 713, 716-719, 281 P.2d 50]* . Declarations that omit some of the vital information required by the homestead declaration statute, however, such as failing to describe the homestead property, have been declared invalid [*Jackson v. Menick (9th Cir. 1958) 260 F.2d 563, 564]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationInterpretationReal Property LawHomestead Exemptions

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§ 294.35 Effect of Declared Homestead

[1] Protections Extended by Recordation

From and after the time the declaration of homestead is recorded, the homestead dwelling is a declared homestead [*Code Civ. Proc. § 704.920*]. Recordation of a homestead declaration, however, is not a prerequisite to claiming the homestead exemption, and does not affect the amount of the exemption, or the right of levy pursuant to a writ of execution [*Code Civ. Proc. § 704.970*]. A homestead declaration recorded under former *Civ. Code §§ 1262-1305* is effective as an exemption from creditors only as provided in *Code Civ. Proc. § 704.910 et seq.* [*Code Civ. Proc. § 694.090*].

Recordation of a homestead declaration extends several protections to the declared homestead. A declared homestead limits the extent to which a subsequently recorded judgment lien, other than a judgment lien based on a judgment for child or spousal support, will attach to the declared homestead. When there is a declared homestead, a judgment lien will attach only to the surplus value of the property over the amount of the homestead exemption set forth in *Code Civ. Proc. § 704.730* plus the amount of all liens and encumbrances on the declared homestead at the time the abstract of judgment is recorded to create the judgment lien [*Code Civ. Proc. § 704.950*; *see also Code Civ. Proc. § 487.025(b)*]. For further discussion of the application of *Code Civ. Proc. § 704.950*, see *§ 294.36*.

Recordation of a declared homestead also provides an advantage for a judgment debtor at any future hearing in which a judgment creditor seeks to challenge the existence or amount of a homestead exemption in that the judgment creditor has the burden of proof at the hearing [*Code Civ. Proc. § 704.780(a)(1)*; *§ 294.54[4]*].

[2] Amount of Declared Homestead Exemption

The amount of a declared homestead exemption is the same as the general homestead exemption discussed in *§ 294.52* [*Code Civ. Proc. §§ 704.950(c), 704.730*]. If a homestead declaration is recorded prior to the operative date of any amendment to *Code Civ. Proc. § 704.730* that increases the amount of the homestead exemption, the amount of a declared homestead exemption is increased by the same amount. However, if a judgment creditor has obtained a lien on a declared homestead prior to the operative date of any such amendment increasing the exemption amount, the amount

of the declared homestead exemption remains the amount in effect at the time the lien attached [*Code Civ. Proc. § 704.965*].

[3] Proceeds From Sale of Homestead

Proceeds from the voluntary sale of a declared homestead are also exempt in the amount of the homestead exemption for a period of six months after the date of the sale [*Code Civ. Proc. § 704.960(a)*].

Illustrative Case:

In specific performance action on a contract for sale of real estate, a court may not order payment of successful seller's attorney fees directly from seller's purchase price, because under *Code Civ. Proc. § 704.950*, the award constitutes a judgment lien that is subordinate to prior existing liens and to the homestead exemption [*Behniwal v. Mix (2007) 147 Cal. App. 4th 621, 636, 54 Cal. Rptr. 3d 427]* .

Moreover, if the proceeds from a sale of the homestead are invested in a new dwelling within six months after the date of the voluntary sale, the new dwelling may be selected as a declared homestead by recording a homestead declaration within the applicable six-month period and the declaration will have the same effect as if it had been recorded at the time the prior homestead declaration was recorded [*Code Civ. Proc. § 704.960(b)*]. Similarly, if proceeds of an execution sale or of insurance or other indemnification for damage or destruction of the homestead are invested in a new dwelling and if a new homestead declaration is recorded within six months, the new dwelling will be deemed a declared homestead as of the date of the prior homestead declaration [*Code Civ. Proc. § 704.960(b)*].

[4] Conveyance of Homestead

The homestead declaration does not restrict or limit any right to convey the declared homestead [*Code Civ. Proc. § 704.940*]. A married person's right to convey or transfer community property is governed by *Civ. Code § 5100 et seq.* (repealed and replaced by *Fam. Code § 720 et seq.*, operative January 1, 1994), and by *Code Civ. Proc. § 872.210(b)*.

[5] Encumbrance of Homestead

The homestead declaration does not restrict or limit any right to encumber the declared homestead [*Code Civ. Proc. § 704.940*]. The homestead statutes are designed to protect the value of the homestead from *judgment liens*, but they do not impair the right of a declared homestead owner to encumber the homestead with *consensual liens*, such as a deed of trust securing a promissory note executed by the declared homestead owner [*Smith v. James A. Merrill, Inc. (1998) 64 Cal. App. 4th 94, 102, 75 Cal. Rptr. 2d 108]* .

It is well settled that, if a declared homestead owner defaults on a debt secured by a consensual lien, the homestead is not protected from a nonjudicial foreclosure, that is, the homestead laws cannot be used to prevent a private sale pursuant to a power of sale conferred by the trust deed or mortgage securing the debt, as distinguished from preventing an execution of judgment sale [*see Code Civ. Proc. § 703.010(b)*].

One court of appeal decision has indicated, however, that the homestead exemption may nevertheless affect distribution of proceeds after a nonjudicial foreclosure [*see Smith v. James A. Merrill, Inc. (1998) 64 Cal. App. 4th 94, 101-102, 75 Cal. Rptr. 2d 108]* . Under the law applicable to nonjudicial foreclosure sales, the proceeds of such a sale are applied first to the costs of the sale and payment of the debts secured by senior encumbrances up to and including the debt secured by the trust deed under which the sale is held. Excess proceeds, if any, are then applied, first, to pay off any junior liens or encumbrances. Lastly, the remaining excess, if any, goes to the trustor or defaulting homeowner [*see Civ. Code § 2924k(a)*]. The court of appeal in *Smith* held that, in the event of a nonjudicial foreclosure of a declared homestead, *Code Civ. Proc. § 704.950(c)* applies to reduce the amount of a junior *judgment* lien when determining the amount of remaining proceeds, if any, that the holder of that junior judgment lien should receive under *Civ. Code § 2924k(a)* [*see Smith v. James A. Merrill, Inc. (1998) 64 Cal. App. 4th 94, 102, 75 Cal. Rptr. 2d 108]* .

ILLUSTRATION:

Determining Amount of Junior Judgment Lien After Private Sale. Homeowners recorded a homestead declaration in 1981. In 1983, Creditors A recorded a second trust deed securing a promissory note executed by homeowners for $18,000. In 1987, Creditors B recorded the abstract of a judgment obtained against homeowners for $65,000; apparently they made no attempt to execute the judgment lien. Creditors C and D later recorded third and fourth trust deeds, respectively, securing subsequent promissory notes executed by homeowners. In 1995, homeowners defaulted on the note secured by the second deed of trust, and Creditors A commenced nonjudicial foreclosure proceedings under their second trust deed. After the private sale, $55,000 remained after paying off the costs of sale and the first and second trust deed.

Creditors C and D brought an action for declaratory relief against Creditor B, to determine how the remaining $55,000 should be distributed under *Civ. Code § 2924k(a)*. The trial court ruled that Creditor B, as a judgment lienholder senior to Creditors C and D, was entitled to all the remaining proceeds. The court of appeal reversed, holding that a judgment lien attached to the property in favor of Creditors B when they recorded the abstract of their judgment, but the *amount* of that lien was determined by reference to *Code Civ. Proc. § 704.950(c)*, that is, the amount of judgment lien was reduced by the amount of the applicable homestead as determined under *Code Civ. Proc. §§ 704.730* and *704.965* [*§ 294.35[2]*]. The court acknowledged that this could result in lienholders otherwise junior to a judgment creditor, in this case Creditors C and D, obtaining priority over the judgment creditor to extent the judgment lien was reduced, but this did not alter the court's conclusion: the homestead exemption was meant to protect the value of the homestead from *judgment* creditors, such as Creditors B, and if homeowners had not chosen, as was their right, to further encumber their property with the consensual liens obtained by Creditors C and D, the homeowners themselves would have received the proceeds remaining from the private sale [*see Smith v. James A. Merrill, Inc. (1998) 64 Cal. App. 4th 94, 96-98, 100-102, 75 Cal. Rptr. 2d 108 (Fourth Dist., Div. One)]* .

The decision in *Smith, above*, conflicts with an earlier decision of another panel of the court of appeal in *Spencer v. Lowery (1991) 235 Cal. App. 3d 1636, 1 Cal. Rptr. 2d 795* . In *Spenser*, homeowners who had defaulted on a secured note attempted to claim the homestead exemption under *Code Civ. Proc. § 704.720(b)* so that they, rather that a junior judgment lienholder who would otherwise have priority, would receive the excess proceeds of the sale under *Civ. Code § 2924k(a)*. The court in *Spenser* held the homeowners could not claim the homestead exemption under *Code Civ. Proc. § 704.720(b)* in a nonjudicial foreclosure sale, reasoning that the plain language of *Code Civ. Proc. § 704.720(b)* and related statutes limited the use of the homestead exemption to proceedings involving executions of money judgments or attachments [*Spencer v. Lowery (1991) 235 Cal. App. 3d 1636, 1638-1639, 1 Cal. Rptr. 2d 795 (First Dist., Div. Five)]* .

The court in *Smith* distinguished the earlier decision in *Spenser* on the ground that *Spenser* involved an attempt by defaulting homeowners to claim the homestead exemption under *Code Civ. Proc. § 704.720(b)*, whereas *Smith* involved a determination of the extent to which a junior judgment lienholder was entitled to excess proceeds of a private sale under *Civ. Code § 2924k(a)* [*Smith v. James a. Merrill, Inc. (1998) 64 Cal. App. 4th 94, 101, 75 Cal. Rptr. 2d 108]* . This distinction does not appear to be a sound one, however. While the court in *Smith* did not apply the homestead exemption pursuant to *Code Civ. Proc. § 704.720(b)*, it did, in effect, apply the homestead exemption by holding that *Code Civ. Proc. § 704.950(c)* should be used on remand to reduce the amount of the junior lienholder's lien by the amount of the applicable homestead exemption. The amount that the judgment lienholder in *Smith* could not recover because of application of *Code Civ. Proc. § 704.950(c)* was to go instead to junior encumbrancers who would not otherwise have had priority under *Civ. Code § 2924k(a)*. Also, as the court in *Smith* acknowledged, this amount would have gone to the homeowners under *Civ. Code § 2924k(a)* if the homeowners had not chosen to further encumber their homestead with the third and fourth trust deeds that were junior to the judgment lien [*see Smith v. James a. Merrill, Inc. (1998) 64 Cal. App. 4th 94, 102, 75 Cal. Rptr. 2d 108]* . What the court in *Smith* did not expressly acknowledge

was that, had there been no junior encumbrancers and the excess had gone to the defaulting homeowners, it would have gone to them *just as if they had sucessfully claimed the homestead exemption*. The practical result in *Smith* was thus the opposite of that in *Spenser*: with respect to entitlement to excess proceeds under *Civ. Code § 2924k(a)*, the judgment lien in *Spenser* was given priority over the homeowners (and junior encumbrances had there been any), but the judgment lien in *Smith* in effect lost priority to the extent of the applicable homestead amount, and the amount thus lost went instead to junior encumbrances (or to the homeowner had there been no junior encumbrances).

It is arguable that, of the two decisions, *Spenser* is the better reasoned. The court in *Spenser*, unlike the court in *Smith*, considered and applied the more general language of *Code Civ. Proc. § 703.010*, which provides that the homestead exemptions "do not apply" in a proceeding "for the foreclosure of a mortgage [or] deed of trust," nor in a proceeding to enforce a lien or encumbrance other than those created under the judgment lien law of *Code Civ. Proc. § 695.010 et seq.* or the attachment law of *Code Civ. Proc. § 481.010 et seq.* [*Code Civ. Proc. § 703.010(b)*; *see also § 294.51*]. Under the plain language of *Code Civ. Proc. § 703.010(b)*, it would appear that the homestead exemption should not be applied in any manner in a nonjudicial foreclosure sale, whether by application of Code Civ. Proc. *§ 704.720(b), Code Civ. Proc.* § 704.950(c), or other related provision.

Finding *Smith* and *Spenser* to be factually distinguishable and any inconsistency between them to be "more imagined than real," one court of appeal held that the trial court erred in refusing to acknowledge the declared homestead exemption afforded by *Code Civ. Proc. § 704.720(c)* with regard to the allocation of a post-trustee's-sale surplus fund [*Title Trust Deed Service Co. v. Pearson (2005) 132 Cal. App. 4th 168, 178-179, 33 Cal. Rptr. 3d 311]* . The homeowner had executed a deed of trust encumbering the property and had not repaid the loan, but after encumbering the property had recorded a declaration of homestead. Thereafter, a default judgment on an unrelated matter was entered against the homeowner and the homeowner executed deeds of trust to secure indemnifications to obtain the release of two women charged with crimes. The trustee on the deed of trust conducted a nonjudicial foreclosure sale. After paying the creditor and costs, the trustee filed an interpleader to ascertain whether to give the surplus funds to the homeowner, to satisfy the default judgment against the homeowner, and/or to satisfy the bail indemnifications incurred by the homeowner. The trial court denied the homeowner's motion to amend his answer to include the declared homestead, finding that under *Spenser*, because the proceeds of the sale were not exempt from execution to satisfy a money judgment, the surplus proceeds were not exempt and the proposed affirmative defense would fail as a matter of law, and awarded the surplus to satisfy the default judgment and bail indemnifications. The Court of Appeal distinguished between the automatic homestead and the declared homestead, finding that the declared homestead provides greater rights than the automatic homestead. The declared homestead provides protection from a voluntary sale; judgment liens only attach to the equity in excess of consensual liens; and the protections of the declared homestead survive the death of the homestead owner. The proceeds from a voluntary sale may be reinvested within six months, allowing the debtor to invest in another residence. The automatic homestead only entitles the debtor to protection from a forced execution sale. A judgment lien, which is created by the recording of an abstract of judgment, only attaches to the equity in the property above and beyond the recorded homestead exemption and any preexisting liens on the property [*Title Trust Deed Service Co. v. Pearson (2005) 132 Cal. App. 4th 168, 174-175, 33 Cal. Rptr. 3d 311]* . The court held that *Smith* trumped *Spenser* because *Smith* arose in the context of a declared homestead, and concluded that wherea declared homestead has been recorded before a judgment lien attached, *Code Civ. Proc. § 704.950(c)* incorporates the homestead exemption as part of its formula for determining the amount of the judgment lien [*Title Trust Deed Service Co. v. Pearson (2005) 132 Cal. App. 4th 168, 175-178, 33 Cal. Rptr. 3d 311]* .

For detailed discussion and forms relating to nonjudicial foreclosure sales generally, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

[6] Protection From Liens After Death of Declared Homestead Owner

The protection of the declared homestead from any creditor having an attachment lien, execution lien, or judgment lien on the dwelling continues after the death of the declared homestead owner if, at the time of his or her death, the

dwelling was the principal dwelling of one or more of the following persons to whom all or part of the decedent's interest passes [*Code Civ. Proc. § 704.995(a)*]:

- The surviving spouse of the decedent; and/or
- A member of the decedent's family.

The protection of the declared homestead provided by *Code Civ. Proc. § 704.995(a)* continues regardless of whether or not the decedent was the sole owner of the declared homestead or owned the declared homestead with the surviving spouse or family member. It also continues regardless of whether or not the surviving spouse or family member was a declared homestead owner at the time of the decedent's death [*Code Civ. Proc. § 704.995(b)*].

The amount of the homestead exemption is determined pursuant to *Code Civ. Proc. § 704.730* depending on the circumstances of the case at the time the amount is required to be determined [*Code Civ. Proc. § 704.995(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsReal Property LawHomestead Exemptions

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§ 294.36 Extent Declared Homestead Is Not Protected From Judgment Lien

[1] Support Orders; Surplus Equity

A judgment lien generally does not attach to a declared homestead when the homestead declaration was recorded before the lien, and when the judgment debtor or his or her spouse is the declared homestead owner. There are two situations, however, in which a declared homestead is not protected from a judgment lien [*Code Civ. Proc. § 704.950(a)*]:

- A declared homestead is not protected from a judgment lien created under *Code Civ. Proc. § 697.320* for child, family, or spousal support [*Code Civ. Proc. § 704.950(b)*; for discussion and forms relating to such liens, *see Ch. 258, Family Law Enforcement: General Enforcement Principles and Remedies, § 258.51*].

- A judgment lien attaches to a declared homestead in the amount of any surplus equity, that is, any surplus over the total of (1) all liens and encumbrances recorded prior to the judgment lien and (2) the homestead exemption [*Code Civ. Proc. § 704.950(c)*; *Fidelity National Title Insurance Co. v. Schroeder (2009) 179 Cal. App. 4th 834, 843-844, 101 Cal. Rptr. 3d 854* ; *see Code Civ. Proc. § 487.025(b)* (prejudgment writ of attachment attaches similarly to surplus equity in declared homestead); *see also § 294.36[2]*].

Homestead protection is not lost by the failure of the property owner to claim the homestead exemption at a hearing on an attachment [*Martin v. Aboyan (1983) 148 Cal. App. 3d 826, 830-832, 196 Cal. Rptr. 266]* .

[2] Surplus Equity Accruing After Judgment Lien Is Recorded

If, when a judgment lien is recorded, there is no "surplus equity" as determined under *Code Civ. Proc. § 704.950(c)* [*see § 294.36[1]*], the judgment lien may not be enforced to any extent [*see also §§ 294.53, 294.56*].

There is some conflict, however, concerning the extent to which a judgment creditor may reach surplus equity (that is, value in the property that exceeds the sum of all senior encumbrances plus the amount of the applicable homestead

exemption) when a surplus develops at some time *after* a judgment lien is created by recordation of the abstract of judgment. The Ninth Circuit, in the context of a bankruptcy proceeding, interpreted *Code Civ. Proc. § 704.950(c)* to mean that, if there was no surplus equity as determined at the time a judgment lien is recorded, the lien not only does not attach to the declared homestead at that time, but cannot attach to it thereafter [*In re Jones (9th Cir. 1997) 106 F.3d 923, 927]* .

In *Teaman v. Wilkinson (1997) 59 Cal. App. 4th 1259, 69 Cal. Rptr. 2d 705* , a California court of appeal rejected the Ninth Circuit's interpretation of *Code Civ. Proc. § 704.950(c)*, concluding that it would lead to unfair results that the Legislature could not have intended. For example, if two creditors obtain judgments against a declared homestead owner at around the same time, and one records the judgment immediately when there no surplus equity, whereas the other records later when there is a surplus, the latter but not the former may recover, even if there is enough surplus to satisfy both. The court also noted that judgment liens continue for 10 years and may be renewed [*Code Civ. Proc. § 697.310(b)*], and that, if a homestead is not subject to judicial sale because of lack of surplus equity, it is not thereafter subject to sale on application by the same creditor for a period of one year, implying that the creditor may reapply after the lapse of a year [*Code Civ. Proc. § 704.800(a)*]. Construing *Code Civ. Proc. § 704.950(c)* in light of these related provisions, the court in *Teaman* concluded that, even if a judgment lien does not attach initially because of lack of surplus equity, it may nevertheless attach later, when and if a surplus develops, and that the judgment creditor may subsequently reach that surplus consistent with provisions such as *Code Civ. Proc. §§ 697.310(b)* and *Code Civ. Proc. § 704.800(a)* [*Teaman v. Wilkinson (1997) 59 Cal. App. 4th 1259, 1264-1266, 69 Cal. Rptr. 2d 705]* .

Another court of appeal decision took an approach different from both *Jones* and *Teaman*. In *Smith v. James A. Merrill, Inc. (1998) 64 Cal. App. 4th 94, 75 Cal. Rptr. 2d 108* , the court considered *Code Civ. Proc. § 704.950(c)* in the context of the distribution of proceeds following a nonjudicial foreclosure [§ 294.35[5]]. The court in *Smith* disagreed with the *Teaman* decision to the extent that it suggested that a lien does not attach to a declared homestead until surplus equity develops. The court noted that this it could be difficult to determine when surplus developed, and hence when a lien finally attached, because, in order to know when a surplus exists, it is necessary to know to the amount of applicable homestead exemption, but this amount, under *Code Civ. Proc. § 704.965*, is sometimes dependent on when the judgment liens attaches [*see § 294.35[2]*]. To avoid this difficulty, the court construed *Code Civ. Proc. § 704.950(c)* to mean that a judgment lien attaches when the abstract of judgment is recorded, but the *amount* of the lien is limited to the amount of surplus, if any, at the time the judgment creditor attempts to enforce the lien judgment [*see Smith v. James A. Merrill, Inc. (1998) 64 Cal. App. 4th 94, 100-102, 75 Cal. Rptr. 2d 108]* .

Under the approach of either *Teaman* or *Smith*, it appears that a judgment creditor may successfully execute against surplus equity in a declared homestead when it develops after the judgment lien is recorded. Either of these decisions is more likely to be followed than the Ninth Circuit's decision in *Jones*.

If, however, the declared homestead owner transfers the declared homestead property to a third party buyer, and at the time of transfer there is no surplus equity, the judgment lien may not thereafter be enforced against that property and against the third party buyer [*Teaman v. Wilkinson (1997) 59 Cal. App. 4th 1259, 1267-1269, 69 Cal. Rptr. 2d 705]* . On the other hand, it may be possible for the judgment creditor to reach surplus equity from the seller, when the seller takes the proceeds of a sale and reinvests them within six months into another declared homestead [*see § 294.35[3]*], and that other declared homestead subsequently develops surplus equity [*Teaman v. Wilkinson (1997) 59 Cal. App. 4th 1259, 1269 n.6, 69 Cal. Rptr. 2d 705]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesJudgment LiensGeneral OverviewReal Property LawHomestead ExemptionsReal Property LawNonmortgage LiensJudgment Liens

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§ 294.37 Abandonment of Declared Homestead

[1] By Declaration

A declared homestead may be abandoned, whether recorded pursuant to *Code Civ. Proc. § 704.910 et seq.* or to former *Civ. Code §§ 1243, 1243.5*, and *1244*, by a declaration of abandonment [*Code Civ. Proc. § 704.980(a)*].

[2] Execution and Acknowledgment

The declaration of abandonment must be executed and acknowledged in the manner of an acknowledgment of a conveyance of real property by either a declared homestead owner or by a person authorized to act on his or her behalf. In the latter event, the authorized person must state that he or she has the authority to act on behalf of the declared homestead owner and state the source of the authority [*Code Civ. Proc. § 704.980(b)*].

[3] Abandonment Limited to Declarant's Interest

The declaration of abandonment will not affect the declared homestead of any person other than the declared homestead owner named in the declaration of abandonment [*Code Civ. Proc. § 704.980(c)*]. For example, if one spouse continues to live in a declared homestead after dissolution of the marriage, the other spouse may abandon the declared homestead and establish a new one. In that case, the abandonment would not affect the right of the former spouse who continued to live in the previously created homestead to retain the dwelling as his or her declared homestead if he or she owns an interest in the dwelling [*see Annual Report*, 16 Cal. L. Revision Comm'n Reports 2137 (1982)].

[4] By Operation of Law

A declared homestead is abandoned by operation of law as to a declared homestead owner if the declared homestead owner, or a person authorized to act on his or her behalf, executes, acknowledges, and records a new homestead declaration on different property. The abandonment would affect only the declarant named in the new homestead declaration [*Code Civ. Proc. § 704.990(a)*].

If, however, a new homestead declaration includes property described in a previously recorded homestead declaration, then to the extent that that declaration is still valid, the new homestead declaration will not be considered an abandonment of the prior declared homestead [*Code Civ. Proc. § 704.990(b)*; *see also Ray v. Valdez (1959) 175 Cal. App. 2d 502, 506-507, 346 P.2d 464]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead Exemptions

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[Reserved]

§§ 294.38[Reserved]

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§ 294.50 Definitions

[1] Dwelling

The term "dwelling," as used in relation to homestead exemptions, means a place where a person actually resides. It includes, but is not limited to, a house or mobilehome, together with the outbuildings and the land on which they are situated; a boat or other waterborne vessel; a condominium, as defined in *Civ. Code § 783*; a planned development, as defined in *Bus. & Prof. Code § 11003*; a stock cooperative, as defined in *Bus. & Prof. Code § 11003.2*; and a community apartment project, as defined in *Bus. & Prof. Code § 11004* [*Code Civ. Proc. § 704.710(a)*].

[2] Family Unit

The term "family unit," as used in relation to homestead exemptions, means the judgment debtor and his or her spouse if they reside together in the homestead, or the judgment debtor or his or her spouse and at least one other of the following persons who he or she cares for or maintains in the homestead [*Code Civ. Proc. § 704.710(b)*]:

- A minor child or grandchild of the judgment debtor, of his or her spouse, or of a deceased or former spouse;
- A minor brother or sister of the judgment debtor or his or her spouse, or a minor child of a deceased brother or sister of either spouse;
- The parent or grandparent of the judgment debtor, of his or her spouse, or of a deceased spouse;
- An unmarried child, brother, or sister of either spouse who has attained the age of majority and is unable to take care of or support himself or herself.

[3] Homestead

The term "homestead," as used in relation to homestead exemptions, means the principal dwelling in which the

judgment debtor or the judgment debtor's spouse resided on the date the judgment creditor's lien attached to the dwelling, and in which the judgment debtor or the judgment debtor's spouse resided continuously thereafter until the date of the court determination that the dwelling is a homestead. Homestead also means the dwelling acquired with the use of exempt proceeds from the sale, damage, or destruction of a homestead as provided in *Code Civ. Proc. § 704.720* [*Code Civ. Proc. § 704.710(c)*; *see California Coastal Commission v. Allen (2008) 167 Cal. App. 4th 322, 329-331, 83 Cal. Rptr. 3d 906* (continuous residence requirement for a principal dwelling exemption not met when defendant resided elsewhere while retaining right to be temporarily present in room on property); *see § 294.35[3]*].

Even though *Code Civ. Proc. § 704.710(c)* states that the owner of property is entitled to the automatic homestead exemption for property that he or she owns and resides in on the date a judgment lien *attaches*, the Court of Appeal for the Second Appellate District, Division Three has ruled that after-acquired property purchased with funds not arising from the sale of a declared homestead to which a prior judgment lien attaches at purchase under *Code Civ. Proc. § 697.340(b)* is not entitled to the automatic homestead exemption even if the purchaser has resided continuously in the property since the date of purchase [*SBAM Partners v. Wang (2008) 164 Cal. App. 4th 903, 911-913, 79 Cal. Rptr. 3d 752]* .

[4] Spouse

The term "spouse," as used in relation to homestead exemptions, does not include a married person, following entry of a judgment decreeing legal separation of the parties, or an interlocutory judgment of dissolution of the marriage, unless the married persons still reside together in the same dwelling [*Code Civ. Proc. § 704.710(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 294.51 Nature of Homestead Exemption

[1] In General

The homestead exemption has no effect on liens created voluntarily by property owners or on claims of creditors secured by liens with priority over the homestead declaration. The exemption ensures that insolvent debtors and their families are not rendered homeless by virtue of an involuntary sale of the residential property they occupy. The homestead law is not designed to protect creditors, but to protect the home against the judgment debtor's creditors. This strong public policy requires courts to adopt a liberal construction of the law and facts to promote the beneficial purposes of the homestead legislation to benefit the debtor [*Amin v. Khazindar (2003) 112 Cal. App. 4th 582, 588, 5 Cal. Rptr. 3d 224* , citing 5 Miller & Starr, California Real Estate § 13.43 (3d ed. 1996); *Code Civ. Proc. § 703.010(a)*].

The homestead exemption applies to any interest of the judgment debtor in a homestead [*Code Civ. Proc. § 704.720(a)*; *see also Annual Report*, 16 Cal. L. Revision Comm'n Reports 2133 (1982)] and to all procedures for enforcement of a money judgment [*Code Civ. Proc. § 703.010(a)*]. The exemption does not apply if the judgment to be enforced is for the foreclosure of a mortgage, deed of trust, or other lien or encumbrance on the property other than enforcement or attachment liens [*Code Civ. Proc. § 703.010(b)*; *see also § 294.35[5]*].

A judgment debtor or his or her spouse may claim a homestead exemption regardless of whether or not the dwelling is a declared homestead [*see Code Civ. Proc. §§ 704.710(c), 704.720(a)*; *see also Annual Report*, 16 Cal. L. Revision Comm'n Reports 2132-2133 (1982)]. However, the declared homestead provides greater rights than the automatic homestead. The declared homestead provides protection from a voluntary sale; judgment liens only attach to the equity in excess of consensual liens; and the protections of the declared homestead survive the death of the homestead owner. The proceeds from a voluntary sale may be reinvested within six months, thus allowing the debtor to invest in another residence. On the other hand, the automatic homestead only entitles the debtor to protection from a forced execution sale [*In re Mulch (Bankr. N.D. Cal. 1995) 182 B.R. 569, 573* ; *Fidelity National Title Insurance Co. v. Schroeder (2009) 179 Cal. App. 4th 834, 843-844, 101 Cal. Rptr. 3d 854* ; *Amin v. Khazindar (2003) 112 Cal. App. 4th 582, 588, 5 Cal. Rptr. 3d 224* ; *accord, In re Kelley (B.A.P., 9th Cir. 2003) 300 B.R. 11, 19-20]* .

A homestead declaration recorded prior to July 1, 1983, pursuant to former *Civ. Code §§ 1237-1304*, is effective as an exemption from a judgment creditor only to the extent provided under *Code Civ. Proc. § 704.910 et seq.* [*Code Civ. Proc. § 694.090*].

[2] Proceeds From Sale of Dwelling

Proceeds from a dwelling sold at an execution sale, or from insurance or other indemnification for damaged or destroyed property, or from the sale of the property for public use, are exempt in the amount prescribed by *Code Civ. Proc. § 704.730* for a period of six months from the time the proceeds are actually received by the judgment debtor. If the proceeds in the amount of the homestead exemption are used to acquire a new dwelling within the six month period, the new dwelling also constitutes a homestead if it is the principal dwelling in which the judgment debtor or the judgment debtor's spouse resided continuously from the date of acquisition until the date the court determines that the dwelling is a homestead, whether or not an abstract or certified copy of a judgment was recorded to create a judgment lien before the dwelling was acquired [*Code Civ. Proc. § 704.710(c)*]. If, however, a judgment debtor receives exempt proceeds but, rather than reinvesting in a replacement dwelling within the six month period, applies a homestead exemption to other property owned by the judgment debtor or the judgment debtor's spouse, the proceeds cease to be exempt [*Code Civ. Proc. § 704.720(b)*]. This provision should be compared to the right of a declared homestead owner to apply the proceeds from either a voluntary or execution sale, or the proceeds from insurance or other indemnification for damaged or destroyed property, to a new declared homestead within the six-month period [*see Code Civ. Proc. § 704.960*; *see also § 294.35[3]*].

[3] Spouses Residing in Separate Homesteads

If the judgment debtor and his or her spouse reside in separate homesteads, only the homestead of one of the spouses is exempt, and only the proceeds of the exempt homestead are exempt [*Code Civ. Proc. § 704.720(c)*]. The spouses may select which of the homesteads is exempt. If they are unable to agree, however, the court determines which homestead is exempt [*see Code Civ. Proc. §§ 703.110, 704.930*; *see also* legislative comments to *Code Civ. Proc. § 704.720*].

[4] Separated or Former Spouse Residing in Homestead

If a judgment debtor is not currently residing in the homestead, but his or her separated or former spouse continues to reside in or exercise control over possession of the homestead, the judgment debtor continues to be entitled to an exemption until entry of a judgment or other legally enforceable agreement dividing the community property between the judgment debtor and the separated or former spouse, or until a later time period as specified by court order. However, the judgment debtor is not entitled to more than one exempt homestead [*Code Civ. Proc. § 704.720(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 294.52 Amount of Homestead Exemption

A judgment debtor may claim a homestead exemption in the amount of $50,000 [*Code Civ. Proc. § 704.730(a)(1)*]. If the judgment debtor or his or her spouse who resides in the homestead is, at the time of the attempted sale of the homestead, a member of a family unit, he or she is entitled to an exemption in the amount of $75,000. There must, however, be at least one member of the family unit who owns no interest in the homestead, or whose only interest in the homestead is a community property interest with the judgment debtor [*Code Civ. Proc. § 704.730(a)(2)*]. The Ninth Circuit has ruled that domestic partners registered with the State of California's Domestic Partnership Registry pursuant to the Domestic Partner Rights and Responsibilities Act, *Fam. Code § 297.5*, are limited to a single homestead exemption pursuant to *Code Civ. Proc. § 703.110*, as are married couples. They are not entitled to the full $75,000 homestead exemption *each* under *Code Civ. Proc. § 704.730(a)(2)*, because the homestead exemption rights of registrants are identical to those of people who are married [*Rabin v. Schoenmann (In re Rabin) (B.A.P. 9th Cir. 2006) 359 B.R. 242, 248-249]* . In other words, under California law, couples with formally joined economic interests, whether as spouses or registrants, are limited to a single homestead exemption [*Rabin v. Schoenmann (In re Rabin) (B.A.P. 9th Cir. 2006) 359 B.R. 242, 248 n. 11* (noting anomaly that debtors with common interests in homestead property who are neither married nor registered domestic partners might each be entitled to a $75,000 exemption)].

The amount of exemption is increased to $150,000 if the judgment debtor or his or her spouse who resides in the homestead is, at the time of the attempted sale of the homestead [*Code Civ. Proc. § 704.730(a)(3)*]:

- 65 years of age or older;
- Physically or mentally disabled and, as a result of that disability, unable to engage in substantial gainful employment; or
- 55 years of age or older with a gross annual income of not more than $15,000, or if married, a gross annual income, including the gross annual income of his or her spouse, of not more than $20,000 and the sale is an involuntary sale.

There is a rebuttable presumption affecting the burden of proof that a person receiving disability insurance benefit payments under Title II or supplemental security income payments under Title XVI of the federal Social Security Act satisfies the requirements of physical or mental disability as to his or her inability to engage in substantial gainful employment [*Code Civ. Proc. § 704.730(a)(2)*]. A creditor facing the presumption has the burden of proof to show that the homestead claimant had the ability to [*In re Rolland (Bankr., C.D. Cal. 2004) 317 B.R. 402, 420]* :

- Perform meaningful mental or physical work-related activity,
- In a competitive or self-employed position,
- That normally results in pay or profit.

For purposes of the third listed basis for the highest exemption amount, the federal courts have applied the definition of "gross annual income" set forth in *Fam. Code § 4058(a)(2)*, which allows sole business proprietors to deduct the costs of product and legitimate expenses from gross receipts of the business to retain the maximum homestead amount. In applying this definition, the Court must first examine the context in which the debtor's income is derived, and then determine what reductions, if any, are appropriate [*In re Bush (Bankr., S.D. Cal. 2006) 346 B.R. 207, 209-210* ; *In re Shelley (B.A.P., 9th Cir. 1995) 184 B.R. 356, 360 , aff'd without op., (9th Cir. 1997) 109 F.3d 639]* . However, a homestead claimant is not entitled to deduct passive losses from an "S" corporation from his or her annual income [*In re Sweitzer (Bankr. C.D. Cal. 2005) 332 B.R. 614, 615, 618]* .

If the judgment debtor or his or her spouse both qualify for an exemption in the homestead, the homestead exemption cannot exceed the amount specified in *Code Civ. Proc. § 704.730(a)(2)* or *(3)*, whether or not the spouses are jointly obligated on the judgment and whether or not the homestead consists of community or separate property or both. If both spouses are entitled to a homestead exemption, the exemption of proceeds of the homestead are to be apportioned between the spouses on the basis of their proportionate interests in the homestead [*Code Civ. Proc. § 704.730(b)*]. This provision is intended to preclude the exemption of unduly large amounts and the inequitable application of exemptions that might occur because of the variety of ways that spouses can hold property and attempt to qualify for increased exemptions [*see Annual Report*, 16 Cal. L. Revision Comm'n Reports 2085 (1982)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 294.53 Application for Order for Sale of Dwelling

[1] In General

Generally, when a judgment creditor seeks to enforce a money judgment on a natural person's interest in a real property dwelling, whether a declared homestead or not, he or she must first obtain a court order for the sale of the dwelling pursuant to *Code Civ. Proc. § 704.710 et seq.* [*Code Civ. Proc. § 704.740(a)*; *California Coastal Com. v. Allen (2008) 167 Cal. App. 4th 322, 329, 83 Cal. Rptr. 3d 906* (exemption not available when property was transferred to corporation); *see Wells Fargo Financial Leasing, Inc. v. D & M Cabinets (2009) 177 Cal. App. 4th 59, 67-69, 99 Cal. Rptr. 3d 97* (judgment creditor, seeking to sell occupied dwelling to collect judgment, may not bypass *Code Civ. Proc. § 704.740* because sale is conducted by receiver)]. If, however, the dwelling is personal property, such as an unattached mobilehome, housetrailer, or houseboat, or the dwelling is a leasehold estate in real property with an unexpired term of less than two years at the time of levy, a court order for sale is not required. An exemption claim as to such property must be made and determined as provided in *Code Civ. Proc. § 703.510 et seq.* [*Code Civ. Proc. § 704.740(b)*; *see also Health & Safety Code §§ 18008, 18551(e)* (provisions governing mobile homes)]. For a discussion of exemption claims under *Code Civ. Proc. § 703.510 et seq.*, see Ch. 254, *Executions and Enforcement of Judgments* .

[2] Notice to Judgment Creditor

Promptly after the judgment creditor has caused a real property dwelling, other than one described in *Code Civ. Proc. § 704.740(b)*, to be levied on, the levying officer must serve notice on the creditor that the levy has been made and that the property will be released unless he or she applies for an order for sale and files a copy of the application with the levying officer within 20 days [*Code Civ. Proc. § 704.750(a)*]. For discussion of filing and service of writs, notices, and other papers, see Ch. 254, *Executions and Enforcement of Judgments* . For a form for an application for an order for sale of a dwelling and a discussion of the contents of the application required by *Code Civ. Proc. §§ 704, 760*, see *§ 294.102*.

[3] Dwelling Located in Another County

If the dwelling is located in a county other than the county in which the judgment was rendered, the judgment creditor

must apply to the superior court of the county where the dwelling is located and file with the application an abstract of judgment in the form prescribed by *Code Civ. Proc. § 674*, or, in the case of a judgment described in *Code Civ. Proc. § 697.320* (for spousal or child support, or against health care provider for periodic payments), a certified copy of the judgment. The judgment creditor must pay the filing fee for a motion provided in *Gov. Code Section 70617(a)* [*Code Civ. Proc. § 704.750(b)*]. A judgment lien on real property also may be created under *Code Civ. Proc. § 697.320(a)* by recording an abstract of judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 294.54 Hearing on Application

[1] Setting

After the judgment creditor has filed the application for an order for sale, the court must set a time and place for hearing and must order the judgment debtor to show cause why an order for sale should not be made in accordance with the application. The hearing must be set no later than 45 days after the application is filed, or such later time as the court orders on a showing of good cause [*Code Civ. Proc. § 704.770(a)*].

[2] Notice of Hearing

The judgment creditor, no later than 30 days before the time set for hearing, must serve on the judgment debtor a copy of the order to show cause, a copy of the judgment creditor's application, and a copy of the notice of the hearing in the form prescribed by the Judicial Council [*Code Civ. Proc. § 704.770(b)(1)*; *see § 294.104*].

[3] Service of Papers

Service must be made either personally or by mail [*Code Civ. Proc. § 704.770(b)(1)*]. In addition, the judgment creditor must personally serve a copy of each of the required documents on an occupant of the dwelling in question. If there is no occupant present at the time service is attempted, a copy of each document must be posted in a conspicuous place at the dwelling [*Code Civ. Proc. § 704.770(b)(2)*].

If service is by mail, the period of notice is extended five days if the place of address is in California, ten days if the place of address is outside California but within the United States, or twenty days if the place of address is outside the United States [*see Code Civ. Proc. § 684.120(a), (b)*]. For discussion of filing and service of writs, notices, and other papers, see Ch. 254, *Executions and Enforcement of Judgments* .

[4] Burden of Proof

If the records of the county tax assessor indicate that there is a current homeowner's [*see Rev. & Tax. Code § 218*] or

disabled veteran's [*see Rev. & Tax. Code § 205.5*] exemption for the dwelling claimed by the judgment debtor or his or her spouse, the judgment creditor has the burden of proof that the dwelling is not a homestead. On the other hand, if the records indicate that there is no current claim of a homestead exemption or disabled veteran's exemption by the judgment debtor or his or her spouse, the burden of proof that the dwelling is a homestead is on the person who claims that the dwelling is a homestead [*Code Civ. Proc. § 704.780(a)*]. If the application states the amount of the homestead exemption, the person claiming the exemption has the burden of proof that the claimed amount is other than the amount stated in the application [*Code Civ. Proc. § 704.780(a)(2)*].

[5] Appointment of Appraiser

The court may appoint a qualified appraiser to assist the court in determining the fair market value of the dwelling. If the court appoints an appraiser, it must fix the compensation of the appraiser in a reasonable amount, not to exceed similar fees for similar services in the community in which the dwelling is located [*Code Civ. Proc. § 704.780(d)*].

[6] Order for Sale of Dwelling

Before the court may order a sale of a dwelling involving real property, it must determine whether or not the dwelling is exempt. The court shall then make an order for sale of the dwelling subject to the homestead exemption, unless it determines that the sale of the dwelling would not be likely to produce a bid sufficient to satisfy any part of the amount due on the judgment pursuant to *Code Civ. Proc. § 704.800* [*Code Civ. Proc. § 704.780(b)*; *see § 294.85[11]*]. If the court determines that the dwelling is exempt, the court shall also determine the amount of the homestead exemption and the fair market value of the dwelling. The order for sale of the dwelling subject to the homestead exemption shall specify the amount of the proceeds of the sale that is to be distributed to each person having a lien or encumbrance on the dwelling and must also include the name and address of each person holding a lien or encumbrance [*Code Civ. Proc. § 704.780(b)*]. After the order for sale is obtained, the dwelling may be sold as provided in *Code Civ. Proc. § 701.510 et seq.* If the court determines that the dwelling is not exempt, the court shall make an order for sale of the property in the manner provided in *Code Civ. Proc. § 701.510 et seq.* [*Code Civ. Proc. § 704.780(b)*]. For a form of order for the sale of a dwelling, see *§ 294.105*. For discussion, forms, and procedures relating to the sale of a dwelling pursuant to court order, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.

When the court has granted the application for order for sale, the court clerk must transmit a certified copy of the order to the levying officer. In the event that the court making the order is not the court in which the judgment was entered, the clerk must send the certified copy to the clerk of the court in which it was entered [*Code Civ. Proc. § 704.780(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessMethodsMailCivil ProceduresPleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProceduresJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProceduresJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewReal Property LawHomestead Exemptions

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§ 294.55 Default Cases

[1] Service of Order

If neither the judgment debtor, the debtor's spouse, nor his or her attorney appeared at the hearing, the judgment creditor must serve a copy of the order and a notice of the order, personally or by mail, on the judgment debtor and his or her spouse. The judgment creditor must also serve a copy and notice of the order personally on an occupant of the dwelling, or if there is no occupant present at the time service is attempted, the judgment creditor must post a copy of the order and notice in a conspicuous place at the dwelling. The service of notice must be made no later than 10 days after the date of the order in the form prescribed by the Judicial Council [*Code Civ. Proc. § 704.790(a), (b)*; *see § 294.106*]. Proof of service and of any posting of the order must be filed with the court and with the levying officer. Failure to comply with these provisions vitiates the order and the dwelling may not be sold [*Code Civ. Proc. § 704.790(c)*]. For discussion of filing and service of notices, see *§ 294.54[3]*.

[2] Second Hearing

If, within 10 days after service of notice of the order, the judgment debtor or his or her spouse files a declaration with the levying officer stating that the absence of the judgment debtor or his or her spouse or attorney was due to mistake, inadvertance, surprise, or excusable neglect and that he or she wishes to assert the homestead exemption, the levying officer must transmit the declaration immediately to the court that ordered the sale [*see § 294.108*]. On receipt of the declaration, the court must set a time and place for hearing to determine whether the order of the court should be modified. The time set for the hearing must be no later than 20 days after receipt of the declaration. The court clerk is responsible for providing prompt notice of the hearing to be given to the parties [*Code Civ. Proc. § 704.790*].

Legal Topics:

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§ 294.56 Minimum Bid Required at Sale

The homestead may not be sold if no bid is received at the court-ordered sale that exeeds the amount of the homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances on the property, including but not limited to any attachment or judgment lien. In this event, the homestead property is released and cannot be subjected to a court order for sale on subsequent application by the same judgment creditor for a period of one year [*Code Civ. Proc. § 704.800(a)*; *see Rourke v. Troy (1993) 17 Cal. App. 4th 880, 883-886, 21 Cal. Rptr. 2d 660* ("all liens and encumbrances" for these purposes includes all liens senior to the lien of the executing judgment creditor, but does not include the judgment creditor's lien)].

If no bid is received at the court-ordered sale of a homestead that is 90 percent or more of the fair maket value as determined by the court during the hearing on the application for order for sale (§ 294.54[6]), the homestead may not be sold unless the court, on motion of the judgment creditor, does one of the following [*Code Civ. Proc. § 704.800(b)*]:

- Grants permission to accept the highest bid that exceeds the minimum bid requirement of *Code Civ. Proc. § 704.800(a)*;

- Makes a new order for sale of the homestead.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 294.57 Sale of Judgment Debtor's Interest Only

If the judgment debtor's interest in a dwelling is that of a joint tenant or tenant in common, or his or her interest is a leasehold or other interest that is less than a fee interest, only the judgment debtor's interest in the dwelling and not the dwelling may be sold at an execution sale. If there is more than one judgment debtor of the judgment creditor, the interests of each of the debtors are to be sold together, and each of the debtors entitled to a homestead exemption may apply his or her exemption to his or her own interest [*Code Civ. Proc. § 704.820*]. If the judgment debtor's interest is an interest in community property, however, the whole community interest is subject to enforcement of the judgment [*see Code Civ. Proc. § 695.020*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawHomestead Exemptions

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25-294 California Forms of Pleading and Practice--Annotated § 294.58

§ 294.58 Distribution of Proceeds from Sale

Once the sale has taken place, the levying officer must distribute the proceeds of the sale of the homestead in the following order [*Code Civ. Proc. § 704.850(a)*]:

(1) To the discharge of all liens and encumbrances, if any, on the property;

(2) To the judgment debtor in the amount of any applicable exemption of proceeds as provided in *Code Civ. Proc. § 704.720* [*see §§ 294.51, 294.52*];

(3) To the levying office for reimbursement of his or her costs for which an advance was not made;

(4) To the judgment creditor to satisfy his or her judgment, costs, and interest accrued; and

(5) To the judgment debtor in the amount remaining.

The general provisions of the Enforcement of Judgments Law (*Code Civ. Proc. § 680.010 et seq.*) governing the time for distributing proceeds (*Code Civ. Proc. § 701.820*) and the resolution of conflicting claims to proceeds from an execution sale (*Code Civ. Proc. § 701.830*) apply to the distribution of proceeds from the sale of a homestead [*Code Civ. Proc. § 704.850(b)*]. For discussion relating to distribution of proceeds, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsReal Property LawHomestead Exemptions

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25-294 California Forms of Pleading and Practice--Annotated § 294.59

§ 294.59 No Acceleration of Debt from Sale of Dwelling

A levy on a homestead that is subject to a lien or encumbrance is not by itself grounds for acceleration of the obligation secured by the lien or encumbrance. If the homestead is subsequently sold pursuant to a court order for sale under the provisions governing homestead exemptions, the amount payable to satisfy a lien or encumbrance cannot include any penalty for prepayment [*Code Civ. Proc. § 704.810*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsReal Property LawHomestead ExemptionsReal Property LawNonmortgage LiensGeneral Overview

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25-294 California Forms of Pleading and Practice--Annotated § 294.60

§ 294.60 Payment of Costs

The judgment creditor is entitled to recover reasonable costs incurred in proceedings under the provisions governing homestead exemptions, except when no bid is received at a court-ordered sale of a homestead that exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy any liens or encumbrances on the property, in which case he or she is not entitled to recover costs [*Code Civ. Proc. § 704.840*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewReal Property LawHomestead ExemptionsReal Property LawNonmortgage LiensJudgment Liens

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25-294 California Forms of Pleading and Practice--Annotated § 294.61

§ 294.61 Right to Extension of Time

The court may allow an extension of time for an act to be done pursuant to *Code Civ. Proc. § 704.710 et seq.* However, written notice of the extension must be filed with the levying officer, and unless waived, promptly on the opposing party [*Code Civ. Proc. § 704.830*; *see Code Civ. Proc. § 703.590*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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25-294 California Forms of Pleading and Practice--Annotated § 294.62

§ 294.62 Right of Appeal

An appeal may be taken from any order made under *Code Civ. Proc. §§ 704.780-704.790*. The appeal must be taken in the manner provided for appeal in the court in which the proceeding took place [*Code Civ. Proc. § 704.830*; *see Code Civ. Proc. § 703.600*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral Overview

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25-294 California Forms of Pleading and Practice--Annotated § 294.63

§ 294.63 Preventive Measures by Judgment Debtor

Under the former statutes governing homestead exemptions, the judgment debtor, in addition to appearing and claiming the exemption at the hearing on the writ of execution, could take separate preventive measures to contest the writ and levy of execution on the homestead property. Among the remedies available were a motion to quash the writ and vacate the levy of execution, injunctive relief, and an action to quiet title. These remedies may no longer be necessary in most cases, however, since under the new provisions of the homestead exemption statutes, an early resolution of the exemption question is provided. In addition, any cloud on the title resulting when the property is levied on but an order for sale is not diligently pursued will be promptly cleared since the judgment creditor has only a 20-day period in which to apply for the order and to file the copy of the application [*Code Civ. Proc. §§ 704.750-704.790*; *see also* §§ 294.53-294.55]. For discussion of preventive measures that can be used by the judgment debtor in relation to preventing an order for sale of property, generally, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsReal Property LawHomestead ExemptionsReal Property LawNonmortgage LiensJudgment Liens

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25-294 California Forms of Pleading and Practice--Annotated §§ 294.64 through 294.79

[Reserved]

§§ 294.64[Reserved]

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25-294 California Forms of Pleading and Practice--Annotated § 294.80

§ 294.80 California Points and Authorities

For memoranda of points and authorities related to forms in this chapter, see California Points and Authorities, Ch. 112, *Homesteads* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead Exemptions

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25-294 California Forms of Pleading and Practice--Annotated § 294.81

§ 294.81 California Legal Forms

For discussion, transaction guide, and forms relating to the creation of a declared homestead, see California Legal Forms, Ch. 27B, *Homesteads* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsReal Property LawHomestead Exemptions

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25-294 California Forms of Pleading and Practice--Annotated § 294.82

§ 294.82 California Real Estate Law and Practice

For discussion of homesteads generally, see California Real Estate Law And Practice, Ch. 344, *The Homestead Exemption* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawHomestead Exemptions

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25-294 California Forms of Pleading and Practice--Annotated § 294.83

§ 294.83 State Constitution

Legislature as required to protect homesteads from forced sale. *Cal. Const., art. XX, § 1.5*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsReal Property LawHomestead Exemptions

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25-294 California Forms of Pleading and Practice--Annotated § 294.84

§ 294.84 State Statutes

[1] Crimes

Making untrue or misleading statements in connection with offering or performing homestead-filing service, using proscribed words in a business name, using mailing envelopes that simulate, or may be confused with, envelopes sent by governmental entities, or failing to make required disclosures as unlawful. *Bus. & Prof. Code § 17537.6*

[2] Declared Homesteads

[a] In General

Value of declared homestead. *Code Civ. Proc. § 704.730*

Selection of homestead and recording of declaration. *Code Civ. Proc. § 704.920*

Contents of homestead declaration. *Code Civ. Proc. § 704.930*

[b] Abandonment of Homestead

Abandonment of homestead by declaration. *Code Civ. Proc. § 704.980*

Abandonment of homestead by operation of law. *Code Civ. Proc. § 704.990*

[3] Definitions

Declared homestead. *Code Civ. Proc. § 704.910(a)*

Declared homestead owner. *Code Civ. Proc. § 704.910(b)*

Property which may constitute a declared homestead. *Code Civ. Proc. § 704.910(c)*

Homestead declaration. *Code Civ. Proc. § 704.910(d)*

[4] Effect of Homestead Declaration

Attachment lien as attaching to declared homestead in amount of surplus over aggregate of any prior liens and encumbrances plus the homestead exemption. *Code Civ. Proc. § 487.025(b)*

Homestead Declaration recorded pursuant to former *Civ. Code §§ 1262-1305* as effective as exemption from creditors only as provided in *Code Civ. Proc.§ 704.910 et seq. Code Civ. Proc.§ 694.090*

Right of declared homestead owner to convey or encumber homestead property. *Code Civ. Proc. § 704.940*

Homestead declaration when properly recorded as prima facie evidence of facts stated and conclusive evidence in favor of good-faith purchaser or encumbrancer. *Code Civ. Proc. § 704.940*

Judgment lien as generally not attaching to declared homestead, but to to surplus value of dwelling in amount of aggregate of all liens, encumbrances, plus homestead exemption. *Code Civ. Proc. § 704.950(a), (c)*

Judgment lien created by recording judgment for child, family, or spousal support as attaching to declared homestead. *Code Civ. Proc. § 704.950(b)*

Right of judgment creditor to levy on declared homestead pursuant to writ of execution. *Code Civ. Proc. § 704.970(a)*

Judgment creditor and judgment debtor as having all rights and benefits provided by statutes governing homestead exemptions. *Code Civ. Proc. § 704.970(b)*

[5] Homestead Exemptions

[a] Definitions

Dwelling. *Code Civ. Proc. § 704.710(a)*

Family unit. *Code Civ. Proc. § 704.710(b)*

Homestead. *Code Civ. Proc. § 704.710(c)*

Spouse. *Code Civ. Proc. § 704.710(d)*

[b] Procedure for Execution on Dwelling

Creation and duration of judgment lien based on specified judgment for support or against health care provider. *Code Civ. Proc. § 697.320*

Application for writ of execution. *Code Civ. Proc. § 699.510*

Provisions governing sale of personal property used as dwelling. *Code Civ. Proc. §§ 703.510-703.610*

Requirement for court order for sale of real property dwelling. *Code Civ. Proc. § 704.740*

Application for court order for sale of dwelling. *Code Civ. Proc. §§ 704.750, 704.760*

Application for order for sale of dwelling in county other than county where judgment entered. *Code Civ. Proc. § 704.750(b)*

Contents of application for court order for sale of dwelling. *Code Civ. Proc. § 704.760*

Notice and setting of hearing to show cause why application for order for sale of dwelling should not be made. *Code Civ. Proc. § 704.770(a)*

Service of notice of hearing of application for order for sale of dwelling. *Code Civ. Proc. § 704.770(b)*

Burden of proof as to existence of homestead; amount of claimed exemption. *Code Civ. Proc. § 704.780(a)*

Court's power to determine whether homestead exempt, amount of homestead exemption, and fair market value of dwelling, and order sale of dwelling to satisfy judgment debt. *Code Civ. Proc. § 704.780(b)*

Appointment of appraiser to assist court in determining fair market value of dwelling. *Code Civ. Proc. § 704.780(d)*

Procedures applicable after order of sale on judgment debtor's default. *Code Civ. Proc. § 704.790*

Minimum bids required at court-ordered sale. *Code Civ. Proc. § 704.800*

Procedure when judgment debtor is coowner or owns less than a fee. *Code Civ. Proc. § 704.820*

Right to extensions of time for act to be done as provided in *Code Civ. Proc. § 703.590*. *Code Civ. Proc. § 704.830*

Right to appeal as provided in *Code Civ. Proc. § 703.600*. *Code Civ. Proc. § 704.830*

Recovery of costs. *Code Civ. Proc. § 704.840*

Priority of disbribution of proceeds of sale of homestead. *Code Civ. Proc. § 704.850*

[6] Proceeds from Sale of Homestead

Time for distribution of proceeds. *Code Civ. Proc. § 701.820*

Resolution of conflicting claims to proceeds. *Code Civ. Proc. § 701.830*

Proceeds from execution sale of homestead or indeminification for damage or destruction of homestead as exempt from sale. *Code Civ. Proc. § 704.720*

Distribution of procceds of sale of homestead. *Code Civ. Proc. § 704.850*

Reinvestment of proceeds from sale of declared homestead or indemnification for damage or destruction of declared homestead as exempt. *Code Civ. Proc. § 704.960*

[7] Property Constituting Homestead

[a] In General

Property constituting homestead, real or personal. *Code Civ. Proc. § 704.710(a)*

[b] Property Not Exempt

Homestead exemption does not apply to judgment foreclosing mortgage, deed of trust, or other lien or encumbrance other than enforcement or attachment liens. *Code Civ. Proc. § 703.010(b)*

[c] Spouses Residing in Separate Homesteads

Court determines which homestead exempt when spouses who reside in separate homesteads unable to agree. *Code Civ. Proc. § 703.110*

Property of only one spouse exempt if judgment debtor and spouse reside in separate homesteads, and only proceeds of exempt homestead exempt. *Code Civ. Proc. § 704.720(c)*

[d] Separated or Former Spouse Residing in Homestead

Judgment debtor entitled to homestead if former or separated spouse resides in or exercises control over possession of homestead until entry of judgment or agreement dividing community property. *Code Civ. Proc. § 704.720(d)*

[8] Provisions Regarding Acceleration Clauses and Prepayment Penalties

Levy on homestead subject to lien or encumbrance is not grounds for acceleration of secured obligation and amount payable to satisfy lien or encumbrance as not to include prepayment penalty. *Code Civ. Proc. § 704.810*

Legal Topics:

For related research and practice materials, see the following legal topics:
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25-294 California Forms of Pleading and Practice--Annotated § 294.85

§ 294.85 Decisions

[1] Abandonment of Homestead

Property settlement agreement prepared in connection with divorce proceeds is ineffective as declaration of abandomnent of homestead. *Estate of Teel (1949) 34 Cal. 2d 349, 352, 210 P.2d 1*

Sale of portion of land other than that in which dwelling located does not constitute abandonment of homestead. *Ray v. Valdez (1959) 175 Cal. App. 2d 502, 506, 346 P.2d 464*

Homestead is not abandoned by conveyance made for purpose of avoiding creditors. *Oppenheim v. Goodley (1957) 148 Cal. App. 2d 325, 327, 306 P.2d 944*

[2] Advertising of Homestead Filing Services

Bus. & Prof. Code § 17537.6, prohibiting untrue or misleading statements in advertising a homestead filing service, does not violate *First Amendment* rights, is not unconstitutionally vague, and does not violate due process. *People v. Morse (1993) 21 Cal. App. 4th 259, 265-271, 25 Cal. Rptr. 2d 816*

[2A] Amount of Homestead Exemption

When debtor's Schedule C on his 2005 tax return shows gross receipts of $31,879 and expenses of $ 28,018, debtor's return shows his business income was $3,861 and adjusted gross income of $3,588, and debtor declared that his earnings for 2005, appropriate year for calculating his gross annual income, arose solely from the operation of his sole proprietorship and that he had no carry forward losses or ownership interests in any "S" corporations and no further losses to offset his business income, debtor's primary source of income was from his sole proprietorship and, even though that income was from performance of services, the debtor is entitled to reduce from gross receipts those

"expenditures required for the operation of the business." *In re Bush (Bankr., S.D. Cal. 2006) 346 B.R. 207, 210*

Homestead exemption claimants were not entitled to exemption under *CCP § 704.730(a)(3)(B)*, based on disability, because their bankruptcy schedules, signed under penalty of perjury pursuant to *Fed. R. Bankr. P. 1008*, admitted that the wife could derive income from self-employment in a meaningful work-related activity at the time of bankruptcy, and those statements were judicial admissions; thus, the trustee met her burden of proof that the debtors were not entitled to the exemption. *In re Rolland (Bankr., C.D. Cal. 2004) 317 B.R. 402, 420*

Homestead exemption claimant failed to sustain the burden of showing satisfactory evidence that he was unable to engage in substantial gainful employment as claimed under *Code Civ. Proc. § 704.730(a)(3)(B)*. *Cal-Western Reconveyance Corp. v. Reed (2007) 152 Cal. App. 4th 1308, 1323, 62 Cal. Rptr. 3d 244*

[3] Attachment

Excess value of homestead property is subject to attachment; attachment levied before transfer of property is charges grantee with notice that title is subject to right of judgment creditor to reach excess value of property through statutory proceedings governing execution and sale of homestead property. *Marelli v. Keating (1929) 208 Cal. 528, 530-531, 282 P. 793*

[4] Constitutional Authorization for Homestead Exemption

Cal. Const., art. XX, § 1.5, authorizes Legislature to enact homestead exemptions to protect homesteads from forced sale. *Lee v. Brown (1976) 18 Cal. 3d 110, 113, 132 Cal. Rptr. 649, 553 P.2d 1121*

[5] Creation of Homestead

Rights of homestead claimant is created by fulfilling two requirements: (1) recording of valid homestead declaration in accordance with statutory provisions, and (2) actual, present existence of facts claimed in the declaration. *Rich v. Ervin (1948) 86 Cal. App. 2d 386, 392, 194 P.2d 809*

When validity of homestead is at issue, truth of facts contained in homestead declaration is required to be proved by independent evidence. *Valley Title Co. v. Parish Egg Basket, Inc. (1973) 31 Cal. App. 3d 776, 779, 107 Cal. Rptr. 717*

[6] Effect of Declared Homestead

Declared homestead rights do not apply to forced sales in a bankruptcy proceeding. *In re Kelley (B.A.P., 9th Cir. 2003) 300 B.R. 11, 20-21*

Recording declaration of homestead by judgment debtor does not automatically entitle debtor to homestead exemption set forth in *Code Civ. Proc. § 704.730*. *In re Kelley (B.A.P., 9th Cir. 2003) 300 B.R. 11, 19-20* ; *In re Anderson (9th Cir. 1987) 824 F.2d 754, 758-759*

Reference to *Code Civ. Proc. § 704.730* in *Code Civ. Proc. § 704.950* does not incorporate all benefits of Article 4 (*Code Civ. Proc. § 704.710 et seq.*) into Article 5 (*Code Civ. Proc. § 704.910 et seq.*); reference is only shorthand method of giving added protection to Article 4 dwelling exemption by further exempting it from judicial liens. *In re Kelley (B.A.P., 9th Cir. 2003) 300 B.R. 11, 19-20* ; *In re Anderson (9th Cir. 1987) 824 F.2d 754, 759*

In interpleader action by trustee of deed of trust after nonjudicial foreclosure sale to distribute surplus proceeds, trial court erred in refusing to acknowledge declared homestead exemption afforded by *Code Civ. Proc. § 704.720(c)* by denying homeowner's motion to amend answer to include the declared homestead, when judgment lien created by recording of abstract of judgment, only attached to equity in property above and beyond recorded homestead exemption and any preexisting liens on property. *Title Trust Deed Service Co. v. Pearson (2005) 132 Cal. App. 4th 168, 174-179, 33 Cal. Rptr. 3d 311*

[7] Execution on Homestead

When defrauded creditor whose money has been used to purchase homestead property attaches homestead, right of defrauded creditor is paramount to that of homestead owner, and that property is not exempt from execution or sale. *Stoner v. Walsh (1972) 24 Cal. App. 3d 938, 943, 101 Cal. Rptr. 485*

When homestead property is subject to execution sale for debts of one spouse only, that spouse is entitled to claim full benefit of homestead exemption applicable on his or her one-half interest in home. *Schoenfeld v. Norberg (1970) 11 Cal. App. 3d 755, 764-765, 90 Cal. Rptr. 47*

If levy is on community property, entirety as subject to execution for one spouse's debt. *Schoenfeld v. Norberg (1970) 11 Cal. App. 3d 755, 760, 90 Cal. Rptr. 47*

Requirement of minimum bid in court-ordered sale of homestead as designed to protect interest of homestead debtor and not that of the judgment creditor. *Van Bogaert v. Avery (1969) 271 Cal. App. 2d 492, 497, 76 Cal. Rptr. 608*

[8] Fraudulent Conveyance of Homestead

When property is homesteaded after fraudulent conveyance, homestead has no effect because fraudulent conveyance was void as to grantor's creditors. *Nicolos v. Grover (1986) 186 Cal. App. 3d 858, 861, 231 Cal. Rptr. 79*

Principles of fraudulent conveyances as not applying to declarations of homestead, and fact that debtor filed declaration of homestead to hinder and delay creditors as not affecting validity of declaration. *Wells Fargo Bank v. PAL Investments, Inc. (1979) 96 Cal. App. 3d 431, 434-438, 157 Cal. Rptr. 818* ; *Putnam Sand & Gravel Co. v. Albers (1971) 14 Cal. App. 3d 722* ; *Oppenheim v. Goodley (1957) 148 Cal. App. 2d 325, 327-329, 306 P.2d 944*

[9] Joint Tenancy and Tenancy in Common

Debtor's transmutation of his community property, marital home, to joint tenancy did not forfeit his homestead rights under *CCP § 704.720(a)*, so transfer did not constitute fraudulent transfer in that respect. *In re Osborn (2006) 346 B.R. 204, 206*

Homesteads are capable of being claimed on property held in tenancy in common and joint tenancy *Estate of Kachigian (1942) 20 Cal. 2d 787, 791, 128 P.2d 865*

Spouse is able to unilaterally convert joint tenancy to tenancy in common by conveyance to self directly or through

strawman even though property is declared by both spouses to be their homestead; homestead as not affected by such conveyance. *Estate of Grigsby (1982) 134 Cal. App. 3d 611, 618, 184 Cal. Rptr. 886*

Fact that spouses took title in real property in joint tenancy as not conclusive evidence that property held in joint tenancy; if it could be shown that parties intended to hold property as community property, that intent would prevail. *Schoenfeld v. Norberg (1970) 11 Cal. App. 3d 755, 764, 90 Cal. Rptr. 47*

Homestead claimant of property held in joint tenancy or tenancy in common as acquiring only those rights of occupancy that he or she had before creation of homestead, and cotenant's rights as in no way affected. *Squibb v. Squibb (1961) 190 Cal. App. 2d 766, 769, 12 Cal. Rptr. 346*

When only one spouse's interest in homestead is subject to sale pursuant to provision for execution on homestead, sale as severing spouse's interest with only debtor spouse's interest passing to purchaser and other spouse becoming tenant in common with new owner. *Strangman v. Duke (1956) 140 Cal. App. 2d 185, 188, 295 P.2d 12*

[10] Liberal Construction

[a] In General

Homestead exemption available to judgment debtors, under *CCP § 704.730*, is more generous than exemption that applies to debtors in bankruptcy. *In re Watts (9th Cir. 2002) 298 F3d 1077, 1080*

Homestead laws are given most liberal construction in order to advance their beneficial objects and to carry out the manifest purpose of Legislature. *Estate of Kachigian (1942) 20 Cal. 2d 787, 791, 128 P.2d 865* ; *Estate of Vannucci (1980) 103 Cal. App. 3d 175, 180, 163 Cal. Rptr. 11* ; *Bonner v. Superior Court (1976) 63 Cal. App. 3d 156, 163, 133 Cal. Rptr. 592* ; *Schoenfeld v. Norberg (1970) 11 Cal. App. 3d 755, 764, 90 Cal. Rptr. 47*

[b] Of Homestead Declaration

Rule of liberal construction of homestead declarations is applicable in case of inaccurate description of homestead property as ten-room dwelling when in fact it consisted of two five-room flats. *Viotti v. Giomi (1964) 230 Cal. App. 2d 730, 736, 41 Cal. Rptr. 345*

Grammatical error in declaration does not invalidate declaration of homestead when it was clear what declarants were referring to. *Clausseneus v. Anderson (1963) 216 Cal. App. 2d 171, 176, 30 Cal. Rptr. 772*

Declaration of homestead is valid when complete except for omission of statement that declaration was made for joint benefit of declarant and her spouse, since statutory provisions substantially complied with and declaration fulfilled purpose of law. *Johnson v. Brauner (1955) 131 Cal. App. 2d 713, 723, 281 P.2d 50*

[c] Not Applied

Homestead declaration that lacked description of homestead property is invalid for failure to meet statutory requirements. *Jackson v. Menick (9th Cir. 1958) 260 F.2d 563, 564*

Homestead declaration is invalid for failing to meet statutory requirement of description of property when declaration described property "Lot 104" when in fact homestead was on Lot 204. *Esten v. Cheek (9th Cir. 1958) 254 F.2d 667, 669-671*

Liberal construction of law and facts does not mean the trial court is at liberty to apply exemption in absence of satisfactory evidence that debtor was unable to engage in substantial gainful employment as claimed under *Code Civ. Proc. § 704.730(a)(3)(B)*. *Cal-Western Reconveyance Corp. v. Reed (2007) 152 Cal. App. 4th 1308, 1323, 62 Cal. Rptr. 3d 244*

Homestead is invalid when facts contained in homestead declaration found to be false. *Rich v. Ervin (1948) 86 Cal. App. 2d 386, 387-394, 194 P.2d 809*

[11] Minimum Bid Required at Sale

"All liens and encumbrances," for purposes of *Code Civ. Proc. § 704.800(a)*, includes all liens senior to the lien of the executing judgment creditor, but does not include the judgment creditor's lien. *Rourke v. Troy (1993) 17 Cal. App. 4th 880, 883-886, 21 Cal. Rptr. 2d 660*

[12] Priority of Liens and Judgments

Execution lien takes priority over homestead declaration recorded later; however, court nevertheless required to apply homestead exemption when declaration was filed in response to application for order of sale that established that property in question was a homestead. *Kahn v. Berman (1988) 198 Cal. App. 3d 1499, 1508-1509, 244 Cal. Rptr. 575*

Proceeds of sale of homestead defined as those payable to seller; consequently, real estate commissions for sale of property are not proceeds and are properly deducted from amount received from sale before proceeds are to be distributed. *Ortale v. Mulhern (1976) 58 Cal. App. 3d 861, 864, 130 Cal. Rptr. 277*

Judgment lien does not take priority over prior recorded homestead declaration; consequently, prior recorded homestead has precedence over tax lien which has force and effect of judgment lien. *Curtis v. County of Kern (1974) 37 Cal. App. 3d 704, 706, 113 Cal. Rptr. 41*

[13] Property Subject to Homestead

Occupation by homestead owner of one part of homestead property and renting out remainder is not inconsistent with homestead. *Estate of Levy (1904) 141 Cal. 646, 647-653, 75 P. 301* (apartment house); *Bodden v. Community Nat'l Bank (1969) 271 Cal. App. 2d 432, 434-436, 76 Cal. Rptr. 278* (lot containing two houses with common yard and right of way); *Oktanski v. Burn (1956) 138 Cal. App. 2d 419, 422, 291 P.2d 954* (duplex)

Homestead is capable of being declared on property that is less than a fee interest. *Blackburn v. Drake (1963) 211 Cal. App. 2d 806, 818-819, 27 Cal. Rptr. 651* (mere possession); *Breeden v. Smith (1953) 120 Cal. App. 2d 62, 65-66, 260 P.2d 185* (full equitable interest); *Arighi v. Rule & Sons (1940) 41 Cal. App. 2d 852, 855, 107 P.2d 970* (life estate); *Estate of Reid (1938) 26 Cal. App. 2d 362, 366, 79 P.2d 451* (completed contract to purchase)

[14] Reinvestment of Homestead Proceeds

General purpose of exemption period for proceeds from sale of homestead is to give owner time to move family to another home with retention of protection from forced sale. *Thorsby v. Babcock (1950) 36 Cal. 2d 202, 205, 222 P.2d 863* ; *Chase v. Bank of America (1964) 227 Cal. App. 2d 259, 262-264, 38 Cal. Rptr. 567*

Statutory six-month exemption period for proceeds of sale of homestead commences from time judgment debtor has access to funds. *Thorsby v. Babcock (1950) 36 Cal. 2d 202, 204-206, 222 P.2d 863*

[15] Res Judicata

Trial court did not err in applying res judicata to bar assertion of homestead in action for breach of contract, negligent misrepresentation and fraud, cancellation of quitclaim deed and quieting of title, where defendant had recorded no homestead when complaint was filed, in answering complaint defendant did not assert homestead interest, either recorded or statutory, fact that defendant contended she no longer had title did not mean court was precluded from finding transfers from plaintiff to defendant and then to third party had been fraudulent, and once jury returned verdict finding defendant had breached her contract, committed negligent misrepresentations and committed fraud in the transaction by having her name placed on blank quit claim deed, there was more than distinct possibility transactions might be set aside; where in three weeks between verdict and trial on equity issues, defendant still did not record homestead or attempt to amend her answer to assert statutory homestead exemption should trial court, sitting as court of equity, determine transaction should be set aside and defendant was still owner; and where, although defendant was not required to actually record homestead under *Code Civ. Proc. § 704.920* and assertion of automatic homestead pursuant to *Code Civ. Proc. § 704.720* would have sufficed, and assertion of homestead interest might have presented defendant with tactical problems due to her assertion she had sold property to third party, she was not legally barred from asserting what would have been inconsistent defense. Because no homestead was recorded, assertion of automatic homestead interest would have required court to make findings concerning value of property, amount of homestead, and whether exemption even applied, and because partition sale amounted to "forced sale" under homestead laws, facts necessarily should have been litigated to arrive at complete disposition of all issues related to property, and because defendant did not raise issue of homestead at trial, she was later barred from raising it. Further, case was not normal forced-sale situation in which interests in property had not been previously litigated and homesteader could file homestead declaration to defeat otherwise legitimate claims of creditors to extent permitted by homestead law, but because of prior equitable action in which rights to property were asserted, defendant should have asserted her residential homestead at that time, and some form of homestead existed at time of partition action and should have been asserted so that trial court could determine priority of liens and appropriate amount to be set aside for homestead. *Amin v. Khazindar (2003) 112 Cal. App. 4th 582, 588-592, 5 Cal. Rptr. 3d 224*

[16] Residence Requirement

Current California homestead laws do not give debtors a homestead exemption to protect equity in house that is not their primary residence. *In re Kelley (B.A.P., 9th Cir. 2003) 300 B.R. 11, 19-20* ; *In re Anderson (9th Cir. 1987) 824 F.2d 754, 760*

Tenant is required to have bona fide intention to make dwelling his or her permanent residence in order for homestead declaration to be valid. *Bullis v. Staniford (1918) 178 Cal. 40, 40-46, 171 P. 1064* ; *Michelman v. Frye (1965) 238 Cal. App. 2d 698, 704-705, 48 Cal. Rptr. 142* ; *Ellsworth v. Marshall (1961) 196 Cal. App. 2d 471, 474-477, 16 Cal. Rptr. 588*

[17] Retroactivity of Changes in Homestead Laws

Retroactive enforcement of new Enforcement of Judgments Act does not violate federal and state contract clauses. *In re Anderson (9th Cir. 1987) 824 F.2d 754, 761*

Enactment of *Code Civ. Proc. § 704.950(c)*, which changed law so that declaration of homestead no longer exempted property from preexisting judgment lien, is applicable retroactively to case in which former *Civ. Code § 1245* had barred plaintiff from attempting to levy on property second time, so that prior action was not res judicata and judgment debtor's home, which had been exempt from execution under former law, was now subject to levy after enactment of new legislation. *Stoffel v. Dutton (1985) 175 Cal. App. 3d 1185, 1187-1189, 221 Cal. Rptr. 346*

[18] Sale of Homestead

Code Civ. Proc. § 704.740, which prohibits sale of "dwelling" except pursuant to court order, does not trump or negate *Code Civ. Proc. § 701.680*, which makes sale of property after levy absolute. *Gonzalez v. Toews, 111 Cal. App. 4th 977, 981, 4 Cal. Rptr. 3d 434*

Requirement of minimum bid in execution sale is designed to protect interest of homestead debtor and that of his or her judgment creditor. *Van Bogaert v. Avery (1969) 271 Cal. App. 2d 492, 497, 76 Cal. Rptr. 608*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataGovernmentsLegislationInterpretationReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawHomestead ExemptionsReal Property LawNonmortgage LiensLien PrioritiesReal Property LawPurchase & SaleFraudulent Transfers

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§ 294.86 Text References

Witkin, California Procedure, vol. 8, *Enforcement of Judgments*, §§ 207-231 (4th ed. 1977)

Witkin, Summary of California Law, vol. 12, *Real Property*, § 53 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewReal Property LawGeneral Overview

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[Reserved]

§§ 294.87[Reserved]

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25-294 California Forms of Pleading and Practice--Annotated § 294.100

§ 294.100 Declaration of Homestead by Owner or Representative [Code Civ. Proc. § 704.930]

[1] FORM Declaration of Homestead by Owner or Representative [Code Civ. Proc. § 704.930]

DECLARATION OF HOMESTEAD

1. I, _____ [_____ (*name of homestead owner or his/her spouse or other person authorized to act on behalf of owner or spouse*) *or* _____ (*name of first spouse*) and I, _____ (*name of second spouse*)], hereby declare:

[2. We are married to each other.]

[*EITHER*]

3. I/We am/are the _____ [owner(s) *or* husband/wife of the owner] of the land and premises located in _____ [*city*], _____ County, California, more particularly described as: _____ [*describe property, e.g.,*

Lot 9, per map entitled "Ocean View, City of Berkeley, Alameda County, California," filed December 16, 1970 in Map Book 90, page 87, Alameda County Records.

The property is more commonly known as 23 Baker Street, Berkeley, California]. I/We hereby claim these premises and the dwelling house and other improvements thereon as a homestead.

[*OR*]

3. I am the _____ [conservator *or* guardian *or other person authorized to act on behalf of homestead*

owner(s) or his/her spouse] of the owner of the land and premises located in _____ [*city*], _____ County, California, more particularly described as: _____ [*describe property, e.g.,*

Lot 9, per map entitled "Ocean View, City of Berkeley, Alameda County, California," filed December 16, 1970, in Map Book 90, page 87, Alameda County Records.

The property is more commonly known as 23 Baker Street, Berkeley, California]. I hereby claim these premises and the dwelling house and other improvements thereon as a homestead.

4. I/We/He/She/They own(s) the following interest(s) in the above-declared homestead: _____ [*specify, e.g.,* fee title as owner(s) in joint tenancy].

5. The above described property is _____ [my *or* our *or* my spouse's *or name of homestead owner or of his/her spouse*] principal dwelling, and I/we/she/he/they currently reside(s) in the above-described property.

[6. I make this declaration pursuant to my authority as _____ (_____ (guardian *or* conservator) of the _____ (person *and/or* estate) *or* attorney in fact on behalf *or specify other status*) of _____ (*name of declared homestead owner or his/her spouse*) under the _____ (*specify document on which authority is based, e.g.,* power of attorney recited and described in an instrument executed on _____ (*date power of attorney signed rather than date of acknowledgment*) and recorded (as Instrument No. _____) in Book 16, Page 09, Official Records of Alameda County, California)].

7. I have read the declaration and know the contents thereof; the facts stated therein are known to be true as of my own personal knowledge.

[I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.]

_____ [*date*]

_____ [*signature*]

ACKNOWLEDGMENT

State of California,)
County of_____)

_____

On _____ [*date*], before me, _____ [*name and title of officer*], personally appeared _____ [*name(s)*], _____ [personally known to me *or* proved to me on the basis of satisfactory evidence] to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity on behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

_____ [*signature*] .....[*Notarial Seal*]

_____ [*typed name*]

_____ [*name of public office*]

CAUTION:

**The above form of declaration must be acknowledged [*Code Civ. Proc. § 704.930(c)*]. It is not clear whether or not the declaration must be verified. The homestead declaration must include a statement that the facts stated in the declaration are known to be true as of the personal knowledge of the person executing and acknowledging the homestead declaration; however *Code Civ. Proc. § 704.930(c)* does not expressly require that the statement be made under penalty of perjury [*compare* Code Civ. Proc. § 704.930(c) *with* Code Civ. Proc. § 2015.5*]. The verification in the above form satisfies the requirements of *Code Civ. Proc. § 2015.5*.

[2] Use of Form

The foregoing form of a declaration of homestead may be used by an owner of property or by his or her spouse to designate the dwelling in which the owner or spouse actually resides as a homestead [*Code Civ. Proc. § 704.930*]. The declaration may also be used by a husband and wife to declare themselves homestead owners or by a conservator or guardian of the person or estate of the homestead owner or his/her spouse [*Code Civ. Proc. § 704.930(a), (b)*].

[3] Contents of Homestead Declaration

The homestead declaration should contain everything required by *Code Civ. Proc. § 704.930*. The declaration must include the name of the declared homestead owner (Paragraph 1), a description of the declared homestead (Paragraphs 3, 4), and a statement that the declared homestead is the principal dwelling of the declared homestead owner or his/her spouse, and that the homestead owner, or spouse, actually resides in the declared homestead on the date the homestead declaration is recorded (Paragraph 5) [*Code Civ. Proc. § 704.930(a)*]. If the declarant is the guardian or conservator of the homestead owner or his or her spouse or is acting under a power of attorney or other authority, the declarant must state that he/she is acting on behalf of the homestead owner or his/her spouse, and the source of that authority (Paragraph 6) [*Code Civ. Proc. § 704.930(c)*].

[4] Acknowledgment

In order for a declared homestead to be established, the declaration of homestead must be executed and acknowledged in the same manner as an acknowledgment of a conveyance of real property [*Code Civ. Proc. § 704.930(b)*; *see Civ. Code §§ 1188, 1189*; *see also § 294.32*]. For a discussion of acknowledgments generally, see Ch. 9, *Acknowledgments* .

[5] Recording

The declaration of homestead must be recorded in the office of the recorder of the county in which the dwelling is located. From and after the time of recording, the dwelling is a declared homestead [*Code Civ. Proc. § 704.920*]. When properly recorded, the declaration is prima facie evidence of the facts contained within the declaration, and conclusive evidence in favor of a purchaser or encumbrancer in good faith and for a valuable consideration [*Code Civ. Proc. § 704.940*].

[6] Selection of Property

The property selected for a declared homestead may be any interest in real property, whether present or future, vested or contingent, legal or equitable, that is a "dwelling" [*Code Civ. Proc. §§ 704.710, 704.910*]. The interest may be in community property, held by the spouses or others as tenants in common or in joint tenancy, or in separate property of the spouses [for further discussion, *see § 294.33*].

[7] California Legal Forms

For discussion, transaction guide, and forms relating to the creation of a declared homestead, see California Legal Forms, Ch. 27, *Deeds, Conveyancing, Dedication, and Homesteads*

[8] California Real Estate Law and Practice

For discussion of procedures in creating a homestead declaration, see California Real Estate Law And Practice, Ch. 344, *Creation and Effect of Homesteads*

[9] State Statutes

Definitions relating to declared homesteads. *Code Civ. Proc. § 704.910(a)-(d)*

Creation of declared homestead. *Code Civ. Proc. § 704.920*

Contents of homestead declaration. *Code Civ. Proc. § 704.930*

Effect of Recording Homestead Declaration. *Code Civ. Proc. § 704.940*

[10] Decisions

[a] Creation of Homestead

When validity of homestead at issue, truth of facts contained in homestead declaration as required to be proved by independent evidence. *Valley Title Co. v. Parish Egg Basket, Inc. (1973) 31 Cal. App. 3d 776, 779, 107 Cal. Rptr. 717*

Rights of homestead claimant as created by fulfilling two requirements: (1) recording of valid homestead declaration in accordance with statutory provisions, and (2) actual present existence of the facts claimed in declaration. *Rich v. Ervin (1948) 86 Cal. App. 2d 386, 392, 194 P.2d 809*

[b] Liberal Construction of Homestead Declaration

Rule of liberal construction of homestead declarations as applicable in case of inaccurate description of homestead property as ten-room dwelling when in fact it consisted of two five-room flats. *Viotti v. Giomi (1964) 230 Cal. App. 2d 730, 736, 41 Cal. Rptr. 345*

Grammatical error in declaration as not invalidating homestead declaration when it was clear what declarants were referring to. *Clausseneus v. Anderson (1963) 216 Cal. App. 2d 171, 176, 30 Cal. Rptr. 772*

Declaration of homestead as valid when complete except for statement that declaration was made for joint benefit of declarant and her spouse, since statutory provisions substantially complied with and declaration fulfilled purpose of law. *Johnson v. Brauner (1955) 131 Cal. App. 2d 713, 723, 281 P.2d 50*

[c] Invalid Homesteads

Homestead as invalid when facts contained in homestead declaration found to be false. *Rich v. Ervin (1948) 86 Cal. App. 2d 386, 387-394, 194 P.2d 809*

Homestead declaration as invalid for failing to meet statutory requirement of description of property when declaration described property "Lot 104" when in fact homestead was on Lot 204. *Esten v. Cheek (9th Cir. 1958) 254 F.2d 667, 669-671*

[d] Residence Requirement

Declarant as required to have bona fide intention to make dwelling his/her permanent residence in order for homestead declaration to be valid. *Bullis v. Staniford (1918) 178 Cal. 40, 40-46, 171 P. 1064* ; *Michelman v. Frye (1965) 238 Cal. App. 2d 698, 704-705, 48 Cal. Rptr. 142* ; *Ellsworth v. Marshall (1961) 196 Cal. App. 2d 471, 474-477, 16 Cal. Rptr. 588*

[11] Cross References

For discussion of and additional forms of acknowledgments, see Ch. 9, *Acknowledgments*

For discussion of the use of verifications, see Ch. 572, *Verification*

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25-294 California Forms of Pleading and Practice--Annotated § 294.101

§ 294.101 Declaration of Abandonment of Homestead [Code Civ. Proc. § 704.980]

[1] FORM Declaration of Abandonment of Homestead [Code Civ. Proc. § 704.980]

DECLARATION OF ABANDONMENT OF HOMESTEAD

I/We, _____ [*name or names of spouses*], hereby declare:

I/We hereby abandon the homestead previously declared by _____ [me/us *or state name of original declarant*] on _____ [*date*], on the dwelling and premises located in _____ [*city*], _____ County, State of California, and more particularly described as follows: _____ [*describe property, e.g.,*

Lot 48 of Tract 1960, filed for record on November 22, 1963, in Book 35 of maps at page 43.

The property is more commonly known as 118 Avalon Street, San Francisco, California]. The declaration of homestead was recorded on _____ [*date*], in Book _____, Page _____, of the _____ records of _____ County, California.

[As _____ (_____ (guardian *or* conservator) of the (person *and/or* estate) *or* attorney in fact on behalf *or specify ot her authority*) of _____ (*name of declared homestead owner(s)*) and having been authorized to act on behalf of _____ (*name*) in connection with this declaration of abandonment of homestead by _____ (*specify source of authority, e.g.,* the power of attorney recited and described in an instrument executed on _____ (*date of signature of power of attorney rather than date of acknowledgment*) and recorded (as Instrument No. _____) in Book 16, Page 09, Official Records of Alameda County, California)].

[*Acknowledgment. See § 294.100.*]

[2] Use of Form

The foregoing form of a declaration of abandonment of homestead may be used by a declared homestead owner to abandon a previous declaration of homestead. A declared homestead, whether recorded pursuant to *Code Civ. Proc. § 704.910 et seq.* or to former *Civ. Code §§ 1237-1304*, may be abandoned in this manner [*Code Civ. Proc. § 704.980(a)*]. If the declaration of abandonment is executed and acknowledged by a person authorized to act on behalf of a declared homestead owner, the declaration must contain a statement that the person has authority to act on behalf of the declared homestead owner and the source of the persons authority [*Code Civ. Proc. § 704.980(b)*]. The declaration of abandonment affects only the declared homestead of the owner named in the declation of abandonment and does not affect the declared homestead of any other person who may have an interest in the same property [*Code Civ. Proc. § 704.980(c)*]. For further discussion of abandonment of a declared homestead, see *§ 294.37*.

[3] State Statutes

Abandonment of homestead by declaration. *Code Civ. Proc. § 704.980*

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25-294 California Forms of Pleading and Practice--Annotated § 294.102

§ 294.102 Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. §§ 704.710-704.850]--Application for Issuance of Order [Code Civ. Proc. § 704.750]

[1] FORM Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. §§ 704.710-704.850]--Application for Issuance of Order [Code Civ. Proc. § 704.750]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	APPLICATION FOR ISSUANCE FOR ORDER
vs.	)	OF SALE OF DWELLING
_____ [*name*],	)	[*Code Civ. Proc. § 704.750*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	

1. _____ [*specify party, e.g.*, Plaintiff] _____ [*name*] hereby applies for an order of the court for sale of the interest of _____ [*name of person having an interest in the dwelling*], a natural person, in a dwelling, pursuant to *Sections 704.740-704.850 of the Code of Civil Procedure.* The application is made by _____ [*name of moving party as described above*] to enforce a judgment entered against _____ [*specify party, e.g.*, defendant in the above-entitled action on _____ [*date*], in the sum of $ _____. [A copy of the abstract of judgment is attached hereto as Exhibit A and incorporated herein.]

2. The dwelling is _____ [*describe property, including location, e.g.,* the house and lot, including a detached garage, located on Lot 9, per map entitled "Ocean View, City of Berkeley, Alameda County, California," commonly known as 23 Baker Street, Berkeley, Alameda County, California].

3. On _____ [*date*] pursuant to instructions of _____ [*name of judgment creditor*], the judgment creditor, the _____ [*specify levying officer, e.g.,* Sheriff of _____ County] levied on _____'s [*name of judgment debtor*] interest in the above-described real property and dwelling under a writ of execution which was issued on _____ [*date*] by the clerk of the court in the above-entitled action. Notice of that levy was given to _____ [*name of judgment debtor*] by the sheriff on or about _____ [*date*].

4. The dwelling is subject to a court order for sale and execution because it is the property of defendant in the above-entitled action and has been duly levied on pursuant to a writ of execution issued by the clerk of the court in the above-entitled action.

5. A reasonable search of the records of the Assessor of _____ County indicates that a current _____ [homeowner's *or* disabled veteran's] exemption does [not] exist [in the name(s) of _____ (*names(s) of any person who claimed either exemption*)].

6. The records of the Recorder of _____ County indicate that a homestead declaration on the above-described dwelling has [not] been recorded.

[*EITHER*]

7. On information and belief, the above-described dwelling is a homestead and the amount of the homestead exemption is _____ [*specify applicable amount of exemption pursuant to Code Civ. Proc. § 704.730, e.g.,* $50,000].

[*OR*]

7. On information and belief, the above-described dwelling is not a homestead because _____ [*state reasons, e.g.,* the dwelling is not the principal residence of the judgment debtor and/or his/her spouse].

[8. The liens and encumbrances on the above-described dwelling are as follows: _____ (*specify amount of each lien or encumbrance and address of each person used by county recorder for return of instrument creating each person's lien or encumbrance after recording*).]

VERIFICATION

I, _____ [*name*], am the _____[*specify party e.g.,* plaintiff] in the above-entitled proceeding. I have read the foregoing application and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of application is for use by a judgment creditor to obtain a court order for sale of a dwelling pursuant to *Code Civ. Proc. § 704.740*. A copy should be made for service on the judgment debtor [*Code Civ. Proc. § 704.770(b)*]. An order for sale must be obtained in order to sell the interest of a natural person in a real property dwelling to enforce a money judgment unless the judgment debtor has only a leasehold estate with an unexpired term of less than two years at the time of the levy on the property [*Code Civ. Proc. § 704.740*].

[3] Contents of Application

The application must include a statement of whether or not the records of the county tax assessor indicate that there is a current homeowner's exemption under *Rev. & Tax. Code § 218* or a disabled veterans's exemption under *Rev. & Tax. Code § 205.5* for the person or persons who claimed the exemption (Paragraph 5) [*Code Civ. Proc. § 704.760(a)*].

The application must also contain a statement, which may be based on information and belief, whether or not the dwelling is a homestead, and if so, the amount of the homestead exemption, and a statement whether or not the records of the county indicate that a homestead declaration was recorded by the judgment debtor and/or his/her spouse relating to the dwelling that is the subject of the application (Paragraph 7) [*Code Civ. Proc. § 704.760(b)*].

Finally, the application must contain the amount of any liens or encumbrances on the dwelling, the name of each person having a lien or encumbrance on the dwelling, and the address of the person used by the county recorder for the return of the instrument creating his/her lien or encumbrance after recording (Paragraph 8) [*Code Civ. Proc. § 704.760(c)*].

[4] Time for Making Application

Within 20 days after the judgment creditor has been served with notice that the levying officer has levied on the dwelling, the judgment creditor must apply to the court for an order for sale of the dwelling and file a copy of the application with the levying officer. Failure to timely file the copy of the application for the order for sale will result in the levying officer's release of the dwelling [*Code Civ. Proc. § 704.750(a)*].

[5] Judgment Rendered in Another County

If the dwelling which is the subject of the application for order for sale is located in a county other than the one in which the judgment was rendered, the judgment creditor must apply to the superior court of the county where the dwelling is located [*Code Civ. Proc. § 704.750(b)(1)*].

The judgment creditor must also file with the application an abstract of judgment in the form prescribed by *Code Civ. Proc. § 674* or, if the judgment was one described under *Code Civ. Proc. § 697.320* (for spousal or child support, or against health care provider for periodic payments), a certified copy of the judgment [*Code Civ. Proc. § 704.750(b)(2)*].

In addition, the judgment creditor must pay the filing fee for a motion provided in *Gov. Code § 70617(a)* [*Code Civ. Proc. § 704.750(b)(3)*].

[6] Verification

The application must be verified [*Code Civ. Proc. § 704.760*; *see also Code Civ. Proc. § 2015.5*].

[7] State Statutes

Application for order for sale of dwelling in county other than in county where judgment entered. *Code Civ. Proc. § 704.750*

Application for writ of execution by judgment creditor. *Code Civ. Proc. § 699.510*

Requirement for court order for sale of dwelling. *Code Civ. Proc. § 704.740*

Application for court order for sale of dwelling. *Code Civ. Proc. § 704.750*

Contents of application for court order for sale of dwelling. *Code Civ. Proc. § 704.760*

[8] California Rules of Court

Notification requirements for ex parte application for order. *Cal. Rules of Ct., Rule 3.120-3.1207*

[9] Decisions

In action to enforce a judgment rendered in county number one, superior court in county number two may rule that the county number one judgment is void as defense to enforcement in county number two. Accordingly, where former client who had received default judgment in one county's superior court instituted new action to collect more than year later in another county's superior court, that was new proceeding pursuant to *Code Civ. Proc. §§ 704.750(b), 392(a)(2),* and it created forum for attorney the default judgment was entered against to challenge judgment as void. *Levine v. Smith (2006) 145 Cal. App. 4th 1131, 1136, 52 Cal. Rptr. 3d 197*

Judgment creditor bank's failure to list federal income tax liens on its application for order of sale of dwelling, in violation of *Code Civ. Proc. § 704.760*, constitutes negligence per se in action by purchaser of dwelling. *Little v. Community Bank (1991) 234 Cal. App. 3d 355, 361, 286 Cal. Rptr. 4*

[10] Cross References

For discussion of verfications, see Ch. 572, *Verification*

See also §§ 294.103-294.107

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§ 294.103 Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. §§ 704.710-704.850]--Order to Show Cause Why Order of Sale of Dwelling Should Not Be Made [Code Civ. Proc. § 704.770]

[1] FORM Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. §§ 704.710-704.850]--Order to Show Cause Why Order of Sale of Dwelling Should Not Be Made [Code Civ. Proc. § 704.770]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER TO SHOW CAUSE WHY ORDER OF
vs.	)	SALE OF DWELLING SHOULD NOT BE MADE
_____ [*name*],	)	[*Code Civ. Proc. § 704.770*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____

To _____ [*name*], the above-named _____ [*specify party, e.g.,* defendant]:

The ex parte application of _____ [*name*], the _____ [*specify party, e.g.,* plaintiff] in the above-entitled action, for an order for sale of a dwelling, pursuant to *Sections 704.740-704.760 of the Code of Civil Procedure*, being before this court, and pursuant to *Section 704.770 of the Code of Civil Procedure*,

IT IS HEREBY ORDERED that you appear before the above-entitled court on _____, 20_____, at _____ _____.M. in [_____ (Department *or* Division) _____ of] this court located at _____ [*address and room number, if any*], _____ [*city*], then and there to show cause, if you have any, why an order for sale of your interest in the real property and dwelling at _____ [*street address*], more particulary described as follows: _____ [*give legal*

description] should not be issued as requested in the application of _____ [*name*], _____ [*specify party, e.g.,* plaintiff] in the above-entitled action, a copy of which is served herewith.

[This order, together with the attached copy of the above-mentioned application and a copy of the notice of the hearing, shall be served on you personally or by mail at least 30 days prior to _____, 20_____ (*date of hearing*).]
Dated: _____, 20_____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The foregoing form of an order to show cause is for use by a judgment creditor in conjunction with a form of application to obtain an order for the sale of a dwelling to enforce a money judgment as set forth in *§ 294.102*. The court must issue such an order to show cause on receiving the application by a judgment creditor for order for sale of a real property dwelling [*Code Civ. Proc. § 704.770*]. Counsel will either fill in the blanks for the time and place of hearing, or leave them blank, depending on local custom and practice. The original order should be deposited with the clerk when the application is filed.

[3] Service

Copies of the foregoing order to show cause, the application for the order of sale [see *§ 294.102*], and an informative notice of the hearing [see *§ 294.104*], must be served on the judgment debtor at least 30 days before the hearing on the application. The judgment creditor must serve the above-mentioned documents either personally or by mail [*Code Civ. Proc. § 704.770(b)(1)*]. In addition, the judgment creditor must personally serve a copy of each of the documents on an occupant of the dwelling in question. If there is no occupant present at the time service is attempted, a copy of each document must be posted in a conspicuous place at the dwelling [*Code Civ. Proc. § 704.770(b)(2)*].

[4] State Statutes

Setting of hearing to show cause why application for order for sale of dwelling should not be made. *Code Civ. Proc. § 704.770(a)*

Notice and service of order to show cause why order for sale of dwelling should not be granted. *Code Civ. Proc. § 704.770(b)*

[5] Cross References

For discussion and forms of orders to show cause, see Ch. 372, *Motions and Orders*

For discussion and forms for proof of service, see Ch. 518, *Service of Summons and Papers*

[6] Cross Reference

See also Comments and References to Forms 3, 5-7

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Chapter 294 HOMESTEADS
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25-294 California Forms of Pleading and Practice--Annotated § 294.104

§ 294.104 Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. §§ 704.710-704.850]--Notice of Hearing on Right to Homestead Exemption [Code Civ. Proc. § 704.770(b)]--Judicial Council Form EJ-180

[1] FORM Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. §§ 704.710-704.850]--Notice of Hearing on Right to Homestead Exemption [Code Civ. Proc. § 704.770(b)]--Judicial Council Form EJ-180

Click here to view image.

[2] Use of Form

This form is an illustrative filled-in reproduction of the notice of hearing on the right to a homestead exemption approved for use by the Judicial Council. It is for use by a judgment creditor in conjunction with the application for order for sale of a dwelling set forth in *§ 294.102* and the order to show cause why the application for the order should not be granted set forth in *§ 294.103*. A copy of the application of the judgment creditor and a copy of the notice of the hearing must be served on the judgment debtor and the occupant of the dwelling that is the subject of the application for order of sale [*Code Civ. Proc. § 704.770(b)*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] State Statutes

Service of notice to judgment debtor and to occupant of dwelling subject of application for order of sale. *Code Civ. Proc. § 704.770(b)*

[4] Cross References

See also *§§ 294.102* and *294.103*

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25-294 California Forms of Pleading and Practice--Annotated § 294.105

§ 294.105 Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. §§ 704.710-704.850]--Order Granting Application for Order of Sale of Dwelling [Code Civ. Proc. § 704.780(b)]

[1] FORM Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. §§ 704.710-704.850]--Order Granting Application for Order of Sale of Dwelling [Code Civ. Proc. § 704.780(b)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER GRANTING APPLICATION FOR ORDER
vs.	)	OF SALE OF DWELLING
_____ [*name*],	)	[*Code Civ. Proc. § 704.780(b)*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____

The application of _____ [*name of moving party, e.g.,* plaintiff] _____ [*name*], for an order for sale of a certain dwelling, namely: _____ [*describe property as in application*], came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant _____ [appeared by counsel _____ (*name*) *or* did not appear].

On proof made to the satisfaction of the court that the property is _____ [not subject to any homestead exemption *or* subject to a homestead exemption in the amount of $ _____ (*specify applicable amount pursuant to Code Civ. Proc. § 704.730, e.g.,* 50,000), that the fair market value of the dwelling is $ _____,] and that the application ought to be granted,

IT IS ORDERED that the application be, and it hereby is, granted. The clerk shall forthwith transmit a copy of the order in accordance with *Section 704.780 of the Code of Civil Procedure.*

[*EITHER if property is not subject to homestead exemption*]

IT IS FURTHER ORDERED that the property be sold in the manner provided in *Sections 701.510 through 701.680 of the Code of Civil Procedure.*

[*OR if property is subject to homestead exemption*]

IT IS FURTHER ORDERED that the dwelling be sold under the order of sale, provided that at the sale, no bid shall be received unless it exceeds $ _____ [*amount of homestead exemption plus aggregate amount of all liens and encumbrances on property*] and is not less than 90 percent ofthe appraised fair market value of the property. If a sale is made, the proceeds from that sale shall be applied in the following order of priority:

First: To the discharge of the following liens and encumbrances on the dwelling:

To _____ [*name and address of person having lien or encumbrance*] in the amount of $ _____ [*amount of lien or encumbrance*]; [*repeat for any additional persons having lien or encumbrance*].

Second: To _____ [*name of judgment debtor/homestead claimant*] in the amount of $ _____ [*specify applicable amount pursuant to Code Civ. Proc. § 704.730, e.g.,* 50,000].

Third: To the levying officer for the reimbursement of his/her costs for which advancement has not been made.

Fourth: To the _____ [*name of moving party, e.g.,* plaintiff] in the above-entitled action to satisfy the following:

First, costs and interest accruing after issuance of the writ pursuant to which the sale is conducted;

Second, the amount due on the judgment in the above-entitled _____ [action *or* proceeding] with costs and interest as entered on the writ.

[*EITHER*]

Fifth: The balance, if any, to _____ [*name of judgment debtor/homestead claimant*].

[*OR*]

Fifth: _____ percent of the balance, if any, to _____ [*name of first spouse/homestead claimant*] and _____ percent of the balance, if any, to _____ [*name of second spouse/homestead claimant*] on the basis of each spouse's proportionate interest in the homestead.
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

This form of order for the sale of a dwelling is for use by a judgment creditor in conjunction with the application for order for sale of a dwelling set forth in *§ 294.102* and the order to show cause why the application for the order should not be granted set forth in *§ 294.103*.

The form includes a determination either that the property is not subject to a homestead exemption or as to the amount of the exemption and the market value of the property [*Code Civ. Proc. § 704.780(b)*]. The form also includes an order that the property be sold in the manner provided by Code *Civ. Proc. §§ 701.510-701.680*, for use if the dwelling is determined not to be exempt [*Code Civ. Proc. § 704.780(b)*]. For use if the court determines that the dwelling is exempt, the form includes an order specifying the amount and priority of the proceeds of the sale that is to be distributed to each person having a lien or encumbrance on the dwelling along with the name and address of each person having a lien or encumbrance [*Code Civ. Proc. §§ 704.780(b), 704.850*]. The foregoing form also includes an order precluding sale of the dwelling when no bid on the dwelling exceeds the amount of the homestead exemption plus any additional amounts necessary to satisfy all liens and encumbrances on the dwelling, or if there is no bid that is 90 percent or more of the fair market value of the dwelling as determined by the court [*see Code Civ. Proc. § 704.800*]. Subject to *Code Civ. Proc. §§ 704.710-704.850*, the sale is governed by *Code Civ. Proc. §§ 701.510-701.680* [*Code Civ. Proc. § 704.780(b)*]. For discussion of the provisions of *Code Civ. Proc. §§ 704.710-704.850* relating to the sale of the dwelling, see §§ 294.53-294.60.

For discussion and forms relating to sales under *Code Civ. Proc. §§ 701.510-701.680*, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.

[3] When Judgment Debtor Owns Less than Full Interest

If the judgment debtor owns the dwelling as a joint tenant or tenant in common, or he/she has a leasehold or other interest less than a fee interest, only the interest of the judgment debtor in the dwelling, and not the dwelling may be sold [*Code Civ. Proc. § 704.820*; *see § 294.57*].

[4] Costs of Proceeding

The judgment creditor may recover reasonable costs incurred in a proceeding to obtain a court order for the sale of a dwelling. If no bid is re ceived at the court-ordered sale of the homestead that exceeds the aggregate amount of the homestead exemption and any additional amounts necessary to satisfy all liens and encumbrances, however, the judgment creditor will not be entitled to recover any of his/her costs [*Code Civ. Proc. § 704.840*].

[5] State Statutes

Order for sale of dwelling to satisfy judgment debt. *Code Civ. Proc. § 704.780(b)*

Minimum bid required at court-ordered sale. *Code Civ. Proc. § 704.800*

Extent of liability of property when judgment debtor is coowner or owns less than a fee. *Code Civ. Proc. § 704.820*

Judgment creditor as entitled to reasonable costs of proceedings. *Code Civ. Proc. § 704.840*

Disbribution of proceeds of sale of homestead. *Code Civ. Proc. § 704.850*

[6] Cross Reference

See also §§ 294.102-294.104

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25-294 California Forms of Pleading and Practice--Annotated § 294.106

§ 294.106 Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. §§ 704.710-704.850]--Declaration for Rehearing on Homestead Exemption [Code Civ. Proc. § 704.790]--Judicial Council Form EJ-182

[1] FORM Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. §§ 704.710-704.850]--Declaration for Rehearing on Homestead Exemption [Code Civ. Proc. § 704.790]--Judicial Council Form EJ-182

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of the declaration for rehearing on homestead exemption approved for use by the Judicial Council [Cal. Judicial Council Form EJ-182; *see also Cal. Rules of Ct., Rule 1.30 et seq.*]. It is for optional use by a judgment creditor to give the judgment debtor notice that a default order has been entered against the debtor for the sale of a dwelling in which the debtor has an interest. The form is also for use by the judgment debtor as a declaration to obtain a rehearing on the judgment creditor's application for the order.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

The notice and declaration must accompany a copy of the court order of sale as set forth in *§ 294.105* when the order was granted by default at a hearing in which neither the judgment debtor, his/her spouse, nor the attorney for either of them appeared [*Code Civ. Proc. § 704.790(a)*]. The judgment creditor must personally or by mail serve a copy of the order [*see § 294.105*] and the foregoing form of notice to the judgment debtor or spouse within 10 days after the date of the order of sale. The judgment creditor must also personally serve on the occupant of the dwelling, or if there is no occupant present at the time service is attempted, must post a copy of the order and notice in a conspicuous place at the dwelling [*Code Civ. Proc. § 704.790(b)*].

For a fillable version of this form in electronic format, see LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexis.com/forms.

[3] Second Hearing

Within 10 days after service of the notice of the order, the judgment debtor or spouse may file with the levying officer the foregoing form of declaration that absence of the judgment debtor and his/her spouse or of the attorney of either of them from the hearing, was due to mistake, inadvertance, surprise, or excusable neglect, and that the judgment debtor or spouse wishes to assert the homestead exemption. In that event, the levying officer must transmit the declaration forthwith to the court. On receipt of the declaration, the court must set a time and place for hearing to determine whether the order of the court should be modified. The time set for the second hearing must be no later than 20 days after receipt of the declaration [*Code Civ. Proc. § 704.790(d)*].

[4] State Statutes

Completion and return of Judicial Council form prescribed in language other than English as authorized. *Code Civ. Proc. § 681.030(b)*

Procedure after order of sale of homestead after default. *Code Civ. Proc. § 704.790*

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25-294 California Forms of Pleading and Practice--Annotated § 294.107

§ 294.107 Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. § 704.710 et seq.]--Notice of Motion [Code Civ. Proc. § 1010] for Order Granting Permission to Accept Highest Bid [Code Civ. Proc. § 704.800(b)]

[1] FORM Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. § 704.710 et seq.]--Notice of Motion [Code Civ. Proc. § 1010] for Order Granting Permission to Accept Highest Bid [Code Civ. Proc. § 704.800(b)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	)))))))))	NO. _____ NOTICE OF MOTION AND MOTION FOR ORDER GRANTING PERMISSION TO ACCEPT HIGHEST BID Date: _____ Time: _____ Dept: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to _____ his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [

specify party, e.g., plaintiff] will, and hereby does, move for an order granting permission to _____ [*name and title of levying officer*] to accept the highest bid received at the sale of the homestead property of _____ [*name(s) of homestead owner(s)*], pursuant to an order issued by this court on _____ [*date*], in the above-entitled action, that exceeds the amount of the homestead exemption [, plus the amount(s) of the lien(s) and encumbrance(s),] as previously determined by this court. The motion will be made on the ground that at the sale of the homestead pursuant to the order, no bid was received that was ninety percent or more of the fair market value as determined by the court pursuant to *Code of Civil Procedure Section 704.780(b)*, and therefore no sale of the property was made and the money judgment awarded to plaintiff in the above-entitled action against defendant remains unsatisfied.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, on the papers, records, and file herein, and onsuch oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for_____ [*party's status and name*]

CAUTION:
A memorandum is required to be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This notice of motion is for use by a judgment creditor to obtain a court order granting permission to the levying officer to accept the highest bid that exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances that may be on the affected property. It is for use when the sale cannot be otherwise completed because no bid was received that exceeded 90 percent of the fair market value of the dwelling determined by the court in the order for sale pursuant to *Code Civ. Proc. § 704.780* [*Code Civ. Proc. § 704.800(b)*]. Counsel should consult local court practice to determine whether the motion must be a noticed motion or may be made ex parte.

[3] Decisions

"All liens and encumbrances," for purposes of *Code Civ. Proc. § 704.800(a)*, includes all liens senior to the lien of the executing judgment creditor, but does not include the judgment creditor's lien. *Rourke v. Troy (1993) 17 Cal. App. 4th 880, 883-886, 21 Cal. Rptr. 2d 660*

[4] Cross References

For discussion and forms relating to noticed motions generally, see Ch. 372, *Motions and Orders*

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25-294 California Forms of Pleading and Practice--Annotated § 294.108

§ 294.108 Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. § 704.710 et seq.]--Declaration [Code Civ. Proc. § 2015.5] in Support of Motion for Order Granting Permission to Accept Highest Bid [Code Civ. Proc. § 704.800(b)]

[1] FORM Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. § 704.710 et seq.]--Declaration [Code Civ. Proc. § 2015.5] in Support of Motion for Order Granting Permission to Accept Highest Bid [Code Civ. Proc. § 704.800(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*] IN SUPPORT OF MOTION FOR ORDER GRANTING PERMISSION TO ACCEPT HIGHEST BID
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Dept: _____
		Trial Date: _____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. On _____ [*date*], _____ [*title and name of levying officer*] executed a sale of the homestead of _____ [*name(s)*], _____ [*identify party, e.g.,* defendant], pursuant to an order for sale of a homestead issued by the above-entitled court on _____ [*date*].

3. At the above-mentioned sale, the highest bid was $ _____, which is less than 90 percent of $ _____, the fair market value of the dwelling as found by this court, but is more than $_____, the amount of the homestead exemption [and the additional amount(s) necessary to satisfy the lien(s) and encumbrance(s) on the property] as determined by this court in the above-mentioned court order.

4. Because no sale of the above-mentioned homestead occured, _____'s [*identify party, e.g.,* plaintiff's] money judgment awarded in the above-entitled action remains unsatisfied.

5. _____ [*Set forth any additional facts tending to show that sale should be allowed, e.g.,* This is the second attempt to sell the dwelling under a writ of execution, and the highest bid received was $_____, which is 89 percent of the fair market value as determined by the court].

WHEREFORE, _____ [*identify party, e.g.,* plaintiff] prays that the court order that _____ [*name and title of levying officer*] be granted permission to accept the highest bid that exceeds the amount of the homestead exemption [plus the additional amount(s) necessary to satisfy the lien(s) and encumbrance(s) on the property] as specified in the above-mentioned court order.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The foregoing form of declaration is for use by a judgment creditor in conjunction with the form of notice of motion set forth in *§ 294.107* to obtain an order granting permission to accept the highest bid that exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances on the property [*Code Civ. Proc. § 704.800(b)*].

[3] Cross References

For discussion and forms relating to declarations generally, see Ch. 15, *Affidavits, Certificates, and Declarations*

See also Comments and References to *§ 294.107*

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25-294 California Forms of Pleading and Practice--Annotated § 294.109

§ 294.109 Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. § 704.710 et seq.]--Order [Code Civ. Proc. § 1003] Granting Permission to Accept Highest Bid [Code Civ. Proc. § 704.800(b)]

[1] FORM Proceedings to Obtain Order of Sale of Dwelling [Code Civ. Proc. § 704.710 et seq.]--Order [Code Civ. Proc. § 1003] Granting Permission to Accept Highest Bid [Code Civ. Proc. § 704.800(b)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [*identify party, e.g.*, plaintiff] for an order granting permission to accept the highest bid that exceeds the amount of the minimum bid required by *Code of Civil Procedure Section 704.800(a)* came on regularly for hearing by the court on _____ [*date*]. _____ [*identify party, e.g.*, Plaintiff] appeared by counsel _____ [*name*]; _____ [*identify party*, defendant] appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that _____ [*name and title of levying officer*] be permitted to accept the highest bid received at the sale of the homestead of _____ [

name], _____ [*identify party, e.g.,* defendant] in this action, which was $ _____.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The forgoing form of order is for use by a judgment creditor to obtain an order granting permission to accept the highest bid that exceeds the amount of the homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances on the property [*Code Civ. Proc. § 704.800(b)*]. The order should be submitted with the notice of motion or at the time of the hearing, depending on local practice.

[3] Cross Reference

See also Comments and References to *§§ 294.107* and *294.108*

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[4] For Inadequate Maintenance of Premises

[5] For Inadequate Attendance of Patients

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[8] Under Borrowed Servant Doctrine

[9] For Corporate Negligence

[10] For Rescue Team Misconduct

[11] For Failure to Preserve Records

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[13] For Loss of Property of Deceased Patient

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§ 295.16 Actions by Minors

§ 295.17 Certificate of Merit

§ 295.18 Damages

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25-295 California Forms of Pleading and Practice--Annotated § 295.01

§ 295.01 Scope of Chapter

This chapter discusses the tort liability of a hospital for professional negligence, including, among other topics, liability [*see § 295.13*], defenses [*see § 295.14*], the application of res ipsa loquitur [*see § 295.22*], and discovery of and patient access to hospital records [*see § 295.23*].

This chapters also provides the following forms:

- Notice of intention to commence action against a health care provider, required by *Code Civ. Proc. § 364* [*see § 295.50*].
- A general complaint for personal injury based on professional negligence for inadequate or improper patient attendance [*see § 295.51*] and allegations that may be used in that form for use in case of:
    - Failure to follow a physician's orders [*see § 295.52*].
    - Failure to maintain medical records [*see § 295.53*].
    - Failure to safeguard a disabled or immature patient [*see § 295.54*].
    - Failure to protect a disabled patient from conditions on the premises [*see § 295.55*].
    - Failure to inform a physician of a patient's worsening condition [*see § 295.56*].
- Failure to provide proper, nondefective equipment and supplies [*see § 295.57*].
- A complaint for failure to protect a mental patient from self-inflicted harm [*see § 295.58*].
- A general complaint for personal injury based on professional negligence by medical personnel who are employed by the hospital [*see § 295.59*], and more specific complaints and allegations relating to:

- Prenatal injuries and injuries and birth [*see § 295.60*].
- Unusual injuries while under anesthesia during surgery [*see § 295.61*].
- Refusal to render emergency assistance [*see § 295.62*].
- Unauthorized transfer for nonmedical reasons [*see § 295.63*].

- A general complaint for personal injury based on professional negligence by the hospital's failure to determine or review the competence and performance of members of the hospital's medical staff [*see § 295.64*].

- Complaint against a health care provider to permit inspection and provide copies of a patient's records [*see § 295.65*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesDefensesGeneral OverviewHealthcare LawActions Against FacilitiesFacility LiabilityHospitalsHealthcare LawBusiness Administration & OrganizationPatient ConfidentialityGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceProofRes Ipsa LoquiturGeneral Overview

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§ 295.02 Cross References

- For discussion and forms relating to abortion and sterilization operations, see Ch. 4, *Abortion and Birth Control Methods* .

- For discussion and forms relating to the stay and dismissal of actions based on agreements containing arbitration clauses, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

- For a procedural guide and forms related to actions based on battery, see Ch. 58, *Assault and Battery* .

- For discussion and forms relating to the duty under the Unruh Civil Rights Act (*Civ. Code § 51*) to furnish professional medical services without discrimination based on race, religion, disability or medical condition, or national origin, see Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

- For discussion and forms relating to security for costs, see Ch. 174, *Costs and Attorney's Fees* .

- For forms alleging entitlement to treble damages when a defendant is not licensed, see *Ch. 177, Damages, § 177.40* et seq.

- For discussion and forms relating to autopsies and the disposition of human remains by hospitals, see Ch. 180, *Dead Bodies and Cemeteries* .

- See generally Ch. 181, *Death and Survival Actions* .

- For discussion and forms relating to malpractice actions against, licensing of, and the acquisition of hospital staff privileges by dentists and physicians, see Ch. 209, *Dentists* , and Ch. 415, *Physicians: Medical Malpractice* .

- For procedural guides and forms relating to the perpetuation of testimony before commencing an action and the discovery of business records and other documents, see Ch. 193, *Discovery: Depositions* , Ch. 195, *Discovery: Inspection of Tangible Evidence* , Ch. 199, *Discovery: Preservation of Evidence* , and Ch. 535, *Subpoena* .

- For discussion and forms relating to malpractice actions in general, see Ch. 209, *Dentists* , and Ch. 415, *Physicians: Medical Malpractice* .

- In connection with a nonprofit hospital's power of eminent domain under *Health & Safety Code § 127050*, see the discussion of the Eminent Domain Law (*Code Civ. Proc. § 1230.010 et seq.*) in Ch. 247, *Eminent Domain*.

- For a complaint for false imprisonment of a person in a mental hospital, see Ch. 257, *False Imprisonment* .

- For an allegation of federal district court jurisdiction under the Federal Tort Claims Act [*28 U.S.C.S. § 1346(b)*], see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

- For discussion and forms related to proceedings for the appointment of a guardian ad litem for a minor in a civil action, see Ch. 291, *Guardians ad Litem* .

- In connection with a hospital's liability as a bailee under *Civ. Code §§ 1859* and *1860* for the loss and damage of personal property, see the related discussion and forms in Ch. 297, *Hotels and Motels* .

- For discussion and forms related to the confinement of mentally disordered, addicted, and alcoholic persons and the commitment of mentally disordered and mentally retarded persons, see Ch. 304, *Insane and Other Incompetent Persons* .

- For discussion and forms related to insurance for hospital and surgical expenses, see Ch. 308, *Insurance* .

- For discussion and forms related to a hospital's lien for emergency medical services under *Civ. Code § 3045.1 et seq.*, see Ch. 342, *Liens and Wage Preferences* .

- For discussion and forms relating to the rights of patients in long term health facilities or residential care facilities for the elderly, see Ch. 351, *Long-term Health and Residential Care* .

- For discussion and forms relating to actions based negligence, see Ch. 380, *Negligence* .

- For allegations in a demurrer and answer raising an affirmative defense based on expiration of the statutory period for commencement of an action and allegations in a complaint pleading facts excusing late commencement of an action, see Ch. 345, *Limitation of Actions* , *see also* Ch. 415, *Physicians: Medical Malpractice* .

- For forms related to civil actions by minors, proceedings under *Fam. Code § 6911* (court consent to medical care of minor when parent or guardian whose consent is required for such care is unavailable), and actions by parents for personal injuries of a minor child, see Ch. 366, *Minors: Court Consent for Medical Care or Enlistment* , Ch. 367A, *Minors: Tort Actions* , and Ch. 394, *Parent and Child* .

- For discussion and forms related to the liability of an owner or possessor of property for dangerous

conditions of the property, see Ch. 421, *Premises Liability* , Ch. 464, *Public Entities and Officers: California Tort Claims Act* , and Ch. 525, *Slip and Fall* .

- For discussion relating to ostensible agency and the liability of an employer for the torts of an independent contractor, see Ch. 427, *Principal and Agent* .

- For further discussion related to the service of providing blood transfusions, see Ch. 460, *Products Liability* .

- For discussion, a procedural guide, and forms related to actions against public entities under the California Tort Claims Act, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

- For discussion and forms related to administrative proceedings revoking or suspending a license, see Ch. 471B, *Licensing by Public Agencies* .

- For discussion and forms relating to the furnishing of medical care under federal, state, and county public assistance programs, see Ch. 527, *Social Services* .

- For discussion of expert witnesses generally, see Ch. 551, *Trial* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesFacility LiabilityHospitalsHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawTreatmentEnd-of-Life DecisionsAbortionGeneral OverviewHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceActionsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityGeneral OverviewTortsProcedureDiscovery

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[Reserved]

§§ 295.03[Reserved]

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§ 295.10 Governing Statutes

The formation, licensing, and regulation of hospitals is governed by *Bus. & Prof. Code §§ 2226, 2282, 2283*; *Gov. Code §§ 37600-37660*; *Health & Safety Code §§ 1250-1339.50, 1440-1475, 121390, 32000-32492, 32500-32508*; and *Welf. & Inst. Code §§ 5000-7518*.

The tort liability of hospitals is governed generally by *Civ. Code § 1714(a)* and is also affected by *Bus. & Prof. Code §§ 2226, 2282, 2283*; *Civ. Code §§ 1668, 3333-3333.2*; *Code Civ. Proc. §§ 335.1, 340.5, 364-365, 667.7, 1029.6, 1295*; *Health & Safety Code §§ 1250, 1317, 123145*; and by *Prob. Code § 330(f)*. The tort liability of a public entity and its employees engaging in hospital and medical activities is governed generally by *Gov. Code §§ 810-996.6* and specifically by *Gov. Code §§ 854-856.6*.

An attorney's contingency fee in an action against a health care provider based on professional negligence is governed by *Bus. & Prof. Code § 6146*.

The discovery and admission of hospital records into evidence is governed by *Code Civ. Proc. §§ 1985, 2025.010 et seq., 2031.010 et seq.*, and *Evid. Code §§ 250, 1156-1157.7, 1158, 1200, 1270, 1271, 1400, 1401, 1520 et seq., 1560-1566*. A patient's access to health records is governed by *Health & Safety Code § 123100 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesFacility LiabilityHospitalsHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationPatient ConfidentialityGeneral OverviewTortsDamagesCosts & Attorney FeesContingent FeesTortsProcedureDiscoveryTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview

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§ 295.11 Hospital Defined

As used in this chapter, the term "hospital" refers primarily to:

- A "general acute care hospital," as defined in *Health & Safety Code § 1250(a)* in conjunction with statutes requiring and governing the licensing of health facilities [*Health & Safety Code §§ 1250-1339.50*]:

A health facility having a duly constituted governing body with overall administrative and professional responsibility and an organized medical staff that provides 24-hour inpatient care, including the following basic services: medical, nursing, surgical, anesthesia, laboratory, radiology, pharmacy, and dietary services. A general acute care hospital may include more than one physical plant maintained and operated on separate premises as provided in *Health & Safety Code § 1250.8*.

- A "special hospital," as defined in *Health & Safety Code § 1250(f)*:

A health facility having a duly constituted governing body with overall administrative and professional responsibility and an organized medical or dental staff that provides inpatient or outpatient care in dentistry or maternity.

As used in this chapter, the term "hospital" refers only peripherally to an "acute psychiatric hospital," as defined in *Health & Safety Code § 1250(b)*:

A health facility having a duly constituted governing body with overall administrative and professional responsibility and an organized medical staff that provides 24-hour inpatient care for mentally disordered, incompetent, or other patients referred to in Division 5 (commencing with Section 5000) or Division 6 (commencing with Section 6000) of the Welfare and Institutions Code, including the following basic services: medical, nursing, rehabilitative, pharmacy, and dietary services.

For full discussion and forms relating to acute psychiatric hospitals and the treatment and commitment of mentally

disordered persons, see Ch. 304, *Insane and Other Incompetent Persons* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesFacility LiabilityGeneral OverviewHealthcare LawBusiness Administration & OrganizationGeneral Overview

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§ 295.12 Formation and Regulation

[1] Operation by Public Entity or Private Party

Under its police power, the state may form and operate hospitals [*see Jardine v. City of Pasadena (1926) 199 Cal. 64, 68, 248 P. 225* (police power of city to maintain hospital, subject to general laws, as broad as that possessed by legislature)] and the state may authorize the formation and operation of hospitals by political subdivisions of the state [*Paso Robles War Mem'l Hosp. Dist. v. Negley (1946) 29 Cal. 2d 203, 204-205, 173 P.2d 813]* . Accordingly, the state maintains hospitals for the mentally disordered [*Welf. & Inst. Code §§ 7200-7375*], hospitals for the mentally retarded [*Welf. & Inst. Code §§ 7500-7518*], and neuropsychiatric institutes [*Welf. & Inst. Code §§ 7600-7700*]. The state has provided for the maintenance of hospitals by cities [*Gov. Code §§ 37650-37660*], by counties [*Health & Safety Code §§ 1440-1475*], and by local hospital districts [*Health & Safety Code §§ 32000-32492*].

Private individuals, corporations, partnerships, and associations may also form and operate hospitals, subject to reasonable regulation by the state within the scope of its police power [*Ex parte Whitwell (1893) 98 Cal. 73, 78-80, 32 P. 870* ; *see Health & Safety Code §§ 19, 1265*]. Under *Health & Safety Code § 32500 et seq.*, a hospital may be founded, endowed, and maintained by a trustee pursuant to a written grant of property. See generally Ch. 61, *Associations and Clubs* , Ch. 160, *Corporations: Capacity* , and Ch. 400, *Partnerships: Governing Statutes* , through Ch. 406, *Partnerships: Dissolution* ; *see also* California Legal Forms, vols. 1-4, *Business and Nonprofit Organizations* (Matthew Bender).

[2] Licensing

Since any facility, place, or building which is organized, maintained, and operated for the diagnosis, care, and treatment of mental or physical human illness may not be operated without a license issued by the Department of Health, both public and private hospitals must comply with the licensing requirements and procedures contained in *Health & Safety Code § 1250 et seq.* [*Health & Safety Code §§ 1250, 1253, 1298*]. The only institutions exempted from the operation of these statutes are (1) facilities for the care and treatment of the sick that are conducted by and for adherents of any recognized religious group depending on prayer or spiritual means for healing in the practice of its religion, (2) hotels or similar places that furnish only board and room to their guests, and (3) institutions supplying board and room only, provided that the Department of Health determines that no resident requires any element of medical care, and any

community care facility as defined in *Health and Safety Code § 1502* [*Health & Safety Code § 1270*].

A license to operate a hospital is issued by the Department of Health after the person or entity wishing the license files a verified application accompanied by the required fee, and the department determines that the applicant has complied with all applicable statutes and regulations [*Health & Safety Code §§ 1265, 1266, 1268*], including *Health & Safety Code § 1265.8* (compliance with the requirements of *Health & Safety Code § 129675 et seq.* for hospital building construction), *Health & Safety Code § 1318* (filing of surety bond conditioned on the health facility's honest handling of patients' money), *Health & Safety Code § 1253.2* (notice requirements for constructing or converting nursing facility or intermediate care facility), and *Health & Safety Code §§ 1276 through 1277* (compliance with State Building Standards Code and other state department regulations prescribing standards for the hospital's physical plant, services, and staffing with duly qualified licensed personnel). The application may be denied if the applicant or an officer, a diretor, the person in charge, or a shareholder with a beneficial interest exceeding 10 percent has been convicted of a crime that is substantially related to the qualifications or duties of the applicant, or to the functions of the business for which the license is to be issued [*Health & Safety Code §§ 1265.1, 1265.2*].

If the application is denied, the department must give immediate written notice of the denial to the applicant, who may petition the department for a hearing under *Gov. Code § 11500 et seq.* within 20 days after the department mails the notice [*Health & Safety Code § 1269*; *see* Ch. 471B, *Licensing by Public Agencies* , and Ch. 473, *Public Agency Adjudication* , through Ch. 473H, *Alternative Procedures for Agency Decisions*].

Once issued, a license to operate a hospital is effective for one year or, in the case of a hospital that is found not to have been in violation of any statutory or regulatory requirements during the preceding licensing period, two years [*Health & Safety Code § 1267*]. In the case of a health facility specified in *Health & Safety Code § 1250(a)* or *(b)* (acute care and acute psychiatric hospitals, respectively), however, the license may be issued for three years if the facility is found to have been in substantial compliance with statutory requirements, regulations, or standards during the preceding license period [*Health & Safety Code § 1267*]. The license may be suspended or revoked pursuant to the procedures in *Gov. Code § 11500 et seq.* for violations of statutory or regulatory requirements, for aiding, abetting, or permitting such violations, or for conduct in operating the licensed facility which is inimical to the public health, morals, welfare, or safety [*Health & Safety Code § 1294*; *see* Ch. 471B, *Licensing by Public Agencies*]. A license may also be revoked on the conviction of the licensee, or of an officer, a director, the person in charge, or a 10 percent or more shareholder of the licensee, for a crime that is substantially related to the qualifications or duties of the licensee, or to functions of the business for which the license was issued [*Health & Safety Code § 1294*; *see Health & Safety Code §§ 1265.1(b), 1265.2*]. Interference with the enforcement of the provisions of *Health & Safety Code §§ 1250-1339.50* is punishable as a misdemeanor [*see Health & Safety Code § 1293.2*].

To secure compliance with, or to prevent violation of, the licensing statutes and regulations, the department may, upon proper identification, enter and inspect any building or premises at any reasonable time [*Health & Safety Code § 1278*]. In addition, the department must inspect licensed facilities periodically [*Health & Safety Code § 1279*] and, when necessary, may contract for the performance of such inspections by outside personnel such as the California Medical Association Committee on Medical Staff Surveys [*Health & Safety Code § 1282*]. The department must accept, consider, and resolve written appeals by a licensee or health facility administrator of findings made on the inspection of a health facility [*Health & Safety Code § 1280.5*]. Violations of the licensing statutes and regulations are subject to criminal penalty [*Health & Safety Code § 1290*] or injunction [*Health & Safety Code § 1291*].

[3] Provisional Licensing

Except for general acute care hospitals and acute psychiatric hospitals, if a health facility or applicant for a license has not been previously licensed pursuant to *Health & Safety Code §§ 1250-1339.50*, the state department may only provisionally license the facility pursuant to *Health & Safety Code § 1437*, which provides that the provisional license shall terminate six months from the date of issuance. Within 30 days of the termination of the provisional license, the

state department must give the facility a full and complete inspection, and if the facility meets all applicable requirements for licensure, a regular license must be issued. If the health facility does not meet the licensure requirements but has made substantial progress towards meeting them, as determined by the state department, the initial provisional license must be renewed for six months. If the state department determines that there has not been substantial progress towards meeting licensure requirements at the time of the first full inspection, or, if the department determines on its inspection made within 30 days of the termination of a renewed provisional license that there is lack of full compliance with the requirements, no further license may be issued. An applicant for a provisional license to operate a health facility may contest denial of provisional licensing by filing a statement of issues, as provided in *Gov. Code § 11504*, and the proceedings to review the denial will be conducted pursuant to *Gov. Code § 11500 et seq.* The department must not apply less stringent criteria when granting a provisonal license than it applies when granting a permanent license [*Health & Safety Code § 1437*].

The state department may issue to a health facility, other than an acute care hospital or an acute psychiatric hospital, a provisional license pursuant to *Health & Safety Code § 1268.5*, which provides that the provisional license shall expire not later than six months after the date of issuance, or at such earlier time as determined by the state department at the time of issuance, and may not be renewed [*Health & Safety Code § 1268.5(a), (b)*]. The department may issue the provisional license if [*Health & Safety Code § 1268.5(a)*]:

- The facility and the applicant substantially meet the standards specified by *Health & Safety Code §§ 1250-1339.50*, as well as any applicable regulations;

- No violations of those provisions or regulations exists in the facility which jeopardizes the health or safety of patients; and

- The applicant has adopted a plan for correction of any existing violations which is satisfactory to the department.

The state department cannot apply less stringent criteria when granting a provisonal license than it applies when granting a permanent license [*Health & Safety Code § 1268.5(c)* (the stated objective of this provision is to provide continuity of Medi-Cal reimbursement when ownership of a skilled nursing or intermediate care facility is transferred)].

At the end of the provisional license period, the state department must assess the facility's full compliance with licensure requirements. The state department may extend a provisional license for no more than six months from the time of the extension for one of the following purposes [*Health & Safety Code § 1268.5(b)*]:

- Requiring the facility's full compliance with a plan of correction, which includes time frames, as specified by the state department.

- Allowing the provisional licensee to comply with *Health & Safety Code § 1336.2*, governing the requirements for the transfer of patients due to a change in licensing or operational status.

- Providing for a change of ownership.

- Instituting a receivership of the facility.

The length of the extension period is determined by the state department at the time the extension is issued [*Health & Safety Code § 1268.5(b)*].

[4] Internal Hospital Organization

If a licensed hospital has five or more physicians and surgeons on its medical staff, its board of directors is required to establish rules to govern the operation of the hospital, including provisions for the following:

- The organization of physicians and surgeons permitted to practice in the hospital into a formal medical staff with appropriate officers and bylaws and staff appointments on an annual or biennial basis.

- The restriction of membership on the medical staff to physicians, surgeons, and other licensed practitioners who are competent in their respective fields, worthy in character, and professionally ethical.

- The self-government of the medical staff with respect to professional work performed in the hospital and periodic meetings of the medical staff to review and analyze their clinical experience.

- The maintenance of adequate and accurate medical records for all patients [*Bus. & Prof. Code § 2392.5*].

If a licensed hospital has less than five physicians and surgeons on its medical staff, the hospital's board of directors is required to establish rules to govern the operation of the hospital, including provisions for the following:

- The restriction of membership on the medical staff to physicians, surgeons, and other licensed practitioners who are competent in their respective fields, worthy in character, and professionally ethical.

- The maintenance of adequate and accurate medical records for all patients [*Bus. & Prof. Code § 2392.6*].

The Division of Medical Quality or the Senior Assistant Attorney General of the Health Care Quality Enforcement Section may inspect a licensed hospital or require written reports from the hospital to determine if the hospital is complying with the requirements of *Bus. & Prof. Code §§ 2392.5* and *2392.6* [*Bus. & Prof. Code § 2226*]. For provisions requiring a licensed hospital to report to the Department of Health when the staff privileges of a licensed practitioner are denied, revoked, or suspended, and to request such reports prior to granting or renewing staff privileges, see *Bus. & Prof. Code §§ 805* and *805.5*. For reports of medical malpractice judgments that an insurer or a licensed hospital must make to the Department of Health, see *Health & Safety Code §§ 1305-1308*.

The decision of a hospital board to exclude a medical professional from practice in the hospital is subject to judicial review if the medical professional complains. The appropriate form of complaint is a petition for a writ of mandate [*see Code Civ. Proc. § 1085*; for discussion of proceeding for writ and appropriate forms, see Ch. 358, *Mandate and Prohibition*], citing either or both of the following grounds for relief:

- The hospital board did not follow basically fair procedure [*see Pinsker v. Pacific Coast Soc'y of Orthodontists (1974) 12 Cal. 3d 541, 549-557, 116 Cal. Rptr. 245, 526 P.2d 253]* .

- The board's findings are not supported by evidence.

Generally, the court's consideration of the evidentiary issue is limited to determining whether or not the findings are supported by substantial evidence. However, if the medical professional alleges discrimination in violation of *Health & Safety Code § 1316* (prohibiting discrimination on the basis of certain distinctions between medical degrees) and makes a preliminary showing of substantial evidence in support of the allegation, the courtmay exercise its independent judgment on the evidence with respect to the allegation, that is, the court may determine whether or not the findings of the board are supported by the weight of the evidence [*see Code Civ. Proc. § 1094.5(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRequirementsPublic Health & Welfare LawHealthcareGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
Chapter 295 HOSPITALS
PART II. LEGAL BACKGROUND

25-295 California Forms of Pleading and Practice--Annotated § 295.13

§ 295.13 Tort Liability

[1] Medical Malpractice Defined

"Medical malpractice" is a term that encompasses all acts in the provision of medical services and care that may give rise to tort liability. It has been described as a departure from the proper standards of medical practice [*Waters v. Bourhis (1985) 40 Cal. 3d 424, 433-434 n. 8, 220 Cal. Rptr. 666, 709 P.2d 469]* . As such, it is a broader term than professional negligence [*see* [2], *below*]. Medical malpractice may arise both from medical services that were negligently rendered (professional negligence) and from those that were unnecessary or unauthorized, the traditional grounds for a battery cause of action against a health care provider [*Noble v. Superior Court (1987) 191 Cal. App. 3d 1189, 1192-1193, 237 Cal. Rptr. 38* ; *Baker v. Sadick (1984) 162 Cal. App. 3d 618, 622-627, 208 Cal. Rptr. 676]* . The difference between the two terms may be important in determining which procedures under MICRA must be followed in a given action [*see, e.g., Herrera v. Superior Court (1984) 158 Cal. App. 3d 255, 259-263, 204 Cal. Rptr. 553* (arbitration requirements of MICRA apply to all medical malpractice causes of action including intentional torts, whereas notice of intention and statute of limitations provisions apply only to professional negligence)].

[2] Professional Negligence Under MICRA

The Medical Injury Compensation Reform Act of 1975 (MICRA) was passed by the legislature in response to a perceived statewide crisis in the availability and cost of medical malpractice insurance [*see* Stats. 1975, chs. 1, 2, 2d Ex. Sess.]. MICRA enacted or amended several statutes governing procedural aspects of actions for professional negligence against health care providers, including limitations on attorney's fees [*see Bus. & Prof. Code § 6146*], evidence of collateral sources [*see Civ. Code § 3333.1*], limitations on recovery of damages for noneconomic losses [*see Civ. Code § 3333.2*], the statute of limitations [*see Code Civ. Proc. § 340.5*], a special requirement of a 90-day notice period before commencement of the action [*see Code Civ. Proc. § 364*], allowance of periodic payments of future damages [*see Code Civ. Proc. § 667.7*], and rules regarding the arbitration of medical malpractice claims [*see Code Civ. Proc. § 1295*]. These particular provisions of MICRA are considered in detail in Ch. 415, *Physicians: Medical Malpractice*.

"Health care providers" within MICRA include health facilities that are licensed under Division 2 of the Health and Safety Code, which includelicensed hospitals [*Bus. & Prof. Code § 6146(c)(2)*; *Civ. Code §§ 3333.1(c)(1), 3333.2(c)(1)*; *Code Civ. Proc. §§ 340.5(1), 364(f)(1), 667.7(e)(3), 1295(g)(1)*].

"Professional negligence" as used in MICRA means negligent acts or omissions in the rendering of professional services that are the proximate cause of a personal injury or wrongful death. The services must be within the scope of services for which the provider is licensed and not within any restriction imposed by the licensing agency or licensed hospital [*Bus. & Prof. Code § 6146(c)(3)*; *Civ. Code §§ 3333.1(c)(2), 3333.2(c)(2)*; *Code Civ. Proc. §§ 340.5(2), 364(f)(2), 667.7(e)(3), 1295(g)(2)*]. For these purposes, "personal injury" covers only injury that impairs the well-being or mental or physical health of the plaintiff, and the term does not cover purely economic injury [*Vazquez de Mercado v. Superior Court (2007) 148 Cal. App. 4th 711, 715-716, 55 Cal. Rptr. 3d 889]* .

"Professional negligence" as it applies to the activities of a hospital has been broadly construed by the courts. It encompasses the duty to recognize the condition of patients under its care and to take appropriate measures for their safety. It encompasses the duty of a hospital to provide a safe environment within which diagnosis, treatment, and recovery can be carried out. Thus, if an unsafe condition on the hospital's premises causes injury to a patient as a result of the hospital's negligence, there is a breach of the hospital's duty *as a hospital*, which constitutes professional negligence [*Murillo v. Good Samaritan Hosp. (1979) 99 Cal. App. 3d 50, 56-57, 160 Cal. Rptr. 33 , disapproved on other grounds, Flowers v. Torrance Memorial Hosp. Medical Center (1994) 8 Cal. 4th 992* , (involving failure to raise patient's bed rail at night, and criticizing *Gopaul v. Herrick Memorial Hosp. (1974) 38 Cal. App. 3d 1002, 113 Cal. Rptr. 811 , disapproved on other grounds, Flowers v. Torrance Memorial Hosp. Medical Center (1994) 8 Cal. 4th 992* , 142 a pre-MICRA case that held that the negligent act of allowing a patient to fall off of a gurney was ordinary rather than professional negligence); *see Taylor v. U.S. (9th Cir. 1987) 821 F.2d 1428, 1432* (following *Murrillo* in holding that disconnection of ventilator from patient is professional negligence of hospital regardless of whether caused by incorrect decision of physician or bump of janitor's broom); *see also Williams v. Superior Court (1994) 30 Cal. App. 4th 318, 324, 36 Cal. Rptr. 2d 112* (failure of hospital to warn non-employee phlebotomist of danger to her from patient was governed by MICRA professional negligence standards and was not question of ordinary negligence)]. A tort claim based on failure to supervise or protect the safety of a patient in a hospital or other health care facility is an action for professional negligence within the meaning of *Code Civ. Proc. § 340.5(2)*, and not an action for ordinary negligence [*Bellamy v. Appellate Department (1996) 50 Cal. App. 4th 797, 809, 57 Cal. Rptr. 2d 894* (following *Murillo*)]. Therefore, it is probable that all injuries to patients that arise from negligent acts of hospital personnel on the premises constitute professional rather than ordinary negligence.

Although the distinction between professional and ordinary negligence is relevant for purposes of determining the applicability of MICRA, it has no bearing on the substantive standard of conduct governing a hospital's actions. A hospital's medical expertise and skill is merely a factor that affects the standard of care governing a negligence action, and a single set of facts therefore cannot give rise to separate and distinct claims for ordinary and professional negligence [*Flowers v. Torrance Memorial Hosp. Medical Center (1994) 8 Cal. 4th 992, 998, 35 Cal. Rptr. 2d 685, 884 P.2d 142]* .

Depending on the cause of action being asserted and the history and purpose of the particular statutory provision being applied, MICRA may not be applicable to a cause of action alleging an intentional tort against a health care provider [*see Unruh-Haxton v. Regents of University of California (2008) 162 Cal. App. 4th 343, 353, 76 Cal. Rptr. 3d 146*]. In one case, for example, plaintiffs brought suit after doctors in a fertility clinic allegedly stole human genetic materials from plaintiffs, such as eggs that had been frozen for future use, and sold the materials without authorization. The court of appeal held that the statute of limitations provided in *Code Civ. Proc. § 340.5*, enacted as part of MICRA, did not apply to plaintiffs' causes of action alleging the intentional torts of fraud, intentional infliction of emotional distress, and conversion. The court, noting that the Legislature had specifically limited application of *Code Civ. Proc. § 340.5* to occasions of "professional negligence," concluded that the intentional and malicious conduct alleged by plaintiffs was qualitatively different from mere negligence [*Unruh-Haxton v. Regents of University of California (2008) 162 Cal. App. 4th 343, 355-356, 76 Cal. Rptr. 3d 146*].

For a form of complaint for damages for personal injuries based on professional negligence, see *§ 295.51*.

[3] For Defective Equipment and Supplies

A hospital is liable for injuries of its patients resulting from the hospital's breach of its duty to exercise ordinary care in furnishing equipment and supplies suitable for their intended use and commensurate with the requirements of patients' cases [*Welsh v. Mercy Hosp. (1944) 65 Cal. App. 2d 473, 478-479, 151 P.2d 17* ; *see Carrasco v. Bankoff (1963) 220 Cal. App. 2d 230, 33 Cal. Rptr. 673* (hospital's liability based partially on failure of physician employed by hospital to transfer patient to another hospital having equipment required for proper treatment of patient); *see also 22 Cal. Code Reg. § 70701(a)(4)* (duty of licensed hospital's governing body to provide appropriate physical resources and personnel required by patients)].

A hospital is not required to anticipate the misuse of hospital supplies by trained personnel and it is not liable for injuries of patients sustained when physicians or nurses employed by the patients use hospital supplies that they should know are unfit for treatment of patients [*Payne v. Santa Barbara Cottage Hosp. (1934) 2 Cal. App. 2d 270, 271, 273, 37 P.2d 1061]* . Nor is a hospital liable for patients' injuries on the basis of a failure to maintain its equipment in good working order if no evidence establishes a causal connection between the injuries and equipment malfunctions [*Huffman v. Lindquist (1951) 37 Cal. 2d 465, 480, 234 P.2d 34]* .

Furthermore, a hospital cannot be held responsible under a theory of strict liability in tort or breach of warranty for defective products that it supplies and that cause injury to patients during treatment. As with persons who sell their services for the guidance of others in economic, financial, and personal affairs, a hospital is burdened only with a duty of reasonable performance under the circumstances; the basis of the hospital's liability, if any, for defective products supplied in the course of the hospital's primary function of providing medical services is limited to negligence or intentional misconduct [*Shepard v. Alexian Brothers Hosp. (1973) 33 Cal. App. 3d 606, 613-614, 109 Cal. Rptr. 132* (blood transfusion as service rather than sale under *Health & Safety Code § 1606*); *Silverhart v. Mount Zion Hospital (1971) 20 Cal. App. 3d 1022, 1028, 98 Cal. Rptr. 187* (hospital as consumer rather than seller of surgical needle which broke during operation); *see also San Diego Hosp. Assn. v. Superior Court (1994)30 Cal. App. 4th 8, 16-17* (hospital as not strictly liable to staff physician for defective laser that injured doctor while performing surgery)]. For an allegation of defective equipment and supplies to use in a complaint, see *§ 295.57*.

[4] For Inadequate Maintenance of Premises

A hospital may be liable as an occupier of property for failure to maintain the hospital premises in a safe condition [*Owens v. White Memorial Hosp. (1956) 138 Cal. App. 2d 634, 639, 292 P.2d 288* (hospital liable for injury to patient's visitor by defective bed rail); for further discussion, *see* Ch. 421, *Premises Liability* ,].

If a hospital has patients who are known to have diminished mental capacities, it must do more to protect such patients than expected of an ordinary landowner. For example, an alcoholic rehabilitation hospital must safeguard its patients from conditions on the premises, including fixtures, that by reason of the patients' particular incapacities may become dangerous to their life or health [*Emerick v. Raleigh Hills Hospital (1982) 133 Cal. App. 3d 575, 581-582, 184 Cal. Rptr. 92]* . For further discussion of the scope of a hospital's duty to attend adequately to its patients, see [5][b], *below*. For an allegation of the hospital's failure to protect disabled patient from conditions on premises, see *§ 295.55*.

[5] For Inadequate Attendance of Patients

[a] Duty

If a hospital undertakes to care for a person as a patient while the person is receiving medical treatment in its facilities, the hospital becomes obligated, under general tort principles or by virtue of an express or implied contract, to exercise reasonable care under the circumstances for the person's protection [*Guilliams v. Hollywood Hosp. (1941) 18 Cal. 2d 97, 99, 114 P.2d 1* ; *Goff v. Doctors General Hosp. (1958) 166 Cal. App. 2d 314, 318, 333 P.2d 29]* . The hospital is

held to have breached this obligation when it carelessly fails to furnish a patient with adequate services and care in accord with its undertaking [*Guilliams v. Hollywood Hosp. (1941) 18 Cal. 2d 97, 103, 114 P.2d 1]* , when it fails to exercise due care in determining the qualifications of its employees for the duties to which they are assigned [*England v. Hospital of Good Samaritan (1936) 16 Cal. App. 2d 640, 644, 61 P.2d 48]* , or when the negligence of its employees in caring for a patient within the scope of their employment is imputed to the hospital under the doctrine of respondeat superior [*Sherman v. Hartman (1955) 137 Cal. App. 2d 589, 600-601, 290 P.2d 894]* . A patient may recover damages from a hospital in an action in tort for ordinary negligence [*Harding v. Liberty Hosp. Corp. (1918) 177 Cal. 520, 522-524, 171 P. 98* (no cause of action for breach of contract); *see Meier v. Ross General Hosp. (1968) 69 Cal. 2d 420, 433, 71 Cal. Rptr. 903, 445 P.2d 519* (hospital employee's conduct which involved no aspect of medical treatment as ordinary negligence rather than medical malpractice)] if the patient has sustained injuries as a proximate result of a breach by the hospital of its duty of protection [*Morand v. Seaside Memorial Hosp. (1953) 121 Cal. App. 2d 745, 746, 264 P.2d 96* (nonliability of hospital for injuries of patient which were not proximately caused by hospital employee's negligence in treating patient)]. However, a hospital's medical expertise and skill is merely a factor that affects the standard of care governing a negligence action; thus, a single set of facts cannot give rise to separate and distinct claims for ordinary and professional negligence [*Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal. 4th 992, 998, 35 Cal. Rptr. 2d 685, 884 P.2d 142]* .

[b] Scope of Duty

The amount of care and diligence that a hospital is required to exercise for the safety of a patient is that reasonably required by the known condition of the patient in proportion to the capacity of the patient to care for himself or herself [*Wood v. Samaritan Institution (1945) 26 Cal. 2d 847, 851, 161 P.2d 556* ; *Gin Non Louie v. Chinese Hosp. Ass'n (1967) 249 Cal. App. 2d 774, 789, 57 Cal. Rptr. 906]* . Thus, a hospital, through its personnel, is responsible for observing and knowing a patient's condition [*Rice v. California Lutheran Hosp. (1945) 27 Cal. 2d 296, 302, 163 P.2d 860* (duty to know patient's confused state of mind and weakened physical condition); for allegation of failure to safeguard disabled or immature patient, see *§ 295.54*; *Valentin v. La Societe Francaise (1946) 76 Cal. App. 2d 1, 6, 9, 172 P.2d 359* (duty to observe patient during recovery from operation); for allegation of inadequate attendance to patient's needs, see *§ 295.51*], for following the orders of physicians in caring for patients and accurately maintaining patients' medical charts [*Cline v. Lund (1973) 31 Cal. App. 3d 755, 763, 107 Cal. Rptr. 629* ; *see Bus. & Prof. Code §§ 2392.5* and *2392.6* (requirement that licensed hospital maintain adequate and accurate medical records for patients); for allegation for failure to follow physician's orders for patient's care, see *§ 295.52*; for allegation of failure to maintain medical records, see *§ 295.56*], and for taking such measures as reasonably appear necessary to guard against foreseeable risks of harm [*Wood v. Samaritan Institution (1945) 26 Cal. 2d 847, 852, 161 P.2d 556* (duty to take measures to preclude mentally disturbed patient from harming himself); for a complaint alleging failure to protect mental patient from self-inflicted harm, see *§ 295.58*; *Goff v. Doctors General Hospital (1958) 166 Cal. App. 2d 314, 318-319, 333 P.2d 29* (patient's worsening condition requiring nurses to inform patient's physician or, in absence of prompt and adequate treatment by physician, hospit al administrator); for allegation of failure to notify physician of patient's worsening condition, see *§ 295.56*; *Thomas v. Seaside Memorial Hosp. (1947) 80 Cal. App. 2d 841, 848, 183 P.2d 288* (duty to provide continuous observation of infant by skilled nurse in view of infant's inability to complain of symptoms); forcomplaint by minor and parents against hospital based on professional negligence, see *§ 295.60*]. However, a hospital is not an insurer of a patient's safety and is not obligated to protect a patient against risks that a reasonable person under the circumstances would not have anticipated [*McDonald v. Foster Memorial Hosp. (1959) 170 Cal. App. 2d 85, 95-97, 338 P.2d 607 , disaproved on other grounds, Siverson v. Weber (1962) 57 Cal. 2d 834, 22 Cal. Rptr. 337, 372 P.2d 97* ; *Valentin v. La Societe Francaise (1946) 76 Cal. App. 2d 1, 6, 9, 172 P.2d 359* (question of fact for the jury whether hospital exercised reasonable care under circumstances)]. Moreover, the duty to take measures to prevent a patient's commission of suicide does not extend beyond the patient's unconditional release [*Katona v. County of Los Angeles (1985) 172 Cal. App. 3d 53, 59, 218 Cal. Rptr. 19]* .

[c] Measured by Community Standard

A hospital's duty to protect patients is also measured by the degree of care, skill, and diligence generally used by hospitals in the community under similar circumstances and required by the express or implied contract of the hospital's undertaking [*Wood v. Samaritan Institution (1945) 26 Cal. 2d 847, 851, 161 P.2d 556]* to the extent that the customary practice of hospitals in the community is not itself negligent [*Leonard v. Watsonville Community Hosp. (1956) 47 Cal. 2d 509, 519-520, 305 P.2d 36]* or does not violate an applicable statute or regulation [*McDonald v. Foster Memorial Hospital (1959) 170 Cal. App. 2d 85, 93, 338 P.2d 607 , disapproved on other grounds, Siverson v. Weber (1962) 57 Cal. 2d 834*].

[6] Effect of Violation of Statute

[a] In General

Statutes, ordinances, and regulations also play a role in establishing the standard of care owed by a hospital to its patients. Under *Evid. Code § 669*, which codifies common law principles, the negligence of a hospital with respect to a patient is presumed if the hospital's violation of a statute, ordinance, or regulation promulgated by a public entity proximately results in the patient's injury or death, the patient is a member of a class of persons for whose protection the statute, ordinance, or regulation was adopted, and the patient's injury or death was the type of harm that the statute, ordinance, or regulation was designed to prevent [*see Cade v. Mid-City Hosp. Corp. (1975) 45 Cal. App. 3d 589, 598, 119 Cal. Rptr. 571* (negligence per se instruction properly refused when regulation governing administration of medication by hospital employees was not designed to protect against patient's kind of injury); *see also Derrick v. Ontario Community Hosp. (1975) 47 Cal. App. 3d 145, 152, 120 Cal. Rptr. 566* (hospital's potential liability to nonpatient for failure to report patient's communicable disease to local health officer in violation of *Health & Safety Code § 120245*)]. In this connection, see the Department of Health regulations contained in *22 Cal. Code Reg. §§ 70001-71667*, prescribing standards for the facilities, equipment, and staffing of licensed hospitals.

[b] Failure to Provide Emergency Services

A licensed health care facility that maintains and operates an emergency department to provide emergency services to the public must provide emergency services and care to any person who requests the services or care, or for whom the services or care is requested, for any condition in which the person is in danger of loss of life, serious injury, or illness. The requirement applies if the facility has appropriate facilities and qualified personnel available to provide the services or care [*Health & Safety Code § 1317(a)*]. Emergency care or services must be rendered without first questioning the patient or any other person as to his or her ability to pay. However, the patient, or his or her legally responsible relative or guardian, must execute an agreement to pay or otherwise supply insurance or credit information promptly after the services are rendered [*Health & Safety Code § 1317(d)*].

The provision of emergency services and care may not be based on or affected by the person's ethnicity, citizenship, age, preexisting medical condition, insurance status, economic status, or ability to pay for medical services, or any other characteristic listed or defined in *Civ. Code § 51(b)* or *(e)*, except to the extent that a circumstance such as age, sex, preexisting medical condition, or physical or mental disability is medically significant to the provision of appropriate medical care to the patient [*Health & Safety Code § 1317(b)*].

A health care facility and its employees are not liable in any action arising out of a refusal to render emergency services or care if the refusal is based on the determination, exercising reasonable care, that the person is not suffering from an emergency medical condition, or that the health facility does not have the appropriate facilities or qualified personnel available to render the services [*Health & Safety Code § 1317(c)*]. If a health care facility does not maintain an emergency department, its employees must nevertheless exercise reasonable care to determine whether an emergency exists. They must direct the person seeking emergency treatment to a nearby facility that can render the needed services, and must assist the person in obtaining the services, including transportation services, in every way reasonable under the circumstances [*Health & Safety Code § 1317(e)*]. The need for continuing dialysis treatment for chronic end stage renal

disease is not emergency condition so as to require mandated emergency service under *section 1317* [*Payton v. Weaver (1982) 131 Cal. App. 3d 38, 45-47, 182 Cal. Rptr. 225]* .

For a form of allegations that may be included in a complaint for personal injury or wrongful death due to a failure to provide emergency services, see *§ 295.62*.

[c] Transfer for Nonmedical Reasons

A hospital may not transfer a person who needs emergency services and care to another hospital for any nonmedical reason, such as the person's inability to pay for any emergency service or care, unless each of the following conditions are met:

- The person must have been examined and evaluated by a physician and surgeon, including any necessary consultation prior to transfer.

- The person must have been provided with emergency services and care so that it can be determined, within reasonable medical probability, that the transfer or delay caused by the transfer will not create a medical hazard to the person.

- A physician and surgeon at the transferring hospital must have notified the receiving hospital, obtained consent to the transfer by a physician and surgeon at the receiving hospital, and obtained confirmation by the receiving hospital that the person meets the hospital's admissions criteria relating to appropriate bed, personnel, and equipment necessary to treat the person.

- The transferring hospital must have provided for the appropriate personnel and equipment that a reasonable and prudent physician and surgeon in the same or similar locality exercising ordinary care would use to effect the transfer.

- All the person's pertinent medical records and copies of all the appropriate diagnostic test results that are reasonably available must have been transferred with the person.

- The records that are transferred with the person must have included a "Transfer Summary" signed by the transferring physician and surgeon that contains relevant transfer information, including at least the following: the patient's name, address, sex, race, age, insurance status, and medical condition; the name and address of the transferring physician and surgeon or emergency department personnel authorizing the transfer; the time and date that the person was first presented at the transferring hospital; the name of the physician and surgeon at the receiving hospital consenting to the transfer and the time and date of the consent; the time and date of the transfer; the reason for the transfer; and the declaration of the signor that the signor is assured, within reasonable medical probability, that the transfer creates no medical hazard to the patient.

- The transfer conforms with regulations that prescribe minimum protocols for patient transfers [*Health & Safety Code § 1317.2(a)-(g)*].

The above requirements do not apply to a transfer of a patient for medical reasons or to a transfer or discharge of a patient if the patient or his or her representative requests it and gives informed consent for it against medical advice [*Health & Safety Code § 1317.2(h), (i)*].

A violation of the limitations on patient transfer may result in the imposition of a fine, or revocation or suspension of the hospital's license [*see Health & Safety Code § 1317.6*]. Also, any person who suffers personal harm as a result of an

improper transfer for nonmedical reasons may recover damages, reasonable attorney's fees, and other appropriate relief in a civil action against the transferring hospital [*Health & Safety Code § 1317.6(j)*]. Whether such an action is separate from an action for professional negligence under MICRA, so that MICRA requirements would not apply, is not entirely resolved [*see* [2], *above*].

However, the cap on noneconomic damages provided in MICRA by *Civ. Code § 3333.2* does apply to a claim for failure to provide stabilizing treatment brought under an analogous federal statute, which, as discussed in [d], *below*, is designed generally to prevent hospitals that have entered into Medicare provider agreements from inappropriately transferring or refusing to treat patients requiring emergency medical treatment [*Barris v. County of Los Angeles (1999) 20 Cal. 4th 101, 109, 83 Cal. Rptr. 2d 145, 972 P.2d 966* ; *see 42 U.S.C.S. § 1395dd*]. In the case so holding, the California Supreme Court's conclusion that these claims are "based on professional negligence," and therefore subject to the provisions of *Civ. Code § 3333.2*, would seem equally applicable to actions brought under the state statutes, at least if the state claims are also based on the failure to provide stabilizing treatment prior to transfer [*see Barris v. County of Los Angeles (1999) 20 Cal. 4th 101, 110, 83 Cal. Rptr. 2d 145, 972 P.2d 966]* .

For a form of allegations that may be included in a complaint for personal injury or wrongful death due to an improper transfer for nonmedical reasons, see *§ 295.63*.

[d] Emergency Medical Treatment and Active Labor Act

The federal Emergency Medical Treatment and Active Labor Act (*42 U.S.C.S. § 1395dd*), which was signed into law as part of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), also provides an enforcement mechanism to deter the practice of those hospitals which, despite being capable of providing the needed medical care, send patients to other facilities or turn patients away because the patients are unable to pay [*see Reid v. Indianapolis Osteopathic Medical Hosp. (S.D. Ind. 1989) 709 F. Supp. 853, 853-854]* .

The Act generally provides that if any individual, whether or not that person is eligible for Medicare benefits, comes to a hospital and the hospital determines that the individual has an emergency medical condition or is in active labor, the hospital must provide either further medical examination and treatment as may be required to stabilize the condition or treatment for the labor, or provide a transfer in accordance with the restrictions under the Act [*see 42 U.S.C.S. § 1395dd(a), (b), (e)*].

There may not be a transfer of a patient with an unstabilized emergency medical condition unless (1) either the patient (or a legally responsible person acting on the patient's behalf) requests a transfer, or a physician (or other qualified medical personnel when a physician is not readily available in the emergency department) has signed a certification that, based on the reasonable risks and benefits to the patient, and based on the information available at the time, the medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the individual's medical condition from effecting the transfer; and (2) the transfer is an "appropriate transfer" within the meaning of the statute [*see 42 U.S.C.S. § 1395dd(c)*; *see also 42 U.S.C.S. § 1395dd(e)(4)(b)* (defining "stabilized")].

Any individual who suffers personal harm as a direct result of a "participating hospital's" violation of the Act may, in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the state in which the hospital is located, and such equitable relief as is appropriate [*42 U.S.C.S. § 1395dd(d)(3)(A)*; *see also Bryant v. Riddle Mem'l Hosp. (E.D. Pa. 1988) 689 F. Supp. 490, 492-493* (dicta citing legislative history supporting concurrent jurisdiction of state courts to hear and decide actions brought under the Act); for allegation of unauthorized transfer for nonmedical reasons, see *§ 295.63*]. A "participating hospital" is a hospital that has entered into a Medicare provider agreement under *42 U.S.C.S. § 1395cc* [*42 U.S.C.S. § 1395dd(e)(3)*]. As noted in [c], *above*, the $250,000 cap on noneconomic damages provided by *Civ. Code § 3333.2* applies to a claim for failure to provide stabilizing treatment brought under the Act [*Barris v. County of Los Angeles (1999) 20 Cal. 4th 101, 116-117, 83 Cal. Rptr. 2d 145, 972*

P.2d 966] .

A hospital that has knowingly and willfully, or negligently, failed to meet the requirements of the Act may also be subject to termination or suspension of its Medicare provider agreement; a participating hospital may incur civil penalties of not more than $50,000 per violation if it knowingly violates the Act; and the responsible physician may receive sanctions [*see 42 U.S.C.S. § 1395dd(d)(1)-(2)*].

[7] Under Doctrine of Respondeat Superior

Under the doctrine of respondeat superior, a hospital may be liable for the injuries of a patient sustained as a proximate result of improper medical treatment by a physician or nurse who is an employee of the hospital acting within the scope of his or her employment [*Rice v. California Lutheran Hospital (1945) 27 Cal. 2d 296, 304, 163 P.2d 860* (negligence); *Inderbitzen v. Lane Hosp. (1932) 124 Cal. App. 462, 468, 12 P.2d 744* (battery based on unauthorized medical treatment)]. Thus, when a physician or nurse as a salaried employee of the hospital treats a patient pursuant to an agreement between the patient and the hospital for medical services, the malpractice of the physician or nurse is generally imputed to the hospital [*Brown v. La Societe Francaise De Bienfaisance Mutuelle (1903) 138 Cal. 475, 476, 71 P. 516* ; *see Jacoves v. United Merchandising Corp. (1992) 9 Cal. App. 4th 88, 103-104, 11 Cal. Rptr. 2d 468]* . In contrast, when medical personnel are directly employed by a patient and merely use hospital facilities to treat the patient, the personnel are considered to be independent contractors, and the hospital is not liable for their malpractice under the respondeat superior theory [*Mayers v. Litow (1957) 154 Cal. App. 2d 413, 418, 316 P.2d 351* (physician using hospital facilities in accordance with medical staff privileges as independent contractor of hospital); *see also Lab. Code § 2750.6* (rebuttable presumption that physician under contract to primary care clinic is independant contractor)]. The hospital may be liable for the acts of an independent contractor, however, based on its corporate negligence [*see Elam v. College Park Hosp. (1982) 132 Cal. App. 3d 332, 340-342, 183 Cal. Rptr. 156* , discussed under [9], *below*].

In addition, a hospital will also incur liability for the tortious acts of medical personnel who are actually independent contractors if a patient does not directly employ the personnel and the hospital causes the patient to reasonably believe that such personnel are hospital employees; in such a case, the agency of the personnel for the hospital is a question for the trier of fact [*Seneris v. Haas (1955) 45 Cal. 2d 811, 831-832, 291 P.2d 915* (ostensible agency of anesthetist practicing at defendant hospital); *Hedlund v. Sutter Med. Serv. Co. (1942) 51 Cal. App. 2d 327, 331, 124 P.2d 878* (estoppel of hospital from denying agency of medical technician employed by independent physician who rented offices in hospital); *see* Ch. 427, *Principal and Agent*].

A finding of ostensible agency generally requires conduct by the hospital that would cause a reasonable person to believe that the physician was an agent of the hospital, as well as the patient's reliance on that apparent agency relationship [*Mejia v. Cmty. Hosp. of San Bernardino (2002) 99 Cal. App. 4th 1448, 1453, 122 Cal. Rptr. 2d 233]* . However, hospitals are generally deemed to hold themselves out as the provider of services unless they give the patient notice to the contrary, and the patient is generally presumed to have looked to the hospital for care unless the patient was treated by his or her personal physician. Therefore, absent some reason for the patient to know that the physician was not the agent of the hospital, ostensible agency is usually inferred [*Mejia v. Cmty. Hosp. of San Bernardino (2002) 99 Cal. App. 4th 1448, 1454-1455, 122 Cal. Rptr. 2d 233* ; *see, e.g., Ermoian v. Desert Hospital (2007) 152 Cal. App. 4th 475, 506-516, 61 Cal. Rptr. 3d 754* (physicians were ostensible agents of hospital as matter of law, although neither physicians nor other hospital staff were found negligent)]. In addition, the fact that the patient had not met or even known about the involvement of the negligent physician at the time is irrelevant to the issue of ostensible agency [*Mejia v. Cmty. Hosp. of San Bernardino (2002) 99 Cal. App. 4th 1448, 1458-1459, 122 Cal. Rptr. 2d 233]* .

For a complaint for personal injuries against a hospital and its employees, see *§ 295.59*. For discussion of the standard of care applicable in actions for the malpractice of medical personnel and forms for use in such actions, see Ch. 415, *Physicians: Medical Malpractice* .

[8] Under Borrowed Servant Doctrine

If hospital employees act under the special supervision and control of an independent physician during a medical procedure directed by the phyician, they become the temporary agents of the physician, and their negligence is imputed to the physician rather than to the hospital [*Ybarra v. Spangard (1944) 25 Cal. 2d 486, 492, 154 P.2d 687]* . However, when, in the course of performing routine duties assumed by the hospital for the care of a patient, hospital employees merely carry out the orders of an independent physician who has general charge of the diagnosis and treatment received by the patient, the employees remain subject to the direction and control of the hospital, and the hospital retains liability for their negligence [*Rice v. California Lutheran Hospital (1945) 27 Cal. 2d 296, 304, 163 P.2d 860* (physician's order that hospital employees serve tea to patient during patient's recovery from operation within scope of hospital's duty to care for patient); *Sherman v. Hartman (1955) 137 Cal. App. 2d 589, 595-597, 290 P.2d 894* (supervision of patient during blood transfusion as routine matter of patient care provided by hospital even though transfusion was ordered by patient's physician)].

[9] For Corporate Negligence

A licensed hospital is required to restrict membership on its medical staff to licensed practitioners, competent in their respective fields, and worthy in character and in professional ethics [*Bus. & Prof. Code §§ 2392.5-2392.6*]. In addition, under *Health & Safety Code § 1250* and the regulations promulgated by the Department of Health for the facilities, equipment, and staffing of licensed hospitals [*22 Cal. Code Reg. § 70001 et seq.*], the governing body of a hospital has overall administrative and professional responsibility for medical staff appointments and for the periodic review of medical staff members' qualifications to competently perform the procedures for which they are given staff privileges [*22 Cal. Code Reg. §§ 70005, 70701, 71035, 71501*]. The organized medical staff of the hospital, in turn, is responsible to the governing body for the fitness, adequacy, and quality of the medical care rendered to patients in the hospital and must institute procedures for evaluating staff appointments, ensuring that appropriate practices are followed in the various departments of the hospital, and requiring consultations among staff members [*22 Cal. Code Reg. §§ 70703, 71503*].

Under the general principles of negligence embodied in *Civ. Code § 1714(a)*, a hospital corporation may be directly liable for the negligence of independent physicians and surgeons who, as members of the medical staff, utilize hospital facilities but are neither employees nor agents of the hospital. Liability arises from the hospital's breach of its duty to protect patients from harm and to act with reasonable prudence in their care. In accordance with the statutory authority recognizing hospital accountability for the quality of medical care provided to patients, this duty of careencompasses the responsibility to establish and implement adequate staff competency screening and review procedures. A failure to adequately supervise the competence of staff physicians is held to create an unreasonable risk of harm to the patients, and any patient injury caused by staff incompetence is therefore directly actionable against the hospital [*see Elam v. College Park Hosp. (1982) 132 Cal. App. 3d 332, 340-342, 183 Cal. Rptr. 156]* .

Civ. Code § 3333.2, limiting recovery for noneconomic losses to $250,000 in any action for injury against a health care provider based on professional negligence, applies to an action based on breach of a hospital's duty to exercise reasonable care in reviewing the competence of its medical staff [*Bell v. Sharp Cabrillo Hosp. (1989) 212 Cal. App. 3d 1034, 1051, 260 Cal. Rptr. 886]* .

In connection with the use of hospital records to prove that a hospital had knowledge of a medical staff member's incompetence prior to the member's injury of a patient, see *§ 295.23, below*.

[10] For Rescue Team Misconduct

No hospital licensed pursuant to *Health & Safety Code § 1250 et seq.*, its officers, staff members, nurses, or employees and no federal, state, or county government is liable for the acts or omissions of any rescue team established by the

hospital, by the federal, state, or county government, or by the Regents of the University of California while the rescue team is attempting to resuscitate any person in immediate danger of loss of life if good faith is exercised [*Health & Safety Code § 1317*]. The hospital is not thereby relieved, however, of any obligation otherwise existing under law to designate and train members of a rescue team or to provide and maintain equipment for use by the team [*Health & Safety Code § 1317*]. "Rescue team" means a special group of physicians and surgeons, nurses, and hospital employees who have been trained in cardiopulmonary resuscitation and have been designated by the hospital to attempt, in cases of emergency, to resuscitate persons who are in immediate danger of loss of life [*Health & Safety Code § 1317*]; *see Lowry v. Henry Mayo Newhall Memorial Hospital (1986) 185 Cal. App. 3d 188, 192-195, 229 Cal. Rptr. 620* .

[11] For Failure to Preserve Records

Providers of health services that are licensed pursuant to *Health & Safety Code § 1253* (as well as those licensed pursuant to *Health & Safety Code § 1205* (clinics), 1575 (adult day health care), or 1726 (home health agencies)) have an obligation, if the licensee ceases operation, to preserve records for a minimum of seven years following discharge of the patient [*Health & Safety Code § 25259(a)*]. Failure to do so subjects the licensee to tort liability for resulting injuries [*Health & Safety Code § 25259(b)*].

Licensed clinical laboratories that provide cytology services must, if the licensee ceases operation, preserve records, cytology slides, and cell blocks as prescribed in *Bus. & Prof. Code §§ 1271(g)* and *1274* [*Bus. & Prof. Code § 1271.1*; *see Bus. & Prof. Code §§ 1271(g)* (requiring preservation of slides and cell blocks for five years, and cytology reports for 10 years), 1274 (requiring preservation of copies of corrected reports of smear evaluations for 10 years)]. Failure to do so subjects the licensee to tort liability for resulting injuries [*Bus. & Prof. Code § 1271.1(b)*]. For further discussion, see *§ 295.23[3][m]*.

[12] For Detention of Patient for Nonpayment of Bill

No patient shall be detained in a health facility solely for the nonpayment of a bill [*Health & Safety Code § 1285(a)*; *see Health & Safety Code § 1285(d)* (detention as a misdemeanor)]. "Detained" means the intentional confinement of a patient in a health facility without authorization of the patient or such other person as may be authorized to provide consent to such care on behalf of the patient [*Health & Safety Code § 1285(b)*].

Any person who is detained in a health facility solely for the nonpayment of a bill has a cause of action against the health facility for the detention, which may be brought by the person detained or that person's parent, guardian, conservator, or other legal representative. The action may be brought against the health facility, proprietor, lessee or their agents, or against any person, corporation, association, or directors thereof. In the action, any person so detained has a right to recover general and punitive damages, court costs, and reasonable attorney's fees actually incurred, and such other relief as the court in its discretion may allow [*Health & Safety Code § 1285(c)*].

[13] For Loss of Property of Deceased Patient

A hospital operator has the same liability for losses of or injuries to personal property as a depositary for hire [*Civ. Code § 1859*]. For general discussion of depositaries for hire, see Ch. 93, *Bailments* . For discussion of *Civ. Code § 1859*, see Ch. 297, *Hotels and Motels* . For discussion of the duties of long-term health care facilities to safeguard the property of patients, see Ch. 351, *Long-term Health and Residential Care* .

In regard to the personal property of a deceased patient, a hospital will not be liable for loss or damage to the property caused by the person to whom the property is delivered if, in delivering the property, the hospital complied with the requirements of *Prob. Code § 330* [*Prob. Code § 330(f)*]. *Prob. Code § 330* allows a hospital to deliver the tangible personal property of the decedent in its possession, including keys to the decedent's residence, to the decedent's surviving spouse, relative, or conservator or guardian of the estate acting in that capacity at the time of death [*Prob.*

Code § 330(a)]. The hospital, however, must not deliver the property if there is reason to believe that there is a dispute over the right to possession of the decedent's property [*Prob. Code § 330(b)*]. The hospital must require reasonable proof of the status and identity of the person to whom the property is delivered [*Prob. Code § 330(c)*; *see also Prob. Code § 13104(d)* (listing documents that may be used to determine person's identity)]. In addition, the hospital must, for three years, maintain a record of the property delivered and the status and identity of the person to whom the property is delivered [*Prob. Code § 330(d)*].

[14] For Retaliation for Patient Complaints

A health facility may not discriminate or retaliate in any manner against any patient or employee of the health facility because that patient or employee, or any other person, has presented a grievance or complaint, or has initiated or cooperated in any investigation or proceeding of any governmental entity, relating to the care, services, or conditions of that facility [*Health & Safety Code § 1278.5(b)(1)*].

A health facility that violates this provision is subject to a civil penalty of not more than twenty-five thousand dollars ($25,000) [*Health & Safety Code § 1278.5(b)(2)*]. This civil penalty is assessed and recovered through the same administrative process set forth in *Health & Safety Code § 1417 et seq.*, which governs long-term health care facilities [*Health & Safety Code § 1278.5(b)(2)*]. Furthermore, any person who willfully violates this provision is guilty of a misdemeanor punishable by a fine of not more than twenty thousand dollars ($20,000) [*Health & Safety Code § 1278.5(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesApparent Agency & Respondeat SuperiorRespondeat SuperiorHealthcare LawActions Against FacilitiesFacility LiabilityHospitalsHealthcare LawActions Against FacilitiesStandards of CareHospitalsHealthcare LawActions Against FacilitiesStandards of CareMedical Malpractice ActionsTortsMalpractice & Professional LiabilityHealthcare Providers

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Chapter 295 HOSPITALS
PART II. LEGAL BACKGROUND

25-295 California Forms of Pleading and Practice--Annotated § 295.14

§ 295.14 Defenses to Tort Liability

[1] Negligence of Patient

A plaintiff's recovery for injuries proximately resulting from the negligence of hospital personnel in caring for the plaintiff while he or she was a patient in a hospital may be reduced to the extent that the plaintiff negligently contributed to his or her own injuries [*see* *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226* (comparative negligence established)].

It is generally a question for the trier of fact whether the plaintiff was in such a physical or mental condition at the time of injury that he or she was incapable of exercising ordinary care for his or her own safety [*Rice v. California Lutheran Hosp. (1945) 27 Cal. 2d 296, 303, 163 P.2d 860* (patient's weakened physical and confused mental condition following surgery); *Welker v. Scripps Clinic & Research Found. (1961) 196 Cal. App. 2d 338, 343, 16 Cal. Rptr. 538* (patient under influence of drugs); *DeMartini v. Alexander Sanitarium, Inc. (1961) 192 Cal. App. 2d 442, 447-448, 13 Cal. Rptr. 564* (mentally disturbed patient)]. If uncontradicted evidence shows that the plaintiff was totally irrational at the time of injury, a court may find that the plaintiff was incapable of negligence as a matter of law [*DeMartini v. Alexander Sanitarium, Inc. (1961) 192 Cal. App. 2d 442, 447-448, 13 Cal. Rptr. 564]* .

[2] No Liability for Following Competent Patient's Instruction

A person of adult years and in sound mind has the right, in the exercise of control over his or her own body, to determine whether or not to submit to lawful medical treatment [*Bartling v. Superior Court (1984) 163 Cal. App. 3d 186, 193-195, 209 Cal. Rptr. 220]* . Neither criminal nor civil liability will attach to treating physicians and hospitals who comply with a competent adult's decision to refuse treatment. Treating physicians and hospitals should be free to act according to the patient's instruction without fear of liability and without advance court approval [*Bartling v. Superior Court (1984) 163 Cal. App. 3d 186, 197, 209 Cal. Rptr. 220]* . Indeed, a hospital or physician may be subject to civil liability for failure to comply with a competent adult patient's instruction to terminate life sustaining treatment [*see* *Bartling v. Glendale Adventist Medical Center (1986) 184 Cal. App. 3d 961, 966-967, 229 Cal. Rptr. 360* (action dismissed because hospital's legal right to follow patient's instruction was not clear at time of patient's hospitalization)]. For a discussion of physician immunity under the Health Care Decisions Law, see Ch. 415, *Physicians: Medical Malpractice* .

[3] Good Faith Reliance on Health Care Decision

[a] Nonliability

Subject to any limitations stated in a durable power of attorney for health care, and subject to certain Probate Code provisions, which are discussed below, a health care provider is not subject to criminal prosecution, civil liability, or professional disciplinary action for relying on a health care decision of a patient's attorney-in-fact under certain circumstances.

For complete discussion of durable powers of attorney, see Ch. 427, *Principal and Agent* .

[b] Changes in Applicable Law Effective July 1, 2000

The Health Care Decisions Law [*Prob. Code § 4600 et seq.*], effective July 1, 2000, repealed, revised, and renumbered many provisions regarding durable powers of attorney for health care under the Power of Attorney Law. For example, until July 1, 2000, the limitations of reliance on a health care decision are found in *Probate Code §§ 4722*, *4723*, *4724*, *4725*, and *4726*. On or after July 1, 2000, the limitations are found in *Probate Code §§ 4680-4690*. Also, until July 1, 2000, the definition of "health care decision" can be found at *Prob. Code § 4612*. On or after July 1, 2000, the definition can be found at *Prob. Code § 4617*.

[c] Requirements for Nonliability Applicable Before July 1, 2000

Until July 1, 2000, a health care provider is not subject to criminal prosecution, civil liability, or professional disciplinary action, if the health care provider relies on a health care decision and both of the following requirements are satisfied [*Prob. Code § 4750(a)*]:

- The health care provider believes in good faith that the attorney-in-fact who made the decision is authorized under *Prob. Code § 4700 et seq.* to make that decision; and

- The health care provider believes in good faith that the decision is not inconsistent with the desires of the patient as expressed in the durable power of attorney for health care or otherwise made known to the health care provider, and, if the decision is to withhold or withdraw health care necessary to keep the patient alive, the health care provider has made a good faith effort to determine the desires of the patient to the extent that the patient is able to convey those desires to the health care provider and the results of the efforts are made a part of the patient's medical records.

However, even if these requirements are met, a health care provider may be subject to criminal prosecution, civil liability, or professional disciplinary action for relying on a health care decision to the same extent as would be the case if the patient, having had the capacity to give informed consent, had made the health care decision on his or her own behalf under like circumstances [*Prob. Code § 4750(a)*].

Nothing in *Prob. Code § 4700 et seq.* authorizes a health care provider to do anything illegal [*Prob. Code § 4750(b)*]. Notwithstanding the health care decision of the attorney-in-fact designated by a durable power of attorney for health care, the health care provider is not subject to criminal prosecution, civil liability, or professional disciplinary action for failing to withdraw health care necessary to keep the patient alive [*Prob. Code § 4750(c)*].

[d] Requirements for Nonliability Applicable on or After July 1, 2000

On or after July 1, 2000, a health care provider acting in good faith and in accordance with generally accepted health care standards applicable to the health care provider is not subject to civil or criminal liability or to discipline for unprofessional conduct for any actions in compliance with the Health Care Decisions Law, including, but not limited to,

any of the following [*Probate Code § 4740*]:

- Complying with a health care decision of a person apparently having authority to make a health care decision for a patient, including a decision to withhold or withdraw health care;

- Declining to comply with a health care decision of a person based on a belief that the person then lacked authority to make that decision;

- Complying with an advance health care directive and assuming that the directive was valid when made and had not been revoked or terminated; and

- Declining to comply with an individual health care instruction or health care decision, in accordance with *Probate Code §§ 4734-4736*.

[e] Continued Validity of Forms Valid Under Prior Law

Nothing in the Health Care Decisions Law affects the validity of any durable power of attorney for health care executed on a printed form that was valid under the prior law, regardless of whether the execution occurred before, on, or after July 1, 2000 [*Prob. Code § 4665(e)*].

[4] Periods of Limitation

[a] In General

If an action for personal injury or death is based on the failure of a hospital to exercise ordinary care in providing facilities, equipment, or attendants commensurate with the condition and needs of a patient, the action will be barred unless it is commenced within within two years (one year, prior to January 1, 2003) after the commission of the negligence [*Code Civ. Proc. § 335.1*; *Gopaul v. Herrick Mem. Hosp. (1974) 38 Cal. App. 3d 1002, 1007, 113 Cal. Rptr. 811 , disapproved on other grounds, Flowers v. Torrance Mem. Hosp. Med. Ctr. (1994) 8 Cal. 4th 992* ; *see* former *Code Civ. Proc. § 340(3)*; *Ch. 345, Limitation of Actions, § 345.14*].

If an action for personal injury or death is based on negligent medical treatment of a patient by a hospital licensed pursuant to *Health & Safety Code § 1250 et seq.* and the negligence was committed within the course and scope of professional services for which the hospital is licensed and which are not within any restriction imposed by the licensing agency or the hospital, the action will be barred unless it is commenced within three years after the date of the injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first [*Code Civ. Proc. § 340.5*]. In wrongful death actions, the word "injury" as used in *Code Civ. Proc. § 340.5* has been interpreted to refer to the death of the person [*Gomez v. Valley View Sanitorium (1978) 87 Cal. App. 3d 507, 509, 151 Cal. Rptr. 97 , disapproved on other grounds, Woods v. Young (1991) 53 Cal. 3d 315, 328*]. In no event may the time for commencement of the action exceed three years unless the three-year period is tolled for any of the following reasons: (1) on proof of fraud, (2) intentional concealment, or (3) the presence of a foreign object in the body of the injured person that has no therapeutic or diagnostic purpose or effect [*Code Civ. Proc. § 340.5*; *see Sanchez v. South Hoover Hospital (1976) 18 Cal. 3d 93, 95, 132 Cal. Rptr. 657, 553 P.2d 1129* (inapplicability of tolling provisions to one-year period); *see also Wallace v. Hibner (1985) 171 Cal. App. 3d 1042, 1047, 217 Cal. Rptr. 748* (foreign body exception applies only to medically inserted objects)].

Prior to the enactment of *Code Civ. Proc. § 340.5* in 1970, all personal injury or death actions based on medical malpractice were governed by former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 335.1* (two-year statute of limitations)), subject to the judicial qualification that the limitation period did not commence to run until the plaintiff discovered, or through the use of reasonable diligence should have discovered, the tortious injury [*Huysman v. Kirsch*

(1936) 6 Cal. 2d 302, 312, 57 P.2d 908 ; *Weinstock v. Eissler (1964) 224 Cal. App. 2d 212, 226-227, 36 Cal. Rptr. 537]* . This judicial discovery rule was modified by the enactment of *Code Civ. Proc. § 340.5* insofar as no action governed by the statute may be brought after three years, whether or not the tortious injury has been discovered during this time [*Blake v. Wernette (1976) 129 Cal. Rptr. 426* ; *but see Hills v. Aronsohn (1984) 152 Cal. App. 3d 753, 760-762, 762 n.7, 199 Cal. Rptr. 816* (three-year period runs not from date of wrongful act, but from date that damaging effect of act becomes reasonably apparent to plaintiff)]. It has not been decided whether the discovery rule imposed on former ode *Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 335.1* (two-year statute of limitations)) prior to 1970 still applies to medical malpractice suits that fall outside the scope of *Code Civ. Proc. § 340.5* and remain subject to *Code Civ. Proc. § 335.1* (*see* former *Code Civ. Proc. § 340(3)*) by implication, such as personal injury or death actions based on a battery arising from unauthorized medical treatment of a patient by hospital employees or personal injury or death actions based on the professional negligence of a hospital during the rendition of medical services for which the hospital is not licensed or which are within a restriction imposed by the licensing authority or the hospital.

For discussion and forms relating to statutes of limitations as an affirmative defense or a ground of demurrer, as well as discussion and forms relating to the necessity of pleading facts in a complaint tolling the limitation period when the complaint shows on its face that the period has run, see Ch. 345, *Limitation of Actions* , and Ch. 415, *Physicians: Medical Malpractice* .

[b] Action Brought by Minor

If a negligence action against a hospital for personal injury or death is brought by a minor, it must be commenced within three years of the alleged wrongful act, except in the case of a minor under the full age of six years, in which case the action must be brought within three years or prior to his or her eighth birthday, whichever provides the longer period. The limitation period for minors is tolled by collusion or fraud on the part of a parent or guardian of the minor and a hospital or its insurer in failing to bring an action on behalf of the injured minor [*Code Civ. Proc. § 340.5*].

The period of limitation applicable to minors does not run until the minor's parent or guardian has discovered, or through the use of reasonable diligence would be expected to discover, the injury and its negligent cause [*Kite v. Campbell (1983) 142 Cal. App. 3d 793, 803, 191 Cal. Rptr. 363 , overruled on other grounds, Young v. Haines (1986) 41 Cal. 3d 883*].

For discussion of special rules that may apply to a medical malpractice action brought by a minor against a public hospital, see [c], *below*. For discussion of the special accrual rule applicable to a minor's medical malpractice claim against a governmental defendant, see [7], *below.*

[c] Action Against Public Hospital

If the action is against a public hospital, both *Gov. Code § 945.6* (statute of limitations for actions against public entities under the Tort Claims Act) and *Code Civ. Proc. § 340.5* (statute of limitations for medical malpractice actions) apply with equal force. Thus, for example, if the plaintiff files a claim under the Tort Claims Act against the hospital, and the plaintiff receives notice of rejection of that claim pursuant to *Gov. Code § 913*, a court action must be filed within six months or the action will be barred under *Gov. Code § 945.6*, even though the action is filed within the one-year limitation period of *Code Civ. Proc. § 340.5* [*Anson v. County of Merced (1988) 202 Cal. App. 3d 1195, 1199, 1202, 249 Cal. Rptr. 457]* . Similarly, a plaintiff suing a public entity hospital for malpractice must meet the three-year limitations period of *Code Civ. Proc. § 340.5*, and failure to do so will provide a limitations defense for the defendant even if the plaintiff's action is otherwise timely under the Government Claims Act [*Roberts v. County of Los Angeles (2009) 175 Cal. App. 4th 474, 481, 96 Cal. Rptr. 3d 60*].

If the malpractice plaintiff is a minor and a timely claim has been filed with and rejected by the public entity, the six-month period for filing a medical malpractice action under *Gov. Code § 945.6* applies even though a longer period

for bringing the action against a non-public health care provider might be allowed under *Code Civ. Proc. § 340.5* [*Martell v. Antelope Valley Hospital Medical Center (1998) 67 Cal. App. 4th 978, 981-983* ; *see* [b], *above*]. In one case, for example, a tort action brought on behalf of a minor was untimely when brought over seven years after the claim against the public entity was filed and rejected, even though the action may have been timely under *Code Civ. Proc. § 340.5* and even though the plaintiffs had earlier filed a timely action that had later been dismissed without prejudice [*Martell v. Antelope Valley Hospital Medical Center (1998) 67 Cal. App. 4th 978, 981-983* .

[5] Charitable Immunity

A private hospital may no longer claim immunity from liability for the negligent injury of a patient by its employees on the basis of its status as a charitable institution [*Malloy v. Fong (1951) 37 Cal. 2d 356, 366, 232 P.2d 241* ; *see Tunkl v. Regents of University of California (1963) 60 Cal. 2d 92, 103-104, 32 Cal. Rptr. 33, 383 P.2d 441* (reaffirming *Malloy* holding in hospital context)].

[6] Governmental Immunity

[a] In General

Under the California Tort Claims Act [*Gov. Code § 810 et seq.*], a public entity engaging in medical or hospital activities has a limited immunity from liability in tort. For discussion, a procedural guide, and forms relating to tort actions against public entities and employees in general, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* . For discussion and forms relating to tort liabilities and immunities of a public entity in connection with medical and hospital functions under the Welfare and Institutions Code, see *Ch. 304, Insane and Other Incompetent Persons, § 304.110 et seq.*

[b] Liability

Like other public entities in California, a public entity that operates or maintains a medical facility [*Gov. Code § 854*] or a mental institution [*Gov. Code §§ 854.2, 854.3*] or that otherwise engages in medical, hospital, and public health activities is generally liable for the negligent or wrongful conduct of one of its employees within the scope of his or her employment if the employee's conduct would have given rise to a cause of action against the employee [*Gov. Code § 815.2(a)*; *see Gov. Code § 820(a)* (subject to statutory exception, liability of public employee as coextensive with that of private person)]. This general liability is incorporated by implication in a number of statutes dealing specifically with public entities engaging in medical, hospital, and public health functions: *Gov. Code §§ 855.6* (liability for torts in connection with examinations or diagnoses performed for treatment purposes), *855.8(b)-(d)* (liability for negligent or wrongful act in prescribing or administering treatment for mental illness or addiction), *856(b), (c)* (liability for negligent or wrongful act in carrying out either determination to confine or release person for mental illness or addiction or determination of terms and conditions of such confinement) [*see Hernandez v. State of California (1970) 11 Cal. App. 3d 895, 899, 90 Cal. Rptr. 205* (purpose of *Gov. Code §§ 855.6, 855.8(c), 856(c)* to protect patient under confinement from medical malpractice and mistreatment)].

A public entity may be liable independently of its employee's negligent or wrongful act for an injury proximately caused by its failure to discharge a mandatory duty imposed by a statute or administrative regulation that is designed to protect against the injury unless the entity establishes that it exercised reasonable diligence to discharge the duty [*Gov. Code § 815.6*]. In addition, a public entity engaging in medical, hospital, and public health activities is liable for an injury proximately resulting from its noncompliance with statutes and regulations prescribing minimum standards for equipment, personnel, or facilities [promulgated by the State Department of Health Services, Social Services, Developmental Services, or Mental Health *Gov. Code § 855*] and from its noncompliance with statutes imposing a duty to admit persons to public health facilities [*Gov. Code § 856.4*] unless the entity establishes that it exercised reasonable diligence to comply. For allegations of a complaint based on a public entity's failure to discharge a mandatory duty, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[c] Immunity

Like other public entities in California, a public entity engaging in medical, hospital, and public health functions is generally not liable for the negligent or wrongful conduct of one of its employees when the employee is immune from liability [*Gov. Code § 815.2(b)*]. Thus, the entity shares the immunity of a public employee for injury resulting from a discretionary act or omission within the scope of his or her employment [*Gov. Code § 820.2*; *see Tarasoff v. Regents of University of California (1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 31, 551 P.2d 334* (characterizing therapist's duty to warn foreseeable victim of patient's violent tendencies as ministerial administrative act outside scope of *Gov. Code § 820.2* immunity rather than discretionary basic policy decision)]. Similarly, the entity is not liable for its employee's decision to take or omit measures to prevent or control communicable disease [*Gov. Code § 855.4(a)*]; its employee's diagnosis or failure to diagnose or prescribe treatment for mental illness or addiction [*Gov. Code § 855.8(a)*; *Fish v. Regents of Univ. of Cal. (1966) 246 Cal. App. 2d 327, 331, 333, 54 Cal. Rptr. 656]* ; its employee's determination, in accordance with applicable statutes, to confine a person for mental illness or addiction, to define the terms and conditions of such confinement, or to release the person from confinement [*Gov. Code § 856(a)*; *Tarasoff v. Regents of University of California (1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 31-32, 551 P.2d 334]* ; or its employee's failure to admit a person to a public medical facility when the employee is not under a mandatory duty to admit the person [*Gov. Code § 856.4*].

In addition, a public entity engaging in medical, hospital, and public health functions has qualified immunity from liability under the Tort Claims Act (*Gov. Code § 810 et seq.*) in several specific situations. The entity and its employees are not liable for an injury resulting from interference with the right of an inmate of a medical facility to obtain a judicial determination or review of the legality of his or her confinement unless the interference is intentional and unjustifiable and a determination has been made that the confinement was illegal [*Gov. Code § 855.2*]. The entity and its employees are not liable for a failure to make an adequate physical or mental examination to determine whether a person has a physical or mental condition that would constitute a public health or safety hazard unless the person under examination is negligently injured in the course of the examination [*see Gov. Code § 855.6* and Law Revision Commission Comment thereto]. The entity and its employees are not liable for injury to, wrongful death of, or injury caused by an escaping or escaped person who has been confined for mental illness or addiction unless the injury results from an employee's actual fraud, corruption, or actual malice, or from an employee's negligent or wrongful act in recapturing a mental patient [*Gov. Code § 856.2*]. Finally, under *Gov. Code § 854.8(a), (c)*, the entity is not liable for an injury to an inpatient or for an injury proximately caused by a patient of a mental institution unless (1) the injury results from a failure to comply with minimum statutory and regulatory standards for equipment, personnel, or facilities under *Gov. Code § 855, (2)* the injury involves an intentional and unjustified interference with a patient's right to obtain a judicial review or determination of his or her confinement under *Gov. Code § 855.2, (3)* the entity would be liable for the negligent operation of a motor vehicle under *Veh. Code § 17001*, or *(4)* the entity would be liable for a failure to maintain its property in a safe condition under *Gov. Code § 830 et seq.* Under *Gov. Code § 854.8(d)*, however, a public employee remains liable for injury resulting from a negligent or wrongful act in caring for a mental patient, and the entity may be derivatively liable insofar as the entity must indemnify an employee legally practicing a healingart for a judgment based on malpractice within the scope of his or her employment and the entity may indemnify other employees who negligently injure mental patients in their care [*County of Los Angeles v. Superior Court (1965) 62 Cal. 2d 839, 843-844, 44 Cal. Rptr. 796, 402 P.2d 868]* .

[7] Failure to File Claim Against Public Entity

Before a person may bring suit against a public entity and its employees for personal injuries sustained as a patient in a hospital operated and maintained by the entity, a claim for damages must be presented to and partially or totally rejected by the entity [*Gov. Code §§ 945.4, 950.2-950.6*].

Subject to late claim relief [*Gov. Code §§ 911.4, 946.6*], the claim must be presented within six months after the accrual of the action under the statute of limitations that otherwise applies to the action [*Gov. Code §§ 901, 911.2*; *see*

Whitfield v. Roth (1974) 10 Cal. 3d 874, 883-885, 112 Cal. Rptr. 540, 519 P.2d 588 (decided under former *Gov. Code § 911.2*, which prescribed 100-day period)]. A special accrual rule applies, however, in the case of a minor's medical malpractice cause of action against a governmental defendant. With respect to medical malpractice actions, *Code Civ. Proc. § 340.5* (discussed in [4], *above*) provides different dates of accrual for minors and adults; for minors, the cause of action accrues on the date of the "alleged wrongful act," whereas an adult's cause of action accrues on either the "date of injury" or on the date when the plaintiff discovers or, through the use of reasonable diligence, should have discovered, the injury [*Code Civ. Proc. § 340.5*]. One court of appeal has held that *Code Civ. Proc. § 340.5*, as applied to determine the date of accrual for calculating the six-month claim period under *Gov. Code § 911.2*, unconstitutionally discriminates against minors, since a minor's cause of action will typically accrue earlier than an adult's similar cause of action [*Torres v. County of Los Angeles (1989) 209 Cal. App. 3d 325, 334, 257 Cal. Rptr. 211]* . For purposes of the tort claim statutes, a minor's medical malpractice cause of action against a government defendant will accrue not on the date of the alleged wrongful act, but when the minor's parent or guardian knew or should have kno wn through the exercise of reasonable diligence that a negligent wrongful act of medical care caused the child's injuries [*Torres v. County of Los Angeles (1989) 209 Cal. App. 3d 325, 335, 257 Cal. Rptr. 211]* .

Claims must be directed to the public entity in compliance with *Gov. Code § 915*. The statute prescribes several methods of presentation, including personal delivery or mailing of the claim to the clerk, secretary, or auditor of the appropriate public entity [*Gov. Code § 915(a)*]. Presentation of a claim to a public hospital's legal department is not one of the prescribed methods, and does not satisfy the statute's requirements, even under a "substantial compliance" theory [*Life v. County of Los Angeles (1991) 227 Cal. App. 3d 894, 899-900, 278 Cal. Rptr. 196* ; *but see Gov. Code § 915(d)* (misdirected claim "actually received" by clerk, secretary, auditor, or board of public entity within time prescribed for presentation is duly presented)].

When an injured party timely files a claim with a government entity and another party also injured by the same event seeks to pursue a suit against the government entity without filing a separate claim, the second injured party may not rely on the claim filed by the original claimant if the injury suffered by the second injured party was separate and distinct [*Nguyen v. Los Angeles County Harbor/UCLA Medical Center (1992) 8 Cal. App. 4th 729, 733-734, 10 Cal. Rptr. 2d 709]* . For example, if a minor bringing an action for medical malpractice against a county hospital makes a tort claim, the minor's parents cannot rely on the tort claim when bringing a subsequent action for emotional injuries as witnesses to the minor's injuries and for emotional injuries and economic damages as direct victims of the county's negligence [*Nguyen v. Los Angeles County Harbor/UCLA Medical Center (1992) 8 Cal. App. 4th 729, 734, 10 Cal. Rptr. 2d 709]* .

A complaint that fails to show compliance with the claims procedure or facts establishing excuse, waiver, or estoppel, is subject to a general demurrer [*Dias v. Eden Township Hospital Dist. (1962) 57 Cal. 2d 502, 503-504, 20 Cal. Rptr. 630, 370 P.2d 334* ; for related discussion and forms of points and authorities in support of and in opposition to such demurrers, *see* California Points and Authorities, Ch. 196, *Public Entities* (Matthew Bender)] or an affirmative defense in the answer based on noncompliance with the claims procedure [*Gonzales v. Brennan (1965) 238 Cal. App. 2d 69, 76, 47 Cal. Rptr. 501]* .

Summary judgment in favor of the public entity defendant may also be proper if the undisputed evidence demonstrates that the plaintiff did not comply with the claims procedure [*see* *Life v. County of Los Angeles (1991) 227 Cal. App. 3d 894, 898, 902, 278 Cal. Rptr. 196]* .

A plaintiff suing a public entity hospital for malpractice must also meet the three-year limitations period of *Code Civ. Proc. § 340.5*, and failure to do so will provide a limitations defense for the defendant even if the plaintiff's action is otherwise timely under the Government Claims Act [*Roberts v. County of Los Angeles (2009) 175 Cal. App. 4th 474, 481, 96 Cal. Rptr. 3d 60*].

For a procedural guide and forms relating to the filing of claims against public entities, see Ch. 464, *Public Entities and*

Officers: California Tort Claims Act .

[8] Contractual Exculpation Invalid

A patient's agreement to release a hospital from liability for future negligent or wrongful acts, executed as a condition of the patient's admission to the hospital, is invalid under *Civ. Code § 1668* as contrary to public policy, and the hospital may not use such an agreement to prevent the patient from bringing an action against the hospital for injuries resulting from negligent treatment of the patient by the hospital's employees [*Tunkl v. Regents of University of California (1963) 60 Cal. 2d 92, 94, 32 Cal. Rptr. 33, 383 P.2d 441]* .

[9] Arbitration Agreement

Under *Code Civ. Proc. § 1295*, a contract between a hospital licensed pursuant to *Health & Safety Code § 1250 et seq.* and a patient for medical services may contain a provision for arbitration of any dispute concerning the hospital's negligence in rendering professional services for which the hospital is licensed and which are not within any restriction imposed by the licensing agency or the hospital, provided the arbitration provision conforms to language mandated by *Code Civ. Proc. § 1295* and the contract contains a boldface notice of the provision above the patient's signature line. Such a provision governs all controversies between the hospital and the patient with respect to the medical services covered by the contract unless or until the provision is rescinded by written notice within 30 days of signature [*Code Civ. Proc. § 1295(c)*; *Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 706-709, 131 Cal. Rptr. 882, 552 P.2d 1178]* or unless the provision is determined to constitute an unenforceable adhesion contract [*Wheeler v. St. Joseph Hospital (1976) 63 Cal. App. 3d 345, 357-362, 133 Cal. Rptr. 775]* . The United States Supreme Court's decision in *Allied-Bruce Terminix Companies, Inc. v. Dobson [(1995) 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753* (Federal Arbitration Act preempts state law that seeks to invalidate arbitration agreements)] throws into question whether a contract lacking the warning required by *Code Civ. Proc. § 1295(c)* is unenforceable. For further discussion, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

Agents and fiduciaries may bind their principals or beneficiaries to agree to arbitration [*see, e.g.,* *Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 709, 131 Cal. Rptr. 882, 552 P.2d 1178* (patient as bound by signature of agent)]. If the patient is a minor child, a parent may bind both the child and the other parent to arbitrate claims related to medical service for the child [*see* *Bolanos v. Khalatian (1991) 231 Cal. App. 3d 1586, 1591, 283 Cal. Rptr. 209* (mother, by signing agreement, bound unborn child and child's nonsignatory father)].

California's appellate courts are in disagreement over whether a person before his or her death may legally bind other family members to arbitrate subsequent wrongful death claims. One line of cases holds that an enforceable agreement requiring the arbitration of claims, if covering the tortious act that is the basis of the wrongful death action, requires that the wrongful death action be submitted to arbitration even if the plaintiffs were not signatories to the arbitration agreement [*see, e.g.,* *Herbert v. Superior Court (1985) 169 Cal. App. 3d 718, 722-727, 215 Cal. Rptr. 477* ; *Hawkins v. Superior Court (1979) 89 Cal. App. 3d 413, 416-419, 152 Cal. Rptr. 491*]. However, another line of cases holds that, while a person may have the authority to bind minor children to arbitrate claims brought after the person's death, a person does not generally have the authority to bind a spouse or adult children to arbitrate his or her claims, including wrongful death claims [*see, e.g.,* *Ruiz v. Podolsky (2009) 175 Cal. App. 4th 227, 238-247, 95 Cal. Rptr. 3d 828* (*review granted* Oct. 14, 2009; adult children not bound); *Rhodes v. California Hospital Medical Center (1978) 76 Cal. App. 3d 606, 608-610, 143 Cal. Rptr. 59* (spouse not bound); *see also* *Baker v. Birnbaum (1988) 202 Cal. App. 3d 288, 291-294, 248 Cal. Rptr. 336* (husband's loss of consortium claim not subject to arbitration)]. Those cases note that a wrongful death action in California is separate and distinct from any cause of action that the decedent may have had had he or she survived, and a decedent generally has no authority to bind adult family members to arbitrate their personal claims [*see, e.g.,* *Ruiz v. Podolsky (2009) 175 Cal. App. 4th 227, 238-247, 95 Cal. Rptr. 3d 828* (*review granted* Oct. 14, 2009)]. The issue is currently pending before the California Supreme Court [*see* *Ruiz v. Podolsky (2009) 175 Cal. App. 4th 227, 95 Cal. Rptr. 3d 828* (*review granted* Oct. 14, 2009)].

As noted above, in order to allow a patient sufficient time to confirm that a waiver of the right to a jury trial is made knowingly and voluntarily, *Code Civ. Proc. § 1295(c)* requires that the patient be given 30 days after signing the agreement to decide whether to rescind an agreement to arbitrate [*Code Civ. Proc. § 1295(c)*]. However, if the patient dies within this 30-day period, the agreement to arbitrate will generally be unenforceable as the person signing the agreement did not have the full statutory period to reconsider whether to rescind [*Rodriguez v. Superior Court (2009) 176 Cal. App. 4th 1461, 1469-1470, 98 Cal. Rptr. 3d 728*]. Although not entirely settled, an exception to that rule might be available if an arbitration agreement expressly provides a procedure for rescission on behalf of a nonpatient minor child who might otherwise be bound by a parent's signature. Thus, for example, if an agreement expressly states that a guardian appointed for a minor child following the death of the child's parent may exercise the right to rescind, the arbitration agreement might be enforceable in the event the child's guardian does not timely exercise this right. Under those circumstances, the equitable tolling doctrine might be used to extend the time for the guardian to act to exclude any period before the guardian was appointed, as well as any additional time between the appointment and the time the guardian learned or reasonably should have learned of the arbitration agreement [*see Rodriguez v. Superior Court (2009) 176 Cal. App. 4th 1461, 1472, 98 Cal. Rptr. 3d 728*].

Arbitration agreements involving hospitals that are exempt from the mandatory language requirements of *Code Civ. Proc. § 1295* may be strictly construed against the drafting party [*Victoria v. Superior Court (1985) 40 Cal. 3d 734, 740-747, 222 Cal. Rptr. 1, 710 P.2d 833* (sexual assault by hospital employee on patient outside scope of arbitration provision requiring arbitration of all claims "arising from rendition or failure to render services")].

Arbitration agreements are not necessarily bound by the limits of *Civ. Code § 3333.2(b)*, which places a $250,000 cap on noneconomic damages in medical malpractice suits. The Fourth Appellate District Court of Appeal has held that *Civ. Code § 3333.2* does not preclude an arbitration award of punitive damages when the patient's claim is based on fraud, willful neglect, and malicious acts. Punitive damages that may be asserted in court may also be asserted under the arbitration clauses in *Code Civ. Proc. § 1295(a)* and *(b)* when the issue is submitted by the patient or with the consent of both parties [*Baker v. Sadick (1984) 162 Cal. App. 3d 618, 626-627, 208 Cal. Rptr. 676]* . The First Appellate District has gone even further and has held that unless specifically required under the terms of the arbitration agreement to act in conformity with rules of law, an arbitration award may be based on broad principles of justice and equity, without regard to any limit imposed by *Civ. Code § 3333.2(b)*, and generally will be immune from judicial review [*Nogueiro v. Kaiser Foundation Hospitals (1988) 203 Cal. App. 3d 1192, 1194-1195, 250 Cal. Rptr. 478]* .

For discussion and forms relating to the stay or dismissal of an action based on an agreement containing a clause to arbitrate disputes arising out of the agreement, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

[10] Claims Arising Under Medicare Act

If a claim brought against a health care provider or health maintenance organization arises under the Federal Medicare Act [*see 42 U.S.C.S. § 1395 et seq.*], that claim must first go through a multilevel administrative review process in accordance with the regulations of the Secretary of Health and Human Services, after which judicial review may be pursued in federal district court [*see 42 U.S.C.S. §§ 405(g), 1395ff(b)*; *42 C.F.R. § 405.701 et seq.*; *McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal. 4th 412, 416-417, 106 Cal. Rptr. 2d 271, 21 P.3d 1189]* . A claim "arises under" the Medicare Act if both the standing and substantive basis for the presentation of the claim is the Medicare Act or if the claim is "inextricable intertwined" with a claim for Medicare benefits [*Heckler v. Ringer (1984) 466 U.S. 602, 615, 104 S. Ct. 2013, 80 L. Ed. 2d 622* ; *McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal. 4th 412, 417, 106 Cal. Rptr. 2d 271, 21 P.3d 1189]* . However, a claim that is "wholly collateral" to a claim for benefits under the Act is not subject to the administrative process, and a claimant need not exhaust administrative remedies if the claimant makes a colorable showing that an erroneous denial of benefits would cause injury that could not be remedied by the later payment of benefits [*Heckler v. Ringer (1984) 466 U.S. 602, 618, 104 S. Ct. 2013, 80 L. Ed. 2d 622* ; *McCall v. PacifiCare of*

Cal., Inc. (2001) 25 Cal. 4th 412, 417-418, 106 Cal. Rptr. 2d 271, 21 P.3d 1189] .

Because the Medicare Act provides for reimbursement of covered claims for services that are reasonable and necessary to diagnose or treat of illness or injury, a claim that, at bottom, seeks reimbursement or payment for medical services is "inextricably intertwined" with a Medicare claim and is subject to the Medicare administrative process [*McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal. 4th 412, 425, 106 Cal. Rptr. 2d 271, 21 P.3d 1189]* . However, a Medicare provider may violate state common law or statutory duties owed to Medicare beneficiaries in a way that is unrelated to Medicare coverage determinations. A claim under state law that does not seek such reimbursement or payment under the Act, but only incidentally refers to a denial of benefits, is not preempted by the Medicare procedures [*McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal. 4th 412, 425, 106 Cal. Rptr. 2d 271, 21 P.3d 1189]* .

For example, a health care provider may negligently fail to use ordinary care in treating a Medicare beneficiary, fail to advise the beneficiary properly about his or her condition or appropriate treatment options, whether or not those treatment options are covered by Medicare, or fail to provide appropriate referrals to a specialist. Thus, without regard to the issue of coverage under the Act, a beneficiary may be prevented from seeking appropriate treatment even at his or her own expense. Claims brought under state law for these negligent acts or omissions, none of which necessarily implicates a coverage determination or falls within the scope of the Medicare administrative review process, are not preempted [*McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal. 4th 412, 425-426, 106 Cal. Rptr. 2d 271, 21 P.3d 1189* (disapproving *Redmond v. Secure Horizons, PacifiCare, Inc. (1997) 60 Cal. App. 4th 96, 70 Cal. Rptr. 2d 174* , *overruled in part, McCall v. PacifiCare of California, Inc., 25 Cal. 4th 412*); *see also Zolezzi v. PacifiCare of California (2003) 105 Cal. App. 4th 573, 585-587, 129 Cal. Rptr. 2d 526* (application of state arbitration disclosure statute to dispute between patient and health care plan regarding plan's failure to authorize surgery was not preempted)].

[11] Immunity for Detention and Release of Person With Mental Disorder

A licensed general acute care hospital (as defined in *Health & Safety Code § 1250(a)*) or licensed acute psychiatric hospital (as defined in *Health & Safety Code § 1250(b)*) that is not a county-designated facility pursuant to *Welf. & Inst. Code § 5150*, licensed professional staff of those hospitals, or any physician and surgeon, providing emergency medical services in any department of those hospitals to a person at the hospital cannot be held civilly or criminally liable for detaining a person if all of the following conditions exist during the detention [*Health & Safety Code § 1799.111(a)*]:

1. In the opinion of the treating physician and surgeon, or a clinical psychologist with the medical staff privileges, clinical privileges, or professional responsibilities provided in *Health & Safety Code § 1316.5*, the person, as a result of a mental disorder, cannot be safely released from the hospital because he or she presents a danger to himself or herself, or others, or is gravely disabled. For these purposes, "gravely disabled" means an inability to provide for his or her basic personal needs for food, clothing, or shelter.

2. The hospital staff, treating physician and surgeon, or appropriate licensed mental health professional have made and documented repeated unsuccessful efforts to find appropriate mental health treatment for the person. Telephone calls or other contacts required under this paragraph must commence at the earliest possible time when the treating physician and surgeon has determined the time at which the person will be medically stable for transfer. In no case shall the required contacts begin after the time when the person becomes medically stable for transfer.

3. The person is not detained beyond 24 hours.

4. There is probable cause for the detention.

If the person is detained beyond eight hours, but less than 24 hours, this immunity is only available if both of the

following additional conditions are met [*Health & Safety Code § 1799.111(b)*]:

1. A discharge or transfer for appropriate evaluation or treatment for the person has been delayed because of the need for continuous and ongoing care, observation, or treatment that the hospital is providing.

2. In the opinion of the treating physician and surgeon, or a clinical psychologist with the medical staff privileges or professional responsibilities provided for in *Health & Safety Code § 1316.5*, the person, as a result of a mental disorder, is still a danger to himself or herself, or others, or is gravely disabled.

Following a detention of up to 24 hours under the provisions described above, the same hospitals and personnel cannot be held civilly or criminally liable for the actions of a detained person after that person's release from hospital detention, if all of the following conditions exist during the detention [*Health & Safety Code § 1799.111(c)*]:

1. The person has not been admitted to a licensed general acute care hospital or a licensed acute psychiatric hospital for evaluation and treatment pursuant to *Welf. & Inst. Code § 5150*.

2. The release is authorized by a physician and surgeon or a clinical psychologist with the medical staff privileges or professional responsibilities provided for in *Health & Safety Code § 1316.5*, who determines, based on a face-to-face examination of the person detained, that the person does not present a danger to himself or herself or others and is not gravely disabled. In order for this paragraph to apply to a clinical psychologist, he or she must have a collaborative treatment relationship with the physician and surgeon. The clinical psychologist may authorize the release of the person from detention, but only after he or she has consulted with the physician and surgeon. In the event of a clinical or professional disagreement regarding the release of a person subject to detention, the detention must be maintained unless the hospital's medical director overrules the decision of the physician and surgeon opposing the release. Both the physician and surgeon and the clinical psychologist must enter their findings, concerns, or objections in the person's medical record.

This immunity does not affect the responsibility of a general acute care hospital or an acute psychiatric hospital to comply with all state laws and regulations pertaining to the use of seclusion and restraint and psychiatric medications for psychiatric patients [*Health & Safety Code § 1799.111(d)*]. In addition, these provisions do not limit any existing duties for psychotherapists contained in *Civ. Code § 43.92*, which are discussed in Ch. 304, *Insane and Other Incompetent Persons* [*Health & Safety Code § 1799.111(f)*].

Persons detained under these provisions retain their legal rights regarding consent for medical treatment [*Health & Safety Code § 1799.111(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesDefensesGeneral OverviewTortsNegligenceDefensesContributory NegligenceGeneral OverviewTortsProcedureStatutes of LimitationsAccrual of ActionsOccurrence of TortTortsPublic Entity LiabilityImmunitySovereign ImmunityTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview

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§ 295.15 Notice of Intention to Commence Action

[1] In General

When a plaintiff sues a health care provider for professional negligence, the plaintiff must give the defendant at least 90 days prior notice of his or her intention to commence the action [*Code Civ. Proc. § 364(a)*] unless the defendant is identified by a fictitious name in the complaint pursuant to *Code Civ. Proc. § 474* [*Code Civ. Proc. § 364(e)*]. For the purpose of this notice requirement, the term "health care provider" includes, among others, licensed medical personnel and hospitals licensed as health facilities under *Health & Safety Code § 1250 et seq.* [*Code Civ. Proc. § 364(f)(1)*]; "professional negligence" means a negligent act or omission by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and are not within any restriction imposed by the licensing agency or hospital [*Code Civ. Proc. § 364(f)(2)*].

Although no particular form of notice is required, the notice must inform the defendant of the legal basis of the plaintiff's claim and the type of loss sustained, including with specificity the nature of the injuries suffered [*Code Civ. Proc. § 364(b)*; for a form of notice of intention to commence action, *see § 295.50*].

The notice may be served in the manner prescribed by *Code Civ. Proc. § 1010 et seq.* [*Code Civ. Proc. § 364(c)*]. If it is served in the last 90 days of the applicable period of limitation, the statute of limitations is tolled for 90 days [*see Russell v. Stanford University Hospital (1997) 15 Cal. 4th 783, 791, 64 Cal. Rptr. 2d 97, 937 P.2d 640* (three-year statute of limitations); *Woods v. Young (1991) 53 Cal. 3d 315, 328, 279 Cal. Rptr. 613, 807 P.2d 455]* . The effect of the 90-day notice period on the statute of limitations is further discussed in Ch. 415, *Physicians: Medical Malpractice* .

Failure to comply with the notice requirement of *Code Civ. Proc. § 364* does not invalidate any proceedings of any court in California, nor does it affect the jurisdiction of the court to render a judgment. However, failure to comply with the notice requirement by an attorney at law is grounds for professional discipline [*Code Civ. Proc. § 365*]. Because failure to comply with the notice requirement is not jurisdictional, the failure to allege each injury suffered in the notice does not prevent a plaintiff from including that injury as a basis for a cause of action in the lawsuit subsequently filed, so long as the cause of action is not otherwise barred by the statute of limitations [*Edwards v. Superior Court (2001)*

93 Cal. App. 4th 172, 180, 112 Cal. Rptr. 2d 838] .

The notice provisions of *Code Civ. Proc. § 364* do not apply in battery actions. Thus, a plaintiff may not extend the one-year statute of limitations for battery by filing a notice within 90 days of the statute's expiration [*see Noble v. Superior Court (1987) 191 Cal. App. 3d 1189, 1192-1194, 237 Cal. Rptr. 38* (action against physician)].

[2] Notice to Public Entity

The filing of the notice of intention pursuant to *Code Civ. Proc. § 364* does not constitute the filing of a claim against a public entity, at least when the notice of intention does not include or set forth any of the matters required by *Gov. Code § 910* to be enumerated on the face of a claim [*see Lutz v. Tri-City Hospital (1986) 179 Cal. App. 3d 807, 812-813, 224 Cal. Rptr. 787* (notice did not constitute filing of late claim for purposes of requiring response within 45 days to avoids waiver of right to contest lateness of claim under *Gov. Code § 911.3*)]. Nevertheless, a notice pursuant to *Code Civ. Proc. § 364* not meeting the requirements of *Gov. Code § 910* constitutes a "claim as presented" if it alerts the public entity to a claim for monetary damages and an impending lawsuit [*Phillips v. Desert Hospital Dist. (1989) 49 Cal. 3d 699, 709, 263 Cal. Rptr. 119, 780 P.2d 349]* . As such, the notice triggers an obligation on the part of the public entity to notify the plaintiff of any defects and provide the plaintiff with an opportunity to file a claim meeting statutory requirements [*Phillips v. Desert Hospital Dist. (1989) 49 Cal. 3d 699, 709, 263 Cal. Rptr. 119, 780 P.2d 349* ; *see Gov. Code §§ 910.8* (requiring public entity to notify plaintiff if claim is substantively deficient), 911.3(a) (requiring public entity to notify claimant if claim is filed late)]. If the public entity fails to provide this notice, the entity waives any defenses based on defects in the "claim as presented" [*Gov. Code §§ 911, 911.3(b)*; *see Phillips v. Desert Hospital Dist. (1989) 49 Cal. 3d 699, 711, 263 Cal. Rptr. 119, 780 P.2d 349]* .

For general discussion of claim requirements under the Tort Claims Act, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesFacility LiabilityHospitalsTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsPublic Entity LiabilityLiabilityClaim PresentationGeneral Overview

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§ 295.16 Actions by Minors

A civil action to recover damages for wrongful death or personal injury is entitled to preference on the motion of any party to the action who is under the age of 14 years unless the court finds that the party does not have a substantial interest in the case as a whole [*Code Civ. Proc. § 36(b)*]. On the granting of a motion for preference under *Code Civ. Proc. § 36(b)*, a party in an action based on a health care provider's alleged professional negligence, as defined in *Code Civ. Proc. § 364*, must receive a trial date not sooner than six months and not later than nine months from the date that the motion is granted [*Code Civ. Proc. § 36(g)*]. For a form of complaint by a minor and parents against a hospital and its employees, see *§ 295.60*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Relationships & TortsWrongful Death & SurvivalChildrenHealthcare LawActions Against FacilitiesFacility LiabilityHospitalsTortsWrongful Death & Survival ActionsPotential Plaintiffs

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§ 295.17 Certificate of Merit

Prior to January 1, 1989, in any action for damages arising out of the professional negligence of specified health care providers, including physicians and surgeons, a complaint was demurrable and the plaintiff's attorney was subject to discipline unless counsel complied with former *Code Civ. Proc. § 411.30* [*see* Stats. 1986, ch. 247], which required the filing of a certificate of merit or other certificate as specified.

Former *Code Civ. Proc. § 411.30* was repealed by its own terms on January 1, 1989 [*see* former *Code Civ. Proc. § 411.30(j)*]. As of January 1, 2003, no provision analogous to former *Code Civ. Proc. § 411.30* had been added to the Code of Civil Procedure.

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesFacility LiabilityHospitalsHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawActions Against Healthcare WorkersSurgeonsTortsMalpractice & Professional LiabilityHealthcare Providers

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25-295 California Forms of Pleading and Practice--Annotated § 295.18

§ 295.18 Damages

[1] In General

In an action by a patient against a hospital for negligently inflicted injuries, as in all actions based on negligence, the general measure of damages is the amount which will compensate the plaintiff for all the detriment proximately caused by the defendant's breach of duty, whether or not such detriment could have been anticipated [*Civ. Code § 3333*]. When a plaintiff sues a health care provider for professional negligence, however, plaintiff's recovery is subject to special treatment under the provisions of *Civ. Code §§ 3333.1* and *3333.2* and *Code Civ. Proc. § 667.7*, which sections do not apply to other negligence actions. For the purposes of these statutes, the term "professional negligence" means negligent conduct by a health care provider in rendering professional services which proximately causes injury and wrongful death, provided that such services are within the scope of services for which the provider is licensed and are not within any restriction imposed by the licensing authority or the hospital [*Civ. Code §§ 3333.1(c)(2), 3333.2(c)(2)*; *Code Civ. Proc. § 667.7(e)(4)*; *see Bell v. Sharp Cabrillo Hospital (1989) 212 Cal. App. 3d 1034, 1051, 260 Cal. Rptr. 886* (hospital's breach of its duty to exercise reasonable care in reviewing competency of its staff physicians as "professional negligence")], and the term "health care provider" includes, among others, licensed medical personnel and hospitals licensed as health facilities under *Health & Safety Code §§ 1250-1339.50* [*Civ. Code §§ 3333.1(c)(1), 3333.2(c)(1)*; *Code Civ. Proc. § 667.7(e)(3)*].

Under *Civ. Code § 3333.1(a)*, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of his or her injury pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness, or income-disability insurance, accident insurance, and any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services. If the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his or her right to any insurance benefits concerning which the defendant has introduced evidence. No source of collateral benefits introduced pursuant to *Civ. Code § 3333.1(a)* may recover any amount against the plaintiff nor may it be subrogated to the rights of the plaintiff against a defendant [*Civ. Code § 3333.1(b)*]. However, some benefit providers, such as the Medi-Cal program, have a statutory right to recover from third-party tortfeasors [*see, e.g., Hernandez v. California Hospital Medical Center (2000) 78 Cal. App. 4th 498, 506, 93 Cal. Rptr. 2d 97]* . For further discussion of these lien rights, see *Ch. 177,*

Damages, § 177.40 et seq.

A defendant's evidence of collateral benefits presented pursuant to *Civ. Code § 3333.1*, even collateral payment of *all* damages, does not constitute summary judgment proof that the plaintiff sustained no damages such that the plaintiff may not prosecute the action. Instead, it is for the jury to decide how to apply the evidence of collateral payments when calculating damages [*Hernandez v. California Hospital Medical Center (2000) 78 Cal. App. 4th 498, 506, 93 Cal. Rptr. 2d 97]* .

Although evidence of the amount of any insurance or disability benefits received by the plaintiff is admissible under *Civ. Code § 3333.1*, that statute does not provide a right to introduce evidence of the taxability of those benefits. Allowing this type of evidence would invite undue jury speculation on how tax liability might affect the plaintiff's future income [*Cox. v. Superior Court (2002) 98 Cal. App. 4th 670, 675, 120 Cal. Rptr. 2d 45]* .

Under *Civ. Code § 3333.2*, the plaintiff may not recover more than $250,000 for noneconomic or nonpecuniary losses such as pain, suffering, inconvenience, physical impairment, or disfigurement. *Civ. Code § 1431.2(a)* requires noneconomic damages in actions for personal injury and wrongful death to be apportioned severally, according to comparative fault, between multiple defendants. For defendants whose liability is limited by MICRA, the $250,000 cap on noneconomic damages under *Civ. Code § 3333.2* must be applied to a noneconomic damage award before the reduction of those damages based on comparative fault under *Civ. Code § 1431.2* [*Gilman v. Beverly California Corp. (1991) 231 Cal. App. 3d 121, 126-130, 283 Cal. Rptr. 17]* . However, in adjusting damages to account for the comparative fault of nonparties who are not subject to MICRA, a noneconomic damages award should be reduced prior to applying the $250,000 cap [*Francies v. Kapla (2005) 127 Cal. App. 4th 1381, 1387-1389, 26 Cal. Rptr. 3d 501]* .

The $250,000 limit on noneconomic damages applies to an action for equitable indemnity brought against a hospital by a third party [*Western Steamship Lines, Inc. v. San Pedro General Hospital (1994) 8 Cal. 4th 100, 111, 32 Cal. Rptr. 2d 263]* . Therefore, the damage cap applied in an action against a hospital by a ship owner, in which the owner had settled a maritime worker's claim for substandard medical care by the ship's medical staff prior and sought equitable indemnity against the hospital, where the worker was subsequently admitted and incurred aggravation of his injuries [*Western Steamship Lines, Inc. v. San Pedro General Hospital (1994) 8 Cal. 4th 100, 111, 32 Cal. Rptr. 2d 263]* .

In addition, if an employer entity, such as a medical partnership group, is vicariously liable for the professional malpractice of a physician employed by the entity, the cap on noneconomic damages applies to any damages awarded against the employer [*Lathrop v. HealthCare Partners Med. Group (2004) 114 Cal. App. 4th 1412, 1424, 8 Cal. Rptr. 3d 668]* . Under the doctrine of respondeat superior, regardless of whether the employee is also sued, the vicarious liability of the employer is wholly derived from the liability of the employee, and any defenses available to the employee also inure to the benefit of the employer [*Lathrop v. HealthCare Partners Med. Group (2004) 114 Cal. App. 4th 1412, 1423, 8 Cal. Rptr. 3d 668]* .

[2] Future Damages

Code Civ. Proc. § 667.7 provides a procedure by which either party to an action in which the award equals or exceeds $50,000 in future damages may secure a judgment in a superior court ordering that money damages or its equivalent in future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by lump-sum payment. Future damages subject to this procedure include damages for future medical treatment, care, or custody, loss of future earnings, loss of bodily function, or future pain and suffering of the judgment creditor [*Code Civ. Proc. § 667.7(e)(1)*; *see* *Fein v. Permanente Medical Group (1985) 38 Cal. 3d 137, 155-178, 211 Cal. Rptr. 368, 695 P.2d 665* (upholding constitutionality of *Civ. Code §§ 3333.1, 3333.2*; periodic payments as mandatory under *Code Civ. Proc. § 667.7*)].

A court is not required to order periodic payments of damages for future loss of earnings attributable to the period by

which plaintiff's life expectancy was diminished as a result of defendant's negligence [*Hurlbut v. Sonora Community Hospital (1989) 207 Cal. App. 3d 388, 405-406, 254 Cal. Rptr. 840]* . A party's request for periodic payment of future damages pursuant to *Code Civ. Proc. § 667.7* must be made prior to the entry of any judgment in the action [*Craven v. Crout (1985) 163 Cal. App. 3d 779, 784, 209 Cal. Rptr. 649]* . If the defendant has put the plaintiff on notice at the pleading stage of his or her intention to seek periodic future damages, and the trial court has instructed the jury to designate the portion of the damages that was attributable to future damages, a formal request for periodic payment of future damages may be made following delivery of the verdict [*see Gorman v. Leftwich (1990) 218 Cal. App. 3d 141, 152, 266 Cal. Rptr. 671]* . A jury award of lump sum damages in a malpractice award cannot be modified by the court to allow periodic payment of future damages under *Code Civ. Proc. § 667.7* when the jury has not identified the amount of damages subject to periodic payment, and the defendant's request for periodic payment was not made until after the judgment was entered [*Craven v. Crout (1985) 163 Cal. App. 3d 779, 783-785, 209 Cal. Rptr. 649]* . See Ch. 415, *Physicians: Medical Malpractice* , for discussion and forms relating to the procedure for securing a judgment for periodic payment of future damages.

[3] Punitive Damages

No claim for punitive damages against a health care provider may be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed [*Code Civ. Proc. § 425.13*]. The court may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits presented that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to *Civ. Code § 3294* [*Code Civ. Proc. § 425.13*].

In determining whether a plaintiff has satisfied this standard, a trial court may not independently assess the evidence supporting the punitive damage claim in order to determine whether the claim should go to the jury. Rather, the statutory standard is met if the plaintiff states a viable claim for punitive damages and shows that the claim is supported by competent, admissible evidence [*College Hospital, Inc. v. Superior Court (1994) 8 Cal. 4th 704, 719, 34 Cal. Rptr. 2d 898, 882 P.2d 894]* . The court shall not grant a motion allowing the filing of an amended pleading that includes a claim for punitive damages if the motion for such an order is not filed within two years after the complaint or initial pleading is filed or not less than nine months before the date the matter is first set for trial, whichever is earlier [*Code Civ. Proc. § 425.13(a)*; *see Code Civ. Proc. § 425.13(b)* (definition of health care provider)]. For a general discussion of the availability of punitive damages, see Ch. 177, *Damages* . For further discussion and forms for obtaining an order under *Code Civ. Proc. § 425.13*, see Ch. 415, *Physicians: Medical Malpractice* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesFacility LiabilityHospitalsTortsDamagesCompensatory DamagesGeneral OverviewTortsDamagesPunitive DamagesGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare Providers

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§ 295.19 Security for Costs

In an action against a licensed hospital for injuries resulting from the negligent performance of professional services or the performance of professional services without consent by a medical practitioner in the employ of the hospital, the defendant may, within six months after service of summons, move the court for an order, on notice to plaintiff and all defendants having appeared in the action and hearing, requiring plaintiff to furnish an undertaking in a sum not to exceed $500 as security for costs which may be awarded against plaintiff. The motion must be supported by affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) showing that the claim against defendant is frivolous. Any other defendant having appeared in the action and within 30 days after receipt of notice may join with the moving party requesting an order as to such additional defendant. The failure of any defendant to join with the moving party precludes each such defendant from subsequently requesting such order [*Code Civ. Proc. § 1029.6(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsExecutionsHealthcare LawActions Against FacilitiesApparent Agency & Respondeat SuperiorGeneral OverviewHealthcare LawActions Against FacilitiesFacility LiabilityHospitalsTortsMalpractice & Professional LiabilityHealthcare Providers

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25-295 California Forms of Pleading and Practice--Annotated § 295.20

§ 295.20 Hearing, Order, and Limitation on Amount

[1] Filing Undertaking

At the hearing on the motion, the court is required to order plaintiff to file an undertaking if defendant shows to the satisfaction of the court that (1) plaintiff would not suffer undue economic hardship in filing the undertaking or making the deposit, and (2) there is no reasonable possibility that plaintiff has a cause of action against each named defendant with respect to whom plaintiff would otherwise be required to file the undertaking [*Code Civ. Proc. § 1029.6(a)*].

A determination by the court that an undertaking either shall or shall not be furnished, or shall be furnished to one or more defendants and not to others, shall not be deemed a determination of any one or more issues in the action or of the merits thereof [*Code Civ. Proc. § 1029.6(a)*]. When more than one such defendant is named, the undertaking must be increased to an extent not exceeding $500 for each additional defendant in whose favor the undertaking is ordered, not to exceed the total of $1,000 [*Code Civ. Proc. § 1029.6(c)*].

The action as to such defendant or defendants must be dismissed unless the undertaking required is furnished within such reasonable time as may be fixed by the court [*Code Civ. Proc. § 1029.6(a)*].

The undertaking must be in writing [*see Code Civ. Proc. § 995.320(a)*] and must be executed by two or more sufficient personal sureties or by one sufficient admitted surety insurer or by any combination of sufficient personal sureties and admitted surety insurers [*Code Civ. Proc. § 995.310*]. For discussion of procedures under the Bond and Undertaking Law (Code *Civ. Proc. §§ 995.010-996.560*) generally and related forms, see *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.40 et seq.*

[2] Award of Costs

On dismissal of the action or the award of judgment to defendant, the court must require plaintiff to pay defendant's court costs. Any sureties shall be liable for such costs in an amount not to exceed the sum of $500 or the amount of the undertaking, whichever is less, for each defendant with respect to whom the sureties have executed an undertaking. If plaintiff prevails in the action against any defendant with respect to whom the undertaking has been filed, such defendant must pay to plaintiff the costs incurred in defending the motion for dismissal authorized by *Code Civ. Proc. §*

1029.6 [*Code Civ. Proc. § 1029.6(d)*].

[3] Summary Judgment

A defendant filing a motion under *Code Civ. Proc. § 1029.6* or joining with a party making such motion is precluded from subsequently filing a motion for summary judgment [*Code Civ. Proc. § 1029.6(e)*], and a defendant filing a motion for summary judgment is precluded from subsequently filing a motion for an undertaking, or joining with a party making such motion [*Code Civ. Proc. § 1029.6(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureRemediesBondsExecutionsHealthcare LawActions Against FacilitiesFacility LiabilityHospitalsTortsDamagesCosts & Attorney FeesGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare Providers

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25-295 California Forms of Pleading and Practice--Annotated § 295.21

§ 295.21 Attorney's Fees

An attorney may not contract for, or collect, a contingency fee for representing any person seeking damages in connection with an action for injury or damage against a health care provider based on such person's alleged professional negligence in excess of the following limits [*Bus. & Prof. Code § 6146(a)*]:

- Forty percent of the first $50,000 recovered;
- Thirty-three and one-third percent of the next $50,000 recovered;
- Twenty-five percent of the next $500,000 recovered; and
- Fifteen percent of any amount on which the recovery exceeds $600,000.

These limitations apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind [*Bus. & Prof. Code § 6146(a)*]. A trial court does not have the power to award extraordinary attorney's fees under *Bus. & Prof. Code § 6146* [*Hathaway v. Baldwin Park Community Hospital (1986) 186 Cal. App. 3d 1247, 1253, 231 Cal. Rptr. 334]* . Furthermore, a client may not waive the provisions of *Bus. & Prof. Code § 6146* by agreeing to pay fees in excess of the statutory limits [*Fineberg v. Harney & Moore (1989) 207 Cal. App. 3d 1049, 1055, 255 Cal. Rptr. 299]* . An attorney who obtains a waiver of the statutory fee limits from a client knowing that a waiver is illegal may be subject to an action for malpractice, for fraud, or to recover money had and received [*see* *Schultz v. Harney (1994) 27 Cal. App. 4th 1611, 1620-1624, 33 Cal. Rptr. 2d 276* (although attorney's actions were taken before court adjudication that waiver of statutory limits was ineffectual, client had malpractice cause of action against attorney for getting waiver from client, as well as action to recover money had and received, and, although not pleaded properly, fraud cause of action may also have been available)].

An attorney representing several plaintiffs in a wrongful death case based on professional negligence must apply the fee scale in *Bus. & Prof. Code § 6146(a)* to the judgment as a whole. The attorney may not compute fees separately on each plaintiff's share of the award [*Yates v. Law Offices of Samuel Shore (1991) 229 Cal. App. 3d 583, 590, 280 Cal. Rptr.*

316] .

Bus. & Prof. Code § 6146 fixes the maximum allowable contingent fee for a medical malpractice action as a whole, including an appeal, and the limitation may not be avoided by charging separate fees for segments of the case or by charging both contingent and hourly fees [*see Yates v. Law Offices of Samuel Shore (1991) 229 Cal. App. 3d 583, 591-592, 280 Cal. Rptr. 316* (attorney is prohibited from charging in excess of statutory formula for hourly fees of attorney associated to handle appeal)].

The 1987 amendment to *Bus. & Prof. Code § 6146*, which increased the maximum contingency fee in medical malpractice lawsuits resulting in recoveries greater than $200,000, operates prospectively only. The original 1975 version of *Bus. & Prof. Code § 6146*, not the 1987 amendment, sets the maximum fee in cases in which the contingency fee agreement for legal representation was entered into before the effective date of the 1987 amendment (January 1, 1988), even if settlement and fee distribution took place after the effective date of the amendment [*Wienholz v. Kaiser Foundation Hospitals (1989) 217 Cal. App. 3d 1501, 1503, 267 Cal. Rptr. 1* ; *see also* former *Bus. & Prof. Code § 6146* (allowing straight 10 percent on recoveries over $200,000)].

The constitutionality of the contingency fee limitations of *Bus. & Prof. Code § 6146* has been upheld by the California Supreme Court, which rejected the contentions that the limitations constituted a denial of due process, violation of equal protection, or violation of the separation of powers doctrine [*Roa v. Lodi Medical Group, Inc. (1985) 37 Cal. 3d 920, 933, 211 Cal. Rptr. 77, 695 P.2d 164* ; *see also Fineberg v. Harney & Moore (1989) 207 Cal. App. 3d 1049, 1054-1055, 255 Cal. Rptr. 299* (*Bus. & Prof. Code § 6146* does not deprive client of right to counsel)].

A contingency-fee contract for representation against a health care provider in an action for professional negligence must contain a statement of the maximum limits set forth by *Bus. & Prof. Code § 6146*, and must also state that the attorney and client may negotiate a lower rate [*Bus. & Prof. Code § 6147(a)(5)*]. If this information is omitted, the contract is voidable at the plaintiff's option. If the option is exercised, the attorney may collect a reasonable fee [*Bus. & Prof. Code § 6147(b)*]. For a discussion of other requirements applying to contingency-fee contracts, see Ch. 72, *Attorney Practice and Ethics* .

For the purpose of *Bus. & Prof. Code § 6146(a)*, the term "health care provider" includes, among others, licensed medical personnel and hospitals licensed as health facilities under *Health & Safety Code §§ 1250-1339.50* [*Bus. & Prof. Code § 6146(c)(2)*]; "professional negligence" means a negligent act or omission by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and are not within any restriction imposed by the licensing agency or hospital [*Bus. & Prof. Code § 6146(c)(3)*]; the term "recovered" means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by the plaintiff and the attorney's office-overhead costs or charges are not deductible disbursements or costs for such purpose [*Bus. & Prof. Code § 6146(c)(1)*].

If periodic payments are awarded to the plaintiff pursuant to *Code Civ. Proc. § 667.7* (*see § 295.18, above*), the court must place a total value on these payments based upon the projected life expectancy of the plaintiff and include this amount in computing the total award from which attorney's fees are calculated under this section [*Bus. & Prof. Code § 6146(b)*]. The appropriate measure of the recovery, for purposes of determining the contingent fee, is the present value of the future periodic payments, not the arithmetic sum of all future payments required by the award [*Schneider v. Kaiser Foundation Hospitals (1989) 215 Cal. App. 3d 1311, 1314, 1320, 264 Cal. Rptr. 227 , disapproved on other grounds, Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1*]. If the future periodic payments are to be made from an annuity purchased by the defendant from a third-party insurance company, the cost of this annuity to the defendant typically is the best measure of present value [*see Schneider v. Kaiser Foundation Hospitals (1989) 215 Cal. App. 3d 1311, 1314, 1319-1320, 264 Cal. Rptr. 227 , disapproved on other grounds, Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesFacility LiabilityHospitalsTortsDamagesCosts & Attorney FeesContingent FeesTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsWrongful Death & Survival ActionsRemediesGeneral Overview

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25-295 California Forms of Pleading and Practice--Annotated § 295.22

§ 295.22 Res Ipsa Loquitur

[1] Creation of the Presumption

[a] In General

In an action by a patient against a hospital for negligently inflicted injuries, a presumption that the defendant's negligence proximately caused the plaintiff's injury arises under the doctrine of res ipsa loquitur when the plaintiff establishes that (1) his or her injury is of a kind which does not ordinarily occur in the absence of someone's negligence, (2) the injury was caused by an agency or instrumentality in the exclusive control of the defendant, and (3) no voluntary conduct on the plaintiff's part was a responsible cause of the injury [*Vistica v. Presbyterian Hospital (1967) 67 Cal. 2d 465, 469-470, 62 Cal. Rptr. 577, 432 P.2d 193* ; *Cline v. Lund (1973) 31 Cal. App. 3d 755, 761, 107 Cal. Rptr. 629]* . Alternatively stated, a plaintiff is entitled to the benefit of a res ipsa presumption against the defendant when it can be said, in light of past experience, that his or her injury was more probably than not the result of someone's negligence and that the defendant was probably the person responsible [*Rimmele v. Northridge Hosp. Foundation (1975) 46 Cal. App. 3d 123, 129, 120 Cal. Rptr. 39]* .

[b] Pleading

A plaintiff may invoke the doctrine of res ipsa loquitur at trial if his or her complaint contains a general allegation of the defendant's negligence. A charging allegation is considered general rather than specific even though specific matters in connection with the plaintiff's injury are pleaded if the allegation shows the plaintiff's ignorance of the underlying cause of or the specific acts resulting in his or her injury or if the allegation notifies the defendant that he or she must meet an inference of negligence arising from the specific acts or omissions charged [*Sherman v. Hartman (1955) 137 Cal. App. 2d 589, 597-599, 290 P.2d 894]* .

A form of complaint that may be used to in an action in which res ipsa loquitur will be an issue, see *§ 295.61*.

[c] Effect of Proving Specific Acts of Negligence

The introduction of evidence of specific acts of negligence does not deprive a plaintiff of the benefit of the doctrine of

res ipsa loquitur unless the facts as to the cause of the accident and the care exercised by the defendant are shown as a matter of law [*Gin Non Louie v. Chinese Hospital Ass'n (1967) 249 Cal. App. 2d 774, 795, 57 Cal. Rptr. 906]* .

[d] Probability of Defendant's Negligence

To establish that his or her injury is probably the result of the defendant's negligence, a plaintiff may rely on common knowledge, expert testimony, or both [*Seneris v. Haas (1955) 45 Cal. 2d 811, 824-825, 291 P.2d 915]* . Expert testimony is required when the plaintiff's injury occurs in the course of medical treatment involving the exercise of professional judgment which can only be assessed in the light of scientific opinion but not when the plaintiff's injury occurs in the course of medical treatment which is within the common knowledge of laymen or when the conduct allegedly causing the injury is not inextricably bound up with medical treatment [*Meier v. Ross Gen. Hosp. (1968) 69 Cal. 2d 420, 429-431, 71 Cal. Rptr. 903, 445 P.2d 519]* .

Evidence that a plaintiff's injury is a rare but inherent risk of a particular medical treatment undergone by the plaintiff is insufficient by itself to prove that the injury was probably caused by negligence [*see, e.g.,* *Curtis v. Santa Clara Valley Med. Ctr. (2003) 110 Cal. App. 4th 796, 802-803, 2 Cal. Rptr. 3d 73* (expert testimony required to establish that defendants were negligent during spinal surgery, because plaintiff's resulting blindness was known, albeit rare, complication that can occur from such surgery)]. However, evidence that the plaintiff's injury is a known risk of a medical treatment which rarely occurs when due care is exercised coupled with evidence of specific acts of negligence by the defendant may afford reasonable grounds, under the particular facts of a case, for believing that the injury was more probably than not the result of the defendant's negligence [*Quintal v. Laurel Grove Hospital (1964) 62 Cal. 2d 154, 165-166, 41 Cal. Rptr. 577, 397 P.2d 161* ; *Cline v. Lund (1973) 31 Cal. App. 3d 755, 763, 107 Cal. Rptr. 629* ; compare *Clemens v. Regents of University of California (1970) 8 Cal. App. 3d 1, 12, 87 Cal. Rptr. 108* (res ipsa instruction inapplicable under facts of case despite evidence that injury was unusual result of treatment coupled with evidence of defendant's negligence)].

The res ipsa loquitur doctrine is often invoked if a plaintiff's injuries were apparently caused while the plaintiff was under anesthesia, which can make it difficult for the plaintiff to produce evidence of the exact cause of the injury. Even under those circumstances, however, a plaintiff may be required to produce some expert testimony that his or her injuries were probably caused by events that took place while the plaintiff was unconscious, rather than caused by some other unrelated event or etiology, in order to succeed under the res ipsa loquitur doctrine [*see, e.g.,* *Elcome v. Chin (2003) 110 Cal. App. 4th 310, 320-321, 1 Cal. Rptr. 3d 631]* .

[e] Defendant's Control

When a plaintiff's injury during medical treatment raises an inference of negligence as the proximate cause of the injury but the plaintiff is unable to identify the particular instrumentality or person in control of the instrumentality which caused the injury because the plaintiff was unconscious at the time of the injury, the plaintiff is entitled to invoke the res ipsa presumption against all persons who had actual control or the right to control the plaintiff's body or an instrumentality which might have caused the injury [*Ybarra v. Spangard (1944) 25 Cal. 2d 486, 492-494, 154 P.2d 687* ; *see* *Oldis v. La Societe Francaise (1955) 130 Cal. App. 2d 461, 463-465, 279 P.2d 184* (rule applied when patient could not reasonably have known cause of injury because he was suffering great pain and was drugged); *but see Elcome v. Chin (2003) 110 Cal. App. 4th 310, 320-321, 1 Cal. Rptr. 3d 631* (expert testimony may be required to establish probability of negligence of those in control as cause of injury)].

A surgeon cannot escape application of the res ipsa loquitur doctrine by arguing that a nurse assisting with surgery was responsible for violating a duty that is ultimately the responsibility of the surgeon. For example, a surgeon has a nondelegable duty to ensure that all sponges and other foreign objects are removed from a patient before a surgery is completed [*Baumgardner v. Yusuf (2006) 144 Cal. App. 4th 1381, 1393-1395, 51 Cal. Rptr. 3d 277]* . Because the surgeon has responsibility to control the details of a surgery, application of the res ipsa loquitur doctrine is appropriate

in a suit against the surgeon when a sponge or other foreign object is inadvertently left in a patient's body after surgery [*Baumgardner v. Yusuf (2006) 144 Cal. App. 4th 1381, 1390-1392, 51 Cal. Rptr. 3d 277]* . Although a hospital's own protocol may place responsibility for monitoring this part of the surgery on the hospital's nursing staff, the surgeon remains responsible for ensuring that no foreign objects are left in a patient even if the surgeon checks with the nursing staff before completing the surgery [*Baumgardner v. Yusuf (2006) 144 Cal. App. 4th 1381, 1399, 51 Cal. Rptr. 3d 277]* .

[f] Plaintiff's Participation

A plaintiff may properly rely on res ipsa loquitur even though he or she has participated in the events leading to the injury if the evidence excludes his or her conduct as a responsible cause [*Meier v. Ross Gen. Hosp. (1968) 69 Cal. 2d 420, 427, 71 Cal. Rptr. 903, 445 P.2d 519* (patient's actions excluded as responsible cause of injury by evidence that hospital was obligated to protect patient against such actions)].

[2] Operation of Presumption

When the evidence relating to the facts conditioning the application of res ipsa loquitur is conflicting or subject to different inferences but the plaintiff has produced sufficient evidence to permit the trier of fact to draw the inference that the defendant's negligence probably caused the plaintiff's injuries, a conditional res ipsa presumption arises: before applying the presumption against the defendant, the trier of fact must determine that the conditional facts are established by a preponderance of the evidence [*see Evid. Code § 646* and Law Revision Commission Comment thereto; *Seneris v. Haas (1955) 45 Cal. 2d 811, 826-827, 291 P.2d 915* ; *see Rimmele v. Northridge Hosp. Foundation (1975) 46 Cal. App. 3d 123, 130-131, 120 Cal. Rptr. 39* (prejudicial error to instruct jury to determine existence of conditional facts established as matter of law as well as conditional facts the existence of which was disputed)].

If the facts giving rise to the res ipsa presumption are found to exist, either by the trier of fact or by the court as a matter of law, the trier of fact is required to find that plaintiff's injuries resulted from defendant's negligence unless the defendant comes forward with evidence sufficient to support a finding that he or she was not negligent or that any negligence on his or her part was not a proximate cause of plaintiff's injury [*see Evid. Code § 646* and Law Revision Commission Comment thereto; *Dierman v. Providence Hosp. (1947) 31 Cal. 2d 290, 295, 188 P.2d 12]* . Since the doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence [*Evid. Code § 646(b)*], upon the introduction of such rebuttal evidence by defendant, the res ipsa presumption is dispelled as a matter of law [*Evid. Code § 604*; *see Evid. Code § 646* and Law Revision Commission Comment thereto; *Slater v. Kehoe (1974) 38 Cal. App. 3d 819, 833, 113 Cal. Rptr. 790]* . In such a case, the trier of fact may usually use the established facts supporting the dispelled presumption as circumstantial evidence on which to base an inference of the defendant's negligence [*see Evid. Code §§ 604, 646* and Law Revision Commission Comments thereto; *Slater v. Kehoe (1974) 38 Cal. App. 3d 819, 833, 113 Cal. Rptr. 790]* , an inference which must be weighed against the other evidence in the case when the trier of fact is determining whether plaintiff's injury was more probably than not the result of defendant's negligence [*see Evid. Code § 646* and Law Revision Commission Comment thereto]. If, however, the defendant's evidence which dispels the res ipsa presumption is clear, positive, uncontradicted, and of such a nature that it cannot be rationally disbelieved, an inference of the defendant's negligence is dispelled as a matter of law [*Leonard v. Watsonville Community Hosp. (1956) 47 Cal. 2d 509, 518, 305 P.2d 36]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewHealthcare LawActions Against FacilitiesFacility LiabilityHospitalsTortsNegligenceProofRes Ipsa LoquiturElementsGeneral OverviewTortsNegligenceProofRes Ipsa LoquiturEvidentiary Effect

California Forms of Pleading and Practice--Annotated

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PART II. LEGAL BACKGROUND

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§ 295.23 Hospital Records

[1] Discovery

The statutes governing the discovery of hospital records in civil actions include *Code Civ. Proc. §§ 1985* (subpoena duces tecum for production of documents or other tangible things at deposition on oral examination), 2019 (notice to party to produce documents or other tangible things at deposition on oral examination), and 2031 (motion for party to produce documents or other tangible things for inspection or copying). For procedural guides and forms related to these methods of discovery, see Ch. 195, *Discovery: Inspection of Tangible Evidence* and Ch. 535, *Subpoena* . For discussion of *Welf. & Inst. Code § 5328*, which governs the release of records of patients receiving services for mental disorders under *Welf. & Inst. Code §§ 5000-7518*, see Ch. 304, *Insane and Other Incompetent Persons* .

[2] Discovery by Attorney Before Commencing Action

Evid. Code § 1158 permits an attorney to inspect or copy the records of a patient in the custody or control of a licensed hospital before filing an action whenever the attorney presents a written authorization signed by the patient, the guardian or conservator of an adult patient, the parent or guardian of a minor patient, or the personal representative or heir of a deceased patient. Failure to make such records available within five days after presentation of the written authorization may subject the hospital to liability for all reasonable expenses, including attorney's fees, incurred in any proceeding to enforce the attorney's right to inspect and copy the records [*Evid. Code § 1158*]. A patient may file a civil action to enforce this statute if the hospital fails to make records available under the conditions prescribed by the statute [*Thornburg v. El Centro Reg'l Med. Ctr. (2006) 143 Cal. App. 4th 198, 204-205, 48 Cal. Rptr. 3d 840* (private action allowed if hospital charged much higher fees than statute permitted)]. For discussion and forms relating to the presentation of a request for a patient's records pursuant to *Evid. Code § 1158* and suggested methods of enforcing such a request, see DeMeo, *California Deposition and Discovery Practice, § 2.01(22)* (Matthew Bender).

All reasonable costs incurred by the hospital in making patient records available pursuant to *Evid. Code § 1158* may be charged against the person whose written authorization required the availability of those records. Reasonable costs include, but are not limited to, 10 cents per page for standard reproduction of standard documents, 20 cents per page for copying documents from microfilm, actual costs for reproduction of documents requiring special processing, reasonable clerical costs in locating and making the records available to be billed at the maximum rate of $16 per hour per person,

actual postage charges, and actual costs charged to the witness by a third person for the retrieval and return of records held by that third person. When the records are delivered to the attorney or the attorney's representative for inspection or photocopying at the record custodian's place of business, the only fee for complying with the authorization shall not exceed $15, plus actual costs, if any, charged to the record custodian by a third person for retrieval and return of records held offsite by the third person [*Evid. Code § 1158*].

No copying may be performed by the medical provider or its agent when the requesting attorney has employed a professional photocopier or anyone identified in *Bus. & Prof. Code § 22451* as his or her representative to obtain or review the records on behalf of the attorney. The presentation of the authorization by the agent on behalf of the attorney is sufficient proof that the agent is the attorney's representative [*Evid. Code § 1158*].

[3] Patient Access to Health Records

[a] Right to Access

Every person having ultimate responsibility for decisions respecting his or her own health care also possesses a concomitant right of access to complete information respecting his or her condition and care provided. Similarly, persons having responsibility for decisions respecting the health care of others should, in general, have access to information on the patient's condition and care. Therefore, the legislature has enacted *Health & Safety Code § 123100 et seq.* to establish procedures for providing access to health care records or summaries of them by patients and by those persons having responsibility for decisions respecting the health care of others [*Health & Safety Code § 123100*].

[b] Definitions

The following definitions apply in *Health & Safety Code § 123100 et seq.* regarding patient access to health records.

"Health care provider" means any of the following [*Health & Safety Code § 123100(a)*]:

- A health facility licensed pursuant to *Health & Safety Code § 1250 et seq.*
- A clinic licensed pursuant to *Health & Safety Code § 1200 et seq.*
- A home health agency licensed pursuant to *Health & Safety Code § 1725 et seq.*
- A physician and surgeon licensed pursuant to *Bus. & Prof. Code § 2000 et seq.* or pursuant to the Osteopathic Act.
- A podiatrist licensed pursuant to *Bus. & Prof. Code § 2460 et seq.*
- A dentist licensed pursuant to *Bus. & Prof. Code § 1600 et seq.*
- A psychologist licensed pursuant to *Bus. & Prof. Code § 2900 et seq.*
- An optometrist licensed pursuant to *Bus. & Prof. Code § 3000 et seq.*
- A chiropractor licensed pursuant to the Chiropractic Initiative Act (Stats. 1923, p. lxxxviii).
- A marriage, family, and child counselor licensed pursuant to *Bus. & Prof. Code § 4980 et seq.*
- A clinical social worker licensed pursuant to *Bus. & Prof. Code § 4900 et seq.*

The term "patient records" means records in any form or medium maintained by, or in the custody or control of, a health care provider relating to the health history, diagnosis, or condition of a patient, or relating to treatment provided or proposed to be provided to the patient. Patient records include only records pertaining to the patient requesting the records or whose representative requests the records. The term does notinclude information given in confidence to a health care provider by a person other than another health care provider or the patient, and such material may be removed from any records prior to inspection or copying under *Health & Safety Code § 123110* or *123115*. The term also does not include information contained in aggregate form, such as indices, registers, or logs [*Health & Safety Code § 123100(d)*].

The term "mental health records" means patient records, or discrete portions thereof, specifically relating to evaluation or treatment of a mental disorder. Mental health records include, but are not limited to, all alcohol and drug abuse records [*Health & Safety Code § 123105(b)*].

The term "alcohol and drug abuse records" means patient records, or discrete portions thereof, specifically relating to evaluation and treatment of alcoholism or drug abuse [*Health & Safety Code § 123105(f)*].

The term "patient" means a patient or former patient of a health care provider [*Health & Safety Code § 123105(c)*].

The term "patient's representative" or "representative" means a parent or the guardian of a minor who is a patient, or the guardian or conservator of the person of an adult patient, or the beneficiary or personal representative of a deceased patient [*Health & Safety Code § 123105(e)*]. The term also includes an agent under a power of attorney for health care, to the extent necessary for the agent to fulfill his or her duties under *Prob. Code § 4600 et seq.* [*Health & Safety Code § 123105(e)(3)*].

[c] Request to Inspect and Copy Patient Records

Despite *Welf. & Inst. Code § 5328* (confidentiality of mental health records; *see* discussion in Ch. 304, *Insane and Other Incompetent Persons* , and except as provided in *Health & Safety Code §§ 123115* (*see* [e] and [f], *below*) and *123120* (*see* [l], *below*), any adult patient of a health care provide, any minor patient authorized by law to consent to medical treatment, and any patient representative is entitled to inspect patient records on presenting to the health care provider a written request therefor and on payment of reasonable clerical costs incurred in locating and making the records available. A patient who is a minor, however, is entitled to inspect patient records pertaining only to health care of a type for which the minor is lawfully authorized to consent [*Health & Safety Code § 123110(a)*; for discussion of minor's authority to consent to medical care, *see* Ch. 366, *Minors: Court Consent for Medical Care or Enlistment*]. A health care provider must permit the inspection during business hours within five working days after receipt of the written request. The inspection must be conducted by the patient or patient's representative requesting the inspection, who may be accompanied by one other person of his or her choosing [*Health & Safety Code § 123110(a)*].

Additionally, any patient or patient's representative is entitled to copies of all or any portion of the patient records that he or she has a right to inspect, on presenting a written request to the health care provider specifying the records to be copied, together with a fee to defray the cost of copying. The fee must not exceed $0.25 per page or $0.50 per page for records that are copied from microfilm and any additional reasonable clerical costs incurred in making the records available. The health care provider must ensure that the copies are transmitted within 15 days after receiving the written request [*Health & Safety Code § 123110(b)*].

Any patient, former patient, or the patient's representative is entitled to a copy, at no charge, of the relevant portion of the patient's records, upon presenting to the provider a written request and proof that the records are needed to support an appeal regarding eligibility for a public benefit program [*Health & Safety Code § 123110(d)(1)*]. Although a patient is not limited to a single request, the patient or patient's representative is entitled to no more than one copy of any

relevant portion of the patient's record free of charge [*Health & Safety Code § 123110(d)(2)*]. If the patient's appeal regarding eligibility for a public benefit program is successful, the hospital or other health care provider may bill the patient, at the statutory specified rates, for the copies of the medical records previously provided free of charge [*Health & Safety Code § 123110(e)*].

Copies of X-rays or tracings derived from electrocardiography, electroencephalography, or electromyography need not be provided to the patient or patient's representative under *Health & Safety Code § 123110*, if the original X-rays or tracings are transmitted to another health care provider on written request of the patient or patient's representative and within 15 days after receipt of the request. The request must specify the name and address of the health care provider to whom the records are to be delivered. All reasonable costs, not exceeding actual cost, incurred by a health care provider in providing copies pursuant to *Health & Safety Code § 123110(c)* may be charged to the patient or representative requesting the copies [*Health & Safety Code § 123110(c)*]. In addition, a health care provider may establish reasonable conditions, including a reasonable deposit fee, to ensure the return of original X-rays transmitted to another health care provider, unless the conditions discriminate on the basis of, or in a manner related to, the license of the provider to which the X-rays are transmitted [*Health & Safety Code § 123110(h)*].

A health care provider may require reasonable verification of identity prior to permitting inspection or copying of patient records, provided the requirements are not used oppressively or discriminatorily to frustrate or delay compliance with *Health & Safety Code § 123110*. Additionally, a health care provider is not required to retain records longer than required by applicable statutes or administrative regulations [*Health & Safety Code § 123110(g)*].

[d] Summary of Health Records

A health care provider may prepare a summary of the record, according to the requirements of *Health & Safety Code § 123130*, for inspection and copying by a patient. If the provider chooses to prepare the summary rather than allowing access to the entire record, he or she must make the summary available to the patient within 10 working days from the date of the patient's request. However, if more time is needed because the record is of extraordinary length or because the patient was discharged from a licensed health facility within the last 10 days, the health care provider must notify the patient of this fact and the date that the summary will be completed, but in no case shall more than 30 days elapse between the request by the patient and the delivery of the summary [*Health & Safety Code § 123130(a)*].

In preparing the summary of the record, the health care provider is not obligated to include information that is not contained in the original record [*Health & Safety Code § 123130(a)*]. However, the summary must contain a list of all current medications prescribed, including dosage, and any sensitivities or allergies to medications recorded by the provider [*Health & Safety Code § 123130(d)*]. A provider may confer with the patient in an attempt to clarify the patient's purpose and goal in obtaining his or her record. If, as a consequence, the patient requests information about only certain injuries, illnesses or episodes, the provider is not required to prepare the summary for other than the injuries, illnesses, or episodes so requested by the patient. The summary must contain for each injury, illness, or episode any information included in the record relative to the following [*Health & Safety Code § 123130(b)*]:

- Chief complaint or complaints including pertinent history.
- Findings from consultations and referrals to other health care providers.
- Diagnosis, when determined.
- Treatment plan and regimen including medications prescribed.
- Progress of the treatment.

- Prognosis including significant continuing problems or conditions.

- Pertinent reports of diagnostic procedures and tests and all discharge summaries.

- Objective findings from the most recent physical examination, such as blood pressure, weight, and actual values from routine laboratory tests.

Health & Safety Code § 123130 does not require any medical records to be written or maintained in any manner not otherwise required by law [*Health & Safety Code § 123130(c)*]. *Health & Safety Code § 123110(c)*, pertaining to copies of specified X-rays or tracings, is applicable whether or not the health care provider elects to prepare a summary of the record [*Health & Safety Code § 123130(e)*].

The health care provider may charge no more than a reasonable fee based on actual time and cost for the preparation of the summary. The cost must be based on a computation of the actual time spent preparing the summary for availability to the patient or the patient's representative. It is the legislature's intent that summaries of records be made available at the lowest possible cost to the patient [*Health & Safety Code § 123130(f)*].

[e] Minor's Patient Records

A minor's representative is not entitled to inspect or obtain copies of the minor's patient records when the minor has a right to inspect the records under *Health & Safety Code § 123110* [*see § 295.23[3][c]*], or when the health care provider determines that access to the patient records requested by the representative would have a detrimental effect on the provider's professional relationship with the minor patient. Similarly, a minor's representative is not entitled to access to the minor's records if the health care provider determines that such access would have a detrimental effect on the provider's professional relationship with the minor or on the minor's physical safety or psychological well-being [*Health & Safety Code § 123115(a)(2)*]. The decision of the health care provider as to whether or not a minor's records are available for inspection or copying under *Health & Safety Code § 123115* does not attach any liability to the provider, unless the decision is found to be in bad faith [*Health & Safety Code § 123115(a)*].

[f] Mental Health Records

When a health care provider determines there is a substantial risk of significant adverse or detrimental consequences to a patient in seeing or receiving a copy of mental health records requested by the patient, the provider may decline to permit inspection or provide copies of the records to the patient, subject to the following conditions [*Health & Safety Code § 123115(b)*]:

- The health care provider must make a written record, to be included with the mental health records requested, noting the date of the request and explaining the provider's reason for refusing to permit inspection or provide copies thereof, including a description of the specific adverse or detrimental consequences to the patient that the provider anticipates would occur if inspection or copying were permitted.

- The health care provider must permit inspection by, or provide copies of, the mental health records to a licensed physician and surgeon, licensed psychologist, licensed marriage and family therapist, or licensed social worker designated by request of the patient.

- The health care provider must inform the patient of the provider's refusal to permit him or her to inspect or obtain copies of the requested records, and must inform the patient of the right to require the provider to permit inspection by, or provide copies to, a licensed physician and surgeon, licensed psychologist, licensed marriage and family therapist, or licensed clinical social worker designated by a

written authorization of the patient.

- The health care provider must indicate in the mental health records of the patient whether or not a request was made under *Health & Safety Code § 123115(b)(2)* (Paragraph 2, *above*).

- The person to whom the records are provided for inspection or copying may not permit inspection or copying by the patient.

[g] Alcohol and Drug Abuse Records

A health care provider is not required to permit inspection or provide copies of alcohol and drug abuse records when prohibited, or in a manner prohibited, by *42 U.S.C.S. §§ 290dd-3, 290ee-3* or by regulations adopted pursuant to these federal laws. Alcohol and drug abuse records subject to such federal laws are also subject to *Health & Safety Code § 123100 et seq.*, to the extent that such federal laws do not prohibit disclosure of the records. All other alcohol and drug abuse records are fully subject to *Health & Safety Code § 123100 et seq.* [*Health & Safety Code § 123125(a)*].

[h] Clinical Laboratory Test Results

Notwithstanding any other provision of law, a health care professional at whose request a test is performed must, on a written or oral request of a patient who is the subject of a clinical laboratory test, provide the patient with the results of the test in plain language conveyed in the manner deemed most appropriate by the health care professional who requested the test. The reported test results must be recorded in the patient's medical records and reported to the patient within a reasonable time period after the test results are received at the offices of the health care professional who requested the test [*Health & Safety Code § 123148*].

[i] Communicable Disease Records

A health care provider is not required to permit inspection or provide copies of records or portions of records when prohibited, or in a manner prohibited, by existing law respecting the confidentiality of information regarding communicable disease carriers [*Health & Safety Code § 123125(b)*].

[j] Withholding Records Due to Unpaid Bill

A health care provider is prohibited from withholding patient records or summaries of patient records because of an unpaid bill for health care services. Any health care provider who willfully withholds patient records or summaries of patient records because of an unpaid bill for health care services will be subject to the sanctions specified in *Health & Safety Code § 123110(i)*, which is discussed in *§ 295.23[3][n]* [*Health & Safety Code § 123110(j)*].

[k] Nonliability for Disclosure or Quality of Records

A health care provider is not liable to the patient or any other person for any consequences that result from disclosure of patient records as required by *Health & Safety Code § 123100 et seq.* A provider is also not liable for the quality of his or her records or the copies provided in excess of existing law and regulations adopted pursuant thereto with respect to the quality of medical records [*Health & Safety Code § 123110(h)*].

[l] Action to Enforce Health Care Provider's Obligations

Any patient or representative aggrieved by a violation of *Health & Safety Code § 123110* may, in addition to any other remedy provided by law, bring an action against the health care provider to enforce the obligations prescribed by that provision. Any judgment rendered in the action may, in the discretion of the court, include an award of costs and reasonable attorney's fees to the prevailing party [*Health & Safety Code § 123120*]. For a complaint to enforce the

health care provider's obligation to permit inspection and transmittal of records to patient, see *§ 295.65*.

[m] Action for Damages for Failure to Preserve Records

Providers of health services that are licensed pursuant to *Health & Safety Code § 1253* (as well as those licensed pursuant to *Health & Safety Code §§ 1205* (clinics), *1575* (adult day health care), or *123145* (home health agencies)) have an obligation, if the licensee ceases operation, to preserve records for a minimum of seven years following discharge of the patient. The records of unemancipated minors must be kept at least one year after the minor has reached the age of 18, and in any case, not less than seven years [*Health & Safety Code § 123145(a)*].

The Department of Health Services or any person injured as a result of the licensee's abandonment of health records may bring an action in a proper court for the amount of damage suffered as a result [*Health & Safety Code § 123145(b)*]. If the licensee is a corporation or partnership that is dissolved, the person injured may take action against that corporation's or partnership's principal officers of record at the time of dissolution [*Health & Safety Code § 123145(b)*]. "Abandoned" in this context means violating *Health & Safety Code § 123145(a)* and leaving patients treated by the licensee without access to medical information to which they are entitled pursuant to *Health & Safety Code § 123110* [*Health & Safety Code § 123145(c)*; *see § 295.23[3][c]*].

Licensed clinical laboratories that provide cytology services must preserve records, reports, cytology slides, and cell blocks for a time period prescribed by statute [*Bus. & Prof. Code § 1271.1(a)*; *see § 295.12[11]*]. Any person injured as a result of a licensee's abandonment of cytological records may bring an action in any court of competent jurisdiction for the amount of any damages suffered as a result [*Bus. & Prof. Code § 1271.1(b)*]. "Abandoned" in this context means violating *Bus. & Prof. Code § 1271.1(a)* and leaving patients and physicians and surgeons without access to information to which they are entitled pursuant to Bus. & Prof. Code § 1250 et seq. [*Bus. & Prof. Code § 1271.1(c)(1)*]. In the event the licensee was a corporation or partnership that has been dissolved, the person injured may bring an action against that corporation's or partnership's principal officers of record at the time of the dissolution [*Bus. & Prof. Code § 1271.1(b)*; *see also Bus. & Prof. Code § 1271.1(c)(2)* (defining "principal officers")].

For an allegation to use in a complaint against a health care provider for failure to maintain medical records, see *§ 295.53*.

[n] Willful Violation by Health Care Provider

Any health care provider described in *Health & Safety Code § 123105(a)* (licensed physician and surgeon, podiatrist, dentist, psychologist, optometrist, chiropractor, marriage and family, physical therapist, clinical social worker, or occupational therapist) who willfully violates *Health & Safety Code § 123100 et seq.* is guilty of unprofessional conduct. Any health care provider described in *Health & Safety Code § 123105(a)* (licensed health facility, clinic, or home health agency) who willfully violates *Health & Safety Code § 123100 et seq.* is guilty of an infraction punishable by a fine of not more than $100. The state agency, board, or commission that issued the health care provider's professional or institutional license must consider the violation as grounds for disciplinary action with respect to the licensure, including suspension or revocation of the license or certificate [*Health & Safety Code § 123110(i)*].

[o] Patient's Rights Under Related Provisions of Law

Health & Safety Code § 123100 et seq. do not supersede any rights that a patient or representative might otherwise have or exercise under *Evid. Code § 1158* or any other provision of law [*Health & Safety Code § 123110(g)*; for discussion of *Evid. Code § 1158*, *see § 295.23[2]*]. Additionally, the Information Practices Act of 1977 (*Civ. Code § 1798 et seq.*) prevails over these sections with respect to records maintained by a state agency [*Health & Safety Code § 123140*]. For a discussion of the Information Practices Act, see *Ch. 429, Privacy, § 429.60* et seq.

Except as otherwise provided by law, *Health & Safety Code § 123100 et seq.* cannot be construed to increase access to individual patient records by any person, firm, association, organization, partnership, business trust, company, corporation, or municipal or other public corporation, or government officer or agency. Therefore, these sections do not do any of the following [*Health & Safety Code § 123135*]:

- Relieve employers of the requirements of the Confidentiality of Medical Information Act (*Civ. Code § 56 et seq.*) [*see Ch. 429, Privacy, § 429.60* et seq].

- Relieve any person subject to the provisions of the Insurance Information and Privacy Protection Act (*Ins. Code § 791 et seq.*) from the requirements of that act.

- Relieve government agencies of the requirements of the Information Practices Act of 1977 (*Civ. Code § 1798 et seq.*) [*see Ch. 429, Privacy, § 429.60* et seq.].

[4] Immunity of Medical Staff Committee Records

The written records of in-hospital medical and dental staff committees that study the reduction of morbidity or mortality are subject to discovery [*Evid. Code § 1156(a)*]. However, insofar as such records contain information concerning patients that is privileged under *Evid. Code §§ 994* (confidential communication between patient and physician) and *1014* (confidential communication between patient and psychotherapist), the identity of patients may not be discovered without the consent of such patients [*Evid. Code § 1156(b)*].

Records and proceedings of the following committees are generally not subject to discovery:

- Organized committees of medical, medical-dental, podiatric, registered dietitian, psychological, marriage and family therapy, licensed clinical social work, or veterinary staffs in hospitals, or of a peer review body, as defined in *Bus. & Prof. Code § 805*, having the responsibility of evaluation and improvement of the quality of care rendered in the hospital, or for that peer review body [*Evid. Code § 1157(a)*].

- Organized review committees of local medical, dental, dental hygenist, chiropractic, podiatric, registered dietitian, acupuncture, or veterinary societies, or review committees of state or local psychological, marriage and family therapy, or clinical social work associations or societies, having the responsibility of evaluation and improvement of the quality of care [*Evid. Code § 1157(a)*].

- Organized committees of any nonprofit medical care foundation or professional standards review organization that make available professional competence to review health care services with respect to medical necessity, quality of care, or economic justification of charges or level of care [*Evid. Code § 1157.5*].

- Committees established under *Welf. & Inst. Code § 4070* having responsibility of evaluation and improvement of the quality of mental health care rendered in county operated or contracted mental health facilities [*Evid. Code § 1157.6*]; and

- Committees established by a local governmental agency to monitor, evaluate, and report on the necessity, quality, and level of specialty health services that are provided by a general acute care hospital that has been designated by that governmental agency as qualified to render specialty health care services [*Evid. Code § 1157.7*; *see County of San Diego v. Superior Court (1986) 176 Cal. App. 3d 1009, 1021-1022, 222 Cal. Rptr. 484* (*Evid. Code § 1157.7* not applicable to general acute care hospital that was never designated as qualified to render specialty health care services; hospital denied designation of

regional trauma center may discover raw data available to committee making designation decision)].

In addition, the identities of evaluating committee members are privileged under *Evid. Code § 1157*. The identities of the evaluators may not be discovered, even though this may limit the liability of an individual plaintiff to discover relevant and admissible information [*Cedars-SinaiMedical Center v. Superior Court (1993) 12 Cal. App. 4th 579, 588-589, 16 Cal. Rptr. 2d 253]* .

To be protected under *Evid. Code § 1157(a)*, a medical staff committee need not be composed entirely of physicians and is not limited to peer review, so long as its purpose and function is the evaluation and improvement of quality of care [*see* *Santa Rosa Memorial Hospital v. Superior Court (1985) 174 Cal. App. 3d 711, 717-721, 220 Cal. Rptr. 236* (infection control committee with majority of personnel not physicians)]. The fact that a medical staff committee consists of all of the physicians who are members of a department's staff, rather than some of them, does not destroy the privilege under *Evid. Code § 1157* [*County of Los Angeles v. Superior Court (1990) 224 Cal. App. 3d 1446, 1454, 274 Cal. Rptr. 712]* . Nor does the privilege require that written minutes of committee meetings be taken [*County of Los Angeles v. Superior Court (1990) 224 Cal. App. 3d 1446, 1453, 274 Cal. Rptr. 712]* .

No person in attendance at a meeting of any of these committees may be required to testify as to what transpired at that meeting, except as provided in *Evid. Code § 1157(c)*, and *(d)*, discussed below [*Evid. Code §§ 1157(b), 1157.5-1157.7*]. However, *Evid. Code § 1157* does not preclude a hospital medical review staff committee member from testifying voluntarily about proceedings of the committee [*West Covina Hospital v. Superior Court (1986) 41 Cal. 3d 846, 851, 855, 226 Cal. Rptr. 132, 718 P.2d 119]* .

The prohibition against discovery of the records and proceedings of the committees described in *Evid. Code § 1157(a)* applies only to discovery in a civil action or proceeding. These records and proceedings are subject to discovery in a criminal action [*People v. Superior Court (Memorial Medical Center) (1991) 234 Cal. App. 3d 363, 381, 286 Cal. Rptr. 478* ("criminal action" includes a proceeding under *Penal Code § 1524* to issue a search warrant)]. *Evid. Code § 1157(e)*, therefore, is to be construed as a legislative clarification that prior amendments to *Evid. Code § 1157* are not intended to affect the statute's applicability [*People v. Superior Court (Memorial Medical Center) (1991) 234 Cal. App. 3d 363, 381, 386-387, 286 Cal. Rptr. 478]* .

These prohibitions against discovery do not apply (1) to the statements made by any person in attendance at a meeting of any of those committees who is a party to an action or proceeding the subject matter of which was reviewed at that meeting; (2) to any person requesting hospital staff privileges; (3) in any action against an insurance carrier alleging bad faith by the carrier in refusing to accept a settlement offer within the policy limits; (4) to medical, dental, dental hygienist, podiatric, dietetic, psychological, veterinary, acupuncture, or chiropractic society committees whose membership exceeds 10 percent of that of the society; or (5) to any committee if any person serves on that committee when his or her own conduct or practice is being reviewed [*Evid. Code §§ 1157(c), (d), 1157.5-1157.7*].

The first and second of these exceptions to the prohibition of discovery do not apply to medical malpractice actions; they were designed merely to set aside the immunity and permit discovery in suits by doctors claiming wrongful or arbitrary exclusion from hospital staff privileges [*West Covina Hospital v. Superior Court (1984) 153 Cal. App. 3d 134, 137, 200 Cal. Rptr. 162* (involving pretrial discovery and first exception); *Schulz v. Superior Court (1977) 66 Cal. App. 3d 440, 446, 136 Cal. Rptr. 67* (same); *Roseville Community Hospital v. Superior Court (1977) 70 Cal. App. 3d 809, 813-816, 139 Cal. Rptr. 170* (involving pretrial discovery and second exception); *Matchett v. Superior Court (1974) 40 Cal. App. 3d 623, 629-630, 115 Cal. Rptr. 317* (same)]. In addition, the second exception does not apply in damage actions for past restrictions on hospital staff privileges [*California Eye Institute v. Superior Court (1989) 215 Cal. App. 3d 1477, 1481, 264 Cal. Rptr. 83]* . Moreover, the fourth exception applies only to a review committee of a local health related society and not to hospital staff committees [*West Covina Hospital v. Superior Court (1984) 153 Cal. App. 3d 134, 138, 200 Cal. Rptr. 162]* .

Thus, in an action by a patient against a doctor for malpractice and against a hospital for negligently appointing and retaining the doctor on its staff, *Evid. Code § 1157* bars the patient from discovering the records of medical staff committees of the hospital whose functions are found to involve the evaluation and improvement of the quality of care rendered by the hospital [*Matchett v. Superior Court (1974) 40 Cal. App. 3d 623, 631, 115 Cal. Rptr. 317]* . Moreover, the spirit and intent of *Evid. Code § 1157*, in furthering the objectivity of peer investigations conducted by staff committees, negates the imposition of a duty on a medical proctor to take affirmative action to assist or protect a patient who suffers injuries during an operation performed by other surgeons [*Clarke v. Hoek (1985) 174 Cal. App. 3d 208, 221, 219 Cal. Rptr. 845* ; *see* Ch. 380, *Negligence*].

Although protection from discovery under *Evid. Code §§ 1157-1157.7* does not amount to a privilege [*see* *Covell v. Superior Court (1984) 159 Cal. App. 3d 39, 42, 205 Cal. Rptr. 371* (distinguishing evidence excluded or affected by extrinsic policies under *Evid. Code § 1100 et seq.* from matters privileged under *Evid. Code § 900 et seq.*)], it operates in much the same way, immunizing material from discovery even though it is otherwise material and relevant [*see, e.g., Mt. Diablo Hospital Medical Center v. Superior Court (1984) 158 Cal. App. 3d 344, 346-347, 204 Cal. Rptr. 626]* . For example, although hospital peer review committee records may be protected from discovery by *Evid. Code § 1157(a)*, those records may still be reviewed by an investigator for the California Department of Health Services (DHS) in the course of an investigation into an incident that is also the basis for a medical malpractice suit [*see, e.g.,* *Fox v. Kramer (2000) 22 Cal. 4th 531, 540, 93 Cal. Rptr. 2d 497, 994 P.2d 343]* . However, peer review committee records do not lose their immunity from discovery simply because they are used in such an investigation. Therefore, malpractice plaintiffs in one case were precluded from compelling the testimony of a DHS investigator who relied on hospital peer review committee records in forming his opinion and drafting a preliminary report of his investigation [*Fox v. Kramer (2000) 22 Cal. 4th 531, 540-543, 93 Cal. Rptr. 2d 497, 994 P.2d 343]* . In that case, the plaintiffs were also prevented from introducing the investigator's preliminary report into evidence, despite the fact that the DHS produced an edited version in response to a request from plaintiffs, because the protection from discovery belongs to the hospital and the hospital did not waive the protection merely by cooperating with the DHS investigation, which it was legally required to do [*Fox v. Kramer (2000) 22 Cal. 4th 531, 540, 93 Cal. Rptr. 2d 497, 994 P.2d 343]* .

Evid. Code § 1157 does not prevent the patient from discovering the hospital's administrative files pertaining to the selection and retention of the doctor whose negligence caused the patient's injury if those portions of the files reflecting the nondiscoverable committee proceedings are excluded [*Matchett v. Superior Court (1974) 40 Cal. App. 3d 623, 628, 115 Cal. Rptr. 317]* . Thus, to protect both parties, there must be an *in camera* hearing by the trial court, reviewing each item of evidence requested and acting on those portions of the pretrial discovery motion that are directed only at hospital administration files not resulting from any investigation conducted by an advisory board [*Saddleback Community Hospital v. Superior Court (1984) 158 Cal. App. 3d 206, 209, 204 Cal. Rptr. 598* (*in camera* inspection of hospital files as required to insure that unprotected administration records contain no staff records protected under *Evid. Code § 1157*)]. An *in camera* inspection is also necessary whenever the protection of *Evid. Code § 1157* is not facially apparent, to insure that a defendant hospital is not in effect avoiding disclosure of nonprotected administrative records by placing them in the possession of members of protected medical staff committees, in order to avoid corporate liability under the rule announced in *Elam v. College Park Hospital (1982) 132 Cal. App. 3d 332, 183 Cal. Rptr. 156* (discussed under *§ 295.13[9], above*) [*see* *Santa Rosa Memorial Hospital v. Superior Court (1985) 174 Cal. App. 3d 711, 721-730, 220 Cal. Rptr. 236* ; *see also* *Mt. Diablo Hospital Dist. v. Superior Court (1986) 183 Cal. App. 3d 30, 35, 227 Cal. Rptr. 790* (*in camera* hearing not necessary because information was clearly within *Evid. Code § 1157* protection)].

Evid. Code § 1157 protects only the records and proceedings of physician evaluations conducted by hospital staff committees; it does not prevent disclosure of whether or not a staff committee did or did not conduct an evaluation of a certain physician [*Brown v. Superior Court (1985) 168 Cal. App. 3d 489, 496, 501-502, 214 Cal. Rptr. 266]* . Similarly, it does not bar discovery of whether or not a hospital required a certain physician to carry malpractice insurance [*Brown v. Superior Court (1985) 168 Cal. App. 3d 489, 496, 502-503, 214 Cal. Rptr. 266]* . Nor does *Evid. Code § 1157* prevent disclosure that an investigation of a drug was conducted by a hospital [*Mt. Diablo Hospital Dist.*

v. Superior Court (1986) 183 Cal. App. 3d 30, 35 n.6, 227 Cal. Rptr. 790] .

The burden of establishing entitlement to nondisclosure under *Evid. Code § 1157* is on the hospital or other party seeking to resist discovery [*Brown v. Superior Court (1985) 168 Cal. App. 3d 489, 500-501, 214 Cal. Rptr. 266]* .

[5] Admissibility

[a] Hearsay Exceptions

When hospital records are offered to prove the truth of the facts stated therein, they are hearsay [*see Evid. Code § 1200*]. They are, however, admissible in evidence as business records under the exception provided by *Evid. Code §§ 1270* and *1271* insofar as they document acts, events, or conditions within the personal knowledge of the entrant or the entrant's informant and the following foundation is laid:

- The records were made in the regular course of hospital business.
- The records were made at or near the time of the acts, conditions, or events recorded.
- The custodian or other qualified witness testifies to their identity and the mode of their preparation.
- The sources of information and method and time of preparation indicate their trustworthiness [*see Loper v. Morrison (1944) 23 Cal. 2d 600, 608, 145 P.2d 1* (deciding admissibility of hospital records under statute preceding and substantially the same as *Evid. Code §§ 1270, 1271*)].

See the discussion of *Evid. Code § 1560 et seq.* under [6], *below*, for a procedure by which the foundation for the admission of hospital records under *Evid. Code §§ 1270* and *1271* may be laid.

Any portion of hospital records that contain histories of patients given to medical personnel by the patients or third persons on their behalves are not admissible under *Evid. Code §§ 1270* and *1271* [*People v. Williams (1960) 187 Cal. App. 2d 355, 363-365, 9 Cal. Rptr. 722]* . It is unclear whether reports of medical personnel in hospital records that diagnose the conditions of patients are also inadmissible under *Evid. Code §§ 1270* and *1271* [*see People v. Reyes (1974) 12 Cal. 3d 486, 502-503, 116 Cal. Rptr. 217, 526 P.2d 225* (distinguishing diagnoses which state opinions from those which state facts); *see also People v. O'Tremba (1970) 4 Cal. App. 3d 524, 528-529, 84 Cal. Rptr. 336* (discussing conflicting cases)]. In any event, patients' histories and medical diagnoses reported in hospital records may be admitted into evidence under some other exception to the hearsay rule or for the limited purpose of showing part of the information on which an expert witness based his treatment of a patient [*Springer v. Reimers (1970) 4 Cal. App. 3d 325, 338-340, 84 Cal. Rptr. 486* ; *Rosener v. Larson (1967) 255 Cal. App. 2d 871, 878, 63 Cal. Rptr. 782]* .

If hospital records are offered under *Evid. Code §§ 1270* and *1271* against a patient who is a defendant in an action, the patient may exercise his privilege under *Evid. Code § 996* (confidential communications between patient and physician) to exclude the records [*Carlton v. Superior Court (1968) 261 Cal. App. 2d 282, 290, 67 Cal. Rptr. 568]* .

[b] As Writings

Hospital records are writings [*see Evid. Code § 250*] that must be authenticated before either the records or secondary evidence of their contents may be admitted into evidence [*see Evid. Code §§ 1400, 1401*]. In addition, if hospital records are offered to prove their contents, the secondary evidence rule applies, requiring the use of the original records if either: (1) a genuine dispute exists concerning material terms of the writing, and justice requires the exclusion of the secondary evidence; or (2) admission of the secondary evidence would be unfair [*see Evid. Code § 1521*]. See [6], *below*, for a procedure that authenticates and makes copies of hospital records admissible.

[6] Admission Based on Custodian's Affidavit

The admission of copies of hospital records into evidence at any proceeding in which testimony can be compelled may be secured by compliance with the procedure set forth in *Evid. Code §§ 1560-1566* unless the hospital is a party or the place where the cause of action is alleged to have arisen [*Evid. Code §§ 1560(b), 1566*].

The procedure involves the service of a subpoena duces tecum on the custodian of the records or other qualified witness for the production of specified records. Within five days after receipt of the subpoena in any criminal action, within 15 days after receipt of the subpoena in any civil action, or within the time agreed on by the party who served the subpoena and the custodian or other qualified witness, the custodian or other qualified witness must deliver by mail or otherwise a true, legible, and durable copy of all the records described in the subpoena to the clerk of court or to the judge if there be no clerk or to such other person as described in *Code Civ. Proc. § 2026.010(d)* [*Evid. Code § 1560(b)*]. The copy of the records must be sealed and addressed as prescribed by the statute [*Evid. Code § 1560(c)*]. The copy of the records must be accompanied by an affidavit stating that (1) the affiant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records, (2) the copy is a true copy of all the records described in the subpoena duces tecum, or pursuant to *Evid. Code § 1560(e)* the records were delivered to the party's attorney, the attorney's representative, or a deposition officer as defined in *Code Civ. Proc. § 2020.420*, for copying at the custodian's or witness' place of business, and (3) the records were prepared by the personnel of the hospital in the ordinary course of business at or near the time of the act, condition, or event recorded [*Evid. Code §§ 1560-1561*]. If the hospital has none or only part of the records described in the subpoena, the custodian or other qualified witness must so state in the affidavit [*Evid. Code § 1561(b)*].

A hospital that is neither a party to an action nor the place where any cause of action arose may demand payment of its costs in producing subpoenaed records [*Evid. Code § 1563*].

The personal attendance of the custodian of the records or other qualified witness and the production of the original records may be required by service of a subpoena duces tecum that contains language prescribed by *Evid. Code § 1564* requiring such attendance and production. In the absence of this language in the subpoena, however, the copy of the records is admissible in evidence if the original records would be admissible in evidence if the custodian had been present and testified to the matters stated in the affidavit, and if the requirements of *Evid. Code § 1271*((business records as evidence) have been met. The affidavit is admissible as evidence of the matters stated therein pursuant to *Evid. Code § 1561*, and the matters so stated are presumed true [*Evid. Code § 1562*].

Unless the parties to the proceeding otherwise agree or the sealed records are returned to a witness who is required to appear personally, the records are not opened until the time of the proceeding, on the direction of the judge or officer in charge, and in the presence of all parties who have appeared at the proceeding. Records that are original documents and are not introduced in evidence or required as part of the record must be returned to the person from whom or entity from which they were received. Records that are copies may be destroyed [*Evid. Code § 1560(d)*].

As an alternative to the procedures described in *Evid. Code § 1560(b),(c)*, and *(d)*, the subpoenaing party may direct the witness to make the records available for inspection or copying by the party's attorney, the attorney's representative, or a deposition officer as defined in *Code Civ. Proc. § 2020.420*, at the business address of the witness under reasonable conditions during normal business hours. It is the responsibility of the attorney's representative to deliver any copy of the records as directed in the subpena [*Evid. Code § 1560(e)*].

For a procedural guide and forms relating to the procedure set forth in *Evid. Code § 1560 et seq.*, see Ch. 535, *Subpoena*
.

[7] Inadmissibility of Medical Staff Committee Records

The written records of in-hospital medical and dental staff committees that study the reduction of morbidity or mortality are not admissible as evidence in any administrative proceeding or any action other than a criminal action [*Evid. Code § 1156(a), (d)*]. The exclusion of such records, however, does not affect the admissibility of the original medical or dental records of any patient [*Evid. Code § 1156(c)*].

For discussion of the immunity of medical and dental staff committee proceedings and records from discovery or admission into evidence, see *§ 295.23[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedurePretrial MattersSubpoenasEvidenceHearsayExceptionsBusiness RecordsGeneral OverviewHealthcare LawActions Against FacilitiesFacility LiabilityHospitalsHealthcare LawBusiness Administration & OrganizationPatient ConfidentialityGeneral Overview

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[Reserved]

§§ 295.24[Reserved]

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25-295 California Forms of Pleading and Practice--Annotated § 295.40

§ 295.40 Related LexisNexis Publications

For discussion and forms related to the discovery of medical records, see DeMeo, California Deposition And Discovery Practice, §§ 20.56-20.59, and Ch. 31 (Matthew Bender)

For discussion and forms related to the formation of corporations, partnerships, and associations, see California Legal Forms, Vols. 1-4, *Business and Nonprofit Organizations* (Matthew Bender)

For points and authorities supporting and opposing a demurrer to a complaint on the ground of plaintiff's failure to present a claim to a public entity prior to commencing judicial action against the entity, see California Points and Authorities, Ch. 196, *Public Entities* (Matthew Bender)

Levy, Golden & Sacks, California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners* ; Ch. 62, *Claims and Actions Against Public Entities and Employees* (Matthew Bender)

Bender's Federal Practice Forms, *Complaints--Federal Tort Claims Act* (Matthew Bender)

D. Louisell and H. Williams, *Medical Malpractice, §§ 16.01,* 16.05-16.08 (Matthew Bender)

Personal Injury: Actions, Defenses, Damages, Vol. 16, *Hospitals and Asylums* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFormationGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedureDiscoveryMethodsRequests for Production & InspectionHealthcare LawActions Against FacilitiesGovernmental & Nonprofit LiabilityFederal Tort Claims ActTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsPublic Entity LiabilityLiabilityClaim PresentationGeneral OverviewTortsPublic Entity LiabilityLiabilityFederal Tort Claims ActProcedural Requirements

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§ 295.41 State Statutes

[1] Attorney's Fees

Limitation of attorney's contingency fee for representing person seeking damages in personal injury action based on professional negligence of health care provider. *Bus. & Prof. Code § 6146*

[2] Bases of Tort Liability

Requirement that licensed hospitals restrict membership on their medical staffs to licensed, competent, and professionally ethical practitioners and maintain adequate and accurate medical records for patients. *Bus. & Prof. Code §§ 2282, 2283*

Duty of acute care hospital or acute care psychiatric hospital [*see Health & Safety Code § 1250(a), (b)*] to establish and implement a written policy to ensure that each of its patients receives prescribed information from a pharmacist or registered nurse, unless already provided by a physician and surgeon, regarding medications received at time of discharge. *Bus. & Prof. Code § 4047.9*

Qualified immunity from monetary liability of member of committee of professional staff of licensed hospital for acts in course of maintaining professional standards in hospital pursuant to written bylaws approved by governing board of hospital. *Civ. Code § 43.7(b)*

Qualified immunity of *Civ. Code § 43.7* as not applying to hospital itself. *Civ. Code § 43.7(e)*

Presumption of negligence arising from violation of statute, ordinance, or regulation which proximately results in injury which statute, ordinance, or regulation was intended to prevent and person injured is member of class which statute, ordinance, or regulation was designed to protect. *Evid. Code § 669*

Duty of licensed hospital which maintains and operates department providing emergency medical services for public to

provide such services upon request to any person in danger of loss of life or serious illness if hospital has appropriate facilities and qualified personnel available. *Health & Safety Code § 1317*

Duty of licensed hospital which does not maintain emergency medical service to exercise reasonable care to determine whether person seeking such services is in emergency condition and to assist person in every reasonable way under circumstances in obtaining emergency services. *Health & Safety Code § 1317*

Immunity of hospital for acts of rescue team attempting to resuscitate person in danger of loss of life if team exercises good faith. *Health & Safety Code § 1317*

Cause of action for damages and attorney's fees on account of transfer for nonmedical reason in violation of statute. *Health & Safety Code § 1317.6(j)*

Duty of county hospital to warn ambulance personnel of instability and potential assaultiveness of mental health patient. *Health & Safety Code § 1444.6*

Hospital that delivers personal property of deceased patient pursuant to *Prob. Code § 330* as not liable for loss or damage to property caused by person to whom property delivered. *Prob. Code § 330(f)*

[3] Blood Transfusions

Disclosure to patient of risks of receiving blood transfusion. *Health & Safety Code § 1645*

[4] Damages

Measure of damages for breach of obligation not arising from contract as amount which will compensate plaintiff for all detriment proximately caused by breach, whether or not such detriment could have been anticipated. *Civ. Code § 3333*

In personal injury action based on professional negligence of health care provider, admissibility of amount payable to plaintiff as result of injury under insurance plan or disability or compensation act. *Civ. Code § 3333.1*

In action for personal injury based on professional negligence of health care provider, limitation of plaintiff's recovery for noneconomic, nonpecuniary losses as $250,000. *Civ. Code § 3333.2*

In personal injury action based on professional negligence of health care provider, procedure for securing payment of future damages award exceeding or equal to $50,000 in periodic installments. *Code Civ. Proc. § 667.7*

[5] Defenses

[a] Arbitration Agreement

Validity of arbitration provision in contract between licensed hospital and patient for medical services if provision conforms to statutory language and boldface notice of provision appears above patient's signature line in contract. *Code Civ. Proc. § 1295*

[b] Contractual Exculpation

Illegality of contracts exempting anyone from negligent or willful violation of law. *Civ. Code § 1668*

[c] Failure to File Claim Against Public Entity

Requirement that plaintiff comply with claim procedures in *Gov. Code § 900 et seq.* before bringing action against public entity or its employees. *Gov. Code §§ 945.4, 950.2-950.6*

[d] Governmental Immunity

Liability of public entity for torts of employee within scope of employmentif employee would be liable; immunity of public entity for torts of employee if employee would be immune. *Gov. Code § 815.2*

Liability of public entity for injury proximately caused by entity's failure to discharge mandatory duty imposed by statute or regulation that is designed to protect against such injury unless entity establishes that it exercised reasonable diligence to discharge duty. *Gov. Code § 815.6*

Liability of public employee as coextensive with that of private person unless specific statutory immunity granted to employee. *Gov. Code § 820*

Definitions of terms used in *Gov. Code §§ 854.8-856.4*. *Gov. Code §§ 854* (medical facility), *854.2* (mental institution), *854.3* (county psychiatric hospital), *854.4* (mental illness or addiction), *854.5* (confined)

Liability and immunity of public entity and employees in connection with injuries caused by and injuries to patients in mental institutions operated and maintained by entity. *Gov. Code § 854.8*

Liability of public entity engaging in medical, hospital, or public health activities for injury proximately resulting from noncompliance with statutes and Department of Health regulations prescribing minimum standards for equipment, personnel, or facilities unless entity establishes that it exercised reasonable diligence to comply. *Gov. Code § 855*

Immunity of public entity and employees for interference with right of inmate of medical facility to obtain judicial determination or review of his or her confinement unless interference is intentional and unjustifiable and inmate's confinement has been determined to be illegal. *Gov. Code § 855.2*

Liability and immunity of public entity and employees in connection with performance of disease prevention and control functions. *Gov. Code § 855.4*

Immunity of public entity and employees from liability for failure to make adequate physical or mental examination to determine whether person has physical or mental condition which would constitute public health or safety hazard. *Gov. Code § 855.6*

Liability and immunity of public entity and employees in connection with diagnosis, prescription, and treatment of mental illness or addiction. *Gov. Code § 855.8*

Liability and immunity of public entity and employees in connection with determinations under applicable statutes to confine persons for mental illness or addiction, to define terms and conditions of such confinements, or to release persons from confinement. *Gov. Code § 856*

Liability and immunity of public entity and employees in connection with injuries caused by, injuries to, or wrongful death of escaping or escaped person who has been confined for mental illness or addiction. *Gov. Code § 856.2*

Immunity of public entity and employees from liability for failure to admit person to public medical facility unless employee is under mandatory duty to admit such person. *Gov. Code § 856.4*

Public Agency employing firefighter, police officer, or other law enforcement officer, EMT-I, EMT-II, or EMT-P as not liable for civil damages if such employee is not liable. *Health & Safety Code § 1799.106*

Qualified immunity from liability as provided for public entities and emergency rescue personnel providing emergency services. *Health & Safety Code § 1799.107*

[e] Other Immunities

Limited immunity from liability resulting from good faith reliance on health care decision of patient's attorney in fact. *Civ. Code § 2438(a)*

Immunity of private, nonprofit volunteer agency participating in state immunization program for specific risk groups. *Health & Safety Code § 104900(f)*

Organization that sponsors, authorizes, supports, finances, or supervises training of laypersons in emergency medical services as not liable for any civil damages alleged to result from such training programs. *Health & Safety Code § 1799.100*

Immunity of qualified poison control center from liability in civil damages with respect to emergency provision of information or advice. *Health & Safety Code § 1799.105*

[f] Periods of Limitation

Two-year limitation period for personal injury or death action based on negligence or battery. *Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)* (one-year period prior to 2003)

Limitation period for personal injury or death action based on hospital's negligence in rendering professional services for which hospital is licensed and which are not within any restriction imposed by licensing agency or hospital as three years or one year after actual or constructive discovery of injury, whichever occurs first, subject to special provisions for tolling three-year period and for minors. *Code Civ. Proc. § 340.5*

Defendant's cause of action for equitable indemnity or partial equitable indemnity against public entity as accruing on date defendant is served with complaint giving rise to claim for indemnity. *Gov. Code § 901*

[6] Emergency Medical Services

In action for damages involving claim of negligence against physician and surgeon providing emergency medical coverage for general acute care hospital emergency department, court as required to admit expert medical testimony only from physicians and surgeons who have had substantial professional experience within last five years while assigned to provide emergency medical coverage in general acute care hospital emergency department. *Health & Safety Code § 1799.110(c)*

[7] Formation and Regulation

[a] In General

City hospitals. *Gov. Code § 37600 et seq.*

Hospice Pilot Project. *Health & Safety Code § 1339.30 et seq.*

County hospitals. *Health & Safety Code § 1440 et seq.*

Local hospital districts. *Health & Safety Code § 32000 et seq.*

Formation, endowment, and maintenance of hospital by trustee pursuant to written grant of property. *Health & Safety Code § 32500 et seq.*

State hospitals for mentally disordered. *Welf. & Inst. Code § 7200 et seq.*

State hospitals for mentally retarded. *Welf. & Inst. Code § 7500 et seq.*

State neuropsychiatric institutes. *Welf. & Inst. Code § 7600 et seq.*

[b] Internal Hospital Organization

Reports required of licensed hospital when staff privileges of licensed practitioner are denied, revoked, or suspended. *Bus. & Prof. Code §§ 805, 805.5*

Requirement that licensed hospital restrict membership on its medical staff to licensed, competent, professionally ethical practitioners. *Bus. & Prof. Code §§ 2282(b), 2283(a)*

Inspection of licensed hospitals to determine hospital's compliance with *Bus. & Prof. Code §§ 2282, 2283*. *Bus. & Prof. Code § 2226*

Unprofessional conduct for hospital's board of directors not to establish rules to govern operation of hospital pertaining to medical staff and patients' medical records. *Bus. & Prof. Code §§ 2392.5, 2392.6*

Reports of medical malpractice judgments required of licensed hospital or insurer. *Health & Safety Code §§ 1305-1308*

[c] Licensing

Recovery of treble damages, and costs and attorney's fees at discretion of court, when unlicensed person causes injury or damage to another while providing goods or performing services for which specified licenses are required. *Code Civ. Proc. § 1029.8*

Licensing requirements generally. *Health & Safety Code § 1250 et seq.*

License issued by Department of Health required for all facilities maintained and operated for diagnosis, care, and treatment of mental or physical human illness. *Health & Safety Code §§ 1250, 1252, 1298*

Procedure and criteria for issuance or denial of license to operate hospital. *Health & Safety Code §§ 1265-1269, 1277, 1318*

Exemption of hotels, institutions furnishing only room and board, community care facilities, and facilities for treatment of sick by spiritual means from licensing requirement for hospitals. *Health & Safety Code § 1270*

Authorization for Department of Health regulations prescribing standards for hospital facilities, services, and staffing with licensed personnel. *Health & Safety Code §§ 1275, 1276*

Enforcement of hospital licensing requirement. *Health & Safety Code §§ 1278-1282* (Department of Health inspection of hospital facilities), *1290* (criminal penalty), *1291* (injunction of licensing violations), *1294-1300* (suspension and revocation of license)

Licensure of hospices. *Health & Safety Code § 1745 et seq.*

[d] Smoking Areas

Prohibition against smoking in designated health facilities; exceptions; criminal penalties. *Health & Safety Code §§ 1234, 1235, 1286, 1290, 25942*

[8] Health Care Service Plans

Notice requirements when health care service plan changes premium rates or coverage under group health care service plan contract. *Health & Safety Code §§ 1374.20-1374.28*; *Ins. Code §§ 10199-10199.9*

[9] Hospital Records

Qualified immunity from monetary liability of member of governing board of hospital in reviewing quality of medical services rendered by members of staff. *Civ. Code § 43.7*

Demand for settlement or offer to compromise in medical malpractice action made prior to service of complaint as required to be accompanied by authorization to disclose medical information to those insuring or defending defendant. *Civ. Code § 56.105*

Subpoena duces tecum for production of documents or things at deposition on oral examination. *Code Civ. Proc. § 1985*

Notice to party to produce documents or other tangible things at deposition on oral examination. *Code Civ. Proc. § 2025.280*

Motion for party to produce documents or other tangible things for inspection or copying. *Code Civ. Proc. § 2031.010 et seq.*

Definition of writing. *Evid. Code § 250*

Privilege for confidential communications between patient and physician. *Evid. Code § 996*

Privilege for confidential communication between patient and psychotherapist. *Evid. Code § 1014*

Limited discoverability but inadmissibility of records of in-hospital medical and dental staff committees which study

reduction of morbidity or mortality. *Evid. Code § 1156*

Limited discoverability but inadmissibility of records of mental health quality assurance committees that study reduction of morbidity or mortality. *Evid. Code § 1156.1*

Immunity from discovery, with specified exceptions, of records and proceedings of specified hospital staff committees or review committees of specified health care societies, associations, peer review bodies, nonprofit foundations, or governmental agencies when such committees are organized to evaluate and improve quality of health care. *Evid. Code §§ 1157-1157.7*

Nondiscoverability, with specified exceptions, of proceedings and records of mental health quality assurance committees. *Evid. Code § 1157.6*

Discoverability of patients' medical records in custody of licensed hospital prior to commencing action. *Evid. Code § 1158*

Exclusion of hearsay evidence. *Evid. Code § 1200*

Exception to hearsay rule for business records. *Evid. Code §§ 1270, 1271*

Requirement that writings be authenticated before admission into evidence. *Evid. Code §§ 1400, 1401*

Secondary evidence rule. *Evid. Code § 1521*

Procedure based on affidavit of custodian of business records for admitting copies of hospital records into evidence. *Evid. Code §§ 1560-1566*

Procedures for patient to obtain access to health records. *Health & Safety Code § 123100 et seq.*

Withholding of patient records or summaries of patient records because of unpaid bill as prohibited. *Health & Safety Code § 123110(j)*

Tort liability for failure to preserve records. *Health & Safety Code § 123145*

Release of information regarding residents of state hospitals or health facilities to family members of the resident. *Welf. & Inst. Code § 4514.5*

[10] Insurance of Facilities

Changes in insurance rates for coverage of health care facilities. *Ins. Code § 676.4*

[11] Interpreters

Duty of hospital to provide interpreters for limited-English-speaking, non-English-speaking, and deaf patients. *Health & Safety Code § 1259*

[12] Liability

Third-party liability to Director of Health Services [*Welf. & Inst. Code § 14061*] for injury to Medi-Cal recipient. *Welf. & Inst. Code § 14124.70 et seq.*

[13] Notice of Intention to Commence Action

Requirement that plaintiff who sues health care provider for professional negligence give defendant 90 days' notice of his or her intention to commence suit. *Code Civ. Proc. § 364*

Noncompliance with notice requirement of *Code Civ. Proc. § 364* as grounds for professional discipline of attorney at law but as not affecting jurisdiction of court. *Code Civ. Proc. § 365*

[14] Punitive Damages

Procedure for claiming punitive damages from health care provider. *Code Civ. Proc. § 425.13(a)*

[15] Res Ipsa Loquitur

Judicial doctrine of res ipsa loquitur as presumption affecting burden of producing evidence. *Evid. Code § 646*

Presumption affecting burden of producing evidence as requiring trier of fact to assume existence of presumed fact unless and until evidence is introduced which supports finding that presumed fact does not exist. *Evid. Code § 604*

[16] Security for Costs

Availability of and procedure for obtaining security for defendant's costs in action against licensed hospital for injuries resulting from negligent performance of professional services or performance of professional services without consent by medical practitioner in employ of hospital. *Code Civ. Proc. § 1029.6*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesDefensesGeneral OverviewHealthcare LawActions Against FacilitiesFacility LiabilityHospitalsHealthcare LawBusiness Administration & OrganizationGeneral OverviewTortsDamagesCompensatory DamagesGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare Providers

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Requirements for emergency medical service in licensed hospital. *22 Cal. Code Reg §§ 70451-70457, 70649-70657*

Administrative and professional responsibility of licensed hospital's governing body for medical staff appointments and periodic review of medical staff members' competence. *22 Cal. Code Reg. §§ 70035, 70701, 71035, 71501*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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§ 295.43 Decisions

[1] Bases of Tort Liability

[a] Equipment and Facilities

[i] Duty

Duty of institutions which receive persons affected with nervous diseases to be supplied with reasonable devices of restraint and sufficient manpower to handle violent cases with minimum danger to patient. *Bellandi v. Park Sanitarium Ass'n (1931) 214 Cal. 472, 479, 6 P.2d 508*

Premises liability of hospital. *Mautino v. Sutter Hosp. Ass'n (1931) 211 Cal. 556, 560-561, 296 P. 76* ; *Owens v. White Memorial Hospital (1956) 138 Cal. App. 2d 634, 639, 292 P.2d 288*

Duty of hospital to exercise ordinary care to maintain safe facilities for use of patients. *Welsh v. Mercy Hospital (1944) 65 Cal. App. 2d 473, 478-479, 151 P.2d 17* ; *Baker v. Board of Trustees (1933) 133 Cal. App. 243, 248-249, 23 P.2d 1071*

Duty of hospital to exercise ordinary care to furnish supplies and equipment commensurate with requirements of patient's case. *Welsh v. Mercy Hospital (1944) 65 Cal. App. 2d 473, 478-479, 151 P.2d 17* ; *Payne v. Santa Barbara Cottage Hospital (1934) 2 Cal. App. 2d 270, 271, 273, 37 P.2d 1061*

[ii] Liability

Hospital as not being subject to separate and distinct claims for professional and ordinary negligence based on same conduct. *Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal. 4th 992, 995, 35 Cal. Rptr. 2d 685, 884 P.2d 142*

Hospital's failure to maintain equipment in working order for use in treatment of patients as nonactionable in absence of evidence establishing causal connection between patient's injuries and equipment malfunction. *Huffman v. Lindquist (1951) 37 Cal. 2d 465, 480, 234 P.2d 34*

Hospital not strictly liable to staff physician for defective laser that injured doctor while performing surgery. *San Diego Hospital Assn. v. Superior Court (1994) 30 Cal. App. 4th 8, 16-17*

Hospital as not strictly liable for injuries resulting from latent defects in its premises; strict liability doctrine as not applicable to transactions whose primary objective is obtaining services. *Pierson v. Sharp Memorial Hospital, Inc. (1989) 216 Cal. App. 3d 340, 344-347, 264 Cal. Rptr. 673*

Hospital's failure to monitor patient and provide adequate staff to assist doctor in immediate postoperative period as act in dereliction of duty from which cardiac arrest and brain damage were readily foreseeable results. *Czubinsky v. Doctors Hospital (1983) 139 Cal. App. 3d 361, 366-367, 188 Cal. Rptr. 685*

When patient fell from bed when guard rails were down, liability of hospital as based on professional, not ordinary, negligence. *Murillo v. Good Samaritan Hospital (1979) 99 Cal. App. 3d 50, 57, 160 Cal. Rptr. 33 , disapproved on other grounds, Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal. 4th 992, 35 Cal. Rptr. 2d 685, 884 P.2d 142*

Transfusion of blood as service rather than sale under *Health & Safety Code § 1606*; hence, under strict liablity in tort or breach of warranty theories, hospital as not liable to patient who becomes infected with serum hepatitis as result of transfusion. *Shepard v. Alexian Brothers Hosp. (1973) 33 Cal. App. 3d 606, 610, 615, 109 Cal. Rptr. 132*

Inapplicability of strict liability in tort or breach of warranty theories to action against hospital by patient for damages resulting from breakage of surgical needle where hospital supplied needle as consumer rather than as seller in course of hospital's primary function of providing medical services. *Silverhart v. Mount Zion Hospital (1971) 20 Cal. App. 3d 1022, 1028, 98 Cal. Rptr. 187*

Liability of hospital for failure of physician employed by hospital to properly treat patient suffering from burns and to transfer patient to hospital facility having equipment required for proper treatment. *Carrasco v. Bankoff (1963) 220 Cal. App. 2d 230, 237-241, 33 Cal. Rptr. 673*

Nonliability of hospital for failure to anticipate use of unfit supplies furnished by hospital for patient care by trained personnel employed by patient. *Payne v. Santa Barbara Cottage Hospital (1934) 2 Cal. App. 2d 270, 271, 273, 37 P.2d 1061*

[b] Inadequate Attendance of Patients

Hospital as not being subject to separate and distinct claims for professional and ordinary negligence based on same conduct in attending to patient. *Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal. 4th 992, 995, 35 Cal. Rptr. 2d 685, 884 P.2d 142*

Conduct of hospital employees in failing to take measures precluding patient from harming himself as ordinary negligence when conduct was not based on good-faith medical reason or was part of medical treatment. *Meier v. Ross General Hospital (1968) 69 Cal. 2d 420, 433, 71 Cal. Rptr. 903, 445 P.2d 519*

Duty of protection owed by hospital to patient under general law or by virtue of special contract or undertaking. *Guilliams v. Hollywood Hospital (1941) 18 Cal. 2d 97, 99, 114 P.2d 1* ; *Meyer v. McNutt Hosp. (1916) 173 Cal. 156,*

159, 159 P. 436 ; *Goff v. Doctors General Hospital (1958) 166 Cal. App. 2d 314, 318, 333 P.2d 29*

Liability of hospital for failure to perform obligations to patient regardless of whether any employees of hospital were guilty of particular acts of negligence. *Guilliams v. Hollywood Hospital (1941) 18 Cal. 2d 97, 103, 114 P.2d 1*

Liability of hospital for negligence of employees in caring for patient under doctrine of respondeat superior. *Timbrell v. Suburban Hospital Inc. (1935) 4 Cal. 2d 68, 71, 47 P.2d 737* ; *Meyer v. McNutt Hosp. (1916) 173 Cal. 156, 159, 159 P. 436* ; *Sherman v. Hartman (1955) 137 Cal. App. 2d 589, 600-601, 290 P.2d 894*

Patient's action against hospital for negligent breach of hospital's duty of protection as arising in tort rather than from contract. *Harding v. Liberty Hospital Corp. (1918) 177 Cal. 520, 522-524, 171 P. 98*

Nonliability of hospital for patient's injuries in absence of proximate causal connection between injuries and negligence on part of hospital. *McDonald v. Foster Memorial Hospital (1959) 170 Cal. App. 2d 85, 98, 338 P.2d 607* , *disaproved on other grounds,* *Siverson v. Weber (1962) 57 Cal. 2d 834, 22 Cal. Rptr. 337, 372 P.2d 97* ; *Morand v. Seaside Memorial Hospital (1953) 121 Cal. App. 2d 745, 746, 264 P.2d 96* ; *Costa v. Regents of Univ. of California (1953) 116 Cal. App. 2d 445, 461, 254 P.2d 85*

Liability of hospital for nurse's negligent injury of patient in course of performing regular duties when hospital failed to exercise due care in determining nurse's qualifications for such duties prior to nurse's employment by hospital. *McDonald v. Foster Memorial Hospital (1959) 170 Cal. App. 2d 85, 95, 338 P.2d 607* , *disaproved on other grounds, Siverson v. Weber (1962) 57 Cal. 2d 834, 22 Cal. Rptr. 337, 372 P.2d 97* ; *England v. Hospital of Good Samaritan (1936) 16 Cal. App. 2d 640, 644, 61 P.2d 48*

[c] Medical Malpractice

[i] Borrowed Servant Doctrine

Nonliability of independent physician for negligence of physicians employed by hospital. *Cavero v. Franklin Gen. Benevolent Soc'y (1950) 36 Cal. 2d 301, 308, 223 P.2d 471* ; *Salgo v. Leland Stanford Jr. Univ. Bd. of Trs. (1957) 154 Cal. App. 2d 560, 573-574, 317 P.2d 170*

Liability of hospital rather than patient's physician for negligent injury of patient by hospital employees in carrying out physician's orders when hospital retains direction and control of employees and acts of employees constitute part of duties assumed by hospital for care of patient. *Rice v. California Lutheran Hospital (1945) 27 Cal. 2d 296, 304, 163 P.2d 860* ; *Hallinan v. Prindle (1936) 17 Cal. App. 2d 656, 661-662, 62 P.2d 1075* , *disapproved on other grounds, Malloy v. Fong (1951) 37 Cal. 2d 356, 232 P.2d 241*

Liability of surgeon for negligence of hospital employees who become surgeon's temporary agents during operation of which surgeon is in charge. *Ybarra v. Spangard (1944) 25 Cal. 2d 486, 492, 154 P.2d 687*

In malpractice action for leaving sponge in patient's abdomen, trial court's granting of hospital's motion for judgment notwithstanding verdict on theory that doctor solely liable for nurse's negligence under borrowed servant doctrine as erroneous since determination of agency was question of fact for jury. *Truhitte v French Hospital (1982) 128 Cal. App. 3d 332, 348, 180 Cal. Rptr. 152*

Liability of hospital rather than physician in charge of patient's care for negligence of hospital employees in performing routine matters of patient care unless employees are under physician's special supervision and control or unless physician selected employees. *Sherman v. Hartman (1955) 137 Cal. App. 2d 589, 595-597, 290 P.2d 894*

[ii] Liability for Malpractice in General

Hospital's refusal to provide rape victim, during emergency care following rape, with information concerning and access to "morning after pill" contraceptive as possibly constituting actionable malpractice; such refusal, however, as not constituting basis for declaratory or injunctive relief. *Brownfield v. Daniel Freeman Marina Hospital (1989) 208 Cal. App. 3d 405, 414, 256 Cal. Rptr. 240*

Health & Safety Code § 123420(c) (formerly *Health & Safety Code § 25955(c)*), providing that no nonprofit hospital organized or operated by religious organization will be liable for refusal to provide abortion services, as not immunizing hospital for failure or refusal to provide information about morning after pill contraceptive to rape victims. *Brownfield v. Daniel Freeman Marina Hospital (1989) 208 Cal. App. 3d 405, 413, 256 Cal. Rptr. 240*

[d] Respondeat Superior

Agency relationship between hospital and physician using hospital facilities as independent contractor as question of fact for jury; liability of hospital for negligence of independent physician when physician is found to be ostensible agent of hospital. *Quintal v. Laurel Grove Hospital (1964) 62 Cal. 2d 154, 167-168, 397 P.2d 161* ; *Seneris v. Haas (1955) 45 Cal. 2d 811, 831-832, 291 P.2d 915* ; *Hedlund v. Sutter Med. Serv. Co. (1942) 51 Cal. App. 2d 327, 331, 124 P.2d 878* (estoppel of hospital to deny agency of medical technician)

Liability of hospital under doctrine of respondeat superior for medical malpractice of physicians and nurses resulting in injuries to patient when physicians and nurses are hospital employees acting within scope of their employment and pursuant to contract for medical services between hospital and patient. *Cavero v. Franklin Gen. Benevolent Soc'y (1950) 36 Cal. 2d 301, 308, 223 P.2d 471* (anesthetist's negligence); *Rice v. California Lutheran Hospital (1945) 27 Cal. 2d 296, 304, 163 P.2d 860* ; *Bellandi v. Park Sanitarium Ass'n (1931) 214 Cal. 472, 480, 6 P.2d 508* (physician's excessive restraint of mental patient); *Rainer v. Community Memorial Hospital (1971) 18 Cal. App. 3d 240, 255-257, 95 Cal. Rptr. 901* (battery based on unauthorized surgery); *Kalmus v. Cedars of Lebanon Hospital (1955) 132 Cal. App. 2d 243, 246-250, 281 P.2d 872* (unsterile hypodermic injection administered by nurse); *Bowers v. Olch (1953) 120 Cal. App. 2d 108, 116, 260 P.2d 997* (needle left in patient's abdomen during surgery); *Hedlund v. Sutter Med. Serv. Co. (1942) 51 Cal. App. 2d 327, 333, 124 P.2d 878* (medical technician's mistaken use of caustic liquid in performance of allergy test); *Criss v. Angelus Hospital Ass'n (1936) 13 Cal. App. 2d 412, 421, 56 P.2d 1274* (exposure of patient to infectious disease and discharge of patient without treatment of disease)

Hospital as liable for physician's malpractice when physician is actually employed by or is ostensible agent of hospital. *Jacoves v. United Merchandising Corp. (1992) 9 Cal. App. 4th 88, 103, 11 Cal. Rptr. 2d 468*

Penal Code § 11172(a), granting medical practitioners absolute immunity from civil liability for reporting suspected child abuse, as defeating action under respondeat superior theory against hospital that employed physicians who reported abuse. *Storch v. Silverman (1986) 186 Cal. App. 3d 671, 681-682, 231 Cal. Rptr. 27*

Nonliability of hospital for acts of physician using hospital facilities to treat patient in accord with physician's privileges as member of hospital's medical staff where evidence established that physician was independent contractor rather than actual or ostensible agent or employee of hospital. *Mayers v. Litow (1957) 154 Cal. App. 2d 413, 418, 316 P.2d 351* ; *Konnoff v. Fraser (1944) 62 Cal. App. 2d 788, 790-791, 145 P.2d 368*

Special nurse as employee of hospital. *State Compensation Ins. Fund v. Industrial Acci. Com. (1954) 124 Cal. App. 2d 1, 5-6, 268 P.2d 40*

Nonliability of hospital for negligence of special nurse employed by patient. *Ware v. Culp (1937) 24 Cal. App. 2d 22, 27, 30-31, 74 P.2d 283*

[e] Scope of Duty

[i] Community Standard

Customary practice of hospitals in community as evidence of standard of care owed by hospital to patient but inconclusive proof of standard insofar as customary practice may be negligent. *Leonard v. Watsonville Community Hosp. (1956) 47 Cal. 2d 509, 519-520, 305 P.2d 36*

Care required of hospital for patient's safety as that degree of care, skill, and diligence used by hospitals generally in community and required by express or implied contract of hospital's undertaking. *Rice v. California Lutheran Hospital (1945) 27 Cal. 2d 296, 299, 163 P.2d 860* ; *Wood v. Samaritan Institution (1945) 26 Cal. 2d 847, 851, 161 P.2d 556* ; *DeMartini v. Alexander Sanitarium, Inc. (1961) 192 Cal. App. 2d 442, 449, 13 Cal. Rptr. 564* ; *Goff v. Doctors General Hospital (1958) 166 Cal. App. 2d 314, 318, 333 P.2d 29* ; *Valentin v. La Societe Francaise (1946) 76 Cal. App. 2d 1, 6, 172 P.2d 359*

Summary judgment as improper if conflicting expert opinions demonstrate that triable issues of fact exist with respect to whether hospital exercised reasonable degree of skill, knowledge, and care ordinarily exercised by medical care providers under similar circumstances in their professional community. *Jacoves v. United Merchandising Corp. (1992) 9 Cal. App. 4th 88, 106, 11 Cal. Rptr. 2d 468*

Customary practice of hospitals in community as evidence of degree of care, skill, and diligence required of particular hospital in caring for patient to extent custom does not violate applicable statute. *McDonald v. Foster Memorial Hospital (1959) 170 Cal. App. 2d 85, 93, 338 P.2d 607 , disapproved on other grounds, Siverson v. Weber (1962) 57 Cal. 2d 834*

[ii] Corporate Negligence

Hospital in corporate status as liable for punitive damages based on acts of employee if it had advance knowledge of employee's unfitness, authorized or ratified wrongful conduct, and personal culpability was present. *Grieves v. Superior Court (1984) 157 Cal. App. 3d 159, 167, 203 Cal. Rptr. 556*

Hospital as liable for negligence of medical staff when it failed to adequately screen, review, and continuously evaluate staff members. *Elam v. College Park Hospital (1982) 132 Cal. App. 3d 332, 345-346, 183 Cal. Rptr. 156*

Liability of hospital for patient's injuries resulting from malpractice of physician on its medical staff when hospital appoints physician without adequately determining physician's professional qualifications. *Joiner v. Mitchell County Hosp. Auth. (1971) 125 Ga. App. 1, 186 S.E.2d 307 , aff'd, 229 Ga. 140, 189 S.E.2d 412 (1972)*

Liability of hospital for patient's injuries resulting from malpractice of physician on its medical staff when hospital fails to review treatment rendered by physician to patient and trained hospital personnel fail to bring worsening condition of patient to attention of hospital administration so that consultation can be secured as required by hospital's bylaws, licensing regulation, and hospital accreditation standards. *Darling v. Charleston Community Memorial Hosp. (1965) 33 Ill. 2d 326, 211 N.E.2d 253 , cert. denied, 383 U.S. 946 (1966)*

Liability of hospital for negligence of nurses in failing to report patient's worsening condition to attending physician, and on physician's inaction, to advise hospital administration so that adequate measures for patient's safety could be

taken. *Goff v. Doctors General Hospital (1958) 166 Cal. App. 2d 314, 318-320, 333 P.2d 29*

[iii] Negligence Per Se

Hospital's failure to report patient's communicable disease to local health officer in violation of former *Health & Safety Code § 3125* (*now see Health & Safety Code § 120245*) as basis for hospital's liability to nonpatient who contracted disease as proximate result of hospital's statutory violation. *Derrick v. Ontario Community Hospital (1975) 47 Cal. App. 3d 145, 152, 120 Cal. Rptr. 566*

Propriety of trial court's refusal to give negligence per se instruction when patient's injury was not type which regulation was intended to prevent and violation of regulation may not have been proximate cause of patient's injury. *Cade v. Mid-City Hosp. Corp. (1975) 45 Cal. App. 3d 589, 598, 119 Cal. Rptr. 571* (regulation dictating that hospital personnel administer medication to patients only upon physician's orders)

Administration of prescribed drugs by unlicensed nurses in violation of statute as insufficient to impose liability on hospital for patient's injuries during fall from bed in absence of proximate causal connection between injuries and violation of licensing statute. *McDonald v. Foster Memorial Hospital (1959) 170 Cal. App. 2d 85, 93-94, 338 P.2d 607 , disaproved on other grounds, Siverson v. Weber (1962) 57 Cal. 2d 834, 22 Cal. Rptr. 337, 372 P.2d 97*

[iv] Patient's Condition

Duty of hospital to anticipate hazards arising from patient's known condition and to take reasonable precautions to prevent their occurrence. *Meier v. Ross General Hospital (1968) 69 Cal. 2d 420, 424, 71 Cal. Rptr. 903, 445 P.2d 519* (failure to guard against patient's suicidal tendencies); *Rice v. California Lutheran Hospital (1945) 27 Cal. 2d 296, 302, 163 P.2d 860* (hot tea served to patient in weakened condition without safeguards against spillage); *Gin Non Louie v. Chinese Hospital Ass'n (1967) 249 Cal. App. 2d 774, 791-792, 57 Cal. Rptr. 906* (failure to obtain medical treatment required by patient's condition); *Valentin v. La Societe Francaise (1946) 76 Cal. App. 2d 1, 6, 9, 172 P.2d 359* (same)

Duty of hospital to exercise such reasonable care for patient's safety as known condition of patient requires but not to insure patient's safety by guarding against risks which reasonable person under circumstances would not anticipate. *Rice v. California Lutheran Hospital (1945) 27 Cal. 2d 296, 299, 163 P.2d 860* ; *Wood v. Samaritan Institution (1945) 26 Cal. 2d 847, 852, 161 P.2d 556* ; *DeMartini v. Alexander Sanitarium, Inc. (1961) 192 Cal. App. 2d 442, 449, 13 Cal. Rptr. 564*

Duty of hospital to observe and know condition of patient. *Rice v. California Lutheran Hospital (1945) 27 Cal. 2d 296, 302, 163 P.2d 860* ; *Mundt v. Alta Bates Hospital (1963) 223 Cal. App. 2d 413, 423-424, 35 Cal. Rptr. 848* ; *Valentin v. La Societe Francaise (1946) 76 Cal. App. 2d 1, 6, 9, 172 P.2d 359*

Negligent postoperative care of patient by hospital in failing to follow physician's order, failing to notify physician of significant change in patient's condition, and failing to accurately keep patient's chart. *Cline v. Lund (1973) 31 Cal. App. 3d 755, 763, 107 Cal. Rptr. 629*

Duty of hospital to exercise such reasonable care for patient's safety as known condition of patient requires in proportion to patient's ability to care for his or her own safety. *Gin Non Louie v. Chinese Hospital Ass'n (1967) 249 Cal. App. 2d 774, 789, 57 Cal. Rptr. 906* ; *Thomas v. Seaside Memorial Hospital (1947) 80 Cal. App. 2d 841, 848, 183 P.2d 288* ; *Valentin v. La Societe Francaise (1946) 76 Cal. App. 2d 1, 5, 172 P.2d 359*

Question of fact for jury whether hospital has exercised reasonable care for patient's safety under circumstances of

case. *Gin Non Louie v. Chinese Hospital Ass'n (1967) 249 Cal. App. 2d 774, 789, 57 Cal. Rptr. 906* ; *Valentin v. La Societe Francaise (1946) 76 Cal. App. 2d 1, 5, 172 P.2d 359*

[2] Blood Banks

Blood bank as health care provider subject to provisions of Medical Injury Compensation Reform Act (MICRA) because of blood bank's status as "health dispensary" licensed pursuant to *Health & Safety Code § 1200 et seq.* *Coe v. Superior Court (1990) 220 Cal. App. 3d 48, 53, 269 Cal. Rptr. 368*

[3] Damages

Limitation of noneconomic damages under *Civ. Code § 3333.2* as applicable in action brought under Federal Tort Claims Act against United States Army hospital, even though hospital was not licensed by state of California. *Taylor v. United States (9th Cir. 1987) 821 F.2d 1428, 1431-1432* Cap on noneconomic damages provided by *Civ. Code § 3333.2* as applicable to claim for failure to provide stabilizing treatment brought under federal Emergency Medical Treatment and Active Labor Act, *42 U.S.C.S. § 1395dd*. *Barris v. County of Los Angeles (1999) 20 Cal. 4th 101, 116-117, 83 Cal. Rptr. 2d 145, 972 P.2d 966*

Threshold requirement for punitive damage claims against health care providers under *Code Civ. Proc. § 425.13* as requiring plaintiff to show that claim is supported by competent, admissible evidence, but as not giving trial court authority to assess evidence independently. *College Hospital Inc. v. Superior Court (1994) 8 Cal. 4th 704, 719, 722-727, 34 Cal. Rptr. 2d 898, 882 P.2d 894*

Hospital as not subject to liability for punitive damages based on acts that fell outside scope of physician's employment and were not ratified by hospital. *College Hospital Inc. v. Superior Court (1994) 8 Cal. 4th 704, 719, 722-727, 34 Cal. Rptr. 2d 898, 882 P.2d 894*

Ceiling of $250,000 on noneconomic damages in medical malpractice actions under *Civ. Code § 3333.2* as applicable to action for equitable indemnity brought against hospital by third party. *Western Steamship Lines, Inc. v. San Pedro General Hospital (1994) 8 Cal. 4th 100, 111, 32 Cal. Rptr. 2d 263*

Civ. Code § 3333.1(b), precluding collateral source that has provided medical expenses to plaintiff in medical malpractice case from obtaining reimbursement from medical malpractice defendant, as not unconstitutional as applied to city barred from seeking reimbursement for worker's compensation benefits paid to policeman who suffered heart attack while on duty and who subsequently sued hospital and doctors for negligently causing brain damage during heart surgery. *Barme v. Wood (1984) 37 Cal. 3d 174, 179-182, 207 Cal. Rptr. 816, 689 P.2d 446*

Imposition of Medi-Cal lien by State Department of Health Services for costs of treatment furnished to plaintiffs as not prohibited by *Civ. Code § 3333.1*, relating to admissibility of evidence and recovery of amount payable to plaintiff from certain collateral sources in personal injury actions against health care providers. *Brown v. Stewart (1982) 129 Cal. App. 3d 331, 333-340, 181 Cal. Rptr. 112*

[4] Defenses

[a] Arbitration Agreement

Validity of arbitration provision in contract for medical care. *Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 706-709, 131 Cal. Rptr. 882, 552 P.2d 1178*

Failure by signatory to read arbitration agreement as not making agreement invalid, in absence of fraud, coercion, or excusable neglect. *Bolanos v. Khalatian (1991) 231 Cal. App. 3d 1586, 1590, 283 Cal. Rptr. 209*

Malpractice plaintiff, who had asserted rights and benefits under group prepaid health plan after she had apparently withdrawn from plan, as estopped from denying application of binding arbitration required by health plan; medical provider as not required to challenge and examine continuing eligibility of each purportedly covered member to maintain arbitration rights. *Avina v. Cigna Healthplans of California (1989) 211 Cal. App. 3d 1, 3, 259 Cal. Rptr. 105*

Coverage of arbitration agreement entered into pursuant to *Code Civ. Proc. § 1295* as not only extending to particular treatment contracted for at time agreement was signed, but also to later follow-up treatment performed pursuant to implied-in-fact contract between physician and patient. *Hilleary v. Garvin (1987) 193 Cal. App. 3d 322, 326-327, 238 Cal. Rptr. 247*

Physician as not having burden under *Code Civ. Proc. § 1295* to accompany arbitration agreement with contract delineating specific course of treatment to be administered; physician as not having burden under *Code Civ. Proc. § 1295* to renew arbitration agreement each time there is variation in treatment or ailment. *Hilleary v. Garvin (1987) 193 Cal. App. 3d 322, 326, 238 Cal. Rptr. 247*

Uncommunicated subjective intent of patient as irrelevant to determination of arbitration agreement's coverage; applicable test as whether reasonable person would, from conduct of parties, determine there was mutual agreement. *Hilleary v. Garvin (1987) 193 Cal. App. 3d 322, 327, 238 Cal. Rptr. 247*

Arbitration agreement in contract with organization exempt from requirements of *Code Civ. Proc. § 1295(a)-(c)* under *Code Civ. Proc. § 1295(f)* as enforceable if notice requirements of *Code Civ. Proc. § 1295(f)* complied with; such agreement as binding on heirs not party to contract if agreement so provides. *Herbert v. Superior Court (1985) 169 Cal. App. 3d 718, 725-727, 215 Cal. Rptr. 477*

Requirements of *Code Civ. Proc. § 1295* regarding language of medical service arbitration contracts as mandatory, allowing contract to be set aside if its language does not comply with statute, and, in medical malpractice actions, preempts general provisions of *Code Civ. Proc. § 1281.2*, which set aside arbitration agreement only if grounds exist for revocation of contract. *Rosenfield v. Superior Court (1983) 143 Cal. App. 3d 198, 202, 191 Cal. Rptr. 611*

Arbitration agreement signed by Spanish-speaking woman in emergency room was not necessarily binding, although it complied with *Code Civ. Proc. § 1295*; *Code Civ. Proc. § 1295* as allowing limited challenge to arbitration agreement based on coercion or lack of knowledge and understanding of agreement's provisions. *Ramirez v. Superior Court (1980) 103 Cal. App. 3d 746, 755, 163 Cal. Rptr. 223*

Code Civ. Proc. § 1295(f) exempting health care service plan contracts negotiated to contain arbitration agreement from requirements of *Code Civ. Proc. § 1295(a)-(c)* as not denying equal protection by distinguishing between persons signing individual medical care contracts and those enrolling in group plans because these groups are not similarly situated. *Dinong v. Superior Court (1980) 102 Cal. App. 3d 845, 852-853, 162 Cal. Rptr. 606*

Defendant's health care plan, although not specifically exempted from notice requirements by *Code Civ. Proc. § 1295(f)* (exempting health care service plan contracts negotiated to contain arbitration agreement) as exempt from notice requirement where failure to be explicitly excluded from *Code Civ. Proc. § 1295(b)* arose from transferring of responsibility from one state bureaucracy to another and from complexity and scope of malpractice insurance crises legislation. *Dinong v. Superior Court (1980) 102 Cal. App. 3d 845, 851, 162 Cal. Rptr. 606*

Arbitration clause in hospital admission form as unenforceable adhesion contract. *Wheeler v. St. Joseph Hospital*

(1976) 63 Cal. App. 3d 345, 357-362, 133 Cal. Rptr. 775

[b] Charitable Immunity

Invalidation of charitable institution's immunity from liability caused by employees of institution. *Malloy v. Fong (1951) 37 Cal. 2d 356, 366, 232 P.2d 241* ; *see Tunkl v. Regents of University of California (1963) 60 Cal. 2d 92, 103-104, 32 Cal. Rptr. 33, 383 P.2d 441* (reaffirming *Malloy* holding in hospital context)

[c] Child Abuse Reporting

Immunity of health care provider under *Penal Code § 11172(a)* from civil liability for making report required or authorized by Child Abuse and Neglect Reporting Act (*Penal Code § 11164 et seq.*) as absolute; immunity as encompassing activity by reporter after initial report is made. *Ferraro v. Chadwick (1990) 221 Cal. App. 3d 86, 91-92, 95, 270 Cal. Rptr. 379*

[d] Contractual Exculpation

Invalidity under *Civ. Code § 1668* of patient's agreement to release hospital from future negligent or wrongful acts of hospital's employees. *Tunkl v. Regents of University of California (1963) 60 Cal. 2d 92, 94, 32 Cal. Rptr. 33, 383 P.2d 441*

[e] Failure to File Claim Against Public Entity

Time period within which plaintiff must present claim for injuries to public entity as condition precedent to commencing suit against entity. *Whitfield v. Roth (1974) 10 Cal. 3d 874, 883-885, 112 Cal. Rptr. 540, 519 P.2d 588* ; *Wozniak v. Peninsula Hospital (1969) 1 Cal. App. 3d 716, 723, 82 Cal. Rptr. 84*

Complaint against public entity which fails to show compliance with claims procedure as subject to general demurrer. *Dias v. Eden Township Hospital Dist. (1962) 57 Cal. 2d 502, 503-504, 20 Cal. Rptr. 630, 370 P.2d 334*

Showing required of petitioner seeking relief from claims requirement under *Gov. Code § 946.6* based on mistake, inadvertence, surprise, or excusable neglect as same as required under *Code Civ. Proc. § 473*; not every mistake as excusing default. *Shank v. County of Los Angeles (1983) 139 Cal. App. 3d 152, 156-157, 188 Cal. Rptr. 644*

Requirement of filing claim with public entity prior to commencing action as inapplicable when public entity failed to file informational statement with Secretary of State pursuant to *Gov. Code § 53051*. *Banfield v. Sierra View Local Dist. Hospital (1981) 124 Cal. App. 3d 444, 456, 177 Cal. Rptr. 290* (disapproved on other grounds in *Woods v. Young (1991) 53 Cal. 3d 315, 328 n.4, 279 Cal. Rptr. 613, 807 P.2d 455*)

Affirmative defense based on noncompliance of plaintiff with claims procedure. *Gonzales v. Brennan (1965) 238 Cal. App. 2d 69, 71, 47 Cal. Rptr. 501*

[f] Governmental Immunity

Immunity of state and state hospital employees under *Gov. Code § 856* from liability for failure to confine person under applicable statutes for mental illness; liability of state and employees for failure to warn foreseeable victim of patient's violent tendencies, which warning constitutes ministerial act outside scope of *Gov. Code § 820.2* immunity for injuries

resulting from discretionary acts of public employees. *Tarasoff v. Regents of University of California (1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 31, 551 P.2d 334*

Direct liability of county hospital employees and derivative liability of county under *Gov. Code § 854.8* for injuries to mental patient as result of negligent care. *County of Los Angeles v. Superior Court (1965) 62 Cal. 2d 839, 843-844, 44 Cal. Rptr. 796, 402 P.2d 868*

Hospital's compliance with minimum legal standards for equipment personnel, or facilities, relating to immunity exception under *Gov. Code § 855(a)*, as issue of fact not resolvable on motion for nonsuit. *Baber v. Napa State Hospital (1989) 209 Cal. App. 3d 213, 220, 257 Cal. Rptr. 55*

Public entity immunity of *Gov. Code § 856.2* for escape of person confined for mental illness as applying to hospital. *Los Angeles County-U.S.C.S. Medical Center v. Superior Court (1984) 155 Cal. App. 3d 454, 460-463, 202 Cal. Rptr. 222*

Immunity of state and state mental hospital employees under *Gov. Code § 855.8(a)* from liability for injuries of third person resulting from negligent diagnosis and treatment of inmate. *Hernandez v. State of California (1970) 11 Cal. App. 3d 895, 897, 90 Cal. Rptr. 205*

Immunity of state and state mental hospital employees under *Gov. Code § 856(a)(3)* from liability for injuries to third persons resulting from unwarranted release of inmate in dangerous condition. *Hernandez v. State of California (1970) 11 Cal. App. 3d 895, 899, 90 Cal. Rptr. 205*

Immunity of county under *Gov. Code § 854.8* from liability for injuries suffered by patient during unsuccessful suicide attempt after patient's release from county hospital by hospital employees who had knowledge of patient's history of suicide attempts but who took no precautions to prevent further attempts by patient. *Goff v. County of Los Angeles (1967) 254 Cal. App. 2d 45, 49-52, 61 Cal. Rptr. 840*

Immunity of county and county hospital physician from liability under *Gov. Code § 855.8* for diagnosing mental illness. *Fish v. Regents of Univ. of Cal. (1966) 246 Cal. App. 2d 327, 331, 333, 54 Cal. Rptr. 656*

Immunity of county hospital under *Gov. Code § 854.8* from liability for death of mental patient caused by another patient whose actions hospital employees negligently failed to control. *Moxon v. County of Kern (1965) 233 Cal. App. 2d 393, 396, 43 Cal. Rptr. 481*

[g] Negligence of Patient

Reduction of plaintiff's recovery for injuries proximately resulting from defendant's negligence to extent that plaintiff negligently contributed to his or her own injuries. *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226*

Weakened physical and confused mental condition of patient following surgery and medication as circumstances to be considered by trier of fact in determining whether patient negligently contributed to his or her injuries or acted as person of ordinary prudence. *Rice v. California Lutheran Hospital (1945) 27 Cal. 2d 296, 303, 163 P.2d 860*

Question of fact for jury whether patient was in such mental condition that he or she did not know significance of his or her acts and was not capable of caring for his or her own safety. *Gin Non Louie v. Chinese Hospital Ass'n (1967) 249 Cal. App. 2d 774, 794, 57 Cal. Rptr. 906* (delirious patient); *Miraglia v. Callison (1964) 226 Cal. App. 2d 177, 187, 37 Cal. Rptr. 837* (drugged patient); *Welker v. Scripps Clinic & Research Found. (1961) 196 Cal. App. 2d 338, 343, 16*

Cal. Rptr. 538 (drugged patient); *DeMartini v. Alexander Sanitarium, Inc. (1961) 192 Cal. App. 2d 442, 447-448, 13 Cal. Rptr. 564* (mentally disturbed patient)

Incapacity of patient for negligence as matter of law where evidence shows that patient was totally devoid of reason at time of injury. *DeMartini v. Alexander Sanitarium, Inc. (1961) 192 Cal. App. 2d 442, 447-448, 13 Cal. Rptr. 564*

Question of fact for trier of fact whether patient negligently contributed to her injuries in getting out of bed in darkness contrary to instructions of hospital personnel. *Ault v. Ross General Hospital (1951) 105 Cal. App. 2d 78, 79, 232 P.2d 528*

[h] Periods of Limitation

Differing accrual dates for malpractice actions brought by minors and those brought by adults as violating constitutional right to equal protection; minor's malpractice claim as accruing on date of injury. *Katz v. Children's Hospital of Orange County (9th Cir. 1994) 28 F.3d 1520, 1529, 1533*

Statute of limitations applicable to health care providers under *Code Civ. Proc. § 340.5* as tolled for 90 days when plaintiff gives 90-day notice of intent to sue required by *Code Civ. Proc. § 364* in last 90 days of period of limitation. *Woods v. Young (1991) 53 Cal. 3d 315, 328, 279 Cal. Rptr. 613, 807 P.2d 455*

Whether plaintiff is minor or adult under *Code Civ. Proc. § 340.5* as determined by his or her age at time of wrongful act. *Steketee v. Lintz, Williams & Rothberg (1985) 38 Cal. 3d 46, 52-53, 210 Cal. Rptr. 781, 694 P.2d 1153*

Tolling provisions of *Code Civ. Proc. § 340.5* as applicable to three-year but not alternative one-year limitation period of *Code Civ. Proc. § 340.5* for personal injury or death action based on professional negligence of hospital or medical practitioner. *Sanchez v. South Hoover Hospital (1976) 18 Cal. 3d 93, 95, 132 Cal. Rptr. 657, 553 P.2d 1129*

Applicability of one-year limitation period of former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 335.1* (two-year limitation period beginning in 2003)) to actions based on medical malpractice with judicial qualification that period did not commence to run until plaintiff's actual or constructive discovery of tortious injury. *Huysman v. Kirsch (1936) 6 Cal. 2d 302, 312, 57 P.2d 908* ; *Weinstock v. Eissler (1964) 224 Cal. App. 2d 212, 226-227, 36 Cal. Rptr. 537* (prior to enactment of *Code Civ. Proc. § 340.5* for actions based on professional negligence of health care provider)

Limitation period as not extended by 90 days under *Code Civ. Proc. § 364(d)* regarding unnamed physicians if plaintiff has actual knowledge of identities of physicians, but gives notice under *Code Civ. Proc. § 364(a)* only to hospital when medical care was provided. *Godwin v. City of Bellflower (1992) 5 Cal. App. 4th 1625, 1632, 7 Cal. Rptr. 2d 524*

Code Civ. Proc. § 340.5 as not relieving litigant of complying with time limits and requirements imposed by *Government Tort Claims Act. Torres v. County of Los Angeles (1989) 209 Cal. App. 3d 325, 333, 257 Cal. Rptr. 211*

Statutory period for medical malpractice claim by minor against public entity (*Gov. Code § 911.2*) as commencing when minor's parent or guardian knew or should have known through exercise or reasonable diligence that negligent wrongful act of medical malpractice caused child's injuries. *Torres v. County of Los Angeles (1989) 209 Cal. App. 3d 325, 335, 257 Cal. Rptr. 211*

In malpractice action arising from injuries caused by plaintiff's use of intrauterine birth control device (IUD), one-year statute of limitations as commencing to run when plaintiff had reasonable suspicion that she had been harmed by defendant physician's prescribed use of *IUD. Rose v. Fife (1989) 207 Cal. App. 3d 760, 768-770, 255 Cal. Rptr. 440*

Reasonableness of plaintiff's belated discovery of defendant's negligence as question of law when reasonable minds can only draw one conclusion from evidence. *Rose v. Fife (1989) 207 Cal. App. 3d 760, 770, 255 Cal. Rptr. 440*

Foreign body exception of *Code Civ. Proc. § 340.5* as delaying start of medical malpractice statute of limitations until patient discovers or through reasonable diligence would have discovered foreign body itself and its role as negligent cause of his or her suffering. *Ashworth v. Memorial Hospital of Long Beach (1988) 206 Cal. App. 3d 1046, 1051, 1062, 254 Cal. Rptr. 104*

Tolling under foreign body exception of *Code Civ. Proc. § 340.5* as continuing even though plaintiff filed earlier action, dismissed without prejudice, based on other forms of malpractice occurring during same medical treatment. *Ashworth v. Memorial Hospital (1988) 206 Cal. App. 3d 1046, 1051, 1063-1064, 254 Cal. Rptr. 104*

Medical malpractice action against county hospital brought after claim rejected under *Gov. Code § 913* as required to be filed within six-month limitation period of *Gov. Code § 945.6*, even though action is filed within one-year limitation period of *Code Civ. Proc. § 340.5* for medical malpractice actions. *Anson v. County of Merced (1988) 202 Cal. App. 3d 1195, 1199, 1202, 249 Cal. Rptr. 457*

Tolling provisions of *Code Civ. Proc. § 364(d)* as not applying to one-year limitation period of former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 335.1* (two-year limitation period beginning in 2003)). *Noble v. Superior Court (1987) 191 Cal. App. 3d 1189, 1192-1194, 237 Cal. Rptr. 38*

Foreign-body exception of *Code Civ. Proc. § 340.5* as applicable only to medically inserted objects that have no therapeutic or diagnostic purpose and that are left in patient's body. *Wallace v. Hibner (1985) 171 Cal. App. 3d 1042, 1047, 217 Cal. Rptr. 748*

Medical malpractice action as required to satisfy both limitation periods under *Code Civ. Proc. § 340.5*; action as barred either if brought more than one year after plaintiff becomes aware of physical manifestation of injury and its negligent cause, or if brought more than three years after plaintiff becomes aware of physical manifestation of injury regardless of awareness of negligent cause, except when one or more of three specified exceptions apply to toll three-year period. *Hills v. Aronsohn (1984) 152 Cal. App. 3d 753, 757-762, 758 n.3, 199 Cal. Rptr. 816*

Silicone intentionally injected into plaintiff for therapeutic purpose, with her consent, as not tolling three-year limitation period in *Code Civ. Proc. § 340.5*; "foreign body" exception in that section as operative when defendant negligently leaves nontherapeutic foreign body in plaintiff's person without plaintiff's awareness. *Hills v. Aronsohn (1984) 152 Cal. App. 3d 753, 763-765, 199 Cal. Rptr. 816*

Three-year period of *Code Civ. Proc. § 340.5* as not commenced in action by minor until parent or guardian discovers, or through use of reasonable diligence would be expected to discover, injury and its negligent cause. *Kite v. Campbell (1983) 142 Cal. App. 3d 793, 803, 191 Cal. Rptr. 363 , overruled on other grounds, Young v. Haines (1986) 41 Cal. 3d 883, 226 Cal. Rptr. 547, 718 P.2d 909*

Code Civ. Proc. § 340.5, rather than former *Civ. Code § 29* (*now see Code Civ. Proc. § 340.4*), as applicable to minor's cause of action for prenatal medical malpractice. *Knox v. Superior Court (1983) 140 Cal. App. 3d 782, 786, 189 Cal. Rptr. 800*

In medical malpractice action, plaintiff's incompetence, aside from minority, does not toll three-year statutory period of limitation. *Fogarty v. Superior Court (1981) 117 Cal. App. 3d 316, 320, 172 Cal. Rptr. 594*

Personal injury action based on professional negligence of health care provider as barred after three-year limitation period of *Code Civ. Proc. § 340.5* has run, whether or not plaintiff's injury is discovered during this period. *Blake v.*

Wernette (1976) 57 Cal. App. 3d 656, 660, 129 Cal. Rptr. 426

Applicability of one-year limitations period of former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 335.1* (two-year limitations period beginning in 2003)) to personal injury action based on hospital's ordinary negligence in caring for patient; applicability of limitation period for professional malpractice when hospital fails to exercise skill, prudence, and diligence in performance of professional and fiduciary duties. *Gopaul v. Herrick Memorial Hosp. (1974) 38 Cal. App. 3d 1002, 1007, 113 Cal. Rptr. 811 , disapproved on other grounds, Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal. 4th 992, 35 Cal. Rptr. 2d 685, 884 P.2d 142*

[5] Emergency Medical Services

Because proper standard of care in medical malpractice action is standard existing at time alleged malpractice occurred, requirement of *Health & Safety Code § 1799.110(c)* that testifying medical expert have substantial experience in emergency medical coverage within "last five years" is measured from date of alleged malpractice, not from date of trial. *Petrou v. S. Coast Emergency Group (2004) 119 Cal. App. 4th 1090, 1094, 15 Cal. Rptr. 3d 64 .*

Health & Safety Code § 1799.110 as not applicable to action against hospital when there was no allegation of negligent care by emergency room physician, but instead involved claim that hospital failed to provide essential hospital services of back-up surgical team and anesthesiologist. *Baxter v. Alexian Brothers Hospital (1989) 214 Cal. App. 3d 722, 262 Cal. Rptr. 867*

Health & Safety Code § 1799.110(c), allowing medical testimony only from physicians and surgeons with substantial professional acute care hospital emergency department experience within past five years, as applicable to action against hospital for damages involving negligence alleged to have been committed by hospital emergency room physician providing emergency care, whether or not physician has been named as defendant. *Jutzi v. County of Los Angeles (1987) 196 Cal. App. 3d 637, 651, 242 Cal. Rptr. 74*

[6] Formation and Operation

Formation and operation of hospitals within power of state and its political subdivisions. *Paso Robles War Mem'l Hosp. Dist. v. Negley (1946) 29 Cal. 2d 203, 204-205, 173 P.2d 813* ; *Jardine v. Pasadena (1926) 199 Cal. 64, 68, 248 P. 225*

State Department of Health Services as empowered under Health and Safety Code to promulgate informed consent regulations governing sterilization operations for hospitals. *California Medical Assn. v. Lackner (1981) 124 Cal. App. 3d 28, 39, 177 Cal. Rptr. 188*

Disclosure of financial information by hospital, required by former *Health & Safety Code § 442(a)*, as valid exercise of state's police power, and as not violating constitutional rights to privacy [*U.S. Const., amend. XIV*; *Cal. Const., art. I, § 1*]. *Wilson v. California Health Facilities Com. (1980) 110 Cal. App. 3d 317, 321, 167 Cal. Rptr. 801*

Under *Health & Safety Code § 32110*, officers, directors, and managers of private nonprofit or private proprietary hospitals as ineligible to serve on public hospital board of directors if both hospitals serve same area. *Franzblau v. Monardo (1980) 108 Cal. App. 3d 522, 528, 166 Cal. Rptr. 610*

[7] Hospital Records

Limited admissibility of medical diagnoses of patients' conditions contained in hospital records. *People v. Reyes*

(1974) 12 Cal. 3d 486, 502-504, 116 Cal. Rptr. 217, 526 P.2d 225 ; *People v. O'Tremba (1970) 4 Cal. App. 3d 524, 528-529, 84 Cal. Rptr. 336* ; *Springer v. Reimers (1970) 4 Cal. App. 3d 325, 338-340, 84 Cal. Rptr. 486*

Admissibility of hospital records as proof of facts contained in records under exception to hearsay rule for business records. *Loper v. Morrison (1944) 23 Cal. 2d 600, 607-609, 145 P.2d 1* ; *Springer v. Reimers (1970) 4 Cal. App. 3d 325, 338, 84 Cal. Rptr. 486*

Damages action by physician for past restrictions of staff privileges as not constituting action by "any person requesting hospital staff privileges" within exception under *Evid. Code § 1157(c)* to general statutory immunity from discovery of records of hospital staff review committee. *California Eye Institute v. Superior Court (1989) 215 Cal. App. 3d 1477, 1481, 264 Cal. Rptr. 83*

In malpractice action combined with products liability action alleging drug defect, minutes of medical staff committee formed to evaluate and approve standards for granting physician privileges to use that new drug as treatment at hospital as within protection of *Evid. Code § 1157*. *Mt. Diablo Hospital Dist. v. Superior Court (1986) 183 Cal. App. 3d 30, 34-35, 227 Cal. Rptr. 790*

Evid. Code § 1157 as denying potential medical malpractice plaintiffs access to proceedings and records of hospital medical staff committees and preserving access rights of individual physician denied staff privileges. *County of San Diego v. Superior Court (1986) 176 Cal. App. 3d 1009, 1022, 222 Cal. Rptr. 484*

When defendant hospital in malpractice action seeks to avoid disclosure of medical staff records under *Evid. Code § 1157(a)*, in camera inspection as necessary whenever protection is not facially apparent to ensure that hospital is not in effect avoiding disclosure of nonprotected administrative records by placing them in the possession of members of protected medical staff committees. *Santa Rosa Memorial Hospital v. Superior Court (1985) 174 Cal. App. 3d 711, 721-730, 220 Cal. Rptr. 236*

Evid. Code § 1157 as representing legislature's choice between competing public concerns and as embracing goal of medical staff candor at cost of impairing plaintiff's access to evidence. *Mt. Diablo Hospital Medical Center v. Superior Court (1984) 158 Cal. App. 3d 344, 347, 204 Cal. Rptr. 626*

In camera hearing by trial court as required to determine that hospital records do not contain reference to proceedings immune under *Evid. Code § 1157* and to determine exception to privacy privilege. *Saddleback Community Hospital v. Superior Court (1984) 158 Cal. App. 3d 206, 209, 204 Cal. Rptr. 598*

Collective bargaining agreement provision that governed injury grievance of football player but was silent on production of records as not depriving state court of jurisdiction to enforce discovery of medical records under *Evid. Code § 1158* despite fact that football industry is subject to federal law. *National Football League Management Council v. Superior Court (1983) 138 Cal. App. 3d 895, 899, 188 Cal. Rptr. 337*

Under *Evid. Code § 1157*, discoverability of hospital's administrative files but nondiscoverability of records of hospital's medical staff committees charged with evaluation and improvement of quality of patient care rendered in hospital. *Matchett v. Superior Court (1974) 40 Cal. App. 3d 623, 628, 631, 115 Cal. Rptr. 317*

Use of procedure set forth in *Evid. Code §§ 1560-1566* to establish foundation for admission of hospital records under *Evid. Code §§ 1270, 1271* for proof of facts contained in records. *People v. Blagg (1968) 267 Cal. App. 2d 598, 609-610, 73 Cal. Rptr. 93*

Nondiscoverability and nonadmissibility of information privileged under *Evid. Code § 996* (confidential patient-physician communications) in hospital records. *Carlton v. Superior Court (1968) 261 Cal. App. 2d 282, 290,*

67 Cal. Rptr. 568

Limited admissibility of hospital records containing patients' histories under exception to hearsay rule for business records. *People v. Williams (1960) 187 Cal. App. 2d 355, 364-366, 9 Cal. Rptr. 722*

[8] Joint Tortfeasors

[a] Affiliation With Medical School

In action by county hospital against medical school for indemnification for losses on malpractice claim, when school was affiliated with hospital in order to train hospital's residents, and resident-trainees were negligent, school as liable for half of judgment as joint tortfeasor. *County of Riverside v. Loma Linda University (1981) 118 Cal. App. 3d 300, 314-319, 173 Cal. Rptr. 371*

[9] Psychologists

Hospital that admits clinical psychologists to its staff as able to permit such psychologists to take primary responsibility for admission, diagnosis, treatment, and discharge of their patients; *Health and Safety Code § 1316.5* as allowing hospital to permit clinical psychologists on its staff to provide psychological services within the legal s cope of their licensure, without physician supervision and without discriminatory restrictions. *California Ass'n of Psychology Providers v. Rank (1990) 51 Cal. 3d 1, 14, 21, 270 Cal. Rptr. 796, 793 P.2d 2*

[10] Res Ipsa Loquitur

[a] Conditions of Doctrine

Applicability of res ipsa loquitur to wrongful death action based on hospital's failure to adequately supervise mental patient with suicidal tendencies. *Meier v. Ross Gen. Hosp. (1968) 69 Cal. 2d 420, 424, 71 Cal. Rptr. 903, 445 P.2d 519* ; *Vistica v. Presbyterian Hospital & Medical Center, Inc. (1967) 67 Cal. 2d 465, 470, 62 Cal. Rptr. 577, 432 P.2d 193*

Propriety of conditional res ipsa loquitur instruction when evidence excludes patient's voluntary actions as responsible cause of patient's injury. *Meier v. Ross Gen. Hosp. (1968) 69 Cal. 2d 420, 427, 71 Cal. Rptr. 903, 445 P.2d 519*

Applicability of res ipsa loquitur where it can be said, in light of past experience, that plaintiff's injuries were more probably than not result of someone's negligence and that defendant was probably person responsible. *Quintal v. Laurel Grove Hospital (1964) 62 Cal. 2d 154, 164-166, 41 Cal. Rptr. 577, 397 P.2d 161* ; *Davis v. Memorial Hospital (1962) 58 Cal. 2d 815, 817, 26 Cal. Rptr. 633, 376 P.2d 561* ; *Seneris v. Haas (1955) 45 Cal. 2d 811, 824, 291 P.2d 915* ; *Crawford v. County of Sacramento (1966) 239 Cal. App. 2d 791, 797, 49 Cal. Rptr. 115*

Application of res ipsa loquitur in action to recover damages for negligence when plaintiff establishes following basic facts: (1) injury is kind which ordinarily does not occur in absence of someone's negligence, (2) injury was caused by agency or instrumentality in defendant's control, and (3) injury was not due to any voluntary action or contribution on part of plaintiff which was responsible cause of injury. *Seneris v. Haas (1955) 45 Cal. 2d 811, 823, 291 P.2d 915* ; *Ybarra v. Spangard (1944) 25 Cal. 2d 486, 489, 154 P.2d 687* ; *Sanchez v. Bay General Hosp. (1981) 116 Cal. App. 3d 776, 786-789, 172 Cal. Rptr. 342* ; *Cline v. Lund (1973) 31 Cal. App. 3d 755, 761, 107 Cal. Rptr. 629*

Superior knowledge of defendant with respect to circumstances and cause of plaintiff's injury as factor to be considered

in determining applicability of res ipsa loquitur. *Seneris v. Haas (1955) 45 Cal. 2d 811, 825, 291 P.2d 915*

[b] Contribution of Patient to Injury

Exclusion of patient's voluntary actions as responsible cause of patient's injury when evidence establishes that hospital having physical care and control of patient owed patient duty of protection from dangers inherent in patient's actions. *Meier v. Ross General Hospital (1968) 69 Cal. 2d 420, 427, 71 Cal. Rptr. 903, 445 P.2d 519* ; *Vistica v. Presbyterian Hospital (1967) 67 Cal. 2d 465, 470, 62 Cal. Rptr. 577, 432 P.2d 193*

Patient as able to rely on res ipsa loquitur even though he or she participated in events leading up to accident, if patient's conduct was not primary cause of accident. *Emerick v. Raleigh Hills Hospital (1982) 133 Cal. App. 3d 575, 584, 184 Cal. Rptr. 92*

[c] Defendant's Control

Applicability of res ipsa loquitur against all persons who had control of or right to control patient's body or instrumentality which might have caused patient's injury during medical treatment or procedure when occurrence of injury raises inference of negligence but patient is unable to identify instrumentality within control of particular person which caused injury because patient was unconscious at time. *Leonard v. Watsonville Community Hosp. (1956) 47 Cal. 2d 509, 514, 305 P.2d 36* ; *Seneris v. Haas (1955) 45 Cal. 2d 811, 825-826, 291 P.2d 915* ; *Ybarra v. Spangard (1944) 25 Cal. 2d 486, 492-494, 154 P.2d 687* ; *Gin Non Louie v. Chinese Hospital Ass'n (1967) 249 Cal. App. 2d 774, 794-795, 57 Cal. Rptr. 906* ; *Ragusano v. Civic Center Hospital Foundation (1962) 199 Cal. App. 2d 586, 596, 19 Cal. Rptr. 118*

Inapplicability of res ipsa loquitur against defendant who had no control of instrumentality causing patient's injury. *Ware v. Culp (1937) 24 Cal. App. 2d 22, 31-32, 74 P.2d 283*

[d] Defendant's Negligence as Probable Cause

Requirement of expert testimony to establish defendant's negligence as cause of patient's injuries when such injuries occurred during medical treatment involving exercise of professional judgment which can only be assessed in light of scientific opinion; no requirement of expert testimony when injuries occurred during medical treatment within common knowledge of lay persons or when cause of injuries was not inextricably bound up with course of medical treatment. *Meier v. Ross General Hospital (1968) 69 Cal. 2d 420, 429-431, 71 Cal. Rptr. 903, 445 P.2d 519* ; *Davis v. Memorial Hospital (1962) 58 Cal. 2d 815, 817, 26 Cal. Rptr. 633, 376 P.2d 561* ; *Seneris v. Haas (1955) 45 Cal. 2d 811, 824-825, 291 P.2d 915* ; *Cavero v. Franklin Gen. Benevolent Soc'y (1950) 36 Cal. 2d 301, 311, 223 P.2d 471* ; *Cline v. Lund (1973) 31 Cal. App. 3d 755, 763, 107 Cal. Rptr. 629*

Applicability of res ipsa loquitur when reasonable basis for believing that patient's injuries were probably caused by negligence is established by evidence that (1) injuries are known risk of medical treatment or procedure which rarely occurs when due care is exercised and (2) specific acts by defendant indicating negligence, even though such acts may not constitute sufficient evidence to prove either defendant's lack of due care or proximate causation. *Quintal v. Laurel Grove Hospital (1964) 62 Cal. 2d 154, 165-166, 41 Cal. Rptr. 577, 397 P.2d 161* ; *Cline v. Lund (1973) 31 Cal. App. 3d 755, 763, 107 Cal. Rptr. 629*

Evidence that patient's injury is rare but inherent risk of medical treatment or procedure as insufficient to prove that injury was probably caused by negligence of persons administering treatment or procedure. *Siverson v. Weber (1962) 57 Cal. 2d 834, 836, 22 Cal. Rptr. 337, 372 P.2d 97* ; *Salgo v. Leland Stanford Jr. Univ. Bd. of Trs. (1957) 154 Cal.*

App. 2d 560, 571, 317 P.2d 170

[e] Effect of Proving Specific Acts

Applicability of res ipsa loquitur despite evidence of specific acts of negligence by defendant unless such evidence establishes cause of injury and care exercised by defendant as matter of law. *Gin Non Louie v. Chinese Hospital Ass'n (1967) 249 Cal. App. 2d 774, 795, 57 Cal. Rptr. 906*

[f] Operation of Doctrine

Propriety of conditional res ipsa loquitur instruction when evidence relating to facts conditioning application of res ipsa is conflicting or subject to different inferences so long as plaintiff has produced sufficient evidence to permit jury to draw inference of defendant's negligence; question of fact for jury whether factual conditions of res ipsa exist and whether res ipsa may be applied. *Quintal v. Laurel Grove Hospital (1964) 62 Cal. 2d 154, 166, 41 Cal. Rptr. 577, 397 P.2d 161* ; *Davis v. Memorial Hospital (1962) 58 Cal. 2d 815, 817-818, 26 Cal. Rptr. 633, 376 P.2d 561* ; *Seneris v. Haas (1955) 45 Cal. 2d 811, 826-827, 291 P.2d 915* ; *Gin Non Louie v. Chinese Hospital Ass'n (1967) 249 Cal. App. 2d 774, 794, 57 Cal. Rptr. 906*

Inference of defendant's negligence arising under doctrine of res ipsa loquitur dispelled as matter of law by clear, positive, uncontradicted evidence which cannot be rationally disbelieved. *Leonard v. Watsonville Community Hosp. (1956) 47 Cal. 2d 509, 518, 305 P.2d 36* ; *Oldis v. La Societe Francaise (1955) 130 Cal. App. 2d 461, 470, 279 P.2d 184*

Applicability of res ipsa loquitur presumption when plaintiff's evidence establishes defendant's negligence as probable cause of injury even though other causes are not excluded and are reasonably inferrable from other evidence. *Seneris v. Haas (1955) 45 Cal. 2d 811, 826, 291 P.2d 915* ; *Cline v. Lund (1973) 31 Cal. App. 3d 755, 764, 107 Cal. Rptr. 629*

Rebuttal of res ipsa loquitur presumption by defendant with evidence sufficient to support finding that (1) defendant exercised such care that injury could not have resulted from his or her lack of care or (2) injury was proximately caused by factors other than defendant's negligence. *Dierman v. Providence Hosp. (1947) 31 Cal. 2d 290, 295, 188 P.2d 12* ; *Oldis v. La Societe Francaise (1955) 130 Cal. App. 2d 461, 469, 279 P.2d 184*

Preconditions for application of res ipsa loquitur as satisfied when bathroom sink in hospital collapsed under patient's pressure. *Emerick v. Raleigh Hills Hospital (1982) 133 Cal. App. 3d 575, 585, 184 Cal. Rptr. 92*

Res ipsa loquitur as presumption affecting burden of producing evidence, requiring trier of fact to find that plaintiff's injuries resulted from defendant's negligence unless defendant comes forward with evidence that would support contrary finding. *Rimmele v. Northridge Hosp. Foundation (1975) 46 Cal. App. 3d 123, 129, 120 Cal. Rptr. 39* ; *Cline v. Lund (1973) 31 Cal. App. 3d 755, 761-762, 107 Cal. Rptr. 629*

[g] Pleading

General allegation of defendant's negligence in complaint as sufficient to invoke doctrine of res ipsa loquitur. *Guilliams v. Hollywood Hospital (1941) 18 Cal. 2d 97, 102, 114 P.2d 1* ; *Sherman v. Hartman (1955) 137 Cal. App. 2d 589, 597-599, 290 P.2d 894*

Allegation of defendant's negligence in complaint as general rather than specific when allegation shows plaintiff's ignorance of underlying cause of or specific acts resulting in injury. *Sherman v. Hartman (1955) 137 Cal. App. 2d*

589, 597-599, 290 P.2d 894 ; *Foster v. Delgrave (1954) 129 Cal. App. 2d 525, 527, 277 P.2d 408*

[11] Residential Care Facilities

Residential care facilities licensed pursuant to *Health & Safety Code § 1502*, although incidentally providing some medical services, as neither "health dispensaries" subject to application of MICRA limits on damages nor "clinics" or "health facilities," because provisions of § 1502 apply to facilities that provide primarily nonmedical care. *Kotler v. Alma Lodge (1998) 63 Cal. App. 4th 1381, 1390-1395, 74 Cal. Rptr. 2d 721*

[12] Small Claims Action Against Malpractice Plaintiff

When health care provider sues party in small claims court, and party has malpractice claim against health care provider exceeding jurisdictional amount in small claims court, party as entitled to continuance of action, to allow compliance with *Code Civ. Proc. § 364* and former *Code Civ. Proc. § 116.8(b)* (*now see Code Civ. Proc. § 116.390*). *Clark v. Superior Court (1980) 113 Cal. App. 3d 865, 869, 169 Cal. Rptr. 898*

[13] Termination or Refusal of Treatment

State as able to apply clear and convincing evidence standard of proof in proceedings in which guardian seeks to discontinue nutrition and hydration of person diagnosed in persistent vegetative state. *Cruzan v. Director, Mo. Health Dept. (1990) 497 U.S. 261, 284, 110 S. Ct. 2841, 111 L. Ed. 2d 224*

Competent, nonterminally ill adult patient as having constitutionally based right to refuse and/or to terminate medical treatment. *Bartling v. Glendale Adventist Medical Center (1986) 184 Cal. App. 3d 97, 99, 102, 228 Cal. Rptr. 847*

Adult patient of sound mind as having right to refuse any medical treatment or service, even when treatment may save or prolong patient's life. *Bouvia v. Superior Court (1986) 179 Cal. App. 3d 1127, 1137, 225 Cal. Rptr. 297*

Right of adult patient of sound mind to refuse medical treatment as basic and fundamental and as part of right of privacy protected by both California and federal *Constitutions. Bouvia v. Superior Court (1986) 179 Cal. App. 3d 1127, 1137, 225 Cal. Rptr. 297* (citing *Cal. Const., art. I, § 1*; *Griswold v. Connecticut (1965) 381 U.S. 479, 484, 85 S. Ct. 1678, 14 L. Ed. 2d 510* ; *Bartling v. Superior Court (1984) 163 Cal. App. 3d 186, 209 Cal. Rptr. 220*)

No criminal or civil liability as attaching to honoring competent, informed adult patient's refusal of medical service. *Bouvia v. Superior Court (1986) 179 Cal. App. 3d 1127, 1145, 225 Cal. Rptr. 297*

Person of adult years and in sound mind as having right, in exercise of control over his or her own body, to determine whether or not to submit to lawful medical treatment; constitutional right of privacy as guaranteeing to individual freedom to choose to reject, or to refuse to consent to, intrusions into his or her bodily integrity, and right of competent adult patient to refuse medical treatment as constitutionally guaranteed right that must not be abridged. *Bartling v. Superior Court (1984) 163 Cal. App. 3d 186, 193-194, 195-196, 209 Cal. Rptr. 220*

[14] Security for Costs

Code Civ. Proc. § 1029.6(a) (permitting ex parte order, on motion of defendant, requiring plaintiff to furnish security for costs of defending against claim for exemplary damages) as unconstitutional taking of property without due process. *Nork v. Superior Court (1973) 33 Cal. App. 3d 997, 1001-1003, 109 Cal. Rptr. 428*

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceHearsayExceptionsBusiness RecordsGeneral OverviewHealthcare LawActions Against FacilitiesApparent Agency & Respondeat SuperiorRespondeat SuperiorHealthcare LawActions Against FacilitiesDefensesGeneral OverviewHealthcare LawActions Against FacilitiesFacility LiabilityHospitalsHealthcare LawActions Against FacilitiesStandards of CareHospitalsHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceProofRes Ipsa LoquiturGeneral Overview

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§ 295.44 Attorney General Opinions

Blind person as having statutory right to be accompanied by guide dog in medical facilities, to extent of providing access equal to that of all or some members of general public. *70 Ops. Cal. Att'y Gen. 104 (1987)*

Superior court as not having jurisdiction to authorize physicians or hospitals to proceed with nonemergency medical treatment for adult patient who has not been declared incompetent even though patient is unable psychologically or physically to give consent. *60 Ops. Cal. Att'y Gen. 382 (1977)*

Prohibition of packaged disaster hospital donations by general law counties; validity of such donations by chartered counties. *59 Ops. Cal. Att'y Gen. 685 (1976)*

Board of Registered Nursing as permitted to discipline supervising registered nurses for authorizing untrained persons or licensed vocational nurses to perform tasks which supervising nurses knew or should have known they lacked competency to safely perform. *59 Ops. Cal. Att'y Gen. 537 (1976)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationPeer ReviewOrganizationsHealthcare LawTreatmentPatient ConsentGeneral Overview

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§ 295.45 Law Reviews

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Merritt, *The Tort Liability of Hospital Ethics Committees, 60 S. Cal. L. Rev. 1239 (1987)*

Comment, *Suicidal Competence and the Patient's Right to Refuse Lifesaving Treatment, 75 Calif. L. Rev. 707 (1987)*

Note, *The Suicide Trap: Bouvia v. Superior Court and the Right to Refuse Medical Treatment, 21 Loy. L.A.L. Rev. 219 (1987)*

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Comment, *Denial of Directed Blood Donations: Grounds for Negligence in Transfusion Transmitted Disease Cases, 12 San. Fern. V.L. Rev. 11 (1984)*

Denham and Geckle, *Who's Watching the Watchdog? Elam and California Evidence Code Section 1157 , 18 U.S.F. L. Rev. 51 (1983)*

Comment, *Nurses' Legal Dilemma: When Hospital Staffing Compromises Professional Standards, 18 U.S.F. L. Rev. 109 (1983)*

Comment, *Toward a Uniform Right to Medical Records: A Proposal for a Model Patient Access and Information Practices Statute, 30 UCLA L. Rev. 1349 (1983)*

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Comment, *Informed Consent to Immunization: The Risks and Benefits of Individual Autonomy, 65 Calif. L. Rev. 1286 (1977)*

Comment, *The Hospital's Responsibility for Its Medical Staff: Prospects for Corporate Negligence in California, 8 Pac. L.J. 141 (1977)*

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Comment, *Patients' Rights and Informed Consent: An Emergency Case for Hospitals?* *12 Cal. W.L. Rev. 406 (1976)*

Article, *Strict Liability--The Medical Service Immunity and Blood Transfusions in California*, *7 U.C. Davis L. Rev. 196 (1974)*

Kayajanian, *Confronting the Conspiracy of Silence: We Have a Tiger by the Tail*, *6 U. West L.A. L. Rev. 40 (1974)*

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Hanson and Stromberg, *Hospital Liability for Negligence*, *21 Hastings L.J. 1 (1969)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesApparent Agency & Respondeat SuperiorGeneral OverviewHealthcare LawActions Against FacilitiesFacility LiabilityHospitalsHealthcare LawBusiness Administration & OrganizationPatient ConfidentialityGeneral OverviewHealthcare LawTreatmentPatient ConsentGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare Providers

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§ 295.46 Text References

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California Personal Injury Proof, Ch. 13, *Hospitals and Medical Records* (Cal. C.E.B. 1970, Supp. 1989)

California Tort Guide, §§ 9.34-9.41, 9.47 (Cal. C.E.B. 1979, Supp. 1989)

Witkin, California Procedure, vol. 3, *Actions*, §§ 158-162, 223-295, 325-326, 333, 510-511, 517-520, 524-543; vol. 4, *Pleading*, §§ 544-545, 552, 559-560, 565-568, 575-576, 578-580 (4th ed. 1997)

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Witkin, California Evidence, vol. 1, Ch. III, *Burden of Proof and Presumptions*, §§ 230-244, 762-768; vol. 2, Ch. VIII, *Documentary Evidence*, *903-905*, 922, 927, *952*, *956*, *1509*, *1510* (3d ed. 1986)

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewHealthcare LawActions Against FacilitiesFacility LiabilityHospitalsTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview

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[Reserved]

§§ 295.47[Reserved]

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25-295 California Forms of Pleading and Practice--Annotated § 295.50

§ 295.50 Notice of Intention to Commence Action Against Health Care Provider [Code Civ. Proc. § 364]

[1] FORM Notice of Intention to Commence Action Against Health Care Provider [Code Civ. Proc. § 364]

_____ [*name and address of defendant health care provider*]:

You are hereby notified that _____ [*name of plaintiff*] intends to file an action against you for professional negligence. The legal basis of this action will be that _____ [*specify basis, e.g.*, defendant(s) _____ (*name* (*s*)) negligently transfused plaintiff with incompatible blood]. Plaintiff will allege and prove that he/she sustained the following losses and injuries as a proximate result of the aforementioned professional negligence: _____ [*specify plaintiff's losses and injuries*].

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[2] Use of Form

The notice in [1], *above,* is an example of the notice that a plaintiff must serve on a health care provider prior to filing an action based on professional negligence against the provider unless the provider is identified by a fictitious name in the complaint pursuant to *Code Civ. Proc. § 474* [*Code Civ. Proc. § 364(a), (e)*]. The term "health care provider" includes, among others, licensed medical personnel and hospitals licensed pursuant to *Health & Safety Code §§ 1250-1319* [*Code Civ. Proc. § 364(f)(1)*].

The term "professional negligence" means a negligent act or omission to act by a health care provider in the rendering

of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital [*Code Civ. Proc. § 364(f)(2)*].

For discussion of the notice requirement and its relationship to the claim requirement if a defendant is a public entity, see *§ 295.15*.

[3] Contents of Form

Although no particular form of notice is required, the notice must notify the defendant of the legal basis of the plaintiff's claim and the type of loss sustained, including with specificity the nature of the injuries suffered [*Code Civ. Proc. § 364(b)*]. For further discussion of the notice of intention to commence action, see *§ 295.15*.

[4] Service of Notice

The notice may be served in the manner prescribed by *Code Civ. Proc. §§ 1010-1020* [*Code Civ. Proc. § 364(c)*]. It must be served within 90 days prior to commencement of plaintiff's action [*Code Civ. Proc. § 364(a)*]. If the notice is served within 90 days of the expiration of the applicable statute of limitations, the time for the commencement of the action is extended 90 days from the service of the notice [*Code Civ. Proc. § 364(d)*].

[5] Effect of Failure to Serve Notice

Failure to comply with the notice requirement of *Code Civ. Proc. § 364* does not invalidate any proceedings of any court in California, nor does it affect the jurisdiction of the court to render a judgment. However, failure to comply with the notice requirement by an attorney at law is grounds for professional discipline. The State Bar of California must investigate and take appropriate action in any such cases brought to its attention [*Code Civ. Proc. § 365*].

Because failure to comply with the notice requirement is not jurisdictional, the failure to allege each injury suffered in the notice does not prevent a plaintiff from including that injury as a basis for a cause of action in the lawsuit subsequently filed, so long as the cause of action is not otherwise barred by the statute of limitations [*Edwards v. Superior Court (2001) 93 Cal. App. 4th 172, 180, 112 Cal. Rptr. 2d 838]* .

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§ 295.51 Complaint for Damages [Civ. Code § 3333, 3333.2] for Personal Injuries Based on Professional Negligence--By Patient Against Hospital and Employees--Inadequate Attendance to Patient's Needs During Patient's Stay in Hospital--General Form

[1] FORM Complaint for Damages [Civ. Code § 3333, 3333.2] for Personal Injuries Based on Professional Negligence--By Patient Against Hospital and Employees--Inadequate Attendance to Patient's Needs During Patient's Stay in Hospital--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	(Negligence)
Defendants.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[*EITHER*]

1. At all times herein mentioned, defendant _____ [*name of private hospital corporation*] was, and is, a corporation duly organized and existing under the laws of the State of California [with its principal place of business in _____ (*city*), _____ County, California].

[*OR*]

1. At all times herein mentioned, defendant City of _____ was, and is, a municipal corporation duly organized and existing under the laws of the State of California [and situated in the County of _____].

[*OR*]

1. At all times herein mentioned, defendant _____ Hospital District was, and is, a local hospital district duly organized and existing under the Local Hospital District Law of the State of California [and situated in _____ County, California].

[*OR*]

1. At all times herein mentioned, defendant County of _____ was, and is, a county and political subdivision of the State of California, duly organized and existing under the laws of the State of California [*or allege other capacity and residence*].

[*CONTINUE*]

2. At all times herein mentioned, defendant _____ [*name of hospital employee*] was, and is, a resident of _____ [*city*], _____ County, California [*or allege other capacity and residence*].

3. [Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by the negligence hereinafter alleged.)]

4. At all times herein mentioned, defendant _____ [*specify, i.e.,* corporation *or* city *or* hospital district *or* county] owned, operated, and maintained a hospital known as _____ [*name of hospital*] in _____ [*city*], _____ County, California, pursuant to a license duly issued by the California State Department of Health.

5. At all times herein mentioned, defendants _____ [*names of hospital employees*] [and defendants DOES I-_____] were the agents and employees of defendant _____ [*name of hospital operator*], and in doing the things herein mentioned, were acting within the course and scope of their authority as such agents and employees with the consent of their codefendant.

6. On or about _____ [*date*], plaintiff entered the hospital for the purpose of _____ [*specify medical treatment or procedure, e.g.,* undergoing surgery]. At that time, defendants, and each of them, undertook to provide plaintiff with such care and attendance as plaintiff might require while he/she was a patient in the hospital.

7. On or about _____ [*date*], while plaintiff was a patient in the hospital, defendants, and each of them, negligently and carelessly _____ [*specify failure to adequately attend to plaintiff's safety, e.g.,* failed to raise the safety rails on plaintiff's bed while plaintiff was recovering consciousness following the administration of anesthesia and surgery, although defendants, and each of them, knew, or in the exercise of reasonable

care for plaintiff's safety should have known, that plaintiff was likely to fall from bed while under the influence of anesthesia unless the safety rails were raised].

8. As a proximate result of the negligence of defendants, and each of them, plaintiff _____ [*specify result of defendants' failure to attend to plaintiff's safety, e.g.,* fell from bed] and suffered the injuries hereinafter alleged.

9. As a proximate result of the negligence of defendants, and each of them, plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her body and shock to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has suffered general damages.

10. As a further proximate result of the negligence of defendants, and each of them, plaintiff has been required to expend money and incur obligations, and will continue to expend money and incur obligations, for medical services, X rays, drugs, and sundries reasonably required in the treatment and relief of the injuries herein alleged. Plaintiff has been damaged thereby.

11. As a further proximate result of the negligence of defendants, and each of them, plaintiff was prevented from attending to his/her usual occupation as a[n] _____ [*state occupation*] _____ [for a period of _____ (*specify*) *or* to the date of the filing of this complaint] and thereby lost earnings.

12. [On or about _____ (*date*), plaintiff presented to _____ (*name of governmental entity*) by _____ (delivering *or* mailing) a claim to the _____ (clerk *or* secretary *or* auditor) for the injuries, disability, losses, and damages suffered and incurred by him/her by reason of the above-described occurrence, all in compliance with the requirements of *Section 905 of the Government Code*. A copy of the claim is attached hereto as Exhibit A and made a part hereof.]

13. [On or about _____ (*date*), _____ (*name of governmental entity*) _____ (rejected the claim in its entirety *or* allowed the claim in the amount of $_____ and rejected it as to the remainder *or* failed to act on the claim within the period of 45 days after its presentation, and the claim was thus deemed rejected, under the provisions of *Section 912.4 of the Government Code*, at the expiration of the 45-day period, to wit, on _____ (*date*)).]

14. Plaintiff gave notice to defendant on _____ [*date*], of intention to commence this action. [A copy of the notice is attached hereto as Exhibit A and made a part hereof.]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The complaint in [1], *above,* may be used by a hospital patient in an action based on professional negligence to recover damages for personal injuries resulting from inadequate care and attendance by hospital employees.

The complaint may be used in an action under the Federal Tort Claims Act [*28 U.S.C.S. §§ 1346(b), 2671-2680*] against a hospital operated by the federal government if appropriate allegations of federal district court jurisdiction and compliance with federal claim procedures prior to commencing suit are included. For a jurisdictional allegation, see Ch. 265, *Federal Courts: Jurisdiction and Removal* . For general discussion of pleading and practice under the Federal Tort Claims Act, see Moore's Federal Practice Forms (3rd ed. Matthew Bender); for related forms, see Frumer and Hall, Bender's Federal Practice Forms, Vol. 1, *Allegations of Jurisdiction--Particular Federal Question*, and Vol. 1A, *Complaints--Federal Tort Claims Act.*

[3] Allegations

The complaint alleges:

- A patient-hospital relationship from which a duty of protection owed to the plaintiff by the defendants can be inferred (Paragraphs 4-6).

- The defendants' negligent conduct breaching this duty (Paragraph 7).

- Injury to the plaintiff as a proximate result of the defendants' breach (Paragraph 8).

- Damages resulting from the injury (Paragraphs 9-11).

- The filing of a claim with a public entity and its rejection (Paragraphs 12, 13). This allegation must be included in the complaint if the defendant hospital is operated by a public entity and the hospital

employees are public employees [*see Gov. Code §§ 945.4, 950.2-950.6*].

This complaint also includes a statement that notice of intention to commence action has been given to all defendants (Paragraph 14). Ninety days' prior notice is required [*Code Civ. Proc. § 364(a)*; *see also § 295.51[4]*].

[4] Applicability of MICRA

This complaint alleges professional negligence against the defendant hospital. Therefore, the requirements of the Medical Injury Compensation Reform Act of 1975 (MICRA) apply [*see Murillo v. Good Samaritan Hospital (1979) 99 Cal. App. 3d 50, 56-57, 160 Cal. Rptr. 33 , disapproved on other grounds, Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal. 4th 992, 35 Cal. Rptr. 2d 685, 884 P.2d 142* ; *see also § 295.13[2]*].

MICRA's requirements include limitations on attorney's fees [*see Bus. & Prof. Code § 6146*], allowance of evidence of collateral sources [*see Civ. Code § 3333.1*], limitations on recovery of damages for noneconomic losses [*see Civ. Code § 3333.2*], a special statute of limitations [*see Code Civ. Proc. § 340.5*], a special requirement of a 90-day notice period before commencement of the action [*see Code Civ. Proc. § 364*; for a form of notice, *see § 295.50*], allowance of periodic payments of future damages [*see Code Civ. Proc. § 667.7*], and arbitration provisions [*see Code Civ. Proc. § 1295*].

These particular provisions of MICRA are considered in detail in Ch. 415, *Physicians: Medical Malpractice* .

[5] Duty of Protection

A hospital owes each of its patients a duty of protection; that is, it must exercise such reasonable care for a patient's safety as the patient's known condition requires, and it is liable for personal injuries of the patient caused by its failure to do so [*Rice v. California Lutheran Hospital (1945) 27 Cal. 2d 296, 299, 163 P.2d 860]* , either directly when the hospital fails to furnish adequate care and competent attendants in accordance with its undertaking [*Guilliams v. Hollywood Hospital (1941) 18 Cal. 2d 97, 103, 114 P.2d 1* ; *England v. Hospital of Good Samaritan (1936) 16 Cal. App. 2d 640, 644, 61 P.2d 48]* or vicariously when hospital employees negligently care for a patient within the scope of their employment [*Sherman v. Hartman (1955) 137 Cal. App. 2d 589, 600-601, 290 P.2d 894]* . See §§ 295.52-295.57 for specific allegations of breaches by a hospital of its duty of protection.

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

A public entity need not verify its answer even though the complaint is verified [*see Code Civ. Proc. § 446*]. The verification of a complaint against a public entity does, however, preclude a general denial in superior court and some limited civil cases [*see Code Civ. Proc. § 431.30(d)*].

[7] Specifying Amount of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for

example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[8] Venue

In an action for personal injury resulting from a wrongful act or negligence, either the county where the injury occurs or the county where the defendants, or some of them, reside at the commencement of the action is a proper county for the trial of the action [*Code Civ. Proc. § 395*]. If venue is based on the situs of the wrongful act or negligence, then the allegations of defendants' residence in Paragraphs 1 and 2 are not necessary.

[9] Cross References

For the notice of intention to commence action against a health care provider, see *§ 295.50*

For allegations of various negligent actions that may be used in connection with the complaint in [1], *above*, see §§ 295.52-295.57

For related forms of complaint alleging negligence on the part of a hospital and its employees, see §§ 295.58-295.63

For a form of complaint based on a hospital's failure to determine or review the competence of medical staff, see *§ 295.64*

For a form of complaint to obtain access to patient records, see *§ 295.65*

For complete discussion of medical malpractice and professional negligence actions against health care providers, including discussion of the Medical Injury Compensation Reform Act of 1975, see Ch. 415, *Physicians: Medical Malpractice*

See generally Ch. 380, *Negligence*

For alternative allegations as to capacity and residence of parties, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used* , and Ch. 464, *Public Entities and Officers: California Tort Claims Act*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms of damage allegations, see Ch. 177, *Damages*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively

For discussion, a procedural guide, and forms related to actions against public entities under the California Tort Claims Act [*Gov. Code §§ 810-996.6*], see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

For points and authorities supporting and opposing a demurrer to a complaint on the ground of plaintiff's failure to

present a claim to a public entity prior to filing suit against the entity, see California Points and Authorities, Ch. 196, *Public Entities* (Matthew Bender)

Frumer and Hall, Bender's Federal Practice Forms, Vol. 1, *Allegations of Jurisdiction--Particular Federal Question* Vol. 1A, *Complaints--Federal Tort Claims Act* (Matthew Bender)

Personal Injury: Actions, Defenses, Damages, Vol. 16, Hospitals and Asylums, §§ 1.03, 1.06

Witkin, Summary of California Law, vol. 5, *Torts,* §§ 801-803 (9th ed. 1990)

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25-295 California Forms of Pleading and Practice--Annotated § 295.52

§ 295.52 Allegation--Failure to Follow Physician's Orders for Care of Patient

[1] FORM Allegation--Failure to Follow Physician's Orders for Care of Patient

Although defendants, and each of them, had undertaken to provide plaintiff with all the care and attendance that plaintiff might require in connection with the medical treatment plaintiff was undergoing as a patient in the hospital, and although defendants, and each of them, knew, or in the exercise of ordinary care should have known, that plaintiff's safety depended on such care and attendance, defendants, and each of them, negligently and carelessly failed to follow the orders of plaintiff's physician, _____ [*specify omission, e.g.*, by taking plaintiff's blood pressure every hour rather than every half-hour as prescribed].

[2] Use of Form

The allegation in [1], *above*, may be incorporated as Paragraph 7 of the complaint set forth in *§ 295.51[1]*. It may be used when hospital employees negligently fail to care for a patient in accordance with the orders of the patient's attending physician and the patient suffers injuries as a result. For further discussion, see *§ 295.13[5][b]*.

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25-295 California Forms of Pleading and Practice--Annotated § 295.53

§ 295.53 Allegation--Failure to Maintain Medical Records

[1] FORM Allegation--Failure to Maintain Medical Records

Although defendants, and each of them, knew, or in the exercise of ordinary care should have known, that plaintiff's safety required them to maintain accurate records of plaintiff's condition, medication, and treatment while plaintiff was a patient in the hospital, defendants, and each of them, negligently and unlawfully _____ [*specify, e.g.*, failed to record the administration of morphine to plaintiff] and, as a proximate result of this negligence, _____ [*specify, e.g.*, plaintiff was given an overdose of morphine].

[2] Use of Form

The allegation in [1], *above*, may be incorporated as Paragraph 7 of the complaint set forth in *§ 295.51[1]*. It may be used when hospital employees negligently fail to maintain accurate records of a patient's condition, medication, and treatment, and the patient is injured as a result.

[3] Duty to Maintain Accurate Records

The maintenance of accurate medical records is not only an aspect of the duty of protection owed by a hospital to a patient [*see Cline v. Lund (1973) 31 Cal. App. 3d 755, 763, 107 Cal. Rptr. 629* (negligence of hospital in failing to keep accurate patient record)] but also a requirement imposed by *Bus. & Prof. Code §§ 2282(d)* and *2283(b)* and by *22 Cal. Code Reg §§ 70747-70751* and *71547-71551* on all hospitals in conjunction with their licensing by the Department of Health [*see Health & Safety Code §§ 1276, 1277*]. Accordingly, a hospital's negligence with respect to a patient will be presumed under *Evid. Code § 669* if the patient is injured as a proximate result of the hospital's failure to maintain accurate records for the patient, if the court determines that (1) the patient is a member of the class of persons whom *22 Cal. Code Reg §§ 70747-70751* and *71547-71551* were intended to protect and (2) the patient's injuries are of the kind which *22 Cal. Code Reg §§ 70747-70751* and *71547-71551* were designed to prevent, and if the hospital fails to rebut the presumption with proof that its failure to maintain accurate records in accord with *22 Cal. Code Reg §§ 70747-70751* and *71547-71551* was reasonable under the circumstances. Similarly, a public entity operating a hospital pursuant to a license issued by the Department of Health will be liable for a patient's injuries proximately resulting from its noncompliance with such regulations unless the entity pleads and proves as an affirmative defense that it exercised

reasonable diligence to comply [*Gov. Code §§ 815.6, 855*] or that it is immune from liability under another statute [*see Hernandez v. State of California (1970) 11 Cal. App. 3d 895, 899, 90 Cal. Rptr. 205* (nonliability of state and its employees under *Gov. Code § 856* for negligence in maintaining mental patient's records)].

If the health care provider, licensed under *Health & Safety Code § 1205* (clinics), *1253* (health facilities), *1575* (adult day health care), or *1726* (home health agencies) has ceased operation but failed to preserve the records for a minimum of seven years following discharge of the patient, and has left the patient without access to medical information to which he or she is entitled pursuant to *Health & Safety Code § 123110*, the person injured as a result may bring an action in a proper court for the amount of damage suffered, pursuant to *Health & Safety Code § 123145(b)* [*Health & Safety Code § 123145*]. If the patient is an unemancipated minor, the action may be brought if the licensee failed to preserve the records for at least one year after the minor has reached the age of 18, and in any case, not less than seven years [*Health & Safety Code § 123145(a), (b)*].

If the licensee is a corporation or partnership that is dissolved, the person injured may take action against that corporation's or partnership's principle officers of record at the time of dissolution [*Health & Safety Code § 123145(b)*]. For further discussion, see *§ 295.23[3][m]*.

[4] Pleading Violation of Statute in Negligence Actions

Since the violation of a statute, ordinance, or regulation which establishes or confirms a standard of care is merely a form of proof in an action based on negligence that a defendant breached the duty which he or she owed to the plaintiff, the existence and violation of a statute, ordinance, or regulation need not be pleaded in the complaint and may be introduced at trial under a general allegation of the defendant's negligence [*Karl v. C.A. Reed Lumber Co. (1969) 275 Cal. App. 2d 358, 361, 79 Cal. Rptr. 852]* . In fact, an allegation pleading the statute, ordinance, or regulation may be stricken from the complaint as unnecessary surplusage [*Jackson v. Hardy (1945) 70 Cal. App. 2d 6, 12, 160 P.2d 161]* . However, when a statute, ordinance, or regulation imposes a duty on a defendant which he or she would not otherwise have, the terms of the law and the fact that it was in force at the time of its violation by the defendant should be alleged [*Brotemarkle v. Snyder (1950) 99 Cal. App. 2d 388, 390, 221 P.2d 992]* . For further discussion and an allegation of the violation of a statute or ordinance, see Ch. 531, *Statutes and Ordinances* .

[5] Cross References

For an allegation of a complaint based on a public entity's failure to discharge a mandatory duty imposed by an enactment, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

For discussion and forms relating to actions based on violations of statutes and ordinances, see Ch. 531, *Statutes and Ordinances*

Witkin, California Procedure, Vol. 4, *Pleading*, § 544 (4th ed. 1997)

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25-295 California Forms of Pleading and Practice--Annotated § 295.54

§ 295.54 Allegation--Failure to Safeguard Disabled or Immature Patient

[1] FORM Allegation--Failure to Safeguard Disabled or Immature Patient

Defendants, and each of them, knew, or in the exercise of ordinary care for plaintiff's safety should have known, that plaintiff _____ [*specify circumstance of plaintiff's condition requiring special attention of hospital employees, e.g.*, was under the influence of drugs *or* had greatly impaired eyesight *or* had just undergone shock treatment *or* was in a greatly weakened physical and mental condition following surgery *or* was a child] and was not capable of exercising reasonable care for his/her own safety. Nevertheless, defendants, and each of them, negligently and carelessly _____ [*specify failure of hospital employees to take special precautions for plaintiff's safety, e.g.*, failed to raise the guard rails on plaintiff's bed *or* failed to use reasonable restraints to subdue plaintiff *or* left a stool which plaintiff could not see next to plaintiff's bed without warning plaintiff of its presence *or* left a poisonous solution which plaintiff was likely to mistake for drinking water within plaintiff's reach *or* served hot tea to plaintiff without providing any special facility to assist plaintiff in drinking *or* failed to provide continuous skilled nursing to monitor plaintiff's critical condition] and failed to take other precautions for plaintiff's safety. As a proximate result of this negligence, plaintiff _____ [*specify, e.g.*, fell out of bed *or* tripped over the stool *or* was poisoned *or* spilled the tea on himself/herself *or* smothered] and sustained the injuries hereinafter alleged.

[2] Use of Form

The allegation in [1], *above*, may be incorporated as Paragraph 7 of the complaint in *§ 295.51[1]*. It may be used when hospital employees fail to exercise the special care and attention required by a specific mental or physical disability of a patient, and the patient is injured as a result. The amount of care which a hospital must exercise for a patient's safety is proportional to the patient's ability to care for himself or herself [*Valentin v. La Societe Francaise (1946) 76 Cal. App. 2d 1, 5, 172 P.2d 359]* . Thus, hospital personnel are responsible for observing the condition of a patient [*Rice v. California Lutheran Hospital (1945) 27 Cal. 2d 296, 302, 163 P.2d 860]* and providing special care to guard against hazards created by a specific disability of the patient [*Thomas v. Seaside Memorial Hosp. (1947) 80 Cal. App. 2d 841, 848, 183 P.2d 288* ; for more discussion, see *§ 295.13[5]*].

[3] Cross References

For a similar allegation that may be used in the case of a patient with a mental disability, see *§ 295.55*

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25-295 California Forms of Pleading and Practice--Annotated § 295.55

§ 295.55 Allegation--Failure to Protect Disabled Patient From Conditions on Premises

[1] FORM Allegation--Failure to Protect Disabled Patient From Conditions on Premises

On or about _____ [*date*], while plaintiff was a patient in the hospital, defendants, and each of them, knew, or in the exercise of ordinary care for plaintiff's safety should have known, that plaintiff _____ [*specify circumstance of plaintiff's condition requiring special protection from conditions on premises, e.g.*, was mentally incapacitated while receiving alcoholic rehabilitative treatment *or* was under the influence of drugs] and was not capable of exercising reasonable care for his/her own safety. Nevertheless, defendants, and each of them, negligently and carelessly _____ [*specify failure of hospital to adequately protect plaintiff from conditions on premises, e.g.*, installed the sink in the bathroom used by plaintiff so that it could not withstand reasonable, foreseeable pressure without collapsing] and failed to take other precautions for pla intiff's safety.

[2] Use of Form

The allegation in [1], *above*, may be incorporated as Paragraph 7 of the complaint in *§ 295.51[1]*. It may be used when a hospital fails to take special precautions to protect a patient from conditions on the premises required by a specific mental disability of the patient, and the patient is injured as a result. This form is adapted from the facts in *Emerick v. Raleigh Hills Hospital (1982) 133 Cal. App. 3d 575, 184 Cal. Rptr. 92* . For further discussion, see *§ 295.13[4]*.

[3] Cross References

For a form for use when a hospital fails to provide special care and attention to a physically disabled or immature patient, see *§ 295.54*

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25-295 California Forms of Pleading and Practice--Annotated § 295.56

§ 295.56 Allegation--Failure to Notify Physician of Patient's Worsening Condition

[1] FORM Allegation--Failure to Notify Physician of Patient's Worsening Condition

On or about _____ [*date*], plaintiff _____ [*specify symptoms of condition requiring prompt medical treatment, e.g.*, began to experience extreme difficulty breathing]. Although defendants, and each of them, knew, or in the exercise of reasonable care for plaintiff's safety should have known, that plaintiff's condition was deteriorating and reaching a critical state that required immediate medical attention, defendants, and each of them, negligently and carelessly failed to [promptly] notify plaintiff's physician of such fact or to take other prompt and adequate measures to safeguard plaintiff.

[2] Use of Form

The allegation in [1], *above*, may be incorporated as Paragraph 7 of the complaint in *§ 295.51[1]*. It may be used when hospital employees fail to promptly obtain medical attention and treatment for a patient, and the patient is injured as a result.

[3] Duty to Procure Necessary Treatment

The procurement of necessary medical treatment for a hospital patient is another aspect of a hospital's duty to exercise such reasonable care for a patient's safety as the known condition of the patient requires, that is, hospital personnel must employ such agencies as appear reasonably necessary to protect the patient [*Valentin v. La Societe Francaise (1946) 76 Cal. App. 2d 1, 5, 172 P.2d 359]* . For further discussion, see *§ 295.13[5][b]*.

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25-295 California Forms of Pleading and Practice--Annotated § 295.57

§ 295.57 Allegation--Defective Equipment and Supplies

[1] FORM Allegation--Defective Equipment and Supplies

Defendants, and each of them, negligently and carelessly _____ [*specify lack of necessary equipment or supplies, furnishing of unsuitable equipment or supplies, or malfunction of equipment required for plaintiff's care and treatment, e.g.,* failed to maintain or otherwise obtain the skin-grafting equipment which they knew or should have known was necessary for the proper treatment of plaintiff's third-degree burns *or* supplied applicators for surgical dressings which they knew or should have known were unfit for such purpose and dangerous to the patients, including plaintiff, for whom they were used *or* failed to keep in good working order the equipment (owned and) maintained by the hospital for the resuscitation of patients, including plaintiff, in emergencies].

[2] Use of Form

The allegation in [1], *above,* may be incorporated as Paragraph 7 of the complaint set forth in *§ 295.51[1]*. It may be used when a hospital fails to provide equipment or supplies, or provides unfit or malfunctioning equipment or supplies, for the care and treatment of a patient, and the patient is injured as a result.

[3] Duty to Furnish Suitable Equipment and Supplies

A hospital owes a patient a duty to exercise ordinary care in furnishing equipment and supplies suitable for their intended use and commensurate with the requirements of the patient's case [*Welsh v. Mercy Hospital (1944) 65 Cal. App. 2d 473, 478-479, 151 P.2d 17]* . In addition, in conjunction with the licensing of hospitals by the Department of Health under *Health & Safety Code § 1250 et seq.,* a variety of department regulations contained in *22 Cal. Code Reg §§ 70001-71667* prescribe minimum standards for hospital equipment, and *22 Cal. Code Reg §§ 70701(a)(4)* and *71501(a)(3)* require the governing bodies of licensed hospitals to provide appropriate physical resources and personnel required to meet the needs of patients. Thus, a hospital's negligence with respect to a patient will be presumed under *Evid. Code § 669* if the patient is injured as a proximate result of the hospital's failure to maintain equipment and supplies in accordance with the Department of Health regulations, if the court determines that (1) the patient is a member of the class of persons whom the regulations were intended to protect and (2) the patient's injuries are of the kind which the regulations were designed to prevent, and if the hospital fails to rebut the presumption with proof that its

failure to maintain equipment and supplies in accordance with department regulations was reasonable under the circumstances. Similarly, a public entity operating a hospital pursuant to a license issued by the Department of Health will be liable for a patient's injuries proximately resulting from its noncompliance with department regulations for equipment and supplies unless the entity pleads and proves as an affirmative defense that it exercised reasonable diligence to comply [*Gov. Code §§ 815.6, 855*].

[4] Inapplicability of Strict Liability

A hospital cannot be held responsible under a theory of strict liability in tort or breach of warranty for defective products which it supplies and which cause injury to patients during treatment. Like persons who sell their services for the guidance of others in economic, financial, and personal affairs, a hospital is burdened only with a duty of reasonable performance under the circumstances. The basis of the hospital's liability, if any, for defective products supplied in the course of the hospital's primary function of providing medical services is limited to negligence or intentional misconduct [*Shepard v. Alexian Brothers Hosp. (1973) 33 Cal. App. 3d 606, 610-615, 109 Cal. Rptr. 132]* . For further discussion, see *§ 295.13[3]*.

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25-295 California Forms of Pleading and Practice--Annotated § 295.58

§ 295.58 Complaint for Damages [Civ. Code § 3333, 3333.2] for Wrongful Death of Patient [Code Civ. Proc. § 377.60] Based on Professional Negligence--By Entitled Person(s) Against Hospital and Its Employees--Failure to Protect Mental Patient From Self-Inflicted Harm

[1] FORM Complaint for Damages [Civ. Code § 3333, 3333.2] for Wrongful Death of Patient [Code Civ. Proc. § 377.60] Based on Professional Negligence--By Entitled Person(s) Against Hospital and Its Employees--Failure to Protect Mental Patient From Self-Inflicted Harm

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*names*] [and	)	
_____ (*name of minor heir*), a	)	NO. _____
minor, by his/her guardian ad litem],	)	COMPLAINT FOR DAMAGES
Plaintiffs,	)	(Wrongful Death)
vs.	)	[Amount demanded _____
_____ [*names*], [and DOES I	)	(exceeds *or* does not exceed) $10,000]
through _____],	)	[LIMITED CIVIL CASE]
Defendants.		

_____

Plaintiff(s) [_____ (*name(s)*) and plaintiff _____ (*name of minor*), a minor, through his/her guardian ad litem] alleges:

1. _____ [Plaintiff(s) *or* The person(s) listed below] is/are entitled to bring an action for the wrongful death of _____ [*name of decedent*] (hereinafter "decedent") pursuant to *Code of Civil Procedure Section 377.60*, based on his/her/their relationship to decedent, as follows:

Name(s)	Relationship(s) to Decedent
_____	_____

_____
_____ _____
_____
_____ _____
_____

[_____ (*If one or more persons are required by statute to establish additional facts, such as that there is no surviving spouse, child, or issue of deceased child, or that the person was dependent on decedent, in order to be entitled to bring a wrongful death action, specify facts that satisfy applicable requirement.*)]

[*If decedent's personal representative is maintaining action on behalf of one or more entitled persons, add:*]

Plaintiff _____ [*name*] is the duly appointed, qualified, and acting personal representative of the estate of decedent, and brings this action on behalf of _____ [all of the above-listed persons entitled to bring a cause of action for the wrongful death of decedent *or* the following person(s) entitled to bring an action for the wrongful death of decedent: _____ (*specify person(s) on whose behalf personal representative is maintaining action*)].

[2. Plaintiff _____ (*name of minor*), is a minor, born _____ (*date*).]

[3. On _____ (*date*), (plaintiff) _____ (*name of guardian ad litem*) was appointed, by order duly given and made by the above-entitled court, and now is, the duly qualified and acting guardian ad litem of plaintiff _____ (*name of minor*) for the purpose of this action and brings this action on (his/her behalf and on) behalf of plaintiff _____ (*name of minor*).]

4-5. [*Capacity and residence of defendants. See § 295.51[1], Paragraphs 1, 2.*]

6. [*Fictitious name allegation, if appropriate. See § 295.51[1], Paragraph 3.*]

7. At all times herein mentioned, defendant _____ [*name of hospital operator*] owned, operated, and managed a hospital known as _____ [*name of hospital*] in _____ [*city*], _____ County, California, pursuant to a license duly issued by the California Department of Health, where he/she/it engaged [in part] in the business of treating and supervising patients suffering from mental disorders.

8. [*Allegation of hospital employee's agency. See § 295.51[1], Paragraph 5.*]

9. On or about _____ [*date*], decedent was admitted to the hospital for the observation and treatment of an acute mental disorder from which decedent was suffering. Immediately prior to decedent's admission to the hospital, decedent had attempted suicide, of which fact defendants, and each of them, were informed when they undertook to treat, attend, and supervise decedent as a patient.

10. Although defendants, and each of them, had knowledge or notice from decedent's attempt to commit suicide that decedent was likely to harm himself/herself unless protective measures were taken, defendants, and each of them, negligently and carelessly failed to attend and supervise decedent while he/she was under their care and control. As a proximate result of this negligence, on _____ [*date*], while unattended, decedent _____ [*specify manner of death, e.g.,* jumped from a window of the hospital and was killed in his/her fall to the ground].

11. _____ [*Describe relationship of decedent and wrongful death plaintiff(s), e.g.,* Prior to the death of decedent, plaintiffs lived with him/her and were totally dependent on him/her for their support and maintenance, and decedent was a faithful and dutiful _____ (*specify, e.g.,* husband and father) to plaintiffs].

12. As a proximate result of the negligence of defendants, and each of them, and the resultant death of decedent, plaintiff(s) have been deprived of the society, comfort, attention, services, and support of decedent.

13. As a further proximate result of the negligence of defendants, and each of them, and the resultant death of decedent, plaintiff _____ [*name*] has incurred funeral and burial expenses.

14-15. [*If defendant hospital operator is a public entity and hospital employees are public employees, allegation that claim was filed with and rejected by such entity. See § 295.51[1], Paragraphs 12, 13.*]

16. Plaintiff gave notice to defendant on _____ [*date*], of intention to commence this action. [A copy of the notice is attached hereto as Exhibit A and made a part hereof.]

WHEREFORE, plaintiffs pray judgment against defendants, and each of them, as follows:

1. For general damages;

2. For funeral and burial expenses incurred by plaintiff _____ [*name of surviving spouse*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff(s)

[*Verification, if desired. See § 295.51[1].*]

[2] Use of Form

The form in [1], *above,* is a complaint against a hospital and its employees for the wrongful death of a patient who committed suicide when the employees failed to adequately supervise that patient. When the death of a person is caused by the wrongful act or negligence of another, certain persons, or a personal representative on their behalf, may bring an action for damages against the person causing the death and any other person responsible (or against the personal representatives of such persons) [*Code Civ. Proc. § 377.60*].

If the plaintiff is a minor, a guardian ad litem must be appointed for the purposes of the action, unless the minor already has a guardian [*see Code Civ. Proc. § 372*]. For discussion and forms relating to appointment of a guardian ad litem generally, see Ch. 291, *Guardians ad Litem* .

[3] Duty to Protect Mental Patient

The duty of care imposed on a hospital with respect to its patients extends to safeguarding the patients from dangers due to mental incapacity [*Wood v. Samaritan Institution (1945) 26 Cal. 2d 847, 852, 161 P.2d 556]* . Thus, if those charged with the care and treatment of a mentally disturbed patient know of facts from which they could reasonably conclude that the patient is likely to harm himself or herself in the absence of preclusive measures, they must use reasonable care under the circumstances to prevent such harm [*Meier v. Ross Gen. Hosp. (1968) 69 Cal. 2d 420, 424, 71 Cal. Rptr. 903, 445 P.2d 519]* . For further discussion, see *§ 295.13[5][b]*.

[4] Allegations

The complaint alleges:

- The basis for plaintiff's entitlement to bring the action (Paragraph 1) [*see Code Civ. Proc. § 377.60*].

- A patient-hospital relationship from which a duty of protection owed to the decedent by the defendants can be inferred (Paragraphs 7-9).

- The defendants' negligent conduct breaching this duty and proximately causing decedent's death (Paragraph 10).

- Damages proximately resulting to plaintiffs from the death of the decedent (Paragraphs 11-13) [*see Code Civ. Proc. § 377.61*].

[5] Applicability of MICRA

This complaint alleges professional negligence against the defendant hospital. Therefore, the requirements of the Medical Injury Compensation Reform Act of 1975 (MICRA) apply [*see Murillo v. Good Samaritan Hospital (1979) 99 Cal. App. 3d 50, 56-57, 160 Cal. Rptr. 33 , disapproved on other grounds, Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal. 4th 992, 35 Cal. Rptr. 2d 685, 884 P.2d 142* ; *see also § 295.13[2]*].

MICRA's requirements include limitations on attorney's fees [*see Bus. & Prof. Code § 6146*], allowance of evidence of collateral sources [*see Civ. Code § 3333.1*], limitations on recovery of damages for noneconomic losses [*see Civ. Code § 3333.2*], a special statute of limitations [*see Code Civ. Proc. § 340.5*], a special requirement of a 90-day notice period before commencement of the action [*see Code Civ. Proc. § 364*; for a fomr of notice, *see § 295.50*], allowance of periodic payments of future damages [*see Code Civ. Proc. § 667.7*], and arbitration provisions [*see Code Civ. Proc. § 1295*].

These particular provisions of MICRA are discussed in detail in Ch. 415, *Physicians: Medical Malpractice* .

[6] Wrongful Death and Survival Actions

When the death of a person is caused by the wrongful act or neglect of another, certain specified persons, or the decedent's personal representative on their behalf, may maintain an action for damages against the wrongdoer, or in case of the death of such wrongdoer, against the wrongdoer's personal representatives, whether the wrongdoer dies before or after the decedent. If any other person is responsible for the wrongful act or neglect causing the death of the decedent, the action may also be maintained against such other person, or in case of his or her death, against his or her personal representatives [*Code Civ. Proc. §§ 377.40, 377.60*].

Code Civ. Proc. § 377.60 permits the decedent's surviving spouse, children, and issue of deceased children to bring a

wrongful death action without qualification, and permits others to bring an action under specified circumstances. For forms of allegations establishing that specific classes of persons are entitled to bring a wrongful death action, including allegations that are required of plaintiffs who are not the decedent's surviving spouse, children, or issue of deceased children, see Ch. 181, *Death and Survival Actions* .

In a wrongful death action, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under *Code Civ. Proc. § 377.34* (survival actions). The court must determine the respective rights in an award of the persons entitled to assert the cause of action [*Code Civ. Proc. § 377.61*].

An action under *Code Civ. Proc § 377.30* (survival actions) may be joined with a wrongful death action arising out of the same wrongful act or neglect [*Code Civ. Proc. § 377.62(a)*]. In addition, a wrongful death action and a survival action under *Code Civ. Proc § 377.31* (survival of pending actions) arising out of the same wrongful act or neglect may be consolidated for trial as provided in *Code Civ. Proc. § 1048* [*Code Civ. Proc. § 377.62(b)*].

[7] Cross References

For general information and cross references relating to complaints based on medical malpractice, see *§ 295.51[2]* et seq.

For alternative complaints and allegations for use in wrongful death actions, see Ch. 181, *Death and Survival Actions*

For discussion and forms related to proceedings for the appointment of a guardian ad litem for a minor in a civil action, see Ch. 291, *Guardians ad Litem*

For discussion and forms related to the confinement of persons with mental disorders, as well as the rights and liabilities of such persons, see Ch. 304, *Insane and Other Incompetent Persons*

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
Chapter 295 HOSPITALS
PART IV. FORMS

25-295 California Forms of Pleading and Practice--Annotated § 295.59

§ 295.59 Complaint for Damages [Civ. Code §§ 3333, 3333.2] for Personal Injuries Based on Professional Negligence--By Patient Against Hospital for Negligence of Physicians Employed by Hospital--General Form

[1] FORM Complaint for Damages [Civ. Code §§ 3333, 3333.2] for Personal Injuries Based on Professional Negligence--By Patient Against Hospital for Negligence of Physicians Employed by Hospital--General Form

[*Caption. See § 295.51[1].*]

Plaintiff alleges:

1-2. [*Capacity and residence of defendants. See § 295.51[1], Paragraphs 1, 2.*]

3. [*Fictitious name allegation, if appropriate. See § 295.51[1], Paragraph 3.*]

4. [*Control and management of licensed hospital by defendant hospital operator. See § 295.51[1], Paragraph 4.*]

5. At all times herein mentioned, defendants _____ [*names of physicians employed by hospital*] [and defendants DOES I-_____], and each of them, were physicians and surgeons duly licensed to practice medicine in the State of California, employed by defendant _____ [*name of hospital operator*] at the hospital to diagnose and treat the medical problems of patients and acting within the course and scope of such employment with the permission and consent of their codefendant.

6. On or about _____ [*date*], plaintiff was admitted to the hospital as a patient for the purpose of _____ [*specify medical service, e.g.,* obtaining diagnosis and treatment of severe chest pains]. Defendants, and each of them, then and there undertook to provide plaintiff with such diagnosis and treatment as plaintiff might require, and plaintiff remained in their care as a patient until his/her discharge from the hospital on or about _____ [*date*].

7. Defendants, and each of them, negligently treated and cared for plaintiff while he/she was in their care in that

_____ [*specify acts and omissions of defendants failing to conform to standard of care required of medical personnel*], and as a proximate result, plaintiff suffered the injuries hereinafter alleged.

8-10. [*Injuries and damages. See § 295.51[1], Paragraphs 9-11*.]

11-12. [*If defendant hospital operator is a public entity and defendant physicians are public employees, allegation that claim was filed with and rejected by such entity. See § 295.51[1], Paragraphs 12, 13*].

13. Plaintiff gave notice to defendant on _____ [*date*], of intention to commence this action. [A copy of the notice is attached hereto as Exhibit A and made a part hereof.]

[*Prayer. See § 295.51[1]*.]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 295.51[1]*.]

[2] Use of Form

The complaint in [1], *above*, may be used by a hospital patient against a hospital and physicians employed by the hospital in an action based on negligence to recover damages for personal injuries resulting from improper medical care. The form may be used in an action under the Federal Tort Claims Act [*28 U.S.C.S. §§ 1346(b), 2671-2680*] against a hospital operated by the federal government if appropriate allegations of federal district court jurisdiction and compliance with federal claim procedures prior to commencing suit are alleged. For a jurisdictional allegation, see Ch. 265, *Federal Courts: Jurisdiction and Removal* . For general discussion of pleading and practice under the Federal Tort Claims Act, see Moore's Federal Practice (3d ed. Matthew Bender); for related forms, see Frumer and Hall, Bender's Federal Practice Forms, Vol. 1, *Allegations of Jurisdiction--Particular Federal Question*, and Vol. 1A, *Complaints--Federal Tort Claims Act.* (Matthew Bender).

[3] Applicability of MICRA

This complaint alleges professional negligence against the defendant hospital. Therefore, the requirements of the Medical Injury Compensation Reform Act of 1975 (MICRA) apply [*see Murillo v. Good Samaritan Hospital (1979) 99 Cal. App. 3d 50, 56-57, 160 Cal. Rptr. 33 , disapproved on other grounds, Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal. 4th 992, 35 Cal. Rptr. 2d 685, 884 P.2d 142* ; *see also § 295.13[2]*].

MICRA's requirements include limitations on attorney's fees [*see Bus. & Prof. Code § 6146*], allowance of evidence of collateral sources [*see Civ. Code § 3333.1*], limitations on recovery of damages for noneconomic losses [*see Civ. Code § 3333.2*], a special statute of limitations [*see Code Civ. Proc. § 340.5*], a special requirement of a 90-day notice period before commencement of the action [*see Code Civ. Proc. § 364*; for a form of notice, *see § 295.50*], allowance of periodic payments of future damages [*see Code Civ. Proc. § 667.7*], and arbitration provisions [*see Code Civ. Proc. § 1295*].

These particular provisions of MICRA are considered in detail in Ch. 415, *Physicians: Medical Malpractice*.

[4] Liability of Hospital for Treatment by Medical Personnel

A hospital is liable for the malpractice of physicians, nurses, or other medical personnel who treat a patient as salaried employees of the hospital pursuant to an agreement between the hospital and the patient for medical services [*Brown v. La Societe Francaise De Bienfaisance Mutuelle (1903) 138 Cal. 475, 476, 71 P. 516]* . Traditionally, a hospital is not liable for the malpractice of medical personnel who are directly employed by the patient and who use hospital facilities to treat the patient in accordance with their privileges as members of the hospital's medical staff since such personnel are considered to be independent contractors [*Mayers v. Litow (1957) 154 Cal. App. 2d 413, 418, 316 P.2d 351* ; *but see* discussion in *§ 295.64*]. Nevertheless, under an estoppel or ostensible agency theory, a hospital may be liable for the malpractice of medical personnel who are actually independent contractors if a patient does not directly employ the personnel and the hospital causes the patient to believe reasonably that such personnel are hospital employees [*Seneris v. Haas (1955) 45 Cal. 2d 811, 831, 832, 291 P.2d 915]* .

For further discussion, see *§ 295.13[7]*. For discussion of ostensible agency and the liability of an employer for the torts of an independent contractor, see Ch. 427, *Principal and Agent* .

[5] Allegations

The complaint alleges:

- Acts from which a duty of care owed by defendants to plaintiff may be inferred--that is, the professional status of the defendant physicians in the employ of the defendant hospital and the admission of the plaintiff to the defendant hospital to receive medical services as a patient (Paragraphs 4-6).

- The defendants' negligent conduct breaching this duty and proximately resulting in injuries to the plaintiff (Paragraph 7).

- Damages resulting from the injury (Paragraphs 8-10).

- The filing of a claim with a public entity and its rejection by the entity (Paragraphs 12, 13). This allegation must be included in the complaint if the defendant hospital is operated by a public entity and the physicians employed by the hospital are public employees [*see Gov. Code §§ 945.4, 950.2-950.6*].

[6] Cross References

For general information and cross references relating to complaints based on medical malpractice, see *§ 295.51[2]* et seq.

For discussion and forms relating to malpractice actions against dentists and physicians, see Ch. 209, *Dentists* , and Ch. 415, *Physicians: Medical Malpractice* .

For procedural guides and forms relating to the perpetuation of testimony before commencing an action and the discovery of business records and other documents, see Ch. 193, *Discovery: Depositions* , Ch. 195, *Discovery: Inspection of Tangible Evidence* , Ch. 199, *Discovery: Preservation of Evidence* and Ch. 535, *Subpeona*

For discussion and forms related to the confinement of mentally disordered, addicted, and alcoholic persons, see Ch. 304, *Insane and Other Incompetent Persons*

For discussion and forms related to the payment of a judgment for future damages equal to or exceeding $50,000 in periodic installments, see Ch. 415, *Physicians: Medical Malpractice* .

Louisell and Williams, *Medical Malpractice, Vol. 1, Ch. 16, Vicarious Liability in Malpractice, §§ 16.01*, 16.05-16.08 (Matthew Bender)

Personal Injury: Actions, Defenses, Damages, Vol. 16, Hospitals and Asylums, §§ 1.05, 1.06

California Personal Injury Proof (Cal CEB 2000), Ch. 13, *Hospital and Medical Records*

Witkin, California Procedure, Vol. 4, *Pleading*, §§ 552, 575 (4th ed. 1997)

Witkin, Summary of California Law, vol. 3, *Agency and Employment*, §§ 29, 30; vol. 5, *Torts*, §§ 222-224, 260, 261, 778-791, 801-803 (10th ed. 2005)

Witkin, *California Evidence, §§ 762-778, 952-956* (3d ed. 1986)

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
Chapter 295 HOSPITALS
PART IV. FORMS

25-295 California Forms of Pleading and Practice--Annotated § 295.60

§ 295.60 Complaint for Damages for Minor's Prenatal Injuries and Injuries at Birth Based on Professional Negligence [Civ. Code §§ 43.1, 3333, 3333.2; Code Civ. Proc. § 340.4, 376; Fam. Code § 6601]--By Minor and Parents Against Hospital and Its Employees

[1] FORM Complaint for Damages for Minor's Prenatal Injuries and Injuries at Birth Based on Professional Negligence [Civ. Code §§ 43.1, 3333, 3333.2; Code Civ. Proc. § 340.4, 376; Fam. Code § 6601]--By Minor and Parents Against Hospital and Its Employees

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name of minor*], a minor, by _____ [*name*], his/her Guardian [ad Litem], and _____ [*names of parents*], Plaintiffs, vs. _____ [*names*], [and DOES I through _____,] Defendants.	)))))))	NO. _____ COMPLAINT FOR DAMAGES (Negligence) [Amount demanded _____ (exceeds *or* does not exceed) $10,000] [LIMITED CIVIL CASE]

_____

FIRST CAUSE OF ACTION FOR NEGLIGENCE BY PLAINTIFF _____ [*name of minor*] AGAINST ALL DEFENDANTS

Plaintiff _____ [*name of minor*], a minor, through his/her guardian [ad litem], alleges:

1. Plaintiff _____ [*name of mother*] is the mother and plaintiff _____ [*name of father*] is the father of plaintiff _____ [*name of minor*], a minor born on _____ [*date*

].

2. For the purpose of this action, plaintiff _____ [*name of guardian*] was duly appointed by the above-entitled court, and now is guardian [ad litem] of plaintiff _____ [*name of minor*] and brings this action on his/her own behalf and on behalf of plaintiff _____ [*name of minor*].

3-4. [*Capacity and residence of defendants. See § 295.51[1], Paragraphs 1, 2.*]

5. [*Fictitious name allegation, if appropriate. See § 295.51[1], Paragraph 3.*]

6. [*Control and management of licensed hospital by defendant hospital operator. See § 295.51[1], Paragraph 4.*]

7-8. [*Allegations of agency of hospital employees, including allegation of professional status of physicians employed by hospital. See § 295.51[1], Paragraph 5 and § 253.59, Paragraph 5.*]

9. At all times herein mentioned, defendants _____ [*names of nurses employed by hospital*] [and defendants DOES I-_____], and each of them, were duly licensed registered nurses in the State of California, employed by _____ [*name of hospital operator*] as such at said hospital and acting within the course and scope of such employment with the permission and consent of their codefendant.

10. Prior to and on or about _____ [*date*], plaintiff _____ [*name of mother*] was pregnant with plaintiff _____ [*name of minor*]. At approximately _____ [*time*] on that date, plaintiff _____ [*name of mother*] commenced labor and went to the hospital where she was admitted as a patient for the delivery of plaintiff _____ [*name of minor*].

11. Defendants, and each of them, so negligently and unskillfully treated, attended, and cared for plaintiff _____ [*name of mother*] while she was a patient in the hospital and so negligently, carelessly, and unskillfully delivered plaintiff _____ [*name of minor*] that, as a proximate result thereof, plaintiff _____ [*name of minor*] sustained serious personal injuries, including but not limited to _____ [*specify, e.g.*, brain damage] all to plaintiff's damage [in the sum of $_____]. [Plaintiff _____ (*name of minor*) is informed and believes and on such information and belief alleges that those injuries are of a permanent nature and will result in his/her permanent and total disability, to plaintiff's further damage.]

12. As a further proximate result of the negligence of defendants, and each of them, and of the resulting injuries, plaintiff _____ [*name of minor*] is informed and believes and thereon alleges that he/she will be obliged to incur expenses for medical care and hospitalization for an indefinite period in the future and to pay other expenses in the treatment and relief of his/her injuries in an amount unknown to him/her at present; when the same has been ascertained, plaintiff _____ [*name of minor*] will seek leave to amend this complaint to so state.

13. Plaintiff gave notice to defendant on _____ [*date*], of intention to commence this action. [A copy of the notice is attached hereto as Exhibit A and made a part hereof.]

SECOND CAUSE OF ACTION FOR NEGLIGENCE BY PLAINTIFF _____ [*names of parents*] AGAINST ALL DEFENDANTS

Plaintiffs _____ [*names of parents*] allege:

14. Plaintiffs _____ [*names of parents*] refer to Paragraphs 1, 3 through 11, and 13 of the First Cause

of Action and make them a part hereof by reference.

15. As a proximate result of the negligence of defendants, and each of them, and the resulting injuries of plaintiff _____ [*name of minor*], plaintiffs _____ [*names of parents*] were compelled to, and did, incur expenses for medical and surgical attention, hospitalization, nursing, medication, and incidentals for plaintiff _____ [*name of minor*].

WHEREFORE, plaintiffs pray judgment against defendants, and each of them, as follows:

On the FIRST CAUSE OF ACTION:

1. For general damages;

2. For future medical and related expenses;

On the SECOND CAUSE OF ACTION:

3. For medical and related expenses incurred as a result of injuries to plaintiff _____ [*name of minor*];

On all CAUSES OF ACTION:

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiffs

[*Verification, if desired. See § 295.51[1].*]

[2] Use of Form

The complaint in [1], *above*, may be used in an action based on negligence by a minor and his or her parents against a hospital and its employees to recover damages resulting from injuries to the minor before and during birth.

[3] Applicability of MICRA

This complaint alleges professional negligence against the defendant hospital. Therefore, the requirements of the Medical Injury Compensation Reform Act of 1975 (MICRA) apply [*see Murillo v. Good Samaritan Hospital (1979) 99 Cal. App. 3d 50, 56-57, 160 Cal. Rptr. 33 , disapproved on other grounds, Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal. 4th 992, 35 Cal. Rptr. 2d 685, 884 P.2d 142* ; *see also § 295.13[2]*].

MICRA's requirements include limitations on attorney's fees [*see Bus. & Prof. Code § 6146*], allowance of evidence of collateral sources [*see Civ. Code § 3333.1*], limitations on recovery of damages for noneconomic losses [*see Civ. Code § 3333.2*], a special statute of limitations [*see Code Civ. Proc. § 340.5*], a special requirement of a 90-day notice period before commencement of the action [*see Code Civ. Proc. § 364*; for a form of notice, *see § 295.50*], allowance of periodic payments of future damages [*see Code Civ. Proc. § 667.7*], and arbitration provisions [*see Code Civ. Proc. § 1295*].

These particular provisions of MICRA are considered in detail in Ch. 415, *Physicians: Medical Malpractice* .

[4] Action by Parents

Parents may maintain an action for injury to an unmarried child caused by the wrongful act or neglect of another [*Code Civ. Proc. § 376*]. Their damages in such an action include medical expenses incurred until trial [*Bauman v. San Francisco (1940) 42 Cal. App. 2d 144, 161, 108 P.2d 989]* , loss of the minor's earning capacity during minority [*Richmond v. Moore (1930) 103 Cal. App. 173, 182, 284 P. 681]* , and loss of the minor's earnings and services during minority [*Girard v. Irvine (1929) 97 Cal. App. 377, 380, 275 P. 840]* . The parent's cause of action does not include recovery for the loss of affection and society of the child because a parent has no cause of action in negligence to recover damages for loss of filial consortium [*Baxter v. Superior Court (1977) 19 Cal. 3d 461, 466, 138 Cal. Rptr. 315, 563 P.2d 871]* .

[5] Action of Minor

A minor may enforce his or her rights in a civil action in the same manner as a person of full legal age except that he or she must appear by a guardian [*Fam. Code § 6601*; *Code Civ. Proc. § 372*]. An unborn child is deemed an existing person so far as it is necessary for its interests in the event of its subsequent birth, but any action by or on behalf of a minor for injuries before or during birth must be brought within six years of the minor's birth [*Civ. Code § 43.1*; *Code Civ. Proc. § 340.4*].

In actions for prenatal medical malpractice against a health care provider, however, the shorter period of limitation under *Code Civ. Proc. § 340.5* (limitation period for minor's action against health care provider as three years or, if minor is under age of six, as three years or prior to minor's eighth birthday, whichever provides a longer period) is applicable. Although both *Code Civ. Proc. §§ 340.4* and *340.5* are by their words applicable to actions for prenatal medical malpractice, *Code Civ. Proc. § 340.5* is the later and more specific prescription and is an integral part of an interrelated, comprehensive legislative scheme relating to medical malpractice claims (Medical Injury Compensation Reform Act). Therefore, *Code Civ. Proc. § 340.5* supplants *Civ. Code § 43.1* in medical malpractice actions [*Knox v. Superior Court (1983) 140 Cal. App. 3d 782, 786, 189 Cal. Rptr. 800* ; *but see Anson v. County of Merced (1988) 202 Cal. App. 3d 1195, 1199, 1202, 249 Cal. Rptr. 457* (in action against public hospital, both *Gov. Code § 945.6* (statute of limitations for actions against public entities under Torts Claims Act) and *Code Civ. Proc. § 340.5* (statute of limitations for medical malpractice actions) apply with equal force, thus plaintiff who receives notice of rejection of claim pursuant to *Gov. Code § 913* must file action within shorter six-month period of *Gov. Code § 945.6*)].

In an action for personal injuries, a minor may recover for pain and suffering [*Capelouto v. Kaiser Foundation Hosp. (1972) 7 Cal. 3d 889, 895, 103 Cal. Rptr. 856, 500 P.2d 880]* , loss of future earning capacity as a person of legal age [*Girard v. Irvine (1929) 97 Cal. App. 377, 386, 275 P. 840]* , and future medical expenses [*Apodaca v. Haworth (1962) 206 Cal. App. 2d 209, 217, 23 Cal. Rptr. 461]* . Although loss of earning capacity during minority and medical expenses incurred prior to trial are usually recoverable by the minor's parents rather than the minor (see discussion under [4], *above*), if the parents or one of them as guardian ad litem for the minor pleads such damages in the minor's cause of action, the parents will be held to have waived their right to such recovery [*Bauman v. San Francisco (1940) 42 Cal. App. 2d 144, 160-161, 108 P.2d 989* (medical expenses); *Girard v. Irvine (1929) 97 Cal. App. 377, 386, 275 P.*

840 (loss of earning capacity during minority)], and the minor may recover such damages instead [*Morningred v. Golden State Co. (1961) 196 Cal. App. 2d 130, 138-139, 16 Cal. Rptr. 219]* . As a practical matter, some attorneys prefer to seek medical expenses in the minor's cause of action rather than include a separate cause of action by the parents.

For further discussion on actions by minors, see *§§ 295.14[4][b], 295.16*.

[6] Cross References

For general information and cross references relating to complaints based on medical malpractice, see *§ 295.51[2]* et seq.

For an alternative complaint by a minor for prenatal injuries against a doctor and a hospital, see Ch. 367A, *Minors: Tort Actions*

For discussion and forms relating to actions by minors and their parents for personal injuries of the minors, see Ch. 394, *Parent and Child*

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25-295 California Forms of Pleading and Practice--Annotated § 295.61

§ 295.61 Complaint for Damages [Civ. Code §§ 3333, 3333.2] for Personal Injuries Based on Professional Negligence--By Patient Against Physician, Hospital, and Hospital Employees--Unusual Injury of Patient Under Anesthesia During Surgery

[1] FORM Complaint for Damages [Civ. Code §§ 3333, 3333.2] for Personal Injuries Based on Professional Negligence--By Patient Against Physician, Hospital, and Hospital Employees--Unusual Injury of Patient Under Anesthesia During Surgery

[*Caption. See § 295.51[1].*]

Plaintiff alleges:

1-2. [*Capacity and residence of defendants. See § 295.51[1], Paragraphs 1, 2.*]

3. [*Fictitious name allegation, if appropriate. See § 295.51[1], Paragraph 3.*]

4. [*Control and management of licensed hospital by defendant hospital operator. See § 295.51[1], Paragraph 4.*]

5. At all times herein mentioned, defendant _____ [*name of plaintiff's physician*] was a physician and surgeon duly licensed to practice medicine and perform surgery in the State of California with offices in _____ [*city*], _____ County, California.

6-7. [*Allegations of professional status and agency of physicians and nurses employed by hospital. See § 295.59[1], Paragraph 5, and § 295.60[1], Paragraph 9.*]

8. On or about _____ [*date*], plaintiff was admitted to the hospital as a patient for _____ [*specify surgical procedure, e.g.,* an appendectomy] to be performed by defendant _____ [*name of plaintiff's physician*]. At that time and place, defendant _____ [*name of hospital operator*] undertook to care for plaintiff and to provide the operating room, surgical equipment, and surgical

assistants for plaintiff's surgery.

9. On or about _____ [*date*], defendant _____ [*name of plaintiff's physician*] performed the _____ [*specify surgical procedure, e.g.,* appendectomy] on plaintiff with the assistance of defendants _____ [*names of physicians and nurses employed by hospital*]. During the entire course of the surgery, plaintiff was rendered unconscious by an anesthetic administered to plaintiff by defendant _____ [*name of anesthesiologist employed by hospital*], and defendants, and each of them, had exclusive control and custody of plaintiff's person and all instrumentalities used during the surgery.

10. Defendants, and each of them, so negligently, carelessly, and unskillfully performed and assisted in the performance of the _____ [*specify surgical procedure, e.g.,* appendectomy] and so negligently cared for plaintiff during the surgery that, as a proximate result, _____ [*specify adverse result, e.g.,* plaintiff's left arm, which was healthy and completely functional before the surgery, was paralyzed].

11-13. [*Injuries and damages. See § 295.51[1], Paragraphs 9-11.*]

14-15. [*If defendant hospital operator is a public entity and defendant physicians and nurses employed by hospital are public employees, allegation that claim was filed with and rejected by such entity. See § 295.51[1], Paragraphs 12, 13.*]

16. [*Allegation of giving of notice of intent to sue. See § 295.51[1], Paragraph 14.*]

[*Prayer. See § 295.51[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 295.51[1].*]

[2] Use of Form

The complaint in [1], *above,* may be used in an action based on negligence by a patient against the patient's physician, a hospital, and hospital employees who assist the patient's physician during surgery in which the patient sustains unusual injuries.

[3] Applicability of MICRA

This complaint alleges professional negligence against the defendant hospital. Therefore, the requirements of the Medical Injury Compensation Reform Act of 1975 (MICRA) apply [*see Murillo v. Good Samaritan Hospital (1979) 99 Cal. App. 3d 50, 56-57, 160 Cal. Rptr. 33 , disapproved on other grounds, Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal. 4th 992, 35 Cal. Rptr. 2d 685, 884 P.2d 142* ; *see also § 295.13[2]*].

MICRA's requirements include limitations on attorney's fees [*see Bus. & Prof. Code § 6146*], allowance of evidence of collateral sources [*see Civ. Code § 3333.1*], limitations on recovery of damages for noneconomic losses [*see Civ. Code § 3333.2*], a special statute of limitations [*see Code Civ. Proc. § 340.5*], a special requirement of a 90-day notice period

before commencement of the action [*see Code Civ. Proc. § 364*; for a form of notice, *see § 295.50*], allowance of periodic payments of future damages [*see Code Civ. Proc. § 667.7*], and arbitration provisions [*see Code Civ. Proc. § 1295*].

These particular provisions of MICRA are considered in detail in Ch. 415, *Physicians: Medical Malpractice* .

[4] Res Ipsa Loquitur

Traditionally, a plaintiff is entitled to a presumption under the doctrine of res ipsa loquitur that the defendant's negligence proximately caused the plaintiff's injuries when the plaintiff establishes that (1) his or her injuries are of a kind which do not ordinarily occur in the absence of someone's negligence, (2) the injuries were caused by an agency or instrumentality in the exclusive control of the defendant, and (3) no voluntary conduct on the plaintiff's part was a responsible cause of the injuries [*Vistica v. Presbyterian Hospital (1967) 67 Cal. 2d 465, 469-470, 62 Cal. Rptr. 577, 432 P.2d 193]* . However, when a plaintiff's injuries during medical treatment raise an inference of negligence as the proximate cause of the injuries but the plaintiff is unable to identify the particular instrumentality or person in control of the instrumentality that caused the injuries because the plaintiff was unconscious at the time, the plaintiff is entitled to invoke the res ipsa presumption against all persons who had actual control or the right to control the plaintiff's body or an instrumentality that might have caused the injuries [*Ybarra v. Spangard (1944) 25 Cal. 2d 486, 492-494, 154 P.2d 687* ; *but see Elcome v. Chin (2003) 110 Cal. App. 4th 310, 320-321, 1 Cal. Rptr. 3d 631* (expert testimony may be required to establish probability of negligence of those in control as cause of injury)]. For further discussion of the operation and application of the doctrine of res ipsa loquitur in medical malpractice cases, see *§§ 295.22, 295.41[15], 295.43[10]*.

[5] Cross References

For general information and cross references relating to complaints based on medical malpractice, see *§ 295.51[2]* et seq.

Personal Injury: Actions, Defenses, Damages, Vol. 16, Hospitals and Asylums, § 1.04

Witkin, *California Evidence, §§ 230-244*, 253-255 (3d ed. 1986)

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PART IV. FORMS

25-295 California Forms of Pleading and Practice--Annotated § 295.62

§ 295.62 Allegations--Refusal to Render Emergency Medical Services or Assistance [Health & Safety Code § 1317]

[1] FORM Allegations--Refusal to Render Emergency Medical Services or Assistance [Health & Safety Code § 1317]

1. [At all times herein mentioned, a specifically designated area of the hospital was fully equipped and staffed with physicians and nurses for the provision of emergency medical services to any member of the public who came to the hospital with urgent medical problems.]

2. On or about _____ [*date*], _____ [plaintiff *or* decedent] _____ [was brought *or* came] to [the emergency room of] the hospital for treatment of _____ [*specify emergency condition, e.g.*, severe chest pains].

[*EITHER*]

3. Defendant, acting through his/her/its agents and employees, unlawfully refused to examine or treat _____ [plaintiff *or* decedent] because of _____ [plaintiff's *or* decedent's] _____ [*specify protected characteristic, e.g.*, citizenship *or* insurance status *or* preexisting medical condition] in that _____ [*specify facts showing refusal to render emergency services was based on protected characteristic*].

[*OR*]

3. Defendant, acting through his/her/its agents and employees, unlawfully refused to examine or treat _____ [plaintiff *or* decedent] in any way until _____ [plaintiff *or* decedent *or* a legally responsible relative *or* _____ (plaintiff's *or* decedent's) guardian] gave proof of ability and willingness to pay for such examination and treatment.

[*OR*]

3. Defendant, acting through his/her/its agents and employees, examined _____ [plaintiff *or* decedent] but negligently failed to determine that _____ [plaintiff *or* decedent] was threatened with _____ [*specify serious illness or injury or death*] and to immediately provide such medical treatment or care as he/she required.

[*OR, if hospital lacks appropriate facilities and available personnel or does not maintain emergency medical service*]

3. Defendant, acting through his/her/its agents and employees, negligently failed to direct and assist _____ [plaintiff *or* decedent] to a nearby facility where he/she might have received the emergency medical care that defendant knew, or in the exercise of reasonable care should have determined, was necessary to prevent _____ [*specify serious illness or injury or death*] of _____ [plaintiff *or* decedent].

[*CONTINUE*]

4. As a proximate result of defendant's _____ [unlawful refusal to provide _____ (plaintiff *or* decedent) *or* negligent failure to provide _____(plaintiff *or* decedent) *or* negligent failure to assist _____ (plaintiff *or* decedent) in obtaining] necessary emergency medical services, and as a proximate result of the delay that defendant's _____ [unlawful refusal *or* negligence] caused _____ [plaintiff *or* decedent] to incur in obtaining necessary medical treatment, _____ [plaintiff *or* decedent] _____ [sustained the injuries hereinafter alleged *or* died].

[2] Use of Form

The allegations in [1], *above*, may be used in a complaint for personal injuries or wrongful death if a hospital wrongfully refuses to render emergency medical care or, lacking appropriate facilities and available personnel, fails to assist a person needing emergency medical care in obtaining it elsewhere. These allegations may be inserted into the complaint in § 295.59[1] as the substantive allegations of negligence against the hospital and its employee physicians.

[3] Applicability of MICRA

These allegations allege professional negligence against the defendant hospital. Therefore, the requirements of the Medical Injury Compensation Reform Act of 1975 (MICRA) should apply [*see Murillo v. Good Samaritan Hospital (1979) 99 Cal. App. 3d 50, 56-57, 160 Cal. Rptr. 33 , disapproved on other grounds, Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal. 4th 992, 35 Cal. Rptr. 2d 685, 884 P.2d 142* ; *see also § 295.13[2]*].

MICRA's requirements include limitations on attorney's fees [*see Bus. & Prof. Code § 6146*], allowance of evidence of collateral sources [*see Civ. Code § 3333.1*], limitations on recovery of damages for noneconomic losses [*see Civ. Code § 3333.2*], a special statute of limitations [*see Code Civ. Proc. § 340.5*], a special requirement of a 90-day notice period before commencement of the action [*see Code Civ. Proc. § 364*; for a form of notice, *see § 295.50*], allowance of periodic payments of future damages [*see Code Civ. Proc. § 667.7*], and arbitration provisions [*see Code Civ. Proc. § 1295*].

These particular provisions of MICRA are considered in detail in Ch. 415, *Physicians: Medical Malpractice* .

[4] Duty to Provide Emergency Services

A licensed hospital that maintains and operates a department providing emergency services to the public must provide such services on request to any person in danger of loss of life or serious illness or injury if the hospital has appropriate facilities and qualified personnel available, but the hospital will not be liable in any action arising out of a refusal to render emergency medical services if the refusal is based on the determination, exercising reasonable care, that the person is not suffering from an emergency medical condition, or that the health facility does not have the appropriate facilities or qualified personnel available to render those services [*Health & Safety Code § 1317(a), (c)*].

If a licensed hospital does not maintain an emergency department, its employees must nevertheless exercise reasonable care to determine whether an emergency exists and must assist the person seeking emergency care in every way reasonable under the circumstances to a nearby facility which can render the needed services [*Health & Safety Code § 1317(e)*].

The provision of emergency services and care must not be based on or affected by the patient's ethnicity, citizenship, age, preexisting medical condition, insurance status, economic status, or ability to pay for medical services or any other characteristic listed or defined in *Civ. Code § 51(b)* or *(e)*, except to the extent that a circumstance such as age, sex, preexisting medical condition, or physical or mental disability is medically significant to the provision of appropriate medical care to the patient [*Health & Safety Code § 1317(b)*]. In addition, emergency services and care must be rendered without first questioning the patient or any other person as to his or her ability to pay [*Health & Safety Code § 1317(d)*]. However, the patient or his or her legally responsible relative or guardian can be required to execute an agreement to pay for the services or otherwise supply insurance or credit information promptly after the services are rendered [*Health & Safety Code § 1317(d)*].

For more discussion on a hospital's duty of care to provide emergency services, see *§ 295.13[6][b]*. For a listing of allegations which are essential to a complaint for personal injuries based on negligence, see discussion in *§§ 295.51[3], 295.59[5]*, as well as Ch. 380, *Negligence* . For a listing of allegations which are essential to a complaint for wrongful death based on negligence, see *§ 295.58[4], [6]*, as well as Ch. 181, *Death and Survival Actions* .

[5] Cross References

For general information and cross references relating to complaints based on medical malpractice, see *§ 295.51[2]* et seq.

For discussion and forms related to a hospital's lien for emergency medical services under *Civ. Code §§ 3045.1-3045.6*, see Ch. 342, *Liens and Wage Preferences*

For complete discussion of medical malpractice and profession negligence actions against health care providers, including discussion of the Medical Injury Compensation Reform Act of 1975, see Ch. 415, *Physicians: Medical Malpractice*

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25-295 California Forms of Pleading and Practice--Annotated § 295.63

§ 295.63 Allegation--Unauthorized Transfer for Nonmedical Reasons [Health & Safety Code §§ 1317.2, 1317.6(j)]

[1] FORM Allegation--Unauthorized Transfer for Nonmedical Reasons [Health & Safety Code §§ 1317.2, 1317.6(j)]

1. On or about _____ [*date*], _____ [plaintiff *or* decedent] _____ [was brought *or* came] to the hospital for treatment of _____ [*specify condition, e.g.,* a gunshot wound to the chest area].

2. Thereafter, _____ [plaintiff *or* decedent] received emergency medical treatment at defendant hospital consisting of the following: _____ [*specify, e.g.,* cleaning the wound].

3. Thereafter, _____ [plaintiff *or* decedent] was transferred from defendant hospital to _____ [*name of receiving hospital*] and transported there by means of _____ [*specify, e.g.,* taxicab].

4. Plaintiff is informed and believes, and on that basis alleges, that this transfer was for a nonmedical reason in that _____ [*specify, e.g.,* agents of defendant hospital learned that _____ (plaintiff *or* decedent) had no medical insurance and was otherwise without financial resources and unable to pay for medical treatment and services and therefore determined that he/she should be transferred].

5. This nonmedical transfer was in violation of the duty owed to _____ [plaintiff *or* decedent] by defendant hospital under *Health and Safety Code Section 1317.2* in that _____ [*specify reason, e.g.,* defendant hospital through its agents and employees did not determine, within a reasonable medical probability, that the delay caused by the transfer would not create a medical hazard to _____ (plaintiff *or* decedent)].

6. As a proximate result of these acts and this breach of duty by defendant hospital, _____ [plaintiff *or* decedent] _____ [*specify harm, e.g.,* died while in transit to the receiving hospital from the gunshot wound for which he/she sought treatment at defendant hospital].

[*Continue with allegations regarding damages. See § 295.51[1].*]

7. In addition to amounts recoverable for damages, _____ [plaintiff *or* decedent] is entitled to recover reasonable attorney's fees under the authority of *Health and Safety Code Section 1317.6(j)*.

[2] Use of Form

The allegations in [1], *above*, may be used in a complaint for personal injury or wrongful death if a hospital wrongfully transfers a patient for a nonmedical reason in violation of the requirements of *Health & Safety Code § 1317.2* [*see Health & Safety Code § 1317.6(j)*]. These allegations may be inserted into the form in *§ 295.59* as the substantive allegations of negligence against the hospital and its employee physicians.

[3] Applicability of MICRA

This allegation alleges professional negligence against the defendant hospital. Therefore, the requirements of the Medical Injury Compensation Reform Act of 1975 (MICRA) should apply [*see Murillo v. Good Samaritan Hospital (1979) 99 Cal. App. 3d 50, 56-57, 160 Cal. Rptr. 33 , disapproved on other grounds, Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal. 4th 992, 35 Cal. Rptr. 2d 685, 884 P.2d 142* ; *see also § 295.13[2]*; *but see* [5], *below*].

MICRA's requirements include limitations on attorney's fees [*see Bus. & Prof. Code § 6146*], allowance of evidence of collateral sources [*see Civ. Code § 3333.1*], limitations on recovery of damages for noneconomic losses [*see Civ. Code § 3333.2*], a special statute of limitations [*see Code Civ. Proc. § 340.5*], a special requirement of a 90-day notice period before commencement of the action [*see Code Civ. Proc. § 364*; for a form of notice, *see § 295.50*], allowance of periodic payments of future damages [*see Code Civ. Proc. § 667.7*], and arbitration provisions [*see Code Civ. Proc. § 1295*].

These particular provisions of MICRA are considered in detail in Ch. 415, *Physicians: Medical Malpractice* .

[4] Hospital's Duties With Regard to Nonmedical Transfer

This form sets forth as an example of an improper nonmedical transfer one for which it was not determined, within a reasonable medical probability, that the transfer would not create a medical hazard to the person transferred [*see Health & Safety Code § 1317.2(b)*]. Other possible grounds are the following:

- If there was no examination or evaluation, including necessary consultations with specialists, prior to the transfer [*see Health & Safety Code § 1317.2(a)*].

- If the receiving hospital was not notified of the transfer or did not consent [*see Health & Safety Code § 1317.2(c)*].

- If the transferring hospital did not provide the appropriate personnel or equipment in effecting the transfer [*see Health & Safety Code § 1317.2(d)*].

- If the pertinent medical records and test results were not transferred with the person [*see Health & Safety Code § 1317.2(e)*].

For further discussion, see *§ 295.13[6][c]*.

[5] Statutory Cause of Action

Any person who suffers personal harm as a result of an improper transfer for nonmedical reasons may recover damages, reasonable attorney's fees, and other appropriate relief in a civil action against the transferring hospital [*Health & Safety Code § 1317.6(j)*]. A violation of the statute may also establish a lack of due care in an action based on professional negligence [*see Evid. Code § 669(a)*; *Cade v. Mid-City Hosp. Corp. (1975) 45 Cal. App. 3d 589, 598, 119 Cal. Rptr. 571* ; *see also § 295.13[6]*].

Nothing in the law suggests that a violation of the statute alone, absent some injury to the plaintiff resulting from the violation, is sufficient to establish a cause of action. For example, the failure to transmit the required Transfer Summary [*see Health & Safety Code § 1317.2(f)*] would not appear to be actionable unless the plaintiff could connect the lack of a summary to his or her injury.

An unresolved issue is whether a cause of action under *Health & Safety Code § 1317.6(j)* is one for professional negligence within the meaning of MICRA so that the requirements and limitations of MICRA attach [*see* [3], *above*]. The acts that give rise to the cause of action under the statute would almost certainly be characterized as professional negligence as defined in MICRA [*see Barris v. County of Los Angeles (1999) 20 Cal. 4th 101, 110, 83 Cal. Rptr. 2d 145, 972 P.2d 966* ; *Murillo v. Good Samaritan Hospital (1979) 99 Cal. App. 3d 50, 56-57, 160 Cal. Rptr. 33* , *disapproved on other grounds, Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal. 4th 992, 35 Cal. Rptr. 2d 685, 884 P.2d 142* ; *see also § 295.13[2]*]. The contrary argument is that by establishing an express statutory cause of action, the legislature intended to give the injured party an additional remedy unencumbered by the otherwise-applicable requirements of a medical malpractice or professional negligence action [*see Health & Safety Code § 1317.6(j)* (provisions are in addition to and do not limit the availability of other remedies)].

However, the cap on noneconomic damages provided in MICRA by *Civ. Code § 3333.2* does apply to a claim for failure to provide stabilizing treatment brought under an analogous federal statute, which, as discussed in *§ 295.13[6][d]*, in the Introduction, is designed generally to prevent hospitals that have entered into Medicare provider agreements from inappropriately transferring or refusing to treat patients requiring emergency medical treatment [*Barris v. County of Los Angeles (1999) 20 Cal. 4th 101, 109, 83 Cal. Rptr. 2d 145, 972 P.2d 966* ; *see 42 U.S.C.S. § 1395dd*]. In the case so holding, the California Supreme Court's conclusion that these claims are "based on professional negligence," and therefore subject to the provisions of *Civ. Code § 3333.2*, would seem equally applicable to actions brought under the state statutes, at least if the state claims are also based on the failure to provide stabilizing treatment prior to transfer [*see Barris v. County of Los Angeles (1999) 20 Cal. 4th 101, 110, 83 Cal. Rptr. 2d 145, 972 P.2d 966]* .

[6] Cross References

For general information and cross references relating to complaints based on medical malpractice, see *§ 295.51[2]* et seq.

For a listing of allegations that are essential to a complaint for wrongful death based on negligence, see *§ 295.58, above*, and Ch. 181, *Death and Survival Actions*

For a listing of allegations that are essential to a complaint for personal injuries based on negligence, see *§§ 295.51* and *295.59*, and Ch. 380, *Negligence*

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§ 295.64 Complaint for Damages [Civ. Code §§ 3333, 3333.2] for Personal Injuries Based on Professional Negligence--By Patient Against Hospital and Governing Body of Hospital--Failure to Determine or Review Medical Staff Member's Performance

[1] FORM Complaint for Damages [Civ. Code §§ 3333, 3333.2] for Personal Injuries Based on Professional Negligence--By Patient Against Hospital and Governing Body of Hospital--Failure to Determine or Review Medical Staff Member's Performance

[*Caption. See § 295.51[1].*]

Plaintiff alleges:

1-2. [*Capacity and residence of defendants. See § 295.51[1], Paragraphs 1, 2.*]

3. [*Fictitious name allegation, if appropriate. See § 295.51[1], Paragraph 3.*]

4. [*Control and management of licensed hospital by defendant hospital operator. See § 295.51[1], Paragraph 4.*]

5. At all times herein mentioned, defendants _____ [*names of hospital's governing body members*] [and defendants DOES I-_____], and each of them, were the duly qualified members of and constituted the _____ [Board of Trustees *or* Board of Directors *or other governing body of hospital*] of the hospital, and in doing the things herein alleged, were the agents of defendant _____ [*name of hospital operator*], acting in the course and scope of their authority as such agents with the permission and consent of their codefendant.

6. At all times herein mentioned, defendants, and each of them, were vested with final authority and responsibility for the conduct of the hospital by _____ [Standards of the Joint Commission on Accreditation of Hospitals *or* regulations promulgated by the Office of Statewide Health Planning and Development and the State Department of Health pursuant to *Sections 1276* and *1277 of the Health and Safety Code or* bylaws and rules of the

hospital], including the appointment and periodic review of the competence of physicians and surgeons on the medical staff of the hospital in order to maintain the highest level of medical care for patients in the hospital.

7. At all times herein mentioned, _____ [*name of plaintiff's physician*] was a physician and surgeon duly licensed to practice medicine and perform surgery in the State of California and a member of the medical staff of the hospital with privileges to use hospital facilities for _____ [*specify, e.g.,* the performance of orthopedic surgery].

8. On or about _____ [*date*], plaintiff was suffering from _____ [*specify illness, e.g.,* severe lower back pain] and consulted _____ [*name of plaintiff's physician*] for diagnosis and treatment. Thereafter, on or about _____ [*date*], plaintiff entered the hospital as a patient on the advice of _____ [*name of plaintiff's physician*] for _____ [*specify treatment by plaintiff's physician, e.g.,* exploratory surgery to be performed by _____ (*name of plaintiff's physician*)].

9. Defendants, and each of them, negligently and carelessly failed to live up to the standards of _____ [accredited hospitals in the same or a similar community *or* regulations promulgated by the California State Department of Health pursuant to *Sections 1276* and *1277 of the Health and Safety Code* for licensed health care facilities such as the hospital *or* the bylaws of the hospital] in that defendants, and each of them, _____ [*specify violation of standards established by the Joint Commission on Accreditation of Hospitals, Department of Health regulations for licensed health care facilities, or hospital bylaws, e.g.,* failed to restrict the privileges of _____ (*name of plaintiff's physician*) to use hospital facilities for _____ (*specify, e.g.,* orthopedic surgery), although they knew or should have known that _____ (*name of plaintiff's physician*) _____ (was not competent and qualified to perform such medical services for patients *or* was not following accepted standards of professional practice in performing such medical services for patients *or* failed to review the treatment rendered by _____ [*name of plaintiff's physician*] to plaintiff and to require a consultation with an expert regarding the complications of plaintiff's case)].

10. As a proximate result of the negligence of defendants, and each of them, on or about _____ [*date*], _____ [*name of plaintiff's physician*] _____ [*specify improper treatment of plaintiff, e.g.,* performed unnecessary surgery on plaintiff in the hospital *or* incompetently and negligently performed plaintiff's surgery in the hospital, carelessly piercing a large artery while probing between plaintiff's vertebrae] and caused the injuries to plaintiff hereinafter alleged.

11-13. [*Injuries and damages. See § 295.51[1], Paragraphs 9-11.*]

14-15. [*If defendant hospital operator is a public entity, allegation that claim was filed with and rejected by such entity. See § 295.51[1], Paragraphs 12, 13.*]

16. [*Allegation of giving of notice of intent to sue. See § 295.51[1], Paragraph 14.*]

[*Prayer. See § 295.51[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 295.51[1].*]

[2] Use of Form

The complaint in [1], *above,* may be used in an action based on professional negligence by a patient against a hospital and its governing body to recover damages for personal injuries resulting from improper medical treatment by a physician on the hospital's medical staff whose competence and performance have not been adequately determined and reviewed by the governing body.

[3] Applicability of MICRA

This complaint alleges professional negligence against the defendant hospital. Therefore, the requirements of the Medical Injury Compensation Reform Act of 1975 (MICRA) should apply [*see Murillo v. Good Samaritan Hospital (1979) 99 Cal. App. 3d 50, 56-57, 160 Cal. Rptr. 33* , *disapproved on other grounds, Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal. 4th 992, 35 Cal. Rptr. 2d 685, 884 P.2d 142* ; *see also § 295.13[2]*].

MICRA's requirements include limitations on attorney's fees [*see Bus. & Prof. Code § 6146*], allowance of evidence of collateral sources [*see Civ. Code § 3333.1*], limitations on recovery of damages for noneconomic losses [*see Civ. Code § 3333.2*; *Bell v. Sharp Cabrillo Hospital (1989) 212 Cal. App. 3d 1034, 1051, 260 Cal. Rptr. 886]* , a special statute of limitations [*see Code Civ. Proc. § 340.5*], a special requirement of a 90-day notice period before commencement of the action [*see Code Civ. Proc. § 364*; for a form of notice, *see § 295.50*], allowance of periodic payments of future damages [*see Code Civ. Proc. § 667.7*], and arbitration provisions [*see Code Civ. Proc. § 1295*].

These particular provisions of MICRA are considered in detail in Ch. 415, *Physicians: Medical Malpractice* .

[4] Duty to Determine and Review Competence of Staff

A licensed hospital is required to restrict membership on its medical staff to licensed practitioners, competent in their respective fields, and worthy in character and in professional ethics [*Bus. & Prof. Code §§ 2282(b), 2283(a)*]. In addition, under *Health & Safety Code § 1250* and *22 Cal. Code Reg. §§ 70005, 70701, 71035,* and *71501,* the governing body of a licensed hospital has overall administrative and professional responsibility for medical staff appointments and for the the periodic review of medical staff members' qualifications to competently perform the procedures for which they are given staff privileges. Because of these statutory and regulatory duties, a hospital can be liable to a patient for the negligence of a member of its medical staff, if the hospital's failure to ensure the competence of its medical staff through selection and review creates an unreasonable risk of harm to its patients [*see Hay v. Scripps Memorial Hospital (1986) 183 Cal. App. 3d 753, 761, 228 Cal. Rptr. 413* ; *Elam v. College Park Hospital (1983) 132 Cal. App. 3d 332, 346-347, 183 Cal. Rptr. 156]* . Although *Evid. Code § 1157* limits discovery from medical staff committees, it does not create a bar against introduction of evidence, and does not prevent a plaintiff from otherwise discovering relevant evidence that can establish such a cause of action [*see Alexander v. Superior Court (1993) 5 Cal. 4th 1218, 1223-1224 n.4, 23 Cal. Rptr. 2d 397, 859 P.2d 96* ; *Webman v. Little Co. of Mary Hosp. (1995) 39 Cal. App. 4th 592, 599, 46 Cal. Rptr. 2d 90]* .

[5] Allegations

The complaint alleges:

- Acts from which a duty of care owed by defendants to plaintiff may be inferred, i.e., the defendant governing body's responsibility for evaluating the competence of medical staff members, the status of the plaintiff's physician as a medical staff member, and the plaintiff's status as a patient in the defendant hospital (Paragraphs 6-8).

- The defendants' negligent conduct breaching this duty (Paragraph 9).

- Injuries and damages proximately resulting from the defendants' breach (Paragraphs 10-13).

- The filing of a claim with a public entity and its rejection by the netity (Paragraphs 14, 15). This allegation must be included in the complaint if the defendant hospital is operated by a public entity [*see Gov. Code § 945.5*].

[6] Cross References

For general information and cross references relating to complaints based on medical malpractice, see *§ 295.51[2]* et seq.

Witkin, California Evidence, § 1095 (3d ed. 1986)

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§ 295.65 Complaint to Permit Inspection and to Obtain Copies of Patient Records--By Patient or Patient's Representative Against Health Care Provider [Health & Safety Code § 123120]

[1] FORM Complaint to Permit Inspection and to Obtain Copies of Patient Records--By Patient or Patient's Representative Against Health Care Provider [Health & Safety Code § 123120]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT TO PERMIT INSPECTION [AND
Defendant.	)	PERMIT COPIES] OF PATIENT RECORDS
	)	
	)	

_____

Plaintiff alleges:

[*EITHER*]

1. Plaintiff is a [former] patient of _____ [*name*], defendant.

[*OR*]

1. Plaintiff is the _____ [father *or* mother *or* guardian] of _____ [*name*], a minor child of the age of _____ who is a [former] patient of _____ [*name*], defendant.

[*OR*]

1. Plaintiff is the _____ [guardian *or* conservator] of the person of _____ [*name*], an adult and a [former] patient of _____ [*name*], defendant.

[*CONTINUE*]

2. Defendant _____ [*name*] is, and at all times herein mentioned was, a _____ [*describe capacity as health care provider, e.g.,* health facility licensed pursuant to *Health & Safety Code Sections 1250-1339.50*] with his/her/its principal place of business in _____ [*city*], _____ County, California [*or allege residence or other basis of venue as appropriate*].

3. On or about _____ [*date*], plaintiff presented to defendant a written request to inspect patient records relating to _____ [*name or* plaintiff] pursuant to *Health and Safety Code Section 123110(a)*. The request was presented to defendant by _____ [*specify manner by which request was presented, e.g.,* delivering it by hand to defendant at his/her/its principal place of business at _____ (*specify address*)]. At the time of presenting the request, plaintiff offered to pay, and is still prepared to pay, the reasonable clerical costs incurred in locating and making the records available. [A copy of the request is attached hereto as Exhibit A and made a part hereof.]

[4. On or about _____ (*date*), plaintiff presented to defendant a written request for copies of _____ (all *or* a portion) of the patient records relating to _____ (*name or* plaintiff) pursuant to *Health and Safety Code Section 123110(b)*. At the time of presenting the request, plaintiff offered to pay, and is still prepared to pay, any fees allowed by Section 123110(b) to defray the cost of copying and any additional reasonable clerical costs incurred in making the records available. (The request was included in the written request to inspect plaintiff's patient records, attached hereto as Exhibit A *or* The request, a copy of which is attached hereto as Exhibit B and made a part hereof, was presented to defendant by _____ (*specify manner by which request was presented*).)]

[5. On or about _____ (*date*), plaintiff presented to defendant, pursuant to *Health and Safety Code Section 123110(c)*, a written request to transmit copies of _____ (all *or* designated) _____ (X rays *or* tracings derived from _____ (electrocardiography *or* electroencephalography *or* electromyography)) to _____ (*name of other health care provider*). Defendant did not transmit the above-described original X rays or tracings to _____ (*name of other health care provider*) within 15 days after receipt of the request. At the time plaintiff presented the request, plaintiff offered to pay, and is still prepared to pay, all reasonable costs, not exceeding actual costs, that defendant may incur in providing copies. Further, plaintiff offered to meet, and is still prepared to meet, all reasonable conditions set by defendant to ensure the return of original X rays transmitted to another health care provider. (The request was included in the written request to inspect plaintiff's patient records, attached hereto as Exhibit A *or* The request, a copy of which is attached hereto as Exhibit B and made a part hereof, was presented to defendant by _____ (*specify manner by which request was presented*).)]

6. Defendant refused, and continues to refuse, plaintiff permission to inspect the patient records. [Defendant also refused, and continues to refuse, _____ (to transmit to plaintiff copies of the patient records which were requested to be copied *and/or* to transmit to _____ (*name of other health care provider*) copies of _____ (X rays *and/or* tracings) which were requested to be transmitted).]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an order requiring defendant to permit plaintiff to inspect the patient records of _____ [*name or* plaintiff] that are maintained by, or are in the custody or control of, defendant;

[2. For an order requiring defendant to provide to plaintiff copies of the patient records of _____ (*name or* plaintiff) that are specified in plaintiff's written request for copies;]

[3. For an order requiring defendant to transmit to _____ (*name of other health care provider*) copies of the _____ (X-rays *and/or* tracings) that are specified in plaintiff's written request for transmittal;]

4. For attorney's fees in the sum of $_____;

5. For costs of the suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 295.51[1].*]

[2] Use of Form

The complaint in [1], *above,* may be used by a patient or a patient's representative in an action against a health care provider to enforce the obligations of the health care provider as prescribed in *Health & Safety Code § 123110* to permit inspection, to provide copies of the patient's health care records, or to transmit copies of X-rays or tracings to another health care provider. Such an action may be brought in addition to any other remedy provided by law [*Health & Safety Code § 123120*; *see § 295.23[3][b]*]. For example, it appears that the patient may also seek damages for the negligent or bad faith refusal of the health care provider to permit inspection or provide copies of the patient's records [*see Civ. Code §§ 1714(a), 3333*; *see also § 295.23[3][l]*].

[3] Allegations

The complaint alleges the following:

- Plaintiff's capacity as a patient or former patient, or as a patient's representative (Paragraph 1) [*see Health & Safety Code § 123105(c),(e)*].

- Defendant's capacity as a health care provider (Paragraph 2) [*see Health & Safety Code § 123105(a)*].

- A venue allegation (Paragraph 2) [*see* [4], *below*].

- Plaintiff's presentation to defendant of a written request to inspect the patient records and plaintiff's offer to pay clerical costs involved in making the records available (Paragraph 3) [*see Health & Safety Code § 123110(a)*].

- Plaintiff's optional presentation to defendant of a written request for copies of the patient records and plaintiff's offer to pay copying fees and reasonable clerical costs (Paragraph 4) [*see Health & Safety Code § 123110(b)*].

- Plaintiff's optional presentation to defendant of a written request to transmit copies of X-rays or tracings to another health care provider and plaintiff's preparedness to pay all reasonable costs in providing the copies (Paragraph 5) [*see Health & Safety Code § 123110(c)*].

- Defendant's continuing refusal to permit inspection of the records pursuant to *Health & Safety Code § 123110(a)*, to provide copies of the records pursuant to *Health & Safety Code § 123110(b)*, or to transmit copies of X-rays or tracings to another health care provider pursuant to *Health & Safety Code § 123110(c)* (Paragraph 6).

For a discussion of the time period within which the health care provider must permit inspection or provide copies, see *§ 295.23[3][c]*.

[4] Venue

Health & Safety Code § 123120 does not contain a venue provision for actions to enforce the obligations of health care providers. It appears that general venue provisions would apply [*see, e.g., Code Civ. Proc. §§ 395(a)* (action against individual), *395.2* (action against unincorporated association), *395.5* (action against corporation or association); *see also* Ch. 571, *Venue*].

[5] Jurisdiction

Health & Safety Code § 123120 does not specify which court has subject matter jurisdiction over an action to enforce the obligations of a health care provider to permit inspection or provide copies of patient records. *Code Civ. Proc. § 86* does not identify sucn an action as a limited civil case. Thus, it appears that the superior court has original jurisdiction over the action as an unlimited civil case [*see Cal. Const., art. VI, § 10*].

[6] Attorney's Fees and Costs

Any judgment rendered in an action against a health care provider to enforce its obligations under *Health & Safety Code § 123110* may, in the court's discretion, include an award of costs and reasonable attorney's fees to the prevailing party [*Health & Safety Code § 123120*].

[7] Cross References

For general information and cross references relating to complaints based on medical malpractice, see *§ 295.51[2]* et seq.

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Chapter 296 [RESERVED]

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Chapter 297 HOTELS AND MOTELS

25-297 California Forms of Pleading and Practice--Annotated 297.syn

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§ 297.12 Innkeeper

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§ 297.13 Defective Condition of Premises

[1] Duty of Innkeeper

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§ 297.17 Defenses to Negligence Action

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[2] Asumption of Risk

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§ 297.19 Loss of or Injury to Property on Premises

[1] Inkeeper as Depositary for Hire

[2] Fixed Sum Liability

[3] Exemption From Liability

[a] Guest Does Not Have Property Deposited in Available Safe

[b] Limitation of Liability as to Items Received for Deposit in Safe

[4] Agreement to Assume Increased Liability

[a] Rationale

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[2] Nature of Innkeeper's Lien

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[d] Boarding House Distinguished

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[7] Innkeeper as Depositary for Hire

[a] Limited Liability Under Civil Code §§ 1859 and 1860

[b] Agreement to Assume Increased Liability

[i] Written Agreement Required

[ii] Written Receipt Imposing Liability

[c] Burden of Proof

[d] Exemption From Liability

[i] Guest Does Not Have Property Deposited in Available Safe

[ii] Limitation of Liability as to Items Received for Deposit in Safe

[e] Fixed Sum Liability

[8] Innkeeper-Guest Relationship

[a] Characteristics of Relationship

[b] Landlord-Tenant Relationship Distinguished

[9] Innkeeper's Lien

[10] Outdoor Signs

[11] Vicarious Liability

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[1] FORM

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§ 297.61 Allegations--Guest Injured When Struck by Plaster Which Fell From Ceiling in Hotel or Motel Room

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[2] Use of Form

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§ 297.63 Allegations--Visitor of Guest Injured by Fall to Ground Through Rotten Railing

[1] FORM

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[3] Cross References

§ 297.64 Allegations--Guest Injured When Knocked to Ground by Employee Pushing Luggage Cart

[1] FORM

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§ 297.65 Complaint for Damages [Civ. Code § 3333] for Wrongful Death [Code Civ. Proc. § 377.60 et seq.] Based on Negligence [Civ. Code § 1714(a)]--By Guest's Heirs Against Innkeeper--Death Caused by Gas Heater in Room

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[3] Allegations

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§ 297.67 Complaint for Compensatory [Civ. Code § 3333] and Exemplary and Punitive [Civ. Code § 3294] Damages for Personal Injuries Based on Negligence [Civ. Code § 1714(a)] and Assault and Battery--By Plaintiff Guest Against Innkeeper and Assailant Guest--Assault and Battery on Plaintiff by Assailant Guest

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§ 297.68 Complaint for Damages [Civ. Code § 1860] for Loss of Personal Property Based on Negligence and Written Receipt [Civ. Code §§ 1714(a), 1852, 1860]--By Guest Against Innkeeper as Depositary for Hire [Civ. Code § 1860]--Guest's Valuables Deposited in Safe and Not Returned Upon Demand

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[3] Allegations

[4] Interest on Lost Property

[5] Cross References

§ 297.69 Complaint for Damages [Civ. Code § 3300] for Breach of Oral Contract [Civ. Code § 1622] for Charges Due Innkeeper

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[3] Innkeeper's Lien

[4] Cross References

§ 297.70 Proceedings for Issuance of Writ of Possession of Baggage or Other Property--Application for Writ [Civ. Code § 1861.5]

[1] FORM

[2] Use of Form

[3] Contents of Application

[4] Procedure for Obtaining Writ

[a] After Hearing on Noticed Motion

[b] Ex Parte Issuance of Writ

[c] Temporary Restraining Order

[5] Cross References

§ 297.71 Proceedings for Issuance of Writ of Possession of Baggage or Other Property--Notice of Application and Hearing for Writ [Civ. Code § 1861.8]

[1] FORM

[2] Use of Form

[3] Contents

[4] Service of Papers Prior to Hearing

[5] Filing of Affidavits and Points and Authorities

[6] Liability of Plaintiff

[7] Cross References

§ 297.72 Proceedings for Issuance of Writ of Possession of Baggage or Other Property--Order for Writ [Civ. Code §§ 1861.6, 1861.10]

[1] FORM

[2] Use of Form

[3] Requirement of Written Undertaking

[4] Cross References

§ 297.73 Proceedings for Issuance of Writ of Possession of Baggage or Other Property--Writ of Possession [Civ. Code § 1861.12]

[1] FORM

[2] Use of Form

[3] Contents

[4] Ex Parte Issuance of Writ of Possession

[5] Plaintiff's Failure to Recover Judgment

[6] Seizure of Property by Levying Officer

[7] Defendant's Undertaking for Redelivery

[8] Exception to Plaintiff's Sureties

[9] Cross References

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[1] FORM

[2] Use of Form

[3] Contents

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§ 297.75 Notice of Public Auction of Baggage or Property by Innkeeper to Satisfy Charges Due Him or Her From Guest [Civ. Code § 1861.24]

[1] FORM

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[4] Cross References

[5] Law Reviews

§ 297.76 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Negligence of Plaintiff-Guest Proceeded in Darkness After Failing to Turn on Light Provided in Room

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[3] Cross References

§ 297.77 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Innkeeper's Liability Not in Excess of Statutory Amount [Civ. Code § 1860]--Guest Given No "Receipt in Writing" When Deposited Valuables in Safe

[1] FORM

[2] Use of Form

[3] Cross References

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Chapter 297 HOTELS AND MOTELS
PART I. SCOPE

25-297 California Forms of Pleading and Practice--Annotated § 297.01

§ 297.01 Scope of Chapter

This chapter discusses and contains forms for use in personal injury actions and in actions to recover damages for loss of or injury to personal property by guests against innkeepers when the injury or loss arises from the negligent operation and maintenance of the hotel or motel premises. The forms are:

- Complaints and allegations for use in alleging personal injuries to a guest or the visitor of a guest on hotel or motel premises [*see* §§ 297.60-297.64].

- Complaint and allegation for wrongful death of a guest [*see* §§ 297.65-297.66].

- Complaint for assault and battery by one guest on another [*see § 297.67*].

- Complaint for loss of a guest's personal property on the hotel or motel premises [*see § 297.68*].

- Affirmative defenses an innkeeper might assert against a guest alleging personal injuries or loss of or injury to personal property [*see §§ 297.76, 297.77*].

The chapter also discusses and actions by an innkeeper to enforce a lien against a guest's personal property to satisfy charges due. Related forms are:

- Complaint for damages for breach of an oral contract for charges due an innkeeper [*see § 297.69*].

- Forms for use in proceedings for issuance of a writ of possession of baggage or other property [*see* § 297.70-297.74].

- Notice of a public auction by an inkeeper to satisfy charges [*see § 297.75*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionGeneral OverviewTortsDamagesCompensatory DamagesProperty DamageGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityActivities & ConditionsCriminal ActivityTortsPremises Liability & PropertyGeneral Premises LiabilityDefensesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesHotelsTortsWrongful Death & Survival ActionsGeneral Overview

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§ 297.02 Cross References

- For a discussion and forms involving assault and battery actions, see Ch. 58, *Assault and Battery*
- For a discussion and forms which may be adopted for use in actions involving discrimination by a hotel or motel, see Ch. 116, *Civil Rights: Discrimination in Business Establishments* .
- For a discussion and forms involving wrongful death actions, see Ch. 181, *Death and Survival Actions*
- For a discussion and forms which may be adapted for use in actions involving the disposition of personal property remaining on an innkeeper's premises, see Ch. 332, *Landlord and Tenant: The Tenancy*
- For a more detailed discussion of negligence and for forms for use in negligence actions generally, see Ch. 380, *Negligence* .
- For general discussion and forms relating to liability for injuries on business premises, see Ch. 421, *Premises Liability*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPublic FacilitiesGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesHotelsTortsWrongful Death & Survival ActionsGeneral Overview

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[Reserved]

§§ 297.03[Reserved]

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§ 297.10 Governing Statutes

An innkeeper's liability for loss of or injury to a guest's personal property on the premises is governed by *Civ. Code §§ 1859, 1860*. The innkeeper's lien law is set forth in *Civ. Code § 1861 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawNonmortgage LiensGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesHotels

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§ 297.11 Definitions

[1] Inn and Hotel

An "inn" is a public house of entertainment [*Pinkerton v. Woodward (1867) 33 Cal. 557, 596]* where all transient persons who choose to visit it will be received and entertained as guests for compensation [*see Fay v. Pacific Improv. Co. (1892) 93 Cal. 253, 259, 28 P. 943]* .

In general, the terms "inn" and "hotel" may be used interchangeably [*see Fay v. Pacific Improv. Co. (1892) 93 Cal. 253, 259, 28 P. 943]* . However, a distinction is sometimes drawn between the two terms in that an inn is said to be for transient guest only, while a hotel accommodates both transients and those whose stay is of a more definite nature [*Piluso v. Spencer (1918) 36 Cal. App. 416, 421, 172 P. 412*]. The fact that many of the guests are not transients, but occupy their rooms on a monthly basis does not alter the nature of a place as a hotel [*People v. Vaughan (1944) 65 Cal. App. 2d Supp. 844, 852, 150 P.2d 964*]. A "hotel" includes all those portions of the premises which provide for refreshment, comfort, and entertainment for guests and which are operated by and under the management of the hotel [*see Berall v. Squaw Valley Lodge of Tahoe (1961) 189 Cal. App. 2d 540, 544, 11 Cal. Rptr. 316* (lodge adjacent to sleeping dormitories as part of hotel)].

[2] Boarding House Distinguished

A "hotel" or "inn" is distinguished from a "boarding house" in that the former is open to receiving all guests, whereas the latter selects boarders and terms of accommodation, contracts specifically with each customer, and usually arranges for longer periods of stay [*see Fay v. Pacific Improv. Co. (1892) 93 Cal. 253, 259, 28 P. 943]* .

[3] Motel

Webster's Seventh New Collegiate Dictionary defines a "motel" as a building or group of buildings used as a hotel in which the rooms are directly accessible from an outdoor parking area. Although there are no California cases directly on point, in other states, a "motel" has been regarded as legally constituting an inn or hotel [*Juengel v. Glendale (Mo.1942) 164 S.W. 2d 610, 613]* , and the proprietor of such a place has been held subject to the duties and liabilities of an innkeeper [*Langford v. Vandaveer (Ky. 1953) 254 S.W.2d 498, 500* ; *see also Sala v. Christensen (1958) 167*

Cal. App. 2d 580, 582-583, 334 P.2d 944] .

[4] Innkeeper

An "innkeeper" is one who is responsible for the supervision and maintenance of a hotel or similar establishment offering public accommodation [*see Fay v. Pacific Improv. Co. (1892) 93 Cal. 253, 260, 28 P. 943]* .

[5] Guest and Lodger

[a] Temporary Stay While Premises Remain Under Control and Supervision of Owner

A "guest" of an inn or hotel is one who receives accommodations or entertainment therein, usually for compensation [*Goldstein v. Healy (1921) 187 Cal. 206, 210, 201 P. 462]* . A guest usually enjoys only a temporary stay and receives no price reduction for the accommodations, whereas a "boarder" or "lodger" usually contracts for a longer definite period of stay and often pays a lower rate than that charged the transient guest [*see Fay v. Pacific Improv. Co. (1892) 93 Cal. 253, 261, 28 P. 943]* .

A person who rents a room is a guest or lodger if the premises are under the direct control and supervision of the owner who furnishes and attends to the room [*Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 421, 282 P.2d 890* ; *Green v. Watson (1964) 224 Cal. App. 2d 184, 190, 36 Cal. Rptr. 362]* . Control and supervision by the owner is demonstrated when he or she retains the key to the room and has access to it for caretaking purposes, furnishes linens and maid service, cleans hallways and removes garbage, and provides light, water, heat, and telephone service [*Roberts v. Casey (1939) 36 Cal. App. 2d Supp. 767, 772, 93 P.2d 654* ; *but see Zavalney v. Donovan (1945) 70 Cal. App. 2d 182, 185-186, 160 P.2d 558* (owner's supplying linen and some janitor service did not create relationship of innkeeper-guest when parties intended relationship to be that of landlord-tenant)].

[b] Tenant Distinguished

The chief distinction between a guest or lodger and a tenant lies in the character of possession of the premises [*see Green v. Watson (1964) 224 Cal. App. 2d 184, 190, 36 Cal. Rptr. 362]* . That is, a guest or lodger has only the right to use the premises, subject to the owner's retention of control and right of access, whereas a tenant has exclusive legal possession of the premises and is responsible for their care and condition [*see Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 421, 282 P.2d 890* (occupant was a guest or lodger); *see Green v. Watson (1964) 224 Cal. App. 2d 184, 190, 36 Cal. Rptr. 362* (status of occupant was a question of fact for jury)].

Factors which suggest that an occupant is a tenant include payment by the tenant of a designated monthly rent or a lower weekly rental rate [*Green v. Watson (1964) 224 Cal. App. 2d 184, 190-191, 36 Cal. Rptr. 362* ; *Zavalney v. Donovan (1945) 70 Cal. App. 2d 182, 185-186, 160 P.2d 558]* , the performance of the maid's work or housework by the occupant [*Green v. Watson (1964) 224 Cal. App. 2d 184, 190-191, 36 Cal. Rptr. 362* ; *Zavalney v. Donovan (1945) 70 Cal. App. 2d 182, 185-186, 160 P.2d 558]* , the rental of a distinct unit having its own kitchen and bathroom rather than the sharing of these facilities with other units [Roberts v. Casey (1939) 36 Cal. App. 2d Supp. 767, 772, *36 Cal. App. 2d Supp. 767, 93 P.2d 654]* , and payment of the same amount of rent for a unit without regard to the number of occupants therein [*Roberts v. Casey (1939) 36 Cal. App. 2d Supp. 767, 772, 93 P.2d 654]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyGeneral Premises LiabilityPremisesHotels

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§ 297.12 Innkeeper

[1] Guest Relationship

The relationship of innkeeper to guest is established when one presents himself or herself to the world as an innkeeper, receives travelers as guests, and solicits the continuance of their patronage. In turn, the traveler relies on these representations and goes to the establishment to receive entertainment and accommodations [*Pinkerton v. Woodward (1867) 33 Cal. 557, 597, 91 Am. Dec. 657]* .

[2] Landlord-Tenant Relationship Distinguished

The distinction between the relationship of an innkeeper to a guest and a landlord to a tenant has been important historically in that an innkeeper, who retains possession of control of the premises, owes a duty to a guest or lodger to maintain the premises in reasonably safe condition at all times [*see* *Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 420-421, 282 P.2d 890* (lodger injured when lamp fell on him); *see* *Wallace v. Speier (1943) 60 Cal. App. 2d 387, 391, 140 P.2d 900* (guest injured when fell in hotel shower which was in state of disrepair)]. On the other hand, a landlord ordinarily had no duty of care with respect to the condition of the premises after exclusive possession was given to the tenant who then became responsible [*see* *Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 421, 282 P.2d 890]* .

The continued importance of this historical distinction between the relationship of an innkeeper to a guest and a landlord to a tenant is doubtful in light of a recent holding that the common-law rules regarding the liability of a landlord for an accident on his or her leased premises have been superceded by *Civ. Code § 1714(a)* [*see* *Brennan v. Cockrell Inv., Inc. (1973)35 Cal. App. 3d 796, 802, 111 Cal. Rptr. 122]* . Applying the rationale of *Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* , the *Brennan* court held that no public policy required that an exception to *Civ. Code § 1714(a)* be made for landlords not in possession when they are sued by their tenants [*Brennan v. Cockrell Inv., Inc. (1973) 35 Cal. App. 3d 796, 800, 111 Cal. Rptr. 122]* . It therefore reversed a jury verdict in the landlord's favor because the jury had been instructed that ordinarily the owner of premises leased to a tenant is not liable for any injury to the tenant that results from a dangerous condition which existed when the tenant took possession and the trial court refused the instruction stating that he was under a duty to exercise ordinary care in the management of the premises [*Brennan v. Cockrell Inv., Inc. (1973) 35 Cal. App. 3d 796, 799, 801, 111 Cal. Rptr. 122]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesInviteesBusiness InviteesTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesHotels

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§ 297.13 Defective Condition of Premises

[1] Duty of Innkeeper

Traditionally, an innkeeper has been considered a possessor of land whose liability to one coming onto the premises has been controlled by the status of the entrant. In general, a guest of a hotel, motel, or similar establishment has been considered a business visitor who is entitled to receive that degree of care applicable to an invitee [*see Sala v. Christensen (1958) 167 Cal. App. 2d 580, 582-583, 334 P.2d 944* (motel guest stepped into hole on grounds and fell); *see Trembley v. Capital Co. (1949) 89 Cal. App. 2d 606, 608-609, 201 P.2d 398* (hotel guest gashed wrist when porcelain shower handle crumbled in hand)]. The status of the visitor of a guest has also been that of an invitee [*Goldstein v. Healy (1921) 187 Cal. 206, 211, 201 P. 462* (visitor of hotel guest injured when fell 20 feet to ground after railing around platform broke)] and his or her visit is subject to reasonable regulations imposed by the manager [*Goldstein v. Healy (1921) 187 Cal. 206, 210-211, 201 P. 462]* .

In *Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561* , the Supreme Court departed from the traditional rules governing the liability of the owners and occupiers of land and held that the test to be applied to the liability of the possessor of land in accordance with *Section 1714 of the Civil Code* is whether in the management of his or her property he or she has acted as a reasonable person in view of the probability of injury to others, and although the plaintiff's status as a trespasser, licensee, or invitee may in the light of the facts giving rise to such status have some bearing on the question of liability, the status is not determinative. Although the *Rowland* case involved a licensee, the test has been applied in the context of a business invitee [*see Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 25-38, 77 Cal. Rptr. 914* (golfer sued for injuries sustained when fell while walking across concrete surface)]. In that case, the court noted, however, that the term "invitee" has not been abandoned, nor have the terms "trespasser" and "licensee." In the minds of the jury, whether a possessor of the premises has acted as a reasonable person toward a plaintiff, in view of the probability of injury to him or her, will tend to involve the circumstances under which he or she came upon defendant's land; and the probability of exposure of plaintiff and others of his or her class to the risk of injury; as well as whether the condition itself presented an unreasonable risk of harm, in view of the foreseeable use of the property. In turn, that reinvolves the degree to which those on the property could be expected to be there, and the use they could be expected to make of the premises. In this, there is a wide difference between a trespasser, who actually may be forbidden the use of the property, and an invitee, invited or urged to be there [

Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 25, 77 Cal. Rptr. 914 (dictum)].

The court further noted that short of an absolute liability, which may arise independently of negligence or want of it, the legal duties declared to exist in favor of the invitee upon the premises have been the highest judicially imposed upon the possessor of land. The court did not believe they have been jettisoned by *Rowland v. Christian*. Likewise, it did not believe that such established decisional principles have been abandoned and freewheeling by the triers of fact substituted in their stead. If guidelines are withdrawn from juries relative to the invitor and invitee, proof of fault might tend to consist of the fact of plaintiff's injury and defendant's ability to pay, assumed to exist since a reasonably prudent person would be silly not to have insurance. If withdrawal of such guidelines expanded the discretion of juries on the one hand, it would limit pro tanto the power of the court to control abuses on the other, for want of yardsticks applicable to appropriate categories of situations. The citizen would be at a loss to learn factually just what the law demands of him or her as a landowner. The diversity of jury decisions on like facts, plaintiff by plaintiff, and defendant by defendant, might well work inequality before the law [*Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 26, 77 Cal. Rptr. 914* (dictum)].

After study and reflection, the court was persuaded that the legal duties announced in relation to the invitor-invitee relationship are generally consonant with *Civil Code § 1714* and that *Rowland v. Christian* does not generally abrogate the decisions declaring the substantive duties of the possessor of land to invitees nor those establishing the correlative rights and duties of invitees [*Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 26, 27, 77 Cal. Rptr. 914* (dictum)].

[2] Scope of Duty

In cases decided prior to the *Rowland* and *Beauchamp*, decisions courts held that an innkeeper, as a possessor of land, must use ordinary care to maintain the premises in reasonably safe condition for a guest [*Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 420-421, 282 P.2d 890* ; *Wallace v. Speier (1943) 60 Cal. App. 2d 387, 391, 140 P.2d 900* ; *Koppelman v. Ambassador Hotel Co. (1939) 35 Cal. App. 2d 537, 540, 96 P.2d 196]* that this includes a duty to inspect the premises to discover any latent defects [*Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 424, 282 P.2d 890* (innkeeper knew or could have known about top-heavy lamp which fell and injured guest); *Crawford v. Pacific States Sav. & L. Co. (1937) 22 Cal. App. 2d 448, 449, 71 P.2d 333* (innkeeper had no actual or constructive knowledge of water on lavatory floor where guest slipped and fell)] followed by such repair, safeguard, and warning as is reasonably necessary for protection of the guest under the circumstances [*Sala v. Christensen (1958) 167 Cal. App. 2d 580, 582-583, 334 P.2d 944* (innkeeper gave no warning about hole into which guest fell on motel premises); *Wallace v. Speier (1943) 60 Cal. App. 2d 387, 391-392, 140 P.2d 900* (innkeeper failed to inspect and repair shower fixture which broke in guest's hand)].

In other cases decided prior to the *Rowland* and *Beauchamp* decisions courts held that an innkeeper's duty to use ordinary care to maintain the premises in reasonably safe condition includes any means of ingress or egress which reasonably appears to have been provided for a guest [*see* *Sala v. Christensen (1958) 167 Cal. App. 2d 580, 582-583, 334 P.2d 944* (sidewalks and pathways connecting motel units); *Staudinger v. Whitlock (1952) 111 Cal. App. 2d 288, 292, 244 P.2d 414* (stairway)] as well as other parts of the premises [*Koppelman v. Ambassador Hotel Co. (1939) 35 Cal. App. 2d 537, 540, 96 P.2d 196* (defendant company had bank on lower floor; plaintiff entered with intent to bank, was distracted by crowd which she followed along corridor where she tripped over timber on floor); *McStay v. Citizens Nat'l Trust & Sav. Bank (1935) 5 Cal. App. 2d 595, 599, 43 P.2d 560* (platform overlooking hotel dining room)].

[3] Patent Defect

In cases decided prior to the *Rowland* and *Beauchamp* decisions, courts held that an innkeeper's duty does not extend to a guest or an invitee of a guest for an injury sustained as a result of a patent defect [*Allred v. Orth (1929) 206 Cal. 494, 496, 274 P. 955* (defect not patent where injured party unfamiliar with premises); *Goldstein v. Healy (1921) 187*

Cal. 206, 211, 201 P. 462 (defect not patent where unknown to injured party prior to fall)]. For discussion of comparative negligence, by which damages awarded are diminished in proportion to the amount of negligence attributable to the person recovering, *see § 297.17[1], below*.

[4] Reasonable Inspection

In cases decided prior to the *Rowland* and *Beauchamp* decisions, courts held that an innkeeper's duty does not extend to a guest or an invitee of a guest for an injury sustained as a result of an unknown defect which could not have been discovered by reasonable inspection [*Trembley v. Capital Co. (1949) 89 Cal. App. 2d 606, 608, 201 P.2d 398* (defect in shower handle could not have been discovered); *Adams v. Dow Hotel (1938) 25 Cal. App. 2d 51, 54, 76 P.2d 210* (inspection of hot water faucet had disclosed no defect)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsDuty to InspectTortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsObvious DangersTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesInviteesBusiness InviteesTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesReasonable CareTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesHotels

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§ 297.14 Duty to Protect Guests From Dangerous Activity

In addition to keeping the premises in reasonably safe physical condition, an innkeeper has a duty to protect guests from injury, annoyance, and mistreatment by third parties on the premises [*see Slawinski v. Mocettini (1963) 217 Cal. App. 2d 192, 196, 31 Cal. Rptr. 613* (patron of tavern died of gunshot wound); *Kingen v. Weyant (1957) 148 Cal. App. 2d 656, 661, 307 P.2d 369* (patron of tavern incurred injuries in fight)].

However, an innkeeper is not an insurer of the guest's safety [*see Slawinski v. Mocettini (1963) 217 Cal. App. 2d 192, 196, 31 Cal. Rptr. 613* ; *Kingen v. Weyant (1957) 148 Cal. App. 2d 656, 661, 307 P.2d 369]* and incurs liability only when he or she negligently receives or harbors persons of known violent or vicious propensities who will probably assault or otherwise mistreat a guest [*Rahmel v. Lehndorff (1904) 142 Cal. 681, 684, 76 P. 659* (hotel guest assaulted and beaten by dining-room waiter while seated at dining table)].

An innkeeper may discharge his or her duty by giving warning adequate to enable a guest to avoid harm from a third party on the premises or by otherwise protecting a guest against such harm [*see Taylor v. Centennial Bowl (1966) 65 Cal. 2d 114, 124, 52 Cal. Rptr. 561, 416 P.2d 793* (insufficient warning given where patron of bowling alley stabbed in parking lot subsequent to repeated offensive behavior by attacker inside)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsDuty to WarnTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesInviteesBusiness InviteesTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesHotels

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§ 297.15 Violation of Statute

The common-law presumption of negligence which arises from an act or failure to act below a statutory standard is codified in *Evid. Code § 669*. That section contains two parts.

The first part provides that the failure of a person to exercise due care is presumed if: (1) he or she violates a statute, ordinance, or regulation of a public entity; (2) the violation proximately caused death or injury to persons or property; (3) the death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury to his or her person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted [*Evid. Code § 669(a)*].

The second part provides that the presumption may be rebutted by proof that: (1) the person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law; or (2) the person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his or her maturity, intelligence, and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications [*Evid. Code § 669(b)*].

Under the common-law principles identical to these codified principles, it was held that the trial court committed reversible error in refusing to give an instruction on the necessity for artificial lighting in hotels as required by former Health & Safety Code § 17819 [*Berall v. Squaw Valley Lodge of Tahoe (1961) 189 Cal. App. 2d 540, 545, 11 Cal. Rptr. 316* (action by guest against lodge owner for injuries sustained in fall in corridor leading to one of shops in main building)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceProofEvidenceInferences & PresumptionsTortsNegligenceProofViolations of LawGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesHotels

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25-297 California Forms of Pleading and Practice--Annotated § 297.16

§ 297.16 Res Ipsa Loquitur

[1] Accident Caused by Instrumentality in Defendant's Control

The doctrine of res ipsa loquitur is applicable in a case where an accident is of a type which ordinarily does not occur unless someone has been negligent, the accident was caused by an agency or instrumentality within the control of the defendant, and plaintiff's conduct did not contribute to the accident [*Vistica v. Presbyterian Hospital (1967) 67 Cal. 2d 465, 469, 62 Cal. Rptr. 577, 432 P.2d 193* (action for wrongful death of mentally ill patient confined in psychiatric ward of defendant hospital)].

Alleging specific acts of negligence does not deprive a plaintiff of the applicability of the doctrine of res ipsa loquitur [*Mintzer v. Wilson (1937) 21 Cal. App. 2d 85, 89, 68 P.2d 370]* .

[2] Effect

The application of the doctrine creates an inference of negligence on the part of the innkeeper [*Mintzer v. Wilson (1937) 21 Cal. App. 2d 85, 88, 68 P.2d 370]* . The inference which it raises shifts the burden of going forward with the evidence to the innkeeper, who is required to rebut the inference with evidence sufficient to offset or balance it [*see Mintzer v. Wilson (1937) 21 Cal. App. 2d 85, 90-91, 68 P.2d 370]* .

[3] When Not Applied

Res ipsa loquitur is not applicable in a case where a pedestrian was struckby a chair thrown from a hotel window to the sidewalk [*Larson v. St. Francis Hotel (1948) 83 Cal. App. 2d 210, 211-214, 188 P.2d 513]* because the hotel did not have exclusive control of its furniture and such an accident was not one that ordinarily would not happen without the negligence of the party charged [*Larson v. St. Francis Hotel (1948) 83 Cal. App. 2d 210, 212, 188 P.2d 513* ; *cf. Mintzer v. Wilson (1937) 21 Cal. App. 2d 85, 88, 68 P.2d 370* (res ipsa loquitur doctrine was held to apply in a case where a hotel guest was injured when a large piece of ceiling plaster fell on her while she slept in her room)]. Nor does the doctrine apply in a case where a resident died in a fire in the hotel where she lived [*Snyder v. Hollingbery (1956) 141 Cal. App. 2d 520, 521, 297 P.2d 485]* . Even though control over the hotel by the innkeeper could be established, it could not reasonably be concluded either that the accident was of a kind which did not normally occur in the absence of

negligence or that the accident was not due to any voluntary action on the part of the plaintiff [*Snyder v. Hollingbery (1956) 141 Cal. App. 2d 520, 527-528, 297 P.2d 485]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceProofRes Ipsa LoquiturElementsGeneral OverviewTortsNegligenceProofRes Ipsa LoquiturEvidentiary EffectTortsNegligenceProofRes Ipsa LoquiturLimits on ApplicationTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesHotels

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25-297 California Forms of Pleading and Practice--Annotated § 297.17

§ 297.17 Defenses to Negligence Action

[1] Negligence of Plaintiff

The defense of contributory negligence has been invalidated in California and replaced with a system of comparative negligence in which the fundamental purpose to assign responsbility and liability for damage in direct proportion to the amount of negligence of each of the parties. Thus, in all actions for negligence resulting in injury to person or property, the contributory negligence of the person injured does not bar recovery, but the damages awarded are diminished in proportion to the amount of negligence attributable to the person recovering [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858, 532 P.2d 1226* (automobile accident case)].

Prior cases involving contributory negligence are, however, instructive insofar as they illustrate negligent conduct of plaintiffs. Thus, cases decided under former law which held that a plaintiff who, as an employee of a hotel, fell down an open stairwell after proceeding in the dark [*Robinson v. King (1952) 113 Cal. App. 2d 455, 457, 248 P.2d 477]* or a plaintiff who, after meeting a friend for lunch, tripped and fell over a stack of planks which presented an obvious danger in the hotel lobby [*Dixon v. St. Francis Hotel Corp. (1969) 271 Cal. App. 2d 739, 743, 77 Cal. Rptr. 201]* were negligent are still valid under comparative negligence, even though a plaintiff's recovery will depend on the amount of fault attributable to plaintiff and the amount attributable to the innkeeper.

[2] Asumption of Risk

The doctrine of assumption of risk, in light of the adoption of comparative fault principles, is analyzed in terms of "primary assumption of risk" and "secondary assumption of risk" [*Knight v. Jewett (1992) 3 Cal. 4th 296, 309, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

Primary assumption of risk describes the situation in which the defendant, by virtue of the nature of the activity and the parties' relationship to the activity, owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury; the doctrine operates as a complete bar to the plaintiff's recovery [*Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . Under this analysis, assumption of risk is an absolute defense only if public policy dictates that the class of which the defendant is a member should owe no duty of care to the class of which the plaintiff is a member in relation to the activity in which they are involved [*Harrold v. Rolling J Ranch (1993) 19*

Cal. App. 4th 578, 584, 23 Cal. Rptr. 2d 671] .

Secondary assumption of risk involves the situation in which the defendant owes a duty of care to the plaintiff but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty. In this situation, the doctrine is merged into the comparative fault scheme and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties [*Knight v. Jewett (1992) 3 Cal. 4th 296, 315, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

If a property owner breachs the duty to eliminate a dangerous condition on his or her property, and a plaintiff is injured when knownly encountering the dangerous condition, secondary assumption of risk applies, and comparative negligence principles determines the relative fault of the parties [*Curties v. Hill Top Developers, Inc. (1993) 14 Cal. App. 4th 1651, 1656, 18 Cal. Rptr. 2d 445* (tenant slip and fall on sloping lawn in apartment complex)].

For discussion of assumption of the risk, see Ch. 380, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesAssumption of RiskElements & NatureGeneral OverviewTortsNegligenceDefensesContributory NegligenceGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDefensesAssumption of RiskTortsPremises Liability & PropertyGeneral Premises LiabilityDefensesComparative & Contributory Negligence

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§ 297.18 Liability Based Upon Express Warranty

A hotel guest who is injured on the premises may recover from the innkeeper for breach of an express warranty [*Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 423, 282 P.2d 890* ; *Shattuck v. St. Francis Hotel & Apts. (1936) 7 Cal. 2d 358, 360-361, 60 P.2d 855]* . Thus, when an innkeeper expressly warrants or represents to a guest that a furnishing is safe and may be used for the purpose for which it was intended, a guest who relies on such representation and is subsequently injured may recover from the innkeeper who is liable for all damages incurred as a result of the defective condition of the furnishing [*Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 423, 282 P.2d 890* (lodger injured when top-heavy lamp fell on him); *Shattuck v. St. Francis Hotel & Apts. (1936) 7 Cal. 2d 358, 360-361, 60 P.2d 855* (occupant injured when bed frame fell on her)]. Actual knowledge by the innkeeper of the defective condition is not required because an occupant who receives assurances that the furnishings are safe has a right to assume the innkeeper knew or could have known that the furnishings were free from any fault inconsistent with the proper use and enjoyment of the room [*see* *Shattuck v. St. Francis Hotel & Apts. (1936) 7 Cal. 2d 358, 360-361, 60 P.2d 855]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionBreach of WarrantyTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesHotels

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§ 297.19 Loss of or Injury to Property on Premises

[1] Inkeeper as Depositary for Hire

The liability of an innkeeper or hotel keeper for losses of or injuries to a guest's personal property is that of a depositary for hire [*see Civ. Code § 1859*; *see also Federal Ins. Co. v. Beverly Hills Hotel Corp. (1962) 202 Cal. App. 2d 120, 123-124, 20 Cal. Rptr. 502* ; *Muehlebach v. Paso Robles Springs Hotel, (1924) 65 Cal. App. 634, 640, 225 P. 19]* .

A depositary for hire only incurs liability for the loss or injury if it is the result of his or her own the negligence or dishonesty or that of his or her employee [*see Civ. Code § 1852*; *see also Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 347-348, 217 P.2d 961* ; *Federal Ins. Co. v. Beverly Hills Hotel Corp. (1962) 202 Cal. App. 2d 120, 127-128, 20 Cal. Rptr. 502* (insurance company's subrogation action against hotel unsuccessful; hotel not negligent or dishonest in case in which guest's mink and jewelry were missing from room)].

The innkeeper's liability is further limited by *Civ. Code § 1860*, relating to liability when guests fail to deposit money, jewelry, or other valuables in an available safe [*see* [3][a], *below*] and by the fact that both *Civ. Code §§ 1859* and *1860*, having a common purpose, must be read together [*Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 350, 217 P.2d 961* ; *Federal Ins. Co. v. Beverly Hills Hotel Corp. (1962) 202 Cal. App. 2d 120, 124, 20 Cal. Rptr. 502* ; *Robert Altman, Inc. v. Biltmore Hotel (1961) 190 Cal. App. 2d 274, 279, 11 Cal. Rptr. 838]* .

For a discussion of liability of depositaries for hire generally, see Ch. 93, *Bailments* .

[2] Fixed Sum Liability

Civ. Code § 1859 limits an innkeeper's liability for loss of or injury to all personal property which a guest brings into a hotel or inn [*Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 351, 217 P.2d 961]* (money) and all personal property of any kind which remains in the guest's room [*Federal Ins. Co. v. Beverly Hills Hotel Corp. (1962) 202 Cal. App. 2d 120, 127, 20 Cal. Rptr. 502* (mink coat and jewelry)].

There are dollar limits on maximum liability in the aggregate, for various specific items, and for all other personal property of any kind, which apply unless the innkeeper has consented in writing with the owner to assume a greater

liability [*Civ. Code § 1859*]. The limits are:

- Aggregate: $1000.
- Each trunk and its contents: $500.
- Each valise or traveling bad and its contents: $250.
- Each box, bundle, or package and its contents: $250.
- All other personal property of any kind: $250.

An innkeeper's liability for negligence as a depositary for hire is limited to the amounts specified in *Civ. Code § 1859* unless he or she consents in writing to greater liability [*see Federal Ins. Co. v. Beverly Hills Hotel Corp. (1962) 202 Cal. App. 2d 120, 127-128, 20 Cal. Rptr. 502]* .

[3] Exemption From Liability

[a] Guest Does Not Have Property Deposited in Available Safe

Civ. Code § 1860 affords an innkeeper additional protection against liability for loss of a guest's personal property. Section 1860 provides that if an innkeeper or hotel keeper keeps a fireproof safe and personally informs the guests or posts printed notice that he or she will not be liable for valuables such as money, jewelry, documents, furs, fur coats, and fur garments, unless placed in the safe, the innkeeper escapes liability for loss of or injury to articles not deposited with him or her [*Civ. Code § 1860*; *see also Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 350-351, 217 P.2d 961* (money); *Federal Ins. Co. v. Beverly Hills Hotel Corp. (1962) 202 Cal. App. 2d 120, 124, 20 Cal. Rptr. 502* (fur coat and jewelry)].

However, Section 1860 does not absolve an innkeeper of negligence so far as his or her own acts contribute to the loss [*Civ. Code § 1860*].

To create a deposit of valuables within the meaning of *Civ. Code § 1860*, a guest must make known to an innkeeper that the articles are of unusual value. Thus, a guest may not rely on the mere appearance of his or her baggage as giving information to the innkeeper that it contains valuables and is being deposited with him or her as such [*Providence Washington Ins. Co. v. Hotel Marysville, Inc. (1943) 60 Cal. App. 2d 338, 344-345, 140 P.2d 698* (no deposit by guest who delivered baggage containing jewelry to bell boy and merely assented to bell boy's inquiry whether they should be placed in hotel safe)].

[b] Limitation of Liability as to Items Received for Deposit in Safe

After exempting from liability an innkeeper who does not receive a guest's valuables for deposit in the hotel safe [*see* [1], *above*], *Civ. Code § 1860* goes on to limit an innkeeper's liability when a guest does deposit valuables with him or her for safekeeping [*see Civ. Code § 1860*]. Section 1860 provides in part that an innkeeper is not liable, except so far as his or her own acts contribute thereto, for any loss of or injury to a guest's valuables, if not deposited with him or her to be placed in the safe, nor in any case for more than $500 for any or all such property of any individual guest or lodger, unless the innkeeper has given a written receipt for the property to the guest or lodger [*Civ. Code § 1860*]. The legislative intent in enacting the section was to limit the amount that a guest, who deposits property with the innkeeper for safekeeping, can recover unless the guest is given a written receipt [*see Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 217 P.2d 961* (action to recover money deposited with innkeeper for safekeeping); *Ricketts v. Morehead Co., Inc. (1954) 122 Cal. App. 2d 948, 954, 265 P.2d 963* (action to recover money and jewelry deposited for safekeeping)].

To recover more than the statutorily specified sum, a guest's receipt must be a "receipt in writing" within the meaning of *Civ. Code § 1860*. Such a receipt must be for specific goods of a declared value [*see* *Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 350-353, 217 P.2d 961* (claim check was not receipt within contemplation of *Civ. Code § 1860*); *Robert Altman, Inc. v. Biltmore Hotel (1961) 190 Cal. App. 2d 274, 279, 11 Cal. Rptr. 838* (no receipt within contemplation of *Civ. Code § 1860*); for discussion, *see* [4], *below*].

The limitation of liability afforded the innkeeper with regard to articles that have been placed in a safe in the innkeeper's possession is not restricted to the period of time in which the articles are actually inside the hotel safe. Thus, *Civ. Code § 1860* applied to a situation in which valuables had been deposited in the safe, were subsequently withdrawn by the guest, and were stolen from the guest as the guest checked out of the hotel. Because the innkeeper had not agreed in writing to assume a greater liability, it was held to be liable for the amount allowed by statute, and no more [*Nagashima v. Hyatt Wilshire Corp. (1991) 228 Cal. App. 3d 1006, 1011, 279 Cal. Rptr. 265]* .

The statutorily specified sum is not a guaranteed minimum recovery. A plaintiff must prove that the deposited property was worth that much and that the innkeeper was informed or had reason to know that fact before the specified sum can be recovered [*Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 350, 217 P.2d 961* (question did not arise where defendant waived requirement of proof by moving for summary judgment)].

[4] Agreement to Assume Increased Liability

[a] Rationale

The theory behind *Civ. Code §§ 1859, 1860* is that should a guest wish protection in excess of the statutory limitation, he or she must declare the value of his or her property to give the innkeeper an opportunity to confirm the estimate of value. The innkeeper can then refuse to assume the greater liability or, if he or she assumes it, take proper precautions for the protection of the property. Liability in excess of the statutory limitation is thus based on an innkeeper's agreement to assume it [*Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 350, 217 P.2d 961* (innkeeper assumed no greater liability; statutory limit applied); *Robert Altman, Inc. v. Biltmore Hotel (1961) 190 Cal. App. 2d 274, 280, 11 Cal. Rptr. 838* (innkeeper assumed no greater liability; guest limited to statutory maximum recovery for loss of jewelry cases worth over $80,000)].

[b] Written Assumption of Liability

To impose liability in excess of the statutory limit on the innkeeper, *Civ. Code § 1859* requires that the innkeeper have "consented in writing" while *Civ. Code § 1860* requires that the guest have received a "receipt in writing" [*Civ. Code §§ 1859, 1860*].

The reason is clear for this variation in terms. *Civ. Code § 1859* refers to the property of guests remaining in their possession in the rooms of the inn or hotel while *Civ. Code § 1860* refers to articles placed in the safe in the possession of the innkeeper. One ordinarily gives a receipt for goods delivered into his or her possession but not for goods remaining in the possession of another. As to articles remaining in a guest's possession, therefore, the legislature required written consent on the part of the innkeeper to assume a greater liability; as to articles deposited in the safe, a written receipt for specific goods of a declared value in excess of the statutory limitation is the equivalent of the written assumption of a greater liability [*Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 351, 217 P.2d 961]* . This construction is clearly consistent with the provision of *Civ. Code § 1840* which limits the liability of a bailee to the apparent value of an article unless the depositor informs him or her that it has greater value [*Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 351, 217 P.2d 961]* .

[c] Written Receipt Imposing Liability

The requirement in *Civ. Code § 1860* that a guest receive a "receipt in writing" for personal property deposited with an innkeeper for safekeeping contemplates an acknowledgment by the innkeeper that a specific item was received with an awareness of its nature and value [*Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 352, 217 P.2d 961* (disapproving definition of "receipt in writing" as "some evidence of the ownership, delivery, and identity of the baggage" as suggested in *Greer v. Los Angeles Athletic Club (1927) 84 Cal. App. 272, 274-278, 258 P. 155*)]. Thus, an identification check given to a guest as a means of identifying an envelope deposited for safekeeping was not a "receipt in writing" since the clerk was not informed about the contents of the envelope or their value [*see Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 352, 217 P.2d 961]* . Nor did a parcel check satisfy the requirement for a "receipt in writing" when it was given to a guest who deposited jewelry cases in the hotel safe without disclosing their value to the hotel [*Robert Altman, Inc. v. Biltmore Hotel (1961) 190 Cal. App. 2d 274, 279, 11 Cal. Rptr. 838]* .

The *Altman* case, *above,* raises some question if there is, in fact, any protection offered a guest in declaring value and receiving a special receipt for property deposited with an innkeeper. The hotel involved had made its own rule to the effect that its employees should not inquire as to the value of articles that were presented for deposit and that they should not accept articles for deposit if the guest made a declaration of value greater than the statutory limitation [*see Robert Altman, Inc. v. Biltmore Hotel (1961) 190 Cal. App. 2d 274, 280, 11 Cal. Rptr. 838]* . Appellant had contended that, in so doing, the hotel had waived the benefit of the limitation of liability prescribed by *Civ. Code § 1860* [*Robert Altman, Inc. v. Biltmore Hotel (1961) 190 Cal. App. 2d 274, 280, 11 Cal. Rptr. 838]* . But the court held that the hotel was under no duty to inquire as to the value of the property, nor had it waived the benefit of the limitation of liability prescribed by *Civ. Code § 1860* [*Robert Altman, Inc. v. Biltmore Hotel (1961) 190 Cal. App. 2d 274, 280, 11 Cal. Rptr. 838]* , and it cited the *Gardner* decision, *above,* for the proposition that an innkeeper can "refuse to assume greater liability" [*Robert Altman, Inc. v. Biltmore Hotel (1961) 190 Cal. App. 2d 274, 279, 11 Cal. Rptr. 838]* .

[5] Limitation Period on Actions for Recovery or Conversion of Personal Property

All civil actions for the recovery or conversion of personal property, wearing apparel, trunks, valises, or baggage alleged to have been left at a hotel, hospital, rest home, sanitarium, boarding house, lodging house, furnished apartment house, or furnished bungalow court must be begun within 90 days from and after the date of the departure of the owner of that personal property from the premises [*Code Civ. Proc. § 341a*; *see Pawn v. Wall (1928) 88 Cal. App. 597, 598, 600, 264 P. 268]* .

The term "personal property" as used in *Code Civ. Proc. § 341a* is restricted to things of a nature similar to or consistent with the items enumerated in the statute [*Martin v. Holiday Inns, Inc. (1988) 199 Cal. App. 3d 1434, 1437-1438, 245 Cal. Rptr. 717* (truck and trailer not "personal property" within meaning of statute)].

Code Civ. Proc. § 341a has been narrowly construed to apply only to those actions expressly mentioned, that is, actions for "recovery" and "conversion" [*see Taylor v. Forte Hotels International (1991) 235 Cal. App. 3d 1119, 1126-1127, 1 Cal. Rptr. 2d 189]* . Thus, it does not apply to actions based on negligence or breach of contract [*Taylor v. Forte Hotels International (1991) 235 Cal. App. 3d 1119, 1126-1127, 1 Cal. Rptr. 2d 189* ; *see Code Civ. Proc. §§ 338(c)* (three-year period for negligence resulting in damage to property), 339(1) (two-year period action on agreement not founded on instrument in writing)].

For further discussion relating to statutes of limitations generally, see Ch. 345, *Limitation of Actions* . For discussion and forms of complaint relating to an action for conversion generally, see Ch. 150, *Conversion* .

[6] Vicarious Liability

An innkeeper, like other employers, is liable for the tortious acts of his or her servants or employees if these acts are committed within the scope of their employment [*see Muehlebach v. Paso Robles Springs Hotel (1924) 65 Cal. App. 634, 648, 225 P. 19]* .

This rule applies to losses resulting from theft by employees as well as to losses resulting from negligence [*see Muehlebach v. Paso Robles Springs Hotel (1924) 65 Cal. App. 634, 645, 225 P. 19* (innkeeper liable for theft by clerk of jewelry delivered by guest to be deposited in hotel safe)]. If a loss results from a theft by an employee acting within the scope of his or her employment, the statutory limitations as set forth in *Civ. Code §§ 1859, 1860* will apply to limit an innkeeper's liability [*see Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 349, 217 P.2d 961]* . And, because a hotel corporation can only act through its employees, the liability of the corporation and its managers is one and the same [*Ricketts v. Morehead Co., Inc. (1954) 122 Cal. App. 2d 948, 953-954, 265 P.2d 963* (action against hotel corporation and comanagers of hotel for loss of guest's money and jewelry deposited for safekeeping)].

For further discussion and forms relating to the vicarious liability of employers generally, see Ch. 248, *Employer's Liability for Employee's Torts* ."

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesProperty DamageGeneral OverviewTortsIntentional TortsConversionDefensesTortsPremises Liability & PropertyGeneral Premises LiabilityDefensesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesHotelsTortsVicarious LiabilityEmployersActivities & ConditionsGeneral Overview

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§ 297.20 Innkeeper's Lien

[1] Lien Defined

A lien is a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act [*Civ. Code § 2872*; *Code Civ. Proc. § 1180*].

[2] Nature of Innkeeper's Lien

An innkeeper's lien is given as security for general charges for services provided for a guest. Thus, every keeper of a hotel, motel, or inn has a lien on the baggage and other property belonging to, or legally under the control of, a guest or lodger in such hotel, etc., for charges for accommodations, extras, advances, and the costs of enforcing the lien [*Civ. Code § 1861*].

[3] Enforcement

[a] Availability and Method

An innkeeper has a right to possession of a guest's or lodger's baggage and other property pursuant to the writ of possession provided for in *Civ. Code § 1861.1 et seq.* during the pendency of any proceedings brought to recover the money or charges owed the innkeeper [*see* §§ 297.70-297.74 and Comments thereto].

The innkeeper's lien may be enforced, however, only after final judgment in the action or proceeding [*Civ. Code § 1861*]. If the final judgment is not paid within 30 days, the innkeeper may sell the baggage and property at public auction, after publication of notice of the sale pursuant to *Gov. Code § 6061* and *15* days mailed notice to the guest [*Civ. Code § 1861.24*].

Civ. Code §§ 1861.1-1861.27 were enacted in 1979 [*see* Stats. 1979, ch. 964] to afford a defendant in the innkeepers' action a hearing prior to the issuance of a writ of possession, except in those circumstances where the property is not necessary for the support of the defendant or his or her family and is in immediate danger of becoming unavailable to levee. These sections were an attempt to remedy the due process questions raised under the former statutory procedure

which did not permit such a hearing [*see Sniadach v. Family Finance Corp. (1969) 395 U.S. 337, 340-342, 23 L. Ed. 2d 349, 89 S. Ct. 1820* ; *Klim v. Jones (N.D. Cal. 1970) 315 F. Supp. 109, 122* (California Innkeeper's Lien Law in former Civ. Code § 1861 was unconstitutional under *Sniadach* since it affected mostly those who were either financially embarrassed or of extremely limited means and was not conditioned by sufficient procedural due process safeguards)].

[b] Property Owned by Third Party

If any baggage or property retained by the innkeeper does not belong to the guest, lodger, tenant, or border who incurred the charges or indebtedness secured thereby, at the time when such charges or indebtedness were incurred, and if the hotel, motel, inn, boarding or lodginghouse keeper entitled to the lien receives notice of that fact at any time before the sale of the baggage or property, then such baggage and property is not subject to lien [*Civ. Code § 1861*].

When property taken is claimed by third person, the rules and proceedings applicable in cases of third-party claims under the Enforcement of Judgment Law apply [*Civ. Code § 1861.25*; *see Code Civ. Proc. § 720.010 et seq.*; for discussion, see Ch. 254, *Executions and Enforcement of Judgments*].

[4] Distribution of Residue of Proceeds

After satisfying the lien out of the proceeds of the sale, together with reasonable costs incurred, the innkeeper must, upon demand within 30 days after the sale, pay the residue of the proceeds to the guest or lodger. If no such demand is made, the innkeeper must pay the residue into the treasury of the county in which the sale took place. If the residue is not claimed within one year, it goes into the county's general fund. The sale is a perpetual bar against the innkeeper for damages [*Civ. Code § 1861.24*].

[5] Exemptions

Any property which is exempt from enforcement of judgment under the provisions of the Code of Civil Procedure is not subject to the innkeeper's lien [*Civ. Code § 1861*; *see Code Civ. Proc. § 703.010 et seq.*; for discussion, *see* Ch. 254, *Executions and Enforcement of Judgments*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsReal Property LawNonmortgage LiensGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesHotels

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§ 297.21 Personal Property Left on Premises

[1] Abandoned Property

A procedure for the release or sale of personal property which remains on the premises after a tenancy has terminated and the premises have been vacated by the guest is provided by *Civ. Code §§ 1980-1991* [*Civ. Code § 1981(a)*]. If the requirements of these sections are not satisfied, they do not affect the rights and liabilities of the innkeeper, former guest, or any other person [*Civ. Code § 1981(e)*].

For a discussion of the procedure and forms which may be adapted for use in the disposition by an innkeeper of a guest's personal property which remains on the premises after the premises have been vacated by the guest, see Ch. 332, *Landlord and Tenant: The Tenancy* . *Civ. Code § 1980-1991* do not apply when *Civ. Code §§ 2081-2081.6* applies [*Civ. Code § 1981(b)*]. Section 2081 et seq. applies with respect to property received by an inkeeper for transportation or safekeeping that goes unclaimed. For discussion and forms, see Ch. 355, *Lost and Unclaimed Property* .

[2] Lost Property

Personal property the innkeeper reasonably believes to have been lost is to be disposed of pursuant to *Civ. Code §§ 2080-2080.9*. The innkeeper is not liable to the owner of the property if he or she complies with those statutes. If the appropriate police or sheriff's department refuses to accept such lost property, the innkeeper may dispose of the property pursuant to *Civ. Code §§ 1980-1991*, discussed in [1], *above* [*Civ. Code § 1982*].

For discussion and forms, see Ch. 355, *Lost and Unclaimed Property* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyGeneral Premises LiabilityPremisesHotels

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[Reserved]

§§ 297.22[Reserved]

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§ 297.40 Related Titles From Lexis Publishing

Personal Injury Actions, Defenses, And Damages, *Hotels, Inns and Boarding and Lodging Houses*, §§ 1-6 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 297.41 State Statutes

[1] Civil Rights

Unruh Civil Rights Act; equal rights required by all business establishments. *Civ. Code §§ 51, 52*

[2] Depositary for Hire

Liability of depositary for negligence as unable to exceed value of deposit. *Civ. Code § 1840*

Innkeeper's liability as depositary for hire; limitation of liability. *Civ. Code § 1859*

Innkeeper not liable for valuables if he or she keeps fireproof safe and gives notice to guests. *Civ. Code § 1860*

[3] Failure to Report Fire

Misdemeanor for of owner or other person in charge of hotel or motel to fail to report fire of which he or she is aware. *Health & Safety Code § 13006.5*

[4] Innkeeper's Lien

"Lien" defined. *Civ. Code § 2872*

Innkeeper's lien. *Civ. Code § 1861 et seq.*

Frequency of publication of notice of sale. *Gov. Code § 6061*

[5] Personal Property Received for Transportation

Disposition by innkeeper of property received for transportation or safekeeping but not claimed. *Civ. Code §§ 2081-2081.6*

[6] Personal Property Remaining on Premises

"Landlord" includes keeper. *Civ. Code § 1980*

"Tenant" includes any paying guest. *Civ. Code § 1980*

Disposition of personal property remaining on premises at termination of tenancy. *Civ. Code §§ 1980-1991*

Civ. Code §§ 1980-1991 are optional procedure. *Civ. Code § 1981*

Lost property. *Civ. Code § 1982*

Notice requirements. *Civ. Code §§ 1983-1985*

Disposition of property before release or public sale. *Civ. Code § 1986*

Release of property. *Civ. Code § 1987*

Public sale of property. *Civ. Code § 1988*

Costs of storage. *Civ. Code § 1990*

[7] Safety Regulations

Owner or operator of hotel or motel must provide emergency procedures to be followed in case of fire, including procedures for handicapped and nonambulatory persons. *Health & Safety Code §§ 13220-13223*

[8] State Housing Law

Applicability of State Housing Law (*Health & Safety Code §§ 17910-17985*) to hotels and motels. *Health & Safety Code §§ 17912, 17950*

Commission of Housing and Community Development authorized to adopt rules and regulations to carry out provisions of housing law. Health & Safety Code § 41209

Substandard building defined. *Health & Safety Code § 17920.3*

[9] Statute of Limitations

Action for recovery or conversion of personal property left at hotel to be begun within 90 days of departure. *Code Civ. Proc. § 341a*

[10] Transportation Services

Exemption from Passenger Charter-Party Carriers' Act for transportation services provided by hotel or motel operators. *Pub. Util. Code § 5353(l)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPublic FacilitiesGeneral OverviewPublic Health & Welfare LawHousing & Public BuildingsGeneral OverviewReal Property LawNonmortgage LiensGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesHotels

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25-297 California Forms of Pleading and Practice--Annotated § 297.42

§ 297.42 Administrative Regulations

Rules and regulations relating to apartment houses, hotels, and dwellings. *25 Cal. Code Reg. § 1 et seq.*

Legal Topics:

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

[1] Allegations Required for Negligence Action

Necessary allegations to state cause of action based on negligence against innkeeper by injured guest. *Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 420-422, 282 P.2d 890*

[2] Defective Condition of Premises

[a] Duty of Innkeeper

Common-law distinctions between guests, invitees, and trespassers as to duty owed abolished; liability predicated on ordinary negligence under *Civ. Code § 1714*, a civil law, not a common-law principle. *Rowland v. Christian (1968) 69 Cal. 2d 108, 112-120, 70 Cal. Rptr. 97, 443 P.2d 561*

Application of principle of *Rowland v. Christian* in context of business invitee. *Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 25-38, 77 Cal. Rptr. 914*

Guest is invitee. *Sala v. Christensen (1958) 167 Cal. App. 2d 580, 582-583, 334 P.2d 944* ; *Trembley v. Capital Co. (1949) 89 Cal. App. 2d 606, 608-609, 201 P.2d 398* (cases decided prior to *Rowland v. Christian*)

Invitation to use premises is inferred when there is a common interest or mutual advantage. *Koppelman v. Ambassador Hotel Co. (1939) 35 Cal. App. 2d 537, 540, 96 P.2d 196* (case decided prior to *Rowland v. Christian*)

Innkeeper is not absolutely liable for injuries suffered by guest, but owes duty to maintain hotel premises in reasonably safe condition. *Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 420-421, 282 P.2d 890* ; *Wallace v. Speier (1943) 60 Cal. App. 2d 387, 391, 140 P.2d 900* ; *Koppelman v. Ambassador Hotel Co. (1939) 35 Cal. App. 2d 537, 540, 96 P.2d 196* (cases decided prior to *Rowland v. Christian*)

Innkeeper has duty to make reasonable inspection of premises to discover defects not known. *Wallace v. Speier (1943) 60 Cal. App. 2d 387, 391-392, 140 P.2d 900*

Innkeeper's duty includes warning guest against and repairing latent defects on premises. *Sala v. Christensen (1958) 167 Cal. App. 2d 580, 582-583, 334 P.2d 944* ; *Wallace v. Speier (1943) 60 Cal. App. 2d 387, 391-392, 140 P.2d 900*

Duty to maintain premises in reasonably safe condition includes duty to repair fixtures on the premises. *Wallace v. Speier (1943) 60 Cal. App. 2d 387, 391-392, 140 P.2d 900*

Innkeeper is liable despite fact that fixture was properly installed originally. *Wallace v. Speier (1943) 60 Cal. App. 2d 387, 391, 140 P.2d 900*

[b] Patent Defect

Guest at hotel or invitee of guest is not entitled to recover when injury arises from patent defect. *Goldstein v. Healy (1921) 187 Cal. 206, 211, 201 P. 462* (decisions prior to *Rowland v. Christian, Beauchamp v. Los Gatos Golf Course,* and *Li v. Yellow Cab Co.*)

Allegation that decayed condition of railing was "unknown" to plaintiff was sufficient declaration that condition was latent. *Goldstein v. Healy (1921) 187 Cal. 206, 211, 201 P. 462*

[c] Reasonable Inspection

Innkeeper not liable for injury sustained by guest as result of unknown defect which could not have been discovered by reasonable inspection. *Trembley v. Capital Co. (1949) 89 Cal. App. 2d 606, 608, 201 P.2d 398* ; *Adams v. Dow Hotel (1938) 25 Cal. App. 2d 51, 54, 76 P.2d 210*

Though innkeeper had no actual knowledge of latent defect which caused guest's injury, duty of due care required inspection to discover defective condition. *Adams v. Dow Hotel (1938) 25 Cal. App. 2d 51, 54, 76 P.2d 210*

[d] Scope of Innkeeper's Duty

Innkeeper's duty to use ordinary care to maintain premises in reasonably safe condition extends to include any means of ingress or egress which reasonably appears to have been provided for guest. *Sala v. Christensen (1958) 167 Cal. App. 2d 580, 582-583, 334 P.2d 944* ; *Staudinger v. Whitlock (1952) 111 Cal. App. 2d 288, 292, 244 P.2d 414* (cases decided prior to *Rowland v. Christian*)

Innkeeper's duty of ordinary care extends to other parts of premises. *Koppelman v. Ambassador Hotel Co. (1939) 35 Cal. App. 2d 537, 540, 96 P.2d 196* ; *McStay v. Citizens Nat'l Trust & Sav. Bank (1935) 5 Cal. App. 2d 595, 599, 43 P.2d 560* (cases decided prior to *Rowland v. Christian*)

Person who enters hotel with intent to visit bank therein is invitee who may conclude that invitation extends to corridors outside bank. *Koppelman v. Ambassador Hotel Co. (1939) 35 Cal. App. 2d 537, 544, 96 P.2d 196*

Motel guest had status of invitee at time she incurred injuries by falling in hole near pathway which connected motel units. *Sala v. Christensen (1958) 167 Cal. App. 2d 580, 582-583, 334 P.2d 944*

Liability of innkeeper to one who enters hotel as invitee depends on scope of invitation. *McStay v. Citizens Nat'l*

Trust & Sav. Bank (1935) 5 Cal. App. 2d 595, 599-600, 43 P.2d 560

[3] Defenses to Negligence Action

Employee on hotel premises was negligent when he fell down open stairwell while proceeding in darkness. *Robinson v. King (1952) 113 Cal. App. 2d 455, 457, 248 P.2d 477*

Obviousness of danger presented by planks which were stacked in corner of hotel lobby negated foreseeability of injury by defendants necessary to establish negligence and established negligence on part of plaintiff who tripped and fell. *Dixon v. St. Francis Hotel Corp. (1969) 271 Cal. App. 2d 739, 743, 77 Cal. Rptr. 201*

In action for wrongful death of minors by drowning in motel pool, burden of proving proximate cause did not shift to defendant on basis of evidence of failure to provide rope barrier; instructions on negligence of minors and parent were proper. *Smith v. Americania Motor Lodge (1974) 39 Cal. App. 3d 1, 6-9, 113 Cal. Rptr. 771*

Motel guest who suffered injuries upon falling in hole was not contributorily negligent in using unlighted path rather than illuminated sidewalk around building. *Sala v. Christensen (1958) 167 Cal. App. 2d 580, 583, 334 P.2d 944*

Motel guest who was not aware of hazard did not acting unreasonably in assuming that there was nothing of a dangerous character on premises. *Sala v. Christensen (1958) 167 Cal. App. 2d 580, 583, 334 P.2d 944*

[4] Definitions

[a] Guest and Lodger

Guest or lodger is one renting premises which remain under direct control and supervision of owner who furnishes and attends to them and who retains keys to them. *Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 421, 282 P.2d 890*

Guest of inn or hotel defined is one who receives accommodations or entertainment therein, usually for compensation. *Goldstein v. Healy (1921) 187 Cal. 206, 210, 201 P. 462*

Guest is distinguished from boarder or lodger in that guest enjoys temporary stays and receives no price reduction for accommodations, whereas boarder of lodger ordinarily contracts for longer definite period, often at lower rate than that charged transient guest. *Fay v. Pacific Improv. Co. (1892) 93 Cal. 253, 261, 28 P. 943*

One possessing characteristics of guest does not becoming boarder or lodger merely because he or she proposed to remain a given number of days, or ascertained price to be charged for entertainment, or paid in advance for part or all of accommodations or entertainment. *Pinkerton v. Woodward (1867) 33 Cal. 557, 597-598, 91 Am Dec 657*

Renter of room is guest or lodger not tenant where building known as "hotel" was under control and supervision of plaintiff who furnished and attended to rooms and retained keys thereto. *Erwin v. San Diego (1952) 112 Cal. App. 2d 213, 217, 246 P.2d 105*

[b] Tenant Distinguished

Renter is tenant, not guest or lodger, where she rented premises for designated sum per month and did own housework; fact that owner supplied linen and some janitor service and delivered mail did not creating relation of innkeeper and guest as matter of law where it appeared that parties intended relation of landlord and tenant. *Zavalney v. Donovan*

(1945) 70 Cal. App. 2d 182, 185-186, 160 P.2d 558

[c] Inn or Hotel

"Inn" is house which is held out to public as place where all transient persons who come will be received and entertained as guests for compensation. *Fay v. Pacific Improv. Co. (1892) 93 Cal. 253, 259, 28 P. 943*

Terms "inn" and "hotel" are interchangeable. *Fay v. Pacific Improv. Co. (1892) 93 Cal. 253, 259, 28 P. 943*

"Inn" is public house of entertainment for all who choose to visit it. *Pinkerton v. Woodward (1867) 33 Cal. 557, 596, 91 Am Dec 657*

Term "hotel" as used in former Health & Safety Code §§ 17819 and 15020 was intended to apply to all portions of hotel premises operated by and under management of hotel which were provided for refreshment, comfort, and entertainment of guests. *Berall v. Squaw Valley Lodge of Tahoe (1961) 189 Cal. App. 2d 540, 544, 11 Cal. Rptr. 316*

Distinction sometimes drawn between "inn" and "hotel" in that "inn" is said to be for transient guests only, while "hotel" accommodates both transients and those whose stay is more indefinite. *Piluso v. Spencer (1918) 36 Cal. App. 416, 421, 172 P. 412*

Character of place as ordinary hotel as not necessarily altered by fact that many of guests are not transients and that some of them occupy their rooms on monthly basis. People v. Vaughan (1944) 65 Cal. App. 2d Supp. 844, 852, *65 Cal. App. 2d Supp. 844, 150 P.2d 964*

[d] Boarding House Distinguished

"Inn" or "hotel" distinguished from "boarding house" in that keeper of inn receives all who frequent it while keeper of boarding house reserves choice of comers and terms of accommodation, contracts specifically with each customer, and usually arranges for long periods of stay and definite abode. *Fay v. Pacific Improv. Co. (1892) 93 Cal. 253, 259, 28 P. 943*

[e] Innkeeper

Innkeeper is one who supervises and maintains hotel. *Fay v. Pacific Improv. Co. (1892) 93 Cal. 253, 260, 28 P. 943*

[5] Duty to Protect From Dangerous Activity on Premises

Proprietor has duty to protect patrons from injury, annoyance, and mistreatment, but is not insurer of safety. *Slawinski v. Mocettini (1963) 217 Cal. App. 2d 192, 196, 31 Cal. Rptr. 613* ; *Kingen v. Weyant (1957) 148 Cal. App. 2d 656, 661, 307 P.2d 369*

Proprietor is liable to patron injured by another guest only when he or she negligently receives or harbors guest of known violent or viscious propensities. *Slawinski v. Mocettini (1963) 217 Cal. App. 2d 192, 196, 31 Cal. Rptr. 613* ; *Kingen v. Weyant (1957) 148 Cal. App. 2d 656, 661, 307 P.2d 369*

Innkeeper is not negligent unless he or she admits to hotel or permits to remain there a person of known violent and disorderly propensities who will probably assault or otherwise mistreat guests. *Rahmel v. Lehndorff (1904) 142 Cal.*

681, 684, 76 P. 659

Landowner or possessor as required to exercise reasonable care to give warning adequate to enable visitor to avoid harm from third party on premises, or otherwise to protect visitor against it. *Taylor v. Centennial Bowl (1966) 65 Cal. 2d 114, 124, 52 Cal. Rptr. 561, 416 P.2d 793*

Proprietor has no duty to protect tenant from other tenant when proprietor has no advance warning of other tenant's dangerous propensities; noise complaints against tenant do not put hotel proprietor on notice that tenant would be dangerous. *Gray v. Kircher (1987) 193 Cal. App. 3d 1069, 1074-1075, 236 Cal. Rptr. 891*

[6] Express Warranty

Express warranty is stated when innkeeper represents to guest that furnishing is safe and may be used for purpose for which intended, and guest, who relies on representation, is subsequently injured as result of defective condition of furnishing. *Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 423, 282 P.2d 890* ; *Shattuck v. St. Francis Hotel & Apts. (1936) 7 Cal. 2d 358, 360-361, 60 P.2d 855*

Occupant who receives assurances that furnishings are safe has right to assume management knew or and had means of knowing that everything required for ordinary use was free from any fault inconsistent with proper use and enjoyment of room; actual knowledge by management not required. *Shattuck v. St. Francis Hotel & Apts. (1936) 7 Cal. 2d 358, 360-361, 60 P.2d 855*

Fact that word "warrant" is not used in conversation between manager of hotel and occupant is immaterial. *Shattuck v. St. Francis Hotel & Apts. (1936) 7 Cal. 2d 358, 361, 60 P.2d 855*

Necessary allegations to state cause of action based on breach of express warranty against innkeeper by injured guest. *Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 423, 282 P.2d 890*

Where owner orally represented and warranted furnishing to be safe, owner assumed duty to have premises in safe condition at time they were rented; allegation that furnishing was in unsafe and dangerous condition sufficiently stated breach of duty. *Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 423, 282 P.2d 890*

[7] Innkeeper as Depositary for Hire

[a] Limited Liability Under Civil Code §§ 1859 and 1860

Civ. Code §§ 1859 and *1860* relieve innkeeper of burden of common-law liability as insurer and establish liability as that of depositary for hire. *Federal Ins. Co. v. Beverly Hills Hotel Corp. (1962) 202 Cal. App. 2d 120, 123-124, 20 Cal. Rptr. 502* ; *Muehlebach v. Paso Robles Springs Hotel (1924) 65 Cal. App. 634, 640, 225 P. 19*

Imposition of liability on innkeeper for loss of property of guests requires that loss be caused by innkeeper's own negligence or dishonesty or that of employees. *Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 347-348, 217 P.2d 961*

Hotel operator, who was neither negligent nor dishonest, is not liable for theft of jewelry and mink coat stolen from hotel room of guest, where guest made no attempt to deposit jewelry and coat with hotel, made no declaration of their value to hotel, made no attempt to obtain receipt therefor, and there was no consent in writing by hotel operator to undertake additional liability. *Federal Ins. Co. v. Beverly Hills Hotel Corp. (1962) 202 Cal. App. 2d 120, 127-128, 20 Cal. Rptr. 502* (applying *Code Civ. Proc. § 1859*)

Civ. Code §§ 1859, 1860 are designed to cover innkeeper's liability for all articles of personal property carried by guests; those two sections have common purpose and must be read together. *Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 350, 217 P.2d 961* ; *Federal Ins. Co. v. Beverly Hills Hotel Corp. (1962) 202 Cal. App. 2d 120, 124, 20 Cal. Rptr. 502* ; *Robert Altman, Inc. v. Biltmore Hotel (1961) 190 Cal. App. 2d 274, 279, 11 Cal. Rptr. 838*

[b] Agreement to Assume Increased Liability

[i] Written Agreement Required

For protection in excess of statutory limitation, guest must declare value of property to give innkeeper opportunity to confirm estimate of value; liability in excess of statutory limitation is based on innkeeper's written agreement to assume it. *Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 350-351, 217 P.2d 961* ; *Robert Altman, Inc. v. Biltmore Hotel (1961) 190 Cal. App. 2d 274, 280, 11 Cal. Rptr. 838*

Even if innkeeper was negligent as to care of guest's property, liability limited is set forth in *Civ. Code § 1859* unless innkeeper consented in writing to assume greater liability. *Providence Washington Ins. Co. v. Hotel Marysville, Inc. (1943) 60 Cal. App. 2d 338, 343, 140 P.2d 698*

Where goods remain in guest's possession, *Civ. Code § 1859* requires written consent on part of innkeeper to assume greater liability. *Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 351, 217 P.2d 961*

"Receipt in writing" exception to *Civ. Code § 1860* requires same acknowledgment of greater liability by innkeeper as that required by "written consent" in *Civ. Code § 1859*. *Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 351, 217 P.2d 961*

Civ. Code § 1840 limits liability of bailee to apparent value of article unless depositor informs him or her that it has greater value. *Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 351, 217 P.2d 961*

[ii] Written Receipt Imposing Liability

Satisfaction of requirement of "receipt in writing" under *Civ. Code § 1860* necessitates an acknowledgment by innkeeper that specific item was received with awareness of its nature and value. *Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 352, 217 P.2d 961* ; *Robert Altman, Inc. v. Biltmore Hotel (1961) 190 Cal. App. 2d 274, 279, 11 Cal. Rptr. 838*

Requirement for "receipt in writing" is not satisfied by mere acknowledgment of an envelope received without knowledge or information of its contents or their value. *Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 352, 217 P.2d 961*

Identification check by which guest could prove title to envelope was not receipt within meaning of *Civ. Code § 1860*; recovery thus limited to *$250. Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 350, 217 P.2d 961*

Parcel checks which were given hotel guests who deposited jewel cases in hotel vault, without disclosing their value to hotel, and which bore no declaration of value, were not being "receipts" within *Civ. Code § 1860*. *Robert Altman, Inc. v. Biltmore Hotel (1961) 190 Cal. App. 2d 274, 279, 11 Cal. Rptr. 838*

Hotel employee's testimony, in action for loss of deposited valuables, that depositors' checks were "receipts" that would increase hotel's liability was legal conclusion which did not bind hotel. *Robert Altman, Inc. v. Biltmore Hotel (1961)*

190 Cal. App. 2d 274, 280, 11 Cal. Rptr. 838

Innkeeper did not "consenting in writing" to assume greater liability within meaning of *Civ. Code § 1859* or give "receipt in writing" within meaning of *Civ. Code § 1860* merely by giving baggage checks evidencing receipt of baggage. *Providence Washington Ins. Co. v. Hotel Marysville, Inc. (1943) 60 Cal. App. 2d 338, 346-348, 140 P.2d 698*

Hotel's directing employees not to inquire as to value of articles presented for deposit, and not to accept articles if guest should make declaration of value, does not constitute waiver of *Civ. Code § 1860* limiting liability for loss of property of undisclosed value. *Robert Altman, Inc. v. Biltmore Hotel (1961) 190 Cal. App. 2d 274, 280, 11 Cal. Rptr. 838*

Hotel is under no duty to make inquiry as to value of articles deposited for safekeeping in hotel safe. *Robert Altman, Inc. v. Biltmore Hotel (1961) 190 Cal. App. 2d 274, 280, 11 Cal. Rptr. 838*

[c] Burden of Proof

Burden of proof rests on bailee to explain failure to redeliver bailor's property if bailor alleges and proves deposit of property with bailee, demand therefor, and failure of bailee to redeliver. *Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 348, 217 P.2d 961*

[d] Exemption From Liability

[i] Guest Does Not Have Property Deposited in Available Safe

Civ. Code § 1860 frees innkeeper from all liability if he or she keeps fireproof safe and gives notice of its availability, and if guest does not then deposit property for safekeeping. *Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 350-351, 217 P.2d 961* ; *Federal Ins. Co. v. Beverly Hills Hotel Corp. (1962) 202 Cal. App. 2d 120, 124, 20 Cal. Rptr. 502*

Civ. Code § 1860 relates to small articles of unusual value that are easily lost or misplaced. *Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 350-351, 217 P.2d 961* ; *Federal Ins. Co. v. Beverly Hills Hotel Corp. (1962) 202 Cal. App. 2d 120, 125, 20 Cal. Rptr. 502*

Guest did not deposit jewelry cases within meaning of *Civ. Code § 1860* where guest did not make known to anyone that they contained other than ordinary baggage. *Providence Washington Ins. Co. v. Hotel Marysville, Inc. (1943) 60 Cal. App. 2d 338, 344-345, 140 P.2d 698*

Civ. Code § 1860 creates no liability, but expresses only a limitation of liability as established in *Civ. Code § 1859. Federal Ins. Co. v. Beverly Hills Hotel Corp. (1962) 202 Cal. App. 2d 120, 124, 20 Cal. Rptr. 502*

[ii] Limitation of Liability as to Items Received for Deposit in Safe

Innkeeper is not liable pursuant to *Civ. Code § 1860* unless guest deposited property with hotel to be placed in safe and then not for more than $250 unless guest was given receipt in writing. *Providence Washington Ins. Co. v. Hotel Marysville, Inc. (1943) 60 Cal. App. 2d 338, 343, 140 P.2d 698*

Civ. Code § 1860 limits amount hotel guest can recover, where hotel keeps fireproof safe and gives due notice thereof, to sum of $250 unless guest is given written receipt. *Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 350, 217 P.2d*

961 ; *Ricketts v. Morehead Co., Inc. (1954) 122 Cal. App. 2d 948, 954, 265 P.2d 963*

Guest's recovery for lost property is limited to $250 if "receipt" is not written receipt within meaning of *Civ. Code § 1860*. *Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 352-353, 217 P.2d 961* ; *Robert Altman, Inc. v. Biltmore Hotel (1961) 190 Cal. App. 2d 274, 279, 11 Cal. Rptr. 838*

To recover $250 in case where property deposited in hotel safe is lost, plaintiff must prove deposited property was worth that much and that innkeeper was informed or had reason to know that fact. *Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 350, 217 P.2d 961*

[e] Fixed Sum Liability

Innkeeper is liable as bailee for hire pursuant to *Civ. Code § 1859* if loss or injury to property in guest's room was caused by innkeeper's negligence or dishonesty; absent written consent to greater liability, innkeeper is liable for only amounts specified in *Civ. Code § 1859*. *Federal Ins. Co. v. Beverly Hills Hotel Corp. (1962) 202 Cal. App. 2d 120, 127-128, 20 Cal. Rptr. 502*

Liability of innkeeper as set forth in *Civ. Code § 1859* is limited to specific sums for certain articles unless innkeeper executes written consent to assume greater liability. *Federal Ins. Co. v. Beverly Hills Hotel Corp. (1962) 202 Cal. App. 2d 120, 124, 20 Cal. Rptr. 502*

[8] Innkeeper-Guest Relationship

[a] Characteristics of Relationship

Relationship of innkeeper and guest is created where person presents self to world as innkeeper, receives travelers as guests, and solicits continuance of their patronage; traveler, relying on such representations, goes to house to receive entertainment. *Pinkerton v. Woodward (1867) 33 Cal. 557, 597*

Relationship of proprietor and lodger is demonstrated by facts that owner retains keys to all apartments, has regular access to them for caretaking purposes, furnishes and launders linen, furnishes regular maid service, cleans hallways, carpets, and windows, attends to removal of garbage, and furnishes light, water, heat, and telephone service. *Roberts v. Casey (1939) 36 Cal. App. 2d Supp. 767, 772, 93 P.2d 654*

[b] Landlord-Tenant Relationship Distinguished

Distinction exists between position of hotel keeper or lodging housekeeper with relation to guest or lodger and that of landlord with relation to tenant; mere guest or lodger is not a tenant. *Roberts v. Casey (1939) 36 Cal. App. 2d Supp. 767, 771, 93 P.2d 654*

Relationship of landlord and tenant is demonstrated by facts that there are no common kitchens, dining rooms, toilets, or bathrooms, that the suites each have these various facilities, that each suite is distinct unit, and that rent for suite is the same without regard to number of occupants. *Roberts v. Casey (1939) 36 Cal. App. 2d Supp. 767, 772, 93 P.2d 654*

Rental of motel unit at lower weekly rate than customary and fact that guests did work usually performed by maid was indicative that relationship was more that of landlord and tenant than lodger and proprietor. *Green v. Watson (1964) 224 Cal. App. 2d 184, 190-191, 36 Cal. Rptr. 362*

"Lodger" has only right to use of premises, subject to landlord's retention of control and right of access; "tenant" has exclusive legal possession of premises and is responsible for their care and condition. *Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 421, 282 P.2d 890* ; *Green v. Watson (1964) 224 Cal. App. 2d 184, 190, 36 Cal. Rptr. 362*

Landlord ordinarily has no duty of care with respect to condition of premises after exclusive possession is given to tenant. *Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 421, 282 P.2d 890*

[9] Innkeeper's Lien

Hotel keeper was not guilty of oppression in changing lock on door to one of housekeeping apartments during absence of its occupant in order to protect lien on occupant's personal property. *Treesh v. Stone (1921) 51 Cal. App. 708, 711, 197 P. 425*

Right of innkeeper to enter premises to assume possession of property to which right to possession exists pursuant to lien law. *Van Dorn v. Couch (1937) 21 Cal. App. 2d Supp. 749, 754-756, 64 P.2d 1197* (involving lien under *Civ. Code 1861a*)

[10] Outdoor Signs

Bus. & Prof. Code § 17564 relating to outdoor signs on motels but not hotels held unconstitutional. *Gawzner Corp. v. Minier (1975) 46 Cal. App. 3d 777, 791, 120 Cal. Rptr. 344*

[11] Vicarious Liability

Innkeeper is liable for tortious acts of servant. *Muehlebach v. Paso Robles Springs Hotel (1924) 65 Cal. App. 634, 648, 225 P. 19*

Civ. Code § 1860 does not exempt innkeeper from liability to third persons for own wrongs or wrongs of servant committed in and as part of transaction of business of principal. *Muehlebach v. Paso Robles Springs Hotel (1924) 65 Cal. App. 634, 648, 225 P. 19*

Civ. Code §§ 1859 and *1860* apply to losses resulting from theft by employees as to losses from negligence. *Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 349, 217 P.2d 961*

Innkeeper is not liable for malicious tort of employee on guest committed outside scope of employee's employment. *Rahmel v. Lehndorff (1904) 142 Cal. 681, 683, 76 P. 659*

Tort of employee which resulted from dispute arising out of employment is one committed within scope of employment; employer was not liable however, where employee's injury was inflicted out of personal malice. *Monty v. Orlandi (1959) 169 Cal. App. 2d 620, 623, 337 P.2d 861*

Liability of hotel corporations and managers for tortious acts of employees are one and same. *Ricketts v. Morehead Co., Inc. (1954) 122 Cal. App. 2d 948, 953-954, 265 P.2d 963*

[12] Res Ipsa Loquitur

[a] Nature of Doctrine

Doctrine of res ipsa loquitur applies where accident is of type which ordinarily does not occur unless someone has been negligent, accident was caused by agency or instrumentality within control of defendant, and plaintiff's conduct did not contribute to accident. *Vistica v. Presbyterian Hospital (1967) 67 Cal. 2d 465, 469, 62 Cal. Rptr. 577, 432 P.2d 193*

Allegations of specific acts of negligence does not deprive plaintiff of benefit of doctrine of res ipsa loquitur. *Mintzer v. Wilson (1937) 21 Cal. App. 2d 85, 89, 68 P.2d 370*

Inference of negligence created by application of doctrine constitutes evidence to be weighed by jury. *Mintzer v. Wilson (1937) 21 Cal. App. 2d 85, 90-91, 68 P.2d 370*

Doctrine applies even though more than one inference may be drawn from facts; issue of defendant's negligence is question of fact for jury. *Mintzer v. Wilson (1937) 21 Cal. App. 2d 85, 89-90, 68 P.2d 370*

[b] Effect

Inference of negligence raised by application of doctrine of res ipsa loquitur shifts burden of going forward with evidence to defendant. *Mintzer v. Wilson (1937) 21 Cal. App. 2d 85, 90-91, 68 P.2d 370*

[c] When Applied

Doctrine was applied to establish inference of negligence when guest was injured by plaster which fell from hotel room ceiling. *Mintzer v. Wilson (1937) 21 Cal. App. 2d 85, 88, 68 P.2d 370*

[d] When Not Applied

Doctrine was not applicable in case where hotel did not have exclusive control of furniture and where accident was not one that ordinarily would not happen without negligence of party charged. *Larson v. St. Francis Hotel (1948) 83 Cal. App. 2d 210, 212, 188 P.2d 513* (chair thrown from hotel window)

Admission that defendant operated hotel at time is not admission of control and management of hotel furniture so as to warrant application of doctrine. *Larson v. St. Francis Hotel (1948) 83 Cal. App. 2d 210, 214, 188 P.2d 513*

Doctrine was not applicable in case where even though control over hotel by innkeeper could be established, it could not reasonably be concluded that accident was of kind which did not normally occur in absence of negligence or that it was not due to any voluntary action on part of plaintiff. *Snyder v. Hollingbery (1956) 141 Cal. App. 2d 520, 527-528, 297 P.2d 485* (hotel fire)

[13] Right to Exclude

Proprietor of hotel may exclude persons who desire to go from room to room for purpose of talking with guests and distributing printed matter to them. *People v. Vaughan (1944) 65 Cal. App. 2d Supp. 844, 852-853, 150 P.2d 964*

Guaranty of freedom of speech, press, and religion do not entitle any person to go into hotel or lodging house, over proprietor's objection, and disturb peace of guests by knocking on doors of rooms to preach gospel and distribute religious literature. *People v. Vaughan (1944) 65 Cal. App. 2d Supp. 844, 853, 150 P.2d 964*

Proprietor of hotel is not permitted to expel guest because of guest's alleged "anti-gay" philosophy; hotel owners are prohibited under *Civ. Code § 51* (Unruh Civil Rights Act) from isolating guests according to perceived social or political philosophies. *Gray v. Kircher (1987) 193 Cal. App. 3d 1069, 1075, 236 Cal. Rptr. 891*

[14] Violation of Statute

Standard of conduct of reasonable person is established by act of legislature; violation of statute is negligence if plaintiff is one of class of persons whom statute was designed to protect and harm which ensued was of type statute designed to prevent. *Berall v. Squaw Valley Lodge of Tahoe (1961) 189 Cal. App. 2d 540, 544, 11 Cal. Rptr. 316*

Court erred in refusing to give instruction on necessity for artificial lighting in apartment houses and hotels as required by former Health & Safety Code § 17819. *Berall v. Squaw Valley Lodge of Tahoe (1961) 189 Cal. App. 2d 540, 545, 11 Cal. Rptr. 316*

Innkeeper was not negligent per se where former Health & Safety Code § 16900 [*see now Health & Safety Code §§ 19881, 19882* (making sale of new or used unvented heater a misdemeanor)] did not deem use of unvented heater unlawful. *Brandwein v. Rodriguez (1955) 133 Cal. App. 2d 433, 436-437, 284 P.2d 130*

[15] Visitor of Guest

Guest has right to invite persons to visit inn for lawful purposes, at proper times, and subject to reasonable restrictions and regulations. *Goldstein v. Healy (1921) 187 Cal. 206, 210-211, 201 P. 462*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceProofRes Ipsa LoquiturGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDefensesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesInviteesBusiness InviteesTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesHotels

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25-297 California Forms of Pleading and Practice--Annotated § 297.44

§ 297.44 Attorney General Opinions

Applicability of *Civ. Code §§ 51, 52* to inns, restaurants, and various other "business establishments." *34 Ops. Cal. Att'y Gen. 230 (1959)*

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§ 297.45 Law Reviews

Davis, "Resort Condominium Hotels-or-An Investment Contract With a View," *49 L.A. Bar. B. 279 (1974)*

Baker, "The Unclaimed Personal Property Problem: A Legislative Proposal," *19 Stan. L. Rev. 619 (1967)*

Hogan, "Innkeeper's Lien at Common Law," *8 Hastings L.J. 33 (1956)*

Note, "Innkeeper's Liability for Guest's Property," *24 So. Cal. L. Rev. 319 (1951)*

Note, "Personal Property-Bailments-Burden of Proof-Destruction of Goods While in Bailee's Possession," *23 So. Cal. L. Rev. 409 (1950)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawNonmortgage LiensGeneral OverviewTortsNegligenceActionsNegligent EntrustmentTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesHotels

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25-297 California Forms of Pleading and Practice--Annotated § 297.46

§ 297.46 Text References

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 113 et seq.; vol. 12, *Real Property*, § 513; vol. 13, *Personal Property*, §§ 161 et seq. (10th ed. 2005)

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[Reserved]

§§ 297.47[Reserved]

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PART IV. FORMS

25-297 California Forms of Pleading and Practice--Annotated § 297.60

§ 297.60 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Guest Against Innkeeper--Defective Condition--General Form

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Guest Against Innkeeper--Defective Condition--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Negligence)
Defendants(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[*EITHER*]

1. Defendant _____ [*name of corporate owner-innkeeper*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California, with its principal place of business in _____ [*city*], _____ County, California [*or allege other capacity*].

[*OR*]

1. Defendant _____ [*name of individual owner-innkeeper*] is, and at all times herein mentioned was, a resident of _____ [*city*], _____ County, California [*or allege other capacity and residence*].

2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of such fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as alleged herein were proximately caused by such negligence.)]

3. At all times mentioned in this complaint, defendant _____ [*name of corporate or individual owner-innkeeper*] owned, operated, maintained, and controlled a certain _____ [*specify, e.g.*, building *or* group of buildings] commonly known as the _____ [*name of hotel or motel*], located at _____ [*address*] in _____ [*city*], _____ County, California.

4. [At all times herein mentioned, defendant _____ (*name of manager*) was the agent and employee of his/her codefendant and in doing all of the things mentioned in this complaint was acting within the scope of his/her authority and employment as such agent and employee and with the permission and consent of his/her codefendant.]

5. On or about _____ [*date*], _____ [*name of plaintiff*] was a guest at _____ [*name of hotel or motel*], occupying room _____ [*number of room*] for which he/she paid $_____ [*amount of rent paid*] to _____ [*name of individual owner-innkeeper or manager*].

6. At or about _____ [*time*], plaintiff guest began to _____ [*specify, e.g.*, take a shower in room _____ (*number of room*). When plaintiff turned on the hot water, the faucet assembly came off of the wall and plaintiff was burned by scalding water which spurted out. In his/her attempt to extricate himself/herself and escape from the stream of scalding hot water, plaintiff slipped and fell in the bathtub with great force and violence, causing plaintiff to sustain severe and painful injuries as alleged below].

7. Defendant [s, and each of them,] negligently and carelessly failed to maintain the premises in a reasonably safe condition in that _____ [*specify, e.g.*, the defective shower equipment caused severe and painful injuries to the plaintiff as stated above]. Defendant[s, and each of them,] knew or should have known, that the _____ [*specify, e.g.*, faucet assembly] was in defective condition, and they negligently, carelessly, and recklessly failed to inspect and repair it or warn plaintiff of the defect therein.

8. As a proximate result of the negligence of defendant[s, and each of them,] plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her body and shock and injury to his/her nervous system and person, all of which injuries have caused and continue to cause plaintiff great mental, physical, and nervous pain and suffering and plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her. As a result of such injuries, plaintiff has suffered general damage according to proof.

9. As a further proximate result of the negligence of defendant[s, and each of them,] plaintiff has incurred and will continue to incur medical and related expenses.

10. At the time of the events described in this complaint, plaintiff was gainfully employed as _____ [*state occupation*]. As a further proximate result of the negligence of defendant [s, and each of them,] as alleged in this complaint, plaintiff was prevented from attending to his/her usual occupation for the period of _____ [*specify*], all to his/her loss of earnings. Furthermore, plaintiff's future earning capacity has been diminished and impaired [by an unknown amount to be proved at trial].

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This complaint is for damages for use by a guest to bring an action for personal injuries based on negligence against an innkeeper where the guest was injured because of a defective condition in his or her hotel or motel room. The form is based on the complaint filed in *Wallace v. Speier (1943) 60 Cal. App. 2d 387, 140 P.2d 900* .

[3] Allegations

This complaint alleges:

- The existence of the innkeeper-guest relationship (Paragraph 5) [*Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 421, 282 P.2d 890]* .

- Negligence on the part of defendant innkeeper (Paragraphs 6 and 7) [*Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 422, 282 P.2d 890]* .

- Injury resulting to the guest (Paragraph 8).

- Damages (Paragraphs 8-10) [*Civ. Code § 3333*].

Although *Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* abolished common-law distinctions between guests, invitees, and trespassers as to the duty owed by a possessor of land and held that liability is predicated on ordinary negligence under *Civ. Code § 1714, Rowland v. Christian* does not generally abrogate the decisions declaring the substantive duties of the possessor of land to invitees nor those establishing the correlative rights and duties of invitees [*see Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 25-38, 77 Cal. Rptr. 914* (application of principle of *Rowland v. Christian* in context of business invitee); *see also § 297.13*].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified if the action is an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion of how verifying a complaint affects the answer, see Ch. 26, *Answers* .

[5] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[6] Cross References

See Ch. 380, *Negligence*

For alternative allegations as to capacity and residence of parties, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms of personal injury allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively

For general discussion and forms relating to liability for injuries on business premises, see Ch. 421, *Premises Liability*

Personal Injury: Actions, Defenses, Damages, Vol. 17, *Hotels, Inns, and Boarding and Lodging Houses* (Matthew Bender)

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 1113-1149 (10th ed. 2005)

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25-297 California Forms of Pleading and Practice--Annotated § 297.61

§ 297.61 Allegations--Guest Injured When Struck by Plaster Which Fell From Ceiling in Hotel or Motel Room

[1] FORM Allegations--Guest Injured When Struck by Plaster Which Fell From Ceiling in Hotel or Motel Room

1. On or about _____ [*date*], _____ [*name of plaintiff*] was a guest at _____ [*name of hotel or motel*], occupying room _____ [*number of room*] for which he/she paid $_____ [*amount of rent paid*] to _____ [*name of individual owner-innkeeper or manager*].

2. At or about _____ [*time*], plaintiff-guest was _____ [*describe activity, e.g.,* asleep in bed] in room _____ [*number of room*]. At that time, a piece of plaster about _____ [*describe size, e.g.,* 2'x 1'] fell from the ceiling in the _____ [*specify, e.g.,* bedroom] and struck plaintiff on the _____ [*describe, e.g.,* head and shoulders *or* lower torso] causing plaintiff to sustain severe and painful injuries as alleged below.

3. Defendant[s, and each of them,] negligently and carelessly failed to maintain the premises in a reasonably safe condition in that a piece of plaster fell from the ceiling, struck plaintiff, and caused severe and painful injuries as mentioned above. Defendant[s, and each of them,] knew or should have known, that the ceiling was in defective condition, and they negligently, carelessly, and recklessly failed to inspect and repair it or warn plaintiff of the defect therein.

[2] Use of Form

The allegations in [1], *above,* are for use in a complaint in an action by a guest who was injured when a piece of plaster from the ceiling of the hotel or motel room fell and struck him or her [*see Mintzer v. Wilson (1937) 21 Cal. App. 2d 85, 88, 68 P.2d 370 , see also Evid. Code § 646* (res ipsa loquitur)].

[3] Cross References

For a form of complaint in which these allegations may be incorporated, and comments and cross references relating to

complaints generally, see *§ 297.60*

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25-297 California Forms of Pleading and Practice--Annotated § 297.62

§ 297.62 Allegations--Guest Injured by Fall in Hole on Portion of Hotel or Motel Premises Used for Ingress and Egress

[1] FORM Allegations--Guest Injured by Fall in Hole on Portion of Hotel or Motel Premises Used for Ingress and Egress

1. At all times mentioned in this complaint, defendants owned, provided, maintained, operated, and controlled the _____ [*specify area, e.g.*, sidewalks and pathways connecting the _____ (motel units *or* hotel buildings)] for the use of anyone lawfully upon the premises, including plaintiff, as a means of ingress and egress.

2. On or about _____ [*date*], _____ [*name of plaintiff*] was a guest at _____ [*name of hotel or motel*], occupying room _____ [*number of room*] for which he/she paid $_____ [*amount of rent paid*] to _____ [*name of individual owner-keeper or manager*].

3. At or about _____ [*time*], plaintiff-guest left his/her motel unit with the intention of _____ [*specify, e.g.*, visting a friend who was staying in a nearby unit. A gravel path, illuminated only by indirect light which came from the sides of the building, connected the units. When he/she stepped around the corner of the building, walking toward the gravel path, he/she stepped into an uncovered access hole, fell to the ground, and sustained the severe and painful injuries alleged below. The access hole extended along the building for _____ (*number of feet*) and was approximately _____ (*number of inches*) in depth].

4. Defendant[s, and each of them,] carelessly and negligently owned, operated, maintained, and controlled _____ [*specify area, e.g.*, the sidewalks and pathways connecting the _____ (motel units *or* hotel buildings)] so that the area was dangerous and unsafe for use by guests, including plaintiff, and did not warn guests of the dangerous condition, thereby proximately causing plaintiff to sustain the injuries and damages described below.

[2] Use of Form

The allegations in [1], *above*, are for use in a complaint in an action by a guest who was injured when he or she fell into a hole near a pathway used for ingress and egress to a hotel or motel [*see Sala v. Christensen (1958) 167 Cal. App. 2d 580, 582-583, 334 P.2d 944]* .

[3] Cross References

For a form of complaint in which these allegations may be incorporated, and comments and cross references relating to complaints generally, see *§ 297.60*

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25-297 California Forms of Pleading and Practice--Annotated § 297.63

§ 297.63 Allegations--Visitor of Guest Injured by Fall to Ground Through Rotten Railing

[1] FORM Allegations--Visitor of Guest Injured by Fall to Ground Through Rotten Railing

1. On or about _____ [*date*], _____ [*name of plaintiff*] was a guest at _____ [*name of hotel or motel*], occupying living quarters for which he/she paid $_____ [*amount of rent paid*] to _____ [*name of sole owner-innkeeper or manager*]. _____ [*Name of plaintiff*] had come to the _____ [hotel *or* motel] to visit _____ [*name of guest*] at his/her invitation and request.

2. Defendant[s, and each of them,] maintained as part of the summer resort and _____ [hotel *or* motel], as living quarters for its guests and their visitors, a tent set on a wooden platform. In order to prevent guests or visitors on the platform from falling, and to protect persons who were on the platform, defendant(s) had erected, placed, and maintained on the outer edge of it _____ [*describe, e.g.*, a railing made of wood about three to four inches in diameter] which was fastened upon the platform about _____ [*describe, e.g.*, three to four feet above the floor of the platform by means of timbers and braces].

3. On or about _____ [*date*], at or about _____ [*time*], plaintiff was present on the platform at the invitation and request of _____ [*name of guest*]. Plaintiff was _____ [*describe activity, e.g.*, standing and talking to _____ (*name of guest*) with his/her back to the railing and with hands resting lightly on it as protection against falling over and off].

4. Defendant[s, and each of them,] had so negligently and carelessly failed to maintain the premises in a reasonably safe condition that the wooden railing was in a state of rottenness and decomposition. As a proximate result of defendant's(s') negligence and carelessness, the railing gave way and broke, causing plaintiff to fall a distance of _____ [*number of feet*] to the ground and causing plaintiff to strike his/her _____ [*specify, e.g.*, head and shoulders] and to sustain severe and painful injuries as alleged below. Defendant(s) knew, or should have known, that the railing was in defective condition, and had negligently, carelessly, and recklessly failed to inspect and repair it or warn plaintiff of the defect therein.

[2] Use of Form

The allegations in [1], *above*, are for use in a complaint in an action by visitor of guest who was injured when he/she fell through a rotten railing [*see Goldstein v. Healy (1921) 187 Cal. 206, 210-211, 201 P. 462* (guest has right to invite persons to visit inn for lawful purposes, at proper times, and subject to reasonable restrictions and regulations)].

[3] Cross References

For a form of complaint in which these allegations may be incorporated, and comments and cross references relating to complaints generally, see *§ 297.60*

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25-297 California Forms of Pleading and Practice--Annotated § 297.64

§ 297.64 Allegations--Guest Injured When Knocked to Ground by Employee Pushing Luggage Cart

[1] FORM Allegations--Guest Injured When Knocked to Ground by Employee Pushing Luggage Cart

1. At all times mentioned, defendant _____ [*name of employee*] was employed by defendant _____ [*name of corporate or individual owner-innkeeper*] in the capacity of _____[*specify type of job, e.g.*, bellhop] and was the agent and employee of his/her codefendant and, in doing all of the things mentioned in this complaint, was acting within the scope of his/her authority and employment as such agent and employee and with the permission and consent of his/her codefendant.

2. On or about _____ [*date*], at or about _____ [*time*], plaintiff was _____ [*describe location in hotel or motel, e.g.*, standing in the lobby of the _____ (hotel *or* motel) at or near the entrance to the elevators]. At that time and place, defendant _____ [*type of employee, e.g.*, bellhop], acting within the scope and course of his/her employment and agency as _____ [*specify, e.g.*, a bellhop], propelled a luggage cart across the lobby toward the elevators near which plaintiff was standing.

3. Defendant _____ [*name of bellhop or other employee*] negligently and carelessly failed to warn members of the public in the lobby, including plaintiff, concerning the approach of the cart. Defendant failed to take proper precautions while operating the cart and negligently and carelessly operated and propelled the cart so as to cause it to strike plaintiff, knock him/her to the floor of the lobby, and cause the severe and painful injuries alleged below.

[2] Use of Form

The allegations in [1], *above,* are for use in a complaint in an action by a guest against an innkeeper and his/her employee when the guest was knocked down and injured by a luggage cart operated by the employee.

[3] Cross References

For a form for use in an action involving a patron of a restaurant who is injured because of the negligent acts of a

waiter, see Ch. 421, *Premises Liability*

For a form of complaint in which these allegations may be incorporated, and comments and cross references relating to complaints generally, see *§ 297.60*

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25-297 California Forms of Pleading and Practice--Annotated § 297.65

§ 297.65 Complaint for Damages [Civ. Code § 3333] for Wrongful Death [Code Civ. Proc. § 377.60 et seq.] Based on Negligence [Civ. Code § 1714(a)]--By Guest's Heirs Against Innkeeper--Death Caused by Gas Heater in Room

[1] FORM Complaint for Damages [Civ. Code § 3333] for Wrongful Death [Code Civ. Proc. § 377.60 et seq.] Based on Negligence [Civ. Code § 1714(a)]--By Guest's Heirs Against Innkeeper--Death Caused by Gas Heater in Room

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*names*],	)	
Plaintiffs,	)	NO. _____
vs.	)	COMPLAIN FOR DAMAGES
_____ [*name(s)*], [and DOES I-	)	(Wrongful Death)
_____, inclusive,]	)	[Amount demanded _____
Defendants(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiffs, _____ [*names*], allege:

1. Plaintiffs _____ [*names*] are the _____ [*allege plaintiffs' capacity under Code Civ. Proc. § 377.60, e.g.,* the sole surviving spouse and children] of _____ [*name*], deceased (hereinafter referred to as "decedent"). Their relationships to decedent are as follows:

Name	Relationship to Decedent
_____	_____

_____ _____
_____ _____

[2. *Capacity and residence of defendant. See § 297.60[1], Paragraph 1.*]

[3. *Fictitious name allegation, if appropriate. See § 297.60[1], Paragraph 2.*]

[4. *Defendant's ownership of hotel or motel. See § 297.60[1], Paragraph 3.*]

[5. *Agency allegation. See § 297.60[1], Paragraph 4.*]

6. On or about _____ [*date*], _____ [*name of plaintiff*] and decedent were guests at _____ [*name of hotel or motel*], occupying room _____ [*number of room*] for which they had paid advance rent of $_____ [*amount of rent paid*] for a period of _____ [*number of days*] to _____ [*name of individual owner-innkeeper or manager*].

7. The _____ [unit *or* apartment] rented by defendant(s) to plaintiff and decedent contained an unvented gas heater that was set in the wall of the _____ [*specify location, e.g.*, living room]. The defendant(s) so negligently and carelessly maintained the gas heater that it produced quantities of carbon monoxide that accumulated in the room in which plaintiff and decedent slept.

8. As a proximate result of the negligence of defendant(s) and of the accumulation of carbon monoxide, decedent was asphyxiated in his/her sleep and died from the effects thereof.

9. Prior to decedent's death, plaintiffs lived with him/her and were totally dependent on him/her for their support and maintenance, and decedent was a faithful and dutiful _____ [*specify, e.g.*, wife and mother] to plaintiffs.

10. As a proximate result of the negligence of defendant[s, and each of them,] and the death of decedent, plaintiffs have sustained pecuniary loss resulting from the loss of the society, comfort, attention, services, and support of decedent.

11. As a further proximate result of the negligence of defendant(s), and the death of decedent, plaintiff _____ [*name of surviving spouse*] has incurred funeral and burial expenses.

WHEREFORE, plaintiffs pray judgment against defendant[s, and each of them,] as follows:

1. For general damages according to proof;

2. For funeral and burial expenses for plaintiff _____ [*name of widow/widower*] according to proof;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff(s)

[*Verification, if desired. See § 297.60[1].*]

[2] Use of Form

The complaint for damages for wrongful death in [1], *above,* is for use by the persons who are authorized to bring a cause of action under *Code Civ. Proc. § 377.60* [*see* [6], *below*] against an innkeeper who negligently failed to maintain a gas heater in a hotel or motel room [*see Brandwein v. Rodriguez (1955) 133 Cal. App. 2d 433, 436-437, 284 P.2d 130* (innkeeper was not negligent per se because former Health & Safety Code § 16900 (*now see Health & Safety Code §§ 19881, 19882*, making sale of new or used unvented heater a misdemeanor did not make use of unvented heater unlawful)].

The form is based on the complaint filed in *Brandwein v. Rodriguez (1955) 133 Cal. App. 2d 433, 284 P.2d 130* .

[3] Allegations

The complaint alleges the following:

- The plaintiff's relationship to the decedent (Paragraph 1) [*see Code Civ. Proc. § 377.60*; for discussion, *see* [6], *below*].

- The existence of the innkeeper-guest relationship (Paragraph 6) [*see Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 421, 282 P.2d 890]* .

- Negligence on the part of defendant innkeeper (Paragraph 7) [*see Brandwein v. Rodriguez (1955) 133 Cal. App. 2d 433, 435-437, 284 P.2d 130]* .

- The death of decedent as a proximate result of negligence of the innkeeper (Paragraph 8) [*see Code Civ. Proc. § 377.60*].

- Damages (Paragraphs 9-11) [*see Code Civ. Proc. § 377.61*].

[4] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*]. Punitive damages generally are not recoverable in a wrongful death action [*see Ford Motor Co. v. Superior Court (1981) 120 Cal. App. 3d 748, 751-753, 175 Cal. Rptr. 39]* . For discussion regarding when punitive damages may be recovered in such cases, see Ch. 181, *Death and Survival Actions* .

[5] Wrongful Death and Survival Actions

A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by the persons listed in *Code Civ. Proc. § 377.60* [*see* [6], *below*]. If the defendant is deceased, the cause of action survives and may be asserted against the decedent's personal representative [*see Code Civ. Proc. §§ 377.20, 377.40, 377.60*]. Damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under *Code Civ. Proc. § 377.34* (survival actions) [*Code Civ. Proc. § 377.61*].

A survival action may be joined with a wrongful death action arising out of the same wrongful act or neglect [*see Code Civ. Proc. § 377.62(a)*]. A wrongful death action and an action under *Code Civ. Proc. § 377.31* (continuation of action by plaintiff's personal representive or successor in interest after plaintiff's death) that arises out of the same wrongful act or neglect may be consolidated for trial as provided in *Code Civ. Proc. § 1048* [*Code Civ. Proc. § 377.62(a)*]. For discussion and forms relating to consolidation generally, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

[6] Who May Bring Wrongful Death Action

The persons who may assert a cause of action for the death of a person caused by the wrongful act or neglect of another are the following [*Code Civ. Proc. § 377.60*; *see* Ch. 181, *Death and Survival Actions*]:

- The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse, who would be entitled to the property of the decedent by intestate succession;

- Whether or not qualified under subparagraph (a), *above*, if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents; and

- A minor, whether or not qualified under subparagraph (a) or (b), *above*, if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one half or more of the minor's support.

In addition, a cause of action for wrongful death may be asserted by the personal representative on behalf the persons described *above* [*Code Civ. Proc. § 377.60*].

[7] Cross References

For discussion of wrongful death actions and a form of complaint with which the decedent's personal representative may bring an action, see Ch. 181, *Death and Survival Actions* .

For additional comments and cross references relating to complaints generally, see *§ 297.60[4]* et seq.

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 1377-1384, 1690-1697 (10th ed. 2005)

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25-297 California Forms of Pleading and Practice--Annotated § 297.66

§ 297.66 Allegations--Guest's Death Caused by Asphyxiation Due to Inadequate Fire Escapes in Hotel

[1] FORM Allegations--Guest's Death Caused by Asphyxiation Due to Inadequate Fire Escapes in Hotel

1. On or about _____ [*date*], decedent was a guest at _____[*name of hotel*], occupying room _____ [*number of room*] located on the _____ [*number of floor*] floor of the building and for which decedent had paid advance rent of $_____ [*amount of rent paid*] for a period of _____ [*number of days*] to _____ [*name of individual owner-innkeeper or manager*].

2. Defendant[s, and each of them,] carelessly and negligently maintained and operated the _____ [*name of hotel*] building, in that he/she/they neglected and failed to provide adequate and proper fire escapes from the buildings, or adequate and sufficient artificial light in the hallways and public passageways, and in that he/she/they negligently and carelessly barred and obstructed the way to fire escapes from the building.

3. On or about _____ [*date*], at or about the hour of _____ [*time*], while decedent was _____ [*describe activity, e.g.*, sleeping], a fire began in the _____ [*name of hotel*] premises and spread rapidly through the building. As a proximate result of the carelessness and negligence of defendant[s, and each of them,] in the maintenance and operation of the hotel, as mentioned above, decedent was prevented from making his/her escape from the building, and while attempting to make his/her escape, and to save his/her life, decedent was overcome by smoke and asphyxiated and died.

[2] Use of Form

The allegations in [1], *above*, are for use in a complaint in a wrongful death action brought by a decedent guest's heirs against an innkeeper who negligently failed to maintain adequate fire escapes in a hotel [*see Roxas v. Gogna (1940) 41 Cal. App. 2d 234, 241, 106 P.2d 227]* .

[3] Cross References

For alternative complaints and allegations for use in actions involving fires, see Ch. 267, *Fires*

For a form of complaint in which these allegations may be incorporated, and comments and cross references relating to complaints for wrongful death generally, see *§ 297.65*

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25-297 California Forms of Pleading and Practice--Annotated § 297.67

§ 297.67 Complaint for Compensatory [Civ. Code § 3333] and Exemplary and Punitive [Civ. Code § 3294] Damages for Personal Injuries Based on Negligence [Civ. Code § 1714(a)] and Assault and Battery--By Plaintiff Guest Against Innkeeper and Assailant Guest--Assault and Battery on Plaintiff by Assailant Guest

[1] FORM Complaint for Compensatory [Civ. Code § 3333] and Exemplary and Punitive [Civ. Code § 3294] Damages for Personal Injuries Based on Negligence [Civ. Code § 1714(a)] and Assault and Battery--By Plaintiff Guest Against Innkeeper and Assailant Guest--Assault and Battery on Plaintiff by Assailant Guest

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	(Negligence; Assault and Battery)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Negligence; Against _____ [*name of hotel or motel and any other parties sued on this theory*])

1. [*Capacity and residence of defendant. See § 297.60[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 297.60[1], Paragraph 2.*]

3. [*Defendant's ownership of hotel or motel. See § 297.60[1], Paragraph 3.*]

4. [*Agency allegation. See § 297.60[1], Paragraph 4.*]

5. On or about _____ [*date*], _____ [*name of plaintiff*] and _____ [*name of assailant guest*] were guests at _____ [*name of hotel or motel*]. Plaintiff occupied room _____ [*room number*], for which plaintiff paid $_____ [*amount of rent paid*] to _____ [*name of individual owner-innkeeper or manager*]. _____ [*Name of assailant guest*] occupied room _____ [*room number*].

6. At all times mentioned in this complaint, _____ [*name of assailant guest*] was _____ [*describe, e.g.*, mentally deranged *or* obstreperously drunk] and a person of violent, vicious, and dangerous character and disposition. At all times mentioned, defendant[s, and each of them] knew or in the exercise of reasonable care, should have known, that the presence of _____ [*name of assailant guest*] in the _____ [hotel *or* motel] would constitute a danger and hazard to guests at the _____ [hotel *or* motel], but carelessly and negligently failed to take reasonable precautions to prevent an assault by _____ [*name of assailant guest*] on plaintiff on the _____ [hotel *or* motel] premises.

7. On or about _____ [*date*], while plaintiff was _____ [*describe activity, e.g.*, sitting in the lobby writing post cards], defendant[s, and each of them,] so negligently and carelessly operated, managed, and controlled the _____ [hotel *or* motel] as to permit the _____ [*assailant guest*] to enter the premises, to remain therein for _____ [*length of time assailant was present*] and to attack and stab plaintiff in a brutal and unprovoked manner, thereby proximately causing injuries and damages to plaintiff as alleged below.

8. [*Injuries and damages. See § 297.60, Paragraphs 8-10.*]

SECOND CAUSE OF ACTION
(Assault and Battery; Against _____ [*name of assailant*])

1. Plaintiff refers to and herein incorporates Paragraphs 1-5, inclusive, of the First Cause of Action.

2. Defendant _____ [*name of assailant*] is and at all times mentioned was a resident of _____ County, California.

3. On or about _____ [*date*], at _____ [*name of hotel or motel*] in _____ [*city*], California, while plaintiff was _____ [*describe activity, e.g.*, sitting in the lobby writing post cards], _____ [*name of defendant assailant*] entered the premises and assaulted and battered plaintiff by _____ [*specify e.g.*, threatening to stab plaintiff and then violently stabbing him/her in and about the neck and shoulders] in a brutal and unprovoked manner.

4. By reason of the acts of defendant _____ [*name of assailant*] as alleged above, plaintiff was placed in great fear for his/her life and physical well being.

5. By reason of the wrongful and malicious acts of defendant _____ [*name of defendant assailant*] and of the fright caused plaintiff, plaintiff has suffered extreme and severe mental anguish and physical pain and has been injured in mind and body as follows: _____ [*describe*], all to plaintiff's damage.

6. By reason of the wrongful and malicious acts of defendant _____ [*name of assailant*], plaintiff was

required to and did expend money and incur obligations for medical services, drugs, and sundries reasonably required in the treatment and relief of the _____ (emotional disturbance *or* injuries *or both*) he/she sustained.

7. By reason of the wrongful acts of defendant _____ [*name of assailant*], plaintiff was prevented from attending to his/her usual _____ [occupation *or* profession] as a _____ [*specify*] and thereby lost earnings. Plaintiff is informed and believes and thereon alleges, that he/she will thereby be prevented from attending to his/her usual _____ [occupation *or* profession] for a period in the future which he/she cannot now ascertain, and will thereby sustain further loss of earnings.

8. The defendant's acts were willful, wanton, malicious, and oppressive and justify the awarding of exemplary and punitive damages.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

On the FIRST CAUSE OF ACTION against innkeeper:

1. For general damages;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

On the SECOND CAUSE OF ACTION against assailant:

4. For general damages;

5. For medical and related expenses according to proof;

6. For loss of earnings according to proof;

7. For exemplary and punitive damages.

On all CAUSES OF ACTION:

8. For costs of suit herein incurred.

9. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 297.60[1].*]

[2] Use of Form

This complaint is for compensatory, exemplary, and punitive damages based on negligence and assault and battery brought by a guest against an innkeeper and an assailant where the plaintiff guest was injured as a result of an assault on him or her by another guest [*see Civ. Code § 43*(right of protection from bodily restraint or harm)].

[3] Allegations of Assault and Battery

A cause of action for battery should allege a willful and unlawful use of force or violence on the person of another (Paragraph 3) [*Penal Code § 242*; *Bartosh v. Banning (1967) 251 Cal. App. 2d 378, 386, 59 Cal. Rptr. 382]* , injury (Paragraphs 4, 5) [*see Civ. Code § 3281*], and damages (Paragraphs 7-8) [*see Civ. Code §§ 3294* (exemplary and punitive damages), 3333 (compensatory damages)].

[4] Cross References

For a discussion of and forms of complaints and affirmative defenses for use in actions involving assault and battery, see Ch. 58, *Assault and Battery*

For alternate forms and allegations against restaurants because of acts of patrons, see Ch. 421, *Premises Liability*

For alternate forms and allegations against bars because of acts of patrons, see Ch. 19, *Alcoholic Beverages: Civil Liability*

For additional comments and cross references relating to complaints generally, see *§ 297.60[4]* et seq.

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25-297 California Forms of Pleading and Practice--Annotated § 297.68

§ 297.68 Complaint for Damages [Civ. Code § 1860] for Loss of Personal Property Based on Negligence and Written Receipt [Civ. Code §§ 1714(a), 1852, 1860]--By Guest Against Innkeeper as Depositary for Hire [Civ. Code § 1860]--Guest's Valuables Deposited in Safe and Not Returned Upon Demand

[1] FORM Complaint for Damages [Civ. Code § 1860] for Loss of Personal Property Based on Negligence and Written Receipt [Civ. Code §§ 1714(a), 1852, 1860]--By Guest Against Innkeeper as Depositary for Hire [Civ. Code § 1860]--Guest's Valuables Deposited in Safe and Not Returned Upon Demand

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Negligence and Written Receipt)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[*EITHER*]

1. Defendant _____ [*name*] is, and at all times mentioned was, a corporation organized and existing under the laws of the State of California with its principal place of business in _____ [*city*], _____ County, California.

[*OR*]

1. Defendant _____ [*name*] is, and at all times mentioned was, a resident of _____ County, California].

2. [*Fictitious name allegation, if appropriate. See § 297.60[1], Paragraph 2.*]

3. [*Defendant's ownership of hotel or motel. See § 297.60[1], Paragraph 3.*]

4. [*Agency allegation. See § 297.60[1], Paragraph 4.*]

5. On or about _____ [*date*], _____ [*name of plaintiff*] was a guest at _____ [*name of hotel or motel*], occupying room _____ [*number of room*] for which he/she paid $_____ [*amount of rent paid*] to _____ [*name of individual owner-innkeeper or manager*].

6. At all times mentioned, plaintiff was the owner of a _____ [*describe article which was the subject of bailment, e.g.*, a leather sample case containing jewelry].

7. On or about _____ [*date*], and while a guest of the _____ [hotel *or* motel], plaintiff deposited the _____ [*describe article which was the subject of bailment, e.g.*, leather sample case containing jewelry] with defendant _____ [*name of individual owner-innkeeper or manager*] for safekeeping in defendant's safe.

8. At the time of depositing the _____ [*specify, e.g.*, jewelry case] with defendant _____ [*name of individual owner-innkeeper or manager*], plaintiff declared to defendant the value of the _____ [*specify, e.g.*, jewelry case] to be $_____.

9. At the time of depositing the _____ [*specify, e.g.*, jewelry case] with defendant _____ [*name*], plaintiff received from defendant for the property a receipt in writing, a copy of which is attached as Exhibit A and made a part hereof. Defendant thereby consented in writing to assume liability for property of the value of $_____ [*amount for which liability was assumed*]. As a part of the contract contained in the receipt, defendant promised to redeliver the property on the presentation of the receipt.

10. On or about _____ [*date*], at or about _____ [*time*], plaintiff presented the written receipt to defendant _____ [*name*] and made demand on the defendant for the return of the _____ [*specify, e.g.*, jewelry case] but defendant was negligent and careless in failing to take precautions customary and usual in the _____ [hotel *or* motel] business to safeguard plaintiff guest's property and as a result defendant failed and refused to redeliver and return the _____ [*specify, e.g.*, jewelry case] to plaintiff, and still fails and refuses to do so.

11. As a direct and proximate result of the negligence and carelessness of defendant [s, and each of them,] and of the loss proximately caused, the _____ [*specify, e.g.*, jewelry case] became wholly lost to plaintiff to his/her damage in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant [s, and each of them,] as follows:

1. For damages in the sum of $_____;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

[*Verification, if desired. See § 297.60[1].*]

[2] Use of Form

This complaint is for damages for loss of personal property based on *Civ. Code § 1860* brought by a guest against an innkeeper as a depositary for hire in a case where the guest deposits valuables with the innkeeper in a fireproof safe, and because of the innkeeper's negligence, he or she fails to return the valuables to the guest on his or her demand.

Because the inkeeper's liability is restricted to $500 unless the innkeeper gives the guest a written receipt for the property accepting greater liability [*see Civ. Code § 1860*; *Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 350-352, 217 P.2d 961* ; for discussion, *see 297.19[3][b], [4]*], this complaint is for use only when damages exceed the specified limit and the innkeeper has consented to a greater liability. When the limitation applies, the plaintiff should seek recovery in small claims court. For a discussion of the procedures involved and for forms of papers filed, see Ch. 526, *Small Claims* .

[3] Allegations

The complaint alleges:

- Defendant's status as innkeeper with duty of ordinary care as depositary for hire to safeguard guest's personal property (Paragraph 3) [*see Civ. Code §§ 1714(a), 1852, 1860*].

- Plaintiff's status as a paying guest (Paragraph 5) [*see Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 347-348, 217 P.2d 961]* .

- That plaintiff owned and deposited with defendant articles declared to be of unusual value for safe keeping in defendant's fire proof safe (Paragraphs 6-8) [*see Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 353, 217 P.2d 961* ; *Providence Washington Ins. Co. v. Hotel Marysville, Inc. (1943) 60 Cal. App. 2d 338, 344, 140 P.2d 698]* .

- That defendant gave plaintiff a receipt in writing for the article (Paragraph 9) [*Robert Altman, Inc. v. Biltmore Hotel (1961) 190 Cal. App. 2d 274, 279, 11 Cal. Rptr. 838]* .

- That plaintiff demanded the return of the article (Paragraph 10) [*Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 348, 217 P.2d 961]* .

- That defendant's failure to redeliver article to plaintiff was proximately caused by defendant's negligence (Paragraphs 10 and 11) [*see Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 349, 217*

P.2d 961] .

- Damages (Paragraph 11).

[4] Interest on Lost Property

When a guest sues for damages for failure of an innkeeper to return property deposited for safekeeping, the plaintiff, having established a right to recover judgment, is entitled to interest from the date of his or her demand for the return of the property [*see Civ. Code § 3287*; *see also Greer v. Los Angeles Athletic Club (1927) 84 Cal. App. 272, 286-287, 258 P. 155* (disapproved on another point in *Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 352, 217 P.2d 961*)].

[5] Cross References

For additional comments and cross references relating to complaints generally, see *§ 297.60[4]* et seq.

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25-297 California Forms of Pleading and Practice--Annotated § 297.69

§ 297.69 Complaint for Damages [Civ. Code § 3300] for Breach of Oral Contract [Civ. Code § 1622] for Charges Due Innkeeper

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Oral Contract [Civ. Code § 1622] for Charges Due Innkeeper

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Breach of Contract)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times mentioned was, a resident of _____ County, California.

2. [Defendants DOES I-_____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences alleged in this complaint, and that plaintiff's damages as herein alleged were proximately caused by those defendants.]

3. On or about _____ [*date*], defendant _____ [*name*] became a

_____ [guest *or* lodger *or* tenant *or* boarder] at _____ [*name of hotel, lodge, apartment, or boardinghouse*], _____ [*address*] and entered into an oral agreement with plaintiff _____ [*state plaintiff's capacity, e.g.*, innkeeper] whereby plaintiff agreed to _____ [*specify agreement, e.g.*, furnish lodging] and defendant agreed to _____ [*specify agreement, e.g.*, pay the rent charged for his/her room at the rate of $_____ per _____ (week *or* day *or* month)].

4. Defendant was a _____ [guest *or* lodger *or* tenant *or* boarder] at _____ [*name of hotel, lodge, apartment, or boardinghouse*] from _____ [*date*], to _____ [*date*], and he/she thus acquired a bill for _____ [*specify charges on defendant's bill, e.g.*, rent due and owing] in the sum of $_____.

5. Plaintiff has performed all conditions, covenants, and promises required by him/her on his/her part to be performed in accordance with the terms and conditions of the contract.

6. On or about _____ [*date*], defendant breached the oral agreement made with plaintiff by refusing to pay plaintiff the sum of $_____, which was the _____ [*specify nature of charge, e.g.*, rent due and owing].

7. As a result ot defendant's breach of the contract, plaintiff has incurred damages for _____ [*specify nature of damage, e.g.*, in the sum of $_____].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For compensatory damages in the sum of $_____;

2. For interest on the sum of $_____ from and after _____ [*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 297.60[1].*]

[2] Use of Form

This complaint is for use in an action for damages brought by an innkeeper for breach of a guest's oral agreement to pay the proper charges due for accommodations, board, lodging, room rent, and such extras as are furnished at the guest's request.

[3] Innkeeper's Lien

The innkeeper's lien [*Civ. Code § 1861*] may be enforced only after final judgment in an action brought to recover the money or charges owed by a guest [*Civ. Code § 1861*].

For forms for use in relation to enforcement of a innkeeper's lien, see §§ 297.70-297.74, below

[4] Cross References

See generally Ch. 140, *Contracts*

For additional comments and cross references relating to complaints generally, see *§ 297.60[3]* et seq.

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25-297 California Forms of Pleading and Practice--Annotated § 297.70

§ 297.70 Proceedings for Issuance of Writ of Possession of Baggage or Other Property--Application for Writ [Civ. Code § 1861.5]

[1] FORM Proceedings for Issuance of Writ of Possession of Baggage or Other Property--Application for Writ [Civ. Code § 1861.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	APPLICATION FOR WRIT OF POSSESSION UN-
Defendant.	)	DER *CIVIL CODE § 1861.5*
	)	
	)	

_____

1. Plaintiff _____[*name*] hereby applies for a writ of possession [ex parte], pursuant to *Civil Code Section 1861.5*, on the following property: _____ [*general description of the property, e.g.*, a small suitcase containing two woolen suits], valued at _____ [*statement of property value*].

2. _____ [*State basis for claim, e.g.*, From _____ (*date*), until _____ (*date*), _____ (*name of guest*) was a lodger at _____ (*name of hotel*) and the rent due and unpaid for that time was the sum of $_____ (*amount of rent due and owing*)].

3. Plaintiff _____ [*name*] is an innkeeper within the meaning of *Civil Code Section 1861.1* and under *Civil Code Section 1861* has a lien on the baggage of defendant _____ [*name of guest*] for the proper charges due from defendant as described above. Plaintiff has filed an action to recover such sum and is entitled under

Civil Code Section 1861 to take possession of the property pursuant to a writ of possession.

[4. *If the writ is being applied for ex parte, add:* This application for a writ of possession of the above-described property is hereby made ex parte because:

(a) The property is not necessary for the support of defendant or his/her family;

(b) There is an immediate danger that the property will become unavailable to levy by reason of being _____ (transferred *or* concealed *or* removed from the state *or* removed from the premises of the _____ (motel *or* hotel *or* inn *or* boardinghouse) *or* substantially impaired in value by _____ (acts of destruction *or* failure to take care of the property in a reasonable manner)), since _____ (*state basis for belief in unavailability of property, e.g.*, defendant _____ (*name*) has threatened to remove the baggage from the hotel premises). Therefore, the ex parte the issuance of a writ of possession is necessary to protect the property; and

(c) There is probable validity for plaintiff's claim in this action in that _____ (*specify*).]

[5. *If a temporary restraining order is sought, add:* Plaintiff hereby also applies for a temporary restraining order prohibiting defendant from (doing any and all of the following): _____ (transferring any interest in the property described above by sale, pledge, or grant of security interest, or otherwise disposing of or encumbering the property; *and/or* concealing or otherwise removing the property in such a manner as to make it less available to seizure by the levying officer; *and/or* impairing the value of the property either by acts of destruction or by failure to care for the property in a reasonable manner). (_____ (*Specify precautions, if needed*).) Such an order is necessary in that _____ (*state grounds justifying issuance of temporary restraining order*).]

[6. *If temporary restraining order is sought ex parte, add:* This temporary restraining order is hereby sought ex parte since:

(a) There is an immediate danger that the above-described property may become unavailable to levy by reason of being _____ (transferred *or* concealed *or* removed *or* substantially impaired in value);

(b) There is a probable validity that plaintiff will prevail in this action in that _____ (*specify*); and

(c) Plaintiff has provided an undertaking as required by *Section 1861.21 of the Civil Code*.]

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing application and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The application in [1], *above*, may be used by an innkeeper to obtain a writ of possession of a guest's or tenant's baggage or other property pursuant to *Civ. Code § 1861.5* and, if desired, a temporary restraining order. The application may be filed by the plaintiff at the time of filing a complaint for recovery of the money or charges owed by the defendant [*see § 297.74*] or at any time thereafter.

A writ of possession is generally issued only after a hearing on a noticed motion [for related forms, *see* § 297.71-297.73], although it may also be issued ex parte. A temporary restraining order may be applied for at or after the time plaintiff files the application for a writ of possession, and it may be applied for ex parte [*see* the discussion under *297.70[4], below*].

The court will not issue a writ of possession or a temporary restraining order until the plaintiff has filed with the court a written undertaking [*Civ. Code § 1861.21*; *see Code Civ. Proc. §§ 995.310, 995.320*].

[3] Contents of Application

The contents of an application for a writ of possession are specified in *Civ. Code §§ 1861.5* and *1861.6* (ex parte application). The application includes [*Civ. Code § 1861.5*]:

- A showing of the basis of the plaintiff's claim, including a showing that the plaintiff is entitled to possession of the property claimed pursuant to an innkeeper's lien.
- A general description of the property and a statement of its value.
- A statement of the amount of money claimed to be owed by the guest, lodger, tenant, or boarder.

[4] Procedure for Obtaining Writ

[a] After Hearing on Noticed Motion

A writ of possession is generally issued after a hearing on a noticed motion [*Civ. Code § 1861.6*]. Prior to this hearing, the defendant should be served with a copy of the summons and complaint [*see § 297.69*], notice of application and hearing [*see § 297.71*], and a copy of the application and any affidavit filed in support of it [*Civ. Code § 1861.7*].

Once a hearing is held and the writ issued, the levying officer may levy on the property. At the time of levy, the levying officer will deliver to the person in possession of the property a copy of the writ of possession, with a copy of the plaintiff's undertaking attached [*Civ. Code § 1861.18(a)*; see *§ 297.73*]. If no one is in possession of the property at the time of levy, the levying officer should subsequently serve the writ and attached undertaking on the defendant [*Civ. Code § 1861.18(b)*].

For a discussion of the seizure of the property by the levying officer and the procedures to be followed by plaintiff, defendant, and the levying officer in regard to and following such seizure, see *§ 297.73[4]* et seq.

[b] Ex Parte Issuance of Writ

If the writ is to be issued ex parte, the application must also include a showing that [*Civ. Code § 1861.6*]:

- The property is not necessary for the support of the defendant or his/her family.

- There is an immediate danger that the property will become unavailable to levy by reason of being transferred, concealed, or removed from the premises of the motel, hotel, inn, boardinghouse, or lodginghouse, or will become substantially impaired in value by acts of destruction or by failure to take care of the property in a reasonable manner.

- The ex parte issuance of a writ of possession is necessary to protect the property.

- There is probable validity for the plaintiff's claim.

If an ex parte writ has been issued, a copy of the summons and complaint, a copy of the application for issuance of the writ and any supporting affidavit, and a notice informing defendant of his or her rights must be served on defendant [*Civ. Code § 1861.6*; *see Civ. Code § 1861.8* (contents of notice); for a form of notice of application and hearing that may be adapted to give notice after ex parte issuance of a writ, *see § 297.73*]. *Section 1861.6* also requires service of these papers on any other person required by *Civ. Code § 1861.8* to be served with a writ of possession, but Section 1861.8 does not appear to require service on anyone other than the defendant. The reference may be intended to refer to *Civ. Code § 1861.18*, which requires delivery of the writ to the person in possession of the property, or if no one is in possession of the property, requires service on the defendant.

A defendant whose property has been taken pursuant to an ex parte writ of possession may make a noticed motion for an order that the writ be quashed and any property levied on pursuant to the writ be released. Pending the hearing of the defendant's application, the court may order that delivery pursuant to *Civ. Code § 1861.19* of any property previously levied on be stayed. If, after hearing, the court determines that plaintiff is not entitled to a writ of possession, the court will quash the writ and order the release and redelivery of any property previously levied on, and the award of damages to defendant for any damages sustained by the defendant which were proximately caused by the levy and the loss of possession of the property pursuant to such levy [*Civ. Code § 1861.6*].

[c] Temporary Restraining Order

At or after the time he or she files an application for a writ of possession the plaintiff may apply for a temporary restraining order. The application must contain a statement of the grounds justifying the issuance of a temporary restraining order, and it may issue ex parte if:

- The plaintiff establishes the probable validity of his or her claim and entitlement to possession of the property pursuant to the innkeeper's lien [*Civ. Code § 1861*];

- The plaintiff has provided an undertaking as required by *Civ. Code § 1861.21*; and

- The plaintiff has established the probable validity that there is an immediate danger that the property claimed will become unavailable to levy [*Civ. Code § 1861.16*].

The application should be verified in either case. The practical use of a temporary restraining order rather than an ex

parte issuance of the writ of possession seems limited to those situations in which the property is necessary for the support of the defendant or his or her family and ex parte issuance of the writ could therefore be unavailable [*see Civ. Code §§ 1861.6, 1861.16*].

If at the hearing on the issuance of the writ of possession the court determines that the plaintiff is not entitled to a writ of possession, the court will dissolve the temporary restraining order; otherwise, the court may issue a preliminary injunction to remain in effect until the property claimed is seized pursuant to the writ of possession [*Civ. Code § 1861.16(c)*].

[5] Cross References

For discussion and additional forms for use in applying for temporary restraining orders, see Ch. 393, *Injunctions*

For discussion of service of papers, see generally Ch. 518, *Service of Summons and Papers*

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§ 297.71 Proceedings for Issuance of Writ of Possession of Baggage or Other Property--Notice of Application and Hearing for Writ [Civ. Code § 1861.8]

[1] FORM Proceedings for Issuance of Writ of Possession of Baggage or Other Property--Notice of Application and Hearing for Writ [Civ. Code § 1861.8]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF APPLICATION AND HEARING FOR
Plaintiff,	)	WRIT OF POSSESSION UNDER *CIVIL CODE § 1861.8*
vs.	)	
_____ [*name*],	)	[Telephone Appearance]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*name of defendant guest*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], a hearing will be held on plaintiff's application for a writ of possession on the following property: _____ [*general description of*

the property, e.g., a small suitcase containing two woolen suits].

The writ of possession on the above-described property will be issued if the court finds that the plaintiff's claim has probable validity and the other requirements for issuing the writ are established. The hearing is not for determining whether the claim is actually valid; such determination will be made in subsequent proceedings in the action.

If you desire to oppose the issuance of the writ, you must file with the court *either* an affidavit providing evidence sufficient to defeat the plaintiff's right to issuance of the writ, or an undertaking to stay the delivery of the property in accordance with *Section 1861.22 of the Civil Code*.

IF YOU BELIEVE THE PLAINTIFF MAY NOT BE ENTITLED TO POSSESSION OF THE PROPERTY CLAIMED, YOU MAY WISH TO SEEK THE ADVICE OF AN ATTORNEY. SUCH ATTORNEY SHOULD BE CONSULTED PROMPTLY SO THAT HE OR SHE MAY ASSIST YOU BEFORE THE TIME SET FOR THE HEARING.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[2] Use of Form

The notice of application and hearing in [1], *above*, is to be used by a plaintiff innkeeper to inform the defendant of his or her application for a writ of possession of defendant's baggage or other property in all cases in which the requirements for an ex parte issuance of the writ are not established [*Civ. Code § 1861.6*].

[3] Contents

The contents of the notice of application and hearing are specified in *Civ. Code § 1861.8*. The notice must inform the defendant of all of the following:

- The hearing will be held at a place and at a time to be specified in the notice, on plaintiff's application for writ of possession.

- The writ will be issued if the court finds that the plaintiff's claim has probable validity and the other requirements for issue in the writ are established. The hearing is not for the purpose of determining whether the claim is actually valid; such determination will be made in subsequent proceedings in the action.

- If the defendant desires to oppose the issuance of the writ, he or she should file with the court either an affidavit providing evidence sufficient to defeat the plaintiff's right to issuance of the writ, or an undertaking to stay the delivery of the property.

- The notice should also contain the following statement in 10-point bold type: IF YOU BELIEVE THE PLAINTIFF MAY NOT BE ENTITLED TO POSSESSION OF THE PROPERTY CLAIMED, YOU MAY WISH TO SEEK THE ADVICE OF AN ATTORNEY. SUCH ATTORNEY SHOULD BE CONSULTED PROMPTLY SO THAT HE OR SHE MAY ASSIST YOU BEFORE THE TIME SET

FOR THE HEARING.

[4] Service of Papers Prior to Hearing

Prior to the hearing required by *Civ. Code § 1861.6(a)* and referred to in this Notice of Application and Hearing, the defendant must be served with, in addition to this notice, (a) a copy of the summons and complaint and (b) a copy of the application and any affidavit filed in support of it [*Civ. Code § 1861.7*].

[5] Filing of Affidavits and Points and Authorities

Each party should file with the court and serve on the other party any affidavits and points and authorities intended to be relied on at the hearing. At the hearing, the court will then make its determination on the basis of the pleadings and other papers in the record, although, on good cause shown, it may receive and consider additional evidence and authority produced at the hearing, or continue the hearing for the production of additional evidence and the filing of other affidavits or points and authorities [*Civ. Code § 1861.9*].

[6] Liability of Plaintiff

If the plaintiff fails to recover judgment in the action, he or she must redeliver the property to the defendant, and be liable for all damages sustained by the defendant which are proximately caused by operation of the temporary restraining order and preliminary injunction, if any, the levy of the writ of possession, and the loss of possession of the property pursuant to the levy of the writ of possession [*Civ. Code § 1861.15*].

[7] Cross References

For discussion of service of papers, see generally Ch. 518, *Service of Summons and Papers*

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25-297 California Forms of Pleading and Practice--Annotated § 297.72

§ 297.72 Proceedings for Issuance of Writ of Possession of Baggage or Other Property--Order for Writ [Civ. Code §§ 1861.6, 1861.10]

[1] FORM Proceedings for Issuance of Writ of Possession of Baggage or Other Property--Order for Writ [Civ. Code §§ 1861.6, 1861.10]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

_____

It appearing to the satisfaction of the court from the pleadings and other papers in the record, evidence and authority produced at the hearing, or affidavits or points and authorities filed at the hearing that the plaintiff has established the probable validity of his/her claim to possession of the following property of defendant: _____ [*general description of the property, e.g.*, a small suitcase containing two woolen suits], that the property described above is located on the premises of the _____ [*specify the apartment, motel, or other boardinghouse or lodginghouse where the property is located, e.g.*, the Fictional Motel, 10 Main Street, Paradise, California], and plaintiff having filed herein a written undertaking binding the sureties to defendant in an amount not less than twice the value of the property as determined by the court for the return of the property to the defendant, if the return thereof be ordered, and for the payment to him/her of any sum he/she may recover against plaintiff, to wit, the sum of $_____,

[*If the order for the writ is issued ex parte, add:* It further appearing that the above-described property is not necessary

for the support of the defendant or his/her family, that there is an immediate danger that the property will become unavailable to levy by reason of being _____ (transferred *or* concealed *or* removed from the state *or* removed from the premises of the _____ (motel *or* hotel *or* inn *or* boardinghouse) *or* substantially impaired in value by _____ (acts of destruction *or* failure to take care of the property in a reasonable manner)), and the ex parte issuance of a writ of possession being necessary to protect the property,]

IT IS ORDERED that a Writ of Possession issue to the Sheriff of _____ County, California, or to any Constable or Marshal of the _____ Judicial District of said County, directing him/her to take possession of the following described property located on the premises of the _____ [*specify the apartment, motel, or other boardinghouse or lodginghouse where the property is located, e.g.*, the Fictional Motel, 10 Main Street, Paradise, California], and described as follows: _____.
Dated: _____,

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

The order for a writ of possession in [1], *above*, is used when the court has found that plaintiff has established the probable validity of his or her claim to possession of the property of the tenant, boarder, or lodger; that the property which is described in the application for the writ is located on the premises of the motel, hotel, boardinghouse or lodginghouse; and that plaintiff has provided an undertaking as required by *Civ. Code § 1861.21* [*Civ. Code § 1861.10*]. For a discussion of when the order may be issued ex parte see *§ 297.70[2]* et seq., *see also Civ. Code § 1861.6*.

[3] Requirement of Written Undertaking

The court may not issue a writ of possession until the plaintiff has filed with the court a written undertaking. The undertaking must provide that the sureties are bound to the defendant in an amount not less than twice the value of the property as determined by the court, for the return of the property to the defendant, if the return thereof is ordered, and for the payment to him or her of any sum he or she may recover against the plaintiff [*Civ. Code § 1861.21*].

The undertaking must be executed by two or more sufficient personal sureties or by one sufficient admitted surety insurer or by any combination of sufficient personal sureties and admitted surety insurers [*see Code Civ. Proc. § 995.310*]. It must be in writing and signed by the sureties under oath [*see Code Civ. Proc. § 995.320*].

[4] Cross References

For forms of undertaking, see Ch. 538, *Suretyship, Bonds, and Undertakings*

For additional commentary and cross references, see *§§ 297.70, 297.71*

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25-297 California Forms of Pleading and Practice--Annotated § 297.73

§ 297.73 Proceedings for Issuance of Writ of Possession of Baggage or Other Property--Writ of Possession [Civ. Code § 1861.12]

[1] FORM Proceedings for Issuance of Writ of Possession of Baggage or Other Property--Writ of Possession [Civ. Code § 1861.12]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	WRIT OF POSSESSION
Defendant.	)	
	)	
	)	

THE PEOPLE OF THE STATE OF CALIFORNIA

To The Sheriff, Any Constable, or Marshal of _____ County:

By an order duly made and filed on _____ [*date*], the above-entitled court having ordered that a Writ of Possession issue to you directing you to enter _____ [*specify the apartment, motel, or other boarding premises that may be entered*, e.g., the Fictional Motel, 10 Main Street, Paradise, California] to take possession of the following property: _____ [*general description of the property, e.g.*, a small suitcase containing two wool suits],

YOU ARE THEREFORE COMMANDED to levy on the above-described property pursuant to *Section 1861.18 of the Civil Code* if found on the described premises and to retain the property in your custody until released or sold pursuant

to *Section 1861.19 of the Civil Code*.
Dated: _____

_____

Clerk

By _____ [*signature*]

Deputy Clerk

[SEAL]

NOTICE TO DEFENDANT

You have the right to except to the plaintiff's undertaking, a copy of which undertaking is attached to this writ, or to obtain the delivery of the property by filing an undertaking as prescribed by *Section 1861.22 of the Civil Code*.

[2] Use of Form

The writ of possession in [1], *above*, may be used to direct the levying officer within whose jurisdiction defendant's baggage or other property is located to levy on the property and hold it until it is released or sold pursuant to *Civ. Code § 1861.19*.

[3] Contents

The contents of the writ of possession are specified in *Civ. Code § 1861.12*. The writ of possession must meet the following requirements:

- Be directed to the levying officer within whose jurisdiction the property is located.

- Generally describe the property to be seized.

- Specify the apartment, motel, or other boarding premises that may be entered to take possession of the property, or some part of it.

- Direct the levying officer to levy on the property pursuant to *Civ. Code § 1861.18* if found on the described premises, and to retain it in his custody until released or sold pursuant to *Civ. Code § 1861.19*.

- Inform the defendant that he or she has the right to except to the plaintiff's undertaking, a copy of which should be attached to the writ, or to obtain the delivery of the property by filing an undertaking as prescribed by *Civ. Code § 1861.22*.

[4] Ex Parte Issuance of Writ of Possession

Any defendant whose property has been taken pursuant to a writ issued ex parte may apply for an order that the writ be quashed and any property levied on pursuant to the writ be released. The application should be made by noticed motion [*Civ. Code § 1861.6(b)*]. For a discussion of the procedure involved in ex parte issuance of a writ of possession, see *§ 297.70[2]* et seq..

[5] Plaintiff's Failure to Recover Judgment

If the plaintiff fails to recover judgment in the action, he or she must redeliver the seized property to the defendant. He or she will be held liable for all damages sustained by the defendant which were proximately caused by operation of the temporary restraining order and preliminary injunction, if any, the levy of the writ of possession, and the loss of possession of the property pursuant to the levy of the writ of possession [*Civ. Code § 1861.15*].

[6] Seizure of Property by Levying Officer

At the time of levy, the levying officer will deliver to the person in possession of the property a copy of this writ of possession, with a copy of the plaintiff's undertaking attached. If no one is in possession of the property at the time of levy, the levying officer will subsequently serve the writ and attached undertaking on the defendant. [*Civ. Code § 1861.18*].

After the levying officer takes possession of the property pursuant to this writ of possession, he or she must keep the property in a secure place, and, if notice of the filing of an undertaking for redelivery or notice of exception to the plaintiff's sureties is not received by the levying officer within 10 days, he or she shall then deliver the property to the plaintiff [*Civ. Code § 1861.19*].

[7] Defendant's Undertaking for Redelivery

The defendant may prevent the plaintiff from taking possession of property, pursuant to a writ of possession, or may regain possession of property so taken, by filing with the court in which the action was brought an undertaking in an amount equal to the amount of the plaintiff's undertaking required by *Civ. Code § 1861.21* [*Civ. Code § 1861.22(a)*].

[8] Exception to Plaintiff's Sureties

The defendant may object to the plaintiff's sureties not later than 10 days after levy of the writ of possession by filing with the court in which the action was brought a Notice of Exception to Sureties and mailing a copy ofthe notice to the levying officer and to the plaintiff. If the plaintiff's sureties fail to justify at the time and place appointed or do not qualify, the court will vacate the writ of possession and any temporary restraining order or preliminary injunction and, if levy was occurred, order the levying officer or the plaintiff to return the property to the plaintiff [*Civ. Code § 1821.23*].

[9] Cross References

For additional comments and cross references, see § 297.70-297.72

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25-297 California Forms of Pleading and Practice--Annotated § 297.74

§ 297.74 Proceedings for Issuance of Writ of Possession of Baggage or Other Property--Temporary Restraining Order

[1] FORM Proceedings for Issuance of Writ of Possession of Baggage or Other Property--Temporary Restraining Order

[*Caption. As on papers previously filed in action.*]

1. The application of plaintiff _____ [*name*] for a temporary restraining order having been considered by the court, the court finds the following:

(a) Plaintiff has filed an undertaking as required by *Civ. Code § 1861.21*;

(b) The plaintiff has established the probable validity of his/her claim and entitlement to possession of the property described below, pursuant to an innkeepers' lien: _____ [*general description of the property, e.g.,* a small suitcase containing two wool suits];

(c) The plaintiff has established the probable validity that there is an immedite danger that the property claimed may become _____ [*either* unavailable to levy by being _____ [transferred *or* concealed *or* removed) *or* substantially impaired in value].

2. THEREFORE, IT IS ORDERED that defendant _____ [*name*] is restrained from doing the following: _____

a. Transferring any interest by sale, pledge, or grant of security interest, or otherwise disposing of or encumbering the following property: _____ (*general description of property*).

[*AND/OR*]

b. Concealing or otherwise removing the following property in such manner as to make it less available to seizure by the levying officer: _____ (*general description of property*).

[*AND/OR*]

c. Impairing the value of the followng property: _____ (*general description of property*) either by acts of destruction or by failure to care for the property in a reasonable manner, including but not limited to the following acts: _____.

3. It is further ordered that the clerk of this court attach a copy of plaintiff's undertaking to this order.

4. It is further ordered that this order shall have no force or effect after _____ [*date*].
Dated: _____ [*date*]

_____ [*signature*]

_____ [*name of Judge*]

[2] Use of Form

The order in [1], *above*, is for use in temporarily restraining a defendant from taking certain actions with respect to certain baggage or other property which is the subject of an innkeeper's lien action [*Civ. Code §§ 1861.16(a), (b)*].

[3] Contents

In the discretion of the court, the temporary restraining order may prohibit the defendant from doing any or all of the following [*Civ. Code § 1861.17*]:

- Transferring any interest in the property by sale, pledge, or grant of security interest, or otherwise disposing of, or encumbering, the property.

- Concealing or otherwise removing the property in such a manner as to make it less available to seizure by the levying officer.

- Impairing the value of the property either by acts of destruction or by failure to care for the property in a reasonable manner.

[4] Termination of Temporary Restraining Order

If at the hearing on the issuance of the writ of possession the court determines that the plaintiff is not entitled to a writ of possession, the court will dissolve any temporary restraining order. If a writ of possession is issued, the court may issue a preliminary injunction to remain in effect until the property claimed is seized pursuant to the writ [*Civ. Code § 1861.16(c)*]. For a discussion of the ex parte issuance of a temporary restraining order, see *§ 297.70*.

[5] Cross References

For discussion and forms for use in applying for temporary restraining orders, see Ch. 393, *Injunctions*

For additional commentary and cross references, see §§ 297.70-297.73

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25-297 California Forms of Pleading and Practice--Annotated § 297.75

§ 297.75 Notice of Public Auction of Baggage or Property by Innkeeper to Satisfy Charges Due Him or Her From Guest [Civ. Code § 1861.24]

[1] FORM Notice of Public Auction of Baggage or Property by Innkeeper to Satisfy Charges Due Him or Her From Guest [Civ. Code § 1861.24]

NOTICE IS HEREBY given that on _____ [*date*], at the hour of _____ [*time*], at _____ [*address*] in _____ [*city*], _____ County, California, the undersigned will sell at public auction the baggage and property left by _____ [*name of guest*] at the _____ [*name of hotel or motel*], on _____ [*date*], a date more than 60 days prior to this date.

The baggage and property consists of _____ [*describe, e.g.,* a small suitcase containing two woolen suits].

The public auction will be made to satisfy the amount due and owing from _____ [*name of guest*] to the undersigned for _____ [*specify, e.g.,* hotel *or* motel] rent in the sum of $_____ [*amount of rent due and owing*], and will be made pursuant to the provisions of *Section 1861.24 of the Civil Code*. Dated: _____.

_____ [*name of hotel or motel*]

By _____ _____ [*signature of agent*]

[2] Use of Form

Publication of the notice in [1], *above,* is required pursuant to the Innkeeper's Lien Law prior to a public sale by an innkeeper of a guest's baggage and property to satisfy charges due and owing from the guest [*see Civ. Code § 1861.24*].

[3] Publication of Notice

The notice must be published one time pursuant to *Gov. Code § 6061*. It must also be mailed to the debtor-guest at his or her post office address at least 15 days before the sale. If that address is not known, the notice must be addressed to the guest in care of the hotel or motel at which the baggage or property was left [*Civ. Code § 1861.24*].

[4] Cross References

For a discussion of and forms for use in actions to recover possession of personal property wrongfully detained, see Ch. 119, *Claim and Delivery*

Witkin, Summary of California Law, vol. 13, *Personal Property*, §§ 222 et seq. (10th ed. 2005)

[5] Law Reviews

Burke and Reber, "*Fourteenth Amendment* and Creditors' Rights," *47 So. Cal. L. Rev. 1 (1973)*

Cowett, "Attachment and Garnishment in California--In Need of Reform," *4 U.C.D. L. Rev. 57 (1971)*

Hogan, "Innkeeper's Lien at Common Law," *8 Hastings L.J. 33 (1956)*

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25-297 California Forms of Pleading and Practice--Annotated § 297.76

§ 297.76 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Negligence of Plaintiff-Guest Proceeded in Darkness After Failing to Turn on Light Provided in Room

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Negligence of Plaintiff-Guest Proceeded in Darkness After Failing to Turn on Light Provided in Room

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that at the time and place of the injuries herein alleged, plaintiff was not exercising ordinary care, caution, or prudence to prevent his/her falling down the stair step from the _____ [*specify rooms, e.g.,* sitting room to the bedroom]. The injuries complained of by plaintiff in his/her complaint, if there were any, were proximately caused by his/her proceeding in darkness after failing to turn on the light in room provided by defendant _____ [*name of hotel or motel*].

[2] Use of Form

The form of affirmative defense in [1], *above,* alleging plaintiff's negligence, may be set forth in an answer [*Code Civ. Proc. § 431.30*] to a complaint by a guest for damages for personal injuries based on negligence arising from an innkeeper's duty to maintain the premises in a reasonably safe condition.

Under comparative negligence, damages awarded to a plaintiff are diminished in proportion to the amount of negligence attributable to plaintiff [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858, 532 P.2d 1226 , see also Robinson v. King (1952) 113 Cal. App. 2d 455, 457, 248 P.2d 477]* .

[3] Cross References

For discussion and forms illustrating the format of affirmative defenses in an answer, see Ch. 26, *Answers*

For discussion of comparative negligence, see Ch. 380, *Negligence*

For discussion of premises liability, see Ch. 421, *Premises Liability*

Personal Injury Actions, Defenses, And Damages, *Hotels, Inns, and Boarding and Lodging Houses*, §§ 4.01-4.03

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25-297 California Forms of Pleading and Practice--Annotated § 297.77

§ 297.77 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Innkeeper's Liability Not in Excess of Statutory Amount [Civ. Code § 1860]--Guest Given No "Receipt in Writing" When Deposited Valuables in Safe

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Innkeeper's Liability Not in Excess of Statutory Amount [Civ. Code § 1860]--Guest Given No "Receipt in Writing" When Deposited Valuables in Safe

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that at the time defendant _____ [*name of individual owner-innkeeper or manager*] deposited plaintiff's _____ [*describe valuables, e.g.,* leather sample case containing jewelry] in a fireproof safe in the _____ [hotel *or* motel] for safekeeping, defendant did not give plaintiff a "receipt in writing" as contemplated by *Civ. Code § 1860* and, therefore, defendant's liability to plaintiff, if any, is limited to $500 as set forth in *Civil Code Section 1860*.

[2] Use of Form

The form of affirmative defense in [1], *above,* states that defendant did not give the plaintiff-guest a "receipt in writing" as required by *Civ. Code § 1860* in order for plaintiff to escape the $500 limit on damages.

The defense may be set forth in an answer [*Code Civ. Proc. § 431.30*] to a complaint by plaintiff seeking damages in excess of the statutory limit of $500 [*Civ. Code § 1860*] in a case where plaintiff deposited valuables in an innkeeper's safe and, due to the innkeeper's negligence, he/she subsequently failed to return the valuables to the plaintiff on demand [*see Gardner v. Jonathan Club (1950) 35 Cal. 2d 343, 352, 217 P.2d 961* ; *Robert Altman, Inc. v. Biltmore Hotel (1961) 190 Cal. App. 2d 274, 279, 11 Cal. Rptr. 838]* .

[3] Cross References

For discussion and forms illustrating the format of affirmative defenses in an answer, see Ch. 26, *Answers*

For additional commentary and cross references, see *§ 297.68[2] et seq.*

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25-299 California Forms of Pleading and Practice--Annotated 299.syn

§ 299.syn Synopsis to Chapter 299: IDENTITY, ESTABLISHMENT OF

§ 299.01 Scope of Chapter

§ 299.02 Cross References

§§ 299.03through 299.09 [Reserved]

§ 299.10 Application of Identity Proceeding

§ 299.11 Correction Deed as Substitute

§ 299.12 Procedure

[1] Petition; Notice; Answer

[2] Decree

§§ 299.13through 299.29 [Reserved]

§ 299.30 Related Matthew Bender Publications

[1] California Legal Forms

[2] California Real Estate Law & Practice

§ 299.31 State Statutes

§ 299.32 Decisions

§ 299.33 Law Reviews

§ 299.34 Text References

§§ 299.35through 299.49 [Reserved]

§ 299.50 Petition to Determine Identity of Grantor [Code Civ. Proc. §§ 770.020, 770.050]--By Successor in Interest

[1] FORM

[2] Use of Form

[3] Caption

[4] Allegations

[5] Joinder

[6] Jurisdiction and Venue

[7] Verification

[8] State Statutes

[9] Decisions

[10] Cross References

§ 299.51 Petition to Determine Identity of Decedent [Code Civ. Proc. §§ 770.020, 770.050]--By Distributee of Estate

[1] FORM

[2] Use of Form

[3] Cross References

§ 299.52 Allegations of Change of Name by Grantor or Decedent--Change by Legal Proceedings [Code Civ. Proc. §§ 1275-1279]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 299.53 Allegation of Change of Name by Grantor or Decedent--Marriage

[1] FORM

[2] Use of Form

[3] Cross References

§ 299.54 Notice of Time and Place of Hearing of Petition to Determine Identity [Code Civ. Proc. § 770.060]--Statutory Form

[1] FORM

[2] Use of Form

[3] Answer

[4] Cross References

§ 299.55 Declaration [Code Civ. Proc. § 2015.5] of Posting Notice of Hearing [Code Civ. Proc. § 770.060]

[1] FORM

[2] Use of Form

[3] Affidavit or Declaration

[4] State Statutes

[5] Cross References

§ 299.56 Decree Establishing Identity [Code Civ. Proc. § 770.070(a)]

[1] FORM

[2] Use of Form

[3] Requirement of Recordation

[4] Appeal

[5] Cross References

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25-299 California Forms of Pleading and Practice--Annotated § 299.01

§ 299.01 Scope of Chapter

Code Civ. Proc. §§ 770.010-770.080 establish a proceeding for adjudicating the identity of a person in the recorded chain of title to real property where a discrepancy exists between the name in which the person acquired an interest in the property and the name in which the person transferred or left the property on death. This chapter describes that proceeding and contains forms of petitions and allegations [*see* §§ 299.50-299.53], a form of notice [*see § 299.54*], a form of declaration [*see § 299.55*], and a form of decree [*see § 299.56*] for use in the proceeding.

For discussion of the procedures by which the name of a natural person, corporation, or limited partnership or other unincorporated association may be changed, see Ch. 377, *Name, Change of*. For discussion of the use of fictitious names by corporations and partnerships and the inclusion of partnership names in statements of partnership, see Ch. 160, *Corporations: Capacity* , and *Ch. 402, Partnerships: Actions Between General Partners or Partnership and Third Parties § 402.11*. See also *California Legal Forms, Ch. 15, General Partnerships, § 15.285* (Matthew Bender).

For discussion of other actions relating to the establishment and transfer of title to real property, see Ch. 13, *Adverse Possession* ; Ch. 107, *Cancellation of Instruments* ; Ch. 184, *Deeds* ; Ch. 455, *Probate: Sale of Estate Property* ; Ch. 482, *Quieting Title* ; and Ch. 488, *Reformation of Instruments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporate NamesName ChangesFamily LawName ChangesProceduresReal Property LawOwnership & TransferGeneral OverviewReal Property LawTitle QualityGeneral Overview

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25-299 California Forms of Pleading and Practice--Annotated § 299.02

§ 299.02 Cross References

For discussion of the procedures by which the name of a natural person, corporation, or limited partnership or other unincorporated association may be changed, see Ch. 377, *Name, Change of.*

For discussion of the use of fictitious names by corporations and partnerships and in the inclusion of partnership names in statements of partnership, see Ch. 160, *Corporations: Capacity* and Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties* .

For discussion of other actions relating to the establishment and transfer of title to real property, see Ch. 13, *Adverse Possession* ; Ch. 107, *Cancellation of Instruments* ; Ch. 189, *Deeds* ; Ch. 455, *Probate: Sale of Estate Property* ; Ch. 482, *Quieting Title* ; and Ch. 488, *Reformation of Instruments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporate NamesFictitious NamesGeneral OverviewBusiness & Corporate LawCorporate NamesName ChangesFamily LawName ChangesProceduresReal Property LawOwnership & TransferGeneral Overview

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[Reserved]

§§ 299.03[Reserved]

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25-299 California Forms of Pleading and Practice--Annotated § 299.10

§ 299.10 Application of Identity Proceeding

When a person changes his or her name after acquiring title to real property and then conveys the property without setting forth the name in which he or she derived title, the recorded conveyance does not constitute constructive notice of its contents to subsequent purchasers and encumbrancers, even though the conveyance is valid between the parties and those with notice of it [*Civ. Code § 1096*; *see* *Puccetti v. Girola (1942) 20 Cal. 2d 574, 576, 128 P.2d 13* (applying *Civ. Code § 1096* to deed by corporate grantor after change of corporate name); *but see* 1947 amendment of *Civ. Code § 1096* (repudiating holding of *Puccetti* insofar as corporate deed was invalidated for failure to recite name in which corporate grantor acquired property)]. Furthermore, when real property is transferred under a name substantially different from the name in which the property is held of record, the recorded chain of title of the property is broken, and the title is unmarketable [*Benson v. Shotwell (1890) 87 Cal. 49, 56-57, 25 P. 249]* . See generally, California Real Estate Law And Practice, Ch. 80, *Deeds and Transfer of Title* (Matthew Bender).

To correct such defects in a title, if property is acquired or stands of record in the name of a person who heretofore or hereafter transfers the property under a name other than or different from the name in which the property is acquired or stands of record, a proceeding is authorized to adjudicate and determine the identity of the person in whose name the property is acquired or stands of record and the person who transfers the property [*Code Civ. Proc. § 770.020*]. As used above, the term "acquired" means received or taken by conveyance, judgment, decree, or otherwise [*Code Civ. Proc. § 770.010(a)*]. "Property" means any right, title, or interest in or lien on real property or part thereof [*Code Civ. Proc. § 770.010(b)*]. "Subsequent owner" means the person to whom property is transferred whether as owner, part owner, or otherwise, or the successors in interest of the person, and includes a distributee of the estate of a decedent [*Code Civ. Proc. § 770.010(c)*]. "Transfer" means voluntary or involuntary transfer and includes a conveyance, reconveyance, satisfaction of a lien, or divestment by judgment, decree, or otherwise. The probate of the estate of a decedent and entry of the decree of distribution is a transfer [*Code Civ. Proc. § 770.010(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsExecution FormalitiesReal Property LawPriorities & RecordingGeneral OverviewReal Property LawTitle QualityMarketable TitleDefects & Encroachments

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25-299 California Forms of Pleading and Practice--Annotated § 299.11

§ 299.11 Correction Deed as Substitute

Title companies generally consider a grantor who appears under different names in a chain of title to real property sufficiently identified and title to the property marketable without an identity adjudication if a correction deed from the grantor, showing the name under which he or she acquired title, is recorded [*see* California Legal Forms, Ch. 26A, *Title Insurance;* Ch. 27, *Deeds and Recording* (Matthew Bender); *see also* *Puccetti v. Girola (1942) 20 Cal. 2d 574, 576, 128 P.2d 13* (reformation of deed to show name in which grantor acquired title as alternative to adjudication of grantor's identity)]. Contrary to this title company practice, however, one court has held that a correction deed is inadequate to establish the identity of a grantor with the record owner of property and therefore inadequate to render title to the property marketable [*Peckham v. Stewart (1893) 97 Cal. 147, 153-154, 31 P. 928]* . Reviewing this discrepancy between practice and law, one text concludes that while an identity adjudication may be the only way to establish marketable title to property which a grantor has conveyed under a different name than the name in which he or she acquired the property, a correction deed constitutes constructive notice to subsequent purchasers and encumbrancers of a conveyance by such a grantor and is adequate when marketability of title is not an important business consideration [Ogden's Revised California Real Property Law (Cal CEB 1974), Vol. 1, Ch. 3, *Transfer by Deed*, § 3.22].

For discussion and forms relating to actions for the cancellation or reformation of deeds, see Ch. 107, *Cancellation of Instruments* , Ch. 189, *Deeds* , and Ch. 488, *Reformation of Instruments* . For discussion of the recordation of correction deeds, see California Real Estate Law And Practice, Ch. 82, *Recording of Instruments* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsRemediesReformationReal Property LawTitle QualityMarketable TitleGeneral Overview

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25-299 California Forms of Pleading and Practice--Annotated § 299.12

§ 299.12 Procedure

[1] Petition; Notice; Answer

Any subsequent owner [*see Code Civ. Proc. § 770.010(c)* (definition)] may obtain an adjudication of the identity of a person in the recorded chain of title to the property by filing a verified petition [*Code Civ. Proc. § 770.040(a)*; *see §§ 299.50, 299.51*] in the superior court of the county where the property or some part of it is situated [*Code Civ. Proc. § 770.030*]. When the petition is filed, the clerk must set the petition for hearing by the court; the petitioner must cause notices of the time and place of the hearing [*see § 299.54*] to be posted at the courthouse of the county where the proceeding is pending and in a conspicuous place on the property described in the petition at least 10 days before the hearing [*Code Civ. Proc. § 770.060*]. Any person interested in the property may answer the petition at any time before the date fixed for the hearing [*Code Civ. Proc. § 770.040(a)*].

[2] Decree

At the hearing, in accordance with proof offered by the petitioner and any person answering the petition, the court must make and enter a decree [*see § 299.56*] determining the identity of the persons named in the petition [*Code Civ. Proc. § 770.070(a)*]. Any aggrieved party may appeal such a decree [*Code Civ. Proc. § 770.070(b)*]. After the decree becomes final, it constitutes prima facie evidence of the matters determined, and the identity of the persons described in the decree is presumed to be that stated in the decree [*Code Civ. Proc. § 770.080(a)*]. A certified copy of the decree must be recorded in the office of the county recorder of every county in which any part of the property is situated [*Code Civ. Proc. § 770.080(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTitle QualityMarketable TitleGeneral Overview

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[Reserved]

§§ 299.13[Reserved]

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25-299 California Forms of Pleading and Practice--Annotated § 299.30

§ 299.30 Related Matthew Bender Publications

[1] California Legal Forms

For forms of deed clauses showing the changed name of a grantor, see California Legal Forms, Ch. 27, *Deeds and Recording* (Matthew Bender)

[2] California Real Estate Law & Practice

For discussion of problems concerning the identity of a grantor and the correction of mistakes in recorded instruments, see California Real Estate Law And Practice, Ch. 80, *Deeds and Transfer of Title ;* Ch. 82, *Recording of Instruments* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsExecution FormalitiesReal Property LawDeedsRemediesReformationReal Property LawTitle QualityMarketable TitleDefects & Encroachments

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25-299 California Forms of Pleading and Practice--Annotated § 299.31

§ 299.31 State Statutes

Inability of recorded conveyance of real property to impart constructive notice of its contents when conveyance does not recite name in which grantor acquired property; validity of such conveyance between parties and those with notice of conveyance. *Civ. Code § 1096*

Procedure for adjudicating identity of person in recorded chain of title who received and conveyed title under different names. *Code Civ. Proc. §§ 770.010-770.080*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsRemediesGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral Overview

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25-299 California Forms of Pleading and Practice--Annotated § 299.32

§ 299.32 Decisions

Title to real property is unmarketable when title is transferred in name different from name in which title was acquired. *Benson v. Shotwell (1890) 87 Cal. 49, 56-57, 25 P. 249*

Conveyance of real property by corporate grantor is invalid under *Civ. Code § 1096* when conveyance did not recite name under which corporation acquired property, deed was not reformed to comply with *Civ. Code § 1096*, or identity of grantor was not adjudicated. *Puccetti v. Girola (1942) 20 Cal. 2d 574, 576, 128 P.2d 13*

Second deed from grantor reciting identity of grantor with record owner of property was inadequate to render title to property marketable. *Peckham v. Stewart (1893) 97 Cal. 147, 153-154, 31 P. 928*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTitle QualityMarketable TitleDefects & Encroachments

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25-299 California Forms of Pleading and Practice--Annotated § 299.33

§ 299.33 Law Reviews

Project, *Selected 1957 Code Legislation*, 32 State B. J. 501 (1957)

Healy, *Frequently Recurring Title Problems*, 30 LA Bar B. 105 (1955)

Note, *Deeds: Conveyance of Real Estate When Name of Grantor Has Been Changed, 31 Cal. L. Rev. 100 (1942)*

Symposium, *The Work of the 1937 California Legislature, 11 So Cal. L. Rev. 49 (1937)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsExecution FormalitiesReal Property LawTitle QualityMarketable TitleDefects & Encroachments

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25-299 California Forms of Pleading and Practice--Annotated § 299.34

§ 299.34 Text References

California Real Property Sales Transactions (Cal CEB 1998), Ch. 9, *Deeds*

Witkin, Summary of California Law, vol. 12, *Real Property*, §§ 263-265 (10th ed. 2005)

26 Cal. Jur. 3d, *Deeds*, §§ 26, 27, 36

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsGeneral Overview

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[Reserved]

§§ 299.35[Reserved]

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25-299 California Forms of Pleading and Practice--Annotated § 299.50

§ 299.50 Petition to Determine Identity of Grantor [Code Civ. Proc. §§ 770.020, 770.050]--By Successor in Interest

[1] FORM Petition to Determine Identity of Grantor [Code Civ. Proc. §§ 770.020, 770.050]--By Successor in Interest

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Determination of the Identity of _____ [*name*], also known as _____ [*name*].	))))))	NO. _____ PETITION TO DETERMINE IDENTITY [*Code Civ. Proc. §§ 770.020, 770.050*]

Petitioner _____ [*name*] alleges:

1. Petitioner is the _____ [owner *or allege other interest of petitioner in property*] of certain real property situated in _____ County, California, particularly described as follows: _____ [*give legal description and street address or common designation, if any*].

2. Petitioner acquired _____ [*allege property interest, e.g.*, title to the property] from _____ [*name by which petitioner's grantor conveyed property*] by a _____ [deed dated _____ *or* _____ (judgment *or* decree) made and entered by the _____ (*name of court*) on _____ (*date*), in the _____ (action *or* proceeding) entitled "_____," Action No. _____]; _____ [the deed *or* a certified copy of the _____ (judgment *or* decree)] was recorded on _____ [*date*], in the Official Records of the County of _____, Book _____, page

_____.

3. _____ [*Name by which petitioner's grantor conveyed property*] acquired _____ [*allege grantor's interest in property, e.g.*, title to the above-described property] in the name of _____ [*name by which petitioner's grantor acquired property*] by a _____ [deed dated _____ *or* _____ (judgment *or* decree) made and entered by the _____ (*name of court*) on _____ (*date*), in the _____ (action *or* proceeding) entitled "_____," Action No. _____]; _____ [the deed *or* a certified copy of the _____ (judgment *or* decree)] was recorded on _____ [*date*], in the Official records of the County of _____, Book _____, page _____.

4. _____ and _____ [*Names by which petitioner's grantor acquired and conveyed property*] were and are the names of the same person.

5. The discrepancy in names used by petitioner's grantor, heretofore alleged, affects _____ [*specify petitioner's interest in property, e.g.*, petitioner's title to the above-described property].

WHEREFORE, petitioner prays:

1. That the names _____ and _____ be determined to be the names of the same person, and the identity of _____ [*name*], also known as _____ [*name*] be established; and

2. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form may be used by a successor in interest of a person who acquired and transferred real property under different names to obtain an adjudication of the identity of the person [*see Code Civ. Proc. § 770.020*]. If the person whose identity is sought is not an immediate predecessor in interest of the petitioner, allegations of intervening transfers must be added to complete the chain of title to petitioner's property [*Code Civ. Proc. § 770.050(b)*].

[3] Caption

The petition should be entitled "In the matter of the determination of the identity of _____" naming all the persons sought to be identified [*Code Civ. Proc. § 770.050(b)*].

[4] Allegations

The petition must include all of the following [*Code Civ. Proc. § 770.050(b)*]:

- A statement of the petitioner's interest in the property.
- A particular description of the property.
- The name or names of the person or persons sought to be identified, setting out the name and a reference to the record of the transaction under which the property was acquired or stands of record and the name and a reference to the record of the transaction under which the property was transferred or stands of record, that the names are the names of the same person, and that the transfers affect the petitioner's title to the real property.
- A prayer that the identity of the persons be established.

[5] Joinder

As many persons sought to be identified as appear of record in the chain of title to the property may be joined in one petition or proceeding [*Code Civ. Proc. § 770.050(c)*].

[6] Jurisdiction and Venue

The petition must be filed in the superior court of the county where the real property described in the petition, or some part of it, is situated [*Code Civ. Proc. § 770.030*].

[7] Verification

The petition must be verified [*Code Civ. Proc. § 770.050(a)*].

[8] State Statutes

Inability of recorded conveyance of real property to impart constructive notice of its contents when conveyance does not recite name in which grantor acquired property; validity of conveyance between parties and those with notice of the conveyance. *Civ. Code § 1096*

Procedure for adjudicating identity of person in recorded chain of title who received and conveyed title under different

names. *Code Civ. Proc. §§ 770.010-770.080*

[9] Decisions

Title to real property is unmarketable when title is transferred in name different from name in which title was acquired. *Benson v. Shotwell (1890) 87 Cal. 49, 56-57, 25 P. 249*

Application of *Civ. Code § 1096* requirements to conveyance of real property by corporation. *Puccetti v. Girola (1942) 20 Cal. 2d 574, 576, 128 P.2d 13*

Second deed from grantor reciting identity of grantor with record owner of property is inadequate to render title to property marketable. *Peckham v. Stewart (1893) 97 Cal. 147, 153-154, 31 P. 928*

[10] Cross References

For discussion and forms relating to the cancellation and reformation of deeds, see Ch. 107, *Cancellation of Instruments* ; Ch. 189, *Deeds* ; and Ch. 488, *Reformation of Instruments*

For alternative captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms of verification, see Ch. 572, *Verification*

For a procedural guide to clearing objections to title and forms of deed clauses showing the changed name of a grantor, see California Legal Forms, Ch. 26, *Real Property Escrows*; Ch. 27, *Deeds and Recording* (Matthew Bender)

For discussion of problems concerning the identity of a grantor and the correction of mistakes in recorded instruments, see California Real Estate Law And Practice, Ch. 80, *Deeds and Transfer of Title ;* Ch. 82, *Recording of Instruments* (Matthew Bender)

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§ 299.51 Petition to Determine Identity of Decedent [Code Civ. Proc. §§ 770.020, 770.050]--By Distributee of Estate

[1] FORM Petition to Determine Identity of Decedent [Code Civ. Proc. §§ 770.020, 770.050]--By Distributee of Estate

[*Caption. See § 299.50.*]

Petitioner _____ [*name*] alleges:

1. Petitioner is the _____ [owner *or allege other interest of petitioner in property*] of certain real property situated in _____ County, California, particularly described as follows: _____ [*give legal description and street address or common designation, if any*].

2. The _____ [*specify petitioner's property interest*] was distributed to petitioner by a decree of distribution made and entered by the Superior Court of California, County of _____, [Department _____,] on _____ [*date*], in proceedings entitled "Estate of _____ [*name of decedent*], Deceased," Action No. _____. A certified copy of the decree of distribution was recorded on _____ [*date*], in the Official Records of the County of _____, Book _____, page _____.

3. Decedent acquired _____ [*allege decedent's interest in property, e.g.*, title to the above-described property] by a _____ [deed from _____ (*name of decedent's grantor*), dated _____, *or* _____ (judgment *or* decree) made and entered by the _____ (*name of court*) on _____ (*date*), in the _____ (action *or* proceeding) entitled "_____," Action No. _____]; _____ [the deed *or* a certified copy of the _____ (judgment *or* decree)] was recorded on _____ [*date*], in the Official Records of the County of _____, Book _____, page _____.

4. _____ and _____ [*Name of decedent in estate proceedings and name by which decedent acquired property*] were and are the names of the same person.

5. Petitioner's _____ [*specify petitioner's interest in property, e.g.*, title to the above-described property] is affected by the discrepancy between the name in which decedent acquired the property and the name in which the property was distributed from decedent's estate.

[*Prayer. See § 299.50.*]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 299.50.*]

[2] Use of Form

This form may be used by a distributee of real property to obtain an adjudication of the decedent's identity, if the estate of a decedent is probated under a name different from the name in which the decedent acquired the property [*Code Civ. Proc. §§ 770.010(d), 770.020*].

If a decree of distribution has not yet been entered in probate proceedings, an adjudication may be avoided by the inclusion of a reference in the decree to the name and record of the conveyance, judgment, or decree under which the decedent acquired interest in the property.

[3] Cross References

See *§ 299.50*

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25-299 California Forms of Pleading and Practice--Annotated § 299.52

§ 299.52 Allegations of Change of Name by Grantor or Decedent--Change by Legal Proceedings [Code Civ. Proc. §§ 1275-1279]

[1] FORM Allegations of Change of Name by Grantor or Decedent--Change by Legal Proceedings [Code Civ. Proc. §§ 1275-1279]

1. On or about _____ [*date*], while record holder of _____ [*allege interest of grantor or decedent in property, e.g.*, title to the real property], as herein alleged, the name of _____ [*name by which grantor or decedent acquired property*] was changed to _____ [*specify new name*] by a decree made and entered by the _____ [*name of court*] on _____ [*date*], in the proceeding entitled, "In the Matter of the Application of _____ [*name by which grantor or decedent acquired property*] for Change of Name," Action No. _____. A certified copy of the decree was filed with the Secretary of State on _____.

2. Since the decree, _____ [*name by which grantor or decedent acquired property*] has been known by the name of _____ [*name established by decree*].

[2] Use of Form

This form contains allegations that may be inserted in § 299.50[1] after Paragraph 3 or in § 299.51[1] after Paragraph 3 when a grantor or decedent appears under different names in the chain of title to real property because the grantor or decedent changed names by legal proceedings after acquiring an interest in the property.

[3] State Statutes

Statutory procedure to change personal name. *Code Civ. Proc. §§ 1275-1279.6*

[4] Cross References

For discussion of the procedures by which the name of a natural person, corporation, or limited partnership or other unincorporated association may be changed, see Ch. 377, *Name, Change of*

For discussion of the use of fictitious names by corporations and partnerships and the inclusion of partnership names in statements of partnership, see Ch. 160, *Corporations: Capacity* and Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties*

See also *§§ 299.50* and *299.51*

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§ 299.53 Allegation of Change of Name by Grantor or Decedent--Marriage

[1] FORM Allegation of Change of Name by Grantor or Decedent--Marriage

1. On or about _____ [*date*], while holding _____ [*allege interest of grantor or decedent in property, e.g.*, title to the above-described real property] of record, as heretofore alleged, _____ [*name by which grantor or decedent acquired property*] married and has since been known by the name of _____ [*married name of grantor or decedent*].

[2] Use of Form

This form contains an allegation that may be inserted in § 299.50[1] after Paragraph 3 or in § 299.51[1] after Paragraph 3 whenever a grantor or decedent appears under different names in the chain of title to real property because the grantor or decedent changed names as a result of marriage after acquiring an interest in the property.

[3] Cross References

See §§ 299.50-299.52

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25-299 California Forms of Pleading and Practice--Annotated § 299.54

§ 299.54 Notice of Time and Place of Hearing of Petition to Determine Identity [Code Civ. Proc. § 770.060]--Statutory Form

[1] FORM Notice of Time and Place of Hearing of Petition to Determine Identity [Code Civ. Proc. § 770.060]--Statutory Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Determination of the Identity of _____ [*name*] also known as _____ [*name*].	)))))))	NO. _____ NOTICE OF TIME AND PLACE OF HEARING TO DETERMINE IDENTITY [*Code Civ. Proc. § 770.060*]

_____

NOTICE IS HEREBY GIVEN that _____ [*name of petitioner*] has filed a petition herein claiming to be the _____ [owner *or* distributee *or allege other property interest*] of lands described as follows _____ [*give legal description of property*] and praying that the identity of the following-named persons, in former _____ [conveyances *or* judgments *or* decrees *or* decrees of distribution in estate proceedings] to said lands or in decrees of distribution of said lands in probate be determined, to wit: _____ [*state names, e.g.*, J. Doe and John Doe]; and that the time and place of hearing the petition has been set for _____ [*date*], at the hour of _____ _____.M., in the courtroom of the above-entitled court in _____ [*city*], _____ County, California.
Dated: _____.

_____ [*signature*]

Clerk of the Superior Court

[2] Use of Form

This form is a notice of the time and place of a hearing to determine the identity of persons. It is substantially similar to the form set forth in *Code Civ. Proc. § 770.060(c)*. When a petition to determine identity is filed and the court clerk has set the petition for hearing, a petitioner must cause notice of the time and place of the hearing to be posted at the courthouse of the county where the proceeding is pending, as well as in a conspicuous place on the property described in the petition, at least 10 days before the hearing [*Code Civ. Proc. § 770.060(b)*].

[3] Answer

Any person interested in the property described in a petition for the determination of identity may answer the petition and deny any of the matters contained in the petition at any time before the date fixed for the hearing [*Code Civ. Proc. § 770.040(b)*]. For discussion and forms for answers generally, see Ch. 26, *Answers* .

[4] Cross References

See *§ 299.50*

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25-299 California Forms of Pleading and Practice--Annotated § 299.55

§ 299.55 Declaration [Code Civ. Proc. § 2015.5] of Posting Notice of Hearing [Code Civ. Proc. § 770.060]

[1] FORM Declaration [Code Civ. Proc. § 2015.5] of Posting Notice of Hearing [Code Civ. Proc. § 770.060]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Determination of the Identity of _____ [*name*], also known as _____ [*name*].	)))))))	NO. _____ DECLARATION OF POSTING NOTICE [*Code Civ. Proc. § 770.060*]

_____

I, _____ [*name*], declare:

I am, and was at all times herein mentioned, over the age of 18 years and not a party to the above-entitled proceeding; my _____ [residence *or* business] address is _____ [*street address*], _____ [*city*], _____ County, California. On _____ [*date*], at _____ _____.M., pursuant to *Code of Civil Procedure Section 770.060*, I posted a Notice of Time and Place of Hearing to Determine Identity in a conspicuous place on the real property described in the notice. A copy of the notice is attached to this Declaration as Exhibit A and made a part hereof.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form is a declaration that may be used to prove the required posting of notice. Although the statute fails to specify how proof of notice is to be made, compliance with the requirements of *Code Civ. Proc. § 1013a* (proof of service of papers by mail) or *417.10* (proof of service of summons) would appear to be sufficient. The declaration, together with the original or a true copy of the notice of hearing, is filed after posting with the clerk of the court in which the proceeding is pending [*Code Civ. Proc. § 1010*].

[3] Affidavit or Declaration

An affidavit may be used to prove service of summons, notice, or other paper in an action or special proceeding [*Code Civ. Proc. § 2009*]. A declaration under penalty of perjury may be used in lieu of an affidavit [*Code Civ. Proc. § 2015.5*].

[4] State Statutes

Methods of proving service of summons. *Code Civ. Proc. § 417.10*

Service of notices and papers. *Code Civ. Proc. §§ 1010-1013a*

Use of affidavits to prove service of summons or notice. *Code Civ. Proc. § 2009*

Declaration under penalty of perjury as substitute for affidavit. *Code Civ. Proc. § 2015.5*

[5] Cross References

For alternate forms of declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

For a procedural guide and forms of proof of service generally, see Ch. 518, *Service of Summons and Papers*

See *§ 299.54*

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
Chapter 299 IDENTITY, ESTABLISHMENT OF
PART IV. FORMS

25-299 California Forms of Pleading and Practice--Annotated § 299.56

§ 299.56 Decree Establishing Identity [Code Civ. Proc. § 770.070(a)]

[1] FORM Decree Establishing Identity [Code Civ. Proc. § 770.070(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Determination of the Identity of _____ [*name*], also known as _____ [*name*].	)))))))	NO. _____ DECREE DETERMINING IDENTITY [*Code Civ. Proc. § 770.070(a)*]

_____

The petition of _____ [*name of petitioner*] to determine the identity of _____ [*name*], also known as _____ [*name*], came on regularly for hearing on _____ [*date*], in [Department _____ of] the above-entitled court, the Honorable _____, Judge, presiding.

Proof having been made to the satisfaction of the court, and the court, after examining the petition and hearing the evidence, finding that all notices of the hearing have been duly given as required by law and that the facts alleged in the petition are true, grants the petition as follows:

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED that _____ [*name*] and _____ [*name*] are the names of the same person, and that the identity of _____ [*name*], also known as _____ [*name*], is established.

IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that the identity of the person named as

_____ [*name*] in the _____ [deed dated _____ (*date*), *or* _____ (judgment *or* decree) entered by the _____ (*name of court*) on _____ (*date*), in the _____ (action *or* proceeding) entitled "_____," Action No. _____], _____ [which deed *or* a certified copy of which _____ (judgment *or* decree)] was recorded on _____ [*date*], in the Official Records of the County of _____, Book _____, page _____, is the same as the _____ (person *or* decedent) named as _____ [*name*] in the _____ [deed dated _____ (*date*), *or* _____ (judgment *or* decree) entered by the _____ (*name of court*) on _____ (*date*), in the _____ (action *or* proceeding) entitled "_____," Action No. _____ *or* decree of distribution entered by the Superior Court of California, County of _____, (Department _____,) on _____ (*date*), in proceedings entitled "Estate of _____ (*name of decedent*), Deceased," Action No. _____], _____ [which deed *or* a certified copy of which _____ (judgment *or* decree *or* decree of distribution)] was recorded on _____ [*date*], in the Official Records of the County of _____, Book _____, page _____.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is a decree that may be used in a proceeding to determine identity. After the decree becomes final, it constitutes prima facie evidence of the matters determined, and the identity of the persons named in the decree is presumed to be that stated in the decree [*Code Civ. Proc. § 770.080(a)*].

[3] Requirement of Recordation

A certified copy of the decree must be recorded in the office of the county recorder of every county in which any part of the property is situated [*Code Civ. Proc. § 770.080(b)*].

[4] Appeal

Any aggrieved party may take an appeal from a decree to determine identity [*Code Civ. Proc. § 770.070(b)*].

[5] Cross References

For forms relating to appeals from superior court judgments and decrees, see Chs. 40-54

For discussion and forms generally relating to judgments and decrees, see Ch. 318, *Judgments*

California Forms of Pleading and Practice--Annotated

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
Chapter 300 INDEMNITY AND CONTRIBUTION

25-300 California Forms of Pleading and Practice--Annotated 300.syn

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[1] FORM

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[1] FORM

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
Chapter 300 INDEMNITY AND CONTRIBUTION
PART I. SCOPE

25-300 California Forms of Pleading and Practice--Annotated § 300.01

§ 300.01 Scope of Chapter

This chapter discusses express contractual indemnity and includes forms relating to actions based on express indemnity agreements [*see* §§ 300.171-300.173]. It also includes a form of notice and request for defense for use by an indemnitee to notify an indemnitor of an action pending against the indemnitee for an implied or express indemnified matter [*see § 300.170*]. For discussion of insurance contracts, see Ch. 308, *Insurance* . For discussion of bonds and other forms of sureties, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

This chapter also discusses comparative indemnity (also known as implied equitable indemnity) among multiple tortfeasors. Included are forms of a cross complaint for partial or full comparative indemnity [*see §§ 300.190, 300.191*]; a complaint for implied contractual indemnity and an allegation to be used in such a complaint with regard to defective auto repairs [*see §§ 300.192* and *300.193*]; a notice of motion for an order awarding attorney fees in an action for comparative indemnity [*see § 300.194*]; an order granting the motion [*see § 300.195*]; a notice of motion for a determination of the good faith of a settlement issue [*see § 300.196*] and supporting declarations [*see §§ 300.198, 300.199*]; an order making the determination [*see § 300.200*]; a petition for writ of mandate to review the trial court's determination of the good faith issue [*see § 300.201*]; and a petition for writ of mandate to challenge the binding effect of the trial court's determination of the good faith issue on the ground that such a binding effect would violate due process [*see § 300.202*].

This chapter also discusses contribution among joint nontort obligors and judgment debtors. Included is a form of complaint for contribution against joint or joint and several obligors [*see § 300.220*]. Also included are forms of a notice of motion [*see § 300.221*], a declaration [*see § 300.222*], and an order for contribution from a nontort judgment debtor [*see § 300.223*]. The relationship of contribution and tort law is discussed in *§ 300.60* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsIndemnityTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsProcedureMultiple DefendantsIndemnityContractual Indemnity

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
Chapter 300 INDEMNITY AND CONTRIBUTION
PART I. SCOPE

25-300 California Forms of Pleading and Practice--Annotated § 300.02

§ 300.02 Overview

[1] Terms

The terms of an indemnity agreement determine the scope of the indemnitee's right to indemnification and the indemnitor's obligation to indemnify [*Tulare Co. Power Co. v. Pacific Sur. Co. (1919) 43 Cal. App. 315, 327, 185 P. 399]* . These terms are construed, like any other contract, with the objective of determining and effectuating the actual intention of the parties to the agreement, so far as the intention is ascertainable and lawful [*City of Los Angeles v. Japan Air Lines Co., Ltd. (1974) 41 Cal. App. 3d 416, 428, 116 Cal. Rptr. 69]* . In no case will a court interpret the terms of an indemnity agreement in a manner that would obligate an indemnitor to protect an indemnitee against loss or liability outside the expressed intention of their agreement [*Southern Cal. Gas Co. v. Ventura Pipe Line Constr. Co. (1957) 150 Cal. App. 2d 253, 257-259, 309 P.2d 849]* .

[2] Construction

The construction of indemnity agreements is governed by the same rules used in the construction of contracts generally; no artificial rules apply [*Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A.G. (1970) 3 Cal. 3d 434, 442, 91 Cal. Rptr. 6, 476 P.2d 406* ; *see Civ. Code §§ 1635-1661* (interpretation of contracts); *Code Civ. Proc. §§ 1856-1864* (construction of written instruments); *see generally* Ch. 140, *Contracts*]. For example, an indemnity agreement must be construed as a whole: the meaning of any particular part must be determined from a consideration of the entire agreement and its general intent, giving effect to all parts of the agreement if possible [*Indenco, Inc. v. Evans (1962) 201 Cal. App. 2d 369, 374, 20 Cal. Rptr. 90]* . Although extrinsic evidence is not admissible to add to, detract from, or vary the terms of a written indemnity agreement, a court may consider evidence of the circumstances surrounding the making of the agreement to ascertain the meaning that the parties attributed to the agreement at its execution, and this evidence is admissible to prove a meaning of which a term is reasonably susceptible [*Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co. (1968) 69 Cal. 2d 33, 39-41, 69 Cal. Rptr. 561, 442 P.2d 641]* . Ambiguities that cannot be resolved by extrinsic evidence must be strictly construed against the party preparing the agreement [*County of Alameda v. Southern Pac. Co. (1961) 55 Cal. 2d 479, 488, 11 Cal. Rptr. 751, 360 P.2d 327* ; *Weaver v. Grunbaum (1939) 31 Cal. App. 2d 42, 49, 87 P.2d 406]* .

The provisions of *Civ. Code § 2778*, defining the scope of indemnification rights and obligations, are regarded as parts

of every indemnity agreement unless the agreement expresses a contrary intention [*Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A.G. (1970) 3 Cal. 3d 434, 442, 91 Cal. Rptr. 6, 476 P.2d 406]* . These statutory provisions are discussed in *§ 300.111[3][a]*.

[3] Liability Imposed by Law

An obligation to indemnify does not accrue in the absence of an obligation validly imposed on the indemnitee by law [*United States Fid. & Guar. Co. v. More (1909) 155 Cal. 415, 418, 101 P. 302* ; *see Civ. Code § 2772* (defining indemnity as protection against legal consequences of conduct)]. Thus, no indemnification is available for payments made "voluntarily," that is, without the compulsion of an existing legal liability [*Southern Cal. Gas Co. v. Ventura Pipe Line Constr. Co. (1957) 150 Cal. App. 2d 253, 257, 309 P.2d 849]* or for a liability incurred as a result of the indemnitee's fraud [*see Bachman v. Independence Indem. Co. (1931) 112 Cal. App. 465, 480-481, 297 P. 110]* or as a result of the indemnitee's failureto raise a complete defense [*Easton v. Boston Inv. Co. (1921) 51 Cal. App. 246, 250, 196 P. 796* ; *see Civ. Code § 2778(7)* (judgment against indemnitee as inconclusive against indemnitor if indemnitee failed to raise good defense)]. However, an indemnitee is not required to establish his or her legal liability by defending an action to judgment [*Eva v. Andersen (1913) 166 Cal. 420, 424-425, 137 P. 16]* or by prosecuting an appeal of the judgment to termination [*Thomas v. Layer (1920) 48 Cal. App. 199, 202-203, 191 P. 949]* . Nor does an indemnitee for damages voluntarily incur liability and forfeit a right of indemnity therefor by waiving a procedural defense to a claim for the damages [*Nicholson-Brown, Inc. v. City of San Jose (1976) 62 Cal. App. 3d 526, 536, 133 Cal. Rptr. 159]* .

Statutes create either conclusive or presumptive effect of a judgment against an indemnitee under certain circumstances [*see Civ. Code § 2778(5)-(7)*]. For discussion, see *§ 300.40[1]*.

[4] Indemnified Risks Under Agreement

The intention expressed by the parties to an indemnity agreement determines the particular risks against which the indemnitor is obligated to protect the indemnitee [*Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 633, 119 Cal. Rptr. 449, 532 P.2d 97]* . For example, the expressed intention of the parties controls whether the indemnitor must indemnify the indemnitee for liability arising from injuries to the indemnitor's employees as well as to other persons [*Herman Christensen & Sons, Inc. v. Paris Plastering Co. (1976) 61 Cal. App. 3d 237, 246-247, 132 Cal. Rptr. 86* ; *see Lab. Code § 3864* (requiring written indemnity agreement to require employer to indemnify for injuries to employees)]; for losses arising from damage to the indemnitee's property as well as from damage to property of third persons [*Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co. (1968) 69 Cal. 2d 33, 36-41, 69 Cal. Rptr. 561, 442 P.2d 641]* ; for losses arising from the indemnitee's contractual undertakings as well as from tort liabilities [*Southern Cal. Gas Co. v. Ventura Pipe Line Constr. Co. (1957) 150 Cal. App. 2d 253, 259, 309 P.2d 849]* ; for liabilities arising at a particular time [*Lincoln v. Narom Dev. Co. (1970) 10 Cal. App. 3d 619, 627, 89 Cal. Rptr. 128]* or in a particular place [*Hollander v. Wilson Estate Co. (1932) 214 Cal. 582, 585, 7 P.2d 177]* ; or for losses arising from personal injuries caused by particular persons [*Baldwin Contracting Co. v. Winston Steel Works, Inc. (1965) 236 Cal. App. 2d 565, 576, 46 Cal. Rptr. 421]* or by particular conduct [*San Diego Gas & Elec. Co. v. Davey Tree Surgery Co. (1970) 11 Cal. App. 3d 1096, 1101-1102, 96 Cal. Rptr. 889]* .

Similarly, the express intention of the parties to an indemnity agreement determines whether the indemnitor is obligated to protect the indemnitee against a risk of liability or against a risk of loss resulting from liability [*see Fernandez v. Tormey (1898) 121 Cal. 515, 519-520, 53 P. 1119* ; *see also § 300.31*]. In general, an indemnity agreement against "claims" evidences an indemnity against loss [*Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A.G. (1970) 3 Cal. 3d 434, 446-447, 91 Cal. Rptr. 6, 476 P.2d 406]* .

A right to indemnity may depend on the occurrence of any condition precedent established by the terms of an indemnity agreement unless, as in the case of other contracts, the indemnitor's conduct excuses the condition [*Weaver v.*

Grunbaum (1939) 31 Cal. App. 2d 42, 50-51, 87 P.2d 406] . In the absence of a contrary provision in the agreement, however, the obligation to indemnify does not depend on a demand by the indemnitee that the indemnitor perform the obligation [*Thomas v. Layer (1920) 48 Cal. App. 199, 201-202, 191 P. 949]* or the indemnitor's notification of and opportunity to defend an action against the indemnitee for an indemnified matter.

Civ. Code § 2775 is also relevant to a determination of the risks covered by an indemnity agreement. That statute provides that an agreement to indemnify against the acts of a certain person applies not only to his or her acts and their consequences but also to those of his or her agents.

[5] Indemnitee's Negligence

[a] In General

Certain special rules of construction have been adopted by the courts with regard to a provision of an indemnity agreement that purports to relieve the indemnitee of responsibility for its own negligence. In general, a contract of indemnity that purports to relieve the indemnitee from the results of a failure to exercise ordinary care should be strictly construed against the indemnitee, and will not be held to provide indemnity unless so expressed in clear and unequivocal terms [*Goldman v. Ecco-Phoenix Elec. Corp. (1964) 62 Cal. 2d 40, 44, 41 Cal. Rptr. 73, 396 P.2d 377* ; *Maryland Cas. Co. v. Bailey & Sons, Inc. (1995) 35 Cal. App. 4th 856, 866, 41 Cal. Rptr. 2d 519]* .

This general rule has led to a corollary that a "general" indemnity agreement does not provide for indemnity against liability or loss caused by the indemnitee's "active" negligence. A general indemnity agreement is one that does not expressly state that damage caused by the indemnitee's negligence is included in the indemnity coverage [*Jimenez v. Pacific W. Constr. Co. (1986) 185 Cal. App. 3d 102, 114, 229 Cal. Rptr. 575* ; *see Vinnell Co. v. Pacific Elec. Ry. Co. (1959) 52 Cal. 2d 411, 415, 340 P.2d 604* ; *see also Maryland Cas. Co. v. Bailey & Sons, Inc. (1995) 35 Cal. App. 4th 856, 865-866, 41 Cal. Rptr. 2d 519* (general indemnity agreement also referred to as "Type II" indemnity agreement, following labels set forth in *MacDonald & Kruse, Inc. v. San Jose Steel Co. (1972) 29 Cal. App. 3d 413, 420, 105 Cal. Rptr. 725*)]. For the meaning of "active" negligence, see *§ 300.02[5][b]*.

Under these rules, the following language has been held to be general andinsufficient to impose indemnity for active negligence: "from all claims for damages to persons," "in any suit at law," and "from any cause whatsoever" [*Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 628-629, 119 Cal. Rptr. 449, 532 P.2d 97* ; *see Morgan v. Stubblefield (1972) 6 Cal. 3d 606, 626, 100 Cal. Rptr. 1, 493 P.2d 465* ("from all claims for damages to persons"); *Markley v. Beagle (1967) 66 Cal. 2d 951, 962, 59 Cal. Rptr. 809, 429 P.2d 129* ("in any suit at law"); *MacDonald & Kruse, Inc. v. San Jose Steel Co. (1972) 29 Cal. App. 3d 413, 422-423, 105 Cal. Rptr. 725* ("from any cause whatsoever"); *see also MacDonald & Kruse, Inc. v. San Jose Steel Co. (1972) 29 Cal. App. 3d 413, 422-423, 105 Cal. Rptr. 725* (additional examples)]. However, a clause that provides for indemnity "except for loss caused solely by the negligence of the indemnitee" is not a general clause. It is not silent with respect to the issue of the indemnitee's negligence and, therefore, provides for indemnity for loss resulting from the combined negligence of the indemnitor and the indemnitee, whether the indemnitee's negligence is characterized as active or passive [*Ralph M. Parsons Co. v. Combustion Equip. Assocs., Inc. (1985) 172 Cal. App. 3d 211, 220, 218 Cal. Rptr. 170* ; *C.I. Eng'rs & Constructors, Inc. v. Johnson & Turner Painting Co. (1983) 140 Cal. App. 3d 1011, 1014-1018, 189 Cal. Rptr. 824]* .

The California Supreme Court has on several occasions reaffirmed the rule that an indemnity clause that does not address itself to the issue of an indemnitee's negligence is a general indemnity clause, which may be construed to provide indemnity for a loss resulting in part from an indemnitee's passive negligence but not active negligence [*Gonzales v. R. J. Novick Constr. Co. (1978) 20 Cal. 3d 798, 809-810, 144 Cal. Rptr. 408, 575 P.2d 1190* ; *Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 628, 119 Cal. Rptr. 449, 532 P.2d 97* ; *see Markley v. Beagle (1967) 66 Cal. 2d 951, 962, 59 Cal. Rptr. 809, 429 P.2d 129]* . However, the Court has made it clear that the above rule is simply one in aid of construction of the agreement, and that the determination of whether an indemnity clause is

general or specific, or whether negligence is active or passive, is never wholly dispositive. The ultimate question is the intent of the parties [*see Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 632-633, 119 Cal. Rptr. 449, 532 P.2d 97* ; *see also Morton Thiokol, Inc. v. Metal Bldg. Alteration Co. (1987) 193 Cal. App. 3d 1025, 1030, 238 Cal. Rptr. 722]* .

Thus, indemnity for the indemnitee's active negligence is not precluded under an indemnity clause that does not expressly provide for indemnity in the case of the indemnitee's negligence if the parties intended that the agreement allow the recovery [*Schackman v. Universal Pictures Co. (1967) 255 Cal. App. 2d 857, 860, 63 Cal. Rptr. 607]* . Such a clause protects an indemnitee from liability for injuries sustained as a result of the indemnitee's negligence if the circumstances of the loss were within the contemplation of the parties as one of the obvious risks against which the indemnitee sought to be covered and it reasonably could be concluded that the parties knowingly bargained for the very protection at issue [*Harvey Mach. Co. v. Hatzel & Buehler, Inc. (1960) 54 Cal. 2d 445, 448, 6 Cal. Rptr. 284, 353 P.2d 924* ; *Ralph M. Parsons Co. v. Combustion Equip. Assocs., Inc. (1985) 172 Cal. App. 3d 211, 220-221, 218 Cal. Rptr. 170* ; *Schackman v. Universal Pictures Co. (1967) 255 Cal. App. 2d 857, 862, 63 Cal. Rptr. 607]* .

[b] Active and Passive Negligence

An indemnitee who participates in some manner in the conduct or omission that caused the injury, beyond the mere failure to perform a duty imposed by law, is actively negligent and therefore is usually not entitled to indemnity under a general indemnity agreement [*Morgan v. Stubblefield (1972) 6 Cal. 3d 606, 625, 100 Cal. Rptr. 1, 493 P.2d 465* ; *MacDonald & Kruse, Inc. v. San Jose Steel Co. (1972) 29 Cal. App. 3d 413, 419-420, 105 Cal. Rptr. 725* ; *see § 300.01[3]*]. Active negligence may consist of the actual connection with an act or omission of another by knowledge of or acquiescence in the act or omission [*Jimenez v. Pacific W. Constr. Co. (1986) 185 Cal. App. 3d 102, 112, 229 Cal. Rptr. 575* ; *see King v. Timber Structures, Inc. (1966) 240 Cal. App. 2d 178, 182, 184-185, 49 Cal. Rptr. 414]* . Strict liability is equated with active negligence for purposes of construing an indemnification agreement [*Widson v. International Harvester Co. (1984) 153 Cal. App. 3d 45, 59-60, 200 Cal. Rptr. 136* ; *see Price v. Shell Oil Co. (1970) 2 Cal. 3d 245, 256-258, 85 Cal. Rptr. 178, 466 P.2d 722]* . For a form of complaint for declaratory relief, alleging that the indemnitor under a contract of indemnity is not obligated because the indemnitee was actively negligent, see *§ 300.172*.

Passive negligence is the failure to perform a duty of care imposed by law, but in which there is no participation with another in any affirmative act of negligence that is the proximate cause of the injury to a third person [*Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 629, 119 Cal. Rptr. 449, 532 P.2d 97* ; *Jimenez v. Pacific W. Constr. Co. (1986) 185 Cal. App. 3d 102, 112, 229 Cal. Rptr. 575]* . Mere nonfeasance, such as a failure to discover a dangerous condition, is passive negligence and does not preclude indemnity under a general indemnity clause [*Markley v. Beagle (1967) 66 Cal. 2d 951, 962, 59 Cal. Rptr. 809, 429 P.2d 129]* . For example, a failure to act in fulfillment of a duty of care that devolves on an indemnitee by law as the owner or occupier of land is passive negligence [*Harvey Mach. Co. v. Hatzel & Buehler, Inc. (1960) 54 Cal. 2d 445, 448, 6 Cal. Rptr. 284, 353 P.2d 924]* .

However, the failure to perform a duty created by virtue of the party's status is not always considered passive negligence. In one case, for example, a general contractor had responsibility for workplace safety due to its status as the general contractor, even though that responsibility was shared with subcontractors under their contractual agreements. Because the general contractor specifically assumed responsibility for eliminating the known danger of holes left in a roof by a subcontractor after the subcontractor failed to correct the dangerous condition, the general contractor engaged in active negligence when it failed to ensure that theholes were covered and marked appropriately. Because the indemnity agreement with the subcontractor did not specifically cover the general contractor's own negligence, indemnity was inappropriate [*McCrary Constr. Co. v. Metal Deck Specialists, Inc. (2005) 133 Cal. App. 4th 1528, 1540-1541, 35 Cal. Rptr. 3d 624]* .

Whether negligence is to be characterized as active or passive is based on the circumstances of each case and presents a question for the trier of fact unless the evidence is so clear and undisputable that reasonable persons could not disagree [*Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 629, 119 Cal. Rptr. 449, 532 P.2d 97]* .

[6] Proportional Contractual Indemnity

The legal principles surrounding the issue of indemnity for the indemnitee's own negligence [*see § 300.01[3]*], such as general indemnity clauses and active and passive negligence, all arose within the context of contractual indemnity being an all-or-nothing matter; that is, either a total shift of liability or no shift [*see Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 676, 151 Cal. Rptr. 399* . Nevertheless, arguments that contractual indemnity should be reconsidered in light of the emerging principles of comparative negligence and comparative indemnity have not met with success [*see, e.g., Regional Steel Corp. v. Superior Court (1994) 25 Cal. App. 4th 525, 528, 32 Cal. Rptr. 2d 417]* . However, a 1994 case may have opened the door to the possible development of a doctrine of "proportional contractual indemnity" [*see Hernandez v. Badger Constr. Equip. Co. (1994) 28 Cal. App. 4th 1791, 34 Cal. Rptr. 2d 732]* .

The case involved an indemnity provision in an equipment lease that provided indemnity to the lessor only for liability incurred on account of the lessee's negligence; it did not provide for any right of indemnity for liability for the lessor's own negligence [*see Hernandez v. Badger Constr. Equip. Co. (1994) 28 Cal. App. 4th 1791, 1818 n.21, 34 Cal. Rptr. 2d 732]* . The equipment caused injury, and the both parties were assessed shares of comparative negligence. The appellate court construed the agreement under contract principles as requiring the lessee to indemnify the lessor for the portion of the lessor's liability attributable to the lessee's fault (emphasis added). It further held that the lessee was not entitled to indemnity from the lessor for the portion of its liability attributable to its own negligence [*Hernandez v. Badger Constr. Equip. Co. (1994) 28 Cal. App. 4th 1791, 1818 n.21, 34 Cal. Rptr. 2d 732]* .

Whether *Hernandez* has any relevance beyond its facts remains to be seen. It rests solely on contractual interpretation of a fairly nontypical indemnity agreement, which did not purport to create any right of indemnity for the indemnitee's own negligence.

Legal Topics:

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

§§ 300.03[Reserved]

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§ 300.10 Governing Law

Civ. Code §§ 2772-2784.5 govern the interpretation of indemnity agreements. Express indemnity agreements are also governed by *Civ. Code §§ 1549-1701*, the statutes applicable to contracts generally. Public policy limitations on contracts for indemnity are set forth in *Civ. Code §§ 1668* (contracts exempting one from liability for fraud, willful injury, or violation of law), 2773 (agreement to indemnify against unlawful act), 2782 (construction contracts), and 2784.5 (hauling, trucking, or cartage contracts).

A general right of contribution among joint obligors is provided for in *Civ. Code § 1432*. Contribution among joint judgment debtors is governed by *Code Civ. Proc. §§ 875-883*]. Contribution among judgment debtors other than joint tortfeasors is governed by *Code Civ. Proc. §§ 881-883*.

Contribution among joint tortfeasor judgment debtors is governed by *Code Civ. Proc. §§ 875-880*. However, some of these statutes [*see, e.g., Code Civ. Proc. §§ 875, 876*] predate the California Supreme Court decisions adopting the doctrines of comparative negligence [*see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226]* and comparative equitable indemnity [*see American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899]* . The continuing validity of these statutes is questionable to the extent that they conflict with principles of comparative negligence and comparative indemnity [*see Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 327-328, 146 Cal. Rptr. 550, 579 P.2d 441* ; *see also, § 300.13*]. The effect of a release of one of two or more joint debtors on contribution rights is stated in *Civ. Code § 1543*.

The Fair Responsibility Act of 1986 (Proposition 51) [*see § 300.63[3]*], which abolished the rule of joint and several liability with regard to certain "noneconomic" damages, is found in *Civ. Code §§ 1431.1-1431.5*.

The right of implied equitable (or comparative) indemnity is a judicially created doctrine. For discussion of the development of this doctrine, see *§ 300.60 et seq.*

Legal Topics:

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§ 300.11 Indemnity Defined

Indemnity may be defined generally as an obligation resting on one party, the indemnitor, to make good a loss or damage that another party, the indemnitee, has incurred [*Regional Steel Corp. v. Superior Court (1994) 25 Cal. App. 4th 525, 528, 32 Cal. Rptr. 2d 417* ; *Phoenix Ins. Co. v. United States Fire Ins. Co. (1987) 189 Cal. App. 3d 1511, 1525-1526, 235 Cal. Rptr. 185* ; *Sammer v. Ball (1970) 12 Cal. App. 3d 607, 610, 91 Cal. Rptr. 121]* . Indemnity is defined by statute as a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person [*Civ. Code § 2772*].

Indemnity may arise from either of two general sources. First, it may arise by virtue of express contractual language establishing a duty in one party to save another harmless if specified circumstances occur (*see § 300.30 et seq.*). Second, it may find its source in equitable considerations brought into play by contractual language not specifically dealing with indemnification or by the equities of the particular case (*see § 300.60 et seq.*) [*Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1032-1033, 269 Cal. Rptr. 720, 791 P.2d 290* ; *E. L. White, Inc. v. City of Huntington Beach (1978) 21 Cal. 3d 497, 506-507, 146 Cal. Rptr. 614, 579 P.2d 505]* . If there is an express indemnity agreement, its provisions, rather than the equitable principles behind comparative indemnity, govern the scope of any duty to indemnify [*Regional Steel Corp. v. Superior Court (1994) 25 Cal. App. 4th 525, 529, 32 Cal. Rptr. 2d 417]* .

Legal Topics:

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§ 300.12 Contribution Defined

The term contribution as used in this chapter means the sharing of a loss or payment among several parties, and the right of one who has discharged a common liability to recover from another party who is also liable the portion of the total payment that the latter ought to pay or bear, based on an equal division of the total payment among all of the liable parties. This aspect of contribution is discussed in *§ 300.90 et seq.*

Code Civ. Proc. § 875 also provides for a right of "contribution" among two or more defendants held jointly liable in a tort action, if one of the tortfeasors has, by payment, discharged more than his or her pro rata share of the joint judgment [*see Code Civ. Proc. § 875(a), (c)*]. However, this statutory right of pro rata contribution among tortfeasors has essentially been superseded by the judicially created doctrine of comparative indemnity, under which one tortfeasor may seek partial indemnity from another tortfeasor liable for the same tort in proportion to the latter's comparative fault [*see American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 598-604, 146 Cal. Rptr. 182, 578 P.2d 899]*
.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 300.13 Indemnity and Contribution Distinguished

Indemnity may operate either to effect a complete shift of loss from the indemnitee to the indemnitor or to effect a partial shifting of loss according to the respective shares of comparative fault of the various tortfeasors [*Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 808, 251 Cal. Rptr. 202, 760 P.2d 399]* . In contrast, contribution generally distributes a loss equally among all who are liable, each bearing a pro rata share [*Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 73, 38 Cal. Rptr. 490]* . For example, if there are two judgment debtors, under general principles of contribution, each would ultimately pay half of the judgment [*see Code Civ. Proc. § 876*; § 300.90 et seq.]. Under indemnity, the loss would either be entirely shifted from one to the other, or each would bear the percentage of the loss that corresponded to that defendant's percentage of fault as found by the trier of fact [*Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 808, 251 Cal. Rptr. 202, 760 P.2d 399* ; *see § 300.30 et seq., § 300.60 et seq.*]

Contribution is a right that continues to apply to nontort judgment debtors [*see Code Civ. Proc. §§ 881-883*; *see also § 300.90 et seq.*]. Before the decision in *American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899* , a right of contribution existed among tort, as well as nontort, judgment debtors [*see, e.g., Caterpillar Tractor Co. v. Teledyne Indus., Inc. (1975) 53 Cal. App. 3d 693, 698-699, 126 Cal. Rptr. 455]* . California statutes continue to provide for a right of contribution among joint tortfeasors [*see Code Civ. Proc. §§ 875-878*; *see also § 300.10*], but after *American Motorcycle*, most courts have construed the word "contribution" in these statutes as now referring to the right of comparative indemnity created by the California Supreme Court in that case [*see Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 327-328, 146 Cal. Rptr. 550, 579 P.2d 441]* . Courts have essentially ignored *Code Civ. Proc. § 876(a)*, which continues to provide for pro rata contribution among tortfeasor judgment debtors. However, at least two courts have found that *Code Civ. Proc. § 876(a)* continues to provide for a pro rata distribution of loss among tortfeasors [*see Coca-Cola Bottling Co. v. Lucky Stores, Inc. (1992) 11 Cal. App. 4th 1372, 1378-1381, 14 Cal. Rptr. 2d 673* ; *Lamberton v. Rhodes-Jamieson (1988) 199 Cal. App. 3d 748, 750-755, 245 Cal. Rptr. 162]* .

Legal Topics:

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

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§ 300.14 Joint and Several Liability

Indemnity and contribution are interconnected with the doctrines of joint, several, and joint and several liability [*see Civ. Code § 1430*]. Indeed, there can be no indemnity without joint and several liability by the prospective indemnitor and indemnitee [*Fieldstone Co. v. Briggs Plumbing Prods., Inc. (1997) 54 Cal. App. 4th 357, 367, 62 Cal. Rptr. 2d 701* (manufacturers of inexpensive bathroom sinks not liable for indemnity in action to recoup costs of replacing prematurely rusted sinks, because defendants were not liable for plaintiff's economic damages under either strict liability or negligence theory)]. If defendants are jointly and severally liable for an obligation, the plaintiff may collect his or her entire damages from any one of them. The defendants are then left to principles of indemnity or contribution in order to apportion ultimate liability among themselves [*see American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 586-590, 146 Cal. Rptr. 182, 578 P.2d 899]* .

In contrast, if defendants are severally liable only, an obligation is divided among them in proportion to their liability, the plaintiff then being entitled to collect from each only the part that corresponds to the liability of each [*see Douglas v. Bergere (1949) 94 Cal. App. 2d 267, 270, 210 P.2d 727]* . Joint liability only (as opposed to joint and several liability) is a concept that has little or no application under current law, and statutory reference to "joint liability" should probably be read as referring to joint and several liability, as opposed to several liability only.

There are various statutory rules and presumptions concerning joint and several liability. An obligation imposed on several persons, or a right created in favor of several persons, is presumed to be joint and not several [*see Civ. Code § 1431*]. However, with regard to tortfeasors, this rule has been modified very substantially by the Fair Responsibility Act of 1986 (Proposition 51), which eliminated joint and several liability for "noneconomic" damages [*see Civ. Code §§ 1431.1-1431.5*; *see also § 300.60 et seq.*].

Under contract law, if all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several [*Civ. Code § 1659*]. However, a promise made in the singular number but executed by several persons is presumed to be joint and several [*Civ. Code § 1660*].

One who indemnifies another against an act to be done by the latter is liable jointly with the person indemnified, and

separately to every person injured by the act [*Civ. Code § 2777*]. Ramifications of this rule are discussed in *§ 300.30 et seq.*, with regard to express indemnity agreements, and in *§ 300.60 et seq.* with regard to implied contractual indemnity. Under the Uniform Commercial Code, two or more persons who sign a negotiable instrument are jointly and severally liable unless the instrument specifies otherwise [*Com. Code § 3116(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawThird PartiesJoint & Several ContractsTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsProcedureMultiple DefendantsIndemnityContractual IndemnityTortsProcedureMultiple DefendantsJoint & Several Liability

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§ 300.15 Proceedings to Determine Indemnity and Contribution Rights

Any party may obtain a determination of indemnity rights by filing a cross complaint for declaratory relief in an action brought by a third party [*People ex rel. Dep't of Transp. v. Superior Court (1980) 26 Cal. 3d 744, 758-760, 163 Cal. Rptr. 585, 608 P.2d 673* ; *see* *Valley Circle Estates v. VTN Consol., Inc. (1983) 33 Cal. 3d 604, 612, 189 Cal. Rptr. 871, 659 P.2d 1160* (noting that proper form of cross compliant for indemnity is one for declaratory relief); *Rimington v. General Accident Group of Ins. Cos. (1962) 205 Cal. App. 2d 394, 397, 23 Cal. Rptr. 40* (express indemnity by cross complaint); *Code Civ. Proc. §§ 428.10* (permissive cross complaints), 1060 (declaratory relief)]. However, this right to seek indemnity by cross complaint does not alter the general rule that indemnity rights do not accrue until the indemnitee suffers actual loss by incurring liability or paying a claim. Therefore, an indemnitee may also enforce indemnity rights in a subsequent action after paying the claim [*E. L. White, Inc. v. City of Huntington Beach (1978) 21 Cal. 3d 497, 506, 146 Cal. Rptr. 614, 579 P.2d 505* ; *see* *Mascarin Prof'l Pharmacy v. Hart (1970) 13 Cal. App. 3d 462, 464, 91 Cal. Rptr. 560]* . A party may also bring a separate action for a declaratory judgment as to contractual indemnity rights [*Indenco, Inc. v. Evans (1962) 201 Cal. App. 2d 369, 373, 374, 20 Cal. Rptr. 90]* . For discussion and forms relating to the filing of complaints and cross complaints for declaratory relief, see Ch. 123, *Complaints and Cross Complaints* and Ch. 182, *Declaratory Relief* .

Contribution may be sought before judgment by an action under *Civ. Code § 1432* [*see, e.g.,* *Burstein v. Zelman (1960) 182 Cal. App. 2d 1, 5 Cal. Rptr. 829]* . It may also be sought by postjudgment motion under *Code Civ. Proc. § 883*. For further discussion, see *§ 300.90 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesComparative NegligenceMultiple PartiesContributionTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsProcedureMultiple DefendantsContributionGeneral OverviewTortsProcedureMultiple DefendantsIndemnityContractual Indemnity

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[Reserved]

§§ 300.16[Reserved]

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§ 300.30 Governing Statutes

Civ. Code §§ 2772-2784 govern express indemnity agreements. Express indemnity agreements are also governed by *Civ. Code §§ 1549-1701*, the statutes applicable to contracts generally. *Lab. Code § 3864* requires a written indemnity agreement to recover indemnity from an employer arising from injury to an employee.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsIndemnityLabor & Employment LawEmployer LiabilityContract LiabilityIndemnityTortsProcedureMultiple DefendantsIndemnityContractual Indemnity

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25-300 California Forms of Pleading and Practice--Annotated § 300.31

§ 300.31 Definition and Nature of Express Indemnity Agreements

An express indemnity is a contractual agreement by which one party engages to save another from the legal consequences of conduct by one of the parties or some other person [*Civ. Code § 2772*]. Such an agreement may be used to provide protection against loss or liability caused by personal injury, property damage, or financial obligations occurring in connection with the performance of a business transaction, such as a land sale [*Lincoln v. Narom Dev. Co. (1970) 10 Cal. App. 3d 619, 626-627, 89 Cal. Rptr. 128]* , an equipment lease [*Price v. Shell Oil Co. (1970) 2 Cal. 3d 245, 256, 85 Cal. Rptr. 178, 466 P.2d 722]* , a construction contract [*Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 628-633, 119 Cal. Rptr. 449, 532 P.2d 97]* , or a suretyship arrangement [*Fidelity & Deposit Co. v. Whitson (1960) 187 Cal. App. 2d 751, 754-758, 10 Cal. Rptr. 6]* .

Historically, a valid contract for indemnity has effected a total shift of liability from the indemnitee to the indemnitor. Principles of comparative negligence [*see § 300.60 et seq.*] do not apply [*Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 676, 151 Cal. Rptr. 399* ; *see Regional Steel Corp. v. Superior Court (1994) 25 Cal. App. 4th 525, 529, 32 Cal. Rptr. 2d 417]* . However, a recent case has introduced the concept of "proportional contractual indemnity" for the first time [*see Hernandez v. Badger Constr. Equip. Co. (1994) 28 Cal. App. 4th 1791, 1818-1823, 34 Cal. Rptr. 2d 732]* . For further discussion, see *§ 300.01[6]*. It has also been the rule that the indemnity rights of the indemnitee under the contract are not affected by any settlement entered into by the indemnitor with the party suffering the loss [*C.L. Peck Contractors v. Superior Court (1984) 159 Cal. App. 3d 828, 834, 205 Cal. Rptr. 754* ; *see Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1028-1035, 269 Cal. Rptr. 720, 791 P.2d 290]* . For discussion of settlements among tortfeasors, see *§ 300.60 et seq.*

An indemnity agreement may provide protection against the occurrence of an event or against the consequences of an event. If an indemnitor promises to hold an indemnitee harmless from some specified event, such as an indebtedness, another's breach of contract, or a tort liability, the indemnity agreement is classified as one against liability, and the obligation to indemnify arises when the event occurs [*Eva v. Andersen (1913) 166 Cal. 420, 423, 137 P. 16]* . If an indemnitor promises to hold an indemnitee harmless from the consequences of some specified event, the indemnity agreement is classified as one against loss or damage, and the obligation to indemnify arises when the indemnitee sustains actual loss from the event [*Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A.G. (1970) 3*

Cal. 3d 434, 446-447, 91 Cal. Rptr. 6, 476 P.2d 406] . In essence, the distinction between an indemnity against liability and an indemnity against loss is the difference between an agreement to prevent loss or its cause and an agreement to reimburse for loss sustained [*White v. Fratt (1859) 13 Cal. 521, 524]* .

Because an indemnity agreement is basically a contract, it is subject to all the requirements applicable to contracts in general [*see Branson v. Sun Diamond Growers (1994) 24 Cal. App. 4th 327, 347, 29 Cal. Rptr. 2d 314* (permitting claims of oral indemnity contract and implied-in-fact indemnity contract)]. For discussion of such requirements as well as forms of complaints and defenses related to actions based on contract, see Ch. 140, *Contracts* . For a form for a complaint to enforce an express contract of indemnity, see *§ 300.171*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsIndemnityTortsProcedureMultiple DefendantsIndemnityContractual Indemnity

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§ 300.32 Indemnity Distinguished From Other Contracts

[1] Suretyship

A surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another [*Civ. Code § 2787*]. An indemnitor undertakes to protect the promisee against liability to a third person or loss resulting from liability [*Civ. Code § 2772*; *see § 300.31*], whereas a surety or guarantor undertakes to protect his or her promisee against loss or damage resulting from the failure of a third person to carry out obligations owed to the promisee [*Somers v. United States Fid. & Guar. Co., (1923) 191 Cal. 542, 547, 217 P. 746]* . Thus, an indemnity agreement is an original or independent agreement requiring only two parties; a contract of surety or guaranty is a secondary obligation collateral to some principal or substantive liability and requires three parties, that is, a surety, a principal obligor, and a promisee or obligee [*Somers v. United States Fid. & Guar. Co., (1923) 191 Cal. 542, 547, 217 P. 746* ; *see generally* California Legal Forms, Ch. 79 (Matthew Bender)].

For discussion and forms related to actions involving suretyship, contracts, and guaranties, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[2] Insurance

Insurance is a contract by which one party, the insurer, undertakes to indemnify another, the insured, against loss, damage, or liability arising from a contingent or unknown event [*Ins. Code §§ 22, 23*]. Thus, an insurance contract is a type of indemnity insofar as it involves one party's assumption, by a legally binding arrangement, of a risk that may subject another party to loss [*California Physicians' Serv. v. Garrison (1946) 28 Cal. 2d 790, 804, 172 P.2d 4* ; *see Herrick Corp. v. Canadian Ins. Co. (1994) 29 Cal. App. 4th 753, 763, 34 Cal. Rptr. 2d 844]* . However, insurance policies and contractual indemnity arise from very different economic fundamentals. An indemnity contract is in the nature of a promise to stand behind specifically identifiable work; insurance policies, on the other hand, cover generally defined sets of risks in exchange for a premium having some relationship to those risks [*Herrick Corp. v. Canadian Ins. Co. (1994) 29 Cal. App. 4th 753, 763, 34 Cal. Rptr. 2d 844]* . Indemnity is usually unlimited in amount, but limited to a given project; insurance is limited liability, but indifferent to the project [*Herrick Corp. v. Canadian Ins. Co. (1994) 29 Cal. App. 4th 753, 765, 34 Cal. Rptr. 2d 844]* .

Further, insurance is highly regulated by the Insurance Code, which does not apply to other indemnity agreements. For this reason, insurance law should not be relied on to determine the rights of parties to other indemnity contracts [*see Smoketree-Lake Murray, Ltd. v. Mills Concrete Constr. Co. (1991) 234 Cal. App. 3d 1724, 1737 n.8, 286 Cal. Rptr. 435]* . For example, a contractual indemnitor is not subject to a claim for equitable contribution from an insurer who has insured a risk that is also within the scope of the indemnity agreement [*Herrick Corp. v. Canadian Ins. Co. (1994) 29 Cal. App. 4th 753, 765, 34 Cal. Rptr. 2d 844]* .

For discussion of the law applicable to insurance contracts and forms relating to actions involving such contracts, see Ch. 308, *Insurance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsIndemnityContracts LawTypes of ContractsGuaranty ContractsInsurance LawClaims & ContractsContract FormationGeneral Overview

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§ 300.33 Indemnification of Illegal Acts Barred

An agreement to indemnify a person against the consequences of performing an act in the future is void if the person, at the time of performance, knows that the act is unlawful [*Civ. Code § 2773*]. This statutory rule, which is intended to prevent the encouragement of illegal conduct by indemnity agreements [*Lemat Corp. v. American Basketball Ass'n (1975) 51 Cal. App. 3d 267, 279, 124 Cal. Rptr. 388]* , accords with the general rule that a contract is void and unenforceable to the extent that its purpose is unlawful, that is, contrary to an express provision of law, the policy of express law, or good morals [*see Buffendeau v. Brooks (1865) 28 Cal. 641, 642-644* (unenforceability of agreement indemnifying sheriff for sale of property in violation of injunction); *see also Civ. Code §§ 1598, 1599, 1667*; *but see Smoketree-Lake Murray, Ltd. v. Mills Concrete Constr. Co. (1991) 234 Cal. App. 3d 1724, 1741-1742, 286 Cal. Rptr. 435* (indemnity agreement not unenforcable because of indemnitee's collateral fraud if damages giving rise to right of indemnity are not due to fraud)]. See generally Ch. 140, *Contracts* , or discussion and forms relating to the defense of illegality in contract actions.

An agreement may validly provide indemnity against the consequences of an illegal future act, however, if the parties to the agreement do not have actual knowledge of the illegality at the time they enter into the agreement and the indemnified act is performed in good faith and without improper motivation [*Stark v. Raney (1861) 18 Cal. 622, 624* ; *Lemat Corp. v. American Basketball Ass'n (1975) 51 Cal. App. 3d 267, 279-280, 124 Cal. Rptr. 388]* . In addition, an agreement may validly provide indemnity against the consequences of any past act except a felony, even if the act was known to be wrongful [*Civ. Code § 2774*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 300.34 Indemnification for Negligent Acts

[1] Generally Allowed

With certain exceptions [*§§ 300.34[2], 300.34[3]*], an indemnity agreement may validly provide protection against an indemnitee's own negligent acts [*Goldman v. Ecco-Phoenix Elec. Corp. (1964) 62 Cal. 2d 40, 44, 41 Cal. Rptr. 73, 396 P.2d 377]* . An indemnity agreement against an indemnitee's negligence is not contrary to public policy because negligence is only an undesirable incident of the agreement, not a result induced by the agreement [*John E. Branagh & Sons v. Witcosky (1966) 242 Cal. App. 2d 835, 839-841, 51 Cal. Rptr. 844]* . Furthermore, although *Civ. Code § 1668*, which makes unlawful any contract that exempts person from responsibility for fraud, injury to person or property, or violation of law, may bar indemnification for an indemnitee's intentional torts by invalidating any contract that exempts a person from responsibility for willful personal injury, injury to property, or willful or negligent violation of law [*see Davidson v. Welch (1969) 270 Cal. App. 2d 220, 235, 75 Cal. Rptr. 676* (court's assumption *arguendo*); *but see Lemat Corp. v. American Basketball Ass'n (1975) 51 Cal. App. 3d 267, 278, 124 Cal. Rptr. 388* (*Civ. Code § 1668* does not apply to indemnity agreements)], the statute does not apply to an indemnity agreement against negligence [*Goldman v. Ecco-Phoenix Elec. Corp. (1964) 62 Cal. 2d 40, 48-49, 41 Cal. Rptr. 73, 396 P.2d 377]* . Unlike the true exculpatory agreement at which *Civ. Code § 1668* is directed and by which the promisee seeks to avoid liability for damages that the promisor may suffer as a result of the promisee's negligence, an indemnity agreement against an indemnitee's negligence does not relieve the indemnitee of responsibility to the injured party; it merely transfers the burden to the indemnitor, who has agreed to provide financial protection under the circumstances [*John E. Branagh & Sons v. Witcosky (1966) 242 Cal. App. 2d 835, 838, 51 Cal. Rptr. 844* ; *see Smoketree-Lake Murray, Ltd. v. Mills Concrete Constr. Co. (1991) 234 Cal. App. 3d 1724, 1735 n.6, 286 Cal. Rptr. 435* ; *No Oil, Inc. v. City of Los Angeles (1987) 196 Cal. App. 3d 223, 250-252, 242 Cal. Rptr. 37]* .

The vast majority of express indemnity cases arise from provisions in commercial contracts viewed as the product of arms-length negotiations between commercial entities and usually involve the allocation of responsibility for loss among the parties' respective insurance carriers [*see Guy F. Atkinson Co. v. Schatz (1980) 102 Cal. App. 3d 351, 356]* . In this context, courts are generally reluctant to disregard a commercial agreement reached by business entities regarding the allocation of loss, at least if the allocation involves only the economic loss sustained by the parties [*see,*

e.g., CAZA Drilling (Cal.), Inc. v. TEG Oil & Gas U.S.A., Inc. (2006) 142 Cal. App. 4th 453, 475, 48 Cal. Rptr. 3d 271] . The public policy considerations are different if the indemnity clause is inserted in a preprinted contract of adhesion in a noncommercial context, such as a residential lease or a consumer contract.

For discussion of the construction of indemnity agreements that purport to relieve the indemnitee of responsibility for its own negligence, see *§ 300.02[5][a], [b]*.

[2] Statutory Exception for Construction Contracts

There is a statutory exception applicable to construction contracts that limits indemnity for a party's own negligence. Except as provided in *Civ. Code §§ 2782.1*, *2782.2*, *2782.5*, and *2782.6*, all provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract are against public policy, void, and unenforceable if they purport to indemnify the promisee against liability for damages for death or bodily injury to persons, injury to property, or any other loss, damage, or expense arising from the sole negligence or willful misconduct of the promisee, or the promisee's agents, servants, or independent contractors who are directly responsible to the promisee, or for defects in design furnished by such persons [*Civ. Code § 2782(a)*; *see also Civ. Code §§ 2783* (construction contract defined), *2784* (design defect defined)]. *Civ.Code § 2782(a)* does not, however, affect the validity of any insurance contract, workers' compensation contract, or agreement issued by an admitted insurer as defined by the Insurance Code [*Civ. Code § 2782(a)*]. In addition, all provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract with a public agency that purport to impose on a contractor, or relieve a public agency from, liability for the active negligence of the public agency are void and unenforceable [*Civ. Code § 2782(b)*].

"Sole negligence" means that, as between the parties to the indemnity agreement, the promisee was solely negligent. The negligence of the plaintiff or of other third parties is immaterial [*Southern Pac. Transp. Co. v. Sandyland Protective Ass'n (1990) 224 Cal. App. 3d 1494, 1498-1499, 274 Cal. Rptr. 626]* . Further, the statute has been held not to prohibit indemnification for aloss that is not due to the indemnitee's sole negligence or *sole* willful misconduct [*see Smoketree-Lake Murray, Ltd. v. Mills Concrete Constr. Co. (1991) 234 Cal. App. 3d 1724, 1737-1738, 286 Cal. Rptr. 435* (emphasis added; loss due to negligence of both indemnitor and indemnitee is indemnifiable despite indemnitee's misrepresentations to party suffering loss)]. However, the amount to be indemnified may not include damages paid because of willful misconduct [*see Smoketree-Lake Murray, Ltd. v. Mills Concrete Constr. Co. (1991) 234 Cal. App. 3d 1724, 1741-1742, 286 Cal. Rptr. 435]* .

There are several statutory exceptions to *Civ. Code § 2782*, providing that in specified situations indemnity or other risk allocation agreements in construction contracts are not violative of public policy. *Civ. Code § 2782* does not prevent a contractor responsible for the performance of a construction contract from indemnifying fully a person, firm, corporation, state, or other agency for whose account the construction contract is not being performed but who, as an accommodation, enters into an agreement with the contractor permitting the contractor to enter on or adjacent to its property for the purpose of performing the construction contract for others [*Civ. Code § 2782.1*].

Civ. Code § 2782 does not prevent a party to a construction contract and the owner or other party for whose account the contract is being performed from negotiating and expressly agreeing with respect to the allocation, release, liquidation, exclusion, or limitation as between the parties of any liability (a) for design defects, or (b) of the promisee to the promisor arising out of or relating to the construction contract [*Civ. Code § 2782.5*]. The word "negotiate" in *Civ. Code § 2782.5* simply means that each party had an opportunity to accept, reject, or modify the provision. If the parties had such an opportunity, the provision is valid even if there is no actual discussion regarding the provision, which was simply proposed and accepted. Whether the parties had that ability or right depends on a consideration of all the facts surrounding the transaction, including but not limited to whether the parties were of relative equal bargaining power and whether it was an arm's length transaction [*Markborough Cal., Inc. v. Superior Court (1991) 227 Cal. App. 3d 705, 714-715, 277 Cal. Rptr. 919]* . There is no affirmative duty to specifically advise the other party of the inclusion of a

limitation of liability clause in the contract, or to inform the other party of the risks involved in the project [*Markborough Cal., Inc. v. Superior Court (1991) 227 Cal. App. 3d 705, 277 Cal. Rptr. 919]* .

Civ. Code § 2782 does not prevent an agreement to indemnify a professional engineer against liability for the negligence (but not the willful misconduct) of the engineer, or the engineer's agents or employees, in providing inspection services to plants or other facilities if all the criteria of *Civ. Code § 2782.2(a)(1)-(5)* are met [*Civ. Code § 2782.2*].

Civ. Code § 2782 does not prevent an agreement, other than an agreement by a public entity, to indemnify a professional engineer or geologist from liability for damages in excess of $250,000 that are caused by the sole negligence (but not gross negligence or willful misconduct) of the engineer or geologist in providing certain professional services with regard to hazardous materials cleanup [*see Civ. Code § 2782.6*].

For residential construction contracts entered into after January 1, 2006, provisions, clauses, covenants, and agreements contained in, collateral to, or affecting the construction contract and any amendments to the contract that purport to indemnify or defend the builder by a subcontractor against liability for claims of construction defects are unenforceable to the extent that the claims arise out of, pertain to, or relate to the negligence of the builder, or the builder's other agents, servants, or independent contractors who are directly responsible to the builder, or for defects in design furnished by those persons, or to the extent the claims do not arise out of, pertain to, or relate to the scope of work in the written agreement between the parties [*Civ. Code § 2782(c)* (as amended effective January 1, 2006)].

This provision may not be waived or modified by contractual agreement, act, or omission of the parties, although contractual provisions, clauses, covenants, or agreements not expressly prohibited are reserved to the agreement of the parties [*Civ. Code § 2782(c)* (as amended effective January 1, 2006)]. In addition, a subcontractor and builder may mutually agree to the timing or immediacy of a defense and provisions for reimbursement of defense costs and fees, so long as that agreement, on final resolution of the claims, does not waive or modify the provisions described above [*Civ. Code § 2782(d)* (as amended effective January 1, 2006)]. Finally, *Civ. Code § 2782(c)* does not affect the obligations of an insurance carrier under *Presley Homes, Inc. v. American States Ins. Co. (2001) 90 Cal. App. 4th 571, 108 Cal. Rptr. 2d 686* , nor does it affect a builder's or subcontractor's obligations under *Civ. Code § 910 et seq.* [*see Civ. Code § 2782(d)* (as amended effective January 1, 2006)].

For construction contracts or amendments entered into on or after January 1, 2009, these provisions have been expanded to apply to agreements that purport to insure or indemnify the builder or a general contractor or other contractor not affiliated with the builder [*see Civ. Code § 2782(c)* (as amended effective January 1, 2009)]. In addition, the 2009 amendments also provide that a subcontractor owes no defense or indemnity for a construction defect claim unless and until the builder or contractor provides a written tender of the claim to the subcontractor, which has the same force and effect as a notice of commencement of a legal proceeding [*Civ. Code § 2782(d)* (as amended effective January 1, 2009)]. Upon tender of a written claim, the subcontractor has theoption of either (1) defending the claim with counsel of its choice and maintaining control of the defense for any claim to which its defense obligation applies, or (2) allowing the builder or contractor to provide its own defense and paying, within 30 days of receipt of an invoice, a reasonable allocated share of the builder's or contractor's defense fees and costs on an ongoing basis during pendency of the claim [*see Civ. Code § 2782(d)(1), (2)* (as amended effective January 1, 2009)].

Failure of a subcontractor to meet its defense obligations adequately and timely under the first option may result in a claim against the subcontractor for compensatory and consequential damages and reasonable attorney's fees, and a failure to timely perform its obligations under the second option may result in a claim for compensatory and consequential damages, as well as for interest on defense and indemnity costs and reasonable attorney's fees incurred to recover from the subcontractor [*see Civ. Code § 2782(e)* (as amended effective January 1, 2009)]. Conversely, if, upon request by a subcontractor, a builder or general contractor that provides its own defense does not reallocate defense fees to subcontractors within 30 days following final resolution of the claim, the subcontractor has the right to pursue a claim

against the builder or contractor for any resulting compensatory and consequential damages, as well as for interest on the fees and the subcontractor's reasonable attorney's fees incurred in pursuing the claim [*see Civ. Code § 2782(e)* (as amended effective January 1, 2009)]. In addition, these provisions protect the right of a builder, general contractor, or subcontractor to seek equitable indemnity for any claim covered by the provisions, including equitable indemnity from a supplier, design professional, or product manufacturer [*Civ. Code § 2782(f), (g)* (as amended effective January 1, 2009)].

For contracts or contractual amendments made after 2006 between a public agency and a design professional such as an architect, landscape architect, professional engineer, or land surveyor, agreements purporting to require the design professional to indemnify the public agency are unenforceable, except to the extent that the design professional agrees to be held liable for the design professional's own negligence, recklessness, or willful misconduct [*Civ. Code § 2782.8(a)-(c)*].

[3] Statutory Exception for Hauling, Trucking, or Cartage Contracts

There is also a statutory exception applicable to certain contracts for the transporation of goods that limits indemnity for a party's own negligence. Under *Civ. Code § 2784.5*, any provision, promise, agreement, clause, or covenant contained in, collateral to, or affecting any hauling, trucking, or cartage contract or agreement is against public policy, void, and unenforceable if it purports to indemnify the promisee against liability for damages for (1) death or bodily injury, (2) injury to property, or (3) any other damage or expense arising under (1) or (2), that are caused by the sole negligence or willful misconduct of the promisee, agents, and servants of the promisee, or independent contractors directly responsible to the promisee [*Civ. Code § 2784.5*]. *Civ. Code § 2784.5* does not apply, however, if the promisee's agents, servants, and independent contractors are acting under the direct supervision and control of the promisor, and the statute does not affect the validity of any insurance contract, workers' compensation contract, or agreement issued by an admitted insurer as defined by *Ins. Code §§ 23* and *24*, or insurance effected by surplus-line brokers under *Ins. Code §§ 1760-1780* [*Civ. Code § 2784.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsIndemnityReal Property LawConstruction LawContractors & SubcontractorsTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsProcedureMultiple DefendantsIndemnityContractual Indemnity

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§ 300.35 Parties Entitled to Indemnification

In general, the only persons entitled to indemnification under an indemnity agreement are the indemnitee, someone in the indemnitee's right such as an assignee or a subrogee, and someone for whose benefit the agreement was expressly made [*Van Der v. Hoof v. Chambon (1932) 121 Cal. App. 118, 130-131, 8 P.2d 925]* . An agreement to indemnify several persons applies to each unless a contrary intention appears from the agreement [*Civ. Code § 2776*].

In certain situations, even an indemnitee will not be entitled to indemnification. For example, an unlicensed general contractor's express indemnity claims against negligent subcontractors may be precluded by *Bus. & Prof. Code § 7031*, which bars a person from suing in a California court to recover compensation for any act or contract that requires a California contractor's license, unless the person alleges and proves that he or she was licensed at all times during the performance [*see Ranchwood Cmtys. Limited P'ship v. Jim Beat Constr. Co. (1996) 49 Cal. App. 4th 1397, 1404, 57 Cal. Rptr. 2d 386] , superseded by statute on other grounds as stated in White v. Cridlebaugh (2009) 178 Cal. App. 4th 506, 520-521, 100 Cal. Rptr. 3d 434* .

As in the case of other contracts, express third-party beneficiaries may enforce the agreement, but incidental beneficiaries of an indemnity agreement may not [*Civ. Code § 1559*; *American Home Ins. Co. v. Travelers Indem. Co. (1981) 122 Cal. App. 3d 951, 967, 175 Cal. Rptr. 826* ; *Southern Cal. Gas Co. v. ABC Constr. Co. (1962) 204 Cal. App. 2d 747, 752, 22 Cal. Rptr. 540]* . Thus, unless an indemnity agreement or an applicable statute or ordinance clearly creates an obligation on the part of the indemnitor in favor of a person who is not a party to the agreement, such a person cannot recover from the indemnitor for damages that he or she has sustained, even though the person has an action against the indemnitee for the damages, the indemnitor appears in defense of the indemnitee during the action, and the indemnitee is entitled to indemnification for loss or liability resulting from the action [*Van Der v. Hoof v. Chambon (1932) 121 Cal. App. 118, 130-131, 8 P.2d 925]* . *Civ. Code § 2777*, which provides that an indemnitee and an indemnitor are jointly and severally liable to every person injured by an indemnified act of the indemnitee, only restates the common law rule applicable to an indemnitor whose agreement to indemnify has induced the indemnitee to commit an act that caused the injury; the statute does not directly obligate an indemnitor to a person whose injury occurred without the indemnitor's contribution [*Treloar v. Keil & Hannon (1918) 36 Cal. App. 159, 168, 171 P. 823]* .

An insurance company that satisfies a loss or liability incurred by its insured is subrogated to any rights of indemnity for the loss or liability that its insured may have by virtue of an indemnity agreement [*Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 633-634, 119 Cal. Rptr. 449, 532 P.2d 97* ; *see Bank of W. v. Valley Nat'l Bank of Ariz. (9th Cir. 1994) 41 F.3d 471, 480]* . For discussion and forms related to subrogation, see Ch. 308, *Insurance* , and Ch. 536, *Subrogation*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsIndemnityTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsProcedureMultiple DefendantsIndemnityContractual Indemnity

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§ 300.36 Indemnitor's Duty to Defend

An indemnitor under an express indemnity agreement is bound, on the request of the indemnitee, to defend actions or proceedings brought against the latter in respect to thematters embraced in the agreement [*Civ. Code § 2778(4)*]. Whether an action or proceeding involves a matter against which an indemnitor is obligated to defend under an indemnity agreement depends not on whether the bare allegations of the complaint against the indemnitee state a cause of action against which the agreement provides protection, but on whether the broad charge of the complaint presents the potentiality of a judgment indemnified by the agreement [*Davidson v. Welch (1969) 270 Cal. App. 2d 220, 233-234, 75 Cal. Rptr. 676]* .

Unless the indemnity agreement provides otherwise, *Civ. Code § 2778(4)* effectively places in every indemnity contract a duty on the part of the indemnitor to assume the indemnitee's defense, if tendered, against all claims embraced by the indemnity agreement. This duty arises immediately upon a proper tender of defense by the indemnitee and does not first require a determination of whether indemnity is actually owed. Thus, this duty to defend does not depend on the outcome of the litigation for which defense is tendered [*Crawford v. Weather Shield Mfg. Inc. (2008) 44 Cal. 4th 541, 557-558, 79 Cal. Rptr. 3d 721, 187 P.3d 424*]. Moreover, it is not necessary that the underlying complaint allege negligence specifically on the part of the indemnitor in order to trigger a duty to defend on the part of that indemnitor. It is sufficient that the complaint describe factual circumstances that suggest the possible negligence of the indemnitor, and the indemnitee then specify in a cross-complaint or otherwise that at least some of the damage would have been caused by the indemnitor's negligence [UDC-Universal Development, L.P. v. CH2M *Hill (2010) 181 Cal. App. 4th 10, 21, 103 Cal. Rptr. 3d 684]* .

An indemnitor who refuses to provide a defense without a contractual basis for such refusal may subsequently owe damages in the form of reimbursement of defense costs to the indemnitee, regardless of whether the indemnitor is found liable for indemnity under the agreement [*Crawford v. Weather Shield Mfg. Inc. (2008) 44 Cal. 4th 541, 557-558, 79 Cal. Rptr. 3d 721, 187 P.3d 424*].

An indemnitee is always entitled to conduct its own defense rather than to rely on a defense provided by an express indemnitor [*Civ. Code § 2778(4)*]. For discussion asto whether the indemnitee is entitled to recover its attorney's fees

and costs incurred in conducting its own defense, see *§ 300.41[2]*. For a form for the indemnitee's notice of action and request to defend, to be given to the indemnitor, see *§ 300.170*.

An indemnity contract is not construed in the same manner as an insurance policy with regard to the duty to defend because it is not necessarily an adhesion contract as is an insurance policy [*Regan Roofing Co. v. Superior Court (1994) 24 Cal. App. 4th 425, 436, 29 Cal. Rptr. 2d 413 disapproved on other grounds in Crawford v. Weather Shield Mfg. Inc. (2008) 44 Cal. 4th 541, 565, 79 Cal. Rptr. 3d 721, 187 P.3d 424]* . For discussion of the related issue of a liability insurer's duty to defend third-party claims against its insured, see *Ch. 308, Insurance, § 308.110*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsIndemnityTortsProcedureMultiple DefendantsIndemnityContractual Indemnity

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§ 300.37 Accrual of Express Indemnification Rights

In the absence of a contrary provision in an indemnity contract, the time at which an obligation to indemnify accrues depends on whether or not the contract provides protection against liability or against loss [*see § 300.31*]. An obligation to hold an indemnitee harmless from a particular liability accrues as soon as the indemnitee incurs the liability [*Civ. Code § 2778(1)*]; the indemnitee is entitled to indemnification, for example, on the entry of a judgment fixing an indemnified liability [*Showers v. Wadsworth (1889) 81 Cal. 270, 272-273, 22 P. 663]* or on the contraction of an indemnified debt [*Eva v. Andersen (1913) 166 Cal. 420, 423, 137 P. 16]* without satisfying the liability or debt.

An obligation to protect an indemnitee from a particular loss, in contrast, accrues only when the indemnitee pays a legal obligation [*Civ. Code § 2778(2)*; *Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A.G. (1970) 3 Cal. 3d 434, 446-447, 91 Cal. Rptr. 6, 476 P.2d 406]* or otherwise sustains actual loss within the scope of an indemnity agreement [*Weaver v. Grunbaum (1939) 31 Cal. App. 2d 42, 49-50, 87 P.2d 406* (loss on corporate securities sustained on corporation's insolvency)]. In the absence of such a loss, neither the indemnitee nor an express beneficiary of the agreement can recover from the indemnitor [*Treloar v. Keil & Hannon (1918) 36 Cal. App. 159, 168-169, 171 P. 823]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 300.38 Statute of Limitations

The four-year limitation period of *Code Civ. Proc. § 337(1)* applies to an action based on a written indemnity agreement [*Globe Indem. Co. v. Larkin (1944) 62 Cal. App. 2d 891, 892, 145 P.2d 633]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsIndemnityContracts LawDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsProcedureMultiple DefendantsIndemnityContractual Indemnity

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§ 300.39 Elements of Cause of Action on Indemnity Agreement

An indemnitee seeking to recover on an indemnity agreement must allege the parties' contractual relationship, the indemnitee's performance of that portion of the contract that gives rise to the indemnity claim, the facts showing a loss within the meaning of the parties' agreement, and the amount of damages sustained [*Four Star Elec., Inc. v. F & H Constr. (1992) 7 Cal. App. 4th 1375, 1380, 10 Cal. Rptr. 2d 1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionElements of ClaimsContracts LawContract Conditions & ProvisionsIndemnityTortsProcedureMultiple DefendantsIndemnityContractual Indemnity

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§ 300.40 Collateral Estoppel

[1] Effect of Indemnitee's Notice of Suit and Request to Defend

An indemnitor is not liable for payments made voluntarily by the indemnitee, that is, without the compulsion of an existing legal liability [*Southern Cal. Gas Co. v. Ventura Pipe Line Constr. Co. (1957) 150 Cal. App. 2d 253, 257, 309 P.2d 849* ; *see § 300.60* et seq. regarding the relationship between voluntary payment rule and settlement]. However, if, after request, an indemnitor neglects to defend the indemnitee in an action brought against the indemnitee, a recovery suffered by the indemnitee in good faith is conclusive of its liability against the indemnitor [*Civ. Code § 2778(5)*].

Notice of the action must be given within a reasonable time before trial, must inform the indemnitor of its responsibility with respect to the action's defense, and must indicate the consequences of a failure to defend [*see Bendix-Westinghouse Auto. Air Brake Co. v. Swan Rubber Co. (1976) 55 Cal. App. 3d 256, 260-262, 127 Cal. Rptr. 571]* . If the indemnitor does not receive reasonable notice of the action or proceeding against the indemnitee or is not allowed to control its defense, judgment against the indemnitee is only presumptive against the indemnitor [*Civ. Code § 2778(6)*]. A stipulation that a judgment against the indemnitee is conclusive against the indemnitor is inapplicable if the indemnitee has a good defense on the merits that, by want of ordinary care, the indemnitee failed to establish in the action [*Civ. Code § 2778(7)*].

Only recoveries by judgment against the indemnitee are "conclusive" for purposes of *Civ. Code § 2778(5)*. An indemnitee who settles without a trial must show that the liability is covered by the contract, that liability existed, and the extent thereof. The settlement is presumptive evidence of liability and amount, but may be overcome by proof from the indemnitor that the settlement was unreasonable [*Peter Culley & Assocs. v. Superior Court (1992) 10 Cal. App. 4th 1484, 1495-1497, 13 Cal. Rptr. 2d 624* ; *see also Mel Clayton Ford v. Ford Motor Co. (2002) 104 Cal. App. 4th 46, 56-60, 127 Cal. Rptr. 2d 759]* . If the settlement includes payment for both indemnified claims and non-indemnified claims, allocation of the settlement amount is an essential part of the claim for contractual indemnity, and the indemnitor has a right to a jury determination of allocation [*Collins Dev. Co. v. D. J. Plastering, Inc. (2000) 81 Cal. App. 4th 771, 777, 97 Cal. Rptr. 2d 83* (trial court committed reversible error by determining allocation on basis of

post-trial briefs)].

The good-faith requirement in the statute means that the proposed indemnitee must have actually presented a defense and be actually subject to liability under the judgment. The indemnitee cannot stipulate to liability in exchange for a covenant not to execute and then bind a proposed indemnitor on the judgment [*Aero-Crete, Inc. v. Superior Court (1993) 21 Cal. App. 4th 203, 210-212, 25 Cal. Rptr. 2d 804]* .

There are other specific statutes that also create the conclusive liability of an indemnitee if the indemnitor has been given notice of the action. If an officer or other person seasonably notifies an indemnitor on a bond or covenant of an action against the officer or person for an act indemnified by the bond or covenant and permits the indemnitor to defend the action, the judgment recovered in the action is conclusiveagainst the indemnitor. The indemnitee-defendant may then move, on five days' notice, for judgment against the indemnitor on the bond or covenant for the amount recovered and costs. The indemnitee must prove the bond or covenant, notice to the indemnitor, and permission to defend [*Code Civ. Proc. § 1055*]. Whether the term "covenant" in this statute includes an indemnity agreement other than a surety [*see § 300.32[1]*] is not clear. The procedure appears to have been seldom, if ever, used in situations other than involving undertakings [*see, e.g.,* *Culley v. Cochran (1930) 107 Cal. App. 525, 290 P. 484]* .

Also, an intermediate purchaser of goods, sued for breach of warranty or another obligation for which his or her seller is answerable, may bind the seller by the result of the suit by giving the seller a written notice of the litigation tendering the defense of the suit to the seller and indicating that the seller will bebound by facts adjudicated in the suit in a subsequent suit by the purchaser against the seller [*Com. Code § 2607(5)(a)*].

[2] Determinations of Negligence

Principles of collateral estoppel may bar a party to an indemnity agreement from relitigating negligence issues that were determined in a prior action that determined the indemnitee's liability, in an indemnity action on the contract. An indemnitee who was found to have been actively negligent [*see § 300.132[2][b]*] in a prior action (or in a prior proceeding within the same action) is collaterally estopped from relitigating in the indemnity action the issue of the characterization of its negligence as active or passive [*see* *Burlingame Motor Co. v. Peninsula Activities, Inc. (1971) 15 Cal. App. 3d 656, 663-664, 93 Cal. Rptr. 376* ; *King v. Timber Structures, Inc. (1966) 240 Cal. App. 2d 178, 182, 183, 49 Cal. Rptr. 414]* . Also, a determination in a prior action to which the indemnitor was a party that the indemnitor was negligent bars relitigation of any element of its negligence in a subsequent action on an indemnity agreement [*see San Diego Gas & Elec. Co. v. Davey Tree Surgery Co. (1970) 11 Cal. App. 3d 1096, 1101, 96 Cal. Rptr. 889]* .

See Ch. 491, *Res Judicata* , for discussion of and forms generally related to the doctrine of collateral estoppel.

[3] Subsequent Action on Contract

A party to a contract may be collaterally estopped from litigating matters that were determined in a prior indemnity action arising from the agreement. However, the indemnitee's complete performance of all terms and conditions of the contract is not a condition precedent to an action for contractual indemnity. All that is required is that the indemnitee have performed that portion of the contract that gives rise to the indemnification claim. The indemnitor may elect not to defend the indemnity action and still seek contract damages for the indemnitee's breach of the contract that is unrelated to the loss from which the indemnity rights arose [*Four Star Elec., Inc. v. F & H Constr. (1992) 7 Cal. App. 4th 1375, 1379-1383, 10 Cal. Rptr. 2d 1]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelContracts LawContract

Conditions & ProvisionsIndemnityTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsProcedureMultiple DefendantsIndemnityContractual Indemnity

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§ 300.41 Amount of Indemnity

[1] In General

Recovery under an indemnity agreement against liability is measured by the amount of the indemnitee's liability [*see Civ. Code § 2778(1)*]. Recovery under an indemnity agreement against loss is measured by the amount of the actual loss sustained by the indemnitee [*Civ. Code § 2778(2)*; *Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A.G. (1970) 3 Cal. 3d 434, 446-447, 91 Cal. Rptr. 6, 476 P.2d 406]* .

[2] Attorney's Fees and Costs

[a] Incurred in Defending Against Liability

Indemnity for loss or liability under an express agreement encompasses the costs that an indemnitee has incurred in good faith and in the exercise of reasonable discretion in defending an action giving rise to the loss or liability [*Civ. Code § 2778(3)*; *Graves v. Moore (1881) 58 Cal. 435, 439]* . Thus, an indemnitor is bound, on the indemnitee's request, to defend actions or proceedings brought against the indemnitee in respect to matters covered by the indemnity agreement [*Civ. Code § 2778(4)*; *see § 300.36*].

Costs of defense include attorney's fees, court costs, and other expenditures necessary to an effectual defense [*Showers v. Wadsworth (1889) 81 Cal. 270, 274, 22 P. 663* ; *Tulare Co. Power Co. v. Pacific Sur. Co. (1919) 43 Cal. App. 315, 329, 185 P. 399]* . The indemnitee's recovery of costs is limited either to the amount of the indemnitee's actual expenditures or to the amount that a court determines to be reasonable, whichever amount is less [*Walsh v. Hooker & Fay (1963) 212 Cal. App. 2d 450, 462, 28 Cal. Rptr. 16]* . The fact that the indemnitee's insurer has actually paid the costs of the defense does not relieve the indemnitor of the obligation [*Bank of W. v. Valley Nat'l Bank of Ariz. (9th Cir. 1994) 41 F.3d 471, 480* ; *see § 300.35* regarding a subrogated insurer's right to indemnity].

An indemnitee who is entitled to a defense at the expense of an indemnitor may conduct its own defense if it prefers [*Civ. Code § 2778(4)*]. However, an indemnitor is only liable for the indemnitee's costs of defense incurred in good faith and in the exercise of reasonable discretion [*Civ. Code § 2778(3)*]. Absent some contractual privilege to do so or some

showing of sufficient justification or need, the indemnitee may not refuse to join in or cooperate with the indemnitor's defense and still recover its separate and redundant attorney's fees and costs. The indemnitee may not recover attorney's fees for its own participation in the defense if the intervention is not required by the terms of the agreement and was wholly voluntary and gratuitous [*Buchalter v. Levin (1967) 252 Cal. App. 2d 367, 371-374, 60 Cal. Rptr. 369* ; *see Goodman v. Severin (1969) 274 Cal. App. 2d 885, 897, 79 Cal. Rptr. 555]* . However, if the indemnitor does not offer to provide a defense, the fact that the indemnitee provides its own defense without first tendering defense of the action to the indemnitor will not preclude the indemnitee from recovering its defense costs, at least in the absence of language in the indemnity agreement that demonstrates a contrary intent [*City of Watsonville v. Corrigan (2007) 149 Cal. App. 4th 1542, 1548-1552, 58 Cal. Rptr. 3d 458]* .

If an indemnitor is properly notified of an action brought against the indemnitee by a third-party and does not defend the action, thus causing the indemnitee to incur the costs and attorney's fees necessary in presenting its own defense, the costs are considered to have been incurred in good faith and in the exercise of reasonable discretion, and may be recovered from the indemnitor [*Buchalter v. Levin (1967) 252 Cal. App. 2d 367, 371, 60 Cal. Rptr. 369* ; *see County of San Joaquin v. Stockton Swim Club (1974) 42 Cal. App. 3d 968, 973, 117 Cal. Rptr. 300*]. It is of no import if the indemnitee is never adjudged to be liable to the plaintiff in the underlying action [*United States Elevator Corp. v. Pacific Inv. Co. (1994) 30 Cal. App. 4th 122, 126-129, 35 Cal. Rptr. 2d 382* (indemnitor rejected tendered defense, but obtained release of indemnitee under settlement)], nor if the indemnitor is never found liable for indemnity under the agreement [*Crawford v. Weather Shield Mfg. Inc. (2008) 44 Cal. 4th 541, 557-558, 79 Cal. Rptr. 3d 721, 187 P.3d 424*]. An indemnitee is also justified in rejecting the indemnitor's tendered defense and conducting its own defense at the indemnitor's expense if there is a conflict of interest between the parties and the defense provided by the indemnitor is not fully protective of the indemnitee's interests [*see Safeway Stores, Inc. v. Massachusetts Bonding & Ins. Co. (1962) 202 Cal. App. 2d 99, 114-116, 20 Cal. Rptr. 820]* .

[b] Incurred in Enforcing Indemnity Agreement

The majority view appears to be that the costs that an indemnitee incurs in prosecuting an action for indemnity against an indemnitor are not part of the loss or liability for which an indemnitee may be entitled to recover under an express agreement. Therefore, these costs may not be recovered by an indemnitee [*Otis Elevator Co. v. Toda Constr. (1994) 27 Cal. App. 4th 559, 563-566, 32 Cal. Rptr. 2d 404* ; *Isthmian Lines, Inc. v. Schirmer Stevedoring Co. (1967) 255 Cal. App. 2d 607, 609, 63 Cal. Rptr. 458* ; *see Code Civ. Proc. § 1021* (attorney's fees not recoverable unless specifically provided for by statute)] unless the indemnity agreement provides for their recovery [*Fidelity & Deposit Co. v. Whitson (1960) 187 Cal. App. 2d 751, 759, 10 Cal. Rptr. 6* ; *see Hillman v. Leland E. Burns, Inc. (1989) 209 Cal. App. 3d 860, 869-870, 257 Cal. Rptr. 535* ; *County of San Joaquin v. Stockton Swim Club (1974) 42 Cal. App. 3d 968, 974, 117 Cal. Rptr. 300* (absent provision in indemnity agreement, attorneys' fees not allowed on successful appeal establishing indemnity)]. There is authority to the contrary, however, permitting recovery of costs and attorney's fees incurred in the prosecution of the indemnification claim, including fees and costs incurred on appeal [*see De Witt v. Western Pac. R.R. Co. (9th Cir. 1983) 719 F.2d 1448, 1452-1453* ; *Nicholson-Brown, Inc. v. City of San Jose (1976) 62 Cal. App. 3d 526, 537, 133 Cal. Rptr. 159* (disapproved on other grounds in *Bullis v. Security Pac. Nat'l Bank (1978) 21 Cal. 3d 801, 815 n.18, 148 Cal. Rptr. 22, 582 P.2d 109*); *Schackman v. Universal Pictures Co. (1967) 255 Cal. App. 2d 857, 863, 63 Cal. Rptr. 607]* .

[3] Interest

Under *Civ. Code § 3287(a)*, every person who has a right to recover damages certain or capable of being made certain by calculation, which right to recover vests in the person on a particular day, is entitled to interest on those damages from that day. Accordingly, an indemnitee who incurs a liability that is indemnified under an agreement against liability is entitled to interest on the amount of the liability from the day on which the liability becomes fixed by a final judgment or by other means [*Hertzka & Knowles v. Salter (1970) 6 Cal. App. 3d 325, 339-340, 86 Cal. Rptr. 23]* . An indemnitee who sustains an actual loss that is indemnified under an agreement against loss is entitled to interest on the

amount of the loss from the day that the loss is sustained by the payment of a legal obligation [*Tulare Co. Power Co. v. Pacific Sur. Co. (1919) 43 Cal. App. 315, 329, 185 P. 399]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesJudgment InterestGeneral OverviewContracts LawContract Conditions & ProvisionsIndemnityTortsProcedureMultiple DefendantsIndemnityContractual Indemnity

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[Reserved]

§§ 300.42[Reserved]

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§ 300.60 Governing Law

Comparative indemnity among multiple tortfeasors is governed primarily by case law, principally *American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 599, 146 Cal. Rptr. 182, 578 P.2d 899* . The effect of a release, dismissal, or covenant not to sue on the right to comparative indemnity is covered by *Code Civ. Proc. §§ 877* and *877.6*.

A right of "contribution" among joint tortfeasor judgment debtors is stated in *Code Civ. Proc. §§ 875, 876, 878-880*. However, statutory pro rata contribution has been largely subsumed by comparative indemnity principles [*see Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 327-333, 146 Cal. Rptr. 550, 579 P.2d 441* ; *American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 599-604, 146 Cal. Rptr. 182, 578 P.2d 899]* .

The Fair Responsibility Act of 1986 (Proposition 51), modifying joint and several liability, is codified at *Civ. Code §§ 1431.1-1431.5*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 300.61 Implied Equitable (Comparative) Indemnity

[1] General Principle

Implied equitable indemnity (hereafter, comparative indemnity; *see § 300.61[3]*) is a method of apportioning liability among those who are responsible for another's personal injury or property damage [*see American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 599-604, 146 Cal. Rptr. 182, 578 P.2d 899* ; *see § 300.61[2]*].

At a minimum, equitable indemnity requires a determination of fault on the part of the alleged indemnitor. In the absence of a contractual agreement between the parties concerning allocation of fault, a court determination that neither party was at fault precludes either from obtaining indemnity against the other [*City of Huntington Beach v. City of Westminster (1997) 57 Cal App. 4th 220, 225, 66 Cal. Rptr. 2d 826]* . Comparative indemnity is based on the comparative fault principles enunciated in *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226* . Comparative fault involves an allocation of fault by the trier of fact forthe plaintiff's injuries. A total of 100 percent of the fault must be distributed among all tortfeasors, including parties and nonparties, and also to the plaintiff for his or her own comparative negligence, if any [*American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 589 n.2, 146 Cal. Rptr. 182, 578 P.2d 899* ; *see Bly-Magee v. Budget Rent-A-Car Corp. (1994) 24 Cal. App. 4th 318, 325-326, 29 Cal. Rptr. 2d 330* ; *BAJI No. 16.72*, Question 8 (7th ed.)]. Comparative indemnity is then based on the percentage of comparative fault that a tortfeasor is assigned. For example, a tortfeasor who is allocated 25 percent of the comparative fault but who has paid 50 percent of the plaintiff's damages has a general right to comparative indemnity from other tortfeasors for half of the payment, subject to the limitations explained elsewhere in this chapter.

[2] Development of Indemnity Theory in Tort Actions

The allocation of damages among multiple tortfeasors was historically analyzed in terms of two mutually exclusive doctrines: contribution and equitable indemnity (also sometimes called implied indemnity or implied equitable indemnity). In traditional terms, contribution provided that liability be *shared* by tortfeasors who were jointly liable for the same tort, whereas indemnity covered situations in which one party who was liable for a tort was able to shift the loss *entirely* to another party. Implied equitable indemnity was an all-or-nothing doctrine that provided a right to total indemnity (1) in favor of a passively negligent tortfeasor against an actively negligent or at fault tortfeasor who was

primarily responsible for the damage to the plaintiff, and (2) in favor of a secondarily liable person (who was not a tortfeasor at all, but only vicariously or derivatively liable) against a primarily liable person (the actual tortfeasor). If both tortfeasors were actively negligent or at fault, there was no right of indemnity between them, so that if the injured party settled with or recovered a judgment against one active tortfeasor, that tortfeasor could not recover any part of the amount he or she paid to the injured party from another active tortfeasor [*see American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 591-592, 146 Cal. Rptr. 182, 578 P.2d 899* (tracing development of doctrines of contribution and indemnity)].

Prior to 1958, the doctrine that "the law will not aid a wrongdoer" prevailed, and there was no right to contribution in California. If one of several tortfeasors against whom a joint and several judgment was rendered paid an entire judgment against them, he or she was not able to exact any share of payment from his or her cotortfeasor judgment debtors [*see, e.g., Byron Jackson Co. v. Woods (1940) 41 Cal. App. 2d 777, 783, 107 P.2d 639]* . Total indemnity was the only method available for shifting liability from one jointly liable party to another.

In 1957, *Code Civ. Proc. §§ 875-877, 878* were enacted to provide for a right of contribution among joint tortfeasors. Under these provisions, each joint tortfeasor against whom a joint and several judgment was rendered was ultimately liable only for his or her pro rata share of the judgment (divided among the number of joint judgment debtor tortfeasors in equal shares), and, if one defendant satisfied more than his or her pro rata share of the judgment, the tortfeasor judgment debtor who had paid an amount in excess of his or her pro rata share could recover judgment for the excess amount under the law of contribution from his or her cojudgment debtors [*see Code Civ. Proc. §§ 875, 876, 878*]. However, under the law at that time, if a plaintiff failed to sue one or more of the joint tortfeasors, there was no way the defendant tortfeasors could compel their joinder or bring them into the action by cross complaint. The result was that the tortfeasors sued would be liable to plaintiff for the full amount of the judgment rendered, and there was no way they could obtain contribution from the nonsued joint tortfeasors.

In 1975, California abandoned contributory negligence as a complete bar to a plaintiff's recovery, and adopted in its place comparative negligence based on principles of comparative fault. Under comparative negligence, a plaintiff's recovery is reduced only by the percentage that reflects the proportion of his or her fault [*see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 813, 119 Cal. Rptr. 858, 532 P.2d 1226]* . With the advent of comparative fault principles, further changes in the doctrines of contribution and equitable indemnity followed.

In 1978, in *American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 591, 598, 146 Cal. Rptr. 182, 578 P.2d 899* , the California Supreme Court modified the equitable indemnity doctrine to permit a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis. Under the comparative fault approach, a tortfeasor is only ultimately liable for damages based on his or her percentage of fault in causing plaintiff's damages [*see § 300.61[1]*]. The common law doctrine of comparative indemnity has, in effect, superseded statutory pro rata contribution among tortfeasors [*see Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 327-328, 146 Cal. Rptr. 550, 579 P.2d 441* ; *American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 599-605, 146 Cal. Rptr. 182, 578 P.2d 899* ; *see also § 300.74*].

[3] Nomenclature

Nomenclature for the right created by *American Motorcycle* has been a cumbersome matter. However, the California Supreme Court has made it reasonably clear that there are only two indemnity doctrines in California. One is express contractual indemnity [*see § 300.30 et seq.*]. The other may be called "implied" indemnity, "equitable" indemnity, or "comparative" indemnity, or any combination of these terms [*see Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1028-1035, 269 Cal. Rptr. 720, 791 P.2d 290* ; *Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 808, 251 Cal. Rptr. 202, 760 P.2d 399]* .

Under California law, a right of indemnity is either express or implied [*see Rossmoor Sanitation, Inc. v. Pylon, Inc.*

(1975) 13 Cal. 3d 622, 628, 119 Cal. Rptr. 449, 532 P.2d 97]. In *Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1028-1035, 269 Cal. Rptr. 720, 791 P.2d 290* , the California Supreme Court clarified that all implied indemnity finds its source in equitable considerations brought into play either by contractual language not specifically dealing with indemnification or by the equities of the particular case. That is, all implied indemnity, including implied contractual indemnity, is equitable indemnity [*see § 300.61[5]*]). In *Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 808, 251 Cal. Rptr. 202, 760 P.2d 399* , the Court held that there were not two separate equitable indemnity doctrines in California, one for partial and the other for total indemnity, but a single "comparative indemnity" doctrine, which permits partial indemnification on a comparative fault basis or a total shift of liability, depending on the facts and circumstances of a given case [*see § 300.61[4]*]. Thus, the Court appears to prefer "comparative indemnity" to describe the doctrine, and this term will be the principal one used in this chapter.

After *American Motorcycle*, there has also been a tendency to interchange the terms "indemnity" and "contribution" with reference to apportionment of fault on a comparative basis [*see, e.g., Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 801, 251 Cal. Rptr. 202, 760 P.2d 399* (cross complaint for "partial contribution"); *see also Code Civ. Proc. § 877.6(c)* (referring to "equitable comparative contribution")]. This probably occurs because of the Court's holding in *American Motorcycle* that *Code Civ. Proc. § 877(b)*, which provides that a good faith settlement extinguishes contribution rights, also extinguishes any claim for comparative indemnity [*American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 603-604, 146 Cal. Rptr. 182, 578 P.2d 899* ; *see § 300.73[4]*]. Nevertheless, the two doctrines remain distinct [*see § 300.13*], and an apportionment of tort liability according to comparative fault is made under principles of indemnity and not of contribution [*see Code Civ. Proc. § 876* (contribution is equal division of liability among all tortfeasors)].

[4] Total Indemnity

Prior to the adoption of comparative fault principles in California, a right of implied equitable indemnity shifted the entire loss from one tortfeasor to another, regardless of whether both were joined as defendants by the injured plaintiff. It was not available if the fault of each party was equal in grade and similar in character [*Atchison, T. & S. F. R. Co. v. Lan Franco (1968) 267 Cal. App. 2d 881, 886, 73 Cal. Rptr. 660]* . Thus, total equitable indemnity was allowed if, as between two tortfeasors, the liability of one for a tort loss was secondary and based on passive misconduct and the liability of the other was primary and based on active misconduct [*Aerojet Gen. Corp. v. D. Zelinsky & Sons (1967) 249 Cal. App. 2d 604, 607, 57 Cal. Rptr. 701]* . Secondary liability, in contrast to primary liability, was founded on a fault that was constructive or imputed as a result of some legal relation, some positive rule of common or statutory law, or a failure to discover or correct a dangerous condition caused by the act of the one primarily responsible [*Angelus Assocs. Corp. v. Neonex Leisure Prods., Inc. (1985) 167 Cal. App. 3d 532, 535-536, 213 Cal. Rptr. 403* ; *Bill Loeper Ford v. Hites (1975) 47 Cal. App. 3d 828, 832, 121 Cal. Rptr. 131* ; *Cobb v. Southern Pac. Co. (1967) 251 Cal. App. 2d 929, 933, 59 Cal. Rptr. 916]* .

The "all-or-nothing" rule of implied equitable indemnity was modified by the California Supreme Court in *American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 591, 146 Cal. Rptr. 182, 578 P.2d 899* , to permit partial equitable indemnity on a comparative fault basis if both defendants are partially at fault in causing the plaintiff's harm. However, under comparative indemnity, the trier of fact may still determine that the facts and equities in a particular case support a complete shifting of loss from one tortfeasor to another, that is, that one party bears 100 percent of the fault and another bears none [*see Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 808, 812-813, 251 Cal. Rptr. 202, 760 P.2d 399]* . Therefore, total loss-shifting may be justified in cases of vicarious liability [*see E. L. White, Inc. v. City of Huntington Beach (1982) 138 Cal. App. 3d 366, 376, 187 Cal. Rptr. 879] , superseded by statute on other grounds as stated in Black Diamond Asphalt, Inc. v. Superior Court (2003) 114 Cal. App. 4th 109, 7 Cal. Rptr. 3d 466* ; implied contractual indemnity [*see Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1034-1035, 269 Cal. Rptr. 720, 791 P.2d 290* ; *see also § 300.61[5]*]; indemnity implied from a license with a public entity [*see City & County of San Francisco v. Ho Sing (1958) 51 Cal. 2d 127, 130, 138, 330 P.2d 802* ; *County of Alameda v. Southern Pac. Co. (1961) 55 Cal. 2d 479, 484, 11 Cal. Rptr. 751, 360 P.2d 327]* ; indemnity implied from the principal-agent

relationship [*see Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal. 2d 834, 837, 36 Cal. Rptr. 741, 389 P.2d 133* ; *Fireman's Fund Ins. Co. v. Haslam (1994) 29 Cal. App. 4th 1347, 35 Cal. Rptr. 2d 135* (indemnity from agent to principal); *Fidelity Mortgage Tr. Serv., Inc. v. Ridgegate E. Homeowners Ass'n (1994) 27 Cal. App. 4th 503, 509-511, 32 Cal. Rptr. 2d 521* (indemnity from principal to agent); *see also* Ch. 427, *Principal and Agent*] or the employer-employee relationship [*see Douglas v. Los Angeles Herald-Examiner (1975) 50 Cal. App. 3d 449, 461, 123 Cal. Rptr. 683* ; *Lab. Code § 2802* (indemnity from employer to employee); *Continental Cas. Co. v. Phoenix Constr. Co. (1956) 46 Cal. 2d 423, 428, 296 P.2d 801* (indemnity from employee to employer); *see also* Ch. 248, *Employer's Liability for Employee's Torts*]; and indemnity from an intentional tortfeasor to a negligent tortfeasor [*see Cicone v. URS Corp. (1986) 183 Cal. App. 3d 194, 212-213, 227 Cal. Rptr. 887]* .

Even if a total shift of loss may be appropriate, the indemnitee's equitable indemnity claim does not differ in its fundamental nature from other comparative indemnity claims [*Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 808, 251 Cal. Rptr. 202, 760 P.2d 399]* . Therefore, a tort defendant who has entered into a good faith settlement within the meaning of *Code Civ. Proc. § 877.6(c)* is absolved of any further liability for all equitable indemnity claims, including claims seeking total equitable indemnity [*Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 800, 817* ; *see § 300.73[4]*].

[5] Implied Contractual Indemnity

Implied contractual indemnity is a form of equitable indemnity in which the equitable considerations are brought into play by contractual language not specifically dealing with indemnification [*Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1029, 269 Cal. Rptr. 720, 791 P.2d 290* ; *E. L. White, Inc. v. City of Huntington Beach (1978) 21 Cal. 3d 497, 506-507, 146 Cal. Rptr. 614, 579 P.2d 505]* . Implied contractual indemnity is based on the premise that a contractual obligation to perform carries with it an implied agreement to indemnify and to discharge foreseeable damages resulting from negligent performance [*Bear Creek Planning Comm. v. Title Ins. & Trust Co. (1985) 164 Cal. App. 3d 1227, 1237, 211 Cal. Rptr. 172 , disapproved on other grounds, Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1032 n.12, 269 Cal. Rptr. 720, 791 P.2d 290* ; *see West v. Superior Court (1994) 27 Cal. App. 4th 1625, 1633, 34 Cal. Rptr. 2d 409* (reaffirming language of *Bear Creek* after *Bay Development*)]. Thus, if A incurs liability to P solely because of B's negligent performance of a contractual obligation owed by B to A, A may recover total indemnity from B for the damages that A must pay to P [*see, e.g., Bear Creek Planning Comm. v. Title Ins. & Trust Co. (1985) 164 Cal. App. 3d 1227, 1237, 1240-1243, 211 Cal. Rptr. 172 , disapproved on other grounds, Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1032 n.12, 269 Cal. Rptr. 720, 791 P.2d 290* (homeowners' association may recover total indemnity from title company for liability incurred because of title company's negligent failure to record deed restrictions); *Great W. Furniture Co. v. Porter Corp. (1965) 238 Cal. App. 2d 502, 517, 48 Cal. Rptr. 76* ; *Alisal Sanitary Dist. v. Kennedy (1960) 180 Cal. App. 2d 69, 78-79, 4 Cal. Rptr. 379]* .

The California Supreme Court has reaffirmed that, under appropriate facts, total indemnity is available to one who incurs liability to a third party solely because of another's breach of a contractual duty [*Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1034-1035, 269 Cal. Rptr. 720, 791 P.2d 290* ; *see Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 808, 251 Cal. Rptr. 202, 760 P.2d 399* (in comparative indemnity action based on implied equitable principles, trier of fact may determine that facts and equities of the case support complete shifting of loss from one tortfeasor to another); *§ 300.61[4]*]. However, implied contractual indemnity cannot be recovered from a party whose settlement with the tort victim is confirmed as in good faith under *Code of Civil Procedure Section 877.6* [*Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1028-1035, 269 Cal. Rptr. 720, 791 P.2d 290* ; *see § 300.73[4]*]. Whether the facts of a particular case require a complete shifting of the loss is to be determined at the good faith hearing [*see West v. Superior Court (1994) 27 Cal. App. 4th 1625, 1635-1637, 34 Cal. Rptr. 2d 409* , as discussed in *§ 300.73[5][c]*]. For a form for a complaint for implied contractual indemnity, *see § 300.192*.

In *Bay Development*, the Court broadly stated that, as a form of equitable indemnity, implied contractual indemnity is subject to the rules governing equitable indemnity [*Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1033,*

269 Cal. Rptr. 720, 791 P.2d 290] . Thus, if the trier of fact apportions fault between the two parties under comparative fault principles, there are no further implied contractual indemnity rights by which one party may shift the loss entirely to the other [*Kramer v. Cedu Found., Inc. (1979) 93 Cal. App. 3d 1, 12-13, 155 Cal. Rptr. 552* ; *see Stratton v. Peat, Marwick, Mitchell & Co. (1987) 190 Cal. App. 3d 286, 290-291, 235 Cal. Rptr. 374* ; *IRM Corp. v. Carlson (1986) 179 Cal. App. 3d 94, 109-110, 224 Cal. Rptr. 438]* . Similarly, in a subsequent case, the Supreme Court held that as with any claim for equitable indemnity, in a claim for implied contractual indemnity, the alleged indemnitor does not owe indemnity for liability imposed on the indemnitee if the indemnitor cannot be held liable directly to the injured third party, as, for example, when the indemnitor is statutorily immune from liability to the injured third party [*Prince v. Pacific Gas & Electric Co. (2009) 45 Cal. 4th 1151, 1165, 90 Cal. Rptr. 3d 732, 202 P.3d 1115* (utility's immunity from liability to tort victim under recreational use immunity of *Civ. Code § 846* prevented landowner from obtaining implied contractual indemnity from utility for landowner's liability to victim); *see generally § 300.63*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsIndemnityTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsProcedureMultiple DefendantsIndemnityContractual Indemnity

California Forms of Pleading and Practice--Annotated

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
Chapter 300 INDEMNITY AND CONTRIBUTION
PART II. LEGAL BACKGROUND
C. Comparative Indemnity Among Tortfeasors

25-300 California Forms of Pleading and Practice--Annotated § 300.62

§ 300.62 Conduct Compared

[1] Strict Liability

Comparative indemnity rights are not limited to codefendants who are both alleged to be liable to the plaintiff on a negligence theory. A right of comparative indemnity exists between a defendant who is alleged to have been negligent and another whose liability rests on a theory of strict liability [*Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 331-332, 146 Cal. Rptr. 550, 579 P.2d 441* ; *Yamaha Motor Corp. v. Paseman (1990) 219 Cal. App. 3d 958, 966-971, 268 Cal. Rptr. 514* (comparative indemnity allowed between strictly liable manufacturer, and consumer-purchaser who allegedly was negligent in maintaining product)]. Thus, comparative fault principles govern a claim for indemnity made by a strictly liable defendant against joint tortfeasors whose liability is based on negligence [*Expressions at Rancho Niguel Ass'n v. Ahmanson Devs., Inc. (2001) 86 Cal. App. 4th 1135, 1140-1143, 103 Cal. Rptr. 2d 895* (comparative fault, rather than principles of joint and several liability, governs indemnification of strictly liable tortfeasors by negligent tortfeasor for amounts paid to settle plaintiffs' claims)]. Comparative indemnity is also available among defendants, each of whom is alleged to be liable to the plaintiff on a strict liability theory [*GEM Developers v. Hallcraft Homes of San Diego, Inc. (1989) 213 Cal. App. 3d 419, 425-430, 261 Cal. Rptr. 626* ; *Gentry Constr. Co. v. Superior Court (1989) 212 Cal. App. 3d 177, 180-183, 260 Cal. Rptr. 421]* .

[2] Willful Misconduct and Intentional Conduct

Willful or reckless misconduct may be compared with any other kind of negligence, and therefore, rights of comparative indemnity exist both in favor of and against the reckless tortfeasor [*see* *Allen v. Sundean (1982) 137 Cal. App. 3d 216, 225-226, 186 Cal. Rptr. 863* ; *Southern Pac. Transp. Co. v. State of California (1981) 115 Cal. App. 3d 116, 121, 171 Cal. Rptr. 187* ; *Sorensen v. Allred (1980) 112 Cal. App. 3d 717, 723, 169 Cal. Rptr. 441]* . However, there is a split in authority regarding an intentional tortfeasor's ability to obtain indemnity under any circumstances. It has been held that an intentional tortfeasor has no right of indemnity [*Allen v. Sundean (1982) 137 Cal. App. 3d 216, 226-227, 186 Cal. Rptr. 863* ; *see* *Heiner v. Kmart Corp. (2000) 84 Cal. App. 4th 335, 348-350, 100 Cal. Rptr. 2d 854* (although defendant waived argument, court concluded comparative fault was inapplicable to battery claim)]. At least one court, however, has retreated from this position, allowing one intentional tortfeasor whose conduct was deemed far less egregious to obtain indemnity from a concurrent intentional tortfeasor [*see* *Baird v. Jones (1993) 21 Cal. App. 4th 684,*

690-693, 27 Cal. Rptr. 2d 232 ; *see also Weidenfeller v. Star & Garter (1991) 1 Cal. App. 4th 1, 5-7, 2 Cal. Rptr. 2d 14]* . A negligent tortfeasor may seek total indemnity from an intentional cotortfeasor [*Cicone v. URS Corp. (1986) 183 Cal. App. 3d 194, 211-213, 227 Cal. Rptr. 887* (involving alleged negligent reliance on another's fraud)].

[3] Vicarious Liability

Historically, the conduct of an employer or principal who is only vicariously liable has not been compared with that of his or her employee or agent that gave rise to the liability. The employee or agent is assigned a percentage of comparative fault, and the employer or principal is jointly and severally liable for the employee's or agent's share [*see Code Civ. Proc. § 876(b)* (applicable to pro rata contribution); *Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 819, 251 Cal. Rptr. 202, 760 P.2d 399* (Kaufman, J., dissenting)]. However, there is a suggestion from the California Supreme Court that this approach is incorrect and that vicarious liability is as amenable to comparison as is strict liability [*see Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 812-814, 813 n.13, 251 Cal. Rptr. 202, 760 P.2d 399* ; *see also Mayhugh v. County of Orange (1983) 141 Cal. App. 3d 763, 764-767, 190 Cal. Rptr. 537* (good faith settlement with active tortfeasor does not release vicariously liable party); *but see Srithong v. Total Inv. Co. (1994) 23 Cal. App. 4th 721, 726-728, 28 Cal. Rptr. 2d 672* ; *Rashtian v. BRAC-BH, Inc. (1992) 9 Cal. App. 4th 1847, 1854, 12 Cal. Rptr. 2d 411* ; *Miller v. Stouffer (1992) 9 Cal. App. 4th 70, 84-85, 11 Cal. Rptr. 2d 454* (all treating vicarious liability as involving single share of comparative negligence for which actively negligent and vicarious liable parties are jointly and severally liable, and all refusing to apply Proposition 51 to situation); *see generally § 300.63[3]*].

Civ. Code § 1714.1, which imposes vicarious liability on a parent for the willful misconduct of a child up to a maximum statutory amount, has been construed to inure not only to the benefit of an injured person, but also to the benefit of other tortfeasors. Therefore, a joint tortfeasor may join the parents and child as defendants and obtain equitable indemnity in the form of a reduction in liability up to the statutory amount, whether or not the plaintiff has proceeded against the child [*Curry v. Superior Court (1993) 20 Cal. App. 4th 180, 183-189, 24 Cal. Rptr. 2d 495]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsStrict LiabilityGeneral OverviewTortsVicarious LiabilityGeneral Overview

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§ 300.63 Requirement of Joint and Several Liability

[1] In General

Comparative indemnity is available only among tortfeasors who are jointly and severally liable to the plaintiff [*GEM Developers v. Hallcraft Homes of San Diego, Inc. (1989) 213 Cal. App. 3d 419, 430, 261 Cal. Rptr. 626* ; *Woodward-Gizienski & Assocs. v. Geotechnical Exploration, Inc. (1989) 208 Cal. App. 3d 64, 68-69, 255 Cal. Rptr. 800* ; *Munoz v. Davis (1983) 141 Cal. App. 3d 420, 425, 190 Cal. Rptr. 400* ; *see § 300.14*]. However, the term "joint tortfeasor" has been broadly defined with regard to indemnity rights. It extends to any transaction that rests on related facts, either concurrent or successive, joint or several, that legally creates a detriment compensable against multiple actors [*Yamaha Motor Corp. v. Paseman (1990) 219 Cal. App. 3d 958, 964-965, 268 Cal. Rptr. 514* (persons who have negligently maintained and repaired defective product may be jointly and severally liable with manufacturer); *GEM Developers v. Hallcraft Homes of San Diego, Inc. (1989) 213 Cal. App. 3d 419, 431, 261 Cal. Rptr. 626]* .

Parties are not jointly and severally liable, and thus there is no right of comparative indemnity between them, if either the indemnitee or the indemnitor is determined to have no liability to the tort victim [*see Woodward-Gizienski & Assocs. v. Geotechnical Exploration, Inc. (1989) 208 Cal. App. 3d 64, 68, 255 Cal. Rptr. 800* (indemnitee not liable for damages paid for which indemnity was sought); *Allis-Chalmers Corp. v. Superior Court (1985) 168 Cal. App. 3d 1155, 1157-1159, 214 Cal. Rptr. 615* (no indemnity because indemnitor was determined by pretrial motion to not be liable to victim); *see also § 300.65*]. Thus, an indemnitor that can establish that it owed no duty to the tort victim cannot be liable to a cotortfeasor for compartive indemnity [*Seamen's Bank v. Superior Court (1987) 190 Cal. App. 3d 1485, 1491-1492, 236 Cal. Rptr. 31* ; *Munoz v. Davis (1983) 141 Cal. App. 3d 420, 425-427, 190 Cal. Rptr. 400]* . Even if the claim is brought as one for implied contractual indemnity, which is still equitable in nature [*see § 300.61[5]*], the alleged indemnitor does not owe indemnity for liability imposed on the indemnitee if the indemnitor cannot be held liable directly to the injured third party, as, for example, when the indemnitor is statutorily immune from liability to the injured third party [*Prince v. Pacific Gas & Electric Co. (2009) 45 Cal. 4th 1151, 1165, 90 Cal. Rptr. 3d 732, 202 P.3d 1115* (utility's immunity from liability to tort victim under recreational use immunity of *Civ. Code § 846* prevented landowner from obtaining implied contractual indemnity from utility for landowner's liability to victim)].

Similarly, if the only duties allegedly violated by the indemnitor are contractual duties owed to the tort victim, and if the indemnitor had no contractual relationship with the tortfeasor and there is no other basis for holding the indemnitor liable in tort, the indemnitor cannot be liable for comparative indemnity to the tortfeasor [*BFGC Architects Planners, Inc. v. Forcum/Mackey Constr., Inc. (2004) 119 Cal. App. 4th 848, 852-853, 14 Cal. Rptr. 3d 721* ; *see also Stop Loss Ins. Brokers, Inc. v. Brown & Toland Medical Group (2006) 143 Cal. App. 4th 1036, 1040-1044, 49 Cal. Rptr. 3d 609]* .

However, rights of indemnity between tortfeasors do not require the existence of any duty from the indemnitor to the indemnitee [*Jaffe v. Huxley Architecture (1988) 200 Cal. App. 3d 1188, 1192, 246 Cal. Rptr. 432* ; *see GEM Developers v. Hallcraft Homes of San Diego, Inc. (1989) 213 Cal. App. 3d 419, 429 n.2, 261 Cal. Rptr. 626* ; *see also Yamaha Motor Corp. v. Paseman (1990) 219 Cal. App. 3d 958, 969, 268 Cal. Rptr. 514]* .

There is a possible exception to this rule in situations in which the right to indemnity arises from an agent's negligent performance of a duty to a principal that causes the principal to incur liability to a third party [*see, e.g., Fireman's Fund Ins. Co. v. Haslam (1994) 29 Cal. App. 4th 1347, 35 Cal. Rptr. 2d 135]* . In these situations, it is questionable whether joint and several liability to the tort victim is actually required, although no court has yet expressly rejected it [*cf. Fireman's Fund Ins. Co. v. Haslam (1994) 29 Cal. App. 4th 1347, 1356, 35 Cal. Rptr. 2d 135* (agent was liable for indemnity because breached duties owed directly to principal, which caused loss to principal; whether or not agent owed any duty to tort victim was irrelevant because it was not breach of any such duty that formed basis of liability)].

[2] Subsequent Tortfeasors

An original tortfeasor may be jointly and severally liable with a subsequent tortfeasor whose negligence aggravated the injury [*see Blecker v. Wolbart (1985) 167 Cal. App. 3d 1195, 1200-1202, 213 Cal. Rptr. 781]* . However, the imposition of joint and several liability under these circumstances requires a two-step duty analysis. First, there must be a duty on the part of the original tortfeasor toward the tort victim to establish the original tort. Then, there must also be a duty on the part of the original tortfeasor toward the victim with regard to the aggravated injury because of the acts of the subsequent tortfeasor. Such a duty usually requires a foreseeability analysis; that is, might the orginal tortfeasor foresee that the subsequent tort might occur [*see Munoz v. Davis (1983) 141 Cal. App. 3d 420, 426-428, 190 Cal. Rptr. 400]* .

The above test has been applied to subsequent medical malpractice and subsequent legal malpractice with opposite results. Subject to limitations on liability for noneconomic damages imposed by Proposition 51 [*see Henry v. Superior Court (2008) 160 Cal. App. 4th 440, 455, 72 Cal. Rptr. 3d 808* ; *Marina Emergency Med. Group v. Superior Court (2000) 84 Cal. App. 4th 435, 439-441, 100 Cal. Rptr. 2d 866* ; *see also § 300.63[3][d]*], an original tortfeasor is liable for the damages caused by subsequent negligent medical treatment as a matter of law and may seek indemnity from the subsequent medical tortfeasor [*Blecker v. Wolbart (1985) 167 Cal. App. 3d 1195, 1200, 213 Cal. Rptr. 781* ; *Niles v. City of San Rafael (1974) 42 Cal. App. 3d 230, 237-240, 116 Cal. Rptr. 733* ; *Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 74-77, 38 Cal. Rptr. 490* ; *see Ash v. Mortensen (1944) 24 Cal. 2d 654, 657, 150 P.2d 876]* . One court has held, however, that there is no joint and several liability between an original tortfeasor and a subsequent legal malpractice tortfeasor, because the subsequent legal malpractice is not foreseeable to the original tortfeasor [*Munoz v. Davis (1983) 141 Cal. App. 3d 420, 426-428, 190 Cal. Rptr. 400]* .

Although an original tortfeasor may be liable for all damages proximately caused, including those caused by the subsequent tortfeasor, the subsequent tortfeasor is liable only for the aggravation of damages caused by the subsequent tort. Therefore, an apportionment is required by the trier of fact between the amount of damages attributable to the original injury and the amount of damages caused by the subsequent malpractice [*Niles v. City of San Rafael (1974) 42 Cal. App. 3d 230, 240, 116 Cal. Rptr. 733]* .

The original tortfeasor is entitled to indemnity from the subsequent tortfeasor with regard to the damages attributed to the aggravation [*Niles v. City of San Rafael (1974) 42 Cal. App. 3d 230, 237-240, 116 Cal. Rptr. 733* ; *Herrero v.*

Atkinson (1964) 227 Cal. App. 2d 69, 74-77, 38 Cal. Rptr. 490] . The subsequent tortfeasor has no right to recover indemnity from the original tortfeasor because the subsequent tortfeasor has no liability for the original injuries [*see Munoz v. Davis (1983) 141 Cal. App. 3d 420, 429, 190 Cal. Rptr. 400]* . However, the subsequent tortfeasor should have the sameright as the original tortfeasor to obtain comparative indemnity with regard to the damages attributed to aggravation [*see Blecker v. Wolbart (1985) 167 Cal. App. 3d 1195, 1203-1204, 213 Cal. Rptr. 781* ; *but see Munoz v. Davis (1983) 141 Cal. App. 3d 420, 429, 190 Cal. Rptr. 400* (dicta stating that comparative indemnity is never available to a subsequent tortfeasor from an original tortfeasor because the subsequent tortfeasor is not liable for the original injury)].

In determining indemnity rights with regard to aggravation of injury, the respective conduct of the tortfeasors and not the extent of the injuries caused by each must be considered by the trier of fact in ascertaining fault. Under comparative negligence, it is for the trier of fact to consider the respective degree of fault as between the conduct of the original and successive tortfeasors, not the extent of the plaintiff's injuries before and after the subsequent tort [*Blecker v. Wolbart (1985) 167 Cal. App. 3d 1195, 1203-1204, 213 Cal. Rptr. 781]* .

[3] Effect of Fair Responsibility Act of 1986

[a] Generally

Prior to enactment of the Fair Responsibility Act of 1986 (Proposition 51), in actions against two or more tortfeasors for damages for the same indivisible injury in which the plaintiff prevailed, a single judgment for the full amount of damages was ordinarily entered against the defendant tortfeasors jointly. However, each of the joint tortfeasors was severally, that is, individually, liable for the entire judgment [*Kemp v. Barnett (1976) 62 Cal. App. 3d 245, 248, 132 Cal. Rptr. 823]* . Hence, once a judgment was rendered against two or more tortfeasors jointly, the plaintiff could rely on their several liability and satisfy the judgment in full against either or any one of them [*Code Civ. Proc. § 875(g)*]. The satisfaction of the judgment by one or more of them extinguished the obligation and discharged the liability of all of them to the plaintiff [*Kemp v. Barnett (1976) 62 Cal. App. 3d 245, 248, 132 Cal. Rptr. 823]* .

The Fair Responsibility Act of 1986 (Proposition 51, *Civ. Code §§ 1431-1431.5*), the so-called "deep pockets" initiative, adopted June 3, 1986, and effective June 4, 1986, has significantly modified the doctrine of joint and several liability in actions for personal injury, property damage, or wrongful death when comparative fault principles apply. The Act has created two classifications of damages and has made the joint-and-several-liability doctrine apply to one kind of damages but not to the other. Under the act, cotortfeasors remain jointly liable for a plaintiff's "economic" damages; however, they are severally liable only, according to their percentage of fault, for a plaintiff's "noneconomic" damages. A separate judgment for that several-only liability is then entered against each defendant for the defendant's proportionate share of noneconomic damages [*Civ. Code § 1431.2(a)*].

"Economic damages" are defined as objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities [*Civ. Code § 1431.2(b)(1)*]. "Noneconomic damages" are defined as subjective, nonmonetary losses, including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation [*Civ. Code § 1431.2(b)(2)*; *see Hernandez v. Badger Constr. Equip. Co. (1994) 28 Cal. App. 4th 1791, 1810-1811, 34 Cal. Rptr. 2d 732* (applying Proposition 51 to claim for loss of consortium)].

If Proposition 51 applies, a tortfeasor who settles claims against a plaintiff may obtain comparative indemnity from other tortfeasors only with regard to the amount of the settlement that represents the plaintiff's economic damages [*Union Pac. Corp. v. Wengert (2000) 79 Cal. App. 4th 1444, 1447-1449, 95 Cal. Rptr. 2d 68]* . Non-settling defendants have a right to litigate or settle their own liabilities to a plaintiff for noneconomic damages, because liability among tortfeasors for those damages is several only [*Union Pac. Corp. v. Wengert (2000) 79 Cal. App. 4th 1444, 1450-1451,*

95 Cal. Rptr. 2d 68 ; *see Civ. Code § 1431.2(a)*]. For further discussion of issues involved if one or more defendants have settled, including the potential effects of Proposition 51, *see § 300.73*.

[b] Prospective Application

Proposition 51 is prospective only and does not apply to causes of action that accrued prior to the June 4, 1986, effective date of the initiative measure [*Evangelatos v. Superior Court (1988) 44 Cal. 3d 1188, 1193-1194, 1205, 246 Cal. Rptr. 629, 753 P.2d 585]* .

In a case subsequent to *Evangelatos*, the California Supreme Court considered the issue of when a plaintiff's cause of action for asbestos-related latent injuries should be deemed to have accrued for the specific and limited purpose of determining whether the provisions of Proposition 51 could be prospectively applied to plaintiff's case, consistent with the holding in *Evangelatos*. The Supreme Court ruled that a cause of action for damages arising from a latent and progressive disease such as asbestos-related lung cancer is deemed to have accrued for Proposition 51 purposes if the plaintiff was diagnosed with the disease for which damages are sought, or otherwise discovered the asbestos-related illness or injuries prior to the June 4, 1986, effective date of Proposition 51. According to the Court, a rule that looks to the earliest of diagnosis of the harm or disease, or plaintiff's awareness or discovery of manifested symptoms, for the limited purpose of determining whether the tort reform measures of Proposition 51 can fairly be applied prospectively to the plaintiff's lawsuit, furthers the purposes of the tort reform measures, and ensures that no party suffers detriment as a result of an actual and reasonable reliance on pre-Proposition 51 law [*Buttram v. Owens-Corning Fiberglas Corp. (1997) 16 Cal. 4th 520, 540, 66 Cal. Rptr. 2d 438, 941 P.2d 71* (rejecting "appreciable harm" test adopted by the Court of Appeal)].

[c] Actions to Which Proposition 51 Applies

[i] Personal Injury Actions

Proposition 51 applies to any action for personal injury, based on principles of comparative fault [*see Civ. Code § 1431.2(a)*].

It is unresolved whether the term "actions for personal injury," as used in Proposition 51, encompasses cases involving solely non-bodily injuries, for example, defamation or infliction of emotional distress. In other contexts, courts have held that the term "personal injury" is not limited to bodily injury [*see, e.g., Roemer v. C.I.R. (9th Cir. 1983) 716 F.2d 693, 697-700* (defamation is personal injury)]. It clearly applies to an action for loss of consortium arising from bodily injury to a spouse [*Hernandez v. Badger Constr. Equip. Co. (1994) 28 Cal. App. 4th 1791, 1810-1811, 34 Cal. Rptr. 2d 732* ; *see Civ. Code § 1431.2(b)(2)*]. One court of appeal has held that it does not apply to a malpractice claim against an attorney [*Brandon G. v. Gray (2003) 111 Cal. App. 4th 29, 39, 3 Cal. Rptr. 3d 330* (action to recover monetary value of claim lost due to attorney's failure to press meritorious claim within requisite time period was not action for "personal injury, property damage, or wrongful death")]. A subsequent court of appeal opinion rejected such a broad rule, however, and held that *Civ. Code § 1431.2* could be applied to an attorney malpractice action that seeks primarily noneconomic damages, such as damages for emotional distress caused when a criminal defense attorney's malpractice resulted in his client's criminal conviction [*Ovando v. County of Los Angeles (2008) 159 Cal. App. 4th 42, 73-74, 71 Cal. Rptr. 3d 415*].

[ii] Property Damage

Proposition 51 applies to any action for property damage, based on principles of comparative fault [*see Civ. Code § 1431.2(a)*]. It therefore presumably applies to actions for tortious injury to property alone, without accompanying personal injury.

[iii] Wrongful Death

Proposition 51 applies to any action for wrongful death, based on principles of comparative fault [*see Civ. Code § 1431.2(a)*].

[iv] Loss of Consortium

Proposition 51 applies to any action for loss of consortium arising from bodily injury to a spouse, based on principles of comparative fault [*Hernandez v. Badger Constr. Equip. Co. (1994) 28 Cal. App. 4th 1791, 1810-1811, 34 Cal. Rptr. 2d 732* ; *see Civ. Code § 1431.2(b)(2)*].

[v] Products Liability

Proposition 51 may apply to an action for strict products liability, based on principles of comparative fault, at least when the plaintiff's harm was caused by multiple products and the evidence provides a basis to allocate liability for noneconomic damages between the different defective products [*Wilson v. John Crane, Inc. (2000) 81 Cal. App. 4th 847, 859, 97 Cal. Rptr. 2d 240* ; *Arena v. Owens-Corning Fiberglas Corp. (1998) 63 Cal. App. 4th 1178, 1192, 74 Cal. Rptr. 2d 580* ; *see Civ. Code § 1431.2(a)*; *Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 742, 144 Cal. Rptr. 380, 575 P.2d 1162* ; *see also § 300.62[1]*].

Proposition 51 has no application in a strict product liability case, however, when the plaintiff's injuries are caused solely by a single defective product and all of the defendants are in the same chain of distribution. A strictly liable defendant may not reduce or eliminate its responsibility to the plaintiff for damages caused by a defective product by shifting blame to others in the product's chain of distribution. When a defendant's joint and several liability is based not on his or her own negligence, but rather on vicarious liability, the defendant cannot invoke Proposition 51 to reduce or eliminate responsibility for a plaintiff's noneconomic damages [*Bostick v. Flex Equipment Co., Inc. (2007) 147 Cal. App. 4th 80, 95, 54 Cal. Rptr. 3d 28* ; *Wimberly v. Derby Cycle Corp. (1997) 56 Cal. App. 4th 618, 623, 629, 65 Cal. Rptr. 2d 532* ; *cf. Garcia v. Duro Dyne Corp. (2007) 156 Cal. App. 4th 92, 102-104, 67 Cal. Rptr. 3d 100* (chain-of-distribution allocation denied when evidence provided no basis for determining amount of harm caused by any specific product)].

[vi] Application of Comparative Fault Principles

Principles of comparative fault apply not only between negligent tortfeasors, but also between negligent tortfeasors and tortfeasors who committed acts of willful misconduct [*Allen v. Sundean (1982) 137 Cal. App. 3d 216, 225-226, 186 Cal. Rptr. 863* ; *Sorensen v. Allred (1980) 112 Cal. App. 3d 717, 725, 169 Cal. Rptr. 441* ; *see § 300.62[2]*]. The principles also apply between negligent and strictly liable tortfeasors [*Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 742, 144 Cal. Rptr. 380, 575 P.2d 1162* ; *see § 300.62[1]*]. Proposition 51 generally applies whenever at least two defendants were independently acting tortfeasors with fault to compare [*Bayer-Bel v. Litovsky (2008) 159 Cal. App. 4th 396, 400, 71 Cal. Rptr. 3d 518* (Proposition 51 applied when one defendant was negligent driver of car and another negligently entrusted vehicle to unlicensed driver)].

Before Proposition 51, principles of comparative fault were held not to apply between negligence and intentional tortious conduct. An intentional tortfeasor could not obtain indemnity from a negligent tortfeasor [*see Allen v. Sundean (1982) 137 Cal. App. 3d 216, 225-227, 186 Cal. Rptr. 863]* or raise the plaintiff's comparative negligence as an affirmative defense [*see Godfrey v. Steinpress (1982) 128 Cal. App. 3d 154, 176, 180 Cal. Rptr. 95]* .

Consistent with these principles, court of appeal opinions that have addressed the issue under Proposition 51 have concluded that an intentional tortfeasor is not entitled to apportionment of liability for noneconomic damages if the negligence of another contributed to the injury, regardless of whether the negligent person is the plaintiff or a third-party tortfeasor [*Thomas v. Duggins Constr. Co., Inc. (2006) 139 Cal. App. 4th 1105, 1112-1113, 44 Cal. Rptr.*

3d 66 (intentional tortfeasor not entitled to apportionment for negligence of co-tortfeasors); *see Heiner v. Kmart Corp. (2000) 84 Cal. App. 4th 335, 348-350, 100 Cal. Rptr. 2d 854* (in dicta, suggesting contributory negligence of plaintiff would not reduce liability of intentional tortfeasor)].

Conversely, a negligent defendant is entitled to apportionment under Proposition 51 if a third-party's intentional misconduct also contributed to causing the injury [*Weidenfeller v. Star & Garter (1991) 1 Cal. App. 4th 1, 5-7, 2 Cal. Rptr. 2d 14* ; *see also Martin v. United States (9th Cir. 1992) 984 F.2d 1033, 1039-1040* (liability for noneconomic damages of party based on negligent supervision of child must be reduced by proportion of fault attributable to person who abducted and raped child)].

[d] Comparing Fault of Absent Tortfeasors

A defendant's liability for noneconomic damages under Proposition 51 is limited bythe comparative fault of all those responsible for the plaintiff's injuries, not merely the fault of the defendants who are present in the action [*DaFonte v. Up-Right, Inc. (1992) 2 Cal. 4th 593, 601-604, 7 Cal. Rptr. 2d 238, 828 P.2d 140* (comparative fault of plaintiff's employer, immune from suit because of workers' compensation, must be included); *see also Hernandez v. Badger Const. Equip. Co. (1994) 28 Cal. App. 4th 1791, 1804-1810, 34 Cal. Rptr. 2d 732* (employer immune from liability under federal Longshore Act)]. Thus, Proposition 51 prevents a plaintiff from recovering noneconomic damages from any tortfeasor in excess of the tortfeasor's comparative share, regardless of whether another tortfeasor might be insolvent, immune from suit, or otherwise absent from the litigation [*see Da Fonte v. Up-Right, Inc. (1992) 2 Cal. 4th 593, 601-604, 7 Cal. Rptr. 2d 238, 828 P.2d 140* ; *Taylor v. John Crane, Inc. (2003) 113 Cal. App. 4th 1063, 1071, 6 Cal. Rptr. 3d 695* (no error to reduce noneconomic damages based on fault allocated to nondefendant U.S. Navy, even though Navy may have been immune from liability); *see also § 300.72*].

However, a statute that precludes direct liability on the ground that a specific conduct does not breach a duty and therefore is not a tort also precludes indirect assignment of comparative "fault" or responsibilities for purposes of Proposition 51 [*see Richards v. Owens-Ill., Inc. (1997) 14 Cal. 4th 985, 1001, 60 Cal. Rptr. 2d 103, 928 P.2d 1181* (*Civ. Code § 1714.45*, precluding liability against tobacco suppliers, also precludes apportionment of fault to those suppliers in action against other parties)]. Thus, for example, when no statutory basis exists for imposing liability on a public entity, no percentage of fault can be attributed to a public entity regardless of whether the entity is named as a defendant in the suit [*Munoz v. City of Union City (2007) 148 Cal. App. 4th 173, 182, 55 Cal. Rptr. 3d 393]* .

Despite the rule that a public entity cannot be apportioned a share of liability in the absence of a statutory basis for imposing liability, one court of appeal opinion held that public employees could be apportioned a share of liability even though they were personally immune from liability under *Gov. Code § 821.6*. The court noted that *Gov. Code § 821.6*, which provides immunity to public employees for prosecutorial actions even if committed maliciously and without probable cause, reflects no legislative determination that an immune employee has breached no legal duty and bears no "fault" for any injury caused [*Ovando v. County of Los Angeles (2008) 159 Cal. App. 4th 42, 71-72, 71 Cal. Rptr. 3d 415*].

Although these principles are generally applied in the context of statutory provisions, at least one court of appeal opinion has applied these principles to a case involving a common law doctrine that shielded a party from liability [*Ford v. Polaris Indus., Inc. (2006) 139 Cal. App. 4th 755, 778-779, 43 Cal. Rptr. 3d 215]* . In that particular case, the court of appeal held that a product manufacturer liable for a product defect could not reduce its liability by pointing to the fault of the product owner, who was not the injured party. The court had already held that under the primary assumption of risk doctrine, the product owner owed no duty of care to the injured party. Using the distinction created by the Supreme Court, the court of appeal held that because the owner of the product owed no duty of care to the injured party, the owner could not be assigned any fault for purposes of reducing the liability of the product manufacturer [*Ford v. Polaris Indus., Inc. (2006) 139 Cal. App. 4th 755, 778-779, 43 Cal. Rptr. 3d 215]* .

If only one defendant remains in an action and desires to limit its own share of responsibility, that defendant bears the burden of offering evidence that another person or entity is partly responsible for the damages caused to plaintiff [*Kellogg v. Asbestos Corp. Ltd. (1996) 41 Cal. App. 4th 1397, 1408, 49 Cal. Rptr. 2d 256* ; *see also Aetna Health Plans of Cal., Inc. v. Yucaipa-Calimesa Joint Unified Sch. Dist. (1999) 72 Cal. App. 4th 1175, 1193, 85 Cal. Rptr. 2d 672* (because only noneconomic damages were at issue, insurer could not seek equitable contribution or indemnity from other insurer for latter's share of responsibility, although first insurer had right to present evidence of latter's responsibility to limit own liability for damages)]. A defendant seeking an offset for noneconomic damages attributable to another person must propose a special verdict requesting this allocation or the issue is waived [*Kitzig v. Nordquist (2000) 81 Cal. App. 4th 1384, 1398, 97 Cal. Rptr. 2d 762]* .

If a defendant seeks to add a nonparty to a special verdict form as a joint tortfeasor, the defendant bears the burden of providing substantial evidence that the nonparty was at fault, which requires evidence that the nonparty violated the applicable standard of care. Evidence that the nonparty merely contributed to the injury, without evidence that the nonparty's conduct fell below the applicable standard of care, is insufficient [*Wilson v. Ritto (2003) 105 Cal. App. 4th 361, 367-370, 129 Cal. Rptr. 2d 336* (defendant in medical malpractice action failed to show that other doctor's conduct fell below medical standard of care)].

If the only remaining defendant is the original tortfeasor and that defendant seeks to introduce evidence of a subsequent tortfeasor's aggravating negligence, that defendant must be allowed to introduce such evidence to allow the jury to limit the original tortfeasor's liability to only his or her proportionate share of any noneconomic damages that may be recoverable [*Henry v. Superior Court (2008) 160 Cal. App. 4th 440, 446, 72 Cal. Rptr. 3d 808* ; *Marina Emergency Med. Group v. Superior Court (2000) 84 Cal. App. 4th 435, 439-441, 100 Cal. Rptr. 2d 866]* . This is the rule under Proposition 51 even in cases in which the subsequent tortious conduct is medical malpractice, despite the general rule that an original tortfeasor is liable for damages caused by subsequent medical malpractice that occurs during treatment for the original injury [*Henry v. Superior Court (2008) 160 Cal. App. 4th 440, 455, 461, 72 Cal. Rptr. 3d 808* (basis for original tortfeasor's liability was premises liability); *Marina Emergency Med. Group v. Superior Court (2000) 84 Cal. App. 4th 435, 439-441, 100 Cal. Rptr. 2d 866* (basis for both original and subsequent tortfeasors' liability was medical malpractice); *see § 300.63[2]*].

Although an apportionment of noneconomic damages between tortfeasors is generally required under Proposition 51, if a defendant is liable for his or her own negligence in aggravating an injury caused by an earlier tortfeasor [*see § 300.63[2]*], an apportionment is not required if the plaintiff has already settled with the earlier tortfeasor and the jury was instructed to award damages against the defendant attributable only to the defendant's conduct in aggravating the initial injuries [*see Kitzig v. Nordquist (2000) 81 Cal. App. 4th 1384, 1402, 97 Cal. Rptr. 2d 762]* .

[e] Effect of Receipt of Workers' Compensation Benefits

Before Proposition 51, if an employer who was immune from suit [*see § 300.63[3][d]*] was at fault in causing harm to a plaintiff-employee, and if plaintiff obtained a judgment against a third-party tortfeasor, the judgment against that party was reduced by the proportionate amount attributable to the employer's negligence up to the amount of the workers' compensation benefits paid [*see Aceves v. Regal Pale Brewing Co. (1979) 24 Cal. 3d 502, 512, 156 Cal. Rptr. 41, 595 P.2d 619]* . Under Proposition 51, the negligent third party is liable for the full amount of the plaintiff's economic damages, but only for its comparative share of the plaintiff's noneconomic damages [*Da Fonte v. Up-Right, Inc. (1992) 2 Cal. 4th 593, 601-604, 7 Cal. Rptr. 2d 238, 828 P.2d 140]* . Because workers' compensation benefits are designed to cover economic loss, the amount of any deduction allowed on account of workers compensation benefits is applied against the amount of the judgment that is compensation for economic damages [*see Hernandez v. Badger Constr. Equip. Co. (1994) 28 Cal. App. 4th 1791, 1810 n.17, 34 Cal. Rptr. 2d 732]* . Otherwise, the negligent third party would be paying less than its comparative share of the plaintiff's noneconomic damages [*see Da Fonte v. Up-Right, Inc. (1992) 2 Cal. 4th 593, 604, 7 Cal. Rptr. 2d 238, 828 P.2d 140]* .

It is also unlikely that Proposition 51 will affect the right of an employer to obtain reimbursement for workers' compensation benefits paid to an injured employee. Under the law before Proposition 51, an employer was entitled to reimbursement from a responsible third-party tortfeasor for workers' compensation payments made to the employee. The amount of reimbursement was limited to the amount that exceeded the employer's proportional share of the employee's total damages [*see Johnson v. Cayman Dev. Co. (1980) 108 Cal. App. 3d 977, 983-984, 167 Cal. Rptr. 29]* . It would appear that because workers' compensation payments cover economic loss, the employer is still entitled to reimbursement [*cf. Hernandez v. Badger Constr. Equip. Co. (1994) 28 Cal. App. 4th 1791, 1803, 1823-1826, 34 Cal. Rptr. 2d 732* (employer recovered full amount of worker's compensation benefits paid under federal Longshore Act without reduction for its comparative share of negligence)]. In addition, it is certainly arguable that any change in the reimbursement rules that reduced the amount of reimbursement to which an employer was entitled would run afoul of *Civ. Code § 1431.3*, which provides that nothing contained in Proposition 51 is intended in any way to alter the law of immunity. For further discussion of an employer's right to reimbursement for workers' compensation benefits, see Ch. 577, *Workers' Compensation* .

[f] Vicarious Liability Doctrine Not Abrogated

Proposition 51 does not abrogate the doctrine of vicarious liability. If the law imposes vicarious liability on one party for the conduct of another, they remain jointly and severally liable for both economic and noneconomic damages [*Srithong v. Total Inv. Co. (1994) 23 Cal. App. 4th 721, 726-728, 28 Cal. Rptr. 2d 672* (vicarious liability of hirer for conduct of independent contractor); *Rashtian v. BRAC-BH, Inc. (1992) 9 Cal. App. 4th 1847, 1854, 12 Cal. Rptr. 2d 411* (statutory vicarious liablity of vehicle owner for conduct of driver under *Veh. Code § 17150*); *Miller v. Stouffer (1992) 9 Cal. App. 4th 70, 84, 11 Cal. Rptr. 2d 454* (employer-employee respondeat superior vicarious liability)]. Thus, for example, Proposition 51 does not limit the vicarious liability of the hirer of an independent contractor when the hirer's liability is based on the nondelegable duty doctrine [*Koepnick v. Kashiwa Fudosan America, Inc. (2009) 173 Cal. App. 4th 32, 35, 92 Cal. Rptr. 3d 453* ; *Srithong v. Total Inv. Co. (1994) 23 Cal. App. 4th 721, 726-728, 28 Cal. Rptr. 2d 672]* .

If a party is both liable for its own conduct and also vicariously liable for the conduct of another, the party is liable for both it's own percentage of comparative negligence and the percentage of the party for whose conduct it is vicariously liable [*Srithong v. Total Inv. Co. (1994) 23 Cal. App. 4th 721, 725, 728, 28 Cal. Rptr. 2d 672* (jury found lessor's comparative fault to be 5 percent and roofer's share to be 95 percent; but lessor was vicariously liable for conduct of roofer, so lessor was liable for 100 percent of damages)].

In addition, because no apportionment is permitted to an intentional tortfeasor under Proposition 51 [*see § 300.63[3][c][vi]*], a party who is vicariously liable for an intentional tort may be liable for all of the plaintiff's noneconomic damages [*Thomas v. Duggins Constr. Co., Inc. (2006) 139 Cal. App. 4th 1105, 1113, 44 Cal. Rptr. 3d 66]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationEffect & OperationProspective OperationTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsProcedureMultiple DefendantsJoint & Several LiabilityTortsVicarious LiabilityGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
Chapter 300 INDEMNITY AND CONTRIBUTION
PART II. LEGAL BACKGROUND
C. Comparative Indemnity Among Tortfeasors

25-300 California Forms of Pleading and Practice--Annotated § 300.64

§ 300.64 Limitations on Recovery

[1] Public Policy and Equitable Considerations

A right of comparative indemnity may be denied if there are strong public policy reasons for not permitting it [*Western S.S. Lines, Inc. v. San Pedro Peninsula Hosp. (1994) 8 Cal. 4th 100, 109-110, 32 Cal. Rptr. 2d 263, 876 P.2d 1062* ; *Munoz v. Davis (1983) 141 Cal. App. 3d 420, 429, 190 Cal. Rptr. 400]* . Public policy precludes an attorney who is sued for legal malpractice for having missed a statute of limitations from seeking indemnity from the original tortfeasor [*Munoz v. Davis (1983) 141 Cal. App. 3d 420, 429-430, 190 Cal. Rptr. 400]* . Public policy also prohibits an action for indemnity against the attorney who is representing the tort victim because such an action intrudes on the attorney-client relationship [*Lewis v. Purvin (1989) 208 Cal. App. 3d 1208, 1214-1217, 256 Cal. Rptr. 827* ; *see Goldfisher v. Superior Court (1982) 133 Cal. App. 3d 12, 22-23, 183 Cal. Rptr. 609]* . The ordinary rules of comparative indemnity do not apply if the claim for indemnity is made against an attorney, is based on a breach of the attorney's duty to his or her client, and is brought by an adverse party in litigation that is the same as or related to that in which the alleged professional negligence occurred [*California State Auto. Ass'n Inter-Ins. Bureau v. Bales (1990) 221 Cal. App. 3d 227, 230, 270 Cal. Rptr. 421]* .

Indemnity rights are also limited by general equitable principles. Equitable indemnification is a matter of fairness. In the great majority of cases, equity and fairness call for an apportionment of loss among wrongdoers in proportion to their relative culpability, rather than by placing the entire loss on one of them. Butbecause indemnification is an equitable doctrine existing only to correct potential injustice, it has no utility if there is no such potential [*Jaffe v. Huxley Architecture (1988) 200 Cal. App. 3d 1188, 1191-1192, 246 Cal. Rptr. 432]* .

[2] Employer Immunity

Under *Lab. Code § 3864*, the employer of a person who is injured as the result of the joint negligence of the employer and a third party is not required to indemnify the third party in the absence of a written agreement, executed by the employer and the third party prior to the employee's injury, providing for such indemnity [*Nielsen Constr. Co. v. International Iron Prods. (1993) 18 Cal. App. 4th 863, 866-869, 22 Cal. Rptr. 2d 497* ; *City of Oakland v. Delcon Assocs. (1985) 168 Cal. App. 3d 1126, 1128, 214 Cal. Rptr. 734* ; *see also Western S.S. Lines, Inc. v. San Pedro*

Peninsula Hosp. (1994) 8 Cal. 4th 100, 113, 32 Cal. Rptr. 2d 263, 876 P.2d 1062 (discussing history of statute)]. Nor is the employer's public liability insurer or workers' compensation insurer required to indemnify the third party in the absence of such an agreement [*Pacific Gas & Elec. Co. v. Morse (1970) 6 Cal. App. 3d 707, 712-713, 86 Cal. Rptr. 7]* . The same rule applies if an employee is injured as the result of the joint negligence of a coemployee and a third party. The third party cannot, in the absence of an express written indemnity agreement, recover under the doctrine of equitable indemnity from the coemployee and the employees' employer the amount it paid in settlement of the injured employee's claim. Such a recovery would frustrate the legislative purpose of *Lab. Code § 3601*, which bars the injured employee from suing the coemployee for ordinary negligence within the course and scope of employment in order to maintain the employer's liability for employee injuries at the level established by the Workers' Compensation Law [*Pacific Gas & Elec. Co. v. Morse (1970) 6 Cal. App. 3d 707, 713-715, 86 Cal. Rptr. 7]* .

Lab. Code § 3864 insulates an employer from any liability for comparative indemnity [*see American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 607 n.9, 146 Cal. Rptr. 182, 578 P.2d 899* ; *see also City of Oakland v. Delcon Assocs. (1985) 168 Cal. App. 3d 1126, 1128-1129, 214 Cal. Rptr. 734* ; *E. B. Wills Co. v. Superior Court (1976) 56 Cal. App. 3d 650, 654, 128 Cal. Rptr. 541]* . However, there are a number of situations in which an employee is authorized to bring a civil action against an employer, and, in those cases, a third party is not barred from seeking indemnity from the employer [*Chase Chem. Co. v. Hartford Accident & Indem. Co. (1984) 159 Cal. App. 3d 229, 238, 205 Cal. Rptr. 469]* .

Even though an employer is generally immune from liability for indemnity, a joint tortfeasor may assert the employer's comparative negligence as a partial defense. The trier of fact is then to determine the comparative negligence of the plaintiff and all tortfeasors, including the employer, and the nonemployer defendants are entitled to certain reductions based on workers' compensation benefits paid [*Associated Constr. & Eng'g Co. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 829, 840-847, 150 Cal. Rptr. 888, 587 P.2d 684]* and under Proposition 51 [*DaFonte v. Up-Right, Inc. (1992) 2 Cal. 4th 593, 596*]. It has been held that employer may not be joined as a cross defendant in the employee's third-party action by cross complaint for declaratory relief [*C.J.L. Constr., Inc. v. Universal Plumbing (1993) 18 Cal. App. 4th 376, 388-392, 22 Cal. Rptr. 2d 360* ; *but see Del Monte Corp. v. Superior Court (1982) 127 Cal. App. 3d 1049, 1053-1055, 179 Cal. Rptr. 855]* . However, nonemployer defendants may avail themselves of all discovery rights provided with regard to nonparties in order to extablish the employer's comparative negligence [*C.J.L. Constr., Inc. v. Universal Plumbing (1993) 18 Cal. App. 4th 376, 392, 22 Cal. Rptr. 2d 360]* .

For situations in which an employee may sue his or her employer, and for discussion and forms relating to actions against third-party tortfeasors by injured employees and their employers and the employer's insurers who have paid workers' compensation to the injured employees, see Ch. 577, *Workers' Compensation* .

[3] MICRA Limitation

MICRA, the Medical Injury Compensation Reform Act of 1975, limits the size of any award for noneconomic damages in an action against a health care provider based on professional negligence to $250,000 [*Civ. Code § 3333.2*]. The California Supreme Court has held that this limitation applies in an action for comparative indemnity against a health care provider [*Western S.S. Lines, Inc. v. San Pedro Peninsula Hosp. (1994) 8 Cal. 4th 100, 107-117, 32 Cal. Rptr. 2d 263, 876 P.2d 1062]* . Thus, if one tortfeasor attempts to recover comparative indemity from a concurrent tortfeasor who is a medical professional, the amount of indemnity that may be recovered on account of noneconomic damages paid to the plaintiff may not exceed the MICRA limit [*Western S.S. Lines, Inc. v. San Pedro Peninsula Hosp. (1994) 8 Cal. 4th 100, 116, 32 Cal. Rptr. 2d 263, 876 P.2d 1062]* .

This rule is based in part on the public-policy limitation to the right to indemnity [*see § 300.64[1]*]. The public policy behind MICRA, to control the cost of medical malpractice insurance, requires that an indemnitee not be allowed to impose liability on a medical professional beyond that which would have been recoverable by the plaintiff on the underlying claim [*Western S.S. Lines, Inc. v. San Pedro Peninsula Hosp. (1994) 8 Cal. 4th 100, 109-114, 32 Cal.*

Rptr. 2d 263, 876 P.2d 1062] .

The limitation is further supported by the rule that there can be no indemnity without liability. Indemnity is subject to whatever immunities or limitations on liability that would otherwise be available to the indemnitor in a direct actionbrought by the tort victim [*Western S.S. Lines, Inc. v. San Pedro Peninsula Hosp. (1994) 8 Cal. 4th 100, 114-115, 32 Cal. Rptr. 2d 263, 876 P.2d 1062]* .

The case in which the MICRA rule was enunciated involved liability imposed on the indemnitee under federal maritime law [*see* *Western S.S. Lines, Inc. v. San Pedro Peninsula Hosp. (1994) 8 Cal. 4th 100, 105 n.1, 32 Cal. Rptr. 2d 263, 876 P.2d 1062]* . The rule may have no or limited applicability with regard to liability imposed under California law. Under Proposition 51, joint tortfeasors are no longer jointly liable for noneconomic damages in any case, whether or not MICRA applies [*Civ. Code § 1431.2*; *see § 300.63[3]*]. Therefore, one tortfeasor will not have been required to pay another tortfeasor's share of noneconomic damages, and there will be no rights of indemnity with regard to noneconomic damages. For further discussion and consideration of possible exceptions to this rule with regard to certain settlements, see Levy, Golden, Sacks & Chapin, California Torts vol. 5, Ch. 74 (Matthew Bender).

MICRA is considered in detail in Ch. 414, *Physicians: Medical Malpractice* .

[4] Payments Made by Tortfeasor's Insurer

If a tortfeasor's insurer has made a payment to the underlying plaintiff on behalf of the insured, that tortfeasor, in seeking equitable indemnity from a co-tortfeasor, may only seek indemnity for those amounts actually paid out of the tortfeasor's own pocket, in proportion to the allocation of fault between the tortfeasors. The tortfeasor may not seek indemnity for the amounts paid by the insurer, although the tortfeasor may seek indemnity for the amount of any deductible that the tortfeasor was required to pay under the insurance policy. A contrary rule would essentially allow the tortfeasor seeking indemnity to benefit financially from the tortfeasor's own wrongdoing [*Miller v. Ellis (2002) 103 Cal. App. 4th 373, 380-382, 126 Cal. Rptr. 2d 667]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployer LiabilityContract LiabilityIndemnityTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnity

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§ 300.65 Collateral Estoppel

The right of a codefendant to seek comparative indemnity may be precluded by determinations of liability between the plaintiff and defendant. If a defendant is determined to have no liability to the plaintiff in pretrial proceedings, such as on a motion to dismiss or for summary judgment, rights of comparative indemnity against that defendant may be precluded by collateral estoppel. Collateral estoppel applies to a cross complaint for indemnity if (1) the issue decided in the prior adjudication was identical; (2) there is a final judgment on the merits; and (3) the party against whom collateral estoppel is raised was a party or in privity with a party to the prior adjudication [*Columbus Line, Inc. v. Gray Line Sight-Seeing Cos. Associated, Inc. (1981) 120 Cal. App. 3d 622, 628-631, 174 Cal. Rptr. 527]* .

In addition, collateral estoppel applies to bar a cross complaint for indemnity if the cross defendant was dismissed from the action based on facts deemed admitted from a failure of the plaintiff to answer a request for admissions [*Allis-Chalmers Corp. v. Superior Court (1985) 168 Cal. App. 3d 1155, 1157-1159, 214 Cal. Rptr. 615]* . However, collateral estoppel does not apply if the plaintiff's complaint and the defendant's cross complaint for comparative indemnity assert different theories of liability. In such a case, there has been no prior determination of the issue of liability on which comparative indemnity is sought [*Frank v. State of California (1988) 205 Cal. App. 3d 488, 491-495, 252 Cal. Rptr. 410]* .

Equitable principles may prohibit reliance on collateral estoppel "offensively," that is, to establish a right to indemnity, rather than "defensively," that is, to escape liability for indemnity. A defendant who is dismissed from an action after prevailing on a pretrial motion may not be able to rely on collateral estoppel to recover a settlement amount paid to the plaintiff in consideration of dismissal of appeal of the judgment of dismissal [*White Motor Corp. v. Teresinski (1989) 214 Cal. App. 3d 754, 763-764, 263 Cal. Rptr. 26]* .

For further discussion of res judicata and collateral estoppel, see Ch. 491, *Res Judicata* .

Legal Topics:

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

Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnity

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25-300 California Forms of Pleading and Practice--Annotated § 300.66

§ 300.66 Procedures for Obtaining Comparative Indemnity

A defendant tortfeasor may normally seek comparative equitable indemnity in one of two ways:

- Filing a cross complaint for declaratory relief concerning the right to indemnity against the indemnitor in the action brought by plaintiff, whether or not the indemnitor is already a party to the action [*Valley Circle Estates v. VTN Consol., Inc. (1983) 33 Cal. 3d 604, 612, 189 Cal. Rptr. 871, 659 P.2d 1160* ; *American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 607, 146 Cal. Rptr. 182, 578 P.2d 899* ; *see Code Civ. Proc. §§ 86(a)(7)(A), 428.10(b), 428.70, 1060*; see *§§ 300.190, 300.191*]; or

- Filing an independent action for indemnity against the indemnitor after conclusion of the original plaintiff's action [*County of Riverside v. Loma Linda Univ. (1981) 118 Cal. App. 3d 300, 315-316, 173 Cal. Rptr. 371]* .

Of the two, courts have recommended the cross complaint procedure as representing the more orderly and expeditious resolution of the controversy [*Shepard & Morgan v. Lee & Daniel, Inc. (1982) 31 Cal. 3d 256, 261, 182 Cal. Rptr. 351, 643 P.2d 968* ; *E. L. White, Inc. v. City of Huntington Beach (1978) 21 Cal. 3d 497, 506, 146 Cal. Rptr. 614, 579 P.2d 505]* . If a cross complaint is filed in the plaintiff's action, the trial court may postpone the trial of the indemnityquestion [*see Code Civ. Proc. § 1048(b)*] if it believes postponement is appropriate to avoid unduly complicating the plaintiff's suit [*American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 584, 146 Cal. Rptr. 182, 578 P.2d 899* ; *see also Paragon Real Estate Group of San Francisco, Inc. v. Hansen (2009) 178 Cal. App. 4th 177, 182-183, 100 Cal. Rptr. 3d 234* (error for trial court to sustain demurrer to cross-complaint filed by one defendant against another named defendant merely because apportionment issues could be resolved in plaintiff's action)]. If trial of the damages and liability issues is by jury, defense counsel should request that special verdicts [*see Code Civ. Proc. §§ 624, 625*] be submitted to the jury directing it to apportion fault or negligence on a percentage basis. For a discussion of general and special verdicts, see Ch. 322, *Juries and Verdicts* .

A third possible procedure for obtaining comparative indemnity is pursuant to a postjudgment motion for "contribution

among tortfeasors" under *Code Civ. Proc. § 878* [*see § 300.203*]. It is not clear, however, that this statute will be construed to refer to comparative indemnity rather than to the pre-*American Motorcycle* contribution doctrine requiring pro rata rather than comparative allocation of liability and loss [*see Code Civ. Proc. § 876(a)*]. For further discussion, see *§ 300.74*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsNegligenceDefensesComparative NegligenceProcedure

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25-300 California Forms of Pleading and Practice--Annotated § 300.67

§ 300.67 Accrual of Cause of Action

[1] In General

Except as otherwise provided by statute, a cause of action for comparative indemnity does not accrue until the party seeking indemnity has suffered actual loss through payment of either a judgment or settlement [*Valley Circle Estates v. VTN Consol., Inc. (1983) 33 Cal. 3d 604, 611, 189 Cal. Rptr. 871, 659 P.2d 1160* ; *E. L. White, Inc. v. City of Huntington Beach (1978) 21 Cal. 3d 497, 506, 146 Cal. Rptr. 614, 579 P.2d 505* ; *City of San Diego v. U.S. Gypsum Co. (1994) 30 Cal. App. 4th 575, 587-588, 35 Cal. Rptr. 2d 876* ; *see Carrier Corp. v. Detrex Corp. (1992) 4 Cal. App. 4th 1522, 1527-1529, 6 Cal. Rptr. 2d 565* (cause of action for indemnity under express or implied warranty in sales contract accrues when loss is incurred, not on date of delivery under *Com. Code § 2725*)]. Hence, the statute of limitations does not begin to run until that time, and any action for indemnity filed prior to that time would be premature. However, a cross complaint for declaratory relief concerning the cross complainant's right to total or partial equitable indemnity from the cross defendant for any judgment that may be rendered against the cross complainant on plaintiff's complaint may be filed in the plaintiff's action [*see § 300.66*]. Thus, a cross complaint for declaratory relief filed in the action giving rise to a right to indemnity is proper and always timely if the complaint was timely filed as to the cross complainant [*see Valley Circle Estates v. VTN Consol., Inc. (1983) 33 Cal. 3d 604, 611-612, 189 Cal. Rptr. 871, 659 P.2d 1160]* . This is true even though an action by the original plaintiff against the indemnitor may be barred by the statute of limitations [*see Watts v. Crocker-Citizens Nat'l Bank (1982) 132 Cal. App. 3d 516, 524, 183 Cal. Rptr. 304* ; *see also West v. Superior Court (1994) 27 Cal. App. 4th 1625, 1631, 34 Cal. Rptr. 2d 409]* .

[2] Against Public Entity

The date on which a cause of action for equitable or partial equitable indemnity against a public entity accrues is the date on which a defendant is served with the complaint giving rise to the defendant's claim for indemnity against the public entity [*Gov. Code § 901*]. The accrual date is not subject to a late discovery rule [*Greyhound Lines, Inc. v. County of Santa Clara (1986) 187 Cal. App. 3d 480, 484-488, 231 Cal. Rptr. 702]* . For discussion of whether a defendant seeking comparative indemnity from a public entity is required to file a claim with the entity, see *§ 300.68*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsProcedureStatutes of LimitationsAccrual of ActionsOccurrence of TortTortsPublic Entity LiabilityLiabilityClaim PresentationActual Notice

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25-300 California Forms of Pleading and Practice--Annotated § 300.68

§ 300.68 Claims Against Public Entity

A defendant who files a pleading for comparative indemnity from a public entity that is not previously a party to the plaintiff's action must first file a claim with the entity pursuant to *Gov. Code § 900 et seq.* [*Krainock v. Superior Court (1990) 216 Cal. App. 3d 1473, 265 Cal. Rptr. 715* ; *State of California v. Superior Court (1983) 143 Cal. App. 3d 754, 756-757, 761, 192 Cal. Rptr. 198]* . For a discussion of the procedure and forms for use in filing a claim against a public entity, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

If the public entity has rejected a claim and is a defendant in the plaintiff's action, no claim is required as a condition to seeking comparative indemnity from the public entity if all of the following conditions are met: (1) the public entity first pleads for comparative indemnity from the cotortfeasor, who then responds with its own pleading for comparative indemnity against the public entity; (2) the pleading for comparative indemnity arises out of the same transaction or event forming the basis of the plaintiff's claim against the public entity; and (3) the pleading seeks only to destroy or diminish the plaintiff's recovery under indemnity principles, but seeks no other affirmative relief from the public entity [*Krainock v. Superior Court (1990) 216 Cal. App. 3d 1473, 1478, 265 Cal. Rptr. 715]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsPublic Entity LiabilityLiabilityClaim PresentationGeneral Overview

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25-300 California Forms of Pleading and Practice--Annotated § 300.69

§ 300.69 Assignment of Indemnity Cause of Action by Tortfeasor

Even though actions for indemnity do not typically accrue for statute of limitations purposes until payment of a judgment or settlement [*see § 300.67[1]*], a tortfeasor may assign a cause of action for equitable indemnity for the contingent damages it faces as a result of litigation. In addition, as long as the assignment carries with it the burden to prove liability and damages, a court may properly award damages directly to an assignee of an indemnity cause of action [*Fleck v. Bollinger Home Corp. (1997) 54 Cal. App. 4th 926, 933, 935, 63 Cal. Rptr. 2d 407]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAssignmentGeneral OverviewTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnity

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25-300 California Forms of Pleading and Practice--Annotated § 300.70

§ 300.70 Statute of Limitations for Comparative Indemnity

[1] In General

The statute of limitations that applies to a cause of action for comparative indemnity is not entirely resolved. Prior to *American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899* [*see §§ 300.61[1], 300.61[2]*], courts had held that a right of implied indemnity rested on implied contract, and that therefore the two-year limitation period of *Code Civ. Proc. § 339(1)* applied, even if the cause of action giving rise to the liability was in tort [*Pacific Employers Ins. Co. v. Hartford Accident & Indem. Co. (9th Cir. 1955) 228 F.2d 365, 373* (construing California law); *see Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal. 2d 834, 843, 36 Cal. Rptr. 741, 389 P.2d 133* (involving implied indemnity between principal and agent for contract liability)]. Since *American Motorcycle*, many courts have ruled on when a cause of action for comparative indemnity accrues [*see § 300.67[1]*], but none has expressly held what statute of limitations applies.

In an equitable indemnity action brought by an insurance company against physicians being sued for medical malpractice, the California Supreme Court applied the general personal injury limitations period of former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 335.1*) [*see Preferred Risk Mut. Ins. Co. v. Reiswig (1999) 21 Cal. 4th 208, 213-218, 87 Cal. Rptr. 2d 187, 980 P.2d 895]* . In that case, however, both parties to the appeal conceded that the limitations period of former *Code Civ. Proc. § 340(3)* was the applicable limitations period, rather than the MICRA limitations period of *Code of Civil Proc. § 340.5* [*Preferred Risk Mut. Ins. Co. v. Reiswig (1999) 21 Cal. 4th 208, 213, 87 Cal. Rptr. 2d 187, 980 P.2d 895]* . Although the Supreme Court agreed, without providing analysis, that *Code Civ. Proc. § 340.5* was inapplicable to the case before it [*Preferred Risk Mut. Ins. Co. v. Reiswig (1999) 21 Cal. 4th 208, 213 n.2, 87 Cal. Rptr. 2d 187, 980 P.2d 895]* , the Court did not otherwise specifically address the general applicability of former *Code Civ. Proc. § 340(3)* to actions for equitable indemnity. The Court did hold, however, that a non-MICRA statute of limitations applied in an equitable indemnity action against a health care provider may be tolled for 90 days pursuant to the notice provisions of *Code Civ. Proc. § 364(d)*, if the claim for indemnity is based on the health care provider's professional negligence [*Preferred Risk Mut. Ins. Co. v. Reiswig (1999) 21 Cal. 4th 208, 218, 87 Cal. Rptr. 2d 187, 980 P.2d 895]* . MICRA is discussed in detail in Ch. 414, *Physicians: Medical Malpractice* .

In a case involving a federal employer's right to indemnity for personal injury to an employee, one court of appeal opinion assumed, without deciding, that the limitations period of former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 335.1*) applied. The court in that case stated that the statute of limitations applicable to a cause of action for indemnity may vary depending on the basis for the claim [*see Southern Pac. Transp. Co. v. Ohbayashi Am. Corp. (1983) 147 Cal. App. 3d 233, 238-239, 195 Cal. Rptr. 63]* . The dearth of authority on the point is probably due to the common practice of seeking comparative indemnity by cross complaint for declaratory relief in the underlying action before the cause of action even accrues [*see § 300.66*].

Prior to the decision in *Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 269 Cal. Rptr. 720, 791 P.2d 290* , one court held that a cause of action based on implied contractual indemnity was subject to the four-year limitation period of *Code Civ. Proc. § 337(1)* applicable to actions founded on a written contract [*Nomellini Constr. Co. v. Harris (1969) 272 Cal. App. 2d 352, 360-362, 77 Cal. Rptr. 361]* . The continued validity of this holding is questionable in light of *Bay Development*, in which the California Supreme Court held that implied contractual indemnity is a form of equitable indemnity, subject to the rules governing equitable indemnity and not those governing express contractual indemnity [*Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1033, 269 Cal. Rptr. 720, 791 P.2d 290* ; *see § 300.61[5]*; *but see Carrier Corp. v. Detrex Corp. (1992) 4 Cal. App. 4th 1522, 1530, 6 Cal. Rptr. 2d 565* (parties "conceded" that action for indemnity arising from breach of warranty in sales contract was governed by *Code Civ. Proc. § 337(1)*; unclear from facts whether right of indemnity was express or implied)].

[2] For Injury From Deficient Planning or Construction of Improvement to Realty

The four-year limitation period of *Code Civ. Proc. § 337.1* applies to a cause of action for comparative indemnity arising from liability based on a patent deficiency resulting from activities associated with construction of an improvement to real property [*Wagner v. State of California (1978) 86 Cal. App. 3d 922, 927-928, 150 Cal. Rptr. 489]* . The cause of action accrues at the time of substantial completion of the project [*Code Civ. Proc. § 337.1(a)*]. The limitation period applies to liability for wrongful death or personal injury, as well as to other damages [*Code Civ. Proc. § 337.1(a)(3)*].

[3] For Damages for Latent Deficiencies in Real Property

No action, including an action for indemnity, may be brought to recover damages from any person, or the surety of a person, who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, observation of construction, or construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement for any (1) latent deficiency in the design, specification, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property; or (2) injury to real or personal property arising out of any such latent deficiency [*Code Civ. Proc. § 337.15(a)*]. However, this statute of limitations applies only to suits for damages for the deficiency itself; it does not apply to actions, including actions for indemnity, arising from liability for wrongful death or personal injury against the persons specified in the statute [*Martinez v. Traubner (1982) 32 Cal. 3d 755, 758-761, 187 Cal. Rptr. 251, 653 P.2d 1046* ; *Grimmer v. Harbor Towers (1982) 133 Cal. App. 3d 88, 92-94, 183 Cal. Rptr. 634]* .

A cross complaint for indemnity may be filed pursuant to *Code Civ. Proc. § 428.10(b)* [*see Code Civ. Proc. § 428.70*] in an action that has been brought within the time period set forth in *Code Civ. Proc. § 337.15(a)* even though the cross complaint for indemnity is filed after expiration of the 10-year period [*Code Civ. Proc. § 337.15(c)*; *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 492, 213 Cal. Rptr. 256, 698 P.2d 159]* . Thus, a defendant who is timely sued under *Code Civ. Proc. § 337.15(a)* may, under *Code Civ. Proc. § 337.15(c)*, file a cross complaint for indemnity against a third party who could not otherwise be reached by a direct action for indemnity filed by the defendant, or by a direct suit for damages filed by the plaintiff [*Valley Circle Estates v. VTN Consol., Inc. (1983) 33 Cal. 3d 604, 609, 189 Cal. Rptr. 871, 659 P.2d 1160]* . The cross complaint for indemnity must arise from the same transaction, occurrence, or series of transactions or occurrences as the original action [*Code Civ. Proc. § 428.10(b)*; *see*

Code Civ. Proc. § 337.15(c)]. However, a cross complaint for indemnity is almost, by definition, transactionally related to the claims asserted by the plaintiff because the claim depends on the allegation that the same harm for which the plaintiff seeks to hold the defendant liable is attributable, in part, to the acts of the cross defendant. An indemnity action seeks to apportion among the parties the precise liability claimed by the plaintiff in the main action; therefore, it necessarily arises out of the same occurrence or series of occurrences as asserted by the plaintiff [*Time for Living, Inc. v. Guy Hatfield Homes/All Am. Dev. Co. (1991) 230 Cal. App. 3d 30, 39, 280 Cal. Rptr. 904]* .

If both the cross complainant and cross defendant performed work on the same development or improvement, their respective labors arise from the same transaction. There may be situations, however, in which work by each on the same property might be viewed as involving distinct developments or improvements. In such a case, there is no transactional relation, and one may not cross complain for indemnity against the other under *Code Civ. Proc. § 337.15(c)* [*Time for Living, Inc. v. Guy Hatfield Homes/All Am. Dev. Co. (1991) 230 Cal. App. 3d 30, 39-41, 280 Cal. Rptr. 904* ; *see Sandy v. Superior Court (1988) 201 Cal. App. 3d 1277, 1284, 247 Cal. Rptr. 677* (contractor sued for negligence in conversion of apartment building to condominiums cannot cross complain for indemnity against original architect of building, because original building and condominium conversion were different developments or improvements)]. Whether work was performed on the same development or improvement is essentially a question of fact [*Time for Living, Inc. v. Guy Hatfield Homes/All Am. Dev. Co. (1991) 230 Cal. App. 3d 30, 39-41, 280 Cal. Rptr. 904]* .

If the underlying action is not filed within the 10-year period specified by *Code Civ. Proc. § 337.15(a)*, the existence of a tolling agreement between the plaintiff and the defendant in the underlying action does not extend the time period for filing a cross-complaint for indemnity against a third party [*FNB Mortgage Corp. v. Pacific Gen. Group (1999) 76 Cal. App. 4th 1116, 1130-1131, 90 Cal. Rptr. 2d 841]* .

In addition, the 10-year period is not subject to equitable tolling if a defendant or cross-defendant promises to make repairs [*Lantzy v. Centex Homes (2003) 31 Cal. 4th 363, 367, 2 Cal. Rptr. 3d 655, 73 P.3d 517* ; *FNB Mortgage Corp. v. Pacific Gen. Group (1999) 76 Cal. App. 4th 1116, 1131-1134, 90 Cal. Rptr. 2d 841]* . However, a defendant may be equitably estopped from asserting the statute of limitations in the following circumstances [*Lantzy v. Centex Homes (2003) 31 Cal. 4th 363, 384, 2 Cal. Rptr. 3d 655, 73 P.3d 517]* :

- The defendant induces the plaintiff to refrain from filing suit within the 10-year period with promises of repair;
- The plaintiff reasonably relies on these promises;
- The representations prove false after the limitations period has expired; and
- The plaintiff proceeds diligently once the truth is known.

The 10-year limitations period also does not apply to cases involving willful misconduct or fraudulent concealment [*Code Civ. Proc. § 337.15(f)*]. In this context, the term "willful misconduct" includes not only intentional wrongdoing, but also negligence that constitutes reckless disregard for the rights of others [*Felburg v. Don Wilson Builders (1983) 142 Cal. App. 3d 383, 391, 191 Cal. Rptr. 92*]. This willful-misconduct exemption may be applied to cross-complaints for indemnity, and a cross-complainant may incorporate by reference the allegations of willful misconduct found in the complaint without specifically repeating those allegations in the cross-complaint [*Pine Terrace Apartments, L.P. v. Windscape, LLC (2009) 170 Cal. App. 4th 1, 4, 87 Cal. Rptr. 3d 630*].

A general contractor cannot avoid application of this willful misconduct exception by claiming to be ignorant of misconduct committed by subcontractors, at least if the evidence supports a reasonable inference that the contractor knew, or should have known through reasonable oversight of the construction, that subcontractors were engaging in willful misconduct that would result in a latent defect [*Acosta v. Glenfed Dev. Corp. (2005) 128 Cal. App. 4th 1278,*

1296-1302, 28 Cal. Rptr. 3d 92].

Because willful misconduct is an exception to the affirmative defense of the 10-year limitations period, the plaintiff bears the burden of alleging and proving that misconduct [*Acosta v. Glenfed Dev. Corp. (2005) 128 Cal. App. 4th 1278, 1293, 28 Cal. Rptr. 3d 92]* , and if the 10-year limitations period appears to apply, the pleadings must allege fraud or willful misconduct in order to prevent *Code Civ. Proc. § 337.15* from barring commencement of the action [*see Felburg v. Don Wilson Builders (1983) 142 Cal. App. 3d 383, 391, 191 Cal. Rptr. 92*].

Under *Code Civ. Proc. § 356*, if the commencement of an action is stayed by injunction or statutory prohibition, the time limited for the commencement of the action does not include the time of the injunction or statutory prohibition. However, because *Code Civ. Proc. § 337.15* is technically a statute of repose, not a statute of limitations, *Code Civ. Proc. § 356* does not extend the 10-year period, at least if theinjunction or statutory prohibition ends prior to the running of the 10-year period [*Inco Dev. Corp. v. Superior Court (2005) 131 Cal. App. 4th 1014, 1021-1022, 31 Cal. Rptr. 3d 872* (bankruptcy stay that ended prior to expiration 10-year period imposed by *Code Civ. Proc. § 337.15* did not extend period)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawConstruction LawContractsTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsProcedureStatutes of LimitationsGeneral Overview

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§ 300.71 Attorney's Fees and Costs

[1] Prevailing Indemnitee

After reviewing the evidence in the principal case, the court may, on motion, award attorney's fees to a person who prevails on a claim for implied indemnity if the court finds that: (1) the indemnitee, through the tort of the indemnitor, has been required to act in the protection of the indemnitee's interest by bringing anaction against or defending an action by a third person; (2) the indemnitor was properly notified of the demand to bring the action or provide the defense and did not avail itself of the opportunity to do so; and (3) the trier of fact determined that the indemnitee was without fault in the principal case that is the basis for the action in indemnity or that the indemnitee had a final judgment entered in his or her favor granting a summary judgment, a nonsuit, or a directed verdict [*Code Civ. Proc. § 1021.6*; *see Bear Creek Planning Comm. v. Title Ins. & Trust Co. (1985) 164 Cal. App. 3d 1227, 1244-1246, 1248-1249, 211 Cal. Rptr. 172 , disapproved on other grounds, Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1032 n.12, 269 Cal. Rptr. 720, 791 P.2d 290]* . For forms for a motion and order under *Code Civ. Proc. § 1021.6* for attorney's fees, see *§§ 300.194* and *300.195*.

If a faultless defendant prevails in the underlying action, and therefore does not have occasion to prevail on a cross complaint for indemnity against the party at fault, the defendant is still entitled to seek attorney's fees under *Code Civ. Proc. § 1021.6*. In such a case, the defendant is deemed to have "prevailed on a claim for indemnity" [*Uniroyal Chem. Co. v. American Vanguard Corp. (1988) 203 Cal. App. 3d 285, 295-296, 249 Cal. Rptr. 787* ; *see Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1026-1027, 269 Cal. Rptr. 720, 791 P.2d 290]* . This rule presupposes that a valid claim for indemnity would have existed, however. A faultless defendant who cannot show a right to indemnification from the party at fault cannot recover attorney's fees under *Code Civ. Proc. § 1021.6* [*Watson v. Department of Transp. (1998) 68 Cal. App. 4th 885, 890, 80 Cal. Rptr. 2d 594* (rejecting claim that faultless driver forced to defend action brought by another driver had right to indemnity from co-defendant Caltrans)].

The reference in *Code Civ. Proc. § 1021.6* to the "principal case" does not necessarily mean the original action brought by a plaintiff. Instead, this reference is to the action that caused the innocent indemnitee to defend itself and thereby incur attorney fees, as distinguished from the indemnitee's action for indemnity in which the *Code Civ. Proc. § 1021.6*

fees are sought [*Wilson, McCall & Daoro v. American Qualified Plans, Inc. (1999) 70 Cal. App. 4th 1030, 1036, 83 Cal. Rptr. 2d 192]* . For example, in one case, the "principal case" for purposes of *Code Civ. Proc. § 1021.6* was a cross complaint brought against an innocent indemnitee by a defendant in a tort action in which the innocent indemnitee was not otherwise named as a party. The court of appeal in that case ruled that the innocent indemnitee had a right to seek fees under *Code Civ. Proc. § 1021.6* from another defendant in the original tort action who had refused to defend the innocent indemnitee when defense of the cross complaint had been tendered [*Wilson, McCall & Daoro v. American Qualified Plans, Inc. (1999) 70 Cal. App. 4th 1030, 1036-1037, 83 Cal. Rptr. 2d 192* (noting that cross complaint is separate pleading, based on independent cause of action)].

Even if the statutory requirements are not all met, attorney's fees may be awarded under the "tort of another" doctrine to a cross complainant who receives total indemnity from a cross defendant on a cross complaint for indemnity. Under this doctrine, one who has been required by the tort of another to act in the protection of his or her interests by bringing or defending an action against a third person is entitled to recover compensation for attorney's fees incurred as an element of damages, not as attorney's fees as such [*Prentice v. North Am. Title Guar. Corp (1963) 59 Cal. 2d 618, 620, 30 Cal. Rptr. 821, 381 P.2d 645* ; *Heckert v. MacDonald (1989) 208 Cal. App. 3d 832, 836-838, 256 Cal. Rptr. 369]* . For further discussion of the "tort of another" doctrine, see *Ch. 177, Damages, § 177.40 et seq.*

Agency law also provides for a right of attorney's fees to an agent who is entitled to indemnity from a principal. Unless otherwise agreed, a principal must indemnify an agent who is not barred by the illegality of his or her conduct for the expense of defending an action brought by a third party because of the agent's authorized conduct. The right to indemnity for costs and attorney's fees exists whether or not either principal or agent is found to be liable to the third party [*Fidelity Mortgage Tr. Serv., Inc. v. Ridgegate E. Homeowners Ass'n (1994) 27 Cal. App. 4th 503, 509-511, 32 Cal. Rptr. 2d 521* ; *see* Restatement (Second) of Agency § 439]. Further, the agent need not have tendered its defense of the action as an absolute prerequisite to indemnification. The agent's failure to notify the principal merely requires that the agent prove that he or she made a reasonable defense [*Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal. 2d 834, 844, 36 Cal. Rptr. 741, 389 P.2d 133* ; *Fidelity Mortgage Tr. Serv., Inc. v. Ridgegate E. Homeowners Ass'n (1994) 27 Cal. App. 4th 503, 511, 32 Cal. Rptr. 2d 521* ; *see* Restatement (Second) of Agency § 438].

Recovery of costs by a prevailing party is authorized by *Code Civ. Proc. § 1032(b)*. For the meaning of "prevailing party," a discussion of costs, and forms for use in securing an award of costs, see *Ch. 174, Costs and Attorney's Fees, § 174.10 et seq.*

[2] Prevailing Indemnitor on Motion for Summary Judgment or Nonsuit

In a proceeding for indemnity or contribution in any civil action, the court, on motion of the defendant or cross defendant made prior to the discharge of the jury or entry of judgment, must, at the time of granting the defendant's or cross defendant's motion for summary judgment, motion for directed verdict, motion for judgment under *Code Civ. Proc. § 631.8*, or nonsuit dismissing the moving party other than the plaintiff, petitioner, cross complainant, or intervenor, or at a later time set forth by Judicial Council rule, determine whether or not the plaintiff, petitioner, cross complainant, or intervenor brought the proceeding with reasonable cause and in the good faith belief that there was a justiciable controversyunder the facts and law that warranted the filing of the complaint, petition, cross complaint, or complaint in intervention. If the court determines that the proceeding was not brought in good faith and with reasonable cause, the amount of defense costs reasonably and necessarily incurred by the party or parties opposing the proceeding must be determined, and the court must render judgment in favor of that party or parties in that amount, in addition to those costs normally awarded to the prevailing party [*Code Civ. Proc. § 1038(a), (c), (d)*]. An award of costs, however, may be made only on notice contained in a party's papers and an opportunity to be heard [*Code Civ. Proc. § 1038(a)*]. Once it is determined that the action was not brought in good faith and with reasonable cause, *Code Civ. Proc. § 1038* mandates that the amount of defense costs be determined and awarded to the moving party [*see Dudman v. State of California (1983) 145 Cal. App. 3d 617, 620, 193 Cal. Rptr. 500* (decided before 1989 amendment to *Code Civ. Proc. § 1038(a)* that added requirement of notice and opportunity to be heard)].

"Defense costs" include reasonable attorney's fees, expert-witness fees, and the expenses of services of experts, advisers, and consultants in defense of the proceeding, if those costs are reasonably and necessarily incurred in defending the proceeding [*Code Civ. Proc. § 1038(b)*].

A party making a motion for defense costs waives any right to seek damages for malicious prosecution, but a failure to make the motion is not to be deemed a waiver of the right to pursue a malicious prosecution action [*Code Civ. Proc. § 1038(c)*]. For a discussion and forms of complaints for malicious prosecution, see Ch. 357, *Malicious Prosecution and Abuse of Process* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewTortsNegligenceDefensesComparative NegligenceMultiple PartiesContributionTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsProcedureMultiple DefendantsContributionGeneral OverviewTortsProcedureMultiple DefendantsIndemnityContractual Indemnity

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§ 300.72 Apportionment of Shortfall

A shortfall with regard to who must pay the plaintiff's damages may be created if one or more tortfeasors is "absent" from the litigation in some sense. Most commonly, a shortfall results from the economic absence of an insolvent or judgment-proof defendant [*see, e.g., Paradise Valley Hosp. v. Schlossman (1983) 143 Cal. App. 3d 87, 93, 191 Cal. Rptr. 531]* . However, a tortfeasor may also be beyond the personal jurisdiction of the court. A pretrial good faith settlement may also create a shortfall if the settling party settled for less than the amount for which it would have been liable under the trier of fact's determination of comparative fault and damages [*see, e.g., Espinoza v. Machonga (1992) 9 Cal. App. 4th 268, 270-277, 11 Cal. Rptr. 2d 498* ; *Sagadin v. Ripper (1985) 175 Cal. App. 3d 1141, 1173-1174, 221 Cal. Rptr. 675]* .

Prior to the enactment of the Fair Responsibility Act of 1986 [*Civ. Code § 1431.1 et seq.*; *see § 300.63[3]*], the following rules were developed to determine the effect of a shortfall: (1) if one tortfeasor defendant is insolvent, that tortfeasor's shortfall is shared proportionately by the solvent defendants according to their comparative fault as though the insolvent person had originally not participated in the action [*Paradise Valley Hosp. v. Schlossman (1983) 143 Cal. App. 3d 87, 93, 191 Cal. Rptr. 531]* ; (2) although a contributorily negligent plaintiff's recovery is reduced by the amount of his or her fault, his or her recovery is not further reduced to share in any shortfall resulting from the insolvency of a joint tortfeasor defendant; and (3) a cross defendant joint tortfeasor's contributory share is proportionately increased to compensate for the shortfall along with the other tortfeasors, even though that cross defendant is also a plaintiff [*Ambriz v. Kress (1983) 148 Cal. App. 3d 963, 969, 196 Cal. Rptr. 417* (recovery of plaintiff who was 20-percent negligent is not reduced to account for insolvency of one defendant; however, her proportionate responsibility for damages suffered by husband and son as proportionately increased to account for share of insolvent defendant's liability to them)]. These rules have been held to apply as well to a shortfall caused by the good faith settlement of a cotortfeasor. The shortfall was shared by the other cotortfeasors in proportion to their comparative fault [*Lyly & Sons Trucking Co. v. State of California (1983) 147 Cal. App. 3d 353, 355, 357-359, 195 Cal. Rptr. 116]* . For a discussion of the effect of a good faith settlement by a cotortfeasor, see *§ 300.73[3]*.

These rules have been modified by the Fair Responsibility Act of 1986 (*Civ. Code § 1431 et seq.*) [*see § 300.63[3]*], also known as Proposition 51, at least to the extent of requiring that the percentage of noneconomic damages assessed

against a joint tortfeasor according to his or her fault be the several, that is, separate, liability of that defendant and not the liability of his or her codefendants. Hence, on the insolvency of a cotortfeasor judgment debtor, for example, any shortfall in the noneconomic damages assessed against that tortfeasor at trial will not be apportioned among the cotortfeasor judgment debtors. On the other hand, any shortfall in the economic damages for which the insolvent tortfeasor is liable will continue to be apportioned among the cotortfeasor judgment debtors according to their proportionate liability [*see Civ. Code § 1431*]. Thus, under the Act, plaintiff will be able to recover from the solvent defendants the full amount of economic damages to which he or she is entitled under the joint and several judgment, but will have to suffer the full loss of the noneconomic damages awarded against an insolvent defendant. For the effect of a tortfeasor's good faith settlement on the liability of a cotortfeasor judgment debtor for the same tort, see *§ 300.73[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesComparative NegligenceMultiple PartiesGeneral OverviewTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsProcedureMultiple DefendantsGeneral Overview

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§ 300.73 Good-Faith Settlement or Dismissal of Fewer Than All Tortfeasors

[1] General Considerations

In multiparty cases in which settlement is contemplated with fewer than all defendants, the parties must consider the impact of the settlement on theirrespective rights to further recovery, and the potential for other liabilities. These considerations must also take into account the modification of the doctrine by Proposition 51, the Fair Responsibility Act of 1986 [*Civ. Code § 1431.1 et seq.*; *see § 300.63[3]*].

Code Civ. Proc. § 877 provides the basic framework for handling settlements in multiparty litigation [*see American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 604, 146 Cal. Rptr. 182, 578 P.2d 899* (extending statute to encompass newly created remedy of comparative indemnity)]. Under this statute, a release, a dismissal with or without prejudice, or a covenant not to sue given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors, has the following effects: (1) it does not discharge any nonsettling defendant from liability unless its terms so provide [*Code Civ. Proc. § 877(a)*]; (2) the value of the settlement is credited against any judgment entered after trial against the nonsettling defendants [*Code Civ. Proc. § 877*; *see § 300.73[3]*]; and (3) the settling defendant is no longer subject to claims for comparative indemnity from the nonsettling defendants [*Code Civ. Proc. § 877(b)*; *see § 300.73[4]*].

These results depend on a judicial determination that the settlement was entered into in "good faith" [*Code Civ. Proc. §§ 877, 877.6*; *see § 300.73[5]*]. Any party to the action is entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more defendants [*Code Civ. Proc. § 877.6*; see *§ 300.73[7]*]. This language limits the scope of the statute to settlements involving a plaintiff or other claimant. Settlements entered into among tortfeasors apportioning their own liability are outside of the statute, and a judicial determination that such a settlement is in good faith does not give it the effect otherwise provided by *Code Civ. Proc. § 877* [*Arizona Pipeline Co. v. Superior Court (1994) 22 Cal. App. 4th 33, 42, 27 Cal. Rptr. 2d 118* (settlement of all but one tortfeasor in declaratory relief action brought to determine their respective liabilities and indemnity rights did not affect nonsettling tortfeasor's indemnity rights)].

Before the passage of Proposition 51 in 1986, the plaintiff could take advantage of the defendants' joint and several liability for all damages, and recover the amount by which the damages exceeded any settlements from any solvent defendant who was found liable at trial, regardless of that defendant's comparative share of liability. Comparative indemnity rights then existed only against or among the nonsettleing defendants, any recourse against the settling defendants for indemnity having been eliminated by the good faith settlement.

Although *Code Civ. Proc. §§ 877* and *877.6* still provide for this system, its operation has been significantly affected by Proposition 51's elimination of joint and several liability for noneconomic damages [*see Civ. Code § 1431.2*]. In actions covered by Proposition 51, plaintiffs who settle with one joint tortfeasor can no longer make up the difference between the compensable noneconomic damages and settlement amounts from other joint tortfeasors after trial because a party against whom a judgment is entered will only be severally liable for his or her comparative share of noneconomic damages [*see Civ. Code § 1431.2*]. Further, the amount by which a judgment against the nonsettling defendants is reduced on account of a settlement does not include amounts paid on account of the settling defendant's several-only liability for noneconomic damages [*Espinoza v. Machonga (1992) 9 Cal. App. 4th 268, 271-277, 11 Cal. Rptr. 2d 498]* . This issue is discussed in *§ 300.73[3][e]*.

Finally, although Proposition 51 does not affect a settling defendant's protection from indemnity claims, it does raise issues concerning what indemnity rights a settling defendant may retain against nonsettling defendants. A settling defendant may not be able to obtain indemnity to the extent that the settlement is for the plaintiff's noneconomic damages. This issue is discussed in *§ 300.73[4][b]*.

A judicial determination that a settlement is not in good faith does not necessarily invalidate the settlement unless the settlement agreement itself so provides [*see Killian v. Millard (1991) 228 Cal. App. 3d 1601, 1607 n.2, 279 Cal. Rptr. 877* ; *Rankin v. Curtis (1986) 183 Cal. App. 3d 939, 949-951, 228 Cal. Rptr. 753* (Staniforth, Acting P.J., dissenting); *see also Skulnick v. Roberts Express, Inc. (1992) 2 Cal. App. 4th 884, 887, 3 Cal. Rptr. 2d 597* (example of settlement agreement contingent on finding of good faith)]. Rather, the effect is that the settling defendants will not be afforded protection from subsequent indemnity claims by nonsettling defendants [*see Killian v. Millard (1991) 228 Cal. App. 3d 1601, 1607 n.2, 279 Cal. Rptr. 877]* .

[2] Scope of Code Civ. Proc. §§ 877 and 877.6

By its terms, *Code Civ. Proc. § 877* applies to tortfeasors claimed to be liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights. It does not apply to co-obligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves, and to contract debts if the contract was made before January 1, 1988 [*Code Civ. Proc. § 877(c), (d)*]. *Code Civ. Proc. § 877.6* applies to "joint tortfeasors or co-obligors on a contract debt" [*Code Civ. Proc. § 877.6(a)(1)*]. The statutes apply not only to personal injury actions, but to tort actions arising out of commercial transactions as well [*Kohn v. Superior Court (1983) 142 Cal. App. 3d 323, 332, 191 Cal. Rptr. 78]* .

"Tortfeasors liable for the same tort," as used in *Code Civ. Proc. § 877*, encompasses joint, concurrent, and successive tortfeasors as those terms have traditionally been understood. The broader term was designed to eliminate any distinctions among them that might exist [*see Mesler v. Bragg Mgmt. Co. (1985) 39 Cal. 3d 290, 302, 216 Cal. Rptr. 443, 702 P.2d 601* ; Turcon *Construction, Inc. v. Norton-Villiers Ltd. (1983) 139 Cal. App. 3d 280, 283, 188 Cal. Rptr. 580* (construing "joint tortfeasors" as used in *Code Civ. Proc. § 877.6* to mean joint, concurrent, and successive tortfeasors); *see also May v. Miller (1991) 228 Cal. App. 3d 404, 409-410, 278 Cal. Rptr. 341]* .

An insurer that provides coverage to an alleged or actual tortfeasor steps into the shoes of the insured and therefore is entitled to no greater rights than the insured and is subject to the same defenses that may be asserted against the insured. Thus, an insurer that settles a claim asserted against its insured stemming from allegedly actionable conduct by the insured cannot pursue equitable indemnity from other tortfeasors in the action who also settle in good faith with the

plaintiff [*Mid-Century Ins. Exch. v. Daimler-Chrysler Corp. (2001) 93 Cal. App. 4th 310, 315-316, 112 Cal. Rptr. 2d 880]* .

"Co-obligors on a contract debt" does not encompass primary insurers of the same risk because their respective obligations are not joint, but rather arise out of separate contracts. Therefore, a settlement paid by one insurer, whether or not it is determined to be in good faith, cannot defeat the equitable contribution rights of another insurer under insurance law principles [*Herrick Corp. v. Canadian Ins. Co. (1994) 29 Cal. App. 4th 753, 759-761, 34 Cal. Rptr. 2d 844* ; *Hartford Accident & Indem. Co. v. Superior Court (1994) 29 Cal. App. 4th 435, 440 n.4, 34 Cal. Rptr. 2d 520]* . There is a division of authority as to whether the term includes primary and excess insurers of the same risk [*compare Pacific Estates, Inc. v. Superior Court (1993) 13 Cal. App. 4th 1561, 1571, 17 Cal. Rptr. 2d 434* ; *with Diamond Heights Homeowners Ass'n v. National Am. Ins. Co. (1991) 227 Cal. App. 3d 563, 582, 277 Cal. Rptr. 906]* . In addition, *Code Civ. Proc. § 877.6* is not the correct mechanism for a workers' compensation insurer seeking to protect its subrogation rights to seek a determination that a settlement entered into by an injured employee and a third-party tortfeasor was made in bad faith [*BaileyReliance Ins. Co. (2000) 79 Cal. App. 4th 449, 457-458, 94 Cal. Rptr. 2d 149]* .

Code Civ. Proc. § 877 makes no distinction between the primary and secondary or vicarious liability of tortfeasors. Consequently, as in the case of concurrent tortfeasors, a nonsettling vicariously liable defendant is not released from liability to the plaintiff by a settlement between the plaintiff and the directly liable defendant [*see Lopez v. Blecher (1983) 143 Cal. App. 3d 736, 738-740, 192 Cal. Rptr. 190* (settlement by primarily liable driver of vehicle that struck plaintiff does not terminate action against vicariously liable owner of another vehicle); *Mayhugh v. County of Orange (1983) 141 Cal. App. 3d 763, 764-767, 190 Cal. Rptr. 537* (settlement by employee does not terminate action against vicariously liable employer)]. Similarly, a plaintiff may proceed against a parent corporation as the "alter ego" of its subsidiary after settling with the subsidiary [*Mesler v. Bragg Mgmt. Co. (1985) 39 Cal. 3d 290, 297-306, 216 Cal. Rptr. 443, 702 P.2d 601]* .

Code Civ. Proc. § 877.6 will apply in an action in which the injured party has actually named the tortfeasors as defendants, even if equitable indemnity claims are not pursued [*Bob Parrett Constr., Inc. v. Superior Court (2006) 140 Cal. App. 4th 1180, 1187, 45 Cal. Rptr. 3d 250]* . Moreover, there is no requirement that there must have even been a single lawsuit in which the injured party sued the joint tortfeasors [*Bob Parrett Constr., Inc. v. Superior Court (2006) 140 Cal. App. 4th 1180, 1187, 45 Cal. Rptr. 3d 250]* .

If an indemnity action is brought in California following settlement of an underlying tort action brought in another state, a good faith determination of the out-of-state settlement may be made in the California indemnity action pursuant to *Code Civ. Proc. §§ 877* and *877.6* [*Nutrition Now, Inc. v. Superior Court (2003) 105 Cal. App. 4th 209, 213, 129 Cal. Rptr. 2d 266]* .

Code Civ. Proc. §§ 877 and *877.6* apply only to settlements entered into before a verdict or judgment has been reached in the case. The statutes have no application to a settlement or compromise reached after a judgment has been entered [*Jhaveri v. Teitelbaum (2009) 176 Cal. App. 4th 740, 750, 98 Cal. Rptr. 3d 268*]. Even without application of these statutes, however, through application of equitable principles, if one joint tortfeasor satisfies a judgment in full or in part, the judgment creditor cannot obtain a double recovery by collecting the same amounts from another of the joint tortfeasors [*Jhaveri v. Teitelbaum (2009) 176 Cal. App. 4th 740, 753-754, 98 Cal. Rptr. 3d 268*].

[3] Effect on Judgment Against Nonsettling Defendants

[a] Generally

Except as modified by the Equal Responsibility Act of 1986 (Proposition 51) [*see Civ. Code § 1431.1-1431.5*; *see also § 300.73[3][e]*], a release, dismissal, or covenant not to sue or to enforce judgment, given in good faith before verdict

or judgment by an injured party to one or more of a number of tortfeasors claimed to be liable for the same tort, reduces the injured party's claims against the other tortfeasors by the amount stipulated in the settlement or by the amount of consideration paid, whichever is greater [*Code Civ. Proc. § 877(a)*]. The reduction of plaintiff's claim against the other tortfeasors is not measured by the settling tortfeasor's proportionate responsibility for the injury but by the amount stipulated or paid [*American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 604, 146 Cal. Rptr. 182, 578 P.2d 899]* . A stipulation of the amount that the settling defendant actually owes is not the same as a stipulation of the amount of the consideration paid in settlement, nor is it a stipulation of the amount to be set off against the claims of the other defendants [*Federal Sav. & Loan Ins. Corp. v. Butler (9th Cir. 1990) 904 F.2d 505, 513* ; *see Arbuthnot v. Relocation Realty Serv. Corp. (1991) 227 Cal. App. 3d 682, 688, 278 Cal. Rptr. 135* (amount of stipulated default judgment that was not to be enforced pursuant to settlement agreement is not stipulated amount by which liability of other defendants is to be reduced)].

The reduction of an award against other tortfeasors under *Code Civ. Proc. § 877(a)* is normally applied in one of two ways: either by the jury after evidence is submitted to it of the settlement, with instructions to reduce the award by the amount paid in settlement; or by the court if the settlement is not presented to the jury [*May v. Miller (1991) 228 Cal. App. 3d 404, 409, 278 Cal. Rptr. 341]* . If thejury is informed of the settlement but not specifically instructed to reduce its judgment against nonsettling tortfeasors, the court has broad discretion to apply *Code Civ. Proc. § 877(a)* to reduce the judgment by the amount of the settlement [*May v. Miller (1991) 228 Cal. App. 3d 404, 410-411, 278 Cal. Rptr. 341]* . If the plaintiff is found to have been comparatively negligent, the total damages are first reduced by the percentage of fault attributed to the plaintiff; then the reduction for the settlement is made [*Lemos v. Eichel (1978) 83 Cal. App. 3d 110, 118-119, 147 Cal. Rptr. 603]* . The court is not to reduce the amount of the settlement to be credited against any future judgment at the good-faith settlement confirmation hearing based on its estimation of comparative fault of the settling and nonsettling defendants [*Erreca's v. Superior Court (1993) 19 Cal. App. 4th 1475, 1500-1502, 24 Cal. Rptr. 2d 156]* .

If the fact and amount of a settlement credit are undisputed and the action against a nonsettling defendant is adjudicated by an arbitrator, the credit need not be applied by the arbitrator and may be applied by a trial court when rendering judgment. While the better practice would be to secure an offset credit before the judgment is issued, if the offset is greater than the amount of the arbitrator's award and the defendant has not previously brought the credit to the attention of the trial court, the nonsettling defendant may use a motion to compel acknowledgment of satisfaction of judgment under *Code Civ. Proc. § 724.050(d)* to effectively achieve the offset [*Wade v. Schrader (2008) 168 Cal. App. 4th 1039, 1048-1049, 85 Cal. Rptr. 3d 865]* .

The "claims" to which an offset may be applied are claims of liability for damages. The term does not extend to costs that may be awarded to a prevailing party after a claim for liability has been adjudicated, unless the plaintiff's agreement with the settling tortfeasor specifically covers the costs of pursuing the action against the remaining defendant [*Reed v. Wilson (1999) 73 Cal. App. 4th 439, 444-446, 86 Cal. Rptr. 2d 510]* .

An offset credit may be applied only for settlement money actually paid to plaintiff by settling defendants and should not be applied for settlement amounts plaintiff has not yet received and may never receive. However, the trial court should reserve jurisdiction to calculate and award offsets in the event that plaintiff is paid additional settlement amounts in the future [*Garcia v. Duro Dyne Corp. (2007) 156 Cal. App. 4th 92, 100-101, 67 Cal. Rptr. 3d 100]* .

If a settling tortfeasor paid more than it would have been required to pay under the jury's apportionment of fault and finding of damages, the entire amount of the settlement is still deducted from the judgment against the other defendants. The balance of the judgment is apportioned to the other defendants according to the jury's apportionment of comparative fault [*Bracket v. State of California (1986) 180 Cal. App. 3d 1171, 1175-1177, 226 Cal. Rptr. 1]* , and the settling tortfeasor is entitled to indemnity from the nonsettling defendants for the amount of its overpayment [*see American Bankers Ins. Co. v. Avco-Lycoming Div. (1979) 97 Cal. App. 3d 732, 736, 159 Cal. Rptr. 70]* . Furthermore, a settling tortfeasor who overpays may assign its comparative indemnity claims to the plaintiff. This may result in the

plaintiff's recovery of more than the total amount of damages awarded in the litigation, but does not expose the nonsettling defendants to any greater degree of liability [*Bush v. Superior Court (1992) 10 Cal. App. 4th 1374, 1385-1386, 13 Cal. Rptr. 2d 382]* . A nonsettling defendant is entitled to a setoff for a settlement under *Code Civ. Proc. § 877*, even if the trier of fact determines that the settling defendant had no fault for the plaintiff's injuries [*McComber v. Wells (1999) 72 Cal. App. 4th 512, 517, 85 Cal. Rptr. 2d 376]* .

If a nonsettling defendant has countersued the plaintiff and both parties are found liable, as, for example, if both parties are found liable and awarded damages to each other for breach of contract, the proper procedure is for the court to offset the jury's damage awards against each other, just as if there had been no settlement, and then to apply the settlement credit toward any amount that the nonsettling defendant might still owe [*Brawley v. J.C. Interiors, Inc. (2008) 161 Cal. App. 4th 1126, 1134, 74 Cal. Rptr. 3d 832*].

In the case of a structured settlement calling for future periodic payments by a settling tortfeasor, the injured party's award is reduced by the future payments discounted to their present cash value, not by the total dollar amount of the future payments [*Franck v. Polaris E-Z Go Div. of Textron, Inc. (1984) 157 Cal. App. 3d 1107, 1116-1121, 204 Cal. Rptr. 321* ; *see Seymour v. Summa Vista Cinema, Inc. (9th Cir. 1987) 809 F.2d 1385, 1389, 1390* (deduction of discounted value of note taken in settlement with joint tortfeasor as proper when discount reflects probability of nonpayment; also stating that federal and California law reach same result)].

[b] Valuing and Crediting Nonmonetary Consideration

If a settlement involves nonmonetary consideration, the consideration must be valued and offset against any judgment against other defendants [*Armstrong World Indus., Inc. v. Superior Court (1989) 215 Cal. App. 3d 951, 955-957, 264 Cal. Rptr. 39]* . Nonmonetary consideration that has been found subject to evaluation and credit includes assignment of the settling defendant's indemnity rights against the nonsettling defendants [*Regan Roofing Co. v. Superior Court (1994) 21 Cal. App. 4th 1685, 1711, 27 Cal. Rptr. 2d 62* ; *Erreca's v. Superior Court (1993) 19 Cal. App. 4th 1475, 1496, 24 Cal. Rptr. 2d 156* ; *Bush v. Superior Court (1992) 10 Cal. App. 4th 1374, 1380-1381, 13 Cal. Rptr. 2d 382]* ; assignment of a settling defendant's rights against its insurer [*Southern Cal. Gas Co. v. Superior Court (1986) 187 Cal. App. 3d 1030, 1034-1037, 232 Cal. Rptr. 320]* ; assignment of rights against an employer [*Arbuthnot v. Relocation Realty Serv. Corp. (1991) 227 Cal. App. 3d 682, 688-690, 278 Cal. Rptr. 135]* ; and waiver of litigation costs [*Armstrong World Indus., Inc. v. Superior Court (1989) 215 Cal. App. 3d 951, 955-957, 264 Cal. Rptr. 39]* . An offset credit may be applied for waiver of litigation costs by settling defendants even if it is undisputed that those settling defendants would have prevailed had they proceeded to trial [*Garcia v. Duro Dyne Corp. (2007) 156 Cal. App. 4th 92, 105-106, 67 Cal. Rptr. 3d 100]* .

The valuation must be made in good faith, and should be part of the confirmation process [*Arbuthnot v. Relocation Realty Serv. Corp. (1991) 227 Cal. App. 3d 682, 689-690, 278 Cal. Rptr. 135]* . Valuation generally should take place at the settlement stage, even if the nonmonetary consideration involves an assignment of rights that may eventually be reduced to an exact amount in a judgment. Valuation as of the time of settlement allows the court to fully evaluate the good faith of the overall settlement asof that time [*Erreca's v. Superior Court (1993) 19 Cal. App. 4th 1475, 1498-1499, 24 Cal. Rptr. 2d 156]* . Valuation may be deferred if it is not necessary to the good-faith determination [*Aero-Crete, Inc. v. Superior Court (1993) 21 Cal. App. 4th 203, 209, 25 Cal. Rptr. 2d 804* (involving settlement with judgment-proof defendants conceded to be unconnected to actual liability)].

The settling parties bear the burden of establishing the value of a nonmonetary settlement [*Arbuthnot v. Relocation Realty Serv. Corp. (1991) 227 Cal. App. 3d 682, 689-690, 278 Cal. Rptr. 135]* . They have the most knowledge of the value of the various claims that they are attempting to settle, and they can best allocate settlement proceeds among those various claims, subject to court approval. They must carry the burden of determining the value of the settlement, including each of its component parts [*Erreca's v. Superior Court (1993) 19 Cal. App. 4th 1475, 1491, 1498, 24 Cal. Rptr. 2d 156]* . Even if making a valuation is difficult, a trial court must require a valuation of nonmonetary settlement

elements to make a good faith determination [*Brehm Cmtys. v. Superior Court (2001) 88 Cal. App. 4th 730, 736-737, 105 Cal. Rptr. 2d 918* ; *see, e.g.,* *Franklin Mint Co. v. Superior Court (2005) 130 Cal. App. 4th 1550, 1558-1561, 31 Cal. Rptr. 3d 319* (despite difficulty of placing value on settlement that had settling defendant putting $25 million in escrow for distribution to charities in name of both plaintiff and defendant, valuation of intangible benefits to parties required)].

The value placed on a settling defendant's assignment to the plaintiff of indemnity rights against nonsettling defendants is a complex matter. It has been held that a good faith value must be credited for offset against any judgment obtained against the nonsettling defendants [*Regan Roofing Co. v. Superior Court (1994) 21 Cal. App. 4th 1685, 1710-1715, 27 Cal. Rptr. 2d 62* ; *Erreca's v. Superior Court (1993) 19 Cal. App. 4th 1475, 1502-1505, 24 Cal. Rptr. 2d 156]* . Although a plaintiff under this scenario might ultimately receive more than the total judgment entered, it is not considered a double recovery [*Regan Roofing Co. v. Superior Court (1994) 21 Cal. App. 4th 1685, 1711-1713, 27 Cal. Rptr. 2d 62* ; *Bush v. Superior Court (1992) 10 Cal. App. 4th 1374, 1385-1387, 13 Cal. Rptr. 2d 382]* . Rather the settling defendant is electing to risk paying more than its actual comparative share by surrendering rather than pursuing its indemnity rights. This may be the prudent course if the value of those rights is speculative at the time of settlement [*Erreca's v. Superior Court (1993) 19 Cal. App. 4th 1475, 1502-1505, 24 Cal. Rptr. 2d 156]* .

[c] Allocation of Settlement

In a typical case involving a single plaintiff and multiple defendants, each tortfeasor's potential liability is based on the same injury to the plaintiff. Therefore, any settlement by one defendant will offset any judgment against the other tortfeasors, and no allocation of the settlement (other than that required under Proposition 51 [*see § 300.73[3][e]*] is required [*Alcal Roofing & Insulation v. Superior Court (1992) 8 Cal. App. 4th 1121, 1124, 10 Cal. Rptr. 2d 844]* . However, multiparty litigation does not always fit this pattern. In some cases, the amount of the offset is uncertain for reasons such as (1) the settlement covers multiple plaintiffs or causes of action with different damages; (2) a sliding scale is used, and payments by the settling defendants are contingent on the degree of plaintiff's success against the nonsettling defendants [*see § 300.73[10]*]; (3) the amount of the settlement is clouded by the inclusion of noncash consideration into the settlement; and/or (4) the settlement covers seperate claims for seperate injuries, not all of which would be attributable to the conduct of the remaining defendants [*Alcal Roofing & Insulation v. Superior Court (1992) 8 Cal. App. 4th 1121, 1124, 10 Cal. Rptr. 2d 844]* . Additionally, the settlement may involve payment of both economic and noneconomic damages, for which the remaining defendants have different liability under Proposition 51 [*see* *Regan Roofing Co. v. Superior Court (1994) 21 Cal. App. 4th 1685, 1705-1708, 27 Cal. Rptr. 2d 62* ; *see also Civ. Code § 1431.2*]. Finally a portion of the settlement may be allocated to costs and expenses of litigation [*see* *Regan Roofing Co. v. Superior Court (1994) 21 Cal. App. 4th 1685, 1708-1710, 27 Cal. Rptr. 2d 62]* .

In a situation in which the cash amount of the settlement is not determinative of the amount of the offset with regard to any remaining defendant, the settling parties must include an allocation or a valuation in their agreement [*Alcal Roofing & Insulation v. Superior Court (1992) 8 Cal. App. 4th 1121, 1124-1125, 10 Cal. Rptr. 2d 844]* . This allocation or valuation is then subject to the requirement that it be made in good faith, committed to the discretion of the court in the good-faith settlement approval process [*Regan Roofing Co. v. Superior Court (1994) 21 Cal. App. 4th 1685, 1701, 27 Cal. Rptr. 2d 62* ; *Erreca's v. Superior Court (1993) 19 Cal. App. 4th 1475, 1489, 24 Cal. Rptr. 2d 156* ; *see § 300.73[5]*]. If found to be in good faith, the allocation is effective to determine the amount of setoff available to the nonsettling defendants [*see* *Regan Roofing Co. v. Superior Court (1994) 21 Cal. App. 4th 1685, 1703, 27 Cal. Rptr. 2d 62]* .

In a complex multiparty case, a trial court may make an initial allocation when making the determination that a settlement is made in good faith, only to change the allocation based on evidence produced at trial against non-settling defendants. For example, if the evidence produced at trial shows that the defendants should not be held liable for one claimed category of damage, settlement amounts initially allocated to compensate for that type of damage may be allocated by the trial court to other categories of damage [*El Escorial Owners' Assn. v. DLC Plastering, Inc. (2007)*

154 Cal. App. 4th 1337, 1351-1352, 65 Cal. Rptr. 3d 524] .

[d] Effect on Rights of Nonsettling Defendants

A settlement that has the objective of abridging a non-settling defendant's indemnification claims and insurance coverage may not be considered to be in good faith [*Bobrow/Thomas & Assocs. v. Superior Court (1996) 50 Cal. App. 4th 1654, 58 Cal. Rptr. 2d 626* (settlement could not be confirmed without full explanation of how agreement would affect action against non-settling defendant, and requirement that plaintiff make firm commitment to limit its recovery against non-settling defendant)].

[e] Special Problems Under Proposition 51

A good faith settlement reduces the claims against nonsettling tortfeasors by the amount deemed to be the consideration for the settlement [*Code Civ. Proc. § 877(a)*]. However, the Fair Responsibility Act of 1986 (Proposition 51) [*Civ. Code §§ 1431.1-1431.5*] created uncertainty concerning the manner in which the settlement amount is to be apportioned and credited against judgments that are subsequently entered against nonsettling defendants. This uncertainty has now been addressed and perhaps resolved by the courts [*see Conrad v. Ball Corp. (1994) 24 Cal. App. 4th 439, 443, 29 Cal. Rptr. 2d 441* ; *Regan Roofing Co. v. Superior Court (1994) 21 Cal. App. 4th 1685, 1705-1708, 27 Cal. Rptr. 2d 62* ; *Espinoza v. Machonga (1992) 9 Cal. App. 4th 268, 271-277, 11 Cal. Rptr. 2d 498]* .

Such an apportionment is required because under Proposition 51, settling and nonsettling defendants are jointly liable only for the plaintiff's economic damages, and each defendant is only severably liable for its comparative share of the plaintiff's noneconomic damages [*see Civ. Code § 1431.2(a)*]. Thus, a reduction of one defendant's comparative share of noneconomic damages by an amount that represents noneconomic damages paid by another defendant violates the purpose of Proposition 51 [*Hoch v. Allied-Signal, Inc. (1994) 24 Cal. App. 4th 48, 62-68* ; *see Civ. Code § 1431.1*]. Only a joint and several judgment for economic damages may be reduced on account of a prior settlement, and then only to the extent that the settlement represents compensation for the plaintiff's economic damages [*Conrad v. Ball Corp. (1994) 24 Cal. App. 4th 439, 443, 29 Cal. Rptr. 2d 441* ; *Regan Roofing Co. v. Superior Court (1994) 21 Cal. App. 4th 1685, 1705-1708, 27 Cal. Rptr. 2d 62* ; *Espinoza v. Machonga (1992) 9 Cal. App. 4th 268, 271-277, 11 Cal. Rptr. 2d 498]* .

For example, suppose that P sues A, B, and C, for personal injuries. Before trial, C pays $50,000 to P in a settlement that is confirmed as having been made in good faith, and C is released from all liability. P proceeds to trial against A and B. The jury awards $100,000 economic damages and $100,000 noneconomic damages and apportions fault 25 percent to A, 25 percent to B, and 50 percent to C. As required by Proposition 51, several judgments are entered against both A and B, each for $25,000 (25 percent of $100,000) [*see Civ. Code § 1431.2(a)*]. A joint judgment must also be entered against A and B for P's economic damages, but A and B are entitled to a reduction of the $100,000 amount of economic damages to reflect the settlement [*Code Civ. Proc. § 877(a)*]. The amount of the reduction depends on the amount of the settlement that is allocated to economic damages [*Espinoza v. Machonga (1992) 9 Cal. App. 4th 268, 271-277, 11 Cal. Rptr. 2d 498]* .

Proposition 51 and *Code Civ. Proc. § 877* are both silent on the manner of apportionment, and several approaches are possible. First, the parties to the settlement may stipulate to an apportionment and the stipulation may be enforced as long as it was made in good faith [*Regan Roofing Co. v. Superior Court (1994) 21 Cal. App. 4th 1685, 1706-1708, 27 Cal. Rptr. 2d 62]* . A high apportionment to economic damages favors the settling defendant by preserving greater indemnity rights, while a high apportionment to noneconomic damages favors the plaintiff by assuring payment of damages that are not recoverable from other defendants. Thus, an apportionment made by the parties might be presumed to reflect the give and take of arms-length bargaining [*Regan Roofing Co. v. Superior Court (1994) 21 Cal. App. 4th 1685, 1708, 27 Cal. Rptr. 2d 62* ; *see Espinoza v. Machonga (1992) 9 Cal. App. 4th 268, 275-276, 11 Cal. Rptr. 2d 498]* . Whether the parties' allocation of a settlement entirely to economic damages or entirely to noneconomic damages

might be made in good faith under particular facts is problematical.

Another possible approach is to defer the question until such time as there is a trial involving the nonsettling defendants, and then to apportion the settlement between economic and noneconomic damages in the same ratio that the jury apportioned its award of damages. In the above example, the settlement amount of $50,000 would be apportioned in a 1:1 ratio, allocating $25,000 to economic damages and $25,000 to noneconomic damages. The amount allocated to economic damages would be subtracted from the jury's award of economic damages ($100,000 minus $25,000), and a joint and several judgment would be entered against A and B for the balance ($75,000). P could collect from either or both, but under indemnity principles, A and B would each ultimately be responsible for half of this amount [*see Sagadin v. Ripper (1985) 175 Cal. App. 3d 1141, 1173-1174, 221 Cal. Rptr. 675]* . This approach was approved by the first appellate court to be confronted with the issue [*Espinoza v. Machonga (1992) 9 Cal. App. 4th 268, 271-277, 11 Cal. Rptr. 2d 498]* .

One court has held that the settling parties must apportion the settlement between economic and noneconomic damages in order for the court to be able to determine if it is in good faith [*Alcal Roofing & Insulation v. Superior Court (1992) 8 Cal. App. 4th 1121, 1129, 10 Cal. Rptr. 2d 844* ; *see also Erreca's v. Superior Court (1993) 19 Cal. App. 4th 1475, 1488, 24 Cal. Rptr. 2d 156]* . However, in another case, the court declined to impose such a requirement. Rather, it noted that allocation of a settlement amount between economic and noneconomic damages by the parties, subject to good faith confirmation, was one possible approach, but that the issue was unresolved [*Espinoza v. Machonga (1992) 9 Cal. App. 4th 268, 275-276, 11 Cal. Rptr. 2d 498* ; *see also Conrad v. Ball Corp. (1994) 24 Cal. App. 4th 439, 443, 29 Cal. Rptr. 2d 441* (also refusing to impose allocation requirement on settling parties)].

Subsequently, the court confirmed just such an allocation as being in good faith, but did not suggest that allocation is required in all instances [*Regan Roofing Co. v. Superior Court (1994) 21 Cal. App. 4th 1685, 1705-1708, 27 Cal. Rptr. 2d 62]* . Thus it appears that both approaches are perfectly valid under Proposition 51; good faith allocation by the parties, and deferral and allocation in the proportions found by the trier of fact. In the absence of a prior determination that a pre-trial settlement allocation was made in good faith, assuming that a court may properly allocate a settlement between economic and noneconomic damages in a proportion different from that determined by the trier of fact, the burden of proving that a different allocation is appropriate would be on the party seeking a different allocation [*see Ehret v. Congoleum Corp. (1999) 73 Cal. App. 4th 1308, 1320-1322, 87 Cal. Rptr. 2d 363* (plaintiffs unsuccessfully seeking different allocation failed to provide evidence of settlement allocation terms, if any)].

In yet another case, settlements were reached with some defendants in an asbestos exposure case that included a release of liability on all personal injury claims by the exposed person, loss of consortium claims brought by his wife, and any wrongful death claims that might be brought in the future by the children of the exposed person. At trial against the lone nonsettling defendant, the parties and the court were faced with the issue of how much of the settlement amount to apportion to the release of potential wrongful death claims, which were not part of the trial, and how to allocate between economic and noneconomic damages. Relying on principles from earlier cases, the court of appeal held that if a jury awards economic damages to an injured plaintiff as well as loss of consortium damages to the plaintiff's spouse, and there are pre-verdict settlements that include these damages, the trial court must apply the ratios established by the jury's verdict to apportion the settlement amounts between economic and noneconomic damages, including the jury's relative valuation of the loss of consortium claim [*Hackett v. John Crane, Inc. (2002) 98 Cal. App. 4th 1233, 1244, 120 Cal. Rptr. 2d 662]* .

The court also held that the trial court retains discretion to determine what portion of the settlements to allocate to noneconomic damages claims that are covered by the settlements but not adjudicated by the jury, including any potential wrongful death claims that might be brought [*Hackett v. John Crane, Inc. (2002) 98 Cal. App. 4th 1233, 1245, 120 Cal. Rptr. 2d 662]* . In the absence of a pre-trial finding that the settlement was reached in good faith, an allocation of non-adjudicated claims by the trial court requires the plaintiff to present to the court evidence of the reasonableness of the proposed allocation, including evidence of a rational basis for the allocation and that the

allocation was reached in an atmosphere of appropriate adverseness with the settling parties [*Jones v. John Crane, Inc. (2005) 132 Cal. App. 4th 990, 1008-1011, 35 Cal. Rptr. 3d 144]* .

Another approach that avoided allocation was accepted by the court in a wrongful death action [*Hoch v. Allied-Signal, Inc. (1994) 24 Cal. App. 4th 48, 29 Cal. Rptr. 2d 615]* . In that case, the plaintiffs settled with three defendants without allocation between economic and economic damages. They then proceeded to trial against the remaining defendant on noneconomic damages only. A several-only judgment was entered on the jury's verdict for that defendant's comparative share of the total noneconomic damages found. No part of the judgment was subject to reduction on account of the settlement because the settling defendant's had no liability for the judgment. The court found no difficulty with the fact that the plaintiffs' total recovery by settlement and judgment exceeded the total damages found by the jury. Such a possibility has always been present in multi-party settlement situations. The fact that the settling defendants prefer to settle rather than risk trial in no way prejudices the nonsettling defendant, who pays only its comparative share of noneconomic damages [*Hoch v. Allied-Signal, Inc. (1994) 24 Cal. App. 4th 48, 62-68, 29 Cal. Rptr. 2d 615]* . Further, although the court did not mention it, the settlement could have included economic damages, which were not before the jury. If there were any economic damages, the plaintiffs elected to recover them entirely by way of settlement.

Whether or not the settlement is apportioned, any subsequent *judgment* against a sole nonsettling defendant must be apportioned between economic and noneconomic damages. Otherwise, there is no basis from which to conclude the amount of damages for which the settling and nonsettling defendants are jointly and severally liable and subject to a potential reduction on account of the settlement. The nonsettling defendant waives any right to reduction by failing to propose an appropriate special verdict [*Conrad v. Ball Corp. (1994) 24 Cal. App. 4th 439, 443-445, 29 Cal. Rptr. 2d 441]* .

[4] Effect on Indemnity and Contribution Rights

[a] Generally

A good-faith settlement discharges the settling tortfeasor from all liability for comparative indemnity to any other parties [*Code Civ. Proc. § 877(b)*]. The statutory language refers to liability for "contribution" rather than indemnity. However, the California Supreme Court expanded the term "contribution" as used in the statute to encompass the remedy of comparative indemnity that was created in the case [*American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 604, 146 Cal. Rptr. 182, 578 P.2d 899]* . The rule barring comparative indemnity claims against tortfeasors who settle in good faith has also been codified in *Code Civ. Proc. § 877.6*, which provides that a determination by the court that the settlement was made in good faith bars any other joint tortfeasor from any further claims against the settling tortfeasor for "equitable comparative contribution" or partial or comparative negligence based on comparative negligence or comparative fault [*Code Civ. Proc. § 877.6(c)*].

This rule bars claims for comparative indemnity based on comparative fault against those joint tortfeasors who settled before liability was established by jury verdict or judgment. It does not bar claims settled after judgment was entered or after a jury has made a final determination regarding liability [*see Code Civ. Proc. §§ 877, 877.6(a)*; *compare Price Pfister, Inc. v. William Lyon Co. (1993) 14 Cal. App. 4th 1643, 1647-1650, 18 Cal. Rptr. 2d 437* (settlement made after jury found one defendant liable, but before determining amount of damages in bifurcated trial is within *Code Civ. Proc. § 877*; cross defendant's liability was not determined by jury); *with Southern Cal. White Trucks v. Teresinski (1987) 190 Cal. App. 3d 1393, 1403-1408, 236 Cal. Rptr. 159* (settlement made after judgment on jury verdict was vacated did not come within *Code Civ. Proc. § 877*, and court's action in vacating judgment that was entered before settlement did not convert settlement into one made "before judgment"); *and Be v. Western Truck Exch. (1997) 55 Cal. App. 4th 1139, 1148, 64 Cal. Rptr. 2d 527]* .

Subject to possible limitatons imposed by Proposition 51 [*see § 300.73[4][b]*, a settling defendant may recover comparative indemnity from a nonsettling tortfeasor [*Bolamperti v. Larco Mfg. (1985) 164 Cal. App. 3d 249,*

251-255, 210 Cal. Rptr. 155 ; *Teachers Ins. Co. v. Smith (1982) 128 Cal. App. 3d 862, 866, 180 Cal. Rptr. 701* ; *American Bankers Ins. Co. v. Avco-Lycoming Div. (1979) 97 Cal. App. 3d 732, 738, 159 Cal. Rptr. 70* ; *see Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 801-802, 251 Cal. Rptr. 202, 760 P.2d 399]* . It does not matter whether the settling party was originally sued by the plaintiff or was brought into the action as a cross defendant for indemnity [*Widson v. International Harvester Co. (1984) 153 Cal. App. 3d 45, 57, 200 Cal. Rptr. 136]* . However, the potential indemnitor may defeat the claim by subsequently entering into a good-faith settlement with the original plaintiff, as long as the settlement is made before verdict or judgment in the underlying action [*see Regal Recovery Agency, Inc. v. Superior Court (1989) 207 Cal. App. 3d 693, 695, 255 Cal. Rptr. 34* (determination of good faith may be made in subsequent action for indemnity as well as in original action; action had been dismissed afterlast settlement)]. Moreover, if a potential indemnitor subsequently enters into a good-faith settlement with the plaintiff, the earlier-settling tortfeasor may be bound by the good-faith determination even though that tortfeasor was not actually a party to the action at the time of the judicial determination of good faith, so long as that tortfeasor had notice of, and an opportunity to be heard at, the good-faith settlement hearing [*Britz, Inc. v. Dow Chem. Co. (1999) 73 Cal. App. 4th 177, 184, 86 Cal. Rptr. 2d 188* ; *see generally § 300.73[7][b]*].

Because an earlier-settling tortfeasor may be barred from seeking indemnity from a later-settling tortfeasor on a finding that the later settlement was in good faith, the insurer for the first tortfeasor, who may have settled within policy limits on behalf of its insured in anticipation of seeking indemnity from another tortfeasor, is also barred from seeking indemnity by a good-faith settlement determination. *Code Civ. Proc. § 877.6* applies under these circumstances even if there is technically no "nonsettling defendant" left in the action, and even if the later-settling defendant was not a named defendant when the insurer settled [*Wilshire Ins. Co. v. Tuff Boy Holding, Inc. (2001) 86 Cal. App. 4th 627, 638-644, 103 Cal. Rptr. 2d 480]* .

The settling defendant is not required to first prove that the amount paid in settlement exceeded the settling defendant's proportionate share as a condition on seeking indemnity [*Gross v. Allen (1994) 22 Cal. App. 4th 354, 360-361, 27 Cal. Rptr. 2d 429]* . Conversely, the proposed indemnitor is not bound by the settlement amount as the measure of the plaintiff's damages, even if the settlement has been found to be in good faith. The indemnitor may attempt to prove that the damages were less than the settlement, and consequently, that its liability for indemnity is less than the amount claimed based on the settlement [*Western S.S. Lines, Inc. v. San Pedro Peninsula Hosp. (1994) 8 Cal. 4th 100, 118-119, 32 Cal. Rptr. 2d 263, 876 P.2d 1062]* . This rule is inapplicable if the comparative liability of both the indemnitor and indemnitee was determined by the trier of fact in the underlying action, and the indemnitor was a party to that action [*see Western S.S. Lines, Inc. v. San Pedro Peninsula Hosp. (1994) 8 Cal. 4th 100, 118, 32 Cal. Rptr. 2d 263, 876 P.2d 1062]* .

If there is a contract that expressly provides for indemnity rights between codefendants [*see § 300.30 et seq.*], a good-faith settlement by the contract indemnitor does not defeat a nonsettling indemnitee's right to *express* contractual indemnity [*Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1019, 1032, 269 Cal. Rptr. 720, 791 P.2d 290* ; *C.L. Peck Contractors v. Superior Court (1984) 159 Cal. App. 3d 828, 834, 205 Cal. Rptr. 754]* . Similarly, an indemnity claim based on statute survives a good-faith settlement by the statutory indemnitor [*Kantor v. Housing Auth. (1992) 8 Cal. App. 4th 424, 430-431, 10 Cal. Rptr. 2d 695* (indemnity claim under *Gov. Code § 825*, which provides for public entity's indemnification of employee or former employee)].

Claims for total indemnity and implied contractual indemnity are barred by a good-faith settlement under *Code Civ. Proc. §§ 877* and *877.6(c)* [*Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1028-1035, 269 Cal. Rptr. 720, 791 P.2d 290* ; *Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 800, 817, 251 Cal. Rptr. 202, 760 P.2d 399]* . The California Supreme Court has held that a claim for total indemnity is not conceptually different from a claim for partial, comparative indemnity, but is rather just one end of the spectrum of comparative-indemnity apportionment possibilities [*Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 809, 251 Cal. Rptr. 202, 760 P.2d 399* ; *see § 300.61[4]*]. The Court has also held that implied contractual indemnity is merely a form of equitable indemnity, subject to the rules governing equitable indemnity [*Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1033, 269 Cal.*

Rptr. 720, 791 P.2d 290 ; *see § 300.61[5]*]. The rights of a defendant asserting that its liability is vicarious only, or that it is liable only because of the settling defendant's breach of contract, may be protected at the hearing at which the good faith of the proposed settlement is determined [*see Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1034-1035, 269 Cal. Rptr. 720, 791 P.2d 290* ; *Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 814-817, 251 Cal. Rptr. 202, 760 P.2d 399]* .

A good-faith settlement bars claims that are in essence claims for comparative indemnity, no matter how the claim is pleaded [*see, e.g., Ratcliff Architects v. Vanir Constr. Mgmt., Inc. (2001) 88 Cal. App. 4th 595, 607, 106 Cal. Rptr. 2d 1* (negligence cross-claim brought by architect against construction manager who settled in good faith with school district was barred, because claim was essentially for indemnification); *see also Gackstetter v. Frawley (2006) 135 Cal. App. 4th 1257, 1274-1279, 38 Cal. Rptr. 3d 333]* . If the claims between joint tortfeasors are identical to those made by the plaintiffs, of if the damages sought by the joint tortfeasors are those that the court would consider in determining the proportionate liability of a settling tortfeasor, the claims are for indemnity, even if couched in affirmative language. On the other hand, a claim by a joint tortfeasor that seeks neither indemnity nor contribution, and that the court would not contemplate in determining the proportionate liability of the settling tortfeasor is not a claim for indemnity, and hence, survives a good-faith settlement [*Cal-Jones Props. v. Evans Pac. Corp (1989) 216 Cal. App. 3d 324, 328, 264 Cal. Rptr. 737* (claim of one alleged tortfeasor against another for breach of fiduciary duty determined to be claim for indemnity)]. However, the claimant must show that the potential liability of the defendant or cross defendant is based on damages for direct injury to the claimant, not on damages incurred as a result of the claimant's liability to a third party [*cf. Cal-Jones Props. v. Evans Pac. Corp (1989) 216 Cal. App. 3d 324, 328, 264 Cal. Rptr. 737* (cross complaint was barred by good-faith settlement because all damages were incurred due to claimant's liability to plaintiff in underlying action)].

A settling defendant whose indemnity rights are defeated by a subsequent verdict of nonliability of a nonsettling defendant has standing to appeal from the judgment denying indemnity, even if the jury also exonerated the settling defendant. On appeal, the settling defendant may assert errors of law in instructing the jury with regard to the standards by which the nonsettling defendant's liability should have been measured [*Tatum v. Armor Elevator Co. (1988) 203 Cal. App. 3d 1315, 1317-1318, 1321, 250 Cal. Rptr. 775]* .

[b] Under Proposition 51

Proposition 51, the Fair Responsibility Act of 1986 [Code Civ. Proc. § 1431.1 et seq.; *see § 300.63[3]*] has created a number of uncertainties with regard to the interaction and mathematics of settlements and indemnity rights. Uncertainty arises because comparative indemnity is available only among tortfeasors who are jointly and severally liable to the plaintiff [*GEM Developers v. Hallcraft Homes of San Diego, Inc. (1989) 213 Cal. App. 3d 419, 430, 261 Cal. Rptr. 626* ; *see § 300.63*], but Proposition 51 eliminates joint and several liability for noneconomic damages [*see* Code Civ. Proc. § 1431.2(a)]. The simple view is that Proposition 51 eliminates indemnity rights with regard to noneconomic damages, and to some extent, this is undoubtedly correct. However, the policies behind settling multi-party tort litigation suggest that some exceptions may be found.

A settlement may create one of several situations that raise different issues under Proposition 51. First, the settling defendant may decide to make the plaintiff whole, paying an amount that is sufficient to cause the plaintiff to dismiss against all parties, but preserving the settling defendant's rights of indemnity against other tortfeasors [*see, e.g., Gross v. Allen (1994) 22 Cal. App. 4th 354, 360-361, 27 Cal. Rptr. 2d 429* ; *American Bankers Ins. Co. v. Avco-Lycoming Div. (1979) 97 Cal. App. 3d 732, 734, 159 Cal. Rptr. 70]* . In this situation, the issue is whether Proposition 51 limits the settling defendant's indemnity rights in any way. The court of appeal has held that Proposition 51 applies to such settlements and that the settling tortfeasor may obtain indemnity from other tortfeasors only with regard to the amount of the settlement that represents the plaintiff's economic damages [*Union Pac. Corp. v. Wengert (2000) 79 Cal. App. 4th 1444, 1447-1449, 95 Cal. Rptr. 2d 68]* .

More commonly, a settlement involves a release of the settling defendant only, and the plaintiff proceeds to trial against the nonsettling defendants. At trial, the finder of fact makes an apportionment of comparative fault among all tortfeasors, including the settling defendant, and determines the plaintiff's economic and noneconomic damages [*see BAJI No. 16.72* (7th ed.)]. Usually, the amount of the settlement is less than what the settling defendant would have paid under the jury's apportionment of fault and damages awarded, meaning that neither the settling or nonsettling defendants have any indemnity rights against each other (assuming that the settlement is found to be in good faith) [*see Code Civ. Proc. §§ 877(b), 877.6(c)*].

Occasionally, however, a defendant may pay an amount in settlement that proves to be more than its comparative share under the apportionment of fault found subsequently by the trier of fact [*see, e.g., Bracket v. State of California (1986) 180 Cal. App. 3d 1171, 1174, 226 Cal. Rptr. 1]* . In this case, the settling defendant retains indemnity rights against the nonsettling defendants [*see Bolamperti v. Larco Mfg. (1985) 164 Cal. App. 3d 249, 251-255, 210 Cal. Rptr. 155]* , although as noted above, Proposition 51 limits the right of the settling defendant to recover indemnity to that amount of the overpayment that is apportioned to economic damages [*Union Pac. Corp. v. Wengert (2000) 79 Cal. App. 4th 1444, 1447-1449, 95 Cal. Rptr. 2d 68]* .

For detailed consideration of the problems concerning good-faith settlements, indemnity rights, and Proposition 51, the public policies involved, and possible resolutions, see Levy, Golden & Sacks, California Torts, Ch. 74 (Matthew Bender).

[5] The "Good Faith" Requirement

[a] Purpose

A settlement must have been made in "good faith" in order to discharge a settling tortfeasor from liability for comparative indemnity [*see Code Civ. Proc. §§ 877, 877.6(c)*; *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 492-493, 213 Cal. Rptr. 256, 698 P.2d 159]* . The California Supreme Court has stated that the formulation of a precise definition of "good faith" is neither possible nor practicable. However, the term as originally used by the Legislature in *Code Civ. Proc. § 877* incorporates by reference the general equitable principle of contribution law that frowns on unfair settlements, including those that are so poorly related to the value of the case that they impose a potentially disproportionate cost on nonsettling defendants [*Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 495, 213 Cal. Rptr. 256, 698 P.2d 159* ; *see River Garden Farms, Inc. v. Superior Court (1972) 26 Cal. App. 3d 986, 997, 103 Cal. Rptr. 498]* . The subsequent use of the term in *Code Civ. Proc. § 877.6*, relating to the judicial determination that a settlement is in good faith [*see § 300.93[2]*], refers back to its meaning in *Code Civ. Proc. § 877* [*Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 496, 213 Cal. Rptr. 256, 698 P.2d 159]* .

The dual purposes behind Civ. Code § 877 are equitable sharing of liability among multiple tortfeasors and encouragement of settlement. In applying the good faith standard, both objectives must be accomodated, and neither statutory goal may be applied to defeat the other. If the policy of encouraging settlement is permitted to overwhelm equitable financial sharing, the possibilities of unfairtactics are multiplied [*Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 494, 213 Cal. Rptr. 256, 698 P.2d 159]* . Equitable sharing isaccomplished, in the absence of rights of comparative indemnity, only if the nonsettling defendants obtain a reasonable reduction in their ultimate liability to the plaintiff under Civ. Code § 877(a) [*see Abbott Ford, Inc. v. Superior Court (1987) 43 Cal. 3d 858, 873, 239 Cal. Rptr. 626, 741 P.2d 124* ; *see § 300.73[3]*].

Thus, the good faith requirement establishes a duty relationship among the plaintiff, the settling defendant, and any nonsettling defendants [*River Garden Farms, Inc. v. Superior Court (1972) 26 Cal. App. 3d 986, 999, 103 Cal. Rptr. 498]* . Its purpose is primarily to protect the interests of the nonsettling defendants [*see Southern Cal. Gas Co. v. Superior Court (1986) 187 Cal. App. 3d 1030, 1036, 232 Cal. Rptr. 320]* . Nonsettling tortfeasors are barred from

seeking comparative indemnity from settling defendants only if the settling parties acted in good faith with respect to them. Good faith of the dismissal alone is not sufficient. The dismissal must represent a settlement that is a good faith determination of relative liabilities. Only in this situation are both policies behind *Code Civ. Proc. § 877* furthered [*Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 496-497, 213 Cal. Rptr. 256, 698 P.2d 159]* .

Thus, for example, a settlement made solely to remove a deep-pocket defendant from the case because of the experts it could produce and the skilled trial attorneys it could retain, is not made in good faith consideration of the relevant liability of all parties [*see Commercial Union Ins. Co. v. Ford Motor Co. (9th Cir. 1981) 640 F.2d 210, 213-214]* . Similarly, good faith may be lacking if the plaintiff's counsel dismisses one defendant as part of a strategy to bring an action against the insurer of a codefendant for bad faith refusal to settle [*Greshko v. County of Los Angeles (1987) 194 Cal. App. 3d 822, 835-836, 239 Cal. Rptr. 846]* . However, a settlement that requires a settling defendant to participate and be represented at trial may be found in good faith if the purpose is simply to deprive the remaining defendants of the trial tactic of using the "empty chair" to ascribe fault to an actor who is not there to defend him or herself and the nature and terms of the settlement will be disclosed to the jury to avoid bias [*Everman v. Superior Court (1992) 8 Cal. App. 4th 466, 470-471, 473, 10 Cal. Rptr. 2d 176]* .

[b] *Tech-Bilt* Factors

The landmark California Supreme Court decision that established the parameters of the inquiry into whether a settlement is in good faith is *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 213 Cal. Rptr. 256, 698 P.2d 159* . Under *Tech-Bilt*, the ultimate test to determine whether a settlement is not made in good faith is whether the settlement is grossly disproportionate to what a reasonable person at the time of settlement would estimate the settlor's liability to be [*City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1262, 238 Cal. Rptr. 119* ; *see Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 499, 213 Cal. Rptr. 256, 698 P.2d 159]* .

In making this determination, the court must take into account a number of factors. These factors include a rough approximation of plaintiff's total recovery and the settlor's proportionate liability; the amount paid in settlement; the allocation of settlement proceeds among the plaintiffs in multiplaintiff cases; and a recognition that a settlor should pay less in settlement than he or she would if found liable after a trial. Other relevant considerations include the financial conditions and insurance policy limits of settling defendants and the existence of any collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants. Finally, practical considerations obviously require that the evaluation be made on the basis of information available at the time of settlement. A defendant's settlement figure must not be grossly disproportionate to what a reasonable person, at the time of the settlement, would estimate the settling defendant's liability to be. The party asserting the lack of good faith, who has the burden of proof on that issue [*see Code Civ. Proc. § 877.6(d)*], should be permitted to demonstrate, if he or she can, that the settlement is so far "out of the ballpark" in relation to these factors as to be inconsistent with the equitable objectives of the statute. Such a demonstration would establish that the proposed settlement was not a "settlement made in good faith" within the meaning of *Code Civ. Proc. § 877.6* [*Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 499-500, 213 Cal. Rptr. 256, 698 P.2d 159* ; *see Long Beach Memorial Medical Center v. Superior Court (2009) 172 Cal. App. 4th 865, 874-876, 91 Cal. Rptr. 3d 494* (good-faith determination reversed when settlement amount was only $200,000 on $8,000,000 claim, although evidence suggested that settling defendant was substantially responsible for injury, amount was only 10 percent of insurance limits, and settlement appeared calculated only to curtail co-tortfeasors' more substantial indemnity rights); *Abbott Ford, Inc. v. Superior Court (1987) 43 Cal. 3d 858, 871-875, 239 Cal. Rptr. 626, 741 P.2d 124* ; *Barth-Wittmore Ins. v. H. R. Murphy Enters., Inc. (1985) 169 Cal. App. 3d 124, 131-132, 214 Cal. Rptr. 894]* .

Bad faith is not established simply by a showing that a settling defendant paid less than his or her theoretical proportionate or fair share based on a reasonable projection of plaintiff's damages and the settling defendant's comparative fault. Such a rule would unduly discourage settlements because damages are often speculative and the

probability of legal liability for them is often uncertain or remote [*Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 499, 213 Cal. Rptr. 256, 698 P.2d 159]* . However, the determination of the defendant's potential range of liability may not be based on an error of law [*Minnesota Mining & Mfg. Co. v. Superior Court (1988) 206 Cal. App. 3d 1025, 1028-1029, 253 Cal. Rptr. 908* ; *see § 300.73[7][c]*].

A particular settlement may be in good faith even if it is for a sum grossly disproportionate to the damages prayed for in the complaint, if it is not disproportionate to what the trial court might have considered the probablerecovery of the plaintiff from the settling joint tortfeasor [*Kohn v. Superior Court (1983) 142 Cal. App. 3d 323, 327-328, 191 Cal. Rptr. 78* ; *see Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 501*], and even if the claimant's damages are obviously great and the liability for them is certain, a disproportionately low settlement figure is often reasonable in the case of a relatively insolvent and uninsured, or underinsured, joint tortfeasor [*Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 499, 213 Cal. Rptr. 256, 698 P.2d 159* ; *see Stambaugh v. Superior Court (1976) 62 Cal. App. 3d 231, 238, 132 Cal. Rptr. 843* ; *see also Aero-Crete, Inc. v. Superior Court (1993) 21 Cal. App. 4th 203, 207-209, 25 Cal. Rptr. 2d 804* (in case of corporate defendant without assets, burden is on nonsettling parties to pierce corporate vail to show dismissal of individual shareholders is not in good faith)]. In such a case, a settlement for the defendant's liability insurance policy limits may be approved as in good faith [*see County of Los Angeles v. Guerrero (1989) 209 Cal. App. 3d 1149, 1156-1158, 257 Cal. Rptr. 787* ; *Schmid v. Superior Court (1988) 205 Cal. App. 3d 1244, 1248-1249, 253 Cal. Rptr. 137]* . An insurer's denial of coverage may be considered, and the court may hear arguments concerning coverage issues. Even if the there is a possibility that coverage can be established, the court may still approve the settlement on determining that no insurance is available for settlement purposes [*see North County Contractor's Ass'n v. Touchstone Ins. Servs. (1994) 27 Cal. App. 4th 1085, 1092-1094]* .

When determining the good faith of a settlement, the court must consider not only the settling defendant's potential liability to the plaintiff, but also the settling defendant's proportionate share of culpability. For example, if a defendant has a pre-existing contract with the plaintiff under which the defendant's liability will be limited to a specified amount, the fact that the defendant settles for the amount specified in the limitation of liability clause will not necessarily justify a finding that the settlement was in good faith. If the settling defendant's proportionate share of culpability is vastly disproportionate to the settlement amount, given the potential damages, the court should deny the good-faith motion, although the settling defendant may still ultimately be protected from further liability pursuant to the limitation of liability clause [*TSI Seismic Tenant Space, Inc. v. Superior Court (2007) 149 Cal. App. 4th 159, 166-168, 56 Cal. Rptr. 3d 751]* .

In testing the good faith of a settlement, the court may rely on its own personal experience and on experts in the field. Represented by knowledgeable counsel, settlement negotiators can predict with some assurance whether a settlement is within the range permitted by the criterion of good faith. The danger that a low settlement violates the good faith provision will not impart uncertainty as long as the parties behave fairly and the courts maintain a realistic awareness of settlement imponderables [*Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 500-501, 213 Cal. Rptr. 256, 698 P.2d 159* ; *see River Garden Farms, Inc. v. Superior Court (1972) 26 Cal. App. 3d 986, 998, 103 Cal. Rptr. 498]* .

[c] Claim for Total Indemnity

Additional concerns are involved in the good faith determination if a nonsettling defendant claims to be entitled to total indemnity from the settling defendant under some legal theory such as vicarious or derivative liability [*see, e.g., Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 814-817, 251 Cal. Rptr. 202, 760 P.2d 399* ; *see also § 300.61[4]*] or implied contractual indemnity, in which the nonsettling defendant alleges that it is liable to the plaintiff only because the settling defendant breached a contractual duty owed to the nonsettling defendant [*see, e.g., Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1034-1035, 269 Cal. Rptr. 720, 791 P.2d 290* ; *see also § 300.61[5]*]. Unless it involves a dismissal of the prospective indemnitee, a good faith settlement between the plaintiff and the prospective indemnitor leaves the indemnitee to face the plaintiff without any recourse to shift the loss to the indemnitor. Therefore,

the indemnitee must be prepared to present the facts that justify or require a total shift of the loss to the indemnitor at the good faith hearing in opposition to the settlement [*see Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1034-1035, 269 Cal. Rptr. 720, 791 P.2d 290* (implied contractual indemnity); *Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 814-817, 251 Cal. Rptr. 202, 760 P.2d 399* (vicarious liability)]. If the settlement does not require the more culpable tortfeasor to bear its fair share of the loss, the court can find that it is not in good faith [*Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 815, 251 Cal. Rptr. 202, 760 P.2d 399* ; *see Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal. App. 3d 864, 869-870, 269 Cal. Rptr. 647* (if actively negligent party has insufficient financial resources to compensate plaintiff completely, vicariously liable party may be expected to make up difference)].

Although the court must consider and protect the interests of nonsettling defendants who are only vicariously liable in making the good faith determination, it need not require dismissal of the vicariously liable party in every case. A nonsettling tortfeasor may be left to bear some portion of the plaintiff's loss, even in situations in which had the indemnity claim gone to trial, the trier of fact might have concluded that the equities supported a total shifting of loss. This result follows from *Tech-Bilt's* recognition: (1) that a settlement may be found to be in good faith, even if the settling tortfeasor does not pay a sum precisely commensurate with its proportionate share of liability; and (2) that it is appropriate that a settling defendant pay less in settlement than it would if it were found liable after trial. In this regard, however, a nonsettling vicariously or derivatively liable tortfeasor is in exactly the same position as any other minimally culpable tortfeasor, and the minor departure from a theoretically precise allocation of loss that the statute sanctions is simply the price thatnonsettling defendants uniformly bear to promote the settlement of litigation [*Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 816-817, 251 Cal. Rptr. 202, 760 P.2d 399]* .

In evaluating the settling defendant's potential proportionate liability for the purposes of determining good faith, the trial court must take into account any contractual relationship between the settling and nonsettling defendants and must consider how each party's performance of its contractual obligations relates to its share of liability. Thus, if the court finds that the settling defendant rather than the nonsettling defendant is primarily responsible for the plaintiff's damages because the loss is largely attributable to the settling defendant's failure to fulfill its contractual obligations properly, the court should find the settlement in good faith only if the settlement requires the settling defendant to bear an appropriate share of the damages and leaves the nonsettling defendant with a remaining liability that is not grossly disproportionate to its own responsibility for the loss. Indeed, if the court concludes that the nonsettling defendant's liability to the plaintiff is wholly attributable to the settling defendant's contractual breach, the court may decline to find a settlement in good faith unless the settlement provides for the dismissal of the action against the nonsettling defendant. This obligation serves to ensure that a nonsettling defendant will receive the benefit of the substantive loss-allocation principles embodied in the implied contractual indemnity doctrine [*Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1034-1035, 269 Cal. Rptr. 720, 791 P.2d 290* ; *see West v. Superior Court (1994) 27 Cal. App. 4th 1625, 1635-1637, 34 Cal. Rptr. 2d 409* (nonliability of settling indemnitor to plaintiff because of statute of limitations bar was not dispositive on good faith of cost-waiver-only settlement because purpose of settlement was to defeat indemnitee's claim for implied contractual indemnity based on indemnitor's breach of duty to perform under contract)].

[6] Voluntary-Payment Limitation

There is a rule, far more often stated than applied, that a party who voluntarily pays a loss is not entitled to seek indemnity [*see Aetna Life & Cas. Co. v. Ford Motor Co. (1975) 50 Cal. App. 3d 49, 54, 122 Cal. Rptr. 852]* . A volunteer has been defined as a mere stranger or intermeddler who has no interest to protect and no moral or legal obligation to pay [*see Mullin Lumber Co. v. Chandler (1986) 185 Cal. App. 3d 1127, 1133, 230 Cal. Rptr. 122]* .

However, the voluntary-payment rule presents little, if any, impediment to settlement. A party who settles in good faith under a reasonable belief that it is necessary to his or her protection is entitled to indemnity, even if it later develops that he or she had no interest to protect. The public-policy considerations underlying multiparty tort litigation are: (1) the maximization of recovery to the injured party; (2) settlement of the injured party's claim; and (3) equitable

apportionment of liability among concurrent tortfeasors. These policies would be seriously impaired if a settling defendant were required to prove its own fault before seeking indemnity against others alleged to have contributed to the plaintiff's injury [*Mullin Lumber Co. v. Chandler (1986) 185 Cal. App. 3d 1127, 1131-1134, 230 Cal. Rptr. 122* ; *see White Motor Corp. v. Teresinski (1989) 214 Cal. App. 3d 754, 764, 263 Cal. Rptr. 26* (settlement paid by party who had been dismissed from action in consideration of dropped appeal is not voluntary payment); *State Farm & Cas. Co. v. Cooperative of Am. Physicians, Inc. (1984) 163 Cal. App. 3d 199, 203-204, 209 Cal. Rptr. 251* (settlement paid by premises liability insurer with duty to defend but who disputed coverage with professional liability insurer is not voluntary payment); *Teachers Ins. Co. v. Smith (1982) 128 Cal. App. 3d 862, 864-866, 180 Cal. Rptr. 701* (insurer may settle and then allege insured's nonliability in independent action for indemnity); *see also Carrier Corp. v. Detrex Corp. (1992) 4 Cal. App. 4th 1522, 1529-1530, 6 Cal. Rptr. 2d 565* (indemnity appropriate for cost of corrective action taken to comply with environmental abatement and clean-up order issued by state; no need for indemnitee to wait to be sued); *Aetna Life & Cas. Co. v. Ford Motor Co. (1975) 50 Cal. App. 3d 49, 52-53, 122 Cal. Rptr. 852* ; *Mabie & Mintz v. B & E Installers (1972) 25 Cal. App. 3d 491, 496-497, 101 Cal. Rptr. 919* ; *Great W. Furniture Co. v. Porter Corp. (1965) 238 Cal. App. 2d 502, 512, 48 Cal. Rptr. 76]* .

If the voluntary payment rule has any applicability to settlement, it is to the area of a settlement involving payment of damages that the law does not recognize as compensible [*see Mullin Lumber Co. v. Chandler (1986) 185 Cal. App. 3d 1127, 1134, 230 Cal. Rptr. 122* (giving example of settlement that encompassed payment for loss of parental consortium, a ground of recovery not recognized under California law)]. One court appears to have applied a voluntary-payment limitation on this ground. In the case, the court held that a settling defendant could not recover indemnity with regard to a settlement that included its payment of an alleged excessive cost of repairs because, under California law, the settling defendant was liable only for the reasonable cost of repairs. However, the court framed its holding in terms of a lack of joint and several liability for the amount of the settlement that represented the excessive cost, rather than as involving a voluntary payment [*see Woodward-Gizienski & Assocs. v. Geotechnical Exploration, Inc. (1989) 208 Cal. App. 3d 64, 68, 255 Cal. Rptr. 800* ; *see also § 300.63[1]*].

[7] Judicial Determination of Good Faith

[a] Procedures to Obtain Determination

Any party to an action in which it is alleged that two or more parties are joint tortfeasors (or co-obligors on a contract) [*see § 300.90 et seq.*] is entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors [*Code Civ. Proc. § 877.6(a)(1)*]. The term "joint tortfeasor" as used in this statute refers to all tortfeasors joined in a single action, regardless of whether their acts were contemporaneous or successive [*Turcon Constr. Inc. v. Norton-Villiers, Ltd. (1983) 139 Cal. App. 3d 280, 283, 188 Cal. Rptr. 580* ; *see Code Civ. Proc. § 877* (using term "tortfeasors claimed to be liable for same tort")].

A party seeking a determination that a settlement is in good faith may proceed by noticed hearing, or under some circumstances, by notice and application [*see Code Civ. Proc. § 877.6(a)*]. If a hearing is desired or required, notice of a motion to confirm a good faith settlement [*see § 300.196*] must be given in the manner provided in *Code Civ. Proc. § 1005(b)* [*Code Civ. Proc. § 877.6(a)(1)*; *see Code Civ. Proc. § 1005(a)(5)*; *see also § 300.196*]. On a showing of good cause, the court may shorten the time for giving the required notice to permit the determination of the issue to be made before the commencement of the trial of the action, or before the verdict or judgment if settlement is made after the trial has commenced [*Code Civ. Proc. § 877.6(a)*].

As an alternative to a noticed hearing, a settling party may give notice of settlement to all parties and to the court, together with an application for determination of good faith settlement and a proposed order. The application must indicate the settling parties, and the basis, terms, and amount of the settlement [*Code Civ. Proc. § 877.6(a)(2)*].

Within 25 days after the mailing of the notice, application, and proposed order, or within 20 days after personal service,

a nonsettling party may file a notice of motion to contest the good faith of the settlement. If none of the nonsettling parties files such a motion, the court may approve the settlement. The notice by a nonsettling party must be given as provided in *Code Civ. Proc. § 1005(b)* [*see § 300.196*]. This procedure is not available if the settlement agreement includes a confidentiality agreement regarding the case or the terms of the settlement [*Code Civ. Proc. § 877.6(a)(2)*]. For a form for an application and proposed order under *Code Civ. Proc. § 877.6(a)(2)*, see *§ 300.196*.1.

A petition for a determination of the good faith of a settlement may only be made to a trial court, not to the court of appeal [*Lopez v. Jarrett (2001) 89 Cal. App. 4th 1298, 1299, 106 Cal. Rptr. 2d 829]* .

[b] Effect of Lack of Notice

Counsel for a settling defendant should ensure that all tortfeasors who might conceivably be liable to the plaintiff for the injury alleged are parties to the action by complaint or cross complaint at the time of settlement, or at least by the time of the good faith hearing under *Code Civ. Proc. § 877.6*. Due process [*see U.S. Const. amend. XIV*; *Cal. Const. art. I, § 17*] requires that a tortfeasor who is not yet a party but whose potential liability is known, or reasonably should have been known, to the settling parties must have an opportunity to be heard on the good faith of a prior settlement [*Singer Co. v. Superior Court (1986) 179 Cal. App. 3d 875, 881, 890-893, 225 Cal. Rptr. 159* (vacating order finding settlement to be in good faith)]. Once the tortfeasor is made a party, it is entitled to a new good faith hearing. The tortfeasor may engage in limited discovery to elicit the evidence relevant to the determination of good faith that was available at the time of settlement, whether or not the evidence was actually presented [*Singer Co. v. Superior Court (1986) 179 Cal. App. 3d 875, 881, 895, 225 Cal. Rptr. 159* ; *but see Rankin v. Curtis (1986) 183 Cal. App. 3d 939, 950-951, 228 Cal. Rptr. 753* (Staniforth, Acting P.J., dissenting; excluded party should have no right to challenge good faith determination as between settling parties; rather, appropriate remedy should simply be to not bar excluded party's indemnity rights)]. For a form for a writ of mandate to challenge a good faith determition by a party without notice, see *§ 300.202*.

Notice and an opportunity to be heard will bind an alleged joint tortfeasor to a good-faith settlement determination even if the party to be bound was not actually a party to the action at the time of the judicial determination of good faith [*Britz, Inc. v. Dow Chem. Co. (1999) 73 Cal. App. 4th 177, 184, 86 Cal. Rptr. 2d 188]* .

[c] Good Faith as Question of Fact

Whether a settlement is in good faith is a question of fact to be determined by the trial court based on the evidentiary material presented to it [*City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1263-1264, 238 Cal. Rptr. 119* ; *Barth-Wittmore Ins. v. H. R. Murphy Enters., Inc. (1985) 169 Cal. App. 3d 124, 131, 214 Cal. Rptr. 894]* . A party seeking confirmation of the good faith of a settlement must, at minimum, explain the following to the court and to all other parties [*see Alcal Roofing & Insulation v. Superior Court (1992) 8 Cal. App. 4th 1121, 1129, 10 Cal. Rptr. 2d 844]* :

- Who has settled with whom;
- The dollar amount of each settlement;
- If any settlement is allocated and how it is allocated between issues, parties, or both; and
- What nonmonetary consideration has been included and how the parties to settlement value that nonmonetary consideration [*see Brehm Cmtys. v. Superior Court (2001) 88 Cal. App. 4th 730, 736-737, 105 Cal. Rptr. 2d 918* (even if making valuation is difficult, trial court must require valuation of nonmonetary settlement elements to make good faith determination)].

As a question of fact, the issue cannot be determined on a motion for summary judgment [*Northrop Corp. v. Stinson*

Sales Corp. (1984) 151 Cal. App. 3d 653, 657-658, 199 Cal. Rptr. 16] . Nor can it be raised for the first time on appeal [*City of Sacramento v. Gemsch Inv. Co. (1981) 115 Cal. App. 3d 869, 878, 171 Cal. Rptr. 764]* . Any factual determinations made on contested issues of liability or damages are tentative and solely for the purpose of evaluating the good faith of a proposed settlement as of the date of evaluation. A party is not precluded from presenting additional evidence on the issue at trial [*Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal. App. 3d 864, 878 n.9, 269 Cal. Rptr. 647]* .

Although a question of fact, good faith depends, in part, on a defendant's potential liability [*see § 300.73[5][b]*], which may turn on a question of law. In such a case, the court must correctly resolve the legal issue in order to make the factual good-faith determination [*see Minnesota Mining & Mfg. Co. v. Superior Court (1988) 206 Cal. App. 3d 1025, 1028-1029, 253 Cal. Rptr. 908]* . Therefore, the court must examine the legal theories under which the defendant may be liable in order to determine if there is a reasonable likelihood that the settling defendant faces substantial liability [*see, e.g., Gehl Brothers Mfg. Co. v. Superior Court (1986) 183 Cal. App. 3d 178, 184-186, 228 Cal. Rptr. 19*]. For example, if a defendant's potential liability is vicarious only, depending on whether or not an active tortfeasor is the settling defendant's employee, the court must properly resolve the employment issue as a matter of law (assuming no dispute of fact) in determining whether the settlement is in good faith [*see Toyota Motor Sales U.S.A., Inc. v. Superior Court (1990) 220 Cal. App. 3d 864, 870-878, 269 Cal. Rptr. 647]* .

[d] No Right to Jury Trial

A good faith settlement confirmation hearing under *Code Civ. Proc. § 877.6* is equitable in nature and not an action at law. Therefore, a jury trial is neither authorized by the statute nor constitutionally required [*Widson v. International Harvester Co. (1984) 153 Cal. App. 3d 45, 56-57, 200 Cal. Rptr. 136]* .

[e] Burden of Proof

The burden of proving the settlement rests on the settling party. Once the settlement is shown, the burden of proof shifts to the nonsettling tortfeasor to show that the settlement was not made in good faith [*Code Civ. Proc. § 877.6(d)*; *City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1261, 238 Cal. Rptr. 119* ; *Ford Motor Co. v. Schultz (1983) 147 Cal. App. 3d 941, 944 n.1, 195 Cal. Rptr. 470* ; *Fisher v. Superior Court (1980) 103 Cal. App. 3d 434, 447, 163 Cal. Rptr. 47]* . For discussion of how each party may meet its burden of proof, see *§ 300.73[7][f]*.

[f] Use of Affidavits and Other Evidence

The good faith issue may be determined by the court on the basis of affidavits (or declarations under *Code Civ. Proc. § 2015.5*) served with the notice of motion and the counteraffidavits (or counterdeclarations) filed in response to them. The court may, in its discretion, receive other evidence at the hearing [*Code Civ. Proc. § 877.6(b)*].

If the motion is made by a nonsettling tortfeasor, it seems that the supporting declarations should set forth evidentiary facts within the declarant's knowledge [*see Code Civ. Proc. §§ 2002(1), 2003, 2009, 2015.5*; *Evid. Code § 702*] negating the existence of good faith; that is, they would have to address the *Tech-Bilt* factors [*see Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 499-500, 213 Cal. Rptr. 256, 698 P.2d 159* ; *see generally §§ 300.73[5][b], 300.199*]. This may require completion of formal discovery to secure the necessary facts [*see § 300.73[7][g]*].

On the other hand, if the motion is made by the settling tortfeasor, a mere showing of the settlement, the amount of the settlement, and perhaps the basis for the settlement is all that is required to be shown in the supporting papers, and would, in the case of an uncontested motion, support an order determining that the settlement was made in good faith [*see City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1257, 1258, 1262, 238 Cal. Rptr. 119* ; *see also § 300.198*]. One court has noted that: (1) hundreds of motions by settling parties for good faith determinations

are presented for trial court approval each year, and that the overwhelming majority are unopposed and granted summarily by the court; (2) at the time of filing, the moving party in many cases does not know if a contest will develop; and (3) if each motion required a full recital by declaration or affidavit setting forth a complete factual response to all of the *Tech-Bilt* factors, literally thousands of attorney hours would be consumed and inch-thick motions would have to be read and considered by trial courts in an exercise that would waste valuable judicial and legal time and clients' resources [*City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1261, 238 Cal. Rptr. 119]* .

A nonsettling tortfeasor who contests the motion should file declarations showing a lack of good faith. This in turn may require the moving party to file responsive counterdeclarations to negate the showing [*City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1262, 238 Cal. Rptr. 119]* .

If the settlement is contested, the trial court's consideration of the settlement agreement and its relationship to the entire litigation must proceed on a sufficient evidentiary basis to enable the court to consider and evaluate the various aspects of the settlement. Therefore, the declarations or other evidence should provide the court with the facts necessary to evaluate the settlement in terms of the *Tech-Bilt* factors. Without a sufficient evidentiary basis, it is impossible for a court to exercise its discretion in an appropriate fashion [*City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1263, 238 Cal. Rptr. 119]* .

A party may not both seek confirmation of a settlement agreement, and withhold it from nonsettling defendants on grounds of confidentiality. However, the agreement need not be executed and presented to the court as long as all of the parties are timely advised of the important terms of the settlement [*Alcal Roofing & Insulation v. Superior Court (1992) 8 Cal. App. 4th 1121, 1127, 10 Cal. Rptr. 2d 844]* . At a minimum, a party seeking confirmation of a settlement should explain to the court and to all other parties (1) who has settled with whom; (2) the dollar amount of each settlement; (3) if any settlement is allocated and how it is allocated between issues and/or parties; and (4) what nonmonetary consideration has been included and how the parties to the settlement value the nonmonetary consideration [*Alcal Roofing & Insulation v. Superior Court (1992) 8 Cal. App. 4th 1121, 1129, 10 Cal. Rptr. 2d 844]* . Additionally, a party seeking confirmation must set forth the evidentiary basis of any allocations and valuations made, and must demonstrate that the allocation was reached in a sufficiently adversarial manner to justify the presumption that a reasonable valuation was reached[*Erreca's v. Superior Court (1993) 19 Cal. App. 4th 1475, 1495-1496, 24 Cal. Rptr. 2d 156]* .

In the case of a settlement involving the dismissal of one defendant, based on plaintiff's assessment that the defendant was not liable, a declaration of the party opposing the settlement may establish the settling defendant's liability if it is based on a proper factual foundation. To establish nonliability, and thus good faith, in such a situation, the supporting affidavits of the plaintiff and settling defendant must present the factual basis for the determination of that defendant's nonliability. The plaintiff's counsel's conclusory declaration of the settling defendant's nonliability is insufficient to establish that the settlement represents a good faith approximation of that defendant's proportionate share of liability [*Greshko v. County of Los Angeles (1987) 194 Cal. App. 3d 822, 834-835, 239 Cal. Rptr. 846]* .

The attorney of a nonsettling defendant is not, as a general rule, subject to deposition on the issue of whether that attorney's bad faith impeded the settlement process, thus justifying a lower than normal settlement amount [*Spectra-Physics, Inc. v. Superior Court (1988) 198 Cal. App. 3d 1487, 1493-1498, 244 Cal. Rptr. 258]* .

[g] Continuances and Discovery

In many instances the defendant who objects to the settlement does not possess sufficient factual information at the time of the hearing to carry the burden of proof that the settlement was not made in good faith. In such a case, it is appropriate for the objector to move for a continuance of the hearing, if necessary, for the purpose of gathering sufficient facts. The process might include further formal discovery to support the statutory burden of proof [*Code Civ. Proc. § 877.6(d)*] regarding all potentially applicable *Tech-Bilt* factors [*City of Grand Terrace v. Superior Court*

(1987) 192 Cal. App. 3d 1251, 1265, 238 Cal. Rptr. 119 ; *see Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 499-500, 213 Cal. Rptr. 256, 698 P.2d 159* ; *see generally § 300.73[5][b]*]. This rule applies to all contested good faith settlement hearings, no matter which of the *Tech-Bilt* factors are in issue. This process could necessarily lead to motions for further discovery, additional declarations and counterdeclarations by the parties, and a delay in the proceedings; however, this procedure will ensure that the expanded scope of the hearing dictated by *Tech-Bilt* will be followed, the evidence will be intelligently assessed, and the objectives of *Tech-Bilt* will be attained [*City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1265, 238 Cal. Rptr. 119]* .

[h] Referral to Special Master

Potential problems arise if the same judge conducts extensive settlement negotiations and then passes on the good faith of the settlement at the confirmation hearing. A judge who hears a settlement proceeding is not automatically barred from hearing a good faith settlement motion. However, a judge should not preside over extensive settlement negotiations that produce tentative resolutions of complex issues, particularly if not all parties are represented, and then also hear the confirmation motion [*Erreca's v. Superior Court (1993) 19 Cal. App. 4th 1475, 1493, 24 Cal. Rptr. 2d 156]* .

For this reason, it may be prudent to refer complex settlement negotiations arising out of a settlement conference to a special master. The master is an officer of the court who is assumed to be acting independently. The master makes a report on settlement matters to the court, and the court is then free to exercise its independent judgment by accepting or rejecting it [*Erreca's v. Superior Court (1993) 19 Cal. App. 4th 1475, 1493, 24 Cal. Rptr. 2d 156]* .

[8] Procedure to Dismiss Indemnity Claim on Finding of Good Faith Settlement

Code Civ. Proc. §§ 877 and *877.6* provide for the discharge of the settling party from comparative indemnity claims of the determination that the settlement is in good faith [*see § 300.73[4]*]. Neither statute, however, specifies a procedure by which the discharge or bar may be implemented as between the settling and nonsettling tortfeasors. Other provisions of the Code of Civil Procedure, nevertheless, provide mechanisms by which the good faith settlor may obtain dismissal of actions or cross complaints for comparative indemnity.

One method is to move for summary judgment under *Code Civ. Proc. § 437c*, either contemporaneously with or following the hearing determining the good faith of the settlement [*City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1266, 238 Cal. Rptr. 119* ; *Shane v. Superior Court (1984) 160 Cal. App. 3d 1237, 1245, 207 Cal. Rptr. 210* ; for discussion, a procedural checklist, and forms for moving for summary judgment, *see* Ch. 537, *Summary Judgment*]. Another approach is a motion for judgment on the pleadings or, if the indemnity claim is not yet at issue, a general demurrer, in either case invoking judicial notice of the good faith settlement determination that bars the claim [*City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1266, 238 Cal. Rptr. 119* ; *Shane v. Superior Court (1984) 160 Cal. App. 3d 1237, 1245, 207 Cal. Rptr. 210* ; *see* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*].

In addition, some courts have granted simple motions to dismiss cross complaints for indemnity immediately on determining the cross defendant's settlement was in good faith [*Greshko v. County of Los Angeles (1987) 194 Cal. App. 3d 822, 830, 239 Cal. Rptr. 846* ; *City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1266, 238 Cal. Rptr. 119* ; *Shane v. Superior Court (1984) 160 Cal. App. 3d 1237, 1246, 207 Cal. Rptr. 210* ; *see Turcon Constr., Inc. v. Norton-Villiers, Ltd. (1983) 139 Cal. App. 3d 280, 282, 188 Cal. Rptr. 580* ; *see* Ch. 212, *Dismissal*]. Although trial courts are not technically empowered by *Code Civ. Proc. § 877.6* to dismiss complaints or cross complaints against a settling tortfeasor at the time of the hearing on the good faith settlement issue, at least one court has stated that, if properly noticed, the good faith determination and the dismissal can be handled at one appearance [*IRM Corp. v. Carlson (1986) 179 Cal. App. 3d 94, 103 n.6, 224 Cal. Rptr. 438]* . Other courts have suggested that employment of a distinct procedure to adjudicate the effect of a judicially determined good faith settlement on a

pending action or claim not only is procedurally necessary but also focuses the court's attention distinctly on two completely different substantive questions--whether the settlement was in good faith and whether the claim sought to be dismissed is of such a nature as to be barred by a good faith settlement [*Housing Group v. Superior Court (1994) 24 Cal. App. 4th 549, 553, 29 Cal. Rptr. 2d 460* ; *City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1266-1267, 238 Cal. Rptr. 119* ; *Shane v. Superior Court (1984) 160 Cal. App. 3d 1237, 1246, 207 Cal. Rptr. 210]* .

A claim for indemnity may only be dismissed by the court in before which it is pending. A determination in one action that a settlement is in good faith may not be followed by an order in that action that a claim for indemnity in a different action is barred. A motion must be made in the second action for determination of the effect of the settlement in the first action [*Shane v. Superior Court (1984) 160 Cal. App. 3d 1237, 1246, 1250-1252, 207 Cal. Rptr. 210]* . Similarly, a determination that a settlement between the parties was in good faith may not be followed by an order that a claim for indemnity arising from liability to different parties is barred [*Housing Group v. Superior Court (1994) 24 Cal. App. 4th 549, 553, 29 Cal. Rptr. 2d 460]* .

The fact that a settling tortfeasor neither needs nor seeks protection from claims for contribution or indemnity under *Code Civ. Proc. § 877.6(c)* does not prevent use of the hearing procedure under *Code Civ. Proc. § 877.6* to secure a determination of the good faith of a settlement [*Barth-Wittmore Ins. v. H. R. Murphy Enters., Inc. (1985) 169 Cal. App. 3d 124, 135, 214 Cal. Rptr. 894]* .

[9] Review of Determination

A determination that a settlement was made in good faith is an interlocutory decree and is not immediately appealable [*Chernett v. Jacques (1988) 202 Cal. App. 3d 69, 71, 248 Cal. Rptr. 63* ; *Barth-Wittmore Ins. v. H. R. Murphy Enters., Inc. (1985) 169 Cal. App. 3d 124, 130, 214 Cal. Rptr. 894]* . However, any party aggrieved by the trial court's determination that a settlement was made with or without good faith may petition the proper court for a writ of mandate [*see § 300.201*] to obtain a review of the determination [*Code Civ. Proc. § 877.6(e)*; *see Abbott Ford, Inc. v. Superior Court (1987) 43 Cal. 3d 858, 868, 239 Cal. Rptr. 626, 741 P.2d 124* (mandate would have issued had case not been fully settled by parties pending Supreme Court review); *City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1255, 1267-1268, 238 Cal. Rptr. 119* (peremptory writ of mandate issued); *Barth-Wittmore Ins. v. H. R. Murphy Enters., Inc. (1985) 169 Cal. App. 3d 124, 130-131, 214 Cal. Rptr. 894* (treating appeal from trial court's determination that settlement was made in good faith, filed before effective date of *Code Civ. Proc. § 877.6(e)*, as petition for writ of mandate to review determination)]. The review by writ may encompass the order or judgment dismissing the indemnity claim because of the good-faith determination, but such review is not compelled by *Code Civ. Proc. § 877.6(e)* [*Housing Group v. Superior Court (1994) 24 Cal. App. 4th 549, 552, 29 Cal. Rptr. 2d 460]* .

The petition must be filed within 20 days after service of written notice of the determination, or within such additional time, not exceeding 20 days, as the trial court may allow [*Code Civ. Proc. § 877.6(e)*]. The reviewing court must, within 30 days of the receipt of all materials to be filed by the parties, determine whether it will hear the writ and notify the parties of the determination [*Code Civ. Proc. § 877.6(e)(1)*]. If the court grants a hearing on the writ, the hearing must be given special precedence over all other civil matters on the court's calendar except those matters to which equal or greater calendar precedence is granted by law [*Code Civ. Proc. § 877.6(e)(2)*]. The running of any time period after which the action would be subject to dismissal pursuant to former *Code Civ. Proc. § 583* (*now see Code Civ. Proc. §§ 583.110-583.430*) is tolled during the review period [*Code Civ. Proc. § 877.6(e)(3)*].

If the issue was tried on declarations, the general rule on appeal applies; that is, the declarations favoring the contention of the prevailing party establish not only the facts stated in them but also all facts that reasonably may be inferred from them. If there is substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed by a reviewing court [*Barth-Wittmore Ins. v. H. R. Murphy Enters., Inc. (1985) 169 Cal. App. 3d 124, 133, 214 Cal. Rptr. 894]* .

In addition to the statutory writ procedure discussed above, under the appropriate circumstances a party may also challenge a determination of good faith on postjudgment appeal from a final order, such as an order of dismissal or judgment in an indemnity action [*Maryland Cas. Co. v. Andreini & Co. (2000) 81 Cal. App. 4th 1413, 1415-1416, 97 Cal. Rptr. 2d 752* ; *see Chernett v. Jacques (1988) 202 Cal. App. 3d 69, 71, 248 Cal. Rptr. 63* ; *Barth-Wittmore Ins. v. H.R. Murphy Enters., Inc. (1985) 169 Cal. App. 3d 124, 130, 214 Cal. Rptr. 894]* . For example, a party who has previously applied unsuccessfully for a writ of mandate may subsequently challenge a good-faith determination on postjudgment appeal [*Wilshire Ins. Co. v. Tuff Boy Holding, Inc. (2001) 86 Cal. App. 4th 627, 636-637, 103 Cal. Rptr. 2d 480* ; *Maryland Cas. Co. v. Andreini & Co. (2000) 81 Cal. App. 4th 1413, 1415-1416, 1425 n.13, 97 Cal. Rptr. 2d 752]* . However, a party may not forgo the writ procedures discussed above entirely and wait toattack the determination for the first time on appeal from a final judgment following trial of a plaintiff's claims against the nonsettling defendants [*O'Hearn v. Hillcrest Gym & Fitness Ctr., Inc. (2004) 115 Cal. App. 4th 491, 499, 9 Cal. Rptr. 3d 342* ; *Main Fiber Prods., Inc. v. Morgan & Franz Ins. Agency (1999) 73 Cal. App. 4th 1130, 1136-1137, 87 Cal. Rptr. 2d 108]* .

A party challenging the legality or appropriateness of applying Sections 877 and 877.6 in the first place, such as a party that argues that the claim does not involve "joint tortfeasors" or "co-obligors on a contract debt," may pursue the challenge by way of appeal [*Rohr Indus., Inc. v. First State Ins. Co. (1997) 59 Cal. App. 4th 1480, 1486, 69 Cal. Rptr. 2d 872]* .

[10] Sliding Scale Recovery Agreement

[a] Defined

A sliding scale agreement, known in the legal literature and in other jurisdictions as a "Mary Carter agreement," and occasionally referred to as a "Gallagher covenant" or "guaranteed verdict agreement" [*see Abbott Ford, Inc. v. Superior Court (1987) 43 Cal. 3d 858, 863 n.1, 869 n.9, 239 Cal. Rptr. 626, 741 P.2d 124]* , is an agreement or covenant between a plaintiff and one or more, but not all, alleged tortfeasor defendants limiting the liability of the agreeing tortfeasor defendants to an amount dependent on the amount of recovery that the plaintiff is able to recover from the nonsettling defendants. These agreements include, but are not limited to, agreements within the scope of *Code Civ. Proc. § 877* [*see § 300.73[4]*] and agreements in the form of a loan from the agreeing tortfeasor defendant to the plaintiff or plaintiffs, which loan is repayable in whole or in part from any ultimate recovery against nonsettling defendants [*Code Civ. Proc. § 877.5(b)*].

[b] Validity

Whether a particular sliding scale agreement is valid depends on the facts of the case. This is so because (1) the variety of contractual arrangements that fall within the general rubric of sliding scale agreements is enormous and, although in all such agreements the defendant's ultimate liability to the plaintiff is dependent at least in part on the amount of money the plaintiff recovers from the nonsettling defendants, the agreements may include a virtually unlimited number of additional provisions; (2) the content and effect of the sliding scale provision itself and the factual background against which the agreement is negotiated frequently vary significantly from case to case; and (3) the agreements may have a variety of effects at different stages of the litigation process--discovery, settlement, trial, or appeal. Consequently, analysis of the validity of a sliding scale agreement requires close attention to the specific provisions of the agreement itself, the factual setting in which the agreement is entered into, and the agreement's effect on the particular aspect of the judicial process at issue [*Abbott Ford, Inc. v. Superior Court (1987) 43 Cal. 3d 858, 870-871, 239 Cal. Rptr. 626, 741 P.2d 124]* .

[c] Disclosure Requirement

Parties entering into a sliding scale recovery agreement or covenant must promptly inform the court in which the action is pending of the existence of the agreement or covenant and its terms and provisions [*Code Civ. Proc. § 877.5(a)(1)*]. If the action is based on acts or omissions occurring on or after January 1, 1988, a sliding scale recovery agreement is not

effective unless, at least 72 hours prior to entering into the agreement, a notice of intent to enter into an agreement has been served on all nonsignatory defendant tortfeasors [*Code Civ. Proc. § 877.5(c)*; *see* Stats. 1987, ch. 1202, § 2]. On a showing of good cause, however, the court may allow a shorter time. The failure to comply with the notice requirements does not constitute good cause to delay commencement of trial [*Code Civ. Proc. § 877.5(c)*].

If the action is tried before a jury and a defendant who is a party to the agreement is a witness, the court will, on motion of a party, disclose the existence and content of the agreement or covenant to the jury, unless the court finds that disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. However, the disclosure must be no more than necessary to be sure that the jury understands (1) the essential nature of the agreement, but not including the amount paid, or any contingency; and (2) the possibility that the agreement may bias the testimony of the alleged tortfeasor who entered into the agreement [*Code Civ. Proc. § 877.5(a)(2)*; *Moreno v. Sayre (1984) 162 Cal. App. 3d 116, 125-126, 208 Cal. Rptr. 444]* . If the action is based on acts or omissions occurring on or after January 1, 1988, the disclosure to the jury must be no more than necessary to inform the jury of the possibility that the agreement may bias the testimony of the witness [*Code Civ. Proc. § 877.5(a)(2)*; *see* Stats. 1987, ch. 1202, § 2].

The participation of settling defendants at trial does not deprive the nonsettling defendants of a fair trial as long as the nature of their interest is fully disclosed to the jury [*Alcala Co. v. Superior Court (1996) 49 Cal. App. 4th 1308, 1318, 57 Cal. Rptr. 2d 349]* .

[d] Good Faith Requirement

[i] In General

A sliding scale settlement may be confirmed as in good faith under *Code Civ. Proc. § 877.6*, and the confirmation has the same effect as with good faith settlements generally [*see §§ 300.73[3], 300.73[4]*]. To meet its burden of proof that the settlement is not in good faith [*see § 300.73[7][e]*], a nonsettling defendant is entitled to discover all of the provisions of the agreement [J. Allen *Radford Co. v. Superior Court (1989) 216 Cal. App. 3d 1418, 1423-1424, 265 Cal. Rptr. 535]* .

If a sliding scale agreement is to relieve the settling defendant of any liability for comparative indemnity to the other defendants in the action, it must be entered into in good faith [*see Code Civ. Proc. §§ 877, 877.6(a), (c)*]. In this regard, the good faith standards enunciated in *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 213 Cal. Rptr. 256, 698 P.2d 159* , apply [*see § 300.73[5][b]*]. Therefore, to be made in good faith, the agreement must satisfy the dual goals of fair apportionment of the loss and encouragement of settlement [*see Abbott Ford, Inc. v. Superior Court (1987) 43 Cal. 3d 858, 871-875, 886-887, 239 Cal. Rptr. 626, 741 P.2d 124]* . To satisfy the statutory objective of fair apportionment of loss [*see § 300.73[10][d][ii]*], the "consideration" paid by a defendant who enters into a sliding scale agreement must fall within the *Tech-Bilt* "ballpark," and the plaintiffs' claims against the remaining defendants must be reduced by the amount of the "consideration paid" by the settling defendant [*see Code Civ. Proc. § 877(a)*]. Any unreasonable or bad faith conduct of the nonsettling defendants that impeded the settlement process and led to the sliding scale agreement may be taken into account in determining whether or not the agreement meets the good faith standard. However, any provision that purports to give the settling defendant a veto over subsequent settlements is valid only if it is limited to settlements that would leave the earlier settling defendant to bear more than his or her fair share of liability for the plaintiff's damages [*Abbott Ford, Inc. v. Superior Court (1987) 43 Cal. 3d 858, 886-887, 239 Cal. Rptr. 626, 741 P.2d 124* ; *see § 300.73[10][d][iii]* regarding the policies regarding provisions granting such a "veto" power].

[ii] Apportionment of Loss

Under the terms of *Code Civ. Proc. § 877*, a good faith settlement has two interrelated consequences: (1) it discharges

the settling tortfeasor from all liability to other defendants for comparative indemnity, and (2) it reduces the plaintiff's claims against the other defendants by the amount of consideration paid for it [*see §§ 300.73[3], 300.73[4]*]. A sliding scale agreement should satisfy the apportionment-of-loss requirement if the court finds that the settling defendant, by entering into a sliding scale agreement, has realistically paid a "consideration" that is within the *Tech-Bilt* "ballpark" and if the nonsettling defendants obtain a reduction in the plaintiff's claims against them in an amount equal to that consideration [*Abbott Ford, Inc. v. Superior Court (1987) 43 Cal. 3d 858, 876-877, 239 Cal. Rptr. 626, 741 P.2d 124]* . Accordingly, the analysis of whether a sliding scale agreement conflicts with the fair-apportionment objective lies in "the amount of consideration" that is attributed to the settling defendant as the "payment" for his or her release from liability by entering into the agreement. As the agreement is given by the settling defendant in exchange for the plaintiff's release and for the immunity from comparative indemnity claims of the nonsettling cotortfeasors, the exchange is assumed to be equal [*Abbott Ford, Inc. v. Superior Court (1987) 43 Cal. 3d 858, 878, 239 Cal. Rptr. 626, 741 P.2d 124]* . Focusing not on what the settling defendant gave up, but rather on what he or she received, results in a simple application of the *Tech-Bilt* rules [*Abbott Ford, Inc. v. Superior Court (1987) 43 Cal. 3d 858, 878, 239 Cal. Rptr. 626, 741 P.2d 124]* .

The burden of establishing the monetary value of the sliding scale agreement is on the parties to the agreement. A joint valuation by the plaintiff and the settling defendant should generally produce a reasonable valuation. Once the parties to the agreement have declared its value, a nonsettling defendant can either (1) accept that value and attempt to show that the settlement is not in good faith because the assigned value is not within the settling defendant's *Tech-Bilt* "ballpark" or (2) attempt to prove that the parties' assigned value is too low and that a greater reduction in plaintiff's claims against the remaining defendants is actually warranted [*Abbott Ford, Inc. v. Superior Court (1987) 43 Cal. 3d 858, 879, 239 Cal. Rptr. 626, 741 P.2d 124]* .

The parties' valuation of sliding-scale consideration paid to a settling plaintiff must be supported by specific evidence, declaration, or opinion, and a good faith determination that accepts a low valuation may be reversed on appeal if the parties provided no meaningful evidence to support the low valuation [*United Servs. Auto. Ass'n v. Superior Court (2001) 93 Cal. App. 4th 633, 642-645, 113 Cal. Rptr. 2d 328* (reversing good faith determination that accepted parties' decision to value total consideration at amount of noncontingent payment, but placed no value on $3.5 million contingent payment)].

[iii] Encouragement of Settlement

A prime value in encouraging settlement lies in removing the case from the judicial system. This occurs only if all claims relating to the loss are settled [*Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 500, 213 Cal. Rptr. 256, 698 P.2d 159* ; *see Abbott Ford, Inc. v. Superior Court (1987) 43 Cal. 3d 858, 880, 239 Cal. Rptr. 626, 741 P.2d 124]* . To the extent that a sliding scale agreement may deter unreasonable nonparticipation by recalcitrant defendants in settlement negotiations, the agreement furthers the settlement goal [*Abbott Ford, Inc. v. Superior Court (1987) 43 Cal. 3d 858, 881-882, 239 Cal. Rptr. 626, 741 P.2d 124]* . Conversely, if the agreement interferes with the ability of the nonparticipating defendants to settle the remainder of the litigation, it may conflict with the public policy favoring full settlement and may frequently result in unnecessary trials. An example is an agreement that grants the settling defendant an open-ended veto power over any subsequent settlement that would affect the settling defendant's ultimate out-of-pocket costs under the guaranty agreement, rather than over subsequent settlements that are unfairly low and that would result in the settling defendant's bearing an ultimate out-of-pocket costhigher than his or her fair share of plaintiff's damages. Accordingly, to be valid and enforceable, such a veto provision must, by its terms, be confined to those subsequent settlements that will require the earlier settling defendant to bear more than his or her fair "ballpark" share of damages [*Abbott Ford, Inc. v. Superior Court (1987) 43 Cal. 3d 858, 882, 883, 239 Cal. Rptr. 626, 741 P.2d 124]* .

In *Abbott Ford*, the Supreme Court declined, on the ground the issue was not raised in the trial court or addressed in the briefs on appeal, to rule on whether the potential antisettlement effect of a sliding scale agreement that established a

high guaranty figure and mandated that the proceeds of any subsequent settlement up to the guaranty figure be credited in toto to the earlier settling defendant, thereby effectively eliminating any incentive plaintiff may have had to settle with the remaining defendants within a range commensurate with those defendants' fair share of responsibility, was sufficient in itself to warrant a finding that the agreement was not a good faith settlement for the purposes of *Code Civ. Proc. §§ 877* and *877.6*. The Court nevertheless noted that the settling parties may be able to obviate such a challenge in the future by providing some mechanism for the sharing of subsequent settlement proceeds between the earlier settling defendant and the plaintiff, thereby assuring that the plaintiff retains at least some incentive to entertain reasonable settlement offers from the remaining defendants [*Abbott Ford, Inc. v. Superior Court (1987) 43 Cal. 3d 858, 884, 239 Cal. Rptr. 626, 741 P.2d 124]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersTortsNegligenceDefensesComparative NegligenceMultiple PartiesContributionTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsProcedureSettlementsMultipartiesGeneral Overview

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§ 300.74 Statutory Pro Rata Contribution Among Tortfeasors

Code Civ. Proc. §§ 875, 876, and *878-880*, enacted in 1957, provide for a right of contribution if a money judgment has been rendered jointly against two or more defendants in a tort action [*see Code Civ. Proc. § 875(a)*]. The contribution statutes provide for pro rata (that is, equal) sharing of tort damages assessed against multiple defendants [*see Code Civ. Proc. §§ 875(c), 876(a)*].

The system of equal allocation of damages among joint tortfeasors, as provided for in the contribution statutes, has essentially been superseded by the subsequently developed judicial rule of comparative indemnity, under which damages imposed against joint tortfeasors are allocated on the basis of the tortfeasors' comparative fault [*see Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 327-328, 146 Cal. Rptr. 550, 579 P.2d 441* ; *American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 599-604, 146 Cal. Rptr. 182, 578 P.2d 899]* . The California Supreme Court has held that California's prior statutes providing for a right of contribution among tortfeasors do not preclude development of a common law system of partial equitable indemnity based on comparative fault [*American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 604, 146 Cal. Rptr. 182, 578 P.2d 899]* . Subsequent decisions have followed this view and construed the term "contribution" in prior statutes as now referring to the rule of comparative indemnity as created in *American Motorcycle* [*see, e.g., Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 327-328, 334, 146 Cal. Rptr. 550, 579 P.2d 441* (reversing trial court judgment apportioning damages on pro rata basis and remanding the case for allocation on basis of comparative fault); *see also Ambriz v. Kress (1983) 148 Cal. App. 3d 963, 969-970, 196 Cal. Rptr. 417* ; *Paradise Valley Hosp. v. Schlossman (1983) 143 Cal. App. 3d 87, 91-93, 191 Cal. Rptr. 531]* . These courts have essentially ignored *Code Civ. Proc. § 876(a)*, which states that a joint tortfeasor's pro rata share of a judgment is determined by dividing the entire judgment equally among all tortfeasors, because the contribution statutes predate comparative negligence [*see Paradise Valley Hosp. v. Schlossman (1983) 143 Cal. App. 3d 87, 92, 191 Cal. Rptr. 531]* . One court, however, has refused to ignore this rule and has denied contribution to a defendant whose payment did not exceed its pro rata share under an equal division, although it did exceed its percentage share under comparative fault [*see Lamberton v. Rhodes-Jamieson (1988) 199 Cal. App. 3d 748, 750-755, 245 Cal. Rptr. 162]* .

For a form for a motion for postjudgment contribution under *Code Civ. Proc. § 878*, see*§ 300.203*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesComparative NegligenceMultiple PartiesContributionTortsProcedureMultiple DefendantsContributionGeneral Overview

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[Reserved]

§§ 300.75[Reserved]

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§ 300.90 Governing Statutes

Contribution among parties to a joint or joint and several obligation is governed by *Civ. Code § 1432*. Contribution among cosureties is governed by *Civ. Code § 2848*. The contribution rights of joint debtors following a release of one of them is governed by *Civ. Code § 1543*. Contribution among joint nontort judgment debtors is governed by *Code Civ. Proc. §§ 881-883*. For statutes governing contribution among particular persons, see *§ 300.150[5]*.

The effect of a release, dismissal, or covenant not to sue on the right to contribution is governed by *Code Civ. Proc. §§ 877* and *877.6*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiability

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§ 300.91 Contribution Among Joint Nontort Obligors

[1] Basis of Right

Except as provided in *Code Civ. Proc. § 877* [*see § 300.93[1]*], if a party to a joint or joint and several obligation (that is, an obligation creating joint liability among several persons) satisfies more than his or her share of the obligation, he or she may require a proportionate contribution from all the parties to the obligation [*Civ. Code § 1432*]. This right to contribution is an outgrowth of the doctrine of implied-at-law covenants, and it is based on the principle of equity that a joint obligor who has paid money that in equity and good conscience should be paid by another should be reimbursed therefor [*see Pacific Freight Lines v. Pioneer Express Co. (1940) 39 Cal. App. 2d 609, 614, 103 P.2d 1056* ; *Jackson v. Lacy (1940) 37 Cal. App. 2d 551, 559, 100 P.2d 313]* . A party who has paid all or part of a joint obligation is thus entitled to bring suit against his or her co-obligors for reimbursement for the amount that he or she has paid above his or her legitimate share [*Arp v. Blake (1923) 63 Cal. App. 362, 366, 218 P. 773]* .

This potential right to contribution among joint obligors concerns only the rights of joint obligors, however, and has no effect on the obligee or creditor suing for payment. If the obligation is joint and several, the creditor may sue one or more of the obligors as he or she desires and as is permitted under the statutory provisions on joinder of parties [*see Code Civ. Proc. §§ 379, 389*; *see also* Ch. 395, *Parties*]. Following payment of a debt by an obligor, however, a right to contribution arises and the obligor may seek reimbursement from his or her co-obligors, regardless of whether they were joined in the original action by the creditor [*Tucker v. Nicholson (1938) 12 Cal. 2d 427, 433, 84 P.2d 1045]* .

[2] Amount of Contribution

Generally, a joint obligor who pays more than his or her share of an obligation may require a proportionate contribution from all parties to the obligation [*Civ. Code § 1432*]. Joint obligors are presumed to be equally liable on the obligation. If no apportionment of joint liability is dictated by the terms of some underlying agreement, such as a partnership agreement, the due proportion of the liability of the several judgment debtors must be calculated on a pro rata basis [*Young v. Rosenthal (1989) 212 Cal. App. 3d 96, 130, 260 Cal. Rptr. 369* ; *see Bunker v. Osborn (1901) 132 Cal. 480, 482, 64 P. 853* ; *cf. Code Civ. Proc. § 876(a)* (pro rata share of joint tortfeasors is determined by dividing entire judgment equally among all who are liable)]. For example, if one of two obligors on a note pays the entire amount due,

he or she is entitled to contribution of one half that amount from a co-obligor.

If contribution is not attainable from a joint obligor by reason of his or her insolvency, the loss arising from his or her lack of payment is born proportionately by the solvent co-obligors, thus increasing the proportionate share owed by each [*Tucker v. Nicholson (1938) 12 Cal. 2d 427, 433-434, 84 P.2d 1045]* .

[3] Limitations on Right to Contribution

The right to contribution arises only after a joint obligor has paid more than his or her proportionate share of an obligation [*Civ. Code § 1432*; *cf. Code Civ. Proc. § 883(a)* (joint judgment debtor may move for contribution after judgment is entered but before it is satisfied); *see generally § 300.92[2]*]. Therefore, an obligor who has paid nothing on an obligation cannot recover from his or her co-obligors their proportionate share of the obligation, and an obligor who has paid no more than his or her proportionate share cannot claim contribution. In either case, it is irrelevant that a co-obligor has paid nothing or less than his or her proportionate share [*Hosking v. Spartan Props., Inc. (1969) 275 Cal. App. 2d 152, 157, 79 Cal. Rptr. 893* ; *Jackson v. Lacy (1940) 37 Cal. App. 2d 551, 559, 100 P.2d 313]* .

The right to contribution is also not available to a party who has partially or completely paid an obligation if he or she was not legally obligated to make the payment. The right to contribution, in other words, cannot be based on voluntary payment of a debt [*Newberry v. Evans (1926) 76 Cal. App. 492, 509, 245 P. 227]* . Furthermore, the right to contribution is not available to a party who incidentally confers a benefit on another party who has made no agreement concerning financial responsibility for the improvements [*Major-Blakeney Corp. v. Jenkins (1953) 121 Cal. App. 2d 325, 340, 341, 263 P.2d 655* ; *see* Restatement of Restitution § 106].

[4] Release of Joint Nontort Obligor

A release given by a creditor to one of two or more joint obligor does not extinguish the debts of the other obligors, unless they are mere guarantors. Except as provided in *Code Civ. Proc. § 877* [*see § 300.93[1]*], such a release also does not affect the right of the debtors to seek contribution from the released obligor[*Civ. Code § 1543*]. Thus, a joint obligor who accepts a release has, in effect, consented to both a continuation of the liability of his or her co-obligors on an obligation, and a continuation of his or her own liability for contribution [*Lovetro v. Steers (1965) 234 Cal. App. 2d 461, 477, 44 Cal. Rptr. 604* ; *Williams v. Reed (1952) 113 Cal. App. 2d 195, 202, 248 P.2d 147]* .

[5] Cosureties

A surety or guarantor, on satisfying an obligation of a principle, may bring suit against one or more of his or her cosureties for contribution without regard to the order of time in which they became sureties [*Civ. Code § 2848*; *see also Civ. Code § 2787* (abolishing distinction between sureties and guarantors)]. The cosurety or guarantor, on paying more than his or her proportionate share of an obligation, may thus sue one or more of his or her cosureties under *Civ. Code § 2848* based on the theory of an implied contract that they would share the burden equally and hold each responsible for an aliquot part of the debt based on the whole number of sureties [*Williams v. Riehl (1899) 127 Cal. 365, 371, 59 P. 762* ; *Overholser v. Glynn (1968) 267 Cal. App. 2d 800, 807, 73 Cal. Rptr. 628]* .

[6] Statute of Limitations

The statute of limitations begins to run in an action for contribution on payment of a debt by the party seeking to enforce his or her rights [*Arp v. Blake (1923) 63 Cal. App. 362, 367, 218 P. 773]* . The action is controlled by the two-year statute of limitations for actions not founded on instruments in writing and thus must be brought within two years from the date of payment [*Code Civ. Proc. § 339*; *Manuel v. Hicks Iron Works (1932) 216 Cal. 459, 461, 14 P.2d 756* ; *see also Hurlbut v. Quigley (1919) 180 Cal. 265, 271, 180 P. 613* (cause of action for contribution against cosurety accrues when surety pays more than his or her share of debt, not when contract establishing cosurety relationship is executed)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityContracts LawDebtor & Creditor RelationsGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 300.92 Contribution Among Joint Nontort Judgment Debtors

[1] Basis of Right

In any action against several defendants, judgment may be given against one or more of them [*Code Civ. Proc. § 578*]. If two or more nontort judgment debtors are jointly liable on a money judgment, one of them who has satisfied more than his or her due proportion of the judgment, whether voluntarily or through enforcement procedures, may compel contribution from another judgment debtor who has satisfied less than his or her due proportion of the judgment [*Code Civ. Proc. § 882(a)*; *see § 300.151[3][a]*]. A joint judgment debtor paying more than his or her proportionate share of a judgment may thus obtain proportionate contribution from those jointly liable with him or her by bringing suit against one or more joint judgment debtor on an implied contract to share the burden fairly [*Woolley v. Seijo (1964) 224 Cal. App. 2d 615, 621-622, 36 Cal. Rptr. 762]* . Contribution rights under *Code Civ. Proc. § 882* are available with regard to any final order on a collateral matter directing the payment of money [*Young v. Rosenthal (1989) 212 Cal. App. 3d 96, 128-129, 260 Cal. Rptr. 369* (applicable to order of sanctions under *Code Civ. Proc. § 128.5*)]. The amount of a judgment of contribution is not to be reduced by setoffs arising from obligations between the judgment debtors. Moreover, if the judgment of contribution does not resolve those obligations, the parties may proceed on them in another action, such as one for dissolution of partnership and an accounting [*Security Pac. Nat'l Bank v. Lyons (1994) 25 Cal. App. 4th 706, 710-712, 30 Cal. Rptr. 2d 623]* .

[2] Procedure for Seeking Contribution

A judgment debtor may apply on noticed motion to the court that entered the judgment for an order determining liability for contribution or repayment, at any time before the judgment is satisfied in full or within 30 days thereafter [*Code Civ. Proc. § 883(a)*]. The order determining liability for contribution or repayment entitles the judgment debtor to the benefit of the judgment to enforce the liability, including every remedy that the judgment creditor has against the persons liable, to the extent of the liability [*Code Civ. Proc. § 883(b)*].

[3] Alternate Remedy of Assignment

The right to demand contribution provided by *Code Civ. Proc. § 883* is not the only remedy available to a judgment

debtor who has paid more than his or her share of a judgment. *Code Civ. Proc. § 883* does not limit any other remedy that a judgment debtor entitled to contribution or repayment may have [*Code Civ. Proc. § 883(c)*]. If a debtor who has paid a joint judgment is unable to seek contribution under *Code Civ. Proc. § 883* and chooses not to proceed under that section, he or she may take an assignment of the original obligation from the obligor-judgment creditor. Because the debt has already been paid and extinguished, the obligor-judgment creditor has nothing of legal value to assign, and the judgment debtor, as assignee, gets no legal rights in the obligation. The assignee judgment-debtor does, however, acquire equitable rights in the assigned obligation with which to force his or her joint judgment debtors to pay their share of the judgment [*Tucker v. Nicholson (1938) 12 Cal. 2d 427, 430, 84 P.2d 1045]* .

[4] Cosureties

If a judgment is based on an obligation of one judgment debtor as surety for another and the surety satisfies the judgment or any part of it, whether voluntarily or through enforcement procedures, the surety may compel repayment from the principal [*Code Civ. Proc. § 882(b)*]. Repayment from the principal may be enforced by means of *Code Civ. Proc. § 883* [*see Code Civ. Proc. § 883(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityContracts LawDebtor & Creditor Relations

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§ 300.93 Settlement or Dismissal of One of Two or More Co-Obligors

[1] Effect on Parties

A release, dismissal, or covenant not to sue or to enforce judgment given in good faith before verdict or judgment to one or more of a number of co-obligors mutually subject to contribution rights does not discharge any other co-obligor from liability unless its terms so provide. However, it does, except as noted below, reduce the injured party's claim against the other co-obligors by the amount stipulated in the settlement or by the amount of consideration paid, whichever is greater [*Code Civ. Proc. § 877(a)*].

A good faith settlement discharges the co-obligor to whom it was given from all liability for contribution to any other co-obligor [*Code Civ. Proc. § 877(b)*]. It also bars any other co-obligor from any further claims against the settling co-obligor for equitable comparative contribution, or partial or comparative indemnity based on comparative negligence or comparative fault [*Code Civ. Proc. § 877.6(c)*].

Code Civ. Proc. § 877 does not apply to co-obligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves [*Code Civ. Proc. § 877(c)*]. Neither does *Code Civ. Proc. § 877* apply to a release, a dismissal (with or without prejudice), or a covenant not to sue or not to enforce judgment given to a co-obligor on an alleged contract debt when the contract was made prior to January 1, 1988 [*Code Civ. Proc. § 877(d)*].

For further discussion of good faith settlements, see *§ 300.73*.

[2] Hearing on Good Faith Issue

Any party to an action in which it is alleged that two or more parties are co-obligors on a contract debt is entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and by one or more alleged co-obligors [*Code Civ. Proc. § 877.6(a)*].

The rules governing proceedings to determine good faith under *Code Civ. Proc. § 877.6* are the same for joint tortfeasors and co-obligors [*see Code Civ. Proc. § 877.6*]. For a discussion of *Code Civ. Proc. § 877.6* proceedings in

relation to settlements by joint tortfeasor defendants (which discussion is generally applicable to settlements by co-obligor defendants), see *§ 300.73*. The forms in §§ 300.196-300.202 may be adapted in proceedings to determine the good faith of a settlement by a co-obligor.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsGeneral OverviewCivil ProcedureSettlementsReleases From LiabilityGeneral Overview

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[Reserved]

§§ 300.94[Reserved]

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A. Express Contractual Indemnity

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§ 300.110 State Statutes

[1] Accrual of Indemnification Rights

Accrual of indemnitee's right to recovery under indemnity contract against liability when indemnitee becomes liable. *Civ. Code § 2778(1)*

Accrual of indemnitee's right to recovery under indemnity contract against claims, demands, damages, or costs on indemnitee's payment thereof. *Civ. Code § 2778(2)*

[2] Amount of Indemnity

Indemnity against demands, claims, or liability as including costs of defending against such claims, demands, or liability that are incurred in good faith and in exercise of reasonable discretion. *Civ. Code § 2778(3)*

Right to recover interest on damages certain or capable of being made certain. *Civ. Code § 3287(a)*

[3] Effect of Prior Adjudication or Settlement

Recovery suffered by indemnitee in good faith in action involving matters covered by indemnity agreement as conclusive against indemnitor who failed to defend action on indemnitee's request. *Civ. Code § 2778(5)*

Judgment against indemnitee in action involving matters covered by indemnity agreement as presumptive evidence against indemnitor who had no reasonable notice of action or who was not allowed to control its defense. *Civ. Code § 2778(6)*

Inapplicability of stipulation that judgment against indemnitee is conclusive on indemnitor if indemnitee fails, by want

of ordinary care, to establish good defense on merits in action in which judgment is rendered. *Civ. Code § 2778(7)*

If indemnitor of officer or other person is seasonably notified of and permitted to defend action against officer or person who has received any valid bond or covenant of indemnity, judgment rendered in action as conclusive against indemnitor. *Code Civ. Proc. § 1055*

[4] Express Indemnity Agreements

[a] Distinguished From Other Contracts

Indemnity agreement as contract by which one party engages to save another from legal consequences of conduct by one of them or some other person. *Civ. Code § 2772*

Surety or guarantor as one who promises to answer for debt, default, or miscarriage ofanother. *Civ. Code § 2787*

Insurance as contract by which one party undertakes to indemnify another against loss, damage, or liability arising from contingent or unknown event. *Ins. Code §§ 22, 23*

[b] Legality

Invalidity of contract exempting person from responsibility for fraud, willful personal or property injury, or willful or negligent violation of law. *Civ. Code § 1668*

Agreement to indemnify person against future act as void if person knows that act is unlawful at time of doing it. *Civ. Code § 2773*

Validity of agreement to indemnify person against past wrongful act other than felony. *Civ. Code § 2774*

Invalidity of indemnity provision in construction contract (as defined in *Civ. Code § 2783*) providing for indemnification of promisee for damages resulting from death, injury to person or property, or any other loss, damage, or expense arising from sole negligence or willful misconduct of promisee or promissee's agents, servants, or independent contractors who are directly responsible to promisee, or for defects in design furnished by such persons and exceptions. *Civ. Code § 2782(a)*

Invalidity of indemnity provision in construction contract imposing on contractor, or relieving public agency from, liability for public agency's active negligence. *Civ. Code § 2782(b)*

Invalidity of provisions, clauses, covenants, and agreements contained in, collateral to, or affecting residential construction contracts and any amendments that purport to indemnify or insure builder or general contractor or other contractor not affiliated with builder by subcontractor against liability for claims of construction defects, to extent claims arise out of, pertain to, or relate to negligence of builder or contractor or their agents. *Civ. Code § 2782(c)*

Validity of agreement providing for indemnification of person or agency which permits use of its property for performance of construction contract (as defined in *Civ. Code § 2783*) for others. *Civ. Code § 2782.1*

Validity of agreement to indemnify professional engineer against liability for negligence (but not willful misconduct) when specified criteria are met. *Civ. Code § 2782.2*

Validity of agreement providing for allocation, release, liquidation, exclusion, or limitation as between parties of any

liability for design defects or of promisee to promisor arising out of or relating to construction contract. *Civ. Code § 2782.5*

Validity of agreement, other than agreement by public entity, to indemnify professional engineer or geologist from liability for damages in excess of $250,000 that are caused by sole negligence (but not gross negligence or willful misconduct) of engineer or geologist in providing certain professional services with regard to hazardous materials cleanup. *Civ. Code § 2782.6*

Construction contract as written or oral agreement for performance of any portion of, any act collateral to, or any service reasonably related to construction, surveying, design, specification, alteration, repair, improvement, maintenance, removal of, or demolition of any building, highway, road, parking facility, bridge, railroad, airport, pier or dock, excavation or other structure, or development or improvement to real or personal property. *Civ. Code § 2783*

Design defect as condition that renders movable or immovable structure, equipment, machinery, or similar object that is constructed substantially in accord with its design either dangerous for use or wholly or partially inherently unfit for its intended use. *Civ. Code § 2784*

Invalidity of indemnity provision in hauling, trucking, or cartage contract that provides for indemnification of promisee against liability for damages resulting from death, personal or property injury, and their consequences that are caused by the sole negligence or willful misconduct of promisee, agents or servants of promisee, or independent contractors directly responsible to promisee, unless agents, servants, or independent contractors are under direct supervision and control of promisor. *Civ. Code § 2784.5*

[c] Scope of Indemnitor's Obligation

Right of person for whose benefit parties expressly contract to enforce contract before parties rescind it. *Civ. Code § 1559*

Rules for interpretation of contracts and construction of written instruments. *Civ. Code §§ 1635-1661*; *Code Civ. Proc. §§ 1856-1864*

Agreement to indemnify against acts of certain person applies not only to person's acts and their consequences but also to those of his or her agents. *Civ. Code § 2775*

Agreement to indemnify several persons is agreement to indemnify each unless contrary intention appears. *Civ. Code § 2776*

Indemnitor against act to be done by another is jointly liable with indemnitee and separately liable to every person injured by act. *Civ. Code § 2777*

Duty of indemnitor to defend, on indemnitee's request, action against indemnitee with respect to matters covered by indemnity agreement; right of indemnitee to conduct defense if indemnitee so chooses. *Civ. Code § 2778(4)*

[5] Methods of Enforcing Indemnity Rights

Jurisdiction of cross complaint for declaration of right to indemnity with respect to relief demanded by complaint or cross complaint in action or proceeding that is otherwise a limited civil case. *Code Civ. Proc. §§ 86(a)(7), 580(b)(4)*; *see Cal. Const. art. VI, § 10*; *Code Civ. Proc. § 85* (definition of limited civil case)

Right of defendant to file cross complaint against existing party or stranger to action that asserts cause arising out of same transaction is cause asserted in complaint against defendant. *Code Civ. Proc. § 428.10(b)(1)*

Postjudgment motion for judgment against indemnitor on bond or covenant of indem nity in action against indemnitee for conduct indemnified by bond or covenant. *Code Civ. Proc. § 1055*

Availability of declaratory relief. *Code Civ. Proc. § 1060*

[6] Statute of Limitations

Four-year limitation period for action on contract or obligation founded on written instrument. *Code Civ. Proc. § 337(1)*

[7] California Rules of Court

Inclusion of request for dismissal of pleading in motion or application for determination of good faith settlement. *Cal. Rules of Ct., Rule 3.1382*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsIndemnityGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsProcedureSettlementsMultipartiesIndemnity

California Forms of Pleading and Practice--Annotated

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
Chapter 300 INDEMNITY AND CONTRIBUTION
PART III. RESEARCH GUIDE
A. Express Contractual Indemnity

25-300 California Forms of Pleading and Practice--Annotated § 300.111

§ 300.111 Decisions

[1] Amount of Indemnity

[a] Attorney's Fees and Costs

Express provision of indemnity agreement entitling indemnitee to recovery for attorney's fees incurred in prosecuting action for indemnity against indemnitor. *Tunstead v. Nixdorf (1889) 80 Cal. 647, 652, 22 P. 472* ; *Iverson v. Spang Indus., Inc. (1975) 45 Cal. App. 3d 303, 314, 119 Cal. Rptr. 399* ; *Fidelity & Deposit Co. v. Whitson (1960) 187 Cal. App. 2d 751, 759, 10 Cal. Rptr. 6*

Indemnitee's costs of defending suit involving matter indemnified by agreement is part of damage or one of legal consequences for which indemnitee is entitled to indemnification. *Graves v. Moore (1881) 58 Cal. 435, 439* ; *Stark v. Raney (1861) 18 Cal. 622, 625*

If indemnity contract authorizes recovery of attorney's fees when one party brings action to enforce indemnity, prevailing indemnitor may recover attorney's fees from indemnitee under *Civ. Code § 1717* rule of reciprocity; amount recovered may include fees incurred by indemnitor in proving that indemnitor was not negligent, if such showing was required to defeat claim of indemnity. *Baldwin Builders v. Coast Plastering Corp. (2005) 125 Cal. App. 4th 1339, 1346, 1348, 24 Cal. Rptr. 3d 9*

Civ. Code § 1717 does not provide for indemnitor's reciprocal right to attorney's fees under general indemnity provision. *Carr Business Enterprises, Inc. v. City of Chowchilla (2008) 166 Cal. App. 4th 14, 23, 82 Cal. Rptr. 3d 128* ; *Myers Building Indus., Ltd. v. Interface Techn., Inc. (1993) 13 Cal. App. 4th 949, 967, 17 Cal. Rptr. 2d 242* ; *Meininger v. Larwin-N. Cal., Inc. (1976) 63 Cal. App. 3d 82, 85, 135 Cal. Rptr. 1*

Express provision of indemnity agreement permitting indemnitee to recover costs of defending action involving indemnified matter even though indemnitee sustains no loss or liability, is result of action. *County of San Joaquin v. Stockton Swim Club (1974) 42 Cal. App. 3d 968, 973, 117 Cal. Rptr. 300* ; *Central Sur. & Ins. Corp. v. Foley (1962)*

204 Cal. App. 2d 738, 741-743, 22 Cal. Rptr. 504

For recovery of attorney's fees incurred in defense of action involving indemnified matter, indemnitee must specially plead and prove actual expenditures for fees. *Eichler Homes, Inc. v. Anderson (1970) 9 Cal. App. 3d 224, 234-235, 87 Cal. Rptr. 893* ; *Walsh v. Hooker & Fay (1963) 212 Cal. App. 2d 450, 462-463, 28 Cal. Rptr. 16*

Indemnitee's recovery from indemnitor for attorney's fees incurred in defense of action involving indemnified matter is limited either to amount of actual expenditures or to amount fixed by court as reasonable, whichever amount is less. *Walsh v. Hooker & Fay (1963) 212 Cal. App. 2d 450, 462, 28 Cal. Rptr. 16*

Costs of defense that indemnitee incurs as result of indemnitor's refusal to defend, on indemnitee's request, action against indemnitee with respect to indemnified matter are costs incurred in good faith and in exercise of reasonable discretion, which indemnitee may recover from indemnitor under *Civ. Code § 2778(3).* *Security Bldg. & Loan Ass'n v. Maryland Cas. Co. (1935) 6 Cal. App. 2d 77, 79-80, 44 P.2d 370*

In absence of contractual provision therefor, indemnitee not entitled to recover costs of defending action involving matter covered by indemnity agreement if indemnitor defends action on indemnitee's behalf; indemnitee's costs of defense are voluntary and gratuitous. *Tulare Co. Power Co. v. Pacific Sur. Co. (1919) 43 Cal. App. 315, 185 P. 399*

[b] Interest

Right of indemnity against liability includes right to recover interest on amount of liability from date when liability is fixed. *Hertzka & Knowles v. Salter (1970) 6 Cal. App. 3d 325, 339-340, 86 Cal. Rptr. 23*

Right of indemnity against loss includes right to recover interest on amount of loss from date when loss is sustained. *Tulare Co. Power Co. v. Pacific Sur. Co. (1919) 43 Cal. App. 315, 329, 185 P. 399*

[2] Effect of Prior Adjudication

[a] On Indemnitor With Notice

Judgment against indemnitee in action involving matter covered by indemnity agreement as conclusive evidence of indemnitee's right to recover amount of such judgment from indemnitor in subsequent action on indemnity agreement if indemnitor had notice of and opportunity to defend action in which judgment was rendered. *Parra v. Traeger (1931) 214 Cal. 535, 538, 6 P.2d 941* ; *Showers v. Wadsworth (1889) 81 Cal. 270, 273-274, 22 P. 663* ; *Dutil v. Pacheco (1863) 21 Cal. 438, 442* ; *Lamb v. Belt Cas. Co. (1935) 3 Cal. App. 2d 624, 631, 40 P.2d 311*

Indemnitor bound by judgment rendered against indemnitee in action involving matter covered by indemnity agreement, even though indemnitee discharged indemnitor from defense of action, if discharge was justified by indemnitor's refusal to take measures necessary to effective defense. *Showers v. Wadsworth (1889) 81 Cal. 270, 274, 22 P. 663*

Settlement by indemnitee in action involving matter covered by indemnity agreement as presumptive evidence of liability and amount; but presumption as overcome if indemnitor establishes that settlement was unreasonable. *Peter Culley & Assocs. v. Superior Court (1992) 10 Cal. App. 4th 1484, 1495-1497, 13 Cal. Rptr. 2d 624*

Substantive adequacy of indemnitee's notice to indemnitor of action against indemnitee with respect to indemnified matters as prerequisite of binding indemnitor by judgment in such action. *Sampson v. Ohleyer (1863) 22 Cal. 200, 208* ; *Bendix-Westinghouse Auto. v. Air Brake Co. v. Swan Rubber Co. (1976) 55 Cal. App. 3d 256, 261-262, 127 Cal.*

Rptr. 571 (notice for vouching-in seller under *Com. Code § 2607(5)(a)*); *Pezel v. Yerex (1922) 56 Cal. App. 304, 309, 205 P. 475*

Indemnitor with opportunity to defend action in which judgment is rendered against indemnitee for matter covered by indemnitee agreement as conclusively bound by factual determinations essential to judgment in subsequent action by party who recovered judgment against indemnitee and who, pursuant to right given by indemnity agreement, sues indemnitor for amount of judgment. *Bonfils v. Pacific Auto. Ins. Co. (1958) 165 Cal. App. 2d 152, 162-163, 331 P.2d 766*

[b] On Indemnitor Without Notice

Indemnitor as bound by judgment rendered against indemnitee in action involving matter covered by indemnity agreement, whether or not indemnitor had notice of and opportunity to defend action, if indemnity agreement so provides and judgment was not obtained by fraud or collusion. *Kruger v. California Highway Indem. Exch. (1927) 201 Cal. 672, 678-680, 258 P. 602*

Validity of provision in indemnity agreement that establishes evidentiary effect of indemnitee's settlement of claim covered by indemnity agreement in action by indemnitee to recover amount of settlement from indemnitor. *Anchor Cas. Co. v. Strube (1963) 221 Cal. App. 2d 29, 33-34, 34 Cal. Rptr. 295* ; *Fidelity & Deposit Co. v. Whitson (1960) 187 Cal. App. 2d 751, 757-758, 10 Cal. Rptr. 6*

Indemnitee's settlement of action involving matter covered by indemnity agreement as presumptive evidence of existence and amount of indemnitee's liability for settlement, which presumption is subject to being overcome by proof in action by indemnitee to recover for settlement from indemnitor. *Fidelity & Deposit Co. v. Whitson (1960) 187 Cal. App. 2d 751, 757-758, 10 Cal. Rptr. 6*

[3] Express Indemnity

[a] Accrual of Express Indemnification Rights

Accrual of indemnitee's right to recovery under indemnity agreement without indemnitor's notice of and opportunity to defend against claim giving rise to liability for which indemnification is sought. *Eva v. Andersen (1913) 166 Cal. 420, 424-425, 137 P. 16*

Accrual of indemnitee's right to recovery under indemnity contract against liability when indemnitee incurs legal liability or obligation, even though indemnitee has sustained no actual loss. *Eva v. Andersen (1913) 166 Cal. 420, 423, 137 P. 16* ; *Showers v. Wadsworth (1889) 81 Cal. 270, 272-273, 22 P. 663* ; *Alberts v. American Cas. Co. (1948) 88 Cal. App. 2d 891, 899, 200 P.2d 37* ; *Thomas v. Layer (1920) 48 Cal. App. 199, 202-203, 191 P. 949*

As prescribed by *Civ. Code § 2778(2)*, accrual of indemnitee's right to recovery under indemnity contract against loss as occurring when indemnitee actually suffers loss by being compelled to pay legal obligation. *Fernandez v. Tormey (1898) 121 Cal. 515, 518-519, 53 P. 1119* ; *Oaks v. Scheifferly (1887) 74 Cal. 478, 480, 16 P. 252* ; *Thode v. McAmis (1950) 96 Cal. App. 2d 833, 836, 216 P.2d 548* ; *Alberts v. American Cas. Co. (1948) 88 Cal. App. 2d 891, 899, 200 P.2d 37* ; *Ramey v. Hopkins (1934) 138 Cal. App. 685, 689, 33 P.2d 443*

Accrual of indemnitee's right to recovery under indemnity contract against both liability and loss either when indemnitee becomes liable or when indemnitee sustains actual loss. *Oaks v. Scheifferly (1887) 74 Cal. 478, 480-481, 16 P. 252* ; *Alberts v. American Cas. Co. (1948) 88 Cal. App. 2d 891, 899, 200 P.2d 37* ; *Globe Indem. Co. v. Larkin (1944) 62 Cal. App. 2d 891, 894, 145 P.2d 633*

Right of indemnity under *Lab. Code § 3864* (providing that, if action prosecuted by employee, employer, or both jointly against third person for injuries to employee results in judgment against third person, or settlement by third person, employer shall have no liability to reimburse or hold third person harmless on judgment or settlement in absence of written agreement to do so executed prior to injury) as not arising unless written indemnity agreement is executed, that is, in writing and signed by the parties, prior to injury giving rise to liability. *Lockheed Missiles & Space Co. v. Gilmore Indus., Inc. (1982) 135 Cal. App. 3d 556, 559, 185 Cal. Rptr. 409*

Accrual of indemnitee's right to recovery under indemnity contract against loss when loss becomes definite; inapplicability of requirement of *Civ. Code § 2778(2)* that indemnitee sustain loss by payment of legal obligation if requirement would defeat purpose of indemnity contract. *Weaver v. Grunbaum (1939) 31 Cal. App. 2d 42, 49-50, 87 P.2d 406* (loss on corporate securities established by corporation's insolvency); *Adler v. Sawyer (1919) 40 Cal. App. 778, 782, 181 P. 817* (loss on promissory note established by determination of note's unenforceability)

Accrual of indemnitee's right to recovery under indemnity agreement as dependent on occurrence of condition precedent established by agreement unless indemnitor's conduct excuses condition. *Weaver v. Grunbaum (1939) 31 Cal. App. 2d 42, 50-51, 87 P.2d 406*

Accrual of indemnitee's right to recovery under indemnity agreement without indemnitee demanding that indemnitor perform obligation to indemnify. *Thomas v. Layer (1920) 48 Cal. App. 199, 201-202, 191 P. 949*

[b] Definitions

Indemnity against liability as agreement to prevent loss or other harm; indemnity against loss as agreement to reimburse for loss. *White v. Fratt (1859) 13 Cal. 521, 524*

Indemnity against liability as agreement to hold indemnitee harmless from specified event; indemnity against loss as agreement to protect indemnitee from consequences of event. *Alberts v. American Cas. Co. (1948) 88 Cal. App. 2d 891, 899, 900, 200 P.2d 37* ; *Ramey v. Hopkins (1934) 138 Cal. App. 685, 689, 33 P.2d 443*

[c] Distinction From Other Contracts

Insurance contract as type of indemnity agreement by which one party assumes another's risk of loss as well as means of distributing such risk among group ofpersons. *California Physicians' Serv. v. Garrison (1946) 28 Cal. 2d 790, 804, 172 P.2d 4*

Indemnity contract distinguished from suretyship and guaranty. *Somers v. United States Fid. & Guar. Co., (1923) 191 Cal. 542, 547, 217 P. 746*

[d] Requirement of Legal Liability

Indemnitee's settlement of claim without adjudication as affecting indemnitee's burden of proving legal liability for settlement in action on indemnity agreement to recover for loss or liability resulting from settlement but as not establishing that indemnitee incurred loss or liability voluntarily. *Eva v. Andersen (1913) 166 Cal. 420, 424-425, 137 P. 16* ; *Fidelity & Deposit Co. v. Whitson (1960) 187 Cal. App. 2d 751, 757, 10 Cal. Rptr. 6* ; *Carpenter Paper Co. v. Kellogg (1952) 114 Cal. App. 2d 640, 651, 251 P.2d 40*

Voluntariness of loss or liability for which indemnitee seeks recovery under indemnity agreement as not established by

indemnitee's failure to assert statute of limitations in defense of action that resulted in loss or liability; statute of limitation as personal or procedural defense, which may be waived by party entitled to assert it. *Eva v. Andersen (1913) 166 Cal. 420, 424, 137 P. 16* ; *Nicholson-Brown, Inc. v. City of San Jose (1976) 62 Cal. App. 3d 526, 536, 133 Cal. Rptr. 159* ; *Fidelity & Deposit Co. v. Whitson (1960) 187 Cal. App. 2d 751, 758, 10 Cal. Rptr. 6*

No right of indemnification under indemnity contract for losses incurred voluntarily without legal compulsion. *United States Fid. & Guar. Co. v. More (1909) 155 Cal. 415, 418, 101 P. 302* ; *Southern Cal. Gas Co. v. Ventura Pipe Line Constr. Co. (1957) 150 Cal. App. 2d 253, 257, 309 P.2d 849* ; *Carpenter Paper Co. v. Kellogg (1952) 114 Cal. App. 2d 640, 651, 251 P.2d 40*

No right to indemnification under indemnity contract for liability imposed by judgment in action to which indemnitee failed to raise available defense. *Easton v. Boston Inv. Co. (1921) 51 Cal. App. 246, 250, 196 P. 796*

No requirement that indemnitee fully prosecute appeal from judgment before seeking recovery under indemnity agreement for liability or loss resulting from judgment; indemnitee's failure to appeal as not establishing that indemnitee sustained liability or loss voluntarily rather than as matter of legal necessity. *Thomas v. Layer (1920) 48 Cal. App. 199, 202-203, 191 P. 949*

[e] Scope of Indemnitor's Obligation

[i] In General

Provisions of *Civ. Code § 2778*, defining scope of obligation to indemnify, as part of every indemnity agreement unless contrary intention appears in agreement. *Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A.G. (1970) 3 Cal. 3d 434, 442, 91 Cal. Rptr. 6, 476 P.2d 406*

Construction of indemnity agreements under rules that govern construction of other contracts with view to determining actual intention of parties. *Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A.G. (1970) 3 Cal. 3d 434, 442, 91 Cal. Rptr. 6, 476 P.2d 406* ; *Herman Christensen & Sons, Inc. v. Paris Plastering Co. (1976) 61 Cal. App. 3d 237, 245, 132 Cal. Rptr. 86* ; *City of Los Angeles v. Japan Air Lines Co., Ltd. (1974) 41 Cal. App. 3d 416, 428, 116 Cal. Rptr. 69* ; *Charles D. Warner & Sons, Inc. v. Seilon, Inc. (1974) 37 Cal. App. 3d 612, 619, 112 Cal. Rptr. 425*

Admissibility of extrinsic evidence to explain meaning of written indemnity agreement. *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co. (1968) 69 Cal. 2d 33, 39-40, 69 Cal. Rptr. 561, 442 P.2d 641* ; *Davidson v. Welch (1969) 270 Cal. App. 2d 220, 230-231, 75 Cal. Rptr. 676*

Expressed intention of parties to indemnity agreement as determining particular risks against which agreement obligates indemnitor to protect indemnitee. *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co. (1968) 69 Cal. 2d 33, 36-41, 69 Cal. Rptr. 561, 442 P.2d 641* ; *Herman Christensen & Sons, Inc. v. Paris Plastering Co. (1976) 61 Cal. App. 3d 237, 246-247, 132 Cal. Rptr. 86*

Strict construction of ambiguity in indemnity agreement against party preparing agreement. *County of Alameda v. Southern Pac. Co. (1961) 55 Cal. 2d 479, 488, 11 Cal. Rptr. 751, 360 P.2d 327*

Expressed intention of parties to indemnity agreement as determining whether indemnitor is obligated to indemnify indemnitee against liability or loss. *Fernandez v. Tormey (1898) 121 Cal. 515, 519-520, 53 P. 1119* ; *Alberts v. American Cas. Co. (1948) 88 Cal. App. 2d 891, 900, 200 P.2d 37*

Determination of meaning of portion of indemnity agreement by construction of agreement in its entirety. *Kwikset*

Locks v. Stewart Commissaries (1964) 225 Cal. App. 2d 146, 149, 37 Cal. Rptr. 248 ; *Indenco, Inc. v. Evans (1962) 201 Cal. App. 2d 369, 374, 20 Cal. Rptr. 90*

Scope of express obligation to indemnify as determined by terms of indemnity agreement. *Southern Cal. Gas Co. v. Ventura Pipe Line Constr. Co. (1957) 150 Cal. App. 2d 253, 257-259, 309 P.2d 849* ; *Tulare Co. Power Co. v. Pacific Sur. Co. (1919) 43 Cal. App. 315, 327, 185 P. 399*

No requirement that ambiguity in indemnity agreement be construed against party preparing agreement if ambiguity can be resolved with extrinsic evidence. *Weaver v. Grunbaum (1939) 31 Cal. App. 2d 42, 49, 87 P.2d 406*

[ii] Indemnitor's Obligation to Defend

Obligation of indemnitor under *Civ. Code § 2778(4)* to defend, on request, actions or proceedings against indemnitee with respect to matters covered by indemnity agreement as excluded or modified by terms of agreement expressing contrary intention. *Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A.G. (1970) 3 Cal. 3d 434, 448, 91 Cal. Rptr. 6, 476 P.2d 406*

Indemnitor's obligation to defend actions against indemnitee with respect to matters covered by indemnity agreement as including all steps necessary to effective defense. *Showers v. Wadsworth (1889) 81 Cal. 270, 274, 22 P. 663*

[iii] Involving Indemnitee's Negligence

Agreement purporting to release, indemnify, or exculpate party who prepared it from liability for that party's own negligence or tortious conduct as invalid for failing tobe clear, explicit, and comprehensible in each of its essential details. *Ferrell v. Southern Nev. Off-Road Enthusiasts, Ltd. (1983) 147 Cal. App. 3d 309, 318, 195 Cal. Rptr. 90*

Recovery under type II indemnity clause (allowing for recovery for indemnitee's passive negligence) as improper when indemnitee was actively negligent as a matter of law. *Armco Steel Corp. v. Roy H. Cox Co. (1980) 103 Cal. App. 3d 929, 936, 163 Cal. Rptr. 330* (holding of active negligence based on jury verdict in action originally brought by injured employee against indemnitee)

General contractor as not entitled to indemnification from subcontractor when general contractor was responsible for creating dangerous condition, and when subcontractor's negligence consisted at most in its employees performing work in area exposed to dangerous condition created by general contractor. *Guy F. Atkinson Co. v. Schatz (1980) 102 Cal. App. 3d 351, 358-359, 161 Cal. Rptr. 436* (agreement provided for indemnification unless loss was due solely to general contractor's negligence)

General indemnity clause that provides only that indemnitor is to indemnify indemnitee for indemnitee's liabilities caused by indemnitor as not to be construed to mean that indemnitor is not obligated to pay for losses caused in part by indemnitee's passive negligence. *Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 673-674, 151 Cal. Rptr. 399* (construction in *MacDonald & Kruse, Inc. v. San Jose Steel Co. (1972) 29 Cal. App. 3d 413, 420-421, 105 Cal. Rptr. 725* , as untenable in light of *Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 628-629, 119 Cal. Rptr. 449, 532 P.2d 97* , and cases relied on therein)

Indemnification under general indemnity agreement for losses to which indemnitee's passive negligence contributed; passive negligence as mere nonfeasance of duty imposed by law or failure to discover dangerous condition of property. *Herman Christensen & Sons, Inc. v. Paris Plastering Co. (1976) 61 Cal. App. 3d 237, 249-250, 251-252, 132 Cal. Rptr. 86* (general contractor's breach of duty to provide safe work place by failing to discover defective rail fastening on scaffold furnished to subcontractor); *Hollywood Turf Club v. Montgomery Elevator Co. (1976) 58 Cal. App. 3d 580,*

586-587, 130 Cal. Rptr. 81 (owner's breach of nondelegable duty to maintain escalator on premises in good order); *Southern Pac. Co. v. Unarco Indus., Inc. (1974) 42 Cal. App. 3d 142, 148-149, 116 Cal. Rptr. 847* (railroad's delay in replacing defective pin suspending car door); *MacDonald & Kruse, Inc. v. San Jose Steel Co. (1972) 29 Cal. App. 3d 413, 425-426, 105 Cal. Rptr. 725* (state's failure to require safety precautions for overpass construction by general contractor); *J. A. Payton v. Kuhn-Murphy, Inc. (1967) 253 Cal. App. 2d 278, 282-283, 61 Cal. Rptr. 575* (general contractor's failure to discover or prevent subcontractor's dangerous performance of work); *Kwikset Locks v. Stewart Commissaries (1964) 225 Cal. App. 2d 146, 150-152, 37 Cal. Rptr. 248* (owner's failure to maintain safe premises); *Pacific Tel. & Tel. Co. v. Chick (1962) 202 Cal. App. 2d 708, 712, 716, 21 Cal. Rptr. 326* (utility's failure to perform nondelegable duty imposed by county ordinance during highway excavation performed by independent contractor)

Question as unsettled whether indemnification is available for loss or liability to which indemnitee's passive or active negligence contributed when indemnity agreement expressly makes indemnitor responsible for loss or liability caused by indemnitor but does not mention loss or liability caused by persons other than indemnitor. *Herman Christensen & Sons, Inc. v. Paris Plastering Co. (1976) 61 Cal. App. 3d 237, 250, 132 Cal. Rptr. 86* (indemnification of passively negligent indemnitee under such agreement); *Western Contracting Corp. v. Southwest Steel Rolling Mills, Inc. (1976) 58 Cal. App. 3d 532, 539-541, 129 Cal. Rptr. 782* (any negligent contribution to liability by indemnitee as bar to indemnification)

Indemnification for loss to which indemnitee's active negligence contributed if indemnity agreement expressly provides protection against loss occasioned by concurrent negligence of indemnitee and indemnitor. *San Diego Gas & Elec. Co. v. Davey Tree Surgery Co. (1970) 11 Cal. App. 3d 1096, 1103, 96 Cal. Rptr. 889* ; *John E. Branagh & Sons v. Witcosky (1966) 242 Cal. App. 2d 835, 839, 842, 51 Cal. Rptr. 844*

Under agreement that does not expressly provide for indemnification for losses to which indemnitee's negligence has contributed, right of indemnity as available for such losses, notwithstanding rule of strict construction of indemnity agreement against indemnitee who seeks indemnity against his or her own negligence, if consideration of agreement's language and circumstances surrounding execution of agreement and occurrence of losses indicates that losses were risk against which indemnitee sought protection and parties knowingly bargained for such protection. *Atchison, T. & S. F. R. Co. v. James Stewart Co. (1966) 246 Cal. App. 2d 821, 831, 55 Cal. Rptr. 316* ; *Rosendahl Corp. v. H.K. Ferguson Co. (1962) 211 Cal. App. 2d 313, 317, 27 Cal. Rptr. 56* ; *Indenco, Inc. v. Evans (1962) 201 Cal. App. 2d 369, 376, 20 Cal. Rptr. 90* ; *County of Los Angeles v. Cox Bros. Constr. Co. (1961) 195 Cal. App. 2d 836, 842, 16 Cal. Rptr. 250*

No indemnification under general indemnity agreement for losses to which indemnitee's active negligence contributed; active negligence as personal participation in negligent conduct, knowledge and acquiescence in negligent conduct, or failure to perform duty assumed by contract. *Baldwin Contracting Co. v. Winston Steel Works, Inc. (1965) 236 Cal. App. 2d 565, 573-576, 46 Cal. Rptr. 421*

[iv] Parties Entitled to Indemnification

Subrogation of insurance company to express or implied indemnification rights of its insured. *Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 633-634, 119 Cal. Rptr. 449, 532 P.2d 97* (express indemnity); *Continental Cas. Co. v. Phoenix Constr. Co. (1956) 46 Cal. 2d 423, 428-429, 296 P.2d 801* (implied indemnity)

Person who is not party to indemnity agreement as not entitled to enforce agreement against indemnitor unless parties to agreement express intention that indemnitor's obligation under agreement directly inure to such person's benefit. *Goff v. Ladd (1911) 161 Cal. 257, 259-260, 118 P. 792* ; *Thode v. McAmis (1950) 96 Cal. App. 2d 833, 836-839, 216 P.2d 548* (construing indemnity aspect of surety's bond); *Van Der v. Hoof v. Chambon (1932) 121 Cal. App. 118, 130-131, 8 P.2d 925*

When one joint venturer cross complained against subcontractor of other joint venturer seeking indemnity in main personal injury action between subcontractor's employee and joint venturers, express indemnity clause in contract between subcon tractor and other joint venturer as not applicable to cross complainant when parties to subcontract intended that term "contractor" in indemnity clause refer only to contracting joint venturer and not cross complainant. *Leo F. Piazza Paving Co. v. Foundation Constructors, Inc. (1981) 128 Cal. App. 3d 583, 592-593, 177 Cal. Rptr. 268*

Under *Civ. Code § 1559*, incidental beneficiary of indemnity agreement as not entitled to enforce agreement against indemnitor. *American Home Ins. Co. v. Travelers Indem. Co. (1981) 122 Cal. App. 3d 951, 967, 175 Cal. Rptr. 826* ; *Southern Cal. Gas Co. v. ABC Constr. Co. (1962) 204 Cal. App. 2d 747, 752, 22 Cal. Rptr. 540*

Persons entitled to indemnification under indemnity agreement as indemnitee, someone in indemnitee's right, and express beneficiary of agreement. *Van Der v. Hoof v. Chambon (1932) 121 Cal. App. 118, 130-131, 8 P.2d 925*

No obligation of indemnitor under *Civ. Code § 2777* to person injured by indemnified act of indemnitee if indemnity agreement did not induce indemnitee's injurious act. *Treloar v. Keil & Hannon (1918) 36 Cal. App. 159, 168, 171 P. 823*

[f] Validity of Indemnity Agreement

Illegality and unenforceability of agreement for indemnification against violation of law. *Buffendeau v. Brooks (1865) 28 Cal. 641, 644* (sheriff's sale in violation of injunction)

Validity of indemnity agreement against future unlawful act if indemnified act is done without improper motive or actual knowledge that the act is illegal. *Stark v. Raney (1861) 18 Cal. 622, 624* (indemnification for unintentional trespass while enforcing legal right); *Lemat Corp. v. American Basketball Ass'n (1975) 51 Cal. App. 3d 267, 279-280, 124 Cal. Rptr. 388* (indemnification for indemnitee's unknowing interference with contractual rights of basketball association when contracting services of association's player)

Commercial entities as entitled to contract to limit liability as between themselves or otherwise to allocate risk of doing business; requirements of agreement exculpating one party from liability to the other for negligence or indemnity. *Philippine Airlines, Inc. v. McDonnell Douglas Corp. (1987) 189 Cal. App. 3d 234, 236-243, 234 Cal. Rptr. 423*

Inapplicability of *Civ. Code § 2782*, barring indemnity provisions in construction contracts against loss and liability arising from indemnitee's sole negligence, to indemnity provisions executed prior to enactment of *Civ. Code § 2782* in 1967. *Western Contracting Corp. v. Southwest Steel Rolling Mills, Inc. (1976) 58 Cal. App. 3d 532, 538-539 n. 2, 129 Cal. Rptr. 782*

Validity of agreement encompassing indemnity against indemnitee's negligence, either ordinary or arising from violation of law, if agreement does not induce such negligence. *Southern Pac. Co. v. Unarco Indus., Inc. (1974) 42 Cal. App. 3d 142, 149, 116 Cal. Rptr. 847* ; *John E. Branagh & Sons v. Witcosky (1966) 242 Cal. App. 2d 835, 839-841, 51 Cal. Rptr. 844*

Invalidity of agreement for indemnification of intentional torts. *Davidson v. Welch (1969) 270 Cal. App. 2d 220, 235, 75 Cal. Rptr. 676*

Invalidity of indemnity agreement the purpose of which is contrary to public policy. *Tischhauser v. Jarvis (1928) 95 Cal. App. 524, 528-529, 273 P. 66*

[4] Methods of Enforcing Indemnity Rights

Indemnification for future losses under indemnity agreement as not concluded by judgment for indemnification of present losses and declaration of present and future indemnity rights under agreement. *Southern Counties Gas Co. v. Ventura Pipeline Constr. Co. (1971) 19 Cal. App. 3d 372, 381-382, 96 Cal. Rptr. 825*

Propriety of original action for declaration of express indemnification rights with respect to liability or loss that may arise from separate, pending action. *Indenco, Inc. v. Evans (1962) 201 Cal. App. 2d 369, 374, 20 Cal. Rptr. 90*

Defendant's cross complaint for declaratory relief against codefendant or stranger to action as appropriate method of adjudicating claim for express indemnity. *Atherley v. MacDonald, Young & Nelson (1955) 135 Cal. App. 2d 383, 386-387, 287 P.2d 529*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewContracts LawContract Conditions & ProvisionsIndemnityTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsProcedureMultiple DefendantsIndemnityContractual Indemnity

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§ 300.112 Attorney General Opinions

County as permitted, as part of compensation and consideration for services under *Gov. Code § 31000*, to indemnify to stated maximum or to provide medical malpractice insurance coverage to physicians who contract to perform services for county. *60 Ops. Cal. Att'y Gen. 59 (1977)*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview

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§ 300.113 Law Reviews

Cava and Wiesner, *Rationalizing a Decade of Judicial Responses to Exculpatory Clauses, 28 Santa Clara L. Rev. 611 (1988)*

Artiano and Holtz, *California Contractual Indemnity, 16 Pac. L.J. 767 (1985)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsExculpatory ClausesContracts LawContract Conditions & ProvisionsIndemnityTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsNegligenceDefensesExculpatory ClausesGeneral OverviewTortsProcedureMultiple DefendantsIndemnityContractual Indemnity

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25-300 California Forms of Pleading and Practice--Annotated § 300.114

§ 300.114 Text References

Cotchett & Cartwright, s California Products Liability Actions, Ch. 2 (Matthew Bender).

s Damages in Tort Actions, Ch. 50, § 50.10 (Matthew Bender)

Personal Injury: Actions, Defenses, Damages, Vol. 17, *Indemnity* (Matthew Bender)

L. Frumer & M. Friedman, s Products Liability, Ch. 15 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesGeneral OverviewTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsProducts LiabilityGeneral Overview

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[Reserved]

§§ 300.115[Reserved]

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25-300 California Forms of Pleading and Practice--Annotated § 300.130

§ 300.130 California Torts

For discussion of the basic concepts of joint and several liability, see Levy, Golden & Sacks, California Torts, Ch. 9 (Matthew Bender)

For discussion of settlements and the relationship between settlements and subsequent judgments against nonsettling defendants, see Levy, Golden & Sacks, s California Torts, Ch. 73 (Matthew Bender)

For further discussion of comparative indemnity, see Levy, Golden & Sacks, California Torts, Ch. 74 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsProcedureMultiple DefendantsJoint & Several LiabilityTortsProcedureSettlementsMultipartiesPartial Settlements

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§ 300.131 State Statutes

[1] Attorney's Fees and Costs

Award of attorney's fees to prevailing indemnitee. *Code Civ. Proc. § 1021.6*

Award of defense costs (including attorney's fees) on granting defendant's or cross defendant's motion for summary judgment or nonsuit in proceeding to recover indemnity or contribution. *Code Civ. Proc. § 1038*

[2] Comparative Indemnity

Statutory right of contribution as not impairing right of indemnity. *Code Civ. Proc. § 875(f)*

Good faith settlement as discharging settling defendant from all liability for comparative indemnity. *Code Civ. Proc. § 877(b)*

Disclosure of sliding scale recovery agreement. *Code Civ. Proc. § 877.5*

Determination that settlement was made in good faith as barring any further claims of joint tortfeasors against settling tortfeasor for partial or comparative indemnity based on comparative negligence or comparative fault. *Code Civ. Proc. § 877.6(c)*

Employer as having no liability to indemnify third person for judgment or settlement resulting from action brought against third party by employee, employer, or both jointly, in absence of written agreement between employer and third party providing for such indemnity executed prior to employee's injuries. *Lab. Code § 3864*

[3] Contribution

Right of contribution among joint tortfeasors. *Code Civ. Proc. § 875*

Contribution rights of liability insurer. *Code Civ. Proc. § 875(e)*

No right of contribution between joint tortfeasor judgment debtors when one tortfeasor is entitled to indemnity from other. *Code Civ. Proc. § 875(f)*

Determination of pro rata share of joint tortfeasor. *Code Civ. Proc. § 876*

Good faith release, dismissal, or covenant not to sue or not to enforce judgment as discharging tortfeasor to whom it was given from liability for any contribution to cotortfeasors. *Code Civ. Proc. § 877(b)*

Determination that settlement was made in good faith as barring any further claims of joint tortfeasors against settling tortfeasor for equitable comparative contribution based on comparative negligence or comparative fault. *Code Civ. Proc. § 877.6(c)*

Judgment for contribution by motion on notice. *Code Civ. Proc. § 878*

[4] Cross Complaints

Cross complaints generally. *Code Civ. Proc. §§ 428.10-428.80*

[5] Limitations of Actions

Four-year statute of limitations for injury of death from deficient planning or construction of improvement to real property. *Code Civ. Proc. § 337.1*

Ten-year statute of limitations on action for damages for latent deficiencies in real property; cross complaint for indemnity as timely if action against cross complainant was filed within 10-year period. *Code Civ. Proc. § 337.15(a), (c)*

Two-year statute of limitations on action founded on implied contract. *Code Civ. Proc. § 339*

[6] Public Entities

Cause of action for equitable indemnity or partial equitable indemnity against public entity as accruing on date defendant is served with complaint giving rise to defendant's claim for equitable indemnity or partial equitable indemnity against public entity. *Gov. Code § 901*

[7] Sales

Procedure for binding seller by factual determination in suit against purchaser by subsequent purchaser for breach of warranty or other obligation for which seller is answerable. *Com. Code § 2607(5)(a)*

Legal Topics:

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

TortsDamagesCosts & Attorney FeesGeneral OverviewTortsNegligenceDefensesComparative NegligenceMultiple PartiesContributionTortsNegligenceDefensesComparative NegligenceMultiple PartiesIndemnityTortsProcedureMultiple DefendantsContributionGeneral OverviewTortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsProcedureStatutes of LimitationsGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationTime Limitations

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§ 300.132 Decisions

[1] Attorney's Fees and Costs

Award of attorney's fees under *Code Civ. Proc. § 1021.6* as precluded by good faith settlement in which plaintiff has released defendant against whom fee award would have been sought. *Reliance Elec. Co. v. Superior Court (1986) 190 Cal. App. 3d 369, 375, 237 Cal. Rptr. 1*

[2] Comparative Indemnity

[a] Accrual of Cause of Action

Tort defendant's equitable indemnity action as separate and distinct from plaintiff's tort action; indemnity action, unlike plaintiff's claim, as not accruing for statute of limitations purposes when original accident occurs, but at time tort defendant pays judgment or settlement as to which he or she is entitled to indemnity. *Watts v. Crocker-Citizens Nat'l Bank (1982) 132 Cal. App. 3d 516, 524, 183 Cal. Rptr. 304*

Accrual of implied indemnity right when indemnitee sustains actual loss by paying legal obligation that arises out of events justifying indemnification. *Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal. 2d 834, 843-844, 36 Cal. Rptr. 741, 389 P.2d 133* 3; *General Brewing Corp. v. Clark (1968) 264 Cal. App. 2d 518, 519-520, 70 Cal. Rptr. 907*

[b] Active and Passive Negligence

Partial indemnity among concurrent tortfeasors as allowed on comparative fault basis without regard to whether negligence of party was active or passive. *Easton v. Strassburger (1984) 152 Cal. App. 3d 90, 109-111, 199 Cal. Rptr. 383*

[c] Assignment of Cause of Action

Overpaying settler's claims for equitable indemnity against nonsettling defendants as assignable to plaintiff despite potential that plaintiff may recover more than total amount of damages awarded in litigation. *Bush v. Superior Court (1992) 10 Cal. App. 4th 1374, 1387-1388, 13 Cal. Rptr. 2d 382*

Cause of action for equitable indemnity as not stated if, by terms of settlement in which settling tortfeasors assigned their equitable crossclaim to plaintiff in return for covenant not to execute on any judgment against them, settling tortfeasors could not as matter of law suffer any loss through payment to plaintiff. *Christian v. County of Los Angeles (1986) 176 Cal. App. 3d 466, 471-472, 222 Cal. Rptr. 76*

[d] Equitable Nature of Doctrine

Duty to indemnify as arising, and indemnity as allowed, in those fact situations in which in equity and good conscience burden of judgment should be shifted from shoulders of person seeking indemnity to one from whom indemnity is sought; right as depending on principle that everyone is responsible for consequences of his or her own wrong, and, if others have been compelled to pay damages which ought to have been paid by wrongdoer, they may recover from him or her; thus, determination of whether or not indemnity should be allowed as required of necessity to depend on facts of each case. *County of San Mateo v. Berney (1988) 199 Cal. App. 3d 1489, 1492-1493, 245 Cal. Rptr. 738*

Equity as key ingredient in equitable indemnity; defendant as not having cause of action for comparative indemnity against victim of defendant's tort. *Seamen's Bank v. Superior Court (1987) 190 Cal. App. 3d 1485, 1492-1493, 236 Cal. Rptr. 31*

Cross complaint for comparative indemnity between joint tortfeasors as equitable action. *Miller v. American Honda Motor Co. (1986) 184 Cal. App. 3d 1014, 1020, 229 Cal. Rptr. 523*

[e] From Dissolved Corporations

Corporation that acted as subcontractor as subject to cross complaint by general contractor for indemnity in owner's suit filed only against general contractor prior to dissolution and based on construction defects that were known prior to dissolution; for purposes of *Corp. Code § 2011(a)* general contractor's claim for indemnity as cause of action arising before dissolution. *Allen v. Southland Plumbing, Inc. (1988) 201 Cal. App. 3d 60, 63-65, 246 Cal. Rptr. 860*

[f] From Employee or Agent

Right of employer or principal to indemnification by employee or agent for legal liability to person injured as result of unauthorized negligent act of employee or agent; basis of right as distinction between primary liability of employee or agent and secondary liability of employer or principal under doctrine of respondeat superior. *Continental Cas. Co. v. Phoenix Constr. Co. (1956) 46 Cal. 2d 423, 428-429, 296 P.2d 801* ; *United States Fire Ins. Co. v. National Union Fire Ins. Co. (1980) 107 Cal. App. 3d 456, 467, 165 Cal Rptr 726* ; *Davidson v. Welch (1969) 270 Cal. App. 2d 220, 226, 75 Cal. Rptr. 676* ; *Lewis Ave. Parent Teachers' Ass'n v. Hussey (1967) 250 Cal. App. 2d 232, 236, 58 Cal. Rptr. 499* ; *Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 77, 38 Cal. Rptr. 490* ; *Walsh v. Hooker & Fay (1963) 212 Cal. App. 2d 450, 462, 28 Cal. Rptr. 16*

Employer as having no right to indemnification by employee for legal liability to third person based on employee's tortious conduct when employer participated in tortious conduct by authorizing, directing, or ratifying such conduct. *Davidson v. Welch (1969) 270 Cal. App. 2d 220, 226-227, 75 Cal. Rptr. 676* ; *Cahill Bros., Inc. v. Clementina Co. (1962) 208 Cal. App. 2d 367, 388, 25 Cal. Rptr. 301*

[g] From Employer or Principal

Right of agent who becomes personally liable for performance of contract that he or she has undertaken to secure in his or her own name for principal as entitled to hold principal for indemnity for damages sustained because of principal's breach of that contract. *Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal. 2d 834, 837, 36 Cal. Rptr. 741, 389 P.2d 133*

Lab. Code § 4558(d) as providing only for contribution on pro rata basis, and not for comparative indemnity, from employer of employee injured because of employer's knowing removal of or failure to install point-of-operation guard on power press. *E. W. Bliss Co. v. Superior Court (1989) 210 Cal. App. 3d 1254, 1257-1259, 258 Cal. Rptr. 783*

Purpose of *Lab. Code § 3864* (action by employer, employee, or both against third party tortfeasor for injury to employee and barring liability of employer to third person) as being to eliminate employer's liability for comparative indemnity if its employee is injured during course and scope of employment because of negligence or partial negligence of third party. *City of Oakland v. Delcon Assocs. (1985) 168 Cal. App. 3d 1126, 1128-1129, 214 Cal. Rptr. 734*

In personal injury action brought by state mental hospital employee against manufacturer and seller of allegedly defective truck in which seller cross complained for indemnity against manufacturer of truck and against state as owner of truck, state as not required to indemnify seller by reason of *Lab. Code § 3864,* which precludes third party from seeking indemnity or contribution from injured employee's employer. *Angelus Chevrolet v. State of California (1981) 115 Cal. App. 3d 995, 998-1004, 171 Cal. Rptr. 801*

Lab. Code § 3864, which precludes third-party tortfeasor from seeking indemnity or contribution from injured employee's employer, as not violating equal protection in protecting employers from liability for comparative indemnity. *Alameda Tank Co. v. Starkist Foods, Inc. (1980) 103 Cal. App. 3d 428, 432, 162 Cal. Rptr. 924*

Lab. Code § 3864 as normally precluding third-party tortfeasor from obtaining indemnification from employer for injury to employee within scope of employment, even if employer's negligence was concurrent cause of injury. *Commercial Standard Title Co. v. Superior Court (1979) 92 Cal. App. 3d 934, 940, 155 Cal. Rptr. 393*

Written agreement between employer of injured employee and third-party tortfeasor providing indemnity against claims for injuries to persons without expressly mentioning indemnity against claims for injuries to employees as sufficient under *Lab. Code § 3864* to permit indemnification action against employer by tortfeasor for judgment that injured employee recovered against tortfeasor. *Herman Christensen & Sons, Inc. v. Paris Plastering Co. (1976) 61 Cal. App. 3d 237, 246, 132 Cal. Rptr. 86*

Lab. Code § 3864 as insulating employer from liability for equitable indemnification of third-party tortfeasor sued by employee injured as result of joint negligence of employer and third party. *E. B. Wills Co. v. Superior Court (1976) 56 Cal. App. 3d 650, 654, 128 Cal. Rptr. 541*

Action against employer of injured employee by third-party tortfeasor seeking indemnity for judgment recovered by employee against tortfeasor as required by *Lab. Code § 3864* to be based on written indemnity agreement executed by tortfeasor and employer prior to employee's injuries. *Burlingame Motor Co. v. Peninsula Activities, Inc. (1971) 15 Cal. App. 3d 656, 662, 93 Cal. Rptr. 376* ; *San Francisco Examiner Div., Hearst Publ'g Co., Inc. v. Sweat (1967) 248 Cal. App. 2d 493, 497-498, 56 Cal. Rptr. 711*

Neither employer nor employer's public liability insurer nor workers' compensation insurer as required to indemnify third-party tortfeasor for injury to employee in absence of written agreement, executed by employer and third party prior to employee's injury, providing for indemnity. *Pacific Gas & Elec. Co. v. Morse (1970) 6 Cal. App. 3d 707, 711,*

713, 86 Cal. Rptr. 7 (insurer); *San Francisco Examiner Div., Hearst Publ'g Co., Inc. v. Sweat (1967) 248 Cal. App. 2d 493, 497, 56 Cal. Rptr. 711* (employer)

[h] From Joint Venturer or Partner

Rule giving employer right of indemnity against negligent employee who subjects employer to vicarious liability as equally applicable if negligent party is partner and subjects partnership to vicarious liability. *United States Fire Ins. Co. v. National Union Fire Ins. Co. (1980) 107 Cal. App. 3d 456, 468, 165 Cal. Rptr. 726*

Joint venturer or partner as having right to indemnification by other joint venturer or partner for liability to third person based on vicarious responsibility for wrongful conduct of other, but not for liability based on direct participation in wrongful conduct. *Cahill Bros., Inc. v. Clementina Co. (1962) 208 Cal. App. 2d 367, 388, 25 Cal. Rptr. 301*

[i] From Subsequent Attorney

Public policy considerations as precluding cross complaint for indemnity by attorney against subsequent attorney bringing legal malpractice action on behalf of client, even though subsequent attorney's alleged negligence occurred concurrently with defendant's in course of representation of client and not with regard to malpractice action. *Lewis v. Purvin (1989) 208 Cal. App. 3d 1208, 1214-1217, 256 Cal. Rptr. 827*

Prohibition on cross complaints by defendant predecessor attorneys for equitable indemnity against successor attorneys as not inconsistent with or violative of right to contribution provided in *Civ. Code § 1432*. *Holland v. Thacher (1988) 199 Cal. App. 3d 924, 936, 245 Cal. Rptr. 247*

Court's refusal to allow attorney sued for attorney malpractice to cross complain against successor attorney for equitable indemnity as not denying attorney equal protection or due process. *Holland v. Thacher (1988) 199 Cal. App. 3d 924, 935, 245 Cal. Rptr. 247*

Attorney sued for malpractice by former client as barred from cross complaining for indemnity against successor attorney hired to assist client in limiting injury caused by original attorney; original attorney as having option, in lieu of seeking indemnity, of asserting successor attorney's negligence as affirmative defense. *Holland v. Thacher (1988) 199 Cal. App. 3d 924, 929-935, 245 Cal. Rptr. 247*

Attorney as liable for equitable indemnity when plaintiff restauranteur sued lessor in tort and contract for failure to provide outdoor dining area as promised in lease; although lessor and lessee retained attorney after lease was signed, attorney's negligent defense against third party's suit to enjoin construction of dining area as partly responsible for plaintiff's damages. *Considine Co. v. Shadle, Hunt & Hagar (1986) 187 Cal. App. 3d 760, 767-768, 232 Cal. Rptr. 250*

If two attorneys, not in privity, successively represented same client in prior action, first attorney sued for malpractice as prohibited by public policy from maintaining claim for equitable, or partial equitable, indemnity against second attorney on alleged ground that client's damages were actually caused or exacerbated by second attorney. *Goldfisher v. Superior Court (1982) 133 Cal. App. 3d 12, 21-23, 183 Cal. Rptr. 609*

Attorney sued by former client for malpractice as permitted to cross complain for partial indemnity against client's second attorney whose negligence as a matter of law contributed to client's loss. *Parker v. Morton (1981) 117 Cal. App. 3d 751, 755-767, 173 Cal. Rptr. 197* (distinguishing prior cases holding attorney sued by former client for malpractice may not cross complain against client's successor attorney who is retained to extricate client from situation created by first attorney when second attorney's alleged negligence consisted of choice of alternative remedies requiring

exercise of professional judgment)

Lawyer sued by former client for professional negligence as not permitted to cross complain for partial equitable indemnity against client's second lawyer who was retained to extricate client from situation created by alleged negligence of first lawyer; rule as applying whether or not person seeking indemnification was a lawyer. *Gibson, Dunn & Crutcher v. Superior Court (1979) 94 Cal. App. 3d 347, 349, 352, 156 Cal. Rptr. 326*

Attorney whose malpractice (failure to advise client entering land-exchange transaction to obtain title insurance respecting parcel to be acquired) contributed to client's injury as not a "joint" tortfeasor with title company (liable for negligent failure to report encumbrance on parcel client acquired), at least for purpose of titlecompany's claim for equitable indemnity from attorney. *Commercial Standard Title Co. v. Superior Court (1979) 92 Cal. App. 3d 934, 938-946, 155 Cal. Rptr. 393*

[j] From Subsequent Tortfeasor

General rule as being that subsequent tortfeasor who by his or her negligence exacerbates damage suffered by already injured party may be named as cross defendant for proportionate indemnity by party whose negligence caused original injury and who may be held liable to injured party for all of injured party's damages including those that resulted from subsequent negligence. *Parker v. Morton (1981) 117 Cal. App. 3d 751, 756, 173 Cal. Rptr. 197*

[k] Implied Contractural Indemnity

Implied contractual indemnity as predicated on indemnitor's breach of contract, with agreement to indemnify foreseeable damages resulting to plaintiff from defendant's performance of contract as what is implied; investment letter in nature of disclosure statement as not meeting *Civ. Code § 1549* definition of contract and as not serving as basis for implied contractual indemnity action. *Seamen's Bank v. Superior Court (1987) 190 Cal. App. 3d 1485, 1493-1494, 236 Cal. Rptr. 31*

City ordinance as not creating right of implied contractual indemnity between city and adjacent owners, in case of slip and fall on city sidewalk, when ordinance required adjacent owner to repair sidewalk and city to inspect and maintain trees and to repair dangerous conditions of which it had notice. *City of Sacramento v. Gemsch Inv. Co. (1981) 115 Cal. App. 3d 869, 874-875, 171 Cal. Rptr. 764*

No right of implied contractual indemnity for indemnitee's contractual liability to third person as result of indemnitor's negligent performance of contractual duties owed to indemnitee when indemnitee actively participates in indemnitor's negligent performance. *Harold A. Newman Co. v. Nero (1973) 31 Cal. App. 3d 490, 498, 107 Cal. Rptr. 464*

Under federal maritime law, substandard performance of maritime contract, in breach of implied warranty of workmanlike and safe performance, as basis of obligation to indemnify shipowner for personal injury liability resulting from breach unless shipowner's negligence or ship's unseaworthiness prevent or seriously handicap safe performance of contract. *Standard Oil Co. v. Intrepid, Inc. (1972) 26 Cal. App. 3d 135, 139-140, 102 Cal. Rptr. 604* ; *Marincovich v. Oriana, Inc. (1970) 13 Cal. App. 3d 146, 160-161, 91 Cal. Rptr. 417*

Right of implied contractual indemnity for contractual liability to another that is primarily and ultimately caused by indemnitor's breach of contractual duties owed to indemnitee. *Nomellini Constr. Co. v. Harris (1969) 272 Cal. App. 2d 352, 359, 77 Cal. Rptr. 361*

Right of implied contractual indemnity for tort liability resulting from indemnitor's breach of contractual duties owed to indemnitee; basis of right as implied agreement of indemnitor to indemnify indemnitee for liability to another

proximately caused by indemnitor's negligent performance of contractual duties. *Muth v. Urricelqui (1967) 251 Cal. App. 2d 901, 907-908, 60 Cal. Rptr. 166* ; *Ferrel v. Vegetable Oil Prods. Co. (1966) 247 Cal. App. 2d 117, 120, 124-125, 55 Cal. Rptr. 589* ; *Ralke Co. v. Esquire Bldg. Maint. Co. (1966) 246 Cal. App. 2d 141, 143-144, 54 Cal. Rptr. 556* ; *Great W. Furniture Co. v. Porter Corp. (1965) 238 Cal. App. 2d 502, 516-518, 48 Cal. Rptr. 76* ; *Montgomery Ward & Co. v. KPIX Westinghouse Broad. Co. (1962) 198 Cal. App. 2d 759, 760-761, 18 Cal. Rptr. 341* ; *Alisal Sanitary Dist. v. Kennedy (1960) 180 Cal. App. 2d 69, 79, 4 Cal. Rptr. 379* ; *De La Forest v. Yandle (1959) 171 Cal. App. 2d 59, 60-61, 340 P.2d 52* ; *San Francisco Unified Sch. Dist. v. Cal. Bldg. Maint. Co. (1958) 162 Cal. App. 2d 434, 448-449, 328 P.2d 785 , superseded by statute as stated in Prince v. Pacific Gas & Electric Co. (2009) 45 Cal. 4th 1151, 1167, 90 Cal. Rptr. 3d 732, 202 P.3d 1115*

[l] Intentional Torts

In cross complaint for comparative indemnity, entire liability for losses may be shifted from neglingent tortfeasor to intentional tortfeasor; partial indemnity as applicable between negligent tortfeasors. *Cicone v. URS Corp. (1986) 183 Cal. App. 3d 194, 211-212, 227 Cal. Rptr. 887*

Joint tortfeasor as not entitled to partial, or comparative, indemnity if tort was intentional. *Allen v. Sundean (1982) 137 Cal. App. 3d 216, 226-227, 186 Cal. Rptr. 863*

[m] Prejudgment Interest

In action for indemnity, indemnitee as entitled to prejudgment interest from date underlying personal injury judgment was paid. *E. L. White, Inc. v. City of Huntington Beach (1982) 138 Cal. App. 3d 366, 377, 187 Cal. Rptr. 879 , superseded by statute on other grounds as stated in Black Diamond Asphalt, Inc. v. Superior Court (2003) 114 Cal. App. 4th 109, 7 Cal. Rptr. 3d 466*

[n] Public Entities

City as entitled to partial indemnity from title company in action by property owner against lessee, title company, and city and its recorder for slander of title and negligence arising from recordation of nonrecordable memorandum of agreement; law as creating no substantive distinctions between private and governmental defendants for purposes of comparative indemnity. *Seeley v. Seymour (1987) 190 Cal. App. 3d 844, 862-863, 237 Cal. Rptr. 282*

[o] Willful Misconduct

Description of party's negligence as willful misconduct as not barring party's right to partial indemnity from joint tortfeasor whose conduct is described as simple negligence. *Southern Pac. Transp. Co. v. State of California (1981) 115 Cal. App. 3d 116, 118, 121, 171 Cal. Rptr. 187*

[3] Implied Total Equitable Indemnity

NOTE:

The principles of the cases set forth below predate the adoption of comparative indemnity in *American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 599, 146 Cal. Rptr. 182, 578 P.2d 899* , but would appear to have some continuing vitality under current law.

Public entity that incurs liability for injuries by passively failing to maintain street in safe condition as entitled to

implied equitable indemnity for such liability fromparty who, while making special use of street, actively created dangerous condition that caused injuries. *County of Alameda v. Southern Pac. Co. (1961) 55 Cal. 2d 479, 483-484, 11 Cal. Rptr. 751, 360 P.2d 327* (failure of railroad and abutting property owner to maintain rail crossing which they had built across highway); *City & County of San Francisco v. Ho Sing (1958) 51 Cal. 2d 127, 134, 138, 330 P.2d 802* (abutting property owner's failure to maintain sidewalk skylight benefiting owner's property); *Reinach v. City & County of San Francisco (1958) 164 Cal. App. 2d 763, 769, 331 P.2d 1006* (failure of gas station lessor and lessee to warn of driveway depression across sidewalk)

Equitable indemnity as historically available in three classes of cases: (1) when court imposed liability without fault; (2) when one tortfeasor's fault was negligible; and (3) when one wrongdoer was less at fault than others. *Munoz v. Davis (1983) 141 Cal. App. 3d 420, 423, 190 Cal. Rptr. 400*

Indemnity as applying in cases in which one party pays debt for which another is primarily liable and that in equity and good conscience should have been paid by latter party, but as not applying to a volunteer; ultimate determination of whether indemnity should be allowed as depending on circumstances of each case. *Aetna Life & Cas. Co. v. Ford Motor Co. (1975) 50 Cal. App. 3d 49, 52-53, 122 Cal. Rptr. 852*

Implied equitable indemnification of product distributor by manufacturer for distributor's strict products liability to third person injured by product's defect. *Green v. City of Los Angeles (1974) 40 Cal. App. 3d 819, 838-839, 115 Cal. Rptr. 685* (indemnification of purchaser-lessor by seller-reconditioner of defective crane); *Fakhoury v. Magner (1972) 25 Cal. App. 3d 58, 66-67, 101 Cal. Rptr. 473* (indemnification of landlord who leased defective furniture with apartment by seller-assembler of furniture); *Pearson Ford Co. v. Ford Motor Co. (1969) 273 Cal. App. 2d 269, 273-274, 78 Cal. Rptr. 279*

Right to implied total equitable indemnity as inuring to person who, without active fault on his or her part, has been compelled by reason of some legal obligation or relationship to pay damages that were caused by initial wrongful acts of another and that, in equity and good conscience, wrongdoer ought to pay. *Pearson Ford Co. v. Ford Motor Co. (1969) 273 Cal. App. 2d 269, 272, 78 Cal. Rptr. 279* ; *Atchison, T. & S. F. R. Co. v. Lan Franco (1968) 267 Cal. App. 2d 881, 885, 73 Cal. Rptr. 660*

Right to implied equitable indemnity as dependent on principle that everyone is responsible for consequences of his or her own wrong and as restitutional in nature. *Atchison, T. & S. F.. Co. v. Lan Franco (1968) 267 Cal. App. 2d 881, 886, 73 Cal. Rptr. 660* ; *Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 74, 38 Cal. Rptr. 490*

Right to implied indemnity as dependent on equitable considerations and facts of each case. *Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 74, 38 Cal. Rptr. 490* ; *Alisal Sanitary Dist. v. Kennedy (1960) 180 Cal. App. 2d 69, 78-80, 4 Cal. Rptr. 379*

[4] Indemnity and Contribution Distinguished

Contribution among joint tortfeasors as pro rata allocation of loss among parties in pari delicto; implied total indemnification as shifting entire loss from one party to another who in equity and good conscience should bear it. *Standard Oil Co. v. Oil, Chem. and Atomic Workers Int'l Union, AFL-CIO (1972) 23 Cal. App. 3d 585, 588, 100 Cal. Rptr. 354* ; *Atchison, T. & S. F. R. Co. v. Lan Franco (1968) 267 Cal. App. 2d 881, 884-885, 73 Cal. Rptr. 660* ; *Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 74, 38 Cal. Rptr. 490*

[5] Inverse Condemnation

Public entity held liable for inverse condemnation caused by contributing actions of third-party subdivision developer

as permitted to seek comparative indemnity from developer whose negligent or fraudulent acts were causative factors in damaging or taking of private property, notwithstanding fact that liability for inverse condemnation is not based on tort. *County of San Mateo v. Berney (1988) 199 Cal. App. 3d 1489, 1493-1494, 245 Cal. Rptr. 738*

[6] Joint and Several Liability

To state claim for indemnification, defendant as required to allege that same harm for which he or she may be held liable is at least partially attributable to alleged indemnitor; absent some claim of mutual liability for same harm, indemnity as unavailable. *Molko v. Holy Spirit Ass'n (1988) 46 Cal. 3d 1092, 1127-1128, 252 Cal. Rptr. 122, 762 P.2d 46*

Chemical companies as potentially jointly liable with polluting property owner for nuisance arising from contamination of ground water, based on companies' breach of duty to warn of environmental hazards associated with use of chemicals. *Selma Pressure Treating Co. v. Osmose Wood Preserving, Inc. (1990) 221 Cal. App. 3d 1601, 1620-1624, 271 Cal. Rptr. 596 , distinguished, Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56*

Designer of chemical waste disposal system as potentially jointly liable with polluting property owner for nuisance arising from contamination of ground water. *Selma Pressure Treating Co. v. Osmose Wood Preserving, Inc. (1990) 221 Cal. App. 3d 1601, 1620, 1624, 271 Cal. Rptr. 596 , distinguished, Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56*

Full satisfaction of judgment by one joint tortfeasor as discharging liability of other joint tortfeasors to plaintiff. *Burton v. Gardner Motors, Inc. (1981) 117 Cal. App. 3d 426, 431, 172 Cal. Rptr. 647*

Contributory wrongdoers, whether joint or concurrent, as ordinarily jointly and severally liable for entire damage; judgment for full amount as rendered against all joint tortfeasors. *Kemp v. Barnett (1976) 62 Cal. App. 3d 245, 248, 132 Cal. Rptr. 823*

Joint tortfeasor as not injured by failure to join concurrent tortfeasor in action or by grant of new trial to concurrent tortfeasor. *Winzler & Kelly v. Superior Court (1975) 48 Cal. App. 3d 385, 391, 393, 122 Cal. Rptr. 259*

[7] Settlement or Dismissal of One of Two or More Jointly Liable Parties

[a] Effect on Indemnity Rights of Defendants

Code Civ. Proc. § 877 as mandating that plaintiff in tort action who sues one party asalter ego of corporate subsidiary defendant may proceed against alleged alter ego after settlement with subsidiary. *Mesler v. Bragg Mgmt. Co. (1985) 39 Cal. 3d 290, 297-306, 216 Cal. Rptr. 443, 702 P.2d 601*

Tortfeasor who has entered into good faith settlement with plaintiff as discharged from any claim for comparative indemnity of concurrent tortfeasor. *Mission Ins. Co. v. Hartford Ins. Co. (1984) 155 Cal. App. 3d 1199, 1211, 202 Cal. Rptr. 635*

Dismissal given in good faith to alleged tortfeasor prior to judicial determination of liability as discharging that tortfeasor from all liability for contribution or comparative indemnity to any other joint tortfeasor. *Northrop Corp. v. Stinson Sales Corp. (1984) 151 Cal. App. 3d 653, 657, 199 Cal. Rptr. 16*

Party whose liability is imputed by statute as joint tortfeasor with other parties whose liability is direct for purposes of *Code Civ. Proc. § 877.6*; statute as not distinguishing between parties primarily and secondarily liable. *Lopez v.*

Blecher (1983) 143 Cal. App. 3d 736, 737-741, 192 Cal. Rptr. 190

Good faith settlement by one or more joint tortfeasors barring any other joint tortfeasor from claiming comparative indemnity against settling tortfeasors under *Code Civ. Proc. § 877.6*; *American Motorcycle Ass'n* as available in commercial actions and as not limited to personal injury actions. *Kohn v. Superior Court (1983) 142 Cal. App. 3d 323, 330-332, 191 Cal. Rptr. 78*

Code Civ. Proc. § 877(b) (discharging settling tortfeasor from all liability for contribution to other tortfeasors) as applying to comparative indemnity, as well as contribution, in suits in which joint tortfeasors have separately settled with plaintiff. *Mill Valley Refuse Co. v. Superior Court (1980) 108 Cal. App. 3d 707, 711, 166 Cal. Rptr. 687*

Settlement by one tortfeasor with plaintiff after liability has been established in bifurcated trial as not denying other tortfeasor of right to contribution, since term, "before verdict or judgment," as used in *Code Civ. Proc. § 877* (providing that tortfeasor released or dismissed from case in good faith before verdict or judgment is discharged from liability for any contribution to other tortfeasors), must be construed to mean before is established. *Halpin v. Superior Court (1971) 14 Cal. App. 3d 530, 543, 92 Cal. Rptr. 329*

[b] Effect on Plaintiff's Recovery From Nonsettling Defendants

Reduction of award against nonsettling tortfesasor by discounted value of note taken in settlement with joint tortfeasor as proper when discount reflects probability of nonpayment. *Seymour v. Summa Vista Cinema, Inc. (9th Cir. 1987) 809 F.2d 1385, 1389-1390* (stating that federal and California law reach same result)

Code Civ. Proc. § 877(a) as mandating that award against nonsettling joint tortfeasors be reduced only by present cash value of structured settlement calling for periodic future payments. *Franck v. Polaris E-Z Go Div. of Textron, Inc. (1984) 157 Cal. App. 3d 1107, 1120, 204 Cal. Rptr. 321*

Code Civ. Proc. § 877 as requiring reduction in judgment against nonsettling defendant by amount plaintiff received from settling cotortfeasor. *Knox v. County of Los Angeles (1980) 109 Cal. App. 3d 825, 832, 167 Cal. Rptr. 463*

Defendants' claim of offset raised after establishment of liability and before judgment as timely under *Code Civ. Proc. § 877*. *Knox v. County of Los Angeles (1980) 109 Cal. App. 3d 825, 834-835, 167 Cal. Rptr. 463*

Pro tanto reduction of plaintiff's claim against nonsettling tortfeasors as provided in *Code Civ. Proc. § 877* as preventing settlements from producing double recoveries by plaintiff in case of single injury caused by joint tortfeasors. *Carr v. Cove (1973) 33 Cal. App. 3d 851, 854, 109 Cal. Rptr. 449* ; *Wouldridge v. Zimmerman (1971) 21 Cal. App. 3d 656, 658, 98 Cal. Rptr. 778*

[c] Good Faith Defined

Actions of attorney of nonsettling defendant in attempting to induce plaintiff to reject other defendant's settlement agreement and enter into similar agreement with his client as not constituting prima facie case of bad faith because proportionate fault of each defendant had not been established and it was possible that settlement underestimated proportionate share of settling defendant's liability. *Spectra-Physics, Inc. v. Superior Court (1988) 198 Cal. App. 3d 1487, 1496-1497, 244 Cal. Rptr. 258*

Sliding scale settlement agreement as not made in bad faith, notwithstanding that amounts agreed on were not in line with damages fixed by jury, when trial court conducted extended hearing and considered numerous appropriate factors on fairness issues. *Barajas v. USA Petroleum Corp. (1986) 184 Cal. App. 3d 974, 986-988, 229 Cal. Rptr. 513*

Finding that settlement was in good faith under *Code Civ. Proc. § 877.6* as possible even though insurer for one settling defendant arguably breached its "good faith" obligations by denying coverage and refusing to negotiate on behalf of one of nonsettling defendants; possible bad faith claim against insurer as irrelevant to issue of whether settling tortfeasor acted in good faith; later action against insurer for bad faith as proper avenue for nonsettling defendant's relief. *Rankin v. Curtis (1986) 183 Cal. App. 3d 939, 944-947, 228 Cal. Rptr. 753*

In action for damages for negligence, strict products liability, and breach of warranty against manufacturers of interrelated farm equipment who cofabricated finished product that injured plaintiff, settlement with one manufacturer for less than one percent of potential settlement liability as not meeting *Tech-Bilt* good faith requirements because such a small settlement would require conclusion that it was "cost of defense settlement" predicated on no liability as a matter of law, and liability devolving on product manufacturer by reason of design defects or failure to warn or provide safety device falls in some proportion on all parties who have mutually participated in designing, assembling, and marketing offending product. *Gehl Bros. Mfg. Co. v. Superior Court (1986) 183 Cal. App. 3d 178, 184-186, 228 Cal. Rptr. 19*

Settlement with defendant in order to "clean up pleadings" as improper basis for good faith settlement, but underlying motive of settling with defendant because of belief that defendant bears minimal or no liability for plaintiff's injuries as good faith motive for settlement. *Ex-Cell-O Corp. v. Holdener (1986) 181 Cal. App. 3d 25, 32-33, 226 Cal. Rptr. 57*

Trial court as having discretion to find settlement to be in good faith even though forsum grossly disproportionate to damages prayed for in complaint if sum is not disproportionate to what court might have considered plaintiff's probable recovery from settling joint tortfeasor. *Kohn v. Superior Court (1983) 142 Cal. App. 3d 323, 327-328, 191 Cal. Rptr. 78*

[d] Prejudgment Interest

If some, but not all, of tortfeasors settle with plaintiff, prejudgment interest as not allowed under *Civ. Code § 3287(a)* because partial settlements do not fix damages and damages are not thereby made certain. *Sagadin v. Ripper (1985) 175 Cal. App. 3d 1141, 1175-1176, 221 Cal. Rptr. 675*

[e] Public Entities

Code Civ. Proc. § 877, which covers releases given in good faith to one or more of a number of tortfeasors claimed to be liable for same tort, as applicable to governmental entity parties. *City of Sacramento v. Gemsch Inv. Co. (1981) 115 Cal. App. 3d 869, 876-877, 171 Cal. Rptr. 764*

[f] Standing to Appeal

Defendant who voluntarily settles with plaintiff, pursues cross complaint for equitable indemnity against nonsettling codefendant, then is found at trial not to have contributed to plaintiff's injury, as nevertheless having standing to appeal portion of judgment denying indemnity. *Tatum v. Armor Elevator Co. (1988) 203 Cal. App. 3d 1315, 1317-1318, 1321, 250 Cal. Rptr. 775*

[g] Voluntary Payment

Good faith settlement of claim for damages, made in face of apparent liability as not prejudicing right to

indemnification for amount paid in settlement. *Aetna Life & Cas. Co. v. Ford Motor Co. (1975) 50 Cal. App. 3d 49, 54, 122 Cal. Rptr. 852* ; *Mabie & Mintz v. B & E Installers (1972) 25 Cal. App. 3d 491, 497, 101 Cal. Rptr. 919*

No implied indemnification rights for loss that is voluntary rather than compelled by legal obligation. *Flying Tiger Lines, Inc. v. Truck Ins. Exch. (1971) 20 Cal. App. 3d 132, 135, 97 Cal. Rptr. 621*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 300.133 Law Reviews

Kornhauser and Revesz, *Sharing Damages Among Multiple Tortfeasors*, *98 Yale L.J. 831 (1989)*

Note, *Far West Financial Corp. v. D & S Co. and the Abolition of Total Equitable Indemnity: What a Long, Strange Trip It's Been*, *21 Pac. L.J. 147 (1989)*

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Note, *Equitable Indemnity--Liability Apportioned Between a Strictly Liable Defendant and a Negligent Defendant on a*

Comparative Fault Basis--Safeway Stores, Inc. v. Nest-Kart, 19 Santa Clara L. Rev. 497 (1979)

Comment, *Comparative Fault and Intentional Torts, 12 Loy. L.A. L. Rev. 179 (1978)*

Comment, *Contribution and Indemnity Collide With Comparative Negligence--The New Doctrine of Equitable Indemnity, 18 Santa Clara L. Rev. 779 (1978)*

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§ 300.150 State Statutes

[1] Contribution Among Joint Judgment Debtors

Right to contribution from joint debtor on oversatisfying due proportion of judgment on application by noticed motion to court that entered judgment. *Code Civ. Proc. §§ 881-883*

[2] Contribution Among Joint Nontort Obligors

Contribution between obligors. *Civ. Code § 1432*

Release of one joint debtor as not extinguishing obligations of others not affecting their right to contribution from released debtor. *Civ. Code § 1543*

Good faith release, dismissal, or covenant not to sue or not to enforce judgment asdischarging co-obligor to whom it was given from liability for any contribution to co-obligors. *Code Civ. Proc. § 877(b)*

Determination that settlement was made in good faith as barring any further claims of co-obligors against settling co-obligor for equitable comparative contribution based on comparative negligence or comparative fault. *Code Civ. Proc. § 877.6(c)*

[3] Joinder of Parties

Permissive joinder of defendants. *Code Civ. Proc. § 379*

Compulsory joinder of parties. *Code Civ. Proc. § 389*

[4] Joint and Several Liability

Obligation imposed on several persons or right created in favor of several persons as presumed to be joint, and not several. *Civ. Code § 1431*

Promise as presumed joint and several. *Civ. Code § 1659*

Promise, executed by several persons, as presumed joint and several, although made in singular number. *Civ. Code § 1660*

[5] Particular Situations in Which Contribution Is Available

Contribution by insurers in event of overinsurance. *Ins. Code §§ 485-487*

Contribution among insurers in event of double insurance. *Ins. Code § 591*

Subrogation of marine insurer to insured's right of contribution. *Ins. Code § 1996*

Pro rata contribution by fire insurers covering same interest. *Ins. Code § 2054(c)*

Contribution among beneficiaries of will if interest of one beneficiary is sold to satisfy debts of testator. *Prob. Code §§ 21401-21403*

Contribution by coowner of mine. *Pub. Res. Code § 3919*

Action for contribution among persons associated by agreement in use of conduit, well, or pumping plant. *Water Code § 7002*

Action for contribution against persons associated by agreement in use of conduit, well, or pumping plant by party contributing more than just proportion of expenses. *Water Code § 7003*

[6] Statute of Limitations

Two-year statute of limitations for action not founded on instrument in writing. *Code Civ. Proc. § 339*

[7] Sureties

Surety defined; distinction between guarantors and sureties abolished. *Civ. Code § 2787*

Contribution from cosurety. *Civ. Code § 2848*

Contribution among sureties on official bonds. *Code Civ. Proc. § 996.250*

Legal Topics:

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

[1] Appeal

Obligor who pays in full or compromises obligation as having right to appeal legal correctness of modified judgment eliminating co-obligor from liability. *Berylwood Inv. Co. v. Graham (1941) 43 Cal. App. 2d 659, 671, 111 P.2d 467*

[2] Contribution Among Joint Judgment Debtors

[a] Alternate Remedy of Assignment

After paying judgment, judgment debtor as entitled to take assignment from judgment creditor and to recover from codebtors in equity. *Tucker v. Nicholson (1938) 12 Cal. 2d 427, 433, 84 P.2d 1045* ; *Woolley v. Seijo (1964) 224 Cal. App. 2d 615, 622, 36 Cal. Rptr. 762*

[b] Basis of Right

Joint judgment debtors paying more than their share of judgment as entitled to obtain contribution from those jointly liable with them and to bring suit against one or more codefendants on implied contract of obligors to share burden. *Woolley v. Seijo (1964) 224 Cal. App. 2d 615, 621-623 36 Cal. Rptr. 762*

[3] Contribution Among Joint Nontort Obligors

[a] Amount of Contribution

Distribution of loss on insolvency of joint debtor. *Tucker v. Nicholson (1938) 12 Cal. 2d 427, 434, 84 P.2d 1045*

Joint endorsers as presumed equally liable on note. *Bunker v. Osborn (1901) 132 Cal. 480, 482, 64 P. 853*

Loss as divided among solvent obligors in proceeding for contribution. *Berylwood Inv. Co. v. Graham (1941) 43 Cal. App. 2d 659, 672, 111 P.2d 467*

[b] Basis of Right

Fact that creditor did not take judgment against particular obligor as not affecting rule of apportionment between co-obligors if obligor not sued should justly bear portion of debt. *Tucker v. Nicholson (1938) 12 Cal. 2d 427, 433, 84 P.2d 1045*

Civ. Code § 1432 as presupposing contractual relations between parties. *County of Tulare v. County of Kings (1897) 117 Cal. 195, 202, 49 P. 8*

Civ. Code § 1432 as providing for contribution if party to joint obligation satisfied more than his or her proportionate share of claim against all. *Hosking v. Spartan Props., Inc. (1969) 275 Cal. App. 2d 152, 157, 79 Cal. Rptr. 893*

Contribution under *Civ. Code § 1432* as not limited to cases in which consent, express or implied, can be found; if plaintiff paid full amount of parties' joint and several tax obligations, cause of action as arising in his favor against defendant. *Murchison v. Murchison (1963) 219 Cal. App. 2d 600, 604, 33 Cal. Rptr. 285*

Right of contribution as outgrowth of contract implied in law. *Pacific Freight Lines v. Pioneer Express Co. (1940) 39 Cal. App. 2d 609, 614, 103 P.2d 1056*

Party as acquiring right of contribution on paying more than his or her share, that is, money that is equity and good conscience should be paid by another. *Jackson v. Lacy (1940) 37 Cal. App. 2d 551, 559, 100 P.2d 313*

Party paying no more than what he or she in equity and good conscience might pay as not able to require proportionate contribution. *Gardiner v. Holcomb (1927) 82 Cal. App. 342, 353, 255 P. 523*

Right of contribution under *Civ. Code § 1432* as based on principle of equity that, if joint obligor has paid money that in good conscience and equity should be paid by another, he or she should be reimbursed therefor. *Arp v. Blake (1923) 63 Cal. App. 362, 366, 218 P. 773*

Right of contribution as unavailable under *Civ. Code § 1432* to plaintiff who was joint maker of note and who paid one fourth of note allegedly owed by defendant comaker because note was made to take up prior note that it was plaintiff's individual duty to pay. *Backer v. Grummett (1918) 39 Cal. App. 101, 103, 178 P. 312*

[c] Cosureties

Surety liable for contribution for aliquot part of debt based on whole number of sureties. *Williams v. Riehl (1899) 127 Cal. 365, 371, 59 P. 762*

Guarantor entitled to obtain contribution from those jointly liable with him or her after paying more than his or her proportionate share of judgment; guarantor's right to contribution is obligation implied in law and governed by equitable principles. *Overholser v. Glynn (1968) 267 Cal. App. 2d 800, 807, 73 Cal. Rptr. 628*

Contribution not required between successive sets of sureties on different bonds. *Hickey v. Santos (1960) 179 Cal. App. 2d 418, 419, 3 Cal. Rptr. 840*

One of several cosureties paying more than his or her share of claim against all is entitled to compel contribution from all parties jointly liable with him or her. *Pond v. Dougherty (1907) 6 Cal. App. 686, 688, 92 P. 1035*

[d] Limitations on Right to Contribution

Obligor who paid nothing on obligation not able to recover from co-obligors for their proportionate share of debt. *Hosking v. Spartan Props., Inc. (1969) 275 Cal. App. 2d 152, 157, 79 Cal. Rptr. 893*

Plaintiff landowner had no right to contribution from adjacent landowners for improvements to its land that incidentally conferred benefit on adjacent property. *Major-Blakeney Corp. v. Jenkins (1953) 121 Cal. App. 2d 325, 340, 341, 263 P.2d 655*

Right to contribution does not arise until obligor has satisfied more than his or her share of claim against all. *Jackson v. Lacy (1940) 37 Cal. App. 2d 551, 559, 100 P.2d 313*

Right of contribution inapplicable if obligation arising out of contract has been paid and extinguished voluntarily by party not obligated to pay it. *Newberry v. Evans (1926) 76 Cal. App. 492, 509, 245 P. 227*

[e] Release of Joint Nontort Obligor

Release of one joint debtor does not extinguish obligation of other joint debtors. *Lovetro v. Steers (1965) 234 Cal. App. 2d 461, 477, 44 Cal. Rptr. 604*

Joint obligor who accepts release agrees that liability of his or her codebtor be continued together with his or her own liability for contribution. *Williams v. Reed (1952) 113 Cal. App. 2d 195, 202, 248 P.2d 147*

[f] Statute of Limitations

Applicable statute of limitations in action for contribution is two years from date of payment. *Manuel v. Hicks Iron Works (1932) 216 Cal. 459, 461, 14 P.2d 756*

Cause of action for contribution among cosureties, covered by two-year statute of limitations, accrues when one surety pays more than its share of debt. *Hurlbut v. Quigley (1919) 180 Cal. 265, 271, 180 P. 613*

Statute of limitations begins to run in action for contribution among co-obligors at payment of debt by party seeking to enforce contribution; right to contribution inchoate from date of creation of relationship between parties and not enforceable until actual payment or discharge of obligation. *Arp v. Blake (1923) 63 Cal. App. 362, 367, 218 P. 773*

[4] Cotenants

Tenant in common paying debt or obligation for benefit of joint property or discharging lien or assessment imposed on it as common burden is entitled to have cotenant, who has received benefit, refund his or her proportionate share of amount paid; right of cotenant to recover excess payment arises at date of expenditure made. *Willmon v. Koyer (1914) 168 Cal. 369, 372, 374, 143 P. 694*

[5] Insurers

Duty of contribution between insurers applyies only to insurers who share same level of obligation on risk as to same insured; thus, no right to contribution exists between primary and excess insurers, absent specific agreement to contrary. *Reliance Nat'l Indem. Co. v. General Star Indem. Co. (1999) 72 Cal. App. 4th 1063, 1080*

When two or more insurers independently provide primary insurance on same risk for which both are liable for any loss to same insured, carrier paying loss or defending lawsuit against insured is entitled to equitable contribution from other insurer or insurers without regard to equitable subrogation principles; one insurer's settlement with insured is not bar to separate action against that insurer by other insurer or insurers for equitable contribution or indemnity. *Fireman's Fund Ins. Co. v. Maryland Cas. Co. (1998) 65 Cal. App. 4th 1279, 1289, 77 Cal. Rptr. 2d 296*

Insurance company that paid entire settlement amount with reservation of its rights to later litigate apportionment was entitled to contribution from coinsurers in amounts proportional to coverage under multiple policies. Phoenix Ins. Co. *United States Fire Ins. Co. (1987) 189 Cal. App. 3d 1511, 1520, 1523-1527, 235 Cal. Rptr. 185*

Insurance company paying total loss, for which several companies insure same risk, was entitled to force contribution from other companies, each bearing proportion that their respective policy limits bear to total amount of insurance under all policies; but no such right to contribution arises if insurer paid more than its share of loss and if each of several insurance policies contained clause for proration. *Pylon, Inc. v. Olympic Ins. Co. (1969) 271 Cal. App. 2d 643, 649, 77 Cal. Rptr. 72*

[6] Life Insurance Policy Beneficiary

Life insurance policy beneficiary voluntarily paying premiums on policy has right to contribution from other beneficiaries later claiming right to share in proceeds of policy. *Stockwell v. Mutual Life Ins. Co. (1903) 140 Cal. 198, 201, 73 P. 833*

[7] Several Liability

Although creditor may sue fewer than all those jointly liable with him or her, debtor not deprived of right to hold co-obligors for share of debt. *Tucker v. Nicholson (1938) 12 Cal. 2d 427, 433, 84 P.2d 1045*

When different persons are severally, but not jointly, obligated to another, creditor may sue one or more of them as he or she desires, and defendant has no right to bring other defendants into trial through cross complaint for contribution. *Garcia v. Superior Court (1941) 45 Cal. App. 2d 31, 35, 36, 113 P.2d 470*

[8] Stockholders

Stockholders of corporation engaged in distilling were jointly and severally liable for tax owed by corporation to federal government, and stockholders were liable for contribution to obligors who paid tax for which all were liable. *Richter v. Henningsan (1895) 110 Cal. 530, 536, 42 P. 1077*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersShareholder Duties & LiabilitiesGeneral OverviewCivil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityContracts LawDebtor & Creditor RelationsGovernmentsLegislationStatutes

of LimitationsTime LimitationsInsurance LawClaims & ContractsCoinsuranceContribution

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
Chapter 300 INDEMNITY AND CONTRIBUTION
PART III. RESEARCH GUIDE
C. Contribution Among Nontort Obligors and Judgment Debtors

25-300 California Forms of Pleading and Practice--Annotated § 300.152

§ 300.152 Law Reviews

Comment, *Right of Contribution for Joint Debts Secured by Jointly Owned Property, 11 Stan. L. Rev. 778 (1959)*

Note, *Contracts: Right of Contribution Between Co-Sureties, 29 Cal. L. Rev. 65 (1940)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesLiabilityContracts LawDebtor & Creditor Relations

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[Reserved]

§§ 300.153[Reserved]

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A. Express Contractual Indemnity

25-300 California Forms of Pleading and Practice--Annotated § 300.170

§ 300.170 Notice of Action Pending Against Indemnitee for Indemnified Matter and Request for Defense [Civ. Code § 2778(4)]--By Indemnitee to Indemnitor

[1] FORM Notice of Action Pending Against Indemnitee for Indemnified Matter and Request for Defense [Civ. Code § 2778(4)]--By Indemnitee to Indemnitor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF ACTION AND DEMAND FOR DE-
and DOES 1 through _____,	)	FENSE
Defendants.	)	[*Civ. Code § 2778(4)*]
	)	
	)	

_____

To _____ [*name of indemnitor*]:

PLEASE TAKE NOTICE that on _____[*date*], the undersigned was served with a complaint and summons in the above-entitled action. Copies of the complaint and summons are attached hereto as Exhibit A and made a part hereof.

The plaintiff in the above-entitled action seeks to recover damages for _____ [*describe nature and cause of damages, e.g.,* personal injuries sustained as a result of a fall into an unguarded excavation that you dug in connection with the construction of a building on the undersigned's property at _____ (*specify location*)].

You agreed to indemnify and hold the undersigned harmless from _____ [loss *or* liability] resulting from damages in the written contract that you entered into with the undersigned on _____ [*date*], in _____ County, California, a copy of which is attached hereto as Exhibit B and made a part hereof.

An appearance in the above-entitled action is due on _____[*date*]. You are hereby requested to appear and defend the action on behalf of the undersigned pursuant to your contract of _____ [*date*], and as required by Section 2778, Subsection 4, of the Civil Code. If you fail to do so, you will be bound to the undersigned for the amount of any _____ [loss *or* liability] that the undersigned sustains as the result of a judgment, claim, or award in the action andfor reasonable attorney's fees and other necessary and reasonable costs incurred by the undersigned in defending the action.

_____ [*date*]

_____ [*signature*]
Attorney for Defendant

[2] Use of Form

This form is for use as a notice to an indemnitor under a written indemnity agreement that the indemnitee has been sued based on facts within the scope of the indemnity agreement, and as a request to the indemnitor to provide a defense in the action [*see Civ. Code § 2778(4)*]. The notice should be given within a reasonable time before trial of the action, should inform the indemnitor of his or her obligation to defend the action under an indemnity agreement, and should indicate the consequences of the indemnitor's failure to defend [*see Bendix-Westinghouse Auto. Air Brake Co. v. Swan Rubber Co. (1976) 55 Cal. App. 3d 256, 261-262, 127 Cal. Rptr. 571]* . For further discussion, see *§§ 300.36, 300.40[1]*, and *300.41[2]*.

[3] Cross References

For manners of serving notice of motion and a form of proof of service by mail, see Ch. 518, *Service of Summons and Papers*

[4] State Statutes

Recovery suffered by indemnitee in good faith in action involving matters covered by indemnity agreement as conclusive against indemnitor who fail ed to defend such action on indemnitee's request. *Civ. Code § 2778(5)*

Judgment against indemnitee in action involving matters covered by indemnity agreement as presumptive evidence against indemnitor who had no reasonable notice of such action or who was not allowed to control its defense. *Civ. Code § 2778(6)*

Inapplicability of stipulation that judgment against indemnitee is conclusive on indemnitor if indemnitee fails, by want of ordinary care, to establish good defense upon merits in action in which judgment was rendered. *Civ. Code § 2778(7)*

If officer or other indemnified person provides indemnitor with seasonable written notice and opportunity to defend in action brought on indemnified act, judgment as conclusive evidence against indemnitor and court as authorized to enter judgment against indemnitor on motion with five days' notice and proof of indemnity and notice. *Code Civ. Proc. § 1055*

Exception to hearsay rule for evidence of final judgment that is offered by judgment debtor to prove any fact essential to judgment in action by judgment debtor to recover indemnity or exoneration for money paid or liability incurred because of the judgment. *Evid. Code § 1301(a)*

[5] Decisions

Indemnitee's failure to notify indemnitor and tender defense of action in which indemnitee is adjudged liable for damages arising from indemnified matter as imposing burden on indemnitee to prove liability for damages in subsequent action against indemnitor to recover indemnity for damages. *Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal. 2d 834, 844, 36 Cal. Rptr. 741, 389 P.2d 133* ; *Eva v. Andersen (1913) 166 Cal. 420, 425, 137 P. 16*

Judgment against indemnitee in action involving matter covered by indemnity agreement as conclusive evidence of indemnitee's right to recover amount of judgment from indemnitor in subsequent action on indemnity agreement if indemnitor had notice of and opportunity to defend action in which judgment was rendered. *Showers v. Wadsworth (1889) 81 Cal. 270, 273-274, 22 P. 663*

Substantive adequacy of indemnitee's notice to indemnitor of action against indemnitee with respect to indemnified matter as prerequisite of binding indemnitor by judgment in action. *Bendix-Westinghouse Auto. Air Brake Co. v. Swan Rubber Co. (1976) 55 Cal. App. 3d 256, 261-262, 127 Cal. Rptr. 571*

Indemnitee notice to indemnitor of pending action that is subject to indemnification and indemnitor's refusal to assume defense of claim, as giving indemnitee right to assume defense of claim and make good faith settlement without assuming risk of being able to prove absolute liability for settlement or its amount. *Mabie & Mintz v. B & E Installers (1972) 25 Cal. App. 3d 491, 496-497, 101 Cal. Rptr. 919*

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25-300 California Forms of Pleading and Practice--Annotated § 300.171

§ 300.171 Complaint for Express Contractual Indemnity [Civ. Code § 2772]--General Form

[1] FORM Complaint for Express Contractual Indemnity [Civ. Code § 2772]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR EXPRESS INDEMNITY
and DOES 1 through _____,	)	[*Civ. Code § 2772*]
Defendants.	)	
	)	
	)	

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, _____[*specify capacity and domicile, e.g.,* a partnership with its principal place of business in _____ (*city*), _____ County, California, and it has filed and published the fictitious business name statement as required by *Sections 17910 through 17917 of the Business and Professions Code*].

2. Defendant is, and at all times herein mentioned was, _____ [*specify capacity and venue, e.g.,* a corporation, organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), _____ County, California].

3. Defendants DOE 1 through DOE _____, inclusive, are sued herein under fictitious names. Their

true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintff will amend this complaint by inserting their true names and capacities herein. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants. Each reference in this complaint to "defendant," "defendants," or a specifically named defendant refers also to all defendants sued under fictitious names.

4. On or about _____ [*date*], (in _____ County, California,) plaintiff and defendant entered into a written contract whereby _____ [*Allege transaction between plaintiff and defendant creating indemnity agreement, e.g.,* defendant agreed, in consideration for a payment of $_____ by plaintiff, to furnish and install an elevator in a retail store operated by plaintiff at _____ (*specify location*)]. As a term and condition of this contract, defendant agreed to indemnify and hold plaintiff harmless from any and all loss, claims, expenses, and liability that plaintiff might sustain at any time as a consequence of _____ [*specify scope of indemnity agreement, e.g.,* any mechanical defects in the elevator]. A copy of this contract is attached hereto as Exhibit A and made a part hereof.

5. _____ [*Describe occurrence of damages against which indemnity agreement provides protection, e.g.,* Thereafter, defendant installed an elevator in plaintiff's store pursuant to the terms of the contract. On or about _____ (*date*), during normal operation of the elevator in the course of plaintiff's business, the mechanism for braking the motion of the elevator failed to function because of a defective part. As a proximate result, the elevator fell to the basement of plaintiff's store, and a customer of plaintiff's who was riding on the elevator sustained serious personal injuries].

6. On or about _____ [*date*], _____ [*name of person with claim arising from occurrence of indemnified risk*] brought an action against plaintiff herein in _____Court, _____ County, California, Action No. _____, to recover _____ [*describe nature of claim, e.g.,* damages for personal injuries sustained as a result of plaintiff's failure to maintain the elevator in plaintiff's store in good working order]. _____ [*Either* A trial was held in this action, and, despite a good faith and vigorous defense, a judgment was entered against plaintiff on _____ (*date*), for the sum of $_____ plus costs in the sum of $_____ *or* Recognizing his/her/its liability for this claim, plaintiff agreed to pay the reasonable sum of $_____ to _____ (*name of person with claim arising from occurrence of indemnified risk*) in settlement of the action *or allege other facts showing and fixing plaintiff's legal liability for consequences of indemnified risk*].

[7. _____ (*If agreement provides for indemnity against loss rather than liability, allege:* On or about _____ (*date*), _____ (in satisfaction of this judgment *or* in accord with this settlement), plaintiff paid the sum of $_____ to _____ (*name of person with with claim arising from occurrence of indemnified risk*).)]

[8. On or about _____ (*date*), plaintiff gave written notice to defendant of the action commenced by _____ (*name of person with claim arising from occurrence of indemnified risk*) against plaintiff, requesting defense of the action by defendant and indicating that defendant would be bound under his/her/its agreement of _____ (*date*) to indemnify plaintiff for any _____ (loss *or* liability) that plaintiff might sustain as a result of the action. A copy of this notice is attached hereto as Exhibit B and made a part hereof. (Nevertheless, defendant failed to undertake the defense of the action and refused to indemnify plaintiff for any _____ (loss *or* liability) resulting from the action.)]

[9. _____ (*If defendant did not defend action against plaintiff, allege:* In _____ (defending *or* settling) the action of _____ (*name of person with claim arising from occurrence of indemnified risk*), plaintiff necessarily and reasonably incurred and paid attorney's fees and other legal costs in the sum

of $_____).]

10. Plaintiff has performed all the conditions and obligations to be performed on his/her/its part under his/her/its agreement with defendant as heretofore alleged in Paragraph 3 [, except _____ (*specify unperformed condition*), the performance of which was excused on the ground that _____ (*specify*)].

11. By reason of the foregoing, plaintiff is entitled to be indemnified by defendant in the sum of $_____, but defendant has not paid any part of this sum to plaintiff.

[12. Plaintiff has incurred, and continues to incur, necessary and reasonable attorney's fees and other legal costs in prosecuting this action against defendant. By the terms of the agreement between plaintiff and defendant, plaintiff is entitled to recover these fees and costs from defendant. Plaintiff does not know the full amount thereof at this time and will move to amend this complaint to state the amount when it becomes known to him/her/it, or on proof thereof.]

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____ as indemnity for the _____ [loss *or* liability] incurred as alleged above;

[2. For attorney's fees and costs incurred in defending and resolving the claim of _____ (*name of injured claimant*) in the sum of $_____;]

3. For interest on the sum of $_____ [*total of amounts subject to indemnity under agreement*] from _____[*date*];

[4. For attorney's fees and costs herein incurred; and]

5. For such other and further relief as the court may deem proper.

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature*]

[2] Use of Form

This form is for use as a complaint to recover indemnity under a written indemnity agreement. A separate action for express contractual indemnity (this form) may be initiated only after the indemnitee's liability has been incurred or the indemnitee's loss has been sustained, the time at which the indemnitee's cause of action on the agreement accrues [*see Alberts v. American Cas. Co. (1948) 88 Cal. App. 2d 891, 899, 200 P.2d 37]* . However, this form may be adapted for

use as a cross complaint for declaratory relief if the indemnity agreement is sought to be enforced in the same action in which the liability of the indemnitee is to be determined [*see, e.g., Rimington v. General Accident Group of Ins. Cos. (1962) 205 Cal. App. 2d 394, 397, 23 Cal. Rptr. 40* (express indemnity by cross complaint); *see also Code Civ. Proc. §§ 428.10* (permissive cross complaints), 1060 (declaratory relief); *see generally § 300.15*]. For an example of a cross complaint for declaratory relief to determine indemnity rights, see *§ 300.190* (cross complaint for declaratory relief for comparative indemnity).

Either party to an indemnity agreement may adjudicate its rights under the agreement in a separate action for declaratory relief before the cause of action accrues [*Indenco, Inc. v. Evans (1962) 201 Cal. App. 2d 369, 374, 20 Cal. Rptr. 90]* . A form of complaint for a declaration of rights and duties under an indemnity agreement is set forth in the form in *§ 300.172*.

This form of complaint may be used by an express third-party beneficiary of an indemnity agreement who has sustained damages indemnified by the agreement [*see Civ. Code § 1559*; *see also Van Der v. Hoof v. Chambon (1932) 121 Cal. App. 118, 130-131, 8 P.2d 925]* . In such a case, the complaint should contain an allegation of the plaintiff's third-party beneficiary status. For a general form of complaint by a third-party beneficiary on a contract, see Ch. 140, *Contracts* .

[3] Allegations

The complaint alleges the following [*see Four Star Elec., Inc. v. F & H Constr. (1992) 7 Cal. App. 4th 1375, 1380, 10 Cal. Rptr. 2d 1* ; *see also Branson v. Sun Diamond Growers (1994) 24 Cal. App. 4th 327, 347, 29 Cal. Rptr. 2d 314]* : (1) the indemnity agreement between plaintiff and defendant (Paragraph 4); (2) facts establishing plaintiff's liability or loss resulting from liability within the terms of the indemnity agreement (Paragraphs 5-7); (3) plaintiff's performance of all conditions precedent to recovery under the indemnity agreement (Paragraph 10); (4) the amount of plaintiff's loss or liability (Paragraphs 6, 9, 11); and (5) defendant's failure to indemnify plaintiff in accordance with his or her obligation under the indemnity agreement (Paragraph 11).

The complaint also contains an optional allegation of the defendant's notice ofand opportunity to defend the action against plaintiff that gave rise to plaintiff's indemnity action (Paragraph 8). This allegation is not essential to the complaint because notice and opportunity to defend are not conditions precedent to an action for indemnity [*Eva v. Andersen (1913) 166 Cal. 420, 424-425, 137 P. 16]* . However, if notice and opportunity to defend were given, the allegation should be included because the plaintiff's burden of proof in the indemnity action is lessened [*see Civ. Code § 2778(4)*]. For discussion of this point, see *§§ 300.36, 300.40[1],* and *300.41[2]*. For a form of notice, see *§ 300.170*.

If the indemnity agreement on which an action for indemnity is based provides for the recovery of attorney's fees and costs in any action to enforce the agreement, the allegation in Paragraph 11 should be included. For discussion, see *§ 300.41[2][b]*.

[4] Venue

An action based on a contractual obligation may be brought in the county where the obligation is to be performed, where the contract was in fact entered into, or where the defendants, or some of them, reside at the commencement of the action [*Code Civ. Proc. §§ 395(a), 395.5*]. The county where the obligation is incurred is deemed to be the county where it is to be performed unless there is a special contract in writing to the contrary [*Code Civ. Proc. § 395(a)*]. For further discussion of venue generally, see Ch. 571, *Venue* .

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b),*

446]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to contracts generally, see Ch. 140, *Contracts*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to FAX service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

For related forms, see *§§ 300.170*, *300.172*

[7] California Legal Forms

For discussion, a transaction guide, and legal forms relating to indemnity agreements, see California Legal Forms, Ch. 79 (Matthew Bender)

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25-300 California Forms of Pleading and Practice--Annotated § 300.172

§ 300.172 Indemnitor's Complaint for Declaration of Nonliability [Code Civ. Proc. § 1060] Under General Indemnity Agreement [Civ. Code § 2772]--Loss or Liability Caused by Indemnitee's Active Negligence

[1] FORM Indemnitor's Complaint for Declaration of Nonliability [Code Civ. Proc. § 1060] Under General Indemnity Agreement [Civ. Code § 2772]--Loss or Liability Caused by Indemnitee's Active Negligence

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DECLARATORY RELIEF
and DOES 1 through _____,	)	
Defendants.	)	
	)	
	)	

Plaintiff alleges:

[1. *Allege capacity to sue and residence of plaintiff. See § 300.171, Paragraph 1.*]

[2. *Allege capacity and domicile of defendant. See § 300.171, Paragraph 2.*]

[3. *Fictitiously named defendants allegation. See § 300.171, Paragraph 3.*]

4. On or about _____ [*date*], (in _____ County, California,) plaintiff and defendant entered into a written contract, attached hereto as Exhibit A and made a part hereof, whereby _____ [

allege transaction between plaintiff and defendant involving indemnity agreement that does not expressly protect defendant-indemnitee against loss or liability caused by defendant's own negligence, e.g., defendant employed plaintiff to construct a sewage pump station and certain sewer lines in conformity with stated specifications for a development project that defendant had undertaken on its property at _____ (*specify location*)]. In the agreement, plaintiff promised to indemnify and hold defendant harmless _____ [*set forth language of indemnity agreement that establishes scope of plaintiff-indemnitor's duty under agreement, e.g.,* against all claims for damages to persons or property arising out of the work covered by the agreement (Exhibit A, paragraph _____)]. The agreement did not require plaintiff to indemnity defendant for loss or liability caused, in whole or in part, by defendant's own negligence.

5. _____ [*Describe occurrence of loss or liability potentially within terms of indemnity agreement, e.g.,* Pursuant to the agreement, plaintiff dug a trench for a pipeline on defendant's property according to the specifications provided by defendant and under the direct control and supervision of defendant and its employees and agents. Thereafter, and several persons entered the trench to install the pipe. While these persons were working in the trench, a cave-in occurred and one of them sustained serious injuries.]

6. On or about _____ [*date*], _____ [*name of person sustaining damages*] brought an action against defendant herein in _____ Court, _____ County, California, Action No. _____, seeking damages for _____ [*describe nature of claim, e.g.,* personal injuries sustained during a cave-in of a trench dug by plaintiff on defendant's property]. [A trial was held in this action, and a judgment was entered against defendant in the sum of $_____ together with costs in the sum of $_____. Defendant has appealed from that judgment and the appeal is now pending in the Court of Appeal, _____ District, (Division _____,) Civil No. _____].

7. Defendant has demanded that plaintiff indemnify and hold defendant harmless from the _____ [loss *or* liability] that defendant _____ [has incurred *or* may incur] with regard to this action pursuant to the terms of the indemnity agreement between the parties (Exhibit A).

8. The _____ [loss *or* liability] that defendant _____ [has incurred *or* may incur] as alleged above does not create a duty of indemnity on the part of plaintiff under the agreement because the _____ [loss *or* liability] was caused, in whole or in part, by defendant's own negligence, in that _____ [*specify conduct of defendant-indemnitor that constitutes active negligence, e.g.,* at all times prior to the event that caused injury, plaintiff and its employees and agents were following the express instructions and specifications of defendant and its employees and agents, with regard to digging the trench that ultimately caved in and caused injury].

9. An actual controversy has arisen and now exists between plaintiff and defendant concerning their respective rights and duties under their written agreement: defendant contends that, by virtue of the agreement, plaintiff is obligated to indemnify and to hold defendant harmless from any and all damages, judgment, or other awards that may be recovered against defendant as a result of _____ [the action *or* an affirmation of the judgment on appeal]. Plaintiff, on the other hand, contends that the agreement does not obligate him/her/it in any manner with regard to any injury or damages suffered by _____[*name of injured person*] arising from the events and occurrences as alleged herein, or from any loss or liability incurred by defendant with regard to such injury or damages.

10. Plaintiff desires a judicial determination of the respective rights and duties of plaintiff and defendant under their written agreement and a declaration that plaintiff is not obligated to indemnify defendant in any manner or in any amountwith regard to the events injuries, damages, loss, and liability as herein alleged.

11. Such a declaration is necessary and appropriate at this time in order that plaintiff may ascertain his/her/its rights and duties with respect to the _____ [defense of the action pending against defendant *or* appeal of the

judgment rendered against defendant in the aforementioned action] and the payment of any damages, judgment, or other awards that may be recovered against defendant as a result of _____ [the action *or* an affirmation of the judgment on appeal].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a declaration that the written agreement between plaintiff and defendant does not obligate plaintiff to indemnify defendant against any and all damages, judgment, or other awards that may be recovered against defendant as a result of _____[the action *or* an affirmation of the judgment on appeal];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 300.171*].

[2] Use of Form

This form is for use as a complaint for declaratory relief with regard to the scope of an express indemnity agreement. The complaint is for use by an express indemnitor who contends that there is no duty of indemnity with regard to the underlying liability because the agreement is "general" and does not expressly provide for indemnity if the indemnitee's own "active" negligence is a cause of the loss.

This form may be adapted for used by the indemnitee under the agreement by omitting the allegation that the indemnitee's own negligence caused the liability (Paragraph 7). This allegation may be replaced by an allegation that any negligence of the indemnitee that might have been a cause of the liability was only "passive" negligence. For discussion, see *§§ 300.02[5][a]* and *300.02[5][b]*.

The complaint seeks declaratory relief and permits the parties to adjudicate their indemnity rights under an express indemnity agreement with regard to loss or liability that the indemnitee may incur as the result of an action pending against the indemnitee. It may be filed in an independent action [*Indenco, Inc. v. Evans (1962) 201 Cal. App. 2d 369, 374, 20 Cal. Rptr. 90]* or, with appropriate adaptations, it may be filed as a cross complaint in the action in which the indemnitee is a defendant [*see Roylance v. Doelger (1962) 57 Cal. 2d 255, 259-262, 19 Cal. Rptr. 7, 368 P.2d 535* ; *see also § 300.15*]. For an example of a cross complaint for declaratory relief to determine indemnity rights, see *§ 300.190* (cross complaint for declaratory relief for comparative indemnity). For additional forms and discussion, see Ch. 123, *Complaints and Cross Complaints* .

This complaint may not be used once the indemnitee has incurred the liability or sustained the loss for which he or she seeks recovery from the indemnitor. Once the indemnitee's right to recover has accrued, the indemnitee must bring an ordinary action for indemnity rather than an action for declaratory relief [*see Mascarin Prof'l Pharmacy v. Hart (1970) 13 Cal. App. 3d 462, 465, 91 Cal. Rptr. 560]* .

[3] Allegations

The complaint alleges:

- The indemnity agreement between plaintiff and defendant (Paragraph 4).

- The events or occurrence giving rise to a potential loss or liability for which the defendant-indemnitee may be liable (Paragraphs 5, 6).

- The defendant-indemnitee's contention that the loss or liability is within the scope of the indemnity agreement and its demand that the plaintiff-indemnitor perform under the agreement (Paragraph 7).

- The conduct of the defendant-indemnitee that constitutes its own active negligence and removes the liability or loss from the scope of the indemnity agreement (Paragraph 8).

- An actual controversy between plaintiff and defendant regarding their respective rights and duties under the indemnity agreement (Paragraph 9).

- Plaintiff's request for a judicial determination of rights and duties of indemnity under the agreement and the facts (Paragraph 10).

- The necessity and propriety of such a determination (Paragraph 11).

[4] Cross References

For related forms, see *§§ 300.170*, *300.171*, and *300.190*.

[5] State Statutes

Jurisdiction over complaints and cross complaints for declaratory relief. *Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(7), 580(b)(4), 1060*

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Chapter 300 INDEMNITY AND CONTRIBUTION
PART IV. FORMS
A. Express Contractual Indemnity

25-300 California Forms of Pleading and Practice--Annotated § 300.173

§ 300.173 Complaint for Express Indemnity [Civ. Code § 2772]--By Surety [Civ. Code § 2787] Against Third-Party Indemnitor--Losses Incurred on Account of Surety's Execution of Performance Bond and Labor and Materials Bond

[1] FORM Complaint for Express Indemnity [Civ. Code § 2772]--By Surety [Civ. Code § 2787] Against Third-Party Indemnitor--Losses Incurred on Account of Surety's Execution of Performance Bond and Labor and Materials Bond

[*Caption. See § 300.171.*]

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, _____[*specify, e.g.,* a corporation duly organized, existing, and authorized to transact a surety insurance business under the laws of the State of California].

[2. *Allege capacity and domicile of defendant. See § 300.171,Paragraph 2.*]

3. Defendants DOE 1 through DOE _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.)

4. On or about _____ [*date*], _____ [*name of principal under suretyship arrangement*] and _____ [*name of obligee under suretyship arrangement*] entered into a written contract under which _____ [*name of principal*] agreed to _____ [*specify nature of contract, e.g.,* construct a home on the premises of _____ (*name of obligee*) at _____ (*specify location*) for the sum of $_____.] A copy of this contract is attached as Exhibit A and made a

part hereof.

5. On or about _____ [*date*], at the request of _____ [*name of principal*] and defendant _____ [*name of third-party indemnitor*], plaintiff executed and delivered to _____ [*name of obligee*] a bond guaranteeing the performance of _____ [*name of principal*] under the terms of the contract and a bond guaranteeing the payment of all persons supplying labor and materials to _____ [*name of principal*] during performance. Copies of these bonds are attached as Exhibits B and C and made a part hereof. In consideration for executing these bonds, plaintiff received, among other things, the written promise of defendant _____[*name of third-party indemnitor*] to indemnify and hold plaintiff harmless from any and all loss, claim, and expense that plaintiff might sustain as a consequence of executing the bonds; a copy of this promise is attached as Exhibit D and made a part hereof.

6. Thereafter, _____ [*name of principal*] began to perform his/her/its contract with _____ [*name of obligee*] but by _____ [*date*], _____ [*specify act in default, e.g.,* was unable to continue] and defaulted on his/her/its obligation under the contract. Plaintiff consequently became bound, under the terms of his/her/its performance bond, to _____ [*specify nature of surety's performance, e.g.,* complete the construction of a home on the premises of _____ (*name of obligee*)]. In performing these acts, plaintiff was compelled to, and did, pay the sum of $_____.

7. Prior to the default of _____ [*name of principal*], numerous persons had supplied _____ [*name of principal*] with materials and labor for the performance of the contract, but _____ [*name of principal*] had paid none of them. As a result, these persons asserted claims and demands for payment against plaintiff under the terms of his/her/its labor and materials bond, and plaintiff, recognizing his/her/its liability therefor, was compelled to employ counsel and incur costs in investigating, processing, and otherwise settling their claims and demands, sustaining losses in the amount of $_____.

8. Plaintiff has performed all conditions to be performed on his/her/its part under the performance bond and labor and materials bond and under the agreement with defendant [, except _____ (*specify unperformed condition(s) and excuse(s) for nonperformance*)].

9. By reason of the foregoing, plaintiff is entitled to indemnity from defendant _____ [*name of third-party indemnitor*] in the sum of $_____, but defendant has not paid any part of this sum to plaintiff.

10. [*Attorney's fees and costs incurred in enforcing indemnity agreement. See § 300.171, Paragraph 11.*]

[*Prayer. See § 300.171.*]

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 300.171.*]

[2] Use of Form

This form is for use by a surety to recover express indemnity from a third-party indemnitor who has agreed to indemnify the surety for loss incurred due to the nonperformance of a principal under a labor and materials bond. Although this form is for use by a surety, it is not based on the undertaking itself, but rather on an indemnity agreement that is collateral to the undertaking. For discussion of the distinction between suretyship and indemnity, see *§ 300.32[1]*

.

In addition to a cause of action against the third-party indemnitor, the surety's complaint for indemnity also may incorporate a cause of action against theprincipal debtor under the suretyship arrangement, based either on an indemnity agreement that the principal executed in consideration for the suretyship or on the surety's equitable right, codified under *Civ. Code §§ 2779* and *2847*, to reimbursement from the principal for the amounts that the surety has been compelled to pay as a result of the principal's default [*see Pacific Indem. Co. v. Harper (1939) 14 Cal. 2d 379, 386, 94 P.2d 586]* . For a form of complaint by a surety against a principal for reimbursement, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[3] Allegations

The complaint alleges: (1) plaintiff's execution of suretyship bonds in conjunction with a principal contract (Paragraph 4) and in consideration for defendant's agreement to indemnify plaintiff against loss incurred as a surety (Paragraph 5); (2) the amounts that plaintiff is compelled to sustain as surety on the principal debtor's default (Paragraphs 6, 7); (3) plaintiff's performance of all conditions precedent under the suretyship agreement and under the indemnity agreement with defendant (Paragraph 8); (4) defendant's noncompliance with its indemnity agreement (Paragraph 9); and (5) the amount of attorney's fees and costs that plaintiff has incurred in prosecuting the indemnity action (Paragraph 10).

[4] Cross References

For discussion and forms related to actions on bonds or written undertakings required in connection with certain judicial proceedings and construction contracts, see Ch. 43, *Appeal: Stay of Proceedings* , Ch. 62, *Attachments* , Ch. 104, *Building Contracts* , Ch. 119, *Claim and Delivery* , Ch. 174, *Costs and Attorney's Fees* , Ch. 258, *Family Law Enforcement* , Ch. 270, *Fraudulent Conveyances* , Ch. 283, *Guardianship and Conservatorship: Bonds* , Ch. 393, *Injunctions* , Ch. 308, *Insurance* , Ch. 348, *Lis Pendens* , Ch. 356, *Lost Papers* , Ch. 446, *Probate: Bonds--Increase and Decrease During Administration* , Ch. 481, *Public Works* ; Ch. 483, *Quo Warranto* , Ch. 486, *Receivers* , Ch. 536, *Subrogation* , and Ch. 538, *Suretyship, Bonds, and Undertakings*

For a related form, see *§ 300.171*

[5] State Statutes

Surety's right to reimbursement from principal for amounts that surety is compelled to pay in satisfaction of surety's obligations resulting from principal's default. *Civ. Code §§ 2779, 2847*

Surety or guarantor as one who promises to answer for debt, default, or miscarriage of another. *Civ. Code § 2787*

Motion for judgment against indemnitor on bond or covenant of indemnity in action against indemnitee for conduct indemnified by bond or convenant. *Code Civ. Proc. § 1055*

[6] Decisions

Surety's equitable right to reimbursement from principal debtor under suretyship arrangement for amounts that surety is compelled to pay in satisfaction of surety's obligations resulting from principal's default. *Pacific Indem. Co. v. Harper (1939) 14 Cal. 2d 379, 386, 94 P.2d 586*

Third-party indemnitor of surety. *Fidelity & Deposit Co. v. Whitson (1960) 187 Cal. App. 2d 751, 753, 759, 10 Cal.*

Rptr. 6

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[Reserved]

§§ 300.174[Reserved]

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PART IV. FORMS
B. Comparative Indemnity Among Tortfeasors

25-300 California Forms of Pleading and Practice--Annotated § 300.190

§ 300.190 Cross Complaint [Code Civ. Proc. § 428.10] for Declaratory Relief [Code Civ. Proc. § 1060] With Respect to Right of Comparative Indemnity From Cotortfeasor

[1] FORM Cross Complaint [Code Civ. Proc. § 428.10] for Declaratory Relief [Code Civ. Proc. § 1060] With Respect to Right of Comparative Indemnity From Cotortfeasor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	
_____ [*name*],	)	NO. _____
Defendant and Cross Complainant,	)	CROSS COMPLAINT FOR DECLARATORY RE-
vs.	)	LIEF; COMPARATIVE INDEMNITY
_____ [*name*],	)	[*Code Civ. Proc. § 1060*]
and DOES 1 through _____,	)	
Cross Defendants.	)	
	)	
	)	

1. Cross defendant _____ [*name*], an individual, is, and at all times herein mentioned was, a resident of _____County, California [*or allege other capacity and residence*].

2. Cross complainant is ignorant of the true names and capacities of cross defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Cross complainant will amend this complaint to allege their true names and capacities when ascertained. Cross complainant is informed and believes and thereon alleges that, if cross complainant is liable to the plaintiff as alleged in the complaint in this

action, each of the fictitiously named cross defendants is jointly or jointly and severally liable with cross complainant to the plaintiff for plaintiff's damages as set forth therein. Each reference in this cross complaint to "cross defendant," "cross defendants," or a specifically named cross defendant refers also to all cross defendants sued under fictitious names.

3. On or about _____ [*date*], plaintiff filed the complaint herein against cross complainant [and cross defendant(s)] seeking damages for _____ [*state nature of damages, e.g.,* personal injuries] that plaintiff allegedly sustained as a result of _____ [*summarize plaintiff's cause of action, e.g.,* cross complainant's alleged negligent operation of a motor vehicle].

4. If plaintiff sustained damages as alleged in his/her complaint, these damages were caused, entirely or in part, by cross defendants as set forth herein.

[*In consecutively numbered paragraphs, set forth allegations sufficient to establish each cross defendant's liability to plaintiff, e.g.:*]

5. At the time and place alleged in plaintiff's complaint, cross defendant _____ [*name*] owned and was operating _____ [*year, make, and model of motor vehicle, e.g.,* a 1990 Honda Civic] automobile.

6. At that time and place, cross defendant _____ [*name*] was negligently operating his/her automobile so as to cause it to strike cross complainant's car from the rear, impelling it forward and causing it to strike plaintiff's car, thereby causing plaintiff's injuries as alleged in the complaint, if plaintiff has, in fact, been so injured.

[*CONTINUE*]

7. An actual controversy has arisen and now exists between cross complainant and cross defendant in that cross complainant contends, and cross defendant denies, the following:

a. That, as between cross complainant and cross defendant, responsibility, if any, for the damages claimed by plaintiff herein rests entirely or partially on cross defendant; and

b. That, as a result, cross defendant is obligated to partially or fully indemnify cross complainant for any sums that cross complainant may be compelled to pay as the result of any damages, judgment, or other awards recovered by plaintiff against cross complainant.

8. Cross complainant desires a judicial determination of the respective rights and duties of cross complainant and cross defendant with respect to the damages claimed in the complaint of plaintiff herein. In particular, cross complainant desires a declaration of the comparative liability of cross complainant and cross defendant for these damages, and a declaration of cross defendant's responsibility for comparative indemnity to cross complainant for any sums that cross complainant may be compelled to pay and for which cross defendant is determined responsible, entirely or in part.

9. Such a declaration is necessary and appropriate at this time in order that cross complainant may ascertain his/her rights and duties with respect to plaintiff's claim for damages. Furthermore, the claim of plaintiff and the claim of cross complainant arise out of the same transaction, and determination of both in one proceeding is necessary and appropriate in order to avoid the multiplicity of actions that would result if cross complainant is required now to defend against the claim of plaintiff and then bring a separate action against cross defendant for indemnification of sums that cross complainant may be compelled to pay as the result of any damages, judgment, or other awards recovered by plaintiff against cross complainant.

WHEREFORE, cross complainant prays judgment against cross defendant as follows:

1. For a judicial determination of the comparative fault of cross complainant and cross defendant for the damages claimed by plaintiff, if any are found to exist;

2. For a declaration of the amount that cross defendant is obligated to indemnify cross complainant if cross complainant is compelled to pay any sum as the result of any damages, judgment, or other awards recovered by plaintiff against cross complainant;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Cross Complainant

[2] Use of Form

This form of cross complaint is for use by a defendant in an action for damages to adjudicate his or her right to comparative indemnity from a codefendant or a new party for any damages that the defendant may be compelled to pay to the plaintiff as the result of any damages, judgment, or other awards recovered by plaintiff [*see American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899]* . Alternatively, the defendant may pay the plaintiff's claim, in whole or in part, and then bring an independent action for comparative indemnity [*E. L. White, Inc. v. City of Huntington Beach (1978) 21 Cal. 3d 497, 506, 146 Cal. Rptr. 614, 579 P.2d 505]* . Once the defendant is actually compelled to pay the damages for which he or she seeks indemnity, declaratory relief is no longer available and the defendant must seek plenary relief in an ordinary action for indemnity [*see Mascarin Prof'l Pharmacy v. Hart (1970) 13 Cal. App. 3d 462, 465, 91 Cal. Rptr. 560]* .

This cross complaint may not be used if the damages for which indemnity is sought are covered by an express indemnity agreement between the party seeking indemnity and the party from whom indemnity is sought. In such a case, the indemnity action must be based on the indemnity agreement [*Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 628, 119 Cal. Rptr. 449, 532 P.2d 97]* , and the complaint in *§ 300.171*, modified as a cross complaint, would be appropriate.

This cross complaint may be used if the cross complainant seeks either a partial or a total shift of liability to the cross defendant. There is only a single comparative indemnity doctrine in California, providing for apportionment of liability on a comparative fault basis as the facts and equities of the case may require. Such an apportionment may involve total comparative indemnity in an appropriate case [*see Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 808, 251 Cal. Rptr. 202, 760 P.2d 399]* .

[3] Allegations

This cross complaint first contains general allegations of capacity, residence, and fictitiously named defendants (Paragraphs 1, 2). Then, the plaintiff's cause of action against cross complainant (and cross defendant) is alleged (Paragraph 3). Next, there is a general statement that if plaintiff was damaged as alleged in the complaint, the damages were caused, wholly or in part, by the cross defendant, in other words, that the parties to the cross complaint may be cotortfeasors with regard to plaintiff (Paragraph 4).

Sample paragraphs then follow in which the nature of the cross defendant's liability to the plaintiff is alleged

(Paragraphs 5, 6). Such paragraphs may be omitted if all cross defendants were sued by the plaintiff in his or her complaint and cross defendant has no additional facts or theories of recovery to plead other than those alleged by the plaintiff. However, a cross complainant for comparative indemnity should state sufficient facts to plead a cause of action against any new party to the litigation, establishing the new party's liability to the plaintiff. Further, a defendant who is dismissed from plaintiff's action is not necessarily entitled to dismissal from a cross action for comparative indemnity if the cross complaint pleads a different theory of recovery than that alleged by the plaintiff in the complaint [*see Frank v. State of California (1988) 205 Cal. App. 3d 488, 491-495, 252 Cal. Rptr. 410* ; *see also § 300.65*]. Therefore, any theories of recovery against a tortfeasor that are not alleged by the plaintiff should be alleged in the cross complaint.

Finally, this cross complaint alleges the elements of a cause of action for declaratory relief (Paragraphs 7-9). For further consideration of complaints for declaratory relief, see Ch. 182, *Declaratory Relief* .

[4] Cross References

For discussion of a vehicle owner's right to recover from a negligent operator, pursuant to *Veh. Code § 17153*, see Ch. 82, Automobiles: Causes of Action

For discussion and forms of complaints generally, see Ch. 123, *Complaint and Cross Complaints*

For discussion and forms relating to consolidation generally, see Ch. 125, *Consolidation, Severance, and Coordination of Actions*

For discussion and forms related to a principal's action for implied indemnity from an agent for damages that the principal was compelled to pay a third person as a result of the agent's negligence or fraud, see Ch. 427, *Principal and Agent*

[5] State Statutes

Jurisdiction of cross complaint for declaration of right to indemnity with respect to relief demanded by complaint or cross complaint in action or proceeding that is otherwise a limited civil case. *Code Civ. Proc. §§ 86(a)(7), 580(b)(4)*; *see Cal. Const. art. VI, § 10*; *Code Civ. Proc. § 85* (definition of limited civil case)

Right of defendant to file cross complaint against existing party or stranger to action that asserts cause arising out of same transaction is cause asserted in complaint against defendant. *Code Civ. Proc. § 428.10(b)(1)*

Joinder of parties as cross defendants. *Code Civ. Proc. § 428.20*

Action for declaratory relief. *Code Civ. Proc. § 1060*

[6] Decisions

Code Civ. Proc. § 1060 authorizes court to declare party's rights or duties in controversy before breach of obligation with respect to which declaration is sought; cross complaint for equitable indemnity is proper subject for declaratory relief action; cross complainant's right to file cross complaint arises when complaint is filed. *Allen v. Southland Plumbing, Inc. (1988) 201 Cal. App. 3d 60, 64, 246 Cal. Rptr. 860*

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§ 300.191 Judicial Council Trial Court Pleading Forms [Code Civ. Proc. § 425.12]--Cross Complaint--Personal Injury, Property Damage, Wrongful Death--Apportionment of Fault, Indemnification, Declaratory Relief [Cal. Judicial Council Form PLD-PI-002]

[1] FORM Judicial Council Trial Court Pleading Forms [Code Civ. Proc. § 425.12]--Cross Complaint--Personal Injury, Property Damage, Wrongful Death--Apportionment of Fault, Indemnification, Declaratory Relief [Cal. Judicial Council Form PLD-PI-002]

Click here to view image.

[2] Use of Form

This form is the Judicial Council form for use as a cross complaint for apportionment of fault, indemnification, and declaratory relief [*see Code Civ. Proc. § 425.12*; Cal. Judicial Council Form PLD-PI-002]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

If this form is used to cross complain against a new party, or if the cross complainant wishes to allege theories of recovery against a named defendant that were not alleged by the plaintiff, allegations such as those set forth in Paragraphs 5 and 6 of the form in *§ 300.190* should be attached.

[3] Filling Out Form

This form is filled out to demonstrate the simple situation of a cross complaint for comparative indemnity between two individual tortfeasors, both of whom are already defendants in the plaintiff's action. By filing such a minimal cross complaint, the cross complainant indicates that he has nothing more to allege with regard to the cross defendant's liability beyond the facts alleged by the plaintiff in the original complaint.

The printed matter of this form asserts three possible causes of action, for "indemnification," "apportionment of fault,"

and "declaratory relief." The indemnification cause of action is for use to allege a right to total indemnity because the cross complainant is only derivatively liable for the acts of the cross defendant (Paragraph 6). The apportionment-of-fault cause of action is for use to allege a right to partial indemnity under principles of comparative fault (Paragraph 7).

Paragraph 8, the cause of action for declaratory relief, should be included in all cases. The proper form of a cross complaint for comparative indemnity is one for declaratory relief [*see Valley Circle Estates v. VTN Consol., Inc. (1983) 33 Cal. 3d 604, 612, 189 Cal. Rptr. 871, 659 P.2d 1160]* .

[4] State Statutes

Judicial Council trial court forms. *Code Civ. Proc. § 425.12*

[5] California Rules of Court

Judicial Council pleading forms. *Cal. Rules of Ct., Rule 1.45*

[6] Cross References

For a related form, see *§ 300.190*

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25-300 California Forms of Pleading and Practice--Annotated § 300.192

§ 300.192 Complaint for Implied Contractual Indemnity--Loss Arising From Indemnitor's Breach of Contractual Duties Owed to Indemnitee--General Form

[1] FORM Complaint for Implied Contractual Indemnity--Loss Arising From Indemnitor's Breach of Contractual Duties Owed to Indemnitee--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR IMPLIED CONTRACTUAL
and DOES 1 through _____,	)	INDEMNITY
Defendants.	)	
	)	
	)	

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, _____[*specify capacity and domicile, e.g.,* a partnership with its principal place of business in _____ (*city*), _____ County, California, and it has filed and published the fictitious business name statement as required by *Sections 17910 through 17917 of the Business and Professions Code*].

2. Defendant is, and at all times herein mentioned was, _____ [*specify capacity and domicile, e.g.,* a corporation, organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), _____ County, California].

3. Defendants DOE 1 through DOE _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged and that plaintiff's damages as herein alleged were proximately caused by those defendants. Each reference in this complaint to "defendant," "defendants," or a specifically named defendant refers also to all defendants sued under fictitious names.

4. _____ [*Allege contractual relationship between plaintiff and defendant, e.g.,* On or about _____ (*date*), plaintiff and defendant entered into a written contract whereby defendant agreed to supply plaintiff with certain steel parts of stated specifications at a cost of $_____ for a fence that plaintiff had undertaken to construct for _____ (*name of third person*). A copy ofthis contract is attached hereto as Exhibit A and made a part hereof.]

5. _____ [*Allege defendant's improper performance of contract and resulting damage, e.g.,* Defendant failed to deliver the steel parts of the required specifications, and as a result, plaintiff was unable to perform the fencing work for _____ (*name of third person*) within the time required.]

6. On or about _____ [*date*], _____ [*name of third person sustaining damages as result of defendant's improper contract performance*] brought an action against plaintiff herein in _____ Court, _____ County, California, Action No. _____, to recover damages for _____ [*describe nature of claim, e.g.,* plaintiff's failure to perform his/her/its agreement to construct a fence within the time required]. _____[*Either* A trial was had in this action, and despite a good faith and vigorous defense by plaintiff, a judgment was entered against plaintiff on _____ (*date*) for the sum of $_____ plus costs in the sum of $_____ *or* Recognizing his/her/its liability for this claim, plaintiff agreed to pay the reasonable sum of $_____ to _____ (*name of third person sustaining damages*) in settlement of the action]. By reason of this _____ [judgment *or* settlement], on or about _____ [*date*], plaintiff was compelled to, and did, pay the sum of $_____ to _____ [*name of third person sustaining damages*].

7. The damages recovered by _____ [*name of third person damaged by defendant's improper contract performance*] against plaintiff were caused primarily and ultimately by defendant's breach of his/her/its contract with plaintiff in _____ [*specify nature of defendant's breach, e.g.,* failing to deliver steel parts of the proper specifications]. Plaintiff's liability for these damages arose, not as a result of any actual fault on his/her/its part, but solely by operation of law, arising from [*state constructive, imputed, or passive basis of plaintiff's liability, e.g.,* defendant's breach that rendered plaintiff unable to perform his/her/its agreement with _____ (*name of third person*)].

[8. On or about _____ (*date*), plaintiff gave written notice to defendant of the action for damages commenced by _____ (*name of third person damaged by defendant's breach*) against plaintiff, requesting the defense of the action by defendant and indicating defendant's primary responsibility for the damages and resultant obligation to indemnify plaintiff for any loss that plaintiff might sustain as a result of the action. A copy of this notice is attached hereto as Exhibit B and made a part hereof. (Nevertheless, defendant failed to undertake the defense of the action and refused to indemnify plaintiff for any loss resulting from the action.)]

[9. *If defendant did not defend action against plaintiff, allege attorney's fees and costs expended by plaintiff in defending or settling action. See § 300.171, Paragraph 9.*]

10. By reason of the foregoing, plaintiff is entitled to indemnity from defendant in the sum of $_____, but defendant has not paid any part of this sum to plaintiff.

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____ as indemnity for the _____ [loss *or* liability] incurred as alleged above;

[2. For attorney's fees and costs incurred in defending and resolving the claim of _____ (*name of injured claimant*) in the sum of $_____;]

3. For interest on the sum of $_____ [*total of amounts subject to indemnity under agreement*] from _____[*date*];

4. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 300.171*.]

[2] Use of Form

This form is for use as a complaint to allege a right to total indemnity implied from a contract not specifically providing for a right of indemnity [*see Bay Dev., Ltd. v. Superior Court (1990) 50 Cal. 3d 1012, 1029, 269 Cal. Rptr. 720, 791 P.2d 290]* . For discussion of the law on which this form is based, see *§ 300.61[5]*.

This form may be adapted for use as a cross complaint for declaratory relief to establish a right of implied contractual indemnity by omitting the allegations that the indemnitee (defendant and cross complainant) has already incurred liability and paid the third party (Paragraphs 6 and 7). In their place, the indemnitee should allege that, because of the contractual breach of the indemnitor (cross defendant), the indemnitee *may* incur liability to a third party in the underlying action. For a form of cross complaint seeking declaratory relief with respect to a right of comparative indemnity, see *§ 300.190*.

This complaint may not be used if the damages for which indemnity is sought are covered by an express indemnity agreement between the indemnitor and indemnitee. In such a case, the indemnity action must be based on the indemnity agreement [*Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 628, 119 Cal. Rptr. 449, 532 P.2d 97]* , and the complaint set forth in *see § 300.171* would be appropriate.

[3] Allegations

The complaint alleges: (1) a contract between plaintiff and defendant (Para graph 4); (2) defendant's breach or improper performance of the contract resulting in damages to a third person (Paragraph 5); (3) plaintiff's legal liability for the damages and the amount of loss resulting from the damages (Paragraphs 6, 9); (4) the imputed, constructive, or passive basis of plaintiff's liability for the damages (Paragraph 7); and (5) defendant's failure to indemnify plaintiff (Paragrap h 10).

The complaint also alleges defendant's notice of and opportunity to defend the action against plaintiff that gave rise to plaintiff's indemnity action (Paragraph 8). This allegation is not essential to the complaint because notice and opportunity to defend are not conditions precedent to an action for indemnity [*Sunset-Sternau Food Co. v. Bonzi*

(1964) 60 Cal. 2d 834, 844, 36 Cal. Rptr. 741, 389 P.2d 133] . However, if notice and opportunity to defend were given, the allegation should be included because the the indemnitee may then be entitled to recover its attorney's fees incurred in defending the principal action [*see Code Civ. Proc. § 1021.6*; *see also § 300.71[1]*]. For a form of such a notice, see *§ 300.170*.

[4] Cross References

For a complaint by a shipowner against a stevedoring company for implied contractual indemnity for damages that the shipowner was compelled to pay as a result of the company's breach of its warranty of workmanlike performance, see Ch. 522, *Ships and Shipping*

For a related form, see *§ 300.190*

[5] Decisions

Right of implied contractual indemnity for contractual liability to another that is primarily and ultimately caused by indemnitor's breach of contractual duties owed to indemnitee. *Nomellini Constr. Co. v. Harris (1969) 272 Cal. App. 2d 352, 359, 77 Cal. Rptr. 361*

Right of implied contractual indemnity for tort liability resulting from indemnitor's breach of contractual duties owed to indemnitee; basis of right as implied agreement of indemnitor to indemnify indemnitee for liability to another proximately caused by indemnitor's negligent performance of contractual duties. *Alisal Sanitary Dist. v. Kennedy (1960) 180 Cal. App. 2d 69, 79, 4 Cal. Rptr. 379* (indemnification of sanitary district by engineers for property damage liability based on inverse condemnation and caused by engineer's defective performance of construction contract on district's land)

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PART IV. FORMS
B. Comparative Indemnity Among Tortfeasors

25-300 California Forms of Pleading and Practice--Annotated § 300.193

§ 300.193 Allegations in Complaint for Implied Contractual Indemnity--By Automobile Owner Against Automobile Repairer--Owner's Liability for Injuries Resulting From Defective Automobile Repairs

[1] FORM Allegations in Complaint for Implied Contractual Indemnity--By Automobile Owner Against Automobile Repairer--Owner's Liability for Injuries Resulting From Defective Automobile Repairs

1. At all times herein mentioned, defendant _____[*name*] operated a garage for the servicing and repair of motor vehicles of the general public at _____ [*address*], _____ [*city*], _____ County, California.

2. On or about _____ [*date*], plaintiff brought a certain _____ [*specify year, make, and model*] automobile owned by plaintiff to defendant's garage for _____ [*describe nature of repairs, e.g.,* the repair and adjustment of its brakes], and defendant undertook this work for a consideration, which plaintiff agreed to pay.

3. Defendant so negligently and carelessly made these repairs on plaintiff's automobile that _____ [*specify defective condition resulting from repair, e.g.,* the brakes of the automobile were completely incapable of stopping the automobile], and operation of the automobile was dangerous to life and limb. As a proximate result of this negligence, _____ [*describe accident and injuries caused by defective repairs, e.g.,* while plaintiff was operating the automobile on or about _____ (*date*), along and on _____ (*name of street*), near _____ (*specify intersecting street*) in _____ (*city*), _____ County, California, plaintiff attempted to stop the automobile, but the brakes failed to function, and the automobile violently collided with another vehicle, causing serious personal injuries to its driver].

[4. *Allege plaintiff's liability for and payment of damages to injured person. See § 300.192, Paragraph 5.*]

5. The damages sustained by _____ [*name of injured person*] were caused entirely by the negligence of defendant in that he/she _____ [*allege defective repair work, e.g.,* improperly adjusted the brakes on plaintiff's automobile, leaving them in an inadequate condition for the safe operation of the automobile]. Plaintiff's

liability for these damages arose solely from plaintiff's failure to perform a nondelegable duty imposed by law on automobile owners to maintain their automobiles in safe working order and not from any actual wrongdoing on plaintiff's part.

[2] Use of Form

This form of allegations may be used in a complaint for implied contractual indemnity by an automobile owner to recover indemnity from an automobile repairer for damages that the owner was legally compelled to pay to a third personwho sustained injury during an accident caused by a defect in the owner's automobile that the repairer had negligently created while performing work on the automobile for the owner. For a form of complaint for implied contractual indemnity, see *§ 300.192*.

[3] Cross References

For an airline's complaint for implied indemnity from an airplane maintenance company for liability resulting from the crash of an airplane defectively repaired by the company, see Ch. 16, *Airplanes and Airports*

For a cross complaint for a declaration of a building owner's right to implied contractual indemnity by an elevator or escalator installer for personal injury liability caused by defective installation and maintenance of the elevator or escalator, see Ch. 244, *Elevators and Escalators*

For a related form, see *§ 300.192*

[4] Decisions

Indemnification of general contractor by subcontractor for property damage liability based on general contractor's passive failure to discover defective condition caused by subcontractor's actively negligent performance of grading contract. *Muth v. Urricelqui (1967) 251 Cal. App. 2d 901, 909-911, 60 Cal. Rptr. 166*

Indemnification of employer of independent contractor for personal injury liability based on employer's breach of nondelegable duty to take precautions against dangers of contractor's work and contractor's actively negligent performance in dangerous manner. *Ferrel v. Vegetable Oil Prods. Co. (1966) 247 Cal. App. 2d 117, 120, 124-125, 55 Cal. Rptr. 589*

Property owner's potential right to indemnification by independent contractor for personal injury liability based on owner's passive failure to maintain its property in safe condition and contractor's creation of danger during performance of maintenance contract. *Ralke Co. v. Esquire Bldg. Maint. Co. (1966) 246 Cal. App. 2d 141, 143-144, 54 Cal. Rptr. 556*

Indemnification of store by firm managing store department for tort liability based on store's responsibility to customers and caused by misconduct of firm's employee in breach of firm's contract with store. *Great W. Furniture Co. v. Porter Corp. (1965) 238 Cal. App. 2d 502, 516-518, 48 Cal. Rptr. 76*

Indemnification of truck owner by repairman for liability based on owner's failure to inspect repairs and caused by defective condition of truck created by repairman's negligent work. *De La Forest v. Yandle (1959) 171 Cal. App. 2d 59, 60-61, 340 P.2d 52*

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25-300 California Forms of Pleading and Practice--Annotated § 300.194

§ 300.194 Proceedings for Order Awarding Attorney's Fees in Comparative Indemnity Action [Code Civ. Proc. § 1021.6]--Notice of Motion

[1] FORM Proceedings for Order Awarding Attorney's Fees in Comparative Indemnity Action [Code Civ. Proc. § 1021.6]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER AWARDING ATTORNEY'S FEES
vs.	)	[*Code Civ. Proc. § 1021.6*]
_____ [*name*],	)	Date: _____
and DOES 1 through _____,	)	Time: _____
Defendants.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

To _____ [*identify opposing party, e.g.,* defendant(s) *or* cross defendant(s)] _____ [*name*] and to his/her/their attorney of record:

NOTICE IS HEREBY GIVEN that, on _____[*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) of] this court, located at _____[*address*], _____ [*city*], _____ [*successful party, e.g.,* plaintiff *or* cross complainant] will, and hereby does, move this court for an order awarding him/her/it attorney's fees in

the amount of $_____ under *Section 1021.6 of the Code of Civil Procedure.* The motion will be made on the grounds that:

1. _____ [*Successful party, e.g.,* Plaintiff *or* Cross complainant] prevailed on a claim for implied indemnity after having been required, through the tort of _____ [*opposing party, e.g.,* defendent *or* cross defendant], to act in the protection of _____ [*e.g.,* plaintiff's] interest by _____ [bringing an action against *or* defending an action by] a third party;

2. _____ [*Opposing party, e.g.,* Defendant *or* Cross defendant] was properly notified of the demand to _____[bring the action *or* provide the defense] and he/she/it did not do so; and

3. _____ [*Successful party, e.g.,* Plaintiff *or* Cross complainant] waswithout fault in the principal case that is the basis for the action in indemnity.

The motion will be based on this notice of motion, on the declaration of _____ [*name*], on the memorandum of points and authorities served and filed herewith, on the papers and records on file herein, and on such evidence as may be presented at the hearing of the motion.

Attorney for Plaintiff _____ [*name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion*]

[2] Use of Form

This form is for use by counsel for the successful plaintiff or cross plaintiff in an action for comparative indemnity to notice a motion for an award under *Code Civ. Proc. § 1021.6* of attorney's fees incurred in defending or prosecuting a third-party action. To be entitled to an award of attorney's fees under the statute, the indemnitee must have been without fault [*Code Civ. Proc. § 1021.6*]. Thus, this form may not be used by a party who has been awarded comparative indemnity on any allocation of fault other than 100/0 percent [*see Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 808, 251 Cal. Rptr. 202, 760 P.2d 399]* . For further discussion of *Code Civ. Proc. § 1021.6*, see *§ 300.71[1]*.

[3] Supporting Papers

A declaration should be filed in support of this notice of motion. The declaration should set forth facts showing that defendant or cross defendant was properly notified of a demand by plaintiff or cross plaintiff to bring the action or provide the defense and did not do so. It should then set forth the resolution of the moving party's indemnity claim in such a way as to indicate that the indemnitee was without fault with regard to the liability to the third party. The amount of attorney's fees required to bring or defend the underlying action should also be established. For a general form of declaration, see Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 372, *Motions and Orders* .

The notice of motion, if made before trial, would be subject to the Civil Law and Motion Rules (*Cal. Rules of Ct., Rules 3.1100 et seq.*) [*see Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(1)*], and specifically to the format requirements of *Cal. Rules of Ct., Rule 3.1110*, and to the requirement that the notice of motion be accompanied by a memorandum of points and authorities [*Cal. Rules of Ct., Rule 3.1113(a)*], complying with the format requirements set out in *Cal. Rules of Ct., Rule 3.1113(b)-(d)*. However, regardless of whether the Civil Law and Motion Rules would otherwise apply, the better

practice is to accompany the notice of motion with supporting points and authorities to ensure that all applicable law is before the court when it rules on the motion. A sample outline form of memorandum has been provided in this form for that purpose. Under *Code Civ. Proc. § 1005*, any supporting points and authorities would have to accompany the notice of motion. For discussion and forms, see Ch. 417, *Points and Authorities* . For forms of memoranda of points and authorities for use on the motion, see California Points and Authorities, Ch. 115, *Indemnity and Contribution* .

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25-300 California Forms of Pleading and Practice--Annotated § 300.195

§ 300.195 Proceedings for Order Awarding Attorney's Fees in Comparative Indemnity Action [Code Civ. Proc. § 1021.6]--Order Granting Motion

[1] FORM Proceedings for Order Awarding Attorney's Fees in Comparative Indemnity Action [Code Civ. Proc. § 1021.6]--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER AWARDING ATTORNEY'S FEES
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
and DOES 1 through _____,	)	Location: _____
Defendants.	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]
	)	

_____

The motion of _____ [*identify moving party, e.g.*, plaintiff *or* cross complainant] _____ [*name(s)*] for an order awarding him/her/it attorney's fees on the basis of *Section 1021.6 of the Code of Civil Procedure* came on regularly for hearing on _____ [*date*]. _____ [Plaintiff *or* Cross complainant] appeared by counsel _____ [*name(s)*]; _____ [defendant *or* cross defendant] appeared by counsel _____ [*name(s)*].

On proof being made to the satisfaction of the court that:

1. The _____ [*identify party, e.g.,* plaintiff *or* cross complainant] was required to act in the protection of his/her/its interest by _____ [bringing an action against *or* defending an action by] a third party;

2. The _____ [*identify party, e.g.,* defendant *or* cross defendant] was properly notified of a demand to _____ [bring the action *or* provide the defense] and he/she/it did not do so; and

3. The _____ [*identify party, e.g.,* plaintiff *or* cross complainant] was without fault in the principal case on which this action for indemnity was based,

IT IS ORDERED that the motion be and hereby is granted, and that _____ [*e.g.,* plaintiff] _____ is entitled under *Section 1021.6 of the Code of Civil Procedure* to receive attorney's fees from _____ [*e.g.,* defendant] [and that the fees are to be paid directly to _____ (*name of attorney*)].

IT IS FURTHER ORDERED that $_____ is a reasonable attorney's fee for the representation by _____ [*name of attorney*] of _____ [*e.g.,* plaintiff] from _____ [*specify time, e.g.,* the beginning of the principal action on _____ (*date*), through _____ (*date*), *or other as appropriate*].

[*If more than one attorney or firm is being awarded fees, repeat the preceding paragraph*.]

_____ [*date*]

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use if the court awards a successful indemnitee attorney's fees under *Code Civ. Proc. § 1021.6* in an action for implied (comparative) indemnity.

[3] Cross References

For a related form, see *§ 300.194*

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25-300 California Forms of Pleading and Practice--Annotated § 300.196

§ 300.196 Proceedings to Determine Good Faith of Settlement [Code Civ. Proc. § 877.6]--Notice of Motion

[1] FORM Proceedings to Determine Good Faith of Settlement [Code Civ. Proc. § 877.6]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MOTION AND NOTICE OF MOTION FOR ORDER DETERMINING GOOD FAITH OF SETTLEMENT
vs.	)	[, SUPPORTING _____ (AFFIDAVIT *or* DECLARATION) OF _____ (*name*), AND MEMORANDUM OF POINTS AND AUTHORITIES]
_____ [*name*],	)	[Telephone Appearance]
and DOES 1 through _____,	)	Date: _____
Defendants.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

To _____ [*identify party, e.g.*, plaintiff _____ (*name*)] and to _____[*name*] his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ *city*], _____ [*identify party, e.g.,* defendant] _____ [*name*] will, and hereby does, move for an order under *Code of Civil Procedure Section 877.6* determining that the settlement of plaintiff's claim entered into by the plaintiff and defendant _____ [*name of settling defendant*] was made and good faith. [_____ (*identify party, e.g.,* Defendant) _____ (*name*) also hereby moves for an order under *Cal. Rules of Court, Rule 3.1382,* dismissing _____ (*specify pleading or portion of pleading*).] The settlement between plaintiff and defendant _____ [*name of settling defendant*] affects the following parties:_____ [*list parties affected by settlement*]; and the following pleadings: _____ [*describe affected pleadings, including respective dates on which each pleading was filed*]. The motion will be made on the ground that the settlement entered into between plaintiff and defendant _____ [*name of settling defendant*] meets the standards for good faith set forth by the California Supreme Court in *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488* .

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name* (*s*)] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

_____ [*date*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. [*Describe briefly the background of the case, using as many paragraphs as are necessary*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion*]

[2] Use of Form

This form of notice of motion is for use by a plaintiff or a settling defendant to secure a court determination that a settlement entered into by the plaintiff and oneor more alleged tortfeasors was made in good faith [*see Code Civ. Proc. § 877.6(a)*]. Optional language is provided to seek dismissal of a pleading or a portion of a pleading [*see Cal. Rules of Court, Rule 3.1382*]. The notice of motion must list each party and pleading or portion of each pleading affected by the settlement, and the date on which the affected pleading was filed [*Cal. Rules of Court, Rule 3.1382*].

A party opposing the settlement may also move for a determination that a settlement is not in good faith [*Code Civ. Proc. § 877.6(a)*]. This form may be adapted for use by an opposing party by casting the request for a good faith determination as seeking a determination that the settlement was not made in good faith.

If cross complaints have been filed in the action, it should be reflected in the title of the case in the caption of the form. For appropriate forms, see Ch. 108, *Captions and Introductions* .

A motion made by a proponent of a settlement must set forth the ground of good faith, accompanied by a declaration that sets forth a brief background of the case [*see City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1260-1261, 238 Cal. Rptr. 119]* . The declaration set forth above includes a paragraph, which may be expanded to several paragraphs if necessary, for this purpose. The notice of motion must also include matter specified in *Cal. Rules of Court, Rule 3.1382*.

[3] Service and Filing of Papers

Notice of a motion to confirm a good faith settlement must be given in the manner provided in *Code Civ. Proc. § 1005(b)* [*Code Civ. Proc. §§ 877.6(a), 1005(a)(5)*]. Under this statute, all moving and supporting papers must be served and filed at least 16 court days before the time appointed for the hearing. In addition, if the notice is served by mail, the required 16-day period of notice before the time appointed for the hearing is increased by 5 days if the place of mailing and the place of address are within the State of California, by 10 days if either the place of mailing or the place of address is outside the State of California but within the United States, and by 20 days if either the place of mailing or the place of address is outside the United States, and if the notice is served by facsimile transmission, express mail, or another method of delivery providing for overnight delivery, the required 16-day period of notice before the time appointed for the hearing will be increased by two calendar days [*Code Civ. Proc. § 1005(b)*]. On a showing of good cause, the court may shorten the time for giving the required notice to permit the determination of the issue to be made before the commencement of the trial of the action, or before the verdict or judgment if settlement is made after the trial has commenced [*Code Civ. Proc. § 877.6(a)*; *see also Code Civ. Proc. § 1005(b)* (court or judge may prescribe shorter time)].

Opposing papers must be filed and served at least nine court days, and reply papers at least five court days, before the time appointed for the hearing. All papers opposing a motion and all reply papers must be served by personal delivery, facsimile transmission, express mail or other means reasonably calculated to ensure delivery to other parties not later than the close of the next business day after the time the opposition or reply papers, as applicable, are filed [*Code Civ. Proc. § 1005(b), (c)*]. The provisions of *Code Civ. Proc. § 1013(a)*, extending the time within which a right may be exercised or an act may be done when service is made by mail, do not apply [*Code Civ. Proc. § 1005(b)*].

[4] Supporting Papers

The good faith issue may be determined by the court on the basis of affidavits (or declarations under *Code Civ. Proc. § 2015.5*) served with the "notice of hearing," and any counter-affidavits (counter-declarations) filed in response, or the

court may, in its discretion, receive other evidence at the hearing [*Code Civ. Proc. § 877.6(b)*; *see City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1261, 238 Cal. Rptr. 119* (requiring supporting declarations in support of motion)]. For forms of supporting and opposing declarations, see *§§ 300.198* and *300.199*. For the contents of the supporting declarations and counter-declarations, see *§ 300.73[7][f]*.

The notice of motion, if made before trial, would be subject to the Civil Law and Motion Rules (*Cal. Rules of Ct., Rules 3.1100 et seq.*) [*see Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(1)*], and specifically to the format requirements of *Cal. Rules of Ct., Rule 3.1110*, and to the requirement that the notice of motion be accompanied by a memorandum of points and authorities [*Cal. Rules of Ct., Rule 3.1113(a)*], complying with the format requirements set out in *Cal. Rules of Ct., Rule 3.1113(b)-(d)*. However, regardless of whether the Civil Law and Motion Rules would otherwise apply, the better practice is to accompany the notice of motion with supporting points and authorities to ensure that all applicable law is before the court when it rules on the motion. A sample outline form of memorandum has been provided in this form for that purpose. Under *Code Civ. Proc. § 1005*, any supporting points and authorities would have to accompany the notice of motion. For discussion and forms, see Ch. 417, *Points and Authorities* . For forms of memoranda of points and authorities for use on the motion, see California Points and Authorities, Ch. 115, *Indemnity and Contribution* (Matthew Bender).

[5] Cross References

See Ch. 372, *Motions and Orders*

[6] State Statutes

Discharge of settling tortfeasor from liability for contribution. *Code Civ. Proc. § 877*

Hearing on good faith of settlement between plaintiff and joint tortfeasor. *Code Civ. Proc. § 877.6*

[7] Decisions

Procedure for securing court determination of good faith of settlement entered into between plaintiff or other claimant and one or more tortfeasors by noticed motion. *City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1261, 238 Cal. Rptr. 119*

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25-300 California Forms of Pleading and Practice--Annotated § 300.197

§ 300.197 Proceedings to Determine Good Faith of Settlement [Code Civ. Proc. § 877.6]--Application for Order Determining Good Faith of Settlement and Proposed Order [Code Civ. Proc. § 877.6(a)(2)]

[1] FORM Proceedings to Determine Good Faith of Settlement [Code Civ. Proc. § 877.6]--Application for Order Determining Good Faith of Settlement and Proposed Order [Code Civ. Proc. § 877.6(a)(2)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	APPLICATION FOR ORDER DETERMINING
_____ [*name*],	)	GOOD FAITH OF SETTLEMENT AND ORDER
and DOES 1 through _____,	)	Dept: _____
Defendants.	)	Trial Date: _____
	)	
	)	

To all parties and to their attorneys of record:

Plaintiff _____ [*name*] and Defendant _____ [*name*] hereby apply for an order of this court determining that a settlement agreement entered into between them on _____ [*date*] meets the standards for good faith set forth by the California Supreme Court in *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488* , and is in good faith within the meaning of *Code of Civil Procedure Sections 877* and *877.6*. The basis, terms, and amount of the settlement are _____ [*specify terms of agreement, or* set forth in the parties' written agreement, which is attached as Exhibit 1 to this Application and incorporated into this application by reference at this point].

_____ [*date*]

Attorney for Plaintiff _____ [*name*]

ORDER

The court finds that all notices required by law have been given. _____ [*Either* Twenty-five days have passed since notice of the above application was mailed to *or* Twenty days have passed since notice of the above application was personally served on] all of the parties to this action, and no notice of motion for hearing on the application has been filed with this court. The court therefore

DETERMINES AND RULES that the settlement between _____ [*name of plaintiff*] and _____ [*name of defendant*] entered into on _____[*date*] is in good faith within the meaning of Code of CivilProcedure Sections 877 and 877.6, and shall have the effect under law as provided by those Sections.

_____ [*date*]

_____ [*signature*]
Judge of the_____ Court

[2] Use of Form

This application and proposed order is for use by a plaintiff or a settling defendant to secure a court determination that a settlement entered into by the plaintiff and one or more alleged tortfeasors was made in good faith [*see Code Civ. Proc. § 877.6(a)*]. In lieu of noticing a hearing for a good faith determination [*see § 300.196*], a settling party may submit this application and proposed order and give notice to all other parties. The burden of proceeding then shifts to any nonsettling party who objects to the settlement [*see § 300.197[4]*]. This procedure may not be used if the settlement involves a confidentiality agreement regarding the case or the terms of the settlement [*Code Civ. Proc. § 877.6(a)(2)*]. For further discussion, see *§ 300.73[7][a]*.

[3] Contents of Application and Order

The application must indicate the settling parties, and the basis, terms, and amount of the settlement [*Code Civ. Proc. § 877.6(a)(2)*]. All nonmonetary consideration for the settlement should be disclosed [*see Arbuthnot v. Relocation Realty Serv. Corp. (1991) 227 Cal. App. 3d 682, 689-690, 278 Cal. Rptr. 135* ; *see also § 300.73[3]*].

The easiest way to meet the disclosure requirement is to attach the settlement agreement as an exhibit to the application, and incorporate it by reference. Failure to attach the agreement might raise the issue of whether there are confidential aspects to the settlement, which would make use of the application procedure inappropriate [*see Code Civ. Proc. § 877.6(a)(2)*].

The form and content of orders is often the subject of local court rules. These rules should be consulted before submitting the proposed order under *Code Civ. Proc. § 877.6(a)(2)*.

[4] Service of Notice and Response

Notice of settlement, the application, and the proposed order must be given by certified mail, return receipt requested. Proof of service must be filed with the court [*Code Civ. Proc. § 877.6(a)(2)*].

Within 25 days of the mailing after the notice, application, and proposed order, or within 20 days after personal service, a nonsettling party may file a notice of motion to contest the good faith of the settlement. If no such motion is filed, the court may approve the settlement [*Code Civ. Proc. § 877.6(a)(2)*]. The forms in*§ 300.196* may be adapted for use by a nonsettling party to notice a motion to oppose confirmation of a settlement as in good faith.

[5] Cross References

For a related form, see *§ 300.190*

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Chapter 300 INDEMNITY AND CONTRIBUTION
PART IV. FORMS
B. Comparative Indemnity Among Tortfeasors

25-300 California Forms of Pleading and Practice--Annotated § 300.198

§ 300.198 Proceedings to Determine Good Faith of Settlement [Code Civ. Proc. § 877.6]--Declaration Supporting Good Faith Determination--By Settling Defendant

[1] FORM Proceedings to Determine Good Faith of Settlement [Code Civ. Proc. § 877.6]--Declaration Supporting Good Faith Determination--By Settling Defendant

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF ORDER DETERMINING GOOD
_____ [*name*],	)	FAITH OF SETTLEMENT
and DOES 1 through _____,	)	Date: _____
Defendants.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for defendant _____ (*name*), hereinafter "settling defendant" *or other statement as appropriate*].

2. As shown by the complaint herein, of which the court is requested to take judicial notice, the action seeks to recover

damages for _____ [*specify, e.g.,* injuries sustained in an automobile accident] and in which it is alleged _____ [*briefly describe joint tortfeasors and the legal theories on which plaintiff seeks to recover from each*].

3. On or about _____ [*date*], plaintiff and settling defendant entered into a settlement agreement _____ [*set forth terms of agreement, e.g.,* by the terms of which plaintiff settled all claims and dismissed the action against settling defendant in consideration of the payment of the sum of $_____ (, which was paid)].

[4. The settlement figure was _____ (*describe source or basis, e.g.,* the policy limit of settling defendant's motor vehicle liability policy and was paid to plaintiff by _____ (*name*), the settling defendant's insurer).]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of declaration is for use by the settling party for a determination by the court that the settlement was made in good faith [*see Code Civ. Proc. § 877.6(b)*]. For a form of a declaration opposing the good faith determination, see *§ 300.199*.

Supporting declarations are required only if the good faith of the settlement is to be determined at a hearing. A hearing may either be noticed by a settling party [*see Code Civ. Proc. § 877.6(a)(1)*; *see also § 300.196*] or by a nonsettling party after receipt of the settling parties' notice of application for an order determining that the settlement is in good faith [*see Code Civ. Proc. § 877.6(a)(2)*; *see also § 300.197*]. If the settling parties proceed by application and no hearing is noticed by the nonsettling parties, the court may find the settlement to be in good faith without further evidentiary showing [*see Code Civ. Proc. § 877.6(a)(2)*].

[3] Showing Required

If a motion for a determination that a settlement is made in good faith under *Code Civ. Proc. § 877.6* is made by a proponent of the settlement, the supporting declaration need show only that a settlement has been made, the amount of the settlement, a brief background of the case, and, possibly, the basis of the settlement [*see City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1260-1261, 238 Cal. Rptr. 119]* . If the determination is contested by a nonsettling tortfeasor who files counter-declarations showing the settlement was not made in good faith, the proponent may file responsive counter-declarations to negate that showing [*see City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1262, 238 Cal. Rptr. 119* ; *see also § 300.73[7]*].

[4] Cross References

For further discussion and forms concerning declarations in general, see Ch. 15, *Affidavits, Certificates, and Declarations*

For a related form, see *§ 300.196*

[5] State Statutes

Determination of good faith issue on basis of affidavits. *Code Civ. Proc. § 877.6(b)*

Declarations under penalty of perjury in lieu of affidavits as authorized. *Code Civ. Proc. § 2015.5*

[6] Decisions

Notice of motion under *Code Civ. Proc. § 877.6* as required by *Code Civ. Proc. § 1005* to be accompanied by supporting declaration. *City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1261, 238 Cal. Rptr. 119*

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25-300 California Forms of Pleading and Practice--Annotated § 300.199

§ 300.199 Proceedings to Determine Good Faith of Settlement [Code Civ. Proc. § 877.6]--Declaration Opposing Good Faith Determination--By Nonsettling Defendant

[1] FORM Proceedings to Determine Good Faith of Settlement [Code Civ. Proc. § 877.6]--Declaration Opposing Good Faith Determination--By Nonsettling Defendant

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN OPPOSITION TO ORDER DETERMINING
_____ [*name*],	)	GOOD FAITH OF SETTLEMENT
and DOES 1 through _____,	)	Date: _____
Defendants.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for defendant _____ (*name of nonsettling tortfeasor*) *or other statement as appropriate*].

2. On or about _____ [*date*], plaintiff settled the within action as against defendant

_____[*name*], hereinafter "the settling defendant," pursuant to an agreement between them by the terms of which plaintiff accepted the sum of $_____ in full satisfaction of all plaintiff's claims against the settling defendant arising out of the accident sued on.

3. _____ [*Set forth general allegations of complaint regarding liability of settling and nonsettling defendant and extent of damages, e.g.,* As shown by the complaint herein, of which this court is requested to take judicial notice, plaintiff sued defendants _____ (*names*), alleging, in essence, that each was liable to plaintiff for the damages sustained as a result of _____ (*specify, e.g.,* an automobile accident). (These damages are alleged to total $_____.)]

4. _____ [*Set forth plaintiff's allegations and theories of liabilityagainst settling defendant, e.g.,* The complaint further alleges that _____ (*specify settling defendant's role in accident, e.g.,* the immediate cause of the accident was the settling defendant's driving his/her car into a city intersection against the red light and hitting plaintiff's car broadside).]

5. _____ [*Set forth plaintiff's allegations and theories of liability against nonsettling defendant, e.g.,* As further shown by the complaint in this matter, plaintiff sued _____ (*name of nonsettling defendant*) under a theory of negligent maintenance of a traffic signal controlling the intersection where the accident giving rise to plaintiff's injuries occurred, alleging that the signal was not functioning properly at the time of the accident.]

6. _____ [*Set forth facts showing settling defendant's high degree of culpability, e.g.,* As shown by the settling defendant's deposition, a copy of the pertinent portion of which is attached hereto as Exhibit A and made a part hereof, immediately before entering the intersection, the settling defendant was distracted by the presence of a police patrol car that he/she thought might stop him/her because he/she had not buckled his/her safety belt, and, at the time he entered the intersection, he/she was trying to "buckle up" and had turned in his/her seat to straighten out the belt, which had become twisted, thereby becoming inattentive to his/her driving and to the traffic control lights.]

7. _____ [*Set forth facts showing nonsettling defendant's low degree of culpability, e.g.,* As shown by the deposition of _____ (*name of deponent*), a copy of the pertinent portion of which is attached hereto as Exhibit B and made a part hereof, the traffic control signal in question was, in fact, working properly immediately prior to the accident.]

8. _____ [*Set forth facts showing extent of plaintiff's injuries, e.g.,* As shown by the deposition of Dr. _____ (*name*), a copy of the pertinent portion of which is attached hereto as Exhibit C and made a part hereof, plaintiff has already incurred economic damages of $_____ and is expected to have permanent injuries and disability as a result of the accident giving rise to his cause of action.]

9. Based on the extent of plaintiff's economic damages and projected permanent injuries, and on my experience with the defense of many other actions for personal injury, it is my professional opinion that, assuming that plaintiff will prove his/her case, his/her total damages could run from a low of $_____ to a high of $_____.

10. The amount of the settlement is _____ [less than *or* only] _____ percent of the low figure.

[11. Although the settlement was in an amount equal to the settling defendant's automobile insurance policy limit, the plaintiff has made no investigation of the settling defendant's personal finances. Declarant is informed and believes and thereon declares that defendant is a person of substantial means, is the owner of substantial property, and is well able to have settled from his/her personal assets in an amount more nearly approximating his proportionate share of liability.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of declaration is for use by a nonsettling defendant in opposition to a judicial determination that another defendant's settlement with plaintiff was made in good faith [*see Code Civ. Proc. § 877.6*]. For a form of a declaration supporting the good faith determination, see *§ 300.198*.

This form may be used in opposition to a settling party's noticed motion for an order determining the settlement to be in good faith [*see Code Civ. Proc. § 877.6(a)(1)*; *see also § 300.196*]. It may also be used in support of the declarant's noticed motion for an order denying a good faith determination [*see Code Civ. Proc. § 877.6(a)(2)*; *see also § 300.197*]. If a nonsettling party is served with a notice of settlement, application, and proposed order determining the settlement to be in good faith, it is insufficient to merely file this declaration. The party must notice a hearing on the application within 25 days after the date of mailing or within 20 days after personal service [*see Code Civ. Proc. § 877.6(a)(2)*].

The fact situation depicted is illustrative only. For the factors to be considered in determining whether the settlement was made in good faith, see *§ 300.73[5][b]*.

[3] Evidence

In a contested setting, the trial court's consideration of the settlement agreement and its relationship to the entire litigation must proceed on a sufficient evidentiary basis to enable the court to consider and evaluate the various aspects of the settlement. Because (1) a rough approximation of the settling defendant's proportionate liability, (2) consideration of all other defendants' proportionate liability, and (3) consideration of all other factors that might affect the fairness of the settlement with respect to the nonsettling defendants are required, the affidavits, declarations, or other evidence should provide the court with the facts necessary to evaluate the settlement in terms of the factors contemplated by *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 213 Cal. Rptr. 256, 698 P.2d 159* [*see § 300.73[5][b]*]. Without the facts, it is impossible for a court in a contested hearing to exercise its discretion in an appropriate fashion [*City of Grand Terrace v. Superior Court (1987) 192 Cal. App. 3d 1251, 1263, 238 Cal. Rptr. 119]* .

The burden of proving lack of good faith is on the party asserting it [*Code Civ. Proc. § 877.6(d)*; *see § 300.73[7][e]*]. Consequently, the supporting declaration or affidavit should set forth evidentiary facts generated by discovery, not merely the declarant's conclusions about what is and what is not good faith [*see Code Civ. Proc. §§ 2002(1), 2003, 2009, 2015.5*; *Evid. Code § 702*]. Argument as to why the amount of the settlement is disproportionate to the settling defendant's probable comparative liability should be set forth in the accompanying memorandum of points and authorities.

This form sets forth: the facts of the settlement (Paragraph 2); the basic allegations of the complaint (Paragraph 3); the specific allegations of the complaint as to the settling defendant (Paragraph 4); the evidence showing a high degree of culpability of the settling defendant (Paragraph 5); the specific allegations of the complaint as to the nonsettling defendant (Paragraph 6); the evidence showing a low degree of culpability of the nonsettling defendant (Paragraph 7); the evidence showing the extent of the plaintiff's injuries (Paragraph 8); the declarant's conclusion, based on experience as an attorney, of the potential range of plaintiff's total damages (Paragraph 9); the mathematical computation of the percent that the settlement bears to the low end of the range of damages (Paragraph 10); and an optional paragraph for use if the settlement is for insurance policy limits alleging insufficient investigation of the settling defendant's other

assets from which the judgment could be satisfied (Paragraph 11).

In addition to the affidavits (declarations) and counter-affidavits (counter-declarations) submitted in support of and in opposition to the motion, the court may, in its discretion, receive other evidence at the time of the hearing [*Code Civ. Proc. § 877.6(b)*].

[4] Cross References

For related forms, see *§§ 300.196, 300.198*

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25-300 California Forms of Pleading and Practice--Annotated § 300.200

§ 300.200 Proceedings to Determine Good Faith of Settlement [Code Civ. Proc. § 877.6]--Order

[1] FORM Proceedings to Determine Good Faith of Settlement [Code Civ. Proc. § 877.6]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
and DOES 1 through _____,	)	Location: _____
Defendants.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	
_____		

The motion of _____ [*identify party, e.g.,* defendant] _____ [*name*] for a court determination as to the good faith of the settlement entered into between plaintiff _____[*name*] and defendant _____ [*name*] in the above-entitled action came on regularly for hearing by the court on _____ [*date*]. [Plaintiff appeared by counsel _____ (*name*).] Defendant _____ [*name of settling tortfeasor*] appeared by counsel _____[*name*]. _____ [Defendant _____ (*name of nonsettling tortfeasor*) appeared by counsel _____ (*name*) *or* No appearance was made by or on behalf of defendant _____ (*name of nonsettling tortfeasor*)].

Having considered the _____ [motion and its supporting papers and no opposition having been filed *or*

supporting and opposing papers filed by counsel, the evidence presented at the hearing, and the argument of counsel], and good cause appearing therefor, the court hereby

DETERMINES, AND SO RULES, THAT the settlement _____[was *or* was not] made in good faith.

_____ [*date*]

_____ [*signature*]
Judge of the_____ Court

[2] Use of Form

This form is for use as an order of the trial court's determination whether asettlement was or was not entered into in good faith [*see Code Civ. Proc. § 877.6*]. It is for use after a noticed hearing to determine the good faith of the settlement, whether the hearing was noticed by a settling party or by a nonsettling party [*see Code Civ. Proc. § 877.6(a)*]. This form will probably be used after a contested hearing. However, the hearing may have been uncontested if it was required because the settlement included a confidentiality agreement [*see Code Civ. Proc. § 877.6(a)(2)*]. For a form for use as an uncontested order on which no hearing was required under *Code Civ. Proc. § 877.6(a)(2)*, see *§ 300.197*.

[3] Cross References

For related forms, see §§ 300.196-300.199

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PART IV. FORMS
B. Comparative Indemnity Among Tortfeasors

25-300 California Forms of Pleading and Practice--Annotated § 300.201

§ 300.201 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Original Proceeding in Court of Appeal [Cal. Rules of Ct., Rules 8.40, 8.486]--To Review Trial Court's Determination of Good Faith Issue of Settlement [Code Civ. Proc. § 877.6(e)]

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Original Proceeding in Court of Appeal [Cal. Rules of Ct., Rules 8.40, 8.490]--To Review Trial Court's Determination of Good Faith Issue of Settlement [Code Civ. Proc. § 877.6(e)]

CIVIL NO. _____
IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
_____ APPELLATE DISTRICT

_____ [*name*],	)	
Petitioner,	)	
vs.	)	
Superior Court of California for the County of	)	CIVIL NO. _____
_____,	)	PETITION FOR WRIT OF MANDATE
Respondent,	)	
_____ [*names*]	)	
Real Parties in Interest.	)	
	)	

_____

TO THE HONORABLE COURT OF APPEAL OF THE STATE OF CALIFORNIA, _____ APPELLATE DISTRICT:

Petitioner alleges:

1. Petitioner _____ [*name of nonsettling defendant*] is the _____ [*identify party, e.g.,* defendant and cross complainant] in an action pending in respondent court entitled _____ [*name*], Plaintiff, vs. _____ [*names*], Defendants, and _____ [*name*], Cross Complainant vs. _____ [*name*], Cross Defendant, Number _____.

2. Respondent is the Superior Court of the State of California for the County of _____.

3. Real parties in interest are the plaintiff _____[*name*] and _____ [*name of settling defendant*], _____ [*identify party, e.g.,* a defendant and the cross defendant] in the action mentioned in Paragraph 1.

4. On or about _____ [*date*], real party _____ [*name*], as plaintiff in the action mentioned in Paragraph 1, filed a complaint for _____ [*specify, e.g.,* damages for personal injuries] alleging that petitioner and real party _____ [*name of settling defendant*] were tortfeasors liable for the same tort that caused injury to plaintiff. A copy of the complaint is attached hereto as Exhibit A and made a part hereof.

5. Thereafter, on or about _____ [*date*], petitioner filed a cross complaint against real party _____ [*name of settling defendant*] for a declaration of rights of comparative indemnity as between them with regard to any damagesrecovered by plaintiff pursuant to the complaint. A copy of the cross complaint is attached hereto as Exhibit B and made a part hereof.

6. On or about _____ [*date*], real parties entered into an agreement with plaintiff by the terms of which agreed _____ [*specify, e.g.,* to pay plaintiff the sum of $_____ in settlement of plaintiff's claim against him/her], and plaintiff agreed to dismiss with prejudice its action as to real party _____ [*name of settling defendant*].

7. Thereafter, on or about _____ [*date*], real party _____ [*name of moving party*] served and filed a notice of motion for a determination as to the good faith of the settlement, together with a supporting declaration under penalty of perjury. A copy of the notice and supporting declaration are attached hereto as Exhibits C and D, respectively, and made a part hereof.

8. Thereafter, petitioner filed a counterdeclaration under penalty of perjury in opposition to the above motion. A copy of this counterdeclaration is attached hereto as Exhibit E and made a part hereof.

9. The hearing was held on _____ [*date*], the Honorable _____ [*name of judge*], presiding.

10. The Court determined, on the basis of the supporting declaration and counterdeclaration filed [and _____ (*specify any other evidence received at the hearing*)], that the settlement was made in good faith. A copy of the court's order is attached hereto as Exhibit F and made a part hereof.

11. The Court abused its discretion in that _____ [*specify, e.g.,* it refused to consider the factors set forth in the counterdeclarations and concluded that, because there was no showing of collusion or fraud between real parties, the settlement was ipso facto made in good faith].

12. The determination is contrary to law in that _____ [*specify reasons why trial court's ruling was erroneous, e.g.,* the figure for which the settlement was made is not within the reasonable range of real party's proportional share of comparative liability for the plaintiff's injuries. The evidence indicates that plaintiff's damages exceed $_____; that the real party defendant's share of comparative fault is no less than

_____ percent; and that, therefore, the minimum reasonable settlement amount of real party's liability should be $_____. The settlement amount is so grossly disproportionate to this amount as to be entirely "out of the ballpark" and inconsistent with the equitable objectives of the law].

13. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition, in that _____ [*state specific facts showing absence of an adequate legal remedy such as appeal*].

WHEREFORE, petitioner prays:

1. That the court issue an alternative writ of mandate commanding respondent court to vacate and set aside its order determining that the settlement was made in good faith and to enter its order determining that the settlement was not made in good faith, or to show cause before this court at a time specified by court order why it has not done so and why a peremptory writ should not issue;

2. That on the return of the alternative writ and the hearing of the petition, this court issue its peremptory writ of mandate to the same effect except for the order to show cause;

3. For costs of this proceeding; and

4. For such other and further relief as the court deems just and proper.

_____ [*date*]

_____ [*signature*]
Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the [attorney for the] petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

CAUTION:

Proof of service on each respondent and real party in interest of a copy of a petition that seeks an alternative writ must accompany the petition when it is offered for filing unless, in its discretion and for good cause, the court grants the writ on ex parte application [*Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rules 8.25(a)(2)*, 8.486(e); for a discussion of service of the petition, see Ch. 358, *Mandate and Prohibition* . The proof of service must name each party represented by each attorney served, and the attorney's telephone number [*Cal. Rules of Ct., Rules 8.25(a), 8.486(e)(3)*]. A petition accompanied by a defective proof of service shall be filed, but if a proper proof of service is not filed within five days, the court may strike the petition or impose a lesser sanction [*Cal. Rules of Ct., Rule 8.486(e)(5)*]. A petition

for writ of mandate filed in a court of appeal must be accompanied by a memorandum [*Cal. Rules of Ct., Rule 8.486(a)(5)*].

In addition, if a writ petition to an appellate court seeks review of a trial court ruling, it must be accompanied by a record adequate to permit the review, including (1) copies of the order or judgment, (2) all documents and exhibits, (3) any other documents or portions of documents submitted to the trial court that are necessary for a complete understanding of the case and the ruling under review, and (4) a transcript of the oral proceedings that resulted in the ruling under review. In exigent circumstances, the petition may be filed without the listed documents if counsel files a declaration that explains the urgency and the circumstances making the documents unavailable and fairly summarizes their substance. If no transcript is available, counsel must include a declaration explaining why the transcript is unavailable and fairly summarizing the proceedings, or a declaration that the transcript has been ordered, the date it was ordered, and the date it is expected to be filed [*Cal. Rules of Ct., Rule 8.486(b)(1)-(3)*; *see also Cal. Rules of Ct., Rule 8.486(c)* (format for documents and exhibits)].

[2] Use of Form

This form of petition for a writ of mandate is designed for filing in a court of appeal to review a superior court determination made under *Code Civ. Proc. § 877.6* of the good faith issue of a settlement [*Code Civ. Proc. § 877.6(e)*; *see Shane v. Superior Court (1984) 160 Cal. App. 3d 1237, 1246-1247, 207 Cal. Rptr. 210]* .

This form assumes that both tortfeasors were sued by plaintiff in the same action, but this is not required. For example, plaintiff may have sued only one of the tortfeasors and settled with the other. The form may be modified for use in such a case.

This form is designed for use by a nonsettling defendant, as petitioner, to challege a determination that the settlement was, if fact, in good faith. The settling defendant and the plaintiff are the real parties in interest. The form may be adapted for use by the settling parties to challenge a judicial determination that the settlement was not in good faith, in which case the nonsettling defendant is the real party in interest.

[3] Verification and Format Requirements

A petition for writ of mandate must be verified [*Code Civ. Proc. § 1086*; *Cal. Rules of Ct., Rule 8.486(a)(4)*]. A petition filed in a court of appeal must also have a red cover [*Cal. Rules of Ct., Rule 8.40(b)*]. The cover must contain the title of the case; the title, trial court number, and court of appeal number of the case; the names of the trial court and each participating trial judge; the name, address, telephone number, and California State Bar number of each attorney filing or joining in the writ; and the name of the party that each attorney on the writ represents [*Cal. Rules of Ct., Rule 8.204(b)(10)*]. For further discussion of the format requirements of a petition for writ of mandate filed in an appellate or a superior court, see Ch. 358, *Mandate and Prohibition* .

[4] Allegations

This petition for writ of mandate alleges the following: (1) the identity of the parties vis-a-vis the lower court action giving rise to the mandate proceeding (Paragraphs 1-3); (2) the filing in the lower court action of the plaintiff's complaint seeking damages against the defendants (Paragraph 4); (3) the filing of the cross complaint by one defendant against his or her codefendant for declaratory relief as to the right to comparative indemnity (Paragraph 5); (4) the out-of-court settlement of plaintiff's claim against the cross defendant (Paragraph 6); (5) the service and filing of a notice of hearing on the good faith issue of the settlement, the supporting paper, and the opposing papers (Paragraphs 7, 8); (6) the hearing and the trial court's ruling (Paragraphs 9, 10); (7) the ruling was an abuse of discretion and against the law (Paragraphs 11, 12); and (8) the lack of any remedy at law (Paragraph 13).

[5] Cross References

For a discussion of mandate proceedings, a procedural checklist, alternative forms of petitions for use when filing in the superior court or the Supreme Court, and related forms, see Ch. 358, *Mandate and Prohibition* .

[6] State Statutes

Mandate as remedy for seeking review of trial court's determination as to good faith of settlement. *Code Civ. Proc. § 877.6(e)*

Mandate proceedings. *Code Civ. Proc. §§ 1084-1097, 1107-1110b*

[7] Decisions

Factors to be considered by trial court in determining good faith issue. *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs. (1985) 38 Cal. 3d 488, 499-500, 213 Cal. Rptr. 256, 698 P.2d 159* ; *Barth-Wittmore Ins. v. H. R. Murphy Enters., Inc. (1985) 169 Cal. App. 3d 124, 131-132, 214 Cal. Rptr. 894*

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California Forms of Pleading and Practice--Annotated

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
Chapter 300 INDEMNITY AND CONTRIBUTION
PART IV. FORMS
B. Comparative Indemnity Among Tortfeasors

25-300 California Forms of Pleading and Practice--Annotated § 300.202

§ 300.202 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Original Proceeding in Court of Appeal [Cal. Rules of Ct., Rules 8.40, 8.486]--To Challenge Binding Effect of Trial Court's Determination of Good Faith Issue of Settlement [Code Civ. Proc. § 877.6(e)]--By Party Without Notice on Due Process Grounds [U.S. Const. amend. XIV; Cal. Const. art. I, § 17]

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Original Proceeding in Court of Appeal [Cal. Rules of Ct., Rules 8.40, 8.490]--To Challenge Binding Effect of Trial Court's Determination of Good Faith Issue of Settlement [Code Civ. Proc. § 877.6(e)]--By Party Without Notice on Due Process Grounds [U.S. Const. amend. XIV; Cal. Const. art. I, § 17]

[*Caption. See § 300.201.*]

TO THE HONORABLE COURT OF APPEAL OF THE STATE OF CALIFORNIA, _____ APPELLATE DISTRICT:

Petitioner alleges:

[1. *Status of petitioner in action. See § 300.201, Paragraph 1.*]

[2. *Status of respondent. See § 300.201, Paragraph 2.*]

[3. *Status of real parties in interest. See § 300.201, Paragraph 3.*]

[4. *Description of initial litigation. See § 300.201, Paragraph 4.*]

[5. *Description of settlement. See § 300.201, Paragraph 6.*]

6. Thereafter, on _____ [*date*], the Superior Court for the County of _____ held a hearing, the Honorable _____ [*name of judge*] presiding, at which it found the settlement to be in good faith. A copy of all moving papers and the court's determination are attached as Exhibits A through _____ and made a part hereof.

7. At no time before or during the good faith determination hearing was petitioner a part of the ensuing litigation, not having been brought into the litigation by complaint or cross complaint.

8. Petitioner received no notice of the good faith determination hearing, nor was given any opportunity to be heard at that hearing.

9. The potential liability of petitioner was known or reasonably should have been known to the settling parties at the time of the good faith determination hearing, because _____ [*specify*].

10. On or about _____ [*date*], after the good faith determination hearing had been concluded and the court's decision had been rendered, petitioner was first brought into the litigation when _____ [*describe, e.g.,* he/she/it was served as a cross defendant in a cross complaint filed by _____ (*name of cross complainants*). A copy of the cross complaint is attached hereto as Exhibit _____ and made a part hereof].

11. Thereafter, on or about _____ [*date*], petitioner filed a cross complaint for comparative indemnity against real party _____ [*name of settling defendant*].

12. On _____ [*date*], petitioner's cross complaint for comparative indemnity was dismissed on the grounds that the good faith determination of the settlement barred petitioner's claim. A copy of the court's order dismissing the cross complaint is attached as Exhibit _____ to this petition and made a part hereof.

13. The good faith determination does not bar petitioner's cross complaint for partial indemnity and contribution because notice and opportunity of the good faith determination hearing was not afforded petitioner, and therefore petitioner is not bound by the finding of good faith at that hearing and has a right to challenge that finding once petitioner has been brought into the litigation.

[14. On _____ [*date*], petitioner was denied a request for discovery of evidence relevant to the good faith determination available at the time of settlement. A copy of the denial is attached hereto as Exhibit _____ and made a part hereof.]

[15. *Allegation that no plain, speedy, adequate remedy exists. See § 300.201, Paragraph 13.*]

WHEREFORE, petitioner prays:

1. That the court issue an alternative writ of mandate commanding respondent court to vacate its order of _____ [*date*], finding the settlement between the settling parties in good faith and on that basis dismissing petitioner's cross complaint against _____ [*name(s)*] for comparative indemnity, [and commanding respondent court to allow petitioner (further) discovery of the evidence relevant to the determination of good faith as was available at the time of settlement, whether or not then actually presented, before holding any further hearing to determine the good faith of the settlement,] or to show cause before this court at a time specified by court order why it has not done so and why a peremptory writ should not issue;

2. That on the return of the alternative writ and the hearing of the petition, this court issue its peremptory writ of mandate to the same effect except for the order to show cause;

3. For costs of this proceeding; and

4. For such other and further relief as the court deems just and proper.

_____ [*date*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification. See § 300.201*.]

CAUTION:

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Proof of service on each respondent and real party in interest of a copy of a petition that seeks an alternative writ must accompany the petition when it is offered for filing unless, in its discretion and for good cause, the court has granted the application for the writ ex parte [*Code Civ. Proc. § 1107*; for a discussion of serving the petition,see Ch. 358, *Mandate and Prohibition*]. The proof of service must name each party represented by each attorney served, and the attorney's telephone number [*Cal. Rules of Ct., Rules 8.25(a)(2)*, 8.486(e)(3)]. A petition accompanied by a defective proof of service shall be filed, but if a proper proof of service is not filed within five days, the court may strike the petition or impose a lesser sanction [*Cal. Rules of Ct., Rule 8.486(e)(5)*]. A petition for writ of mandate filed in a court of appeal must be accompanied by a memorandum [*Cal. Rules of Ct., Rule 8.486(a)(5)*].

In addition, when a writ petition to an appellate court seeks review of a trial court ruling, it must be accompanied by a record adequate to permit the review, including (1) a copy of the order or judgment from which relief is sought; (2) copies of all documents and exhibits submitted to the trial court supporting and opposing the petitioner's position; (3) copies of all other documents submitted to the trial court that are necessary for a complete understanding of the case; and (4) a transcript of the proceedings below or a declaration that a transcript has been ordered and is expected to be filed on a certain date or, if no transcript is available, an explanation of its unavailability and a summary of the proceedings [*Cal. Rules of Ct., Rule 8.486(b)(1), (3)*; *see also Cal. Rules of Ct., Rule 8.486(c)* (format for documents and exhibits)]. In exigent circumstances, the petition may be filed without the listed documents if counsel files a declaration that explains the urgency and the circumstances making the documents unavailable and fairly summarizes their substance [*Cal. Rules of Ct., Rule 8.486(b)(2)*].

[2] Use of Form

This form of petition for a writ of mandate is designed for filing in a court of appeal to review a superior court order finding a settlement to be in good faith [*see Code Civ. Proc. § 877.6(e)*]. This form is for use by a defendant who was not a party to the litigation at the time when the good faith of the settlement was confirmed and who had no notice of and no opportunity to be heard on the issue [*see Singer Co. v. Superior Court (1986) 179 Cal. App. 3d 875, 881, 890-893, 225 Cal. Rptr. 159]* . Entitlement to the writ is based on constitutional due process requirements [*see U.S. Const. amend. XIV*; *Cal. Const. art. I, § 17*; *see also § 300.73[7][b]*]. An optional paragraph and corresponding prayer are included if petitioner sought but was denied discovery of evidence relevant to the good faith determination [*see Singer Co. v. Superior Court (1986) 179 Cal. App. 3d 875, 881, 895-897, 225 Cal. Rptr. 159]* .

[3] Appeal as Alternative

This form alleges that the petitioner's cross complaint for comparative indemnity against the settling defendant was dismissed because of the good faith determination (Paragraph 12) [*see Code Civ. Proc. §§ 877(b), 877.6(c)*]. As an alternative, or in addition to seeking mandate to review the good faith determination, the nonsettling defendant might consider an appeal directly from the judgment dismissing the cross complaint. One judge has forcefully argued, albeit in a dissenting opinion, that a party without notice should have no right to challenge a good faith determination as between the settling parties; rather, the appropriate remedy should simply be not to bar the party's indemnity rights against the settling defendant [*see Rankin v. Curtis (1986) 183 Cal. App. 3d 939, 950-951, 228 Cal. Rptr. 753* (Staniforth, Acting P.J., dissenting)].

[4] Allegations

This petition for writ of mandate alleges the following: (1) the identity of the parties (Paragraphs 1-3); (2) a description of the initial litigation (Paragraph 4); (3) a description of the settlement (Paragraph 5); (4) the determination of good faith in the settlement (Paragraph 6); (5) no notice or opportunity to be heard (Paragraphs 7, 8, and 13); (6) potential liability of petitioner was known or should have been known (Paragraph 9); (7) initiation of litigation against petitioner (Paragraph 10); (8) petitioner's filing of cross complaint for partial indemnity and contribution (Paragraph 11); (9) the dismissal of petitioner's cross complaint for partial indemnity and contribution (Paragraph 12); (10) petitioner's denial of discovery (optional Paragraph 14); and (11) petitioner's lack of remedy at law (Paragraph 15).

[5] Cross References

For a related form, see *§ 300.201*

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25-300 California Forms of Pleading and Practice--Annotated § 300.203

§ 300.203 Postjudgment Proceeding for Judgment of Contribution From Joint Tortfeasor [Code Civ. Proc. § 878]--Notice of Motion [Code Civ. Proc. § 1010]

[1] FORM Postjudgment Proceeding for Judgment of Contribution From Joint Tortfeasor [Code Civ. Proc. § 878]--Notice of Motion [Code Civ. Proc. § 1010]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION FOR CONTRIBUTION
_____ [*name*],	)	[*Code Civ. Proc. § 878*]
and DOES 1 through _____,	)	Date: _____
Defendants.	)	Time: _____
	)	Location: _____
	)	

_____

To defendant _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____[*date*], at _____ [*time*], or as soon thereafter as the matter may be heard in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], defendant _____ [*name*] will move for a judgment for contribution, based on principles of comparative fault, in his/her favor and against defendant _____ [*name*], in the amount of $_____. The motion will be made on the grounds that a joint and several judgment for money against the moving party and defendant _____ [*name*] has been entered in the above-entitled action and that the moving party has paid _____ [the judgment in full *or* more than his/her equitable comparative share of the judgment based on

comparative fault].

The motion will be based on this notice of motion on the declaration of _____ [*name*] and the memorandum of points and authorities served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.

_____ [*date*]

_____ [*signature*]
Attorney for Defendant _____[*name*]

[2] Use of Form

This notice of motion is for use by a joint tortfeasor against whom a joint and several judgment for economic damages [*see Civ. Code § 1431.2(b)(1)*] has been rendered and who has paid all or more than his or her comparative share of the judgment according to the allocation of comparative fault made by the trier of fact. For example, if there are two defendants and they are found to be comparatively at fault in a 70/30 percent ratio, the defendant who is 70 percent at fault may pay the entire joint judgment and then seek comparative "contribution" from the other defendant for 30 percent of the payment under *Code Civ. Proc. § 878*.

[3] Caution in Using Form

Code Civ. Proc. § 878 is part of California's 1957 contribution statutes, enacted prior to the advent of comparative indemnity in *American Motorcycle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 599, 146 Cal. Rptr. 182, 578 P.2d 899* . Prior to *American Motorcycle*, contribution among tortfeasors was on a pro rata (equal) basis, not under comparative fault principles, and statutes still so provide [*see Code Civ. Proc. §§ 875(c), 876(a)*]. Thus, if two defendants are jointly liable under a judgment, each would be required to "contribute" 50 percent of judgment, notwithstanding the fact that their comaparative fault might be other than 50/50.

After *American Motorcycle*, some courts have been willing to construe the word "contribution" in *Code Civ. Proc. § 878* to encompass the principle of comparative fault, thus converting the pro rata rule into one of "comparative contribution," a concept indistinguishable from comparative indemnity [*see Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 327-328, 334, 146 Cal. Rptr. 550, 579 P.2d 441* ; *Ambriz v. Kress (1983) 148 Cal. App. 3d 963, 969-970, 196 Cal. Rptr. 417]* . These cases provide authority for the proposition of this form, that a joint tort judgment may be allocated among the judgment debtors on a comparative fault basis by a postjudgment motion for contribution under *Code Civ. Proc. § 878*.

However, at least one court has rejected this authority and has enforced a pro rata rather than a comparative allocation of responsibility pursuant to a postjudgment motion for contribution. Under this court's view, the statutes that require contribution among tortfeasors to be pro rata rather than comparative are still on the books and should be followed until the legislature removes them [*see Lamberton v. Rhodes-Jamieson (1988) 199 Cal. App. 3d 748, 750-755, 245 Cal. Rptr. 162]* . For this reason, use of a postjudgment motion under *Code Civ. Proc. § 878* to effect an allocation of responsibility under comparative fault principles is not recommended. Counsel should note, however, that the factual and procedural situation presented in that case was an unusual one, and the court's holding may well be limited to similar facts. For further discussion, see *§ 300.74*.

[4] Procedure

A notice of motion regarding the enforcement of a judgment must beaccompanied by a memorandum of points and authorities [*see Cal. Rules of Ct., Rules 3.1103(a)(2), 3.1112(a)(3), 3.1113(a)*]. A motion for contribution by a judgment debtor who has paid more than his or her equitable comparative share of a judgment based on comparative negligence

or fault would appear to be such a motion.

The notice of motion must also be accompanied by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) setting forth any information that the moving party may have regarding the assets of defendants available for satisfaction of the judgment or claim for contribution [*Code Civ. Proc. § 878*]. A declaration setting forth the particulars of the payment of more than the moving party's equitable comparative share may also be necessary unless the fact of payment already appears in the record [*see Code Civ. Proc. §§ 875(c), 1010, 2009*]. If the fact of payment appears in the record, the notice of motion or the affidavit (declaration) setting forth the cojudgment debtor's assets may request that the court take judicial notice of the record containing that fact [*see Evid. Code §§ 452(d), 453*].

The notice of the motion is required to be given to all parties in the action, including the plaintiff or plaintiffs, at least 10 days before the hearing [*Code Civ. Proc. § 878*]. For the manner of serving the notice of motion and supporting papers and proof of service, see Ch. 518, *Service of Summons and Papers* .

[5] Recommended Alternative Procedures

A tortfeasor's right to comparative indemnity from cotortfeasors who are liable for plaintiff's damages would ordinarily be enforced by a cross complaint for declaratory relief regarding the right to indemnity, filed in the underlying tort action [*Valley Circle Estates v. VTN Consol., Inc. (1983) 33 Cal. 3d 604, 612, 189 Cal. Rptr. 871, 659 P.2d 1160* ; *American Motorcyle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 584, 607, 146 Cal. Rptr. 182, 578 P.2d 899* ; *see Code Civ. Proc. §§ 86(a)(7), 428.10(b), 428.70, 1060*; *see also § 300.190*]. Alternatively, an independent action for comparative indemnity, filed against the indemnitor, after conclusion of the original plaintiff's action and payment of the judgment, may be available [*see Shepard & Morgan v. Lee & Daniel, Inc. (1982) 31 Cal. 3d 256, 261, 182 Cal. Rptr. 351, 643 P.2d 968* ; *County of Riverside v. Loma Linda Univ. (1981) 118 Cal. App. 3d 300, 315-316, 173 Cal. Rptr. 371]* . For the reasons discussed in *§ 300.203[3]*, one of these procedures is preferable. For additional discussion, see *§ 300.66*.

[6] Cross References

See generally Ch. 372, *Motions and Orders*

[7] California Points and Authorities

For memoranda of points and authorities in support of and in opposition to a motion for contribution from a joint tortfeasor, see s California Points and Authorities, Ch. 115, *Indemnity and Contribution*

[8] State Statutes

Right of contribution among joint tortfeasors. *Code Civ. Proc. § 875*

Determination of pro rata share. *Code Civ. Proc. § 876*

Notice of motion for entry of judgment for contribution. *Code Civ. Proc. § 878*

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25-300 California Forms of Pleading and Practice--Annotated § 300.204

§ 300.204 Postjudgment Proceeding for Judgment of Contribution From Joint Tortfeasor [Code Civ. Proc. § 878]--Declaration Supporting Motion

[1] FORM Postjudgment Proceeding for Judgment of Contribution From Joint Tortfeasor [Code Civ. Proc. § 878]--Declaration Supporting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	DECLARATION OF _____ [*name*]
_____ [*name*],	)	IN SUPPORT OF MOTION FOR JUDGMENT OF
and DOES 1 through _____,	)	CONTRIBUTION
Defendants.	)	[*Code Civ. Proc. § 878*]
	)	Date: _____
	)	Time: _____
		Location: _____

_____

I, _____ [*name*], declare:

1. I am a defendant in this action.

2. On _____ [*date*], the _____ [jury *or* court] apportioned comparative fault in this action among the parties as follows: _____ [*designate names of parties and percentages of negligence apportioned to each*].

3. On _____ [*date*], I paid _____ [the entire *or* more than my proportionate share on

the] judgment in this action rendered jointly against myself and defendant _____ [*name*] in the sum of $_____ by _____ [*specify manner and amount of payment*] as evidenced by the _____ [satisfaction of judgment filed herein *or specify other*].

[4. I am informed and believe and thereon state that defendant _____ (*name*) in this action _____ (is insolvent *or* has declared bankruptcy), which has resulted in a shortfall of his/her proportionate share of the judgment, and that defendant(s) _____ (*name of other defendant(s)*) should contribute to the payment of this deficit in the proportion of their responsibility to plaintiff.]

5. I have the following information as to the assets of defendant _____ [*name*] and the availability of those assets for the satisfaction of the judgment or claim for contribution in this action: _____ [*specify*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of declaration is for use in support of a notice of motion seeking a judgment for contribution among joint judgment debtors in a tort action [*see Code Civ. Proc. § 878*]. This procedure should be used with great caution [*see § 300.203[3]*].

Payment by the moving party of more than his or her proportionate share (Paragraph 3) is required as a condition to bringing a motion for postjudgment contribution [*Code Civ. Proc. § 875(c)*]. The declaration sets forth information that the moving party has as to the assets of defendants available for the satisfaction of the judgment or claim for contribution as required by *Code Civ. Proc. § 878* (Paragraph 5).

Additionally, the declaration may set forth the fact that the proportionate share of one of the defendants was not paid because of that defendant's absence, such as by insolvency or due to a good faith settlement (Paragraph 4), in which case the moving party may request that that defendant's shortfall be paid by the other defendants and the moving party in proportion to their degree of fault [*see Ambriz v. Kress (1983) 148 Cal. App. 3d 963, 971, 196 Cal. Rptr. 417* ; *Paradise Valley Hosp. v. Schlossman (1983) 143 Cal. App. 3d 87, 93, 191 Cal. Rptr. 531* ; *see also § 300.72*].

[3] Cross References

For further discussion and forms concerning declarations in general, see Ch. 15, *Affidavits, Certificates, and Declarations*

For a related form, see *§ 300.203*

[4] State Statutes

Affidavit regarding assets as required to accompany notice of motion for entry of judgment for contribution. *Code Civ. Proc. § 878*

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25-300 California Forms of Pleading and Practice--Annotated § 300.205

§ 300.205 Postjudgment Proceeding for Judgment of Contribution From Joint Tortfeasor [Code Civ. Proc. § 878]--Judgment

[1] FORM Postjudgment Proceeding for Judgment of Contribution From Joint Tortfeasor [Code Civ. Proc. § 878]--Judgment

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	JUDGMENT FOR CONTRIBUTION
and DOES 1 through _____,	)	[*Code Civ. Proc. §§ 578, 878*]
Defendants.	)	
	)	
	)	

_____

The motion of defendant _____ [*name of moving party*] for judgment for contribution among joint tortfeasors under *Code of Civil Procedure Section 878* came on regularly for hearing of this court this date. Defendant [*name*] appeared by counsel _____ [*name*] and defendant _____ [*name*] appeared by counsel _____ [*name*].

The court finds that (1) defendant _____ [*name of moving party*] is jointly liable with _____ [*name of other defendant*] for the judgment in this action based on tort in the amount of $_____ [*amount of judgment for economic damages*]: (2) that the comparative fault of defendant _____ [*name of moving party*] as found by the trier of fact for the occurrence giving rise to the judgment is _____ percent; (3) that defendant _____'s [*name of moving party*]

comparative share of the joint judgment is therefore the sum of $_____; and (4) that defendant _____ [*name of moving party*] has, in fact, paid plaintiff the sum of $_____, an amount in excess of his/her comparative share.

THEREFORE, IT IS ORDERED that the defendant _____ [*name of moving party*] have and recover judgment against defendant _____ [*name*] for contribution, apportioned according to principles of comprative fault, in the sum of $_____, plus interest at the rate of _____ percent per annum from _____ [*date of payment of more than proportionate share*].
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of judgment is for use if one tortfeasor judgment debtor is granted postjudgment contribution [*see § 300.203*] against another tortfeasor judgment debtor. This procedure should be used with great caution [*see § 300.203[3]*].

This form of judgment sets forth findings as to the moving party defendant's share of comparative fault, proportionate share of the joint judgment for economic damages [*see Civ. Code § 1431.2*], amount of payment, and amount of contribution. These findings are not required, but are helpful in clarifying that the amount of the judgment should be computed according to principles of comparative fault and not pro rata contribution (*see* Comments to *§ 300.203*).

[3] Cross References

See generally Ch. 318, *Judgments*

For a related form, see *§ 300.203*

[4] State Statutes

Interest. *Civ. Code § 3287*

Judgment defined. *Code Civ. Proc. § 577*

Judgment for or against several plaintiffs or defendants. *Code Civ. Proc. § 578*

Judgment as ineffectual until entered. *Code Civ. Proc. § 664*

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25-300 California Forms of Pleading and Practice--Annotated §§ 300.206-300.219

[Reserved]

§§ 300.206[Reserved]

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25-300 California Forms of Pleading and Practice--Annotated § 300.220

§ 300.220 Complaint for Contribution From Co-Obligor [Civ. Code § 1432]

[1] FORM Complaint for Contribution From Co-Obligor [Civ. Code § 1432]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR CONTRIBUTION
_____ [*name*],	)	[LIMITED CIVIL CASE]
[and DOES 1 through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	
	)	

_____

Plaintiff alleges:

1. Defendant, an individual person, is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and domicile*].

[*Repeat allegation of capacity and domicile for each named defendant*]

[2. Defendants DOE 1 through DOE _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged,

and that plaintiff's damages as herein alleged were proximately caused by those defendants.)]

3. _____ [*Set forth the nature of the obligation and how plaintiff and defendants became jointly or jointly and severally liable on it, e.g.,* On _____ (*date*), plaintiff and defendants executed and delivered to _____ (*name of creditor*) their joint and several promissory note in writing in the sum of $_____ payable as follows: _____ (*specify terms*).]

4. _____ [*Set forth manner in which plaintiff has paid more than his/her share, e.g.,* At the maturity of the note on _____ (*date*), _____ (*name of creditor*) demanded payment from plaintiff and defendants. Defendants failed and refused to pay the same. As a result, on _____ (*date*), plaintiff was compelled to and did pay the full amount of the principal of the note and $_____ as accrued interest thereon.]

5. Defendants have failed and refused, and continue to fail and refuse, to contribute to plaintiff their share of the obligation in the sum of $_____ each [*amount of each defendant's pro rata share*] or any part thereof, despite plaintiff's demand for the same. [*Add if one or more of multiple defendants is insolvent:* Plaintiff is informed and believes and thereon alleges that defendant _____ (*name*) is insolvent and unable to contribute to plaintiff his/her/its share of the obligation.]

WHEREFORE, plaintiff prays judgment against defendants as follows:

[1. For a determination by the court that defendants _____ (*names*) are solvent and that defendant _____ (*name*) is insolvent and unable to pay the contribution requested, and that the amount of contribution paid by each solvent defendant should be determined according to the number of solvent defendants;]

2. For total contribution in the amount of $_____, to be divided equally among the solvent defendants;

3. For interest in the foregoing sum at _____ percent from _____ [*date obligation was paid*];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of complaint is for use in an action for contribution by a party to a joint or joint and several nontort obligation who satisfies more than his or her share of the claim against all [*see Civ. Code § 1432*]. To recover contribution from a codefendant following a judgment against several nontort obligors, a judgment debtor should not file a complaint, but should use the procedure established in *Code Civ. Proc. § 883* [*see* §§ 300.221-300.223].

This form of complaint may also be used, with minor changes involving the caption and allegations of assignment, as a complaint against joint or joint and several obligors following payment of the obligation by one joint obligor and assignment of the obligation to that obligor by the creditor [*see § 300.92[3]*].

[3] Allegations

This complaint alleges: (1) the nature of the obligation between the obligee and the plaintiff and defendant (Paragraph 3); (2) facts establishing how plaintiff and defendant became jointly or jointly and severally liable on the obligation (Paragraph 3); (3) the manner in which plaintiff has paid more than his or her share of the obligation (Paragraph 4); (4) the refusal of defendants to pay their share of the obligation (Paragraph 5); (5) the amount of each defendant's pro rata share of the obligation, assuming that all are solvent (Paragraph 5); and (6) an optional allegation on information and belief that one defendant is insolvent, thereby increasing the pro rata share of the solvent defendants (Paragraph 5) [*see Tucker v. Nicholson (1938) 12 Cal. 2d 427, 433-434, 84 P.2d 1045]* .

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)(1)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Venue

Although defendants in a contribution action may generally be sued in their place of residence or principal place of business, venue also lies in the county where the defendants' debt was due to the plaintiff and where, accordingly, the liability of defendants to contribute their share of the debt arose [*see Pacific Freight Lines v. Pioneer Express Co. (1940) 39 Cal. App. 2d 609, 615, 103 P.2d 1056* (venue of contribution action against corporation)].

[6] Cross References

For alternative forms or allegations as to capacity and residence of parties, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

See generally Ch. 123, *Complaints and Cross Complaints*

For an alternative form of complaint for contribution against a cotenant, see Ch. 316, *Joint Tenancy and Tenancy in Common*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification*

For an alternative form of complaint for contribution against a cosurety, see Ch. 538, *Suretyship, Bonds, and Undertakings*

[7] State Statutes

Joint and joint and several obligations defined. *Civ. Code §§ 1430, 1431*

Contribution among joint obligors. *Civ. Code § 1432*

Promise presumed joint and several, *Civ. Code §§ 1659, 1660*

Contribution among cosureties. *Civ. Code § 2848*

Interest. *Civ. Code § 3287(a)*

Contents of complaint. *Code Civ. Proc. § 425.10*

Verification. *Code Civ. Proc. §§ 431.30(d), 446*

Promissory note creates joint and several liability. *Com. Code § 3116(a)*

[8] Decisions

Right of contribution on satisfying more than proportionate share of debt. *Hosking v. Spartan Props., Inc. (1969) 275 Cal. App. 2d 152, 157, 79 Cal. Rptr. 893*

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Chapter 300 INDEMNITY AND CONTRIBUTION
PART IV. FORMS
C. Contribution Among Nontort Obligors and Judgment Debtors

25-300 California Forms of Pleading and Practice--Annotated § 300.221

§ 300.221 Postjudgment Proceeding for Order Determining Liability of Joint Nontort Judgment Debtor for Contribution [Code Civ. Proc. §§ 882, 883]--Notice of Motion

[1] FORM Postjudgment Proceeding for Order Determining Liability of Joint Nontort Judgment Debtor for Contribution [Code Civ. Proc. §§ 882, 883]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MOTION AND NOTICE OF MOTION FOR OR-
Plaintiff,	)	DER DETERMINING LIABILITY FOR CONTRI-
vs.	)	BUTION
_____ [*name*],	)	[Telephone Appearance]
Defendants.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant _____ (*name*)] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], defendant

_____ [*name*] will, and hereby does, move for an order determining liability for contribution in favor of defendant _____ [*name of moving party*] and against defendant _____ [*name*] on the joint judgment rendered herein in the sum of $_____. The motion will be made on the grounds that each defendant's due proportion of the judgment is the sum of $_____ [and that defendant _____ (*name of moving party*) has paid the sum of $_____ to plaintiff in (partial) satisfaction of the judgment, an amount that exceeds defendant's pro rata share].

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name* (s)] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

This form of notice of motion is for postjudgment use to seek an order determining rights to contribution among multiple nontort obligors who have been found liable to the plaintiff [*see Code Civ. Proc. §§ 882, 883*]. The motion may be brought at any time before the judgment is satisfied in full or within 30 days thereafter [*Code Civ. Proc. § 883(a)*]. Therefore, payment by the moving party of all or more than its proportionate share of the judgment is not a condition precedent to bringing the motion. For further discussion, see *§ 300.92*.

[3] Accompanying Papers

A memorandum of points and authorities must be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For general discussion and forms, see Ch. 417, *Points and Authorities* .

[4] Cross References

See generally Ch. 371, *Motions and Orders*

For a related form, see *§ 300.220*

[5] California Points and Authorities

For memoranda of points and authorities in support of and in opposition to a motion for contribution from a joint judgment debtor, see California Points and Authorities, Ch. 115, *Indemnity and Contribution*

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25-300 California Forms of Pleading and Practice--Annotated § 300.222

§ 300.222 Postjudgment Proceeding for Order Determining Liability of Joint Nontort Judgment Debtor for Contribution [Code Civ. Proc. §§ 882, 883]--Declaration Supporting Motion

[1] FORM Postjudgment Proceeding for Order Determining Liability of Joint Nontort Judgment Debtor for Contribution [Code Civ. Proc. §§ 882, 883]--Declaration Supporting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF MOTION FOR ORDER DE-
_____ [*name*],	)	TERMINING LIABILITY FOR CONTRIBUTION
and DOES 1 through _____,	)	Date: _____
Defendants.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

I am a defendant in this action.

1. On _____ [*date*], a joint judgment in the sum of $_____ was rendered against defendants _____ [*names*] in this action on the plaintiff's _____ [*specify obligation*].

[*EITHER*]

2. The amount due from each defendant on the judgment is the sum of $_____ computed according to a pro rata or equal division of the judgment among all judgment debtors.

[*OR*]

2. The amount due from each defendant is $_____ from defendant _____ [*name*]; $_____ from defendant _____ [*name*]; and $_____ from defendant _____ [*name*]; computed according to _____ [*specify method of division required by terms of underlying agreement, e.g.,* the respective interests of the parties in the partnership that incurred the obligation on which judgment was entered]. A true copy of this _____ [*specify document creating other than pro rata obligation, e.g.,* partnership agreement] is attached as Exhibit A to this declaration and made a part hereof.

[*CONTINUE*]

[3. On _____ (*date*), I paid the sum of $_____ to plaintiff in (partial) satisfaction of the judgment, an amount that exceeds my proportionate share of the judgment as set forth in Paragraph 2, above, by the sum of $_____.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of declaration is for use with a notice of motion for an order determining liability for contribution among nontort judgment debtors [*see § 300.221*].

The declaration should set forth the manner in which the judgment is to be divided among the judgment debtors (alternate Paragraphs 2). In the absence of an underlying agreement compelling a different method, the judgment is to be divided equally among all judgment debtors (first alternative Paragraph 2) [*see Young v. Rosenthal (1989) 212 Cal. App. 3d 96, 130, 260 Cal. Rptr. 369]* . An unequal division might be required if, for example, the instrument that creates the obligation specifies otherwise, or the parties have agreed among themselves that each is to have a particular interest in the property for which the obligation was incurred (second alternative Paragraph 2) [*see, e.g., Tucker v. Nicholson (1938) 12 Cal. 2d 427, 432-434, 84 P.2d 1045* ; *Woolley v. Seijo (1964) 224 Cal. App. 2d 615, 621-623, 36 Cal. Rptr. 762]* .

[3] Cross References

See generally Ch. 15, *Affidavits, Certificates, and Declarations*

For a related form, see *§ 300.221*

[4] State Statutes

Use of affidavits on motion. *Code Civ. Proc. § 2009*

Declaration under penalty of perjury in lieu of affidavit. *Code Civ. Proc. § 2015.5*

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25-300 California Forms of Pleading and Practice--Annotated § 300.223

§ 300.223 Postjudgment Proceeding for Order Determining Liability of Joint Nontort Judgment Debtor for Contribution [Code Civ. Proc. §§ 882, 883]--Order

[1] FORM Postjudgment Proceeding for Order Determining Liability of Joint Nontort Judgment Debtor for Contribution [Code Civ. Proc. §§ 882, 883]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER DETERMINING LIABILITY FOR CON-
and DOES 1 through _____,	)	TRIBUTION
Defendants.	)	
	)	
	)	

The motion of defendant _____ [*name of moving party*] for an order determining liability for contribution came on regularly for hearing before this court on _____ [*date*]. Defendant _____ [*name*] appeared by counsel _____ [*name*], and defendant _____[*name*] appeared by counsel _____[*name*].

On proof made to the satisfaction of the court,

IT IS ORDERED that, as among themselves, the defendant judgment debtors are liable for the judgment in this action, under principles of contribution, in the following amounts:

Defendant _____ [*name*]: $_____.

Defendant _____ [*name*]: $_____.

[Defendant _____ (*name*) has paid the amount of $_____ to the plaintiff in (partial) satisfaction of the judgment, an amount in excess of his/her proportional share; defendant _____ (*name*) is therefore entitled to contribution from defendant _____ (*name*) in the amount of $_____, plus $_____ of interest on the payment.]

_____ [*date*]

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form is for use as a court order determining the liability of joint nontort judgment debtors for contribution [*see Code Civ. Proc. § 882, 883*]. The order sets forth the proportionate share of the judgment that each defendant is required to pay [*see § 300.222*]. If one defendant has paid all or more than his or her proportionate share of the judgment, this order includes a paragraph to set forth the amount of contribution that the paying defendant is entitled to receive from the other defendants.

[3] Cross References

For related forms, see *§§ 300.221, 300.222*

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
Chapter 302 INITIATIVE, REFERENDUM, AND RECALL

25-302 California Forms of Pleading and Practice--Annotated 302.syn

§ 302.syn Synopsis to Chapter 302: INITIATIVE, REFERENDUM, AND RECALL

§ 302.01 Scope of Chapter

§ 302.02 Cross References

§ 302.03 Definitions

[1] Initiative

[2] Referendum

[3] Recall

[4] Signature

§§ 302.04-302.09 [Reserved]

§ 302.10 Scope

§ 302.11 Governing Law

[1] Constitutional Provisions

[2] Statutes

[3] City, County, or City and County Charters

§ 302.12 Limitations on Use of Initiative or Referendum

[1] In General

[a] Restricted to Enactment of Laws

[b] Restriction of Local Power of Referendum Over Matters of Statewide Concern

[2] Single-Subject Rule

[a] "Reasonably Germane" Test

[b] Liberal Construction

[c] Unduly Diverse Provisions

[d] Severance Prohibited to Cure Violation

[e] Preelection Review

[f] Separate-Vote Provision

[3] Constitutional Amendment or Statute Naming Individual to Office or Naming Corporation to Perform Function

[a] Prohibited

[b] Severance Possible

[4] Urgency Legislation, Tax Levies and Appropriations, and Statutes Calling Elections

[5] Approval or Rejection of Administrative Acts

[6] State's Lawmaking Power

[7] Constitutional Revision

§ 302.13 Conflicting Provisions of Two or More Measures

[1] General Rule

[2] Competing Regulatory Schemes

[3] Complementary or Supplementary Measures

§ 302.14 Initiative and Referendum Distinguished

§ 302.15 Initiative and Referendum Procedure Summarized

§ 302.16 Privacy Requirements

[1] Legislative Findings and Declarations

[2] Printed Initiative Petition Requirements and Notices on Voter Registration Cards

[3] Proponent Requirements and Declarations Before Circulating Initiative Petitions

[4] Statement Regarding Permissible Uses of Voter Registration Information

§§ 302.17-302.19 [Reserved]

§ 302.20 Construction of Initiatives

§ 302.21 State Measure

[1] Commencement of Initiative Petition Process

[2] Circulating Title and Summary

[a] Request for Circulating Title and Summary for State Initiative Measure

[b] Preparation of Circulating Title and Summary for State Initiative Measure

[c] Compelling Preparation of Circulating Title and Summary

[d] Fiscal Estimate or Opinion by Department of Finance and Joint Legislative Budget Committee

[e] Copy of Title and Summary to Secretary of State; Amendment of Proposal

[f] State Initiative Measure Proposed by Attorney General

[3] Legislative Hearings on Proposed State Initiative Measure

[4] State Initiative Petition

[a] Format of Petition for State Initiative Measure

[b] Circulation of State Initiative Petition

[c] Filing of State Initiative Petition

[5] State Ballot Pamphlet

[a] Preparation

[b] Objection to Ballot Pamphlet

[6] Submission of State Initiative Measure to Voters

§ 302.22 County Ordinance Measure

[1] Commencement of Initiative Petition Process

[2] Filing of Notice of Intention to Circulate County Initiative Petition

[3] County Initiative Ballot Title and Summary

[a] Preparation and Content Requirements

[b] Compelling Amendment of County Initiative Ballot Title or Summary

[4] Publication of County Initiative Notice of Intention and Ballot Title and Summary

[5] County Initiative Petition

[a] Contents

[b] Circulation of County Initiative Petition

[c] Filing of County Initiative Petition

[6] Submission of County Initiative Measure to Voters

§ 302.23 County Charter Measure

§ 302.24 City Ordinance Measure

[1] Application of Statutory Initiative Process

[a] To Charter City

[b] To Specified Ordinances in Charter or General Law City

[2] Commencement of City Initiative Petition Process

[3] Filing of Notice of Intention to Circulate City Initiative Petition

[4] City Initiative Ballot Title and Summary

[a] Request, Preparation, and Content Requirements

[b] Compelling Amendment of City Initiative Ballot Title or Summary

[5] Publication and Posting of City Initiative Notice of Intention, Ballot Title, and Summary

[6] City Initiative Petition

[a] Contents

[b] Circulation of City Initiative Petition

[c] Filing of City Initiative Petition

[7] Submission of City Initiative Measure to Voters

[8] Use of Public Funds in Campaign

§ 302.25 City Charter Measure

[1] Initiative for Election to Form Charter Commission

[a] General Steps

[b] Petition and Election

[2] Initiative for Election to Adopt Proposed Charter Amendments

[a] Availability and Commencement of Process

[b] Notice of Intention to Circulate Petition, Ballot Title, and Summary

[c] Contents of Charter Amendment Initiative Petition

[d] Circulation of Charter Amendment Initiative Petition

[e] Filing of Charter Amendment Initiative Petition

[f] Submission of Charter Amendment Initiative Measure to Voters

[3] Effect of Voter Approval of Conflicting Measures

[4] Submission to Secretary of State After Election and Publication

§ 302.26 District Ordinance Measure

[1] Application of Initiative Process

[2] Commencement of District Initiative Petition Process

[3] Publication and Posting of Notice of Intention to Circulate District Initiative Petition and Statement of Reasons

[4] Filing of Notice and Statement and Proof of Publication and Posting

[5] District Initiative Petition

[a] Contents

[b] Initiative Petition

[c] Filing of District Initiative Petition

[6] Submission of District Initiative Measure to Voters

§ 302.27 Effective Date of Initiative Ordinance

§ 302.28 Effect of Adoption of Conflicting Initiative Ordinances

§ 302.29 Amendment or Repeal

[1] Of Initiative Statute

[2] Of Initiative Ordinance

§§ 302.30-302.39 [Reserved]

§ 302.40 Nature of Referendum

§ 302.41 Construction of Referenda

§ 302.42 State Referendum Measure

[1] Commencement of Petition Process

[2] Circulating Title and Summary

[a] Request for Circulating Title and Summary for State Referendum

[b] Preparation of Circulating Title and Summary for State Referendum

[c] Compelling Preparation of Circulating Title and Summary

[3] Legislative Hearings on Proposed State Referendum Measure

[4] State Referendum Petition

[a] Format of Petition for State Referendum

[b] Circulation of State Referendum Petition

[c] Filing of State Referendum Petition

[5] Submission of State Referendum Measure to Voters

[6] Effect of Referendum Petition on Statute

[7] Amendment or Repeal of Referendum Statute

[8] Effective Date of Referendum Statute

§ 302.43 County Measure

[1] Commencement of Referendum Petition Process

[2] Effective Date of County Ordinance

[3] Conduct of County Referendum Petition Process

[4] Required Number of Signatures on County Referendum Petition

[5] Filing of County Referendum Petition

[6] Effect of Referendum Petition on County Ordinance

[7] Submission of County Referendum Measure to Voters

[8] Effective Date of County Referendum Ordinance

§ 302.44 County Legislative Act Undertaken by Resolution

§ 302.45 City Measure

[1] Application of Referendum Statutes

[a] To Charter City

[b] To Specified Ordinances in Charter or General Law

[2] Commencement of City Referendum Petition Process

[3] Effective Date of General Law City Ordinance

[4] City Referendum Petition

[a] Contents

[b] Circulation of City Referendum Petition

[c] Required Number of Signatures on City Referendum Petition

[5] Filing of City Referendum Petition

[6] Effect of Referendum on City Ordinance

[7] Submission of Referendum Measure to Voters

[8] Effective Date of City Referendum Ordinance

§ 302.46 District Referendum Petition

§ 302.47 Required Number of Signatures on Referendum Petition Against Ordinance Pursuant to Joint Powers Agreement

§§ 302.48-302.59 [Reserved]

§ 302.60 Scope

§ 302.61 Governing Law

§ 302.62 Construction of Recalls

§ 302.63 Definitions

[1] Elections Official

[2] Electoral Jurisdiction

[3] Governing Board

[4] Judge

[5] Local Officer

§ 302.64 Officers to Whom Recall Applies

§ 302.65 Recall Procedure Summarized

§ 302.66 Qualifications of Recall Proponents

§ 302.67 Commencement of Recall Petition Process

[1] Recall of State Officer

[2] Recall of Local Officer

[3] Measuring Time Periods

§ 302.68 Notice of Intention to Circulate Recall Petition

[1] Contents

[2] Service and Filing

[3] Publication, Posting, and Proof

§ 302.69 Answer of Officer Sought to Be Recalled

§ 302.70 Delivery to Voters of Reasons for Recall and Answer

§ 302.71 Recall Petition

[1] Form and Contents

[2] Declaration of Circulator

[3] Circulation

[a] Prerequisite Approval by Elections Official

[b] Manner and Place

[c] Time Available

[4] Required Number of Signatures

[a] Recall of State Officer or Judge

[b] Recall of Local Officer

[5] Filing With Elections Official

[a] Petition Found Sufficient

[b] Petition Found Insufficient

[c] Procedures for Recall of State Officer

§ 302.72 Submission of Recall to Voters

§ 302.73 Recall Election

[1] Provisions Applicable to Recall of All Officers

[2] Recall of City Officer

[3] Recall of Other Officer

§ 302.74 Unsuccessful Recall of State Officer

[1] Reimbursement for Expenses

[2] Availability of Another Recall

§§ 302.75-302.79 [Reserved]

§ 302.80 State Constitution

§ 302.81 State Statutes

[1] In General

[2] Initiative and Referendum

[a] General Provisions and Requirements

[b] City Measures

[c] County Measures

[d] District Measures

[e] Growth Control Ordinances

[f] State Measures

[3] Writ of Mandate

[4] Recall

§ 302.82 Decisions

[1] Availability

[a] Of Initiative

[b] Of Referendum

[2] Filing of Initiative or Referendum

[3] Constitutional Amendments

[4] Procedure in General

[5] Single-Subject Rule

[5.1] Separate-Vote Provision

[6] Initiative

[a] Election

[b] Redistricting Ordinance

[c] Construction of Initiative

[d] Petition Contents

[7] Referendum

[a] In General

[b] Election

[c] Construction of Referenda

[d] Petition Contents

[8] Ballot Arguments

[9] Ballot Title and Summary

[10] Charter Revisions

[11] Growth-Control Ordinances

[12] Tax Levies

[13] Recall

[14] Injunctive Relief

[15] Local Elections

[16] Validity of Petition

[17] Review

§ 302.83 Attorney General Opinions

§ 302.84 Law Reviews

§§ 302.85-302.89 [Reserved]

§ 302.90 Complaint by Taxpayer Against Elections Official for Injunctive Relief to Halt Official Action on Unlawful Initiative or Referendum Proceeding [Civ. Code § 3422; Code Civ. Proc. §§ 526a, 527]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification Requirement

[5] Certification re Notice on Ex Parte Application

[6] Jurisdiction

[7] Cross References

§ 302.91 Petition for Writ of Mandate by Proponent of Initiative or Referendum Against Elections Official for Failure to Accept or Process Petition [Code Civ. Proc. §§ 1085, 1086]

[1] FORM

[2] Use of Form

[3] Verification Requirement

[4] Memorandum

§ 302.92 Petition for Writ of Mandate by Proponent of Initiative Against County Counsel or City Attorney Because Ballot Title for and/or Summary of Proposed Measure Is False, Misleading, or Not Impartial [Code Civ. Proc. §§ 1085, 1086; Elec. Code §§ 9105, 9106, 9203, 9204]

[1] FORM

[2] Use of Form

[3] Allegations

§§ 302.93-302.99 [Reserved]

§ 302.100 Complaint for Injunctive Relief by Public Officer Against Proponents of Recall for Untimely Commencement of Recall Proceedings [Cal. Const., art. II, § 18; Civ. Code § 3422; Code Civ. Proc. §§ 526, 527; Elec. Code § 11007]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification Requirement

§ 302.101 Complaint for Injunctive Relief by Public Officer Against Proponents of Recall for Premature Circulation of Petition [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527; Elec. Code § 11042]

[1] FORM

[2] Use of Form

[3] Verification Requirement

§ 302.102 Complaint for Injunctive Relief by Public Officer Against Proponents of Recall for Circulation of Unlawful Petition [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527; Elec. Code §§ 11040-11047]

[1] FORM

[2] Use of Form

[3] Verification Requirement

§ 302.103 Complaint for Injunctive Relief by Public Officer Against Elections Official for Processing Unlawful Petition [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527; Elec. Code § 11040 et seq.]

[1] FORM

[2] Use of Form

[3] Duty of Elections Official

[4] Verification Requirement

§ 302.104 Petition for Writ of Mandate by Proponent of Recall Against Elections Official for Failure to Accept or Process Recall Petition [Code Civ. Proc. §§ 1085, 1086]

[1] FORM

[2] Use of Form

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PART I. SCOPE

25-302 California Forms of Pleading and Practice--Annotated § 302.01

§ 302.01 Scope of Chapter

This chapter discusses the initiative, referendum, and recall petition process, and provides forms for conducting legal proceedings related to that process, including:

- The statutory requirements for commencing and conducting of initiative and referendum petitioning [*see § 302.10 et seq.*] and related forms [*see § 302.90 et seq.*].

- The statutory requirements for commencing and conducting of recall petitions [*see § 302.60 et seq.*] and related forms [*see § 302.100 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationInitiative & ReferendumGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsEmployees & Officials

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25-302 California Forms of Pleading and Practice--Annotated § 302.02

§ 302.02 Cross References

For discussion and forms relating to the registration of electors, the canvassing of election returns, and candidate election contests, Ch. 243, *Elections*.

For discussion and forms relating to the correction of errors or omissions in candidate election material, violations of the Political Reform Act of 1974 (*Gov. Code § 81000 et seq.*) and the Truth in Endorsements Law (*Elec. Code § 20000 et seq.*), *see* Ch. 242, *Election Campaigns* .

For discussion and forms relating to conflicts of interest on the part of elected officials as regulated by pertinent provisions of the Political Reform Act of 1974 and various conflict-of-interest codes, *see* Ch. 469, *Public Entities and Officers* .

For discussion and forms of matters relating to freedom of speech and the right of access for political activities, *see* Ch. 59, *Assemblies and Meetings* .

For discussion of and forms for use in actions and proceedings that may be of interest to litigants in connection with initiative, referendum, or recall, see the following chapters:

- Ch. 112, *Civil Rights: Government-Funded Programs and Activities*.
- Ch. 120, *Class Actions*.
- Ch. 182, *Declaratory Relief*.
- Ch. 303, *Injunctions*.
- Ch. 358, *Mandate and Prohibition*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechPolitical SpeechGovernmentsLegislationInitiative & ReferendumGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElectionsGovernmentsState & Territorial GovernmentsEmployees & Officials

California Forms of Pleading and Practice--Annotated

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
Chapter 302 INITIATIVE, REFERENDUM, AND RECALL
PART I. SCOPE

25-302 California Forms of Pleading and Practice--Annotated § 302.03

§ 302.03 Definitions

[1] Initiative

At the state level, the initiative is the power of the electors to propose statutes and amendments to the state Constitution and to adopt or reject them [*Cal. Const., art. II, § 8(a)*; *see National Paint & Coatings Assn. v. State of California (1997) 58 Cal. App. 4th 753, 760, 68 Cal. Rptr. 2d 360* ; *Referendum Committee v. City of Hermosa Beach (1986) 184 Cal. App. 3d 152, 157 n.4, 229 Cal. Rptr. 51* ; *see also Elec. Code § 321* ("elector" defined)].

At local levels, it is the analogous power of county, city, or district voters to adopt ordinances [*see Elec. Code §§ 9100, 9200, 9300*] and of city voters to adopt, revise, amend, or repeal a city charter [*see Gov. Code §§ 34450, 34459*].

[2] Referendum

At the state level, the referendum is the power of the electors to approve or reject statutes or parts of statutes [*see Cal. Const., art. II, § 9(a)*; *see also Elec. Code § 321* ("elector" defined)].

At local levels, it is the analogous power of county, city, or district voters to approve or reject ordinances [*see Elec. Code §§ 9140, 9237, 9340*; *Hopping v. Council of City of Richmond (1915) 170 Cal. 605, 609-610, 150 P. 977]* . City voters may have a referendum power respecting any act of the city government, if they so provide in a charter [*see Hopping v. Council of City of Richmond (1915) 170 Cal. 605, 611, 150 P. 977* ; *Billig v. Voges (1990) 223 Cal. App. 3d 962, 965, 273 Cal. Rptr. 91]* .

For further distinctions between initiatives and referenda, see *§ 302.15*.

[3] Recall

Recall is the power of the electors to remove an elective officer from office through use of the franchise [*Cal. Const., art. II, § 13*; *see Elec. Code § 321* ("elector" defined)].

The constitution mandates the Legislature to provide for the recall of local officers [*see Cal. Const., art. II, § 19*]. *Cal.*

Const., art. II, § 19, does not affect counties and cities whose charters provide for recall, unless those charters provide for recall to be governed by state statutes.

[4] Signature

The term "signature" includes a person's mark if the name of the person affixing the mark is written near the mark by a witness over the age of 18 years designated by the person and the designee subscribes his or her own name as a witness thereto [*Elec. Code § 354.5(a)(1)*]. A mark attested as provided in *Elec. Code § 354.5(a)(1)* may serve as a signature for any purpose specified in the Elections Code, including a sworn statement [*Elec. Code § 354.5(b)*].

Beginning January 1, 2008, a person with a disability, who is unable to write because of the disability, can qualify to use a signature stamp, in lieu of signing or making a mark, for any purpose specified in the Elections Code [*see Elec. Code § 354.5(a)(2), (b)-(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationInitiative & ReferendumGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsEmployees & Officials

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[Reserved]

§§ 302.04[Reserved]

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25-302 California Forms of Pleading and Practice--Annotated § 302.10

§ 302.10 Scope

This subpart discusses the procedures to be followed throughout the initiative or referendum petition process. Related forms include the following:

- Complaint for injunctive relief against government officials threatening to undertake, or undertaking, to process a petition in an unlawful initiative or referendum proceeding [*§ 302.90*].

- Petition for writ of mandate to compel an elections official to accept and process an initiative or referendum petition presented for filing [*§ 302.91*].

- Petition for a writ of mandate to compel a city attorney or county counsel to amend the title or summary of a ballot measure or both because the title or summary is false, misleading, or not impartial [*§ 302.92*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLegislationInitiative & ReferendumGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsEmployees & Officials

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25-302 California Forms of Pleading and Practice--Annotated § 302.11

§ 302.11 Governing Law

[1] Constitutional Provisions

The powers of initiative and referendum are reserved to the people in *Cal. Const., art. IV, § 1*. State constitutional provisions governing initiatives are set forth in *Cal. Const., art. II, §§ 8* and *10-12*. State constitutional provisions governing referendum are set forth in *Cal. Const., art. II, §§ 9-11*.

The Constitution also provides for the exercise of initiative and referendum powers by the electors of each city or county under procedures that the Legislature is mandated to provide [*see Cal. Const., art. II, §§ 11* (initiative and referendum); *see also Elec. Code § 321* ("elector" defined)].

[2] Statutes

Statutes governing the petitioning process of the initiative and referendum are set forth in *Elec. Code § 9000 et seq.* Use of the initiative power to adopt, revise, amend, or repeal a city charter is also governed by *Gov. Code § 34450 et seq.*

The Political Reform Act of 1974 (*Gov. Code § 81000 et seq.*) contains provisions respecting ballot pamphlets [*Gov. Code § 88001 et seq.*] that are reproduced in *Elec. Code § 9084 et seq.* [*see Elec. Code § 9080*] for the sole purpose of having all statutes respecting elections collected at one place. The Political Reform Act of 1974 was not amended to delete *Gov. Code § 88001 et seq.* because, being an initiative statute, the Act is difficult for the Legislature to amend [*see Cal. Const., art. II, § 10(c)*; *Gov. Code § 81012*].

Penal statutes respecting initiative and referendum are set forth in *Elec. Code § 18600 et seq.*

[3] City, County, or City and County Charters

Cal. Const., art. II, § 11, governing initiative and referendum at the local level, does not affect a city with a charter that provides for initiative and referendum. Thus, city charter provisions governing initiative and referendum supersede

statutory provisions [*see Elec. Code § 9247*]. The same is not true in the case of a county charter. However, a charter city can adopt the state provisions, and thereby make them applicable, by incorporating them into its charter [*see Billig v. Voges (1990) 223 Cal. App. 3d 962, 965, 273 Cal. Rptr. 91]* .

Amendment, repeal, or revision of a city or county charter, can be proposed by initiative [*Cal. Const., art. XI, § 3(b)* (amendment, repeal, or revision of a charter can also be proposed by the governing body of the city or county)]. An election to determine whether to draft or revise a charter and elect a charter commission can be required by initiative [*Cal. Const., art. XI, § 3(c)* (the election can also be required by the governing body of the city or county)].

In any initiative or referendum process, the practitioner is urged to consult the elections official in the affected jurisdiction before commencing the process, to ascertain what local requirements, if any, exist in addition to the statutory requirements to facilitate the process, and what forms, if any, the local jurisdiction requires or recommends to be used.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationInitiative & ReferendumGovernmentsLocal GovernmentsCharters

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25-302 California Forms of Pleading and Practice--Annotated § 302.12

§ 302.12 Limitations on Use of Initiative or Referendum

[1] In General

[a] Restricted to Enactment of Laws

Courts liberally construe the initiative and referendum power of the electorate of a city or county whenever it is challenged. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it. Thus, absent a clear showing of the Legislature's intent to the contrary, legislative decisions of a city council or board of supervisors are subject to initiative or referendum [*Voters for Responsible Retirement v. Board of Supervisors (1994) 8 Cal. 4th 765, 777, 35 Cal. Rptr. 2d 814, 884 P.2d 645* (holding, however, that, under *Gov. Code § 25123*, ordinance specifically relating to implementation of a memorandum of understanding between a county and its employee associations is not subject to referendum); *San Mateo County Coastal Landowners' Assn. v. County of San Mateo (1995) 38 Cal. App. 4th 523, 537, 45 Cal. Rptr. 2d 117]* . Courts' traditional reluctance to find a limitation on the availability of the powers of initiative and referendum has been described either as a judicial policy of liberally construing the power of initiative and referendum or as a presumption in favor of the power absent a clear showing of legislative intent to the contrary [*Empire Waste Management v. Town of Windsor (1998) 67 Cal. App. 4th 714, 718, 79 Cal. Rptr. 2d 262]* .

However, the electorate's use of the powers of initiative and referendum is not unlimited. These powers do not encompass all possible actions of a legislative body. Rather, they are limited to the adoption or rejection of statutes and ordinances [*Marblehead v. City of San Clemente (1991) 226 Cal. App. 3d 1504, 1509, 277 Cal. Rptr. 550]* . For example, when an initiative attempts to do something other than enact a statute, such as render an administrative decision, adjudicate a dispute, or declare by resolution the views of the resolving body, then it must be struck down as not within the scope of initiative power reserved by the people [*see American Federation of Labor v. Eu (1984) 36 Cal. 3d 687, 714, 206 Cal. Rptr. 89, 686 P.2d 609* ; *see also Bramberg v. Jones (1999) 20 Cal. 4th 1045, 1063 n.19, 86 Cal. Rptr. 2d 319, 978 P.2d 1240* (to extent first two sections of Proposition 225 might be viewed as constituting non-binding advisory measures severable from more explicitly coercive provisions of Proposition, those provisions would not constitute valid initiative measure under California Constitution; measure does not create law and thus does

not adopt statute within meaning of Cal. Const., art. II); *Empire Waste Management v. Town of Windsor (1998) 67 Cal. App. 4th 714, 717 n.1, 79 Cal. Rptr. 2d 262* (referendum may review only legislative decisions, but not matters that are strictly executive or administrative)]. This is so even when the initiative measure is labeled as such because, in determining whether an initiative measure enacts a law, it is the substance, rather than the form, that controls [*Marblehead v. City of San Clemente (1991) 226 Cal. App. 3d 1504, 1509, 277 Cal. Rptr. 550* (initiative measure purporting to amend city's general plan was, in reality, a resolution, and therefore invalid)]. Similarly, mere advisory action by a governing body is beyond the reach of the referendum process, that is, it is not subject to repeal by referendum [*see* *Memorial Hospitals Assn. v. Randol (1995) 38 Cal. App. 4th 1300, 1310-1312, 45 Cal. Rptr. 2d 547]* .

In addition, an initiative or referendum may be held unconstitutional under the federal constitution. For example, under U.S. Const., art. V, the process for amending the United States Constitution is vested in Congress and the state legislatures, and voters may not use the referendum or initiative power to thwart or mandate the operation of the federal constitutional amendment process [*Bramberg v. Jones (1999) 20 Cal. 4th 1045, 1048, 1063, 86 Cal. Rptr. 2d 319, 978 P.2d 1240* (Proposition 225, relating to congressional term limits, held unconstitutional)].

The rights of initiative and referendum reserved to the voters under *Cal. Const., art. II, § 11* are co-extensive with the rights reserved to the people of the state as set forth in the state Constitution, unless a local charter gives the voters broader powers. Thus, unless a charter extends the local initiative or referendum power, constitutional limitations on the statewide initiative and referendum powers generally apply to also restrict the power of local voters to vote on countywide initiatives [*Pala Band of Mission Indians v. Board of Supervisors (1997) 54 Cal. App. 4th 565, 581-582, 63 Cal. Rptr. 2d 148]* .

[b] Restriction of Local Power of Referendum Over Matters of Statewide Concern

In matters of statewide concern, the state may if it chooses preempt the entire field to the exclusion of all local control. If the state chooses instead to grant some measure of local control and autonomy, it has the authority to impose procedural restrictions on the exercise of the power granted, including the authority to bar the exercise of the initiative and referendum [*Jahr v. Casebeer (1999) 70 Cal. App. 4th 1250, 1258, 83 Cal. Rptr. 2d 172* (quoting *Committee of Seven Thousand v. Superior Court (1998) 45 Cal. 3d 491, 511, 247 Cal. Rptr. 362, 754 P.2d 708]* .

There are two instances in which the power of referendum will be found to have been withdrawn [*DeVita v. County of Napa (1995) 9 Cal. 4th 763, 776, 889 P.2d 1019* ; *Citizens for Jobs and the Economy v. County of Orange (2002) 94 Cal. App. 4th 1311, 1326, 115 Cal. Rptr. 2d 90* ; *Empire Waste Management v. Town of Windsor (1998) 67 Cal. App. 4th 714, 718, 79 Cal. Rptr. 2d 262]* :

- When there is a definite indication by the Legislature that it intends to preempt the discretion of a local legislative body to legislate.

- When the Legislature, rather than preempt local legislative action, has instead sought to delegate legislative power so exclusively to a local governing body as to indicate its intent to preclude the citizens' otherwise coextensive right of referendum.

In the latter case, the presumption that the people retain the power of referendum is overcome only by a clear showing of legislative intent to make an exclusive grant to the local governing entity. A statute delegating authority to a local "governing body" or "legislative body" supports a weak inference of exclusive delegation while use of more specific terms such as board of supervisors or city council supports a stronger inference of exclusive delegation [*Empire Waste Management v. Town of Windsor (1998) 67 Cal. App. 4th 714, 718, 79 Cal. Rptr. 2d 262]* .

When the statute contains generic language, such as "legislative body," the inquiry then turns on whether and to what extent the statute deals with an issue of statewide concern rather than a purely local one. The mere presence of statewide

concerns, however, will not be sufficient to establish restriction of the power of referendum. The court must look at the nature of the state's regulatory interests to determine if they are fundamentally incompatible with the exercise of the right of referendum. Lastly, the court looks at any other indicia of legislative intent to preclude the availability of the power of referendum [*Empire Waste Management v. Town of Windsor (1998) 67 Cal. App. 4th 714, 718-719, 79 Cal. Rptr. 2d 262]* . However, a mechanical consideration of the factors must yield in favor of finding against preclusion of the power of referendum if doubts can reasonably be resolved that preclusion was not the Legislature's intent [*Empire Waste Management v. Town of Windsor (1998) 67 Cal. App. 4th 714, 718-719, 79 Cal. Rptr. 2d 262]* .

[2] Single-Subject Rule

[a] "Reasonably Germane" Test

A constitutional or state statutory initiative measure embracing more than one subject cannot be submitted to voters or have any effect [*Cal. Const., art. II, § 8(d)*]. This constitutional provision is known as the "single-subject rule." It has been noted that at least one court has assumed that the single subject rule applicable to statewide initiatives applies equally to county initiatives [*Pala Band of Mission Indians v. Board of Supervisors (1997) 54 Cal. App. 4th 565, 582, 63 Cal. Rptr. 2d 148* , citing *San Mateo County Coastal Landowners' Assn. v. County of San Mateo (1995) 38 Cal. App. 4th 523, 553, 45 Cal. Rptr. 2d 117]* . The single subject rule's primary purpose is to minimize voter confusion and deception [*Yoshioka v. Superior Court (1997) 58 Cal. App. 4th 972, 992, 68 Cal. Rptr. 2d 553* ; *see Senate of the State of Cal. v. Jones (1999) 21 Cal. 4th 1142, 1156, 90 Cal. Rptr. 2d 810, 988 P.2d 1089]* .

A measure complies with the single-subject rule if its provisions, despite their varied collateral effects, are reasonably germane to one another [*Kennedy Wholesale, Inc. v. State Bd. of Equalization (1991) 53 Cal. 3d 245, 253, 279 Cal. Rptr. 325, 806 P.2d 1360* ; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal. 3d 208, 230, 149 Cal. Rptr. 239, 583 P.2d 1281* ; *see Senate of the State of Cal. v. Jones (1999) 21 Cal. 4th 1142, 1157, 90 Cal. Rptr. 2d 810, 988 P.2d 1089]* and to the general purpose or object of the initiative [*Raven v. Deukmejian (1990) 52 Cal. 3d 336, 346, 276 Cal. Rptr. 326, 801 P.2d 1077* ; *Brosnahan v. Brown (1982) 32 Cal. 3d 236, 245, 186 Cal. Rptr. 30, 651 P.2d 274* ; *see Senate of the State of Cal. v. Jones (1999) 21 Cal. 4th 1142, 1157, 90 Cal. Rptr. 2d 810, 988 P.2d 1089]* .

Under this test, the various provisions of an initiative are not required to be interlocking or interdependent [*Raven v. Deukmejian (1990) 52 Cal. 3d 336, 349, 276 Cal. Rptr. 326, 801 P.2d 1077* ; *Brosnahan v. Brown (1982) 32 Cal. 3d 236, 248-249, 186 Cal. Rptr. 30, 651 P.2d 274]* . Additionally, the various provisions of an initiative need not be functionally related to one another; it is enough that the various provisions are reasonably related to a common theme or purpose in furtherance of a common underlying purpose [*Senate of the State of Cal. v. Jones (1999) 21 Cal. 4th 1142, 1157, 90 Cal. Rptr. 2d 810, 988 P.2d 1089* ; *Raven v. Deukmejian (1990) 52 Cal. 3d 336, 349, 276 Cal. Rptr. 326, 801 P.2d 1077]* . Therefore, review of whether a measure complies with the single-subject rule is not an attempt to predict whether each section will actually further the measure's purpose. It is rather an inquiry into whether the provisions are reasonably germane to the measure's general purpose or objective [*Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal. 3d 805, 841-842, 258 Cal. Rptr. 161, 771 P.2d 1247]* . In any event, the California Supreme court has stated that a measure complies with the single subject rule if its provisions are either functionally related to one another or are reasonably germane to one another or the objects of the enactment [*Harbor v. Deukmejian (1987) 43 Cal. 3d 1078, 1100, 240 Cal. Rptr. 569, 742 P. 2d 1290* ; *see San Mateo County Coastal Landowners' Assn. v. County of San Mateo (1995) 38 Cal. App. 4th 523, 553 fn. 21, 45 Cal. Rptr. 2d 117* ; *League of Women Voters v. Eu (1992) 7 Cal. App. 4th 649, 659, 9 Cal. Rptr. 2d 416* ; *see also Chemical Specialties Manufacturers Assn., Inc. v. Deukmejian (1991) 227 Cal. App. 3d 663, 667, 670, 278 Cal. Rptr. 128* (Proposition 105 entitled Public's Right to Know Act, adopted in 1988 by voters, neither functionally related to one another nor reasonably germane to one another or objects of enactment and thus violated single subject rule)].

In ascertaining whether a measure complies with the rule under the "reasonably germane" test, some courts also look to

the extent to which a measure's provisions are germane to the measure's general subject as reflected in its title and the field of legislation suggested thereby [*see, e.g.,* *Chemical Specialties Manufacturers Assn., Inc. v. Deukmejian (1991) 227 Cal. App. 3d 663, 667, 278 Cal. Rptr. 128* (this may also be considered in determining if provisions functionally related to one another); *California Trial Lawyers Assn. v. Eu (1988) 200 Cal. App. 3d 351, 358, 245 Cal. Rptr. 916* ; *see also* *Perry v. Jordan (1949) 34 Cal. 2d 87, 93, 207 P.2d 47]* . This analysis of germaneness is permissible because the "reasonably germane" test as applied to the single-subject rule of *Cal. Const., art. II, § 8(d)* governing initiative measures is the same test that is applied to the single-subject rule of *Cal. Const., art. IV, § 9* governing legislative enactments. The same principles of construction apply to both [*Harbor v. Deukmejian (1987) 43 Cal. 3d 1078, 1098, 240 Cal. Rptr. 569, 742 P.2d 1290* ; *Perry v. Jordan (1949) 34 Cal. 2d 87, 92-93, 207 P.2d 47]* . It should be noted, however, that even though the constitution requires a statute's single subject to be expressed in its title [*see Cal. Const., art. IV, § 9*], the constitution does not require the same of an initiative measure's single subject [*see Cal. Const., art. II, § 8(d)*; *Harbor v. Deukmejian (1987) 43 Cal. 3d 1078, 1098, 240 Cal. Rptr. 569, 742 P.2d 1290]* .

The single-subject rule is designed to avoid "logrolling" and voter confusion [*Harbor v. Deukmejian (1987) 43 Cal. 3d 1078, 1098, 240 Cal. Rptr. 569, 742 P.2d 1290* ; *California Trial Lawyers Assn. v. Eu (1988) 200 Cal. App. 3d 351, 360-361, 245 Cal. Rptr. 916* (extending protection against confusion to signers of initiative petitions); *see also* *Senate of the State of Cal. v. Jones (1999) 21 Cal. 4th 1142, 1156, 90 Cal. Rptr. 2d 810, 988 P.2d 1089* (ballot argument in favor of proposed single-subject amendment explained principal purpose of amendment was attempt to avoid confusion of either voters or petition signers and to prevent subversion of electorate's will)]. In the initiative context, logrolling is the practice of combining several proposals in a single ballot measure to obtain a majority of votes for a combined package that would not have been approved if it had been divided into its several proposals and each proposal had been put before the voters as a separate measure [*see* *Harbor v. Deukmejian (1987) 43 Cal. 3d 1078, 1096, 240 Cal. Rptr. 569, 742 P.2d 1290* ; *Chemical Specialties Manufacturers Assn., Inc. v. Deukmejian (1991) 227 Cal. App. 3d 663, 672, 278 Cal. Rptr. 128]* . Despite this goal, the single-subject rule does not require a showing that each one of a measure's several provisions is capable of gaining voter approval independently of the other provisions [*Kennedy Wholesale, Inc. v. State Bd. of Equalization (1991) 53 Cal. 3d 245, 255, 279 Cal. Rptr. 325, 806 P.2d 1360* ; *Raven v. Deukmejian (1990) 52 Cal. 3d 336, 349, 276 Cal. Rptr. 326, 801 P.2d 1077]* .

The single-subject rule imposes no barrier to the presentation of any subject to the electorate, but simply precludes drafters from combining, in a single initiative, provisions that are not reasonably germane to a common theme or purpose. Unrelated proposals always may be placed before the voters through separate initiative measures, which may be circulated contemporaneously, affording the electorate the choice of approving all, some, or none of the distinct proposals [*Senate of the State of Cal. v. Jones (1999) 21 Cal. 4th 1142, 1158, 90 Cal. Rptr. 2d 810, 988 P.2d 1089]* .

[b] Liberal Construction

The "reasonably germane" test for singleness of subject is a liberal test, in keeping with the liberal construction of initiative measures in general. Under the test, courts will sustain initiative constitutional and statutory measures that fairly disclose a reasonable and common sense relationship among their various components in furtherance of a common purpose [*see* *Brosnahan v. Brown (1982) 32 Cal. 3d 236, 253, 186 Cal. Rptr. 30, 651 P.2d 274]* .

Examples of initiative measures containing broad, multifaceted, and complex provisions that have been deemed united by a common subject or purpose and therefore sustained by the courts on single-subject grounds include enactment of the following:

- The Jarvis-Gann property taxation initiative [*see* *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal. 3d 208, 230, 149 Cal. Rptr. 239, 583 P.2d 1281]* .

- The Political Reform Act of 1974 [*see* *Fair Political Practices Com. v. Superior Court (1979) 25 Cal. 3d 33, 41, 157 Cal. Rptr. 855, 599 P.2d 46]* .

- The "Victims' *Bill of Rights*" [*see Brosnahan v. Brown (1982) 32 Cal.3d 236, 253, 186 Cal. Rptr. 30, 651 P.2d 274]* .

- The "Crime Victims Justice Reform Act" [*see Raven v. Deukmejian (1990) 52 Cal. 3d 336, 349, 276 Cal. Rptr. 326, 801 P.2d 1077]* .

- Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998 [*see Manduley v. Superior Court (2002) 27 Cal. 4th 537, 549-556, 117 Cal. Rptr. 2d 168]* .

One common (though not indispensable) thread running through all of these measures is that each constitutes a legal "reform" to which the various provisions of each measure have been held germane [*see, e.g., Raven v. Deukmejian (1990) 52 Cal. 3d 336, 346-349, 276 Cal. Rptr. 326, 801 P.2d 1077* ; *Brosnahan v. Brown (1982) 32 Cal. 3d 236, 245-253, 186 Cal. Rptr. 30, 651 P.2d 274]* .

[c] Unduly Diverse Provisions

Despite the liberal interpretation of initiative measures in general and the single-subject rule in particular, initiative proponents are not given blank checks to draft measures containing unduly diverse or extensive provisions bearing no reasonable relationship to each other or to the general object that is sought to be promoted [*see Brosnahan v. Brown (1982) 32 Cal. 3d 236, 253, 186 Cal. Rptr. 30, 651 P.2d 274* ; *accord Senate of the State of Cal. v. Jones (1999) 21 Cal. 4th 1142, 1157-1158, 90 Cal. Rptr. 2d 810, 988 P.2d 1089]* . Thus, for example, a measure bearing one or more provisions that lack any reasonably discernible nexus between the stated object of the initiative and the provisions in question will not satisfy the rule [*see, e.g., California Trial Lawyers Assn. v. Eu (1988) 200 Cal. App. 3d 351, 359-361, 245 Cal. Rptr. 916* (striking down "Insurance Cost Control Initiative of 1988")].

The single-subject rule is a constitutional safeguard adopted to protect against multifaceted measures of undue scope. For example, the rule forbids joining disparate provisions that appear germane only to subjects of excessive generality such as "government" or "public welfare" [*see Brosnahan v. Brown (1982) 32 Cal. 3d 236, 253, 186 Cal. Rptr. 30, 651 P.2d 274]* . The number and scope of topics that could be considered germane to such excessively general subjects would essentially obliterate the single-subject requirement [*see, e.g., Chemical Specialties Manufacturers Assn., Inc. v. Deukmejian (1991) 227 Cal. App. 3d 663, 670-671, 278 Cal. Rptr. 128* (striking down "Public's Right to Know Act")]. Thus, when a challenged measure designed Proposition 24 embraced at least two distinct subjects, state officers' compensation and reapportionment, and the proponent sought to justify the joinder of these disparate subjects on the theory that because each of the substantive sections of the proposition contained a provision for voter approval, "voter approval" properly could be viewed as the single subject to which all of the measure's provisions were reasonably germane, the court has rejected this argument and held that the proposition violated the single subject rule. When the drafters of an initiative measure join separate provisions dealing with otherwise unrelated political issues in a single initiative, the initiative cannot be found to satisfy the single-subject rule simply because each provision imposes a requirement of voter approval, any more than if each provision contained a remedy for money damages or a remedy for injunctive relief. The circumstance that provisions in an initiative dealing with unrelated subjects happen to make use of a similar remedy, such as public disclosure or voter approval, is not sufficient to find that the disparate provisions are reasonably germane to a single subject for purposes of the single-subject rule [*Senate of the State of Cal. v. Jones (1999) 21 Cal. 4th 1142, 1146, 1162-1163, 90 Cal. Rptr. 2d 810, 988 P.2d 1089]* .

[d] Severance Prohibited to Cure Violation

The constitution does not provide for severance in the event that more than one subject is included in a statutory or constitutional initiative measure [*see Cal. Const., art II, § 8(d)*; *Harbor v. Deukmejian (1987) 43 Cal. 3d 1078, 1098, 240 Cal. Rptr. 569, 742 P.2d 1290* ; *California Trial Lawyers Assn. v. Eu (1988) 200 Cal. App. 3d 351, 361-362, 245*

Cal. Rptr. 916] . In fact, the language and context of *Cal. Const. art. II, § 8(d)* preclude severance to cure single-subject rule violations [*Senate of the State of Cal. v. Jones (1999) 21 Cal. 4th 1142, 1168, 90 Cal. Rptr. 2d 810, 988 P.2d 1089* (when initiative measure violates single-subject rule, severance is not an available remedy; submission of multisubject measure to electorate precluded); *California Trial Lawyers Assn. v. Eu (1988) 245 Cal. Rptr. 916* (declining to exercise severance to cure single-subject rule violation); *compare Cal. Const., art II, § 8(d)* (initiative measure embracing more than one subject cannot be submitted to electors or have any effect) *with Cal. Const., art. IV, § 9* (statute embracing subject not expressed in title is void only as to portion not expressed in title)].

The rationale for the rule of nonseverability is clear. An initiative that violates the single-subject rule contains two or more portions that could be separately enacted, but cannot be combined in one measure. A court finding such a violation has no method of deciding which part of the initiative will take effect [*Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal. 3d 805, 836, 258 Cal. Rptr. 161, 771 P.2d 1247]* .

Severance of particular parts of an initiative measure has been recognized as permissible in a few cases involving circumstances in which the excised portions were invalid because they conflicted either with substantive federal constitutional protections or prohibitions [*see, e.g.,* *Legislature v. Eu (1991) 54 Cal. 3d 492, 534-535, 286 Cal. Rptr. 283, 816 P.2d 1309* (provision of Proposition 140 imposing restrictions on pensions of incumbent legislators severed as unconstitutional impairment of contract under federal and California law); *Fair Political Practices Com. v. Superior Court (1979) 25 Cal. 3d 33, 49, 157 Cal. Rptr. 855, 599 P.2d 46* (sections of Political Reform Act of 1974 severed as substantial limitations on exercise of specified *First Amendment* rights); *Santa Barbara Sch. Dist. v. Superior Court (1975) 13 Cal. 3d 315, 332, 118 Cal. Rptr. 637, 530 P.2d 605* (sections of proposition relating to school desegregation severed as unconstitutional and void under United States and California Supreme Court rulings outlawing school segregation; proposition contained severability clause and offending sections were mechanically severable)], or with state constitutional prohibitions [*see, e.g.,* *Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal. 3d 805, 835-837, 258 Cal. Rptr. 161, 771 P.2d 1247* (section of initiative measure forming private corporation to represent insurers' interests severed as violative of *Cal. Const., art. II, § 12*, discussed in [3], *below*)]. However, these cases have not involved severance for the purpose of curing a single-subject rule violation, even though some of them have successfully rebuffed single-subject rule challenges [*see, e.g.,* *Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal. 3d 805, 841-842, 258 Cal. Rptr. 161, 771 P.2d 1247* ; *Fair Political Practices Com. v. Superior Court (1979) 25 Cal. 3d 33, 41, 157 Cal. Rptr. 855, 599 P.2d 46]* .

[e] Preelection Review

The constitution not only prohibits a statutory or constitutional initiative measure embracing more than one subject from taking effect. It also prohibits submission of such a measure to the electorate [*Cal. Const., art. II, § 8(d)*]. The general rule governing preelection review of all ballot propositions, including initiative measures, is that absent some clear showing of a proposition's invalidity, it is usually more appropriate to review constitutional and other challenges to a ballot proposition after an election rather than to disrupt the electoral process by reviewing the challenges before the election and thereby possibly preventing the exercise of the people's franchise [*Brosnahan v. Eu (1982) 31 Cal. 3d 1, 4, 181 Cal. Rptr. 100, 641 P.2d 200* (declining preelection review of initiative measure challenged on single-subject grounds; measure subsequently upheld on single-subject rule challenge in *Brosnahan v. Brown (1982) 32 Cal. 3d 236, 253, 186 Cal. Rptr. 30, 651 P.2d 274*); *see* *Senate of the State of Cal. v. Jones (1999) 21 Cal. 4th 1142, 1153, 90 Cal. Rptr. 2d 810, 988 P.2d 1089]* . The general rule applies primarily when a challenge rests on the alleged unconstitutionality of the substance of the proposed initiative. The rule does not preclude preelection review, however, when the challenge is based on a claim, for example, that the proposed measure may not be submitted to the voters because the measure is not legislative in character or because it amounts to a constitutional revision rather than an argument [*Senate of the State of Cal. v. Jones (1999) 21 Cal. 4th 1142, 1153, 90 Cal. Rptr. 2d 810, 988 P.2d 1089]* .

In case of a challenge based on the single-subject rule, it is clear from the relevant constitutional provision itself that, in an appropriate instance, preelection relief not only is permissible, but is expressly contemplated. Thus, in view of the

explicit language of the single-subject provision of *Cal. Const., art II, § 8(d)* that specifies that an initiative embracing more than one subject may not be submitted to the electors, when a court determines that the challenges to an initiative measure have demonstrated that there is a strong likelihood that the initiative violates the single-subject rule, it is appropriate to resolve the single-subject challenge before the election [*Senate of the State of Cal. v. Jones (1999) 21 Cal. 4th 1142, 1153-1154, 90 Cal. Rptr. 2d 810, 988 P.2d 1089* ; *see, e.g.,* *California Trial Lawyers Assn. v. Eu (1988) 200 Cal. App. 3d 351, 357, 245 Cal. Rptr. 916* (exercising preelection review of initiative measure presenting palpable transgression of single-subject rule); *see also* *League of Women Voters v. Eu (1992) 7 Cal. App. 4th 649, 658, 9 Cal. Rptr. 2d 416* (reviewing single-subject challenge to initiative measure well in advance of placing measure on ballot)]. Under such circumstances, deferring a decision until after the election not only will defeat the constitutionally contemplated procedure reflected by the language in *Cal. Const., art II, § 8(d)*, but may contribute to an increasing cynicism on the electorate's part with respect to the efficacy of the initiative process [*Senate of the State of Cal. v. Jones (1999) 21 Cal. 4th 1142, 1154, 90 Cal. Rptr. 2d 810, 988 P.2d 1089]* .

The general rule set forth in *Brosnahan v. Eu (1982) 31 Cal. 3d 1, 641 P.2d 200* recognizing a strong presumption against preelection resolution of a challenge to an initiative measure--is inapplicable to a challenge not based on the alleged unconstitutionality of the substance of the initiative measure but rather on the contention that the measure in question is not the type of measure that may be adopted through the initiative process [*Independent Energy Producers Assn. v. McPherson (2006) 38 Cal. 4th 1020, 1024-1025, 44 Cal. Rptr. 3d 644, 136 P.3d 178]* . Nonetheless, although preelection resolution of this type of a challenge is not presumptively improper, the challenge at issue in such a case generally will not become moot after an election if the measure is adopted, and thus such a claim reasonably is susceptible to judicial resolution either before or after an election. As a consequence, when such a challenge is brought prior to an election, a court should recognize that the need for an expedited preelection resolution of the claim is less compelling than with regard to the type of claim at issue in *Costa v. Superior Court (2006) 37 Cal. 4th 986, 39 Cal. Rptr. 3d 470* , which involved a claim that the initiative failed to comply with a procedural requirement relating to the circulation of the initiative petition. Accordingly, in such a case a court should take into consideration the availability of post-election relief in deciding whether it is preferable to resolve the issue in the often charged and rushed atmosphere of an expedited preelection review, or instead to leave the challenge for resolution with the benefit of the full, unhurried briefing, oral argument, and deliberation that generally will be available after the election [*Independent Energy Producers Assn. v. McPherson (2006) 38 Cal. 4th 1020, 1025, 44 Cal. Rptr. 3d 644, 136 P.3d 178]* .

In decisions made prior to *Independent Energy Producers Assn. v. McPherson (2006) 38 Cal. 4th 1020, 44 Cal. Rptr. 3d 644, 136 P.3d 178* , courts held that if the challenge goes to the electorate's power to adopt the initiative in the first instance, as would a challenge based on a claimed violation of the single-subject rule, preelection review is proper, even absent a clear showing of the measure's invalidity on other grounds [*American Federation of Labor v. Eu (1984) 36 Cal. 3d 687, 695-696, 696 n.11, 206 Cal. Rptr. 89, 686 P.2d 609* (exercising preelection review of measure on grounds unrelated to single-subject rule violation)].

Moreover, preelection review of an initiative measure is appropriate when it is clearly shown that the measure is otherwise substantively invalid [*Citizens for Responsible Behavior v. Superior Court (1992) 1 Cal. App. 4th 1013, 1019, 2 Cal. Rptr. 2d 648* (upholding city's refusal to place initiative measure on ballot when measure violated *Equal Protection Clause* of federal and California Constitutions); *see* *Legislature v. Deukmejian (1983) 34 Cal. 3d 658, 665-666, 194 Cal. Rptr. 781, 669 P.2d 17* (exercising preelection review of measure challenged on grounds unrelated to single-subject rule violation); *deBottari v. City Council, (1985) 171 Cal. App. 3d 1204, 1209-1210* ; *see also* *San Francisco Forty-Niners v. Nishioka (1999) 75 Cal. App. 4th 637, 644-650, 89 Cal. Rptr. 2d 388* (noncompliance with Election Code can result in initiative's disqualification from ballot; when initiative petition in violation of *Elec. Code § 18600* contains misleading assertions of fact that are false beyond dispute, writ may issue to prevent circulation of undisputed falsehoods; rule, however, does not apply to expressions of opinion nor to factual matters that are subject to question or dispute; argument that writ of mandate constitutes unlawful prior restraint of right to free speech under *First Amendment of United States Constitution* rejected)].

[f] Separate-Vote Provision

In 2006, the California Supreme Court granted review to address an issue of first impression: the proper interpretation of *Cal. Const., art. XVIII, § 1*, which requires in its second sentence that when the Legislature proposes an amendment of the state Constitution, "[e]ach amendment shall be so prepared and submitted that it can be voted on separately." The court concluded that the separate-vote provision is a limitation upon legislative power to submit constitutional amendments to the voters, and should be construed consistently with its kindred provision, the single subject provision. Thus, the Legislature's proposed submission, in a single constitutional amendment, of two changes to the state Constitution that are not germane to a common theme, purpose, or subject, violated the constitutional separate-vote requirement [Californians for an *Open Primary v. McPherson (2006) 38 Cal. 4th 735, 738, 43 Cal. Rptr. 3d 315, 134 P.3d 299]* .

[3] Constitutional Amendment or Statute Naming Individual to Office or Naming Corporation to Perform Function

[a] Prohibited

No constitutional amendment, and no statute proposed to the voters by initiative or referred to the voters by the Legislature, that names any individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty, can be submitted to the voters or have any effect [*Cal. Const., art. II, § 12*]. The purpose of this constitutional prohibition is to prevent the initiative from being used to confer special privilege or advantage on specific persons or organizations [*see Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal. 3d 805, 832, 832-833, 258 Cal. Rptr. 161, 771 P.2d 1247]* . As such, the prohibition is not limited to existing corporate entities [*Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal. 3d 805, 833, 258 Cal. Rptr. 161, 771 P.2d 1247]* , to "for-profit" corporations as opposed to a nonprofit public benefit corporation [*Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal. 3d 805, 834, 258 Cal. Rptr. 161, 771 P.2d 1247]* , or to situations in which the initiative describes the subject corporation as performing a public function [*Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal. 3d 805, 835, 258 Cal. Rptr. 161, 771 P.2d 1247]* . This prohibition applies equally to statewide and local initiatives unless a local charter provides otherwise [*Pala Band of Mission Indians v. Board of Supervisors (1997) 54 Cal. App. 4th 565, 582, 63 Cal. Rptr. 2d 148* ; *cf. Citizens for Responsible Government v. City of Albany (1997) 56 Cal. App. 4th 1199, 1229-1230, 66 Cal. Rptr. 2d 102* (declining to extend *Pala* to land use measure that named developer when land use provisions originated with city council and measure had to be submitted to voters because of earlier initiative measure that required voter approval of future zoning amendments, general plan changes, and development agreements in a waterfront area; measure was not of the type addressed by *Cal. Const., art. II, § 12*)].

[b] Severance Possible

When a portion of an initiative violates the prohibition, the offending portion must be severed from the initiative, and the remainder can take effect. This rule of severability requires only that the offending statute be severed, and thus precludes severability only within the confines of a particular statute that impermissibly names or identifies a person or private corporation. Severability to this degree is permissible because, by its terms, *Cal. Const., art. II, § 12*, prohibits a statute in violation of its provisions from being submitted to the voters or having any effect. The question whether the statute can be severed from the balance of the initiative must then be determined by general rules of statutory severability. The rule of severability applicable to initiative statutes in violation of *Cal. Const., art. II, § 12*, is to be distinguished from the rule of severability applicable to entire initiative measures under the single-subject rule of *Cal. Const., art II, § 8(d)* (discussed in [2][d], *above*) [*Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal. 3d 805, 835-836, 258 Cal. Rptr. 161, 771 P.2d 1247* (provision of Proposition 103 creating insurance consumers' advocacy corporation violates *Cal. Const., art. II, § 12*, but not essential to initiative's purpose and structure and therefore is severable); *see also Pala Band of Mission Indians v. Board of Supervisors (1997) 54 Cal. App. 4th 565, 585-587, 63 Cal. Rptr. 2d 148* (county initiative provision held invalid as violating *Cal. Const., art. II, § 12*, but remainder of initiative severed and

upheld; when initiative contains severability clause, invalid provision severable if it can be separated grammatically, functionally, and volitionally)].

[4] Urgency Legislation, Tax Levies and Appropriations, and Statutes Calling Elections

The power of referendum does not extend to urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the state [*Cal. Const., art. II, § 9(a)*]. This constitutional exclusion of specified statutes from the referendum powers extends to local elections [*see Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 239 n.11, 45 Cal. Rptr. 2d 207, 902 P.2d 225]* .

The possibility that the Legislature may on rare occasions foreclose use of the referendum through a declaration of urgency is an inherent feature of California's constitutional system. The framers of the initiative and referendum provisions, and the people in adopting those provisions, deliberately accepted this limitation on use of the referendum power. The existence of this limitation is not a justifiable basis for extending use of the initiative into areas not permitted by the state constitution [*Legislature v. Deukmejian (1983) 34 Cal. 3d 658, 680, 194 Cal. Rptr. 781, 669 P.2d 17]* .

The initiative power cannot be used as an indirect or b ackhanded technique to invoke the referendum process against a tax ordinances of a general law city [*Myers v. City Council of Pismo Beach (1966) 241 Cal. App. 2d 237, 243, 50 Cal. Rptr. 402]* . However, not every initiative that would repeal a tax and forbid its future imposition constitutes a backhand referendum. For example, under a city or county charter that excludes tax measures from the referendum power, but does not so restrict the initiative power, the electorate may by initiative repeal a tax if the repeal does not become effective until a subsequent fiscal year [*Rossi v. Brown (1995) 9 Cal. 4th 688, 710-711, 38 Cal. Rptr. 2d 363, 889 P.2d 557* ; *see Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 238-246, 45 Cal. Rptr. 2d 207, 902 P.2d 225* (voter approval requirement contained in *Gov. Code § 53722* as condition precedent before local government may impose special tax held not to constitute a referendum)].

[5] Approval or Rejection of Administrative Acts

The powers of initiative and referendum apply only to acts that are legislative in character, and not to executive or administrative acts. Acts constituting a declaration of public purpose, and making provision for ways and means of accomplishing that purpose, may be generally classified as calling for the exercise of legislative power. Acts of administration are those necessary to carry out legislative policies and purposes already declared by a legislative body. Stated another way, power to be exercised is legislative in nature if it prescribes a new policy or plan. Power to be exercised is administrative in nature if it merely pursues a plan already adopted by the legislative body itself or some power superior to it [*see Southwest Diversified, Inc. v. City of Brisbane (1991) 229 Cal. App. 3d 1548, 1555, 280 Cal. Rptr. 869* (construing revision of zoning boundary pursuant to previously adopted procedure as administrative action)].

The acts and resolutions of administrative agencies of the state are not subject to referendum by local electors [*Board of Education v. Superior Court (1979) 93 Cal. App. 3d 578, 582, 155 Cal. Rptr. 839]* . If the subject is one of statewide concern in which the Legislature has delegated decision-making power not to local voters but to a local council or board as the state's designated agent for local implementation of state policy, the action receives an administrative characterization and is thus outside the scope of the initiative and referendum [*Friends of Mount Diablo v. County of Contra Costa (1977) 72 Cal. App. 3d 1006, 1011, 139 Cal. Rptr 469]* . An example of a matter of statewide concern is the regulation of the public school system. For purposes of the availability of the initiative and referendum, school districts have become administrative agencies of the state for the local operation of the state school system. The actions of the school districts are therefore administrative rather than legislative and, as such, beyond the purview of the initiative and referendum power [*Board of Education v. Superior Court (1979) 93 Cal. App. 3d 578, 581-583, 155 Cal. Rptr. 839]* .

[6] State's Lawmaking Power

Neither the Legislature nor the voters may enact a law of a nature that exceeds a limitation on the state's lawmaking power. For example, the voters cannot enact a law that violates the state constitutional requirement of *Cal. Const., art. XXI, § 1*, limiting reapportionment to once every 10 years, or *Cal. Const., art. I, § 2(a)*, prohibiting any law that restrains or abridges freedom of speech or press [*Kennedy Wholesale, Inc. v. State Bd. of Equalization (1991) 53 Cal. 3d 245, 252, 279 Cal. Rptr. 325, 806 P.2d 1360* ; *see* *Legislature v. Deukmejian (1983) 34 Cal. 3d 658, 673, 194 Cal. Rptr. 781, 669 P.2d 17]* .

Not every procedural limitation on the Legislature applies to the volers. For example, although *Cal. Const., art. XIIIA, § 3* (Proposition 13), requires a two-thirds supermajority for legislative enactment of any state tax enacted for the purpose of increasing revenue [*see Cal. Const., art. XIIIA, § 3*], that article of the constitution does not limit the voters' power to raise taxes through an initiative statute enacted by a majority of the voters [*Kennedy Wholesale, Inc. v. State Bd. of Equalization (1991) 53 Cal. 3d 245, 252, 253, 279 Cal. Rptr. 325, 806 P.2d 1360* (upholding tax on tobacco products enacted by initiative Proposition 99)].

[7] Constitutional Revision

Although the voters can amend the California Constitution by initiative, a revision of the Constitution can only be accomplished by assembling a constitutional convention and obtaining popular ratification or by legislative submission of the measure to the voters [*Cal. Const., art. XVIII, §§ 1-4*; *Legislature v. Eu (1991) 54 Cal. 3d 492, 506, 286 Cal. Rptr. 283, 816 P.2d 1309* ; *see* *Raven v. Deukmejian (1990) 52 Cal. 3d 336, 349, 276 Cal. Rptr. 326, 801 P.2d 1077]* .

To determine whether a particular provision of an initiative is an amendment or a revision, a court must analyze the quantitative and qualitative effects of the provision on the constitutional scheme. Substantial changes in either respect could amount to a revision [*Legislature v. Eu (1991) 54 Cal. 3d 492, 506, 286 Cal. Rptr. 283, 816 P.2d 1309]* . A substantial number of changes in the constitution affecting a host of provisions may result in a quantitative revision, rendering part or all of an initiative measure invalid [*see* *Legislature v. Eu (1991) 54 Cal. 3d 492, 506, 286 Cal. Rptr. 283, 816 P.2d 1309]* .

Modifications in the constitution that alter the nature of California's basic governmental plan, such as changes in the state's fundamental structure or the foundational powers of its branches, constitute a qualitative revision [*Legislature v. Eu (1991) 54 Cal. 3d 492, 509, 286 Cal. Rptr. 283, 816 P.2d 1309* ; *Raven v. Deukmejian (1990) 52 Cal. 3d 336, 350-354, 276 Cal. Rptr. 326, 801 P.2d 1077]* . A court will find a qualitative revision if it necessarily or inevitably appears from the face of the challenged provision that the measure will substantially alter the basic governmental framework set forth in the constitution [*compare* *Raven v. Deukmejian (1990) 52 Cal. 3d 336, 350-354, 276 Cal. Rptr. 326, 801 P.2d 1077* (striking down as improper constitutional revision provision of Proposition 115 that would have vested in United States Supreme Court sole power to interpret under California Constitution certain procedural rights of criminal defendants), *with* *Legislature v. Eu (1991) 54 Cal. 3d 492, 506, 286 Cal. Rptr. 283, 816 P.2d 1309* (upholding provisions of Proposition 140 that established term limits for state legislators and various state constitutional officers and imposed specific restrictions on Legislature's budget, because these provisions do not affect either Legislature's fundamental structure or its foundational powers)]. A court is not required to fathom the long-term effects of the provision on the state's basic government plan to decide that a provision is not a qualitative revision [*Legislature v. Eu (1991) 54 Cal. 3d 492, 510, 286 Cal. Rptr. 283, 816 P.2d 1309]* .

In contrast, even an initiative that makes very significant changes constitutes only an amendment if its changes nonetheless operate functionally within a relatively narrow range of subject matter [*Strauss v. Horton (2009) 46 Cal. 4th 364, 428, 93 Cal. Rptr. 3d 591, 207 P.3d 48* (*citing* *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal. 3d 208, 228, 149 Cal. Rptr. 239, 583 P.2d 1281*)].

The question of whether an initiative constitutes an amendment or a revision requires analysis of the statute on its face [*Rippon v. Bowen (2008) 160 Cal. App. 4th 1308, 1319, 73 Cal. Rptr. 3d 421]* .

For full discussion of the constitutional amendment-revision dichotomy, see *Ch. 126A, Constitutional Law, § 126A.13[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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25-302 California Forms of Pleading and Practice--Annotated § 302.13

§ 302.13 Conflicting Provisions of Two or More Measures

[1] General Rule

If provisions of two or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote prevail [*Cal. Const., art. II, § 10(b)* (applicable to both initiative and referendum measures)]. This rule of construction is not, however, applied at face value and unconditionally. Rather, as shown in the discussion below, application of the rule is tempered by application of the common law rule of construction requiring a court, whenever possible, to construe an initiative statute or ordinance to ensure its validity [*Lesher Communications, Inc. v. City of Walnut Creek (1990) 52 Cal. 3d 531, 543, 277 Cal. Rptr. 1, 802 P.2d 317]* .

[2] Competing Regulatory Schemes

Initiative ballot measures addressing the same subject are to be examined as a whole and, if they offer conflicting regulatory schemes for governance of that subject, it is the measure receiving the highest affirmative vote that prevails. Absent an express contrary intent in one or more of the initiative measures, no part of any measure receiving a lesser affirmative vote becomes operative [*Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com. (1990) 51 Cal. 3d 744, 767, 274 Cal. Rptr. 787, 799 P.2d 1220* (holding Proposition 73, relating to campaign finance, operative and Proposition 68, relating to the same subject matter and comprising a competing campaign finance regulatory scheme, inoperative)]. Therefore, unless a contrary intent is apparent in the measures, when two or more measures are competing initiatives, either because they are expressly offered as "all-or-nothing" alternatives or because each creates a comprehensive regulatory scheme related to the same subject, *Cal. Const., art. II, § 10(b)*, mandates that only the measure receiving the highest number of affirmative votes be enforced. Neither an administrative or regulatory agency, nor a court, may enforce individual provisions of the measure receiving the lower number of affirmative votes [*Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com. (1990) 51 Cal. 3d 744, 747, 274 Cal. Rptr. 787, 799 P.2d 1220]* .

When a court is faced with competing initiative regulatory schemes, the standard rule of statutory construction that requires an attempt to reconcile statutory provisions relating to the same subject matter whenever possible to avoid

conflict and give effect to every provision does not apply. *Cal. Const., art. II, § 10(b)* does not require the court to analyze each provision of the schemes receiving fewer votes to determine which provisions survive, particularly when to do so might result in a regulatory scheme created without any basis for ascertaining whether the electorate understood or intended the resulting scheme. The constitution does not permit a court to engraft onto one regulatory scheme provisions intended to be part of a different scheme [*Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com. (1990) 51 Cal. 3d 744, 764-770, 274 Cal. Rptr. 787, 799 P.2d 1220]* .

[3] Complementary or Supplementary Measures

When practicable, a court should construe two or more initiative measures as complementary or supplementary rather than as competing or conflicting, so that the expressed will of the voters is given the greatest possible deference [*Yoshisato v. Superior Court (1992) 2 Cal. 4th 978, 988-989, 9 Cal. Rptr. 2d 102, 831 P.2d 327* (provisions of Propositions 114 and 115 were presented to voters as complementary or supplementary measures to amend *Penal Code § 190.2*)]. In determining whether two initiative measures are complementary or supplementary rather than competing, a court must give due consideration to the intent of the voters [*Yoshisato v. Superior Court (1992) 2 Cal. 4th 978, 989, 9 Cal. Rptr. 2d 102, 831 P.2d 327]* .

Special analysis of voter intent is required when only selected parts of a statute are amended by the initiative power. Under *Cal. Const., art. IV, § 9*, if voters make discrete amendments to a portion of the statute, they are compelled also to reenact the entire statute to effectuate the amendments. Thus, the voters are technically deemed to have adopted the unamended portions of the statute, regardless of their actual intent to do so [*Yoshisato v. Superior Court (1992) 2 Cal. 4th 978, 989-990, 9 Cal. Rptr. 2d 102, 831 P.2d 327]* . Nevertheless, if one initiative amends portions of a statute and, thus, the voters are constitutionally compelled to reenact the entire statute, this does not, in itself, evidence the intent of the voters that the compulsorily reenacted portions of the first initiative prevail overall other provisions of a second initiative enacted by a lesser affirmative vote in the same election. Indeed, if there is no evidence to demonstrate that the first initiative proposed a comprehensive regulatory scheme governing the subject matter of the statute sought to be amended by both initiatives, a court will not interpret voter approval of the first initiative as an indication of the voters' intent to adopt the first initiative as an all-embracing measure that supersedes the provisions of the second initiative. Accordingly, changes made by the second initiative to those portions of the statute that the first initiative merely reenacts without any amendments are operative, even if the first initiative receives more affirmative votes that the second initiative [*Yoshisato v. Superior Court (1992) 2 Cal. 4th 978, 989-990, 9 Cal. Rptr. 2d 102, 831 P.2d 327* (because ballot pamphlet information did not demonstrate that Proposition 114 presented comprehensive regulatory scheme governing criminal penalties set forth in *Penal Code § 190.2*, changes made by Proposition 115 to those provisions of the section that Proposition 114 merely reenacted without any amendments are operative even though Proposition 114 received more affirmative votes than Proposition 115)]. Under these circumstances, a court will give effect to the amendments enacted by both initiatives as long as (1) a "provision-by-provision" comparison of the two measures reveals that each amendment of the second initiative does not conflict with any amendment made to the same provision by the first initiative, and (2) each amendment of the second initiative that cannot be given effect is severable from any other provision of the second initiative [*Yoshisato v. Superior Court (1992) 2 Cal. 4th 978, 991, 9 Cal. Rptr. 2d 102, 831 P.2d 327]* .

Similarly, when a second initiative makes substantive amendments to provisions of a statute that were compulsorily reenacted by a first initiative with minor, nonsubstantive changes, the two measures are not necessarily conflicting. Under such circumstances, it cannot reasonably be concluded that the voters intended that the provisions as reenacted by the first initiative should prevail over the substantive amendments made by the second initiative unless there is evidence to the contrary [*Yoshisato v. Superior Court (1992) 2 Cal. 4th 978, 992, 9 Cal. Rptr. 2d 102, 831 P.2d 327* (substitution of gender neutral language and minor nonsubstantive grammatical change made by Proposition 114 to *Penal Code § 190.2* did not supersede substantive amendments to same provisions by Proposition 115, absent evidence of voter intent to adopt Proposition 114 as comprehensive regulatory scheme)].

Legal Topics:

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§ 302.14 Initiative and Referendum Distinguished

Both the power of initiative and the power of referendum allow the voters of the state to bypass the law-making power of their elected legislative bodies. The difference between the two is as follows: the power of referendum is the right of the people to adopt or reject any act or measure thathas been passed by a legislative body and that, in most cases, would without action on the part of the electors become a law. Thus, the referendum process allows the voters to veto statutes and ordinances enacted by their elected legislative bodies before those laws become effective. Enactment is not a quality of the referendum. That is, referenda do not enact law and may not address certain subjects. In contrast, the power of initiative is the right of the electorate to legislate on any subject; that is, to enact laws [*Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 241, 253, 45 Cal. Rptr. 2d 207, 902 P2d 225* ; *Referendum Committee v. City of Hermosa Beach (1986) 184 Cal. App. 3d 152, 157-158, 229 Cal. Rptr. 51* ; *see City of Westminster v. County of Orange (1988) 204 Cal. App. 3d 623, 627, 251 Cal. Rptr. 511]* .

Unlike with the power of referendum, the California constitution does not limit the subject matter of direct legislation that may be proposed by initiative [*Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 253, 45 Cal. Rptr. 2d 207, 902 P.2d 225* ; for constitutional limitations concerning the power of referendum, see discussion under *§ 302.12[4]]*. Moreover, the repeal of an already effective ordinance is an exercise of the initiative power [*Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 242, 45 Cal. Rptr. 2d 207, 902 P.2d 225]* . To the extent that the initiative is the constitutional power of the electors to propose, adopt, or reject statutes, it is generally coextensive with the power of the Legislature to enact statutes [*Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 253, 45 Cal. Rptr. 2d 207, 902 P.2d 225]* .

Legal Topics:

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

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§ 302.15 Initiative and Referendum Procedure Summarized

Essentially, the procedure is the same whether the proceeding concerns initiative or referendum. There is a series of steps to be taken before an election is held; the proponents must complete the bulk of these and the rest is done by government officials.

At the state level, the first step is to submit the text of the proposed measure to the Attorney General, along with a request for preparation of a circulating title and summary of the proposed measure [*Elec. Code § 9001(a)*]. The Attorney General will prepare the circulating title and summary [*Elec. Code §§ 9004(a), 9006(a)*] and will send a copy, together with a copy of the text of the proposed measure, to the Legislature [*Elec. Code § 9007*]. A copy of the circulating title and summary will also be sent to the proponents [*Elec. Code §§ 9004(b), 9006(b)*], who must include the circulating title and summary in the petition [*Elec. Code §§ 9008, 9012*]. The appropriate committees of each house of the Legislature may hold public hearings on the subject of the proposed measure. However, the Legislature has no authority to alter the measure or prevent it from appearing on the ballot [*Elec. Code § 9007*].

At the local level, the first step is for the proponents of a countywide or citywide initiative measure to file, with the county or city elections official (1) notice of their intention to circulate the petition, and (2) a copy of the proposed measure with a request that the county counsel or city attorney prepare a ballot title for and a summary of the measure. The county counsel or city attorney will prepare the ballot title and summary, and the elections official will, in turn, transmit them to the proponents [*see Elec. Code §§ 9103, 9105, 9202, 9203*]. The proponents may, under certain statutorily specified conditions, initiate mandate proceedings to amend the ballot title, the summary, or both [*see Elec. Code §§ 9106, 9204*]. Once the ballot title and summary are obtained, and are acceptable to the proponents, the next step is for the proponents to give notice of their intention to circulate the petition [*see Elec. Code §§ 9103, 9202*].

After completing any prescribed preliminary steps, the proponents must solicit and obtain a certain minimum number of signatures on the petition and then file the petition with the appropriate elections official within a statutorily specified time. The numbers and time periods vary [*see Cal. Const., art. II, §§ 8(b), 9(b)*; *Elec. Code §§ 336, 9107 et seq., 9142, 9144, 9207, 9208, 9214, 9215, 9236, 9237, 9310, 9340, 9341*; *Gov. Code §§ 34452, 34459, 34460*].

The proponents of a state or local initiative or referendum measure may withdraw the measure at any time before filing the petition with the appropriate elections official if legislative approval of matters embraced in the measure has been secured as a result of good faith bargaining between competing interests [*Elec. Code § 9604(a)*]. Withdrawal of a state initiative or referendum measure is effective on receipt by the Secretary of State of a written notice of withdrawal signed by all proponents of the measure [*Elec. Code § 9604(b)*]. Withdrawal of a local measure is effective on receipt of the notice by the appropriate elections official [*Elec. Code § 9604(c)*].

Filing the petition is the last step required of the proponents. Thereafter, the appropriate elections official will examine the petition to determine how many "qualified" signatures it contains. If the petition is sufficient, then an election must be scheduled (unless, at a local level, the appropriate legislative body voluntarily takes the action desired by the proponents) [*see Elec. Code §§ 9030 et seq., 9113 et seq., 9144 et seq., 9210 et seq., 9239 et seq., 9243, 9310*; *see also Gov. Code §§ 34452, 34459-34461*]. At the local level, the county board of supervisors or the city council may, at its option and before adopting an initiative measure or holding an election, refer the measure to any city or county agency for a report on the impact of the measure on, among other things, the city's or county's general plan [*see Elec. Code §§ 9111, 9212*].

On certification of an initiative measure for the ballot, copies of the measure and its circulating title and summary are sent to the Senate and Assembly, in which case each house assigns the measure to its appropriate committees. These committees must then hold joint public hearings on the subject of the measure before the date on which it is to be voted on. However, the hearing cannot be held within 30 days before that date. This procedure does not authorize the Legislature to alter the initiative measure or prevent it from appearing on the ballot [*Elec. Code § 9034*].

Provision is made in the statutes for submission of arguments for and against initiative and referendum measures and for inclusion of the arguments in a voters' pamphlet [*see Elec. Code §§ 9060 et seq., 9160 et seq., 9280 et seq., 9295, 9315, 9317, 9380, 9502, 9509, 9600, 9601*].

Legal Topics:

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§ 302.16 Privacy Requirements

[1] Legislative Findings and Declarations

The legislature has expressly found and declared [Stats. 2002, ch. 959, § 1]:

- In the Internet age, an individual's voter registration information is in danger of being shared, sold, or borrowed for purposes outside of the strict limits of the law.

- There exists a need to provide greater security for information contained in voter files, which generally may be accessed from the offices of county elections officials, the office of the Secretary of State, commercial vendors, and campaign consultants.

Further, it is the intent of the legislature that a voter be fully informed of the permissible uses of personal information supplied by him/or for the purpose of completing a voter registration affidavit [*Elec. Code § 2157.1*].

[2] Printed Initiative Petition Requirements and Notices on Voter Registration Cards

In addition to other required contents of a petition or paper for any state or local initiative, the following notices must be placed prior to the portion for voter's signature, printed names, and residence address, in 12-point type:

- "THIS PETITION MAY BE CIRCULATED BY A PAID SIGNATURE GATHERER OR A VOLUNTEER. YOU HAVE THE RIGHT TO ASK." [*Elec. Code § 101*].

Many circulators of petitions provide voter registration cards alongside the petitions since only registered voters are allowed to sign the petitions [*see Elec. Code § 100*]. Voter registration cards must now contain [*Elec. Code § 2157(5), (6), (7)*]:

- In a type size and color of ink that is clearly distinguishable from surrounding text, a statement

identical or substantially similar to the following:

> "Certain voters facing life-threatening situations may qualify for confidential voter status. For more information, please contact the Secretary of State's Safe at Home program or visit the Secretary of State's Web site at www.ss.ca.gov." [**Publisher's Note:** Although the code section containing this prescribed language remains unchanged, the website referred to is now located at http://www.sos.ca.gov/.]

- In a type size and color of ink that is clearly distinguishable from surrounding text, a statement that the use of voter registration information for commercial purposes is a misdemeanor pursuant to *Elec. Code § 2194(a)*, and any suspected misuse shall be reported to the Secretary of State.

- A toll-free fraud hotline telephone number maintained by the Secretary of State that the public may use to report suspected fraudulent activity concerning misuse of voter registration information.

[3] Proponent Requirements and Declarations Before Circulating Initiative Petitions

The proponents of an initiative measure must ensure that any person, company, or other organization that is paid, or who volunteers, to solicit signatures to qualify the proposed measure for the ballot must receive instruction on the requirements and prohibitions imposed by state law with respect to circulation of the petition and signature gathering, with an emphasis on the prohibition on the use of signatures on an initiative petition for a purpose other than qualification of the proposed measure for the ballot [*Elec. Code § 9607*].

A proponent of an initiative measure must execute and submit, along with the request for a title and summary for the proposed measure, a signed statement that reads as follows [*Elec. Code § 9608(a)*]:

> I, _____, acknowledge that it is a misdemeanor under state law (*Section 18650 of the Elections Code*) to knowingly or willfully allow the signatures on an initiative petition to be used for any purpose other than qualification of the proposed measure for the ballot. I certify that I will not knowingly or willfully allow the signatures for this initiative to be used for any purpose other than qualification of the measure for the ballot.
>
> _____ (Signature of Proponent) Dated this _____ day of _____, 20_____

This certification must be kept on file by the agency authorized to prepare the title and summary for the proposed initiative measure for not less than eight months after the certification of the results of the election for which the measure qualified for, or if the measure, for any reason, is not submitted to the voters, eight months after the deadline for submission of the petition to the elections official [*Elec. Code § 9608(b)*]. Failure to comply with this section does not invalidate any signatures on a state or local initiative petition [*Elec. Code § 9608(c)*].

Prior to allowing a person to circulate an initiative petition for signatures, the person, company official, or other organizational officer who is in charge of signature gathering must execute and submit to the proponents, a signed statement that reads as follows [*Elec. Code § 9609(a)*]:

> I, _____, acknowledge that it is a misdemeanor under state law (*Section 18650 of the Elections Code*) to knowingly or willfully allow the signatures on an initiative petition to be used for any purpose other than qualification of the proposed measure for the ballot. I certify that I will not knowingly or willfully allow the signatures for this initiative to be used for any purpose other than qualification of the measure for the ballot.

_____ (Signature of Official) Dated this _____ day of _____, 20_____

This certification must be kept on file by the proponents of the proposed initiative measure for not less than eight months after the certification of the results of the election for which the measure qualified, or if the measure, for any reason, is not submitted to the voters, eight months after the deadline for submission of the petition to the elections official [*Elec. Code § 9609(b)*]. Failure to comply with this section does not invalidate any signatures on a state or local initiative petition [*Elec. Code § 9609(c)*].

Prior to soliciting signatures on an initiative petition, a circulator must execute and submit to the person, company official, or other organizational officer who is in charge of signature gathering a signed statement that reads as follows [*Elec. Code § 9610(a)*]:

> I, _____, acknowledge that it is a misdemeanor under state law (*Section 18650 of the Elections Code*) to knowingly or willfully allow the signatures on an initiative petition to be used for any purpose other than qualification of the proposed measure for the ballot. I certify that I will not knowingly or willfully allow the signatures for this initiative to be used for any purpose other than qualification of the measure for the ballot.
>
> _____ (Signature of Circulator)
> Dated this _____ day of _____, 20_____

This certification must be kept on file by the person, company official, or other organizational officer who is in charge of signature gathering for the proposed initiative measure for not less than eight months after the certification of the results of the election for which the measure qualified, or if the measure, for any reason, is not submitted to the voters, eight months after the deadline for submission of the petition to the elections official [*Elec. Code § 9610(b)*]. This requirement does not apply to unpaid circulators of state or local initiative petitions [*Elec. Code § 9610(c)*]. Failure to comply with this section does not invalidate any signatures on a state or local initiative petition [*Elec. Code § 9610(d)*].

[4] Statement Regarding Permissible Uses of Voter Registration Information

In order that a voter be fully informed of the permissible uses of personal information supplied by him or her for the purpose of completing a voter registration affidavit, local elections officials must post on any local elections official Web site relating to voter information, and the Secretary of State must print in the state ballot pamphlet and post on his or her Web site, a statement identical or substantially similar to the following [*Elec. Code § 2157.2*]:

> "Information on your voter registration affidavit will be used by elections officials to send you official information on the voting process, such as the location of your polling place and the issues and candidates that will appear on the ballot. Commercial use of voter registration information is prohibited by law and is a misdemeanor. Voter information may be provided to a candidate for office, a ballot measure committee, or other person for election, scholarly, journalistic, political, or governmental purposes, as determined by the Secretary of State. Driver's license and social security numbers, or your signature as shown on your voter registration card, cannot be released for these purposes. If you have any questions about the use of voter information or wish to report suspected misuse of such information, please call the Secretary of State's Voter Protection and Assistance Hotline.
>
> Certain voters facing life-threatening situations may qualify for confidential voter status. For more information, please contact the Secretary of State's Safe At Home program or visit the Secretary of State's Web site at www.ss.ca.gov." [**Publisher's Note:** Although the code section containing this prescribed language remains unchanged, the website referred to is now located at http://www.sos.ca.gov/.]

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[Reserved]

§§ 302.17[Reserved]

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§ 302.20 Construction of Initiatives

Even though the legislative power is firmly vested in the Legislature, under the state constitution the people have reserved to themselves the powers of initiative and referendum. The power of the initiative has been recognized as one of the most precious rights of the democratic process [*Kennedy Wholesale, Inc. v. State Bd. of Equalization (1991) 53 Cal. 3d 245, 250, 279 Cal. Rptr. 325, 806 P.2d 1360]* . Therefore, the initiative power, as well as a statute or ordinance enacted by initiative, is required to be liberally construed to promote the democratic process [*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal. 3d 208, 219, 149 Cal. Rptr. 239, 583 P.2d 1281* ; *Arvin Union School Dist. v. Ross (1985) 176 Cal. App. 3d 189, 198, 221 Cal. Rptr. 720* ; *see Proposition 103 Enforcement Project v. Quackenbush (1998) 64 Cal. App. 4th 1473, 1486, 76 Cal. Rptr. 2d 342* ; *National Paint & Coatings Assn. v. State of California (1997) 58 Cal. App. 4th 753, 760, 68 Cal. Rptr. 2d 360]* .

All presumptions favor the validity of initiative measures and mere doubts to validity are insufficient [*Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 253, 45 Cal. Rptr. 2d 207, 902 P.2d 225]* . Any reasonable doubts must be resolved in favor of the exercise of the initiative power [*Kennedy Wholesale, Inc. v. State Bd. of Equalization (1991) 53 Cal. 3d 245, 250, 279 Cal. Rptr. 325, 806 P.2d 1360* ; *Estate of Cirone (1984) 153 Cal. App. 3d 199, 205-206, 200 Cal. Rptr. 511* ; *see Proposition 103 Enforcement Project v. Quackenbush (1998) 64 Cal. App. 4th 1473, 1486, 76 Cal. Rptr. 2d 342]* . Such measures must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears [*Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 253, 45 Cal. Rptr. 2d 207, 902 P.2d 225]* . Thus, a court is required, whenever possible, to construe an initiative statute or ordinance to ensure its validity [*see, e.g.,* *Lesher Communications, Inc. v. City of Walnut Creek (1990) 52 Cal. 3d 531, 543, 277 Cal. Rptr. 1, 802 P.2d 317]* . Moreover, a court in an appropriate case may reform, that is, rewrite, an initiative statute to preserve it against invalidation under the Constitution when the court can say with confidence that (1) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the electorate, and (2) the electorate would have preferred the reformed construction to the statute's invalidation [*Kopp v. Fair Pol. Practices Com. (1995) 11 Cal. 4th 607, 615, 661-663, 670-671, 685, 47 Cal. Rptr. 2d 108, 905 P.2d 1248* (court declined to reform portions of Proposition 73)].

Apart from the above, statutes and ordinances adopted by initiative are subject to the same constitutional limitations and rules of construction as are other statutes [*Marblehead v. City of San Clemente (1991) 226 Cal. App. 3d 1504, 1508, 277 Cal. Rptr. 550* ; *see* *People v. Rizo (2000) 22 Cal. 4th 681, 685, 94 Cal. Rptr. 2d 375, 996 P.2d 27* (in interpreting voter initiative, appellate court applies same principles that govern statutory construction); *Hotel Employees & Restaurant Employees Internat. Union v. Davis (1999) 21 Cal. 4th 585, 602, 88 Cal.Rptr. 2d 56, 981 P.2d 990* (statutory initiative is subject to same state and federal constitutional limitations as are Legislature and statutes which it enacts); *see also* *Rosasco v. Commission on Judicial Performance (2000) 82 Cal. App. 4th 315, 321-326, 98 Cal. Rptr. 2d 111* (prospective application of initiative); *Yoshioka v. Superior Court (1997) 58 Cal. App. 4th 972, 979-992, 68 Cal. Rptr. 2d 553* (retroactive and prospective application of initiative)]. For example, in the interpretation of initiative measures, legislative intent is tantamount to electoral intent, so that courts are required to construe them in such a way as to give effect to the intent of electorate [*see* *Arvin Union School Dist. v. Ross (1985) 176 Cal. App. 3d 189, 198, 221 Cal. Rptr. 720]* . Absent ambiguity, it is presumed that voters intend the meaning apparent on the face of an initiative measure. Therefore, a court may not add to or rewrite an initiative statute or ordinance to conform to an assumed intent that is not apparent in its language [*Lesher Communications, Inc. v. City of Walnut Creek (1990) 52 Cal. 3d 531, 543, 277 Cal. Rptr. 1, 802 P.2d 317]* . Moreover, as a general rule, it is not the judiciary's function to reweigh findings of legislative fact underlying a legislative enactment and to the extent an initiative measure contains findings made by the people as electors that actually state legislative facts, a court will follow the general rule of deference; however, to the extent such findings do not consist of legislative fact, but of statutory or constitutional interpretation, the general rule of deference is not implicated [*Hotel Employees & Restaurant Employees Internat. Union v. Davis (1999) 21 Cal. 4th 585, 610, 88 Cal.Rptr. 2d 56, 981 P.2d 990]* . Similarly, in the construction of constitutional provisions enacted by initiative, the intent of the electorate is of paramount consideration. Therefore, a court is required to give words their ordinary meanings in determining the proper interpretation of the provisions [*Davis v. City of Berkeley (1990) 51 Cal. 3d 227, 234, 272 Cal. Rptr. 139, 794 P.2d 897]* . For discussion of the general rules of statutory interpretation including retroactive application, see Ch. 531, *Statutes and Ordinances* .

There is a general presumption in law that both the Legislature and the electorate by the initiative process are deemed to be aware of laws in effect at the time they enact new laws and are conclusively presumed to have enacted the new laws in light of existing laws having a direct bearing on them. However, unlike cases in which the lawmakers can be presumed to borrow from existing law to supply omitted meaning to later enactments, the presumption that one legislated with full knowledge of existing law is not conclusive, and not even helpful, in cases when a later enactment directly conflicts with an earlier law [*McLaughlin v. State Bd. of Education (1999) 75 Cal. App. 4th 196, 212-213, 89 Cal. Rptr. 2d 295]* . There are important limitations to the initiative process, one of which is the absence of rigorous legislative review to ensure existing initiative's provisions are consistent with existing laws. Thus, the initiative process itself, particularly when viewed in light of the number of existing laws which may be affected by any new law and which may require amendment or repeal to avoid creating conflicts, makes conflicts between the new law and existing laws virtually inevitable [*McLaughlin v. State Bd. of Education (1999) 75 Cal. App. 4th 196, 212-216, 89 Cal. Rptr. 2d 295]* . Therefore, when an initiative measure conflicts with an earlier law, the court will look to the rules of statutory interpretation that can be brought to bear to resolve the conflict. Courts have developed several applicable interpretative paradigms by which a later-enacted law in conflict with an existing statute may be given effect [*McLaughlin v. State Bd. of Education (1999) 75 Cal. App. 4th 196, 219-224, 89 Cal. Rptr. 2d 295* (new chapter in California's Education Code created by Proposition 227, the "English Language in Public Schools" initiative statute held to amend *Educ. Code § 33050* by implication; several rules discussed in case noted in § 308.82[6][c]; *see also* Ch. 531, *Statutes and Ordinances*)].

Statutes, ordinances, and constitutional provisions enacted by initiative have unique construction aids not available in the construction of statutes and ordinances enacted through the representative legislative process. For example, ballot arguments are an available and proper aid in construing statutes, ordinances, and constitutional provisions enacted by initiative [*see, e.g.,* *Davis v. City of Berkeley (1990) 51 Cal. 3d 227, 237 n.4, 272 Cal. Rptr. 139, 794 P.2d 897* (construction of constitutional provisions); *Long Beach City Employees Ass'n v. City of Long Beach (1986) 41 Cal. 3d 937, 943 n.5, 227 Cal. Rptr. 90, 719 P.2d 660* (construction of statutes and ordinances)]. Thus, when such statutes,

ordinances, or constitutional provisions are subject to varying interpretations, evidence of their purpose may be drawn from many sources including the historical context of the statutes, ordinances, or constitutional provisions involved, the ballot arguments favoring the measure, and the general statement of purpose found in the initiative [*see Amwest Surety Ins. Co. v. Wilson (1995) 11 Cal. 4th 1243, 1256-1257, 48 Cal. Rptr. 2d 12, 906 P.2d 1112* ; *see also People v. Rizo (2000) 22 Cal. 4th 681, 685, 94 Cal. Rptr. 2d 375, 996 P.2d 27* (when language is ambiguous, appellate court refers to other indicia of voters' intent, particularly analysis and arguments contained in official ballot pamphlet); *McLaughlin v. State Bd. of Education (1999) 75 Cal. App. 4th 196, 215-216, 89 Cal. Rptr. 2d 295* (when statutory language may appear to be unambiguous yet latent ambiguity exists, courts must go behind literal language and analyze intent of law using customary rules of statutory construction or legislative history for guidance; this may include reference to ballot materials in case of initiatives to discern what average voter would understand to be intent of law on which he or she was voting); *Professional Engineers v. Wilson (1998) 61 Cal. App. 4th 1013, 1020, 72 Cal. Rptr.2d 111* (when meaning of words not clear, court may use ballot analysis and arguments presented to voters); *Citizens for Responsible Government v. City of Albany (1997) 56 Cal. App. 4th 1199, 1209 n.1, 66 Cal. Rptr. 2d 102* (courts may consider analysis and arguments in official ballot pamphlet)]. Ballot titles and summaries are also proper aids in ascertaining the purpose, as well as the voters' intent and understanding, of initiative statutes and ordinances [*see, e.g., Lesher Communications, Inc. v. City of Walnut Creek (1990) 52 Cal. 3d 531, 541-543, 277 Cal. Rptr. 1, 802 P.2d 317* ; *Legislature v. Deukmejian (1983) 34 Cal. 3d 658, 673 n.14, 194 Cal. Rptr. 781, 669 P.2d 17* ; *Professional Engineers v. Wilson (1998) 61 Cal. App. 4th 1013, 1020, 72 Cal. Rptr.2d 111* (official summary)]. When the language is clear and unambiguous, however, there is no need for construction, nor is it necessary to resort to indicia of the intent of the voters [*Jahr v. Casebeer (1999) 70 Cal. App. 4th 1250, 1254, 83 Cal. Rptr. 2d 172* ; *see McLaughlin v. State Bd. of Education (1999) 75 Cal. App. 4th 196, 215, 89 Cal. Rptr. 2d 295* (resort to legislative materials or other external sources is unnecessary)]. However, the court will not presume that the lawmakers intended the literal construction of a law if that construction would result in absurd consequences. In those circumstances, the court must consider extrinsic evidence of the voters intent despite the unambiguous language of the enactment [*Woo v. Superior Court (2000) 83 Cal. App. 4th 967, 975, 100 Cal. Rptr. 2d 156]* .

It should be noted that under *Cal. Const., art II, § 10(c)* the Legislature may not amend or repeal an initiative statute without voter approval unless the initiative statute permits amendment or repeal without their approval. It is common for an initiative measure to include a provision authorizing the Legislature to amend the initiative without voter approval only if the amendment furthers the purpose of the initiative [*Amwest Surety Ins. Co. v. Wilson (1995) 11 Cal. 4th 1243, 1251, 48 Cal. Rptr. 2d 12, 906 P.2d 1112]* . When such a provision exists and the Legislature thereafter amends the initiative statute without voter approval, construction issues can arise [*see, e.g., Amwest Surety Ins. Co. v. Wilson (1995) 11 Cal. 4th 1243, 1256-1265, 48 Cal. Rptr. 2d 12, 906 P.2d 1112* (*Ins. Code § 1861.135*, subsequently repealed in 2004, held invalid because it does not further purposes of Proposition 103); *see also People v. Snyder (2000) 22 Cal. 4th 304, 311, 92 Cal. Rptr. 2d 734, 992 P. 2d 1102* (construing *Gov. Code §§ 83116.5* and *91015*)]. For discussion of amendment or repeal of an initiative statute or ordinance, see *§§ 302.29*, 302.30.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 302.21 State Measure

[1] Commencement of Initiative Petition Process

An initiative proceeding for enactment, amendment, or repeal of a state statute or adoption of an amendment to the state constitution may be begun at any time.

The Secretary of State is required to prepare and provide to any person, on request, a pamphlet describing the procedures and requirements for preparing and circulating a statewide initiative measure and for filing sections of the petition, and describing the procedure used in determining and verifying the number of qualified voters who have signed the petition [*Elec. Code § 9018*].

[2] Circulating Title and Summary

[a] Request for Circulating Title and Summary for State Initiative Measure

Prior to the circulation of any initiative petition for signatures, the text of the proposed measure must be submitted to the Attorney General with a written request that a circulating title and summary of the chief purpose and points of the proposed measure be prepared [*see Cal. Const., art II, § 10(d)*; *Costa v. Superior Court (2006) 37 Cal. 4th 986, 1009, 39 Cal. Rptr. 3d 470]* . The electors presenting the request are the "proponents" [*Elec. Code § 342*]. The Attorney General must preserve the written request until after the next general election [*Elec. Code § 9001(a)*].

Each and every proponent of any proposed initiative measure must, at the time of submitting the text of the proposed measure, provide both (1) an original signed certification stating, "I, [*name*], declare under penalty of perjury that I am a citizen of the United States, 18 years of age or older, and a resident of [*county*], California," and (2) public contact information [*Elec. Code § 9001(b)*].

The proponents of any initiative measure, at the time of submitting the text of the proposed measure to the Attorney General, must pay a fee, which will be placed in a trust fund in the office of the Treasurer and will be refunded to the

proponents if the measure qualifies for the ballot within two years from the date the summary is furnished to the proponents. If the measure does not qualify within that period, the fee will be paid into the General Fund of the state [*Elec. Code § 9001(c)*].

All proposed initiative measures must be submitted to the Attorney General's Initiative Coordinator, located in the Sacramento office, by U.S. Postal Service mail or alternative mail service or personal delivery. Only printed documents will be accepted; facsimile or e-mail delivery will not be accepted [*Elec. Code § 9001(d)*].

The Attorney General's office will not treat a request for a circulating title and summary as submitted until the foregoing requirements are met [*Elec. Code § 9001(e)*].

[b] Preparation of Circulating Title and Summary for State Initiative Measure

On receipt of the text of a proposed initiative measure, the Attorney General must prepare a circulating title and summary of the chief purpose and points of the proposed measure [*see Elec. Code § 303.5(c)(1)(A)*]. The circulating title and summary must not exceed a total of 100 words [*see Elec. Code § 303.5(c)(2)*]. The Attorney General must also provide a unique numeric identifier for each proposed initiative measure. The circulating title and summary must be prepared in the manner provided for the preparation of ballot titles and summaries in *Elec. Code § 9050 et seq.*, the provisions of which, in regard to the preparation, filing, and settlement of ballot titles and summaries, are applicable to the circulating title and summary [*Elec. Code § 9004(a)*].

The title and summary need not contain a complete catalogue of all the measure's provisions. They must instead summarize its chief purposes and points [*see Cal. Const., art. II, § 10(d)*; *Elec. Code § 9004(a)*]. The title and summary prepared by the Attorney General is, as a general rule, presumed to be accurate [*see Lungren v. Superior Court (1996) 48 Cal. App. 4th 435, 439, 55 Cal. Rptr. 2d 690]* , and substantial compliance with the chief-purpose-and-points requirement is all that is required [*see Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal. 3d 208, 243, 149 Cal. Rptr. 239, 583 P.2d 1281* ; *Lungren v. Superior Court (1996) 48 Cal. App. 4th 435, 439-440, 55 Cal. Rptr. 2d 690* ; *Brennan v. Board of Supervisors (1981) 125 Cal. App. 3d 87, 96, 177 Cal. Rptr. 677]* .

The Attorney General must provide a copy of the circulating title and summary and its unique numeric identifier to the proponents and to the Secretary of State within 15 days after receipt of the fiscal estimate or opinion prepared by the Department of Finance and the Joint Legislative Budget Committee pursuant to *Elec. Code § 9005*. The date the copy is delivered or mailed to the proponents is the "official summary date" [*Elec. Code § 9004(b)*]. (A petition with signatures on a proposed initiative measure must be filed with the county elections official not later than 150 days from the official summary date [*Elec. Code § 9014*; *see § 302.21[4][c]*].)

On receipt of the circulating title and summary from the Attorney General, the Secretary of State must, within one business day, (1) notify the proponents and county elections official of each county of the official summary date and (2) provide a copy of the circulating title and summary to each county elections official. This notification must also include a complete schedule showing the maximum filing deadline, and the certification deadline by the counties to the Secretary of State [*Elec. Code § 9004(c)*].

[c] Compelling Preparation of Circulating Title and Summary

The duty of the Attorney General to prepare a title and summary for a proposed state initiative measure is a ministerial one, and mandate will lie to compel him or her to prepare them when the proposal is in proper form and complies with statutory and constitutional procedural requirements [*see Schmitz v. Younger (1978) 21 Cal. 3d 90, 92-93, 145 Cal. Rptr. 517, 577 P.2d 652* ; *Warner v. Kenny (1946) 27 Cal. 2d 627, 630-631, 165 P.2d 889]* .

[d] Fiscal Estimate or Opinion by Department of Finance and Joint Legislative Budget Committee

The Attorney General, in preparing a circulating title and summary for a proposed initiative measure, must include in the circulating title and summary either an estimate of the amount of any increase or decrease in revenues or costs to the state or local government or an opinion as to whether or not a substantial net change in state or local finances would result if the proposed initiative is adopted [*Elec. Code § 9005(a)*].

The estimate must be made jointly by the Department of Finance and the Joint Legislative Budget Committee, who must deliver the estimate to the Attorney General so that he or she may include the estimate in the circulating title and summary prepared by him or her [*Elec. Code § 9005(b)*]. The estimate must be delivered to the Attorney General within 25 working days from the date of receipt of the final version of the proposed initiative measure from the Attorney General, unless, in the opinion of both the Department of Finance and the Joint Legislative Budget Committee, a reasonable estimate of the net impact of the proposed initiative measure cannot be prepared within the 25-day period. In the latter case, the Department of Finance and the Joint Legislative Budget Committee must, within the 25-day period, give the Attorney General their opinion as to whether or not a substantial net change in state or local finances would result if the proposed initiative measure is adopted [*Elec. Code § 9005(c)*].

Any statement of fiscal impact prepared by the Legislative Analyst pursuant to *Gov. Code § 12172(b)* (requiring the Secretary of State to obtain a statement of fiscal impact from the Legislative Analyst, on the request of the proponents of an initiative measure) may be used by the Department of Finance and the Joint Legislative Budget Committee in the preparation of the fiscal estimate or the opinion [*Elec. Code § 9005(d)*].

The 100-word limit for the circulating title and summary prepared by the Attorney General [*see Elec. Code § 9004(a)*; § 302.21[2][b]] is exclusive of the financial estimate or opinion, which is required in addition to (not as part of) the title and summary [*Elec. Code § 303.5(c)(2); Holmes v. Jones (2000) 83 Cal. App. 4th 882, 888, 890, 100 Cal. Rptr. 2d 138]* .

[e] Copy of Title and Summary to Secretary of State; Amendment of Proposal

The Attorney General must provide a copy of the title and summary to the Secretary of State within 15 days after receipt of the final version of a proposed initiative measure, or, if a fiscal estimate or opinion is to be included, then within 15 days after receipt of the fiscal estimate or opinion prepared by the Department of Finance and the Joint Legislative Budget Committee pursuant to *Elec. Code § 9005* [*Elec. Code § 9002(a)*].

If, during that 15-day period, the proponents of the proposed initiative measure submit amendments, other than technical and nonsubstantive amendments, to the final version of the measure, the Attorney General must provide a copy of the title and summary to the Secretary of State within 15 days after receipt of the amendments [*Elec. Code § 9002(a)*]. An amendment must be submitted with a signed request by all of the proponents to prepare a circulating title and summary using the amended language [*Elec. Code § 9002(b)*]. The amendment must be submitted to the Attorney General's Initiative Coordinator, located in the Sacramento office, by U.S. Postal Service mail or alternative mail service or personal delivery. Only printed documents will be accepted; facsimile or e-mail delivery will not be accepted [*Elec. Code § 9002(c)*].

[f] State Initiative Measure Proposed by Attorney General

In the event that the Attorney General is a proponent of a proposed measure, the circulating title and summary of the chief purpose and points of the proposed measure, including an estimate or opinion on the financial impact of the measure, must be prepared by the Legislative Counsel, and the other duties of the Attorney General specified in *Elec. Code § 9001 et seq.* with respect to the circulating title and ballot title and summary and an estimate of the financial effect of the measure must be performed by the Legislative Counsel [*Elec. Code § 9003*].

[3] Legislative Hearings on Proposed State Initiative Measure

Immediately on the preparation of the circulating title and summary of a proposed initiative measure, the Attorney General must forthwith transmit copies of the text of the measure and the circulating title and summary to the Senate and the Assembly. The appropriate committees of each house may hold public hearings on the subject of the measure. However, the Legislature has no authority to alter the measure or prevent it from appearing on the ballot [*Elec. Code § 9007*].

[4] State Initiative Petition

[a] Format of Petition for State Initiative Measure

Any petition for a proposed initiative measure may be presented in sections, but each section must contain a full and correct copy of the circulating title and summary and text of the proposed measure. The text of the proposed measure must be printed in type not smaller than 8 points [*Elec. Code § 9012*].

A space at least one inch wide shall be left blank across the top of each page of every initiative petition and after the name of each voter who has signed the petition for the use of the county elections official in verifying the petition [*Elec. Code § 9013*].

Every proposed initiative measure, prior to circulation, must have placed across the top of the petition, in 12-point or larger roman boldface type, the following [*Elec. Code § 9008*]:

- The circulating title and summary prepared by the Attorney General, which is to be (1) placed on each section of the petition preceding the text of the measure and (2) preceded there by the following statement: "Initiative measure to be submitted directly to the voters," and (3) placed on each page of the petition on which signatures are to appear; and

- The Attorney General's unique numeric identifier, which is to be placed before the circulating title and summary on each page where the circulating title and summary appears.

The purpose of particularly requiring the title and summary to be on the petition is to inform the voters of exactly what is proposed to be put on the ballot and thus to protect voters from being misled, by disclosing the chief purposes and points of the proposed measure [*Lesher Communications, Inc. v. City of Walnut Creek (1990) 52 Cal. 3d 531, 542, 277 Cal. Rptr. 1, 802 P.2d 317* ; *see City of Irvine v. Irvine Citizens Against Overdevelopment (1994) 25 Cal. App. 4th 868, 878, 30 Cal. Rptr. 2d 797]* .

The heading of an initiative petition must be in substantially the following form [*Elec. Code § 9009*]:Initiative Measure to Be Submitted Directly to the Voters

Initiative Measure to Be Submitted Directly to the Voters

The Attorney General of California has prepared the following circulating title and summary of the chief purpose and points of the proposed measure:

[*Here set forth the unique numeric identifier provided by the Attorney General and circulating title and summary prepared by the Attorney General.*]

To the Honorable Secretary of State of California

We, the undersigned, registered, qualified voters of California, residents of _____ County [*or* City and County], hereby propose amendments to the Constitution of California [*or* the _____ Code, relating to _____ ,] and petition the Secretary of State to submit the same to the voters of California for their adoption or rejection at the next succeeding general election or at any special statewide election held prior to that general election or as otherwise provided by law. The proposed constitutional [*or* statutory] amendments [*full title and text of the measure*] read as follows:

Specified notices in 12-point type must be printed on the petition regarding paid signature gatherers and signature privacy rights [*Elec. Code § 101*]. For the text of these notices and discussion of other privacy rights, see *§ 302.16[2]*.

[b] Circulation of State Initiative Petition

A petition for a proposed initiative measure may not be circulated for signatures before the official summary date [*Elec. Code § 9014*]. The official summary date is the date a circulating title and summary of a proposed initiative measure is delivered or mailed by the Attorney General to the proponents of the proposed measure [*Elec. Code §§ 336, 9004(b)*; *see § 302.21[2][b]*].

Prior to the circulation of a petition, the proponents must:

- Ensure that all signature gatherers receive instruction on the requirements and prohibitions of state law, with an emphasis on prohibited use of signatures [*Elec. Code § 9607*];

- Submit a signed statement to the state acknowledging criminal penalties for misuse of signatures and certification that the signatures will not be misused [*Elec. Code § 9608(a)*];

- Have the organizational officer in charge of signature-gathering sign a statement acknowledging criminal penalties for misuse of signatures and certification that the signatures will not be misused [*Elec. Code § 9609(a)*]; and

- Have the all circulators sign a statement acknowledging criminal penalties for misuse of signatures and certification that the signatures will not be misused [*Elec. Code § 9610(a)*].

For the text of the required statements, file retention periods, and other privacy requirements, see *§ 302.16[3]*.

The petition may be circulated in sections [*see Elec. Code § 9012*] simultaneously in some or all of the several counties, which is the usual practice. For discussion of the requirement that title, summary, and text appear on each section, see *§ 302.21[4][a]*].

A person who is a voter or who is qualified to register to vote in California may circulate the petition anywhere within the state. Each section of the petition must bear the name of a county or city and county, and only qualified registered voters of that county or city and county may sign that section [*Elec. Code § 9021*].

Slight discrepancies between the version submitted to the Attorney General [*see § 302.21[2][a]*] and the version circulated for signature may be permissible if the discrepancies do not mislead the public or otherwise frustrate or undermine the purposes underlying any of the applicable constitutional or statutory provisions or threaten the integrity of the electoral process [*Costa v. Superior Court (2006) 37 Cal. 4th 986, 1028, 39 Cal. Rptr. 3d 470* ; *cf. MHC Financing Limited Partnership Two v. City of Santee (2005) 125 Cal. App. 4th 1372, 1389, 23 Cal. Rptr. 3d 622* (discussion of other defects)].

Each section of the petition must have attached to it the declaration of the person soliciting the signatures, setting forth the information required by *Elec. Code § 104* [*Elec. Code § 9022(a)*]. The circulator must certify to the content of the declaration and meet other execution requirements [*Elec. Code § 9022(b)*]. The declaration probably need not be attached until after circulation, but it must be attached before filing, of the petition [*see Elec. Code § 104*]. The declaration has evidentiary effect as specified in *Elec. Code § 9022(b)*.

In the case of a statute proposed to be enacted, amended, or repealed by initiative petition, the petition must be signed by a number of electors equal to at least 5 percent of the votes for all candidates for Governor at the last preceding gubernatorial election. In the case of a constitutional amendment proposed by initiative petition, the petition must be signed by a number of electors equal to at least 8 percent of the votes for all candidates for Governor at the last preceding gubernatorial election [*Cal. Const., art. II, § 8(b)*; *see Elec. Code § 321* (elector defined)].

[c] Filing of State Initiative Petition

Officers required by law to receive or file in their offices any initiative petition must not receive or file any initiative petition not in conformity with *Elec. Code § 9001 et seq.* [*Elec. Code § 9015*]. A petition with signatures on a proposed initiative measure must be filed with the county elections official not later than 150 days from the official summary date, and no county elections official may accept a petition on the proposed initiative measure after that period [*Elec. Code § 9014*].

The state constitution requires the petition to be presented to the Secretary of State [*see Cal. Const., art. II, § 8(b)*]. Presentation is accomplished by a series of steps [*see Elec. Code §§ 9030-9033*] that begins with the filing of the sections of the petition with the several county elections officials; all sections that were circulated in a given county are filed all at once with the elections official of that county. Once filed, no petition section may be amended except by order of a court of competent jurisdiction [*Elec. Code § 9030(a)*]. Filings may occur in separate counties at different times, but all sections of the petition that the proponents wish to file must be filed with the appropriate county elections officials not later than 150 days from the official summary date [*Elec. Code § 9014*]. The official summary date is discussed in *§ 302.21[2][b]*.

It is not clear whether the 150-day period begins with the official summary date or with the following day. Rules of construction would support either view; therefore, the safer course for the proponents is to consider that the period begins with the official summary date. The period ends on the 150th day thereafter, counting consecutively every day. In a leap year [*see Gov. Code § 6802*], February 29th is considered a separate day, and is to be counted, if it falls in the 150-day period [*see Sanguinetti v. Sanguinetti (1937) 9 Cal. 2d 95, 97-98, 69 P.2d 845]* . If the 150th day is a holiday [*see Gov. Code § 6700 et seq.*] or for another reason is a day when the county elections official's office is not open for business, the last day for filing is the next preceding day when the office is open, since the statute requires filing "not later than" the 150th day and specifically enjoins elections officials from accepting any petition after expiration of the 150-day period [*see Elec. Code § 9014*; *see also Steele v. Bartlett (1941) 18 Cal. 2d 573, 574, 116 P.2d 780]* . If the election official's office is actually open on the last day for filing, at a time when the office might lawfully be closed, and the petition sections are then presented for filing, the elections official must accept them [*see Cosgriff v. Board of Election Comm'rs (1907) 151 Cal. 407, 410, 91 P. 98]* .

[5] State Ballot Pamphlet

[a] Preparation

The Secretary of State is required to prepare a state ballot pamphlet [*Elec. Code § 9081*]. Provisions relating to its content and other requirements are contained in *Elec. Code § 9080 et seq. Elec. Code §§ 9084-9093*, inclusive, are a restatement of and are to be construed in conformity with *Gov. Code §§ 88001-88007*, inclusive [*Elec. Code § 9080*].

The ballot pamphlet must contain several items concerning each ballot initiative measure, including the official summary prepared by the Attorney General [*Elec. Code § 9086*; *see Lungren v. Superior Court (1996) 48 Cal. App. 4th 435, 439, 55 Cal. Rptr. 2d 690]* .

[b] Objection to Ballot Pamphlet

Under *Elec. Code § 9092*, the Secretary of State, not less than 20 days before he or she submits the copy of the ballot pamphlet to the state printer, must make the copy available for public examination. Any elector may seek a writ of mandate requiring any copy to be amended or deleted from the ballot pamphlet. A writ of mandate will only issue on clear and convincing proof that the copy in question is false, misleading, or inconsistent with the requirements of the Election Code or *Gov. Code §§ 88000-88007*, and that issuance of the writ will not substantially interfere with the printing and distribution of the ballot pamphlet as required by law [*Elec. Code § 9092*; *see Gov. Code § 88006*; *Lungren v. Superior Court (1996) 48 Cal. App. 4th 435, 439, 55 Cal. Rptr. 2d 690]* .

Venue for a proceeding under *Elec. Code § 9092* is exclusively in Sacramento County. The Secretary of State must be named as a respondent and the State Printer and the person or official who authored the copy in question must be named as real parties in interest. If the Secretary of State initiates the proceeding, the State Printer must be named as a respondent [*Elec. Code § 9092*].

Thus, for example, in *Lungren v. Superior Court (1996) 48 Cal. App. 4th 435, 439, 55 Cal. Rptr. 2d 690* , opponents of Proposition 209 asserted the ballot title and ballot label [*see Elec. Code § 303* (formerly section 13281)] provided by the Attorney General were misleading in that they failed to describe Proposition 209's true purpose, which they argued was to prohibit affirmative action by state and local government. The superior court entered judgment commanding the Attorney General to revise the ballot title and ballot label to reflect that the chief purpose of the measure is to prohibit affirmative action programs by public entities that are inconsistent with the prohibition in the measure. The court of appeal, however, issued a peremptory writ of mandate directing the superior court to vacate its judgment, holding that by essentially repeating the operative language of Proposition 209 the Attorney General complied with the mandate of Elec. Code § 9051 and former section 9052 that the Attorney General provide the electorate with a true and impartial statement of the purpose of the measure. The superior court was not authorized to require more [*Lungren v. Superior Court (1996) 48 Cal. App. 4th 435, 443, 55 Cal. Rptr. 2d 690*].

[6] Submission of State Initiative Measure to Voters

If the measure qualifies for the ballot, it must be submitted to the voters at the next general election held at least 131 days after the measure qualifies. Alternatively, the measure may be submitted to the voters at a special statewide election held before the general election at which it would otherwise be required to appear on the ballot, provided the special election is held at least 131 days after the measure qualifies [*Cal. Const., art. II, § 8(c)*; *Elec. Code §§ 9016, 9017*; *see Elec. Code §§ 324, 356* ("general election" and "special election" defined); *see also Brosnahan v. Eu (1982) 31 Cal. 3d 1, 15 n.1, 181 Cal. Rptr. 100, 641 P.2d 200* (dissent noting that whether initiative measure may be presented at primary election, in view of constitutional and statutory requirement that it be presented at general election, has never been resolved by court)].

Legal Topics:

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California Forms of Pleading and Practice--Annotated

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Volume 25: Habeas Corpus thru Initiative, Referendum, and Recall-Chs. 292-302
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2. Initiative

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§ 302.22 County Ordinance Measure

[1] Commencement of Initiative Petition Process

An initiative proceeding for adoption of a county ordinance may be begun at any time.

[2] Filing of Notice of Intention to Circulate County Initiative Petition

Before the proponents may begin to circulate an initiative petition and solicit signatures on it, they must file with the county elections official a notice of their intention to circulate the petition. The notice of intention must be accompanied by the written text of the initiative and a request that a ballot title and summary be prepared [*Elec. Code § 9103(a)*]. The notice may include a printed statement stating the reason for the proposed petition [*Elec. Code § 9104*]. The notice must meet form and content requirements [*see Elec. Code § 9104*]. A signed statement acknowledging the privacy rights of the signatures to be gathered, and acknowledgment of criminal penalties for violation, also must accompany the request [*Elec. Code § 9608(a)*]. For a copy of the required statement and discussion of other privacy requirements, see *§ 302.16[3]*.

The purpose of the notice of intention and the optional statement of reasons is to give the signers of the petition notice of the purpose of the proposed initiative [*see Lesher Communications, Inc. v. City of Walnut Creek (1990) 52 Cal. 3d 531, 542, 277 Cal. Rptr. 1, 802 P.2d 317]* . Thispurpose is further facilitated by the requirements that the notice be published [*see § 302.22[4]*] and that it appear on the petition when the petition is circulated for signatures [*see § 302.22[5]*].

Any person filing a notice of intention with the county elections official must pay a fee. The amount of the fee is set by the board of supervisors but may not exceed a statutorily specified maximum. The fee is refunded to the filer if, within one year of the date of filing the notice, the county elections official certifies the sufficiency of the petition [*Elec. Code § 9103(b)*].

[3] County Initiative Ballot Title and Summary

[a] Preparation and Content Requirements

The county elections official must immediately transmit a copy of any proposed measure to the county counsel. Within 15 days after the proposed measure is filed, the county counsel must provide and return to the county elections official a ballot title and summary for the proposed measure. The ballot title may differ from any other title of the proposed measure and must express in 500 words or less the purpose of the proposed measure. In providing the ballot title, the county counsel must give a true and impartial statement of the purpose of the proposed measure in such language that the ballot title will be neither an argument nor likely to create prejudice, for or against the proposed measure [*Elec. Code § 9105(a)*].

As in the case of the notice of intention, the purpose of the required ballot title and summary is to give both petition signers and voters notice of the purpose of the proposed measure [*see Lesher Communications, Inc. v. City of Walnut Creek (1990) 52 Cal. 3d 531, 542, 277 Cal. Rptr. 1, 802 P.2d 317]* . This purpose is further facilitated by the requirements that the title and summary be published [*see Elec. Code § 9105(b)*, discussed in *§ 302.22[4]*] and that it appear on the petition as circulated [*see Elec. Code § 9108*, discussed in *§ 302.22[5]*].

The county elections official must furnish a copy of the ballot title and summary to the proponents of the proposed measure [*Elec. Code § 9105(b)*].

Because the initiative power is limited to the adoption or rejection of actual legislation, a proposed measure that did not contain any such legislation would be beyond the scope of the initiative power, and it would be proper for a county counsel to seek and be granted relief from the duty to prepare a ballot title and summary for such a measure [*see Widders v. Furchtenicht (2008) 167 Cal. App. 4th 769, 776 n.6, 785, 84 Cal. Rptr. 3d 428* (*Elec. Code § 9105(a)* prescribes same duties for county counsel that *Elec. Code § 9203(a)* prescribes for city attorney, in essentially identical words; city attorney was not required to prepare ballot titles and summaries for two proposed measures); *see also § 302.24[4][a]* (discussion of city attorney's duties respecting preparation of ballot title and summary)].

[b] Compelling Amendment of County Initiative Ballot Title or Summary

If the proponent of the ballot measure deems the ballot title or summary to be false, misleading, or inconsistent with the requirements of *Elec. Code § 9105* [*see* [a], *above*], he or she may, on receipt of a copy of the ballot title and summary prepared by the county counsel, seek a writ of mandate requiring the ballot title or summary to be amended [*see Elec. Code § 9106*].

After the county counsel has prepared the title and summary under *Elec. Code § 9105*, only a proponent of the initiative has standing during the prequalification phase to seek an order requiring the county counsel to amend that title and summary; a voter who opposes a proposed countywide initiative is unable to prevent proponents of the initiative from collecting the signatures needed to qualify it for the ballot based on a contention that the title and summary of the initiative prepared by a county counsel is not impartial or accurate [*Songstad v. Superior Court of Orange County (2001) 93 Cal. App. 4th 1202, 1208, 113 Cal. Rptr. 2d 729]* .

For a form of petition for a writ of mandate requiring the amendment of a ballot title or summary, see *§ 302.92*.

[4] Publication of County Initiative Notice of Intention and Ballot Title and Summary

The proponents must, before circulating the petition, publish the Notice of Intention and the ballot title and summary of the proposed measure in a newspaper of general circulation published in that county. They must then file proof of publication with the elections official [*Elec. Code § 9105(b)*].

[5] County Initiative Petition

[a] Contents

Specified notices in 12-point type must be printed on the petition regarding paid signature gatherers and signature privacy rights [*Elec. Code § 101*]. For the text of these notices and discussion of other privacy rights, see *§ 302.16[2]*.

The ballot title and summary prepared by the county counsel must appear on each section of the petition in accordance with the specifications of *Elec. Code §§ 9105(c)* and *9108*. The notice of intention must also appear on each section of the petition [*Elec. Code § 9108*]. The text of the measure must be printed in type no smaller than specified in Elec. Code § 9150(c) and the heading of the proposed measure must be in substantially the same form as that set forth in *Elec. Code § 9105(c)*.

An affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of the person circulating the petition must be attached to each section of the petition. It must be substantially in the same form as set forth in *Elec. Code § 104* [*Elec. Code § 9109*]. The affidavit probably need not be attached until after circulation, but before filing, of the petition [*see Elec. Code § 104*].

[b] Circulation of County Initiative Petition

Prior to the circulation of a petition, the proponent must:

- Ensure that all signature gatherers receive instruction on the requirements and prohibitions of state law, with an emphasis on prohibited use of signatures [*Elec. Code § 9607*].

- Submit a signed statement acknowledging criminal penalties for misuse of signatures and certification that the signatures will not be misused [*Elec. Code § 9608(a)*].

- Have the organizational officer in charge of signature gathering sign a statement acknowledging criminal penalties for misuse of signatures and certification that the signatures will not be misused [*Elec. Code § 9609(a)*].

- Have the all circulators sign a statement acknowledging criminal penalties for misuse of signatures and certification that the signatures will not be misused [*Elec. Code § 9610(a)*].

For the text of the required statements, file retention periods, and other privacy requirements, see *§ 302.16[3]*.

The proponents may begin circulating the petitions among the voters of the county for signatures by any registered voter of the county after publication of the title and summary prepared by the county counsel [*Elec. Code § 9108*]. The petition may be circulated in sections [*see Elec. Code §§ 9101, 9113*] simultaneously throughout the county, which is the usual practice.

The petition must be signed by a number of voters equal to at least 10 percent of the entire vote cast in the county for all candidates for Governor at the last preceding gubernatorial election [*see Elec. Code § 9118*]. A "voter" is any elector who is registered under the provisions of the Elections Code [*Elec. Code § 359*]. An "elector" is any person who is a United States citizen 18 years of age or older and a resident of an election precinct at least 15 days before an election [*Elec. Code § 321*]. The "last preceding gubernatorial election" is defined as the last gubernatorial election that precedes the publication of the notice of intention to circulate the initiative petition [*see Elec. Code §§ 9116, 9118*].

Signatures must be obtained and the petition presented to the county elections official for filing within 180 days from the date of receipt of the ballot title and summary, or after termination of any action for a writ of mandate to amend the ballot title, summary or both, and, if applicable, after receipt of an amended title, summary, or both, whichever occurs

later [*Elec. Code § 9110*].

[c] Filing of County Initiative Petition

The petition must be filed either by the proponents or by any person or persons authorized by the proponents in writing. All sections of the petition must be filed at one time, and any sections of the petition not so filed will be void for all purposes. Once filed, no petition section may be amended except by court order [*Elec. Code § 9113*].

A writ of mandate will lie to compel the county elections official to accept and process an initiative petition presented for filing, when all statutory and constitutional procedural and substantive requirements surrounding the petition have been met. For a form of petition for a writ of mandate ordering a county elections official to accept and process an initiative petition presented for filing, see *§ 302.91*.

Once the proponents have filed the petition, the county elections official has 30 days (excluding Saturdays, Sundays, and holidays) from the filing date within which to examine the petition and verify the signatures. If the petition is found insufficient, no further action is taken. However, the failure to secure sufficient signatures does not preclude the filing of a new petition on the same subject at a later date. If the petition is found sufficient, the elections official must certify the results of the examination to the board of supervisors at the next regular meeting of the board [*Elec. Code §§ 9114, 9115*].

[6] Submission of County Initiative Measure to Voters

If the measure qualifies for the ballot, and (1) the board of supervisors does not adopt the proposed ordinance without alteration at the regular meeting at which the certification of the petition is presented, or within 10 days after it is submitted, or (2) if a report under *Elec. Code § 9111* has been ordered at the regular meeting at the time certification of the petition is requested and the board of supervisors, when the report is presented to it, does not adopt the ordinance within 10 days, the measure must be submitted to the voters [*Elec. Code §§ 9116, 9118*]. The board of supervisors has a mandatory and ministerial duty to submit the measure to the voters under these circumstances, unless it has been directed to do otherwise on court order after a compelling showing that a proper case has been established for interfering with the initiative power [*Citizens Against a New Jail v. Board of Supervisors (1976) 63 Cal. App. 3d 559, 561, 134 Cal. Rptr. 36* (decided under former *Elec. Code § 3711*; *now see Elec. Code § 9118*)].

With regard to submitting the measure to the voters, both the type and timing of the election to be held are subject to the requirements and conditions of *Elec. Code §§ 1405, 9116, 9118*. Paramount among these conditions is the number of signatures on the petition [*see Elec. Code §§ 9116, 9118*].

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25-302 California Forms of Pleading and Practice--Annotated § 302.23

§ 302.23 County Charter Measure

Any proposal to enact, amend, or otherwise revise a county charter by initiative petition may be submitted to the board of supervisors. Any such proposal is subject to the provisions of *Elec. Code § 9100 et seq.*, which govern initiative proceedings for the adoption of county ordinances [*see § 302.22*]. Nothing in *Elec. Code § 9100 et seq.*, however, allows a board of supervisors to enact, amend, or otherwise revise a county charter without submitting the proposal to the voters [*Elec. Code § 9102*; *see also Cal. Const., art. XI, § 3(b), (c)* (amendment or repeal may be proposed by initiative; election to draft or revise may be required by initiative; discussed in *§ 302.25*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationInitiative & ReferendumGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsCharters

California Forms of Pleading and Practice--Annotated

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25-302 California Forms of Pleading and Practice--Annotated § 302.24

§ 302.24 City Ordinance Measure

[1] Application of Statutory Initiative Process

[a] To Charter City

Except as discussed in the next paragraph, the statutes governing initiative proceedings respecting city ordinances [*Elec. Code § 9200 et seq.*] do not apply to any cities with charters that provide for the direct initiation of ordinances by the voters [*Elec. Code § 9247*; *see Cal. Const., art. II, § 11*; *see also Cal. Const., art. XI, § 3* (authorization for city charters)].

The initiative process in charter cities with these kinds of provisions in their charters is governed by the city charter rather than by statute. However, a city may adopt the state provisions by incorporating them into its charter [*see Billig v. Voges (1990) 223 Cal. App. 3d 962, 965, 273 Cal. Rptr. 91]* .

[b] To Specified Ordinances in Charter or General Law City

Elec. Code § 9200 et seq. is also inapplicable to proceedings for the improvement of streets in or rights-of-way owned by cities, the opening or closing of streets, the changing of grades, or the performance of other work, all or some of the cost of which is to be borne by special assessments on real property [*Elec. Code § 9247*].

[2] Commencement of City Initiative Petition Process

An initiative proceeding for adoption of an ordinance in any incorporated, that is, general law, city [*see Elec. Code § 9200*] or in any charter city whose charter incorporates the pertinent state statutes [*see Billig v. Voges (1990) 223 Cal. App. 3d 962, 965, 273 Cal. Rptr. 91]* may be begun at any time.

[3] Filing of Notice of Intention to Circulate City Initiative Petition

Before the proponents may circulate an initiative petition and solicit signatures on it, they must file with the city elections official a notice of their intention to circulate the petition. The notice of intention must be accompanied by the written text of the initiative and may be accompanied by a written statement, not in excess of 500 words, setting forth the reasons for the proposed petition [*see Elec. Code § 9202(a)*].

The notice must be signed by at least one, but not more than three, proponents, and must be in substantially the same form as that set forth in *Elec. Code § 9202(a)*.

The purpose of the notice of intention is to give the petition signers and voters notice of the purpose of the proposed initiative measure [*Lesher Communications, Inc. v. City of Walnut Creek (1990) 52 Cal. 3d 531, 542, 277 Cal. Rptr. 1, 802 P.2d 317]* . This purpose is further facilitated by the requirements that the notice of intention be published or posted before circulation of the petition [*see Elec. Code § 9205*; *see also* [5], *below*] and that the notice appear on the petition when circulated [*see Elec. Code §§ 9203(b), 9207*; *see also* [6], *below*].

Any person filing a notice of intention with the city elections official must pay a fee. The amount of the fee is set by the legislative body of the city, but cannot exceed a statutory maximum. The fee is to be refunded to the filer if, within one year of the date of filing the notice of intent, the elections official certifies the sufficiency of the petition [*Elec. Code § 9202(b)*].

[4] City Initiative Ballot Title and Summary

[a] Request, Preparation, and Content Requirements

Before circulating the petition, the proponents must also file a request with the city elections official that a ballot title and summary of the measure be prepared by the city attorney. The request must be accompanied by the address of the person filing the proposed measure [*Elec. Code § 9203(a)*]. It is probably best to file this request at the same time the notice of intention is filed, because both this request and the notice require a copy of the measure to be filed with the elections official [*see Elec. Code §§ 9202(a), 9203(a)*]. On receipt of the request, the elections official must immediately transmit a copy of the proposed measure to the city attorney [*Elec. Code § 9203(a)*]. A signed statement acknowledging the privacy rights of the signatures to be gathered, and acknowledgment of criminal penalties for violation, also must accompany the request [*Elec. Code § 9608(a)*]. For a copy of the required statement and discussion of other privacy requirements, see *§ 302.16[3]*.

Within 15 days after the proposed measure is filed, the city attorney must provide, and return to the elections official, a ballot title for and summary of the proposed measure. The ballot title may differ from any other title of the proposed measure but must express, in 500 words or less, the purpose of the proposed measure. In providing the ballot title, the city attorney must give a true and impartial statement of the purpose of the proposed measure in such language that the ballot title is neither an argument, nor likely to create prejudice, for or against the proposed measure [*Elec. Code § 9203(a)*].

As in the case of the notice of intention, the purpose underlying the ballot title and summary requirement is to give notice to petition signers and voters of the purpose of the proposed measure [*Lesher Communications, Inc. v. City of Walnut Creek (1990) 52 Cal. 3d 531, 542, 277 Cal. Rptr. 1, 802 P.2d 317]* . This purpose is further facilitated by the requirements that the title and summary be published or posted prior to circulation of the petition [*see Elec. Code § 9205*; *see also § 302.24[5]*], and that they appear on the petition as circulated [*see Elec. Code §§ 9203(b), 9207*; *see also § 302.24[6]*].

The elections official must then furnish a copy of the ballot title and summary to the person filing the proposed measure [*Elec. Code § 9203(b)*].

The city attorney may conclude that the proposed measure does not in fact propose legislation and that, therefore, the proposed measure is outside the scope of the initiative power as conferred by the constitution. On this ground, the city attorney may sue for a declaratory judgment vindicating that conclusion and authorizing the city attorney to decline to prepare a ballot title and summary. As the duty to prepare a ballot title and summary is ministerial, the city attorney is obliged to perform that duty unless and until a court determines that the duty does not exist, on the ground of constitutional violation asserted by the city attorney or on some other ground. The statutory 15-day period for performing that duty [*Elec. Code § 9203(a)*] is not a deadline for filing the declaratory relief complaint; the action will be timely if commenced with reasonable promptness in the circumstances. In practice, as numerous cases have shown, a city attorney could instead simply arrogate the judicial function and refuse to prepare a ballot title and summary on the basis of asserted unconstitutionality, or on some other ground. The city attorney could then wait for the proponent to sue for a writ of mandate compelling the city attorney to prepare a ballot title and summary, and a successful defense could be based on the ground that was asserted for refusing to do it [*Widders v. Furchtenicht (2008) 167 Cal. App. 4th 769, 776-779, 785, 84 Cal. Rptr. 3d 428* (instead of proposing actual legislation to be enacted, two proposed measures merely stated policies and directed city council to enact unspecified laws pursuant to those policies; neither measure purported to amend or revise any element of city's general plan or municipal code; because initiative power is limited to adoption or rejection of actual legislation, and those proposed measures did not contain any such legislation, it was proper for city attorney to seek and be granted relief from duty to prepare ballot titles and summaries for those measures)].

[b] Compelling Amendment of City Initiative Ballot Title or Summary

If the proponent of the ballot measure deems the ballot title or summary to be false, misleading, or inconsistent with the requirements of *Elec. Code § 9203* [*see § 302.24[4][a]*], he or she may, on receipt of a copy of the ballot title and summary prepared by the city attorney, seek a writ of mandate requiring the ballot title or summary to be amended [*see Elec. Code § 9204*].

For a form of petition for a writ of mandate requiring the amendment of a ballot title or summary, see *§ 302.92*.

[5] Publication and Posting of City Initiative Notice of Intention, Ballot Title, and Summary

The notice, together with the title and summary of the proposed measure prepared by the city attorney, must be published or posted, or both, in accordance with the requirements of *Elec. Code § 9205* [*see Elec. Code § 9205*].

Substantial compliance with these publication and posting requirements is insufficient. The requirements must be strictly complied with prior to circulation of the petition [*Ibarra v. City of Carson (1989) 214 Cal. App. 3d 90, 95, 99-100, 262 Cal. Rptr. 485]* . The city elections official will not count signatures obtained before compliance for purposes of ballot qualification [*Ibarra v. City of Carson (1989) 214 Cal. App. 3d 90, 95, 262 Cal. Rptr. 485]* .

Within 10 days after the date of publication or posting, or both, the proponents must file with the city elections official a copy of the notice and ballot title and summary as published and/or posted [*Elec. Code § 9206*]. The copy must be accompanied by an affidavit of a representative of the newspaper in which the notice, title, and summary were published. If the notice, title, and summary were posted, the copy must be accompanied by the affidavit of a voter of the city. Each affidavit must certify to the fact of publication or posting. If the notice, title, and summary are both published and posted, two affidavits must be filed: one each from a representative of the newspaper of publication and a city voter, certifying, respectively, to the fact that the notice was published and posted [*Elec. Code § 9206*].

[6] City Initiative Petition

[a] Contents

Specified notices in 12-point type must be printed on the petition regarding paid signature gatherers and signature

privacy rights [*Elec. Code § 101*]. For the text of these notices and discussion of other privacy rights, see *§ 302.16[2]*.

Before circulation of the petition, the person proposing the measure must place the ballot title and summary prepared by the city attorney, as well as the notice of intention, on each section of the petition [*see Elec. Code §§ 9203(b), 9207*]. The ballot title must be located, and in type size, as specified in *Elec. Code § 9203(b)*. Similarly, the text of the measure must be set out in the required type size [*see Elec. Code §§ 9201, 9203(b)*]. A heading of the proposed measure must also appear in substantially the same form as that set forth in *Elec. Code § 9203(b)*.

The purpose of the full text requirement is to provide sufficient information so that registered voters can intelligently evaluate whether to sign the initiative petition and to avoid confusion [*Mervyn's v. Reyes (1998) 69 Cal. App. 4th 93, 99, 81 Cal. Rptr. 2d 148* (petition held invalid for violating full text requirement of *Elec. Code § 9201*)]. Referendum petitions are subject to similar requirements [*Mervyn's v. Reyes (1998) 69 Cal. App. 4th 93, 99, 81 Cal. Rptr. 2d 148* ; for discussion of the full text requirement concerning referendum, *see § 302.45[4][a]*].

Additionally, each section of the petition must have attached to it the declaration of the person soliciting the signatures. The declaration must be in substantially the same form as that set forth in *Elec. Code § 9022* [*see § 302.21[4][a]*]. The declaration must meet the additional and/or alternative content requirements of *Elec. Code § 9209* [*see Elec. Code § 9209*]. The declaration probably need not be attached until after circulation, but before filing, of the petition [*see Elec. Code §§ 104, 9022*].

A city elections official has a ministerial duty to place all initiative measures that comply with formal requirements on the ballot. On the other hand, a city elections official has a duty to reject a duly signed initiative petition that has been circulated without the notice of intention on any of the circulated petition sections [*Myers v. Patterson (1987) 196 Cal. App. 3d 130, 136-138, 241 Cal. Rptr. 751* (decided under former *Elec. Code § 4005* (*now see Elec. Code § 9207*); substantial compliance with requirement not established)].

Pursuant to *Elec. Code § 9201*, an initiative petition does not have to contain all the information an informed voter would want, only the text of the measure proposed to be enacted. Where passage of an initiative would affect a city's general plan, *Elec. Code § 9201* does not require the initiative petition to include the text of every plan, law, or ordinance the measure might affect [We Care-- *Santa Paula v. Herrera (2006) 139 Cal. App. 4th 387, 390-391, 42 Cal. Rptr. 3d 577]* .

[b] Circulation of City Initiative Petition

Prior to the circulation of a petition, the proponent must:

- Ensure that all signature gatherers receive instruction on the requirements and prohibitions of state law, with an emphasis on prohibited use of signatures [*Elec. Code § 9607*].

- Submit a signed statement acknowledging criminal penalties for misuse of signatures and certification that the signatures will not be misused [*Elec. Code § 9608(a)*].

- Have the organizational officer in charge of signature gathering sign a statement acknowledging criminal penalties for misuse of signatures and certification that the signatures will not be misused [*Elec. Code § 9609(a)*].

- Have the all circulators sign a statement acknowledging criminal penalties for misuse of signatures and certification that the signatures will not be misused [*Elec. Code § 9610(a)*].

For the text of the required statements, file retention periods, and other privacy requirements, see *§ 302.16[3]*.

The proponents may begin circulating the petitions among the voters of the city for signature by any registered voter of the city after publication and/or posting of the notice of intention, title, and summary [*Elec. Code § 9207*]. The petition may be circulated in sections [*see Elec. Code §§ 9201, 9208*] simultaneously throughout the city, which is the usual practice.

Except when a city charter otherwise provides [*see Cal. Const., art. II, § 11*; *Elec. Code § 9247*], and except when the governing statutes do not apply [*see Elec. Code § 9247*], an initiative petition that proposes the adoption of a city ordinance must be signed by at least 10 percent of the voters according to the last report of registration by the county elections official to the Secretary of State pursuant to *Elec. Code § 2187* (voter registration reports required to be submitted by county elections officials to Secretary of State), effective at the time of publication of the notice of intention to circulate the petition. In a city with 1,000 or fewer voters, the initiative petition will be sufficient if it is signed by 100 voters or 25 percent of the voters, whichever is less [*Elec. Code § 9215*; *see Elec. Code § 359* ("voter" defined)].

Signatures on petitions and sections of petitions must be secured, and the petition, together with all its sections, filed within 180 days from the date of receipt of the title and summary, or after termination of any action for a writ of mandate to amend the ballot title, summary or both, and, if applicable, after receipt of an amended title, summary, or both, whichever occurs later [*Elec. Code § 9208*].

[c] Filing of City Initiative Petition

The petition must be filed in the office of the elections official during normal posted office hours by the proponents or by any person or persons authorized in writing by the proponents. All sections of the petition must be filed at one time [*Elec. Code §§ 9208, 9210*]. If the petitions are not filed within the time permitted, they will be void for all purposes [*Elec. Code§ 9208*]. Once filed, a petition section may be amended only by court order [*see Elec. Code § 9210*].

[7] Submission of City Initiative Measure to Voters

If the measure qualifies for the ballot, and (1) the legislative body of the city does not adopt the proposed ordinance without alteration at the regular meeting at which the certification of the petition is presented, or within 10 days after it is submitted, or (2) if a report under *Elec. Code § 9212* has been ordered at the regular meeting at the time certification of the petition is requested and the legislative body, when the report is presented to it, does not adopt the ordinance within 10 days, the measure must be submitted to the voters [*Elec. Code §§ 9214, 9215*; *see Elec. Code § 9216*]. Mandate will lie to compel the city's legislative body to either adopt the proposed ordinance without alteration or submit it to the voters [*Blotter v. Farrell (1954) 42 Cal. 2d 804, 812-813, 270 P.2d 481]* .

With regard to submitting the measure to the voters, both the type and timing of the election to be held are subject to the requirements and conditions of *Elec. Code §§ 1405, 9214, 9215*, and *9218*. Paramount among these conditions is a specified minimum percentage of voters' signatures on the petition. [*see Elec. Code §§ 9214, 9215*].

[8] Use of Public Funds in Campaign

In the absence of clear and unmistakable language (in a pertinent constitutional provision, statute, charter provision, or ordinance) specifically authorizing a public entity to expend public funds for campaign activities or materials in connection with an initiative measure, the entity lacks authority to make such expenditures [*Vargas v. City of Salinas (2009) 46 Cal. 4th 1, 24, 92 Cal. Rptr. 3d 286, 205 P.3d 207]* . However, a public entity could legitimately spend general funds for informational purposes, so as to provide the public with a fair presentation of relevant information relating to an initiative measure [*Stanson v. Mott (1976) 17 Cal. 3d 206, 221, 130 Cal. Rptr. 697, 551 P.2d 1]* . When public funds have been spent (or will be spent) on activities in connection with an initiative measure, and there is no

sufficient specific authorization, the question of whether the expenditure was (or would be) lawful turns on whether the activities fall within the category of informational activities that may be funded through general appropriations or, instead, constitute campaign activities that may not be paid for by public funds in the absence of such explicit authorization [*Vargas v. City of Salinas (2009) 46 Cal. 4th 1, 34-35, 92 Cal. Rptr. 3d 286, 205 P.3d 207]* . Moreover, the proscription against unauthorized campaign activity does not preclude a governmental entity from publicly expressing an opinion with regard to the merits of a proposed ballot measure and the impact on the entity that passage or defeat of the measure is likely to have, as long as the entity does not expend public funds to mount a campaign on the measure [*Vargas v. City of Salinas (2009) 46 Cal. 4th 1, 36-38, 92 Cal. Rptr. 3d 286, 205 P.3d 207* (city council had authority to decide, in advance of election, which services would be cut if revenue-reducing measure were to be adopted, and then to inform city's residents of council's decision; in posting on city's website detailed minutes of all city council meetings relating to council's action, along with detailed and analytical reports prepared by various municipal departments and presented by department officials at city council meetings, city engaged in permissible informational activity rather than campaign activity; providing summary in one-page document that could be obtained on request at city clerk's office also was permissible, as was mailing newsletter, which described proposed cuts in services, to city residents soon before election)].

In many instances the distinction between campaign activities and informational activities is quite evident. Sometimes, however, the line between unauthorized campaign expenditures and authorized informational activities is not so clear, and then the determination of the propriety or impropriety of the expenditure depends on a careful consideration of the style, tenor, and timing of the communicative activity being funded [*Stanson v. Mott (1976) 17 Cal.3d 206, 221-222,130 Cal. Rptr. 697, 551 P.2d 1]* . Even when a publication or communication imparts useful information and does not expressly advocate a vote for or against a specific ballot measure, the expenditure of public funds to prepare or distribute the publication or communication is improper if the style, tenor, and timing of it demonstrate that it constitutes traditional campaign activity [*Vargas v. City of Salinas (2009) 46 Cal. 4th 1, 27, 92 Cal. Rptr. 3d 286, 205 P.3d 207]* . Moreover, the circumstance that in some instances it may be necessary to consider the style, tenor, and timing of a communication or activity, so as to determine whether, from an objective standpoint, the communication or activity realistically constitutes campaign activity rather than informational material, does not render the distinction between campaign activities and informational activities impermissibly vague [*Vargas v. City of Salinas (2009) 46 Cal. 4th 1, 33-34, 92 Cal. Rptr. 3d 286, 205 P.3d 207]* . Thus, a court could conclude that a public entity's activities relating to an initiative measure are more properly characterized as providing information than as campaigning when (1) the information conveyed generally involved past and present pertinent facts--for instance, regarding a measure to repeal a city tax: how the original tax was enacted, what proportion of the budget was produced by the tax, and how the city council had voted to modify the budget if the tax were repealed; (2) the communications avoided argumentative or inflammatory rhetoric and did not urge voters to vote in a particular manner or to take other actions in support of or in opposition to the measure; and (3) the information provided and the manner in which it was disseminated were consistent with established practice regarding the communication media, such as use of the entity's website and regular circulation of the entity's official newsletter [*Vargas v. City of Salinas (2009) 46 Cal. 4th 1, 40, 92 Cal. Rptr. 3d 286, 205 P.3d 207]* .

A statute provides that an officer, employee, or consultant of a local agency may not expend or authorize the expenditure of any of the funds of the local agency to support or oppose the approval or rejection of a ballot measure, or the election or defeat of a candidate, by the voters [*Gov. Code § 54964(a)*]. This refers to a payment of public funds for communications that expressly advocate the approval or rejection of a clearly identified ballot measure, or the election or defeat of a clearly identified candidate, by the voters [*Gov. Code § 54964(b)(3)* (definition of expenditure)]. However, the statute does not affirmatively authorize or permit a municipality or other local agency to expend public funds on a communication, provided that it does not expressly advocate the approval or rejection of a ballot measure; rather, the statute simply prohibits a municipality's use of public funds for communications that expressly advocate such a position. In other words, nothing in the statute purports to grant authority to a local agency or its officers or employees to use public funds to pay for communications or activities that would constitute campaign activities, provided the communications do not "expressly advocate" the approval or rejection of a ballot measure or candidate [*Vargas v.*

City of Salinas (2009) 46 Cal. 4th 1, 29, 92 Cal. Rptr. 3d 286, 205 P.3d 207] . On the other hand, the statute does not prohibit the expenditure of public funds by local agencies to propose, draft, or sponsor a ballot measure, including expenditures to marshal support for placing the measure on the ballot, or to inform the public of need for a sales or use tax or bond offering to provide revenue to pay for public improvements [*Santa Barbara County Coalition Against Auto. Subsidies v. Santa Barbara County Ass'n of Gov'ts (2008) 167 Cal. App. 4th 1229, 1242, 84 Cal. Rptr. 3d 714]* .

That statute also provides that it does not prohibit the expenditure of local agency funds to provide information to the public about the possible effects of a ballot measure on the activities, operations, or policies of the local agency, if both of the following conditions are met: (1) the informational activities are not otherwise prohibited by California law, and (2) the information provided constitutes an accurate, fair, and impartial presentation of relevant facts to aid the voters in reaching an informed judgment regarding the ballot measure [*Gov. Code § 54964(c)*]. This is merely an exception to the statute's general prohibition, above, for communications that satisfy the two specified conditions; this does not purport to be an affirmative grant of authority to local entities to expend funds for communications that fall within its purview [*Vargas v. City of Salinas (2009) 46 Cal. 4th 1, 29-30, 92 Cal. Rptr. 3d 286, 205 P.3d 207]* .

Legal Topics:

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§ 302.25 City Charter Measure

[1] Initiative for Election to Form Charter Commission

[a] General Steps

The enactment, amendment, or repeal of a city charter, or of a city and county charter, may be proposed by initiative petition for an election to establish a charter commission [*see Cal. Const., art. XI, § 3(c)*; *Gov. Code § 34450*]. Alternatively, the governing body of the city or city and county may call an election to form a charter commission [*see Cal. Const., art. XI, § 3(c)*; *Gov. Code §§ 34450, 34452-34458*].

When the enactment, amendment, or repeal is proposed by initiative petition, a two-step election process ensues. The first step entails placing on the ballot, by initiative petition, the questions of (1) whether to draft or revise the charter and (2) whom to elect as members of a charter commission to do the actual drafting or revising [*see Cal. Const., art. XI, § 3(c)*; *Gov. Code §§ 34452, 34453*]. Assuming the measure receives a majority affirmative response to the first question, the second step entails the drafting or revising of a proposed charter by the elected charter commissioners, filing it in the office of the clerk of the governing body of the city or city and county, and then submitting the proposed charter to the voters for their approval at a subsequent, second election [*see Gov. Code §§ 34453, 34455, 34457*]. Thus, the proposed charter is never itself thesubject of the initiative petition; the final election to approve the proposed charter results from the actions of the charter commission [*see Gov. Code § 34452 et seq.*].

As an alternative to the initiative process to establish a charter commission, a city or city and county charter may also be amended or repealed pursuant to *Elec. Code § 9255 et seq.* [*Gov. Code § 34450*]. For discussion of the initiative procedure under the Elections Code, see *§ 302.25[2]*.

[b] Petition and Election

There is no requirement that the initiative process for the election of charter commissioners be commenced at a particular time. There is also no requirement that the proponents give any notice of their intentions to circulate the

petition, or that they take any other preliminary steps before circulating the petition and soliciting signatures on it. In addition, there is no time limit for filing a petition that proposes the election of charter commissioners [*see Gov. Code § 34452(a)*].

The petition must be signed by not less than 15 percent of the registered voters of the city or city and county. The petition also must be verified by the authority having charge of the registration records of the city, or city and county. If the petition satisfies these requirements, the governing body must call a regular election for one of the dates set forth in *Elec. Code § 1000* (regular election dates) and consolidate the election pursuant to *Elec. Code § 10403*, if necessary, with any statewide election being held on that date [*Gov. Code § 34452(a)*].

At the election, the voters vote first on the question whether a charter commission should be elected to propose a new charter and, secondly, for the candidates for the office of charter commissioner [*Gov. Code § 34453*]. (Presumably, the first question is worded differently if the proposal is to revise an existing charter rather than to adopt a new charter.) The charter commission candidates are nominated as provided in *Gov. Code § 34454*. They are not nominated by initiative petition [*see Gov. Code § 34454*].

If the first question receives less than a majority of the votes of the qualified voters voting on the measure, then no charter commission is deemed to have been elected. If, however, the first question receives a majority of the votes of the qualified voters voting on the measure, then the 15 candidates for the office of charter commissioner receiving the highest number of votes must organize as a charter commission [*Gov. Code § 34453*]. The elected commissioners must then propose a charter and may propose amendments to a charter, which is filed in the office of the clerk of the governing body of the city or city and county, and subsequently submitted to the voters [*Gov. Code §§ 34455, 34457*].

[2] Initiative for Election to Adopt Proposed Charter Amendments

[a] Availability and Commencement of Process

The amendment or repeal of a city charter, or of a city and county charter, may be proposed directly by initiative petition [*see Cal. Const., art. XI, § 3(b)*; *Elec. Code § 9255(a)(3), (4)*; *Gov. Code § 34450*]. Alternatively, amendment or repeal may be proposed directly by the governing body of the city or city and county [*see Gov. Code § 34458*]. A charter commission elected or appointed by the governing body may also propose a charter, or a charter commission may submit a charter pursuant to *Gov. Code § 34455* [*Elec. Code § 9255(a)(1)*; *see Gov. Code § 34452*; *see also* § [1], *above*]. The following discussion focuses on the initiative process to amend or repeal a city or city and county charter pursuant to *Elec. Code § 9255 et seq.*

The initiative process for amendment or repeal can be begun at any time.

[b] Notice of Intention to Circulate Petition, Ballot Title, and Summary

Before circulating a charter amendment initiative petition for signatures, the petition's proponents are subject to the same precirculation requirements as are proponents of an initiative petition to adopt a city ordinance [*Elec. Code § 9256*]. Thus, the proponents of the charter amendment petition must file with the city elections official both a notice of their intention to circulate the petition and a written text of the proposed amendment [*Elec. Code § 9256*; *see Elec. Code § 9202*, discussed in *§ 302.24[3]*]. They must also file with the elections official a request that the city attorney prepare a ballot title for and a summary of their proposed amendment [*Elec. Code § 9256*; *see Elec. Code § 9203*, discussed in *§ 302.24[4][a]*]. They have the right to seek a writ of mandate ordering amendment of the ballot title or the summary if either, or both, do not meet certain statutorily specified conditions [*Elec. Code § 9256*; *see Elec. Code §§ 9203, 9204*, discussed in *§ 302.24[4][b]*; *see also § 302.92*, form of petition for writ of mandate by proponent of initiative against county counsel or city attorney for false, misleading, or not impartial ballot title or summary]. A signed statement acknowledging the privacy rights of the signatures to be gathered, and acknowledgment of criminal penalties for

violation, also must accompany the request [*Elec. Code § 9608(a)*]. For a copy of the required statement and discussion of other privacy requirements, see *§ 302.16[3]*. Finally, they must publish or post, or publish and post, the notice of intention and the ballot title and summary, and file affidavits of proof of such publication and/or posting with the city elections official [*Elec. Code § 9256*; *see Elec. Code §§ 9205, 9206*, discussed in *§ 302.24[5]*].

[c] Contents of Charter Amendment Initiative Petition

Specified notices in 12-point type must be printed on the petition regarding paid signature gatherers and signature privacy rights [*Elec. Code § 101*]. For the text of these notices and discussion of other privacy rights, see *§ 302.16[2]*.

Each section of the petition must bear a copy of the notice of intention and the title and ballot summary [*Elec. Code § 9256*; *see Elec. Code § 9207*]. The petition must set forth the full text of the proposed amendment [*Elec. Code §§ 9257, 9262*]. The petition must be in substantially the same form as that set forth in *Elec. Code § 9260* and must meet the format requirements of *Elec. Code §§ 9262* and *9263* [*Elec. Code § 9260*; *see Elec. Code §§ 9262, 9263*].

The affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of the person soliciting the signatures must be attached to each section of the petition. The affidavit (or declaration) must be substantially in the form set forth in *Elec. Code § 9022* (declaration of circulator of state initiative petition) and must comply with the requirements of *Elec. Code §§ 104* (partial required contents of circulator's declaration) and 9209 (declaration of circulator of city initiative petition) [*Elec. Code § 9261*]. The declarations may probably be attached after circulation, but before filing, of the petition [*see Elec. Code §§ 104, 9022*].

[d] Circulation of Charter Amendment Initiative Petition

Prior to the circulation of a petition, the proponent must:

- Ensure that all signature gatherers receive instruction on the requirements and prohibitions of state law, with an emphasis on prohibited use of signatures [*Elec. Code § 9607*].

- Submit a signed statement acknowledging criminal penalties for misuse of signatures and certification that the signatures will not be misused [*Elec. Code § 9608(a)*].

- Have the organizational officer in charge of signature gathering sign a statement acknowledging criminal penalties for misuse of signatures and certification that the signatures will not be misused [*Elec. Code § 9609(a)*].

- Have the all circulators sign a statement acknowledging criminal penalties for misuse of signatures and certification that the signatures will not be misused [*Elec. Code § 9610(a)*].

For the text of the required statements, file retention periods, and other privacy requirements, see *§ 302.16[3]*.

The petition may be circulated in sections, which is the usual manner of circulation [*see Elec. Code § 9258*]. Each signer must sign it in the manner prescribed by *Elec. Code § 9020* (manner of signature on statewide initiative or referendum petition) [*Elec. Code § 9259*]. A voter maywithdraw his or her signature from a petition in the manner prescribed in *Elec. Code § 9602* (manner of withdrawing signature from initiative or referendum petition) [*Elec. Code § 9264*].

A petition proposing an amendment to or a repeal of a city charter must be signed by 15 percent of the registered voters of the city [*Elec. Code § 9255(a)(3)*; *see Elec. Code § 359* ("voter" defined)]. A petition proposing an amendment to or a repeal of a city and county charter must be signed by 10 percent of the registered voters of the city and county [*Elec.*

Code § 9255(a)(4); *see Elec. Code § 359* ("voter" defined)].

[e] Filing of Charter Amendment Initiative Petition

The petition must be filed not more than 200 days after the date on which the notice of intent to circulate was published or posted, or both. It is filed with the elections official by the proponents, or by any person or persons authorized in writing by the proponents. All sections of the petition must be filed at one time. No petition section submitted subsequently may be accepted by the elections official [*Elec. Code § 9265*]. Petitions that do not substantially conform to the form requirements of *Elec. Code §§ 9255 et seq.* will not be accepted for filing by the elections official [*Elec. Code § 9267*].

[f] Submission of Charter Amendment Initiative Measure to Voters

If the petition is signed by the minimum number of registered voters required by *Elec. Code § 9255(a)(3), (4), (c)*, the proposal must be submitted to the voters at either a special election called for that purpose, at any established municipal election date, or at any established election date set forth in *Elec. Code § 1000*, as long as there are at least 88 days before the election [*Elec. Code § 9255(a)*].

The two statutes governing initiatives to repeal or amend city charters, *Elec. Code § 9255* and *Elec. Code § 1415*, have no maximum time limits. Nothing in them requires a city council to order the election at the next available opportunity. Indeed, the fact that each statute allows options in election dates refutes that idea [*Jeffrey v. Superior Court (2002) 102 Cal. App. 4th 1, 3-6, 125 Cal. Rptr. 2d 175]* .

[3] Effect of Voter Approval of Conflicting Measures

If provisions of two or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote prevail [*Cal. Const., art. XI, § 3(d)*].

[4] Submission to Secretary of State After Election and Publication

On completion of the canvass of votes after the election, the elections official submits the adopted measures to the Secretary of State [*see Elec.Code § 9269*]. If the vote is in favor of the measure, then the charter proposal, amendment, or repeal is deemed to be ratified, but cannot take effect until it is accepted and filed by the Secretary of State [*Gov. Code §§ 34459, 34460*; *see Cal. Const., art. XI, § 3(a)*]. A charter proposal, amendment, or repeal by the voters that is submitted to the Secretary of State by the elections official in compliance with the provisions of *Gov. Code § 34450 et seq.* must be accepted and filed by the Secretary of State [*Gov. Code § 34461*].

The charter proposal, amendment, or repeal must then be published in the official state statutes. A county charter adopted pursuant to *Cal. Const., art. XI, § 3(a)*, supersedes all laws inconsistent with that charter, and also supersedes any existing charter. The provisions of a charter are the law of the state and have the force and effect of legislative enactments [*Cal. Const., art. XI, § 3(a)*; *Gov. Code § 34461*].

After a charter proposal, amendment, or repeal is accepted and filed by the Secretary of State, the courts must take judicial notice of it [*Gov. Code § 34461*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationInitiative & ReferendumGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsChartersGovernmentsLocal GovernmentsElections

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25-302 California Forms of Pleading and Practice--Annotated § 302.26

§ 302.26 District Ordinance Measure

[1] Application of Initiative Process

As a general rule, district ordinances may be enacted by initiative petition pursuant to *Elec. Code § 9300 et seq.* [*Elec. Code § 9300*]. For the purposes of the availability of the initiative under *Elec. Code § 9300 et seq.*, "district" includes any regional agency that has the power to tax, to regulate land use, or to condemn and purchase land [*Elec. Code § 317*].

However, the initiative is unavailable to the following types of districts [*Elec. Code § 9300*]:

- An irrigation district;
- A district formed under a law that does not provide a procedure for elections;
- A district formed under a law that does not provide for action by ordinance (a school district is an example of this type of district);
- A district governed by an election procedure that permits voters, in electing the district's directors or trustees, to cast more than one vote per voter; or
- A district in which the directors are empowered to cast more than one vote per director when acting on any matter.

[2] Commencement of District Initiative Petition Process

An initiative proceeding for adoption of an ordinance in any of certain kinds of districts [*see Elec. Code §§ 317, 9300*] may be commenced at any time.

[3] Publication and Posting of Notice of Intention to Circulate District Initiative Petition and Statement of

Reasons

Before circulating an initiative petition, the proponents of the measure must publish and/or post a notice of intention, accompanied by a printed statement of the reasons for the proposed petition that is not to exceed 500 words. The notice must be signed by at least one, but not more than five, proponents, and must be in substantially the same form as set forth in *Elec. Code § 9302* [*Elec. Code § 9302*]. The notice and statement must then be published in a newspaper or posted in the district, or both, as required by *Elec. Code § 9303*.

The purpose of the notice of intention and statement of reasons is to give the petition signers and voters notice of the purpose of the proposed initiative measure [*see Lesher Communications, Inc. v. City of Walnut Creek (1990) 52 Cal. 3d 531, 542, 277 Cal. Rptr. 1, 802 P.2d 317]* . This purpose is further facilitated by the requirements that the notice of intention be published or posted prior to circulation of the petition [*see Elec. Code § 9303*] and that the notice and statement appear on the petition when circulated [*see Elec. Code § 9305*; *see also* [5], *below*].

Contrary to the case of county and city initiative petitions, there is no statutory requirement that the notice of intention be filed with the district elections official before publication and/or posting. Prior filing may be strongly recommended by the district elections official.

[4] Filing of Notice and Statement and Proof of Publication and Posting

Within 10 days of the date of the publication and/or posting of the notice and statement, the proponents of the district measure must file with the district elections official a copy of the notice and statement as published and/or posted. With the notice and statement, the proponents must file an affidavit or declaration of a representative of the newspaper in which the notice was published, or if the notice was posted, an affidavit or declaration of a voter of the district, certifying to the fact of publication or posting [*Elec. Code § 9304*].

[5] District Initiative Petition

[a] Contents

Specified notices in 12-point type must be printed on the petition regarding paid signature gatherers and signature privacy rights [*Elec. Code § 101*]. For the text of these notices and discussion of other privacy rights, see *§ 302.16[2]*.

Each section of the petition must bear a copy of the notice of intention and statement [*Elec. Code § 9305*].

An affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of the person who solicited the signatures must be attached to each section of the petition. The affidavit must be in substantially the same form as that set forth in *Elec. Code § 9022*, and must include the additional and/or alternative contents set forth in *Elec. Code § 9307* [*Elec. Code § 9307*; *see Elec. Code §§ 104* (form and content of circulators' declarations), 9022 (governing contents, certification, and evidentiary effect of declaration of circulator of state initiative petition)]. The affidavit probably need not be attached until after circulation, but before filing, of the petition [*see Elec. Code §§ 104, 9022*].

[b] Initiative Petition

Prior to the circulation of a petition, the proponent must:

- Ensure that all signature gatherers receive instruction on the requirements and prohibitions of state law, with an emphasis on prohibited use of signatures [*Elec. Code § 9607*].

- Submit a signed statement acknowledging criminal penalties for misuse of signatures and certification that the signatures will not be misused [*Elec. Code § 9608(a)*].

- Have the organizational officer in charge of signature gathering sign a statement acknowledging criminal penalties for misuse of signatures and certification that the signatures will not be misused [*Elec. Code § 9609(a)*].

- Have the all circulators sign a statement acknowledging criminal penalties for misuse of signatures and certification that the signatures will not be misused [*Elec. Code § 9610(a)*].

For the text of the required statements, file retention periods, and other privacy requirements, see *§ 302.16[3]*.

The petition may be circulated among the voters of the district after the publication or posting, or both, of the notice of intention and statement [*Elec. Code § 9305*].

Signatures must be obtained and the petition filed within 180 from the date of publication and/or posting of the notice of intention and statement [*Elec. Code § 9306*].

The petition must be signed by not less than 10 percent of the registered voters in the district if the total number of registered voters in the district is less than 500,000. The petition must be signed by not less than 5 percent of the registered voters in the district if the total number of registered voters in the district is 500,000 or more [*Elec. Code § 9310(a)*; *see Elec. Code §§ 359* ("voter" defined), *9305* (requiring signatures of "registered" voters)]. The number of registered voters is calculated as of the time of the last report of registration by the county elections official to the Secretary of State made before publication or posting of the notice of intention to circulate the petition [*Elec. Code § 9310(b)*].

[c] Filing of District Initiative Petition

The signed petitions and sections thereof must be filed within 180 days from the date of publication or posting (or both) of the notice of intention and statement; a petition that does not meet this deadline is void for all purposes [*Elec. Code § 9306*]. Given the consequences of a failure to comply with this somewhat ambiguous time limitation, the proponents should compute the final date to file the petition using the most conservative view of the statute [*see § 302.21[4][c]*].

[6] Submission of District Initiative Measure to Voters

If the measure qualifies for the ballot, and the district board does not adopt the proposed ordinance without alteration either at the regular meeting at which the certification of the petition is presented, or within 10 days after it is presented, the measure must be submitted to the voters [*Elec. Code §§ 9310, 9311*].

With regard to such nonadopted measures, if the petition contains a request that the ordinance be submitted immediately to a vote at a special election, the district board must immediately order that the ordinance be submitted to the voters without alteration under *Elec. Code § 1405(a)* [*Elec. Code § 9310(a)(2)*]. If the petition, however, does not request a special election, the district board must submit the ordinance to the voters, without alteration, under *Elec. Code § 1405(b)*, unless the ordinance petitioned for is required to be, or for some reason is, submitted to the voters at a special election under *Elec. Code § 1405(a)* [*Elec. Code § 9311(b)*; *see also Elec. Code §§ 348, 356* (defining "regular" and "special" elections)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationInitiative & ReferendumGovernmentsLocal GovernmentsElectionsGovernmentsLocal GovernmentsOrdinances & Regulations

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§ 302.27 Effective Date of Initiative Ordinance

If a majority of the voters voting on a proposed ordinance vote in its favor, the ordinance becomes a valid and binding ordinance of the county, the city, or the district. The ordinance is considered as adopted on the date the vote is declared by the board of supervisors, the city's legislative body, or the district board, and goes into effect ten days after that date [*Elec. Code §§ 9122* (county), *9217* (city), *9320* (district)].

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§ 302.28 Effect of Adoption of Conflicting Initiative Ordinances

If the provisions of two or more ordinances adopted at the same election conflict, the ordinance receiving the highest number of affirmative votes controls [*Elec. Code §§ 9123* (county), *9221* (city), *9321* (district)].

Legal Topics:

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§ 302.29 Amendment or Repeal

[1] Of Initiative Statute

The Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors, unless the initiative statute permits amendment or repeal without their approval [*Cal. Const., art. II, § 10(c)*; *In re Oluwa (1989) 207 Cal. App. 3d 439, 445-446, 255 Cal. Rptr. 35* ; *see Proposition 103 Enforcement Project v. Quackenbush (1998) 64 Cal. App. 4th 1473, 1483-1484, 76 Cal. Rptr. 2d 342* (legislature may amend initiative statute only if voters specifically provide for that power, and subject to any conditions voters attached to that power)]. The purpose of California's constitutional limitation on the legislature's power to amend initiative statutes is to protect the people's initiative powers by precluding the legislature from undoing what the people have done, without the electorate's consent [*Proposition 103 Enforcement Project v. Quackenbush (1998) 64 Cal. App. 4th 1473,1484, 76 Cal. Rptr. 2d 342]* . Thus, amendments which may conflict with the subject matter of initiative measures must be accomplished by popular vote, as opposed to legislatively enacted statutes, when the original initiative does not provide otherwise [*see Proposition 103 Enforcement Project v. Quackenbush (1998) 64 Cal. App. 4th 1473, 1483-1485, 76 Cal. Rptr. 2d 342]* .

An amendment is any change of the scope or effect of an existing statute or ordinance, whether by addition, omission, or substitution of provisions, that does not wholly terminate its existence, whether by an act purporting to amend, repeal, revise, or supplement, or by an act independent and original in form [*Mobilepark West Homeowners Assn. v. Escondido Mobilepark West (1995) 35 Cal. App. 4th 32, 40, 41 Cal. Rptr. 2d 393* ; *Franchise Tax Bd. v. Cory (1978) 80 Cal. App 3d 772, 776-777, 145 Cal. Rptr. 819]* . A statute that adds to or takes away from an existing statute is considered an amendment. Moreover, an amendment of an initiative may be accomplished by some action other than the subsequent enactment of a statute; the question is whether the action in question adds to or takes away from the initiative [*Proposition 103 Enforcement Project v. Quackenbush (1998) 64 Cal. App. 4th 1473, 1485, 76 Cal. Rptr. 2d 342]* .

Whether an act amends existing law is not determined solely by the title, or by statements in the new act that it amends

existing law. Rather, one must examine and compare the provisions of the new law with existing law. If the aim of the act is to clarify or correct uncertainties that arose from the enforcement of the existing law, or to reach situations that were not covered by the original statute, the act is amendatory, even though in its working it does not purport to amend the language of the prior act [*Mobilepark West Homeowners Assn. v. Escondido Mobilepark West (1995) 35 Cal. App. 4th 32, 40, 41 Cal. Rptr. 2d 393* ; *see also Lesher Communications, Inc. v. City of Walnut Creek (1990) 52 Cal. 3d 531, 540 n.8, 277 Cal. Rptr. 1, 802 P.2d 317]* .

For discussion relating to the interpretation of legislative acts generally, see Ch. 531, *Statutes and Ordinances* .

Initiatives commonly include a provision authorizing the Legislature to amend the intitiative without voter approval only if the amendment furthers the purpose of the initiative [*Amwest Surety Ins. Co. v. Wilson (1995) 11 Cal. 4th 1243, 1251, 48 Cal. Rptr. 2d 12, 906 P.2d 1112* ; *see Proposition 103 Enforcement Project v. Quackenbush (1998) 64 Cal. App. 4th 1473, 1490, 76 Cal. Rptr. 2d 342]* . In determining whether an amendment by the Legislature is valid under such a provision, the court will start with the presumption that the Legislature acted within the scope of its authority and will uphold the amendment if, by any reasonable construction, it can be said that the statute furthers the purposes of the initiative [*Amwest Surety Ins. Co. v. Wilson (1995) 11 Cal. 4th 1243, 1256, 48 Cal. Rptr. 2d 12, 906 P.2d 1112* (holding amendment invalid)]. The court is guided by, but not limited to, the general statement of purpose found in the initiative when discerning the initiative purposes so as to determine whether a legislative amendment furthers its purpose and thus is valid [Proposition *103 Enforcement Project v. Quackenbush (1998) 64 Cal. App. 4th 1473, 1490, 76 Cal. Rptr. 2d 342* (repeal and reenactment of *Ins. Code § 769.2* did not further purposes of Proposition 103 was beyond legislature's power)]. For discussion of construction aids available to help ascertain initiative's purpose, see *§ 302.20*.

Once a portion of an initiative has been held unconstitutional and severable, that portion is void and has been stricken from the initiative. The legislature cannot thereafter amend something that no longer exists [*see Proposition 103 Enforcement Project v. Quackenbush (1998) 64 Cal. App. 4th 1473, 1488-1489, 76 Cal. Rptr. 2d 342]* .

[2] Of Initiative Ordinance

An ordinance proposed by initiative petition and adopted either by the board of supervisors, the city's legislative body, or the district board without submission to the voters or by the voters can be amended or repealed only by a vote of the people, unless provision is otherwise made in the original ordinance [*Elec. Code §§ 9125* (county), *9217* (city), *9323* (district)]. Statutes relating to county and district initiative ordinances expressly provide that in all other respects, a county or district ordinance proposed by initiative petition and adopted has the same force and effect as any ordinance adopted by the board of supervisors or the district board [*Elec. Code §§ 9125* (county), *9323* (district)].

For discussion relating to whether an act constitutes an amendment of an initiative measure, see [1], *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationEffect & OperationAmendmentsGovernmentsLegislationExpirations, Repeals & SuspensionsGovernmentsLegislationInitiative & ReferendumGovernmentsLocal GovernmentsOrdinances & Regulations

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[Reserved]

§§ 302.30[Reserved]

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25-302 California Forms of Pleading and Practice--Annotated § 302.40

§ 302.40 Nature of Referendum

The referendum is the power of the electors to approve or reject all or parts of state statutes or local ordinances [*see Cal. Const., art. II, §§ 9(a), 11,* and *art. IV, § 1*; *Hopping v. Council of City of Richmond (1915) 170 Cal. 605, 609-610, 150 P. 977* ; *see Empire Waste Management v. Town of Windsor (1998) 67 Cal. App. 4th 714, 717, 79 Cal. Rptr. 2d 262* (referendum is means by which electorate may approve or reject measures passed by legislative body); *see also § 302.03*]. Thus, the referendum places before the voters one discrete issue. Because the expression of the voters' will is direct, there is no need to rely on representatives to articulate the voters' opinions [*see Southern Cal. Rapid Transit Dist. v. Bolen (1992) 1 Cal. 4th 654, 670-671, 3 Cal. Rptr. 2d 843, 822 P.2d 875* (issue-specific nature of special-benefit assessment district referendum and fact that vote on it would be direct expression of voter opinion enables court to analyze whether approval or rejection of referendum has disproportionate impact on identifiable group of voters for purposes of equal protection)]. The statute or ordinance may come before the electorate for approval or rejection in two ways. The Legislature or the local governing body may refer the statute or the ordinance to the electorate directly without a petition [*see Elec. Code §§ 9040 et seq.* (state statute), 9140, 9342 (county and district ordinances, respectively)]. Alternatively, the electorate may petition the Legislature or the local governing body to refer the statute or the ordinance to the electorate [*Cal. Const., art. II, § 9(b)*; *Elec. Code §§ 9000 et seq.* (state statute), 9144 (county ordinance), 9237 (city ordinance), 9340 (district ordinance)]. This subpart addresses the procedures governing the exercise of the right of state and local voters to petition for referendum.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 302.41 Construction of Referenda

Legislation affording the people the right to repeal legislation, like legislation affording the people the right to initiate legislation or recall public officials, is to be given the same liberal construction as that extended to election statutes generally [*Reites v. Wilkerson (1950) 99 Cal. App. 2d 500, 503, 222 P.2d 81* ; *see Wilcox v. Enstad (1981) 122 Cal. App. 3d 641, 651, 176 Cal. Rptr. 560]* .

The scope of the referendum power is generally coextensive with the scope of legislative authority. Any legislative decision made by a representative body is subject to referendum. Some specific subjects, however, are constitutionally and statutorily exempted from the scope of state or local referenda (*see Cal. Const., art. II, § 9(a)*; *Elec. Code § 9247*) [*Empire Waste Management v. Town of Windsor (1998) 67 Cal. App. 4th 714, 717, n.1, 79 Cal. Rptr. 2d 262]* . Moreover, a referendum may review only legislative decisions, but not matters that are strictly executive or administrative [*Empire Waste Management v. Town of Windsor (1998) 67 Cal. App. 4th 714, 717 n.1, 79 Cal. Rptr. 2d 262]* . For further discussion of limitations on the scope of the referendum power, see *§ 302.12*.

Legal Topics:

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

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§ 302.42 State Referendum Measure

[1] Commencement of Petition Process

A referendum proceeding respecting a statute or part of a statute may be begun at any time, even before the statute is enacted. There is no specific prohibition against beginning a referendum proceeding before the statute in question has been enacted, such as while the bill to enact it is pending when it becomes evident that the bill will pass the Legislature and that the Governor will sign it (or, at least, will not veto it). Opponents of a pending bill, if they intend to start a referendum proceeding in the event the bill passes and becomes a law, should not overlook this point. As explained below, if they wait until the statute is enacted, they might have as little as 59 days (or less) in which to circulate their petition and obtain the minimum required number of signatures.

[2] Circulating Title and Summary

[a] Request for Circulating Title and Summary for State Referendum

Prior to the circulation of any referendum petition for signatures, the text of the proposed measure must be submitted to the Attorney General with a written request that a circulating title and summary of the chief purpose and points of the proposed measure be prepared [*see Cal. Const., art II, § 10(d)*]. The electors presenting the request are the "proponents" [*Elec. Code § 342*]. The Attorney General must preserve the written request until after the next general election [*Elec. Code § 9001(a)*].

All referenda must be submitted to the Attorney General's Initiative Coordinator, located in the Sacramento office, by U.S. Postal Service mail or alternative mail service or personal delivery. Only printed documents will be accepted; facsimile or e-mail delivery will not be accepted [*Elec. Code § 9001(d)*].

The Attorney General's office will not treat a request for a circulating title and summary as submitted until the foregoing requirements are met [*Elec. Code § 9001(e)*].

[b] Preparation of Circulating Title and Summary for State Referendum

On receipt of the text of a proposed referendum, the Attorney General must prepare a circulating title and summary of the chief purpose and points of the proposed statute at issue [*see Elec. Code § 303.5(c)(1)(B)*]. The circulating title and summary must not exceed a total of 100 words [*see Elec. Code § 303.5(c)(2)*]. No fiscal analysis is required be included [*Elec. Code § 9006(a)*].

The Attorney General must provide a copy of the circulating title and summary of the proposed referendum to the proponents and to the Secretary of State within 10 days after receipt of the proposed referendum [*Elec. Code § 9006(b)*].

On receipt of the circulating title and summary from the Attorney General, the Secretary of State must, within one business day, (1) notify the proponents and county elections official of each county of the official summary date and (2) provide a copy of the circulating title and summary to each county elections official. This notification must also include a complete schedule showing the maximum filing deadline, and the certification deadline by the counties to the Secretary of State [*Elec. Code § 9006(c)*].

[c] Compelling Preparation of Circulating Title and Summary

The duty of the Attorney General to prepare a title and summary for a proposed state referendum measure is a ministerial one, and mandate will lie to compel him or her to prepare them when the proposal is in proper form and complies with statutory and constitutional procedural requirements [*cf. Schmitz v. Younger (1978) 21 Cal. 3d 90, 92-93, 145 Cal. Rptr. 517, 577 P.2d 652* (so holding with respect to preparation of title and summary for *initiative* measure)].

[3] Legislative Hearings on Proposed State Referendum Measure

Immediately on the preparation of the circulating title and summary of a referendum measure, the Attorney General must forthwith transmit copies of the text of the measure and the circulating title and summary to the Senate and the Assembly. The appropriate committees of each house may hold public hearings on the subject of the measure. However, the Legislature has no authority to alter the measure or prevent it from appearing on the ballot [*Elec. Code § 9007*].

[4] State Referendum Petition

[a] Format of Petition for State Referendum

Any petition for a referendum may be presented in sections, but each section must contain a full and correct copy of the circulating title and summary and text of the proposed measure. The text of the proposed measure must be printed in type not smaller than 8 points [*Elec. Code § 9012*].

A space at least one inch wide shall be left blank across the top of each page of every referendum petition and after the name of each voter who has signed the petition for the use of the county elections official in verifying the petition [*Elec. Code § 9013*].

Across the top of each page of a referendum petition must be printed in 12-point boldface type the following: 'Referendum Against an Act Passed by the Legislature' [*Elec. Code § 9010*].

Across the top of each page after the first page of every referendum petition or section of a referendum petition, which is prepared and circulated, must be printed in 18-point gothic type a short title, in 20 words or less, showing the nature of the petition and the subject to which it relates. A space at least one inch wide must be left blank at the top of each page and after each name, for the use of the county elections official, in verifying the petition [*Elec. Code § 9011*].

[b] Circulation of State Referendum Petition

A petition for a referendum may not be circulated for signatures before the official summary date [*Elec. Code § 9014*]. The official summary date is not defined by statute but probably is the date a circulating title and summary of the proposed referendum is delivered or mailed by the Attorney General to the proponents of the referendum [*cf. Elec. Code § 336* (so providing with respect to proposed *initiative* measure); *see § 302.42[2][b]*].

The petition may be circulated in sections [*see Elec. Code § 9012*] simultaneously in some or all of the several counties, which is the usual practice.

A person who is a voter or who is qualified to register to vote in California may circulate the petition anywhere within the state. Each section of the petition must bear the name of a county or city and county, and only qualified registered voters of that county or city and county may sign that section [*Elec. Code § 9021*].

Each section of the petition must have attached to it the declaration of the person soliciting the signatures, setting forth the information required by *Elec. Code § 104* [*Elec. Code § 9022(a)*]. The circulator must certify to the content of the declaration and meet other execution requirements [*Elec. Code § 9022(b)*]. The declaration probably need not be attached until after circulation, but it must be attached before filing, of the petition [*see Elec. Code § 104*]. The declaration has evidentiary effect as specified in *Elec. Code § 9022(b)*.

The petition must be signed by electors equal in number to at least 5 percent of the votes for all candidates for Governor in the last preceding gubernatorial election [*see Cal. Const., art. II, § 9(b)*; *see also Elec. Code § 321* (elector defined)].

[c] Filing of State Referendum Petition

Officers required by law to receive or file in their offices any referendum petition must not receive or file any referendum petition not in conformity with *Elec. Code § 9001 et seq.* [*Elec. Code § 9015*]. A petition for a proposed referendum measure must be filed with the county elections officials not later than 90 days from the date the legislative bill was chaptered by the Secretary of State, and a county elections official must not accept a petition for the proposed referendum after that period [*Elec. Code § 9014*].

The petition must be presented to the Secretary of State within 90 days after the enactment date of the statute. In the case of a statute enacted by a bill passed by the Legislature on or before the date the Legislature adjourns for a joint recess to reconvene in the second calendar year of the biennium of the legislative session, and in the possession of the Governor after that date, the petition may not be presented on or after January 1 next following the enactment date unless a copy of the petition is submitted to the Attorney General for preparation of a ballot title and summary before January 1 [*Cal. Const., art. II, § 9(b)*].

Presentation of the petition to the Secretary of State is accomplished by a series of steps [*see Elec. Code § 9030 et seq.*], of which the proponents perform only the first step of filing the petition and its sections with the several county elections officials. All sections circulated in a given county, and that the proponents wish to file, must be filed at the same time with the elections official of that county [*Elec. Code § 9030(a)*]. Filings may occur in separate counties at different times. However, all sections of the petition that the proponents wish to file must, as a practical matter, be filed with the appropriate county elections officials well before the expiration of the 90-day period prescribed in the Constitution. Once filed, no petition section may be amended except by court order [*Elec. Code § 9030(a)*].

A petition is deemed filed with the Secretary of State on the date of the receipt by the Secretary of State of one or more certificates from one or more county elections officials showing the petition to be signed by the requisite number of voters [*Elec. Code § 9033*]. Unless that date is within 90 days after the enactment date of the statute in question, the referendum proceeding will fail [*see Cal. Const., art. II, § 9(b)*]. Therefore, if the proponents begin a referendum

proceeding after the statute in question is enacted, they might in fact have only 59 days (or less) in which to circulate the petition and obtain the minimum required number of signatures.

The 90-day period is measured from the day following the enactment date, counting that day as the first. The period ends on the 90th day thereafter, counting consecutively every day. In a leap year, February 29 is considered a separate day, and is counted if it falls in the 90-day period [*see Sanguinetti v. Sanguinetti (1937) 9 Cal. 2d 95, 97-98, 69 P.2d 845]* . It is not clear what the consequence would be if the 90th day is a holiday [*see Gov. Code § 6700 et seq.*] and the last necessary elections official's certificate is received by the Secretary of State on the following day or two days later. It is also unclear when an elections official's certificate will be deemed received by the Secretary of State, which could become troublesome in view of the fact that all of the several elections officials are likely to mail their certificates at different times.

The enactment date of a statute is the date when the bill embodying it becomes a law, irrespective of the statute's effective or operative date. A bill becomes a law when the Governor signs it or, if he or she omits to sign it and does not veto it, on the day after expiration of the period during which he or she might have vetoed it [*see Cal. Const., art. IV, § 10*; *County of Orange v. Flournoy (1974) 42 Cal. App. 3d 908, 912-913, 117 Cal. Rptr. 224]* .

[5] Submission of State Referendum Measure to Voters

If a referendum measure qualifies for the ballot, it must be submitted to the voters at the next general election held at least 31 days (rather than 131 days as in the case of an initiative measure [*see Cal. Const., art. II, § 8(c)*]) after the measure qualifies [*Cal. Const., art. II, § 9(c)*; *see Elec. Code § 324* ("general election" defined)]. If for any reason the measure is not submitted to the voters at the next succeeding statewide election, that failure will not prevent its submission at a succeeding statewide election [*Elec. Code § 9017*; *see Elec. Code §§ 357* ("statewide election" defined), 1200 (statewide general election date)].

Alternatively, the measure may be submitted to the voters at a special statewide election held before the general election at which it would otherwise be required to appear on the ballot [*Cal. Const., art. II, § 9(c)*; *see Elec. Code § 356* ("special election" defined)].

[6] Effect of Referendum Petition on Statute

The filing of a valid referendum challenging a statute normally stays implementation of the statute until after a vote by the electorate [*Assembly v. Deukmejian (1982) 30 Cal. 3d 638, 656, 180 Cal. Rptr. 297, 639 P.2d 939]* . If a referendum petition is filed against a part of a statute, the remainder is not delayed from going into effect [*Cal. Const., art. II, § 10(a)*].

[7] Amendment or Repeal of Referendum Statute

The Legislature may amend or repeal referendum statutes [*Cal. Const., art. II, § 10(c)*].

[8] Effective Date of Referendum Statute

A referendum statute approved by a majority of votes takes effect the day after the election, unless the measure provides otherwise [*Cal. Const., art. II, § 10(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationInitiative & ReferendumGovernmentsState & Territorial GovernmentsElectionsGovernmentsState & Territorial GovernmentsLegislatures

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§ 302.43 County Measure

[1] Commencement of Referendum Petition Process

The referendum petition process respecting all or part of a county ordinance must be commenced before the *effective* date of the ordinance in question [*see Elec. Code § 9144*; *see also Mapstead v. Anchundo (1998) 63 Cal. App. 4th 246, 259, 73 Cal. Rptr. 2d 602]* , and the petition must be filed with the county elections official before that date [*see Elec. Code §§ 9144, 9146*; *see also Elec. Code §§ 9113-9115*, discussed in *§ 302.22[5][c]*].

The referendum petition must be circulated during the 30 days following passage of ordinance in question. Signatures collected prior to passage of the ordinance will not be counted [*see Mapstead v. Anchundo (1998) 63 Cal. App. 4th 246, 258-260, 73 Cal. Rptr. 2d 602* (requiring registrar to count signatures that according to circulator's declaration had been collected too early, when petition revealed clerical error and showed that signatures were collected within required time period)].

[2] Effective Date of County Ordinance

Except for an ordinance granting a franchise, the following county ordinances take effect immediately [*Elec. Code § 9141(a)*; *Gov. Code § 25123*; *Ortiz v. Board of Supervisors (1980) 107 Cal. App. 3d 866, 873, 166 Cal. Rptr. 100]* :

- Those calling or otherwise relating to an election;
- Those specifically required by law to take immediate effect;
- Those fixing the amount of money to be raised by taxation or the rate of taxes to be levied; and
- Those for the immediate preservation of the public peace, health, or safety; these types of ordinances must contain a declaration of the facts constituting the necessity and must be passed by a four-fifths vote of the board of supervisors.

All other ordinances, including ordinances granting a franchise, become effective 30 days from and after the date of final passage [*Elec. Code § 9141(b)*; *Gov. Code § 25123*; *see Kuhs v. Superior Court (1988) 201 Cal. App. 3d 966, 973-974, 247 Cal. Rptr. 544* (construing former *Elec. Code § 3751* to mean "30 days after the date of final passage"; statute subsequently amended in 1989 consistent with this construction [*see now Elec. Code § 9141*])].

Regardless of the above, however, ordinances authorizing the issuance of revenue bonds by a county as part of a joint powers entity pursuant to *Gov. Code § 6547* do not take effect for 60 days [*Elec. Code § 9142(a)*]. Similarly, ordinances or parts of ordinances that change supervisorial salaries become effective 60 days from the date of final passage [*Elec. Code § 9143*].

The date of final passage (or adoption [*see Gov. Code § 25123.5*], which is the same thing) has no connection with the effective or operative date and is, apparently, the date on which the last act is done that is necessary to make the ordinance a law [*see Solomon v. Alexander (1911) 161 Cal. 23, 25-28, 118 P. 217]* .

Even if the date of final passage or adoption can be easily determined, there still may be some doubt as to which is the effective date. When time is measured "from the date" of an event, that date might or might not be included in the period measured; rules of construction vary [*see, e.g., Mapstead v. Anchundo (1998) 63 Cal. App. 4th 246, 258-259, 73 Cal. Rptr. 2d 602* (construing Gov. Code § 9114 concerning validity of signatures on referendum petition; ordinance before court passed on February 6, and 30-day qualifying period was from February 7 through March 7)]. When time is measured "after" an event, the date of that event would logically be excluded from the period measured. The safest course for proponents of a referendum is to assume that the critical period begins with the date of final passage counted as the first day and runs without interruption to and including the thirtieth or sixtieth day thereafter, which day should be considered the effective date of an ordinance that does not take effect immediately. In a leap year, February 29 is considered a separate day, and is counted, if it falls within the period [*see Sanguinetti v. Sanguinetti (1937) 9 Cal. 2d 95, 97-98, 69 P.2d 845]* .

[3] Conduct of County Referendum Petition Process

With a few exceptions discussed below, the provisions of the Elections Code relating to the form of petitions, the duties of the county elections official, and the manner of holding elections when an ordinance is proposed by initiative petition govern the procedure on referenda petitions filed against ordinances [*see Elec. Code § 9146*]. These provisions are set out in *Elec. Code § 9100 et seq.* and are discussed in *§ 302.22*. They include the requirements of filing and publishing a notice of intention to circulate the petition and of obtaining a ballot title and summary from the county counsel [*see Elec. Code §§ 9103-9105*]. They also include the petition content requirement that the ballot title and summary appear on the petition [*see Elec. Code § 9105(c)*].

An exception is that the heading of a proposed referendum measure must be in substantially the same form as that set forth in *Elec. Code § 9147(a)*. Additionally, each section of the petition must contain the title and text of the ordinance or the portion of the ordinance that is the subject of the referendum [*Elec. Code § 9147(b)*].

Specified privacy requirements were added to the Elections Code effective January 1, 2003 [2002 Cal. stats 959]. For "initiative measures," statements are required to be filed acknowledging the privacy rights of the signatures to be gathered, and acknowledgment of criminal penalties for violation; and these statements must accompany the request for preparation of the official title and summary [*Elec. Code § 9608(a)*]. Whether these requirements are extended to "referendum measures" remains to be seen, but the prudent course of action for proponents would be to follow these privacy requirements. For discussion of these privacy requirements, see *§ 302.16*.

[4] Required Number of Signatures on County Referendum Petition

The referendum petition must be signed by voters of the county equal in number to at least 10 percent of the entire vote cast within the county for all candidates for Governor at the last preceding gubernatorial election [*Elec. Code § 9144*; *see Elec. Code § 359* ("voter" defined)]. *Elec. Code § 9144* has been construed to require that no less than 10 percent of the entire electorate who voted at the last gubernatorial general election support a referendum measure before the legislative process can be subverted [*Sylva v. Board of Supervisors (1989) 208 Cal. App. 3d 648, 654, 256 Cal. Rptr. 138]* . Signatures that do not include the voter's residence are not counted as valid [*Elec. Code §§ 100, 105*; *Mapstead v. Anchundo (1998) 63 Cal. App. 4th 246, 261-264, 73 Cal. Rptr. 2d 602* (signatures listing post office boxes or mailing addresses rather than residence addresses or other descriptions of place of residence were invalid)].

When the ordinance under attack authorizes the issuance of revenue bonds by a county that is part of a joint powers entity pursuant to *Gov. Code § 6547*, the number of signatures required is different and is governed by *Elec. Code § 9142*. For discussion of this signature requirement, see *§ 302.47*.

[5] Filing of County Referendum Petition

By filing the referendum petition with the county elections official, the proponents take the only step they need toward presentation of the petition to the board of supervisors. As previously noted [*see* [1], *above*], the petition must be filed before the effective date of the ordinance in question [*see Elec. Code § 9144*]. No statute prohibits filing a petition before the ordinance has been adopted. Therefore, it is arguable that an ordinance that takes effect immediately may be subject to a referendum by filing a petition before the date of final passage (adoption). Indeed, it would follow that any referendum petition may be filed before the ordinance in question has been adopted, and that filing would not be premature but would be effective for all purposes. On the other hand, the courts are likely to be reluctant to take this view [*see, e.g.,* *Hopping v. Council of City of Richmond (1915) 170 Cal. 605, 609-610, 150 P. 977* (analogizing local referendum power to statewide referendum power); *see also Cal. Const., art. II, § 9(a)* (limiting statewide referendum power and excluding urgency statutes, which take effect immediately); *Mapstead v. Anchundo (1998) 63 Cal. App. 4th 246, 258-260, 73 Cal. Rptr. 2d 602* (referendum petition required to be circulated during 30 days following passage of ordinance in question)].

If the last day for filing is a holiday [*see Gov. Code § 6700 et seq.*] or for another reason is a day when the elections official's office is not open for business, the last day for filing becomes the next preceding day when the elections official's office is open since the statute requires filing before the effective date of the ordinance [*see Elec. Code § 9144*; *see also* *Steele v. Bartlett (1941) 18 Cal. 2d 573, 574, 116 P.2d 780]* . If the elections official's office is actually open on the last day for filing, at a time when the office might lawfully be closed, and the petition is then presented for filing, the elections official must accept it [*see* *Cosgriff v. Board of Election Comm'rs (1907) 151 Cal. 407, 410, 91 P. 98]* .

A writ of mandate will lie to compel the county elections official to accept and process a referendum petition presented for filing, when all statutory and constitutional procedural and substantive requirements surrounding the petition have been met. For a form for a petition for a writ of mandate ordering a county elections official to accept and process a referendum petition presented for filing, see *§ 302.91*.

[6] Effect of Referendum Petition on County Ordinance

Presentation of a referendum petition to the board of supervisors suspends the ordinance in protest of which the petition has been drawn up [*Elec. Code § 9144*; *see* *Mapstead v. Anchundo (1998) 63 Cal. App. 4th 246, 273, 73 Cal. Rptr. 2d 602* ; *see also* *In re Stratham (1920) 45 Cal. App. 436, 439-440, 187 P. 986* (when municipal ordinance has been suspended by referendum petition and then has been repealed, city council may not subsequently enact another ordinance that is in all essential features like repealed ordinance); § 302.45[6]].

[7] Submission of County Referendum Measure to Voters

When the county elections official timely certifies the referendum petition to the board of supervisors, the supervisors must reconsider the ordinance. If the supervisors do not entirely repeal the ordinance, they must submit the ordinance to the voters at the next regularly scheduled county election occurring not less than 88 days after the date of the order or at a special election called for that purpose not less than 88 days after the date of the order [*Elec. Code § 9145*; *see Mapstead v. Anchundo (1998) 63 Cal. App. 4th 246, 273, 73 Cal. Rptr. 2d 602]* .

[8] Effective Date of County Referendum Ordinance

If the ordinance is submitted to the electorate, it does not become effective unless and until a majority of the voters vote in favor of it [*Elec. Code § 9145*; *see Mapstead v. Anchundo (1998) 63 Cal. App. 4th 246, 273, 73 Cal. Rptr. 2d 602]* .

Legal Topics:

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§ 302.44 County Legislative Act Undertaken by Resolution

The right of referendum is available to county electors to attack county resolutions constituting legislative acts (as opposed to other resolutions, for example, those constituting administrative acts) [*Midway Orchards v. County of Butte (1990) 220 Cal. App. 3d 765, 782, 269 Cal. Rptr. 796]* . Although there is no legislative provision for referenda procedures to attack legislative acts accomplished by county resolution, the state constitution provides that referendum power is reserved to the people, and case law holds that the power reserved to the citizens of the state is identical to the powers reserved to the citizens of cities, towns, and counties [*Midway Orchards v. County of Butte (1990) 220 Cal. App. 3d 765, 777, 777 n.28, 269 Cal. Rptr. 796* ; *see Cal. Const., art. II, §§ 9(a), 11*; *art. IV, § 1*]. This constitutional provision is self-executing, so that the power of referendum may be exercised even in the absence of facilitating legislation [*MidwayOrchards v. County of Butte (1990) 220 Cal. App. 3d 765, 777-778, 269 Cal. Rptr. 796]* . Moreover, the failure of the Legislature to enact implementing legislation, amounting to a denial of constitutionally protected rights, may be remedied by the courts [*Midway Orchards v. County of Butte (1990) 220 Cal. App. 3d 765, 778, 269 Cal. Rptr. 796* ; *see Code Civ. Proc. § 187* (granting courts all means necessary to exercise of their jurisdiction)].

The procedures under *Elec. Code § 9140 et seq.*, specifically applicable to referenda to attack an ordinance, also apply to referenda to attack a resolution that constitutes a legislative act, such as one adopting or amending a county general plan [*Midway Orchards v. County of Butte (1990) 220 Cal. App. 3d 765, 773, 779, 269 Cal. Rptr. 796* ; *see § 302.43*]. Consequently, resolutions subject to referenda are not effective until 30 days from the date of their enactment [*Midway Orchards v. County of Butte (1990) 220 Cal. App. 3d 765, 779, 269 Cal. Rptr. 796]* .

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§ 302.45 City Measure

[1] Application of Referendum Statutes

[a] To Charter City

Except as discussed below, the statutes governing referendum proceedings respecting city ordinances [*Elec. Code § 9235 et seq.*] do not apply to any cities with charters that provide for the direct initiation of ordinances by the voters [*Elec. Code § 9247*; *see Cal. Const., art. II, § 11*; *see also Cal. Const., art. XI, § 3* (authorization for city charters)].

The referendum process in charter cities with these kinds of provisions in their charters is governed by the city charter rather than by statute [*Elec. Code § 9247*; *see Cal. Const., art. II, § 11*]. However, a city may adopt the state provisions by incorporating them into its charter [*see Billig v. Voges (1990) 223 Cal. App. 3d 962, 965-966, 273 Cal. Rptr. 91]* .

[b] To Specified Ordinances in Charter or General Law

Elec. Code § 9235 et seq. are also inapplicable to proceedings for the improvement of streets in or rights-of-way owned by cities, the opening or closing of streets, the changing of grades, or the doing of other work, all or some of the cost of which is to be borne by special assessments on real property [*Elec. Code § 9247*].

[2] Commencement of City Referendum Petition Process

A referendum proceeding respecting a city ordinance or part of a city ordinance may not be begun before the ordinance has been adopted. The petition must be filed with the city elections official within 30 days of the date the adopted ordinance is attested by the city clerk or secretary to the legislative body [*see Elec. Code § 9237*]. Therefore, the petition process must be begun and completed within that 30-day period. Because there is no requirement that the proponents give any notice of their intention to circulate the petition, or that they take any other preliminary steps before circulating the petition and obtaining signatures on it, the proceeding is begun by circulating the petition.

The date of adoption has no connection with the effective or operative date and is, apparently, the date on which the last act is done that is necessary to make the ordinance a law [*see Elec. Code § 9245*; *Solomon v. Alexander (1911) 161 Cal. 23, 25-28, 118 P. 217]* . The effective date of a city ordinance appears to be immaterial. If the statutes are applied as written, a city ordinance taking effect immediately can be the subject of a referendum proceeding, if a proper petition is filed within 30 days from the date of the adoption of the ordinance.

[3] Effective Date of General Law City Ordinance

A general law city ordinance usually becomes effective 30 days from and after the date of its final passage. The exceptions to this rule are as follows [*Elec. Code § 9235*]:

- An ordinance calling or otherwise relating to an election;

- An ordinance for the immediate preservation of the public peace, health, or safety, that contains a declaration of, and the facts constituting, its urgency, and that is passed by a four-fifths vote of the city council;

- An ordinance relating to street improvement proceedings; and

- Any other ordinance governed by particular provisions of state law prescribing the manner of their passage and adoption.

Regardless of the above, ordinances authorizing the issuance of revenue bonds by a city as part of a joint powers entity pursuant to *Gov. Code § 6547* do not take effect for 60 days [*Elec. Code § 9142*].

[4] City Referendum Petition

[a] Contents

The referendum petition must meet the form and content requirements of *Elec. Code § 9238*. Among these are the requirements that each section of the petition contain the identifying number or title and the text of the ordinance or portion of the ordinance that is the subject of the referendum [*Elec. Code § 9238(b)*; *see Hebard v. Bybee (1998) 65 Cal. App. 4th 1331, 1338, 77 Cal. Rptr. 2d 352* ; *Nelson v. Carlson (1993) 17 Cal. App. 4th 732, 737-740, 21 Cal. Rptr. 2d 485]* . With regard to the identifying number or title requirement, although each section of the referendum petition may include the number and text of the ordinance, with no title, by choosing to include both the number and title of the ordinance, there is a duty to provide both of them correctly to the voters who would rely on the accuracy of the materials presented [*Hebard v. Bybee (1998) 65 Cal. App. 4th 1331, 1338, 77 Cal. Rptr. 2d 352]* . An incomplete title that creates confusion regarding the ordinance does not substantially comply with the requirements of *Elec. Code § 9238* [*see Hebard v. Bybee (1998) 65 Cal. App. 4th 1331, 1334, 1339-1341, 77 Cal. Rptr. 2d 352* (petition sections containing misstated title neither technically nor substantially complied with Election Code requirements)].

The requirement that each section of the petition contain the text of the ordinance or the portion of the ordinance that is the subject of the referendum has been construed to mean that each section of the petition must contain the exact wording of the challenged ordinance. The requirement is not met by including only part of the text (even if that part is the only objectionable part of the text), and this defect is not cured by including a summary of the omitted text (even if the summary is one that had been officially published for the purpose of informing voters) [*Billig v. Voges (1990) 223 Cal. App. 3d 962, 967-968, 273 Cal. Rptr. 91* (opponents of 22-page ordinance, which comprised three sections, submitted referendum petition that was insufficient because it included only texts of two objectionable sections plus only one of three exhibits, together with city council's summary of ordinance that had been published in newspaper)].

The required "text" generally must include documents that are physically attached as exhibits to, or incorporated by reference into, the ordinance in question, but more than that is not required in a referendum petition unless the "text" as so defined would be affirmatively misleading [*Lin v. City of Pleasanton (2009) 176 Cal. App. 4th 408, 417, 419-420, -- Cal. Rptr. 3d* -- (referendum petition contained text of planning ordinance, two exhibits that were attached to and incorporated by reference into that ordinance, and exhibit to one of those two exhibits incorporated by reference into ordinance; no documents that were attached to or specifically incorporated into ordinance were omitted; referendum petition satisfied plain language of *Elec. Code § 9238(b)* "text" requirement; inclusion of copy of development plan adopted by that ordinance was not required because development plan was not included in text of that ordinance, was not attached as exhibit to it, and was not expressly incorporated by reference into it, and "text" of ordinance that was provided in this case was not rendered misleading by omission of development plan)]. Moreover, a document is not incorporated by reference for this purpose unless it is explicitly incorporated; that is, the purpose of referencing that document must be to make it part of the text of the ordinance. A mere cross reference, inserted for the purpose of rendering the text sensible, does not have the effect of incorporating the referenced document [*Lin v. City of Pleasanton (2009) 176 Cal. App. 4th 408, 417, 421-422, -- Cal. Rptr. 3d* -- (text of planning ordinance was that city council "Approves Case PUD-33, the application of James Tong, Charter Properties, for Planned Unit Development (PUD) development plan approval ... subject to the conditions shown on Exhibit B, attached here and incorporated herein by this reference"; this text incorporated that exhibit but did not incorporate development plan, which was referenced merely for contextual clarity)].

On the other hand, it is not always necessary to include all documents that happen to be attached to the challenged ordinance or incorporated into it by reference. The rule is, rather, that when a central purpose of the ordinance is to adopt and enact into law the contents of an incorporated or attached document, a referendum petition on the ordinance does not satisfy the *Elec. Code § 9238(b)* "text" requirement unless the referendum petition includes a copy of that document [*Defend Bayview Hunters Point Com. v. City & County of San Francisco (2008) 167 Cal. App. 4th 846, 858, 84 Cal. Rptr. 3d 486* (referendum petition, which included copy of challenged 13-page ordinance, did not satisfy "text" requirement of *Elec. Code § 9238(b)* because petition did not include copy of 57 page redevelopment plan that had been incorporated by reference into ordinance when it was adopted; incorporating language was, 'By this reference, the Redevelopment Plan, a copy of which is on file with the Clerk ... is incorporated in and made a part of this Ordinance with the same force and effect as though set forth fully herein'; trial court found that petition signers could not have discerned meaning of ordinance except by referring to incorporated redevelopment plan); *accord, Lin v. City of Pleasanton (2009) 176 Cal. App. 4th 408, 417, 420 n.4, -- Cal. Rptr. 3d --]* .

The circulator's declaration required by *Elec. Code § 9238(c)* probably need not be attached until after circulation, but before filing, of the petition [*see Elec. Code §§ 104, 9022, 9238*].

[b] Circulation of City Referendum Petition

For "initiative measures," statements are required to be filed acknowledging the privacy rights of the signatures to be gathered, and acknowledgment of criminal penalties for violation. These statements must be completed before petitions are circulated [*Elec. Code § 9608-9610*]. Whether these requirements are extended to "referendum measures" remains to be seen, but the prudent course of action for proponents would be to follow these privacy requirements. For discussion of these privacy requirements, see *§ 302.16*.

The referendum petition may be circulated in sections, which is the usual practice [*see Elec. Code §§ 9238, 9242*].

The proponents have a maximum of 30 days within which to circulate the petition [*see Elec. Code § 9242*; *see also § 302.45[2]*]. It is unclear when the 30-day period begins and ends. The safest course for the proponents is to assume that the period begins with the date of adoption, which is counted as the first day, and runs without interruption to and including the 30th day thereafter. In a leap year, February 29 is considered a separate day, and is counted, if it falls within the period [*see Sanguinetti v. Sanguinetti (1937) 9 Cal. 2d 95, 97-98, 69 P.2d 845]* .

A city ordinance that prohibits counting of signatures gathered by a person who is not a resident and registered voter within the city does not violate the free speech rights of the party seeking to qualify the referendum for the ballot, or the party's right to challenge local government through referendum [*Browne v. Russell (1994) 27 Cal. App. 4th 1116, 1120-1121, 1125, 33 Cal. Rptr. 2d 29]* .

[c] Required Number of Signatures on City Referendum Petition

In a city with more than 1,000 registered voters, the petition must be signed by at least 10 percent of the voters of the city according to the county elections official's last official report of registration to the Secretary of State. In a city with 1,000 or fewer registered voters, the petition must be signed by not less than 25 percent of the voters or 100 voters, whichever is the lesser [*Elec. Code § 9237*; *see Elec. Code § 359* ("voter" defined)].

A signature is subject to being disqualified if the voter did not personally write out identifying information as required by *Elec. Code § 100*, which prescribes that the voter, at the time of signing the petition, "shall... personally affix his or her printed name, and place of residence, giving street and number, and if no street or number exists, then a designation of the place of residence which will enable the location to be readily ascertained." However, a voter who is unable to "personally affix" the required information may request another person to print the voter's name and place of residence in the appropriate spaces on the petition, but the voter must personally affix his or her mark or signature in the appropriate space on the petition, and that act by the voter must be witnessed by one person "by subscribing his or her name thereon" [*Elec. Code § 100.5*]. The witness's signature must be near the voter's mark or signature. In the event of noncompliance with these requirements, an assisted signature must be disqualified; and the deficiency cannot be cured by trying to construe *Elec. Code § 100.5* in such a way that the signature could be taken as being validated by the required declaration of the petition circulator [*see Elec. Code § 104*] that is attached to each sheet of signatures [*Friends of Bay Meadows v. City of San Mateo (2007) 157 Cal. App. 4th 1175, 1179, 1189-1191, 68 Cal. Rptr. 3d 916*].

When the ordinance under attack is one that authorizes the issuance of revenue bonds by a city that is part of a joint powers entity pursuant to *Gov. Code § 6547*, the number of signatures required is different and is governed by *Elec. Code § 9236*. This signature requirement is discussed in *§ 302.47*.

[5] Filing of City Referendum Petition

The petition must be filed within 30 days from the date of adoption of the ordinance. Any petition not filed within that time is void for all purposes [*Elec. Code § 9242*]. All sections of the petition must be filed simultaneously with the city elections official [*Elec. Code §§ 9237, 9239, 9242*].

If the last day for filing is a holiday [*see Gov. Code § 6700 et seq.*], or for another reason is a day when the elections official's office is not open for business, the petition should be filed on the next preceding day when the elections official's office is open, notwithstanding the rule in *Gov. Code § 6800* (holiday as excluded from a period if it is the last day). The applicability of that rule in such a case is uncertain. If the elections official's office is actually open on the last day for filing, at a time when the office might lawfully be closed, and the petition is then presented for filing, the elections official must accept it [*see Cosgriff v. Board of Election Comm'rs (1907) 151 Cal. 407, 410, 91 P. 98]* .

Once the proponents have filed the petition, the county elections official has 30 days (excluding Saturdays, Sundays, and holidays) from the filing date within which to examine the petition and verify the signatures. If the petition is found insufficient, no further action is taken. However, the failure to secure sufficient signatures does not preclude the filing of a new petition on the same subject at a later date. If the petition is found sufficient, the elections official certifies the results of the examination to the legislative body of the city at the next regular meeting of the body [*Elec. Code §§ 9239, 9240*; *see Elec. Code §§ 9114, 9115, 9210*].

A city elections official has the ministerial duty to reject and refuse to process the petition if it is facially procedurally invalid [*see Billig v. Voges (1990) 223 Cal. App. 3d 962, 968-969, 273 Cal. Rptr. 91]* . Conversely, a writ of mandate will lie to compel the city elections official to accept and process a referendum petition presented for filing, when all statutory and constitutional procedural and substantive requirements surrounding the petition have been met. For a form for a petition for a writ of mandate ordering a city elections official to accept and process a referendum petition presented for filing, see *§ 302.91*.

[6] Effect of Referendum on City Ordinance

The effective date of an ordinance is suspended if the petition, containing the requisite number of signatures, is filed with the city elections official within 30 days of the date the adopted ordinance is attested by the city clerk or secretary to the legislative body [*Elec. Code § 9237*].

When an ordinance has been suspended by a referendum petition and then has been repealed by the city council, the council may not subsequently enact another ordinance that is in all essential features like the repealed ordinance. The council may, however, deal further with the subject of the suspended ordinance by enacting an ordinance essentially different from the referred ordinance, avoiding the objections made to that ordinance. If this is done, and not in bad faith nor with intent to evade the effect of the referendum petition, then the second ordinance will not be held invalid for this cause [*In re Stratham (1920) 45 Cal. App. 436, 439-440, 187 P. 986* ; *cf. Elec. Code § 9241* (referred ordinance "shall not again be enacted by the [municipal] legislative body for a period of one year after the date of its repeal by the legislative body")]. This principle (sometimes called the *Stratham* rule) applies equally to both general law cities and charter cities [*Rubalcava v. Martinez (2007) 158 Cal. App. 4th 563, 570, 70 Cal. Rptr. 3d 225*].

[7] Submission of Referendum Measure to Voters

If a referendum measure qualifies for the ballot, and the city elections official certifies the results to the legislative body of the city, the legislative body must reconsider the ordinance [*Elec. Code § 9237*; *see Elec. Code § 9240*]. If the legislative body does not entirely repeal the ordinance against which the petition is filed, it must submit the measure to the voters at a regular or special election, as necessary, within the time frame set forth in *Elec. Code § 9241* [*see Elec. Code § 9241*].

The legislative body of the city has a mandatory duty to either repeal the challenged ordinance or to submit the ordinance to referendum unless directed to do so by court order on a compelling showing that a proper case has been established for interfering with the referendum power [*deBottari v. City Council (1985) 171 Cal. App. 3d 1204, 1209, 217 Cal. Rptr. 790]* .

[8] Effective Date of City Referendum Ordinance

The ordinance does not become effective until a majority of the voters voting on it vote in favor of it. If the legislative body repeals the ordinance or submits it to the voters and a majority of the voters voting on it do not vote in favor of it, the ordinance cannot again be enacted by the legislative body for a period of one year after the date of its repeal by the legislative body or disapproval by the voters [*Elec. Code § 9241*]. The function of the stay provision in *Elec. Code § 9241* is to enforce the electorate's power to approve or reject measures provisionally adopted by the legislature *before* they take effect [*Lindelli v. Town of San Anselmo (2003) 111 Cal. App. 4th 1099, 1109, 4 Cal. Rptr. 3d 453]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 302.46 District Referendum Petition

The right of the voters to petition for referendum on legislative acts of a district is available in any district that is a local public entity as defined by *Gov. Code § 900.4* and to which *Elec. Code § 9300* applies [*Elec. Code § 9340*]. For discussion of *Elec. Code § 9300*, see *§ 302.26[1]*.

The right of district voters to petition for referendum is available in the same manner and subject to the same rules as apply to counties under *Elec. Code § 9141 et seq.* These rules are discussed in *§ 302.43*. All computations referred to and all county officers mentioned in those code sections, however, are to be construed to refer to comparable computations and officers of any given district [*Elec. Code § 9340*].

District ordinances authorizing the issuance of revenue bonds by a district as part of a joint powers entity pursuant to *Gov. Code § 6547* do not take effect for 60 days [*Elec. Code § 9341(a)*]. When the ordinance under attack is one authorizing the issuance of revenue bonds by the district as part of the joint powers entity, the number of signatures on the petition is governed by *Elec. Code § 9341* [*see § 302.47*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 302.47 Required Number of Signatures on Referendum Petition Against Ordinance Pursuant to Joint Powers Agreement

A referendum petition against an ordinance authorizing the issuance of revenue bonds by a county, city, school district, special district, or other local agency that is part of a joint powers entity pursuant to *Gov. Code § 6547* has its own signature requirements. When the number of votes cast for all candidates for Governor at the last preceding gubernatorial election within the boundaries of the county, city, school district, special district, or local agency that is part of the entity exceeds 500,000, the petition must be signed by at least 5 percent of the entire vote cast within the boundaries of the county, city, school district, special district, or local agency for all candidates for Governor at the last preceding gubernatorial election. When the number of votes is less than 500,000, the petition must be signed by at least 10 percent of the entire vote cast within the boundaries of the county, city, school district, special district, or other local agency for all candidates for Governor at the last preceding gubernatorial election [*Elec. Code §§ 9142(b)* (county), *9236* (city), *9341(b)* (district)].

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[Reserved]

§§ 302.48[Reserved]

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§ 302.60 Scope

This subpart discusses the procedure for recalling an elected official. Related forms include:

- Complaints for injunctive relief against the proponents of a recall petition, for use by a public officer threatened with recall proceedings [§§ 302.100-302.102].

- Complaint for injunctive relief against a clerk who threatens to process an unlawful recall petition, for use by the public officer in question [*§ 302.103*].

- Petition for a writ of mandate to compel a clerk to accept and process a recall petition presented for filing [*§ 302.104*].

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§ 302.61 Governing Law

State constitutional provisions governing recall are set forth in *Cal. Const., art. II, §§ 13-19*. The Legislature has plenary power to provide for circulation, filing, and certification of petitions, nomination of candidates to succeed recalled officers, and recall elections, respecting both state and local officers [*see Cal. Const., art. II, §§ 16, 19*]. However, the Legislature cannot provide laws respecting recall of local officers that contravene county, city, or city and county charter provisions on the same subject [*see Cal. Const., art. II, § 19*].

Statutes governing recall are set forth in *Elec. Code § 11000 et seq.* These statutes govern the recall of state and local elective officers. They do not supersede the provisions of a city, county, or city and county charter, or of ordinances adopted pursuant to such a charter, relating to recall [*Elec. Code § 11000*]. A charter may, however, incorporate by reference all or some of the statutory provisions governing recall and render them applicable under the charter [*see, e.g., Muehleisen v. Forward (1935) 4 Cal. 2d 17, 20, 46 P.2d 969]* .

Penal statutes relating to recall election campaigns are set forth in *Elec. Code § 18600 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 302.62 Construction of Recalls

Legislation affording the people the right to recall public officials, like legislation affording the people the right to initiate and repeal legislation, is to be given the same liberal construction as that extended to election statutes generally [*Reites v. Wilkerson (1950) 99 Cal. App. 2d 500, 503, 222 P.2d 81* ; *see Wilcox v. Enstad (1981) 122 Cal. App. 3d 641, 651, 176 Cal. Rptr. 560]* . Specifically, recall legislation is to be liberally construed to enable citizens to exercise their rights of recall [*Hartman v. Kenyon (1991) 227 Cal. App. 3d 413, 420, 277 Cal. Rptr. 765* ; *see Moore v. City Council (1966) 244 Cal. App. 2d 892, 901, 53 Cal. Rptr. 603]* . However, this rule of statutory construction does not permit the courts to enlarge the scope of a procedural statute when the statutory provisions are clear [*Hartman v. Kenyon (1991) 227 Cal. App. 3d 413, 420, 277 Cal. Rptr. 765* (elections official lacked authority under former *Elec. Code §§ 44, 27210* [*now see Elec. Code §§ 104, 11220*] to accept amended circulator declarations); *Wilcox v. Enstad (1981) 122 Cal. App. 3d 641, 651, 176 Cal. Rptr. 560* (elections official lacked authority under former *Elec. Code § 27215* [*now see Elec. Code § 11225*] to permit petition to be supplemented with additional signatures)].

Legal Topics:

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§ 302.63 Definitions

[1] Elections Official

In the case of the recall of elective officers of a county, school district, county board of education, community college district, or resident voting district, and of judges of trial courts the term "elections official" means the county elections official including, but not necessarily limited to, a county clerk [*Elec. Code § 11000 et seq.*]. In the case of the recall of elective officers of a city, "elections official" means the city elections official including, but not necessarily limited to, a city clerk. In the case of the recall of elective officers of a landowner voting district or any district in which, at a regular election, candidate's nomination papers are filed with the secretary of the governing board, "elections official" means the secretary of the governing board [*Elec. Code § 11002*].

[2] Electoral Jurisdiction

For the purposes of *Elec. Code § 11000 et seq.*, "electoral jurisdiction" means the area within which the voters reside who are qualified to vote for the officer sought to be recalled [*Elec. Code § 322*].

[3] Governing Board

For the purposes of *Elec. Code § 11000 et seq.*, "governing board" means a city council, the board of supervisors of a county, the board of trustees of a school district or community college district, or the legislative body of a special district, as the context requires. In the case of the recall of a trial court judge, "governing board" means the board of supervisors [*Elec. Code § 11003*].

[4] Judge

For the purposes of *Elec. Code § 11000 et seq.*, judges of courts of appeal are considered state officers, and judges of trial courts are considered county officers [*Elec. Code § 11001*].

[5] Local Officer

For the purposes of *Elec. Code § 11000 et seq.*, a "local officer" is an elective officer of a city, county, school district, community college district, or special district, or a judge of a trial court [*Elec. Code § 11004*]. It appears that the term "local officer" specifically includes elected officers of school districts [*see Board of Education v. Superior Court (1979) 93 Cal. App. 3d 578, 585, 155 Cal. Rptr. 839* (recall available to remove school district's elective officers)].

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§ 302.64 Officers to Whom Recall Applies

Recall is applicable to elective officers of the state and of all counties, cities, school districts, county boards of education, community college districts, and special districts. Recall is also applicable to judges of courts of appeal and trial courts [*see Elec. Code § 11000*]. All officers to whom recall is applicable are subject to recall even if they hold office as the result of appointment either in lieu of election or to fill a vacancy [*see Elec. Code § 11006*].

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§ 302.65 Recall Procedure Summarized

Recall is accomplished by the voters at a recall election [*see § 302.73*]. The proponents of the recall petition for the election. The election is held if the petition is filed with the appropriate official [*see Elec. Code §§ 11102-11103* (recall of state officer), *11220*, *11222* (recall of local officer)] within the required time period [*see Elec. Code § 11220*], is certified to bear the minimum required number of signatures [*see Elec. Code §§ 11107-11110*, *11222-11227*], and otherwise qualifies. If the petition qualifies, a recall election is scheduled [*see Elec. Code §§ 11110*, *11240*, *11242*; *see also Cal. Const. art. II, § 15*]. At the election, the voters vote first on whether to recall the subject officer and then, depending on the electoral jurisdiction, either to choose a successor or authorize the governing body of the jurisdiction either to appoint a successor or hold a special election for the electorate to choose a successor.

In the event the petition is certified as lacking the minimum required number of signatures, the petition signatures may be examined in accordance with *Gov. Code § 6253.5* and thus the proponents of the petition and the proponent's representatives as designated by the proponents in writing may examine the petition to determine which signatures were disqualified and to determine the reasons for disqualification [*Elec. Code § 11301*; *Gov. Code § 6253.5*]. The filing of an insufficient petition in no way precludes the later filing of another petition against the same officer [*Elec. Code § 11300*]. For further discussion of an insufficient petition, see *§ 302.71[5][b]*.

Recall petitions are generally kept on file for eight months and then may be destroyed [*see Elec. Code § 17400*]. Public access to the petitions is restricted, however [*see Elec. Code § 17400(c)*; *Gov. Code § 6253.5*].

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§ 302.66 Qualifications of Recall Proponents

The proponents of a recall must be registered voters of the electoral jurisdiction of the officer they seek to recall [*Elec. Code § 11005*; *see Elec. Code § 359* ("voter" defined)]. In other words, anyone eligible to vote for a candidate for the office in question, if an election were currently held, is entitled to propose recall of the incumbent.

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§ 302.67 Commencement of Recall Petition Process

[1] Recall of State Officer

Proceedings to recall a state officer may be begun as soon as the officer takes office.

If a state officer is the subject of a recall election and is not recalled, recall proceedings may not be begun again concerning that officer until six months have passed after the recall election [*Cal. Const. art. II, § 18*].

If recall of the Governor or Secretary of State is initiated, the recall duties of that office will be performed by the Lieutenant Governor or the Controller, respectively [*Cal. Const., art. II, § 17*].

[2] Recall of Local Officer

Recall proceedings may not be commenced against an officer of a city, county, special district, school district, community college district, or county board of education in any of the following circumstances [*Elec. Code § 11007*; *see also § 302.100* (form for complaint to enjoin untimely commencement of recall proceedings)]:

- The officer has not held office during the current term for more than 90 days.
- A recall election has been determined in the officer's favor within the last six months.
- The officer's term of office ends within six months or less.

This prohibition does not apply to recall proceedings instituted against an officer who has been appointed to office by the city's governing body pursuant to *Elec. Code § 10229* when no person had been nominated to fill the vacancy [*see Elec. Code § 11007*].

When the city or county clerk is the officer sought to be recalled, his or her duties are to be performed by some other person designated by the governing board [*Elec. Code § 11201*].

[3] Measuring Time Periods

For coverage of some of the problems arising in the measurement of the various time periods prescribed by statute, see *§ 302.21[4][c]*. In general, the safest course for the proponents is to assume that the applicable period begins with the date of the determining event and runs without interruption. Proponents should note that a period measured in months refers to calendar months, unless the contrary is specified [*see Gov. Code § 6804*].

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§ 302.68 Notice of Intention to Circulate Recall Petition

[1] Contents

Proceedings are commenced for the recall of any elective officer, including any officer appointed in lieu of election or to fill a vacancy, by the service, filing, and publication or posting of a notice of intention to circulate a recall petition [*Elec. Code § 11006*; *see Hartman v. Kenyon (1991) 227 Cal. App. 3d 413, 417, 277 Cal. Rptr. 765]* .

The contents of the notice are set forth in *Elec. Code § 11020*. They include, among other things, a requirement that the proponents include in the notice a statement of the reasons for the proposed recall. They also include a requirement that the provisions of *Elec. Code § 11023*, permitting the officer sought to be recalled to file an answer to the statement in the notice, be set forth therein [*see Elec. Code § 11020*].

Even though *Elec. Code § 11020* sets forth certain form and content requirements for the statement of reasons for the recall, the statement is intended solely for the information of the voters. Therefore, no insufficiency in its form or substance is to affect the validity of the election proceedings [*Elec. Code § 11024*]. Furthermore, in the case of state officers, sufficiency of reason for recall is not reviewable [*Cal. Const. art. II, § 14(a)*].

[2] Service and Filing

A copy of the notice must be served, by personal delivery or certified mail, on the officer sought to be recalled. The original of the notice must then be filed, within seven days of service, together with an affidavit of the time and manner of service, with the clerk in the case of the proposed recall of a local officer, with the Secretary of State in the case of the proposed recall of a state officer, or with the Controller in the case of the proposed recall of the Secretary of State. A separate notice of intention must be filed for each officer sought to be recalled [*Elec. Code § 11021*; *see Cal. Const. art. II, § 17*; *Hartman v. Kenyon (1991) 227 Cal. App. 3d 413, 417, 277 Cal. Rptr. 765]* .

[3] Publication, Posting, and Proof

After service and filing, a copy of the notice must be published or posted. The copy of the notice, as published or

posted, need not include the provisions of *Elec. Code § 11023* (*see* [1], *above*) [*Elec. Code § 11022*]. A copy of the notice must be published at the proponent's expense pursuant to *Gov. Code § 6061* [*Elec. Code § 11022*].

Publication is required unless there is no newspaper of general circulation able to provide timely publication in the jurisdiction of the officer sought to be recalled. If publication is not possible, the notice must be posted in at least three public places within the jurisdiction of the officer to be recalled [*Elec. Code § 11022*].

The publication or posting of the notice cannot be dispensed with. An unpublished or unposted petition is invalid and cannot qualify as a recall petition. The filing by the clerk of a petition that does not conform to the publication or posting requirements of *Elec. Code § 11022* would be a useless and idle act, because it would require the clerk to examine signatures from an invalid petition rather than a petition that subsequently may be found insufficient [*Moore v. City Council (1966) 244 Cal. App. 2d 892, 899-900, 53 Cal. Rptr. 603* ; *see § 302.71[5]* (filing of petition)].

The proponents will be required to submit proof of publication or an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of posting of the notice, as the case may be, to the elections official in the case of the proposed recall of a local officer, the Secretary of State in the case of the proposed recall of a state officer, or the Controller in the case of the proposed recall of the Secretary of State. The proof or affidavit (or declaration) must be filed with the elections official, Secretary of State, or Controller within 10 days after the officer sought to be recalled has filed an answer to the notice, if in fact he or she has answered. If he or she has not answered, then the proof or affidavit (or declaration) must be filed with the elections official, Secretary of State, or Controller within 10 days after the expiration of the seven-day period within which he or she could have answered [*Elec. Code § 11042(a)*; *see Elec. Code § 11023(a),(b)*; *see also Cal. Const. art. II, § 17*]. In effect, unless the officer sought to be recalled has obtained an extension of time within which to file his or her answer, the time period for filing proof of publication or an affidavit (or declaration) of posting of the notice of intention is within 17 days after the filing of the notice of intention [*see Elec. Code §§ 11023, 11042(a)*].

The proponents must file proof of publication or the affidavit (or declaration) of posting at the same time that they submit blank copies of the proposed recall petition to the elections official, Secretary of State, or Controller for approval before circulation for signatures. For discussion of precirculation approval, see *§ 302.71[3]*.

Legal Topics:

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25-302 California Forms of Pleading and Practice--Annotated § 302.69

§ 302.69 Answer of Officer Sought to Be Recalled

Within seven days after the notice of intention has been filed, the officer sought to be recalled may file an answer to the statement contained in the notice. If the officer is a state officer other than the Secretary of State, the answer is to be filed with the Secretary of State. If the officer is the Secretary of State, the answer is to be filed with the Controller. If the officer is a local officer, the answer is to be filed with the elections official [*Elec. Code § 11023(a)*; *see Cal. Const. art. II, § 17*].

If the officer chooses to file an answer, he or she must also serve a copy of it, by personal delivery or certified mail, on one of the proponents named in the notice of intention [*Elec. Code § 11023(b)*; *see Elec. Code § 11020* (contents of notice of intention)]. Service must be made within seven days after the notice of intention has been filed [*Elec. Code § 11023(b)*].

Even though *Elec. Code § 11023(a)* and *(c)* sets forth certain form and content requirements for the answer, such as that it may not exceed 200 words, the answer is intended solely for the information of the voters. Therefore, no insufficiency in its form or substance is to affect the validity of the election proceedings [*Elec. Code § 11024*].

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25-302 California Forms of Pleading and Practice--Annotated § 302.70

§ 302.70 Delivery to Voters of Reasons for Recall and Answer

If the recall petition is ultimately certified to the elections official, Controller, or Secretary of State and an election is ordered to be held, a printed copy of the proponents' statement of reasons for recall of the subject officer will be mailed to each registered voter of the electoral jurisdiction of the officer sought to be recalled. Similarly, and also dependent on the certification of the petition and the ordering of an election, if the officer sought to be recalled files an answer to the statement, a printed copy of that answer will be mailed to each registered voter of the officer's electoral jurisdiction. Both the statement and the answer will be mailed with the sample ballot, either in a separate document or in the same document as the sample ballot [*Elec. Code § 11325*].

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25-302 California Forms of Pleading and Practice--Annotated § 302.71

§ 302.71 Recall Petition

[1] Form and Contents

The proponents must use the recall petition format provided by the Secretary of State and available from the county elections official or the Secretary of State [*Elec. Code § 11041*]. If proponents are seeking to recall more than one officer, separate petitions are necessary to propose the recall of each officer [*Elec. Code § 11044*]. It should be noted that the Secretary of State must provide to county elections officials a recall petition format for distribution to proponents for a recall. The recall petition format must be made available on request by the county elections official and by the Secretary of State [*Elec. Code § 11043.5(a)*]. The recall petition made available under *Elec. Code § 11043.5(a)* must be used by proponents of a recall election [*Elec. Code § 11043.5(b)*].

Any recall petition must meet the form and content requirements of *Elec. Code §§ 11040, 11041*, and *11043* [*see Elec. Code §§ 11040, 11041, 11043*]. Chief among these requirements is that the petition contain a request that an election be called to elect a successor to the officer sought to be recalled [*Elec. Code § 11041(a)*; *see Hartman v. Kenyon (1991) 227 Cal. App. 3d 413, 417, 277 Cal. Rptr. 765]* . However, if the officer is a justice of the Supreme Court or of a court of appeal as specified in *Cal. Const. art. VI, § 16(a)*, the request must be that the Governor appoint a successor to the officer [*see Elec. Code § 11041(a)(1)*].

Additionally, the petition must bear a copy of the notice of intention to circulate, together with the statement of grounds for recall. For the purpose of this requirement, the copy of the notice of intention must contain the names of at least 10 recall proponents that appear on the notice of intention and that are selected by the proponents. The election officials shall not require the names of more than 10 proponents to be included as part of the language of the notice of intention [*Elec. Code § 11041(a)(2)*]. The provisions of *Elec. Code § 11023* do not need to be included as part of the language of the notice of intention [*see Elec. Code §§ 11023, 11041(a)(2)*]. The petition must also bear the answer of the officer sought to be recalled. If the officer has not answered, the petition must so state [*see Elec. Code § 11041(a)(3)*].

Elec. Code § 11041(b) requires that all petition sections be printed in uniform size and darkness with uniform spacing; this statute requires the use of a uniform typeface in the statement of reasons for the recall and the answer of the recall

target. However, even if a petition does not actually comply with *Elec. Code § 11041(b)*, it may be valid under the doctrine of substantial compliance. The purpose of *Elec. Code § 11041(b)* is to ensure equal emphasis of the statement of the reasons and the answer, and this purpose may be satisfied if neither the statement nor the answers are unduly emphasized [*Ruiz v. Sylva (2002) 102 Cal. App. 4th 199, 210-217, 125 Cal. Rptr. 2d 351]* .

The federal Voting Rights Act of 1965 imposes specified bilingual or multilingual election requirements on "covered" states and political subdivisions, which are defined as having specified percentages of minority-language citizens of voting age who have limited proficiency in English and whose illiteracy rate is above the national average [*see 42 U.S.C. § 1973aa*--1a(b)(2)(A)]. With respect to local elections, various counties (and other subdivisions) in California are "covered" subdivisions and so are subject to the requirement that "[w]henever any... [covered] subdivision... provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language" [*42 U.S.C. § 1973aa-1a(c)*]. However, a recall petition that is initiated, drafted, and circulated by the proponents of the recall, and which therefore cannot be considered to be "provide[d]" by a covered subdivision or by the state, is not subject to this other-language requirement [*Padilla v. Lever (9th Cir. 2006) 463 F.3d 1046, 1050-1052* (fact that *Elec. Code § 11041* prescribes format and describes required content of recall petition does not mean that state "provides" recall petition, for purposes of this other-language requirement in Voting Rights Act)].

For a form for a complaint to enjoin the circulation of an unlawful petition for recall, see *§ 302.102*.

[2] Declaration of Circulator

Each section of the petition must have attached to it a declaration signed by the circulator of that section of the petition, setting forth all of the information required by *Elec. Code § 104* [*Elec. Code § 11046*]. The declaration must include a statement that the circulator is a registered voter in the jurisdiction of the officer sought to be recalled [*Elec. Code § 11046*]. However, the declaration probably need not be attached until after the petition sections have been circulated [*see Elec. Code §§ 104, 11046*]. *Elec. Code §§ 104, 11046* include certain verification requirements, which must be met. They are not met by purported declarations under penalty of perjury that are neither dated nor subscribed by the circulator of the petition [*Dodge v. Free (1973) 32 Cal. App. 3d 436, 444, 108 Cal. Rptr. 311* (construing former Elec. Code § 27203 [*see now Elec. Code §§ 104, 11046*, containing similar provisions] and *Code Civ. Proc. § 2015.5*)]. The clerk, Secretary of State, or Controller is therefore not authorized to file sections of petitions bearing such defective circulator's declarations [*see Dodge v. Free (1973) 32 Cal. App. 3d 436, 444, 446, 108 Cal. Rptr. 311]* .

It is an abuse of an election official's authority to determine that recall petitions are insufficient on the basis of minor defects or irregularities in the circulators' declarations that do not affect the validity of the petition itself. The remedy for these minor defects or irregularities is to permit the circulator to amend his or her declaration so that it complies with the law. However, a declaration that affirmatively demonstrates that a petition, or section thereof, was circulated outside the statutorily specified period within which all signatures are to be obtained, or a declaration that fails to state that a petition, or section thereof, was circulated within the statutory period is so irregular or defective as to affect the validity of the petition itself. This is so because signatures that are not obtained within the statutorily specified period cannot be counted [*Hartman v. Kenyon (1991) 227 Cal. App. 3d 413, 419, 277 Cal. Rptr. 765]* . A declaration exhibiting either of these defects cannot be amended by the filing of supplemental petitions, because the election statutes make no provision for the filing of supplemental petitions after a recall petition has been found insufficient [*see Elec. Code §§ 11222, 11225*; *see also* [5], *below*]. Therefore, an elections official has no statutory authority to accept supplemental petitions proffered after a finding of insufficiency [*Hartman v. Kenyon (1991) 227 Cal. App. 3d 413, 419-420, 277 Cal. Rptr. 765]* .

[3] Circulation

[a] Prerequisite Approval by Elections Official

No signature may be affixed to a recall petition, and therefore the proponents of the recall may not circulate a petition for signatures, until the elections official in the case of the recall of a local officer, the Controller in the case of the recall of the Secretary of State, or the Secretary of State in the case of the recall of a state officer notifies the proponents that the form and wording of the proposed petition meet the requirements of *Elec. Code § 11040 et seq.* (form and content of recall petitions) [*Elec. Code § 11042(d)*; *see Cal. Const. art. II, § 17*; *Hartman v. Kenyon (1991) 227 Cal. App. 3d 413, 417, 277 Cal. Rptr. 765]* .

The proponents obtain this approval by filing two blank copies of the petition, together with proof of publication or an affidavit (or declaration) of posting of the notice of intention, with the elections official, Controller, or Secretary of State. The blank copies must be filed within 10 days after the officer sought to be recalled has filed an answer, if in fact he or she has answered. If the subject officer has not answered, the blanks must be filed within 10 days after the expiration of the seven-day period within which he or she could have answered [*see Elec. Code § 11042(a)*; *Hartman v. Kenyon (1991) 227 Cal. App. 3d 413, 417, 277 Cal. Rptr. 765* ; *see also Cal. Const. art. II, § 17*]. Unless the subject officer has obtained an extension of time within which to file an answer, the time period within which the proponents must file the blank copies of the petition and the proof of publication or affidavit (or declaration) of posting of the notice is within 17 days after filing the notice of intention, regardless of whether the subject officer has answered the notice [*see Elec. §§ 11023(a),(b), 11042*; *Hartman v. Kenyon (1991) 227 Cal. App. 3d 413, 417, 277 Cal. Rptr. 765]* .

Within 10 days of receiving the blank copies, the elections official, Controller, or Secretary of State must notify the proponents in writing of his or her finding relative to the sufficiency of the petition [*Elec. Code § 11042(b)*; *see Cal. Const. art II, § 17*]. If the finding is that the form and content requirements of *Elec. Code § 11040 et seq.* are met, then the proponents are free to begin circulating the petition. If the finding is that the requirements are not met, then the elections official, Controller, or Secretary of State must include in the findings a statement as to what alterations in the petition are necessary. The proponents then have 10 days within which to make the corrections and refile two blank copies of the corrected petition. The 10-day correction notification period and the 10-day filing period for corrected petitions may be repeated until the elections official or the Secretary of State finds no alterations are required [*Elec. Code § 11042(c)*; *see Hartman v. Kenyon (1991) 227 Cal. App. 3d 413, 417, 277 Cal. Rptr. 765]* .

For a form for a complaint to enjoin the premature circulation of a petition for recall, see *§ 302.101*.

[b] Manner and Place

Specified privacy requirements were added to the Elections Code effective January 1, 2003 [2002 Cal. stats 959]. For "initiative measures," statements are required to be filed acknowledging the privacy rights of the signatures to be gathered, and acknowledgment of criminal penalties for violation; and these statements must be completed before petitions are circulated [*Elec. Code § 9608-9610*]. Whether these requirements are extended to "recall measures" remains to be seen, but the prudent course of action for proponents would be to follow these privacy requirements. For discussion of these privacy requirements, see *§ 302.16*.

The petition may be circulated in sections [*see, e.g., Elec. Code § 11040*]. Only registered voters of the electoral jurisdiction of the officer sought to be recalled are qualified to circulate or sign a recall petition for that officer [*Elec. Code § 11045*; *see Elec. Code § 359* ("voter" defined)]. When a petition is circulated in more than one county for the recall of an officer, each section of the petition must bear the name of the county in which it is circulated. Only registered voters of that county may sign that petition [*Elec. Code § 11047*].

Any voter who has signed a recall petition will have his or her signature withdrawn from the petition on filing a written request for withdrawal with the elections official prior to the day the petition section bearing the voter's signature is filed [*Elec. Code § 11303*].

[c] Time Available

The amount of time the proponents have to circulate the petition is measured from the date the elections official, Controller, or Secretary of State notifies them that the form and wording of the petition meets the pertinent statutory form and content requirements [*Elec. Code § 11220(a)*; *see Elec. Code § 11042*; [a], *above*; *see also Cal. Const. art. II, § 17*]. Signatures not obtained within the statutory time period for circulating the petition may not be counted [*Hartman v. Kenyon (1991) 227 Cal. App. 3d 413, 419, 277 Cal. Rptr. 765]* . The number of days from that notification date within which the proponents have to circulate and file their petition depends on the number of registered voters in the electoral jurisdiction of the officer sought to be recalled. The number of days available for circulation and filing relative to the number of registered voters in the jurisdiction is as follows [*see Elec. Code § 11220(a)*]:

Registration	Days
Less than 1,000	40
1,000-4,999	60
5,000-9,999	90
10,000-49,999	120
50,000 or more	160

The number of registered voters is the number reported at the last report of registration by the county elections official to the Secretary of State pursuant to *Elec. Code § 2187* (summary statement of voter information) and before a finding of the clerk, Controller, or Secretary of State that no alterations are required in the form of the petition pursuant to *Elec. Code § 11042* [*Elec. Code § 11220(b)*; *see Elec. Code § 11042*].

[4] Required Number of Signatures

[a] Recall of State Officer or Judge

A petition to recall a senator, member of the Assembly, member of the Board of Equalization, judge of a court of appeal or trial (superior or municipal) court, must bear signatures of electors equal in number to at least 20 percent of the last vote for the office [*Cal. Const. art. II, § 14(b)*; *Elec. Code § 11221(b)*; *see Elec. Code § 321* ("electors" defined); *but see Cal. Const. art. II, § 19* (power of Legislature to provide for recall of local officers); *Elec. Code §§ 11001* (trial court judges are county officers for recall purposes), 11045 (only registered voters of the electoral jurisdiction of the officer sought to be recalled as entitled to sign recall petition)]. In the case of a judge of a superior or municipal court whose office has never appeared on the ballot since being created, or did not appear on the ballot at its last election pursuant to *Elec. Code § 8203* (reelection of incumbent), the Elections Code provides that the 20 percent is based on the number of votes cast within the judicial jurisdiction for the countywide office that had the least number of votes in the most recent general election in the county in which the judge holds office [*Elec. Code § 11221(c)(1)*]. For these purposes, "countywide office" means an elective office wholly within the county that is voted on throughout the county [*Elec. Code § 11221(c)(2)*].

A petition to recall any other state officer must be signed by electors equal in number to at least 12 percent of the last vote for the office, with signatures from each of 5 counties equal in number to at least 1 percent of the last previous vote for the office in the county [*Cal. Const. art. II, § 14(b)*; *Elec. Code § 11221(c)(1)*; *see Elec. Code § 321* ("elector" defined)].

[b] Recall of Local Officer

A petition to recall an officer of a city, county, school district, community college district, county board of education, or resident voting district must be signed by registered voters equal in number to not less than a specified percentage of the

registered voters in the electoral jurisdiction calculated as of the time of the last report of registration by the county elections official to the Secretary of State pursuant to *Elec. Code § 2187* (summary statement of voter information) and before a finding by the elections official, Controller, or Secretary of State that no alterations are required in the form of the recall petition pursuant to *Elec. Code § 11042* (approval of form and wording of petition) [*Elec. Code § 11221(a), (b)*]. The specified percentages are as follows [*Elec. Code § 11221(a)*]:

Registration	Percentage
Less than 1,000	30 percent
1,000-9,999	25 percent
10,000-49,999	20 percent
50,000-99,999	15 percent
100,000 or more	10 percent

A petition to recall an officer of a landowner voting district must be signed by voters owning at least 10 percent of the assessed value of land within the electoral jurisdiction of the officer sought to be recalled [*Elec. Code § 11221(d)*; *see Elec. Code § 359* ("voter") defined].

[5] Filing With Elections Official

[a] Petition Found Sufficient

The filing procedures discussed in the following paragraphs apply to petitions to recall both local and state officers. However, some variations on these procedures apply to petitions to recall state officers [*see* [c], *below*].

The petition must be filed by the proponents, or by any person or persons authorized, in writing, by a proponent. If the petition was circulated in sections, all sections must be filed at the same time [*Elec. Code § 11222(a)*].

When the petition is presented for filing, the elections official must first determine the total number of signatures affixed to the petition. If, from this examination, the elections official determines that the number of signatures, prima facie, is equal to or greater than the minimum number of signatures required, then the elections official must accept the petition for filing. The petition is deemed filed on the date of acceptance [*Elec. Code § 11222(b)*; *see Hartman v. Kenyon (1991) 227 Cal. App. 3d 413, 418, 277 Cal. Rptr. 765]* .

From that date, the elections official then has 30 days (excluding Saturdays, Sundays, and holidays) within which to examine the petition and either verify each signature individually or, if the petition contains more than 500 signatures, verify the signatures by a random-sample method [*see Elec. Code §§ 11224, 11225*; *see Hartman v. Kenyon (1991) 227 Cal. App. 3d 413, 418, 277 Cal. Rptr. 765]* . If the petition is found sufficient, then the elections official must notify the proponents of the sufficiency and must certify the results of the examination to the governing board of the electoral jurisdiction at the board's next regular meeting [*see Elec. Code §§ 11224(d), 11225(h), 11227*]. On a finding of sufficiency, the elections official has a ministerial duty to certify the results to the governing body, and mandate will lie to compel the elections official to perform this duty [*see Baroldi v. Denni (1961) 197 Cal. App. 2d 472, 476, 477, 17 Cal. Rptr. 647]* . For a form for a petition for a writ of mandate to compel an election official to accept and process a petition for recall, see *§ 302.104*.

[b] Petition Found Insufficient

If the petition is presented for filing and the elections official determines that the number of signatures, prima facie, does not equal or exceed the minimum number of signatures required, then the petition may not be filed. Any section of the petition not so filed is void for all purposes. Any petition not accepted for filing is returned to the proponents [*Elec.*

Code § 11222(b)].

If a filed petition is found insufficient within the 30-day examination period, then the elections official must notify the proponents of the insufficiency [*Elec. Code §§ 11224(c), 11225(f)*]. The insufficient petition remains on file [*Elec. Code § 11226*]. The petition signatures may be examined in accordance with *Gov. Code § 6253.5* and thus the proponents of the petition and the proponent's representatives as designated by the proponents in writing may examine the petition in order to determine which signatures were disqualified and the reasons for disqualification [*Elec. Code § 11301*; *Gov. Code § 6253.5*; *see Hartman v. Kenyon (1991) 227 Cal. App. 3d 413, 418, 277 Cal. Rptr. 765]* . The examination must commence not later than 21 days after certification of insufficiency [*Gov. Code § 6253.5*]. The right to examine the petition after a certification of insufficiency does not, however, confer on the proponents a right to file amended petitions to cure the insufficiency [*Hartman v. Kenyon (1991) 227 Cal. App. 3d 413, 420, 277 Cal. Rptr. 765]* .

Regardless of the method of signature verification used, the elections official may take no further action on the petition if the number of valid signatures is found insufficient [*Elec. Code § 11226*]. The elections official is, therefore, under a mandatory duty to take no further action, and a writ of mandate will lie to compel an elections official to desist from taking any further action [*see Wilcox v. Enstad (1981) 122 Cal. App. 3d 641, 648, 656, 176 Cal. Rptr. 560* (construing former *Elec. Code § 27215* [*now see Elec. Code § 11225*])]. For a form for a complaint to enjoin an election official from processing an unlawful petition, see *§ 302.103*.

No insufficiency in a petition against any officer bars the later filing of a new petition against that officer [*Elec. Code § 11300*]. This includes an insufficiency due to the proponents' failure to secure sufficient signatures [*see Elec. Code § 11225(g)*].

[c] Procedures for Recall of State Officer

In the case of a petition to recall a state officer, each section of the petition must be filed with the elections official of the county for which it was circulated [*Elec. Code § 11102*]. Each section must be filed by the proponents or by any person or persons authorized, in writing, by a proponent [*Elec. Code § 11103*]. Unless and until an official investigation proves otherwise, it is presumed that the petition presented contains the signatures of the requisite number of registered voters [*Elec. Code § 11101*].

Thirty days after the recall has been initiated, and every 30 days thereafter, or more frequently at the elections official's discretion, the election official of each county where a petition has been filed makes a determination of the number of registered voters that have signed the petition [*Elec. Code § 11104*]. For all practical purposes, of course, the first of these periodic determinations cannot occur until a petition has been presented to a county elections official, even though a recall is considered initiated by the filing, service, and publication or posting of the notice of intention to circulate the petition [*see Elec. Code § 11006*]. The results of each periodic examination are then forwarded to the Controller in the case of the recall of the Secretary of State, or to the Secretary of State in the case of the recall of any other state officer [*see Cal. Const. art. II, § 17*; *Elec. Code §§ 11107, 11108*]. When, as a result of these periodic examinations, the Secretary of State or the Controller determines that the proponents have collected sufficient signatures, he or she certifies that fact to the Governor [*Elec. Code § 11109*; *see Cal. Const. art. II, § 17*]. If the Governor is the subject of the recall, certification of the sufficiency of the petitions is made to the Lieutenant Governor [*see Cal. Const. art. II, § 17*; *Elec. Code § 11109*].

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§ 302.72 Submission of Recall to Voters

Within 14 days after the meeting at which the governing body receives the elections official's certificate of the sufficiency of the petition [*see § 302.71[5]*], the governing body must issue an order stating that an election will be held to determine whether the officer named in the petition will be recalled [*Elec. Code § 11240*]. If the governing board fails to issue the order within the time specified, the county elections official, within five days, is required to set the election date. If the recall is to be voted on by voters in more than one county, the elections official of the county with the largest number of registered voters who will be voting in the election is required to set the date for holding the election in consultation with the county elections officials of the other counties [*Elec. Code § 11241*].

The duty of the governing body to call an election when presented with a recall petition, duly certified by the elections official as bearing the signatures of the requisite number of voters, is mandatory, providing the petition is sufficient in form and substance. Mandate will lie to compel the governing body to call an election. However, the governing body may refuse to proceed with the election if the petition is insufficient in form or substance [*Cunningham v. City Council (1962) 200 Cal. App. 2d 340, 342, 19 Cal. Rptr 297]* .

In the case of the recall of a state officer other than the Governor, on receipt of the Secretary of State's certification of the sufficiency of the petitions (or the Controller's certification if the Secretary of State is the subject of the recall, *see Cal. Const. art. II, § 17*), the Governor is responsible for publishing notice of the holding of the recall election [*Elec. Code § 11110*].

In the case of the recall of the Governor, on receipt of the Secretary of State's certification of the sufficiency of the petitions, the Lieutenant Governor is responsible for publishing notice of the holding of the recall election [*see Cal. Const. art. II, § 17*; *Elec. Code § 11110*].

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§ 302.73 Recall Election

[1] Provisions Applicable to Recall of All Officers

The recall election is conducted and canvassed, and the results declared, in substantially the manner provided by law for a regular election for the office [*Elec. Code § 11328*]. For discussion and forms related to the conduct, canvass, and declaration of the results elections generally, see Ch. 243, *Elections* .

One election is sufficient for the recall of several officers [*Elec. Code § 11329*].

[2] Recall of City Officer

In a city recall election, the voters vote not only on whether the officer in question should be recalled but also on whether the successor, if recall is mandated, will be appointed by the legislative body of the city or will be elected by the voters at a special election [*see Elec. Code § 11321*].

A majority vote in favor of recall renders the office in question vacant [*see* Elec. Code § 11362]. If an election to fill the vacancy is not favored by the majority of the voters, then the legislative body must at once fill the vacancy by appointment. If an election to fill the vacancy is favored by the majority of the voters, then the legislative body must, at its next regular meeting, call a special election to elect a successor. In lieu of calling a special election, the election to elect a successor may be consolidated with a regular municipal election, if one is upcoming within the time specified by Elec. Code § 11363. Regardless of whether the vacancy is filled by appointment or election, the person elected or appointed holds office only for the unexpired term of the former incumbent [Elec. Code § 11363(a)].

The recalled officer may not be a candidate to succeed himself or herself at a special election held to fill the vacancy created by his or her recall. The recalled officer also may not be appointed by the legislative body to fill the vacancy created by his or her recall. Furthermore, the recalled officer may not be a candidate to fill the vacancy created by another recalled officer on the same governing board [Elec. Code § 11363(b)].

In the case of the recall of a city councillor, if a majority of the voters do not favor a special election to fill the vacancy,

and if an appointment would result in a majority of the members of the city council having been appointed, the council is prohibited from filling the vacancy by appointment [*Gov. Code §§ 34902, 36512(d)(1)*]. Instead, the council can either call an election to fill the vacancy so long as the next regularly established election is at least 114 days later, or fill the vacancy at the next regularly established election date [*Gov. Code § 36512(d)(2), (3)*; *see Elec. Code § 11326*].

If a majority of the legislative body of the city is recalled simultaneously, special provision is made for electing successors [*see* Elec. Code § 11364].

[3] Recall of Other Officer

Except in the case of a landowner voting district recall election, the voters in an election to recall a public officer other than a city officer will vote not only on whether the officer in question should be recalled but also on who should be the successor, if recall is mandated [*Elec. Code § 11322*; *see Elec. Code § 11381* (nominations of candidates to succeed recalled incumbent)]. *Elec. Code §§ 11320* and *11322* expressly exclude landowner voting districts, and since the repeal of *Elec. Code § 27314* in 1977, no statute has provided for the form of a ballot in a landowner voting district recall election.

No person whose recall is being sought may be a candidate to succeed himself or herself at a recall election. No person whose recall is being sought may be a candidate to succeed any other member of the same governing board whose recall is being sought at the same election [*Elec. Code § 11381(c)*].

If a majority of the voters favor recall, the subject officer is removed from office on the qualification of the successor [*see Elec. Code §§ 11383, 11384*], who is the candidate receiving the highest number of votes [*Elec. Code § 11385*]. If that candidate qualifies within 10 days after receiving his or her certificate of election, he or she serves the remainder of the unexpired term [*Elec. Code § 11386*]. If he or she fails to qualify within that period, the office to which he or she was elected is vacant and must be filled according to law as in other cases of vacancy [*Elec. Code § 11386*].

Legal Topics:

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

25-302 California Forms of Pleading and Practice--Annotated § 302.74

§ 302.74 Unsuccessful Recall of State Officer

[1] Reimbursement for Expenses

A state officer who is not recalled must be reimbursed by the state for his or her recall election expenses legally and personally incurred [*Cal. Const. art. II, § 18*]. Reimbursement is available only to state officers and not to local officers [*Hickman v. State of California (1971) 19 Cal. App. 3d 1038, 1039, 97 Cal. Rptr. 383* (county assessor not entitled to reimbursement for expenses incurred in defeating recall election)].

[2] Availability of Another Recall

Another recall may not be initiated against the officer until six months after the election [*Cal. Const. art. II, § 18*].

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[Reserved]

§§ 302.75[Reserved]

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§ 302.80 State Constitution

Initiative and referendum generally. *Cal. Const. art. II, §§ 8-12*

Officers subject to recall. *Cal. Const. art. II, § 13*

Recall petition re state officers. *Cal. Const. art. II, § 14*

Recall election re state officers. *Cal. Const. art. II, § 15*

Power of Legislature to enact laws governing recall. *Cal. Const. art. II, §§ 16, 19*

Recall of Governor or Secretary of State; duties to be performed by other officials. *Cal. Const. art. II, § 17*

Reimbursement of expenses to officer not recalled. *Cal. Const. art. II, § 18*

Reservation of powers of initiative and referendum. *Cal. Const. art. IV, § 1*

Adoption, amendment, or repeal of county or city charter are subject to initiative. *Cal. Const. art. XI, § 3*

Amendment of constitution by initiative. *Cal. Const. art. XVIII, § 3*

Ordinance relating to construction or development of low-rent housing project subject to mandatory referendum. *Cal. Const. art. XXXIV, § 1*

Legal Topics:

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25-302 California Forms of Pleading and Practice--Annotated § 302.81

§ 302.81 State Statutes

[1] In General

Initiative and referendum. *Elec. Code § 9000 et seq.*

Recall. *Elec. Code § 11000 et seq.*

Penal provisions. *Elec. Code § 18600 et seq.*

City charter initiatives. *Gov. Code § 34450 et seq.*

Political Reform Act of 1974 (provisions relating to ballot pamphlets). *Gov. Code § 88001 et seq.*

[2] Initiative and Referendum

[a] General Provisions and Requirements

Signature privacy. *Elec. Code §§ 9608-9610*

Notices on petitions. *Elec. Code § 101*

Validity of signature on initiative or referendum, recall petition, or paper. *Elec. Code § 105*

Bond issues. *Elec. Code § 9400 et seq.*

General provisions respecting initiative and referendum. *Elec. Code § 9600 et seq.*

Withdrawal of signature from initiative or referendum petition. *Elec. Code § 9602*

[b] City Measures

Initiative. *Elec. Code § 9200 et seq.*

Referendum. *Elec. Code § 9235 et seq.*

City or city and county charters. *Elec. Code § 9255 et seq.*

Arguments concerning citywide measures. *Elec. Code § 9280 et seq.*

[c] County Measures

Initiative. *Elec. Code § 9100 et seq.*

Referendum. *Elec. Code § 9140 et seq.*

Arguments concerning countywide measures. *Elec. Code § 9160 et seq.*

[d] District Measures

Initiative. *Elec. Code § 9300 et seq.*

Referendum. *Elec. Code §§ 9340, 9342*

[e] Growth Control Ordinances

Burden of proof and presumptions in growth control ordinances adopted by initiative or referendum. *Evid. Code § 669.5(d)*

[f] State Measures

Initiative and referendum petitions. *Elec. Code § 9000 et seq.*

Petition signatures. *Elec. Code § 9020 et seq.*

Filing petitions. *Elec. Code § 9030 et seq.*

Measures proposed by Legislature. *Elec. Code § 9040 et seq.*

Ballot titles. *Elec. Code § 9050 et seq.*

Arguments concerning measures submitted to voters. *Elec. Code § 9060 et seq.*

Ballot pamphlet. *Elec. Code § 9080 et seq.*

[3] Writ of Mandate

Form and content of peremptory writ. *Code Civ. Proc. § 1087*

Notice prerequisite to issuance of peremptory writ. *Code Civ. Proc. § 1088*

Proof of service when seeking peremptory writ. *Code Civ. Proc. § 1088.5*

Costs and damages. *Code Civ. Proc. § 1095*

[4] Recall

Signature on recall petition or paper is invalid if residence address listed on petition or paper is not same as residence address on affidavit of registration, or if petition does not specify address. *Elec. Code § 105*

Application of Elections Code provisions governing recall. *Elec. Code § 11000*

Definitions. *Elec. Code § 11002 et seq.*

Commencement of recall proceedings. *Elec. Code § 11006*

Timing of recall proceedings. *Elec. Code § 11007*

Notice of intention; answer. *Elec. Code § 11020 et seq.*

Form, circulation, and signing of petition. *Elec. Code §§ 11040 et seq., 11221*

Filing of petition. *Elec. Code §§ 11100, 11102-11103*

Examination and certification of petition. *Elec. Code §§ 11103-11109, 11222-11227, 11301*

Calling recall election. *Elec. Code §§ 11110, 11240 et seq.*

Subsequent filing after petition found insufficient. *Elec. Code § 11300*

Vacancy in office after proceedings begin. *Elec. Code § 11302*

Withdrawal of signature on petition. *Elec. Code § 11303*

Form and content of ballot and sample ballot. *Elec. Code § 11320 et seq.*

Conduct and results of election. *Elec. Code § 11328 et seq.*

Recall petitions are not public records. *Gov. Code § 6253.5*

Legal Topics:

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§ 302.82 Decisions

[1] Availability

[a] Of Initiative

Circulation of state initiative petition involves interactive communication on political change that amounts to core political speech deserving of highest level of protection under *U.S. Const. amends. I, XIV*. *Meyer v. Grant (1988) 486 U.S. 414, 421-422, 108 S. Ct. 1886, 100 L. Ed. 2d 425*

Statutes governing local planning [*see Gov. Code § 65100 et seq.*] do not prevent voters from exercising initiative power under *Cal. Const. art. II, § 11*, to amend county general plan; *Elec. Code § 9111* specifically allows such amendment. *DeVita v. County of Napa (1995) 9 Cal. 4th 763, 770-771, 38 Cal. Rptr. 2d 699, 889 P.2d 1019*

Voters in charter city whose power under city charter is equal to board of supervisors to propose, enact, and reject ordinances, acts, and measures may permissibly use initiative process to repeal tax ordinance. *Rossi v. Brown (1995) 9 Cal. 4th 688, 712-713, 38 Cal. Rptr. 2d 363, 889 P.2d 557 (San Francisco)*

State's plenary power over matters of statewide concern is sufficient authorization for legislation barring local exercise of initiative and referendum on matters that have been specifically and exclusively delegated to local legislative body. *Committee of Seven Thousand v. Superior Court (1988) 45 Cal. 3d 491, 511-512, 247 Cal. Rptr. 362, 754 P.2d 708*

In matters of statewide concern, state may preempt entire field of legislation to the exclusion of all local control; in choosing to grant some measure of local control, state has authority to impose procedural restrictions on exercise of power granted, including authority to bar exercise of initiative and referendum. *Committee of Seven Thousand v. Superior Court (1988) 45 Cal. 3d 491, 511, 247 Cal. Rptr. 362, 754 P.2d 708*

Statutory reference to action by local legislative body, although generally not conclusive on legislative intent, supports inference that intent was to preclude action by initiative or referendum; intent to exclude ballot measures more readily inferred if statute addresses matter of statewide concern rather than purely municipal affair. *Committee of Seven*

Thousand v. Superior Court (1988) 45 Cal. 3d 491, 501, 247 Cal. Rptr. 362, 754 P.2d 708

Zoning ordinance is legislative act, no matter what size parcel is, and thus subject to change by initiative. *Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal. 3d 511, 515-525, 169 Cal. Rptr. 904, 620 P.2d 565*

Administrative negation of otherwise valid planning activities that have not yet been fully carried out pursuant to previously-approved initiative measure is not a valid subject of an initiative measure. *Citizens for Jobs and the Economy v. County of Orange (2002) 94 Cal. App. 4th 1311, 1331-1334, 115 Cal. Rptr. 2d 90*

Initiative to permit local voters to set county supervisor salaries by initiative is unconstitutional because under clear language of *Cal. Const., art. XI, § 1(b)*, voters are only authorized to challenge county supervisors' salaries by referendum. *Jahr v. Casebeer (1999) 70 Cal. App. 4th 1250, 1254, 83 Cal. Rptr. 2d 172*

Any legislative act may be enacted by initiative and may be subject to referendum regardless whether act is denominated ordinance or resolution; land use decisions by local governing bodies can be challenged by either initiative or referendum. *Mervyn's v. Reyes (1998) 69 Cal. App. 4th 93, 100-101, 81 Cal. Rptr. 2d 148*

Zoning ordinances, as well as general plan, may be amended by initiative; initiative measure amending general plan or zoning ordinance is valid so long as reasonable minds might differ as to necessity or propriety of the enactment. *Pala Band of Mission Indians v. Board of Supervisors (1997) 54 Cal. App. 4th 565, 573-574, 63 Cal. Rptr. 2d 148*

When Legislature has enacted statewide policy and assigned particular local body the duty to implement that policy, Legislature thereby places implementation of statewide policy beyond reach of local initiative and referendum. *Memorial Hospitals Assn. v. Randol (1995) 38 Cal. App. 4th 1300, 1313, 45 Cal. Rptr. 2d 547*

A local coastal program that has been submitted to the state Coastal Commission pursuant to The Costal Act of 1976 (*Pub. Res. Code § 30000 et seq.*) and has been certified may be amended through the initiative process; local coastal program amendments are analogous to general plan amendments as local legislative acts subject to initiative; a statutory scheme does not restrict power of initiative or referendum merely because some elements of statewide concern are present; amendments to local coastal program not preempted by the *Coastal Act. San Mateo County Coastal Landowners' Assn. v. County of San Mateo (1995) 38 Cal. App. 4th 523, 535-539, 45 Cal. Rptr. 2d 117*

Provision of initiative ordinance conditioning annexation of "green belt" property on voter approval of general plan amendment conflicts with state law preemption of annexation law (*Gov. Code § 56000 et seq.*); ordinance unconstitutional under Cal. Const., art. XI, § 7. L. I. *F. E. Committee v. City of Lodi (1989) 213 Cal. App. 3d 1139, 1143-1149, 262 Cal. Rptr. 166*

Initiative is not remedy for denial of right to referendum, because referendum suspends effect of ordinance until issue is resolved by voters at next election, whereas initiative does not become effective until passed by voters. *Kuhs v. Superior Court (1988) 201 Cal. App. 3d 966, 971, 247 Cal. Rptr. 544*

Initiative constitutional amendment (as opposed to statutory initiative measure) is sole means available for people to modify or impinge on freedom of Legislature to exercise its constitutionally granted powers. *People's Advocate, Inc. v. Superior Court (1986) 181 Cal. App. 3d 316, 327, 226 Cal. Rptr. 640*

Initiative power of electors to propose, adopt, or reject statutes is shared with *Legislature and Governor. People's Advocate, Inc. v. Superior Court (1986) 181 Cal. App. 3d 316, 324-325, 226 Cal. Rptr. 640*

Powers of initiative reserved to people under *Cal. Const., art. IV, § 1*, does not include power to regulate internal workings of *Legislature. People's Advocate, Inc. v. Superior Court (1986) 181 Cal. App. 3d 316, 327, 226 Cal. Rptr.*

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Purpose of former *Elec. Code § 3711* (*now see Elec. Code § 9118*) is to preserve right of legislating by initiative on county level, and intent of Legislature in granting solely indirect initiative power to voters at county level (initiative can go before voters only if first presented to county legislative body) creates opportunity to spare expense of public vote. *Thompson v. Board of Supervisors (1986) 180 Cal. App. 3d 555, 561, 225 Cal. Rptr. 640*

Section of citywide initiative that engrafts impermissible condition on state and local solid waste disposal management is unenforceable and void because legislative area of solid waste disposal management is preempted by former *Gov. Code § 66700 et seq.* *Wiltshire v. Superior Court (1985) 172 Cal. App. 3d 296, 305, 218 Cal. Rptr. 199*

Initiative that withdraws power to issue special use permit from city council is impermissible because special use permits are issued or denied in exercise of council's adjudicatory, rather than legislative, powers. *Wiltshire v. Superior Court (1985) 172 Cal. App. 3d 296, 303, 218 Cal. Rptr. 199*

Initiative power may not be invoked when inevitable effect would be to greatly impair some other governmental power, practical application of which is essential; county ordinance adopted by initiative is therefore invalid when effect was to limit supervisors' power to levy taxes or appropriations for usual expenses of county, contrary to limitation on referendum power imposed by *Cal. Const., art. II, § 9*. *Community Health Assn. v. Board of Supervisors (1983) 146 Cal. App. 3d 990, 993-996, 194 Cal. Rptr. 557*

Initiative is not available to curtail city's power to tax or to contravene state law regarding definition of "special tax" in *Cal. Const., art. XIIIA, § 4*. *City of Atascadero v. Daly (1982) 135 Cal. App. 3d 466, 470, 185 Cal. Rptr. 228*

[b] Of Referendum

Under U.S. Const., art. V, process for amending United States Constitution is vested in Congress and state legislatures, and voters of state may not, through exercise of referendum or initiative power, thwart or mandate operation of federal constitutional amendment process. *Bramberg v. Jones (1999) 20 Cal. 4th 1045, 1063, 86 Cal. Rptr. 2d 319, 978 P.2d 1240*

Cal. Const., art. XI, § 1(b), neither restricts nor secures local right of referendum on employee compensation decisions; *Gov. Code § 25123(e)* restricts right of referendum when ordinance that would be subject of referendum specifically relates to implementation of memorandum of understanding between county and its employee associations. *Voters for Responsible Retirement v. Board of Supervisors (1994) 8 Cal. 4th 765, 769, 776, 784, 35 Cal. Rptr. 2d 814, 884 P.2d 645*

Power of referendum applies only to legislative acts of local governing body, as distinguished from administrative acts; city council's amendment of land use plan and rezoning of land are legislative acts subject to referendum, even though these acts are also regulated by California Coastal Act (*Pub. Res. Code § 30000 et seq.*). *Yost v. Thomas (1984) 36 Cal. 3d 561, 569-574, 205 Cal. Rptr. 801, 685 P.2d 1152*

A city elections official does not have the authority to refuse to certify an initiative petition based on extrinsic evidence relating to the manner of its circulation. An elections official's role in certifying an initiative petition is confined to the ministerial task of examining the four corners of the petition for compliance with submission requirements. *Alliance for a Better Downtown Millbrae v. Wade (2003) 108 Cal. App. 4th 123, 133, 133 Cal. Rptr. 2d 249*

Any legislative act may be enacted by initiative and may be subject to referendum regardless whether act is denominated ordinance or resolution; land use decisions by local governing bodies can be challenged by either initiative

or referendum. *Mervyn's v. Reyes (1998) 69 Cal. App. 4th 93, 100-101, 81 Cal. Rptr. 2d 148*

Power of referendum will be found to have been withdrawn when Legislature indicates intent to preempt discretion of local legislative body or when Legislature has sought to delegate legislative power so exclusively to local governing body as to indicate intent to preclude citizens' right of referendum; *Pub. Res. Code § 40059*, part of Integrated Waste Management Act (*Pub. Res. Code § 40000 et seq.*), giving governing body of local governmental agency authority to grant exclusive franchise for solid waste handling services held not to deprive local citizens of power to conduct referendum on whether to repeal long-term extension of franchise granted by their municipal council. *Empire Waste Management v. Town of Windsor (1998) 67 Cal. App. 4th 714, 716-719, 723, 79 Cal. Rptr. 2d 262*

Scope of referendum power is generally coextensive with scope of legislative authority; any legislative decision made by representative body is subject to referendum; specific subjects, however, are constitutionally and statutorily exempted from scope of state or local referenda (*see Cal. Const., art. II, § 9(a)*; *Elec. Code § 9247*); moreover, referendum may review only legislative decisions, but not matters that are strictly executive or administrative. *Empire Waste Management v. Town of Windsor (1998) 67 Cal. App. 4th 714, 717, 717 n.1, 79 Cal. Rptr. 2d 262*

Mere advisory action by local governing body is beyond the reach of referendum process; purpose of referendum is to repeal a lawful enactment by local governing body; purpose of initiative is to enact laws the local governing body could enact; referendum power does not permit establishment of a jury of the electorate to pass on legality of governing body's action; unlawful action is addressed in courts, not in voting booth; rather, referendum permits establishment of legislature of entire electorate to pass on wisdom of action lawfully taken by governing body. *Memorial Hospitals Assn. v. Randol (1995) 38 Cal. App. 4th 1300, 1310-1312, 45 Cal. Rptr. 2d 547*

When Legislature has enacted statewide policy and assigned particular local body the duty to implement that policy, Legislature thereby places implementation of statewide policy beyond reach of initiative and referendum. *Memorial Hospitals Assn. v. Randol (1995) 38 Cal. App. 4th 1300, 1313, 45 Cal. Rptr. 2d 547*

Referendum procedure is available to county citizens to challenge county board resolution amending county general plan; agreement between county and developers is unenforceable because citizens had begun referendum procedures to repeal resolution amending general plan that permitted development under agreement. *Midway Orchards v. County of Butte (1990) 220 Cal. App. 3d 765, 773, 777, 778-782, 269 Cal. Rptr. 796*

Referendum process, which allows voters to veto statutes and ordinances duly enacted by their elected legislative bodies before those laws become effective, can seriously disrupt essential governmental functions; before voters are allowed to bypass lawmaking power of their elective bodies, referendum measure must have wide base of public support. *Sylva v. Board of Supervisors (1989) 208 Cal. App. 3d 648, 654, 256 Cal. Rptr. 138*

City council's adoption of amendment to development plan formulated under Endangered Species Act (*16 U.S.C. § 1531 et seq.*) is administrative act not subject to referendum. *W. W. Dean & Associates v. City of South San Francisco (1987) 190 Cal. App. 3d 1368, 1377-1380, 236 Cal. Rptr. 11*

Initiative measure that requires voter approval of amendments to city's land use element of general plan, zoning map, or zoning code does not improperly invoke referendum power. *Lee v. City of Monterey Park (1985) 173 Cal. App. 3d 798, 810-812, 219 Cal. Rptr. 309*

City council makes required compelling showing that substantive provisions of referendum are clearly invalid, and thus not subject to referendum, if referendum would enact city zoning ordinance that would be invalid as inconsistent with general plan of city. *deBottari v. City Council (1985) 171 Cal. App. 3d 1204, 1210-1213, 217 Cal. Rptr. 790*

Referendum is not available to reject city ordinance properly imposing fee or tax on users of utility services. *Fenton*

v. City of Delano (1984) 162 Cal. App. 3d 400, 404-407, 208 Cal. Rptr. 486

County board of supervisors' action in enacting ordinance imposing criminal sanctions for housing code violations is legislative rather than administrative act and subject to referendum. *Merriman v. Board of Supervisors (1983) 138 Cal. App. 3d 889, 893, 188 Cal. Rptr. 343*

[2] Filing of Initiative or Referendum

City elections official or other ministerial officer is not authorized to refuse to process referendum based on his or her own decision that subject is not appropriate for submission to voters, even if supported by advice of city attorney. *Yost v. Thomas (1984) 36 Cal. 3d 561, 564 n.2, 205 Cal. Rptr. 801, 685 P.2d 1152*

Writ of mandate issued to compel registrar of voters to determine sufficiency of initiative petition after filing. *Farley v. Healey (1967) 67 Cal. 2d 325, 329, 62 Cal. Rptr. 26, 431 P.2d 650*

Requirement to file papers "not later than" specified date is strictly enforced; filing after specified date, even if it is a holiday, is too late. *Steele v. Bartlett (1941) 18 Cal. 2d 573, 574, 116 P.2d 780*

When February 29 is counted as separate day in measuring period of time. *Sanguinetti v. Sanguinetti (1937) 9 Cal. 2d 95, 97-98, 69 P.2d 845*

Writ of mandate issued to compel city elections official to accept and process referendum petition presented for filing. *Ley v. Dominguez (1931) 212 Cal. 587, 602, 299 P. 713* ; *Dwyer v. City Council (1927) 200 Cal. 505, 519, 253 P. 932*

Writ of mandate issued to compel county elections official to accept and process referendum petition presented for filing. *Perry v. Gross (1916) 172 Cal. 468, 472, 156 P. 1031*

Clerk is required to accept papers presented for filing when office actually open, even if on holiday. *Cosgriff v. Board of Election Comm'rs (1907) 151 Cal. 407, 410, 91 P. 98*

Election officials have ministerial duty to reject initiative petitions that suffer from a substantial, as opposed to technical, statutory defect that directly affects quality of information provided to voters. *San Francisco Forty-Niners v. Nishioka (1999) 75 Cal. App. 4th 637, 644, 89 Cal. Rptr. 2d 388*

Referendum petition must be circulated during 30 days following passage of ordinance in question; 30-day qualifying period for ordinance passed on February 6, 1996, was from February 7 through March 7, 1996. *Mapstead v. Anchundo (1998) 63 Cal. App. 4th 246, 259, 73 Cal. Rptr. 2d 602*

Referendum petition opposing ordinance under former *Elec. Code § 3751* [*see now Elec. Code § 9141*] is timely filed on 30th day after passage, because 30 days, exclusive of day of passage, are required to pass before 30-day type of ordinance is effective. *Kuhs v. Superior Court (1988) 201 Cal. App. 3d 966, 974, 247 Cal. Rptr. 544*

In mandate proceeding to compel city elections official to accept and process municipal referendum petition, elections official is not estopped from denying validity of petition despite elections official's letter to one proponent stating elections official's belief that petition was valid, when elections official orally informed proponent of official's lack of legal expertise, official provided proponent with copies of applicable Elections Code sections, and no unusual and unique circumstances existed to warrant official's acceptance of defective petition. *Creighton v. Reviczky (1985) 171 Cal. App. 3d 1225, 1233, 217 Cal. Rptr. 834*

Writ of mandate issued to compel city elections official to accept and process initiative petition presented for filing. *Duran v. Cassidy (1972) 28 Cal. App. 3d 574, 587-588, 104 Cal. Rptr. 793* ; *Bayless v. Limber (1972) 26 Cal. App. 3d 463, 470, 102 Cal. Rptr. 647*

Writ of mandate issued to compel city elections official to return defective referendum petition to proponents and to allow them one hour and 36 minutes (time remaining between original filing and closing hour of elections official's office on last day for filing) in which to cure defects. *Beck v. Piatt (1972) 24 Cal. App. 3d 611, 617, 101 Cal. Rptr. 236*

Writ of mandate issued to compel Secretary of State to accept section of initiative petition presented for filing. *Hunt v. Jordan (1934) 139 Cal. App. 200, 202, 36 P.2d 828*

Legislative distinction between allowing 60 days to file referendum petitions for ordinances relating to revenue bonds and supervisorial salaries, under former *Elec. Code §§ 3751.7, 3752* [*see now Elec. Code §§ 9142* and *9143*], and allowing 30 days to file referendum petitions for other ordinances, including redistricting, under former *Elec. Code § 3751* [*see now Elec. Code § 9141*], is rationally related to legitimate state end, so that subjecting petitioners to 30-day filing time limit under former *Elec. Code § 3751* did not deny petitioners equal protection of laws under *U.S. Const. amend. XIV*. *Thompson v. Board of Supervisors (1986) 180 Cal. App. 3d 555, 564, 225 Cal. Rptr. 640*

Enactment date of statute is date it becomes law. *County of Orange v. Flournoy (1974) 42 Cal. App. 3d 908, 912-913, 117 Cal. Rptr. 224*

[3] Constitutional Amendments

Proposition 225, initiative measure which instructed legislators to propose and support specific congressional term limits amendment to United States Constitution and required ballot in future elections for congressional and state legislative offices to include notice of nonsupport of term limits adjacent to any candidate who failed to support or pledge support for proposed amendment held unconstitutional as violating U.S. Const. art. V amendment process; process for amending constitution under U.S. Const., art. V is vested in Congress and state legislatures, and voters cannot thwart or mandate operation of that process by use of referendum or initiative power; moreover, to extent first two sections of Proposition 225 might be viewed as constituting non-binding advisory measures permissible under U.S. Const. art. V and severable from other provisions of Proposition, those provisions would not constitute valid initiative measure under California Constitution because they do not create law and thus do not adopt statute within meaning of Cal. Const., art. II. *Bramberg v. Jones (1999) 20 Cal. 4th 1045, 1048, 1063, 1063 n.19, 86 Cal. Rptr. 2d 319, 978 P.2d 1240*

Initiative process is designed to enact statutes or amend state constitution and is not available to compel Legislature to apply for constitutional convention to propose amendment to federal constitution requiring balanced budget. *American Federation of Labor v. Eu (1984) 36 Cal. 3d 687, 694-695, 697-716, 206 Cal. Rptr. 89, 686 P.2d 609*

[4] Procedure in General

Slight discrepancies between the version of Proposition 77 submitted to the Attorney General and the version circulated for signature did not mislead the public or otherwise frustrate or undermine the purposes underlying any of the applicable constitutional or statutory provisions or threaten the integrity of the electoral process. Under the particular circumstances presented in this matter, the Court found substantial compliance with the requirements, but narrowly tailored its decision. *Costa v. Superior Court (2006) 37 Cal. 4th 986, 1028, 39 Cal. Rptr. 3d 470*

Constitutional right reserved by people to submit legislative questions to direct vote of the people is not subject to

abridgment by procedural requirements. *Referendum Committee v. City of Hermosa Beach (1986) 184 Cal. App. 3d 152, 161, 229 Cal. Rptr. 51*

Environmental impact report is not required when initiative placed on ballot because public entity is not acting or giving approval. *Stein v. City of Santa Monica (1980) 110 Cal. App. 3d 458, 460-462, 168 Cal. Rptr. 39*

[5] Single-Subject Rule

Provisions of Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998, have the common purpose of addressing the problem of juvenilecrime and gang-related crime. The fact that the measure's three strikes provisions affect adults in addition to juveniles and gang members does not mean that these provisions are not reasonably germane to the purpose of the initiative. *Manduley v. Superior Court (2002) 27 Cal. 4th 537, 575-582, 117 Cal. Rptr. 2d 168*

In case of challenge based on single-subject rule, pre-election relief not only is permissible in appropriate instances, but is expressly contemplated; thus, when court determines that challengers to initiative measure have demonstrated that there is strong likelihood that initiative violates single-subject rule, it is appropriate to resolve single-subject challenge before election. *Senate of the State of Cal. v. Jones (1999) 21 Cal. 4th 1142, 1153-1154, 90 Cal. Rptr. 2d 810, 988 P.2d 1089*

Initiative measure does not violate single-subject rule if, despite its varied collateral effects, all its parts are reasonably germane to each other and to general purpose of object of initiative; single-subject provision does not require that each of provisions of a measure effectively interlock in a functional relationship; it is enough that the various provisions are reasonably related to common theme or purpose. *Senate of the State of Cal. v. Jones (1999) 21 Cal. 4th 1142, 1157, 90 Cal. Rptr. 2d 810, 988 P.2d 1089*

When drafters of initiative measure join separate provisions dealing with otherwise unrelated political issues in single initiative, initiative cannot be found to satisfy single-subject rule simply because each provision imposes requirement of voter approval. *Senate of the State of Cal. v. Jones (1999) 21 Cal. 4th 1142, 1162-1163, 90 Cal. Rptr. 2d 810, 988 P.2d 1089*

Diversity of provisions of "Crime Victims Justice Reform Act" (Proposition 115) not unconscionably complex or defying ready summary or easy comprehension by even most conscientious and sophisticated voters, because voters' pamphlet sets forth summary of measure, detailed analysis by Legislative Analyst, and complete text of proposed measure, together with customary written arguments and rebuttals, which court assumes that voters duly considered and comprehended. *Raven v. Deukmejian (1990) 52 Cal. 3d 336, 349, 276 Cal. Rptr. 326, 801 P.2d 1077*

Provisions of Proposition 115 satisfies single subject rule in that provisions were reasonably germane to each other, united to form comprehensive criminal justice reform package, promoted single subject of rights of crime victims, and had unifying theme of abrogating case law that drafters of initiative deemed unduly expansive of criminal defendants' rights. *Raven v. Deukmejian (1990) 52 Cal. 3d 336, 347, 349, 276 Cal. Rptr. 326, 801 P.2d 1077*

Provisions of "Victims' *Bill of Rights*" (Proposition 8) reasonably germane and, therefore, satisfy single-subject requirement of *Cal. Const. art. II, § 8(d)*, because each of its several facts bears common concern, "general object," or "general subject," promoting rights of actual or potential crime victims. *Brosnahan v. Brown (1982) 32 Cal. 3d 236, 247, 186 Cal. Rptr. 30, 651 P.2d 274*

Single-subject requirement for initiative measures [*Cal. Const., art. II, § 8(d)*] does not apply to, nor does any other constitutional provision, or any statute, impose single-subject requirement concerning, ballot measure sponsored by city

council. *Hernandez v. County of Los Angeles, 167 Cal. App. 4th 12, 23, 84 Cal. Rptr. 3d 10*

Proposition 71, adopted in 2004 general election, which authorized and provided for stem-cell research, did not violate single-subject rule. *California Family Bioethics Council, LLC v. California Inst. for Regenerative Medicine (2007) 147 Cal. App. 4th 1319, 1330*

Proposition 10, the California Children and Families Act of 1998, which increased the tobacco excise tax for the stated purposes of reducing tobacco use, particularly among teenagers, funded early child development and anti-smoking programs, and created the California Children and Families Commission (CCFC) and local county commissions to administer its statutory mandates, did not violate the single-subject rule because it addressed the separate subjects of early child development and tobacco consumption. All of the provisions of the Act were reasonably germane to the single subject of the improvement of the health of children from prenatal stage to age five. The record included evidence that the health of this demographic group was harmed by tobacco consumption by pregnant women and secondhand smoke. The Act improves children's health by increasing tobacco taxes, which discourages consumption and reduces the harmful effects of tobacco consumption on children, and raises revenue to be spent on improving the health and welfare of young children. *California Assn. of Retail Tobacconists v. State of California (2003) 109 Cal. App. 4th 792, 808-814, 135 Cal. Rptr. 2d 224*

An initiative entitled "Save Agriculture and Open Space Lands" reasonably and naturally encompasses provisions that will (1) limit a use of the land at issue, such as a landfill, that is incompatible with this title, and (2) promote an activity, such as coordination of solid waste recycling and management, that fosters this title by reducing a cause for encroachment on open space. Consequently, such provisions, even if they may effectively realign agency responsibility for solid waste management, would not mislead a voter as to the measure's purpose, because, like all the provisions in the measure, they are germane to achieving its clearly stated objective of preserving and enhancing specifically defined open space and agricultural lands within the County. *Shea Homes Limited Partnership v. County of Alameda (2003) 110 Cal. App. 4th 1246, 1255-1259, 2 Cal. Rptr. 3d 739*

Proposition 213 made it clear its primary subject was to limit recovery of noneconomic damages for drivers that break law; this topic can best be described as one unified subject having three integrated parts consisting of drunk drivers, uninsured drivers, and drivers in commission of or fleeing from a felony; the three subparts of this topic are generally germane to electorate's interests of restoring balance to justice system and lowering insurance premiums. *Yoshioka v. Superior Court (1997) 58 Cal. App. 4th 972, 992-993, 68 Cal. Rptr. 2d 553*

Local initiative measure entitled "Coastal Protection Initiative" that amended local coastal program that had been submitted to state Coastal Commission pursuant to The Costal Act of 1976 (*Pub. Resources Code § 30000 et seq.*) satisfied single-subject rule; initiative provisions were reasonable germane to one another in that they all dealt with planning and regulation of development in coastal zone to protect coastal resources, including agricultural lands, ecologically significant habitats and scenic values; initiative's stated purposes, including preventing construction of onshore facilities and pipelines for offshore drilling were directed at single general purpose expressed in title: protection of coastal resources. *San Mateo County Coastal Landowners' Assn. v. County of San Mateo (1995) 38 Cal. App. 4th 523, 553-555, 45 Cal. Rptr. 2d 117*

Various provisions of proposed ballot initiative, including those implementing substantive and procedural reform of welfare system, extending time within which Governor must submit budget proposal to Legislature, granting counties discretion in setting general assistance levels, and establishing incentives for school attendance by teenage parents receiving AFDC benefits, are reasonably germane to initiative's overall stated purpose of balancing budget. *League of Women Voters v. Eu (1992) 7 Cal. App. 4th 649, 658-667, 9 Cal. Rptr. 2d 416*

Initiative does not violate single-subject rule solely because summary provided by attorney general misdescribed it. *Insurance Industry Initiative Campaign Com. v. Eu (1988) 203 Cal. App. 3d 961, 968, 250 Cal. Rptr. 320*

Single-subject rule does not require initiative that would repeal existing law to share underlying purpose of law to be repealed; proposed repeal must be germane to purposes and objects of initiative. *Insurance Industry Initiative Campaign Com. v. Eu (1988) 203 Cal. App. 3d 961, 965, 250 Cal. Rptr. 320*

Provisions of automobile and liability insurance initiative relating to campaign contributions and conflicts of interest of elected officials receiving contributions are neither reasonably germane nor functionally related to stated general object of measure or to other provisions of measure, and therefore violate single-subject rule. *California Trial Lawyers Assn. v. Eu (1988) 200 Cal. App. 3d 351, 362, 245 Cal. Rptr. 916*

[5.1] Separate-Vote Provision

Cal. Const., art. XVIII, § 1, which requires in its second sentence that when the Legislature proposes an amendment of the state Constitution, "[e]ach amendment shall be so prepared and submitted that it can be voted on separately," is a limitation upon legislative power to submit constitutional amendments to the voters, and should be construed consistently with its kindred provision, the single subject provision. The Legislature's proposed submission, in a single constitutional amendment, of two changes to the state Constitution that are not germane to a common theme, purpose, or subject, violated the constitutional separate vote requirement. Californians for an *Open Primary v. McPherson (2006) 38 Cal. 4th 735, 738, 43 Cal. Rptr. 3d 315, 134 P.3d 299*

[6] Initiative

[a] Election

Writs of mandate and prohibition to prohibit Secretary of State from placing initiative measure on ballot denied. *Brosnahan v. Eu (1982) 31 Cal. 3d 1, 4, 181 Cal. Rptr. 100, 641 P.2d 200*

Writ of mandate issued to compel city council to hold election in consequence of filing of initiative petition. *Kugler v. Yocum (1968) 69 Cal. 2d 371, 384, 71 Cal. Rptr. 687, 445 P.2d 303* ; *Goodenough v. Superior Court (1971) 18 Cal. App. 3d 692, 697, 96 Cal. Rptr. 165*

Proponents of city ordinance initiative measure are entitled to writ of mandate compelling mayor and city council to submit measure to city voters. *Blotter v. Farrell (1954) 42 Cal. 2d 804, 813, 270 P.2d 481*

Writ of mandate issued to prevent Secretary of State from placing initiative measure on ballot. *Gage v. Jordan (1944) 23 Cal. 2d 794, 808, 147 P.2d 387* ; *Boyd v. Jordan (1934) 1 Cal. 2d 468, 475, 35 P.2d 533*

Writ of mandate issued to compel Secretary of State to place initiative measure on ballot. *Willett v. Jordan (1934) 1 Cal. 2d 461, 465, 35 P.2d 1025*

Irrespective of the constitutionality of an initiative, public officials must perform their ministerial statutory duties to certify the results of an initiative election. *City of Santa Monica v. Stewart (2005) 126 Cal. App. 4th 43, 76, 24 Cal. Rptr. 3d 72*

A city's failure to either adopt a qualified voter initiative or place it on the ballot within the statutory time periods does not preclude the city from exercising its ministerial and mandatory duty to take such action. *MHC Financing Limited Partnership Two v. City of Santee (2005) 125 Cal. App. 4th 1372, 1384, 23 Cal. Rptr. 3d 622*

Writ of mandate to stop circulation of initiative petition granted when initiative petition contained misleading assertions

of fact that were false beyonddispute in violation of *Elec. Code § 18600*. *San Francisco Forty-Niners v. Nishioka (1999) 75 Cal. App. 4th 637, 639, 644-645, 650, 89 Cal. Rptr. 2d 388*

Writ of mandate issued to compel city elections official to remove initiative measure from ballot. *Campen v. Greiner (1971) 15 Cal. App. 3d 836, 844, 93 Cal. Rptr. 525*

Writ of mandate issued to compel county elections official to omit initiative measure from ballot. *Mueller v. Brown (1963) 221 Cal. App. 2d 319, 328, 34 Cal. Rptr. 474*

[b] Redistricting Ordinance

County board of supervisors does not violate former *Elec. Code § 35006* [*see now Elec. Code § 21506* (prohibiting change in boundaries of supervisorial district between direct primary election and general election)] by passage of initiative redistricting ordinance with effective date between primary and general election, but with operative date after general election. *Thompson v. Board of Supervisors (1986) 180 Cal. App. 3d 555, 562, 225 Cal. Rptr. 640*

[c] Construction of Initiative

In interpreting voter initiative, appellate court applies same principles that govern statutory construction; court first turns to language of statute, giving word their ordinary meaning; statutory language must also be construed in context of statute as whole and overall statutory scheme; when language is ambiguous, court refers to other indicia of voters' intent, particularly analysis and arguments contained in official ballot pamphlet; if penal statute reasonably susceptible to multiple constructions, court ordinarily adopts construction that is more favorable to offender; rule against interpreting statutory language in a manner that would render some part of statute surplusage is only a guide and will not be used to defeat legislative intent or provide absurd results. *People v. Rizo (2000) 22 Cal. 4th 681, 685-687, 94 Cal. Rptr. 2d 375, 996 P.2d 27*

Statutory initiative is subject to same state and federal constitutional limitations as are Legislature and statutes which it enacts; statute that is inconsistent with California Constitution is void; statute that is invalid as inconsistent with California Constitution is not ineffective and inoperative to extent that its invalid parts can be severed from any valid ones; invalid part can be severed if, and only if, it is "grammatically, functionally and volitionally separable"; it is "grammatically" severable if it is distinct and separate and, hence can be removed as a whole without affecting wording of any of measure's other provisions; it is "functionally" separable if it is necessary to measure's operation and purpose; and it is "volitionally" separable if it was not of critical importance to measure's enactment; moreover, as general rule, it is not judiciary's function to reweigh findings of legislative fact underlying a legislative enactment and to extent initiative measure contains findings made by people as electors that actually state legislative facts, court will follow the general rule of deference; to extent, however, such findings do not consist of legislative fact, but of statutory orconstitutional interpretation, general rule of deference is not implicated; because Proposition 5, authorizing tribal casino gambling, is in conflict with anticasino provision of *Cal Const., art IV, § 19*, Proposition 5, except for final sentence of *Gov. Code § 98005*, held invalid and inoperative; state's consent to suit contained in final sentence of *Gov. Code § 98005* held severable from measure's invalid provisions. *Hotel Employees & Restaurant Employees Internat. Union v. Davis (1999) 21 Cal. 4th 585, 589, 602, 610, 613-615, 88 Cal.Rptr. 2d 56, 981 P.2d 990*

Evidence of purpose of statutes or constitutional amendments enacted by initiative may be drawn from many sources including historical context of statutes or amendments, ballot arguments favoring measure, and general statement of purpose found in initiative. *Amwest Surety Ins. Co. v. Wilson (1995) 11 Cal. 4th 1243, 1256-1257, 48 Cal. Rptr. 2d 12, 906 P.2d 1112*

Power of court in appropriate case to reform (rewrite) initiative statute to preserve it against invalidation under

Constitution; earlier federal appeal's court judgment affirming federal district court injunction against enforcement of sections of initiative statute based on sections unconstitutionality does not render those sections incapable of reformation by California Supreme court; whether state statute may be reformed or construed in manner that preserves its constitutionality is question of state not federal law; public interest exception to principles of res judicata or collateral estoppel held to apply. *Kopp v. Fair Pol. Practices Com. (1995) 11 Cal. 4th 607, 615, 620-622, 661-662, 685, 47 Cal. Rptr. 2d 108, 905 P2d 1248*

Although both initiatives approved by voters, Proposition 73 is effective and Proposition 68 is inoperative, since absent contrary intent, when competing, conflicting initiatives seek to comprehensively regulate same subject, only initiative receiving highest vote becomes operative. *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com. (1990) 51 Cal. 3d 744, 765, 274 Cal. Rptr. 787, 799 P. 2d 1220*

Motive or purpose of drafters of initiative are not relevant to its construction, unless there is reason to conclude that voters were aware of drafters' purpose and believed language of initiative would accomplish it. *Taxpayers to Limit Campaign Spending v. Fair Pol. Practices Com. (1990) 51 Cal. 3d 744, 764-765 n.10, 274 Cal. Rptr. 787, 799 P. 2d 1220*

Practices adopted and followed by local governments to comply with constitutional amendments adopted by initiative properly considered and given great deference in interpreting initiative. *Davis v. City of Berkeley (1990) 51 Cal. 3d 227, 239, 272 Cal. Rptr. 139, 794 P.2d 897*

Historical context is proper aid to construction of constitutional amendments adopted by initiative. *Davis v. City of Berkeley (1990) 51 Cal. 3d 227, 235, 272 Cal. Rptr. 139, 794 P.2d 897*

Power to adopt statutes by initiative is coextensive with legislative power, and statutory initiative is subject to same constitutional limitations and rules of construction as legislative enactments. *Building Industry Assn. v. City of Camarillo (1986) 41 Cal. 3d 810, 821, 226 Cal. Rptr. 81, 718 P.2d 68* ; *Legislature v. Deukmejian (1983) 34 Cal. 3d 658, 674-676, 194 Cal. Rptr. 781, 669 P.2d 17* ; *City of Westminster v. County of Orange (1988) 204 Cal. App. 3d 623, 628, 251 Cal. Rptr. 511*

Appellate court construes voter-approved amendment to city charter as court would construe voter-approved amendment to state constitution; court will not presume lawmakers (here, voters) intended literal construction of law if that construction would result in absurd consequences; in those circumstances, court must consider extrinsic evidence of voters' intent despite unambiguous language of enactment; information and arguments contained in official ballot pamphlet may indicate voters' understanding of measure and their intent in passing it; historical context in which provisions was adopted also is relevant; statement of individual legislator (in form of declaration) can properly be consider as evidence of legislative intent as long as statement is reiteration of legislative discussion and events leading up to adoption of proposed amendment rather than merely expression of personal opinion. *Woo v. Superior Court (2000) 83 Cal. App. 4th 967, 974-978, 100 Cal. Rptr. 2d 156*

Interpretation of statute presents question of law, which appellate court reviews de novo; with regard to more specific question of construing statutory limitation of 100 words for Attorney General's circulating title and summary of proposed initiative measure [*see Elec. Code §§ 303.5(c)(2), 9004(a)* (formerly section 9002)], standard of review in *Epperson v. Jordan (1938) 12 Cal. 2d 61, 82 P.2d 445* adopted; appellate court liberally construes initiative provisions to permit, if possible, electors' exercise of that privilege; court attempts to harmonize different parts of statutory scheme, and to construe language with view toward achieving result that corresponds to legislative intent and avoids absurd or unworkable result. *Holmes v. Jones (2000) 83 Cal. App. 4th 882, 888, 891, 100 Cal. Rptr. 2d 138*

When words of voter initiative are at least arguably ambiguous, court may look to various canons of statutory construction, compare provisions given to other similar statutes, and examine ballot materials as aids to ascertaining

intent of electorate; with regard to *Civ. Code § 3333.4*, a part of Personal Responsibility Act of 1996, enacted by initiative (Proposition 213), there is no explicit language in ballot materials accompanying Proposition 312, to effect punitive damages should or should not be included in limited recovery provisions of *Civ. Code § 3333.4(a)*; there is, in fact, no mention of punitive damages at all in ballot materials; thus, court reasoned that absence of any reference to limits on punitive damages in ballot materials leads to common sense conclusion that electorate did not intend to deny uninsured motorists right to seek punitive damages in appropriate case; findings and declaration of purposes in ballot materials also supported its conclusion. *Nakamura v. Superior Court (2000) 83 Cal. App. 4th 825, 834, 837-838, 100 Cal. Rptr. 2d 97*

Initiative measures are subject to same rules and cannons of statutory construction as ordinary enactments; as general rule, absent some clear indication to contrary, any change in law is presumed to have prospective application only; retroactive application cannot be supported by characterizing legislative or constitutional change as merely procedural statute; in truth, distinction relates not so much as to form of statute as to its legal effect; if substantial changes are made, even in statute which might ordinarily be classified as procedural, operation on existing rights would be retroactive because legal effect of past events would be changed, and statute will be construed to operate only in futuro unless legislative intent to contrary clearly appears; question is whether procedural changes made in law have substantial impact of changing legal effect of past events, with unanticipatedconsequences on existing circumstances, rights or reasonable expectations; if so, law must be construed to operate prospectively only unless legislative intent to contrary appears; presumption of prospectivity held to apply to relevant provisions of *Cal. Const., art VI, § 18*, enacted by voters by Proposition 190 and consequently burden was on appellant to overcome presumption by offering some evidence that drafters of Proposition 190 and voters who enacted it intended retrospective application which appellant failed to do. *Rosasco v. Commission on Judicial Performance (2000) 82 Cal. App. 4th 315, 321-326, 98 Cal. Rptr. 2d 111*

In case of a constitutional provision adopted by voters, their intent governs; in interpreting provision of constitution, court looks to ordinary and common meaning of words used; when constitution, however, contains word with both technical and popular meaning, courts will accord it its popular meaning, unless context suggests, or very nature of subject indicates, that it is employed in its technical sense. *Keller v. Chowchilla Water Dist. (2000) 80 Cal. App. 4th 1006, 1011, 96 Cal. Rptr. 2d 246*

To extent there is any ambiguity as to intent of Proposition 227, the English Language in Public School's initiative that created new chapter in California's Education Code (Chapter), and which requires children in public school who are of "Limited English Proficiency"(LEP) to be taught only in English, subject to right of parents of each affected child to seek waiver from requirement of English-only instruction, legislative history clarifies that Chapter was designed to wrest from school boards and administrators decisionmaking authority for selecting between LEP educational options, and repose this power exclusively in parents of LEP students; thus Chapter is in direct and irreconcilable conflict with *Educ. Code § 33050* which generally allows local school districts to apply to the State Board of Education for waivers from program requirements of the Education Code not enumerated in that section; in face of such a positive repugnancy, under well-recognized principles of statutory construction, enactment of Chapter held to amend by implication *Educ. Code § 33050* to except these core provisions of Chapter from general waiver process; court reached same result by employing another, but related rule of statutory construction concerning specific statute controlling over general statute when statutes are in conflict; in reaching its holding, court noted there is general presumption in law that both Legislature and electorate by initiative process are deemed aware of laws in effect at time they enact new laws and are conclusively presumed to have enacted new laws in light of existing laws having a direct bearing on them; however, unlike cases where lawmakers can be presumed to borrow from existing law to supply omitted meaning to later enactments, presumption that one legislated with full knowledge of existing law is not conclusive, and not even helpful, in cases when later enactment directly conflicts with an earlier law; when statutory language may appear unambiguous yet latent ambiguity exists, courts must go behind literal language and analyze intent of law using customary rules of statutory construction or legislative history for guidance; this may include reference to ballot materials in case of initiatives to discern what average voter would understand to be intent of law on which he or she was voting; California

courts have long recognized that an act adding, new provisions to and affecting application of existing statute in a sense amends statute; an implied amendment is an act that creates an addition, omission, modification or substitution and changes scope or effect of existing statute; wlike related principles of "repealed by implication" and "drafter's oversight," amendments by implication are disfavored but allowed to preserve statutory harmony and effectuate intent of Legislature. *McLaughlin v. State Bd. of Education (1999) 75 Cal. App. 4th 196, 201-202, 212-216, 218-225, 89 Cal. Rptr. 2d 295*

Judicial policy is to liberally construe initiative and referendum power whenever challenged so that right will not be improperly annulled; if doubts can reasonably be resolved in favor of use of this reserve power, courts will preserve it. *Mervyn's v. Reyes (1998) 69 Cal. App. 4th 93, 100-101, 81 Cal. Rptr. 2d 148*

When interpreting statute, court attempts to determine legislative intent to effectuate purpose of law; first court reads statute in ordinary way unless special definitions provided; if meaning of words clear, language controls; if meaning of words not clear, court can use interpretative aids; with voter approved enactments, interpretative aids include ballot analysis, official summary, and arguments presented to voters. *Professional Engineers v. Wilson (1998) 61 Cal. App. 4th 1013, 1019-1021, 72 Cal. Rptr.2d 111*

Initiatives are subject to same constitutional analysis as statutes. *Yoshioka v. Superior Court (1997) 58 Cal. App. 4th 972, 987 n.8, 68 Cal. Rptr. 2d 553*

Courts addressing retroactive application of initiatives generally follow two-step analysis; first, court must determine whether initiative has been retroactively applied; if so, court must then decide if people intended that statute be so applied; on finding of intent, initiative may be enacted unless it is prohibited by state or federal constitutional provisions; since initiative before court did not expressly state that it will apply retroactively, court must determine electorate's intent; to determine intent it is best to look at language of initiative itself; retroactive application of Proposition 213 upheld. *Yoshioka v. Superior Court (1997) 58 Cal. App. 4th 972, 979-992, 68 Cal. Rptr. 2d 553*

Constitutional provision for initiative rests on theory that all power of government ultimately resides in people and thus initiative power is reserved to people, not granted to them; it is duty of court to jealously guard this right of the people; judicial policy is to apply liberal construction to this power whenever it is challenged in order that the right not be improperly annulled; if doubts can reasonably be resolved in favor of use of this reserve power, courts will preserve it. *National Paint & Coatings Assn. v. State of California (1997) 58 Cal. App. 4th 753, 760, 68 Cal. Rptr. 2d 360*

When a misdemeanor *Pen. Code § 113* was inconsistent and incompatible with a later felony *Pen. Code § 113* enacted by initiative, the later enacted felony *Pen. Code § 113* was held to repeal misdemeanor *Pen. Code § 113*; when two laws on same subject, passed at different times, are inconsistent with each other, latter act prevails. *People v. Bustamante (1997) 57 Cal. App. 4th 693, 701, 67 Cal. Rptr. 2d 295*

Words of measure adopted by initiative are required to be understood as words of voters who adopted measure; words are required to be understood in common, popular way and, absent strong and convincing reason to contrary, are not entitled to consideration in technical sense inconsistent with popular meaning. *AIU Ins. Co. v. Gillespie (1990) 222 Cal. App. 3d 1155, 1159, 272 Cal. Rptr. 334*

Statute amended by proposition, requiring state plan to establish occupational standards consistent with federal OSHA standards (to avoid federal preemption of state jurisdiction), unambiguously requires inclusion in state plan of statute regarding warnings about carcinogenic chemicals, provided by another proposition; consequently, in mandamus action seeking to order Cal/OSHA Board to include warning provision in state plan, court is not required to examine intent of voters in that regard. *California Lab. Federation v. Occupational Safety & Health Stds. Bd. (1990) 221 Cal. App. 3d 1547, 1556-1557, 271 Cal. Rptr. 310*

Severability of statute enacted by initiative is possible and proper when (1) language of statute is mechanically severable, (2) sections to be severed are capable of independent application, and (3) electorate's attention was sufficiently focused on sections to be severed that it would have separately considered and adopted them absent invalid portions. *People's Advocate, Inc. v. Superior Court (1986) 181 Cal. App. 3d 316, 330-333, 226 Cal. Rptr. 640*

Words of measure adopted by initiative must be read to harmonize with subject matter and with general purpose and object of measure, consistent with measure's language. *Arvin Union School Dist. v. Ross (1985) 176 Cal. App. 3d 189, 198, 221 Cal. Rptr. 720*

Consideration of official statements made to voters in connection with proposition of law that voters are requested to approve or reject is proper to ascertain intent of electorate. *Arvin Union School Dist. v. Ross (1985) 176 Cal. App. 3d 189, 198, 221 Cal. Rptr. 720*

When electorate has altered city charter by initiative measure, but terms of amendment are ambiguous when read with existing law, legislative body of city may adopt ordinances that interpret initiative in order to harmonize it with existing law. *Creighton v. City of Santa Monica (1984) 160 Cal. App. 3d 1011, 1021, 207 Cal. Rptr. 78*

Initiative repealing inheritance tax with provision for operative date as of date of passage construed to be operative from beginning of election date when measure passed. *Estate of Cirone (1984) 153 Cal. App. 3d 199, 202-207, 200 Cal. Rptr. 511*

[d] Petition Contents

Elec. Code § 9201 does not require that initiative petition contains all the information an informed voter would want, only the text of the measure proposed to be enacted. Where passage of an initiative would affect a city's general plan, *Elec. Code § 9201* does not require the initiative petition to include the text of every plan, law, or ordinance the measure might affect. We Care-- *Santa Paula v. Herrera (2006) 139 Cal. App. 4th 387, 390-391, 42 Cal. Rptr. 3d 577*

Initiative petition involving land use and city's general plan that violated full text requirement of *Elec. Code § 9201* held invalid; purpose of full text requirement is to provide sufficient information so that registered voters can intelligently evaluate whether to sign initiative petition and to avoid confusion; cases finding lack of substantial compliance discussed. *Mervyn's v. Reyes (1998) 69 Cal. App. 4th 93, 99-104, 81 Cal. Rptr. 2d 148*

[7] Referendum

[a] In General

Under U.S. Const., art. V, process for amending United States Constitution is vested in Congress and state legislatures, and voters of state may not,through exercise of referendum or initiative power, thwart or mandate operation of federal constitutional amendment process; Proposition 225, initiative measure dealing with congressional term limits, held unconstitutional as violating amendment process authorized under U.S. Const., art. V. *Bramberg v. Jones (1999) 20 Cal. 4th 1045, 1063, 86 Cal. Rptr. 2d 319, 978 P.2d 1240*

Referendum is means by which electorate is entitled, as power reserved by it under state Constitution, to approve or reject measures passed by legislative body; scope of referendum power is generally coextensive with scope of legislative authority; any legislative decision made by representative body is subject to referendum; specific subjects, however, are exempted from scope of state or local referenda (*see Cal. Const., art. II, § 9(a)*; *Elec. Code § 9247*); moreover, referendum may review only legislative decisions, not matters that are strictly executive or administrative. *Empire Waste Management v. Town of Windsor (1998) 67 Cal. App. 4th 714, 717, 717 n.1, 79 Cal. Rptr. 2d 262*

Mere advisory action by local governing body is beyond reach of referendum process; purpose of referendum is to repeal lawful enactment by local governing body; purpose of initiative is to enact laws local governing body could enact; referendum power does not permit establishment of jury of electorate to pass on legality of governing body's action; unlawful action is addressed in courts, not in voting booth; rather, referendum permits establishment of legislature of entire electorate to pass on wisdom of action lawfully taken by governing body. *Memorial Hospitals Assn. v. Randol (1995) 38 Cal. App. 4th 1300, 1310-1312, 45 Cal. Rptr. 2d 547*

When Legislature has enacted statewide policy and assigned particular local body the duty to implement that policy, Legislature thereby places implementation of statewide policy beyond reach of initiative and referendum. *Memorial Hospitals Assn. v. Randol (1995) 38 Cal. App. 4th 1300, 1313, 45 Cal. Rptr. 2d 547*

Function of applicable sections of Elections Code facilitates, rather than limits or restricts, operation of constitutional power of referendum. *Lee v. City of Monterey Park (1985) 173 Cal. App. 3d 798, 812, 219 Cal. Rptr. 309*

Procedures to be provided by Legislature to facilitate exercise of referendum power (*see Cal. Const. art. II, § 11*) do not give Legislature power to enact substantive measures that would extend, restrict, or reduce scope of referendum. *Ortiz v. Board of Supervisors (1980) 107 Cal. App. 3d 866, 871, 166 Cal. Rptr. 100*

[b] Election

Writ of mandate issued to compel city council to hold election (or repeal ordinance) in consequence of filing of referendum petition. *Hopping v. Council of City of Richmond (1915) 170 Cal. 605, 618, 150 P. 977* ; *O'Loane v. O'Rourke (1965) 231 Cal. App. 2d 774, 785, 42 Cal. Rptr. 283* ; *Reagan v. City of Sausalito (1962) 210 Cal. App. 2d 618, 621, 631, 26 Cal. Rptr. 775*

Date of adoption or final passage of ordinance is date of last act done that is necessary to make it law. *Solomon v. Alexander (1911) 161 Cal. 23, 25-28, 118 P. 217*

Negligence of mayor in mistakenly signing ordinance that authorized special election to amend city charter by referendum is insufficient grounds to challenge validity of ordinance, since signed legislation had already been delivered to city clerk before mayor discovered error and issued subsequent veto. *Pulskamp v. Martinez (1992) 2 Cal. App. 4th 854, 861-866, 3 Cal. Rptr. 2d 607*

[c] Construction of Referenda

Judicial policy is to liberally construe to initiative and referendum power whenever challenged so that right will not be improperly annulled; if doubts can reasonably be resolved in favor of use of this reserve power, courts will preserve it. *Mervyn's v. Reyes (1998) 69 Cal. App. 4th 93, 100-101, 81 Cal. Rptr. 2d 148*

Courts are traditionally reluctant to find limitation on availability of electoral powers; power of referendum will be foun d to have been withdrawn in two instances; first, when there is definite indication by Legislature that it intends to preempt discretion of local legislative body to legislate; second, when Legislature, rather than preempt local legislative action, has instead sought to delegate legislative power so exclusively to local governing body as to indicate its intent to preclude citizens' otherwise coextensive right of referendum. *Empire Waste Management v. Town of Windsor (1998) 67 Cal. App. 4th 714, 718-719, 79 Cal. Rptr. 2d 262*

[d] Petition Contents

Under *Elec. Code § 9238(b)*, although each section of referendum petition may include number and text of ordinance, with no title, by choosing to include both number and title of ordinance, there is duty to provide both of them correctly to voters who would rely on accuracy of materials presented; moreover, incomplete title that creates confusion regarding ordinance does not substantially comply with requirements of *Elec. Code § 9238*; petition sections containing misstated title neither technically nor substantially complied with Election Code requirements. *Hebard v. Bybee (1998) 65 Cal. App. 4th 1331, 1334, 1338-1341, 77 Cal. Rptr. 2d 352*

Municipal referendum petition is in substantial compliance with content requirements of former *Elec. Code § 4052* [*see now Elec. Code § 9238*] even though petition did not carry required title, when heading of petition set forth briefly and clearly same information as would have title. *Hayward Area Planning Assn. v. Superior Court (1990) 218 Cal. App. 3d 53, 55, 266 Cal. Rptr. 745*

Even though language of former *Elec. Code § 4052* [*see now Elec. Code § 9238*] is mandatory, substantial compliance test controls so that technical deficiencies in petitions will not invalidate petitions if they substantially comply with statutory and constitutional requirements; petitions challenging zoning ordinance is not in substantial compliance when petitions failed to apprise prospective signers of precise location of affected real property. *Chase v. Brooks (1986) 187 Cal. App. 3d 657, 663-664, 232 Cal. Rptr. 65*

Former *Elec. Code § 4052* [*see now Elec. Code § 9238*] designed to reduce confusion over contents of petitions and to promote full enlightenment of prospective signers of substantive provisions of challenged ordinance to justify expenditure of public funds in placing issue on ballot. *Chase v. Brooks (1986) 187 Cal. App. 3d 657, 662, 232 Cal. Rptr. 65*

When municipal referendum petition utterly fails to apprise prospective signers of substantive provisions of ordinance, purpose of former *Elec. Code § 4052* [*see now Elec. Code § 9238*] is frustrated by defective form of petition, and petition is properly refused. *Creighton v. Reviczky (1985) 171 Cal. App. 3d 1225, 1228, 1233-1234, 217 Cal. Rptr. 834*

[8] Ballot Arguments

Where a ballot title for a local ballot measure that would increase the number of terms a city council member could serve from two to three was neither false, misleading, nor partial in violation of *Elec. Code § 9295*, the judiciary was not free to substitute its judgment given its deferential standard of review [*Martinez v. Superior Court (2006) 142 Cal. App. 4th 1245, 1248, 48 Cal. Rptr. 3d 660]*

Elec. Code § 9295 does not vest the trial court with a wide range of discretion. Instead, relief may be granted only upon clear and convincing evidence that the challenged election material is false or misleading or otherwise inconsistent with the provisions applicable to municipal elections. *Horneff v. City & County of San Francisco (2003) 110 Cal. App. 4th 814, 821, 2 Cal. Rptr. 3d 79*

Although *Elec. Code § 9295* contains no express relevancy requirement, both common sense and the reference to the general requirements of Chapter of the Elections Code would seem to imply some minimal relevancy requirement; but it is indeed a minimal requirement. *Huntington Beach City Council v. Superior Court, (2002) 94 Cal. App. 4th 1417, 1428, 115 Cal. Rptr. 2d 439*

Trial court abuses discretion in awarding attorney's fees under *Code Civ. Proc. § 1021.5* to prevailing party in mandate action under former *Elec. Code § 5025* [*see Elec. Code § 9295*] if changes ordered were (1) de minimis and (2) not required by former *Elec. Code § 5025*, and therefore did not result in significant benefit to public. *Mandicino v.*

Maggard (1989) 210 Cal. App. 3d 1413, 1416-1420, 258 Cal. Rptr. 917 (distinguishing *Washburn v. City of Berkeley (1987) 195 Cal. App. 3d 578, 240 Cal. Rptr. 784*)

Deletion of false, misleading, or inconsistent ballot arguments pursuant to former *Elec. Code §§ 3795* (county measures), 5025 (city measures) [*see now Elec. Code §§ 9190, 9295*], and city charter that provides for challenge in front of neutral judicial officer does not impermissibly encroach on free speech rights. *Patterson v. Board of Supervisors (1988) 202 Cal. App. 3d 22, 30-32, 248 Cal. Rptr. 253*

Award of attorney's fees under *Code Civ. Proc. § 1021.5* to prevailing party in mandate action under former *Elec. Code § 5025* [*see now Elec. Code § 9295*] challenging ballot argument as false and misleading is proper because (1) plaintiffs lacked pecuniary interest in election results and outcome of litigation; (2) substantial benefit accrues to public from successful action under former *Elec. Code § 5025*; (3) ballot arguments are not privileged within meaning of *Civ. Code § 47* (and thus capable of giving rise to award of attorney's fees in action under former *Elec. Code § 5025*); and (4) award does not violate real party's rights to free speech and petition of government for redress of grievances under *U.S. Const., amend. I*, and *Cal. Const., art. I, § 3*, respectively. *Washburn v. City of Berkeley (1987) 195 Cal. App. 3d 578, 584-591, 240 Cal. Rptr. 784*

In charter city, charter governs procedures for submission of ballot arguments supporting or opposing initiatives. *Gebert v. Patterson (1986) 186 Cal. App. 3d 868, 872 n.2, 231 Cal. Rptr. 150*

[9] Ballot Title and Summary

After the county counsel has prepared the title and summary under *Elec. Code § 9105*, only a proponent of the initiative has standing during the prequalification phase to seek an order requiring the county counsel to amend that title and summary; a voter who opposes a proposed countywide initiative is not able to prevent proponents of the initiative from collecting the signatures needed to qualify it for the ballot based on a contention that the title and summary of the initiative prepared by a county counsel is not impartial or accurate. *Songstad v. Superior Court of Orange County (2001) 93 Cal. App. 4th 1202, 1208, 113 Cal. Rptr. 2d 729*

Writ of mandate issued to compel Attorney General to provide official title and summary for proposed initiative measure. *Schmitz v. Younger (1978) 21 Cal. 3d 90, 93, 145 Cal. Rptr. 517, 577 P.2d 652* ; *Warner v. Kenny (1946) 27 Cal. 2d 627, 631, 165 P.2d 889*

Cal. Const., art. XIIIA, § 1(b), states that any "proposition" for certain school-related bonds must include specified accountability requirements, but makes no reference to contents of ballot that will be used in election for voter approval; in any event, statutory requirement for abbreviated statement (not exceeding 75 words) of any measure on ballot [*see Elec. Code §§ 9051(b), 13247*], would preclude putting those accountability requirements on ballot; therefore, omitting those accountability requirements on ballot for voter approval of bond measure was not error and did not affect validity of election in which measure was approved. *Committee for Responsible Sch. Expansion v. Hermosa Beach City Sch. Dist. (2006) 142 Cal. App. 4th 1178, 1187-1191, 48 Cal. Rptr. 3d 705*

Substantial compliance with ballot form prescribed by statute is required; government may not take sides in election contests or bestow unfair advantage on one of several competing factions; ballot language held not to substantially comply with statutory form in that it included language overtly favoring partisan position, which implicated interests protected by constitutional guarantee of equal protection and freedom of expression; use of ballot form to favor particular side in election directly conflicts with legislative intent to submit measure to voters in concise and neutral manner. *Citizens for Responsible Government v. City of Albany (1997) 56 Cal. App. 4th 1199, 1224-1228, 66 Cal. Rptr. 2d 102*

By essentially repeating operative language of Proposition 209, Attorney General complied with mandate of *Elec. Code § 9051* (and former section 9052) that Attorney General provide electorate with true and impartial statement of purpose of measure. *Lungren v. Superior Court (1996) 48 Cal. App. 4th 435, 443, 55 Cal. Rptr. 2d 690*

Requirements for ballot summary under *Cal. Const., art. II, § 10(d)*, and former *Elec. Code § 3572* [*see now Elec. Code § 9087*] satisfied by summary that enumerates "chief points" of initiative measure but does not include discussion of measure's possible effect on constitutional provisions not directly amended. *Tinsley v. Superior Court (1983) 150 Cal. App. 3d 90, 107-109, 197 Cal. Rptr. 643*

Trial court has authority to examine content of ballot proposition summary to determine if it fairly represents measure it summarizes. *Brennan v. Board of Supervisors (1981) 125 Cal. App. 3d 87, 91, 177 Cal. Rptr. 677*

[10] Charter Revisions

Cal. Const., art. XIII C, § 3 grants local voters the right to use the initiative power to reduce the rate that a public water district charges for domestic water. However, this constitutional provision does not grant local voters a right to impose a voter approval requirement on all future adjustments of water delivery charges. Because proposed initiative was invalid insofar as it sought to impose a voter approval requirement on future actions by the agency's governing board to increase the existing water rate and other charges or to impose new charges, it was properly withheld from the ballot. *Bighorn-Desert View Water Agency v. Verjil (2006) 39 Cal. 4th 205, 220-222, 46 Cal. Rptr. 3d 73*

The provisions in *Cal. Const., art. XI, § 3(a)* that a city may adopt a charter by majority vote and a charter may be amended in the same manner must be construed to mean that the electorate of a city has the right, but not the obligation, to adopt or amend a charter; but if the electorate exercises that right, only a majority vote, not a super majority vote, is required for approval of such charter adoption or amendment. Further, *Cal. Const., art. XIII C, § 2(b)* clearly and unambiguously means that approval of a local government's imposition or increase of any general tax requires only a majority vote, and a two-thirds vote cannot be required for such approval. *Howard Jarvis Taxpayers Assn. v. City of San Diego (2004) 120 Cal. App. 4th 374, 390-394, 15 Cal. Rptr. 3d 457*

The two statutes governing initiatives to repeal or amend city charters, *Elec. Code § 9255* and *Elec. Code § 1415*, have no maximum time limits. Nothing in them requires a city council to order the election at the next available opportunity. Indeed, the fact that each statute allows options in election dates refutes that idea. *Jeffrey v. Superior Court (2002) 102 Cal. App. 4th 1, 3-6, 125 Cal. Rptr. 2d 175*

City charter is city's constitution; accordingly, appellate court construes voter-approved amendment to city charter as court would construe voter-approved amendment to state constitution; court will not presume lawmakers (here, voters) intended literal construction of law if that construction would result in absurd consequences; in those circumstances, court must consider extrinsic evidence of voters' intent despite unambiguous language of enactment; information and arguments contained in official ballot pamphlet may indicate voters' understanding of measure and their intent in passing it; historical context in which provisions was adopted also is relevant; statement of individual legislator (in form of declaration) can properly be consider as evidence of legislative intent as long as statement is reiteration of legislative discussion and events leading up to adoption of proposed amendment rather than merely expression of personal opinion. *Woo v. Superior Court (2000) 83 Cal. App. 4th 967, 974-978, 100 Cal. Rptr. 2d 156*

Provisions of Elections Code do not require either notice of intention to circulate charter amendment petitions, or that circulator be city resident. *San Rafael Fireman's Assn. v. City Council (1980) 105 Cal. App. 3d 358, 362-364, 164 Cal. Rptr. 376*

[11] Growth-Control Ordinances

Initiative ordinance that conflicts with city's general plan is not amendment to general plan when no basis exists for believing that voters viewed measure as amendment. *Lesher Communications, Inc. v. City of Walnut Creek (1990) 52 Cal. 3d 531, 538-544, 277 Cal. Rptr. 1, 802 P.2d 317*

Gov. Code § 65863.6 (requiring growth-control ordinances to contain findings as to public health, safety, and welfare factors justifying restrictions on housing opportunities) inapplicable to growth-control ordinances enacted by initiative process. *Building Industry Assn. v. City of Camarillo (1986) 41 Cal. 3d 810, 824, 226 Cal. Rptr. 81, 718 P.2d 68*

Growth-control ordinances enacted by initiative process must be substantially and reasonably related to welfare of affected region, but must not unfairly discriminate against particular parcels of property or be arbitrary or capricious. *Building Industry Assn. v. City of Camarillo (1986) 41 Cal. 3d 810, 824, 226 Cal. Rptr. 81, 718 P.2d 68*

Referendum petition repealing zoning ordinance and creating inconsistency with city's general plan could not implicitly repeal city ordinance requiring consistency between zoning ordinances and general plan; referendum petition would fail to disclose scope of the proposed amendment. *City of Irvine v. Irvine Citizens Against Overdevelopment (1994) 25 Cal. App. 4th 868, 878, 30 Cal. Rptr. 2d 797*

Burden of proof requirement of *Evid. Code § 669.5* (city or county ordinances placing restrictions on residential buildings) applies to ordinances adopted by initiative or referendum and constitutional when so applied. *Building Industry Assn. v. City of Camarillo (1986) 41 Cal. 3d 810, 820, 226 Cal. Rptr. 81, 718 P.2d 68* ; *Lee v. City of Monterey Park (1985) 173 Cal. App. 3d 798, 807, 219 Cal. Rptr. 309*

[12] Tax Levies

Statewide statutory initiative repealing tax neither impairs fiscal powers of Legislature nor violates constitutional prohibition against referenda on tax levies. *Carlson v. Cory (1983) 139 Cal. App. 3d 724, 729-731, 189 Cal. Rptr. 185*

[13] Recall

Subject of recall petition has "vital interest" in recall proceeding and sufficient standing to challenge irregularities. *Baines v. Zemansky (1917) 176 Cal. 369, 380, 168 P. 565*

Although *Elec. Code § 11041(b)* requires that all petition sections be printed in uniform size and darkness with uniform spacing, where a petition does not actually comply with *Elec. Code § 11041(b)*, it may be valid under the doctrine of substantial compliance. The purpose of *Elec. Code § 11041(b)* is to ensure equal emphasis of the statement of the reasons and the answer, and this purpose may be satisfied if neither the statement nor the answers are unduly emphasized. *Ruiz v. Sylva (2002) 102 Cal. App. 4th 199, 210-217, 125 Cal. Rptr. 2d 351*

Elections official do not violate rule of *Walters v. Weed (1988) 45 Cal. 3d 1, 14, 246 Cal. Rptr. 5, 752 P.2d 443* , by invalidating signatures on recall petition when residence addresses of signatories to petition differed from residences of those signatories as shown on voter registration affidavits. *Hartman v. Kenyon (1991) 227 Cal. App. 3d 413, 423, 277 Cal. Rptr. 765*

Clerk is under mandatory duty to take no further action on petition found to contain insufficient number of valid signatures under former *Elec. Code § 27214* or *27215* [*now see Elec. Code § 11224* or *11225*]. *Wilcox v. Enstad (1981) 122 Cal. App. 3d 641, 648, 176 Cal. Rptr. 560*

Statute requiring attachment of circulator's declaration to petition sections, and specifying form and content of

declaration, is not undue restraint on constitutional right of recall, because statute's purpose is to safeguard against possible forgery of signatures on recall petition. *Dodge v. Free (1973) 32 Cal. App. 3d 436, 444, 108 Cal. Rptr. 311* (construing former Elec. Code § 27203 [*see now Elec. Code §§ 104, 11046*])

Successful appeal by officer, subject of recall petition, who was real party in interest in mandate proceeding by proponents against clerk. *Dodge v. Free (1973) 32 Cal. App. 3d 436, 439, 108 Cal. Rptr. 311*

Writ of mandate issued to compel city council to hold recall election on clerk's certification of sufficiency of petition. *Moore v. City Council (1966) 244 Cal. App. 2d 892, 902-903, 53 Cal. Rptr. 603* ; *Martin v. Board of Trustees (1929) 96 Cal. App. 705, 707-708, 274 P. 1015*

City clerk ordered, in contempt proceeding, to comply with writ of mandate previously issued to compel clerk to process recall petition. *Reites v. Wilkerson (1950) 99 Cal. App. 2d 500, 505, 222 P.2d 81*

[14] Injunctive Relief

Relief granted in taxpayer's mandate proceeding to prevent expending public funds on unlawful election. *Miller v. Greiner (1964) 60 Cal. 2d 827, 833-834, 36 Cal. Rptr. 737, 389 P.2d 129*

Availability of injunctive relief to enjoin elections official from processing referendum petition. *Kuhs v. Superior Court (1988) 201 Cal. App. 3d 966, 968-969, 247 Cal. Rptr. 544*

Action to enjoin city from conducting special election is frivolous and subject to sanctions when action lacks legal grounds, plaintiffs are guilty of laches in initiating action, and plaintiffs fail to introduce any admissible evidence in support of their allegations. *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 12-16, 244 Cal. Rptr. 581*

Whether referendum petitions failed to comply with requirements of former *Elec. Code § 4052* [*see now Elec. Code § 9238*] is moot once election is held; therefore, plaintiff's remedy of injunctive relief does not survive election, but is replaced by potential remedy of election contest. *Chase v. Brooks (1986) 187 Cal. App. 3d 657, 662, 232 Cal. Rptr. 65*

Injunction issued, on suit of privately interested party, to prevent city officials from taking further official action in unlawful referendum proceeding. *Lincoln Property Co. No. 41, Inc. v. Law (1975) 45 Cal. App. 3d 230, 233, 236, 119 Cal. Rptr. 292*

[15] Local Elections

The specified statutory exceptions contained in *Cal. Const., art. II, § 9(a)* to which the power of referendum does not extend, that is, urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State, impliedly limits exercise of referendum power reserved to local electors. *Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 239 n.11, 45 Cal. Rptr. 2d 207, 902 P.2d 225*

Initiative and referendum powers of local voters are generally analogous to powers at state level, unless city charter provides otherwise. *Hopping v. Council of City of Richmond (1915) 170 Cal. 605, 609-611, 150 P. 977*

Former *Elec. Code § 4014* [*see now Elec. Code § 9218*] (relating to local elections of noncharter municipalities on initiatives and providing that any number of proposed ordinances may be voted on at same election but that same subject matter must not be voted on twice within any 12-month period at special election) relates only to successive special initiative elections held within 12 months of each other, but not to admixture of initiative and referendum

processes, and specifically not to special referendum election followed within 12-month period by special initiative election on same subject matter. *Referendum Committee v. City of Hermosa Beach (1986) 184 Cal. App. 3d 152, 158, 160-161, 229 Cal. Rptr. 51*

[16] Validity of Petition

Slight discrepancies between the version of Proposition 77 submitted to the Attorney General and the version circulated for signature did not mislead the public or otherwise frustrate or undermine the purposes underlying any of the applicable constitutional or statutory provisions or threaten the integrity of the electoral process. *Costa v. Superior Court (2006) 37 Cal. 4th 986, 1028, 39 Cal. Rptr. 3d 470*

Technical deficiencies in referendum and initiative petitions will not invalidate the petitions if they are in " 'substantial compliance' with statutory and constitutional requirements. A paramount concern in determining whether a petition is valid despite an alleged defect is whether the purpose of the technical requirement is frustrated by the defective form of the petition." *MHC Financing Limited Partnership Two v. City of Santee (2005) 125 Cal. App. 4th 1372, 1389, 23 Cal. Rptr. 3d 622*

Paramount concern in determining if petition is valid under substantial compliance theory despite alleged technical defect as whether or not purpose of technical requirement is frustrated by petition's defective form. *Assembly v. Deukmejian (1982) 30 Cal. 3d 638, 652, 180 Cal. Rptr. 297, 639 P.2d 939*

Failure to instruct signers of petition to list residence address, as required by former *Elec. Code § 3516(c)* [*see now Elec. Code § 9020*], rather than address at which signer is registered to vote, is grounds for invalidating petition that has not been provided by Secretary of State to Attorney General following preparation of title and summary. *Assembly v. Deukmejian (1982) 30 Cal. 3d 638, 652, 180 Cal. Rptr. 297, 639 P.2d 939*

Technical deficiencies in referendum and initiative petitions will not invalidate the petitions if they are in substantial compliance with statutory and constitutional requirements. A paramount concern in determining whether a petition is valid despite an alleged defect is whether the purpose of the technical requirement is frustrated by the defective form of the petition. The failure of proponents to print the short title on each page of the petition is not confusing or misleading when it is apparent that the pages from which the short title is missing are continuation pages of the text of the act. *Zaremberg v. Superior Court (2004) 115 Cal. App. 4th 111, 118, 8 Cal. Rptr. 3d 723*

Initiative petition that contained misleading assertions of fact that were false beyond dispute in violation of *Elec. Code § 18600* held invalid. *San Francisco Forty-Niners v. Nishioka (1999) 75 Cal. App. 4th 637, 639, 644-645, 650, 89 Cal. Rptr. 2d 388*

Initiative petition involving land use and city's general plan that violated full text requirement of *Elec. Code § 9201* held invalid; cases finding a lack of substantial compliance discussed. *Mervyn's v. Reyes (1998) 69 Cal. App. 4th 93, 99-104, 81 Cal. Rptr. 2d 148*

Although each section of referendum petition under *Elec. Code § 9238(b)*, may include number and text of ordinance, with no title, by choosing to include both number and title of ordinance, there is duty to provide both of them correctly to voters who would rely on accuracy of materials presented; technical deficiencies in referendum petitions will not invalidate petitions if they are in substantial compliance with statutory and constitutional requirements; in considering whether petition substantially complies with statute, court looks to reason for statutory requirement and paramount concern in determining whether petition valid despite alleged defect is whether purpose of technical requirement frustrated by defective form of petition; substantial compliance means actual compliance in respect to substance essential to every reasonable objective of statute; petition sections containing misstated title neither technically nor

substantially complied with Election Code requirements. *Hebard v. Bybee (1998) 65 Cal. App. 4th 1331, 1334, 1338-1341, 77 Cal. Rptr. 2d 352*

Although registrar invalidated certain signatures because circulator declarations attested that signatures were obtained before permissible collection period, petition sections themselves demonstrated that signatures were collected within required time period and accordingly trial court did not err in finding that petition sections contained obvious clerical error and that signatures on these sections should have been counted by registrar. *Mapstead v. Anchundo (1998) 63 Cal. App. 4th 246, 258-272, 73 Cal. Rptr. 2d 602*

Under *Elec. Code §§ 100, 105*, registrar correctly invalidated signatures that only gave post office boxes or mailing addresses rather than residence addresses or other descriptions of place of residence; *Elec. Code § 105* requires that signer's residence address shown on petition be same as residence address shown on signer's voter registration affidavit and if residence address on petition does not match address on affidavit of registration, affected signature is not to be counted; *Elec. Code §§ 100* and *9020* both require signer's printed name and residence address to be personally affixed by signer. *Mapstead v. Anchundo (1998) 63 Cal. App. 4th 246, 261-272, 73 Cal. Rptr. 2d 602*

Elections Code does not mandate automatic disqualification of individual who does not print separately each letter of his or her full name when signing referendum petition; action by county elections department to disqualify such person is arbitrary as a matter of law. *Malick v. Athenour (1995) 37 Cal. App. 4th 1120, 1127, 44 Cal. Rptr. 2d 281*

Referendum petition against ordinance is properly refused when, in reliance on advice of county officials, it had signatures of 10 percent of voters in unincorporated area rather than 10 percent of voters countywide as required by former *Elec. Code § 3753* [*see now Elec. Code § 9144*], and when reliance on incorrect advice was not sufficiently justified so as to estop application of that requirement. *Board of Supervisors v. Superior Court (1983) 147 Cal. App. 3d 206, 212-216, 195 Cal. Rptr. 67*

Former *Elec. Code § 29770* [*see now Elec. Code § 18650*], prohibiting use of names and addresses on initiative, referendum, or recall petition for any other purpose than securing qualification of measure or question for ballot, not unconstitutional infringement on rights to free speech and association. *Bilofsky v. Deukmejian (1981) 124 Cal. App. 3d 825, 832-833, 177 Cal. Rptr. 621*

Initiative petitions with insufficient number of valid signatures are entitled to be supplemented with additional signatures within one year of first signatures. *Coalition for Fair Rent v. Abdelnour (1980) 107 Cal. App. 3d 97, 106, 107, 165 Cal. Rptr. 685*

Petition to put city charter amendment on ballot is not invalidated merely because signers did not include printed names after signatures. *San Rafael Fireman's Assn. v. City Council (1980) 105 Cal. App. 3d 358, 363, 164 Cal. Rptr. 376*

[17] Review

The general rule set forth in *Brosnahan v. Eu (1982) 31 Cal. 3d 1, 181 Cal. Rptr. 100, 641 P.2d 200* recognizing a strong presumption against preelection resolution of a challenge to an initiative measure--is inapplicable to a challenge not based on the alleged unconstitutionality of the substance of the initiative measure but rather on the contention that the measure in question is not the type of measure that may be adopted through the initiative process. Nonetheless, although preelection resolution of this type of a challenge is not presumptively improper, the challenge at issue in such a case generally will not become moot after an election if the measure is adopted, and thus such a claim reasonably is susceptible to judicial resolution either before or after an election. As a consequence, when such a challenge is brought prior to an election, a court should recognize that the need for an expedited preelection resolution of the claim is less compelling than with regard to the type of claim at issue in *Costa v. Superior Court (2006) 37 Cal. 4th 986, 39 Cal.*

Rptr. 3d 470 , which involved a claim that the initiative failed to comply with a procedural requirement relating to the circulation of the initiative petition. Accordingly, in such a case a court should take into consideration the availability of post-election relief in deciding whether it is preferable to resolve the issue in the often charged and rushed atmosphere of an expedited preelection review, or instead to leave the challenge for resolution with the benefit of the full, unhurried briefing, oral argument, and deliberation that generally will be available after the election. *Independent Energy Producers Assn. v. McPherson (2006) 38 Cal. 4th 1020, 1024-1025 44 Cal. Rptr. 3d 644, 136 P.3d 178*

As a general matter, a procedural challenge based upon an allegation that a proposed initiative measure has failed to comply with the essential procedural requirements necessary to qualify an initiative measure for the ballot (for example, an initiative petition's alleged failure to have obtained the requisite number of qualified signatures) may be brought and resolved prior to an election. Because the question at issue in such a case is whether the initiative measure has satisfied the constitutional or statutory procedural prerequisites necessary to qualify it for the ballot, it is logical and appropriate for a court to consider such a claim prior to the election, because if the threshold procedural prerequisites have not been satisfied, the measure is not entitled to be submitted to the voters. *Costa v. Superior Court (2006) 37 Cal. 4th 986, 1006, 39 Cal. Rptr. 3d 470*

Preelection review of initiative ballot measure is proper when challenged on grounds that electorate lacks power to adopt the proposed initiative. *American Federation of Labor v. Eu (1984) 36 Cal. 3d 687, 695-696, 206 Cal. Rptr. 89, 686 P.2d 609*

Because Secretary of State has no discretion to refuse to submit properly qualified initiative measure to voters, any challenge to submission must be promptly made and determined by petition for writ of mandate. *Legislature v. Deukmejian (1983) 34 Cal. 3d 658, 679, 194 Cal. Rptr. 781, 669 P.2d 17*

Although review of challenge to initiative measure is usually more appropriate after election, preelection review is compelled on clear showing of "jurisdictional" invalidity and that delay would result in unnecessary public expenditure and disruption of orderly conduct of subsequent primary election. *Legislature v. Deukmejian (1983) 34 Cal. 3d 658, 665-667, 194 Cal. Rptr. 781, 669 P.2d 17*

Constitutional and other challenges to ballot propositions or initiative measures are more appropriately reviewed judicially after election so as not to disrupt electoral process by preventing exercise of people's franchise, absent clear showing of invalidity. *Brosnahan v. Eu (1982) 31 Cal. 3d 1, 4, 181 Cal. Rptr. 100, 641 P.2d 200*

Although city's action for pre-election declaratory judgment as to validity of proposed initiative, aimed at limiting city's exercise of eminent domain power, was commenced promptly after initiative proponents began to circulate petitions, trial court improperly granted proponents' anti-SLAPP motion, since city had genuine and legitimate basis for challenging validity of proposed initiative. *City of Riverside v. Stansbury (2007) 155 Cal. App. 4th 1582, 1585, 1594, 66 Cal. Rptr. 3d 862*

Respect for the doctrine of separation of powers and concern for the electorate's constitutionally reserved initiative power does not permit courts to adjudicate the constitutionality of a ballot measure after the measure has been adopted by the voters, but before it has become effective. City of Santa Monica v. Stewart (2005) *126 Cal. App. 4th 43, 77, 24 Cal. Rptr. 3d 72*

Elec. Code § 9380 is the statute governing voter pamphlets for district elections. Its provisions for challenges to ballot arguments are the same as those of *Elec. Code § 13313*, except that voters or the elections official may challenge candidate statements, but only voters may challenge district election ballot arguments. *Moraga-Orinda Fire Protection Dist. v. Weir (2004) 115 Cal. App. 4th 477, 480, 10 Cal. Rptr. 3d 13*

A voter pamphlet is unquestionably a public forum involving issues of public interest. The right to seek to correct

statements made in voter pamphlets provides no protection for baseless litigation. By enacting *Code Civ. Proc. § 425.16(d)*, which exempts "any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor," the Legislature has demonstrated that it knows how to create an exemption from the anti-SLAPP statute when it wishes to do so. It has not done so for voter pamphlet challenges. *Moraga-Orinda Fire Protection Dist. v. Weir (2004) 115 Cal. App. 4th 477, 480-481, 10 Cal. Rptr. 3d 13*

In light of the fact that the Legislature has determined in the Elections Code that an election cannot be undone on the basis of alleged deficiencies in a measure's impartial analysis, trying to achieve the same result under the rubric of constitutional due process requires a showing that the impartial analysis profoundly misled the electorate, and not just that it failed to educate the electorate as to all the legal nuances of the measure. *People ex rel. Kerr v. County of Orange (2003) 106 Cal. App. 4th 914, 934, 131 Cal. Rptr. 2d 274*

Elec. Code § 18600 prohibits making of intentionally false representations concerning contents, purport or effect of an initiative, and specifically with intent to induce voter into signing petition; when initiative petition contains misleading assertions of fact that are false beyond dispute, writ may issue to prevent circulation of undisputed falsehoods; rule, however, does not apply to expressions of opinion nor to factual matters that are subject to question or dispute; argument that writ of mandate constitutes unlawful prior restraint of right to free speech under *First Amendment of United States Constitution* rejected. *San Francisco Forty-Niners v. Nishioka (1999) 75 Cal. App. 4th 637, 644-650, 89 Cal. Rptr. 2d 388*

With regard to petition signatures, court in mandamus proceeding may review clerk's certification; when it finds clerk acted reasonably and not arbitrarily or fraudulently, it must accept clerk's determination; whether signer personally affixed his or her printed name and residence address is essentially factual question and thus question before court is whether registrar acted reasonably; in holding limited to facts of the case, appeal dismissed as moot and election results defeating ordinance allowed to stand when referendum petition containing insufficient signatures had been submitted to voters. *Mapstead v. Anchundo (1998) 63 Cal. App. 4th 246, 269, 269 n.15, 277, 73 Cal. Rptr. 2d 602*

Initiative process is not public opinion poll, but method of enacting legislation; if proposed measure does not enact legislation, or seeks to compel legislative action electorate has no power to compel, it should not be on ballot and preelection challenge is proper. *Yes On Measure A v. City of Lake Forest (1997) 60 Cal. App. 4th 620, 626, 70 Cal. Rptr. 2d 517*

Any voter may seek writ of mandate requiring any copy to be amended or deleted from ballot pamphlet; writ of mandate will only issue on clear and convincing proof that copy in question is false, misleading, or inconsistent with requirements of Election Code or *Gov. Code §§ 88000-88007*, and that issuance of writ will not substantially interfere with printing and distribution of ballot pamphlet as required by law. *Lungren v. Superior Court (1996) 48 Cal. App. 4th 435, 439, 55 Cal. Rptr. 2d 690* ; *Elec. Code § 9092*; *see Gov. Code § 88006*

Trial court has discretion whether to entertain preelection challenge to ballot measure and appellate court will review trial court's action for abuse of discretion; trial court will remove initiative or referendum from ballot before voters are permitted to vote on measure only on compelling showing that proper case has been established for interfering; trial court's preelection "compelling showing" standard inapplicable to postelection appellate review; once appellate court consideration is postelection, whether appellate court confronted with victorious measure, or one that never made ballot in the first place, appellate court simply determines whether, as a matter of law, ballot measure is valid. *Memorial Hospitals Assn. v. Randol (1995) 38 Cal. App. 4th 1300, 1306-1307, 45 Cal. Rptr. 2d 547*

Writ petition for review of trial court's order preliminarily enjoining county elections official from accepting and processing referendum petitions not moot even though petitioner has circulated initiative petitions covering same subject matter as referendum petitions, because availability of initiative does not remedy denial of right to referendum.

Kuhs v. Superior Court (1988) 201 Cal. App. 3d 966, 971, 247 Cal. Rptr. 544

Issuance of mandate writ prohibiting Secretary of State and three county voter registrars from qualifying, certifying, or placing initiative on ballot is proper because initiative petition was still in signature-collecting stage when writ petition was filed and measure presented palpable transgression of single-subject rule. *California Trial Lawyers Assn. v. Eu (1988) 200 Cal. App. 3d 351, 357, 245 Cal. Rptr. 916*

Denial of preliminary injunction to prevent city from conducting special election proper when electorate clearly has power to adopt proposed measure and substantive provisions of proposed measure are legally valid. *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 12-13, 244 Cal. Rptr. 581*

Appeal from denial of preliminary injunction to prevent city from conducting special election moot and subject to dismissal when election was already held and postelection injunctive relief would thus be purely academic. *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 10-11, 244 Cal. Rptr. 581*

Moot appeal involving defective initiative petition not subject to dismissal because defect in petition was likely to recur between other parties and yet evade meaningful review. *Myers v. Patterson (1987) 196 Cal. App. 3d 130, 134-135, 241 Cal. Rptr. 751*

Even though it is more appropriate to review challenges to initiative measures after election than to disrupt electoral process by preventing exercise of people's right to vote, preelection review is proper on showing that proposed initiative is beyond power of voters to adopt or is not legislative in character. *Wiltshire v. Superior Court (1985) 172 Cal. App. 3d 296, 302, 218 Cal. Rptr. 199*

Exceptions to general rule limiting judicial review of ballot measures to postelection proceedings is recognized when electorate lacks power to adopt proposal in first instance and when substantive provisions of proposed measure are legally invalid; thus, even if proposed measure is within scope of initiative power, courts retain equitable discretion to examine measure before election on compelling showing that substantive provisions of measure are clearly invalid. deBottari v. *City Council (1985) 171 Cal. App. 3d 1204, 1209-1210, 217 Cal. Rptr. 790*

Judicial review of constitutional or other challenges to ballot proposition or initiative measure is generally more appropriate after election in absence of clear showing of invalidity. *Bailey v. County of El Dorado (1984) 162 Cal. App. 3d 94, 98-100, 210 Cal. Rptr. 237*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLegislationInitiative & ReferendumGovernmentsLocal GovernmentsChartersGovernmentsLocal GovernmentsElectionsGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsLocal GovernmentsOrdinances & RegulationsGovernmentsState & Territorial GovernmentsEmployees & Officials

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§ 302.83 Attorney General Opinions

Elec. Code § 9209 unconstitutional in requiring circulators of city initiative petitions to declare that they are voters of the city. *82 Ops. Cal. Atty Gen. 250 (1999)*

Quo warranto is inappropriate remedy for testing validity of proposed statewide initiative. *75 Ops. Cal. Atty. Gen. 70 (1992)*

Legislature is not authorized under existing statutes to call special election before general election for purpose of submitting to electorate initiative measure that qualified less than 131 days before general election; Legislature is not authorized to place initiative measure that qualified less than 131 days before special election on ballot of special election called by Governor for purpose of submitting another qualified initiative to electorate. *64 Ops. Cal. Atty. Gen. 55 (1981)*

Former *Elec. Code § 29770* [*see now Elec. Code § 18650*] precludes proponent of ballot measure from using names and addresses on petition section to compile mailing list for fund raising in support of qualifying and securing passage of measure for ballot. *63 Ops. Cal. Atty. Gen. 37 (1980)*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationInitiative & ReferendumGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElectionsGovernmentsState & Territorial GovernmentsLegislatures

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§ 302.84 Law Reviews

Sutro, *Interpretation of Initiatives by Reference to Similar Statutes: Canons of Construction Do Not Adequately Measure Voter Intent, 34 Santa Clara L. Rev. 945 (1994)*

Comment, *Putting the "Single" Back in the Single-Subject Rule: A Proposal for Initiative Reform in California, 24 U.C. Davis L. Rev. 879 (1991)*

Kirsch, *Initiatives: Cutting Up the Constitution?* 4(11) Cal. Law. 34 (1984)

Comment, *Judicial Intervention in the Preelection Stage of the Initiative Process: A Change of Policy by the California Supreme Court, 15 Pac. L.J. 1127 (1984)*

Lowenstein, *California Initiatives and the Single-Subject Rule, 30 UCLA L. Rev. 936 (1983)*

Comment, *Preelection Judicial Review: Taking the Initiative in Voter Protection, 71 Cal. L. Rev. 1216 (1983)*

Legal Topics:

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

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25-302 California Forms of Pleading and Practice--Annotated §§ 302.85-302.89

[Reserved]

§§ 302.85[Reserved]

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25-302 California Forms of Pleading and Practice--Annotated § 302.90

§ 302.90 Complaint by Taxpayer Against Elections Official for Injunctive Relief to Halt Official Action on Unlawful Initiative or Referendum Proceeding [Civ. Code § 3422; Code Civ. Proc. §§ 526a, 527]

[1] FORM Complaint by Taxpayer Against Elections Official for Injunctive Relief to Halt Official Action on Unlawful Initiative or Referendum Proceeding [Civ. Code § 3422; Code Civ. Proc. §§ 526a, 527]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s) and title(s)*]	)	COMPLAINT FOR INJUNCTIVE RELIEF
,[and DOES I through _____,]	)	
Defendant(s).	)	
	)	
	)	

_____

Plaintiff alleges:

1. Defendant _____ [*allege name and official status of each defendant, e.g.,* Jane Smith is the Secretary of State of California *or* John Smith is the Clerk of the County of _____].

[2. At all times herein mentioned defendants _____ (*names*) were the agents, servants, and employees of their codefendants, and in doing the things hereinafter alleged were acting in the course and scope of their authority as such agents, servants, and employees, and with the permission and consent of their codefendants.]

[3. Plaintiff is ignorant of the true names and capacities of defendants sued as DOES I-_____,

inclusive, and, therefore, sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the detriment alleged in this complaint.)]

4. Plaintiff is a taxpayer of the _____ [*describe electoral jurisdiction, e.g.,* State of California *or* County of _____] and brings this action in that capacity under the provisions of *Code of Civil Procedure Section 526a*.

5. _____ [*Allege facts showing why initiative or referendum proceeding is unlawful and why all official action on it should be halted to savetax money, e.g.,* On _____ (*date*), certain persons not parties to this action presented to defendant _____ (*name*), in his/her official capacity as _____ (*describe, e.g.,* Clerk of the County of _____), a petition protesting against the adoption of a certain ordinance that was duly adopted by _____ (*specify, e.g.,* the Board of Supervisors of the County of _____) on _____ (*date*), entitled _____ (*set forth title*), a copy of which is attached as Exhibit _____ and made a part hereof. The effective date of the ordinance was _____ (*date*). The petition was, therefore, presented for filing after the effective date of the ordinance. Nevertheless, defendant _____ (*name*) accepted the petition as duly filed and is now preparing to undertake, or has already undertaken, an examination of the petition to determine how many "qualified" signatures it contains].

6. _____ [*Allege detriment and irreparable injury that will follow unless injunction is issued, and why compensatory relief or other legal remedies would be inadequate or extremely difficult to ascertain, e.g.,* Unless defendant is enjoined from pursuing the examination of the petition, and from taking further official action respecting it, public funds of _____ (*specify, e.g.,* the County of _____) will be needlessly and unlawfully expended, in a substantial but presently unascertainable sum, and the working time of a number of employees of _____ (*specify, e.g.,* the County of _____) will be fruitlessly devoted to a wasteful task, resulting in a proportionate neglect by them to perform proper and pressing duties respecting other matters, all to the detriment of plaintiff taxpayer and the taxpayers and citizens of _____ (*specify, e.g.,* the County of _____)].

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For an order requiring defendant(s) to show cause, if any, why he/she/they should not be enjoined as set forth below, during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction restraining and enjoining defendant[s, and each of them,] and his/her/their agents, servants, and employees, and all persons acting under, in concert with, or for him/her/them, from _____[*specify acts to be restrained*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____[*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action by a taxpayer for injunctive relief [*see Code Civ. Proc. § 526a*] against election officials who threaten to undertake, or have already undertaken, to act officially on an initiative or referendum petition when the proceeding is unlawful, either because of an error in timing or because the minimum required number of signatures does not appear on the petition [*see, e.g., Kuhs v. Superior Court (1988) 201 Cal. App. 3d 966, 968-969, 247 Cal. Rptr. 544]* . For discussion of the requirements regarding timing, signatures, and other procedures relating to initiative and referendum petitions, see *§§ 302.20 et seq.* and *302.40 et seq.*, respectively.

[3] Allegations

This complaint alleges the following:

- Defendant's status as an elections official (Paragraph 1).
- The scope of authority of defendants acting as agents (Optional Paragraph 2) [*see Civ. Code § 2300 et seq.*].
- The existence of fictitious defendants (Optional Paragraph 3) [*see Code Civ. Proc. § 474*].
- Plaintiff's status as a taxpayer (Paragraph 4) [*see Code Civ. Proc. § 526a*].
- Facts showing why the initiative or referendum proceedings is unlawful and should be restrained (Paragraph 5).
- The illegal expenditure and waste of public funds and the inadequacy of legal remedies (Paragraph 6) [*see Code Civ. Proc. §§ 526a, 527*].

[4] Verification Requirement

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. § 446*] and precludes a

general denial [*Code Civ. Proc. § 431.30(d)*]. For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

[5] Certification re Notice on Ex Parte Application

This form assumes that a separate ex parte application for a temporary restraining order and order to show cause re preliminary injunction will be made.

When a temporary restraining order is sought without formal notice, the applicant or the applicant's attorney is required to certify to the court under oath that (1) within the applicable time period under *Cal Rules of Ct., Rule 3.1203*, the applicant informed the opposing party when and where the application would be made; or (2) the applicant in good faith attempted to inform the opposing party but was unable to do so, specifying the efforts made to inform the opposing party; or (3) for reasons specified, the applicant should not be required to inform the opposing party [*Code Civ. Proc. § 527(c)*; *Cal. Rules of Ct., Rule 3.1204(b)*].

A party seeking an ex parte order must notify all parties no later than 10:00 a.m. the court day before the ex parte appearance, absent a showing of exceptional circumstances that justify a shorter time for notice [*Cal. Rules of Ct., Rule 3.1203(a)*].

The clerk must not reject an ex parte application for filing and must promptly present the application to the appropriate judicial officer for consideration, notwithstanding the failure of an applicant to comply with the notification requirements in *Cal Rules of Ct., Rule 3.1203* [*Cal. Rules of Ct., Rule 3.1205*].

For more detailed discussion and related forms, including a form of application for a temporary restraining order that includes a certification re notice, see Ch. 303, *Injunctions* .

For a more detailed discussion of ex parte motions, see *Ch. 372, Motions and Orders, § 372.19*.

[6] Jurisdiction

An action seeking permanent injunctive relief is in the jurisdiction of the superior court and is not a limited civil case [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*].

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers*

For discussion and forms concerning injunctive relief, see Ch. 303, *Injunctions*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue* , Pt. I

For alternative forms for verification, see Ch. 572, *Verification*

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25-302 California Forms of Pleading and Practice--Annotated § 302.91

§ 302.91 Petition for Writ of Mandate by Proponent of Initiative or Referendum Against Elections Official for Failure to Accept or Process Petition [Code Civ. Proc. §§ 1085, 1086]

[1] FORM Petition for Writ of Mandate by Proponent of Initiative or Referendum Against Elections Official for Failure to Accept or Process Petition [Code Civ. Proc. §§ 1085, 1086]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name(s) and title(s)*],	)	PETITION FOR WRIT OF MANDATE
Respondent(s).	)	
	)	
	)	

Petitioner represents:

1. Petitioner _____[*name*] is one of several persons who propose to file _____ [an initiative *or* a referendum] petition with respondent.

2. Respondent _____[*name*] is the _____ [*specify, e.g.,* Clerk of the County of _____].

3. _____ [*Allege facts showing need for relief, e.g.,* On _____ (*date*), petitioner presented to respondent a petition in the form of Exhibit _____, attached hereto and made a part hereof, bearing more than _____ (*number*) signatures. Petitioner requested that

the petition be filed and processed according to law. Respondent refused to accept the petition for the stated reason that _____ (*set forth reasons stated, if any*)].

4. Respondent has a clear, present, and ministerial duty to accept and process the petition by reason of _____ [*specify authority binding respondent, e.g., Elections Code Sections 9110-9116 and any other statute, ordinance, or regulation*].

5. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition, in that _____ [*specify, e.g.*, petitioner has satisfied all requirements for submission of the _____ (initiative *or* referendum) petition to respondent and now has no other legal recourse to compel respondent(s) to fulfill his/her/their duties in accepting and processing the petition].

WHEREFORE, petitioner prays:

1. That the court issue an alternative writ of mandate commanding respondent to accept and process the petition according to law or, in the alternative, to show cause before the court at a time specified by the courtwhy respondent has not done so and why a peremptory writ of mandate should not be issued;

2. That on the return of the alternative writ and the hearing of this petition, the court issue a peremptory writ of mandate commanding respondent to accept and process the petition according to law;

3. For costs of this proceeding; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____[*name*], am the petitioner in this proceeding. I have read the foregoing petition and know its contents. The facts stated therein are true and are within my personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

[2] Use of Form

The form of petition in [1], *above*, is for use in a proceeding for an alternative writ of mandate to compel an elections

official to accept and process an initiative or a referendum petition presented for filing [*see Code Civ. Proc. §§ 1085, 1086*].

For further discussion relating to the availability and procedure for obtaining either an alternative or peremptory writ of mandate, see Ch. 358, *Mandate and Prohibition* .

[3] Verification Requirement

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Proof of service on each respondent and real party in interest of a copy of a petition that seeks an alternative writ must accompany the petition when it is offered for filing except when, in its discretion and for good cause, the court has granted the application for the writ ex parte [*Code Civ. Proc. § 1107*; for a discussion of serving the petition, *see* Ch. 358, *Mandate and Prohibition*].

[4] Memorandum

A memorandum also customarily accompanies a petition filed in a superior court, although it does not appear to be expressly required by statute [*but see Code Civ. Proc. § 1090* (mandate proceeding referred to as "motion"); *Cal. Rules of Ct., Rules 3.1103(a)(2)* (application for writ of mandate as "law and motion proceeding"), 3.1113(a) (a supporting memorandum required to be served with a motion (except motions specified in *Cal. Rules of Ct., Rule 3.1114*); for discussion and forms, see Ch. 417, *Points and Authorities*]. When no alternative writ is sought, proof of service of a copy of the petition need not accompany the application, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

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25-302 California Forms of Pleading and Practice--Annotated § 302.92

§ 302.92 Petition for Writ of Mandate by Proponent of Initiative Against County Counsel or City Attorney Because Ballot Title for and/or Summary of Proposed Measure Is False, Misleading, or Not Impartial [Code Civ. Proc. §§ 1085, 1086; Elec. Code §§ 9105, 9106, 9203, 9204]

[1] FORM Petition for Writ of Mandate by Proponent of Initiative Against County Counsel or City Attorney Because Ballot Title for and/or Summary of Proposed Measure Is False, Misleading, or Not Impartial [Code Civ. Proc. §§ 1085, 1086; Elec. Code §§ 9105, 9106, 9203, 9204]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name(s) and title(s)*],	)	PETITION FOR WRIT OF MANDATE
Respondent(s).	)	
	)	
	)	

Petitioner represents:

1. Petitioner _____[*name*] is the proponent of an initiative measure to _____ [*describe, e.g.,* submit to a vote of the people at a special election a proposition to build a baseball stadium in the City of _____].

2. Respondent _____[*name*] is the _____ [*identify, e.g.,* City Attorney for the City of _____].

3. On _____[*date*], petitioner filed with _____[*name*], the elections official of the _____ [*specify, e.g.,* City of _____] a copy of the proposed initiative measure, and requested that a ballot title and summary be prepared by respondent. Petitioner paid the requisite filing fee of $_____. Copies of the notice and the proposed measure are attached as Exhibits _____ and _____, respectively, and made a part hereof.

4. On or about _____[*date*], the elections official transmitted a copy of the proposed measure to respondent, who prepared and returned to the elections official a ballot title for and a summary of the proposed measure. On _____[*date*], the elections official furnished a copy of the ballot title and summary to petitioner. Copies of the ballot title and summary are attached as Exhibits _____ and _____, respectively, and made a part hereof.

5. The _____ [ballot title *or* summary of proposed measure *or both*] as prepared by respondent is _____ [*describe defect complained of, e.g.,* misleading] in that _____ [*allege facts showing defective nature, e.g.,* it leads the voter to believe that the baseball stadium that is the subject of the measure will be built at no cost to the City and taxpayers of _____. However, according to the text of the proposed measure, it is only the land on which the stadium will be built that will cost the city and the taxpayers nothing.]

6. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law in that the law provides no other means by which petitioner can require respondent to amend the _____ [*specify, e.g.,* ballot title] as requested below.

WHEREFORE, petitioner prays:

1. That the court issue a peremptory writ of mandate in the first instance commanding respondent to _____ [*state terms of proposed peremptory writ, e.g.,* amend the ballot title to reflect the true nature of the cost to the City of _____ of building the baseball stadium that is the subject of petitioner's proposed initiative measure, so that the ballot title as amended is not false, misleading, or inconsistent with the requirements of Elections Code Section _____ (9105 *or* 9203)]; or

2. That the court first issue an alternative writ of mandate commanding respondent to _____[*state terms of proposed alternative writ, as set forth above*] or, in the alternative, show cause why he/she should not do so, and thereafter issue a peremptory writ commanding respondent to _____[*state terms of proposed alternative writ, as set forth above*];

3. For costs of this proceeding; and

4. For such other and further relief as the court may deem proper.
Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 302.91[1].*]

[2] Use of Form

The form of petition in [1], *above*, is for use by the proponent of an initiative measure to obtain a peremptory or alternative writ of mandate to amend the ballot title and/or the summary of the proposed measure, as prepared by a city attorney or a county counsel. The court must expedite hearing on the writ [*Elec. Code §§ 9106* (county measure), *9204* (city measure)].

A peremptory writ of mandate will be issued only on clear and convincing proof that the ballot title or summary is false, misleading, or inconsistent with the requirements of *Elec. Code § 9105* (in case of county measure) or *Elec. Code § 9203* (in case of city measure), for example by being so worded as to constitute an argument, or likely to create prejudice, for or against the proposed measure [*see Elec. Code §§ 9106, 9204*; *see also Elec. Code §§ 9105(a)* (impartial wording of county measure's ballot title), *9203(a)* (impartial wording of city measure's ballot title)].

For discussion of requirements relating to verification and points and authorities, see *§ 302.91[3], [4]*.

[3] Allegations

This form alleges:

- The identity and capacity of petitioner and respondent (Paragraphs 1 and 2) [*see Elec. Code §§ 9106, 9204*].

- Petitioner's filing of the requisite copy of the proposed measure, payment of the requisite filing fee, and request that a ballot title and/or summary be prepared by the county counsel or city attorney (Paragraph 3).

- Respondent's preparation of the requested ballot title and/or summary (Paragraph 4) [*see Elec. Code §§ 9105, 9203*].

- The false, misleading, or partial nature of the ballot title and/or summary as prepared (Paragraph 5) [*see Elec. Code §§ 9105, 9106, 9203, 9205*].

- Petitioner's lack of an adequate remedy at law, apart from the instant proceeding (Paragraph 6) [*see Code Civ. Proc. § 1086*].

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A. Initiative and Referendum

25-302 California Forms of Pleading and Practice--Annotated §§ 302.93-302.99

[Reserved]

§§ 302.93[Reserved]

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25-302 California Forms of Pleading and Practice--Annotated § 302.100

§ 302.100 Complaint for Injunctive Relief by Public Officer Against Proponents of Recall for Untimely Commencement of Recall Proceedings [Cal. Const., art. II, § 18; Civ. Code § 3422; Code Civ. Proc. §§ 526, 527; Elec. Code § 11007]

[1] FORM Complaint for Injunctive Relief by Public Officer Against Proponents of Recall for Untimely Commencement of Recall Proceedings [Cal. Const., art. II, § 18; Civ. Code § 3422; Code Civ. Proc. §§ 526, 527; Elec. Code § 11007]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____ COMPLAINT FOR INJUNCTIVE RE-
_____ [*name(s)*], [and DOES I	)	LIEF
through_____,]	)	
Defendant(s).	)	
	)	

Plaintiff alleges:

1. _____ [*Allege each defendant's residence and capacity, e.g.,* Defendant _____ (*name*) is, and at all times herein mentioned was, a resident of _____ County, California].

[2. *Agency allegation, if appropriate. See § 302.90[1], Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 302.90[1], Paragraph 3.*]

4. Plaintiff is the _____ [*describe office, e.g.,* Assessor of _____ County] and took office on _____[*date*]. [Plaintiff's current term of office will end on _____ (*date*).]

[*ADD, if recall election has been determined in officer's favor within last six months*]

5. On _____[*date*], at a duly held election, the voters of _____ [*name electoral jurisdiction, e.g.,* _____ County] voted on the question whether plaintiff should be recalled, and more than one half of the votes were "No."

[*CONTINUE*]

6. _____ [*Allege facts showing untimely commencement of recall proceedings, e.g.,* On _____ (*date*), defendants _____ (*names*) published in the _____ (*name of newspaper*) and served on plaintiff a notice of their intention to circulate a petition to recall plaintiff. Defendants have commenced recall proceedings _____ (prematurely *or* too late), in violation of _____ (the *California Constitution, Article II, Section 18 and/or specify applicable statute(s), e.g., Elections Code Section 11007(a)*)].

7. Unless defendants are enjoined from pursuing the recall proceedings they have begun, plaintiff will suffer great and irreparable injury in that plaintiff will be obliged to resist an unlawful proceeding against him/her and will incur unnecessary debts; plaintiff's attendance to his/her official duties will be hampered; and plaintiff will be exposed to the risk of recall contrary to law.

8. Plaintiff has no adequate remedy at law for the injuries that are threatened in that it will be impossible for plaintiff to determine the precise amount of damage that he/she will suffer if defendants' conduct is not restrained, and plaintiff has no other legal remedy available to prevent defendants from going forward with the unlawful recall proceedings.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For an order requiring defendants to show cause, if any, why they should not be enjoined as set forth below, during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, restraining and enjoining defendants, and each of them, and their agents, servants, and employees, and all persons acting under, in concert with, or for them, from continuing in any way the recall proceedings against plaintiff that defendants have begun as herein alleged;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 302.90[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action by a public officer for injunctive relief against proponents of the officer's recall, when the recall proceedings have been begun prematurely or too late [*see, e.g., Cal. Const. art. II, § 18*; *Elec. Code § 11007*].

For discussion of the requirement of certification re notice under *Code Civ. Proc. § 527(a)* if a temporary restraining order is sought ex parte, see *§ 302.90[5]*.

[3] Allegations

The plaintiff's status as a public elective officer [*see Cal. Const. art. II, § 13*] should be alleged (Paragraph 4).

If the basis for complaint is the premature commencement of recall proceedings in violation of *Elec. Code § 11007(a)*, the date when plaintiff took office should be alleged.

If the basis for complaint is a violation of *Elec. Code § 11007(c)*, the date when plaintiff's term will end should be alleged (Paragraph 4).

If the basis for complaint is a violation of *Cal. Const. art. II, § 18* or *Elec. Code § 11007(b)*, Paragraph 5 should be included.

The facts showing untimely commencement of recall proceedings will vary from case to case. In any case it will be helpful to allege which law has been violated (Paragraph 6) [*see § 302.67*].

The complaint must allege the great or irreparable harm to be suffered by plaintiff, and that no adequate legal remedy is available (Paragraphs 7, 8) [*see Code Civ. Proc. §§ 526(a)(2),(4),(5), 527*].

[4] Verification Requirement

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*; for further discussion, *see § 302.90[4]*.

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25-302 California Forms of Pleading and Practice--Annotated § 302.101

§ 302.101 Complaint for Injunctive Relief by Public Officer Against Proponents of Recall for Premature Circulation of Petition [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527; Elec. Code § 11042]

[1] FORM Complaint for Injunctive Relief by Public Officer Against Proponents of Recall for Premature Circulation of Petition [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527; Elec. Code § 11042]

[*Caption. See § 302.100[1].*]

Plaintiff alleges:

1. [*Allegation of each defendant's residence and capacity. See § 302.100[1], Paragraph 1.*]

[2. *Agency allegation, if appropriate. See § 302.90[1], Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 302.90[1], Paragraph 3.*]

4. Plaintiff is the _____ [*specify office, e.g.,* Assessor of _____ County].

5. On or about _____[*date*], defendants began to circulate in _____ [*specify electoral jurisdiction, e.g.,* _____ County] a petition for plaintiff's recall. They have solicited and obtained signatures on the petition. These acts are premature and in violation of *Elections Code Section 11042* in that defendants have not obtained official approval of the form and wording of the petition.

6. [*Allegation of great or irreparable injury to be suffered by plaintiff. See § 302.100[1], Paragraph 7.*]

7. [*Allegation of inadequacy of legal remedy. See § 302.100[1], Paragraph 8.*]

[*Prayer. See § 302.100[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 302.90[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action by a public officer for injunctive relief against proponents of the officer's recall when the recall petition is being circulated prematurely. No signature may be affixed to a recall petition, and therefore no petition may be circulated, until the clerk or, in the case of the recall of a state officer, the Secretary of State or the Controller, has notified the proponents that the form and wording of the proposed petition meet the requirements of *Elec. Code § 11000 et seq.* [*Elec. Code § 11042(d)*; *see Elec. Code §§ 11020* (form of notice), *11021* (service and filing), *11022* (publication or posting)].

For further discussion of a complaint for injunctive relief against proponents of a recall see *§ 302.100*.

For discussion of the requirement of certification re notice under *Code Civ. Proc. § 527(a)* if a temporary restraining order is sought ex parte, see *§ 302.90[5]*.

[3] Verification Requirement

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*; for further discussion, *see § 302.90[4]*].

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25-302 California Forms of Pleading and Practice--Annotated § 302.102

§ 302.102 Complaint for Injunctive Relief by Public Officer Against Proponents of Recall for Circulation of Unlawful Petition [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527; Elec. Code §§ 11040-11047]

[1] FORM Complaint for Injunctive Relief by Public Officer Against Proponents of Recall for Circulation of Unlawful Petition [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527; Elec. Code §§ 11040-11047]

[*Caption. See § 302.100[1].*]

Plaintiff alleges:

1. [*Allegation of each defendant's residence and capacity. See § 302.100[1], Paragraph 1.*]

[2. *Agency allegation, if appropriate. See § 302.100[1], Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 302.100[1], Paragraph 3.*]

4. [*Plaintiff's status. See § 302.101[1], Paragraph 4.*]

5. Defendants are now, and since _____[*date*] have been, engaged in circulating in _____ [*specify electoral jurisdiction, e.g.,* _____ County] a petition for plaintiff's recall, in violation of _____ [*specify section, e.g., Elections Code Section 11041(a)*] in that _____ [*describe violation, e.g.,* some sections of the petition have been circulated without each page of the section bearing a copy of the notice of intention to circulate the petition].

6. [*Allegation of great or irreparable injury to be suffered by plaintiff. See § 302.100[1], Paragraph 7.*]

7. *Allegation of inadequacy of legal remedy. See § 302.100[1], Paragraph 8.*]

[*Prayer. See § 302.100[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 302.90[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action by a public officer for injunctive relief against proponents of the officer's recall, when the recall petition, or some sections of it, do not comply with form and content requirements set out in the Elections Code [*see Elec. Code §§ 11040-11044*]. For a discussion of these requirements, see *§ 302.71[1]*.

For further discussion of a complaint for injunctive relief against proponents of a recall see *§ 302.100*.

For discussion of the requirement of certification re notice under *Code Civ. Proc. § 527(a)* if a temporary restraining order is sought ex parte, see *§ 302.90[5]*.

[3] Verification Requirement

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*; for further discussion, *see § 302.90[4]*].

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25-302 California Forms of Pleading and Practice--Annotated § 302.103

§ 302.103 Complaint for Injunctive Relief by Public Officer Against Elections Official for Processing Unlawful Petition [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527; Elec. Code § 11040 et seq.]

[1] FORM Complaint for Injunctive Relief by Public Officer Against Elections Official for Processing Unlawful Petition [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527; Elec. Code § 11040 et seq.]

[*Caption. See § 302.90[1].*]

Plaintiff alleges:

1. Defendant is the _____ [Clerk of _____ (*specify electoral jurisdiction, e.g.,* _____ County) *or* Secretary of the _____ (*specify governing board of landowner voting district or other district*)].

2. [*Plaintiff's status. See § 302.101[1], Paragraph 4.*]

3. On or about _____[*date*], certain petitions for plaintiff's recall were filed with defendant. At least some of these petitions do not comply with requirements set out in the Elections Code, in that some of them _____ [*describe noncompliance, e.g.,* do not have the circulator's declaration attached as required by *Elections Code Section 11046*]; and some of them _____[*continue with as many instances of violations of the Elections Code as are known to plaintiff*].

4. _____ [*Allege further facts, as required, e.g.,* On _____ (*date*), plaintiff notified defendant that, to plaintiff's knowledge, some of the petitions then filed with defendant respecting plaintiff's recall were not in compliance with various provisions of the Elections Code. Plaintiff asked that defendant isolate all such petitions and that defendant not count any of the signatures on them during defendant's examination. Defendant replied that he/she would make no judgment as to compliance with Elections Code provisions other than those respecting signatures on the petitions. Furthermore, defendant refused, and continues to refuse, to disregard petitions that are not in

compliance with pertinent Elections Code provisions].

5. Unless defendant is enjoined from counting signatures on petitions that do not comply with the Elections Code, plaintiff will suffer great and irreparable injury in that plaintiff will be obliged to resist an unlawful proceeding against him/her and will incur unnecessary debts; plaintiff's attendance to his/her official duties will be hampered; and plaintiff will be exposed to the risk of recall contrary to law.

6. Plaintiff has no adequate remedy at law for the injuries that are threatened in that it will be impossible for plaintiff to determine the precise amount of damage that he/she will suffer if defendant's conduct is not restrained, and plaintiff has no other legal remedy available to prevent defendant from going forward with the unlawful recall proceedings.

WHEREFORE, plaintiff prays judgment as follows:

1. For an order requiring defendant to show cause, if any, why he/she should not be enjoined as set forth below, during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, restraining and enjoining defendant from counting any signatures on, or otherwise processing, any petition for plaintiff's recall that does not comply in all respects with pertinent provisions of the Elections Code, and particularly certain of the petitions now filed with defendant, insofar as any of them are proved at trial not to comply with pertinent provisions of the Elections Code;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 302.90[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action by a public officer for injunctive relief against an elections official [*see Elec. Code § 11002* ("elections official" defined)] who threatens to process a recall petition not in compliance with pertinent Elections Code provisions [*see Elec. Code § 11040 et seq.*].

For discussion of the requirement of certification re notice under *Code Civ. Proc. § 527(a)* if a temporary restraining order is sought ex parte, see *§ 302.90[5]*.

[3] Duty of Elections Official

A recall petition is filed with a county elections official, a city elections official, or the secretary of the governing board of a district, depending on which officer's recall is being sought [*see Elec. Code §§ 11002, 11102, 11220*]. That official is not charged with determining the entire sufficiency of the petition but has only the duty of counting and verifying

signatures [*see Elec. Code §§ 11104-11107, 11222-11227*]. Therefore, it is possible that a clerk would refuse in some cases to disregard signatures on petitions not in compliance with pertinent Elections Code provisions.

[4] Verification Requirement

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. § 446*] and precludes a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

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25-302 California Forms of Pleading and Practice--Annotated § 302.104

§ 302.104 Petition for Writ of Mandate by Proponent of Recall Against Elections Official for Failure to Accept or Process Recall Petition [Code Civ. Proc. §§ 1085, 1086]

[1] FORM Petition for Writ of Mandate by Proponent of Recall Against Elections Official for Failure to Accept or Process Recall Petition [Code Civ. Proc. §§ 1085, 1086]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Petitioner,	)	
vs.	)	
_____ [*name and title*],	)	PETITION FOR WRIT OF MANDATE
Respondent,	)	
_____ [*name*],	)	
Real Party in Interest.	)	
	)	
	)	

Petitioner represents:

1. Petitioner is registered to vote in _____ County and is one of several proponents of the recall of [*name*] , the real party in interest, who is the _____ [*describe office, e.g.,* Assessor of _____ County].

2. Respondent is the _____ [*describe official elections capacity, e.g.,* Clerk of _____ County].

3. _____ [*Allege facts showing petitioner's need for relief, e.g.,* On _____ (*date*), petitioner presented to respondent a petition for the recall of _____ (*name*) and asked that it be filed and processed according to law. Respondent refused to accept it for the stated reason that _____ (*set forth reason, if any reason was stated*)].

4. Respondent has a clear, present, and ministerial duty to accept and process the recall petition by reason of Elections Code Section(s) _____.

5. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition, in that _____ [*specify, e.g,* petitioner has satisfied all requirements for submission of the recall petition to respondent and now has no other legal recourse to compel respondent to fulfill his/her duties in accepting and processing the petition].

WHEREFORE, petitioner prays judgment as follows:

1. That the court issue an alternative writ of mandate commanding respondent to accept and process the recall petition according to law or, in the alternative, to show cause before the court at a time specified by the court why respondent has not done so and why a peremptory writ of mandate should not be issued;

2. That on the return of the alternative writ and the hearing of this petition, the court issue a peremptory writ of mandate commanding respondent to accept and process the recall petition according to law;

3. For costs of this proceeding; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 302.91[1].*]

[2] Use of Form

The form of petition in [1], *above*, is for use in a proceeding for a writ of mandate to compel a clerk [*see Elec. Code § 11002* ("elections official" defined)] to accept and process a recall petition that has been presented for filing [*see Elec. Code §§ 11102-11103* (filing petition recalling state officer), *11222* (filing petition recalling other public officer)].

It is unclear whether the officer whose recall is being sought has the standing of a real party in interest. However, the officer clearly has a litigable interest [*see, e.g., Dodge v. Free (1973) 32 Cal. App. 3d 436, 446, 108 Cal. Rptr. 311]* , and probably should be made a real party in interest.

For discussion of requirements relating to verification and points and authorities, see *§ 302.91[3], [4]*.

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Volume 26: Injunctions thru Insurance-Chs. 303-313
Chapter 303 INJUNCTIONS

26-303 California Forms of Pleading and Practice--Annotated 303.syn

§ 303.syn Synopsis to Chapter 303: INJUNCTIONS

§ 303.01 Scope of Chapter

§ 303.02 Cross References

[1] Related Procedures

[2] Specific Chapters With Forms for Injunctive Relief

§§ 303.03-303.09 [Reserved]

§ 303.10 Nature and Purpose of Injunctive Relief

[1] In General

[2] No Right to Jury Trial

[3] Damages Also Permitted

§ 303.11 Mandatory vs. Prohibitory Injunctions

[1] In General

[2] Mandatory Preliminary Injunctions Rarely Granted

[3] Mixed Mandatory and Prohibitory Features

[4] Examples of Mandatory Injunctions

§ 303.12 Nature of Provisional and Final Injunctions

[1] Provisional Relief in General

[2] Temporary Restraining Order

[3] Preliminary Injunction

[4] Permanent Injunction

§ 303.13 Persons Bound by Injunction

§ 303.14 Courses of Action Available to Defendant

§ 303.15 Specific Situations When Injunctions Are Available or Prohibited

§ 303.16 Harassment and Workplace Violence

§§ 303.17-303.19 [Reserved]

§ 303.20 Subject Matter Jurisdiction

[1] Permanent Injunctive Relief

[2] Preliminary Injunctive Relief

[3] Supreme Court and Courts of Appeal

§ 303.21 Personal Jurisdiction

§ 303.22 Retention of Jurisdiction to Ensure Compliance

§ 303.23 Venue

§§ 303.24-303.29 [Reserved]

§ 303.30 When Temporary Restraining Order Permitted

§ 303.31 Procedure to Obtain Temporary Restraining Order

[1] Verified Complaint

[2] Notice to Opposing Party

[3] Ex Parte Issuance

[a] Irreparable Injury Requirement

[b] Advance Notification Requirement

[4] Order to Show Cause Issued

[5] Time for Hearing of Order to Show Cause

[6] Undertaking Preferred but Not Required

[7] Period of Effectiveness

[8] Order Granted or Denied in Discretion of Court

§§ 303.32-303.39 [Reserved]

§ 303.40 Grounds for Obtaining Preliminary Injunction

[1] Applicant Entitled to Relief Demanded

[2] Injunction Necessary to Prevent Waste or Irreparable Injury

[3] Action or Threatened Action Violates Rights of Another Party

[4] Pecuniary Compensation Inadequate

[5] Compensation Not Ascertainable

[6] Injunction Necessary to Avoid Multiplicity of Suits

[7] Obligation Arises From Trust

[8] Statutes Specifically Authorizing Injunction for Violation

§ 303.41 Situations Where Preliminary Injunction Unavailable

[1] Staying of Judicial Proceedings

[2] Preventing Execution of Public Statute

[a] In General

[b] Exception if Statute Is Unconstitutional or Invalid

[3] Preventing Breach of Contract Not Specifically Enforceable

[a] Basic Rule

[b] Exception for Certain Personal Service Contracts

[4] Preventing Exercise of Public or Private Office

[5] Preventing Legislative Act by Municipal Corporation

[6] Causing Noncompensable Injury to Public Interest

§ 303.42 Procedure for Obtaining Preliminary Injunction

[1] In General

[2] Notice to Adversely Affected Parties

[3] Time for Application

[4] Verified Complaint or Affidavits Required

[5] Service of Complaint and Affidavits After Issuance of Temporary Restraining Order

[6] Service of Affidavits by Defendant in Response to Order to Show Cause

[7] Continuances Allowed Defendant

[8] Continuances Allowed Plaintiff

[9] Waiver of Responding Party's Rights

[10] Dissolution of Temporary Restraining Order

[11] Hearing

§ 303.43 Determination by Court

[1] Discretion of Trial Court

[2] Consideration of Interim Harm and Determining Likelihood of Success

[a] Evaluation of Factors

[b] Balancing of Equities if Public Entity Is Involved

[3] Evaluation of Affidavits or Declarations

[4] Evaluation of Complaint

[5] Consideration of Demurrer to Complaint

[6] Effect of Denial of Allegations

§ 303.44 Preliminary Injunction and Anti-SLAPP Motion to Strike Compared

§ 303.45 Issuance of Injunction

[1] When Issued

[2] Order Must Be Clear and Definite

[3] Granting of Permanent Injunction Prohibited

[4] Statement of Decision Not Required

§ 303.46 Undertaking

[1] When Required

[2] Injunction Enjoining Construction Project

[3] Injunction Enjoining Housing Project

[4] Poor or Indigent Movant

§ 303.47 Dissolution of Injunction for Deficient Undertaking

§ 303.48 Enforcement of Undertaking

§ 303.49 Submission of Proposed Order and Undertaking

§§ 303.50-303.59 [Reserved]

§ 303.60 Statutory Grounds for Issuance of Permanent Injunction

§ 303.61 Procedure for Obtaining Permanent Injunctions

[1] In General

[2] Order to Show Cause Not Necessary

[3] Issues to Be Determined

[4] Effect of Final Order on Preliminary Order

§§ 303.62-303.69 [Reserved]

§ 303.70 Courses of Action Available to Responding Party When Applicant Seeks Injunctive Relief

§ 303.71 Affirmative Defenses to Injunctive Relief

[1] Changed Circumstances or Completed Acts

[2] Doctrine of Balancing of Conveniences

[3] First Amendment Rights Infringed

[4] Laches

[5] Other Legal Remedy Adequate

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§ 303.132 Proceedings for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction [Code Civ. Proc. § 527]--Temporary Restraining Order and Order to Show Cause re Preliminary Injunction

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§ 303.134 Declaration Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]

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[1] FORM

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§ 303.137 Order Denying Preliminary Injunction and Dissolving Temporary Restraining Order [Code Civ. Proc. § 527]

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§ 303.138 Proceedings to Dissolve or Modify Temporary Restraining Order or Injunction [Civ. Code § 3424; Code Civ. Proc. §§ 532(a), 533]--Notion of Motion and Supporting Declaration

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§ 303.140 Proceedings to Enforce Liability of Principal and Surety on Bond or Undertaking Filed as Security for Wrongfully Issued Temporary Restraining Order or Preliminary Injunction [Code Civ. Proc. § 996.440]--Notice of Motion and Supporting Declaration

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[11] Attorney's Fees

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§ 303.141 Proceedings to Enforce Liability of Principal and Surety on Bond or Undertaking Filed as Security for Wrongfully Issued Temporary Restraining Order or Preliminary Injunction [Code Civ. Proc. § 996.440]--Order

[1] FORM

[2] Use of Form

[3] Cross References

§ 303.142 Application and Order for Reissuance of Order to Show Cause and Temporary Restraining Order [Code Civ. Proc. §§ 527(d)(2), 527(d)(5)]--Judicial Council Form CIV-025

[1] FORM

[2] Use of Form

California Forms of Pleading and Practice--Annotated

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Volume 26: Injunctions thru Insurance-Chs. 303-313
Chapter 303 INJUNCTIONS
PART I. SCOPE

26-303 California Forms of Pleading and Practice--Annotated § 303.01

§ 303.01 Scope of Chapter

This chapter covers temporary and permanent injunctive relief. The chapter discusses the following specific topics:

- A general overview of injunctive [*see § 303.10* et seq.].
- Jurisdictional and venue requirements [*see § 303.20* et seq.].
- Temporary restraining orders [*see § 303.30* et seq.].
- Preliminary injunctions [*see § 303.40* et seq.].
- Permanent injunctions [*see § 303.60* et seq.].
- Defenses available in injunction proceedings [*see § 303.70* et seq.].
- Proceedings after the grant or denial of injunctive relief [*see § 303.80* et seq.].
- Enforcement of an injunction [*see § 303.90* et seq.].

The chapter includes Procedural Checklists for a plaintiff seeking preliminary injunctive relief [*see § 303.120*] and for a defendant resisting injunctive relief [*see § 303.121*].

The chapter contains the following forms:

- Complaint for a temporary restraining order, preliminary injunction, permanent injunction, and damages [*see § 303.130*].
- An ex parte application for a temporary restraining order and preliminary injunction and a supporting declaration [*see § 303.131*].

- An order to show cause regarding a preliminary injunction and temporary restraining order [*see § 303.132*].

- A notice of motion and supporting declaration for a preliminary injunction [*see § 303.133*].

- A declaration opposing an application for a preliminary injunction [*see § 303.134*].

- A demurrer to a complaint for injunctive relief on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*see § 303.135*].

- A preliminary injunction and undertaking [*see § 303.136*].

- An order denying a preliminary injunction and dissolving a temporary restraining order [*see § 303.137*].

The chapter also contains the following forms:

- A notice of motion and supporting declaration for an order dissolving or modifying a preliminary injunction [*see § 303.138*] and a form for that order [*see § 303.139*].

- Forms of a notice of motion and supporting declaration to determine and enforce the liability of a principal and surety based on a bond or undertaking filed as security for a wrongfully issued temporary restraining order or preliminary injunction [*see § 303.140*] and a form of judgment enforcing that liability [*see § 303.141*].

The chapter also includes a Research Guide [*see § 303.100* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

California Forms of Pleading and Practice--Annotated

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Chapter 303 INJUNCTIONS
PART I. SCOPE

26-303 California Forms of Pleading and Practice--Annotated § 303.02

§ 303.02 Cross References

[1] Related Procedures

- For discussion and forms related to affidavits, certificates, and declarations under penalty of perjury, see Ch. 15, *Affidavits, Certificates, and Declarations* .

- For discussion, procedural guides, and forms related to all phases of appeals from judgments and orders of the superior court in civil actions other than limited civil cases, see Ch. 40, *Appeal: An Overview* , et seq.

- For discussion and forms for use in drafting complaints and cross complaints, see Ch. 123, *Complaints and Cross Complaints* .

- For discussion and forms related to contempt proceedings and the review of such proceedings by extraordinary writ, see Ch. 135, *Contempt* .

- For discussion, procedural guides, and forms for use in actions for declaratory relief, see Ch. 182, *Declaratory Relief* .

- For discussion and forms for use in removing actions from a state court to a federal district court, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

- For discussion and forms related to the limitation of actions, see Ch. 345, *Limitation of Actions* .

- For discussion, procedural checklists, and forms for use in actions involving the torts of malicious prosecution and abuse of process, see Ch. 357, *Malicious Prosecution and Abuse of Process* .

- For discussion, procedural guide, and forms related to proceedings seeking a writ of prohibition, see Ch. 358, *Mandate and Prohibition* .

- For discussion, procedural guide, and forms related to motions and orders generally, see Ch. 372, *Motions and Orders* .

- For discussion, procedural guide, and forms related to the service of summons and other papers, see Ch. 518, *Service of Summons and Papers* .

- For discussion and forms related to suretyship as well as bonds and undertakings, see Ch.538, *Suretyship, Bonds, and Undertakings* .

- For discussion and forms related to trial procedure generally, see Ch. 551, *Trial* .

- For discussion and forms related to the subject of venue, see Ch. 571, *Venue* .

[2] Specific Chapters With Forms for Injunctive Relief

- For forms of complaints for permanent injunctions to compel the removal of an encroaching structure and to prevent the removal of lateral support, see *Ch. 11, Adjoining Landowners, §§ 11.23, 11.32*.

- For forms of complaints for injunctive relief to require an adjoining owner to repair his or her half of a party wall or allow plaintiff to do so and to restrain an adjacent owner from increasing the height of a party wall, see *Ch. 11, Adjoining Landowners, § 11.43*.

- For forms for use in enjoining adoptive parents in an action to set aside a decree of adoption due to extrinsic fraud, see *Ch. 12E, Adoptions: Attack on Decree, § 12E.41*.

- For a form of complaint for injunctive relief for use when a prescriptive appurtenant easement has been obstructed, see *Ch. 13, Adverse Possession, § 13.45*.

- For a form of complaint for injunctive relief to enjoin untrue or misleading advertising, see Ch. 14, *Advertising* .

- For a form of complaint to enjoin the unlawful selling or serving of liquor as a nuisance under the Unlawful Liquor Sale Abatement Law (*Penal Code § 11200 et seq.*), see *Ch. 19, Alcoholic Beverages: Civil Liability, § 19.100*.

- For forms of complaints for injunctive relief involving trespassing and stray animals, see *Ch. 23, Animals: Civil Liability, § 23.180*.

- For forms of complaints for injunctive relief to prevent arbitration, see *Ch. 33, Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding, §§ 33.74, 33.75*.

- For forms of complaints for injunctive relief when a state or local governmental agency has denied an application for a permit to use public property and when there has been interference with the right of assembly, see *Ch. 59, Assemblies, Meetings, and Demonstrations, § 59.50*.

- For a form of complaint for injunctive relief for use by an unincorporated association against a rival incorporated association and its member-officers to restrain the use of plaintiff's name and insignia, see *Ch. 61, Associations and Clubs, § 61.120*.

- For forms for use in obtaining injunctive relief in the context of the prejudgment remedy of attachment, see Ch. 62, *Attachment* .

- For a form of complaint for damages and injunctive relief for use by a contractor against a public entity to restrain the expenditure of monies from a construction fund, and a form of complaint to restrain an unlicensed person from acting in the capacity of a contractor, see Ch. 104, *Building Contracts* .

- For forms of complaints for injunctive relief to enjoin wrongful expulsion and compel election of directors and to compel distribution of an equitable share of church property after the division of a local church has been authorized by a church tribunal, see *Ch. 110, Churches and Religious Organizations, § 110.54*.

- For forms of complaints for violating civil rights relating to business, employment, and housing discrimination, and to interference with civil rights generally, see *Civil Rights*, §§ 113.51, 115.90, 117.80.

- For discussion and forms related to obtaining temporary restraining orders in the context of the provisional remedy of claim and delivery, see *Ch. 119, Claim and Delivery, §§ 119.114, 119.115*.

- For a form of complaint for injunctive relief to restrain the billing for unordered goods, see *Ch. 128, Consumer Contracts: Statutes Regulating Specific Types of Contracts, § 128.70*.

- For forms for use by an owner of a condominium unit to restrain the management body of a condominium from selling a condominium unit to enforce a lien for unpaid assessments, see Ch. 124, *Condominiums and Other Developments* .

- For a form of complaint for injunctive relief to postpone a shareholders' meeting following a delay in compliance with a demand for corporate records, see Ch. 165, *Corporations: Corporate Records and Reports* .

- For forms of complaint for injunctive relief for use by a shareholder to enjoin any actions resulting from an invalid meeting, or to compel the resolicitation of consents or proxies, see Ch. 166, *Corporations: Shareholders' Meetings and Voting* .

- For a form of complaint for injunctive relief for use by a corporation against a former officer if the officer wrongfully appropriated an invention belonging to the corporation, see Ch. 167, *Corporations: Directors and Management* .

- For a form of complaint for injunctive relief for use by an optionee against an optioner if an option to repurchase stock was sold to an employee on the termination of employment with a close corporation, see *Ch. 163, Corporations: Transfers of Shares, § 163.44*.

- For a form of complaint for injunctive relief to enjoin a city from uses inconsistent with a park dedication, see *Ch. 183, Dedication, § 183.31*.

- For a form of complaint for injunctive relief to prevent the construction of a building in violation of tract restrictions, see *Ch. 184, Deeds, § 184.60*.

- For forms for use in obtaining provisional injunctive relief in dissolution proceedings or to prohibit

domestic violence or harassment, see Ch. 293, *Harassment and Domestic Violence* .

- For a form of complaint for declaratory and injunctive relief for use by a pharmacy owner against a prescription drug claims processor, see *Ch. 214, Drugs and Pharmacists, § 214.120*.

- For forms of complaints for injunctive relief for use when rights involving easements have been violated, see *Ch. 240, Easements, § 240.51*.

- For a form of complaint for injunctive relief to enjoin violations of and to compel compliance with the provisions of the Political Reform Act of 1974 (*Gov. Code § 81000 et seq.*), see *Ch. 242, Election Campaigns, § 242.133*.

- For a form of complaint for injunctive relief when an elevator has no operational permit and is in an unsafe condition, see Ch. 244, *Elevators and Escalators* .

- For forms for use by a purchaser of a judgment creditor seeking an order restraining waste during the redemption period, see *Ch. 254, Executions and Enforcement of Judgments, § 254.150* et seq.

- For a form of complaint for injunctive relief to abate a nuisance caused by the blasting of a quarry in a populated area, see *Ch. 256, Explosives, § 256.50*.

- For forms of complaints involving the unauthorized construction of fences on the landowner's property, see *Ch. 266, Fences, §§ 266.51, 266.52*.

- For forms of complaints for injunctive relief when initiatives, referendums, or recalls are involved, see *Ch. 302, Initiative, Referendum, and Recall, §§ 302.90, 302.100 -302.103*.

- For a form of complaint by an assignee for the benefit of creditors against a judgment creditor of the debtor to quiet title and for an injunction, see *Ch. 307, Insolvency, § 307.50*.

- For form for use in enjoining defendants from prosecuting or commencing actions affecting the rights and obligations of the parties in interpleader, see *Ch. 314, Interpleader, §§ 314.90, 314.91*.

- For forms for use in proceedings to prevent the diversion, diminution, or increase of the flow of water in its natural channels, see *Ch. 315, Irrigation, § 315.14*.

- For a form of complaint for damages and permanent injunction for use by a cotenant out of possession for waste, see Ch. 316, *Joint Tenancy and Tenancy in Common* .

- For a form of complaint for use by a remainderman against a life tenant for waste, see Ch. 344, *Life Estates and Remainders* .

- For forms of complaints for injunctive relief for use in situations involving the plagiarism of literary property and the infringement of a federal copyright, see *Ch. 349, Literary Property and Copyright, §§ 349.100, 349.27[5], 349.85[j]*.

- For a form of complaint for injunctive relief to enjoin the wrongful garnishment of wages, see Ch. 357, *Malicious Prosecution and Abuse of Process* .

- For a form of complaint for injunctive relief by a motion picture corporation against an actor and a

competing motion picture corporation to enjoin breach of contract when there is a contract for artistic services executed during the actor's minority and approved by the superior court, see Ch. 365, *Minors: Contract Actions* .

- For a form of complaint to enjoin violating a reasonable rule or regulation of a mobilehome park, see Ch. 369, *Mobilehomes and Mobilehome Parks* .

- For forms of complaints for use in abating various types of nuisances, see Ch. 391, *Nuisance* .

- For a form of complaint for use by a landowner to enjoin a subsurface trespass and removal of oil and gas from a well that was slant drilled from adjoining property, see *Ch. 393, Oil and Gas, § 393.66*.

- For a form of complaint for use by a partner for injunctive relief for dissolving partnership and an accounting, see *Ch. 406, Partnerships: Dissolution, § 406.60[8]*.

- For a form of order to show cause and temporary restraining order during the pendency of a parentage action under the Uniform Parentage Act, see Ch. 412, *Paternity* .

- For forms of complaints for injunctive relief for use in state and federal courts involving pollution and related environmental matters, see *Ch. 418, Pollution and Environmental Matters, §§ 418.180, 418.153*.

- For forms of complaint for injunctive relief involving disclosures of private and public records, see *Ch. 429, Privacy, § 429.60 et seq., and Ch. 470C, Public Records Act, § 470C.53*.

- For forms of complaint for injunctive relief to prohibit wiretapping or eavesdropping, and related invasions of privacy, see *Ch. 429, Privacy, § 429.280* et seq.

- For a form of complaint to restrain deprivation of rights under color of state law, see *Ch. 429, Privacy, § 429.310* et seq.

- For forms of complaint for declaratory and injunctive relief to prevent the violation of an open meeting law and to nullify action taken by violation of the law, see *Ch. 470B, Public Agency Meetings, § 470B.62*.

- For a form of complaint for injunctive relief to enjoin an unlawful administrative investigation, see *Ch. 471, Investigations by Public Agencies, § 471.70*.

- For a form of complaint for injunctive relief to enjoin the enforcement of an invalid local licensing requirement, see *Ch. 471B, Licensing by Public Agencies, § 471B.112*.

- For a form of complaint for declaratory and injunctive relief relating to an administrative regulation's validity, see *Ch. 472B, Review of Agency Rulemaking, § 472B.60*.

- For forms of complaints for use by resident taxpayers to enjoin the unlawful expenditures of public funds, see Ch. 466, *Public Entities and Officers: Taxpayer's Actions* .

- For a form of complaint for injunctive relief to enjoin violations of and to compel compliance with conflicts of interest provisions of the Political Reform Act of 1974 (*Gov. Code § 81000 et seq.*), see Ch. 469, *Public Entities and Officers: Conflicts of Interest* .

- For a form of complaint for injunctive relief to enjoin the broadcasting of advertisements after plaintiff gave defendant notice to stop the advertisements, see Ch. 484, *Radio and Television* .

- For a form of complaint for injunctive relief to restrain a secured party not proceeding in accordance with law from disposing of collateral and to require a secured party to honor plaintiff's right to redeem the collateral, see Ch. 503, *Sales: Secured Transactions* .

- For a form of complaint for damages and injunctive relief based on unlawful practices in the sales or lease of consumer goods or services, see *Ch. 504, Sales: Consumers Legal Remedies Act, § 504.31*.

- For a form of complaint for injunctive relief by a property owner against a sanitary district to enjoin collecting unpaid assessments under invalid improvement bonds, see Ch. 511, *Sanitation and Sewerage Districts* .

- For a form of complaint for injunctive relief to enjoin a school district or other public education agency from failing to provide free appropriate public education to a handicapped pupil, see Ch. 513, *Schools: Student Rights and Responsibilities* .

- For a form of complaint for injunctive relief by a public school student against school officials to enjoin the denial of freedom of speech, see Ch. 513, *Schools: Student Rights and Responsibilities* .

- For a form of complaint for damages and an injunction for interference with the right of a franchisee to join a trade association, as well as for an unlawful refusal to consent to the transfer of a dealership, see *Ch. 515, Securities and Franchise Regulation, § 515.50* et seq.

- For a form of complaint for injunctive relief to enjoin the breach of a personal services contract, see Ch. 528, *Specific Performance* .

- For a form of complaint for use by a person enjoined against sureties on a bond given to support a temporary restraining order and undertaking given to support a preliminary injunction, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

- For forms of complaints for use to enjoin the infringement of trademarks and trade names, see *Ch. 549, Trademarks and Trade Names, § 549.91*.

- For a form of complaint for injunctive relief to compel the removal of a continuing trespass based on the encroachment of a building, see *Ch. 550, Trespass, § 550.40*.

- For a form of complaint for injunctive relief by a trustor as to the existence of a breach of an obligation secured by a deed of trust, see *Ch. 555, Trust Deeds and Real Property Mortgages, § 555.147*.

- For a form of complaint for injunctive relief to enjoin the breach of a charitable trust, see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

- For forms for use to obtain injunctive relief to enjoin the unfair interference with business relations by a former employee, to restrain unfair interference with business relations, to restrain the selling below cost to eliminate competition, and to restrain a retailer from selling a commodity below the fair trade price, see Ch. 565, *Unfair Competition* .

- For forms of complaints for injunctive relief involving usurious transactions, see Ch. 568, *Usury* .

- For forms of complaints for injunctive relief involving the acquisition and determination of rights to water, see Ch. 575, *Waters* .

- For a form of complaint for injunctive relief for use by a city seeking to enjoin a violation of a zoning ordinance, see Ch. 579, *Zoning and Planning* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureAppealsGeneral OverviewReal Property LawAdjoining LandownersEncroachmentsReal Property LawTortsNuisanceRemediesInjunctionsGeneral OverviewTortsPremises Liability & PropertyTrespassRemediesInjunctions

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Chapter 303 INJUNCTIONS
PART I. SCOPE

26-303 California Forms of Pleading and Practice--Annotated §§ 303.03-303.09

[Reserved]

§§ 303.03[Reserved]

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Chapter 303 INJUNCTIONS
PART II. LEGAL BACKGROUND
A. Overview of Injunctive Relief

26-303 California Forms of Pleading and Practice--Annotated § 303.10

§ 303.10 Nature and Purpose of Injunctive Relief

[1] In General

An injunction is generally defined as an equitable remedy requiring a person to refrain from a particular act [*see Code Civ. Proc. § 525*; *see also Civ. Code §§ 3368, 3420*; *Tide Water Assoc. Oil Co. v. Superior Court (1955) 43 Cal. 2d 815, 822, 279 P.2d 35]* . An injunction may issue to prevent an act (prohibitory injunction) [*People v. Mobile Magic Sales, Inc. (1979) 96 Cal. App. 3d 1, 13, 157 Cal. Rptr. 749]* or to require a person to do an affirmative act (mandatory injunction) [*see Comfort v. Comfort (1941) 17 Cal. 2d 736, 741, 112 P.2d 259]* .

The distinction between mandatory and prohibitory injunctions becomes important when the issuance of the injunction is appealed. Mandatory injunctions are automatically stayed on appeal whereas prohibitory injunctions are not [*Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc. (1987) 43 Cal. 3d 696, 706, 238 Cal. Rptr. 780, 739 P.2d 140* ; *Kettenhofen v. Superior Court (1961) 55 Cal. 2d 189, 191, 10 Cal. Rptr. 356, 358 P.2d 684* ; *Byington v. Superior Court (1939) 14 Cal. 2d 68, 70, 92 P.2d 896* ; *see § 303.81*]. On appeal, the court must examine the terms and effect of the injunction to discover its character as mandatory or prohibitory [*People v. Mobile Magic Sales, Inc. (1979) 96 Cal. App. 3d 1, 13, 157 Cal. Rptr. 749]* . The distinction between these two purposes of injunctions is more fully discussed at *§ 303.11*.

[2] No Right to Jury Trial

Because an action for injunctive relief is in essence equitable, there is no right to a jury trial [*see People v. Englebrecht (2001) 88 Cal. App. 4th 1236, 1245, 106 Cal. Rptr. 2d 738* (action to abate public nuisance and for injunctive relief was equitable)]. For discussion of the right to a jury trial, including cases in which equitable and legal issues are mixed, see *Ch. 322, Juries and Jury Selection, § 322.13*.

PRACTICE TIP:

Avoid Requesting Mandatory Injunctions. Unless it is absolutely essential, avoid requesting a mandatory injunction (except for injunctive relief issued in connection with receivership orders). Mandatory temporary restraining orders and preliminary injunctions are rarely granted. For further

discussion, see *§ 303.11[2]*.

[3] Damages Also Permitted

A suit may combine legal and equitable relief. Thus, a suit may seek both a money judgment and injunctive relief [*St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 361, 287 P.2d 387* ; *see Pacific Western Oil Co. v. Bern Oil Co. (1939) 13 Cal. 2d 60, 66, 87 P.2d 1045]* . In addition, a party may seek a preliminary injunction in a legal action for damages when it is reasonably necessary and fair to both sides to maintain the status quo pending the litigation's outcome [*Lenard v. Edmonds (1957) 151 Cal. App. 2d 764, 769, 312 P.2d 308]* .

ILLUSTRATION:

When Preliminary Injunction Proper. Although an action for ejectment is a purely legal action, the plaintiff may seek a preliminary injunction to restrain the defendant from committing waste [*Lenard v. Edmonds (1957) 151 Cal. App. 2d 764, 769, 312 P.2d 308]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsActions in EquityCivil ProcedureRemediesInjunctionsMandatory InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureAppealsReviewabilityGeneral Overview

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§ 303.11 Mandatory vs. Prohibitory Injunctions

[1] In General

The purpose of mandatory relief is to compel the performance of a substantive act or a change in the relative positions of the parties. By contrast, a prohibitory order seeks to restrain a party from a course of conduct or to halt a particular condition [*Davenport v. Blue Cross of California (1997) 52 Cal. App. 4th 435, 446, 60 Cal. Rptr. 2d 641* ; *People v. Mobile Magic Sales, Inc. (1979) 96 Cal. App. 3d 1, 13, 157 Cal. Rptr. 749* ; *see Code Civ. Proc. § 525* (defining "injunction" as writ or order requiring person to refrain from particular act); *Scripps Health v. Marin (1999) 72 Cal. App. 4th 324, 332, 85 Cal. Rptr. 2d 86* (express codified purpose of prohibitory injunction is to prevent future harm to applicant by ordering defendant to refrain from doing particular act)]. An order enjoining action by a party is prohibitory in nature if its effect is to leave the parties in the same position as they were before the entry of the judgment. On the other hand, it is mandatory in effect if its enforcement would change the position of the parties and compel them to act in accordance with the judgment rendered [*Paramount Pictures Corp. v. Davis (1964) 228 Cal. App. 2d 827, 835, 39 Cal. Rptr. 791* ; *Musicians Club of L.A. v. Superior Court (1958) 165 Cal. App. 2d 67, 71, 331 P.2d 720]* . In deciding whether an injunction is mandatory or prohibitory, courts will look to the substance and not the form of the injunction as the determining factor [*Davenport v. Blue Cross of California (1997) 52 Cal. App. 4th 435, 447, 60 Cal. Rptr. 2d 641]* .

[2] Mandatory Preliminary Injunctions Rarely Granted

A mandatory preliminary injunction is more difficult to obtain [*see* *Shoemaker v. County of Los Angeles (1995) 37 Cal. App. 4th 618, 625, 43 Cal. Rptr. 2d 774* ; *Alvarez v. Eden Township Hospital Dist. (1961) 191 Cal. App. 2d 309, 312, 12 Cal. Rptr. 661* ; *see also* *Teachers Ins. & Annunity Assn. v. Furlotti (1999) 70 Cal. App. 4th 1487, 1493, 83 Cal. Rptr. 2d 455* (mandatory injunction rarely granted)], and will be issued only when justified by extraordinary circumstances [*see* *Shoemaker v. County of Los Angeles (1995) 37 Cal. App. 4th 618, 625, 43 Cal. Rptr. 2d 774]* , as for example the following:

- The need for immediate removal of an embankment that is causing flood waters to threaten land [*see* *Piper v. Hawley (1918) 179 Cal. 10, 18, 175 P. 417]* .

- The need to compel a general partner to pay current profits being withheld from limited partners [*Fretz v. Burke (1967) 247 Cal. App. 2d 741, 744-745, 55 Cal. Rptr. 879]* .

- The need to compel a contractor to release a mechanic's lien on an owner's property [*see Slatkin v. White (2002) 102 Cal. App. 4th 963, 968, 126 Cal. Rptr. 2d 54]* .

Although courts may be reluctant to impose a mandatory writ, in a proper case it is generally not denied [*Allen v. Stowell (1905) 145 Cal. 666, 669, 79 P. 371]* .

[3] Mixed Mandatory and Prohibitory Features

Whether a decree is mandatory or prohibitory often presents a close question, and frequently the same decree contains both mandatory and prohibitory features [*Orange Co. Water Dist. v. City of Riverside (1957) 154 Cal. App. 2d 345, 348, 316 P.2d 43]* . An injunction may have mandatory aspects and still be deemed prohibitory [*see Youngblood v. Wilcox (1989) 207 Cal. App. 3d 1368, 1372 n.1, 255 Cal. Rptr. 527* (injunction to prevent club from prohibiting ousted members from use and enjoyment of club facilities pending determination on merits)]. An order that is entirely negative or prohibitory in form may prove on analysis to be mandatory and affirmative in essence and effect [*Food & Grocery Bureau v. Garfield (1941) 18 Cal. 2d 174, 177, 114 P.2d 579* ; *Podesta v. Linden Irrigation Dist. (1955) 132 Cal. App. 2d 250, 257, 281 P.2d 905]* .

The distinction between mandatory and prohibitory injunctions becomes important when an appeal is taken on the injunction, because mandatory injunctions are automatically stayed on appeal whereas prohibitory injunctions are not [*Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc. (1987) 43 Cal. 3d 696, 706, 238 Cal. Rptr. 780, 739 P.2d 140* ; *Kettenhofen v. Superior Court (1961) 55 Cal. 2d 189, 191, 10 Cal. Rptr. 356, 358 P.2d 684* ; *Byington v. Superior Court (1939) 14 Cal. 2d 68,70, 92 P.2d 896* ; *see § 303.84[1]*]. On appeal, the court must examine the terms and effect of the injunction to discover its character as mandatory or prohibitory [*People v. Mobile Magic Sales, Inc. (1979) 96 Cal. App. 3d 1, 13, 157 Cal. Rptr. 749]* .

[4] Examples of Mandatory Injunctions

Mandatory injunctions include ordering the removal of a fence [*Kettenhofen v. Superior Court (1961) 55 Cal. 2d 189, 190-191, 10 Cal. Rptr. 356, 358 P.2d 684]* , the remodeling of a dwelling into a house [*In re Donovan (1949) 94 Cal. App. 2d 399, 401, 210 P.2d 860]* , or the removal of structures erected on a beach that were causing the plaintiff's beach to be washed away [*Katenkamp v. Superior Court (1940) 16 Cal. 2d 696, 698-699, 108 P.2d 1]* . They also include injunctions that compel the surrender of the lawful possession of real property [*Byington v. Superior Court (1939) 14 Cal. 2d 68, 70, 72, 92 P.2d 896]* , injunctions that compel a party to surrender a position he or she holds and is entitled to hold [*Dosch v. King (1961) 192 Cal. App. 2d 800, 804, 13 Cal. Rptr. 765* ; *Johnston v. Superior Court (1957) 148 Cal. App. 2d 966, 970, 307 P.2d 946]* , and injunctions that compel reinstatement of a party to an administrative position when at the time of the trial court's order that party has already been removed from the position [*Shoemaker v. County of Los Angeles (1995) 37 Cal. App. 4th 618, 625 n.4, 43 Cal. Rptr. 2d 774]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsMandatory InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

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§ 303.12 Nature of Provisional and Final Injunctions

[1] Provisional Relief in General

Provisional relief includes temporary restraining orders and preliminary injunctions [*see Code Civ. Proc. § 527(a)-(f)*]. A temporary restraining order or a preliminary injunction, or both, may be granted in an individual suit or in a class action in which one or more of the parties sues or defends for the benefit of numerous parties on the same grounds as in other actions, whether or not the class has been certified [*Code Civ. Proc. § 527(b)*].

[2] Temporary Restraining Order

A temporary restraining order (also commonly known as a "TRO") is issued by a court pending its determination whether a party is entitled to a preliminary injunction [*San Diego Water Co. v. Pacific Coast S.S. Co. (1894) 101 Cal. 216, 218, 35 P. 651* ; *see Code Civ. Proc. § 527*].

The temporary restraining order terminates automatically when a preliminary injunction is issued or denied [*Landmark Holding Group, Inc. v. Superior Court (1987) 193 Cal. App. 3d 525, 529, 238 Cal. Rptr. 475]* .

A temporary restraining order may be issued ex parte, on an appropriate showing, and although a bond is usually required, it is not essential [*Chico Feminist Women's Health Center v. Scully (1989) 208 Cal. App. 3d 230, 237 n.1, 256 Cal. Rptr. 194* (quoting from Witkin, California Procedure, vol. 6, *Provisional Remedies*, § 247 (3d ed. 1985))].

For a complete discussion of temporary restraining orders, see *§ 303.30* et seq. For a sample form of a complaint for a temporary restraining order, see *§ 303.130*.

In certain instances a statute authorizes the issuance of a TRO pending an evidentiary hearing to determine whether to issue a permanent injunction [*see, e.g., Code Civ. Proc. §§ 527.6* (threat of harm due to harassment), *527.8* (violence towards employees at workplace); *see also USS-Posco Indus. v. Edwards (2003) 111 Cal. App. 4th 436, 442-443, 4 Cal. Rptr. 3d 54* (construing *section 527.8*); *Scripps Health v. Marin (1999) 72 Cal. App. 4th 324, 333-336, 85 Cal. Rptr. 2d 86* (construing *section 527.8*)].

[3] Preliminary Injunction

A preliminary injunction, also called a temporary injunction or an injunction pendente lite, is issued to preserve the status quo pending a decision on the merits [*Continental Baking Co. v. Katz (1968) 68 Cal. 2d 512, 528, 67 Cal. Rptr. 761, 439 P. 2d 889* ; *O'Connell v. Superior Court (2006) 141 Cal. App. 4th 1452, 1472, 47 Cal. Rptr. 3d 147* ; *Casmalia Resources, Ltd. v. County of Santa Barbara (1987) 195 Cal. App. 3d 827, 832, 240 Cal. Rptr. 903]* . It is not, in itself, a cause of action [*Korean American Legal Advocacy Foundation v. City of Los Angeles (1994) 23 Cal. App. 4th 376, 399, 28 Cal. Rptr. 2d 530* ; *Major v. Miraverde Homeowners Assn. (1992) 7 Cal. App. 4th 618, 623, 9 Cal. Rptr. 2d 237]* .

A preliminary injunction is a provisional remedy and temporary in character. It assumes a pending litigation in which all questions are to be settled by a judgment and, therefore, operates only until the judgment is rendered. The preliminary injunction automatically terminates at the time the court renders a judgment either granting or denying a permanent injunction [*Shahen v. Superior Court (1941) 46 Cal. App. 2d 187, 188, 115 P.2d 516]* . However, its effectiveness may be continued pending appeal from a judgment denying injunctive relief, depending on whether it is a mandatory or prohibitory injunction [*see City of Pasadena v. Superior Court (1910) 157 Cal. 781, 786, 109 P. 620* ; *see also §§ 303.81* and *303.84*].

In deciding whether to issue a preliminary injunction, the court must balance the respective equities of the parties and conclude that, pending a trial on the merits, the responding party should or should not be restrained from exercising a claimed right [*Robbins v. Superior Court (1985) 38 Cal. 3d 199, 206, 211 Cal. Rptr. 398, 695 P.2d 695* ; *Continental Baking Co. v. Katz (1968) 68 Cal. 2d 512, 528, 67 Cal. Rptr. 761, 439 P.2d 889* ; *see Southern Christian Leadership Conference v. Al Malaikah Auditorium Co. (1991) 230 Cal. App. 3d 207, 223, 281 Cal. Rptr. 216* ; *see also Subpart D, § 303.43*].

A hearing on a preliminary injunction is a full evidentiary hearing giving all parties the opportunity to present arguments and evidence [*see Code Civ. Proc. § 527(a)-(f)*; *Landmark Holding Group, Inc. v. Superior Court (1987) 193 Cal. App. 3d 525, 529, 238 Cal. Rptr. 475]* .

PRACTICE TIP:

Use of Declarations or Affidavits. Live testimony is rarely permitted at hearings on preliminary injunctions. Instead, evidence usually is submitted in the form of declarations or affidavits, or by judicial notice. All declarations and affidavits must be offered into evidence, and must comply with all the rules of evidence (including hearsay).

For a complete discussion of preliminary injunctions, see *Subpart D, § 303.40 et seq.* For a sample complaint for a preliminary injunction, see *§ 303.130*.

[4] Permanent Injunction

A permanent or final injunction [*see Civ. Code § 3420*] is issued as the ultimate relief in an action after trial on the merits. It may be the same in scope and effect as a previously granted preliminary injunction or different, since it is a restraint imposed by a new and distinct order [*San Diego Water Co. v. Pacific Coast S.S. Co. (1894) 101 Cal. 216, 221, 35 P. 651]* . For example, a permanent injunction that is broader in scope and effect supersedes the previously granted preliminary injunction [*Milani v. Smith (1948) 85 Cal. App. 2d 163, 167, 192 P.2d 830* ; *see Sheward v. Citizens' Water Co. (1891) 90 Cal. 635, 638, 27 P. 439]* .

For a complete discussion of permanent injunctions, see *Subpart E § 303.60 et seq.* For a sample complaint for a permanent injunction, see *§ 303.130*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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§ 303.13 Persons Bound by Injunction

An injunction is generally a personal decree and is not effective against the world at large. On the other hand, enjoined parties may not nullify an injunction by carrying out prohibited acts with or through nonparties to the original proceeding. Thus, an injunction may cover classes of persons with or through whom the enjoined party may act [*Planned Parenthood Golden Gate v. Foti (2003) 107 Cal. App. 4th 345, 352-353, 132 Cal. Rptr. 2d 46* (affirming injunction that covers agents, employees and those who act in concert with enjoined party)]. Any person, even one who was not a party to the original action, may be included in the scope of an injunction and held guilty of contempt for disobedience [*Ross v. Superior Court (1977) 19 Cal. 3d 899, 906, 141 Cal. Rptr. 133, 569 P.2d 727]* . For example, an injunction may include not only a corporation or association, but also its officers, employees, and agents [*Mattos v. Superior Court (1939) 30 Cal. App. 2d 641, 647, 86 P.2d 1056* ; *see Pitchess v. Superior Court (1969) 2 Cal. App. 3d 653, 656, 83 Cal. Rptr. 41]* . On the other hand, an injunction against a corporate employer is inappropriate to enjoin the actions of specific employees [*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal (2005) 129 Cal. App. 4th 1228, 1266, 29 Cal. Rptr. 3d 521]* . However, a claim for disobedience of the injunction cannot be based on the act of a person not in any way included in its terms or acting in concert with the enjoined party [*Planned Parenthood Golden Gate v. Foti (2003) 107 Cal. App. 4th 345, 352-353, 132 Cal. Rptr. 2d 46* (invalidating injunction providing that anyone with personal notice was bound by it); *see People ex rel. Gwinn v. Kothari (2000) 83 Cal. App. 4th 759, 770-771, 100 Cal. Rptr. 2d 29* (injunction in nuisance abatement action could not bind future purchasers of property)].

PRACTICE TIP:

Include All Enjoined Persons. It is common practice to make an injunction run to classes of persons through whom the enjoined person may act, such as agents, servants, employees, aiders, abettors, persons acting in concert with specifically named parties, corporate affiliates, etc., even though they are not parties to the action. This practice has been upheld by the courts [*Berger v. Superior Court (1917) 175 Cal. 719, 721, 167 P. 143]* . It is important, however, to include these categories of persons in the injunction order itself. Merely serving the injunction on a person not included in the order does not bring the person within the scope of the injunction, unless he or she has been acting in concert with one so included [*Berger v. Superior Court (1917) 175 Cal. 719, 721-722, 167 P. 143* ; *Planned Parenthood Golden Gate v. Foti (2003) 107 Cal. App. 4th 345, 352-353, 132 Cal. Rptr. 2d 46* (invalidating injunction

providing that anyone with personal notice was bound by it)].

For discussion of how a court may use its contempt powers to enforce an injunction, see *Subpart H, § 303.90 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsContempt

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§ 303.14 Courses of Action Available to Defendant

Counsel for a defendant who either is about to be or has been subjected to injunctive relief by a plaintiff can pursue several options. If a temporary restraining order has been granted, counsel should prepare and serve a memorandum of points and authorities and declarations to oppose the pending application for a preliminary injunction. If the temporary restraining order was issued on the basis of a verified complaint, counsel may demur or answer to the complaint. If a temporary restraining order was not sought or was not issued, counsel will still want to prepare and serve a memorandum of points and authorities and declarations to oppose the pending application for a preliminary injunction. Counsel for defendant also should consider making a motion for change of venue if plaintiff has brought the action in the wrong county [*see generally* Ch. 571, *Venue*]. Counsel may also want to consider petitioning for removal of the action to federal court [*see generally* Ch. 265, *Federal Courts: Jurisdiction and Removal*].

If a preliminary injunction has already issued, counsel for a defendant may:

- Seek to have the preliminary injunction modified or dissolved [*see § 303.80*].
- Appeal and seek to have the order stayed pending the outcome of the appeal [*see § 303.81*].
- Seek a writ of prohibition [*see § 303.87*].
- Decide not to comply with the preliminary injunction with the attendant risk of contempt [*see § 303.92*].

If it is later determined either by a judgment in defendant's favor or by appeal that the preliminary injunction should not have been issued to the plaintiff, then defendant's counsel may move for damages from the sureties who are liable under the injunction bond [*see § 303.48*].

If a permanent injunction has issued, counsel for a defendant has the same four basic options just listed: modification or dissolution, appeal, writ of prohibition, or risking contempt by noncompliance. Each of these major courses of action is

discussed below.

For an outline of an opposing party's possible responses to an application for an injunction, *see* Defendant's Checklist for Opposing Injunctive Relief at *§ 303.121*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferChoice of ForumCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureRemediesWritsCommon Law WritsProhibition

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§ 303.15 Specific Situations When Injunctions Are Available or Prohibited

The scope of this chapter does not permit discussion of the particular factual situations in which injunctive relief has been granted or denied. For a listing of some of the statutory provisions that authorize the granting of injunctive relief to private parties, see the entries in the Research Guide at *§ 303.102[9]*. For a similar listing of decisions that show factual situations in which injunctive relief has been granted to private parties, see the cases cited in the Research Guide *§ 303.104[19]*.

For a listing of some of the statutory provisions that prohibit the granting of injunctive relief, see the entries in the Research Guide at *§ 303.102[10]*. For a similar listing of decisions that show factual situations in which injunctive relief has been denied, see the cases cited in the Research Guide at *§ 303.104[20]*.

Counsel who is seeking assistance with the applicability of injunctive relief to a particular situation also should consult other chapters in this set that contain forms for injunctive relief. References to these chapters appear at *§ 303.02[2]*.

Legal Topics:

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

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§ 303.16 Harassment and Workplace Violence

Provisions for obtaining a temporary restraining order and injunction prohibiting harassment, as defined in *Code Civ. Proc. § 527.6(b)*, including domestic violence (*see Code Civ. Proc. § 527.6(f)*), are contained in *Code Civ. Proc. § 527.6*. Similarly, provisions for an employer, under specified circumstances, to obtain a temporary restraining order and an injunction on an employee's behalf prohibiting unlawful violence or threats of violence are contained in *Code Civ. Proc. § 527.8* [*see, e.g., USS-Posco Indus. v. Edwards (2003) 111 Cal. App. 4th 436, 442-443, 4 Cal. Rptr. 3d 54* (construing *section 527.8*)]. For discussion of *Code Civ. Proc. §§ 527.6* and *527.8*, see Ch. 293, *Harassment and Domestic Violence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersFamily LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & NeglectLabor & Employment LawWorkplace Violence

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[Reserved]

§§ 303.17[Reserved]

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26-303 California Forms of Pleading and Practice--Annotated § 303.20

§ 303.20 Subject Matter Jurisdiction

[1] Permanent Injunctive Relief

Superior courts have jurisdiction to grant permanent injunctive relief except in limited civil cases. Permanent injunctive relief cannot be granted in a limited civil case [*see Cal. Const., art. VI, § 10* (original jurisdiction of superior courts); *Code Civ. Proc. § 580(b)(2)*].

[2] Preliminary Injunctive Relief

A preliminary injunction may be granted by the court in which the action is brought or by a judge of that court. A preliminary injunction may be enforced as an order of the court [*Code Civ. Proc. § 525*].

In a limited civil case, the court has original jurisdiction in civil proceedings to issue only temporary restraining orders and preliminary injunctions [*Code Civ. Proc. § 86(a)(8)*]. The court does not have jurisdiction to issue permanent injunctions in a limited civil case [*Code Civ. Proc. § 580(b)(2)*].

[3] Supreme Court and Courts of Appeal

The Supreme Court and courts of appeal lack jurisdiction over original applications for injunctive relief [*Modern Barber Col. v. Cal. Emp. Stab. Com. (1948) 31 Cal. 2d 720, 730, 192 P.2d 916* ; *Walsh v. Railroad Commission (1940) 16 Cal. 2d 691, 694, 107 P.2d 611* ; *see Cal. Const., art. VI, § 10*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

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§ 303.21 Personal Jurisdiction

The granting of either a provisional or final injunction requires personal jurisdiction over the person enjoined [*see Comfort v. Comfort (1941) 17 Cal. 2d 736, 741, 112 P.2d 259* (permanent); *Rothschild v. Erda (1968) 258 Cal. App. 2d 750, 753, 66 Cal. Rptr. 209* (preliminary)]. Once a court obtains personal jurisdiction over the responding party, the effect of the injunction may extend beyond the boundaries of the state [*People ex rel. Mosk v. National Research Co. of Cal. (1962) 201 Cal. App. 2d 765, 776, 20 Cal. Rptr. 516]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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26-303 California Forms of Pleading and Practice--Annotated § 303.22

§ 303.22 Retention of Jurisdiction to Ensure Compliance

The trial court has the inherent power to reserve jurisdiction to ensure compliance with its injunctive orders [*Estes v. Rowland (1993) 14 Cal. App. 4th 508, 536, 17 Cal. Rptr. 2d 901* (concurring opinion by Benson, J., concurred with by Peterson, J., at 541-542, restricting actions taken by any appointed monitor to be purely advisory in nature, not binding on superior court)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral Overview

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26-303 California Forms of Pleading and Practice--Annotated § 303.23

§ 303.23 Venue

Because an action for injunctive relief is ordinarily personal and transitory, venue is generally proper in the county in which the defendant resides at the time of the action's commencement [*see Code Civ. Proc. § 395(a)*; *Golden Cross Min. & Milling Co. v. Spiers (1896) 115 Cal. 247, 251, 47 P. 108* ; *Sloan v. Court Hotel (1945) 72 Cal. App. 2d 308, 316, 164 P.2d 516]* . Another venue may be applicable, however, as dictated by the capacity of the defendant, for example, if the defendant is a corporation [*see Code Civ. Proc. §§ 392-395.5*]. For discussion and forms related to the subject of venue generally, see Ch. 571, *Venue* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueCorporationsCivil ProcedureVenueIndividual DefendantsCivil ProcedureRemediesInjunctionsGeneral Overview

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[Reserved]

§§ 303.24[Reserved]

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26-303 California Forms of Pleading and Practice--Annotated § 303.30

§ 303.30 When Temporary Restraining Order Permitted

A temporary restraining order (TRO) is permitted in the same situations as a preliminary injunction [*see generally § 303.40* et seq.]. However, a court will issue a TRO only for a limited period of time, which is usually pending its consideration whether to order a preliminary injunction [*San Diego Water Co. v. Pacific Coast S.S. Co. (1894) 101 Cal. 216, 218, 35 P. 651* ; *see Code Civ. Proc. § 527*]. A TRO terminates automatically when a preliminary injunction is issued or denied [*Landmark Holding Group, Inc. v. Superior Court (1987) 193 Cal. App. 3d 525, 529, 238 Cal. Rptr. 475]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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26-303 California Forms of Pleading and Practice--Annotated § 303.31

§ 303.31 Procedure to Obtain Temporary Restraining Order

[1] Verified Complaint

Temporary restraining orders usually are obtained by counsel for the plaintiff filing a verified complaint with the clerk and presenting a copy of the complaint [*see § 303.130*], any affidavits (or declarations [*Code Civ. Proc. § 2015.5*]) [*see* § 303.171], and a memorandum of points and authorities to the court [*see Code Civ. Proc. § 527*]. If the action is initiated the same day a TRO or OSC is sought, the complaint must be filed first [*Cal. Rules of Ct., Rule 3.1150(b)*].

PRACTICE TIP:

Submit Declarations or Affidavits. Although the evidentiary showing necessary for the issuance of the temporary restraining order may be satisfied solely by a verified complaint, the better practice is to submit declarations or affidavits. *Code Civ. Proc. § 446* limits a party's ability to rely on a verified complaint to establish the necessary evidentiary facts. In any case, the applicant must submit a proposed order and memorandum of points and authorities.

A Procedural Checklist is included at *§ 303.120*. The Checklist illustrates the basic steps counsel should follow either in applying for or in defending against temporary restraining orders. It should be consulted if counsel is interested in a step-by-step procedural discussion of temporary restraining orders.

[2] Notice to Opposing Party

In most cases, counsel must attempt to notify the opposition of the application for a TRO [*Cal. Rules of Ct., Rules 3.1150(a), (g), 3.1203-3.1204*]. If certain requirements are met, however, a TRO may be issued ex parte without notice [*see Code Civ. Proc. § 527(c)*; *Cal. Rules of Ct., Rules 3.1150(a), 3.1200- 3.1207*; *see also [3], below*].

[3] Ex Parte Issuance

[a] Irreparable Injury Requirement

Temporary restraining orders may be granted ex parte if it appears from the facts set forth in the affidavit or declaration [*see Code Civ. Proc. § 2015.5*] or the verified complaint that great or irreparable injury would result to the applicant before the matter could be heard on notice [*see Code Civ. Proc. § 527(c)(1)*]. This satisfies the requirements of due process [*Dickey v. Rosso (1972) 23 Cal. App. 3d 493, 497-498, 100 Cal. Rptr. 358]* .

The affidavits, declarations, or verified complaint must contain specific facts, on personal knowledge, supporting the allegations that are the basis for the request for a TRO. A restraining order may not be granted on an affidavit supported only on information and belief [*Low v. Low (1956) 143 Cal. App. 2d 650, 654, 299 P.2d 1022]* .

[b] Advance Notification Requirement

For ex parte issuance of a TRO, the applicant or the applicant's attorney must also certify to the court under oath (or by declaration under penalty of perjury) one of the following [*Code Civ. Proc. § 527(c)(2)*; *Cal. Rules of Ct., Rules 3.1204*; *see § 303.130*]:

- No later than 10:00 a.m. the court day before the application, the party informed the responding party or the responding party's attorney when and where the application would be made.

- The party in good faith attempted to inform the responding party and the responding party's attorney but was unable to do so, specifying the efforts made to contact them.

- For reasons specified, the party should not be required to inform the responding party or the responding party's attorney.

The certification requirement does not apply to orders sought in certain family law proceedings [*see Code Civ. Proc. § 527(g)*; *see, e.g., Fam. Code §§ 2045 et seq., 6300 et seq., 7700 et seq.*]. For discussion of issuing injunctive relief, including temporary restraining orders, regarding family law matters, see Ch. 221, *Dissolution of Marriage: Procedure* , Ch. 293, *Harassment and Domestic Violence* , and Ch. 412, *Paternity* .

PRACTICE TIP:

Requirement of Advance Notice. In view of the advance notice requirements, it is useful to keep in mind that "ex parte" generally means shortened and informal notice, rather than no notice at all.

Counsel should prepare a separate supporting declaration setting out in detail the actions taken to comply with the advance notice requirements [*see Cal. Rules of Ct., Rule 3.1204*; § 303.171].

ILLUSTRATION: Immediate Danger to Property. The final alternative of the advance notification requirement, i.e., that the moving party for specified reasons should not be required to give advance notification, may be used when the advance notice would result in immediate danger to real or personal property. If the responding party is likely to abscond with funds, for example, the applicant may cite this as a basis for being excused from attempting to provide advance notification.

[4] Order to Show Cause Issued

If a TRO is granted without notification, the matter must be made returnable on an order to show cause why a preliminary injunction should not be granted [*Code Civ. Proc. § 527(d)(1)*; *see § 303.133*].

Personal service of an order to show cause on the responding party gives the court personal jurisdiction and, therefore, the power to enforce the order in contempt proceedings [*Chrysler Credit Corp. v. Waegele (1972) 29 Cal. App. 3d 681, 687-689, 105 Cal. Rptr. 914]* . For that purpose, the applicant need not serve the summons on the responding party

at the same time of service of the order to show cause. This is true because service of a summons, in addition to the order to show cause, adds nothing to the order of the court commanding the responding party to appear for a hearing on the TRO [*Chrysler Credit Corp. v. Waegele (1972) 29 Cal. App. 3d 681, 688, 105 Cal. Rptr. 914]* . Until legal service of process has been made, however, the court has no jurisdiction to render judgment even though the responding party may have actual knowledge of the pendency of the action [*Chrysler Credit Corp. v. Waegele (1972) 29 Cal. App. 3d 681, 688, 105 Cal. Rptr. 914]* .

The party who obtained the temporary restraining order must, within five days from the date the temporary restraining order is issued or two days prior to the hearing whichever is earlier, serve on the opposing party a copy of the complaint if not previously served, the order to show cause stating the date, time, and place of the hearing, any affidavits to be used in the application, and a copy of the points and authorities in support of the application. The court may for good cause, on motion of the applicant or on its own motion, shorten the time required by this paragraph for service on the opposing party [*Code Civ. Proc. §§ 527(d)(2), 527(d)(5)*].

However, upon the filing of an affidavit by the applicant that the opposing party could not be served within the time required, the court may reissue any temporary restraining order previously issued. The time for hearing is then measured from the date of reissuance. No fees are charged for reissuing the order [*Code Civ. Proc.§ 527(d)(5)*; for Judicial Council Form, *see § 303.142*].

PRACTICE TIP:

Preparation of Two Orders. Even when a TRO is being sought, the order to show cause and the TRO should be prepared so that they are stated separately but within the same document. The order to show cause must be stated first [*Cal. Rules of Ct., Rule 3.1150(e)*]. Although this separation involves repetition, it enables a court to strike parts or delete the whole of the TRO without striking anything from the order to show cause.

PRACTICE TIP: Temporary Restraining Order Service. Unless service of a TRO is accepted by counsel for the enjoined parties at the hearing, personal service of the court order should be effectuated as soon as possible after the TRO issues. Counsel should consult local rules of practice concerning the time and place for filing proof of service.

[5] Time for Hearing of Order to Show Cause

The hearing on an order to show cause why a preliminary injunction should not be granted must be held on the earliest day that the business of the court permits, but not later than 15 days or, if good cause appears to the court, 22 days from the date of the TRO [*Code Civ. Proc. § 527(d)(1)*].

CAUTION:

Hearing Beyond Statutory Limit. If the order to show cause is set for hearing beyond the statutory limit, the TRO is void and must be dissolved [*Agricultural P. Com. v. Superior Court (1938) 30 Cal. App. 2d 154, 155, 85 P.2d 898* ; *McDonald v. Superior Court (1937) 18 Cal. App. 2d 652, 655, 64 P.2d 738]* .

[6] Undertaking Preferred but Not Required

Although an undertaking is not required before obtaining a TRO [*see Code Civ. Proc. §§ 527, 529*; *Chico Feminist Women's Health Center v. Scully (1989) 208 Cal. App. 3d 230, 237 n.1, 256 Cal. Rptr. 194]* , a trial court has the inherent equitable power to require one during the period of effectiveness of a TRO [*Biasca v. Superior Court (1924) 194 Cal. 366, 367, 228 P. 861* ; *Neumann v. Moretti (1905) 146 Cal. 31, 33, 79 P. 512]* .

The court, in the exercise of discretion, may include as obligees any persons the court determines should be protected

against the impact of the TRO if it were found later to have been improperly issued [*Allen v. Pitchess (1973) 36 Cal. App. 3d 321, 329-330, 111 Cal. Rptr. 658]* .

The policy behind exempting a public entity from providing an undertaking to obtain a preliminary injunction [*Code Civ. Proc. § 529(b)(3)*; *see § 303.46[1]*] must be enforced also when a public entity applies for a TRO [*City of South San Francisco v. Cypress Lawn Cemetery Ass'n (1992) 11 Cal. App. 4th 916, 920-924, 14 Cal. Rptr. 2d 323]* .

[7] Period of Effectiveness

A TRO expires by its own limitation; it is effective until the propriety of granting the preliminary injunction can be determined on the hearing of the order to show cause [*Maier v. Luce (1923) 61 Cal. App. 552, 555-556, 215 P. 399]* . Thus, the order will expire after the 15/22-day time period for holding the hearing on the order to show cause, if no action is taken [*see Code Civ. Proc. § 527(d)(1)*; *see also [5], above*]. A TRO also terminates automatically when a preliminary injunction is issued or denied [*Landmark Holding Group, Inc. v. Superior Court (1987) 193 Cal. App. 3d 525, 529, 238 Cal. Rptr. 475]* . In addition, a TRO remains in force until the preliminary injunction, if granted, has become effective against the party enjoined. This allows a reasonable time for filing the required undertaking and giving the necessary notice [*Houser v. Superior Court (1932) 121 Cal. App. 31, 35, 8 P.2d 483]* .

The party who obtained the temporary restraining order must, within five days from the date the temporary restraining order is issued or two days prior to the hearing whichever is earlier, serve on the opposing party a copy of the complaint if not previously served, the order to show cause stating the date, time, and place of the hearing, any affidavits to be used in the application, and a copy of the points and authorities in support of the application. The court may for good cause, on motion of the applicant or on its own motion, shorten the time required by this paragraph for service on the opposing party [*Code Civ. Proc. §§ 527(d)(2), 527(d)(5)*].

However, upon the filing of an affidavit by the applicant that the opposing party could not be served within the time required, the court may reissue any temporary restraining order previously issued. The time for hearing is then measured from the date of reissuance. No fees are charged for reissuing the order [*Code Civ. Proc. § 527(d)(5)*]. For Judicial Council Form, *see § 303.142*.

If the party who obtained the TRO is not ready to proceed at the time of the hearing on the order to show cause or has failed to serve a copy of the complaint, affidavits, and points and authorities required by *Code Civ. Proc. § 527(d)(2), (3)*] [*see [1], above*], the court must dissolve the TRO [*Code Civ. Proc. § 527(d)(3)*; *see Cal. Rules of Ct., Rules 3.1150*].

PRACTICE TIP:

Preparation for Filing Undertaking. Many judges routinely require the filing of the undertaking in their courtroom within a certain number of days following the issuance of their TRO. Counsel should usually obtain an application for a bond before filing the application for the TRO, and also obtain the necessary financial information from the client. The bond application can then be completed after the court fixes the amount of the bond when it issues the TRO.

[8] Order Granted or Denied in Discretion of Court

The grant or denial of a TRO is left to the trial court's sound discretion. The court's decision may not be disturbed on appeal except on a clear showing of abuse of discretion [*Killeen v. Hotel & Restaurant Employees' International Alliance & Bartenders' International League (1948) 84 Cal. App. 2d 87, 95, 190 P.2d 30* ; *Palm Springs La Quinta Dev. Co. v. Kieberk Corp. (1940) 37 Cal. App. 2d 642, 644, 100 P.2d 346* ; *see § 303.81*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureRemediesInjunctionsElementsIrreparable HarmCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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[Reserved]

§§ 303.32[Reserved]

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§ 303.40 Grounds for Obtaining Preliminary Injunction

[1] Applicant Entitled to Relief Demanded

A preliminary injunction may be granted when it appears that the party applying for relief is entitled to the relief demanded, and all or part of the relief consists in restraining the commission or continuance of the act complained of (or commanding certain conduct) either for a limited period or perpetually [*Code Civ. Proc. § 526(a)(1)*; *see § 303.10[1]*]. In determining whether to issue a preliminary injunction, courts consider two factors: (1) the likelihood that the plaintiff will prevail on the merits of its case at trial; and (2) the interim harm that the plaintiff is likely to sustain if the injunction is denied compared to the harm the defendant is likely to suffer if the court grants the preliminary injunction [*Right Site Coalition v. Los Angeles Unified School Dist. (2008) 160 Cal. App. 4th 336, 341-342, 72 Cal. Rptr. 3d 678* ; *O'Connell v. Superior Court (2006) 141 Cal. App. 4th 1452, 1467-1468, 47 Cal. Rptr. 3d 147* ; *Teamsters Local 856 v. Priceless, LLC (2003) 112 Cal. App. 4th 1500, 1509-1510, 5 Cal. Rptr. 3d 847* (affirming preliminary injunction requiring release of public employee salaries); *White v. Davis (2002) 98 Cal. App. 4th 969, 981, 121 Cal. Rptr. 2d 51]* .

[2] Injunction Necessary to Prevent Waste or Irreparable Injury

A preliminary injunction may be granted when it appears by the verified complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party in the action [*Code Civ. Proc. § 526(a)(2)*]. An order granting a preliminary injunction is not fatally flawed because it contains no explicit finding that the injunction is necessary to prevent irreparable injury [*Conover v. Hall (1974) 11 Cal. 3d 842, 850, 114 Cal. Rptr. 642, 523 P. 2d 682]* .

Under the "irreparable injury" standard, an injunction may issue to prevent wrongs of repeated and continuing character or ones that cause damages estimable only by conjecture and not by any accurate standard [*Huong Que, Inc. v. Luu, 150 Cal. App. 4th 400, 417-418, 58 Cal. Rptr. 3d 527* ; *People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater (1981) 118 Cal. App. 3d 863, 870-871, 173 Cal. Rptr. 476* ; *Wind v. Herbert (1960) 186 Cal. App. 2d 276, 285, 8 Cal. Rptr. 817]* .

ILLUSTRATION:

Example of "Irreparable Injury." Plaintiffs seek a preliminary injunction against defendants, who operate a theater exhibiting and selling allegedly obscene films. May plaintiff show irreparable injury by the continued exhibition and sale pending trial? Yes. If the films being sold and exhibited are later determined to be obscene, their exhibition and sale would be a wrong of a repeated and continuing character. In addition, since the ultimate remedy plaintiffs seek is a permanent injunction, there is no standard for assessing damages [*People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater (1981) 118 Cal. App. 3d 863, 870-871, 173 Cal. Rptr. 476]* .

The applicant may also show that the wrongful act constitutes an actual or threatened injury to personal or property rights that cannot be compensated by an ordinary damage award [*Brownfield v. Daniel Freeman Marina Hospital (1989) 208 Cal. App. 3d 405, 410, 256 Cal. Rptr. 240]* . Damage is not irreparable if it can be adequately compensated by an award of monetary damages [*Helms Bakeries v. St. Bd. Equalization (1942) 53 Cal. App. 2d 417, 425, 128 P.2d 167]* . Irreparable harm may be established where there is an injury, but an inability to ascertain the amount of damage, i.e., pecuniary compensation would not afford adequate relief or that it would be extremely difficult to ascertain the amount that would afford adequate relief [*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc. (2009) 176 Cal. App. 4th 697, 721-722, 97 Cal. Rptr. 3d 856*].

Whether the damage and injury inflicted is irreparable and entitles the applicant to injunctive relief is so intimately bound up with the question of the availability of an adequate remedy at law that the two may well be considered together [*People v. Monterey Fish Products Co. (1925) 195 Cal. 548, 564, 234 P. 398]* .

[3] Action or Threatened Action Violates Rights of Another Party

A preliminary injunction will also issue when it appears during litigation that a party is doing, threatens, is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action regarding the subject of the action and tending to render the judgment ineffectual [*Code Civ. Proc. § 526(a)(3)*].

ILLUSTRATION:

Rendered Judgment Possibly Ineffectual. Plaintiffs, husband and wife, bring an action against defendants. Plaintiffs are both represented by the husband, who is not a licensed attorney. May defendants obtain a preliminary injunction preventing the husband from representing the wife? Yes. The husband's representation of the wife is unlawful under state law. Thus, doubt would be cast on any judgment affecting the wife [*Abar v. Rogers (1981) 124 Cal. App. 3d 862, 864-865, 177 Cal. Rptr. 655]* .

NOTE: Interference With Court-Appointed Receiver. Whenever the court has appointed a receiver pendente lite to take charge of property that is the subject of a pending action, all persons are effectively enjoined as a matter of law from interfering with the receiver's possession and control of that property.

[4] Pecuniary Compensation Inadequate

A preliminary injunction will issue when pecuniary compensation would not afford adequate relief [*Code Civ. Proc. § 526(a)(4)*], for example when injury to real property is threatened. In evaluating whether the legal remedy of damages is adequate, the defendant's asserted insolvency is a proper matter for the court's consideration [*see West Coast Constr. Co. v. Oceano Sanitary Dist. (1971) 17 Cal. App. 3d 693, 700, 95 Cal. Rptr. 169* ; *Union Oil Co. v. Domengeaux (1939) 30 Cal. App. 2d 266, 271-272, 86 P.2d 127]* . In addition, an award of declaratory relief does not necessarily render the request for an injunction moot [*Syngenta Crop Protection, Inc. v. Helliker (2006) 136 Cal. App. 4th 1464, 1496-1497, 40 Cal. Rptr. 3d 278* (declaratory judgment is cumulative remedy and does not preclude injunctive relief based on same facts)]. In addition, an award of declaratory relief does not necessarily render the request for an

injunction moot [*Syngenta Crop Protection, Inc. v. Helliker (2006) 138 Cal. App. 4th 1135, 1167, 42 Cal. Rptr. 3d 191* (declaratory judgment is cumulative remedy and does not preclude injunctive relief based on same facts)].

If monetary damages afford adequate relief and are not extremely difficult to ascertain, the court will deny a request for an injunction [*Ajaxo Inc. v. E*TRADE Group, Inc. (2005) 135 Cal. App. 4th 21, 64 n.44, 37 Cal. Rptr. 3d 221* ; *Thayer Plymouth Center, Inc. v. Chrysler Motors Corp. (1967) 255 Cal. App. 2d 300, 306, 63 Cal. Rptr. 148]* . Other legal remedies, aside from monetary damages, may also be adequate and therefore grounds for denying injunctive relief. For example, the following legal remedies are adequate:

- The right to pay a tax under protest with the subsequent right to file a claim for a refund and, if unsuccessful, the further right to bring a suit for a refund [*Helms Bakeries v. St. Bd. Equalization (1942) 53 Cal. App. 2d 417, 421-425, 128 P.2d 167* ; *see* Ch. 540, *Taxes and Assessments*].

- The presence of an administrative remedy that plaintiff has not exhausted [*Teeter v. Los Angeles (1930) 209 Cal. 685, 687, 290 P. 11* ; *San Joaquin and Kings River Canal & Irr. v. Stanislaus (1908) 155 Cal. 21, 29, 99 P. 365]* .

- The right to seek a writ of mandate [*Moore v. Superior Court (1936) 6 Cal. 2d 421, 423-424, 57 P.2d 1314* ; *see* Ch. 358, *Mandate and Prohibition*].

- The right to pursue the legal remedy of quo warranto [*Hallinan v. Mellon (1963) 218 Cal. App. 2d 342, 344-348, 32 Cal. Rptr. 446* ; *Somo v. Superior Court (1933) 135 Cal. App. 584, 586, 27 P.2d 790* ; *see* Ch. 483, *Quo Warranto*].

- The availability of appeal, motion for new trial, or motion to vacate or modify a court's judgment [*Lezama v. Justice Court (1987) 190 Cal. App. 3d 15, 21, 235 Cal. Rptr. 238* ; *see* Ch. 40, *Appeal: An Overview* , et seq., Ch. 318, *Judgments* , *§ 318.70 et seq.*, and Ch. 371, *Motions After Trial* , §§ 357.60 et seq., *357.90 et seq.*].

- The federal government is in a better position from the standpoint of efficiency and policy to provide the relief sought [*Larez v. Oberti (1972) 23 Cal. App. 3d 217, 221-223, 100 Cal. Rptr. 57* ; *Diaz v. Kay-Dix Ranch (1970) 9 Cal. App. 3d 588, 592-599, 88 Cal. Rptr. 443]* .

[5] Compensation Not Ascertainable

A preliminary injunction will issue when it would be extremely difficult to ascertain the amount of compensation that would afford adequate relief [*Code Civ. Proc. § 526(a)(5)*].

[6] Injunction Necessary to Avoid Multiplicity of Suits

A preliminary injunction will issue when necessary to prevent a multiplicity of judicial proceedings [*Code Civ. Proc. § 526(a)(6)*]. This rule applies to two kinds of actions [*Verdier v. Verdier (1962) 203 Cal. App. 2d 724, 735, 22 Cal. Rptr. 93]* :

- Cases in which many claims that have not been adjudicated have been brought into equity to be the subject of a single trial and decree.

- Vexatious cases on causes of action that have been settled by former adjudication.

ILLUSTRATION:

Preliminary Injunction Prevents Multiplicity. Ninety-eight plaintiffs file an action in superior court seeking damages for fraud involving land-sales contracts. Four months later, defendants' assignee brings actions against 13 of the plaintiffs in municipal court to recover amounts due on the contracts. May plaintiffs in the superior court action obtain an injunction to restrain the assignee from proceeding in the municipal court action? Yes. Since (1) the superior court action was within the superior court's subject matter jurisdiction, (2) defendants had appeared and submitted to personal jurisdiction, and (3) the superior court action was filed first, the injunction was properly granted to avoid a multiplicity of suits [*Aldrich v. Transcontinental Land & Water Co. (1955) 131 Cal. App. 2d 788, 796-797, 281 P.2d 362]* .

However, an injunction is not available to prevent multiple suits absent evidence that the controversy involves the same parties, subject matter, or facts [*Planned Parenthood Golden Gate v. Foti (2003) 107 Cal. App. 4th 345, 358, 132 Cal. Rptr. 2d 46]* .

Whether a case belongs to the second class of cases involves a question of res judicata [*Bartholomew v. Bartholomew (1942) 56 Cal. App. 2d 216, 225, 132 P.2d 297* ; *see* Ch. 491, *Res Judicata*].

[7] Obligation Arises From Trust

A preliminary injunction may issue when the obligation arises from a trust [*Code Civ. Proc. § 526(a)(7)*].

[8] Statutes Specifically Authorizing Injunction for Violation

When a statute authorizes the granting of a preliminary injunction for its violation, a private party need not show irreparable injury and inadequacy of a remedy at law if the statutory conditions for the injunction's issuance are met [*In re Marriage of Van Hook (1983) 147 Cal. App. 3d 970, 985, 195 Cal. Rptr. 541* ; *see, e.g., Code Civ. Proc. § 527.6* (injunctive relief prohibiting harassment)].

If a governmental entity seeks an injunction under a specific statute and the entity establishes that it is reasonably probable that it will prevail on the merits, a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the responding party. The responding party must then show that it will suffer grave or irreparable harm if the preliminary injunction issues. Only then will the court examine the relative actual harms to the parties [*IT Corp. v. County of Imperial (1983) 35 Cal. 3d 63, 72, 196 Cal. Rptr. 715, 672 P.2d 121]* .

Some statutes specifically state that their violation may be enjoined without the required showing of a lack of an adequate remedy at law and irreparable injury. These include:

- *Bus. & Prof. Code § 4339* (authorizing injunction for violating any provisions governing pharmacies) and *Bus. & Prof. Code § 4380* (authorizes injunctive relief for resale of drugs that constitute unfair trade practice without need to allege or prove damage or injury or threat of damage or injury).

- *Bus. & Prof. Code § 8658* (authorizing injunction against violating provisions governing structural pest control operators).

- *Health & Safety Code §§ 1508, 1541* (authorizing injunction against operating community care facility without license).

The mere showing of a violation of the statute, however, does not create an automatic right to an injunction. The applicant must still introduce sufficient evidence showing he or she is entitled to a preliminary injunction under one of the remaining requirements of *Code Civ. Proc. § 526* [*Woods v. Superior Court (1980) 102 Cal. App. 3d 608, 613-617, 162 Cal. Rptr. 577]* . Some statutes do provide, however, that the trial court must issue an injunction on a

showing of a violation of the section to be enforced [*see, e.g., Lab. Code § 3712* (if court finds defendant is operating a business without full compensation security required, it must issue order restraining the business as long as violation continues)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsElementsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

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§ 303.41 Situations Where Preliminary Injunction Unavailable

[1] Staying of Judicial Proceedings

A preliminary injunction may not be granted:

- To stay a judicial proceeding that was pending at the time the action was commenced in which the injunction is demanded, unless the restraint is necessary to prevent a multiplicity of proceedings [*Civ. Code § 3423(a)*; *Code Civ. Proc. § 526(b)(1)*].

- To stay proceedings in a court of the United States [*Civ. Code § 3423(b)*; *Code Civ. Proc. § 526(b)(2)*].

- To stay proceedings in another state on a judgment of a court of that state [*Civ. Code § 3423(c)*; *Code Civ. Proc. § 526(b)(3)*].

The provision of *Code Civ Proc. § 526(b)(1)*, that an injunction cannot be granted to stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless the restraint is necessary to prevent a multiplicity of judicial proceedings, necessarily implies that a judicial proceeding which is not pending at the commencement of the action in which the injunction is demanded may be stayed [*Glade v. Glade (1995) 38 Cal. App. 4th 1441, 1455, 45 Cal. Rptr. 2d 695]* . Thus, a family law court with priority of jurisdiction over alleged community property may stay a latter-commenced foreclosure action pending in another department of the superior court and concerning some of the same property [*Glade v. Glade (1995) 38 Cal. App. 4th 1441, 1456, 45 Cal. Rptr. 2d 695* (noting that even if the foreclosure action had been considered as pending before the dissolution action, under *Code Civ. Proc. § 526(b)(1)* the family law court properly issued the injunction to prevent a multiplicity of actions)]. For discussion of the principle of priority of jurisdiction between departments of the superior court, see Ch. 324, *Jurisdiction: Subject Matter* .

[2] Preventing Execution of Public Statute

[a] In General

An injunction may not be granted to prevent the execution of a public statute for the public benefit by officers of the law [*Civ. Code § 3423(d)*; *Code Civ. Proc. § 526(b)(4)*; *Carson Mobilehome Park Owners' Ass'n v. City of Carson (1983) 35 Cal. 3d 184, 195, 197 Cal. Rptr. 284, 672 P.2d 1297* ; *McCarthy v. Superior Court (1987) 191 Cal. App. 3d 1023, 1031-1032, 236 Cal. Rptr. 833]* . Under the doctrine of separation of powers [*City of Los Angeles v. Superior Court (1959) 51 Cal. 2d 423, 430, 333 P.2d 745]* , courts of equity have no power by injunction to restrain a public officer from performing an official act that he or she is required by valid law to perform. Thus, only acts that are without the sanction of a sound law may be restrained [*Financial Indem. Co. v. Superior Court (1955) 45 Cal. 2d 395, 402, 289 P.2d 233* ; *see O'Connell v. Superior Court (2006) 141 Cal. App. 4th 1452, 47 Cal. Rptr. 3d 147]* .

ILLUSTRATION:

Ordinance Restraining Nightclub's Operation. A cabaret challenges a city ordinance that requires cabarets to be closed between the hours of 2 a.m. and 6 a.m. The cabaret argues that providing entertainment is an activity protected by the free speech guarantees of the federal and state constitutions and that the ordinance infringes those constitutional guarantees. Will the cabaret succeed in obtaining a preliminary injunction? No. Although *First Amendment* rights are at stake, a trial court may still weigh the competing burdens on the cabaret and the city and determine if the cabaret will prevail in a trial on the merits. Here, the burden on the cabaret's *First Amendment* rights is minimal, and the cabaret will be unlikely to prevail on the merits [*Sundance Saloon, Inc. v. City of San Diego (1989) 213 Cal. App. 3d 807, 812, 261 Cal. Rptr. 841]* .

[b] Exception if Statute Is Unconstitutional or Invalid

Civ. Code § 3423(d) and *Code Civ. Proc. § 526(b)(4)*, which preclude issuing an injunction to prevent the execution of a public statute by officers of the law for the public benefit, do not apply to an unconstitutional or invalid statute or ordinance if the plaintiff shows he or she will suffer irreparable injury pending a trial on the merits [*Alfaro v. Terhune (2002) 98 Cal. App. 4th 492, 120 Cal. Rptr. 2d 197* ; *Leach v. City of San Marcos (1989) 213 Cal. App. 3d 648, 660-661, 261 Cal. Rptr. 805]* . Courts have full authority to enjoin the execution of these enactments [*Conover v. Hall (1974) 11 Cal. 3d 842, 850, 114 Cal. Rptr. 642, 523 P.2d 682]* .

For example, injunctions are often granted to stop infringement of *First Amendment* rights [*see, e.g.,* *Ketchens v. Reiner (1987) 194 Cal. App. 3d 470, 480, 239 Cal. Rptr. 549* (statutes making it a crime for parents to abuse teacher in presence of school personnel or pupils was enjoined as overbroad and applicable to protected speech); *American Booksellers Assn., Inc. v. Superior Court (1982) 129 Cal. App. 3d 197, 206, 181 Cal. Rptr. 33* (city ordinances restricting display of sexually explicit material for commercial purposes enjoined as overbroad); *but see* *Sundance Saloon, Inc. v. City of San Diego (1989) 213 Cal. App. 3d 807, 812, 261 Cal. Rptr. 841]* .

The general rule may also be inapplicable in the following cases:

- When the activity sought to be enjoined is an attempt to apply a statute or ordinance to conduct not within its terms [*Crittenden v. Superior Court (1964) 61 Cal. 2d 565, 569, 39 Cal. Rptr. 380, 393 P.2d 692* ; *Novar Corp. v. Bureau of Collection & Investigative Services (1984) 160 Cal. App. 3d 1, 6, 206 Cal. Rptr. 287]* .

- When a public officer exceeds his or her powers [*Financial Indem. Co. v. Superior Court (1955) 45 Cal. 2d 395, 402, 289 P.2d 233]* .

- When a statute valid on its face is nevertheless being applied in an unconstitutional manner [*Brock v. Superior Court (1939) 12 Cal. 2d 605, 610, 86 P.2d 805* ; *Midget Products, Inc. v. Jacobsen (1956)*

140 Cal. App. 2d 517, 523, 295 P.2d 542] .

ILLUSTRATION:

Conduct Outside Valid Statute. A political party applies to a city council for permission to solicit funds door-to-door within the city. The city council refuses permission, citing an ordinance regulating the soliciting of business door-to-door within the city. Will the party succeed in obtaining a preliminary injunction preventing application of the ordinance to them? Yes. The ordinance by its own terms applies expressly to commercial solicitation. In addition, it provides an exception for solicitations for religious, charitable or educational purposes, or "similar purposes." Whether a political solicitation would be deemed a similar purpose is open to reasonable doubt. Therefore, the trial court would not abuse its discretion in granting the injunction [*see MacLeod v. City of Los Altos (1960) 182 Cal. App. 2d 364, 369-370, 6 Cal. Rptr. 326]* .

ILLUSTRATION: Valid Statute Unconstitutionally Applied. Plaintiffs intend to manufacture and sell a dessert topping containing no milk or milk products. The California Director of Agriculture contends that the product must be marketed as "imitation milk," under a provision of the Agriculture Code requiring special licensing and consumer displays. The product is not, however, a true "imitation milk" product; it is a food product of its own distinctive character and peculiar merits. May the plaintiffs obtain a preliminary injunction preventing the director from applying this provision to them? Yes. The Director's attempt to apply the provision to plaintiffs is unconstitutional and constitutes an unreasonable interference with plaintiff's property and business; injunctive relief is appropriate [*see Midget Products, Inc. v. Jacobsen (1956) 140 Cal. App. 2d 517, 523, 295 P.2d 542]* .

[3] Preventing Breach of Contract Not Specifically Enforceable

[a] Basic Rule

An injunction may not be granted to prevent the breach of a contract the performance of which may not be specifically enforced, except for certain unique personal services contracts [*Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(b)(5)*; *Thayer Plymouth Center, Inc. v. Chrysler Motors Corp. (1967) 255 Cal. App. 2d 300, 304, 63 Cal. Rptr. 148* ; *see* [b], *below*].

ILLUSTRATION:

Contract: Affirmative and Negative Stipulations. Plaintiff seeks a permanent injunction to prevent defendant from selling to other dealers in breach of an exclusive agency contract. The contract contains both affirmative and negative stipulations. Will plaintiff succeed? No. When a contract contains both affirmative and negative stipulations, equity will not interfere to prevent a breach of the negative covenant if the affirmative covenant is of such a nature that it may not be specifically enforced by judicial decree [*see Long Beach Drug Co. v. United Drug Co. (1939) 13 Cal. 2d 158, 168, 89 P.2d 386* ; *Whipple Rd. Quarry Co. v. L.C. Smith Co. (1952) 114 Cal. App. 2d 214, 216, 249 P.2d 854]* .

For discussion, procedural guides, and forms for use in obtaining and defending against the remedy of specific performance, see Ch. 528, *Specific Performance* .

[b] Exception for Certain Personal Service Contracts

Despite the general prohibition that precludes granting an injunction to prevent the breach of a contract the performance of which cannot be specifically enforced [*see* [a], *above*], there is a statutory exception involving certain personal services contracts [*see Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(b)(5)*]. This exception permits a court to order an injunction to prevent the breach of a contract if the contract meets four statutory requirements. The contract must be [*Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(b)(5)*; *see MCA Records, Inc. v. Newton-John (1979) 90 Cal. App. 3d 18,*

22-24, 153 Cal. Rptr. 153] :

- In writing.
- For the rendition or furnishing of personal services from one to another.
- For a certain specified minimum compensation per annum [*see* Ch. 528, *Specific Performance* , for discussion of the minimum compensation requirements].
- One in which the promised services are of a special, unique, unusual, extraordinary, or intellectual character that gives them peculiar value that cannot be reasonably or adequately compensated in an action at law.

The minimum compensation provided in these contracts entered into on or before December 31, 1993, must be at the rate of $6,000 per annum, and at higher rates in successive years for contracts entered into on or after January 1, 1994 [*Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(b)(5)*; *see* Stats. 1993, chs. 5, 836; *MCA Records, Inc. v. Newton-John (1979) 90 Cal. App. 3d 18, 22-24, 153 Cal. Rptr. 153* ; for additional discussion of the minimum compensation requirements, *see also* Ch. 528, *Specific Performance*].

Because an injunction that forbids an artist to accept new employment may be a harsh and powerful remedy, the minimum compensation requirement in *Civ. Code § 3423(e)* is intended to serve as a counterweight in balancing the equities by ensuring that an artist who is enjoined from accepting new employment will at least have the alternative of earning a minimal annual compensation by performing his or her old contract [*Foxx v. Williams (1966) 244 Cal. App. 2d 223, 236, 52 Cal. Rptr. 896* (construing former *Civ. Code § 3423(5)* before 1992 and 1993 amendments to the minimum annual compensation); *see Beverly Glen Music, Inc. v. Warner Communications, Inc. (1986) 178 Cal. App. 3d 1142, 1145, 224 Cal. Rptr. 260* (employer could not enjoin other record company from employing performer whose contract did not ensure the statutory minimum compensation)].

[4] Preventing Exercise of Public or Private Office

An injunction may not be granted to prevent the exercise of a public or private office in a lawful manner by the person in possession [*Civ. Code § 3423(f)*; *Code Civ. Proc. § 526(b)(6)*].

ILLUSTRATION:

Lawful Exercise of Public Office. Plaintiff taxpayers bring suit against the local district attorney, among others, seeking an injunction preventing the district attorney from spending public funds to deputize private attorneys to prosecute misdemeanor violations of local boating ordinances. The district attorney has the authority under *Gov. Code § 24101* to appoint deputy district attorneys as necessary for the prompt and faithful discharge of the district attorney's duties. Will plaintiffs prevail? No. The court may not enjoin the lawful exercise of a public office by the officeholder [*Fort Emory Cove Boatowners Assn. v. Cowett (1990) 221 Cal. App. 3d 508, 514, 270 Cal. Rptr. 527]* .

[5] Preventing Legislative Act by Municipal Corporation

An injunction may not be issued to prevent a legislative act by a municipal corporation [*Civ. Code § 3423(g)*; *Code Civ. Proc. § 526(b)(7)*; *see Save the Welwood Murray Memorial Library Com. v. City Council (1989) 215 Cal. App. 3d 1003, 1016-1017, 263 Cal. Rptr. 896* (although injunction is improper to prevent legislative act by municipal corporation, injunction was proper on ground of city's obligation to maintain public trust)]. *Civ. Code § 3423(g)* and *Code Civ. Proc. § 526(b)(7)* are based in the doctrine of separation of powers of government into three independent departments [*City of Los Angeles v. Superior Court (1959) 51 Cal. 2d 423, 430, 333 P.2d 745]* .

[6] Causing Noncompensable Injury to Public Interest

A court has the discretion to deny preliminary injunctive relief when the injunction would cause injury to a public interest that an injunction bond would not compensate [*Socialist Workers 1974 California Campaign Committee v. Brown (1975) 53 Cal. App. 3d 879, 889, 125 Cal. Rptr. 915]* .

ILLUSTRATION:

Relief Denied in Public Interest. The Socialist Workers Campaign Committee seeks an injunction to prevent disclosures required by state election laws of the names and addresses of contributors of $100 or more. The state contends that the public has a compelling interest in fair disclosure of campaign financing and the court concludes that the injury to the public from no disclosure would exceed the injury to plaintiffs from disclosure. Should the court enjoin the disclosures? No. The state has established a compelling state interest, and the injunction should not issue [*see* *Socialist Workers 1974 California Campaign Committee v. Brown (1975) 53 Cal. App. 3d 879, 889, 125 Cal. Rptr. 915]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsContracts LawRemediesEquitable ReliefInjunctive ReliefContracts LawTypes of ContractsPersonal Service Agreements

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§ 303.42 Procedure for Obtaining Preliminary Injunction

[1] In General

A Procedural Checklist is included at *§ 303.120*. The Checklist illustrates the basic steps counsel should follow either in applying for or in defending against preliminary injunctions. Counsel should consult it for a step-by-step procedural discussion of preliminary injunctions.

In discussion of requirements imposed by *Code Civ. Proc. § 527*, the term "court" refers to the court in which the action is pending [*Code Civ. Proc. § 527(h)(2)*].

[2] Notice to Adversely Affected Parties

A preliminary injunction may not be granted without notice to the adversely affected party [*Code Civ. Proc. § 527(a)*; *Cal. Rules of Ct., Rule 3.1150(a)*; *see § 303.133*]. Thus, an order that grants a preliminary injunction is void when it is made on the court's own motion and without prior notice [*Thompson & Holmes v. Superior Court (1960) 184 Cal. App. 2d 306, 307, 7 Cal. Rptr. 386]* . Likewise, such an order is void when made on oral motion in open court without the prior notice, unless notice was waived [*Oksner v. Superior Court (1964) 229 Cal. App. 2d 672, 687, 40 Cal. Rptr. 621]* .

Code Civ. Proc. § 527 does not specify the methods by which notice of the hearing of the application for the preliminary injunction may be given.

PRACTICE TIP:

Methods for Giving Notice. In practice, the most common means by which notice is given is by service of the order to show cause issued with a temporary restraining order [*see Code Civ. Proc. § 527(a)*; *see also § 303.133* and discussion at *§ 303.31[4]*]. When an applicant wants to obtain a preliminary injunction against a party who has appeared in the action, a second method, called the noticed-motion procedure may be used [*see § 303.133*]. When a preliminary injunction is sought against a person who is not named as a party to the action or who has not appeared in the action, the applicant may serve an order

to show cause issued by the court. In this instance, the noticed-motion procedure may not be used because the court does not have personal jurisdiction over the person and, therefore, no way of requiring the person to come to court [*see Cal. Rules of Ct., Rule 3.1150(a)*; *see also § 303.21*]. Hence, in such a case, it is desirable to have the court issue an order to show cause that, if disobeyed, could be enforced through contempt proceedings.

PRACTICE TIP: Consult Local Rules and Practice. Although California Rules of Court have preempted local rules governing provisional remedies [*Cal. Rules of Ct., Rule 3.20*], some local rules remain regarding assignment of TROs and preliminary injunctions [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 9.6]. Counsel should consult those local rules.

[3] Time for Application

A preliminary injunction may be granted at any time before judgment [*Code Civ. Proc. § 527(a)*]. Thus, it is not necessary that an application for a preliminary injunction be made at the time the complaint is filed [*McDonald v. Superior Court (1937) 18 Cal. App. 2d 652, 655-656, 64 P.2d 738]* . Similarly, the fact that a court has issued a previous temporary restraining order that was void does not preclude the court from thereafter granting a preliminary injunction [*McDonald v. Superior Court (1937) 18 Cal. App. 2d 652, 656, 64 P.2d 738]* . An injunction may not be allowed after the defendant has answered, however, unless it is on notice or on an order to show cause [*Code Civ. Proc. § 528*]. In such a case, the defendant may be restrained until the decision of the court or judge granting or refusing the injunction [*Code Civ. Proc. § 528*].

[4] Verified Complaint or Affidavits Required

A preliminary injunction may be granted on a verified complaint or cross complaint or on affidavits or declarations under penalty of perjury [*Code Civ. Proc. § 527(a), (h)(1)*; *see Code Civ. Proc. § 2015.5*; *Gray v. Superior Court (2005) 125 Cal. App. 4th 629, 640-641, 23 Cal. Rptr. 3d 50* (no competent evidence supported injunction when criminal complaint signed under penalty of perjury by Chief Deputy District Attorney, but no indication attorney had personal knowledge of facts alleged); *cf. California State University, Hayward v. National Collegiate Athletic Assn. (1975) 47 Cal. App. 3d 533, 545, 121 Cal. Rptr. 85* (under *Code Civ. Proc. § 446* complaint filed by officer of state in official capacity did not have to be verified to be considered in support of preliminary injunction); *see also §§ 303.130, 303.133* (forms)]. The complaint, affidavits, or declarations must show, by admissible evidence, that sufficient grounds exist for issuing the preliminary injunction [*Code Civ. Proc. § 527(a)*]. Thus, a preliminary injunction may issue on a satisfactory showing of sufficient facts under oath. Criminal sanctions for perjury are available to ensure that injunction applications are substantially supported by a truthful factual representation and made in good faith [*Ancora-Citronelle Corp. v. Green (1974) 41 Cal. App. 3d 146, 148, 115 Cal. Rptr. 879]* . Moreover, the requirement that good cause, under oath, must be shown in support of a preliminary injunction is jurisdictional. Thus, a court has no power to act unless the procedural requisites are met [*Ancora-Citronelle Corp. v. Green (1974) 41 Cal. App. 3d 146, 148, 115 Cal. Rptr. 879]* .

The allegations of the affidavits, declarations, or complaint must be factual. Conclusionary averments are insufficient to support issuing an injunction [*Levy v. City of Santa Monica (2004) 114 Cal. App. 4th 1252, 1262, 8 Cal. Rptr. 3d 507* (declarations relying on conclusory statements, hearsay, and speculation insufficient)]. Averments that are conclusions of law are not competent testimony even if they may stand as a matter of pleading [*E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 370-371, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581* ; *see Leach v. City of San Marcos (1989) 213 Cal. App. 3d 648, 661, 261 Cal. Rptr. 805]* .

A petition for an injunction to limit picketing, restrain real property encroachments, or protect easements must depict by drawings, plot plans, photographs, or other appropriate means, or must describe in detail the premises involved, including, if applicable, the length and width of the frontage on a street or alley, the width of sidewalks, and the number,

size, and location of entrances [Cal. Rules of Ct., Rule 3.1161].

[5] Service of Complaint and Affidavits After Issuance of Temporary Restraining Order

Within five days from the date the temporary restraining order (TRO) is issued or two days before the hearing, whichever is earlier, a party who obtained a TRO must serve on the opposing party a copy of the complaint if not previously served, the order to show cause stating the date, time, and place of the hearing, any affidavits, and the memorandum of points and authorities in support of the application. At the time of the hearing, the party who obtained the TRO must be ready to proceed. The court must dissolve the TRO if the applicant fails to satisfy either of these requirements [*Code Civ. Proc. § 527(d)(2), (3)*]. These documents must be served two days before the actual hearing, not two days before the original date set for the hearing [*McDonald v. Superior Court (1937) 18 Cal. App. 2d 652, 657, 64 P.2d 738* (decided under former *Code Civ. Proc. § 527(a)*; *now see Code Civ. Proc. § 527(d)(2)* (service must be within five days from date of TRO or two days before hearing, whichever is earlier)].

[6] Service of Affidavits by Defendant in Response to Order to Show Cause

A defendant may, in response to an order to show cause, present affidavits or declarations "relating to the granting of the preliminary injunction" [*Code Civ. Proc. § 527(e)*; *see Code Civ. Proc. § 2015.5*; *see also § 303.134*]. Thus, an application for a preliminary injunction may be resisted solely by affidavits or declarations, and there is no need that the defendant also file a verified answer in addition to the affidavits or declarations [*Schwartz v. Arata (1920) 45 Cal. App. 596, 602-603, 188 P. 313]* .

[7] Continuances Allowed Defendant

Before a preliminary injunction may be granted, the responding party is entitled to one continuance for a reasonable period of not less than 15 days, or any shorter period requested by the responding party, to enable him or her to meet the application for the preliminary injunction [*Code Civ. Proc. § 527(d)(4)*; *Cohen v. Herbert (1960) 186 Cal. App. 2d 488, 494, 8 Cal. Rptr. 922* (decided under former *Code Civ. Proc. § 527(a)*)]. Although the statutory language may refer only to a continuance after a TRO has been granted, it clearly indicates that the responding party must have ample time to enable him or her to meet the application [*Cohen v. Herbert (1960) 186 Cal. App. 2d 488, 494-495, 8 Cal. Rptr. 922]* .

PRACTICE TIP:

Prompt Discovery, Continuance Request. As soon as a responding party is served with an application for a preliminary injunction, that responding party should consider initiating discovery and requesting the continuance to provide adequate time for such discovery before preparing the opposition papers. Expedited discovery may be necessary.

[8] Continuances Allowed Plaintiff

No provision exists for an applicant for an injunction to obtain a continuance. When the time for the hearing comes up after an applicant has obtained a TRO, the applicant must be ready to proceed or the court will dissolve the TRO [*Code Civ. Proc. § 527(d)(3)*]. If the responding party serves affidavits on the applicant in response to the order to show cause at least two days before the hearing, the applicant is not entitled to a continuance [*Code Civ. Proc. § 527(e)*; *see [6], above*]. Applying the converse, if a responding party does not file the affidavits two days before the hearing, the applicant is entitled to a continuance [*City of Los Angeles v. Superior Court (1925) 196 Cal. 445, 450-451, 238 P. 670]* .

[9] Waiver of Responding Party's Rights

The responding party may waive the procedural requirements set forth in *Code Civ. Proc. § 527* [*West Coast Constr.*

Co. v. Oceano Sanitary Dist. (1971) 17 Cal. App. 3d 693, 699, 95 Cal. Rptr. 169] .

ILLUSTRATION:

Defendant Waives Right. Plaintiff brings an action for a TRO requiring defendant to refrain from spending a specified fund in a specified manner. Four appearances and four continuances later, the hearing on whether to issue a preliminary injunction is held with both parties participating. At the hearing, defendant files a counter-declaration asserting that the order to show cause dated December 8 was made returnable on December 24, 16 days later. Will defendant succeed in claiming that the order to show cause violates the 15-day limit of former *Code Civ. Proc. § 527(a)*? No. Defendant did not object to the continuances and participated voluntarily in the hearing. The procedural requirements of *Code Civ. Proc. § 527* are primarily for the benefit of the defendant and may be waived [*West Coast Constr. Co. v. Oceano Sanitary Dist. (1971) 17 Cal. App. 3d 693, 699, 95 Cal. Rptr. 169]* .

[10] Dissolution of Temporary Restraining Order

When the application for a preliminary injunction comes up for hearing [*see* [5], *above*], the court must dissolve the TRO if the applicant is not ready to proceed or has failed to serve a copy of the complaint, affidavits or declarations, and supporting memorandum of points and authorities [*Code Civ. Proc. § 527(d)(2), (3)*]. However, if the applicant has failed to file the memorandum of points and authorities two days before the hearing and the responding party demands an immediate hearing without the memorandum being on file, the responding party waives any objection that the memorandum was not on file [*Remillard Brick Co. v. Dandini (1941) 47 Cal. App. 2d 63, 67, 117 P.2d 432* (decided under former *Code Civ. Proc. § 527(d)*; *now see Code Civ. Proc. § 527(d)(2), (3)*)].

[11] Hearing

On the day on which the order to show cause is made returnable, the hearing takes precedence over all other matters on the calendar except older matters of the same character and matters to which special precedence may be given by law [*Code Civ. Proc. § 527(e)*; for further discussion of special precedence by statute, *see* Ch. 425, *Pretrial Proceedings*].

In the absence of a general demurrer in response to an order to show cause for a preliminary injunction [*see* discussion at *§ 303.43[5]*], the question to be decided at the hearing is whether the responding party should be restrained pendente lite from exercising rights claimed by him or her [*State Comp. Ins. Fund v. Maloney (1953) 121 Cal. App. 2d 33, 43, 262 P.2d 662* ; *Trickey v. City of Long Beach (1951) 101 Cal. App. 2d 871, 878, 226 P.2d 694]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral OverviewCivil ProcedurePretrial MattersContinuancesCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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§ 303.43 Determination by Court

[1] Discretion of Trial Court

The grant or denial of a preliminary injunction rests in the trial court's sound discretion, and its order may not be interfered with on appeal except for an abuse of discretion [*IT Corp. v. County of Imperial (1983) 35 Cal. 3d 63, 69, 196 Cal. Rptr. 715, 672 P.2d 121* ; *ReadyLink Healthcare v. Cotton (2005) 126 Cal. App. 4th 1006, 1016, 24 Cal. Rptr. 3d 720* ; *see Hunt v. Superior Court (1999) 21 Cal. 4th 984, 999, 90 Cal. Rptr. 2d 236, 987 P.2d 705]* .

A proper exercise of discretion requires the court to evaluate the two factors that must be considered in deciding whether to grant a preliminary injunction (discussed under *[2], below*) [*see Hunt v. Superior Court (1999) 21 Cal. 4th 984, 999, 90 Cal. Rptr. 2d 236, 987 P.2d 705* ; *King v. Meese (1987) 43 Cal. 3d 1217, 1226, 240 Cal. Rptr. 829, 743 P.2d 889* ; *see also Cinquegrani v. Department of Motor Vehicles (2008) 163 Cal. App. 4th 741, 750, 77 Cal. Rptr. 3d 816* ; *14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal. App. 4th 1396, 1402, 74 Cal. Rptr. 2d 712* ; *Shoemaker v. County of Los Angeles (1995) 37 Cal. App. 4th 618, 624-625, 43 Cal. Rptr. 2d 774]* . A trial court abuses its discretion if it exceeds the bounds of reason or contravenes uncontradicted evidence in making its decision [*Pro-Family Advocates v. Gomez (1996) 46 Cal. App. 4th 1674, 1680, 54 Cal. Rptr. 2d 600* ; *14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal. App. 4th 1396, 1402, 74 Cal. Rptr. 2d 712* ; *Shoemaker v. County of Los Angeles (1995) 37 Cal. App. 4th 618, 624, 43 Cal. Rptr. 2d 774]* .

[2] Consideration of Interim Harm and Determining Likelihood of Success

[a] Evaluation of Factors

In deciding whether or not to grant a preliminary injunction, courts must evaluate two factors [*Common Cause v. Board of Supervisors (1989) 49 Cal. 3d 432, 441-442, 261 Cal. Rptr. 574, 777 P.2d 610* ; *Right Site Coalition v. Los Angeles Unified School Dist. (2008) 160 Cal. App. 4th 336, 341-342, 72 Cal. Rptr. 3d 678* ; *Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc. (2001) 91 Cal. App. 4th 678, 695-696, 110 Cal. Rptr. 2d 708]* :

- The likelihood that the applicant will prevail on the merits at trial.

- The balance of any interim harm to the applicant if the injunction is denied compared with the harm to the responding party if the injunction is issued.

Under the former factor, the court must evaluate the possibility of success on the merits [*see Teachers Ins. & Annuity Assn. v. Furlotti (1999) 70 Cal. App. 4th 1487, 1493, 83 Cal. Rptr. 2d 455]* . Success may be determined with respect to the ultimate merits of the action or the merits of a pending motion [*Dodge, Warren & Peters Insurance Services, Inc. v. Riley (2003) 105 Cal. App. 4th 1414, 1418, 130 Cal. Rptr. 2d 385* (court affirms preliminary injunction based on probably of success on merits of pending discovery motion requiring preservation of electronic evidence)].

The latter factor involves consideration of such things as the inadequacy of other remedies, the degree of irreparable harm, and the necessity of preserving the status quo [*14859 Moorpark Homeowner's Assn. v. VRTCorp. (1998) 63 Cal. App. 4th 1396, 1402, 74 Cal. Rptr. 2d 712* ; *see O'Connell v. Superior Court (2006) 141 Cal. App. 4th 1452, 47 Cal. Rptr. 3d 147]* . By balancing the respective equities, the trial court should conclude whether or not to grant an injunction that restrains defendant's rights pending the trial [*Pro-Family Advocates v. Gomez (1996) 46 Cal. App. 4th 1674, 1681, 54 Cal. Rptr. 2d 600]* . A trial court, however, may not grant a preliminary injunction regardless of the balance of harm unless there is some possibility that the plaintiff would ultimately prevail on the merits of the claim [*Hunt v. Superior Court (1999) 21 Cal. 4th 984, 999, 90 Cal. Rptr. 2d 236, 987 P.2d 705]* .

The burden is on the applicant to show all of the elements necessary to support issuance of a preliminary injunction; the applicant must affirmatively show that harm is likely to result if the injunction is not granted [*Casmalia Resources, Ltd. v. County of Santa Barbara (1987) 195 Cal. App. 3d 827, 838, 240 Cal. Rptr. 903]* . The more likely that the applicant will ultimately prevail, however, the less severe the harm that must be shown, especially when the injunction maintains, rather than alters, the status quo [*King v. Meese (1987) 43 Cal. 3d 1217, 1227, 240 Cal. Rptr. 829, 743 P.2d 889* ; *Right Site Coalition v. Los Angeles Unified School Dist. (2008) 160 Cal. App. 4th 336, 341-342, 72 Cal. Rptr. 3d 678* ; *14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal. App. 4th 1396, 1407, 74 Cal. Rptr. 2d 712]* . Thus, if the party seeking the injunction can make a sufficiently strong showing of likelihood of success on the merits, the trial court has discretion to issue the injunction notwithstanding that party's inability to show that the balance of harms tips in his or her favor [*Right Site Coalition v. Los Angeles Unified School Dist. (2008) 160 Cal. App. 4th 336, 342, 72 Cal. Rptr. 3d 678* ; *14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal. App. 4th 1396, 1407, 74 Cal. Rptr. 2d 712]* .

In making its determination, the court must not determine the merits of the controversy or whether the applicant will prevail but only whether there is a likelihood the applicant will prevail [*see Youngblood v. Wilcox (1989) 207 Cal. App. 3d 1368, 1372, 255 Cal. Rptr. 527* ; *see also Pro-Family Advocates v. Gomez (1996) 46 Cal. App. 4th 1674, 1681 n.9, 54 Cal. Rptr. 2d 600* (granting preliminary injunction does not constitute an adjudication on merits of complaint)]. The court cannot undertake the final adjudication of a lawsuit in determining the propriety of a preliminary injunction, and granting or denying a preliminary injunction does not constitute adjudication of the ultimate rights in the controversy [*Hunt v. Superior Court (1999) 21 Cal. 4th 984, 999, 90 Cal. Rptr. 2d 236, 987 P.2d 705]* .

Although a court must consider both factors in making its decision [*King v. Meese (1987) 43 Cal. 3d 1217, 1226, 240 Cal. Rptr. 829, 743 P.2d 889* ; *Abrams v. St. John's Hospital & Health Center (1994) 25 Cal. App. 4th 628, 636, 30 Cal. Rptr. 2d 603]* , it may deny a preliminary injunction if either of the two factors alone would support a ruling denying relief [*Jessen v. Keystone Savings & Loan Assn. (1983) 142 Cal. App. 3d 454, 459, 191 Cal. Rptr. 104]* . For example, a court should not issue an injunction if there is no possibility of success, even if issuing the injunction might prevent irreparable harm [*see Scates v. Rydingsword (1991) 229 Cal. App. 3d 1085, 1096* ; *see also Tosi v. County of Fresno (2008) 161 Cal. App. 4th 799, 803-804, 74 Cal. Rptr. 3d 727* ; *14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal. App. 4th 1396, 1408, 74 Cal. Rptr. 2d 712* ; *Perez v. Hastings College (1996) 45 Cal. App. 4th 453, 456-457, 53 Cal. Rptr. 2d 1]* , because there is no justification in delaying harm where, although irreparable, it is also inevitable [*14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal. App. 4th 1396, 1408-1410, 74 Cal.*

Rptr. 2d 712] .

[b] Balancing of Equities if Public Entity Is Involved

If a preliminary injunction is sought by a governmental entity to enjoin alleged violation of an ordinance that specifically provides for injunctive relief, the balancing of equities proceeds somewhat differently. In that case, if the court determines a reasonable probability that the entity will prevail on the merits, a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the responding party. If the responding party shows that it would suffer grave or irreparable harm from the issuance of the preliminary injunction, the court must then examine the relative actual harms to the parties [*IT Corp. v. County of Imperial (1983) 35 Cal. 3d 63, 72, 196 Cal. Rptr. 715, 672 P.2d 121* ; *see DVD Copy Control Association Inc. v. Bunner (2004) 116 Cal. App. 4th 241, 250, 10 Cal. Rptr. 3d 185* (when plaintiff is not governmental entity and statute does not expressly provide otherwise, finding of interim harm is necessary)].

[3] Evaluation of Affidavits or Declarations

The trial court is the judge of the credibility of the affidavits or declarations filed in support of and in opposition to a preliminary injunction. In other words, the court must resolve all conflicts in the documents filed [*Voeltz v. Bakery & Confectionery Workers International Union (1953) 40 Cal. 2d 382, 386, 254 P.2d 553* (*overruled on other grounds in Smyrniotis v. Local Joint Executive Bd. (1966) 64 Cal. 2d 30, 40, 48 Cal. Rptr. 725, 409 P.2d 949*)].

[4] Evaluation of Complaint

In general, a court will grant a preliminary injunction only under the following circumstances [*Moreno Mut. Irr. Co. v. Beaumont Irr. Dist. (1949) 94 Cal. App. 2d 766, 778, 211 P.2d 928]* :

- A complaint is on file [*see Cal. Rules of Ct., Rule 3.1150(b)*] stating a sufficient cause of action for injunctive relief of the same character as the preliminary injunction.

- The injunction is reasonably necessary to protect the legal rights of the moving party pending litigation.

The court will take undenied allegations in the complaint as true [*Kold Kist v. Amalgamated Meat Cutters (1950) 99 Cal. App. 2d 191, 196, 221 P.2d 724]* .

In an appropriate case, however, a court may grant a preliminary injunction based on a complaint that may be subject to a demurrer if any defects that appear in the complaint may be corrected by the filing of an amended complaint showing good grounds for granting it [*Handyspot Co. v. Buegeleisen (1954) 128 Cal. App. 2d 191, 194, 274 P.2d 938* ; *McPheeters v. McMahon (1933) 131 Cal. App. 418, 427, 21 P.2d 606]* . Even when a complaint does not request injunctive relief, a court may issue a preliminary injunction on the basis of affidavits to maintain the status quo or to prevent irreparable injury during the pendency of the suit [*Dennis v. Overholtzer (1957) 149 Cal. App. 2d 101, 104, 307 P.2d 1012]* .

ILLUSTRATION:

Preliminary Injunction From Affidavits. Plaintiff brings an action for specific performance of a real estate sales contract and for declaratory relief. May the plaintiff obtain a preliminary injunction to maintain the status quo or prevent irreparable harm during the pendency of the lawsuit? Yes. The requirement that a complaint seeking injunctive relief be on file applies only when a preliminary injunction is sought on the basis of a complaint, not when it is sought on the basis of affidavits. A court's power to issue a preliminary injunction is not limited to injunctions based on complaints [*Dennis v. Overholtzer (1957) 149 Cal. App. 2d 101, 104, 307 P.2d 1012]* .

[5] Consideration of Demurrer to Complaint

A cause of action must exist before injunctive relief may be granted [*Camp v. Board of Supervisors (1981) 123 Cal. App. 3d 334, 356, 176 Cal. Rptr. 620* ; *Golden Gate S.T., Inc. v. San Francisco (1937) 21 Cal. App. 2d 582, 585, 69 P.2d 899]* , and a court will sustain a demurrer to a complaint [*see* Form 303.135] that fails to state a cause of action [*Golden Gate S.T., Inc. v. San Francisco (1937) 21 Cal. App. 2d 582, 586, 69 P.2d 899]* . A court will also grant a demurrer to a complaint that contains only conclusionary allegations which are unsupported by facts [*Davitt v. American Bakers' Union (1899) 124 Cal. 99, 101, 56 P. 775* ; *see Willis v. Lauridson (1911) 161 Cal. 106, 108, 118 P. 530]* . For a discussion of the requirement that a complaint allege facts for the issuance of an injunction, *see § 303.42[4]*.

PRACTICE TIP:

One Judge for Demurrer, Injunction. Local rules in some courts (e.g., Los Angeles Superior Courts) prescribe that demurrers to a complaint or cross-complaint that are filed before the hearing of an OSC or a motion for preliminary injunction must be heard by the judge who will hear the preliminary injunction [Los Angeles Co. Super. Ct. Rules, Rule 9.6].

NOTE: Cause of Action Not Stated. A court may deny a temporary restraining order or preliminary injunction on the ground of a failure to state a cause of action even if no demurrer has been filed. If an amended complaint stating a cause of action is filed before hearing the order to show cause or motion, or if it appears to the court that the complaint or cross-complaint can be amended to state a cause of action, the court may grant a preliminary injunction [*see County of Tehama v. Sisson (1907) 152 Cal. 167, 178-179, 92 P. 64]* .

[6] Effect of Denial of Allegations

Ordinarily, a preliminary injunction should not be granted when a verified answer filed in response explicitly and unequivocally denies the allegations of the complaint. Nevertheless, circumstances may exist in a case that justify the issuance of a preliminary injunction notwithstanding the absolute denial in the answer. When the allegations of the complaint make out a strong case for injunctive relief, the defendant cannot deprive the court of its power and discretion to issue the injunction merely by filing an answer and denials or an affidavit [*Garner v. Journeyman Barbers', Hairdressers', Cosmetologists' and Proprietors' Int'l Union of America (1963) 223 Cal. App. 2d 101, 104, 35 Cal. Rptr. 693]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsComplaintsRequirementsCivil ProceduresJudicial OfficersJudgesDiscretionCivil ProceduresRemediesInjunctionsElementsGeneral OverviewCivil ProceduresRemediesInjunctionsPreliminary & Temporary Injunctions

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§ 303.44 Preliminary Injunction and Anti-SLAPP Motion to Strike Compared

The fact that a preliminary injunction has been issued does not preclude the granting of, or have collateral estoppel or res judicata effect on, a subsequent anti-SLAPP suit [*see Code Civ. Proc. § 425.16* (SLAPP stands for "Strategic Lawsuit Against Public Participation")], motion to strike. The issues involved in consideration of a preliminary injunction are different from those involved in an anti-SLAPP suit motion to strike [*Lam v. Ngo (2001) 91 Cal. App. 4th 832, 836]* . In deciding whether to grant preliminary injunction, the trial court not only assesses "the likelihood that the plaintiff will prevail at trial," but "the interim harm that the plaintiff will likely sustain if the injunction were denied" and must balance the respective equities, which decision is tested under an abuse of discretion standard. In passing on anti-SLAPP suit motions, the trial court determines whether the plaintiff has made a prima facie showing of facts which, if proved at trial, support a favorable judgment. A plaintiff's ability to obtain a preliminary injunction cannot be equated with a "probability" the plaintiff will prevail on the claim in a situation in which equities favored the grant of a preliminary injunction [*Lam v. Ngo (2001) 91 Cal. App. 4th 832, 843* (preliminary injunction required protesters to remain certain distance from business establishment which had lost approximately 40 percent of its business since protest, vandalism, and harassment of customers began)].

The trial court has the authority to issue a preliminary injunction even after a notice of appeal is filed on a ruling of an anti-SLAPP motion [*Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc. (2006) 143 Cal. App. 4th 1284, 1302, 50 Cal. Rptr. 3d 27*].

Note also that a petition for injunctive relief under *Code Civ. Proc. § 527.6* is subject to a special motion to strike under the anti-SLAPP statute [*Thomas (2005) 126 Cal. App. 4th 635, 646-661, 24 Cal. Rptr. 3d 619]* . However, no motion to strike can be filed in response to the TRO procedure provided for in *Code Civ. Proc. § 527.6* [*Thomas v. Quintero (2005) 126 Cal. App. 4th 635, 652, 24 Cal. Rptr. 3d 619]* .

There is an additional difference when multiple causes of action are involved. A single cause of action can sustain a preliminary injunction, but an anti-SLAPP suit motion involves examination of each of the causes of action attacked, because the purpose is to weed out meritless claims at an early stage [*Lam v. Ngo (2001) 91 Cal. App. 4th 832, 844]* .

ILLUSTRATION:

Preliminary Injunction Does Not Preclude Grant of Anti-SLAPP Motion to Strike. A city council member who owned a restaurant obtained a preliminary injunction against protesters who were harassing customers of the restaurant and putting posters on its walls and windows, limiting the conditions of the protest. The complaint alleged causes of action for intentional infliction of emotional distress, intentional interference with economic advantage, trespass, and nuisance. Only the protest organizer was a named defendant, but the declarations at both hearings indicated that the organizer had not engaged in or authorized anything other than peaceful protest. Should the motion to strike have been granted? In part, yes. The cause of action against the protesters as a group for nuisance might be meritorious, but the anti-SLAPP suit motion as it applied to the named defendant was granted. Plaintiffs showed that other, anonymous, protesters did engage in violent acts for which there was no *First Amendment* protection. Therefore the anit-SLAPP motion was denied to the extent it contemplated causes of action against Doe defendants based on violent acts. Plaintiff should substitute for current Doe defendants any specific individuals who were actually involved in the wrongful acts [*Lam v. Ngo (2001) 91 Cal. App. 4th 832, 844, 852]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

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§ 303.45 Issuance of Injunction

[1] When Issued

A preliminary injunction may be issued and served on any day, including judicial holidays [*Code Civ. Proc. § 134(b)*].

[2] Order Must Be Clear and Definite

A preliminary injunction must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as a standard for a court to apply in determining whether an injunctive order has been violated. Thus, a court may not issue an injunction with terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application [*Pitchess v. Superior Court (1969) 2 Cal. App. 3d 644, 651, 83 Cal. Rptr. 35* ; *ReadyLink Healthcare v. Cotton (2005) 126 Cal. App. 4th 1006, 1026, 24 Cal. Rptr. 3d 720* (injunction barring soliciting "anyone" associated with plaintiff was vague and overbroad); *see also* *Korean Philadelphia Presbyterian Church v. California Presbytery (2000) 77 Cal. App. 4th 1069, 1085, 92 Cal. Rptr. 2d 275* (overbroad injunction also containing ambiguous language); *San Diego Unified Port Dist. v. U.S. Citizens Patrol (1998) 63 Cal. App. 4th 964, 972 n.2, 74 Cal. Rptr. 2d 364* (vague injunctive provision involving *First Amendment* rights)].

When restrictions in the area of free expression are at issue, a preliminary injunction must be drawn with narrow specificity to prevent repression of *First Amendment* rights [*In re Berry (1968) 68 Cal. 2d 137, 155, 65 Cal. Rptr. 273, 436 P.2d 273* ; *Evans v. Evans (2008) 162 Cal. App. 4th 1157, 1171-1173, 76 Cal. Rptr. 3d 859* (order prohibiting party from contacting sheriff's department about other party was overbroad); *Chico Feminist Women's Health Center v. Scully (1989) 208 Cal. App. 3d 230, 250, 256 Cal. Rptr. 194* ; *see* *Westside Sane/Freeze v. Ernest W. Hahn, Inc. (1990) 224 Cal. App. 3d 546, 558-560, 274 Cal. Rptr. 51* ; *see also* *Balboa Island Village Inn, Inc. v. Lemen (2007) 40 Cal. 4th 1141, 1159-1161, 57 Cal. Rptr. 3d 320, 156 P.3d 339* (permanent injunction that limits speech must be narrowly drawn); *San Diego Unified Port Dist. v. U.S. Citizens Patrol (1998) 63 Cal. App. 4th 964, 971-973, 74 Cal. Rptr. 2d 364* (injunction went much further than necessary to provide relief sought by district)].

For a sample form of preliminary injunction and order, see *§ 303.136*.

[3] Granting of Permanent Injunction Prohibited

A court may not grant a permanent injunction based on the evidence produced at the hearing on a preliminary injunction unless [*Paul v. Allied Dairymen, Inc. (1962) 209 Cal. App. 2d 112, 122, 25 Cal. Rptr. 595* ; *Anderson v. Joseph (1956) 146 Cal. App. 2d 450, 454, 303 P.2d 1053]* :

- The parties stipulate.
- The applicant submits the cause of action on the merits and makes a satisfactory showing.
- The responding party defaults in pleading.

Any order purporting to grant a permanent injunction without satisfying one of the exceptions is void [*Paul v. Allied Dairymen, Inc. (1962) 209 Cal. App. 2d 112, 122, 25 Cal. Rptr. 595* ; *Anderson v. Joseph (1956) 146 Cal. App. 2d 450, 454, 303 P.2d 1053]* .

[4] Statement of Decision Not Required

A court is not required to issue a statement of decision or explanation when it makes its decision concerning a preliminary injunction [*Metro Traffic Control, Inc. v. Shadow Traffic Network (1994) 22 Cal. App. 4th 853, 858, 27 Cal. Rptr. 2d 573* ; *City of Los Altos v. Barnes (1992) 3 Cal. App. 4th 1193, 1198, 5 Cal. Rptr. 2d 77]* .

PRACTICE TIP:

Decision Statement Aids Appeal. One court has criticized the lack of a statement of decision requirement in a case in which oral testimony was permitted, stating that without it appellate courts have difficulty reviewing the sufficiency of the evidence that was before the trial court. Thus, the better practice is to request a statement of decision [*People v. Landlords Professional Services, Inc. (1986) 178 Cal. App. 3d 68, 70-72, 223 Cal. Rptr. 483]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

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§ 303.46 Undertaking

[1] When Required

On granting an injunction, the court or judge must require an undertaking on the applicant's part to the effect that the applicant will pay the party enjoined any damages, not exceeding an amount to be specified, that may be sustained by reason of the injunction if the court finally decides that the applicant was not entitled to the injunction [*Code Civ. Proc. § 529(a)*; *see Cal. Rules of Ct., Rule 3.1150(f)*].

This requirement does not apply to any of the following:

- Either spouse against the other in proceedings for legal separation or dissolution of marriage [*Code Civ. Proc. § 529(b)(1)*].
- The applicant for an order described in *Fam. Code § 240* [*Code Civ. Proc. § 529(b)(2)*].
- Public entities and officers [*Code Civ. Proc. § 529(b)(3)*; *see Code Civ. Proc. § 995.220*].

The undertaking is mandatory, and a preliminary injunction does not become operative until it is furnished [*Casitas Inv. Co. v. Charles L. Harney, Inc. (1962) 203 Cal. App. 2d 811, 816, 21 Cal. Rptr. 821* ; *Griffin v. Lima (1954) 124 Cal. App. 2d 697, 699, 269 P.2d 191]* . An order granting a preliminary injunction that does not provide for an undertaking is inoperative and of no effect [*Federal Automotive Services v. Lane Buick Co. (1962) 204 Cal. App. 2d 689, 695, 22 Cal. Rptr. 603]* or a nullity [*Oksner v. Superior Court (1964) 229 Cal. App. 2d 672, 687, 40 Cal. Rptr. 621]* . Actions on undertakings are governed by *Code Civ. Proc. § 996.410 et seq.* [*see § 303.48*; *see generally* Ch. 538, *Suretyship, Bonds, and Undertakings*]. However, a bond may be waived or forfeited by the person to be enjoined [*Smith v. Adventist Health System/West (2010) 182 Cal. App. 4th 729, 740-744, 106 Cal. Rptr. 3d 318]* .

PRACTICE TIPS:

Applying for Undertaking. A client should be fully advised about the necessity for an undertaking when the injunction is first discussed with the client. If a bond will be sought from a bonding company,

the application should be completed and a financial statement obtained from the client who must guarantee the bond. The implication of the guarantee and the premium also should be fully discussed with the client. If possible, line up the bond *before* filing the application for preliminary injunction.

Amount of Bond. The amount of the bond is fixed on the basis of the amount of damage the party restrained will probably sustain by reason of an injunction if the court finally decides the applicant was not entitled to that injunction. Counsel for both sides should be prepared to discuss the amount of the bond, and should assist the court by presenting facts that bear on the amount of the probable damage.

[2] Injunction Enjoining Construction Project

In all actions in which the court has granted a plaintiff's application for a preliminary injunction to enjoin a construction project that has received all legally required licenses and permits, the defendant may apply for an undertaking as security for costs and damages incurred as a result of the delay. The defendant must request the order by noticed motion. The motion must be made on the grounds that there is no reasonable possibility that the plaintiff will obtain a judgment against the moving defendant and that the plaintiff will not suffer undue economic hardship by filing the undertaking [*Code Civ. Proc. § 529.1(a)*].

If, after a hearing, the court determines that the grounds for the motion have been established, it must order the plaintiff to file the undertaking in an amount specified in the court's order as security for costs and damages of the defendant. The plaintiff's liability may not exceed $500,000 [*Code Civ. Proc. § 529.1(b)*].

Under this provision a construction project includes, but is not restricted to, the construction, surveying, design, specifications, alteration, repair, improvement, maintenance, removal, or demolition of any building, highway, road, parking facility, bridge, railroad, airport, pier or dock, excavation or other structure, development, or other improvement of real or personal property [*Code Civ. Proc. § 529.1(c)*].

The undertaking must be in writing [*see Code Civ. Proc. § 995.320*] and is not required of a public entity [*see Code Civ. Proc. § 995.220*].

[3] Injunction Enjoining Housing Project

When a plaintiff in a civil action seeks an injunction against construction of certain housing projects, the defendant may apply by noticed motion for an undertaking as security and costs for damages for harm caused by delay in carrying out the project. The housing project must be a development project, as defined by *Gov. Code § 65928*, and must meet or exceed the requirements for low- or moderate-income housing as set forth in *Gov. Code § 65915*. The defendant may apply for the undertaking if the application for injunction has the effect of preventing or delaying the project from being carried out [*see Code Civ. Proc. § 529.2(a)*; *see also Code Civ. Proc. § 529.2(c)* (liability of developer to plaintiff for cost of obtaining undertaking for bad faith change in development plan)].

The motion must be made on both of the following grounds [*Code Civ. Proc. § 529.2(a)*]:

- The action was brought in bad faith, vexatiously, for the purpose of delay, or to thwart the low- or moderate-income nature of the housing development project.

- The plaintiff will not suffer undue economic hardship by filing the undertaking.

If the court, after hearing, determines that the grounds for the motion have been established, it will order the plaintiff to file the undertaking in an amount specified in the court's order as security for costs and damages of the defendant. The plaintiff's liability may not exceed $500,000 [*Code Civ. Proc. § 529.2(b)*].

The undertaking must be in writing [*see Code Civ. Proc. § 995.320*] and may not be required of a public entity [*see Code Civ. Proc. § 995.220*].

[4] Poor or Indigent Movant

The undertaking required by *Code Civ. Proc. § 529(a)* is a form of security intended to protect an adversary party from potential injury [*Conover v. Hall (1974) 11 Cal. 3d 842, 851, 114 Cal. Rptr. 642, 523 P.2d 682]* . California courts retain common law authority to waive the requirement of an undertaking in cases involving poor or indigent litigants [*Conover v. Hall (1974) 11 Cal. 3d 842, 847, 850-852, 114 Cal. Rptr. 642, 523 P.2d 682]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsExecutionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsReal Property LawConstruction LawGeneral Overview

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§ 303.47 Dissolution of Injunction for Deficient Undertaking

If a preliminary injunction is issued without the required undertaking, the person enjoined may have it dissolved [*Neumann v. Moretti (1905) 146 Cal. 31, 32-33, 79 P. 512* ; *Casitas Inv. Co. v. Charles L. Harney, Inc. (1962) 203 Cal. App. 2d 811, 816, 21 Cal. Rptr. 821]* . In addition, within five days after service of the injunction, the person enjoined may object to the undertaking, and, if the court determines that the undertaking is insufficient and a sufficient one is not filed within the time required, the order granting the injunction must be dissolved [*Code Civ. Proc. § 529(a)*; *see Rees v. Gardner (1961) 197 Cal. App. 2d 469, 471, 17 Cal. Rptr. 93]* .

In determining the sufficiency of an undertaking, a court must consider the harmful effect on the beneficiary if the applicant is not entitled to the injunction. This determination should include the amount of attorney's fees necessary for the beneficiary to prosecute an appeal of the injunction or to defend at trial the causes of action on which the injunction was granted [*ABBA Rubber Co. v. Seaquist (1991) 235 Cal. App. 3d 1, 14-16, 286 Cal. Rptr. 518]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsObjectionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

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§ 303.48 Enforcement of Undertaking

A surety's liability on an injunction undertaking may be enforced on a motion made in court without the necessity of an independent action [*Code Civ. Proc. § 996.440(a)*]. The motion may not be made until after entry of the final judgment in the action or proceeding in which the undertaking is given and time for appeal has expired. If an appeal is taken, the motion must be made after the appeal is finally determined. In either case, the motion may not be made more than one year after the later of these dates [*Code Civ. Proc. § 996.440(b)*]. For forms of notice of motion and declaration for enforcing an undertaking on an injunction, and an order therefor, see *§§ 303.140, 303.141*. For discussion of actions against sureties generally, see *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.40* et seq.

ILLUSTRATION:

Motion to Recover Denied. Plaintiff obtains a temporary restraining order and makes a deposit in lieu of bond to satisfy the undertaking requirement. However, plaintiff's application for a preliminary injunction is denied. Defendants then present a motion to recover their attorneys' fees and damages in defending against the temporary restraining order. Will defendants prevail? No. The motion to recover on the undertaking may not be made until entry of the final judgment and time for appeal has expired, or, if appeal is taken, until the appeal is finally determined [*Satinover v. Dean (1988) 202 Cal. App. 3d 1298, 1300-1301, 249 Cal. Rptr. 277]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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§ 303.49 Submission of Proposed Order and Undertaking

Within one day after an application for a preliminary injunction is granted, or other time ordered, a proposed order must be presented to the judge for signature, together with an undertaking in the amount ordered [*Cal. Rules of Ct., Rule 3.1150(f)*]. This one day requirement is an exception to *Cal. Rules of Ct., Rule 3.1312*, which generally provides a longer period of time to prepare an order [*Cal. Rules of Ct., Rule 3.1150(f)*]. Unless otherwise ordered, any restraining order previously granted will remain in effect during the time allowed for presentation for signature of the order of injunction and undertaking. If the proposed order and the undertaking required are not presented within the time allowed, the temporary restraining order may be vacated without notice All bonds and undertakings must comply with *Cal. Rules of Ct., Rule 3.1130* [*Cal. Rules of Ct., Rule 3.1150(f)*; *see Code Civ. Proc. § 529(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsExecutionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

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[Reserved]

§§ 303.50[Reserved]

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26-303 California Forms of Pleading and Practice--Annotated § 303.60

§ 303.60 Statutory Grounds for Issuance of Permanent Injunction

The Civil Code lists the following grounds for granting a final injunction to prevent the breach of an obligation existing in the applicant's favor:

- When pecuniary compensation would not afford adequate relief [*Civ. Code § 3422(1)*];
- When it would be extremely difficult to ascertain the amount of compensation that would afford adequate relief [*Civ. Code § 3422(2)*];
- When the restraint is necessary to prevent a multiplicity of judicial proceedings [*Civ. Code § 3422(3)*]; or
- When the obligation arises from a trust [*Civ. Code § 3422(4)*].

These grounds are the same as four of the grounds listed for the granting of a preliminary injunction [*see Code Civ. Proc. § 526(a)(4)-(7)*; *see also § 303.40*]. The principles and examples underlying the factors of inadequate remedy at law and multiplicity of suits are essentially the same with regard to preliminary and permanent injunctions [*see § 303.40[4]* and *[6]*]. However, because a permanent injunction is a judgment, the trial court's discretion is not as broad as when deciding whether to issue a preliminary injunction; like any judgment, a permanent injunction must be sufficiently supported by the evidence of record [*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc. (2009) 176 Cal. App. 4th 697, 721, 97 Cal. Rptr. 3d 856*].

Legal Topics:

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

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26-303 California Forms of Pleading and Practice--Annotated § 303.61

§ 303.61 Procedure for Obtaining Permanent Injunctions

[1] In General

A final or permanent injunction [*see Civ. Code 3420, 3422*] is obtained by procuring a judgment that grants the desired relief, just as in any other civil action [*see San Diego Water Co. v. Pacific Coast S.S. Co. (1894) 101 Cal. 216, 220, 35 P. 651* ; *Chico Feminist Women's Health Center v. Scully (1989) 208 Cal. App. 3d 230, 253, 256 Cal. Rptr. 194]* . To qualify for a permanent injunction, the plaintiff must prove (1) the elements of a cause of action involving the wrongful act sought to be enjoined, and (2) the grounds for equitable relief [*San Diego Unified Port. Dist. v. Gallagher (1998) 62 Cal. App. 4th 501, 503, 73 Cal. Rptr. 2d 30* (district failed to establish its entitlement to equitable relief by failing to show it is likely to prevail on merits)].

Permanent injunctive relief may be granted without trial if there is stipulation or other satisfactory showing that warrants submitting cause on the merits [*Camp v. Board of Supervisors (1981) 123 Cal. App. 3d 334, 357-358, 176 Cal. Rptr. 620* ; *see Hunt v. Superior Court (1999) 21 Cal. 4th 984, 999 n.8, 90 Cal. Rptr. 2d 236, 987 P.2d 705* (dicta)]. For discussion of when a court may grant a permanent injunction based on evidence produced at a hearing on a preliminary injunction, see *§ 303.45[3]*].

For discussion and forms relating to obtaining and entering judgments in general, see *Ch. 318, Judgments, § 318.40* et seq. For a sample form of judgment awarding a permanent injunction against interference with economic relations, see *Ch. 565, Unfair Competition, § 565.130* et seq.

[2] Order to Show Cause Not Necessary

When an injunction is a part of the final judgment that adjudicates all of the rights of the parties, a notice or an order to show cause like those required before the issuance of a preliminary injunction is not necessary [*Knox v. Wolfe (1946) 73 Cal. App. 2d 494, 506, 167 P.2d 3]* .

[3] Issues to Be Determined

Issues decided on a hearing of an order to show cause for a preliminary injunction may be reexamined at the final hearing [*Hartwick v. Superior Court (1959) 174 Cal. App. 2d 809, 811, 345 P.2d 304* ; *Trickey v. City of Long Beach (1951) 101 Cal. App. 2d 871, 878, 226 P.2d 694]* . Those issues must be determined on the basis of the situation as it exists at the time of the trial, not at the time of bringing the action [*Ellis v. American Federation of Labor (1941) 48 Cal. App. 2d 440, 445, 120 P.2d 79* ; *Collins v. Sargent (1928) 89 Cal. App. 107, 114, 264 P. 776]* .

[4] Effect of Final Order on Preliminary Order

At the time a judgment on the permanent injunction is made either granting or denying the permanent injunction, the preliminary injunction automatically ends [*City of Oakland v. Superior Court (1982) 136 Cal. App. 3d 565, 569, 186 Cal. Rptr. 326* (no necessity for formal motion to dissolve preliminary); *Shahen v. Superior Court (1941) 46 Cal. App. 2d 187, 188, 115 P.2d 516]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsElementsGeneral OverviewCivil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

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[Reserved]

§§ 303.62[Reserved]

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26-303 California Forms of Pleading and Practice--Annotated § 303.70

§ 303.70 Courses of Action Available to Responding Party When Applicant Seeks Injunctive Relief

The following courses of action are available to oppose a preliminary injunction:

- If a temporary restraining order (TRO) has been granted, prepare and serve a memorandum of points and authorities and declarations to oppose the pending application for a preliminary injunction.

- If the TRO was issued on the basis of a verified complaint, demur to or answer the complaint.

- If a TRO was not sought or was not issued, prepare and serve a memorandum of points and authorities and declarations to oppose the pending application for a preliminary injunction.

- Consider making a motion for change of venue if applicant has brought the action in the wrong county.

- Consider petitioning for removal of the action to federal court.

- If a preliminary injunction has already issued,

  - Seek to have the preliminary injunction modified or dissolved [*see § 303.80*].

  - Appeal and seek to have the order stayed pending the outcome of the appeal [*see § 303.81*].

  - Seek a writ of prohibition [*see § 303.87*].

  - Decide not to comply with the preliminary injunction with the attendant risk of contempt [*see § 303.92*].

- If it is later determined either by a judgment in enjoined party's favor or by appeal that the preliminary injunction should not have been issued, move for damages from the sureties who are liable under the injunction bond [*see § 303.82*].

PRACTICE TIP:

Consider Proposed Injunction's Overbreadth. Counsel representing a responding party should evaluate the possible overbreadth of the proposed preliminary injunction. Consider a more limited alternative order that may be acceptable to the responding party.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisGeneral OverviewCivil ProcedureVenueMotions to TransferChoice of ForumCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesWritsCommon Law WritsProhibition

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26-303 California Forms of Pleading and Practice--Annotated § 303.71

§ 303.71 Affirmative Defenses to Injunctive Relief

[1] Changed Circumstances or Completed Acts

Absent extraordinary circumstances, injunctive relief may not be granted when events have rendered the relief unnecessary or ineffectual [*Paul v. Milk Depots, Inc. (1964) 62 Cal. 2d 129, 133, 41 Cal. Rptr. 468, 396 P.2d 924]* . Thus, an injunction will not be granted when, at the time of the hearing, conditions have so changed that no unlawful act is threatened [*Donald v. Cafe Royale, Inc. (1990) 218 Cal. App. 3d 168, 184, 266 Cal. Rptr. 804* ; *Engle v. City of Oroville (1965) 238 Cal. App. 2d 266, 270, 47 Cal. Rptr. 630* ; *see O'Toole v. Superior Court (2006) 140 Cal. App. 4th 488, 513, 44 Cal. Rptr. 3d 531* ; *Cisneros v. U.D. Registry, Inc. (1995) 39 Cal. App. 4th 548, 574, 46 Cal. Rptr. 2d 233* (denial of injunction justified based on changed circumstances rendering injunctive relief moot or unnecessary); *accord Scripps Health v. Marin (1999) 72 Cal. App. 4th 324, 332, 85 Cal. Rptr. 2d 86]* . In addition, injunctive relief has no application to wrongs that have been completed, or that have voluntarily ceased, and will be denied absent a showing that past violations will probably recur [*Cisneros v. U. D. Registry, Inc. (1995) 39 Cal. App. 4th 548, 574, 46 Cal. Rptr. 2d 233* ; *Phipps v. Saddleback Valley Unified School Dist. (1988) 204 Cal. App. 3d 1110, 1117, 251 Cal. Rptr. 720* ; *Gold v. Los Angeles Democratic League (1975) 49 Cal. App. 3d 365, 372, 122 Cal. Rptr. 732* ; *see Smith v. Board of Supervisors (1989) 216 Cal. App. 3d 862, 868, 265 Cal. Rptr. 466* (neither appellate court nor trial court may issue injunction or writ of mandamus to prevent what has taken place)]. To authorize injunctive relief, it must appear with reasonable certainty that the wrongful acts will be continued or repeated [*Sahlolbei v. Providence Healthcare, Inc. (2003) 112 Cal. App. 4th 1137, 1156-1157, 5 Cal. Rptr. 3d 598* (termination of physician without pre-termination hearing was continuing harm that could be prevented by reinstating him and ordering hearing); *Scripps Health v. Marin (1999) 72 Cal. App. 4th 324, 332-333, 85 Cal. Rptr. 2d 86]* . The evaluation of the probability that the acts complained of will recur lies in the trial court's discretion [*City of Vernon v. Central Basin Mun. Water Dist. (1999) 69 Cal. App. 4th 508, 517-518, 81 Cal. Rptr. 2d 650* (denial of injunction upheld)]. For example, an injunction was not issued in the following cases:

- To prohibit a corporation that sold information regarding residential renters to landlords from reporting information that only possibly related to a consumer ("possibles") when the court had granted summary adjudication, providing in part that defendants could not make a report about a consumer

unless defendants had positively identified that consumer as the party involved, and the evidence at trial showed that since the order was made the corporation ceased reporting or discussing possibles [*Cisneros v. U.D. Registry, Inc. (1995) 39 Cal. App. 4th 548, 573-574, 46 Cal. Rptr. 2d 233]* .

- To prevent the construction of a radio tower already erected [*McManus v. KPAL Broadcasting Corp. (1960) 182 Cal. App. 2d 558, 563, 6 Cal. Rptr. 441]* .

- To prohibit the construction of a freeway already completed [*Griffith v. Department of Public Works (1959) 52 Cal. 2d 848, 853, 345 P.2d 469]* .

- To compel contractors and subdividers to remove a completed and accepted public street built according to government-approved plans and specifications [*Anderson v. Fay Improvement Co. (1955) 134 Cal. App. 2d 738, 743, 286 P.2d 513]* .

- To prevent the erection of a building already built [*Gardner v. Stroever (1889) 81 Cal. 148, 150, 22 P. 483]* .

[2] Doctrine of Balancing of Conveniences

The doctrine of balancing of conveniences may be invoked as a defense when the applicant seeks an injunction to vindicate a technical and unsubstantial right that would impose an unusual hardship on the public or the responding party [*Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 200, 323 P.2d 1001]* . Under the doctrine, a court may deny injunctive relief and relegate the applicant to his or her remedy at law if the benefit to the applicant would be slight compared to the injury caused the responding party [*Wright v. Best (1942) 19 Cal. 2d 368, 386, 121 P.2d 702]* . Proof of irreparable injury by the responding party is a necessary element of the defense [*Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 200, 323 P.2d 1001]* . The doctrine is often applied in encroachment cases when one party has built a wall or other structure that is only partly on the land of his or her neighbor [*see* *Baglione v. Leue (1958) 160 Cal. App. 2d 731, 734, 325 P.2d 471]* .

When a court of equity balances conveniences to determine that an injunction, otherwise warranted, should be withheld, its action approaches an exercise of the right of eminent domain in favor of a private person. Thus, proof of irreparable injury by the defendant is a necessary element of a defense based on a balancing of conveniences [*Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 200, 323 P.2d 1001]* .

For additional discussion of the doctrine in relationship to adjoining land cases and a form of affirmative defense based on it, see Ch. 11, *Adjoining Landowners* .

[3] First Amendment Rights Infringed

An injunction may not be granted when the restraint interferes with freedom of speech [*Rosicrucian Fellow. v. Rosicrucian Fellow Non-Sectarian Ch. (1952) 39 Cal. 2d 121, 145, 245 P.2d 481* ; *see, e.g.,* *Evans v. Evans (2008) 162 Cal. App. 4th 1157, 1166-1167, 76 Cal. Rptr. 3d 859* (order prohibiting party from publishing false statements is unconstitutional prior restraint); *Saline v. Commonwealth Energy Corporation (2002) 100 Cal. App. 4th 909, 915-916, 122 Cal. Rptr. 2d 813* (injunction prohibiting corporate director from disclosing contents of corporate records was unlawful prior restraint absent allegations director would commit tort against corporation); *San Diego Unified Port Dist. v. U.S. Citizens Patrol (1998) 63 Cal. App. 4th 964, 970-971, 74 Cal. Rptr. 2d 364* (right to free speech protected from censorship by hostile reaction, sometimes referred to as "heckler's veto"; preliminary injunction that subjected defendant's right to engage in protected speech to censorship of group that disagreed with its content constituted impermissible "heckler's veto" to defendant's protected speech)]. This is especially true when the injunction involves religious controversies [*Rosicrucian Fellow. v. Rosicrucian Fellow Non-Sectarian Ch. (1952) 39 Cal. 2d 121, 145,*

245 P.2d 481 ; *cf. Korean Philadelphia Presbyterian Church v. California Presbytery (2000) 77 Cal. App. 4th 1069, 1081, 1087-1089, 92 Cal. Rptr. 2d 275* (discussing distinction between internal church disputes involving question of ownership or control of church property, which civil courts may decide, and internal church disputes involving religious doctrine and practice, which civil courts may not adjudicate)]. In a public nuisance case, the injunction may not burden the constitutional right of association more than is necessary to serve the significant governmental issue at stake [*People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1115, 1120-1122, 60 Cal. Rptr. 2d 277, 929 P.2d 596* ; *People ex rel. Reisig v. Acuna (2010) 182 Cal. App. 4th 866, 885-886, 106 Cal. Rptr. 3d 560* ; *People v. Englebrecht (2001) 88 Cal. App. 4th 1236, 1262, 106 Cal. Rptr. 2d 738* (injunction issued in gang conduct abatement proceeding did not impermissibly burden associational rights)].

Not every injunction that impinges on the right of free expression constitutes an invalid prior restraint [*Balboa Island Village Inn, Inc. v. Lemen (2007) 40 Cal. 4th 1141, 1159-1161, 57 Cal. Rptr. 3d 320, 156 P.3d 339* (court may issue permanent injunction enjoining defamation); *Aguilar v. Avis Rent-A-Car System, Inc. (1999) 21 Cal. 4th 121, 140, 143, 87 Cal. Rptr. 2d 132, 980 P.2d 846* ; *see also Brekke v. Wills (2005) 125 Cal. App. 4th 1400, 1409, 23 Cal. Rptr. 3d 609* (defendant's speech not protected when between purely private parties, about purely private parties, on matters of purely private interest)]. Once a court has found that a specific pattern of speech is unlawful, it may be enjoined without violating the prohibition against prior restraint [*Balboa Island Village Inn, Inc. v. Lemen (2007) 40 Cal. 4th 1141, 1159-1161, 57 Cal. Rptr. 3d 320, 156 P.3d 339* (court may issue permanent injunction enjoining defamation); *Aguilar v. Avis Rent-A-Car System, Inc. (1999) 21 Cal. 4th 121, 140, 143, 87 Cal. Rptr. 2d 132, 980 P.2d 846]* . The following are examples of speech that could be enjoined:

- Posting a computer program that decrypted movies stored on DVDs and enabled users to copy and distribute those movies may be enjoined as a violation of the trade secret laws [*DVD Copy Control Assn., Inc. v. Bunner (2003) 31 Cal. 4th 864, 881883, 4 Cal. Rptr. 3d 69, 75 P.3d 1]* .

- Sending unwanted e-mails to a private, proprietary e-mail system may be enjoined as a trespass to chattels [*Intel Corp. v. Hamidi (2003) 30 Cal. 4th 1342, 1353, 1 Cal. Rptr. 3d 32, 71 P.3d 296* (former employee enjoined from sending e-mail to employees on company's system)].

- Injunctive relief is available to prevent a defendant from continuing a course of repetitive speech that has been judicially determined to constitute unlawful harassment in violation of the Fair Employment and Housing Act (Gov. Code. § 12900 et seq.) [*Aguilar v. Avis Rent-A-Car System, Inc. (1999) 21 Cal. 4th 121, 126, 144-145, 87 Cal. Rptr. 2d 132, 980 P.2d 846* (opinion discusses other instances in which injunctive restraint of speech has been upheld)].

- In a gang conduct abatement proceeding, provisions of an injunction forbidding both the use of any words, gestures, hand signs or other forms of communication which describe or refer to the gang and the wearing of clothing which bears the gang name or letters that spell out the gang name were proper when read as enjoining the conscious expression of gang affiliation, support and allegiance [*People v. Englebrecht (2001) 88 Cal. App. 4th 1236, 1266-1267, 106 Cal. Rptr. 2d 738]* .

[4] Laches

The equitable defense of laches may be asserted in a suit for an injunction [*see Vesper v. Forest Lawn Cemetery Assn. (1937) 20 Cal. App. 2d 157, 165, 67 P.2d 368]* by showing unreasonable delay in bringing the action and prejudice to the responding party from the delay [*Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 14, 244 Cal. Rptr. 581]* . Whether delay amounts to laches is measured in each case by equitable considerations [*California Western School of Law v. California Western University (1981) 125 Cal. App. 3d 1002, 1007, 178 Cal. Rptr. 685]* . Thus, there is no hard and fast rule as to the length of time that operates to bring about laches, and the defense may be invoked even if the delay is less than an applicable limitation period [*Holt v. County of Monterey (1982) 128 Cal. App. 3d 797, 801, 180*

Cal. Rptr. 514] . In the case of an intentional and continuing invasion of the applicant's rights, the delay must amount to assent or acquiescence [*California Western School of Law v. California Western University (1981) 125 Cal. App. 3d 1002, 1007, 178 Cal. Rptr. 685]* .

The following are some factors courts weigh in deciding whether to deny an injunction on the basis of laches [*California Western School of Law v. California Western University (1981) 125 Cal. App. 3d 1002, 1006, 178 Cal. Rptr. 685* ; *Tustin Community Hospital, Inc. v. Santa Ana Community Hospital Assn. (1979) 89 Cal. App. 3d 889, 905, 153 Cal. Rptr. 76]* :

- The length of the delay.
- Excuses for the delay.
- Responding party's knowledge of the harm to applicant.
- Moving party's acquiescence or consent, or the appearance of acquiescence or consent, regarding responding party's conduct.
- Prejudice to, or reliance by, the responding party.
- Possible changes in conditions that have occurred during the delay in bringing suit.
- The effect of the delay on the availability of evidence.
- Alternative solutions to injunctive relief.
- A general balancing of the equities of the parties.

Examples of fact situations in which laches was found to be a defense to an injunction include the following:

- Moving party has passively permitted responding party to spend money and effort in building an illegal structure [*Vesper v. Forest Lawn Cemetery Asso. (1937) 20 Cal. App. 2d 157, 165-166, 67 P.2d 368* ; *Los Angeles Athletic Club v. Long Beach (1932) 128 Cal. App. 427, 433, 17 P.2d 1061]* .
- Moving party knew of a proposed condominium construction plan two-and-one-half years before filing suit to stop the project [*Holt v. County of Monterey (1982) 128 Cal. App. 3d 797, 801, 180 Cal. Rptr. 514]* .
- Plaintiff waited three months after learning of a proposed municipal election, and until two weeks before it was scheduled, before seeking an injunction against allowing it [*Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 14, 244 Cal. Rptr. 581]* .

Because the trial court has discretion over granting or denying an injunction, an appellate court will not interfere with a court's conclusion unless manifestly an injustice is done [*Lusk v. Krejci (1960) 187 Cal. App. 2d 553, 556, 9 Cal. Rptr. 703]* .

[5] Other Legal Remedy Adequate

A responding party may challenge an injunction on the ground that a legal remedy would be adequate. For example, if monetary damages afford adequate relief and are not extremely difficult to ascertain, an injunction may not be granted [

Thayer Plymouth Center, Inc. v. Chrysler Motors Corp. (1967) 255 Cal. App. 2d 300, 306, 63 Cal. Rptr. 148] .

ILLUSTRATION:

Legal Remedy Adequate Relief. An automobile manufacturer notifies an auto dealer that it is terminating the dealer's dealership contract to sell its automobiles. The dealer files a declaratory relief action to the effect that the manufacturer's notice of termination to him was void. The dealer also seeks a preliminary injunction prohibiting the manufacturer from giving effect to the notice of termination pending the determination of the lawsuit. Should the injunction issue? No. In cases involving breach of a dealership contract, a dealer's remedy at law for damages ordinarily affords adequate relief. When an adequate remedy exists at law, and if monetary damages afford adequate relief and are not extremely difficult to ascertain, an injunction may not be granted [*Thayer Plymouth Center, Inc. v. Chrysler Motors Corp. (1967) 255 Cal. App. 2d 300, 306, 63 Cal. Rptr. 148]* .

For discussion of adequacy of the legal remedy, including the adequacy of other types of legal remedies, see *§ 303.40[4]*.

[6] Policy Favoring Public Interest

Although a party has made a prima facie case for injunctive relief, the court must consider the interests of third persons, if any, as well as the general public. For example, when private property has been put to a public use by a public service corporation and a public necessity has been established, a landowner harmed by the public use is not entitled to an injunction but must instead seek damages [*see* *Loma Portal Civic Club v. American Airlines, Inc. (1964) 61 Cal. 2d 582, 588-589, 39 Cal. Rptr. 708, 394 P.2d 548* ; *see* *O'Connell v. Superior Court (2006) 141 Cal. App. 4th 1452, 1471, 47 Cal. Rptr. 3d 147* (trial court erred in failing to take into account public interest in enforcing state testing requirement)].

ILLUSTRATION:

Public Benefit Outweighs Individual Harm. Landowners in an area adjacent to a public airport seek an injunction against various airlines to ban certain flight operations in the air space over their property. Will the plaintiffs prevail? No. The public interest in adequate and safe air service outweighs the rights of individual landowners to the peaceful enjoyment of their property [*see* *Loma Portal Civic Club v. American Airlines, Inc. (1964) 61 Cal. 2d 582, 588-589, 39 Cal. Rptr. 708, 394 P.2d 548* ; *see also Kachadoorian v. Calwa County Water Dist. (1979) 96 Cal. App. 3d 741, 747, 158 Cal. Rptr. 223* (no injunction available for removing public utility's pipeline); *Diaz v. Kay-Dix Ranch (1970) 9 Cal. App. 3d 588, 591-600, 88 Cal. Rptr. 443* (farm workers action to enjoin ranch owners from knowingly employing illegal entrants as properly dismissed if federal action comparatively more efficient)].

[7] Terms Contrary to Law

An injunction may not be granted when the relief would be contrary to the requirements of the law. Although courts have flexible and expansive power to issue equitable relief, they do not have the power to disregard or set aside express terms of legislation [*People ex rel. Dept. of Transportation v. Maldonado (2001) 86 Cal. App. 4th 1225, 1233-1234, 104 Cal. Rptr. 2d 66* ; *Armstrong v. Picquelle (1984) 157 Cal. App. 3d 122, 129, 203 Cal. Rptr. 552]* .

ILLUSTRATION:

Injunction Requires Acts Contrary to Law. The California Department of Transportation brought a nuisance abatement action against a property owner, arising from his use of a billboard on his property, which was adjacent to a landscaped freeway. The trial court issued an injunction requiring, among other things, that the property owner obtain a permit before displaying any advertising. The injunctive provision was invalid because no permit is required under the Outdoor Advertising Act [*Bus. & Prof. Code § 5200 et seq.*] if an advertising display falls within an exception to the general prohibition on

advertisements on landscaped freeways. The court could not disregard the Act's provisions that its permit requirements do not apply to owners of property abutting landscaped freeways when the advertisements on their property fall within the statutory exceptions [*see People ex rel. Dept. of Transportation v. Maldonado (2001) 86 Cal. App. 4th 1225, 1233-1234, 104 Cal. Rptr. 2d 66]* .

[8] Unclean Hands

A responding party may challenge an action for an injunction by claiming that the applicant does not have "clean hands" [*see London v. Marco (1951) 103 Cal. App. 2d 450, 453, 229 P.2d 401]* . The inequitable conduct charged must pertain to the subject matter involved in the action and must affect the equitable relations between the parties [*Nutro Products, Inc. v. Cole Grain Co. (1992) 3 Cal. App. 4th 860, 869, 5 Cal. Rptr. 2d 41* ; *Germo Mfg. Co. v. McClellan (1930) 107 Cal. App. 532, 541, 290 P. 534]* . The applicant may also assert the unclean hands defense against a responding party [*see Hernandez v. Stabach (1983) 145 Cal. App. 3d 309, 315, 193 Cal. Rptr. 350]* .

ILLUSTRATION:

Unclean Hands Defense Asserted. Plaintiffs bring a class action against an apartment owner alleging that the owner's apartments are dangerous, uninhabitable, and in violation of state and local laws. In addition, plaintiffs seek a preliminary injunction against defendant's retaliatory unlawful detainer actions. May plaintiffs assert the unclean hands doctrine against defendant, after defendant alleges that the injunction should not issue because plaintiffs were in violation of their lease agreements because of overcrowding? Yes. Defendant could not raise the overcrowding defense because of unclean hands as he rented to plaintiffs with knowledge that overcrowding would occur [*see Hernandez v. Stabach (1983) 145 Cal. App. 3d 309, 315, 193 Cal. Rptr. 350]* .

The unclean hands defense has no applicability when the act sought to be enjoined is against public policy [*Jomicra, Inc. v. California Mobile Home Dealers Assn. (1970) 12 Cal. App. 3d 396, 402, 90 Cal. Rptr. 696]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsElementsBalance of HardshipConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechGeneral Overview

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[Reserved]

§§ 303.72[Reserved]

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26-303 California Forms of Pleading and Practice--Annotated § 303.80

§ 303.80 Dissolving or Modifying Injunction or Temporary Restraining Order

[1] On Change of Facts or Law or to Serve Ends of Justice

In any action, the court may on notice modify or dissolve an injunction or temporary restraining order on a showing that [*Code Civ. Proc. § 533*]:

- There has been a material change in the facts on which the injunction or temporary restraining order was granted;

- The law on which the injunction or temporary restraining order was granted has changed; or

- The ends of justice would be served by the modification or dissolution of the injunction or temporary restraining order.

The court may also, on notice and motion, modify or dissolve a final injunction on these same grounds, as set out in *Civ. Code § 3424* [*Civ. Code § 3424(a)*; *but see Civ. Code § 3424(c)* (*Civ. Code § 3424* does not apply to final injunctions issued pursuant to the Family Code)].

The statutory provisions of *Code Civ. Proc. § 533* and *Civ. Code § 3424* in effect codify a case law rule based on the court's inherent power to amend an injunction [*see Sontag Chain Stores Co. v. Superior Court (1941) 18 Cal. 2d 92, 94-95, 113 P.2d 689* ; *New Tech Developments v. Bank of Nova Scotia (1987) 191 Cal. App. 3d 1065, 1072, 236 Cal. Rptr. 746]* . Thus, for example, courts held that it was proper to vacate or modify an injunction when it was equitable to do so under changed circumstances, even when the parties had previously stipulated to the judgment giving rise to the injunctive relief [*see Mendly v. County of Los Angeles (1994) 23 Cal. App. 4th 1193, 1207, 28 Cal. Rptr. 2d 822* ; *Welsch v. Goswick (1982) 130 Cal. App. 3d 398, 404-405, 181 Cal. Rptr. 703]* . If the restrained party seeks to terminate a restraining order, the burden is on the restrained party to show by a preponderance of the evidence that one of the circumstances set forth in *Code Civ. Proc. § 533* is present and justifies terminating the restraining order [*Loeffler v. Medina (2009) 174 Cal. App. 4th 1495, 1504, 95 Cal. Rptr. 3d 343*].

ILLUSTRATION:

Law Change Justifying Modification. Plaintiff, a corporate storeowner, successfully obtains a final judgment granting an injunction to prevent defendant labor unions from picketing in front of its store. Following the injunction's rendition, the law changes regarding the rights of labor unions to picket. Defendants move to vacate or modify the injunction. After the superior court indicates its intention to act on defendant's motion, plaintiff files a writ of prohibition in the California Supreme Court claiming that the superior court had no jurisdiction to modify a final judgment. Will the plaintiff prevail on the writ of prohibition? No. An injunction, even a permanent one, is of an executory or continuing nature. A court has an inherent power to modify or dissolve such a judgment when the facts or the law affecting the action change [*see Sontag Chain Stores Co. v. Superior Court (1941) 18 Cal. 2d 92, 94-95, 113 P.2d 689* ; *Waremart Foods v. United Food & Commercial Workers Union (2001) 87 Cal. App. 4th 145, 153-154, 104 Cal. Rptr. 2d 359* (union successfully challenged preliminary injunction restricting picketing at retail store because trial court made no finding that public officers charged with the duty to protect the store's property were unable or unwilling to furnish adequate protection, as required by *Lab. Code § 1138.1(a)(5)*, which became effective after preliminary injunction issued)].

A court cannot modify or dissolve an injunction granted by an arbitrator under an agreement to arbitrate. The proper foru m is a new arbitration proceeding [*Swan Magnetics, Inc. v. Superior Court (1997) 56 Cal. App. 4th 1504, 1506, 1512, 66 Cal. Rptr. 2d 541]* .

For a form of motion to modify or dissolve an injunction or temporary restraining order, see *§ 303.138*.

[2] Injunction Defective Because of No Notice

If an injunction is granted without notice to the person enjoined, he or she may apply to dissolve or modify it on reasonable notice to the judge who granted the injunction or the court in which the action was brought [*Code Civ. Proc. § 532(a)*; *see New Tech Developments v. Bank of Nova Scotia (1987) 191 Cal. App. 3d 1065, 1071, 236 Cal. Rptr. 746* ; *see [1], above*].

[3] Injunction Defective Because Vague and Ambiguous

Lack of notice may occur when an injunction is uncertain or ambiguous and the defendant is unable to determine from the order what he may and may not do [*Evans v. Evans (2008) 162 Cal. App. 4th 1157, 1171-1173, 76 Cal. Rptr. 3d 859* (order prohibiting party from contacting sheriff's department about other party was overbroad); *ReadyLink Healthcare v. Cotton (2005) 126 Cal. App. 4th 1006, 1026, 24 Cal. Rptr. 3d 720* (injunction barring soliciting "anyone" associated with plaintiff was vague and overbroad); *City of Redlands v. County of San Bernardino (2001) 96 Cal. App. 4th 398, 415, 117 Cal. Rptr. 2d 582* (injunction prohibiting county from readopting general plan amendment "or any similar amendment" not vague or ambiguous)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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26-303 California Forms of Pleading and Practice--Annotated § 303.81

§ 303.81 Review by Appeal

An appeal may be taken from an order granting or dissolving, or refusing to grant or dissolve, an injunction [*Code Civ. Proc. § 904.1(a)(6)* (appeal in other than limited civil case), *Code Civ. Proc. § 904.2(g)* (appeal of ruling by superior court judge or other judicial officer in limited civil case)]. Unlike the rule governing certain intermediate orders, there is a right of appeal from the rendition of injunctive relief at any stage of the proceeding. The intent of *Code Civ. Proc. § 904.1(a)(6)* (former *Code Civ. Proc. § 963(2)*) is that all orders granting or refusing injunctions, whether temporary, permanent, or provisional pending appeal, are appealable [*Western Electroplating Co. v. Henness (1959) 172 Cal. App. 2d 278, 283, 341 P.2d 718* ; *see* *Pro-Family Advocates v. Gomez (1996) 46 Cal. App. 4th 1674, 1678 n.1, 54 Cal. Rptr. 2d 600* (order modifying preliminary injunction is appealable as an order granting an injunction); *see also* *Chico Feminist Women's Health Center v. Scully (1989) 208 Cal. App. 3d 230, 251, 256 Cal. Rptr. 194* (order modifying preliminary injunction is appealable as order granting injunction pursuant to former *Code Civ. Proc. § 904.1(f), now see Code Civ. Proc. § 904.1(a)(6)*)].

An order refusing to grant a permanent injunction is not appealable unless and until it is embodied in a final judgment. Although the rationale for this rule differs, the appropriate rationale is that a trial court may revisit its decision to deny a permanent injunction at any time until final judgment. Thus, the interlocutory denial of a permanent injunction is not a sufficiently definitive "order refusing to grant an injunction" within the meaning of *Code Civ. Proc. § 904.1(a)(6)* [*Bishop Creek Lodge v. Scira (2000) 82 Cal. App. 4th 631, 633-634, 98 Cal. Rptr. 2d 398* ; *see* *Art Movers, Inc. v. Ni West, Inc. (1992) 3 Cal. App. 4th 640, 645-649, 4 Cal. Rptr. 2d 689* (collecting cases holding that interlocutory order dismissing a cause of action for a permanent injunction is appealable only from the final judgment in the case)].

Cases purporting to allow appeals from interlocutory denials of permanent injunctions have usually done so in connection with some other basis for appeal [*Art Movers, Inc. v. Ni West, Inc. (1992) 3 Cal. App. 4th 640, 645-649, 4 Cal. Rptr. 2d 689* ; *see, e.g.,* *Pardee Construction Co. v. City of Camarillo (1984) 37 Cal. 3d 465, 467, 208 Cal. Rptr. 228, 690 P.2d 701* (appeal from order made after final judgment); *Mateo-Woodburn v. Fresno Community Hospital & Medical Center (1990) 221 Cal. App. 3d 1169, 1174-1175 n.2, 270 Cal. Rptr. 894* (appeal from order dissolving preliminary injunction)]. Those opinions that have permitted an immediate appeal have done so without discussion [*Art Movers, Inc. v. Ni West, Inc. (1992) 3 Cal. App. 4th 640, 645-649, 4 Cal. Rptr. 2d 689]* .

A defendant may not separately appeal from an order fixing the amount of a preliminary injunction bond. Such an order is not listed in *Code Civ. Proc. § 904.1* or *Code Civ. Proc. § 904.2* as an appealable matter and thus is not appealable. The appellate court may, however, in connection with the appeal of an order granting a preliminary injunction, address the issue of whether the amount of the undertaking is inadequate to meet requirements of *Code Civ. Proc. § 529(a)* [*County of Los Angeles v. City of Los Angeles (1999) 76 Cal. App. 4th 1025, 1026-1028, 90 Cal. Rptr. 2d 799]* .

For discussion, procedural guides, and forms related to all phases of appeals generally, see Ch. 40, *Appeal: An Overview* , through Ch. 54, *Appeal: California Supreme Court Review* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral Overview

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26-303 California Forms of Pleading and Practice--Annotated § 303.82

§ 303.82 Scope and Standard of Review

The standard of review is abuse of discretion, and the appellate court looks at the evidence that was presented to the trial court to determine if there was substantial support for the trial court's decision [*Thompson v. 10,000 RV Sales, Inc. (2005) 130 Cal. App. 4th 950, 964, 31 Cal. Rptr. 3d 18* ; *Trader Joe's Co. v. Progressive Campaigns, Inc. (1999) 73 Cal. App. 4th 425, 430-431, 86 Cal. Rptr. 2d 442]* .

The appellate court's task is to ensure that the trial court's express or implied factual determinations are supported by substantial evidence [*Shapiro v. San Diego City Council (2002) 96 Cal. App. 4th 904, 912, 117 Cal. Rptr. 2d 631* ; *Shoemaker v. County of Los Angeles (1995) 37 Cal. App. 4th 618, 625, 43 Cal. Rptr. 2d 774]* . The appellate court does not, however, reweigh the evidence, even if it was conflicting [*Academy of Pediatrics v. Van de Kamp (1989) 214 Cal. App. 3d 831, 838, 263 Cal. Rptr. 46]* . Thus, the appellate court will not reweigh conflicting evidence to determine the credibility of witnesses. It is the trial court's province to resolve conflicting evidence and in so doing to judge the credibility of witness affidavits that are submitted in support of an application for a preliminary injunction [*Shoemaker v. County of Los Angeles (1995) 37 Cal. App. 4th 618, 625, 43 Cal. Rptr. 2d 774]* . Rather, the reviewing court must examine the evidence and interpret the facts in the light most favorable to the prevailing party, drawing all reasonable inferences in his or her favor and resolving conflicts in the evidence in favor of the trial court's order [*Horsford v. Board of Trustees of California State University (2005) 132 Cal. App. 4th 359, 33 Cal. Rptr. 3d 644* ; *American Academy of Pediatrics v. Van de Kamp (1989) 214 Cal. App. 3d 831, 838, 263 Cal. Rptr. 46* ; *People ex rel. Gillespie v. Neu (1989) 209 Cal. App. 3d 1066, 1072-1073, 257 Cal. Rptr. 778* ; *see Pro-Family Advocates v. Gomez (1996) 46 Cal. App. 4th 1674, 1680, 54 Cal. Rptr. 2d 600* (if evidence conflicts, reviewing court must construe evidence in light most favorable to trial court's decision); *accord California Correctional Peace Officers Assn. v. State of California (2000) 82 Cal. App. 4th 294, 302, 98 Cal. Rptr. 2d 302]* .

If the trial court was presented with evidence on the two factors of interim harm and likelihood of success (*see § 303.43[2]*), but fails to make express findings, the appellate court will presume that the trial court made appropriate factual findings and review the record for substantial evidence to support the ruling [*14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal. App. 4th 1396, 1402, 74 Cal. Rptr. 2d 712]* . For further discussion of abuse of discretion standard, see *§ 303.86[1]*.

When review of a preliminary injunction involves solely questions of law, independent review standard rather than abuse of discretion standard applies [*Strategix, Ltd v. Infocrossing West, Inc. (2006) 142 Cal. App. 4th 1068, 1072, 48 Cal. Rptr. 3d 614* ; *Teamsters Local 856 v. Priceless, LLC (2003) 112 Cal. App. 4th 1500, 1509-1510, 5 Cal. Rptr. 3d 847* (applying independent review to construe *California Public Records Act); San Diego Unified Port Dist. v. U.S. Citizens Patrol (1998) 63 Cal. App. 4th 964, 969, 74 Cal. Rptr. 2d 364* ; for further discussion, *see § 303.86[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionCivil ProcedureAppealsStandards of ReviewSubstantial EvidenceGeneral Overview

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§ 303.83 Law at Time of Appellate Decision Applicable

On an appeal involving an injunctive decree or order, the appellate court applies the law in effect at the time the appellate court renders its opinion [*Hunt v. Superior Court (1999) 21 Cal. 4th 984, 999, 1008, 90 Cal. Rptr. 2d 236, 987 P.2d 705* (upholding trial court's grant of preliminary injunction); *Cal-Dak Co. v. Sav-On Drugs, Inc. (1953) 40 Cal. 2d 492, 496-497, 254 P.2d 497* (reversing order denying preliminary injunction); *Waremart Foods v. United Food & Commercial Workers Union (2001) 87 Cal. App. 4th 145, 153-154, 104 Cal. Rptr. 2d 359]* . Similarly, when injunctive relief against a legislative enactment is sought, the relevant provision for purposes of appeal is the one that is in effect at the time of the appeal [*Building Industry Ass'n v. City of Oxnard (1985) 40 Cal. 3d 1, 3-4, 218 Cal. Rptr. 672, 706 P.2d 285* (remanded to trial court to determine necessity of injunction with regard to modified ordinance); *Aktar v. Anderson (1997) 58 Cal. App. 4th 1166, 1176, 68 Cal. Rptr. 2d 595]* .

However, although the appellate court usually applies the law in effect at the time of its decision, when plaintiffs seek both injunctive relief and damages, as well as a determination that defendant's actions violated existing law, the appellate court may confine itself to the law applicable at the time of the acts described in the complaint when the record is insufficient to enable the appellate court to determine if defendant is in compliance with an amended statute. In that situation, the trial court is the proper court in which to seek relief based on changes in law that occurred after the entry of judgment [*Cisneros v. U. D. Registry, Inc. (1995) 39 Cal. App. 4th 548, 565, n.4, 46 Cal. Rptr. 2d 233]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 303.84 Stay of Order or Decree

[1] Stay of Injunction Pending Appeal

To preserve the status quo pending appeal, a mandatory injunction is automatically stayed, whereas a prohibitory injunction is not [*Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc. (1987) 43 Cal. 3d 696, 706, 238 Cal. Rptr. 780, 739 P.2d 140* ; *see Dewey v. Superior Court (1889) 81 Cal. 64, 68, 22 P. 333* ; *Paramount Pictures Corp. v. Davis (1964) 228 Cal. App. 2d 827, 835, 39 Cal. Rptr. 791]* . When a decree consists of both mandatory and prohibitory features, an appeal will stay operation of the mandatory features but not the prohibitory ones [*Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc. (1987) 43 Cal. 3d 696, 706, 238 Cal. Rptr. 780, 739 P.2d 140* ; *Ohaver v. Fenech (1928) 206 Cal. 118, 123, 273 P. 555]* .

The trial court may also protect the parties on appeal by stipulating conditions in its order that preserve the subject matter of the appeal for the appellant and the benefits of the judgment for the respondent [*City of San Diego v. Southern Cal. Tel. Corp. (1954) 42 Cal. 2d 110, 120, 266 P.2d 14* ; *Tulare Irr. Dist. v. Superior Court (1925) 197 Cal. 649, 671, 242 P. 725]* .

ILLUSTRATION:

Conditions Placed on Order. Plaintiff city sues to recover amounts due from defendant utility for use of city streets between the time one franchise agreement expired and another was entered into. At issue was the method of determining compensation under the expired franchise agreement and whether the trial court properly stayed an injunction preventing the utility from using the streets until the matter was resolved. Will the city prevail in its contention that the injunction could be stayed only on the condition that amounts due the city must be determined using the method actually used under the earlier franchise agreement? No. Since the dispute centered on the old accounting method, the trial court could condition the injunction on appeal by requiring the exact terms of the expired franchise rather than the allegedly erroneous interpretation of those terms previously used. Thus, either party could appeal the trial court's determination of the amounts due and both were protected because the condition ensured the status quo under the exact terms of the expired franchise [*City of San Diego v. Southern Cal. Tel. Corp. (1954) 42 Cal. 2d 110, 120, 266 P.2d 14]* .

[2] Injunctive Order to Preserve Status Quo

After a trial court has denied a motion for injunctive relief, it may still exercise its discretion to order injunctive relief to preserve the status quo pending a motion for a new trial or an appeal [*Pierce v. City of Los Angeles (1911) 159 Cal. 516, 517-520, 114 P. 818* (motion for new trial); *City of Pasadena v. Superior Court (1910) 157 Cal. 781, 786-787, 109 P. 620* (appeal)]. This power also extends to situations in which the trial court denies an injunction but decides either to continue a preliminary injunction in force or to make an original order restraining the defendant pending an appeal by the unsuccessful plaintiff [*American Trading Co. v. Superior Court (1923) 192 Cal. 770, 771-773, 222 P. 142* (continuing in force restraining order pending appeal from order denying preliminary injunction); *City of Pasadena v. Superior Court (1910) 157 Cal. 781, 786-787, 109 P. 620* (preliminary injunction continued in effect)].

[3] Writ of Supersedeas

If a court mistakenly attempts to enforce a mandatory injunctive order that should be stayed pending appeal, the appellant is entitled as a matter of right to issuance of a writ of supersedeas. A supersedeas writ maintains the status quo until the appeal is finally determined. In addition, although enforcement of a prohibitory injunction pending appeal does not entitle the appellant to a writ of supersedeas as a matter of right, a court of appeal has inherent power to issue the writ if it is necessary or proper to the complete exercise of its appellate jurisdiction [*Rubin v. American Sportsmen Television Equity Soc. (1951) 102 Cal. App. 2d 288, 290-291, 227 P.2d 303* ; *see Masonite Corp. v. County of Mendocino Air Quality Management Dist. (1996) 42 Cal. App. 4th 436, 444, 49 Cal. Rptr. 2d 639* (petition for writ of supersedeas granted to stay effect of trial court's order denying motion for preliminary injunction relating to disclosure of alleged trade secrets pending appeal); *see also Shoemaker v. County of Los Angeles (1995) 37 Cal. App. 4th 618, 624, 43 Cal. Rptr. 2d 774* (writ of supersedeas granted staying enforcement of preliminary injunction mandating affirmative act to preserve status quo pending appeal)]. For a discussion of the procedure used to obtain a writ of supersedeas and related forms, see Ch. 43, *Appeal: Stay of Proceedings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsNonmoney JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsMandatory Injunctions

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§ 303.85 Temporary Restraining Orders

A temporary restraining order is separately appealable [*Code Civ. Proc. § 904.1(a)(6)*; *McLellan v. McLellan (1972) 23 Cal. App. 3d 343, 357, 100 Cal. Rptr. 258* ; *David v. Goodman (1948) 89 Cal. App. 2d 162, 170, 200 P.2d 568]* . However, when a temporary restraining order was issued under the Domestic Violence Prevention Act (*Fam. Code § 6200 et seq.*) and thereafter the trial court on the date set for the hearing granted a three-year restraining order, an appeal from the temporary restraining order following the granting of the three year restraining order has been held moot and the purported appeal from the temporary restraining has been dismissed [*O'Kane v. Irvine (1996) 47 Cal. App. 4th 207, 210 n.4, 54 Cal. Rptr. 2d 549]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsTemporary Restraining OrdersCivil ProcedureAppealsReviewabilityGeneral OverviewFamily LawFamily Protection & WelfareCohabitants & SpousesAbuse, Endangerment & Neglect

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§ 303.86 Preliminary Injunctions

[1] Abuse of Discretion Standard

An order granting, denying, dissolving, or refusing to dissolve a preliminary injunction will not be modified or dissolved on appeal except for an abuse of discretion [*see IT Corp. v. County of Imperial (1983) 35 Cal. 3d 63, 69, 196 Cal. Rptr. 715, 672 P.2d 121* ; *ReadyLink Healthcare v. Cotton (2005) 126 Cal. App. 4th 1006, 1016, 24 Cal. Rptr. 3d 720* ; for discussion of when the standard of independent review rather than abuse of discretion applies, *see, below*]. The appellate court must determine whether the trial court abused its discretion in failing to consider or in evaluating the following two factors [*Smith v. Adventist Health System/West (2010) 182 Cal. App. 4th 729, 749, 106 Cal. Rptr. 3d 318* ; *Teachers Ins. & Annuity Assn. v. Furlotti (1999) 70 Cal. App. 4th 1487, 1493, 83 Cal. Rptr. 2d 455* ; *Kennedy, Cabot & Co. v. National Assn. of Securities Dealers, Inc. (1996) 41 Cal. App. 4th 1167, 1174-1175, 49 Cal. Rptr. 2d 66* ; *see Garamendi v. Executive Life Ins. Co. (1993) 17 Cal. App. 4th 504, 512, 21 Cal. Rptr. 2d 578* ; *see also § 303.43[2]*]:

- Whether the applicant will prevail on the merits at trial.

- The interim harm that the applicant is likely to sustain if the injunction is denied as compared to the harm that the responding party is likely to suffer if the preliminary injunction is issued.

A court abuses its discretion if it exceeds all bounds of reason or contravenes uncontradicted evidence [*Biosense Webster, Inc. v. Superior Court (2006) 135 Cal. App. 4th 827, 834, 37 Cal. Rptr. 3d 759* ; *California Correctional Peace Officers Assn. v. State of California (2000) 82 Cal. App. 4th 294, 302, 98 Cal. Rptr. 2d 302* ; *Teachers Ins. & Annuity Assn. v. Furlotti (1999) 70 Cal. App. 4th 1487, 1493, 83 Cal. Rptr. 2d 455] .*

When the trial court has denied a preliminary injunction, if the appellate court finds that the trial court abused its discretion as to one of the factors, it may still affirm if it finds no abuse of discretion as to the other [*Cohen v. Board of Supervisors (1985) 40 Cal. 3d 277, 286-287, 219 Cal. Rptr. 467, 707 P.2d 840* ; *Abrams v. St. John's Hospital & Health Center (1994) 25 Cal. App. 4th 628, 636, 30 Cal. Rptr. 2d 603*); *see also § 303.43[2]*]. Thus, an appellate court

will reverse an order denying a preliminary injunction only if the trial court has abused its discretion in ruling on both factors [*14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal. App. 4th 1396, 1403, 74 Cal. Rptr. 2d 712]* . However, if the superior court limited its ruling to only one of the factors, that factor must conclusively support the order [*Right Site Coalition v. Los Angeles Unified School Dist. (2008) 160 Cal. App. 4th 336, 344-345, 72 Cal. Rptr. 3d 678* (reversing denial of injunction when court expressly declined to address likelihood of success on merits factor); *Efstratis v. First Northern Bank (1997) 59 Cal. App. 4th 667, 671, 69 Cal. Rptr. 2d 445* (reversing denial of injunction based solely on likelihood of prevailing on merits factor); *see King v. Meese (1987) 43 Cal. 3d 1217, 1227, 240 Cal. Rptr. 829, 743 P.2d 889* (recognizing rule and finding that balance of hardships did not support denial of relief irrespective of plaintiff's likelihood of success on merits, but taking "unusual" step of determining merits issue because of importance of case and absence of contested facts)].

On the other hand, when the trial court has granted a preliminary injunction, but in so doing has abused its discretion as to either factor, that is, likelihood of success on the merits or interim harm, it appears that the appellate court must reverse [*Teachers Ins. & Annuity Assn. v. Furlotti (1999) 70 Cal. App. 4th 1487, 1493, 83 Cal. Rptr. 2d 455* (decision reversed only if trial court abused discretion as to either factor); *14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal. App. 4th 1396, 1403, 74 Cal. Rptr. 2d 712* (appellate court reverses if trial court abused discretion in ruling on one of the factors)]. Although this appears to conflict with language in *King v. Meese (1987) 43 Cal. 3d 1217, 1227, 240 Cal. Rptr. 829, 743 P.2d 889* , that a trial court's order concerning a preliminary injunction may be affirmed if either factor alone would support the ruling, the order appealed from in *King* was an order denying a preliminary injunction, and the correct rule is that an injunction should not issue if there is no possibility of success even though its issuance might prevent irreparable harm [*American Academy of Pediatrics v. Van de Kamp (1989) 214 Cal. App. 3d 831, 837-838, 263 Cal. Rptr. 46* (appellate court must reverse if either of two interrelated factors do not support superior court's order granting injunction); *see also Hunt v. Superior Court (1999) 21 Cal. 4th 984, 999, 90 Cal. Rptr. 2d 236, 987 P.2d 705* (trial court may not grant preliminary injunction regardless of balance of harm unless there is some possibility that plaintiff would ultimately prevail on merits of claim); *Pro-Family Advocates v. Gomez (1996) 46 Cal. App. 4th 1674, 1681, 54 Cal. Rptr. 2d 600* (if party that sought preliminary injunction has no likelihood of prevailing at trial, reviewing court must reverse the order granting the preliminary injunction)]. Nonetheless, the presence or absence of each factor is usually a matter of degree, and if the party seeking an injunction can make a sufficiently strong showing of likelihood of success on merits, the trial court has discretion to issue an injunction notwithstanding the party's inability to show that the balance of harm tips in that party's favor [*Common Cause v. Board of Supervisors (1989) 49 Cal. 3d 432, 447, 261 Cal. Rptr. 574, 777 P.2d 610* (finding no likelihood that plaintiffs would prevail on merits andthus preliminary injunction should not have been issued)]. However, the California Supreme Court has held that the decision in *Common Cause v. Board of Supervisors (1989) 49 Cal. 3d 432, 447, 261 Cal. Rptr. 574* did not suggest that when a party makes a sufficient showing of likely success on the merits a trial court need not consider the relative balance of hardships at all, or that, when the balance of hardships dramatically favors the denial of a preliminary injunction, a trial court nonetheless may grant a preliminary injunction on the basis of the likelihood of success factor alone [*White v. Davis, 30 Cal. 4th 528, 561, 133 Cal. Rptr. 2d 648, 68 P.3d 74* (taxpayer's interest in not having public funds spent unlawfully not irreparable harm that warrants preliminary injunctive relief)]. Moreover, although a trial court's decision granting a preliminary injunction is reviewed under the abuse of discretion standard, if the preliminary injunction mandates an affirmative act changing the status quo, the appellate court will exercise greater scrutiny to determine whether there has been an abuse of discretion [*Perez v. Hastings College (1996) 45 Cal. App. 4th 453, 456-457, 53 Cal. Rptr. 2d 1]* .

For discussion of abuse of discretion by a trial court generally, see *§ 303.43[1].*

The appellate court's decision is not a final adjudication as to the parties' ultimate rights concerning the controversy [*Hunt v. Superior Court (1999) 21 Cal. 4th 984, 999, 90 Cal. Rptr. 2d 236, 987 P.2d 705]* . Rather, the appellate court merely determines whether the trial court abused its discretion based on the record before the trial court at the time it ruled on the matter [*Right Site Coalition v. Los Angeles Unified School Dist. (2008) 160 Cal. App. 4th 336, 344-346, 72 Cal. Rptr. 3d 678* (remanding determination to trial court); *Shoemaker v. County of Los Angeles (1995) 37 Cal.*

App. 4th 618, 625-626, 43 Cal. Rptr. 2d 774] . For further discussion concerning abuse of discretion standard, see *§ 303.82*.

[2] When Issue Is Pure Question of Law

When there is no issue of fact, an appellate court may determine whether the granting of the preliminary injunction was error as a matter of law [*Citizens to Save California v. California Fair Political (2006) 145 Cal. App. 4th 736, 746, 52 Cal. Rptr. 3d 17* ; *Strategix, Ltd v. Infocrossing West, Inc. (2006) 142 Cal. App. 4th 1068, 1072, 48 Cal. Rptr. 3d 614* ; *Pro-Family Advocates v. Gomez (1996) 46 Cal. App. 4th 1674, 1680, 54 Cal. Rptr. 2d 600* ; *California Correctional Peace Officers Assn. v. State of California (2000) 82 Cal. App. 4th 294, 302, 98 Cal. Rptr. 2d 302* ; *see also Shapiro v. San Diego City Council (2002) 96 Cal. App. 4th 904, 912, 117 Cal. Rptr. 2d 631* ; *San Diego Unified Port Dist. v. U.S. Citizens Patrol (1998) 63 Cal. App. 4th 964, 969, 74 Cal. Rptr. 2d 364* (when solely question of law standard of review is not abuse of discretion but independent review of whether trial court correctly interpreted and applied statutory or constitutional law)].

The issue of the likelihood of prevailing on the merits occasionally depends on a question of pure law rather than on evidence to be introduced at the subsequent trial, for example, when a question concerns a statute's constitutionality on its face [*Evans v. Evans (2008) 162 Cal. App. 4th 1157, 1166, 76 Cal. Rptr. 3d 859* ; *Citizens to Save California v. California Fair Political (2006) 145 Cal. App. 4th 736, 746, 52 Cal. Rptr. 3d 17* ; *Hunter v. City of Whittier (1989) 209 Cal. App. 3d 588, 595-596, 257 Cal. Rptr. 559* ; *see Ketchens v. Reiner (1987) 194 Cal. App. 3d 470, 474, 239 Cal. Rptr. 549]* . Similarly, when issuance of preliminary injunction depends on the construction of a statute, and the matter is purely a question of law, the standard of review is whether the statute was correctly construed, and accordingly the appellate court reviews de novo the court's order granting a preliminary injunction [Teamsters Local 856 v. *Priceless, LLC (2003) 112 Cal. App. 4th 1500, 1509-1510, 5 Cal. Rptr. 3d 847* (applying independent review to construe *California Public Records Act); Yes on Measure A v. City of Lake Forest (1997) 60 Cal. App. 4th 620, 623, 70 Cal. Rptr. 2d 517]* . When a question of pure law is involved, it can sometimes be determinative of the matter, for example, if a defendant can show that the plaintiff's interpretation is wrong as a matter of law and therefore there is no possibility that plaintiff can prevail on the merits [*Kennedy, Cabot & Co. v. National Assn. of Securities Dealers, Inc. (1996) 41 Cal. App. 4th 1167, 1174-1175, 49 Cal. Rptr. 2d 66* (scope of arbitration clause in action to enjoin pending arbitration)]. Even if the question of law is not entirely determinative, it may be appropriate for an appellate court to express its opinion on the question to clarify or narrow the issues for trial [*Hunter v. City of Whittier (1989) 209 Cal. App. 3d 588, 595-596, 257 Cal. Rptr. 559* ; *see Ketchens v. Reiner (1987) 194 Cal. App. 3d 470, 474, 239 Cal. Rptr. 549]* .

To the extent that the determination on the likelihood of a party's success rests on an issue of pure law not presenting factual issues to be resolved at trial, when the trial court has denied a preliminary injunction, the appellate court reviews the determination de novo [*Evans v. Evans (2008) 162 Cal. App. 4th 1157, 1166, 76 Cal. Rptr. 3d 859* ; *14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal. App. 4th 1396, 1403-1407, 74 Cal. Rptr. 2d 712]* .

If the grant or denial of a preliminary injunction depends on the construction of a statute and the matter is purely a question of law, the standard of review is not whether discretion was appropriately exercised, but whether the statute was correctly construed [*Garamendi v. Executive Life Ins. Co. (1993) 17 Cal. App. 4th 504, 512, 21 Cal. Rptr. 2d 578* ; *Ciani v. San Diego Trust & Savings Bank (1991) 233 Cal. App. 3d 1604, 1611, 285 Cal. Rptr. 699]* .

[3] Burden on Appellant

The burden is on the appellant to make a clear showing of abuse of the trial court's discretion in denying or granting a preliminary injunction [*IT Corp. v. County of Imperial (1983) 35 Cal. 3d 63, 69, 196 Cal. Rptr. 715, 672 P.2d 121* ; *see California Correctional Peace Officers Assn. v. State of California (2000) 82 Cal. App. 4th 294, 302, 98 Cal. Rptr. 2d 302* ; *see also Shoemaker v. County of Los Angeles (1995) 37 Cal. App. 4th 618, 624, 43 Cal. Rptr. 2d 774* (burden

on party attacking trial court's ruling to make clear showing of abuse of discretion)], or error of law [*Pro-Family Advocates v. Gomez (1996) 46 Cal. App. 4th 1674, 1680, 54 Cal. Rptr. 2d 600* ; *see California Correctional Peace Officers Assn. v. State of California (2000) 82 Cal. App. 4th 294, 302, 98 Cal. Rptr. 2d 302]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionCivil ProcedureAppealsStandards of ReviewFact & Law Issues

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§ 303.87 Review by Extraordinary Writ

The right to appeal an order granting injunctive relief does not bar a party from applying for a writ of prohibition when the right to appeal does not afford an adequate remedy [*Northcutt v. Superior Court (1924) 66 Cal. App. 350, 356, 226 P. 25* ; *see United Farm Workers Organizing Committee v. Superior Court (1971) 4 Cal. 3d 556, 563-564, 94 Cal. Rptr. 263, 483 P.2d 1215]* . An appellate court will issue a writ of prohibition to restrain a trial court from enforcing an injunction when the trial court has acted in excess of its jurisdiction [*City of Los Angeles v. Superior Court (1959) 51 Cal. 2d 423, 430, 333 P.2d 745]* . For example, writs of prohibition have been issued to restrain a court in the following instances:

- When the court enjoined the enactment or enforcement of a valid public statute or ordinance [*City of Los Angeles v. Superior Court (1959) 51 Cal. 2d 423, 430, 333 P.2d 745]* .

- When a court attempted to enforce an order from a court that had not complied with the procedural requirements of *Code Civ. Proc. § 527* [*Harlan v. Superior Court (1949) 94 Cal. App. 2d 902, 905, 211 P.2d 942* (disapproved on other grounds in *Signal Oil & Gas Co. v. Ashland Oil & Refining Co. (1958) 49 Cal. 2d 764, 775-776 n.5, 322 P.2d 1*)].

- When a court threatened to interfere by injunction with the functioning of another branch of the government [*Alden v. Superior Court (1963) 212 Cal. App. 2d 764, 768, 28 Cal. Rptr. 387]* .

- When a plaintiff had failed to serve the affidavits on the defendant at least two days before the hearing of the order to show cause as required by former *Code Civ. Proc. § 527(a)* [*Green v. Superior Court (1924) 65 Cal. App. 237, 240, 223 P. 582* (decided under former *Code Civ. Proc. § 527(a)*; *now see Code Civ. Proc. § 527(d)(2)* requiring service within five days from date of temporary restraining order or two days before hearing, whichever is earlier)].

Prohibition is also an appropriate remedy to enjoin the enforcement of a preliminary injunction alleged to be unconstitutional [*United Farm Workers Organizing Committee v. Superior Court (1971) 4 Cal. 3d 556, 563 n.7, 94*

Cal. Rptr. 263, 483 P.2d 1215 ; *Evans v. Superior Court (1939) 14 Cal. 2d 563, 579, 96 P.2d 107]* . For discussion, procedural guide, and forms relating to proceedings seeking a writ of prohibition, see Ch. 358, *Mandate and Prohibition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 303.90 Service of Injunction

A party may serve an injunction in the same manner that service of a summons is made [*Golden Gate Consol. Hydraulic Mining Co. v. Superior Court of Yuba County (1884) 65 Cal. 187, 190, 3 P. 628* ; *see Code Civ. Proc. § 413.10 et seq.*; *Sorrell v. Superior Court (1946) 73 Cal. App. 2d 194, 201-202, 166 P.2d 80* ; *see generally* Ch. 518, *Service of Summons and Papers*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 303.91 Actual Notice Without Service

A person with actual notice of an injunction is bound by the injunction even though it was not served on him or her [*Golden Gate Consol. Hydraulic Mining Co. v. Superior Court of Yuba County (1884) 65 Cal. 187, 190, 3 P. 628]* . A person who appears in court or is represented by an attorney at the time the injunction is heard and granted is deemed to have actual notice [*Mattos v. Superior Court (1939) 30 Cal. App. 2d 641, 647, 86 P.2d 1056]* . However, this appears to be a rebuttable presumption [*cf. Mossman v. Superior Court (1972) 22 Cal. App. 3d 706, 711, 99 Cal. Rptr. 638* ("disputable" presumption of notice arises when contempt order served on alleged contemnor's attorney, but not on contemnor)].

Legal Topics:

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

[1] In General

A person is subject to contempt if he or she refuses to comply with a court's valid injunctive order [*see Code Civ. Proc. § 1209(a)(5)*; *see also § 303.13*]. Specifically, the four elements necessary to establish contempt are [*Conn v. Superior Court (1987) 196 Cal. App. 3d 774, 784, 242 Cal. Rptr. 148]* :

- The rendition of a valid order.
- Actual knowledge of the order.
- Ability to comply.
- Willful disobedience.

Contempt proceedings are quasi-criminal in nature [*Pacific Tel. & Tel. Co. v. Superior Court (1968) 265 Cal. App. 2d 370, 371, 72 Cal. Rptr. 177]* . The accused contemnor is entitled to a presumption of innocence and cannot be compelled to testify. Furthermore, the contempt must be proved beyond a reasonable doubt [*In re Martin (1977) 71 Cal. App. 3d 472, 480, 139 Cal. Rptr. 451]* . The major difference between contempt and a criminal trial is that there is no right to a jury [Los Angeles Co. Super. Ct. Rules, Rule 9.7(b); *see In re Morelli (1970) 11 Cal. App. 3d 819, 850, 91 Cal. Rptr. 72]* . For each act of contempt, the court may impose a fine not exceeding $1,000 and/or a jail term of up to five days [*Code Civ. Proc. § 1218*]. The statutes governing contempt [*Code Civ. Proc. §§ 1209-1222*] do not provide for recovering attorney's fees in contempt proceedings.

PRACTICE TIP:

Contempt Is Costly Procedure. Contempt is a very costly procedure because it is in essence a mini-trial. However, costs and fees may be recoverable in a successful proceeding. A person who is subject to a court order as a party to the action, or any agent of this person, who is adjudged guilty of contempt for violating that court order may be ordered to pay to the party initiating the contempt

proceeding the reasonable attorney's fees and costs incurred by this party in connection with the proceeding [*Code Civ. Proc. § 1218(a)*]. Moreover, a finding of contempt will often encourage the contemnor to reconsider settlement alternatives.

For discussion, procedural checklists, and forms for use in initiating contempt proceedings, see Ch. 135, *Contempt* .

[2] No Contempt When Order Is Ambiguous

The acts constituting contempt must be clearly and specifically prohibited by the terms of the injunction. The party subject to the injunction must be able to determine from its terms what he or she may and may not do, and thus may not be held guilty of contempt for violating an injunction that is uncertain or ambiguous [*Brunton v. Superior Court (1942) 20 Cal. 2d 202, 205, 124 P.2d 831* ; *Sorensen v. Superior Court (1969) 269 Cal. App. 2d 73, 78, 74 Cal. Rptr. 597]* . The test is whether an injunction forbids an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application [*Pitchess v. Superior Court (1969) 2 Cal. App. 3d 644, 651, 83 Cal. Rptr. 35]* .

Any ambiguity in the injunction must be resolved in favor of the person accused of the violation [*Gottlieb v. Superior Court (1959) 168 Cal. App. 2d 309, 313, 335 P.2d 714]* . Thus, in determining whether the party to be enjoined has been given sufficient notice of the conduct proscribed or compelled, the language of the injunction must be interpreted in light of the record that discloses the kind of conduct that is sought to be enjoined [*People v. Wheeler (1973) 30 Cal. App. 3d 282, 296, 106 Cal. Rptr. 260* ; *see City of Vernon v. Superior Court (1952) 38 Cal. 2d 509, 514, 241 P.2d 243* ; *Gelfand v. O'Haver (1948) 33 Cal. 2d 218, 222, 200 P.2d 790]* .

[3] No Contempt When Judge Lacks Jurisdiction

An injunction may be void because the judge who issued it lacked jurisdiction to do so [*In re Wood (1939) 34 Cal. App. 2d 546, 551, 93 P.2d 1058* ; *see Condor Enterprises, Ltd. v. Valley View State Bank (1994) 25 Cal. App. 4th 734, 741, 30 Cal. Rptr. 2d 613]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 303.93 Purposeful Failure to Comply With Injunction

Although an enjoined party may deliberately choose to disobey an injunctive order that he or she believes to be invalid and then test the validity of an adjudication of contempt by seeking a writ of habeas corpus [*see In re De Silva (1948) 33 Cal. 2d 76, 79, 199 P.2d 6* ; *In re Circosta (1963) 219 Cal. App. 2d 777, 784, 33 Cal. Rptr. 514* ; *see generally* Ch. 292, *Habeas Corpus*], certiorari [*see Brady v. Superior Court (1962) 200 Cal. App. 2d 69, 72, 19 Cal. Rptr. 242* ; *see generally* Ch. 492, *Review (Certiorari), Writ of*], or prohibition [*Harlan v. Superior Court (1949) 94 Cal. App. 2d 902, 905-906, 211 P.2d 942* ; *see generally* Ch. 358, *Mandate and Prohibition*], this is not the preferred practice. Orderly procedure suggests that, when the party served believes the order is invalid, he or she should take the proper steps to have it dissolved rather than resort to self-help [*Mason v. U. S. Fid. & Guar. Co. (1943) 60 Cal. App. 2d 587, 591, 141 P.2d 475]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 303.100 Related Matthew Bender Publications

For memoranda of points and authorities supporting and opposing the issuance of preliminary injunctions, see California Points and Authorities, Ch. 116, *Injunctions* (Matthew Bender)

For memoranda of points and authorities supporting and opposing preliminary injunctions involving particular factual situations, see California Points and Authorities, *Cumulative Index* (Matthew Bender)

California Civil Actions--Pleading and Practice, chs. 2; 40, pt. A; 46; 90; 91 (Matthew Bender)

Moore's Federal Practice, Ch. 65 (3rd ed. Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 303.101 State Constitution

Superior courts has original jurisdiction in all causes except those given by statute to other trial courts. *Cal. Const., art. VI, § 10*

No equitable process can issue in any proceeding in any court against State of California or any officer thereof to prevent or enjoin collection of any tax. *Cal. Const., art. XIII, § 32*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 303.102 State Statutes

[1] Appeals

Appeal can be taken from order granting or dissolving injunction or refusing to grant or dissolve injunction. *Code Civ. Proc. § 904.1(a)(6)* (appeal in other than limited civil case), *Code Civ. Proc. § 904.2(g)* (appeal of ruling by superior court judge or other judicial officer in limited civil case)

[2] Attorney's Fees and Costs

Plaintiff who only seeks and obtains injunctive relief to compel compliance with Consumer Credit Reporting Agencies Act (*Civ. Code § 1785.1 et seq.*) is to be awarded court costs and attorney's fees under *Code Civ. Proc. § 1021.5. Civ. Code § 1785.31(f)*

Award of costs, including costs of investigation, discovery, and attorney's fees, when government seeks to enjoin sale, distribution, or public exhibition of obscene matter as defined in *Penal Code § 311*, seeks to enjoin use of building for illegal gambling, lewdness, or prostitution, seeks to enjoin such acts under Red Light Abatement Law [*Penal Code § 11226 et seq.*], seeks to enjoin use of building, or seeks to enjoin in any building, the unlawful sale, manufacture, service, storage, or keeping or giving away of any controlled substance as authorized by the California Uniform Controlled Substances Act (*Health & Safety Code § 11570 et seq.*), or seeks to enjoin unlawful sale, service, storage, or keeping or giving away of alcoholic liquor as authorized by the Unlawful Liquor Sale Abatement Law (*Penal Code § 11200 et seq.*). *Civ. Code § 3496*

[3] Damages

Action for injunctive relief under *Civ. Code § 1770* of Consumers Legal Remedies Act can be commenced without compliance with provisions of *Civ. Code § 1782(a)*; consumer can amend complaint to include request for damages within 30 days after action's commencement if consumer complies with provisions of *Civ. Code § 1782(a). Civ. Code §*

1782(d)

Civil penalty for violating injunction issued under *Civ. Code §§ 1812.30-1812.35* (credit transactions) is fine of up to $2,500 for each day that injunction is violated. *Civ. Code § 1812.33(a)*

Damages are available against person who wrongfully participates in suit enjoining sale of bonds for public improvement or public utility. *Code Civ. Proc. § 526b*

[4] Definitions

Preventive relief is given by prohibiting party from doing that which should not be done. *Civ. Code § 3368*

Preventive relief is granted by injunction, provisional or final. *Civ. Code § 3420*

Injunction defined. *Code Civ. Proc. § 525*

[5] Grounds for Injunctive Relief

Preventive relief cannot be given in cases other than those specified in *Civ. Code §§ 3366-3423*. *Civ. Code § 3274*

Preventive relief can be given as provided by the laws of *California. Civ. Code § 3366*

Grounds for issuing injunction. *Civ. Code § 3422* (permanent); *Code Civ. Proc. § 526* (provisional)

[6] Jurisdiction

Superior courts in limited civil cases have jurisdiction to issue temporary restraining orders and preliminary injunctions to preserve property or rights of any party to an action of which court has jurisdiction. *Code Civ. Proc. § 86(a)(8)*

[7] Limitation Periods

Period of limitation is 180 days in action to enjoin underground trespass, use, or occupancy by means of well drilled for oil or gas or both. *Code Civ. Proc. § 349*3/4

When action is stayed by injunction, time of continuing injunction is not part of time limit for action's commencement. *Code Civ. Proc. § 356*

[8] Procedures for Obtaining Injunctive Relief

[a] In General

Granting of injunction. *Code Civ. Proc. § 525*

Procedure to obtain temporary restraining order and preliminary injunction. *Code Civ. Proc. § 527*

Injunction is not allowed after defendant has answered unless it is on notice or an order to show cause. *Code Civ. Proc. § 528*

Notice is required when proceeding is to prevent increase or diminution of flow of water. *Code Civ. Proc. § 530*

Notice is required when proceeding is to suspend general and ordinary business of corporation. *Code Civ. Proc. § 531*

Application to dissolve or modify injunction is permitted when injunction granted without notice. *Code Civ. Proc. § 532*

Dissolution when insufficient grounds or modification when extent of injunction is too great. *Code Civ. Proc. § 533*

Nature of answer and reply to answer in water diversion cases. *Code Civ. Proc. § 534*

[b] Undertaking

Undertaking is required on granting of injunction. *Code Civ. Proc. § 529*

Objections to undertaking. *Code Civ. Proc. §§ 529, 995.910-995.960*

Undertaking is required when enjoining construction project. *Code Civ. Proc. § 529.1*

Undertaking is required when enjoining housing development project. *Code Civ. Proc. § 529.2*

Bond and Undertaking Law. *Code Civ. Proc. §§ 995.010-996.560*

Public entity is not required to furnish undertaking. *Code Civ. Proc. § 995.220*

Waiver of undertaking for poor litigants. *Code Civ. Proc. § 995.240*

Executing and filing undertakings generally. *Code Civ. Proc. §§ 995.310-995.380*

Liability of principal and sureties on undertaking. *Code Civ. Proc. §§ 996.410-996.495*

[9] Specific Situations When Injunctions Authorized

[a] Attachment

Nothing in *Code Civ. Proc. § 481.010 et seq.* (attachment) precludes granting relief under *Code Civ. Proc. §§ 525-534* (injunctions). *Code Civ. Proc. § 482.020*

[b] Business

Department of Food and Agriculture or any sealer can bring action to enjoin violation or threatened violation of any provision of *Bus. & Prof. Code § 13400 et seq.* (petroleum and hydrogen fuels) or of any regulation made pertaining to those provisions. *Bus. & Prof. Code § 13611*

Injunction under Consumer Cooperative Law (*Corp. Code § 12200 et seq.*). *Corp. Code § 12678*

[c] Children

Court has power to restrain removal of child that would prejudice child's rights or welfare. *Fam. Code § 3063*

[d] Claim and Delivery

Temporary restraining orders in context of provisional remedy of claim and delivery. *Code Civ. Proc. §§ 513.010, 513.020*

Nothing in *Code Civ. Proc. § 511.010 et seq.* (claim and delivery of personal property) precludes granting relief under *Code Civ. Proc. §§ 525-534* (injunctions). *Code Civ. Proc. § 516.050*

[e] Consumer Transactions

Injunctions against violation of consumer laws. *Bus. & Prof. Code § 125.5(a)*

Injunctive relief is available to any consumer who suffers damage as result of deceptive act or practice declared to be unlawful by *Civ. Code § 1770* (Consumers Legal Remedies Act). *Civ. Code § 1780(a)(2)*

Injunctive relief is available to any person applying to consumer credit reporting agency who is aggrieved by a violation or threatened violation of *Civ. Code § 1785.1 et seq.* (Consumer Credit Reporting Agencies Act). *Civ. Code § 1785.31(b)*

Any person or other specified business entity that violates or proposes to violate *Civ. Code §§ 1812.30-1812.35* (discrimination in credit transactions on basis of marital status) can be enjoined by any court of competent jurisdiction. *Civ. Code § 1812.32*

[f] Domestic Violence

Emergency protective orders are available to prevent domestic violence. *Fam. Code § 2045*

Temporary restraining order are available to prevent domestic violence. Fam. Code. § 6300 et seq.

[g] Elections

Taxpayer's general interest in not having public funds spent unlawfully, while sufficient to afford standing to bring taxpayer's action under *Code Civ. Proc. § 526a* and to obtain permanent injunction after full adjudication on merits, does not constitute type of irreparable harm that warrants preliminary injunctive relief. *White v. Davis, 30 Cal. 4th 528, 556-557, 133 Cal. Rptr. 2d 648, 68 P.3d 74*

Superior court may issue temporary or permanent restraining order or injunction against publication, circulation, posting, broadcasting, or telecasting of any matter in violation of *Elec. Code §§ 20001-20009*, in any case brought before it by registered voter. *Elec. Code § 20006*

Member of county central committee or state central committee can commence action in superior court to enjoin misrepresentation by candidate or committee that candidate has support of state or county central committee involved. *Elec. Code § 20007*

[h] Elevators

Any person affected by fact that any conveyance (as defined in *Lab. Code § 7300.1(i)* to include elevator, dumbwaiter, escalator, moving platform lift, stairway chairlift, people mover) is being operated without required valid permit and is in such condition that its use is dangerous to life or safety of any person can apply to superior court of county in which conveyance is located for injunction restraining operation of conveyance until condition is corrected. *Lab. Code § 7303*

[i] Employment

Injunctive relief by employer on behalf of employee prohibiting violence or threat of violence by another individual. *Code Civ. Proc. § 527.8*

Injunctions available to restrain dangerous place of employment, operation of dangerous machinery. *Lab. Code §§ 6323, 6324*

[i.1] Environmental Law

Injunction as available to allow redevelopment agency to seek injunction against utility to remove or remedy environmental contamination within project area. *Health & Safety Code § 33459*

Permanent injunction as available to require agency to comply with California Environmental Quality Act (CEQA). *Public Resources Code § 21168.9*

[j] Gang Violence

Aggrieved individual can obtain injunction against any group, association, society, or other assemblage of two or more persons who have met and taken substantial action in furtherance of committing act of violence. *Code Civ. Proc. § 527.7*

[j.1] Government

Injunctive relief as available to require legislative body to post proper disclosures in compliance with Ralph M. Brown Act (*Gov. Code § 54950 et seq.*) before holding closed sessions. *Gov. Code § 54960(a)*

[k] Harassment

Injunction is available to prohibit harassment. *Code Civ. Proc. § 527.6*

[l] Health Care Personnel

Superior court of any county may issue injunction restraining person who has engaged or is about to engage in any acts or practices that constitute or will constitute offense under *Bus. & Prof. Code § 2000 et seq.* (crimes and penalties involving medical practice) on application of Board of Medical Examiners or of 10 or more persons holding physician's and surgeon's or podiatrist's certificates. *Bus. & Prof. Code § 2311*

Division of Medical Quality must obtain injunction against any physician and surgeon within its jurisdiction if it has reasonable cause to believe that allowing such person to continue to practice would endanger public health, safety, and

welfare. *Bus. & Prof. Code § 2312*

Superior court of county in which any person has engaged or is about to engage in any act that constitutes offense under *Bus. & Prof. Code § 3000 et seq.* (optometry) may issue injunction restraining that conduct on application of State Board of Optometry, Attorney General, district attorney, or 10 or more persons holding optometry licenses. *Bus. & Prof. Code § 3094*

[m] Individuals With Disabilities

Persons aggrieved or potentially aggrieved by violation of *Civ. Code § 54* or *54.1* (rights of individuals with disabilities or certain medical conditions), *Gov. Code § 4450 et seq.* (access to public buildings by persons with disabilities), or *Health & Safety Code § 19955 et seq.* (access to public accommodations by physically handicapped persons) is authorized to bring action to enjoin violation. *Civ. Code § 55*

[n] Labor

Any person injured or threatened with injury by violation of *Lab. Code §§ 1115-1122* (jurisdictional strikes) is entitled to injunctive relief in proper case. *Lab. Code § 1116*

Any collective bargaining agreement between employer and labor organization is enforceable by injunctive relief as is available on other contracts in courts of *California. Lab. Code § 1126*

[o] Licensees

Temporary restraining orders is available against certain licensees. *Bus. & Prof. Code §§ 125.7(a), 125.8(a)*

[p] Mobilehome Parks

Injunction is available to restrain violating reasonable rule or regulation of mobilehome park. *Civ. Code § 798.88*

[q] Nuisances

Preventive relief may be granted to enforce penalty or forfeiture in case of nuisance. *Civ. Code § 3369*

Private person may maintain action for public nuisance, but nuisance is required to be specially injurious to this person. *Civ. Code § 3493*

Action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by private nuisance as defined by statute. *Code Civ. Proc. § 731*

By judgment in action against private nuisance, nuisance may be enjoined or abated as well as damages recovered therefor. *Code Civ. Proc. § 731*

[r] Partition of Real and Personal Property

Superior court may issue temporary restraining orders and injunction in actions for partition of real and personal

property to prevent waste, protect property or title to property, and restrain unlawful interference with partition of property ordered by court. *Code Civ. Proc. § 872.130*

[s] Pollution

Injunction is available to restrain violating air pollution control laws. *Health & Safety Code §§ 41513, 42453, 42454*

Injunction is available to restrain contamination by waste. *Health & Safety Code § 5460*

[t] Probate

Court may suspend powers of personal representative or make order to secure proper performance of personal representative's duties when it appears that petitioner's interest otherwise would be jeopardized. *Prob. Code § 9614*

Order restraining personal representative from taking proposed action without court supervision as described in *Prob. Code § 10580(a)* or *(b)* may be granted without requiring notice to personal representative and without cause being shown. *Prob. Code § 10588*

[u] Public Utility

Injunction is available to restrain violation of law by public utility. *Pub. Util. Code §§ 2102, 2103*

[v] Real Property

Court, by injunction after good cause shown, may restrain party in possession from doing any act which injures real property during foreclosure of mortgage on property or after levy and before transfer of possession in accordance with sale under levy. *Code Civ. Proc. § 745*

[w] Redemption

Court may restrain waste during time period allowed for redemption of property sold at execution sale. *Code Civ. Proc. § 729.090(c)*

[x] Roadside Vegetation Control

Any property owner may seek injunction to restrain violation of Property Owners' Roadside Vegetation Control Information Act of 1991 (*Food & Agric. Code § 5501 et seq.*). *Food & Agric. Code § 5509*

[y] Subdivisions

Aggrieved person, firm, or corporation may file suit in superior court of county in which any real property attempted to be subdivided, sold, leased, or financed in violation of *Gov. Code § 66410 et seq.* (provisions regulating subdivisions). *Gov. Code § 66499.33*

[z] Taxpayer Suits

Action to restrain illegal expenditure of, waste of, or injury to, estate, funds, or other property of a governmental entity. *Code Civ. Proc. § 526a*

[aa] Trademarks and Trade Names

Likelihood of injury to business reputation or of dilution of distinctive quality of mark registered under *Bus. & Prof. Code § 14200 et seq.* (registration and protection of trademarks) or a mark valid at common law is ground for injunctive relief notwithstanding absence of competition between parties or absence of confusion as to source of goods or services. *Bus. & Prof. Code § 14330*

Use without owner's consent or infringement of mark registered under state or federal law to sell, enhance commercial value of, or solicit purchase of, product or service is ground for injunction against that use or infringement. *Bus. & Prof. Code § 14335*

Owner of mark registered under *Bus. & Prof. Code § 14200 et seq.* (registration and protection of trademarks) may proceed by suit to enjoin manufacture, use, display, or sale of any counterfeits or imitations thereof. *Bus. & Prof. Code § 14340*

Court of competent jurisdiction may restrain by injunction use of name of any organization in commercial venture, trade, or business; in the solicitation of subscriptions for or sale of any newspaper, book, or other publication, or in solicitation of advertising in any newspaper, book, or other publication; or in solicitation of donations, aid, or other benefits by any other person, firm, or corporation representing directly or indirectly that such is sponsored, endorsed, or being offered by organization owning such name. *Bus. & Prof. Code § 14493*

[bb] Ultra Vires Acts of Corporation

Corporation's shareholder may enjoin ultra vires acts by corporation or its officers. *Corp. Code § 208(a)*

[cc] Unfair Competition and Trade Practices

Person injured by violation of *Bus. & Prof. Code § 16700 et seq.* (restraint of trade) is entitled to preliminary and permanent injunctive relief under same conditions and principles as generally applicable. *Bus. & Prof. Code § 16750(a)*

Any person or trade association may bring action to enjoin and restrain any violation of *Bus. & Prof. Code § 17000 et seq.* (unfair trade practices). *Bus. & Prof. Code § 17070*

Provisions regarding obtaining injunctive relief to restrain person from violating *Bus. & Prof. Code § 17000 et seq.* (unfair trade practices). *Bus. & Prof. Code §§ 17078-17081*

Preventive relief may be granted to enforce penalty or forfeiture in case of unfair competition. *Bus. & Prof. Code § 17202*

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. *Bus. & Prof. Code § 17203*

Injunctive relief is available to any consumer who suffers damage as result of unfair method of competition declared to be unlawful by *Civ. Code § 1770* (Consumers Legal Remedies Act). *Civ. Code § 1780(a)(2)*

Violation of *Civ. Code §§ 1797.8-1797.86* (relating to grey market goods) is unfair competition under *Bus. & Prof. Code § 17200* and is unfair method of competition or deceptive practice within meaning of *Civ. Code § 1770*. *Civ. Code § 1797.86*

Court of competent jurisdiction may restrain by injunction use of insignia or name of unincorporated association by person not entitled to use same. *Corp. Code § 21308*

[dd] Unlawful Motor Vehicle Subleasing

Injunction and other relief is authorized in case of unlawful motor vehicle subleasing, as defined in *Penal Code § 571*. *Civ. Code § 3343.5*

[ee] Water Rights

Injunctions in water diversion cases. *Code Civ. Proc. §§ 530, 532, 534*; *Water Code § 1052*

[10] Specific Situations When Injunctions Prohibited

Preventive relief is given in no other cases than those specified in *Civ. Code §§ 3366-3423*. *Civ. Code § 3274*

Preventive relief is not granted to enforce penalty or forfeiture or to enforce penal law with exception of case involving nuisance or as otherwise provided by law. *Civ. Code § 3369*

Situations in which injunctions not issued. *Civ. Code § 3423*; *see Code Civ. Proc. § 526*

Injunctions may not restrain offering for sale, or issuance of any municipal bonds for public improvements or public utilities. *Code Civ. Proc. § 526a*

Enumerated acts involving labor disputes are legal; no court or judge has jurisdiction to issue restraining order or preliminary or permanent injunction from doing them. *Code Civ. Proc. § 527.3*; *see Lab. Code § 1138.1-1138.5* (restrictions on granting injunctive relief when it is available in relation to labor disputes)

Injunctions by private persons may not enjoin reasonable and necessary operation in any industrial or commercial zone or airport when zones for such use have been established under authority of law. *Code Civ. Proc. § 731a*

Injury to formations bearing oil or gas is not grounds for enjoining secondary recovery operations if undertaking is given. *Code Civ. Proc. § 731c*

Injunctions is prohibited for purpose of preventing or enjoining collection of state taxes. *Rev. & Tax. Code §§ 4807, 6931*

[11] Uniform Foreign-Money Claims Act

Procedure for establishing under Uniform Foreign-Money Claims Act (*Code Civ. Proc. § 676 et seq.*) value of foreign-money claim in U.S. dollars for purposes of facilitating enforcement of provisional remedies. *Code Civ. Proc. § 676.11*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsExecutionsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsElementsGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral Overview

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§ 303.103 California Rules of Court

Procedure for obtaining preliminary injunction. *Cal. Rules of Ct., Rule 3.1150*

Description of property in petition for injunction to limit picketing, enjoin encroachment on real property, or protect easement. *Cal. Rules of Ct., Rule 3.1151*

Procedures for petition for injunctive relief under *Code Civ. Proc. § 527.6* (civil harassment) or under *Code Civ. Proc. § 527.8* (violence against employee). *Cal. Rules of Ct., Rule 3.1152*

Grounds for granting ex parte applications for orders. *Cal. Rules of Ct., Rule 3.1200 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsLabor & Employment LawWorkplace ViolenceReal Property LawAdjoining LandownersEncroachments

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§ 303.104 Decisions

[1] Appeal

[a] Appeal Negates Motion to Dismiss

Trial court may properly refuse to consider motion to dismiss preliminary injunction if there has been appeal from order granting preliminary injunction because it does not have jurisdiction under *Code Civ. Proc. § 916. Environmental Coalition of Orange County, Inc. v. AVCO Community Developers, Inc. (1974) 40 Cal. App. 3d 513, 525, 115 Cal. Rptr. 59*

[b] Considerations on Appeal

Trial court, when it denies application for preliminary injunction, is implicitly determining that plaintiff has failed to satisfy either or both "interim harm" and "likelihood of prevailing on the merits" factors; on appeal, question is whether trial court abused its discretion in ruling on both factors; appellate court, even if finds that trial court abused its discretion as to one factor, may affirm trial court's order if it finds no abuse of discretion as to other. *Cohen v. Board of Supervisors (1985) 40 Cal. 3d 277, 286-287, 219 Cal. Rptr. 467, 707 P.2d 840* ; *Savage v. Trammell Crow Co. (1990) 223 Cal. App. 3d 1562, 1571 n.2, 273 Cal. Rptr. 302*

When there is no issue of fact, an appellate court may determine whether granting a preliminary injunction was error as a matter of law. *Citizens to Save California v. California Fair Political (2006) 145 Cal. App. 4th 736, 746, 52 Cal. Rptr. 3d 17*

To the extent review of injunction depends on its constitutionality, court of appeals independently reviews whether trial court correctly interpreted and applied applicable constitutional principles; facts relevant to the constitutional analysis are reviewed de novo, independent of trial court's findings. *Evans v. Evans (2008) 162 Cal. App. 4th 1157, 1166, 76 Cal. Rptr. 3d 859*

If the grant or denial of a preliminary injunction depends on the construction of a statute and the matter is purely a question of law, the standard of review is not whether discretion was appropriately exercised, but whether the statute was correctly construed. *Strategix, Ltd v. Infocrossing West, Inc. (2006) 142 Cal. App. 4th 1068, 1072, 48 Cal. Rptr. 3d 614*

The law is well settled that the decision to grant a restraining order rests in the sound discretion of the trial court; a trial court will be found to have abused its discretion only when it has exceeded the bounds of reason or contravened the uncontradicted evidence. *Biosense Webster, Inc. v. Superior Court (2006) 135 Cal. App. 4th 827, 834, 37 Cal. Rptr. 3d 759*

To the extent trial court reviewed evidence to resolve disputed factual issues and draw inferences from presented facts, court of appeal reviews such factual findings under substantial evidence standard. *Thompson v. 10,000 RV Sales, Inc. (2005) 130 Cal. App. 4th 950, 964, 31 Cal. Rptr. 3d 18*

Appellate court applies abuse of discretion standard of review in reviewing lower court's order granting preliminary injunction. *ReadyLink Healthcare v. Cotton (2005) 126 Cal. App. 4th 1006, 1016, 24 Cal. Rptr. 3d 720*

Trial courts evaluate two interrelated factors when deciding whether to issue preliminary injunction; first is likelihood that plaintiff will prevail on merits at trial; second is interim harm plaintiff will likely sustain if injunction were denied as compared to harm defendant will likely suffer if injunction were issued; by balancing respective equities, trial court should conclude whether, pending trial on merits, defendant should or should not be restrained from exercising his or her claimed right; thus, on appeal from order granting preliminary injunction, question generally is whether both irreparable harm and likelihood of prevailing on merits are established. *California Correctional Peace Officers Assn. v. State of California (2000) 82 Cal. App. 4th 294, 302, 98 Cal. Rptr. 2d 302*

By granting preliminary injunction, trial court made preliminary evaluation of who was likely to be prevailing party based on evidence before it at that time; appellate court is called on to address only propriety of that preliminary injunction and whether particular evidence placed before trial court at time of its ruling adequately supports it. *Korean Philadelphia Presbyterian Church v. California Presbytery (2000) 77 Cal. App. 4th 1069, 1081, 92 Cal. Rptr. 2d 275*

Appeal from order granting preliminary injunction involves limited review of two interrelated factors evaluated by trial court in deciding whether to issue injunction; first is reasonable probability that plaintiff will prevail on merits at trial; second is interim harm plaintiff is likely to sustain if injunction is denied as compared to harm defendant is likely to suffer if preliminary injunction is granted. *Teachers Ins. & Annuity Assn. v. Furlotti (1999) 70 Cal. App. 4th 1487, 1493, 83 Cal. Rptr. 2d 455*

Question on typical appeal from order granting preliminary injunction is whether both the likelihood of prevailing on the merits and irreparable harm are established; if evidence conflicts, reviewing court must construe evidence in the light most favorable to trial court's decision; if no issue of fact is presented, however, reviewing court determines whether granting of preliminary injunction was error as matter of law; if party that sought preliminary injunction has no likelihood of prevailing at trial, trial court has committed an error of law and reviewing court must reverse order granting preliminary injunction. *Pro-Family Advocates v. Gomez (1996) 46 Cal. App. 4th 1674, 1680-1681, 54 Cal. Rptr. 2d 600*

Appeal from order granting preliminary injunction ordinarily involves very limited review of trial court's exercise of discretion concerning (1) likelihood of plaintiff ultimately prevailing, and (2) plaintiff's interim harm if preliminary injunction denied compared to defendant's interim harm if injunction granted pending final determination of merits; when likelihood of prevailing on merits depends on question of pure law rather than on evidence to be produced at trial, however, question of law can sometimes be determinative over the other factor, for example, when defendant shows that plaintiff's interpretation is wrong as a matter of law and thus plaintiff has no possibility of prevailing on the merits.

Kennedy, Cabot & Co. v. National Assn. of Securities Dealers, Inc. (1996) 41 Cal. App. 4th 1167, 1174-1175, 49 Cal. Rptr. 2d 66 .

On appeal from order granting preliminary injunction, appellate court may reach merits of any purely legal questions if propriety of trial court's finding regarding "interim harm" factor is undisputed; in these circumstances, appellate court is in as good a position to resolve issue as trial court would be after determination of appeal; moreover, in reviewing grant of preliminary injunction, appellate court is required to interpret facts in light most favorable to prevailing party and to indulge in all reasonable inferences in support of trial court's order. *Crespin v. Kizer (1990) 226 Cal. App. 3d 498, 507, 518, 276 Cal. Rptr. 571*

Party challenging grant of preliminary injunction is ordinarily required to demonstrate that trial court abused its discretion in evaluating interrelated factors of (1) likelihood that plaintiff will prevail on merits at trial, and (2) interim harm that plaintiff is likely to sustain if injunction were denied as compared to harm that defendant is likely to suffer if preliminary injunction were issued; however, when matter is solely question of violation of law, standard of review is not abuse of discretion but whether statutory or constitutional law was correctly interpreted and applied by trial court. *Bullock v. City and County of San Francisco (1990) 221 Cal. App. 3d 1072, 1094, 271 Cal. Rptr. 44*

On appeal from order granting or denying preliminary injunction, reviewing court does not ordinarily decide merits of complaint; instead, court decides only whether trial court abused its discretion in granting or denying injunction; but in appropriate case, as when there are no factual issues requiring resolution at trial and when issues have been extensively briefed, merits of action are permissibly determined on appeal from preliminary injunction order. *Wilkinson v. Times Mirror Corp. (1989) 215 Cal. App. 3d 1034, 1039-1040, 264 Cal. Rptr. 194*

[c] Effect of Appellate Decision

Neither trial court nor appellate court may undertake final adjudication of lawsuit in determining propriety of preliminary injunction; granting or denying preliminary injunction does not constitute adjudication of ultimate rights in controversy. *Hunt v. Superior Court (1999) 21 Cal. 4th 984, 999, 90 Cal. Rptr. 2d 236, 987 P.2d 705*

Appellate court should decline to address the potential merits or to determine whether a preliminary injunction should issue because it is the appellate court's role to review the trial court's exercise of its discretion in applying and weighing the factors, rather than to exercise discretion in the first instance. *Right Site Coalition v. Los Angeles Unified School Dist. (2008) 160 Cal. App. 4th 336, 344-346, 72 Cal. Rptr. 3d 678*

Appellate decision does not constitute final adjudication of ultimate rights in controversy, but rather only a determination of whether trial court abused its discretion based on record before it at time of ruling. *Shoemaker v. County of Los Angeles (1995) 37 Cal. App. 4th 618, 625-626, 43 Cal. Rptr. 2d 774*

Conclusion by appellate court that trial court did not abuse its discretion in denying preliminary injunction is no intimation of what judgment should be following trial on merits. *Socialist Workers 1974 California Campaign Committee v. Brown (1976) 53 Cal. App. 3d 879, 889, 125 Cal. Rptr. 915* ; *French Art Cleaners v. St. Bd. of Dry Cleaners (1949) 91 Cal. App. 2d 890, 897, 206 P.2d 25*

Appellate court in passing on propriety of issuing or dissolving preliminary injunction is not determining merits of case in advance of trial; court's decision as to propriety of granting writ is not intimation of what judgment of lower court should be at final hearing and not law of case in subsequent appeal from final judgment on merits. *Jomicra, Inc. v. California Mobile Home Dealers Assn. (1970) 12 Cal. App. 3d 396, 401, 90 Cal. Rptr. 696*

Person who pays fine in accordance with order of contempt for violating preliminary injunction pending appeal is

entitled to refund of fine when order granting injunction reversed on appeal. *Elysium, Inc. v. Superior Court (1968) 266 Cal. App. 2d 763, 765-766, 72 Cal. Rptr. 355*

If permanent injunction later granted after order granting or denying preliminary injunction appealed, then appeal dismissed as moot. *American Ins. Co. v. Gernand (1968) 262 Cal. App. 2d 300, 305, 68 Cal. Rptr. 810*

Reversal of order granting preliminary injunction restores parties to their status quo ante. *Sloan v. Court Hotel (1945) 72 Cal. App. 2d 308, 317, 164 P.2d 516*

[d] Law at Time of Appellate Decision Applicable

Law in effect when appellate court renders its opinion is required to be applied. *Sullivan v. Fox (1987) 189 Cal. App. 3d 673, 683, 235 Cal. Rptr. 5*

[e] Mandatory vs. Prohibitory Injunction

[i] Distinguishing Type of Injunctions

Reviewing court looks to substance of order to determine its real nature. *Feinberg v. One Doe Co. (1939) 14 Cal. 2d 24, 28, 92 P.2d 640* ; *Paramount Pictures Corp. v. Davis (1964) 228 Cal. App. 2d 827, 835, 39 Cal. Rptr. 791*

Prohibitory language of preliminary injunction did not control whether it was deemed by court to be mandatory or prohibitory because substance and not form is determining factor. *Davenport v. Blue Cross of California (1997) 52 Cal. App. 4th 435, 446-447, 60 Cal. Rptr. 2d 641*

Appellate court exercises greater scrutiny in determining whether abuse of discretion has occurred when trial court has granted preliminary injunction that mandates an affirmative act changing status quo; trial court abused discretion in granting preliminary injunction that required college to readmit student following college's refusal to do so because of unsatisfactory academic performance when student failed to demonstrate likelihood to prevail on merits. *Perez v. Hastings College (1996) 45 Cal. App. 4th 453, 456-457, 53 Cal. Rptr. 2d 1*

Plaintiff must show urgency and prospect of irreparable injury if mandatory injunction is requested. *Youngblood v. Wilcox (1989) 207 Cal. App. 3d 1368, 1372 n.1, 255 Cal. Rptr. 527*

Injunction may have incidental mandatory aspects but still be deemed prohibitory. *Youngblood v. Wilcox (1989) 207 Cal. App. 3d 1368, 1372 n.1, 255 Cal. Rptr. 527*

Injunction enjoining party from refusing to allow access to documents, with provision for court hearing if dispute arose over particular document, was prohibitory rather than mandatory injunction. *Franchise Tax Board v. Firestone Tire & Rubber Co. (1983) 139 Cal. App. 3d 843, 845-846, 189 Cal. Rptr. 99*

[ii] Effect of Appeal

Decree that is of dual nature is stayed with regard to mandatory features but not prohibitory features on appeal. *Food & Grocery Bureau v. Garfield (1941) 18 Cal. 2d 174, 177, 114 P.2d 579* ; *Ohaver v. Fenech (1928) 206 Cal. 118, 123, 273 P. 555*

[f] Preliminary Injunctions

[i] In General

Order modifying preliminary injunction is appealable order under *Code Civ. Proc. § 904.1(a)(6)*. *Pro-Family Advocates v. Gomez (1996) 46 Cal. App. 4th 1674, 1678 n.1, 54 Cal. Rptr. 2d 600*

Order denying preliminary injunction is appealable order. *Lubavitch Congregation v. City of Long Beach (1990) 217 Cal. App. 3d 1388, 1390, 266 Cal. Rptr. 513*

Failure to appeal provisions of preliminary injunction does not preclude later review of subsequent permanent injunction; final adjudication of ultimate rights in controversy normally occurs following hearing on merits, at which time trial court may enter permanent injunction, which is entirely new order from which appeal may be taken. *Chico Feminist Women's Health Center v. Scully (1989) 208 Cal. App. 3d 230, 253, 256 Cal. Rptr. 194*

Order dissolving injunction is expressly appealable, under former *Code Civ. Proc. § 904.1(f)* (*now see Code Civ. Proc. § 904.1(a)(6)*). *New TechDevelopments v. Bank of Nova Scotia (1987) 191 Cal. App. 3d 1065, 1068 n.1, 236 Cal. Rptr. 746*

In reviewing preliminary injunction on appeal, appellate court interprets facts in light most favorable to prevailing party and indulges all intendments and reasonable inferences in support of trial court's order. *MCA Records, Inc. v. Newton-John (1979) 90 Cal. App. 3d 18, 21, 153 Cal. Rptr. 153*

[ii] Abuse of Discretion Required for Reversal

Generally, ruling on application for preliminary injunction rests in sound discretion of trial court; exercise of that discretion will not be disturbed on appeal absent showing that it has been abused. *Hunt v. Superior Court (1999) 21 Cal. 4th 984, 999, 90 Cal. Rptr. 2d 236, 987 P.2d 705*

Order granting, denying, dissolving, or refusing to dissolve preliminary injunction may be modified or dissolved on appeal only if abuse of discretion present. *King v. Meese (1987) 43 Cal. 3d 1217, 1226, 240 Cal. Rptr. 829, 743 P.2d 889* ; *Continental Baking Co. v. Katz (1968) 68 Cal. 2d 512, 527, 67 Cal. Rptr. 761, 439 P.2d 889*

Order granting preliminary injunction will be reversed if it coerces defendant into performing mandatory act that might not be ordered after trial. *Hagen v. Beth (1897) 118 Cal. 330, 331, 50 P. 425* ; *Bo Kay Chan v. Gerdon Land Co. (1951) 103 Cal. App. 2d 724, 726-728, 230 P.2d 1*

If the grant or denial of a preliminary injunction depends on the construction of a statute and the matter is purely a question of law, the standard of review is not whether discretion was appropriately exercised, but whether the statute was correctly construed. *Strategix, Ltd v. Infocrossing West, Inc. (2006) 142 Cal. App. 4th 1068, 1072, 48 Cal. Rptr. 3d 614*

The law is well settled that the decision to grant a restraining order rests in the sound discretion of the trial court; a trial court will be found to have abused its discretion only when it has exceeded the bounds of reason or contravened the uncontradicted evidence. *Biosense Webster, Inc. v. Superior Court (2006) 135 Cal. App. 4th 827, 834, 37 Cal. Rptr. 3d 759*

Appellate court applies abuse of discretion standard of review in reviewing lower court's order granting preliminary injunction. *ReadyLink Healthcare v. Cotton (2005) 126 Cal. App. 4th 1006, 1016, 24 Cal. Rptr. 3d 720*

Generally, preliminary injunction is reviewed based on abuse of discretion. However, where likelihood of prevailing on merits depends on question of law or construction of statute, appellate court review is de novo. Teamsters Local 856 v. *Priceless, LLC (2003) 112 Cal. App. 4th 1500, 1509-1510, 5 Cal. Rptr. 3d 847*

Ordinarily, court of appeal examines trial court's denial of preliminary injunction for abuse of discretion in evaluating the interrelated factors of the plaintiff's likelihood of success on merits and magnitude of interim harm to plaintiff and defendant. However, when trial court's decision is based solely on question of law, court of appeal considers issue de novo. *Los Angeles County Association of Environmental Health Specialists v. County of Los Angeles (2002) 102 Cal. App. 4th 1112, 1117, n.4, 126 Cal. Rptr. 2d 300*

Decision to grant preliminary injunction rests in trial court's sound discretion and will not be reversed unless court has exceeded all bounds of reason or contravened uncontradicted evidence. *California Correctional Peace Officers Assn. v. State of California (2000) 82 Cal. App. 4th 294, 302, 98 Cal. Rptr. 2d 302*

On appeal, preliminary injunction will be overturned only on showing abuse of discretion. *Trader Joe's Co. v. Progressive Campaigns, Inc. (1999) 73 Cal. App. 4th 425, 430-431, 86 Cal. Rptr. 2d 442*

When no factual dispute and review of preliminary injunction involves solely question of law as to whether challenged portions of the preliminary injunction violate constitutional law, standard of review not abuse of discretion standard, but rather independent review standard; appellate court independently reviews challenged portions of injunction to determine whether trial court correctly interpreted and applied statutory and constitutional law. *San Diego Unified Port Dist. v. U.S. Citizens Patrol (1998) 63 Cal. App. 4th 964, 969, 74 Cal. Rptr. 2d 364*

When issuance of preliminary injunction depends on construction of statute, and matter is purely question of law, standard of review is not whether discretion was appropriately exercised, but whether statute was correctly construed and appellate court reviews de novo order granting preliminary injunction. *Yes on Measure A v. City of Lake Forest (1997) 60 Cal. App. 4th 620, 623, 70 Cal. Rptr. 2d 517*

Denial of injunction within trial court's sound discretion and absent abuse of discretion denial will be upheld on appeal. *Cisneros v. U. D. Registry, Inc. (1995) 39 Cal. App. 4th 548, 574, 46 Cal. Rptr. 2d 233*

Appeal from order granting preliminary injunction involves limited review of two factors, likelihood of success on merits and interim harm; appellate court must reverse if trial court abused discretion on either factor. *Shoemaker v. County of Los Angeles (1995) 37 Cal. App. 4th 618, 625, 43 Cal. Rptr. 2d 774*

Granting or denying preliminary injunction on verified complaint, together with oral testimony or affidavits rests in sound discretion of trial court and its order will not be interfered with on appeal except for abuse of discretion. *Southern Christian Leadership Conference v. Al Malaikah Auditorium Co. (1991) 230 Cal. App. 3d 207, 223, 281 Cal. Rptr. 216*

When preliminary injunction mandates affirmative act that changes status quo, appellate court scrutinizes it even more closely for abuse of discretion than it otherwise does. *Board of Supervisors v. McMahon (1990) 219 Cal. App. 3d 286, 295, 268 Cal. Rptr. 219*

Trial court that dissolved preliminary injunction did not commit abuse of discretion when initial issuance was contrary to statutory law. *New Tech Developments v. Bank of Nova Scotia (1987) 191 Cal. App. 3d 1065, 1073, 236 Cal. Rptr. 746*

[iii] Burden on Appellant

The burden rests with the party challenging an injunction to make a clear showing of an abuse of discretion. *Biosense Webster, Inc. v. Superior Court (2006) 135 Cal. App. 4th 827, 834, 37 Cal. Rptr. 3d 759*

Party challenging injunction bears burden of showing clear abuse of discretion or error of law. *California Correctional Peace Officers Assn. v. State of California (2000) 82 Cal. App. 4th 294, 302, 98 Cal. Rptr. 2d 302*

Burden is on party challenging trial court's ruling on application for injunction to make clear showing of abuse of discretion. *Teachers Ins. & Annuity Assn. v. Furlotti (1999) 70 Cal. App. 4th 1487, 1493, 83 Cal. Rptr. 2d 455*

Burden rests with appellant to make clear showing of abuse of trial court's discretion in denying or granting preliminary injunction. *American Credit Indemnity Co. v. Sacks (1989) 213 Cal. App. 3d 622, 629-630, 262 Cal. Rptr. 92* ; *Socialist Workers 1974 California Campaign Committee v. Brown (1975) 53 Cal. App. 3d 879, 889, 125 Cal. Rptr. 915*

[iv] Facts Involved

If evidence conflicts, appellate court must construe it in light most favorable to trial court's decision. *California Correctional Peace Officers Assn. v. State of California (2000) 82 Cal. App. 4th 294, 302, 98 Cal. Rptr. 2d 302*

Trial court abuses discretion if it exceeds bounds of reason or contravenes uncontradicted evidence; if evidence conflicts, reviewing court must construe evidence in light most favorable to trial court's decision. *Pro-Family Advocates v. Gomez (1996) 46 Cal. App. 4th 1674, 1680, 54 Cal. Rptr. 2d 600*

On review of order granting or denying preliminary injunction, appellate court examines evidence in light most favorable to prevailing party, drawing all reasonable inferences in his or her favor, and resolving conflicts in evidence in favor of trial court's order. *People ex rel. Gillespie v. Neu (1989) 209 Cal. App. 3d 1066, 1072-1073, 257 Cal. Rptr. 778* ; *MCA Records, Inc. v. Newton-John (1979) 90 Cal. App. 3d 18, 21, 153 Cal. Rptr. 153*

[v] Facts Not Involved

Appellate court determines whether granting of preliminary injunction was error as matter of law if no issue of fact is presented. *California Correctional Peace Officers Assn. v. State of California (2000) 82 Cal. App. 4th 294, 302, 98 Cal. Rptr. 2d 302*

Question on typical appeal from order granting preliminary injunction is whether both likelihood of prevailing on the merits and irreparable harm are established; if party that sought preliminary injunction has no likelihood of prevailing at trial, trial court has committed error of law and reviewing court must reverse order granting the preliminary injunction. *Pro-Family Advocates v. Gomez (1996) 46 Cal. App. 4th 1674, 1681, 54 Cal. Rptr. 2d 600*

Appellate court is not bound by abuse of discretion standard when it reviews trial court's decision to grant injunction based solely on interpretation of statute. *Thornton v. Carlson (1992) 4 Cal. App. 4th 1249, 1255, 6 Cal. Rptr. 2d 375*

When issue of fact is not present, appellate court is permitted to determine whether granting of preliminary injunction was error as matter of law. *Environmental Coalition of Orange County, Inc. v. AVCO Community Developers, Inc. (1974) 40 Cal. App. 3d 513, 521, 115 Cal. Rptr. 59*

[g] Stay of Order or Decree

Stay orders issued by appellate court in connection with appellants' petition for writ of supersedeas do not alter normal standard of judicial review of granting of preliminary injunction; stay orders do not reflect determination of case merits but are designed only to maintain status quo during pendency of appeal. *Voorhies v. Greene (1983) 139 Cal. App. 3d 989, 995, 189 Cal. Rptr. 132*

Postjudgment injunction is proper to maintain status quo of parties pending appeal from judgment. *Addiego v. Hill (1968) 268 Cal. App. 2d 280, 289-290, 73 Cal. Rptr. 901*

Superior court has power to reinstate preliminary injunction pending appeal on ground appeal from judgment does not deprive court of jurisdiction and power to preserve subject of litigation until final determination of appeal. *Hayes v. Risk (1967) 255 Cal. App. 2d 613, 627-628, 64 Cal. Rptr. 36*

[h] Temporary Restraining Orders (TRO)

Notwithstanding that they have become moot, courts made exception to consider issues raised on appeal with regard to ex parte restraining orders. *H-CHH Associates v. Citizens for Representative Government (1987) 193 Cal. App. 3d 1193, 1219, 238 Cal. Rptr. 841*

TRO is separately appealable. *McLellan v. McLellan (1972) 23 Cal. App. 3d 343, 357, 100 Cal. Rptr. 258* ; *David v. Goodman (1948) 89 Cal. App. 2d 162, 170, 200 P.2d 568*

[2] Attachment Compared to Injunction

Injunction is not appropriate when it achieves same result as prejudgment attachment without meeting requirements for attachment. *Doyka v. Superior Court (1991) 233 Cal. App. 3d 1134, 1136-1137, 285 Cal. Rptr. 14*

[3] Attorney's Fees

Plaintiffs is entitled to attorney's fees under "private attorney general doctrine" (*Code Civ. Proc. § 1021.5*; *42 U.S.C. § 1988*) for obtaining preliminary injunction to prevent reporting of immigration status of public school children to immigration service under state law that was later repealed. *Maria P. v. Riles (1987) 43 Cal. 3d 1281, 1290-1293, 240 Cal. Rptr. 872, 743 P.2d 932*

Reasonable attorney's fees are treated as item of damages recoverable on bond when either temporary restraining order or preliminary injunction is regular on its face and requires legal services to obtain its dissolution. *Allen v. Pitchess (1973) 36 Cal. App. 3d 321, 327, 111 Cal. Rptr. 658* ; *Russell v. United Pacific Ins. Co. (1963) 214 Cal. App. 2d 78, 88-89, 29 Cal. Rptr. 346*

Damages recoverable on temporary restraining order bond include reasonable value of legal services to procure dissolution of order and to resist successfully application for issuance of preliminary injunction; those damages are not included legal services incurred to defend main action after dissolution of temporary restraining order. *Allen v. Pitchess (1973) 36 Cal. App. 3d 321, 327-328, 111 Cal. Rptr. 658*

Fixing of reasonable fee rests in trial judge's discretion and is not to be disturbed on appeal unless its allowance constitutes palpable and plain abuse of discretion. *Russell v. United Pacific Ins. Co. (1963) 214 Cal. App. 2d 78, 89, 29 Cal. Rptr. 346*

[4] Defenses

[a] Changed Circumstances

Trial court erred in dismissing plaintiffs' request for injunctive relief, which sought to prevent defendants from making warrantless entry into owner's property to impound dog for violation of leash law in violation of *Fourth Amendment* rights of pet and property owners in city, because although there was no dispute that dog had died in interim, defendants had not addressed whether plaintiffs owned some other pet subject to leash law and if that possibility existed, request for injunction was not moot. *Conway v. Pasadena Humane Society (1996) 45 Cal. App. 4th 163, 179-180, 52 Cal. Rptr. 2d 777*

Denial of injunctive relief is justified when changed circumstances render the remedy unnecessary. *East Bay Mun. Utility Dist. v. Department of Forestry & Fire Protection (1996) 43 Cal. App. 4th 1113, 1126, 51 Cal. Rptr. 2d 299*

In action asking that restaurant be enjoined from operation so long as handicapped persons were not provided full access to accommodations, trial court finding that action was moot was proper because restaurant was no longer in business, was insolvent, and was dissolved as corporation. *Donald v. Cafe Royale, Inc. (1990) 218 Cal. App. 3d 168, 183-184, 266 Cal. Rptr. 804*

Dismissal of action seeking to enjoin city from enforcing unconstitutional ordinance was proper on ground of mootness when city agreed in good faith not to enforce ordinance. *Lee v. Gates (1983) 141 Cal. App. 3d 989, 993-994, 190 Cal. Rptr. 682*

[b] Completed Acts

Injunction lies only to prevent threatened injury and has no application to wrongs that have been completed. *Griffith v. Department of Public Works (1959) 52 Cal. 2d 848, 853, 345 P.2d 469* ; *Gold v. Los Angeles Democratic League (1975) 49 Cal. App. 3d 365, 372, 122 Cal. Rptr. 732*

The purpose of injunctive relief is to prevent future or threatened harm; it must appear with reasonable certainty that the wrongful acts will be continued or repeated. *O'Toole v. Superior Court (2006) 140 Cal. App. 4th 488, 513, 44 Cal. Rptr. 3d 531*

Termination of physician without pre-termination hearing was continuing harm that could be prevented by granting injunction reinstating him and ordering hearing. *Sahlolbei v. Providence Healthcare, Inc. (2003) 112 Cal. App. 4th 1137, 1156-1157, 5 Cal. Rptr. 3d 598*

Injunctive relief lies only to prevent threatened injury and has no application to completed wrongs; it should neither serve as punishment for past acts, nor be exercised in absence of any evidence establishing reasonable probability acts will be repeated in future; indeed, change of circumstances at time of hearing, rendering injunctive relief moot or unnecessary, justifies denial of request; moreover, not only may injunctive relief be denied when defendant voluntarily discontinued wrongful conduct, there exists no equitable reason for ordering it when defendant has in good faith discontinued proscribed conduct; thus to authorize issuance of injunction, it must appear with reasonable certainty that wrongful acts will be continued or repeated. *Scripps Health v. Marin (1999) 72 Cal. App. 4th 324, 332-333, 85 Cal. Rptr. 2d 86*

When acts discontinued in good faith, court of equity will not grant injunction to prevent future acts when no evidence that acts likely in future to be repeated; evaluation of probability of recurrence of complained of acts lies in trial court's discretion. *City of Vernon v. Central Basin Mun. Water Dist. (1999) 69 Cal. App. 4th 508, 517-518, 81 Cal. Rptr. 2d 650*

Injunction should not issue as remedy for past acts that are not likely to recur; injunction properly issues only when right to be protected is clear, injury is impending and so immediately likely that only issuance of injunction will avoid it. *East Bay Mun. Utility Dist. v. Department of Forestry & Fire Protection (1996) 43 Cal. App. 4th 1113, 1126, 51 Cal. Rptr. 2d 299*

Injunction should not be granted as punishment for past acts in absence of any evidence that acts likely to be repeated in future; injunction may be denied when defendant's wrongful conduct voluntarily ceases. *Cisneros v. U. D. Registry, Inc. (1995) 39 Cal. App. 4th 548, 574, 46 Cal. Rptr. 2d 233*

Equity acts in present tense not in past tense. *Engle v. City of Oroville (1965) 238 Cal. App. 2d 266, 270, 47 Cal. Rptr. 630*

Injunctive power is not used as punishment for past acts unless there is evidence they will probably recur; no injunctive relief is available to prevent in future that which in good faith has been discontinued. *Mallon v. City of Long Beach (1958) 164 Cal. App. 2d 178, 190, 330 P.2d 423*

[c] Doctrine of Balancing of Conveniences

Proof of irreparable injury is necessary element of defense based on balancing of conveniences because court's action in withholding relief from plaintiff amounts to exercise of right of eminent domain in private person's favor. *Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 200, 323 P.2d 1001*

Good faith of party against whom injunction is sought, proportionate hardships to parties, delay in seeking mandatory injunction, and whether plaintiff will suffer irreparable injury are considered in balancing equities to grant injunction. *Bennett v. Lew (1984) 151 Cal. App. 3d 1177, 1184-1185, 199 Cal. Rptr. 241*

Factors to be considered by court in encroachment case when balancing conveniences. *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 562-563, 250 P.2d 660*

[d] First Amendment Rights Infringed

Following a trial at which it is determined that the plaintiff defamed the defendant, the court may issue an injunction prohibiting the defendant from repeating the statements determined to be defamatory. *Balboa Island Village Inn, Inc. v. Lemen (2007) 40 Cal. 4th 1141, 1161, 57 Cal. Rptr. 3d 320, 156 P.3d 339*

Order prohibiting party from publishing false statements is unconstitutional prior restraint. *Evans v. Evans (2008) 162 Cal. App. 4th 1157, 1167-1168, 76 Cal. Rptr. 3d 859*

Speech not protected by *First Amendment* when between purely private parties, about purely private parties, on matters of purely private interest. *Brekke v. Wills (2005) 125 Cal. App. 4th 1400, 1409, 23 Cal. Rptr. 3d 609*

Freedom of association does not trump parent's right to direct and control activities of minor child, including with whom child may associate. *Brekke v. Wills (2005) 125 Cal. App. 4th 1400, 1410, 23 Cal. Rptr. 3d 609*

Injunction precluding city council members from engaging in acts designed to influence city administrative staff through direct communication with staff with respect to zoning enforcement matters violated *First Amendment*. *Levy v. City of Santa Monica (2004) 114 Cal. App. 4th 1252, 1261-1262, 8 Cal. Rptr. 3d 507*

Injunction that bound anyone with actual notice of it was content-based and violated *First Amendment* rights of abortion protestors. *Planned Parenthood Golden Gate v. Foti (2003) 107 Cal. App. 4th 345, 354-355, 132 Cal. Rptr. 2d 46*

Injunction prohibiting corporate director from disclosing contents of corporate records was unlawful prior restraint on free speech, absent allegations that director would commit tort against corporation. *Saline v. Commonwealth Energy Corporation (2002) 100 Cal. App. 4th 909, 915-916, 122 Cal. Rptr. 2d 813*

In trespass action, trial court's order granting preliminary injunction banning defendants from soliciting signatures for initiative petitions at plaintiff's store during pendency of action affirmed; under facts, state constitutional right to engage in expressive activity on private property, as recognized in *Robins v. Pruneyard Shopping Center (1979) 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341* , did not protect defendants' challenged activity; "heckler's veto," which refers to hostile reaction to disfavored viewpoint, was not involved. *Trader Joe's Co. v. Progressive Campaigns, Inc. (1999) 73 Cal. App. 4th 425, 430-438, 86 Cal. Rptr. 2d 442*

Right to free speech protected from censorship by hostile reaction ("heckler's veto"); preliminary injunction that subjected defendant's right to engage in protected speech to censorship of group that disagreed with its content constituted impermissible "heckler's veto"; even if there were basis to enjoin certain conduct of defendant's members, injunction went much further than necessary to provide relief sought by plaintiff. *San Diego Unified Port Dist. v. U.S. Citizens Patrol (1998) 63 Cal. App. 4th 964, 970-971, 74 Cal. Rptr. 2d 364*

Denial of preliminary injunction, which would allow cable television company to reconnect subscribers in apartment complex who had been disconnected by landlord in breach of contract, was proper; cable company did not have right to connect equipment under *U.S. Const., amend. I*, partly because intrusion of connection would amount to taking of owner's property without compensation. *Cox Cable San Diego, Inc. v. Bookspan (1987) 195 Cal. App. 3d 22, 25-30, 240 Cal. Rptr. 407*

[e] Laches

In action for mandamus and injunctive relief to compel county to set aside decision approving specific plan for condominium construction, laches was defense even though suit was brought within statutory time limits, when plaintiff knew of proposed project two and one half years before filing suit and when developers substantially and justifiably relied to their detriment on plan's approval. *Holt v. County of Monterey (1982) 128 Cal. App. 3d 797, 801, 180 Cal. Rptr. 514*

Defense of laches in trademark injunction action was unavailable to defendants engaging in intentional and continuing invasion of plaintiff's rights despite knowledge of plaintiff's objection to their use of trade name during entire period of infringement; court was required to weigh equities in determining application of defense. *California Western School of Law v. California Western University (1981) 125 Cal. App. 3d 1002, 1006, 178 Cal. Rptr. 685*

No hard and fast rule exists with regard to length of time that operates to bring about laches. *Lusk v. Krejci (1960) 187 Cal. App. 2d 553, 556, 9 Cal. Rptr. 703*

[f] Legal Remedy Adequate

Injunction is not granted when plaintiff has right to seek writ of mandate. *Moore v. Superior Court (1936) 6 Cal. 2d 421, 423-424, 57 P.2d 1314*

Injunction is not granted when plaintiff has failed to exhaust administrative remedy. *Teeter v. Los Angeles (1930) 209*

Cal. 685, 687, 290 P. 11 ; *San Joaquin and Kings River Canal & Irr. Co. v. County of Stanislaus (1908) 155 Cal. 21, 29, 99 P. 365*

Injunctive or declaratory relief was not proper when petitioner had statutory basis to file appeal, move for new trial, or move to vacate or modify judgment but failed to do so. *Lezama v. Justice Court (1987) 190 Cal. App. 3d 15, 21, 235 Cal. Rptr. 238*

Injunction is not granted when plaintiff has right to pursue legal remedy of quo warranto. *Hallinan v. Mellon (1963) 218 Cal. App. 2d 342, 344-348, 32 Cal. Rptr. 446* ; *Somo v. Superior Court (1933) 135 Cal. App. 584, 586, 27 P.2d 790*

Injunction is not granted when plaintiff has right to pay tax under protest with subsequent right to file claim and sue for refund. *Helms Bakeries v. St. Bd. Equalization (1942) 53 Cal. App. 2d 417, 421-425, 128 P.2d 167*

[g] Public Interest

Where plaintiff seeks to enjoin public officers and agencies in the performance of their duties, the public interest must be considered. *O'Connell v. Superior Court (2006) 141 Cal. App. 4th 1452, 1471, 47 Cal. Rptr. 3d 147*

Preliminary injunction requiring state-maintained visitor center in nuclear weapons research facility to allow petitioners to distribute literature opposing such facility was properly granted if administrative inconvenience caused to respondent by granting injunction was greatly outweighed by infringement of petitioners' constitutionally protected rights if injunction were denied. *U. C. Nuclear Weapons Labs Conversion Project v. Lawrence Livermore Laboratory (1984) 154 Cal. App. 3d 1157, 1160, 1172, 201 Cal. Rptr. 837*

Courts of equity are permitted to go further in giving and withholding injunctive relief in furtherance of public interest than when only private interests are involved. *Socialist Workers 1974 California Campaign Committee v. Brown (1975) 53 Cal. App. 3d 879, 889, 125 Cal. Rptr. 915*

[h] Relief Unnecessary or Ineffectual; No Threatened Act or Recurrence

Injunctive relief is not granted when events have rendered this relief unnecessary or ineffectual. *Paul v. Milk Depots, Inc. (1964) 62 Cal. 2d 129, 133, 41 Cal. Rptr. 468, 396 P.2d 924*

Injunctions cannot be predicated on the proponent's fear of something that may happen in the future. *Connerly v. Schwarzenegger (2007) 146 Cal. App. 4th 739, 750, 53 Cal. Rptr. 3d 203*

Injunction may not issue in vacuum based on proponents' fears about something that may happen in future; it must be supported by actual evidence that there is realistic prospect that party enjoined intends to engage in activity to be prohibited; preliminary injunction held to be overbroad and dissolved, and case remanded to trial court concerning portion of preliminary injunction that enjoined defendants and others "and all persons acting in concert or participating with them" from coming onto church's property or "interfering" with worship services or other church functions "at all times and at all places" to determine if (1) pressing need to prevent physical trespass still existed and (2) narrower language concerning this portion of preliminary injunction could be formulated consistent with court's opinion. *Korean Philadelphia Presbyterian Church v. California Presbytery (2000) 77 Cal. App. 4th 1069, 1083-1085, 92 Cal. Rptr. 2d 275*

When acts discontinued in good faith, court of equity will not grant injunction to prevent future acts when no evidence that acts likely in future to be repeated; evaluation of probability of recurrence of complained of acts lies in trial court's

discretion. *City of Vernon v. Central Basin Mun. Water Dist. (1999) 69 Cal. App. 4th 508, 517-518, 81 Cal. Rptr. 2d 650*

Denial of injunction justified on changed circumstances rendering injunctive relief moot or unnecessary; injunction should not be granted as punishment for past acts absent any evidence that acts are likely to be repeated in future; injunction may be denied when defendant's wrongful conduct voluntarily ceases. *Cisneros v. U. D. Registry, Inc. (1995) 39 Cal. App. 4th 548, 574, 46 Cal. Rptr. 2d 233*

Injunctive relief is inappropriate if there is no reasonable probability that past acts complained of will recur. *Phipps v. Saddleback Valley Unified School Dist. (1988) 204 Cal. App. 3d 1110, 1117, 251 Cal. Rptr. 720*

Injunction is not proper remedy to prevent person from doing act that he or she has never undertaken or threatened to undertake. *San Francisco v. Market S. R. Co. (1950) 95 Cal. App. 2d 648, 655, 213 P.2d 780*

[5] Demurrer to Complaint

Complaint fails to state cause of action for injunctive relief if it alleges only general conclusions not warranted by any pleading of facts. *E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1*

Complaint treated as affidavit and its sufficiency tested by same rules that are applicable to oral testimony; conclusions are not competent to justify issuance of injunction simply because they might stand as a matter of pleading. *Bank of America v. Williams (1948) 89 Cal. App. 2d 21, 23, 200 P.2d 151*

[6] Dissolution or Modification

Rule that superior court should modify or vacate injunction on motion if it finds changes in facts or law or if ends of justice would be served applies to preliminary as well as permanent injunctions. *New Tech Developments v. Bank of Nova Scotia (1987) 191 Cal. App. 3d 1065, 1072, 236 Cal. Rptr. 746*

Even though jurisdiction to modify injunction is inherent, better practice is to include specific reservation of jurisdiction to modify injunction in judgment. *Components for Research, Inc. v. Isolation Products, Inc. (1966) 241 Cal. App. 2d 726, 731, 50 Cal. Rptr. 829*

[7] Enforcement of Injunction

No contempt is possible for violating mandatory injunction stayed during course of appeal. *Stewart v. Superior Court (1893) 100 Cal. 543, 547, 35 P. 156* ; *Johnston v. Superior Court (1957) 148 Cal. App. 2d 966, 969-971, 307 P.2d 946*

[8] Enforcement of Undertaking

[a] In General

Because cause of action against sureties is predicated on breach of contract, no element of wrongful act or bad motive is necessary. *Russell v. United Pacific Ins. Co. (1963) 214 Cal. App. 2d 78, 87, 29 Cal. Rptr. 346*

All that is necessary to recover on injunction bond is final judgment dissolving injunction plus proof of damage; dissolution of injunction fulfills condition of bond. *Edwards v. Container Kraft Carton & Paper Supply Co. (1958) 161 Cal. App. 2d 752, 761, 327 P.2d 622*

[b] Damages Available

Right to recover damages under former *Code Civ. Proc. § 535* (*now see Code Civ. Proc. § 996.440*) for improperly issued injunction was not available when plaintiffs posted no bond, undertaking, or deposit; defendants were limited to common law remedies by way of action for abuse of process or malicious prosecution. *Wallace v. Miller (1983) 140 Cal. App. 3d 636, 643-645, 189 Cal. Rptr. 637*

Damages recoverable on preliminary injunction or temporary restraining order are those that appear with reasonable certainty to be necessary and proximate result of injunction, not exceeding bond's penal sum. *Allen v. Pitchess (1973) 36 Cal. App. 3d 321, 327, 111 Cal. Rptr. 658*

Measure of damage varies with circumstances of case; arbitrary rules do not govern; equitable principles apply; damages allowed are required to furnish just and reasonable compensation for loss sustained. *Surety Sav. & Loan Assn. v. National Automobile & Cas. Ins. Co. (1970) 8 Cal. App. 3d 752, 757, 87 Cal. Rptr. 572*

Plaintiff seeking damages from surety on injunction bond is not limited to damages accruing during time injunction was operative; plaintiff is entitled to damages flowing directly from wrongful injunction for period of time beyond date of injunction's dissolution. *Russell v. United Pacific Ins. Co. (1963) 214 Cal. App. 2d 78, 88, 29 Cal. Rptr. 346*

[c] No Liability for Failure to Post Bond

Failure to post undertaking merely precludes litigant from obtaining injunction; it does not subject him or her to liability for damages that may accrue while opponent allows injunction to stand; remedy in these circumstances is to obtain injunction's dissolution. *Dickey v. Rosso (1972) 23 Cal. App. 3d 493, 499, 100 Cal. Rptr. 358*

[d] Terms of Bond Limit Liability

Surety's liability is measured by terms of bond. *Wilshire Mortgage Corp. v. Graybeal Co. (1940) 41 Cal. App. 2d 1, 6, 105 P.2d 996*

[e] Waiver of Right to Damages

Defendants in suit for injunction waive their rights under surety bond when they sign stipulation dismissing suit without insisting either that plaintiff voluntarily dismiss suit or that court determine whether injunction was properly granted when bond stipulates that surety would not be liable without superior court finally deciding whether plaintiff entitled to temporary restraining order or to preliminary injunction. *Wilshire Mortgage Corp. v. Graybeal Co. (1940) 41 Cal. App. 2d 1, 6-7, 105 P.2d 996*

[9] General Grounds When Injunctions Available

[a] Inadequacy of Legal Remedy

NOTE:
For specific case examples of when injunctions have been held to be proper, see [19], *below*.

Extreme difficulty in ascertaining damages is a factor favoring injunctive relief. *Huong Que, Inc. v. Luu, 150 Cal. App. 4th 400, 417-418, 58 Cal. Rptr. 3d 527*

To obtain preliminary injunctive relief plaintiff is required to show inadequacy of other remedies at law. *Gleaves v. Waters (1985) 175 Cal. App. 3d 413, 417, 220 Cal. Rptr. 621* ; *In re Marriage of Van Hook (1983) 147 Cal. App. 3d 970, 984, 195 Cal. Rptr. 541*

[b] Irreparable Injury

Term "irreparable injury" as applied to granting of injunction is defined as that species of damages, whether great or small, that ought not to be submitted to on the one hand or inflicted on the other. *Anderson v. Souza (1952) 38 Cal. 2d 825, 834, 243 P.2d 497* ; *Wind v. Herbert (1960) 186 Cal. App. 2d 276, 285, 8 Cal. Rptr. 817*

Elements of cause of action for injunctive relief are tort or other wrongful act constituting cause of action, plus irreparable injury, that is, factual showing that wrongful act constitutes actual or threatened injury to property or personal rights that cannot be compensated by ordinary damage award. *Brownfield v. Daniel Freeman Marina Hospital (1989) 208 Cal. App. 3d 405, 410, 256 Cal. Rptr. 240*

Irreparable harm suffered by plaintiff through permanent loss of potential subscriber is sufficient to support issuance of preliminary injunction. *National Subscription Television v. Formula International, Inc. (1984) 153 Cal. App. 3d 308, 315, 200 Cal. Rptr. 213*

Under definition of irreparable injury, trial judge is warranted in using injunctive power against wrong that is deemed insufferable because it constitutes an overbearing assumption by one person of superiority and domination over rights and property of others. *Fretz v. Burke (1967) 247 Cal. App. 2d 741, 746, 55 Cal. Rptr. 879*

[c] Personal Services Contract for Unique Services

Term "minimum compensation" referred to in *Civ. Code § 3423(e)* and *Code Civ. Proc. § 526(b)(5)* does not mean "net profits"; hence, preliminary injunction to restrain defendant from recording for anyone other than plaintiff pending determination of lawsuit was proper when, under terms of contract, plaintiff advanced to defendant nonreturnable sum of $200,000 per year and defendant was to bear cost of producing recordings, notwithstanding cost of producing recordings exceeded $194,000 per year. *MCA Records, Inc. v. Newton-John (1979) 90 Cal. App. 3d 18, 22, 153 Cal. Rptr. 153* (construing former *Civ. Code § 3423(5)* and *Code Civ. Proc. § 526* second subd. (5); *now see Civ. Code § 3423(e)* and *Code Civ. Proc. § 526(b)(5)*)

Breach of agreement to transfer stock of peculiar value may be enjoined because it may be specifically enforced. *Gilfallan v. Gilfallan (1914) 168 Cal. 23, 26, 141 P. 623* ; *Steinmeyer v. Warner Cons. Corp. (1974) 42 Cal. App. 3d 515, 519, 116 Cal. Rptr. 57*

[d] Preventing Multiplicity of Suits

Injunction is not available to prevent multiple suits absent evidence that the controversies involve the same parties, subject matter, or facts. *Planned Parenthood Golden Gate v. Foti (2003) 107 Cal. App. 4th 345, 358, 132 Cal. Rptr. 2d 46*

Injunction is necessary to consolidate cases to avoid unseemly conflict between courts that might arise if they were free to make contradictory decisions relating to same controversy. *Rynsburger v. Dairymen's Fertilizer Coop., Inc. (1968) 266 Cal. App. 2d 269, 279, 72 Cal. Rptr. 102*

Two classes of cases in which injunction issued to prevent multiplicity of actions are those in which many claims consolidated into one action, and those in which vexatious suits filed on causes of action that have been settled by former adjudication. *Verdier v. Verdier (1962) 203 Cal. App. 2d 724, 735, 22 Cal. Rptr. 93* ; *Bartholomew v. Bartholomew (1942) 56 Cal. App. 2d 216, 225, 132 P.2d 297*

[e] Public Trust

Under *Code Civ. Proc. § 526(a)(7)*, court is authorized to grant injunction when obligation arises from public trust; thus, injunction is proper to enforce city's obligation to use certain property as library. *Save the Welwood Murray Memorial Library Com. v. City Council (1989) 215 Cal. App. 3d 1003, 1016-1017, 263 Cal. Rptr. 896* (construing former *Code Civ. Proc. § 526* first subd. (7); *now see Code Civ. Proc. § 526(a)(7)*)

[f] Rendering Judgment Ineffectual

Preliminary injunction against disposal of property is proper if disposal would render final judgment ineffectual, for example, when property is being dissipated. *Heckmann v. Ahmanson (1985) 168 Cal. App. 3d 119, 136, 214 Cal. Rptr. 177*

Injunction may be issued under *Code Civ. Proc. § 526(a)(3)* to enjoin directors who had resigned and who had been superseded by election of others when they were shown to have threatened to hold directors' meeting and to take action detrimental to interest of stockholder seeking injunctive relief. *Rossi v. Rossi (1955) 134 Cal. App. 2d 639, 641, 286 P.2d 563* (construing former *Code Civ. Proc. § 526* first subd. (3); *now see Code Civ. Proc. § 526(a)(3)*)

[g] Taxpayer Suits

Taxpayer's general interest in not having public funds spent unlawfully, while sufficient to afford standing to bring taxpayer's action under *Code Civ. Proc. § 526a* and to obtain permanent injunction after full adjudication on merits, does not constitute type of irreparable harm that warrants preliminary injunctive relief. *White v. Davis, 30 Cal. 4th 528, 556-557, 133 Cal. Rptr. 2d 648, 68 P.3d 74*

Code Civ. Proc. § 526a authorizes action by resident taxpayer against officers of county, town, city, or city and county to obtain injunction restraining and preventing illegal expenditure of public funds; primary purpose of *Code Civ. Proc. § 526a* is to enable large body of citizenry to challenge governmental action that would otherwise go unchallenged because of standing requirement. *Blair v. Pitchess (1971) 5 Cal. 3d 258, 267-268, 96 Cal. Rptr. 42, 486 P.2d 1242*

Taxpayer action must involve an actual or threatened expenditure of public funds. General allegations, innuendo, and legal conclusions are not sufficient; rather, the plaintiff must cite specific facts and reasons for a belief that some illegal expenditure or injury to the public fisc is occurring or will occur. *Connerly v. Schwarzenegger (2007) 146 Cal. App. 4th 739, 749, 53 Cal. Rptr. 3d 203*

Liberal construction of *Code Civ. Proc. § 526a* to permit taxpayers' challenge to illegal government activity without showing of special damage to particular taxpayer does not require trial court in action for preliminary injunction conclusively to presume irreparable injury and balance of interim harms in taxpayer's favor when taxpayer has failed to show further actual or threatened harm to himself or herself, or to show that other persons in community felt imminently threatened. *Cohen v. Board of Supervisors (1986) 178 Cal. App. 3d 447, 453-456, 225 Cal. Rptr. 114*

[h] Unconstitutional or Invalid Statute

Equity court may enjoin prosecution that is based on unconstitutional statute or ordinance that would injure plaintiff's rights. *Abbott v. City of Los Angeles (1960) 53 Cal. 2d 674, 678 n.2, 3 Cal. Rptr. 158, 349 P.2d 974*

Enforcement of local ordinance banning street vendors from parking in residential areas is preempted by Vehicle Code and thus subject to preliminary injunction. *Barajas v. City of Anaheim (1993) 15 Cal. App. 4th 1808, 1813, 1817, 19 Cal. Rptr. 2d 764*

Granting of preliminary injunction against enforcement of municipal ordinance is proper if ordinance is unconstitutionally overbroad with pervasive chilling effect on exercise of free speech. *American Booksellers Assn., Inc. v. Superior Court (1982) 129 Cal. App. 3d 197, 206-207, 181 Cal. Rptr. 33*

Code Civ. Proc. § 526(b)(7) is not applicable when action sought to be restrained is unlawful so long as purportedly taken in absence of conditions that are prerequisite to its legality. *Camp v. Board of Supervisors (1981) 123 Cal. App. 3d 334, 356-357, 176 Cal. Rptr. 620* (construing former *Code Civ. Proc. § 526* second subd. (7); *now see Code Civ. Proc. § 526(b)(7)*)

Preliminary injunction is properly issued preventing enforcement of unconstitutionally vague and overbroad municipal ordinance that required license to engage in charitable solicitations and vested unrestrained discretion in licensing official. *Hillman v. Britton (1980) 111 Cal. App. 3d 810, 818-826, 168 Cal. Rptr. 852*

Injunctive relief is available when statute valid on its face is unconstitutionally applied, but discretion of trial court is not abused in denying preliminary injunction to party that is unlikely to prevail on question of constitutionality. *Merandette v. City and County of San Francisco (1979) 88 Cal. App. 3d 105, 110-111, 151 Cal. Rptr. 580*

[10] General Grounds When Injunctions Not Available

[a] Bar Federal Actions

NOTE:
For specific case examples of when injunctions have been held to be improper, see [20], *below*.

State courts do not have power to enjoin litigants from filing and prosecuting pending or prospective in personam actions in the federal courts. *General Atomic Co. v. Felter (1977) 434 U.S. 12, 12, 98 S. Ct. 76, 54 L. Ed 2d 199*

[b] No Irreparable Harm

Injunction not available when employer suffered no actual or threatened harm to its computer system when former employee sent mass e-mail messages to current employees. *Intel Corporation v. Hamidi (2003) 30 Cal. 4th 1342, 1353, 1 Cal. Rptr. 3d 32, 71 P.3d 296*

Injunctive or declaratory relief was not proper when county was not moving to enforce judgment for attorney's fees against allegedly indigent petitioners, and therefore no serious risk of irreparable harm was shown. *Lezama v. Justice Court (1987) 190 Cal. App. 3d 15, 21, 235 Cal. Rptr. 238*

[c] Prevent Breach of Contract Not Specifically Enforceable

Breach of contract to render personal services may not be enjoined because contract may not be specifically enforced.

Foxx v. Williams (1966) 244 Cal. App. 2d 223, 235, 52 Cal. Rptr. 896

[d] Prevent Breach of Personal Services Contract

Employer that is prohibited by *Civ. Code § 3423(e)* from enjoining performer/employee from performing for another company is similarly unable to enjoin other company from hiring employee/performer. *Beverly Glen Music, Inc. v. Warner Communications, Inc. (1986) 178 Cal. App. 3d 1142, 1145, 224 Cal. Rptr. 260* (construing former *Civ. Code § 3423(5)*; *now see Civ. Code § 3423(e)*, with amended minimum compensation requirements)

Personal services contract clause giving employer option to pay employee at least $6,000/year does not satisfy minimum compensation requirement for injunctive relief allowed under exception of *Civ. Code § 3423(e)*. *Motown Record Corp. v. Brockert (1984) 160 Cal. App. 3d 123, 135-140, 207 Cal. Rptr. 574* (construing former *Civ. Code § 3423(5)*; *now see Civ. Code § 3423(e)*, with amended minimum compensation requirements)

Injunction to prevent breach of personal services contract requires compensation for services under that contract to be at rate of not less than $6,000/year, and performer's being paid at least $6,000/year under another contract with same employer does not satisfy that requirement. *Motown Record Corp. v. Brockert (1984) 160 Cal. App. 3d 123, 134, 207 Cal. Rptr. 574*

[e] Prevent Collection of Tax

Injunction will not be granted to prevent collection of tax; rule applies equally to local taxes; to contest constitutionality of tax ordinance, taxpayer must pay tax and file suit for refund. *Flying Dutchman Park, Inc. v. City and County of San Francisco (2001) 93 Cal. App. 4th 1129, 1131, 1137, 1151-1153, 113 Cal. Rptr. 2d 690* (parking tax)

Injunction prohibiting sale of noncash asset seized pursuant to jeopardy assessment is improper injunction against collection of tax. *Hunter-Reay v. Franchise Tax Board (1983) 140 Cal. App. 3d 875, 878-881, 189 Cal. Rptr. 810*

[f] Prevent Execution of Public Statute

Courts lacks jurisdiction to enjoin enforcement of validly adopted constitutional ordinance. *Carson Mobilehome Park Owners' Ass'n v. City of Carson (1983) 35 Cal. 3d 184, 195, 197 Cal. Rptr. 284, 672 P.2d 1297*

Injunction is not available to enjoin execution of public statute except where: (1) the statute is unconstitutional and there is a showing of irreparable injury; (2) the statute is valid but is enforced in an unconstitutional manner; (3) the statue is valid but, as construed, does not apply to the plaintiff; and (4) the public official's action exceeds his or her authority. *Alfaro v. Terhune (2002) 98 Cal. App. 4th 492, 501, 120 Cal. Rptr. 2d 197*

Injunctive relief is not available to prevent execution of public statute relating to parole. *McCarthy v. Superior Court (1987) 191 Cal. App. 3d 1023, 1031-1032, 236 Cal. Rptr. 833*

Trial courts are required to be extremely cautious to enjoin law enforcement officials from enforcing ordinance approved and adopted to promote and protect public morality. *DeMott v. Board of Police Commissioners (1981) 122 Cal. App. 3d 296, 300, 175 Cal. Rptr. 879*

Only exceptions to rule that injunction will not lie to prevent execution of public statute by officers of law for public benefit is when statute itself is unconstitutional or when officer of law is acting illegally. *Lawton v. Board of Medical Examiners (1956) 143 Cal. App. 2d 256, 263, 299 P.2d 362*

[g] Prevent Legislative Act by Municipal Corporation

Civ. Code § 3423(g) and *Code Civ. Proc. § 526(b)(7)*, which prevent injunctive relief being granted to prevent legislative act by municipal corporation, are based on doctrine of separation of powers of government into three independent departments. *City of Los Angeles v. Superior Court (1959) 51 Cal. 2d 423, 430, 333 P.2d 745* (construing former *Civ. Code § 3423(7)* and *Code Civ. Proc § 526* second subd. (7); *now see Civ. Code § 3423(g)* and *Code Civ. Proc § 526(b)(7)*)

[11] Jurisdiction: Personal Jurisdiction Required

Plaintiff is not required to serve summons in addition to temporary restraining order for court to obtain personal jurisdiction over defendant. *Chrysler Credit Corp. v. Waegele (1972) 29 Cal. App. 3d 681, 687-689, 105 Cal. Rptr. 914*

[12] Mandatory Injunction vs. Mandate

Mandate, rather than mandatory injunction, is traditional remedy for public official's failure to perform legal duty, and legal principles governing judicial compulsion of official acts have developed under rubric of mandamus rather than injunction. *Common Cause v. Board of Supervisors (1989) 49 Cal. 3d 432, 442, 261 Cal. Rptr. 574, 777 P.2d 610*

There are two basic requirements for a writ of mandate: a clear, present and usually ministerial duty on the part of the defendant, and a clear, present and beneficial right in the petitioner to the performance of that duty. *Catalina Investments, Inc. v. Jones (2002) 98 Cal. App. 4th 1, 6, 119 Cal. Rptr. 2d 256*

[13] Nature and Purpose of Injunctive Relief

[a] In General

Injunctions may require person to do certain action in affirmative manner. *Comfort v. Comfort (1941) 17 Cal. 2d 736, 741, 112 P.2d 259*

Express codified purpose of prohibitory injunction is to prevent future harm to applicant by ordering defendant to refrain from doing particular act. *Scripps Health v. Marin (1999) 72 Cal. App. 4th 324, 332, 85 Cal. Rptr. 2d 86*

Injunction is equitable remedy available in special proceeding for mandamus as well as in civil action because *Code Civ. Proc. §§ 1084-1097* (mandamus proceedings) incorporate *Code Civ. Proc. §§ 525-534* (injunctive relief) as rules of practice. *Camp v. Board of Supervisors (1981) 123 Cal. App. 3d 334, 356, 176 Cal. Rptr. 620*

[b] Action Rather Than Proceeding

Suit for injunction classified is "action" under *Code Civ. Proc. § 22* rather than "special proceeding" within meaning of *Code Civ. Proc. § 23*. *Tide Water Assoc. Oil Co. v. Superior Court (1955) 43 Cal. 2d 815, 822, 279 P.2d 35* ; *Yuba County v. North America Consolidated Gold Min. Co. (1909) 12 Cal. App. 223, 225, 107 P. 139*

Suit for injunction is case in equity. *Coast Truck Line v. Asbury Truck Co. (1933) 218 Cal. 337, 339, 23 P.2d 513* ; *People v. Englebrecht (2001) 88 Cal. App. 4th 1236, 1245, 106 Cal. Rptr. 2d 738*

[14] Persons Bound by Injunction

Well-established rule is that injunction may run to classes of persons through whom enjoined party may act, such as agents, servants, employees, aiders, and abettors, though they were not parties to action; thus, injunction restraining corporation and its officers, agents, and employees is binding on all such persons having notice of injunction. *Ross v. Superior Court (1977) 19 Cal. 3d 899, 906, 141 Cal. Rptr. 133, 569 P.2d 727* ; *Pitchess v. Superior Court (1969) 2 Cal. App. 3d 653, 656, 83 Cal. Rptr. 41*

Complaint was insufficient to state damage claim against defendant for alleged violation of injunction when complaint on face showed defendant was not party enjoined; action claiming violation of injunction must plead and prove party was bound by order and had ability to comply with order; court noted plaintiff cited no authority holding private civil action seeking damages for violation of an injunction may be maintained, although some courts have stated in dicta that such action is available. *Freeman v. San Diego Assn. of Realtors (1999) 77 Cal. App. 4th 171, 203-204, 91 Cal. Rptr. 2d 534*

Person may be held guilty of contempt when he or she violates injunction even though not a party to original action if he or she is included in injunction and has either actual or constructive notice thereof. *Mattos v. Superior Court (1939) 30 Cal. App. 2d 641, 647, 86 P.2d 1056*

[15] Preliminary Injunctions

[a] Burden of Proof

To obtain preliminary injunction, plaintiff must establish that defendants should be restrained from challenged activity, pending trial; plaintiff must show (1) reasonable probability it will prevail on merits and (2) that harm to plaintiff resulting from not granting preliminary injunction outweighs harm to defendant from imposing injunction. *Trader Joe's Co. v. Progressive Campaigns, Inc. (1999) 73 Cal. App. 4th 425, 429-430, 86 Cal. Rptr. 2d 442*

In seeking preliminary injunction, plaintiff bears burden of demonstrating both likely success on merits and occurrence of irreparable harm before final judgment can be entered. *Savage v. Trammell Crow Co. (1990) 223 Cal. App. 3d 1562, 1571, 273 Cal. Rptr. 302*

[b] Denial in Doubtful Case

Denial of preliminary injunction to cable television company that would have allowed it to reconnect subscribers at apartment complex who had been disconnected by complex owner in breach of contract was proper when money damages would be adequate, cable company had no *First Amendment* right to connect equipment, and intrusion would be more harmful to owner and competing cable company than exclusion would be to plaintiff. *Cox Cable of San Diego, Inc. v. Bookspan (1987) 195 Cal. App. 3d 22, 25-30, 240 Cal. Rptr. 407*

Preliminary injunction will not issue in doubtful case. *Thayer Plymouth Center, Inc. v. Chrysler Motors Corp. (1967) 255 Cal. App. 2d 300, 305, 63 Cal. Rptr. 148*

Denial of preliminary injunction is proper when plaintiff's allegations completely denied and substantial conflict in evidence exists. *London v. Marco (1951) 103 Cal. App. 2d 450, 452-453, 229 P.2d 401*

[c] Discretion of Trial Court

Generally, ruling on application for preliminary injunction rests in sound discretion of trial court. *Hunt v. Superior Court (1999) 21 Cal. 4th 984, 999, 90 Cal. Rptr. 2d 236, 987 P.2d 705*

The law is well settled that the decision to grant a restraining order rests in the sound discretion of the trial court; a trial court will be found to have abused its discretion only when it has exceeded the bounds of reason or contravened the uncontradicted evidence. *Biosense Webster, Inc. v. Superior Court (2006) 135 Cal. App. 4th 827, 834, 37 Cal. Rptr. 3d 759*

Granting or denial of preliminary injunction rests in trial court's sound discretion; discretion is abused when court exceeds bounds of reason or contravenes uncontradicted evidence. *Continental Baking Co. v. Katz (1968) 68 Cal. 2d 512, 527, 67 Cal. Rptr. 761, 439 P.2d 889* ; *California Correctional Peace Officers Assn. v. State of California (2000) 82 Cal. App. 4th 294, 302, 98 Cal. Rptr. 2d 302*

Trial court is required to exercise its discretion in favor of party that is more likely to be injured by decision to grant or refuse injunction. *Continental Baking Co. v. Katz (1968) 68 Cal. 2d 512, 528, 67 Cal. Rptr. 761, 439 P.2d 889* ; *California State University, Hayward v. National Collegiate Athletic Assn. (1975) 47 Cal. App. 3d 533, 544, 121 Cal. Rptr. 85* Generally, ruling on application for preliminary injunction rests in trial court's sound discretion, and exercise of that discretion is not disturbed on appeal absent showing that it has been abused. *Board of Supervisors v. McMahon (1990) 219 Cal. App. 3d 286, 295, 268 Cal. Rptr. 219*

Granting or denial of preliminary injunction on verified complaint, together with oral testimony or affidavits, rests in trial court's sound discretion even though evidence may be conflicting. *California Satellite Systems, Inc. v. Nichols (1985) 170 Cal. App. 3d 56, 63, 216 Cal. Rptr. 180*

Granting or denial of preliminary injunction rests in trial court's sound discretion; action of trial court is not adjudication of ultimate rights in controversy, but merely determination that defendant should or should not be restrained; denial of injunction is usual action unless there is reasonable probability that plaintiff will succeed in action. *Bennett v. Lew (1984) 151 Cal. App. 3d 1177, 1182-1183, 199 Cal. Rptr. 241*

Exercise of court's discretion to deny preliminary injunction is proper if based on substantial evidence either that irreparable harm will not occur to plaintiff or that plaintiff has not demonstrated reasonable probability of success in action. *Jessen v. Keystone Savings & Loan Assn. (1983) 142 Cal. App. 3d 454, 459, 191 Cal. Rptr. 104*

Exercise of trial court's discretion in granting or denying preliminary injunction is based on considerations of balancing of hardships and likelihood that moving party will prevail in trial on merits. *Forde v. Bank of Finance (1982) 136 Cal. App. 3d 38, 42, 186 Cal. Rptr. 272*

[d] Effect of Judgment on Merits

When judgment on merits for defendant is reversed on appeal and case remanded, plaintiff is entitled to preliminary injunction originally granted; but evidentiary hearing is required before preliminary injunction reinstated. *City of Oakland v. Superior Court (1982) 136 Cal. App. 3d 565, 569-570, 186 Cal. Rptr. 326*

Judgment granting or denying final injunction ends preliminary injunction. *Shahen v. Superior Court (1941) 46 Cal. App. 2d 187, 188, 115 P.2d 516*

[e] Effect of Ruling

Granting of preliminary injunction does not constitute adjudication on merits of complaint. *Pro-Family Advocates v. Gomez (1996) 46 Cal. App. 4th 1674, 1681 n.9, 54 Cal. Rptr. 2d 600*

Appellate decision does not constitute final adjudication of ultimate rights in controversy, but rather only determination of whether trial court abused its discretion based on record before it at time of ruling. *Shoemaker v. County of Los Angeles (1995) 37 Cal. App. 4th 618, 625-626, 43 Cal. Rptr. 2d 774*

[f] Factors Considered

In deciding whether to issue preliminary injunction, trial court weighs two interrelated factors, i.e., likelihood moving party will prevail on merits, and relative interim harm to parties from issuance or nonissuance of injunction; trial court may not grant preliminary injunction regardless of balance of harm unless there is some possibility that plaintiff would ultimately prevail on merits of claim. *Hunt v. Superior Court (1999) 21 Cal. 4th 984, 999, 90 Cal. Rptr. 2d 236, 987 P.2d 705*

Only when one party cannot prevail on the ultimate merits of the case as a matter of law, the balance of hardships is irrelevant and the grant of a preliminary injunction would merely delay the inevitable result. *Tosi v. County of Fresno (2008) 161 Cal. App. 4th 799, 803-804, 74 Cal. Rptr. 3d 727*

The likelihood of a plaintiff's ultimate success on the merits affects the showing necessary to a balancing-of-hardships analysis. That is, the more likely it is that the plaintiff will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue. It is the mix of these factors that guides the trial court in its exercise of discretion. *Right Site Coalition v. Los Angeles Unified School Dist. (2008) 160 Cal. App. 4th 336, 345-346, 72 Cal. Rptr. 3d 678*

When plaintiff is not governmental entity and statute does not expressly provide otherwise, finding of interim harm is necessary. *DVD Copy Control Association Inc. v. Bunner (2004) 116 Cal. App. 4th 241, 250, 10 Cal. Rptr. 3d 185*

Trial courts evaluate two interrelated factors when deciding whether to issue preliminary injunction; first is likelihood that plaintiff will prevail on merits at trial; second is interim harm plaintiff will likely sustain if injunction were denied as compared to harm defendant will likely suffer if injunction were issued; by balancing respective equities, trial court should conclude whether, pending trial on merits, defendant should or should not be restrained from exercising his or her claimed right. *California Correctional Peace Officers Assn. v. State of California (2000) 82 Cal. App. 4th 294, 302, 98 Cal. Rptr. 2d 302*

Two related factors trial court considers in determining whether to grant preliminary injunction are (1) likelihood plaintiff will prevail on merits of its case at trial and (2) interim harm that plaintiff is likely to sustain if injunction is denied as compared to harm defendant is likely to suffer if injunction is granted; latter factor involves consideration of such things as inadequacy of other remedies, degree of irreparable harm, and necessity of preserving status quo. *14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal. App. 4th 1396, 1402, 74 Cal. Rptr. 2d 712*

In ruling on motion for preliminary injunction, court considers whether greater injury will result to defendant from granting injunction than to plaintiff from refusing it; trial court considers probability of plaintiff's ultimately prevailing in trial on merits and denies preliminary injunction unless there is reasonable probability that plaintiff will successfully assert his or her rights. *Southern Christian Leadership Conference v. Al Malaikah Auditorium Co. (1991) 230 Cal. App. 3d 207, 223, 281 Cal. Rptr. 216*

[g] Irreparable Injury Showing

Order granting preliminary injunction is not fatally flawed because order contains no explicit finding that injunction is necessary to prevent irreparable injury. *Conover v. Hall (1974) 11 Cal. 3d 842, 850, 114 Cal. Rptr. 642, 523 P.2d 682*

When party seeking injunction will not succeed on merits, injunction should not issue even though its issuance might prevent irreparable harm, because there is no justification in delaying that harm when, although irreparable, it is also inevitable. *14859 Moorpark Homeowner's Assn. v. VRT Corp. (1998) 63 Cal. App. 4th 1396, 1408, 74 Cal. Rptr. 2d 712*

To qualify for preliminary injunctive relief, plaintiff is required to show irreparable injury, either existing or threatened, and to satisfy this requirement, plaintiff is required to present evidence. *Loder v. City of Glendale (1989) 216 Cal. App. 3d 777, 782-783, 265 Cal. Rptr. 66*

Before trial court can exercise its discretion to grant preliminary injunction, applicant is required to make prima facie showing of entitlement to injunctive relief and to demonstrate real threat of immediate and irreparable injury due to inadequacy of legal remedies. *Triple A Machine Shop, Inc. v. State of California (1989) 213 Cal. App. 3d 131, 138, 261 Cal. Rptr. 493*

Requirement of showing irreparable injury is strictly applied if preliminary injunction sought to thwart enforcement of ordinances the validity of which is presumed. *City of Santa Monica v. Superior Court (1964) 231 Cal. App. 2d 223, 227, 41 Cal. Rptr. 824*

[h] Nomenclature Used Unimportant

Regardless of label for order used by issuing court, if restraint is until further order of court, it is preliminary injunction. *Neumann v. Moretti (1905) 146 Cal. 31, 32-33, 79 P. 512* ; *Lincoln v. Superior Court (1942) 51 Cal. App. 2d 61, 67, 124 P.2d 179*

[i] Purpose

General purpose of preliminary injunction is to preserve status quo pending final adjudication of claims on merits. *O'Connell v. Superior Court (2006) 141 Cal. App. 4th 1452, 1472, 47 Cal. Rptr. 3d 147*

Purpose of preliminary injunction is to preserve status quo until final determination of action's merits. *Korean American Legal Advocacy Foundation v. City of Los Angeles (1994) 23 Cal. App. 4th 376, 398-399, 28 Cal. Rptr. 2d 530* ; *Major v. Miraverde Homeowners Assn. (1992) 7 Cal. App. 4th 618, 623, 9 Cal. Rptr. 2d 237*

Preserving status quo is not restricted to inaction; continuing of regular and usual procedures is also encompassed in term's meaning. *Fretz v. Burke (1967) 247 Cal. App. 2d 741, 746, 55 Cal. Rptr. 879*

[j] Scope of Injunction

Injunction against corporate employer inappropriate to enjoin actions of specific employees. *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal (2005) 129 Cal. App. 4th 1228, 1266, 29 Cal. Rptr. 3d 521*

Preliminary injunction that subjected defendant's right to engage in protected speech to censorship of group that disagreed with its content constituted impermissible "heckler's veto," and even if there were basis to enjoin certain conduct of defendant's members, injunction went much further than necessary to provide relief sought by plaintiff.

San Diego Unified Port Dist. v. U.S. Citizens Patrol (1998) 63 Cal. App. 4th 964, 970-971, 74 Cal. Rptr. 2d 364

In action by political group challenging prohibition of shopping center and its management company against distributing leaflets in center, trial court, in granting preliminary injunction, did not abuse its discretion by extending injunction to all shopping centers throughout state owned, managed, or controlled by defendants, even though complaint mentioned only one shopping center, when evidence presented to trial court showed that other shopping centers managed or owned by defendants had enforced similar rules restricting access to centers; not only did this disposition avert wastefulness of additional judicial proceedings that would have produced same result, it appropriately provided complete interim relief from extensive threatened infringement of California constitutional rights (*Cal. Const., art. I, § 2(a)*). *Westside Sane/Freeze v. Ernest W. Hahn, Inc. (1990) 224 Cal. App. 3d 546, 560, 274 Cal. Rptr. 51*

[16] Procedure to Obtain Permanent Injunction

[a] Determination by Appellate Court

Whether permanent injunction should issue is question of law when ultimate facts undisputed; appellate court is permitted to determine issue without regard to conclusion of trial court in this situation. *Eastern Columbia, Inc. v. Waldman (1947) 30 Cal. 2d 268, 273, 181 P.2d 865*

[b] Effect of Appeal From Preliminary Injunction

Appeal from order granting or refusing to grant preliminary restraining order pending determination of cause on its merits does not deprive court of jurisdiction to try cause on its merits. *Gray v. Bybee (1943) 60 Cal. App. 2d 564, 571, 141 P.2d 32*

[17] Procedure to Obtain Preliminary Injunction

[a] Granting Permanent Injunction Generally Prohibited

Court has jurisdiction to determine merits of case and to grant permanent injunction on hearing for preliminary injunction without further trial when only substantive issue to be decided is question of law resolvable without reference to extrinsic evidence, which was already addressed at preliminary injunction hearing. *Camp v. Board of Supervisors (1981) 123 Cal. App. 3d 334, 357-358, 176 Cal. Rptr. 620*

Unless based on stipulation or other satisfactory showings submitting cause on merits, court has no jurisdiction to determine merits on hearing of motion for temporary injunction, and orders purporting to do so are void; stipulation to use of return in mandamus action in declaratory relief action is not stipulation to trial on merits. *Antoine v. Department of Public Health (1973) 33 Cal. App. 3d 215, 220-221, 108 Cal. Rptr. 689*

[b] Standard of Proof Required

Clear and convincing evidence standard is proper one for preliminary injunction because preliminary injunction involves only temporary determination, and clear and convincing evidence standard is sufficient to show existence of reasonable probability of obtaining permanent injunction. *People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater (1981) 118 Cal. App. 3d 863, 872, 173 Cal. Rptr. 476*

[c] Undertaking

A bond may be waived or forfeited by the person to be enjoined. *Smith v. Adventist Health System/West (2010) 182 Cal. App. 4th 729, 740-744, 106 Cal. Rptr. 3d 318*

Single individual may constitute sufficient surety within meaning of *Code Civ. Proc. § 529* in accordance with trial court's discretion. *River Trails Ranch Co. v. Superior Court (1980) 111 Cal. App. 3d 562, 567, 168 Cal. Rptr. 747*

Minute order that continues in effect restraining order that does not provide for an undertaking is of no effect. *Miller v. Santa Margarita Land & Cattle Co. (1963) 217 Cal. App. 2d 764, 766, 31 Cal. Rptr. 866*

[d] Verified Complaint or Affidavits Required

Explicit finding of irreparable harm is not required to sustain preliminary injunction when complaint alleged irreparable injury, absent any contrary indication in record. *Conover v. Hall (1974) 11 Cal. 3d 842, 850, 114 Cal. Rptr. 642, 523 P.2d 682*

In absence of verified showing of threatened harm by moving party, a trial court exceeds its jurisdiction by granting preliminary injunction. *Gray v. Superior Court (2005) 125 Cal. App. 4th 629, 640-641, 23 Cal. Rptr. 3d 50*

Court subjects facts stated in complaint to same test to which oral testimony is subject; conclusionary statements are required to be supported by facts or court will not sustain application for injunction. *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 14-15, 244 Cal. Rptr. 581*

Declaration in connection with action for preliminary injunction was properly disregarded because declarant merely interpreted question of law beyond declarant's competence. *Sullivan v. Fox (1987) 189 Cal. App. 3d 673, 682 n.4, 683, 235 Cal. Rptr. 5*

Complaint alleging on information and belief and declaration by widow, not party to contract, regarding her expectations as to survivability of dealership, was insufficient for injunction. *San Francisco Newspaper Printing Co. v. Superior Court (1985) 170 Cal. App. 3d 438, 441-442, 216 Cal. Rptr. 462*

Complaint is required to state facts showing how and why injury would result. *San Juan Gold Co. v. San Juan Ridge Mut. Water Asso. (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582*

Court was not justified in extending its aid by way of preventive relief in absence of facts substantiating or supporting allegation of irreparable injury. *Eames v. Philpot (1925) 72 Cal. App. 151, 157, 236 P. 373*

[18] Procedure to Obtain Temporary Restraining Order

Restraining orders generally not granted on affidavits stated on information and belief. *Provident L. Corp. v. Provident I. Dist. (1937) 22 Cal. App. 2d 105, 108, 79 P.2d 392*

Temporary restraining order is not necessarily void merely because order to show cause not actually heard and determined within statutory period; hearing may be continued either at request of defendant or when necessary business of court prevents it from hearing the matter within statutory period. *McDonald v. Superior Court (1937) 18 Cal. App. 2d 652, 656-657, 64 P.2d 738*

Nomenclature used does not determine whether an order is temporary restraining order or preliminary injunction. *Yellen v. Fidelity & Casualty Co. of N.Y. (1931) 115 Cal. App. 434, 436, 1 P.2d 1019*

[19] Specific Situations When Injunctions Available

[a] Actions in Excess of Jurisdiction

NOTE:
For case examples of general grounds for injunctions, see *[9], above*.

Court of equity may enjoin municipal corporations, inferior boards, or inferior tribunals from acting or proposing to act in excess of their jurisdiction and without authority. *San Ysidro Irr. Dist. v. Superior Court (1961) 56 Cal. 2d 708, 719-720, 16 Cal. Rptr. 609, 365 P.2d 753*

[b] Completed Acts That Will Probably Recur

For standing to seek injunction, plaintiff must show likelihood plaintiff will be harmed in future if injunction not granted. *Blumhorst v. Jewish Family Services of Los Angeles (2005) 126 Cal. App. 4th 993, 1004, 24 Cal. Rptr. 3d 474*

Injunction may be granted with regard to past acts if there is evidence that they will probably recur. *Rosicrucian Fellow. v. Rosicrucian Fellowship Non-Sectarian Ch. (1952) 39 Cal. 2d 121, 144, 245 P.2d 481* ; *Fretz v. Burke (1967) 247 Cal. App. 2d 741, 744, 55 Cal. Rptr. 879*

Court in injunction matters does not consider issues moot when issues relate to matter of public interest and there is likelihood that matter will arise again in future. *Dept. of Agriculture v. Tide Oil Co. (1969) 269 Cal. App. 2d 145, 150-151, 74 Cal. Rptr. 799*

Court is not required to accept guilty party's statement that he or she no longer intends to commit transgressions when he or she retains means of continuing transgressions. *Wood v. Peffer (1942) 55 Cal. App. 2d 116, 124, 130 P.2d 220*

[c] Conversion

Injunction against use of plaintiff's jewelry molds was appropriate to prevent defendants from profiting from conversion of plaintiff's property. *Gladstone v. Hillel (1988) 203 Cal. App. 3d 977, 988-990, 250 Cal. Rptr. 372*

[d] First Amendment Rights Protected

Loss of *First Amendment* freedoms, for even minimal periods of time, "unquestionably" constitutes irreparable injury. *Ketchens v. Reiner (1987) 194 Cal. App. 3d 470, 480, 239 Cal. Rptr. 549*

In case involving unconstitutionally overbroad and vague licensing ordinance, plaintiffs were irreparably harmed when threatened with prosecution or arrest if they asserted their *First Amendment* rights, even though they neither applied for nor were denied license to solicit, and were not under arrest for attempting to solicit without license. *Hillman v. Britton (1980) 111 Cal. App. 3d 810, 813-816, 168 Cal. Rptr. 852*

[e] Injuries to Land

[i] Eminent Domain Without Compensation

General rule is that when taking of private property for public use is attempted under power of eminent domain without any provision having been made for compensation, injunction is available; exception to rule is made when public use has intervened and other relief by way of damages for inverse condemnation is available. *Sheffet v. County of Los Angeles (1970) 3 Cal. App. 3d 720, 737, 84 Cal. Rptr. 11*

[ii] Encroachments

Mandatory injunction is available to abate encroachment; balancing conveniences of parties and weighing relative hardships. *Posey v. Leavitt (1991) 229 Cal. App. 3d 1236, 1243, 1247-1249, 1251-1252, 280 Cal. Rptr. 568*

To justify mandatory injunction against encroachment, plaintiff must show irreparable injury even though damage need not be great. *Pearson v. Baldwin (1954) 125 Cal. App. 2d 670, 673, 270 P.2d 866*

[iii] Private Nuisances

Polluting kilns of factory enjoined as private nuisance. *Vowinckel v. N. Clark & Sons (1932) 216 Cal. 156, 163, 13 P.2d 733*

Obstruction of easement enjoined as private nuisance. *Hartsif v. Wann (1956) 139 Cal. App. 2d 119, 120, 293 P.2d 65*

Barking of dogs in pet hospital enjoined as private nuisance. *Wilms v. Hand (1951) 101 Cal. App. 2d 811, 816, 226 P.2d 728*

[iv] Public Nuisances

Although gang injunction with nonassociation provision placed incidental burden on familial relationships, such burden was necessary under the circumstances for injunction to be effective. *People ex rel. Reisig v. Acuna (2010) 182 Cal. App. 4th 866, 885-886, 106 Cal. Rptr. 3d 560*

Health & Safey Code § 33459 et seq. allows redevelopment agency to seek injunction compelling utility to remove or remedy environmental contamination within project area; redevelopment agency need not plead direct financial jeopardy to have standing to sue. *Redevelopment Agency of San Diego v. San Diego Gas & Electric Co. (2003) 111 Cal. App. 4th 912, 917-920, 4 Cal. Rptr. 3d 317*

Gang member subject to injunction prohibiting various activities including possessing weapons and associating with other gang members within designated area. *People v. Englebrecht (2001) 88 Cal. App. 4th 1236, 1242, 1267, 106 Cal. Rptr. 2d 738*

Owner of property adjacent to landscaped freeway may be subject to injunction prohibiting advertising display violating Outdoor Advertising Act [*Bus. & Prof. Code § 5200 et seq.*]. *People ex rel. Dept. of Transportation v. Maldonado (2001) 86 Cal. App. 4th 1225, 1231, 104 Cal. Rptr. 2d 66*

Sale of videotapes of obscene films was subject to preliminary injunction because sale is clearly commerce and public distribution of obscenity. *People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater (1981) 118 Cal. App. 3d 863, 869-870, 173 Cal. Rptr. 476*

Property owner adjacent to nuisance on state-owned land may obtain injunction if owner shows special injury to

himself or herself; proof of substantial injury, actual or potential, is required to maintain action for public nuisance. *Woods v. Johnson (1966) 241 Cal. App. 2d 278, 281, 50 Cal. Rptr. 515*

[v] Threatened Repeated Acts of Trespass

Distribution of newsletter under apartment doors could be enjoined because building was private and access restricted to tenants and their guests. *Golden Gateway Center v. Golden Gateway Tenants Assn. (2001) 26 Cal. 4th 1013, 1033-1035, 111 Cal. Rptr. 2d 336, 29 P.3d 797*

Trespass of continuing nature, constant recurrence of which would render remedy at law inadequate unless by multiplicity of suits, affords sufficient ground for relief by way of injunction. *Slater v. Pacific American Oil Co. (1931) 212 Cal. 648, 655, 300 P. 31* ; *State of California v. Hansen (1961) 189 Cal. App. 2d 604, 611, 11 Cal. Rptr. 335*

Courts of equity do not permit suit for injunction to be substituted for legal action for ejectment; injunction issued, however, because threatened injury would be irreparable and legal remedy inadequate. *Harmon v. DeTurk (1917) 176 Cal. 758, 762, 169 P. 680*

Injunction will issue to prevent wrongful act if its continuance may ripen into easement in favor of defendant that will deprive plaintiff of use and enjoyment of his or her property or take substance of his or her estate. *Freitas v. City of Atwater (1961) 196 Cal. App. 2d 289, 296, 16 Cal. Rptr. 397*

Property owner was not relegated to successive suits for damages when repeated or continuous trespasses take place. *Empire Star Mines Co. v. Butler (1944) 62 Cal. App. 2d 466, 529, 145 P.2d 49*

[vi] Use of Property

Plaintiff is entitled to injunction against continued and threatened wrongful use of property unless harmful results thereof are of trivial nature or are compensable in damages. *Kennedy v. Rosecrans Gardens, Inc. (1952) 114 Cal. App. 2d 87, 90, 249 P.2d 593*

In cases involving promises as to use of property, injunctive relief is granted if awarding of damages inadequate. *Smith v. Mendonsa (1952) 108 Cal. App. 2d 540, 543, 238 P.2d 1039*

[vii] Water Rights

Injunctive relief is proper when one cotenant is taking more water than his or her proportionate share. *Barton Land & Water Co. v. Crafton Water Co. (1915) 171 Cal. 89, 97, 152 P. 48* ; *De La Cuesta v. Bazzi (1941) 47 Cal. App. 2d 661, 672-673, 118 P.2d 909*

Injunctive relief is proper to restrain defendant from using water of particular stream when party seeking injunction claims right to take all water from particular stream. *Lema v. Ferrari (1938) 27 Cal. App. 2d 65, 71, 80 P.2d 157*

[f] Interference With Established Business

Injunctive relief is granted to prevent improper diversion of customers by private competitors or even to restrain law enforcement officials from acting beyond scope of their authority. *Crittenden v. Superior Court (1964) 61 Cal. 2d*

565, 568, 39 Cal. Rptr. 380, 393 P.2d 692

Owner of business may enjoin enforcement of unconstitutional or void statute or ordinance that deprives him or her of effective access to his or her customers. *Crittenden v. Superior Court (1964) 61 Cal. 2d 565, 568, 39 Cal. Rptr. 380, 393 P.2d 692* ; *McKay Jewelers, Inc. v. Bowron (1942) 19 Cal. 2d 595, 597-604, 122 P.2d 543*

Owner of established business may enjoin enforcement of unconstitutional or void statute or ordinance that causes irreparable injury to his or her business. *Crittenden v. Superior Court (1964) 61 Cal. 2d 565, 568, 39 Cal. Rptr. 380, 393 P.2d 692* ; *Bueneman v. City of Santa Barbara (1937) 8 Cal. 2d 405, 408-415, 65 P.2d 884*

Threat of future interference with lawful business is proper subject for injunctive action. *Uptown Enterprises v. Strand (1961) 195 Cal. App. 2d 45, 51, 15 Cal. Rptr. 486* ; *Imperial Ice Co. v. Rossier (1941) 18 Cal. 2d 33, 39, 112 P.2d 631*

[g] Labor Policy of State Violated

Injunctive relief and damages are appropriate when employees are discharged contrary to public policy as reflected in *Lab. Code §§ 923* (freedom of employees to pursue rights) and 1196 (discrimination against employee for testifying concerning minimum wage violations). *Montalvo v. Zamora (1970) 7 Cal. App. 3d 69, 75-77, 86 Cal. Rptr. 401*

[h] Obscenity

Issuance of preliminary injunction prohibiting exhibition of obscene films in accordance with *Code Civ. Proc. § 527* is constitutional because burden is on censor to bring matter to final determination and statute requires that highest priority is given to final determination. *People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater (1981) 118 Cal. App. 3d 863, 867-869, 173 Cal. Rptr. 476*

[i] Partnership Dissolution Proceedings

Preliminary injunction is proper in partnership dissolution proceedings. *Fretz v. Burke (1967) 247 Cal. App. 2d 741, 744, 55 Cal. Rptr. 879* ; *Kendall v. Foulks (1919) 180 Cal. 171, 173-174, 179 P. 886*

[j] Preventing Breach of Specifically Enforceable Contract

Injunction is proper to restrain owner from using policy limiting occupancy of three-bedroom apartment in publicly assisted complex; *Civ. Code § 3423* is not applicable because regulatory agreement provided that city could compel owner's performance by mandamus or other legal or equitable proceeding. *Zakaria v. Lincoln Property Co. (1986) 185 Cal. App. 3d 500, 507-510, 229 Cal. Rptr. 669*

[k] Restrictive Covenant in Deed

Code Civ. Proc. § 731a does not abolish rule that land use that is violative of restrictive covenant may be enjoined even though zoning permits the use. *Mullally v. Ojai Hotel Co. (1968) 266 Cal. App. 2d 9, 11-12, 71 Cal. Rptr. 882*

Grantor is entitled to injunction to restrain grantee from violating valid restrictive covenant contained in deed. *Doo v. Packwood (1968) 265 Cal. App. 2d 752, 756-757, 71 Cal. Rptr. 477*

[l] Restrictive Employment Covenants

Rule of equity that under contract calling for exceptional services employer may enjoin his or her employee from rendering those services to others is applicable to options. *Warner Bros. Pictures, Inc. v. Brodel (1948) 31 Cal. 2d 766, 773-774, 192 P.2d 949*

Injunction is properly issued against parties to agreement not to compete, those in privity with them, and persons who may aid convenantor in violating covenant. *H.G. Fenton Mat. Co. v. Challet (1942) 49 Cal. App. 2d 410, 415, 121 P.2d 788*

[m] Trade Secrets

Injunction issued under trade secret law against web site operator for posting program that decrypted contents of DVDs and enabled users to copy and distribute movies did not violate free speech clauses of United States and California Constitutions. *DVD Copy Control Assn., Inc. v. Bunner (2003) 31 Cal. 4th 864, 881883, 4 Cal. Rptr. 3d 69, 75 P.3d 1*

Preliminary injunction not available to protect trade secret when, after publication, trade secret became widely known to public. *DVD Copy Control Association Inc. v. Bunner (2004) 116 Cal. App. 4th 241, 252-255, 10 Cal. Rptr. 3d 185*

Injunctions in the area of trade secrets are governed by the principles applicable to injunctions in general. *Schlage Lock Company v. Whyte (2002) 101 Cal. App. 4th 1443, 1449, 125 Cal. Rptr. 2d 277*

Part of information contained in reports filed with County Air Quality Management District (District) pursuant to the Air Toxics "Hot Spots" Information and Assessment Act of 1987 (*Health & Safety Code § 44300 et seq.*) qualified as protected trade secrets under the act and trial court erred in denying motion for preliminary injunction to prevent its disclosure by District; similarly, information denominated as trade secrets in reports when submitted to District were entitled to trade secret protection, did not become public records despite mistaken disclosure by public agencies to environmental organizations, and trial court erred in denying motion for preliminary injunction to prevent disclosure of that information by District; however, information mistakenly not designated as trade secrets in the original filed reports, but only so designated in later revised, redacted reports and items identified in reports as trade secret information, but voluntarily disclosed elsewhere without trade secret designation, became a public record not subject to trade secret protection, so that trial court did not err in denying the motion for preliminary injunction to enjoin disclosure of that category of information by *District. Masonite Corp. v. County of Mendocino Air Quality Management Dist. (1996) 42 Cal. App. 4th 436, 449-455, 49 Cal. Rptr. 2d 639*

Any unwarranted disclosure of confidential information constitutes breach of trust, and equity may restrain any threatened disclosure or use thereof by employee or former employee to detriment of employer; character of information, if peculiar and important to business, is not material. *Ernst & Ernst v. Carlson (1966) 247 Cal. App. 2d 125, 128-129, 55 Cal. Rptr. 626* (manner of handling account by accounting firm); *Riess v. Sanford (1941) 47 Cal. App. 2d 244, 246, 117 P.2d 694* (manner of manufacturing cactus phonograph needles)

Guidelines required to be established as conditions precedent to obtain injunction against unlawful use of confidential information by former employee. *Nalley's Inc. v. Corona Processed Foods, Inc. (1966) 240 Cal. App. 2d 948, 952, 50 Cal. Rptr. 173* ; *Alex Foods, Inc. v. Metcalfe (1955) 137 Cal. App. 2d 415, 429, 290 P.2d 646*

Injunction prohibiting defendants from soliciting further business from customers was not too broad when evidence existed that justified trial court in concluding that list of customers was confidential and was unfairly used by

defendants to detriment of plaintiffs. *American Loan Corp. v. California Commercial Corp. (1963) 211 Cal. App. 2d 515, 525, 27 Cal. Rptr. 243*

[n] Preserving Discovery

Injunction available to preserve status quo pending discovery motion. *Dodge, Warren & Peters Insurance Services, Inc. v. Riley (2003) 105 Cal. App. 4th 1414, 1416, 130 Cal. Rptr. 2d 385* (court affirms preliminary injunction based on probably of success on merits of pending discovery motion requiring preservation of electronic evidence)

[20] Specific Situations When Injunctions Prohibited

[a] Authorize Violation of Criminal Statute

NOTE:
For case examples of general grounds when injunctions are not available, see [10], *above.*

Preliminary injunction may not permit and authorize even a limited violation of criminal statute. *Downing v. Cal. State Board of Pharmacy (1948) 85 Cal. App. 2d 30, 36, 192 P.2d 39*

[b] Encroachments

Injunction to remove encroachment is not always available; if court in its discretion balances hardship and allows encroachment to remain, it may grant encroacher affirmative relief (here prescriptive easement) to protect its interest in disputed land. *Hirshfield v. Schwartz (2001) 91 Cal. App. 4th 749, 754-755, 110 Cal. Rptr. 2d 861*

[c] Enforce Criminal Law

Civ. Code § 3369 is statutory enactment of fundamental rule that courts of equity are not concerned with criminal matters and may not be resorted to for preventing criminal acts except when property rights are involved. *Stegner v. Bahr & Ledoyen, Inc. (1954) 126 Cal. App. 2d 220, 231, 272 P.2d 106* ; *Perrin v. Mountain View Mausoleum Asso. (1929) 206 Cal. 669, 671, 275 P. 787*

Civ. Code § 3369 is applicable when acts complained of constitute merely a crime or series of crimes; only when threatened acts will constitute public nuisance as that term is defined by statute may court of equity prevent injury through injunction. *People v. Brophy (1942) 49 Cal. App. 2d 15, 32, 120 P.2d 946*

Reason that court of equity will not undertake to enforce criminal law is that individual accused of crime by way of injunction would be required to prove his or her own innocence and would lose constitutionally guaranteed rights. *Monterey Club v. Superior Court (1941) 48 Cal. App. 2d 131, 146, 119 P.2d 349*

[d] Federal Labor Law Preempts State Jurisdiction

Trial court has no jurisdiction to issue injunction in labor dispute enjoining picketing when under federal law controversy is subject to jurisdiction of National Labor Relations Board and when plaintiff fails to demonstrate that Board in its discretion would decline to assert jurisdiction. *Musicians Union, Local No. 6 v. Superior Court (1968) 69 Cal. 2d 695, 700, 73 Cal. Rptr. 201, 447 P.2d 313*

[e] Prevent Criminal Prosecution

Separation of powers doctrine (*Cal. Const., art. III, § 3*) requires judicial restraint in enjoining criminal investigations and prosecutions; prosecutor's authority stems from executive branch of government, and investigation and gathering of evidence relating to criminal offenses is prosecutor's responsibility and rests solely within his or her discretion; discretionary authority to investigate and prosecute criminal conduct is considered too vital to the interest of public order to be subjected to prior restraint by courts except under extraordinary circumstances. *Triple A Machine Shop, Inc. v. State of California (1989) 213 Cal. App. 3d 131, 144-145, 261 Cal. Rptr. 493*

Injunction is not granted to protect person from prosecution for alleged commission of criminal offense; court having jurisdiction over criminal offenses is forum in which such question of fact determined. *Manchel v. County of Los Angeles (1966) 245 Cal. App. 2d 501, 505, 54 Cal. Rptr. 53*

Rule that injunction not granted to protect person from prosecution for alleged commission of criminal offense is rule irrespective of contention that injunction should be issued to prevent multiplicity of actions or to prevent injurious interference with plaintiff's business. *Fairchild v. Brock (1948) 88 Cal. App. 2d 425, 429, 199 P.2d 9*

[f] Prevent Fair Competition With Former Employer

In absence of enforceable contract containing negative covenants to the contrary, equity will not enjoin former business associate from soliciting business of former employer provided competition is fairly and legally conducted. *Anderson Crop Dusters, Inc. v. Matley (1958) 159 Cal. App. 2d 811, 814, 324 P.2d 710* ; *Aetna Bldg. Maintenance Co. v. West (1952) 39 Cal. 2d 198, 203, 246 P.2d 11*

Question in cases of alleged unfair competition is whether former employee is guilty of unfair competition in soliciting former employer's customers. *Aetna Bldg. Maintenance Co. v. West (1952) 39 Cal. 2d 198, 203, 246 P.2d 11*

Whether equity will enjoin former employees from using information acquired while in that employment to disadvantage of former employer depends on whether or not in each case information gained is secret and confidential. *Peerless Oakland Laundry Co. v. Hickman (1962) 205 Cal. App. 2d 556, 559, 23 Cal. Rptr. 105*

Injunction is not granted against former employee of plaintiff employer when relief would in effect restrain employee from pursuing his or her profession. *Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279, 288, 23 Cal. Rptr. 198*

[g] Restrain Exercise of Constitutional Right

In action for injunction to require shopping center to allow plaintiff to distribute religious leaflets on automobiles in center's parking lot, preliminary injunction was properly denied when defendant's declaration stated that prohibiting distribution of any literature in parking lot was designed to prevent littering and traffic problems, which was valid regulation of time, place, or manner of activity otherwise protected by California Constitution, which is measured by federal constitutional standards, was content neutral and narrowly tailored to meet significant interest of shopping center, and thus demonstrated that plaintiff was not likely to succeed in establishing right to distribute religious tracts in parking lot. *Savage v. Trammell Crow Co. (1990) 223 Cal. App. 3d 1562, 1571-1575, 273 Cal. Rptr. 302*

[h] Right-to-Die

Judicial intervention in right-to-die cases should be minimal; thus, injunction is improper unless there is disagreement between parties and they have exhausted all nonjudicial efforts to resolve dispute. *Conservatorship of Morrison (1988) 206 Cal. App. 3d 304, 312, 253 Cal. Rptr. 530*

[i] Transfer Possession of Real or Personal Property

Injunctive relief not appropriate remedy for secured creditor to recover personal property; writ of possession is appropriate remedy for secured party to obtain possession of collateral. *Simms v. NPCK Enterprises, Inc. (2003) 109 Cal. App. 4th 233, 243, 134 Cal. Rptr. 2d 557*

No basis for injunctive relief as existing to restore attorney locked out of law offices by other members of legal corporation to possession or use of premises, equipment, or client files on mere allegations of wrongful discharge from employment; preliminary injunction as not granted to transfer possession of real or personal property held under ostensibly extant employment contract when title in dispute. *Voorhies v. Greene (1983) 139 Cal. App. 3d 989, 996-998, 189 Cal. Rptr. 132*

[j] Trespass by Public Service Entity

Trespass by public service entity generally precludes award of injunctive relief when owner has notice or gives permission. *Slemons v. Southern Cal. Edison Co. (1967) 252 Cal. App. 2d 1022, 1026, 60 Cal. Rptr. 785*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresJudgmentsEntry of JudgmentsStays Pending AppealsNonmoney JudgmentsCivil ProceduresRemediesInjunctionsElementsGeneral OverviewCivil ProceduresRemediesInjunctionsMandatory InjunctionsCivil ProceduresRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProceduresAppealsStandards of ReviewAbuse of Discretion

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§ 303.105 Law Reviews

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For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsElementsIrreparable HarmCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersLabor & Employment LawCollective Bargaining & Labor RelationsJudicial InterventionLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsJurisdictionSecurities LawLiabilityRemediesEquitable Relief

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§ 303.106 Text References

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Witkin, Summary of California Law, vol. 7, *Constitutional Law*, § 98; vol. 9, *Taxation*, §§ 295-297; vol. 12, *Real Property*, § 375; vol. 13, *Equity*, §§ 71, 76, 77, 80-84, 93-96 (10th ed. 2005)

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[Reserved]

§§ 303.107[Reserved]

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§ 303.120 Plaintiff's Checklist for Obtaining Preliminary Injunction

[1] By Noticed Motion

PRACTICE TIP:
If plaintiff desires to obtain a preliminary injunction after a complaint has already been filed and the party against whom it is sought has appeared, the plaintiff may follow the noticed motion procedure directly, without requesting a temporary restraining order [*see Wutchumna Water Co. v. Superior Court (1932) 215 Cal. 734, 739-740, 12 P.2d 1033* (implicitly approving motion procedure); *see also Cal. Rules of Ct., Rule 3.1150(a)*].

☐ Draft notice of motion for preliminary injunction [*see § 303.133*].

☐ Draft memorandum of points and authorities.

☐ Draft affidavits or declarations.

☐ Obtain statements from, and then prepare affidavits or declarations on behalf of, all persons who have personal knowledge of facts that support issuance of requested preliminary injunction.

☐ Obtain signatures and, if affidavits used, have statements notarized.

☐ Make sufficient copies for service on all parties.

☐ Request that the court file to be made available to judge hearing the application [*Cal. Rules of Ct., Rule 3.1150(b)*].

☐ Appear at hearing of motion.

☐ Present complaint, memorandum of points and authorities, and affidavits or declarations, to court.

PRACTICE TIP:
Counsel should ascertain in which department, if relevant, and at what time of day, if restricted, applications for preliminary injunctions are considered [*see, e.g.,* Los Angeles Co. Super Ct. Rules, Rule 2.5(i) (applications for preliminary injunction assigned to Writs and Receivers Department)].

☐ Present any oral argument or witnesses, if permitted by local court rules, to appropriate court for hearing.

☐ Disclose to court any previous application for similar relief, and if any, the result of the application [*see Code Civ. Proc. § 1008(b)*; *see also Cal. Rules of Ct., Rule 3.1150(e)*].

COMMENT:
If the temporary restraining order has been issued, the hearing on order to show cause for preliminary injunction must be set no later than 15 days or, if good cause appears to court, 22 days from date of order [*Code Civ. Proc. § 527(d)(1)*].

☐ If granted, draft proposed preliminary injunction and present it to the judge for signature within one court day after the granting of the application unless another time period has been ordered by court [*Cal. Rules Ct., Rule 3.1150(f)*].

☐ Obtain undertaking or bond in amount ordered by court [*see Code Civ. Proc. § 529(a)*] and present it to the judge with the proposed preliminary injunction order within one court day after granting of application unless another time period has been ordered by court [*Cal. Rules Ct., Rule 3.1150(f)*].

☐ Personally serve preliminary injunction signed by judge on all enjoined parties, and serve by mail on the attorneys for all parties to ensure that they have notice of it.

[2] By Order to Show Cause

PRACTICE TIP:
If a party desires to obtain a preliminary injunction against a party who has not appeared in the action, an order to show cause is generally used. The order serves not only as a notice of the hearing but also as a citation or summons giving the court personal jurisdiction over the party to be enjoined [*see Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 8 n.6, 118 Cal. Rptr. 21, 529 P.2d 53]* .

☐ Draft complaint [*see § 303.130*], if case has not yet been initiated.

☐ Draft order to show cause [*see § 303.131*].

☐ Draft memorandum of points and authorities.

☐ Draft affidavits or declarations.

☐ Obtain statements from, and then prepare affidavits or declarations on behalf of, all persons who can make the application for provisional relief stronger from factual standpoint.

☐ Obtain signatures and, if affidavits, have statements notarized.

☐ Make sufficient copies to append a copy of each affidavit or declaration to each copy of the complaint.

☐ File complaint, if not previously filed.

☐ If action is initiated on the same day as the OSC is sought, provide file-stamped copy of complaint to judge who will hear application;if action was initiated earlier, request that court file to be made available to judge hearing the application [*Cal. Rules of Ct., Rule 3.1150(f)*].

☐ Present papers to court.

PRACTICE TIP:

Counsel should ascertain in which department, if relevant, and at what time of day, if restricted, applications for preliminary injunctions are considered.

☐ Serve order to show cause, any memorandum of points and authorities, and affidavits or declarations on party to be enjoined.

If unable to serve, file an affidavit stating that the opposing party could not be served within the time required and ask court to reissue Order to Show Cause and Temporary Restraining Order [*Code Civ. Proc. §§ 527(d)(2), 527(d)(5)*; for illustration of Judicial Council Form 982(a)(30), *see § 303.142*].

☐ Appear at hearing.

☐ Present papers and any oral argument or witnesses, if permitted by local court rules, to appropriate court for hearing.

☐ Disclose to the court any previous application for similar relief, and if any, the result of the application [*see Code Civ. Proc. § 1008(b)*; *see also Cal. Rules of Ct., Rule 3.1150(e)*].

☐ If granted, draft proposed preliminary injunction and present it to the judge for signature within one court day after granting of application unless another time period has been ordered by court [*Cal. Rules of Ct., Rule 3.1150(f)*].

☐ Obtain undertaking or bond in amount ordered by court [*see Code Civ. Proc. § 529(a)*] and present it to judge with proposed preliminary injunction order within one court day after granting of application unless another time period has been ordered by court [*Cal. Rules of Ct., Rule 3.1150(f)*].

☐ Personally serve preliminary injunction signed by judge on all enjoined parties, as well as on their attorneys, and serve by mail on the attorneys for all parties to ensure that they have notice of it.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsExecutionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

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§ 303.121 Defendant's Checklist for Opposing Injunctive Relief

[1] Preliminary Determinations

PRACTICE TIP:
Counsel defending against an application for injunctive relief should carefully investigate local practice for any different or additional requirements governing opposition to injunctive relief.

☐ Determine date, manner, and place of service of temporary restraining order and order to show cause, notice of motion, or order to show cause.

☐ Determine which of the facts alleged in applicant's documents are true, which are false, and which ones responding party is unsure about.

☐ Determine sufficiency of complaint and affidavits, declarations, and other supporting papers for purposes of responding to complaint by demurrer, answer, motion to strike, and counter-affidavits or counter-declarations.

☐ Ascertain available defenses:

- ☐ Injunctive relief is prohibited by statute.
- ☐ Injunctive relief is prohibited by equitable considerations or other reasons as they have been developed by decision.
- ☐ Changed circumstances or complete acts.

☐ Balance of conveniences favors responding party.

☐ Injunction will infringe on responding party's *First Amendment* rights.

☐ Laches.

☐ Applicant's legal remedy is adequate.

☐ Injunction will adversely affect important public interest.

☐ Unclean hands.

☐ Statutes of limitation.

☐ Venue.

[2] Documents to Be Obtained

☐ Written statements of parties or witnesses under penalty of perjury, supported by documentary evidence.

☐ Diagrams, photographs, or other descriptions of property or conduct involved.

☐ Bills, receipts, canceled checks, etc., that might serve as evidence of extent of harm incurred by applicant.

[3] Response to Temporary Restraining Order

☐ Respond to notification, if any [*see Code Civ. Proc. § 527(c)*; *Cal. Rules of Ct., Rule 3.1150(g), 3.1200- 3.1207*; *see also § 303.31[3]*].

☐ Request undertaking or bond if court decides to issue temporary restraining order [*see § 303.31[6]*].

[4] Response to Application for Preliminary Injunction

☐ Consider initiating discovery for use in preparing the application's opposition (including expedited discovery).

☐ Draft motion to modify or dissolve temporary restraining order, if temporary restraining order was issued and motion is warranted.

☐ Draft answer to complaint and verify answer, if necessary [*see Code Civ. Proc. §§ 92(b), 446*].

☐ Draft demurrer to complaint, if warranted [*see § 303.43[5], 303.135*].

☐ Draft motion to strike any portions of applicant's declarations that do not satisfy the requirements for admissible evidence.

☐ Draft responding affidavits or declarations [*see § 303.134*]:

☐ Obtain statements from and prepare affidavits or declarations on behalf of all persons who can provide factual statements on personal knowledge that contradict applicant's complaint, affidavits, or declarations in support of application for preliminary injunction.

☐ Obtain signatures and, if affidavits, have statements notarized.

☐ Make sufficient copies for the purpose of appending a copy of each to each copy of the answer to be served on all other parties.

☐ Prepare memorandum opposing application for preliminary injunction, if warranted [*see Cal. Rules of Ct., Rule 3.1113*], and make sufficient copies for the purpose of appending a copy of each to each copy of the demurrer or answer to be served on all other parties.

☐ File answer and any other supporting papers.

☐ Serve answer, affidavits or declarations, and any memorandum of points and authorities on all other parties [*see Code Civ. Proc. § 527(e)*].

☐ Obtain continuance to prepare for hearing, if desired [*see Code Civ. Proc. § 527(d)(4)*].

☐ Appear at hearing.

☐ Draft proposed order denying preliminary injunction and dissolving temporary restraining order [*see § 303.137*], if desired or requested; or alternatively, ordering the filing of an undertaking by the applicant.

☐ Prepare an affidavit or declaration, if requested or required, that states facts that will assist the court in fixing the amount of the undertaking or bond.

☐ Object to undertaking, if warranted on grounds that [*see Code Civ. Proc. § 529*; *see also Code Civ.*

Proc. § 995.920 et seq.]:

☐ Sureties are insufficient.

☐ Amount of undertaking is insufficient.

☐ Undertaking is insufficient for any other cause [*see Code Civ. Proc. § 995.920*].

☐ Ascertain damages to later be taken out of amount of undertaking if temporary restraining order is dissolved.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsObjectionsCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining Orders

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Volume 26: Injunctions thru Insurance-Chs. 303-313
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PART IV. PROCEDURAL CHECKLISTS

26-303 California Forms of Pleading and Practice--Annotated §§ 303.122-303.129

[Reserved]

§§ 303.122[Reserved]

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Volume 26: Injunctions thru Insurance-Chs. 303-313
Chapter 303 INJUNCTIONS
PART V. FORMS

26-303 California Forms of Pleading and Practice--Annotated § 303.130

§ 303.130 Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527], Permanent Injunction [Civ. Code § 3422], and Damages [Civ. Code § 3333]

[1] FORM Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527], Permanent Injunction [Civ. Code § 3422], and Damages [Civ. Code § 3333]

_____ [*Attorney identification*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAIN T FOR TEMPORARY RESTRAINING
_____ [*names*],	)	ORDER,
Defendants.	)	PRELIMINARY AND PERMANENT INJUNC-
	)	TIONS,
	)	AND DAMAGES

_____

Plaintiff alleges:

1. Plaintiff is, and at all times mentioned in this complaint was, _____ [*identify plaintiff and allege capacity in which plaintiff is suing defendants if that capacity is other than as an individual*].

2. _____ [*Allege facts showing that plaintiff has a personal or property right or interest of the kind that injunctive relief is available to protect, such as the ownership or possession of real property, the possession of an occupational or political status or position, or the right to conduct an established business*].

3. Defendants _____ [*name*] and _____ [*name*] are, and at all times mentioned in this complaint were, _____ [*allege status, capacity, and relationship to the subject matter of the controversy of each defendant, showing the nature of the duties, if any, owed by defendants to plaintiff*].

[4. Defendants Doe I through Doe _____, inclusive, are sued in this complaint under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences alleged in this complaint, and that plaintiff's damages as alleged in this complaint were proximately caused by those defendants.)]

5. Beginning on or about _____ [*date*], [and continuing to the present time,] defendants, and each of them, wrongfully and unlawfully _____ [*allege specific facts showing particularly what defendants are doing, threatening to do, refusing to do, or causing or permitting to be done that constitutes the invasion of, infringement on, or interference with plaintiff's protectible rights and interests*].

[6. *Allege, if appropriate, plaintiff's demand that defendants stop their (threatened) conduct, defendants refusal, and resulting necessity for prompt judicial action to protect plaintiff, e.g.,* On or about _____ (*date*), (and a number of times since then,) plaintiff has demanded that defendants stop their wrongful (threatened) conduct described above. Defendants, and each of them, have refused and still refuse to refrain from their (threatened) conduct.]

7. Defendants' [threatened] wrongful conduct, unless and until enjoined and restrained by order of this court, will cause great and irreparable injury to plaintiff as _____ [*specify particular facts indicating how defendants' actions will constitute great and irreparable injury*].

8. Plaintiff has no adequate remedy at law for the injuries _____ [currently being suffered *or* that are threatened] as _____ [*specify facts in addition to those previously alleged that tend to show the inadequacy of any legal remedy, especially monetary damages, that plaintiff might pursue, e.g.,* it will be impossible for plaintiff to determine the precise amount of damage that he/she will suffer if defendants' conduct is not restrained *or* plaintiff will be forced to institute a multiplicity of suits to obtain adequate compensation for his/her injuries].

[9. *Allege damages, if any, that have been incurred, e.g.,* As a proximate result of defendants' wrongful conduct, plaintiff's _____ (*specify, e.g.,* property *or* business) has been damaged in the sum of $_____. (Plaintiff will be further damaged in like manner so long as defendants' conduct continues. The full amount of this damage is not now known to plaintiff, and plaintiff will amend this complaint to state this amount when it becomes known to him/her or on proof of the damages.)]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For an order requiring defendants to show cause, if any they have, why they should not be enjoined as set forth in this complaint, during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendants, and each of them, and their agents, servants, and employees, and all persons acting under, in concert with, or for them:

a. From _____ [*specify each of the acts, courses of conduct, and conditions defendants are to be prohibited from doing, commencing, continuing, maintaining, failing to do, etc.*];

b. To _____ [*specify each of the acts, courses of conduct, and conditions defendants are to be commanded to do, undertake, etc.*];

3. For damages in the sum of $_____, plus damages in such further sums as may be sustained and as are ascertained before final judgment in this action;

4. For costs of suit incurred in this action; and

5. For such other and further relief as the court deems proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know its contents. The same is true of my own knowledge, except as to those matters that are alleged in the complaint on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

The general form of complaint in *[1], above*, is for use by a plaintiff who is seeking a temporary restraining order, preliminary injunction [*Code Civ. Proc. §§ 526, 527*; *Cal. Rules of Ct., Rule 3.1150*], and permanent injunction [*Code Civ. Proc. § 525*] as well as damages. The infinite variety of factual situations in which injunctions may be issued precludes any greater specificity [*see, e.g., Cal. Rules of Ct., Rule 3.1151* (description of property required in petition for injunction to limit picketing, enjoin encroachment on real property, or protect easement)]. Counsel desiring more specific allegations regarding a particular factual situation should consult *§ 303.02[2]* for references to forms of complaints for specific injunctive relief contained in this set. For further discussion of this complaint, see *§ 303.42[4]*.

In drafting the general form of complaint for injunctive relief at [1], *above*, it was assumed that counsel will be filing affidavits (or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*]) in support of the allegations in the complaint. If the complaint will not be supported by affidavits (or declarations), counsel must take care to plead evidentiary facts that would entitle plaintiff to the relief sought [*Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581* ; *Moreno Mut. Irr. Co. v. Beaumont Irr. Dist. (1949) 94 Cal. App. 2d 766, 778, 211 P.2d 928* ; *see Leach v. City of San Marcos (1989) 213 Cal. App. 3d 648, 661, 261 Cal. Rptr. 805]* . In addition, if no affidavits or declarations are prepared, the complaint must be verified [*see Code Civ. Proc. § 527(a)*].

[3] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a verified complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d*

369, 373, 106 P.2d 1 ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[4] Certification re Notice

For a discussion of the notice required when a temporary restraining order is sought without formal notice, *see § 303.31[3][b]*. The certification is normally appended to the application for the temporary restraining order [*see § 303.132*].

[5] Subject Matter Jurisdiction

Superior courts in limited civil cases have jurisdiction to issue temporary restraining orders and preliminary injunctions to preserve property or rights of any party to an action of which court has jurisdiction [*Code Civ. Proc. § 86(a)(8)*], but they cannot issue permanent injunctions in limited civil cases. For discussion of subject matter jurisdiction [*Cal. Const., art. VI, §§ 5* and *10*], see *§ 303.20*. For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter* .

[6] Personal Jurisdiction

For discussion of personal jurisdiction, see *§ 303.21*. For further discussion, *see generally* Ch. 323, *Jurisdiction: Personal* .

[7] Venue

For discussion of venue, see *§ 303.23*. For discussion and forms related to the subject of venue generally, see Ch. 571, *Venue* .

[8] Allegations

[a] In General

The form of complaint in *[1], above*, alleges the following:

- Plaintiff's capacity (Paragraph 1).
- Facts showing a protectible right or interest (Paragraph 2).
- Defendants' capacity (Paragraph 3).
- An optional allegation alleging fictitious defendants (Paragraph 4) [*see Code Civ. Proc. § 474*].
- The nature of defendants' wrongful conduct (Paragraph 5).
- An optional paragraph setting forth any demand that plaintiff has made that defendants refrain from their conduct (Paragraph 6).

- Facts showing how defendants' conduct will constitute great and irreparable injury (Paragraph 7) [*Code Civ. Proc. §§ 526(a)(2), 527*; *see E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1]* .

- Facts showing why plaintiff lacks an adequate remedy at law (Paragraph 8) [*see Civ. Code § 3422(1)-(3)*; *Code Civ. Proc. § 526(a)(4)-(6)*].

- An optional paragraph setting forth any damages that plaintiff has incurred (Paragraph 9) [*see Civ. Code § 3333*].

[b] Pleading Must Be Factual, Not Conclusionary

The allegations of the complaint must be factual; conclusionary averments are insufficient to support issuance of an injunction [*E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 370-371, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581* ; *see Leach v. City of San Marcos (1989) 213 Cal. App. 3d 648, 661, 261 Cal. Rptr. 805]* .

[c] Irreparable Injury and Inadequacy of Legal Remedy

This complaint alleges both plaintiff's irreparable injury (Paragraph 7) and the inadequacy of his or her legal remedy (Paragraph 8). Although Code *Civ. Proc. § 526* appears to make these separate, independent grounds for obtaining preliminary injunctive relief [*see Code Civ. Proc. § 526(a)(2), (4), (5)*], both allegations traditionally are included in a complaint for injunctive relief [*see Lezama v. Justice Court (1987) 190 Cal. App. 3d 15, 21, 235 Cal. Rptr. 238]* . This is because an injury will not be considered irreparable when it can be adequately compensated in damages--that is, when the remedy at law is adequate [*Helms Bakeries v. St. Bd. Equalization (1942) 53 Cal. App. 2d 417, 425, 128 P.2d 167]* . Moreover, *Civ. Code § 3422*, which governs the issuance of final injunctions, does not list irreparable injury as a ground for obtaining a final injunction [*see Civ. Code § 3422*].

Nevertheless, the fact that an injury cannot be compensated at law clearly must be alleged as part of an allegation that an injury is irreparable. The California Supreme Court has stated that the questions of whether an actual or threatened injury is irreparable and whether the legal remedy is adequate are so inextricable that the two should be considered together [*People v. Monterey Fish Products Co. (1925) 195 Cal. 548, 564, 234 P. 398]* . The complaint should therefore allege both facts showing actual or threatened injury (Paragraph 7) and facts showing that the legal remedy of an action for damages is inadequate because of either the inadequacy of pecuniary compensation for the wrong committed or threatened, or the continuing or repeated character of the wrong (Paragraph 8) [*see Huong Que, Inc. v. Luu, 150 Cal. App. 4th 400, 417-418, 58 Cal. Rptr. 3d 527* ; *Brownfield v. Daniel Freeman Marina Hospital (1989) 208 Cal. App. 3d 405, 410, 256 Cal. Rptr. 240* ; *Lezama v. Justice Court (1987) 190 Cal. App. 3d 15, 21, 235 Cal. Rptr. 238* ; *Gleaves v. Waters (1985) 175 Cal. App. 3d 413, 417, 220 Cal. Rptr. 621]* .

[9] Damages Permitted

A suit may combine legal and equitable relief. For further discussion, see *§ 303.10[3]*. For additional discussion of damages, see Ch. 177, *Damages* .

[10] Service of Complaint

For a discussion of the service of this complaint after a party has obtained a temporary restraining order, see *§ 303.42[5]*.

[11] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For alternative forms of prayers, see Ch. 420, *Prayers*

For memoranda of points and authorities supporting and opposing the issuance of preliminary injunctions, see California Points and Authorities, *Injunctions* (Matthew Bender)

For memoranda of points and authorities in support of and in opposition to preliminary injunctions involving particular factual situations, see the cumulative index to California Points and Authorities (Matthew Bender)

Witkin, California Procedure, vol. 2, *Jurisdiction*, §§ 239-241, 351-352, 403; vol. 3, *Actions*, §§ 120-121, 185, 654; vols. 4, 5, *Pleading*, §§ 152, 766-778; vol. 6, *Provisional Remedies*, §§ 276-415 (4th ed. 1997)

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Chapter 303 INJUNCTIONS
PART V. FORMS

26-303 California Forms of Pleading and Practice--Annotated § 303.131

§ 303.131 Proceedings for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction [Code Civ. Proc. § 527]--Ex Parte Application, Supporting Declaration and Declaration re Notice [Cal. Rules of Ct., Rule 3.1200 et seq.]

[1] FORM Proceedings for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction [Code Civ. Proc. § 527]--Ex Parte Application, Supporting Declaration and Declaration re Notice [Cal. Rules of Ct., Rule 3.1200 et seq.]

_____ [*Attorney identification*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	EX PARTE APPLICATION AND SUPPORTING
Plaintiff,	)	DECLARATION OF _____
vs.	)	[*name*] FOR TEMPORARY RESTRAINING OR-
_____ [*name*],	)	DER AND ORDER TO SHOW CAUSE RE PRE-
Defendant.	)	LIMINARY INJUNCTION; CERTIFICATION RE
	)	NOTICE
	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

Plaintiff _____ [*name*] applies for a temporary restraining order restraining defendant _____ [*name*][, and his/her agents, servants, and employees,] from _____ [*specify act(s) to be restrained*], and an order to show cause why a preliminary injunction should not be granted enjoining defendant [and his/her agents, servants, and employees,] from _____ [committing *or* performing] the above described act(s) during the pendency of this action. This application is made on the ground(s) that _____ [*specify one or more grounds listed in Code Civ. Proc. § 526*], and on the further ground that _____ [great *and/or* irreparable] injury will result to plaintiff before the matter can be heard on notice.

Plaintiff _____ [has not previously applied for to any judicial officer for similar relief *or describe previous application and the result of the application*].

This application is based on the complaint on file in this case, [and] on the declaration of _____ [*specify, e.g.,* plaintiff] _____ [appended *or* attached] to this application [, and on the attached memorandum].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*describe status of declarant and relationship to action, e.g.,* the plaintiff in this action] and make this declaration in support of _____ [my *or* plaintiff's] application for a temporary restraining order and order to show cause re preliminary injunction.

2. _____ [*Describe act(s) sought to be restrained, the persons committing or performing the act(s) and the relationship of these persons to defendant, and facts showing that the act(s) are without right or are wrongful*].

3. _____ [*Identify any exhibits attached as evidence to this declaration, e.g.,* Exhibit A attached to and made a part of this application is a photograph taken by _____ (*name of photographer*) on _____ (*date*), showing _____ (*identify matter depicted and describe its significance*). I personally observed _____ (*specify, e.g.,* the scene in question at the time the photograph was taken), and Exhibit A is a fair and accurate representation of _____ (*specify, e.g.,* the scene) as it occurred on _____ (*date*)].

4. _____ [*Continue with references to and support for exhibits attached to the declaration, identifying and describing the significance of each, as in Paragraph 3*].

5. _____ [*Describe the effect of the act(s) on plaintiff that establish the ground(s) for pendente lite injunctive relief*].

6. Unless a temporary restraining order is granted, _____ [great *and/or* irreparable] injury will result to _____ [me *or* plaintiff] as _____ [*describe injury that will be sustained that cannot*

be compensated for in money].

[7. On _____ (*date*), (and a number of times since then,) _____ (I *or* plaintiff) demanded that defendants stop their wrongful (threatened) conduct described above. Defendants have refused, and still refuse, to refrain from their (threatened) conduct.]

8. The above facts are within my personal knowledge and I am competent to testify to their truth if called as a witness.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

SUPPORTING DECLARATION OF _____ [*name*]
RE ADVANCE NOTIFICATION

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*specify party, e.g.,* plaintiff) in the above-described action].

[*In succeeding numbered paragraph(s) describe with particularity the actions taken to provide advance notification of the ex parte application in compliance with Cal. Rules of Ct., Rule 3.1204, e.g.:*]

[*EITHER*]

2. On _____ [*date*], at _____ [*time not later than 10:00 of the court day before the application*], I informed _____ [defendant(s) *or* _____ (defendant's *or* defendants') attorney, _____ (*name*),] by _____ [*describe manner of notice, e.g.,* by telephone and a faxed letter confirming our conversation], that the above application for a temporary restraining order and order to show cause would be made on _____ [*specify date and time*] at _____ [*specify place*].

3. _____ [*Describe response or lack of response to notification*]. Therefore, I _____ [expect *or* do not expect *or* could not determine whether to expect] opposition to the application.

[*OR*]

2. In good faith I attempted to inform _____ [defendant(s) *or* _____ (defendant's *or* defendants') attorney, _____ (*name*),] of the time and place the above application for a temporary restraining order and order to show cause would be made. I _____ [*specify efforts made*]. However I was unable to make contact.

[*OR*]

2. Notice to _____ [defendant(s) *or* _____ (defendant's *or* defendants') attorney, _____ (*name*),] of the time and place the above application for a temporary restraining order should not be required for the following reason(s): _____ [*specify*].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

The form in *[1], above*, is for use to apply ex parte for a temporary restraining order and order to show cause re preliminary injunction [*see Code Civ. Proc. § 527(a)-(f)* (procedure for securing temporary restraining order and preliminary injunction on basis of facts alleged in verified complaint or set forth in affidavits); *Code Civ. Proc. § 2015.5* (use of declaration under penalty of perjury in lieu of affidavit)]. For a form of order to show cause re preliminary injunction and temporary restraining order, see *§ 303.132, below*. For discussion of the requirements under *Code Civ. Proc. § 527(c)* for issuing a temporary restraining order ex parte, see *§ 303.31[3]*. Generally, temporary restraining orders will not be granted on affidavits which are stated on information and belief [*Low v. Low (1956) 143 Cal. App. 2d 650, 654, 299 P.2d 1022* ; *Provident L. Corp. v. Provident I. Dist. (1937) 22 Cal. App. 2d 105, 108, 79 P.2d 392]* . For discussion of jurisdiction, venue, and sufficiency of allegations, see *§ 303.130[5] -[10]*.

The form at [1], *above*, includes a statement to indicate whether the plaintiff has previously applied for similar relief, and if so, the result of the application [*see Cal. Rules of Ct., Rule 3.1150(e)*].

The form also includes an attorney's certificate regarding advance notification of the application, which is required by *Cal. Rules of Ct., Rule 3.1204*. For discussion of this requirement, see *§ 303.31[3][b]*.

[3] Memorandum

There is no requirement that the ex parte application for a temporary restraining order and order to show cause re preliminary injunction be supported by a memorandum. Nevertheless, statute requires that, when the matter first comes up for hearing, the party who obtained the temporary restraining order must be ready to proceed, and must have served on the opposite party within five days from the date of the temporary restraining order or at least two days before the hearing, whichever is earlier, a copy of the complaint and of all affidavits or declarations to be used in the application and a copy of the points and authorities in support of the application [*Code Civ. Proc. § 527(d)(1)*].

Even when not required, counsel may wish to cite any authority that would support the granting of the temporary restraining order and order to show cause for the court's information so that the application will not be denied and plaintiff directed to proceed by noticed motion. If a memorandum of points and authorities is used, the nature of the papers in the caption of this form should be amended to include "and Memorandum of Points and Authorities." For memoranda of points and authorities supporting and opposing the issuance of preliminary injunctions, see California Points and Authorities, Ch. 116, *Injunctions* (Matthew Bender).

[4] Cross References

California Civil Procedure Before Trial, vol. 2, ch. 39, *Injunctions*, §§ 39.33-39.36 (Cal. C.E.B. 1993)

Witkin, California Procedure, vol. 6, *Provisional Remedies*, §§ 362-365 (4th ed. 1997)

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26-303 California Forms of Pleading and Practice--Annotated § 303.132

§ 303.132 Proceedings for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction [Code Civ. Proc. § 527]--Temporary Restraining Order and Order to Show Cause re Preliminary Injunction

[1] FORM Proceedings for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction [Code Civ. Proc. § 527]--Temporary Restraining Order and Order to Show Cause re Preliminary Injunction
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER TO SHOW CAUSE RE PRELIMINARY
Plaintiff,	)	INJUNCTION AND TEMPORARY RESTRAINING
vs.	)	ORDER
_____ [*name*],	)	[Telephone Appearance]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

On reading the [verified] complaint of plaintiffs on file in the above-entitled action [and the _____ (declaration(s) *or* affidavit(s))] [and the memorandum of points and authorities submitted therewith], it appears to the satisfaction of the court that this is a proper case for granting an order to show cause for a preliminary injunction [and a temporary restraining order, and that, unless the temporary restraining order prayed for be granted, great or irreparable injury will result to plaintiff before the matter can be heard on notice].

IT IS ORDERED that the above-named defendants, and each of them, appear in [_____ (Department

or Division) _____ of] this court, located at _____ [*address*], _____ [*city*], on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, then and there to show cause, if any they have, why they and their agents, servants, employees, and representatives, and all persons acting in concert or participating with them, should not be enjoined and restrained during the pendency of this action from engaging in, committing, or performing, directly or indirectly, any and all of the following acts:

a.

_____ [*Specify the various acts and lines of conduct or threatened acts and conduct sought to be prohibited, as far as practicable use the same terms as those used in the prayer of the complaint*];

b.

_____ [*Continue with such specifications if more than one*].

IT IS FURTHER ORDERED that the above-named defendants, and each of them, appear at the same time and place and show cause, if any they have, why they should not be commanded by order of this court and required [during the pendency of this action] to:

a.

_____ [*Specify each of the acts or courses of conduct defendants are to be commanded to do, commence, or continue, and each of the conditions they are to maintain*];

b.

_____ [*Continue with such specifications if more than one*].

IT IS FURTHER ORDERED that:

a. Plaintiff shall serve this order to show cause on defendants in the following time and manner:

_____ .

b. Proof of service must be delivered to the court hearing the OSC on:

_____ .

c. The parties shall adhere to the following briefing schedule:

_____ .

[d. The temporary restraining order shall expire on:

_____ .]

[IT IS FURTHER ORDERED that, pending the hearing and determination of the order to show cause, the above-named defendants, and each of them, and their officers, agents, employees, representatives, and all persons acting in concert or

participating with them, are restrained and enjoined from engaging in or performing, directly or indirectly, any and all of the following acts:]

[a.

_____ (Specify acts or conduct to be prohibited pending the order to show cause hearing. Frequently these acts will be merely a repetition of the preceding prohibitory specifications, but counsel may seek a restraining order that is different (usually less extensive) from the preliminary injunction he or she seeks);]

[b.

_____ (*Continue with such specifications if more than one*).]

[IT IS FURTHER ORDERED that, pending the hearing and determination of the above order to show cause, the above-named defendants, and each of them, are required and ordered to:]

[a.

_____ (*Specify each of the acts or courses of conduct defendants are to be commanded to do, commence, or continue, and each of the conditions they are to maintain pending the order to show cause hearing. Frequently these acts will be merely a repetition of the preceding mandatory specifications, but counsel may seek a restraining order that is different (usually less extensive) from the preliminary injunction he or she seeks*);]

[b.

_____ (*Continue with such specifications if more than one*).]

IT IS FURTHER ORDERED that copies of the complaint [, _____ (declaration(s) *or* affidavits(s)),] [memorandum of points and authorities,]and this order to show cause [and temporary restraining order] be served on _____ [defendants *or* the party against whom this order is made] not later than _____ [*date*].

[*Include order fixing bond if counsel for plaintiff knows that same will be required by court e.g.,* Bond on this temporary restraining order is fixed in the sum of $_____.]

Let the above order issue [on plaintiff's filing a bond in the sum of $_____].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[*If counsel for plaintiff does not know in advance that the court will require a bond before issuing a temporary restraining order, he or she should not include any reference to a bond in the body of the order. Rather, reference to it may be added to the order later, as follows, e.g.,* Bond on the above temporary restraining order is fixed in the sum of $_____. The above temporary restraining order may not issue until plaintiff has filed a bond in the above-specified sum.]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of order to show cause (OSC) and optional temporary restraining order (TRO) in *[1], above*, is for use by plaintiff in obtaining that injunctive relief before the hearing on an order to show cause why a preliminary injunction should not be issued [*see Cal. Rules of Ct., Rule 3.1150(a)-(c)*]. The form contains both prohibitory and mandatory allegations with regard to the OSC and the TRO. Counsel should freely delete any of the allegations that are not appropriate to the type of relief required in a particular situation.

The language granting a TRO is set forth as optional language in the form as it would not be used in the case in which the plaintiff is seeking only a preliminary injunction and not a TRO. For the same purpose, language within the OSC may also be modified by use of optional phrases for giving notice of a hearing on an application for a preliminary injunction when plaintiff's counsel is not seeking a TRO and/or the opposing party has not appeared in the action. The use of an OSC is preferred over the noticed-motion procedure *set forth in § 303.133* because it is an order from the court that may be enforced by contempt proceedings [*see Code Civ. Proc. § 1209(a)(5)*].

The OSC and the TRO must be stated separately, with the OSC stated first. Furthermore, the retraining language sought in an OSC and a TRO must be separately stated in each and may not be incorporated by reference. The OSC must describe the injunction to be sought at the hearing, and the TRO must describe the activities to be enjoined pending the hearing [*Cal. Rules of Ct., Rule 3.1150(c)*].

In addition, the proposed OSC must contain blank spaces for the time and manner of service on the responding party or parties, the date on which the proof of service must be delivered to the court hearing the OSC, a briefing schedule, and if applicable, for the expiration date of the TRO [*Cal. Rules of Ct., Rule 3.1150(c)*]. When a temporary restraining order is granted without notice, the matter must be made returnable on order to show cause why preliminary injunction should not be granted. The hearing on the order to show cause must be held on the earliest day that the business of the court permits, but not later than 15 days, or 22 days if good cause appears to the court [*Code Civ. Proc. § 527(d)(1)*].

For a discussion of the procedures required to obtain a TRO, the ex parte issuance of a TRO, and the issuance of an OSC, see *§§ 303.30 -303.31*.

[3] No Ex Parte Issuance After Answer

An injunction may not be allowed after the defendant has answered unless it is on notice or on an order to show cause [*Code Civ. Proc. § 528*]. In that case, however, the defendant may be restrained until the decision of the court or judge granting or refusing the injunction [*Code Civ. Proc. § 528*].

[4] Undertaking

An undertaking on temporary restraining order is not required by statute but may be required by reason of the trial court's inherent power over provisional relief. If required, the bond may include as obligees any persons who the trial court determines, in exercise of its sound discretion, should be protected against the impact of the temporary restraining order if it is found to have been improperly issued [*Allen v. Pitchess (1973) 36 Cal. App. 3d 321, 329-330, 111 Cal. Rptr. 658]* . As stated as instructions in the form at [1], *above*, if counsel for plaintiff does not know in advance that the court will require a bond before issuing a temporary restraining order, he or she should not include any reference to a bond in the body of the order. Rather, reference to it may be added to the order later, if necessary.

[5] Cross References

California Civil Procedure Before Trial, vol. 2, ch. 39, *Injunctions*, § 39.91 (Cal. C.E.B. 1993)

Witkin, California Procedure, vol. 6, *Provisional Remedies*, §§ 364-371 (4th ed. 1997)

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Chapter 303 INJUNCTIONS
PART V. FORMS

26-303 California Forms of Pleading and Practice--Annotated § 303.133

§ 303.133 Proceedings for Preliminary Injunction [Code Civ. Proc. § 527]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Preliminary Injunction [Code Civ. Proc. § 527]--Notice of Motion and Supporting Declaration

_____ [*Attorney identification*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MOTION AND NOTICE OF MOTION FOR PRELIMINARY INJUNCTION, SUPPORTING DECLARATION OF _____ [*name of plaintiff*],
vs.	)	
_____ [*name*],	)	AND MEMORANDUM
Defendant.	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*e.g.*, defendant] _____ [*name*] and to _____ [*name*],

his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], plaintiff will, and hereby does, move the court for a preliminary injunction enjoining and restraining the above-named defendants [and their officers, agents, employees, representatives, and all persons acting in concert or participating with them,] from engaging in or performing, directly or indirectly, any and all of the following acts:

a. _____ [*Specify the various acts and types of conduct or threatened acts and conduct sought to be prohibited*];

b. _____ [*Continue with such specifications if more than one*].

Plaintiff will also move the court that the above-named defendants, and each of them, be required and ordered to:

a. _____ [*Specify each of the acts or courses of conduct defendants are to be commanded to do, commence, or continue, and each of the conditions they are to maintain*];

b. _____ [*Continue with such specifications if more than one*].

The motion will be made on the grounds that _____ [*specify grounds, such as those stated in Code Civ. Proc. § 526*].

The motion will be based on this notice, on the declaration(s) of _____ [name(s)], on the memorandum of points and authorities served and filed with this motion, on the papers and records on file, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*specify, e.g.,* the plaintiff in this action].

2. _____ [*Set forth facts showing plaintiff has a property interest of the kind a preliminary injunction is available to protect, e.g.,* property ownership].

3. _____ [*Set forth facts showing what defendants are doing that interferes with plaintiff's rights, e.g.,* On _____ (*date*), defendants erected an embankment adjacent to the aforementioned property of mine, causing flooding on that property].

4. _____ [*Set forth facts showing irreparable injury will be sustained if preliminary injunction is not*

issued, e.g., If defendants are not forced to remove the embankment adjacent to my aforementioned property, the flooding will continue, and the property will be irreparably damaged].

5. _____ [*Set forth facts showing inadequacy of legal remedy, e.g.,* Monetary damages would be inadequate to pay for the loss of use of the land].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

MEMORANDUM

[*Add memorandum supporting motion.*]

[2] Use of Form

The form of notice of motion in *[1], above*, is for use by plaintiff in giving notice of a hearing at which he or she intends to apply for a preliminary injunction. The noticed-motion procedure is generally used when the party sought to be enjoined has already appeared. This procedure and that of the order to show cause, which must be issued when the plaintiff has been granted a temporary restraining order [*see Code Civ. Proc. § 527(b)*], are the two principal methods of meeting the notice requirements of *Code Civ. Proc. § 527(a)-(c)*. When a party has not appeared, an order to show cause is generally used to give notice of the hearing. Although not specifically mentioned in *Code Civ. Proc. § 527*, the noticed-motion procedure has been approved implicitly by the California Supreme Court [*see Wutchumna Water Co. v. Superior Court (1932) 215 Cal. 734, 739-740, 12 P.2d 1033]* .

For a discussion of the grounds and availability for obtaining a preliminary injunction, see *§§ 303.40 -303.41*. For a discussion of the procedural requirements applicable to obtaining a preliminary injunction, including notice to adversely affected parties, see *§ 303.42*.

[3] Memorandum of Points and Authorities

A memorandum of points and authorities must be served with the motion and notice of motion [*see* Cal. Rules of Ct., Rules 3.112(a), 3.113(a)]. For discussion and general forms of points and authorities, see Ch. 417, *Points and Authorities* .

[4] Service of Complaint and Declarations

Because the noticed-motion procedure for applying for a preliminary injunction is generally used when the opposing party has already appeared, he or she will already have been served with a copy of the complaint and summons [*see § 303.130*]. It is uncertain when the affidavits or declarations must be served if they are to be used to support the application for the preliminary injunction. It would be best to serve them along with the notice of motion, but, in any event, they must be served on defendant within five days of the temporary restraining order or at least two days before the hearing on the motion, whichever is earlier [*see Code Civ. Proc. § 527(d)(2)*].

[5] Cross References

California Civil Procedure Before Trial, vol. 2, ch. 39, *Injunctions*, § 39.92 (Cal. C.E.B. 1993)

Witkin, California Procedure, vol. 6, *Provisional Remedies*, §§ 368-371 (4th ed. 1997)

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26-303 California Forms of Pleading and Practice--Annotated § 303.134

§ 303.134 Declaration Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]

[1] FORM Declaration Opposing Application for Preliminary Injunction [Code Civ. Proc. § 527]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____
vs.	)	[*name*] OPPOSING APPLICATION FOR PRELIM-
_____ [*name*],	)	INARY INJUNCTION
Defendant.	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*describe status of defendant, e.g.,* one of the defendants in this action]. This declaration is made in opposition to plaintiff's application for a preliminary injunction.

2. I have read plaintiff's complaint in the above-entitled action that seeks a preliminary [and a permanent] injunction against me. Except as admitted below, [and except as to those allegations of which I have no information or belief,] each and all of the allegations in that complaint [and in the supporting declaration(s) of _____ (*name*) (and _____ (*name*))] are false.

3. I admit that _____ [*set forth admissions of allegations in complaint*].

[4. I further admit that _____ (*set forth admissions of allegations in declaration(s) supporting complaint*).]

5. It is particularly not true that _____ [*set forth allegations in complaint that are not true and state true facts*].

[6. It is also not true that _____ (*set forth allegations in declaration(s) that are not true and state true facts*).]

[7. I have no information or belief as to the truth or falsity of the allegations in the complaint that state that _____ (*set forth allegations in complaint of which defendant has no information or belief*).]

[8. I have no information or belief as to the truth or falsity of the allegations in the declaration(s) of _____ (*name*) (and _____(*name*)), which state that _____ (*set forth allegations in declaration(s) of which defendant has no information or belief*).]

[9. A temporary restraining order was served on defendants in this action on _____ (*date*). Defendants have complied with the order by _____ (*state facts showing compliance with order*). Compliance with this order is, however, causing defendants damage by _____ (*state facts indicating ways in which temporary restraining order is damaging defendants*).]

10. If the court grants plaintiff a preliminary injunction against defendants, defendants will suffer great harm, in that _____ [*allege specific facts showing manner in which defendants will be injured if a preliminary injunction is issued*].

11. It is not true that plaintiff has no adequate remedy at law and will suffer great or irreparable injury by defendants' conduct unless a preliminary injunction is granted because _____ [*specify facts showing an adequate remedy at law and lack of any such injury, e.g.*, defendant is solvent and is capable of responding to any judgment for damages caused to plaintiff by defendants' conduct in an action for _____ (*specify type of legal action that plaintiff might bring to obtain relief for any damages caused by defendants*)].

WHEREFORE, declarant prays that this court deny plaintiff's application for a preliminary injunction [against this declarant] [*if a temporary restraining order has been issued, add:* and that the temporary restraining order previously issued in this action be dissolved].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

The form of declaration at *[1], above*, is for use by a defendant to oppose a complaint seeking a preliminary injunction [*see Code Civ. Proc. § 527(e)* (defendant may present affidavits in response to order to show cause relating to granting of preliminary injunction)]. The declaration may be used in addition to an answer to the complaint and any demurrer [*see § 303.135*]. With appropriate modifications, it may be used to structure a declaration by a person who is not a defendant in the action but who, nevertheless, is in a position to offer factual material useful to counsel defending

against an application for a preliminary injunction.

For a discussion of the grounds and availability for obtaining a preliminary injunction, see *§§ 303.40 -303.41*. For a discussion of the procedural requirements applicable to obtaining a preliminary injunction, see *§ 303.42*.

If the declarations are served on the applicant at least two days before the hearing on the order to show cause, the applicant will not be entitled to any continuance on that account [*Code Civ. Proc. § 527(e)*].

[3] Cross References

California Civil Procedure Before Trial, vol. 2, ch. 39, *Injunctions*, §§ 39.49-39.52 (Cal. C.E.B. 1993)

Witkin, California Procedure, vol. 6, *Provisional Remedies*, § 379-380 (4th ed. 1997)

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26-303 California Forms of Pleading and Practice--Annotated § 303.135

§ 303.135 Demurrer [Code Civ. Proc. § 430.30(a)] to Complaint for Injunctive Relief and Notice of Hearing [Cal. Rules of Ct., Rule 3.1320(c)]--Complaint Fails to State Facts Sufficient to Constitute Cause of Action

[1] FORM Demurrer [Code Civ. Proc. § 430.30(a)] to Complaint for Injunctive Relief and Notice of Hearing [Cal. Rules of Ct., Rule 3.1320(c)]--Complaint Fails to State Facts Sufficient to Constitute Cause of Action

_____ [*Attorney identification*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DEMURRER OF _____ [*name*] TO
vs.	)	COMPLAINT BY _____ [*name*],
_____ [*name*],	)	MEMORANDUM, AND NOTICE OF HEARING
Defendant.	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

Defendant demurs to the complaint in this action on the following ground:

[*EITHER*]

The complaint in this action does not state facts sufficient to constitute a cause of action in that _____ [*specify reason that no cause of action for injunctive relief is stated*].

[*OR*]

The complaint in this action does not state facts sufficient to constitute a cause of action in that the complaint alleges only general conclusions and does not contain adequate factual allegations of plaintiff's right to injunctive relief as more fully appears from the accompanying memorandum of points and authorities.

[*CONTINUE, if desired*]

[WHEREFORE, defendant prays that this demurrer be sustained (without leave to amend), that plaintiff take nothing by his/her complaint, that defendant have judgment for his/her costs, and for all other proper relief.]
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

MEMORANDUM

[*Add memorandum supporting demurrer.*]

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that this demurrer has been set for hearing on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] the above-entitled court, located at _____ [*address*], _____ [*city*], California.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

The form of demurrer in *[1], above,* is for use by counsel for a defendant in replying to a complaint for injunctive relief. The demurrer alleges that the complaint fails to state a cause of action either because no cause of action is alleged or because the allegations in the complaint are not adequately factual [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*]. The form includes the notice of hearing on the demurrer, and room to insert a memorandum of points and authorities, both

of which are required [*see* Cal. Rules of Ct., Rules 3.112(a), 3.113(a), *3.1320(c)*].

For a discussion of the grounds and availability for obtaining a preliminary injunction, see *§§ 303.40 -303.41*. General defenses against an action for injunctive relief are discussed in *§§ 303.70 -303.71*. For discussion of a complaint for injunctive relief, see *§ 303.130[2] -[11]*.

[3] Demurrer When No Cause of Action

A cause of action must exist before injunctive relief may be granted [*Camp v. Board of Supervisors (1981) 123 Cal. App. 3d 334, 356, 176 Cal. Rptr. 620* ; *Golden Gate S.T., Inc. v. San Francisco (1937) 21 Cal. App. 2d 582, 585, 69 P.2d 899]* . A preliminary injunction is not, in itself, a cause of action [*Major v. Miraverde Homeowners Assn. (1992) 7 Cal. App. 4th 618, 623, 9 Cal. Rptr. 2d 237]* .

A demurrer to the complaint will be sustained when a cause of action for injunctive relief is not stated [*Golden Gate S.T., Inc. v. San Francisco (1937) 21 Cal. App. 2d 582, 586, 69 P.2d 899]* .

[4] Demurrer When Insufficient Facts

When the complaint is the sole basis of an application for a preliminary injunction and is treated as an affidavit, its sufficiency must be tested by the same rules applicable to oral testimony. Conclusions that might stand as a matter of pleading are not competent to justify the issuance of an injunction [*Bank of America v. Williams (1948) 89 Cal. App. 2d 21, 23, 200 P.2d 151* ; *see Willis v. Lauridson (1911) 161 Cal. 106, 108, 118 P. 530]* . Thus, a complaint for an injunction that is unsupported by affidavits and alleges only general conclusions not warranted by any pleading of facts does not state a cause of action to enjoin the acts complained of [*E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581* ; *see Leach v. City of San Marcos (1989) 213 Cal. App. 3d 648, 661, 261 Cal. Rptr. 805]* .

[5] Cross References

For discussion, procedural guides, and forms related to demurrers generally, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

For discussion and general forms relating to memoranda of points and authorities, see Ch. 417, *Points and Authorities*

For memoranda of points and authorities that may be used to support the above form of demurrer, see California Points and Authorities, Ch. 116, *Injunctions*

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26-303 California Forms of Pleading and Practice--Annotated § 303.136

§ 303.136 Order Granting Preliminary Injunction and Requiring Undertaking [Code Civ. Proc. § 527]

[1] FORM Order Granting Preliminary Injunction and Requiring Undertaking [Code Civ. Proc. § 527]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	PRELIMINARY INJUNCTION
Defendants.	)	
	)	
	)	

The _____ [application *or* motion] of plaintiff for the preliminary injunction came on regularly for hearing by the court this date in accordance with _____ [an order to show cause issued by this court on _____ (*date*) *or* plaintiff's motion for a preliminary injunction]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the court's satisfaction, and good cause appearing:

IT IS ORDERED that during the pendency of this action the above-named defendants, and each of them, and their officers, agents, employees, representatives, and all persons acting in concert or participating with them, are enjoined and restrained from engaging in, committing, or performing, directly or indirectly, by any means whatsoever, any of the following acts:

a. _____ [*Specify the various acts and types of conduct that are prohibited with sufficient clarity to apprise all of the persons enjoined of what they are prohibited from doing*];

b. _____ [*Continue with such specifications if more than one*].

IT IS FURTHER ORDERED that the above-named defendants are required and ordered to:

a. _____ [*Specify each of the acts or courses of conduct defendants are required to do, commence, or continue, and each of the conditions they are to maintain*];

b. _____ [*Continue with such specifications if more than one*].

IT IS FURTHER ORDERED that, before this order shall take effect, plaintiff must file a written undertaking in the sum of $_____, as required by *Code of Civil Procedure Section 529*, for the purpose of indemnifying defendants for the damages as they may sustain by reason of this preliminary injunction if the court finally decides that plaintiff is not entitled to it.

IT IS FURTHER ORDERED that the preliminary injunction as set forth above shall issue on plaintiff's filing a written undertaking in the sum specified above.

The court reserves jurisdiction to modify this injunction as the ends of justice may require.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of preliminary injunction in *[1], above*, should be prepared by counsel for a plaintiff when counsel has persuaded a court to issue a preliminary injunction. The form contains both prohibitory and mandatory allegations. Counsel should freely delete any of the allegations to which the court has not agreed.

For a detailed discussion of proceedings after a court has granted a preliminary injunction, see *§ 303.80* et seq.

[3] Time to Apply

A preliminary injunction may be granted at any time before judgment [*Code Civ. Proc. § 527(a)*]. Thus, it is not necessary that an application for a preliminary injunction be made at the time the complaint is filed [*McDonald v. Superior Court (1937) 18 Cal. App. 2d 652, 655-656, 64 P.2d 738]* .

[4] Specific Reservation of Jurisdiction to Modify

Even though jurisdiction to modify an injunction seems to be an inherent power of the court [*see Sontag Chain Stores Co. v. Superior Court (1941) 18 Cal. 2d 92, 94-95 113 P.2d 689* ; *see also* discussion in *§ 303.80[1]*], it is advisable to include in the judgment a specific reservation of jurisdiction to modify the injunction [*Components for Research, Inc. v. Isolation Products, Inc. (1966) 241 Cal. App. 2d 726, 731, 50 Cal. Rptr. 829]* .

[5] Undertaking Required

On granting a preliminary injunction, the court or judge must require an undertaking [*see Oksner v. Superior Court (1964) 229 Cal. App. 2d 672, 687, 40 Cal. Rptr. 621* ; *Federal Automotive Services v. Lane Buick Co. (1962) 204 Cal. App. 2d 689, 695, 22 Cal. Rptr. 603* (order granting preliminary injunction that does not provide for bond is nullity)]. The undertaking must be to the effect that the applicant will pay to the party enjoined any damages, not exceeding an

amount to be specified, that party may sustain by reason of the injunction if the court finally decides that the applicant was not entitled to the injunction [*Code Civ. Proc. § 529(a)*]. Certain persons and entities are exempted from this requirement [*see Code Civ. Proc. § 529(b)*]. However, a bond may be waived or forfeited by the person to be enjoined [*Smith v. Adventist Health System/West (2010) 182 Cal. App. 4th 729, 740-744, 2010 Cal. App. LEXIS 291]* .

All bonds and undertakings must comply with *Cal. Rules of Ct., Rule 3.1130* [*Cal. Rules of Ct., Rule 3.1150(f)*; for discussion of *Rule 3.1130, see* Ch. 538, *Suretyship, Bonds, and Undertakings*].

For a discussion of undertakings generally, see *§ 303.46*. See also the discussion of proceedings to enforce liability on an undertaking or bond in.

[6] Procedure to Obtain Writ After Hearing

Notwithstanding *Cal. Rules of Ct., Rule 3.1312*, on the preparation of orders, whenever an application for a preliminary injunction is granted, a proposed order must be presented to the judge for signature, together with an undertaking in the amount the judge has ordered, within one court day after the granting of the application or within the time ordered by the court. Unless otherwise ordered, any restraining order previously granted remains in effect during the time allowed for presentation for signature of the order of injunction and undertaking. If the proposed order and the undertaking required are not presented within the time allowed, the temporary restraining order may be vacated without notice [*Cal. Rules of Ct., Rule 3.1150(f)*].

[7] Service of Writ

The Code of Civil Procedure does not provide how or by whom an injunction must be served. Because the statutes are silent, it is sufficient if service is made in conformity with the mode of service prescribed with reference to service of a summons [*Golden Gate Consol. Hydraulic Mining Co. v. Superior Court of Yuba County (1884) 65 Cal. 187, 190, 3 P. 628* (service of temporary restraining order held valid); *see generally* Ch. 518, *Service of Summons and Papers*].

[8] Cross References

For discussion and forms related to suretyship, bonds, and undertakings, see Ch. 538, *Suretyship, Bonds, and Undertakings*

California Civil Procedure Before Trial, vol. 2, ch. 39, *Injunctions*, §§ 39.62-39.65 (Cal. C.E.B. 1993)

Witkin, California Procedure, vol. 6, *Provisional Remedies*, §§ 382-387 (4th ed. 1997)

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26-303 California Forms of Pleading and Practice--Annotated § 303.137

§ 303.137 Order Denying Preliminary Injunction and Dissolving Temporary Restraining Order [Code Civ. Proc. § 527]

[1] FORM Order Denying Preliminary Injunction and Dissolving Temporary Restraining Order [Code Civ. Proc. § 527]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	ORDER DENYING PRELIMINARY INJUNCTION
Defendants.	)	
	)	
	)	

The _____ [application *or* motion] of plaintiff for a preliminary injunction came on regularly for hearing by the court this date in accordance with _____ [an order to show cause issued by this court on _____ (*date*) *or* plaintiff's motion for a preliminary injunction]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

The matter having been submitted on the pleadings[, on the _____ (affidavit(s) *or* declaration(s)) of _____ (*name(s)*),] [on the memorandum of points and authorities on file herein,] and on the oral and documentary evidence presented at the hearing, and the court being fully advised in the matter:

IT IS HEREBY ORDERED that [the temporary restraining order granted on _____ (*date*) be and hereby is dissolved and vacated, and that] plaintiff's application for a preliminary injunction is denied.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of order in *[1], above*, may be used by defense counsel who has persuaded a court to deny plaintiff's application for a preliminary injunction and to dissolve the temporary restraining order if one was granted. Note that the optional language dissolving the temporary restraining order is not mandatory because an order denying a preliminary injunction automatically dissolves an existing temporary restraining order [*Landmark Holding Group, Inc. v. Superior Court (1987) 193 Cal. App. 3d 525, 529,238 Cal. Rptr. 475]* . Orders denying preliminary injunctions are also made by minute order.

For a discussion of issuing temporary restraining orders, see *§§ 303.30 -303.31*. For a discussion of the determinations made by the court in granting or denying a preliminary injunction, see *§ 303.43*.

[3] Cross References

California Civil Procedure Before Trial, vol. 2, ch. 39, *Injunctions*, § 39.94 (Cal. C.E.B. 1993)

Witkin, California Procedure, vol. 6, *Provisional Remedies*, §§ 382-387 (4th ed. 1997)

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Volume 26: Injunctions thru Insurance-Chs. 303-313
Chapter 303 INJUNCTIONS
PART V. FORMS

26-303 California Forms of Pleading and Practice--Annotated § 303.138

§ 303.138 Proceedings to Dissolve or Modify Temporary Restraining Order or Injunction [Civ. Code § 3424; Code Civ. Proc. §§ 532(a), 533]--Notion of Motion and Supporting Declaration

[1] FORM Proceedings to Dissolve or Modify Temporary Restraining Order or Injunction [Civ. Code § 3424; Code Civ. Proc. §§ 532(a), 533]--Notice of Motion and Supporting Declaration

_____ [*Attorney identification*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MOTION AND NOTICE OF MOTION FOR OR-
vs.	)	DER _____[DISSOLVING *or*
_____ [*name*],	)	MODIFYING]
Defendant.	)	_____[TEMPORARY RE-
	)	STRAINING ORDER *or* PRELIMINARY INJUNC-
	)	TION *or* PERMANENT INJUNCTION], SUPPORT-
	)	ING DECLARATION OF _____
	)	[*name*], AND SUPPORTING MEMORANDUM
	)	[Telephone Appearance]
		Date: _____
		Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To plaintiff _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], defendant _____ [*name*] will, and hereby does, move for an order _____ [dissolving *or* modifying] the _____ [temporary restraining order *or* preliminary injunction *or* permanent injunction] granted on _____ [*date*]. [*If the injunction is to be modified or only partially dissolved, specify the extent of this change.*] The motion will be made on the grounds that _____ [*specify, e.g.,* there has been a material change in the facts on which the injunction was granted in that _____ (*specify*)].

The motion will be based on this notice of motion, on the _____ [declaration(s) *or* affidavit(s)] of _____ [*name(s)*], on the memorandum of points and authorities served and filed in this proceeding, on the papers and records on file, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*specify, e.g.,* the defendant in the within action].

2. On _____ [*date*], the court granted a _____ [temporary restraining order *or* preliminary injunction *or* permanent injunction] compelling me to _____ [*describe court's order compelling defendant to do or refrain from doing something*].

3. _____ [*Describe changed circumstances or other reason for motion to modify or dissolve injunction, e.g.,* At the time of granting the preliminary injunction, the court also ordered plaintiff to post a bond in the amount of $_____, which plaintiff never posted].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

SUPPORTING MEMORANDUM

[*Add memorandum of points and authorities supporting motion.*]

[2] Use of Form

The form of notice of motion in *[1], above*, is for use by counsel for a defendant who has been subjected to a temporary restraining order, preliminary injunction, or permanent injunction, when defendant desires to have the order or injunction either dissolved or modified [*see Civ. Code § 3424* (motion to modify or dissolve temporary restraining order, preliminary injunction, or final injunction on grounds of material change in facts, change in law, or ends of justice would otherwise be served); *Code Civ. Proc. § 533* (preliminary injunction or temporary restraining order)]. If the restrained party seeks to terminate a restraining order, the burden is on the restrained party to show by a preponderance of the evidence that one of the circumstances set forth in *Code Civ. Proc. § 533* is present and justifies terminating the restraining order [*Loeffler v. Medina (2009) 174 Cal. App. 4th 1495, 1504, 95 Cal. Rptr. 3d 343*]. With slight changes, the form may be adapted for use by a plaintiff or other party. Though not the situation addressed in the declaration at *[1], above*, a party who has been enjoined without notice may apply for dissolution or modification of an injunction [*Code Civ. Proc. § 532(a)*].

[3] Court's Power to Amend Injunction

For discussion of the court's power to amend injunctions, see *§ 303.80*.

[4] Service of Motion to Modify or Dissolve Permanent Injunction

Service of a motion to modify or dissolve a final injunction must be made on the nonmoving party as follows [*Civ. Code § 3424(b)*]:

- If the party has not appeared in the action, the motion must be served in the same manner as a summons, pursuant to *Code Civ. Proc. § 415.10 et seq.*

- If the party has appeared in the action, the motion must be served on the party or his or her attorney (or on the party if he or she has appeared without an attorney), either in the same manner as a summons under *Code Civ. Proc. § 415.10 et seq.*, or as provided in *Code Civ. Proc. § 1010 et seq.* (service of notice of motion and other papers).

For detailed discussion and forms relating to service of summons and service of other papers, see Ch. 518, *Service of Summons and Papers* .

[5] Memorandum of Points and Authorities

A memorandum of points and authorities must be served with the motion and notice of motion [*see* Cal. Rules of Ct., Rules 3.112(a), 3.113(a)]. For discussion and general forms of points and authorities, see Ch. 417, *Points and Authorities* .

[6] Cross References

For memoranda of points and authorities for use in supporting a motion for the dissolution or modification of either a preliminary or permanent injunction, see California Points and Authorities, Ch. 116, *Injunctions*

California Civil Procedure Before Trial, vol. 2, ch. 39, *Injunctions*, §§ 39.76-39.79 (Cal. C.E.B. 1993)

Witkin, California Procedure, vol. 6, *Provisional Remedies*, §§ 396-398 (4th ed. 1997)

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26-303 California Forms of Pleading and Practice--Annotated § 303.139

§ 303.139 Proceedings to Dissolve or Modify Temporary Restraining Order or Injunction [Civ. Code § 3424; Code Civ. Proc. §§ 532(a), 533]--Order

[1] FORM Proceedings to Dissolve or Modify Temporary Restraining Order or Injunction [Civ. Code § 3424; Code Civ. Proc. §§ 532(a), 533]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER ORDER [DISSOLVING *or* MODIFYING]
_____ [*names*],	)	_____
Defendants.	)	[TEMPORARY RESTRAINING ORDER *or* PRE-
	)	LIMINARY INJUNCTION *or* PERMANENT IN-
	)	JUNCTION]

_____

The motion of defendant for an order _____ [modifying *or* dissolving] the _____ [temporary restraining order *or* preliminary injunction *or* permanent injunction] granted on _____ [*date*], came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the court's satisfaction, and good cause appearing:

IT IS ORDERED that the _____ [temporary restraining order *or* preliminary injunction *or* permanent injunction] granted on _____ [*date*], be and hereby is _____ [dissolved *or* modified as follows: _____ (*specify how injunction is modified*)].

[*If the order or injunction is modified or only partially dissolved, set forth the injunction's revised terms.*]

Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of order in *[1], above*, is for use by counsel for a defendant who has persuaded a court to dissolve or modify a previously granted temporary restraining order, preliminary injunction, or permanent injunction [*see Civ. Code § 3424*; *Code Civ. Proc. §§ 532(a), 533*]. The form may be adapted as necessary for use by another party.

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26-303 California Forms of Pleading and Practice--Annotated § 303.140

§ 303.140 Proceedings to Enforce Liability of Principal and Surety on Bond or Undertaking Filed as Security for Wrongfully Issued Temporary Restraining Order or Preliminary Injunction [Code Civ. Proc. § 996.440]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Enforce Liability of Principal and Surety on Bond or Undertaking Filed as Security for Wrongfully Issued Temporary Restraining Order or Preliminary Injunction [Code Civ. Proc. § 996.440]--Notice of Motion and Supporting Declaration

_____ [*Attorney identification*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	))))))))))	NO. _____ MOTION AND NOTICE OF MOTION FOR ORDER TO ENFORCE LIABILITY ON _____[BOND *or* UNDERTAKING *or* DEPOSIT] FILED AS SECURITY FOR WRONGFULLY ISSUED _____ [TEMPORARY RESTRAINING ORDER *or* PRELIMINARY INJUNCTION], SUPPORTING DECLARATION OF _____ [*name of defendant*], AND MEMORANDUM OF POINTS AND AUTHORITIES [Telephone Appearance] Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____

Trial Date: _____

_____

_____ [*Name of plaintiff*], plaintiff; to _____ [*name*], his/her attorney of record; to _____ [*name of surety or person who has made deposit in accordance with Code of Civil Procedure Section 529(a)*] and to _____ [*name*], his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], defendant _____ [*name*] will, and hereby does move for an order determining and enforcing the liability of plaintiff and his/her/its surety on the _____ [bond *or* undertaking *or* deposit], which was made in accordance with *Code of Civil Procedure Section 529(a)* and filed on _____ [*date*] as security for the _____ [temporary restraining order *or* preliminary injunction] issued by the above-entitled court on _____ [*date*], against this defendant. On _____ [*date*], the above-entitled court by final judgment determined that plaintiff was not entitled to the _____ [temporary restraining order *or* preliminary injunction] and _____ [an appeal was made and determined in favor of defendant *or* the time for appeal has expired and no appeal of the judgment was made]. The _____ [bond *or* undertaking *or* deposit] that was made in accordance with *Code of Civil Procedure Section 529(a)* was in the amount of $_____. The wrongful issuance of the above-described _____ [temporary restraining order *or* preliminary injunction] has damaged defendant _____ [*name*] in the sum of $_____ [*specify amount not exceeding amount of bond, undertaking, or deposit*]. Defendant will claim this amount as his/her damage at the hearing on _____ [*date*].

The motion will be based on this notice of motion, on the _____ [affidavits *or* declaration(s)] of _____ [*name(s)*], on the memorandum of points and authorities served and filed in this proceeding, on the papers and records on file in the above-entitled action, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*specify, e.g.,* the defendant in this action].

2. On _____ [*date*], the court granted a _____ [temporary restraining order *or* preliminary injunction] compelling me to _____ [*describe court's order compelling defendant to do or refrain from doing something*].

3. On _____ [*date*], the court entered a final judgment in the action in my favor and against plaintiff.

4. _____ [The time for appeal of the final judgment has expired *or* Plaintiff appealed the final judgment and the court of appeal issued an opinion in my favor and against plaintiff].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion.*]

[2] Use of Form

The form of notice of motion in *[1], above*, is for use by defense counsel to enforce the liability of plaintiff and his or her surety on a bond or undertaking posted for a temporary restraining order or preliminary injunction after a decision has been made in the main action and it has been determined that plaintiff was not entitled to the temporary restraining order or preliminary injunction [*see Code Civ. Proc. § 996.440(b)*]. Actually, a motion to enforce a bond such as that in [1], *above*, does not require that a legally effective order or injunction have been issued, but only requires that the person restrained knew of and complied with an improvidently issued order or injunction and suffered damages as a result [*see Special Editions v. Kellison (1982) 129 Cal. App. 3d 803, 809, 181 Cal. Rptr. 351* (decided under former *Code Civ. Proc. § 535*)].

A deposit may be made in lieu of a bond or undertaking [*see Code Civ. Proc. § 995.710(a)*]. Thus, the form contains alternative language for a bond, undertaking, or deposit, as appropriate.

For further discussion of undertakings generally, see *§ 303.46* et seq.

[3] Jurisdiction

A surety on a bond given on an injunction submits itself to the jurisdiction of the court in all matters affecting its liability on the bond [*see Code Civ. Proc. § 996.420(a)*].

[4] Noticed-Motion Procedure to Enforce Liability

If a bond is given on a temporary restraining order or preliminary injunction, the liability of the party and his or her surety or sureties, if any, may be enforced on a motion filed in the trial court without the necessity of an independent action [*see Code Civ. Proc. § 996.440(a)*].

[5] When Motion May Be Made

The motion may not be made until after entry of the final judgment in the action in which the bond or undertaking was given and the time for appeal has expired, or, if an appeal was taken, until the appeal is finally determined [*Code Civ. Proc. § 996.440(b)*; *see Satinover v. Dean (1988) 202 Cal. App. 3d 1298, 1300-1301, 249 Cal. Rptr. 277* (enforcement may not be made after dissolution of temporary restraining order or court's refusal to grant preliminary injunction until after termination of main action)]. The motion may not be made or notice of the motion served more than one year after the later of these dates [*Code Civ. Proc. § 996.440(b)*].

[6] Service of Notice; Contents; Affidavits

Notice of the motion must be served on the principal and sureties at least 30 days before the time set for hearing of the motion. The notice must state the amount of the claim and must be supported by affidavits or declarations setting forth the facts on which the claim is based. The notice and affidavits or declarations must be served in accordance with any procedure authorized by *Code Civ. Proc. § 1010 et seq.* [*Code Civ. Proc. § 996.440(c)*].

[7] Response by Sureties

Judgment may be entered against the principal and sureties in accordance with the motion unless the principal or sureties serve and file affidavits or declarations opposing the motion showing those facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact [*Code Civ. Proc. § 996.440(d)*].

[8] No Stay of Proceedings

The principal and sureties may not obtain a stay of the proceedings pending determination of any conflicting claims among beneficiaries [*Code Civ. Proc. § 996.440(e)*].

[9] Trial

If a triable issue of fact is presented, the court must specify the issues to be tried. Trial must be set for the earliest date convenient to the court, allowing sufficient time for any discovery proceedings that may be requested [*Code Civ. Proc. § 996.440(d)*].

[10] Measure of Damages

Damages recoverable on a preliminary injunction or a temporary restraining order bond are those that appear with reasonable certainty to be the necessary and proximate result of the injunction, not exceeding the penal sum of the bond [*Allen v. Pitchess (1973) 36 Cal. App. 3d 321, 327, 111 Cal. Rptr. 658* (decided under former *Code Civ. Proc. § 535*)]. The factors to be considered in determining the loss depend on the circumstances of the case. The measure of damage will vary with those circumstances. Arbitrary rules do not govern; equitable principles are applied. The allowance, although often difficult to measure accurately, should furnish just and reasonable compensation for the loss sustained [*Surety Sav. & Loan Assn. v. National Automobile & Cas. Ins. Co. (1970) 8 Cal. App. 3d 752, 757, 87 Cal. Rptr. 572]* . A plaintiff seeking damages from the surety on an injunction bond is not, however, limited to damages accruing during the time the injunction was operative; he or she is entitled to damages flowing directly from the wrongful injunction for a period of time beyond the date of its dissolution [*Russell v. United Pacific Ins. Co. (1963) 214 Cal. App. 2d 78, 88, 29 Cal. Rptr. 346]* .

[11] Attorney's Fees

When either a temporary restraining order or a preliminary injunction is regular on its face and thus requires legal services to obtain its dissolution, reasonable attorney's fees are treated as an item of damages recoverable on the bond [*Allen v. Pitchess (1973) 36 Cal. App. 3d 321, 327, 111 Cal. Rptr. 658* (temporary restraining order; decided under former *Code Civ. Proc. § 535*); *Russell v. United Pacific Ins. Co. (1963) 214 Cal. App. 2d 78, 88-89, 29 Cal. Rptr. 346* (preliminary injunction)]. The fixing of a reasonable fee rests in the trial judge's discretion; an appellate court will not disturb the ruling unless the sum allowed is so exorbitant that its allowance constitutes a palpable and plain abuse of discretion [*Russell v. United Pacific Ins. Co. (1963) 214 Cal. App. 2d 78, 89, 29 Cal. Rptr. 346]* . Note that, once a temporary restraining order has been dissolved and the preliminary injunction denied, attorney's fees in defending the main action are not recoverable [*Allen v. Pitchess (1973) 36 Cal. App. 3d 321, 327-328, 111 Cal. Rptr. 658]* .

[12] Waiver

Defendants in a suit for an injunction waive their rights under a surety bond when they sign a stipulation dismissing the suit without insisting either that the plaintiff voluntarily dismiss the suit or that the court determine whether the injunction was properly granted, if the bond stipulated that the surety would not be liable without the superior court finally deciding that the plaintiff was not entitled to either a temporary restraining order or to a preliminary injunction [*Wilshire Mortgage Corp. v. Graybeal Co. (1940) 41 Cal. App. 2d 1, 6-7, 105 P.2d 996]* . Ordinarily, however, voluntary dismissal of action for injunction with or without prejudice constitutes a final decision against plaintiff on the issue of entitlement to an injunction for purposes of proceeding against the surety under *Code Civ. Proc. § 996.440* [*Special Editions v. Kellison (1982) 129 Cal. App. 3d 803, 808, 181 Cal. Rptr. 351* (decided under former *Code Civ. Proc. § 535*)].

[13] Terms of Bond Limit Surety's Liability

A surety's liability is limited by the terms of its bond [*see Code Civ. Proc. § 996.470(a)*; *Wilshire Mortgage Corp. v. Graybeal Co. (1940) 41 Cal. App. 2d 1, 6, 105 P.2d 996]* . The principal's liability is not limited to the amount of the bond, except as otherwise provided by statute [*see Code Civ. Proc. § 996.470(a)*].

[14] No Liability for Injunction Issued Without Bond

Under former law, the statutory remedy for enforcing a bond or undertaking was unavailable if no bond or undertaking was posted on a temporary restraining order or preliminary injunction [*Wallace v. Miller (1983) 140 Cal. App. 3d 636, 642-645, 189 Cal. Rptr. 637* (decided under former *Code Civ. Proc. §§ 535, 1054a*)]. Because the present law setting forth enforcement procedures against sureties [*see Code Civ. Proc. § 996.440*] is substantially similar to the previous law, this also appears to be true under current law.

[15] Cross References

For a form of order granting the motion, see *§ 303.141*

California Civil Procedure Before Trial, vol. 2, ch. 39, *Injunctions*, §§ 39.82-39.86 (Cal. C.E.B. 1990)

Witkin, California Procedure, vol. 6, *Provisional Remedies*, § 38 (4th ed. 1997)

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26-303 California Forms of Pleading and Practice--Annotated § 303.141

§ 303.141 Proceedings to Enforce Liability of Principal and Surety on Bond or Undertaking Filed as Security for Wrongfully Issued Temporary Restraining Order or Preliminary Injunction [Code Civ. Proc. § 996.440]--Order

[1] FORM Proceedings to Enforce Liability of Principal and Surety on Bond or Undertaking Filed as Security for Wrongfully Issued Temporary Restraining Order or Preliminary Injunction [Code Civ. Proc. § 996.440]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	ORDER TO ENFORCE LIABILITY ON
Defendants.	)	_____ [BOND *or* UNDERTAK-
	)	ING *or* DEPOSIT] FILED AS SECURITY FOR
	)	WRONGFULLY ISSUED _____
		[TEMPORARY RESTRAINING ORDER *or* PRE-
		LIMINARY INJUNCTION]

_____

The motion of defendant _____ [*name*] for an order to determine and enforce the liability of plaintiff and his/her/its surety on the _____ [bond *or* undertaking *or* deposit] that was made in accordance with *Code of Civil Procedure Section 529(a)*, and filed on _____ [*date*] as security for the _____ [temporary restraining order *or* preliminary injunction] issued by this court on _____ [*date*], against defendant _____ [*name*], came on regularly for hearing by this court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the court's satisfaction, and good cause appearing therefor:

IT IS ORDERED that _____ [*name of surety or person who made deposit*] in accordance with *Code of Civil Procedure Section 529(a)* pay $_____ to defendant _____ [*name*] as his/her/its liability for the _____ [temporary restraining order *or* preliminary injunction] to which this court determined by final judgment on _____ [*date*] that plaintiff was not entitled.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of order in *[1], above*, is for use by defense counsel to enforce the liability of plaintiff and his or her surety on a bond or undertaking posted for a temporary restraining order or preliminary injunction after a decision has been made in the main action and it has been determined that plaintiff was not entitled to the temporary restraining order or preliminary injunction [*see Code Civ. Proc. § 996.440(b)*].

A deposit may be made in lieu of a bond or undertaking [*see Code Civ. Proc. § 995.710(a)*]. Thus, the form contains alternative language for a bond, undertaking, or deposit, as appropriate.

[3] Cross References

For the related form of notice of motion, see *§ 303.140*

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26-303 California Forms of Pleading and Practice--Annotated § 303.142

§ 303.142 Application and Order for Reissuance of Order to Show Cause and Temporary Restraining Order [Code Civ. Proc. §§ 527(d)(2), 527(d)(5)]--Judicial Council Form CIV-025

[1] FORM Application and Order for Reissuance of Order to Show Cause and Temporary Restraining Order [Code Civ. Proc. §§ 527(d)(2), 527(d)(5)]--Judicial Council Form CIV-025

Click here to view image.

[2] Use of Form

The form illustrated in *[1], above*, is Judicial Council Form CIV-025, for use by a party who has been issued a temporary restraining order, but has been unable to serve the opposing party within the required five days from the date the temporary restraining order is issued or two days prior to the hearing whichever is earlier. Upon the filing this form by the applicant declaring that the opposing party could not be served within the time required, the court may reissue any temporary restraining order previously issued [*Code Civ. Proc. §§ 527(d)(2), 527(d)(5)*].

The party who obtained the temporary restraining order must serve on the opposing party a copy of the complaint if not previously served, the order to show cause stating the date, time, and place of the hearing, any affidavits to be used in the application, and a copy of the points and authorities in support of the application [*Code Civ. Proc. § 527(d)(2)*].

The time for hearing is then measured from the date of reissuance. No fees are charged for reissuing the order [for further discussion, *see §§ 303.31[4]*; *303.31[7]*].

Use of this Judicial Council Form is optional. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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Chapter 304 INSANE AND OTHER INCOMPETENT PERSONS

26-304 California Forms of Pleading and Practice--Annotated 304.syn

§ 304.syn Synopsis to Chapter 304: INSANE AND OTHER INCOMPETENT PERSONS

§ 304.01 Scope of Chapter

§ 304.02 Cross References

§§ 304.03-304.09 [Reserved]

§ 304.10 "Insanity" and "Incompetency" Defined

§ 304.11 Rights and Responsibilities of Persons With Mental Illness

§ 304.12 Protection and Advocacy Agency for Persons With Disability or Mental Illness

[1] Background

[2] Powers and Duties

[3] Statutory Immunities

[4] Complaints to Agency--Prohibition Against Retaliation

[5] Relationship to Other Entities

§ 304.13 Availability of Legal Representation

§ 304.14 Appeal Rights in Civil Commitment Proceedings

§§ 304.15-304.29 [Reserved]

§ 304.30 Governing Statutes

§ 304.31 Standard for Involuntary Treatment

[1] "Gravely Disabled" or "Danger"

[2] "Gravely Disabled" Defined

[a] Mental Disorder

[b] Chronic Alcoholism and Substance Abuse

[3] Consideration of Historical Course of Mental Disorder

[4] Present Disability Required

[5] Survival With Help of Others

[6] Mentally Retarded Person Not "Gravely Disabled"

§ 304.32 Legislative Intent of the LPS Act

§ 304.33 Exclusions From LPS Act

§ 304.34 Seventy-Two Hour Detention

[1] Basis for Custody--"Gravely Disabled" or "Danger"

[2] Notice

[3] Evaluation and Treatment Requirements

[4] Requirement for Early Release

[5] Postdetention Requirements

[6] Inebriated Persons

[a] Basis for Custody

[b] Requirements for Treatment Facility

[c] Civil Protective Custody for Disorderly Conduct

[d] Statutory Right to Make Telephone Calls

[e] Request for Early Release

[7] Court-Ordered Evaluation

[a] In General

[b] Criminal Defendants

[8] Disposition After Evaluation

[9] Liability of Medical Personnel

[10] Confiscation of Firearms

§ 304.35 Fourteen-Day Involuntary Intensive Treatment

[1] Certification

[2] Notice of Rights

[3] Certification Review Hearing--General Requirement and Time

[4] Conduct of Hearing

[5] Rights of Person Certified

[6] Detention or Release After Findings

[7] Notice of Findings to Person Certified

[8] Availability of Legal Services

[9] Disposition After Hearing

[a] During Treatment Period

[b] After Treatment Period

[10] Liability of Medical Personnel

§ 304.36 Fourteen-Day Treatment of Suicidal Persons

[1] Certification

[2] Disposition After Treatment

[3] Liability of Medical Personnel

§ 304.37 Thirty-Day Involuntary Intensive Treatment--Certification

§ 304.38 Recommendation for Conservatorship

§ 304.39 180-Day Treatment for Imminently Dangerous Persons

[1] Basis for Commitment

[2] Affirmative Obligation to Treat

[3] Petition and Hearing

[4] Notice of Right to Representation and Jury Trial

[5] Release or Other Disposition

§ 304.40 Judicial Review by Writ of Habeas Corpus

[1] Certification for Involuntary Intensive Treatment

[2] Notice to Detainee

[3] Jurisdiction and Venue

[4] Standard of Proof on Review by Habeas Corpus

§ 304.41 Assisted Outpatient Treatment Program

[1] When Available

[2] Petition

[3] Hearing

[4] Order

[5] Subsequent Proceedings

[6] Settlement Agreements

§ 304.42 Conservatorship for Gravely Disabled Person

[1] When Appropriate

[2] Procedure for Appointment of Conservator

[3] Demand for Trial

[4] Persons for Whom Conservatorship Proceedings May Be Initiated

[5] Who May Recommend Conservatorship

[6] Investigation and Report

[7] Petition by Investigating Officer

[8] Hearing on Petition; Right to Attorney

[a] General Requirements

[b] Notice of Hearing

[c] Standard of Proof

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§ 304.223 Judicial Review by Writ of Habeas Corpus--Certification for Intensive Treatment [Welf. & Inst. Code §§ 5275-5278]

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[3] Allegations

[4] Other Uses of Form

[5] Cross References

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[1] FORM

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[1] FORM

[2] Use of Form

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[1] FORM

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[3] Allegations

[4] Verification

[5] Jurisdiction

[6] Venue

[7] Specification of Damages

[8] Statute of Limitations

[9] Cross References

§ 304.301 Complaint for Damages for Wrongful Death of Patient [Code Civ. Proc. § 377.60]--Based on Psychiatrist's Breach of Duty to Decedent--By Entitled Person(s) or By Personal Representative on Behalf of Entitled Person(s)

[1] FORM

[2] Use of Form

[3] Statute of Limitations

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[2] Use of Form

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26-304 California Forms of Pleading and Practice--Annotated § 304.01

§ 304.01 Scope of Chapter

This chapter discusses and contains a procedural checklist for use in actions involving the involuntary detention and treatment of persons in mental institutions. It also briefly discusses voluntary admissions to mental institutions. The part includes a form for a petition for writ of habeas corpus for use in seeking judicial review of involuntary detention for intensive treatment [*see § 304.280*] and an optional Judicial Council Form Petition for Writ of Habeas Corpus--LPS Act (MS-265) [*see § 304.280*.1]. The part also includes a form of demand for a court or jury trial on the issue of whether a proposed conservatee is gravely disabled [*see § 304.282*], a petition for rehearing when a proposed conservatee is adjudicated gravely disabled [*see § 304.283*], an order granting or denying a rehearing [*see § 304.284*], and an order terminating a conservatorship [*see § 304.284*.1].

This chapter also discusses and contains a procedural checklist for use in actions and proceedings involving the treatment or judicial commitment of mentally retarded or developmentally disabled persons [*see § 304.240* et seq.].

This chapter also discusses the ability of mentally disordered persons to bring actions for false imprisonment, malicious prosecution, assault and battery, and for negligently or intentionally inflicted harm [*see § 304.90* et seq.].

It also discusses the liability of mentally disordered persons and their relatives and therapists for damages inflicted on others by mentally disordered persons and contains a form of complaint against a therapist by a third person for failure of the therapist to warn the third person of a dangerous client [*see § 304.300*] and by the decedent's personal representative for failure of the therapist to take measures to prevent the decedent's suicide [*see § 304.301*].

This chapter also includes a discussion of the constitutional rights of all persons detained because of mental disorder and similar conditions [*see § 304.97*].

This chapter discusses the procedure for obtaining a court order authorizing a designated person to consent to health care for an adult who is in need of health care but lacks capacity to make health care decisions and does not have a conservator authorized to make the decisions [*see § 304.110* et seq.]. Forms for petitions for such an order are included and discussed [*see §§ 304.320* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationHealthcare LawTreatmentPatient ConsentConsent by Guardians & ParentsPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of Adults

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§ 304.02 Cross References

For further discussion of conservatorships, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* , through Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships* .

For further discussion of habeas corpus, generally, see Ch. 292, *Habeas Corpus* .

For discussion and forms relating to actions for damages for false imprisonment arising from confinement of mental patients, see Ch. 257, *False Imprisonment* .

For discussion and forms relating to writs of habeas corpus, see Ch. 292, *Habeas Corpus* .

For discussion and forms for use in actions against hospitals and hospital employees, including a complaint for use by a patient or patient's representative to permit inspection of a patient's health care records, see Ch. 295, *Hospitals* .

For discussion and forms relating to actions for malicious prosecution, see Ch. 357, *Malicious Prosecution and Abuse of Process* .

For discussion and forms for use in actions against physicians and other medical personnel and for discussion and forms for use concerning the licensing of physicians and other medical personnel, see Ch. 414, *Physicians: Licensing and Discipline* .

For forms for use when the adult has a conservator of the person, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , through Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships* .

For forms for use when court consent to medical care of a minor is required, see Ch. 366, *Minors: Court Consent for Medical Care or Enlistment* .

For discussion of medical consent requirements in general, see Ch. 415, *Physicians: MedicFal Malpractice* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureHabeas CorpusGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewFamily LawGuardiansGeneral OverviewHealthcare LawTreatmentPatient ConsentConsent by Guardians & ParentsTortsIntentional TortsAbuse of ProcessGeneral OverviewTortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare Providers

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[Reserved]

§§ 304.03[Reserved]

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PART II. LEGAL BACKGROUND
A. In General

26-304 California Forms of Pleading and Practice--Annotated § 304.10

§ 304.10 "Insanity" and "Incompetency" Defined

An examination of applicable statutes and of the cases interpreting them indicates the variety of meanings of the term "insanity" and terms equivalent to it as well as the possibility of the use of these terms in different situations. Among other meanings are the following: (1) insanity or incompetency in relation to capacity to contract as governed by the Civil Code; (2) insanity or incompetency in relation to testamentary capacity as governed by the Probate Code and related cases; (3) insanity in relation to capacity to commit a crime as governed by the Penal Code; and (4) insanity or mental disorder in relation to "mental illness" that warrants confinement under the Welfare and Institutions Code or that merits appointment of a conservator under that code. "Insanity" may mean a variety of things depending on the pertinent statute, and as a result a variety of issues of fact can be the subject of litigation. Depending on which statute is invoked, the parties to the litigation are different and the results obtained are different [*In re Zanetti (1949) 34 Cal. 2d 136, 141, 208 P.2d 657]* .

A person is "insane" if the person is incapable of caring for his or her property, transacting business, or understanding the nature or effects of his or her acts [*Alcott Rehabilitation Hosp. v. Superior Court (2001) 93 Cal. App. 4th 94, 101, 112 Cal. Rptr. 2d 807* (tolling of statute of limitations based on insanity)]. Insane persons are not of sound mind [*Estate of Ladd (1979) 91 Cal. App. 3d 219, 226, 153 Cal. Rptr. 888]* . The terms "insane" and "incompetent" are not necessarily interchangeable since a person may be incompetent by reason of insanity or from some other cause [*Robertson v. Superior Court (2001) 90 Cal. App. 4th 1319, 1328 fn. 8, 109 Cal. Rptr. 2d 650* ; *see In re Locks (2000) 79 Cal. App. 4th 890, 895, 94 Cal. Rptr. 2d 495* (finding of not guilty by reason of insanity establishes legal status of insanity, but does not constitute finding of incompetence to refuse treatment)].

For a discussion of the meanings of terms appearing in the various statutes governing detention for treatment and governing civil commitment such as the term "mentally disordered," see the discussion in the Introductions to the appropriate parts of this chapter.

Legal Topics:

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

Contracts LawFormationCapacity of PartiesMental CapacityCriminal Law & ProcedureDefensesInsanityGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawWill ContestsTestamentary CapacityGeneral OverviewPublic Health & Welfare LawHealthcareMental Health ServicesGeneral Overview

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§ 304.11 Rights and Responsibilities of Persons With Mental Illness

Persons with mental illness have the same legal rights and responsibilities that other persons have under the state and federal constitutions and laws, except as otherwise specifically provided by federal or state law or regulation [*Welf. & Inst. Code § 5325.1* (enumerating some of the rights of mentally ill persons)].

Statutory law sets forth a variety of limitations on the rights and responsibilities of persons who may be classified as mentally ill. Statutes specifically provide, for example, that persons without understanding have no power to make contracts of any kind (but are liable for the reasonable value of necessaries furnished for their support and the support of their families) [*Civ. Code § 38*]; that persons of unsound mind are not liable for exemplary damages unless capable of knowing, at the time of commission, that a tortious act is wrong (but are liable for compensatory damages) [*Civ. Code § 41*]; that the adoption of a minor may be set aside on the ground of the minor's developmental disability or mental illness, in certain circumstances [*Fam. Code § 9100*], and that a marriage contracted by a person of unsound mind is voidable on that ground [*Fam. Code § 2210*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawEqual ProtectionDisabilityFamily LawMarriageValidityVoid & Voidable MarriagesVoidable MarriagesTortsDamagesPunitive DamagesGeneral OverviewTortsIntentional TortsDefensesIntent

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§ 304.12 Protection and Advocacy Agency for Persons With Disability or Mental Illness

[1] Background

Protection and advocacy agencies are federally mandated disability rights agencies established under federal law to provide advocacy services to people with disabilities, including investigating incidents of abuse or neglect and otherwise protecting the legal and civil rights of people with disabilities. The California Legislature has found and declared that it is in the interest of people with disabilities in this state that protection and advocacy services be available to all people with disabilities who may be subject to abuse or neglect, or who request or require the advocacy services of the protection and advocacy agency [Stats. 2003, ch. 878, § 1(a)(1), (4), (9)]. Protection and advocacy services are available to all persons with disabilities as defined under California law, even when that law defines disability in a manner that is broader than the definition of disability under federal law [Stats. 2003, ch. 878, § 1(b)(1)].

For purposes of protection and advocacy services, the term "disability" means a developmental disability as defined in *42 U.S.C.S. § 15002(8)*, a mental illness as defined in *42 U.S.C.S. § 10802(4)*, a disability within the meaning of the Americans with Disabilities Act [*42 U.S.C.S. § 12101 et seq.*] as defined in *42 U.S.C.S. § 12102(2)*, or a disability within the meaning of the California Fair Employment and Housing Act [*Gov. Code § 12900 et seq.*] as defined in *Gov. Code § 12926(i)* or *(k)* [*Welf. & Inst. Code § 4900(d), (i)*].

Establishment of a protection and advocacy is mandated by federal law as a prerequisite to the receipt of specified federal funding for assistance programs for persons with developmental disabilities or mental illness [*see 42 U.S.C.S. § 6042*].

[2] Powers and Duties

The agency is a private, nonprofit corporation that has the following powers and duties:

- To establish a grievance procedure for clients or prospective clients of the protection and advocacy system to ensure that persons with a disability or mental illness have full access to services of the system [*see Welf. & Inst. Code § 4901(a)*].

- To investigate any incident of abuse and neglect of persons with a disability or mental illness if the incident is reported to the agency or if the agency determines there is probable cause to believe the incident occurred [*see Welf. & Inst. Code § 4902(a)(1)*]. "Probable cause" to believe that an individual has been subject to abuse or neglect, or is at significant risk of being subjected to abuse or neglect, exists when the agency determines that it is objectively reasonable for a person to entertain that belief. The individual making a probable cause determination may base the decision on reasonable inferences drawn from his or her experience or training regarding similar incidents, conditions, or problems usually associated with abuse or neglect. Information supporting a probable cause determination may result from monitoring or other activities, including, but not limited to, media reports and newspaper articles [*Welf. & Inst. Code § 4900(h)*]. The agency's authority to investigate includes having reasonable access to a facility or program, as well as the authority to examine all relevant records and to interview any facility or program service recipient, employee, or other person who might have knowledge of the alleged abuse or neglect [*Welf. & Inst. Code § 4902(a)(1)*].

- To pursue administrative, legal, and other appropriate remedies or approaches to ensure the protection of the rights of persons with disabilities [*see Welf. & Inst. Code § 4902(a)(2)*].

- To provide information and training on, and referral to, programs and services addressing the needs of persons with developmental disabilities or mental illness [*see Welf. & Inst. Code § 4902(a)(3)*].

- To have reasonable access to state facilities or programs that provide care and treatment to persons with disabilities or mental illness, together with access to those persons [*see Welf. & Inst. Code § 4902(b)*]. The agency may not obtain access through the use of physical force if access is delayed or denied, but may pursue appropriate legal remedies to enforce its access authority [*Welf. & Inst. Code § 4906*].

- To have access to statutorily specified information about and records of specified persons with disabilities or mental illness, and the facilities and programs rendering care and treatment to those persons [*see Welf. & Inst. Code § 4903(a)-(e)*].

- To issue public reports [*see Welf. & Inst. Code § 4903(f)(2)*].

- To report investigation results to responsible investigative or enforcement agencies [*see Welf. & Inst. Code § 4903(f)(3)*].

- To pursue alternative remedies, including initiating legal action [*Welf. & Inst. Code § 4903(f)(4)*].

- To report suspected elder or dependent adult abuse under the Elder Abuse and Dependent Adult Civil Protection Act (*Welf. & Inst. Code § 15600 et seq.*) [*Welf. & Inst. Code § 4903(f)(5)*].

[3] Statutory Immunities

The agency is aided in the exercise of its protection and advocacy powers by a variety of statutory immunities from civil, criminal, and punitive damage liability in specified situations [*see Welf. & Inst. Code § 4904*].

[4] Complaints to Agency--Prohibition Against Retaliation

The agency may not subject a person with a disability to reprisal or harassment, or directly or indirectly take or threaten to take any action that would prevent the person, his or her legally authorized representative, or family member from

reporting or otherwise bringing to the agency's attention any facts or information relative to suspected abuse, neglect, or other violations of the person's rights [*Welf. & Inst. Code § 4905(a)*]. Furthermore, any attempt to involuntarily remove from a facility, program, or service, or to deny privileges or rights without good cause to, a person with a disability or mental illness by or for whom a complaint has been made to the agency within 60 days after the complaint has been made or within 60 days after the conclusion of any proceeding resulting from a complaint raises a presumption that the action was taken in retaliation for filing the complaint [*Welf. & Inst. Code § 4905(b)*].

[5] Relationship to Other Entities

The agency's statutory authority does not supplant the jurisdiction or responsibilities of adult protective services programs under *Welf. & Inst. Code § 15600 et seq.* or *Welf. & Inst. Code § 15750 et seq.* [*Welf. & Inst. Code § 4901(d)*], or the duties or authority of the State Long-Term Care Ombudsman Program under *Welf. & Inst. Code § 9700 et seq.* [*Welf. & Inst. Code § 4901(e)(1)*]. The agency must cooperate with this program when appropriate [*Welf. & Inst. Code § 4901(e)(2)*; *see Welf. & Inst. Code § 9717*]. Finally, the agency's statutory authority does not alter or impact the Elder and Dependent Adult Civil Protection Act (*Welf. & Inst. Code § 15600 et seq.*), including the confidentiality requirements and legal responsibility of the agency to report elder or dependent adult abuse or neglect as required by that Act [*Welf. & Inst. Code § 4901(f)(1)*]. The adult protective services agency retains the responsibility for investigating any report of abuse or neglect in accordance with *Welf. & Inst. Code § 15750* et seq., when the reported abuse or neglect is within that agency's jurisdiction [*Welf. & Inst. Code § 4901(f)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareDependent & Disabled AdultsServicesPublic Health & Welfare LawSocial ServicesMentally Ill & Mentally Retarded IndividualsAdvocacy & Protection

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§ 304.13 Availability of Legal Representation

Legal services at public expense are mandated in mental health matters when restraint of liberty is possible [*Phillips v. Seely (1974) 43 Cal. App. 3d 104, 113, 117 Cal. Rptr. 863* ; *see, e.g., Welf. & Inst. Code § 5111* (counties without public defender as authorized to compensate attorneys for representing persons in LPS Act proceedings)]. For discussion of legal representation in specific LPS proceedings, see *§§ 304.35[2]* and *[8]*, *304.39*, and *304.40[2]*. For further discussion of legal representation when a petition is filed for an order authorizing medical treatment of an adult without a conservator, see *§ 304.118*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselAppointmentsFamily LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of AdultsPublic Health & Welfare LawSocial ServicesLegal Aid

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§ 304.14 Appeal Rights in Civil Commitment Proceedings

In any civil commitment case in which the defendant would be entitled to appointment of counsel on appeal if indigent, it is the duty of the attorney who represented the person at trial to provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal [*Penal Code § 1240.1(a)*]. That attorney may also have the duty to file a notice of appeal [*see Penal Code § 1240.1(b)*]. For further discussion, see Ch. 42, *Appeal: Notice of Appeal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityGeneral OverviewFamily LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of Adults

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[Reserved]

§§ 304.15[Reserved]

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§ 304.30 Governing Statutes

The Lanterman-Petris-Short Act ("LPS Act") is found in *Welf. & Inst. Code § 5000 et seq.* Voluntary admissions generally are governed by *Welf. & Inst. Code §§ 6000-6008*. The detention and treatment of juveniles is governed by *Welf. & Inst. Code §§ 6550-6552*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare LawHealthcareMental Health ServicesCommitmentChildrenPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of Adults

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26-304 California Forms of Pleading and Practice--Annotated § 304.31

§ 304.31 Standard for Involuntary Treatment

[1] "Gravely Disabled" or "Danger"

The standard for involuntary detention or treatment of persons under the LPS Act is not simply the existence of mental disorder or impairment. The person to be detained must be a danger to others or to himself or herself, or gravely disabled as a result of the condition [*see Welf. & Inst. Code §§ 5150, 5170, 5200, 5206, 5213, 5225, 5230, 5250*]. Involuntary commitment under the LPS Act is proper only if the person committed meets the appropriate statutory standards [*see In re L.L. (1974) 39 Cal. App. 3d 205, 209, 114 Cal. Rptr. 11.]*

[2] "Gravely Disabled" Defined

[a] Mental Disorder

For purposes of *Welf. & Inst. Code § 5150 et seq.* (72-hour detention of person who is dangerous or gravely disabled for evaluation and treatment), *Welf. & Inst. Code § 5200 et seq.* (court-ordered evaluation of person alleged to be dangerous or gravely disabled), *Welf. & Inst. Code § 5250 et seq.* (additional 14-day detention for treatment of person who is dangerous or gravely disabled), and *Welf. & Inst. Code § 5350 et seq.* (establishment of conservatorship for person who is gravely disabled as a result of mental disorder), "gravely disabled" means a condition in which a person, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter [*Welf. & Inst. Code § 5008(h)(1)(A)*; *see Conservatorship of Smith (1986) 187 Cal. App. 3d 903, 905, 909, 232 Cal. Rptr. 277]* .

For these same purposes, "gravely disabled" also includes a condition in which a person has been found to be mentally incompetent under *Penal Code § 1370* (incompetent to stand trial) and (1) the indictment or information that charges a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person has not been dismissed, and (2) as a result of mental disorder, the person is unable to understand the nature and purpose of the proceedings and to assist counsel in conducting a defense in a rational manner [*Welf. & Inst. Code § 5008(h)(1)(B)*].

[b] Chronic Alcoholism and Substance Abuse

For purposes of *Welf. & Inst. Code §§ 5225 et seq.* (court-ordered evaluation of person who is impaired by chronic alcoholism), *5250 et seq.* (14-day detention for treatment of person who is impaired by chronic alcoholism), and *5350 et seq.* (establishment of conservatorship for person who is gravely disabled because of impairment due to chronic alcoholism), "gravely disabled" means a condition in which a person, as a result of impairment by chronic alcoholism, is unable to provide for his or her basic personal needs for food, clothing, or shelter [*Welf. & Inst. Code § 5008(h)(2)*].

A person is also "a danger to others or to himself or herself, or gravely disabled" under the LPS Act if he or she is a danger or gravely disabled as the result of the use of controlled substances. Any person in this category is subject to the provisions of *Welf. & Inst. Code § 5150 et seq.* (72-hour detention for evaluation and treatment), *Welf. & Inst. Code § 5200 et seq.* (court-ordered evaluation), *Welf. & Inst. Code § 5275 et seq.* (rightto hearing by writ of habeas corpus), and *Welf. & Inst. Code § 5325 et seq.* (rights of persons involuntary detained for evaluation or treatment). However, any custody, evaluation and treatment, or any procedures pursuant to these provisions must relate to and concern the problem of the person's use of controlled substances [*Welf. & Inst. Code §§ 5342, 5343*].

[3] Consideration of Historical Course of Mental Disorder

Welf. & Inst. Code § 5008.2 provides that the historical course of a person's mental disorder, as determined by available relevant information about the course of the person's mental illness, must be considered if it has a direct bearing on the determination of whether a person is a danger to others, or to himself or herself, or gravely disabled, as the result of a mental illness. This requirement must be met when applying the term "mental disorder" for the purposes of *Welf. & Inst. Code § 5200 et seq.* (court-ordered evaluations), *Welf. & Inst. Code § 5250 et seq.* (detention for treatment), *Welf. & Inst. Code § 5275 et seq.* (judicial review), and *Welf. & Inst. Code § 5350 et seq.* (establishment of conservatorship for gravely disabled persons) [*Welf. & Inst. Code § 5008.2*].

Available relevant information about the historical course of a person's mental disorder must also be considered when determining if probable cause exists to take a person into custody, or to cause a person to be taken into custody, under *Welf. & Inst. Code § 5150*. If the probable cause is based on the statement of a person other than the one taking the person into custody, a member of the attending staff, or a professional person, the person making the statement may be held liable in a civil action for intentionally giving a statement that he or she knows to be false [*Welf. & Inst. Code § 5150.05*].

[4] Present Disability Required

The disability must be present and not prospective. Thus, a person will not be found to have a grave disability if the proposed conservatee can presently provide for his or her basic needs with the help of another, even if a conservatorship may apparently be needed at some future time, for example, because of the need for possible medical treatment [*see Conservatorship of Neal (1987) 190 Cal. App. 3d 685, 687-689, 235 Cal. Rptr. 577* (proposed conservatee's common law wife was presently able to provide for his needs)].

[5] Survival With Help of Others

A person is not "gravely disabled" within the meaning of *Welf. & Inst. Code § 5008(h)(1)(A)* if he or she is capable of surviving safely in freedom with the help of willing and responsibilty family members, friends, or third parties [*see Welf. & Inst. Code § 5250(d)(1)*; *Conservatorship of Early (1983) 35 Cal. 3d 244, 250-251, 197 Cal. Rptr. 539, 673 P.2d 209* ; *Conservatorship of Davis (1981) 124 Cal. App. 3d 313, 321, 177 Cal. Rptr. 369* ; *see also Conservatorship of Neal (1987) 190 Cal. App. 3d 685, 687-689, 235 Cal. Rptr. 577* ; *Conservatorship of Wilson (1982) 137 Cal. App. 3d 132, 134-135, 186 Cal. Rptr. 748]* . However, unless the family, friends, or others specifically indicate in writing their willingness and ability to help the person, they will not be considered willing or able to provide this help [*Welf. & Inst. Code § 5250(d)(2)*]. This provision was enacted to avoid the necessity for, and the harmful effects of, requiring family, friends, and others publicly to state, and requiring the certification review officer publicly to

find, that no one is willing or able to assist the mentally disordered person in providing for the person's basic needs for food, clothing, or shelter [*Welf. & Inst. Code § 5250(d)(3)*].

[6] Mentally Retarded Person Not "Gravely Disabled"

"Gravely disabled" does not include a person who is mentally retarded [*Welf. & Inst. Code § 5008(h)(3)*]. For a discussion of "gravely disabled" in the context of mental retardation, see *§ 304.70* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of Adults

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§ 304.32 Legislative Intent of the LPS Act

The stated legislative intent of the LPS Act is to end the inappropriate, indefinite, and involuntary commitment of mentally disordered persons and persons impaired by chronic alcoholism, and to eliminate their legal disabilities [*Welf. & Inst. Code § 5001(a)*; *Kaplan v. Superior Court (1989) 216 Cal. App. 3d 1354, 1360, 265 Cal. Rptr. 408]* . The provisions of the Act are intended to reflect the concern of the legislature that mentally disordered persons are to be regarded as patients to be provided care and treatment and not as inmates of institutions for the purpose of secluding them from the rest of the public [*Welf. & Inst. Code § 4132*].

The LPS Act has been described as "scrupulously protect[ing] the rights of involuntarily detained mentally disordered persons" [*Edward W. v. Lamkins (2002) 99 Cal. App. 4th 516, 526, 122 Cal. Rptr. 2d 1]* . It expressly guarantees a number of legal and civil rights and provides that involuntarily detained patients retain all rights not specifically denied under the Act [*Welf. & Inst. Code §§ 5325, 5327*; *Edward W. v. Lamkins (2002) 99 Cal. App. 4th 516, 526, 122 Cal. Rptr. 2d 1]* .

The Act is intended to provide prompt, short-term, community-based intensive treatment, without stigma or loss of liberty, to individuals with mental disorders who are either dangerous or gravely disabled [*Ford v. Norton (2001) 89 Cal. App. 4th 974, 977, 107 Cal. Rptr. 2d 776]* . The purpose is to protect an individual from the consequences of his or her illness by providing remedial treatment [*Conservatorship of Rodney M. (1996) 50 Cal. App. 4th 1266, 1271, 58 Cal. Rptr. 2d 513]* . The Act represents a balance between prompt intervention for the purpose of treating gravely disabled persons and the protection of their rights not tobe deprived of freedom without due process [*Edward W. v. Lamkins (2002) 99 Cal. App. 4th 516, 526, 122 Cal. Rptr. 2d 1* ; *Elizabeth G. v. Kevin M. (Conservatorship of Kevin M.), (1996) 49 Cal. App. 4th 79, 89, 56 Cal. Rptr. 2d 765]* .

Under the LPS Act, a person who is dangerous or gravely disabled due to a mental disorder may be detained for involuntary treatment; however, these detentions are implemented incrementally in accordance with the legislative purpose of preventing inappropriate, indefinite commitments of mentally disordered persons [*Ford v. Norton (2001) 89 Cal. App. 4th 974, 979, 107 Cal. Rptr. 2d 776]* . Involuntary placements under the Act can be terminated before the expiration of the commitment period. Thus, the Act assures a person who is properly detained of an opportunity for

early release [*Ford v. Norton (2001) 89 Cal. App. 4th 974, 979, 107 Cal. Rptr. 2d 776]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of Adults

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§ 304.33 Exclusions From LPS Act

Mentally disordered sex offenders, mentally retarded persons, and mentally disordered criminal offenders are excluded from the LPS Act, unless specifically provided otherwise in *Pen. Code § 4011.6* or other statutes [*Welf. & Inst. Code § 5002*; *see Pederson v. Superior Court (2003) 105 Cal. App. 4th 931, 939-942, 130 Cal. Rptr. 2d 289* (finding *Pen. Code § 1367.1*, which requires misdemeanor defendants suspected of incompetence due to mental disorder to submit to LPS involuntary evaluation and treatment before or instead of competency determination, is unconstitutional; it deprives these defendants of equal protection because felony defendants are not required to undergo LPS evaluation and treatment before competency determination)].

The initial 72-hour evaluation and treatment of minors is covered by the Children's Civil Commitment and Mental Health Treatment Act of 1988 [*Welf. & Inst. Code §§ 5585-5585.59*; *see § 304.45[1]*]. However, the LPS Act covers treatment and evaluation of minors after the initial 72-hour period [*Welf. & Inst. Code §§ 5585.20, 5585.53, 5585.55*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentChildrenPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of Adults

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26-304 California Forms of Pleading and Practice--Annotated § 304.34

§ 304.34 Seventy-Two Hour Detention

[1] Basis for Custody--"Gravely Disabled" or "Danger"

The detention for evaluation and treatment of persons for 72 hours in an evaluation facility is governed by *Welf. & Inst. Code §§ 5150-5156*. If any person, as a result of mental disorder, is a danger to others or to himself or herself or is gravely disabled, a peace officer, a member of the attending staff, as defined by regulation, of an evaluation facility designated by the county, or any other professional person designated by the county, may, on probable cause, take the person (or may cause the person to be taken) into custody and place the person in a facility for 72-hour treatment and evaluation [*Welf. & Inst. Code §§ 5150, 5150.05*].

When determining if probable cause exists to take a person into custody under *Welf. & Inst. Code § 5150*, available relevant information about the historical course of the person's mental disorder must be considered if this information has a reasonable bearing on the determination of whether the person is a danger to self or others, or is gravely disabled as a result of the mental disorder [*Welf. & Inst. Code § 5150.05(a)*]. The information to be considered includes evidence presented by the individual who has provided or is providing mental health or related support services to the person to be detained, evidence presented by the person's family members, and evidence presented by the person or anyone else he or she has designated [*Welf. & Inst. Code § 5150.05(b)*]. If probable cause is based on the statement of a person other than the person authorized to take the mentally disordered person into custody, a member of the attending staff, or a professional person, the person making the statement may be liable in a civil action for intentionally giving any statement he or she knows to be false [*Welf. & Inst. Code § 5150.05(c)*].

For an outline of the procedures and statutory standards applicable to 72-hour detentions, see the Procedural Checklist, Paragraph I(A).

[2] Notice

Any person who takes another person into custody under *Welf. & Inst. Code § 5150* must orally inform the person taken into custody of certain information specified by statute [*see Welf. & Inst. Code § 5157(a)*]. In addition, when the person is admitted to a designated facility for a 72-hour evaluation and treatment, the admission staff must inform the admittee,

orally and in writing, of information specified by statute [*see Welf. & Inst. Code § 5157(c)*]. The designated facility must keep records of the advisement [*see Welf. & Inst. Code § 5157(b), (d)*].

[3] Evaluation and Treatment Requirements

Each person admitted to a facility for 72-hour treatment and evaluation for mental disorders must receive an evaluation as soon as possible after he or she is admitted and receive whatever treatment and care his or her condition requires for the full period that he or she is held [*Welf. & Inst. Code § 5152(a)*].

[4] Requirement for Early Release

The person must be released before 72 hours have elapsed only if the psychiatrist directly responsible for the person's treatment believes, as the result of personal observations, that the person no longer requires evaluation or treatment [*Welf. & Inst. Code § 5152(a)*; *Ford v. Norton (2001) 89 Cal. App. 4th 974, 980-981, 107 Cal. Rptr. 2d 776* (although LPS Act permits broad range of persons to initiate 72-hour detention, only psychiatrist can authorize early release)].

However, if both a psychiatrist and a psychologist have personally evaluated or examined the person and there is a collaborative treatment relationship between them, either may authorize the person's release, but only after they have consulted with each other [*Welf. & Inst. Code § 5152(a)*]. In the event of a clinical or professional disagreement about an early release, the 72-hour hold must be maintained unless the facility's medical director overrules the decision of the psychiatrist or psychologist who opposes the release. Both the psychiatrist and the psychologist must enter their findings, concerns, or objections into the person's medical record [*Welf. & Inst. Code § 5152(a)*].

If any other professional person, who is authorized to release the person, believes the person should be released before 72 hours have elapsed, and the psychiatrist directly responsible for the person objects, the matter must be referred to the medical director for the final decision. However, if the medical director is not a psychiatrist, he or she must appoint a designee who is a psychiatrist. If the matter is referred, the person must be released before 72 hours have elapsed only if the psychiatrist making the final decision believes, as a result of his or her personal observations, that the person no longer requires evaluation or treatment [*Welf. & Inst. Code § 5152(a)*].

[5] Postdetention Requirements

Persons who have been detained for evaluation and treatment must be released, referred for further care and treatment on a voluntary basis, certified for intensive treatment, or have a conservator or temporary conservator appointed under *Welf. & Inst. Code § 5350 et seq.*, as required [*Welf. & Inst. Code § 5152(b)*].

In addition, persons who have been detained for evaluation and treatment and who are receiving medications as a result of their mental illness must be given, as soon as possible after detention, written and oral information about the probable effects and possible side effects of the medication by a person designated by the mental health facility where each respective person is detained. The State Department of Mental Health is required to develop and promulgate written materials on the effects of medications for use by county mental health programs, as disseminated or as modified by the county mental health program, that address the probable effects and possible side effects of the medication [*Welf. & Inst. Code § 5152(c)*]. The following information must be given orally to the patient [*Welf. & Inst. Code § 5152(c)*]:

- The nature of the mental illness or behavior that is the reason the medication is being given or recommended;
- The likelihood of improving or not improving without the medication;
- Reasonable alternative treatments available; and

- The name and type, frequency, amount, and method of dispensing the medication, and the probable length of time the medication will be taken.

The fact that the above information has or has not been given must be indicated on the patient's chart. A failure to give information about the probable effects and possible side effects of the medication does not constitute new grounds for release [*Welf. & Inst. Code § 5152(c)*].

[6] Inebriated Persons

[a] Basis for Custody

The detention and treatment of inebriated persons for 72 hours is governed by *Welf. & Inst. Code §§ 5170-5176*. When any person is a danger to others or to himself or herself or gravely disabled as a result of inebriation, a peace officer, a member of the attending staff, as defined by regulation, of an evaluation facility designated by the county, or any other person designated by the county may, on reasonable cause, take the person (or cause the person to be taken) into civil protective custody and place the person in a facility designated by the county and approved by the Department of Health as a facility for 72-hour treatment and evaluation of inebriates [*Welf. & Inst. Code § 5170*].

The provisions for detention of inebriates apply only to those counties in which the Board of Supervisors has adopted a resolution stating that suitable facilities exist and has adopted the relevant statutory provisions [*Welf. & Inst. Code § 5176*]. The procedures for detention of inebriates for 72 hours are outlined in the Procedural Checklist, Paragraph A(2).

[b] Requirements for Treatment Facility

The treatment and evaluation facility must include one or more of the following: (1) a screening, evaluation, and referral facility (which may be provided by a mobile crisis unit, first aid station, or ambulatory detoxification unit); (2) a detoxification facility for alcoholic and acutely intoxicated persons; and (3) an alcohol recovery house [*Welf. & Inst. Code § 5170.1*].

[c] Civil Protective Custody for Disorderly Conduct

Pen. Code § 647(g) requires a peace officer who finds a person in a public place under the influence of intoxicating liquor in such a condition that he or she is unable to exercise care for his or her own safety or the safety of others to place the person in civil protective custody and take him or her to a facility designated under *Welf. & Inst. Code § 5170* for the 72-hour treatment and evaluation of inebriates [*see Pen. Code § 647(f)*(public inebriacy as disorderly conduct); *but see Pen. Code § 647(g)(1)-(3)* (civil protective custody not available to certain violators)]. *Pen. Code § 647(g)* also provides that after the person has been taken to the treatment facility, he or she is not subject to any criminal prosecution or juvenile court proceeding based on the facts giving rise to the placement.

This civil protective custody is available to any person who has violated the disorderly conduct provisions of *Pen. Code § 647(f)* except (1) persons who are under the influence of drugs, or the combined influence of drugs and liquor, (2) persons whom the officer has probable cause to believe have committed a felony, (3) persons whom the officer has probable cause to believe have committed some misdemeanor other than the mere public inebriety, and (4) persons whom the peace officer in good faith believes will attempt to escape or will be unreasonably difficult for medical personnel to control [*Pen. Code § 647(g)*].

For factors that may be considered in determining a peace officer's reasonable ability to comply with these civil protective custody procedures, see *People v. Ambellas (1978) 85 Cal. App. 3d Supp. 24, 30-40* ; *Stout v. City of Porterville (1983) 148 Cal. App.3d 937, 945-947, 196 Cal. Rptr. 301* (police not required to take public inebriate into custody).

The failure of a county to establish a facility for inebriates does not deny equal protection of the laws to persons in that county [*People v. McNaught (1973) 31 Cal. App.3d 599, 608-609, 107 Cal. Rptr. 566]* .

[d] Statutory Right to Make Telephone Calls

Persons placed in an evaluation and treatment facility pursuant to these provisions have the statutory right to make telephone calls [*see Welf. & Inst. Code § 5170.5*].

[e] Request for Early Release

A person who requests to be released from the facility before 72 hours have elapsed must be released only if the psychiatrist directly responsible for the person's treatment believes, as a result of his or her personal observations, that the person is not a danger to others or to himself or herself. If any other professional person who is authorized to release the person, believes the person should be released before 72 hours have elapsed and the psychiatrist directly responsible for the person's treatment objects, the matter must be referred to the medical director of the facility for the final decision. However if the medical director is not a psychiatrist, he or she must appoint a designee who is a psychiatrist. If the matter is referred, the person will be released before 72 hours have elapsed only if the psychiatrist making the final decision believes, as a result of his or her personal observations, that the person is not a danger to others or to himself or herself [*Welf. & Inst. Code § 5170.7*].

[7] Court-Ordered Evaluation

[a] In General

Any person alleged, as a result of a mental disorder, to be a danger to others or to himself or herself or to be gravely disabled may be given an evaluation of his or her condition under a superior court order pursuant to *Welf. & Inst. Code § 5200 et seq.* Procedures for court-ordered evaluation are outlined in the Procedural Checklist, Paragraph A(3).

The procedure is begun by an individual's application to a person or agency designated by the county for a petition alleging that there is in the county a person who is, as a result of a mental disorder, a danger to others or to himself or herself or is gravely disabled, and requesting that an evaluation of the person's condition be made [*see Welf. & Inst. Code §§ 5201, 5208* ("evaluation" defined)]. The agency screens the case to determine if there is probable cause to believe the allegations and whether or not the person will voluntarily accept services or an evaluation [*see Welf. & Inst. Code §§ 5202, 5208(f)* ("prepetition screening" defined)]. The person or agency providing prepetition screening must conduct a reasonable investigation of the allegations and make a reasonable effort to interview the subject of the petition personally [*Welf. & Inst. Code § 5202*].

The person to be evaluated has a right to remain in his or her own home or other place of his or her own choosing prior to the evaluation, and to be accompanied to the evaluation by certain other persons [*see Welf. & Inst. Code § 5206*]. A person who fails to appear after proper notification for evaluation may, however, be taken into custody [*see Welf. & Inst. Code §§ 5206, 5208*].

[b] Criminal Defendants

The court-ordered evaluation of criminal defendants who appear to be dangerous or gravely disabled as a result of chronic alcoholism or the use of narcotics or restricted drugs is governed by *Welf. & Inst. Code §§ 5225-5230*. The judge before whom the person is brought may order the person's evaluation [*see Welf. & Inst. Code § 5225*], but the defendant must be advised of the right immediately to continue with the criminal proceeding [*see Welf. & Inst. Code § 5226*]. Procedures for court-ordered evaluation of a criminal defendant pursuant to these statutory provisions are *outlined in § 304.221* (*see* Paragraph 4).

[8] Disposition After Evaluation

The relevant statutes provide that the period of initial detention for evaluation and treatment may not exceed 72 hours, but Saturdays, Sundays, and holidays may be excluded from computation if evaluation and treatment services are not available on those days [*see Welf. & Inst. Code §§ 5151, 5171, 5213(a), 5230*]. Several dispositions of the person involuntarily evaluated are possible:

- The person may be released at or before the end of the 72-hour detention period [*see Welf. & Inst. Code §§ 5152(a), 5170.7, 5172, 5206, 5226.1, 5230*; *see also Welf. & Inst. Code § 5152.1* (notification of release)];

- The person may be referred for further care and treatment on a voluntary basis [*see Welf. & Inst. Code §§ 5152(b), 5171, 5172, 5206, 5230*]; or

- The person may have a conservator appointed [*see Welf. & Inst. Code §§ 5152(b), 5172, 5206*]. For procedures for appointment of a conservator, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* .

If the relevant statutory standards are met, the person may be certified for 14-day involuntary intensive treatment [*Welf. & Inst. Code §§ 5152(a), 5172, 5206, 5230*].

[9] Liability of Medical Personnel

Persons and entities, such as hospitals and clinics, authorized to detain a mentally disordered person for a 72-hour period may not be held criminally or civilly liable for exercising this authority in accordance with the law [*Welf. & Inst. Code § 5278*; *Jacobs v. Grossmont Hospital (2003) 108 Cal. App. 4th 69, 74, 133 Cal. Rptr. 2d 9* (immunity extends to peace officers, members of attending staff at designated facilities, certain members of a mobile crisis team, and other professionals designated by county); *Cruze v. National Psychiatric Services, Inc. (2003) 105 Cal. App. 4th 48, 54-57, 129 Cal. Rptr. 2d 65* (applying immunity to institutions and agencies with which health care professionals are associated, affiliated, or employed)]. To eliminate any concern for possible liability related to the decision to detain a person involuntarily for 72 hours, *Welf. & Inst. Code § 5278* affords immunity to those individuals who exercise the authority to detain in accordance with the law. This immunity allows those individuals to make the decision to impose a 72-hour hold for treatment and evaluation, without fear of exposure to criminal or civil liability. The immunity applies to individuals or entities who make the decision to detain, when that decision is supported by probable cause [*Jacobs v. Grossmont Hospital (2003) 108 Cal. App. 4th 69, 76, 133 Cal. Rptr. 2d 9]* . If the provisions of *Welf. & Inst. Code § 5152* have been met, the professional person in charge of the facility providing the 72-hour treatment and evaluation and the medical director of the facility (or their designees), as well as the psychiatrist who is directly responsible for the person's treatment, or the psychologist, may not be held civilly or criminally liable for any action by the person following his or her early release [*Welf. & Inst. Code § 5154(a)*; *Ford v. Norton (2001) 89 Cal. App. 4th 974, 980-984, 107 Cal. Rptr. 2d 776* (immunity does not extend to psychologist who authorized early release, because this release does not meet requirements of *Welf. & Inst. Code § 5152*); *but see Welf. & Inst. Code § 5152(a)* (psychologist who has personally evaluated or examined person, and who has collaborative relationship with psychiatrist, may authorize early release after consulting with psychiatrist)].

The immunity provided by *Welf. & Inst. Code § 5278* is not absolute [*Jacobs v. Grossmont Hospital (2003) 108 Cal. App. 4th 69, 77, 133 Cal. Rptr. 2d 9]* . It extends to claims based on circumstances that are inherent in the involuntary detention, evaluation, and treatment, but it does not confer blanket immunity for any act or omission occurring during the 72-hour hold, no matter how negligent, wrongful, or criminal [*Jacobs v. Grossmont Hospital (2003) 108 Cal. App. 4th 69, 78-79, 133 Cal. Rptr. 2d 9* (rejecting hospital's suggestion that liability should be limited to extreme or outrageous acts not rationally related to a therapeutic purpose of necessary to maintain detention for required period)].

For example, the statute does not insulate from liability negligent medical treatment that falls below the standard of professional care [*Jacobs v. Grossmont Hospital (2003) 108 Cal. App. 4th 69, 79 fn. 3, 133 Cal. Rptr. 2d 9* ; *see Gonzalez v. Paradise Valley Hosp. (2003) 111 Cal. App. 4th 735, 741, 3 Cal. Rptr. 3d 903* (*Welf. & Inst. Code § 5278* is inapplicable to actions for negligence stemming from acts or omissions in evaluation or treatment during 72-hour hold)]. Protected conduct is confined to the exercise of statutory authority to detain, evaluate, and treat against a patient's wishes; immunity does not extend to the manner in which evaluation and treatment are conducted [*Gonzalez v. Paradise Valley Hospital (2003) 111 Cal. App. 4th 735, 741, 3 Cal. Rptr. 3d 903]* .

In addition, a treating psychiatrist who releases a patient who has been involuntarily committed under the LPS Act, merely because the patient does not have insurance, may be liable to the patient and any person the patient injures. The immunities for treating psychiatrists contained in the Act are not applicable unless the treating psychiatrist complies with the requirements of the Act before releasing a patient. In other words, the psychiatrist must believe, based on his or her own personal observations, that the patient is no longer a danger [*Bragg v. Valdez (2003) 111 Cal. App. 4th 421, 425, 433, 3 Cal. Rptr. 3d 804]* . A psychiatrist's decision to release a patient under the Act must be made on medical, not monetary, grounds [*Bragg v. Valdez (2003) 111 Cal. App. 4th 421, 431-432 fn.10, 3 Cal. Rptr. 3d 804* (suggesting actions that might appropriately be taken to transfer uninsured patient to public facility for treatment)]. An action by a person the patient injures based on a psychiatrist's failure to comply with the duties imposed under the involuntary commitment procedures of the LPS Act is not barred by *Civ. Code § 43.92* or *Tarasoff v. Regents of University of California (1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334* , which preclude a cause of action against a psychotherapist for failing to warn of a patient's threatened violent behavior unless the patient has made a serious threat of physical violence against a reasonably identifiable victim [*Bragg v. Valdez (2003) 111 Cal. App. 4th 421, 433-435, 3 Cal. Rptr. 3d 804]* .

However, the immunity afforded by *Welf. & Inst. Code § 5154 does* apply in a case in which a psychiatrist fails to warn an individual of a patient'sspecific threats of harm against that individual, and the patient harms the individual, as long as the psychiatrist authorized release of the patient in accordance with the required statutory findings--that is, that the patient no longer posed a threat to self or others [*Michael E.L. v. County of San Diego (1986) 183 Cal. App. 3d 515, 523-524, 527, 530, 228 Cal. Rptr. 139* (psychiatrist owes duty under *Tarasoff* to take reasonable care to protect intended victim from danger of serious violence he or she perceives in person placed under 72-hour hold for evaluation and treatment, but is immune from liability if person's release complies with statutory requirements)].

[10] Confiscation of Firearms

When a person is taken into custody for evaluation of an apparent mental disorder under *Welf. & Inst. Code § 5150*, the detaining officer must confiscate any firearms or other deadly weapons owned or possessed by the person [*Welf. & Inst. Code § 8102(a)*]. The confiscated weapons must be returned to the person unless the law enforcement agency, within 30 days of the person's release, files a petition with the court to determine whether returning the weapons would be likely to result in endangering the person or others, and sends the person notice of his or her right to a hearing on this issue [*Welf. & Inst. Code § 8102(c)*; *see Rupf v. Yan (2000) 85 Cal. App. 4th 411, 420-428, 102 Cal. Rptr. 2d 157* ; *People v. One Ruger .22-Caliber Pistol (2000) 84 Cal. App. 4th 310, 313-314, 100 Cal. Rptr. 2d 780* (upholding constitutionality of this procedure)]. At this hearing, the court may allow the psychiatrist who examined the person during his or her confinement to testify on the issue of whether the person is a danger to self or others [*People v. One Ruger .22-Caliber Pistol (2000) 84 Cal. App. 4th 310, 314-315, 100 Cal. Rptr. 2d 780* (*Evid. Code § 1024* affords exception to patient-psychotherapist privilege when psychotherapist has reasonable cause to believe that patient is dangerous to self or others, and that disclosure of otherwise privileged communication is necessary to avert danger to others)]. The court may also admit testimony of the detaining officer regarding his or her observations of the person or consider the officer's report [*see Rupf v. Yan (2000) 85 Cal. App. 4th 411, 428-432, 102 Cal. Rptr. 2d 157* (assuming, without deciding, that hearing is subject to rules of evidence applicable in civil cases and not to more relaxed evidentiary rules used in administrative proceedings)]. The court may consider whether the circumstances leading to the 72-hour hold might occur again, and whether possession or control of the confiscated weapons in this event would pose

a risk of danger to the detained person or others [*Rupf v. Yan (2000) 85 Cal. App. 4th 411, 424, 102 Cal. Rptr. 2d 157]* .

The power to seek forfeiture of firearms or other deadly weapons under *Welf. & Inst. Code § 8102* is predicated on the performance of an assessment and evaluation of the person as required by *Welf. & Inst. Code §§ 5151* and *5152*. A court does not have the power to order the forfeiture of firearms owned by a person who, although subject to detention under *Welf. & Inst. Code § 5150*, was never assessed or evaluated [*City of San Diego v. Kevin B. (2004) 118 Cal. App. 4th 933, 940-943, 13 Cal. Rptr. 3d 450]* .

In addition to the confiscation and forfeiture of weapons provided by *Welf. & Inst. Code § 8102*, any person who has been detained for evaluation under *Welf. & Inst. Code § 5150* may not own, possess, control, receive, or purchase firearms for a period of five years after the person's release from the mental health facility that performed the evaluation of his or her mental state [*Welf. & Inst. Code § 8103(f)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawActions Against FacilitiesDefensesImmunityHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentDischarge & Release of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesTreatment

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§ 304.35 Fourteen-Day Involuntary Intensive Treatment

[1] Certification

The procedures for certification of a person, after detention for 72 hours, for 14 days of involuntary treatment in a hospital are set forth in *Welf. & Inst. Code § 5250 et seq.* To detain the person for 14-day treatment, the person must have been found by the professional staff to be, as a result of mental disorder or impairment by chronic alcoholism, a danger to others or to himself or herself or to be gravely disabled. The person must also have been advised of, but not to have accepted, voluntary treatment, and the facility providing treatment must be designated by the county to provide intensive treatment, must agree to admit the person, and must comply with certification review hearing requirements [*Welf. & Inst. Code § 5250(a)-(c)*]. The procedures for certification of a person for 14-day involuntary intensive treatment are *outlined in § 304.222*.

[2] Notice of Rights

When a notice of 14-day certification is delivered to a person for 14-day treatment, the person is informed that he or she has the right to a certification review hearing and the right to the assistance of an attorney or another person to prepare for that hearing [*see Welf. & Inst. Code §§ 5252, 5254*].] The person detained is also informed of his or her legal right to judicial review by habeas corpus and the right to counsel, including court-appointed counsel [*Welf. & Inst. Code §§ 5254.1, 5276*].

[3] Certification Review Hearing--General Requirement and Time

When a person is certified for intensive treatment, a certification review hearing to determine whether or not probable cause exists to detain the person for intensive treatment must be held unless judicial review has been requested [*see Welf. & Inst. Code §§ 5254, 5256*; *see also § 304.40[1]*]. The certification review hearing must be held within four days of the date on which the person is certified for a period of intensive treatment, unless judicial review is requested or the hearing is postponed by request of theperson or his or her attorney or advocate [*Welf. & Inst. Code §§ 5254, 5256*]. Hearings may be postponed for 48 hours or, in counties with a population of 100,000 or less, until the next regularly scheduled hearing date [*Welf. & Inst. Code § 5256*].

[4] Conduct of Hearing

The hearing must be conducted by either a court-appointed commissioner or a referee or a certification review hearing officer who is either a state-qualified administrative judge, a medical doctor, a licensed psychologist, a registered nurse, a lawyer, a certified law student, a licensed marriage, family, or child counselor, or a licensed clinical social worker. No employee of the county mental health program or of any facility designated by the county and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation may serve as a certification review hearing officer [*see Welf. & Inst. Code § 5256.1*]. At the hearing, the evidence in support of the certification decision must be presented by a person designated by the director of the facility. In addition, either the district attorney or the county counsel may present evidence [*Welf. & Inst. Code § 5256.2*]. All relevant evidence may be admitted and considered [*Welf. & Inst. Code 5256.4(d)*]. Although resistance to involuntary commitment may be a product of a mental disorder, resistance does not, in and of itself, imply the presence of a mental disorder or constitute evidence that a person meets the criteria of being dangerous to self or others or of being gravely disabled [*Welf. & Inst. Code § 5256.4(e)*].

[5] Rights of Person Certified

The person certified is entitled, among other things, to be present at the hearing, to be assisted by an attorney or advocate, to present evidence, to question those presenting evidence in support of the certification decision, and to make reasonable requests for the attendance of facility employees who participated in or had knowledge of the certification decision [*see Welf. & Inst. Code §§ 5256.3, 5256.4(a)*]. The mental health facility must make reasonable attempts to notify family members, or any other person designated by the patient, of the time and place of the certification hearing, unless the patient requests that this information not be provided. The treating facility must also advise the patient that he or she has the right to request that this information not be provided [*Welf. & Inst. Code § 5256.4(c)*].

[6] Detention or Release After Findings

If the person conducting the hearing finds that there is no probable cause to believe that the person certified is, as a result of a mental disorder or impairment by chronic alcoholism, a danger to others or to himself or herself, or is gravely disabled, then the person certified may no longer be involuntarily detained. The person is not prohibited from remaining at the facility on a voluntary basis, however, and the facility is not prevented from providing the person with appropriate referral information concerning mental health services [*Welf. & Inst. Code § 5256.5*]. If the person conducting the hearing finds that there is probable cause that the person certified is a danger to others or to himself or herself or is gravely disabled, the person may be detained for involuntary care, protection, and treatment related to the mental disorder or alcoholic impairment for 14 or 30 additional days [*Welf. & Inst. Code § 5256.6*; *see Welf. & Inst. Code §§ 5250, 5270.15*; *see also § 304.37, below*].

[7] Notice of Findings to Person Certified

The person certified must be given oral notification of the decision at the conclusion of the certification review hearing, and, as soon thereafter as is practicable, the person's attorney or advocate and the director of the facility where the person is receiving treatment must be provided with written notification of the decision. The attorney or advocate must notify the person certified of the decision and of his or her rights to file a request for release and to have a hearing. A copy of the decision and the certification must be submitted to the superior court [*see Welf. & Inst. Code § 5256.7*].

[8] Availability of Legal Services

Any person who is held longer than 72 hours for treatment has a right to a lawyer, a qualified interpreter, and a hearing before a judge. If the person detained is unable to pay for a lawyer, one will be provided free [*see Welf. & Inst. Code § 5157*; *see also Phillips v. Seely (1974) 43 Cal. App. 3d 104, 113, 117 Cal. Rptr. 863* (legal services at public expense are mandated in mental health matters when restraint of liberty is possible)].

[9] Disposition After Hearing

[a] During Treatment Period

If, during the 14-day additional treatment period, the psychiatrist directly responsible for the person's treatment believes, based on personal observations, that the person is no longer either a danger to others or to himself or herself, or is no longer gravely disabled because of mental disorder or impairment by chronic alcoholism, the person's involuntary commitment must end, and the person must be released [*Welf. & Inst. Code § 5257(a)*].

If both a psychiatrist and a psychologist have personally evaluated or examined the person and there is a collaborative treatment relationship between them, either may authorize the person's release, but only after they have consulted with each other [*Welf. & Inst. Code § 5257(a)*]. In the event of a clinical or professional disagreement about an early release, theperson may not be released unless the facility's medical director overrules the decision of the psychiatrist or psychologist who opposes the release. Both the psychiatrist and the psychologist must enter their findings, concerns, or objections into the person's medical record [*Welf. & Inst. Code § 5257(a)*].

If any other professional person who is authorized to release the person believes the person should be released during the 14-day additional treatment period and the psychiatrist directly responsible for the person's treatment objects, the matter must be referred to the medical director of the facility for the final decision. However, if the medical director is not a psychiatrist, he or she must appoint a designee who is a psychiatrist [*Welf. & Inst. Code § 5257(a)*].

If the matter is referred, the person must be released during the 14-day additional treatment period only if the psychiatrist making the final decision believes, based on personal observations, that the person certified no longer is, as a result of mental disorder or impairment by chronic alcoholism, a danger to others or to himself or herself or gravely disabled [*Welf. & Inst. Code § 5257(a)*].

The person is not prohibited, however, from remaining at the facility on a voluntary basis, and the facility is not prohibited from providing the person with appropriate referral information concerning mental health services [*Welf. & Inst. Code § 5257(a)*].

[b] After Treatment Period

Persons who have been certified for 14 days of intensive treatment, and who are not sooner released, must not be involuntarily detained beyond 14 days, except in the following cases [*Welf. & Inst. Code § 5257(b)*]:

- The person agrees to receive further treatment on a voluntary basis;

- The person is certified for an additional 14 days of intensive treatment as a suicidal person [*see Welf. & Inst. Code § 5260 et seq.*; *see also § 304.36*];

- The person is certified for an additional 30 days intensive treatment [*see Welf. & Inst. Code § 5270.10 et seq.*; *see also* discussion *§ 304.37*];

- The person is the subject of an LPS conservatorship petition [*see Welf. & Inst. Code § 5350 et seq.*; *see also §§ 304.38* and *304.144[6]*]; or

- The person is the subject of a petition for postcertification as an imminently dangerous person [*see Welf. & Inst. Code § 5300 et seq.*; *see also* discussion *§ 304.39*].

[10] Liability of Medical Personnel

If the provisions of *Welf. & Inst. Code § 5257* have been met, the professional person in charge of the facility providing intensive treatment (or his or her designee), the medical director of the facility (or his or her designee), the psychiatrist directly responsible for the person's treatment, or the psychologist may not be held civilly or criminally liable for any action by a person who is released before the end of the 14 days of intensive treatment [*Welf. & Inst. Code § 5259.3(a)*], or for any action by a person who is released at the end of the 14 days of intensive treatment [*Welf. & Inst. Code § 5259.3(b)*]. In addition, the attorney or advocate representing the person, the court-appointed commissioner or referee, the certification review officer conducting the certification review hearing, and the peace officer responsible for the person's detainment may not be held civilly or criminally liable for any action by the person released at or before the end of the 14 days of intensive treatment [*Welf. & Inst. Code § 5259.3(c)*].

However, a treating psychiatrist who releases a patient who has been involuntarily committed under the LPS Act, merely because the patient does not have insurance, may be liable to the patient and any person the patient injures. The immunities for treating psychiatrists contained in the Act are not applicable, unless the treating psychiatrist complies with the requirements of the Act before releasing a patient. In other words, the psychiatrist must believe, based on his or her own personal observations, that the patient is no longer a danger [*Bragg v. Valdez (2003) 111 Cal. App. 4th 421, 425, 433, 3 Cal. Rptr. 3d 804]* . A psychiatrist's decision to release a patient under the Act must be made on medical, not monetary, grounds [*Bragg v. Valdez (2003) 111 Cal. App. 4th 421, 431-432 fn. 10, 3 Cal. Rptr. 3d 804* (suggesting actions that might appropriately be taken to transfer uninsured patient to public facility for treatment)]. An action by a person the patient injures based on a psychiatrist's failure to comply with the duties imposed under the involuntary commitment procedures of the LPS Act is not barred by *Civ. Code § 43.92* or *Tarasoff v. Regents of University of California (1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334* , which preclude a cause of action against a psychotherapist for failing to warn of a patient's threatened violent behavior unless the patient has made a serious threat of physical violence against a reasonably identifiable victim [*Bragg v. Valdez (2003) 111 Cal. App. 4th 421, 433-435, 3 Cal. Rptr. 3d 804]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentDischarge & Release of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesTreatment

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§ 304.36 Fourteen-Day Treatment of Suicidal Persons

[1] Certification

The procedures for additional treatment of suicidal persons are set forth in *Welf. & Inst. Code § 5260 et seq.* Additional involuntary intensive treatment may occur only under the following conditions [*Welf. & Inst. Code § 5260(a)-(d)*]:

- The professional staff has analyzed the person's condition and has found that the person presents an imminent threat of taking his or her own life;

- The person has been advised of but has not accepted voluntary treatment;

- The facility providing additional intensive treatment is equipped, staffed, and designated to provide that treatment; and

- The person, as a result of mental disorder or impairment by chronic alcoholism, has threatened or attempted to take his or her own life during the 14-day period of intensive treatment or the 72-hour evaluation and treatment, or was detained for evaluation and treatment because the person threatened or attempted to take his or her own life.

The procedures for certification of a suicidal person for 14 days of additional intensive treatment are *outlined in § 304.224*.

[2] Disposition After Treatment

A certification of imminently suicidal persons must be for no more than 14 days of intensive treatment, and must terminate only as soon as the psychiatrist directly responsible for the person's treatment believes, based on his or her personal observations, that the individual has improved sufficiently for him or her to leave, or is prepared to accept voluntary treatment or referral or to remain in the facility providing intensive treatment on a voluntary basis [*Welf. & Inst. Code § 5264(a)*].

If both a psychiatrist and a psychologist have personally evaluated or examined the person and there is a collaborative treatment relationship between them, either may authorize the person's release, but only after they have consulted with each other [*Welf. & Inst. Code § 5264(a)*]. In the event of a clinical or professional disagreement about an early release, the person may not be released unless the facility's medical director overrules the decision of the psychiatrist or psychologist who opposes the release. Both the psychiatrist and the psychologist must enter their findings, concerns, or objections into the person's medical record [*Welf. & Inst. Code § 5264(a)*].

If any other professional person who is authorized to release the person believes the person should be released before 14 days have elapsed and the psychiatrist directly responsible for the person's treatment objects, the matter must be referred to the medical director of the facility for the final decision. If, however, the medical director is not a psychiatrist, he or she must appoint a designee who is a psychiatrist. If the matter is referred, the person must be released before 14 days have elapsed only if the psychiatrist believes, based on his or her personal observations, that the individual has improved sufficiently for him or her to leave, or is prepared to accept voluntary treatment on referral or to remain in the facility providing intensive treatment on a voluntary basis [*Welf. & Inst. Code § 5264*].

Persons to whom *Welf. & Inst. Code § 5226.1*(criminal defendants dangerous as a result of use of drugs or chronic alcoholism) does not apply, or with respect to whom the criminal charge has been dismissed under *Welf. & Inst. Code § 5226.1*, must be released at the end of the 14 days of further intensive treatment unless any of the following applies [*Welf. & Inst. Code § 5264(b)*; *see Welf. & Inst. Code §§ 5270.10 et seq., 5300 et seq.*; *see also* discussion *§ 304.38*]:

- The patient agrees to receive further treatment on a voluntary basis;
- The patient is recommended for conservatorship; or
- The patient is confined for 180 days for treatment as an imminently dangerous person.

[3] Liability of Medical Personnel

If the provisions of *Welf. & Inst. Code § 5264* [*see § 304.36[2]*] have been met, the professional person in charge of the facility providing intensive treatment (or his or her designee), the medical director of the facility (or his or her designee), the psychiatrist directly responsible for the person's treatment, or the psychologist may not be held civilly or criminally liable for any action by a person who is released before the end of the 14 days of intensive treatment [*Welf. & Inst. Code § 5267(a)*], or for any action by a person who is released at the end of the 14 days of intensive treatment [*Welf. & Inst. Code § 5267(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesTreatment

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§ 304.37 Thirty-Day Involuntary Intensive Treatment--Certification

On completion of a 14-day period of intensive treatment under *Welf. & Inst. Code § 5250* [*see § 304.35[1]*], the person may be certified for an additional period of not more than 30 days of intensive treatment under both of the following conditions [*Welf. & Inst. Code § 5270.15*]:

- The professional staff of the agency or facility treating the person has found that the person remains gravely disabled as the result of a mental disorder or impairment by chronic alcoholism; and

- The person remains unwilling or unable to accept treatment voluntarily.

The purpose of this additional intensive treatment is to reduce the number of gravely disabled persons for whom conservatorship petitions are filed and who are placed under temporary conservatorship only to obtain an additional period of treatment without the petitioner's belief that a conservator is actually needed and the intent to proceed further on the conservatorship petition [*Welf. & Inst. Code § 5270.10*]. Additional intensive treatment is operative only if the county board of supervisors by resolution authorizes its application. The board of supervisors must also make a finding that any additional costs incurred by the county in implementation are funded either by new funding sufficient to cover the resulting costs that are incurred by the county or by funds redirected from cost savings that result from its implementation, or from a combination of thesesources, so that no current service reductions will occur as a result [*Welf. & Inst. Code § 5270.12*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesTreatment

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§ 304.38 Recommendation for Conservatorship

If it is contemplated that a gravely disabled person may need to be detained beyond the end of the 14-day period of intensive treatment, the professional person in charge of the treating facility must cause an evaluation to be made, based on the patient's current condition and past history, about whether it appears that the person is likely to qualify for appointment of a conservator even after a period of up to 30 days of additional treatment. The evaluation must be made prior to proceeding with an additional 30-day certification. If the appointment of a conservator appears likely, the conservatorship referral must be made during the 14-day period of intensive treatment [*Welf. & Inst. Code § 5270.55(a)*]. If it appears that with up to 30 days additional treatment the person is likely to reconstitute sufficiently to obviate the need for appointment of a conservator, the person may be certified for the additional 30-day period [*Welf. & Inst. Code § 5270.55(b)*].

If no conservatorship referral has been made during the 14-day period and, during the 30-day period, it appears that the person is likely to require the appointment of a conservator, the conservatorship referral must be made to allow sufficient time for conservatorship investigation and other related procedures. If a temporary conservatorship is obtained, it must run concurrently with and not consecutively to the 30-day certification period. The conservatorship hearing must be held by the 30th day of the certification period. The maximum involuntary detention period for gravely disabled persons under *Welf. & Inst. Code §§ 5150, 5250,* and *5270.15* is limited to 47 days [*Welf. & Inst. Code § 5270.55(c)*; *see Welf. & Inst. Code § 5352.3* (period may exceed 47 days if continuance is granted)].

For further discussion of the appointment of a conservatorship for a gravely disabled person, *see § 304.144[6]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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B. Lanterman-Petris-Short Act And Related Proceedings

26-304 California Forms of Pleading and Practice--Annotated § 304.39

§ 304.39 180-Day Treatment for Imminently Dangerous Persons

[1] Basis for Commitment

Postcertification treatment is governed by *Welf. & Inst. Code § 5300 et seq.*]. At the expiration of the 14-day period of intensive treatment, a person may be confined for further treatment for an additional period, not to exceed 180 days, if one of the following exists [*Welf. & Inst. Code § 5300*]:

(a) The person has attempted, inflicted, or made a serious threat of substantial physical harm on the person of another after having been taken into custody and while in custody for evaluation and treatment, and who, as a result of mental disorder or mental defect, presents a demonstrated danger of inflicting substantial physical harm on others;

(b) The person had attempted or inflicted physical harm on the person of another, that act having resulted in his or her being taken into custody, and who presents, as a result of mental disorder or mental defect, a demonstrated danger of inflicting substantial physical harm on others; or

(c) The person had made a serious threat of substantial physical harm on the person of another within seven days of being taken into custody, that threat having at least in part resulted in his or her being taken into custody, and the person presents, as a result of mental disorder or mental defect, a demonstrated danger of inflicting substantial physical harm on others.

[2] Affirmative Obligation to Treat

Any commitment to a licensed health facility under *Welf. & Inst. Code § 5300 et seq.*, which governs postcertification treatment, places an affirmative obligation on the facility to provide treatment for the underlying causes of the person's mental disorder [*Welf. & Inst. Code § 5300*].

Amenability to treatment is not required for a finding that any person qualifies for further treatment. Treatment programs need only be made available to these persons. Treatment does not mean that the treatment be successful or potentially successful, nor does it mean that the person must recognize his or her problem and willingly participate in

the treatment program [*Welf. & Inst. Code § 5300*].

[3] Petition and Hearing

The professional person in charge of the facility, or a designee, may ask the district attorney or the county counsel (see *Welf. & Inst. Code § 5114*) to petition the superior court in the county in which the facility is located for an order requiring the person to undergo an additional period of treatment [*Welf. & Inst. Code § 5301*]. The petition must actually be filed within the 14-day period [*People v. Superior Court (Finch) (1988) 200 Cal. App. 3d 1546, 1550-1551, 248 Cal. Rptr. 23]* . For purposes of counting the 14-day period, the general method of counting set forth in *Code Civ. Proc. § 12* is used, meaning that the day on which the 14-day period of confinement begins is excluded and the last day is included [*People v. Superior Court (Finch) (1988) 200 Cal. App. 3d 1546, 1551, 248 Cal. Rptr. 23* (if 14-day period begins on February 11, February 12 is counted as first day and February 25 is last day)]. The remedy for late filing is release of the person from confinement, not dismissal of the petition [*People v. Superior Court (Finch) (1988) 200 Cal. App. 3d 1546, 1548, 1551, 248 Cal. Rptr. 23]* .

If, at the hearing, the court or jury finds that the person named in the petition meets the standard for postcertification treatment [*see Welf. & Inst. Code §§ 5300, 5304(a)*], the court must remand the person for a period not to exceed 180 days of further treatment [*Welf. & Inst. Code§ 5304*]. Procedures for the petition for further treatment for 180 days are *outlined in § 304.225*.

[4] Notice of Right to Representation and Jury Trial

At the time a petition for postcertification treatment is filed, the court must advise the person named in the petition of his or her right to be represented by an attorney and of his or her right to demand a jury trial. The court must appoint a public defender or another attorney to represent the person named if that person is financially unable to provide his or her own attorney. The attorney must represent the person and advise the person of his or her rights in relationship to the proceeding [*Welf. & Inst. Code § 5302*].

[5] Release or Other Disposition

The person must be released at the end of 180 days unless another petition that alleges the same condition of the person is filed for postcertification treatment in the superior court in which the original petition was filed [*Welf. & Inst. Code § 5304(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentDischarge & Release of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesTreatment

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§ 304.40 Judicial Review by Writ of Habeas Corpus

[1] Certification for Involuntary Intensive Treatment

If a person detained for 72-hours is subsequently detained by certification for 14-day involuntary intensive treatment, additional 14-day treatment, additional 30-day treatment or 180-day postcertification treatment, that person is entitled to a hearing by writ of habeas corpus for release under *Welf. & Inst. Code § 5275* [*see Thorn v. Superior Court (1970) 1 Cal. 3d 666, 674-675, 83 Cal. Rptr. 600, 464 P.2d 56* ; *see also Welf. & Inst. Code § 5250 et seq.*; *Welf. & Inst. Code § 5260 et seq.*; *Welf. & Inst. Code § 5270.10 et seq.*; *Welf. & Inst. Code §§ 5300, 5308*]. See *§§ 304.35* and *304.39[1]*

Review by habeas corpus is a matter of right after the detainee or a person acting on his or her behalf has made a request for release to (1) the person who delivered the copy of the notice of certification to the detainee at the time of the delivery, or (2) any member of the treatment facility staff at any time during the period of intensive treatment pursuant to *Welf. & Inst. Code §§ 5250, 5260*, or *5270.10* [*Welf. & Inst. Code § 5275*]. A patient must not be moved from the county providing evaluation services to a different county for intensive services once the evaluation facility staff has been notified that judicial review will be sought until judicial review has been completed [*Welf. & Inst. Code § 5276*].

[2] Notice to Detainee

The person delivering the notice of certification to the person certified must, at the time of delivery, inform the person certified of his or her legal right to a judicial review by writ of habeas corpus and must explain the term to the person certified [*Welf. & Inst. Code § 5254.1*]. The person delivering the notice must also inform the person of the right to counsel, including court-appointed counsel, pursuant to *Welf. & Inst. Code § 5276* [*Welf. & Inst. Code § 5254.1*], and the right to a certification review hearing within four days of certification unless judicial review is requested [*Welf. & Inst. Code § 5254*; *see § 304.35[3]*].

Certification of an imminently suicidal person for an additional 14 days of intensive involuntary treatment requires notice to the detainee of his or her continuing legal right to judicial review by habeas corpus, and an explanation of that term [*Welf. & Inst. Code §§ 5262, 5263*; *see § 304.36[1]*]. Certification for additional 30-day intensive treatment under Welf. & Ins. Code § 5270.15 also requires notification that is substantially in the form required for initial 14-day

certification under *Welf. & Inst. Code § 5252* [*Welf. & Inst. Code § 5270.15*; *see § 304.37[1]*]. Likewise, a person hospitalized under *Welf. & Inst. Code 5300 et seq.*(additional confinement for imminently dangerous persons), must be notified of his or her right to judicial review by habeas corpus in the manner prescribed in *Welf. & Inst. Code § 5254.1* [*see Welf. & Inst. Code § 5308* (citing former *Welf. & Inst. Code § 5252.1*, now repealed, which is continued in Section 5254.1); *see § 304.39[1]*].

If a person detained for certification requests release, that person must be informed of his or her right to counsel to assist in preparation of the writ of habeas corpus, and the right to court-appointed counsel, if he or she cannot afford to pay for legal services [*Welf. & Inst. Code § 5276*].

[3] Jurisdiction and Venue

Venue for judicial review by habeas corpus is in the superior court for the county in which the 72-hour evaluation was conducted if the patient or person acting in his or her behalf informs the professional staff of the evaluation facility (in writing) that judicial review will be sought. Otherwise, judicial review is in the superior court for the county in which the facility providing intensive treatment is located [*Welf. & Inst. Code § 5276*].

[4] Standard of Proof on Review by Habeas Corpus

The standard of proof on review of certification for involuntary confinement by habeas corpus is the existence of more evidence than not, namely, a preponderance of the evidence, that the patient is gravely disabled. Procedurally, the state must bear the burden of proof, including the burden of persuasion, to justify the certification [*In re Azzarella (1989) 207 Cal. App. 3d 1240, 1247, 254 Cal. Rptr. 922]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureHabeas CorpusProcedureGeneral OverviewFamily LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesTreatment

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§ 304.41 Assisted Outpatient Treatment Program

[1] When Available

In any county that provides assisted outpatient treatment services under the Assisted Outpatient Treatment Demonstration Project Act of 2002 [*Welf. & Inst. Code §§ 5345-5349.5*], a court may order a person who is the subject of a petition filed under the Act to obtain assisted outpatient treatment if the court finds, by clear and convincing evidence, that the facts stated in the verified petition are true and establish that all of the requisite criteria for this treatment are met, including, but not limited to the following [*Welf. & Inst. Code § 5346(a)*]:

- The person is at least 18 years of age.
- The person is suffering from a mental illness [*Welf. & Inst. Code § 5600.3(b)(2), (3)*].
- There has been a clinical determination that the person is unlikely to survive safely in the community without supervision.
- The person has a history of lack of compliance with treatment for his or her mental illness.
- The person has been offered an opportunity to participate in a treatment plan by the local mental health department, but continues to fail to engage in treatment.
- The person's condition is deteriorating substantially.
- Participation in the assisted outpatient treatment program is the least restrictive placement necessary to ensure the person's recovery and stability.
- The person needs this treatment to prevent a relapse or deterioration that is likely to result in grave disability or serious harm to self or others.

- It is likely that the person will benefit from this treatment.

[2] Petition

The petition is filed by the county mental health director, at the request of certain specified persons (including family members and treatment providers), and after conducting an investigation into the appropriateness of filing the petition [*see Welf. & Inst. Code § 5346(b)*]. It must be accompanied by an affidavit of a licensed mental health treatment provider who has examined the subject of the petition within 10 days before the submission of the petition or has attempted to do so but has been unsuccessful in persuading the person to submit to an examination [*Welf. & Inst. Code § 5346(b)(5)*]. The petition must be filed in the superior court in the county in which the person is present or reasonably believed to be present [*Welf. & Inst. Code § 5346(b)(1)*]. The petition and notice of hearing must be personally served on the person who is the subject of the petition [*Welf. & Inst. Code § 5346(d)(1)*].

[3] Hearing

A hearing on the petition must beheld within five days after it is received by the court, excluding Saturdays, Sundays, and holidays [*Welf. & Inst. Code § 5346(d)(1)*]. The hearing is limited to the facts and grounds stated in the petition, to ensure adequate notice to the person who is the subject of the petition and his or her counsel [*Welf. & Inst. Code § 5346(b)(4)(B)*]. The person has the right to be represented by counsel at all stages of the proceedings, and the court must appoint the public defender to represent the person if he or she has not retained counsel [*Welf. & Inst. Code § 5346(c), (d)(4)(C)*].

At the hearing, the court must hear testimony and may examine the person in or out of court, if the person is available [*Welf. & Inst. Code § 5346(d)(1), (4)(E), (F)* (person has right to be present at hearing and to present evidence)]. The court may conduct the hearing in the person's absence if appropriate attempts to secure his or her attendance have failed, but must set forth the factual basis for conducting the hearing without the person's presence [*Welf. & Inst. Code § 5346(d)(1)*].

The court may not order assisted outpatient treatment unless an examining licensed mental health treatment provider, who has personally examined and reviewed the available treatment history of the person within 10 days before the filing of the petition, testifies in person at the hearing [*Welf. & Inst. Code § 5346(d)(2)*]. If the person refuses to be examined and the court finds reasonable cause to believe that the allegations in the petition are true, the court may order the person taken into custody and transported to a hospital for examination by a licensed mental health treatment provider as soon as is practicable [*Welf. & Inst. Code § 5346(d)(3)*]. Detention under the order may not exceed 72 hours [*Welf. & Inst. Code § 5346(d)(3)*].

[4] Order

If, after hearing all relevant evidence, the court finds that the person does not meet the criteria for assisted outpatient treatment, the court must dismiss the petition [*Welf. & Inst. Code § 5346(d)(5)(A)*]. If the court finds that the person *does* meet the criteria for assisted outpatient treatment and there is no appropriate and feasible less restrictive alternative, the court may order the person to receive this treatment for an initial period of up to six months [*Welf. & Inst. Code § 5346(d)(5)(B)*]. The order must state the categories of treatment, as set forth in *Welf. & Inst. Code § 5348*, that the person is to receive [*Welf. & Inst. Code § 5346(d)(5)(B)*]. The court may only order treatment that has been recommended by the examining licensed mental health treatment provider and included in a written treatment plan [*Welf. & Inst. Code § 5346(d)(5)(B), (e)*].

If the person ordered to undergo assisted outpatient treatment was not present at the hearing at which the order was issued, he or she mayimmediately petition the court for a writ of habeas corpus [*Welf. & Inst. Code § 5346(j)* (treatment

under order may not begin until petition is resolved)].

[5] Subsequent Proceedings

The director of the outpatient treatment program must file an affidavit with the court at least every 60 days during the period of the order, affirming that the person continues to meet the criteria for this treatment [*Welf. & Inst. Code § 5346(h)*]. If the person disagrees with the director's affidavit, he or she has the right to a hearing on whether he or she still meets the criteria for assisted outpatient treatment [*Welf. & Inst. Code § 5346(h)*]. At the hearing, the burden of proof is on the director [*Welf. & Inst. Code § 5346(h)*].

If the person believes he or she is being wrongfully retained in the assisted outpatient treatment program against his or her wishes, the person may file a petition for a writ of habeas corpus, thus requiring the director to prove that the person continues to meet the criteria for assisted outpatient treatment [*Welf. & Inst. Code § 5346(i)*].

If the court determines that the person's condition requires further assisted outpatient treatment beyond the period specified in the initial treatment order, the court may order continued treatment for a period of up to 180 days [*Welf. & Inst. Code § 5346(g)*].

[6] Settlement Agreements

Any person the court determines meets the criteria for assisted outpatient treatment under *Welf. & Inst. Code § 5346(a)* [*see § 304.41[1]*] may voluntarily enter into an agreement for treatment services [*Welf. & Inst. Code § 5347(a)*]. After a petition for an order for assisted outpatient treatment is filed, but before the conclusion of the hearing on the petition, the person who is the subject of the petition, or the person's legal counsel with the person's consent, may waive the right to a hearing for the purpose of obtaining treatment under a settlement agreement, as long as an examining licensed mental health treatment provider states that the person can survive safely in the community [*Welf. & Inst. Code § 5347(b)(1)*]. The settlement agreement must be agreed to by all parties and may not be for a period of more than 180 days [*Welf. & Inst. Code § 5347(b)(1)*]. The agreement must be in writing, approved by the court, and include a treatment plan developed by the community-based program that will provide services which provides treatment in the least restrictive manner consistent with the person's needs [*Welf. & Inst. Code § 5347(b)(2)*]. Either party may request the court to modify the treatment plan at any time [*Welf. & Inst. Code § 5347(b)(3)*]. Such an agreement has the same force and effect as an order for treatment [*Welf. & Inst. Code § 5347(b)(5)*].

The court must designate the appropriate county department to monitor the person's treatment under, and compliance with, the settlement agreement [*Welf. & Inst. Code § 5347(b)(4)*]. If the person fails to comply with the treatment, the designated county department must notify the counsel designated by the county and the person's counsel of the person's noncompliance [*Welf. & Inst. Code § 5347(b)(4)*]. At the hearing on the issue of noncompliance, the written statement of noncompliance submitted is prima facie evidence that a violation of the conditions of the agreement has occurred [*Welf. & Inst. Code § 5347(b)(6)*]. If the person denies any of the facts set forth in the statement, he or she has the burden of proving by a preponderance of the evidence that the alleged facts are false [*Welf. & Inst. Code § 5347(b)(6)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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26-304 California Forms of Pleading and Practice--Annotated § 304.42

§ 304.42 Conservatorship for Gravely Disabled Person

[1] When Appropriate

Conservatorship is an additional means by which a patient may be involuntarily committed for psychiatric treatment [*Edward W. v. Lamkins (2002) 99 Cal. App. 4th 516, 526, 122 Cal. Rptr. 2d 1]* .

A conservator of the person or estate, or both, may be appointed for any person who is gravely disabled as a result of mental disorder or impairment by chronic alcoholism [*Welf. & Inst. Code § 5350*]. The definition of "gravely disabled," is discussed in *§ 304.111*. *Welf. & Inst. Code § 5350* does not apply to a person who is gravely disabled as defined in *Welf. & Inst. Code § 5008(h)(1)(B)* (incapacity to stand trial) [*Welf. & Inst. Code § 5350(e)(4)*].

Notwithstanding the definition of "gravely disabled" in *Welf. & Inst. Code § 5008(h)(1)(A)*, a person is not gravely disabled for purposes of an LPS conservatorship under *Welf. & Inst. Code § 5350* if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter [*Welf. & Inst. Code § 5350(e)(1)*]. Unless they specifically indicate in writing their willingness and ability to help, family, friends, or others are not considered willing or able to provide this help [*Welf. & Inst. Code § 5350(e)(2)*]. The legislative purpose of this provision is to avoid the necessity for, and the harmful effects of, requiring family, friends, and others publicly to state, and requiring the court publicly to find, that no one is willing or able to assist the mentally disordered person in providing for the person's basic needs for food, clothing, or shelter [*Welf. & Inst. Code § 5350(e)(3)*]. Because of this purpose and despite the writing requirement, if the person who is willing and able to assist the proposed conservatee testifies in court to his or her willingness and ability, the person need not give a writing to that effect [*Conservatorship of Johnson (1991) 235 Cal. App. 3d 693, 699 n.5, 1 Cal. Rptr. 2d 46]* . Thus, even if it is admitted that a proposed conservatee has a mental disorder and would otherwise be unable to provide for his or her personal needs, the court will not find the person to be "gravely disabled" as long as he or she can safely survive with the assistance of awilling family member or friend who can provide for these needs [*see Conservatorship of Johnson (1991) 235 Cal. App. 3d 693, 698-699, 1 Cal. Rptr. 2d 46* (assistance offered by conservatee's mother held insufficient to ensure conservatee's "safe survival")]. However, the limitations on the definition of "gravely disabled" discussed in this paragraph are inapplicable

if the proposed conservatee has been charged with the commission of a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person, and has been found mentally incompetent to stand trial [*Welf. & Inst. Code § 5350(e)(4)*; *see Welf. & Inst. Code § 5008(h)(1)(B)*; *see also Pen. Code § 1370* and discussion *§ 304.31[2]*].

A conservatee living in a board and care facility paid for by public assistance checks issued to a parent has been found not to be utilizing the assistance of willing and responsible family members, friends, or third parties [*Conservatorship of Law (1988) 202 Cal. App. 3d 1336, 1341, 249 Cal. Rptr. 415]* . Similarly, Department of Corrections supervision of a parolee does not qualify as "third-party assistance" precluding a finding of "grave disability" [*Conservatorship of Jones (1989) 208 Cal. App. 3d 292, 300-302, 256 Cal. Rptr. 415]* .

[2] Procedure for Appointment of Conservator

The procedure for establishing, administering, and terminating conservatorships for gravely disabled persons under the Lanterman-Petris-Short Act is the same as that provided in the Guardianship and Conservatorship Law (*Prob. Code § 1400 et seq.*), except as follows:

- A conservator (not a guardian) may be appointed for a gravely disabled minor [*Welf. & Inst. Code § 5350(a)*].

- Appointment of a conservator for a gravely disabled person is subject to the list of priorities in *Probate Code § 1812*, unless the officer investigating the conservatorship for the court recommends otherwise [*Welf. & Inst. Code § 5350(b)(1)*].

- In appointing a conservator for a person who has been charged with the commission of a felony involving death, great bodily harm, or a serious threat to the physical well-being of another person, and has been found mentally incompetent to stand trial [*see Welf. & Inst. Code § 5008(h)(1)(B)*; *see also Pen. Code § 1370* and discussion *§ 304.31[2]*], the court must consider the purposes of protection of the public and the treatment of the conservatee [*Welf. & Inst. Code § 5350(b)(2)*].

- A conservatorship of the *estate* cannot be established for a gravely disabled person under the Lanterman-Petris-Short Act if the person already has a guardian or conservator of the estate appointed under the Probate Code [*Welf. & Inst. Code § 5350(c)*].

- A conservatorship of the *person* may be established for a gravely disabled person under the LPS Act even if the person already has a guardian or conservator of the person appointed under the Probate Code [*Welf. & Inst. Code § 5350(c)*]. The LPS Act proceedings will not terminate the Probate Code proceedings, but will be concurrent with and superior to them [*Welf. & Inst. Code § 5350(c)*]; however, the guardian or conservator under the Probate Code must be given notice of the LPS Act proceedings [*Welf. & Inst. Code § 5350(g)*]. The court in the LPS Act proceedings may appoint the existing guardian and conservator or another person as conservator [*Welf. & Inst. Code § 5350(c)*].

- On or after filing a petition for appointment of a conservator, any person entitled to petition for appointment of the conservator may file a petition for appointment of a temporary conservator of the person or estate or both [*Prob. Code § 2250.2*].

- The proposed conservatee may demand a trial on the issue of whether he or she is gravely disabled, and may specify whether it is to be a court or jury trial [*Welf. & Inst. Code § 5350(d)*]. The demand must be made within five days following the hearing on the conservatorship petition [*see Welf. & Inst. Code § 5365* and discussion in *§ 304.42[8]*]. If the trial is demanded before the hearing, the hearing is waived.

Whether the trial is to be a jury or a court trial, it must begin within 10 days of the date of demand, unless counsel for the proposed conservatee requests that it be continued for a period not to exceed 15 days [*Welf. & Inst. Code § 5350(d)*].

- The conservatorship investigation must be conducted under the LPS Act and not under the Probate Code [*Welf. & Inst. Code § 5350(f)*; *see also § 304.42[6]*].

- In appointing a conservator for a conservatee who is gravely disabled as defined in *Welf. & Inst. Code § 5008(h)(1)(B)* (incapacity to stand trial), the court must consider both the purposes of protecting the public and treating the conservatee [*Welf. & Inst. Code § 5350(b)(2)*].

Because a conservatorship under the grave disability provisions of the LPS Act threatens a massive curtailment of the conservatee's liberty and personal autonomy, strict compliance with the statutory procedures designed to protect the conservatee is required [*Edward W. v. Lamkins (2002) 99 Cal. App. 4th 516, 531, 533-534, 122 Cal. Rptr. 2d 1]* .

For discussion of the Guardianship and Conservatorship Law, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , through Ch.290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships* .

[3] Demand for Trial

A demand for a court or jury trial must be made within five days following the hearing on the conservatorship petition. If the proposed conservatee demands a court or jury trial before the date of the hearing, as provided for in *Welf. & Inst. Code § 5365*, the demand constitutes a waiver of the hearing [*Welf. & Inst. Code § 5350*]. The court or jury trial must commence within 10 days of the date of the demand, except that the court must continue the trial date for a period not to exceed 15 days on request of counsel for the proposed conservatee. The right to court or jury trial also applies in subsequent proceedings to reestablish a conservatorship [*Welf. & Inst. Code § 5350*].

The right to a jury trial may be waived orally in open court by the attorney for the proposed conservatee because civil procedural law determines whether an individual has waived the right to a jury trial in a conservatorship proceeding [*Conservatorship of Maldonado (1985) 173 Cal. App. 3d 144, 148, 218 Cal. Rptr. 796* ; *see Code Civ. Proc. § 631(d)(3)*; *Prob. Code § 1827*; *Welf. & Inst. Code § 5350*].

[4] Persons for Whom Conservatorship Proceedings May Be Initiated

Conservatorship proceedings may be initiated for any person who has been committed to a state hospital or local mental health facility or placed on outpatient treatment under *Pen. Code § 1026* (insane defendant), or 1370 (mentally incompetent defendant), or transferred under *Pen. Code § 4011.6* (commitment of prisoner to mental facility) on recommendation of the medical director of the state hospital or a designee, or on recommendation of the professional person in charge of the local mental health facility or a designee, or on recommendation of the local mental health director or a designee to the conservatorship investigator of the county of residence of the person before his or her admission to the hospital or facility or of the county in which the hospital or facility is located. The initiation of conservatorship proceedings or the existence of a conservatorship does not affect any pending criminal proceedings [*Welf. & Inst. Code § 5352.5*].

Subject to the provisions of *Welf. & Inst. Code §§ 5150* and *5250* (discussed in *§§ 304.34* and *304.35[1]*), conservatorship proceedings may be initiated for any person convicted of a felony who has been transferred to a state hospital under the jurisdiction of the State Department of Mental Health under *Pen. Code § 2684* by the recommendation of the medical director of the state hospital to the conservatorship investigator of the county of residence of the person or of the county in which the state hospital is located [*Welf. & Inst. Code § 5352.5*].

Subject to *Welf. & Inst. Code §§ 5150* and *5250*, conservatorship proceedings also may be initiated for any person committed to the Youth Authority or on parole from a facility of the Youth Authority, by the recommendation of the Director of the Department of the Youth Authority or the director's designee to the conservatorship investigator of the county of residence of the person or of the county in which the facility is situated [*Welf. & Inst. Code § 5352.5*].

[5] Who May Recommend Conservatorship

When the professional person in charge of an agency providing comprehensive evaluation or a facility providing intensive treatment determines that a person in his or her care is gravely disabled as a result of mental disorder or impairment by chronic alcoholism and is unwilling to accept, or incapable of accepting treatment voluntarily, he or she may recommend conservatorship to the officer providing conservatorship investigation of the county of residence of the person before his or her admission as a patient in a facility [*Welf. & Inst. Code § 5352*]. Thus, if a person can provide for his or her own basic personal needs (is not gravely disabled) *or* is able to voluntarily accept treatment, there is no need for a conservatorship [*Conservatorship of Walker (1987) 196 Cal. App. 3d 1082, 1092, 242 Cal. Rptr. 289* ; *but see Conservatorship of Symington (1989) 209 Cal. App. 3d 1464, 1467, 257 Cal. Rptr. 860* (actual finding that proposed conservatee is unwilling or unable to accept treatment is not necessary to establish LPS conservatorship)]. The determination of whether a proposed conservatee is gravely disabled as a result of mental disorder and amendable to treatment under the LPS Act is solely in the conservator's discretion. A court can order an investigation for a conservatorship, but cannot require that a petition for an LPS conservatorship be filed [*People v. Karriker (2007) 149 Cal. App. 4th 763, 782, 57 Cal. Rptr. 3d 412]* .

The professional person in charge of an agency providing comprehensive evaluation or a facility providing intensive treatment may recommend conservatorship for a person without the person being an inpatient in the facility, if both of the following conditions are met: (1) the professional person or another professional person designated by the professional person has examined and evaluated the person and determined that the person is gravely disabled; (2) the professional person or another professional person designated by the professional person has determined that future examination on an inpatient basis is not necessary for a determination that the person is gravely disabled [*Welf. & Inst. Code § 5352*].

[6] Investigation and Report

The officer providing conservatorship investigation must investigate all available alternatives to conservatorship and must recommend conservatorship to the court only if no suitable alternatives are available. The officer must render to the court a written report of the investigation before the hearing. If the officerproviding conservatorship investigation recommends against conservatorship, he or she must set forth all alternatives available. A copy of the report must be transmitted to the individual who originally recommended conservatorship, to the person or agency, if any, recommended to serve as conservator, and to the person recommended for conservatorship. The court may receive the report in evidence and may read and consider the contents of the report in rendering its judgment [*Welf. & Inst. Code § 5354*; *Conservatorship of Isaac O. (1987) 190 Cal. App. 3d 50, 54-55, 235 Cal. Rptr. 133* (failure to transmit copy of conservatorship investigation report to proposed conservatee does not cause court to lose jurisdiction over proceeding)]. However, only nonhearsay portions of the investigator's report may be admitted at a contested court or jury trial on the issue of grave disability [*Conservatorship of Manton (1985) 39 Cal. 3d 645, 648-653, 217 Cal. Rptr. 253, 703 P.2d 1147]* .

If the investigating officer recommends conservatorship, the recommendation must designate the most suitable person, corporation, state or local agency, or county officer or employee to be conservator [*Welf. & Inst. Code § 5355*]. The appointment of a conservator is subject to the list of priorities set forth in *Prob. Code § 1812*, unless the conservatorship investigator recommends otherwise [*Welf. & Inst. Code § 5350(b)*]. Under *Prob. Code § 1812*, preference is to be given in the following order: the spouse or domestic partner [as defined by *Prob. Code § 37*; *Fam. Code § 297 et seq.*], an

adult child, a parent, a brother or sister, and any other person eligible [*see Prob. Code § 1812*; *Conservatorship of Walker (1987) 196 Cal. App. 3d 1082, 1100-1101, 242 Cal. Rptr. 289]* . While the LPS Act does not expressly state that the conservatorship investigator should follow these priorities, at least one appellate court has implied that they should be followed. It held that a trial court abused its discretion in summarily appointing a public conservator on the basis of a report that did not "justify negating the possibility of appointing immediate family members" [*see Conservatorship of Walker (1987) 196 Cal. App. 3d 1082, 1101, 242 Cal. Rptr. 289]* .

The report also must contain an agreement signed by the person or agency recommended certifying that the person or agency is able and willing to serve as conservator [*Welf. & Inst. Code § 5356*]. Despite the requirement that the investigative report contain this agreement, the public guardian must serve as conservator of any person found to be gravely disabled if the court recommends the conservatorship after the investigation and finds that no other person or entity is willing and able to serve as conservator [*Welf. & Inst. Code § 5356*].

The report must contain the investigating officer's recommendations concerning the powers to be granted to, and the duties to be imposed on the conservator, the legal disabilities to be imposed on the conservatee, and the proper placement for the conservatee under *Welf. & Inst. Code § 5358* [*Welf. & Inst. Code § 5356*].

All conservators of the estate have the general powers specified in *Prob. Code §§ 2400-2586* and the additional powers specified in *Prob. Code §§ 2590-2595* as the court may designate [*Welf. & Inst. Code § 5357*; for discussion of a conservator's powers under *Prob. Code §§ 2400-2595*], see Ch. 287, *Guardianship and Conservatorship: General Management Powers* , and Ch. 288, *Guardianship and Conservatorship: Independent Exercise of Powers* . The report must set forth which, if any, of the additional powers it recommends [*Welf. & Inst. Code § 5357*]. The report also must recommend for or against the imposition of disabilities on the proposed conservatee concerning his or her privilege of possessing a driver's license and his or her right to enter into contracts, to vote [*see Elec. Code § 2208*], and to refuse or consent to medical treatment [*Welf. & Inst. Code § 5357*]. At any time, the conservatee may petition the court for a hearing to contest the rights denied or the powers granted to the conservator [*Welf. & Inst. Code § 5358.3*].

[7] Petition by Investigating Officer

If the officer providing conservatorship investigation concurs with the recommendation that a conservatorship be established, he or she must petition the superior court in the county of residence of the patient to establish conservatorship [*Welf. & Inst. Code § 5352*]. Only the officer designated by the county to provide conservatorship investigation may file and prosecute the petition [*Kaplan v. Superior Court (1989) 216 Cal. App. 3d 1354, 1358-1360, 265 Cal. Rptr. 408* ; *see Welf. & Inst. Code § 5351*].

When temporary conservatorship is indicated, the fact must be alternatively pleaded in the petition. The officer providing conservatorship investigation or other county officer or employee designated by the county must act as the temporary conservator [*Welf. & Inst. Code § 5352*].

[8] Hearing on Petition; Right to Attorney

[a] General Requirements

A hearing on any petition under *Welf. & Inst. Code § 5350 et seq.* must be held within 30 days of the date of the petition. The court must appoint the public defender or other attorney for the conservatee or proposed conservatee within five days after the date of the petition [*Welf. & Inst. Code § 5365*]. In fixing a sum for the compensation and expenses of appointed counsel, the court has discretion to compensate counsel for services rendered or expenses incurred before he or she was appointed [*see Prob. Code § 1472(a)(1)*].

A proposed conservatee does not have a constitutional right under the *Sixth Amendment* or a statutory right under [*Welf.*

& Inst. Code § 5350] to represent himself or herself in the civil commitment proceedings, but the court has the discretion to permit self-representation [*Conservatorship of Joel E. (2005) 132Cal. App. 4th 429, 438-442, 33 Cal. Rptr. 3d 704]* . The California Supreme Court has held that a hearing to establish a conservatorship under LPS Act did not violate the or the proposed conservatee's constitutional right of due process when the court accepted representation by the proposed conservatee's attorney and proceeded with the hearing in the proposed conservatee's absence, when the proposed conservatee told appointed counsel that he did not contest the proposed conservatorship and did not want to attend the hearing, and there were no allegations that the attorney misrepresented the contents of that discussion [*Conservatorship of John L. (2010) 48 Cal. 4th 131, 157, 105 Cal. Rptr. 3d 424, 225 P.3d 554]* .

[b] Notice of Hearing

The LPS Act does not expressly describe the requirements for notice to a proposed conservatee, but does provide that, with specified exceptions, the procedure for establishing a conservatorship under the Act is the same as that provided in division 4 of the Probate Code [*Welf. & Inst. Code § 5350*; *Edward W. v. Lamkins (2002) 99 Cal. App. 4th 516, 526, 122 Cal. Rptr. 2d 1]* . The Probate Code requires that a proposed conservatee be served with notice of the petition at least 15 days before the hearing on the petition [*Prob. Code §§ 1822-1824*].

The county mental health program must make reasonable attempts to notify family members or any other person designated by the person for whom conservatorship is sought (proposed conservatee) of the time and place of the conservatorship hearing. The treating facility must advise the proposed conservator that he or she may request that information about the time and place of the conservatorship hearing not be given to family members if the proposed conservator is not a family member. This request must be honored by the mental health program. However, neither *Welf. & Inst. Code § 5350* nor *§ 5350.2* is to be interpreted to allow the proposed conservatee to request that any proposed conservator not be advised of the time and place of the conservatorship hearing [*see Welf. & Inst. Code § 5350.2*].

At the hearing, the court may receive oral and written evidence [*Welf. & Inst. Code § 5118*]. The proposed conservatee may waive the presence of the physician or other professional person who recommended conservatorship and of the physician providing evaluation or intensive treatment [*see § 304.42[5]*]. If there is such a waiver, the physician or other professional person need not be present at the hearing if the parties stipulate that the recommendation and records of the physician or other professional person concerning the proposed conservatee's mental condition and treatment will be received in evidence [*Welf. & Inst. Code § 5365.1*]. However, the conservatee's failure to exercise the waiver does not create an affirmative right to the physician's or other professional person's presence at the hearing [*Conservatorship of Scharles (1990) 220 Cal. App. 3d 247, 254, 269 Cal. Rptr. 398]* .

[c] Standard of Proof

Because of the deprivation of liberty and stigma attached to involuntary commitment to a mental institution, due process requires that grave disability be established by proof beyond a reasonable doubt and, if a jury trial has been requested, by a unanimous verdict [*Conservatorship of Hofferber (1980) 28 Cal. 3d 161, 178-179, 167 Cal. Rptr. 854, 616 P.2d 836* ; *Conservatorship of Margaret L. (2001) 89 Cal. App. 4th 675, 679, 107 Cal. Rptr. 2d 542]* .

On the other hand, it requires a verdict of only nine out of twelve jurors to find that a person is *not* gravely disabled [*Conservatorship of Margaret L. (2001) 89 Cal. App. 4th 675, 679 fn. 4, 107 Cal. Rptr. 2d 542]* . A court is required on request to instruct a jury in language emphasizing that the proposed conservatee is presumed not gravely disabled until the state carries its burden of proof. On a proper statement of the evidence, a party is also entitled on request to have jurors informed of the manner in which the "reasonable doubt" standard must be established when the evidence is circumstantial [*Conservatorship of Walker (1987) 196 Cal. App. 3d 1082, 1098-1099, 242 Cal. Rptr. 289*].

Due process further requires that physical restraints not be used on the proposed conservatee during a jury trial unless

there are facts on the record that justify the trial court's decision to impose restraints and a sua sponte instruction advises the jury that restraints are not evidence of the defendant's disability [*Conservatorship of Warrack (1992) 11 Cal. App. 4th 641, 647-648, 14 Cal. Rptr. 2d 99]* . The testimony of a treating psychologist that a defendant posed present danger constitutes sufficient evidence justifying restraints. However, the lack of an instruction to jury with regard to restrains imposed on a proposed conservatee is harmless error when counsel unanimously agree that the restrains lack evidentiary value [*Conservatorship of Warrack (1992) 11 Cal. App. 4th 641, 647-648, 14 Cal. Rptr. 2d 99]* .

[d] Admissibility of Investigative Reports

Welf. & Inst. Code § 5354 does not authorize use of hearsay portions of the investigating officer's report at a contested court or jury trial on the issue of grave disability [*Conservatorship of Manton (1985) 39 Cal. 3d 645, 648-653, 217 Cal. Rptr. 253, 703 P.2d 1147* ; *see § 304.42[6]*]. An investigative report may be admitted only at the initial court "hearing" to the extent that the report does not otherwise qualify for admission under any exception to the hearsay rule [*Conservatorship of Manton (1985) 39 Cal. 3d 645, 648-653, 217 Cal. Rptr. 253, 703 P.2d 1147]* .

[9] Exclusionary Rule Does Not Apply

The exclusionary rule does not apply to a trial of a proposed conservatee's grave disability in a conservatorship proceeding under the LPS Act [*Conservatorship of Susan T. (1994) 8 Cal. 4th 1005, 1014-1015, 36 Cal. Rptr. 2d 40, 884 P.2d 988]* . According to the California Supreme Court, the deterrent effect of the exclusionary rule does not outweigh the social cost of disregarding a continuing state of disability [*Conservatorship of Susan T. (1994) 8 Cal. 4th 1005, 1018-1020, 36 Cal. Rptr. 2d 40, 884 P.2d 988]* . It is possible, however, that a seizure of evidence in such proceedings may be so egregious as to implicate due process concerns under *Rochin v. California (1952) 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183* [*Conservatorship of Susan T. (1994) 8 Cal. 4th 1005, 1020, 36 Cal. Rptr. 2d 40, 884 P.2d 988]* .

In *Conservatorship of Susan T.*, the California Supreme Court refused to consider whether the exclusionary rule applies to 14-day and 30-day certifications for intensive treatment, but noted that in both types of hearing certification hearings, all relevant evidence must be admitted and considered by the hearing officer according to statute [*Conservatorship of Susan T. (1994) 8 Cal. 4th 1005, 1019, 36 Cal. Rptr. 2d 40, 884 P.2d 988]* .

[10] Temporary Conservatorship

The court may establish a temporary conservatorship for a period not to exceed 30 days and appoint a temporary conservator on the basis of the comprehensive report of the officer providing conservatorship investigation or on the basis of an affidavit of the professional person who recommended conservatorship stating the reasons for his or her recommendation, if the court is satisfied that the comprehensive report or affidavit shows the necessity for a temporary conservatorship [*Welf. & Inst. Code § 5352.1*].

When a temporary conservatorship is sought, the proposed conservatee must be given at least five days' notice of the proposed appointment, unless the court, for good cause, orders otherwise [*Prob. Code § 2250(e)*]. A public guardian's practice of requesting a waiver of this notice in all applications for temporary conservatorships was held to violate the potential conservatees' right to due process [*Edward W. v. Lamkins (2002) 99 Cal. App. 4th 516, 543-545, 122 Cal. Rptr. 2d 1]* . The appointment of a temporary conservator affects a conservatee's liberty, personal autonomy, and dignitary interests in receiving notice and an opportunity to be heard [*Edward W. v. Lamkins (2002) 99 Cal. App. 4th 516, 530, 533-535, 538-539, 122 Cal. Rptr. 2d 1]* . There is also a substantial risk of erroneous ex parte decisionmaking in the mental health context. When a temporary conservatorship is established without notice to the proposed conservatee, the court will often be acting on incomplete information, because the proposed conservatee is given no opportunity to present his or her side of the story [*Edward W. v. Lamkins (2002) 99 Cal. App. 4th 516, 535-536, 122 Cal. Rptr. 2d 1]* . Finally, the costs associated with providing notice in most cases are generally minimal [*Edward W.*

v. Lamkins (2002) 99 Cal. App. 4th 516, 544, 122 Cal. Rptr. 2d 1] . The notice requirement of *Prob. Code § 2250(c)* may be departed from only on a showing of good cause, i.e., an individualized showing of exigent circumstances in a particular case; a blanket statement of reasons offered as a matter of routine policy does not constitute good cause [*Edward W. v. Lamkins (2002) 99 Cal. App. 4th 516, 541-545, 122 Cal. Rptr. 2d 1]* .

All temporary conservatorships expire automatically at the conclusion of 30 days, unless before that date the court conducts a hearing on the issue of whether or not the proposed conservatee is gravely disabled. However, if the proposed conservatee demands a court or jury trial on the issue of grave disability, the court may extend the temporary conservatorship until the date of the disposition of the issue by the court or jury trial, provided that the extension in no event exceeds a period of six months [*Welf. & Inst. Code § 5352.1*].

A temporary conservator must determine what arrangements are necessary to provide the person with food, shelter, and care pending the determination of conservatorship. He or she must give preference to arrangements that allow the person to return to his or her home, family, or friends. If necessary, the temporary conservator may require the person to be detained in a facility providing intensive treatment or in a facility specified in *Welf. & Inst. Code § 5358* pending the determination of conservatorship. Any person so detained has the same right to judicial review set forth in *Welf. & Inst. Code §§ 5275-5278*, as discussed in *§ 304.144[6][d]*. The powers of a temporary conservator are those granted in the decree, but in no event can they be broader than the powers that may be granted a conservator [*Welf. & Inst. Code § 5353*].

[11] Placement and Treatment of Conservatee

[a] Inpatient Placement

When ordered by the court after a hearing, the conservator must place the conservatee in the least restrictive alternative placement, as designated by the court. The placement may include a medical, psychiatric, nursing, or other state-licensed facility, or a state hospital, county hospital, hospital operated by the Regents of the University of California, a United States government hospital, or other nonmedical facility approved by the State Department of Mental Health or an agency accredited by the State Department of Mental Health, or, in cases of chronic alcoholism, to a county alcoholic treatment center [*Welf. & Inst. Code § 5358(a)*].

A conservator may also have the right, if specified in the court order, to require the conservatee to receive treatment related specifically to remedying or preventing the recurrence of the conservatee's grave disability, or to require the conservatee to receive routine medical treatment unrelated to remedying or preventing the recurrence of the conservatee's grave disability [*Welf. & Inst. Code § 5358(b)*; *see Welf. & Inst. Code § 5352.6* (development of individualized treatment plan); *see also Keyhea v. Rushen (1986) 178 Cal. App. 3d 526, 535, 223 Cal. Rptr. 746* (discussing right of LPS conservator to require conservatee's receipt of medical treatment)]. Except in emergency cases in which the conservatee faces loss of life or serious bodily injury, no surgery may be performed on the conservatee without the conservatee's prior consent or a court order specifically authorizing the surgery obtained under *Welf. & Inst. Code § 5358.2* [*Welf. & Inst. Code § 5358(b)*].

If a conservatee requires medical treatment and the conservator has not been specifically authorized by the court to require the conservatee to receive medical treatment, the conservator, after notice to the conservatee, must obtain a courtorder for that medical treatment, except in emergency cases in which the conservatee faces loss of life or serious bodily injury. The conservatee, if he or she chooses to contest the request for a court order, may petition the court for a hearing, which must be held before the court grants the order [*Welf. & Inst. Code § 5358.2*].

[b] Outpatient Placement

If the conservatee is not to be placed in his or her own home or the home of a relative, the first priority is placement in a

suitable facility as close as possible to his or her home or the home of a relative. "Suitable facility" means the least restrictive residental placement available and necessary to achieve the purposes of treatment. At the time that the court considers the report of the officer providing conservatorship investigation the court must consider available placement alternatives. After considering all of the evidence, the court must determine the least restrictive and most appropriate alternative placement for the conservatee. When the conservatee is incapable of making routine medical decisions, the court must designate the least restrictive alternative placement for a conservatee upon the establishment of a conservatorship [*Conservatorship of Amanda B. (2007) 149 Cal. App. 4th 342, 351-352, 56 Cal. Rptr. 3d 901* ; *see Welf. & Inst. Code § 5358(c)(1)*]. The court also must determine who is to be notified of a change of placement [*Welf. & Inst. Code § 5358(c)*]. The fact that the proposed conservatee is not an inpatient is not to be construed by the court as an indication that the person does not meet the criteria of grave disability [*Welf. & Inst. Code § 5358(c)*].

If requested, the local mental health director is required to assist the conservator or the court in selecting a placement facility for the conservatee. When a conservatee who is receiving services from the local mental health program is placed, the conservator must inform the local mental health director of the facility's location and any movement of the conservatee to another facility, and must require the conservator to notify the district attorney or the attorney representing the originating county [*Welf. & Inst. Code § 5358(c)*].

If the conservatee leaves a facility without permission, the conservator can take the conservatee into custody or request a peace officer to detain the conservatee [*Welf. & Inst. Code § 5358.5*].

[c] In Community Care or Residential Elderly Facility

[i] Licensing Requirement

If the conservator places the conservatee in a community care facility [*see Health & Safety Code § 1502(a)* ("community care facility" defined); *see also Health & Safety Code § 1500 et seq.*], or if an employee of the conservator places, refers, or recommends placement of the conservatee in a community care facility, the facility must be licensed or be exempt from licensing under *Health & Safety Code § 1505* (placement in county-licensed foster family home) or satisfy the condition of *Welf. & Inst. Code § 362(c)* (counseling or education program for minor adjudged dependent child of the court) [*Health & Safety Code § 1536.1(b), (c)*; *see Health & Safety Code § 1536.1(a)* ("placement agency" includes LPS conservator)]. If the conservator places the conservatee in a residential care facility for the elderly [*see Health & Safety Code § 1569.2(k)* ("residential care facility for the elderly" defined); *see also Health & Safety Code § 1569 et seq.*], or if an employee of the conservator places, refers, or recommends placement of the conservatee in a residential care facility for the elderly, the facility must be either licensed or exempt from licensing under *Health & Safety Code § 1569.145* (various specified exemptions from licensing requirement) [*Health & Safety Code § 1569.47(b), (c)*; *see Health & Safety Code § 1569.47(a)* ("placement agency" includes LPS conservator)].

It is a misdemeanor for an employee of an LPS conservator to place, refer, or recommend placement of a conservatee in an unlicensed community care facility or residential care facility for the elderly, except when the facility is exempt from licensing as discussed above [*see Health & Safety Code §§ 1536.1(c), 1569.47(c)*]. Furthermore, any employee of an LPS conservator who knows, or reasonably suspects, that such a facitlity is not exempt and is operating without a license must report the facility's name and address to the State Department of Social Services. Failure to do so is a misdemeanor [*Health & Safety. Code §§ 1536.1(d), 1569.47(d)*].

[ii] Duty to Report Abuses by Facility

If the conservatee is placed in either a community care facility or in a residential care facility for the elderly, the conservator is required to notify the appropriate licensing agency of any known or suspected incidents that would jeopardize the health or safety of the facility's residents [*Health & Safety Code §§ 1536.1(f), 1569.47(f)*]. A representative, although not inclusive, list of reportable incidents is set forth in *Health & Safety Code §§ 1536.1(f)* and

1569.47(f), and includes incidents of physical, mental, or verbal abuse experienced by the residents [*see Health & Safety Code §§ 1536.1(f)(1), (5), 1569.47(f)(1), (5)*], or any situation in which a facility has insufficient or incompetent personnel on duty [*see Health & Safety Code §§ 1536.1(f)(4), 1569.47(f)(4)*].

[iii] Judicial Review of Placement

A gravely disabled conservatee may challenge his or her placement or the conditions of her confinement by writ of habeas corpus pursuant to *Penal Code § 1473* (writ of habeas corpus for unlawful restraint or imprisonment generally), *Welf. & Inst. Code § 7250* (writ of habeas corpus for unlawful confinement instate hospital for mentally disordered) [*see Welf. & Inst. Code § 5358.7*], or *Welf. & Inst. Code § 5275* (writ of habeas corpus for release from intensive treatment pursuant to *Welf. & Inst. Code §§ 5250, 5260*, or *5270.10*). See discussion *§ 304.223, see §§ 304.280* and *304.280*.1, and Ch. 292, *Habeas Corpus* .

However, a conservatee under an LPS conservatorship who is subject to involuntary intensive treatment may not ordinarily utilize the habeas corpus writ to obtain a less restrictive treatment placement [*see In re Gandolfo (1984) 36 Cal. 3d 889, 897, 206 Cal. Rptr. 149, 686 P.2d 669]* . Nevertheless, habeas corpus directed to the court in the county of treatment may be an appropriate remedy for an unreasonable denial of such freedom as is essential to the conservatee's welfare, or for unreasonable consequences that might flow from limitations of the statutory review mechanism [*In re Gandolfo (1984) 36 Cal. 3d 889, 898, 206 Cal. Rptr. 149, 686 P.2d 669]* .

[12] Transfer of Conservatee

The conservator may transfer the conservatee to a less restrictive alternative placement without a further hearing and court approval. In any case in which a conservator has reasonable cause to believe that the conservatee is in need of immediate, more restrictive placement because the condition of the conservatee has so changed that the conservatee poses an immediate and substantial danger to himself or herself or others, the conservator has the right to place the conservatee in a more restrictive facility or hospital. If the change of placement is to a placement more restrictive than the court-determined placement, the conservator must provide written notice of the change of placement and the reason for the change to the court, the conservatee's attorney, the county patient's rights advocate, and the other persons designated by the court pursuant to *Welf. & Inst. Code § 5358(c)*, discussed in *§ 304.42[11]* [*Welf. & Inst. Code § 5358(d)(1)*]. If the conservatee is gravely disabled as defined in *Welf. & Inst. Code § 5008(h)(1)(B)*, the conservator must also notify the district attorney or the attorney representing the originating county [*Welf. & Inst. Code § 5358(d)(2)*]. If any person designated to receive notice of the transfer of a gravely disabled conservatee objects to the transfer within 10 days after receiving notice, the matter must be set for a further hearing and court approval. The notification and hearing is not required for the transfer of persons between state hospitals [*Welf. & Inst. Code § 5358(d)(2)*].

[13] Outpatient Treatment

A conservator who places his or her conservatee in an inpatient facility pursuant to *Welf. & Inst. Code § 5358*, as discussed in *§ 304.42[11]*, may also require the conservatee to undergo outpatient treatment. Before doing so, the conservator must obtain the agreement of the person in charge of a mental health facility that the conservatee will receive outpatient treatment and that the person in charge of the facility will designate a person to be the outpatient supervisor of the conservatee. The person in charge of the facility must notify the county mental health director or his or her designee of the agreement. At 90-day intervals following the commencement of the outpatient treatment, the outpatient supervisor must report in writing to the conservator and to the person in charge of the mental health facility setting forth the status and progress of the conservatee [*Welf. & Inst. Code § 5358.6*].

[14] Petition for Rehearing

[a] Who May File and When

At any time, the conservatee may petition the superior court for a rehearing as to his or her status as a conservatee. However, after the filing of the first petition for rehearing, no further petition for rehearing may be submitted for a period of six months [*Welf. & Inst. Code § 5364, see Conservatorship of Amanda B. (2009) 173 Cal. App. 4th 1380, 1384, 93 Cal. Rptr. 3d 817* (conservatee may file an initial petition for rehearing at any time, but must wait six months before filing a subsequent petition for rehearing concerning his or her status as conservatee)].

[b] Availability of Appointed and Pro Bono Counsel

[i] General Rights

Statutory provisions governing the hearing on the petition and the appointment of counsel when necessary are discussed in *§ 304.42[8]*. One court has noted that the five days in which the court has to appoint counsel pursuant to *Welf. & Inst. Code § 5365* do not necessarily constitute a gap in the law for appointed counsel to aid an indigent conservatee in filing the petition for rehearing. The indigent conservatee has the option of contacting and advising previously appointed counsel to file the petition, inasmuch as previously appointed counsel is the conservatee's attorney of record and, as such, is responsible for protecting the conservatee's rights [*see Conservatorship of Scharles (1991) 233 Cal. App. 3d 1334, 1343 n.7, 285 Cal. Rptr. 325]* . Alternatively, the indigent conservatee may have access to privately obtained pro bono counsel [*see, e.g., Conservatorship of Scharles (1991) 233 Cal. App. 3d 1334, 1337, 285 Cal. Rptr. 325]* .

A proposed conservatee who requests substitute appointed counsel must be given a full opportunity to state the reasons for his or her requests [*Conservatorship of David L. (2008) 164 Cal. App. 4th 701, 712, 79 Cal. Rptr. 3d 530*]. A court's failure to afford a proposed conservatee a full opportunity to state his or her reasons for requesting substitute counsel violates his or her right to due process of law [*Conservatorship of David L. (2008) 164 Cal. App. 4th 701, 712, 79 Cal. Rptr. 3d 530*].

[ii] Motion for Independent Forensic Psychiatric Examination

When an indigent conservatee in fact has privately obtained pro bono counsel and moves for an independent forensic psychiatric examination at county expense, it is an abuse of discretion for the trial court to deny the motion solely on the basis that the conservatee has obtained pro bono rather than appointed counsel and absent a judicial inquiry into the financial and evidentiary need for the examination, when county policy would permit funding of the examination if the conservatee had appointed counsel [*Conservatorship of Scharles (1991) 233 Cal. App. 3d 1334, 1340-1342, 285 Cal. Rptr. 325]* . Furthermore, denial of the conservatee's motion under these circumstances deprives the conservatee of his or her statutory right to a meaningful rehearing by discriminately restricting his orher ability to gather and present evidence [*see Conservatorship of Scharles (1991) 233 Cal. App. 3d 1334, 1340, 1343, 285 Cal. Rptr. 325]* . Finally, denial of the conservatee's motion under these circumstances conflicts outright with statewide policy of encouraging attorneys to perform pro bono services [*Conservatorship of Scharles (1991) 233 Cal. App. 3d 1334, 1342, 285 Cal. Rptr. 325]* .

[c] Standard of Proof

At the hearing on the petition, the burden is on the conservatee to produce evidence and prove by a preponderance of the evidence that he or she is no longer gravely disabled [*Conservatorship of Everette M. (1990) 219 Cal. App. 3d 1567, 1572, 269 Cal. Rptr. 182* ; *Baber v. Superior Court (1980) 113 Cal. App. 3d 955, 965-966, 170 Cal. Rptr. 353* ; *see Conservatorship of Scharles (1991) 233 Cal. App. 3d 1334, 1343 n.8, 285 Cal. Rptr. 325* (declining to address conservatee's contention that court's denial of her request for an independent forensic psychiatric examination shifted burden of proof back to conservator and county)]. The conservatee establishes a prima facie case by showing that, since the prior establishment or reestablishment of conservatorship, his or her situation has changed so that he or she is no longer disabled [*Conservatorship of Everette M. (1990) 219 Cal. App. 3d 1567, 1573, 269 Cal. Rptr. 182* ; *Baber v. Superior Court (1980) 113 Cal. App. 3d 955, 966, 170 Cal. Rptr. 353]* .

[15] Appeal

[a] Right to and Effect of Appeal

It is clear that an order establishing a conservatorship for a person under the Lanterman-Petris-Short Act is appealable, but the statutory authority for the right to appeal, and the effect of an appeal on the operation and effect of the order while the appeal is pending, are not clear. *Prob. Code § 1301(a)* provides that the grant or refusal to grant an order granting letters of conservatorship is appealable. *Welf. & Inst. Code § 5350* provides that the procedure for establishing, administering, and terminating a conservatorship under the LPS Act is the same as that provided in *Prob. Code § 1400 et seq.* for guardianships, conservatorships, and other protective proceedings. Although *Prob. Code § 1301(a)* is not one of the Probate Code sections referred to in *Welf. & Inst. Code § 5350*, it may be argued that the legislature intended to make conservatorships under the LPS Act subject to the same rules for appeal as Probate Code guardianships, since *Prob. Code § 1301* states broadly that is applies "with respect to guardianships, conservatorships, and other protective proceedings."

However, the rules for staying an order establishing a conservatorship under the LPS Act differ somewhat from the rules for staying an order establishing a conservatorship under the Probate Code. *Welf. & Inst. Code § 5352.4*, which applies to conservatorships under the LPS Act, provides that if the conservatee appeals the court's decision to establish the conservatorship, the conservatorship will continue unless execution of judgment is stayed by the appellate court. In contrast, *Prob. Code § 1310(a)*, which applies to Probate Code conservatorships, provides that an appeal stays the operation and effect of the judgment or order, and *Prob. Code § 1310(b)* provides that when an appeal is taken, the trial court, for the purpose of preventing injury or loss to a person or property, may direct the exercise of the powers of the conservator, or may appoint a temporary conservator to exercise the powers, as if no appeal were pending.

[b] Strict Standard of Review

The appellate court must apply a strict standard of review for the appeal of an LPS commitment proceeding, because the deprivation of individual liberty is at stake [Conservatorship of Buchanan (1978) 78 Cal. App. 3d281, 288, *144 Cal. Rptr. 241* (disapproved on other grounds in *Conservatorship of Early (1983) 35 Cal. 3d 244, 255, 197 Cal. Rptr. 539, 673 P.2d 209*)]. On appeal of the issue of grave disability, the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence such that a reasonable trier of fact could find the conservatee gravely disabled beyond a reasonable doubt [*Conservatorship of Walker (1989) 206 Cal. App. 3d 1572, 1577, 254 Cal. Rptr. 552* ; *see Conservatorship of Johnson (1991) 235 Cal. App. 3d 693, 696-697, 1 Cal. Rptr. 2d 46]* . Substantial evidence is evidence that is reasonable, credible, and of solid value [*Conservatorship of Walker (1989) 206 Cal. App. 3d 1572, 1577, 254 Cal. Rptr. 552]* . Error in the proceeding can be held to be harmless only if the court is able to declare that it was harmless beyond a reasonable doubt [*see Conservatorship of Early (1983) 35 Cal. 3d 244, 255, 197 Cal. Rptr. 539, 673 P.2d 209]* .

An appellate court will not independently review the record for error. The procedural safeguards established by *Anders v. California (1967) 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493* and *People v. Wende (1979) 25 Cal. 3d 436, 158 Cal. Rptr. 839, 600 P.2d 1071* , which require an independent review of the record in certain criminal cases to determine whether there is any arguable appellate issue, do not apply on appeal of an order for a conservatorship under the LPS Act [*Conservatorship of Ben C. (2007) 40 Cal. 4th 529, 543*].

[c] Applicable Rules

The rules governing appeals from the superior court in criminal cases are applicable to any appeal from a judgment or order pursuant to *Welf. & Inst. Code § 5350*, except when otherwise expressly provided by Cal. Rules of Ct., *Rule 8.300 et seq. Cal Rules of Ct.*, Rule 8.320 et seq. sets forth requirements for the contents of the record on appeal, transmission of copies of that record, and service of appellate briefs.

[d] Appeals by Indigents--Special Considerations

Special considerations apply in the case of appeals by indigent persons. For example, an indigent appellant whose appointed counsel submits a brief that raises no specific issues or describes the appeal as frivolous is nevertheless entitled to a *Wende* review on appeal from an order granting a conservatorship under *Welf. & Inst. Code § 5350* [*Conservatorship of Besoyan (1986) 181 Cal. App. 3d 34, 38, 226 Cal. Rptr. 196* ; *see People v. Wende (1979) 25 Cal. 3d 436, 441-442, 158 Cal. Rptr. 839, 600 P.2d 1071]* . Similarly, a *Wende* review is required when appointed counsel fails to discover an arguable issue on appeal [*Conservatorship of Margaret L. (2001) 89 Cal. App. 4th 675, 682, 107 Cal. Rptr. 2d 542*]. Thus, an appellate court must conduct an independent review of the trial record to determine whether any arguable factual or legal issues exist [*see People v. Wende (1979) 25 Cal. 3d 436, 441-442, 158 Cal. Rptr. 839, 600 P.2d 1071]* . Furthermore, at least one court of appeal has held that an indigent conservatee is entitled to a free trial transcript in an appeal from the imposition of an LPS conservatorship and confinement in a county mental health facility [*Waltz v. Zumwalt (1985) 167 Cal. App. 3d 835, 836-839, 213 Cal. Rptr. 529]* .

[16] Termination of Conservatorship

[a] Procedure

A fundamental difference between a conservatorship under the Probate Code and one under the LPS Act is in the termination of the conservatorship. A probate conservatorship continues indefinitely, subject to periodic review [*see Prob. Code §§ 1850, 1860*]. An LPS conservatorship automatically terminates one year after the appointment of the conservator, not including the period of service of a temporary conservator. However, affirmative steps may be taken to reestablish it for another year (discussed in *§ 304.43[1]*) [*Welf. & Inst. Code § 5361*; *see Conservatorship of Benvenuto (1986) 180 Cal. App. 3d 1030, 1035, 226 Cal. Rptr. 33]* . An LPS conservatorship may also be terminated by the court if the goals of the treatment plan have been reached and the conservatee is no longer gravely disabled [*Welf. & Inst. Code § 5352.6*]. Any facility in which a conservatee is placed must release the conservatee at his or her request when the conservatorship terminates [*Welf. & Inst. Code § 5361*].

[b] Notice of Impending Termination

Sixty days before the automatic termination date of the conservatorship, the clerk of the superior court must give notice of the pending termination to the conservator, the conservatee, the conservatee's attorney, and the person in charge of the facility where the conservatee resides. If the conservator is a private party, the clerk must also notify the mental health director and the county officer providing conservatorship investigation [*Welf. & Inst. Code § 5362(a)*]. Thus, the court that appointed the conservator bears the responsibility of initiating the process that may lead to the reestablishment of the conservatorship [*see Henreid v. Superior Court (1976) 59 Cal. App. 3d 552, 556, 130 Cal. Rptr. 892]* .

The notification must be given in person or by first-class mail. It must be in substantially the form set forth in the statute [*Welf. & Inst. Code § 5362(a)*]. The statutory notice of termination informs the recipients, including the conservatee, that they will be notified if the conservator petitions to reestablish the conservatorship [*Welf. & Inst. Code § 5362(a)*; *see Conservatorship of Moore (1986) 185 Cal. App. 3d 718, 726-728, 229 Cal. Rptr. 875* (notice provisions are reasonably likely to provide actual notice and thus meet requirement of procedural due process)].

The statutory notice also informs the recipients that, on the request of anyone entitled to notice, a court hearing or jury trial may be had on the issue of whether the conservatee is still gravely disabled and in need of conservatorship [*Welf. & Inst. Code § 5362(a)*]. Failure to advise the conservatee of his or her right to a jury trial on the reestablishment petition has been held to constitute reversible error [*Conservatorship of Benvenuto (1986) 180 Cal. App. 3d 1030, 1037-1039, 226 Cal. Rptr. 33]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentFamily LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesTreatmentPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesCommunity Residence

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§ 304.43 Reestablishment of Conservatorship

[1] Basis

If the conservator determines that the conservatee remains gravely disabled, he or she may petition the superior court for reappointment for a succeeding one-year period. The petition must include the opinion of two physicians or licensed psychologists who have a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders that the conservatee is still gravely disabled as a result of mental disorder or impairment by chronic alcoholism. If the conservator is unable to obtain the opinion of two physicians or psychologists, he or she may request that the court appoint them [*Welf. & Inst. Code § 5361*].

[2] Notice Requirements

No express manner of giving notice of the filing of a petition for reestablishment is specified in the LPS Act. In general, the proceedings for establishing, administering, and terminating LPS conservatorships are those applicable to other conservatorships under the Probate Code [*Welf. & Inst. Code § 5350*]. A petition for the establishment of a probate conservatorship must be served on the proposed conservatee either personally or by mail with acknowledgment of receipt [*Prob. Code § 1824*]. However, one court has refused to impose this requirement with regard to proceedings for the reestablishment of an LPS conservatorship [*Conservatorship of Delay (1988) 199 Cal. App. 3d 1031, 1040* ns.10-11, *245 Cal.Rptr. 216* (local rule providing for service by first-class mail meets due process requirements)].

If service is by mail, it must be addressed to the conservatee. It may be sent to him or her in care of the facility where he or she resides. However, service by mail only on the facility where the conservatee resides is insufficient [*Conservatorship of Delay (1988) 199 Cal. App. 3d 1031, 1040-1041, 245 Cal. Rptr. 216]* .

The petition for reestablishment must also be transmitted to the facility in which the conservatee has been placed at least 30 days before the date of automatic termination of the conservatorship. The facility may detain the conservatee after the termination date only if the reestablishment proceedings have not been completed and the court orders the conservatee to be held until the proceedings have been completed [*Welf. & Inst. Code § 5361*].

[3] Continuation of Powers of Conservator of Estate

If a petition for reestablishment is filed, the superior court may grant the conservator of the estate a continuation of authority, for a reasonable time after the date of automatic termination, as necessary for (1) the collection of assets or income that accrued during the conservatorship but were uncollected before the date of termination; (2) the payment of expenses that accrued during the conservatorship and of which the conservator was notified before the termination; and (3) the completion of sales of real property for which the only act remaining at the date of termination is the actual transfer of title [*Welf. & Inst. Code § 5361*].

[4] Dismissal of Petition to Reestablish Conservatorship

The conservator has the discretion under *Code Civ. Proc. § 581(b)(1)* to voluntarily dismiss the petition to reestablish the conservatorship before trial commences [*Conservatorship of Martha P. (2004) 117 Cal. App. 4th 857, 865-869, 12 Cal. Rptr. 3d 142* (request for dismissal granted on finding that conservatee was no longer gravely disabled)].

[5] Hearing or Jury Trial

Any party entitled to notice, including the conservatee, may request a court hearing or a jury trial on the reestablishment petition [*see Welf. & Inst. Code §§ 5361, 5362(a)*; *see also Conservatorship of Benvenuto (1986) 180 Cal. App. 3d 1030, 1037-1039, 226 Cal. Rptr. 33]* . If a jury trial is requested, the jury must unanimously agree that the conservatee is gravely disabled [*Conservatorship of Roulet (1979) 23 Cal. 3d 219, 235, 152 Cal. Rptr. 425, 590 P.2d 1]* . However, only nine out of 12 jurors are required to find that the conservatee is *not* gravely disabled [*Conservatorship of Rodney M. (1996) 50 Cal. App. 4th 1266, 1270-1271, 58 Cal. Rptr. 2d 513]* .

If there is no request for a jury trial, the court may accept or deny the petition on its own motion [*Welf. & Inst. Code § 5362(b)*; *see Conservatorship of Moore (1986) 185 Cal. App. 3d 718, 731-733, 229 Cal. Rptr. 875* (fact that conservatee may be gravely disabled does not automatically preclude meaningful waiver of hearing or trial)]. Furthermore, a conservatee who waives his or her presence and the presence of his or her attorney at a reestablishment hearing essentially admits that he or she does not oppose reestablishment. A conservatee's due process rights are adequately protected when the conservatee receives a copy of the petition for reestablishment of conservatorship, is aware of the proposed placement and disabilities, has received written notices of right to a hearing and a jury trial, and conservatee's attorney has met with the conservatee and signed an affidavit attesting to the conservatee's agreement to reestablishment of the conservatorship without a hearing [*see Conservatorship of Tian L. (2007) 149 Cal. App. 4th 1022, 1031, 57 Cal. Rptr. 3d 382]* . Thus, a "brief and pro forma" hearing is not necessary; an ex parte review is sufficient [*see Conservatorship of Pollock (1989) 208 Cal. App. 3d 1406, 1413, 257 Cal. Rptr. 14]* .

In ruling on a petition for reestablishment, the court must apply the standard of proof beyond a reasonable doubt [*Conservatorship of Roulet (1979) 23 Cal. 3d 219, 223-230, 152 Cal. Rptr. 425, 590 P.2d 1]* . The court must determine whether the conservatee remains gravely disabled as of the time of the hearing or trial. If the conservatee is at that time able to provide for his or her basic needs, the court may not approve the petition on the basis of expert testimony that the conservatee is likely to once again become gravely disabled in the future [*Conservatorship of Benvenuto (1986) 180 Cal. App. 3d 1030, 1033-1034, 226 Cal. Rptr. 33* ; *Conservatorship of Murphy (1982) 134 Cal. App. 3d 15, 18-19, 184 Cal. Rptr. 363]* .

[6] Ratification of Acts of Conservator After Termination

If the conservator continues in good faith to act within the powers granted in the initial appointment beyond the date of automatic termination, he or she may petition for a decree that ratifies his or her acts beyond the period. The decree must be granted and must provide for retroactive appointment of the conservator to provide continuity of authority in those cases in which the conservator did not apply in time for reappointment [*Welf. & Inst. Code § 5363*].

[7] Compensation of Conservator or Conservator's Attorney

California Rules of Court, Rules 7.750-7.755 set forth requirements that apply to payment of compensation to conservators and their attorneys, and are specifically made applicable to conservatorships under the LPS Act [*Cal. Rules of Ct., Rule 7.750*]. These rules provide that a petition for allowance of compensation to a conservator or to the attorney for a conservator may include a request for compensation for services rendered before an order appointing the conservator [*Cal. Rules of Ct., Rule 7.751(a)*]. The petition must show facts that demonstratethe necessity for these preappointment services [*Cal. Rules of Ct., Rule 7.751(a)*]. All petitions for orders fixing and allowing compensation must comply with the requirements of *Cal. Rules of Ct., Rule 7.702* concerning petitions for extraordinary compensation in decedents' estates, to the extent applicable to conservatorships, except that the best interest of the conservatee is to be considered rather than the interest of the beneficiaries of the estate [*Cal. Rules of Ct., Rule 7.751(b)*]. Thus, the petition must include, or be accompanied by, a statement of the facts on which the petition is based showing the nature and difficulty of the tasks performed, the results achieved, and the benefit of the services to the conservatee, and the amount requested for each category of service performed, the hourly rate of each person who performed the services and the hours spent by each of them, and a description of the services rendered [*Cal. Rules of Ct., Rule 7.702*]. Thecourt may order the conservator to file an accounting before or at the time the petition is filed or heard [*Cal. Rules of Ct., Rule 7.752*].

A conservator may not pay or receive, and the attorney for a conservator may not receive, any payment from the estate of the conservatee for services rendered in advance of a court order authorizing the payment [*Cal. Rules of Ct., Rule 7.755(a)*]. If an advance payment is made or received, the court may surcharge the conservator, in addition to removing the conservator or imposing any other sanction authorized by law on the conservator or on the attorney [*Cal. Rules of Ct., Rules 7.755(a), 7.700(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentFamily LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesTreatment

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§ 304.44 Users of Controlled Substances and Dangerous Drugs

If any person is a danger to others or to himself or herself or is gravely disabled as a result of the use of controlled substances or restricted dangerous drugs, that person is subject, insofar as possible, to the LPS Act provisions [*see Welf. & Inst. Code §§ 5150-5156, 5200-5213, 5275-5278, 5325-5337*], except that any custody, evaluation, and treatment, or any procedure pursuant to these provisions must only be related to and concerned with the problem of the person's use of controlled substances and restricted dangerous drugs [*Welf. & Inst. Code §§ 5340-5343*].

Legal Topics:

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

[1] Involuntary Commitment

Special rules apply to the involuntary commitment of juveniles under the Children's Civil Commitment and Mental Health Treatment Act of 1988 [*see Welf. & Inst. Code § 5585 et seq.*]. This Act governs only an initial 72-hour evaluation and treatment period. Evaluation and treatment of a minor beyond this period continues to be governed by the provisions of the LPS Act [*Welf. & Inst. Code § 5585.20*]. The Act does not apply to emancipated minors, who are considered as adults and are subject to the LPS Act [*Welf. & Inst. Code § 5585.59*].

The Act applies if "authorization for voluntary treatment is not available" [*Welf. & Inst. Code § 5585.50*]. The Act does not address the question of whether authorization for voluntary treatment is available if the minor's parent or guardian consents, but the minor objects. However, under other applicable law, a parent or guardian has the power to apply for the voluntary admission of his or her minor child or ward to a state mental institution subject to certain due process limitations if the child is over the age of 14 [*Welf. & Inst. Code § 6000*; *In re Roger S. (1977) 19 Cal. 3d 921, 927, 141 Cal. Rptr. 298, 569 P.2d 1286* ; *see also* discussion *§ 304.50*].

[2] Basis for Commitment

A minor who as a result of mental disorder is a danger to self or to other persons, or who is gravely disabled, may be taken into custody involuntarily for 72 hours by a peace officer, by a member of the attending staff of a county-designated evaluation facility, by members of a mobile crisis team, or by other professional persons designated by the county [*Welf. & Inst. Code § 5585.50*]. A minor is gravely disabled if, as a result of a mental disorder, he or she is unable to use the elements of life that are essential to health, safety, and development, including food, clothing, and shelter, even though these elements are provided to the minor by others. Mental retardation, epilepsy, or other developmental disabilities; alcoholism or other drug abuse; or repeated antisocial behavior do not, by themselves, constitute a mental disorder [*Welf. & Inst. Code § 5585.25*].

The minor who has been taken into custody must be placed in a facility designated by the county and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation of minors. The facility must make

every effort to notify the minor's parent or legal guardian as soon as possible after the minor is detained [*Welf. & Inst. Code § 5585.50*]. Minors under the age of 16 years may not be held with adults receiving psychiatric treatment under the LPS Act [*Welf. & Inst. Code § 5585.55*]. A waiver of this limitation may be granted on a county level if the policy causes undue hardship due to inadequate or unavailable alternative resources [*Welf. & Inst. Code § 5751.7*].

[3] Probable Cause Requirement

The decision to take the minor into custody must be based on probable cause. The receiving facility must require a written application that states the circumstances under which the minor's condition was called to the attention of the person who made the decision that the minor should be taken into custody. The application must state that that person has probable cause to believe that the minor is, as a result of mental disorder, a danger to self or to others, or is gravely disabled, and that authorization for voluntary treatment is not available. If the probable cause is based on the statement of a person other than the person who made the decision, the person who made the statement is civilly liable for intentionally giving a statement known to be false [*Welf. & Inst. Code § 5585.50*].

[4] Evaluation and Treatment

The minor must receive a clinical evaluation during the 72-hour period [*see Welf. & Inst. Code § 5585.52*]. If, in the opinion of the evaluator, the minor will require additional mental health treatment, a treatment plan must be written and must identify the least restrictive placement alternative in which the minor can receive the necessary treatment. The family, legal guardian, or caretaker and the minor must be consulted and informed about the basic recommendations for further treatment and placement requirements. Every effort must be made to obtain the consent of the minor's parent or legal guardian prior to treatment and placement of the minor. Inability to obtain this consent does not preclude the involuntarytreatment of a minor who is determined to be gravely disabled or a danger to self or to others [*Welf. & Inst. Code § 5585.53*].

[5] Wards and Dependents of Juvenile Court

If a juvenile court, after finding a minor to be a person described by *Welf. & Inst. Code §§ 300, 601*, or *602* (a ward or dependent child of the court), is in doubt about the state of mental health or the mental condition of the minor, the court may continue the hearing and proceed pursuant to *Welf. & Inst. Code §§ 6550, 6551* [*see Welf. & Inst. Code § 6550*]. If the court is in doubt as to whether the person is mentally disordered or mentally retarded, the court must order the person to be taken to a facility designated by the county and approved by the Department of Health as a facility for 72-hour evaluation and treatment. From that point, the provisions of the LPS Act governing civil commitments apply, except that the professional person in charge of the facility must make a written report to the court concerning the results of the evaluation of the person's mental condition [*Welf. & Inst. Code § 6551*].

The determination of whether a juvenile may be committed to a state mental hospital must be made pursuant to *Welf. & Inst. Code §§ 6550* and *6551* and the provisions of the LPS Act [*In re E. (1975) 15 Cal. 3d 183, 189, 123 Cal. Rptr. 103, 538 P.2d 231]* . The actual commitment of a minor ward of the juvenile court to a state hospital can be accomplished only through the appointment of a conservator under the LPS Act who is authorized to place the minor in such a hospital. A probation officer, as court-appointed custodian of the minor, cannot make application for a "voluntary" commitment pursuant to *Welf. & Inst. Code § 6000(b)* [*In re E. (1975) 15 Cal. 3d 183, 192, 123 Cal. Rptr. 103, 538 P.2d 231* ; *In re Vicki H. (1979) 99 Cal. App. 3d 484, 497, 160 Cal. Rptr. 294* ; *see Welf. & Inst. Code §§ 5350-5371*; *In re L. L. (1974) 39 Cal. App. 3d 205, 209-210, 214-215, 114 Cal. Rptr. 11* (approved in part in *In re E. (1975) 15 Cal. 3d 183, 193 n.14, 123 Cal. Rptr. 103, 538 P.2d 231*)].

[6] Mental Retardation

If, after referral, the minor is found to be mentally retarded, the juvenile court may direct the filing in another court of a petition for the commitment of the minor to a state hospital as a mentally retarded person pursuant to *Welf. & Inst. Code*

§§ 6500-6512 [*see Welf. & Inst. Code § 6551*]. See *§ 304.70* et seq. for commitment procedures. Additionally, either before or after adjudication, a minor brought before the juvenile court under the Juvenile Court Law may be referred for commitment as a mentally retarded person if it appears to the juvenile court that the person is mentally retarded [*see Welf. & Inst. Code § 6512*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawDelinquency & DependencyDependency ProceedingsFamily LawDelinquency & DependencyWards of CourtFamily LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentChildren

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§ 304.46 Statutory Rights of Patients

Each person involuntarily detained for evaluation and treatment under the LPS Act, each person admitted as a voluntary patient, and each mentally retarded person committed pursuant to *Welf. & Inst. Code §§ 6500-6512* has certain enumerated statutory rights [*see Welf. & Inst. Code § 5325*].

The professional person in charge of the facility or a designee may, however, for good cause shown, deny a person any of these rights, except the right to refuse convulsive or shock treatment and psychosurgery and the right to a patient advocate [*see Welf. & Inst. Code § 5326*]. Good cause for denying patient rights exists either when the professional person in charge of the facility or a designee has good reason to believe that the exercise of the specific right would be injurious to the patient; or when there is evidence that the specific right, if exercised, would seriously infringe on the rights of others; or when the institution or facility would suffer serious damage if the specific right was not denied; and when there is not a less restrictive way of protecting the interests to be protected [*9 Cal. Code Reg. § 865.2*]. The reason used to justify the denial of a right to a patient must be related to the specific right denied. A right must not be withheld or denied as a punitive measure, nor must a right be considered a privilege to be earned. Treatment must not include denial of any right specific by statute, and waivers signed by a patient, relative, guardian, or conservator must not be used as a basis for denial of a right specified by statute [*9 Cal. Code Reg. § 865.2(b), (c)*]. These rights may not be waived by the person's parent, guardian, or conservator [*Welf. & Inst. Code § 5325*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 304.47 Right to Refuse Medical Treatment

[1] Qualified Right

Under the LPS Act, a mental patient has a qualified right to refuse medical treatment [*Keyhea v. Rushen (1986) 178 Cal. App. 3d 526, 534-536, 223 Cal. Rptr. 746* ; *see also People v. Thomas (1990) 217 Cal. App. 3d 1034, 1037, 266 Cal. Rptr. 295* ; *Riese v. St. Mary's Hospital & Medical Center (1987) 209 Cal. App. 3d 1303, 1313, 271 Cal. Rptr. 199]* . Mental patients cannot be presumed incompetent, and therefore incapable of making treatment decisions, solely because they are hospitalized [*Riese v. St. Mary's Hospital & Medical Center (1987) 209 Cal. App. 3d 1303, 1315, 271 Cal. Rptr. 199* ; *see Welf. & Inst. Code § 5331*].

[2] Antipsychotic Medication

[a] Scope of Right

The right to refuse medical treatment includes the right to refuse antipsychotic medication [*Riese v. St. Mary's Hospital & Medical Center (1987) 209 Cal. App. 3d 1303, 1318, 243 Cal. Rptr. 241* ; *see Keyhea v. Rushen (1986) 178 Cal. App. 3d 526, 540-541, 223 Cal. Rptr. 746]* . "Antipsychotic medication" is any medication customarily prescribed for the treatment of symptoms of psychoses and other severe mental and emotional disorders[*Welf. & Inst. Code § 5008(l)*; *see Keyhea v. Rushen (1986) 178 Cal. App. 3d 526, 531 n.1, 223 Cal. Rptr. 746* (containing partial list of antipsychotic medications)]. Any person who is subject to detention pursuant to *Welf. & Inst. Code § 5150* (72-hour detention of persons who are dangerous or gravely disabled for evaluation and treatment), *Welf. & Inst. Code § 5250* (additional 14-day detention for treatment), *Welf. & Inst. Code § 5260* (further 14-day detention if person is suicidal), or *Welf. & Inst. Code § 5270.15* (additional 30-day detention for treatment if person remains gravely disabled and unwilling or unable to accept treatment voluntarily) has a qualified right to refuse treatment with antipsychotic medication, subject to the provisions set forth in *Welf. & Inst. Code §§ 5332-5327*[*Welf. & Inst. Code § 5325.2*].

[b] Nonemergency Situations

In a nonemergency situation, antipsychotic medication cannot be administered without the patient's informed consent,

absent (1) a staff determination that treatment alternatives to involuntary medication are unlikely to meet the patient's needs, and (2) a judicial determination of incompetence [*Welf. & Inst. Code §§ 5332(a), (b), 5333(b), 5334(c)* (adopting, in large part, rule of *Riese v. St. Mary's Hospital & Medical Center (1987) 209 Cal. App. 3d 1303, 1320, 271 Cal. Rptr. 199*)]. If possible, the agency or facility providing the treatment must acquire the person's medication history [*Welf. & Inst. Code § 5332(d)*]. However, antipsychotic medication can be administered to the patient, over his or her refusal, pending an appeal of a determination of incapacity [*Welf. & Inst. Code § 5334(e)(3)*]. See discussion in *§ 304.47[2][d]* and *[g]*.

[c] Emergency Situations

In an emergency, the patient may be treated with antipsychotic medication over his or her objection prior to a capacity hearing, but only with antipsychotic medication that is required to treat the emergency condition [*Welf. & Inst. Code § 5332(e)*]. An "emergency" is a situation in which action to impose treatment over a person's objection is immediately necessary for the preservation of life or the prevention of serious bodily harm to the patient or others, and it is impracticable to first gain consent [*Welf. & Inst. Code § 5008(m)*]. It is not necessary for harm to take place or become unavoidable prior to treatment or intervention [*Welf. & Inst. Code §§ 5008(m), 5332(e)*]. In an emergency, any antipsychotic medication provided is to be provided in the manner least restrictive to the personal liberty of the patient [*Welf. & Inst. Code § 5332(e)*].

There is no statutory specification as to how long the medication can be administered on an emergency basis. In what appears to be an "emergency" fact situation, one court of appeal has held, in a ruling issued prior to the 1991 enactment of *Welf. & Inst. Code §§ 5325.2* and *5332-5337* (codification of right and exercise of right to refuse antipsychotic medication), that the state may administer involuntary antipsychotic medication to a prisoner without a judicial determination that the patient is incompetent to refuse the treatment. The state may administer medication only on a short-term basis not to exceed 24 days; thereafter, unless the emergency continues, involuntary medication may not continue absent a court order. A court may extend the period of involuntary medication for an additional period of one year. To obtain a court order, the state must file a petition containing specified allegations and must satisfy the court that (1) because of a mental disorder, the patient presents a danger to others or to himself or herself or is gravely disabled; and (2) the patient is incompetent to refuse medication [*People v. Thomas (1990) 217 Cal. App. 3d 1034, 1037, 1039-1040 n.2, 266 Cal. Rptr. 295* (involving state prisoner confined in medical facility and noting that the procedural requirements of the LPS Act, insofar as they are relevant to a given case, extend to state prisoners)]. It is not clear what effect the emergency provisions of *Welf. & Inst. Code § 5332(e)* have on this holding.

[d] Petition to Determine Incapacity to Consent to Medication

As previously noted, under the LPS Act, a mental patient's right to refuse antipsychotic medication on a nonemergency basis can be denied only when there has been a staff determination that treatment alternatives to involuntary medication are unlikely to meet the patient's needs and a judicial determination of incapacity to consent to the medication [*Welf. & Inst. Code §§ 5332(b), 5333(b), 5334(c)*]. Thus, a petition must be filed in superior court [*Welf. & Inst. Code § 5333(b)*], and there must be an evidentiary hearing, at which the person subject to the hearing has the right to representation by an advocate or legal counsel [*Welf. & Inst. Code 5332(b), 5333(a)*]. The standard of proof by which incapacity must be determined is not statutorily specified, but case law decided prior to the 1991 enactment of *Welf. & Inst. Code §§ 5325.2* and *5332-5337* indicates that the standard is one of clear and convincing evidence [*see, e.g., Riese v. St. Mary's Hospital & Medical Center (1987) 209 Cal. App. 3d 1303, 1322, 271 Cal. Rptr. 199* (antipsychotic medication case); *Lillian F. v. Superior Court (1984) 160 Cal. App. 3d 314, 324, 206 Cal. Rptr. 603* (convulsive treatment case)].

The requirement that there be a judicial determination of incapacity under the LPS Act before a person may be subjected to involuntary administration of psychotropic medication extends to prisoners [*Keyhea v. Rushen (1986) 178 Cal. App. 3d 526, 542, 223 Cal. Rptr. 746* ; *but see In re Locks (2000) 79 Cal. App. 4th 890, 894-897, 94 Cal.*

Rptr. 2d 495 (inmate who has had judicial hearing under *Pen. Code § 1026*, in which inmate was found not guilty by reason of insanity, and who was committed to state hospital for treatment, is not entitled to hearing to determine whether he or she is competent to refuse to take psychotropic medication; inmate's only judicial remedy is to seek determination that he or she is not danger to others under *Pen. Code § 1026.2*)].

[e] Factors to Be Considered at Capacity Hearing

A judicial determination of capacity or incapacity to consent to medication should focus primarily on (1) whether the patient is aware of his or her situation; (2) whether the patient is able to understand the benefits and risks of, as well as the alternatives to, taking the proposed medication; and (3) whether the patient is able (a) to understand and knowingly and intelligently to evaluate the information required to be given to patients whose informed consent is sought [*see Welf. & Inst. Code § 5326.2* (information required to be given to constitute informed consent)], and (b) otherwise to participate in the medication decision through rational thought processes [*Riese v. St. Mary's Hospital & Medical Center (1987) 209 Cal. App. 3d 1303, 1322-1323, 271 Cal. Rptr. 199]* . If the patient is judicially determined to possess the capacity to give informed consent and refuses to do so, he or she cannot be required to take the medication in a nonemergency [*Welf. & Inst. Code § 5332(b)*]. If the patient is judicially determined incapable of giving informed consent, either the patient may be required to take the medication [*see Welf. & Inst. Code 5332(b)*; *see also Welf. & Inst. Code § 5334(e)(3)*] or consent may be obtained from a surrogate, as circumstances dictate [*see Riese v. St. Mary's Hospital & Medical Center (1987) 209 Cal. App. 3d 1303, 1323, 271 Cal. Rptr. 199]* .

Generally, the court may only consider such issues as are pertinent to assessing consent, and may not decide medical questions such as whether the proposed treatment is actually necessary or is the least drastic alternative available [*People v. Thomas (1990) 217 Cal. App. 3d 1034, 1039-1040, 266 Cal. Rptr. 295* ; *Riese v. St. Mary's Hospital & Medical Center (1987) 209 Cal. App. 3d 1303, 1320-1321, 271 Cal. Rptr. 199]* . However, the court must find that treating staff have considered and determined that treatment alternatives to involuntary medication are unlikely to meet the patient's needs [*see Welf. & Inst. Code § 5332(b)*].

[f] Duration of Incapacity Determination

Any determination of a person's incapacity to refuse treatment remains in effect only for the duration of the shorter of the following times [*Welf. & Inst. Code § 5336*]:

(1) The detention period described in *Welf. & Inst. Code § 5150* (72 hours) or *Welf. & Inst. Code § 5250* (14 days), or both;

(2) Until capacity has been restored according to standards developed by the treatment facility in conjunction with its medical or clinical staff; or

(3) Any court-determined time.

[g] Review of Capacity Determination

The person who is the subject of the capacity hearing may appeal the determination to the superior court or the court of appeal [*Welf. & Inst. Code § 5334(e)(1)*]. The person who filed the original petition for the hearing may request the district attorney or county counsel in the county in which the person is receiving treatment to appeal the determination to the superior court or the court of appeal on behalf of the state [*Welf. & Inst. Code § 5334(e)(2)*]. Any appeal to the superior court is subject to de novo review [*Welf. & Inst. Code § 5334(f)*].

The provisions regarding the conduct of capacity hearing and the appeal of a capacity hearing determination do not preclude the right of a person to bring a writ of habeas corpus under *Welf. & Inst. Code § 5275* [*Welf. & Inst. Code §*

5334(e)(4); *see § 304.223*].

[3] Psychosurgery and Convulsive (Shock) Treatment

[a] Scope of Right

Under the LPS Act, psychosurgery (defined in *Welf. & Inst. Code § 5325(g)*) may only be performed if the patient gives written informed consent (defined in *Welf. & Inst. Code § 5326.5*) and other required procedures are followed [*see Welf. & Inst. Code § 5326.6*]. There is no provision for administration of psychosurgery in the case of a patient who has refused consent, even when the patient could be deemed incapable of informed consent.

Convulsive treatment (defined in *Welf. & Inst. Code § 5325(f)* and including coma treatment) may be administered to an involuntary patient, including a patient under guardianship or conservatorship, only if the patient gives written informed consent and other required procedures have been followed [*see Welf. & Inst. Code § 5326.7*]. Requirements for the administration of convulsive treatment to all other patients, including but not limited to voluntary patients and those receiving treatments in a physician's office or a private home, are similar to those for the administration of convulsive treatments to involuntary patients under the LPS Act, although less stringent [*see Welf. & Inst. Code § 5326.75*; *Aden v. Younger (1976) 57 Cal. App. 3d 662, 684, 129 Cal. Rptr. 535]* .

The provision of special procedures for consent of mental patients to psychosurgery and convulsive treatment is not a denial of equal protection of the laws, because it is based on a reasonable classification having a substantial relation to a legitimate object to be accomplished [*Aden v. Younger (1976) 57 Cal. App. 3d 662, 673, 129 Cal. Rptr. 535]* . Furthermore, a patient has no right to be left uninformed concerning treatment. No such right renders unconstitutional the requirement that a physician inform the patient concerning the treatment to be administered [*Aden v. Younger (1976) 57 Cal. App. 3d 662, 674-675, 129 Cal. Rptr. 535]* .

[b] Determination of Incapacity to Consent to Convulsive Treatment

The patient's attorney, or if none, a public defender appointed by the court, must also agree to the patient's capacity or incapacity to give written informed consent [*see Welf. & Inst. Code § 5326.7(e)*]. If either the attending physician or the attorney believes that the patient does not have the capacity to give written informed consent, a petition is filed in the superior court to determine the patient's capacity to consent [*see Welf. & Inst. Code § 5326.7(f)*; *see Conservatorship of Fadley (1984) 159 Cal. App. 3d 440, 446, 205 Cal. Rptr. 572]* . In a hearing pursuant to *Welf. & Inst. Code § 5326.7(f), (g)* to determine whether the conservatee has the capacity to give informed consent to convulsive treatments, the standard of proof is "clear and convincing" evidence [*Lillian F. v. Superior Court (1984) 160 Cal. App. 3d 314, 324, 206 Cal. Rptr. 603]* . A finding of lack of capacity to give informed consent is improper if the conservatee, although mentally ill, has reiterated a rational fear and refusal of shock treatments during nonpsychotic moments [*see Conservatorship of Waltz (1986) 180 Cal. App. 3d 722, 728-734, 227 Cal. Rptr. 436]* .

Intentional violation of *Welf. & Inst. Code §§ 5326.2-5326.8* is subject to a civil penalty of not more than $5,000 for each violation. The penalty may be assessed and collected in a civil action brought by the Attorney General in a superior court [*Welf. & Inst. Code § 5326.9*]. Alleged or suspected violations of the laws governing denial of rights must be reported to the Director of Health, who must investigate [*Welf. & Inst. Code § 5326.9(a)*]. Statutory requirements for the administration of convulsive treatment may not be altered by a local governmental entity such as a city. Regulation of convulsive treatment is a matter of state rather than local concern [*Northern Cal. Psychiatric Society v. City of Berkeley (1986) 178 Cal. App. 3d 90, 105-106, 223 Cal. Rptr. 609]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor &

Mentally Disabled PatientsInstitutionalizationHealthcare LawTreatmentPatient ConsentInformed ConsentHealthcare LawTreatmentPatient ConsentRight to Refuse TreatmentPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesTreatment

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§ 304.48 Confidentiality of Records

[1] General Rule of Nondisclosure

All information and records obtained in the course of providing services under the LPS Act, the Bronzan-McCorquodale Act [*Welf. & Inst. Code § 5600 et seq.*], voluntary admission and judicial commitment procedures [*see Welf. & Inst. Code § 6000 et seq.*], and procedures for mental institutions [*see Welf. & Inst. Code § 7000 et seq.*] must be kept confidential and may be disclosed only under certain listed circumstances [*see Welf. & Inst. Code §§ 5010, 5328-5329*]. A person whose confidential records have been willfully and knowingly released in violation of these provisions or of *Health & Safety Code § 11860 et seq.* (concerning methadone programs) may bring an action for civil damages and injunction [*Welf. & Inst. Code § 5330*].

[2] Exceptions

[a] "Administration of Justice"

Confidential records may be disclosed to the court, as well as to the Youth Authority and Adult Correctional Agency, as necessary for the administration of justice [*Welf. & Inst. Code §§ 5328(f), 5328.02*]. A district attorney is also allowed access to an individual's treatment record information contained in an updated evaluation when that individual is charged under the Sexually Violent Predators Act (*Welf. & Inst. Code §§ 6600-6609.3*) [*Welf. & Inst. Code § 5328.01*; *Albertson v. Superior Court (2001) 25 Cal. 4th 796, 803-804, 107 Cal. Rptr. 2d 381, 23 P.3d 611]* .

[b] "Serious Danger to Others"

Another important exception to the confidentiality of records under *Welf. & Inst. Code § 5328* applies when a patient, in the opinion of his or her psychotherapist, presents a serious danger of violence to a reasonably foreseeable victim. In such a case, confidential records or information may be released to the potential victim and to law enforcement agencies as the psychotherapist determines is needed for the protection of the potential victim [*Welf. & Inst. Code § 5328(r)*]. In certain situations, the information and records made confidential under *Welf. & Inst. Code § 5328* may be disclosed to governmental law enforcement agencies investigating a crime when the records relate to a patient who is or has been

confined as a mentally disordered sex offender [*see Welf. & Inst. Code § 5328.01*].

[c] Information Relating to Genetically Handicapping Conditions

If the patient consents, information specifically pertaining to the existence of genetically handicapping conditions, as defined in *Health & Safety Code § 341.5*, may be released to qualified professional persons for purposes of genetic counseling for blood relatives on the request of a blood relative. If a patient does not or cannot respond to a request for permission to release this information after reasonable attempts have been made over a two-week period to get a response, the information may be released on the request of a blood relative [*Welf. & Inst. Code § 5328(q)*]. For this purpose, "qualified professional persons" means those persons with the qualifications necessary to carry out the genetic counseling duties as determined by the genetic disease unit established by the StateDepartment of Health Services under *Health & Safety Code § 309* [*Welf. & Inst. Code § 5328(q)*].

[d] On Request of Designated State Agencies

Regardless of the disclosure limitations of *Welf. & Inst. Code § 5328*, information and records must be disclosed to the state agency charged with the protection and advocacy of persons with disabilities or mental illness [*Welf. & Inst. Code § 5328.06(a)*; *see Welf. & Inst. Code § 4900 et seq.* (discussed in the General Introduction)]. Access to this information and these records is gained according to the procedures set forth in *Welf. & Inst. Code § 4900 et seq.* [*Welf. & Inst. Code § 5328.06(b)*].

[3] Some Disclosure Protected by Immunity

Members of a mental health professional quality assurance committee established under *Welf. & Inst. Code § 4070* (standards and guidelines for quality assurance activities) and *Welf. & Inst. Code § 5624* (county mental health quality assurance program) are immune from monetary liability and damages for any act or proceeding performed within the function of a committee formed to review and evaluate the adequacy, appropriateness, or effectiveness of the care and treatment planned for or provided to mental health patients in order to improve the quality of care by mental health professionals, if the act was taken without malice, after a reasonable effort to obtain the facts of the matter, and in the reasonable belief that the action was warranted [*Civ. Code § 43.7(a)*].

A similar immunity is available to some professional societies and various committees that monitor the quality of professional services and the members of those societies and committees if the act is undertaken to maintain the professional standards of a society or to review the quality of services rendered [*Civ. Code § 43.7(b)*; *see* Ch. 340, *Libel and Slander*]. Persons providing information to professional licensing boards or review committees are also immune from liability and damages when they make a communication that is intended to aid in the evaluation of a practitioner of the healing arts and that does not represent as true any matter not reasonably believed to be true [*Civ. Code § 43.8*]. The immunities provided by *Civ. Code § 43.7* and *Civ. Code § 43.8* do not affect the availability of any absolute privilege under *Civ. Code § 47* [*Civ. Code § 43.8*]. The immunities also are inapplicable to the quality assurance committee itself, as opposed to the individual *members* of the committee [*Civ. Code § 43.7(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawActions Against FacilitiesDefensesImmunityHealthcare LawBusiness Administration & OrganizationPatient ConfidentialityGeneral OverviewHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of Adults

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§ 304.49 Information to Patient's Family Members or Other Designated Person

[1] Patient's Diagnosis, Prognosis, Medication, or Progress

On the request of a member of the family of a patient, or other person designated by the patient, a public or private treatment facility must give the family member or the designee notification of the patient's diagnosis, the prognosis, the medications prescribed, the side effects of medications prescribed, if any, and the progress of the patient if, after notification of the patient that this information is requested, the patient authorizes disclosure. If, when initially informed of the request for notification, the patient is unable to authorize the release of that information, notation of the attempt must be made into the patient's treatment record, and daily efforts must be made to secure the patient's consent or refusal of authorization. However, if a request for information is made by the spouse, parent, child, or sibling of the patient and the patient is unable to authorize the release of that information, the requester must be notified of the patient's presence in the facility, except to the extent prohibited by federal law [*Welf. & Inst. Code § 5328.1(a)*].

[2] Patient's Admission, Release, Transfer, Serious Illness, Injury, or Death

On the admission of any mental health patient to a 24-hour public or private mental health facility licensed pursuant to *Health & Safety Code § 1250*, the facility must make reasonable attempts to notify the patient's next of kin or any other person designated by the patient of the patient's admission, unless the patient requests that such information not be provided. The facility must make reasonable attempts to notify the patient's next of kin or any other person designated by the patient of the patient's release, transfer, serious illness, injury, or death only on request of the family member, unless the patient requests that this information not be provided [*Welf. & Inst. Code § 5328.1(b)*].

[3] Public or Private Entity Not Liable for Release of Information

No public or private entity or public or private employee is liable for damages caused or alleged to be caused by the release of information or the omission to release information regarding the patient's condition pursuant to *Welf. & Inst. Code § 5328.1* [*Welf. & Inst. Code § 5328.1(c)*; *see § 304.49*].

[4] Photocopying of Records

Nothing in *Welf. & Inst. Code § 5328.1* is to be construed to require photocopying of a patient's medical records in order to satisfy its provisions [*Welf. & Inst. Code § 5328.1(c)*; *see § 304.49*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawBusiness Administration & OrganizationPatient ConfidentialityGeneral OverviewHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesTreatment

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§ 304.50 Voluntary Admission

[1] Mentally Disordered Adults

On receipt of a written application for admission of a person into a state hospital for the mentally disordered or mentally retarded, the medical director of the hospital may admit any person who is a suitable person for care and treatment in that hospital. If the person is an adult, the application must be made voluntarily by the person at a time when the person is in a condition of mind that renders the person competent to make the application or, if the person is a conservatee with a conservator appointed pursuant to the Welfare and Institutions Code with the right to place the conservatee in a state hospital, by the conservator [*Welf. & Inst. Code § 6000(a)*].

[2] Mentally Disordered Minors

The application of a minor for voluntary admission must be made by the minor's parents, or by the parent, guardian, conservator, or other person entitled to custody of the minor [*Welf. & Inst. Code § 6000(b)*]. However, the California Supreme Court has held that minors 14 years of age and older have the right to establish that they should not be so admitted, and the right to notice and a hearing on that issue, unless these rights are waived [*In re Roger S. (1977) 19 Cal. 3d 921, 935-938, 141 Cal. Rptr. 298, 569 P.2d 1286]* . If the minor has a conservator appointed under the Welfare and Institutions Code who is authorized by the court to place the conservatee in a state hospital, the application must be made by the conservator [*Welf. & Inst. Code § 6000(b)*].

A minor who has been declared to be within the jurisdiction of the juvenile court may, with the advice of counsel, make a voluntary application for inpatient or outpatient mental health services in accordance with *Welf. & Inst. Code § 5003*, and, notwithstanding the provisions of *Welf. & Inst. Code § 6000(b)*, *6002*, or *6004*, the juvenile court may authorize the minor to make such an application if it is satisfied that the minor suffers from a mental disorder [*see Welf. & Inst. Code § 6552*].

The involuntary commitment of a minor ward or dependent child of the juvenile court may not be accomplished as a voluntary commitment by having the probation officer or court place the minor in a hospital. Such a commitment can only be accomplished in accordance with the procedures and safeguards of the LPS Act [*In re E. (1975) 15 Cal. 3d*

183, 189-191, 123 Cal. Rptr. 103, 538 P.2d 231] .

[3] Release

A person who has been voluntarily admitted may leave the hospital when the person who is entitled to make the voluntary admission, whether that person is the patient or the patient's parent, guardian, or conservator, has given notice of the desire to leave or obtain the person's release [*see Welf. & Inst. Code § 6000*].

[4] Voluntary Patients' Rights

A person admitted as a voluntary patient to a state hospital, a private mental institution, or a county psychiatric hospital has the following rights in addition to the right to leave the hospital as specified in *Welf. & Inst. Code §§ 6000-6008*: the right to receive the care and treatment that the condition warrants for the full period of patient status; and the full patient rights specified in *Welf. & Inst. Code §§ 5325-5331* [*Welf. & Inst. Code § 6006*]. See generally the discussion *§ 304.46*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentChildrenPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentDischarge & Release of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentVoluntary Commitment of Adults

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[Reserved]

§§ 304.51[Reserved]

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§ 304.70 Governing Statutes

Receipt of services by mentally retarded persons is governed by the Lanterman Developmental Disabilities Services Act [*Welf. & Inst. Code §§ 4500-4846*]. Under this Act, care for the developmentally disabled is provided by private contractors operating, among other services, residential care facilities [*Morohoshi v. Pacific Home (2004) 34 Cal. 4th 482, 486, 20 Cal. Rptr. 3d 890, 100 P.3d 433]* .

The judicial commitment of mentally retarded persons is governed by *Welf. & Inst. Code §§ 6500-6512*. Judicial commitment generally is governed by *Welf. & Inst. Code §§ 6250-6254*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareDependent & Disabled AdultsServicesFamily LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of AdultsPublic Health & Welfare LawSocial ServicesMentally Ill & Mentally Retarded IndividualsGeneral Overview

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§ 304.71 Definitions

"Developmental disability" means a disability that originates before an individual attains age 18, continues or can be expected to continue indefinitely, and constitutes a substantial disability for the individual. Developmental disabilities include mental retardation, cerebral palsy, epilepsy, and autism. It also includes disabling conditions that are closely related to or that require treatment similar to mental retardation, but does not include other handicapping conditions that are solely physical in nature [*Welf. & Inst. Code § 4512(a)*]. This last category was held not to be unconstitutionally vague when taken together with its implementing regulations, because the determination of developmental disability does not depend on a subjective standard, but rather on a determination of whether an individual's condition is substantially similar to that of mental retardation [*Mason v. Office of Administrative Hearings (2001) 89 Cal. App. 4th 1119, 1129, 108 Cal. Rptr. 2d 102]* . For a definition of "mentally retarded person" for purposes of judicial commitment, see Judicial Commitment, *below*.

"Substantial disability" means the existence of significant functional limitations in three or more of the following major life activities, as appropriate to the individual's age [*Welf. & Inst. Code § 4512(l)*]:

- Self-care.
- Receptive and expressive language.
- Learning.
- Mobility.
- Self-direction.
- Capacity for independent living.
- Economic self-sufficiency.

"Services and supports for persons with developmental disabilities" means specialized services and supports or special adaptations of generic services and supports directed toward the following [*Welf. & Inst. Code § 4512(b)*]:

- The alleviation of a developmental disability;

- The social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability; or

- The achievement and maintenance of independent, productive, normal lives.

The determination of which services and supports are necessary must be made on the basis of the individual's needs and preferences or, when appropriate, those of the individual's family [*Welf. & Inst. Code § 4512(b)*].

The coordination and delivery of services is the responsibility of private nonprofit community agencies, called "regional centers" [*Welf. & Inst. Code § 4620(b)*; *Morohoshi v. Pacific Home (2004) 34 Cal. 4th 482, 486, 20 Cal. Rptr. 3d 890, 100 P.3d 433]* . These regional centers are responsible for determining through testing and evaluation whether an individual has a developmental disability [*Welf & Inst. Code §§ 4642, 4643*; *Morohoshi v. Pacific Home (2004) 34 Cal. 4th 482, 488, 20 Cal. Rptr. 3d 890, 100 P.3d 433* ; *see also § 304.73[2]*]. Although the term "regional center" is not defined, such centers have been established pursuant to the Lanterman Developmental Disabilities Services Act to provide fixed points of contact in the community for persons with developmental disabilities and their families so that those persons may have access to the facilities and services best suited to them throughout their lifetimes. It is the intent of the legislature that the network of regional centers for persons with developmental disabilities and their families be accessible to every family in need of regional center services. It is the further intent of the legislature that the design and activities of regional centers reflect a strong commitment to the delivery of direct service coordination and that all other operations expenditures of regional centers are necessary to support and enhance the delivery of direct service coordination and services and supports identified in individual program plans [*Welf. & Inst. Code § 4620*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareDependent & Disabled AdultsGeneral OverviewPublic Health & Welfare LawSocial ServicesMentally Ill & Mentally Retarded IndividualsGeneral Overview

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§ 304.72 Rights of Developmentally Disabled Persons

Persons with developmental disabilities have the same legal rights and responsibilities guaranteed all other individuals by the federal constitution and laws and constitution of the state. No otherwise qualified person may be excluded by reason of having a developmental disability from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity that receives public funds [*Welf. & Inst. Code § 4502*]. In addition, developmentally disabled persons have certain other enumerated rights [*see Welf. & Inst. Code §§ 4502, 4503*], although some of these rights, the right to refuse psychosurgery, electroconvulsive therapy, or behavior modification techniques which cause pain or trauma, may be denied for good cause [*see Welf. & Inst. Code § 4504*]. Mentally retarded persons committed to state hospitals pursuant to *Welf. & Inst. Code §§ 6500-6512* have the rights discussed in Part I of this chapter, in *§ 304.46* [*see Welf. & Inst. Code § 5325 et seq.*].

An adult person with a developmental disability has the legal right to determine where his or her residence will be. Except in a situation that presents immediate danger to the health and well-being of the individual, the regional center or its designee must not remove a consumer from a residential care facility against the consumer's wishes unless there has been specific court action to abridge such right with respect to an adult, or unless the parent, guardian, or conservator consents with respect to a child [*Welf. & Inst. Code § 4741*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareDependent & Disabled AdultsGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesCommunity ResidencePublic Health & Welfare LawSocial ServicesMentally Ill & Mentally Retarded IndividualsHousing

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§ 304.73 Provision of Services

Developmental disabilities alone do not justify judicial commitment. Instead, persons with developmental disabilities are to receive services pursuant to the Lanterman Developmental Disabilities Services Act, although persons who constitute a danger to themselves or others may be judicially committed if evidence of the danger is proven in court [*Welf. & Inst. Code § 4507*; *see generally* the discussion *§ 304.74*].

The Lanterman Developmental Disabilities Services Act is a comprehensive statutory scheme designed to provide an array of services and supports sufficiently complete to meet the needs of choices of each person with developmental disabilities, regardless of age or degree of disability, and at each stage of life, and to support his or her integration into the mainstream life of the community [*Welf. & Inst. Code § 4501*]. The purpose of the statutory scheme is (1) to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community and (2) to enable them to approximate the pattern of everyday living of nondisabled persons of the same age [*Association for Retarded Citizens v. Department of Developmental Services (1985) 38 Cal. 3d 384, 388, 211 Cal. Rptr. 758, 696 P.2d 150* ; *Williams v. Macomber (1990) 226 Cal. App. 3d 225, 228 n.1, 276 Cal. Rptr. 267]* .

[1] Guardian or Conservator for Developmentally Disabled Person

The Director of Developmental Services may be appointed as either guardian or conservator of the person or estate, or both, of any developmentally disabled person who is either (1) eligible for the services of a regional center, or (2) a patient who was admitted or committed to any state hospital from a county served by a regional center [*Health & Safety Code § 416*].

Unless exceptions are expressly made in *Health & Safety Code §§ 416-416.23*, *Prob. Code §§ 1400-2808* (appointment, powers, and duties of Probate Code conservators) apply to such guardianship and conservatorship appointments [*Health & Safety Code § 416.1*; for discussion of *Prob. Code §§ 1400-2808*, *see* Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , through Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships*].

Limited conservatorships may also be established under the provisions of the Probate Code for developmentally disabled adults [*see Prob. Code § 1801(d)*]. For a discussion of the establishment of limited conservatorships, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* .

[2] Regional Center Services

Any person believed to have a developmental disability, and any person believed to have a high risk of parenting a disabled infant, is eligible for initial intake and assessment services in the regional centers [*Welf. & Inst. Code § 4642*]. In addition, any infant having a high risk of becoming developmentally disabled may be eligible for initial intake and assessment services in the center. "High risk infant" means any child less than 36 months of age whose genetic, medical, or environmental history is predictive of a substantially greater risk for developmental disability than that for the general population [*Welf. & Inst. Code § 4642*]. If any person requests regional center services and is found to be ineligible, the reasons for denial must be presented in writing to the applicant and, if necessary, a referral to other appropriate services must be arranged. The applicant must also be advised of the appeals procedure [*Welf. & Inst. Code § 4645*; *see Welf. & Inst. Code §§ 4700-4725* (procedure)].

If a regional center determines that a person has a developmental disability and is eligible for services, a planning team consisting of the disabled person, his or her parents or guardian, one or more regional representatives, and any other person or entity invited to participate, must develop an individual program plan [*Welf. & Inst. Code §§ 4512(j), 4646(c), (d)*]. The plan must identify the disabled person's goals, objectives, and needed services and supports, taking into account the individual needs and preferences of the person and his or her family [*Welf. & Inst. Code § 4646(a), (d)*]. It must include a schedule of the type and amount of services and supports to be purchased by the regional center or obtained from generic agencies or other resources in order to achieve the plan's goals and objectives [*Welf. & Inst. Code § 4646.5(a)(4)*]. The plan must be completed within 60 days after completion of the assessment [*Welf. & Inst. Code § 4646(b), (c)*]. This direct service coordination is the regional centers' most important role [*Welf. & Inst. Code § 4640.6(a)*; *Morohoshi v. Pacific Home (2004) 34 Cal. 4th 482, 488, 20 Cal. Rptr. 3d 890, 100 P.3d 433]* .

If a person who is eligible for regional center services moves to another location in the state, he or she must be considered eligible for services offered by the regional center in the new location unless, after a comprehensive reassessment, that center concludes that the original determination that the person has a developmental disability is clearly erroneous [*Welf. & Inst. Code § 4643.5(a), (b)*].

The regional centers secure the needed services by purchasing or obtaining them from direct service providers, such as residential care facilities [*Welf. & Inst. Code §§ 4647(a), 4648(a)(1)*; *Morohoshi v. Pacific Home 100 P.3d 433]* . The direct provision of care is not a responsibility of the regional centers [*Morohoshi v. Pacific Home (2004) 34 Cal. 4th 482, 488-489, 20 Cal. Rptr. 3d 890, 100 P.3d 433]* . Except in emergency situations, regional centers may not provide direct treatment and therapeutic services, but must use appropriate public and private community agencies and service providers to obtain these services [*Welf. & Inst. Code § 4648(f)*]. Regional centers have important, but limited monitoring responsibilities [*Morohoshi v. Pacific Home (2004) 34 Cal. 4th 482, 490, 20 Cal. Rptr. 3d 890, 100 P.3d 433]* . They must monitor the provision of care and services supplied by a provider to ensure they are provided in accordance with the disabled person's individual program plan [*Welf. & Inst. Code §§ 4742, 4743*], and inform the provider of any corrective actions that need to be taken [*Welf. & Inst. Code § 4745*]. A regional center may terminate its contract with a provider if the provider fails to comply with the contract or with applicable law and regulations [*Welf. & Inst. Code § 4648.1(d)*]. A regional center is not required, however, to monitor the provision of care and services on a day-to-day basis, but is only required to provide periodic monitoring [*Morohoshi v. Pacific Home (2004) 34 Cal. 4th 482, 490, 20 Cal. Rptr. 3d 890, 100 P.3d 433]* .

When a minor child requires a living arrangement outside of the family home, the regional center must make every effort to secure a living arrangement, consistent with the individual program plan, in reasonable close proximity to the family home [*Welf. & Inst. Code § 4685.1(a)*]. This requirement may not be construed to impede the movement of

consumers to other geographical areas or the preference of the parent or guardian for the placement of their minor child [*Welf. & Inst. Code § 4685.1(c)*].

[3] State Hospital Admissions

In addition to the procedure provided for the judicial commitment of mentally retarded persons who are dangerous to themselves or to others [*Welf. & Inst. Code §§ 6500-6513*; *see § 304.74, below*], *Welf. & Inst. Code §§ 4653, 4825,* and *6000.5* provide a procedure under which a nonprotesting developmentally disabled adult may be admitted to a state hospital as a "voluntary" patient on application of the person's parent or conservator and referral by a regional center. A judicial hearing must be held prior to a "voluntary" admission under this procedure. The indefinite placement of a developmentally disabled person without prior judicial determination regarding his or her disability or a knowing and intelligent request for admission denies equal protection and due process [*In re Hop (1981) 29 Cal. 3d 82, 92-93, 171 Cal. Rptr. 721, 623 P. 2d 282]* This requirement does not, however, provide a vehicle for judicial commitment of nonconsenting developmentally disabled adults to state hospitals. It only applies constitutional safeguards to this statutory scheme [*In re Violet C. (1989) 213 Cal. App. 3d 86, 88, 94-95, 261 Cal. Rptr. 470]* .

If there is no parent or conservator to apply for admission of a nondangerous developmentally disabled person to a state hospital, the Director of Developmental Services may be appointed conservator of the person in a Probate Code proceeding [*see Welf. & Inst. Code § 4825*; *Health & Safety Code §§ 416, 416.1, 416.9*]. On appointment, the Director may delegate his or her duties as conservator to a regional center or to other designated agencies or individuals [*see Health & Safety Code § 416.19*]. The Director's delegate may then apply to a state hospital for the admission [*North Bay Regional Center v. Sherry S. (1989) 207 Cal. App. 3d 449, 458, 256 Cal. Rptr. 129]* . If the developmentally disabled person is unable to consent to the admission, a judicial hearing and determination is required in addition to the delegate's application for the admission [*North Bay Regional Center v. Sherry S. (1989) 207 Cal. App. 3d 449, 460, 256 Cal. Rptr. 129]* . The same procedural scheme applies to the commitment of a nondangerous developmentally disabled person who objects to the commitment [*see In re Violet C. (1989) 213 Cal. App. 3d 86, 95-97, 261 Cal. Rptr. 470]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentFamily LawFamily Protection & WelfareDependent & Disabled AdultsServicesHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of AdultsPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsGeneral Overview

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§ 304.74 Judicial Commitment

[1] Statutory Grounds in General

Judicial commitments of mentally retarded persons who are dangerous to themselves or to others are governed by *Welf. & Inst. Code §§ 6500-6513*. Judicial commitments generally are governed by *Welf. & Inst. Code §§ 6250-6254*. Procedures for judicial commitment are outlined in the Procedural Checklist, *below*.

[2] Definition of Mental Retardation

For a person to be "mentally retarded" for the purposes of a commitment proceeding under *Welf. & Inst. Code §§ 6500-6513*, evidence must be adduced (1) that the allegedly retarded person has significantly subaverage general intellectual functioning, (2) that this functioning exists concurrently with deficits in adaptive behavior, and (3) that both of these deficits appeared in the developmental period [*In re Krall (1984) 151 Cal. App. 3d 792, 797, 199 Cal. Rptr. 91]* .

[3] Jury Trial and Standard of Proof

Due process of law requires that a developmentally disabled person be entitled to a jury trial on demand prior to commitment [*In re Hop (1981) 29 Cal. 3d 82, 93, 171 Cal. Rptr. 721, 623 P. 2d 282]* . Equal protection and due process also requires the court to *advise* the defendant of his or her right to a jury trial. Before adjudicating commitment or recommitment in a *court* trial, the record must show that the defendant was advised of and waived the right to a jury trial [*People v. Alvas (1990) 221 Cal. App. 3d 1459, 1463-1466, 271 Cal. Rptr. 131* (requirement that court advise defendant of right to jury trial does not apply retroactively)].

Due process also requires the application of the standard of proof beyond a reasonable doubt [*In re Hop (1981) 29 Cal. 3d 82, 93-94, 171 Cal. Rptr. 721, 623 P.2d 282* ; *O'Brien v. Superior Court (1976) 61 Cal. App. 3d 62, 72, 132 Cal. Rptr. 13]* . Additionally, because the definition of mental retardation does not have a meaning commonly understood by people of reasonable intelligence, evidence by a qualified expert is necessary to create an evidentiary foundation for a jury's finding of mental retardation [*In re Krall (1984) 151 Cal. App. 3d 792, 797, 199 Cal. Rptr. 91]*

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[4] Presence at Hearing

In the absence of an affirmative showing that the person is physically unable to attend or has waived personal attendance, due process requires the physical presence of the alleged mentally retarded person at the commitment hearing [*In re Watson (1979) 91 Cal. App. 3d 455, 462, 154 Cal. Rptr. 151]* .

Because commitment proceedings of mentally retarded persons are essentially civil in nature, the subject of the petition may be called as a witness [*see Evid. Code § 776* (examination of adverse party)]. However, the subject may still claim the privilege against self-incrimination; and, to the extent that mental retardation and dangerousness must be proven by evidence of criminal conduct, such evidence must, if the privilege is claimed, be elicited from sources other than the subject [*Cramer v. Tyars (1979) 23 Cal. 3d 131, 137-139, 151 Cal. Rptr. 653, 588 P.2d 793* (error in requiring subject to testify about criminal conduct held harmless if other evidence supporting petition uncontradicted)].

[5] Expiration of Order

An order of commitment made under *Welf. & Inst. Code §§ 6500-6513* expires automatically one year after the order is made. However,subsequent petitions may be filed for additional periods of commitment, following the same procedures as in the original proceeding [*Welf. & Inst. Code § 6500*]. A decision on an appeal of a commitment order that is rendered beyond the one-year period is technically moot. However, a decision may be made on the merits when the issues are important questions of law that could repeatedly evade appellate review if the committed person is likely to be committed in the future [*People v. Quinn (2001) 86 Cal. App. 4th 1290, 1293, 103 Cal. Rptr. 2d 915]* .

[6] Detention Pending Recommitment

During the interim period, if any, between the expiration of a commitment order made under *Welf. & Inst. Code §§ 6500-6513* and the recommitment hearing, a developmentally disabled person may be detained pursuant to an ex parte temporary hold order [*Cramer v. Gillermina R. (1981) 125 Cal. App. 3d 380, 392, 178 Cal. Rptr. 69]* . An adversarial probable cause hearing prior to the temporary detention is not constitutionally required, either on equal protection or on due process grounds. Further, a person detained during the interim period is not entitled to credit for the time he or she is detained prior to recommitment [*Cramer v. Gillermina R. (1981) 125 Cal. App. 3d 380, 387-388, 392, 394, 178 Cal. Rptr. 69]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of Adults

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§ 304.75 Judicial Review by Habeas Corpus

[1] Authority to Seek Review

Every adult who is or has been admitted or committed to a state hospital, community care facility, or health facility as a developmentally disabled person has a right to a hearing by writ of habeas corpus for release from the facility after the person committed or any person acting in his or her behalf makes a request for release to any member of the staff of the state hospital or other facility or to any employee of a regional center [*Welf. & Inst. Code § 4800(a)*]. However, it should be noted that the statutory scheme that provides for the "voluntary" admission of a developmentally disabled adult to a state hospital without a prior judicial hearing has been declared constitutionally infirm, notwithstanding the availability of a writ of habeas corpus pursuant to *Welf. & Inst. Code § 4800* [*see In re Hop (1981) 29 Cal. 3d 82, 90-92, 171 Cal. Rptr. 721, 623 P.2d 282* ; *see also § 304.73[3]*].

Procedures for judicial review are set forth in *Welf. & Inst. Code §§ 4800-4805*. A form for a request for release is set forth in *Welf. & Inst. Code § 4800(d)*. Procedures for judicial review by writ of habeas corpus are *outlined in § 304.223*. For a petition for writ of habeas corpus, *see § 304.280* and Ch. 292, *Habeas Corpus* .

[2] Jury Trial and Standard of Proof

Due process does not require that the alleged developmentally disabled person seeking judicial review on writ of habeas corpus be given the right to request a jury trial. No jury trial is required because a jury trial is provided in the initial judicial commitment proceeding pursuant to *Welf. & Inst. Code § 6500 et seq.* and because no judicial commitment is for longer than a year [*see Welf. & Inst. Code § 6500*], at which time a new petition and hearing, with the right to a jury trial, is required [*see O'Brien v. Superior Court (1976) 61 Cal. App. 3d 62, 72, 132 Cal. Rptr. 13]* . Proof by a preponderance of the evidence rather than proof beyond a reasonable doubt is the proper standard of proof in proceedings for judicial review by writ of habeas corpus [*see O'Brien v. Superior Court (1976) 61 Cal. App. 3d 62, 72, 132 Cal. Rptr. 13]* .

The statutory rules for commitment of dangerous mentally retarded persons [*Welf. & Inst. Code § 6500*] contain no requirement of proof that the dangerous condition be caused by mental retardation. Further, the absence of a causational

requirement is not violative of equal protection rights because the statute furthers the state's compelling interest to protect all dangerous retarded persons, not just those whose violence is caused by retardation [*People v. Quinn (2001) 86 Cal. App. 4th 1290, 1293, 103 Cal. Rptr. 2d 915]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureHabeas CorpusProcedureGeneral OverviewFamily LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of Adults

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[Reserved]

§§ 304.76[Reserved]

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§ 304.90 Actions Brought by Mental Patients

[1] In General

Generally, a person who is not actually insane and who is unlawfully hospitalized or otherwise unlawfully detained may bring a civil action for his or her injuries. Either the one-year statute of limitations for false imprisonment [*Code Civ. Proc. § 340(c)*] or the two-year (one-year, prior to January 1, 2003) statute of limitations for assault, battery, or injury caused by the wrongful act or neglect of another [*Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)*; *Ch. 345, Limitation of Actions, § 345.14*] applies to such actions, even though they may involve violations of the LPS Act [*see Jackson v. Cedars-Sinai Med. Ctr. (1990) 220 Cal. App. 3d 1315, 1321, 269 Cal. Rptr. 877* (complaint alleging violations of *Welf. & Inst. Code §§ 5150, 5250, 5325.1, 5326.2* and *42 U.S.C.S. § 1983* resulting in false imprisonment, assault and battery, and intentional infliction of emotional distress)].

When necessary, a guardian ad litem should be appointed for an incompetent person who is a party to a civil action [*see Code Civ. Proc. §§ 372, 373(c)*]. For discussion and forms for use in proceedings to appoint a guardian ad litem, see Ch. 291, *Guardians ad Litem* .

[2] False Imprisonment

The involuntary hospitalization of a person in a mental institution in violation of relevant statutes constitutes false imprisonment [*Maben v. Rankin (1961) 55 Cal. 2d 139, 144, 10 Cal. Rptr. 353, 358 P.2d 681]* . A good-faith report of the behavior of a person by a doctor who does not recommend to participate in a detention [*Fish v. Regents of University of Cal. (1966) 246 Cal. 327, 331-332, 54 Cal. Rptr. 656]* or the fact that a doctor testified at a hearing that the person was insane [*Baer v. Smith (1945) 68 Cal. App. 2d 716, 721, 157 P.2d 646]* does not make the doctor liable for false imprisonment. Liability for false imprisonment may be based on lack of probable cause for the detention [*see Whaley v. Jansen (1962) 208 Cal. App. 2d 222, 229, 25 Cal. Rptr. 184* (*see Welf. & Inst. Code § 5150*)]. Failure by the sheriff to serve a petition for a commitment hearing in violation of the statutory requirements may also be the basis of a false imprisonment action [*see Culbertson v. Santa Clara County (1968) 261 Cal. App. 2d 274, 275, 67 Cal. Rptr. 752* (decided under former *Welf. & Inst. Code § 5050.2* (*now see Welf. & Inst. Code § 5208*))]. Release of the plaintiff by writ of habeas corpus is immaterial to an action for false imprisonment based on lack of probable cause, since there may

have been probable cause for the detention although the plaintiff was entitled to release under the standard applicable in habeas corpus proceedings for release [*Whaley v. Kirby (1962) 208 Cal. App. 2d 232, 238, 25 Cal. Rptr. 50* ; *Vallindras v. Massachusetts Bonding & Ins. Co. (1954) 42 Cal. 2d 149, 155, 265 P.2d 907]* . For further discussion and forms for use in actions for false imprisonment generally, see Ch. 257, *False Imprisonment* .

[3] Assault and Battery

When force is used to accomplish the unlawful detention of a person as a mental patient, there may be liability for assault and battery. The use of force in the treatment of the patient hospitalized may not, however, constitute assault and battery in all circumstances. Further, there is not necessarily such a close relationship between detention and treatment that any treatment, even though in itself proper, becomes unlawful merely because it is given during an unlawful detention [*Maben v. Rankin (1961) 55 Cal. 2d 139, 144, 10 Cal. Rptr. 353, 358 P.2d 681]* . For discussion and forms concerning actions for assault and battery generally, see Ch. 58, *Assault and Battery* .

[4] Malicious Prosecution

One who initiates a civil proceeding against another which alleges the other's insanity is liable for the harm to the other's reputation caused by the proceedings if [*Brock v. Southern Pac. Co. (1948) 86 Cal. App. 2d 182, 185, 195 P.2d 66]* :

- The proceedings are initiated without probable cause and primarily for a purpose other than that of securing the adjudication of the claim on which the proceedings are based, and

- Except where they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

When the commitment proceeding is dismissed, such a dismissal constitutes a favorable termination of the proceeding for purposes of a malicious prosecution action [*Sutherland v. Palme (1949) 93 Cal. App. 2d 307, 312-313, 208 P.2d 1035]* . For discussion and forms for use in malicious prosecution actions generally, see Ch. 357, *Malicious Prosecution and Abuse of Process* .

[5] Negligent Harm to Mental Patient

When a mentally ill patient is confined for care and treatment in the psychiatric ward of a hospital, there is a duty imposed by law on the hospital to exercise such reasonable care toward the patient as the patient's mental and physical condition, if known, requires. The duty extends to safeguarding the patient from dangers due to mental incapacity [*Vistica v. Presbyterian Hosp. (1967) 67 Cal. 2d 465, 469, 62 Cal. Rptr. 577, 432 P.2d 193]* . If those charged with the care and treatment of a mentally disturbed patient have notice or knowledge of facts from which they could reasonably conclude that the patient would be likely to harm himself or herself in the absence of preclusive measures, then they must use reasonable care under the circumstances to prevent such harm [*Meier v. Ross Gen. Hosp. (1968) 69 Cal. 2d 420, 424, 71 Cal. Rptr. 903, 445 P.2d 519]* .

Whenever the facts of a case support a theory of liability based on a duty to protect plaintiff from his or her own actions, voluntary or involuntary, the plaintiff may properly rely on res ipsa loquitur although plaintiff participated in events leading to the accident, if the evidence excludes plaintiff's conduct as the responsible cause [*Meier v. Ross Gen. Hosp. (1968) 69 Cal. 2d 420, 427, 71 Cal. Rptr. 903, 445 P.2d 519* ; *Vistica v. Presbyterian Hosp. (1967) 67 Cal. 2d 465, 470-471, 62 Cal. Rptr. 577, 432 P.2d 193]* . The applicability of the doctrine of res ipsa loquitur may depend on whether the jury believes that plaintiff was in such a state as to make him or her irrational and not responsible for taking an action such as attempting escape which results in plaintiff's injury. The applicability of res ipsa loquitur may be submitted to the jury where there is such a question of fact [*DeMartini v. Alexander Sanitarium, Inc. (1961) 192 Cal.*

App. 2d 442, 446, 13 Cal. Rptr. 564] .

The question of the contributory negligence of a mental patient is a question of fact, unless the evidence discloses that the plaintiff is completely devoid of reason, in which case the plaintiff would be entitled tohave the jury so instructed. The position of such a plaintiff would be like that of a child of tender years, who is incapable of contributory negligence as a matter of law [*DeMartini v. Alexander Sanitarium, Inc. (1961) 192 Cal. App. 2d 442, 447, 13 Cal. Rptr. 564]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawActions Against FacilitiesGeneral OverviewHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of AdultsTortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsFalse ImprisonmentElementsTortsIntentional TortsMalicious ProsecutionElementsGeneral OverviewTortsProcedureStatutes of LimitationsGeneral Overview

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§ 304.91 Suicide

A defendant's liability for the wrongful death of one who committed suicide arises in two situations. First, a psychiatrist who knows of facts from which he or she could reasonably conclude that a patient would be likely to harm himself or herself in the absence of preclusive measures has a duty to use reasonable care under the circumstances to prevent such harm [*Meier v. Ross Gen. Hosp. (1968) 69 Cal. 2d 420, 424, 71 Cal. Rptr. 903, 445 P.2d 519* ; *Bellah v. Greenson (1978) 81 Cal. App. 3d 614, 619, 146 Cal. Rptr. 535* ; for a complaint against a hospital in such a case, see Ch. 295, *Hospitals*]. Although the duty of care varies in each case, it exists regardless of whether the patient had been institutionalized or was merely being seen by the psychiatrist on an out-patient basis [*Kockelman v. Segal (1998) 61 Cal. App. 4th 491, 501-505, 71 Cal. Rptr. 2d 552* ; for a complaint in an out-patient case, *see § 304.301*]. However, the duty to take measures to prevent a patient from committing suicide does not extend beyond the patient's unconditional release [*Katona v. County of Los Angeles (1985) 172 Cal. App. 3d 53, 59, 218 Cal. Rptr. 19]* .

The standard of care by which the conduct of the psychiatrist is measured may be either a professional medical standard or an ordinary negligence standard, depending on whether the conduct which led to the suicide was based on good-faith medical reasons or was without any peculiarly "medical" justification [*Meier v. Ross Gen. Hosp. (1968) 69 Cal. 2d 420, 429, 433, 71 Cal. Rptr. 903, 445 P.2d 519* (also permitting a res ipsa loquitur instruction to be given where evidence showed that, as a matter of common knowledge, injury would not have occurred unless defendant had been negligent)]. In determining the amount of care required of the psychiatrist in a particular case, the fact that the psychiatrist failed to disclose information respecting the decedent's likelihood of committing suicide, even to the decedent's closest relatives, may not be considered in the absence of evidence showing that the risk to be prevented thereby was a danger of violent assault on another person [*Bellah v. Greenson (1978) 81 Cal. App. 3d 614, 622, 146 Cal. Rptr. 535]* .

In alleging the psychiatrists failure to take preventive measures, the plaintiff need not specify the nature of the precautionary steps which could or should have been taken by the defendant. This presents a purely factual question to be resolved at a trial on the merits [*Bellah v. Greenson (1978) 81 Cal. App. 3d 614, 620, 146 Cal. Rptr. 535]* .

The second situation in which defendant may be liable for a person's suicide arises when the suicide is a proximate

result of a mental condition for which the defendant was either negligently or intentionally responsible. Thus, if the defendant intended by his or her conduct to cause serious mental distress or physical suffering, and did so, and such distress or suffering is shown to have been a substantial factor in bringing about the suicide, a cause of action for wrongful death results. It is irrelevant that the suicide was committed either in a state of insanity or in response to an irresistible impulse [*Tate v. Canonica (1960) 180 Cal. App. 2d 898, 909, 5 Cal. Rptr. 28]* . On the other hand, a defendant is only responsible for a suicide as a result of his or her negligent conduct if, by acting negligently, he or she causes a mental condition which results in an uncontrollable impulse to commit suicide. It should be stressed that it is the uncontrollable impulse for which the defendant is responsible. If the act only causes a mental condition in which the decedent was able to realize the nature of an act of suicide and has the power to control it if he or she so desired, the act is an independent intervening force [*Tate v. Canonica (1960) 180 Cal. App. 2d 898, 915, 5 Cal. Rptr. 28* ; *see Grant v. F.P. Lathrop Constr. Co. (1978) 81 Cal. App. 3d 790, 797-799, 146 Cal. Rptr. 45* ; for complaints for the negligent and intentional infliction of mental distress, *see* Ch. 362, *Mental Suffering and Emotional Distress*].

Damages recoverable against the tortfeasor are governed by *Code Civ. Proc. § 377.61* (wrongful death actions) and *Code Civ. Proc. § 377.34* (survival actions). For detailed discussion of damages recoverable in wrongful death and survival actions, see Ch. 181, *Death and Survival Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersDoctors & PhysiciansTortsNegligenceCausationProximate CauseGeneral OverviewTortsNegligenceStandards of CareSpecial CareHighly Skilled ProfessionalsTortsWrongful Death & Survival ActionsGeneral Overview

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§ 304.92 Negligent Misdiagnosis by Psychiatrist or Psychologist

The liability of a mental health professional for causing the wrongful detention of a person whom the professional has misdiagnosed as having a mental disorder is discussed in *§ 304.90[2]*.

A clinical psychologist is not liable for indirectly discouraging adoption of a minor through negligently misdiagnosing the minor as mentally retarded [*Smith v. Alameda County Soc. Servs. Agency (1979) 90 Cal. App. 3d 929, 941, 153 Cal. Rptr. 712]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare Providers

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§ 304.93 Harm Caused by Mentally Disordered Persons

[1] Actions Against Mentally Disordered Persons

Civ. Code § 41 provides that a person of unsound mind, of whatever degree, is civilly liable for a wrong he or she commits, but is not liable for exemplary damages unless, at the time of the act, the person was capable of knowing that the act was wrongful. This statute is intended to place an incompetent person in the same posture as a competent person [*Herrle v. Estate of Marshall (1996) 45 Cal. App. 4th 1761, 1766, 53 Cal. Rptr. 2d 713]* . It is a codification of the common law, and is based on severalpolicy considerations, including that, as between two innocent persons, the one whose act caused the injury should bear the loss. It also avoids the difficult evidentiary problems in attempting to estimate the existence and extent of a person's mental deficiency. Finally, imposing liability encourages those responsible for incompetent persons to provide care for them so as to avoid injury to others [*Herrle v. Estate of Marshall (1996) 45 Cal. App. 4th 1761, 1766, 53 Cal. Rptr. 2d 713]* .

The defense of assumption of the risk is available to an incompetent defendant in an action by a caregiver for injuries caused by the defendant, when the caregiver has consented to care for mentally ill patients who are known to be occasionally violent and combative [*Herrle v. Estate of Marshall (1996) 45 Cal. App. 4th 1761, 1765-1768, 53 Cal. Rptr. 2d 713]* . Because of the nature of the activity of caring for the mentally infirm, and the relationship between patients and caregivers, mentally incompetent patients should not owe a legal duty to protect caregivers from injuries suffered in attending to them [*Herrle v. Estate of Marshall (1996) 45 Cal. App. 4th 1761, 1770-1771, 53 Cal. Rptr. 2d 713* (health care provider, not patient, is in best position to protect against risks to provider based on very reason for treatment)].

[2] Actions Against Therapists

Civ. Code § 43.92 provides that on or after January 1, 1986, there is no monetary liability on the part of, and no cause of action arises against, any psychotherapist as defined in *Evid. Code § 1010* in failing to warn of and protect from a patient's threatened violent behavior or failing to predict and warn of and protect from a patient's violent behavior except if the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims [*Civ. Code § 43.92(a)*; *see* *Calderon v. Glick (2005) 131 Cal. App. 4th 224, 232, 31 Cal.*

Rptr. 3d 707 (no duty to warn if patient consistently denied to psychotherapists that patient intended to harm anyone); *Barry v. Turek (1990) 218 Cal. App. 3d 1241, 1244-1246, 267 Cal. Rptr. 553]* . There is no monetary liability on the part of, and no cause of action against, a psychotherapist who discharges his or her duty to warn and protect under these limited circumstances by making reasonable efforts to communicate the threat to the victims and to a law enforcement agency [*Civ. Code § 43.92(b)*; *see also Welf. & Inst. Code § 5328* (authorizing release of patient's confidential records by psychotherapist in certain situations)]. No monetary liability or cause of action can be brought against a psychotherapist who discharges his or her duty to warn [*Civ. Code § 43.92(b)*]. The constitutionality of *Civ. Code § 43.92* has been upheld [*Ewing v. Goldstein (2004) 120 Cal. App. 4th 807, 821, 15 Cal. Rptr. 3d 864]* .

A therapist has no duty to warn an individual when the patient has not communicated to the therapist any threats of physical violence against that individual [*Calderon v. Glick (2005) 131 Cal. App. 4th 224, 230-232, 31 Cal. Rptr. 3d 707]* . A therapist also is not liable for professional malpractice to such an individual who is harmed by the therapist's patient, because the therapist does not owe a duty of care to the individual [*Calderon v. Glick (2005) 131 Cal. App. 4th 224, 232-234, 31 Cal. Rptr. 3d 707]* .

In one case, for example, the court of appeal held that a psychiatrist owed no duty of care to the neighbors of a patient when the patient shot and killed two of the neighbors' family members. The surviving family members argued that the psychiatrist's negligent prescription of drugs to the patient caused him to become violent and caused the shooting. The court concluded, however, that despite plaintiffs' causation argument, they neglected to show first that the psychiatrist owed them a duty of care, a requirement to establishing liability. The court noted that the patient, who had come to the psychiatrist with a preexisting mental disorder, had exhibited no violent tendencies nor expressed any dangerous motives against the neighbors that would have put the psychiatrist on notice that the patient may have been a danger to his eventual victims. Absent such advance indicators of potential violence towards the neighbors, the psychiatrist owed no duty of care to protect them from potential danger [*Greenberg v. Superior Court (2009) 172 Cal. App. 4th 1339, 1348-1350, 92 Cal. Rptr. 3d 96]* .

Under case law existing prior to 1986, when a therapist determined, or pursuant to the standards of the profession should have determined, that a patient presented a serious danger of violence to another, the therapist incurred an obligation to use reasonable care to protect the intended victim against the danger [*see* *Hedlund v. Superior Court (1983) 34 Cal. 3d 695, 700-704, 194 Cal. Rptr. 805, 669 P.2d 41* ; *Tarasoff v. Regents of University of Cal. (1976) 17 Cal. 3d 425, 431, 131 Cal. Rptr. 14, 551 P.2d 334* (decided prior to 1985 enactment of *Civ. Code § 43.92*)].

Although *Civ. Code § 43.92* states that the communication must come from the patient to trigger a duty to warn, the court of appeal has held that the duty to warn is also triggered under the statute if the threat of harm is communicated to the psychotherapist by a member of the patient's immediate family for the purpose of facilitating and furthering the patient's treatment [*Ewing v. Goldstein (2004) 120 Cal. App. 4th 807, 817, 15 Cal. Rptr. 3d 864* (triable issue of fact existed as to whether duty was triggered by information known to therapist)]. Expert medical testimony is not required to prove that the psychotherapist actually believed or predicted that the patient posed a serious threat of physical violence to another person [*Ewing v. Northridge Hosp. Med. Ctr. (2004) 120 Cal. App. 4th 1289, 1302-1304, 16 Cal. Rptr. 3d 591]* .

Despite the warning requirement imposed by *Civ. Code § 43.92*, one court of appeal opinion held that because the statute is designed to protect "a reasonably identifiable victim or victims," a failure to warn under the statute may not be used to hold a psychiatrist liable for injuries caused to a police officer by a patient, if the psychiatrist knew only that the patient harbored homicidal feelings for his work supervisor [*Tilley v. Schulte (1999) 70 Cal. App. 4th 79, 85-86, 82 Cal. Rptr. 2d 497]* . In that particular case, the patient had not told the psychiatrist that he harbored generalized homicidal feelings or that he desired to harm the police officer, and the incident the officer was investigating at the time did not involve the patient's work supervisor. The psychiatrist's failure to report the hostile feelings toward the patient's supervisor did not result in liability for the injuries to the officer under *Civ. Code § 43.92*, because, under the facts, that statute could only be used to protect the supervisor [*see* *Tilley v. Schulte (1999) 70 Cal. App. 4th 79, 85-86, 82 Cal.*

Rptr. 2d 497] .

A communication made by a member of the patient's family to the patient's therapist for the purpose of advancing the patient's therapy is a patient communication within the meaning of *Civ. Code § 43.92*. Thus, a therapist's duty to warn a victim arises if the information communicated by the family member leads thetherapist to believe or predict that the patient poses a serious risk of grave bodily injury to this individual [*Ewing v. Goldstein (2004) 120 Cal. App. 4th 807, 817-820, 15 Cal. Rptr. 3d 864]* . For example, a statement by a patient's father to his son's therapist relatinga threat the son had made against the boyfriend of the son's former girlfriend should have been considered a patient communication in determining whether the therapist's duty to warn was triggered [*Ewing v. Goldstein (2004) 120 Cal. App. 4th 807, 817-820, 15 Cal. Rptr. 3d 864]* . The statute only applies, however, to statements by family members of a threat made by the patient, not to statements of a mere belief that the patient poses a danger [*Ewing v. Goldstein (2004) 120 Cal. App. 4th 807, 820 fn. 12, 15 Cal. Rptr. 3d 864]* .

A therapist has a duty to warn if, and only if, the threat the therapist has learned--whether from the patient or a family member--actually leads the therapist to believe the patient poses a risk of grave bodily injury to another person [*Ewing v. Goldstein (2004) 120 Cal. App. 4th 807, 821, 15 Cal. Rptr. 3d 864]* . A threat to take another's life, if believed, is sufficient to trigger a therapist's duty to warn the intended victim and a law enforcement agency. The duty to warn can also arise if the therapist becomes aware that the patient intends to commit an act of grave bodily injury, akin to "mayhem" as defined by *Pen. Code § 203* or "serious bodily injury" as defined by *Pen. Code § 243(f)(4)* [*Ewing v. Goldstein (2004) 120 Cal. App. 4th 807, 821, 15 Cal. Rptr. 3d 864]* .

An action by a person a patient injures based on a psychiatrist's failure to comply with the duties imposed under the involuntary commitment procedures of the LPS Act is not barred by *Civ. Code § 43.92* or *Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334* [*Bragg v. Valdez (2003) 111 Cal. App. 4th 421, 433-435, 3 Cal. Rptr. 3d 804]* . However, the immunity afforded by *Welf. & Inst. Code § 5154* applies in a case in which a psychiatrist fails to warn an individual of a patient's specific threats of harm against that individual, and the patient harms the individual, as long as the psychiatrist authorized release of the patient in accordance with the required statutory findings, *i.e.*, that the patient no longer posed a threat to self or others [*Michael E.L. v. County of San Diego (1986) 183 Cal. App. 3d 515, 523-524, 527, 530, 228 Cal. Rptr. 139* (psychiatrist owes duty under *Tarasoff* to take reasonable care to protect intended victim from danger of serious violence he or she perceives in person placed under 72-hour hold for evaluation and treatment, but is immune from liability if person's release complies with statutory requirements)].

[3] Actions Against Relatives

The public policy of California allows a person to walk the streets of the state even if mentally ill [*Alva v. Cook (1975) 49 Cal. App. 3d 899, 906, 123 Cal. Rptr. 166]* . As a result, when the relatives of a person cannot successfully petition under the LPS Act for the person's commitment, they are not liable on a negligence theory for caring for the person at home so that the person was able to injure a third party [*Alva v. Cook (1975) 49 Cal. App. 3d 899, 906, 123 Cal. Rptr. 166]* . In the absence of ultimate pleaded facts showing that the person was dangerous to himself or to herself or to others at least sufficient to warrant a reasonable assumption that a petition for evaluation or commitment under the LPS Act would be granted, a court will not equate relatives' assumption of a moral obligation to care for a mentally disordered relative to a guarantee and indemnification agreement for the person's conduct on or off the relatives' premises. A court has refused to hold that the relatives' take care of the person at their risk [*see* *Alva v. Cook (1975) 49 Cal. App. 3d 899, 909, 123 Cal. Rptr. 166]* .

[4] Notice of Release on Outpatient Status

Although not creating civil liability for any violation of its provisions, *Penal Code § 1603* does give the victim, or the next of kin of the victim, of the offense for which a person has been committed the right to request notice of the

offender's release on outpatient status. In any case in which the victim or victim's next of kin has filed a request for notice with the director of the state hospital or other treatment facility, he or she must be notified by the director at the inception of any program in which the committed person would be allowed any type of day release unattended by staff of the facility [*Penal Code § 1603(a)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersDoctors & PhysiciansTortsDamagesPunitive DamagesGeneral OverviewTortsIntentional TortsDefensesIntentTortsNegligenceDutyAffirmative Duty to ActSpecial RelationshipsHealthcare ProvidersTortsVicarious LiabilityFamily MembersGeneral Overview

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§ 304.94 Governmental Immunity and Liability: Tort Claims Act

Under the California Tort Claims Act [*Gov. Code §§ 810-996.6*], a public entity or public employee engaging in medical activities concerning a mental patient has a limited immunity from tort liability. Generally, the Government Code sections dealing with governmental immunity or responsibility for torts of employees in dealing with mental patients are intended to provide immunity for diagnosing, treating, confining, and releasing the mentally ill, but to make clear that public entities and employees are liable for injuries caused by negligent or wrongful acts or omissions in administering or failing to administer prescribed treatment or confinement [*Los Angeles County v. Superior Court (1965) 62 Cal. 2d 839, 843-844, 44 Cal. Rptr. 796, 402 P.2d 868* ; *Hernandez v. State of California (1970) 11 Cal. App. 3d 895, 899, 90 Cal. Rptr. 205]* . Public entities have been held to enjoy an absolute immunity for injuries caused by patients of mental institutions under *Gov. Code § 854.8* [*Guess v. California (1979) 96 Cal. App. 3d 111, 120, 157 Cal. Rptr. 618]* . Limits on liability of public employees and entities for injuries to persons in mental institutions is not a denial of equal protection of the laws to such persons [*Los Angeles County v. Superior Court (1965) 62 Cal. 2d 839, 846, 44 Cal. Rptr. 796, 402 P.2d 868* ; *Goff v. County of Los Angeles (1967) 254 Cal. App. 2d 45, 51, 61 Cal. Rptr. 840]* . For discussion and forms concerning the Tort Claims Act generally, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* . For discussion and forms concerning the medical liability provisions of the Tort Claims Act, see Ch. 295, *Hospitals* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesDefensesImmunityTortsPublic Entity LiabilityImmunitySovereign ImmunityTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview

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§ 304.95 Statutory Liability to Person Detained

If the probable cause to detain a person as mentally disordered is based on the statement of a person other than a peace officer, a member of the attending staff, or a professional person, the person making the statement is liable in a civil action for intentionally giving a statement which he or she knows to be false [*Welf. & Inst. Code § 5150*]. Further, any individual who seeks a petition for court-ordered evaluation knowing that the person for whom the petition is sought is not, as a result of mental disorder, a danger to others, or to himself or herself, or gravely disabled is guilty of a misdemeanor, and may be held liable in civil damages by the person against whom the petition was sought [*Welf. & Inst. Code § 5203*].

Any individual who is knowingly and willfully responsible for detaining a person for more than 14 days is liable to that person in civil damages [*Welf. & Inst. Code § 5255*], and a person who knowingly and willingly detains a person for more than 14 days in violation of the provisions for release of suicidal persons certified for additional treatment is liable to that person in civil damages [*Welf. & Inst. Code § 5265*].

Any physician who intentionally violates *Welf. & Inst. Code §§ 5326.2-5326.8* (patients' rights) is subject to a civil penalty of not more than $5,000 for each violation. This penalty may be assessed and collected in a civil action brought by the Attorney General in a superior court [*Welf. & Inst. Code § 5326.9(c)*]. The remedy provided by this section is in addition to and not in substitution for any other remedies which a person may have under law [*Welf. & Inst. Code § 5326.9(c)*].

Every adult who is or has been committed or admitted to a state hospital, community care facility, health facility, developmental center, or any other appropriate placement permitted by law, as a developmentally disabled patient has a right to a hearing by writ of habeas corpus for release from the facility after the person or anyone acting in his or her behalf makes a request for release. The staff member to whom the request is made has a duty to inform the person of rights and to provide a request for release form, among other things. Any person who intentionally violates this section is guilty of a misdemeanor [*see Welf. & Inst. Code § 4800(a)-(c)*]. Additionally, a state hospital, or other facility, may not admit any adult as a developmentally disabled patient on recommendation of a regional center unless a copy of a certificate showing that there has been no objection to the admission has been transmitted to the hospital or other

facility. Any person knowingly certifying that no objection has been made, knowing that an objection has in fact been made, is guilty of a misdemeanor [*Welf. & Inst. Code § 4803*].

A person requesting release on certification for intensive treatment pursuant to the LPS Act has a right to judicial review and to be informed of certain rights in that regard (see the discussion in *§ 304.144[6][d]*). Any person who intentionally violates the section of the Welfare and Institutions Code providing for the right of the patient to request release and to be informed of his or her rights is guilty of a misdemeanor [*Welf. & Inst. Code § 5275*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentDischarge & Release of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of Adults

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§ 304.96 Statutory Immunity From Liability for Acts of Person Detained

Notwithstanding *Welf. & Inst. Code § 5113*, if the provisions of *Welf. & Inst. Code § 5152* have been met, the professional person in charge of the facility providing 72-hour treatment and evaluation, his or her designee, the medical director of the facility or his or her designee described in *Welf. & Inst. Code § 5152*, the psychiatrist directly responsible for the person's treatment, or the psychologist, will not be held civilly or criminally liable for any action by a person released before the end of 72 hours [*Welf. & Inst. Code § 5154(a)*]. For purposes of applying this immunity, the releasing professional is only required to show that the provisions of *Welf. & Inst. Code § 5152* actually dealing with early release have been met and need not show compliance with other provisions of *Welf. & Inst. Code § 5152*. Therefore, the professional must show only that he or she had a subjective belief, based on his or her personal observations, that the person being evaluated no longer required evaluation and treatment [*Coburn v. Sievert (2005) 133 Cal. App. 4th 1483, 1500-1505, 35 Cal. Rptr. 3d 596]* .

The professional person in charge of the facility providing 72-hour treatment and evaluation, his or her designee, the medical designee, the medical director of the facility or his or her designee described in *Welf. & Inst. Code § 5152*, the psychiatrist directly responsible for the person's treatment, or the psychologist, will not be held civilly or criminally liable for any action by a person released at the end of the 72 hours pursuant to this article [*Welf. & Inst. Code § 5154(b)*].

The peace officer responsible for the detainment of the person is not civilly or criminally liable for any action by a person released at or before the end of 72 hours pursuant to this article [*Welf. & Inst. Code § 5154(c)*; *see Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 449-450, 131 Cal. Rptr. 14, 551 P.2d 334]* . Similar exemptions from liability exist for other types of detention and release pursuant to the LPS Act [*see Welf. & Inst. Code § 5173* (inebriates released at or before 72 hours); *Welf. & Inst. Code § 5257* (release of person certified for intensive treatment at or before end of 14 days); *Welf. & Inst. Code § 5267* (release of person held for further intensive treatment at or before end of 14 days)]. Additionally, individuals authorized to detain a person under the various procedures of the LPS Act are not either criminally or civilly liable for exercising that authority in accordance with law [*see Welf. & Inst. Code § 5278*; *see also Cruze v. National Psychiatric Servs., Inc. (2003) 105 Cal. App. 4th 48, 56, 129 Cal. Rptr. 2d 65* (immunity under *Welf. & Inst. Code § 5278* extends to institutions and agencies with or by which health care professionals are

associated, affiliated, or employed)]. This immunity applies only to claims based on facts inherent to involuntary detention, however, and does not extend to other tortious or criminal wrongs committed during the course of detention, evaluation, or treatment [*Jacobs v. Grossmont Hosp. (2003) 108 Cal. App. 4th 69, 78-79, 133 Cal. Rptr. 2d 9* ; *see Gonzalez v. Paradise Valley Hosp. (2003) 111 Cal. App. 4th 735, 741, 3 Cal. Rptr. 3d 903* (*Welf.& Inst. Code § 5278* is inapplicable to actions for negligence stemming from acts or omissions in evaluation or treatment during 72-hour hold)]. Protected conduct is confined to the exercise of statutory authority to detain, evaluate, and treat against a patient's wishes; immunity does not extend to the manner in which evaluation and treatment are conducted [*Gonzalez v. Paradise Valley Hosp. (2003) 111 Cal. App. 4th 735, 741, 3 Cal. Rptr. 3d 903]* .

In addition, a treating psychiatrist who releases a patient who has been involuntarily committed under the LPS Act, merely because the patient does not have insurance, may be liable to the patient and any person the patient injures. The immunities for treating psychiatrists contained in the Act are not applicable, unless the treating psychiatrist complies with the requirements of the Act before releasing a patient--that is, the psychiatrist must believe, based on his or her own personal observations, that the patient is no longer a danger [*Bragg v. Valdez (2003) 111 Cal. App. 4th 421, 425, 433, 3 Cal. Rptr. 3d 804]* . A psychiatrist's decision to release a patient under the Act must be made on medical, not monetary, grounds [*Bragg v. Valdez (2003) 111 Cal. App. 4th 421, 431-432 fn. 10, 3 Cal. Rptr. 3d 804* (suggesting actions that might appropriately be taken to transfer uninsured patient to public facility for treatment)]. An action by a person the patient injures based on a psychiatrist's failure to comply with the duties imposed under the involuntary commitment procedures of the LPS Act is not barred by *Civ. Code § 43.92* or *Tarasoff v. Regents of University of California* [*Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334]* , which preclude a cause of action against a psychotherapist for failing to warn of a patient's threatened violent behavior unless the patient has made a serious threat of physical violence against a reasonably identifiable victim [*Bragg v. Valdez (2003) 111 Cal. App. 4th 421, 433-435, 3 Cal. Rptr. 3d 804]* .

The immunity afforded by *Welf. & Inst. Code § 5154 does* apply in a case in which a psychiatrist fails to warn an individual of a patient's specific threats of harm against that individual, and the patient harms the individual, as long as the psychiatrist authorized release of the patient in accordance with the required statutory findings--that is, that the patient no longer posed a threat to self or others [*Michael E.L. v. County of San Diego (1986) 183 Cal. App. 3d 515, 523-524, 527, 530, 228 Cal. Rptr. 139* (psychiatrist owes duty under *Tarasoff* to take reasonable care to protect intended victim from danger of serious violence he or she perceives in person placed under 72-hour hold for evaluation and treatment, but is immune from liability if person's release complies with statutory requirements)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersDoctors & PhysiciansPublic Health & Welfare LawHealthcareMental Health ServicesTreatmentTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceDefensesPrivate ImmunitiesGeneral Overview

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§ 304.97 Constitutional Protections

[1] Inaccuracy of Psychiatric Predictions

The concern of the legislature and courts was at one time to minimize formal court procedure and to work toward a change in public attitudes as to proceedings for the commitment of the mentally ill, from commitment like a criminal to admission like a patient. This change considered modernization of commitment legislation [*see Brock v. Southern Pac. Co. (1948) 86 Cal. App. 2d 182, 185, 195 P.2d 66]* . The modern trend however, is toward recognition of the limits of psychiatric determinations as medical determinations and of a consequent need for judicial safeguards of the rights of the allegedly mentally disordered. It has been recognized, for example, that psychiatrists still experience considerable difficulty in confidently and accurately diagnosing mental illness and that those difficulties are multiplied manyfold when psychiatrists venture from diagnosis to prognosis and undertake to predict the consequences of such an illness. There is a growing concensus that psychiatrists are not uniquely qualified to predict dangerous behavior and are, in fact, less accurate in their predictions than other professionals. The same studies which proved the inaccuracy of psychiatric predictions have demonstrated beyond dispute the no less disturbing manner in which such prophecies consistently err: they predict acts of violence that will not in fact take place, thus branding as "dangerous" many persons who are in reality totally harmless. A court has, however, declined to reach the conclusion that no psychiatrist should be permitted in civil commitment proceedings to give an opinion as to the future dangerousness of a person and that any commitment based on such an opinion constitutes a deprivation of liberty without due process of law [*People v. Burnick (1975) 14 Cal. 3d 306, 326-328, 121 Cal. Rptr. 488, 535 P.2d 352]* .

[2] Stigma and Abridgment of Personal Freedom

Proceedings to determine whether a person is mentally ill are, technically, civil rather than criminal proceedings [*People v. Parriera (1965) 237 Cal. App. 2d 275, 284, 46 Cal. Rptr. 835* (deciding that a declaration of intent to commit suicide was not admissible under the hearsay rule as a declaration against penal interest since it could not lead to criminal prosecution but only to proceedings for commitment civil in nature)]. The Supreme Court, however, has noted the social stigma attached to mental illness. The enlightened view and the treatment of the mentally ill as subjects of understanding and compassion rather than ignorance and aversion, the Court has noted, does not prevail [*see People v. Burnick (1975) 14 Cal. 3d 306, 321, 121 Cal. Rptr. 488, 535 P.2d 352]* . The Court has also noted as indisputable fact

that civil commitment entails a massive curtailment of liberty in the constitutional sense and that the destruction of an individual's personal freedoms effected by civil commitment is scarcely less total than that effected byconfinement in a penitentiary. The Court has also noted that civil commitment, because it is for an indefinite term, may in some ways involve a more serious abridgment of personal freedom than imprisonment for commission of a crime usually does, that civil commitment involves stigmatizing the affected individuals, and thatthe stigma attached, although in theory less severe than the stigma attached to criminal conviction, may in reality be as severe, or more so [*see People v. Burnick (1975) 14 Cal. 3d 306, 322-323, 121 Cal. Rptr. 488, 535 P.2d 352]* .

[3] Procedural Safeguards

Although the LPS Act authorizes a commitment process somewhat more medical and with fewer legal procedures than the civil commitment procedures which it repealed, nevertheless the provisions of the act requiring notice of the 14-day certification for involuntary intensive treatment to be given to the superior court and to various attorneys, among others, and the express specification of the rights of a patient who requests release to have counsel appointed and to seek habeas corpus demonstrate the concern of the legislature that the patient's rights receive full protection at all times [*Thorn v. Superior Court (1970) 1 Cal. 3d 666, 674, 83 Cal. Rptr. 600, 464 P.2d 56]* . Due process requires conveying to the patient a realistic notice that he or she has been certified for 14-day intensive treatment but that he or she has a right to counsel and to seek release on habeas corpus. Absent an understanding by the patient of the nature of the detention and of the rights, the patient cannot knowingly decide whether or not to exercise them. Many patients, for example, will be undergoing treatment with sedating and tranquilizing drugs, and others may lack the capacity to comprehend the nature of the notice of certification. It is therefore appropriate that additional procedures be established which will assure that the patient's rights receive meaningful protection [*Thorn v. Superior Court (1970) 1 Cal. 3d 666, 674-675, 83 Cal. Rptr. 600, 464 P.2d 56* (affirming superior court order that all certified patients be visited by counsel)].

Since commitment proceedings are purely statutory and not based on the common law, jurisdiction to enter an order of commitment depends on strict complaince with each of the specific statutory prerequisites for maintenance of the proceeding. The requirements of the statute must be at least substantially, if not strictly, followed, in order to give the court jurisdiction [*In re Raner (1963) 59 Cal. 2d 635, 639, 30 Cal. Rptr. 814, 381 P.2d 638* ; *In re Hofmann (1955) 131 Cal. App. 2d 758, 761-762, 281 P.2d 96]* .

[4] Right to Treatment

It has been said that the insane have always been subject to the control of the state both for their own protection and for the protection of others [*Dribin v. Superior Court (1951) 37 Cal. 2d 345, 352, 231 P.2d 809]* . The states in their character as parens patriae have the general duty of caring for insane persons. The prerogative is a segment of the police power. In the exercise of that power, insane persons may be restrained and confined both for the welfare of themselves and for the protection of the public. If the exactions of due process are met, such restraint and confinement do not violate any constitutional right of the individual [*Higgins v. United States (9th Cir. 1953) 205 F.2d 650, 653]* .

The United States Supreme Court has declined to decide whether mentally ill persons dangerous to themselves or to others have a right to treatment on compulsory confinement by the state, or whether the state may compulsorily confine a nondangerous, mentally ill individual for the purpose of treatment. The court, however, has considered the case of the confinement of a nondangerous individual and decided that a finding of "mental illness" alone cannot justify a state's locking a person up against his or her will and keeping the person indefinitely in custodial confinement. Further, the state may not confine the harmless mentally ill in order to raise their living standards or in order to save citizens from exposure to those whose ways are different [*O'Connor v. Donaldson (1975) 422 U.S. 563, 575, 95 S. Ct. 2486, 45 L. Ed. 2d 396]* .

Involuntary confinement for the status of having a mental or physical illness or disorder constitutes a violation of the *cruel and unusual punishment clauses* of both the state and federal constitutions [*U.S. Const., Amendments VIII* and *XIV*

; *Cal. Const. art I, § 17*] unless it is accompanied by adequate treatment [*People v. Feagley (1975) 14 Cal. 3d 338, 359, 121 Cal. Rptr. 509, 535 P.2d 373]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesTreatment

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[Reserved]

§§ 304.98[Reserved]

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26-304 California Forms of Pleading and Practice--Annotated § 304.110

§ 304.110 Governing Statutes

The procedures for determining whether or not a person lacks capacity to make health care decisions are governed by *Prob. Code § 3200 et seq.* Prior to amendments effective July 1, 2000, *Prob. Code § 3200 et seq.* referred to a person's capacity to give "informed consent" to health care decisions, rather than "capacity" to make health care decisions [*see* discussion *below*].

The procedures authorized by *Prob. Code § 3200 et seq.* are supplemental and alternative to other procedures or methods for obtaining consent to health care or making health care decisions [*Prob. Code § 3210(a)*]. These procedures are also subject to a valid advance health care directive, including a power of attorney for health care or individual health care instruction [*see Prob. Code § 4600 et seq.*; *see below*]. If an advance health care directive exists, it should be carefully examined before invoking the petition procedure described in this part. For discussion of the rules governing advance health care directives, see California Legal Forms, Ch. 104, *Medical and Hospital Services* (Matthew Bender).

Effective July 1, 2000, the Natural Death Act [*see Health & Safety Code § 7185 et seq.*] and statutory provisions for powers of attorney for health care [*see Probate Code § 4600 et seq.*] are repealed, revised, and replaced by the Health Care Decisions Law [*Prob. Code § 4600 et seq.*]. Accordingly, the procedures authorized by *Prob. Code § 3200 et seq.* (also revised effective July 1, 2000), are subject to any provisions respecting health care decisions under the Health Care Decision Law.

The most significant distinction between the versions of the procedures outlined in *Prob. Code § 3200 et seq.* effective July 1, 2000, and the prior version of those procedures is in terminology. The prior procedures used the term "informed consent," while the procedures effective July 1, 2000, generally use the terms "consent" or "health care decision." A health care decision is defined as a decision regarding the patient's health care, including selection and discharge of health care providers and institutions, approval or disapproval of diagnostic tests, surgical procedures, programs of medication, and directions to provide, withhold or withdraw all forms of health care [*Prob. Code § 3201(b)*, effective July 1, 2000]. Additionally, the prior procedures refer to "medical condition" and "treatment," whereas the procedures effective July 1, 2000, refer to "health" and "health care."

Prob. Code §§ 810-814, which set forth criteria for determining whether a person lacks capacity to give consent to health care decisions, were not amended by the legislation effective July 1, 2000. Since *Prob. Code § 3204(h)* still references *Prob. Code § 811(a)* regarding the patient's mental functions, *Prob. Code §§ 810-814* apparently continue to apply.

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentPatient ConsentConsent by Guardians & ParentsHealthcare LawTreatmentPatient ConsentInformed Consent

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26-304 California Forms of Pleading and Practice--Annotated § 304.111

§ 304.111 Definitions

The following definitions apply to the procedures discussed in this part [*Prob. Code § 3200*]:

- "Health care" means any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a patient's physical or mental condition.

- "Health care decision" (which replaces the former term "informed consent") means a decision regarding the patient's health care, including the following:

  - Selection or discharge of health care providers and institutions.

  - Approval or disapproval of diagnostic tests, surgical procedures, and programs of medication.

  - Directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care, including cardiopulmonary resuscitation.

- "Health care institution" means an institution, facility, or agency authorized by law to provide health care in the ordinary course of business.

- "Patient' means an adult who does not have a conservator of the person and for whom a health care decision needs to be made.

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentPatient ConsentConsent by Guardians & ParentsHealthcare LawTreatmentPatient ConsentInformed Consent

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26-304 California Forms of Pleading and Practice--Annotated § 304.112

§ 304.112 Capacity to Consent to Medical Treatment

[1] Test for Determining Capacity

The mere diagnosis of a mental or physical disorder is not sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to make medical decisions [*Prob. Code §§ 810(b), 811(d)*]. *Prob. Code § 813* establishes specific rules for determining whether a person has the capacity to give informed consent to a proposed medical treatment. These rules prevail over the more general rules for determining whether a person lacks the capacity to make decisions [*see Prob. Code § 812* (general rules in *Prob. Code § 812* subject to *Prob. Code § 813*)]. Under *Prob. Code § 813*, a person has the capacity to give informed consent to a proposed medical treatment if the person is able to do all of the following [*Prob. Code § 813(a)*]:

- Respond knowingly and intelligently to queries about that medical treatment.
- Participate in that treatment decision by means of a rational thought process.
- Understand all of the following items of minimum basic medical treatment information with respect to that treatment:

  (1) The nature and seriousness of the illness, disorder, or defect that the person has.

  (2) The nature of the medical treatment that is being recommended by the person's health care providers.

  (3) The probable degree and duration of any benefits and risks of any medical intervention that is being recommended by the person's health care providers, and the consequences of lack of treatment.

[2] Evidence of Deficit in Mental Functions Required

For purposes of determinations regarding legal capacity, including the capacity to make medical decisions, there exists a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions [*Prob. Code § 810(a)*].

A judicial determination that a person is of unsound mind or lacks the capacity to make a medical decision should be based on evidence of a deficit in one or more of the person's mental functions rather than a diagnosis of a mental or physical disorder [*Prob. Code § 810(c)*]. Accordingly, a determination that a person lacks the capacity to make medicaldecisions must be supported by evidence of a deficit in at least one of the following functions, as well as evidence of a correlation between the deficit or deficits and an incapacity to make medical decisions [*Prob. Code § 811(a)*]:

- Alertness and attention, including, but not limited to, the following:

  (1) Level of arousal or consciousness.

  (2) Orientation to time, place, person, and situation.

  (3) Ability to attend and concentrate.

- Information processing, including, but not limited to, the following:

  (1) Short- and long-term memory, including immediate recall.

  (2) Ability to understand or communicate with others, verbally or otherwise.

  (3) Recognition of familiar objects and familiar persons.

  (4) Ability to understand and appreciate quantities.

  (5) Ability to reason using abstract concepts.

  (6) Ability to plan, organize, and carry out actions in one's own rational self-interest.

  (7) Ability to reason logically.

- Thought processes. Deficits in these functions may be demonstrated by the presence of the following:

  (1) Severely disorganized thinking.

  (2) Hallucinations.

  (3) Delusions.

  (4) Uncontrollable, repetitive, or intrusive thoughts.

- Ability to modulate mood and affect. Defects in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, which is inappropriate in degree to the individual's circumstances.

A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question [*Prob. Code § 811(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentPatient ConsentInformed Consent

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§ 304.113 Petition to Authorize Health Care

If an adult who does not have a conservator of the person is in need of health care for an existing or continuing medical condition, and there are doubts as to the adult's capacity to make health care decisions, a petition may be filed to determine whether the adult has that capacity [*Prob. Code § 3201(a), (b)*]. If the petition seeks an order that the adult lacks the necessary capacity, the petition may also request that a designated person be authorized to consent to make a health care decision on behalf of the adult [*Prob. Code § 3201(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentPatient ConsentConsent by Guardians & ParentsHealthcare LawTreatmentPatient ConsentInformed Consent

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§ 304.114 Included and Excluded Health Care

The petition generally may be used to determine the adult's capacity to consent to any kind of health care. However, certain types of health care are specifically excluded from this procedure. The excluded types of health care are the following [*Prob. Code § 3211*]:

- Placing a person in a mental health treatment facility;
- Prescribing or administering experimental drugs [*see Health & Safety Code § 111515*];
- Performing convulsive treatment [*see Welf. & Inst. Code § 5325*]; and
- Sterilization.

Legal Topics:

For related research and practice materials, see the following legal topics:
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26-304 California Forms of Pleading and Practice--Annotated § 304.115

§ 304.115 Emergency Health Care

The rules authorizing a petition to determine capacity do not limit the provision of health care in emergencies in which the health care is required for the alleviation of severe pain or because the patient has a medical condition which, if not immediately diagnosed and treated, will lead to serious disability or death [*Prob. Code § 3210(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentPatient ConsentConsent by Guardians & ParentsHealthcare LawTreatmentPatient ConsentInformed Consent

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26-304 California Forms of Pleading and Practice--Annotated § 304.116

§ 304.116 Who May File Petition

Any of the following persons may file a petition to determine a person's capacity to consent to make health care decisions [*Prob. Code § 3203*]:

- The patient;
- The patient's spouse;
- A relative or friend of the patient of other interested person, including the patient's agent under a power of attorney for health care;
- The patient's physician;
- If the person is in a health care institution, a person acting on behalf of the health care institution in which the patient is located; or
- The public guardian, or other county officer designated by the board of supervisors of the county in which the patient is located, resides, or is temporarily living.

Legal Topics:

For related research and practice materials, see the following legal topics:
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26-304 California Forms of Pleading and Practice--Annotated § 304.117

§ 304.117 Jurisdiction and Venue

[1] Appropriate Counties

A petition instituting the type of proceeding discussed in this Part may be filed in the superior court of any of the following counties:

- The county in which the patient resides;
- The county in which the patient is temporarily living; or
- Such other county as may be in the patient's best interests [*Prob. Code § 3202*].

[2] Continuing Jurisdiction

The court in which the petition is filed has continuing jurisdiction to revoke or modify an order made under *Prob. Code §§ 3200-3211* on a petition filed, noticed, and heard in the same manner as an original petition filed under these statutes [*Prob. Code § 3209*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureVenueIndividual DefendantsHealthcare LawTreatmentPatient ConsentConsent by Guardians & ParentsHealthcare LawTreatmentPatient ConsentInformed Consent

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26-304 California Forms of Pleading and Practice--Annotated § 304.118

§ 304.118 Representation of Patient

[1] Retained or Appointed Counsel

On the filing of the petition, the court will determine the name of the attorney the patient has retained to represent the patient in the proceeding or the name of the attorney the patient plans to retain. If the patient has not retained an attorney and does not plan to retain one, the court will appoint the public defender or private counsel under *Prob. Code § 1471* to consult with and represent the patient at the hearing on the petition [*Prob. Code § 3205*]. Counsel will be appointed at or before the time of the hearing if, based on information contained in the court investigator's report or obtained from any other source, the court determines that the appointment would be helpful to the resolution of the matter or is necessary to protect the patient's interests [*Prob. Code § 1471*].

[2] Attorney's Fees

If counsel is appointed under *Prob. Code § 1471*, the court, on conclusion of the proceeding, will fix a reasonable sum for compensation and expenses of counsel, and will make a determination of the patient's ability to pay all or a portion of this amount. The sum allowed to the attorney may include, in the discretion of the court, compensation for services rendered and expenses incurred before the date of the order appointing counsel. If the court determines that the patient has the ability to pay all or part of the sum, the court will order the patient to pay in whatever installments and in whatever manner as the court determines to be reasonable and compatible with the person's financial ability. The payment ordered by the court will be made to the county if the public defender has been appointed or if private counsel has been appointed to perform the public defender's duties and the county has compensated the counsel. In the case of other court-appointed counsel, the payment will be made to the counsel directly. If, however, the court determines that the patient lacks the ability to pay all or a portion of the fixed sum, the county will pay the sum to the private counsel to the extent the court determines the patient is unable to pay [*Prob. Code §§ 1472, 3205*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselAppointmentsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses &

FeesReasonable FeesHealthcare LawTreatmentPatient ConsentConsent by Guardians & ParentsHealthcare LawTreatmentPatient ConsentInformed Consent

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§ 304.119 Notice

A copy of the petition and notice of the time and place of the hearing must be personally served on the patient, the patient's attorney, and the agent under the patient's power of attorney for health care, if any, at least 15 days before the hearing [*Prob. Code § 3206(a)*]. A copy of the petition and notice of the time and place of the hearing must also be mailed to the patient's spouse and relatives at their addresses as stated in the petition [*Prob. Code § 3206(b)*]. For good cause, the court may shorten or waive notice of the hearing [*Prob. Code § 3206(c)*]. In determining the period of notice to be required, the court must consider the medical facts and circumstances set forth in the petition, or in a medical declaration attached to the petition or presented to the court, and the desirability, when the patient's condition permits, of giving adequate notice to all interested persons [*Prob. Code § 3206(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProceduresPleading & PracticeService of ProcessMethodsService Upon AgentsHealthcare LawTreatmentPatient ConsentConsent by Guardians & ParentsHealthcare LawTreatmentPatient ConsentInformed Consent

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26-304 California Forms of Pleading and Practice--Annotated § 304.120

§ 304.120 Submission on Affidavits

Notwithstanding the notice requirements of *Prob. Code § 3206*, the matter may be submitted for the court's determination on proper and sufficient medical declarations, if the attorney for the petitioner and the attorney for the patient so stipulate and further stipulate that there remains no issue of fact to be determined [*Prob. Code § 3207*].

Legal Topics:

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§ 304.121 Requisite Findings

The court may authorize the recommended health care and designate a person to consent to the health care if it determines from the evidence all of the following [*Prob. Code § 3208(a)*]:

- That the existing or continuing condition of the patient's health requires the recommended course of health care.

- That there is a probability that the condition, if untreated, will become life-endangering or result in a serious threat to the physical or mental health of the patient.

- That the patient is unable to consent to the recommended health care.

The court may authorize the withholding or withdrawing of artificial nutrition and hydration and all other forms of health care, and designate a person to give or withhold consent to the recommended health care if the court determines from the evidence all of the following [*Prob. Code § 3208(c)*]:

- That the recommended health care is in accordance with the patient's best interest, considering the patient's personal values to the extent known by petitioner.

- The patient is unable to consent to the recommended health care.

In determining whether the patient's mental functioning is so severely impaired that the patient lacks capacity to make any health care decisions, the court may take into consideration the frequency, severity, and duration of periods of impairment [*Prob. Code § 3208(b)*]. A judicial determination that a person lacks the capacity to make medical decisions must be supported by evidence of a deficit in at least one of a number of specific mental functions, as well as evidence of a correlation between the deficit or deficits and an incapacity to make medical decisions [*see Prob. Code § 811(a)* and discussion in *§ 304.112[2]*].

If the patient has the capacity to consent to the recommended health care, the court must so find in its order [*Prob. Code § 3208.5(a)*]. If the court finds that the patient has the capacity to consent to the recommended health care but refuses to do so, the court may not authorize the health care or designate a person to consent to it [*Prob. Code § 3208.5(c)*; *see Prob. Code § 813(b)* (person who has capacity to give informed consent to proposed medical treatment also has capacity to refuse consent to that treatment)].

If the court finds that the patient has capacity to consent to the recommended health care, the court must, if requested, determine whether the patient has accepted or refused the recommended health care, and whether the consent is an informed consent [*Prob. Code § 3208.5(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentPatient ConsentConsent by Guardians & ParentsHealthcare LawTreatmentPatient ConsentInformed Consent

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26-304 California Forms of Pleading and Practice--Annotated § 304.122

§ 304.122 Effect of Patient's Recovery of Capacity After Issuance of Order

If an order authorizing health care and designating a person to consent to it has been made, and the patient later recovers the capacity to consent, the court must revoke the first order [*Prob. Code § 3208.5(c)*]. Until revoked or modified, however, such an order is effective authorization for the treatment [*Prob. Code § 3208.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 304.123 Treatment by Spiritual Means

Nothing in *Prob. Code § 3200 et seq.* supersedes or impairs the right of a person to chose treatment by spiritual means in lieu of medical treatment. No person choosing treatment by spiritual means may be required to submit to medical testing of any kind pursuant to a determination of capacity [*Prob. Code § 3212*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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E. Authorization Of Health Care For Adult Without Conservator

26-304 California Forms of Pleading and Practice--Annotated §§ 304.124-304.139

[Reserved]

§§ 304.124[Reserved]

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§ 304.140 California Points and Authorities

For memoranda of points and authorities involving writs of habeas corpus brought by insane and incompetent persons, see s California Points and Authorities, Ch. 110, *Habeas Corpus* and Ch. 117, *Insane and Incompetent Persons* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureHabeas CorpusGeneral OverviewFamily LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of Adults

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§ 304.141 State Statutes

Children's Civil Commitment and Mental Health Treatment Act. *Welf. & Inst. Code § 5585 et seq.*

[1] Community Mental Health Services

Assisted Outpatient Treatment Demonstration Project Act of 2002. *Welf. & Inst. Code §§ 5345-5349.5*

Bronzan-McCorquodale Act. *Welf. & Inst. Code § 5600 et seq.*

[2] Inadmissability of Patient Records

Patient information obtained in county-authorized research and study of mental patients is nondiscoverable and inadmissible evidence. *Evid. Code §§ 1156.1, 1157.6.*

[3] LPS Act

[a] Certification for Involuntary Treatment

Certification for 14-day intensive treatment. *Welf. & Inst. Code § 5250 et seq.*

Certification for additional 14-day intensive treatment for suicidal persons. *Welf. & Inst. Code § 5260 et seq.*

Certification for additional 30-day intensive treatment. *Welf. & Inst. Code § 5270.10 et seq.*

[b] Conservatorship Proceedings

Placement and treatment of LPS conservatee in community care facilty or residential care facility for elderly. *Health & Safety Code §§ 1536.1, 1569.47*

Criminal liability of LPS conservator's employee relating to placement of conservatee in community care facility or residential care facility for elderly. *Health & Safety Code §§ 1536.1(c), (d), 1569.47(c), (d)*

Conservatorship for gravely disabled persons. *Welf. & Inst. Code § 5350 et seq.*

Requirement that county mental health program make reasonable attempts to notify family members, or designee of prposed conservatee of time and place of conservatorship hearing. *Welf. & Inst. Code § 5350.2*

[c] Detention for Evaluation

LPS detention for evaluation and treatment of persons violating *Penal Code § 647(f)* regarding disorderly conduct. *Welf. & Inst. Code § 5170.3*

Detention of mentally disordered persons for 72-hour evaluation and treatment. *Welf. & Inst. Code §§ 5150-5157*

Detention of inebriates for 72-hour evaluation and treatment. *Welf. & Inst. Code §§ 5170-5176*

Court-ordered evaluation for mentally disordered persons. *Welf. & Inst. Code § 5200 et seq.*

Court-ordered evaluation for criminal defendants impaired by chronic alcoholism or abuse of narcotics or dangerous drugs. *Welf. & Inst. Code § 5225 et seq.*

Evaluation and treatment of users of controlled substances. *Welf. & Inst. Code § 5340 et seq.*

LPS evaluation and treatment of juvenile wards. *Welf. & Inst. §§ 6550, 6551*

[d] Judicial Review

General provisions for review by habeas corpus. *Penal Code § 1473 et seq.*

Judicial review of certification for intensive treatment. *Welf. & Inst. Code § 5275 et seq.*

Appeals from judgments or orders regarding appointment of conservator. *Welf. & Inst. Code § 5350*

Habeas corpus challenge by conservatee of placement or conditions of confinement. *Welf. & Inst. Code § 5358.7*

Judicial review by habeas corpus of commitment to state hospital. *Welf. & Inst. Code § 7250*

Filing fee may not be charged in appellate proceedings under Lanterman-Petris-Short Act. *Gov. Code § 68926*

[e] Patient Rights and Records

Rights of patient or patient's representative to inspect or obtain copies of patient's health care records. *Health & Safety Code § 123110*

Mental Health Advocacy. *Welf. & Inst. Code § 5500 et seq.*

Rights of persons involuntarily detained. *Welf. & Inst. Code § 5325 et seq.*

Right of persons detained under specified LPS provisions to refuse antipsychotic medication. *Welf. & Inst. Code §§ 5325.2, 5332-5337*

Conditions for disclosing confidential patient information and records. *Welf. & Inst. Code § 5328*

[f] Postcertification Treatment

Postcertification treatment for additional 180-days for persons presenting imminent threat of substantial physical harm to others. *Welf. & Inst. Code § 5300 et seq.*

[4] Voluntary Admissions

Voluntary admissions to state hospitals. *Welf. & Inst. Code § 6000 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentChildrenPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentVoluntary Commitment of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesTreatment

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§ 304.142 Administrative Regulations

Community mental health services under the Short-Doyle Act. *9 Cal. Code Reg. § 500 et seq.*

Facilities for evaluation and treatment under the LPS Act. *9 Cal. Code Reg. § 820 et seq.*

Voluntary patients' right to refuse antipsychotic medications. *9 Cal. Code Reg. §§ 850-857*

Denial of patients' rights for good cause. *9 Cal. Code Reg. §§ 860-868*

Conduct of research in state hospitals, neuropsychiatric facilities, local mental health facilities, and public or private institutions. *9 Cal. Code Reg. §§ 900-943*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareDependent & Disabled AdultsServicesPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentVoluntary Commitment of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesTreatmentPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral Overview

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§ 304.143 California Rules of Court

Appeals from judgments or orders regarding appointment of conservator pursuant to *Welf. & Inst. Code § 5350*; *Cal. Rules of Ct., Rule 8.480*

Petition for writ of habeas corpus to be on approved form, unless petitioner shows good cause or the petition is submitted by an attorney. *Cal. Rules of Ct., Rules 8.380, 8.384(b)*

Compensation of LPS conservator or conservator's attorney. *Cal. Rules of Ct., Rules 7.750-7.755*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionPleadingsEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointment

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26-304 California Forms of Pleading and Practice--Annotated § 304.144

§ 304.144 Decisions

[1] Alcoholism

Fact that county has not established facility for detention and treatment of persons impaired by alcoholism is not denial of equal protection. *People v. McNaught (1973) 31 Cal. App. 3d 599, 107 Cal. Rptr. 566*

[2] Appointment of Attorney

Proposed conservatee does not have right to represent himself or herself in LPS Act proceedings, but court may permit self-representation. *Conservatorship of Joel E. (2005) 132 Cal. App. 4th 429, 438-442, 33 Cal. Rptr. 3d 704*

Mere fact that conservatorship is established under LPS Act does not give rise to constructive attorney-client relationship between county counsel, whowas designated as attorney for public conservator, and conservatee. *In re Lee G. (1991) 1 Cal. App. 4th 17, 29-33, 1 Cal. Rptr. 2d 375*

Representation by county counsel's office of public conservator in LPS Act proceedings against conservatee and of Department of Social Services in separate dependency proceedings to determine whether conservatee should regain custody of child does not give rise to conflict of interest requiring recusal of county counsel in dependency proceedings. *In re Lee G. (1991) 1 Cal. App. 4th 17, 29-33, 1 Cal. Rptr. 2d 375*

[3] Attorney's Fees

Legal services for indigent persons at public expense are mandated in mental health matters when restraint of liberty possible. *Phillips v. Seely (1974) 43 Cal. App. 3d 104, 113, 117 Cal. Rptr. 863*

[4] Confidentiality of Patient Records

Welf. & Inst. Code § 5328, requiring confidentiality of records of mentally ill persons, establishes absolute discovery privilege, subject only to legislative exceptions listed in statute. *Gilbert v. Superior Court (1987) 193 Cal. App. 3d 161, 169-170, 238 Cal. Rptr. 220*

Provisions of *Welf. & Inst. Code § 5328* requiring confidentiality of patient records have legislative purpose of encouraging persons to seek treatment on voluntary basis; purpose would be nullified by permitting persons or agencies to obtain disclosure whenever determined by court to be administration of justice. *County of Riverside v. Superior Court (1974) 42 Cal. App. 3d 478, 481, 116 Cal. Rptr. 886*

[5] Confinement to Mental Hospital

[a] In General

Variation of length and conditions of confinement of mentally disturbed persons, depending on degrees of danger reasonably perceived as to special classes of persons, is valid exercise of state power. *Conservatorship of Hofferber (1980) 28 Cal. 3d 161, 172, 167 Cal. Rptr. 854, 616 P.2d 836*

[b] Basis For

Kentucky statutory scheme involving differing burdens of proof for involuntary commitment of mentally retarded (clear and convincing evidence) and mentally ill (beyond reasonable doubt) individuals has rational basis and therefore is consistent with *Equal Protection Clause*; permitting family members and guardians party status in commitment proceedings for mentally retarded but not in proceedings for mentally also has rational basis. *Heller v. Doe (1993) 509 U.S. 312, 328-329, 113 S. Ct. 2637, 125 L. Ed. 2d 257*

Dangerous mental condition of incompetent criminal defendant, which is basis for continued confinement, must be established beyond a reasonable doubt and, if requested, by unanimous jury. *Conservatorship of Hofferber (1980) 28 Cal. 3d 161, 178-179, 167 Cal. Rptr. 854, 616 P.2d 836*

Legislature did not specify standard of proof required for involuntary commitment of persons under LPS Act; question is for courts to decide in view of consequences of commitment. *People v. Burnick (1975) 14 Cal. 3d 306, 314 n.5, 121 Cal. Rptr. 488, 535 P.2d 352*

Person committed to mental hospital is not entitled to release when person's condition worse at time of application for writ of habeas corpus and person is unable to care for himself or herself. *In re Cloutman (1941) 47 Cal. App. 2d 77, 78, 117 P.2d 378*

Question of whether person is suffering from mental condition such as justifies commitment to state hospital under applicable statutory standard is question of fact. *In re Gavin (1926) 80 Cal. App. 27, 30, 251 P. 231*

[6] Conservatorship for Gravely Disabled Person

[a] Due Process and Other Constitutional Issues

Hearing to establish conservatorship under Lanterman-Petris-Short (LPS) Act did not violate Act or proposed conservatee's constitutional right of due process when court accepted representation of proposed conservatee's attorney and proceeded with hearing in proposed conservatee's absence, when proposed conservatee told appointed counsel that

he did not contest proposed conservatorship and did not want to attend hearing, and there were no allegations that the attorney misrepresented the contents of that discussion. *Conservatorship of John L. (2010) 48 Cal. 4th 131, 157, 105 Cal. Rptr. 3d 424, 225 P.3d 554* .

Mentally disordered offender did not have constitutional or statutory right to jury trial on issue of whether to administer involuntary antipsychotic medication under *Welf. & Inst. Code § 5300*. *People v. Fisher (2009) 172 Cal. App. 4th 1006, 1015-1016, 91 Cal. Rptr. 3d 609*

Mentally disordered offender had constitutional right to be present at hearing on issue of whether to administer involuntary antipsychotic medication under *Welf. & Inst. Code § 5300* because he did not personally waive his right to be present and was not unable to attend the hearing, but absence from court on day that his psychiatrist testified was harmless beyond a reasonable doubt when his counsel thoroughly cross-examined psychiatrist, psychiatrist's testimony was compelling, and defendant thereafter was present and was given a full and fair opportunity to rebut the testimony. *People v. Fisher (2009) 172 Cal. App. 4th 1006, 1013-1014, 91 Cal. Rptr. 3d 609*

Court in Lanterman-Petris-Short Act proceeding did not have duty to instruct jury sua sponte that if the proposed conservatee was able to accept voluntary treatment there is no need for conservatorship; Lanterman-Petris-Short Act conservatorships are civil, not criminal, proceedings, and the civil trial procedural rules are ones that apply. *Conservatorship of George H (2008) 169 Cal. App. 4th 157, 162, 165, 86 Cal. Rptr. 3d 666* ; *disagreeing with holding in Conservatorship of Walker (1987) 196 Cal. App. 3d 1082, 242 Cal. Rptr. 289*

Proposed conservatee who requests substitute appointed counsel must be given full opportunity to state the reasons for his or her requests, and court's failure to afford proposed conservatee a full opportunity to state his or her reasons for requesting substitute counsel violates his or her right to due process of law. *Conservatorship of David L. (2008) 164 Cal. App. 4th 701, 712, 79 Cal. Rptr. 3d 530*

Conservatee's due process rights were adequately protected under Lanterman-Petris-Short Act when conservatee received copy of petition for reestablishment of conservatorship and accompanying medical statement, conservatee was aware of proposed placement and disabilities, conservatee received at least two written notices of right to hearing and jury trial, and conservatee's attorney met with conservator in person and signed an affidavit attesting to conservatee's agreement to reestablishment of conservatorship without a hearing. *Conservatorship of Tian L. (2007) 149 Cal. App. 4th 1022, 1031, 157 Cal. Rptr. 3d 382*

Ex parte procedure to reestablish conservatorship for gravely disabled person comported with constitutional due process requirements when proposed conservatee communicated to court (via attorney) that he did not desire hearing after being notified of right to hearing. *Conservatorship of Moore (1986) 185 Cal. App. 3d 718, 726-727, 229 Cal. Rptr. 875*

Notification procedures set forth in *Welf. & Inst. Code § 5362* for reestablishing conservatorship for gravely disabled person met constitutional standards for due process of law. *Conservatorship of Moore (1986) 185 Cal. App. 3d 718, 726-727, 229 Cal. Rptr. 875*

Criminal due process rights applicable in LPS conservatorship proceedings; appellate court is required to review entire record for error when appointed appellate counsel files brief stating there are no arguable issues on appeal. *Conservatorship of Besoyan (1986) 181 Cal. App. 3d 34, 36-38, 226 Cal. Rptr. 196*

Jury verdict finding person not gravely disabled for purposes of LPS Act is different from criminal acquittal so that appeal or later petition to have person declared LPS conservatee is not barred by due process or protection against double jeopardy. *Conservatorship of Davis (1981) 124 Cal. App. 3d 313, 330, 177 Cal. Rptr. 369*

Standard of "gravely disabled" defined in *Welf. & Inst. Code § 5008* is neither unconstitutionally vague nor overbroad. *Conservatorship of Chambers (1977) 71 Cal. App. 3d 277, 285, 139 Cal. Rptr. 357*

[b] Grave Disability Requirement

Department of Corrections supervision of parolee does not qualify as "third-partyassistance," which precludes finding of "grave disability" required to establish and maintain LPS conservatorship. *Conservatorship of Jones (1989) 208 Cal. App. 3d 292, 300-302, 256 Cal. Rptr. 415*

Conservatee who is living in board and care facility paid for by public assistance checks issued to parent is not deemed to be using assistance of willing and responsible family members, friends, or third parties, so as to preclude LPS conservatorship. *Conservatorship of Law (1988) 202 Cal. App. 3d 1336, 1341, 249 Cal. Rptr. 415*

Finding of "grave disability" is improper if proposed conservatee can presently provide for his or her basic needs with help of another, even if conservatorship might be needed at future time because of need for possible medical treatment. *Conservatorship of Neal (1987) 190 Cal. App. 3d 685, 687-689, 235 Cal. Rptr. 577*

Procedure permitting recommendation of conservatorship for person both gravely disabled and unwilling or unable to voluntarily accept treatment pursuant to *Welf. & Inst. Code § 5352* implies that if person is not gravely disabled *or* is able to voluntarily accept treatment that no conservatorship is required. *Conservatorship of Walker (1987) 196 Cal. App. 3d 1082, 1092, 242 Cal. Rptr. 289*

Person is not gravely disabled within *Welf. & Inst. Code § 5008(h)(1)(A)* (formerly *Welf. & Inst. Code § 5008(h)(1)*) if capable of surviving safely with help of willing and responsible family members, friends, or third parties. *Conservatorship of Early (1983) 35 Cal. 3d 244, 250-251, 197 Cal. Rptr. 539, 673 P.2d 209* ; *Conservatorship of Neal (1987) 190 Cal. App. 3d 685, 687-689, 235 Cal. Rptr. 577* ; *Conservatorship of Davis (1981) 124 Cal. App. 3d 313, 321, 177 Cal. Rptr. 369*

Finding of grave disability must be based on evidence that person, due to mental disorder, is incapacitated or unable to carry out transactions necessary for survival, or otherwise provide for basic needs of food, clothing, or shelter, with or without aid of others. *Conservatorship of Smith (1986) 187 Cal. App. 3d 903, 905, 909, 232 Cal. Rptr. 277*

In proceeding by public guardian for reappointment pursuant to *Welf. & Inst. Code § 5361*, evidence was insufficient to support finding that conservatee presently disabled as defined in *Welf. & Inst. Code § 5008(h)*, when trial court's determination based on likelihood that conservatee, if released, would return to alcohol, and not on whether conservatee was presently capable of managing own affairs. *Conservatorship of Murphy (1982) 134 Cal. App. 3d 15, 18-19, 184 Cal. Rptr. 363*

[c] Investigation Report

Investigating officer who receives recommendation from interested person other than professional person in charge of evaluating or treating facility that conservatorship be instituted, and who does not concur with recommendation, does not file conservatorship petition or prepare investigation report. *Kaplan v. Superior Court (1989) 216 Cal. App. 3d 1354, 1357-1358, 265 Cal. Rptr. 408*

Appointment of LPS conservator is subject to list of priorities in *Prob. Code § 1812* unless conservatorship investigator recommends otherwise; trial court abused its discretion in summarily appointing public conservator on basis of report that did not "justify negating the possibility of appointing immediate family members." *Conservatorship of Walker (1987) 196 Cal. App. 3d 1082, 1101, 242 Cal. Rptr. 289*

Court is not deprived of jurisdiction if proposed conservatee does not receive copy of investigation report as required by *Welf. & Inst. Code § 5354*. *Conservatorship of Forsythe (1987) 192 Cal. App. 3d 1406, 1411-1412, 238 Cal. Rptr. 77* ; *Conservatorship of Jones (1986) 188 Cal. App. 3d 306, 312, 232 Cal. Rptr. 600*

Report mailed to conservatee's appointed counsel is sufficient to satisfy *Welf. & Inst. Code § 5354* requirement that investigation report be mailed to proposed conservatee. *Conservatorship of Jones (1986) 188 Cal. App. 3d 306, 312, 232 Cal. Rptr. 600*

Only nonhearsay portions of investigator's report are admissible (*Welf. & Inst. Code § 5354*) at contested court or jury trial on issue of grave disability. *Conservatorship of Manton (1985) 39 Cal. 3d 645, 648-653, 217 Cal. Rptr. 253, 703 P.2d 1147*

[d] Judicial Review

Conservatee may file an initial petition for rehearing under *Welf. & Inst. Code § 5364* to challenge his or her status as conservatee at any time, but must wait six months before filing a subsequent petition for rehearing concerning his or her status as conservatee. *Conservatorship of Amanda B. (2009) 173 Cal. App. 4th 1380, 1384, 93 Cal. Rptr. 3d 817*

Anders/Wende procedures imposed by Supreme Court, which require an independent review of the record in certain criminal cases to determine whether there is any arguable appellate issue, are not required in appeals from LPS conservatorship proceedings because a conservatee is not a criminal defendant and the proceedings are civil in nature *Conservatorship of Ben C. (2007) 40 Cal. 4th 529, 543, 53 Cal. Rptr. 3d 856, 150 P.3d 738*

In petition for rehearing, conservatee made prima facie showing that he was no longer gravely disabled by establishing existence of monthly income and furnishing budget that would fit within income, establishing employment history, testifying that he would seek further employment to assist in meeting budgetary needs, and providing evidence that fiance would prepare meals and monitor medication. *Conservatorship of Everette M. (1990) 219 Cal. App. 3d 1567, 1573-1574, 269 Cal. Rptr. 182*

Temporary conservator's appointment and placement choice is challenged by same habeas corpus mechanism used for 14-day certification challenge. *In re Lois M. (1989) 214 Cal. App. 3d 1036, 1039-1040, 263 Cal. Rptr. 100*

Appellate court is required to review entire record for error when appointed appellate counsel files brief stating there are no arguable issues on appeal. *Conservatorship of Besoyan (1986) 181 Cal. App. 3d 34, 36-38, 226 Cal. Rptr. 196*

Gravely disabled indigent conservatee is entitled to free trial transcript in appeal from imposition of LPS conservatorship and confinement in county mental health facility. *Waltz v. Zumwalt (1985) 167 Cal. App. 3d 835, 836-839, 213 Cal. Rptr. 529*

Relief by habeas corpus was improperly granted by one county to relocate LPS conservatee to less restrictive facility when another county had continuing jurisdiction and had previously found that conservatee was "gravely disabled" and developmentally disabled and had ordered placement in locked facility. *In re Gandolfo (1984) 36 Cal. 3d 889, 893-900, 206 Cal. Rptr. 149, 686 P.2d 669*

State's appeal of jury verdict that person is not gravely disabled for purposes of LPS Act did not violate respondent's rights against double jeopardy. *Conservatorship of Baber (1984) 153 Cal. App. 3d 542, 550, 200 Cal. Rptr. 262* ; *Conservatorship of Davis (1981) 124 Cal. App. 3d 313, 330, 177 Cal. Rptr. 369*

[e] Jury Instructions on Grave Disability

Criminal circumstantial evidence instruction was not required when civil instruction given and inferences from circumstantial evidence point only toexistence of certain mental state to be provided. *Conservatorship of Law (1988) 202 Cal. App. 3d 1336, 1342, 249 Cal. Rptr. 415*

Use of present tense in defining "grave disability" was sufficient to instruct jury on conservatee's present disabilities. *Conservatorship of Law (1988) 202 Cal. App. 3d 1336, 1341-1342, 249 Cal. Rptr. 415*

Proper instruction on grave disability eliminated need for special instructions on evidence of conservatee's ability and willingness to voluntarily accept treatment. *Conservatorship of Law (1988) 202 Cal. App. 3d 1336, 1341, 249 Cal. Rptr. 415*

"Not gravely disabled" presumption merely insured that state prove its case beyond reasonable doubt, so that trial court failure to instruct on presumption is not prejudicial once jury is properly instructed on standard of proof. *Conservatorship of Law (1988) 202 Cal. App. 3d 1336, 1340, 249 Cal. Rptr. 415*

Jury instructions, which admonished that LPS conservatorship may not be imposed only if person can provide for his or her needs *and* is willing to accept treatment, were erroneous. *Conservatorship of Walker (1987) 196 Cal. App. 3d 1082, 1098-1099, 242 Cal. Rptr. 289*

Court is required on request to instruct jury in language emphasizing that proposed conservatee is presumed not gravely disabled until state carries its burder of proof. *Conservatorship of Walker (1987) 196 Cal. App. 3d 1082, 1091-1092, 242 Cal. Rptr. 289*

In proceeding to reestablish conservatorship over proposed conservatee previously found to be gravely disabled as defined in former *Welf. & Inst. Code § 5008(h)(1)* (*now see Welf. & Inst. Code § 5008(h)(1)(A)*), trial court was not in error when it instructed jurors that if they found proposed conservatee capable of surviving safely in freedom by himself or with help of willing and responsible family members and friends, they should find he was not gravely disabled. *Conservatorship of Baber (1984) 153 Cal. App. 3d 542, 552-553, 200 Cal. Rptr. 262*

In proceeding to reestablish conservatorship over proposed conservatee previously found to be gravely disabled as defined in former *Welf. & Inst. Code § 5008(h)(1)* (*now see Welf. & Inst. Code § 5008(h)(1)(A)*), trial court erred when it failed to intruct jurors that they must find proposed conservatee both unwilling and incapable of making meaningful commitment to treatment before determining him to be gravely disabled. *Conservatorship of Baber (1984) 153 Cal. App. 3d 542, 552-553, 200 Cal. Rptr. 262*

In proceeding to establish conservatorship for person allegedly suffering from mental disorder and gravely disabled pursuant to former *Welf. & Inst. Code § 5008(h)(1)* (now see *Welf. & Inst. Code § 5008(h)(1)(A)*, failure of court to admit evidence of and to instruct jury on availability of assistance of others to meet proposed conservatee's basic needs was prejudicial error requiring reversal. *Conservatorship of Early (1983) 35 Cal. 3d 244, 248, 197 Cal. Rptr. 539, 673 P.2d 209*

In conservatorship proceeding under *Welf. & Inst. Code § 5350*, jury instruction that "gravely disabled" means inability to provide for personal needs without assistance of others was erroneous; proper instruction must consider ability to provide for personal needs with any available help or encouragement, such as family assistance. *Conservatorship of Wilson (1982) 137 Cal. App. 3d 132, 134-135, 186 Cal. Rptr. 748*

[f] Standard and Burden of Proof

On proper state of evidence, party is entitled to request to have jurors informed of manner in which "reasonable doubt" standard must be established when evidence is circumstantial. *Conservatorship of Walker (1987) 196 Cal. App. 3d 1082, 1097-1098, 242 Cal. Rptr. 289*

Conservatorship is allowed to be established only if jury finds unanimously and beyond reasonable doubt that person is gravely disabled. *Conservatorship of Early (1983) 35 Cal. 3d 244, 248, 197 Cal. Rptr. 539, 673 P.2d 209*

Petitioner for rehearing pursuant to Welf. & Inst. Code § 6364 has burdens of producing evidence and proving by preponderance of evidence that he or she is no longer gravely disabled. *Baber v. Superior Court (1980) 113 Cal. App. 3d 955, 965-966, 170 Cal. Rptr. 353*

[7] Temporary and Successor Conservatorship Proceedings

Appointment of conservator pending outcome of conservatorship trial is in substance a temporary conservatorship, which is well within authority of trial court. *Conservatorship of Early (1983) 35 Cal. 3d 244, 255, 197 Cal. Rptr. 539, 673 P.2d 209*

Successorship public conservator is permitted to reestablish LPS conservatorship without notice and hearing to conservatee concerning successor's appointment; notice and hearing requirements of Prob. Code §§ 2283 and *2684* are inapplicable to public conservators under *Welf. & Inst. Code § 5350 et seq.* *Conservatorship of Cabanne (1990) 223 Cal. App. 3d 199, 204-205, 272 Cal. Rptr. 407*

[8] Reestablishment of Conservatorship

Conservator is entitled to voluntarily dismiss petition to reestablish the conservatorship before trial commences. *Conservatorship of Martha P. (2004) 117 Cal. App. 4th 857, 865-869, 12 Cal. Rptr. 3d 142*

In reestablishment hearing, conservatee is permitted to waive presence of physician or other professional person who recommends that conservatorship be continued, as long as parties stipulate that person's recommendation and records concerning conservatee may be received in evidence [*see Welf. & Inst. Code § 5365.1*]. *Conservatorship of Scharles (1990) 220 Cal. App. 3d 247, 254-255, 269 Cal. Rptr. 398*

Reappointment of conservatorship is proper for gravely disabled conservatee who is unlikely to take medication on release because of lack of insight into illness. *Conservatorship of Walker (1989) 206 Cal. App. 3d 1572, 1577, 254 Cal. Rptr. 552*

Continued grave disability does not by itself satisfy evidentiary requirements for continuing special disabilities previously imposed on conservatee. *Conservatorship of Walker (1989) 206 Cal. App. 3d 1572, 1578, 254 Cal. Rptr. 552*

Gravely disabled person is not automatically precluded from making knowing and intelligent waiver of right to hearing on issue of reestablishing conservatorship; ability to make waiver as question of fact. *Conservatorship of Moore (1986) 185 Cal. App. 3d 718, 732-733, 229 Cal. Rptr. 875*

In proceeding to reestablish conservatorship, psychiatrist permitted to testify as expert witness on person's mental capacities and able to rely on hearsay, including statements made by patient or third party. *Conservatorship of Torres (1986) 180 Cal. App. 3d 1159, 1163, 226 Cal. Rptr. 142*

[9] Detention

Person committed to Department of Health following acquittal of criminal charge because of insanity is not permitted to be held in department's custody for period in excess of maximum term provided for underlying offense for which charged and acquitted; unless People or other committing authority establishes grounds for extended commitment; People, after expiration of maximum term, as extended, if further confinement and treatment are sought, must proceed in accordance with civil commitment provisions of *Lanterman-Petris-Short Act. In re Moye (1978) 22 Cal. 3d 457, 460, 149 Cal. Rptr. 491, 584 P.2d 1097*

Standard of proof on lawfulness of temporary detention is preponderance of evidence. *In re Lois M. (1989) 214 Cal. App. 3d 1036, 1040-1042, 263 Cal. Rptr. 100*

County has burden of proof on lawfulness of temporary detention. *In re Lois M. (1989) 214 Cal. App. 3d 1036, 1039-1040, 263 Cal. Rptr. 100*

Test for probable cause for warrantless arrest is applicable to detention pursuant to *Welf. & Inst. Code § 5150*; probable cause for detention are facts known to peace officer that would lead person of ordinary care and prudence to believe, or to entertain strong suspicion, that person is mentally disordered and danger to self, or is gravely disabled. *People v. Triplett (1983) 144 Cal. App. 3d 283, 287-288, 192 Cal. Rptr. 537*

Police officer who responded to disturbance call and found defendant who appeared intoxicated, upset, and had bleeding cuts on wrists had probable cause to detain defendant pursuant to *Welf. & Inst. Code § 5150*. *People v. Triplett (1983) 144 Cal. App. 3d 283, 287-288, 192 Cal. Rptr. 537*

[10] Involuntary Treatment

Welf. & Inst. Code § 5300 is constitutionally adequate for due process purposes because elements of present illness and potential danger are both provided for, and statute makes clear that past conduct is relevant only as prognosticator of probable future behavior. *People v. Superior Court (Dodson) (1983) 148 Cal. App. 3d 990, 998, 196 Cal. Rptr. 431*

[11] Jury Trial

Due process requires that physical restraints not be used on proposed conservatee during jury trial absent facts on record justifying trial court's decision to impose restraints, accompanied by cautionary instruction to jury. *Conservatorship of Warrack (1992) 11 Cal. App. 4th 641, 647-648, 14 Cal. Rptr. 2d 99*

Proposed conservatee is permitted to exercise six peremptory challenges available to civil parties, rather than 10 challenges available to criminal defendants. *Conservatorship of Gordon (1989) 209 Cal. App. 3d 364, 368-370, 257 Cal. Rptr. 365*

Attorney for proposed conservatee in LPS hearing may properly waive, by oral consent in open court, proposed conservatee's right to jury trial. *Conservatorship of Mary K. (1991) 234 Cal. App. 3d 265, 271, 285 Cal. Rptr. 618* ; *Conservatorship of Isaac O. (1987) 190 Cal. App. 3d 50, 55-56, 235 Cal. Rptr. 133* ; *Conservatorship of Maldonado (1985) 173 Cal. App. 3d 144, 148, 218 Cal. Rptr. 796*

Petitioner for rehearing pursuant to *Welf. & Inst. Code § 5364* has no right to jury trial under either *LPS Act or Constitution. Baber v. Superior Court (1980) 113 Cal. App. 3d 955, 960-965, 170 Cal. Rptr. 353*

[12] Medical Treatment and Antipsychotic Drugs

Given requirements of prison environment, state may, pursuant to administrative hearing procedure and without judicial hearing, treat prison inmate who has serious mental illness with antipsychotic medication against inmate's will if inmate is dangerous to himself or herself or others, and treatment is in inmate's medical interest. *State of Washington v. Harper (1990) 494 U.S. 210, 110 S. Ct. 1028, 108 L. Ed. 2d 178, 201-207* .

In determining whether patient lacks capacity to consent to antipsychotic medication, court is not permitted to decide medical questions such as whether proposed treatment is actually necessary or is least drastic alternative available, but may consider such issues only as pertinent to assessing consent. *People v. Thomas (1990) 217 Cal. App. 3d 1034, 1039-1040, 266 Cal. Rptr. 295* ; *Riese v. St. Mary's Hospital & Medical Center (1989) 209 Cal. App. 3d 1303, 1320-1321, 271 Cal. Rptr. 199* ; *but see Welf. & Inst. Code § 5332(b)* (enacted in 1991, and requiring that antipsychotic medication be administered over patient's refusal in nonemergency situation only after staff determination that treatment alternatives to involuntary medication are unlikely to meet patient's needs and judicial determination of incapacity to refuse)

Absent judicial determination of patient's incompetence, medical and psychiatric personnel are not permitted to administer antipsychotic medication in nonemergency situations without patient's informed consent. *Riese v. St. Mary's Hospital & Medical Center (1989) 209 Cal. App. 3d 1303, 1320, 271 Cal. Rptr. 199* (decided before 1991 enactment of *Welf. & Inst. Code §§ 5325.2, 5332-5337*).

Prisoners, like nonprisoners under LPS statutory scheme, are entitled to judicial determination of competency to refuse treatment before subjection to long-term involuntary antipsychotic medication. *Keyhea v. Rushen (1986) 178 Cal. App. 3d 526, 542, 223 Cal. Rptr. 746* (decided before 1991 enactment of *Welf. & Inst. Code §§ 5325.2, 5332-5337*)

Mental patient has qualified right to refuse medical treatment. *Keyhea v. Rushen (1986) 178 Cal. App. 3d 526, 534-536, 223 Cal. Rptr. 746* (decided before 1991 enactment of *Welf. & Inst. Code §§ 5325.2, 5332-5337*).

[13] Minors

Procedures established by Department of Health to implement authorization of *Welf. & Inst. Code § 6000(b)* for admissions of minors to state hospitals denied minors 14 years of age and older due process. *In re Roger S. (1977) 19 Cal. 3d 921, 935-938, 141 Cal. Rptr. 298, 569 P.2d 1286*

Welf. & Inst. Code § 6000, authorizing voluntary commitment of minor by parent, guardian, or person entitled to minor's custody, did not authorize juvenile court to commit minor by ordering probation officer to have minor voluntarily commited to mental hospital. *In re E. (1975) 15 Cal. 3d 183, 191, 123 Cal. Rptr. 103, 538 P.2d 231*

Local court rule authorizing appointment of nonattorney adviser, rather than attorney, for minor hospitalized under LPS Act violated minor's due process rights. *In re Antoine C. (1986) 186 Cal. App. 3d 424, 425, 427, 230 Cal. Rptr. 738*

Commitment of minor ward of juvenile court to state hospital may be properly accomplished only in accordance with *LPS Act. In re Vicki H. (1979) 99 Cal. App. 3d 484, 497, 160 Cal. Rptr. 294*

Direct commitment of juvenile to mental hospital without consent of minor or parents and without invoking statutory procedures is in excess of powers of juvenile court. *In re L. L. (1974) 39 Cal. App. 3d 205, 213, 217, 114 Cal. Rptr. 11*

[14] Other Privileges in LPS Hearings

Welf. & Inst. Code § 5303 is not intended to import whole of criminal procedure into postcertification proceedings; subject of hearings did not have right not to be called as a witness and not to testify. *Conservatorship of Bones (1987) 189 Cal. App. 3d 1010, 1015-1017, 234 Cal. Rptr. 724*

[15] Privilege Against Self-Incrimination

In proceeding to reestablish conservatorship over proposed conservatee previously found to be gravely disabled as defined in former *Welf. & Inst. Code § 5008(h)(1)* (*now see Welf. & Inst. Code § 5008(h)(1)(A)*), trial court erred in refusing to allow public guardian to call proposed conservatee as witness; prospective conservatee was not permitted to refuse to testify at commitment hearing on ground that testimony would violate privilege against self-incrimination because conservatorship proceeding not analgous to criminal trial. *Conservatorship of Baber (1984) 153 Cal. App. 3d 542, 550, 200 Cal. Rptr. 262*

Proposed conservatee in LPS Act proceeding has no absolute right to warning of privilege against self-incrimination before psychiatric examination. *Conservatorship of Mitchell (1981) 114 Cal. App. 3d 606, 612, 170 Cal. Rptr. 759*

[16] Psychosurgery and Convulsive Treatments

Regulation of electroconvulsive treatment is a matter of state, not local, concern and city ordinance purporting to ban such treatment was properly enjoined for being unconstitutional and void. *Northern Cal. Psychiatric Society v. City of Berkeley (1986) 178 Cal. App. 3d 90, 105-106, 223 Cal. Rptr. 609*

Hearing under *Welf. & Inst. Code § 5326.7(f)* is limited to issue of whether patient has capacity to give informed consent to convulsive treatment; court's review of need for treatment was improper, but harmless error. *Conservatorship of Fadley (1984) 159 Cal. App. 3d 440, 446, 205 Cal. Rptr. 572*

Standard of proof in hearing under *Welf. & Inst. Code § 5326.7(f), (g)* to determine capacity of conservatee to give informed consent to convulsive treatments is clear and convincing evidence. *Lillian F. v. Superior Court (1984) 160 Cal. App. 3d 314, 324, 206 Cal. Rptr. 603*

Review committee procedure for convulsive treatment and psychosurgery did not violate constitutional rights of patient. *Aden v. Younger (1976) 57 Cal. App. 3d 662, 683-684, 129 Cal. Rptr. 535*

Patient's right to informed consent to procedures is protected by statutes governing psychosurgery and convulsive treatments; patient as having no right to be left uninformed. *Aden v. Younger (1976) 57 Cal. App. 3d 662, 675, 129 Cal. Rptr. 535*

Procedures for informed consent of mental patients to convulsive treatment and psychosurgery did not violate equal protection rights of mental patients. *Aden v. Younger (1976) 57 Cal. App. 3d 662, 673-674, 129 Cal. Rptr. 535*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 304.145 Attorney General Opinions

Persons over 21 years of age suffering from Alzheimer's disease, brain injuries, or other organic brain disorders possibly fall within scope of *Welf. & Inst. Code § 5150*. *72 Ops. Cal. Att'y Gen. 41 (1989)*

Duty to report child abuse under Child Abuse Reporting Law (*Penal Code §§ 11165-11174.5*) supersedes confidentiality provisions of Lanterman-Petris-Short Act (*Welf. & Inst. Code § 5328*). *65 Ops. Cal. Att'y Gen. 345 (1982)*

Conservators and guardians are required to obtain express judicial authority in making necessary medical decisions for gravely disabled adult conservatees and wards. *60 Ops. Cal. Att'y Gen. 375 (1977)*

Person suffering lapses of consciousness and others with mental disorders are required to be reported to local health officer by physician. *58 Ops. Cal. Att'y Gen. 338 (1975)*

Conservatorship for gravely disabled person. *52 Ops. Cal. Att'y Gen. 260 (1969)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 304.146 Text References

For discussion of the use of the writ of habeas corpus by criminal defendants, including criminal defendants subject to penal commitment, see s California Criminal Defense Practice, Ch. 102, *Extraordinary Writs* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureHabeas CorpusGeneral Overview

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26-304 California Forms of Pleading and Practice--Annotated § 304.160

§ 304.160 State Statutes

Rights of patient and patient's representative to inspect and obtain copies of patient's health care records. *Health & Safety Code § 123110*

Receipt of services by the developmentally disabled. *Welf. & Inst. Code §§ 4500-4847*

Confidentiality of records pertaining to developmentally disabled persons. *Welf. & Inst. Code §§ 4514-4518*

Judicial commitment procedures generally. *Welf. & Inst. Code §§ 6250-6254*

Judicial commitment of the mentally retarded. *Welf. & Inst. Code §§ 6500-6513*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 304.161 California Code of Regulations

Rights of persons with developmental disabilities. *17 Cal. Code Reg. §§ 50510, 50515*

Notification of rights. *17 Cal. Code Reg. § 50520*

Denial of rights. *17 Cal. Code Reg. §§ 50530-50538*

Complaint procedure. *17 Cal. Code Reg. § 50540*

Client's rights advocate. *17 Cal. Code Reg. § 50550*

Legal Topics:

For related research and practice materials, see the following legal topics:
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26-304 California Forms of Pleading and Practice--Annotated § 304.162

§ 304.162 Decisions

Person involuntarily committed to state institution for mentally retarded has constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and training as may be required by these interests, under due process clause of *U.S. Const., amend. XIV*; decisions by appropriate professional are entitled to presumption of correctness in determining whether state has met its obligations. *Youngberg v. Romeo (1982) 457 U.S. 307, 324-325, 102 S. Ct. 2452, 73 L. Ed. 2d 28*

Lanterman Developmental Disabilities Services Act (*Welf. & Inst. Code § 4500 et seq.*) does not authorize sterilization of nonconsenting persons even when necessary to achieve goals of Act; present legislative scheme that absolutely precludes sterilization of incompetent developmentally disabled persons is impermissible deprivation of privacy and liberty interests protected by *U.S. Const., amend. XIV*, and *Cal. Const., art. I, § 1*. *Conservatorship of Valerie N. (1985) 40 Cal. 3d 143, 160-161, 219 Cal. Rptr. 387, 707 P.2d 760*

Department of Developmental Services is without authority under Lanterman Act (*Welf. & Inst. Code § 4500 et seq.*) to control manner in which regional centers provide services or their operations; department director's spending priorities directing cutbacks in services by category without regard to individual client's plan are therefore void. *Association for Retarded Citizens v. Department of Developmental Services (1985) 38 Cal. 3d 384, 389-390, 211 Cal. Rptr. 758, 696 P.2d 150*

Statutory scheme permitting placement of nonprotesting developmentally disabled adults in state hospitals without prior hearing violate equal protection and due process. *In re Hop (1981) 29 Cal. 3d 82, 92-93, 171 Cal. Rptr. 721, 623 P.2d 282*

Instruction that permits jury in commitment proceeding to take into account possible improvement by allegedly mentally retarded person if given future medication was properly refused because inquiry under *Welf. & Inst. Code § 6507* is limited to person's present condition or status. *Cramer v. Tyars (1979) 23 Cal. 3d 131, 142, 151 Cal. Rptr. 653, 588 P.2d 793*

Statutory administrative fair hearing provisions of the Lanterman Act are the procedure available for conservator to object to regional center's community placement decision; parties are not authorized to bypass this procedure and insist on judicial hearing. *Conservatorship of the Person & Estate of Whitley (2007) 155 Cal. App. 4th 1447, 1461, 66 Cal. Rptr. 3d 808*

Although decision on appeal of commitment order that is rendered beyond one-year period is technically moot, decision may be made on merits when issues are important questions of law that could repeatedly evade appellate review if committed person is likely to be committed in the future. *People v. Quinn (2001) 86 Cal. App. 4th 1290, 1293, 103 Cal. Rptr. 2d 915*

Statutory rules for commitment of dangerous mentally retarded persons [*Welf. & Inst. Code § 6500*] contain no requirement of proof that dangerous condition be caused by mental retardation; absence of causational requirement is not violative of equal protection rights because statute furthers state's compelling interest to protect all dangerous retarded persons, not just those whose violence is caused by retardation. *People v. Quinn (2001) 86 Cal. App. 4th 1290, 1293, 103 Cal. Rptr. 2d 915*

Grounds for regional center's denial of client's request that she be provided specified in-home day-care services held insufficient and contrary to purposes and provisions of Lanterman Developmental Disabilities Services Act (*Welf. & Inst. Code § 4500 et seq.*) when center's only basis for denial was that its policy is not to provide such services. *Williams v. Macomber (1990) 226 Cal. App. 3d 225, 232, 233-234, 276 Cal. Rptr. 267*

Welf. & Inst. Code § 6500 is not unconstitutionally vague because it fails to define "dangerousness" for those alleged to come within its scope who are not both incompetent and charged with one of its specified crimes; insofar as "dangerousness" is not defined in *Welf. & Inst. Code § 6500*, it should be construed to mean potential for infliction of substantial harm on defendant himself or herself, or on others. *People v. Alvas (1990) 221 Cal. App. 3d 1459, 1466-1467, 271 Cal. Rptr. 131*

Exploration of specially designed reunification services is prerequisite to termination of parental rights of developmentally disabled person. *In re Victoria M. (1989) 207 Cal. App. 3d 1317, 1329-1331, 255 Cal. Rptr. 498*

Welf. & Inst. Code § 4514, requiring confidentiality of records of developmentally disabled persons, establishes absolute discovery privilege subject only to legislative exceptions listed in statute; denial of access to records under *Welf. & Inst. Code § 4514* does not violate procedural due process. *Gilbert v. Superior Court (1987) 193 Cal. App. 3d 161, 170-172, 174, 238 Cal. Rptr. 220*

Expert testimony regarding mental retardation is necessary to support jury finding of mental retardation in commitment proceeding under *Welf. & Inst. Code § 6500*. *In re Krall (1984) 151 Cal. App. 3d 792, 797, 199 Cal. Rptr. 91*

Definition of mental retardation for purposes of commitment under *Welf. & Inst. Code § 6500*. *In re Krall (1984) 151 Cal. App. 3d 792, 797, 199 Cal. Rptr. 91*

Welf. & Inst. Code § 6500, providing for civil commitment of mentally retarded persons who are dangerous to themselves or others, is not unconstitutionally vague for failing to define mental retardation, because the term has generally accepted technical meaning and commitment hearings under statute afford full procedural safeguards against errors in fact-finding. *Money v. Krall (1982) 128 Cal. App. 3d 378, 397-399, 180 Cal. Rptr. 376*

Developmentally disabled person is not entitled to credit for time detained pursuant to ex parte hold order between expiration of commitment and recommitment hearing. *Cramer v. Gillermina R. (1981) 125 Cal. App. 3d 380, 394, 178 Cal. Rptr. 69*

Separate statutory schemes for treatment of mentally ill (*Welf. & Inst. Code § 5150 et seq.*) and developmentally disabled persons (*Welf. & Inst. Code § 6500 et seq.*) is not unconstitutional on equal protection grounds because mentally ill persons are not similarly situated with developmentally disabled persons and because state has substantial interest in treating them differently. *Cramer v. Gillermina R. (1981) 125 Cal. App. 3d 380, 387-388, 178 Cal. Rptr. 69*

Detention of developmentally disabled persons, without adversarial probable cause hearing, during interim between automatic expiration of commitment order and recommitment hearing is constitutional. *Cramer v. Gillermina R. (1981) 125 Cal. App. 3d 380, 392, 178 Cal. Rptr. 69*

Regional center has standing to petition for writ of habeas corpus to enforce recommendation of community placement for developmentally disabled adult who was voluntarily admitted to state hospital before 1977; burden of proof is on opponents of recommendation; but, if disabled adult proven competent to choose residence, choice is to be respected even if more restrictive than recommended by center. *In re Borgogna (1981) 121 Cal. App. 3d 937, 940-949, 175 Cal. Rptr. 588*

Miranda principles are inapplicable to proceedings under former *Welf. & Inst. Code § 6500.1*, but trial court is required, on appropriate motion, to hold hearing regarding voluntariness of statements made to police by allegedly mentally retarded person. *Cramer v. Shay (1979) 94 Cal. App. 3d 242, 245, 247, 156 Cal. Rptr. 303*

Due process requires right to jury trial in commitment or recommitment proceedings of allegedly mentally retarded persons pursuant to *Welf. & Inst. Code § 6500 et seq.* *O'Brien v. Superior Court (1976) 61 Cal. App. 3d 62, 69, 132 Cal. Rptr. 13*

No right to jury trial required by due process or statute on writ of habeas corpus testing the commitment of a mentally retarded person pursuant to former Health & Safety Code §§ 38450 and 38451 (*now see Welf. & Inst. Code §§ 4800, 4801*). *O'Brien v. Superior Court (1976) 61 Cal. App. 3d 62, 72, 132 Cal. Rptr. 13*

Proof by preponderance of the evidence rather than beyond a reasonable doubt is required in proceedings on writ of habeas corpus of mentally retarded person seeking release from commitment. *O'Brien v. Superior Court (1976) 61 Cal. App. 3d 62, 72, 132 Cal. Rptr. 13*

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§ 304.163 Law Reviews

Hayman, *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, *103 Harv. L. Rev. 1201 (1990)*

Schwartz and Costanzo, *Compelling Treatment in the Community: Distorted Doctrines and Violated Values*, *20 Loy. L.A.L. Rev. 1392 (1987)*

Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, *70 Cal. L. Rev. 54 (1982)*

Mickenberg, *Competency to Stand Trial and the Mentally Retarded Defendant: The Need for a Multi-Disciplinary Solution to a Multi-Disciplinary Problem*, *17 Cal. W.L. Rev. 365 (1981)*

Murdock, *Sterilization of the Retarded: A Problem or a Solution?* *62 Cal. L. Rev. 917 (1974)*

Spencer, *Thursday's Child: Legal Problems of Families With a Mentally Retarded Member*, *6 U.C. Davis L. Rev. 40 (1973)*

Project, *Legal Planning for the Mentally Retarded: The California Experience*, *60 Cal. L. Rev. 438 (1972)*

Legal Topics:

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26-304 California Forms of Pleading and Practice--Annotated § 304.180

§ 304.180 California Points and Authorities

For memoranda of points and authorities related to writs of habeas corpus brought by allegedly insane or incompetent persons, see California Ponts and Authorities, Ch. 110, *Habeas Corpus*

For memoranda of points and authorities involving actions for false imprisonment brought by insane and incompetent persons, see California Points and Authorities, Ch. 117, *Insane and Incompetent Persons*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 304.181 State Statutes

Person of unsound mind is civilly liable for a wrong done by him or her, but is not generally liable in exemplary damages. *Civ. Code § 41*

Psychotherapist not liable for failure to warn and protect from patient's threatened violent behavior unless patient has communicated serious threat of physical violence against reasonably identifiable victim; psychotherapist's limited duty discharged by reasonable efforts to communicate threat to victim and to law enforcement agency. *Civ. Code § 43.92*

No monetary liability or cause of action can be brought against a psychotherapist who discharges his or her duty to warn. *Civ. Code § 43.92(b) Civ. Code § 43.92*

Government Tort Claims Act. *Gov. Code §§ 810-996.6*

Liability and immunity of public employee and public entity for torts involving mental patients. *Gov. Code §§ 854.8-856.4*

Duty of county hospital to warn ambulance personnel of instability and potentialassaultiveness of mental health patient. *Health & Safety Code § 1444.6*

Rights of patient and patient's representative to inspect and obtain copies of patient's health care records. *Health & Safety Code § 1795 et seq.*

Immunity of psychotherapist for actions by patient released before or at end of 72-hour treatment and evaluation. *Welf. & Inst. Code § 5154(a), (b)*

Admission and review procedures to protect rights of minors admitted by their parents to private acute psychiatric facilities because of mental disorders or mental disorders coupled with substance abuse disorders. *Welf. & Inst. Code §§*

6002.10-6002.40

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesDefensesImmunityTortsDamagesPunitive DamagesGeneral OverviewTortsNegligenceDefensesPrivate ImmunitiesGeneral OverviewTortsNegligenceDutyAffirmative Duty to ActSpecial RelationshipsHealthcare ProvidersTortsPublic Entity LiabilityImmunityGeneral Overview

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§ 304.182 Decisions

[1] Actions by Mental Patients

[a] Assault and Battery

Force used to accomplish unlawful detention of person as mental patient results in liability for assault and battery; but use of force in treatment does not constitute assault and battery in all circumstances, even when confinement was unlawful. *Maben v. Rankin (1961) 55 Cal. 2d 139, 144, 10 Cal. Rptr. 353, 358 P.2d 681*

[b] False Imprisonment

Involuntary hospitalization of a person in mental hospital in violation of statute constitutes false imprisonment. *Maben v. Rankin (1961) 55 Cal. 2d 139, 144, 10 Cal. Rptr. 353, 358 P.2d 681*

Doctor who reports to another doctor but who does not participate in detention of a person is not liable for false imprisonment in absence of bad faith or taking active part in detention. *Fish v. Regents of the Univ. of Cal. (1966) 246 Cal. App. 2d 327, 331-332, 54 Cal. Rptr. 656*

Sheriff liable for false imprisonment to person detained in invalid sanity hearing due to failure of sheriff to serve petition as required by statute. *Culbertson v. Santa Clara County (1968) 261 Cal. App. 2d 274, 275, 67 Cal. Rptr. 752*

Failure to satisfy a specific statutory requirement of the detention renders it wrongful for purposes of false imprisonment action. *Culbertson v. Santa Clara County (1968) 261 Cal. App. 2d 274, 275-276, 67 Cal. Rptr. 752*

Probable cause to confine for mental disorder is not confined to acts committed in the presence of the officers. *Whaley v. Jansen (1962) 208 Cal. App. 2d 222, 229, 25 Cal. Rptr. 184*

Probable cause to detain person as mentally disordered may be shown from fact that doctors later found person to be mentally disordered. *Whaley v. Kirby (1962) 208 Cal. App. 2d 232, 238, 25 Cal. Rptr. 50*

Release of person from commitment on a writ of habeas corpus is immaterial to lack of probable cause for commitment of person in an action for false imprisonment. *Whaley v. Kirby (1962) 208 Cal. App. 2d 232, 238, 25 Cal. Rptr. 50*

Personal and family psychiatric history of a plaintiff who sues for unlawful commitment is not remote to the subject matter of the suit. *Regents of University of Cal. v. Superior Court of San Francisco (1962) 200 Cal. App. 2d 787, 788, 19 Cal. Rptr. 568*

Testimony of doctor that a person is insane does not make the doctor liable for false imprisonment. *Baer v. Smith (1945) 68 Cal. App. 2d 716, 721, 157 P.2d 646*

[c] Invastion of Privacy

Failure to allege lack of probable cause to file petition seeking evaluation of person as mentally ill prevents liability for invasion of privacy. *Schwartz v. Thiele (1966) 242 Cal. App. 2d 799, 804, 51 Cal. Rptr. 767*

[d] Malicious Prosecution

Dismissal of petition alleging that a person is mentally disordered is favorable termination of a prosecution for purposes of malicious prosecution action. *Sutherland v. Palme (1949) 93 Cal. App. 2d 307, 313, 208 P.2d 1035*

Person who wrongfully initiates civil commitment proceedings against another is liable for harm to reputation caused by the proceedings. *Brock v. Southern Pac. Co. (1948) 86 Cal. App. 2d 182, 185, 195 P.2d 66*

[e] Negligence

When facts of case support a theory of liability based on a duty to protect plaintiff from his or her own actions, plaintiff may properly rely on res ipsa loquitur. *Meier v. Ross Gen. Hosp. (1968) 69 Cal. 2d 420, 427, 71 Cal. Rptr. 903, 445 P.2d 519*

Those charged with care of patient who know of facts from which they could reasonably conclude that the patient would be likely to harm himself or herself or others in the absence of preclusive measures are required to use reasonable care under the circumstances to prevent such harm. *Meier v. Ross Gen. Hosp. (1968) 69 Cal. 2d 420, 424, 71 Cal. Rptr. 903, 445 P.2d 519*

Duty of hospital where mentally ill patient is confined is to exercise such reasonable care toward the patient as the patient's mental and physical condition, if known, requires. *Vistica v. Presbyterian Hospital (1967) 67 Cal. 2d 465, 469, 62 Cal. Rptr. 577, 432 P.2d 193*

Even though decedent was clearly acting erratically, paramedics were under no affirmative duty to prevent decedent, who was voluntary passenger, from escaping ambulance on arrival at hospital and were not liable for failing to protect her from her own suicidal, reckless, or irrational conduct when she was subsequently hit by car. *Hernandez v. KWPH Enters. (2004) 116 Cal. App. 4th 170, 181, 10 Cal. Rptr. 3d 137*

Question of contributory negligence of a mental patient is a question of fact, unless the evidence discloses that plaintiff was completely devoid of reason, as a matter of law. *DeMartini v. Alexander Sanitarium, Inc. (1961) 192 Cal. App.*

2d 442, 447, 13 Cal. Rptr. 564

[2] Constitutional Protections

[a] In General

Inherently speculative nature of psychiatric predictions. *People v. Burnick (1975) 14 Cal. 3d 306, 328, 121 Cal. Rptr. 488, 535 P.2d 352*

Confinement to a state hospital results in a real deprivation of liberty. *People v. Burnick (1975) 14 Cal. 3d 306, 319, 121 Cal. Rptr. 488, 535 P.2d 352*

Social stigma results from commitment for mental illness. *People v. Burnick (1975) 14 Cal. 3d 306, 321, 121 Cal. Rptr. 488, 535 P.2d 352*

In common with all those confined against their will for treatment of mental illness, person committed under mentally disordered sex offender statutes suffer massive curtailment of liberty. *People v. Burnick (1975) 14 Cal. 3d 306, 319, 121 Cal. Rptr. 488, 535 P.2d 352*

[b] Procedural Safeguards

Due process demands that the length of commitments to state hospitals must bear some reasonable relationship to the purpose which originally justified commitment. *In re Davis (1973) 8 Cal. 3d 798, 805, 106 Cal. Rptr. 178, 505 P.2d 1018* , cert. denied sub. nom. *Palma v. California (1973) 414 U.S. 870, 94 S. Ct. 87, 38 L. Ed. 2d 88*

Use of inappropriate printed forms in commitment proceedings condemned. *In re Lopez (1970) 3 Cal. 3d 147, 148 n. 1, 89 Cal. Rptr. 614, 474 P.2d 430* ; *In re Raner (1963) 59 Cal. 2d 635, 637 n. 1, 30 Cal. Rptr. 814, 381 P.2d 638*

Procedures to safeguard patient rights in certification for intensive treatment. *Thorn v. Superior Court (1970) 1 Cal. 3d 666, 675-676, 83 Cal. Rptr. 600, 464 P.2d 56*

When commitment proceedings are purely statutory in origin and not based on common law, requirements of the statute must be followed to give the court jurisdiction of the proceedings. *In re Raner (1963) 59 Cal. 2d 635, 639, 30 Cal. Rptr. 814, 381 P.2d 638*

Sterilization of the mentally retarded or disordered after commitment to a state mental hospital. *Guardianship of Kemp (1974) 43 Cal. App. 3d 758, 763, 118 Cal. Rptr. 64*

Person being taken to state mental hospital is in custody within the meaning of *Miranda* rule. *People v. Layton (1972) 29 Cal. App. 3d 349, 354, 105 Cal. Rptr. 509*

Burden of proving that criminal defendant is not guilty by reason of insanity is on defendant, whereas burden of providing insanity in civil commitment proceeding as on state. *People v. Redmond (1971) 16 Cal. App. 3d 931, 939-940, 94 Cal. Rptr. 543*

Authority of the court in civil commitment proceedings is purely statutory. *In re Hofmann (1955) 131 Cal. App. 2d 758, 761, 281 P.2d 96*

[c] Right to Treatment

Mental illness alone without finding of harmfulness is not capable of justifying a state in locking person up against his or her will in custodial confinement without treatment. *O'Connor v. Donaldson (1975) 422 U.S. 563, 576, 95 S. Ct. 2486, 45 L. Ed. 2d 396*

States have general duty as parens patriae to care for insane persons. *Higgins v. United States (9th Cir. 1953) 205 F.2d 650, 653*

Insane persons is always subject to the control of the state for their own protection and for the protection of others. *Dribin v. Superior Court (1951) 37 Cal. 2d 345, 352, 231 P.2d 809*

[3] Governmental Immunity and Liability

[a] Immunities

Decision of public employee psychotherapist whether to warn the intended victim of the therapist's patient is not kind of discretionary decision for which immunity from liability is granted by *Gov. Code § 820.2*. *Tarasoff v. Regents of University of California (1976) 17 Cal. 3d 425, 444-445, 131 Cal. Rptr. 14, 551 P.2d 334* (decided prior to 1985 enactment of *Civ. Code § 43.92*, which establishes limitations on psychotherapist's liability for failure to warn)

Scope of immunity granted by *Gov. Code § 856*. *Tarasoff v. Regents of University of California (1976) 17 Cal. 3d 425, 448, 131 Cal. Rptr. 14, 551 P.2d 334* (decided prior to 1985 enactment of *Civ. Code § 43.92*, which establishes limitations on psychotherapist's liability for failure to warn)

Liability may only be imposed against public entity under *Gov. Code § 855* for violation of statute or regulation promulgated by one of four state departments specified by statute; regardless of whether liability is predicated on statute or regulation, relevant statute or regulation must prescribe specific minimum standard and provisions providing only general guidelines, such as requiring "sufficient" personnel or like, cannot be basis for imposing liability. *Lockhart v. County of Los Angeles (2007) 155 Cal. App. 4th 289, 305-309, 66 Cal. Rptr. 3d 62*

Pen. Code § 1618 provides absolute immunity to state agencies and staff of Forensic Conditional Release Program for injuries caused by released mentally disordered offenders. *Ley v. State of Cal. (2004) 114 Cal. App. 4th 1297, 1303-1305, 8 Cal. Rptr. 3d 642*

Hospital's compliance with minimum legal standards for equipment, personnel, or facilities, for purposes of applicability of immunity exception under *Gov. Code § 855(a)*, was issue of fact not resolvable on motion for nonsuit. *Baber v. Napa State Hospital (1989) 209 Cal. App. 3d 213, 220, 257 Cal. Rptr. 55* (action for negligence against hospital based on hospital's failure to protect plaintiff from violent patients)

Person detained on 72-hour hold under *Welf. & Inst. Code § 5150* is confined within meaning of *Gov. Code § 856.2*; immunity of *Gov. Code § 856.2* applies to public entity confining person who escapes and sustains injury while on 72-hour hold. *Los Angeles County-U.S.C. Medical Center v. Superior Court (1984) 155 Cal. App. 3d 454, 460-463, 202 Cal. Rptr. 222*

Gov. Code § 854.8 is not a denial of equal protection of the laws or due process of laws to person in mental institutions. *Los Angeles County v. Superior Court (1965) 62 Cal. 2d 839, 846, 44 Cal. Rptr. 796, 402 P.2d 868* ; *Goff v. County of Los Angeles (1967) 254 Cal. App. 2d 45, 51, 61 Cal. Rptr. 840*

Tort Claims Act provisions protect a patient under confinement from medical malpractice and mistreatment but not

protecting the patient or the public from injuries following unwarranted release from confinement. *Hernandez v. State of California (1970) 11 Cal. App. 3d 895, 899, 90 Cal. Rptr. 205*

Gov. Code § 855.6 provides immunity when faulty diagnosis results in a mentally defective person not being placed in custody. *Kravitz v. California (1970) 8 Cal. App. 3d 301, 306-307, 87 Cal. Rptr. 352*

Gov. Code § 855.8 immunizes public employee from liability in malicious prosecution case involving commitment proceeding. *Fish v. Regents of the Univ. of Cal. (1966) 246 Cal. App. 2d 327, 331, 54 Cal. Rptr. 656*

[b] Statutory Liabilities

Patient confined in state-operated mental hospital without his informed consent and without involuntary placement procedure mandated by state (Florida) law stated claim for violation of procedural due process rights against hospital staff under *42 U.S.C.S. § 1983*; liability of state hospital staff under *42 U.S.C.S. § 1983* was unaffected by possible availability of postdeprivation damage remedies. *Zinermon v. Burch (1990) 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed. 2d. 100, 121-122*

Tort Claims Act provisions was intended to provide immunity for diagnosing, treating, confining, and releasing the mentally ill, but to make clear that public entities and employees are liable for injuries caused by negligence or wrongful acts or omissions. *Los Angeles County v. Superior Court (1965) 62 Cal. 2d 839, 843-844, 44 Cal. Rptr. 796*

[c] Statutory Immunity for Acts of Persons Detained

Police officers who released person were not liable for harm to a third person because of the immunity provided by *Welf. & Inst. Code § 5154*. *Tarasoff v. Regents ofUniversity of California (1976) 17 Cal. 3d 425, 450, 131 Cal. Rptr. 14, 551 P.2d 334*

Gov. Code § 856.2 immunized governmental entity for acts of escaped mental patient. *Buenavista v. City and County of San Francisco (1989) 207 Cal. App. 3d 1168, 1173-1174, 255 Cal. Rptr. 329*

Scope of immunity granted by *Welf. & Inst. Code § 5154*. *Lowe v. County of San Diego (1986) 183 Cal. App. 3d 515, 527-530, 228 Cal. Rptr. 139*

[4] Harm Caused by Mentally Disordered Persons

[a] Actions Against Mentally Disordered Persons

Defense of assumption of risk is available to incompetent defendant in action by caregiver for injuries caused by defendant, when caregiver has consented to care for mentally ill patients who are known to be occasionally violent and combative. *Herrle v. Estate of Marshall (1996) 45 Cal. App. 4th 1761, 1765-1768, 53 Cal. Rptr. 2d 713*

[b] Actions Against Relatives

Nonliability of relatives caring for mentally disordered person for acts of the person when a petition for commitment of the person would not have been granted. *Alva v. Cook (1975) 49 Cal. App. 3d 899, 906, 909, 123 Cal. Rptr. 166*

Fact that patient had on several occasions displayed inappropriate and offensive sexual behavior was insufficient to put psychotherapist on notice, for purposes of defeating statutory immunity under *Civ. Code § 43.92*, that patient presented

serious threat of physical violence. *Barry v. Turek (1990) 218 Cal. App. 3d 1241, 1246, 267 Cal. Rptr. 553*

Determination of whether person attacked by patient was "reasonably identifiable victim" for purposes of *Civ. Code § 43.92*, limiting therapist's liability,involves consideration of patient's access to victim and patient's prior conduct toward persons similarly situated to victim. *Barry v. Turek (1990) 218 Cal. App. 3d 1241, 1245, 267 Cal. Rptr. 553*

[c] Actions Against Therapists

Three-year period of limitation under *Code Civ. Proc. § 340.5* for professional negligence applies when psychotherapist fails to warn third party of danger posed by patient. *Hedlund v. Superior Court (1983) 34 Cal. 3d 695, 700-703, 194 Cal. Rptr. 805, 669 P.2d 41* (decided prior to the 1985 enactment of *Civ. Code § 43.92*)

Emotional distress of small child when mother was shot was foreseeable as matter of law when therapist negligently failed to warn child's mother that patient threatened her. *Hedlund v. Superior Court (1983) 34 Cal. 3d 695, 705-706, 194 Cal. Rptr. 805, 669 P.2d 41* (decided prior to the 1985 enactment of *Civ. Code § 43.92*)

When therapist determines, or pursuant to standards of the profession should determine, that patient presents a serious danger of violence to another, therapist incurs an obligation to use reasonable care to protect intended victim against the danger. *Tarasoff v. Regents of University of California (1976) 17 Cal. 3d 425, 431, 131 Cal. Rptr. 14, 551 P.2d 334* (decided prior to 1985 enactment of *Civ. Code § 43.92*, which establishes limitations on psychotherapist's liability for failure to warn)

Therapist's duty to warn victim arises if information communicated by patient's family member leads therapist to believe or predict that patient poses serious risk of grave bodily injury to this individual. *Ewing v. Goldstein (2004) 120 Cal. App. 4th 807, 817-820, 15 Cal. Rptr. 3d 864*

Therapist has duty to warn if, and only if, threat therapist has learned actually leads therapist to believe patient poses risk of grave bodily injury to another person, *Ewing v. Goldstein (2004) 120 Cal. App. 4th 807, 821, 15 Cal. Rptr. 3d 864*

Action by person patient injures based on psychiatrist's failure to comply with duties imposed under involuntary commitment procedures of LPS Act is not barred by *Civ. Code § 43.92* or *Tarasoff (Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 131 Cal. Rptr. 14, 551 P.2d 334*). *Bragg v. Valdez (2003) 111 Cal. App. 4th 421, 433-435, 3 Cal. Rptr. 3d 804*

Immunity afforded by *Welf. & Inst. Code § 5154* applies in case in which psychiatrist fails to warn individual of patient's specific threats of harm against that individual, and patient harms individual, as long as psychiatrist authorized release of patient in accordance with required statutory findings--that is, that patient no longer posed threat to self or others. *Michael E.L. v. County of San Diego (1986) 183 Cal. App. 3d 515, 523-524, 527, 530, 228 Cal. Rptr. 139*

Fact that patient had on several occasions displayed inappropriate and offensive sexual behavior was insufficient to put psychotherapist on notice, for purposes of defeating statutory immunity under *Civ. Code § 43.92*, that patient presented serious threat of physical violence. *Barry v. Turek (1990) 218 Cal. App. 3d 1241, 1246, 267 Cal. Rptr. 553*

Determination of whether person attacked by patient was "reasonably identifiable victim" for purposes of *Civ. Code § 43.92*, limiting therapist's liability,involved consideration of patient's access to victim and patient's prior conduct toward persons similarly situated to victim. *Barry v. Turek (1990) 218 Cal. App. 3d 1241, 1245, 267 Cal. Rptr. 553*

Psychiatrist immune from liability under *Welf. & Inst. Code § 5154* for release of patient at or before end of 72-hour

treatment and evaluation. *Lowe v. County of San Diego (1986) 183 Cal. App. 3d 515, 527-530, 228 Cal. Rptr. 139*

Public entity immune from liability for injuries caused by patient of mental institution. *Guess v. California (1979) 96 Cal. App. 3d 111, 120, 157 Cal. Rptr. 618*

Psychiatrist not required to disclose risk of self-inflicted harm or risk of property damage. *Bellah v. Greenson (1978) 81 Cal. App. 3d 614, 622, 146 Cal. Rptr. 535*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersDoctors & PhysiciansPublic Health & Welfare LawHealthcareMental Health ServicesTreatmentTortsIntentional TortsAbuse of ProcessElementsTortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsPublic Entity LiabilityImmunityGeneral OverviewTortsVicarious LiabilityFamily MembersChildren & Parents

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26-304 California Forms of Pleading and Practice--Annotated § 304.183

§ 304.183 Attorney General Opinions

Patient's advocate has right to access to records. *62 Ops. Cal. Att'y Gen. 57 (1979)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationPatient ConfidentialityGeneral Overview

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§ 304.184 Law Reviews

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Comment, *Prisoner Access to Psychosurgery: A Constitutional Perspective, 9 Pacific L.J. 249 (1978)*

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Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawEqual ProtectionDisabilityFamily LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of AdultsTortsNegligenceDutyAffirmative Duty to ActSpecial RelationshipsHealthcare Providers

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§§ 304.185[Reserved]

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§ 304.200 State Statutes

Evidence of deficit in specific mental functions required to support determination of incapacity. *Prob. Code § 811(a)*

Capacity to make decisions generally. *Prob. Code § 812*

Test for capacity to give informed consent to medical treatment. *Prob. Code § 813*

Capacity to refuse medical treatment. *Prob. Code § 814*

"Patient" defined. *Prob. Code § 3200*

Authorization of health care for adult without conservator. *Prob. Code §§ 3200-3212*

Petition to authorize health care. *Prob. Code § 3201*

Venue. *Prob. Code § 3202*

Who may petition. *Prob. Code § 3203*

Contents of petition. *Prob. Code § 3204*

Representation of patient. *Prob. Code § 3205*

Notice. *Prob. Code § 3206*

Submission on affidavits. *Prob. Code § 3207*

Orders when patient lacks capacity. *Prob. Code § 3208*

Orders when patient has capacity. *Prob. Code § 3208.5*

Continuing jurisdiction. *Prob. Code § 3209*

Procedure as supplemental to other procedures. *Prob. Code § 3210*

Prohibited treatment. *Prob. Code § 3211*

Treatment by spiritual means. *Prob. Code § 3212*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsHealthcare LawTreatmentPatient ConsentConsent by Guardians & ParentsHealthcare LawTreatmentPatient ConsentInformed Consent

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§ 304.201 Attorney General Opinions

Superior court as not having jurisdiction to authorize physicians or hospitals to proceed with nonemergency medical treatment for adult patient who has not been declared incompetent even though patient is unable psychologically or physically to give consent. *60 Ops. Cal. Att'y Gen. 382 (1977)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentPatient ConsentGeneral Overview

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§ 304.202 Law Reviews

Comment, *A Bright Thread for California's Legal Crazy-Quilt: A Proposed Right to Refuse Antipsychotic Drugs, 22 U.S.F. L. Rev. 341 (1988)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentPatient ConsentRight to Refuse Treatment

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PART IV. PROCEDURAL CHECKLISTS
A. Lanterman-Petris-Short Act And Related Proceedings

26-304 California Forms of Pleading and Practice--Annotated § 304.220

§ 304.220 Scope

This checklist is a general outline of the procedures used in the involuntary placement of persons in mental institutions for evaluation or treatment pursuant to the Lanterman-Petris-Short Act [*Welf. & Inst. Code § 5000 et seq.*]. It is intended to suggest the procedures which can be followed and to provide the attorney representing mental patients with references to the appropriate code sections.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of Adults

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§ 304.221 Detention for 72 Hours for Treatment or Evaluation

1. Detention of mentally disordered person [*Welf. & Inst. Code §§ 5150-5157*]

a. STANDARD: On probable cause to believe that a person is, as a result of mental disorder, a danger to others, or to himself or herself, or gravely disabled [*Welf. & Inst. Code § 5150*].

b. PROCEDURE: Application in writing stating the circumstances under which the person's condition was called to the attention of the person taking custody and stating the existence of probable cause [*Welf. & Inst. Code § 5150*].

c. BY: Peace officer, member of the attending staff of an evaluation facility, or other professional person designated by the county [*Welf. & Inst. Code § 5150*].

d. TIME: 72 hours, including Saturdays, Sundays, and holidays unless the Director of Mental Health has certified that evaluation and treatment services cannot reasonably be made available at the facility in question on those days [*Welf. & Inst. Code § 5151*].

NOTE:
When a person is detained pursuant to *Welf. & Inst. Code § 5150*, the total period of detention, including both voluntary and involuntary periods, may not exceed the total maximum period during which the person could have been detained involuntarily from the time of admission to the facility, unless the person agrees to remain voluntarily for a longer period [*Welf. & Inst. Code § 5258*].

e. CHALLENGED BY: Writ of habeas corpus. See *§ 304.223*.

f. ACTIONS FOR DAMAGES: False imprisonment. See *§ 304.90* et seq. and Ch. 257, *False*

Imprisonment .

NOTE:

When probable cause is based on a statement by a person other than a peace officer, member of the attending staff, or professional person, the person giving the statement is liable in a civil action for intentionally giving a statement he or she knows to be false [*Welf. & Inst. Code § 5150*].

g. DISPOSITION:

(1) Provision of evaluation, crisis intervention, or other inpatient or outpatient services on a voluntary basis [*Welf. & Inst. Code §§ 5151, 5152*].

STANDARD: In the judgment of the professional person, the person to be evaluated can be properly served without being detained [*Welf. & Inst. Code § 5151*].

(2) Release before 72 hours have elapsed [*Welf. & Inst. Code § 5152*].

(a) STANDARD: The psychiatrist directly responsible for the person's treatment believes, as the result of personal observations, that the person no longer requires evaluation or treatment [*Welf. & Inst. Code § 5152(a)*]. If both a psychiatrist and a psychologist have personally evaluated or examined the person and there is a collaborative treatment relationship between them, either may authorize the person's release, but only after they have consulted with each other. In the event of a clinical or professional disagreement about an early release, the 72-hour hold must be maintained unless the facility's medical director overrules the decision of the psychiatrist or psychologist who opposes the release. Both the psychiatrist and the psychologist must enter their findings, concerns, or objections into the person's medical record [*Welf. & Inst. Code § 5152(a)*].

(b) RESOLUTION OF DISPUTES RE RELEASE: If any other professional person, who is authorized to release the person, believes the person should be released before 72 hours have elapsed, and the psychiatrist directly responsible for the person objects, the matter shall be referred to the medical director for the final decision. However, if the medical director is not a psychiatrist, he or she must appoint a designee who is a psychiatrist. If the matter is referred, the person must be released before 72 hours have elapsed only if the psychiatrist making the final decision believes, as a result of his or her personal observations, that the person no longer requires evaluation or treatment [*Welf. & Inst. Code § 5152(a)*].

(3) Referral for further care and treatment on a voluntary basis [*Welf. & Inst. Code § 5152(b)*];

(4) Certification for 14-day intensive treatment [*Welf. & Inst. Code § 5152(b)*]; or

(5) Appointment of a conservator or temporary conservator [*Welf. & Inst. Code § 5152(b)*].

h. RIGHTS OF PERSON: To receive an evaluation as soon after admission as possible and to receive such treatment and care as his or her condition requires for the full period that he or she is held [*Welf. & Inst. Code § 5152(a)*]. To be given written and oral information about the probable effects and possible side effects of medications the person is receiving, by someone designated by the mental health facility [*Welf. & Inst. Code § 5152(c)*].

2. Detention of inebriate [*Welf. & Inst. Code §§ 5170-5176*].

a. STANDARD: On reasonable cause to believe that a person is a danger to others, or to himself or herself, or gravely disabled as a result of inebriation [*Welf. & Inst. Code § 5170*].

b. PROCEDURE: Application in writing stating the circumstances under which the person's condition was called to the attention of the person taking custody and stating that the person taking custody believes as a result of personal observations that the person is as above or has violated *Penal Code § 647(f)* [*Welf. & Inst. Code § 5170.3*].

c. BY: Peace officer, member of the attending staff of a facility, or other person designated by the county [*Welf. & Inst. Code § 5170*].

d. TIME: 72 hours, including Saturdays, Sundays, and holidays.

e. RELEASE OR CHALLENGE: See Paragraph A(1), *above*.

f. ACTIONS FOR DAMAGES: See Paragraph A(1), *above*.

g. RIGHTS OF PERSON: Except when physically impossible, no later than three hours after placement in the facility, the right to make at least two completed phone calls [*Welf. & Inst. Code § 5170.5*].

3. Court-ordered evaluation [*Welf. & Inst. Code §§ 5200-5213*].

a. STANDARD: Person alleged as a result of a mental disorder to be a danger to others, or to himself or herself, or to be gravely disabled [*Welf. & Inst. Code § 5200*].

b. PROCEDURE:

(1) Application by an individual for a petition alleging that there is a person as described above and requesting an evaluation of the person's condition [*Welf. & Inst. Code § 5201*].

(2) Prepetition screening [*Welf. & Inst. Code § 5202*] to determine whether there is probable cause to believe the allegations and whether the person will agree voluntarily to receive crisis intervention services or evaluation in his or her own home or in a facility [*Welf. & Inst. Code § 5202*]. The person or agency providing prepetition screening must conduct a reasonable investigation of the allegations and make a reasonable effort to personally interview the subject of the petition [*Welf. & Inst. Code § 5202*].

(3) Filing of the petition [*Welf. & Inst. Code § 5202*].
(a) STANDARD: There is probable cause and the person will not voluntarily receive services or evaluation [*Welf. & Inst. Code § 5202*].

(b) FORM: Petition [*Welf. & Inst. Code § 5204*]. Contents [*Welf. & Inst. Code § 5204*].

(c) BY: Person or agency designated by county to prepare petition.

(4) Order for evaluation [*Welf. & Inst. Code § 5206*].

(a) STANDARD: Person appears to the satisfaction of a judge of a superior court to be as a result of mental disorder a danger to others, to himself or herself, or gravely disabled and has refused or failed to accept evaluation voluntarily [*Welf. & Inst. Code § 5206*].

(b) PROCEDURE: Judge issues an order notifying the person to submit to evaluation at

a time and place designated [*Welf. & Inst. Code § 5206*].

(c) FORM: Order for Evaluation [*Welf. & Inst. Code § 5207*].

(d) BY: Judge of the superior court [*Welf. & Inst. Code § 5206*].

(5) Personal service of the order and petition on the person to be evaluated and the professional person in charge of the facility or a designee [*Welf. & Inst. Code § 5208*].

(6) Notification of person who served the order that the person has failed to appear [*Welf. & Inst. Code § 5208*].
BY: Professional person in charge [*Welf. & Inst. Code § 5208*].

(7) Person taken into custody and placed in a facility for evaluation [*Welf. & Inst. Code § 5206*].
BY: Peace officer, counselor in mental health, or court-appointed official [*Welf. & Inst. Code § 5206*].

(8) Evaluation [*Welf. & Inst. Code § 5206*].

c. TIME: 72 hours maximum, excluding Saturdays, Sundays, and holidays if services not available on those days; evaluation to be as prompt as possible [*Welf. & Inst. Code § 5206*].

d. RIGHTS OF PERSON: To remain at home or other place of his or her own choosing prior to the evaluation; to be accompanied by one or more relatives, friends, an attorney, personal physician, or other professional or religious advisor to the place of evaluation; and, if the person requests, to have those persons present during the evaluation [*Welf. & Inst. Code § 5206*]. To be given written and oral information about the probable effects and possible side effects of medications the person is receiving during detention for evaluation, by someone designated by the mental health facility [*Welf. & Inst. Code § 5213(b)*].

e. RELEASE OR CHALLENGE: Habeas corpus *see* Paragraph C, *below*.

f. ACTIONS FOR DAMAGES: False imprisonment. *see* Part IV and Ch. 257, *False Imprisonment*.

Any person who seeks a petition for evaluation knowing that the person is not as alleged, is guilty of a misdemeanor, and may be held civilly liable for damages to the person for whom the petition is sought [*Welf. & Inst. Code § 5203*].

g. DISPOSITION:

(1) Released;

(2) Referred for care on a voluntary basis;

(3) Certified for intensive treatment; or

(4) Recommended for conservatorship [*Welf. & Inst. Code § 5206*].

4. Court-ordered evaluation of criminal defendant [*Welf. & Inst. Code §§ 5225-5230*].

a. STANDARD: Criminal defendant who appears, as a result of chronic alcoholism or the use of

narcotics or restricted dangerous drugs, to be a danger to others, to himself or herself, or to be gravely disabled, brought before a judge [*Welf. & Inst. Code § 5225*].

b. PROCEDURE:

(1) Transfer to superior court, if necessary [*Welf. & Inst. Code § 5225*].

(2) Order for evaluation [*Welf. & Inst. Code § 5225*].
(a) FORM: Order for Evaluation [*Welf. & Inst. Code § 5227*].

(b) BY: Judge of superior court.

(3) Service of order for evaluation on the person to be evaluated and the professional person in charge of the facility [*Welf. & Inst. Code § 5228*].

(4) Dismissal or suspension of criminal proceedings [*Welf. & Inst. Code § 5226.1*].

c. TIME: No time specified for evaluation; subsequent detention for treatment for 72 hours from the time of evaluation or detention for evaluation, excluding Saturdays, Sundays, and holidays if treatment services are not available on those days [*Welf. & Inst. Code § 5230*].

d. RIGHTS OF PERSON: The criminal defendant must be advised of his or her right to immediately continue with the criminal proceeding. The judge must fully appraise the defendant of this option and of the consequences of the evaluation procedure. Right to legal counsel at the proceeding where the choice is made [*Welf. & Inst. Code § 5226*].

e. CHALLENGE BY: Writ of habeas corpus [*see* Paragraph C, *below*].

f. ACTION FOR DAMAGES: None due to judicial immunity.

g. DISPOSITION:

(1) Release if criminal charge is dismissed [*Welf. & Inst. Code § 5230*];

(2) Release to custody of sheriff pursuant to *Welf. & Inst. Code § 5226.1* for return to the court where the order for evaluation was made and for resumption or dismissal of the criminal proceedings [*Welf. & Inst. Code §§ 5226.1, 5230*];

(3) Detention in the facility by court order pursuant to *Welf. & Inst. Code § 5226.1* [*Welf. & Inst. Code § 5230*];

(4) Referral for further care on a voluntary basis [*Welf. & Inst. Code § 5230*];

(5) Certification for intensive treatment [*Welf. & Inst. Code § 5230*]; or

(6) Recommendation for conservatorship, subject to the prior disposition of the criminal charge in the court in which that charge is pending [*Welf. & Inst. Code §§ 5226.1, 5230*].

Legal Topics:

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

Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesTreatment

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A. Lanterman-Petris-Short Act And Related Proceedings

26-304 California Forms of Pleading and Practice--Annotated § 304.222

§ 304.222 Intensive Treatment for 14 Days [Welf. & Inst. Code §§ 5250-5259.3]

1. STANDARD: Person detained for 72 hours who has received an evaluation, where the professional staff has found that the person is, as a result of mental disorder or impairment by chronic alcoholism, a danger to others, or himself or herself, or gravely disabled; the person has not accepted voluntary treatment; and the facility is designated by the county to provide treatment, agrees to admit the person, and complies with certification hearing requirements [*Welf. & Inst. Code § 5250*].

2. PROCEDURE:

a. Signing of notice of certification.
FORM: Notice of Certification [*Welf. & Inst. Code § 5252*].

b. Delivery of notice of certification to person certified [*Welf. & Inst. Code § 5253*] and sending of a copy of the notice to the person's attorney or advocate [*Welf. & Inst. Code § 5253*].

c. Designation by the person of another person who is to be sent a copy of the certification notice [*Welf. & Inst. Code § 5253*].

d. Informing the person of the right to a certification review hearing and his or her rights at that hearing [*Welf. & Inst. Code § 5254*].

e. Advice and explanation of the right to judicial review by habeas corpus, explanation of the term, and the right to counsel [*Welf. & Inst. Code § 5254.1*] [*see* Paragraph C, *below*].

3. BY: Notice of certification must be signed by the professional person, or a designee, in charge of the agency or facility and a physician who participated in the evaluation, or, if a physician is not available, certain other professionals [*Welf. & Inst. Code § 5251*].

4. TIME: Not more than 14 days [*Welf. & Inst. Code §§ 5250, 5257*].

NOTE:

When a person is detained pursuant to *Welf. & Inst. Code § 5250*, the total period of detention, including both voluntary and involuntary periods, may not exceed the total maximum period during which the person could have been detained involuntarily from the time of admission to the facility, unless the person agrees to remain voluntarily for a longer period [*Welf. & Inst. Code § 5254.1*].

5. RIGHTS OF PERSON: To be informed of the legal right to a certification review hearing and a judicial review by habeas corpus [*Welf. & Inst. Code § 5252.1*].

6. CERTIFICATION REVIEW HEARING:

a. Hearing required within four days of date on which person is certified for period of intensive treatment unless judicial review is requested or hearing is postponed by request of person or his or her attorney or advocate [*Welf. & Inst. Code §§ 5254, 5256*].

b. Certified person entitled to be present, to be assisted, present evidence, to question, and to make certain requests [see Welf.& Inst. Code § 5256.4(a)]. Mental health facility required to make reasonable attempts to notify family members or other person designated by patient of time and place of hearing [*see Welf. & Inst. Code § 5256.4(c)*].

c. All relevant evidence admitted and considered by hearing officer [*Welf. & Inst. Code § 5256.4(b), (d)*]. Resistance to involuntary commitment does not imply existence of mental disorder or evidence that person is dangerous or gravely disabled [*Welf. & Inst. Code § 5256.4(e)*].

d. Required release of certified person on finding of no probable cause that person is a danger to himself or herself or others, or is gravely disabled [*Welf. & Inst. Code § 5256.5*].

e. Detention for 14 days beyond end of initial 72-hour detention period if probable cause is found [*Welf. & Inst. Code § 5256.6*].

f. Notification to certified person, attorney or advocate, and director of facility where person receiving treatment of decision, statement of evidence relied on, and reasons for decision [Welf. & Inst. Code § 5236.7].

7. DISPOSITION:

a. Release [*Welf. & Inst. Code § 5257(a)*].

STANDARD: The psychiatrist directly responsible for the person's treatment believes, as a result of his or her personal observations, that the person certified no longer is, as a result of mental disorder or impairment by chronic alcoholism, a danger to others or to himself or herself, or gravely disabled; disputes regarding release are to be resolved using a procedure specified by statute [*see Welf. & Inst. Code § 5257(a)*]. If both a psychiatrist and a psychologist have personally evaluated or examined the person and there is a collaborative treatment relationship between them, either may authorize the person's release, but only after they have consulted with each other. In the event of a clinical or professional disagreement about an early release, the person may not be released unless the facility's medical director

overrules the decision of the psychiatrist or psychologist who opposes the release. Both the psychiatrist and the psychologist must enter their findings, concerns, or objections into the person's medical record [*Welf. & Inst. Code § 5257(a)*].

b. Holding in the facility pursuant to *Welf. & Inst. Code § 5226.1* [*see* Paragraph A(4), *above*];

c. Patient remaining voluntarily [*Welf. & Inst. Code § 5154*];

d. Petition for appointment of conservator [*Welf. & Inst. Code § 5257(b)(4)*; *see Welf. & Inst. Code §§ 5350-5371*];

e. Certification for further intensive treatment as suicidal person [*Welf. & Inst. Code § 5257(b)(2) see Welf. & Inst. Code §§ 5260-5268*];

f. Certification for additional 30 days of intensive treatment [*Welf. & Inst. Code § 5257(b)(3)*; *see Welf. & Inst. Code §§ 5270.10-5270.65*]; or

g. Petition for postcertification of imminently dangerous person [*Welf. & Inst. Code § 5257(b)(5)*; *see Welf. & Inst. Code §§ 5300-5309*].

8. RELEASE OR CHALLENGE: Habeas corpus [*see* Paragraph C, *below*].

9. ACTIONS FOR DAMAGES:

a. False imprisonment;

b. Civil rights action [*see 42 U.S.C.S. §§ 1981-1983*].

c. Any individual who is knowingly and willfully responsible for detaining a person for more than 14 days in violation of the provisions of *Welf. & Inst. Code §§ 5250-5259.3* is liable to that person in civil damages [*Welf. & Inst. Code §§ 5259.1*];

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of Adults

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26-304 California Forms of Pleading and Practice--Annotated § 304.223

§ 304.223 Judicial Review by Writ of Habeas Corpus--Certification for Intensive Treatment [Welf. & Inst. Code §§ 5275-5278]

1. STANDARD: Any person detained by certification for intensive treatment pursuant to *Welf. & Inst. Code §§ 5250, 5260, 5270.10, 5300 et seq.* who has made or for whom a person has made a request for release [*Welf. & Inst. Code §§ 5275*] or any person detained for intensive treatment during pendency of conservatorship proceedings [*see Welf. & Inst. Code § 5353*].

2. BY: Request for release made by person certified or by another person on that person's behalf [*Welf. & Inst. Code § 5275*].

3. PROCEDURE:

a. Request for release made to person delivering notice of certification or to any member of the treatment staff at any time during the intensive treatment [*Welf. & Inst. Code § 5275*].

b. Person to whom request is made provides request for release for signature by the person certified.

FORM: Request for Release [*Welf. & Inst. Code § 5275*].

c. Delivery of request for release to professional person in charge [*Welf. & Inst. Code § 5275*].

d. Notification of the superior court of the county [*Welf. & Inst. Code § 5275*].
BY: Person notified [*Welf. & Inst. Code § 5275*].

e. Informing person requesting release of right to counsel.
BY: Treatment staff and the court [*Welf. & Inst. Code § 5276*].

f. Appointment of public defender or other attorney [*Welf. & Inst. Code § 5276*].

g. If request withdrawn, certification review hearing held within four days [*Welf. & Inst. Code § 5276.2*].

h. Filing petition for writ of habeas corpus.
BY: Person certified and attorney.

For procedures and forms for use in proceedings on the writ of habeas corpus, *see §§ 304.280* and *304.280*.1, and Ch. 292, *Habeas Corpus* .

i. Immediate release [*Welf. & Inst. Code § 5276*]; or evidentiary hearing within two judicial days after the petition is filed [*Welf. & Inst. Code § 5276*].

j. Mental health facility to make reasonable attempts to notify family members or other person designated by patient of time and place of judicial review, unless patient requests otherwise [*Welf. & Inst. Code § 5276*].

4. RIGHTS OF PERSON:

a. To be represented by counsel [*Welf. & Inst. Code § 5276*].

b. To remain in the county in which review will be sought [*Welf. & Inst. Code § 5276*].

5. DISPOSITION:

a. Immediate release [*Welf. & Inst. Code § 5276*];

b. Release if the court finds:

(1) That the person is not, as a result of mental disorder or impairment by chronic alcoholism, a danger to others, or to himself or herself, or gravely disabled;

(2) That the person was not advised of, or had accepted, voluntary treatment; or

(3) That the facility is not equipped and staffed to provide, or is not designated to provide, intensive treatment [*Welf. & Inst. Code § 5276*].

c. Continued detention.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionGeneral OverviewFamily LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesTreatment

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26-304 California Forms of Pleading and Practice--Annotated § 304.224

§ 304.224 Additional Intensive Treatment for Suicidal Person [Welf. & Inst. Code §§ 5260-5268]

1. STANDARD: Person after 72-hour detention and 14-day intensive treatment who, as a result of mental disorder or impairment by chronic alcoholism, during the period of confinement, threatened or attempted to take his or her own life or who was detained for evaluation and treatment because of a threat to take his or her own life and who continues to present an imminent threat of doing so; who has not accepted voluntary treatment; and when the facility is equipped and staffed to provide treatment, is designated to provide such treatment, and agrees to admit the person [*Welf. & Inst. Code § 5260*].

2. PROCEDURE:

a. Signing of second notice of certification [*Welf. & Inst. Code § 5261*].
(1) FORM: Second Notice of Certification [*Welf. & Inst. Code § 5262*].

(2) BY: Professional person in charge of the facility providing 14-day intensive treatment and by a physician or other professional person who participated in analysis of the person's condition pursuant to *Welf. & Inst. Code § 5260* [*Welf. & Inst. Code § 5261*].

b. Personal delivery of the second notice of certification to the person certified; filing of a copy with the superior court; sending of a copy to the person's attorney, the district attorney, the public defender, if any, to the facility providing intensive treatment, and to the Department of Health [*Welf. & Inst. Code § 5263*].

c. Designation by certified person of any person who is to be sent copy of certification notice [*Welf. & Inst. Code § 5263*].

d. Advice and explanation of the continuing right to judicial review by habeas corpus. (This step is not specifically required by statute, but the second notice of certification set forth in *Welf. & Inst. Code § 5262* states that the person has been so advised and must be signed by the certifying professional person

[see *Welf. & Inst. Code § 5262*].) [*see* Paragraph C, *above*].

3. TIME: Not more than 14 days [*Welf. & Inst. Code §§ 5260, 5264*].

4. DISPOSITION:

a. Release.

STANDARD: As soon as the psychiatrist directly responsible for the person's treatment believes, as a result of his or her personal observations, that the individual has improved sufficiently to leave or is prepared to accept voluntary treatment or referral, or to voluntarily remain in the treating facility. Disputes concerning release are to be resolved using a statutory procedure [*Welf. & Inst. Code § 5264(a)*].

b. Holding in the facility pursuant to *Welf. & Inst. Code § 5226.1* [*Welf. & Inst. Code § 5264(b)*; *see* Paragraph A(4)];

c. Patient remaining voluntarily [*Welf. & Inst. Code § 5264(b)(1)*];

d. Recommendation for conservatorship [*Welf. & Inst. Code § 5264(b)(2)*]; or

e. Postcertification treatment as a dangerous person [*Welf. & Inst. Code § 5264(b)(3)*].

5. RELEASE OR CHALLENGE: Writ of habeas corpus [*see* Paragraph C, *above*].

6. ACTION FOR DAMAGES:

a. False imprisonment.

b. Civil rights action [*42 U.S.C.S. §§ 1981-1983*].

c. Any individual who is knowingly and willfully responsible for detaining a person for more than 14 days in violation of the provisions of *Welf. & Inst. Code § 5264* is liable to that person in civil damages [*Welf. & Inst. Code § 5265*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesTreatment

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26-304 California Forms of Pleading and Practice--Annotated § 304.225

§ 304.225 Additional Intensive Treatment for 30 Days [Welf. & Inst. Code § 5270.10 et. seq.]

1. STANDARD: On completion of 14-day period of intensive treatment (*see* Paragraph B, *above*), person may be certified for additional period of not more than 30 days of intensive treatment if professional staff of treating agency or facility finds that person remains gravely disabled as a result of mental disorder or impairment by chronic alcoholism and person remains unwilling or unable to accept treatment voluntarily [*Welf. & Inst. Code § 5270.15*].

2. PROCEDURE:

a. Second notice of certification must be signed by professional person in charge of treating facility and one of following [*Welf. & Inst. Code §§ 5270.20, 5270.25*; *see Welf. & Inst. Code § 5252* (statutory form)]:

(1) Physician who must, if possible, be board-qualified psychiatrist and who participated in evaluation and finding that patient meets standard;

(2) Licensed psychologist who has doctoral degree in psychology and at least five years of postgraduate experience in diagnosis and treatment of emotional and mental disorders and who participated in evaluation and finding that patient meets standard;

(3) Another physician or psychologist, if professional person in charge of treating facility is the physician who performed the medical evaluation and finding, or a psychologist; or

(4) Social worker or registered nurse who participated in evaluation and finding if professional person in charge of treating facility is the physician who performed the medical evaluation and finding, or a psychologist, and another physician or psychologist is not available.

b. Copies of second notice of certification must be filed with court, personally delivered to person certified, and sent to person's attorney, district attorney, public defender, if any, and treating facility [*Welf. & Inst. Code § 5270.30*].

c. Person certified must be informed of his or her rights [*see Welf. & Inst. Code §§ 5252, 5270.25*; *see also* Paragraph 3, *below*].

d. Unless judicial review is requested [*see* Paragraph C, *above*], second certification review hearing must be held [*Welf. & Inst. Code § 5270.15*; *see Welf. & Inst. Code § 5256*; *see also* Paragraph B(6), *above*].

3. RIGHTS OF PERSON CERTIFIED:

a. Professional staff of treating agency or facility must monitor person's progress daily and analyze person's condition at intervals of no more than 10 days to determine whether person continues to meet criteria established for certification [*Welf. & Inst. Code § 5270.15*].

b. Professional person in charge of the treating facility, or a designee, may permit person to leave facility for short periods during period of intensive treatment [*Welf. & Inst. Code § 5270.65*].

c. Person must be asked to designate any individual who is to be sent copy of certification notice, either at time of certification or later if he or she is incapable of making the designation at that time [*Welf. & Inst. Code § 5270.30*].

d. Person is entitled to judicial review [*Welf. & Inst. Code § 5270.15*; *see* Paragraph C, *above*].

e. Person is entitled to certification review hearing unless judicial review is requested [*Welf. & Inst. Code § 5270.15*; *see* Paragraph B(6), *above*].

f. Person is entitled to attorney or advocate, who must visit him or her and provide assistance in preparing for hearing or to answer questions regarding commitment or to provide other assistance [*Welf. & Inst. Code §§ 5252, 5270.25*].

4. DISPOSITION:

a. Release before or at end of 30-day period if psychiatrist directly responsible for person's treatment believes, as a result of personal observations, that person no longer meets criteria for certification, or is either prepared to accept voluntary treatment on a referral basis or remain in treating facility voluntarily [*Welf. & Inst. Code § 5270.35(a)*]. If both a psychiatrist and a psychologist have personally evaluated or examined the person and there is a collaborative treatment relationship between them, either may authorize the person's release, but only after they have consulted with each other. In the event of a clinical or professional disagreement about an earlyrelease, the person may not be released unless the facility's medical director overrules the decision of the psychiatrist or psychologist who opposes the release. Both the psychiatrist and the psychologist must enter their findings, concerns, or objections into the person's medical record [*Welf. & Inst. Code § 5270.35(a)*].

NOTE:

If any other professional person who is authorized to release the person believes that the person should be released before 30 days have elapsed, and the psychiatrist directly responsible for the person's treatment objects, the matter must be referred

to the medical director of the facility for the final decision. However, if the medical director is not a psychiatrist, he or she must appoint a designee who is a psychiatrist. If the matter is referred to a designee, the person may be released before 30 days only if the designee-psychiatrist believes, as a result of his or her personal observations, that the person no longer meets the criteria for certification or is prepared to accept voluntary treatment [*Welf. & Inst. Code § 5270.35(a)*].

b. Patient remains in treating facility voluntarily [*Welf. & Inst. Code § 5270.35(b)(1)*].

c. Further involuntary detention for one of following reasons [*Welf. & Inst. Code § 5270.35(b)(2), (3)*]:

(1) Person is subject of LPS conservatorship petition [*see Welf. & Inst. Code §§ 5350-5371*]; or

(2) Person is subject of petition for postcertification of imminently dangerous person [*see Welf. & Inst. Code §§ 5300-5309*; *see also* Paragraph F, *below*].

5. RELEASE OR CHALLENGE. Writ of habeas corpus [*see* Paragraph C, *above*].

6. ACTION FOR DAMAGES

a. False imprisonment.

b. Civil rights action [*42 USC §§ 1981-1983*].

c. Any individual who is knowingly and willfully responsible for detaining person for more than 30 days without basis for further detention is civilly liable to person detained [*Welf. & Inst. Code § 5270.40*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesTreatment

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26-304 California Forms of Pleading and Practice--Annotated § 304.226

§ 304.226 Confinement for Further Treatment for 180 Days of Person Dangerous to Others [Welf. & Inst. Code §§ 5300-5309].

1. STANDARD:

a. The person has attempted, inflicted, or made a serious threat of substantial physical harm on the person of another after having been taken into custody, and while in custody, for evaluation and treatment, and who, as a result of mental disorder or mental defect, presents a demonstrated danger of inflicting substantial physical harm on others [*Welf. & Inst. Code § 5300(a)*];

b. The person had attempted or inflicted physical harm on the person of another, that act having resulted in his of her being taken into custody and who presents, as a result of mental disorder or mental defect, a demonstrated danger of inflicting substantial physical harm on others [*Welf. & Inst. Code § 5300(b)*]; or

c. The person had made a serious threat of substantial physical harm on the person of another within seven days of being taken into custody, that threat having at least in part resulted in his or her being taken into custody, and the person presents, as a result of mental disorder or mental defect, a demonstrated danger of inflicting substantial physical harm on others [*Welf. & Inst. Code § 5300(c)*].

2. PROCEDURE:

a. Petition for order requiring further treatment.
(1) FORM: Petition [*Welf. & Inst. Code § 5301*].

(2) BY: Professional person in charge or a designee [*Welf. & Inst. Code § 5301*].

b. Affidavits supporting petition describing in detail the behavior that indicates that the person falls within the standard [*Welf. & Inst. Code § 5301*].

c. Service of the petition and affidavits on the person on the same day as the petition is filed with the superior court [*Welf. & Inst. Code § 5301*].

d. Filing of the petition with the clerk of the superior court [*Welf. & Inst. Code § 5301*].

e. Court to advise the person of his or her right to representation by an attorney and of the right to demand a jury trial; and to assist the person in finding an attorney or appoint the public defender or other attorney [*Welf. & Inst. Code § 5302*].

NOTE:

Counsel for the person confined should determine local practice as to the filing of written objection to the petition or other method of making appearance and objection.

Counsel should also make a demand for jury trial if it is determined that a jury trial would be in the best interests of the client [*Welf. & Inst. Code § 5303*].

f. Appointment of a psychiatrist or psychologist with forensic skills to examine the person confined and to testify [*Welf. & Inst. Code § 5303.1*].

BY: Judge [*Welf. & Inst. Code § 5303.1*]; or if such a person is not appointed, person confined, may, on advice of counsel,waive the presence of the professional person who petitioned for the confinement and who gave intensive treatment [*Welf. & Inst. Code § 5303.1*].

g. Hearing within four judicial days of the filing of the petition [*Welf. & Inst. Code § 5303*]; or request for jury trial and jury trial commencing within 10 judicial days of the filing of the petition, unless the person's attorney requests a continuance for a maximum of 10 additional judicial days [*Welf. & Inst. Code § 5303*].

h. Person held for treatment until a final decision on the merits, until released by order of the superior courts or until the petition is withdrawn [*Welf. & Inst. Code § 5303*].

3. TIME: Treatment for not more than 180 days from the date of the court judgment [*Welf. & Inst. Code §§ 5300, 5304(a)*].

4. RIGHTS OF PERSON: To be informed of the right to be represented by an attorney, the right to demand a jury trial, and the right to judicial review by habeas corpus [*Welf. & Inst. Code §§ 5302, 5308*].

5. DISPOSITION:

a. Release required.

STANDARD: No decision on the petition within 30 days after filing, not including extensions requested by the person's attorney [*Welf. & Inst. Code § 5303*];

b. Postcertification treatment for 180 days.

STANDARD: Finding by the court or by unanimous jury verdict [see *Welf. & Inst. Code § 5303*] that the person comes within the standard for postcertification treatment [*Welf. & Inst. Code § 5304(a)*];

c. Release if the person does not come within the standard; or

d. Filing a new petition for further postcertification treatment after 180 days [*Welf. & Inst. Code § 5304(b)*];

6. RELEASE OR CHALLENGE. Writ of habeas corpus [*see* Paragraph C, *above*].

7. ACTION FOR DAMAGES:

a. False imprisonment.

b. Civil rights action [*42 U.S.C.S. §§ 1981-1983*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of AdultsPublic Health & Welfare LawHealthcareMental Health ServicesTreatment

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26-304 California Forms of Pleading and Practice--Annotated § 304.227

§ 304.227 Outpatient Status During 180-Day Period [Welf. & Inst. Code §§ 5305-5309]

1. CONDITIONS: Person in charge of health facility determines person named in petition will no longer be a danger to the health and safety of others while on outpatient status and will benefit from outpatient status, and county mental health director advises court recommending outpatient status and identifies program of supervision and treatment [*Welf. & Inst. Code § 5305(a)*].

2. PROCEDURE:

a. Notification of appropriate public officer, counsel of person named in petition, court, and county mental health director [*Welf. & Inst. Code § 5305(b)*].

b. If no hearing requested, outpatient plan becomes effective within five judicial days after notice [*Welf. & Inst. Code § 5305(b)*]. Progress reports required at 90-day intervals during outpatient treatment [*Welf. & Inst. Code § 5305(d)*].

c. If requested, hearing is held within five judicial days of actual notice given [*Welf. & Inst. Code § 5305(b)*].

3. REVOCATION:

a. Request for revocation of outpatient status by outpatient treatment supervisor on grounds that person receiving treatment requires extended inpatient treatment or refuses to accept further outpatient treatment and supervision [*Welf. & Inst. Code § 5306.5*].

b. Notice of request to court, person's counsel, and public officer [Welf. & Inst. Code § 5306.6].

c. Hearing within 15 days, and order of confinement if necessary [Welf. & Inst. Code §

5306.6].

d. Petition to the court by public officer on grounds that person is a danger to health and safety of others while on outpatient status [*Welf. & Inst. Code § 5307*].

e. Notice of hearing by clerk to person, county mental health director, and person's attorney [*Welf. & Inst. Code § 5307*].

f. Hearing within 15 days, and order of confinement, if judge determines that person is danger to health and safety of others or self [*Welf. & Inst. Code § 5307*].

g. Confinement of person pending hearing under Welf. & Inst. Code § 5306.6 or *5307*, if county mental health director is of the opinion that the person will be a danger to self or to another while on outpatient status and that to delay hospitalization until hearing would pose demonstrated danger of harm to the person or to another [*Welf. & Inst. Code § 5308*].

4. RELEASE BEFORE EXPIRATION OF COMMITMENT PERIOD:

a. Person being treated may be released prior to expiration of commitment period if psychiatrist directly responsible for person's treatment believes, as a result of his or her personal observations, that person no longer constitutes demonstrated danger of substantial physical harm to others. Disputes concerning release are to be resolved using a statutory procedure [*Welf. & Inst. Code § 5309*].

b. Notice to public officer, to counsel of person, to court, and to county mental health director [*Welf. & Inst. Code § 5309*].

c. Unconditional release plan becomes effective within five judicial days of actual notice, unless a court hearing is requested [*Welf. & Inst. Code § 5309*].

d. If requested, hearing held within five judicial days of notice, and release will not take effect until approved by the court after the hearing [*Welf. & Inst. Code § 5309*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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26-304 California Forms of Pleading and Practice--Annotated § 304.228

§ 304.228 Conservatorship [Welf. & Inst. Code §§ 5350-5371]

1. STANDARD: Person gravely disabled as a result of mental disorder or impairment by chronic alcoholism [*Welf. & Inst. Code § 5350*].

2. PROCEDURE:

a. Recommendation by professional person in charge of agency or facility to officer providing conservatorship investigation [*Welf. & Inst. Code § 5352*].

b. Investigation by officer providing conservatorship investigation and report to court [*Welf. & Inst. Code §§ 5354-5357*].

c. Petition by investigating officer to establish conservatorship [*Welf. & Inst. Code § 5352*].

NOTE:
The procedure for establishing, administering, and terminating conservatorships for gravely disabled persons is the same as that provided in *Prob. Code §§ 1400-2808* except as otherwise noted in *Welf. & Inst. Code §§ 5350* and *5350.2* . For procedural requirements not provided for in *Welf. & Inst. Code §§ 5350-5371* , see Ch. 280, *Guardianship and Conservatorship: Appointment of Conservators* , through Ch. 281, ***Guardianship and Conservatorship: Appointment of Conservators*** , and succeeding chapters.

d. Temporary conservatorship established for period not to exceed 30 days if court determines need for temporary conservator [*Welf. & Inst. Code § 5352.1*].

e. Appointment of counsel for proposed conservatee within five days after date of petition [*Welf. & Inst.*

Code § 5365].

f. Reasonable attempts by mental health program to notify family members or other person designated by patient of time and place of hearing on petition [*Welf. & Inst. Code § 5350.2*].

g. Notice of proceedings given to guardian or conservator of person or estate of proposed conservatee appointed under Probate Code [*Welf. & Inst. Code § 5350(g)*].

h. Hearing on petition within 30 days of date of petition [*Welf. & Inst. Code § 5365*].

i. Demand for trial within five days of hearing [*Welf. & Inst. Code § 5350*].

3. DISPOSITION: Appointment of conservator and placement of conservatee by conservator in least restrictive placement, after hearing, as designated by court [*Welf. & Inst. Code § 5358(a)*]. For a conservatee who is gravely disabled as defined under *Welf. & Inst. Code § 5008(h)(1)(B)* (incapacity to stand trial), placement by the conservator of the conservatee in a placement that achieves the treatment of the conservatee and the protection of the public [*Welf. & Inst. Code § 5358(h)(1)(B)*].

4. CHALLENGE OF PLACEMENT OR CONDITIONS OF CONFINEMENT: Writ of habeas corpus [*see Welf. & Inst. Code §§ 5353, 5358.7*]. See *§§ 304.280* and *304.280*.1.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsAppointment

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26-304 California Forms of Pleading and Practice--Annotated §§ 304.229-304.239

[Reserved]

§§ 304.229[Reserved]

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1. Scope

26-304 California Forms of Pleading and Practice--Annotated § 304.240

§ 304.240 Scope

NOTE:

The following is a general outline of the procedures used in the involuntary commitment of persons who are developmentally disabled or mentally retarded, pursuant to *Welf. & Inst. Code §§ 6500-6513*. It includes the procedures used for judicial review pursuant to *Welf. & Inst. Code §§ 4800-4805*. It is intended to be suggestive of the procedures that are followed and to provide the attorney with a reference to the appropriate code sections. Where " *FORM*" appears together with a form title and citation to a code section, a form for the procedure being discussed is set forth either fully or in part in the cited code section.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of Adults

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26-304 California Forms of Pleading and Practice--Annotated § 304.241

§ 304.241 Petition for Commitment [Welf. & Inst. Code §§ 6251, 6502]

1. STANDARD: Person is mentally retarded and a danger to himself or herself or to others [*Welf. & Inst. Code § 6500*].

2. *FORM: Petition* [*Welf. & Inst. Code § 6251*].

3. BY WHOM FILED: [*see Welf. & Inst. Code § 6502*].

4. PROCEDURE:

a. Filing of petition in the superior court of the county that determined the question of the person's mental competence when the person has been found incompetent to stand trial under *Penal Code § 1367 et seq.* on being charged with one or more of the offenses identified or described in Welf. & Inst.Code § 6500. In all other cases, filing of petition in the superior court of the county in which the person is physically present [*Welf. & Inst. Code § 6502*].

b. Filing of affidavit verifying petition [*Welf. & Inst. Code § 6502*].

c. Fixing by court of time and place of hearing of the petition [*Welf. & Inst. Code § 6503*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health

ServicesCommitmentInvoluntary Commitment of Adults

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26-304 California Forms of Pleading and Practice--Annotated § 304.242

§ 304.242 Notice of Hearing [Welf. & Inst. Code § 6504]

Notice of hearing to alleged mentally retarded person and to the parent, guardian, conservator, or other person charged with the support of the person mentioned in the petition [*Welf. & Inst. Code § 6504*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsParental NoticePublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of Adults

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26-304 California Forms of Pleading and Practice--Annotated § 304.243

§ 304.243 Apprehension and Examination

1. Order for apprehension of the person, as the court deems necessary or advisable [*Welf. & Inst. Code § 6505*].

2. Examination at a regional center for the developmentally disabled and a written report to the court, within 15 judicial days after the order for examination, evaluating the person and recommending where the person may be placed, with a description of the least-restrictive residential placement necessary to achieve the purposes of treatment [*Welf. & Inst. Code § 6504.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of Adults

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§ 304.244 Hearing

Counsel should, on receipt of the petition, prepare a demand for jury trial on the issue of whether the alleged mentally retarded person should be committed. It has been held that due process requires the right to a jury trial in such a proceeding [*see In re Watson (1979) 91 Cal. App. 3d 455, 460, 154 Cal. Rptr. 151* ; *O'Brien v. Superior Court (1976) 61 Cal. App. 3d 62, 72, 132 Cal. Rptr. 13]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury TrialFamily LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of Adults

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26-304 California Forms of Pleading and Practice--Annotated § 304.245

§ 304.245 Disposition

1. Order of commitment [*Welf. & Inst. Code § 6509*].
FORM: Order for Care, Hospitalization, or Commitment [*Welf. & Inst. Code § 6254*].
STANDARD: The court finds that the person is mentally retarded and that he or she is dangerous to himself or herself or to others [*Welf. & Inst. Code § 6509*];

2. Return to home state [*Welf. & Inst. Code § 6509*]; or

3. Release.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of Adults

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26-304 California Forms of Pleading and Practice--Annotated §§ 304.246-304.259

[Reserved]

§§ 304.246[Reserved]

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26-304 California Forms of Pleading and Practice--Annotated § 304.260

§ 304.260 Request for Release [Welf. & Inst. Code § 4800]

1. STANDARD: Any adult who is or has been admitted or committed to a state hospital, community care facility, or health facility as a developmentally disabled patient [*Welf. & Inst. Code § 4800(a)*].

2. PROCEDURE:

a. Request for release to any member of the staff of the facility or employee of a regional center by the person or some person in his or her behalf [*Welf. & Inst. Code § 4800*].

b. Person to whom the request is made delivers copy of request for release form [*Welf. & Inst. Code § 4800(b)*].
FORM: Request for Release [*Welf. & Inst. Code § 4800(d)*].

c. Delivery of copy of the form to the administrator or director of the facility [*Welf. & Inst. Code § 4800(b)*].

d. Notification of the superior court in the county and transmission of a copy of the request to the court, to the regional center director, and to the person's parent or conservator, with a statement that notice of the proceedings will be forwarded by the court [*Welf. & Inst. Code § 4800(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentDischarge & Release of AdultsPublic Health & Welfare LawHealthcareMental Health

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26-304 California Forms of Pleading and Practice--Annotated § 304.261

§ 304.261 Notification of Right to, and Appointment of, Counsel [Welf. & Inst. Code § 4801]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselAppointmentsFamily LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of Adults

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26-304 California Forms of Pleading and Practice--Annotated § 304.262

§ 304.262 Preparation of Petition for Writ of Habeas Corpus by Counsel [Welf. & Inst. Code § 4801]

See *§ 304.280* and Ch. 292, *Habeas Corpus* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionGeneral OverviewFamily LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of Adults

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26-304 California Forms of Pleading and Practice--Annotated § 304.263

§ 304.263 Filing of Petition for Writ of Habeas Corpus [Welf. & Inst. Code § 4801]

PROCEDURE: Notification of parent or conservator by clerk of the court sending a copy of the petition and notification of the time and place of the hearing [*Welf. & Inst. Code § 4801*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionGeneral OverviewFamily LawFamily Protection & WelfareInvoluntary CommitmentHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsParental NoticePublic Health & Welfare LawHealthcareMental Health ServicesCommitmentInvoluntary Commitment of Adults

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26-304 California Forms of Pleading and Practice--Annotated § 304.264

§ 304.264 Hearing

1. PROCEDURE:

a. Release of petitioner [*Welf. & Inst. Code § 4801*]; or

b. Order for evidentiary hearing to be held not sooner than 5 or more than 10 judicial days after the petition and notice to theparent or conservator and to the director of the regional center [*Welf. & Inst. Code § 4801*].

2. DISPOSITION:

a. Release.
STANDARD: Person is not developmentally disabled or person is developmentally disabled but is able to provide safely for basic personal needs for food, clothing, and shelter [*Welf. & Inst. Code § 4801*].

b. Release to responsible person, agency, or regional center, subject to conditions that the court deems proper [*Welf. & Inst. Code § 4801*].
STANDARD: Person is unable to provide for basic needs safely but one of the above is willing and able to provide for these needs [*Welf. & Inst. Code § 4801*].

c. Order that regional center initiate proceedings for appointment of guardian or conservator [*Welf. & Inst. Code § 4801*].
STANDARD: The person is developmentally disabled and has no parent or conservator and is in need of one [*Welf. & Inst. Code § 4801*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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26-304 California Forms of Pleading and Practice--Annotated §§ 304.265-304.279

[Reserved]

§§ 304.265[Reserved]

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26-304 California Forms of Pleading and Practice--Annotated § 304.280

§ 304.280 Proceeding to Obtain Judicial Review of Detention by Certification for Involuntary Intensive Treatment [Welf. & Inst. Code § 5275 et seq.]--Petition for Writ of Habeas Corpus [Penal Code § 1473 et seq.; Cal. Rules of Ct., Rule 56.5]

[1] FORM Proceeding to Obtain Judicial Review of Detention by Certification for Involuntary Intensive Treatment [Welf. & Inst. Code § 5275 et seq.]--Petition for Writ of Habeas Corpus [Penal Code § 1473 et seq.; Cal. Rules of Ct., Rule 56.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the Application of	)	NO. _____
_____ [*name*],	)	PETITION FOR WRIT OF HABEAS CORPUS
[in Behalf of	)	
_____ (*name*)],	)	
for a Writ of Habeas Corpus.	)	

TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE [CITY AND] COUNTY OF _____:

Petitioner alleges:

1. _____ [*Name of person certified for intensive treatment*] is unlawfully restrained of his/her liberty [and imprisoned, detained, and confined] by _____ [*name and official position of professional person or persons in charge of the facility providing intensive treatment, or description if name is not known*], at _____ [*name and address of hospital or other facility*], _____ County, California.

2. [Petitioner is the _____ (*specify relationship*) of _____ (*name*), the person for whom this petition has been filed.]

3. _____ [*Name*] purports to restrain and keep custody of _____ [*name*] by authority of and pursuant to a notice of certification for _____ [*specify, e.g.*, involuntary intensive treatment as described in Section _____ (5250, 5260, *or* 5270.10) of the Welfare and Institutions Code (allegedly) delivered to _____ (*name*) on or about _____ (*date*).]

4. The illegality of the detention of _____ [*name*] consists in the following: _____ [*allege facts showing that the person detained does not come within the substantive statutory standard for the type of detention occurring, e.g.*, _____ (*name*) is not properly certified for involuntaryintensive treatment because he/she is neither a danger to others, nor to himself/herself, nor is he/she gravely disabled as required for certification by *Section 5250 of the Welfare and Institutions Code or allege other procedural error, e.g.*, _____ (*name*) has been held for a period of time in excess of 14 days from the delivery of the notice of certification, without the delivery, as required by *Section 5253 of the Welfare and Institutions Code*, of an additional notice of certification for additional treatment or the commencement of any other proceedings whatsoever which would authorize this detention].

5. Petitioner is entitled pursuant to *Section 5275 of the Welfare and Institutions Code* to a hearing by writ of habeas corpus for his/her release because _____ [petitioner *or* _____ (*name*) acting in his/her behalf] made a request for release on or about _____ [*date*], to _____ [*name*], _____ [the person delivering the copy of the notice of certification to _____ (*name of person detained*) *or* a member of the treatment staff of the facility wherein _____ (*name of person detained*) is detained for intensive treatment]. At that time _____ [*name of person detained or person requesting release*] _____ [signed *or* marked with his/her mark] a form of request for release as provided by *Section 5275 of the Welfare and Institutions Code*.

6. _____ [No other *or* The following other] applications, petitions, or motions have been filed or made in regard to the detention alleged herein: _____ (*list if applicable*)].

WHEREFORE, petitioner prays:

1. That a writ of habeas corpus be granted, directed to _____ [*name and title of custodian*], commanding him/her to have the body of _____ [petitioner *or name of person in whose behalf the writ is sought*], together with the reasons for his/her detention [and the conditions *or* length of time *or* place thereof] before _____ [this court *or* Your Honor] at a specified time within two judicial days after this petition is filed;

2. That _____ [petitioner *or name of person in whose behalf writ is sought*] be _____ [*specify precise relief desired, e.g.*, released from detention]; and

3. That the court grant such other and further relief as it deems proper.
Dated: _____.

_____ [*signature*]

Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form is a petition for writ of habeas corpus for use in a proceeding to obtain judicial review as a matter of right of the certification for involuntary intensive treatment of a person in a mental facility [*see Welf. & Inst. Code § 5275 et seq.*]. Judicial review by writ of habeas corpus under these provisions is available after a person detained by a notice of certification for involuntary treatment, or a person acting on his or her behalf, has made a request for release (1) to the person delivering the notice at the time of delivery or (2) to any member of the treatment facility staff at any time during the period of 14-day or 30-day intensive treatment pursuant to *Welf. & Inst. Code §§ 5250, 5260, 5270.10* [*Welf. & Inst. Code § 5275*; *see Welf. & Inst. Code § 5308*].

The allegations in this form are intended to comply with the requirements of both Welf. & Inst. Code § 4275 et seq. and *Penal Code § 1473 et seq.* The allegations can be adapted for use under other statutory provisions for habeas corpus relief in LPS proceedings [*see, e.g., Welf. & Inst. Code §§ 5358.7* (habeas corpus for conservatee challenging placement or conditions of confinement), 7250 (habeas corpus for persons committed to state hospitals for mentally disordered); *see also Penal Code § 1473* (general right of habeas corpus); *see § 304.280*.1]. However, habeas corpus relief is available to any person whose liberty is unreasonably restrained, whether or not that person comes within statutory provisions regarding habeas corpus [*see Cal. Const., art. I, § 4* (writ of habeas corpus may not be suspended unless required by public safety in cases of rebellion or invasion); *In re De La O (1963) 59 Cal. 2d 128, 142-143, 28 Cal. Rptr. 489, 378 P.2d 793]* . For additional forms and further discussion of habeas corpus generally, see Ch. 292, *Habeas Corpus* .

By court rule, any petition for writ of habeas corpus that seeks the release from or modification of the conditions of custody of one who is confined under the process of any court in a state or local penal institution, hospital, narcotics treatment facility, or other institution must be on a form approved by the Judicial Council [Cal. Rules of Ct., Rule 56.5(a)]. Any such petition is exempt from the provisions of Rule 56 relating to form and content of a petition and requiring a petition to be accompanied by points and authorities [Cal. Rules of Ct., Rule 56.5(a)]. However, for good cause the court may permit the filing of a petition that does not comply with the provisions of this rule [Cal. Rules of Ct., Rule 56.5(b)]. If the petitioner is filing a habeas petition in pro per, however, he or she should add a declaration or cover letter stating why the Judicial Council form was notavailable or setting out any other facts that would convince the court to waive the form requirement.

A petition for a writ of habeas corpus that is not on the Judicial Council form must contain the information required on other petitions, motions, or applications with respect to the commitment [*see* Cal. Rules of Ct., Rule 201]. See Form No. 1.1 for the Judicial Council form for a Petition for Writ of Habeas Corpus.

[3] Allegations

The petition alleges the following:

- That a person in a mental facility is unlawfully restrained of his/her liberty (Paragraph 1) [*Penal Code § 1474*];

- The name of the person unlawfully restrained (Paragraph 1) [*Penal Code § 1474*];

- The name or description of the officer by whom he/she is restrained (Paragraph 1) [*Penal Code § 1474*];

- The place of restraint (Paragraph 1) [*Penal Code § 1474*];

- The relationship of the person restrained to the petitioner, if appropriate (Paragraph 2);

- The cause or pretext of the restraint (Paragraph 3) [*Penal Code § 1473*; *Welf. & Inst. Code § 5275*];

- The illegality of the restraint and supporting facts (Paragraph 4) [*Penal Code § 1474*; *Welf. & Inst. Code § 5276*];

- That the person is entitled pursuant to *Welf. & Inst. Code § 5275* to a hearing by writ of habeas corpus (Paragraph 5) [*Welf. & Inst. Code § 5275*]; and

- What, if any, other applications, petitions, or motions have been filed or made with regard to the detention (Paragraph 6) [*Penal Code § 1475*].

[4] Verification; Signature

This petition must be verified [*Penal Code §§ 1474(3), 1475*], and the petition must be signed by the party for whose relief it is intended or by some person in his or her behalf [*Penal Code § 1474*].

[5] Endorsement

Any court or judge authorized to grant the writ, to whom a petition is presented, must endorse on the petition the hour and date of its presentation and the hour and date of the granting or denial of the writ [*Penal Code § 1476*].

[6] Jurisdiction and Venue

Judicial review must be in the superior court for the county in which the facility providing intensive treatment is located or in the county in which the 72-hour evaluation was conducted if the patient or a person acting in his or her behalf informs the professional staff of the evaluation facility in writing that judicial review will be sought. If the staff of the evaluation facility has been informed in writing that a judicial review will be sought, no patient may be transferred from the county providing evaluation services to a different county for intenstive treatment until the completion of the judicial review [*Welf. & Inst. Code § 5276*].

For the purpose of conducting hearings under the LPS Act, the court in and for the county where the petition is filed may be convened at any time and place within or outside the county, suitable to the mental and physical health of the patient, and may receive evidence both oral and written, and render decisions. The time and place for hearing, however, must not be different from the time and place for the trial of civil actions for that court, if any party to the proceeding, prior to the hearing, objects to the different time and place. Hearings conducted at a state hospital or mental health facility are deemed to be hearings held in a place for the trial of civil actions and in a regular courtroom of the court. However, any party to the proceeding may demand that the hearing be public, and that it be held in a place suitable for

attendance of the public [*Welf. & Inst. Code § 5118*].

[7] Prayer and Relief Sought

The prayer should indicate the precise relief sought since a court which has issued the writ of habeas corpus is not limited either to discharging petitioner from or remanding petitioner to custody, but it may dispose of the petition as justice of the case may require [*In re Crow (1971) 4 Cal. 3d 613, 619, 94 Cal. Rptr. 254, 483 P.2d 1206]* . For a form for a petition for the writ of habeas corpus seeking modification of the terms and conditions of confinement or seeking enforcement of rights to which an inmate is entitled in confinement, see Ch. 292, *Habeas Corpus* .

[8] Time of Hearing

The court must either release the person or order an evidentiary hearing to be held within two judicial days after the petition is filed [*Welf. & Inst. Code § 5276*].

[9] Notice to Family Members

Reasonable attempts must be made by the mental health facility to notify family members or any other person designated by the patient of the time and place of the judicial review, unless the patient requests that this information not be provided. The patient must be advised by the treatingfacility that he or she has the right to request that this information not be provided [*Welf. & Inst. Code § 5276*].

[10] Right to Counsel

The person requesting release must be informed of the right to counsel by a member of the treatment staff and by the court. If the person chooses to be represented, the court must immediately appoint the public defender or other attorney to assist the person in preparation of a petition for the writ of habeas corpus and, if the person so elects, to represent the person in the proceedings. The person must, however, pay the cost of these legal services if he or she is able [*Welf. & Inst. Code § 5276*]. Additionally, the person delivering the copy of the notice of certification to the person certified must, at the time of delivery, inform the person certified of the legal right to judicial review by writ of habeas corpus and must inform the person of the right to counsel, including court-appointed counsel pursuant to *Welf. & Inst. Code § 5276* [*Welf. & Inst. Code § 5254.1* (initial 14-day certification); *Welf. & Inst. Code § 5270.25* (additional 30-day certification); *but see Welf. & Inst. Code § 5262* (additional 14-day certification for imminently suicidal persons requires notice of right to habeas corpus, but does not mention notice of right to counsel)]. The notice of certification contains a recitation that the person has been informed of the right to counsel, including court-appointed counsel [*see Welf. & Inst. Code §§ 5252, 5270.25* (form of notice)].

[11] Waiver of Presence of Physicians

The person requesting release on advice of counsel, may, waive the presence at the evidentiary hearing of the physician or other professional person who certified the petition under *Welf. & Inst. Code § 5251* and of the physician providing intensive treatment. In the event of such a waiver, the physician or other professional person is not required to be present at the hearing if it is stipulated that the certification and records of the physicians concerning the mental condition and treatment of the person regarding release will be received in evidence [*Welf. & Inst. Code § 5276.1*].

[12] Preparation for Hearing

The behavior of the petitioner at the hearing on the writ is important to whether the petitioner is released or the confinement is continued. Counsel therefore should give consideration to the effect which medication or treatments such as convulsive treatments will have on petitioner if administered before the hearing. Although no statutory authority specifically authorizes the petitioner to seek a restraining order or temporary injunction controlling the administration of

medication or treatments before the hearing on the writ of habeas corpus, there does not seem to be any reason why it would not be possible to obtain such an order pending the hearing, particularly if treatment or medication would interfere with petitioner's ability to consult with counsel [*see Thorn v. Superior Court (1970) 1 Cal. 3d 666, 674-675, 83 Cal. Rptr. 600, 464 P.2d 56* ; *In re Raner (1963) 59 Cal. 2d 635, 640, 30 Cal. Rptr. 814, 381 P.2d 638* ; *but see Campbell v. People (1961) 190 Cal. App. 2d 253, 256, 12 Cal. Rptr. 60]* . See generally Ch. 393, *Injunctions* , for discussion and forms.

[13] Statutory Grounds for Release

The person seeking judicial review must be released immediately if the court finds that (1) the person is not, as a result of mental disorder, or impairment by chronic alcoholism, a danger to others, or to himself or herself, or gravely disabled; (2) the person had not been advised of, or had accepted, voluntary treatment; or (3) the facility providing intensive treatment is not equipped and staffed to provide treatment or is not designated by the county to provide intensive treatment [*Welf. & Inst. Code § 5276*].

[14] Other Grounds for Release

If the proper statutory procedures are not strictly followed for commitment of a person to a mental hospital, the person committed may petition the court for a writ of habeas corpus [*In re E. (1975) 15 Cal. 3d 183, 192-193, 123 Cal. Rptr. 103, 538 P.2d 231]* . If commitment procedures are set up by statute and are in the nature of special civil proceedings unknown to the common law, jurisdiction to enter an order of commitment pursuant to the statutory scheme depends on strict compliance with each of the specific statutory prerequisites for maintenance of the commitment. Procedures for civil commitment of persons in mental hospitals are this type of special statutory procedure [*In re Raner (1963) 59 Cal. 2d 635, 639-640, 30 Cal. Rptr. 814, 381 P.2d 638* (decided under procedures for commitment of narcotic addicts); *In re Hofmann (1955) 131 Cal. App. 2d 758, 761-762, 281 P.2d 96]* .

[15] Other Uses of Form

This form for a petition for writ of habeas corpus may also be used, with appropriate modifications, to challenge the validity of the judicial commitment of a person as a mentally disordered sex offender to a state hospital or other mental health facility.[*In re Bevill (1968) 68 Cal. 2d 854, 858, 69 Cal. Rptr. 599, 442 P.2d 679]* . The writ may be used to challenge a finding that a person is a mentally disordered sex offender if the finding was obtained without following the proper statutory court procedures[*In re Baker (1970) 5 Cal App. 3d 55, 57-58, 84 Cal. Rptr. 814]* . In addition, the writ is proper if the proceedings were based on an invalid criminal conviction[*In re Bevill (1968) 68 Cal. 2d 854, 860, 69 Cal. Rptr. 599, 442 P.2d 679]* or if the requirements of due process were not met in the commitment proceedings [*In re Baker (1970) 5 Cal. App. 3d 55, 57-58, 84 Cal Rptr. 814* ; *People v. Harvath (1967) 251 Cal. App. 2d 780, 783, 60 Cal. Rptr. 15]* . It may also be used for judicial review of the confinement of a developmentally disabled (mentally retarded) adult [*see* § 3034.70 et seq.].

[16] Order to Show Cause

The superior court may in some cases follow the procedure of issuing in response to the petition for the writ an order to show cause why a writ of habeas corpus should not issue rather than issuing the writ itself. This procedure would most frequently, however, be followed by an appellate court and the order to show cause would usually be directed to the medical director of the hospital to inquire into the detention and confinement of a person in the hospital [*see In re L. L. (1974) 39 Cal. App. 3d 205, 114 Cal. Rptr. 11* ; *In re Cirino (1972) 28 Cal. App. 3d 1009, 1011, 105 Cal. Rptr. 194]* . For a discussion of the procedure whereby an order to show cause rather than a writ of habeas corpus is issued, see Ch. 292, *Habeas Corpus* .

[17] Cross References

For forms and discussion for use in proceedings for the writ of habeas corpus, see Ch. 292, *Habeas Corpus*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

[18] California Points and Authorities

For memoranda of points and authorities for use in proceedings on habeas corpus to test the validity of detentions of mental patients, see s California Points and Authorities, Ch. 110, *Habeas Corpus* (Matthew Bender)

[19] State Statutes

Petition for writ of habeas corpus. *Penal Code § 1474*

Contents of petition for writ. *Penal Code § 1475*

Endorsement of the petition. *Penal Code § 1476*

Right of adult developmentally disabled patient to judicial review by writ of habeas corpus. *Welf. & Inst. Code §§ 4800-4804*

Judicial review by writ of habeas corpus of certification for involuntary intensive treatment of person allegedly mentally disordered. *Welf. & Inst. Code §§ 5275-5278*

Venue for judicial review by conservatee of placement or conditions of confinement pursuant to *Penal Code § 1473* or *Welf. & Inst. Code § 7250*. *Welf. & Inst. Code § 5358.7*

Judicial review by writ of habeas corpus of commitment to state hospital for mentally disordered. *Welf. & Inst. Code § 7250*.

[20] Decisions

[21] Available Relief

Having issued writ of habeas corpus, court's power is not limited either to discharging petitioner from or to remanding petitioner to custody, but rather extends to disposing of petitioner as justice of case may require. *In re Crow (1971) 4 Cal. 3d 613, 619, 94 Cal. Rptr. 254, 483 P.2d 1206*

[22] Grounds for Relief

Use by hospitals of inappropriate printed forms in civil commitment proceedings condemned. *In re Lopez (1970) 3 Cal. 3d 147, 148 n.1, 89 Cal. Rptr. 614, 474 P.2d 430* ; *In re Raner (1963) 59 Cal. 2d 635, 637 n.1, 30 Cal. Rptr. 814, 381 P.2d 638*

Due process requires that patient receive realistic notice that he or she has been certified for intensive treatment and of the right to counsel and judicial review; establishment of procedures in addition to those required by statutes to safeguard these rights is appropriate. *Thorn v. Superior Court (1970) 1 Cal. 3d 666, 674-675, 83 Cal. Rptr. 600, 464*

P.2d 56

Writ of habeas corpus is appropriate remedy to challenge validity of person's commitment or continued confinement as an *MDSO. In re Bevill (1968) 68 Cal. 2d 854, 69 Cal. Rptr. 599, 442 P.2d 679*

When commitment proceedings are statutory in origin and not based on common law, requirements of statute must be substantially and strictly followed to give court jurisdiction of proceedings. *In re Raner (1963) 59 Cal. 2d 635, 639, 30 Cal. Rptr. 814, 381 P.2d 638* ; *In re Hofmann (1955) 131 Cal. App. 2d 758, 761-762, 281 P.2d 96*

Proceedings to determine whether person is mentally ill are technically civil rather than criminal proceedings. *People v. Parriera (1965) 237 Cal. App. 2d 275, 284, 46 Cal. Rptr. 835*

Medication of person before hearing on commitment does not affect validity of hearing; reasonable opportunity of person to participate in hearing is properly left to sound discretion of trial judge. *Campbell v. People (1961) 190 Cal. App. 2d 253, 256, 12 Cal. Rptr. 60*

Person is not denied right to counsel when advised of right but has refused to accept representation or to request representation. *Campbell v. People (1961) 190 Cal. App. 2d 253, 257-258, 12 Cal. Rptr. 60*

Person is not entitled to release from mental hospital on writ of habeas corpus when testimony of medical witnesses shows that person is insane and has become unable to care for himself or herself through old age or physical disability while in the hospital. *In re Cloutman (1941) 47 Cal. App. 2d 77, 78, 117 P.2d 378*

[23] Standard of Proof

Burden is on county in *Welf. & Inst. Code § 5276* habeas corpus proceeding to prove compliance with certification criteria and lawfulness of detention. *In re Azzarella (1989) 207 Cal. App. 3d 1240, 1247, 254 Cal. Rptr. 922*

County's standard of proof in *Welf. & Inst. Code § 5276* habeas corpus proceeding is by a preponderance of the evidence. *In re Azzarella (1989) 207 Cal. App. 3d 1240, 1248-1251, 254 Cal. Rptr. 922*

Burden in civil commitment proceeding is on the state to show insanity. *People v. Redmond (1971) 16 Cal. App. 3d 931, 939-940, 94 Cal. Rptr. 543* (dictum)

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Volume 26: Injunctions thru Insurance-Chs. 303-313
Chapter 304 INSANE AND OTHER INCOMPETENT PERSONS
PART V. FORMS
A. Lanterman-Petris-Short Act And Related Proceedings

26-304 California Forms of Pleading and Practice--Annotated § 304.281

§ 304.281 Petition for Writ of Habeas Corpus--LPS Act (Mental Health) [Penal Code § 1473; Welf. & Inst. Code §§ 5275, 5353, 7250]--Cal. Judicial Council Form MC-265

[1] FORM Petition for Writ of Habeas Corpus--LPS Act (Mental Health) [Penal Code § 1473; Welf. & Inst. Code §§ 5275, 5353, 7250]--Cal. Judicial Council Form MC-265

Click here to view image.

[2] Use of Form

This form is an illustration of the approved Judicial Council petition for writ of habeas corpus for use in LPS proceedings [Cal. Judicial Council Form MC-265]. The petition may be used in a proceeding to obtain judicial review of involuntary detention, treatment, placement, or conditions of detention, treatment, or placement under the Lanterman-Petris-Short Act [*Welf. & Inst. Code § 5000 et seq.*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

The California Rules of Court state that except as otherwise provided (*see below*), petitions for habeas corpus must be submitted on California Judicial Council Form MC-275, the Judicial Council's general form for petitions of habeas corpus [*Cal. Rules of Court, Rule 4.551(a)*; *see Cal. Rules of Court, Rule 4.550(a)* (rules applicable to "any other provision of law authorizing relief from unlawful confinement or unlawful conditions of confinement"); for discussion and illustration of form MC-275, *see Ch. 292, Habeas Corpus, § 292.81*]. However, the Judicial Council also has approved two additional forms for petitions for writ of habeas corpus for use in proceedings relating to mental health commitments, neither of which is specifically referenced in the Rules of Court:

- This form, Cal. Judicial Council Form MC-265, Petition for Writ of Habeas Corpus--LPS Act (Mental Health); and

- Cal. Judicial Council Form MC-270, Petition for Writ of Habeas Corpus--Penal Commitment

(Mental Health).

Both of the latter forms, as well as Form MC-275, are designated as optional [*see Cal. Rules of Court, Rules 1.30(b), 1.35*)]. However, any petition that is not on a Judicial Council form must contain all pertinent information specified in Form MC-275 [*see Ch. 292, Habeas Corpus, § 292.81*], including information required regarding other petitions, motions, or applications filed in any court with respect to the commitment [*Cal. Rules of Court, Rule 4.551(a)(2)*].

Habeas Corpus petitions under the Lanterman-Petris-Short Act are subject to the general processing and procedural rules governing habeas corpus petitions generally [*Cal. Rules of Court, Rule 4.550(a)* (rules applicable to "any other provision of law authorizing relief from unlawful confinement or unlawful conditions of confinement"); *see Cal. Rules of Court, Rules 4.550-4.552* (procedural rules)]. For detailed discussion of these rules, see Ch. 292, *Habeas Corpus* .

[3] Allegations

This illustration is based on the failure to comply with statutory requirements for 180-day postcertification treatment under *Welf. & Inst. Code § 5300 et seq.* The petition alleges the following:

- The unlawful restraint of the liberty of the petitioner at a treatment facility by the named agency and treating psychiatrist (Paragraph 1) [*Penal Code § 1474*].

- The date the petitioner was admitted to the treatment facility and the current statutory basis for confining the petitioner (Paragraph 2) [*Penal Code § 1473*].

- The illegality of the restraint and the supporting facts (Paragraph 3) [*Penal Code § 1474*].

- The relief sought (Paragraph 4).

This form does not provide for a statement regarding other applications, petitions, or motions that have been filed or made with regard to the detention, as required by *Penal Code § 1475* [*see § 304.280*]. However, petitioner may want to add this information in an attachment to the petition.

[4] Other Uses of Form

This petition for writ of habeas corpus may also be used, with appropriate modifications, to challenge other involuntary restraints in LPS proceedings, including detention by certification for involuntary intensive treatment or the confinement of a conservatee [*Welf. & Inst. Code §§ 5275 et seq., 7250*].

[5] Cross References

For a related form, *see § 304.280*.

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PART V. FORMS
A. Lanterman-Petris-Short Act And Related Proceedings

26-304 California Forms of Pleading and Practice--Annotated § 304.282

§ 304.282 Demand for Court or Jury Trial [Welf. & Inst. Code § 5350(d)]

[1] FORM Demand for Court or Jury Trial [Welf. & Inst. Code § 5350(d)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Conservatorship of the _____ [Person and Estate *or* Person *or* Estate] of _____ [*name*], Conservatee.	)))))	NO. _____ DEMAND FOR _____ [COURT *or* JURY] TRIAL ON ISSUE OF GRAVE DISABILITY

_____

_____ [*Name*], proposed conservatee, demands a _____ [court *or* jury] trial on the issue as to whether he/she is gravely disabled and should have a conservator appointed for him/her.

_____ [signature]

Attorney for Proposed Conservatee

[2] Use of Form

This form is used to demand a court or jury trial on the issue as to whether the proposed conservatee is gravely disabled [*Welf. & Inst. Code § 5350(d)*].

[3] Time for Filing

The demand for a court or jury trial must be made within five days following the hearing on the conservatorship

petition. If it is made before the hearing, it constitutes a waiver of the right to the hearing [*Welf. & Inst. Code § 5350(d)*].

[4] Time for Commencement of Trial

The court or jury trial must commence within 10 days of the date of the demand, except that the court must continue the trial date for a period not to exceed 15 days upon the request of counsel for the proposed conservatee [*Welf. & Inst. Code § 5350(d)*].

[5] Right Applies to Proceedings for Reappointment

The right to demand a court or jury trial also applies to proceedings for reestablishment of the conservatorship [*Welf. & Inst. Code § 5350(d)*].

[6] Decisions

Right to jury trial is waivable orally in open court by attorney for proposed conservatee since civil procedural law determines issue of jury trial waiver in conservatorship proceeding. *Conservatorship of Maldonado (1985) 173 Cal. App. 3d 144, 148, 218 Cal. Rptr. 796*

[7] State Statutes

Right to demand court or jury trial. *Welf. & Inst. Code § 5350(d)*

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26-304 California Forms of Pleading and Practice--Annotated § 304.283

§ 304.283 Petition for Rehearing as to Status as Gravely Disabled Person Requiring Conservator [Welf. & Inst. Code § 5364]

[1] FORM Petition for Rehearing as to Status as Gravely Disabled Person Requiring Conservator [Welf. & Inst. Code § 5364]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Conservatorship of the _____ [Person and Estate *or* Person *or* Estate] of _____ [*name*], Conservatee.	)))))	NO. _____ PETITION FOR REHEARING

Petitioner _____ [*name*], respectfully represents:

1. Petitioner was adjudged to be a gravely disabled person and _____ [*name*] was appointed the conservator of his/her _____ [person and estate *or* person *or* estate] by this court on _____ [*date*].

2. Petitioner is _____ years old and presently _____ [resides at _____ (*address*), California *or* is a patient at _____ (*name and address of institution*)].

3. Petitioner is no longer gravely disabled and is able to provide for his/her basic personal needs for food, clothing, and shelter. [Attached as Exhibit A and incorporated by reference is _____ (*specify, e.g.*, a report of _____ (*name*), a duly licensed California physician and surgeon and specialist in psychiatry, to the

effect that petitioner is no longer gravely disabled).]

4. Petitioner has not filed a petition for rehearing within six months of the date before the date of this petition.

[*ADD, if petitioner seeks appointed counsel*]

[5. Petitioner is not represented by, and cannot afford to pay for, counsel in this proceeding. (Previously appointed counsel assisted petitioner to prepare this petition and, at petitioner's request, is willing to represent petitioner in this proceeding if appointed by the court.)]

WHEREFORE, petitioner prays as follows:

1. That a rehearing be granted;

2. That the court find that petitioner is not gravely disabled;

[3. That _____ (*name*) be appointed as counsel for petitioner in this proceeding;]

4. That the conservatorship be terminated; and

5. For such other and further orders as the court may deem proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 304.280.*]

[2] Use of Form

This petition is for use by the conservatee to seek a rehearing on his or her status as a conservatee [*Welf. & Inst. Code § 5364*].

[3] Contents of Petition

After giving the date of appointment of the conservator and the conservatee's age and residence, the petition should contain facts showing that the conservatee is no longer gravely disabled [*see Welf. & Inst. Code §§ 5350* (requirement that conservatee be gravely disabled), 5008(h) (definition of grave disability); *see also* discussions in *§§ 304.111* and *304.144[6]*]. Since a petition for rehearing cannot be filed more often than every six months, the petition should also state that the petitioner has not sought a rehearing within the six months prior to the date of the petition [*Welf. & Inst. Code § 5364*].

If the petitioner seeks the appointment of counsel, the petition should contain statements that the petitioner is unrepresented and indigent and the prayer should contain a request for appointment.

[4] Notice

Although there is no statutory notice requirement, notice of the petition should be given to the conservator. Notice of the time and place of the rehearing may now be required to be given by the county mental health program to family members or to any other other person designated by the proposed conservatee. *Welf. & Inst. Code § 5350.2* requires this notice for a conservatorship hearing, subject to specific exceptions. It does not refer to rehearings, but its application to rehearings appears to follow by parallel reasoning. Nevertheless, no reported decision has so interpreted this section.

[5] Attorney and Time of Hearing

The hearing must be held within 30 days of the petition, and an attorney must be provided for the petitioner [*Welf. & Inst. Code § 5365*]. The petitioner may be represented by privately obtained pro bono counsel [*see, e.g., Conservatorship of Scharles (1991) 233 Cal. App. 3d 1334, 1337, 285 Cal. Rptr. 325]* . For further discussion, see the Introduction *§ 304.42[14]*.

[6] State Statutes

Notification of family members of conservatorship hearing. *Welf. & Inst. Code 5350.2*

Petition for rehearing. *Welf. & Inst. Code § 5364*

Time for hearing and attorney. *Welf. & Inst. Code § 5365*

[7] Decisions

Conservatee may file an initial petition for rehearing under *Welf. & Inst. Code § 5364* to challenge his or her status as conservatee at any time, but must wait six months before filing a subsequent petition for rehearing concerning his or her status as conservatee. *Conservatorship of Amanda B. (2009) 173 Cal. App. 4th 1380, 1384, 93 Cal. Rptr. 3d 817*

Petitioner for rehearing pursuant to *Welf. & Inst. Code § 5364* has burden of producing evidence and burden of proving by preponderance of evidence that petitioner is no longer gravely disabled. *Conservatorship of Scharles (1991) 233 Cal. App. 3d 1334, 1343 n.8, 285 Cal. Rptr. 325* ; *Baber v. Superior Court (1980) 113 Cal. App. 3d 955, 965-966, 170 Cal. Rptr. 353*

Five days in which court has to appoint counsel does not necessarily constitute gap in law for appointed counsel to aid indigent conservatee in filing rehearing petition, because indigent conservatee can contact and advise previously appointed counsel, as attorney of record, to file the petition. *Conservatorship of Scharles (1991) 233 Cal. App. 3d 1334, 1343 n.7, 285 Cal. Rptr. 325*

Indigent conservatee was deprived of statutory right to meaningful rehearing by trial court's denial of conservatee's motion for independent forensic psychiatric examination at county expense on sole ground that conservatee has privately obtained pro bono, rather than appointed, counsel and absent judicial inquiry into financial and evidentiary need for examination. *Conservatorship of Scharles (1991) 233 Cal. App. 3d 1334, 1340, 1343, 285 Cal. Rptr. 325*

Nonsuit judgment at status rehearing is error unless conservatee fails to make prima facie showing that he or she is no longer gravely disabled. *Conservatorship of Everette M. (1990) 219 Cal. App. 3d 1567, 1574, 269 Cal. Rptr. 182*

Department of Corrections' supervision of parolee does not constitute "third-party assistance," which precludes finding of "grave disability" required to establish and maintain LPS conservator ship. *Conservatorship of Jones (1989) 208*

Cal. App. 3d 292, 300-302, 256 Cal. Rptr. 415

Petitioner for rehearing pursuant to *Welf. & Inst. Code § 5364* has no right to jury trial under either *LPS Act or Constitution. Baber v. Superior Court (1980) 113 Cal. App. 3d 955, 960-965, 170 Cal. Rptr. 353*

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PART V. FORMS
A. Lanterman-Petris-Short Act And Related Proceedings

26-304 California Forms of Pleading and Practice--Annotated § 304.284

§ 304.284 Order Granting or Denying Rehearing as to Status as Conservatee [Welf. & Inst. Code § 5364]

[1] FORM Order Granting or Denying Rehearing as to Status as Conservatee [Welf. & Inst. Code § 5364]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Conservatorship of the _____ [Person and Estate *or* Person *or* Estate] of _____ [*name*], Conservatee.	)))))	NO. _____ ORDER

After considering the petition for rehearing as to status as a conservatee by _____ [*name*], conservatee, the court _____ [grants *or* denies] the petition for rehearing [and appointment of counsel] [and sets the new hearing for _____ (*time*) on _____ (*date*), in _____(*specify department or room number*) of this court at _____ (*address*), California].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is an order granting or denying the petition for rehearing for use with *§ 304.283*.

[3] Cross References

For a related form, *see § 304.283*.

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26-304 California Forms of Pleading and Practice--Annotated § 304.285

§ 304.285 Order Terminating Conservatorship [Welf. & Inst. Code § 5364]

[1] FORM Order Terminating Conservatorship [Welf. & Inst. Code § 5364]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Conservatorship of the _____ [Person and Estate *or* Person *or* Estate] of _____ [*name*], Conservatee.	)))))	NO. _____ ORDER TERMINATING CONSERVATORSHIP

The rehearing as to the status as a conservatee of _____ [*name*] came on regularly for hearing by the court this date. The conservatee appeared by _____ [*name; specify other appearance, if any*].

After hearing the evidence offered at the hearing, the court finds that _____ [*name*] is no longer gravely disabled and that a conservatorship is no longer required for him/her.

IT IS ORDERED that the conservatorship of the _____ [person and estate *or* person *or* estate] of _____ [*name*] is terminated [subject only to the accounting and distribution of the assets of the conservatorship estate].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is an order for use in terminating the conservatorship after the rehearing.

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26-304 California Forms of Pleading and Practice--Annotated §§ 304.286-304.299

[Reserved]

§§ 304.286[Reserved]

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PART V. FORMS
B. Civil Actions And Constitutional Rights

26-304 California Forms of Pleading and Practice--Annotated § 304.300

§ 304.300 Complaint--For Damages [Civ. Code § 3333] Based on Negligence [Civ. Code § 1714(a)]--Against Psychotherapist When Patient Communicates Serious Threat of Physical Violence Against Reasonably Identifiable Victim and Psychotherapist Fails to Discharge Duty [Civ. Code § 43.92]

[1] FORM Complaint--For Damages [Civ. Code § 3333] Based on Negligence [Civ. Code § 1714(a)]--Against Psychotherapist When Patient Communicates Serious Threat of Physical Violence Against Reasonably Identifiable Victim and Psychotherapist Fails to Discharge Duty [Civ. Code § 43.92]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Negligence)
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California.

2. [Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____ inclusive, and therefore sues these defendants by those fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and

that plaintiff's injuries as herein alleged were proximately caused by that negligence.)]

3. [Plaintiff is informed and believes and thereon alleges that] at all times herein mentioned each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the scope of that agency.

4. At all times herein mentioned defendant was, and still is, a psychotherapist as defined in *Section 1010 of the Evidence Code* duly certified to practice as such in California.

5. At all times herein mentioned, defendant _____ [*name*] was _____ [employed *or* engaged] by _____ [*name of patient*] to provide psychotherapy to _____ [*name*] and did provide such psychotherapyand treatment for mental disorders and mental problems suffered by _____ [*name*].

6. On or about _____ [*date*], _____ [*name of patient*] did assault and batter plaintiff by _____ [*specify manner of assault and battery, e.g.*, threatening to strike plaintiff and by violently striking plaintiff in and about the face].

[*EITHER*]

7. _____ [*Name of patient*] communicated to defendant, as his/her psychotherapist, a serious threat of physical violence against plaintiff, a reasonably identifiable victim.

[*OR*]

7. _____ [*Name of member of patient's immediate family*], a member of the immediate family of _____ [*name of patient*], communicated to defendant, as the psychotherapist of _____ [*name of patient*], a serious threat of physical violence posed by _____ [*name of patient*] against plaintiff, a reasonably identifiable victim, and _____ [*name of member of patient's immediate family*] communicated this serious threat in order to facilitate and further the treatment of _____ [*name of patient*].

8. At no time did defendant make reasonable efforts to communicate the threat of violence against plaintiff to him/her and to a law enforcement agency.

9. As a proximate result of the negligence of defendant[s, and each of them], plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her body and shock and injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has suffered general damages.

[*EITHER*]

10. As a further proximate result of defendant's negligence herein alleged, plaintiff has been required to expend money and incur obligations, for medical services, X rays, drugs, and sundries reasonably required in the treatment and relief of the injuries herein alleged, plaintiff has been damaged thereby.

[*OR*]

10. As a further proximate result of the negligence of defendant [s, and each of them], plaintiff has incurred, and will contin ue to incur, medical and related expenses. [The full amount of those expenses is not known to plaintiff at this time, and plaintiff will move to amend this complaint to state such amount when the same becomes known to him/her, or on proof thereof.]

11. As a further proximate result of the negligence of defendant [s, and each of them], plaintiff was prevented from attending to his/her usual occupation as a _____ [*state occupation*] for a period _____ [of _____ (*specify*) *or* to the date of the filing of this complaint] and thereby lost earnings.

12. As a proximate result of the negligence of defendant [s, and each of them], plaintiff's _____ [*describe personal property*] was _____ [*describe damage, e.g.*, destroyed beyond repair, all to plaintiff's damage in the sum of $_____ *or* damaged]. [*If property was not destroyed, add:* Plaintiff has expended $_____ for repair of that _____ (*describe personal property*), which is a reasonable sum for the repair.]

13. [At all times herein mentioned, defendant _____ (*specify public entity, e.g.*, County of _____), was a _____ (*specify type of public entity*), duly organized and existing under the laws of the State of California and situated in the County of _____).]

14. [On or about _____ (*date*), plaintiff presented to _____ (*name of governmental entity employing defendant psychotherapist*) by _____ (delivering *or* mailing) a claim to the _____ (clerk *or* secretary *or* auditor) for the injuries, disability, losses, and damages suffered and incurred by him/her by reason of the above-described occurrence, all in compliance with the requirement of *Section 905 of the Government Code*. A copy of the claim is attached as Exhibit A and incorporated by reference.]

15. [On or about _____ (*date*), _____ (*name of governmental entity*) _____ (rejected the claim in its entirety *or* allowed the claim in the amount of $_____ and rejected it as to the remainder *or* failed to act on the claim within the period of 45 days after its presentation, and the claim was thus deemed rejected, under the provisions of *Section 912.4 of the Government Code*, at the expiration of the 45-day period, to wit, on _____ (*date*).]

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

1. For general damages to according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

4. For costs of suit herein incurred;

5. For damage to plaintiff's personal property [in the sum of $_____]; and

6. For such other and further relief as the court deems proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See Form* 1.]

[2] Use of Form

This complaint for damages is for use when a psychotherapist's patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably indentifiable victim (plaintiff), the psychotherapist failed to make reasonable efforts to communicate the threat to plaintiff and to a law enforcement agency, and the patient subsequently harmed plaintiff [*see Civ. Code § 43.92*]. For further discussion, see *§ 304.93[2]*.

[3] Allegations

The complaint alleges the following:

- That defendant is a psychotherapist as defined in *Evid. Code § 1010* (Paragraph 4).

- That defendant stood in the relationship of psychotherapist-patient with the person who harmed plaintiff (Paragraph 5).

- That the defendant's patient injured plaintiff (Paragraph 6).

- That the patient, or a member of the patient's immediate family, communicated to the defendant, as the patient's psychotherapist, a serious threat of physical violence against a reasonably identifiable victim, plaintiff (Paragraph 7) [*Civ. Code § 43.92*].

- That defendant did not make reasonable efforts to communicate the threat of violence to plaintiff and a law enforcement agency (Paragraph 8) [*Civ. Code § 43.92*].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

If a public entity is named as a defendant, the complaint generally would not be verified since under *Code Civ. Proc. § 446* a public entity need not verify its answer even though a complaint be verified. If a doctor or psychotherapist employed by a public entity is also a defendant, however, the complaint might be verified to require a verified answer from the individual defendant [*see Code Civ. Proc. § 446*].

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in

controversy, exclusive ofinterest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9)*, (10)].

[6] Venue

The county in which the cause or some part of the cause arose is the proper county for the trial of actions against a public officer or a person especially appointed to execute the duties of a public officer, for an act done by the officer or person in virtue of the office; or against a person who, by the officer's command or in the officer's aid, does anything touching the duties of the officer [*Code Civ. Proc. § 393(b)*].

An action against a county or city and county, city, or local agency may be tried in that county, or city and county, or in the county in which the city or local agency is located [*see Code Civ. Proc. § 394*].

[7] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*]. However, the complaint still must specify whether it is a limited or an unlimited civil case [*see Code Civ. Proc. § 422.30*], and, if it is a limited civil case, the first paper must state whether or not the amount of the demand exceeds $10,000 [*Code Civ. Proc. § 425.10(b)* (complaint must comply with *Code Civ. Proc. § 422.30* and *Gov. Code § 70613(b)*)].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damagessought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[8] Statute of Limitations

The three-year statute of limitations under *Code Civ. Proc. § 340.5* for professional negligence governs an action against a psychotherapist for injuries suffered as a result of the therapist's negligence in failing to warn a potential victim of a threat to the victim made by the therapist's patient [*see Hedlund v. Superior Court (1983) 34 Cal. 3d 695, 700-705, 194 Cal. Rptr. 805, 669 P.2d 41* (decided prior to 1985 enactment of *Civ. Code § 43.92*)].

[9] Cross References

For alternative allegations of damages, see Ch. 177, *Damages*

For complaints and related discussion concerning the negligence of hospitals in caring for patients generally, see Ch. 295, *Hospitals*

For complaints and related discussion concerning the negligence of physicians and other professionals, see Ch. 415, *Physicians: Medical Malpractice* .

For complaints and discussion of procedures for actions for negligence against public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

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26-304 California Forms of Pleading and Practice--Annotated § 304.301

§ 304.301 Complaint for Damages for Wrongful Death of Patient [Code Civ. Proc. § 377.60]--Based on Psychiatrist's Breach of Duty to Decedent--By Entitled Person(s) or By Personal Representative on Behalf of Entitled Person(s)

[1] FORM Complaint for Damages for Wrongful Death of Patient [Code Civ. Proc. § 377.60]--Based on Psychiatrist's Breach of Duty to Decedent--By Entitled Person(s) or By Personal Representative on Behalf of Entitled Person(s)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name(s)*] [as _____ (*specify capacity, e.g.*, Administrator of the Estate of _____ (*name*), Deceased)], Plaintiff(s), vs. _____ [*name(s)*], and DOES 1 through _____, Defendant(s).	))))))	NO. _____ COMPLAINT FOR DAMAGES FOR WRONGFUL DEATH [Amount demanded _____ (exceeds *or* does not exceed) $10,000] [LIMITED CIVIL CASE]

Plaintiff(s) allege(s):

1. _____ [Plaintiff(s) *or* The person(s) listed below] is/are entitled to bring an action for the wrongful death of _____ [*name of decedent*] (hereinafter "decedent") pursuant to *Code of Civil Procedure Section 377.60*, based on his/her/their relationship to decedent, as follows:

Name(s)	Relationship(s) to Decedent
_____	_____
_____	_____
_____	_____

[_____ (*If one or more persons are required to establish additional facts, such as that there is no surviving spouse, domestic partner child, or issue of deceased child, or that the person was dependent on decedent, in order to be entitled to bring a wrongful death action under Code Civ. Proc. § 377.60, specify facts that satisfy applicable requirement*).]

[*ADD, if decedent's personal representative is maintaining action on behalf of one or more entitled persons*]

Plaintiff _____ [*name*] is the duly appointed, qualified, and acting personal representative of the estate of decedent, and brings this action on behalf of _____ [all of the above-listed persons entitled to bring a cause of action for the wrongful death of decedent *or* the following person(s)entitled to bring an action for the wrongful death of decedent: _____ (*specify person(s) on whose behalf personal representative is maintaining action*)].

2. [*Venue allegation. See § 304.300, Paragraph 1.*]

3. [*Fictitious defendant allegation. See § 304.300, Paragraph 2.*]

4. [*Agency allegation. See § 304.300, Paragraph 3.*]

5. On or about _____ [*date*], decedent employed defendant _____ [*name*] to provide psychotherapy and treatment for decedent's mental disorders and mental problems. Thereupon, and continuing until decedent's death, defendant did provide such therapy and treatment to decedent.

6. In the course of the therapy and treatment, defendant _____ [*name*] knew, or in the exercise of reasonable care should have known, that decedent was likely to attempt suicide. Despite this knowledge, defendant negligently failed to take appropriate measures to prevent decedent's suicide.

7. As a proximate result of defendant's negligence, decedent committed suicide by _____ [*specify cause of death, e.g.,* a self-inflicted overdose of sleeping pills] on or about _____ [*date*].

8. As a proximate result of the negligence of defendant [s, and each of them], and of the death of decedent, _____ [plaintiff(s) *or* the entitled person(s) specified in Paragraph 1] has/have sustained pecuniary loss resulting from the loss of the society, comfort, attention, services, and support of the decedent.

9. As a further proximate result of the negligence of defendant[s, and each of them], and of the death of decedent, plaintiff(s) _____ [*name(s)*] has/have incurred funeral and burial expenses.

WHEREFORE, plaintiff(s) pray(s) judgment as follows:

1. For general damages;

2. For funeral and burial expenses;

3. For costs of suit incurred herein; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 304.280.*]

CAUTION:
A notice of intention to commence an action against a health care provider must be served 90 days prior to the commencement of this action [*Code Civ. Proc. § 364(a)*]. For form of such a notice, see Ch. 415, *Physicians: Medical Malpractice* .

[2] Use of Form

This complaint is for use in an action for wrongful death of a mental patient who committed suicide. The cause of action is based on the negligence of a psychiatrist who knew that the decedent was likely to attempt suicide and failed to take appropriate measures to prevent the suicide. When the death of a person is caused by the wrongful act or negligence of another, certain persons, or the decedent's personal representative on their behalf, may bring an action for damages against the person causing the death and any other person responsible (or against the personal representatives of those persons) [*Code Civ. Proc. § 377.60*].

The complaint alleges the following:

- The plaintiff's standing to bring the wrongful death action (Paragraph 1) [*Code Civ. Proc. § 377.60*]
- Existence of a psychiatrist-patient relationship (Paragraph 5)
- The therapist's knowledge that the decedent was likely to attempt suicide (Paragraph 6), the negligent failure of the psychiatrist to take preventive measures (Paragraph 6)
- Damages proximately resulting from such negligence (Paragraphs 8, 9).

These allegations constitute a cause of action for breach of a psychiatrist's duty of care [*Bellah v. Greenson (1978) 81 Cal. App. 3d 614, 620, 146 Cal. Rptr. 535* (cause of action was barred by statute of limitations)].

This complaint is for use if the decedent was not hospitalized. For a complaint for use where the decedent was hospitalized, see Ch. 295, *Hospitals* .

Code Civ. Proc. § 377.60 permits decedent's surviving spouse, domestic partner children, and issue of deceased

children to bring a wrongful death action without qualification, and permits others to bring an action under specified circumstances. For allegations establishing that specific classes of persons are entitled to bring a wrongful death action, including allegations that are required of plaintiffs who are not the decedent's surviving spouse, domestic partner children, or issue of deceased children, see Ch. 181, *Death and Survival Actions* .

For purposes of *Code Civ. Proc. § 377.60*, a "domestic partner" is a person who, at the time of the decedent's death, was the domestic partner of the decedent in a registered domestic partnership established under *Fam. Code § 297(b)* [*Code Civ. Proc. § 377.60(f)(1)*]. For a death occurring before January 1, 2002, a person may maintain a wrongful death cause of action under *Code Civ. Proc. § 377.60*, as a domestic partner of thedecedent, by establishing the factors listed in *Fam. Code § 297(b)(1)-(6)*, as it read under Stats. 2001, Ch. 893, § 3, before becoming inoperative on January 1, 2005 [*Code Civ. Proc. § 377.60(f)(2)*]. A mere cohabitant, who does not qualify as a domestic partner, lacks standing to sue for the wrongful death of his or her cohabitant [*Holguin v. Flores (2004) 122 Cal. App. 4th 428, 434-443, 18 Cal. Rptr. 3d 749]* .

If a plaintiff is a minor, a guardian ad litem must be appointed for the purposes of the action, unless the minor already has a guardian [*see Code Civ. Proc. § 372*]. For discussion and forms relating to appointment of a guardian ad litem generally, see Ch. 291, *Guardians ad Litem* .

In a wrongful death action, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under *Code Civ. Proc. § 377.34* (survival actions). The court must determine the respective rights in an award of the persons entitled to assert the cause of action [*Code Civ. Proc. § 377.61*]. An action under *Code Civ. Proc § 377.30* (survival actions) may be joined with a wrongful death action arising out of the same wrongful act or neglect [*Code Civ. Proc. § 377.62(a)*]. In addition, a wrongful death action and a survival action under *Code Civ. Proc § 377.31* (survival of pending action) arising out of the same wrongful act or neglect may be consolidated for trial as provided in *Code Civ. Proc. § 1048* [*Code Civ. Proc. § 377.62(b)*].

[3] Statute of Limitations

This cause of action is based on negligence rather than on breach of contract and therefore the one-year statute of limitations [*Code Civ. Proc. § 340.5*] is applicable [*Bellah v. Greenson (1978) 81 Cal. App. 3d 614, 622, 146 Cal. Rptr. 535]* .

[4] Cross References

For additional discussion and cross references relating to complaints, *see § 304.300*, Comments and References

For a discussion of wrongful death actions and alternative forms, see Ch. 181, *Death and Survival Actions*

For discussion and forms relating to appointment of a guardian ad litem, see Ch. 291, *Guardians ad Litem* .

For a form of complaint against a hospital based on negligent care of mental patient, see Ch. 295, *Hospitals*

For a discussion and additional forms for use in actions against health care providers, see Ch. 415, *Physicians: Medical Malpractice*

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[Reserved]

§§ 304.302[Reserved]

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C. Authorization Of Health Care For Adult Without Conservator

26-304 California Forms of Pleading and Practice--Annotated § 304.320

§ 304.320 Petition to Obtain Court Authorization of Health Care for Adult Without Conservator [Prob. Code §§ 3200-3212]

[1] FORM Petition to Obtain Court Authorization of Health Care for Adult Without Conservator [Prob. Code §§ 3200-3212]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR AUTHORIZATION OF HEALTH
Respondent.	)	CARE OF ADULT
	)	
	)	

Petitioner alleges:

1. Petitioner _____ [*name*] is _____ [*indicate petitioner's status as person with standing to initiate proceeding, e.g.*, respondent's spouse].

2. Respondent _____ [*name*] is, and at all times herein mentioned was, _____ [a resident of *or* temporarily living in] _____ County, California.

3. Respondent is, and at all times herein mentioned was, an adult of the age of _____ years. Respondent does not have a conservator of the person.

4. [Petitioner is informed and believes and thereon alleges that,] [A]s more fully set forth in the affidavit of _____ [*name*], M.D., attached as Exhibit A and incorporated by reference, respondent has _____ [*state general nature of medical condition which requires health care*], which will probably _____ [become life-endangering to respondent *and/or* result in a serious threat to respondent's health] if untreated. The medically appropriate health care which has been recommended consists of _____ [*generally describe treatment*]. The _____ [predictable *or* probable] outcome of the recommended health care is that _____ [*specify generally*]. _____ [The medically available alternatives to this treatment are _____ (*specify generally*) *or* There are no medically available alternatives to this treatment]. However, if the recommended health care is delayed or denied by the court, it is likely that _____ [*state resulting threat to respondent's health*]; and if the recommended health care is denied by the court, it is likely that _____ [*state resulting threat to respondent's health*].

5. Respondent has _____ [a deficit *or* deficits] in the following function[s]: _____ [*indicate deficit or deficits in one or more mentalfunctions listed in Prob. Code § 811(a)*]. [In part] [B]ecause of _____ [that deficit *or* those deficits], respondent is unable to _____ [respond knowingly and intelligently to queries about the recommended health care *and/or* participate in a health care decision by means of a rational thought process]. _____ [*State efforts made to obtain patient's informed consent, e.g.,* As more fully set forth in Exhibit A, _____ (*name*), M.D., has tried (on several occasions) to explain to respondent his/her medical condition, the recommended health care, and the probable benefits and possible risks involved in the health care, and to obtain respondent's consent to the treatment *or state facts showing that efforts to obtain consent would be useless*]. Respondent, however, is unable to give his/her consent to the recommended health care because he/she lacks capacity to do so, by reason of the fact that he/she is unable to _____ [*state reason why respondent allegedly lacks capacity to consent to health care, e.g.,* respond knowingly and intelligently to queries about that health care *and/or* participate in that health care by means of a rational thought process *and/or* understand the nature or seriousness of the disorder he/she has, the nature of the health care, or the probable degree and duration of any benefits and risks of the medical intervention that is being recommended and the consequences of lack of health care].

6. The names and addresses, so far as they are known to the petitioner, of the persons specified in *Probate Code Section 1821(b)* are as follows: _____.

WHEREFORE, petitioner prays for an order authorizing the recommended health care and authorizing _____ [petitioner *or name of person designated*] to give consent to such health care on behalf of respondent, and for such other and further relief as the court deems proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form is a petition for an order authorizing a particular course of health care and authorizing the petitioner or person designated by a petitioning medical facility to consent to the health care on behalf of an adult who does not have a conservator of the person and who is in need of health care. It is drafted on the assumption that it will be accompanied by a medical affidavit or declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5*].

[3] Contents of Petition

The petition must state, or set forth by medical affidavit or declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5*] attached to the petition, all of the following so far as is known to the petitioner at the time the petition is filed [*Prob. Code § 3204*]:

- The health condition of the patient (respondent) which requires treatment;
- The recommended course of health care which is considered to be medically appropriate;
- The threat to the patient's health if authorization for the recommended health care is delayed or denied by the court;
- The predictable or probable outcome of the recommended health care;
- The medically available alternatives, if any, to the recommended health care;
- The efforts made to obtain consent from the patient; and
- The name of the person to be designated to give consent to the recommended health care on behalf of the patient, if the petition is filed by a person on behalf of a medical facility.
- The deficit or deficits in the patient's mental functions listed in *Prob. Code § 811(a)* which are impaired, and identifying a link between the deficit or deficits and the patient's inability to respond knowingly and intelligently to queries about the recommended health care or inability to participate in a treatment decision about the recommended health care by means of a rational thought process.
- The names and addresses, so far as they are known to the petitioner, of the persons specified in *Prob. Code § 1821(b)*.

Prob. Code § 1821(b) specifies the persons who are entitled to notice of a petition for the establishment of a conservatorship. They include the spouse or domestic partner [as defined by *Prob. Code § 37*; *Family Code § 297 et*

seq.], and the relatives of the proposed conservatee within the second degree. If no spouse or domestic partner or relatives within the second degree are known to the petitioner, the persons entitled to notice are the spouse or domestic partner of a predeceased parent, the children of a predeceased spouse or domestic partner, the siblings of the parents,if any, but if none, then the natural and adoptive children of the parents' siblings, and the natural and adoptive children of the siblings [*Prob. Code § 1821(b)*].

[4] Existence of Capacity

Paragraph 5 of this form alleges that the respondent lacks capacity to consent to health care. It also specifies the deficit or deficits that the patient has in the mental functions listed in *Prob. Code § 811(a)* and identifies a correlation between the deficit or deficits and the patient's inability to consent to health care [*see § 304.112[2]*].

The grounds on which a finding of incapacity to consent to medical treatment may be based are specified in *Prob. Code § 813*. Under *Prob. Code § 811*, before the court actually issues a determination that a person lacks the capacity to make a health care decision, there must be evidence of a deficit in one or more specific mental functions that, by itself or in combination with other deficits, significantly impairs the persons's ability to understand and appreciate the consequences of his or her actions [*see Prob. Code § 811* and discussion in *§ 304.112[2]*]. Diagnosis of a mental or physical disorder, without evidence of a deficit in at least one of these mental functions, as well as evidence of a correlation between the deficit or deficits and the alleged incapacity is not sufficient to support a finding of incapacity [*see Prob. Code § 810(c)*]. *Prob. Code § 3204(h)* requires that the petition state the deficit or deficits in the patient's mental functions listed in *Prob. Code § 811(a)* which are impaired and identify a link between the deficit or deficits and the patient's inability to respond knowing and intelligently to queries about the recommended health care or inability to participate in a treatment decision about the recommended health care by means of a rational thought process. For additional discussion, see *§ 304.112[1]*.

Note that the current version of *Prob. Code § 3200 et seq.*, effective July 1, 2000, refers to an individual's capacity to consent to health care and to make health care decisions. Prior to July 1, 2000, the statutes used the term "informed consent." Since the statute no longer uses the latter term, that term is no longer used in this form. For additional discussion, see Governing Statutes in the Introduction to this part.

[5] Verification

The petition must be verified [*Prob. Code § 1021(a)*].

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[RESERVED]

Chapters 305[RESERVED]

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Volume 26: Injunctions thru Insurance-Chs. 303-313
Chapter 307 INSOLVENCY

26-307 California Forms of Pleading and Practice--Annotated 307.syn

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[1] Composition Agreements

[2] Discharge of Debtor

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[3] Duties of Assignee

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[c] Nonconsenting Creditors

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[a] In General

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§§ 307.36-307.49 [Reserved]

§ 307.50 Complaint by Common Law Assignee for Benefit of Creditors Against Judgment Creditor of Debtor to Quiet Title [Code Civ. Proc. §§ 760.020(a), 761.020] and for Preliminary and Permanent Injunction [Code Civ. Proc. §§ 526, 527]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Prayer

[5] Verification

[6] Alternative Remedies

[7] Certification re Notice

[8] Lis Pendens

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§ 307.51 Complaint by Assignee for Benefit of Creditors to Recover Transfer of Property of Assignor [Code Civ. Proc. § 1800]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Statute of Limitations

[5] Interest

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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Chapter 307 INSOLVENCY
PART I. SCOPE

26-307 California Forms of Pleading and Practice--Annotated § 307.01

§ 307.01 Scope of Chapter

This chapter discusses and contains the following forms for use in actions involving assignments for the benefit of creditors and in defenses involving composition agreements:

- A complaint for use by a common law assignee for the benefit of creditors to quiet title to real property against a judgment creditor of the assignor [*see § 307.50*].

- A complaint to recover property transferred by the assignor [*see § 307.51*].

- A complaint by a creditor of an assignor for the benefit of creditors against the assignee to have the validity of the claim determined [*see § 307.52*].

- An affirmative defense for inclusion in an answer to a complaint in an action on a creditor's claim if the claim is barred by a composition agreement entered into between a defendant and the defendant's creditors, including the plaintiff [*see § 307.53*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewContracts LawDebtor & Creditor RelationsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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26-307 California Forms of Pleading and Practice--Annotated § 307.02

§ 307.02 Cross References

- For discussion and forms for use in actions involving an accord and satisfaction, see Ch. 6, *Accord and Satisfaction* .

- For discussion and forms for use in actions involving assignments of things in action, see Ch. 60, *Assignments* .

- For discussion and forms for use in California state court matters involving federal bankruptcy law issues, see Ch. 94, *Bankruptcy* .

- For a form of complaint by a creditor against a bank for fraud and misrepresentation as to solvency, see Ch. 95, *Banks, Deposits, and Checks* .

- For discussion and forms for use in asserting a third-party claim to personal property levied on in an action, see generally Ch. 254, *Executions and Enforcement of Judgments* .

- For discussion and forms for use in actions involving fraudulent conveyances, see Ch. 270, *Fraudulent Conveyances* .

- For discussion of wage preferences and a form for use by an unpaid wage claimant whose employer has made an assignment for the benefit of creditors, see Ch. 342, *Liens and Wage Preferences* .

- For discussion and forms for use in actions to quiet title to real property, see Ch. 482, *Quieting Title* .

- For discussion and forms relating to receivers, see generally Ch. 486, *Receivers* .

- For discussion and forms for use in actions involving compromise and settlement of causes of action, see Ch. 520, *Settlement and Release* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionFraudulent TransfersCivil ProcedureRemediesReceivershipsReceiversGeneral OverviewContracts LawPerformanceAccord & SatisfactionContracts LawPerformanceAssignmentGeneral OverviewReal Property LawPurchase & SaleFraudulent TransfersReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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26-307 California Forms of Pleading and Practice--Annotated §§ 307.03- 307.09

[Reserved]

§§ 307.03[Reserved]

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26-307 California Forms of Pleading and Practice--Annotated § 307.10

§ 307.10 Procedure for Making Assignment for Benefit of Creditors; Statutory Authorization Repealed

Prior to January 1, 1981, there were two procedures for making assignments for the benefit of creditors: (1) a statutory procedure, pursuant to *Civ. Code §§ 3448-3473*, and *(2)* a nonstatutory, or common law, procedure. The statutory procedure [*Civ. Code §§ 3448-3473*] was repealed by Stats. 1980, Ch 135, pursuant to a finding of the California Law Revision Commission that this procedure was not utilized and its recommendation that the statutes be repealed [California Law Revision Commission Annual Report (1979), pp. 1121-1122]. This leaves only the nonstatutory procedure.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency Laws

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26-307 California Forms of Pleading and Practice--Annotated § 307.11

§ 307.11 Purpose of Assignments

An assignment for the benefit of creditors is a business liquidation device available as an alternative to bankruptcy. Its use is prevalent in the commercial credit community in larger urban areas. Assignments are handled predominantly by large creditors' associations and by attorneys who specialize in the field. An assignment is most successful when there is cooperation among the debtor, the creditors, and the assignee [California Law Revision Commission Annual Report (1979), p 1121]. By an assignment for the benefit of creditors, the debtor assigns his, her, or its property to an assignee who sells the property and distributes the proceeds among the assignor's creditors [*see Bumb v. Bennett (1958) 51 Cal. 2d 294, 298-299, 333 P.2d 23* ; *Mechanics Bank v. Rosenberg (1962) 201 Cal. App. 2d 419, 421-424, 20 Cal. Rptr. 202]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency Laws

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26-307 California Forms of Pleading and Practice--Annotated § 307.12

§ 307.12 Assignments

[1] Generally

A conveyance to a trustee made with the intention to divest oneself not only of title to property but of all control over it, as well as with the intention to convey absolutely all one's property for the purpose of securing a distribution of its proceeds among one's creditors, is considered in legal effect an assignment for the benefit of creditors, no matter what name or designation the parties may have given it [*Sabichi v. Chase (1895) 108 Cal. 81, 86, 41 P. 29* (disapproved in *Bumb v. Bennett (1958) 51 Cal. 2d 294, 300, 333 P.2d 23* only insofar as *Sabichi* held that preferential assignments were invalid because they violated former statutory assignment provisions)].

[2] Preferential Assignments

In addition to assignments to all one's creditors, which are considered in legal effect assignments for the benefit of creditors [*see Sabichi v. Chase (1895) 108 Cal. 81, 86, 41 P. 29]* , an assignor may also make a valid common law assignment for the benefit of particular creditors [*see Bumb v. Bennett (1958) 51 Cal. 2d 294, 298-300, 333 P.2d 23* ; *Jarvis v. Webber (1925) 196 Cal. 86, 96-99, 236 P. 138]* . The power to make such an assignment for the benefit of particular creditors rests on the right of creditors to take payment or security for their debts, even though others may thereby be deprived of all means of obtaining satisfaction of their own equally meritorious claims [*see Heath v. Wilson (1903) 139 Cal. 362, 367, 73 P. 182]* . That is, since an insolvent debtor may lawfully pay one or more creditors to the exclusion of others by way of a direct transfer [*see Civ. Code § 3432* (debtor as permitted to pay one creditor in preference to another)], the debtor is permitted to do the same thing by way of a transfer in trust. In the absence of fraud, an assignment for the benefit of a particular class of creditor, and to such other creditors as have assented to its terms, effectively postpones the nonconsenting creditors in favor of the claims of the consenting creditors [*see Bumb v. Bennett (1958) 51 Cal. 2d 294, 300, 333 P.2d 23* ; *Brainard v. Fitzgerald (1935) 3 Cal. 2d 157, 163, 44 P.2d 336* (in absence of fraud, assignment limited to particular class of creditors as prevailing over subsequent attachment or execution)].

[3] Assignments Under Attachment Law

[a] Conditions of Assignment

Although there no longer exists a general statutory authorization for assignment for the benefit of creditors, the Attachment Law [*Code Civ. Proc. §§ 481.010-493.060*] permits a general assignment for the benefit of creditors as a means of terminating a lien of a temporary protective order or attachment if the lien was created within 90 days prior to the making of the assignment [*see Code Civ. Proc. § 493.030(a)*]. The assignment must meet the following conditions [*see Code Civ. Proc. §§ 493.010, 493.020*]:

- It must be of all the defendant's assets that are transferable and not exempt from enforcement of a money judgment.

- It must be for the benefit of all the defendant's creditors.

- It must not itself create a preference of one creditor or class of creditors over any other creditor or class of creditors.

The lien may be reinstated under specified conditions [*see Code Civ. Proc. § 493.050*]. Once the lien terminates, the assignee is subrogated to the rights of the plaintiff under the temporary protective order or attachment [*Code Civ. Proc. § 493.060(a)*].

[b] Exempt Property

In any general assignment for the benefit of creditors [*see Code Civ. Proc. § 493.010* (definition)] by an individual (or by a married couple), the assignor (or either spouse) may choose to retain as exempt property either the property that is otherwise exempt under the Enforcement of Judgments Law [*see Code Civ. Proc. § 703.010 et seq.*; *see also* Ch. 254, *Executions and Enforcement of Judgments*] or, in the alternative, the following property (to be valued at fair market value as of the date of the making of the assignment):

- The assignor's aggregate interest, not to exceed $7,500 in value, in real property or personal property that the assignor or a dependent or spouse of the assignor uses as a residence, in a cooperative that owns property that the assignor or a dependent or spouse of the assignor uses as a residence, or in a burial plot for the assignor or a dependent or spouse of the assignor [*Code Civ. Proc. § 1801(a)*].

- The assignor's interest, not to exceed $1,200 in value, in one motor vehicle [*Code Civ. Proc. § 1801(b)*].

- The assignor's interest, not to exceed $200 in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the assignor or a dependent or spouse of the assignor [*Code Civ. Proc. § 1801(c)*].

- The assignor's aggregate interest, not to exceed $500 in value, in jewelry held primarily for the personal, family, or household use of the assignor or a dependent or spouse of the assignor [*Code Civ. Proc. § 1801(d)*].

- The assignor's aggregate interest, not to exceed in value $400 plus any unused amount of the exemption provided under *Code Civ. Proc. § 1801(a)*, in any property [*Code Civ. Proc. § 1801(e)*].

- The assignor's aggregate interest, not to exceed $750 in value, in any implements, professional books, or tools, of the trade of the assignor or the trade of a dependent or spouse of the assignor [*Code Civ. Proc. § 1801(f)*].

- Any unmatured life insurance contract owned by the assignor, other than a credit life insurance contract [*Code Civ. Proc. § 1801(g)*].

- The assignor's aggregate interest, not to exceed in value $4,000 in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the assignor under which the insured is the assignor or an individual of whom the assignor is a dependent or spouse [*Code Civ. Proc. § 1801(h)*].

- Professionally prescribed health aids for the assignor or a dependent or spouse of the assignor [*Code Civ. Proc. § 1801(i)*].

- The assignor's right to receive a social security benefit, unemployment compensation (after any deduction under *Unemp. Ins. Code § 1255.7* for unpaid child support), or a local public assistance benefit [*Code Civ. Proc. § 1801(j)(1)*].

- The assignor's right to receive a veterans' benefit [*Code Civ. Proc. § 1801(j)(2)*].

- The assignor's right to receive a disability, illness, or unemployment benefit (after any deduction under *Unemp. Ins. Code § 1255.7* for unpaid child support) [*Code Civ. Proc. § 1801(j)(3)*].

- The assignor's right to receive alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the assignor and any dependent or spouse of the assignor [*Code Civ. Proc. § 1801(j)(4)*].

- The assignor's right to receive a payment under a stock-bonus, pension, profit-sharing, or annuity plan, or a similar plan or contract, on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the assignor and any dependent or spouse of the assignor, provided [*Code Civ. Proc. § 1801(j)(5)*]:

    - The plan or contract was not established by or under the auspices of an employer of which the assignor was a partner, officer, director, or controlling person at the time the assignor's rights under the plan or contract arose.

    - The payment is not on account of age or length of service.

- The plan or contract is qualified under the Internal Revenue Code [*see I.R.C. §§ 401(a), 403(a), 403(b), 408, 409* (qualification of plan or contract)].

- The assignor's right to receive, or property that is traceable to, an award under a crime victim's reparation law [*Code Civ. Proc. § 1801(k)(1)*].

- The assignor's right to receive, or property that is traceable to, a payment on account of the wrongful death of an individual of whom the assignor was a dependent or spouse, to the extent reasonably necessary for the support of the assignor and any dependent or spouse of the assignor [*Code Civ. Proc. § 1801(k)(2)*].

- The assignor's right to receive, or property that is traceable to, a payment under a life insurance contract that insured the life of an individual of whom the assignor was a dependent or spouse on the date of such individual's death, to the extent reasonably necessary for the support of the assignor and any

dependent or spouse of the assignor [*Code Civ. Proc. § 1801(k)(3)*].

- The assignor's right to receive, or property that is traceable to, a payment, not to exceed $7,500, on account of personal bodily injury, as compensation for pain and suffering or actual pecuniary loss (other than loss of future earnings), of the assignor or an individual of whom the assignor is a dependent or spouse [*Code Civ. Proc. § 1801(k)(4)*].

- The assignor's right to receive, or property that is traceable to, a payment in compensation of loss of future earnings of the assignor or an individual of whom the assignor is or was a dependent or spouse, to the extent reasonably necessary for the support of the assignor and any dependent or spouse of the assignor [*Code Civ. Proc. § 1801(k)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency LawsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureRemediesProvisional RemediesAttachments

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26-307 California Forms of Pleading and Practice--Annotated § 307.13

§ 307.13 Debtor's Complete Investment of Interest in Property Assigned Required

An assignment for the benefit of creditors must vest all interest in the property transferred in the assignee or trustee [*see Brainard v. Fitzgerald (1935) 3 Cal. 2d 157, 163, 44 P.2d 336* ; *Mechanics Bank v. Rosenberg (1962) 201 Cal. App. 2d 419, 424, 20 Cal. Rptr. 202]* . Thus, the intention of the debtor to divest himself, herself, or itself must be present [*Mechanics Bank v. Rosenberg (1962) 201 Cal. App. 2d 419, 424, 20 Cal. Rptr. 202* (secret intention of assignor to reserve present interest was not controlling when transaction effected, in fact, divestment of assignor's interest)]. However, a reservation in an assignment instrument of any surplus of the property assigned after the creditors have been paid does not invalidate the assignment since the assignee would hold the excess as agent or trustee for the assignor, whether stated in the instrument or not [*Heath v. Wilson (1903) 139 Cal. 362, 369, 73 P. 182]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency Laws

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26-307 California Forms of Pleading and Practice--Annotated § 307.14

§ 307.14 Assignment of Real Property as Conveyance

An assignment of real property for the benefit of creditors which purports to pass all interest of the assignor is a conveyance [*see Civ. Code § 1215*] and, as such, is subject to all the provisions of the Civil Code relating to transfers of real property [*Moore v. Schneider (1925) 196 Cal. 380, 389-392, 238 P. 81* ; *see also Bumb v. Bennett (1958) 51 Cal. 2d 294, 299-300, 333 P.2d 23* (holding, however, that failure to record transfer did not render conveyance invalid against subsequently attaching creditor since unrecorded deed or assignment is sufficient to pass title against creditor)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency LawsReal Property LawOwnership & TransferGeneral Overview

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§ 307.15 Duties of Assignee

The assignment must vest legal title to the property assigned in the assignee or trustee [*see Moore v. Schneider (1925) 196 Cal. 380, 385, 238 P. 81]* who has the duties of a trustee acting for the benefit of creditors in accordance with the assignment instrument [*Mechanics Bank v. Rosenberg (1962) 201 Cal. App. 2d 419, 424-425, 20 Cal. Rptr. 202* (common law assignment)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 307.16 Status of Assignee

Although an assignment for the benefit of creditors is binding on the assignor and the creditors assenting to it [*Peterson v. Ball (1931) 211 Cal. 461, 468, 296 P. 291]* and, in the absence of fraud or other considerations, may postpone the claim of a nonconsenting creditor to that of a consenting creditor [*see Brainard v. Fitzgerald (1935) 3 Cal. 2d 157, 163, 44 P.2d 336]* , the assignee acquires no greater right in the property assigned than the assignor had at the time of the assignment. He or she takes only the interest of the assignor in and to the property and can assert no claim to the property which the assignor might not [*Moore v. Schneider (1925) 196 Cal. 380, 385-386, 238 P. 81]* . In this respect, although the assignee may be a trustee and the creditors may be considered the beneficiaries of the assignment [*see Mechanics Bank v. Rosenberg (1962) 201 Cal. App. 2d 419, 424-425, 20 Cal. Rptr. 202]* , the assignee is no more than a representative of the assignor and does not represent the creditors [*Peterson v. Ball (1931) 211 Cal. 461, 471, 296 P. 291]* .

The assignee or trustee is a representative of the assignor and not a bona fide purchaser for value [*First Nat'l Bank v. Pomona Tile Mfg. Co. (1947) 82 Cal. App. 2d 592, 608, 186 P.2d 693]* . "Value," as used in the phrase "bona fide purchaser for value," means a present contemporaneous value, whereas the consideration for a general assignment for the benefit of creditors is the antecedent debt owed by the assignor to the creditors, and, hence, is past consideration [*First Nat'l Bank v. Pomona Tile Mfg. Co. (1947) 82 Cal. App. 2d 592, 607, 186 P.2d 693]* .

The assignment may not take priority over a prior assignment since it is not for value [*First Nat'l Bank v. Pomona Tile Mfg. Co. (1947) 82 Cal. App. 2d 592, 607-608, 186 P.2d 693]* .

An assignee for the benefit of creditors does not assume the underlying liabilities of the debtor. For instance, the assignee cannot be personally liable for attorney's fees that are awarded against the debtor in an action on a lease under which the debtor is a tenant. The procedure of an assignment for the benefit of creditors would be eviscerated if an assignee were required to assume the underlying liabilities of the assignor's insolvent business [*Sherwood Partners, Inc. v. EOP-Marina Bus. Ctr., L.L.C. (2007) 153 Cal. App. 4th 977, 979, 62 Cal. Rptr. 3d 896*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 307.17 Right to Set Aside Fraudulent Transfer

An assignee of a general assignment for the benefit of creditors, as defined in *Code Civ. Proc. § 493.010* [*see § 307.12[3]*], may exercise any or all of the rights specified in *Civ. Code § 3439.07* of the Uniform Fraudulent Transfer Act and all those in *Civ. Code §§ 3440-3440.9* (relating to transfers of personal property by assignor without immediate delivery and change in possession) if they are available to one or more creditors of the assignor who are beneficiaries of the assignment. In those cases, the assignee can exercise those rights and remedies (1) only to the extent the rights or remedies are so available, and (2) only for the benefit of those creditors whose rights are asserted by the assignee [*Civ. Code §§ 3439.07(d), 3440(b)*]. Pursuant to *Civ. Code § 3439.07(a)-(c)* and subject to the limitations set forth in *Civ. Code § 3439.08*, if a transfer or obligation is fraudulent as to a creditor, the creditor may have the transfer set aside or the obligation annulled to the extent necessary to satisfy his or her claim, disregard the conveyance and attach or levy execution on the property conveyed, or seek other remedies such as injunction or appointment of a receiver to take possession of the asset transferred or its proceeds [*see* Ch. 270, *Fraudulent Conveyances*].

Civ. Code § 3439.07(d) appears to abrogate the prior rule that an assignee may not maintain an action to set aside a fraudulent conveyance made by an assignor [*see Moore v. Schneider (1925) 196 Cal. 380, 385-387, 238 P. 81]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 307.18 Right to Occupy Business Premises

In any general assignment for the benefit of creditors, as defined in *Code Civ. Proc. § 493.010* [*see § 307.12[3]*], the assignee has the right to occupy, for a period of up to 90 days after the date of the assignment, any business premises held under a lease by the assignor on payment when due of the monthly rental reserved in the lease for the period of the occupancy, notwithstanding any provision in the lease for its termination on the making of the assignment or the insolvency of the lessee or other condition relating to the financial condition of the lessee. The assignee has this right whether the lease was entered into before or after February 17, 1982, the effective date of *Civ. Code § 1954.1*. *Civ. Code § 1954.1* is to be construed as establishing the reasonable rental value of the premises recoverable by a landlord on a holding-over by the tenant on the termination of a lease under the circumstances specified above [*Civ. Code § 1954.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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26-307 California Forms of Pleading and Practice--Annotated § 307.19

§ 307.19 Parties Bound by Assignments

[1] Which Parties Are Bound

A common law assignment for the benefit of creditors is binding on the assigning debtor and all creditors who assent to it [*Peterson v. Ball (1931) 211 Cal. 461, 468, 296 P. 291]* . It vests the assignor's title to the property in the assignee and is, at most, void only against creditors not assenting to it and against good-faith purchasers and encumbrancers for value [*Garn v. Thorwaldson (1919) 40 Cal. App. 62, 66, 180 P. 9]* . The acceptance of the assignment by the creditors is presumed until the contrary is shown, and while the nonacceptance of any particular creditor may result in postponing him, her, or it to other creditors, it is not fatal to the assignment, since preferences are not illegal under the law [*Brainard v. Fitzgerald (1935) 3 Cal. 2d 157, 163, 44 P.2d 336* (citing Civ. Code § 3451, repealed by Stats. 1980, Ch 135); *but see Civ. Code § 3432*].

A nonconsenting creditor is not bound by an assignment for the benefit of a limited number of creditors, and his, her, or its consent to it cannot be compelled by any act of the debtors, the trustee, or other creditors. An attempted transfer by a debtor, for the purpose of paying or securing one or more creditors but not amounting to an assignment for creditors generally, must be executed with due regard to the general principles of law applicable to such transactions to be made effective as against nonconsenting creditors [*Jarvis v. Webber (1925) 196 Cal. 86, 99, 236 P. 138* ; *see also Brainard v. Fitzgerald (1935) 3 Cal. 2d 157, 161, 44 P.2d 336]* .

[2] Assignment Voided by Fraudulent Transfer

If an assignment for the benefit of a particular class of creditors was in fraud of the debtor's other creditors by virtue of being in violation of the provisions governing fraudulent conveyances, a nonconsenting creditor may avoid the attempted preference [*see Bumb v. Bennett (1958) 51 Cal. 2d 294, 300, 333 P.2d 23]* . Thus, if the debtor (1) intended to prevent the application of his or her property, in whole or in part, to the satisfaction of his or her debts [*see Civ. Code § 3439.04(a)* (conveyance made with actual intent to defraud creditor); *Heath v. Wilson (1903) 139 Cal. 362, 73 P. 182* ; *CACI Nos. 4200, 4201* (related California Judicial Council jury instructions)]; (2) made the transfer or incurred the obligation without receiving reasonably equivalent value in exchange for the transfer or obligation if he or she was insolvent at the time or became insolvent as a result of the transfer or obligation [*see Civ. Code § 3439.05*; *CACI Nos. 4203, 4205, 4206* (related California Judicial Council jury instructions); *but see Civ. Code § 3439.03* (value as given to

extent antecedent debt is satisfied or secured)]; or (3) transferred personal property without an actual and continued change of possession of the property transferred [*see Civ. Code § 3440*; *Jarvis v. Webber (1925) 196 Cal. 86, 99* ; *see also Civ. Code § 3440(e)*; *Brainard v. Fitzgerald (1935) 3 Cal. 2d 157, 159, 44 P.2d 336* (provisions of *Civ. Code § 3440* inapplicable to statutory or common law assignments made for benefit of creditors generally); *but see Civ. Code § 3440.1(e)* (provisions in *Civ. Code § 3440 et seq.* are generally inapplicable to assignments for benefit of creditors)], then an assignment for the benefit of a particular creditor or creditors is ineffective as against a nonconsenting creditor [*see Civ. Code §§ 3439.07(a), 3440(b)*; *Bumb v. Bennett (1958) 51 Cal. 2d 294, 300, 333 P.2d 23* ; *Jarvis v. Webber (1925) 196 Cal. 86, 88]* .

For a complaint by an assignee for the benefit of creditors against a judgment creditor of debtor to quiet title, see *§ 307.50*.

[3] Waiver of Assignment Irregularities by Filing Claim

A creditor is bound by an assignment and waives all objection to the regularity of the assignment and to the title of the assignee to the assets if he, she, or it accepts the assignment by filing his, her, or its claim under it [*Lacy v. Gunn (1904) 144 Cal. 511, 516, 78 P. 30* (involving former statutory assignment)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 307.20 Recovery of Preferences by Assignee

[1] Generally

Code Civ. Proc. § 1800 contains detailed provisions, discussed below, authorizing recovery by the assignee of a general assignment for the benefit of creditors of transfers of the assignor's property under conditions specified in the statute. *Code Civ. Proc § 1800* is not preempted by the Bankruptcy Code [*Haberbush v. Charles & Dorothy Cummins Family Limited Partnership (2006) 139 Cal. App. 4th 1630, 1640, 43 Cal. Rptr. 3d 814* ; *accord, Credit Managers Assn. v. Countrywide Home Loans, Inc. (2006) 144 Cal. App. 4th 590, 598-600, 50 Cal. Rptr. 3d 259* ; *contra, Sherwood Partners, Inc. v. Lycos, Inc. (9th Cir. 2005) 394 F.3d 1198, 1202-1206]* .

[2] Insolvent Defined

Code Civ. Proc. § 1800(a)(1) defines "insolvent," as used in the section, as meaning, with reference to a person other than a partnership, a financial condition such that the sum of the person's debts is greater than all of the person's property, at a fair valuation, exclusive of (1) property transferred, concealed, or removed with intent to hinder, delay, or defraud the person's creditors [*Code Civ. Proc. § 1800(a)(1)(A)(i)*]; and (2) property that may be exempted from property of the estate pursuant to the person's election made under *Code Civ. Proc. § 1801* (*see § 307.12[3][b]*) [*Code Civ. Proc. § 1800(a)(1)(A)(ii)*].

With reference to a partnership, "insolvent" means a financial condition in which the sum of the partnership's debts are greater than the aggregate of, at a fair valuation, all of the partnership's property, exclusive of property of the kind specified in *Code Civ. Proc. § 1800(a)(1)(A)(i)*, above [*Code Civ. Proc. § 1800(a)(1)(B)(i)*], and the sum of the excess of the value of each general partner's separate property, exclusive of property of the kind specified in *Code Civ. Proc. § 1800(a)(1)(A)(ii)*, above, over that partner's separate debts [*Code Civ. Proc. § 1800(a)(1)(B)(ii)*].

[3] Transfer Defined

The term "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, or disposing of or parting with property or with an interest in property, including retention of title as a security interest [*Code Civ. Proc. § 1800(a)(10)*].

[4] Insider Defined

The term "insider," with respect to an individual, means any of the following [*see Code Civ. Proc. § 1800(a)(3)(A)*]:

- A relative of the assignor or of a general partner of the assignor.
- A partnership in which the assignor is a general partner.
- A general partner of the assignor.
- A corporation of which the assignor is a director, officer, or person in control.

If the assignor is a corporation, "insider" means any of the following [*see Code Civ. Proc. § 1800(a)(3)(B)*]:

- A director of the assignor.
- An officer of the assignor.
- A person in control of the assignor.
- A partnership in which the assignor is a general partner.
- A general partner of the assignor.
- A relative of a general partner, director, officer, or person in control of the assignor.

If the assignor is a partnership, "insider" means any of the following [*see Code Civ. Proc. § 1800(a)(3)(C)*]:

- A general partner in the assignor.
- A relative of a general partner in, general partner of, or person in control of the assignor.
- A partnership in which the assignor is a general partner.
- A general partner of the assignor.
- A person in control of the assignor.

"Insider" also includes an affiliate of the assignor, or an insider of an affiliate as if the affiliate were the assignor [*see Code Civ. Proc. 1800(a)(3)(D)*]. A managing agent of the assignor is also classified as an "insider" [*see Code Civ. Proc. 1800(a)(3)(F)*].

For purposes of the above definition, "relative" means an individual related by affinity or consanguinity with the third degree as determined by the common law, or an individual in a step or adoptive relationship within the third degree. "Affiliate" means a person that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the assignor; or 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote by the assignor (excluding securities held in a fiduciary or agency capacity without sole discretionary power to vote, or held solely to secure a debt if the holder has not in fact exercised the power to vote), or a person who operates the business of the assignor under a lease or operating agreement or whose business is operated by the assignor under a lease or operating agreement [*see Code Civ. Proc.*

1800(a)(3)].

[5] Inventory Defined

The term "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease [*Code Civ. Proc. § 1800(a)(2)*].

[6] Judicial Lien Defined

"Judicial lien" means a lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding [*Code Civ. Proc. § 1800(a)(4)*].

[7] New Value Defined

The term "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to the transferee in a transaction that is neither void nor voidable by the assignor or the assignee under any applicable law, but does not include an obligation substituted for an existing obligation [*Code Civ. Proc. § 1800(a)(5)*].

[8] Receivable Defined

"Receivable" means a right to payment, whether or not that right has been earned by performance [*Code Civ. Proc. § 1800(a)(6)*].

[9] Security Agreement Defined

The term "security agreement" means an agreement that creates or provides for a security interest [*Code Civ. Proc. § 1800(a)(7)*].

[10] Security Interest Defined

The term "security interest" means a lien created by an agreement [*Code Civ. Proc. § 1800(a)(8)*].

[11] Statutory Lien Defined

The term "statutory lien" means a lien arising solely by force of statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not that interest or lien is provided by or is dependent on a statute and whether or not that interest or lien is made fully effective by statute [*Code Civ. Proc. § 1800(a)(9)*].

[12] Recovery of Property Transferred

Except as provided in *Code Civ. Proc. § 1800(c)* [*see* [13], *below*], an assignee of any general assignment for the benefit of creditors, as defined in *Code Civ. Proc. 493.010* [*see § 307.12[3]*], may recover any transfer of property of the assignor [*Code Civ. Proc. § 1800(b)*]:

- To or for the benefit of a creditor;
- For or on account of an antecedent debt owed by the assignor before the transfer was made;

- Made while the assignor was insolvent;

- Made on or within 90 days before the date of the making of the assignment or if the creditor, at the time of transfer, was an insider and had reasonable cause to believe the debtor was insolvent at the time of the transfer, made between 90 days and one year before the date of making the assignment; and

- That enables the creditor to receive more than another creditor of the same class.

[13] Property Not Recoverable

An assignee may not recover a transfer [*Code Civ. Proc. 1800(c)*]:

- To the extent that it was intended by the assignor and the creditor to or for whose benefit the transfer was made to be a contemporaneous exchange for new value given to the assignor and in fact a substantially contemporaneous exchange.

- To the extent that the transfer was in payment of a debt incurred in the ordinary course of business or financial affairs of the assignor and the transfer was in the ordinary course of business or financial affairs of the assignor and the transferee and according to ordinary business terms [*see Credit Managers' Assn. v. Brubaker (1991) 233 Cal. App. 3d 1587, 1593-1594, 285 Cal. Rptr. 417* (chief executive officer was not in business of making loans, thus repayments by insolvent of advances made to it by chief executive officer were not "in ordinary course of transferee's business" and were recoverable by assignee for benefit of creditors)].

- Of a security interest in property acquired by the assignor:

  - To the extent that the security interest secures new value that was (1) given at or after the signing of a security agreement that contains a description of the property as collateral, (2) given by or on behalf of the secured party under the agreement, (3) given to enable the assignor to acquire the property, and (4) in fact used by the assignor to acquire the property, and

  - That is perfected within 10 days after the security interest attaches.

- To or for the benefit of a creditor to the extent that, after the transfer, the creditor gave new value to or for the benefit of the assignor not secured by an otherwise unavoidable security interest and on account of which new value the assignor did not make an otherwise unavoidable transfer to or for the benefit of the creditor.

- Of a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the making of the assignment and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by the security interest exceeded the value of all security interest for the debt on the later of (1) 90 days before the date of the making of the assignment, and (2) the date on which new value was first given under the security agreement creating the security interest;

- That is the fixing of a statutory lien [*Code Civ. Proc. § 1800(c)*].

- That is payment to a claimant [*see Civ. Code § 3085* ("claimant" defined)] in exchange for the claimant's waiver or release of any potential or asserted claim of lien, stop notice, or right to recover on a

payment bond, or any combination of those claims [*Code Civ. Proc. § 1800(c)*].

- To the extent payment of a debt to a spouse, former spouse, or child of the debtor is for alimony or maintenance, or for a separation agreement, divorce decree, or other order of a court of record, or for a determination made in accordance with state or territorial law by a governmental unit, or for a property settlement agreement; but not to the extent that either of the following occurs:

  - The debt is assigned to another entity voluntarily, by operation of law, or otherwise, in which case the assignee may not recover that portion of the transfer that is assigned to the state or any political subdivision of the state pursuant to Part D of Title IV of the Social Security Act [*42 U.S.C. 601 et seq.*] and passes on to the spouse, former spouse, or child of the debtor; or

  - The debt includes a liability designated as alimony, maintenance, or support, unless the liability is actually in the nature of alimony, maintenance, or support.

[14] Property Transferred to Secure Surety's Reimbursement

An assignee of any general assignment for the benefit of creditors (as defined in *Code Civ. Proc. § 493.010* [*see § 307.12[3]*]) may avoid a transfer of property of the assignor transferred to secure reimbursement of a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the assignee under *Code Civ. Proc. § 1800(b)*. The liability of the surety under the bond or obligation is discharged to the extent of the value of the property recovered by the assignee or the amount paid to the assignee [*Code Civ. Proc. § 1800(d)*].

[15] Circumstances Under Which Transfer Made or Perfected

For the purposes of *Code Civ. Proc. § 1800*, a transfer of real property other than fixtures, but including the interest of seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of the property from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee. A transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee [*Code Civ. Proc. § 1800(e)(1)*].

Except as provided in *Code Civ. Proc. § 1800(e)(3)*, a transfer is made at the time the transfer takes effect between the transferor and the transferee, if the transfer is perfected at, or within 10 days after, that time; at the time the transfer is perfected if perfected after 10 days; or immediately before the date of the making of the assignment if the transfer is not perfected at the later of the making of the assignment and 10 days after the transfer takes effect between transferor and transfeee [*Code Civ. Proc. § 1800(e)(2)*].

For the purposes of *Code Civ. Proc. § 1800*, a transfer is not made until the assignor has acquired rights in the property transferred [*Code Civ. Proc. § 1800(e)(3)*].

[16] Presumption of Insolvency

For the purposes of *Code Civ. Proc. § 1800*, an assignor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the making of the assignment [*Code Civ. Proc. § 1800(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 307.21 Discharge of Debtor

[1] Release of Debtor as Condition of Assignment

Ordinarily an assignment for the benefit of creditors and the payment of dividends thereunder do not act as a discharge of the debtor, except to the extent that the claims of the creditors are thereby reduced by actual payment. However, such assignments often contain a condition that the debtors shall be released from further liability; that condition in an assignment is binding on creditors who accept the benefits of the assignment [*Boteler v. Robinson (1930) 105 Cal. App. 611, 615, 288 P. 135]* .

[2] Secured Creditors

If the assignor is released from further liability to a particular creditor on the acceptance of the benefits of the assignment by that creditor, any lien or other security held by the creditor for the released claim normally cannot continue to exist [*Equitable Life Assur. Soc'y v. Jacobson (1924) 68 Cal. App. 717, 722, 230 P. 200]* . However, a security agreement in which such a creditor retains title to the property until the underlying indebtedness is fully satisfied would not be affected by the creditor's promise to release his or her claim against the assignor since, in the absence of a contrary intention, the assignment does not ordinarily include property retained by the creditor as security [*see* *Stoody Co. v. Valley Pipe & Welding Co. (1937) 20 Cal. App. 2d 580, 586-587, 67 P.2d 747* (holding that creditor has right to recover property sold under conditional sales contract)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawClaimsTypesSecured Claims & LiensGeneral OverviewBankruptcy LawDischarge & DischargeabilityEffects of DischargeGeneral OverviewBankruptcy LawState Insolvency Laws

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§ 307.22 Claims Having Priority Over Assignment

[1] Debts Owed to United States

The debts due to the United States by any person who is insolvent must first be satisfied. This priority extends to cases in which a debtor, not having sufficient property to pay all his, her, or its debts, makes a voluntary assignment of those debts [*31 U.S.C. § 191*]. Any assignee or other person, who pays, in whole or in part, any debt due by the assignor before he, she, or it satisfies and pays the debts due to the United States from the assignor, is personally answerable to the extent of those payments for the debts so due to the United States, or for as much of these debts as may remain due and unpaid [31 U.S.C. § 192].

[2] Unemployment Contributions and Sales and Use Taxes

The wage and employer contributions required to be paid by any employing unit for unemployment and disability insurance and sales and use taxes required to be paid by any person, together with interest and penalties, must be satisfied whenever (1) the employment unit or person is insolvent or (2) the unit or person makes a voluntary assignment of its assets [*Unemp. Ins. Code § 1701*; *Rev. & Tax Code § 6756*].

[3] Labor Claims

When an assignment, whether voluntary or involuntary or formal or informal, is made for the benefit of creditors of the assignor, or results from any proceeding in insolvency or receivership commenced against the assignor, or when any property is turned over to the creditors of a person, firm, association, or corporation, or to a receiver or trustee for the benefit of creditors, the following claims have priority in the following order:

- Allowed unsecured claims for wages, salaries, or commissions, including vacation, severance, and sick-leave pay:

  - Earned by an individual within 90 days before the date of the making of the assignment or the taking over of that property or the commencement of the court proceeding or the date of the cessation of the debtor's business, whichever occurs first; but

only

- To the extent of $2,000 for each such individual.

- Allowed unsecured claims for contributions to employee benefit plans:

  - Arising from services rendered within 180 days before the date of making of such assignment or the taking over of that property or the commencement of the court proceeding or the date of the cessation of the debtor's business, whichever occurs first, but only

  - For each such plan, to the extent of (1) the number of employees covered by such plan multiplied by $2,000, less (2) the aggregate amount paid to those employees under *Code Civ. Proc. § 1204(a)* plus the aggregate amount paid by the estate on behalf of those employees to any other employee benefit plan [*Code Civ. Proc. § 1204*].

The above claims must be paid by the trustee, assignee, or receiver before the claim of any other creditor of the assignor, insolvent, or debtor whose property is so turned over, and must be paid as soon as the money with which to pay it becomes available. If there is insufficient money with which to pay all such labor claims in full, the money available must be distributed among the claimants in proportion to the amount of their respective claims. The trustee, receiver, or assignee for the benefit of creditors has the right to require sworn claims to be presented and has the right to refuse to pay any preferred claim, either in whole or in part, if he or she has reasonable cause to believe that the claim is not valid, but must pay any part that is not disputed, without prejudice to the claimant's rights, as to the balance of his or her claim, and withhold sufficient money to cover the disputed portion until the claimant in question has a reasonable opportunity to establish the validity of his or her claim by court action, either in his or her own name or through an assignee [*Code Civ. Proc. § 1204*].

For a more thorough discussion of wage preferences and a form for use by an unpaid wage claimant where the claimant's employer has made an assignment for the benefit of creditors, see Ch. 342, *Liens and Wage Preferences* .

[4] Consumer Deposits

In any general assignment for the benefit of creditors, the following claims have priority, subordinate to the priorities for labor claims under *Code Civ. Proc. § 1204*, but prior to all other unsecured claims: allowed unsecured claims of individuals, to the extent of $900 for each individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of those individuals, that were not delivered or provided [*Code Civ. Proc. § 1204.5*]. The priority granted by *Code Civ. Proc. § 1204.5* is subordinate to that granted by former *Rev. & Tax. Code §§ 18933* and *26312* (*see now Rev. & Tax. Code § 19253*) [*Code Civ. Proc. § 1204.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawClaimsTypesGovernmental EntitiesBankruptcy LawClaimsTypesUnsecured Priority ClaimsGeneral OverviewBankruptcy LawState Insolvency Laws

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§ 307.23 Insolvency as Factor in Involuntary Bankruptcy

Prior to October, 1979, a general assignment for the benefit of creditors was an act of bankruptcy under the former Bankruptcy Act [*see* former *11 U.S.C. § 21(a)(4)*] and gave the bankruptcy court exclusive jurisdiction regardless of the solvency of the alleged bankrupt debtor [*In re Wing Sing Chew (9th Cir. 1974) 495 F.2d 18]* . With the enactment of the Bankruptcy Reform Act of 1978 [*see 11 U.S.C. § 101 et seq.*], acts of bankruptcy, including assignments for the benefit of creditors, have been eliminated and an equity solvency test or a custodian taking possession of the debtor's property have replaced the former Act's test as grounds for creditors to initiate an involuntary bankruptcy proceeding against a debtor.

Under the Bankruptcy Code, a bankruptcy court will order relief against a debtor in an involuntary bankruptcy case only if (1) the debtor is generally not paying the debtor's debts as those debts become due, or (2) within 120 days before the date of the filing of the involuntary petition in bankruptcy, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against the property, was appointed or took possession [*11 U.S.C. § 303(h)*].

Under the Servicemembers Civil Relief Act [*see 50 U.S.C. App. § 501 et seq.*] and comparable California law [*see Mil. & Vet. Code § 400 et seq.*], it is unlawful for any lender, creditor, credit reporting agency, or other person to determine that a service member [*see 50 U.S.C. App. § 511*; *Mil. & Vet. Code § 400*] is unable to pay any civil obligation or liability in accordance with its terms, solely because the service member applied for or received a stay, postponement, or suspension, pursuant to the federal act or *Mil. & Vet. Code § 400 et seq.*, in the payment of any tax, fine, penalty, insurance premium, or other civil obligation or liability [*50 U.S.C. App. § 518(1)*; *Mil. & Vet. Code § 401(a)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationCommencementInvoluntary CasesGeneral OverviewBankruptcy LawState Insolvency Laws

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26-307 California Forms of Pleading and Practice--Annotated § 307.24

§ 307.24 Other Remedies

[1] Extension Agreements

Other remedies that may be available to an insolvent debtor include extension agreements whereby the creditors agree to extend the time in which payment of their claims is to be made. However, such agreements contemplate eventual payment of the claims in full. The agreement may simply postpone payment in full to a specified date or provide for partial payment on a specified future date with the balance to be paid in a series of installments [*see* California Legal Forms, Ch. 78, *Creditors' Agreements: Nonbankruptcy Alternatives* (Matthew Bender)].

Notwithstanding *Civ. Code § 1526(a)* (right of creditor to prevent accord and satisfaction by striking out a "payment in full" notation), the acceptance of a check or draft constitutes an accord and satisfaction if a check or draft is tendered pursuant to a composition or extension agreement between a debtor and its creditors, under which all creditors of the same class are accorded similar treatment, and the creditor receives the check or draft with knowledge of the restriction [*Civ. Code § 1526(b)*]. A creditor will be conclusively presumed to have knowledge of the restriction if either of the following conditions is satisfied [*Civ. Code § 1526(b)*]:

- The creditor executes a written consent to the composition or extension agreement prior to the receipt of the check or draft.

- The creditor receives written notice, not less than 15 days nor more than 90 days prior to receipt of the check or draft, that a check or draft will be tendered with a restrictive endorsement and that acceptance and cashing of the check or draft will constitute an accord and satisfaction.

For purposes of *Civ. Code § 1526(b)(2)*, mailing the notice by first-class mail, postage prepaid, addressed to the address shown for the creditor on the debtor's books or such other address as the creditor may designate in writin,g constitutes notice [*Civ. Code § 1526(d)*].

[2] Composition Agreements

[a] Defined

A composition of the debtor's outstanding obligations in lieu of or in addition to an extension agreement is another alternative. A composition agreement with creditors is an agreement, made on a sufficient consideration, between an insolvent or embarrassed debtor and his or her creditors, or a considerable proportion of them, whereby the creditors agree to accept a dividend less than the whole of their claims, to be distributed pro rata, in discharge and satisfaction of the whole [*Reynolds v. Pennsylvania Oil Co. (1907) 150 Cal. 629, 634-635, 89 P. 610* (quoting from *Wilson v. Samuels (1893) 100 Cal. 514, 518, 35 P. 148*)]. The essence of the agreement is that the assenting creditors agree to forbear prosecution of their claims and agree to discharge their claims against the debtor on payment of less than the full amount of their claims [*see* *Reynolds v. Pennsylvania Oil Co. (1907) 150 Cal. 629, 634, 89 P. 610* ; *Pierson v. McCahill (1862) 21 Cal. 122, 128]* . The agreement may provide for the cash payment of a negotiated uniform percentage of the amounts of the claims (composition), or it may be a combination composition-extension agreement whereby the assenting creditors agree to accept a negotiated uniform percentage, in discharge of the full amounts of their claims, under which they are paid a designated part in cash and the balance over an extended period of time, usually in installments [*see* California Legal Forms, Ch. 78, *Creditors' Agreements: Nonbankruptcy Alternatives* (Matthew Bender)].

[b] Consideration

Except as modified by statute [*see Civ. Code § 1524*], an agreement between a debtor and a single creditor for the acceptance by the creditor of an amount less than that owed in full satisfaction of the debt is invalid for want of consideration [*Pierson v. McCahill (1862) 21 Cal. 122, 129]* . In comparison, a composition is an agreement between a debtor and two or more creditors. It is considered an agreement among the creditors themselves as well as an agreement between the debtor and the creditors [*Reynolds v. Pennsylvania Oil Co. (1907) 150 Cal. 629, 634, 89 P. 610]* , since the creditors agree among themselves to forego their right to pursue the usual method of enforcing their demands in consideration of being paid a less sum at a given time. In this respect, the agreement is binding on the creditors, since the engagement of each creditor is a sufficient consideration for the engagement of the others to do the same [*Wilson v. Samuels (1893) 100 Cal. 514, 520, 35 P. 148* ; *Pierson v. McCahill (1862) 21 Cal. 122, 129]* . For an affirmative defense to a creditor's action against a debtor when the action is barred by composition agreement, see *§ 307.53*.

[c] Good Faith of Parties Required

The law demands the utmost good faith on the part of the debtor in effecting a composition agreement. It will not, for example, permit a debtor, by pretending to be insolvent, to induce the creditors to accept a small portion of their debts in lieu of the whole when, in fact, the debtor's property is ample to pay the creditors in full. This good faith requires that the debtor, before being permitted to profit by the composition agreement, make a full and fair disclosure of assets to, and practice no concealment, deception, or fraud on, the creditors [*Boas v. Bank of America (1942) 51 Cal. App. 2d 592, 597, 125 P.2d 620* (disapproved on another point in *Gagne v. Bertran (1954) 43 Cal. 2d 481, 488 n. 5, 275 P.2d 15*); *see also* *Bank of America v. Greenbach (1950) 98 Cal. App. 2d 220, 233-234, 219 P.2d 814* (creditor has legal right to rely on debtor's statements and debtor is required to make full and complete disclosure and exercise utmost good faith)].

The law also demands the utmost good faith between the debtor and the creditors in entering into a composition agreement. Such agreements rest on the express or implied understanding that all the creditors are to share in the assets of the debtor [*O'Brien v. Greenebaum (1891) 92 Cal. 104, 107, 28 P. 214* ; *Muth v. Educators Security Ins. Co. (1981) 114 Cal. App. 3d 749, 758, 170 Cal. Rptr. 849]* . Hence, if some of the creditors have, unknown to the others, obtained as a consideration for their assent more favorable terms than are disclosed by the agreement, the agreement is fraudulent and void as to those creditors who did not receive such secret preferences [*O'Brien v. Greenebaum (1891) 92 Cal. 104, 107, 28 P. 214]* .

Finally, the law requires that the creditors act in good faith among themselves, since a composition is also an agreement among the creditors by which each creditor agrees with the others to receive the sum fixed by the agreement in satisfaction of his, her, or its debt. Hence, a secret preference paid by a person other than the debtor, such as a friend or relative of the debtor, and not from the debtor's assets, to induce the creditors to whom it is paid to enter into the composition agreement violates the principles of equity and the mutual confidence among creditors on which the agreement is based and renders the agreement invalid [*Kullman v. Greenebaum (1891) 92 Cal. 403, 404-406, 28 P. 674]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency LawsContracts LawConsiderationSufficient ConsiderationContracts LawContract InterpretationGood Faith & Fair DealingContracts LawPerformanceAssignmentGeneral Overview

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[Reserved]

§§ 307.23[Reserved]

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§ 307.30 Related Lexis Publications

For general assignments for the benefit of creditors and composition agreements, see California Legal Forms, Ch. 78, *Creditors' Agreements: Nonbankruptcy Alternatives* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency Laws

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26-307 California Forms of Pleading and Practice--Annotated § 307.31

§ 307.31 Federal Statutes

Insolvency as factor in determining bankruptcy court's granting of order of relief against debtor in involuntary bankruptcy proceeding. *11 U.S.C. § 303(h)*

Priority of debts owed United States in cases in which debtor makes voluntary assignment of assets. *31 U.S.C. § 191*

Personal liability of assignee for failure to satisfy preferences of United States. 31 U.S.C. § 192

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationCommencementInvoluntary CasesPrerequisitesBankruptcy LawClaimsTypesGovernmental EntitiesBankruptcy LawState Insolvency Laws

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§ 307.32 State Statutes

[1] Assignments for Benefit of Creditors

Right of assignee of general assignment for benefit of creditors to occupy business premises held under lease by assignor. *Civ. Code § 1954.1*

Requirements of general assignments for benefit of creditors under Attachment Law (*Code Civ. Proc. §§ 481.010-493.060*). *Code Civ. Proc. § 493.010*

Defendant entitled to make general assignment for benefit of creditors. *Code Civ. Proc. § 493.020*

When general assignment for benefit of creditors terminates lien of temporary protective order and attachment. *Code Civ. Proc. § 493.030*

Subrogation of assignee to plaintiff's rights. *Code Civ. Proc. § 493.060*

[2] Exempt Property

Property individual may choose to retain as exempt property. *Code Civ. Proc. § 1801*

[3] Fraudulent Transfers

[a] In General

Debtor permitted to pay one creditor in preference to another, or give creditor security for payment of that creditor's demand in preference to another. *Civ. Code § 3432*

Uniform Fraudulent Transfer Act. *Civ. Code § 3439 et seq.*

[b] Exceptions

Provisions of *Civ. Code §§ 3440-3440.9* do not apply to assignments, statutory or otherwise, made for benefit of creditors generally or to transfers by any assignee under such assignment. *Civ. Code § 3440.1(e)*

General assignment for benefit of all creditors, and subsequent transfers by assignee thereunder are not subject to Bulk Sales Law. *Com. Code § 6103(c)(6)*

[4] Insolvent

Defined. *Civ. Code § 3439.02(a)*; *Code Civ. Proc. § 1800(a)(1)*; *Com. Code § 1202(b)(23)*

[5] Priorities

Priority of labor claims over assignments for benefit of creditors. *Code Civ. Proc. § 1204*

Priority of unsecured claims of individuals arising from deposits for specified purposes over assignment for benefit of creditors. *Code Civ. Proc. § 1204.5*

Preferred claim of California against assignee of assignment for benefit of creditors under Fish and Game Code. *Fish & Game Code § 1058*

Priority of collection of sales and use taxes. *Rev. & Tax Code § 6756*

Priority of wage earner and employer contributions required to be paid by employing unit for unemployment and disability insurance. *Unemp. Ins. Code § 1701*

[6] Receivers

Appointment of receiver in cases in which corporation is insolvent or in imminent danger of insolvency. *Code Civ. Proc. § 564*

[7] Recovery of Preferences

Assignee is permitted to recover specified transfers of property of assignor. *Code Civ. Proc. § 1800(b)*

Property not recoverable by assignee. *Code Civ. Proc. § 1800(c)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawClaimsTypesUnsecured Priority ClaimsSubrogationBankruptcy LawState Insolvency LawsCivil ProcedureRemediesProvisional RemediesAttachments

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26-307 California Forms of Pleading and Practice--Annotated § 307.33

§ 307.33 Decisions

[1] Composition Agreements

Composition agreement defined. *Reynolds v. Pennsylvania Oil Co. (1907) 150 Cal. 629, 634-635, 89 P. 610* ; *Wilson v. Samuels (1893) 100 Cal. 514, 518, 35 P. 148*

Essential covenant of composition agreement is promise on part of creditors to discharge their claims against debtor on payment of less than full amount of claims. *Reynolds v. Pennsylvania Oil Co. (1907) 150 Cal. 629, 634, 89 P. 610* ; *Boteler v. Robinson (1930) 105 Cal. App. 611, 615, 288 P. 135*

Consideration for composition agreement. *Wilson v. Samuels (1893) 100 Cal. 514, 520, 35 P. 148* ; *Pierson v. McCahill (1862) 21 Cal. 122, 129*

Law demands utmost good faith between debtor and creditors in entering into composition agreement; such agreements rest on express or implied understanding that all creditors are to share in debtor's assets. *O'Brien v. Greenebaum (1891) 92 Cal. 104, 107, 28 P. 214* ; *Muth v. Educators Security Ins. Co. (1981) 114 Cal. App. 3d 749, 758, 170 Cal. Rptr. 849*

Secret preferences given to certain creditors to secure their assent to composition agreement which are unknown to other creditors to agreement render agreement invalid. *Kullman v. Greenebaum (1891) 92 Cal. 403, 404-406, 28 P. 674* ; *O'Brien v. Greenebaum (1891) 92 Cal. 104, 107, 28 P. 214*

Law demands utmost good faith on part of debtor in effecting composition agreement and as not permitting debtor to induce creditor to accept small portion of debt in lieu of whole when in fact there is ample property to satisfy creditor's claim in full. *Boas v. Bank of America (1942) 51 Cal. App. 2d 592, 597, 125 P.2d 620* (disapproved on another point in *Gagne v. Bertran (1954) 43 Cal. 2d 481, 488 n. 5, 275 P.2d 15*); *see also* *Bank of America v. Greenbach (1950) 98 Cal. App. 2d 220, 233-234, 219 P.2d 814*

[2] Discharge of Debtor

[a] Release of Debtor as Condition of Assignment

When transaction is considered mortgage and not assignment for benefit of creditors, exercise of power of sale in contract of conveyance bars creditor under *Code Civ. Proc. § 580d* from maintaining action to recover deficiency on note. *Jensen v. Friedman (1947) 79 Cal. App. 2d 494, 498-501, 507, 179 P.2d 855*

Assignment for benefit of creditors and payment of dividends thereunder ordinarily does not discharge debtor, except to extent that claims of creditors are thereby reduced by actual payment. *Boteler v. Robinson (1930) 105 Cal. App. 611, 615, 288 P. 135*

Condition in assignment which releases debtor from further liability on assignment of assets binds creditors who accept benefits of assignment. *Boteler v. Robinson (1930) 105 Cal. App. 611, 615, 288 P. 135* ; *Equitable Life Assur. Soc'y v. Jacobson (1924) 68 Cal. App. 717, 722, 230 P. 200*

[b] Secured Creditors

Security agreement in which creditor retains title to property is not affected by creditor's promise to release claim against debtor since, in absence of contrary intention, assignment does not include property retained by creditor as security. *Stoody Co. v. Valley Pipe & Welding Co. (1937) 20 Cal. App. 2d 580, 586-587, 67 P.2d 747*

Lien or other security normally does not continue to exist on acceptance of benefits of assignment containing condition that debtor is discharged on making assignment. *Equitable Life Assur. Soc'y v. Jacobson (1924) 68 Cal. App. 717, 722, 230 P. 200*

[3] Duties of Assignee

Assignee for benefit of creditors has discretion, according to what he or she considers to be in best interest of creditors, to perform or refuse to perform assignor's part of executory contract; but in dealing with assignor's obligations, assignee is required to exercise ordinary prudence and good faith, and when assignee induces other party to perform or otherwise reaps benefit of contract, he or she is required to assume its obligations. *Sweet v. Markwart (1958) 158 Cal. App. 2d 700, 707, 323 P.2d 192*

[4] Duties of Trustee

Requirement that trustees in bankruptcy read and "reasonably construe" documents sent to them. *In re Franciscan Vineyards, Inc. (9th Cir. 1979) 597 F.2d 181*

[5] Jurisdiction of Action to Determine Creditor's Rights

General jurisdiction to determine respective rights of creditors where assignment for benefit of creditors is made reposes in superior court. *Hempy v. Public Utilities Com. (1961) 56 Cal. 2d 214, 217, 14 Cal. Rptr. 436, 363 P.2d 476*

[6] Parties Bound by Assignment

[a] In General

Assignment for benefit of creditors which is otherwise valid common law assignment is not invalid as against creditors of assignor by reason of failure to record assignment as required by (former) Civ. Code § 3465 [repealed by Stats. 1980, Ch 135] for statutory assignments. *Bumb v. Bennett (1958) 51 Cal. 2d 294, 299, 333 P.2d 23*

Valid common law assignment of stock in trade for benefit of creditors generally prevails over subsequent attachment. *Brainard v. Fitzgerald (1935) 3 Cal. 2d 157, 163, 44 P.2d 336*

Acceptance of assignment for benefit of creditors generally is presumed until contrary is shown. *Brainard v. Fitzgerald (1935) 3 Cal. 2d 157, 163, 44 P.2d 336*

Common law assignment for benefit of creditors is binding on assigning debtor and all creditors who assent. *Peterson v. Ball (1931) 211 Cal. 461, 468, 296 P. 291* ; *Jarvis v. Webber (1925) 196 Cal. 86, 98-99, 236 P. 138*

Creditor has right to proceed against other assets of debtor although creditor had assented to assignment and accepted its benefits. *Lacy v. Gunn (1904) 144 Cal. 511, 518, 78 P. 30* ; *Mechanics Bank v. Rosenberg (1962) 201 Cal. App. 2d 419, 20 Cal. Rptr. 202*

Common law assignment is, at most, void only against creditors not assenting thereto and purchasers and encumbrancers in good faith and for value. *Wilhoit v. Lyons (1893) 98 Cal. 409, 412, 33 P. 325* ; *Garn v. Thorwaldson (1919) 40 Cal. App. 62, 66, 180 P. 9*

[b] Fraudulent Transfers

Provisions of former *Civ. Code § 3440* (*now see Civ. Code §§ 3440-3440.9*) (presumably fraudulent transfers of personal property not accompanied by immediate delivery and continued change of possession) exempting general assignments for benefit of creditors. *Brainard v. Fitzgerald (1935) 3 Cal. 2d 157, 159, 44 P.2d 336*

Nonconsenting creditor not bound by transfer of personal property made for benefit of certain creditors which did not comply with provisions of former *Civ. Code § 3440* (*now see Civ. Code §§ 3440-3440.9*) in that there was lack of requisite delivery and continual change of possession. *Jarvis v. Webber (1925) 196 Cal. 86, 99, 236 P. 138*

[c] Nonconsenting Creditors

Although requirement in common law assignment for particular creditors that creditors surrender their security or forfeit right to participate in proceeds of assignment may be so unreasonable as to render assignment invalid as against nonconsenting creditor, that objection cannot be raised by parties not injured by enforcement of condition. *Bumb v. Bennett (1938) 51 Cal. 2d 294, 300, 333 P.2d 23*

Common law assignment for benefit of certain creditors does not bind nonconsenting creditor to transfer of property, and creditors' consent cannot be compelled by any act of debtor, trustee, or other creditors. *Jarvis v. Webber (1925) 196 Cal. 86, 99, 236 P. 138*

[d] Waiver of Assignment Irregularities

Creditor who accepts assignment by filing claim under it thereby waives all objections to regularity of assignment and to assignee's title to assets. *Lacy v. Gunn (1904) 144 Cal. 511, 516, 78 P. 30* (statutory assignment)

[7] Priorities

[a] Sales and Use Taxes

Rev. & Tax Code § 6756 (preference of sales and use taxes) expresses legislative intent that tax obligations are preferred as to principal, interest, and penalties in all cases of assignment for benefit of creditors and that right to interest and penalties is not cut off by mere fact of assignment. *People v. Warfel (1958) 162 Cal. App. 2d 400, 408, 328 P.2d 456*

Priority conferred by *Rev. & Tax Code § 6756* (recovery of sales and use taxes) is applicable only to cases of insolvency where state would otherwise be required to share equal footing with employer's general creditors. *Durkin v. Durkin (1955) 133 Cal. App. 2d 283, 286, 284 P.2d 185*

[b] Wage Claims

NOTE:
The following cases were decided prior to the 1979 amendment of *Code Civ. Proc. § 1204* .

Assignment for benefit of creditors creates in wage claimants of assignor a lien on property assigned superior in entitlement to expenses of administration and liquidation incurred by assignee. *Meyer v. Bass (9th Cir. 1960) 281 F.2d 728, 731* ; *Division of Labor Law Enforcement v. Stanley Restaurants (9th Cir. 1955) 228 F.2d 420, 423*

Intent of *Code Civ. Proc. § 1204* (preference of wage claims over claims of assignees of assignments for benefit of creditors) to ease economic burden of employees of businesses in financial distress. *Dunlop v. Tremayne (1965) 62 Cal. 2d 427, 429, 42 Cal. Rptr. 438, 398 P.2d 774*

Payments made by employer, pursuant to industry-wide bargaining agreement, into independent trust funds for medical, welfare, and retirement benefits constitute wages under *Code Civ. Proc. § 1204* and, hence, have priority over trustee's claims. *Dunlop v. Tremayne (1965) 62 Cal. 2d 427, 429-431, 42 Cal. Rptr. 438, 398 P.2d 774*

Under rule of ejusdem generis, words "other persons" in *Code Civ. Proc. § 1204* are intended to refer to those in same general class as those specifically mentioned; that is, other persons not standing in relation to corporation in official capacity. *Carpenter v. Policy Holders Life Ins. Ass'n (1937) 9 Cal. 2d 167, 170, 70 P.2d 487*

Officials of corporation, such as president, vice president, or secretary treasurer, are not entitled to preferential claim under *Code Civ. Proc. § 1204* for unpaid balance of salaries due them when corporation passes into liquidation. *Carpenter v. Policy Holders Life Ins. Ass'n (1937) 9 Cal. 2d 167, 169, 70 P.2d 487*

Assignee does not assume contractual obligations of insolvent; thus, assignee is not liable to employee of insolvent for term of his or her contract remaining after insolvent discontinued its business operations. *Credit Managers' Assn. v. Brubaker (1991) 233 Cal. App. 3d 1587, 1594, 285 Cal. Rptr. 417* (but affirming recovery in quantum meruit for two weeks of service assisting in winding down insolvent's affairs)

Officer or major shareholder in corporation is entitled to wage preference under *Code Civ. Proc. § 1204* in property assigned for benefit of creditors for services performed within specific designations in section. *Clark v. Marjorie Michael, Inc. (1939) 34 Cal. App. 2d Supp. 775, 777-785* , *90 P.2d 866*

[8] Recording of Assignment of Real Property

Fact that conveyance of real property is not recorded does not render assignment invalid since unrecorded deed or assignment is sufficient to pass title against subsequent attaching creditor. *Bumb v. Bennett (1958) 51 Cal. 2d 294, 299-300, 333 P.2d 23*

Assignment of real property for benefit of creditors is conveyance under *Civ. Code § 1215* and subject to all provisions of Civil Code relating to transfers of real property. *Moore v. Schneider (1925) 196 Cal. 380, 389-392, 238 P. 81*

[9] Requirement of Debtor's Complete Divestment

Reservation in assignment of surplus of property assigned after creditors have been paid does not invalidate assignment since assignee would hold excess as agent or trustee for assignor in any case. *Heath v. Wilson (1903) 139 Cal. 362, 369, 73 P. 182*

Intention of debtor to divest himself or herself of property subject to assignment for benefit of creditors is required to be present; however, secret intent to reserve interest is not controlling if transaction effected complete divestment. *Mechanics Bank v. Rosenberg (1962) 201 Cal. App. 2d 419, 424, 20 Cal. Rptr. 202*

[10] Requisites of Common Law Assignments

[a] In General

Consideration for general assignment for benefit of creditors is antecedent debt owed by assignor to creditors. *Brainard v. Fitzgerald (1935) 3 Cal. 2d 157, 163, 44 P.2d 336* ; *First Nat'l Bank v. Pomona Tile Mfg. Co. (1947) 82 Cal. App. 2d 592, 607, 186 P.2d 693*

If intention of debtor is merely to secure debt and conveyance is not intended as absolute disposition of property, but debtor reserves right therein, conveyance is treated as mortgage, although debtor is insolvent, and conveyance covers all debtor's property, and but portion of debts are secured by it. *Heath v. Wilson (1903) 139 Cal. 362, 369, 73 P. 182*

If conveyance is to trustee with intention to divest oneself not only of title, but of all control over property, and to convey absolutely, and with purpose of securing distribution of its proceeds among creditors, in legal effect conveyance is assignment for benefit of creditors. *Sabichi v. Chase (1895) 108 Cal. 81, 86, 41 P. 29* (disapproved in *Bumb v. Bennett (1958) 51 Cal. 2d 294, 300, 333 P.2d 23* insofar as preferential assignments were held invalid)

[b] Right to Make Preferences

Since insolvent is permitted lawfully to pay one or more of his or her creditors to exclusion of others by direct transfer, insolvent is permitted to do same thing by way of transfer in trust when there is no basis for contending that transfer is in fraud of creditors. *Bumb v. Bennett (1958) 51 Cal. 2d 294, 300, 333 P.2d 23*

Creditor violated no rule of law by taking payment or security for his or her demand, though others are thereby deprived of all means of obtaining satisfaction of their own equally meritorious claims. *Heath v. Wilson (1903) 139 Cal. 362, 367, 73 P. 182*

Assignee is entitled to prejudgment interest under *Civ. Code § 3282(a)* on amount of preference recovered from date of demand letter that requested exact amount awarded; demand letter set forth exact amounts and manner of their calculation. *Credit Managers' Assn. v. Brubaker (1991) 233 Cal. App. 3d 1587, 1595, 285 Cal. Rptr. 417*

[11] Status of Assignee

Assignee under common law assignment is representative of assignor and not of creditors. *Peterson v. Ball (1931) 211 Cal. 461, 471, 296 P. 291*

Assignee of common law assignment for benefit of creditors acquires no greater right in property than assignor has at time of assignment, takes only interest of assignor in and to property and is unable to assert claim to property which assignor might not. *Moore v. Schneider (1925) 196 Cal. 380, 385-386, 238 P. 81*

Assignee not permitted to maintain action to set aside fraudulent conveyance made by assignor since conveyance is binding on assignor and, therefore, binding on assignee. *Moore v. Schneider (1925) 196 Cal. 380, 385, 387, 238 P. 81*

Assignee for benefit of creditors entitled to be substituted in action in place of assignor; assignor's default to be set aside. *Credit Managers Ass'n v. National Indep. Bus. Alliance (1984) 162 Cal. App. 3d 1166, 1171-1173, 209 Cal. Rptr. 119*

Assignee for benefit of creditors is not bona fide purchaser for value because he or she is not purchaser for value within meaning of that phrase. *First Nat'l Bank v. Pomona Tile Mfg. Co. (1947) 82 Cal. App. 2d 592, 607, 186 P.2d 693*

Assignment for benefit of creditors does not have priority over other assignments under assignment priority rules since it is not for value. *First Nat'l Bank v. Pomona Tile Mfg. Co. (1947) 82 Cal. App. 2d 592, 607-608, 186 P.2d 693*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationExaminers, Officers & TrusteesDuties & FunctionsGeneral OverviewBankruptcy LawCase AdministrationExaminers, Officers & TrusteesFraudulent TransfersGeneral OverviewBankruptcy LawCase AdministrationExaminers, Officers & TrusteesPreferential TransfersElementsBenefit of CreditorBankruptcy LawClaimsTypesSecured Claims & LiensGeneral OverviewBankruptcy LawClaimsTypesUnsecured Priority ClaimsGeneral OverviewBankruptcy LawDischarge & DischargeabilityGeneral OverviewBankruptcy LawState Insolvency Laws

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Chapter 307 INSOLVENCY
PART III. RESEARCH GUIDE

26-307 California Forms of Pleading and Practice--Annotated § 307.34

§ 307.34 Law Reviews

Sommer, *Counseling the Consumer*, 29(1) Prac. Law. 19 (1983)

Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain, 91 Yale L.J. 857 (1982)*

Neustadter, *Consumer Insolvency Counseling for Californians in the 1980's, 19 Santa Clara L. Rev. 817 (1979)*

Note, *Creditors' Remedies: Assignment for the Benefit of Creditors: Validity of Common-Law Preferential Assignment of Realty, 47 Cal. L. Rev. 595 (1959)*

Note, *Creditors' Remedies: Assignment for Benefit of Creditors: Priorities, 45 Cal. L. Rev. 66 (1957)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency Laws

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26-307 California Forms of Pleading and Practice--Annotated § 307.35

§ 307.35 Text References

1 Debt Collection Practice in California, §§ 2.35, 2.36, 4.100-4.103 (Cal. C.E.B. 1987)

California Debt Collection Manual, ch. 11, *Insolvency* (Cal. C.E.B. 1978)

Personal Bankruptcy and Wage Earner Plans, ch. 1, *Alternative Debtor Remedies* (Cal. C.E.B. 1971)

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 213, 214 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency LawsContracts LawGeneral Overview

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[Reserved]

§§ 307.36[Reserved]

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Volume 26: Injunctions thru Insurance-Chs. 303-313
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PART IV. FORMS

26-307 California Forms of Pleading and Practice--Annotated § 307.50

§ 307.50 Complaint by Common Law Assignee for Benefit of Creditors Against Judgment Creditor of Debtor to Quiet Title [Code Civ. Proc. §§ 760.020(a), 761.020] and for Preliminary and Permanent Injunction [Code Civ. Proc. §§ 526, 527]

[1] FORM Complaint by Common Law Assignee for Benefit of Creditors Against Judgment Creditor of Debtor to Quiet Title [Code Civ. Proc. §§ 760.020(a), 761.020] and for Preliminary and Permanent Injunction [Code Civ. Proc. §§ 526, 527]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s) of known defendant(s)*] [*if unknown defendants are included, add:*; and all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud on plaintiff's title thereto],	)	COMPLAINT TO QUIET TITLE TO REAL PROPERTY AND FOR PRELIMINARY AND PERMANENT INJUNCTION
Defendant(s).	)	

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California.

2. Plaintiff is now, and at all times herein mentioned was, the common law assignee for the benefit of [certain specified]

creditors of _____ [*name of assignor*], hereinafter referred to as the assignor [, and such other creditors as consented to the terms of the assignment]. This assignment was executed and signed by the assignor on _____ [*date*][, and on _____ (*date*), was duly recorded in the Official Records of _____ County, California, Book/Reel _____, page/image _____ (*or allege other facts putting defendant(s) on notice prior to his/her/its acquiring interest in property*)]. A copy of the assignment is attached as Exhibit A and incorporated by reference.

3. Under the assignment, the assignor assigned to plaintiff all of his/her/its property of every kind and nature wheresoever situated, both real and personal or mixed, including the following-described real property located in _____ County, California: _____ [*give legal description and street address or common designation, if any*]. Defendant _____ [*name*] claims and asserts an interest in this real property adverse to plaintiff.

4. Plaintiff was _____ [seised *or* possessed] of the above-described property within five years of the commencement of this action.

5. On the date of the execution and signing of the assignment by the assignor, defendant was a creditor of the assignor who was indebted to defendant in the sum of $_____.

[6. On or about _____ (*date*), defendant, although not a party to the assignment and not named specifically as a creditor for whose benefit the assignment was made, consented to the assignment by _____ (*describe actions of defendant which manifested his or her or its assent to assignment*).]

7. On _____ [*date*], defendant, as plaintiff, filed an action in the _____ [*specify, e.g.,* Superior] Court in and for the County of _____ against the assignor on the debt referred to in Paragraph 5.

8. On _____ [*date*], a judgment was entered in that action in favor of the plaintiff (defendant herein), and on or about _____ [*date*], a writ of execution was issued by the clerk of the court that rendered the judgment. [A certified copy each of the judgment and of the writ of execution are attached as Exhibits B and C, respectively, and incorporated by reference.] On or about _____ [*date*], defendant herein caused the writ of execution to be levied on the real property hereinabove described.

9. Plaintiff is informed and believes and thereon alleges that defendant is about to cause the above-described real property to be sold to satisfy the judgment in the action against the assignor.

10. Plaintiff has had an appraisal made of the assets of the assignor in the assignment, and the books and records of the assignor indicate that accounts payable and debts of the assignor surpass in amount the value of the appraised assigned estate. Therefore it is anticipated there will be no residue that plaintiff may return to the assignor on satisfaction of his/her/its liabilities, pursuant to the terms of the assignment.

11. Plaintiff is attempting, pursuant to the assignment, to collect the assets of the assignor, to convert these assets to cash, and to make distribution to the creditors of the assignor and, more particularly, plaintiff is and has been attempting to sell the above-described real property. Plaintiff has been hindered in his/her/its negotiation for this sale by reason of the attachment and execution by defendant, and therefore delayed in the speedy distribution of the estate to the creditors of the assignor, thereby causing plaintiff great and irreparable injury.

[12. *If unknown defendants have been named, allege:* The defendants herein named as "all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or cloud on plaintiff's title thereto" are unknown to plaintiff. These defendants, and each of them, claim some right,

title, estate, lien, or interest in the above-described property adverse to plaintiff's title and their claim or claims constitute a cloud on plaintiff's title. These claims are without any right whatever and these defendants have no right, title, estate, lien, or interest whatever in the above-described property or any part thereof.]

[13. *If the claim of a named defendant is unknown, uncertain, or contingent, allege:* The claim of _____ (*name of defendant*) is _____ (unknown *or* uncertain *or* contingent). (*If the lack of knowledge, uncertainty, or contingency is caused by a transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, allege:* _____ (*Name*), age _____, is the person who would be entitled to an adverse claim if _____ (*describe contingency*) had occurred prior to the commencement of this action.) (*If person is subject to a legal disability, allege:* This person is subject to _____ (*specify legal disability*)).]

14. Pecuniary compensation would not afford plaintiff adequate relief because of the difficulty in measuring the damages involved in the delay of distributing the assignor's estate to his/her/its creditors[, _____ (*allege any additional facts showing inadequacy of legal remedy*)], and, therefore, plaintiff has no adequate remedy at law.

15. Plaintiff seeks to quiet title against the claims of defendant(s) as follows: the claim of _____ [*named defendant*] based on the debt, judgment, and writ described in Paragraphs 5, 7 and 8[; _____ (*continue with whichever are applicable:* successor defendants described in Paragraph _____; all persons unknown as described in Paragraph 12; and _____ (*name*), whose unknown, uncertain, or contingent claim, if any, is fully described in Paragraph 13)]. Defendants' claims, and each of them, are without any right whatever and defendants, and each of them, have no right, title, estate, lien, or interest whatever in the above-described property, or any part of that property[, except the following: _____ (*set forth any adverse claims of which plaintiff admits the validity, e.g.,* a utility easement held by Pacific Gas and Electric Company)].

16. Plaintiff seeks to quiet title as of _____ [*date*]. [*If the date is a date other than the date on which the complaint was filed, allege why a determination is sought as of that date*.]

WHEREFORE, plaintiff prays judgment as follows:

1. For a judgment quieting title in plaintiff's interest in the above-described real property and determining the ownership rights in the property of plaintiff and defendant(s);

2. That defendant be ordered to release the real property herein described from the levy of the writ of execution made on it;

3. That defendant and his/her/its officers and agents, and each of them, be enjoined pendente lite and permanently both from selling the real property herein described pursuant to the levy of the writ of execution heretofore made or causing any future levy on that property pursuant to the writ; that this court make an order directing defendant to show cause, at a time and place appointed in that order, why he/she/it should not be enjoined and restrained during the pendency of this action from doing any of the above-mentioned acts and things; that a temporary restraining order be granted to plaintiff herein enjoining and restraining defendant, his/her/its agents, officers, and employees, and each of them, until the hearing on the order to show cause, from doing or causing to be done, and continuing, any of the acts or other things herein complained of; and that, on the hearing of the order to show cause, a preliminary injunction be granted, enjoining defendant and his/her/its agents, officers, and employees from doing any of these acts and things during the pendency of the action;

4. That, in the alternative, this court make a binding declaration of plaintiff's rights and duties in the real property hereinabove described and of defendant's rights and duties therein, and that it be adjudged and decreed by the court that if defendant has any rights in and to this property, such rights are merely rights against the contingent residuary interest of the assignor by virtue of the assignment made to plaintiff;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

CERTIFICATION RE NOTICE

I hereby certify that _____ [on _____ (*date*), I informed defendant of what time and where the foregoing application for a temporary restraining order would be made *or* in good faith I attempted to inform defendant of what time and where the foregoing application for a temporary restraining order would be made, by _____ (*specify efforts*), but I was unable to do so *or* notice to defendant of the foregoing application for a temporary restraining order should not be required for the reason that _____ (*specify*)].

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

The complaint in [1], *above*, is for use by the assignee of an assignment for the benefit of creditors in an action against a judgment creditor of the assignor to quiet title to real property on which the judgment creditor is attempting to execute [*see Bumb v. Bennett (1958) 51 Cal. 2d 294, 298, 333 P.2d 23]* . The form is based on the fact that the assignment was

prior to defendant's attempted execution on the real property [*see Bumb v. Bennett (1958) 51 Cal. 2d 294, 300, 333 P.2d 23* ; *Brainard v. Fitzgerald (1935) 3 Cal. 2d 157, 161, 44 P.2d 336]* or that defendant as a creditor of the assignor consented to the assignment [*see Peterson v. Ball (1931) 211 Cal. 461, 468, 296 P. 291* ; *see also § 307.19*].

A plaintiff who intends to name "all persons unknown" as defendants may wish to obtain a title report before commencing the action, because an examination of the record title and an inspection of the property will be necessary [*see Code Civ. Proc. § 762.060(b)*]. The court also may order plaintiff to obtain a title report and keep it available for inspection and copying by the parties [*Code Civ. Proc. § 762.040(b)*].

[3] Allegations

The complaint in [1], *above*, alleges the following:

- The status of plaintiff as assignee of an assignment for the benefit of creditors and the nature of the assignment (Paragraph 2).

- The assignment of all the assignor's property as the basis for plaintiff's title and the legal and street description of the property (Paragraph 3) [*Code Civ. Proc. § 761.020(a),(b)*].

- That plaintiff has been seised or possessed of the real property in question within five years of the date on which the action was filed (Paragraph 4) [*Code Civ. Proc. § 318*].

- The status of defendant as a creditor of plaintiff on the date of the assignment (Paragraph 5).

- The status of other defendants who are either unknown (Paragraph 12) [*Code Civ. Proc. § 762.020(a)*] or whose claim is unknown, uncertain, or contingent (Paragraph 13) [*see Code Civ. Proc. § 762.020(b)*].

- An optional allegation that defendant had consented to the terms of the assignment (Paragraph 6) [*see Peterson v. Ball (1931) 211 Cal. 461, 468, 296 P. 291]* .

- The defendant's adverse claim to certain real property that formed part of the assignment to plaintiff, based on defendant's civil action against the assignor and his, her, or its subsequent enforcement proceedings (Paragraphs 3, 7-9, 11).

- The insufficiency of the assets of the assignment to satisfy the demands on the assignor's estate (Paragraph 10).

- The claims against which plaintiff seeks to have titled quieted (Paragraph 15) [*Code. Civ. Proc. § 761.020(c)*].

- Any defendants' claims plaintiff admits are valid (Paragraph 15) [*Code. Civ. Proc. § 762.060(c)*].

- The date as of which plaintiff seeks to have title quieted, including, if necessary, the reasons why title is sought to be quieted as of some date other than the date on which the complaint is filed (Paragraph 16) [*Code. Civ. Proc. § 761.020(d)*].

The complaint in [1], *above*, does not contain any allegations regarding fictitious defendants [*Code Civ. Proc. § 474*], nor any allegations regarding defendants who are personal representatives [*Code Civ. Proc. § 762.030(a)*] or heirs and intestate or testate successors [*Code Civ. Proc. § 762.030(b)*] of persons known or believed by the plaintiff to be

deceased. If those defendants are necessary in a particular situation [*see Code Civ. Proc. §§ 762.010, 762.030*], use the appropriate allegations from Ch. 482, *Quieting Title* , Form 1. Note also that a lis pendens must be filed as soon as the complaint is filed [*see Code Civ. Proc. § 761.010(b)*, discussed under [8], *below*].

For a detailed discussion of the allegations required in a complaint to quiet title, see Ch. 482, *Quieting Title* .

[4] Prayer

A complaint to quiet title must include a prayer for the determination of the title against adverse claims [*Code Civ. Proc. § 761.020(e)*].

[5] Verification

A complaint to quiet title must be verified [*Code Civ. Proc. § 761.020*].

[6] Alternative Remedies

In the case of an attachment of the assignor's real or personal property that passed to the assignee, a possible alternative remedy to the complaint in [1], *above*, to quiet title is a motion for wrongful attachment based on the fact that the levy of attachment was on property other than that of the person against whom the writ was issued [*see Code Civ. Proc. §§ 490.010(d), 490.050* (person not party to action whose property is attached as permitted to move for wrongful attachment in that action)]. For a discussion and form for a motion for wrongful attachment, see Ch. 62, *Attachments* . In addition, if the creditor of the assignor has caused a levy of attachment or execution on personal property assigned to the assignee in a creditor's action against the assignor, the assignee may make a third-party claim [*see Code Civ. Proc. §§ 720.010-720.800*] claiming title and right to possession of the personal property levied on in the action. For discussion and forms for third-party claims, see *Ch. 254, Executions and Enforcement of Judgments, § 254.310 et seq.*

[7] Certification re Notice

When a temporary restraining order is sought without formal notice to the opposing party, the applicant or the applicant's attorney must certify to the court under oath one of the following [*Code Civ. Proc. § 527(c)(2)*]:

- That within a reasonable time before the application, the applicant informed the opposing party or the opposing party's attorney when and where the application would be made.

- That the applicant in good faith attempted, but was unable, to inform the opposing party and the opposing party's attorney, specifying the efforts made to contact them.

- That for reasons specified the applicant should not be required to so inform the opposing party or the opposing party's attorney.

An additional requirement is that it must appear from facts shown by affidavit or verified complaint that great or irreparable injury will result to the applicant before the matter can be heard on the notice [*Code Civ. Proc. § 527(c)(1)*].

[8] Lis Pendens

Immediately on the commencement of the filing of a complaint to quiet title, the plaintiff must file a lis pendens in the office of the county recorder of each county in which any real property described in the complaint is located [*Code Civ. Proc. § 761.010*; *see generally* Ch. 482, *Quieting Title* and Ch. 348, *Lis Pendens*].

[9] Cross References

For a discussion and form for a motion for wrongful attachment by a third person who owns the property attached, see Ch. 62, *Attachments*

For a discussion and forms for third-party claims in attachment and execution proceedings, see *Ch. 254, Executions and Enforcement of Judgments, § 254.310* et seq.

For a discussion of preliminary and permanent injunctions, see Ch. 393, *Injunctions* and Ch. 482, *Quieting Title*

For a detailed discussion of the allegations required to be included in an action to quiet title, of the provisions of the quiet title law respecting defendants who are unknown or known to be dead, service by publication of a complaint to quiet title, and the filing of a lis pendens, see Ch. 482, *Quieting Title*

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26-307 California Forms of Pleading and Practice--Annotated § 307.51

§ 307.51 Complaint by Assignee for Benefit of Creditors to Recover Transfer of Property of Assignor [Code Civ. Proc. § 1800]

[1] FORM Complaint by Assignee for Benefit of Creditors to Recover Transfer of Property of Assignor [Code Civ. Proc. § 1800]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT TO RECOVER TRANSFER OF
vs.	)	PROPERTY OF ASSIGNOR FOR BENEFIT OF
_____ [*name(s)*],	)	CREDITORS
Defendant(s).	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

Plaintiff alleges:

1. _____ [*Capacity and residence of defendant. See § 307.50[1], Paragraph 1*].

2. _____ [*Allege plaintiff's capacity as assignee of general assignment for the benefit of creditors. See § 307.50[1], Paragraph 2*].

3. _____ [*Allege facts regarding assignment, e.g.*, Under the assignment, _____ (*name of assignor*), the assignor, assigned to plaintiff all of his/her/its property of every kind and nature wheresoever

situated, both real and personal or mixed].

4. On _____ [*date*], the assignor transferred _____ [*specify property*] to or for the benefit of _____ [*name of defendant*] who is a creditor of the assignor.

[*EITHER*]

5. The above-described transfer was made on or within 90 days before the date of the making of the above-described assignment.

[*OR*]

5. The above-described transfer was made between 90 days and one year before the date of the making of the above-described assignment. Plaintiff is informed and believes and thereon alleges that at the time of the above-described transfer, defendant was an insider in that he/she/it was _____ [*specify role as insider, e.g.,* a general partner of the assignor], and that defendant had reasonable cause to believe the assignor was insolvent at the time of the transfer.

6. Plaintiff is informed and believes and thereon alleges that the above-described transfer of property was for and on account of an antecedent debt owned by the assignor to defendant before the transfer was made.

7. The above-described transfer of property was made while the assignor was insolvent in that _____ [*specify facts showing assignor was insolvent within definition of Civ. Code § 1800(a), e.g.,* the sum of the assignor's debts was greater than all of his/ her/its property, at fair valuation, exclusive of property transferred, concealed, or removed with intent to hinder, delay, or defraud his/her/its creditors and property exempted from property of the estate under *Code of Civil Procedure Section 699.010 et seq.*].

8. Plaintiff has had an appraisal made of the assets of the assignor in the assignment, and the books and records of the assignor indicate that the transfer to defendant will enable defendant to receive more than will other creditors of the assignor of the same class.

WHEREFORE, plaintiff prays judgment as follows:

1. That defendant be ordered to transfer the property received from the assignor to plaintiff assignee;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 307.50[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by an assignee of a general assignment for the benefit of creditors in an action to recover a transfer of property of the assignor. For a description of transfers of property which the assignee may not recover, see *§ 307.20[13], above.*

[3] Allegations

The complaint alleges:

- The status of plaintiff as assignee of an assignment for the benefit of creditors (Paragraph 2).
- Facts concerning the assignment (Paragraph 3).
- The transfer of property to defendant creditor (Paragraph 4).
- Either that the transfer was made on or within 90 days before the date of the making of the assignment, or that the transfer was made between 90 days and one year before the date of the making of the assignment when the creditor was an insider and had reasonable cause to believe the debtor was insolvent (Paragraph 5).
- That the transfer was for and on account of an antecedent debt owed by the assignor before the transfer was made (Paragraph 6).
- That the transfer was made while the assignor was insolvent (Paragraph 7).
- That the transfer would enable defendant creditor to receive more than would other creditors of the same class (Paragraph 8) [*see Code Civ. Proc. § 1800(b)*].

[4] Statute of Limitations

An action by an assignee under *Code Civ. Proc. § 1800* must be commenced within one year after the making of the assignment [*Code Civ. Proc. § 1800(g)*].

[5] Interest

An assignee was held entitled to prejudgment interest under *Civ. Code § 3282(a)* on the amount of preference recovered from the date of a demand letter that requested that exact amount awarded; when the demand letter set forth exact amounts and the manner of their computation [*Credit Managers' Assn. v. Brubaker (1991) 233 Cal. App. 3d 1587, 1595, 285 Cal. Rptr. 417]* .

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26-307 California Forms of Pleading and Practice--Annotated § 307.52

§ 307.52 Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--By Creditor of Assignor Against Assignee for Benefit of Creditors to Determine Validity of Claim

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--By Creditor of Assignor Against Assignee for Benefit of Creditors to Determine Validity of Claim

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DECLARATORY RELIEF
Defendant.	)	
	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 307.50[1], Paragraph 1*].

2. Plaintiff is now, and at all times mentioned herein has been, a creditor of _____ [*name of assignor*], hereinafter referred to as the assignor, holding a claim against the assignor in the sum of $_____. This claim arose as follows: _____ [*set out circumstances and particular facts concerning debt*].

3. On or about _____ [*date*], the assignor made an assignment for the benefit of creditors to defendant, and defendant, since that date, has been and now is the assignee for the benefit of creditors of the assignor.

4. Since the date alleged in Paragraph 3, defendant has reduced all of the assets of the assignment to cash and has a sum

of money presently available for distribution among the creditors of the assignor in an amount unknown to plaintiff.

5. Immediately after the assignment, plaintiff duly filed his/her/its creditor's claim against the assignor with defendant as the the assignee for the benefit of creditors.

6. An actual controversy has arisen and now exists between plaintiff and defendant as to whether plaintiff's claim should be allowed and be entitled to receive a proportionate share of the distribution of the dividends from the assets to be distributed among the total creditors of the assignor. Plaintiff claims _____ [*set forth plaintiff's contentions*]. Whereas, defendant claims _____ [*set forth defendant's contentions*].

7. Plaintiff desires a judicial determination of his/her/its rights and duties, and a declaration as to whether or not plaintiff is eligible for and entitled to his/her/its proportionate share of the moneys to be distributed by defendant, and whether or not the assets of the assignor in the hands of defendant are now in a condition for distribution to the creditors.

8. Such a declaration is necessary and appropriate at this time in order that the parties may ascertain their respective rights and duties.

WHEREFORE, plaintiff prays judgment as follows:

1. For a determination of the rights of the parties herein and their duties and obligations with respect to the matters and things set forth in the foregoing complaint;

2. For a declaration allowing the plaintiff's claim and adjudging that plaintiff is entitled to receive whatever shares may be allowed by defendant in connection with the distribution of the assets of the assignor pursuant to the assignment for the benefit of creditors made to defendant;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification. See § 307.50[1].*]

[2] Use of Form

The complaint in [1], *above*, may be used in an action for declaratory relief brought by a creditor against the assignee for the benefit of creditors where the creditor's claim to a distribution of the assets of the assignor's estate has been disputed by the assignee [*see Code Civ. Proc. § 1060*].

[3] Cross References

For discussion of actions for declaratory relief, see generally Ch. 182, *Declaratory Relief*

California Forms of Pleading and Practice--Annotated

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Volume 26: Injunctions thru Insurance-Chs. 303-313
Chapter 307 INSOLVENCY
PART IV. FORMS

26-307 California Forms of Pleading and Practice--Annotated § 307.53

§ 307.53 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Creditor's Action Against Debtor--Action Barred by Composition Agreement

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Creditor's Action Against Debtor--Action Barred by Composition Agreement

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. On or about _____ [*date*], defendant and his/her creditors, including plaintiff, entered into and executed a composition agreement by the terms of which the creditors agreed to accept part payment in full satisfaction of their claims against defendant [and to forego legal action against defendant unless defendant failed to make payment as provided in the agreement,] and agreed that, on receipt of payment according to the terms of the agreement, their claims against defendant would be fully discharged. The claim sued on is covered by the composition agreement, a copy of which is attached as Exhibit 1 and incorporated by reference.

2. _____ [*Specify performance of agreement or prematurity of action, e.g.,* On or about _____ (*date*), defendant paid plaintiff the full sum of $_____, in accordance with the terms of the composition agreement, and was therefore discharged from any and all liability to plaintiff on account of the claim sued on *or* Payment pursuant to the terms of the agreement is not due until _____ (*date*), and this action therefore is premature].

[2] Use of Form

The affirmative defense in [1], *above*, is for use in an answer to the complaint in a creditor's action against his or her debtor when the claim sued on is covered by a composition agreement entered into between defendant and his or her creditors, including plaintiff, and the agreement has been fully performed, or the time for performance has not yet arrived.

For discussion of composition agreements, see *§ 307.24[2]*.

California Forms of Pleading and Practice--Annotated

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Volume 26: Injunctions thru Insurance-Chs. 303-313
Chapter 308 INSURANCE

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[5] Text References

[6] Cross References

§ 308.392 Allegation--Insured Disappeared More Than Five Years Earlier and Is Presumed Dead [Evid. Code § 667]

[1] FORM

[2] Use of Form

[3] Presumption of Death

[a] Lack of Statutory Procedure

[b] Proof of Death

[4] State Statutes

[5] Decisions

[6] Cross References

§§ 308.393-308.399 [Reserved]

§ 308.400 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Disability Insurance Policy [Ins. Code § 106]--General Form

[1] FORM

[2] Use of Form

[3] Decisions

[a] Definitions

[b] Evidence

[c] Process of Nature Rule

[d] Return to Work

[e] Test of Disability

[f] Total Disability

[4] Cross References

§§ 308.401-308.409 [Reserved]

§ 308.410 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Property Insurance Policy--General Form

[1] FORM

[2] Use of Form

[3] Cross References

§ 308.411 Allegation of Insurable Interest in Property--Transferee and Assignee

[1] FORM

[2] Use of Form

[3] Statutes

[4] Decisions

[5] Cross References

§ 308.412 Allegation of Loss or Damage to Property--Vandalism

[1] FORM

[2] Use of Form

[3] Decisions

§ 308.413 Allegation of Loss or Damage to Property--Windstorm

[1] FORM

[2] Use of Form

§ 308.414 Complaint by Insured Against Several Insurance Companies for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--On Property Insurance Policies and for Declaration of Liability of Each Insurer Where Amount of Loss Not in Dispute

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

§§ 308.415-308.419 [Reserved]

§ 308.420 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Fire Insurance Policy [Ins. Code § 102]--Defendant Estopped [Evid. Code § 623] to Rely on 12-Month Policy Provision for Filing Action [Ins. Code § 2071]

[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

§ 308.421 Proceedings to Determine Liability Under Oral Fire Insurance Contract--Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--By Insured Against Several Insurance Companies and Their Mutual Agent

[1] FORM

[2] Use of Form

[3] Statutes

[4] Decisions

[5] Cross References

§ 308.422 Proceedings to Determine Liability Under Oral Fire Insurance Contract--Cross Complaint by Defendant Insurance Agent Against Codefendant Insurance Companies for Declaratory Relief [Code Civ. Proc. §§ 86, 428.70, 1060]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

§§ 308.423-308.429 [Reserved]

§ 308.430 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Burglary Insurance Policy [Ins. Code § 112]--General Form

[1] FORM

[2] Use of Form

§§ 308.431-308.439 [Reserved]

§ 308.440 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Comprehensive Dwelling Insurance Policy--Collapse of Foundation and Additional Living Expenses

[1] FORM

[2] Use of Form

[3] Decisions

§ 308.441 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Landslide

[1] FORM

[2] Use of Form

§§ 308.442-308.449 [Reserved]

§ 308.450 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Fidelity Policy [Ins. Code § 105]--Comprehensive Dishonesty, Disappearance, and Destruction Policy

[1] FORM

[2] Use of Form

§ 308.451 Allegations of Coverage and Loss Under Surety Policy [Ins. Code § 105]--Broker's Bond Policy Covering Transportation of Money

[1] FORM

[2] Use of Form

§ 308.452 Allegations of Coverage and Loss Under Surety Policy [Ins. Code § 105]--Indemnification Against Loss From Embezzlement

[1] FORM

[2] Use of Form

§§ 308.453-308.459 [Reserved]

§ 308.460 Complaint by Insured's Judgment Creditor Against Insurer for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Liability Policy [Ins. Code § 108]--Refusal of Insurer to Pay Judgment Against Insured [Ins. Code § 11580(b)(2)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Defenses

[5] Declaratory Relief Action

[6] State Statutes

[7] Decisions

[8] Cross References

§ 308.461 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302] and Compensatory and Punitive Damages [Civ. Code §§ 3294, 3333] for Breach of Implied Covenant of Good Faith and Fair Dealing--Liability Policy [Ins. Code § 108]--Refusal of Insurer to Pay Third-Party Judgment in Excess of Policy Limits After Wrongful Refusal to Settle

[1] FORM

[2] Use of Form

[3] Allegations

[4] Personal Injury and Punitive Damages

[5] Insurer's Assumption of Defense

[a] Duty to Defend

[b] Duty to Appoint Independent Counsel

[6] State Statutes

[7] Decisions

[8] Cross References

§ 308.462 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302] and Damages [Civ. Code §§ 3294, 3333] for Breach of Implied Covenant of Good Faith and Fair Dealing--Liability Policy [Ins. Code § 108]--Refusal of Insurer to Defend Action Against Insured

[1] FORM

[2] Use of Form

[3] Allegations

[4] Decisions

[5] Text References

[6] Cross References

§ 308.463 Complaint by Judgment Creditor on Assigned Claim of Insured Against Insurer for Damages for Breach of Contract [Civ. Code § 3300] [and Breach of Implied Covenant of Good Faith and Fair Dealing (Civ. Code §§ 3294, 3333)]--Liability Policy [Ins. Code § 108]--To Recover Judgment in Excess of Policy Limit After Wrongful Refusal to Settle

[1] FORM

[2] Use of Form

[3] Allegations

[4] Entitlement and Assignability of Damages

[5] State Statutes

[6] Decisions

[7] Text References

[8] Cross References

§ 308.464 Complaint by Insured's Judgment Creditor Against Insurer to Recover Amount of Judgment Against Insured, and for Compensatory and Punitive Damages Based on Insurer's Bad Faith Refusal to Pay Amount of Judgment After Judgment Became Final [Ins. Code § 11580]

[1] FORM

[2] Use of Form

[3] Right of Judgment Creditor to Recover Judgment From Insurer

[4] Right of Judgment Creditor to Maintain Direct Action Against Insurer for Breach of Covenant of Good Faith and Fair Dealing

[5] Single Action Seeking Recovery of Underlying Judgment and Damages for Bad Faith

[6] Cautionary Note

[7] State Statutes

[8] Decisions

[9] Cross References

§§ 308.465-308.469 [Reserved]

§ 308.470 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Marine Policy [Ins. Code § 103]--Valued Policy [Ins. Code § 412] Insuring Ship

[1] FORM

[2] Use of Form

[3] "Valued Policy" Defined

[4] Effect of Valuation

[5] State Statutes

[6] Decisions

§ 308.471 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Marine Policy [Ins. Code § 103]--Open Policy [Ins. Code § 411]--General Form

[1] FORM

[2] Use of Form

[3] "Open Policy" Defined

[4] Rules for Estimating Loss Under Open Policy

[5] Partial Loss of Ship or Equipments

[6] Damaged Cargo

[7] State Statutes

[8] Cross References

§ 308.472 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Marine Policy [Ins. Code § 103]--Personal Property Floater [Ins. Code § 103(a)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Administrative Regulations

[5] Cross References

§§ 308.473-308.479 [Reserved]

§ 308.480 Demand for Appraisal of Value or Loss

[1] FORM

[2] Use of Form

[3] Changes in Standard Fire and Residential Property Policies Issued or Renewed After December 31, 2001

[4] State Statutes

[5] Decisions

§ 308.481 Petition to Order Appraisal of Loss to Insured Property

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

§ 308.482 Order Directing Party to Appoint Appraiser and Proceed With Appraisal

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

§ 308.483 Petition for Appointment of Umpire on Failure of Appraisers to Select

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

§ 308.484 Order Appointing Umpire

[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

§ 308.485 Notice of Appraisers' Award and Tender of Payment

[1] FORM

[2] Use of Form

[3] Decisions

§ 308.490 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Policy Canceled Before Loss

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[a] Cancellation of Policy

[b] Estoppel

[c] Pleading

[d] Premiums

[5] Cross References

§ 308.491 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Policy Rescinded [Ins. Code § 650]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Text References

§ 308.492 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Plaintiff's Lack of Insurable Interest [Ins. Code § 286]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

§ 308.493 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action Premature--Appraisal Proceeding Pending

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

§ 308.494 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action Against Liability Insurer--Failure of Insured to Comply With "No Action" Clause

[1] FORM

[2] Use of Form

[3] "No Action" Clause

[4] "Actual Trial" Requirement

[5] State Statutes

[6] Decisions

[7] Text References

§ 308.495 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action Barred by Failure to File Within Time Specified in Policy

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

§ 308.496 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Concealment or False Representation in Application for Insurance

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

§ 308.497 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--False or Fraudulent Statements in Proof of Loss

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

§ 308.498 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Noncoverage of Policy or Loss Resulting From Excluded or Excepted Risk

[1] FORM

[2] Use of Form

[3] Loss From Excepted Peril

[4] Coverage Regarding Multiple Causation of Loss

[a] Nature of Coverage is Determinative

[b] First-Party Property Damage

[c] Third-Party Liability

[5] State Statutes

[6] Decisions

[a] Conditions Precedent to Coverage

[b] Exclusions From Coverage

[c] Multiple Causation of Loss

[d] Prohibited Exclusions

§ 308.499 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Policy Assigned Without Consent of Insurer

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

§ 308.500 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Breach of Condition--Insured's Failure to Give Notice and Proof of Loss

[1] FORM

[2] Use of Form

[3] "Notice-Prejudice" Rule

[4] State Statutes

[5] Decisions

[a] Defense

[b] Delay in Giving Notice

[c] Discovery of Loss

[d] Duty of Court

[e] Prejudice Required to Be Shown

[f] Waiver

[i] Of Notice or Proof of Loss

[ii] Of Payment of Premium

[6] Cross References

§ 308.501 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Breach of Condition--Insured's Failure to Keep Accurate Books and Accounts

[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

§ 308.502 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Breach of Condition--Insured's Failure to Cooperate

[1] FORM

[2] Use of Form

[3] Cooperation Clauses

[4] Breach of Cooperation Clause

[5] Decisions

§ 308.503 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Reservation of Right to Raise Defense of Noncoverage of Policy

[1] FORM

[2] Use of Form

§ 308.504 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Willful Act of Insured

[1] FORM

[2] Use of Form

[3] Nonliability of Insurer for Insured's Willful Act

[4] State Statutes

[5] Decisions

§§ 308.505-308.509 [Reserved]

§ 308.510 Complaint by Customer Against Licensed Insurance Broker--For Damages [Civ. Code §§ 1709, 3333] for Fraud [Civ. Code § 1710] and Negligence [Civ. Code § 1714(a)]--Failure to Procure Business Interruption Insurance Covering Mechanical Breakdown of Equipment

[1] FORM

[2] Use of Form

[3] Statement of Action

[4] Allegations

[5] State Statutes

[a] Broker

[b] Damages

[c] Deceit

[d] Fraud

[6] Decisions

§ 308.511 Complaint by Customer Against Licensed Insurance Broker--For Damages [Civ. Code § 3333] for Negligence [Civ. Code § 1714(a)]--Failure to Procure Fire Insurance [Ins. Code § 102] Ordered by Plaintiff

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Cross References

§ 308.512 Complaint by Insured Against Licensed Insurance Agent--For Damages [Civ. Code § 3333] for Negligence [Civ. Code § 1714(a)]--Failure to Procure Issuance of Automobile Liability Insurance Policy [Ins. Code §

108] in Amount Ordered--Insurance Company Joined

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Decisions

[6] Cross References

§ 308.513 Complaint by Insurance Agent or Broker Against Insurance Company--For Accounting and Damages [Civ. Code § 3300] for Breach of Contract (Unpaid Commissions)

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Cross References

§ 308.514 Complaint by Former General Manager Against Insurance Company for Damages [Civ. Code § 3300] for Breach of Employment Contract

[1] FORM

[2] Use of Form

[3] Allegations

[4] Decisions

[5] Cross References

§§ 308.515-308.519 [Reserved]

§ 308.520 Complaint by Insurance Company Against Insured to Recover Premium [Civ. Code §§ 3300, 3302]

[1] FORM

[2] Use of Form

[3] Right to Premium

[4] State Statutes

§ 308.521 Complaint by Insurance Company Against Insured to Recover Payment Made Under Policy and Damages [Civ. Code §§ 1709, 3287, 3333] for Fraudulent Representations [Civ. Code §§ 1572, 1710] in Claim or Proof of Loss

[1] FORM

[2] Use of Form

[3] Allegations

[4] Civil Penalties and Restitution

[5] State Statutes

[6] Decisions

[7] Cross References

§ 308.522 Complaint by One Insurance Company Against Another Insurance Company for Declaratory Relief [Code Civ. Proc. § 1060]--To Secure Judicial Declaration Concerning Which Liability Policy Provides Primary Coverage

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction

[5] Multiple Insurance Coverage

[a] Types of Coverage

[b] Effect of Escape Clauses

[c] Effect of Excess Clauses

[6] State Statutes

[7] Decisions

[8] Cross References

§ 308.523 Complaint by Insurance Company Against Insured's Independent (Cumis) Counsel for Damages Caused by Independent Counsel's Negligent Breach of Statutory Duties [Civ. Code § 2860(d), (f)] to Cooperate and Exchange Information With Insurer's Counsel

[1] FORM

[2] Use of Form

[3] Independent (Cumis) Counsel

[a] Requirement

[b] Statutory Rights and Duties of Cumis Counsel

[c] Liability of Cumis Counsel to Insurer for Breach of Statutory Duties

[4] Cross References

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Volume 26: Injunctions thru Insurance-Chs. 303-313
Chapter 308 INSURANCE
PART I. SCOPE

26-308 California Forms of Pleading and Practice--Annotated § 308.01

§ 308.01 Scope of Chapter

This chapter discusses insurance and contains forms for use in actions by and against insurance companies, insureds, brokers, and agents. The chapter is divided into four major categories. The first relates to actions against insurance companies to receive policy benefits, the second to actions by and against agents, brokers, and employees, the third to actions by insurance companies, and the fourth to proceedings involving certification and licensing.

Pertaining to actions against insurance companies to receive policy benefits, this chapter discusses insurance generally [*see § 308.10* et seq.] and contains a general form of complaint by a beneficiary, insured, or loss-payable payee against the insurer to recover policy benefits [*§ 308.370*], various forms of allegations [§§ 308.371- 308.378] for insertion in such a complaint, a complaint by the insured against the insurer for damages for tortious breach of an insurance contract [*§ 308.379*], and a complaint by the insured under a health and accident policy against the insurer for declaratory relief as to the extent of coverage and for damages for intentional infliction of emotional distress [*§ 308.380*].

This chapter also discusses life insurance [*see § 308.40* et seq.] and contains a complaint by an insured against the insurer to recover the cash surrender value of his or her policy [*§ 308.390*], a complaint by the named beneficiary under a group policy to recover life insurance proceeds [*§ 308.391*], and an allegation of the presumption of death where the insured has been missing for seven years [*§ 308.392*] for inclusion in a complaint to recover policy proceeds [*see § 308.370*]. For a complaint for reformation of an insurance policy based on mistake as to coverage and for damages for breach of the policy as reformed. For a complaint by a spouse to recover the community property interest in life insurance proceeds on the death of the other spouse.

This chapter also discusses disability insurance [*see § 308.50* et seq.] and contains a general form of complaint by the insured against the insurer to recover insurance benefits under a disability policy [§ 308.400]. For complaints by insureds in actions against insurers to recover compensatory and punitive damages for tortious breach of contract, see *§§ 308.379, 308.380*.

This chapter also discusses property insurance and is divided into a general discussion [*see § 308.60* et seq.], fire insurance [*see § 308.70* et seq.], burglary and theft insurance [*see § 308.80* et seq.], and comprehensive dwelling insurance [*see § 308.90* et seq.]. For complaints by insureds in actions against insurers to recover compensatory and

punitive damages for tortious breach of contract, see *§§ 308.379, 308.380*. The general discussion includes the following forms:

- A general form of complaint by an insured against an insurer that may be adapted for use in case of breach of any property insurance policy by the insurer [*see § 308.410*].

- An allegation of the insurable interest of the insured's transferee in the property [*§ 308.411*].

- Various allegations of loss [*see §§ 308.412, 308.412*].

- A general form of complaint by an insured for a declaration of the liability of each insurer in the case of multiple insurers when the amount of loss is not in dispute [*see § 308.414*].

This discussion on fire insurance [*see § 308.70* et seq.] includes a complaint by an insured against the insurer in which an estoppel is pleaded against the insurer to rely on the 12-month limitation on a policy for filing a complaint [§ 308.420], a complaint for declaratory relief against several insurers and their agent under an oral contract for insurance [*see § 308.421*], and a cross complaint by the agent against his or her codefendant insurers for declaratory relief [*see § 308.422]. §§ 308.410 -308.414* may also be adapted for use in actions on fire insurance policies.

The discussion on burglary and theft insurance [*see § 308.80* et seq.] contains a general form of complaint by an insured against the insurer for the latter's failure to pay a loss covered by the policy [*see § 308.430]. §§ 308.410 -308.414* may also be adapted for use in actions on burglary and theft insurance policies. For forms for use in actions on surety policies insuring against loss occasioned by an employee, see *§ 308.450 -308.451*.

This discussion on comprehensive dwelling insurance policies including loss of property covered by a homeowners policy [*see § 308.90* et seq.] includes two complaints by the insured against the insurer:

- To recover for loss for collapse of the dwelling's foundation [*see § 308.440*].

- To recover for loss caused by landslide [*see § 308.441*].

§§ *308.410- 308.414* may also be adapted for use in actions on comprehensive dwelling insurance policies.

This chapter also discusses surety insurance [*see § 308.100* et seq.] and contains a complaint by the insured against the insurer on such a policy for failure of the insurer to pay a covered loss [*see § 308.450*], as well as alternative allegations of coverage and loss [*see §§ 308.451, 308.452]. §§ 308.410* and *308.414* may also be adapted for use in actions on surety insurance policies. For complaints by insureds in actions against insurers to recover compensatory and punitive damages for tortious breach of contract, see *§§ 308.379* and *308.380*.

This chapter also discusses and contains forms relating to liability insurancegenerally [*see § 308.110* et seq.]. The discussion includes the nature of liability insurance, the scope of the insurer's duty to defend the insured in a third-party action, the insurer's duty to investigate and settle a claim, and the insurer's duty of good faith and fair dealing regarding a third-party claim. It includes a form of complaint by the insured's judgment creditor against an insurer to recover the amount of a judgment obtained against the insured [*see § 308.460*], a form of complaint brought by an insured against the insurer to recover the amount of a third-party judgment against the insured in excess of the policy limits, based on the insurer's wrongful refusal to settle [*see § 308.461*], a form of complaint by the insured against the insurer to recover damages resulting from the insurer's wrongful refusal to defend the insured in a third-party action [*see § 308.462*], and a form of complaint by the insured's judgment creditor (after assignment by the insured) to recover the amount of the judgment against the insured in excess of policy limits, based on the insurer's wrongful failure to settle the claim within policy limits [*see § 308.463*]. For additional complaints by the insured against the insurer for breach of the implied

covenant of good faith and fair dealing, see *§§ 308.379* and *308.380*.

This chapter also discusses marine insurance [*see § 308.140* et seq.] and contains a complaint by the insured against the insurer on a valued policy insuring a ship [*see § 308.470*], a general form of complaint by an insured against the insurer on an open policy [*see § 308.471*], and a complaint by an insured against the insurer on a marine policy personal property floater [*see § 308.472*]. For actions against shipowners by injured workers and others, rights and remedies of shipowners, actions against shipowners by shippers, and actions for pilotage, salvage, and towage, and forms for use in such actions, see Ch. 522, *Ships and Shipping* .

This chapter also discusses arbitration and appraisal proceedings [*see § 308.510* et seq.] and contains forms relating to appraisal only. For forms for use in arbitration proceedings, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* , Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* , and Ch. 34, *Contractual Arbitration: Judicial Review* . Included are a demand for appraisal of a loss under an insurance policy [§ 308.480], a petition and an order for appraisal of the amount of loss to the property covered by the insurance [*see §§ 308.481*, *308.482*], a petition for appointment of and an order appointing an umpire on failure of the appraisers selected by the parties to do so [*see §§ 308.483*, *308.484*], and a notice of the appraisers' award [*see § 308.485*].

This chapter also discusses some of the more common affirmative defenses that may be pleaded by insurance companies in their answers to complaints seeking recovery under insurance policies [*see § 308.160* et seq.]. For a discussion and format of answers generally, see Ch. 26, *Answers* .

This chapter also contains complaints by and against insurance agents, brokers, and employees [*see § 308.170* et seq.]. Included are complaints by a customer against a broker or agent for failure to secure issu ance of the policy or coverage ordered [*see §§ 308.510 -308.512*]; a complaint by an agent or broker against an insurance company for an accounting and damages for breach of contract [*see § 308.513*]; and a complaint by a former employee against an insurance company for damages for breach of an employement contract [*see § 308.514*].

This chapter also contains discussion of complaints filed by insurance companies. illustrative complaints for use in actions by insurance companies [*see § 308.190* et seq.]. It includes the following forms:

- A complaint to recover an unpaid premium [*see § 308.520*].

- A complaint against an insured to recover payment made by the insurer under a policy and for damages for an insured's fraud in a claim or proof of loss [*see § 308.521*].

- A complaint by one insurer against another for a declaration as to which policy provides primary coverage and which excess coverage with respect to an insurable event [*see § 308.522*].

- A complaint by an insurer against the insured's independent (*Cumis*) counsel seeking damages for that counsel's negligent breach of its duties to the insurer under *Civ. Code § 2860* [*see § 308.523*].

This chapter also discusses the certification of insurance businesses, the licensing of life agents and agent-brokers, and related disciplinary proceedings. It also includes a discussion of licensing and disciplinary proceedings for insurance adjusters [*see § 308.190* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityRemediesGeneral OverviewInsurance LawClaims & ContractsFiduciary ResponsibilitiesInsurance LawClaims & ContractsGood Faith & Fair DealingAgents &

BrokersInsurance LawIndustry RegulationInsurance Company OperationsConducting BusinessCertificates of Authority

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§ 308.02 Cross References

For discussion and forms regarding automobile liability insurance, see Ch. 88, *Automobiles: Automobile Insurance*

For a discussion of the summons and the manner of its service, see Ch. 518, *Service of Summons and Papers* .

For a discussion of venue and subject matter jurisdiction, see Ch. 571, *Venue* , and Ch. 324, *Jurisdiction: Subject Matter* .

See generally Ch. 140, *Contracts* , Ch. 182, *Declaratory Relief* , Ch. 300, *Indemnity and Contribution* , Ch. 488, *Reformation of Instruments* , and Ch. 490, *Rescission and Restitution*

For a complaint by a spouse to recover community property interest in life insurance proceeds, see Ch. 122, *Community Property* , and Ch. 222, *Dissolution of Marriage: Property Division and Valuation*

For a complaint for reformation of an insurance policy and damages for breach of the policy as reformed, see Ch. 488, *Reformation of Instruments*

For forms for use in interpleader actions and to intervene in a pending action, see Ch. 314, *Interpleader* , and Ch. 395, *Parties* .

For discussion and forms regarding surety insurance in the context of subrogation actions, see Ch. 536, *Subrogation*

For discussion and forms regarding attorney malpractice liability, see Ch. 76, *Attorney Professional Liability*

For discussion and forms regarding breach of contract generally, see Ch. 140, *Contracts*

For discussion and forms regarding damages generally, see Ch. 177, *Damages*

For discussion and forms regarding indemnity generally, see Ch. 300, *Indemnity and Contribution*

For discussion and forms regarding medical malpractice liability, see Ch. 414 *Physicians: Medical Malpractice*

For discussion and forms regarding subrogation generally, see Ch. 536, *Subrogation*

For discussion and forms regarding workers' compensation generally, see Ch. 577, *Workers' Compensation*

For discussion of arbitration of uninsured motorist claims and forms for use in such proceedings, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* , and Ch. 88A, *Automobiles: Uninsured Motorist Claims*

For discussion of arbitration proceedings, a general procedural checklist, and forms for use in such proceedings and in enforcement of awards, see Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* , and Ch. 34, *Contractual Arbitration: Judicial Review*

For discussion and forms regarding accounting, see Ch. 7, *Accounting, Action for*

For discussion and forms regarding an account stated, see Ch. 8, *Accounts Stated and Open Accounts*

For discussion and forms regarding common counts, see Ch. 121, *Common Counts*

For discussion and forms regarding employment relationships, see Ch. 248, *Employer's Liability for Employee's Torts* ; Ch. 249, *Employment Law: Termination and Discipline* ; and Ch. 250, *Employment Law: Wage and Hour Disputes*

For discussion and forms regarding fraud, see Ch. 269, *Fraud and Deceit*

For discussion and forms regarding negligence, see Ch. 380, *Negligence*

For discussion and forms regarding principal and agent, see Ch. 427, *Principal and Agent*

For forms for use in proceedings to have causes pending in the state court removed to a federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For forms that may be adapted for use by an insurance company to interplead multiple claimants to insurance proceeds, see Ch. 314, *Interpleader*

For forms that may be adapted for use by insurance companies or others to intervene in a pending action, see Ch. 395, *Parties*

For discussion and forms regarding public administrative law generally, see Ch. 470, *Overview of Public Administrative Law* , through Ch. 474C, *Procedures in Reviewing Agency Decisions*

For provisions of *Ins. Code §§ 791-791.26* (Insurance Information Privacy Protection Act) and *Ins. Code §§ 799-799.10* (underwriting of AIDS risks), and the relevant case law, see Ch. 429, *Privacy*

For discussion and forms regarding title insurance, see Ch. 548, *Title Insurance*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewInsurance LawClaims & ContractsContract FormationReformationInsurance LawClaims & ContractsSubrogationGeneral OverviewInsurance LawLife InsuranceBeneficiariesCommunity PropertyInsurance LawMotor Vehicle InsuranceGeneral Overview

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[Reserved]

§§ 308.03[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.10

§ 308.10 Classes of Insurance

Insurance in California is divided into the following classes [*Ins. Code § 100*]: (1) life; (2) fire; (3) marine; (4) title; (5) surety; (6) disability; (7) plate glass; (8) liability; (9) workers' compensation; (10) common carrier liability; (11) boiler and machinery; (12) credit; (13) burglary; (14) sprinkler; (15) team and vehicle; (16) automobile; (17) mortgage; (18) aircraft; (19) mortgage guaranty; (20) insolvency; (21) legal insurance; and (22) miscellaneous. Each of these classes is separately defined in *Ins. Code §§ 100-120*. There is also a class known as home protection insurance, defined in *Ins. Code § 12740*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBusiness InsuranceGeneral OverviewInsurance LawDisability InsuranceGeneral OverviewInsurance LawLife InsuranceGeneral OverviewInsurance LawMotor Vehicle InsuranceGeneral OverviewInsurance LawProperty InsuranceGeneral Overview

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26-308 California Forms of Pleading and Practice--Annotated § 308.11

§ 308.11 "Insurance" and "Policy" Defined

"Insurance" is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event [*Ins. Code § 22*; *see also Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830 n.5, 69 Cal. Rptr. 321, 442 P.2d 377* ; *Fageol Truck & Coach Co. v. Pacific Indem. Co. (1941) 18 Cal. 2d 731, 739, 117 P.2d 661]* . The contract is one of "adhesion" [*see Smith v. Westland Life Ins. Co. (1975) 15 Cal. 3d 111, 122 n.12, 123 Cal. Rptr. 649, 539 P.2d 433* ; *Young v. Metropolitan Life Ins. Co. (1969) 272 Cal. App. 2d 453, 460-461, 77 Cal. Rptr. 382* ; *Schmidt v. Pacific Mut. Life Ins. Co. (1969) 268 Cal. App. 2d 735, 737, 74 Cal. Rptr. 367]* . A contract of adhesion is a standardized contract which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it [*Schmidt v. Pacific Mut. Life Ins. Co. (1969) 268 Cal. App. 2d 735, 737, 74 Cal. Rptr. 367]* .

The written instrument in which the contract of insurance is set forth is the "policy" [*Ins. Code § 380*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsAdhesion ContractsInsurance LawClaims & ContractsContract FormationGeneral OverviewInsurance LawClaims & ContractsPolicy InterpretationAdhesion Contracts

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26-308 California Forms of Pleading and Practice--Annotated § 308.12

§ 308.12 "Insurer" and "Insured" Defined

The person who undertakes to indemnify another by insurance is the "insurer" and the person indemnified is the "insured" [*Ins. Code § 23*]. In place of these words, the English variants, "assurance," "assurer," and "assured," are frequently used. Any person capable of making a contract may, subject to the restrictions imposed by the Insurance Code, be an insurer [*Ins. Code § 150*; for limitations on persons who may contract, *see Fam. Code § 6700 et seq.* (minors) and *Civ. Code §§ 38-40* (persons of unsound mind); for emancipated minors' ability to enter into insurance contracts, *see Fam. Code § 7051*]. Any person except a public enemy may be insured [*Ins. Code § 151*].

A sole proprietorship is not a legal entity itself, but refers to a natural person who directly owns the business; therefore, an automobile registered in a sole proprietor's trade name is owned by the sole proprietor [*Providence Wash. Ins. Co. v. Valley Forge Ins. Co. (1996) 42 Cal. App. 4th 1194, 1199, 50 Cal. Rptr. 2d 192]* . As to whether the individual is also the insured, an "insured" under statute [*Ins. Code § 151*] must be a legal "person," such as an individual, partnership, or corporation [*Providence Wash. Ins. Co. v. Valley Forge Ins. Co. (1996) 42 Cal. App. 4th 1194, 1200, 50 Cal. Rptr. 2d 192]* . The designation "dba" or "doing business as" simply indicates the individual operates his or her sole proprietorship under a fictitious business name, and doing business under another name does not create an entity distinct from the person operating the business, so it is the individual who is the insured [*Providence Wash. Ins. Co. v. Valley Forge Ins. Co. (1996) 42 Cal. App. 4th 1194, 1201, 50 Cal. Rptr. 2d 192]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsContract FormationGeneral Overview

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26-308 California Forms of Pleading and Practice--Annotated § 308.13

§ 308.13 Insurable Interest

[1] In Property

An "insurable interest" in property is any interest in the property, or any relation to it or liability in respect of it, of such a nature that a contemplated peril might directly damnify the insured [*Ins. Code § 281*; *see also Davis v. Phoenix Ins. Co. (1896) 111 Cal. 409, 414, 43 P. 1115]* . The insurable interest may consist of: (1) an existing interest; (2) an inchoate interest founded on an existing interest; or (3) an expectancy, coupled with an existing interest in that out of which the expectancy arises [*Ins. Code § 282*]. But a mere contingent or expectant interest in anything, not founded on an actual right to the thing or on any valid contract for it, is not insurable [*Ins. Code § 283*]. The measure of an insurable interest in property is, except in the case of a property held by the insured as a carrier or depositary, the extent to which the insured might be damnified by loss or injury of it [*Ins. Code § 284*]. A carrier or depositary has an insurable interest in a thing held by him or her as such to the extent of its value [*Ins. Code § 285*].

An insurable interest in property insured must exist when the insurance takes effect and when the loss occurs, but need not exist in the meantime [*Ins. Code § 286*; *see also Greco v. Oregon Mut. Fire Ins. Co. (1961) 191 Cal. App. 2d 674, 686, 12 Cal. Rptr. 802]* .

[2] In Person

Every person has an insurable interest in his or her own life and health and inthe life and health of (1) any person on whom he depends wholly or in part for education or support, (2) any person under a legal obligation to him for the payment of money or respecting property or services of which death or illness might delay or prevent the performance, and (3) any person on whose life any estate or interest vested in him or her depends [*Ins. Code § 10110*; *see Ins. Code § 10112* (insurance of or for minors)].

An insurable interest by the person purchasing the insurance in the life or health of the person insured must exist when the insurance takes effect, but need not exist thereafter or when the loss occurs [*see Ins. Code § 286*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawDisability InsuranceInsurable InterestsInsurance LawLife InsuranceInsurable InterestsGeneral OverviewInsurance LawProperty InsuranceInsurable Interests

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§ 308.14 Insurable Events

Any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, other than as noted below, may, subject to the provisions of the Insurance Code, be insured against [*Ins. Code § 250*].

A lottery or its outcome may not be insured against [*Ins. Code § 251*], and a policy executed by way of gaming or wagering is void [*Ins. Code § 252*]. Too, if the insured has no insurable interest [*see § 308.13*], the contract is void [*Ins. Code § 280*]. Any stipulation in an insurance policy for the payment of loss whether the person insured does or does not have any interest in the property insured or that the policy shall be received as proof of such interest is void [*Ins. Code § 287*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceInsurable Interests

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26-308 California Forms of Pleading and Practice--Annotated § 308.15

§ 308.15 Types of Policies

A policy is either "open" or "valued" [*Ins. Code § 410*]. An open policy is one in which the value of the subject matter is not agreed on but is left to be ascertained in case of loss [*Ins. Code § 411*; *see Ins. Code § 2051* (measure of indemnity in fire insurance under an open policy)]. A valued policy is one which expresses on its face an agreement that the thing insured shall be valued at a specified sum [*Ins. Code § 412*; *see Ins. Code §§ 2050, 2052-2056* (valued fire insurance policies); *see also Elliano v. Assurance Co. of Am. (1975) 45 Cal. App. 3d 170, 180, 119 Cal. Rptr. 653* ; *Breshears v. Indiana Lumbermens Mut. Ins. Co. (1967) 63 Cal. Rptr. 879* (both cases pointing out that such policy is seldom if ever written in this state since it is subject to moral hazard of over evaluation)].

A "running" policy is one which contemplates successive insurances and which provides that the object of the policy may be from time to time defined, especially as to the subjects of insurance, by additional statements or endorsements [*Ins. Code § 413*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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26-308 California Forms of Pleading and Practice--Annotated § 308.16

§ 308.16 Entitlement and Contents of Policy; Signatures

Except in an underwriter's policy issued under a name or title approved by and registered with the Insurance Commissioner [*Ins. Code § 20*], each policy must [*Ins. Code § 16*] be entitled by the insurer's own name printed on the policy in large bold type [*Ins. Code § 430*].

A policy must specify: (1) the parties between whom the contract is made; (2) the property or life insured; (3) the interest of the insured in the property insured if he is not the absolute owner of it; (4) the risks insured against; (5) the period during which the insurance is to continue; and (6) either a statement of the premium or, if the insurance is of a character where the exact premium is only determinable on the termination of the contract, a statement of the basis and rates on which the final premium is to be determined and paid [*Ins. Code § 381*; *see Ins. Code § 383* (violation of this last requirement as a misdemeanor)]. "Premium," as used in *Ins. Code § 381(f)* (item (6) above), includes a service charge imposed for payment in full of the stated insurance premium for a one-month term policy [*Troyk v. Farmers Group, Inc. (2009) 171 Cal. App. 4th 1305, 1324, 90 Cal. Rptr. 3d 589*].

Policies issued by incorporated insurers must be subscribed by the president or vice president, or chairman, or chief executive officer, or in case of the death, absence, or disability of those officers by any two directors, and countersigned by the secretary of the corporation [*Ins. Code § 386*]. All such policies are as binding and obligatory on the corporation as if executed over the corporate seal [*Ins. Code § 386*]. In the case of fire insurance, if the insurer has no president or secretary in the United States, the facsimile signature on the standard form [*see Ins. Code § 2071*] may be that of its principal executive officer or manager residing in the United States [*Ins. Code § 2082.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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26-308 California Forms of Pleading and Practice--Annotated § 308.17

§ 308.17 Warranties

There are two classes of conditions usually inserted in insurance policies. The first points to the time of the contract and the second to things which may occur or which have to be performed at a time subsequent. The first is an affirmative warranty and the second a promissory warranty. Breach of an affirmative warranty consists in the falsity of the affirmation when made; breach of a promissory warranty, which is in its nature executory, consists of nonperformance of the stipulation [*Cowan v. Phoenix Ins. Co. (1889) 78 Cal. 181, 184, 20 P. 408]* .

A statement in a policy which imports that there is an intention to do or not to do a thing which materially affects the risk is a warranty that such act or omission will take place [*Ins. Code § 445*; *Chase v. National Indem. Co. (1954) 129 Cal. App. 2d 853, 858, 278 P.2d 68]* .

A warranty is either express or implied [*Ins. Code § 440*]. A statement in a policy of a matter relating to the person or thing insured, or to the risk, as a fact, is an express warranty of it [*Ins. Code § 441*]. Every express warranty made at or before execution of a policy must be contained in the policy itself, or in another instrument signed by the insured and referred to in the policy, as making a part of it [*Ins. Code § 443*].

A warranty may relate to the past, the present, the future, or to any or all of these [*Ins. Code § 444*]. When, before the time arrives for the performance of a warranty relating to the future, a loss insured against happens, or performance becomes unlawful at the place of the contract, or impossible, the omission to fulfill the warranty does not avoid the policy [*Ins. Code § 446*].

The violation of a material warranty or other material provision of a policy on the part of either party to it entitles the other to rescind [*Ins. Code § 447*], but, unless thepolicy declares that a violation of specified provisions thereof shall avoid it, the breach of an immaterial provision does not avoid the policy [*Ins. Code § 448*; *see Los Angeles Mut. Ins. Co. v. Cawog (1973) 30 Cal. App. 3d 378, 383, 106 Cal. Rptr. 307]* . A breach of warranty without fraud merely exonerates the insurer from the time that it occurs, or where the warranty is broken in its inception, prevents the policy from attaching to the risk [*Ins. Code § 449*].

Generally speaking, compliance with the terms of a warranty is a condition precedent to a right to recover on the policy [*Chase v. National Indem. Co. (1954) 129 Cal. App. 2d 853, 858, 278 P.2d 68]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsDisclosure ObligationsWarranties

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§ 308.18 Application for Insurance

[1] Temporary Coverage; Termination

An ordinary person who applies for insurance and pays the premium at the time he applies is justified in assuming that payment will bring immediate protection, regardless of whether or not the insurer ultimately decides to accept the risk. The layman's expectation of complete and immediate coverage on payment of the premium is so strong that if the insurer wishes to avoid its obligation of providing such protection it must not only use clear and unequivocal language evidencing its intent to limit temporary coverage pending its approval of the policy, but must also call such limiting condition to the attention of the applicant. In the absence of proof by the insurer that it satisfied both of these requirements, the coverage provided under a temporary contract of insurance is that which the ordinary layman, acting in the ordinary course of business, reasonably may expect by virtue of that transaction, namely, complete and immediate coverage on payment of the premium [*Smith v. Westland Life Ins. Co. (1975) 15 Cal. 3d 111, 122-123, 123 Cal. Rptr. 649, 539 P.2d 433* ; *see State Farm Mut. Auto. Ins. Co. v. Khoe (9th Cir. 1989) 884 F.2d 401, 405-408* (summary judgment for insurer reversed because triable issue of fact remained regarding "conditional receipt clause"); *see also Ins. Code § 10115* (life insurance other than group insurance); *see generally § 308.18[2]*].

When a contract of temporary insurance arises on the insurer's receipt of an application for insurance together with the first premium payment, the expectation of the applicant of complete and immediate coverage actually emerges from two conjoined acts--his signing of the application and his payment of the premium. This reasonable expectation on the part of the applicant extends to a continuance of such coverage until the insurer has nullified the two factors responsible for its existence--the application for the policy by rejection and notice of rejection, and the payment of premium by a refund of it. Unless the insurer manifests this intention to refuse permanent coverage by the return of the premium within a reasonable time, the applicant can assume that his insurance is effective [*Smith v. Westland Life Ins. Co. (1975) 15 Cal. 3d 111, 123-124, 123 Cal. Rptr. 649, 539 P.2d 433* (rejecting, at page 118 n.10, trial court's finding that issuance of amended policy rather than one applied for was a qualified acceptance constituting rejection of application under *Civ. Code § 1585* and hence terminated temporary coverage; the Supreme Court explained that "we are unwilling to take this overly technical approach in the present case to find termination of the temporary insurance")].

[2] Approval of Life Insurance Policy Prior to Insured's Death

Unlike the issue of temporary coverage raised if an applicant for life insurance dies before the application has been approved, *Ins. Code § 10115* addresses the issue of coverage if the application has been approved, but the policy has not been issued and delivered at the time of the insured's death [*compare Hodgson v. Banner Life Ins. Co. (2004) 124 Cal. App. 4th 1358, 1372-1373, 21 Cal. Rptr. 3d 907* ; *with Ransom v. Penn Mut. Life Ins. Co. (1954) 43 Cal. 2d 420, 425, 274 P.2d 633]* . Under the rule of *Ransom v. Penn Mut. Life Ins. Co. (1954) 43 Cal. 2d 420, 425, 274 P.2d 633* , and its progeny, the retention of a premium payment, in light of the conditional receipt issued by the insurance company, may create a reasonable expectation of coverage in the mind of the applicant. *Ins. Code § 10115*, on the other hand, imposes a coverage obligation whenever the conditions for issuance of a life insurance policy have been satisfied, but the formalities of issuance and deliverance have not occurred. This obligation is imposed by law and does not rest on the reasonable expectation of the parties, based on the language of a conditional receipt and the acceptance of an initial premium payment [*Hodgson v. Banner Life Ins. Co. (2004) 124 Cal. App. 4th 1358, 1372-1373, 21 Cal. Rptr. 3d 907]* .

Therefore, in a case in which a life insurance policy applicant paid an initial premium and set up automatic payments for future premiums after receiving a conditional receipt, the insurance became effective despite the applicant's death prior to the full processing of "permanent coverage," and even though the insurer returned the check because the policy amount was too high for a conditional receipt under new guidelines not printed on the application. The policy in that case stated that insurance does not take effect until the full first premium is paid and until the policy is delivered to the owner while the insured is living and his or her health remains as described in the application. However, *Ins. Code § 10115*, provides the following [*Hodgson v. Banner Life Ins. Co. (2004) 21 Cal. Rptr. 3d 907]* :

> "When a payment is made equal to the full first premium at the time an application for life insurance other than group life insurance is signed by the applicant and either (1) the applicant received at that time a receipt for said payment on a form prepared by the insurer, or (2) in the absence of such a receipt the insurer receives the said payment at its home office ... and in either case the insurer, pursuant to its regular underwriting practices and standards, approves the application for the issuance by it of a policy of life insurance on the plan and for the class of risk and amount of insurance applied for, and the person to be insured dies on or after the date of the application, on or after the date of the medical examination, if any, or on or after any date specially requested in the application for the policy to take effect, whichever is later, but before such policy is issued and delivered, the insurer shall pay such amount as would have been due under the terms of the policy in the same manner and subject to the same rights, conditions and defenses as if such policy had been issued and delivered on the date the application was signed by the applicant."

This language means that if a prospective insured makes a first premium payment concurrently with submitting an insurance application, if either the prospective insuredreceives a form receipt for the premium or the insurer receives the payment at its home office, if the insurer approves the application for the class of risk and amount applied for, and if the prospective insured dies on or after the date of the application, the insurer must pay the amount that would have been due under the terms of the policy as if the policy had been issued and delivered on the date that the prospective insured signed the application [*Hodgson v. Banner Life Ins. Co. (2004) 124 Cal. App. 4th 1358, 1372, 21 Cal. Rptr. 3d 907]* .

[3] Duty of Disclosure

Each party to an insurance contract is required to communicate to the other, in good faith, all facts within his knowledge which are, or which he believes to be, material to the contract and as to which he makes no warranty, and which the other has not the means of ascertaining [*Ins. Code § 332*]. But, except in answer to the inquiries of the other, neither party is bound to communicate information of matters: (1) which the other knows; (2) which, in the exercise of ordinary care, the other ought to know and of which the party has no reason to suppose him or her ignorant; (3) of which the

other waives communication; (4) which prove or tend to prove the existence of a risk excluded by a warranty, and which are not otherwise material; or (5) which relate to a risk excepted from insurance, and which are not otherwise material [*Ins. Code § 333*].

Materiality is to be determined not by the event but solely by the probable and reasonable influence of the facts on the party to whom the communication is due in forming his estimate of the disadvantages of the proposed contract or in making his inquiries [*Ins. Code § 334*]. In one case, a trucking company's application listed some of the commodities that it hauled while omitting dump trucks. Seeking summary judgment regarding coverage for an accident that occurred while the insured was hauling a dump truck, the insurer stated that the premium charged was based on the types of commodities identified in the application, and that if the application had disclosed that the insured hauled motor vehicles, the insurer would have either declined to issue the policy or charged a significantly higher premium. The appellate court held that the material misrepresentation in the application rendered the policy invalid and established a complete defense to the insured's counts for breach of contract and bad faith [*Superior Dispatch, Inc. v. Insurance Corp. of N.Y. (2010) 181 Cal. App. 4th 175, 191-193, 104 Cal. Rptr. 3d 508 , reh'g denied, 2010 Cal. App. LEXIS 215 (2010)]* .

Each party is bound to know all the general causes which are open to his or her inquiry equally with that of the other and which may affect either the political or material perils contemplated and all the general usages of trade [*Ins. Code § 335*].

Information of the nature or amount of the interest of one insured need not be communicated unless in answer to an inquiry, except as prescribed by *Ins. Code § 381* (relating to required contents of insurance policies) or by the provisions of the insurance contract if such provisions are prescribed by the Insurance Code as part of a standard form [*Ins. Code § 337*].

Neither party to an insurance contract is bound to communicate, even on inquiry, information of his own judgment on the matters in question [*Ins. Code § 339*].

As a matter of law, notification of the right to arbitration is not required in every communication between an insurer and insured [*Chase v. Blue Cross of Cal. (1996) 42 Cal. App. 4th 1142, 1157, 50 Cal. Rptr. 2d 178]* . Instead, forfeiture of an insurer's right to arbitration results only if the insurer breaches the covenant of good faith and fair dealing by engaging in bad faith conduct designed to mislead the insured [*Chase v. Blue Cross of Cal. (1996) 42 Cal. App. 4th 1142, 1157, 50 Cal. Rptr. 2d 178]* . The question of whether an insurer has engaged in a course of conduct designed to mislead its insured is primarily a factual one. For example, in a case in which the insurer had informed the insured of the right to arbitrate in some correspondence, the court of appeal would not rule as a matter of law whether the insurer had forfeited its right to arbitrate [*Chase v. Blue Cross of Cal. (1996) 42 Cal. App. 4th 1142, 1157-1158, 50 Cal. Rptr. 2d 178]* .

It should be noted that California law mandating forfeiture of the right to arbitration if an insurer breaches the covenant of good faith and fair dealing by engaging in bad faith conduct designed to mislead the insured is not preempted by the Federal Arbitration Act (*9 U.S.C.S. § 1 et seq.*) [*Chase v. Blue Cross of Cal. (1996) 42 Cal. App. 4th 1142, 1158, 50 Cal. Rptr. 2d 178]* . States may regulate contracts, including arbitration clauses. The broad purpose of the federal act, to countermand judicial reluctance to enforce privately contracted arbitration agreements, is not violated merely because general contract law principles preclude enforcement of a given arbitration agreement [*Chase v. Blue Cross of Cal. (1996) 42 Cal. App. 4th 1142, 1159, 50 Cal. Rptr. 2d 178]* .

[4] Waiver

The right to information of material facts may be waived, either (1) by the terms of insurance or (2) by neglect to make inquiries as to such facts where they are distinctly implied in other facts of which information is communicated [*Ins.*

Code § 336].

Waiver requires the insurer to intentionally relinquish its right to deny coverage [*Monteleone v. Allstate Ins. Co. (1996) 51 Cal. App. 4th 509, 515, 59 Cal. Rptr. 2d 48]* .

[5] Concealment

A neglect to communicate that which a party knows and ought to communicate is concealment [*Ins. Code § 330*] and concealment, whether intentional or unintentional, entitles the injured party to rescind the insurance [*Ins. Code § 331*]. An intentional and fraudulent omission on the part of one insured to communicate information of matters proving or tending to prove the falsity of a warranty entitles the insurer to rescind [*Ins. Code § 338*].

[6] Representations

A representation (1) may be oral or written [*Ins. Code § 350*], (2) may be made at the time of or before issuance of the policy [*Ins. Code § 351*], (3) cannot qualify an express provision in an insurance contract although it may qualify an implied warranty [*Ins. Code § 354*], and (4) may be altered or withdrawn before the insurance is effected but not afterwards [*Ins. Code § 355*]. A representation as to the future is a promise unless it is merely a statement of a belief or an expectation [*Ins. Code § 353*]. The completion of the insurance contract is the time to which a representation must be presumed to refer [*Ins. Code § 356*].

When an insured has no personal knowledge of a fact he may nevertheless repeat information which he has on the subject and which he believes to be true with the explanation that he does so on the information of others; or he may submit the information in its whole extent to the insurer. In neither case is he responsible for its truth unless it proceeds from an agent of the insured whose duty it is to give the information [*Ins. Code § 357*].

A representation is false when the facts fail to correspond with its assertions orstipulations [*Ins. Code § 358*]. If a representation is false on a material point, whether affirmative or promissory, the injured party is entitled to rescind the contract from the time the representation becomes false [*Ins. Code § 359*]. The materiality of a representation is determined by the same rule as the materiality of a concealment [*Ins. Code § 360*; *see § 308.18[3]*].

[7] Grounds for Rescission

[a] In General

Ins. Code §§ 331, 338, and *359* provide that a contract may be rescinded on the ground of concealment or for a materially false misrepresentation. *Ins. Code § 361* makes these provisions applicable to a modification of an insurance contract as to its original formation. In the case of concealment, the statute expressly provides for rescission whether the concealment was intentional or unintentional [*Ins. Code § 331*]. This is also true of a false representation. "[A]n insurer may rescind the contract of insurance *ab initio* for a material misrepresentation--even though the insured's misstatements were the result of negligence, or, indeed, the product of innocence" [*Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 666 n. 4, 79 Cal. Rptr. 106, 456 P.2d 674* (holding, however, that insurer could not rescind)].

Materiality is determined solely by the probable and reasonable effect which truthful answers would have had on the insurer [*Ins. Code § 331*; *Unionamerica Ins. Co. v. Fort Miller Group, Inc. (N.D. Cal. 2008) 590 F. Supp. 2d 1254, 2008 U.S. Dist. LEXIS 104565, 10* ; *Imperial Cas. & Indem. Co. v. Sogomonian (1988) 198 Cal. App. 3d 169, 181, 243 Cal. Rptr. 639]* . The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law [*Thompson v. Occidental Life Ins. Co. (1973) 9 Cal. 3d 904, 915-916, 109 Cal. Rptr. 473, 513 P.2d 353]* .

On the other hand, if the applicant for insurance had no present knowledge of the facts sought, or failed to appreciate the significance of information related to him, his incorrect or incomplete responses would not constitute grounds for rescission. Moreover, questions concerning illness or disease in an application for life insurance do not relate to minor indispositions but are to be construed as referring to serious ailments which undermine the applicant's general health. Finally, as the misrepresentation must be a material one, an incorrect answer on an insurance application does not give rise to the defense of fraud where the true facts, if known, would not have made the contract less desirable to the insurer. And the trier of fact is not required to believe the "post mortem" testimony of an insurer's agents that insurance would have been refused had the true facts been disclosed [*Thompson v. Occidental Life Ins. Co. (1973) 9 Cal. 3d 904, 916, 109 Cal. Rptr. 473, 513 P.2d 353]* .

[b] Exceptions

All life insurance policies issued in California must provide that the validity of the policy is incontestable after the policy has been in effect, during the lifetime of the insured, for a period of two years from its date of issue [*Ins. Code §§ 10113.5* (individual life insurance), 10206 (group life insurance)]. After this period has elapsed, the incontestability clause precludes the insurer from asserting defenses based on the insured's fraud or misrepresentation, including the insured's misrepresentation about his or her health in applying for the insurance [*Amex Life Assurance Co. v. Superior Court (1997) 14 Cal. 4th 1231, 1236-1238, 1243, 930 P.2d 1264]* .

An automobile liability insurer must undertake a reasonable investigation of the insured's insurability within a reasonable period of time from the acceptance of the application and the issuance of a policy. This duty directly inures to the benefit of third person injured by the insured. The injured party, after he has obtained an unsatisfied judgment against the insured, may properly proceed against the insureron the policy [*see Ins. Code § 11580(b)(2)*; *see also § 308.20*] and the insurer cannot successfully defend on the ground of its own failure reasonably to investigate the application [*Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 663, 79 Cal. Rptr. 106, 456 P.2d 674* ; *see Philadelphia Indem. Ins. Co. v. Findley (9th Cir. 2005) 395 F.3d 1046* (certifying question of whether duty of insurer to investigate insurability of insured applies to automobile liability insurer that issues excess liability insurance policy in context of rental car transaction)].

The fact that the automobile liability insurer that fails to make such an investigation loses its right to rescind does not, however, necessarily mean that it forfeits all remedies against the insured for his misrepresentations. The insurer may, after satisfying the injured person's claim, still prosecute a cause of action against the insured for damages for wrongful misrepresentation, or, in an action against it brought by the insured after he has satisfied a judgment against him by the injured person, defend on the ground of misrepresentations in the application [*Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 681, 79 Cal. Rptr. 106, 456 P.2d 674]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsCancellation & NonrenewalMaterial MisrepresentationInsurance LawClaims & ContractsContract FormationApplicationsInsurance LawClaims & ContractsDisclosure ObligationsGeneral OverviewInsurance LawClaims & ContractsEstoppel & WaiverGeneral Overview

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26-308 California Forms of Pleading and Practice--Annotated § 308.19

§ 308.19 Change of Interest

Except as noted below, and in the cases of life and disability insurance [*see Ins. Code §§ 10130, 10131*], a change of interest in any part of a subject insured, unaccompanied by a corresponding change of interest in the insurance, suspends the insurance to an equivalent extent until the interest in the subject and the interest in the insured are vested in the same person [*Ins. Code § 300*]. The mere transfer of the subject matter insured does not transfer the insurance; it suspends it until the same person becomes the owner of both the insurance and the subject matter insured [*Ins. Code § 305*]. Moreover, where a fire insurance policy, for example, provides that it is not assignable without the consent of the insurer, any purported assignment of it on transfer of the property covered without such consent is ineffective. The insurance involves the obligation of the insurer to indemnify a particular person against loss and the selection of its indemnitee properly is a matter of its own choice [*Greco v. Oregon Mut. Fire Ins. Co. (1961) 191 Cal. App. 2d 674, 682, 12 Cal. Rptr. 802]* .

A change of interest in a subject insured after the occurrence of an injury which results in a loss does not affect the right of the insured to indemnity for the loss [*Ins. Code § 301*], and the right to recover on the policy after the loss has occurred is assignable without the insurer's consent [*see § 308.20*]; this latter situation involves only the payment of a claim founded on a loss against which the policy indemnifies, and the designation of a payee of such claim properly is a matter left solely to the discretion of the indemnitee, that is, the insured [*Greco v. Oregon Mut. Fire Ins. Co. (1961) 191 Cal. App. 2d 674, 682, 12 Cal. Rptr. 802]* .

A change of interest in one or more of several distinct subjects separately insured by one policy does not avoid the insurance as to the others [*Ins. Code § 302*]. Nor does a change of interest by will or succession on the death of the insured avoid insurance; in such event the interest in the insurance passes to the person taking the interest in the subject matter insured [*Ins. Code § 303*]. In the case of partners, joint owners, or owners in common who are jointly insured, a transfer of interest by one to another of them does not avoid the insurance, even though it has been agreed that the insurance shall cease on an alienation of the subject insured [*Ins. Code § 304*].

On the assignability of life and disability insurance policies, see *Ins. Code §§ 10130, 10131, 10173,* and *10174.* On

assignment by the insured under a group life insurance policy of the incidents of ownership, see *Ins. Code § 10209.3*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawGroup PoliciesAssignments & TransfersInsurance LawLife InsuranceAssignments & Transfers

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26-308 California Forms of Pleading and Practice--Annotated § 308.20

§ 308.20 Assignment of Claim Against Insurer

At common law, a partial assignee of a claim had no legal standing to sue. The underlying rationale was that the original creditor could not split his cause of action and sue the debtor in two actions, and he could not bring about the same result by assigning part of the claim to another and subjecting the debtor to two suits by different plaintiffs. Enforcement of a partial assignment of a claim was permitted in equity, however, by the process of requiring joinder of all interested parties, that is, the assignor and all partial assignees. But under the codes, which have merged legal and equitable actions and adopted the equity procedure of joinder, there is no longer any procedural obstacle to enforcement of the partial assignment. The partial assignee may sue by joining the partial assignor, and the partial assignor may sue on joinder of the partial assignee [*Cain v. State Farm Mut. Auto. Ins. Co. (1975) 47 Cal. App. 3d 783, 794-795, 121 Cal. Rptr. 200]* .

But, an insured under a liability policy, for example, may not make a blanket assignment to the injured party of his or her claim against the insurer for bad-faith refusal to settle within the policy limits [*see § 308.463*] and, after the injured party has commenced action on the assignment, himself or herself sue the insurer in a separate action for damages for emotional distress resulting from the insurer's wrongful failure to settle with the injured party. That is, he or she may not split his or her cause of action and maintain separate actions on the parts against the insurer [*see Purcell v. Colonial Ins. Co. (1971) 20 Cal. App. 3d 807, 810-814, 97 Cal. Rptr. 874* ; *see also Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 832, 69 Cal. Rptr. 321, 442 P.2d 377* ; *Cain v. State Farm Mut. Auto. Ins. Co. (1975) 47 Cal. App. 3d 783, 795, 121 Cal. Rptr. 200]* .

In the case of a policy containing liability provisions, *Ins. Code § 11580(b)* provides that no such policy shall be issued or delivered to any person in this state unless it contains "(2) A provision that whenever judgment is secured against the insured or the executor or administrator of a deceased insured in an action basedupon bodily injury, death, or property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment."

Ins. Code § 11580(b) also provides that a direct action against an insurer is allowed only after the underlying judgment

against the insured is "final." This has been interpreted to mean that the appeal has been concluded or the time for appeal has passed [*McKee v. National Union Fire Ins. Co. (1993) 15 Cal. App. 4th 282, 287, 19 Cal. Rptr. 2d 286]* .

Notwithstanding the provisions of this section, the injured third party, that is, the insured's judgment creditor, may not sue the insurer to recover that portion of the judgment in excess of the policy limits against the insured without first obtaining an assignment of the cause of action from the insured. The reason for this requirement was explained by the California Supreme Court as follows [*Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 942, 132 Cal. Rptr. 424, 553 P.2d 584]* :

> "The insured may assign [his or her] cause of action for breach of the duty to settle without consent of the insurance carrier, even when the policy provisions provide the contrary... . However, part of the damage arises from the personal tort aspect of the bad faith cause of action... . And because a purely personal tort cause of action is not assignable in California, it must be concluded that damage for emotional distress is not assignable... . The same is true of a claim for punitive damage... .
>
> "In *Purcell v. Colonial Ins. Co. (1971) 20 Cal. App. 3d 807, 814 [97 Cal. Rptr. 874]* , an insured assigned his cause of action for breach of the duty to settle, the assignee suing on the assignment. Subsequently, the insured sued for mental distress. The second action was held to violate the rule against splitting a cause of action... . The court suggested the insured should have brought a single action in his own name for all damage, agreeing to pay part of the recovery to the assignee."

The court concluded that *Ins. Code § 11580* does not authorize the insured's judgment creditor to proceed against the insurer for the excess of the judgment over policy limits without an assignment and the Court concluded that the action is not authorized by former *Code Civ. Proc. § 720* [*now see Code Civ. Proc. §§ 708.180(c), (d), 708.210*], relating to creditors' suits. Holding that an assignment is necessary to enable the insured's judgment creditor to sue the insurer to recover the excess of the judgment over policy limits, the Court explained [*Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 946-947, 132 Cal. Rptr. 424, 553 P.2d 584]* :

> "Requiring assignment before the claimant may proceed would of course insure notice to the insured that the claimant wished to proceed against the insurer. At that point the insured would have the choice of partially assigning and then joining in the action, or of bargaining for a release from liability in excess of coverage. The release would permit the insured to protect [himself or herself] from continued exposure to personal liability. Further, because the judgment creditor would then both own and control the cause of action against the insurer, [he or she] could attempt to satisfy [his or her] judgment thereby. Finally, the insured could protect [his or her] right to nonassignable claims for punitive, emotional and personal injury damage."

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityAssignment of Claims

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§ 308.21 Actions by Third Party Beneficiaries

[1] No Action Against Insurer Absent Assignment or Third Party Beneficiary Status

As a general rule, unless there has been an assignment of rights or a final judgment [*see § 308.20*], a third party claimant may not bring a direct action against the insurance company on the contract [*J. C. Penney Cas. Ins. Co. v. M. K. (1991) 52 Cal. 3d 1009, 1018, 804 P.2d 689* ; *see Ins. Code § 11580(b)(2)* (injured party who procures final judgment against insured may bring action against insurer to recover on judgment)]. However, a third party may bring a direct action against an insurance company to enforce the terms of a contract intended to benefit the third party [*Civ. Code § 1559*]. The third party need not be named in the contract, as long as he or she is a member of a class for whose benefit the policy was expressly made [*Northwestern Mut. Ins. Co. v. Farmers' Ins. Group (1978) 76 Cal. App. 3d 1031, 1042-1043, 143 Cal. Rptr. 415]* .

[2] Enforcing Medical Payment Provisions

Both homeowner's and liability insurance policies frequently include medical payment provisions requiring the insurer to pay medical expenses incurred by a third party who suffers injury because of an accident on the insured's property, regardless of fault. Such an injured party is the direct beneficiary of the medical payment provision and therefore has the right to bring a direct action against the insurer to recover under the medical payment provision [*Harper v. Wausau Ins. Corp. (1997) 56 Cal. App. 4th 1079, 1088-1090, 66 Cal. Rptr. 2d 64]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawThird PartiesBeneficiariesGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityAssignment of ClaimsInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsThird Party Claims

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§ 308.22 Interpretation of Policies

Being contracts [*see § 308.11*], insurance policies are interpreted in accordance with the rules governing construction of contracts generally [*Zito v. Firemen's Ins. Co. (1973) 36 Cal. App. 3d 277, 284, 111 Cal. Rptr. 392* ; on construction of indemnity contracts, *see Civ. Code § 2778* and *Hertzka & Knowles v. Salter (1970) 6 Cal. App. 3d 325, 330-338, 86 Cal. Rptr. 23* (involving construction of certificate of errors and omissions insurance issued by Underwriters at Lloyds, London); on construction of disability policies, *see Ins. Code §§ 10176, 10176.1*].

An appellate court held that the choice-of-law rule in *Civil Code § 1646* determines the law governing the interpretation of a contract, notwithstanding the application of the governmental interest analysis to other choice-of-law issues, and therefore in one case California law governed a policy issued in Texas [*Frontier Oil Corp. v. RLI Ins. Co. (2007) 153 Cal. App. 4th 1436, 1459-1460, 63 Cal. Rptr. 3d 816* ; *see* Chapter 140, *Contracts*]. Section 1646 states that a contract is to be interpreted according to the law and usage of the place it is to be performed if the contract "indicate[s] a place of performance" and according to the law and usage of the place it was made if the contract "does not indicate a place of performance." A contract "indicate[s] a place of performance" within the meaning of *Civil Code § 1646* if the contract expressly specifies a place of performance or if the intended place of performance can be gleaned from the nature of the contract and its surrounding circumstances [*Frontier Oil Corp. v. RLI Ins. Co. (2007) 153 Cal. App. 4th 1436, 1442-1443, 63 Cal. Rptr. 3d 816]* . In a case involving a commercial general liability insurance policy executed in Texas regarding oil and gas operations in Beverly Hills, the court found that the provisions for both indemnity and defense obligations related to locations in California, not Texas. It concluded that California was the intended place of performance of the contract with respect to those claims, that the policy thus "indicate[s] a place of performance" within the meaning of *Civil Code § 1646* with respect to those claims, and that California law governs the interpretation of the policy [*Frontier Oil Corp. v. RLI Ins. Co. (2007) 153 Cal. App. 4th 1436, 1462 63 Cal. Rptr. 3d 816]* .

The proper construction of an insurance policy is a question of law, which is reviewed independently on appeal [*Hameid v. National Fire Ins. of Hartford(2003) 31 Cal. 4th 16, 21, 1 Cal. Rptr. 3d 401, 71 P.3d 761* ; *Rosen v. State Farm Gen. Ins. Co. (2003) 30 Cal. 4th 1070, 1074, 135 Cal. Rptr. 2d 361, 70 P.3d 351* ; *Bluehawk v. Continental Ins. Co. (1996) 50 Cal. App. 4th 1126, 1131, 58 Cal. Rptr. 2d 147]* .

The general rules for construing policies are as follows:

- The mutual intention of the parties at the time the contract is formed governs interpretation [*Civ. Code § 1636*; *E.M.M.I., Inc. v. Zurich Am. Ins. Co. (2004) 32 Cal. 4th 465, 470, 9 Cal. Rptr. 3d 701, 84 P.3d 385]* .

- Relevant statutory law governing insurance policies and in force at the time the policy is issued is read into the policy and becomes a part of the contract between the parties [*Modglin v. State Farm Mut. Auto. Ins. Co. (1969) 273 Cal. App. 2d 693, 698, 78 Cal. Rptr. 355]* .

- Policies are construed in their entirety with each clause lending meaning to the others [*Holz Rubber Co., Inc. v. American Star Ins. Co. (1975) 14 Cal. 3d 45, 55, 120 Cal. Rptr. 415, 533 P.2d 1055* ; *see also Sentex Sys., Inc. v. Hartford Accident & Indem. Co. (9th Cir. 1996) 93 F.3d 578, 580* (insurance policy provisions must be given their ordinary meaning); *New York Life Ins. Co. v. Hollender (1951) 38 Cal. 2d 73, 81, 237 P.2d 510* (life insurance policy); *Crawford v. Lloyds London (1969) 275 Cal. App. 2d 524, 526, 80 Cal. Rptr. 70* (accident policy)].

- Coverage clauses are broadly construed so as to afford the greatest possible protection to the insured [*E.M.M.I., Inc. v. Zurich Am. Ins. Co. (2004) 32 Cal. 4th 465, 471, 9 Cal. Rptr. 3d 701, 84 P.3d 385* ; *State Farm Mut. Auto. Ins. Co. v. Partridge (1973) 10 Cal. 3d 94, 101, 109 Cal. Rptr. 811, 514 P.2d 123* , *limited on other grounds,* *Garvey v. State Farm Fire & Cas. Co. (1989) 48 Cal. 3d 395, 405, 257 Cal. Rptr. 292, 770 P.2d 704* ; *Mid-Century Ins. Co. v. Hauck (1973) 35 Cal. App. 3d 293, 297, 110 Cal. Rptr. 707]* . In this regard, the reasonable expectations of the parties in entering into the agreement will be considered by the court [*Holz Rubber Co., Inc. v. American Star Ins. Co. (1975) 14 Cal. 3d 45, 56, 120 Cal. Rptr. 415, 533 P.2d 1055* ; *Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 269, 54 Cal. Rptr. 104, 419 P.2d 168* ; *Otter v. General Ins. Co. (1973) 34 Cal. App. 3d 940, 951, 109 Cal. Rptr. 831]* and, if semantically permissible, the policy will be construed to fairly achieve the agreement's object of securing indemnity to the insured for losses to which the insurance relates [*State Farm Mut. Auto. Ins. Co. v. Jacober (1973) 10 Cal. 3d 193, 203, 110 Cal. Rptr. 1, 514 P.2d 953* ; *Schmidt v. Pacific Mut. Life Ins. Co. (1969) 268 Cal. App. 2d 735, 738, 74 Cal. Rptr. 367]* . If there is any doubt as to the extent or fact of coverage, whether as to the peril insured against, the amount of liability, or the person or persons protected, the language must be understood in its most inclusive sense for the benefit of the insured [*Holz Rubber Co., Inc. v. American Star Ins. Co. (1975) 14 Cal. 3d 45, 59-60, 120 Cal. Rptr. 415, 533 P.2d 1055* ; *State Farm Mut. Auto. Ins. Co. v. Elkins (1975) 52 Cal. App. 3d 534, 538, 125 Cal. Rptr. 139]* . If the insurer deals with the public on a mass basis, the notice of noncoverage of the policy in a situation in which the public may reasonably expect coverage must be conspicuous, plain, and clear [*Schmidt v. Pacific Mut. Life Ins. Co. (1969) 268 Cal. App. 2d 735, 738, 74 Cal. Rptr. 367]* .

- Exclusionary clauses are interpreted narrowly against the insurer [*E.M.M.I., Inc. v. Zurich Am. Ins. Co. (2004) 32 Cal. 4th 465, 471, 9 Cal. Rptr. 3d 701, 84 P.3d 385* ; *State Farm Mut. Auto. Ins. Co. v. Partridge (1973) 10 Cal. 3d 94, 102, 109 Cal. Rptr. 811, 514 P.2d 123* , *limited on other grounds, Garvey v. State Farm Fire & Cas. Co. (1989) 48 Cal. 3d 395, 405, 257 Cal. Rptr. 292, 770 P.2d 704* ; *Northbrook Excess & Surplus Ins. Co. v. Coastal Rescue Sys. Corp. (1986) 182 Cal. App. 3d 763, 767-768, 227 Cal. Rptr. 639]* . The burden is on the insurer to phrase exceptions and exclusions in clear and unmistakable language [*E.M.M.I., Inc. v. Zurich Am. Ins. Co. (2004) 32 Cal. 4th 465, 471, 9 Cal. Rptr. 3d 701, 84 P.3d 385* ; *State Farm Mut. Auto. Ins. Co. v. Jacober (1973) 10 Cal. 3d 193, 202, 110 Cal. Rptr. 1, 514 P.2d 953* ; *Harris v. Glens Falls Ins. Co. (1972) 6 Cal. 3d 699, 701, 100 Cal. Rptr. 133, 493 P.2d 861]* and, to be given effect, those clauses must be conspicuous, plain, and clear [*State Farm Mut. Auto. Ins. Co. v. Jacober (1973) 10 Cal. 3d 193, 202, 110 Cal. Rptr. 1, 514 P.2d 953* ; *see*

also California State Auto. Ass'n Inter-Ins. Bureau v. Warwick (1976) 17 Cal. 3d 190, 194, 130 Cal. Rptr. 520, 550 P.2d 1056] . Moreover, an exclusionary clause will not be construed in a manner that would render the coverage a nullity [*SDR Co. v. Federal Ins. Co. (1987) 196 Cal. App. 3d 1433, 1437, 242 Cal. Rptr. 534* ; *Oliver Mach. Co. v. United States Fid. & Guar. Co. (1986) 187 Cal. App. 3d 1510, 1514-1515, 232 Cal. Rptr. 691]* . Under the "reasonable expectations doctrine," if attempted exclusions in an insurance policy are not clear, plain, and conspicuous enough to negate a layperson's objectively reasonable expectation of coverage, they are unenforceable [*Lancaster v. U.S. Shoe Corp. (N.D. Cal. 1996) 934 F. Supp. 1137, 1157]* . Thus, for example, the "reasonable expectations doctrine" may be applied to an ERISA plan that confers discretion on the plan administrator to construe plan terms and that is therefore subject to abuse of discretion review [*Lancaster v. U.S. Shoe Corp. (N.D. Cal. 1996) 934 F. Supp. 1137, 1159]* .

- If a clause is included because of a specific statutory directive, the clause must be given a reasonable construction in light of the legislature's apparent intent [John Hancock Mut. Life Ins. Co. v. Greer (1998) *60 Cal. App. 4th 877, 884, 71 Cal. Rptr. 2d 48* (incontestability clause in disability policy)].

- Ambiguity or uncertainty in an insurance contract will be resolved in the insured's favor, consistent with the insured's reasonable expectations [*E.M.M.I., Inc. v. Zurich Am. Ins. Co. (2004) 32 Cal. 4th 465, 470, 9 Cal. Rptr. 3d 701, 84 P.3d 385* ; *Safeco Ins. Co. v. Robert S. (2001) 26 Cal. 4th 758, 765, 110 Cal. Rptr. 2d 844, 28 P.3d 889* ; *Kazi v. State Farm Fire & Cas. Co. (2001) 24 Cal. 4th 871, 879, 103 Cal. Rptr. 2d 1, 15 P.3d 223]* . However, a series of decisions has made clear that this rule is only the final step in an interpretive process designed to achieve the fundamental goal of all contractual interpretation, which is to give effect to the mutual intention of the parties [*see Bank of W. v. Superior Court (1992) 2 Cal. 4th 1254, 1264, 10 Cal. Rptr. 2d 538, 833 P.2d 545* (court stated that insured had invoked rule of construction against insurer "too early" in interpretive process)]. Ambiguity exists when an insurance policy provision is susceptible to two or more constructions that are reasonable and not based on strained interpretations [*E.M.M.I., Inc. v. Zurich Am. Ins. Co. (2004) 32 Cal. 4th 465, 470, 9 Cal. Rptr. 3d 701, 84 P.3d 385* ; *Producers Dairy Delivery Co. v. Sentry Ins. Co. (1986) 41 Cal. 3d 903, 912, 226 Cal. Rptr. 558, 718 P.2d 920]* .

- The mere fact that a word or phrase in a policy may have multiple meanings does not create an ambiguity [*Palmer v. Truck Ins. Exch. (1999) 21 Cal. 4th 1109, 1118, 90 Cal. Rptr. 2d 647, 988 P.2d 568* ; *Atlantic Mut. Ins. Co. v. Ruiz (2004) 123 Cal. App. 4th 1197, 1203, 20 Cal. Rptr. 3d 628]* . A word with a broad meaning or multiple meanings may be used for that very reason--that is its breadth--to achieve a broad purpose [*Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co. (1993) 5 Cal. 4th 854, 868, 21 Cal. Rptr. 2d 691, 855 P.2d 1263* ; *Atlantic Mut. Ins. Co. v. Ruiz (2004) 123 Cal. App. 4th 1197, 1203, 20 Cal. Rptr. 3d 628]* .

Various rules are applied to determine whether or not ambiguity exists. The court must consider the allegedly ambiguous language in context, with regard to its intended function in the policy, because the language in a contract must be construed in the context of the contract as a whole and cannot be found to be ambiguous in the abstract [*Bank of W. v. Superior Court (1992) 2 Cal. 4th 1254, 1264-1265, 10 Cal. Rptr. 2d 538, 833 P.2d 545]* . If a party claims that language is ambiguous, the court must consider extrinsic evidence to determine whether or not the language is indeed ambiguous, even if it appears to the court to be plain and unambiguous on its face [*Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co. (1968) 69 Cal.2d 33, 36-37, 69 Cal. Rptr. 561, 442 P.2d 641* ; *ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co. (1993) 17 Cal. App. 4th 1773, 1790-1791, 22 Cal. Rptr. 2d. 206* (extrinsic evidence not admissible to show ambiguity when policy language is clear and explicit)].

Courts may consider evidence of the drafting history of standardized policy provisions and other insurance industry interpretive aids when those aids are relevant to the issues being considered [*Montrose Chem. Corp. v. Admiral Ins.*

Co. (1995) 10 Cal. 4th 645, 670, 42 Cal. Rptr. 2d 324, 913 P.2d 878] . In one case, for example, the California Supreme Court found that the drafting history of standardized general liability policy provisions was relevant in evaluating the insurer's argument that the insurance industry would be harmed by the adoption of a "continuous injury" trigger of coverage theory and that the industry purportedly never anticipated that such a theory would be applied to these policies [*Montrose Chem. Corp. v. Admiral Ins. Co. (1995) 10 Cal. 4th 645, 671, 42 Cal. Rptr. 2d 324, 913 P.2d 878]* .

Reliance on insurance industry materials has also been criticized, however [*see ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co. (1993) 17 Cal. App. 4th 1773, 1790-1791, 22 Cal. Rptr. 2d 206]* , and the California Supreme Court has qualified its approval of reliance on such materials by stating that they "are by no means dispositive" [*Montrose Chem. Corp. v. Admiral Ins. Co. (1995) 10 Cal. 4th 645, 671, 42 Cal. Rptr. 2d 324, 913 P.2d 878]* . Thus, insurance industry information sources apparently may not be relied on in a manner that would contravene the established rules of insurance contract interpretation [*see American Star Ins. Co. v. Insurance Co. of W. (1991) 232 Cal. App. 3d 1320, 1330, 284 Cal. Rptr. 45]* ; for example, to show an ambiguity when the policy language is clear and explicit [*ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co. (1993) 17 Cal. App. 4th 1773, 1790-1791, 22 Cal. Rptr. 2d 206]* or to arrive at an interpretation that would not be in accordance with the reasonable expectations of the insured [*see Montrose Chem. Corp. v. Admiral Ins. Co. (1995) 10 Cal. 4th 645, 673, 42 Cal. Rptr. 2d 324, 913 P.2d 878* (after finding drafting history of business general liability policy relevant in evaluating insurer's argument against adopting "continuous injury" theory of coverage, court found no reason to infer that insured's reasonable expectations with respect to policy provisions would differ from position taken in industry materials)]. Cases relying on insurance industry sources generally involve disputes between multiple insurers [*see, e.g., Fireman's Fund Ins. Co. v. Aetna Cas. & Sur. Co. (1990) 223 Cal. App. 3d 1621, 1629, 273 Cal. Rptr. 431 , overruled on other grounds, Montrose Chem. Corp. v. Admiral Ins. Co. (1995) 10 Cal. 4th 645, 684, 42 Cal. Rptr. 2d 324*] or situations in which the industry sources take a position that is favorable to coverage and/or contrary to that being asserted by the insurer in the particular case [*see, e.g., Montrose Chem. Corp. v. Admiral Ins. Co. (1995) 10 Cal. 4th 645, 673, 42 Cal. Rptr. 2d 324, 913 P.2d 878* ; *Prudential-LMI Commercial Ins. Co. v. Reliance Ins. Co. (1994) 22 Cal. App. 4th 1508, 1512-1513* (stating that "insurance industry publications are particularly persuasive as interpretive aids where they support coverage on behalfof the insured"); *Maryland Cas. Co. v. Reeder (1991) 221 Cal. App. 3d 961, 968, 976-977, 270 Cal. Rptr. 719]* .

Policy language is given the meaning that a layperson would ascribe to the language, unless it can be shown that at the time of formation of the contract, both the insured and the insurer understood the policy language in a technical or restrictive manner [*Civ. Code § 1644*; *AIU Ins. Co. v. Superior Court (1990) 51 Cal. 3d 807, 822, 274 Cal. Rptr. 820, 799 P.2d 1253* ; *see also Civ. Code § 1645* (technical words interpreted in technical sense)]. If the policy language is clear and explicit, then that language governs [*Rosen v. State Farm Gen. Ins. Co. (2003) 30 Cal. 4th 1070, 1074, 135 Cal. Rptr. 2d 361, 70 P.3d 351* (homeowners' policy defining term "collapse" to mean "actually fallen down or fallen into pieces" did not cover imminent collapse of deck attached to house)].

If the meaning a layperson would ascribe to contract language is not ambiguous, the courts will apply that meaning [*Hameid v. National Fire Ins. of Hartford (2003) 31 Cal. 4th 16, 21, 1 Cal. Rptr. 3d 401, 71 P.3d 761* ; *AIU Ins. Co. v. Superior Court (1990) 51 Cal. 3d 807, 822, 274 Cal. Rptr. 820, 799 P.2d 1253* ; *Sentex Sys., Inc. v. Hartford Accident & Indem. Co. (9th Cir. 1996) 93 F.3d 578, 580* (insurance policy provisions must be given their ordinary meaning)]. Courts may also employ "common sense" in determining the insured's reasonable expectations [*Bank of W. v. Superior Court (1992) 2 Cal. 4th 1254, 1276, 10 Cal. Rptr. 2d 538, 833 P.2d 545* ; *Cooper Cos. v. Transcontinental Ins. Co. (1995) 31 Cal. App. 4th 1094, 1106, 37 Cal. Rptr. 2d 508]* .

If a court determines that an ambiguity does exist, the language must then be interpreted in the sense that the insurer believed the insured understood it [*Civ. Code § 1649*; *Bank of W. v. Superior Court (1992) 2 Cal. 4th 1254, 1264-1265, 10 Cal. Rptr. 2d 538, 833 P.2d 545* ; *AIU Ins. Co. v. Superior Court (1990) 51 Cal. 3d 807, 822, 274 Cal. Rptr. 820, 799 P.2d 1253* ; *ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co. (1993) 17 Cal. App. 4th 1773, 1784-1785, 22 Cal. Rptr. 2d 206* ; *Shell Oil Co. v. Winterthur Swiss Ins. Co. (1993) 12 Cal. App. 4th 715, 737, 15 Cal. Rptr. 2d 815]* . This rule, in the insurance context, protects not the subjective belief of the insurer, but rather the

"objectively reasonable expectations" of the insured [*Bank of W. v. Superior Court (1992) 2 Cal. 4th 1254, 1265, 10 Cal. Rptr. 2d 538, 833 P.2d 545* ; *AIU Ins. Co. v. Superior Court (1990) 51 Cal. 3d 807, 822, 274 Cal. Rptr. 820, 799 P.2d 1253* ; *Conway v. Farmers Home Mut. Ins. Co. (1994) 26 Cal. App. 4th 1185, 1191* ; *ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co. (1993) 17 Cal. App. 4th 1773, 1788, 22 Cal. Rptr. 2d 206]* .

This term has often been referred to as the insured's "reasonable expectation of coverage" [*see* *Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 280, 54 Cal. Rptr. 104, 419 P.2d 168]* . In making this interpretation, the court must interpret the language in context, with regard to its intended function in the policy, because "language in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case, and cannot be found to be ambiguous in the abstract" [*Bank of W. v. Superior Court (1992) 2 Cal. 4th 1254, 1265, 10 Cal. Rptr. 2d 538, 833 P.2d 545* (italics omitted); *Producers Dairy Delivery Co. v. Sentry Ins. Co. (1986) 41 Cal. 3d 903, 916, n.7, 226 Cal. Rptr. 558, 718 P.2d 920]* . Courts may also employ "common sense" [*Bank of W. v. Superior Court (1992) 2 Cal. 4th 1254, 1276, 10 Cal. Rptr. 2d 538, 833 P.2d 545* ; *Cooper Cos. v. Transcontinental Ins. Co. (1995) 31 Cal. App. 4th 1094, 1106, 37 Cal. Rptr. 2d 508]* .

To establish the intended purpose of the language in question, courts may consider the record in the case when appropriate, including the insured's purpose in obtaining the coverage, the amount and structure of the premiums, and the general availability or unavailability in the marketplace of the type of coverage the insured is seeking based on the ambiguous language [*see* *Cooper Cos. v. Transcontinental Ins. Co. (1995) 31 Cal. App. 4th 1094, 1106-1109, 37 Cal. Rptr. 2d 508]* . If the insured had no objectively reasonable expectation of coverage, taking into account the facts and circumstances under which the policy was purchased, an ambiguity will be construed in a manner favorable to the insurer [*see* *Cooper Cos. v. Transcontinental Ins. Co. (1995) 31 Cal. App. 4th 1094, 1106-1111, 37 Cal. Rptr. 2d 508]* . Thus, the fact that a provision is found to be ambiguous does not automatically require that it be construed against the insurer in all cases [*Cooper Cos. v. Transcontinental Ins. Co. (1995) 31 Cal. App. 4th 1094, 1106, 37 Cal. Rptr. 2d 508]* .

If these rules do not eliminate or resolve any ambiguity, any ambiguous language will be construed against the party who caused that language to exist [*Civ. Code § 1654*; *Bank of W. v. Superior Court (1992) 2 Cal. 4th 1254, 1265, 10 Cal. Rptr. 2d 538, 833 P.2d 545]* . Because the insurer writes the policy, it is held responsible for ambiguous policy language, which is therefore construed in favor of coverage [*AIU Ins. Co. v. Superior Court (1990) 51 Cal. 3d 807, 822, 274 Cal. Rptr. 820, 799 P.2d 1253]* .

Although they have special features, insurance policies are fundamentally contracts and are therefore interpreted using the ordinary rules of contractual interpretation [*Bluehawk v. Continental Ins. Co. (1996) 50 Cal. App. 4th 1126, 1131, 58 Cal. Rptr. 2d 147]* .

The Ninth Circuit has adopted the reasonable expectations doctrine as federal common law for interpretation of ERISA governed insurance contracts. In such cases, the court "will protect the reasonable expectations of applicants, insureds, and intended beneficiaries regarding coverage afforded by insurance carriers even though a careful examination of the policy provisions indicates that such expectations are contrary to the expressed intention of the insured" [*Saltarelli v. Bob Baker Group Med. Trust (9th Cir. 1994) 35 F.3d 382, 385-386* (exclusionfor pre-existing conditions not enforceable because table of contents had no heading for this "critically important item," headings that appeared relevant referred to sections with no mention of the exclusion, and exclusion appeared only in "Definitions" chapter and required coordinated reading of three different definitions)].

When extrinsic evidence is admitted as an aid to interpretation of an insurance policy, the appellate court is not bound by the trial court's interpretation but independently determines the meaning of the policy [*Golden Security Thrift & Loan Ass'n v. First Am. Title Ins. Co. (1996) 53 Cal. App. 4th 250, 256, 61 Cal. Rptr. 2d 442]* .

For additional discussion of the resolution of ambiguities in the interpretation of insurance policies, see California

Insurance Law and Practice, Ch. 8 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsPolicy InterpretationAmbiguous TermsConstruction Against InsurersInsurance LawClaims & ContractsPolicy InterpretationEntire ContractInsurance LawClaims & ContractsPolicy InterpretationExclusionsInsurance LawClaims & ContractsPolicy InterpretationQuestions of LawInsurance LawClaims & ContractsPolicy InterpretationReasonable ExpectationsGeneral Overview

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§ 308.23 Proof of Lost Policy Provisions

In general, if a contract has been lost in good faith and the actual language is unavailable, the proponent of the lost contract need only prove the relevant substance of the document and need not provide proof of the actual language [*Dart Indus., Inc. v. Commercial Union Ins. Co. (2002) 28 Cal. 4th 1059, 1073, 124 Cal. Rptr. 2d 142, 52 P.3d 79]* . With respect to a lost or destroyed insurance policy, an insured may establish rights under the policy through secondary evidence that attests to the substance of that insurance policy; the insured need not produce the actual language of the policy for this purpose. That is, the absence of "actual language" evidence does not preclude an insured from obtaining the benefits of a policy that has been lost or destroyed. If an insurance policy indisputably covered the relevant time period and the policy was lost in good faith and not recovered after a diligent search, secondary evidence that attests to the substance, but not the precise language of an insurance policy, is not insufficient as a matter of law to establish the insurer's contractual obligations [*Dart Indus., Inc. v. Commercial Union Ins. Co. (2002) 28 Cal. 4th 1059, 1074, 124 Cal. Rptr. 2d 142, 52 P.3d 79]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsPolicy InterpretationGeneral Overview

California Forms of Pleading and Practice--Annotated

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§ 308.24 Common-Law Bad Faith Action Against Insurer

[1] Covenant of Good Faith and Fair Dealing

A covenant of good faith and fair dealing is implied in every contract, including insurance policies. This covenant requires that no party to a contract will injure the right of another party to receive the benefits of the agreement. An insurer's refusal, without proper cause, to compensate its insured for a loss covered by the policy may give rise to a cause of action in tort for breach of the implied covenant of good faith and fair dealing [Wilson v. 21st *Century Ins. Co. (2007) 42 Cal. 4th 713, 720, 68 Cal. Rptr. 3d 746, 171 P.3d 1082, 2007 Cal. LEXIS 13314* . *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 573-574, 108 Cal. Rptr. 480, 510 P.2d 1032]* Inasmuch as a breach of this duty sounds in both contract and tort, the insured may recover punitive damages under *Civ. Code § 3294* in an appropriate case [*Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 819-821, 157 Cal. Rptr. 482, 598 P.2d 452]* .

While an insurance company has no obligation under the implied covenant of good faith and fair dealing to pay every claim its insured makes, the insurer cannot deny the claim without fully investigating the grounds for its denial. To protect its insured's contractual interest in security and peace of mind, it is essential that an insurer fully inquire into possible bases that might support the insured's claim before denying it. By the same token, denial of a claim on a basis unfounded in the facts known to the insurer, or contradicted by those facts, may be deemed unreasonable. A trier of fact may find that an insurer acted unreasonably if the insurer ignores evidence available to it which supports the claim. The insurer may not just focus on those facts which justify denial of the claim [Wilson v. 21st *Century Ins. Co. (2007) 42 Cal. 4th 713, 721, 68 Cal. Rptr. 3d 746, 171 P.3d 1082, 2007 Cal. LEXIS 13314*].

The California Supreme Court held that an insurer that refused to provide underinsured motorist benefits to its insured, who was injured in an automobile accident by an underinsured drunk driver, unreasonably failed to investigate the insured's claim for benefits based on spinal injuries resulting from the accident. The insurer asserted without investigating that the injuries were the result of a preexisting condition and that the insured's pain was due to "soft tissue" injuries, although medical examinations refuted those assertions [Wilson v. 21st *Century Ins. Co. (2007) 42 Cal. 4th 713, 721, 68 Cal. Rptr. 3d 746, 171 P.3d 1082, 2007 Cal. LEXIS 13314*]. The Court stated that a jury could

reasonably find that nothing in the material the claims examiner had received justified its conclusions. The claims examiner had no basis for his contrary conclusion that a causative link between the accident and the insured's injuries was "unlikely." Nor was there any apparent medical basis for the claims examiner's assertion that the insured had a preexisting condition [Wilson v. 21st *Century Ins. Co. (2007) 42 Cal. 4th 713, 721, 68 Cal. Rptr. 3d 746, 171 P.3d 1082, 2007 Cal. LEXIS 13314*]. Although the insurer was not obliged to accept the examining physician's opinion without scrutiny or investigation, to the extent it had good faith doubts, it would have been within its rights to investigate the basis for the claim by asking the physician to reexamine or further explain his findings, having a physician review all the submitted medical records and offer an opinion, or, if necessary, having its insured examined by other physicians (as it later did). What it could not do, consistent with the implied covenant of good faith and fair dealing, was ignore the physician's conclusions without any attempt at adequate investigation, and reach contrary conclusions lacking any discernable medical foundation [Wilson v. 21st *Century Ins. Co. (2007) 42 Cal. 4th 713, 722, 68 Cal. Rptr. 3d 746, 171 P.3d 1082, 2007 Cal. LEXIS 13314*]. In reversing summary judgment for the insurer, the Court found the existence of sufficient evidence for a jury to find that the insurer's decision was prompted not by an honest mistake, bad judgment, or negligence, but rather by a conscious and deliberate act, "which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement" [Wilson v. 21st *Century Ins. Co. (2007) 42 Cal. 4th 713, 726, 68 Cal. Rptr. 3d 746, 171 P.3d 1082, 2007 Cal. LEXIS 13314*].

Inasmuch as a breach of this duty sounds in both contract and tort, the insured may recover punitive damages under *Civ. Code § 3294* in an appropriate case [*Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 819-821, 157 Cal. Rptr. 482, 598 P.2d 452]* .

[2] Damages for Emotional Distress

The plaintiff in a bad faith action may not recover damages for emotional distress caused by the insurer's bad faith unless he or she can prove some economic loss. However, once economic loss is established, the plaintiff need not show any causal link between the economic loss and the emotional distress in order to recover damages for emotional distress [*Clayton v. United Servs. Auto. Ass'n (1997) 54 Cal. App. 4th 1158, 1160-1162, 63 Cal. Rptr. 2d 419* (rejecting *Blake v. Aetna Life Ins. Co. (1979) 99 Cal. App. 3d 901, 925, 160 Cal. Rptr. 528* , insofar as it holds that emotional distress must arise from financial deprivation arising from claim)].

[3] Parties Entitled to Bring Action

Because the covenant of good faith and fair dealing is contractual, privity of contract ordinarily is required [*see Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 576, 108 Cal. Rptr. 480, 510 P.2d 1032* ; *Austero v. National Cas. Co. (1976) 62 Cal. App. 3d 511, 516-517, 133 Cal. Rptr. 107]* . Consequently, a bad faith action against an insurer generally is available only to the policyholder, a named insured, the insured's assignee [*Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 943-944, 132 Cal. Rptr. 424, 553 P.2d 584]* , or an express third-party beneficiary of the contract, such as a person falling within the policy's definition of "additional insured" [*Northwestern Mut. Ins. Co. v. Farmers' Ins. Group (1978) 76 Cal. App. 3d 1031, 1041-1042, 143 Cal. Rptr. 415* ; *see Johansen v. California State Auto. Ass'n Inter-Ins. Bureau (1975) 15 Cal. 3d 9, 20, 123 Cal. Rptr. 288, 538 P.2d 744* ; *Cancino v. Farmers Ins. Group (1978) 80 Cal. App. 3d 335, 338-339, 145 Cal. Rptr 503* ; *see also Jones v. Aetna Cas. & Sur. Co. (1994) 26 Cal. App. 4th 1717, 1722-1725, 33 Cal. Rptr. 2d 291* (lessee could not sue lessor's insurer for bad faith on third-party beneficiary theory)]. A person may also be an insured under the particular policy definition. For example, a commercial general liability (CGL) policy may insure an individual and his or her sole proprietorship as named insureds, but may include within the definition of "insured" the spouse of that individual, with respect to the conduct of that business. In that case, the spouse is entitled to sue the insurer for bad faith [*Century Sur. Co. v. Polisso (2006) 139 Cal. App. 4th 922, 940-945, 43 Cal. Rptr. 3d 468]* . Absent an assignment, a third-party plaintiff cannot sue the defendant's insurer directly for breach of the covenant [*Coleman v. Gulf Ins. Group (1986) 41 Cal. 3d 782, 795, 226 Cal. Rptr. 90, 718 P.2d 77* ; *Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 943-944, 132 Cal. Rptr. 424, 553 P.2d 584]* .

Once a third party obtains a final judgment against the insured, the judgment creditor attains limited third-party beneficiary status by virtue of *Ins. Code 11580*, the "direct action statute" that permits judgment creditors of an insured to bring an action against the insurer to recover the amount of the judgment. Therefore, a third-party judgment creditor may maintain a direct action for breach of the covenant of good faith and fair dealing against an insurer that refuses, unreason ably and in bad faith, to pay the entire amount of a judgment after it becomes final [*Hand v. Farmers Ins. Exch. (1994) 23 Cal. App. 4th 1847, 1857, 29 Cal. Rptr. 2d 258* ; *see § 308.464*]. A stipulated judgment with a covenant not to execute against the insured will also support a direct action against an insurer [*Pruyn v. Agricultural Ins. Co. (1995) 36 Cal. App. 4th 500, 518-522, 42 Cal. Rptr. 2d 295]* . A judgment supporting a direct action need not be based on a contested or adversarial trial, but may rest on a default hearing following a settlement or an uncontested trial, if the insured settled with the claimant and presented no defense [*Garamendi v. Golden Eagle Ins. Co. (2004) 116 Cal. App. 4th 694, 711-712, 10 Cal. Rptr. 3d 724* (insurer overtly declined to participate in litigation)].

However, a third-party judgment creditor may not maintain a direct action for breach of the covenant of good faith and fair dealing against an insurer that unreasonably refused to settle, since the insurer's duty to settle runs only to the insured, and not to the judgment creditor [*Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 943-944, 132 Cal. Rptr. 424, 553 P.2d 584* ; *see Hand v. Farmers Ins. Exch. (1994) 23 Cal. App. 4th 1847, 1858, 29 Cal. Rptr. 2d 258]* .

When an insured obtains a bad faith judgment against its own insurer (a situation in which *Ins. Code § 11580* is inapplicable), the insured becomes a judgment creditor of the insurer. The entry of judgment absolves the insurer of any further contractual obligations, and the judgment for damages replaces the insurer's contractual obligations. The insured therefore cannot assert yet another bad faith claim based on the insurer's failure to pay the judgment, nor can the insured assert such a claim in his or her status as judgment creditor [*Tomaselli v. Transamerica Ins. Co. (1994) 25 Cal. App. 4th 1766, 1771, 31 Cal. Rptr. 2d 224]* .

For a form of complaint by an insured against an insurer for bad faith breach of contract, and for discussion of that cause of action, including preemption defenses, see *§ 308.379*.

For a form of complaint for use by an insured against its liability insurer to recover the amount of a third-party judgment in excess of policy limits, including a cause of action for bad faith, see *§ 308.461*. For a form of complaint for use by an insured against its liability insurer to recover damages resulting from the insurer's wrongful failure to defend a third-party action, including a cause of action for bad faith, see *§ 308.462*.

[4] Tort Damages Not Available Based Solely on Retroactive Excessive Premiums

The California Supreme Court has ruled that a plaintiff does not have a tort action against an insurer that breaches the covenant of good faith and fair dealing by retroactively overcharging a premium that the insurer knows is not owed [*Jonathan Neil & Assocs., Inc. v. Jones (2004) 33 Cal. 4th 917, 941, 16 Cal. Rptr. 3d 849, 94 P.3d 1055]* . In this case, a trucking company participated in, and paid premiums charged by, the California Automobile Assigned Risk Plan (CAARP), a statutorily created program governed by the Insurance Commissioner, and designed to make vehicle liability insurance available to those unable to obtain insurance through ordinary methods [*see Ins. Code § 11620 et seq.*; *10 Cal. Code Regs. § 2432 et seq.*]. In ruling against theavailability of tort remedies in this context, the Court noted that the insured in this case (the trucking company) was not in the same vulnerable position as those who suffer from an insurer's bad faith claims and settlement practices, because of the following [*see Jonathan Neil & Assocs., Inc. v. Jones (2004) 33 Cal. 4th 917, 939-941, 16 Cal. Rptr. 3d 849, 94 P.3d 1055]* :

- The billing dispute in this case did not, by itself, deny the insured the benefits of the insurance policy, the security against losses, and third-party liability.

- The billing dispute did not require the insured to prosecute the insurer in order to enforce its right, as

in the case of bad-faith claims and settlement practices (the trucking company's bad faith action arose as a cross-complaint in a case filed by the insurer to recover retroactively charged premiums;

- Traditional tort remedies may be available to an insured who is wrongfully billed a retroactive premium--for example, actions for malicious prosecution, defamation, and intentional interference with prospective economic advantage.

The excessive premium charges in this case did not involve the deliberate mishandling of claims that would otherwise give rise to tort remedies. Therefore, the Supreme Court's holding applies only to retroactive billing cases in which the billing is separate and distinct from any allegations of claims mishandling [*Jonathan Neil & Assocs., Inc. v. Jones (2004) 33 Cal. 4th 917, 941 n.10, 16 Cal. Rptr. 3d 849, 94 P.3d 1055]* . The Court did not decide whether an insurer that in bad faith terminates or causes the termination of an insured in an assigned risk program such as the CAARP, effectively leaving the insured without the benefits of insurance, may be liable in tort [*see Jonathan Neil & Assocs., Inc. v. Jones (2004) 33 Cal. 4th 917, 941 n.11, 16 Cal. Rptr. 3d 849, 94 P.3d 1055]* .

[5] Punitive Damages

An insured may recover punitive damages in a bad faith action if there is clear and convincing evidence that the defendant is guilty of oppression, fraud or malice [*Civ. Code § 3294(a)*; *Neal v. Farmers Ins. Exch. (1978) 21 Cal. 3d 910, 922, 148 Cal. Rptr. 389, 582 P.2d 980* ; *Campbell v. Cal-Gard Sur. Servs., Inc. (1998) 62 Cal. App. 4th 563, 570]* . A finding that the insurer acted in bad faith does not automatically support an award of punitive damages [*Silberg v. California Life Ins. Co. (1974) 11 Cal. 3d 452, 462-463, 113 Cal. Rptr. 711, 521 P.2d 1103]* .

In one case, the insureds' "extended replacement cost" homeowners' policy (providing 25 percent over policy limits) covered, among other things, the dwelling, personal property ($135,100), and mortgage disaster protection. As a condition to recovering extended replacement cost coverage, the insurer required that the dwelling coverage limits be equal to the cost to replace the home, which in turn required the insurer's inspection and issuance of a report. The policy, written before the inspection, stated personal property limits of $135,100. After the inspection, the insurer increased the limits by letter, increasing personal property limits to $213,651 [*see Major v. Western Home Ins. Co. (2009) 169 Cal. App. 4th 1197, 1204, 87 Cal. Rptr. 3d 556*]. After a fire destroyed the home in October 2003, the insurer had a separate claims-administration company handle the claim. It did not make the first payment until February 2004; and failed to make a timely mortgage payment that month. The first adjuster handling the claim failed to provide the insureds with a copy of the policy after several requests. Three months later that company reassigned the claim to a second adjuster, who had not received the required training under California law regarding fair claims settlement practices. The insurer was delinquent two months on mortgage payments, and delinquent in payments for the trailer located on the property, in which the insureds were living. The second adjuster failed to respond to the insureds' repeated demands and inquiries, telling them that their claim was "not his top priority." In mid-July that adjuster denied the claim for replacement coverage of the swimming pool, and further admitted to ignorance regarding additional coverage questions. In September the insurer again failed to pay mortgage benefits. In October 2004, the insurers retained legal counsel. Shortly thereafter, the insurer paid all personal property benefits submitted in May 2004. An officer of the insurer reviewed the inspection report and noted that the replacement cost for the house was "significantly higher" than the coverage limit in the policy, after which he authorized a corresponding increase in limits. The insureds filed suit in February 2005, after which the claims-administration company sent the insureds' counsel a letter increasing coverage limits, to reflect the discrepancy between policy limits and the inspection report. The first claims adjuster assumed claims-handling duties after the insureds retained counsel. By spring of 2005, the insurer had paid all policy benefits due. A jury verdict found for the insureds on claims of breach of contract and bad faith, awarding damages for personal property benefits (approximately $31,300), noneconomic damages for emotional distress ($450,000), Brandt fees, and punitive damages (approximately $646,500). The appellate court upheld the judgment, holding that the insureds were entitled to the economic damages award because the increased policy benefits were not "courtesy benefits," but were rather increased coverage limits that the insurer was contractually bound to pay under the policy

terms [*Major v. Western Home Ins. Co. (2009) 169 Cal. App. 4th 1197, 1210, 87 Cal. Rptr. 3d 556*]. The court also held with respect to the punitive damages award that the first claims adjuster employed by the claims-administration company was a managing agent within the meaning of *Civil Code § 3294(b)*; hence, the insurer was responsible for her actions in handling the claim. Furthermore, neither the award of noneconomic damages nor the award of punitive damages was excessive [*Major v. Western Home Ins. Co. (2009) 169 Cal. App. 4th 1197, 1221-1222, 87 Cal. Rptr. 3d 556*].

Courts must ensure that the measure of punishment is not only reasonable, but also proportionate to both the amount of harm to the plaintiff and the general damages recovered [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 426, 123 S. Ct. 1513, 155 L. Ed. 2d 585]* . An excessive punitive damages award implicates the due process clause of the U.S. Constitution as an irrational and arbitrary deprivation of the defendant's property [*see* *State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 429, 123 S. Ct. 1513, 155 L. Ed. 2d 585* ($145 million punitive damages award in Utah insurance bad faith case reversed in 6 to 3 decision on constitutional grounds); *see also U.S. Const. amend. XIV*].

The U.S. Supreme Court has provided the following general guidelines for the imposition of punitive damages:

- The degree of reprehensibility of the defendant's conduct [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 419, 123 S. Ct. 1513, 155 L. Ed. 2d 585* ; *BMW of N. Am., Inc. v. Gore (1996) 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L. Ed. 2d 809]* ;

- The disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 424-425, 123 S. Ct. 1513, 155 L. Ed. 2d 585* ; *BMW of N. Am., Inc. v. Gore (1996) 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L. Ed. 2d 809]* ; and

- The disparity between a punitive damages award and the civil or criminal penalties authorized or imposed in comparable cases [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 426-427, 123 S. Ct. 1513, 155 L. Ed. 2d 585* ; *BMW of N. Am., Inc. v. Gore (1996) 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L. Ed. 2d 809* ; *Pacific Mut. Life Ins. Co. v. Haslip (1991) 499 U.S. 1, 23, 111 S. Ct. 1032, 113 L. Ed. 2d 1]* .

In an insurance bad faith case, the degree of reprehensibility of the defendant's conduct may be analyzed only with respect to the conduct that harmed the insured in that particular case [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 417-425, 123 S. Ct. 1513, 155 L. Ed. 2d 585]* . Therefore, a large and disproportionate punitive damages award based on the insurer's questionable claims-handling practices unrelated to the case at hand was vulnerable to reversal, particularly if a great deal of evidence unrelated to that case was considered for the purpose of punishing the insurer [*see* *State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 417-427, 123 S. Ct. 1513, 155 L. Ed. 2d 585* ; *see also* *Romo v. Ford Motor Co. (2003) 113 Cal. App. 4th 738, 753, n.7, 6 Cal. Rptr. 3d 793* (jury instructions must not invite jury to impose punitive damages sufficient to punish and deter all conduct by defendant of type directed toward plaintiffs in particular case)].

There are no concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff, and the punitive damages award [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 424, 123 S. Ct. 1513, 155 L. Ed. 2d 585* ; *BMW of N. Am., Inc. v. Gore (1996) 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L. Ed. 2d 809]* . The U.S. Supreme Court has stated that few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process. An award of more than four times the amount of compensatory damages "might be close to the line of constitutional impropriety" [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585, 605-606* ; *BMW of N. Am., Inc. v. Gore (1996) 517 U.S. 559, 581, 116 S. Ct. 1589, 134 L. Ed. 2d 809* ; *Pacific Mut. Life Ins. Co. v. Haslip (1991) 499 U.S. 1, 23-24, 111 S. Ct. 1032, 113 L. Ed. 2d 1]* . Single-digit

ratios are more likely to comport with due process, while still achieving the goals of deterrence and retribution, than awards with ratios in the range of, for example, 500 to one, or (as in the case before the Court) 145 to one [*State Farm Mut.Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585]* . However, greater ratios may comport with due process if a particularly egregious act has resulted in only a small amount of economic damages [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585]* .

The converse is also true. If compensatory damages are substantial, then a lesser ratio, perhaps only equal to those compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case must be based on the facts and circumstances of the defendant's conduct, as well as the harm to the plaintiff [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585]* . In the particular insurance bad faith case before the Court, the Court reversed a judgment of $145 million in punitive damages because the $1 million compensatory damages award was based in part on factors also relevant to the punitive damages award. Under the facts of that case, involving an insurer's bad faith failure to settle that resulted in an excess verdict against the insureds, the Court found that the compensatory damages likely were based on a component that was duplicated in the punitive damages award--that is, the outrage and humiliation that the insureds suffered at the actions of their insurer [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 426, 123 S. Ct. 1513, 155 L. Ed. 2d 585]* .

The Court cited the following factors in reversing the punitive damages award in that case [*State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 426, 123 S. Ct. 1513, 155 L. Ed. 2d 585]* :

- The harm arose from a transaction in the economic realm, not from physical injury;
- The insurer paid the excess verdict before the complaint was filed;
- The compensatory award was substantial (the insureds were awarded $1 million for a year and a half of emotional distress); and
- A component of the compensatory damages duplicated the punitive damages award.

Because insurance bad faith cases arise from economic transactions as opposed to circumstances involving physical injuries, courts determining the validity of a punitive damages award in an insurance bad faith case must also consider the following factors on a case-by-case basis:

- The insurer's mitigating conduct within a reasonable time after the dispute arises between the insurer and insured;
- The adequacy of the compensatory damages award to remedy all wrongs;
- The amount of compensatory damages; and
- The nature and distinguishable components of the compensatory damages award.

The California Supreme Court has stated that a ratio of one to one is the federal constitutional limit in a case involving relatively low reprehensibility and a substantial compensatory damages verdict, which included a substantial award of noneconomic damages [*Roby v. McKesson Corp. (2009) 47 Cal. 4th 686, 719, 101 Cal. Rptr. 3d 773, 219 P.3d 749* (wrongful discharge case)].

In one insurance bad faith case, involving a "California Special Multi-Peril Policy" (insuring business personal property) issued to a printing and design business, the award of punitive damages against the insurer was supported by substantial evidence that the insurer was intentionally dishonest and acted in conscious disregard of the insured's rights

in denying full coverage for a claim following water damage to the insured's property [*Amerigraphics, Inc. v. Mercury Cas. Co. (2010) 182 Cal. App. 4th 1538, 1559-1560, 107 Cal. Rptr. 3d 307]* . In that case, the jury awarded $3 million in punitive damages, which the trial court reduced to $1.7 million, representing 10 times the total of $130,000 in compensatory damages, plus $40,000 in prejudgment interest. The appellate court analyzed the appropriate factors used in setting the award, stating among other things, that of the five reprehensibility factors, only financial vulnerability weighs in favor of the insured [*Amerigraphics, Inc. v. Mercury Cas. Co. (2010) 182 Cal. App. 4th 1538, 1562-1563, 107 Cal. Rptr. 3d 307]* . The court concluded that the trial court's remittitur of punitive damages to $1.7 million was constitutionally excessive. It held that neither the interest in deterrence nor the insurer's substantial wealth justified a punitive damages award of 10 times the amount of compensatory damages. Noting that the $130,000 in compensatory damages awarded was the precise amount of damages that the insured sought, it stated that there did not appear to be a punitive element to the compensatory damages award. The court concluded that the maximum award of punitive damages consistent with due process in this case is $500,000, that is, a 3.8-to-one ratio of compensatory damages [*Amerigraphics, Inc. v. Mercury Cas. Co. (2010) 182 Cal. App. 4th 1538, 1566, 107 Cal. Rptr. 3d 307]* .

For a more complete discussion of punitive damages, see *Ch. 177, Damages, § 177.40* et seq.

[6] Attorneys' Fees

Attorneys' fees may be recovered as an element of damages in a bad faith action. However, the plaintiff may recover only those fees reasonably incurred to compel the payment of policy benefits, and may not recover fees incurred in pursuing the bad faith action itself. Accordingly, if the plaintiff's award in the bad faith action exceeds the amount due under the policy, any fees attributable to obtaining the excess amount are not recoverable [*Brandt v. Superior Court (1985) 37 Cal. 3d 813, 819-820, 210 Cal. Rptr. 211, 693 P.2d 796* ; *Campbell v. Cal-Gard Sur. Servs., Inc. (1998) 62 Cal. App. 4th 563, 571-572]* .

An insured's assignment of a cause of action against an insurance company for tortious breach of the covenant of good faith and fair dealing by wrongfully denying benefits due under an insurance policy carries with it the right to recover *Brandt* fees that the assignee incurs to recover the policy benefits in the lawsuit against the insurance company [*Essex Ins. Co. v. Five Star Dye House, Inc. (2006) 38 Cal. 4th 1252, 1264, 45 Cal. Rptr. 3d 362, 137 P.3d 192]* .

Although one appellate court has held that *Brandt* fees are recoverable on appeal, authority to the contrary exists [*Baron v. Fire Ins. Exchange (2007) 154 Cal. App. 4th 1184, 1198, 65 Cal. Rptr. 3d 502* ; *accord McGregor v. Paul Revere Life Ins. Co. (9th Cir. 2004) 369 F.3d 1099, 1101* ; *but see Burnaby v. Standard Fire Ins. Co. (1995) 40 Cal. App. 4th 787, 47 Cal. Rptr. 2d 326*]. The court held that attorney fees the insured has incurred to defend a judgment against the insurer's appeal are a logical extension of the fees incurred in pursuing the recovery in the trial court. The collection of the benefits due is not complete when the insurer resists the judgment by challenging the judgment on appeal [*Baron v. Fire Ins. Exchange (2007) 154 Cal. App. 4th 1184, 1198, 65 Cal. Rptr. 3d 502* ; *see also McGregor v. Paul Revere Life Ins. Co. (9th Cir. 2004) 369 F.3d 1099, 1101*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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1. In General

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§ 308.25 Statutory Actions Against Insurer

[1] Unfair Practices Act

The Unfair Practices Act (*Ins. Code §§ 790-790.10*) regulates trade practices in the business of insurance by proscribing practices that constitute unfair methods of competition, or unfair or deceptive acts or practices [*Ins. Code § 790*]. Prior to the California Supreme Court's opinion in *Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58* , private actions were brought under the Act by both first-party insureds and third-party claimants. However, *Moradi-Shalal*, by overturning *Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, 885-888, 153 Cal. Rptr. 842, 592 P.2d 329* , eliminated a third-party cause of action under the Act, effective October 17, 1988. The Court also unequivocally disapproved any private cause of action under the Act. Subsequent cases have held that under the reasoning of *Moradi-Shalal, Ins. Code § 790.03(h)* cannot be used as the basis for a private action, whether brought by first parties or third parties.

Consequently, all private first-party claims under *Ins. Code § 790.03(h)* are precluded prospectively from the effective date of *Moradi-Shalal* (October 17, 1988) [*Tricor Cal., Inc. v. Superior Court (1990) 220 Cal. App. 3d 880, 885-887, 269 Cal. Rptr. 642* ; *Zephyr Park v. Superior Court (1989) 213 Cal. App. 3d 833, 836-840, 262 Cal. Rptr. 106* ; *see also McMillin Scripps N. P'ship v. Royal Ins. Co. (1993) 19 Cal.App. 4th 1215, 1222, 23 Cal. Rptr. 2d 243* (no statutory cause of action for failure to properly investigate claim)]. For further discussion of *Moradi-Shalal*, see *§ 308.25[2]*.

[2] Anti-Discrimination, Unfair Competition, and Anti-Trust Statutes

The business of insurance is subject to the laws of California applicable to any other business, including, but not limited to, the Unruh Civil Rights Act (*Civ. Code §§ 51-53*), and the antitrust and unfair business practices law (*Bus. & Prof. Code §§ 16600-17365* and *17500-17930*) [*Ins. Code § 1861.03(a)*]. However, although the laws affecting businesses are generally applicable to the insurance business, none of the following are prohibited [*Ins. Code § 1861.03(b)*]:

- Any agreement to collect, compile, and disseminate historical data on paid claims or reserves for

reported claims, provided the data is contemporaneously transmitted to the commissioner.

- Participation in any joint arrangement established by statute or the commissioner to assure availability of insurance.

- Any agent or broker, representing one or more insurers, obtaining from any insurer it represents information relative to the premium for any policy or risk to be underwritten by that insurer.

- Disclosure by any agent or broker to an insurer it represents of any quoted rate or charge offered by another insurer represented by that agent or broker for the purpose of negotiating a lower rate, charge, or term from the insurer to whom the disclosure is made.

- Any agents, brokers, or insurers from utilizing or participating with multiple insurers or reinsurers for underwriting a single risk or group of risks.

In *Manufacturers Life Ins. Co. v. Superior Court (1995) 10 Cal. 4th 257, 41 Cal. Rptr. 2d 220, 895 P.2d 56* , the California Supreme Court held that the Unfair Insurance Practices Act (*Ins. Code § 790 et seq.*) does not supersede or displace insurance-industry-related claims under the Cartwright Act (*Bus. & Prof. Code § 16720 et seq.*) and/or the Unfair Competition Act (*Bus. & Prof. Code § 17200 et seq.*). The Unfair Insurance Practices Act does not grant the insurance industry a general exemption from state antitrust and unfair business practices statutes. Rather, the rights and remedies available under those statutes are cumulative to the powers granted to the insurance commissioner to enjoin future unlawful actions and impose sanctions in the form of license and certificate suspension or revocation when a member of the industry violates any applicable statute, rule, or regulation [*Manufacturers Life Ins. Co. v. Superior Court (1995) 10 Cal. 4th 257, 263, 279-284, 41 Cal. Rptr. 2d 220, 895 P.2d 56]* .

The Unfair Insurance Practices Act does not create a private right of action for violation of its provisions, and a plaintiff may not "plead around" that limitation by casting a cause of action based on a violation of the Unfair Insurance Practices Act as one brought under the Unfair Competition Act. However, the Unfair Competition Act permits any person to sue for injunctive relief and restitution for conduct constituting unfair competition, defined as any "unlawful, unfair or fraudulent business act or practice" [*Manufacturers Life Ins. Co. v. Superior Court (1995) 10 Cal. 4th 257, 267-268, 41 Cal. Rptr. 2d 220, 895 P.2d 56* ; *see Bus. & Prof. Code §§ 17200, 17203, 17204*].

In *Manufacturers Life Ins. Co.*, a life insurance brokerage and consulting business that advised attorneys regarding settlement annuities brought suit against other insurers, competing insurance brokers, trade associations, and an officer of a competing broker, asserting causes of action for violation of the Cartwright Act, the Unfair Competition Act, and the Unfair Insurance Practices Act [*Manufacturers Life Ins. Co. v. Superior Court (1995) 10 Cal. 4th 257, 263-264, 41 Cal. Rptr. 2d 220, 895 P.2d 56]* . The California Supreme Court allowed the plaintiff to state a claim under the Cartwright Act. The Court held that this result did not compromise the rule of *Moradi-Shalal*. In *Moradi-Shalal* the Court did not hold that by identifying practices that are unlawful in the insurance industry, practices that violate the Cartwright Act, the legislature intended to bar Cartwright Act causes of action based on those practices. Remedies and penalties under the Unfair Competition Act are cumulative to other remedies and penalties [*Manufacturers Life Ins. Co. v. Superior Court (1995) 10 Cal. 4th 257, 284, 41 Cal. Rptr. 2d 220, 895 P.2d 56]* .

There is a conflict between California appellate courts regarding the application of *Moradi-Shalal* in barring particular claims under the Unfair Competition Law (UCL) [*see Zhang v. Superior Court (2009) 178 Cal. App. 4th 1081, 1084-1085, 100 Cal. Rptr. 3d 803 (4th Appellate District) , review granted, depublished, Zhang v. Superior Court (2010) 105 Cal. Rptr. 3d 886, 225 P.3d 1080, 2010 Cal. LEXIS 897 , contra Textron Fin. Corp. v. National Union Fire Ins. Co. (2004) 118 Cal. App. 4th 1061, 1070, 13 Cal. Rptr. 3d 586 (4th Appellate District)* ; *see also Bus. & Prof. Code § 17200 et seq.*].

In *Textron Fin. Corp. v. National Union Fire Ins. Co. (2004) 118 Cal. App. 4th 1061, 13 Cal. Rptr. 3d 586 (4th Appellate District, Division 3)* , the plaintiff, a secured party with respect to the vehicle involved, alleged that when the owner canceled coverage, the insurer failed to notify the plaintiff. The complaint alleged that the insurer did the following: (1) "used misleading documents to falsely suggest that it would provide insurance ... where it had no intention to do so"; (2) "falsely suggested that it would ... provid[e] timely notice of [policy] cancellations"; (3) "misrepresented the terms and meaning of its policies"; and (4) "engaged in a pattern and practice of wrongful and false cancellations of insurance policies" [*see Textron Fin. Corp. v. National Union Fire Ins. Co. (2004) 118 Cal. App. 4th 1061, 1070, 13 Cal. Rptr. 3d 586* ; *see also Zhang v. Superior Court (2009) 178 Cal. App. 4th 1081, 1086, 100 Cal. Rptr. 3d 803 , review granted, depublished, Zhang v. Superior Court (2010) 105 Cal. Rptr. 3d 886, 225 P.3d 1080, 2010 Cal. LEXIS 897*]. In upholding the trial court's ruling sustaining the defendant insurer's demurrer to the UCL cause of action, the appellate court in Textron Financial commented that the specific allegations of wrongful conduct contained in the cause of action for using misleading documents and misrepresenting both the terms of the insurance policies and its obligations under them for its own benefit, are the type of activities covered by the UCL [*see Textron Fin. Corp. v. National Union Fire Ins. Co. (2004) 118 Cal. App. 4th 1061, 1070, 13 Cal. Rptr. 3d 586* ; *see also Zhang v. Superior Court (2009) 178 Cal. App. 4th 1081, 1086-1087, 100 Cal. Rptr. 3d 803 , review granted, depublished, Zhang v. Superior Court (2010) 105 Cal. Rptr. 3d 886, 225 P.3d 1080, 2010 Cal. LEXIS 897*]. The court in *Textron Financial* relied on *Safeco Ins. Co. v. Superior Court (1990) 216 Cal. App. 3d 1491, 265 Cal. Rptr. 585* (2nd Appellate district, division 2), which rejected a third-party UCL claim based on the insurer's position during negotiations that its insured was not legally liable for a certain item of claimed damages. This claim was concededly covered by the description in *Ins. Code § 790.04(h)* of prohibited "unfair claims settlement practices" [*Safeco Ins. Co. v. Superior Court (1990) 216 Cal. App. 3d 1491, 1493-1494, 265 Cal. Rptr. 585* ; *see Zhang v. Superior Court (2009) 178 Cal. App. 4th 1081, 1087, 100 Cal. Rptr. 3d 803 , review granted, depublished, Zhang v. Superior Court (2010) 105 Cal. Rptr. 3d 886, 225 P.3d 1080, 2010 Cal. LEXIS 897*].

However, in *Zhang v. Superior Court (2009) 178 Cal. App. 4th 1081, 100 Cal. Rptr. 3d 803 (4th Appellate District) , review granted, depublished, Zhang v. Superior Court (2010) 105 Cal. Rptr. 3d 886, 225 P.3d 1080, 2010 Cal. LEXIS 897* , the appellate court disagreed in part with *Textron Financial*, which was decided by a different division of the Fourth Appellate District, in holding that *Moradi-Shalal* did not bar the claim under the UCL [*Zhang v. Superior Court (2009) 178 Cal. App. 4th 1081, 1084-1085, 100 Cal. Rptr. 3d 803 , review granted, depublished, Zhang v. Superior Court (2010) 105 Cal. Rptr. 3d 886, 225 P.3d 1080, 2010 Cal. LEXIS 897*]. In *Zhang v. Superior Court*, the insured brought an action against her insurer based on its handling of a first-party claim. The complaint alleged causes of action for: (1) breach of contract; (2) bad faith; and (3) violation of the UCL, which incorporated all the previous allegations. The third cause of action also alleged that the defendant "engaged in unfair, deceptive, untrue, and/or misleading advertising. ... [Defendant] promises its insureds that it will timely pay proper coverage in the event the insured suffers a covered loss. ... However ... [defendant] in fact has no intention of properly paying the true value of its insureds' covered claims. ... [Defendant] had and has no intention of honoring such advertised promises" [*see Zhang v. Superior Court (2009) 178 Cal. App. 4th 1081, 1084, 100 Cal. Rptr. 3d 803 , review granted, depublished, Zhang v. Superior Court (2010) 105 Cal. Rptr. 3d 886, 225 P.3d 1080, 2010 Cal. LEXIS 897*]. The defendant demurred to the third cause of action on the basis that the conduct alleged was prohibited by *Ins. Code § 790.03*, and the insured could not state a private cause of action pursuant to *Moradi-Shalal*. The trial court also relied on *Textron Financial* in sustaining the demurrer [*see Zhang v. Superior Court (2009) 178 Cal. App. 4th 1081, 1084-1085, 100 Cal. Rptr. 3d 803 , review granted, depublished, Zhang v. Superior Court (2010) 105 Cal. Rptr. 3d 886, 225 P.3d 1080, 2010 Cal. LEXIS 897*]. The court noted that in reviewing a ruling on demurrer, it is required to give a generous interpretation of the pleading in favor of stating a cause of action. Therefore, if any of the allegations would support a cause of action under the UCL, it is immaterial that some of them might not. For that reason, the court found it unnecessary to determine whether the plaintiff's allegations, found in other causes of action but incorporated into the UCL cause of action, relating to claim-handling procedures would alone permit suit under the UCL. The court considered it clear that the insured's claims of false advertising support the third cause of action [*Zhang v. Superior Court (2009) 178 Cal. App. 4th 1081, 1085, 100 Cal. Rptr. 3d 803 , review granted, depublished, Zhang v. Superior Court (2010) 105 Cal. Rptr. 3d 886, 225 P.3d 1080, 2010 Cal. LEXIS 897*].

The court in *Zhang v. Superior Court* noted that the California Supreme Court in *Moradi-Shalal*, among other things, held that the prohibitory provisions of *Ins. Code § 790.03* (part of the Unfair Insurance Practices Act) did not create a private right of action under the statute against insurers who commit the unfair practices enumerated in that provision. Although it was a third-party case, the principle was later extended to first-party suits in an appellate case [*see Zephyr Park v. Superior Court (1989) 213 Cal. App. 3d 833, 837-838, 262 Cal. Rptr. 106]* . The court noted that although neither case expressly references the UCL, they both stand for the accepted principle that a violation of *Ins. Code § 790.03* does not result in a private cause of action for unfair practices. To that extent, the court agreed that the insured would be unable to state a cause of action for tort damages based directly and solely on the insurer's alleged violations of that statute [*Zhang v. Superior Court (2009) 178 Cal. App. 4th 1081, 1085-1086, 100 Cal. Rptr. 3d 803 , review granted, depublished, Zhang v. Superior Court (2010) 105 Cal. Rptr. 3d 886, 225 P.3d 1080, 2010 Cal. LEXIS 897*]. The court noted that the UCL on its face applies to all businesses, and does not expressly except or exempt insurers. It also authorizes any injured person to sue for the violation of its requirements and/or prohibitions, that is, for unfair competition. Unfair competition is defined to include any unlawful, unfair, or fraudulent business act or practice, and unfair, deceptive, untrue, or misleading advertising [*Zhang v. Superior Court (2009) 178 Cal. App. 4th 1081, 1086, 100 Cal. Rptr. 3d 803 , review granted, depublished, Zhang v. Superior Court (2010) 105 Cal. Rptr. 3d 886, 225 P.3d 1080, 2010 Cal. LEXIS 897* ; *see Bus. & Prof. Code § 17200*].

The court in *Zhang v. Superior* Court stated that in *Safeco Ins. Co. v. Superior Court*, the insurer's alleged misconduct was arguably proscribed only by the Unfair Insurance Practices Act, and the result in that case was required by *Moradi-Shalal*. However, in *Textron Financial*, which relied on *Safeco Ins. Co. v. Superior Court*, and in the instant case, the plaintiffs alleged conduct that is not merely improper under the Unfair Insurance Practices Act [*see Zhang v. Superior Court (2009) 178 Cal. App. 4th 1081, 1087, 100 Cal. Rptr. 3d 803 , review granted, depublished, Zhang v. Superior Court (2010) 105 Cal. Rptr. 3d 886, 225 P.3d 1080, 2010 Cal. LEXIS 897*]. The California Supreme Court in *Moradi-Shalal* did not state that insurers who violate the Unfair Insurance Practices Act can never be liable in tort to the injured party, whether first party or third party. After explaining that enforcement of violations of *Ins. Code § 790.03* was vested solely in the insurance commissioner, the Court noted that courts retain jurisdiction to impose civil damages or other remedies against insurers in appropriate common-law actions, based on such traditional theories as fraud, infliction of emotional distress, and (as to the insured) either breach of contract or bad faith [*see Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal. 3d 287, 304-305, 250 Cal. Rptr. 116, 758 P.2d 58* ; *see also Zhang v. Superior Court (2009) 178 Cal. App. 4th 1081, 1087, 100 Cal. Rptr. 3d 803 , review granted, depublished, Zhang v. Superior Court (2010) 105 Cal. Rptr. 3d 886, 225 P.3d 1080, 2010 Cal. LEXIS 897*]. Moreover, in *Manufacturers Life Ins. Co.*, the California Supreme Court expressly eschewed the idea that the Unfair Insurance Practices Act was intended to displace existing rights and remedies for unlawful business practices in the insurance industry, among them the Cartwright Act (*Bus. & Prof. Code § 16720 et seq.*) and the UCL [*Manufacturers Life Ins. Co. v. Superior Court (1995) 10 Cal. 4th 257, 267, 41 Cal. Rptr. 2d 220]* . In *Manufacturers Life Ins. Co. v. Superior Court*, although the insurers attempted to persuade the court that they were in essence untouchable with respect to civil claims based on anticompetitive conduct, the Court rejected the argument that the Unfair Insurance Practices Act exempts insurance companies from other state antitrust laws or from civil liability for anticompetitive conduct. The Court also stated that the Unfair Insurance Practices Act does not reflect legislative intent to repeal the Cartwright Act insofar as it applies to the insurance industry; and the legislature has stated its intent that the remedies and penalties under the UCL are cumulative to other remedies and penalties [*Manufacturers Life Ins. Co. v. Superior Court (1995) 10 Cal. 4th 257, 279, 284, 41 Cal. Rptr. 2d 220* ; *see Zhang v. Superior Court (2009) 178 Cal. App. 4th 1081, 1088, 100 Cal. Rptr. 3d 803 , review granted, depublished, Zhang v. Superior Court (2010) 105 Cal. Rptr. 3d 886, 225 P.3d 1080, 2010 Cal. LEXIS 897*]. Pursuant to *Manufacturers Life Ins. Co.*, the court in *Zhang v. Superior Court* stated it found no reason to treat insurers differently from other businesses with respect to actions under the UCL except as required by *Moradi-Shalal*. If a plaintiff relies on conduct that violates the Unfair Insurance Practices Act but is not otherwise prohibited, *Moradi-Shalal* requires that a civil action under the UCL be considered barred. In the instant case, the insured's specific additional allegations made part of the UCL cause of action were that the insurer made fraudulent misrepresentations and promulgated misleading advertising with respect to its intentions to "pay proper coverage in the

event the insured suffers a covered loss" [*see Zhang v. Superior Court (2009) 178 Cal. App. 4th 1081, 1088, 100 Cal. Rptr. 3d 803 , review granted, depublished, Zhang v. Superior Court (2010) 105 Cal. Rptr. 3d 886, 225 P.3d 1080, 2010 Cal. LEXIS 897*]. The court noted that false advertising is a recognized basis for suit under the UCL both expressly as provided by statute and in case law. It found no reason why an insurance company should not be subject to similar liability under the UCL if false advertising or similar misrepresentations can be proved [*Zhang v. Superior Court (2009) 178 Cal. App. 4th 1081, 1089, 100 Cal. Rptr. 3d 803 , review granted, depublished, Zhang v. Superior Court (2010) 105 Cal. Rptr. 3d 886, 225 P.3d 1080, 2010 Cal. LEXIS 897* ; *see Progressive West Ins. Co. v. Superior Court (2005) 135 Cal. App. 4th 263, 37 Cal. Rptr. 3d 434* (3rd Appellate District; while not deciding whether conduct was "unfair," holding that plaintiff can maintain UCL claim against insurer with respect to fraudulent conduct)].

The court in *Zhang v. Superior Court* held that at the very least, the insured's allegations in the third cause of action, that the insurer solicited her business through false advertising and false promises, justifies a claim under the UCL. The court clarified that it did not hold that the insured can recover under this cause of action if she proves only that the insurer behaved unreasonably in handling her claim. She will also have to establish that the insurer advertised or otherwise represented to the public that it operated honestly and equitably in settling claims, and that it had a policy or regular practice of "lowballing," delaying, or taking unfair advantage, so that its advertising and/or representations were likely to mislead the public [*Zhang v. Superior Court (2009) 178 Cal. App. 4th 1081, 1090, 100 Cal. Rptr. 3d 803 , review granted, depublished, Zhang v. Superior Court (2010) 105 Cal. Rptr. 3d 886, 225 P.3d 1080, 2010 Cal. LEXIS 897*].

In *Triplett v. Farmers Ins. Exch. (1994) 24 Cal. App. 4th 1415, 29 Cal. Rptr. 2d 741* , after trial a plaintiff attempted to add the defendant's insurer under *Code Civ. Proc. § 187* to obtain sanctions under *Code Civ. Proc. § 128.5*, based on allegations that the insurer insisted on a jury trial and unreasonably failed to settle the case [*Triplett v. Farmers Ins. Exch. (1994) 24 Cal. App. 4th 1415, 29 Cal. Rptr. 2d 741]* . The court stated that the insurer is not the alter ego of the insured for purposes of *Code Civ. Proc. § 187*, even if the insurer did exert some practical control over the defense of the case [*Triplett v. Farmers Ins. Exch. (1994) 24 Cal. App. 4th 1415, 1421, 29 Cal. Rptr. 2d 741]* . The court further stated that the decision to insist on the right to a jury trial rather than settle a case is not sanctionable under *Code Civ. Proc. § 128.5*, even if the trial court had concluded that the failure to settle was motivated by ulterior and improper purposes; a defendant always has the right to take a case to trial [*Triplett v. Farmers Ins. Exch. (1994) 24 Cal. App. 4th 1415, 1422, 29 Cal. Rptr. 2d 741]* . Finally, the court pointed out that a third party may not use sanctions under *Code Civ. Proc. § 128.5* to get around the holding in *Moradi Shalal* [*Triplett v. Farmers Ins. Exch. (1994) 24 Cal. App. 4th 1415, 1424, 29 Cal. Rptr. 2d 741]* . For discussion, see California Insurance Law and Practice, Ch. 13 (Matthew Bender).

For discussion and forms regarding the Unruh Civil Rights Act, see Ch. 116, *Civil Rights: Discrimination in Business Establishments* . For discussion and forms regarding unfair business practices under *Bus. & Prof. Code §§ 17000-17208*, see *Ch. 565, Unfair Competition, § 565.10* et seq. For discussion and forms regarding antitrust provisions under *Bus. & Prof. Code §§ 16700-16770*, see *Ch. 565, Unfair Competition, § 565.70* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationGeneral OverviewInsurance LawIndustry RegulationUnfair Business PracticesDiscriminationInsurance LawIndustry RegulationUnfair Business PracticesUnfair Trade Practices Acts

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26-308 California Forms of Pleading and Practice--Annotated § 308.26

§ 308.26 Action for Conspiracy to Commit Bad Faith

An action for civil conspiracy cannot be stated against noninsurers with respect to bad faith conduct unless the defendant owes an independent duty to the insured [*Doctors' Co. v. Superior Court (1989) 49 Cal. 3d 39, 47, 260 Cal. Rptr. 183, 775 P.2d 508]* . For example, if an attorney, hired by an insurer to represent the insured, wrongfully derogates the insured's collateral rights against the third party, he or she may incur liability for civil conspiracy, along with the insurer, for breach of the duty of good faith and fair dealing with regard to the insurance policy [*Barney v. Aetna Cas. & Sur. Co. (1986) 185 Cal. App. 3d 966, 981-982, 230 Cal. Rptr. 215* (attorney wrongfully dismissed action with knowledge that insured intended to pursue collateral rights); *see also Ivy v. Pacific Auto. Ins. Co. (1958) 156 Cal. App. 2d 652, 663, 320 P.2d 140* (attorneys' conduct in arranging settlement violated attorneys' own fiduciary duty to insured plaintiff)]. However, an agent or employee of an insurer, acting solely in a representative capacity, is not subject to liability for civil conspiracy to violate *Ins. Code § 790.03* [*Doctors' Co. v. Superior Court (1989) 49 Cal. 3d 39, 44-45, 260 Cal. Rptr. 183, 775 P.2d 508* ; *see § 308.25[1]*].

Similarly, with respect to the insured's duty of good faith and fair dealing, an insurer does not establish a cause of action for conspiracy to commit bad faith against the agents of the insured based on alleged acts that were solely within their capacity as agents [*Cooper v. Equity Gen. Ins. (1990) 219 Cal. App. 3d 1252, 1261, 268 Cal. Rptr. 692]* . An insurer is also unable to state a cause of action for conspiracy to commit bad faith against the insured's attorney, based on the attorney's breach of fiduciary duty, when that duty is owed not to the insurer, but rather to the insured [*Cooper v. Equity Gen. Ins. (1990) 219 Cal. App. 3d 1252, 1261-1262, 268 Cal. Rptr. 692]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewTortsProcedureMultiple DefendantsConcerted ActionCivil ConspiracyElements

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[Reserved]

§§ 308.27[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.40

§ 308.40 "Life Insurance" Defined

"Life insurance" is a class of insurance [*Ins. Code § 100(1)*] and is defined as including insurance on the lives of persons or appertaining thereto, and the granting, purchasing, or disposing of annuities [*Ins. Code § 101*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawLife InsuranceGeneral Overview

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26-308 California Forms of Pleading and Practice--Annotated § 308.41

§ 308.41 Insurable Interest

Every person has an insurable interest in himself or herself, in any person on whom he or she depends wholly or in part for education or support, in any person under a legal obligation to him or her for the payment of money or respecting property or services of which death or illness might delay or prevent the performance, and in any person on whose life any estate or interest vested in him or her depends [*Ins. Code § 10110*]. An interest in the life or health of a person insured must exist when the insurance takes effect but need not exist thereafter or when the loss occurs [*Ins. Code § 286*]. If the insured has no insurable interest, the contract is void [*Ins. Code § 280*].

A person may not obtain an insurance policy on the life of another in whom he or she has no insurable interest. However, a person has an insurable interest in his or her own life [*Ins. Code § 10110*], and he or she may therefore insure his or her own life and make the proceeds of the policy payable to his or her estate or to any other person. In this situation, the question as to whether or not the named beneficiary has an insurable interest in the life of the insured is immaterial [*Boyer v. United States Fid. & Guar. Co. (1929) 206 Cal. 273, 279, 274 P. 57* ; *Comegys v. National Union Assurance Soc'y (1935) 3 Cal. App. 2d 637, 639-640, 39 P.2d 861]* .

An insured may also assign his or her policy to a person with no insurable interest. That is, a life policy may pass by transfer, will, or succession to any person, whether or not the transferee has an insurable interest, and the transferee may recover on the policy [*Ins. Code § 10130*; *see Ins. Code §§ 10129, 10129.5*]. Notice of the transfer need not be given to the insurer to preserve the validity of the policy unless expressly required by the policy [*Ins. Code § 10131*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawLife InsuranceAssignments & TransfersInsurance LawLife InsuranceInsurable InterestsGeneral OverviewInsurance LawLife InsuranceInsurable InterestsInsured Persons

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26-308 California Forms of Pleading and Practice--Annotated § 308.42

§ 308.42 Insurance Takes Effect When Insured Signs Application and Pays First Premium or Receives Receipt

Ins. Code § 10115 provides the following:

> "When a payment is made equal to the full first premium at the time an application for life insurance other than group life insurance is signed by the applicant and either (1) the applicant received at that time a receipt for said payment on a form prepared by the insurer, or (2) in the absence of such a receipt the insurer receives the said payment at its home office ... and in either case the insurer, pursuant to its regular underwriting practices and standards, approves the application for the issuance by it of a policy of life insurance on the plan and for the class of risk and amount of insurance applied for, and the person to be insured dies on or after the date of the application, on or after the date of the medical examination, if any, or on or after any date specially requested in the application for the policy to take effect, whichever is later, but before such policy is issued and delivered, the insurer shall pay such amount as would have been due under the terms of the policy in the same manner and subject to the same rights, conditions and defenses as if such policy had been issued and delivered on the date the application was signed by the applicant."

This language means that if a prospective insured makes a first premium payment concurrently with submitting an insurance application, if either the prospective insured receives a form receipt for the premium or the insurer receives the payment at its home office, if the insurer approves the application for the class of risk and amount applied for, and if the prospective insured dies on or after the date of the application, the insurer must pay the amount that would have been due under the terms of the policy as if the policy had been issued and delivered on the date that the prospective insured signed the application [*Hodgson v. Banner Life Ins. Co. (2004) 124 Cal. App. 4th 1358, 1372, 21 Cal. Rptr. 3d 907]* .

Consequently, in a case in which a life insurance policy applicant paid an initial premium and set up automatic payments for future premiums after receiving a conditional receipt, the insurance became effective despite the insured's

death prior to the full processing of "permanent coverage," and despite the insurer's having returned the check because the policy amount was too high for a conditional receipt under new guidelines not printed on the application. The premium check was received at the insurer's home office, and the application was processed and ultimately approved essentially for the coverage requested by the insured. *Ins. Code § 10115* prevailed despite policy language stating that the insurance does not take effect until the full first premium is paid and the policy is delivered to the owner while the insured is living and his or her health remains as described in the application [*Hodgson v. Banner Life Ins. Co. (2004) 124 Cal. App. 4th 1358, 1371-1373, 21 Cal. Rptr. 3d 907]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsContract FormationGeneral OverviewInsurance LawClaims & ContractsPremiumsGeneral OverviewInsurance LawLife InsuranceGeneral Overview

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26-308 California Forms of Pleading and Practice--Annotated § 308.43

§ 308.43 Incontestability Clause

Every group and individual life insurance policy issued in California must provide that the validity of the policy is incontestable after the policy has been in effect, during the lifetime of the insured, for a period of two years from its date of issue [*Ins. Code §§ 10113.5* (individual life insurance), 10206 (group life insurance)]. After this period has elapsed, the incontestability clause precludes the insurer from asserting defenses based on the insured's fraud or misrepresentation, including the insured's misrepresentation about his or her health in applying for the insurance [*Amex Life Assurance Co. v. Superior Court (1997) 14 Cal. 4th 1231, 1236-1238, 930 P.2d 1264]* .

An individual life insurance policy, on reinstatement, may be contested on account of fraud or misrepresentation of facts material to the reinstatement only for the same period following reinstatement, and with the same conditions and exceptions, as the policy provides with respect to contestability after original issuance. [*Ins. Code § 10113.5*].

Incontestability clauses do not apply to nonpayment of premiums and, in the case of individual policies, to supplemental benefits described in *Ins. Code § 10271*, to the extent that the policy or a contract supplemental to the policy provides for the contestability of such benefits. Nor do they preclude the assertion of defenses based on policy provisions that exclude or restrict coverage [*Ins. Code §§ 10113.5, 10206*]. In addition, individual insurance policies delivered or issued for delivery prior to January1, 1974, are not required to contain incontestability provisions [*Ins. Code § 10113.5*].

Some cases from outside California have permitted the insurer to contest a claim despite the incontestability clause when an impostor claimed to be the named insured. The California Supreme Court has held that after the contestability period has expired, an insurer may not assert the defense that an impostor took the medical exam if the named insured personally applied for insurance. However, the court left open the possibility that the impostor defense could be recognized if the impostor both applied for the insurance and took the medical exam, using someone else's name [*Amex Life Assurance Co. v. Superior Court (1997) 14 Cal. 4th 1231, 1239-1246, 930 P.2d 1264]* .

Legal Topics:

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

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§ 308.44 Measure of Liability; Payment of Insurance

The only measure of liability and damage under the policy is the sum or sums payable in the manner and at the times as provided in the policy to the person entitled to them [*Ins. Code § 10111*]. On when life insurance may be made payable, see *Ins. Code § 10170*. On the requirement that insurance payable on death be paid within 30 days after the date of death if the person died after January 1, 1976, if the insurer is to avoid paying interest on the proceeds, see *Ins. Code § 10172.5*. On payment by the insurer as discharging it from claims under the policy, see *Ins. Code § 10172* and *Leonard v. Occidental Life Ins. Co. (1973) 31 Cal. App. 3d 117, 120-124, 106 Cal. Rptr. 899* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawLife InsuranceGeneral Overview

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§ 308.45 Death Caused by Beneficiary

A person who feloniously and intentionally kills the decedent is broadly precluded from recovering any money or property that he or she would otherwise be entitled to on the death of the decedent [*see generally Prob. Code § 250 et seq.*]. Statutory law expressly provides that a named beneficiary of a bond, life insurance policy, or other contractual arrangement who feloniously and intentionally kills the principal obligee or the person on whose life the policy is issued is not entitled to any benefit under the bond, policy, or other contractual arrangement, and it becomes payable as though the killer had predeceased the decedent [*Prob. Code § 252*; *see Nationwide Life Ins. Co. v. Richards (9th Cir. 2008) 541 F.3d 903, 905 n.1* ; *In re Peterson (2007) 156 Cal. App. 4th 676, 679, 67 Cal. Rptr. 3d 584]* . Another statute provides that, in any case not described in *Prob. Code §§ 250-252* in which a person feloniously and intentionally kills another, any acquisition of property, interest, or benefit by the killer as a result of the killing is to be treated in accordance with the principles of *Prob. Code § 250 et seq.* [*Prob. Code § 253*].

A final judgment of conviction of felonious and intentional killing is conclusive for purposes of *Prob. Code § 250 et seq.* [*Prob. Code § 254(a)*]. In the absence of a final judgment of conviction of felonious and intentional killing, the court may determine by a preponderance of evidence whether the killing was felonious and intentional. The burden of proof is on the party seeking to establish that the killing was felonious and intentional for the purposes of *Prob. Code § 250 et seq.* [*Prob. Code § 254(b)*].

In one case, the insurer brought an interpleader action under *Code Civ. Proc. § 386* in a civil suit between the beneficiary of the policy, who was the husband convicted of the decedent's murder, and the administrator of the decedent's estate. The insurer asked for an order discharging it from any liability to the beneficiary or to the administrator, and directing both parties to litigate between themselves their claims to the life insurance proceeds. The court dismissed the insurer after it deposited the proceeds with the court clerk and the parties stipulated to litigate the matter. The trial court took judicial notice of court documents evidencing the beneficiary's conviction for the first-degree murder of the decedent. The beneficiary's attorney submitted a declaration that the conviction was on appeal; the court nevertheless granted the administrator's motion for summary judgment. The appellate court held that

the administrator met her burden under *Prob. Code § 252(b)* to show that the beneficiary feloniously and intentionally killed the decedent. Although the phrase "final judgment of conviction" in *Prob. Code § 254* does not include a judgment that is on appeal, the nonfinal judgment of first-degree murder, not rebutted by any evidence that appellant did not feloniously and intentionally murder his wife, constitutes sufficient evidence to warrant the granting of the administrator's summary judgment motion under *Prob. Code § 254(b)* [*In re Peterson (2007) 156 Cal. App. 4th 676, 685-687, 67 Cal. Rptr. 3d 584*].

Under the former statutory rule that made a conviction or an acquittal a conclusive determination of the unlawfulness or lawfulness of the killing [*see* former *Prob. Code § 258* (repealed in 1983)], an appellate court held that a judgment committing a defendant to a state hospital after a finding of insanity was an acquittal for the purposes of that statute, even though the person seeking to inherit was found guilty of the crime by the jury [*see* *Estate of Ladd (1979) 91 Cal. App. 3d 219, 225-226, 153 Cal. Rptr. 888* (jury's verdict of guilty, entered before determination of sanity, is not conviction)]. The court discussed the legislative intent underlying the former statute, that termination of inheritance rights should be based on a degree of culpability not present in one who, owing to mental incapacity, is not held criminally responsible for his or her conduct [*see* *Estate of Ladd (1979) 91 Cal. App. 3d 219, 225-227, 153 Cal. Rptr. 888]* . A similar argument should support a contention that a killing by a person found not guilty by reason of insanity is not felonious and intentional for the purposes of *Prob. Code § 254(b)*.

In the event of an intentional killing of the insured by the primary beneficiary, the contingent beneficiaries become entitled to the insurance proceeds. If there are no contingent beneficiaries, the proceeds are payable to and become a part of the murdered insured's estate and may be recovered by his or her heirs (excluding the killer) [*Estate of McGowan (1973) 35 Cal. App. 3d 611, 615, 111 Cal. Rptr. 39* (decided under former *Prob. Code § 258*); *see also* *Beck v. West Coast Life Ins. Co. (1952) 38 Cal. 2d 643, 645, 241 P.2d 544* ; *Mize v. Reserve Life Ins. Co. (1975) 48 Cal. App. 3d 487, 491 n.2, 121 Cal. Rptr. 848]* . This would be true even apart from *Prob. Code § 250 et seq.*, because public policy does not allow a beneficiary who murders or unlawfully kills the insured to recover under the policy [*Drown v. New Amsterdam Cas. Co. (1917) 175 Cal. 21, 23, 165 P. 5* ; *Estate of McGowan (1973) 35 Cal. App. 3d 611, 615, 111 Cal. Rptr. 39]* .

If a spouse is the named beneficiary of a policy on the life of the other spouse and deliberately and without justification kills the latter, the community property interestof the killer-spouse in the policy proceeds is limited to one half of the cash-surrender value, if any, immediately before commission of the wrongful act. It does not include the death benefit that is otherwise payable to the spouse, to the extent that it is greater than the cash-surrender value [*Aetna Life Ins. Co. v. Primofiore (1978) 80 Cal. App. 3d 920, 924-926, 145 Cal. Rptr. 922* (decided under former *Prob. Code § 258* (*now see Prob. Code § 250(a)*))].

An insurance company, financial institution, or other obligor making payment according to the terms of its policy or obligation is not liable by reason of *Prob.Code § 250 et seq.* unless, prior to payment, it has received at its home office or prinicipal address written notice of a claim under *Prob. Code § 250 et seq.* [*Prob. Code § 256*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawLife InsuranceExclusionsSlayer's Rule

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[Reserved]

§§ 308.46[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.50

§ 308.50 "Disability Insurance" Defined

"Disability insurance" is a class of insurance [*Ins. Code § 100(6)*] and is defined as including insurance appertaining to injury, disablement, or death resulting to the insured from accidents and appertaining to disablements resulting to the insured from sickness [*Ins. Code § 106(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawDisability InsuranceGeneral Overview

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26-308 California Forms of Pleading and Practice--Annotated § 308.51

§ 308.51 Disability and Life Insurance Compared

Disability insurance is classifed by the Insurance Code as different from life insurance [*see Ins. Code § 100(1), (6)*], since risks assumed by one type of policy will not be covered by another. There are, however, situations where disability insurance includes the risk of the insured's death in the coverage [*see Ins. Code § 10174*], but that coverage comes into operation only if the insured dies from injuries resulting from an accident.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawDisability InsuranceGeneral OverviewInsurance LawLife InsuranceGeneral Overview

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26-308 California Forms of Pleading and Practice--Annotated § 308.52

§ 308.52 Occupational and Nonoccupational Policies Compared

An "occupational policy" or an "own occupation" policy indemnifies the insured if the insured becomes disabled from performing the material acts necessary to his or her chosen profession. By contrast, a general disability policy, otherwise known as a "nonoccupational" or "any occupation" policy, indemnifies the insured if the insured becomes incapable of following any occupation for profit [*see Gross v. Unumprovident Life Ins. Co. (C.D. Cal. 2004) 319 F. Supp. 2d 1129, 1132-1133]* .

To determine coverage under "occupational" policies, a court must first analyze the policy language with respect to key terms such as "disability," "partial disability," and "residual disability," as well as the definition of the insured's occupation [*see Gross v. Unumprovident Life Ins. Co. (C.D. Cal. 2004) 319 F. Supp. 2d 1129, 1132-1136]* . With respect to the insured's occupation, some courts focus on the substantial and material duties of a typical person pursuing the profession in which the insured was engaged at the time of disability, while other courts take a more functional approach, examining the insured's actual occupational experience [*see Gross v. Unumprovident Life Ins. Co. (C.D. Cal. 2004) 319 F. Supp. 2d 1129, 1146]* .

Essentially, the question is whether the insured continues to work in his or her pre-disability occupation, albeit in a limited fashion, or whether the insured is essentially performing a different occupation altogether, although using some of the skills the insured acquired in that occupation. In making this determination, it is irrelevant whether the insured is able to earn a more substantial living post-disability than the insured earned pre-disability. Because occupational disability policies are designed to indemnify against loss of capacity to work, not against loss of income, the fact that the insured derives a larger income from a new occupation will not bar recovery under the disability policy. However, the insured's post-disability income is relevant to the question of whether a given occupational duty is important [*see Gross v. Unumprovident Life Ins. Co. (C.D. Cal. 2004) 319 F. Supp. 2d 1129, 1153-1159* (occupational policy covering orthopedic surgeon)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawDisability InsuranceGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceDisability BenefitsCoverage & DefinitionsGeneral Overview

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26-308 California Forms of Pleading and Practice--Annotated § 308.53

§ 308.53 Incontestability Clauses

Every disability policy issued in California must contain an incontestability clause, which much conform with either of two statutorily prescribed forms [*Ins. Code § 10350.2*]. The insurer may choose which of the forms to include in the policy. The first form provides that after two years from the date the policy is issued, the insurer may not void the policy or deny a claim for loss incurred or disability on the basis of a misstatement made in the application, unless the misstatement is fraudulent. Under the second provision, the contract becomes incontestable after two years as to any statement contained in the application, regardless of whether it is fraudulent. However, under the second provision, the two-year contestability period is tolled during any period during which the insured is disabled [*Ins. Code § 10350.2*]. Only a disability that falls within the policy coverage tolls the contestability period; an undisclosed pre-existing condition that does not fall within the policy coverage does not toll the period [*John Hancock Mut. Life Ins. Co. v. Greer (1998) 60 Cal. App. 4th 877, 71 Cal. Rptr. 2d 48]* .

Disability coverage offered by the Department of Veterans Affairs of the State of California under a Cal-Vet program is not a form of insurance subject to the Insurance Code. Therefore, these disability policies are not required to include an incontestability clause [*Sweatman v. Department of Veterans Affairs (2001) 25 Cal. 4th 62, 68-74, 104 Cal. Rptr. 2d 602, 18 P.3d 29]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsIncontestabilityDisability & Health Insurance PoliciesMilitary & Veterans LawVeteransBenefitsDisability Benefits

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26-308 California Forms of Pleading and Practice--Annotated § 308.54

§ 308.54 Arbitration Clauses

The United States Arbitration Act (*9 U.S.C.S. § 1, et seq.*) creates a presumption in favor of arbitrability [*Engalla v. Permanente Med. Group, Inc. (1997) 15 Cal. 4th 951, 971, 64 Cal. Rptr. 2d 843, 938 P.2d 903* ; *see 9 U.S.C.S. § 2*] and permits courts to refuse to enforce agreements to arbitrate only on "such groundsas exist at law or in equity for the revocation of any contract" [*9 U.S.C.S. § 2*; *see* Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*]. Similarly, *Code Civ. Proc. § 1280, et seq.* expresses a strong public policy favoring the enforcement of valid agreements to arbitrate [*Boghos v. Certain Underwriters at Lloyd's of London (2005) 36 Cal. 4th 495, 502, 30 Cal. Rptr. 3d 787, 115 P.3d 68* ; *Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 9, 10 Cal. Rptr. 2d 183, 832 P.2d 899]* .

The California Supreme Court has upheld a binding arbitration clause in an individual disability insurance policy, despite assertedly contrary language in the Certificate of Insurance [*Boghos v. Certain Underwriters at Lloyd's of London (2005) 36 Cal. 4th 495, 503-509, 30 Cal. Rptr. 3d 787, 115 P.3d 68]* .

In this case, the arbitration clause read as follows [*see Boghos v. Certain Underwriters at Lloyd's of London (2005) 36 Cal. 4th 495, 500, 30 Cal. Rptr. 3d 787, 115 P.3d 68]* :

> "BINDING ARBITRATION: Not withstanding [sic] any other item setforth [sic] herein, the parties hereby agree that any dispute which arises shall be settled in Binding Arbitration. By agreeing to Binding Arbitration, all parties acknowledge and agree that they waive their right to a trial by jury. Binding Arbitration will be held before a neutral arbitrator who will be agreed to by all parties. If the parties cannot agree as to the arbitrator, or believe that a single arbitrator cannot adequately settle the dispute, then an arbitration panel made up of three arbitrators shall be formed. One arbitrator shall be appointed by Us. The second arbitrator shall be appointed by You. The third arbitrator shall be agreed by the two appointed arbitrators. The venue shall be in Los Angeles County or at another location if agreed by all parties. The arbitration will be governed by the commercial arbitration rules of the American Arbitration

Association. Costs for the arbitration shall be equally split among the parties."

The "service of suit" clause in the Certificate of Insurance read as follows [*see Boghos v. Certain Underwriters at Lloyd's of London (2005) 36 Cal. 4th 495, 500, 30 Cal. Rptr. 3d 787, 115 P.3d 68]* :

> "In the event of the failure of Underwriters to pay any amount claimed to be due under the insurance described herein, Underwriters have agreed that, at the request of Assured (or Reinsured) they will submit to the jurisdiction of a court of competent jurisdiction within the United States. Nothing in this clause constitutes or should be understood to constitute a waiver of Underwriters' rights to commence an action in any court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States. In any suit instituted against any one of them upon the insurance described herein, Underwriters have agreed to abide by the final decision of such Court or of any Appellate Court in the event of an appeal."

When the insured sued the insurer for contract breach and related torts, based on a benefits dispute, the insurer moved to compel arbitration on all claims, pursuant to the arbitration clause of the policy. The trial court and court of appeal found that the "service of suit" and arbitration provisions conflicted, creating ambiguity and requiring interpretation in favor of the insured and against compelled arbitration [*Boghos v. Certain Underwriters at Lloyd's of London (2005) 36 Cal. 4th 495, 508, 30 Cal. Rptr. 3d 787, 115 P.3d 68]* . However, the California Supreme Court disagreed. In a typical "service of suit" clause, one or more parties agree to submit to the jurisdiction of courts for designated purposes related to the contract in which the clause appears. In this case, the insurer agreed, "[i]n the event of [its] failure ... to pay any amount claimed to be due under the [policy]," and "at the request of Assured," to "submit to the jurisdiction of a court of competent jurisdiction within the United States" [*see Boghos v. Certain Underwriters at Lloyd's of London (2005) 36 Cal. 4th 495, 502, 30 Cal. Rptr. 3d 787, 115 P.3d 68]* . The policy also included language establishing priority as between the arbitration (or appraisal) clause and the service of suit clause. The first sentence of the arbitration clause expressly declares (after corrected spelling) that, "Notwithstanding any other item set forth herein, the parties hereby agree that any dispute which arises shall be settled in Binding Arbitration." The phrase "[n]otwithstanding any other item" clearly indicates the parties intended the arbitration clause to apply according to its terms and for all disputes to be settled in binding arbitration, even if other provisions, read in isolation, might seem to require a different result. No ambiguity therefore existed [*Boghos v. Certain Underwriters at Lloyd's of London (2005) 36 Cal. 4th 495, 503, 30 Cal. Rptr. 3d 787, 115 P.3d 68* (leaving for remand determination whether clause in arbitration provision requiring insured to share costs of arbitration and arbitrator's fees is enforceable)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsInsurance LawClaims & ContractsArbitration

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[Reserved]

§§ 308.55[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.60

§ 308.60 Governing Law

The various classes of insurance are listed in *Ins. Code § 100* and defined in *Ins. Code §§ 101-120*. The classes insuring an interest in property include: fire [*Ins. Code §§ 100(2), 102*]; marine [*Ins. Code §§ 100(3), 103*]; title [*Ins. Code §§ 100(4), 104*; *see* Ch. 548, *Title Insurance*]; boiler and machinery [*Ins. Code §§ 100(11), 111*]; burglary [*Ins. Code §§ 100(12), 112*]; sprinkler [*Ins. Code §§ 100(14), 114*]; automobile [*Ins. Code §§ 100(16), 116*]; aircraft [*Ins. Code §§ 100(18), 118*]; and miscellaneous [*Ins. Code §§ 100(20), 120*].

For a discussion of the requirement that the insured have an insurable interest in property and the effect of a change of interest in the property on the insurable interest, see *§ 308.10* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceGeneral OverviewInsurance LawProperty InsuranceInsurable Interests

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26-308 California Forms of Pleading and Practice--Annotated §§ 308.61-308.69

[Reserved]

§§ 308.61[Reserved]

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II. Fire Insurance

26-308 California Forms of Pleading and Practice--Annotated § 308.70

§ 308.70 "Fire Insurance" Defined

Fire insurance is a class of insurance [*Ins. Code § 100(2)*] and includes:

- Insurance against loss by fire, lightning, windstorm, tornado, or earthquake [*Ins. Code § 102(a)*].

- Insurance against loss or destruction of or damage to any of the following-described property when such insurance includes loss of it by fire and excludes coverage of property while it is in the custody or possession of or being transported by any carrier for hire or in the mail:

- Accounts, books, maps, manuscripts, indexes and other valuable papers, documents, and records incidental to the business or profession or activity in which the insured is engaged, resulting from any cause, but excluding any article constituting stock in trade or used as a sample or sold or held for sale.

- Moneys, stamps, coins, bullion, securities, notes, drafts, acceptances, or instruments of like kind or character, resulting from any cause, except:

    - Forgery; or

    - Any dishonest, fraudulent, or criminal act of any officer, employee, partner, director, trustee, or authorized representative of the insured [*Ins. Code § 102(b)*].

- Insurance by means of an all-risk policy of the type commonly known as the "Personal Property Floater" against any and all kinds of loss of or damage to, or loss of use of, any personal property other than merchandise [*Ins. Code § 102(c)*].

An insurance policy that insures against loss by windstorms, tornadoes, or earthquakes is not a fire insurance policy

unless it also insures against loss by fire and lightning. Otherwise, it is classified as miscellaneous insurance [*Unetco Indus. Exch. v. Homestead Ins. Co. (1997) 57 Cal. App. 4th 1459, 1466-1467, 67 Cal. Rptr. 2d 784* ; *see Ins. Code §§ 100(20)* (definition of miscellaneous insurance), 2071 (mandatory provisions of fire insurance policy)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceCoverageHurricanes & TornadoesInsurance LawProperty InsuranceCoverageReal PropertyFire Insurance

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26-308 California Forms of Pleading and Practice--Annotated § 308.71

§ 308.71 Standard Policy

Fire policies on subject matter in California must be on the standard form prescribed by *Ins. Code § 2071* [*Ins. Code § 2070*], but this requirement does not apply to insurance written pursuant to the provisions of *Ins. Code § 102(b)* or *(c)* [*Ins. Code § 102*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceCoverageReal PropertyFire Insurance

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26-308 California Forms of Pleading and Practice--Annotated §§ 308.72-308.79

[Reserved]

§§ 308.72[Reserved]

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III. Burglary and Theft Insurance

26-308 California Forms of Pleading and Practice--Annotated § 308.80

§ 308.80 "Burglary Insurance" Defined

Burglary insurance is a class of insurance [*Ins. Code § 100(12)*] and includes [*Ins. Code § 112*]:

- Insurance against loss by burglary or theft or both.

- Insurance against loss or destruction of or damage to any of the following-described property, resulting from any cause, when such insurance includes loss of it by burglary or theft or both, and excludes coverage of property while in the custody or possession of, or being transported by, any carrier for hire or in the mail: moneys, stamps, coins, bullion, securities, notes, drafts, acceptances or instruments of like kind or character, accounts, books, maps, manuscripts, indexes, and other valuable papers, documents, and records incidental to the business or profession or activity in which the insured is engaged.

- Insurance by means of an all-risk policy of the type commonly known as the "Personal Property Floater" against any and all kinds of loss of or damage to, or loss of use of, any personal property other than merchandise.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceCoverageRisk of Crime

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[Reserved]

§§ 308.81[Reserved]

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IV. Comprehensive Dwelling Insurance

26-308 California Forms of Pleading and Practice--Annotated § 308.90

§ 308.90 "Comprehensive Dwelling Insurance" Defined

Comprehensive dwelling insurance usually comprises a standard form fire insurance policy with extended coverage endorsements that cover many of the risks excepted in the fire policy such as windstorm, hail, explosion, riot, riot attending a strike, civil commotion, aircraft, vehicles, smoke, and frequently, a burglary policy. Personal liability and personal property floaters are attached so as to give the insured blanket protection in one "package."

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceCoverageGeneral OverviewInsurance LawProperty InsuranceCoverageReal PropertyFire Insurance

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[Reserved]

§§ 308.91[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.100

§ 308.100 "Surety Insurance" Defined

Surety insurance is a class of insurance [*Ins. Code § 100(5)*]. It includes the following [*Ins. Code § 105*]:

- The guaranteeing of behavior of persons and the guaranteeing of performance of contracts (including executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law allowed), other than insurance policies and other than for payments secured by a mortgage, deed of trust, or other instrument constituting a lien or charge on real estate.

- Insurance against loss resulting from the forgery or alteration of any instrument of any kind or character or of any signature thereon. Nothing in *Ins. Code § 105* limits any of the powers of title insurers.

- Any of the following insurance when included as part of a contract containing any such guarantee of behavior or performance or in a contract indemnifying any bank, banker, broker, financial or moneyed corporation or association, any state, political subdivision, public or municipal corporation, or any officer of any state, political subdivision, public or municipal corporation: insurance indemnifying the insured named therein against loss or destruction from any cause of any evidences of debt of any kind or character, evidences of ownership of any kind or character, deeds, mortgages, warehouse receipts, bills of lading, certificates of stock, bonds, notes, drafts, checks, instruments of similar character, stamps, documents, money, precious metals of any kind or character, refined or unrefined, and articles made therefrom, jewelry, watches, necklaces, bracelets, gems and precious and semi-precious stones, and also against loss or damage, except by fire, to the insured's premises, furnishings, fixtures, equipment, safes and vaults therein, caused by burglary, robbery, hold-up, theft or larceny or attempt thereat. No such insurance indemnifying against loss of property as specified above shall, however, indemnify against loss of any such property occurring while in the mail or in the exclusive custody or possession of a common carrier for the purpose of transportation, except for the purpose of transportation by an armored motor vehicle.

No insurance may be written as surety insurance if it falls within the definition of financial guaranty insurance as set forth in *Ins. Code § 12100*.

Legal Topics:

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

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[Reserved]

§§ 308.101[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.110

§ 308.110 Governing Statutes

The scope of liability insurance is governed by *Ins. Code § 108*. Regulations regarding liability insurance carriers are set forth in *Ins. Code §§ 11550-11558*. Actions on policies containing liability provisions are governed by *Ins. Code §§ 11580-11589.5*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawGeneral Liability InsuranceGeneral Overview

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26-308 California Forms of Pleading and Practice--Annotated § 308.111

§ 308.111 Liability Insurance as Class of Insurance

The various classes of insurance are listed in *Ins. Code § 100* and are defined in *Ins. Code §§ 101-120*. Liability insurance is enumerated as a class of insurance under *Ins. Code § 100(8)*. It is defined under *Ins. Code § 108* [*see § 308.112*]. Other classes of insurance that may insure against liability include marine [*see Ins. Code §§ 100(3), 103*], workers' compensation [*see Ins. Code §§ 100(9), 109*], common carrier [*see Ins. Code §§ 100(10), 110*], boiler and machinery [*see Ins. Code §§ 100(11), 111*], team and vehicle [*see Ins. Code §§ 100(15), 115*], and miscellaneous [*see Ins. Code §§ 100(20), 120*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBusiness InsuranceMarine InsuranceGeneral OverviewInsurance LawGeneral Liability InsuranceGeneral Overview

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26-308 California Forms of Pleading and Practice--Annotated § 308.112

§ 308.112 Liability Insurance Defined

Liability insurance includes:

- Insurance against loss resulting from liability for injury, fatal or nonfatal, suffered by any natural person, or resulting from liability for damage to property or to property interests of others; but does not include workers' compensation, common carrier liability, boiler and machinery, or team and vehicle insurance [*Ins. Code § 108(a)*; for discussion and forms regarding workers' compensation and motor vehicle insurance, *see* Ch. 577, *Workers' Compensation* , Ch. 88, *Automobiles: Automobile Insurance* , and Ch. 88A, *Automobiles: Uninsured Motorist Claims*].

- With respect to operations or property covered by a liability insurance policy as defined in *Ins. Code § 108(a)*, insurance of medical, hospital, surgical, and funeral loss or expense of the insured or other persons injured, and in the case of an automobile liability policy, disability benefits to the insured or other persons injured, and in the event of their death, funeral and accidental death benefits to their dependents, beneficiaries, or personal representatives irrespective of legal liability of the insured, when issued with or supplemental to the insurance defined in *Ins. Code § 108(a)* [*Ins. Code § 108(b)(1)*; for discussion of automobile liability policy coverage, *see* Ch. 88, *Automobiles: Automobile Insur ance*].

- When issued with or supplemental to the insurance defined in *Ins. Code § 108(a)*, disability insurance covering the insured and members of his or her household, or other persons who customarily operate any automobile covered by and named in the policy; and the disability insurance may cover against accidental injury, death, or dismemberment caused by any or all hazards as defined in the coverage [*Ins. Code § 108(b)(2)*].

- Insurance covering injuries sustained by an insured resulting from a tort committed by a third party against which the third party is not himself or herself covered by liability insurance [*Ins. Code § 108(c)*].

- Insurance coverage against the legal liability of the insured, and against loss, damage, or expense incident to a claim arising out of the death or injury of any person as the result of negligence or malpractice in rendering professional services by any person who holds a certificate or license issued pursuant to *Bus. & Prof. Code §§ 2000-2515*, a license issued pursuant to the Osteopathic Initiative Act [*see* Bus. & Prof. Code, Appendix II], a license as a community clinic defined in *Health & Safety Code § 1203(a)*, or a license as a health facility pursuant to *Health & Safety Code §§ 1250-1339.27* [*Ins. Code § 108(d)*].

The Insurance Code provisions relating to disability insurance do not apply to insurance defined in *Ins. Code § 108* [*Ins. Code § 108(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawGeneral Liability InsuranceCoverageGeneral Overview

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26-308 California Forms of Pleading and Practice--Annotated § 308.113

§ 308.113 Nature of Risk, Not Choice of Remedy, Determines Whether Coverage Applies to Tort or Contract Claims

[1] Same Act May Be Both Breach of Contract and Tort

The California Supreme Court in *Vandenberg v. Superior Court (1999) 21 Cal. 4th 815* , held that policy language limiting coverage to amounts the insured is "legally obligated to pay as damages," does not necessarily refer to tort liability, to the exclusion of a claim that involves a contract. Noting that the same act may constitute both a breach of contract and a tort, the Court held that coverage may not be predicated on an injured party's choice of remedy or the form of the action [*Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 838-841, 88 Cal. Rptr. 2d 366, 982 P.2d 229]* .

Courts must focus on the nature of the risk and the injury, in light of the policy provisions, to make that determination. A coverage agreement that embraces "all sums [that] the insured shall become legally obligated to pay as damages ..." is intentionally broad enough to include the insured's obligation to pay damages for breach of contract as well as for tort, within limitations imposed by other terms of the coverage agreement (for example, bodily injury and property damage as defined, caused by an occurrence) and by the exclusions [*Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 838-841, 88 Cal. Rptr. 2d 366, 982 P.2d 229]* .

In *Vandenberg*, the Court considered commercial general liability (CGL) policies issued to the lessee of commercial property. The policies provided coverage for sums the lessee was "legally obligated to pay as damages" because of property damage. Thirty years after the lessee had used the land as an automobile sales and service facility, the owners took possession of the land and prepared to sell it. After discovering soil and groundwater contamination, the owners sued the lessee, alleging breach of contract, breach of the covenant of good faith and fair dealing, public and private nuisance, negligence, waste, trespass, strict liability, and equitable indemnity, and seeking both declaratory relief and injunctive relief, based on the lessee's installation and operation of waste oil storage tanks that caused petroleum contamination. A settlement between the owners, the lessee, and the sole insurer that agreed to provide the lessee a defense, disposed of all claims except those based on the theory that the contamination constituted a breach of the lease

agreement. The parties agreed to resolve those claims through binding arbitration. Although the insurer agreed to provide a defense, it reserved the ultimate issues of coverage and indemnity for further resolution [*see Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 826, 88 Cal. Rptr. 2d 366, 982 P.2d 229]* .

Following the arbitrator's ruling for the owners, all of the insurers rejected the lessee's request for indemnification, and the lessee then sued the insurers for failure to defend, settle, or indemnify. All the insurers sought summary adjudication on the basis that the arbitrator awarded damages for breach of lease, a contractual cause of action, and that contractual damages are not covered by the policies. The trial court granted that motion, but the court of appeal reversed. The appellate court ruled that coverage under the insurance policies could not be determined by the "general rule" that damages for an insured's nonperformance of a contract are not covered under commercial general liability (CGL) policies [*see Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 827, 88 Cal. Rptr. 2d 366, 982 P.2d 229]* .

The Supreme Court granted review. The insurers contended that CGL policies limiting coverage to amounts the insured is "legally obligated to pay as damages," or using similar language, refer to tort liability and not contract liability. The Court held that the long line of cases so holding misread the seminal case of *Ritchie v. Anchor Cas. Co. (1955) 135 Cal. App. 2d 245, 286 P.2d 1000* , which held that the phrase "liability imposed by law" as used in the policy at issue in that case related to the nature of the liability to be defended rather than the result of the lawsuit. In that case, "liability imposed ... by written contract" occurred in one coverage provision, but not the coverage provision in question. Subsequent cases erroneously generalized that the phrase "damages for a liability imposed by law"uniformly refers to a liability arising ex delicto as distinguished from ex contractu [*Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 839, 88 Cal. Rptr. 2d 366, 982 P.2d 229]* .

[2] Mutual Intent of Parties Regarding "Damages" Provision Controls

Insurance policies are contracts construed in accordance with the parties' mutual intent at the time of contract formation, as inferred from the written provisions [*Civ. Code §§ 1636, 1639*]. Whatever ambiguity a phrase possesses due to a party's legal knowledge is resolved in favor of coverage [*Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 840-841, 88 Cal. Rptr. 2d 366, 982 P.2d 229]* .

If the policies in question do not suggest that the phrase "legally obligated to pay as damages" has any special or legalistic meaning, that language must be interpreted in accordance with the ordinary and popular sense [*Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 840-841, 88 Cal. Rptr. 2d 366, 982 P.2d 229]* .

[3] Appellate Cases Limiting Damages to Tort Liability Disapproved

The Supreme Court in *Vandenberg v. Superior Court (1999) 21 Cal. 4th 815* , disapproved a twenty-year-old line of appellate cases holding that the phrase "legally obligated to pay as damages" in this context uniformly referred to a liability arising ex delicto as distinguished from ex contractu. These cases had erroneously established an arbitrary distinction between tort and contract damages, categorically precluding coverage pled on a theory of breach of contract [*Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 839-841 n.13, 88 Cal. Rptr. 2d 366, 982 P.2d 229* ; *see, e.g., International Surplus Lines Ins. Co. v. Devonshire Coverage Corp. (1979) 93 Cal. App. 3d 601, 610-611, 155 Cal. Rptr. 870* (example of disapproved case)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsPolicy InterpretationAmbiguous TermsCoverage FavoredInsurance LawGeneral Liability InsuranceCoverageTriggersGeneral OverviewInsurance LawGeneral Liability InsuranceOccurrences

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§ 308.114 Duty to Indemnify--Scope of Duty to Indemnify

[1] In General

Under a standard commercial or comprehensive liability insurance policy, the insurer has a duty to indemnify the insured for those sums that the insured becomes legally obligated to pay as damages for a covered claim. The insurer's duty to indemnify arises after liability has been established and extends to claims that are actually covered, in light of the facts proved [*Aerojet-Gen. Corp. v. Transport Indem. Co. (1997) 17 Cal. 4th 38, 56, 70 Cal. Rptr. 2d 118, 948 P.2d 909]* .

[2] Trigger of Duty

An insurer's duty to indemnify under a standard commercial or comprehensive general liability policy is triggered when it is established that specified harm was caused by an included occurrence and at least some such harm resulted within the policy period. Once the duty to indemnify is triggered, it extends to all specified harm caused by the included occurrence, even if some of the harm occurs after the policy has expired [*Aerojet-Gen. Corp. v. Transport Indem. Co. (1997) 17 Cal. 4th 38, 56-57, 70 Cal. Rptr. 2d 118, 948 P.2d 909* ; *see also Montrose Chem. Corp. v. Admiral Ins. Co. (1995) 10 Cal. 4th 645, 669-673, 42 Cal. Rptr. 2d 324, 913 P.2d 878*].

[3] Indemnification Against Liability and Against Claims Distinguished

Under an insurance policy indemnifying the insured against liability, the insured is entitled to recover on becoming liable [*see Civ. Code § 2778(1)*; *Hertzka & Knowles v. Salter (1970) 6 Cal. App. 3d 325, 338, 86 Cal. Rptr. 23]* . Under an insurance policy indemnifying the insured against claims, demands, damages, or costs, the insured is not entitled to recover until after payment [*see Civ. Code § 2778(2)*]. Whether an insurance policy is an indemnity against liability or one against demands depends on the intent of the parties as expressed in the language of the policy. For further discussion, see Ch. 300, *Indemnity and Contribution* .

[4] "All Sums Insured Legally Obligated to Pay as Damages" in CGL Policy Equates to Money Ordered by

Court

A CGL policy, often referred to as a business general liability policy, provides liability insurance for businesses. In general, CGL policies are limited to providing coverage for accidental occurrences, and do not provide coverage for professional negligence claims [*Food Pro Int'l, Inc. v. Farmers Ins. Exch. (2008) 169 Cal. App. 4th 976, 985, 89 Cal. Rptr. 3d 1 , rev. denied, 2009 Cal. LEXIS 3729 (2009)]* .

The insurer's duty to indemnify the insured for "all sums that the insured becomes legally obligated to pay as damages" under the standard comprehensive general liability (CGL) insurance policy is limited to money ordered by a court [*Certain Underwriters at Lloyd's of London v. Superior Court (2001) 24 Cal. 4th 945, 960, 103 Cal. Rptr. 2d 672, 16 P.3d 94]* . The provision imposing the duty to defend expressly links "damages" to a "suit"--that is, a civil action prosecuted in a court--because it is in a "suit" that "damages" are fixed in their amount through the court's order. Moreover, "damages" exist traditionally inside of court [*Certain Underwriters at Lloyd's of London v. Superior Court (2001) 24 Cal. 4th 945, 962, 103 Cal. Rptr. 2d 672, 16 P.3d 94]* .

The duty to indemnify under a CGL policy containing this provision therefore does not extend to any expenses required by an administrative agency pursuant to an environmental statute (and, specifically, pursuant to proceedings conducted before the Regional Water Boards pursuant to the Porter-Cologne Act) [*Certain Underwriters at Lloyd's of London v. Superior Court (2001) 24 Cal. 4th 945, 966, 103 Cal. Rptr. 2d 672, 16 P.3d 94* ; *see Water Code § 13000 et seq.*].

The California Supreme Court reached a similar conclusion in a case involving a "nonstandard" (or "manuscript form") excess third-party liability policy [*see County of San Diego v. Ace Prop. & Cas. Ins. Co. (2005) 37 Cal. 4th 406, 416, n.4, 33 Cal. Rptr. 3d 583*].The central insuring agreement in that case obligated the insurer to indemnify the insured county for "all sums [that the county] is obligated to pay by reason of liability imposed by law or assumed under contract or agreement" for "damages ... by reason of injury of any nature sustained by any person or persons" and "damages because of injury to or destruction of tangible property." The Court held that this language limited the insurer's duty of indemnity to the payment of money. Therefore, the insurer was not obligated to reimburse the insured county either for costs and expenses associated with responding to administrative orders to clean up and abate soil or groundwater contamination outside the context of a government-initiated lawsuit seeking remedial relief, or for property buy-out settlements negotiated with third-party claimants outside the context of a court suit [*County of San Diego v. Ace Prop. & Cas. Ins. Co. (2005) 37 Cal. 4th 406, 416-417, 421, 33 Cal. Rptr. 3d 583, 118 P.3d 607* (distinguishing *Powerine Oil Co., Inc. v. Superior Court (2005) 37 Cal. 4th 377, 395-396, 33 Cal. Rptr. 3d 562, 118 P.3d 589* , based on different policy language); *see Certain Underwriters at Lloyd's of London v. Superior Court (2001) 24 Cal. 4th 945, 960, 103 Cal. Rptr. 2d 672, 16 P.3d 94]* .

In another case, however, the California Supreme Court held that the insuring language of nine excess/umbrella policies was broader than that of the standard primary CGL policy [*see Certain Underwriters at Lloyd's of London v. Superior Court (2001) 24 Cal. 4th 945, 960, 103 Cal. Rptr. 2d 672, 16 P.3d 94]* , and covered costs that the insured was required to expend in complying with an administrative agency's pollution cleanup and abatement orders [*Powerine Oil Co., Inc. v. Superior Court (2005) 37 Cal. 4th 377, 382-383, 398, 33 Cal. Rptr. 3d 562, 118 P.3d 589]* . In that case, the relevant insuring language of the policies (identical in all nine policies) stated [*see Powerine Oil Co., Inc. v. Superior Court (2005) 37 Cal. 4th 377, 395-396, 33 Cal. Rptr. 3d 562, 118 P.3d 589]* :

> The Company hereby agrees ... to indemnify the Insured for all sums which the Insured shall be obligated to pay by reason of the liability ... imposed upon the Insured by law ... for damages, direct or consequential and expenses, all as more fully defined by the term "ultimate net loss" on account of: ... property damage ... caused by or arising out of each occurrence happening anywhere in the world.

"Ultimate net loss" was defined in the policy as "the total sum [that] the Insured, or any company as [the Insured's] insurer, or both, become obligated to pay by reason of ... property damage ... either through adjudication or

compromise, and shall also include hospital, medical and funeral charges and all sums paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachment or appeal bonds, interest, expenses for doctors, lawyers, nurses and investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits [that are] paid as a consequence of any occurrence covered hereunder" [*see Powerine Oil Co., Inc. v. Superior Court (2005) 37 Cal. 4th 377, 395-396, 33 Cal. Rptr. 3d 562, 118 P.3d 589]* .

[5] Damages Under CERCLA

Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) [*42 U.S.C.S. § 9601 et seq.*] and comparable state statutes, an entity may become liable for the costs of cleaning up hazardous wastes and remedying property damage that occurred before the entity had any connection with the property damage or with the site on which the hazardous wastes were released. This commonly occurs when the entity acquires the site after the damage occurred [*see, e.g., FMC Corp. v. Plaisted & Cos. (1998) 61 Cal. App. 4th 1132, 1151, 72 Cal. Rptr. 2d 467]* .

Although an insurer's duty to indemnify under an occurrence-based comprehensive general liability policy is generally triggered when a specified harm occurs during the policy period, an insurer has no duty to indemnify the insured for damages under CERCLA unless every factual predicate for CERCLA liability, including a connection between the insured and the damage or the site, could be shown to have existed before or during the policy period [*FMC Corp. v. Plaisted & Cos. (1998) 61 Cal. App. 4th 1132, 1154-1155, 72 Cal. Rptr. 2d 467]* . Therefore, although the insured may be liable for cleanup costs for damages that occurred before it acquired a toxic waste site, its insurer may not be obligated to indemnify it for those costs.

[6] Personal Injury Liability Clause

Personal injury liability coverage, unlike liability coverage for property damage or bodily injury, is not based on an accidental occurrence, but is instead triggered when the insured commits one of the offenses listed in the personal injury clause of the policy. In this context, the term "personal injury" does not refer to bodily harm, but instead to injury caused by the specified offense [*Tinseltown Video, Inc. v. Transportation Ins. Co. (1998) 61 Cal. App. 4th 184, 195, 71 Cal. Rptr. 2d 371* (citing *General Accident Ins. Co. v. West Am. Ins. Co. (1996) 42 Cal. App. 4th 95, 103, 49 Cal. Rptr. 2d 603*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawGeneral Liability InsuranceCoverageEnvironmental ClaimsInsurance LawGeneral Liability InsuranceCoveragePersonal InjuriesInsurance LawGeneral Liability InsuranceCoverageTriggersGeneral OverviewInsurance LawGeneral Liability InsuranceObligationsIndemnification

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26-308 California Forms of Pleading and Practice--Annotated § 308.115

§ 308.115 Willful Act of Insured

[1] Statutory Exclusion (Ins. Code § 533).

An insurer is not liable for a loss caused by the willful act of the insured, but an insurer is not exonerated by the negligence of the insured, or of the insured's agents or others [*Ins. Code § 533*]. *Ins. Code § 533* is incorporated into every insurance contract, operating as an exclusionary clause contained within the contract regarding willful acts of the insured. As an exclusion, the statute is strictly construed against the insurer [*American States Ins. Co. v. Borbor (9th Cir. 1987) 826 F.2d 888, 891, 894]* . The public policy behind Ins.Code § 533 is to prevent the encouragement of willful torts [*J.C. Penney Cas. Ins. Co. v. M.K. (1991) 52 Cal. 3d 1009, 1021, 278 Cal. Rptr. 64, 804 P.2d 689* ; *Allstate Ins. Co. v. Kim W. (1984) 160 Cal. App. 3d 326, 331, 206 Cal. Rptr. 609]* . Moreover, homeowner's policies generally exclude from personal liability coverage bodily injury or property damage that is either expected or intended from the standpoint of the insured [*see, e.g.,* *Grain Dealers Mut. Ins. Co. v. Marino (1988) 200 Cal. App. 3d 1083, 1086, 246 Cal. Rptr. 410]* .

Malicious prosecution constitutes a willful act within the meaning of both *Ins. Code § 533* and a homeowner's policy exclusion regarding intentional acts of the insured, precluding the insurer's duty to defend or indemnify the insured with regard to a third-party action arising from that conduct [*State Farm Fire & Cas. Co. v. Drasin (1984) 152 Cal. App. 3d 864, 867-869, 199 Cal. Rptr. 749* ; *Maxon v. Security Ins. Co. (1963) 214 Cal. App. 2d 603, 615-616, 29 Cal. Rptr. 586]* . Nevertheless, many standard general liability policies do purport to insure against damages resulting from liability for malicious prosecution. This policy language has created some confusion among courts, and apparently in some cases among insurers themselves, as to insurers' obligations under policies containing such language [*see, e.g., City Prods. Corp. v. Globe Indem. Co. (1979) 88 Cal. App. 3d 31, 33, 151 Cal. Rptr. 494]* . For additional discussion of cases involving insurance issues relating to malicious prosecution claims, see California Insurance Law and Practice, Ch. 41 (Matthew Bender).

Similarly, there is no potential liability for coverage, and therefore no duty to defend, arising from a wrongful termination action against the insured when the liability policy extends coverage only for claims resulting from an

accidental event [*St. Paul Mercury Ins. Co. v. Ralee Eng'g Co. (9th Cir. 1986) 804 F.2d 520, 522-523* ; *Dyer v. Northbrook Prop. & Cas. Ins. Co. (1989) 210 Cal. App. 3d 1540, 1546-1549, 259 Cal. Rptr. 298]* . The application of *Ins. Code § 533* to other specific types of intentional conduct is discussed in California Insurance Law and Practice, Ch. 41 (Matthew Bender).

The California Supreme Court has held that as a matter of law, *Ins. Code § 533* precludes insurance coverage for damages arising from child sexual molestation, because that conduct is inherently harmful [*J.C. Penney Cas. Ins. Co. v. M.K. (1991) 52 Cal. 3d 1009, 1025, 1028, 278 Cal. Rptr. 64, 804 P.2d 689]* . Consequently, in such a case, an insured (or other interested party, such as an injured third party seeking to establish insurance coverage) cannot show or attempt to show that the insured subjectively intended no harm [*J.C. Penney Cas. Ins. Co. v. M.K. (1991) 52 Cal. 3d 1009, 1025, 1028, 278 Cal. Rptr. 64, 804 P.2d 689]* . Child sexual molestation includes activity such as that prohibited by *Penal Code § 288* (lewd acts with child under age of 14) [*see, e.g., Allstate Ins. Co. v. Gilbert (9th Cir. 1988) 852 F.2d 449, 451-454* ; *Fire Ins. Exch. v. Abbott (1988) 204 Cal. App. 3d 1012, 1022-1023, 251 Cal. Rptr. 620]* . Although the Court limited its holding to cases involving child molestation, other courts have applied the same analysis to determine that other conduct is inherently harmful, including wrongful termination in violation of public policy [*see B & E Convalescent Ctr. v. State Comp. Ins. Fund (1992) 8 Cal. App. 4th 78, 97-98, 9 Cal. Rptr. 2d 894]* , assault [*see Fire Ins. Exch. v. Altieri (1991) 235 Cal. App. 3d 1352, 1357, 1 Cal. Rptr. 2d 360]* , racial hate crimes [*see Allstate Ins. Co. v. Tankovich (N.D. Cal. 1991) 776 F. Supp. 1394, 1397-1398]* , antitrust claims [*see Trailer Marine Transp. v. Chicago Ins. Co. (N.D. Cal. 1992) 791 F. Supp 809, 811-812]* , sexual assault on an adult [*see State Farm Fire & Cas. Co. v. Ezrin (N.D. Cal. 1991) 764 F. Supp. 153, 156-158]* , and an insured's intentional misrepresentation that he or she does not have AIDS in order to induce a partner to engage in sex [*Aetna Cas. & Sur. Co. v. Sheft (9th Cir. 1993) 989 F.2d 1105, 1108]* .

Conversely, a federal court applying this analysis has held that *Ins. Code § 533* does not automatically bar coverage for copyright infringement claims, because copyright infringement can be either innocent or intentional [*Zurich Ins. Co. (U.S. Branch) v. Killer Music, Inc. (9th Cir. 1993) 998 F.2d 674, 678-679]* . Since patent infringement, like copyright infringement, may be either inadvertent or intentional, the rationale applied to copyrights should apply with equal force to patent infringement claims, although as a practical matter the application of *Ins. Code § 533* to patent infringement claims ordinarily will not be a determining factor with respect to claims under standard business general liability policies since those policies ordinarily do not cover patent infingement claims [*see Bank of W. v. Superior Court (1992) 2 Cal. 4th 1254, 1275, 10 Cal. Rptr. 2d 538, 833 P.2d 545* ; *Aetna Cas. & Sur. Co. v. Superior Court (1993) 19 Cal. App. 4th 320, 327-328, 23 Cal. Rptr. 2d 442* ; *Intex Plastics Sales Co. v. United Nat'l Ins. Co. (9th Cir. 1994) 23 F.3d 254, 256* ; *Iolab Corp. v. Seaboard Sur. Co. (9th Cir. 1994) 15 F. 3d 1500, 1506-1507* ; *National Union Fire Ins. Co. v. Siliconix, Inc. (N.D. Cal. 1989) 729 F. Supp. 77, 79]* . Coverage for inducing patent infringement, as opposed to patent infringement itself, is barred by *Ins. Code § 533*, since in order to be liable for inducing infringement, a party must have the specific intent to induce another to infringe [*Aetna Cas. & Sur. Co. v. Superior Court (1993) 19 Cal. App. 4th 320, 331, 23 Cal. Rptr. 2d 442* ; *Intex Plastics Sales Co. v. United Nat'l Ins. Co. (9th Cir. 1994) 23 F.3d 254, 256-257]* .

With respect to discrimination claims, one federal court has drawn a distinction between claims of disparate impact and disparate treatment for purposes of *Ins. Code § 533*. This court reasoned that while disparate treatment is intentional, and claims based on such treatment therefore are barred by *Ins. Code § 533*, disparate impact claims may be based on unintentional acts. The court concluded that since a plaintiff need not establish that the insured intended to commit a wrongful act in order to recover on a disparate impact theory, the criteria established in *J.C. Penney Casualty Insurance Co. v. M.K.* [*J.C. Penney Cas. Ins. Co. v. M.K.(1991) 52 Cal. 3d 1009, 1019-1021, 278 Cal. Rptr. 64, 804 P.2d 689*] were not met, and *Ins. Code § 533* therefore is inapplicable [*Save Mart Supermarkets v. Underwriters (N.D. Cal. 1994) 843 F. Supp. 597, 606* (claims of both sex discrimination and race discrimination)].

If an insured intends to throw someone into a swimming pool intending to get that person wet, but mistakenly throws that person onto the pool's concrete steps, causing injury, the incident is an "accident" within the meaning of insurance

law. The term "accident" may refer to the unintended or unexpected consequence of the act. When an injury is an unexpected or unintended consequence of the insured's conduct, it may be characterized as an accident for which coverage exists. Therefore, potential coverage exists, and the insurer has a duty to defend [*State Farm Fire and Casualty Co. v. Superior Court (2008) 164 Cal. App. 4th 317, 324, 329, 78 Cal. Rptr. 3d 828*].

Ins. Code § 533 precludes, as a matter of public policy, fines or restitution imposed as a result of a criminal conviction [*Baker v. Mid-Century Ins. Co. (1993) 20 Cal. App. 4th 921, 924-926, 25 Cal. Rptr. 2d 34* ; *see California Cas. Mgmt. Co. v. Martocchio (1992) 11 Cal. App. 4th 1527, 1533, 15 Cal. Rptr. 2d 277* , (sanctions imposed against insured under former *Code Civ. Proc. § 128.5* (*now see Code Civ. Proc. § 128.7*)) for bad faith litigation tactics are not insurable)]. This includes attorneys' fees awarded as a fine or restitution for a criminal act, such as fees awarded to victims of felony drunk driving [*Baker v. Mid-Century Ins. Co. (1993) 20 Cal. App. 4th 921, 925-926, 25 Cal. Rptr. 2d 34* (fees awarded under *Code Civ. Proc. § 1021.4*)].

[2] Defense of Claims Arising From Insured's Willful Act

The statutory prohibition against coverage for a loss caused by a willful act does not necessarily absolve the insurer from the duty to defend an action arising from an insured's willful act. The insurer and insured are free to contract for the provision of a defense to claims that cannot be indemnified. However, when there clearly is no basis for coverage, whether under the policy language or because coverage is precluded by the operation of *Ins. Code § 533*, the duty to defend exists only if the policy expressly provides for a defense without regard to indemnification or the policy terms lead the insured to reasonably expect a defense of the type of claim asserted [*B & E Convalescent Ctr. v. State Comp. Ins. Fund (1992) 8 Cal. App. 4th 78, 100, 9 Cal. Rptr. 2d 894* (no duty to defend wrongful termination action for which coverage was precluded under *Ins. Code § 533*); *see Republic Indem. Co. v. Superior Court (1990) 224 Cal. App. 3d 492, 497-498, 273 Cal. Rptr. 331* (insurer excused from defending action premised on willful conduct only if there is an express exclusion to that effect or if insured does not reasonably expect a defense); cf. *Century Transit Sys., Inc. v. American Empire Surplus Lines Ins. Co. (1996) 42 Cal. App. 4th 121, 130, 49 Cal. Rptr. 2d 567* (no duty to defend assault and battery action because policy specifically excluded coverage for "any claim based on assault and battery"); *see also Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 274, 54 Cal. Rptr. 104, 419 P.2d 168]* . For example, it was held in one case that although *Ins. Code § 533* barred coverage for sexual molestation committed by a teacher, the insurer had a duty to defend because the claim also alleged negligent nonsexual conduct related to the molestation [*Horace Mann Ins. Co. v. Barbara B. (1993) 4 Cal. 4th 1076, 1084, 17 Cal. Rptr. 2d 210, 846 P.2d 792]* . If allegations of nonsexual conduct are "inseparably intertwined" with the sexual misconduct, however, the insurer has no duty to defend [*Jane D. v. Ordinary Mut. (1995) 32 Cal. App. 4th 643, 653, 38 Cal. Rptr. 2d 131]* .

For example, allegations that a priest used counseling techniques to obtain information about the plaintiff and then misused those techniques to induce the plaintiff's behavior were held to be "inseparably intertwined" with the priest's sexual misconduct [*Jane D. v. Ordinary Mut. (1995) 32 Cal. App. 4th 643, 653, 38 Cal. Rptr. 2d 131]* . Similarly, an insurer did not have a duty to defend a teacher in an action alleging that a teacher molested a student and then negligently failed to report the incident to the proper authorities, because the failure to report was directly and necessarily linked to the molestation [*State Farm Fire & Cas. Co. v. Century Indem. Co. (1997) 59 Cal. App. 4th 648, 661-663, 69 Cal. Rptr. 2d 403]* . Another case held that an insurer had no duty to defend a sexual harassment suit against an insured corporation when the complaint contained no allegations of negligent conduct and the acts in question could not reasonably be characterized as negligent or unintentional [*Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co. (1993) 14 Cal. App. 4th 1595, 1603-1604, 18 Cal. Rptr. 2d 692]* .

Even when the insurer has provided a defense, if *Ins. Code § 533* precludes the duty of indemnity, it also prevents coverage for the insured's costs of suit, such as attorney's fees [*Combs v. State Farm Fire & Cas. Co. (2006) 143 Cal. App. 4th 1338, 1347, 49 Cal. Rptr. 3d 917]* .

For discussion of the insurer's duty to defend generally, see *§ 308.119*. For additional discussion of the relationship

between *Ins. Code § 533* and the insurer's duty to defend, see California Insurance Law and Practicie, Ch. 41 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawGeneral Liability InsuranceExclusionsIntentional ActsInsurance LawGeneral Liability InsuranceObligationsDefense

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§ 308.116 Illegal, Intentional, or Criminal Act Exclusions

If a homeowners policy expressly covers accidental bodily injury, but excludes coverage for bodily injury arising out of an "illegal act," without defining the term, the insurer may nonetheless be obligated to defend and indemnify its insureds in a wrongful death action. In one case, the insurer was obligated to defend and indemnify its insureds after their teenage son accidentally shot and killed his friend [*Safeco Ins. Co. v. Robert S. (2001) 26 Cal. 4th 758, 765-767, 110 Cal. Rptr. 2d 844, 28 P.3d 889]* . In its decision, the California Supreme Court discussed the ambiguous language of the policy. Because the term "illegal act," left undefined, is subject to many definitions, some of which would cover this incident, and some of which would exclude it, the Court construed the policy against the insurer to allow coverage [*Safeco Ins. Co. v. Robert S. (2001) 26 Cal. 4th 758, 763-767, 110 Cal. Rptr. 2d 844, 28 P.3d 889]* . Therefore, if a policy uses this language, a criminal act that results from unintentional conduct may be covered under the policy.

By contrast, in one appellate case involving a similar incident, the homeowners' policy contained an exclusion for bodily injury that "is a foreseeable result of an intentional or criminal act of any insured or [that] is expected or intended by any insured, including bodily injury ... [that] is more extensive than or of a differentnature from that expected or intended by the insured" [*see* *Century-Nat'l Ins. Co. v. Glenn (2001) 86 Cal. App. 4th 1392, 1397-1398, 104 Cal. Rptr. 2d 73]* . In that case, the insured, allegedly trying only to scare off inebriated youths attending his backyard party, shot a gun off in the backyard and wounded one of the youths. The insured pled nolo contendere to felony willful discharge of a firearm. In a declaratory judgment action, the trial court granted summary judgment for the insurer. On appeal, the court affirmed, holding that the "criminal acts" exclusion barred coverage. The court concluded that the bodily injury suffered by the victim was a "foreseeable result" of a criminal act by the insured [*Century-Nat'l Ins. Co. v. Glenn (2001) 86 Cal. App. 4th 1392, 1397-1398, 104 Cal. Rptr. 2d 73]* . In *Safeco Insurance Co. v. Robert S.,* the Supreme Court would have found coverage if it had interpreted the policy's clause excluding coverage for an "illegal act" as the equivalent of a clause excluding coverage for a "criminal act" [*Safeco Ins. Co. v. Robert S. (2001) 26 Cal. 4th 758, 765, 110 Cal. Rptr. 2d 844, 28 P.3d 889]* . The Court determined that it could not do so, however, because the term was left undefined and therefore ambiguous [*Safeco Ins. Co. v. Robert S. (2001) 26 Cal. 4th 758, 766, 110 Cal. Rptr. 2d 844, 28 P.3d 889]* .

In *Delgado v. Interinsurance Exch. of Auto. Club of So. Cal.*, the insured under a homeowner's policy hit and kicked a person, who brought suit against the insured. In his first cause of action for intentional tort, the injured party alleged that the insured acted in an unprovoked manner and without justification. In his second cause of action, he alleged that the insured negligently and unreasonably believed he was engaging in self-defense, and unreasonably acted in self-defense when he struck the plaintiff. The insured tendered the defense of the matter to his insurer, which denied coverage and refused to defend. The insurer asserted that the assault was not an "occurrence," defined in the policy as an "accident," and that the allegations arose out of the insured's intentional acts, which were excluded from coverage. After the trial court dismissed the intentional tort claim, the parties settled, stipulating that the insured's use of force occurred because he negligently believed he was acting in self-defense. The insured then agreed to pay the injured party a portion of the judgment, and assigned the claims against his insurer. The injured party gave the insured a partial satisfaction of judgment and a covenant not to execute on the remainder of the judgment. He then sued the insurer, alleging that the insured's actions constituted an accident [*see Delgado v. Interinsurance Exch. of Auto. Club of So. Cal. (2009) 47 Cal. 4th 302, 305-306, 317, 97 Cal. Rptr. 3d 298, 211 P.3d 1083*].

The California Supreme Court held that there was no potential for coverage, and that the insurer had no duty to defend [*Delgado v. Interinsurance Exch. of Auto. Club of So. Cal. (2009) 47 Cal. 4th 302, 305, 312, 317, 97 Cal. Rptr. 3d 298, 211 P.3d 1083*]. In the context of liability insurance, an accident is an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause. The Court held that whether there was an accident within the policy language need not be determined from the injured party's perspective. An insured's unreasonable, subjective belief in the need for self-defense does not convert an act that is purposeful and intended to inflict injury into an "accident" [*Delgado v. Interinsurance Exch. of Auto. Club of So. Cal. (2009) 47 Cal. 4th 302, 308-311, 97 Cal. Rptr. 3d 298, 211 P.3d 1083*].

The injured party's argument that an insured's mistaken and unreasonable belief in the need for self-defense converts the assault into an accidental act is based on the notion that a provocative act by the injured party turns the insured's physical response into an accidental act. This argument fails because the insured's acts of wrongdoing are the acts that must be considered the starting point of the causal series of events. "Accident" in the policy coverage clause refers to the injury-producing acts of the insured, not those of the injured party. Therefore, an insured's unreasonable belief in the need for self-defense does not turn the resulting purposeful and intentional act of assault and battery into an accident within the policy coverage clause [*Delgado v. Interinsurance Exch. of Auto. Club of So. Cal. (2009) 47 Cal. 4th 302, 314-317, 97 Cal. Rptr. 3d 298, 211 P.3d 1083*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawGeneral Liability InsuranceExclusionsCriminal ActsInsurance LawGeneral Liability InsuranceExclusionsIntentional Acts

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§ 308.117 Intervention by Insurer

An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and defendant [*see Code Civ. Proc. § 387(a)*]. Insurance companies may seek to intervene in actions brought by or against their insured to protect their interests. An insurer must be permitted to intervene in an action to request the court to vacate a default judgment against the insured [*Nasongkhla v. Gonzalez (1994) 34 Cal. Rptr. 2d 379]* . Otherwise, the insurer may have no other opportunity to litigate fault or damages issues in any action later brought under *Ins. Code § 11580*. Furthermore, it would be unfair to wait until after a judgment is entered against the defendant because the burden of proof would then be on the insurer to show substantial likelihood that the jury would have found in the insured's favor [*Nasonghkhla v. Gonzalez (1994) 34 Cal. Rptr. 2d 379]* . Note that the insurer must choose between vacation of default (aligned with insured) or declaratory relief (adverse to insured) [*Nasongkhla v. Gonzalez (1994) 34 Cal. Rptr. 2d 379]* . For discussion and forms regarding intervention, see Ch. 395, *Parties* .

An insurer providing a defense, even though subject to a reservation of rights, may intervene in the action when the insured attempts to settle the case to the potential detriment of the insurer. In contrast to the insurer that refuses to defend, an insurer providing a defense under a reservation of rights has not lost its right to control the litigation, and therefore retains a direct interest in the case [*Gray v. Begley (2010) 182 Cal. App. 4th 1509, 1523-1524, 106 Cal. Rptr. 3d 729]* .

When an insurer denied coverage and refused to defend the liability action against the insured, it could not later intervene in the action under *Code Civ. Proc. § 387(a)*. The insurer did not have a direct and immediate interest to warrant intervening in the lawsuit [*Hinton v. Beck (2009) 176 Cal. App. 4th 1378, 1380, 1385-1386, 98 Cal. Rptr. 3d 612*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureParties InterventionGeneral OverviewInsurance LawClaims & ContractsFiduciary ResponsibilitiesInsurance LawGeneral Liability InsuranceObligationsDefense

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A. Actions Against Insurance Companies to Recover Insurance Contract Benefits
5. Liability Insurance

26-308 California Forms of Pleading and Practice--Annotated § 308.118

§ 308.118 Insurer's Duty to Provide Insured With Independent Counsel When Conflict of Interest Exists

[1] Requirements

The language of a liability insurance policy typically reserves control of the defense to the insurer. The insurer ordinarily selects defense counsel for the insured and controls the insured's defense. However, a conflict of interest may arise when an insurer reserves its right to contest coverage and the determination of whether coverage exists depends upon resolution of facts at issue in the underlying lawsuit. This conflict is premised on the presumptive inability of a defense attorney, hired by the insurer to defend its insured, to represent the divergent interests of the joint clients [*San Diego Fed. Credit Union v. Cumis Ins. Soc'y, Inc. (1984) 162 Cal. App. 3d 358, 365, 375, 208 Cal. Rptr. 494]* .

In *San Diego Navy Federal Credit Union v. Cumis Insurance Society*, the court held that under these circumstances the counsel retained by the insurer must notify the insured of the conflict and either obtain the written consent of the insured or cease the joint representation. If the insured does not consent to joint representation, the carrier must pay for the insured to retain separate counsel of the insured's choice, and must permit the insured and the insured's independent counsel to control the litigation [*San Diego Fed. Credit Union v. Cumis Ins. Soc'y, Inc. (1984) 162 Cal. App. 3d 358, 375, 208 Cal. Rptr. 494]* . Independent counsel appointed under these circumstances to represent an insured at the insurer's expense have come to be referred to as " *Cumis* counsel."

The *Cumis* requirements, with some additional controls, have been codified in *Civ. Code § 2860*. Under *Civ. Code § 2860*, if the provisions of an insurance policy impose a duty to defend on the insurer, and a conflict of interest arises that creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer must provide independent counsel to represent the insured unless, at the time the insured is notified that a possible conflict may arise or does exist, the insured expressly waives, in writing, the right to independent counsel. An insurance contract may contain a provision that sets forth the method of selecting counsel consistent with *Civ. Code § 2860* [*Civ. Code § 2860(a)*].

A conflict of interest does not exist for purposes of *Civ. Code § 2860* concerning allegations or facts in the litigation for

which the insurer denies coverage. In addition, conflict of interest is deemed to exist concerning allegations of punitive damages or solely because an insured is sued for an amount in excess of the insurance policy limits [*Civ. Code § 2860(b)*; *see Civ. Code § 2860(c)* (requirements set by insurer), (d) (disclosure and privileges), (e) (waiver), (f) (cooperation between counsel)].

When an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist [*Civ. Code § 2860(b)*]. However, not every reservation of rights entitles the insured to select *Cumis* counsel. The insured is not entitled to *Cumis* counsel if the coverage issue is extrinsic to the issues in the underlying action. Moreover, a mere possibility of an unspecified conflict does not require *Cumis* counsel. Instead, the court must analyze the parties' respective interests to determine whether they can be reconciled, such as by a defense based on total non-liability, or whether an actual conflict prevents the insurer-appointed counsel from presenting a quality defense for the insured [*see Dynamic Concepts, Inc. v. Truck Ins. Exch. (1998) 61 Cal. App. 4th 999, 1007-1008, 71 Cal. Rptr. 2d 882]* .

An insurer is entitled to a reasonable period of time to analyze an insured's request for *Cumis* counsel [*Dynamic Concepts, Inc. v. Truck Ins. Exch. (1998) 61 Cal. App. 4th 999, 1010, 71 Cal. Rptr. 2d 882]* .

[2] Arbitration of Fee Issues

Under *Civ. Code § 2860(c)*, *Cumis* fee issues are to be decided in an arbitrationforum and not the state's judicial forum. However, the statutory arbitration requirement applies only to disputes concerning the fees to be paid; it does not require that disputes over the insurer's duty to provide *Cumis* counsel in the first instance be arbitrated [*Truck Ins. Exch. v. Dynamic Concepts, Inc. (1992) 9 Cal. App. 4th 1147, 1150-1151, 11 Cal. Rptr. 2d. 873]* .

In one case, the insurer agreed to provide a defense to its insured under a reservation of rights, but then elected not to have counsel representing its own interests participate in the third-party action, instead allowing counsel selected by the insured to conduct and control the entire defense. A subsequent fee dispute between the insured's counsel and the insurer is subject to mandatory arbitration under *Civil Code § 2860(c)* if the reservation of rights creates a conflict of interest that triggers the insurer's duty to provide independent counsel [*Long v. Century Indemnity Co. (2008) 163 Cal. App. 4th 1460, 1464-1465, 1475, 78 Cal. Rptr. 3d 483*]. *Civil Code § 2860(b)* states that a conflict may exist "when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim." Although that language arguably suggests the duty to provide *Cumis* counsel may be contingent on the insurer's retention of its own counsel, the potential conflict described in § 2860(b) exists because the interests of the insurer and its insured diverge, precluding the use of counsel (absent a waiver by the insured) who purports to represent jointly the interests of both insurer and insured. It is not the presence of the insurer-selected attorney that creates the conflict. Rather, the existence of the conflict or potential conflict creates the need for "independent" or *Cumis* counsel, an attorney who owes his or her allegiance solely to the insured. Even if the insurer forgoes its right to its own representation under these circumstances, the insured retains its right to independent counsel whom it selects and controls [*Long v. Century Indemnity Co. (2008) 163 Cal. App. 4th 1460, 1472, 78 Cal. Rptr. 3d 483*].

In a case brought by the insured against its liability insurer for breach of contract and bad faith involving failure to defend, including failure to pay Cumis fees, the defendant insurer filed a petition to compel arbitration under *Civ. Code § 2860(c)*. The insured successfully opposed the petition on the ground that the complaint alleged wrongful conduct beyond the mere failure to pay attorney's fees, and therefore fell outside the scope of section 2860. The appellate court reversed, holding that notwithstanding the inclusion of other nonarbitrable issues in the complaint, any contested issues concerning the amount of attorney's fees allegedly owed by the insurer for the insured's independent counsel are subject to mandatory arbitration under *Civ. Code § 2860(c)* [*Compulink Mgmt. Ctr., Inc. v. St. Paul Fire & Marine Ins. Co. (2008) 169 Cal. App. 4th 289, 300, 87 Cal. Rptr. 3d 72*].

Furthermore, *Civ. Code § 2860(c)* does not affect the normal relationship between the federal and state courts when actions have been filed in both of these jurisdictions dealing with the same subject matter. Since *Civ. Code § 2860* does not forbid federal judges or juries from deciding these issues, it is not an abuse of discretion to deny a petition compelling the arbitration of a *Cumis* fee dispute pending the outcome of a federal action involving the same issues [*Caiafa Prof'l Law Corp. v. State Farm Fire & Cas. Co. (1993) 15 Cal. App. 4th 800, 805, 19 Cal. Rptr. 2d 138]* .

[3] Liability of Independent Counsel to Insurer

The insurer may not recover from *Cumis* counsel under *Civ. Code § 2860* for that counsel's negligent failure to investigate, prepare, assert, establish, or perform similar functions regarding a defense of position favorable to the insurer. However, *Cumis* counsel may be held liable to the insurer for negligent failure to keep the insurer properly informed of the facts, theories, status, procedural developments, and evaluations in the underlying action, to disclose all nonprivileged information relating to the action, and to timely inform and consult with the insurer on all matters related to the action, when these failures preclude the insurer from timely presenting a complete defense to the action [*Assurance Co. of Am. v. Haven (1995) 32 Cal. App. 4th 78, 83, 92, 38 Cal. Rptr. 2d 25]* . For discussion and form, see *§ 308.523*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsFiduciary ResponsibilitiesInsurance LawGeneral Liability InsuranceConflicts of InterestInsurance LawGeneral Liability InsuranceObligationsGeneral Overview

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§ 308.119 Insurer's Duty to Defend

[1] Scope of Duty to Defend

Liability insurance policies normally provide that the insurer will defend suits brought against the insured that come within the risk assumed by the insurer, even if they are groundless, false, or fraudulent [*see, e.g.,* *Fireman's Fund Ins. Co. v. Chasson (1962) 207 Cal. App. 2d 801, 803-804, 24 Cal. Rptr. 726]* . Under such a provision, the insurer is required to defend any action against the insured that potentially seeks damages within the coverage of the policy [*Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 276-277, 54 Cal. Rptr. 104, 419 P.2d 168* ; *Watts Indus., Inc. v. Zurich Am. Ins. Co. (2004) 121 Cal. App. 4th 1029, 1039, 18 Cal. Rptr. 3d 61* ; *CNA Cas. of Cal. v. Seaboard Sur. Co. (1986) 176 Cal. App. 3d 598, 605-607, 222 Cal. Rptr. 276]* . If any facts stated or fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurer's duty to defend arises and is not extinguished until the insurer negates all facts suggesting potential coverage. On the other hand, if, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance [*Scottsdale Ins. Co. v. MV Transp. (2005) 36 Cal. 4th 643, 655, 31 Cal. Rptr. 3d 147, 115 P.3d 460]* . That is, if there is no possibility of coverage, there is no duty to defend [*Waller v. Truck Ins. Exchange, Inc. (1995) 11 Cal. 4th 1, 37, 44 Cal. Rptr. 2d 370, 900 P.2d 619* ; *Fire Ins. Exch. v. Abbott (1988) 204 Cal. App. 3d 1012, 1029, 251 Cal. Rptr. 620]* .

A "suit" in this context is a court proceeding initiated by the filing of a complaint [*Foster-Gardner, Inc. v. National Union Fire Ins. Co. (1998) 18 Cal. 4th 857, 888, 77 Cal. Rptr. 2d 107, 959 P.2d 265]* . In a case of first impression in California, the California Supreme Court has held that a coercive administrative action is not the initiation of a "suit" within the meaning of a comprehensive general liability policy that does not specifically define the term [*Foster-Gardner, Inc. v. National Union Fire Ins. Co. (1998) 18 Cal. 4th 857, 889, 77 Cal. Rptr. 2d 107, 959 P.2d 265]* . The Court stated that with respect to policies that treat the terms "suit" and "claim" separately rather than synonymously but do not define the terms, a precomplaint notice may not be construed to mean a "suit" in some instances but not in others. "Suit" denotes court proceedings, not a substantive or functional equivalent of court proceedings such as anEPA notice or order, even if the administrative action has serious consequences or precludes substantial defenses [

Foster-Gardner, Inc. v. National Union Fire Ins. Co. (1998) 18 Cal. 4th 857, 879, 77 Cal. Rptr. 2d 107, 959 P.2d 265] .

In 1986, the standard insurance form was amended to define "suit" as "a civil proceeding in which damages because of bodily injury, property damage, personal injury or advertising injury to which this insurance applies are alleged. 'Suit' includes an arbitration proceeding alleging such damages to which you must submit or submit with our consent." Since then, this definition has been refined [*see Foster-Gardner, Inc. v. National Union Fire Ins. Co. (1998) 18 Cal. 4th 857, 864 n.3, 77 Cal. Rptr. 2d 107, 959 P.2d 265]* .

One court of appeal has noted that read together, *Foster-Gardner* and *CertainUnderwriters at Lloyd's of London v. Superior Court (2001) 24 Cal. 4th 945, 955, 103 Cal. Rptr. 2d 672, 16 P.3d 94* [*see § 308.114[4]*] stand for the proposition that the duty to defend a "suit" seeking "damages" under pre-1986 CGL policies is restricted to civil actions prosecuted in a court, initiated by the filing of a complaint, and does not include claims, which can denote proceedings conducted by administrative agencies under environmental statutes. Likewise, the duty to indemnify for "all sums that the insured becomes legally obligated to pay as damages" in the same standard primary policies is limited to money ordered by a court and does not include expenses, such as those that may be incurred in responding to administrative agency orders [*see Certain Underwriters at Lloyd's of London v. Superior Court (2001) 24 Cal. 4th 945, 961, 103 Cal. Rptr. 2d 672, 16 P.3d 94]* .

In another case, the defendant filed a setoff claim against the insured plaintiff that implicated the plaintiff's insurance coverage. The California Supreme Court held that the plaintiff stated a prima facie case against the plaintiff's insurer for breach of contract and bad faith, based on the insurer's refusal to indemnify and defend against the setoff claim, by alleging that: (1) the insurance policy obligated the insurer to defend and indemnify the insured against suits seeking damages, and (2) under the terms of the policy, the setoff claim by the defendant in the underlying suit fell within the scope of that contractual obligation. In that case, the Court held that a defendant may not obtain an award of affirmative relief against a plaintiff by way of *Code Civ. Proc. § 431.70*. Instead, the defendant may only assert the setoff defensively to defeat the plaintiff's claim in whole or in part. Because the precise terms of the policy were not before the Court, however, the Court did not decide whether an insured may treat a setoff claim as a suit for damages [*Construction Protective Servs., Inc. v. TIG Specialty Ins. Co. (2002) 29 Cal. 4th 189, 198-199, 126 Cal. Rptr. 2d 908, 57 P.3d 372]* . For further discussion of *Code Civ. Proc. § 431.70*, see Ch. 26, *Answers* .

To determine whether the insurer has a duty to defend, the factual allegations of the complaint and the extrinsic facts known to the insurer must be compared with the terms of the policy [*Montrose Chem. Corp. v. Superior Court (1993) 6 Cal. 4th 287, 295, 24 Cal. Rptr. 2d 467, 861 P.2d 1153]* . In determining whether a particular policy provides a potential for coverage and a duty to defend, courts are governed by the general rules applicable to the interpretation of insurance policies [*Waller v. Truck Ins. Exch., Inc. (1995) 11 Cal. 4th 1, 18-19, 44 Cal. Rptr. 2d 370, 900 P.2d 619* ; for discussion of these rules, *see § 308.22*]. The court must construe the coverage provisions of the policy liberally in favor of the insured and construe the exclusions narrowly against the insurer [*Charles E. Thomas Co. v. Transamerica Ins. Group (1998) 62 Cal. App. 4th 379, 382, 72 Cal. Rptr. 2d 577* ; *Mariscal v. Old Republic Life Ins. Co. (1996) 42 Cal. App. 4th 1617, 1623, 50 Cal. Rptr. 2d 224]* .

The duty to defend is fixed by the facts that the insurer learns from the complaint, the insured, or other sources [*Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 276, 54 Cal. Rptr. 104, 419 P.2d 168* ; *Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 944, 122 Cal. Rptr. 470]* . It does not turn on the ultimate adjudication of coverage [*State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co. (1970) 9 Cal. App. 3d 508, 526, 88 Cal. Rptr. 246]* . An insurer is required to investigate and evaluate facts expressed or implied in the third-party complaint, as well as those learned from its insured and any other sources, before it may properly reject the tender of defense [*CNA Cas. of Cal. v. Seaboard Sur. Co. (1986) 176 Cal. App. 3d 598, 610, 222 Cal. Rptr. 276]* . An insurer may breach the implied covenant of good faith and fair dealing by failing to promptly and properly investigate its insured's claim [*Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 817, 169 Cal. Rptr. 691* ; *Eigner v. Worthington (1997) 57 Cal. App. 4th 188, 195, 66 Cal. Rptr. 2d 808]* . An insurer who denies coverage without investigation runs the risk that the insured may

later be able to prove that a reasonable investigation would have uncovered evidence establishing a potential for coverage. In that case, the insurer is liable for the costs of the defense and may also be exposed to tort liability in a bad faith action [*Eigner v. Worthington (1997) 57 Cal. App. 4th 188, 195-199, 66 Cal. Rptr. 2d 808]* .

The fact that a coverage dispute is capable of being resolved without reference to the facts of the underlying claim does not permit an insurer to avoid its duty to defend when the facts determinative of coverage are disputed [*Amato v. Mercury Cas. Co. (1993) 18 Cal. App. 4th 1784, 1791-1792, 23 Cal. Rptr. 2d 73* (in action by mother-in-law for injuries sustained in accident caused by son-in-law, evidence suggesting that son-in-law did not reside with mother-in-law created a potential for coverage and triggered insurer's duty to defend, even though jury ultimately found that parties did reside together and coverage was barred under policy's "resident relative" exclusion; repudiated as to the proper measure of damages on appeal after remand, *Amato v. Mercury Cas. Co. (1997) 53 Cal. App. 4th 825, 61 Cal. Rptr. 2d 909*)].

There is no duty to defend if the facts giving rise to the claim do not arise out of operations covered by the policy, and occur in a remote location from the operations of the insured [*Hartford v. State of California (1996) 41 Cal. App. 4th 1564, 1570, 49 Cal. Rptr. 2d 282* (coverage of operation of exhibitor's booth at fairground did not extend to injury on bleachers that were 100 feet from booth and had no relationship to exhibitor's operations)].

Even if a complaint, on its face, does not create a potential for coverage under the policy, evidence extrinsic to the complaint can generate a duty to defend [*Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 276, 54 Cal. Rptr. 104, 419 P.2d 168]* . In such a situation, facts extrinsic to the complaint are considered in determining whether any potential for coverage existed at the inception of theunderlying lawsuit [*Golden Eagle Ins. Co. v. Travelers Cos. (9th Cir. 1996) 103 F.3d 750, 757]* . However, absent an allegation of facts showing a potential for coverage, and in the face of mere speculation by the insured about unpled third party claims, coverage will not be found, and there will be no duty to defend [*Hurley Constr. Co. v. State Farm Fire & Cas. Co. (1992) 10 Cal. App. 4th 533, 538, 12 Cal. Rptr. 2d 629]* .

Evidence extrinsic to the complaint may also defeat an insurer's duty to defend, when the issue of coverage can be determined as a matter of law on undisputed facts [*Montrose Chem. Corp. v. Superior Court (1993) 6 Cal. 4th 287, 296-299, 24 Cal. Rptr. 2d 467, 861 P.2d 1153]* .

Inasmuch as potential liability depends on the facts known to the insurer or pleaded in the complaint, when the only potential for liability depends on the resolution of a legal question, instead of on the resolution of disputed facts, there may be no duty to defend [*see* *State Farm Mut. Auto. Ins. Co. v. Longden (1987) 197 Cal. App. 3d 226, 233, 242 Cal. Rptr. 726* (potential liability depended on whether undisputed facts constituted an "accident")].

The duty to defend is broader than the duty to indemnify [*Fire Ins. Exch. v. Jiminez (1986) 184 Cal. App. 3d 437, 441, 229 Cal. Rptr. 83]* . Any doubt regarding whether the duty to defend exists will be resolved in favor of the insured against the insurer [*Eichler Homes, Inc. v. Underwriters at Lloyd's, London (1965) 238 Cal. App. 2d 532, 538, 47 Cal. Rptr. 843]* . The duty to defend does not dissolve simply because the insured is ultimately found liable under facts not giving rise to coverage [*Central Mut. Ins. Co. v. Del Mar Beach Club Owners Ass'n (1981) 123 Cal. App. 3d 916, 927, 176 Cal. Rptr. 895]* .

When a suit against an insured alleges a claim that potentially, or even possibly, could subject the insured to liability for covered damages, the insurer must defend unless and until the insurer can demonstrate, by reference to undisputed facts, that the claim cannot be covered [*Borg v. Transamerica Ins. Co. (1996) 47 Cal. App. 4th 448, 455, 54 Cal. Rptr. 2d 811]* . To prevail, the insured must prove the existence of a potential for coverage, while the insurer must establish the absence of any such potential [*Borg v. Transamerica Ins. Co. (1996) 47 Cal. App. 4th 448, 455, 54 Cal. Rptr. 2d 811]* .

Thus, the insured need only show that the underlying claim *may* fall within policy coverage, while the insurer must

prove it cannot; facts merely tending to show that the claim is not covered, or may not be covered, but that are insufficient to eliminate the possibility that resultant damages (or the nature of the action) will fall within the scope of coverage, add no weight to the scales [*Borg v. Transamerica Ins. Co. (1996) 47 Cal. App. 4th 448, 456, 54 Cal. Rptr. 2d 811]* . Only if the underlying complaint can by no conceivable theory raise a single issue which could bring it within the policy coverage is the insured excused from the duty to defend [*Borg v. Transamerica Ins. Co. (1996) 47 Cal. App. 4th 448, 456-457, 54 Cal. Rptr. 2d 811]* . However, the existence of an unresolved legal dispute concerning policy interpretation, which is ultimately resolved in favor of the insurer, is not a basis for the existence of a duty to defend [*Lebas Fashion Imports of USA, Inc. v. ITT Hartford Ins. Group (1996) 50 Cal. App. 4th 548, 556, 59 Cal. Rptr. 2d 36]* .

The duty to defend is not without limitation. It extends only to the defense of those actions of the nature and kind covered by the policy. For example, a workers' compensation insurer has no duty to defend a civil action by an employee against his employer for wrongful termination in violation of public policy merely because the plaintiff might later file a covered workers' compensation claim [*La Jolla Beach & Tennis Club, Inc. v. Industrial Indem. Co. (1994) 9 Cal. 4th 27, 44, 36 Cal. Rptr. 2d 100, 884 P.2d 1048]* .

Comprehensive liability insurers that insure only for tangible property losses do not owe a duty to defend in a dispute involving the right to use an implied easement. Interference with an easement right is not property damage to tangible property giving rise to a duty to defend [*Kazi v. State Farm Fire & Cas. Co. (2001) 24 Cal. 4th 871, 879-882, 887, 103 Cal. Rptr. 2d 1, 15 P.3d 223]* . Actions over easement ownership, interference, or the right to use an easement concern "pure rights in property" or intangible rights only [*Kazi v. State Farm Fire & Cas. Co. (2001) 24 Cal. 4th 871, 882, 103 Cal. Rptr. 2d 1, 15 P.3d 223]* . An easement is a nonpossessory interest in the land of another that gives its owner the right to use the land of another or to prevent the other property owner from using that property owner's own land. It represents a limited privilege to use the land of another for the benefit of the easement holder's land, but it does not create an interest in the land itself [*Kazi v. State Farm Fire & Cas. Co. (2001) 24 Cal. 4th 871, 880-881, 103 Cal. Rptr. 2d 1, 15 P.3d 223]* .

The insurer, after taking into consideration facts gathered from its own investigation or information supplied to it, and determining that no potential liability under the policy exists, may refuse to defend the lawsuit. The lack of pre-existing authority on the existence of an insurer's duty to defend on a given issue does not automatically compel the insurer to defend a third party lawsuit until the issue is resolved by controlling authority. It is not necessary that there be a published judicial opinion definitively construing the specific policy provision on which the insurer relies in denying a defense. If the terms of the policy provide no potential for coverage, the insurer may properly deny a defense even if that duty is later evaluated under case law that did not exist at the time of the tender [*Waller v. Truck Ins. Exch., Inc. (1995) 11 Cal. 4th 1, 23-25, 44 Cal. Rptr. 2d 370, 900 P.2d 619]* .

However, an insurer refuses to defend at its own risk. If liability or potential liability under the policy is ultimately established, the insurer is accountable to itsinsured or to the person who obtained judgment against the insured in the action it refused to defend [*Dillon v. Hartford Accident & Indem. Co. (1974) 38 Cal. App. 3d 335, 339-340, 113 Cal. Rptr. 396* (holding no duty to defend under policies involved)].

[2] Summary Adjudication of Duty to Defend

On a motion for summary adjudication of the duty to defend, the insured must prove the existence of a potential for coverage, while the insurer must prove the absence of any potential for coverage. Facts that tend to show that the claim is not covered or may not be covered but which do not wholly eliminate the possibility that the claim will fall within the scope of coverage are insufficient to meet the insurer's burden [*Montrose Chem. Corp. v. Superior Court (1993) 6 Cal. 4th 287, 300, 24 Cal. Rptr. 2d 467, 861 P.2d 1153]* .

Because the insured is entitled to a prompt ruling on its motion for summary adjudication of the duty to defend, the court may not delay adjudication to give the insurer time to investigate and prepare. However, a ruling in favor of the

insured is not necessarily a permanent determination. Although the insurer must undertake the defense once summary adjudication is entered in favor of the insured, the insurer may continue to investigate and develop evidence that will allow it to defeat the insured's coverage claim and terminate its defense. The insurer may move for a summary adjudication that it has no duty to defend at any time it can conclusively eliminate the potential for coverage [*Liberty Mut. Ins. Co. v. Superior Court (1997) 58 Cal. App. 4th 617, 621-624, 68 Cal. Rptr. 2d 219* ; *Haskel, Inc. v. Superior Court (1995) 33 Cal. App. 4th 963, 978, 39 Cal. Rptr. 2d 520]* .

An insurer's subsequent motion for summary judgment or adjudication on the duty to defend is not considered a motion for reconsideration, and the insurer is therefore not required to prove that the facts on which the motion is based were newly discovered after the insured's earlier motion for summary adjudication [*Liberty Mut. Ins. Co. v. Superior Court (1997) 58 Cal. App. 4th 617, 623, 68 Cal. Rptr. 2d 219]* .

[3] After Payment of Policy Limits

An insurer may limit the duty to defend by including policy language expressly limiting its defense obligation when the insurer has already paid out the insured's limit of coverage based on the same claim [*Heredia v. Farmers Ins. Exch. (1991) 228 Cal. App. 3d 1345, 1355, 279 Cal. Rptr. 511* ; *Johnson v. Continental Ins. Cos. (1988) 202 Cal. App. 3d 477, 481, 248 Cal. Rptr. 412* ; *but see County of Santa Clara v. USF & G (N.D. Cal. 1994) 868 F. Supp. 274, 277-278, 280* (issuance of remedial action order by California Department of Health Services was not equivalent to an adjudication of liability that would allow primary insurer to pay out its policy limits and thereby extinguish its duty to defend insured)]. Although California has yet to decide whether a general duty to defend ends with the payment of policy limits, an insurer may be able to rely on clear policy language to insulate itself from the duty to defend once policy limits are paid out in those cases in which the insured suffers no prejudice [*see Johnson v. Continental Ins. Cos. (1988) 202 Cal. App. 3d 477, 483-486, 248 Cal. Rptr. 412]* .

For a form of complaint brought by an insured against an insurer to recover damages for failure to defend, see *§ 308.462*.

[4] Trigger of Duty to Defend

An insurer's duty to defend under a policy providing occurrence-based coverage, such as a standard commercial liability policy, is triggered when the harm specified in the policy may possibly have been caused by an included occurrence, if at least some of the harm may potentially have resulted within the policy period [*Aerojet-Gen. Corp. v. Transport Indem. Co. (1997) 17 Cal. 4th 38, 75, 70 Cal. Rptr. 2d 118, 948 P.2d 909]* . It is not necessary for the harm to be reported during the policy period. If bodily injury or property damage continues throughout successive policy periods, all of the insured's policies in effect during those periods are triggered. Coverage is not limited to the policy in effect at the time of the precipitating event or conditions [*Montrose Chem. Corp. v. Admiral Ins. Co. (1995) 10 Cal. 4th 645, 669-670, 42 Cal. Rptr. 2d 324, 913 P.2d 878* ; *County of San Bernardino v. Pacific Indem. Co. (1997) 56 Cal. App. 4th 666, 682, 65 Cal. Rptr. 2d 657* ; *see Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co. (1996) 45 Cal. App. 4th 1, 39-40, 52 Cal. Rptr. 2d 690]* .

A claims-made liability policy generally limits coverage to claims made against the insured and reported to the company during the policy period. Reporting of the claim to the insurance company is the event that triggers coverage [*KPFF, Inc. v. California Union Ins. Co. (1997) 56 Cal. App. 4th 963, 972, 66 Cal. Rptr. 2d 36]* .

[5] Duty to Defend All Claims

Under a standard general commercial liability policy, once a potential for coverage is established as to at least one of the claims asserted against the insured, the insurer is obligated to defend against all of the claims involved in the action, both covered and noncovered, until either the action is concluded or it is shown that no claim can in fact be covered [

Buss v. Superior Court (1997) 16 Cal. 4th 35, 46, 65 Cal. Rptr. 2d 366, 939 P.2d 766] . If such a showing is made, the duty to defend is extinguished prospectively only; in other words, the insurer has a duty to defend the entire action until that point [*Buss v. Superior Court (1997) 16 Cal. 4th 35, 46, 65 Cal. Rptr. 2d 366, 939 P.2d 766]* .

[6] Right to Reimbursement of Defense Costs From Insured

Under a standard commercial liability insurance policy, the insurer has a quasi-contractual duty to defend the entire action if at least one claim is potentially covered [*Buss v. Superior Court (1997) 16 Cal. 4th 35, 47-49, 65 Cal. Rptr. 2d 366, 939 P.2d 766]* . However, the insurer has a right to seek reimbursement from the insured for those defense costs that can be allocated solely to claims that were not even potentially covered [*Buss v. Superior Court (1997) 16 Cal. 4th 35, 50-52*].

To obtain reimbursement for defense costs, the insurer must reserve its right to reimbursement. Through reservation, the insurer gives the insured notice of how the insurer will, or at least may, proceed and provides the insured an opportunity to take any steps that the insured may deem reasonable or necessary in response, including choosing either to accept defense by the insurer and under the insurer's control or, instead, to defend in some other way [*Buss v. Superior Court (1997) 16 Cal. 4th 35, 61 n.27, 65 Cal. Rptr. 2d 366, 939 P.2d 766* ; *see also Blue Ridge Ins. Co. v. Jacobsen (2001) 25 Cal. 4th 489, 502, 106 Cal. Rptr. 2d 535]* .

The insurer may unilaterally condition its proffer of a defense on its reservation of a right later to seek reimbursement of costs advanced to defend claims that are not, and never were, potentially covered by the relevant policy. Such an announcement by the insurer permits the insured to decide whether to accept the insurer's terms for providing a defense, or instead to assume and control the insured's own defense [*Scottsdale Ins. Co. v. MV Transp. (2005) 36 Cal. 4th 643, 656, 31 Cal. Rptr. 3d 147, 115 P.3d 460* ; *see Buss v. Superior Court (1997) 16 Cal. 4th 35, 61 n27, 65 Cal. Rptr. 2d 366, 939 P.2d 766]* . Having reserved the right to dispute coverage, an insurer may settle a third-party action within policy limits, even over the insured's objection, then obtain reimbursement of its settlement payments from the insured on a later determination that the underlying claims were not covered [*Blue Ridge Ins. Co. v. Jacobsen (2001) 25 Cal. 4th 489, 498, 106 Cal. Rptr. 2d 535, 22 P.3d 313* ; *see Scottsdale Ins. Co. v. MV Transp. (2005) 36 Cal. 4th 643, 660 n.5, 31 Cal. Rptr. 3d 147, 115 P.3d 460]* .

An insurer under a standard CGL policy, having properly reserved its rights, may advance sums to defend its insured against a third-party lawsuit, and may thereafter recoup those costs from the insured if it is determined, as a matter of law, that no duty to defend ever arose because the third-party suit never suggested the possibility of a covered claim [*Scottsdale Ins. Co. v. MV Transp. (2005) 36 Cal. 4th 643, 662, 31 Cal. Rptr. 3d 147, 115 P.3d 460]* .

If only a portion of a claim is potentially covered, as may occur when a claim seeks damages for injuries occurring over an extended period of time, the insurer has a right to seek reimbursement for defense costs that can be allocated solely to that part of the claim that was not even potentially covered. For example, an insurer may seek reimbursement for defense costs for part of a claim involving acts or omissions that may have caused continuing or discrete injury only after its policies expired [*Aerojet-Gen. Corp. v. Transport Indem. Co. (1997) 17 Cal. 4th 38, 69-71, 70 Cal. Rptr. 2d 118, 948 P.2d 909]* . The insurer bears the burden of proving the allocation of costs by a preponderance of the evidence [*Aerojet-Gen. Corp. v. Transport Indem. Co. (1997) 17 Cal. 4th 38, 69, 70 Cal. Rptr. 2d 118, 948 P.2d 909* ; *Buss v. Superior Court (1997) 16 Cal. 4th 35, 53, 65 Cal. Rptr. 2d 366, 939 P.2d 766]* .

Absent express language in the policy, an insurer has no right of reimbursement for claims that were potentially covered by the policy, even if the claims are ultimately not covered. Therefore, an insurer's "reservation of rights" to seek reimbursement for such claims is ineffectual, even if the insured agrees to the reservation [*Buss v. Superior Court (1997) 16 Cal. 4th 35, 49-50* & n.12, *65 Cal. Rptr. 2d 366, 939 P.2d 766]* .

An insurer may not seek equitable contribution to defense costs from an insured party, even if the insured party is

"self-insured" or covered only by a fronting policy during some part of the period covered by a claim [*Aerojet-Gen. Corp. v. Transport Indem. Co. (1997) 17 Cal. 4th 38, 71-72, 70 Cal. Rptr. 2d 118, 948 P.2d 909* ; *County of San Bernardino v. Pacific Indem. Co.(1997) 56 Cal. App. 4th 666, 690-691, 65 Cal. Rptr. 2d 657]* .

[7] Claims-Made Policies

A claims-made liability policy generally limits coverage to claims made against the insured and reported to the company during the policy period [*KPFF, Inc. v. California Union Ins. Co. (1997) 56 Cal. App. 4th 963, 972, 66 Cal. Rptr. 2d 36]* . In addition, a claims-made policy may contain an "awareness provision" (also known as a "discovery clause"), to the effect that if the insured gives written notice to the insurer during the policy period of any circumstances that may later give rise to a claim against the insured by reason of a covered act or omission, then any claim arising out of the act or omission will be treated as having been made during the policy period. An awareness provision extends the limits of insurance coverage in a claims-made policy [*Gyler v. Mission Ins. Co. (1973) 10 Cal. 3d 216, 220, 110 Cal. Rptr. 139, 514 P. 2d 1219]* .

Information received from sources other than the insured does not constitute written notice from the insured within the meaning of an awareness provision. Thus, if the insured fails to give the insurer written notice of circumstances that could give rise to a subsequent claim within the policy period, the insurer's receipt of such information from a third party during the policy period does not trigger the coverage provided by the awareness provision. In addition, reports based on speculation or rumor do not rise to the level of notice necessary under anawareness provision [*KPFF, Inc. v. California Union Ins. Co. (1997) 56 Cal. App. 4th 963, 976-978, 66 Cal. Rptr. 2d 36]* .

The transmission of pleadings to the insurance company may serve as a means of reporting a claim. In addition, if the pleadings contain material relevant both to reporting a claim and to circumstances covered by an awareness provision, the pleadings may also serve as written notice of circumstances that may give rise to future claims. However, in order to trigger the awareness provision, the pleadings must do more than present a speculative possibility of circumstances that might give rise to future claims; they must give the insurer a reasonable basis to infer the likelihood of such claims [*KPFF, Inc. v. California Union Ins. Co. (1997) 56 Cal. App. 4th 963, 974-976, 66 Cal. Rptr. 2d 36]* .

The covenant of good faith and fair dealing, which is implied in all insurance policies, imposes on the insurer a duty to investigate claims that have been properly submitted under a claims-made policy. This includes a duty to make inquiries regarding professional principles and practices relevant to evaluating a claim and determining whether the insurer has a duty to defend. The insurer is charged with constructive notice of facts it could have learned if it had properly conducted the investigation [*KPFF, Inc. v. California Union Ins. Co. (1997) 56 Cal. App. 4th 963, 973, 66 Cal. Rptr. 2d 36]* . In addition, the significance of written notice of circumstances under an awareness provision is evaluated in light of professional understanding of the matters disclosed, and the insurer is charged with the knowledge it would have obtained had it inquired into the professional understanding of such written notice [*KPFF, Inc. v. California Union Ins. Co. (1997) 56 Cal. App. 4th 963, 974, 66 Cal. Rptr. 2d 36* ; *see Civ. Code § 19*].

[8] In Context of Primary and Excess Coverage

If an insured has both primary and excess insurance, the excess insurer generally has no duty to participate in the insured's defense, or to contribute to a settlement on its behalf, until primary coverages are exhausted [*Phoenix Ins. Co. v. United States Fire Ins. Co. (1987) 189 Cal. App. 3d 1511, 1520, 1528, 235 Cal. Rptr. 185]* . When a dispute arises over whether or not policy limits have been exhausted, the primary insurer must defend until it obtains a declaratory judgment or summary judgment that it has exhausted its policy limits [*Hartford Accident & Indem. Co. v. Superior Court (1994) 23 Cal. App. 4th 1774, 1781, 29 Cal. Rptr. 2d 32* ; *see also Montrose Chem. Corp. v. Superior Court (1993) 6 Cal. 4th 287, 24 Cal. Rptr. 2d 467, 861 P.2d 1153]* . A primary insurer that successfully proves exhaustion is equitably entitled to be reimbursed by the excess insurer for its share of the defense costs [*Hartford Accident & Indem. Co. v. Superior Court (1994) 23 Cal. App. 4th 1774, 1780-1782, 29 Cal. Rptr. 2d 32]* .

Construing a "broad as primary" endorsement in an excess insurance policy to apply to any loss that is within the scope of the primary policy's coverage, regardless of whether there is actual payment, does not violate the stricture against interpretations that make words redundant, in particular the words "the excess of" as in the policy's phrase, "a loss which is covered ... the excess of which would be payable" [*Housing Group v. California Ins. Guarantee Ass'n (1996), 56 Cal. Rptr. 2d 378]* . Thus, in an insured developer's declaratory relief action against an excess insurer, the trial court properly found that defendant covered construction defects lawsuits against plaintiff after the primary coverage had been exhausted, where plaintiff had a primary comprehensive general liability policy and an umbrella policy with the excess insurer, which listed the primary policy in its schedule of "underlying" insurance and which had a "broad as primary" endorsement that provided coverage for "a loss which is covered under the policies of underlying insurance" [*Housing Group v. California Ins. Guarantee Ass'n (1996), 56 Cal. Rptr. 2d 378]* .

An excess insurer has no duty to defend or to provide coverage unless and until the insured's primary insurance coverage is exhausted, and a good faith settlement between an excess insurer and its insured does not bar the contribution claim of a second excess insurer [*Home Ins. Co. v. Superior Court (1996) 46 Cal. App. 4th 1286, 1292, 54 Cal. Rptr. 2d 292]* .

[9] Nonwaiver Agreement and Reservation of Rights

If an action is brought against an insured, and the insurer, with knowledge of a ground of noncoverage under the policy, assumes and conducts the defense without disclaiming liability and giving the insured notice of its rights, the insurer waives right to assert the ground of noncoverage [*Phoenix Ins. Co. v. United States Fire Ins. Co. (1987) 189 Cal. App. 3d 1511, 1527 n.15, 235 Cal. Rptr. 185* ; *Miller v. Elite Ins. Co. (1980) 100 Cal. App. 3d 739, 755, 161 Cal. Rptr. 322]* . An insurer may also waive its right to assert a policy exclusion if it fails to assert a reservation of rights in a timely manner, especially if the insured is prejudiced by the delay [*see Stonewall Ins. Co. v. City of Palos Verdes Estates (1996) 46 Cal. App. 4th 1810, 1839, 54 Cal. Rptr. 2d 176* (insurer's failure to inform insured of its reservation of rights under exclusion until three weeks before trial constituted waiver; insured was prejudiced because separate counsel could have been retained for excluded claim had timely notice been given)]. To avoid waiving its right to assert noncoverage defenses, while at the same time satisfying its duty to defend, the insurer may undertake defense of the action after either securing a nonwaiver agreement (bilateral agreement) from the insured, or by making an adequate reservation of rights (unilateral agreement) to assert noncoverage at a later time [*Val's Painting & Drywall, Inc. v. Allstate Ins. Co. (1975) 53 Cal. App. 3d 576, 586, 126 Cal. Rptr. 267* ; *see, e.g., Golden Eagle Ins. Corp. v. Cen-Fed, Ltd. (2007) 148 Cal. App. 4th 976, ___, 56 Cal. Rptr. 3d 279* (reservation of rights)].

The insurer may not recover from the insured its attorney's fees and legal expenses in defending the action, as long as the claim against the insured waspotentially within policy coverage [*Buss v. Superior Court (1997) 16 Cal. 4th 35* , 49-52, *65 Cal. Rptr. 2d 366, 939 P.2d 766* ; *Val's Painting & Drywall, Inc. v. Allstate Ins. Co. (1975) 53 Cal. App. 3d 576, 582-583, 126 Cal. Rptr. 267* ; *Hertzka & Knowles v. Salter (1970) 6 Cal. App. 3d 325, 329-336, 86 Cal. Rptr. 23]* . A reservation of rights to recover such costs is ineffective, even if the insured agreed to the reservation [*Buss v. Superior Court (1997) 16 Cal. 4th 35, 49-50*]. However, if an insurer properly reserved its rights, it may recoup defense costs from the insured if it is determined, as a matter of law, that no duty to defend ever arose because the third-party suit never suggested the possibility of a covered claim [*Scottsdale Ins. Co. v. MV Transp. (2005) 36 Cal. 4th 643, 662, 31 Cal. Rptr. 3d 147, 115 P.3d 460]* . The insurer must reserve its right of reimbursement for defense costs in order to avoid waiver. It may do so unilaterally, without the agreement of the insured [*Scottsdale Ins. Co. v. MV Transp. (2005) 36 Cal. 4th 643, 656, 31 Cal. Rptr. 3d 147, 115 P.3d 460* ; *Buss v. Superior Court (1997) 16 Cal. 4th 35, 61 n.27, 65 Cal. Rptr. 2d 366, 939 P.2d 766* ; *see Golden Eagle Ins. Corp. v. Cen-Fed, Ltd. (2007) 148 Cal. App. 4th 976, ___, 56 Cal. Rptr. 3d 279* , *2007 Cal. App. LEXIS 406* , pp5-6, n4, 5 (because letter of "complete" reservation of rights to deny coverage not included in appellate record, unclear whether insurer has right of reimbursement of defense costs and expenses although it had no duty to indemnify nor defend; also unclear whether insurer sought that reimbursement)].

An insurer who does not reserve any rights against the insured still retains the right to assert that its policy does not provide coverage in an action seeking equitable indemnity from the insured's other insurers [*Mitchell, Silberberg & Knupp v. Yosemite Ins. Co. (1997) 58 Cal. App. 4th 389, 393-395, 67 Cal. Rptr. 2d 906]* .

An insurer that adequately reserves its right to assert a noncoverage defense will not be bound by a judgment against the insured in favor of the injured party. For example, in a case involving allegations of sexual molestation, the underlying action by the injured party against the insured went forward while the coverage dispute was being decided in the reviewing courts. The reviewing courts ultimately determined that the insurer was not entitled to summary judgment on the issue of coverage because of the possibility that the injury was caused in part by the insured's negligence, for which the policy provided coverage. In the underlying third party action, damages were awarded against the insured based on a theory of negligence. Because the insurer had adequately reserved its right to assert a noncoverage defense, it was not collaterally estopped from subsequently litigating the issue of whether the insured's conduct was intentional, rather than negligent, and therefore not covered under the policy [*Barbara B. v. Horace Mann Ins. Co. (1998) 61 Cal. App. 4th 158, 164-166, 71 Cal. Rptr. 2d 350* (citing *J.C. Penney Cas. Ins. Co. v. M.K. (1991) 52 Cal. 3d 1009, 1017-1018, 278 Cal. Rptr. 64, 804 P.2d 689*)].

Even without a nonwaiver agreement or reservation of rights, the insurer is not bound by the judgment against the insured in the third-party action regarding issues not necessarily adjudicated in that action. Hence, the insurer can still present in the insured's action against it for wrongful failure to defend any defenses that are not inconsistent with the judgment in the third-party action against the insured [*Hogan v. Midland Nat'l Ins. Co. (1970) 3 Cal. 3d 553, 564, 91 Cal. Rptr. 153, 476 P.2d 825* ; *see also* *Alta Cal. Reg'l Ctr. v. Fremont Indem. Co. (1994) 25 Cal. App. 4th 455, 459, 30 Cal. Rptr. 2d 841* , *disapproved on other grounds,* *Waller v. Truck Ins. Exch., Inc. (1995) 11 Cal. 4th 1, 44 Cal. Rptr. 2d 370, 900 P.2d 619* (insurer that simply denies coverage, without expressly reserving right to assert defenses based on policy provisions that could limit amount of benefits available under policy in the event coverage did exist, does not waive right to assert those defenses in the event coverage ultimately is found to exist].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsClaims Made PoliciesGeneral OverviewInsurance LawClaims & ContractsEstoppel & WaiverGeneral OverviewInsurance LawClaims & ContractsFiduciary ResponsibilitiesInsurance LawExcess InsuranceObligationsDefenseInsurance LawGeneral Liability InsuranceObligationsDefense

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§ 308.120 Failure to Defend as Breach of Implied Covenant

Wrongful failure of the insurer to provide a defense to its insured may give rise to a cause of action in tort for breach of the implied covenant of good faith and fair dealing [*see Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 942-943, 122 Cal. Rptr. 470* ; *see also Civ. Code § 3333* (tort damages generally)]. For further discussion, see *§ 308.24*. For a form of complaint brought by an insured against an insurer to recover damages for failure to defend, including an allegation of breach of the implied covenant of good faith and fair dealing, see *§ 308.462*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityRefusals to Defend

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§ 308.121 Damages Recoverable for Wrongful Failure to Defend

[1] Expenses of Litigation

When the insured is required to conduct his or her own defense because of the insurer's breach of its duty to defend, the insured may recover the expenses of litigation, including costs and attorney's fees, from the insurer. The insured may also recover the expenses of an appeal when the grounds for the appeal are reasonable, even if the appeal is unsuccessful [*Arenson v. National Auto. & Cas. Ins. Co. (1957) 48 Cal. 2d 528, 537, 310 P.2d 961]* . Generally, the insurer is liable for the total amount of the fees expended in defending the action, even if some of the damages recovered in the action against the insured were outside the coverage of the policy [*Hogan v. Midland Nat'l Ins. Co. (1970) 3 Cal. 3d 553, 564, 91 Cal. Rptr. 153, 476 P.2d 825]* .

[2] Amount of Third-Party Judgment or Good Faith Settlement

In addition to the costs of defense, the insured may also recover the amount of the judgment by the third party, up to the policy limits, unless the insurer canestablish that the loss was not covered by the policy (and is not estopped from doing so) [*see Hogan v. Midland Nat'l Ins. Co. (1970) 3 Cal. 3d 553, 564-566, 91 Cal. Rptr. 153, 476 P.2d 825* ; *see also Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 279-280, 54 Cal. Rptr. 104, 419 P.2d 168* (insurer liable for amount of third-party judgment when judgment did not exclude possibility of policycoverage); *see generally § 308.119[9]*].

If the insurer tortiously breaches its duty to defend and the insured suffers a default judgment because he or she cannot afford other counsel, the insurer is liable for the full amount of the default judgment, regardless of whether coverage in fact existed [*Amato v. Mercury Cas. Co. (1997) 53 Cal. App. 4th 825, 831-833, 61 Cal. Rptr. 2d 909]* . Additionally, the insured is not required to prove that the amount of the underlying judgment would have been smaller if the insurer had provided a defense [*Amato v. Mercury Cas. Co. (1997) 53 Cal. App. 4th 825, 835-839, 61 Cal. Rptr. 2d 909]* .

Moreover, an insurer that rejects a reasonable settlement offer within policy limits, in addition to refusing to defend, is subject to liability for the underlying judgment in excess of policy limits [*Samson v. Transamerica Ins. Co. (1981) 30 Cal. 3d 220, 237-238, 178 Cal. Rptr. 343, 636 P.2d 32* ; *see § 308.461*; *see also § 308.123[4][a]*].

An insurer that wrongfully fails to defend is liable for the full amount of a reasonable settlement up to the policy limit arrived at in good faith between the third party and the insured [*Cravens, Dargan & Co. v. Pacific Indem. Co. (1972) 29 Cal. App. 3d 594, 602, 105 Cal. Rptr. 607* ; *Northwestern Title Sec. Co. v. Flack (1970) 6 Cal. App. 3d 134, 146, 85 Cal. Rptr. 693* ; *see Consolidated Am. Ins. v. Mike Soper Marine (9th Cir. 1991) 951 F.2d 186, 191* (insurer also liable for accrued interest on stipulated judgment)].

If an insurer erroneously denies coverage or improperly refuses to defend the insured in violation of its contractual duties, an insured is entitled to make a reasonable settlement of the claim in good faith and may then maintain an action against the insurer to recover the amount of the settlement [*Earth Elements, Inc. v. National Am. Ins. Co. (1995) 41 Cal. App. 4th 110, 111, 48 Cal. Rptr. 2d 399]* . Thus, for example, an insurer that breached its contractual duty to defend and indemnify an insured that was sued by a third party was liable to the insured for breach of contract for the value of the insured's counterclaim against the third party, which the insured agreed to dismiss in order to settle the third party's claim [*Earth Elements, Inc. v. National Am. Ins. Co. (1995) 41 Cal. App. 4th 110, 112, 48 Cal. Rptr. 2d 399]* .

[3] Compensatory Damages

The insured may also recover compensatory damages for pain and emotional distress proximately caused by the refusal to defend [*State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co. (1970) 9 Cal. App. 3d 508, 529, 88 Cal. Rptr. 246* (affirming award of damages for attorney's fees, costs, physical pain, and emotional distress); *see* Ch. 177, *Damages* , and Ch. 362, *Mental Suffering and Emotional Distress*].

[4] Punitive Damages

If the insurer's conduct in failing to defend gives rise to a cause of action in tort for breach of the implied covenant of good faith and fair dealing, the insured may be entitled to punitive damages [*see Tibbs v. Great Am. Ins. Co. (9th Cir. 1985) 755 F.2d 1370, 1375* ; *see also § 308.120*]. A simple breach by the insurer of its obligation to defend does not, in and of itself, support an award of punitive damages. To recover punitive damages, oppression, fraud, or malice on the part of the insurer must be shown [*see Civ. Code § 3294(a)*; *Tibbs v. Great Am. Ins. Co. (9th Cir. 1985) 755 F.2d 1370, 1375]* .

"Malice" means conduct intended to injure the insured, or "despicable" conduct carried on by the insurer with a willful and conscious disregard of the rights or safety of others [*Civ. Code § 3294(c)(1)*]. The word "despicable" indicates that absent an intent to injure, "malice" requires *more* than a "willful and conscious" disregard of the insured's interests; rather, the conduct must be "base," "vile," or "contemptible" [*College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 725, 34 Cal. Rptr. 2d 898, 882 P.2d 894* ; *see Tomaselli v. Transamerica Ins. Co. (1994) 25 Cal. App. 4th 1269, 1286-1288, 31 Cal. Rptr. 2d 433]* .

Constitutional due process considerations limit the imposition of punitive damages [*see State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 416, 123 S. Ct. 1513, 155 L. Ed. 2d 585* (bad faith failure to settle)]. For further discussion, see *§ 308.24[5]*.

For discussion and forms regarding contract and tort damages generally, see Ch. 177, *Damages* .

[5] Representation Provided by Another Insurer

The insured is not entitled to recover damages from an insurer who fails to provide a defense if the insured received representation from another insurer [*Barbara B. v. Horace Mann Ins. Co. (1998) 61 Cal. App. 4th 158, 164, 71 Cal. Rptr. 2d 350* ; *Ceresino v. Fire Ins. Exch. (1989) 215 Cal. App. 3d 814, 823, 264 Cal. Rptr. 30]* . Under these circumstances, the insured is not faced with the financial burden of undertaking its own defense, nor is it deprived of an

insurance carrier's expertise in investigating and defending against the third party claim [*Barbara B. v. Horace Mann Ins. Co. (1998) 61 Cal. App. 4th 158, 164, 71 Cal. Rptr. 2d 350* ; *Ceresino v. Fire Ins. Exch. (1989) 215 Cal. App. 3d 814, 823, 264 Cal. Rptr. 30]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityRefusals to DefendInsurance LawBad Faith & Extracontractual LiabilityRemediesActual & Consequential DamagesInsurance LawBad Faith & Extracontractual LiabilityRemediesPunitive DamagesGeneral OverviewInsurance LawClaims & ContractsCosts & Attorney FeesFailure to Defend

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§ 308.122 Effect of Settlement Between Insured and Insurer in Multi-Insurer Litigation

California appellate decisions are unresolved as to the effect of a settlement between an insured and one of its liability insurers that purports to release theinsurer from all claims arising from an event covered by multiple insurers. In *Rohr Indust., Inc. v. First State Ins. Co. (1997) 59 Cal. App. 4th 1480, 69 Cal. Rptr. 2d 872* , which involved a claim of continuous injury covered by multiple insurers over an extended period of time, the Court of Appeal held that a trial court lacked the authority to bar or dismiss claims of non-settling insurers against a co-insurer based on the court's determination of a good faith settlement between the co-insurer and the insured. The Court held that the trial court's finding of a good faith settlement pursuant to Civ. Code §§ 877 and 877.6 did not bar a third insurer's claims for equitable contribution against the settling insurer, because co-insurers are not co-obligors within the meaning of the statute [*Rohr Indus., Inc. v. First State Ins. Co. (1997) 59 Cal. App. 4th 1480, 1487-1490, 69 Cal. Rptr. 2d 872* ; *see also* *Topa Ins. Co. v. Fireman's Fund Ins. Cos. (1995) 39 Cal. App. 4th 1331, 1339-1340, 46 Cal. Rptr. 2d 516* ; *Hartford Accident & Indem. Co. v. Superior Court (1994) 29 Cal. App. 4th 435, 441, 34 Cal. Rptr. 2d 520]* .

A different result was suggested in *Diamond Heights Homeowners Ass'n v. National Am. Ins. Co. (1991) 227 Cal. App. 3d 563, 277 Cal. Rptr. 906* . In that case, the Court of Appeal stated that if the trial court confirms the good faith of a settlement between the insured and its primary insurer, the excess insurer stands in the position of a co-obligor and is barred from claiming that the settlement was made in bad faith [*Diamond Heights Homeowners Ass'n v. National Am. Ins. Co. (1991) 227 Cal. App. 3d 563, 582, 277 Cal. Rptr. 906]* . Although the court was not called on to decide the issue of whether the excess insurer would be permitted to seek contribution or indemnity from the settling primary insurer, the court's conclusion that the excess insurer was in the position of a co-obligor suggests that the court's confirmation of a good faith settlement could bar a co-insurer from seeking contribution.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawGeneral Liability InsuranceObligationsSettlements

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§ 308.123 Insurer's Duty to Settle Claim Against Insured

[1] Substantial Likelihood of Recovery in Excess of Policy Limits

Liability insurance policies usually include a provision authorizing the insurer to investigate, negotiate, and settle any claim or suit against the insured as it deems expedient [*see, e.g.,* *Merritt v. Reserve Ins. Co. (1973) 34 Cal. App. 3d 858, 863, 870, 110 Cal. Rptr. 511]* . Moreover, there is implied in every contract, including insurance policies, a covenant of good faith and fair dealing that neither party will do anything that will injure the right of the other to receive the benefits of the agreement [*Johansen v. California State Auto. Ass'n Inter-Ins. Bureau (1975) 15 Cal. 3d 9, 14, 123 Cal. Rptr. 288, 538 P.2d 744* ; *Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A. G. (1970) 3 Cal. 3d 434, 447, 91 Cal. Rptr. 6, 476 P.2d 406* ; *see § 308.24[1]*]. The implied covenant of good faith and fair dealing imposes a duty on the insurer to settle a claim against its insured within policy limits whenever there is a substantial likelihood of a recovery in excess of those limits [*Johansen v. California State Auto. Ass'n Inter-Ins. Bureau (1975) 15 Cal. 3d 9, 14-15, 123 Cal. Rptr. 288, 538 P.2d 744* ; *Comunale v. Traders & Gen. Ins. Co. (1958) 50 Cal. 2d 654, 659, 328 P.2d 198]* . Conversely, an insurer is not required to accept a settlement demand that is within policy limits when there is no threat of an excess judgment against the insured [*Camelot by Bay Condo. Owners' Ass'n v. Scottsdale Ins. Co. (1994) 27 Cal. App. 4th 33, 53-54, 32 Cal. Rptr. 2d 354]* .

The requirement in *Civ. Code § 2860(f)* that independent counsel be allowed to participate in all aspects of litigation does not give the insured control over the insurer's contractual right to settle a claim [*Western Polymer Tech., Inc. v. Reliance Ins. Co. (1995) 32 Cal. App. 4th 14, 22, 38 Cal. Rptr. 2d 78]* .

[2] Agreement to Accept Settlement Offer

[a] Reasonable Settlement Within Policy Limits

An insurer that fails to accept a reasonable settlement offer within the policy limits, because it does not believe the policy provides coverage, assumes the risk that it will be liable for all resulting damages, including a judgment that exceeds the policy limits [*Blue Ridge Ins. Co. v. Jacobsen (2001) 25 Cal. 4th 489, 498, 106 Cal. Rptr. 2d 535* ;

Johansen v. California State Auto. Ass'n Inter-Ins. Bureau (1975) 15 Cal. 3d 9, 12, 15, 123 Cal. Rptr. 288, 538 P.2d 744] . In determining whether a settlement offer is reasonable, an insurer may not consider the issue of coverage. Instead, the only permissible consideration in evaluating the reasonableness of the settlement offer is whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer [*Blue Ridge Ins. Co. v. Jacobsen (2001) 25 Cal. 4th 489, 498, 106 Cal. Rptr. 2d 535* ; *Johansen v. California State Auto. Ass'n Inter-Ins. Bureau (1975) 15 Cal. 3d 9, 16, 123 Cal. Rptr. 288, 538 P.2d 744]* .

[b] Insurer's Reservation of Right to Assert Noncoverage

An insurer may agree to defend a lawsuit subject to a reservation of its right to assert noncoverage [*Blue Ridge Ins. Co. v. Jacobsen (2001) 25 Cal. 4th 489, 497-498, 106 Cal. Rptr. 2d 535* ; *Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 279, 54 Cal. Rptr. 104, 419 P.2d 168]* . The insurer only has a duty to indemnify the insured for covered claims. It has no duty to pay for noncovered claims, because the insured did not pay premiums for such coverage [*Blue Ridge Ins. Co. v. Jacobsen (2001) 25 Cal. 4th 489, 502-503, 106 Cal. Rptr. 2d 535* ; *Buss v. Superior Court (1997) 16 Cal. 4th 35, 50-51, 65 Cal. Rptr. 2d 366, 939 P.2d 766* ; *see § 308.119*].

If the insurer adequately reserves its right subsequently to assert the noncoverage defense, it will not be bound by the judgment. If the injured party prevails,that party or the insured may assert a claim against the insurer. The insurer may then raise the noncoverage defense previously reserved [*Blue Ridge Ins. Co. v. Jacobsen (2001) 25 Cal. 4th 489, 497-498, 106 Cal. Rptr. 2d 535* ; *Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 279, 54 Cal. Rptr. 104, 419 P.2d 168]* .

An insurer may reserve its right to assert noncoverage unilaterally merely by giving notice to the insured. By accepting the insurer's defense under these circumstances, the insured is deemed to have accepted this reservation of rights [*Blue Ridge Ins. Co. v. Jacobsen (2001) 25 Cal. 4th 489, 498, 106 Cal. Rptr. 2d 535]* .

[c] Insurer's Right to Seek Reimbursement From Insured

If an insurer has reserved its right subsequently to assert noncoverage, has accepted a reasonable offer, and has subsequently established that its policy does not provide coverage, the insurer may seek reimbursement of the settlement payment from its insured [*Blue Ridge Ins. Co. v. Jacobsen (2001) 25 Cal. 4th 489, 499, 106 Cal. Rptr. 2d 535* ; *Johansen v. California State Auto. Ass'n Inter-Ins. Bureau (1975) 15 Cal. 3d 9, 19, 123 Cal. Rptr. 288, 538 P.2d 744]* .

An insurer may seek reimbursement for reasonable settlement of noncovered claims paid on the insured's behalf in the absence of the insured's express agreement, if the insurer satisfies the following conditions [*Blue Ridge Ins. Co. v. Jacobsen (2001) 25 Cal. 4th 489, 501, 106 Cal. Rptr. 2d 535]* :

- A timely and express reservation of rights;

- An express notification to the insured of the insurer's intent to accept a proposed settlement offer; and

- An express offer to the insured that the insured may assume the insured's own defense if the insurer and the insured disagree regarding whether to accept the proposed settlement.

An insurer that satisfies these prerequisites is deemed to have an implied-in-law right of reimbursement to avoid the insured's unjust enrichment [*Blue Ridge Ins. Co. v. Jacobsen (2001) 25 Cal. 4th 489, 502, 106 Cal. Rptr. 2d 535]* .

[3] Settlements Made Without Insurer's Participation

If the insurer denies coverage and a defense, the policyholder may make a reasonable, noncollusive settlement without the insurer's consent and seek reimbursement for the settlement amount in an action for breach of the covenant of good faith and fair dealing. If the insurer has repudiated its obligation to defend, the policyholder may, in the absence of fraud, settle with the plaintiff, on the best terms possible, taking a covenant not to execute, without forfeiture of the right to indemnity [*see Hamilton v. Maryland Cas. Co. (2002) 27 Cal. 4th 718, 728, 117 Cal. Rptr. 2d 318, 41 P.3d 128* ; *see also Roman v. Unigard Ins. Group (1994) 26 Cal. App. 4th 177, 180-184, 31 Cal. Rptr. 2d 501]* . Therefore, a policyholder that is denied a defense for covered claims by its liability insurer may make a reasonable settlement with the plaintiff, in good faith, and then maintain (or assign) an action against the insurer for breach of its defense duties. In such an action, a reasonable settlement made by the insured to terminate the underlying claim against the insured may be used as presumptive evidence of the insured's liability on the underlying claim and of the amount of liability [*Hamilton v. Maryland Cas. Co. (2002) 27 Cal. 4th 718, 728-729, 117 Cal. Rptr. 2d 318, 41 P.3d 128* ; *see also Isaacson v. California Ins. Guarantee Ass'n (1988) 44 Cal. 3d 775, 791, 244 Cal. Rptr. 655, 750 P.2d 297]* .

However, if the insurer has accepted defense of the claim, and might have prevailed at trial had the insured and the claimant not settled without the insurer's participation, no presumption of the insured's liability arises from the fact or amount of the settlement between the insured and the claimant [*Hamilton v. Maryland Cas. Co. (2002) 27 Cal. 4th 718, 729, 117 Cal. Rptr. 2d 318, 41 P.3d 128* ; *see also Isaacson v. California Ins. Guarantee Ass'n (1988) 44 Cal. 3d 775, 793-794, 244 Cal. Rptr. 655, 750 P.2d 297]* . Moreover, court approval of the settlement pursuant to *Code Civ. Proc. § 877.6* ("good faith settlement" protections in multiparty cases) cannot transform an agreed judgment that, by covenant, the insured will never be required to pay, into a determination of the existence and extent of the insured's liability. In one case, for example, after the insurer undertook defense of the underlying case and rejected the claimant's settlement offer, the insured, without the insurer's agreement, stipulated to a judgment against it in excess of both the policy limits and the previously rejected settlement offer, coupled with a covenant not to execute. The parties obtained court approval of the settlement pursuant to *Code Civ. Proc. § 877.6*. The California Supreme Court held that the stipulated judgment carried no weight in the subsequent assigned bad faith action brought by the claimant against the insurer [*Hamilton v. Maryland Cas. Co. (2002) 27 Cal. 4th 718, 731, 117 Cal. Rptr. 2d 318, 41 P.3d 128* (insurer entitled to summary judgment)].

A good faith finding under *Code Civ. Proc. § 877.6* bars actions for contribution or indemnity by joint tortfeasors or co-obligors not participating in the settlement [*Code Civ. Proc. § 877.6(c)*; *Hamilton v. Maryland Cas. Co. (2002) 27 Cal. 4th 718, 729, 117 Cal. Rptr. 2d 318, 41 P.3d 128]* . The purpose of a Section 877.6 hearing is to ensure fairness to absent tortfeasors, not fairness to the settling defendant's insurer. By contrast, the concerns of the settling defendant's insurer are whether its insured is admitting liability too easily or is agreeing to pay more than the defendant's proportionate share of the plaintiff's loss. For purposes of a dispute between the settling tortfeasor and that tortfeasor's insurer, the evidentiary showing made at the Section 877.6 proceedings cannot be a substitute for anactual trial [*Hamilton v. Maryland Cas. Co. (2002) 27 Cal. 4th 718, 729, 117 Cal. Rptr. 2d 318, 41 P.3d 128]* . Consequently, a defending insurer cannot be bound to a settlement made without its participation and without any actual commitment on its insured's part to pay the judgment, even if the settlement has been found to be in good faith for purposes of *Code Civ. Proc. § 877.6* [*Hamilton v. Maryland Cas. Co. (2002) 27 Cal. 4th 718, 730, 117 Cal. Rptr. 2d 318, 41 P.3d 128]* . For further discussion of *Code Civ. Proc. § 877.6*, see Ch. 300, *Indemnity and Contribution* .

An insured who is provided a defense by the insurer, and believes that this insurer has rejected a reasonable settlement demand within policy limits, may minimize further injury by doing either of the following:

- If the insurer is willing to contribute some part of the demanded settlement figure, the insured may conclude a favorable settlement by contributing the deficit and, assuming the insurer's breach can be proven, recover the payment in a subsequent action against the insurer for breach of the covenant of good faith and fair dealing [*see Hamilton v. Maryland Cas. Co. (2002) 27 Cal. 4th 718, 732, 117 Cal. Rptr. 2d 318, 41 P.3d 128* ; *see also Isaacson v. California Ins. Guarantee Ass'n (1988) 44 Cal. 3d 775, 793,*

244 Cal. Rptr. 655, 750 P.2d 297] .

- If the claimant is willing, the parties may exchange an assignment and a covenant not to execute before trial, eliminating the insured's personal exposure to an excess judgment. This assignment, however, is not immediately assertable and does not settle the third party's claim. So long as the insurer is providing a defense, the insurer is allowed to proceed through trial to judgment. The assignment of the bad faith cause of action becomes operative after the excess judgment has been rendered [*see Hamilton v. Maryland Cas. Co. (2002) 27 Cal. 4th 718, 732, 117 Cal. Rptr. 2d 318, 41 P.3d 128* ; *see also Archdale v. American Int'l Specialty Lines Ins. Co. (2007) 154 Cal. App. 4th 449, 474, 468, 64 Cal. Rptr. 3d 632* ; *Safeco Ins.Co. v. Superior Court (1999) 71 Cal. App. 4th 782, 788-789, 84 Cal. Rptr. 2d 43]* .

[4] Wrongful Failure to Settle

[a] Judgment in Excess of Policy Limits

If an insurer wrongfully declines a reasonable offer to settle a claim for an amount within policy limits and a judgment is entered against the insured exceeding policy limits, the insurer is liable for the full amount of the judgment, notwithstanding the policy limits [*Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 941, 132 Cal. Rptr. 424, 553 P.2d 584* ; *Johansen v. California State Auto. Ass'n Inter-Ins. Bureau (1975) 15 Cal. 3d 9, 19, 123 Cal. Rptr. 288, 538 P.2d 744]* .

Because the covenant of good faith and fair dealing is contractual, privity of contract ordinarily is required to bring an action against an insurer for wrongful failure to settle [*see Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 576, 108 Cal. Rptr. 480, 510 P.2d 1032* ; *Austero v. National Cas. Co. (1976) 62 Cal. App. 3d 511, 516-517, 133 Cal. Rptr. 107]* . Absent an assignment, a third-party plaintiff cannot sue the defendant's insurer directly for breach of the covenant [*Coleman v. Gulf Ins. Group (1986) 41 Cal. 3d 782, 795, 226 Cal. Rptr. 90, 718 P.2d 77* ; *Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 943-944, 132 Cal. Rptr. 424, 553 P.2d 584* ; *see § 308.24[1]*].

An appellate court has held that if an insurer is providing a defense, but merely refuses to settle, the insured has no immediate remedy. The court reiterated the general rule that a cause of action for bad faith refusal to settle arises only after a judgment has been rendered in excess of the policy limits [*Safeco Ins. Co. v. Superior Court (1999) 71 Cal. App. 4th 782, 788, 84 Cal. Rptr. 2d 43]* .

For a form of complaint brought by an insured against the insurer to recovery a third-party judgment in excess of policy limits, based on the insurer's wrongful failure to settle, see *§ 308.461*.

[b] Compensatory and Punitive Damages

An insured may recover damages for emotional distress that results from the insurer's tortious conduct in refusing to settle third-party actions [*see, e.g.,* *Crisci v. Security Ins. Co. (1967) 66 Cal. 2d 425, 433-434, 58 Cal. Rptr. 13, 426 P.2d 173]* .

An insurer's unreasonable failure to settle a third-party action, in violation of the implied covenant of good faith and fair dealing, constitutes a tort as well as a breach of contract, and consequently may support an award of punitive damages when accompanied by malice, fraud, or oppression [*Betts v. Allstate Ins. Co. (1984) 154 Cal. App. 3d 688, 708, 201 Cal. Rptr. 528* ; *Miller v. Elite Ins. Co. (1980) 100 Cal. App. 3d 739, 758, 161 Cal. Rptr. 322* ; *see Civ. Code § 3294(a)* (punitive damages); *see also Ch. 177, Damages, § 177.40* et seq.].

Constitutional due process considerations limit the imposition of punitive damages [*see State Farm Mutual Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 428, 123 S. Ct. 1513, 155 L. Ed. 2d 585* (bad faith failure to settle)]. For further

discussion, see *§ 308.24[5]* and Ch. 177, *Damages* .

[c] No Liability for Punitive Damages Awarded Against Insured Based on Insured's Conduct

An insured that sues an insurer for wrongful failure to settle may not recover from the insurer the amount of punitive damages ultimately awarded against the insured in the third-party lawsuit, if the punitive damages award was based on the conduct of the insured [*PPG Indus., Inc. v. Transamerica Ins. (1999) 20 Cal. 4th 310, 315-319, 84 Cal. Rptr. 2d 455, 975 P.2d 652]* . The rationale for this ruling is threefold [*PPG Indus., Inc. v. Transamerica Ins. (1999) 20 Cal. 4th 310, 316-319, 84 Cal. Rptr. 2d 455, 975 P.2d 652]* :

- Liability for intentional wrongdoing may not be offset or reduced by the negligence of another;
- The purpose of punitive damages (punishing the defendant and deterring future misconduct by making an example of the defendant) would not be served by shifting responsibility for the defendant's morally culpable behavior to the insurer; and
- Public policy prevents indemnification for punitive damages.

[5] Other Unreasonable Settlement Conduct

[a] Liability for Settling Claim in Derogation of Insured's Collateral Rights

An insurer may incur liability by settling a third-party claim if, by doing so, it derogates the rights of the insured to pursue collateral claims against the third party. The insurer has a fiduciary duty not to contravene the insured's rights, and subjects itself to liability for breach of the duty of good faith and fair dealing in such a case if it knows of the insured's intent to pursue those rights, even though the insurer does not breach any express duty and the insured has retained independent counsel [*Barney v. Aetna Cas. & Sur. Co. (1986) 185 Cal. App. 3d 966, 975-981, 230 Cal. Rptr. 215* ; *Rothtrock v. Ohio Farmers Ins. Co. (1965) 233 Cal. App. 2d 616, 43 Cal. Rptr. 716]* . Moreover, an insurer has a duty to use good faith in investigating, defending, setting claims reserves, and settling claims, when those activities directly influence the insured's premiums and dividends under the policy [*Security Officers Serv., Inc. v. State Comp. Ins. Fund (1993) 17 Cal. App. 4th 887, 890, 898, 21 Cal. Rptr. 2d 653* (insurer's claims adjustment and settlement practices allegedly resulted in increased premium revenue from insured)].

[b] Liability for Delay in Settling Claim

An insured may bring a bad faith action against an insurer for unreasonable settlement conduct if the insurer's unreasonable delay in settling a claim harms the insured. For example, in one case, a burglar took customer property from the insured's jewelry store. Because the insurer's delay in settling the claim alienated the insured's customers and thereby harmed the insured's goodwill, the insured was entitled to bring a bad faith action against the insurer [*Bodenhamer v. Superior Court (1987) 192 Cal. App. 3d 1472, 1479, 238 Cal. Rptr. 177]* .

[c] Liability for Forcing Insured to Contribute to Settlement

Because California law bars indemnification against punitive damage awards [*Ins. Code § 533*], an insurer's duty of good faith does not require it to pay money to settle punitive damage claims. However, the insurer must reasonably assist and cooperate with the insured in defending and settling punitive damages claims. Therefore, in cases in which punitive damages are sought against the insured, the insurer's duty of good faith requires the insurer to give fair consideration to the insured's concerns about its exposure to punitive damages in its attempts to settle the case. A bad faith action may lie against an insurer who uses the insured's fear of uninsured punitive damage exposure to coerce the insured to contribute to a settlement [*J.B. Aguerre, Inc. v. American Guarantee & Liab. Ins. Co. (1997) 59 Cal. App. 4th 6, 13-15, 68 Cal. Rptr. 2d 837]* .

[d] No Liability for Injuring Insured's Business Reputation in Settling Claim

When the policy language permits an insurer to settle a claim as it deems expedient, the implied covenant of good faith and fair dealing apparently does not impose any obligation on the insurer to consider potential injury to the insured's business reputation in settling a claim. Thus, an insurer is under no obligation to forgo settlement in favor of vindicating the insured's reputation, and an allegation that a settlement injured the insured's business reputation is not sufficient to support a bad faith action [*Western Polymer Tech., Inc. v. Reliance Ins. Co. (1995) 32 Cal. App. 4th 14, 26-27, 38 Cal. Rptr. 2d 78]* .

[6] No Affirmative Defense of Comparative Bad Faith

In an action against an insurer for breach of the covenant of good faith and fair dealing, the insurer may not raise as an affirmative defense the insured's "comparative bad faith." Because of the disparate scopes and natures of the insurer's and the insured's obligations of good faith, an insurer's breach sounds in tort, while the insured's arises strictly from contractual provisions [*Kransco v. American Empire Surplus Lines Ins. Co. (2000) 23 Cal. 4th 390, 404-405, 97 Cal. Rptr. 2d 151, 2 P.3d 1]* . In so ruling, the California Supreme Court expressly disapproved, to the extent that it is inconsistent, *California Cas. Gen. Ins. Co. v. Superior Court (1985) 173 Cal. App. 3d 274, 218 Cal. Rptr. 817* , the only published California case holding that in a bad faith action, the insurer may assert the affirmative defense of comparative bad faith [*Kransco v. American Empire Surplus Lines Ins. Co. (2000) 23 Cal. 4th 390, 407, 97 Cal. Rptr. 2d 151, 2 P.3d 1]* .

The scope of the insured's duty of good faith and fair dealing, and the remedies available to the insurer for a breach of that duty, are fundamentally and conceptually distinct from the insurer's reciprocal duty, and the remedies available to the insured for breach of that duty, under the insurance policy. The parties are bound by a reciprocal obligation of good faith and fair dealing, but the particular duties differ, given the differing performance due under the contract of insurance. A fundamental disparity exists between the insured, which performs its basic duty of paying the policy premium at the outset, and the insurer, which, depending on a number of factors, may or may not have to perform its basic dutiesof defense and indemnification. An insured is thus not on equal footing with its insurer. The relationship between insured and insurer is inherently unequal, the inequality resting on contractual asymmetry. An insurer's tort liability for breach of the covenant is thus predicated on special policy factors inapplicable to the insured. The scope of the *insured's* duty of good faith and fair dealing in turn is confined by the express contractual provisions of the policy. In addition, an insurer's rights under an insurance contract are adequately protected by other means, such as the following [*Kransco v. American Empire Surplus Lines Ins. Co. (2000) 23 Cal. 4th 390, 408, 97 Cal. Rptr. 2d 151, 2 P.3d 1]* :

- Evidence of an insured's misconduct may factually disprove the insurer's liability for bad faith by showing that the insurer acted reasonably under the circumstances.

- The insured's breach of the covenant of good faith and fair dealing is separately actionable as a contract claim.

- Some forms of misconduct by an insured will void coverage altogether under the insurance policy, and without coverage there can be no liability for bad faith on the part of the insurer.

- An insured's fraudulent misconduct is separately actionable and can give rise to tort damages.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityRemediesActual & Consequential DamagesInsurance LawBad

Faith & Extracontractual LiabilityRemediesPunitive DamagesGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsPolicy LimitsInsurance LawClaims & ContractsFiduciary ResponsibilitiesInsurance LawGeneral Liability InsuranceObligationsSettlements

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26-308 California Forms of Pleading and Practice--Annotated § 308.124

§ 308.124 Liability of Attorney for Wrongfully Inducing Dismissal

An attorney, hired by an insurer to represent the insured, who wrongfully induces a dismissal to the detriment of the insured's rights against the third party may incur liability for legal malpractice, although he or she may not be held liable for breach of the implied covenant of good faith and fair dealing that the insurer owes to its insured [*Barney v. Aetna Cas. & Sur. Co. (1986) 185 Cal. App. 3d 966, 981-982, 230 Cal. Rptr. 215* ; *see Doctors' Co. v. Superior Court (1989) 49 Cal. 3d 39, 47, 260 Cal. Rptr. 183, 775 P.2d 508]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewTortsMalpractice & Professional LiabilityAttorneys

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26-308 California Forms of Pleading and Practice--Annotated § 308.125

§ 308.125 Judgment Creditor Action Against Insurer

Liability insurance policies are required to provide, whenever judgment is secured against the insured or the executor or administrator of a deceased insured in an action based on bodily injury, death, or property damage, then the judgment creditor may bring an action against the insurer on the policy and subject to its terms and limitations, to recover on the judgment [*Ins. Code § 11580(b)(2)*]. Under *Ins. Code § 11580(b)(2)*, no assignment by the insured is required [*Campbell v. Allstate Ins. Co. (1963) 60 Cal. 2d 303, 305, 32 Cal. Rptr. 827, 384 P.2d 155]* .

This statutory authority includes the right to bring a direct action for breach of the covenant of good faith and fair dealing against an insurer that refuses, unreasonably and in bad faith, to pay the entire amount of a judgment after it becomes final [*Hand v. Farmers Ins. Exch. (1994) 23 Cal. App. 4th 1847, 1857, 29 Cal. Rptr. 2d 258]* . However, once the judgment has been paid in full, the insurer's delay in paying policy benefits, even if unreasonable, does not in itself establish the economic loss necessary to maintain a third party judgment creditor's bad faith action [*Maxwell v. Fire Ins. Exch. (1998) 60 Cal. App. 4th 1446, 1449-1450, 70 Cal. Rptr. 2d 866]* .

A judgment creditor may not maintain a direct action for breach of the covenant of good faith and fair dealing against an insurer that unreasonably refused to settle, since the insurer's duty to settle runs only to the insured, and not to the judgment creditor [*Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 943-944, 132 Cal. Rptr. 424, 553 P.2d 584* ; *see Hand v. Farmers Ins. Exch. (1994) 23 Cal. App. 4th 1847, 1858, 29 Cal. Rptr. 2d 258]* .

For a form of complaint brought by a judgment creditor against an insurer under *Ins. Code § 11580(b)(2)*, see *§ 308.460*. For a form of complaint brought by a judgment creditor against the insurer to recover the amount of a judgment in excess of policy limits based on the insurer's wrongful failure to settle on an assigned cause of action, which includes an allegation of bad faith, see *§ 308.463*.

Legal Topics:

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

Insurance LawClaims & ContractsGood Faith & Fair DealingThird Party ClaimantsInsurance LawGeneral Liability InsuranceGeneral Overview

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26-308 California Forms of Pleading and Practice--Annotated § 308.126

§ 308.126 Third-Party Statutory Bad Faith Action Against Insurer

In 1959, the California legislature enacted the Unfair Practices Act (*Ins. Code §§ 790-790.10*) to regulate trade practices in the business of insurance by proscribing practices that constitute unfair methods of competition, or unfair or deceptive acts or practices [*Ins. Code § 790*]. The act provides for enforcement by the Insurance Commissioner [*Ins. Code § 790.06*]. In 1979, the California Supreme Court held that the Act also permits a private cause of action for violations of the Act, which could be brought by a third-party claimant against the insured's carrier without first obtaining an assignment from the insured [*Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, 885-888, 153 Cal. Rptr. 842, 592 P.2d 329* , overturned prospectively by *Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58]* .

The court in *Royal Globe* held that the provisions of *Ins. Code § 790.03(h)* (regarding unfair claims-settlement practices, such as failure to attempt in good faith to settle claims promptly) may be violated either by a single knowing commission of the prohibited act or by showing that the act was committed with such frequency as to indicate a general business practice [*Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, 890-891, 153 Cal. Rptr. 842, 592 P.2d 329* , overturned prospectively by *Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58]* . Subsequently, actions were filed under *Ins. Code § 790.03* by both first-party insureds andthird-party claimants [*see, e.g.,* *Travelers Ins. Co. v. Lesher (1986) 187 Cal. App. 3d 169, 189, 231 Cal. Rptr. 791* , *disapproved on other grounds,* *Buss v. Superior Court (1997) 16 Cal. 4th 35, 65 Cal. Rptr. 2d 366, 939 P.2d 766]* .

However, in 1988, the California Supreme Court reconsidered Royal Globe and overturned it, effective prospectively only [*Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58]* . In *Moradi-Shalal*, the Court held that the analysis of *Royal Globe* allowing a private action under the Act was incorrect, and that only the Insurance Commissioner has standing to enforce that statute [*Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58]* .

As the holding in *Moradi-Shalal* is prospective, it does not apply to cases that were filed prior to the date on which that

decision became final, October 17, 1988. For those surviving cases, a third-party claimant must establish that the insurer had facts to demonstrate that the liability of its insured had become "reasonably clear" [*Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 307, 250 Cal. Rptr. 116, 758 P.2d 58* (disapproving *Williams v. Transport Indem. Co. (1984) 157 Cal. App. 3d 953, 965, 203 Cal. Rptr. 868* , holding that duty arises only on determination of liability of insured); *see Ins. Code § 790.03(h)(5)*]. The plaintiff must also establish that, knowing these facts, the insurer did not act in good faith to effectuate a prompt, fair, and equitable settlement [*see Mercury Cas. Co. v. Superior Court (1986) 179 Cal. App. 3d 1027, 1035, 225 Cal. Rptr. 100]* . Moreover, the underlying action between the injured party and the insured must have been concluded [*Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 305, 250 Cal. Rptr. 116, 758 P.2d 58]* . The Court in *Moradi-Shalal*, after discussing conflicting appellate court decisions, held that for purposes of a surviving *Royal Globe* action, the conclusion must be a final binding judicial determination of liability in the underlying action. Consequently, a settlement between the insured and the claimant, dismissal of the underlying action with prejudice, or even an admission of liability by the insurer, in the absence of a final judgment regarding liability, is insufficient to satisfy the condition precedent of finality of the underlying action [*Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 308-313, 250 Cal. Rptr. 116, 758 P.2d 58]* .

A stipulated judgment under *Code Civ. Proc. § 664.6* (judgment entered pursuant to terms of stipulated settlement by parties to pending litigation), entered into between the third-party claimant and the insured, signed by the insurer, that stipulates to the liability of the insured, is sufficiently conclusive to be the basis of the cause of action [*California State Auto. Ass'n Inter-Ins. Bureau v. Superior Court (1990) 50 Cal. 3d 658, 665, 268 Cal. Rptr. 284, 788 P.2d 1156]* . For discussion of the effect of *Moradi-Shalal* on first-party statutory bad faith actions, see *§ 308.25[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawIndustry RegulationUnfair Business PracticesUnfair Trade Practices Acts

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§ 308.127 Insurer Under No Common Law Duty to Renew Policy

There is no general duty to renew a professional liability insurance policy. Thus, in the absence of statutory provisions to the contrary, an insurer may refuse to renew a term policy for any reason, or for no reason at all [*Schimmel v. NORCAL Mut. Ins. Co. (1995) 39 Cal. App. 4th 1282, 1283, 46 Cal. Rptr. 2d 401* (no cause of action stated by allegations that insurer refused to renew and terminated term insurance based on two reasons allegedly violative of public policy, namely that plaintiff used nurse midwives and primarily treated unmarried women of Hispanic and East Indian descent)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsCancellation & NonrenewalGeneral Overview

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26-308 California Forms of Pleading and Practice--Annotated § 308.128

§ 308.128 Coverage of Insured's Corporate Successor

Federal and state case law are in conflict regarding whether, under California law, product line tort liability includes any right to insurance coverage for the tort [*see Henkel Corp. v. Hartford Accident & Indem. Co. (2003) 29 Cal. 4th 934, 943, 129 Cal. Rptr. 2d 828, 62 P.3d 69]* . The Ninth Circuit Court of Appeals has held that the right to indemnity follows the liability, rather than the policy itself. As a result, in that case, even though the parties did not assign the predecessor's insurance policy in the agreement, the right to indemnity under the policy transferred to the successor corporation by operation of law [*Northern Ins. Co. of N.Y. v. Allied Mut. Ins. Co. (9th Cir. 1992) 955 F.2d 1353]* . However, California appellate courts have held that under California law, product line tort liability does not include any right to the insurance coverage for the tort [*see General Accident Ins. Co. v. Superior Court (1997) 55 Cal. App. 4th 1444, 1454, 64 Cal. Rptr. 2d 781* ; *Quemetco Inc. v. Pacific Auto. Ins. Co. (1994) 24 Cal. App. 4th 494, 499-501, 29 Cal. Rptr. 2d 627]* .

The California Supreme Court has held that if liability is assumed by contract, the successor corporation's rights are defined and limited by that contract, and hence cannot be deemed transferred by operation of law [*Henkel Corp. v. Hartford Accident & Indem. Co. (2003) 29 Cal. 4th 934, 943, 129 Cal. Rptr. 2d 828, 62 P.3d 69]* . For more complete discussion, see California Insurance Law and Practice, Ch. 47 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBusiness InsuranceGeneral OverviewTortsVicarious LiabilityCorporationsPredecessor & Successor Corporations

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[Reserved]

§§ 308.129[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.140

§ 308.140 Governing Statutes

Marine insurance is classified and defined in *Ins. Code §§ 100(3)* and *103*, respectively. Insurable interests in the subjects of marine insurance are set forth in *Ins. Code §§ 1880-1886*. Rules peculiar to marine insurance on concealment andrepresentations and on implied warranties are set forth in *Ins. Code §§ 1900-1927*. The effect of the course of the voyage is covered by *Ins. Code §§ 1940-1945* and losses by *Ins. Code §§ 1960-1997*. Insurance Code provisions not applicable to marine insurance are listed in *Ins. Code § 2010*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBusiness InsuranceMarine InsuranceGeneral Overview

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26-308 California Forms of Pleading and Practice--Annotated § 308.141

§ 308.141 "Marine Insurance" Defined

"Marine insurance" is a class of insurance [*Ins. Code § 100(3)*] and includes insurance against any and all kinds of loss of or damage to vessels, craft, aircraft, cars, automobiles, and vehicles of every kind (excluding aircraft and automobiles operating under their own power or while in storage not incidental to transportation), as well as to all goods, freights, cargoes, merchandise, effects, disbursements, profits, money, bullion, securities, choses in action, evidences of debt, valuable papers, bottomry and respondentia interests, and all other kinds of property and interests in it in respect to, appertaining to, or in connection with any and all risks or perils of navigation, transit, or transportation, including war risks, on or under any seas or other waters, on land, or in the air, or while being assembled, packed, crated, baled, compressed, or similarly prepared for shipment or while awaiting shipment, or during any delays, storage, transshipment, or reshipment incidental thereto including marine builder's risks, and all personal property floater risks [*Ins. Code § 103(a)*].

It also includes insurance against any and all kinds of loss or damage to person or property in connection with or appertaining to a marine, inland marine, transit, or transportation insurance including liability for loss or damage arising out of or in connection with the construction, repair, maintenance, or use of the subject matter of such insurance (but not including life insurance or surety bonds) [*Ins. Code § 103(b)*] and to precious stones, jewels, jewelry, gold, silver, and other precious metals, whether used in business or trade or otherwise and whether the same be in course of transportation or otherwise [*Ins. Code § 103(c)*]. Inland marine insurance is deemed to include hull insurance on water pleasure craft not used for commercial purposes of a size and type determined by the Insurance Commissioner [*Ins. Code § 103(b)*]

Except as specified in *Ins. Code § 103*, marine insurance does not mean insurances against loss by reason of bodily injury to the person [*Ins. Code § 103(b)*].

Legal Topics:

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

Insurance LawBusiness InsuranceMarine InsuranceCargo CoverageInsurance LawBusiness InsuranceMarine InsuranceDefinitionsInsurance LawBusiness InsuranceMarine InsuranceHull Coverage

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26-308 California Forms of Pleading and Practice--Annotated § 308.142

§ 308.142 Insurable Interests

On insurable interests in property generally, see *Ins. Code §§ 281-286* and § 308.41.

With respect to marine insurance, the owner of a ship has in all cases an insurable interest in the ship, even when it has been chartered by one who agrees to pay him or her its value in case of loss [*Ins. Code § 1880*], but the insurable interest of the owner of a ship hypothecated by bottomry is only the excess of its value over the amount secured by bottomry [*Ins. Code § 1881*]. ("Bottomry" is a contract by which a vessel or its freightage is hypothecated as security for a loan, which is to be repaid only if the vessel survives a particular risk, voyage, or period [*Harb. & Nav. Code § 450*].)

A shipowner also has an insurable interest in expected freightage which he or she would have certainly earned but for the intervention of a peril insured against [*Ins. Code § 1883*; *see also Civ. Code § 2110* ("Property carried is called freight; the reward, if any, to be paid for its carriage is called freightage"); *Ins. Code § 1882* ("Freightage, in marine insurance, signifies all the benefit derived by the owner, either from the chartering of the ship or its employment for the carriage of his own goods or those of others")]. This interest exists, in the case of a charter party, when the ship has broken ground on the chartered voyage [*Ins. Code § 1884*; *see also Civ. Code § 1959* ("The contract by which a ship is let is termed a charter-party")]. If a price is to be paid for the carriage of goods, the interest exists when they are actually on board or there is some contract for putting them on board and both ship and goods are ready for the specified voyage [*Ins. Code § 1884*].

In marine insurance, a person who has an interest in the thing from which profits are expected to proceed has an insurable interest in the profits [*Ins. Code § 1885*].

The charterer of a ship has an insurable interest in it to the extent that he or she is liable to be damaged by its loss [*Ins. Code § 1886*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBusiness InsuranceMarine InsuranceGeneral Overview

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26-308 California Forms of Pleading and Practice--Annotated § 308.143

§ 308.143 Kinds of Policies

Policies are either open or valued [*Ins. Code § 410*]. An open policy is one in which the value of the aubject matter is not agreed on but is left to be ascertained in the case of loss [*Ins. Code § 411*]. A valued policy is one which expresses on its face an agreement that the thing insured shall be valued at a specified sum [*Ins. Code § 412*]. A running policy is one which contemplates successive insurances and which provides that the object of the policy may be from time to time defined, especially as to the subjects of insurance, by additional statements or endorsements [*Ins. Code § 413*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBusiness InsuranceMarine InsuranceDefinitions

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26-308 California Forms of Pleading and Practice--Annotated § 308.144

§ 308.144 Duration of Risk

Marine policies are time policies, voyage policies, or mixed policies [*see Ins. Code § 460*, excluding marine insurance from that section's inception hour requirement of policies]. A time policy is one that limits the duration of the risk by fixing commencement and termination dates. Such policies cover all voyagesundertaken during the policy term [*see Gulf of Cal. Navigation & Express Co. v. State Inv. & Ins. Co. (1886) 70 Cal. 586, 587, 12 P. 473]* . A voyage policy is one that covers only a specified voyage which is described by setting forth the places of its beginning and ending; in such case, the voyage insured is one which conforms to the course of sailing fixed by mercantle usage between those places [*Ins. Code § 1940*] or, if the course is not fixed by mercantile usage, the voyage insured is that way between the places specified which, to a master of ordinary skill and discretion, would seem the most natural, direct, and advantageous [*Ins. Code § 1941*; on the effect on insurance of deviations from the course of voyage, see *Ins. Code §§ 1942-1945*].

A mixed policy is either a time or voyage policy in which, in the case of a time policy, for example, the duration of the policy is stated but the policy applies only to specified voyages during that time or, in the case of a voyage policy, covers a specified voyage but limits the risk as to time.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBusiness InsuranceMarine InsuranceDefinitions

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26-308 California Forms of Pleading and Practice--Annotated §§ 308.145-308.149

[Reserved]

§§ 308.145[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.150

§ 308.150 Arbitration and Appraisal In General

Many insurance contracts contain clauses providing for arbitration or appraisal proceedings to be followed where the insurer and insured disagree on the right of the insured to recover damages or the amount thereof or on matters of valuation and the amount of loss. Not only do such clauses provide a means for settling disputes without resort to suit, but they may also block an insured's right to sue until and unless the arbitration or appraisal provisions have been complied with.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsAppraisalsInsurance LawClaims & ContractsArbitration

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§ 308.151 Policy Provisions

[1] Arbitration

Typical of arbitration clauses are those in automobile liability policies relating to uninsured motorist coverage. Such policies must "provide that the determination as to whether the insured shall be legally entitled to recover damages, and if so entitled, the amount thereof, shall be made by agreement between the insured and the insurer or, in the event of disagreement, by arbitration" [*Ins. Code § 11580.2(f)*; *see Freeman v. State Farm Mut. Auto. Ins. Co. (1975) 14 Cal. 3d 473, 480-481, 121 Cal. Rptr. 477, 535 P.2d 341* ; *In re Bongfeldt (1971) 22 Cal. App. 3d 465, 467-468 n.1, 99 Cal. Rptr. 428* ; *see generally* Ch. 88A, *Automobiles: Uninsured Motorist Claims*].

The arbitration must be conducted by a single neutral arbitrator [*Ins. Code § 11580.2(f)*]. Many policies require arbitration before the American Arbitration Association, but some do not. Enforcement of arbitration agreements and arbitration proceedings are governed by *Code Civ. Proc. § 1280 et seq.* For further discussion of arbitration, a general procedural checklist, and forms for use in such proceedings, see Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* .

[2] Appraisal

Typical of appraisal clauses are those found in the California Standard Form Fire Insurance Policy, *Ins. Code § 2071*, applicable to fire insurance policies that originated or were renewed prior to January 1, 2002. This version of the statute is as follows:

> "Appraisal. In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon such umpire, then, on request of the insured or this company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss,

> stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally."

In 2001, this provision in the standard form of fire insurance policy was amended, applicable to policies originated or renewed after December 31, 2001, as follows, with the changes shown by added italics [*Ins. Code § 2071*; *see* 2001 ch. 583, § 4]:

> "Appraisal. In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written request of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of the request. *Where the request is accepted,* the appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon the umpire, then, on request of the insured or this company, the umpire shall be selected by a judge of a court of record in the state in which the property covered is located. *Appraisal proceedings are informal unless the insured and this company mutually agree otherwise. For purposes of this section, "informal" means that no formal discovery shall be conducted, including depositions, interrogatories, requests for admission, or other forms of formal civil discovery, no formal rules of evidence shall be applied, and no court reporter shall be used for the proceedings.* The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, soitemized, of any two when filed with this company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him or her and the expenses of appraisal and umpire shall be paid by the parties equally. *In the event of a government-declared disaster, as defined in the Government Code, appraisal may be requested by either the insured or this company but shall not be compelled.*"

In addition, *Ins. Code § 10082.3* was enacted in 2001, applicable to the following policies originated or renewed after December 31, 2001: all policies of residential property insurance (defined in *Ins. Code § 10087*); all policies, endorsements, or certificates of insurance providing coverage for loss or damage caused by the peril of earthquake issued pursuant to *Ins. Code § 10020 et seq.* (underwriters fire patrols); and all policies of basic residential earthquake insurance issued pursuant to *Ins. Code § 10089.5 et seq.* (California Earthquake Authority) [*Ins. Code § 10082.3*]. This statute sets forth, among other things, a provision for appraisals identical to the one provided above under the version of *Ins. Code § 2071(a)* that was amended in 2001 [*see Ins. Code § 10082.3*].

The appraisal provisions of the policy will usually detail the procedural steps to be followed to effect an appraisal of loss under the policy. Generally, appraisal award proceedings are subject to the arbitration provisions outlined in the California Arbitration Act [*see Code Civ. Proc. § 1280 et seq.*; *Devonwood Condominium Owners Assn. v. Farmers Ins. Exchange (2008) 162 Cal. App. 4th 1498, 1505, 77 Cal. Rptr. 3d 88* ; *see also* Ch. 34, *Contractual Arbitration: Judicial Review*]. The arbitration provisions of *Code Civ. Proc. §§ 1280-1294.2* may be invoked in any case in which the provisions of the policy are incomplete or inadequate [*see, e.g.*, *Johnston v. Security Ins. Co. (1970) 6 Cal. App. 3d 839, 840 n.1, 86 Cal. Rptr. 133* ("It appears from the record that the respective appraisers submitted their respective figures as to the loss payable and that the hearing proper was conducted by the neutral umpire alone taking active part. The parties, however, have treated the proceeding as an arbitration ... and we do likewise"); *Canadian Indem. Co. v. Ohm (1969) 271 Cal. App. 2d 703, 706, 76 Cal. Rptr. 902* ("That the appraisal procedure provided in [the] insurance policy constituted an arbitration agreement, governed by [*Code Civ. Proc. § 1280 et seq.*] is not questioned by either party")].

In fact, an agreement to arbitrate includes any agreement providing for valuations, appraisals, and similar proceedings [*Code Civ. Proc. § 1280*]. A confirmed award in an appraisal proceeding has thus been treated as a confirmed award in arbitration in one decision of the court of appeal. If a party is dissatisfied with the award, his or her remedy is a

proceeding to vacate or correct it [*see Code Civ. Proc. §§ 1286.2, 1286.4, 1286.6*]. If a party fails to serve and file either a petition to vacate the award or a response to a petition to confirm it within the 100-day period from the date of service of the award as prescribed in *Code Civ. Proc. §§ 1288, 1288.2*, the award must be treated as final [*Klubnikin v. California Fair Plan Ass'n (1978) 84 Cal. App. 3d 393, 395, 397-398, 148 Cal. Rptr. 563* ; *see generally* Ch. 32, *Contractual Arbitration: Judicial Review*].

A party may petition the court to confirm, vacate, or correct an appraisal; and a responding party may seek dismissal of the petition, or ask the court to confirm, vacate, or correct the award [*Code Civ. Proc. §§ 1285, 1285.2*]. The court must confirm the award as made unless it corrects the award and confirms it as corrected, vacates the award, or dismisses the proceedings [*Code Civ. Proc. § 1286*]. If an award is confirmed, judgment must be entered accordingly. The judgment so entered has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action of the same jurisdictional classification; and it may be enforced like any other judgment of the court in which it is entered, in an action of the same jurisdictional classification [*Code Civ. Proc. § 1287.4*; *Devonwood Condominium Owners Assn. v. Farmers Ins. Exchange (2008) 162 Cal. App. 4th 1498, 1505-1506, 77 Cal. Rptr. 3d 88*]. A judgment that is not in conformity with the appraisal award made pursuant to *Ins. Code § 2071*, on which it is based, violates *Code Civ. Proc. § 1287.4* [*Devonwood Condominium Owners Assn. v. Farmers Ins. Exchange (2008) 162 Cal. App. 4th 1498, 1506-1507, 77 Cal. Rptr. 3d 88*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsAppraisalsInsurance LawClaims & ContractsArbitrationInsurance LawMotor Vehicle InsuranceArbitrationInsurance LawProperty InsuranceCoverageReal PropertyAppraisals

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26-308 California Forms of Pleading and Practice--Annotated §§ 308.145-308.159

[Reserved]

§§ 308.145[Reserved]

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§ 308.160 Governing Law

The law governing the form and content of answers to a complaint, as well as objections to a complaint are found in *Code Civ. Proc. § 431.30*. Laws governing a rescinded policy are found in *Ins. Code § 650*. Laws governing a plaintiff's lack of insurable interest are found in *Ins. Code § 286*.

For more detailed discussions of answers and defenses, see Ch. 26, *Answers* ; Ch. 140, *Contracts* ; Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* ; Ch. 345, *Limitations of Actions* ; and Ch. 537, *Summary Judgment* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProceduresPleading & PracticePleadingsAnswersInsurance LawClaims & ContractsCancellation & NonrenewalGeneral Overview

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26-308 California Forms of Pleading and Practice--Annotated §§ 308.161-308.169

[Reserved]

§§ 308.161[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.170

§ 308.170 Definitions

An "insurance agent" is a person authorized, by and on behalf of an insurer, to transact all classes of insurance other than life insurance [*Ins. Code §§ 31, 1621*]. A life licensee is a person authorized to act as a life agent on behalf of a life insurer or a disability insurer to transact any of the following: (1) life insurance; (2) accident and health insurance; or (3) life and accident and health insurance [*Ins. Code §§ 32(a), 1622*]. A life agent may be authorized to transact 24-hour care coverage [*Ins. Code § 32(c)*; *see Ins. Code §§ 1749(d), 1749.02, 1749.33(b)*]. A "fire and casualty broker-agent" is a person licensed under *Ins. Code § 1625* [*Ins. Code § 33.5*]. An "insurance broker" is a person who, for compensation and on behalf of another person, transacts insurance other than life with, but not on behalf of, an insurer [*Ins. Code §§ 33, 1623*]. An "insurance solicitor" is a natural person employed to aid a fire and casualty broker-agent acting as an insurance agent or insurance broker in transacting insurance other than life [*Ins. Code §§ 34, 1624*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawIndustry RegulationInsurance Company OperationsRepresentativesAgentsGeneral AgentsInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesAgentsSpecial AgentsInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesBrokers

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26-308 California Forms of Pleading and Practice--Annotated § 308.171

§ 308.171 Insurer Has Special Duties to Insured Based on Nature of Insurance Contract

An insurer is not a fiduciary. The insurer-insured relationship is not a true fiduciary relationship in the same sense as the relationship between trustee and beneficiary, or attorney and client. It is, instead, a relationship often characterized by unequal bargaining power in which the insured must depend on the good faith and performance of the insurer. This characteristic has led the courts to impose "special and heightened" duties on insurers. Although these "special" duties are akin to, and often resemble, duties also owed by fiduciaries, these fiduciary-like duties arise because of the unique nature of the insurance contract, not because the insurer is a fiduciary [*see Vu v. Prudential Prop. & Cas. Ins. Co. (2001) 26 Cal. 4th 1142, 1150-1151, 113 Cal. Rptr. 2d 70, 33 P.3d 487* ; Hydro-Mill Co., Inc. v. *Hayward, Tilton & Rolapp Ins. Assocs., Inc. (2004) 115 Cal. App. 4th 1145, 1158, 10 Cal. Rptr. 3d 582]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsFiduciary Responsibilities

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26-308 California Forms of Pleading and Practice--Annotated § 308.172

§ 308.172 Nature of Duty Between Agent or Broker and Insured

[1] Relationship Not Defined as Fiduciary

It is unclear whether a fiduciary relationship exists between an insurance broker and an insured [*see Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Assocs., Inc. (2004) 115 Cal. App. 4th 1145, 1156, 10 Cal. Rptr. 3d 582]* . If an insurer is not a fiduciary, then arguably, neither is a broker [*see Hydro-Mill Co., Inc. v. Hayward,Tilton & Rolapp Ins. Assocs., Inc. (2004) 115 Cal. App. 4th 1145, 1158, 10 Cal. Rptr. 3d 582]* .

[2] Agent and Broker Have Some Fiduciary Duties Toward Insured

Whether or not the relationship between a broker and an insured is a fiduciary one, a broker still has certain fiduciary duties toward an insured. For example, all funds received by any person acting as an insurance agent or broker as a premium or a return premium on or under any policy of insurance are received and held by that person in his or her fiduciary capacity. Any such person who diverts or appropriates those fiduciary funds to his or her own use is guilty of theft and punishable as provided by law [*see Ins. Code § 1733*; *see also Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Assocs., Inc. (2004) 115 Cal. App. 4th 1145, 1158, 10 Cal. Rptr. 3d 582* ; *Westrec Marina Mgmt., Inc. v. Jardine Ins. Brokers Orange County, Inc. (2000) 85 Cal. App. 4th 1042, 1050, 102 Cal. Rptr. 2d 673* (brokers liable for breach of fiduciary duty by failing to obtain insurance at best available price)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsFiduciary ResponsibilitiesInsurance LawClaims & ContractsGood Faith & Fair DealingAgents & Brokers

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26-308 California Forms of Pleading and Practice--Annotated § 308.173

§ 308.173 Agent or Broker's Liability for Failure to Obtain Requested Coverage

Insurance agents and brokers have been liable to insureds or applicants for insurance on a number of theories, including breach of contract and professional negligence. Some of the cases arose in the context of an agent who failed to obtain insurance for a client as promised. In other cases, the agent obtained insurance, but failed to obtain certain requested coverage or obtained the requested coverage in the wrong amount. In any of these situations, contractual liability of the agent can be at least theoretically premised on the agent's breach of an oral agreement to obtain insurance as requested by the client [*see Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Assocs., Inc. (2004) 115 Cal. App. 4th 1145, 1153, 10 Cal. Rptr. 3d 582* ; *see also Saunders v. Cariss (1990) 224 Cal. App. 3d 905, 908-909, 274 Cal. Rptr. 186]* .

In one case, for example, the insured based a suit against the broker for failure to obtain the full extent of requested earthquake coverage on theories of negligence, breach of oral contract, negligent misrepresentation, and breach of fiduciary duty [*see Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Assocs., Inc. (2004) 115 Cal. App. 4th 1145, 1153, 10 Cal. Rptr. 3d 582]* .

In some situations, the duty may extend to third parties. In one such case, a company (the customer) hired a software company to design computer software for its business. The contract between them required the software company to obtain an errors and omissions policy to compensate the customer for the software company's breach. The customer contacted a retail insurance broker and informed the broker that the software company, which was located in India, needed E&O insurance. The broker contacted a surplus lines insurance broker for that purpose and gave it the information received from the customer. The surplus lines broker contacted an insurance company, which issued a policy to the software company. The policy, however, excluded coverage for any claims arising from or related to work performed in India. When the software company failed to deliver the software, the customer sued for breach of contract. The insurance company refused to pay benefits or defend the action, citing the India exclusion. A default judgment was entered for the customer, which was uncollectible. The customer then sued the surplus lines broker for negligence in procuring a policy that did not cover work in India. The court of appeal held that the surplus lines broker owed the customer a duty of care, even though the parties had no direct contact, the parties were not in privity of contract, and the customer was not named in the policy. The controlling factors in this situation are: (1) the extent to which the transaction was intended to affect the plaintiff (in this case, the customer); (2) the foreseeability of harm to the plaintiff;

(3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury suffered; (5) the moral blame attached to the defendant's conduct; and (6) the policy of preventing future harm [*Business to Bus. Mkts., Inc. v. Zurich Specialties London Ltd. (2005) 135 Cal. App. 4th 165, 168-169, 37 Cal. Rptr. 3d 295]* .

In this case, the policy was intended to protect the plaintiff, the harm was foreseeable, the plaintiff suffered damages as shown on a prove-up default hearing, the defendant bore moral blame for accepting the responsibility of finding the required insurance and failing to do so adequately, and imposing liability on the defendant would have the "salutary effect of encouraging ... insurance brokers to secure insurance policies for their clients that meet their clients' needs." Furthermore, whether the connection between the plaintiff and the defendant was sufficiently close depends on whether the plaintiff was an intended beneficiary, to whom the defendant owed a duty of care, or merely an incidental third-party beneficiary, to whom the defendant owed no such duty. An intended beneficiary need not be specifically named, so long as that person or entity is in the class of members that the insurance is intended to benefit [Business to Bus. Mkts., *Inc. v. Zurich Specialties London Ltd. (2005) 135 Cal. App. 4th 165, 169-171, 37 Cal. Rptr. 3d 295* ; *Harper v. Wausau Ins. Co. (1997) 56 Cal. App. 4th 1079, 66 Cal. Rptr. 2d 64]* . Although the plaintiff in this case was "not quite an intended beneficiary," it was treated as one because of the relationship among the plaintiff, the two brokers, and the insured--for example, because the contract between the plaintiff and the software company required the software company to obtain the insurance [*Business to Bus. Mkts., Inc. v. Zurich Specialties London Ltd. (2005) 135 Cal. App. 4th 165, 171, 37 Cal. Rptr. 3d 295* ; *see also Biakanja v. Irving (1958) 49 Cal. 2d 647, 650, 320 P.2d 16]* .

If a third party's injuries arise from the defendant's rendering of professional services, additional factors must be considered, including: (1) the degree to which clients and third parties ordinarily relinquish control for decision making to the professional; (2) the degree to which the defendant works under professional standards established and maintained by the defendant's profession; (3) the defendant's ability to spread costs by raising fees or buying liability insurance; and (4) the expected and customary reliance by clients and others on the skillfulness and expertise of the defendant's profession. In this particular case, all these additional factors weighed in support of finding a duty. Surplus lines insurance is a specialized, niche-market service. Clients and others rely on the broker to obtain the right type of policy. In addition, insurance is a highly regulated industry with a number of associations and bodies dedicated to promoting the industry's well-being and professionalism. Finally,insurance exists within a broad, well-developed marketplace, permitting market participants to charge prices that reflect their costs and risks [*Business to Bus. Mkts., Inc. v. Zurich Specialties London Ltd. (2005) 135 Cal. App. 4th 165, 172, 37 Cal. Rptr. 3d 295]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingAgents & Brokers

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26-308 California Forms of Pleading and Practice--Annotated § 308.174

§ 308.174 Agent and Broker Have Duty to Advise Insured of Coverage Availability Under Some Circumstances

As a general rule, the agent or broker does not have a fiduciary duty to voluntarily inform the insured of the availability or advantages of additional coverage [*Fitzpatrick v. Hayes (1997) 57 Cal. App. 4th 916, 927, 67 Cal. Rptr. 2d 445* ; *Jones v. Grewe (1987) 189 Cal. App. 3d 950, 954, 234 Cal. Rptr. 717]* .

However, there are two exceptions to this rule. The agent owes the insured a fiduciary duty to advise the insured of the availability of coverage if the insured requests or specifically inquires into a particular type or extent of coverage [*see Free v. Republic Ins. Co. (1992) 8 Cal. App. 4th 1726, 1730, 11 Cal. Rptr. 2d 296* ; *Westrick v. State Farm Ins. (1982) 137 Cal. App. 3d 685, 691-692, 187 Cal. Rptr. 214]* or if the agent assumes an additional duty by either express agreement or by representing that he or she has expertise in the specific field of insurance being sought by the insured [*see Kurtz, Richards, Wilson & Co. v. Insurance Communicators Mktg. Corp. (1993) 12 Cal. App. 4th 1249, 1257, 16 Cal. Rptr. 2d 259]* . In addition, an agent may be found to have breached its fiduciary duty to the insured if it misrepresents the nature, extent or scope of the coverage being offered or provided [*Desai v. Farmers Ins. Exch. (1996) 47 Cal. App. 4th 1110, 1119, 55 Cal. Rptr. 2d 276]* . An agent who negligently represents the coverage provided by a policy thereby assumes a special duty to ensure that the insured has the coverage it thought it had purchased [*Paper Savers, Inc. v. Nacsa (1996) 51 Cal. App.4th 1090, 1095, 59 Cal. Rptr. 2d 547* ; *see § 308.173*].

The mere fact that the insured has purchased insurance from the same agent over a period of years and has followed the agent's advice on other insurance matters is insufficient to imply the existence of a duty to recommend additional coverage [*Fitzpatrick v. Hayes (1997) 57 Cal. App. 4th 916, 929-930, 67 Cal. Rptr. 2d 445]* . In addition, absent a specific inquiry by the insured into the availability of additional coverage or the adequacy of the coverage purchased, an insurance agent's representation of the adequacy of the insured's coverage does not in itself create liability if the coverage ultimately proves to be inadequate [*Fitzpatrick v. Hayes (1997) 57 Cal. App. 4th 916, 927-929, 67 Cal. Rptr. 2d 445* ; *Jones v. Grewe (1987) 189 Cal. App. 3d 950, 954, 956-957, 234 Cal. Rptr. 717]* .

Legal Topics:

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

Insurance LawClaims & ContractsFiduciary ResponsibilitiesInsurance LawClaims & ContractsGood Faith & Fair DealingAgents & Brokers

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26-308 California Forms of Pleading and Practice--Annotated § 308.175

§ 308.175 Two-Year Limitations Period Applies to Suit Against Broker Based on Professional Negligence

If the gravamen of a suit by an insured against a broker is the broker's failure to execute its obligations as an insurance broker, the two-year limitations period for professional negligence under *Code Civ. Proc. § 339* applies [*see Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Assocs., Inc. (2004) 115 Cal. App. 4th 1145, 1158-1160, 10 Cal. Rptr. 3d 582]* . In one case, for example, the insured brought suit on theories of negligence, breach of oral contract, negligent misrepresentation, and breach of fiduciary duty, because the broker obtained less earthquake coverage for the insured than requested, resulting in losses to the insured following the Northridge earthquake. The court held that the two-year limitations applied to all stated causes of action because they were all based on the broker's professional negligence in failing to obtain the requested coverage [*Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Assocs., Inc. (2004) 115 Cal. App. 4th 1145, 1154-1160, 10 Cal. Rptr. 3d 582]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingAgents & BrokersTortsMalpractice & Professional LiabilityProfessional ServicesTortsProcedureStatutes of LimitationsAccrual of ActionsGeneral Overview

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26-308 California Forms of Pleading and Practice--Annotated § 308.176

§ 308.176 Broker's Obligations to Insurer

In the proper circumstances, an insurance broker may be liable to the insurer for fraud and negligence. If the insurance broker has forged a document in support of an insurance application, the insurer may sue the broker for fraud [*Century Sur. Co. v. Crosby Ins., Inc. (2004) 124 Cal. App. 4th 116, 122-127, 21 Cal. Rptr. 3d 115]* . Furthermore, if the insurance broker knows of actual misstatements in the insurance application, the broker may be liable to the insurer for transmitting those misrepresentations in the application, knowing that the insurer will reasonably rely on them [*Century Sur. Co. v. Crosby Ins., Inc. (2004) 124 Cal. App. 4th 116, 129, 21 Cal. Rptr. 3d 115]* .

In one case, for example, the insurance broker allegedly prepared and submitted an application for liability insurance for a company that was a general contractor although the broker represented that the company worked only as a drywall contractor. In addition, the broker's agent allegedly submitted with the application a letter forged by the broker that was purportedly from the insured's former insurer, asserting that the insured had no known losses in the previous two years. The trial court sustained the broker's demurrer on the ground that the broker owed no duty to the insurer in negligence and that the insurer could not maintain a fraud action against the broker, because the insurer's exclusive remedy was in rescission against the insured. The court of appeal reversed, holding that the insurer properly pleaded a cause of action in fraud, based on the false written statement included with the insurance application. An insurer has a fraud remedy against a broker who has actively forged documents to support an insurance application [*Century Sur. Co. v. Crosby Ins., Inc. (2004) 124 Cal. App. 4th 116, 122-123, 21 Cal. Rptr. 3d 115]* . The right of rescission is not an insurer's exclusive remedy against an insured [*Century Sur. Co. v. Crosby Ins., Inc. (2004) 124 Cal. App. 4th 116, 126, 21 Cal. Rptr. 3d 115]* .

Furthermore, the insurer properly pleaded a cause of action in negligence against the broker by alleging that: (1) the broker and his agent (who allegedly did the actual forging of the application) owed a duty toward the insurer to properly prepare and process the application for insurance in an honest, truthful, and accurate manner, by fully divulging in good faith to the insurer all facts within their knowledge material to the contract that the insurer had no means of ascertaining; (2) the broker owed a duty not to defraud the insurer; (3) the broker intentionally, carelessly, or negligently failed to prepare and process the application by failing to fully and truthfully divulge to the insurer the insured's true and accurate loss history; (4) the insurer relied on the application; and (5) the insurer incurred resulting damages [*Century Sur. Co.*

v. Crosby Ins., Inc. (2004) 124 Cal. App. 4th 116, 127, 21 Cal. Rptr. 3d 115] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingAgents & BrokersTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsMalpractice & Professional LiabilityProfessional Services

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26-308 California Forms of Pleading and Practice--Annotated §§ 308.177-308.189

[Reserved]

§§ 308.177[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.190

§ 308.190 Type of Actions

An insurer is entitled to payment of the premium as soon as the subject matter insured is exposed to the peril insured against [*Ins. Code § 480*]. On cancellation of policies for nonpayment of premium, see *Ins. Code §§ 484, 661(a)(1), 676(a), 1861.03(c)(1)*. On when the insured is entitled to return of the premium or a portion of it, see *Ins. Code §§ 481-483* and *485-487*. On the prohibition against increasing premiums of certain automobile insurance policies, see *Ins. Code §§ 488* and *488.5*. For a related form, see *§ 308.520*.

An insurer may seek action to recover payment made by it to its insured based on a materially false and fraudulent claim or proof of loss [*see Civ. Code §§ 1572, 1709, 1710, 3287, 3333*]. For a related form, see *§ 308.521*.

An insurer may seek declaratory relief to determine liability, in an case by one insurer against another insurer, both of which issued a liability policy covering the same insurable event, and to seek a declaration regarding which of the policies is primary and which is excess [*see Code Civ. Proc. § 1060* (declaratory relief); *see also Employers Reinsurance Corp. v. Phoenix Ins. Co. (1986) 186 Cal. App. 3d 545, 230 Cal. Rptr. 792]* . For a related form, see *§ 308.522*.

When several insurers are obligated to indemnify or defend the same loss or claim, an insurer that has paid more than its share of the loss or has defended the action without any participation by the others, has the right to seek equitable contribution from its coinsurers. When multiple insurers insure the same insured and cover the same risk, each insurer has independent standing to assert a cause of action against its coinsurers for equitable contribution when it has undertaken a defense or indemnification of the common insured [*Scottsdale Ins. Co. v. Century Surety Co. (2010) 182 Cal. App. 4th 1023, 1031, 105 Cal. Rptr. 3d 896]* .

An insurer may seek an action for damages against in independent (*Cumis*) counsel caused by the independent counsel's negligent breach of statutory duties, and to cooperate and exchange information with the insurer's counsel [*Civ. Code § 2860(d), (f)*]. For a related form, see *§ 308.523*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsDeclaratory ReliefGeneral OverviewInsurance LawClaims & ContractsPremiumsGeneral Overview

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26-308 California Forms of Pleading and Practice--Annotated §§ 308.191-308.199

[Reserved]

§§ 308.191[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.200

§ 308.200 Governing Law

Election and qualification of the Insurance Commissioner are governed by *Ins. Code § 12900 et seq.* The powers and duties of the Insurance Commissioner are set out in *Ins. Code § 12919 et seq.* Regulations regarding the Insurance Commissioner are set forth in *10 Cal. Code Reg. §§ 2050-2683.23*. License requirements for insurance agents, insurance brokers, insurance solicitors, and life agents are governed by *Ins. Code § 1631 et seq.* License applications are governed by *Ins. Code § 1652 et seq.* License qualifications are governed by *Ins. Code § 1666 et seq.* Certificates of convenience are governed by *Ins. Code § 1685 et seq.* Issuance of licenses is governed by *Ins. Code § 1702 et seq.* Termination of licenses is governed by *Ins. Code § 1708 et seq.* Disciplinary proceedings regarding violations of licensing requirements are governed by *Ins. Code § 1737 et seq.* Enforcement of licensing requirements is governed by the Administrative Adjudication Act, set forth in Gov. Code § 11500 et seq. Insurance adjusters are governed generally by *Ins. Code § 14000 et seq.* Regulation, licensing, and registration of insurance adjusters are governed by *Ins. Code § 14020 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawIndustry RegulationInsurance Company OperationsConducting BusinessCertificates of AuthorityInsurance LawIndustry RegulationState Insurance Commissioners & DepartmentsGeneral Overview

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§ 308.201 Insurance Commissioner

The provisions of the Insurance Code are enforced by the Insurance Commissioner [*see Ins. Code § 12921* (Commissioner required to perform all duties imposed by law); *see also Ins. Code § 12919 et seq.* (powers and duties of the Commissioner); *10 Cal. Code Reg. §§ 2050-2683.23* (regulations)]. The Commissioner is elected in the same time, place, and manner and for the same term as the Governor [*Ins. Code § 12900(a)*; *see Cal. Const. art. V, § 2* (election of Governor for four-year term)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawIndustry RegulationState Insurance Commissioners & DepartmentsGeneral Overview

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26-308 California Forms of Pleading and Practice--Annotated § 308.202

§ 308.202 Certificate of Authority to Transact Insurance

[1] Requirement and Limitations

No person may transact any class of insurance business in California without first being admitted for that class. Except for the State Compensation Insurance Fund as authorized by *Ins. Code §§ 11770* and *11778 to 11780.5*, inclusive, admission is secured by procuring a certificate of authority from the Insurance Commissioner [*Ins. Code § 700*; *see Ins. Code § 705.1 (fee)*]. Except as specifically permitted by the Insurance Code, no certificate of authority can be issued to an unincorporated insurer [*Ins. Code § 699*].

The ownership or financial control, in part, direct, or indirect, of any domestic, foreign, or alien insurer, by any state of the United States or foreign government or its political subdivision, or by an agency of any other state, government, or its subdivision, does not restrict the insurance commissioner from issuing, renewing, or continuing in effect the license of that insurer to transact in California the kinds of insurance business for which that insurer is otherwise qualified, unless the commissioner finds that any of the following is true [*Ins. Code § 699.5(a)*; *see State of California v. Altus Fin. S.A. (9th Cir. 2008) 540 F.3d 992, 997 n.5*]:

- The insurer is subject to any form of subsidy that would enable it to compete unfairly with domestic insurers.

- The insurer is subject to governmental practices that discriminate on the basis of any characteristic listed or defined in *Civil Code § 51(b)* or *(e)* [*see Ch. 116, Civil Rights: Discrimination in Business Establishments, § 116.11*].

- The ownership or financial control will not create any soverign immunity in the insurer;

- Appropriate measures and controls do not exist to avoid security problems resulting from an insurer's access to confidential information and data of its insured; or

- The ownership or financial control results in substantial or undue influence being asserted over the insurer.

This provision applies only if the insurer complies with all other requirements for issuance, renewal, or continuation of a license [*Ins. Code § 699.5(a)*]. An applicant's failure to submit information requested by the commissioner for the purpose of determining whether to make one or more of these findings is sufficient to deny the application [*Ins. Code § 699.5(b)*]. No license may be issued to an insurer that iswholly owned by a governmental entity [*Ins. Code § 699.5(c)*].

If the applicant is a wholly owned domestic subsidiary of an admitted domestic insurer, the commissioner is required to issue a certificate of authority to the applicant within 180 days of application unless the commissioner has found that the applicant is substantially deficient in respect to one or more of the items set forth in *Ins. Code § 717* [*Ins. Code § 717.1*].

For detailed discussion of the licensing and requirements applicable to insurance carriers, see California Insurance Law and Practice, Chs. 2 and 3 (Matthew Bender).

[2] Expiration

Subject to the annual fee provisions [*see Ins. Code § 705*], a certificate of authority is for an indefinite term and expires on expiration or termination of the corporate existence of its holder [*Ins. Code § 701*].

[3] Suspension

The certificate may, after proper notice and hearing, be suspended for not exceeding one year, or the holder may be fined in a sum not exceeding $55,000, for any of the practices listed in *Ins. Code § 704* [*Ins. Code §§ 704, 704.7*] or on the ground set forth in *Ins. Code § 704.5*.

The proceedings are conducted in accordance with the provisions of *Gov. Code § 11500 et seq.*, the Administrative Adjudication Act [*Ins. Code § 704*]. Judicial review of the proceedings is instituted by filing a petition for writ of mandate [*Gov. Code § 11523*] in the proper superior court under the provisions of *Code Civ. Proc. § 1094.5*. The petition must be filed within 30 days after the last day on which reconsideration can be ordered, unless time is extended by a request to the agency to prepare the record [*Gov. Code § 11523*].

For forms for use in those proceedings, see Ch. 471, *Investigations by Public Agencies* , and Ch. 473, *Public Agency Adjudication* through Ch. 473H, *Alternative Procedures for Agency Decisions* . For forms relating to review, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawIndustry RegulationInsurance Company OperationsConducting BusinessCertificates of Authority

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26-308 California Forms of Pleading and Practice--Annotated § 308.203

§ 308.203 License for Insurance Agent, Broker, Solicitor, and Life Agent

Unless exempt by law, no person may act as an insurance agent, broker, or solicitor, or as a life agent, unless he or she holds a valid license from the Insurance Commissioner authorizing him or her to act in that capacity [*Ins. Code § 1631*; *see Ins. Code § 1621 et seq.* (definitions)]. Exemptions are noted in *Ins. Code §§ 1634* and *1635*. Any person who transacts insurance without a valid license is guilty of a misdemeanor punishable by a fine not exceeding $50,000, by imprisonment in a county jail for a period not exceeding one year, or by both thefine and imprisonment [*Ins. Code § 1633*].

A person otherwise eligible for a license may be authorized to act in the capacity of insurance agent, insurance broker, insurance solicitor, or life agent, unless prohibited under *Ins. Code § 1621 et seq.* [*Ins. Code § 1632*; *see Ins. Code § 1640 et seq.* (prohibitions and restrictions); *see also Ins. Code § 1639* (qualifications for nonresident licenses)]. For definitions of these classifications, see *§ 308.170* et seq.

An organization may hold any license or licenses necessary to act in the following capacities: (1) a life-only agent; (2) an accident and health agent; (3) a fire and casualty broker-agent; (4) a cargo shipper's agent; (5) a personal lines licensee; (6) a credit insurance agent; (7) a rental car agent; (8) a limited lines licensee with a nonresident license; or (9) a self-service storage agent [*Ins. Code § 1637*; *see Ins. Code § 1628* (organization defined as legal entity other than natural person)].

A written application for a license or renewal under *Ins. Code § 1621 et seq.* must be filed with the Insurance Commissioner [*Ins. Code § 1652(a)*; *see Ins. Code §§ 1650* (contents of license), 1652 et seq. (procedure), 1662 et seq. (bonds), 1666 et seq. (qualifications), 1675 et seq. (examinations), 1702 et seq. (issuance of license), and 1716 et seq. (license terms)]. The holder of a license under *Ins. Code § 1621 et seq.* must comply with the conduct set forth in *Ins. Code § 1724 et seq.* [*see Ins. Code § 1724 et seq.*].

Legal Topics:

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

Insurance LawIndustry RegulationInsurance Company OperationsRepresentativesAgentsLicensesInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesAgentsSpecial AgentsInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesBrokers

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26-308 California Forms of Pleading and Practice--Annotated § 308.204

§ 308.204 Denial of License

The grounds for denying a license are listed in *Ins. Code §§ 1668, 1669,* and *1672*. Except as provided in *Ins. Code § 1669* (denial without hearing), a license may not be denied without an opportunity to the applicant to be heard in support of his or her application. When a hearing is held, the proceedings are conducted in accordance with the provisions of *Gov. Code § 11500 et seq.*, the Administrative Adjudication Act [*Ins. Code § 1667*]. Judicial review of the proceedings may be instituted by filing a petition for a writ of mandate [*Gov. Code § 11523*] in the superior court pursuant to the provisions of *Code Civ. Proc. § 1094.5*.

For further discussion and forms for use in those proceedings, see Ch. 471B, *Licensing by Public Agencies* .

If the applicant for a license, within one year from the date the commissioner received the application whether or not the filing is complete, or within one year from the date a certificate of convenience was issued, whichever is later, neither fully qualifies for and receives the license on a permanent basis nor is denied its issue, the application is automatically denied without prejudice to the filing of a new application, unless in a proceeding under a statement of issues the commissioner for good cause determines that the denial should be set aside or stayed [*Ins. Code § 1670*; *see also Ins. Code § 1765.4* (applications to act as surplus lines broker or special lines surplus lines broker)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawIndustry RegulationInsurance Company OperationsRepresentativesAgentsLicenses

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26-308 California Forms of Pleading and Practice--Annotated § 308.205

§ 308.205 Disciplinary Actions Against Licensees

[1] Grounds

The Insurance Commissioner may suspend or revoke any permanent license issued pursuant to *Ins. Code § 1621 et seq.* on any of the grounds set forth in *Ins. Code § 1666 et seq.* on which he or she may deny an application for a license [*Ins. Code § 1738*]. The grounds for application denial are set forth in *Ins. Code §§ 1668, 1669,* and *1672*. Other grounds for suspension or revocation of a license are scattered throughout the Insurance Code [*see, e.g., Ins. Code §§ 383.5, 760, 766, 773, 777.2, 783, 1746, 1747*; *see also Ins. Code §§ 1745, 1746* (minor offenses); *Ins. Code § 1748* (payment of money penalty in lieu of suspension)]. The purpose of suspending or revoking a license is not to punish the errant licensee but to insure that the privileges granted under the license are not exercised in derogation of the public interest [*Ready v. Grady (1966) 243 Cal. App. 2d 113, 117, 52 Cal. Rptr. 303]* .

[2] Procedure and Judicial Review

A suspension or revocation of a license based on a ground set forth in *Ins. Code § 1669* (grounds for denying application for license without a hearing) may be without notice or hearing. A suspension or revocation of any permanent license, except a restricted license, on any other ground may be ordered only after notice and hearing conducted in accordance with the provisions of *Gov. Code § 11500 et seq.*, the Administrative Adjudication Act, and the Insurance Commissioner has all the power granted in those sections [*Ins. Code § 1738*].

Judicial review of the order after hearing may be had by filing a petition for writ of mandate [*Gov. Code § 11523*] in the superior court pursuant to the provisions of *Code Civ. Proc. § 1094.5*. For further discussion and forms for use in those proceedings, see Ch. 471B, *Licensing by Public Agencies* .

Since the Insurance Commissioner is not a constitutional agency with judicial authority but a state officer exercising statutory powers, his determination in a disciplinary proceeding is subject to a trial de novo in the superior court in which the court is entitled to exercise its independent judgment on the evidence [*Ready v. Grady (1966) 243 Cal. App. 2d 113, 115, 52 Cal. Rptr. 303]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawIndustry RegulationInsurance Company OperationsRepresentativesAgentsLicensesInsurance LawIndustry RegulationState Insurance Commissioners & DepartmentsJudicial ReviewMandamus

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D. Certification and Licensing

26-308 California Forms of Pleading and Practice--Annotated § 308.206

§ 308.206 Insurance Adjusters

An insurance adjuster within the meaning of *Ins. Code § 14000 et seq.* is a person other than a private investigator as defined in *Bus. & Prof. Code § 7521* who, for any consideration whatsoever, engages in business or accepts employment to furnish, or agrees to make, or makes, any investigation for the purpose ofobtaining information in the course of adjusting or otherwise participating in the disposal of any claim under or in connection with a policy of insurance, or engages in other specified activities [*Ins. Code § 14021*]. The license requirement does not apply to an attorney-at-law in the performance of his or her duties as an attorney, among other classifications of persons [*see Ins. Code § 14022*].

A violation of the licensing statute is punishable as a misdemeanor, except for the falsification of fingerprints or photographs submitted as part of the license application, which is punishable as a felony [*Ins. Code § 14080*].

An application for a license under *Ins. Code § 14000 et seq.* must be on a form prescribed by the Insurance Commissioner and accompanied by the appropriate application [*see Ins. Code §§ 14023-14045* (licensing procedure), 14050 et seq. (bonds), 14090 et seq. (expiration and renewal), 14097 (fee schedule)]. The grounds for license denial include the prior refusal or revocation of a license, among other things [*see Ins. Code § 14028*]. An insurance adjuster is prohibited from knowingly making any false report to his or her employer or client for whom information was being obtained, among other things [*see Ins. Code § 14038*].

The Insurance Commissioner may suspend or revoke a license issued under *Ins. Code § 14000 et seq.* on the ground that the licensee (or his or her manager, if an individual, or if the licensee is a person other than an individual, any of its officers, directors, partners, or its manager) has committed any of several enumerated acts, including assault, battery, or kidnapping, or the use of force or violence on any person, without proper justification [*see Ins. Code § 14061(h)*; *see also Ins. Code §§ 14060 et seq.* (disciplinary proceedings), 14070 et seq. (nonresidents), 14061, 14063, 14064 (grounds for suspension or revocation)].

Public insurance adjusters are subject to a separate but similar licensing, conduct, and disciplinary scheme [*see Ins. Code § 15000 et seq.*]. A public insurance adjuster is essentially a person who, for compensation, assists an insured in

negotiating for or effecting the settlement of a claim for insurance proceeds [*Ins. Code § 15007*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawIndustry RegulationInsurance Company OperationsRepresentativesAdjusters & InvestigatorsGeneral OverviewInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesAdjusters & InvestigatorsLicensesInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesAdjusters & InvestigatorsPublic Insurance Adjusters

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[Reserved]

§§ 308.207[Reserved]

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§ 308.220 Related Matthew Bender Publications

For discussion of insurance generally, see California Insurance Law and Practice (Matthew Bender)

For memoranda of points and authorities regarding insurance generally, see California Points and Authorities, Ch. 120, *Insurance* (Matthew Bender)

For discussion of insurance contracts, including rules of interpretation, see Levy, Golden & Sacks, California Torts, Ch. 80 (Matthew Bender)

For discussion of insurance policies generally, see Levy, Golden & Sacks, California Torts, Ch. 81 (Matthew Bender)

For discussion of claims and disputes under insurance policies, see Levy, Golden & Sacks, California Torts, Ch. 82 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGeneral OverviewInsurance LawClaims & ContractsContract FormationGeneral Overview

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§ 308.221 State Constitution

Legal rate of interest is 10 percent pursuant to legislature's enactment of *Code Civ. Proc. § 685.010(a). Cal. Const. art. XV, § 1*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawNational BanksInterest & UsuryInterestInsurance LawGeneral Overview

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§ 308.222 State Statutes

[1] In General

Actions by third party beneficiaries of insurance policies. *Ins. Code § 1559*

Cancellation of premium financed policies. *Ins. Code § 673*

Causes of loss. *Ins. Code §§ 530-533*

Classes of insurance. *Ins. Code § 100 et seq.*

[2] Construction

Of contracts. *Civ. Code §§ 1644-1661*

Of disability policies. *Ins. Code §§ 10176, 10176.1*

Of indemnity contracts. *Civ. Code §§ 2772-2778*

[3] Definitions

"Admitted." *Ins. Code § 24*

"Concealment." *Ins. Code § 330*

"Domestic." *Ins. Code § 26*

"Domestic corporation." *Corp. Code § 167*

"Foreign." *Ins. Code § 27*

"Foreign corporation." *Corp. Code § 170*

"Group" (as designation of coverage). *Ins. Code § 42*

"Insurance." *Ins. Code § 22*

"Insurance agent." *Ins. Code §§ 31, 1621*

"Insurance broker." *Ins. Code §§ 33, 1623*

"Insurance solicitor." *Ins. Code §§ 34, 1624*

"Insured." *Ins. Code § 23*

"Insurer." *Ins. Code § 23*

"Lien." *Ins. Code § 29*

"Life licensee." *Ins. Code §§ 32, 1622*

"Life and disability insurance analyst." *Ins. Code § 32.5*

"Mortgage," "mortgagee," and "mortgagor." *Ins. Code § 29*

"Nonadmitted." *Ins. Code § 25*

"Nonresident." *Ins. Code § 30*

"Oath." *Ins. Code § 17*

"Person." *Ins. Code § 19*

"Policy." *Ins. Code § 380*

"Resident." *Ins. Code § 30*

"Signature" and "subscription." *Ins. Code § 18*

"Transact." *Ins. Code § 35*

"Twenty-four hour coverage." *Ins. Code § 1749.02*

"Trust deed." *Ins. Code § 29*

"Workers' compensation." *Ins. Code § 46*

"Writing." *Ins. Code § 8*

[4] Designation of Agent for Service of Process

By domestic corporation. *Corp. Code §§ 202(c), 1502(b)*

By foreign corporation qualified to transact intrastate business. *Corp. Code § 2105*

Estoppel. *Evid. Code § 623*

Evidence of offers to compromise in *Ins. Code § 790.03* actions. *Evid. Code § 1152(b)*

Excuse for nonperformance of obligation. *Civ. Code §§ 1511-1515*

Failure to make good faith attempt to settle as unfair claims-settlement practice. *Ins. Code § 790.03(h)(5)*

Financial guaranty insurance. *Ins. Code § 12100 et seq.*

Fire insurance. *Ins. Code §§ 2030-2083*

Genetic characteristics and genetic testing in insurance underwriting. *Ins. Code §§ 10140(b)* (repealed eff. Jan. 1, 2002), 10146-10149.1

Good faith duty of insurers, brokers, agents, and others regarding long-term care insurance. *Ins. Code § 10234.8*

Fraternal benefit societies. *Ins. Code §§ 10970-11165*

Insurable events. *Ins. Code §§ 250-253*

Insurable interest. *Ins. Code §§ 280-305, 10110*

[5] Jurisdiction

Limited civil cases. *Code Civ. Proc. § 86*; *see also* Cal. Const. art. V *I, § 10*

Small claims court. *Code Civ. Proc. § 116.220*

Land, insurance covering. *Ins. Code §§ 12340-12661*

Land value insurance. *Ins. Code §§ 12660-12661*

Liability, workers' compensation, and common carrier liability insurance. *Ins. Code §§ 11550-11906*

Life and disability policies. *Ins. Code §§ 10110-10402.1*, 11430-11536

Marine insurance. *Ins. Code §§ 1880-2010*

Medicare supplemental policies. *Ins. Code § 10192.1 et seq.*

Minors, emancipated, ability to enter into insurance contract. *Fam. Code § 7051*

Miscellaneous casualty insurance. *Ins. Code § 12050 et seq.*

Mortgage insurance. *Ins. Code §§ 12420-12631*

Mortgage guaranty insurance. *Ins. Code §§ 12640.01-12640.20*

Motor clubs. *Ins. Code §§ 12140-12311*

Nonprofit corporations. *Corp. Code §§ 10250, 10251*

Notice to insured regarding penalty for presenting false claims. *Ins. Code § 1871.2*

Notice of loss. *Ins. Code §§ 550* (fire loss), 551 (casualty loss), 10350.5 (disability loss)

Parties to insurance contract. *Ins. Code §§ 150-172*

[6] Policies

Cancellation or failure to renew. *Ins. Code §§ 660-679.6*

Cancellation of commercial policies. *Ins. Code § 676.2*

Cancellation or nonrenewal of commercial excess and umbrella policies. *Ins. Code § 676.6*

Contents. *Ins. Code §§ 381, 383*

Electronic transmission of required written notice by insurer. *Ins. Code § 38.5*

Entitlement. *Ins. Code § 430*

Inception hours. *Ins. Code § 460*

Signatures. *Ins. Code § 386*

Types. *Ins. Code §§ 410-413*

Premiums. *Ins. Code §§ 480-491*

Privileged communications--communication made in judicial proceeding knowingly concealing existence of insurance policy not privileged. *Civ. Code § 47(b)(3)*

Prohibition of discriminatory practices (based on marital status, sex, race, color, religion, national origin, or ancestry) by certain admitted insurers. *Ins. Code §§ 679.70-679.73*

Prohibited acts and practices. *Ins. Code § 790.03(h)*

Proof of loss. *Ins. Code §§ 552, 555*

Reciprocal insurers. *Ins. Code §§ 1280-1540*

Reformation or revision of contract based on mistake or fraud. *Civ. Code § 3399*

Renewal premium notices, notice required to discontinue. *Ins. Code § 500*

[7] Rescission

Generally. *Ins. Code §§ 650-651*

Grounds. *Ins. Code §§ 331, 359, 483*

Service of summons and proof of service. *Code Civ. Proc. §§ 413.10-417.40*; *Ins. Code § 12931*

Standard provisions in disability policies. *Ins. Code §§ 10270-10402.1*

Title insurers. *Ins. Code §§ 12350-12417*

Transfer of interest after loss. *Ins. Code § 520*

Underwriters fire patrols. *Ins. Code §§ 10020-10080*

[8] Unfair Practices

Cartwright Act, relating to antitrust provisions generally. *Bus. & Prof. Code § 16700 et seq.*

Unfair Practices Act, relating to business generally. *Bus. & Prof. Code § 17000 et seq.*

Unfair Practices Act, relating to insurance. *Ins. Code § 790 et seq.*

Application of *Civ. Code §§ 51-53* (Unruh Civil Rights Act), *Bus. & Prof. Code §§ 16600 et seq.*, and *17500 et seq.* to insurance business. *Ins. Code § 1861.03(a)*

Venue of actions. *Corp. Code § 105*; *Code Civ. Proc. §§ 116.370, 392-395.5*

Warranties. *Ins. Code §§ 440-449*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsService Upon AgentsInsurance LawClaims & ContractsCancellation & NonrenewalGeneral OverviewInsurance LawClaims & ContractsPolicy InterpretationGeneral OverviewInsurance LawClaims & ContractsPremiumsGeneral OverviewInsurance LawIndustry RegulationUnfair Business PracticesGeneral Overview

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§ 308.223 Decisions

[1] Agent's Authority to Bind Insurer

Punitive damages properly awarded against insurer based on failure to give loss payee required notice of cancellation by company acting as insurer's managing agent within meaning of *Civ. Code § 3294(b)*; agent had broad discretion over insurer's business, could solicit, bind, write, and administer insurance policies, and could exercise its independent judgment as to time, place, and manner of soliciting insurance and serving policyholders. *Textron Fin. Corp. v. National Union Fire Ins. Co. (2004) 118 Cal. App. 4th 1061, 1080-1081, 13 Cal. Rptr. 3d 586*

In action by insured against insurer regarding disputed health insurance coverage, trial court committed reversible error by refusing to instruct jury that person who told insured that coverage would be provided for particular services was agent of insurer for purposes of binding insurer, when person had agency appointment on file with Department of Insurance listing him as agent of that insurer, had entered into written agreement with insurer expressly authorizing him to transact business as insurer's agent, and officer of insurer testified that he was agent of insurer. *Loehr v. Great Republic Ins. Co. (1990) 226 Cal. App. 3d 727, 733-735, 276 Cal. Rptr. 667*

[2] Ambiguity

[a] Exclusion Clause

"Flood Exclusion" in excess policy encompassed water damage to insured's shipyards caused by Hurricane Katrina. *Northrop Grumman Corp. v. Factory Mut. Ins. Co. (9th Cir. 2008) 538 F.3d 1090, 1094*

"Vehicle theft exclusion" in jeweler's block insurance policy was ambiguous with respect to exclusion for loss from "[t]heft from any vehicle unless, you, an employee, or other person whose only duty is to attend to the vehicle are actually in or upon such vehicle at the time of the theft"; insured was behind running vehicle inspecting suspicious noise

when thief entered vehicle and drove away with jewels inside vehicle. *E.M.M.I., Inc. v. Zurich Am. Ins. Co. (2004) 32 Cal. 4th 465, 470-474, 9 Cal. Rptr. 3d 701, 84 P.3d 385*

Exclusionary clause must be conspicuous, plain, and clear. *GGIS Ins. Svcs. v. Superior Court (2008) 168 Cal. App. 4th 1493, 1507, 86 Cal. Rptr. 3d 515*

Exception to exclusion in jeweler's block policy for loss or damage to property left in unattended automobile was not ambiguous and did not apply to theft of jewelry from traveling sales representative's unattended vehicle, when policy stated that exclusion did not apply if property was lost or damaged while in custody of a "carrier" mentioned in schedule to contract, and schedule clearly defined carrier to mean commercial carrier. *Nissel v. Certain Underwriters at Lloyds of London (1998) 62 Cal. App. 4th 1103, 1112-1113, 73 Cal. Rptr. 2d 174*

"Family exclusion" clause in homeowner's policy expressly provided that insurer affords no liability coverage for injuries suffered by insured or insured's relatives, and was unambiguous and unequivocal. *Lumbermens Mut. Cas. Co. v. Vaughn (1988) 199 Cal. App. 3d 171, 179, 244 Cal. Rptr. 567*

Although rules of construction applicable to exclusionary clauses construe ambiguities against insurer, identical language used in defining boundaries of both coverage and exclusion regarding "bodily injury" was unambiguous, and excluded coverage. *Mori v. Southern Gen. Ins. Co. (1987) 196 Cal. App. 3d 99, 104, 241 Cal. Rptr. 463*

Possibly ambiguous exclusion clause as not strictly construed against insurer when insured itself proposed or drafted language of exclusion. *Fireman's Fund Ins. Co. v. Fibreboard Corp. (1986) 182 Cal. App. 3d 462, 468, 227 Cal. Rptr. 203*

[b] Generally

Uncertainties in policy resolved against insurer. *Northrop Grumman Corp. v. Factory Mut. Ins. Co. (9th Cir. 2008) 538 F.3d 1090, 1094* ; *American States Ins. Co. v. Borbor (9th Cir. 1987) 826 F.2d 888, 891* ; *James B. Lansing Sound, Inc. v. Nat'l U. Fire Ins. (9th Cir. 1986) 801 F.2d 1560, 1564* ; *Oakland-Alameda County Coliseum, Inc. v. National Union Fire Ins. Co. (N.D. Cal. 2007) 480 F. Supp. 2d 1182* , 1189; *Safeco Ins. Co. v. Robert S. (2001) 26 Cal. 4th 758, 765, 110 Cal. Rptr. 2d 844, 28 P.3d 889* ; *Kazi v. State Farm Fire & Cas. Co. (2001) 24 Cal. 4th 871, 879, 103 Cal. Rptr. 2d 1, 15 P.3d 223* ; *Reserve Ins. Co. v. Pisciotta (1982) 30 Cal. 3d 800, 807-808, 180 Cal. Rptr. 628, 640 P.2d 764* ; *Holz Rubber Co., Inc. v. American Star Ins. Co. (1975) 14 Cal. 3d 45, 55-60* ; *Century Bank v. St. Paul Fire & Marine Ins. Co. (1971) 4 Cal. 3d 319, 321, 93 Cal. Rptr. 569, 482 P.2d 193* ; *Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A.G. (1970) 3 Cal. 3d 434, 442, 91 Cal. Rptr. 6, 476 P.2d 406* ; *California Comp. & Fire Co. v. Industrial Accident Comm'n (1965) 62 Cal. 2d 532, 534, 42 Cal. Rptr. 845, 399 P.2d 381* ; *Nava v. Mercury Cas. Co. (2004) 118 Cal. App. 4th 803, 805, 13 Cal. Rptr. 3d 816* ; *Home Svgs. of Am. v. Continental Ins. Co. (2001) 87 Cal. App. 4th 835, 841, 104 Cal. Rptr. 2d 790* (mortgagee clause in all-risk policy); *Oliver Mach. Co. v. United States Fid. & Guar. Co. (1986) 187 Cal. App. 3d 1510, 1516, 232 Cal. Rptr. 691* ; *Employers Reinsurance Corp. v. Phoenix Ins. Co. (1986) 186 Cal. App. 3d 545, 553-554, 230 Cal. Rptr. 792* ; *Threlkeld v. Ranger Ins. Co. (1984) 156 Cal. App. 3d 1, 6, 202 Cal. Rptr. 529* ; *Moore v. American United Life Ins. Co. (1984) 150 Cal. App. 3d 610, 635, 197 Cal. Rptr. 878* ; *Spaid v. Cal-W. States Life Ins. Co. (1982) 130 Cal. App. 3d 803, 806, 182 Cal. Rptr. 3* ; *State Farm Mut. Auto. Ins. Co. v. Elkins (1975) 52 Cal. App. 3d 534, 538, 125 Cal. Rptr. 139* ; *Globe Indem. Co. v. State of California (1974) 43 Cal. App. 3d 745, 750, 118 Cal. Rptr. 75* ; *Hartford Accident & Indem. Co. v. Civil Serv. Employees Ins. Co. (1973) 33 Cal. App. 3d 26, 31, 108 Cal. Rptr. 737* ; *Burke Concrete Accessories, Inc. v. Tolson (1972) 27 Cal. App. 3d 237, 241, 103 Cal. Rptr. 513*

Doctrine of strict construction against insurer does not mean strained construction; courts, under guise of strict construction, are not able to rewrite policy to bind insurer to risk that it did not contemplate and for which it has not

been paid. *Commercial Union Ins. Co. v. Sponholz (9th Cir. 1989) 866 F.2d 1162, 1163*

Court may not force construction of policy so as to cast liability on insurance company that it has not assumed. *Horvatin v. Allstate Life Ins. Co. (9th Cir. 1988) 848 F.2d 1012, 1014*

Principle that ambiguity of policy is interpreted against insurer as inapplicable when claimant is purported third-party beneficiary rather than party to contract, and conditions of bargaining inequality usually envisioned in insurance agreements did not exist in framing of policy. *Garcia v. Truck Ins. Exch. (1984) 36 Cal. 3d 426, 435, 204 Cal. Rptr. 435, 437, 682 P.2d 1100*

Ambiguity in termination clause, as in other clauses of insurance policy, construed against insurer. *Williams v. American Cas. Co. (1971) 6 Cal. 3d 266, 275, 98 Cal. Rptr. 814, 491 P.2d 398*

When interpreting policy involving coverage dispute, court must first determine whether language as construed by lay person is ambiguous; if so, court determines whether finding of coverage is consistent with objectively reasonable expectations of insured; court must use common sense in considering policy as a whole and circumstances of underlying case. *Baker v. National Interstate Ins. Co. (2009) 180 Cal. App. 4th 1319, 1327-1328, 103 Cal. Rptr. 3d 565, 2009 Cal. App. LEXIS 2117*

Court resolves ambiguous policy provision in insured's favor, consistent with insured's reasonable expectations; however, potential for coverage cannot be based on unresolved legal dispute concerning policy interpretation that is ultimately resolved in favor of insurer. *Kim Seng Co. v. Great American (2009) 179 Cal. App. 4th 186, 193, 101 Cal. Rptr. 3d 537* , reh'g denied, *2009 Cal. App. LEXIS 1971 (2009)*

Term in insurance contract is ambiguous if it is capable of two or more reasonable constructions. *Supervalu, Inc. v. Wexford Underwriting Managers, Inc. (2009) 175 Cal. App. 4th 64, 73, 96 Cal. Rptr. 3d 316* (excess workers' compensation policy)

Policy language is ambiguous if susceptible of more than one reasonable interpretation in context of policy as whole; policy language cannot be found ambiguous in the abstract; any ambiguity must be resolved in manner consistent with objectively reasonable expectations of insured in light of nature and kind or risks covered by policy. *GGIS Ins. Svcs. v. Superior Court (2008) 168 Cal. App. 4th 1493, 1506-1507, 86 Cal. Rptr. 3d 515*

Replacement cost under fire insurance policy included cost of replacing a damaged building by purchasing another building at a different location; ordinary and popular sense of policy provisions did not support insurer's interpretation of policy; policy was ambiguous at best on meaning of replacement cost, and that ambiguity would be construed against insurer. *Conway v. Farmers Home Mut. Ins Co. (1994) 26 Cal. App. 4th 1185, 1191-1192, 31 Cal. Rptr. 2d 883*

Term "sudden and accidental" is not ambiguous; even if it was ambiguous, interpreting term to cover gradual pollution would not be within objectively reasonable expectations of insured. *ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co. (1993)17 Cal. App. 4th 1773, 1788, 22 Cal. Rptr. 2d 206*

Question whether policy language is ambiguous is one of law. *Johnson v. Continental Ins. Cos. (1988) 202 Cal. App. 3d 477, 480, 248 Cal. Rptr. 412*

Rules regarding interpretation of ambiguous language inapplicable to policy free from ambiguity; courts may adopt strained or absurd interpretation in order to create ambiguity when none exists. *Advanced Micro Devices, Inc. v. Great Am. Surplus Lines Ins. Co. (1988) 199 Cal. App. 3d 791, 801, 245 Cal. Rptr. 44* ; *Padberg v. Travelers Cos. (1987) 197 Cal. App. 3d 1161, 1166, 243 Cal. Rptr. 266*

Rule that ambiguity in policy is to be resolved against insurer is inapplicable when contractual liability is superimposed on insurers by statute. *Enterprise Ins. Co. v. Mulleague (1987) 196 Cal. App. 3d 528, 536, 241 Cal. Rptr. 846* (construing *Ins. Code § 11580.2(a)(1), (m)* regarding uninsured motorist coverage)

Ambiguity as resolved in favor of insured only if inquiry regarding meaning of disputed policy terms reveals material uncertainty in their application that is of consequence to coverage. *National Auto. & Cas. Ins. Co. v. Contreras (1987) 193 Cal. App. 3d 831, 836-837, 238 Cal. Rptr. 627*

Ambiguity in insurance policy required to be found, if it exists, in circumstances of particular case; ambiguity is not to be created by resort to hypothetical hyperbole. *Blumberg v. Guarantee Ins. Co. (1987) 192 Cal. App. 3d 1286, 1296, 238 Cal. Rptr. 36*

Rules pertaining to interpretation of ambiguous or uncertain language in insurance policies as applicable only when policy, in fact, presents some uncertainty or ambiguity. *Hackethal v. National Cas. Co. (1987) 189 Cal. App. 3d 1102, 1109, 234 Cal. Rptr. 853* ; *Apparel City Sewing Mach. Co. v. Transamerica Ins. Group (1982) 129 Cal. App. 3d 400, 405-406, 181 Cal. Rptr. 64*

Alleged ambiguity in policy as not properly based on strained and grammatically incorrect reading of policy's terms. Atlas Assurance Co. v. McCombs Corp. (1983) *146 Cal. App. 3d 135, 143, 194 Cal. Rptr. 66*

When policy provision is ambiguous. *Spaid v. Cal-W. States Life Ins. Co. (1982) 130 Cal. App. 3d 803, 806, 182 Cal. Rptr. 3* ; *Rullman v. State Farm Mut. Auto. Ins. Co. (1970) 8 Cal. App. 3d 606, 609, 87 Cal. Rptr. 551* ; *Brunt v. Occidental Life Ins. Co. (1963) 223 Cal. App. 2d 179, 183, 35 Cal. Rptr. 492* ; *see Steven v. Fidelity & Cas. Co. (1962) 58 Cal. 2d 862, 871, 875, 27 Cal. Rptr. 172, 377 P.2d 284*

[c] Reasonable Expectation Doctrine

In bad faith action against health care insurer in which insurer refused claim arising from treatment recommended by member physician, policy as unambiguous with respect to method of determining medical necessity of treatment; insured's expectation that member-physician's recommendantion would be honored as extending only to reasonable recommendation. *Sarchett v. Blue Shield of Cal. (1987) 43 Cal. 3d 1, 10, 233 Cal. Rptr. 76, 729 P.2d 267* (reversing judgment on directed verdict finding ambiguity)

Insured could not have had objectively reasonable expectation that policies covered pre-acquisition torts of after-acquired companies when such coverage was not available in the marketplace at time policies in question were written. *Cooper Cos. v. Transcontinental Ins. Co. (1995) 31 Cal. App. 4th 1094, 1109, 37 Cal. Rptr. 2d 508*

Manner in which premiums were assessed supported court's conclusion with respect to insured's objectively reasonable expectations regarding policy coverage. *Cooper Cos.v. Transcontinental Ins. Co. (1995) 31 Cal. App. 4th 1094, 1108, 37 Cal. Rptr. 2d 508*

Because insured's decision to purchase, and expectations regarding coverage, are usually based on advertising or brochures, insurer might be required to provide coverage according to its advertising, despite more restrictive provisions in contract itself; however, newspaper advertisement language regarding definition of "loss of limbs" unambiguously referred to severance of limbs, even though language could have been more explicit. *Suarez v. Life Ins. Co. of N. Am. (1988) 206 Cal. App. 3d 1396, 1403, 254 Cal. Rptr. 377*

Doctrine of reasonable expectation of coverage as applicable only when ambiguity is present in policy. *Hallmark Ins. Co. v. Superior Court (1988) 201 Cal. App. 3d 1014, 1019, 247 Cal. Rptr. 638* ; *Lumbermens Mut. Cas. Co. v. Vaughn*

(1988) 199 Cal. App. 3d 171, 179, 244 Cal. Rptr. 567 ; *State Farm Fire & Cas. Co. v. Lewis (1987) 191 Cal. App. 3d 960, 963, 236 Cal. Rptr. 807* ; *Wolf Mach. Co. v. Insurance Co. of N. Am. (1982) 133 Cal. App. 3d 324, 328, 183 Cal. Rptr. 695*

[d] Specific Terms

Exception to pollution exclusion in liability and umbrella policies for damage from heat, smoke or fumes from a "hostile fire" held unambiguous; clear and explicit meaning of "fire" is a chemical reaction that releases heat and light; summary judgment for insurer reversed and remanded to allow insured's expert to provide evidence that there was a fire. *Maffei v. Northern Ins. Co. of N.Y. (9th Cir. 1993) 12 F.3d 892, 896-897*

"Children" is not ambiguous; stepchild was not within coverage limited to children of insured. *Evans v. Safeco Life Ins. Co. (9th Cir. 1990) 916 F.2d 1437, 1441*

Benefits arising from treatment of insured's child for autism not excluded from coverage, based on ambiguity of term "mental illness" in limiting clause, when policy neither defined nor explained term, nor suggested whether cause or manifestation determines coverage of particular illness, and evidence showed that autism is organically based. *Kunin v. Benefit Trust Life Ins. Co. (9th Cir. 1990) 910 F.2d 534, 541*

Under group comprehensive major medical policy, exclusion of "medical treatment" (of preexisting conditions), which was not defined anywhere in the policy, implied definition that most favors coverage; construction of term to include only therapeutic, and not diagnostic procedures was proper under circumstances. *Franceschi v. American Motorists Ins. Co. (9th Cir. 1988) 852 F.2d 1217, 1220*

Provision in incontestability clause of disability insurance policy that two-year contestability period would be tolled during any period that "insured is disabled" applied only to disabilities within policy coverage and not to all disabilities that fell within dictionary definition of "disability." *John Hancock Mut. Life Ins. Co. v. Greer (1998) 60 Cal. App. 4th 877, 883-886, 71 Cal. Rptr. 2d 48*

Word "disparaging," which appeared in personal liability clause of policy in context of defamation torts dealing with injuries to character and reputation, was not ambiguous and insured could not reasonably expect that it referred to cause of action for disparagement of title. *Truck Ins. Exch. v. Bennett (1997) 53 Cal. App. 4th 75, 83-86, 61 Cal. Rptr. 2d 497*

Although policy language provided for coverage for any company "hereafter acquired," insured purchasing the policy would have had an objectively reasonable expectation of coverage only for companies acquired during policy period. *Cooper Cos. v. Transcontinental Ins. Co. (1995) 31 Cal. App. 4th 1094, 1111, 37 Cal. Rptr. 2d 508*

In context of fire damage policy paying replacement costs of a home, "replacement" did not require that insured rebuild on same lot; cost of purchasing replacement residence was also covered. *Conway v. Farmers Home Mut. Ins Co. (1994) 26 Cal. App. 4th 1185, 1191-1192, 31 Cal. Rptr. 2d 883*

Term "residence" in homeowner's policy is not ambiguous as used in resident relative exclusion; "residence" varies according to the facts and circumstances of the case and cannot be determined by the subjective intent of the dependent family member. *Utley v. Allstate Ins. Co. (1993) 19 Cal. App. 4th 815, 821, 24 Cal. Rptr. 2d 1*

"Roof" as used in policy covering damage to property in a warehouse was not ambiguous and did not include a temporary covering of plastic sheeting, used while roof was being repaired, that was not weatherproof enough to prevent rain damage to warehouse contents. *Diep v. California Fair Plan Ass'n (1993) 15 Cal. App. 4th 1205,*

1208-1211, 19 Cal. Rptr. 2d 591

"Accident" in liability policies occurs at time when complaining party was actually damaged, and not at time wrongful act was committed, according to general rule. *State Farm Mut. Auto. Ins. Co. v. Longden (1987) 197 Cal. App. 3d 226, 231, 242 Cal. Rptr. 726* (rejecting conflicting holding of *Sylla v. United States Fid. & Guar. Co. (1976) 54 Cal. App. 3d 895, 901, 127 Cal. Rptr. 38*)

Policy insuring mortgage payments on "disability" of insured does not include liabilityon insured's death; policy provisions regarding prerequisite of physician's care, rights to examine insured, and extent of insured's sickness or injury, were inconsistent with construing "disability" to include death. *Silva v. Aetna Life Ins. Co. (1987) 196 Cal. App. 3d 789, 795, 242 Cal. Rptr. 157*

Automobile involved in accident was not "covered auto" under policy when insurer no longer had insurable interest in it at time of accident. *International Serv. Ins. Co. v. Gonzales (1987) 194 Cal. App. 3d 110, 117-118, 239 Cal. Rptr. 341*

Policy providing coverage to "spouse" of insured was unambiguous and sufficient to apprise parties that marriage is prerequisite to coverage under classification of "spouse"; former spouse not covered under policy despite lack of additional language providing specific exclusion in event of divorce. *International Serv. Ins. Co. v. Gonzales (1987) 194 Cal. App. 3d 110, 117, 239 Cal. Rptr. 341*

Under homeowner's policy, coverage of "bodily injury" as clearly defined and unambiguous, and exclusion of bodily injury to insureds as precluding liability therefor. *State Farm Fire & Cas. Co. v. Lewis (1987) 191 Cal. App. 3d 960, 963, 236 Cal. Rptr. 807*

Term "any customer," used in bankers blanket bond, as ambiguous. *Jones v. Fireman's Fund Ins. Co. (1969) 270 Cal. App. 2d 779, 786, 76 Cal. Rptr. 97*

[3] Assignment

Fraud claims arising out contractual obligations of insurance carriers are not based on purely personal wrongs and therefore are assignable; insureds could assign fraud claim arising out of alleged misrepresentation and concealment of insurer's defense obligations. *McLaughlin v. National Union Fire Ins. Co. (1994) 23 Cal. App. 4th 1132, 1147-1148* ; *see Civ. Code § 954*

Insurer that withdrew from providing coverage in California under cease and desist order from Insurance Commission under *Ins. Code § 1065.2*, and that assigned rights and liabilities under existing policy to another insurer, remained liable to insured under original policy after assignee-insurer became insolvent; burden of obligation transferable only with consent of party entitled to its benefit, pursuant to *Civ. Code § 1457*. *Baer v. Associated Life Ins. Co. (1988) 202 Cal. App. 3d 117, 123-125, 248 Cal. Rptr. 236*

Substance rather than form of transaction determines whether assignment was intended. *Kelley v. British Commercial Ins. Co. (1963) 221 Cal. App. 2d 554, 564, 34 Cal. Rptr. 564* (assignment of cause of action against insurer for bad-faith refusal to settle claim under liability policy)

Assignment of right to collect insurance proceeds after loss by fire; assignee of chose in action as necessary party in any action on it. *Greco v. Oregon Mut. Fire Ins. Co. (1961) 191 Cal. App. 2d 674, 687-688, 12 Cal. Rptr. 802*

[4] Attorney's Fees

Made-whole rule does not bar automobile insurer from seeking reimbursement for med-pay proceeds that it paid to insured, subject to deduction under common-fund theory for its share of attorney's fees that insured expended to obtain payment from tortfeasor. 21st *Century Ins. Co. v. Superior Court (2009) 47 Cal. 4th 511, 518, 98 Cal. Rptr. 3d 516, 213 P.3d 972* ; *see also* 21st *Century Ins. Co. v. Superior Court (2009) 47 Cal. 4th 511, 515, 533-535, 98 Cal. Rptr. 3d 516, 213 P.3d 972* (conc. opn. of Werdegar, J.)

Insured's assignment of bad faith cause of action against insurer based on wrongful denial of benefits carries with it right to recover *Brandt* fees incurred by assignee in recovery of benefits from insurer. *Essex Ins. Co. v. Five Star Dye House, Inc. (2006) 38 Cal. 4th 1252, 1264, 45 Cal. Rptr. 3d 362, 137 P.3d 192*

In contingent fee context, *Brandt* fees are determined by calculating percentage of legal fees paid to attorney that reflects work attributable to obtaining contract recovery; no portion of legal fees attributable to punitive damages award can be recovered as *Brandt* fees. *Cassim v. Allstate Ins. Co. (2004) 33 Cal. 4th 780, 811-812, 16 Cal. Rptr. 3d 374, 94 P.3d 513*

Award of *Brandt* fees proper when insureds received full amount of personal property benefits under "extended replacement cost" homeowners' policy only after jury verdict. *Major v. Western Home Ins. Co. (2009) 169 Cal. App. 4th 1197, 1219, 87 Cal. Rptr. 3d 556*

Attorney's fees reasonably incurred to compel payment of policy benefits as element of damages in bad faith action. *Brandt v. Superior Court (1985) 37 Cal. 3d 813, 819-820, 210 Cal. Rptr. 211, 693 P.2d 796 , disapproving Austero v. Washington Nat'l Ins. Co. (1982) 132 Cal. App. 3d 408, 422, 182 Cal. Rptr. 919*

In bad faith action, insured may recover only that portion of attorneys' fees reasonably incurred to compel payment of policy benefits, and not fees incurred in pursuing bad faith action itself; fees attributable to obtaining portion of award exceeding amount due under policy are not recoverable. *Campbell v. Cal-Guard Sur. Servs., Inc. (1998) 62 Cal. App. 4th 563, 571-572, 73 Cal. Rptr. 2d 64*

Insurer not entitled to attorney's fees as damages for insured's breach of covenant of good faith and fair dealing, because insured's breach of covenant as giving rise to cause of action that sounds only in contract, not in tort; recovery therefore limited to contract damages. *California Fair Plan Ass'n v. Politi (1990) 220 Cal. App. 3d 1612, 1618, 270 Cal. Rptr. 243*

Insured's attorney's fees in declaratory relief action seeking declaration of rights under policy as required to be borne by insured. *Carroll v. Hanover Ins. Co. (1968) 266 Cal. App. 2d 47, 51, 71 Cal. Rptr. 868*

[5] Bad Faith Actions

[a] Basis for Relief

Summary judgment for insurer on causes of action for bad faith (common-law and statutory) properly granted when denial of claim that was basis for action turned on construction of preexisting-condition exclusion, and insurer's interpretation was not arbitrary or unreasonable. *Franceschi v. American Motorists Ins. Co. (9th Cir. 1988) 852 F.2d 1217, 1220*

Before insurer can be found to have acted tortiously, i.e., in bad faith, in refusing to bestow policy benefits, it must have done so without proper cause; ultimate test of bad-faith liability in first-party cases is whether refusal to pay policy benefits was unreasonable. *Volkswagen v. Universal Underwriters Group (N.D. Cal. 2008) 571 F. Supp. 2d 1148,*

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Bad faith claim cannot be based on insurer's failure to renew policy or insurer's unilateral rescission in violation of *Ins. Code § 650*, although insured may argue that insurer's refusal to defend and rescission were in bad faith. *Atmel Corp. v. St. Paul Fire & Marine Ins. Co. (N.D. Cal. 2006) 421 F. Supp. 2d 1265, 1268-1270*

To avoid liability for bad faith, insurer's actions and position with respect to insured's claim, and delay or denial of policy benefits, must be founded on basis that is reasonable under all circumstances under objective standard. *Bosetti v. United States Life Ins. Co. (2009) 175 Cal. App. 4th 1208, 1237, 96 Cal. Rptr. 3d 744 , rev. denied, 2009 Cal. LEXIS 10796 (2009)*

Duty of good faith and fair dealing includes insurer's duty to investigate claims; insured's failure to comply with notice or claims provisions in policy will not excuse insurer's obligations unless insurer proves it was substantially prejudiced by late notice. *Safeco Ins. Co. of America v. Parks (2009) 170 Cal. App. 4th 992, 1003-1004, 88 Cal. Rptr. 3d 730 , reh'g denied, 2009 Cal. App. LEXIS 293 (2009)*

Insurer that denies or delays payment of policy benefits because of existence of genuine dispute with its insured as to existence of coverage liability or amount of coverage claim is not liable in bad faith even though it might be liable for breach of contract; however, "genuine dispute rule" cannot be invoked to protect insurer's denial of or delay in payment of benefits unless insurer's position was both reasonable and reached in good faith. Brehm v. 21st *Century Ins. Co. (2008) 166 Cal. App. 4th 1225, 1238-1239, 83 Cal. Rptr. 3d 410 , citing* Wilson v. 21st *Century Ins. Co. (2007) 42 Cal. 4th 713, 723-724, 68 Cal. Rptr. 3d 746, 171 P.3d 1082*

When insurer sought reimbursement for med-pay benefits previously paid in proper amount and in timely manner to insured, insured could not state cause of action for bad faith, because insured could not allege that insurer failed to pay benefits under policy; moreover, insured did not need to sue insurer to enforce its rights, and insured had tort remedy of malicious prosecution if insurer's conduct was malicious. *Progressive W. Ins. Co. v. Superior Court (2005) 135 Cal. App. 4th 263, 278-279, 37 Cal. Rptr. 3d 434*

Insurer that favors interests of one insured over those of another violates implied covenant of good faith and fair dealing. *Schwartz v. State Farm Fire & Cas. Co. (2001) 88 Cal. App. 4th 1329, 1337, 106 Cal. Rptr. 2d 523*

Insurer's duty not to favor interests of one insured over those of another requires excess insurer to consider interests of all its insureds, including named insured, in limited policy proceeds, whether or not interest has matured to point of requiring payment. *Schwartz v. State Farm Fire & Cas. Co. (2001) 88 Cal. App. 4th 1329, 1338, 106 Cal. Rptr. 2d 523*

Implied covenant of good faith and fair dealing may be breached when worker's compensation carrier sets reserves and processes claims in such a way that there is a negative impact on insured's premiums and dividends; when insured's premiums can be increased through insurer's claims handling practices, duty of good faith includes duty to act reasonably in adjusting claims against insured. *Security Officers Serv., Inc. v. State Comp. Ins. Fund (1993) 17 Cal. App. 4th 887, 894-896, 21 Cal. Rptr. 2d 653* ; *see also Tricor Cal., Inc. v. State Comp. Ins. Fund (1994) 30 Cal. App. 4th 230, 237-238, 35 Cal. Rptr. 2d 550* (evidence of negligent mishandling of claims is admissible in action alleging that bad faith claims handling by worker's compensation insurer resulted in payment of higher premiums and wrongfully denied dividends)

In action by deceased insured's estate against insurer stating causes of action for bad faith and wrongful death, based on denial of hospitalization coverage for depressed patient who then committed suicide, summary judgment for insurer was improper when triable issues of fact remained regarding whether insurer's conduct was substantial factor in causing death. *Wilson v. Blue Cross of S. Cal. (1990) 222 Cal. App. 3d 660, 673-674, 271 Cal. Rptr. 876*

[b] Conduct Not Constituting Bad Faith

If insurer's coverage decision was reasonable, it has no liability for breach of covenant of good faith and fair dealing; insurer that denied benefits reasonably, but incorrectly, is liable only for damages flowing from breach of contract, i.e., policy benefits. *Griffin Dewatering Corp. v. Northern Ins. Co. of N.Y. (2009) 176 Cal. App. 4th 172, 196, 97 Cal. Rptr. 3d 568*

Right of subrogation is not duty under contract, nor can it be transformed into duty by virtue of tort law; because decision of whether and how to pursue subrogation is insurer's right, insured cannot state cause of action for bad faith based on insurer's alleged failure to pursue its own right diligently and properly. *Tilbury Constructors, Inc. v. State Comp. Ins. Fund (2006) 137 Cal. App. 4th 466, 477, 40 Cal. Rptr. 3d 392*

Insured cannot maintain bad faith claim absent covered loss. *Benavides v. State Farm Gen. Ins. Co. (2006) 136 Cal. App. 4th 1241, 1250, 39 Cal. Rptr. 3d 650*

Property insurer that insured common areas of condominium structure did not unreasonably delay final payment for repairs following 1994 Northridge earthquake by reasonably investigating several genuinely disputed issues involving whether certain claimed items were covered and whether certain claimed fees were reasonable. *Chateau Chamberay Homeowners Ass'n v. Associated Int'l Ins. Co. (2001) 90 Cal. App. 4th 335, 108 Cal. Rptr. 2d 776* (insurer entitled to summary adjudication on bad faith cause of action)

Homeowner insurer that recommends and guarantees work of particular general contractors or other professionals, needed to perform repair work following covered losses, does not subject itself to action for bad faith if professionals fail to perform adequately; insurers not liable in tort for omissions or errors of contractors engaged to provide repair and restoration services. *Rattan v. United Servs. Auto. Ass'n (2000) 84 Cal. App. 4th 715, 723, 101 Cal. Rptr. 2d 6*

Insurer did not commit bad faith by refusing policy-limits settlement offer that included release of only one of its three insureds; insurer may, within boundaries of good faith, reject settlement offer that does not include a complete release of all its insureds. *Strauss v. Farmers Ins. Exch. (1994) 26 Cal. App. 4th 1017, 1021-1022, 31 Cal. Rptr. 2d 811* ; *Heredia v. Farmers Ins. Exch. (1991) 228 Cal. App. 3d 1345, 1355, 279 Cal. Rptr. 511* ; *see also Lehto v. Allstate Ins. Co (1994) 31 Cal. App. 4th 60, 73-74, 36 Cal. Rptr. 2d 814* (rejecting argument that insurer has duty to accept such a settlement when it would not increase potential liability of remaining insured, by crediting policy-limits settlement against any recovery ultimately obtained against remaining insured)

Insurer that promptly offered to replace insured's "totalled" vehicle, and then, on insured's refusal, tendered cash value (accepted by insured), exhibited "exemplary" conduct and did not act in bad faith as matter of law; insurer not required to inform insured of right to appraisal when insured accepted cash value without questioning adequacy of amount. *Twaite v. Allstate Ins. Co. (1989) 216 Cal. App. 3d 239, 252, 264 Cal. Rptr. 598*

[6] Damages

[a] Generally

Insurer's breach of covenant of good faith and fair dealing does not sound in tort based on insurer's retroactive overcharging premium it knows is not owed, outside context of deliberate mishandling of claims that would otherwise give rise to tort remedies. *Jonathan Neil & Assocs., Inc. v. Jones (2004) 33 Cal. 4th 917, 941-942, 16 Cal. Rptr. 3d 849, 94 P.3d 1055*

Although plaintiff must prove economic damages in order to recover damages for emotional distress in bad faith action,

plaintiff is not required to establish any causal link between economic loss and emotional damages. *Clayton v. United Servs. Auto. Ass'n (1997) 54 Cal. App. 4th 1158, 1160-1162, 63 Cal. Rptr. 2d 419*

[b] Defendants

State Compensation Insurance Fund is not quasi-governmental entity immune from liability for punitive damages for violation of implied covenant of good faith and fair dealing. *Tricor Cal., Inc. v. State Comp. Ins. Fund (1994) 30 Cal. App. 4th 230, 241, 35 Cal. Rptr. 2d 550* ; *Courtesy Ambulance Serv. v. Superior Court (1992) 8 Cal. App. 4th 1504, 1516-1517, 11 Cal. Rptr. 2d 161*

In bad faith action by car owner against "administrator" of vehicle service contract (underwritten by insurance company), triable issue of fact existed regarding whether company, by its relationship with automobile dealer that sold VSC, sells "insurance" within meaning of *Ins. Code § 116(b)* (defining warranty contract as automobile "insurance"). *Pistone v. Superior Court (1991) 228 Cal. App. 3d 672, 681-683, 279 Cal. Rptr. 173*

California Insurance Guarantee Association immune from tort liability for its own violations of Unfair Practices Act [*Ins. Code §§ 790-790.10*], common law bad-faith actions, and intentional infliction of emotional distress in connection with its own claims settlement practices; however, insured is entitled to obtain reimbursement for amounts expended (up to statutory maximum) as result of CIGA's breach of its statutory duties to pay and defend covered claims. *Carver v. Workers' Comp. Appeals Bd. (1990) 217 Cal. App. 3d 1539, 1546, 266 Cal. Rptr. 718*

[c] Defenses

In bad faith action brought by insured, insurer may not raise affirmative defense of comparative bad faith; insured's obligations under covenant of good faith and fair dealing arise from contract, and insured's breach of covenant does not sound in tort because scope and nature of insurer's and insured's obligations under covenant are disparate. *Kransco v. American Empire Surplus Lines Ins. Co. (2000) 23 Cal. 4th 390, 404-405, 97 Cal. Rptr. 2d 151, 2 P.3d 1*

Insurer not required to allege as affirmative defense contention that its reliance on advice of counsel showed that conduct was reasonable and not in bad faith. *State Farm Mut. Auto. Ins. Co. v. Superior Court (1991) 228 Cal. App. 3d 721, 727, 279 Cal. Rptr. 116*

[d] Excess Insurance Issues

Excess or secondary policy does not cover a loss, nor does any duty to defend arise, until *all* primary insurance has been exhausted; however, rule of "drop-down upon vertical exhaustion" is possible when provision in excess policy states specifically that it is excess over specifically described policy and will cover a claim when that specific primary policy is exhausted. *Padilla Constr. Co., Inc. v. Transportation Ins. Co. (2007) 150 Cal. App. 4th 984, 987 n.1, 58 Cal. Rptr. 3d 807*

Excess insurer could not recover from primary carrier for bad faith on theory that excess insurer was forced to pay benefits because primary insurer improperly allocated proceeds from its policies in settlement with third-party claimant; there was no contractual relationship between primary and excess insurers, excess insurer was not third-party beneficiary of primary insurance contract, and there was no extra-contractual basis for duty of good faith, such as subrogation to insured's rights against primary carrier. *Fireman's Fund Ins. Co. v. Maryland Cas. Co. (1994) 21 Cal. App. 4th 1586, 1599-1602, 26 Cal. Rptr. 2d 762*

[e] Limitation Period

For purposes of accrual of bad faith cause of action, insurer is not required to take firm, unmovable position before denial letter can be considered unconditional. *Liberty Transp., Inc. v. Harry W. Gorst Co. (1991) 229 Cal. App. 3d 417, 429-430, 280 Cal. Rptr. 159*

Action for bad faith and intentional infliction of emotional distress (characterized as "restatement" of bad faith claim) under fire insurance policy is governed by one-year statutory limitation period of *Ins. Code § 2071* if claim is essentially "on the policy," that is, when claim is transparent attempt to recover policy benefits in contravention of statutory limitation. *Jang v. State Farm Fire & Cas. Co. (2000) 80 Cal. App. 4th 1291, 1303-1304, 95 Cal. Rptr. 2d 917* ; *Prieto v. State Farm Fire & Cas. Co. (1990) 225 Cal. App. 3d 1188, 1196, 275 Cal. Rptr. 362*

Causes of action for bad faith and unfair business practices subject to limitation period setforth in policy when based on insured's attempts to recover on policy. *Abari v. State Farm Fire & Cas. Co. (1988) 205 Cal. App. 3d 530, 536, 252 Cal. Rptr. 565*

[f] Preemption

Action for common-law bad faith alleging wrongful rescission of group insurance policy preempted by ERISA (*29 U.S.C.S. §§ 1001-1461*), but improperly removed because of untimely filing of petition for removal. *Cantrell v. Great Republic Ins. Co. (9th Cir. 1989) 873 F.2d 1249, 1253, 1256*

Surviving private action under *Ins. Code § 790.03(h)* preempted by ERISA (*29 U.S.C.S. §§ 1001-1461*), which provides exclusive remedies for claims asserting improper processing of claims regarding employee benefits plans. *Commercial Life Ins. Co. v. Superior Court (1988) 47 Cal. 3d 473, 483-484, 253 Cal. Rptr. 682, 764 P.2d 1059* ; *see also* *Pilot Life Ins. Co. v. Dedeaux (1987) 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39* ; *Kanne v. Connecticut Gen. Life Ins. Co. (9th Cir. 1988) 859 F.2d 96, 100* ; *Rizzi v. Blue Cross of S. Cal. (1988) 206 Cal. App. 3d 380, 392-395, 253 Cal. Rptr. 541*

[f.1] Prejudgment Interest Not Available

Prejudgment interest under *Civ. Code § 3291* unavailable in insurance bad faith action because nature of action is one seeking recovery of property right, not one for personal injury. *Gourley v. State Farm Mut. Auto. Ins. Co. (1991) 53 Cal. 3d 121, 130, 279 Cal. Rptr. 307, 806 P.2d 1342*

[g] Proper Plaintiffs

In action for declaratory relief seeking determination that insurer under CGL covering oil and gas operations had duty to defend, insurer failed to establish that particular company was not insured after making that assertion because company was identified in policy as joint venture but alleged activities did not involve joint venture. *Frontier Oil Corp. v. RLI Ins. Co. (2007) 153 Cal. App. 4th 1436, 1468-1469, 63 Cal. Rptr. 3d 816*

Co-owner of insured company and wife of named insured, who was insured under definition as spouse of insured in CGL policy, had standing to bring bad faith suit against insurer. *Century Sur. Co. v. Polisso (2006) 139 Cal. App. 4th 922, 944, 43 Cal. Rptr. 3d 468*

Pilot who rented and then damaged airplane was not insured on policy issued to airplane-rental company, could not bring bad faith action, and was properly defendant in subrogation action brought by insurer. *McKinley v. XL Specialty Ins. Co. (2005) 131 Cal. App. 4th 1572, 1577-1578, 33 Cal. Rptr. 3d 98*

Lessee of property could not sue lessor's insurer for bad faith because lessee was neither an implied-in-law coinsured nor a third-party beneficiary of contract between lessor and lessee, despite fact that lessor was obligated under lease agreement to maintain rental income insurance with loss payable to lessor in event of damage or destruction of leased property; fact that lease provided that lessee's rent would be reduced during any repairs to premises after damage or destruction to extent lessor received insurance proceeds held insufficient to confer third-party beneficiary status on lessee. *Jones v. Aetna Cas. & Sur. Co. (1994) 26 Cal. App. 4th 1717, 1722-1725, 33 Cal. Rptr. 2d 291*

[h] Punitive Damages

Punitive damages are aimed not at compensation but principally at retribution and deterring harmful conduct. *Exxon Shipping Co. v. Baker (2008) -- U.S.--, 128 S. Ct. 2605, 2621, 171 L. Ed. 2d 570*

Punitive damages awards are subject to limits under Due Process Clause of U.S. Constitution; courts must consider (1) degree of reprehensibility of defendant's conduct, (2) disparity between actual or potential harm suffered by plaintiff and punitive damages award, and (3) disparity between punitive damages award and civil or criminal penalties authorized or imposed in comparable cases; circumstances of case may warrant no punitive damages if component of compensatory damages punishes defendant's conduct. *State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 418, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585*

Ratio of one to one is federal constitutional limit in case involving relatively low reprehensibility and substantial compensatory damages verdict, which included substantial award of noneconomic damages; punitive damages award modified in wrongful discharge case. *Roby v. McKesson Corp. (2009) 47 Cal. 4th 686, 719, 101 Cal. Rptr. 3d 773, 219 P.3d 749*

In fraud case, award of punitive damages in amount "just exceeding" largest single-digit ratio amount (10 times amount of compensatory damages) was maximum allowable amount under federal constitutional guidelines. *Simon v. San Paolo U.S. Holding Co. (2005) 35 Cal. 4th 1159, 1189, 29 Cal. Rptr. 3d 379, 113 P.3d 63*

Punitive damages under California law are constrained generally by restriction that they are ordinarily recoverable only in action for breach of obligation not arising from contract, when requisite culpable conduct is also present. *Brewer v. Premier Golf Prop., LP (2008) 168 Cal. App. 4th 1243, 1251-1252, 86 Cal. Rptr. 3d 225*

In action for unreasonable refusal to defend based on denial by adjustor and his supervisor without following internal protocol of deferring that ultimate decision to higher management, insurer was found to have acted with oppression but not with malice or fraud, and compensatory damages were substantial; 5.5:1 ratio of punitive to compensatory damages was excessive; $8.3 million award of punitive damages was properly reduced to $1.5 million; reprehensibility of conduct is most important factor. *Walker v. Farmers Ins. Exch. (2007) 153 Cal. App. 4th 965, 972-974, n.9, 63 Cal. Rptr. 3d 507*

Court's harmless error in ruling that spouse of named insured who was defined as insured under CGL part of policy, was also insured under Installation Floater, did not affect her award of punitive damages; consideration of relevant factors was not affected by her lack of coverage under floater. *Century Sur. Co. v. Polisso (2006) 139 Cal. App. 4th 922, 946-947, 43 Cal. Rptr. 3d 468*

Award of $2,015,000 in punitive damages and $623,000 in compensatory tort damages, ratio of 3.2-to-1, was well within constitutional limit; although compensatory damages were substantial, ratio was warranted given insurer's net worth and reprehensible conduct in taking "every opportunity to stall, stonewall, engage in scare tactics," and then refusing to pay insureds' attorney in full or in timely manner. *Century Sur. Co. v. Polisso (2006) 139 Cal. App. 4th*

922, 966-967, 43 Cal. Rptr. 3d 468

Punitive damages properly awarded against insurer based on actions of company acting as its managing agent within meaning of *Civ. Code § 3294(b)*, pursuant to agency agreement; loss payee on policy was not notified, as required by policy, of pending cancellation and subsequent removal of coverage for property in which loss payee held security interest; agent had active role in mistake. *Textron Fin. Corp. v. National Union Fire Ins. Co. (2004) 118 Cal. App. 4th 1061, 1080-1081, 13 Cal. Rptr. 3d 586*

Award of punitive damages in bad faith action against provider of automobile "theft deterrent policy" was supported by evidence that provider falsely represented to insured that she would be named as additional insured under policy written by reputable insurer and that claim would be submitted to insurer for investigation, when in fact insured was not named as additional insured and claim was never submitted to insurer; provider had no policies or procedures for handling claims; policy contained unreasonably short notice period; provider unreasonably delayed processing and denying claim; provider failed to respond to insured's inquiries concerning status of her claim; and provider failed to investigate insured's claim or her excuse for late reporting. *Campbell v. Cal-Guard Sur. Servs., Inc. (1998) 62 Cal. App. 4th 563, 570-571, 73 Cal. Rptr. 2d 64*

In bad faith action against group medical insurer, award of punitive damages was supported by evidence that denial of claim was product of fragmentary medical records, cursory review of records, consultant's disclaimer of any obligation to investigation, use of standard of medical necessity at variance with community standards, and uninformative follow-up letters sent to treating physicians. *Hughes v. Blue Cross of N. Cal. (1989) 215 Cal. App. 3d 832, 847, 263 Cal. Rptr. 850*

[i] Severance of Action Against Insured

Severance of action against tortfeasor from action against tortfeasor's insurer for bad faith was within discretion of trial court; suing insured for negligence and insurer for bad faith in same lawsuit violates both letter and spirit of *Evid. Code § 1155*, which precludes use of evidence that tortfeasor has insurance for alleged injury. *Omaha Indem. Co. v. Superior Court (1989) 209 Cal. App. 3d 1266, 1271, 258 Cal. Rptr. 66*

[j] Statutory Actions

[i] Availability of Private Remedy

Private cause of action under *Royal Globe* abrogated on October 17, 1988, but actions filed before that date survive, subject to requirement of conclusive judicial determination of underlying claim. *Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58*

Third-party claimant had direct cause of action under *Ins. Code § 790.03* against tortfeasor's insurer, without first obtaining assignment from insured. *Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, 884-891, 153 Cal. Rptr. 842, 592 P.2d 329* , overruled prospectively in *Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58* (final October 17, 1988)

Moradi-Shalal ruling applies to bar action if third-party claimant is insured by same insurer as other party; insurers do not owe duty of good faith and fair dealing to third-party claimants whom they also insure. *Coleman v. Republic Indem. Ins. Co. of Cal. (2005) 132 Cal. App. 4th 403, 409, 413-415, 33 Cal. Rptr. 3d 744*

Action by third party against insurer, alleging that insurer advised insured to lie in deposition taken in medical malpractice action, barred by *Moradi-Shalal* as to *Ins. Code § 790.03* violations. *Doctors' Co. Ins. Servs. v. Superior*

Court (1990) 225 Cal. App. 3d 1284, 1291-1300, 275 Cal. Rptr. 674 (also holding that cause of action for intentional infliction of emotional distress precluded by former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*) (privileged publication made in judicial proceeding))

[ii] Conclusion of Underlying Third-Party Action

In statutory action based on insurer's alleged violation of *Ins. Code § 790.03(h)*, judicial determination of insured's liability is prerequisite for insurer's liability. *Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 305-306, 250 Cal. Rptr. 116, 758 P.2d 58* (applicable to cases filed after October 17, 1988); *Heninger v. Foremost Ins. Co. (1985) 175 Cal. App. 3d 830, 834-835, 221 Cal. Rptr. 303*

Judgment against insured entered in underlying federal court action pursuant to settlement under *Fed. R. Civ. P. 68* did not constituting conclusive judicial determination of insured's liability for purposes of satisfying procedural prerequisite under *Moradi-Shalal*, because of absence of express or implied admission of liability in settlement. *Laxague v. Fireman's Fund Ins. Co. (1990) 220 Cal. App. 3d 530, 535-536, 269 Cal. Rptr. 456*

Procedural prerequisite of final judicial determination of insured's liability requires judgment that is final, for res judicata purposes, with regard to both liability and damages. *Marenger v. Hartford Accident & Indem. Co. (1990) 219 Cal. App. 3d 625, 632, 268 Cal. Rptr. 290*

Procedural prerequisite of conclusive judicial determination of insured's liability satisfied by summary judgment in favor of third party against insured; subsequent settlement agreement following appeal resolved only appeal taken from judgment, and language in agreement that insured does not admit liability does not affect nature of underlying judgment for purpose of allowing third party to sue insurer in viable *Royal Globe* action. *Pon v. Fremont Indem. Co. (1990) 217 Cal. App. 3d 29, 33, 265 Cal. Rptr. 733* .

Determination of insured's liability pursuant to judicial arbitration, and subsequent entry of final judgment based on arbitration award, is sufficient judicial resolution of insured's liability in underlying third-party action. *State Farm Mut. Auto. Ins. Co. v. Superior Court (1989) 211 Cal. App. 3d 5, 16, 259 Cal. Rptr. 50*

Third party's settlement of underlying action by accepting lump-sum payment, and signing "Release of Claims," was insufficient to establish final judicial determination of insured's liability in surviving private action under *Ins. Code § 790.03(h)*; doctrine of collateral estoppel as inapplicable regarding liability of insured, which is condition precedent to viable statutory action. *American Int'l Underwriters Agency Corp. v. Superior Court (1989) 208 Cal. App. 3d 1357, 1363, 256 Cal. Rptr. 730*

In surviving private action under *Ins. Code § 790.03(h)*, sustaining demurrer without leave to amend was proper on ground that settlement of underlying action pursuant to *Code Civ. Proc. § 998* did not constitute final judicial determination of that action; compromise agreement did not constitute adjudication of either liability or damages. *Wade v. 20th Century Ins. Co. (1988) 206 Cal. App. 3d 32, 38*

Settlement of third party's underlying claim against insured, even if it contains admission of liability, was insufficient conclusion of underlying action for purposes of *Moradi-Shalal* requirement of judicial determination of insured's liability as prerequisite for cause of action still viable under *Ins. Code § 790.03(h)*. *Lee v. Travelers Cos. (1988) 205 Cal. App. 3d 691, 694, 252 Cal. Rptr. 468*

Holding in *Royal Globe [(1979) 23 Cal. 3d 880, 153 Cal. Rptr. 842, 592 P.2d 329]* that underlying suit must be concluded prior to action against against insurer is applicable only to bad faith actions under *Ins. Code § 790.03(h)*, and not to action for breach of third-party insurer's oral agreement to settle. *Ahmed v. Peterson (1986) 186 Cal. App. 3d*

374, 376, 230 Cal. Rptr. 636

Action between third party and insured stayed due to insured's institution of bankruptcy proceedings as not "concluded" for purposes of third-party action against insurers under *Ins. Code § 790.03(h)*, despite third party's contention that bankruptcy proceeding had removed insured from civil litigation as effectively as if judgment had been entered. *Green v. Travelers Indem. Co. (1986) 185 Cal. App. 3d 544, 550-554, 230 Cal. Rptr. 13*

Final determination that insured is liable is condition precedent to action against liability insurer for violation of *Ins. Code § 790.03(h)(5)*; failure to obtain final determination bars action by spouse of injured person as representative of spouse's estate, as well as action by spouse in personal capacity for negligent infliction of emotional distress. *Williams v. Transport Indem. Co. (1984) 157 Cal. App. 3d 953, 962, 203 Cal. Rptr. 868* , approved in *Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 308, 250 Cal. Rptr. 116, 758 P.2d 58* (but disapproved on another ground)

Cause of action under *Ins. Code § 790.03(h)(5)* does not accrue until conclusion of action between third-party claimant and insured, but cause of action nevertheless survives when third-party claimant dies after insurer's alleged breach of duty but before conclusion of action against insured, pursuant to former *Prob. Code § 573* [*now see Code Civ. Proc. § 377.20 et seq.*], providing for survival of actions, which encompasses rights not yet mature or actionable. *Carr v. Progressive Cas. Ins. Co.(1984) 152 Cal. App. 3d 881, 888-891, 199 Cal. Rptr. 835*

Injured plaintiff who successfully sued insured in personal injury action and then brought action under *Ins. Code § 790.03* against insurer alleging bad faith in failure to settle within policy limits, did not have cause of action against insurer during appeal of underlying personal injury action because final judgment for res judicata purposes had not been secured. *Nationwide Ins. Co. v. Superior Court (1982) 128 Cal. App. 3d 711, 714, 180 Cal. Rptr. 464 , approved, Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 250 Cal. Rptr. 116, 758 P.2d 58*

[iii] Conflict of Laws

Trial court properly applied foreign state's law to action under *Ins. Code § 790.03(h)* when accident occurred in foreign state and plaintiff subsequently moved to California, because law of foreign state would be more impaired if its laws were not applied, and application of law of plaintiff's residence would encourage forum-shopping. *Zimmerman v. Allstate Ins. Co. (1986) 179 Cal. App. 3d 840, 846-847, 224 Cal. Rptr. 917* (foreign state did not recognize third-party bad faith claims)

[iv] Damages

Recoverable damages limited to those that accrued before insurer rectified initial violation of duties under *Ins. Code § 790.03*. *Schlauch v. Hartford Accident & Indem. Co. (1983) 146 Cal. App. 3d 926, 936, 194 Cal. Rptr. 658*

[v] Defendants

Physicians' cooperative and interindemnity associations (*see* Corp. Code § 25100, Ins. Code § 1280.7) not subject to liability for violation of *Ins. Code § 790.03* in action by third party based on alleged bad faith failure to settle malpractice claim against member physician. *Mundy v. Mutual Prot. Trust (1990) 219 Cal. App. 3d 127, 131-133, 267 Cal. Rptr. 917*

Self-insurer subject to liability under *Ins. Code § 790.03(h)* when engaged in liability-insurance business in substantial although not exclusive manner, such as when it regularly issues written contracts of liability insurance to its customers

pursuant to car-rental agreements, and employs investigative and legal resources to manage insurance claims. *Nathanson v. Hertz Corp. (1986) 183 Cal. App. 3d 78, 82-84, 227 Cal. Rptr. 799*

Self-insurer and its employees hired to investigate and adjust claims for compensation not engaged in business of insurance within meaning of *Ins. Code § 790.01*. *Dill v. Claims Admin. Servs., Inc. (1986) 178 Cal. App. 3d 1184, 1190, 224 Cal. Rptr. 273* ; *Richardson v. GAB Bus. Servs., Inc. (1984) 161 Cal. App. 3d 519, 523, 207 Cal. Rptr. 519*

Unfair Practices Act (*Ins. Code §§ 790-790.10*) applicable to independent claims adjusters. *Davis v. Continental Ins. Co. (1986) 178 Cal. App. 3d 836, 839-841, 224 Cal. Rptr. 66* ; *Bodenhamer v. Superior Court (1986) 178 Cal. App. 3d 180, 183-185, 223 Cal. Rptr. 486* ; *but see Henry v. Associated Indem. Corp. (1990) 217 Cal. App. 3d 1405, 1416, 266 Cal. Rptr. 578* (expressly declining to follow *Davis* and *Bodenhamer* on ground that adjuster is agent or employee of insurer and therefore not individually liable)

[vi] Defenses

In viable third-party action against insurer under *Ins. Code § 790.03*, insurer was unable to assert claim for equitable indemnity in cross-complaint, based on alleged negligence of third party's former attorney, because ordinary rules of implied equitable indemnity in tort do not apply to claim made against attorney based on breach of attorney's duty to client and brought by adverse party in litigation that is same as or related to that in which alleged negligence took place. *California State Auto. Ass'n Inter-Ins. Bureau v. Bales (1990) 221 Cal. App. 3d 227, 230, 270 Cal. Rptr. 421*

[vii] Failure to Settle

Jury award of damages in lesser amount than that of injured party's settlement request did not preclude action for failure to attempt in good faith to settle based on insurer's rejection of offer, because insurer's failure to investigate claim, offer to settle earlier, or make counteroffer might have constituted bad faith. *Pray v. Foremost Ins. Co. (9th Cir. 1985) 767 F.2d 1329, 1330*

Insurer not liable under *Ins. Code § 790.03(h)(5)* for failure to attempt to settle when its insured refuses to consent to settlement, and consent is prerequisite under policy provisions. *Carlile v. Farmers Ins. Exch. (1985) 173 Cal. App. 3d 975, 980-981, 219 Cal. Rptr. 773*

[k] Waiver and Estoppel

Insurer's cancellation of insurance contract was neither waiver nor estoppel that would preclude insurer from raising limitations clause as defense in bad faith action. *Velasquez v. Truck Ins. Exch. (1991) 1 Cal. App. 4th 712, 722-723, 5 Cal. Rptr. 2d 1*

[7] Bankruptcy of Insured

When rights derive from property claimed to be exempt in bankruptcy proceeding, claims arose after bankruptcy petition was filed, and bankruptcy court determines property to be exempt, debtor had standing to litigate causes of action with regard to that property; insured had standing to bring action against insurer regarding insured property that was claimed to be exempt in bankruptcy proceeding. *Amstone v. Peninsular Fire Ins. Co. (1991) 226 Cal. App. 3d 1019, 1024-1027, 277 Cal. Rptr. 260*

[8] Breach of Contract Action

No breach of contract action stated based on allegations that insurer failed to analyze whether insured was made whole or whether common-fund doctrine applied prior to instituting suit against insured for reimbursement of med-pay benefits previously paid; insurer does not have burden of determining whether insured made whole prior to seeking reimbursement. *Progressive W. Ins. Co. v. Superior Court (2005) 135 Cal. App. 4th 263, 281-282, 37 Cal. Rptr. 3d 434*

To support action for breach of contract, plaintiff must show plaintiff has suffered damages; in breach of contract action by insured against insurer, because insurer paid portion of insured's legal expenses in underlying lawsuit and second insurer paid balance of those expenses plus settlement, insured could not show it suffered any contract damages. *Emerald Bay Cmty. Ass'n v. Golden Eagle Ins. Corp. (2005) 130 Cal. App. 4th 1078, 1088-1089, 31 Cal. Rptr. 3d 43*

[9] Burden of Proof

Insured, in action on insurance policy against insurer, as having burden of proving contract of insurance and its terms, as well as loss; burden of bringing itself within any exculpatory clause contained in policy as on insurer. *National Am. Ins. Co. v. Certain Underwriters at Lloyd's London (9th Cir. 1996) 93 F.3d 529, 534* (insured has burden of proving both existence and material terms of insurance contract); *Executive Aviation, Inc. v. National Ins. Underwriters (1971) 16 Cal. App. 3d 799, 806, 94 Cal. Rptr. 347* ; *Carr v. International Indem. Co. (1922) 58 Cal. App. 614, 617, 209 P. 83*

In action between insurance companies, burden of showing that claim falls within scope of basic coverage as belonging to party claiming coverage; burden of showing that claim falls within exclusion as belonging to insurer whose policy is in question. *American Star Ins. Co. v. Insurance Co. of W. (1991) 232 Cal. App. 3d 1320, 1325, 284 Cal. Rptr. 45*

[10] Cancellation of Policy

If insured who has financed purchase of insurance policy through lender defaults, and lender notifies insurer under *Ins. Code § 673(d)* that it is exercising insured's right to cancel policy, additional named insured is not entitled to notice of cancellation; if subcontractor financed purchase of commercial lines policy naming contractor as additional insured, and lender instructed insurer to cancel policy for insured's nonpayment of premiums, pursuant to insured's assignment of right to cancel, additional insured not entitled to notice of cancellation. *Gorham Co., Inc. v. First Fin. Ins. Co. (2006) 139 Cal. App. 4th 1532, 1541-1544, 44 Cal. Rptr. 3d 197*

To state claim for wrongful cancellation insured must prove, in addition to fact that insurer attempted to cancel policy for an improper purpose, (1) that cancellation was proximate cause of damages suffered by insured; and (2) nature and extent of damages. *McLaughlin v. National Union Fire Ins. Co. (1994) 23 Cal. App. 4th 1132, 1158-1159*

Fact that attempted cancellation is ineffective and policy benefits are ultimately available to insured does not preclude recovery for wrongful cancellation if insured can show damage resulting from interim deprivation of benefits. *McLaughlin v. National Union Fire Ins. Co. (1994) 23 Cal. App. 4th 1132, 1157-1158*

Insured's acceptance of offer to renew insurance estops insurer from subsequently asserting nonrenewal by retroactively cancelling the renewal policy from its inception; whether or not insured has accepted a renewal policy is determined from the totality of the circumstances. *Golden Eagle Ins. Co. v. Foremost Ins. Co. (1993) 20 Cal. App. 4th 1372, 1387-1389, 25 Cal. Rptr. 2d 242*

When policy required mailing of notice to named insured to effect cancellation, evidence of insurer's cancellation procedures, and postal receipt showing that unidentified envelope was mailed to insureds, were insufficient to prove notice as matter of law; proof of mailing of notice is properly shown by declaration that competent witness placed

notice in envelope addressed to named insured at proper address, with proper postage, and that envelope was placed in mail at certain location. *Preis v. American Indem. Co. (1990) 220 Cal. App. 3d 752, 759-760, 269 Cal. Rptr. 617*

Requirement that premium lender notify insurer of cancellation under *Ins. Code § 673* is intended for benefit of insurer, not insured, because insurer may waive right to notice; insured is unable to claim ineffective cancellation of policy based on lack of notice to insurer. *Hoffman v. Citadel Gen. Assurance, Ltd. (1987) 194 Cal. App. 3d 1356, 1362-1363, 240 Cal. Rptr. 253*

[11] Class Action

Propriety of class action against insurer where complaint alleges community of interest among large number of policyholders and involving claims each too small to justify individual litigation as to be determined by kind of noticed hearing provided for in *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 94 Cal. Rptr. 796, 484 P.2d 964* . *Jensen v. Allstate Ins. Co. (1973) 32 Cal. App. 3d 789, 793, 108 Cal. Rptr. 498* (nevertheless holding that defendant's demurrer was properly sustained for complainant's failure to state cause of action where pertinent terms of insurance policy were not pleaded)

Class action to recover interest workmen's compensation carriers had failed to pay on workmen's compensation awards. *Addington v. Industrial Indem. Co. (1972) 24 Cal. App. 3d 802, 808-810, 101 Cal. Rptr. 277*

[12] Classes of Insurance

Pub. Util. Code § 3631, requiring regulated highway carriers to provide liability protection for personal injuries and property damage, was enacted to protect public against reckless operation of vehicles by financially irresponsible owners and provide means of recovery for those injured in their person or property by such operation and as not requiring vehicle liability policies to cover work-related injuries sustained by vehicle owner's employees. *Chong v. Fremont Indem. Co. (1988) 202 Cal. App. 3d 1097, 1101-1102, 249 Cal. Rptr. 264*

[13] Conflict of Interest

In conflict of interest situation between insurer and its insured, insurer's desire to exclusively control defense of action against insured as required to yield to insurer's obligation to defend policyholder; accordingly, insurer's obligation to defend as extending to paying reasonable value of legal services and costs performed by independent counsel, selected by insured. *Executive Aviation, Inc. v. National Ins. Underwriters (1971) 16 Cal. App. 3d 799, 810, 94 Cal. Rptr. 347*

Independent counsel's control of insured's defense does not extend to preventing insurer from exercising its contractual right to settle claim as insurer deems expedient; requirement in *Civ. Code § 2860(f)* that independent counsel be allowed to participate in all aspects of litigation does not give insured control over insurer's contractual right to settle a claim. *Western Polymer Tech., Inc. v. Reliance Ins. Co. (1995) 32 Cal. App. 4th 14, 22, 38 Cal. Rptr. 2d 78*

Insurer's reservation of rights regarding extent of damages covered by policy as not creating conflict of interest that would require insurer to provide independent counsel for insured. *Blanchard v. State Farm Fire & Cas. Co. (1991) 2 Cal. App. 4th 345, 349, 2 Cal. Rptr. 2d 884*

Premature notification to insured to seek independent counsel did not amount to breach of covenant of fair dealing or, as pleaded, of duty to defend; allegations of premature notification without allegations of injury insufficient to state cause of action for either intentional or negligent infliction of emotional distress. *Bogard v. Employers Cas. Co. (1985) 164 Cal. App. 3d 602, 619-620, 210 Cal. Rptr. 578*

Conflict of interest exists when multiple theories of recovery are alleged and some theories involve conduct not covered by policy; when there is conflict of interest, insurer not allowed to compel insured to surrender control of litigation, necessarily implying that insurer has to pay for insured's independent counsel. *San Diego Fed. Credit Union v. Cumis Ins. Soc'y, Inc. (1984) 162 Cal. App. 3d 358, 365-369, 208 Cal. Rptr. 494* (decided before enactment of *Civ. Code § 2860*)

[14] Contract Principles

Although insurance contracts have special features, general rules of contract interpretation apply in *California. Northrop Grumman Corp. v. Factory Mut. Ins. Co. (9th Cir. 2008) 538 F.3d 1090, 1094*

Contractual terms of insurance coverage are enforced whenever possible, even if doing so is inconsistent with proration provisions in other policies. *Carmel Dev. Co. v. RLI Ins. Co. (2005) 126 Cal. App. 4th 502, 511-512, 24 Cal. Rptr. 3d 588* (determining which of multiple insurers provided excess coverage)

Traditional assignment of contract principles applied to insurance policies prior to enactment of *Ins. Code § 1071.5*, which requires insurers that withdraw as insurers to cause liabilities under existing policies to be reinsured and assumed; common-law assignment principles require assignor-insurer to remain liable on policy absent consent of insured to assignment. *Baer v. Associated Life Ins. Co. (1988) 202 Cal. App. 3d 117, 123-125, 248 Cal. Rptr. 236*

Insurance policy as contract, and when terms are plain and unambiguous, court as required to hold parties to contract; forced construction of insurance policy to impose liability on insurance company that it has not assumed as improper. *Hackethal v. National Cas. Co. (1987) 189 Cal. App. 3d 1102, 1109, 234 Cal. Rptr. 853* ; *Schrillo Co. v. Hartford Accident & Indem. Co. (1986) 181 Cal. App. 3d 766, 771, 226 Cal. Rptr. 717*

Insurance policies as interpreted according to rules that govern construction of contracts generally. *Zito v. Firemen's Ins. Co. (1973) 36 Cal. App. 3d 277, 284, 111 Cal. Rptr. 392* ; *Chase v. National Indem. Co. (1954) 129 Cal. App. 2d 853, 858, 278 P.2d 68*

[15] Construction as Question of Law

The proper construction of insurance policy is question of law, which is reviewed independently on appeal. *Bluehawk v. Continental Ins. Co. (1996) 50 Cal. App. 4th 1126, 1131, 58 Cal. Rptr. 2d 147*

[16] Cooperation Clause

When insurer has reserved rights, resulting in declaratory relief action, policy's "cooperation clause" does not effect waiver of insured's attorney-client or work product privileges with respect to documents sought by insurer. *Rockwell Int'l Corp. v. Superior Court (1994) 26 Cal. App. 4th 1255, 1266, 1269-1270, 32 Cal. Rptr. 2d 153*

[17] Costs and Expenses

Underwriters of certificate of errors and omission insurance not entitled to deduct from reimbursement to assured costs and expenses of investigating claim against insured and conducting arbitration. *Hertzka & Knowles v. Salter (1970) 6 Cal. App. 3d 325, 329-336, 86 Cal. Rptr. 23*

[18] Coverage Disputes

Claim for coverage under insurance policy is contract claim. *Loughney v. Allstate Ins. Co. (S.D. Cal. 2007) 465 F. Supp. 2d 1039, 1041*

Absent relevant admissions of insured, insurer moving for summary adjudication of issues or summary judgment on merits of case in which coverage is disputed must provide copies of policies or, if policies are missing, secondary evidence sufficient to inform court of relevant terms and conditions of insurance contract. *Certain Underwriters at Lloyd's of London v. Superior Court (1997) 56 Cal. App. 4th 952, 955-959, 65 Cal. Rptr. 2d 821*

Insurer has right to limit policy coverage in plain and understandable language, and is free to limit character and extent of risk it undertakes to assume. *Hackethal v. National Cas. Co. (1987) 189 Cal. App. 3d 1102, 1109, 234 Cal. Rptr. 853*

When two causes join in causing injury, one of which is insured against, insured covered by policy. *Hughes v. Potomac Ins. Co. (1962) 199 Cal. App. 2d 239, 244, 18 Cal. Rptr. 650* ; *Zimmerman v. Continental Life Ins. Co. (1929) 99 Cal. App. 723, 726, 279 P. 464*

Insurers' liability under both homeowner's policy and automobile liability policy if injury results from two concurrent negligent acts of insured, one auto-related and other non-auto-related. *State Farm Mut. Auto. Ins. Co. v. Partridge (1973) 10 Cal. 3d 94, 106, 109 Cal. Rptr. 811, 514 P.2d 123* ; *see also Glens Falls Ins. Co. v. Rich (1975) 49 Cal. App. 3d 390, 394-395, 122 Cal. Rptr. 696*

Group accidental-death and dismemberment insurance policy clause providing that coverage terminates on first premium due date following date on which insured ceases to be employee covers injury suffered on evening of first premium due date following termination. *Green v. American Cas. Co. (1971) 17 Cal. App. 3d 270, 272-273, 94 Cal. Rptr. 528*

[19] Declaratory Relief Actions

In declaratory relief action to determine insurer's obligations under policy, initial burden on insured to prove event is claim within scope of basic coverage; burden then shifts to insurer to prove that claim falls within exclusion. *Merced Mut. Ins. Co. v. Mendez (1989) 213 Cal. App. 3d 41, 47, 261 Cal. Rptr. 273*

Party's right to jury trial if action for declaratory relief is used as substitute for action at law for breach of contract. *Patterson v. Insurance Co. of N. Am. (1970) 6 Cal. App. 3d 310, 315, 85 Cal. Rptr. 665* ; *see also Interinsurance Exch. v. Savior (1975) 51 Cal. App. 3d 691, 693-694, 124 Cal. Rptr. 239*

Insured in declaratory relief action required to prove coverage under policy whether action was instituted by him or by insurer. *State Farm Mut. Auto. Ins. Co. v. Spann (1973) 31 Cal. App. 3d 97, 100, 106 Cal. Rptr. 923*

[20] Definitions

"Fire" means a chemical reaction that releases heat and light; summary judgment for insurer reversed and remanded to allow insured's expert to provide evidence that there was a fire. *Maffei v. Northern Ins. Co. of N.Y. (9th Cir. 1993) 12 F.3d 892, 896-897*

Phrases "legally obligated to pay" and "legal liability," as used in general liability policies, are arguably synonymous and refer to tort liability, not liability based upon negligent failure to perform contract. *Wilmington Liquid Bulk Terminals, Inc. v. Somerset Marine, Inc. (1997) 53 Cal. App. 4th 186, 193-195, 61 Cal. Rptr. 2d 727*

"Loss" under former *Ins. Code § 556* (covering false or fraudulent claims; *now see Penal Code § 550*) defined as destruction, damage, or deprivation of a person, thing, or amount. *People v. Newman (1991) 233 Cal. App. 3d 646, 650, 284 Cal. Rptr. 628*

"Insurance" under *Ins. Code § 22* as construed to require two elements: (1) risk of loss to which one party is subject and shifting of that risk to another party, and (2) distribution of risk among similarly situated persons; however, mere fact that contract contains these two elements as not necessarily meaning that agreement constitutes insurance contract for purposes of statutory regulation. *Truta v. Avis Rent A Car Sys. Inc. (1987) 193 Cal. App. 3d 802, 812, 238 Cal. Rptr. 806*

"Willful" as connoting act done with malevolence, and "willful tort" as synonymous with "malice in fact" under *Ins. Code § 533*. *California Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 Cal. App. 3d 1, 32, 221 Cal. Rptr. 171*

"Comprehensive" in context of insurance policies defined as covering all hazards of given type with exception of individual hazards specifically excluded. *Morris v. Atlas Assurance Co. (1984) 158 Cal. App. 3d 8, 13, 204 Cal. Rptr. 95*

"Self-insurance" as clear to plaintiff and not ambiguous under circumstances of case. *Nabisco, Inc. v. Transport Indem. Co. (1983) 143 Cal. App. 3d 831, 835-836, 192 Cal. Rptr. 207*

"Accidents" as used in liability policies. *Maples v. Aetna Cas. & Sur. Co. (1978) 83 Cal. App. 3d 641, 644-650, 148 Cal. Rptr. 80* (discussing cases and repudiating holdings asto meaning of term in *Sylla v. United States Fid. & Guar. Co. (1976) 54 Cal. App. 3d 895, 127 Cal. Rptr. 38* and *Oil Base, Inc. v. Continental Cas. Co. (1969) 271 Cal. App. 2d 378, 76 Cal. Rptr. 594* , as contrary to established California law)

"Willful act" as used in *Ins. Code § 533*. *Russ-Field Corp. v. Underwriters at Lloyd's (1958) 164 Cal. App. 2d 83, 95-96, 330 P.2d 432*

[21] Discovery of Unfair Settlement Practices

In action against insurance company for unfair settlement practices, breach of contract, and breach of duty of good faith and fair dealing, plaintiff entitled to discover names, addresses, and files of other insureds whose claims were handled by plaintiff's claims adjuster because determination of frequency of alleged unfair practices was relevant to plaintiff's action and might lead to admissible evidence. *Colonial Life & Accident Ins. Co. v. Superior Court (1982) 31 Cal. 3d 785, 790-792, 183 Cal. Rptr. 810, 647 P.2d 86*

[22] Duty to Insured

Former *10 Cal. Code Reg § 2695.1* [*now see 10 Cal. Code Reg § 2695.4*] imposes on insurers duty to advise insureds of applicable claim time limits; insurer's violation of Fair Claims Settlement Practices Regulations (*10 Cal. Code Reg 2695.4(a)*) may provide basis of estoppel against insurer's assertion of contract limitations defense. *Spray, Gould & Bowers v. Associated Int'l Ins. Co. (1999) 71 Cal. App. 4th 1260, 1269-1274, 84 Cal. Rptr. 2d 552* . Insurer's exercise of poor judgment in insuring bad risk did not establish duty to insured; property loss caused by pilot's crashing of plane, not by insurer's naming of that pilot in pilot-clause endorsement in policy on airplane; insurer under no duty to investigate named pilot's qualifications. *American Cont'l Ins. Co. v. C & Z Timber Co. (1987) 195 Cal. App. 3d 1271, 1279, 241 Cal. Rptr. 466* (summary judgment for insurer upheld)

Any fiduciary duty owed to insured limited to four corners of insurance contract; implied covenant of good faith and

fair dealing not extended beyond contract terms. *Gibson v. Government Employees Ins. Co. (1984) 162 Cal. App. 3d 441, 446-452, 208 Cal. Rptr. 511* (insurer has no duty to advise insured of availability of particular kind of insurance or advise of coverage inadequacies obvious to reasonable person)

[23] Emotional Distress

Husband of injured party as capable of having independent cause of action for emotional distress against defendant insurance companies where he was party to insurance contract and effect on him of improper denial of wife's claim was reasonably foreseeable. *Delos v. Farmers Inc. Group (1979) 93 Cal. App. 3d 642, 658-659, 155 Cal. Rptr. 843*

[24] Estoppel and Waiver

ERISA, when applicable, preempts state estoppel claims; federal equitable estoppel in an ERISA action limited to situations in which wronged party can prove (1) provisions of plan are ambiguous; and (2) oral representations were made to employee; failure to inform insured that insurer would not pay benefits is not enough to satsify ERISA equitable estoppel requirements and insurer therefore was not equitably estopped from invoking a policy provision allowing it to terminate benefit payments under medical insurance plan. *Qualls v. Blue Cross of Cal. (9th Cir. 1994) 22 F.3d 839, 845-846*

Waiver established only by conduct showing intent to waive rights; denial of coverage on one ground does not, absent clear and convincing evidence, impliedly waive grounds not mentioned in denial letter. *Waller v. Truck Ins. Exch., Inc. (1995) 11 Cal. 4th 1, 31-33, 44 Cal. Rptr. 2d 370, 900 P.2d 619*

In insurance context especially, estoppel may arise from variety of circumstances in which insurer's conduct threatens unfairly to impose a forfeiture of benefits on insured; "equitable relief" may be broadly available in proper case to relieve insured of forfeiture under contractual condition of coverage. *City of Hollister v. Monterey Ins. Co. (2008) 165 Cal. App. 4th 455, 488, 81 Cal. Rptr. 3d 72*

Under commercial lines policy insuring against fire, "Functional Building Valuation" endorsement obligating insurer to pay repair cost or replace building, on condition that insured contract for repair or replacement within 180 days after loss (otherwise obligating insurer to pay market value), operated despite insured's failure to meet condition, when insurer's dilatory conduct caused delay; insurer estopped to assert 180-day contracting condition as bar to benefits. *City of Hollister v. Monterey Ins. Co. (2008) 165 Cal. App. 4th 455, 491, 499, 81 Cal. Rptr. 3d 72*

Under standard American Institute of Architects (AIA) construction contract (1) requiring owner to maintain property insurance covering interest of owner and contractor; and (2) containing a mutual waiver of owner's and contractor's rights against another for damages covered by that property insurance, owner's insurer could not recover as subrogee for rain damage to interior of facility cause by contractor's alleged negligence; owner's waiver of all claims to extent covered by insurance barred owner's property insurer from recovering as subrogee, even though damage was outside scope of contractor's work. *Lloyd's Underwriters v. Craig & Rush, Inc. (1994) 26 Cal. App. 4th 1194, 1199-1201, 32 Cal. Rptr. 2d 144*

In action by employee against employer's group health-plan insurer, arising from insurer's denial of benefits for insured's dependent, in which agent told insured dependent was covered but failed to obtain required form until after claim submitted, plaintiff as entitled to assert estoppel claim in favor of existence of coverage; "no-estoppel" rule generally applicable to claims under Employee Retirement Income Security Act as precluding enlargement of terms of coverage, but as not precluding assertion by eligible claimant of equitable estoppel doctrine to allow payment for coverage under substantive terms of agreement despite defective compliance with procedural claim requirement. *Powell v. General Am. Life Ins. Co. (1990) 221 Cal. App. 3d 817, 821-822, 271 Cal. Rptr. 16*

Insurer who acts within reasonable time as allowed to deny reinstatement to all who are uninsurable when they seek reinstatement; waiver as occurring if insurer does not deny reinstatement to uninsurable applicant within reasonable time; whether insurer held premium check beyond reasonable time, thereby waiving premium lapse, as question of fact. *Mardirosian v. Lincoln Nat'l Life Ins. Co. (9th Cir. 1984) 739 F.2d 474, 477-478*

In juvenile proceedings against insureds' minor son, insurer under homeowner's policy as estopped under facts from asserting that insured's counsel may not recover fees for representing insureds, if representation was initially appropriate; however, insurer as having no obligation to defend under policy because juvenile proceeding was not action for damages, pursuant to policy requirement. *United Pac. Ins. Co. v. Hall (1988) 199 Cal. App. 3d 551, 555-556, 245 Cal. Rptr. 99*

Insurer that reserved its rights under comprehensive business-liability policy, while defending insured in action resulting from traffic collision, as not estopped from asserting automobile exclusion two years later on discovering that insured had not exercised automobile-coverage option until after accident in question had occurred; insurer's "postaccident conduct" as not constituting waiver. *Hartford Fire Ins. Co. v. Spartan Realty Int'l (1987) 196 Cal. App. 3d 1320, 1327*

Insurer as not estopped from enforcing exclusionary clause regarding paying passengers inpolicy covering airplane when insured's assertion that insurer owed a duty to investigate qualifications of pilot were unfounded in common law or statute, and exclusionary clause was otherwise enforceable. *American Cont'l Ins. Co. v. C & Z Timber Co. (1987) 195 Cal. App. 3d 1271, 1279 n.3, 241 Cal. Rptr. 466* (summary judgment for insurer in declaratory relief action upheld)

Insurer's failure to reinvestigate insurability of applicant each time policy is renewed as not estopping insurer from rescinding policy based on changed circumstances. *International Serv. Ins. Co. v. Gonzales (1987) 194 Cal. App. 3d 110, 117, 239 Cal. Rptr. 341* (finding noncoverage of insured's former spouse who was named in initial policy as spouse, but divorced prior to renewal)

In action under *Ins. Code § 790.03(h)* (duty to settle third-party claim in good faith), in which demurrers to complaint were sustained without leave to amend, theory of estoppel as not preventing defendant from asserting absence of final judgment in action between insured and insurers (on ground that defendant's bad faith caused insured to file for bankruptcy, which caused stay of civil action and hence nonfinality of judgment), because (1) theory cannot be raised for first time on appeal, and (2) doctrine operates defensively only. *Green v. Travelers Indem. Co. (1986) 185 Cal. App. 3d 544, 555, 230 Cal. Rptr. 13* ; *but see Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58* (prospectively overruling *Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, 885-888, 153 Cal. Rptr. 842, 592 P.2d 329* , which allowed private statutory third-party standing)

Essential elements required to be established for doctrine of equitable estoppel to apply. *Silva v. National Am. Life Ins. Co. of Cal. (1976) 58 Cal. App. 3d 609, 615, 130 Cal. Rptr. 211*

Estoppel which is an element of plaintiff's action as required to be specifically pleaded in complaint; but estoppel which controverts new matter raised in answer as not required to be pleaded. *Varela v. Wells Fargo Bank (1971) 15 Cal. App. 3d 741, 747, 93 Cal. Rptr. 428*

Facts constituting waiver or estoppel as not required to be pleaded in complaint; if answer alleges breach of condition, plaintiff as able to prove waiver or estoppel by way of evidence in reply to such defense without any necessity of pleading it. *Arnold v. American Ins. Co. (1906) 148 Cal. 660, 668, 84 P. 182* ; see also *Walker v. Home Indem. Co. (1956) 145 Cal. App. 2d 318, 325, 302 P.2d 361*

[25] Exclusions

Under the "reasonable expectations doctrine," where attempted exclusions in an insurance policy are not clear, plain, and conspicuous enough to negate a layperson's objectively reasonable expectations of coverage, they are unenforceable. *Lancaster v. U.S. Shoe Corp. (N.D. Cal. 1996) 934 F. Supp. 1137, 1157*

Insurer may seek summary judgment on ground that claim is excluded. *Roberts v. Assurance Co. of America (2008) 163 Cal. App. 4th 1398, 1406, 78 Cal. Rptr. 3d 361*

When investigation showed that damage to insured's property was result of movement of ancient landslide below property, which was activated by placement of fill soil on adjoining lot and on insured's lot during grading prior to construction, in combination with heavy rains, claim was barred under earth-movement exclusion in builder's risk policy. *Roberts v. Assurance Co. of America (2008) 163 Cal. App. 4th 1398, 1406, 78 Cal. Rptr. 3d 361*

[26] Excuse for Insured's Nonperformance of Condition

Delay or failure to give insurer notice of claim as required by liability insurance policy as excused if insured had no knowledge of accident and could not have acquired such knowledge by exercise of reasonable diligence; rule as applied where, although insured had knowledge of accident, accident was of apparently such trivial nature that there was no reasonable ground to believe that bodily injury would follow; *a fortiori*, same excuse as existing if "additional insured" has no knowledge he or she is included within terms of policy insuring named insured who, although present when accident occurs, is not then identifiable as party involved. *Wasson v. Atlantic Nat'l Ins. Co. (1962) 207 Cal. App. 2d 464, 468-469, 24 Cal. Rptr. 665* (disapproved on another point in *Campbell v. Allstate Ins. Co. (1963) 60 Cal. 2d 303, 307, 32 Cal. Rptr. 827, 384 P.2d 155*)

Delay in filing statement within statutory [*Ins. Code § 11580.2(b)(2)*] and policy limits under uninsured motorist coverage provision in automobile liability insurance policy where uninsured vehicle was a "hit and run" vehicle as excused where claimant is an "additional insured" under terms of policy and did not know that coverage was available under policy. *Hanover Ins. Co. v. Carroll (1966) 241 Cal. App. 2d 558, 566, 50 Cal. Rptr. 704*

[27] Extrinsic Evidence

Extrinsic evidence to explain meaning of insurance policy as admissible when relevant to interpretation to which language of policy is reasonably susceptible. *Garcia v. Truck Ins. Exch. (1984) 36 Cal. 3d 426, 435, 204 Cal. Rptr. 435, 682 P.2d 1100*

When extrinsic evidence admissible to explain meaning of written instrument. *Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A.G. (1970) 3 Cal. 3d 434, 443, 91 Cal. Rptr. 6, 476 P.2d 406* ; *Atlas Assurance Co. v. McCombs Corp. (1983) 146 Cal. App. 3d 135, 143, 194 Cal. Rptr. 66* ; *Patterson v. Insurance Co. of N. Am. (1970) 6 Cal. App. 3d 310, 316, 85 Cal. Rptr. 665*

[28] Fraud

Plaintiffs could not recover for fraud based on agent's misrepresentations about coverage provided by health insurance policy when plaintiffs did not read policy and a reading would clearly have disclosed policy's limitations on available benefits. *Hadland v. NN Investors Life Ins. Co. (1994) 24 Cal. App. 4th 1578, 1587-1589, 30 Cal. Rptr. 2d 88*

Insurance agent as possibly liable for negligent misrepresentation, based on agent's failure to disclose particular exclusion in policy while disclosing apparently exhaustive list of other exclusions; duty to disclose as based on fact that

very small percentage of policyholders are aware of policy terms; insurer as having duty to disclose policy provisions, pursuant to *Ins. Code §§ 780, 781, 790.03*. *Eddy v. Sharp (1988) 199 Cal. App. 3d 858, 864-866, 245 Cal. Rptr. 211* (reversing summary judgment in favor of agent)

In action by insured against insurer regarding malpractice defendants' indemnity policy, directed verdict for defendant in fraud cause of action as improperly denied when there was no misrepresentation in policy regarding coverage, and when plaintiff's reliance regarding coverage not expressly set forth in policy was unjustifiable as matter of law. *Hackethal v. National Cas. Co. (1987) 189 Cal. App. 3d 1102, 1111, 234 Cal. Rptr. 853*

[29] Indemnity

Lab. Code § 3864 as restricting liability of employer and its liability carrier to reimburse third-party tortfeasor to actions based on express indemnity contract. *Pacific Gas & Elec. Co. v. Morse (1970) 6 Cal. App. 3d 707, 710-715, 86 Cal. Rptr. 7*

[30] Indorsements

Provisions of loss payable indorsement attached to insurance policy as controlling over any contrary provisions in body of policy. *Chase v. National Indem. Co. (1954) 129 Cal. App. 2d 853, 859, 278 P.2d 68*

[31] Insolvent Insurer

Insurance Commissioner, as conservator of insolvent insurance company's assets, holds assets in trust for private parties, primarily insurer's policyholders; assets held in trust by Commissioner pursuant to *Ins. Code § 1011* (conservatorship) are not state funds within meaning of California False Claims Act [*Gov. Code § 12650 et seq.*]; Attorney General has standing to pursue only civil penalties and possibly injunctive relief (but not restitution) under Unfair Competition Law (*Bus. & Prof. Code § 17200 et seq.*), and may not pursue civil remedies under California False Claims Act because assets are not state funds. *California v. Altus Finance, S.A. (2005) 36 Cal. 4th 1284, 1290-1291, 1308-1309, 32 Cal. Rptr. 3d 498, 116 P.3d 1175* (answering questions from Ninth Circuit)

CIGA funds may not be used to pay claim if other insurance providing required coverage is available; therefore, CIGA had no liability for any portion of worker's compensation award for employee who suffered cumulative injury during period covered by three insurers, one of which was insolvent at time claim was adjudicated, because remaining two solvent insurers were jointly and severally liable for full amount of employee's claim. *Industrial Indem. Co. v. Workers' Comp. Appeals Bd. (1997) 60 Cal. App. 4th 548, 556-559, 70 Cal. Rptr. 2d 295*

In action by purchaser of defective rope against manufacturer and seller of rope, seeking indemnity and other relief arising from underlying tort settlement, manufacturer's motion for summary judgment on complaint and cross-complaint filed by co-defendant was properly granted when its insurer had been placed in liquidation; plaintiff's subrogated insurer was not entitled to recover indemnity from CIGA (*Ins. Code § 1063 et seq.*), either directly or indirectly, for noncovered subrogation claim. *Collins-Pine Co. v. Tubbs Cordage Co. (1990) 221 Cal. App. 3d 882, 889, 271 Cal. Rptr. 20*

When insolvent insurer is placed under conservatorship of Insurance Commissioner or liquidated, court has discretion under *Ins. Code § 1020* to stay actions pending against insurer and to set terms and conditions of stay; person injured in shooting incident inside offices of insurance company that was itself insured by another carrier, and that was subsequently placed under conservatorship of insurance commissioner because of insolvency, was required to make binding election between seeking recovery from insolvent insurer's own assets or from proceeds of insurer's insurance coverage. *Webster v. Superior Court (1988) 46 Cal. 3d 338, 350-351, 250 Cal. Rptr. 268, 758 P.2d 596*

[32] Insurable Interest

Letter of intent that is binding contract to assume insured's obligations under lease as creating insurable interest in property. *California Food Serv. Corp. v. Great Am. Ins. Co. (1982) 130 Cal. App. 3d 892, 897, 182 Cal. Rptr. 67*

Innocent purchaser for value of stolen automobile as having "insurable interest" under *Ins. Code §§ 280, 281*. *Riley v. Mid-Century Ins. Exch. (1981) 118 Cal. App. 3d 195, 200, 173 Cal. Rptr. 257*

[33] Interpretation of Policy Generally

Interpretation of contract must give effect to mutual intent of parties at time contract was formed. *Northrop Grumman Corp. v. Factory Mut. Ins. Co. (9th Cir. 2008) 538 F.3d 1090, 1094*

Insurance policy interpreted using same rules applicable to other contracts. *GGIS Ins. Svcs. v. Superior Court (2008) 168 Cal. App. 4th 1493, 1506, 86 Cal. Rptr. 3d 515*

"Course of performance" evidence is used not only to interpret an ambiguity, but also to reveal ambiguity in language otherwise thought to be clear; "course of performance" evidence is used to ascertain meaning of parties' agreement, and to supplement or qualify terms of agreement; rules relating to course of performance as extrinsic evidence apply to insurance policy interpretation. *Employers Reinsurance Co. v. Superior Court (2008) 161 Cal. App. 4th 906, 920-921, 74 Cal. Rptr. 3d 733*

Fundamental goal of policy interpretation is to give effect to mutual intention of the parties. *Conway v. Farmers Home Mut. Ins Co. (1994) 26 Cal. App. 4th 1185, 1191, 31 Cal. Rptr. 2d 883*

Proper construction of insurance policy as question of law. *Nationwide Mut. Ins. Co. v. Devlin (1992) 11 Cal. App. 4th 81, 84, 13 Cal. Rptr. 2d 795*

As with interpretation of any contract, provisions of insurance policy are required to be construed in accordance with plain meaning of words. *Nationwide Mut. Ins. Co. v. Devlin (1992) 11 Cal. App. 4th 81, 84, 13 Cal. Rptr. 2d 795*

When no evidence is presented in aid of insurance policy's language, construction of that language as purely matter of law. *Chong v. Fremont Indem. Co. (1988) 202 Cal. App. 3d 1097, 1100, 249 Cal. Rptr. 264*

Policy to be read as lay person would read it and not as it might be analyzed by attorney or insurance expert. *Reserve Insurance Co. v. Pisciotta (1982) 30 Cal. 3d 800, 807, 180 Cal. Rptr. 628, 640 P.2d 764* ; *Crane v. State Farm Fire & Cas. Co. (1971) 5 Cal. 3d 112, 115, 95 Cal. Rptr. 513, 485 P.2d 1129* ; *Advanced Micro Devices, Inc. v. Great Am. Surplus Lines Ins. Co. (1988) 199 Cal. App. 3d 791, 801, 245 Cal. Rptr. 44* ; *Employers Reinsurance Corp. v. Phoenix Ins. Co. (1986) 186 Cal. App. 3d 545, 554, 230 Cal. Rptr. 792* ; *Threlkeld v. Ranger Ins. Co. (1984) 156 Cal. App. 3d 1, 6, 202 Cal. Rptr. 529* ; *Otter v. General Ins. Co. (1973) 34 Cal. App. 3d 940, 949, 109 Cal. Rptr. 831*

Insurance policy as construed in its entirety, with each clause lending meaning to the other. *Holz Rubber Co., Inc. v. American Star Ins. Co. (1975) 14 Cal. 3d 45, 56* ; *Fraker v. Sentry Life Ins. Co. (1993) 19 Cal. App. 4th 276, 284* ; *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co. (1970) 9 Cal. App. 3d 508, 517, 88 Cal. Rptr. 246* ; *see New York Life Ins. Co. v. Hollender (1951) 38 Cal. 2d 73, 81, 237 P.2d 510* and *Crawford v. Lloyds London (1969) 275 Cal. App. 2d 524, 526, 80 Cal. Rptr. 70*

Contract to be given construction that will fairly provide indemnity for loss to which insurance relates, if semantically

possible. *State Farm Mut. Auto. Ins. Co. v. Jacober (1973) 10 Cal. 3d 193, 203, 110 Cal. Rptr. 1, 514 P.2d 953* ; *Moore v. American United Life Ins. Co. (1984) 150 Cal. App. 3d 610, 635, 631-632, 197 Cal. Rptr. 878* ; *Spaid v. Cal-W. States Life Ins. Co. (1982) 130 Cal. App. 3d 803, 806, 182 Cal. Rptr. 3* ; *Burke Concrete Accessories, Inc. v. Tolson (1972) 27 Cal. App. 3d 237, 241, 103 Cal. Rptr. 513*

Court must ascertain legislature's intent so as to effectuate purpose of law; literal construction should not prevail if it is contrary to legislature's apparent intention. *JohnHancock Mut. Life Ins. Co. v. Greer (1998) 60 Cal. App. 4th 877, 884, 71 Cal. Rptr. 2d 48*

Rules for interpreting insurance contracts. *Frontier Oil Corp. v. RLI Ins. Co. (2007) 153 Cal. App. 4th 1436, 1462-1463, 63 Cal. Rptr. 3d 816* ; *Atlas Assurance Co. v. McCombs Corp. (1983) 146 Cal. App. 3d 135, 143, 194 Cal. Rptr. 66* ; *Russell v. Bankers Life Co. (1975) 46 Cal. App. 3d 405, 412-413, 120 Cal. Rptr. 627*

Endorsement as controlling conflict between endorsement and body of policy. *Certain Underwriters at Lloyds v. Engs Motor Truck Co. (1982) 135 Cal. App. 3d 831, 835, 836, 185 Cal. Rptr. 613*

Principles applicable to interpretation of insurance contracts. *McBride v. Farmers Ins. Exch. (1982) 130 Cal. App. 3d 258, 260-261, 181 Cal. Rptr. 539*

Specific provision in insurance contract as prevailing over general provision. *Cal-Farm Ins. Co. v. Fireman's Fund Ins. Co. (1976) 54 Cal. App. 3d 708, 715, 126 Cal. Rptr. 704*

Relevant statutory law in force at time policy is issued is read into policy. *Contreras v. America, Compania Gen. De Seguros, S.A. (1975) 48 Cal. App. 3d 270, 275, 121 Cal. Rptr. 694* ; *Modglin v. State Farm Mut. Auto. Ins. Co. (1969) 273 Cal. App. 2d 693, 698, 78 Cal. Rptr. 355* ; *see Aas v. Avemco Ins. Co. (1976) 55 Cal. App3d 312, 319, 127 Cal. Rptr. 192* ; *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co. (1970) 9 Cal. App. 3d 508, 516, 88 Cal. Rptr. 246*

Acts of parties subsequent to execution of contract and before any controversy has arisen are relevant to meaning of contract. *Zito v. Firemen's Ins. Co. (1973) 36 Cal. App. 3d 277, 284-285, 111 Cal. Rptr. 392* ; *Spott Elect. Co. v. Industrial Indem. Co. (1973) 30 Cal. App. 3d 797, 808, 106 Cal. Rptr. 710*

Interpretation of indemnity contracts. *Hertzka & Knowles v. Salter (1970) 6 Cal. App. 3d 325, 335, 86 Cal. Rptr. 23* ; *see Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A.G. (1970) 3 Cal. 3d 434, 442, 91 Cal. Rptr. 6, 476 P.2d 406*

Interpretation making contract unusual, extraordinary, harsh, unjust, or inequitable must be avoided. *Hertzka & Knowles v. Salter (1970) 6 Cal. App. 3d 325, 335, 86 Cal. Rptr. 23*

[34] Jurisdiction

Foreign insurer's conduct under *Ins. Code §§ 1610* and *1611* confers jurisdiction on California courts only when conduct is sufficient to establish "minimum contacts" under *Code Civ. Proc. § 410.10* and established case law. *In re Marriage of Martin (1989) 207 Cal. App. 3d 1426, 1435, 255 Cal. Rptr. 720*

Obligations of insurer under liability policy to defend and indemnify insured are not of such nature as to be subject to attachment so as to confer on California trial court quasi in rem jurisdiction over nonresident insured defendant in action for wrongful death arising out of automobile accident in another state. *Javorek v. Superior Court (1976) 17 Cal. 3d 629, 646, 131 Cal. Rptr. 768, 552 P.2d 728*

[35] Language of Policy

At pleading stage, insurer moving for demurrer based on insurance policy language must establish conclusively that language unambiguously negates, beyond reasonable controversy, construction alleged in body of complaint. *Palacin v. Allstate Ins. Co. (2004) 119 Cal. App. 4th 855, 862, 14 Cal. Rptr. 3d 731*

Homeopathic remedy was "drug" within meaning of medical malpractice policy exclusion for drugs not approved by FDA, when remedy qualified as drug under both dictionary definition of "drug" and technical definition provided by federal Food, Drug, and Cosmetic Act administered by *FDA. Meza v. Southern Cal. Physicians Ins. Exch. (1998) 62 Cal. App. 4th 709, 711-714, 73 Cal. Rptr. 2d 91*

In interpreting an insurance contract, objective intent of parties, as evidenced by words of contract, is controlling. *Lloyd's Underwriters v. Craig & Rush, Inc. (1994) 26 Cal. App. 4th 1194, 1197, 32 Cal. Rptr. 2d 144*

Words used in insurance policy are construed according to their plain meaning and reasonable expectations of insured. *Oliver Mach. Co. v. United States Fid. & Guar. Co. (1986) 187 Cal. App. 3d 1510, 1515, 1518, 232 Cal. Rptr. 691* ; *Farmers Ins. Exch. v. Galvin (1985) 170 Cal. App. 3d 1018, 1021, 216 Cal. Rptr. 844*

If policy language raises any reasonable doubt as to coverage or extent of liability, language is understood in its most inclusive sense. *Continental Cas. Co. v. Pacific Indem. Co. (1982) 134 Cal. App. 3d 389, 394, 184 Cal. Rptr. 583*

In construing words of insurance policy, court required to give words their plain and ordinary meaning; when language used is clear, court properly not straining construction to impose on insurer liability it has not assumed; meaning of term "property damage" as used in liability insurance policy. *Giddings v. Industrial Indem. Co. (1980) 112 Cal. App. 3d 213, 218-220, 169 Cal. Rptr. 278*

Absent circumstances to contrary, words in policy are used according to their plain, ordinary, and popular sense. *Burke Concrete Accessories, Inc. v. Tolson (1972) 27 Cal. App. 3d 237, 241, 103 Cal. Rptr. 513* ; *see also Civ. Code § 1644*

[36] Limitations and Exclusions

Applicable limitations period is determined by gravamen of complaint rather than named cause of action; insured that seeks to recover benefits under policy is bound to contractual one-year limitations period. *Akin v. Certain Underwriters at Lloyd's London (2006) 140 Cal. App. 4th 291, 299, 44 Cal. Rptr. 3d 284* (although insurer rescinded policies, insured attempted to revive them and recover benefits under their provisions)

Under "all-risks" homeowner's policy, claim for structural damage caused by both earth movement and third-party negligence is properly denied when policy clearly excluded both risks. *Tzung v. State Farm Fire & Cas. Co. (9th Cir. 1989) 873 F.2d 1338, 1340-1342*

Insurer has burden of proof regarding existence of excepted risk or applicability of exclusion. *State Farm Fire & Cas. Co. v. Martin (9th Cir. 1989) 872 F.2d 319, 321* (citing *Searle v. Allstate Life Ins. Co. (1985) 38 Cal. 3d 425, 437-438, 212 Cal. Rptr. 466, 696 P.2d 1308*)

"Trading loss" exclusion (in policy purchased by municipal-bond brokerage firm), which applies to market losses sustained by firms as result of ill-advised, unauthorized, or unlucky trading decisions, was held not to preclude coverage merely because trade occurs somewhere in chain of events resulting in loss to insured; exclusion inapplicable to claim

based on employee fraud simply because employee's acts included trading activities. *Insurance Co. of N. Am. v. Gibralco, Inc. (9th Cir. 1988) 847 F.2d 530, 533*

When insurer exercises its right to limit coverage of risks, plain language of that limitation is required to be observed. *Wagner v. Director, Fed. Emergency Mgmt. Agency (9th Cir. 1988) 847 F.2d 515, 522*

Any provision that takes away or limits coverage reasonably expected by insured must be conspicuous, plain, and clear, must be placed and printed so that it will attract reader's attention, and must be stated precisely and understandably, in words that are part ofworking vocabulary of average lay person. *Haynes v. Farmers Ins. Exch. (2004) 32 Cal. 4th 1198, 1204, 13 Cal. Rptr. 3d 68, 89 P.3d 381*

Insured parties are not expected to know of statutory limitations or exclusions on coverage not contained in their insurance policies. *State Farm Fire & Cas. Co. v. Workers' Comp. Appeals Bd. (1997) 16 Cal. 4th 1187, 1199 n.7, 69 Cal. Rptr. 2d 602, 947 P. 2d 795*

Exclusionary clauses are subjected to heightened scrutiny and must be conspicuous, clear, and plain; otherwise, they are strictly construed against insurer; exclusionary provision in automobile insurance policy (limiting per-person liability to statutorily required minimums if permissive user is driving) was inconspicuous and unenforceable in policy otherwise providing for $100,000 limit per person. *Thompson v. Mercury Cas. Co. (2000) 84 Cal. App. 4th 90, 94-98, 100 Cal. Rptr. 2d 596*

Homeowners' policy exclusion for claims between two "insureds" applied to assault and battery complaint between husband and wife, who had "stormy relationship," but were still legally married and still physically residing in marital home when husband injured wife. *Mitroff v. United Servs. Auto. Ass'n (1999) 72 Cal. App. 4th 1230, 1242-1243, 85 Cal. Rptr. 2d 759*

Under "all-risks" policy, damage due to contractor's substandard performance, which damage was neither readily observable nor apparent on reasonable inspection, falls within policy's latent defect exclusion. *Carty v. American States Ins. Co. (1992) 7 Cal. App. 4th 399, 404, 9 Cal. Rptr. 2d 1*

Insurer is bound by greater coverage in earlier policy, if insured is not notified of specific reduction in coverage provided by renewal policy. *Davis v. United Servs. Auto. Ass'n (1990) 223 Cal. App. 3d 1322, 1332, 273 Cal. Rptr. 224*

Under "all risk" policy, exclusion of loss caused by "latent defect" excludes coverage of loss to insured's property resulting from rupture of kettle filled with molten zinc, caused by defective welding design, because defect was not apparent on reasonable inspection and was therefore latent defect as matter of law. *Acme Galvanizing Co. v. Fireman's Fund Ins. Co. (1990) 221 Cal. App. 3d 170, 179, 270 Cal. Rptr. 405*

Limitations that insurer wishes to place on coverage is required to be stated in conspicuous, plain, and clear language. *Strickland v. Federal Ins. Co. (1988) 200 Cal. App. 3d 792, 802, 246 Cal. Rptr. 345* (coverage for soil-stabilization found under homeowner's policy)

"Family exclusion" is designed to protect insurer from collusion both by and between family members; exclusion is applicable whether family member colludes with another family member, or with adversary who is not family member. *Lumbermens Mut. Cas. Co. v. Vaughn (1988) 199 Cal. App. 3d 171, 181, 244 Cal. Rptr. 567*

Lack of causal connection between excluded activity and loss did not render exclusion unenforceable. *American Cont'l Ins. Co. v. C & Z Timber Co. (1987) 195 Cal. App. 3d 1271, 1279 n.3, 241 Cal. Rptr. 466*

Insurance company has right to limit coverage of policy it has issued; plain language of limitation required to be respected. *Hartford Fire Ins. Co. v. Spartan Realty Int'l (1987) 196 Cal. App. 3d 1320, 1324, 242 Cal. Rtpr 462* ; *American Cont'l Ins. Co. v. C & Z Timber Co. (1987) 195 Cal. App. 3d 1271, 1279 n.3, 241 Cal. Rptr. 466* ; *National Union Fire Ins. Co. v. Estate of Meyer (1987) 192 Cal. App. 3d 866, 872, 237 Cal. Rptr. 632*

Exclusionary clause required to be conspicuous, plain, and clear. *Employers Reinsurance Corp. v. Phoenix Ins. Co. (1986) 186 Cal. App. 3d 545, 554, 230 Cal. Rptr. 792*

Exclusionary clause set in conspicuous, boldface type and organized by catagories in order of coverage sections is sufficiently conspicuous. *Travelers Ins. Co. v. Lesher (1986) 187 Cal. App. 3d 169, 185, 231 Cal. Rptr. 791* , *disapproved on other grounds,* *Buss v. Superior Court (1997) 16 Cal. 4th 35, 65 Cal. Rptr. 2d 366, 939 P.2d 766*

Exceptions and limitations on coverage that insured could reasonably expect in standardized contracts required to be called to insured's attention before exclusions are interpreted to relieve insurer of liability or performance. *Underwriters Ins. Co. v. Purdie (1983) 145 Cal. App. 3d 57, 65, 193 Cal. Rptr. 248*

[37] Limitation Period

Former *10 Cal. Code Reg § 2695.1* (*now see 10 Cal. Code Reg § 2695.4*) imposes on insurers duty to advise insureds of applicable claim time limits; insurer's violation of Fair Claims Settlement Practices Regulations (*10 Cal. Code Reg 2695.4(a)*) may provide basis of estoppel against insurer's assertion of contract limitations defense. *Spray, Gould & Bowers v. Associated Int'l Ins. Co. (1999) 71 Cal. App. 4th 1260, 1269-1274, 84 Cal. Rptr. 2d 552*

Contractual limitation period (12 months after discovery by insured of occurrence giving rise to claim) is applicable only to claim by insured, not to claim by insurer. *California Union Ins. Co. v. Poppy Ridge Partners (1990) 224 Cal. App. 3d 897, 903, 274 Cal. Rptr. 191* (action by insurer to recover salvage value of insured property per contract provision)

[38] Lost or Destroyed Policy

through secondary evidence that attests to substance of policy; insured need not prove "actual language" of policy for this purpose. *Dart Indus., Inc. v. Commercial Union Ins. Co. (2002) 28 Cal. 4th 1059, 1073, 124 Cal. Rptr. 2d 142, 52 P.3d 79*

[39] Misrepresentation by Insurer

Action for negligent misrepresentation against insurer requires that plaintiff actually rely on representation and that reliance is justified and reasonable; plaintiff failed to prove falsity of insurer's representations or detrimental reliance. *McLaughlin v. National Union Fire Ins. Co. (1994) 23 Cal. App. 4th 1132, 1152, 29 Cal. Rptr. 2d 559*

[40] Mutual Intent of Parties

Mutual intention of contracting parties when contract was formed governs interpretation. *GGIS Ins. Svcs. v. Superior Court (2008) 168 Cal. App. 4th 1493, 1506, 86 Cal. Rptr. 3d 515*

Insurance policy is contract to be construed to effect intention of parties. *National Union Fire Ins. Co. v. Estate of Meyer (1987) 192 Cal. App. 3d 866, 872, 237 Cal. Rptr. 632*

Test for construction of insurance contract is intent of parties demonstrated by language of contract read as whole, and demonstrated by particular circumstances. *Employers Cas. Co. v. Northwestern Nat'l Ins. Group (1980) 109 Cal. App. 3d 462, 471-472, 167 Cal. Rptr. 296 , disapproved on other grounds, In re Marriage of Arceneaux (1990) 51 Cal. 3d 1130, 275 Cal. Rptr. 797, 800 P.2d 1227*

Civ. Code § 1636 requires that contract be interpreted to give effect to mutual intent of parties as it existed at time of contracting. *Spott Elec. Co. v. Industrial Indem. Co. (1973) 30 Cal. App. 3d 797, 808, 106 Cal. Rptr. 710*

[41] Nature of Insurance Contract

Contract of indemnity against loss or damage; contract of indemnity against liabilitydistinguished. *Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A.G. (1970) 3 Cal. 3d 434, 446, 91 Cal. Rptr. 6, 476 P.2d 406*

Contract of insurance is contract of indemnity. *Fageol Truck & Coach Co. v. Pacific Indem. Co. (1941) 18 Cal. 2d 731, 739, 117 P.2d 661* ; *Davis v. Phoenix Ins. Co. (1896) 111 Cal. 409, 415, 43 P. 1115* ; *see also Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830 n.5, 69 Cal. Rptr. 321, 442 P.2d 377* (citing *Ins. Code § 22*)

Contract not adhesive when two large corporate entities, each represented by specialized insurance brokers or risk managers, negotiated insurance terms. *Fireman's Fund Ins. Co. v. Fibreboard Corp. (1986) 182 Cal. App. 3d 462, 468, 227 Cal. Rptr. 203*

Insurance contracts are contracts of adhesion. *Young v. Metropolitan Life Ins. Co. (1969) 272 Cal. App. 2d 453, 460-461, 77 Cal. Rptr. 382* ; *see also Smith v. Westland Life Ins. Co. (1975) 15 Cal. 3d 111, 122 n. 12, 123 Cal. Rptr. 649, 539 P.2d 433* ; *Steven v. Fidelity & Cas. Co. (1962) 58 Cal. 2d 862, 882, 27 Cal. Rptr. 172, 377 P.2d 284* ; *Schmidt v. Pacific Mut. Life Ins. Co. (1969) 268 Cal. App. 2d 735, 737, 74 Cal. Rptr. 367*

Insured under contract of indemnity not entitled to payment from insurer until claims have been paid [*Civ. Code § 2778(2)*] and then only to extent of loss suffered by reason of that payment. *Aitchison v. Founders Ins. Co. (1958) 166 Cal. App. 2d 432, 439, 333 P.2d 178*

[42] Negligence of Counsel Hired by Insurer to Defend Insured

Generally, attorney hired by insurer to represent insured as independent contractor, and insurer not vicariously liable for negligence of trial counsel appointed to represent insured provided that attorney is not controlled by insurer. *Travelers Ins. Co. v. Lesher (1986) 187 Cal. App. 3d 169, 191, 231 Cal. Rptr. 791*

[43] Negligence of Insured

Negligence of insured, insured's agents, or others, as not exonerating insurer from liability under policy, pursuant to *Ins. Code § 533*. *Downey Sav. & Loan Ass'n v. Ohio Cas. Ins. Co. (1987) 189 Cal. App. 3d 1072, 1095, 234 Cal. Rptr. 835*

[44] Oral Contract With Third Party's Insurer

In action by insured against tortfeasor, seeking damages arising from accident, and against tortfeasor's insurer, seeking damages for breach of oral agreement to settle, dismissal of cause of action against insurer based on *Royal Globe Ins.*

Co. v. Superior Court (1979) 23 Cal. 3d 880, 153 Cal. Rptr. 842, 592 P.2d 329 , which holds that underlying suit must be concluded prior to action against insurer, as improper because *Royal Globe* conclusion requirement applies only to bad faith actions under *Ins. Code § 790.03(h)*. *Ahmed v. Peterson (1986) 186 Cal. App. 3d 374, 376, 230 Cal. Rptr. 636* ; *but see* *Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58* (prospectively overturning *Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, 885-888, 153 Cal. Rptr. 842, 592 P.2d 329* , which allowed private statutory third-party standing)

[45] Parties to Lawsuits

In action by third party against insured and insurers asserting causes of action for breach of contract, misrepresentation, and negligence, *Royal Globe* prohibition against joining insured and insurer in one action as applicable because, although action was not brought under *Ins. Code § 790.03(h)*, conduct stemmed from claims-processing practices; joinder of insured and insurer in one action as proscribed by *Evid. Code § 1155* (evidence of insurance inadmissible to prove negligence or wrongdoing). *Geraci v. United Servs. Auto. Ass'n (1987) 188 Cal. App. 3d 1245, 1248-1253, 233 Cal. Rptr. 896* (based on *Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, 885-888, 153 Cal. Rptr. 842, 592 P.2d 329* , which was overruled prospectively by *Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58*)

Insurance companies as not parties to actions against their insureds. *Southern Cal. Edison Co. v. State Farm Mut. Auto. Ins. Co. (1969) 271 Cal. App. 2d 744, 748, 76 Cal. Rptr. 909*

[46] Premiums

Ins. Code § 481 by its terms permits parties to make their own contract for return of unearned premium. *Jensen v. Allstate Ins. Co. (1973) 32 Cal. App. 3d 789, 793, 108 Cal. Rptr. 498*

[47] Privileges

Insurer's letter that knowingly concealed existence of insurance policy, even if it was communication in "judicial proceeding," falls into exception to litigation privilege under *Civ. Code § 47(b)(3)*. *Mezzetti v. State Farm Mut. Auto. Ins. Co. (N.D. Cal. 2004) 346 F. Supp. 2d 1058, 1067*

[48] Punitive Damages

NOTE:

Civ. Code § 3294 was amended in 1980 to define malice, oppression, and fraud; it was again amended in 1987, altering the standard of proof to require proof by clear and convincing evidence, and redefining malice and oppression [*see Civ. Code § 3294(a), (c)*]. Counsel should use the older cases with care, and only to the extent that the principles expressed in those earlier cases are consistent with the statute as amended.

Punitive damages properly awarded against insurance company when insurer refused to defend insured's employee in bad faith and was guilty of oppression, fraud, or malice. *Tibbs v. Great Am. Ins. Co. (9th Cir. 1985) 755 F.2d 1370, 1374-1375*

Amendments to *Civ. Code § 3294* referring to "despicable" conduct impose new substantive limitation on punitive damage awards; "despicable" is a powerful term that connotes base, vile or contemptible behavior, and indicates that "malice" requires more than a willful and conscious disregard of a plaintiff's rights under current law. *College Hosp.,*

Inc. v. Superior Court (1994) 8 Cal. 4th 704, 725, 34 Cal. Rptr. 2d 898, 882 P.2d 894

Award of punitive damages in insurance bad faith case supported by evidence showing that insurer was intentionally dishonest and acted in conscious disregard of insured's rights in denying full first-party coverage; among other things, insurer never advised insured about available coverages, immediately told insured there was no coverage, and made effort to determine coverage only after insured insisted and drew attention to certain policy provisions; moreover, insurer stated that its investigation showed no basis for one portion of claim when it had not undertaken any such investigation. *Amerigraphics, Inc. v. Mercury Cas. Co. (2010) 182 Cal. App. 4th 1538, 1559, 107 Cal. Rptr. 3d 307*

Punitive damages award reversed when court concluded that although the evidence supported finding that carrier had been negligent, overzealous, legally incorrect, and callous, no evidence existed of behavior that was evil, criminal, recklessly indifferent, or done wth an intent to injure. *Tomaselli v. Transamerica Ins. Co. (1994) 25 Cal. App. 4th 1269, 1286-1288, 31 Cal. Rptr. 2d 433*

Insurer's bad faith conduct, such as extreme delay in investigating third party's claim against insured, does not necessarily rise to level of conduct required for punitive damages; third party must present substantial evidence of malice, such as intent by insurer to cause injury to third party, or that insurer acted in conscious disregard of third party's rights. *Stewart v. Truck Ins. Exch. (1993) 17 Cal. App. 4th 468, 21 Cal. Rptr. 2d 338* (action brought within "window" period allowed under *Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58*)

Instruction that punitive damages may be recovered for defendant's fraud, malice or oppression as proper in action for tortious breach of covenant of good faith and fair dealing, without necessity of establishing actual fraud. *Pistorius v. Prudential Ins. Co. (1981) 123 Cal. App. 3d 541, 556, 176 Cal. Rptr. 660*

"Oppression" within meaning of *Civ. Code § 3294*, relating to punitive damages, as meaning subjecting person to cruel and unjust hardship in conscious disregard of his rights. *Richardson v. Employers Liab. Assurance Corp. (1972) 25 Cal. App. 3d 232, 246, 102 Cal. Rptr. 547* (oppression by insurer against its insureds was proved)

Actual malice as required to be shown in order for punitive damages to be awarded under *Civ. Code § 3294*; but malice, including malicious intent, as inferred from circumstances of case. *Richardson v. Employers Liab. Assurance Corp. (1972) 25 Cal. App. 3d 232, 245, 102 Cal. Rptr. 547* (holding malice proved in action by insureds against insurer for failure to settle claim under uninsured motorist provision of automobile liability policy)

"Fraud" as technically referring to number of different legal problems but as word of common usage with commonly accepted meaning, for example, an instance or an act of trickery or deceit especially when involving misrepresentation; an intentional misrepresentation, concealment, or nondisclosure for purpose of inducing another in reliance on it to part with some valuable thing. *Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 405, 89 Cal. Rptr. 78* ; *see Civ. Code § 3294(c)(3)*

Promise made with no intention of performing as actionable fraud where other party relies on it as inducement to enter into agreement. *Miller v. National Am. Life Ins. Co. (1976) 54 Cal. App. 3d 331, 338, 126 Cal. Rptr. 731*

Insured's claim of fraud in inducement, though incident to insurance contract, as in tort and as supporting punitive damage award on proper proof. *Miller v. National Am. Life Ins. Co. (1976) 54 Cal. App. 3d 331, 336, 126 Cal. Rptr. 731*

Requirements for awarding punitive damages against insurer and its employees for bad-faith refusal to pay medical benefits due insured under his automobile insurance policy. *Hale v. Farmers Ins. Exch. (1974) 42 Cal. App. 3d 681, 689-702, 117 Cal. Rptr. 146 , overruled in part, Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822, 169*

Cal. Rptr. 691, 620 P.2d 141

[49] Question of Law

When underlying facts are undisputed, interpretation of insurance policy presents question of law. *Loughney v. Allstate Ins. Co. (S.D. Cal. 2007) 465 F. Supp. 2d 1039, 1042*

Interpretation of written contract as solely judicial function, unless interpretation turns on credibility of extrinsic evidence, even when conflicting inferences may be drawn from uncontroverted evidence. *Garcia v. Truck Ins. Exchange (1984) 36 Cal. 3d 426, 439, 204 Cal. Rptr. 435, 682 P.2d 1100* (insurance contract)

Construction of insurance policy as question of law when case is submitted on stipulation of facts and no evidence in aid of policy language is presented. *Bianchi v. Westfield Ins. Co. (1987) 191 Cal. App. 3d 287, 293, 236 Cal. Rptr. 343* ; *Employers Cas. Ins. Co. v. Foust (1972) 29 Cal. App. 3d 382, 385, 105 Cal. Rptr. 505*

[50] Reasonable Expectation of Parties

Insured could not have had objectively reasonable expectation that policies covered pre-acquisition torts of after-acquired companies when such coverage was not available in the marketplace at time policies in question were written. *Cooper Cos. v. Transcontinental Ins. Co. (1995) 31 Cal. App. 4th 1094, 1109, 37 Cal. Rptr. 2d 508*

Manner in which premiums were assessed supported court's conclusion with respect to insured's objectively reasonable expectations regarding policy coverage. *Cooper Cos. v. Transcontinental Ins. Co. (1995) 31 Cal. App. 4th 1094, 1108, 37 Cal. Rptr. 2d 508*

In interpreting an insurance contract, objective intent of the parties, as evidenced by the words of the contract, is controlling. *Lloyd's Underwriters v. Craig & Rush, Inc. (1994) 26 Cal. App. 4th 1194, 1197, 32 Cal. Rptr. 2d 144*

Principle of construing insurance contracts to give effect to mutual intent of the parties exists is not to protect subjective belief of insurer, but objectively reasonable expectations of insured. *Conway v. Farmers Home Mut. Ins Co. (1994) 26 Cal. App. 4th 1185, 1191, 31 Cal. Rptr. 2d 883*

In interpreting standardized provisions in form insurance contract, courts' primary focus is on reasonable expectations of insured when executing contract. *Travelers Ins. Co. v. National Union Fire Ins. Co. (1989) 207 Cal. App. 3d 1390, 1398, 255 Cal. Rptr. 727*

Court as taking cognizance of reasonable expectations of parties in entering into contract. *Holz Rubber Co., Inc. v. American Star Ins. Co. (1975) 14 Cal. 3d 45, 56* ; *Century Bank v. St. Paul Fire & Marine Ins. Co. (1971) 4 Cal. 3d 319, 321, 93 Cal. Rptr. 569, 482 P.2d 193* ; *Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 269, 54 Cal. Rptr. 104, 419 P.2d 168* ; *Globe Indem. Co. v. State of California (1974) 43 Cal. App. 3d 745, 751, 118 Cal. Rptr. 75* ; *Dillon v. Hartford Accident & Indem. Co. (1974) 38 Cal. App. 3d 335, 345, 113 Cal. Rptr. 396* ; *Otter v. General Ins. Co. (1973) 34 Cal. App. 3d 940, 951, 109 Cal. Rptr. 831* ; *Hartford Accident & Indem. Co. v. Civil Serv. Employees Ins. Co. (1973) 33 Cal. App. 3d 26, 31, 108 Cal. Rptr. 737* ; *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co. (1970) 9 Cal. App. 3d 508, 517, 88 Cal. Rptr. 246*

Courts as interpreting meaning of form contracts according to reasonable expectation of reasonable buyer, thus protecting weaker buyers' expectation at expense of more strongly positioned draftsman. *Employers Cas. Ins. Co. v. Foust (1972) 29 Cal. App. 3d 382, 386, 105 Cal. Rptr. 505*

[51] Reformation of Policy

If parties attempt reformation years after insurance policy was executed and only after adverse effect on third parties is apparent, prejudice to third parties must be considered in determining initial intent of contracting parties; although policy may eventually be reformed, parties are not free merely to decide between themselves that something other than their clear written provision was their initial intent; court of equity must look at whole picture in deciding if there was mutual mistake that permits reformation. *Schools Excess Liab. Fund v. Westchester Fire Ins. Co. (2004) 117 Cal. App. 4th 1275, 1283, 12 Cal. Rptr. 3d 626*

Mistake of one party not known or suspected by another party to written contract as not justifying its reformation. *Insurance Co. of N. Am. v. Bechtel (1973) 36 Cal. App. 3d 310, 316, 111 Cal. Rptr. 507*

Written contract as subject to being reformed by court of equity where, due to mutual mistake on part of parties, it fails to express their true intentions; insurance policy as subject to being reformed to limit or exclude coverage if such was intention of parties, even where rights of third-party claimants who are not parties to insurance contract are adversely affected. *Truck Ins. Exch. v. Wilshire Ins. Co. (1970) 8 Cal. App. 3d 553, 559, 87 Cal. Rptr. 604* ; *see also Insurance Co. of N. Am. v. Bechtel (1973) 36 Cal. App. 3d 310, 317, 111 Cal. Rptr. 507* (employee insured under group policy is treatedas being in legal status of party to insurance contract, and employer policyholder is treated as agent of insurer)

Third person whom named insured and insurer mistakenly omit from coverage under liability policy as permitted to secure reformation, and party suffering damage who has recovered judgment as properly seeking, or joining in seeking, reformation. *Orcutt v. Ferranini (1965) 237 Cal. App. 2d 216, 224, 46 Cal. Rptr. 715*

Judgment reforming automobile liability insurance policy after accident to in effect exclude from coverage minor driver of vehicle at time of accident as not res judicata in action by injured third party against insurer to recover amount of its judgment against minor and his parents where third party was not a party to reformation action. *Shapiro v. Republic Indem. Co. of Am. (1959) 52 Cal. 2d 437, 439-440, 341 P.2d 289*

In action for reformation of excess insurance policy due to mistake, three-year statute of limitations (*Code Civ. Proc. § 338(d)*) is not tolled as to excess carrier during prosecution of underlying action defended by primary carrier, when (1) action is one for reformation rather than for excess carrier's failure to defend, (2) excess carrier's duty to defend has not commenced because defense has not been tendered to it, and (3) as a matter of law, reformation cause of action accrued more than three years before action was commenced when insured discovered facts constituting mistake. *North Star Reinsurance Corp. v. Superior Court (1992) 10 Cal. App. 4th 1815, 1818, 1822-1825, 13 Cal. Rptr. 2d 775*

Mistake that results in failure of written contract to express true intent of parties as principle prerequisite to reformation of policy. *Am. Home Ins. Co. v. Travelers Indem. Co. (1981) 122 Cal. App. 3d 951, 961* Reformation to include additional insured as not permitted when there has been no objective demonstration that parties intended to cover party in original contract. *Am. Home Ins. Co. v. Travelers Indem. Co. (1981) 122 Cal. App. 3d 951, 964, 175 Cal. Rptr. 826*

Mistake that results in failure of written contract to express true intent of parties as principle prerequisite to reformation of policy. *Am. Home Ins. Co. v. Travelers Indem. Co. (1981) 122 Cal. App. 3d 951, 961*

Reformation as unavailable to incidental beneficiary to contract and therefore as also unavailable to party basing standing on rights of incidental beneficiary. *Am. Home Ins. Co. v. Travelers Indem. Co. (1981) 122 Cal. App. 3d 951, 968, 175 Cal. Rptr. 826*

Intended third-party beneficiary of insurance contract as capable of maintaining action for reformation. *Jackson v. Aetna Life & Cas. Co. (1979) 93 Cal. App. 3d 838, 847-848, 155 Cal. Rptr. 905*

[52] Reinsurance

Reinsured proved the existence and terms of two reinsurance policies; reinsured presented original excess insurance policy and subsequent endorsement converting it to a reinsurance policy, and although telexes between the broker and the reinsurers discussed cancellation of a portion of the coverage, no discussion occurred about cancellation of the general liability coverage of the reinsurance policy. *National Am. Ins. Co. of Cal v. Underwriters (9th Cir. 1996) 93 F.3d 529, 534*

[53] Release by Insured

Release of claims, signed by insureds in connection with settlement for uninsured motorist claim, is not subject to interpretation by parole evidence, and bars bad faith causes of action, because release covered "any and all rights," including "general, special, compensatory and punitive damages," and "any and all damages, injuries or claims," insureds had previously threatened to bring bad faith action regarding same conduct, and were represented by attorney when signing re l ease. *Edwards v. Comstock Ins. Co. (1988) 205 Cal. App. 3d 1164, 1167-1169, 252 Cal. Rptr. 807*

[54] Renewal of Policy

Insured's acceptance of offer to renew insurance estops insurer from subsequently asserting nonrenewal by retroactively cancelling renewal policy from its inception. *Golden Eagle Ins. Co. v. Foremost Ins. Co. (1993) 20 Cal. App. 4th 1372, 1389, 25 Cal. Rptr. 2d 242*

Whether or not insured has accepted renewal policy is determined from totality of the circumstances; insured who never paid renewal premium and told agent that he was seeking cheaper coverage elsewhere nevertheless was found to have accepted renewal policy because he retained renewal certificate for two months before objecting to amount of premium and because there was a pre-existing relationship between insurer and insured. *Golden Eagle Ins. Co. v. Foremost Ins. Co. (1993) 20 Cal. App. 4th 1372, 1387-1390, 25 Cal. Rptr. 2d 242*

To effect renewal of insurance policy, both offer to renew and acceptance of offer as required. *Fujimoto v. Western Pioneer Ins. Co. (1978) 86 Cal. App. 3d 305, 313, 150 Cal. Rptr. 88*

[55] Representations Regarding Coverage

Insurance broker's representation that benefits based on insured's "disability" would continue after insured's death is ineffective because broker was not insurance agent, and because statements were made long after issuance of policy and could not have been relied on by insured in connection with application for insurance. *Silva v. Aetna Life Ins. Co. (1987) 196 Cal. App. 3d 789, 797, 242 Cal. Rptr. 157*

[56] Rescission

D&O policies void *ab initio* because of applicant's material misrepresentations regarding number of prior claims of sexual harassment. *United States Specialty Ins. Co. v. Bridge Capital Corp. (C.D. Cal. 2007) 482 F. Supp. 2d 1164, 1165, 1169-1170*

When insurance broker completed application for insureds, who did not understand English well and signed without reading it, and questions remained regarding whether broker or insureds later provided information that was initially omitted, summary judgment for insurer reversed in suit by insureds based on violation of *Health & Safety Code §*

1389.3 (prohibition against postclaims underwriting) in connection with rescission following claim for benefits; to complete medical underwriting, health care service plan must make reasonable efforts to ensure potential subscriber's application is accurate and complete; insurer failed to establish as matter of law that its preissuance investigation met proper standard for completion of medical underwriting; disputed issues of material fact existed regarding whether insureds willfully misrepresented or omitted information in application. *Nazaretyan v. California Physicians' Svc. (2010) 182 Cal. App. 4th 1601, 1607-1615, 107 Cal. Rptr. 3d 137*

Summary judgment for insurer proper in suit by insured for contract breach, bad faith, and related claims based on rescission some months after issuance of health insurance policy, when insured omitted certain medical condition and treatment on application; insurer entitled to rescind policy based on applicant's material misrepresentations and omissions; pursuant to *Ins. Code § 331*, concealment, whether intentional or unintentional, entitles injured party to rescind insurance. *Nieto v. Blue Shield of Cal. Life & Health Ins. Co. (2010) 181 Cal. App. 4th 60, 75-77, 103 Cal. Rptr. 3d 906 , reh'g denied, 2010 Cal. App. LEXIS 275 (2010)*

Health & Safety Code § 1389.3 (prohibition against postclaim underwriting; remedies for willful misrepresentation applicable) precludes health-care services plan from rescinding contract for material misrepresentation or omission unless plan demonstrates either: (1) misrepresentation or omission was willful, or (2) it had made reasonable efforts to ensure subscriber's application was accurate and complete as part of precontract underwriting process. *Hailey v. California Physicians' Svc. (2007) 158 Cal. App. 4th 452, 463-468, 69 Cal. Rptr. 3d 789*

Insured cannot recover damages under policy in action for rescission under *Civ. Code § 1692*. *Akin v. Certain Underwriters at Lloyd's London (2006) 140 Cal. App. 4th 291, 294, 299, 44 Cal. Rptr. 3d 284*

If one party is injured by breach of contract and lacks ability or desire to keep contract alive, that party can choose between two different remedies: (1) treat contract as rescinded and recover damages resulting from the rescission; or (2) treat contract as repudiated by other party and recover damages to which that party would have been entitled had other party not breached contract or prevented that party's performance; election of one bars recovery under other. *Akin v. Certain Underwriters at Lloyd's London (2006) 140 Cal. App. 4th 291, 296, 44 Cal. Rptr. 3d 284*

In context of insurance case, action for damages for breach of contract may entitle aggrieved party to payment of benefits under policy, but action for rescission only permits aggrieved party to return of premiums and whatever else may be required torestore parties to status quo ante; in action for rescission, parties are treated as though policy of insurance never existed. *Akin v. Certain Underwriters at Lloyd's London (2006) 140 Cal. App. 4th 291, 298, 44 Cal. Rptr. 3d 284*

Ins. Code §§ 331 and *359* are part of larger statutory framework imposing heavy burdens of disclosure on both parties to insurance contract respecting material representations and provision of requested information; insurer may rescind fire insurance policy based on insured's negligent or unintentional misrepresentation of material fact in insurance application, notwithstanding willful misrepresentation clause included in required standard form fire insurance policy. *Mitchell v. United Nat'l Ins. Co. (2005) 127 Cal. App. 4th 457, 468, 472-474, 479, 25 Cal. Rptr. 3d 627* ; *see also Ins. Code §§ 2070, 2071*

Liability insurer who undertook defense of insured contractor in third party actions permitted to intervene on behalf of insured in action by co-insurers for rescission of their liability policies, when insured was barred by statute from defending itself and insurer would lose its ability to seek equitable contribution from co-insurers if default judgment of rescission were granted. *Truck Ins. Exch. v. Superior Court (1997) 60 Cal. App. 4th 342, 346-350, 70 Cal. Rptr. 2d 255*

[57] Reservation of Rights

Insurer under standard CGL policy, having properly reserved its rights, may advance sums to defend its insured against third-party lawsuit, and may thereafter recoup those costs from insured if it is determined, as matter of law, that no duty to defend ever arose because third-party suit never suggested possibility of covered claim. *Scottsdale Ins. Co. v. MV Transp. (2005) 36 Cal. 4th 643, 662, 31 Cal. Rptr. 3d 147, 115 P.3d 460*

Insurer that provided defense under reservation of rights is not obligated to pay costs taxed against insured despite "supplemental payments" provision in policy (requiring insurer to pay all costs taxed against insured in suit) when insurer had no duty to indemnify nor defend as matter of law. *Golden Eagle Ins. Corp. v. Cen-Fed, Ltd. (2007) 148 Cal. App. 4th 976, 56 Cal. Rptr. 3d 279, 2007 Cal. App. LEXIS 406* , pp27-37

Insurer that stated certain policy provisions as bases for exercising reservation of rights, as properly claiming whatever rights it has under policy; citation of policy rights relied on as not precluding exercise of others. *California Union Ins. Co. v. Poppy Ridge Partners (1990) 224 Cal. App. 3d 897, 902, 274 Cal. Rptr. 191*

[58] Review

In third appellate district, unauthorized failure of party, party's attorney, or representative of party's insurance carrier, to attend court-ordered appellate mediation necessarily constitutes conduct that unreasonably violates Local Rule 1(d)(9) (Cal. Rules of Ct., Supp. Third App. Dist., Local Rules of Ct., Rule 1, Mediation in Civil Appeals), warranting imposition of sanctions. *Campagnone v. Enjoyable Pools & Spas Svc. & Repairs, Inc. (2008) 163 Cal. App. 4th 566, 572, 77 Cal. Rptr. 3d 551*

Absent factual dispute, interpretation and application of insurance contracts are issues of law, reviewed de novo. *Penn-Am. Ins. Co. v. Mike's Tailoring (2005) 125 Cal. App. 4th 884, 889, 22 Cal. Rptr. 3d 918*

Reviewing court is required to make independent determination of whether policy language is ambiguous, looking to words of policy and considering language therein in accordance with its plain and ordinary sense. *Johnson v. Continental Ins. Cos. (1988) 202 Cal. App. 3d 477, 480, 248 Cal. Rptr. 412*

Under California law, when evidence is uncontradicted, interpretation of policy as solely judicial function, and reviewing court as not bound by interpretation of trial court. *James B. Lansing Sound, Inc. v. National Union Fire Ins. (9th Cir. 1986) 801 F.2d 1560, 1564* ; *Morris v. Atlas Assurance Co. (1984) 158 Cal. App. 3d 8, 12, 204 Cal. Rptr. 95*

When no extrinsic evidence is introduced to aid in construction, interpretation of policy as presenting question of law, and appellate court as free to make independent determination concerning policy's meaning. *Bareno v. EmployersLife Ins. Co. (1972) 7 Cal. 3d 875, 881, 103 Cal. Rptr. 865, 500 P.2d 889* ; *Prickett v. Royal Ins. Co. Ltd. (1961) 56 Cal. 2d 234, 237, 14 Cal. Rptr. 675, 363 P.2d 907* ; *State Farm Fire & Cas. Co. v. Lewis (1987) 191 Cal. App. 3d 960, 963, 236 Cal. Rptr. 807* ; *Hackethal v. National Cas. Co. (1987) 189 Cal. App. 3d 1102, 1109, 234 Cal. Rptr. 853* ; *Employers Reinsurance Corp. v. Phoenix Ins. Co. (1986) 186 Cal. App. 3d 545, 553, 230 Cal. Rptr. 792* ; *State Farm Mut. Auto. Ins. Co. v. Eastman (1984) 158 Cal. App. 3d 562, 566, 204 Cal. Rptr. 827* ; *Boogaert v. Occidental Life Ins. Co. (1984) 150 Cal. App. 3d 875, 879, 198 Cal. Rptr. 357*

Trial court's factual findings supported by substantial evidence as binding on appellate court interpreting insurance policy. *Safeco Ins. Co. v. Hale (1983) 140 Cal. App. 3d 347, 351, 189 Cal. Rptr. 463*

Issue that insurer, when renewing policy, may not change its terms without first notifying insured as improperly raised for first time on appeal. *Zito v. Firemen's Ins. Co. (1973) 36 Cal. App. 3d 277, 282-283, 111 Cal. Rptr. 392*

[59] Scope of Coverage of Particular Policies

Malpractice defendants' indemnity policy providing reimburse ment for expenses and lost income for insured's time spent in court, regarding trial of civil suit for damages related to malpractice, as not applying to time spent in administrative hearing regarding ethics charges and license revocation. *Hackethal v. National Cas. Co. (1987) 189 Cal. App. 3d 1102, 1107-1110, 234 Cal. Rptr. 853*

[60] Terminology of Policy

Insurance policy provisions must be given their ordinary meaning. *Sentex Sys., Inc. v. Hartford Accident & Indem. Co. (9th Cir. 1996) 93 F.3d 578, 580*

A plea for clarity in policies. *Insurance Co. of N. Am. v. Electronic Purification Co. (1967) 67 Cal. 2d 679, 691-692, 63 Cal. Rptr. 382, 433 P.2d 174* ; see also *Bareno v. Employers Life Ins. Co. (1972) 7 Cal. 3d 875, 878, 103 Cal. Rptr. 865, 500 P.2d 889*

Courts interpret words of insurance contract with their ordinary and popular sense, unless words are used in technical sense or special meaning is given to them by usage. *GGIS Ins. Svcs. v. Superior Court (2008) 168 Cal. App. 4th 1493, 1506, 86 Cal. Rptr. 3d 515*

Although they have special features, insurance policies are fundamentally contracts and are therefore interpreted using the ordinary rules of contractual interpretation. *Bluehawk v. Continental Ins. Co. (1996) 50 Cal. App. 4th 1126, 1131, 58 Cal. Rptr. 2d 147*

When extrinsic evidence is admitted as an aid to interpretation of an insurance policy, the appellate court is not bound by the trial court's interpretation but independently determines the meaning of the policy. *Golden Sec. Thrift & Loan Ass'n v. First Am. Title Ins. Co. (1996) 53 Cal. App. 4th 250, 256, 61 Cal. Rptr. 2d 442*

Request for legislation specifying precise exclusions from automobile insurance policies as matter of law, unless there is specific endorsement to contrary, and requiring that exclusions be written in statutorily designated language in large print on first page of policy. *Meritplan Ins. Co. v. Woollum (1975) 52 Cal. App. 3d 167, 176, 123 Cal. Rptr. 613*

[61] Third Party Beneficiaries

Insurer that denies coverage and refuses to defend liability action against insured does not have requisite direct and immediate interest in liability action against insured for intervention purposes on ground that plaintiff as judgment creditor may proceed directly against it under *Ins. Code § 11580(b)(2)*; after denial of coverage and defense, insurer may not then intervene in liability action. *Hinton v. Beck (2009) 176 Cal. App. 4th 1378, 1380, 1385-1386, 98 Cal. Rptr. 3d 612*

Right of insured's judgment creditor to sue insurer under *Ins. Code § 11580(b)(2)* does not extend to supplemental payments provision of policy covering defense and interest costs; defense duty and related costs and interest provisions fall outside scope of policy provisions that may be enforced by insured's judgment creditor, if there has been no assignment of cause of action. *San Diego Hous. Comm'n v. Industrial Indem. Co. (2002) 95 Cal. App. 4th 669, 691-692, 116 Cal. Rptr. 2d 103*

Third party injured on store's premises could bring action directly against store's insurer to recover medical expenses under liability policy's medical payment clause, which provided for payment of medical expenses of persons injured on

premises, without regard to fault. *Harper v. Wausau Ins. Corp. (1997) 56 Cal. App. 4th 1079, 1086-1090, 66 Cal. Rptr. 2d 64*

[62] Types of Policies

Insurance policy indemnifying television network for costs if cast member could not work because of illness as not disability policy because it contained no mandatory provisions for disability policies required under *Ins. Code §§ 10350.1-10350.12*; contractual limitations period of one year as controlling, rather than statutory three-year limitations period for disability policies. *CBS Broad. Inc. v. Fireman's Fund Ins. Co. (1999) 70 Cal. App. 4th 1075, 1081, 83 Cal. Rptr. 2d 197*

[63] Unfair Competition Actions

Insured stated cause of action for unfair business practices by alleging: (1) insurer's "pattern and practice" of seeking med-pay reimbursement even though insurer never engaged in any discussion, analysis or conclusion that injured party had in fact been made whole; (2) insurer's continuing to seek sums it is not entitled to as a matter of law to further its "unlawful scheme"; (3) insurer's "pattern and practice" of ignoring California law by seeking 100 percent reimbursement for amounts paid under its med-pay provision; and (4) insurer's "systematic scheme" that is contrary to law and nothing more than "sharp, illicit business practice." *Progressive W. Ins. Co. v. Superior Court (2005) 135 Cal. App. 4th 263, 283, 37 Cal. Rptr. 3d 434*

Insurer's practice of employing "broker-agents" who were not appointed agents, including charging of broker fees for use of persons called brokers who were actually agents, constituted unfair business practice; broker-agents are not exempt from appointment requirement of *Ins. Code § 1704(a)*. *Krumme v. Mercury Ins. Co. (2004) 123 Cal. App. 4th 924, 945-948, 20 Cal. Rptr. 3d 485*

Purchasers of health insurance policies stated claims for unfair business practices under *Bus. & Prof. Code § 17200*, fraud, and negligence failure to disclose, based on violations of *Ins. Code §§ 330, 331, 332, 334, 361*, by alleging that insurer failed to notify them of imminent material changes in their insurance policies, resulting in higher premiums and lower coverage, before they purchased policies. *Pastoria v. Nationwide Ins. (2003) 112 Cal. App. 4th 1490, 1496-1499, 6 Cal. Rptr. 3d 148*

Adoption of *Ins. Code §§ 1861.03* and *1861.10* as part of Prop. 103 did not restore or create private action under *Ins. Code § 790.03*. *Maler v. Superior Court (1990) 220 Cal. App. 3d 1592, 1596-1598, 270 Cal. Rptr. 222*

Remedies available under *Bus. & Prof. Code § 17203* are limited to injunctive relief and restitution and do not include award of damages. *Industrial Indem. Co. v. Superior Court (1989) 209 Cal. App. 3d 1093, 1095-1097, 257 Cal. Rptr. 655*

[64] Validity of Policy

Signature of insured on application for insurance as not required for issuance of valid policy. *Kincer v. Reserve Ins. Co. (1970) 11 Cal. App. 3d 714, 718, 90 Cal. Rptr. 94*

[65] Warranties

Affirmative and promissory warranties distinguished. *Cowan v. Phoenix Ins. Co. (1889) 78 Cal. 181, 184, 20 P. 408*

Compliance with terms of warranty [*Ins. Code § 445*] as, generally speaking, condition precedent to right of recovery under policy. *Chase v. National Indem. Co. (1954) 129 Cal. App. 2d 853, 858, 278 P.2d 68*

Provision in fire insurance policy that "This policy being written at a reduced rate based on the protection of the premises by an automatic sprinkler system, it is a condition of this policy that, so far as the sprinkler system and the water supply therefor are under the control of the insured, due diligence shall be used by the insured to maintain them in complete working order ..." as warranty within meaning of *Ins. Code §§ 441, 442*, and *445*. *Holz Rubber Co., Inc. v. American Star Ins. Co. (1975) 14 Cal. 3d 45, 55-56 n. 11, 120 Cal. Rptr. 415, 533 P.2d 1055*

[66] Waiver of Conditions

Insured as not permitted to rely on waiver of condition in insurance policy unless waiver is pleaded. *Fujimoto v. Western Pioneer Ins. Co. (1978) 86 Cal. App. 3d 305, 310 n. 3, 150 Cal. Rptr. 88*

[67] Wrongful Death Action

Summary judgment for insurer is improper in cause of action for wrongful death, based on denial of hospitalization benefits for depressed patient who then committed suicide, when triable issues of fact remained regarding whether insurer's conduct was substantial factor in causing death. *Wilson v. Blue Cross of S. Cal. (1990) 222 Cal. App. 3d 660, 664, 668-671, 271 Cal. Rptr. 876*

[68] Workers' Compensation Carrier

Workers' compensation insurance carrier as subject to action at law for intentional torts committed on claimant for workers' compensation benefits. *Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 625-631, 102 Cal. Rptr. 815, 498 P.2d 1063* (involving tortious conduct of carrier's investigators in investigating insurance claim); *Fremont Indem. Co. v. Superior Court (1982) 133 Cal. App. 3d 879, 881, 184 Cal. Rptr. 184* ; *but see Everfield v. State Comp. Ins. Fund (1981) 115 Cal. App. 3d 15, 18-21, 171 Cal. Rptr. 164* (alleged acts of carrier insufficiently outrageous and extreme to avoid exclusivity of worker's compensation remedy)

Legal Topics:

For related research and practice materials, see the following legal topics:
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Alexander, *The Impact of Proposition 103, 29 Santa Clara L. Rev. 521 (1989)*

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Note, *Rodriquez v. Fireman's Fund Insurance Companies, Inc.: An Illustration of the Problems Inherent in the Royal Globe Doctrine, 15 Sw. U. L. Rev. 371 (1985)*

Allswang, *How to Pursue Claims Against Insurance Companies, 17 Real Prop. Prob. & Tr. J. 690 (1982)*

Birnbaum, *Insurable Interests of Lenders, Tenants, Purchasers, and Mixed-Use Occupants*, 17 Real Estate L.J. 645 (1982)

Comment, *A Statutory Action for Insurer Bad Faith--The Reasonably Clear Remedy for the Third Party Claimant, 11 Pac. L.J. 945 (1980)*

Comment, *The Emerging Fiduciary Obligations and Strict Liability in Insurance Law, 14 Cal. W. L. Rev. 358 (1978)*

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Comment, *The Adhesion Contract of Insurance, 5* Santa Clara Law. 60 (1964)

Note, *Blind Faith Conquers Bad Faith: Only Congress Can Save Us After Pilot Life Insurance Co. v. Dedeaux, 21 Loy. L.A. L. Rev. 1343 (1988)*

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Note, *The Expectation of Peace of Mind: A Basis for Recovery of Damages for Mental Suffering Resulting from the Breach of First Party Insurance Contracts, 56 S. Cal. L. Rev. 1345 (1983)*

Shea, *The Product Liability Risk Retention Act of 1981*, 28(2) Prac. Law. 9 (1982)

Note, *Insurance for Punitive Damages: A Reevaluation, 28 Hastings L.J. 431 (1976)*

Comment, *The Emerging Fiduciary Obligations and Strict Liability in Insurance Law, 14 Cal. W. L. Rev. 358 (1978)*

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Gage, *Recovery of Unlimited Insurance Proceeds Through Punitive Damages Based Upon Bad Faith and Unfair Dealings, 5 U.S.F. L. Rev. 367 (1977)*

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Angelo, *Agricultural Insurance--Indemnification for Loss Due to Labor Dispute, 13 Hastings L.J. 236 (1961)*

Patterson, *Some Contract Provisions of the California Insurance Code, 32* So. Cal. L. Rev. 227 (1959)

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Note, *Application as Constituting an Offer by the Insurer, 8* Hastings L.J. 225 (1957)

Note, *Mistake of Fact: Recovery of Insurance Payments, 2 UCLA L. Rev. 285 (1955)*

Comment, *Foreign Insurance Company's Consent to 'Direct-Action' Statute, Given as Condition of Doing Business, Cannot Be Enforced in Derogation of ContractMade Out of State, 5 Stan. L. Rev. 514 (1953)*

Note, *Actions on Policies--Insurer's Liability for Attorney's Fees,"* *24 So. Cal. L. Rev. 120 (1950)*

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§ 308.225 Text References

Witkin, Summary of California Law, Vol. 2, *Insurance*, §§ 51, 53, 54, 60, 62-65, 82, 89-91, 93, 96-97, *132*, *135*, *137*, *138*, *140*, 145, 148-157, 219, 220, 222-225, 230 (10th ed. 2005)

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§ 308.230 State Statutes

Assignment of life insurance policies. *Ins. Code §§ 10173, 10173.2*

Blanket life insurance. *Ins. Code § 10220 et seq.*

Burial contracts. *Ins. Code § 10240 et seq.*

Change to reserve plan by assessment plan insurer. *Ins. Code §§ 11420-11490*

Community property. *Civ. Code § 5110*, through December 31, 1993; repealed and replaced by *Fam. Code § 760*, operative January 1, 1994

Continuance of group life or disability policies during labor dispute. *Ins. Code § 10116*

Death after payment of premium but before policy issued. *Ins. Code § 10115*

Discrimination because of blindness, partial blindness, or physical or mental impairment as prohibited after January 1, 1984, in life, annuity, or disability insurance. *Ins. Code §§ 10144, 10145*

Discrimination in life, accident, or health insurance because of blindness as prohibited after January 1, 1984. *Ins. Code § 10650*

Discriminatory practices. *Ins. Code §§ 10140-10142*

Firemen's, Policemen's, or Peace Officers' benefit and relief associations. *Ins. Code §§ 11400-11407*

Fraternal benefit societies. *Ins. Code §§ 10970-11165*

General contract provisions. *Ins. Code § 10110 et seq.*

Genetic characteristics and genetic testing in insurance underwriting. *Ins. Code §§ 10140(b)* (repealed eff. Jan. 1, 2002), 10146-10149.1

General regulation of life insurers. *Ins. Code §§ 10430-10508*

Grants and annuities. *Ins. Code §§ 11520-11524*

Group life policies. *Ins. Code § 10200 et seq.*

Incontestability clauses. *Ins. Code §§ 10113.5, 10206*

Incorporated life insurers issuing policies on reserve basis. *Ins. Code §§ 10510-10540*; *Corp. Code §§ 10840, 10841*

Individual life insurance of less than $10,000. *Ins. Code § 10127.7*

Insolvency of life insurers. *Ins. Code § 1067 et seq.*

Insurable interest. *Ins. Code §§ 280, 286, 10110*

Insurance code sections inapplicable to life insurance. *Ins. Code § 10190*

Insurance of minors. *Ins. Code § 10112*

Insurers' nonliability for punitive damages based on refusal or delay of payment, if autopsy necessary to determine suicidal or accidental nature of death is prohibited under *Gov. Code § 27491.43* (certificate of religious belief). *Ins. Code § 10111.5*

Interest payable on insurer's failure to pay policy proceeds within 30 days after death. *Ins. Code § 10172.5*

Life licensee. *Ins. Code §§ 32, 1622, 1626*

Life and disability insurance analyst. *Ins. Code § 32.5*

Life insurance. *Ins. Code §§ 100(1), 101*

Life and disability insurance definitions. *Ins. Code § 10113.2*

Long-Term Care Insurance Act. *Ins. Code § 10231 et seq.*

Measure of indemnity. *Ins. Code § 10111*

Nonprofit hospital service plans. *Ins. Code §§ 11491-11517*

Payment and proceeds. *Ins. Code § 10170 et seq.*

Payment of Benefits to Person Providing Services. *Ins. Code § 10133.7*

Policy as entire contract. *Ins. Code § 10113*

Power of Insurance Commissioner to promulgate rules and regulations. *Ins. Code § 10191*

Replacement of group life and disability insurance. *Ins. Code § 10128 et seq.*

Replacement of life insurance and annuity policies. *Ins. Code § 10509 et seq.*

Required disclosures in advertisements for term life insurance directed to individuals55 years of age or older. *Ins. Code § 10127.8*

Required policy provisions. *Ins. Code §§ 10150 et seq., 10160*

Standard nonforfeiture law. *Ins. Code § 10159.1 et seq.*

Transfer of life or disability policies. *Ins. Code §§ 10129-10133*

Transfer of policy. *Ins. Code § 10129 et seq.*

Twenty-four hour coverage. *Ins. Code § 1749.02*

Unlawful and intentional killing as preventing succession to decedent's estate. *Prob. Code § 250 et seq.*

Voluntary mutualization of incorporated life and life and disability insurers having capital stock and issuing nonassessable policies on reserve basis. *Ins. Code §§ 11525-11533*

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§ 308.231 Decisions

[1] Accidental Death Benefits

Insurer's failure to investigate whether road in Cuba was "freeway" within meaning of "Freeway Coverage" provision precluded summary judgment for insurer in action to recover death benefits arising from death of insured in Cuban accident; although Swiss Embassy representative concluded that accident did not occur on "freeway," analysis and supporting evidence were neither provided to court nor authenticated. *Estate of Parker v. AIG Life Ins. (C.D. Cal. 2004) 317 F. Supp. 2d 1167, 1173*

Policy that paid for loss of life due to "bodily injury caused solely by an accident" held to be "accidental death" rather than "accidental means" policy because phrase "accidental means" was not expressly used; therefore proper to instruct jury that as a matter of law death by drowning, unless suicidal, is presumed to be an accidental death, notwithstanding evidence that insured ingested alcohol and Valium prior to accident. *Olson v. American Bankers Ins. Co. (1994) 30 Cal. App. 4th 816, 823-824, 35 Cal. Rptr. 2d 897*

"In consequence of," as used in *Ins. Code § 10369.12* permitting insurers to exclude losses sustained "in consequence of" insured being intoxicated or under influence of any controlled substance, equated with "proximate cause"; not error to instruct jury that to avoid liability under exclusion, insurer was required to prove that influence of alcohol was "the" (not merely "a") proximate cause of insured's death. *Olson v. American Bankers Ins. Co. (1994) 30 Cal. App. 4th 816, 828-831, 35 Cal. Rptr. 2d 897*

Policy covering death by "accidental means" is distinguishable from a policy covering "accidental death"; "accidental death" policies provide coverage for accidental results, i.e. unforeseen or unexpected death; "accidental means" requires that means of death be accidental, and death caused by unintentional overdose resulting from voluntary and intentional act of ingesting cocaine was not death by "accidental means." *Weil v. Federal Kemper Life Assurance Co. (1994) 7 Cal. 4th 125, 134-135, 147, 27 Cal. Rptr. 2d 316, 866 P.2d 774* .

Asphysia resulting from choking on undigested food as accidental death by "external means." *Spaid v. Cal-W. States Life Ins. Co. (1982) 130 Cal. App. 3d 803, 806-808, 182 Cal. Rptr. 3*

When insured died nearly two years later from injuries sustained in automobile accident, and insurance policy contained double indemnity provision if death occurred within 90 days of injuries from accident, court as applying process of nature rule, admitting evidence of actual causation rather than relying on arbitrary time limitations, and allowing recovery if claimant can prove that death occurred as direct, exclusive result of accident. *National Life & Accident Ins. Co. v. Edwards (1981) 119 Cal. App. 3d 326, 332-336, 174 Cal. Rptr. 31*

When express terms of insurance policy place burden of providing death was accident on beneficiary, claimant as required to provide theory of why death was accidental; insurance company as acting reasonably in withholding payment and continuing to investigate in absence of evidence showing death was not suicide. *Blake v. Aetna Life Ins. Co. (1979) 99 Cal. App. 3d 901, 924, 160 Cal. Rptr. 528*

Beneficiary of group life insurance covering beneficary's father is entitled to accidental death benefit (double indemnity), even though circumstances of death brought case within terms of exclusionary provision, insurance was offered and obtained through father's employer, copy of policy was not delivered to father (but was available for inspection), exclusionary provision limited coverage father could otherwise reasonably have expected, and exclusionary provision was not clearly and plainly called to father's attention. *Jones v. Crown Life Ins. Co. (1978) 86 Cal. App. 3d 630, 638-640, 150 Cal. Rptr. 375*

Beneficiary of one who died as result of self-administered overdose of heroin is entitled to accidental death benefits; death certificate properly certified by local registrar as prima facie evidence, in all courts and places, of facts stated in it; "accident" and "accidental" as never having acquired technical meaning in law and is required to be construed according to ordinary understanding and common usage. *Pilcher v. New York Life Ins. Co. (1972) 25 Cal. App. 3d 717, 720-723, 102 Cal. Rptr. 82*

"Accidental death" and "death by accidental means" distinguished. *Rooney v. Mutual Benefit Health & Accident Ass'n (1946) 74 Cal. App. 2d 885, 888-889, 170,* P.2d 72When disease will and will not be considered intervening cause of death by accidental means. *Horton v. Travelers Ins. Co. (1920) 45 Cal. App. 462, 471-473, 187 P. 1070*

[2] Annuities

Sales of annuities, like sales of life insurance, do not fall within ambit of *California Consumer Remedies Act. Estate of Migliaccio v. Midland Nat'l Life Ins. Co. (C.D. Cal. 2006) 436 F. Supp. 2d 1095, 1109*

Classification of annuities as life insurance [*Ins. Code § 101*] for purposes of Insurance Code as not requiring their classification as insurance for purposes of Revenue and Taxation Code relating to exemption of insurance proceeds from inheritance tax. *Estate of Barr (1951) 104 Cal. App. 2d 506, 511, 231 P.2d 876*

Annuity contract as differing from life insurance contract; in life insurance policy risk assumed is to pay on insured's death; in pure annuity contract risk assumed is topay as long as insured may live. *Equitable Life Assurance Soc'y v. Johnson (1942) 53 Cal. App. 2d 49, 57, 127 P.2d 95* ; see also *Estate of Barr (1951) 104 Cal. App. 2d 506, 508, 231 P.2d 876*

[3] Application

Contract of insurance arising on insurer's receipt of completed application and first premium payment as not terminated

until applicant receives from insurer both notice of rejection of application and refund of premium. *Smith v. Westland Life Ins. Co. (1975) 15 Cal. 3d 111, 120-121, 123 Cal. Rptr. 649, 539 P.2d 433*

Insurer as generally having right to know all that applicant for life insurance knows regarding applicant's state of health and medical history. *Thompson v. Occidental Life Ins. Co. (1973) 9 Cal. 3d 904, 915, 109 Cal. Rptr. 473, 513 P.2d 353*

Effect of applicant's good faith belief in his or her "good health." *Harte v. United Benefit Life Ins. Co. (1967) 66 Cal. 2d 148, 152, 56 Cal. Rptr. 889, 424 P.2d 329* ; *Metropolitan Life Ins. Co. v. Devore (1967) 66 Cal. 2d 129, 140, 56 Cal. Rptr. 881, 424 P.2d 321*

Effect of insurer's unreasonable delay in acting on life insurance application if applicant paid first premium and died before application was accepted. *Smith v. Minnesota Mut. Life Ins. Co. (1948) 86 Cal. App. 2d 581, 591-592, 195 P.2d 457* ; *see also Orcutt v. Ferranini (1965) 237 Cal. App. 2d 216, 224-226, 46 Cal. Rptr. 715*

[4] Assignment

Insurance policy as property that can be sold, assigned, or bequeathed by its owner. *Sullivan v. Union Oil Co. of Cal. (1940) 16 Cal. 2d 229, 237, 105 P.2d 922* ; *Estate of Sears (1960) 182 Cal. App. 2d 525, 530, 6 Cal. Rptr. 148*

Life insurance policy as subject to assignment. *Curtiss v. Aetna Life Ins. Co. (1891) 90 Cal. 245, 251-252, 27 P. 211* ; *see also* former Civ. Code § 2764 (*now see Ins. Code § 10130*)

Language contained in life insurance policy ("assignee ... shall have all right, title and interest of the prior Owner") as entitling assignee to receive notice of impending lapse of policy and consequent right to reinstatement despite fact that *Ins. Code § 10173.2*, requiring such notice, had not yet been enacted. *Estate of Coate (1979) 98 Cal. App. 3d 982, 987-989, 159 Cal. Rptr. 794*

[5] Beneficiary

Insured armed forces member has right to change beneficiary of policy issued under Servicemen's Group Life Insurance Act (former *38 U.S.C.S. §§ 765-779, now see 38 U.S.C.S. § 1965 et seq.*), even though state court divorce decree required insured to name children of former marriage as beneficiaries, because provisions of the federal act prevail over and displace inconsistent state law under Supremacy Clause. *Ridgway v. Ridgway (1981) 454 U.S. 46, 56-60, 102 S. Ct. 49, 70 L. Ed. 2d 39*

Ins. Code § 10173.2 requires insurer to give notice to assignees of prospective lapse of policy; no comparable provision applicable to owner-beneficiaries of insurance policies. *Mardirosian v. Lincoln Nat'l Life Ins. Co. (9th Cir. 1984) 739 F.2d 474, 477*

Failure of insurer to take affirmative action to change beneficiary of life insurance policy on request of insured was not unreasonable behavior constituting violation of covenant of fair dealing, but may be negligent conduct. *National Life & Accident Ins. Co. v. Edwards (1981) 119 Cal. App. 3d 326, 339, 174 Cal. Rptr. 31*

Ordinary beneficiary of life policy as having merely an expectancy of incomplete and inchoate gift revocable at will of insured; contract beneficiary as having vested right in policy proceeds. *Phoenix Mut. Life Ins. Co. v. Birkelund (1946) 29 Cal. 2d 352, 360, 175 P.2d 5* ; *see also Orcutt v. Ferranini (1965) 237 Cal. App. 2d 216, 220-221, 46 Cal. Rptr. 715* ; *Estate of Welfer (1952) 110 Cal. App. 2d 262, 265, 242 P.2d 655* ; *Shaw v. Board of Admin. (1952) 109 Cal. App. 2d 770, 774, 241 P.2d 635* (disapproved on another point in *Watenpaugh v. State Teachers' Ret. Sys. (1959) 51*

Cal. 2d 675, 681, 336 P.2d 165)

Execution of holographic will giving insurance proceeds to other than named beneficiaries and evidence of intent to change beneficiary as not substantial compliance with insurer's rules so as to change beneficiary. *Moss v. Warren (1974) 43 Cal. App. 3d 651, 656, 117 Cal. Rptr. 796*

Member of United States Armed Forces as unable to effect valid change of beneficiary on policy issued under Servicemen's Group Life Insurance Act [former *38 U.S.C.S. §§ 765-779*] except through use of designated form filed with Uniformed Services, though serviceman intended to change beneficiaries and executed and submitted forms to effectuate that intent. *Hill v. Hill (1972) 23 Cal. App. 3d 760, 763-766, 100 Cal. Rptr. 458*

Rule that method of changing beneficiary specified in group insurance policy must be substantially followed is subject to three relaxations of rule if contest is only between claimants to proceeds, when: (1) carrier has waived its own rules and, pursuant to insured's request, issued new certificate; (2) it was beyond power of insured to literally comply with formalities; and (3) insured has pursued course set out in policy and has done all in insured's power to change beneficiary, but before new certificate is issued dies. *Union Cent. Life Ins. Co. v. Pepe (1970) 8 Cal. App. 3d 502, 507-508, 87 Cal. Rptr. 610*

Ins. Code § 10170 as in essence providing that insured retains right to change beneficiary unless policy specifically negates it. *Polk v. Polk (1964) 228 Cal. App. 2d 763, 786-787, 39 Cal. Rptr. 824*

Beneficiary under ordinary life insurance policy paid for by insured is donee beneficiary. *MacDonald v. California-W. States Life Ins. Co. (1962) 203 Cal. App. 2d 440, 453, 21 Cal. Rptr. 659*

Word "children" as used in beneficiary clause of group life insurance policy includes illegitimate children. *Turner v. Metropolitan Life Ins. Co. (1943) 56 Cal. App. 2d 862, 865-866, 133 P.2d 859*

Written request by insured to insurer's head office to change beneficiary from estate to named individual as effective to change beneficiary although insured dies before letter reaches insurer. *Estate of Burnett (1941) 47 Cal. App. 2d 464, 466, 118 P.2d 298*

Recovery by insured decedent's creditors of policy proceeds paid as result of fraudulent changes of beneficiary by insured while insolvent. *Bryson v. Manhart (1936) 11 Cal. App. 2d 691, 697, 54 P.2d 778*

In absence of fraud or statutory provision to contrary, life insurance taken out by insured in favor of another is payble to named beneficiary as against deceased insured's creditors and personal representatives. *Comegys v. National Union Assurance Soc'y (1935) 3 Cal. App. 2d 637, 641, 39 P.2d 861*

[6] Community Property Rights

Life insurance policies purchased with community funds are community assets in which each spouse has present, existing, and equal interest. *In re Marriage of Milhan (1974) 13 Cal. 3d 129, 133 n.2, 117 Cal. Rptr. 809, 528 P.2d 1145* ; *Estate of Allie (1958) 50 Cal. 2d 794, 798, 329 P.2d 903* ; *see also* *Grimm v. Grimm (1945) 26 Cal. 2d 173, 175, 157 P.2d 841* ; *Polk v. Polk (1964) 228 Cal. App. 2d 763, 781, 39 Cal. Rptr. 824* ; *Estate of Sears (1960) 182 Cal. App. 2d 525, 530, 6 Cal. Rptr. 148* ; *Estate of Foy (1952) 109 Cal. App. 2d 329, 333, 240 P.2d 685* ; *Johnston v. Johnston (1951) 106 Cal. App. 2d 775, 779, 236 P.2d 212*

Widow not designated beneficiary under policy issued under Federal Employees' Group Life Insurance Program [15 U.S.C.S. §§ 8701-8716] as entitled to one-half of proceeds based on state community property laws. *Carlson v.*

Carlson (1974) 11 Cal. 3d 474, 479-480, 113 Cal. Rptr. 722, 521 P.2d 1114

Widow not designated beneficiary under policy issued under National Service Life Insurance Program [*38 U.S.C.S. § 1901 et seq.*] as having no claim to any portion of death benefits paid despite fact premiums were paid out of community funds. *Wissner v. Wissner (1950) 338 U.S. 655, 658-661, 70 S. Ct. 398, 94 L. Ed. 424* ; see also *In re Marriage of Milhan (1974) 13 Cal. 3d 129, 132, 117 Cal. Rptr. 809, 528 P.2d 1145* ; *Carlson v. Carlson (1974) 11 Cal. 3d 474, 477-480, 113 Cal. Rptr. 722, 521 P.2d 1114* ; *Estate of Allie (1958) 50 Cal. 2d 794, 798-799, 329 P.2d 903* ; *Sehrt v. Sehrt (1960) 179 Cal. App. 2d 167, 168-174, 3 Cal. Rptr. 555*

Former wife of insured named beneficiary in life insurance policy while parties were married as entitled to proceeds of policy even though prior to insured's death parties had been divorced, and insured remarried and was living with his second wife at time of death, where no portion of premiums was paid from community property of second marriage. *Jenkins v. Jenkins (1931) 112 Cal. App. 402, 405-413, 297 P. 56*

Where husband in property settlement agreement agreed to deliver insurance policy on his life to his first wife who agreed to pay accruing premiums and, instead of so delivering policy, he subsequently named his second wife as beneficiary and delivered policy to her and he and she paid premiums for a number of years, first wife, after husband's death, as having equitable right to recover such proportion of policy proceeds as amount of premiums paid at time of property settlement agreement bears to total premiums paid and second wife as entitled to remainder. *Phoenix Mut. Life Ins. Co. v. Birkelund (1946) 29 Cal. 2d 352, 353-354, 175 P.2d 5*

Former wife as named beneficiary as not entitled to policy proceeds on death of former husband where right disposed of by prior property settlement agreement followed by divorce. *Life Ins. Co. of N. Am. v. Cassidy (1984) 35 Cal. 3d 599, 607-610, 200 Cal. Rptr. 28, 676 P.2d 1050* ; *Sullivan v. Union Oil Co. of Cal. (1940) 16 Cal. 2d 229, 232-237, 105 P.2d 922* ; see also *Thorp v. Randazzo (1953) 41 Cal. 2d 770, 772-777, 264 P.2d 38*

General expressions or clauses in property settlement agreements as not to be construed as including assignment or renunciation of expectancies; beneficiary as therefore retaining his status under an insurance policy if it does not clearly appear from agreement that in addition to segregation of property of spouses it was intended to deprive either spouse of right to take property under insurance contract of the other. *Grimm v. Grimm (1945) 26 Cal. 2d 173, 176, 157 P.2d 841*

Divorce decree in and of itself as having no effect on wife's right to proceeds of policy on husband's life designating her as beneficiary issued prior to divorce of parties; same rule generally as governing case where wife is designated as beneficiary in death benefit certificate of fraternal insurance association; that is, beneficiary may recover death benefit notwithstanding divorce. *Shaw v. Board of Admin. (1952) 109 Cal. App. 2d 770, 774-775, 241 P.2d 635* (disapproved on another point in *Watenpaugh v. State Teachers' Ret. Sys. (1959) 51 Cal. 2d 675, 681, 336 P.2d 165*)

Wife as able to release her community interest in insurance policy on husband's life and still be a beneficiary of it. *Grimm v. Grimm (1945) 26 Cal. 2d 173, 175, 157 P.2d 841* ; *Shaw v. Board of Admin. (1952) 109 Cal. App. 2d 770, 776, 241 P.2d 635* (disapproved on another point in *Watenpaugh v. State Teachers' Ret. Sys. (1959) 51 Cal. 2d 675, 681, 336 P.2d 165*)

Right to renew life insurance policy provided by employer as not "property" within meaning of community property laws; renewal dependent on continued offer of benefit by employer and insured's continued employment, so renewal right was mere expectation. *In re Marriage of Spengler (1992) 5 Cal. App. 4th 288, 299, 6 Cal. Rptr. 2d 764*

Term life insurance, covering spouse who remains insurable, as community property only for period beyond date of separation for which community funds were used to pay premium; if insured dies during that period, proceeds of policy as fully community. *Estate of Logan (1987) 191 Cal. App. 3d 319, 325, 236 Cal. Rptr. 368*

Wife not named beneficiary of life insurance policy as not able to recover proceeds against named beneficiary where she has executed release of all community property interest in policy. *Fritschi v. Teed (1963) 213 Cal. App. 2d 718, 728, 29 Cal. Rptr. 114*

In insurer's action in interpleader to determine who is entitled to life insurance policy proceeds, decedent's wife or decedent's widow, change of beneficiary in favor of widow as not effective where procedure specified by policy was not followed and procedure fell within no exception to requirement of compliance with policy terms as to change of beneficiary. *Union Cent. Life Ins. Co. v. Pepe (1970) 8 Cal. App. 3d 502, 507-509, 87 Cal. Rptr. 610*

[7] Constructive Trust

Proceeds of policy issued under Servicemen's Group Life Insurance Act (former *38 U.S.C.S. § 765 et seq., now see 38 U.S.C.S. § 1965 et seq.*) as not subject toconstructive trust due to Supremacy Clause. *Ridgway v. Ridgway (1981) 454 U.S. 46, 61, 102 S. Ct. 49, 70 L. Ed. 2d 39*

[8] Controlling Law

Contract law, not inheritance law, as governing right to life insurance proceeds. *Turner v. Metropolitan Life Ins. Co. (1943) 56 Cal. App. 2d 862, 865, 133 P.2d 859*

[9] Coverage

Participant in ERISA benefit plan cannot be denied benefits under life insurance policy for failing to comply with undisclosed condition for personal health statement after otherwise complying with all directions of Plan Administrator, properly applying for benefit, and paying premiums on policy until time claim was submitted; plan fiduciaries may not shift to plan beneficiary harm resulting from their own failure to advise beneficiary of conditions necessary to obtain plan benefits because fiduciaries are in position of superior knowledge; insurer waived right to require submission of personal health statement; insurer estopped from enforcing evidence of good health provision. *Gaines v. Sargent Fletcher, Inc. Group Life Ins. Plan (C.D. Cal. 2004) 329 F. Supp. 2d 1198, 1220-1223*

Accrued vacation as not extending job termination date for purpose of determining cessation of group insurance coverage of employee. *Daniels v. Equitable Life Assurance Soc'y (1981) 123 Cal. App. 3d 467, 475, 176 Cal. Rptr. 670*

Extension of period for conversion from group to individual life insurance without requiring evidence of insurability as not extending coverage period of original group policy. *Daniels v. Equitable Life Assurance Soc'y (1981) 123 Cal. App. 3d 467, 473, 176 Cal. Rptr. 670*

In case of standarized insurance contracts, exceptions and limitations on coverage insured could reasonably expect as required to be called to his attention, clearly and plainly, before exclusions will be interpreted to relieve insurer of liability or performance. *Logan v. John Hancock Mut. Life Ins. Co. (1974) 41 Cal. App. 3d 988, 995, 116 Cal. Rptr. 528* (exceptions and exclusions to accidental death coverage in life policy not yet issued included participation in felony and entry into body of intoxicant; insured killed when motorcycle he was driving while intoxicated collided with car)

In action for breach of contract against insurer under policy of accidentaldeath life insurance, insurer as unable to avoid coverage under clause excluding liability if insured dies while committing a felony, where injuring of third party by wreckage of insured's car due to drunk driving of insured occurs after insured's death and is held not to be felony drunk

driving. *Romero v. Volunteer State Life Ins. Co. (1970) 10 Cal. App. 3d 571, 576-580, 88 Cal. Rptr. 820*

Non-occupational vehicle accident death benefit clause in life insurance policy limited to driving or riding in private automobile or being struck by motor vehicle while not driving or riding in motor vehicle as not applying to insured who was killed while driving motorcycle. *LaCosta v. Prudential Ins. Co. of Am. (1975) 50 Cal. App. 3d 526, 527-528, 123 Cal. Rptr. 368*

Insurer of group life insurance policy as bound by error of agent in including plaintiff within group where no basis for concluding that fraudulent intent existed on part of anyone concerned. *Amberg v. Bankers Life Co. (1971) 3 Cal. 3d 973, 980, 92 Cal. Rptr. 273, 479 P.2d 633*

Insurer as bound by terms of credit life insurance certificate where representations in certificate indicate broader coverage than provided by master policy; maximum coverage clause in each credit life insurance certificate covering respective debts incurred on purchase of separate parcels of land as providing maximum coverage on each parcel rather than on parcels collectively. *Evans v. Holly Corp. (1971) 15 Cal. App. 3d 1020, 1023-1024, 93 Cal. Rptr. 712*

Death at any time on date of termination of coverage under group accidental death and disability insurance policy as covered by policy. *Williams v. American Cas. Co. (1971) 6 Cal. 3d 266, 275, 98 Cal. Rptr. 814, 491 P.2d 398*

[10] Definitions

Under ERISA (*29 U.S.C.S. § 1001 et seq.*) accident policy, "children" as not including insured's stepchildren or former spouse's child; no death benefit coverage for death of natural son of insured's ex-spouse. *Evans v. Safeco Life Ins. Co. (9th Cir. 1990) 916 F.2d 1437, 1441*

Lower body paralysis resulting from spinal injury as not constituting "severance at or above ... ankle joint" as defined within coverage of accidental death and dismemberment policy. *Horvatin v. Allstate Life Ins. Co. (9th Cir. 1988) 848 F.2d 1012, 1013-1014*

"Accident." *Price v. Occidental Life Ins. Co. (1915) 169 Cal. 800, 802* ; *Williams v. Hartford Accident & Indem. Co. (1984) 158 Cal. App. 3d 229, 233-234, 204 Cal. Rptr. 453* ; *Meyer v. Pacific Employers Ins. Co. (1965) 233 Cal. App. 2d 321, 327, 43 Cal. Rptr. 542* ; *Alessandro v. Massachusetts Cas. Ins. Co. (1965) 232 Cal. App. 2d 203, 208, 42 Cal. Rptr. 630*

"Accidental means." *Moore v. Fidelity & Cas. Co. (1928) 203 Cal. 465, 471, 265 P. 207*

"Violent means." *Horton v. Travelers Ins. Co. (1920) 45 Cal. App. 462, 470-471, 187 P. 1070*

Distinction between "accidental death" and "accidental means" in life and disability policies. *Olson v. American Bankers Ins. Co. (1994) 30 Cal. App. 4th 816, 35 Cal. Rptr. 2d 897* Policy that paid for loss of life due to "bodily injury caused solely by an accident" held to be "accidental death" rather than "accidental means" policy, because phrase "accidental means" was not expressly used. *Olson v. American Bankers Ins. Co. (1994) 30 Cal. App. 4th 816, 824-825, 35 Cal. Rptr. 2d 897*

"Term life insurance" as life insurance written for fixed or specified term; at expiration of term of years, policy as expiring without retaining cash value. *Estate of Logan (1987) 191 Cal. App. 3d 319, 324, 236 Cal. Rptr. 368*

[11] Discharge of Insurer by Payment

Constitutionality of *Ins. Code § 10172*, providing that when insurer makes payment in accordance with terms of life insurance policy, such payment fully dischargesinsurer from all claims unless insurer received written notice of claim before payment is made. *Leonard v. Occidental Life Ins. Co. (1973) 31 Cal. App. 3d 117, 120-124, 106 Cal. Rptr. 899* (widow barred from recovering community property interest where insurer had paid full benefits prior to receiving written notice of her claim)

[12] Double Indemnity

Insurance company as sustaining its burden of proving that condition that applicant of life insurance undergo medical examination as prerequisite to full double indemnity liability was called to applicant's attention; insurer's burden as being that of proof of advice not as to all such conditions prerequisite to double indemnity recovery, but only as to those conditions sufficient to defeat double indemnity recovery. *Young v. Metropolitan Life Ins. Co. (1971) 20 Cal. App. 3d 777, 781-783, 98 Cal. Rptr. 77*

[13] Exclusions

Exclusion when covered person "dies as a result of flying as a pilot or crew member of any aircraft" as ambiguous as matter of law concerning application to student pilot who had acquired neither student pilot certificate nor requisite medical certificate. *Castro v. Fireman's Fund Am. Life Ins. Co. (1988) 206 Cal. App. 3d 1114, 1121-1122, 253 Cal. Rptr. 833*

Life insurance policy clause limiting recovery to amount of premiums paid if insured committed suicide within one year as not applicable to suicide occurring within one year after issuance of policy but more than one year after issuance of conditional receipt. *Turner v. Investors Syndicate Life Ins. & Annuity Co. (1973) 33 Cal. App. 3d 424, 426-428, 108 Cal. Rptr. 47*

Exclusion clause in supplemental life insurance policy stating that insurershall not be liable for any loss to which a contributing cause was insured's commission of or attempt to commit a felony as valid and as excluding coverage where death resulted from insured's felony drunk driving. *Barker v. California-W. States Life Ins. Co. (1967) 252 Cal. App. 2d 768, 771-778, 61 Cal. Rptr. 595*

[14] Exemption From Execution

Endowment policy as life insurance under former statute of 1868 [*now see Code Civ. Proc. § 704.100*] exempting life insurance from execution. *Briggs v. McCullough (1869) 36 Cal. 542, 549-551*

Exemption from execution of moneys, accruing or in any manner growing out of life insurance, subject to certain limitations, provided by former *Code Civ. Proc. § 690.19* [*now see Code Civ. Proc. § 704.100*] as available to beneficiary of life group policy who receives proceeds of policy after insured's death. *Bowman v. Wilkinson (1957) 153 Cal. App. 2d 391, 394-395, 314 P.2d 574*

Life insurance proceeds in hands of beneficiary as exempt from execution for debts of beneficiary under former *Code Civ. Proc. § 690.19* [now *Code Civ. Proc. § 704.100*]. *Prudential Ins. Co. v. Beck (1940) 39 Cal. App. 2d 355, 360, 103 P.2d 241*

Former *Code Civ. Proc. § 690* [*now see Code Civ. Proc § 704.010 et seq.*], relating to property exempt from execution, as applying to any judgment debtor or defendant in action in which it is sought to attach or levy on proceeds of life insurance policies in satisfaction of or in anticipation of satisfaction of judgment; each judgment debtor or defendant, or

potential judgment debtor or defendant, as entitled to right to assert allowable exemption under former *Code Civ. Proc. § 690.19* [*now see Code Civ. Proc. § 704.100*] in his behalf in proportion to his interest in total proceeds of life insurance policy. *Jackson v. Fisher (1961) 56 Cal. 2d 196, 200-201, 14 Cal. Rptr. 439, 363 P.2d 479*

[15] Flight insurance

Insurance companies selling flight insurance as not liable on negligence theory based on failure to post written notice and to indicate in bold type on purchaser's receipt and on face of policy that policy contained exclusion or exception whereunder no payment would be made in event of death or injury caused by voluntary act of insured. *Stopp v. Mutual of Omaha Ins. Co. (1970) 4 Cal. App. 3d 239, 241-243, 84 Cal. Rptr. 344*

Insurance companies selling flight insurance through over-the-counter automatic vending machine to passenger who, intending to commit suicide, caused plane to crash as not liable on negligence theory to heirs of other passengers killed in crash. *Galanis v. Mercury Int'l Ins. Underwriters (1967) 247 Cal. App. 2d 690, 694-699, 55 Cal. Rptr. 890*

[16] Inception of Contract

After his completion of application and initial medical examination. *Thompson v. Occidental Life Ins. Co. (1973) 9 Cal. 3d 904, 910-914, 109 Cal. Rptr. 473, 513 P.2d 353*

[17] Insurable Interest

In action brought by life insurance company to challenge policies on ground that they were void as being a "stranger in interest" transaction, summary judgment awarded to defendants; insurer challenged practice of unrelated third parties taking, at outset, a stake in life insurance policies ("STOLI") or investor-owned life insurance ("IOLI"); insurable interest (real or potential beneficial interest) existed when policies issued; however, financing program involving irrevocable trusts that collaterally assigned policies to third parties, "skirts close to the letter, and certainly can be viewed as violating the spirit, of the law." *Lincoln Nat'l Life Ins. Co. v. Gordon R.A. Fishman Irrevocable Life Trust (C.D. Cal. 2009) 638 F. Supp. 2d 1170, 1172-1179*

Insurable interest defined under California law as interest based on reasonable expectation of pecuniary advantage through continued life, health, or bodily safety of another person and consequent loss by reason of that person's death engendered by love and affection in case of individuals closely related by blood or law. *Lincoln Nat'l Life Ins. Co. v. Gordon R.A. Fishman Irrevocable Life Trust (C.D. Cal. 2009) 638 F. Supp. 2d 1170, 1177* (citing *Ins. Code § 10110.1(a)*)

Wife as having insurable interest in life of husband. *Crotty v. Union Mut. Life Ins. Co. (1892) 144 U.S. 621, 627, 12 S. Ct. 749, 36 L. Ed. 566* ; *North British & Mercantile Ins. Co. v. Ingalls (1930) 109 Cal. App. 147, 159, 292 P. 678*

Woman who lived with man who supported her [*Ins. Code § 10110*] in meretricious relationship as having an insurable interest in his life. *Rudell v. Board of Admin. (1937) 8 Cal. 2d 600, 602, 66 P.2d 1203*

Any dependent of insured as having insurable interest in insured's life; *Ins. Code § 10110* as not requiring that dependency should result from legal obligation to support but as resting solely on fact of dependency. *Rudell v. Board of Admin. (1937) 8 Cal. 2d 600, 602, 66 P.2d 1203*

Corporation as having insurable interest in life of its president. *Boldemann Chocolate Co. v. Price (1936) 5 Cal. 2d 200, 202, 53 P.2d 946*

Creditor as having insurable interest in life of debtor. *Curtiss v. Aetna Life Ins. Co. (1891) 90 Cal. 245, 250, 27 P. 211*

Creditor's insurable interest in life of debtor as limited to amount of debt, plus insurance premiums paid, plus interest on those two amounts. *Jimenez v. Protective Life Ins. Co. (1992) 8 Cal. App. 4th 528, 541* E

Illegitimate child as having insurable interest in life of his or her father. *Perry v. Manning (1952) 109 Cal. App. 2d 557, 560, 241 P.2d 43* ; *Turner v. Metropolitan Life Ins. Co. (1943) 56 Cal. App. 2d 862, 866, 133 P.2d 859*

Everyone as having insurable interest in his or her own life. *Mayfield v. Fidelity & Cas. Co. (1936) 16 Cal. App. 2d 611, 621, 61 P.2d 83*

Amount of insurable interest of creditor in life of debtor as being amount of debt; on payment of debt creditor as losing all interest and policy as becoming one for benefit of insured, collectible by his executors or administrators. *Crotty v. Union Mut. Life Ins. Co. (1892) 144 U.S. 621, 623-624, 12 S. Ct. 749, 36 L. Ed. 566*

Person who supports insured and has implied promise from insured to pay forservices as having insurable interest under *Ins. Code § 10110* providing in part that every person has insurable interest in life and health of any person under legal obligation to him for payment of money or respecting property or services of which death or illness might delay or prevent performance. *Jenkins v. Hill (1939) 35 Cal. App. 2d 521, 523-524, 96 P.2d 168*

Veteran's insurable interest in home purchased under contract with California Department of Veterans Affairs as terminated by interlocutory divorce decree awarding property to veteran's wife; hence, insurer as not liable on insurance policy to pay balance of purchase price still owing under contract of sale where veteran dies during interlocutory period. *Decker v. Occidental Life Ins. Co. (1969) 70 Cal. 2d 842, 845, 76 Cal. Rptr. 470, 452 P.2d 686*

Designation of beneficiary in life insurance policy valid in its inception as remaining so, although insurable interest or relationship has ceased. *Shaw v. Board of Admin. (1952) 109 Cal. App. 2d 770, 774, 241 P.2d 635* (disapproved on another point in *Watenpaugh v. State Teachers' Ret. Sys. (1959) 51 Cal. 2d 675, 681, 336 P.2d 165*); *Jenkins v. Jenkins (1931) 112 Cal. App. 402, 405, 297 P. 56*

Named beneficiary as not required to have insurable interest in life of insured who purchases insurance on his own life. *Boyer v. United States Fid. & Guar. Co. (1929) 206 Cal. 273, 279, 274 P. 57* ; see also *Mayfield v. Fidelity & Cas. Co. (1936) 16 Cal. App. 2d 611, 618, 61 P.2d 83* ; *Comegys v. National Union Assurance Soc'y (1935) 3 Cal. App. 2d 637, 639, 39 P.2d 861*

Insurer as only party who can raise question of insurable interest. *Jenkins v. Hill (1939) 35 Cal. App. 2d 521, 524, 96 P.2d 168*

[18] Interest

Computation of interest on life insurance proceeds withheld from beneficiary. *Insurance Co. of N. Am. v. Bechtel (1973) 36 Cal. App. 3d 310, 318-320, 111 Cal. Rptr. 507*

[19] Killing of Insured by Benificiary

District court did not abuse its discretion in precluding named beneficiary of life insurance policy from testifying that she was not involved in insured's murder, nor in drawing adverse conclusion from her assertion of *Fifth Amendment*

privilege against self-incrimination. *Nationwide Life Ins. Co. v. Richards (9th Cir. 2008) 541 F.3d 903, 909-912, 915*

Insured's intent that proceeds of policy should go to person related to killer, if such intent is established, as sufficient to permit award of policy proceeds to that person without violating policy against permitting wrongdoer to profit from wrong; language of *Prob. Code § 252*, providing that policy proceeds become payable "as though the killer had predeceased the decedent," as precluding only inheritance through killer. *State Farm Life Ins. Co. v. Pearce (1991) 234 Cal. App. 3d 1685, 1694, 286 Cal. Rptr. 267*

Former *Prob. Code § 258* [*now see Prob. Code § 250 et seq.*], which prevents unlawful and intentional killer of decedent from succeeding to any portion of estate, applies to beneficiary under insurance contract. *Estate of McGowan (1973) 35 Cal. App. 3d 611, 615, 111 Cal. Rptr. 39*

Public policy as prohibiting beneficiary under life insurance contract who unlawfully kills insured as recovering proceeds of policy. *Drown v. New Amsterdam Cas. Co. (1917) 175 Cal. 21, 23, 165 P. 5* ; *Estate of McGowan (1973) 35 Cal. App. 3d 611, 615, 111 Cal. Rptr. 39* ; see also *Beck v. West Coast Life Ins. Co. (1952) 38 Cal. 2d 643, 644, 241 P.2d 544* ; *New York Life Ins. Co. v. Cawthorne (1975) 48 Cal. App. 3d 651, 653-654, 121 Cal. Rptr. 808*

Insurance proceeds in case of murder or other intentional killing of insured by named beneficiary as payable to insured's estate. *Mize v. Reserve Life Ins. Co. (1975) 48 Cal. App. 3d 487, 491 n. 2, 121 Cal. Rptr. 848* ; see also *Beck v. West Coast Life Ins. Co. (1952) 38 Cal. 2d 643, 645, 241 P.2d 544*

Widow who killed husband as entitled to one-half surrender value of policy,as of date of killing, where policy was purchased with community funds and she was beneficiary. *Manufacturers Life Ins. Co. v. Moore (S.D. Cal. 1953) 116 F. Supp. 171, 177*

Wife as not losing her one-half vested interest in insurance policy, which had been acquired by community funds, on husband's life because of accelerated payment of proceeds resulting from her having killed husband. *New York Life Ins. Co. v. Cawthorne (1975) 48 Cal. App. 3d 651, 655, 121 Cal. Rptr. 808* (declining to rule on whether wife or wife's heir at law would be entitled to those proceeds in an action between them on ground wife had defaulted in action which was in interpleader and hence waived her rights to fund and affirming judgment awarding one-half of policy proceeds to wife's daughter and heir at law as against beneficiary named in policy)

[20] Limitation of Action

Code Civ. Proc. § 354.4, which extends statute of limitations until 2010 for claims arising out of life insurance policies issued to Armenian genocide victims, is preempted by foreign policy of federal executive branch. *Movsesian v. Victoria Versicherung AG (9th Cir. 2009) 578 F.3d 1052, 1053-1056*

Statute of limitations on action by decedent insured's administrators to compel payment of life insurance proceeds to estate rather than to named beneficiary who murdered insured as tolled until judgment against named beneficiary for murder of insured becomes final on affirmance by appellate court. *Mize v. Reserve Life Ins. Co. (1975) 48 Cal. App. 3d 487, 494, 121 Cal. Rptr. 848*

Provision in life insurance policy limiting period of time within which action can be brought on policy after submission of proof of loss, although reasonable, as noneffective where, under facts of case, it would be unreasonable and inequitable to give effect to limitation. *Mize v. Reserve Life Ins. Co. (1975) 48 Cal. App. 3d 487, 495, 121 Cal. Rptr. 848*

[21] Parties to Insurance Contract

Employee insured under group policy secured by employer as party to insurance contract and employer policyholder as agent of insurer. *Insurance Co. of N. Am. v. Bechtel(1973) 36 Cal. App. 3d 310, 318, 111 Cal. Rptr. 507*

[22] Pleading

Trial court's dismissal of class action for damages after sustaining insurer's demurrer to complaint without leave to amend as reversible error where complaint alleged that insurance company promoted and offered home loans secured by trust deeds on condition that borrower purchase life insurance policy and assign it as further security for loan, suggesting illegal tie in agreement violative of *Ins. Code § 790.03*. *Greenberg v. Equitable Life Assurance Soc'y (1973) 34 Cal. App. 3d 994, 998-1001, 110 Cal. Rptr. 470* ; *but see* *Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58* (prospectively overruling *Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, 885-888, 153 Cal. Rptr. 842, 592 P.2d 329* , which allowed private statutory third-party standing)

[23] Premiums

Life insurance company as unable to insist on forfeiture of policy for nonpayment of premium when it has in its possession sufficient dividends accumulated to insured's account to cover premium due. *Gaunt v. Prudential Ins. Co. of Am. (1967) 255 Cal. App. 2d 18, 26-27, 62 Cal. Rptr. 624*

[24] Probate Estate

Proceeds of life insurance policy payable to named individual as not passing through insured's estate. *Prudential Ins. Co. v. Beck (1940) 39 Cal. App. 2d 355, 361, 103 P.2d 241*

Beneficiary under life insurance policy as taking by virtue of contract of insurance rather than by law of succession; proceeds as not becoming part of insured's estate; law of descent and distribution as having no applicability to such cases. *Estate of Welfer (1952) 110 Cal. App. 2d 262, 265, 242 P.2d 655*

While life insurance proceeds payable directly to third-person beneficiary are not properly includable in decedent's estate, estate as having interest in such insurance and as required to include its value to extent that proceeds are payable to or for benefit of estate. *Estate of Adams (1957) 148 Cal. App. 2d 319, 322, 306 P.2d 623* (holding amount of federal old-age insurance payable "to any person or persons, equitably entitled thereto, to the extent and in the proportions that he or they shall have paid the expenses of burial" of the decedent, not to exceed $255, as includible in determining value of estate)

[25] Proof of Death

Purpose and effect of proofs of death in life insurance cases. *Crotty v. Union Mut. Life Ins. Co. (1892) 144 U.S. 621, 626, 12 S. Ct. 749, 36 L. Ed. 566*

[26] Reformation

Under *Civ. Code § 3399*, providing that contract may be reformed for various reasons on application of party aggrieved, aggrieved party as not required to be an original party to transaction; term as including one who has suffered prejudice or pecuniary loss. *Orcutt v. Ferranini (1965) 237 Cal. App. 2d 216, 224, 46 Cal. Rptr. 715*

Reformation of insurance contract based on scrivener's error as not barred by incontestability clause. *Schaeffer v. California-W. States Life Ins. Co. (1968) 262 Cal. App. 2d 840, 845, 69 Cal. Rptr. 183*

Group policy insuring life of key employees and payable entirely to estate of deceased employee as not subject to reformation on ground of mutual mistake where employer intended that one-half of benefits be payable to employer, since deceased must be treated as party to contract and contract correctly recorded his understanding. *Insurance Co. of N. Am. v. Bechtel (1973) 36 Cal. App. 3d 310, 316-317, 111 Cal. Rptr. 507* (noting liability of insurance company to employer for negligence)

Beneficiaries named in life insurance policy as proper parties to enforce cause of action against insurer for reformation of policy after death of insured. *Orcutt v. Ferranini (1965) 237 Cal. App. 2d 216, 218-220, 226, 46 Cal. Rptr. 715*

[27] Remedies

Life insurance is not a service subject to the remedial provisions of Consumers Legal Remedies Act (*Civ. Code § 1750, et seq.*). *Fairbanks v. Superior Court (2009) 46 Cal. 4th 56, 92 Cal. Rptr. 3d 279, 205 P.3d 201, 2009 Cal. LEXIS 3687*

When insured who had been ordered by court, as part of dissolution decree, to maintain life insurance on himself, committed suicide, thereby voiding policy, constructive trust was properly imposed upon insured's estate in favor of insured's ex-wife, who had been beneficiary under policy. *Tintocalis v. Tintocalis (1993) 20 Cal. App. 4th 1590, 1596, 25 Cal. Rptr. 2d 655*

Action for declaratory relief [*Code Civ. Proc. § 1060*], rather than for anticipatory breach of contract [*Civ. Code § 1440*], as appropriate remedy to secure adjudication as to whether union members remained insured under group life insurance policy after cancellation of policy by union and subsequent cancellation of coverage by insurer. *Garage Employees Union v. Pacific Mut. Life Ins. Co. (1969) 2 Cal. App. 3d 706, 711, 82 Cal. Rptr. 821*

Propriety of summary judgment for insurer in class action, brought on behalf of borrowers from finance company, seeking recovery of portion of credit insurance premiums refunded by insurer to finance company. *Keniston v. American Nat'l Ins. Co. (1973) 31 Cal. App. 3d 803, 810-813, 107 Cal. Rptr. 583*

[28] Rescission

Insurer properly rescinded life insurance policy after receiving claim for payment by insured's widower following insured's death, based on two inaccurate answers on application regarding existence of other life insurance policies; because insured's failure to disclose other current insurance policies in application was material to insurer's decision to issue policy, and insurer did not waive right to information of material facts, insurer was entitled to summary judgment. *West Coast Life Ins. Co. v. Ward (2005) 132 Cal. App. 4th 181, 186-188, 33 Cal. Rptr. 3d 319*

Insurer as having right to rescind life insurance policy based on misrepresentations regarding insured's smoking history. *Old Line Life Ins. Co. v. Superior Court (1991) 229 Cal. App. 3d 1600, 1606, 281 Cal. Rptr. 15*

Principle of rescission in life insurance cases [see *Ins. Code § 331*] as recognized where concealment is not result of ignorance. *Thompson v. Occidental Life Ins. Co. (1969) 276 Cal. App. 2d 559, 564-565, 81 Cal. Rptr. 37*

Material misrepresentations regarding medical history of applicant as, under certain circumstances, justifying rescission of life insurance contract under *Ins. Code §§ 330-361*. *Thompson v. Occidental Life Ins. Co. (1973) 9 Cal. 3d 904,*

914, 109 Cal. Rptr. 473, 513 P.2d 353

[29] Retirement Systems

Provisions for death benefits under retirement systems as differing in important respects from ordinary life insurance policies; for example, retirement benefits as completelystatutory in origin, membership in retirement system as compulsory, and requirements for change of beneficiary as not subject to negotiation. *Watenpaugh v. State Teachers' Ret. Sys. (1959) 51 Cal. 2d 675, 681, 336 P.2d 165* ; *see also Estate of Richartz (1955) 45 Cal. 2d 292, 294-295, 288 P.2d 857*

[30] Suicide

Life insurance clause excluding coverage for "suicide, whether sane or insane," within two years of issuance of policy as exempting insurance company from liability only if insured, whether sane or insane at time, committed act of self-destruction with suicidal intent; burden of proving suicide as on insurer; if suicidal intent is negated by determination that insured did not understand physical nature and consequences of act, insurer as liable for full amount of policy. *Searle v. Allstate Life Ins. Co. (1985) 38 Cal. 3d 425, 436-437, 212 Cal. Rptr. 466, 696 P.2d 1308*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawLife InsuranceAccidental DeathGeneral OverviewInsurance LawLife InsuranceAssignments & TransfersInsurance LawLife InsuranceBeneficiariesGeneral OverviewInsurance LawLife InsuranceExclusionsGeneral OverviewInsurance LawLife InsuranceInsurable InterestsGeneral Overview

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§ 308.232 Law Reviews

Comment, *Handling Community Property Claims Against Life Insurance in California: The Modified Risk Payment Theory*, *18 Pac. L.J. 969 (1987)*

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Duesenberg, *Insurer's Tort Liability for Issuing Policy Without Insurable Interest--A Comment, 47 Cal. L. Rev. 64 (1959)*

Comment, *Wrongful Death Liability of Insurance Carrier for Homicide of Insured by Applicant--Beneficiary With No Insurable Interest, 32 S. Cal. L. Rev. 76 (1958)*

Note, *Insurable Interest as Affected by Decree of Divorce, 13 S. Cal. L. Rev. 117 (1939)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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Witkin, Summary of California Law, Vol. 2, *Insurance, §§ 26*, 72 (10th ed. 2005)

Legal Topics:

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§ 308.240 State Statutes

"Accident and sickness insurance" defined. *Ins. Code § 10275*

Binding arbitration. *Health & Safety Code §§ 1363.1, 1373.19*; *Ins. Code §§ 10123.9, 11512.33*

Conversion rights of covered dependent spouse on marriage termination. *Ins. Code §§ 10126, 11512.6*; *Gov. Code § 12532.3*

Construction of disability policies. *Ins. Code § 10176.1*

Catastrophic health insurance. *Health & Safety Code § 123175 et seq.*

Continuation of group benefits for members and dependents (including former spouses, legally separated spouses, and others) following termination of regular coverage. *Health & Safety Code §§ 1373.62, 1373.621*; *Ins. Code §§ 10116.5, 11512.03, 12692*; *Lab. Code § 2800.2*

Coverage for long-term care facility services or home-based care regarding Alzheimer's disease and related progressive, degenerative, and dementing illnesses. *Health & Safety Code § 1373.14*; *Ins. Code §§ 10123.16, 10123.17, 11512.177*

Denial of experimental medical procedure or treatment plan for claimant with terminal illness. *Health & Safety Code § 1368.1*; *Ins. Code §§ 10144.1, 11512.194*

Diethylstilbestrol exposure coverage. *Ins. Code §§ 10119.7, 11512.195*

"Disability insurance" defined. *Ins. Code §§ 100(6), 106*

Discrimination prohibited in issuance, terms, conditions, benefits, or cancellation of disability policies. *Ins. Code § 10140*

Discriminatory practices. *Ins. Code §§ 10140-10142*

Dispute resolution for health care service plan subscribers. Ins. Code §§ 1367, 1368

Effect of Medi-Cal benefits. *Ins. Code § 10117*

Genetic characteristics and genetic testing in insurance underwriting. *Ins. Code §§ 10146-10149.1*

Group disability policies. *Ins. Code §§ 10116, 10122, 10123.1, 10123.9, 10133, 10200*

Health Insurance Disclosure Act of 1974. *Ins. Code §§ 10600-10609*; *see also Ins. Code § 10291.5*

"Health insurance" in statutes effective after 2001, means individual or group disability policy, excluding certain types of insurance. *Ins. Code § 106(b)*

Impaired and insolvent disability insurers (California Life and Health Insurance Guarantee Association Act). *Ins. Code § 1067 et seq.*

Insurance of minors. *Ins. Code §§ 10112, 10118, 10119*; *see also Ins. Code §§ 10702.1, 10719.1*, 10731.1; *Welf. & Inst. Code § 14124.93* (coverage required by child support orders)

Knox-Keene Health Care Service Plan Act of 1975. *Health & Safety Code §§ 1340-1399.5*

Life and disability insurance definitions. *Ins. Code § 10113.2*

Life licensee. *Ins. Code §§ 32, 1622, 1626*

Measure of indemnity. *Ins. Code § 10111*

Medical reimbursement provisions. *Ins. Code §§ 10176, 10176.3*

Mental or nervous disorder coverage. *Ins. Code §§ 10125, 10127, 11512.5*

Maternity benefit provisions. *Ins. Code § 10119.5*

Multiple employer welfare arrangements. *Ins. Code § 742.20 et seq.* (operative until January 1, 2004)

Nonprofit hospital service plans. *Ins. Code §§ 11491-11517, Corp. Code §§ 10840, 10841*

Payment and proceeds. *Ins. Code §§ 10174-10176.3*

Physical therapy services. *Ins. Code §§ 10176.2, 10176.3*

Point-of-service health care service plan contracts. *Health & Safety Code §§ 1374.60-1374.71*

Policy as entire contract. *Ins. Code § 10113*

Proscription against rescission, cancellation, or limitation, or rise in premiums after 24 months following issuance of health care service plain contract. *Ins. Code § 10384.17*

Replacement of group disability insurance and health care service plans (where policy issued and disability occurs after January 1, 1977). *Health & Safety Code §§ 1399.60-1399.64*; *Ins. Code §§ 10123.1, 10128-10128.4*

Replacement of group life and disability insurance. *Ins. Code §§ 10128-10128.4*

Reinstatement after default in payment of premium. Ins. Code §§ 10334, *10350.4*

Respiratory care services. *Ins. Code § 10176.8*

Self-insured employee welfare benefit plans. *Ins. Code §§ 10121 et seq., 10177*

Standards and provisions in disability policies. *Ins. Code §§ 10270-10401*

Sterilization operation or procedure. *Ins. Code § 10120*

"Twenty-four hour coverage." *Ins. Code § 1749.02*

Unconditional coverage requirement for newborn dependents and adopted minor dependents. *Ins. Code § 10119*

Legal Topics:

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§ 308.241 Decisions

[1] Application

Ins. Code §§ 10113 and *10381.5* preclude insurer from raising defense of fraud based on insured's statements in application for insurance, if application had not been attached to or endorsed on policy when issued; insurer may not invoke defense of misrepresentations in or omissions from unattached and unendorsed application. *Ticconi v. Blue Shield of Calif. Life & Health Ins. Co. (2008) 160 Cal. App. 4th 528, 540-541, 72 Cal. Rptr. 3d 888*

Applicant's failure to answer question in application for polio policy as to whether there had been polio in his family in preceding 90 days where truthful answer, if given, would have been "no," as not depriving him of coverage. *Metts v. Central Standard Life Ins. Co. (1956) 142 Cal. App. 2d 445, 451-452, 298 P.2d 621*

Application for insurance as required to be construed as it would be taken by ordinary applicant. *Metts v. Central Standard Life Ins. Co. (1956) 142 Cal. App. 2d 445, 450, 298 P.2d 621* (involving application for special polio insurance)

Recital in receipt given for first month's premium payment with application for sickness and accident insurance policy that policy would be dated and made effective as of date of payment if, in opinion of company's authorized officers, applicant were insurable and acceptable as a standard risk as a condition subsequent, that is as meaning that applicant was covered until rejected; hence applicant injured after making application and before policy was issued or application was rejected as covered despite insurer's subsequent determination that applicant was unacceptable as a standard risk. *Brunt v. Occidental Life Ins. Co. (1963) 223 Cal. App. 2d 179, 181-183, 35 Cal. Rptr. 492*

Applicant's cashing of check for returned premium on rejection of his application for polio insurance as not constituting acknowledgment that no contract of insurance had been entered into or barring him from suing to recover insurance benefits. *Metts v. Central Standard Life Ins. Co. (1956) 142 Cal. App. 2d 445, 453, 298 P.2d 621*

[2] Arbitration

Binding arbitration clause in individual disability insurance policy upheld despite assertedly contrary language in Certificate of Insurance. *Boghos v. Certain Underwriters at Lloyd's of London (2005) 36 Cal. 4th 495, 503-509*

[3] Construction of Policy

Health policy unambiguously stated that benefits were not payable after cancellation of coverage, and that benefits were only payable for covered charges incurred during lifetime of policy, not lifetime of insured; numerous policy provisions regarding termination would be rendered meaningless if policy was interpreted to provide "lifetime" benefits. *Fraker v. Sentry Life Ins. Co. (1993) 19 Cal. App. 4th 276, 284, 23 Cal. Rptr. 2d 372*

Disability insurance policy as construed in favor of insured where two constructions are reasonable. *Schilk v. Benefit Trust Life Ins. Co. (1969) 273 Cal. App. 2d 302, 307, 78 Cal. Rptr. 60*

Judgment against insurer providing plaintiff insured with reimbursement for each of several operations necessarily resulting from plaintiff's accident where insurer contended that policy provided liability for one operation only if as result of injury more than one operation becomes necessary as proper where policy stated that it provided benefits for "surgical operations" that result "from accidental bodily injuries." *Williams v. Seaboard Life Ins. Co. of Am. (1969) 274 Cal. App. 2d 95, 99-100, 78 Cal. Rptr. 597*

Phrase "at or above the wrist" in accident policy defining term "loss of limb" as physical separation of hand at or above the wrist as ambiguous. *Crawford v. Lloyds London (1969) 275 Cal. App. 2d 524, 528, 80 Cal. Rptr. 70*

"Premium due date," in context of group disability insurance, as reasonably interpreted to refer either to date on which group's collective premium is due from employer, or alternatively, to date on which premium is paid by payroll deduction. *Williams v. American Cas. Co. (1971) 6 Cal. 3d 266, 273-274, 98 Cal. Rptr. 814, 491 P.2d 398*

[4] Covenant of Good Faith

State tort action for bad faith handling of disability insurance when plan was part of collective bargaining agreement as required to be treated as *29 U.S.C.S. § 185(a)* (violation of union labor contract) claim, or dismissed as preempted by federal labor-contract law. *Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202, 105 S. Ct. 1904, 85 L. Ed. 2d 206, 221*

Knowing misstatement of definition of total disability under California law to insured claiming under disability policy, and to physician examining insured to determine disability, as constituting bad faith claims practice. *Moore v. American United Life Ins. Co. (1984) 150 Cal. App. 3d 610, 620-621, 637-638, 197 Cal. Rptr. 878*

Disability insurer liable for breach of implied covenant of good faith and fair dealing in failing to properly investigate claim. *Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 819, 157 Cal. Rptr. 482, 598 P.2d 452*

[5] Coverage

Dual role of ERISA plan administrator in both determining eligibility for benefits and paying benefits "out of its own pocket" creates conflict of interest that reviewing court should consider in determining whether plan administrator has abused its discretion in denying benefits. *Metropolitan Life Ins. Co. v. Glenn (2008) 554 U.S. 105, 128 S. Ct. 2343,*

2348-2351, 171 L. Ed. 2d 299

Doctors may not bill patient for emergency services that HMO is obligated to pay; balance billing not permitted. *Prospect Med. Group, Inc. v. Northridge Emergency Med. Group (2009) 45 Cal. 4th 497, 507, 87 Cal. Rptr. 3d 299, 198 P.3d 86*

Pursuant to *Ins. Code § 10123.15*, disability policies must provide same coverage for bipolar disorders as for other brain disorders. *Bosetti v. United States Life Ins. Co. (2009) 175 Cal. App. 4th 1208, 1231-1232, 96 Cal. Rptr. 3d 744 , rev. denied, 2009 Cal. LEXIS 10796 (2009)*

When mental symptoms arise from separate physical causal event, or physical symptoms arise from separate mental causal event, "mental disorder" is necessarily ambiguous, absent dispositively precise definition in disability policy. *Bosetti v. United States Life Ins. Co. (2009) 175 Cal. App. 4th 1208, 1233, 96 Cal. Rptr. 3d 744 , rev. denied, 2009 Cal. LEXIS 10796 (2009)*

Unconditional coverage for newborns required by *Ins. Code § 10119* extends only for 31 days, and insurer's requirement of evidence of insurability (i.e., proof of good health) in any application made after expiration of the 31-day period was not a prohibited limitation of coverage under the statute; insurer could deny coverage when insured waited 49 days after birth before submitting written application for dependent coverage. *Redlands Cmty. Hosp. v. New England Mut. Life Ins. Co. (1994) 23 Cal. App. 4th 898, 908, 28 Cal. Rptr. 2d 582*

Accident insurance covering loss of limbs, and defining "loss" of legs as "actual severance," as not covering loss of use of legs because of spinal injury caused by traffic accident. *Suarez v. Life Ins. Co. of N. Am. (1988) 206 Cal. App. 3d 1396, 1403, 254 Cal. Rptr. 377*

In event of conflict or ambiguity between master policy and individual certificate, terms of certificate as binding on insurer; California law (*Ins. Code § 10128.3(c)*, prohibiting preexisting condition limitations on superseding policies) as applicable to foreign state policy for which certificate of insurance was issued in California. *Cross v. Mutual Benefit Life Ins. Co. (1985) 173 Cal. App. 3d 821, 825-827*

Ins. Code § 10127.15, prohibiting insurance companies from selling nonfreeze disability policies as prospective, not retroactive, in application, covering those holding policies issued or renewed after Jan. 1, 1977, and those disabled after that date. *Union Mut. Life Ins. Co. v. Kinder (1980) 108 Cal. App. 3d 517, 520, 166 Cal. Rptr. 524*

Coverage of discharged employee under employer's group life and disability insurance. *Bareno v. Employers Life Ins. Co. (1972) 7 Cal. 3d 875, 882-886, 103 Cal. Rptr. 865, 500 P.2d 889*

Group accidental-death and dismemberment insurance policy clause providing that coverage terminates on first premium due date following date on which insured ceases to be employee as covering injury suffered on evening of first premium due date following termination. *Green v. American Cas. Co. (1971) 17 Cal. App. 3d 270, 272-273, 94 Cal. Rptr. 528*

Where insurance policy provides that benefits would be payable on proof of loss of sight of both eyes, fact that insured lost sight of only one eye during policy term as not rendering insurer liable under policy without a showing that insurer knew insured had lost sight of other eye many years before policy was issued and had accepted risk. *Glover v. National Life & Accident Ins. Co. (1960) 2 Cal. Rptr. 454*

[6] Definitions

"Disability insurance." *California Physicians' Serv. v. Garrison (1946) 28 Cal. 2d 790, 803, 172 P.2d 4*

"Health care service plan" (HMO) under Knox-Keene Act (*Health & Safety Code § 1340 et seq.*) is any person who undertakes to arrange for provision of health care services to subscribers or enrollees, or to pay for or to reimburse any part of cost for those services, in return for prepaid or periodic charge paid by or on behalf of subscribers or enrollees; HMO not precluded from delegating liability for health care decisions. *Watanabe v. California Physicians' Svc. (2008) 169 Cal. App. 4th 56, 66-67, 86 Cal. Rptr. 3d 374*

"Injury" defined in disability policy as "accidental bodily injury sustained ... directly and independently of disease or bodily infirmity, or any other causes" did not encompass repetitive keyboard typing resulting in carpal tunnel syndrome; typing did not become "accident" merely because cumulative effect of long period of typing was onset of that condition. *Gin v. Pennsylvania Life Ins. Co. (2005) 134 Cal. App. 4th 939, 945-946, 36 Cal. Rptr. 3d 571*

"Violent means." *Horton v. Travelers Ins. Co. (1920) 45 Cal. App. 462, 470-471, 187 P. 1070*

[7] Estoppel

ERISA, when applicable, preempts state estoppel claims; federal equitable estoppel in an ERISA action limited to situations in which wronged party can prove (a) provisions of plan are ambiguous; and (b) oral representations were made to employee; failure to inform insured that insurer would not pay benefits is not enough to satisify ERISA equitable estoppel requirements and insurer therefore was not equitably estopped from invoking a policy provision allowing it to terminate benefit payments under medical insurance plan. *Qualls v. Blue Cross of Cal. (9th Cir. 1994) 22 F.3d 839, 845-846*

In action by employee against employer's group health-plan insurer, arising from insurer's denial of benefits for insured's dependent after agent told insured that dependent was covered but failed to obtain required form until after claim was submitted, plaintiff was entitled to assert estoppel claim; "no-estoppel" rule generally applicable to ERISA claims precludes use of estoppel to create additional coverage that did not otherwise exist under substantive provisions of benefit plan, but estoppel could be used to obtain coverage within scope of benefits offered. *Powell v. General Am. Life Ins. Co. (1990) 221 Cal. App. 3d 817, 821-822, 271 Cal. Rptr. 16*

[8] Exclusions

Preexisting condition exclusion as applicable if condition was manifest to insured at time policy obtained; sickness as manifesting itself when symptoms would cause reasonable person to seek medical consultation; establishment, as matter of law, of preexisting condition within context of policy language as supporting insurer's motion for summary judgment. *Mogil v. California Physicians Corp. (1990) 218 Cal. App. 3d 1030, 1034, 1041, 267 Cal. Rptr. 487*

Long term disability policy excluding coverage for treatment of "mental or nervous disorders" if insured is not confined to institution specializing in that particular disorder, as excluding outpatient treatment for manic depression; manic depression as "mental disorder" within meaning of policy despite characterization as having physical etiology. *Equitable Life Assurance Soc'y v. Berry (1989) 212 Cal. App. 3d 832, 840, 260 Cal. Rptr. 819 , superseded by statute as stated in Bosetti v. United States Life Ins. Co. (2009) 175 Cal. App. 4th 1208, 1229-1232, 96 Cal. Rptr. 3d 744*

Notwithstanding representations in insurer's brochure that hospital policy was supplementary insurance, exclusion in policy respecting benefits insured not required to pay as applicable to benefits paid under Medicare Plan A which is not voluntarily financed but mandatorily financed under contracts between hospital and federal government. *Appleman v. National-Ben Franklin Ins. Co. (1978) 84 Cal. App. 3d 1012, 1014-1015, 149 Cal. Rptr. 117*

Provision in medical and hospital insurance policy excluding hospitalization or medical treatment furnished by or on behalf of federal or state government as excluding only liability for services rendered without charge. *Migliore v. Sheet Metal Workers' Welfare Plan (1971) 18 Cal. App. 3d 201, 205-206, 95 Cal. Rptr. 669*

[9] Federal Preemption

Two-part test to determine whether state law regulates insurance within purview of *ERISA § 514(b)* (*29 U.S.C. § 1144(b)(2)* provides that: (1) state law must be specifically directed toward entities engaged in insurance, and (2) state law must substantially affect risk-pooling arrangement between insurer and insured). *Coast Plaza Doctors Hospital v. Blue Cross of Cal. (2009) 173 Cal. App. 4th 1179, 1187, 93 Cal. Rptr. 3d 479*

In California, health care providers are statutorily required to provide emergency care to patient without regard to patient's ability to pay for care; if patient who receives emergency care is enrollee of health care service plan, *Health & Safety Code § 1371* requires plan to reimburse provider for cost of emergency care, absent certain exceptions. *Coast Plaza Doctors Hospital v. Blue Cross of Cal. (2009) 173 Cal. App. 4th 1179, 1182, 93 Cal. Rptr. 3d 479*

Health & Safety Code § 1371.4 (requiring Knox-Keene plan to reimburse provider for cost of emergency care given to patient who is plan enrollee) is not subject to ordinary preemption under ERISA because it falls under purview of ERISA's saving clause; trial court committed reversible error by sustaining insurer's demurrer to hospital's complaint for recovery of cost of emergency services rendered. *Coast Plaza Doctors Hospital v. Blue Cross of Cal. (2009) 173 Cal. App. 4th 1179, 1189, 93 Cal. Rptr. 3d 479*

[10] Fraudulent Claims

Various paragraphs of *Penal Code § 550(a)* describe different means of committing single crime of insurance fraud; defendant cannot be convicted of multiple violations of § 550(a) for same act. *People v. Zanoletti (2009) 173 Cal. App. 4th 547, 556, 92 Cal. Rptr. 3d 757*

Multiple convictions under *Penal Code § 550(a)* are appropriate when based on different acts of fraud. *People v. Zanoletti (2009) 173 Cal. App. 4th 547, 556-558, 92 Cal. Rptr. 3d 757*

Insurance fraud under *Penal Code § 550* is concerned with means, rather than the end; under *Penal Code § 550(a)(5)*, crime is complete when individual knowingly prepares, makes, or subscribes any writing, with intent to present or use it, or to allow it to be presented, in support of any false or fraudulent claim; under *Penal Code § 550(a)(1)*, crime is complete when fraudulent claim is "presented." *People v. Zanoletti (2009) 173 Cal. App. 4th 547, 560, 92 Cal. Rptr. 3d 757*

Various paragraphs of *Penal Code § 550(a)* describe different means of committing single crime of insurance fraud; defendant cannot be convicted of multiple violations of section 550(a) for same act. *People v. Zanoletti (2009) 170 Cal. App. 4th 1516, 1524-1525, 89 Cal. Rptr. 3d 156*

Penal Code § 550(b)(3), prohibiting concealment or knowing failure to disclose occurrence of event affecting continued right to receive insurance benefit, requires specific intent to defraud. *People v. Blick (2007) 153 Cal. App. 4th 759, 774-775, 63 Cal. Rptr. 3d 260*

[11] Inception of Illness or Disability

Illness or disability as deemed to have its inception when it first becomes manifest or when there is distinctive

symptom or condition from which expert may diagnose disease with reasonable accuracy. *Bower v. Roy-Al Corp. (1973) 33 Cal. App. 3d 1027, 1033, 109 Cal. Rptr. 612*

[12] Incontestability Clause

Disability coverage offered by the Department of Veterans Affairs of the State of California under a Cal-Vet program is not form of insurance subject to Insurance Code and is not subject to provisions of Insurance Code requiring disability policies to include incontestability clause. *Sweatman v. Department of Veterans Affairs (2001) 25 Cal. 4th 62, 68-74, 104 Cal. Rptr. 2d 602, 18 P.3d 29*

Statutory incontestability clause in disability policies (*Ins. Code § 10350.2*), intended to remove fraud as a defense after the passage of two years, controls over nonrequired policy provisions less favorable to insured; *Ins. Code § 10350.2* places effective, mandatory limits on insurer's ability to deny disability benefits on account of preexisting condition, regardless of when the condition first became manifest; if any nonrequired policy provision, such as a definitional provision, is in conflict with any required provision, such as an incontestability clause, insurer's rights, duties and obligations are governed by required provisions. *Galanty v. Paul Revere Life Ins. Co. (2000) 23 Cal. 4th 368, 375, 97 Cal. Rptr. 2d 67, 1 P.3d 658*

[13] Lien on Insurer's Recovery From Tortfeasor

Validity of clause in group health service agreement conditioning benefits on member's agreement to reimburse group for benefits paid on collection of damages and allowing group a lien to extent of benefits provided to be filed with person whose act caused injuries, his agent, or court. *Block v. Cal. Physicians' Serv. (1966) 244 Cal. App. 2d 266, 272-273, 53 Cal. Rptr. 51*

[14] Life and Disability Insurance Compared

Risk assumed by disability insurance policy as different from risk assumed by life insurance contract. *Baine v. Continental Assurance Co. (1942) 21 Cal. 2d 1, 4, 129 P.2d 396*

[15] Notice of Claim

Form A, in *Ins. Code § 10350.5*, relating to disability policies and concerning notice of claim, as not prescribing a 20-day period as a contractual absolute, but as meaning that notice of claim may be given after 20-day period if given as soon as is reasonably possible. *Joyce v. United Ins. Co. (1962) 202 Cal. App. 2d 654, 661, 21 Cal. Rptr. 361*

Failure to give, or delay in giving, required notice of loss under disability insurance policy providing for giving of notice of claim "as soon as practicable," "promptly," "immediately," or in similar language, as not fatal to recovery under policy unless insurer has been prejudiced by such failure or delay. *Joyce v. United Ins. Co. (1962) 202 Cal. App. 2d 654, 662, 21 Cal. Rptr. 361*

Failure of insured to notify defendant insurer of accident in which plaintiff was injureduntil some seven and one-half months later as not barring recovery on policy requiring notice be given as soon as practicable, unless defendant insurer was in fact prejudiced by delay. *Gibson v. Colonial Ins. Co. (1949) 92 Cal. App. 2d 33, 36, 206 P.2d 387* (disapproved on another point in *Campbell v. Allstate Ins. Co. (1963) 60 Cal. 2d 303, 307, 32 Cal. Rptr. 827, 384 P.2d 155*)

[16] Offset of Workers' Compensation Benefits

Disability insurer as entitled to offset only temporary disability benefits received by insured from workers' compensation benefits. *Russell v. Bankers Life Co. (1975) 46 Cal. App. 3d 405, 416, 120 Cal. Rptr. 627*

[17] Policy Provisions

"Total disability" does not signify absolute state of helplessness, but means disability that renders insured unable to perform the substantial and material acts necessary to the prosecution of a business or occupation in usual or customary way. *Hecht v. Paul Revere Life Ins. Co. (2008) 168 Cal. App. 4th 30, 32, 85 Cal. Rptr. 3d 18*

Ins. Code § 10176.2, providing that disability insurance policy may provide that physical therapy services will be paid only if prescribed by physician or surgeon, as not operating to discriminate unreasonably against chiropractors. *California Chiropractic Ass'n v. Board of Admin. (1974) 40 Cal. App. 3d 701, 704-708, 115 Cal. Rptr. 286*

[18] Punitive Damages

Punitive damages as properly awarded when insurer demonstrated bad faith in refusing plaintiff's disability claim by taking inconsistent position that plaintiff was disabled for purpose of determining accuracy of medical policy application but not disabled for purpose of recovery under disability policy. *Austero v. Washington Nat'l Ins. Co. (1982) 132 Cal. App. 3d 408, 418, 182 Cal. Rptr. 919*

Termination of disability payments in disregard of medical report that plaintiff remained disabled and unreasonable delay in resuming payments after medical consultant confirmed plaintiff's inability to work as grounds for punitive damage award. *Pistorius v. Prudential Ins. Co. (1981) 123 Cal. App. 3d 541, 548, 549, 176 Cal. Rptr. 660*

Punitive damage award of $5 million as excessive as matter of law since it was 40 times larger than compensatory damage award and it represented two and one half months of insurer's net income for one year and more than seven months of income for another year. *Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 823-824, 157 Cal. Rptr. 482, 598 P.2d 452*

Knowingly false representation by insurer that insured under health and accident insurance policy would receive lifetime benefit payments under policy in event she was permanently disabled by reason of sickness or injury made to induce insured not to cancel policy and resulting in actual damages to insured (amount of premiums paid for insurance coverage which insurer did not intend to provide as supporting award of punitive damages). *Wetherbee v. United Ins. Co. of Am. (1968) 265 Cal. App. 2d 921, 929-932, 71 Cal. Rptr. 764* (trial court awarded actual damages in sum of $1,050 and punitive damages in amount of $500,000; appellate court held amount of punitive damages awarded was excessive as matter of law and reversed for retrial on issue of amount to be awarded; on retrial jury awarded $200,000 punitive damages and this award was affirmed on appeal [*Wetherbee v. United Ins. Co. of Am. (1971) 18 Cal. App. 3d 266, 95 Cal. Rptr. 678]*)

[19] Question of Fact

Determination of disability as question of fact. *Joyce v. United Ins. Co. (1962) 202 Cal. App. 2d 654, 666, 21 Cal. Rptr. 361* ; see also *McMackin v. Great Am. Reserve Ins. Co. (1971) 22 Cal. App. 3d 428, 436-439, 99 Cal. Rptr. 227*

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Munch, *Which Disability Insurance Policy?* 26(5) Prac. Law. 11 (1980)

Note, *Insurance Contract--Medical Insurer Found in Breach of the Implied Covenant of Good Faith and Fair Dealing by Failure to Make Payments During Pendency of Insured's Claim for Workmen's Compensation Benefits and Was Liable for Physical and Mental Distress Proximately Caused Thereby-- Silberg v. California Life Insurance Co. 11 Cal. 3d 452 , modified, 113 Cal. Rptr. 711, 521 P.2d 1103 (1974) , 15 Santa Clara Lawyer 232 (1974)*

Note, *The Widening Scope of Damages for the Disability Insurer: Fletcher v. Western National Life Insurance Company, 7 Calif. West L. Rev. 496 (1971)*

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§ 308.243 Text References

Witkin, Summary of California Law, Vol. 2, *Insurance, § 27* (10th ed. 2005)

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[Reserved]

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§ 308.250 State Statutes

Cancellation and failure to renew insurance. *Ins. Code §§ 675-679.* Change in use of property not increasing risk. *Ins. Code § 2031*

Disclosures that must be made by insurer regarding residential property insurance provisions. *Ins. Code § 10101 et seq.*

Enumerated. *Ins. Code § 100*

Aircraft. *Ins. Code §§ 100(18), 118*

Automobile. *Ins. Code §§ 100(16), 116*

Boiler and machinery. *Ins. Code §§ 100(11), 111*

Burglary. *Ins. Code §§ 100(12), 112*

Fire. *Ins. Code §§ 100(2), 102*

Marine. *Ins. Code §§ 100(3), 103*

Miscellaneous. *Ins. Code §§ 100(20), 120*

Plate glass. *Ins. Code §§ 100(7), 107*

Sprinkler. *Ins. Code §§ 100(14), 114*

Title. *Ins. Code §§ 100(4), 104*

Effect of transfer of property on insurable interest. *Ins. Code §§ 300-305*

Fair Claims Settlement Practices provisions relating specifically to residential property insurance. *Ins. Code §§ 790.031, 790.034(b), 2071.1, 10082.3*

Insurable interest in property. *Ins. Code §§ 280-287*

Requirement that insurer compute any total loss or damage to specific item of personal property of insured which is separately listed and described and on which item a separate amount of insurance is placed as being amount of insurance placed on it; exclusion of property used for business purpose and motor vehicles; proration of loss if two or more policies insure same property. *Ins. Code § 381.2*

Requirement that insurers offer residential earthquake insurance. *Ins. Code §§ 10081-10088.5*

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§ 308.251 Decisions

[1] In General

Under Washington law, policy language covered not only actual collapse, but also imminent collapse; collapse provision contained additional language indicating intent to extend broader coverage. *Assurance Co. of Am. v. Wall & Assocs. LLC of Olympia (9th Cir. 2004) 379 F.3d 557, 562-563*

Insurer entitled to summary judgment in action by insured for bad faith because insurer's denial of claim for burglarized items was based on insured's fraud in inflating value of stolen property. *Feldman v. Allstate Ins. Co. (9th Cir. 2003) 322 F.3d 660, 670*

Breach of contract claim failed as matter of law when policy explicitly excluded coverage for damage caused by landslide and third-party negligence, and claim's viability depended on existence of that coverage. *Loughney v. Allstate Ins. Co. (S.D. Cal. 2007) 465 F. Supp. 2d 1039, 1043*

Homeowners' policy defining term "collapse" to mean "actually fallen down or fallen into pieces" did not cover imminent collapse of deck attached to house; no public policy overrides express provision of policy. *Rosen v. State Farm Gen. Ins. Co. (2003) 30 Cal. 4th 1070, 1073-1075, 135 Cal. Rptr. 2d 361, 70 P.3d 351* (distinguished from *Doheny W. Homeowners' Ass'n v. Am. Guarantee & Liab. Ins. Co. (1997) 60 Cal. App. 4th 400, 402-403, 70 Cal. Rptr. 2d 260* , in which policy did not specifically define "collapse"); *see also Jordan v. Allstate Ins. Co. (2004) 116 Cal. App. 4th 1206, 1221-1222, 11 Cal. Rptr. 3d 169*

Builder's risk policy providing first-party coverage during course of construction, and covering "direct physical loss to Covered Property from any covered loss," did not cover damages to structure caused by earth movement; loss fell within "earth movement" exclusion. *Roberts v. Assurance Co. of America (2008) 163 Cal. App. 4th 1398, 1406, 78 Cal. Rptr. 3d 361*

Although insurer's interpretation of policy exclusion for wet or dry rot was reasonable, it also had duty to investigate insured's claim based on additional coverage provisions relating to entire collapse of structure, which appellate court had held, in prior related case, was also reasonable and consistent with insured's objectively reasonableexpectations. *Jordan v. Allstate Ins. Co. (2007) 148 Cal. App. 4th 1062, 1074, 56 Cal. Rptr. 3d 312*

Commercial policy that provided coverage only for "direct physical loss" to property did not cover loss resulting from destroyed computer data after computer "crash." *Ward Gen. Ins. Servs. v. Employers Fire Ins. Co. (2003) 114 Cal. App. 4th 548, 556-557, 7 Cal. Rptr. 3d 844*

Insurers not required by public policy or common-law duty to investigate fitness of pilots specifically authorized by policy to operate insured aircraft. *American Cont'l Ins. Co. v. C & Z Timber Co. (1987) 195 Cal. App. 3d 1271, 1277-1279, 241 Cal. Rptr. 466* (summary judgment for insurer upheld)

Action to recover on insurance policy covering loss of aircraft. *Executive Aviation, Inc. v. National Ins. Underwriters (1971) 16 Cal. App. 3d 799, 805-810, 94 Cal. Rptr. 347*

Insurance policy as not insuring property but interest in property of person for whose benefit policy is issued and who is named in it as the insured. *Benton v. Cravens, Dargan & Co. (1961) 188 Cal. App. 2d 637, 643, 10 Cal. Rptr. 740*

[2] Aircraft Policies

Policy insuring private airplane that required insurer to pay for physical damage to aircraft, including disappearance of aircraft, provided coverage for reimbursement of expenses reasonably incurred to prevent further physical loss after government seizure when no probable cause was found to seize airplane in subsequent civil forfeiture proceeding. *American Alternative Ins. Corp. v. Superior Court (2006) 135 Cal. App. 4th 1239, 1248-1249, n.2, 37 Cal. Rptr. 3d 918* (also involving endorsement deleting exclusion of coverage for government seizure)

Damages proximately caused by fueling of aircraft are within coverage of aircraft insurance policy that covers damages arising out of use or maintenance of aircraft. *Transport Indem. Co. v. Schnack (1982) 131 Cal. App. 3d 149, 151-154, 182 Cal. Rptr. 256*

Provision in helicopter insurance policy excluding damage "due and confined to" mechanical failure did not preclude recovery for damage to hull of helicopter that crashed when fan blade in engine component sheared off and traveled backward through engine, causing engine failure, but did preclude recovery for damage to engine. *Cobb v. Home & Auto. Ins. Co. (1978) 86 Cal. App. 3d 673, 679, 150 Cal. Rptr. 370*

[3] All-Risk Homeowners' Policy

All-risk homeowners' policy expressly excluded coverage for loss of value of house caused by unfinished renovation project, pursuant to exclusion of coverage for loss caused by inadequate repair, construction, renovation, or remodeling. *Wilson v. Farmers Ins. Exch. (2002) 102 Cal. App. 4th 1171, 1174-1177, 126 Cal. Rptr. 2d 305*

[4] Burden of Proof

In action on "all-risks" policy as opposed to "specific peril" policy, insurer has burden of proving insured's loss was proximately caused by peril specifically excluded from coverage. *Pieper v. Commercial Underwriters Ins. Co. (1997) 59 Cal. App. 4th 1008, 1018-1020, 69 Cal. Rptr. 2d 551* (homeowners policy); *Southern Ins. Co. v. Domino of Cal.,*

Inc. (1985) 173 Cal. App. 3d 619, 626, 219 Cal. Rptr. 112 (involving action by insurer against insured for declaratory relief concerning loss of business merchandise); *Strubble v. United Servs. Auto. Ass'n (1973) 35 Cal.App. 3d 498, 504, 110 Cal. Rptr. 828* (involving homeowners all-risks of physical loss insurance policy)

In action on policy to recover for loss of aircraft, insured has burden of proving contract of insurance and its terms, as well as loss, and insurer has burden of bringing itself within any exculpatory clause contained in policy. *Executive Aviation, Inc. v. National Ins. Underwriters (1971) 16 Cal. App. 3d 799, 806, 94 Cal. Rptr. 347*

[5] Condominium Insurance

Because condominium owner's insurance policy covered real property items that "are your insurance responsibility as expressed or implied under the governing rules of the condominium," and insured submitted claim for water damage to walls andfloors, demurrer to complaint for breach of contract and bad faith on ground of no coverage as matter of law was properly sustained, based on assertion that damaged items were not insured's "insurance responsibility" under homeowners association rules; however, court should have allowed insured to amend complaint because whether property damage was insured's implied responsibility under homeowner association rules and whether damage was to "improvements" were issues open to interpretation. *Palacin v. Allstate Ins. Co. (2004) 119 Cal. App. 4th 855, 864-868*

[6] Construction of Policy

Meaning of "sue and labor clause." *Young's Mkt. Co. v. American Home Assurance Co. (1971) 4 Cal. 3d 309, 313-315, 93 Cal. Rptr. 449, 481 P.2d 817*

In "California Special Multi-Peril Policy" issued to business, "business income" provision (business-interruption clause) led ordinary insured to conclude that, in event of covered loss that forced complete suspension of its business operations, policy would cover any lost profits; if there were no lost profits, policy would cover ongoing expenses incurred during period of suspension. *Amerigraphics, Inc. v. Mercury Cas. Co. (2010) 182 Cal. App. 4th 1538, 1551-1554, 107 Cal. Rptr. 3d 307*

In "California Special Multi-Peril Policy" issued to business, "business income" provision (business-interruption clause) covered both elements stated in policy definition, i.e., that insured was entitled to recover both net income and continuing normal operating expenses without having to offset one against the other. *Amerigraphics, Inc. v. Mercury Cas. Co. (2010) 182 Cal. App. 4th 1538, 1548, 1554, 107 Cal. Rptr. 3d 307*

Under a property insurance policy, insurer is not liable for reimbursing investigation costs incurred by insured when investigation ultimately discloses no covered loss, unless there is policy language requiring reimbursement. *McMillin Scripps N. P'ship v. Royal Ins. Co. (1993) 19 Cal. App. 4th 1215, 1220-1221, 23 Cal. Rptr. 2d 243*

All-risk policy excluding loss caused by mere disappearance of property, or loss or shortage of property disclosed on taking inventory, was not vague or ambiguous, and did not require construction against insurer. *Southern Ins. Co. v. Domino of Cal., Inc. (1985) 173 Cal. App. 3d 619, 624, 219 Cal. Rptr. 112*

Interpretation of "necessity of destruction" in insurance policy covering loss from death of race horse. *Donnelly v. Underwriting Members of Lloyd's (1942) 51 Cal. App. 2d 739, 742-743, 125 P.2d 530*

Duty of insured to prevent and mitigate insurable loss and obligation of insurer to reimburse for expenses so incurred were separate questions; fulfillment of duty to mitigate gives rise to obligation of reimbursement under sue and labor clause if mitigation expenses are for primary benefit of insurer and not incidental to insured's obligation to mitigate. *Southern Cal. Edison Co. v. Harbor Ins. Co. (1978) 83 Cal. App. 3d 747, 759, 148 Cal. Rptr. 106*

Interpretation of policy when evidence is uncontradicted is solely a judicial function; reviewing court not bound by trial court's interpretation. *Graydon-Murphy Oldsmobile v. Ohio Cas. Ins. Co. (1971) 16 Cal. App. 3d 53, 57, 93 Cal. Rptr. 684*

[7] Exclusions

Property insurance policy containing vacancy exclusion with exception for "building under construction" may cover water damage that occurred while building was vacant during renovations to existing structure; "construction" cannot reasonably be understood to be limited only to erection of new structures. *TRB Invs., Inc. v. Fireman's Fund Ins. Co. (2006) 40 Cal. 4th 19, 22-23, 31, 50 Cal. Rptr. 3d 597, 145 P.3d 472* (reversing summary judgment for insurer, and remanding for proceedings consistent with opinion)

Exclusion in homeowner's policy precluding coverage for bodily injury or propertydamage arising out of sale or transfer of real property, including known or unknown property defects, precluded defense duty and coverage regarding claims brought against insured sellers of real property by purchasers, alleging personal injury and property damage based on negligence, fraud, and contract breach with regard to construction and design defects. *Davis v. Farmers Ins. Group (2005) 134 Cal. App. 4th 100, 106-107, 35 Cal. Rptr. 3d 738* ("course of construction" policy converted to homeowner's policy and second homeowner's policy)

Exclusion in commercial lines policy from coverage for "water that backs up from" sewer or drain encompassed exclusion from coverage for sewage that inevitably accompanies water in sewer; damage resulting from clogged sewer line that caused raw sewage to flow into basement was therefore not covered under policy terms covering discharge of "pollutants" caused by discharge of water directly resulting from breaking of part of system containing water. *Penn-Am. Ins. Co. v. Mike's Tailoring (2005) 125 Cal. App. 4th 884, 890-893, 22 Cal. Rptr. 3d 918*

If multiple causes of commercial property loss were both excluded under policy, and insured articulated no other possible cause, summary judgment finding no coverage was proper; efficient proximate cause of loss was excluded peril. *Alex R. Thomas & Co. v. Mutual Serv. Cas. Ins. Co. (2002) 98 Cal. App. 4th 66, 76, 119 Cal. Rptr. 2d 394*

[8] Multiple Causes of Loss

"Weather conditions" clause, excluding coverage for losses incurred when weather conditions contribute to loss caused by an excluded peril, did not violate *Ins. Code § 530* with respect to exclusion of coverage under "open peril" policy for damage to home caused by rain-induced landslide, under particular policy language and facts of case. *Julian v. Hartford Underwriters Ins. Co. (2005) 35 Cal. 4th 747, 761, 27 Cal. Rptr. 3d 648, 110 P.3d 903*

Existence of coverage when loss caused by multiple perils, both included and excluded under policy, in context of first-party property damage, is determined by whether covered peril was "efficient proximate cause" of loss. *Garvey v. State Farm Fire & Cas. Co. (1989) 48 Cal. 3d 395, 402-404, 257 Cal. Rptr. 292, 770 P.2d 704* ; *Sabella v. Wisler (1963) 59 Cal. 2d 21, 31-32, 27 Cal. Rptr. 689, 377 P.2d 889* ; *see also Alex R. Thomas & Co. v. Mutual Serv. Cas. Ins. Co. (2002) 98 Cal. App. 4th 66, 72, 119 Cal. Rptr. 2d 394*

By specifying in water-damage exclusion that even though water damage caused by sudden and accidental release of water is covered, mold resulting from that damage is not, all-risk homeowners' policy clarified that mold damage caused by sudden and accidental release of water is excluded peril; water-damage exclusion did not violate *Ins. Code § 530* or "efficient proximate cause" doctrine. *DeBruyn v. Superior Court (2008) 158 Cal. App. 4th 1213, 70 Cal. Rptr. 3d 652, 2008 Cal. App. LEXIS 45* , p.22

"Efficient proximate cause" rule of *Garvey v. State Farm Fire & Cas. Co. (1989) 48 Cal. 3d 395, 402-404, 257 Cal. Rptr. 292, 770 P.2d 704* , applies retroactively; rule is not new rule of law, and appellate cases to contrary misconstrue statutory ruleunder *Ins. Code §§ 530* and *532*. *La Bato v. State Farm Fire & Cas. Co. (1989) 215 Cal. App. 3d 336, 343, 263 Cal. Rptr. 382*

Efficient proximate cause analysis did not apply when excluded risk of brush fire was caused by covered risk of arson, because efficient proximate cause analysis applies only when there are separate and distinct perils, either of which could have independently caused damage, and does not apply when there is single cause of damage that can be characterized in two different ways, i.e., brush fire or arson. *Pieper v. Commercial Underwriters Ins. Co. (1997) 59 Cal. App. 4th 1008, 1018-1020, 69 Cal. Rptr. 2d 551* ; *see* *Penn-Am. Ins. Co. v. Mike's Tailoring (2005) 125 Cal. App. 4th 884, 891-892, 22 Cal. Rptr. 3d 918* (efficient proximate cause analysis did not apply because loss resulted from single cause)

[9] Rental Dwelling Insurance

Insurer had no duty to defend insured in defamation suit filed by deputy sheriff based on insured's defamatory statements that sheriff had strip searched her, because arrest followed violent domestic argument in insured's own dwelling between her and her co-insured husband concerning insured rental property under rental dwelling policy (held by landlords insuring rental property); insufficient causal relationship between defamatory statements and insured property. *Turner v. State Farm Fire & Cas. Co. (2001) 92 Cal. App. 4th 681, 689-690, 112 Cal. Rptr. 2d 277*

[10] Tort Cause of Action

Under policy obtained by homeowners' association insuring common areas of condominium complex, insurer owed no duty of care to individual unit owners; individual owners had no negligence cause of action against insurer based on insurer's delay in funding repairs to insured structures and facilities, which delayed owners' ability to repair their own units. *Adelman v. Associated Int'l Ins. Co. (2001) 90 Cal. App. 4th 352, 366-370, 108 Cal. Rptr. 2d 788*

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Brady, Andris and Fisher, *Insurance Coverage Concerns in California Continuous Property Loss Cases After Prudential-LMI, 31 Santa Clara L. Rev. 851 (1991)*

Mattis, *Earth Movement Claims Under All Risk Insurance: The Rules Have Changed in California, 31 Santa Clara L. Rev. 29 (1991)*

Herr, *Commercial and Residential Property and Liability Insurance*, 17 Real Prop. Prob. & Tr. J. 633 (1982)

Schaefle, Builders Risk Insurance, 17 Real Prop. Prob. & Tr. J. 661 (1982)

Comment, *The Judicial Approach to "Accidental Means" Policies in California, 13 Hastings L.J. 255 (1961)*

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§ 308.253 Text References

California Insurance Law and Practice, Chs. 35 and 36 (Matthew Bender).

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Fire insurance defined. *Ins. Code §§ 100(2), 102*

Open policies. *Ins. Code §§ 410, 411, 2051, 2051.5*

Running policies. *Ins. Code § 413*

Valued policies. *Ins. Code §§ 410, 412*

Cancellation and renewal of policies. *Ins. Code §§ 675-679.6, 2074.8*

Fire insurance contract. *Ins. Code § 2070 et seq.*; see also *Ins. Code §§ 380-392*

Insurer's notice requirement regarding applicable statute of limitation after filing of claim, if loss due to corrosive soils. *Ins. Code § 2070.1*

Standard form fire insurance policy. *Ins. Code § 2071*

Insureds' rights regarding examination under oath, applicable to *Ins. Code § 2071* and other policies containing similar examination provision, if policy originates or is renewed after December 31, 2001. *Ins. Code § 2071.1*

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§ 308.261 Decisions

[1] Appraisal

If insurer and insured disagree about amount of loss, parties must participate in informal appraisal proceeding in which each party selects a competent and disinterested appraiser, who together must then select a competent and disinterested umpire, unless appraisers cannot agree, in which case court appoints appraiser. *Mahnke v. Superior Court (2009) 180 Cal. App. 4th 565, 103 Cal. Rptr. 3d 197, 2009 Cal. App. LEXIS 2036, *6* , citing *Ins. Code § 2071*

If insurer and insured disagree about amount of loss, ensuing appraisal proceedings must conform to procedural requirements of Arbitration Act. *Mahnke v. Superior Court (2009) 180 Cal. App. 4th 565, 103 Cal. Rptr. 3d 197, 2009 Cal. App. LEXIS 2036, *9*

Requirement that each party select "competent and disinterested appraiser" pursuant to *Ins. Code § 2071*, incorporated into every fire insurance policy issued in California, constitutes contractual agreement between parties to select neutral arbitrators. *Mahnke v. Superior Court (2009) 180 Cal. App. 4th 565, 103 Cal. Rptr. 3d 197, 2009 Cal. App. LEXIS 2036, *14*

Disclosure requirements in *Code Civ. Proc. § 1281.9* and relevant ethics standards for neutral arbitrators apply only to jointly selected or court-appointed, proposed neutral arbitrator, or, in contested appraisal proceedings, the competent and disinterested umpire; there is no automatic and unlimited right of disqualification for disclosures of competent and disinterested appraisers selected by parties in appraisal proceedings pursuant to *Ins. Code § 2071*. *Mahnke v. Superior Court (2009) 180 Cal. App. 4th 565, 103 Cal. Rptr. 3d 197, 2009 Cal. App. LEXIS 2036, *20-23*

Judgment that does not conform to appraisal award made pursuant to *Ins. Code § 2071*, on which it is based, violates *Code Civ. Proc. § 1287.4*. *Devonwood Condominium Owners Assn. v. Farmers Ins. Exchange (2008) 162 Cal. App. 4th 1498, 1506-1507, 77 Cal. Rptr. 3d 88*

Appraisal proceeding under *Ins. Code § 2071* is an arbitration; appraiser in fire-insurance appraisal proceeding has arbitral immunity from liability for negligence based on allegations of not adequately representing insured's interests with respect to crucial issue of "replacement cost"; litigation privilege under *Civ. Code § 47(b)* does not apply to prevent a party from suing its own expert witness, even if that suit is based on the expert's testimony, and therefore does not protect appraiser from negligence claims raised by insured with respect to appraiser's role as expert hired by insured. *Lambert v. Carneghi (2008) 158 Cal. App. 4th 1120, 1129-1134, 1144, 70 Cal. Rptr. 3d 626*

[2] Arson

In action by insured against insurance company for breach of contractual duty of good faith, arson charge on which insured was acquitted as not tolling four-year statute of limitations on bringing actions, and insurer as granted summary judgment based on running of statute. *Hartford Accident & Indem. Co. v. Superior Court (1981) 121 Cal. App. 3d 249, 252-255, 175 Cal. Rptr. 282*

Agent as having no authority under general power of attorney to commit arson. *Nuffer v. Insurance Co. of N. Am. (1965) 236 Cal. App. 2d 349, 355, 45 Cal. Rptr. 918*

Recovery on fire insurance policy as not defeated by fact that loss for which recovery is sought resulted from intentional burning by insured's agent of property covered by policy, unless insured personally participated in arson or ratified it or agent would benefit substantially from recovery on policy. *Erlin-Lawler Enters., Inc. v. Fire Ins. Exch. (1968) 267 Cal. App. 2d 381, 384, 73 Cal. Rptr. 182* ; *Nuffer v. Insurance Co. of N. Am. (1965) 236 Cal. App. 2d 349, 354-355, 45 Cal. Rptr. 918*

When corporation may recover on policy where fire was deliberately set by its officer or shareholder. *Erlin-Lawler Enters., Inc. v. Fire Ins. Exch. (1968) 267 Cal. App. 2d 381, 385-386, 73 Cal. Rptr. 182*

Innocent joint tenant as denied recovery under policy where fire was set by other joint tenant. *Erlin-Lawler Enters., Inc. v. Fire Ins. Exch. (1968) 267 Cal. App. 2d 381, 386, 73 Cal. Rptr. 182*

Innocent partners and joint venturers as barred from recovery under policy where arson was perpetrated by partner or joint venturer. *Erlin-Lawler Enters., Inc. v. Fire Ins. Exch. (1968) 267 Cal. App. 2d 381, 386, 73 Cal. Rptr. 182*

Innocent spouse as not barred from recovery under policy covering his or her separate property where arson was perpetrated by other spouse but as barred where property burned was community property. *Erlin-Lawler Enters., Inc. v. Fire Ins. Exch. (1968) 267 Cal. App. 2d 381, 386, 73 Cal. Rptr. 182*

[3] Construction of Policy

"Actual cash value" as used in *Ins. Code § 2071*, setting forth required policy provisions, as meaning fair market value. *Jefferson Ins. Co. v. Superior Court (1970) 3 Cal. 3d 398, 402, 90 Cal. Rptr. 608, 475 P.2d 880* ; *Elliano v. Assurance Co. of Am. (1975) 45 Cal. App. 3d 170, 179, 119 Cal. Rptr. 653*

Insurer of holder of life estate on residence and insurer of trust holding remainder interest properly pro rated benefits after destruction of home by fire, based on relative insured interests of parties, pursuant to "other insurance" provisions in policies; multiple insureds cannot recover more than value of property destroyed on fire insurance claim resulting from single occurrence. *Burns v. California FAIR Plan Assn. (2007) 152 Cal. App. 4th 646, 656-659, 61 Cal. Rptr. 3d 809*

"Actual cash value," as used in loss settlement provision of *Ins. Code § 2071*, is synonymous with fair market value, and insurer therefore may not use replacement cost less depreciation to determine actual cash value, unless insurer and insured have agreed to use this method to value damage to property. *Cheeks v. California Fair Plan Ass'n (1998) 61 Cal. App. 4th 423, 425-429, 71 Cal. Rptr. 2d 568*

Insurer's submission to suit under service of suit provision as not barring insurer from reliance on *Ins. Code § 2071* standard Appraisal Clause because there is no connection between the two clauses. *Appalachian Ins. Co. v. Rivcom Corp. (1982) 130 Cal. App. 3d 818, 827-828, 182 Cal. Rptr. 11*

Ins. Code §§ 2070-2080, relating to fire insurance, as inapplicable to business interruption insurance provided for in fire insurance policy. Apparel City Sewing *Mach. Co. v. Transamerica Ins. Group (1982) 129 Cal. App. 3d 400, 409, 181 Cal. Rptr. 64*

In construing ambiguous fire insurance policy, coverage as extending to dwelling and personal property when face sheet of policy failed to clearly exclude personal property and insured could reasonably expect such coverage from other terms of contract. *Hurd v. Republic Ins. Co. (1981) 113 Cal. App. 3d 250, 253, 169 Cal. Rptr. 675*

Meaning, nature, and effect of coinsurance clause in fire insurance policy. *Los Angeles Mut. Ins. Co. v. Cawog (1973) 30 Cal. App. 3d 378, 385-386, 106 Cal. Rptr. 307*

Civ. Code § 1668, providing that contracts exempting anyone from responsibility for his own fraud or willful injury or violation of law, whether willful or negligent, are against policy of law, as not intended to provide that owner or other person interested in property could not insure premises against damage by fire caused by his own negligence. *Sacramento-Yolo Port Dist. v. Cargill of Cal., Inc. (1970) 4 Cal. App. 3d 1004, 1012, 84 Cal. Rptr. 822*

[4] Duties of Insured

Insureds could not maintain breach of contract action against insurer for closing claim for loss of home based on insureds' failure to submit to examinations under oath, because reasons for failure to appear were legally insufficient excuses that did not raise triable issue; related bad faith claim could not survive summary judgment motion because of genuine dispute as to insurer's liability, insurer's denial of claim based on insureds' refusal to submit to examination, and investigation showing arson. *Cook v. Allstate Ins. Co. (C.D. Cal. 2004) 337 F. Supp. 2d 1206, 1214-1218*

Summary adjudication for insurer proper in action by insured for contract breach based on denial of claim of loss of residence following fire; local fire department and fire investigation company concluded that fire was deliberately set; insured failed to comply with insurer's requests for proof of loss, including timely statement of loss, detailed damages claim, property inventory, and relevant receipts and records; insured also failed to submit to examination under oath; insured's purported reliance on alleged advice of counsel in refusing to answer insurer's questions and failing to supply requested documentation did not excuse her failure to comply with policy conditions requiring her to supply that information. *Abdelhamid v. Fire Ins. Exch. (2010) 182 Cal. App. 4th 990, 1000-1008, 106 Cal. Rptr. 3d 26*

Under commercial lines policy insuring against fire, "Functional Building Valuation" endorsement obligating insurer to pay repair cost or replace building, on condition that insured contract for repair or replacement within 180 days after loss (otherwise obligating insurer to pay market value), operated despite insured's failure to meet condition, when insurer's dilatory conduct caused delay; insurer estopped to assert180-day contracting condition as bar to benefits. *City of Hollister v. Monterey Ins. Co. (2008) 165 Cal. App. 4th 455, 491, 499, 81 Cal. Rptr. 3d 72*

Insured's compliance with policy requirement to submit to examination under oath is prerequisite to right to receive benefits under policy; insured's failure, six months after insurer's initial request for examination under oath, to propose

any dates for examination, to respond in timely manner to insurer's proposed dates, and to submit to examination, legally constituted refusal to submit to examination under oath; insured's noncompliance bars contract and bad faith actions. *Brizuela v. CalFarm Ins. Co. (2004) 116 Cal. App. 4th 578, 587-595, 10 Cal. Rptr. 3d 661*

Failure of named insured to submit to examination under oath, pursuant to policy requirements, barred action against insurer brought by purported assignee of vandalism claim; showing of resulting prejudice by insurer unnecessary, because submission to examination is condition precedent to duty to pay on claim. *California Fair Plan Ass'n v. Superior Court (2004) 115 Cal. App. 4th 158, 166, 8 Cal. Rptr. 3d 746*

[5] Gratuitous Repair of Damage by Third Person

Fact that repairing of fire loss may cost insured nothing or that insured may, if property is destroyed by fire, compel another person to replace destroyed property without expense to him, or that he may recoup his loss by resort to a contract liability of a third person, as in no way affecting liability of insurer, in absence of any exemption in policy, to pay insured for loss in accordance with terms of policy. *Hughes v. Potomac Ins. Co. (1962) 199 Cal. App. 2d 239, 250-251, 18 Cal. Rptr. 650*

[6] Interest

In action on fire insurance policy, interest on recovery as ordinarily allowed from time when loss was due and payable and amount was determined or was capable of being made certain by calculation. *Atlantic Mut. Ins. Co. v. Cooney (1962) 303 F.2d 253, 270*

When evidence in action on fire insurance policy shows total loss of property insured and compliance with all terms of policy on part of insured, except such as have been waived by insurer, interest as properly included on amount of obligation due under terms of policy from date when loss was payable. *Jacobs v. Farmers' Mut. Fire Ins. Co. (1935) 5 Cal. App. 2d 1, 11, 41 P.2d 960*

Prejudgment interest from date insurance proceeds should have been paid as recoverable under *Civ. Code § 3287* in action by insured against insurer under earthquake damage provision of fire policy for damage to insured's building from earthquake where insurer did not dispute liability but only amount of loss, ultimate jury award to insured conformed closely to amount claimed in proofs of loss, and prior to suit parties had all of the knowledge and all of the means of knowledge of the extent of the loss which was available to them or to the court or jury on the subsequent trial of the case. *Koyer v. Detroit Fire & Marine Ins. Co. (1937) 9 Cal. 2d 336, 345-346, 70 P.2d 927*

Denial of insured's motion for prejudgment interest in action on fire policy as prejudicial error where dispute between parties essentially involved insurer's denial of coverage and not manner of computation of loss. *Esgro Cent., Inc. v. General Ins. Co. of Am. (1971) 20 Cal. App. 3d 1054, 1060-1062, 98 Cal. Rptr. 153*

[7] Lessor-Lessee

When lessee contracts with lessor for latter to maintain fire insurance andobtain waiver of subrogation clauses in its policies, in very nature of transaction absolution of risk of loss from lessee's own negligence as prime purpose of contract. *Sacramento-Yolo Port Dist. v. Cargill of Cal., Inc. (1970) 4 Cal. App. 3d 1004, 1012, 84 Cal. Rptr. 822*

Fire insurance policy purchased by lessor for mutual benefit of lessor and lessee as not excluding coverage for fires caused by negligence of lessee and hence insurer as having no right to recover from lessee sums it paid lessor on account of fire loss resulting from lessee's negligence. *Gordon v. J.C. Penney Co. (1970) 7 Cal. App. 3d 280, 283-285,*

86 Cal. Rptr. 604

Failure of employer-lessee to maintain insurance as agreed as breach of lease giving rise to liability measured by damage suffered from failure to secure indemnity from promised insurance. *Davidson v. Welch (1969) 270 Cal. App. 2d 220, 236-237, 75 Cal. Rptr. 676*

Where there is agreement for insurance between parties standing in relationship of lessor and lessee and party obligated in violation of his agreement procures insurance payable to himself alone, other party for whose benefit agreement was made as having equitable lien on proceeds of such insurance. *Davidson v. Welch (1969) 270 Cal. App. 2d 220, 237, 75 Cal. Rptr. 676*

[8] Limitations Period

Denial of coverage, even if phrased as "representation" that policy does not cover insured's claim, or words to that effect, offers no grounds for estopping insurer from raising statute of limitations defense. *Vu v. Prudential Prop. & Cas. Ins. Co. (2001) 26 Cal. 4th 1142, 1153, 113 Cal. Rptr. 2d 70 , reaffirming Neff v. New York Life Ins. Co. (1947) 30 Cal. 2d 165, 180 P.2d 900*

Insurer may be estopped from raising one-year statute of limitations defense under *Ins. Code § 2071* if insured can show that insured refrained from bringing timely action because insured reasonably relied on insurer's factual misrepresentation that damages were less than policy's deductible amount. *Vu v. Prudential Prop. & Cas. Ins. Co. (2001) 26 Cal. 4th 1142, 1153, 113 Cal. Rptr. 2d 70* (answering certified question from 9th Cir. involving earthquake damage claim after 1994 Northridge earthquake; not deciding whether district court erred in sustaining insurer's motion for summary judgment)

One-year contractual limitation period (*see Ins. Code 2071*) is tolled to time insurer formally denies claim in writing; one-year period equitably tolled because insurer had never denied claim in writing. *Aliberti v. Allstate Ins. Co. (1999) 74 Cal. App. 4th 138, 145-149, 87 Cal. Rptr. 2d 645 , see also Prudential-LMI Commercial Ins. v. Superior Court (1990) 51 Cal. 3d 674, 678, 798 P.2d 1230*

[9] Loss Recoverable

Policy containing exclusion at variance with *Ins. Code § 2071*, and excluding loss caused by enforcement of "ordinance or law regulating construction" (code upgrades), provided for "replacement cost" rather than "actual cash value"; policy covered costs of replacement home of substantially similar construction that is functional equivalent of home lost or portion of home destroyed, even if changes in building codes result in higher loss settlement than "cost to repair or replace" property with "material of like kind and quality" within "reasonable time after" loss, without "allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair" as provided in *Ins. Code § 2071*. *Fire Ins. Exch. v. Superior Court (2004) 116 Cal. App. 4th 446, 458, 462-466, 10 Cal. Rptr. 3d 617*

Replacement cost under fire insurance policy included cost of replacing a damaged building by purchasing another building at a different location; ordinary and popular sense of policy provisions did not support insurer's interpretation of policy; policy was ambiguous at best on meaning of replacement cost, and that ambiguity would be construed against insurer. *Conway v. Farmers Home Mut. Ins Co. (1994) 26 Cal. App. 4th 1185, 1191-1192, 31 Cal. Rptr. 2d 883*

In action by insureds against insurer under homeowner's policy, arising from claim submitted for fire damage to insured's garage, insurer as obligated to pay cost of rebuilding wooden floor, rather than constructing reinforced and substantially more expensive concrete floor required by municipal building code, when "loss settlement clause"

provided for "replacement cost of that part of the building damaged for equivalent construction and use on the same premises." *McCorkle v. State Farm Ins. Co. (1990) 221 Cal. App. 3d 610, 614, 615, 270 Cal. Rptr. 492*

Policy of insurance as a contract of indemnity against actual loss and insured as entitled to recover under open policy such loss as he has actually sustained not exceeding sum stipulated. *Whitney Estate Co. v. Northern Assurance Co. of London (1909) 155 Cal. 521, 524, 101 P. 911*

Loss as difference between fair market value of property immediately before fire and its fair market value immediately after fire. *Jefferson Ins. Co. v. Superior Court (1970) 3 Cal. 3d 398, 402, 90 Cal. Rptr. 608, 475 P.2d 880* ; *Elliano v. Assurance Co. of Am. (1975) 45 Cal. App. 3d 170, 179, 119 Cal. Rptr. 653*

Insured owner of building as entitled to receive gross loss of rents by reason of fire without any deduction for supposed expenses of collecting them where policy indemnified owner in specified sum on its rents and provided that, if building be rendered untenantable by fire, insurer shall be liable to insured for actual loss of rent ensuing therefrom based on rentals in force from rented portions at time of fire, not exceeding sum insured, to be computed from date of fire for time it would require to put premises in tenantable condition; if not strictly a valued policy, such policy as nevertheless analogous to valued policy insofar as it prescribes method for determining, as between parties, amount of loss. *Whitney Estate Co. v. Northern Assurance Co. of London (1909) 155 Cal. 521, 522-526, 101 P. 911*

Interest accruing on construction loan during time required to repair and restore building in construction partially destroyed by fire as not an element of "actual cash value of the property at the time of loss" and as not recoverable from insurer under fire policy providing that insurer "does insure the named insured ... to the extent of the actual cash value of the property at the time of the loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality, ... without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all LOSS BY FIRE ..." and separately provided "This policy insures against all risks of direct physical loss to ... Building[s]. ..." *Bergren v. Premier Ins. Co. (1976) 56 Cal. App. 3d 273, 275, 128 Cal. Rptr. 452*

[10] Mortgagee Clause in All-Risk Policy

Loss payable clause patterned after ISO Standard Mortgagee Clause is standard loss payable clause. *Home Sav. of Am. v. Continental Ins. Co. (2001) 87 Cal. App. 4th 835, 841, 104 Cal. Rptr. 2d 790*

Mortgagee was covered under insured's all-risk policy with respect to intentional demolition of residence, which was part of overall renovation and development of property by non-insured third party owner, following transfer of title without mortgagee's knowledge; loss was fortuitous as to mortgagee because policy did not exclude loss caused by intentional demolition of residence by third party, and mortgagee did not approve or ratify destruction of residence. *Home Sav. of Am. v. Continental Ins. Co. (2001) 87 Cal. App. 4th 835, 850-852, 855, 104 Cal. Rptr. 2d 790*

Sufficiency of complaint by insured owner of bar and restaurant damaged by fire against three companies which insured premises against fire loss for breach of duty of good faith and fair dealing. *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 575, 108 Cal. Rptr. 480, 510 P.2d 1032*

[11] Proof of Loss

Purpose of proofs of loss in fire insurance cases. *Crotty v. Union Mut. Life Ins. Co. (1892) 144 U.S. 621, 626, 12 S. Ct. 749, 36 L. Ed. 566*

Failure of fire insurer to object to proof of loss on ground it was not made by insured as waiver of objection. *Greco v.*

Oregon Mut. Fire Ins. Co. (1961) 191 Cal. App. 2d 674, 685, 12 Cal. Rptr. 802

Willful misrepresentation [*see Penal Code § 550*] by one partner of insured partnership to insurance company with respect to claim under fire insurance policy, which under *Ins. Code § 2071* (standard form of fire insurance) voids policy, as imputed to innocent copartner so as to bar latter's recovery under policy. *Zemelman v. Boston Ins. Co. (1970) 4 Cal. App. 3d 15, 17-18, 84 Cal. Rptr. 206*

In absence of fraud on part of insured, court as carefully examining evidence regarding failure to furnish proof of loss by fire so as to avoid forfeiture of legitimate claims merely because of technical omissions. *Elliano v. Assurance Co. of Am. (1970) 3 Cal. App. 3d 446, 449, 83 Cal. Rptr. 509*

[12] Rescission

Pursuant to *Ins. Code §§ 331, 359*, insurer may rescind fire insurance policy based on insured's negligent or unintentional misrepresentation of material fact in insurance application, notwithstanding willful misrepresentation clause included in required standard form fire insurance policy. *Mitchell v. United Nat'l Ins. Co. (2005) 127 Cal. App. 4th 457, 472-474, 479,25 Cal. Rptr. 3d 627* ; *see also Ins. Code §§ 2070, 2071*

[13] Subrogation

Where fire loss occurs during redemption period after trustee sale by second mortgagees and named insureds as entitled to share insurance proceeds where they repaired damage and were thus subrogated to right of first mortgagee to recover fire insurance proceeds. *Scheidle v. Joergensen (1970) 10 Cal. App. 3d 139, 142-143, 88 Cal. Rptr. 723*

[14] Warranties

Provision in fire insurance policy that "This policy being written at a reduced rate based on the protection of the premises by an automatic sprinkler system, it is a condition of this policy that, so far as the sprinkler system and the water supply therefor are under the control of the insured, due diligence shall be used by the insured to maintain them in complete working order ..." as warranty within meaning of *Ins. Code §§ 441, 442*, and *445*. *Holz Rubber Co., Inc. v. American Star Ins. Co. (1975) 14 Cal. 3d 45, 55-56 n.11, 120 Cal. Rptr. 415, 533 P.2d 1055*

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§ 308.262 Law Reviews

Moless, *Fire Insurance Covenants in Deeds of Trust: Death of Contract?, 16 Lincoln L. Rev. 97 (1986)*

Comment, *Good Faith and Fire Insurance Contracts, 22 U.C.L.A. L. Rev. 847 (1975)*

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Witkin, Summary of California Law, Vol. 2, *Insurance, § 120, 122* (10th ed. 2005)

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§ 308.270 State Statutes

[1] Definitions

"Burglary." *Penal Code §§ 459, 460*

"Burglary insurance." *Ins. Code §§ 100(12), 112*

[2] Policies

Cancellation and renewal. *Ins. Code §§ 675-679.6*

Robbery. *Penal Code §§ 211, 212.5*

Theft. *Penal Code §§ 484, 486 et seq.*

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§ 308.271 Decisions

"Vehicle theft exclusion" in jeweler's block insurance policy was ambiguous with respect to exclusion for loss from "[t]heft from any vehicle unless, you, an employee, or other person whose only duty is to attend to the vehicle are actually in or upon such vehicle at the time of the theft"; insured was behind running vehicle inspecting suspicious noise when thief entered vehicle and drove away with jewels inside vehicle. *E.M.M.I., Inc. v. Zurich Am. Ins. Co. (2004) 32 Cal. 4th 465, 470-474, 9 Cal. Rptr. 3d 701, 84 P.3d 385*

Definition of "payroll" as used in payroll robbery policy. *MacGruer v. Fidelity & Cas. Co. (1928) 89 Cal. App. 227, 229, 264 P. 501*

Words "theft," "robbery," and "pilferage" as used in insurance policies in their c ommon and ordinary meaning. *Granger v. New Jersey Ins. Co. (1930) 108 Cal. App. 290, 294, 291 P. 698*

Act of taking car from automobile dealer on pretext of trying it out and never returning with car as "theft" within meaning of automobile insurance policy insuring against theft, robbery, and pilferage. *Granger v. New Jersey Ins. Co. (1930) 108 Cal. App.290, 295-296, 291 P. 698*

Purchase of stolen car as no more a "theft" within meaning of insurance policy than was subsequent taking of vehicle by police as agents for rightful owner. *Jackson v. Teachers Ins. Co. (1973) 30 Cal. App. 3d 341, 344-345, 106 Cal. Rptr. 208*

Insurance policy affording "outside robbery" protection to wholesale diamond merchant and excluding premises protection as not covering robbery of office safe. *Siegman v. Orion Ins. Co. (1971) 16 Cal. App. 3d 533, 536-538, 94 Cal. Rptr. 80*

Salesman's floater insurance policy covering jewelry salesman for robbery of jewels from automobile when insured was "actually in or upon" his vehicle and jewelry was in his "personal custody" as not covering theft of insured's automobile and jewelry in its trunk approximately 30 seconds after insured left it to ask directions and while he was only two or three feet away from car. *Revesz v. Excess Ins. Co. (1973) 30 Cal. App. 3d 125, 128-129, 106 Cal. Rptr. 166*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceCoverageRisk of CrimeInsurance LawProperty InsuranceExclusionsGeneral Overview

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§ 308.272 Text References

28 Cal. Jur. 2d, *Insurance*, §§ 466-471

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[Reserved]

§§ 308.273[Reserved]

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Cancellation and renewal of policies. *Ins. Code §§ 675-679.6, 2074.8*

Coverage against fire peril, required provisions. *Ins. Code §§ 2070, 2070.1*

Earthquake insurance, requirement that insurer offer. *Ins. Code §§ 10082-10089*

Open policies. *Ins. Code §§ 410, 411*

Required provisions (loss, appraisal, adjusters) in residential property insurance (*Ins. Code § 10087*); policies, endorsements, or certificates of insurance regarding earthquake coverage (*Ins. Code § 10020 et seq.*); and basic residential earthquake policies (*Ins. Code § 10089.5 et seq.*). *Ins. Code § 10082.3* (applicable to policies originated or renewed after December 31, 2001)

Revival of insurance cause of action based on damages arising out of 1994 Northridge earthquake, otherwise barred because of expired limitations period. *Code Civ. Proc. § 340.9*

Running policies. *Ins. Code § 413*

Valued policies. *Ins. Code §§ 410, 412*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsCancellation & NonrenewalGeneral OverviewInsurance LawProperty

InsuranceCoverageNatural PhenomenaInsurance LawProperty InsuranceCoverageReal PropertyFire InsuranceInsurance LawProperty InsuranceHomeowners InsurancePersonal Property

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§ 308.281 Decisions

[1] Burden of Proof

In action on homeowners policy to recover for damage allegedly caused by earthquake, insurer as having burden of proving that loss was caused by earth movement or landslide rather than by earthquake, where policy insured plaintiffs against all risks of physical loss, subject only to certain specific exclusions, including movement other than earthquake. *Strubble v. United Servs. Auto. Ass'n (1973) 35 Cal. App. 3d 498, 503-505, 110 Cal. Rptr. 828*

[2] Cancellation of Policy

Ins. Code § 10086.5, prohibiting cancellation of policy because insured accepted earthquake insurance, as applicable prospectively only; insurer that issued homeowner's policy essentially to enable homeowner to close escrow, prior to enactment of *Ins. Code § 10086.5*, and informed insured that dwelling did not qualify for earthquake coverage under its usual underwriting standards and that policy would probably be cancelled if insured ultimately accepted mandatory offer of earthquake coverage, as entitled to cancel policy on insured's acceptance of that coverage, pursuant to *Ins. Code §§ 10082* and *10086*, which allow insurer to utilize usual underwriting standards in issuing insurance that includes earthquake coverage. *Williams v. State Farm Fire & Cas. Co. (1989) 216 Cal. App. 3d 1540, 1548-1549, 265 Cal. Rptr. 644*

[3] Construction of Policy

Provision in property insurance policy covering "loss or damage caused by or resulting from risks of direct physical loss involving collapse of a building or any part of a building" covered both actual and imminent collapse, but did not cover "substantial impairment of structural integrity." *Doheny W. Homeowners' Ass'n v. American Guarantee & Liab.*

Ins. Co. (1997) 60 Cal. App. 4th 400, 403-409, 70 Cal. Rptr. 2d 260

Exclusion for automobile-related activities in homeowners policy as applicable unless independent nonvehicular conduct also occurs. *National Indem. Co. v. Farmers HomeMut. Ins. Co. (1979) 95 Cal. App. 3d 102, 108, 157 Cal. Rptr. 98*

Although earthquake itself is a specific peril, earthquake endorsement providing coverage of this peril in homeowners all-risks insurance policy which otherwise excluded damages resulting from earth movement as not changing "all-risks" nature of policy, since coverage must be construed broadly and exclusions narrowly. *Strubble v. United Servs. Auto. Ass'n (1973) 35 Cal. App. 3d 498, 505 n.6, 110 Cal. Rptr. 828*

[4] Coverage

Insurer under homeowners' policy had no duty to defend insured in underlying suit alleging that insured acted under unreasonable belief of self-defense while hitting and kicking plaintiff; acts did not constitute "accident," and policy excluded intentional acts; insured's unreasonable belief in need for self-defense does not turn resulting purposeful and intentional act of assault and battery into "accident" within policy coverage. *Delgado v. Interinsurance Exch. of Auto. Club of So. Cal. (2009) 47 Cal. 4th 302, 305, 317, 97 Cal. Rptr. 3d 298, 211 P.3d 1083*

"Weather conditions" clause, excluding coverage for losses incurred when weather conditions contribute to loss caused by an excluded peril, did not violate *Ins. Code § 530* with respect to exclusion of coverage under "open peril" policy for damage to home caused by rain-induced landslide, under particular policy language and facts of case. *Julian v. Hartford Underwriters Ins. Co. (2005) 35 Cal. 4th 747, 761, 27 Cal. Rptr. 3d 648, 110 P.3d 903*

Existence of coverage when loss caused by multiple perils, both included and excluded under policy, in context of first-party property damage, as determined by whether covered peril was "efficient proximate cause" of loss. *Garvey v. State Farm Fire & Cas. Co. (1989) 48 Cal. 3d 395, 402, 257 Cal. Rptr. 292, 770 P.2d 704* (damage to dwelling allegedly caused by negligent construction (covered) and soil subsidence (excluded)); *see also Sabella v. Wisler (1963) 59 Cal. 2d 21, 31-32, 27 Cal. Rptr. 689, 377 P.2d 889* (damage to dwelling allegedly caused by water-pipe leakage (covered) and soil settlement (excluded))

Homeowners' all-risk policy excluded coverage of extensive water damage that occurred years after contractor drove nail through pipe while hanging drywall, ultimately resulting in corrosion and leaking; policy excluded coverage of damage caused by third parties' negligent conduct and defective workmanship whenever they interact with an excluded peril; and policy excluded perils of corrosion and continuous or repeated seepage or leakage of water. *Freedman v. State Farm Ins. Co. (2009) 173 Cal. App. 4th 957, 962-963, 93 Cal. Rptr. 3d 296 , citing Julian v. Hartford Underwriters Ins. Co. (2005) 35 Cal. 4th 747, 27 Cal. Rptr. 3d 648, 110 P.3d 903*

Efficient proximate cause doctrine applies only when two or more conceptually distinct perils combine to cause the loss; when loss was caused by only a single cause, albeit one susceptible to various characterizations, efficient proximate cause analysis has no application; concealment of ancient landslide is not a conceptually distinct peril apart from ancient landslide itself. *Roberts v. Assurance Co. of America (2008) 163 Cal. App. 4th 1398, 1409, 78 Cal. Rptr. 3d 361*

By specifying in water-damage exclusion that even though water damage caused by sudden and accidental release of water is covered, mold resulting from that damage is not, all-risk homeowners' policy clarified that mold damage caused by sudden and accidental release of water is excluded peril; water-damage exclusion did not violate *Ins. Code § 530* or "efficient proximate cause" doctrine. *DeBruyn v. Superior Court (2008) 158 Cal. App. 4th 1213, 1224, 70 Cal. Rptr. 3d 652*

Under commercial property insurance policy, coverage for "hidden decay" not otherwise defined in policy covers progressive physical deterioration, rather than just decay caused by rot, unless other policy terms limit coverage. *Stamm Theatres, Inc. v. Hartford Cas. Ins. Co. (2001) 93 Cal. App. 4th 531, 534, 542-543, 113 Cal. Rptr. 2d 300*

"Brush fire" exclusion in all risks policy was clear and unambiguous in context of case involving fire that swept through seven miles of chaparral area, because homeowners were aware that they lived in high risk area for brush fires, were unable to find coverage that did not exclude brush fire damage, and considered brush fire exclusion to be problem with policy. *Pieper v. Commercial Underwriters Ins. Co. (1997) 59 Cal. App. 4th 1008, 1016-1018, 69 Cal. Rptr. 2d 551*

Test for latent defect or inherent vice is whether or not defect was apparent by reasonable inspection; however, for purposes of determining whether such defects are excluded from coverage under homeowner's policy, test includes reasonable inspection with expert assistance. *Chadwick v. Fire Ins. Exch. (1993) 17 Cal. App. 4th 1112, 1126, 21 Cal. Rptr. 2d 871*

Loss in the form of diminished market value, allegedly due to fact that insured home was in a landslide area, is not recoverable under all-risk homeowners policy; diminution in value is not a covered peril; insuring land values is illegal in California under *Ins. Code § 12660*. *Hoffman v. State Farm Fire & Cas. Co. (1993) 16 Cal. App. 4th 184, 191, 19 Cal. Rptr. 2d 809*

Under homeowner's policy containing natural groundwater and earth movement exclusion, but not excluding third-party negligence, "efficient proximate cause" of structural damage due to earth movement caused by combination of third-party negligence and resultant rising groundwater levels, as third-party negligence under facts (therefore affording coverage). *State Farm Fire & Cas. Co. v. Von Der Lieth (1991) 54 Cal. 3d 1123, 1131-1135, 2 Cal. Rptr. 2d 183, 820 P.2d 285*

"Concurrent proximate cause" rule regarding coverage when loss caused by both covered and excluded perils, as applicable only to third-party liability context, and as inapplicable in first-party property damage context. *Garvey v. State Farm Fire & Cas. Co. (1989) 48 Cal. 3d 395, 410-413, 257 Cal. Rptr. 292, 770 P.2d 704*

Existence of coverage when loss caused by both included and excluded perils, in context of first-party loss, as determined by whether covered peril was "prime or moving cause" of loss. *Brooks v. Metropolitan Life Ins. Co. (1945) 27 Cal. 2d 305, 309-310, 163 P.2d 689* (regarding death of insured caused by fire in house (covered) and insured's disease of cancer (excluded))

Under all-risk homeowner's policy, insurer as having no duty to defend or to indemnify regarding underlying action arising from sale of property based on alleged misrepresentations of insured regarding property boundaries and legality of patio construction; injured party as improperly seeking, in effect, to convert tortfeasor's homeowner's policy to title policy. *Warner v. Fire Ins. Exch. (1991) 230 Cal. App. 3d 1029, 1032-1037, 281 Cal. Rptr. 635*

Damage to concrete foundation, caused by corrosive attack of sulfates and chlorides, as excluded from coverage under all-risk homeowner's policy, pursuant to exclusion of loss due to "seepage or leakage of water," "wear and tear," "deterioration," "inherent vice, latent defect," or "contamination." *Butki v. United Servs. Auto. Ass'n (1990) 225 Cal. App. 3d 464, 466-467, 274 Cal. Rptr. 909*

Homeowner's policy as excluding coverage for damage caused by broken pipe initially caused by gradual corrosion of pipe metal exposed to acidic soil, under exclusion regarding "deterioration." *Murray v. State Farm Fire & Cas. Co. (1990) 219 Cal. App. 3d 58, 64-65, 268 Cal. Rptr. 33*

Exclusionary provisions of property-insurance policies as unenforceable to extent that they purport to limit insurers' liability beyond what is permitted by *Ins. Code § 530* and its interpreting cases. *Howell v. State Farm Fire & Cas. Co. (1990) 218 Cal. App. 3d 1446, 1456, 267 Cal. Rptr. 708* ; *see* *Julian v. Hartford Underwriters Ins. Co. (2005) 35 Cal. 4th 747, 754, 27 Cal. Rptr. 3d 648, 110 P.3d 903*

Issue of efficient proximate cause for purposes of determining coverage in multiple causation cases as question of fact for jury. *Howell v. State Farm Fire & Cas. Co. (1990) 218 Cal. App. 3d 1446, 1459, 267 Cal. Rptr. 708*

Homeowner's policy excluding coverage for damage from "continuous or repeated seepage or leakage" from plumbing system as excluding coverage for leakage damage initially caused by sudden break in pipe; break, which alone would have constituted covered peril, as not distinct from leakage for purposes of determining "efficient proximate cause." *Finn v. Continental Ins. Co. (1990) 218 Cal. App. 3d 69, 72-73, 267 Cal. Rptr. 22*

In bad faith action for denial of coverage based on claim arising from cracks in foundation and floor of dwelling, summary judgment for insurer as proper when all three asserted causes of damage--earth movement, contaminated soil, and third-party negligence--were excluded under homeowner's policy. *Brodkin v. State Farm Fire & Cas. Co. (1989) 265 Cal. Rptr. 710*

Under all-risk homeowner's policy, exclusion of loss resulting from earth movement as precluding coverage for damage to deck through removal of lateral support, resulting from flooded creek that caused departure of portion of insured's backyard. *La Bato v. State Farm Fire & Cas. Co. (1989) 215 Cal. App. 3d 336, 340-343, 263 Cal. Rptr. 382*

Under property insurance policy issued to condominium homeowners' association, latent defect, which was excluded peril, as efficient cause of loss, precluding coverage under *Garvey*; "diminution of value" as not covered peril (invoking coverage under multiple-causation rule), but rather as mere measure of loss or damage. *State Farm Fire & Cas. Co. v. Superior Court (1989) 215 Cal. App. 3d 1435, 1445, 264 Cal. Rptr. 269*

Under "all-risk" homeowner's policy covering soil stabilization, insurer not entitled to offset for amounts paid by municipality in incomplete effort to stabilize land; insurer also not entitled to pro rate benefits to insured with benefits paid to neighboring homeowners by their respective insurers for cost of soil stabilization, in absence of clear and conspicuous policy provision to that effect. *Strickland v. Federal Ins. Co. (1988) 200 Cal. App. 3d 792, 802-803, 246 Cal. Rptr. 345*

"All-risk" homeowner's policy as including coverage for damage caused by continuing geological hazard of earth movement resulting from ancient landslide underneath house, including structural damage to house, ruptured gas lines, and possible total collapse during earthquake or rainstorm; coverage includes cost of stabilizing underlying soil. *Strickland v. Federal Ins. Co. (1988) 200 Cal. App. 3d 792, 801-802, 246 Cal. Rptr. 345*

When earth slide following heavy rainfall, excluded peril, that resulted in destruction of insured's home would not have occurred if subdrain under home had not been damaged; was damage to drain, covered peril, concurrent proximate cause of loss; insurer liable under policy. *Premier Ins. Co. v. Welch (1983) 140 Cal. App. 3d 720, 728, 189 Cal. Rptr. 657 , overruled in part,* *Garvey v. State Farm Fire & Casualty Co. (1989) 38 Cal. 3d 395, 399, 257 Cal. Rptr. 292, 770 P.2d 704*

When loss occurs through concurrence of covered and uncovered risks, insurer's liabilityunder policy as depending on whether of not efficient cause of loss (cause that sets other causes in motion) is covered peril; if so, insurer is liable under policy even though other exempted causes also contribute to loss. *Premier Ins. Co. v. Welch (1983) 140 Cal. App. 3d 720, 725, 189 Cal. Rptr. 657 , disapproved,* *Garvey v. State Farm Fire & Casualty Co. (1989) 48 Cal. 3d 395, 410-412, 257 Cal. Rptr. 292, 770 P.2d 704*

Twelve-inch drop of masonry wall, accompanied by open breaks in wall and decommissioning of house's heating system, which took place suddenly without warning or previous visible indication of such drastic consequences, and resulted from house having been built on fill and improperly compacted soil, was not "normal" settling within meaning of exclusionary clause of comprehensive dwelling insurance policy. *Prickett v. Royal Ins. Co. Ltd. (1961) 56 Cal. 2d 234, 237-238, 14 Cal. Rptr. 675, 363 P.2d 907*

[5] Earthquake Insurance

Code Civ. Proc. § 340.9 revives all claims against insurer that are "on the policy" in accordance with *Ins. Code § 2071*, including breach of contract, bad faith, negligence, and negligent and intentional misrepresentation (in this case, all state law claims). *Campanelli v. Allstate Life Ins. Co. (9th Cir. 2003) 322 F.3d 1086, 1096-1097* (not deciding whether § 340.9 revives RICO claim); *but see* 20th *Century Ins. Co. v. Superior Court (2001) 90 Cal. App. 4th 1247, 1268, 109 Cal. Rptr. 2d 611* (*Code Civ. Proc. § 340.9* revives breach of contract and bad faith claims, but not fraud claims because they are not covered by one-year limitations period of *Ins. Code § 2071*)

Insurer that paid $1.5 million settlement to insured homeowners' association for damage to structures caused by Northridge earthquake, could not require insured to rescind settlement agreement and repay $1.5 million (which it had already spent on repairs) before bringing later claims of fraud based on understating policy limits by $7 million, contract breach, and bad faith; precedents holding that plaintiff cannot avoid fraudulently induced contract of release without rescinding contract and restoring money paid as consideration for release, do not apply to contract for settlement and release of insurance claims, when insurer is alleged to have induced the settlement by misrepresenting policy limits. *Village Northridge Homeowners Assn. v. State Farm Fire Casualty Co. (2007) 157 Cal. App. 4th 1416, 1421, 1427, 69 Cal. Rptr. 3d 551*

Code Civ. Proc. § 340.9 revives lawsuit that was terminated after demurrer was sustained without leave to amend solely on statute of limitations grounds, and then dismissed without prejudice; if demurrer to complaint is sustained without leave to amend solely by virtue of statute of limitations, and time for direct attack on judgment has passed, case is final, but not "litigated to finality" under *Code Civ. Proc. § 340.9(d)(1)*. *Mid-Century Ins. Co. v. Superior Court (2006) 138 Cal. App. 4th 769, 776-777, 41 Cal. Rptr. 3d 833*

Insurer's reopening and reconsideration of insured's Northridge earthquake claim at insured's request seven years after claim was settled (because structure could not be repaired for settlement sum) equitably tolled revived one-year period under *Code Civ. Proc. § 340.9*. *Ashou v. Liberty Mut. Fire Ins. Co. (2006) 138 Cal. App. 4th 748, 761-764, 41 Cal. Rptr. 3d 819* (not deciding whether equitable tolling renders suit timely); *see also* *Prudential-LMI Commercial Ins. v. Superior Court (1990) 51 Cal. 3d 674, 693, 274 Cal. Rptr. 387, 798 P.2d 1230*

Code Civ. Proc. § 340.9 does not obligate insurer to investigate and adjust new Northridge earthquake damage claims presented in 2001 without regard to actions insurer may have taken on claims relating to same property originally presented in 1994. *Lincoln Fountain Villas Homeowners Ass'n v. State Farm Fire & Cas. Ins. Co. (2006) 136 Cal. App. 4th 999, 1005-1006, 39 Cal. Rptr. 3d 345*

Because both insurer and insured condominium homeowners' association inspected damage after Northridge earthquake and concluded that it was largely cosmetic and totaled amount less than deductible, and because insured consequently withdrew its claim in 1994, it could not cite *Code Civ. Proc. § 340.9* eight years later to support claims for contract breach and bad faith; statute did not create any rights for insured beyond expansion of filing period for claims it would otherwise have. *1231 Euclid Homeowners Ass'n v. State Farm Fire & Cas. Co. (2006) 135 Cal. App. 4th 1008, 1020-1021, 37 Cal. Rptr. 3d 795*

Code Civ. Proc. § 340.9 does not revive action if complaint lacked factual allegations sufficient to survive demurrer.

Davaloo v. State Farm Ins. Co. (2005) 135 Cal. App. 4th 409, 419, 37 Cal. Rptr. 3d 528 (original complaint for contract breach and bad faith, filed at end of revival period, lacked factual allegations and failed to mention statute)

Requirement under *Code Civ. Proc. § 340.9*, that insured had contacted "representative" of insurer regarding potential Northridge earthquake claim before year 2000, was met because insured contacted insurer's "producer," who wrote the policy, and reported losses shortly after earthquake. *Arocho v. California Fair Plan Ins. Co. (2005) 134 Cal. App. 4th 461, 472, 36 Cal. Rptr. 3d 200*

Code Civ. Proc. § 340.9 does not preclude Northridge earthquake victims from obtaining equitable relief from statutory limitation period of *Ins. Code § 2071*; insured may raise equitable estoppel against insurer's limitations defense following expiration of one-year extension period under § 340.9. *Doheny Park Terrace Homeowners Ass'n, Inc. v. Truck Ins. Exchange (2005) 132 Cal. App. 4th 1076, 1095, 34 Cal. Rptr. 3d 157* ; *Cordova v. 21st Century Ins. Co. (2005) 129 Cal. App. 4th 89, 106*

Code Civ. Proc. § 340.9 does not preclude victims of Northridge earthquake from obtaining equitable relief from statutory limitation period of *Ins. Code § 2071*; insured allowed to raise equitable estoppel against insurer's limitations defense following expiration of one-year extension period under § 340.9. *Cordova v. 21st Century Ins. Co. (2005) 129 Cal. App. 4th 89, 108-109*

Insured permitted to state cause of action against CIGA for violation of *Ins. Code § 1063 et seq.* (payment of claims of insolvent insurers) by alleging CIGA denied insured's Northridge earthquake claim revived by *Code Civ. Proc. § 340.9* against insurer declared insolvent after effective date of § 340.9. *Berger v. California Ins. Guarantee Ass'n (2005) 128 Cal. App. 4th 989, 1002-1005, 27 Cal. Rptr. 3d 583*

Code Civ. Proc. § 340.9 merely reopened filing window, for one-year period, to otherwise viable cases that had become time-barred, but did not affect any other defenses that insurer might have to insured's claim; statute does not revive cause of action on ground that settlement was void because of fraud and duress; defense of prior settlement and release is not affected by operation of statute. *Rosenblum v. Safeco Ins. Co. (2005) 126 Cal. App. 4th 847, 859-861, 24 Cal. Rptr. 3d 427* (no evidence of fraud or duress in settlement proceedings)

Pursuant to *Code Civ. Proc. § 340.9(d)(2)*, relief under *Code Civ. Proc. § 340.9* does not apply if insurer and insured entered into written settlement agreement and insured was represented by counsel admitted to California bar who signed agreement; cause of action filed within one-year statutory extension period against insurer for bad faith, contract breach, injunction, and related torts was therefore barred by statute of limitations because represented insured had previously entered into settlement agreement of class action suit against that insurer regarding insurer's handling of deductible amounts on policies. *Israel-Curley v. California Fair Plan (2005) 126 Cal. App. 4th 123, 128-129, 24 Cal. Rptr. 3d 1*

Because owner assigned insurance proceeds to lender under deed of trust, lender had rightto control disbursement of any insurance policy obtained by owner; lender had right to control earthquake insurance proceeds. *JEM Enters. v. Washington Mut. Bank (2002) 99 Cal. App. 4th 638, 645, 121 Cal. Rptr. 2d 458*

Code Civ. Proc. § 340.9 does not apply to damage arising from aftershock of Northridge earthquake, if insured did not obtain earthquake coverage until after January 17, 1994. *Migliore v. Mid-Century Ins. Co. (2002) 118 Cal. Rptr. 2d 548*

Code Civ. Proc. § 340.9 (extending limitations period for time-barred Northridge earthquake claims) applies if otherwise applicable limitations bar is based on either untimely notice to insurer or untimely filing of lawsuit, and as so construed does not unconstitutionally impair contracts; insured's case against insurer not "litigated to finality" within meaning of statute until timely appeal is final. *Bialo v. Western Mut. Ins. Co. (2002) 95 Cal. App. 4th 68, 78-83, 115 Cal. Rptr. 2d 3* (reversing summary judgment for insurer in bad faith case)

Code Civ. Proc. § 340.9(a) survives constitutional challenge under U.S. *Const. art. I, § 10, cl. 1, Cal. Const. art. I, § 9,* and due process provisions. *Hellinger v. Farmers Group, Inc. (2001) 91 Cal. App. 4th 1049, 1061-1067, 111 Cal. Rptr. 2d 268* ; *see also Bialo v. Western Mut. Ins. Co. (2002) 95 Cal. App. 4th 68, 82* ; *20th Century Ins. Co. v. Superior Court (2001) 90 Cal. App. 4th 1247, 1268* .

Individual owners of condominium units had no negligence cause of action against association's insurer, based on insurer's delay in funding repairs to insured structures and facilities damaged in 1994 Northridge earthquake, although owners' ability to repair their own units was consequently delayed; insurer owed no duty of care to persons who were not policyholders. *Adelman v. Associated Int'l Ins. Co. (2001) 90 Cal. App. 4th 352, 366-370, 108 Cal. Rptr. 2d 788*

Under tolling provision for mediation program devised to resolve disputes arising from 1994 Northridge earthquake (*Ins. Code § 10089.82(e)*), any applicable statute of limitations for litigation purposes is tolled for number of days beginning from referral to mediation until (1) date on which mediation is either completed or declined, or (2) date on which insured fails to appear for scheduled mediation for second time, or (3) if settlement is completed, expiration of any applicable three business-day cooling off period; tolling not extended to date that any notification is given by Department of Insurance following termination of mediation. *Michelson v. Mid-Century Ins. Co. (2000) 83 Cal. App. 4th 450, 458-459, 99 Cal. Rptr. 2d 804* (issue of tolling during mediation moot because limitations period was exceeded based on applicable cut-off dates prior to mediation)

Clause in earthquake and flood insurance policy that provided that parties would select appraisers if parties failed to agree as to "amount of loss" and that appraisers would then appraise "the loss" did not provide for appraisal of replacement cost for purpose of determining amount of deductible based on replacement cost. *Unetco Indus. Exch. v. Homestead Ins. Co. (1997) 57 Cal. App. 4th 1459, 1467-1469, 67 Cal. Rptr. 2d 784*

If lender does not require earthquake insurance on property that secured loan, and loan documents contain no reference to earthquake insurance proceeds, lender has no right to receive or to control proceeds of earthquake insurance policy. *Ziello v. Superior Court (1995) 36 Cal. App. 4th 321, 329, 42 Cal. Rptr. 2d 251* ; *cf. Martin v. World Sav. & Loan Ass'n (2001) 92 Cal. App. 4th 803, 809, 112 Cal. Rptr. 2d 225* (provision in loan documents that although earthquake coverage not required, any earthquake coverage obtained must name lender as loss payee, was enforceable)

Ins. Code § 10081 et seq. require only that insurance carriers offering homeowners insurance to condominiums containing four or more dwelling units offer earthquake coverage to individual unit owners; no requirement that such carriers offer condominium association earthquake coverage for common areas. *Marina Green Homeowners Ass'n v. State Farm Fire & Cas. Co. (1994) 25 Cal. App. 4th 200, 203-206, 30 Cal. Rptr. 2d 364* ; *see Ins. Code § 10087(a)*

[6] Interest

If policy provides that any loss for which company may be liable is payable 60 days after proof of loss is received, and ascertainment of loss is made either by agreement between insured and company or by filing with company an award as therein provided, principal payable under policy does not bear interest for any time before period so provided has expired but bears interest from that time. *Hughes v. Potomac Ins. Co. (1962) 199 Cal. App. 2d 239, 253-254, 18 Cal. Rptr. 650*

[7] Gratuitous Repair of Damage by Third Person

Amount of loss fixed immediately after occurrence of peril insured against; damage repair by gratuitous act of someone other than party to insurance contract does not inure to benefit of insurer so as to deprive insured of right to recover under policy. *Hughes v. Potomac Ins. Co. (1962) 199 Cal. App. 2d 239, 249-251, 18 Cal. Rptr. 650* (landslide damage

repaired by gratuitous act of county Flood Control District)

[8] Limitation Period

In case involving first-party progressive property loss claim under homeowner's policy, one-year suit provision of *Ins. Code § 2071* to run from date of "inception of the loss," defined as that point in time when appreciable damage occurs and is or should be known to insured, such that reasonable insured would be aware that notification duty under policy has been triggered; one-year period tolled from time insured gives notice of damage to insurer, pursuant to applicable policy notice provisions, until formal written denial of claim. *Prudential-LMI Commercial Ins. v. Superior Court (1990) 51 Cal. 3d 674, 679, 686-687, 693, 274 Cal. Rptr. 387, 798 P.2d 1230*

In first-party progressive property loss cases, when loss occurs over several policy periods and is not discovered until several years after it commences, manifestation rule, which fixes liability on insurer whose policy was in force when the damage became appreciable (that is, manifest), is applicable. *Prudential-LMI Commercial Ins. v. Superior Court (1990) 51 Cal. 3d 674, 694, 699, 274 Cal. Rptr. 387, 798 P.2d 1230* ; *see Sapiro v. Encompass Ins. (N.D. Cal. 2004) 221 F.R.D. 513, 518*

Equitable tolling of *Prudential-LMI Commercial Ins. v. Superior Court (1990) 51 Cal. 3d 674, 693, 274 Cal. Rptr. 387, 798 P.2d 1230* cannot be extended to allow tolling after insured received payment on claim, but did not receive unequivocal written statement from insurer that claim was closed. *Marselis v. Allstate Ins. Co. (2004) 121 Cal. App. 4th 122, 125, 16 Cal. Rptr. 3d 668*

Rule of equitable tolling set forth in *Prudential-LMI Commercial Ins. v. Superior Court (1990) 51 Cal. 3d 674, 274 Cal. Rptr. 387, 798 P.2d 1230* , applied retroactively. *San Jose Crane & Rigging, Inc. v. Lexington Ins. Co. (1991) 227 Cal. App. 3d 1314, 1320-1321, 278 Cal. Rptr. 301*

Insurer did not breach duty of good faith and fair dealing by refusing to pay replacement value based on costs of construction to be completed more than 180 days after appraisal, because it had paid undisputed actual cash value in timely manner and was otherwise reasonable in retaining experts and investigating, obtaining appraisal on disputed portion of claim, and promptly paying replacement-cost appraisal award after insureds purchased another home in lieu of proceeding with untimely reconstruction of damaged home. *Fraley v. Allstate Ins. Co. (2000) 81 Cal. App. 4th 1282, 1293, 97 Cal. Rptr. 2d 386*

Determination of when appreciable damage occurs for purposes of triggering 12-month limitation period for progressive loss claim is factual matter. *San Jose Crane & Rigging, Inc. v. Lexington Ins. Co. (1991) 227 Cal. App. 3d 1314, 1316, 278 Cal. Rptr. 301*

Insurer not estopped to plead statute of limitations defense merely because it failed to inform insured of pertinent laws or legal theories when it denied claim; insured barred by statute of limitations from bringing action almost seven years after geotechnical expert advised that damage to house was caused by earth movement and third-party negligence (covered risk), because statute of limitations commences when party knows or should know of facts essential to claim. *Love v. Fire Ins. Exch. (1990) 221 Cal. App. 3d 1136, 1143-1144, 271 Cal. Rptr. 246*

Under homeowner's "all risk" policy, claim for damage arising from structural defects as barred by contractual one-year limitations period, when insured had notice of defects more than one year of commencing suit. *Magnolia Square Homeowners Ass'n v. Safeco Ins. Co. (1990) 221 Cal. App. 3d 1049, 1059-1060, 271 Cal. Rptr. 1*

Plaintiff's status as absentee landlord during worsening of subsidence damage as not tolling accrual of cause of action. *Abari v. State Farm Fire & Cas. Co. (1988) 205 Cal. App. 3d 530, 535, 252 Cal. Rptr. 565*

Contractual one-year limitation period as barring insured's action against insurer based on damage to dwelling caused by earth subsidence, when insured failed to file action within one year of knowing or having reason to know that cause was covered risk; insurer as not estopped from asserting limitation period by reason of its failure to inform insured that although earth subsidence was excluded risk, third-party negligence was covered risk, because insurer is under no obligation to explain to insured all possible legal theories of recovery. *Lawrence v. Western Mut. Ins. Co. (1988) 204 Cal. App. 3d 565, 572-574, 251 Cal. Rptr. 319*

[9] Newly-Acquired Property Clause

Clause in commercial property insurance policy that extended coverage to newly-acquired property and provided that such coverage would terminate 90 days after property was acquired or upon reporting property value to insurer, whichever occurred first, provided only temporary coverage, which was not automatically converted to permanent coverage when insured reported property value to insurer within 90 day period. *S. Kornreich & Sons, Inc. v. Genesis Ins. Co. (1997) 56 Cal. App. 4th 407, 413-417, 65 Cal. Rptr. 2d 418*

[10] Terminology

Market value, where property is of such nature that its market value can be readily determined, as frequently applied as test or criterion of "actual cash value" of property at time of loss under policies insuring to that extent. *Hughes v. Potomac Ins. Co. (1962) 199 Cal. App. 2d 239, 253, 18 Cal. Rptr. 650*

Terms "dwelling" or "dwelling building" in insurance policies as connoting a place fit for occupancy, a safe place in which to dwell or live; hence, unless policy specifically limits coverage to building or excludes land underlying house and supporting it, landslide which causes soil beneath house to give way and leave it overhanging 30-foot cliff as covered by policy. *Hughes v. Potomac Ins. Co. (1962) 199 Cal. App. 2d 239, 248-249, 18 Cal. Rptr. 650*

[11] Workers' Compensation

Homeowner's policy that included coverage for comprehensive personal liability and provided statutorily-mandated workers' compensation coverage for insured's residential employees covered insured's son, who was employed as carpenter by insured; *Labor Code § 3352(a)*, which excludes from mandatory workers' compensation coverage employer's parent, spouse or child who works as residential employee, does not apply when coverage is provided under personal liability policy. *State Farm Fire & Cas. Co. v. Workers' Comp. Appeals Bd. (1997) 16 Cal. 4th 1187, 1193-1201, 69 Cal. Rptr. 2d 602, 947 P. 2d 795*

Labor Code § 4151, which permits election of workers' compensation coverage for and by any person not defined as employee under Labor Code, does not require "conscious" election; insured who purchased homeowner's policy providing comprehensive personal liability coverage, including workers' compensation coverage for residential employees, thereby elected to provide coverage for son who worked as carpenter on his residence, and employee son elected to be covered because he did not give written notice upon entering into employment that he elected not to be covered by workers' compensation laws. *State Farm Fire & Cas. Co. v. Workers' Comp. Appeals Bd. (1997) 16 Cal. 4th 1187, 1198-1200, 69 Cal. Rptr. 2d 602, 947 P. 2d 795*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsCancellation & NonrenewalGeneral OverviewInsurance LawProperty

InsuranceCoverageGeneral OverviewInsurance LawProperty InsuranceCoverageNatural PhenomenaInsurance LawProperty InsuranceCoverageReal PropertyFire InsuranceInsurance LawProperty InsuranceHomeowners InsuranceGeneral Overview

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§ 308.282 Law Reviews

Note, *Farmers Insurance Exchange v. Adams: Concurrent Causation and the All-Risk Homeowner's Policy, 20 Loy. L.A. L. Rev. 841 (1987)*

Legal Topics:

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

§§ 308.283[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.290

§ 308.290 State Statutes

Surety insurance defined. *Ins. Code §§ 100(5), 105*

Legal Topics:

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

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§ 308.291 Decisions

Depository bank's crediting of checks with forged endorsements to depositor's account and allowance of withdrawals on uncollected funds as proximate cause of its loss and, under terms of bond, within exclusion. *Mitsui Mfrs. Bank v. Federal Ins. Co. (9th Cir. 1986) 795 F.2d 827, 830-832*

Under California law, insurer has burden of proving that exclusion applies. *Mitsui Mfrs. Bank v. Federal Ins. Co. (9th Cir. 1986) 795 F.2d 827, 829*

Attorney's fees as proper in action by insured to recover on fidelity bond to extent attributable to efforts to obtain payments withheld in bad faith. *Pacific-S. Mortgage Trust Co. v. Insurance Co. of N. Am. (1985) 166 Cal. App. 3d 703, 717, 212 Cal. Rptr. 754*

Discovery of loss provision in fidelity insurance contract covering mutual fund as tolled during period that discovery was impossible because of wrongdoer's position in company. *Admiralty Fund v. Peerless Ins. Co. (1983) 143 Cal. App. 3d 379, 388, 191 Cal. Rptr. 753*

Fidelity bond covering losses discovered during bond period as not covering losses resulting from employees' acts known to employer prior to effective date of bond even though employer failed to understand until after effective date of bond dishonest or fraudulent nature of acts or that such acts came within policy provisions. *USLIFE Sav. & Loan Ass'n v. National Sur. Corp. (1981) 115 Cal. App. 3d 336, 344-346, 171 Cal. Rptr. 393*

When each of two brokers' blanket bonds covering same risk purport to be excess insurance to other insurance, neither excess clause as given effect, but loss as prorated in proportion to coverage; when two insurers cover same risk, defense costs required under bonds to be paid by insurer as required to be shared between them pro rata in proportion to respective coverage. *Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc. (1978) 83 Cal. App. 3d 593, 608, 148 Cal. Rptr. 57*

Procuring loan through presentation of forged instruments and making of false representations as theft and loss as covered by bankers blanket bond insuring bank against loss by robbery, larceny, burglary, and theft. *Security Trust & Sav. Bank of San Diego v. New York Indem. Co. (1934) 220 Cal. 372, 376, 31 P.2d 365* (reversing judgment for plaintiff insured, however, and directing entry of judgment for defendant insurer on ground losses effected directly or indirectly by means of forgery and losses resulting from loans made by insured were expressly excluded from coverage by bond provisions)

Bankers blanket bond insuring against loss from reliance on forged or counterfeited documents, which term is not defined in policy, as encompassing falsely made and spurious treaty of reinsurance relied on as security for loan. *Century Bank v. St. Paul Fire & Marine Ins. Co. (1971) 4 Cal. 3d 319, 321-322, 93 Cal. Rptr. 569, 482 P.2d 193*

No liability under bankers bond providing coverage for any loss through insured's having in good faith and in course of business extended any credit on faith of, or otherwise acted on, any written instruments which prove to have been forged as to signature of any surety or guarantor where evidence establishes that credit was not extended on faith of written instrument in question, signature on which had been forged. *Continental Bank v. Phoenix Ins. Co. (1972) 24 Cal. App. 3d 909, 912-914, 101 Cal. Rptr. 392*

Fidelity insurer as not liable to insured for thefts by its employees underpolicy providing that "The Assured shall keep verifiable records of all property covered by this policy" where plaintiff failed to keep such records. *S & M Lamp Co. v. Lumbermens Mut. Cas. Co. (1962) 199 Cal. App. 2d 446, 450-453, 18 Cal. Rptr. 633*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBusiness InsuranceFidelity InsuranceDiscovery of LossesInsurance LawBusiness InsuranceFidelity InsuranceLimitations on LiabilityInsurance LawBusiness InsuranceGuaranty Insurance

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§ 308.292 Law Reviews

Note, *Fidelity Bonds--Interpretation--Extent of Coverage--Cumulative or Non-Cumulative, 20 So Cal. L. Rev. 226 (1947)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBusiness InsuranceFidelity InsuranceGeneral Overview

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§§ 308.293[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.300

§ 308.300 Related Matthew Bender Publications

For discussion of liability insurance generally, see California Insurance Law and Practice, Chs. 41 and 49 (Matthew Bender)

For memoranda of points and authorities regarding improper claims settlement practices, see California Points and Authorities, Ch. 120, *Insurance* (Matthew Bender)

For discussion of insurance liability policy provisions, see Levy, Golden & Sacks, California Torts, Ch. 81 (Matthew Bender)

For discussion of disputes under liability policies generally, see Levy, Golden & Sacks, California Torts Ch. 82 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsGeneral OverviewInsurance LawGeneral Liability InsuranceCoverageGeneral Overview

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Action for declaration of rights, duties, and obligations relating to policy of professional liability insurance issued to health care provider. *Code Civ. Proc. § 1062.5*

Evidence of liability insurance as inadmissible to prove negligence or other wrongdoing. *Evid. Code § 1155*

Liability insurance as class of insurance. *Ins. Code § 100(8)*

Liability insurance defined. *Ins. Code § 108*

Exclusions and limitations regarding medical malpractice coverage. *Ins. Code § 676.3*

Regulation of liability carriers. *Ins. Code §§ 11550-11558*

Actions on policies containing liability provisions. *Ins. Code §§ 11580-11588*

Legal Topics:

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

[1] Aircraft Policy

Provision of California Uniform Aircraft Financial Responsibility Act [*Pub. Util. Code §§ 24230-24410*] requiring insurer to provide Department of Transportation (Department) with 30 days' prior notice before canceling aircraft liability policy is ambiguous as to whether it governs cancellation of all aircraft liability policies or only those policies filed with Department after accident to satisfy aircraft owner or operator's financial responsibility requirement; court chose latter interpretation because it was likely to have fairer and more predictable consequences. *Escobedo v. Estate of Snider (1997) 14 Cal. 4th 1214, 1226-1228, 930 P.2d 979* (interpreting *Pub. Util. Code § 24361*)

No coverage under aircraft liability insurance policy defining term "insured" in insuring clause to include not only named insured "but also any person while using or riding in the aircraft ... provided the actual use is with the permission of the Named Insured" when plane crashed while being piloted by permissive user who did not meet pilot qualifications specified in subsequent parts of policy. *National Ins. Underwriters v. Carter (1976) 17 Cal. 3d 380, 384-386, 131 Cal. Rptr. 42, 551 P.2d 362*

In aviation liability insurance, exclusion for "injury to or destruction of any crops ... to which the aerial application is deliberately made whether in error or not" as unambiguously precluding coverage for pilot's mistakenly spraying wrong crop with herbicide. *Farm Air Flying Serv. v. Southeastern Aviation Ins. Servs., Inc. (1988) 206 Cal. App. 3d 637, 639-640, 254 Cal. Rptr. 1*

Under policy issued to owner of airplane for liability for death of passengers, providing that insurance would only be effective when pilot held current medical certificate, insurer as not liable for deaths that occurred while pilot with expired medical certificate was operating airplane, despite fact that pilot's medical condition did not cause accident. *National Union Fire Ins. Co. v. Estate of Meyer (1987) 192 Cal. App. 3d 866, 868-873, 237 Cal. Rptr. 632*

Aircraft liability policy as not excluding coverage for injuries to passenger because pilot failed to renew his medical

certificate. *Woods v. Insurance Co. of N. Am. (1974) 38 Cal. App. 3d 144, 147-148, 113 Cal. Rptr. 82*

[2] Assignment of Policy

Although accrued right to collect proceeds of a policy is assignable without consent, insofar as an assignment involves substitution of one insured for another it is not effective without consent of insurer; sale of assets of business did not operate to make acquiring business an insured in absence of insurer's consent. *Quemetco Inc. v. Pacific Auto. Ins. Co. (1994) 24 Cal. App. 4th 494, 502, 29 Cal. Rptr. 2d 627*

[3] Attorney's Fees

Directors' and officers' liability policy that provided coverage for payment of legal costs, but did not state that insurer will defend claims, did not impose duty to defend; policy obligates insurer only to pay defense expenses as incurred. *Gon v. First State Ins. Co. (9th Cir. 1989) 871 F.2d 863, 868*

Insurer not liable for insured's attorney's fees paid to independent counsel during pendency of third-party claims because resolution of those claims did not control outcome of parties' coverage dispute. *Native Sun Inv. Group v. Ticor Title Ins. Co. (1987) 189 Cal. App. 3d 1265, 1276-1277, 235 Cal. Rptr. 34*

Expenses and attorney's fees of city defending action against it for false imprisonment are recoverable against city's insurer. *City of Newport Beach v. Sasse (1970) 9 Cal. App. 3d 803, 809, 88 Cal. Rptr. 476*

[4] Cancellation

No formal written notice of cancellation of liability policy normally required; however, when contractual conditions for cancellation are part of insurance policy, strict compliance required. *Pacific Nat'l Ins. Co. v. Webster (1985) 174 Cal. App. 3d 779, 782, 220 Cal. Rptr. 274*

[5] Collateral Estoppel

Insurer was collaterally estopped from relitigating issues of liability and damages and was bound by judgment in underlying action, despite fact that parties to underlying action agreed that in exchange for covenant not to execute, action would proceed as uncontested matter, because plaintiff's counsel presented evidence on liability and damages to judge, who rendered decision on those issues; proceeding was sufficient to satisfy "actual trial" requirement of policy's "no action" clause because it involved (1) independent adjudication of facts based on evidentiary showing; and (2) process that did not create potential for abuse, fraud or collusion. *National Union Fire Ins. Co. v. Lynette C. (1994) 27 Cal. App. 4th 1434, 1451, 33 Cal. Rptr. 2d 496* .

Doctrine of collateral estoppel inapplicable when earlier judgment, on which estoppel was based, is reversed; collateral estoppel doctrine requires final judgment on merits. *Grain Dealers Mut. Ins. Co. v. Marino (1988) 200 Cal. App. 3d 1083, 1088-1089, 246 Cal. Rptr. 410*

[6] Commercial General Liability Policy

Although Patent Act as amended in 1994 and effective in 1996 includes some conduct involving advertising, thus allowing patent infringement to arise out of insured's advertising activities in some instances, in this case conduct alleged in underlying complaint (direct infringement of patent by offering to sell infringing products through

advertising) did not include advertising injury of "misappropriation of advertising idea or style of doing business" pursuant to comprehensive general liability (CGL) policy. *Homedics, Inc. v. Valley Forge Ins. Co. (9th Cir. 2002) 315 F.3d 1135, 1139-1141*

When CGL policy contained "personal liability injury liability" and "advertising injury" clauses, duty to defend was triggered by underlying complaint by insured's competitor in software products stating causes of action for false advertising and unfair competition that suggested claim for disparagement by implication, based on allegations of insured's representations about technological architecture of its own products. *E.piphany, Inc. v. St. Paul Fire & Marine Ins. Co. (N.D. Cal. 2008) 590 F. Supp. 2d 1244, 1251*

In action arising from third-party suit filed against insured computer-chip manufacturer, based on sale of allegedly defective chips, CGL policy covering "property damage," defined as "physical damage" or "loss of use," did not cover costs attributable to repair and replacement of defective components. *Atmel Corp. v. St. Paul Fire & Marine Ins. Co. (N.D. Cal. 2006) 430 F. Supp. 2d 989, 994*

Insurer under standard CGL policy, having properly reserved its rights, may advance sums to defend its insured against third-party lawsuit, and may thereafter recoup those costs from insured if it is determined, as matter of law, that no duty to defend ever arose because third-party suit never suggested possibility of covered claim. *Scottsdale Ins. Co. v. MV Transp. (2005) 36 Cal. 4th 643, 662, 31 Cal. Rptr. 3d 147, 115 P.3d 460*

Coverage for "advertising injury" arising out of "misappropriation of advertising ideas or style of doing business" under comprehensive general liability (CGL) policy requires widespread promotion to the public such that one-on-one solicitation of few customers does not give rise to insurer's duty to defend underlying lawsuit; allegations in underlying complaint that insured defendant took competitor's customer list and solicited customers from it did not give rise to insurer's duty to defend; defendant's alleged act was not misappropriation of advertising ideas under policy definition. *Hameid v. National Fire Ins. of Hartford (2003) 31 Cal. 4th16, 29-30, 1 Cal. Rptr. 3d 401, 71 P.3d 761* (not deciding whether widespread promotional activities directed at specific market segments constitute advertising under policy); *see Hayward v. Centennial Ins. Co. (9th Cir. 2005) 430 F.3d 989, 991-992* (misappropriation of trade secrets and wrongful solicitation of plaintiff's customers did not constitute advertising injury)

Insurer's duty to indemnify insured for "all sums that the insured becomes legally obligated to pay as damages" under standard comprehensive general liability (CGL) policy is limited to money ordered by court; duty to indemnify under policy containing this provision does not extend to any expenses required by administrative agency pursuant to environmental statute. *Certain Underwriters at Lloyds, London v. Superior Court (2001) 24 Cal. 4th 945, 960, 966, 103 Cal. Rptr. 2d 672, 16 P.3d 94*

Comprehensive liability insurers insuring only for tangible property losses do not owe duty to defend in dispute involving right to use implied easement; interference with easement right is not property damage to tangible property giving rise to duty to defend. *Kazi v. State Farm Fire & Cas. Co. (2001) 24 Cal. 4th 871, 879-882, 887, 103 Cal. Rptr. 2d 1, 15 P.3d 223*

Coverage for "advertising liability," which included "infringement of ... title," did not apply to underlying judgment for plaintiff in action by one real estate developer against another, for impermissibly including registered trademark in name of real estate development and related advertisements; in context of relevant comprehensive umbrella liability policy, "title" means name of literary or artistic work; moreover, policy excluded coverage "with respect to advertising activities" for "infringement of registered trade mark, service mark or trade name." *Palmer v. Truck Ins. Exch. (1999) 21 Cal. 4th 1109, 1114-1116, 90 Cal. Rptr. 2d 647, 988 P.2d 568*

Under standard comprehensive general liability insurance policy, insured's site investigation expenses are defense costs that insurer must pay if insured establishes following requirements by preponderance of evidence: site investigation was

actually conducted between tender of defense and conclusion of action, site investigation was objectively reasonable and necessary effort to avoid or minimize liability, and site investigation expenses were objectively reasonable and necessary for that purpose. *Aerojet-Gen. Corp. v. Transport Indem. Co. (1997) 17 Cal. 4th 38, 60-63, 70 Cal. Rptr. 2d 118, 948 P.2d 909*

Standard comprehensive or commercial general liability insurance policies provide that insurer has duty to indemnify insured for those sums that insured becomes legally obligated to pay as damages for covered claim. *Aerojet-Gen. Corp. v. Transport Indem. Co. (1997) 17 Cal. 4th 38, 56, 70 Cal. Rptr. 2d 118, 948 P.2d 909* ; *California Pac. Homes, Inc. v. Scottsdale Ins. Co. (1999) 70 Cal. App. 4th 1187, 1192, 83 Cal. Rptr. 2d 328* .

Comprehensive general liability policy that did not specifically define "damages" incurred because of "property damage" that insured is "legally obligated" to pay covered environmental cleanup costs, including governmental-response reimbursement and remedial injunctive relief expenses. *AIU Ins. Co. v. Superior Court (1990) 51 Cal. 3d 807, 828-843, 274 Cal. Rptr. 820, 799 P.2d 1253*

Nonconformity exclusion in CGL precluded coverage in underlying suit for advertising activities based solely on insured telecommunication company's advertising allegedly misrepresenting its own phone cards. *Total Call Int'l, Inc. v. Peerless Ins. Co. (2010) 181 Cal. App. 4th 161, 169-172, 104 Cal. Rptr. 3d 319*

In CGL issued to school bus business primarily involved in transporting school children, exclusion for bodily injury damages caused by insured's "products" and "completed operations," advising insured that it did not have coverage for bodily injury arising out of "your product" or "your work," and providing separate definitions of "your product" and "your work," excluded coverage for damages arising from insured's negligent inspection of a bus; inspection was a work-related, "completed operation," even though damages occurred after insured sold the bus. *Baker v. National Interstate Ins. Co. (2009) 180 Cal. App. 4th 1319, 1339, 103 Cal. Rptr. 3d 565, 2009 Cal. App. LEXIS 2117*

Insurance industry's standardized "products-completed operations hazard" exclusion language in CGL policies sets forth two unambiguous, separate, and unrelated circumstances under which coverage is excluded. *Baker v. National Interstate Ins. Co. (2009) 180 Cal. App. 4th 1319, 103 Cal. Rptr. 3d 565, 2009 Cal. App. LEXIS 2117*

When advertising injury coverage included trademark infringement, exclusion for prior publication before the coverage date applies to trademark infringement, and is not limited to defamation and privacy claims; in this policy, "advertising injury" is surrounded by quotation marks, and appears with quotation marks in prior-publication exclusion; "advertising injury" has the same meaning when used in exclusion that it has whenever it appears in policy enclosed in quotation marks. *Kim Seng Co. v. Great American (2009) 179 Cal. App. 4th 186, 195, 200, 101 Cal. Rptr. 3d 537 , reh'g denied, 2009 Cal. App. LEXIS 1971 (2009)*

CGL policy is written in two essential parts: insuring agreement, which states covered risks, and exclusion clauses, which remove coverage for risks that would otherwise fall within insuring clause; policy exclusions are strictly construed, while exceptions to exclusions are broadly construed in favor of insured. *Food Pro Int'l, Inc. v. Farmers Ins. Exch. (2008) 169 Cal. App. 4th 976, 985, 89 Cal. Rptr. 3d 1 , rev. denied, 2009 Cal. LEXIS 3729 (2009)*

When party injured by brake-cleaning product did not file complaint against product manufacturer until three weeks before limitations period expired; plaintiff served complaint late after difficulty in locating proper agent; and defendant promptly notified its insurance broker, which failed to respond on insured's behalf, default judgment entered against defendant without further communication by plaintiff's attorney was improper, and motion for relief under *Code Civ. Proc. § 473* should have been granted. *Fasuyi v. Permatex, Inc. (2008) 167 Cal. App. 4th 681, 696-703, 84 Cal. Rptr. 3d 351*

Commercial general liability policy executed in Texas regarding oil and gas operations in California, and interpreted

according to California law, included duty to defend pollution claims arising from oil and gas operations in Beverly Hills notwithstanding that pollution liability endorsement does not mention duty to defend. *Frontier Oil Corp. v. RLI Ins. Co. (2007) 153 Cal. App. 4th 1436, 63 Cal. Rptr. 3d 816*

Sums agreed to be paid as settlement of litigation are not subject to indemnification as "damages" under excess liability insurance policies; "damages" as interpreted in *Powerine I* and used in liability insurance indemnity provisions means only money ordered by a court to be paid. *Aerojet-General Corp. v. Commercial Union Ins. Co. (2007) 155 Cal. App. 4th 132, 143-144, 65 Cal. Rptr. 3d 803* (terms of agreement not entered as judgments in lawsuits); *citing Certain Underwriters at Lloyd's of London v. Superior Court (2001) 24 Cal. 4th 945, 962-964, 103 Cal. Rptr. 2d 672, 16 P.3d 94* (*Powerine I*)

No potential duty to defend, and no coverage under advertising injury and property damage provisions of CGL policy for liability based on insured's violation of federal Telephone Consumer Protection Act of 1991 (*47 U.S.C. § 227(b)(1)(C)*) and invasion of privacy by sending unsolicited faxed advertisements. *ACS Sys., Inc. v. St. Paul Fire & Marine Ins. Co. (2007) 147 Cal. App. 4th 137, 151-155, 53 Cal. Rptr. 3d 786*

"Occurrence" in CGL policy as applied to bodily injuries caused by exposure to asbestos means injurious exposure to asbestos, not manufacture and distribution of those products; aggregation provisions in policy preclude treating all asbestos exposure as resulting from single annual occurrence. *London Mkt. Insurers v. Superior Court (2007) 146 Cal. App. 4th 648, 669-672, 53 Cal. Rptr. 3d 154*

Insurer of developer under occurrence-based commercial general liability policy was potentially liable for coverage and therefore had duty to defend construction-defect suit brought by condominium association, because property damage occurred during policy period, even though association was not formed and owned no property until after damage occurred; critical question is when property damage occurred, not when homeowners' association came into existence. *Standard Fire Ins. Co. v. Spectrum Cmty. Ass'n (2006) 141 Cal. App. 4th 1117, 1131, 46 Cal. Rptr. 3d 804*

Setoff affirmative defense could constitute suit seeking damages for purposes of CGL policy if affirmative defense: (1) would unquestionably have been suit for damages if asserted in court of law, and (2) fell within scope of contractual obligation; in suit by insured against its tenants to recoup CERCLA testing costs, affirmative defenses seeking apportionment of costs did not constitute suit seeking damages because tenants had no independent claim against insured; because tenants' indemnity claim was purely defensive, it was not functional equivalent of allegation seeking affirmative relief that could be asserted as suit for damages, which, in turn, might constitute suit for damages within meaning of usual CGL policy duty-to-defend provision. *CDM Investors v. Travelers Cas. & Sur. Co. (2006) 139 Cal. App. 4th 1251, 1269, 43 Cal. Rptr. 3d 669*

Under nonstandard CGL policy, duty to defend "any suit or action," did not obligate insurer to defend administrative actions that had not ripened into lawsuits; "wrongful entry" or "violation or infringement of property or contract rights" do not cover liability for pollution-related property damage; term "accident" means "sudden, unintended, and unexpected happening that is identifiable in time and place." *Lockheed Martin Corp. v. Continental Ins. Co. (2005) 134 Cal. App. 4th 187, 193-194, 35 Cal. Rptr. 3d 799 , overruled in part, State of California v. Allstate Ins. Co. (2009) 45 Cal. 4th 1008, 1036, 201 P.3d 1147*

Business policy that defined advertising to include notice that is broadcast or published to general public or specific market segments about insured's goods, products, orservices, for purpose of attracting customers or supporters, did not cover injuries caused by insured's hosted breakfast and Internet press release announcing that its franchisee company would disassociate itself from franchisor company, soliciting business from current customers, and importuning employees to join new company in same type of business; no advertising offense alleged. *Rombe Corp. v. Allied Ins. Co. (2005) 128 Cal. App. 4th 482, 492-494, 27 Cal. Rptr. 3d 99*

Underlying complaint alleging that plaintiff's former employee currently worked fordefendant, stole trade secrets, and attempted to solicit his former employer's customers, did not involve any advertising injury, defined in policy as: oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services, oral or written publication of material that violates a person's right of privacy; misappropriation of advertising ideas or style of doing business; or infringement of copyright, title or slogan. *We Do Graphics, Inc. v. Mercury Cas. Co. (2004) 124 Cal. App. 4th 131, 136-138, 21 Cal. Rptr. 3d 9* (no coverage or duty of defense)

Automobile exclusion in commercial general liability (CGL) policy precluded coverage and duty to defend with respect to assigned action arising from passenger's injuries sustained in automobile collision, because CGL policy was issued to company owned by driver's father, who purchased automobile for son's use; demurrer of CGL insurer properly sustained. *Ace Am. Ins. Co. v. Walker (2004) 121 Cal. App. 4th 1017, 1025-1026, 18 Cal. Rptr. 3d 1*

In case in which subcontractor provided substandard-grade steel pile caps to contractor, and contractor welded most of defective pile caps to driven piles at water-facility pumping plant before realizing that grade of steel was inferior, contractor's welding of defective pile caps did not constitute "property damage" within meaning of subcontractor's commercial general liability (CGL) policy solely because welded unit was inadequate to meet contractual design specifications, because there was no physical injury to piles or to other property, and defective pile caps were ultimately used as modified to meet design specifications. *F & H Constr. v. ITT Hartford Ins. Co. (2004) 118 Cal. App. 4th 364, 371, 377, 12 Cal. Rptr. 3d 896*

Policy defining "personal injury" as "injury other than 'bodily injury,' arising out of one or more of the following offenses: ... oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services" potentially covered underlying claim that insured had contacted plaintiff's customers, told them that plaintiff was infringing its patent, and threatened legal action. *Atlantic Mut. Ins. Co. v. J. Lamb, Inc. (2002) 100 Cal. App. 4th 1017, 1032-1037, 123 Cal. Rptr. 2d 256*

In case involving inclusion of contractor as additional insured in subcontractor's commercial general liability (CGL) policy, contractual liability coverage included indemnitee's attorney fees and costs as sums insured is "legally obligated to pay as *damages* because of" covered tort claims. *Golden Eagle Ins. Co. v. Ins. Co. of W. (2002) 99 Cal. App. 4th 837, 852, 121 Cal. Rptr. 2d 682*

CGL policy issued to construction company and "additional insured" endorsement provided coverage for "those sums that [additional insured] becomes legally obligated to pay as damages because of 'bodily injury' " and limited coverage to "liability arising out of" construction company's work; policy and endorsement covered construction company employee's injuries incurred while performing maintenance work for employer when wooden stair located on additional insured's premises collapsed, because sufficient causal connection existed between insured's work and additional insured's liability. *Fireman's Fund Ins. Cos. v. Atlantic Richfield Co. (2001) 94 Cal. App. 4th 842, 848-851, 115 Cal. Rptr. 2d 26*

Construction company's commercial general liability policy covering bodily injury and property damage did not cover claims by insured's business partner seeking resolution of economic disputes arising from construction-defect suits, dissolution of partnership, and accounting; insured could not possibly be liable to partner for causing property damage because partner made no claim for physical injury to tangible property; all asserted construction defect claims that were potentially covered under policy were already being defended by insurer in third-party suits; no duty to defend. *Continental Cas. Co. v. Superior Court (2001) 92 Cal. App. 4th 430, 439-441, 111 Cal. Rptr. 2d 849*

Complaint allegations of trade dress infringement, in light of extrinsic evidence (that product was possibly depicted in advertisement prior to suit) provided to insurer when insured tendered defense, were sufficient to implicate potential coverage under CGL policies' advertising injury liability coverage, and therefore to trigger duty to defend. *El-Com*

Hardware, Inc. v. Fireman's Fund Ins. Co. (2001) 92 Cal. App. 4th 205, 215-219, 111 Cal. Rptr. 2d 670 (reversing summary judgment for insurer)

Public policy requires that commercial general liability policy, held by contractor and insuring real estate developer as named additional insured, provide duty to defend developer against entire third-party action (that is, both covered and noncovered claims) brought by real estate buyer for construction defects. *Presley Homes, Inc. v. American States Ins. Co. (2001) 90 Cal. App. 4th 571, 574-576, 108 Cal. Rptr. 2d 686*

Executive officers covered, for purposes of surviving demurrer, with respect to action brought by their corporation alleging breach of fiduciary duty and related torts, based on their comments criticizing restructuring of subsidiary medical management company and opining that changes compromised patient care and violated California insurance laws; officers possibly acting within scope of their duties as executive officers. *Barnett v. Fireman's Fund Ins. Co. (2001) 90 Cal. App. 4th 500, 512-513, 108 Cal. Rptr. 2d 657* (reversing dismissal of all claims following sustaining of demurrer)

Coverage for personal and advertising injury did not include duty to indemnify or defend shareholder/director in federal counterclaim alleging defamation and other torts because he was not acting as director at relevant times and was therefore sued in individual capacity; allegation of breach of fiduciary duty did not render him an "insured" under corporation's CGL policy. *Lomes v. Hartford Fin. Servs. Group, Inc. (2001) 88 Cal. App. 4th 127, 134, 105 Cal. Rptr. 2d 471*

Action by city against hotel owner for violating ordinance against renting rooms to nonpermanent residents did not invoke liability insurer's coverage with respect to claiming damages that insured was "obligated to pay" under commercial general liability (CGL) policy; underlying action by city alleged (1) violations of city ordinance, city planning code, and unfair business practice statutes, and (2) public nuisance; action sought injunctions, abatement of nuisance, appointment of receiver, and civil penalties. *Bullock v. Maryland Cas. Co. (2001) 85 Cal. App. 4th1435, 1444-1449, 102 Cal. Rptr. 2d 804* (distinguishing *AIU Ins. Co. v. Superior Court (1990) 51 Cal. 3d 807, 274 Cal. Rptr. 820, 799 P.2d 1253*)

In action for indemnity under third-party general liability insurance policy, proof of causation and amount of damages incurred during each policy period are essential elements of plaintiff's prima facie case. *Golden Eagle Refinery Co. v. Associated Int'l Ins. Co. (2000) 85 Cal. App. 4th 1300, 1314, 102 Cal. Rptr. 2d 834 , overruled in part, State of California v. Allstate Ins. Co. (2009) 45 Cal. 4th 1008, 1036, 201 P.3d 1147*

Comprehensive general liability policies do not cover liabilities arising from ownership of properties acquired after the policy period. *Tosco Corp. v. General Ins. Co. (2000) 85 Cal. App. 4th 1016, 1021-1022, 102 Cal. Rptr. 2d 657* ; *A.C. Label Co. v. Transamerica Ins. Co. (1996) 48 Cal. App. 4th 1188, 56 Cal. Rptr. 2d 207* ; *but see In re K. F. Dairies, Inc. & Affiliates (9th Cir. 2000) 224 F.3d 922, 924*

Ins. Code § 677.2(b) and *(c)*, governing notice of cancellation of commercial general liability policy for nonpayment of premiums, requires notice to all insureds named in policy. *Kotlar v. Hartford Fire Ins. (2000) 83 Cal. App. 4th 1116, 1121, 100 Cal. Rptr. 2d 246*

Automobile exclusion clause in commercial general liability policy precluded coverage for injuries resulting when insured's niece took van keys without permission from insured's business office, drove van around parking lot, and struck her friend; injured party's complaint against insured for negligence in use of premises, negligent entrustment of van, negligent failure to supervise use of van, and vicarious liability did not state claim potentially covered under policy because injuries resulted solely from niece's use of insured's van; insurer had no duty to indemnify or defend. *Belmonte v. Employers Ins. Co. (2000) 83 Cal. App. 4th 430, 433-435, 99 Cal. Rptr. 2d 661*

"Advertising" as used in standard CGL policy does not include responding to single customer in competitive bidding process with product tailor-made for that customer. *Peerless Lighting Corp. v. American Motorists Ins. Co. (2000) 82 Cal. App. 4th 995, 1012, 98 Cal. Rptr. 2d 753*

Self-insured retentions (SIRs) are not primary insurance; with respect to losses insured by successive commercial liability policies, rule of horizontal exhaustion does not apply to SIRs; insured not required to exhaust SIRs on all potentially applicable policies before any insurer has any duty to indemnify insured for losses. *Montgomery Ward & Co. v. Imperial Cas. & Indem. Co. (2000) 81 Cal. App. 4th 356, 364, 97 Cal. Rptr. 2d 44*

Under "first-publication" exclusion clause contained in general commercial liability policy, insurer had no duty to defend or indemnify certain defamation claims asserted against insured in underlying lawsuits; policy expressly did not cover re-publication of defamatory material whose "first publication" took place before effective date of policy. *Ringler Assocs. Inc. v. Maryland Cas. Co. (2000) Cal. App. 4th 1165, 1186-1187, 96 Cal. Rptr. 2d 136*

"Infringement of ... title" with respect to "infringement of copyright, title or slogan" in context of "advertising liability," means distinctive name, designation, or other appellation; "infringement of title," in context of commercial general liability policy in question, inapplicable to claims based on infringement of legal ownership rights to property, such as patent infringement suit. *Maxconn Inc. v. Truck Ins. Exch. (1999) 74 Cal. App. 4th 1267, 1277-1279, 88 Cal. Rptr. 2d 750* (no duty to defend)

"Advertising injury coverage" applicable to "advertising injury caused by ... offense committed in ... course of advertising your goods, products or services," did not provide potential coverage for alleged copyright infringement concerning unauthorized copy of registered painting purchased by and displayed in insured's building lobby; insurer therefore had no duty to defend suit for copyright infringement brought by artist of original painting. *Ziman v. Fireman's Fund Ins. Co. (1999) 73 Cal. App. 4th 1382, 1389, 87 Cal. Rptr. 2d 397*

Standard pickup truck modified with hydraulic scissors lift (which raises and lowers container called a "bed") is "mobile equipment," not "automobile," for purposes of commercial general liability policy; house fire, which started when truck bed overfilled with gravel fell into burning propane kettle and ignited roofing tar, was not excluded peril. *Alpine Ins. Co. v. Planchon (1999) 72 Cal. App. 4th 1316, 1321-1324, 85 Cal. Rptr. 2d 777*

Comprehensive or commercial general liability policy triggered if specified harm is caused by included occurrence, so long as at least some such harm results within policy period. *California Pac. Homes, Inc. v. Scottsdale Ins. Co. (1999) 70 Cal. App. 4th 1187, 1192, 83 Cal. Rptr. 2d 328*

"Work product" exclusion in comprehensive general liability policy issued to real estate developer and general contractor precluded coverage for damages recovered by homeowners based on design and construction deficiencies (for example, problems with roofing, drainage system, leaks) in action brought under former *Code Civ. Proc. § 374* (condominium association's standing to sue regarding damage to common areas) [*now see Civ. Code § 1368.3*]. *Diamond Heights Homeowners Ass'n v. National Am. Ins. Co. (1991) 227 Cal. App. 3d 563, 572-573, 277 Cal. Rptr. 906*

Under comprehensive general liability policy issued to real estate contractors and developers, broad form endorsement excluding coverage for property damage to "work performed by the named insured arising out of such work" did not exclude coverage for claims arising out of work performed by subcontractors retained by insured; exclusion for "property damage to the named insured's products arising out of such products" not applicable to damages arising from faulty services provided to named insured by subcontractors. *Maryland Cas. Co. v. Reeder (1990) 221 Cal. App. 3d 961, 971, 976, 270 Cal. Rptr. 719*

Comprehensive general liability protection against claims for bodily injury or damage to tangible property resulting

from accidental event, when accident is defined as something that insured did not intend to happen, did not cover wrongful-termination claim, and no duty to defend action therefore exists. *St. Paul Fire & Marine Ins. Co. v. Superior Court (1984) 161 Cal. App. 3d 1199, 1202, 208 Cal. Rptr. 5*

[7] Continuous or Progressive Damage

Under standard comprehensive general liability insurance policy, insurance policy is triggered when included occurrence causes specified harm within policy period; once policy is triggered, insurer is responsible for full extent of insured's liability resulting from included occurrence thereafter, and not just for that part of injury or damages that occurred during policy period. *Aerojet-Gen. Corp. v. Transport Indem. Co. (1997) 17 Cal. 4th 38, 56-57*

Under "continuous injury" theory adopted for third-party liability insurance cases in California, bodily injury and/or property damage that is continuous or progressively deteriorating throughout several policy periods is covered by all policies in effect during those periods, not merely by policy in effect at time damage is first manifested. *Montrose Chem. Corp. v. Admiral Ins. Co. (1995) 10 Cal. 4th 645, 689, 42 Cal. Rptr. 2d 324, 913 P.2d 878*

In context of continuous or progressively deteriorating property damage or bodily injury insurable under third-party liability policy, as long as uncertainty exists about damage or injury that may occur during policy period and imposition of liability upon insured, and no legal obligation to pay third party claims has been established, there is potentially insurable risk within meaning of *Ins. Code §§ 22, 250*; "loss in progress" rule will not defeat coverage when it had yet to be established, at time insurer entered into insurance contract with policyholder, that insured had legal obligation to pay damage to third party in connection with loss. *Montrose Chem. Corp. v. Admiral Ins. Co. (1995) 10 Cal. 4th 645, 693, 42 Cal. Rptr. 2d 324, 913 P.2d 878*

Continuous injury trigger described in *Montrose Chemical Corp. v. Admiral Ins. Co. (1995) 10 Cal. 4th 645, 42 Cal. Rptr. 2d 324, 913 P.2d 878* , absent consideration of some defense other than trigger itself that would render no claim in underlying suit even potentially covered, generally means that all primary insurers over time of alleged continuous injury have obligation to defend underlying action claiming continuous damage. *Padilla Constr. Co., Inc. v. Transportation Ins. Co. (2007) 150 Cal. App. 4th 984, 987, 58 Cal. Rptr. 3d 807*

Mere fact that portions of continuous damage could not possibly have been covered by primary insurer makes no difference so far as excess insurer's duty to defend isconcerned. *Padilla Constr. Co., Inc. v. Transportation Ins. Co. (2007) 150 Cal. App. 4th 984, 988, 58 Cal. Rptr. 3d 807*

"Personal injury" coverage in commercial general liability (CGL) policy did not potentially include coverage for lessee's claim alleging business losses because of insured lessor's failure to timely vacate premises pursuant to lease agreement; insured lessor's conduct did not constitute "wrongful eviction," a covered claim under policy; moreover, "property damage" provision did not potentially include coverage for loss of use of intangible property rights. *Cunningham v. Universal Underwriters (2002) 98 Cal. App. 4th 1141, 1150-1156, 120 Cal. Rptr. 2d 162*

Insurers had duty to indemnify third-party claimant, who purchased insured hotel after expiration of all policies, because hotel was extensively expanded and remodeledby insureds and damage occurred during policy period. *Century Indem. Co. v. Hearrean (2002) 98 Cal. App. 4th 734, 743, 120 Cal. Rptr. 2d 66*

Insurer had no duty to indemnify insured for cleanup costs and property damage for which policy holder was liable under CERCLA, when damage occurred during policy period but before insured purchased damaged site or otherwise had any connection with damages. *FMC Corp. v. Plaisted & Cos. (1998) 61 Cal. App. 4th 1132, 1150-1155, 72 Cal. Rptr. 2d 467*

Once coverage for continuous injury was triggered under comprehensive general liability policy, provision requiring insurer to indemnify insured for "all sums" which insured was obligated to pay by reason of specified liabilities requiredinsurer to cover insured's liability in full up to policy limits, even though only part of damages occurred during policy period; insured was not required to pay pro rata share for period during which it either had no insurance or for any other reason had not established coverage. *FMC Corp. v. Plaisted & Cos. (1998) 61 Cal. App. 4th 1132, 1183-1187, 72 Cal. Rptr. 2d 467*

When coverage for single occurrence that resulted in continuous and progressive environmental injury was triggered in more than one policy period, insured was not entitled to "stack" policies and receive sum of coverage limits of policies triggered by occurrence, but was instead required to select one policy under which it would be indemnified and would receive coverage up to maximum amount "per occurrence" under that policy. *FMC Corp. v. Plaisted & Cos. (1998) 61 Cal. App. 4th 1132, 1188-1190, 72 Cal. Rptr. 2d 467*

Under comprehensive general liability policy issued to developer, insurer had duty to defend third party action alleging damages resulting from severe leakage throughout home, although damage did not manifest itself until nearly two years after policy expired, when clear implication of complaint was that there had been continuing and progressive deterioration beginning with defective design and construction. *Pepperell v. Scottsdale Ins. Co. (1998) 62 Cal. App. 4th 1045, 1054, 73 Cal. Rptr. 2d 164*

[8] Coverage

[a] In General

Under subcontractor's liability policy covering property damage defined as "physical injury" to "tangible property," claim arising from insured's faulty drywall construction was not covered under diminution-of-value theory based on increased fire risk to structure and burden of maintaining fire safety system caused by inadequate drywall installation; lack of coverage hinged on narrow definition of "property damage" under policy. *New Hampshire Ins. Co. v. Vieira (9th Cir. 1991) 930 F.2d 696, 701*

Bank's loss of collateralization due to misrepresentations regarding collateral was economic loss that was not covered under liability policy, rather than covered "property damage"; fact that misrepresentations related to quantity and physical condition of collateral did not convert loss into one for property damage; damage also was not "advertising injury" within meaning of policy. *Fireman's Fund Ins. v. Nat'l Bank for Coops. (N.D. Cal. 1994) 849 F. Supp. 1347, 1356-1357, 1359*

Standard business general liability policy does not provide coverage for physical and emotional distress arising from non-covered economic losses (business and intentional torts). *Waller v. Truck Ins. Exch., Inc. (1995) 11 Cal. 4th 1, 15-16, 44 Cal. Rptr. 2d 370, 900 P.2d 619*

"Unfair competition" as used in advertising injury coverage of comprehensive general liability policy refers to common law tort of unfair competition rather than to conduct prohibited under Unfair Business Practices Act (*Bus. & Prof. Code § 17200 et seq.*). *Bank of W. v. Superior Court (1992) 2 Cal. 4th 1254, 1263-1264, 1272, 10 Cal. Rptr. 2d 538, 833 P.2d 545* ; *Chatton v. National Union Fire Ins. Co. (1992) 10 Cal. App. 4th 846, 863-865, 13 Cal. Rptr. 2d 318*

Patent infringement not covered under "advertising injury" coverage of standard business general liability policy. *Bank of W. v. Superior Court (1992) 2 Cal. 4th 1254, 1275, 10 Cal. Rptr. 2d 538, 833 P.2d 545* ; *Aetna Cas. & Sur. Co. v. Superior Court (1994) 19 Cal. App. 4th 320, 327-328, 23 Cal. Rptr. 2d 442* ; *Intex Plastics Sales Co. v. United Nat'l Ins. Co. (9th Cir. 1994) 23 F.3d 254, 256* ; *Iolab Corp. v. Seaboard Sur. Co. (9th Cir. 1994) 15 F. 3d 1500, 1506-1507* ; *National Union Fire Ins. Co. v. Siliconix Inc. (N.D. Cal. 1989) 729 F. Supp. 77, 79*

Civ. Code § 2782, governing unenforceability under certain circumstances of construction-contract provisions limiting liability, does not limit enforcement of "additional insured" endorsement provided to indemnitee by indemnitor's liability insurer pursuant to terms of indemnity agreement. *American Cas. Co. v. General Star Indem. Co. (2005) 125 Cal. App. 4th 1510, 1515-1516, 1531, 24 Cal. Rptr. 3d 34*

Homeowners' serving of eviction notice on tenants on ground that homeowners would soon be moving into house, then renting to other tenants instead, in violation of local rent-stabilization ordinance, was not "occurrence" or "accident" with respect to tenants' underlying wrongful eviction claim. *Swain v. California Cas. Ins. Co. (2002) 99 Cal. App. 4th 1, 7, 120 Cal. Rptr. 2d 808*

In suit alleging that insured's agent retrieved documents regarding prior litigation from trash of claimant's attorneys, which documents revealed to insured privileged attorney-client information about claimant, no potential claim for "property damage" existed; although damages may be awarded for use of *information* contained in trashed documents, no recovery may be based on injury to or loss of use of documents as "tangible property" within policy definition. *Ananda Church of Self-Realization v. Massachusetts Bay Ins. Co. (2002) 95 Cal. App. 4th 1273, 1281-1285, 116 Cal. Rptr. 2d 370*

Policy covering only real property in another state did not cover property owned by insured in California for which claim was sought; insurer not entitled to contribution and indemnification from additional insurers if underlying claim concerning property in another state was not covered under policy. *Fidelity & Deposit Co. v. Charter Oak Fire Ins. Co. (1998) 66 Cal. App. 4th 1080, 1085-1088, 78 Cal. Rptr. 2d 429*

Policy language covering sums that insured becomes "legally obligated to pay" refers to tort liability, because it describes liability based on breach of duty imposed by law, rather than by contract. *Old Republic Ins. Co. v. Superior Court (1998) 66 Cal. App. 4th 128, 146, 77 Cal. Rptr. 2d 642* (contract claim not covered)

When policy defined "occurrence" for which coverage was provided as event "unexpectedly and unintentionally" resulting in injury, court did not err in ruling that if insured intended any damage to third party property, coverage would be denied not only for expected or intended damage but for any further third party property damage resulting from same cause, even though further damage exceeded scope or nature of expected or intended third party property damage. *FMC Corp. v. Plaisted & Cos. (1998) 61 Cal. App. 4th 1132, 1173-1179, 72 Cal. Rptr. 2d 467*

Showing that insured expected soil damage to result from discharge of pollutants was sufficient to bar coverage for both soil damage and unexpected groundwaterdamage resulting from same discharge, when comprehensive general liability policy provided coverage only for unexpected and unintentional injuries. *FMC Corp. v. Plaisted & Cos. (1998) 61 Cal. App. 4th 1132, 1173-1179, 72 Cal. Rptr. 2d 467*

Judgment in favor of investors against directors and officers of financial services company for negligence and breach of fiduciary duty was not covered under policy; damages awarded for emotional distress were not covered because emotional distress is not "bodily injury" as required by policy, and plaintiffs' alleged physical distress derived from investment loss which was an economic loss and thus not within policy coverage for property damage to "tangible property." *McLaughlin v. National Union Fire Ins. Co. (1994) 23 Cal. App. 4th 1132, 1150, 29 Cal. Rptr. 2d 559* ; *see also Keating v. National Union Fire Ins. (9th Cir. 1993) 995 F.2d 154, 156-157*

Coverage for inducing patent infringement, as opposed to patent infringement itself, is barred by *Ins. Code § 533*; in order to be liable for inducing infringement, party must have specific intent to induce another to infringe, and act would have to be intentionally performed with knowledge of its harmful nature. *Aetna Cas. & Sur. Co. v. Superior Court (1993) 19 Cal. App. 4th 320, 331* (no duty to defend because no potential for coverage existed); *Intex Plastics Sales Co. v. United Nat'l Ins. Co. (9th Cir. 1994) 23 F.3d 254, 256-257*

Phrase "bodily injury, sickness or disease" was plain and unambiguous; coverage under bodily injury clause of comprehensive general liability policy is limited to physical injury to body and does not include include nonphysical, emotional, or mental harm. *Chatton v. National Union Fire Ins. Co. (1992) 10 Cal. App. 4th 846, 854, 13 Cal. Rptr. 2d 318*

Phrase "tangible property" in comprehensive general liability policy does not include coverage for injury to, or destruction or loss of use of, intangible property, such as economic interests or property rights. *Chatton v. National Union Fire Ins. Co. (1992) 10 Cal. App. 4th 846, 857-858, 13 Cal. Rptr. 2d 318*

"Occurrence" as defined in comprehensive general liability policy means "accidental" and therefore does not cover purposeful acts such as intentional or fraudulent conduct. *Chatton v. National Union Fire Ins. Co. (1992) 10 Cal. App. 4th 846, 860-861, 13 Cal. Rptr. 2d 318*

General liability policy covering sums that insured is legally obliged to pay as damages because of personal injury did not provide coverage for action alleging only fraud and intentional and negligent misrepresentation. *Horsemen's Benevolent & Protective Ass'n v. Insurance Co. of N. Am. (1990) 222 Cal. App. 3d 816, 820, 271 Cal. Rptr. 838*

Under "protection and indemnity" provision of all-risk yacht policy that covered sums insured is legally obligated to pay as result of ownership, operation, or maintenance of vessel, insurer had no duty to defend or to indemnify insured regarding wrongful death action arising from insured's alleged shooting of person aboard yacht; protection and indemnity policies cover only those liabilities specifically enumerated in policy. *Reliance Ins. Co. v. Alan (1990) 222 Cal. App. 3d 702, 706-708, 272 Cal. Rptr. 65 , disapproved on other grounds, Buss v. Superior Court (1997) 16 Cal. 4th 35, 65 Cal. Rptr. 2d 366, 939 P.2d 766*

In action brought by third party against insured, alleging causes of action based on contaminated soil on third party's property, arising from insured's contamination of soil some 15 years prior to third party's purchase of property, insurer under policy covering damage "caused by an occurrence," defined as "physical injury" to property "during the policy period," had duty to defend and indemnify insured, when both wrongful act and damage occurred within policy period, despite fact that third party did not own property at that time. *Garriott Crop Dusting Co. v. Superior Court (1990) 221 Cal. App. 3d 783, 793-795, 270 Cal. Rptr. 678*

"Contractual liability coverage" covers third-party tort liabilities that insured assumes by contract, not damages suffered by third party as result of insured's breach of contract entered into with that party. *Loyola Marymount Univ. v. Hartford Accident & Indem. Co. (1990) 219 Cal. App. 3d 1217, 1226, 271 Cal. Rptr. 528*

Inverse condemnation damages arising from property damage unintentionally caused by city's drainage system as covered by city's liability insurance policy, providing for payment of sums obligated to pay that were caused by occurrence resulting in property damage neither expected nor intended by insured. *Mill Valley v. Transamerica Ins. Co. (1979) 98 Cal. App. 3d 595, 600, 601, 159 Cal. Rptr. 635*

Insurer, under comprehensive general liability insurance policy and comprehensive personal insurance policy, as liable to State of California under *Health & Safety Code § 13009* for cost of fire fighting when fire was caused by negligence of insured and spread to other property. *Globe Indem. Co. v. State of California (1974) 43 Cal. App. 3d 745, 752-753, 118 Cal. Rptr. 75*

Liability insurance policy of lessee of trucks naming manufacturer-lessor as additional insured as not covering latter's liability based on strict liability in tort for defect in manufacture causing injury to lessee's employee. *Dart Transp. Serv. v. Mack Trucks, Inc. (1970) 9 Cal. App. 3d 837, 847-848, 88 Cal. Rptr. 670*

[b] Burden of Proof

Under rule allocating to insured burden of proving that claim comes within policy coverage and allocating to insurer burden of proving that claim falls within exclusion, insured had burden of proving that property damage for which it was liable occurred unexpectedly, because policy's definition of covered occurrence included requirement that damage occur unexpectedly. *FMC Corp. v. Plaisted & Cos. (1998) 61 Cal. App. 4th 1132, 1157-1160, 72 Cal. Rptr. 2d 467*

[c] When Coverage Is Triggered

Under standard general liability policy, coverage is triggered when complaining party is actually damaged, not when wrongful act causing damage was committed. *Montrose Chem. Corp. v. Admiral Ins. Co. (1995) 10 Cal. 4th 645, 669-670, 42 Cal. Rptr. 2d 324, 913 P.2d 878* ; *Remmer v. Glens Falls Indem. Co. (1956) 140 Cal. App. 2d 84, 88, 295 P.2d 19*

Under "continuous injury" theory adopted for third-party liability insurance cases in California, coverage under standard general liability policy is triggered neither by accident, event, or conditions causing bodily injury or property damage, nor by date of discovery of the damage or injury; it is only effect--occurrence of bodily injury or property damage during policy period, resulting from sudden accidentalevent or continuous or reported exposure to conditions--that triggers coverage. *Montrose Chem. Corp. v. Admiral Ins. Co. (1995) 10 Cal. 4th 645, 675, 42 Cal. Rptr. 2d 324, 913 P.2d 878*

Continuous injury trigger, rather than manifestation trigger, applied to third party action against insured developer for damages resulting from severe leakage throughout home, when clear implication of complaint was that there had been continuing and progressive deterioration beginning with defective design and construction of home. *Pepperell v. Scottsdale Ins. Co. (1998) 62 Cal. App. 4th 1045, 1050-1055, 73 Cal. Rptr. 2d 164*

Although continuous injury trigger applied to gradual release of pollutants, insurer had no duty to indemnify insured for cleanup costs and property damage for which insured was liable under CERCLA, when damage occurred during policy period but before insured purchased site or otherwise had any connection with damages. *FMC Corp. v. Plaisted & Cos. (1998) 61 Cal. App. 4th 1132, 1150-1155, 72 Cal. Rptr. 2d 467*

Under "claims made" policy, coverage is triggered when claim is made against insured and reported to insurer within policy period. *KPFF, Inc. v. California Union Ins. Co. (1997) 56 Cal. App. 4th 963, 972, 66 Cal. Rptr. 2d 36*

[9] Directors' and Officers' Liability Policy

In action against their insurers by corporations involved in merger and insured by D&O policies containing "company reimbursement coverage," for denial of coverage in underlying shareholder class action, summary judgment for one insurer reversed because claims and exposures settled in underlying suit were not so narrow in scope as to preclude coverage; claims may have sought non-restitutionary compensation for injuries suffered by shareholders, which would be covered. *Pan Pac. Retail Props. v. Gulf Ins. Co. (9th Cir. 2006) 471 F.3d 961, 966-970*

Directors and officers sued in their official capacities with regard to one corporation were not "insureds" within meaning of errors and omissions policy covering them in their official capacity with regard to different corporation for which they worked during same period. *Bowie v. Home Ins. Co. (9th Cir. 1991) 923 F.2d 705, 709*

Waiver under *Ins. Code § 554* (late notice) requires insurer to intentionally relinquish its right to deny coverage; denial of coverage on one ground does not, absent clear and convincing evidence to suggest otherwise, impliedly waive

grounds not stated in the denial. *Oakland-Alameda County Coliseum, Inc. v. National Union Fire Ins. Co. (N.D. Cal. 2007) 480 F. Supp. 2d 1182, 1191*

In mixed action, insurer that ascertained obligation under D&O policy to pay only 50 percent of defense costs had no contractual or other duty to advance on current basis 100 percent of reasonable attorneys' fees and costs that insured becomes obligated to pay in defending itself, its subsidiary, and several officers and employees in ongoing lawsuit; insurer need only advance on current basis those defense costs it believes to be covered under policy until different allocation is negotiated, arbitrated, or judicially determined. *Commercial Capital Bankcorp, Inc. v. St. Paul Mercury Ins. Co. (C.D. Cal. 2006) 419 F. Supp. 2d 1173, 1185*

"Insured vs. insured" exclusion in D&O policy bars coverage for securities fraud claims only if director or officer actively and voluntarily provided substantial aid or help to securities fraud plaintiff with intent of obtaining economic benefit by aiding prosecution of lawsuit; officers who provided information to securities fraud plaintiffs did not do so to obtain economic benefit and therefore did not provide "assistance" to plaintiffs within meaning of exclusion. *Harris v. Gulf Ins. Co. (N.D. Cal. 2003) 297 F. Supp. 2d 1220, 1226*

Letter to insured from third-party claimant's attorney was "claim" within meaning of D&O policy; insured's failure to report claim in timely manner after receiving letter rendered its later notice of claim untimely. *Westrec Marina Management, Inc. v. Arrowood Indemnity Co. (2008) 163 Cal. App. 4th 1387, 1396, 78 Cal. Rptr. 3d 264*

Insurer not liable for settlement or judgment in underlying suit against corporation and officer for breach of contract; D&O policy did not cover corporation's contractual debt or officer's liability for contract breach; in underlying suit, corporation was simply required to pay amount it voluntarily contracted to pay. *August Entm't, Inc. v. Philadelphia Indem. Ins. Co. (2007) 146 Cal. App. 4th 565, 581-583, 52 Cal. Rptr. 3d 908* (affirming trial court's judgment for insurer after sustaining demurrer to complaint in bad faith action)

D&O policy issued to condominium association covering "wrongful acts" referred to negligent acts, negligent errors, and negligent omissions, and did not cover claim by contractors for breach of contract. *Oak Park Calabasas Condo. Ass'n v. State Farm Fire & Cas. Co. (2006) 137 Cal. App. 4th 557, 564-565, 40 Cal. Rptr. 3d 263*

Violation of *Corp. Code §§ 25400, 25500* (stock manipulation) involves knowing and intentional, not negligent, conduct; pursuant to *Ins. Code § 533,* D&O policy does not cover liability alleged in class action suit against insured based on fraudulent manipulation of securities market in violation of Corporations Code. *California Amplifier, Inc. v. RLI Ins. Co. (2001) 94 Cal. App. 4th 102, 112-116*

Policy construed as "wasting" or "self-consuming"; defense costs held payable against liability limits just like any other element of "loss" as defined in policy. *Helfand v. National Union Fire Ins. Co. (1992) 10 Cal. App. 4th 869, 880, 13 Cal. Rptr. 2d 295*

[10] Duty to Defend

[a] Commencement of Action for Breach of Duty

If any facts stated or fairly inferable in complaint, or otherwise known or discovered by insurer, suggest claim potentially covered by policy, duty to defend arises and is not extinguished until insurer negates all facts suggesting potential coverage; however, if, as matter of law, neither complaint nor known extrinsic facts indicate any basis for potential coverage, duty to defend does not arise in first instance. *Scottsdale Ins. Co. v. MV Transp. (2005) 36 Cal. 4th 643, 655, 31 Cal. Rptr. 3d 147, 115 P.3d 460* ; *Kim Seng Co. v. Great American (2009) 179 Cal. App. 4th 186, 193, 101 Cal. Rptr. 3d 537 , reh'g denied, 2009 Cal. App. LEXIS 1971 (2009)*

Cause of action for refusal to defend accrues on discovery of loss or harm (when insurer refuses to defend); duty to defend is continuing; limitations period is equitably tolled from time cause of action accrues (when insurer refuses defense) until underlying lawsuit is terminated by final judgment. *Eaton Hydraulics Inc. v. Continental Cas. Co. (2005) 132 Cal. App. 4th 966, 973, 34 Cal. Rptr. 3d 91*

Duty of insurer under liability insurance policy to defend action against insured as continuing; hence, insured as entitled to elect to wait until final judgment is entered and duty to defend ceases before commencing action against insurer for breach of contract. *Oil Base, Inc. v. Continental Cas. Co. (1969) 271 Cal. App. 2d 378, 389-390, 76 Cal. Rptr. 594*

[b] Damages Recoverable for Breach of Duty

Wrongful failure to defend as rendering insurer liable for all damages reasonably incurred by insured in defending third-party action. *Wint v. Fidelity & Cas. Co. (1973) 9 Cal. 3d257, 261, 107 Cal. Rptr. 175, 507 P.2d 1383*

Distinction in measure of damages between wrongful refusal to settle and wrongful refusal to defend. *Hogan v. Midland Nat'l Ins. Co. (1970) 3 Cal. 3d 553, 565, 91 Cal. Rptr. 153, 476 P.2d 825* ; *Comunale v. Traders & Gen. Ins. Co. (1958) 50 Cal. 2d 654, 659-660, 328 P.2d 198*

Insurer who tortiously breaches duty to defend is liable for full amount of default judgment against insured, regardless of whether coverage actually existed; insured is not required to prove that judgment would have been lower had insurer undertaken defense. *Amato v. Mercury Cas. Co. (1997) 53 Cal. App. 4th 825, 831-839, 61 Cal. Rptr. 2d 909*

Refusal of insurer to defend insured, when insured tendered defense of third party's claim, as subjecting insurer to liability for amount of stipulated judgment between insured and third party; conscious decision by insurer not to defend as precluding it from later setting aside stipulated judgment between insured and third party after third party brings action against insurer to recover amount of stipulation. *Sunseri v. Camperos Del Valle Stables, Inc. (1986) 185 Cal. App. 3d 559, 561-562, 230 Cal. Rptr. 23*

[c] Duty to Investigate

When sale of excess policy of supplemental liability insurance in rental car transaction occurs after rental car customer presents facially valid driver's license and after license inspection and signature verification have been met, excess insurer has no obligation to conduct further inquiry regarding validity of customer's driver's license and does not forfeit any statutory or contractual right to rely on customer's presentation of facially valid but suspended license as basis for avoiding liability to third persons under excess policy. *Philadelphia Indemnity Ins. Co. v. Montes-Harris (2006) 40 Cal. 4th 151, 161-164, 51 Cal. Rptr. 3d 709, 146 P.3d 1251* (answering certified question from 9th Cir.)

Insurer does not have continuing duty to investigate potential for coverage if it has made informed decision on coverage at time of tender; however, when information available at time of tender shows no coverage but later information shows otherwise, duty to defend may then arise. *American States Ins. Co. v. Progressive Casualty Ins. Co. (2009) 180 Cal. App. 4th 18, 26, 102 Cal. Rptr. 3d 591*

Insurer who provided homeowner's coverage for third party bodily injury and property damage claims and who refused to tender defense of third party claims alleging emotional distress and "other injuries" without conducting any investigation was not entitled to have judgment against insured vacated based on insurer's mistake or excusable neglect in denying coverage, because complaint, on its face, should have alerted reasonable insurer to need to investigate whether plaintiffs' claims of emotional distress potentially included physical injury. *Eigner v. Worthington (1997) 57*

Cal. App. 4th 188, 196-199, 66 Cal. Rptr. 2d 808

[d] Insurer's Defenses

Although insurer is precluded from unilaterally rescinding once insured has filed suit, insurer may raise same issues by asserting rescission as affirmative defense and counterclaim. *Atmel Corp. v. St. Paul Fire & Marine Ins. Co. (N.D. Cal. 2006) 416 F. Supp. 2d 802, 805-807*

In action for breach of duty to defend in which insurer raised affirmative defense of rescission, if insurer is entitled to rescission, then policies are rendered void *ab initio*, and insurer never owed insured duty to defend. *Atmel Corp. v. St. Paul Fire & Marine Ins. Co. (N.D. Cal. 2006) 416 F. Supp. 2d 802, 807*

If insurer, by reasonable investigation, could have discovered a ground for asserting lack of coverage, that ground is waived if insurer fails to state it at time a request for coverage is tendered by insured; insurer may not belatedly raise that ground if reason upon which insurer initially denied coverage is found to have no merit or if insurer did not deny coverage at the outset. *Alta Cal. Reg'l Ctr. v. Fremont Indem. Co. (1994) 25 Cal. App. 4th 455, 459, 30 Cal. Rptr. 2d 841 , disapproved on other grounds, Waller v. Truck Ins. Exchange, Inc. (1995) 11 Cal. 4th 1, 44 Cal. Rptr. 2d 370, 900 P.2d 619*

Insurer that simply denies coverage, without expressly reserving right to assert defenses based on policy provisions that could limit amount of benefits available under policy if coverage ultimately is found to exist, does not waive right to assert those defenses in the event coverage is found; unreasonable to require insurer that is denying coverage to assert at outset an inconsistent theory that coverage is limited under policy terms. *Alta Cal. Reg'l Ctr. v. Fremont Indem. Co. (1994) 25 Cal. App. 4th 455, 459-460, 30 Cal. Rptr. 2d 841 , disapproved on other grounds, Waller v. Truck Ins. Exch. Inc. (1995) 11 Cal. 4th 1, 44 Cal. Rptr. 2d 370, 900 P.2d 619* (carrier's attempt to assert applicability of "other insurance" clause to limit benefits); *see Zumbrun v. United Servs. Auto. Ass'n (E.D. Cal. 1989) 719 F. Supp. 890, 897*

Defense under primary policy, accompanied by a reservation of rights, did not constitute an estoppel against denial of coverage under an excess policy written by same insurer. *State Farm Fire & Cas. Co. v. Jioras (1994) 24 Cal. App. 4th 1619, 1626-1627, 29 Cal. Rptr. 2d 840*

If action is brought against insured, and insurer, with knowledge of a ground of noncoverage under policy, assumes and conducts defense without disclaiming liability and giving notice of its rights, insurer waives right to assert noncoverage. *Phoenix Ins. Co. v. United States Fire Ins. Co. (1987) 189 Cal. App. 3d 1511, 1527, n.15, 235 Cal. Rptr. 185* ; *Miller v. Elite Ins. Co. (1980) 100 Cal. App. 3d 739, 755, 161 Cal. Rptr. 322*

[e] Insurer's Recovery of Expenses

Amounts expended by insurance company in partial defense of action as not always reimbursable as matter of law if court finds there was no duty to defend. *St. Paul Mercury Ins. Co. v. Ralee Eng'g Co. (9th Cir 1986) 804 F.2d 520, 522-523*

Insurer under standard CGL policy, having properly reserved its rights, may advance sums to defend its insured against third-party lawsuit, and may thereafter recoup those costs from insured if it is determined, as matter of law, that no duty to defend ever arose because third-party suit never suggested possibility of covered claim. *Scottsdale Ins. Co. v. MV Transp. (2005) 36 Cal. 4th 643, 662, 31 Cal. Rptr. 3d 147, 115 P.3d 460*

In context of claim alleging continuous injury resulting from discharge of hazardous substances over period of time, insurer whose policy covered only portion of period at issue may recover from insured those defense costs that can be

allocated solely to that part of claim for which insurer is not even potentially liable, such as damages caused by occurrence after policy expired. *Aerojet-Gen. Corp. v. Transport Indem. Co. (1997) 17 Cal. 4th 38, 69-71, 70 Cal. Rptr. 2d 118, 948 P.2d 909*

Under standard general commercial liability policy, insurer has obligation imposed by law to defend against entire action if at least one claim is potentially covered; however, insurer may seek reimbursement from insured for defense costs that can be allocated solely to those claims that are not even potentially covered; insurer has burden of proof by preponderance of evidence. *Buss v. Superior Court (1997)16 Cal. 4th 35, 47-53, 65 Cal. Rptr. 2d 366, 939 P.2d 766*

Under claims made policy covering structural engineering firm, insurer had no duty to defend seismic claim made after policy period had expired; complaint during policy period seeking modest damages for repairing damage to building resulting from cable failures did not constitute requisite written notice under policy's awareness provision, because it did not give insurer reasonable basis to infer likelihood of seismic claim. *KPFF, Inc. v. California Union Ins. Co. (1997) 56 Cal. App. 4th 963, 974-976, 66 Cal. Rptr. 2d 36*

Under awareness provision of claims made policy, written notice of circumstances that could give rise to subsequent claim arising out of act or omission of insured must be provided by insured itself; letter from counsel retained by insurer in earlier action did not constitute requisite written notice. *KPFF, Inc. v. California Union Ins. Co. (1997) 56 Cal. App. 4th 963, 976-977, 66 Cal. Rptr. 2d 36*

[f] Limitations on Duty to Defend

Insurer under comprehensive general liability policy issued to motion-picture special-effects company not obligated to defend or indemnify insured in action by motion-picture studio for failure to complete work, because harm was not "property damage" within meaning of policy. *Gulf Ins. Co. v. L.A. Effects Group, Inc. (9th Cir. 1987) 827 F.2d 574, 577*

Insurer had no duty to defend insured based on cross-complaint in suit by family members regarding insured's alleged mismanagement of family-owned property; cross-complaint asserted only economic causes of action, all of which pertained solely to financial management of property. *Storek v. Fidelity & Guaranty Ins. Underwriters, Inc. (N.D. Cal. 2007) 504 F. Supp. 2d 803, 807-809*

Liability insurance policies often contain "deductible" or "self-insured retention" (SIR), requiring insured to bear portion of loss otherwise covered by policy; unlike deductible, which generally relates only to damages, SIR also applies to defense costs and settlement of any claim; SIRs are equivalent to primary liability insurance; policies that are subject to SIRs are "excess policies" that have no duty to indemnify until SIR is exhausted. *Forecast Homes, Inc. v. Steadfast Ins. Co. (2010) 181 Cal. App. 4th 1466, 1473-1474, 105 Cal. Rptr. 3d 200*

In case in which developer required its subcontractors to defend and hold it harmless against any liability arising out of subcontractors' work, and required subcontractors to add developer to their general liability policies as additional insured, insurer had no obligation to defend developer because named insureds failed to pay "self-insured retention" (SIR), which was precondition for coverage; only named insureds, and not developer, could satisfy SIR and trigger coverage. *Forecast Homes, Inc. v. Steadfast Ins. Co. (2010) 181 Cal. App. 4th 1466, 1472-1474, 1476-1481, 105 Cal. Rptr. 3d 200*

Insurer had no duty to defend directors and officers in underlying bond litigation under "Nonprofit Organization Liability Insurance" policy because policy did not cover damages arising out of breach of contract, and plaintiffs in underlying suit sought to recover damages for failure of defendants to perform their contractual obligations to make repayments on bonds. *Medill v. Westport Ins. Corp. (2006) 143 Cal. App. 4th 819, 829-831, 49 Cal. Rptr. 3d 570*

Insurer has no duty to defend class action suit. *Low v. Golden Eagle Ins. Co. (2002) 99 Cal. App. 4th 109, 113, 120 Cal. Rptr. 2d 827* (suit seeking class action status, alleging personal injury from ingestion of insured's food product)

Insurer under comprehensive general liability (CGL) policy issued to corporation that provided coverage for bodily injury and property damage did not owe duty to indemnify or defend shareholder/director in federal counterclaim alleging defamation, conversion, intentional interference with economic relations, breach of fiduciary duty, and misappropriation of trade secrets; plaintiff/counterclaim defendant was not acting as director at relevant times. *Lomes v. Hartford Fin. Servs. Group, Inc. (2001) 88 Cal. App. 4th 127, 134, 105 Cal. Rptr. 2d 471* (same insurer already defending defendant and counterclaimant in that suit)

No duty under commercial general liability (CGL) policies to defend lawsuit for violation of Clean Water Act if alleged conduct occurred after expiration of all policies. *Buena Vista Mines, Inc. v. Industrial Indem. Co. (2001) 87 Cal. App. 4th 482, 487-490, 104 Cal. Rptr. 2d 557*

Insurer has no duty to defend when policy provides no potential basis for coverage. *Waller v. Truck Ins. Exch., Inc. (1995) 11 Cal. 4th 1, 37, 44 Cal. Rptr. 2d 370, 900 P.2d 619* ; *Lomes v. Hartford Fin. Servs. Group, Inc. (2001) 88 Cal. App. 4th 127, 132, 105 Cal. Rptr. 2d 471*

Insurer not required to defend insured in third party action seeking incidental emotional distress damages caused by insured's noncovered economic or business torts. *Waller v. Truck Ins. Exch., Inc. (1995) 11 Cal. 4th 1, 15-16, 44 Cal. Rptr. 2d 370, 900 P.2d 619*

Insurer providing homeowners' policy had no duty to defend daughter of woman who lived with insured in suit involving daughter's negligence in abandoning drunken passenger on highway; daughter was not "insured" under policy because was not member of insured's household or insured's dependent. *Safeco Ins. Co. v. Parks (2004) 122 Cal. App. 4th 779, 793-794, 19 Cal. Rptr. 3d 17*

There is no duty to defend if there is no possibility of coverage; yacht insurance policy provided no possible coverage for insured's liability for allegedly transmitting herpes virus to plaintiff, because only connection with boat was allegation that plaintiff and defendant were sailing on defendant's boat while sexual relations allegedly occurred. *Peters v. Firemen's Ins. Co. (1998) 67 Cal. App. 4th 808, 812-814, 79 Cal. Rptr. 2d 326*

Insurer had no duty to defend action for assault and battery, intentional infliction of emotional distress, negligence, and negligent infliction of emotional distress arising from alleged rape and related injuries. *Quan v. Truck Ins. Exch. (1998) 67 Cal. App. 4th 583, 595-602, 79 Cal. Rptr. 2d 134*

Insurer has no duty arising by operation of law to defend insured's corporate successor in action brought by third party injured by insured's predissolution activities, despite finding of corporate successor's tort liability for those activities; law may not impose contractual insurance relationship between insurer and stranger to insurance contract. *General Accident Ins. Co. of Am. v. Superior Court (1997) 55 Cal. App. 4th 1444, 1454-1455, 64 Cal. Rptr. 2d 781*

Allegations that priest used counseling techniques to obtain information about plaintiff and then misused those techniques to induce plaintiff's behavior were "inseparably intertwined" with priest's sexual misconduct, and insurer therefore had no duty to defend claim. *Jane D. v. Ordinary Mut. (1995) 32 Cal. App. 4th 643, 653, 38 Cal. Rptr. 2d 131*

No duty to defend sexual harassment suit against insured corporation when complaint contained no allegations of negligent conduct, acts in question could not reasonably be characterized as negligent or unintentional, corporation was aware of harassment by its officers and employees, and conduct was ratified or condoned by corporation. *Coit*

Drapery Cleaners, Inc. v. Sequoia Ins. Co. (1993) 14 Cal. App. 4th 1595, 1603-1604, 18 Cal. Rptr. 2d 692

Liability policy covering accidental bodily injury or property damage does not impose duty on insurer to defend action for conspiracy to engage in fraudulent billing practices, when potential for recovery is limited to intangible economic interests and property rights. *Hurley Constr. Co. v. State Farm Fire & Cas. Co. (1992) 10 Cal. App. 4th 533, 541, 12 Cal. Rptr. 2d 629*

Liability policy covering "bodily injury" did not impose duty on insurer to defend or to indemnify regarding action for negligent breach of fiduciary duty, breach of contract, and infliction of emotional distress, brought by insured's employee based on insured's failure to provide promised health insurance coverage and employee's consequent liability for medical expenses arising from car accident. *Aim Ins. Co. v. Culcasi (1991) 229 Cal. App. 3d 209, 217-228, 280 Cal. Rptr. 766*

Duty to defend is measured by nature and kind of risks covered by policy; under claims-made medical malpractice policy, no potential duty to defend exists when third party neither made any claim nor asserted any right against insured. *Hill v. Physicians &Surgeons Exch. (1990) 225 Cal. App. 3d 1, 7, 274 Cal. Rptr. 702*

Under general comprehensive policy that excluded coverage for personal injuries arising out of business pursuits of insured, insurer had no duty to defend in underlying action alleging negligent infliction of emotional distress based on wrongful termination claim against insured. *California Ins. Guarantee Ass'n v. Wood (1990) 217 Cal. App. 3d 944, 949, 266 Cal. Rptr. 250*

Medical malpractice insurer has no duty to defend insured in wrongful termination action; although evaluation of physician's performance requires medical expertise, decision to terminate physician is not "rendering professional services" within meaning of coverage. *Inglewood Radiology Med. Group, Inc. v. Hospital Shared Servs., Inc. (1989) 217 Cal. App. 3d 1366, 1370, 266 Cal. Rptr. 501*

Under homeowner's policy providing obligation to defend actions that seek damages, insurer was under no duty to provide representation of insureds in juvenile proceedings against insureds' minor son. *United Pac. Ins. Co. v. Hall (1988) 199 Cal. App. 3d 551, 556, 245 Cal. Rptr. 99*

Insurer of real estate company had no duty to defend and indemnify insured's employee in action based on employee's activities prior to employment with company, when policy provided coverage for employee "but only while acting within the scope of his duties as such." *Padberg v. Travelers Cos. (1987) 197 Cal. App. 3d 1161, 1165-1166, 243 Cal. Rptr. 266*

Under vendor's broad form endorsement to comprehensive general liability policy purchased by manufacturer, insurer had no duty to defend vendor regarding injury caused by product manufactured by predecessor corporation because policy provided coverage only for named insured's products. *Oliver Mach. Co. v. United States Fid. & Guar. Co. (1986) 187 Cal. App. 3d 1510, 1515-1520, 232 Cal. Rptr. 691*

Psychiatrist's malpractice insurance policy did not require defense of criminal prosecution for Medi-Cal fraud and theft; no duty of insurance company to defend absent potential for coverage within limits of policy. *Jaffe v. Cranford Ins. Co. (1985) 168 Cal. App. 3d 930, 934, 214 Cal. Rptr. 567*

Insurer's obligation to defend was terminated when bifurcated trial settled issue of liability; insurer's letter stating that it would assume cost of defense for entire action did not impose broader obligation than policy created. *California Union Ins. Co. v. Club Aquarius (1981) 113 Cal. App. 3d 243, 247-248, 169 Cal. Rptr. 685*

[g] Multiple Insurers Having Duty to Defend

In context of claim alleging continuous injury resulting from discharge of hazardous substances over 28-year period, each insurer that issued standard comprehensive general liability policy during that period had duty to defend entire action, because each policy potentially covered part of claim; each insurer may also have had corresponding right to require other insurers to share in discharging duty or to contribute to its costs. *Aerojet-Gen. Corp. v. Transport Indem. Co. (1997) 17 Cal. 4th 38, 69-70*

When more than one insurer owes duty to defend, defense by one insurer does not excuse failure of other insurer to perform. *Wint v. Fidelity & Cas. Co. (1973) 9 Cal. 3d 257, 263, 107 Cal. Rptr. 175, 507 P.2d 1383*

If coverage is ultimately denied and hence there is no duty to indemnify, insured may nonetheless recover costs incurred in defense of action; however, costs may not be recovered if other insurers were on the risk and assumed insured's defense. *Tradewinds Escrow, Inc. v. Truck Ins. Exch. (2002) 97 Cal. App. 4th 704, 712, 118 Cal. Rptr. 2d 561*

Court's confirmation of good faith settlement between liability insurer and insured did not bar non-settling co-insurers from asserting future claims for equitable contribution or indemnity against settling insurer. *Rohr Indus., Inc. v. First State Ins. Co. (1997) 59 Cal. App. 4th 1480, 1487-1490, 69 Cal. Rptr. 2d 872*

No definite rule applicable in all situations regarding apportionment of costs of defense among insurers jointly responsible for defense; trial court's method of allocation, according to relative limits of coverage set by respective policies, was not abuse of discretion given acceptance of formula by overwhelming weight of authority. *CNA Cas. of Cal. v. Seaboard Sur. Co. (1986) 176 Cal. App. 3d 598, 619-620, 222 Cal. Rptr. 276*

[h] Payment of Policy Limits

In action involving environmental clean-up, issuance of remedial action order by California Department of Health Services was not equivalent to adjudication of liability that would allow primary insurer to pay out its policy limits and thereby extinguish its duty to defend insured, even though estimated cost of cleanup exceeded policy limits, but approval of remediation plan that clearly establishes that cost of remediation will exceed primary policy limits would be sufficient to allow primary insurer to tender policy limits to insured and thereby extinguish its duty to defend. *County of Santa Clara v. USF & G (N.D. Cal. 1994) 868 F. Supp. 274, 277-278, 280*

[i] Procedure in Action for Breach of Duty to Defend

When liability insurer providing defense to its insured believes there is no longer potential for coverage and, therefore, no longer duty to defend, it may bring declaratory relief action to obtain judicial declaration that it need no longer do so; however, insured may seek to stay that action if proceeding could prejudice its defense of underlying liability action. *Great American Ins. Co. v. Superior Court (2009) 178 Cal. App. 4th 221, 225, 234-235, 100 Cal. Rptr. 3d 258*

Insurer or insured may sue to determine whether insurer has duty to defend or indemnify insured in action by third party; coverage action may be framed as action for declaratory relief, breach of contract, breach of implied covenant of good faith and fair dealing, or otherwise; coverage action should generally be stayed until third-party action is resolved. *GGIS Ins. Svcs. v. Superior Court (2008) 168 Cal. App. 4th 1493, 1504-1505, 86 Cal. Rptr. 3d 515*

Demurrer to complaint by insured alleging bad faith was properly sustained without leave to amend after judgment was entered on cross-complaint in underlying action in which insured sought damages from insurer for breach of duties to defend and indemnify against injured party's claim; insured had impermissibly split single cause of action. *Lincoln Prop. Co., N.C., Inc. v. Travelers Indem. Co. (2006) 137 Cal. App. 4th 905, 914-916, 41 Cal. Rptr. 3d 39*

Claim for breach of covenant of good faith and fair dealing and claim for breach of duty to defend with respect to handling of particular claim are parts of same asserted primary right, and therefore must both be brought in same suit; failure to do so bars second action as impermissible splitting of single cause of action. *Lincoln Prop. Co., N.C., Inc. v. Travelers Indem. Co. (2006) 137 Cal. App. 4th 905, 914-916, 41 Cal. Rptr. 3d 39*

Absent relevant admissions of insured, insurer moving for summary adjudication of issues or summary judgment on merits of case in which coverage is disputed must provide copies of policies or, if policies are missing, secondary evidence sufficient to inform court of relevant terms and conditions of insurance contract. *Certain Underwriters at Lloyd's of London v. Superior Court (1997) 56 Cal. App. 4th 952, 955-959, 65 Cal. Rptr. 2d 821*

[j] Reservation of Rights

Insurer that has assumed defense with reservation of rights not required to segregatehandling of liability claims from coverage investigation. *Employers Ins. of Wausau v. Albert D. Seeno Constr. (9th Cir. 1991) 945 F.2d 284, 288*

Insurer under standard CGL policy, having properly reserved its rights, may advance sums to defend its insured against third-party lawsuit, and may thereafter recoup those costs from insured if it is determined, as matter of law, that no duty to defend ever arose because third-party suit never suggested possibility of covered claim. *Scottsdale Ins. Co. v. MV Transp. (2005) 36 Cal. 4th 643, 662, 31 Cal. Rptr. 3d 147, 115 P.3d 460*

Insurer may reserve its right to assert noncoverage of settled claims unilaterally. *Blue Ridge Ins. Co. v. Jacobsen (2001) 25 Cal. 4th 489, 498, 106 Cal. Rptr. 2d 535*

To obtain reimbursement from insured for defense costs regarding claims not potentially covered, insurer must reserve its right to seek reimbursement. *Buss v. Superior Court (1997) 16 Cal. 4th 35, 61 n.27, 65 Cal. Rptr. 2d 366, 939 P.2d 766*

Absent contrary provision in policy, insurer has no right of reimbursement for defending claims potentially covered by policy, and insurer's "reservation of rights" to seek reimbursement for claims is therefore ineffectual, even if insured agrees to reservation. *Buss v. Superior Court (1997) 16 Cal. 4th 35, 49-50*

Insurer that refused to defend California Department of Transportation (CalTrans) as additional insured in action arising from fatal traffic collision allegedly because of defective median barrier and involving company hired by CalTrans, could not intervene to defend while reserving rights after case had already been settled; insurer took no steps to participate until several years had passed and comprehensive settlement agreement had been reached. *Noya v. A.W. Coulter Trucking (2006) 143 Cal. App. 4th 838, 842, 49 Cal. Rptr. 3d 584*

When insurer has reserved its rights, resulting in declaratory relief action, policy's "cooperation clause" does not effect waiver of insured's attorney-client or work product privileges with respect to documents sought by insurer. *Rockwell Int'l Corp. v. Superior Court (1994) 26 Cal. App. 4th 1255, 1265-1266, 32 Cal. Rptr. 2d 153*

Insurer's reservation of rights letter that conditioned its right to seek reimbursement of defense costs on insured's agreement to reservation of that right did not create, in absence of any express agreement by insured, contractual understanding sufficient to entitle insurer to seek subsequent reimbursement of defense costs. *American Motorists Ins. Co. v. Allied-Sysco Food Servs., Inc. (1993) 19 Cal. App. 4th 1342, 1355-1356, 24 Cal. Rptr. 2d 106 , disapproved on other grounds, Buss v. Superior Court (1997) 16 Cal. 4th 35, 65 Cal. Rptr. 2d 366, 939 P.2d 766* ; *but see Walbrook Ins. Co. Ltd. v. Goshgarian & Goshgarian (C.D. Cal. 1989) 726 F. Supp. 777* ; *Omaha Indem. Ins. Co. v. Cardon Oil Co. (N.D. Cal. 1988) 687 F. Supp 502* (insured's acceptance of defense under insurer's reservation of rights letter that

expressly reserved right to recover defense costs without conditioning that right on insured's approval constituted insured's agreement to insurer's reservation of rights)

Following determination of noncoverage, insurer not entitled to recover defense costs on equitable restitution theory when insurer was uncertain whether policy provided coverage and undertook defense to protect itself from breach of contract claim, and policy contained no reimbursement provision. *Reliance Ins. Co. v. Alan (1990) 222 Cal. App. 3d 702, 708-710, 272 Cal. Rptr. 65* , *disapproved on other grounds,* *Buss v. Superior Court (1997) 16 Cal. 4th 35, 65 Cal. Rptr. 2d 366, 939 P.2d 766*

Insurer properly undertaking defense under reservation of rights. *Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 279, 54 Cal. Rptr. 104, 419 P.2d 168* ; *State Farm Mut. Auto. Ins. Co. v. Allstate Ins. Co. (1970) 9 Cal. App. 3d 508, 515, 88 Cal. Rptr. 246*

[k] Scope of Duty to Defend

[i] Generally

Policy provision for defense of malicious prosecution claims also required insurer to defend claim for abuse of process. *Lunsford v. American Guarantee & Liab. Ins. Co. (9th Cir. 1994) 18 F.3d 653*

Under California law, liability insurer has broad duty to defend its insured against claims that create potential for indemnity; because duty to defend is broader than duty to indemnify, insurer may have duty to defend even though no damages are ultimately awarded. *E.piphany, Inc. v. St. Paul Fire & Marine Ins. Co. (N.D. Cal. 2008) 590 F. Supp. 2d 1244, 1251*

Duty to defend, although broad, is not unlimited, and is measured by nature and kinds of risks covered by policy. *E.piphany, Inc. v. St. Paul Fire & Marine Ins. Co. (N.D. Cal. 2008) 590 F. Supp. 2d 1244, 1251*

If any facts stated or fairly inferable in complaint, or otherwise known or discovered by insurer, suggest claim potentially covered by policy, insurer's duty to defend arises and is not extinguished until insurer negates all facts suggesting potential coverage; however, if, as matter of law, neither complaint nor known extrinsic facts indicate any basis for potential coverage, duty to defend does not arise in first instance. *Scottsdale Ins. Co. v. MV Transp. (2005) 36 Cal. 4th 643, 655, 31 Cal. Rptr. 3d 147, 115 P.3d 460* ; *GGIS Ins. Svcs. v. Superior Court (2008) 168 Cal. App. 4th 1493, 1506, 86 Cal. Rptr. 3d 515*

Institution of "suit" for purposes of triggering insurer's duty to defend is effected by filing of complaint that initiates court proceeding; "suit" denotes court proceedings, not substantive or functional equivalent of court proceedings, e.g., administrative notice or order issued by EPA, even if administrative action has serious consequences or precludes substantial defenses. *Foster-Gardner, Inc. v. National Union Fire Ins. Co. (1998) 18 Cal. 4th 857, 879, 882, 888-889, 77 Cal. Rptr. 2d 107, 959 P.2d 265*

Evidence extrinsic to complaint may defeat as well as trigger insurer's duty to defend, when issue of coverage can be determined as matter of law on undisputed facts. *Montrose Chem. Corp. v. Superior Court (1993) 6 Cal. 4th 287, 296-299, 24 Cal. Rptr. 2d 467, 861 P.2d 1153*

Insurer had duty to defend claim arising out of sexual molestation committed by teacher despite fact that *Ins. Code § 533* barred coverage, because claim also alleged negligent nonsexual conduct related to molestation. *Horace Mann Ins. Co. v. Barbara B. (1993) 4 Cal. 4th 1076, 1084, 17 Cal. Rptr. 2d 210, 846 P.2d 792* ; *but see* *State Farm Fire & Cas. Co. v. Century Indem. Co. (1997) 59 Cal. App. 4th 648, 661-663, 69 Cal. Rptr. 2d 403* (teacher's alleged negligent

failure to report hisown molestation of students was so directly related to and inseparable from uninsurable molestation itself that alleged negligence did not trigger insurer's duty to defend); *Jane D. v. Ordinary Mut. (1995) 32 Cal. App. 4th 643, 653, 38 Cal. Rptr. 2d 131* (allegations that priest used counseling techniques to obtain information about plaintiff and then misused those techniques to induce plaintiff's behavior were "inseparably intertwined" with priest's sexual misconduct, and therefore insurer had no duty to defend claim)

Insurer must defend its insured whenever it ascertains facts that give rise to potential of liability under policy; duty to defend "insured" includes both named insured and anyone else included in policy definition of "insured." *American States Ins. Co. v. Progressive Casualty Ins. Co. (2009) 180 Cal. App. 4th 18, 26, 102 Cal. Rptr. 3d 591*

When some claims are potentially covered and others are not, insurer must defend entire action, including those claims for which there is no potential coverage, even if those claims predominate; duty to defend entire action continues until insurer produces undeniable evidence supporting allocation of specific portion of defense costs to noncovered claim. *American States Ins. Co. v. Progressive Casualty Ins. Co. (2009) 180 Cal. App. 4th 18, 26, 102 Cal. Rptr. 3d 591*

Issue whether particular policy provides potential for coverage and duty to defend is question of law. *Kim Seng Co. v. Great American (2009) 179 Cal. App. 4th 186, 193, 101 Cal. Rptr. 3d 537 , reh'g denied, 2009 Cal. App. LEXIS 1971 (2009)*

Duty to defend is both separate from and broader than duty to indemnify. *Food Pro Int'l, Inc. v. Farmers Ins. Exch. (2008) 169 Cal. App. 4th 976, 985, 89 Cal. Rptr. 3d 1 , rev. denied, 2009 Cal. LEXIS 3729 (2009)*

To prevail in duty to defend action, insured must prove existence of potential for coverage, while insurer must establish absence of any potential; insured need only show that underlying claim may fall within policy coverage; insurer must prove it cannot. *Food Pro Int'l, Inc. v. Farmers Ins. Exch. (2008) 169 Cal. App. 4th 976, 985, 89 Cal. Rptr. 3d 1 , rev. denied, 2009 Cal. LEXIS 3729 (2009)*

Liability insurer owes broad duty to defend its insured against claims that create potential for indemnity; carrier must defend suit that potentially seeks damages within coverage of policy; duty to defend is broader than duty to indemnify. *Great American Ins. Co. v. Superior Court (2009) 178 Cal. App. 4th 221, 234, 100 Cal. Rptr. 3d 258*

Potential liability for purposes of duty to defend is gauged by facts alleged in complaint and facts known to insurer at time of coverage. *Griffin Dewatering Corp. v. Northern Ins. Co. of N.Y. (2009) 176 Cal. App. 4th 172, 197-198, 97 Cal. Rptr. 3d 568*

Insurer's refusal to defend insured (contractor whose primary work involves movement of water) in suit by water district was reasonable; suit arose from insured's work on manhole feeding into main sewer that resulted in sewer-water damage to a residence; refusal to defend was rooted in literal language of absolute pollution exclusion. *Griffin Dewatering Corp. v. Northern Ins. Co. of N.Y. (2009) 176 Cal. App. 4th 172, 202-208, 97 Cal. Rptr. 3d 568 , citing MacKinnon v. Truck Ins. Exch. (2003) 31 Cal. 4th 635, 3 Cal. Rptr. 3d 228, 73 P.3d 1205*

Duty to defend groundless action applies only to claims covered by policy. *Venoco, Inc. v. Gulf Underwriters Ins. Co. (2009) 175 Cal. App. 4th 750, 765, 96 Cal. Rptr. 3d 409*

Duty to defend arises under California law on tender to insurer of potentially covered claim and continues until lawsuit is concluded or until insurer shows that facts extrinsic to third-party complaint conclusively negate potential for coverage. *Frontier Oil Corp. v. RLI Ins. Co. (2007) 153 Cal. App. 4th 1436, 1466, 63 Cal. Rptr. 3d 816*

Underlying complaint alleging that as result of oil and gas exploration activities, hazardous substances were discharged into environment, causing damage covered by policy, created potential for coverage under CGL policy; because insurer

failed to establish absence of duty to defend, it was not entitled to summary judgment on that basis. *Frontier Oil Corp. v. RLI Ins. Co. (2007) 153 Cal. App. 4th 1436, 1468, 63 Cal. Rptr. 3d 816*

Insurer under primary and excess liability policies covering property damage had duty to defend insured commercial nursery that sold strawberry nursery stock to third-party growers, in suit by growers alleging that aerially sprayed herbicide that causes systemic damage to strawberry plants drifted onto insureds' property and stock ofplants, which insureds negligently sold to growers. *Hendrickson v. Zurich Am. Ins. Co. (1999) 72 Cal. App. 4th 1084, 1091, 85 Cal. Rptr. 2d 622*

Insurer may have duty to defend even if insurer ultimately has no obligation to indemnify, either because no damages are awarded in underlying action against insured or because actual judgment is for damages not covered under policy. *Wausau Underwriters Ins. Co. v. Unigard Sec. Ins. Co. (1998) 68 Cal. App. 4th 1030, 1047, 80 Cal. Rptr. 2d 688*

Liability insurer owes duty to defend its insured if claim creates any potential for indemnity; whether duty to defend arises is determined by comparing terms of policy with allegations of complaint and any known extrinsic facts; any doubt as to whetherfacts create duty to defend is resolved in favor of insured. *Smith Kandal Real Estate v. Continental Cas. Co. (1998) 67 Cal. App. 4th 406, 413-414, 79 Cal. Rptr. 2d 52*

Insurer's unilateral determination that insured did not contaminate groundwater and therefore was not liable for misconduct alleged in third-party complaint did not permit insurer to avoid duty to defend; duty to defend covers third party claims that are groundless, false, or fraudulent. *A-H Plating, Inc. v. American Nat'l Fire Ins. Co. (1997) 57 Cal. App. 4th 427, 442-443, 67 Cal. Rptr. 2d 113*

Insurer had duty to defend action including claims that teacher engaged in both sexual conduct and nonsexual physical conduct with student, when nonsexual conduct was temporally and spatially separate from sexual conduct, and trier of fact could reasonably find non-sexual conduct was inappropriate or negligent and caused student embarrassment. *State Farm Fire & Cas. Co. v. Century Indem. Co. (1997) 59 Cal. App. 4th 648, 664-665, 69 Cal. Rptr. 2d 403*

When dispute arises over whether or not policy limits have been exhausted, primary insurer must continue to defend until it obtains declaratory judgment or summary judgment that it has exhausted policy limits; primary insurer that successfully proves exhaustion is entitled to be reimbursed by excess insurer for its share of defense costs. *Hartford Accident & Indem. Co. v. Superior Court (1994) 23 Cal. App. 4th 1774, 1780-1782, 29 Cal. Rptr. 2d 32* , relying on *Montrose Chem. Corp. v. Superior Court (1993) 6 Cal. 4th 287, 24 Cal. Rptr. 2d 467, 861 P.2d 1153*

Insurer that possessed evidence suggesting that insured did not reside with mother-in-law had duty to defend insured in action by mother-in-law for injuries suffered in auto accident involving insured, even though jury ultimately found that parties did in fact reside together and coverage therefore was barred under policy's "resident relative" exclusion. *Amato v. Mercury Cas. Co. (1993) 18 Cal. App. 4th 1784, 1789, 23 Cal. Rptr. 2d 73 , modified, Amato v. Mercury Cas. Co. (1997) 53 Cal. App. 4th 825, 61 Cal. Rptr. 2d 909*

Insurer had duty to appeal adverse judgment when reasonable grounds for appeal exist, and policy is construed to include post-trial remedies; duty to appeal not precluded by contract unless contract very specifically exempts insurer from that duty. *Jenkins v. Insurance Co. of N. Am. (1990) 220 Cal. App. 3d 1481, 1490-1492, 272 Cal. Rptr. 7*

Under homeowner's policy containing personal liability coverage, insurer had duty to defend insured in action by third party based on transmission of venereal disease, when complaint alleged both negligent and intentional torts and insurer was potentially required to indemnify with regard to negligent conduct. *State Farm Fire & Cas. Co. v. Eddy (1990) 218 Cal. App. 3d 958, 965-966, 267 Cal. Rptr. 379*

Law held to impose implied obligation to defend on excess insurer when that obligation is not expressly and clearly

omitted from particular risk; absent explicit provision that defense duty is optional, duty is imposed. *Interstate Fire & Cas. Co. v. Stuntman, Inc. (9th Cir. 1988) 861 F.2d 203, 205*

Insurer required under liability policy to defend lawsuit against insured that potentially seeks damages within coverage of policy. *Aetna Cas. & Sur. Co. v. Centennial Ins. Co. (9th Cir. 1988) 838 F.2d 346, 350* ; *Gulf Ins. Co. v. L.A. Effects Group, Inc. (9th Cir. 1987) 827 F.2d 574, 576* ; *Wint v. Fidelity & Cas. Co. (1973) 9 Cal. 3d 257, 261, 107 Cal. Rptr. 175, 507 P.2d 1383* ; *Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 276-277, 54 Cal. Rptr. 104, 419 P.2d 168* ; *Sunseri v. Camperos Del Valle Stables, Inc. (1986) 185 Cal. App. 3d 559, 561, 230 Cal. Rptr. 23*

Insurer had duty to provide counsel hired to defend insured with sufficient funds to conduct defense, and had duty to stay informed of progress and status of litigation in order to act intelligently and in good faith on settlement offers; duty to defend includes duty to negotiate and evaluate settlement offers. *Travelers Ins. Co. v. Lesher (1986) 187 Cal. App. 3d 169, 188, 191, 231 Cal. Rptr. 791 , disapproved on other grounds, Buss v. Superior Court (1997) 16 Cal. 4th 35, 65 Cal. Rptr. 2d 366, 939 P.2d 766*)

Insurer's duty to defend is broader than duty to indemnify. *Val's Painting & Drywall, Inc. v. Allstate Ins. Co. (1975) 53 Cal. App. 3d 576, 584, 126 Cal. Rptr. 267*

[ii] Application of Exclusions

"Exclusion--Engineers, Architects or Surveyors Professional Liability," or "professional services exclusion," in CGL policy did not preclude duty to defend when exclusion was applied narrowly to incident occurring while insured was on project site as engineering consultant; because insured was engineering firm, general liability policy would otherwise be essentially useless. *Food Pro Int'l, Inc. v. Farmers Ins. Exch. (2008) 169 Cal. App. 4th 976, 986, 992, 89 Cal. Rptr. 3d 1 , rev. denied, 2009 Cal. LEXIS 3729 (2009)*

CGL insurer had duty to defend insured, one of insured's partners, and manager employed by insured, in suit by former employee for sexual harassment, defamation, and other claims in context of wrongful termination, alleging that coworker made defamatory sexual remarks about former employee following her termination of their affair; alleged defamation was outside scope of exclusion for personal injury arising out of any employment-related practices, policies, acts or omissions, including defamation. *Golden Eagle Ins. Corp. v. Rocky Cola Cafe, Inc. (2001) 94 Cal. App. 4th 120, 128-129, 114 Cal. Rptr. 2d 16*

Insurer had duty to defend action seeking to recover for losses caused by leak in underground fuel tank, despite policy exclusion for losses arising out of "request, demand or order" that insured or others in any way respond to or assess effects of pollutants; although fire department had ordered plaintiff to conduct tests, improve its monitoring systems, and repair leaking tank, complaint also alleged that plaintiff removed and replaced storage tanks, excavated and disposed of contaminated soil, and repaired damage to property where leak occurred, none of which activities had been ordered by fire department or any other agency. *Charles E. Thomas Co. v. Transamerica Ins. Group (1998) 62 Cal. App. 4th 379, 382-384, 72 Cal. Rptr. 2d 577*

Under comprehensive general liability policy purchased by machine manufacturer, exclusionary clause for relabeled products held insufficient to release insurer from duty to defend additional insured vendor, when all products sold were relabeled and when to deny duty would nullify coverage of additional insured. *Oliver Mach. Co. v. United States Fid. & Guar. Co. (1986) 187 Cal. App. 3d 1510, 1514-1515, 232 Cal. Rptr. 691*

Statutory exclusion against indemnification of punitive damages not sufficient by itself to establish that insurer had no duty to continue defense against claim for punitive damages after settlement of other claims for which insurer had potential duty to indemnify, when policy did not expressly exclude coverage for punitive damages. *Ohio Cas. Ins. Co.*

v. Hubbard (1984) 162 Cal. App. 3d 939, 946-948, 208 Cal. Rptr. 806

[11] Duty to Provide Independent Counsel

In general, insurer entitled to control settlement negotiations without interference from insured; insurer normally cannot be liable to insured if insurer does no more than settle claim or suit within policy limits; insurer retains contractual right to settle claim as insurer deems expedient even if independent counsel is controlling insured's defense. *Seltzer v. Barnes (2010) 182 Cal. App. 4th 953, 966-967, 106 Cal. Rptr. 3d 290*

Conduct of insurer that accepted defense under reservation of rights and provided full defense pending its analysis of Cumis issue was not equivalent of providing no defense at all, when insured filed bad faith action rather than provide insurer with requested information regarding vague Cumis conflict, insurer waived its contractual right to control defense and sat as second chair to personal attorney for insured, insurer did not restrict defense counsel's discovery activities or litigation expenses, and record contained no support for allegation that insurer intended to offer only token defense. *Dynamic Concepts, Inc. v. Truck Ins. Exch. (1998) 61 Cal. App. 4th 999, 1006-1009*

Independent counsel's control of insured's defense does not extend to preventing insurer from exercising its contractual right to settle claim as insurer deems expedient; requirement in *Civ. Code § 2860(f)* that independent counsel be allowed to participate in all aspects of litigation does not give insured control over insurer's contractual right to settle claim. *Western Polymer Tech., Inc. v. Reliance Ins. Co. (1995) 32 Cal. App. 4th 14, 22, 38 Cal. Rptr. 2d 78*

Dispute between insurer and insured concerning duty to provide independent counsel in the first instance not required to be resolved by mandatory binding arbitration provisions of *Civ. Code § 2860(c).* *Truck Ins. Exch. v. Dynamic Concepts, Inc. (1992) 9 Cal. App. 4th 1147, 1150-1151, 11 Cal. Rptr. 2d 873*

Confidential communications between insurance adjuster and insurer privileged under *Evid. Code § 954* (attorney-client privilege), and not subject to discovery by insured, when there is no issue regarding misrepresentation of status of insurance adjuster and no allegations of damage by virtue of adjuster's dual role in representing interests of both insurer and insured. *State Farm Fire & Cas. Co. v. Superior Court (1989) 216 Cal. App. 3d 1222, 1227, 265 Cal. Rptr. 372*

Duty to provide independent counsel does not encompass duty to provide two insurance adjusters who maintain separate files: one for underlying liability action and one for coverage dispute. *State Farm Fire & Cas. Co. v. Superior Court (1989) 216 Cal. App. 3d 1222, 1226-1227, 265 Cal. Rptr. 372*

Prompt filing of declaratory relief action is appropriate procedure for determining application of principles set forth in *San Diego Fed. Credit Union v. Cumis Ins. Soc'y, Inc. (1984) 162 Cal. App. 3d 358, 208 Cal. Rptr. 494* in given case; insurer that is dissatisfied with competence of *Cumis* counsel is afforded other applicable remedies in addition to those under *Civ. Code § 2860* (particularly when action filed prior to enactment of statute). *United States Fid. & Guar. Co. v. Superior Court (1988) 204 Cal. App. 3d 1513, 1526, 1527, 252 Cal. Rptr. 320*

[12] Duty to Settle

[a] Assignment of Cause of Action Against Insurer

Absent assignment of rights from insured under automobile liability policy, injured third party's only viable claim is under *Ins. Code § 11580(b)(2)* (direct action by insured's judgment creditor against insurer on final judgment arising from conduct by insured and covered by liability policy issued by insurer); assignment grants to third party only those rights that were properly assignable, i.e., claims by insured against insurer except his nonassignable, "purely personal"

tort claims for emotional distress and punitive damages. *Archdale v. American Int'l Specialty Lines Ins. Co. (2007) 154 Cal. App. 4th 449, 458, 468, 64 Cal. Rptr. 3d 632*

Judgment against insured is necessary condition to insured's assignment to claimant of bad faith cause of action against insurer; stipulated judgment with covenant not to execute is insufficient to bind insurer under *Civ. Code § 2778(5)*; however, insured's criminal conviction for manslaughter with gross negligence is sufficient basis for assignment. *Smith v. State Farm Mut. Auto. Ins. Co. (1992) 5 Cal. App. 4th 1104, 1114-1116, 7 Cal. Rptr. 2d 131*

Assignment of bad faith cause of action against insurer invalid when no legal liability had been imposed in wrongful death action that would have given rise to insurer's liability. *Doser v. Middlesex Mut. Ins. Co. (1980) 101 Cal. App. 3d 883, 891-892, 162 Cal. Rptr. 115*

Insured permitted to assign cause of action for recovery of amount by which judgment exceeded policy limits to injured third party, and still maintain cause of action to recover emotional distress damages, as long as both plaintiffs' actions are joined into single action against insurer. *Cain v. State Farm Mut. Auto. Ins. Co. (1975) 47 Cal. App. 3d 783, 794-796, 121 Cal. Rptr. 200* ; *see also* *Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 946, 132 Cal. Rptr. 424, 553 P.2d 584*

Insured not permitted to maintain separate action against insurer to recover damages for emotional distress resulting from insurer's wrongful failure to settle third-party action against insured within policy limits after assigning "all causes of action" against insurer. *Purcell v. Colonial Ins. Co. (1971) 20 Cal. App. 3d 807, 810-814, 97 Cal. Rptr. 874*

[b] Coercion of Insured

Bad faith action may lie against insurer who uses insured's fear of uninsured punitive damage exposure to coerce insured to contribute to settlement, when insurer knows punitive damages are unlikely. *J.B. Aguerre, Inc. v. American Guarantee & Liab. Ins. Co. (1997) 59 Cal. App. 4th 6, 13-15, 68 Cal. Rptr. 2d 837*

[c] Damages as Element of Cause of Action for Bad Faith Failure to Settle

Essential element of cause of action for breach of implied covenant of good faith and fair dealing based on wrongful refusal to settle is resulting damages; damages ordinarily include entire amount of judgment after trial, including amount in excess of policy limits, but excluding any punitive damages. *Wolkowitz v. Redland Ins. Co. (2003) 112 Cal. App. 4th 154, 163, 5 Cal. Rptr. 3d 95* ; *see also* *Hamilton v. Maryland Cas. Co. (2002) 27 Cal. 4th 718, 726, 117 Cal. Rptr. 2d 318, 41 P.3d 128* ; *PPG Indus., Inc. v. Transamerica Ins. Co. (1999) 20 Cal. 4th 310, 313-315, 84 Cal. Rptr. 2d 455, 975 P.2d 652*

[d] Damages for Breach of Duty to Settle

Punitive damages awards are subject to limits under due process clause of U.S. Constitution; courts must consider: (1) degree of reprehensibility of defendant's conduct, (2) disparity between actual or potential harm suffered by plaintiff and punitive damages award, and (3) disparity between punitive damages award and civil or criminal penalties authorized or imposed in comparable cases; circumstances of case may warrant no punitive damages if component of compensatory damages punishes defendant's conduct. *State Farm Mutual Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 419-427, 123 S. Ct. 1513, 155 L. Ed. 2d 585* (bad faith failure to settle)

Insured that sues insurer for wrongful failure to settle may not recover from insurer the amount of punitive damages ultimately awarded against insured in third-party lawsuit, if punitive damages award was based on conduct of insured.

PPG Indus., Inc. v. Transamerica Ins. (1999) 20 Cal. 4th 310, 315-319, 84 Cal. Rptr. 2d 455, 975 P.2d 652

Insurer that wrongfully breaches duty to insured to settle claim against insured within policy limits is liable to insured for underlying judgment in excess of policy limit and for damages for mental suffering. *Crisci v. Security Ins. Co. (1967) 66 Cal. 2d 425, 429-434, 58 Cal. Rptr. 13, 426 P.2d 173*

Insurer that refuses to accept reasonable settlement offer within policy limits in violation of its duty to consider in good faith interest of insured in settlement is liable for entire judgment against insured even if it exceeds policy limit. *Comunale v. Traders & Gen. Ins. Co. (1958) 50 Cal. 2d 654, 659, 661, 328 P.2d 198*

Insurer that breaches duty of reasonable settlement is liable for all insured's damages proximately caused by breach, regardless of policy limits; when underlying action has proceeded to trial and judgment in excess of policy limits was entered against insured, insurer is ordinarily liable to insured for entire amount of that judgment, excluding any punitive damages awarded. *Archdale v. American Int'l Specialty Lines Ins. Co. (2007) 154 Cal. App. 4th 449, 466, 64 Cal. Rptr. 3d 632 , citing Hamilton v. Maryland Casualty Co. (2002) 27 Cal.4th 718, 725, 117 Cal. Rptr. 2d 318, 41 P.3d 128*

Determination that insurer unreasonably failed to settle within policy limits does not itself show intent necessary to recover punitive damages; requisite intent shown when insurer refused to accept and actively concealed known adverse evidence, willfully manipulated testimony of insured, and exploited access to cross file of insured third party. *Betts v. Allstate Ins. Co. (1984) 154 Cal. App. 3d 688, 708-710, 201 Cal. Rptr. 528*

Punitive damages recoverable in action by insured against insurer for bad faith breach of duty to settle claim against insured within policy limit. *Cain v. State Farm Mut. Auto. Ins. Co. (1975) 47 Cal. App. 3d 783, 793-794, 121 Cal. Rptr. 200*

[e] No Comparative Bad Faith Defense

In bad faith suit brought by insured, insurer may not assert affirmative defense of "comparative bad faith"; because of disparate scopes and natures of insurer's and insured's obligations of good faith, insurer's breach sounds in tort, while insured's arises strictly from contractual provisions. *Kransco v. American Empire Surplus Lines Ins. Co. (2000) 23 Cal. 4th 390, 404-405, 97 Cal. Rptr. 2d 151, 2 P.3d 1* (third-party suit for failure to settle)

[f] Reasonableness of Settlement Offer

Only permissible consideration in evaluating reasonableness of settlement offer is whether, in light of victim's injuries and probable liability of insured, ultimate judgment is likely to exceed amount of settlement offer; such factors as limits imposed by policy, desire to reduce amount of future settlements, or belief that policy does not provide coverage, should not affect determination of reasonableness. *Johansen v. California State Auto. Ass'n Inter-Ins. Bureau (1975) 15 Cal. 3d 9, 16, 123 Cal. Rptr. 288, 538 P.2d 744*

Whether liability insurer's failure to accept settlement offer constitutes breach of implied covenant depends on whether that settlement offer was reasonable; existence of coverage dispute, however meritorious the insurer's position, is not proper consideration in deciding whether to accept offer to settle claim against insured. *Archdale v. American Int'l Specialty Lines Ins. Co. (2007) 154 Cal. App. 4th 449, 464-465, 64 Cal. Rptr. 3d 632*

Reasonable settlement offer exists when, in light of nature and scope of victim's injuries and probable liability of insured, ultimate judgment is likely to exceed amount of offer. *Archdale v. American Int'l Specialty Lines Ins. Co. (2007) 154 Cal. App. 4th 449, 470, 64 Cal. Rptr. 3d 632*

Whether insurer has acted unreasonably in rejecting settlement offer is question of fact to be determined by jury. *Cain v. State Farm Mut. Auto. Ins. Co. (1975) 47 Cal. App. 3d 783, 792, 121 Cal. Rptr. 200* ; *Marsango v. Automobile Club of S. Cal. (1969) 1 Cal. App. 3d 688, 696, 82 Cal. Rptr. 92*

[g] Reimbursement for Settlement of Noncovered Claims

Insurer may seek reimbursement from insured for reasonable settlement of noncovered claims, in absence of insured's express agreement, on following conditions: (1) timely and express reservation of rights; (2) express notification to insured of insurer's intent to accept proposed settlement offer; and (3) express offer to insured that insured may assume insured's own defense if insurer and insured disagree regarding whether to accept proposed settlement. *Blue Ridge Ins. Co. v. Jacobsen (2001) 25 Cal. 4th 489, 501, 106 Cal. Rptr. 2d 535*

[h] Scope of Duty to Settle

If policy grants to insurer "right and duty" to defend any claim or suit for covered injury or damage, including claims and suits that are "groundless, false, or fraudulent" and "right to settle any claim or suit within available limits of coverage," insurer need not obtain insured's consent prior to settling with third party, even though settling leads to loss of insured's potential claim for malicious prosecution, injures insured's reputation, or affects insured's future insurability. *Hurvitz v. St. Paul Fire & Marine Ins. Co. (2003) 109 Cal. App. 4th 918, 920, 929-934, 135 Cal. Rptr. 2d 703*

Implied covenant may not be used to limit or restrict express grant of discretion in contract to party to contract; insurer acted properly under insurance policy, and within its contractual discretion, in settling claims against insured. *New Hampshire Ins. Co. v. Ridout Roofing Co. (1998) 68 Cal. App. 4th 495, 504, 80 Cal. Rptr. 2d 286* ; *see also* *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal., Inc. (1992) 2 Cal. 4th 342, 374, 6 Cal. Rptr. 2d 467, 826 P.2d 710*

Liability of insurer clearly established based on insurer's initial refusal to defend third-party action, and subsequent refusal to settle within policy limits; case provides "classic" demonstration of bad faith as defined by decisional law, in that insurer abandoned insured in face of multimillion-dollar third-party claim, causing him significant emotional distress over long period of time. *Tan Jay Int'l, Ltd. v. Canadian Indem. Co. (1988) 198 Cal. App. 3d 695, 702-708, 243 Cal. Rptr. 907*

Even when coverage dispute exists, insurer deciding whether or not to settle is required to conduct itself as if it alone were liable for entire amount of judgment; belief that policy does not provide coverage is improper factor in insurer's decision regarding whether settlement offer is reasonable. *Travelers Ins. Co. v. Lesher (1986) 187 Cal. App. 3d 169, 188, 231 Cal. Rptr. 791 , disapproved on other grounds,* *Buss v. Superior Court (1997) 16 Cal. 4th 35, 65 Cal. Rptr. 2d 366, 939 P.2d 766*

Insurer liable for failure to accept numerous offers to settle within policy limits in light of evidence that it unreasonably failed to investigate and fairly appraise claims against insured. *Betts v. Allstate Ins. Co. (1984) 154 Cal. App. 3d 688, 707-708, 201 Cal. Rptr. 528*

Insurer does not breach contract when it fails to settle claim voluntarily by reimbursing insured, and insists on adjudication of controversy when policy has standard "no action" clause, providing for indemnification once liability is established by judgment after trial or by settlement in which insurer participates. *Clark v. Bellefonte Ins. Co. (1980) 113 Cal. App. 3d 326, 335-338, 169 Cal. Rptr. 832*

[i] Settlement Without Insurer's Participation

Rule that defending insurer is not bound by settlement made without its participation, as described in *Hamilton v. Maryland Cas. Co. (2002) 27 Cal. 4th 718, 725-731, 117 Cal. Rptr. 2d 318, 41 P.3d 128* , applies whether claim against insurer to recover on agreed or stipulated judgment is based on breach of contract or on tortious bad faith. *Mercado v. Allstate Ins. Co. (9th Cir. 2003) 340 F.3d 824, 826-827* ; *Wolkowitz v. Redland Ins. Co. (2003) 112 Cal. App. 4th 154, 164, 5 Cal. Rptr. 3d 95*

Defending insurer cannot be bound to settlement made without its participation and without any actual commitment on its insured's part to pay judgment, even if settlement has been found to be in good faith for purposes of *Code Civ. Proc. § 877.6.* *Hamilton v. Maryland Cas. Co. (2002) 27 Cal. 4th 718, 730, 117 Cal. Rptr. 2d 318, 41 P.3d 128*

In case by numerous plaintiffs against insured church, Valuation Order in which judge purported to make findings concerning actual trial requirements under *Hamilton v. Maryland Cas. Co. (2002) 27 Cal. 4th 718, 117 Cal. Rptr. 2d 318, 41 P.3d 128* , for purpose of precluding insurers from declaring forfeiture of coverage if church settled without their consent, and providing evidence of bad faith for future use, was vacated as exceeding judge's authority on grounds that judge made factual findings and prepared coercive order in mediation proceedings. *Travelers Cas. & Sur. Co. v. Superior Court (2005) 126 Cal. App. 4th 1131, 1146, 24 Cal. Rptr. 3d 751*

[13] Environmental Impairment Policy

If insured, without insurer's agreement, stipulates to judgment against insured in excess of both policy limits and previously rejected settlement offer, and if stipulated judgment is coupled with covenant not to execute, agreed judgment cannot fairly be attributed to insurer's conduct, even if insurer's refusal to settle within policy limits was unreasonable. *Hamilton v. Maryland Cas. Co. (2002) 27 Cal. 4th 718, 731, 117 Cal. Rptr. 2d 318, 41 P.3d 128* ; *see also* *Wolkowitz v. Redland Ins. Co. (2003) 112 Cal. App. 4th 154, 164, 5 Cal. Rptr. 3d 95* (agreement between bankruptcy trustee and injured third party)

Bankruptcy order simply allowing excess claim by injured third party on trustee's unopposed motion does not constitute judicial determination of debtor's liability for purposes of establishing damages proximately caused by refusal of debtor's insurer's to settle; demurrer properly sustained regarding complaint for bad faith by bankruptcy trustee against debtor's insurer, based on agreement between trustee and third party resulting in bankruptcy court's allowance of claim ($26 million) in excess of policy limits ($500,000), because claim was never formally filed (and thus never supported) and personal injury action following rejection of settlement offer was not prosecuted; claim allowance not binding on insurer. *Wolkowitzv. Redland Ins. Co. (2003) 112 Cal. App. 4th 154, 164-166*

Environmental impairment liability policy with "unusual" wording, that covered damage caused by discharge of toxic chemicals that is gradual and fortuitous and neither expected nor intended by the insured, did not cover clean-up and abatement costs arising from insured's intentional discharge of chemicals into ground. *Masonite Corp. v. Great Am. Surplus Lines Ins. Co. (1990) 224 Cal. App. 3d 912, 917-920, 274 Cal. Rptr. 206*

[14] Evidence

Absent relevant admissions of insured, insurer moving for summary adjudication of issues or summary judgment on merits of case in which coverage is disputed must provide copies of policies or, if policies are missing, secondary evidence sufficient to inform court of relevant terms and conditions of insurance contract. *Certain Underwriters at Lloyd's of London v. Superior Court (1997) 56 Cal. App. 4th 952, 955-959, 65 Cal. Rptr. 2d 821*

Admissions made in criminal action for theft admissible under *Evid. Code § 1224* when insurer's obligation to defend and indemnify its insured depends on employee's criminal liability or lack thereof. *Atlas Assurance Co. v. McCombs*

Corp. (1983) 146 Cal. App. 3d 135, 146, 194 Cal. Rptr. 66

In wrongful death action against manufacturer and repairer of portable grinder, accident report prepared by agent of manufacturer's insurer containing evidence favorable to plaintiff's theory concerning defective grinder wheel not admissible under *Evid. Code § 1224*, which permits hearsay evidence in certain situationswhen indemnitor is sued and evidence would be admissible against indemnitee, because manufacturer was in position of indemnitee, not indemnitor. *Young v. Aro Corp. (1973) 36 Cal. App. 3d 240, 245, 111 Cal. Rptr. 535*

[15] Exclusions

[a] Generally

Under all-risk policy insuring office building, exclusion for "faulty workmanship" not applicable to claim arising from rain damage resulting from roofer's failure to cover roof overnight; policy ambiguous regarding whether faulty-workmanship exclusion refers to flawed quality of finished product or flawed construction process. *Allstate Ins. Co. v. Smith (9th Cir. 1991) 929 F.2d 447, 449-450*

Words of exclusionary clause "arising from" augmented with words "directly or consequentially" implied that, to be excluded from coverage, claim need be only slightly connected to one of types of injury that is specifically identified for exclusion. *Continental Cas. Co. v. City of Richmond (9th Cir. 1985) 763 F.2d 1076, 1080-1081*

Liability policy issued to oil company containing "toxic pollution exclusion" excluded coverage for injuries caused by toxic chemical contamination of property adjacent to location of oil and gas operations; exception to exclusion that applies under limited circumstances provided that insured notifies insurer of claim within 60 days of occurrence did not apply because insured did not make required notification. *Venoco, Inc. v. Gulf Underwriters Ins. Co. (2009) 175 Cal. App. 4th 750, 758-763, 96 Cal. Rptr. 3d 409*

Endorsement in liability insurance policy issued to nonprofit property owners association that excluded coverage of claims for wrongful acts based on design or construction of any structure, did not preclude coverage of lawsuit brought by member against association asserting claims of fraud and breach of duty; member's claims were not based on association's involvement in design or construction of a structure, but instead were based on association's conduct in opining on dispute between the member and another homeowner after the member constructed structure blocking view of other homeowner. *Marquez Knolls Property Owners Assn., Inc. v. Executive Risk Indemnity, Inc. (2007) 153 Cal. App. 4th 228, 230, 234-235, 62 Cal. Rptr. 3d 510*

"Employment-Related Practices" liability exclusion in CGL policy did not apply to claims by employees of independent contractor. *North Am. Bldg. Maint., Inc. v. Fireman's Fund Ins. Co. (2006) 137 Cal. App. 4th 627, 634, 642-643, n.5, 40 Cal. Rptr. 3d 468*

Commercial general liability policies often contain exclusions for loss resulting from rendering of or failure to render professional services; claims based on insured company's failure to close escrow, which caused plaintiff's eviction and loss of financing, alleged wrongful acts committed during performance of escrow services and therefore fell within professional services exclusion. *Tradewinds Escrow, Inc. v. Truck Ins. Exch. (2002) 97 Cal. App. 4th 704, 713, 118 Cal. Rptr. 2d 561*

Neither "work performed" exclusion nor "premises alienated" exclusion barred coverage for insured developer's liability for property damage arising from work of third persons; coverage extended to damages from conversion and marketing of condominiums. *Prudential-LMI Commercial Ins. Co. v. Reliance Ins. Co. (1994) 22 Cal. App. 4th 1508, 1513-1514, 27 Cal. Rptr. 2d 841*

Changes made in 1986 to premises alienated exclusion were meant to clarify that exclusion was intended to apply to insureds who fail to repair or disclose defects at time of a sale, rather than to a contractor's completed operations. *Prudential-LMI Commercial Ins. Co. v. Reliance Ins. Co. (1994) 22 Cal. App. 4th 1508, 1512, 27 Cal. Rptr. 2d 841*

Under business liability policy covering losses arising from accidental event, personal injury, or advertising injury, and excluding losses arising from rendering of professional services, insurer not liable to defend or indemnify insured regarding third-party actions alleging securities fraud. *Allstate Ins. Co. v. Interbank Fin. Servs.(1989) 215 Cal. App. 3d 825, 830-831, 264 Cal. Rptr. 25*

Under comprehensive general liability policy issued to contractor, "work product" exclusion precluded coverage when losses arose solely from insured's defective work and insured's satisfactory work that was damaged by work that failed. *Maryland Cas. Co. v. Imperial Contracting Co. (1989) 212 Cal. App. 3d 712, 723, 260 Cal. Rptr. 797*

Language in comprehensive general liability policy's definition of covered "occurrence" requiring that property damage have occurred "unexpectedly and unintentionally" was not functional equivalent of policy exclusion as to which insurer should bear burden of proof, but was instead integral part of definition of occurrence and therefore subject to rule assigning burden of proof of coverage to insured. *FMC Corp. v. Plaisted & Cos. (1998) 61 Cal. App. 4th 1132, 1158-1160, 72 Cal. Rptr. 2d 467 .*

Provision in liability policy issued to developer excluding coverage for property damage caused by subsidence and arising out of or attributable to operations of insured was applicable to claims based on subsidence resulting from lot preparation work performed by independent contractors under contract to insured developer. *Blackhawk Corp. v. Gotham Ins. Co. (1997) 54 Cal. App. 4th 1090, 1094-1098, 63 Cal. Rptr. 2d 413*

Policy specifically excluding coverage for bodily injury to employee of insured "arising out of and in the course of his employment by the insured" was inapplicable to injuries inflicted by one employee on another employee while drinking alcohol and socializing after work hours at insured's house, which was used as business office. *West Am. Ins. Co. v. California Mut. Ins. Co. (1987) 195 Cal. App. 3d 314, 323, 240 Cal. Rptr. 540*

Provision excluding, inter alia, use and operation of aircraft, was applicable to liability for negligent flight training; liability for negligent flight instruction depended on pilot's use and operation of aircraft, precluding finding that negligent instruction was independent concurrent proximate cause of airplane crash and therefore covered by policy. *State Farm Fire & Cas. Co. v. Keenan (1985) 171 Cal. App. 3d 1, 23-25, 216 Cal. Rptr. 318*

Negligent supervision of minor's swimming from stopped boat not within homeowner's insurance policy exclusion of liability for use of boat; insured's liability not dependent on use of boat, although use of boat put injured party in position leading to injury. *Ohio Cas. Ins. Co. v. Hartford Accident & Indem. Co. (1983) 148 Cal. App. 3d 641, 645, 196 Cal. Rptr. 164*

Firearm exclusion in liability policy issued to liquor store owners did not preclude coverage for damages to plaintiff shot by store employee; complaint alleged injuries were caused by owners' negligence in hiring employee with violenttendencies, an insured risk, and negligence was not indivisibly related to use of firearm. *Underwriters Ins. Co. v. Purdie (1983) 145 Cal. App. 3d 57, 70-71, 193 Cal. Rptr. 248*

Aircraft exclusion effective unless there is independent, concurrent, nonaircraft-related proximate cause for injuries. *Hartford Fire Ins. Co. v. Superior Court (1983) 142 Cal. App. 3d 406, 416-417, 191 Cal. Rptr. 37*

Provision excluding coverage for damages "arising out of" non-insured premises inapplicable to damage from animal that escaped from noninsured premises. *Safeco Ins. Co. v. Hale (1983) 140 Cal. App. 3d 347, 353-354, 189 Cal. Rptr.*

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General liability policy that excludes automobile-related accidents did not cover incident in which there was no independent act of negligence not auto-related and in which insured also held automobile insurance such that overlapping coverage was not with in reasonable expectation. *Allstate Ins. Co. v. Jones (1983) 139 Cal. App. 3d 271, 277, 278, 188 Cal. Rptr. 557*

Under tavern owner's insurance policy, exclusion of coverage for injury caused by serving liquor to intoxicated person enforceable when insured aware of lack of that coverage, and word "exclusions" in insurance policy was printed in bold face type set off by double spacing. *Stewart v. Estate of Bohnert (1980) 101 Cal. App. 3d 978, 989, 162 Cal. Rptr. 126*

[b] Absolute Pollution Exclusion

Scope of absolute pollution exclusion (implemented in 1986) is limited to injuries arising from events commonly thought of as pollution--that is, environmental pollution--and therefore does not apply to ordinary acts of negligence involving harmful substances. *MacKinnon v. Truck Ins. Exch. (2003) 31 Cal. 4th 635, 645-653, 3 Cal. Rptr. 3d 228, 73 P.3d 1205*

Insurer's oral representation, given to induce policy renewal, that future liability claims based on release of sewage would be covered (despite previous position that coverage of sewage releases for same claim was excluded under "total pollution exclusion"), did not give rise to bad faith liability for refusal to defend insured (contractor whose primary work involves movement of water) in suit by water district regarding residential property damage resulting from faulty repair work on manhole feeding into main sewer; oral promise not alleged in complaint, and complaint not amended. *Griffin Dewatering Corp. v. Northern Ins. Co. of N.Y. (2009) 176 Cal. App. 4th 172, 210-211, 97 Cal. Rptr. 3d 568*

"Total pollution exclusion" excludes little more than "absolute pollution exclusion," i.e., is less favorable to insured; specifically, "total pollution exclusion" further limits coverage by excluding releases from products and for certain off-site releases of pollutants. *Griffin Dewatering Corp. v. Northern Ins. Co. of N.Y. (2009) 176 Cal. App. 4th 172, 178, n.3, 97 Cal. Rptr. 3d 568*

Furniture-stripping company's release of methylene chloride into public sewer system constituted "environmental pollution" under CGL policy with "absolute pollution exclusion" clause similar to that in *MacKinnon v. Truck Ins. Exch. (2003) 31 Cal. 4th 635, 3 Cal. Rptr. 3d 228, 73 P.3d 1205* ; coverage excluded for injuries to sewer worker arising from discharge of substance. *American Casualty Co. of Reading, Pa. v. Miller (2008) 159 Cal. App. 4th 501, 515-516, 71 Cal. Rptr. 3d 571*

In policy executed in Texas concerning oil and gas operations in California, "Oil and Gas Lease Operators' Pollution Liability Coverage" endorsement removed absolute pollution exclusion from original policy and replaced it with limited promise of coverage for claims arising from any "sudden and accidental emission, discharge, release or escape of pollutants." *Frontier Oil Corp. v. RLI Ins. Co. (2007) 153 Cal. App. 4th 1436, 1444, 3 Cal. Rptr. 3d 816*

Unambiguous total pollution exclusion excluded coverage under CGL and excess policies regarding EPA order and resulting suit, based on insured company's placement of dredged fill material (pollutants within meaning of Clean Water Act) on its leased property to replace road washed out by storms, and resultant filling of adjacent creek; state and federal environmental laws may provide insight into scope of policies' definition of pollutants without being specifically incorporated in those definitions. *Ortega Rock Quarry v. Golden Eagle Ins. Co. (2006) 141 Cal. App. 4th 969, 980-990, 46 Cal. Rptr. 3d 517*

Absolute pollution exclusion regarding "[a]ny loss, cost, or expense arising out of any governmental direction or

request that you test for ... pollutants" excluded coverage for costs incurred in responding to California Water Quality Control Board's order to test property for pollutants, which resulted in finding that insured's property was not cause of groundwater pollution. *CDM Investors v. Travelers Cas. & Sur. Co. (2006) 139 Cal. App. 4th 1251, 1261-1262, 43 Cal. Rptr. 3d 669*

Pollution exclusion excluded coverage for claims alleging sale of defective sandblasting products that caused bodily injury from inhaling sandblasted silica particles; policy endorsement specifically excluding asbestos claims does not restrict scope of exclusion for silica claims; insurers properly rejected tenders of defense based on pollution exclusion contained in CGL policy. *Garamendi v. Golden Eagle Ins. Co. (2005) 127 Cal. App. 4th 480, 487-488, 25 Cal. Rptr. 3d 642* (policy did not except product liability claims from exclusion)

[c] Pollution Exclusion Prior to 1986 Absolute Exclusion

Insured rather than insurer has burden of proving that discharge is "sudden and accidental" within meaning of exception to pollution exclusion. *Aeroquip Corp. v. Aetna Cas. & Sur. Co., Inc. (9th Cir. 1994) 26 F.3d 893, 895*

Insured cannot break down its long-term waste disposal practices into temporal components to bring its activities within exception for "sudden and accidental" activities; discharges that occurred when waste treatment plant broke down or became incapacitated could not be characterized as "sudden" and segregated from insured's long-term waste practices when evidence clearly indicated that pollution was gradual and resulted from those long-term practices. *Smith v. Hughes Aircraft Co. (9th Cir. 1993) 22 F.3d 1432, 1438* (applying California law)

Fact that chemical was not listed as a pollutant by Environmental Protection Agency until after discharges in question occurred is irrelevant, because language of pollution exclusion does not require that listing. *Smith v. Hughes Aircraft Co. (9th Cir 1993) 22 F.3d 1432, 1438* (applying California law)

Exception to pollution exclusion in liability and umbrella policies for damage from heat, smoke, or fumes from "hostile fire" held unambiguous; clear and explicit meaning of term "fire" is chemical reaction that releases heat and light. *Maffei v. Northern Ins. Co. of N.Y. (9th Cir. 1993) 12 F.3d 892, 896-897*

Pollution exclusion held applicable to action against insured based on gaseous styrene emanation from insured's manufacturing plant; styrene gas, released into atmosphere as result of manufacturing process for fiberglass bathtubs, was not "product" within meaning of "products-completed operations hazard" exception to pollution exclusion. *Hydro Sys., Inc. v. Continental Ins. Co. (9th Cir. 1991) 929 F.2d 472, 475-477*

In case in which State of California sought coverage for liability imposed in federal court based on discharge of hazardous waste, because California's liability for property damages was founded on its negligence in allowing pollutants to escape from evaporation ponds into surrounding groundwater and land, application of "sudden and accidental" discharge exception to pollution exclusion depends on when pollutants escaped from site into larger environment, and not when chemical wastes were initially deposited into storage on site. *State of Cal. v. Allstate Ins. Co. (2009) 45 Cal. 4th 1008, 1021-1022, 90 Cal. Rptr. 3d 1, 201 P.3d 1147*

"Accidental" discharge, within meaning of "sudden and accidental" exception to pollution exclusion, is one insured neither intended nor expected to happen; discharge is "expected" only when insured subjectively knew or believed it was highly like to occur. *State of Cal. v. Allstate Ins. Co. (2009) 45 Cal. 4th 1008, 1024, 90 Cal. Rptr. 3d 1, 201 P.3d 1147*

In case in which State of California sought coverage for liability imposed in federal court based on discharge of hazardous waste, to extent California can show that "sudden and accidental" releases proximately caused damage for

which it was held liable, it is contractually entitled to indemnity for that liability. *State of Cal. v. Allstate Ins. Co. (2009) 45 Cal. 4th 1008, 1029, 90 Cal. Rptr. 3d 1, 201 P.3d 1147*

In case in which State of California sought coverage for liability imposed in federal court based on discharge of hazardous waste, when property damage was caused by set of pollutant discharges, some sudden and accidental, and some gradual or nonaccidental, California must prove its damages were indivisible to claim coverage, while insurers must show damages were not indivisible; triable issue exists as to whether damages are divisible, precluding summary judgment for insurer. *State of California v. Allstate Ins. Co. (2009) 45 Cal. 4th 1008, 1029-1035, 90 Cal. Rptr. 3d 1, 201 P.3d 1147 , citing State Farm Mut. Auto. Ins. Co. v. Partridge (1973) 10 Cal. 3d 94, 109 Cal. Rptr. 811, 514 P.2d 123*

Insurers have burden of proof to show watercourse pollution exclusion applies. *State of Cal. v. Allstate Ins. Co. (2009) 45 Cal. 4th 1008, 1022, 90 Cal. Rptr. 3d 1, 201 P.3d 1147*

Insured bears burden of proving that discharge is "sudden and accidental"; "sudden and accidental" provision is coverage provision, rather than exclusionary provision, thus allocating burden of proof to insured. *Aydin Corp. v. First State Ins. Co. (1998) 18 Cal. 4th 1183, 1191, 77 Cal. Rptr. 2d 537, 959 P.2d 1213*

"Sudden and accidental" language in pollution exclusions is unambiguous if words are given their full significance: "sudden" describes event that is abrupt or immediate and also unexpected; "accidental" is synonymous with "unexpected and unintended"; plain language of "sudden and accidental" discharge of pollutants means abrupt, unintended, and unexpected discharge of pollutants. *Syntex Corp. v. Lowsley-Williams & Cos. (1998) 67 Cal. App. 4th 871, 883, 79 Cal. Rptr. 2d 371*

Word "sudden," as used in exception to pollution exclusion for pollution caused by "sudden and accidental" release or "sudden, unintended and unexpected" happening, requires that release be abrupt; consequently, gradual release of pollutants, no matter how unexpected, does not fall within exception. *FMC Corp. v. Plaisted & Cos. (1998) 61 Cal. App. 4th 1132, 1145-1146, 72 Cal. Rptr. 2d 467*

Pollution exclusion in comprehensive general liability policy focuses on discharge of pollutants into or upon land, air, or water and not on environmental damage caused by discharge; therefore, when hazardous waste is deposited directly into landfill, relevant discharge of pollutants for purpose of exclusion is deposit of waste into landfill, and not subsequent release of pollutants from landfill into water, air, and adjoining land, but when hazardous waste is stored in tanks or other containers, relevant discharge is release from storage containers into environment. *Standun, Inc. v. Fireman's Fund Ins. Co. (1998) 62 Cal. App. 4th 882, 889-891, 73 Cal. Rptr. 2d 116*

When insured arranges to have hazardous waste removed from its property and deposited into municipal landfill by third party, disposal of hazardous waste into landfill by third party is discharge of pollutants for purpose of pollution exclusion, even if insured complied with all applicable regulations and licensing requirements in disposing of hazardous waste. *Standun, Inc. v. Fireman's Fund Ins. Co. (1998) 62 Cal. App. 4th 882, 889, 73 Cal. Rptr. 2d 116*

Exclusion for losses "arising out of ... request, demand or order" that insured or others in any way respond to or assess effects of pollutants could not be broadly read to exclude all losses arising out of pollution; if insurer had intended absolute exclusion of pollution-related liability, policy language could have so stated. *Charles E. Thomas Co. v. Transamerica Ins. Group (1998) 62 Cal. App. 4th 379, 383-384, 72 Cal. Rptr. 2d 577*

For purpose of policy exclusion for property damage caused by release of pollutants unless release was "sudden and accidental," release was accidental if it was "unexpected" and unintended, and release was "unexpected" if insured did not know or believe release was substantially certain or highly likely to occur; fact that insured had adopted procedures to prevent, contain, and clean up spills in general did not mean that insured expected any particular spill. *A-H Plating,*

Inc. v. American Nat'l Fire Ins. Co. (1997) 57 Cal. App. 4th 427, 439-441, 67 Cal. Rptr. 2d 113

"Absolute" 1986 pollution exclusion held unambiguously to exclude cost of operation to clean up soil and groundwater contaminated with hazardous substance; exclusion may be ambiguous with regard to whether policy definition of "pollutants" to include "any solid ... irritant or contaminant, including ... waste" applies to nonhazardous solid waste that insured was required to remove as part of cleanup operation; however, waste located on insured's property would be excluded under "owned property" exclusion in any case. *Titan Corp. v. Aetna Cas. & Sur. Co. (1994) 22 Cal. App. 4th 457, 469-471, 27 Cal. Rptr. 2d 476*

Purchaser of property containing underground storage tanks denied coverage for clean-up costs under its comprehensive general liability policy; "sudden and accidental" exception to pollution exclusion inapplicable because pollutants were released gradually by corroding storage tanks; one neglected aspect of judicial attempts to interpret term "sudden" is that no ordinary person would think something that happens gradually also happened suddenly. *ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co. (1993) 17 Cal. App. 4th 1773, 1788, 22 Cal. Rptr. 2d 206*

Exception to standard pollution exclusion for "sudden and accidental" interpreted to have temporal meaning; leak of 60-day duration was not "sudden" when policy defined term as "not continuous"; no reasonable expectation of coverage for long-term pollution. *Truck Ins. Exch. v. Pozzuoli (1993) 17 Cal. App. 4th 856, 21 Cal. Rptr. 2d 650*

Coverage for pollution claims arising from deliberate, liability-producing acts that insured expected to cause harm is barred by *Ins. Code § 533* and "intentional acts" exclusion. *Shell Oil Co. v. Winterthur Swiss Ins. Co. (1993) 12 Cal. App. 4th 715, 747-748, 15 Cal. Rptr. 2d 815*

"Sudden" as used in exception to pollution component includes temporal component and does not merely mean "unexpected" or "unintended"; if discharge continues for a long time; at some point it ceases to be sudden and accidental. *Shell Oil Co. v. Winterthur Swiss Ins. Co. (1993) 12 Cal. App. 4th 715, 756, 15 Cal. Rptr. 2d 815*

[16] Homeowner's Policy

[a] Business Pursuit Exclusion

Homeowner's policy provision excluding coverage of any business pursuit by insured other than "activities therein" that are ordinarily incident to nonbusiness pursuits did not exclude activities that, although they occur while insured is engaged in business pursuit, are ordinarily incident to nonbusiness pursuit. *Crane v. State Farm Fire & Cas. Co. (1971) 5 Cal. 3d 112, 116, 95 Cal. Rptr. 513, 485 P.2d 1129* (involving home care of children)

Professional plumber who installed water heater for friend, from whom he sometimesbut not always expected payment for similar services, was not covered under his homeowner's insurance policy for damages caused by his faulty work that resulted in fire; policy excluded coverage for professional services, business activities, and damages arising out of any premises other than those of insured. *Amex Assurance Co. v. Allstate Ins. Co. (2003) 112 Cal. App. 4th 1246, 1252-1253, 5 Cal. Rptr. 3d 744*

"Business pursuit" exclusion is broader than employment exception, and is applicable to injuries inflicted by one employee on another employee while drinking alcohol and socializing after work hours at insured's house, which was used as business office; employer's business pursuit logically included any activity that arises from and is in course of employee's employment. *West Am. Ins. Co. v. California Mut. Ins. Co. (1987) 195 Cal. App. 3d 314, 323-324, 240 Cal. Rptr. 540*

Application of business pursuit exclusion turns on motivation for pursuit; business defined as regular activity with

motivation for profit or gain. *Fire Ins. Exch. v. Jiminez (1986) 184 Cal. App. 3d 437, 443-444, 229 Cal. Rptr. 83*

Homeowner's policy that excluded coverage for bodily injury or property damage arising out of business pursuits, or arising from any premises other than insured premises, did not cover injury to third person that occurred on separate commercial premises that was also owned by insured, but was not listed in policy. *Fire Ins. Exch. v. Jiminez (1986) 184 Cal. App. 3d 437, 439-443, 229 Cal. Rptr. 83*

Homeowner's policy exclusion of coverage of business pursuits applicable to preclude duty on insurer's part to defend or indemnify insured against civil action that, although unrelated to insured's profession as attorney, arose from supplemental income project, such as mining partnership for profit in which insured had engaged for more than a year. *State Farm Fire & Cas. Co. v. Drasin (1984) 152 Cal. App. 3d 864, 869-870, 199 Cal. Rptr. 749*

[b] Coverage

Homeowner's policy did not provide indemnity or defense coverage for claim arising from insured's alleged breach of quasi-marital agreement, because crucial act for coverage purposes is "sundering of the relationship," an intentional act, irrespective of insured's contention that losses to third party occurred accidentally; moreover, policy did not cover losses arising from breach of contract. *Chamberlain v. Allstate Ins. Co. (9th Cir. 1991) 931 F.2d 1361, 1364-1365*

Homeowner's policy providing coverage for claim made because of "property damage," defined as "physical injury to or destruction of tangible property, including loss of this property," caused by "occurrence" defined as "an accident, including exposure to conditions which results, during the policy period, in bodily injury or property damage," did not cover damages arising from insured's sale of real property based on insured's alleged negligent failure to inspect property, misrepresentation, breach of contract, and rescission. *Safeco Ins. Co. of Am. v. Andrews (9th Cir. 1990) 915 F.2d 500, 501-502*

Injury caused by multiple acts, both included and excluded under policy, in context of third-party liability, is covered under policy if act covered under policy was "concurrent proximate cause" of loss. *State Farm Mut. Auto. Ins. Co. v. Partridge (1973) 10 Cal. 3d 94, 104-105, 109 Cal. Rptr. 811, 514 P.2d 123* (car passenger injured by insured's firing of pistol in car, caused by insured's filing of "hair trigger" and driving negligently)

Homeowners' encroachment on adjacent property to rebuild residence was not "accident" under homeowners' policy, even though they acted under mistaken belief that they owned disputed boundary strip because they had obtained a lot line adjustment from city with cooperation from previous owner of adjacent property; there was no unexpected and unintended event between the intentional construction of the building and the encroachment. *Fire Ins. Exch. v. Superior Court (2010) 181 Cal. App. 4th 388, 396-397, 104 Cal. Rptr. 3d 534 , reh'g denied, 2010 Cal. App. LEXIS 282 (2010)*

Adult son of named insured was not "resident of household" under homeowners' policy because he was temporarily house-sitting at time in question, had no permanent residence, generally slept in spare bedroom or on living room couch, and kept most of his belongings in his car; no coverage for son under policy. *California Cas. Indem. Exch. v. Frerichs (1999) 74 Cal. App. 4th 1446, 1453, 88 Cal. Rptr. 2d 858* (reversing trial court's holding that son was resident and therefore insured under policy, with respect to injuries inflicted on third party)

"Household" in homeowners' policy was unambiguous; nephew living in named insured's home was resident relative within meaning of policy exclusion, even though he paid rent. *Afrasiabi v. State Farm Fire & Cas. Co. (1999) 73 Cal. App. 4th 1183, 1186-1187, 86 Cal. Rptr. 2d 926*

"Household" under homeowner's policy did not include stepson of insured's daughter who lived with insured's daughter

in duplex adjacent to insured's; units were separate households, although insured intended policy to cover entire structure containing both duplex units. *Jacobs v. Fire Ins. Exch. (1991) 227 Cal. App. 3d 584, 588-589, 278 Cal. Rptr. 52*

"Vacant land" covered under homeowner's policy as meaning lands that are both unoccupied and unused; beneficial use or improvement of untenanted property (such as construction and maintenance of dam and reservoir) as rendering it nonvacant, particularly when improvements caused damage that was subject of claim under policy. *Bianchi v. Westfield Ins. Co. (1987) 191 Cal. App. 3d 287, 292-293, 236 Cal. Rptr. 343*

Automobile liability insurance policy, rather than homeowner's liability policy, as covering personal injury claim by third party struck by can of burning gasoline thrown by insured's son after gasoline ignited while son was attempting to start nonowned vehicle away from insured's premises by pouring gasoline into carburetor. *United Services Auto. Ass'n v. United States Fire Ins. Co. (1973) 36 Cal. App. 3d 765, 770-771, 111 Cal. Rptr. 595*

Reasonable expectations of parties to homeowner's policy as not including vicarious liability imposed by *Veh. Code §§ 17707* and *17708* on parent or guardian as signers of minor's application for driver's license for accident arising from negligent operation of vehicle by minor. *Los Angeles Ins. Co. v. Fireman's Ins. Co. (1973) 30 Cal. App. 3d 669, 673-674, 106 Cal. Rptr. 540*

Homeowner's policy as not covering insured's teenage weekend guest when "insured" defined in policy to include named insured and, if residents of his household, his spouse, relatives of either, and any other person under age of 21 in care of an insured; residence as connoting place of abode of some permanency, more than temporary sojourn. *Vanguard Ins. Co. v. Hartford Ins. Co. (1970) 9 Cal. App. 3d 765, 767-768, 88 Cal. Rptr. 628*

[c] Exclusions Generally

Provision excluding coverage for "bodily injury or property damages arising out of any premises, other than an insured premises, owned, rented, or controlled by anyinsured," as excluding coverage for injuries occurring as result of insured's negligent construction of improvement on premises other than insured premises. *Preston v. Goldman (1986) 42 Cal. 3d 108, 120-121, 227 Cal. Rptr. 817, 720 P.2d 476*

Homeowner's policy excluding liability for bodily injury to insureds, and including death within definition of "bodily injury," as excluding coverage for damages arising from insured's infliction of injuries to his spouse and wrongful death of his own children. *State Farm Fire & Cas. Co. v. Lewis (1987) 191 Cal. App. 3d 960, 962-965, 236 Cal. Rptr. 807*

Homeowner's insurance policy provision excluding coverage of "midget automobiles" as not excluding coverage of injury inflicted by "minibike," based on expert testimony that "midget automobile" describes four-wheeled vehicle, whereas "minibike" describes a two-wheeled vehicle; "midget automobile" as susceptible of more than one interpretation, and extrinsic evidence as admissible to construe it. *Gulf Ins. Co. v. Edgerly (1973) 31 Cal. App. 3d 334, 339-341, 107 Cal. Rptr. 246*

[d] Family Exclusion

"Family exclusion" (excluding liability coverage for injuries to insured or insured's relatives) in homeowner's policy as not against public policy. *Lumbermens Mut. Cas. Co. v. Vaughn (1988) 199 Cal. App. 3d 171, 180, 244 Cal. Rptr. 567* ; *State Farm Fire & Cas. Co. v. Clendening (1983) 150 Cal. App. 3d 40, 43, 197 Cal. Rptr. 377*

[e] Illegal Act Exclusion

Under homeowners policy that expressly covers accidental bodily injury, but excludes coverage for bodily injury arising out of "illegal act," without defining term, insurer obligated to defend and indemnify insureds in wrongful death action brought against them after their teenage son accidentally shot and killed his friend. *Safeco Ins. Co. v. Robert S. (2001) 26 Cal. 4th 758, 765-767, 110 Cal. Rptr. 2d 844, 28 P.3d 889* ; *see also Kerns v. CSE Ins. Group (2003) 106 Cal. App. 4th 368, 394-395, 130 Cal. Rptr. 2d 754*

[f] Intentional or Criminal Act Exclusion

Insurer under homeowners' policy had no duty to defend insured in underlying suit alleging that insured acted under unreasonable belief of self-defense while hitting and kicking plaintiff; acts did not constitute "accident," and policy excluded intentional acts; insured's unreasonable belief in need for self-defense does not turn resulting purposeful and intentional act of assault and battery into "accident" within policy coverage. *Delgado v. Interinsurance Exch. of Auto. Club of So. Cal. (2009) 47 Cal. 4th 302, 305, 317, 97 Cal. Rptr. 3d 298, 211 P.3d 1083*

Homeowner's policy excluding coverage for "bodily injury ... [that] is a foreseeable result of an intentional or criminal act of [the] insured or which is in fact intended by [the] insured" does not cover injuries caused by insured's armed assault on victim for which insured was convicted of felony; insurer entitled to summary judgment based on criminal act exclusion, despite subsequent claim that insured acted unintentionally and in self-defense. 20th *Century Ins. Co. v. Schurtz (2001) 92 Cal. App. 4th 1188, 1196-1198, 112 Cal. Rptr. 2d 547*

[g] Motor Vehicle Exclusion

Insurer as liable under both homeowner's policy and automobile liability policy for injury resulting from two concurrent negligent acts of insured, one auto-related and other non-auto-related. *State Farm Mut. Auto. Ins. Co. v. Partridge (1973) 10 Cal. 3d 94, 97, 106, 109 Cal. Rptr. 811, 514 P.2d 123* (holding limited by *Garvey v. State Farm Fire & Cas. Co. (1989) 48 Cal. 3d 395, 257 Cal. Rptr. 292, 770 P.2d 704*); *see also Glens Falls Ins. Co. v. Rich (1975) 49 Cal. App. 3d 390, 394-395, 122 Cal. Rptr. 696*

Insurer not entitled to summary judgment in assigned action by injured party against insurer for contract breach and bad faith; injured party poured gasoline into carburetor of nonoperating van used only as toolshed and parked on insured's property; motor vehicle exclusion exception for vehicle not subject to motor vehicle registration and used only on insured location may apply. *Meraz v. Farmers Ins. Exch. (2001) 92 Cal. App. 4th 321, 325-327, 111 Cal. Rptr. 2d 804*

Under homeowner's policy excluding bodily injury arising out of maintenance of motor vehicle, physical injury to third party who attempted to repair insured's automobile tire, caused by insured's prior use of flammable sealant, as excluded from coverage. *State Farm Fire & Cas. Co. v. Salas (1990) 222 Cal. App. 3d 268, 274, 271 Cal. Rptr. 642*

Provision in homeowner's policy excluding coverage regarding bodily injury arising out of use or loading of motor vehicle owned by insureds as precluding coverage regarding wrongful death action that arose out of insureds' use and loading of their van in their driveway. *National Am. Ins. Co. v. Coburn (1989) 209 Cal. App. 3d 914, 917-923, 257 Cal. Rptr. 591*

Stolen "sandrail vehicle," designed primarily for use on sand dunes, as excluded from coverage under homeowner's policy that did not cover any "motor propelled vehicle ... designed for movement on land," and as not falling within exception for vehicles used solely for service of insured location (such as tractor-mower). *Watamura v. State Farm Fire & Cas. Co. (1988) 206 Cal. App. 3d 369, 371, 253 Cal. Rptr. 555*

Homeowner's policy excluding motor vehicle coverage as also excluding coverage for liability resulting from insured's negligent entrustment of motor vehicle. *Safeco Ins. Co. v. Gilstrap (1983) 141 Cal. App. 3d 524, 530-531, 190 Cal. Rptr. 425*

[h] Resident Relative Exclusion

Although there is no "bright line" test for determining child's residency if parents are divorced, usual rules of contract interpretation and common understanding of terms "resident" and "residence as providing clear direction regarding applicability of resident relative exclusion: does child regularly spend time in household in question, such that there exists continuing expectation of child's periodic return on intervals regular enough that household is child's home during time child is there, as opposed to place of infrequent and irregular visits. *Kibbee v. Blue Ridge Ins. Co. (1999) 69 Cal. App. 4th 53, 62, 81 Cal. Rptr. 2d 294* (finding that child was not resident relative)

"Residence" is not ambiguous as used in a resident relative exclusion, and its meaning varies according to facts and circumstances of case; there was substantial evidence that son was a resident relative at parent's house when he ate, slept, kept his belongings, and received mail at the house. *Utley v. Allstate Ins. Co. (1993) 19 Cal. App. 4th 815, 821, 24 Cal. Rptr. 2d 1*

[i] Sexual Misconduct Exclusion

Under mobile homeowner's policy that excluded injuries arising out of "[p]hysical abuse, sexual abuse, sexual molestation or sexual harassment by anyone" and applying "whether damages arise from an insured's act or failure to act," insurer had no duty to defend or indemnify insured with respect to underlying third-party action alleging intentional and negligent acts related to sexual assault. *Northland Ins. Co. v. Briones (2000) 81 Cal. App. 4th 796, 805-810, 97 Cal. Rptr. 2d 127*

[17] Implied Covenant of Good Faith and Fair Dealing

Covenant of good faith and fair dealing that neither party will do anything to injure right of other to receive benefits of agreement as implied in every contract, including insurance policies. *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 573, 108 Cal. Rptr. 480, 510 P.2d 1032* ; *Crisci v. Security Ins. Co. (1967) 66 Cal. 2d 425, 430, 58 Cal. Rptr. 13, 426 P.2d 173* ; *Comunale v. Traders & Gen. Ins. Co. (1958) 50 Cal. 2d 654, 658, 328 P.2d 198*

Mere filing by insurer of action to declare insurer's rights and duties relative to insurance policy, absent other facts, as not forming basis of breach of duty of good faith and fair dealing; assuming insurer has not otherwise abandoned, compromised, or rejected insured's claim, action seeking declaratory relief as not frustrating insured's enjoyment of contract rights, but rather insurer's exercise of statutory right to seek declaratory relief under *Code Civ. Proc. § 1069. Atlas Assurance Co. v. McCombs Corp. (1983) 146 Cal. App. 3d 135, 150, 194 Cal. Rptr. 66*

[18] Interest

In action on liability policy, insurer as generally liable for interest from date judgment is entered against insured, or from date of payment of proper settlement; if policy is of indemnity, interest as accruing from date of payment. *Atlantic Mut. Ins. Co. v. Cooney (9th Cir. 1962) 303 F.2d 253, 270*

Insurer of defendants in personal injury action as not obligated to pay prejudgment interest under *Civ. Code § 3291*, when insurer made settlement offer of policy limits to third party before lawsuit filed, and policy stated that insurer's

obligation to pay prejudgment interest ceases when insurer offers amount due under coverage. *State Farm Mut. Auto. Ins. Co. v. Crane (1990) 217 Cal. App. 3d 1127, 1138, 266 Cal. Rptr. 422*

[19] Interpretation of Policy Terms

Changes in standard Insurance Services Office (ISO) policy forms, by themselves, are not evidence of whether or not a particular policy contained particular language on a given date; ISO is not a party to the insurance contract and its forms therefore have no bearing on contents of a specific insurance contract unless and until specifically adopted by the contracting parties. *Crane v. Royal Ins. Co. of Am. (9th Cir. 1994) 17 F.3d 1186, 1188* (involving language of watercraft exclusion)

Insurance policy providing liability coverage for bodily injury sustained by any "person" as including fetus later born alive for purposes of action for prenatal injury under former *Civ. Code § 29* [*now see Civ. Code § 43.1*]. *Endo Labs., Inc. v. Hartford Ins. Group (9th Cir. 1984) 747 F.2d 1264, 1266-1267*

In multi-part insurance policy, "employment related defense" benefit providing $10,000 coverage for each suit and $500,000 annual aggregate limit, provided coverage for each of 46 suits filed against insured by its employees demanding arbitration; insurer breached its obligation by treating 46 suits as one. *Volkswagen v. Universal Underwriters Group (N.D. Cal. 2008) 571 F. Supp. 2d 1148, 1155, 1157*

"Damages" that insured is legally obligated to pay because of property damage, within meaning of comprehensive general liability policy that does not define term, as including reimbursement of government-response costs, and costs of injunctive relief insofar as they comprise remedial and mitigative, rather than prophylactic, measures. *AIU Ins. Co. v. Superior Court (1990) 51 Cal. 3d 807, 833, 841-843, 274 Cal. Rptr. 820, 799 P.2d 1253*

In eminent domain action in which government agency filing action reduces market value of property by amount required to effect environmental cleanup, insured is not legally obligated to compensate agency in money as result of any loss or detriment suffered by agency; policies insuring vacant land did not insure against diminution in market value as result of property's environmental condition because diminution in value does not constitute "damages." *Block v. Golden Eagle Ins. Corp. (2004) 121 Cal. App. 4th 186, 196-199, 17 Cal. Rptr. 3d 13* ; *see Goodstein v. Continental Casualty Co. (9th Cir. 2007) 509 F.3d 1042, 1054* (distinguished; involving Washington law)

Subcontractor's general liability policy coverage of contractor as additional insured did not cover injury to subcontractor's employee because injury was caused by contractor's own conduct and additional insured coverage was limited "to liability [to contractor] arising out of [subcontractor's] ongoing operations performed for [contractor]." *St. Paul Fire & Marine Ins. Co. v. American Dynasty Surplus Lines Ins. Co. (2002) 101 Cal. App. 4th 1038, 1055-1060, 124 Cal. Rptr. 2d 818*

California courts as consistently giving broad interpretation to terms "arising out of" or "arising from" in various kinds of insurance provisions; these terms broadly link factual situation with event creating liability and connote only minimal causal connection to incidental relationship. *Acceptance Ins. Co. v. Syufy Enters. (1999) 69 Cal. App. 4th 321, 328, 81 Cal. Rptr. 2d 557* (under contractor's CGL policy, injury to roof worker while entering negligently maintained "hatch" to reach roof arose out of contractor's work for building owner); *see also Vitton Constr. Co., Inc. v. Pac. Ins. Co. (2003) 110 Cal. App. 4th 762, 766, 2 Cal. Rptr. 3d 1*

Policies requiring that injury occur during policy period did not cover anticompetitive conduct that occurred during policy period but caused injury that occurred after expiration of policy period; policy that covered "occurrences or accidents which happen during the policy period" might be construed to provide coverage because "occurrence" simply meant something that happened during policy period, regardless of whther injury occurred then or later; policies that

simply covered "offenses committed during the policy period" potentially covered injury, because triggering event was the act rather than the injury. *American Cyanamid Co. v. American Home Assurance (1994) 30 Cal. App. 4th 969, 982, 35 Cal. Rptr. 2d 920*

Insured's ongoing negligent failure to protect and supervise her foster child, who was sexually molested by insured's husband over a period of several years, constituted several distinct breaches of insured's duty which occurred during each of three separate policy periods. *National Union Fire Ins. Co. v. Lynette C. (1994) 27 Cal. App. 4th 1434, 1463-1465, 33 Cal. Rptr. 2d 496*

Under contractor's liability policy, damages allegedly arising out of conversion of personal property did not constitute "property damage," defined as "injury, destruction or loss of use of tangible property," because conversion does not involve physical injury to property but rather the taking or deprivation of property, nor does conversion constitute loss of use of property. *Collin v. American Empire Ins. Co. (1994) 21 Cal. App. 4th 787, 810-813, 26 Cal. Rptr. 2d 391*

Multiple instances of negligent care and supervision, which allowed several children to be repeatedly molested, constituted one single occurrence under terms of policy because each child's injuries resulted from repeated exposure to substantially same general conditions. *State Farm Fire & Cas. Co. v. Elizabeth N. (1992) 9 Cal. App. 4th 1232, 1234, 1236-1239, 12 Cal. Rptr. 2d 327*

"Bodily," modifying "injury," means "having a body or a material form: physical, corporeal," and as not reasonably encompassing "purely mental, emotional, and spiritual"; "bodily injury" as not including emotional distress in absence of physical injury; "bodily injury" as more restrictive than "personal injury." *Aim Ins. Co. v. Culcasi (1991) 229 Cal. App. 3d 209, 219-220, 224, 280 Cal. Rptr. 766*

Teacher's conduct in molesting student does not constitute occurrence "in the course of the insured's educational employment activities" within meaning of educators' employment liability policy covering teacher. *Horace Mann Ins. Co. v. Analisa N. (1989) 214 Cal. App. 3d 850, 855-856, 263 Cal. Rptr. 61*

"Accident" within meaning of homeowner's policy does not include sexual activity in violation of *Penal Code § 288a* (oral copulation), and insured's contention that resulting harm was unintentional as irrelevant; accident never present when insured performs deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces damage. *Merced Mut. Ins. Co. v. Mendez (1989) 213 Cal. App. 3d 41, 50-53, 261 Cal. Rptr. 273*

"Accident" is source and cause of damage to property, within terms of accident policy insuring against liability for property damage that is unexpected or unforeseen happening or consequence from either known or unknown cause. *Hogan v. Midland Nat'l Ins. Co. (1970) 3 Cal. 3d 553, 559, 91 Cal. Rptr. 153, 476 P.2d 825* ; *Geddes & Smith, Inc. v. St. Paul Mercury Indem. Co. (1959) 51 Cal. 2d 558, 564, 334 P.2d 881* ; *Rafeiro v. American Employers' Ins. Co. (1970) 5 Cal. App. 3d 799, 807, 85 Cal. Rptr. 701* ; *Oil Base, Inc. v. Continental Cas. Co. (1969) 271 Cal. App. 2d 378, 387, 76 Cal. Rptr. 594*

Covered "damages" include expenses incurred by insured environmental polluters pursuant to injunctive relief sought by government agencies in underlying action that compelled insureds to "clean up" their pollution of waterways. *Aerojet-Gen. Corp. v. Superior Court (1989) 211 Cal. App. 3d 216, 237-238, 258 Cal. Rptr. 684*

Under personal liability umbrella policy issued to insured, boat owned by partnership in which insured was partner as not "owned by" insured individually; person injured in collision with partnership's boat entitled to recover benefits only from partnership's comprehensive business liability policy, and not from personal umbrella policy of one partner, although, under other circumstances, vehicle legally registered to partnership could be deemed "owned by" an individual partner for purposes of insurance coverage under definition of "insured." *Bartlome v. State Farm Fire & Cas. Co. (1989) 208 Cal. App. 3d 1235, 1243, 256 Cal. Rptr. 719*

Merchant insurance policy excluding liability coverage arising from provision of "professional services" excluded coverage for damages arising from cosmetic establishment's ear-piercing services; definition encompassed service offered in course of business enterprise. *Hollingsworth v. Commercial Union Ins. Co. (1989) 208 Cal. App. 3d 800, 808-810, 256 Cal. Rptr. 357*

Under general liability policy, "occurrence" means accident, including continuous or repeated exposure to conditions, that results in bodily injury or property damage neither expected nor intended from standpoint of insured. *Hallmark Ins. Co. v. Superior Court (1988) 201 Cal. App. 3d 1014, 1017, 247 Cal. Rptr. 638*

Under liability insurance policy covering "malicious prosecution ... if such offense is committed during the policy period," "offense" is "committed" on institution of malicious action; "bodily injury" interpreted to refer to "personal injury," including malicious prosecution. *Harbor Ins. Co. v. Central Nat'l Ins. Co. (1985) 165 Cal. App. 3d 1029, 1036, 211 Cal. Rptr. 902*

Property damage caused by defect in product before defect was discovered as "accident" for purposes of policy, but damage caused after discovery of defect as not "accident" since subsequent damage was foreseeable event. *Economy Lumber Co. v. Insurance Co. of N. Am. (1984) 157 Cal. App. 3d 641, 647, 204 Cal. Rptr. 135*

[20] Judgment Creditor Actions

Because *Ins. Code § 11580(b)(2)* requires that injured party first obtain judgment against insured, it is not "direct action" statute within meaning of *28 U.S.C.S. § 1332(c)(1)* (in "direct actions" insurer deemed citizen of state of which insured is citizen, as well as of any state where insurer has been incorporated or where insurer has principal place of business); because "direct actions" under *28 U.S.C.S. § 1332(c)(1)* are causes of action in which liability sought against insurers could be imposed against their insureds, they do not involve suits against insurers for their own alleged misconduct. *Mezzetti v. State Farm Mut. Auto. Ins. Co. (N.D. Cal. 2004) 346 F. Supp. 2d 1058, 1062-1064*

With respect to direct action against insurer under *Ins. Code § 11580(b)(2)*, property damage need not be caused by vehicle or draft animal (pursuant to *Ins. Code § 11580(a)(2)*). *People ex rel. City of Willits v. Certain Underwriters at Lloyd's of London (2002) 97 Cal. App. 4th 1125, 1131-1132, 118 Cal. Rptr. 2d 868*

After obtaining judgment for property damage caused by insured contractor's negligent selection, use, and installation of unsuit able materials and unworkmanlike services, judgment creditor as not entitled to recover amount of judgment from contractor's liability insurer under *Ins. Code § 11580* when policy excluded coverage of any claim or suit alleging that construction or repair did not comply with customers' specifications. *Rafeiro v. American Employers' Ins. Co. (1970) 5 Cal. App. 3d 799, 805-807, 85 Cal. Rptr. 701*

[21] Legal Malpractice Policy

Under "claims made and reported" policy, if late report was made de minimis time after expiration of policy because insured learned of claim late in policy period under ambiguous circumstances and did not confirm existence of claim until after policy expired, and if insured had not been given opportunity to be protected under extended claim-reporting endorsement, reporting requirement is condition that may be equitably excused under common law contract principles; no blanket notice-prejudice rule applied, however. *Root v. American Equity Specialty Ins. Co. (2005) 130 Cal. App. 4th 926, 947-948, 30 Cal. Rptr. 3d 631*

Legal malpractice policy did not create duty to defend malicious prosecution action brought against insured attorney, when that action arose from another action voluntarily brought by insured on his own behalf. *Johnson v. First State*

Ins. Co. (1994) 27 Cal. App. 4th 1079, 1080-1081, 33 Cal. Rptr. 2d 163

Under legal malpractice policy in which "claim" is not limited to "lawsuit," expenses incurred by insured in investigation of claim that does not result in litigation as covered; however, expenses incurred in defense of criminal prosecution as not covered if related only to nebulous possibility of future civil suit, when policy required that insurer either undertake certain action that insured believes is reasonably required, or consent in writing to allow insured to take that action. *Stein v. International Ins. Co. (1990) 217 Cal. App. 3d 609, 613-615, 266 Cal. Rptr. 72*

Legal malpractice policy as not creating duty to defend action brought by insured's law partner regarding conduct relating solely to business relationship between them; coverage as not including conduct by insured if not rendering professional services for others, nor acting in capacity as lawyer, pursuant to policy. *Transamerica Ins. Co. v. Sayble (1987) 193 Cal. App. 3d 1562, 1568-1569* ; *see also Blumberg v. Guarantee Ins. Co. (1987) 192 Cal. App. 3d 1286, 1292-1293, 238 Cal. Rptr. 36*

[22] Liability Insurance Defined

Liability insurance as contract between insurer and insured for their benefit and for benefit of unknown third person who becomes known and identified on being injured by insured. *Ford v. Providence Wash. Ins. Co. (1957) 151 Cal. App. 2d 431, 438, 311 P.2d 930*

[23] Limitation of Actions

Advance payments received by injured person under *Ins. Code § 11583* as not tolling statute of limitations with respect to cause of action for loss of consortium by injured person's spouse. *Evans v. Dayton Hudson Corp. (1991) 234 Cal. App. 3d 49, 51-52*

Notice requirement of *Ins. Code § 11583* as not satisfied by statement on back of draft tendered as partial payment of claim; however, limitations period tolled only until claimant retains attorney, making complaint as filed untimely. *Conlin v. Del Mar Paving (1991) 286 Cal. Rptr. 33*

Under *Ins. Code § 11583*, when insurer, that made partial payments under liability policy to injured person but never gave written notice of applicable statute of limitations regarding cause of action against tortfeasor, applicable (one-year) statute of limitations as tolled from date when first advance payment was made until date on which injured person retained counsel. *Associated Truck Parts, Inc. v. Superior Court (1991) 228 Cal. App. 3d 864, 870, 279 Cal. Rptr. 76*

Statute of limitations on claim against liability insurer for breach of duty to defend commences when final judgment against the insured is entered in underlying litigation. *Israelsky v. Title Ins. Co. (1989) 212 Cal. App. 3d 611, 613, 261 Cal. Rptr. 72* (applying rule to title insurance); *Oil Base, Inc. v. Continental Cas. Co. (1969) 271 Cal. App. 2d 378, 389, 76 Cal. Rptr. 594*

Ins. Code § 11583 as providing that advance payment or partial payment made by any person or person's insurer, under liability insurance [*Ins. Code § 108(a)*] as accommodation to injured person shall require that person or insurer notify recipient in writing of applicable statute of limitation; failure to give notice as tolling statute of limitations on action until written notice is actually given. *Llanera v. M & S Pipe Supply Co. (1979) 92 Cal. App. 3d 332, 336, 154 Cal. Rptr. 704*

[24] Limits on Coverage

Client's suit against attorney alleging multiple causes of action arising out of negligent collection of debt was single "claim" within policy definition because plaintiff client had one right--to non-negligent performance of debt collection services by attorney--and acts in question arose out of collection of a single debt. *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co. (1993) 5 Cal. 4th 854, 859-860, 21 Cal. Rptr. 2d 691, 855 P.2d 1263*

Under liability policies issued to city, insurer as not obligated to indemnify city for amounts paid pursuant to posttrial settlements in suits in which all original causes of action except inverse condemnation were dismissed with prejudice prior to jury consideration, when policies were expressly inapplicable to liability arising out of inverse condemnation. *City of Laguna Beach v. Mead Reinsurance Corp. (1990) 226 Cal. App. 3d 822, 828-829, 276 Cal. Rptr. 438*

Whether pre-tender expenses are available to insured as question of fact based on interpretation of insurance contract; those expenses as not precluded as matter of law. *Fiorito v. Superior Court (1990) 226 Cal. App. 3d 433, 440, 277 Cal. Rptr. 27*

Under general liability policy issued to city, conduct alleged in 12 underlying civil-rights suits under *42 U.S.C.S. § 1983* based on police misconduct as constituting two occurrences for purposes of establishing limits of coverage; liability under statute as arising not from each separate act of police misconduct, but from underlying municipal policy of condoning series of similar police acts. *Mead Reinsurance v. Granite State Ins. Co. (9th Cir. 1988) 873 F.2d 1185, 1187-1188*

Under directors' and officers' liability policy, coverage for disparate acts and omissions made by five directors in connection with issuance of over 200 unrelated loans as not construed to be single loss for purposes of limit provided for each loss. *Eureka Federal Sav. & Loan Asso. v. American Casualty Co. (9th Cir. 1989) 873 F.2d 229, 234-235*

[25] Medical Coverage

Medical coverage provisions contained in liability policies as form of minimal group accident insurance provided at minimal cost, with named insured as entity through whom coverage is issued; generally, medical payment clauses constitute separate accident insurance coverage, divisible from remainder of policy, and create direct liability to contemplated beneficiaries. *Shaolian v. Safeco Ins. Co. (1999) 71 Cal. App. 4th 268, 272, 83 Cal. Rptr. 2d 702*

Purpose of medical coverage provisions in liability policies as granting peace of mind and creating fund for payment of medical services, so that those injured will not necessarily be contemplating how to impose liability on insured; provision as separate obligation of insurer, independent of its obligation to pay sums of money as damages under liability features of contract. *Shaolian v. Safeco Ins. Co. (1999) 71 Cal. App. 4th 268, 272, 83 Cal. Rptr. 2d 702*

[26] Medical Malpractice Policy

Insurer under medical malpractice policy as having no duty to indemnify or to defend regarding federal criminal prosecution of insured for illegal dispensing of steroids and other drugs. *Perzik v. St. Paul Fire & Marine Ins. Co. (1991) 228 Cal. App. 3d 1273, 1276-1278, 279 Cal. Rptr. 498*

[27] Notice Provisions

Letter to insured from third-party claimant's attorney was "claim" within meaning of D&O policy; insured's failure to report claim in timely manner after receiving letter rendered its later notice of claim untimely. *Westrec Marina Management, Inc. v. Arrowood Indemnity Co. (2008) 163 Cal. App. 4th 1387, 1396, 78 Cal. Rptr. 3d 264*

In homeowner's action against insurer of homeowner's contractor, seeking payment on default judgment that resulted from lack of notice by insured in underlying action against contractor, insurer is liable on default judgment unless it suffered actual, substantial prejudice; mere inability to investigate claim thoroughly or to present defense in underlying suit does not satisfy prejudice requirements. *Belz v. Clarendon America Ins. Co. (2007) 158 Cal. App. 4th 615, 620, 632-633, 69 Cal. Rptr. 3d 864*

In action in which insurer denied coverage and asserted notice defense at same time, summary adjudication for insured as improper because insurer showed it was prejudiced by insured's lack of notice; insurer's denial of coverage as precluding its reliance on insured's lack of notice if insurer would not have acted any differently had it received timely notice. *Select Ins. Co. v. Superior Court (1990) 226 Cal. App. 3d 631, 637, 276 Cal. Rptr. 598*

Insurer's denial of liability under policy as waiving any claim that requirements undernotice provisions of policy have not been met. *CNA Cas. of Cal. v. Seaboard Sur. Co. (1986) 176 Cal. App. 3d 598, 617, 222 Cal. Rptr. 276*

[28] Personal Injury Policy

Excess policy covering personal injury, defined as injury arising out of racial or religious discrimination and humiliation caused by injury to character or reputation, did not cover damages for humiliation and emotional distress arising from discriminatory hiring practices; provision was limited to certain types of discrimination and would not be expanded to cover all types of discrimination; humiliation was covered only if it arose out of torts against character or reputation, not discriminatory hiring. *American Motorists Ins. Co v. Allied-Sysco Food Servs., Inc. (1993) 19 Cal. App. 4th 1342, 1348, 24 Cal. Rptr. 2d 106 , overruled on other grounds, Buss v. Superior Court [1997] 16 Cal. 4th 35, 50, 65 Cal. Rptr. 2d 366, 939 P.2d 766*

In personal injury liability policy, exclusion of "an offense directly or indirectly related to the employment or prospective employment" of injured person by insured as encompassing claim of wrongful discharge; employment exclusion as applicable to all "personal injuries" that arise from or derive from injured person's employment and termination. *Loyola Marymount Univ. v. Hartford Accident & Indem. Co. (1990) 219 Cal. App. 3d 1217, 1222-1223, 271 Cal. Rptr. 528*

In personal injury liability policy, coverage for injury arising out of "wrongful entry or eviction, or other invasion of the right of private occupancy" as referring to real property, and as inapplicable to damages arising from repossession of automobile. *Waranch v. Gulf Ins. Co. (1990) 218 Cal. App. 3d 356, 359-361, 266 Cal. Rptr. 827*

For purposes of "personal injury" insurance policy covering false arrest, detention, or imprisonment, or malicious prosecution, tort of malicious prosecution is committed on filing of complaint; therefore, policy issued subsequent to filing of underlying complaint as not liable for damages arising therefrom. *Zurich Ins. Co. v. Peterson (1986) 188 Cal. App. 3d 438, 448, 232 Cal. Rptr. 807*

Personal injury clause providing liability coverage for wrongful eviction, wrongful entry, or invasion of right of private occupancy of premises did not potentially provide coverage for claim asserted by partners in video store that defendant insured wrongfully took possession of partnership assets, because (1) clause applied to real property and partner's interest in partnership property is interest in personalty, even if partnership property consists of realty and (2) partner's statutory right to possess partnership real property does not include personal right of action to sue nonpartner third party for interference with that right to possess. *Tinseltown Video, Inc. v. Transportation Ins. Co. (1998) 61 Cal. App. 4th 184, 196-200, 71 Cal. Rptr. 2d 371*

Although personal injury coverage is triggered by commission of specified offense rather than by damage suffered by plaintiff, fact that gravamen of plaintiff's action against insured was claim for economic losses not covered under policy

was evidence that insured could not show potential for coverage. *Tinseltown Video, Inc. v. Transportation Ins. Co. (1998) 61 Cal. App. 4th 184, 202, 71 Cal. Rptr. 2d 371*

[29] Personal Liability Policy

Comprehensive personal liability insurance policy that contained statutorily-mandated workers' compensation coverage for insured's residential employees covered insured's son, who was employed as carpenter by insured; *Labor Code § 3352(a)*, which excludes from mandatory workers' compensation coverage employer's parent, spouse or child who works as residential employee, does not apply when coverage is provided under personal liability policy. *State Farm Fire & Cas. Co. v. Workers' Comp. Appeals Bd. (1997) 16 Cal. 4th 1187, 1193-1201, 69 Cal. Rptr. 2d 602, 947 P. 2d 795*

Labor Code § 4151, which permits election of workers' compensation coverage for and by any person not defined as employee under Labor Code, does not require "conscious" election; by purchasing comprehensive personal liability insurance policy that provided workers' compensation coverage for residential employees homeowner "elected" to provide coverage for son who worked as carpenter on his residence, and employee son "elected" to be covered because he did not give written notice upon entering into employment that he elected not to be covered by workers' compensation laws. *State Farm Fire & Cas. Co. v. Workers' Comp. Appeals Bd. (1997) 16 Cal. 4th 1187, 1198-1200, 69 Cal. Rptr. 2d 602, 947 P. 2d 795*

[30] Primary and Excess Policies

Excess insurance policy issued to stunt-performer company, excluding damages arising from bodily injury to performers, and defining personal injury coverage to include bodily injury, shock, sickness, or disease (including mental suffering), as covering indemnification for damages over excess amount for that portion of third-party judgment compensating stunt performer for mental injuries resulting from shock, sickness, or disease, that is, resulting from non-bodily injuries. *Interstate Fire & Cas. Co. v. Stuntman, Inc. (9th Cir. 1988) 861 F.2d 203, 205*

Excess insurance policy as including risk of primary carrier's insolvency within scope of its coverage and excess insurer liable for amounts up to policy limits of primary carrier, in addition to any amounts covered by excess insurance policy. *Reserve Ins. Co. v. Pisciotta (1982) 30 Cal. 3d 800, 815, 180 Cal. Rptr. 628, 640 P.2d 764*

When insured has primary insurance from one insurer and excess insurance from another, and condition precedent to excess insurer's liability may or may not occur, according to when insured chooses to make claims on primary insurer, excess insurer as not liable if insured did not allocate primary insurance claims fairly and in good faith so as to get maximum possible primary benefits. *Kaiser Found. Hosps. v. North Star Reinsurance Corp. (1979) 90 Cal. App. 3d 786, 791-794, 153 Cal. Rptr. 678*

[31] Professional Liability Policies

[a] Generally

Notice-prejudice rule, requiring insurer to establish actual and substantial prejudice in order to avoid liability based on insured's breach of notice clause, as inapplicable to "claims-made" professional liability policy. *Burns v. International Ins. Co. (9th Cir. 1991) 929 F.2d 1422, 1424* (regarding policy issued to officers and directors of savings and loan corporation)

In coverage provision of errors and omissions policy applicable to wrongful act committed anywhere in world provided

that claim is "first brought" in U.S., Puerto Rico, or Canada, phrase "claim first brought" was ambiguous; parties intended that determination of coverage would be made at single point in time (when injured party first brought to insured's attention that claim for damages was being asserted); completed claim is not made or brought until it is received. *National Cas. Co. v. Sovereign Gen'l Ins. Servs., Inc. (2006) 137 Cal. App. 4th 812, 822-823, 40 Cal. Rptr. 3d 591*

Professional liability policy issued to insurance salesman, providing coverage for claims made against insured and reported in writing to insurer during policy period, as not covering claims made after policy period expired; "notice prejudice rule," applicable to "occurrence" policy (covering claims arising from occurrence during policy period), as inapplicable to "claims made" policy. *Pacific Employers Ins. Co. v. Superior Court (1990) 221 Cal. App. 3d 1348, 1359, 270 Cal. Rptr. 779*

[b] Exclusions

Liability policy issued to medical professionals, containing exclusion denying defense or indemnity for intentional act "even if such activities are related to your rendering or failing to render professional services," did not cover class action brought against professional medical group based on group's alleged policy of withholding epidural care from indigent women because Medi-Cal would not pay for procedure. *Upland Anesthesia Med. Group v. Doctors' Co. (2002) 100 Cal. App. 4th 1137, 1139, 1142-1144, 123 Cal. Rptr. 2d 94*

Ownership exclusion in professional liability insurance for real estate agents and brokers is designed to cover risks involved in selling property for others; broker's attempt to purchase for herself property, for which her client had made counteroffer, did not invoke ownership exclusion because broker was not dealing with her own property. *Morris v. Employers Reinsurance Corp. (2000) 84 Cal. App. 4th 1026, 1029-1030, 101 Cal. Rptr. 2d 350*

Insurer could "conclusively presume" that plaintiff was partner in accounting firm and that her claim fell within exclusion in firm's professional liability policy for claims brought by former partners when, despite plaintiff's failure to meet statutory licensing requirements for becoming partner in accounting firm, both plaintiff and firm held her out to insurer as partner and requested that defendant insure her as partner. *Montgomery v. Cal Accountants Mut. Ins. Co. (1998) 61 Cal. App. 4th 854, 859, 860, 72 Cal. Rptr. 2d 39*

Dual capacity doctrine did not bring claim brought against accounting firm by former partner in her capacity as investor, rather than former partner, within coverage of professional liability policy; claim fell within policy exclusion for claims made by former partners, because exclusion clause in policy did not distinguish between claims relating to investment actions and claims relating to partnership disputes. *Montgomery v. Cal Accountants Mut. Ins. Co. (1998) 61 Cal. App. 4th 854, 860, 72 Cal. Rptr. 2d 39*

[32] Self-Insurance

Self-insurance is not "insurance" and is not subject to regulation under Insurance Code; moreover, with exception of certificates of automobile self-insurance, self-insurance may not be considered in determining priority of insurance coverage policy. *Orange County Water Dist. v. Association of Cal. Water Agencies Joint Powers Ins. Auth. (1997) 54 Cal. App. 4th 772, 777-779, 63 Cal. Rptr. 2d 182*

[33] Subrogation

Owner's liability insurer subrogated to owner's right of indemnity from contractor and its insurer under indemnity agreement, notwithstanding "other insurance" clauses in both owner's and contractor's liability policies. *Rossmoor*

Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 634, 119 Cal. Rptr. 449, 532 P.2d 97

Rossmoor Sanitation, Inc. v. Pylon (1975) 13 Cal. 3d 622, 119 Cal. Rptr. 449, 532 P.2d 97 , did not apply to case in which dispute was between primary insurer of one party and excess insurer of other; by contrast, *Rossmoor* involved dispute between two primary carriers, each of whose policies contained "other insurance" clause, on issue of whether their respective liability on loss should be settled on standard basis of apportionment. *JPI Westcoast Constr., L.P. v. RJS & Assoc., Inc. (2007) 156 Cal. App. 4th 1448, 1460, 68 Cal. Rptr. 3d 91*

Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 119 Cal. Rptr. 449, 532 P.2d 97 did not permit insurer to bring subrogation action on indemnity contract in all cases in which indemnity contract exists; nor did it purport to establish general rule that contractual indemnity agreement between insured and third party takes precedence over well-established general rules of primary and excess coverage in action between insurers. *Reliance Nat'l Indem. Co. v. General Star Indem. Co. (1999) 72 Cal. App. 4th 1063, 1078, 1081, 85 Cal. Rptr. 2d 627*

Whether insurer is entitled to subrogation against party who, by separate contract, has agreed to assume responsibility for same loss and is not responsible for causing loss, depends on respective equities of parties; equities do not permit recovery if (1) parties to indemnity agreement are not present, and (2) action is between primary and excess carriers as identified by their policies. *Reliance Nat'l Indem. Co. v. General Star Indem. Co. (1999) 72 Cal. App. 4th 1063, 1078, 1081-1082, 85 Cal. Rptr. 2d 627*

Liability insurer that pays claim against its insured that resulted from negligence of insured's attorneys has no subrogation rights with respect to insured's legal malpractice claim against attorneys [*Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg (1994) 30 Cal. App. 4th 1373, 1387, 36 Cal. Rptr. 2d 424]* .

Ins. Code § 11583 does not require that settlement proceeds paid by tortfeasor's insurer to plaintiff be reduced by amount paid by plaintiff's insurer to plaintiff when tortfeasor's insurer knew of payment before settling; settlement made with knowledge of prior payment is no bar to insurer-subrogee's cause of action. *Griffin v. Calistro (1991) 229 Cal. App. 3d 193, 196-197, 280 Cal. Rptr. 30*

Insured that is required to reimburse insurer for medical payments made under policy out of recovery from third party required to pay from all damages recovered, not only medical payment damages; insured entitled to pro rata recovery of attorney's fees incurred in obtaining recovery. *Hartford Accident & Indem. Co. v. Gropman (1984) 163 Cal. App. 3d Supp. 33, 39-40*

Insurer not permitted to subrogate against tortfeasor who has statutory right to reimbursement against insured party. *Longoria v. Hengehold Motor Co. (1983) 142 Cal. App. 3d 1059, 1060-1062, 191 Cal. Rptr. 439*

[34] Successor Corporations

Predecessor corporation's products liability coverage held available to provide coverage to successor corporation for product liability claims arising out of predecessor corporation's pre-sale occurrences. *Northern Ins. Co. of N.Y. v. Allied Mut. Ins. (9th Cir. 1992) 955 F.2d 1353, 1357-1358* ; *see* *Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 28, 136 Cal. Rptr. 574, 560 P.2d 3* (successor liability rule in products liability actions)

If liability is assumed by contract, successor corporation's rights are defined and limited by that contract, and hence cannot be deemed transferred by operation of law. *Henkel Corp. v. Hartford Accident & Indem. Co. (2003) 29 Cal. 4th 934, 943, 129 Cal. Rptr. 2d 828, 62 P.3d 69*

Purchasing corporation faced with CERCLA cleanup costs for hazardous waste deposited by its predecessor before

CERCLA was enacted held not covered under predecessor's liability policy; since CERCLA was passed after asset purchase occurred, no liability passed at time of the asset sale because no such liability existed at that time. *Quemetco Inc. v. Pacific Auto. Ins. Co. (1994) 24 Cal. App. 4th 494, 501-502, 29 Cal. Rptr. 2d 627*

[35] Third-Party Bad Faith Actions

Third party judgment creditor's loss of use of money during insurer's 81-day delay in paying full amount of judgment with interest failed to meet threshold economic loss requirement necessary to recover emotional distress damages for bad faith. *Maxwell v. Fire Ins. Exch. (1998) 60 Cal. App. 4th 1446, 1449-1452*

[36] Third-Party Rights Generally

Although liability insurer has option to join injured third party as codefendant in insurer's declaratory relief action to determine coverage, third-party claimant does not have equivalent rights. *Otay Land Co. v. Royal Indem. Co. (2008)169 Cal. App. 4th 556, 564-565, 86 Cal. Rptr. 3d 408*

Current property owner's declaratory relief action was properly dismissed when it regarded liability insurer's anticipated coverage of one of its former insureds, a nonparty that formerly owned the property, with respect to contamination problems; third-party claimant was premature in claiming that actual controversy existed relating to its current or future rights under insurance policy; declaratory relief theory may not proceed without more specific justification for allowing separate action to proceed, in light of existence of integrally related litigation on policy interpretation grounds, still pending between parties directly affected. *Otay Land Co. v. Royal Indem. Co. (2008) 169 Cal. App. 4th 556, 566-567, 86 Cal. Rptr. 3d 408*

Because insurer's duties flow to its insured alone, third-party claimant may not bring direct action against insurance company; as general rule, third party may directly sue insurer only if there has been assignment of rights by, or final judgment against, insured. *Shaolian v. Safeco Ins. Co. (1999) 71 Cal. App. 4th 268, 271, 83 Cal. Rptr. 2d 702*

Third-party claimant as precluded from suing on contracts without either assignment of rights from insureds or judgment in claimant's favor. *Griffith v. State Farm Mut. Auto. Ins. Co. (1991) 230 Cal. App. 3d 59, 71, 281 Cal. Rptr. 165*

Injured third party as having no right to obtain disclosure of policy limits from insurer prior to filing of lawsuit or other formal proceeding; under Insurance Information and Privacy Act (*Ins. Code § 791 et seq.*), policy limits as protected "personal information," release of which is prohibited prior to initiation of formal proceeding. *Griffith v. State Farm Mut. Auto. Ins. Co. (1991) 230 Cal. App. 3d 59, 64-73, 281 Cal. Rptr. 165*

[37] Time of Occurrence

Legal malpractice insurance policy providing coverage against claim for breach of professional duty "which may be made against them" during period set forth in policy by reason of any negligent act, error, or omission, whenever or wherever same was or may have been committed, as covering claim for legal malpractice made more than two years after expiration of policy for alleged malpractice occurring during policy period. *Gyler v. Mission Ins. Co. (1973) 10 Cal. 3d 216, 218-219, 110 Cal. Rptr. 139, 514 P.2d 1219*

Policies requiring that *injury* occur during policy period did not cover anticompetitive conduct that occurred during policy period but caused injury that occurred after expiration of policy period; policy that covered "occurrences or accidents which happen during the policy period" might be construed to provide coverage because "occurrence" simply

meant something that happened during policy period, regardless of whther injury occurred then or later; policies that simply covered "offenses committed during the policy period" potentially covered injury, because triggering event was the act rather than the injury. *American Cyanamid Co. v. American Home Assurance (1994) 30 Cal. App. 4th 969, 982, 35 Cal. Rptr. 2d 920*

Under multiperil policy issued to condominium developer, coverage for third-party liability based on structural damage discovered after policy issued, and effect of insured's discovery of other damage prior to that date, requires factual determinations (precluding summary judgment for insurer) because (1) knowledge of one defect or set of defects is not equivalent of knowledge of other, distinct defects of same construction project; (2) to bar third-party liability coverage, defect causing postsale damage must be known to insured or agents at relevant time; and (3) coverage as not barred merely because insured "should have discovered" defect but negligently failed to do so. *Chu v. Canadian Indem. Co. (1990) 224 Cal. App. 3d 86, 97-101, 274 Cal. Rptr. 20*

Under general liability policy, time of accident as time when complaining party was actually injured. *Hallmark Ins. Co. v. Superior Court (1988) 201 Cal. App. 3d 1014, 1018-1019, 247 Cal. Rptr. 638*

[38] Transfer of Policy

Transfer of a policy does not create a separate liability limit in favor of transferee; substitution of transferees as named insured did not entitle new named insured to separate liability limits. *Golden Eagle Ins. Co. v. Foremost Ins. Co. (1993) 20 Cal. App. 4th 1372, 1380-1382, 25 Cal. Rptr. 2d 242*

[39] Willful Act of Insured

[a] Application to Sexual Offenses

Ins. Code § 533 precludes coverage under homeowner's liability policy for damages arising from insured's sexual molestation of minor. *State Farm Fire & Cas. Co. v. Abraio (9th Cir. 1989) 874 F.2d 619, 623* ; *State Farm Fire & Cas. Co. v. Estate of Jenner (9th Cir. 1989) 874 F.2d 604, 606-607* ; *American States Ins. Co. v. Borbor (9th Cir. 1987) 826 F.2d 888, 891*

Insurer under no duty to defend or indemnify wife in action alleging her negligent supervision of child, arising from sexual molestation by her husband, because policy excluded claims resulting from intentional acts by "an insured" under policy; coverage as also precluded by *Ins. Code § 533*. *Allstate Ins. Co. v. Gilbert (9th Cir. 1988) 852 F.2d 449, 453-454* ; *see also Farmer v. Allstate Ins. Co. (C.D. Cal. 2004) 311 F. Supp. 2d 884, 895*

Homeowner's policy did not cover claims of sexual molestation asserted by insureds' granddaughters; policy does not cover acts intended to cause bodily injury; child molestation is always intentional. *Miller v. Allstate Ins. Co. (S.D. Cal. 2007) 489 F. Supp. 2d 1133, 1137*

Ins. Code § 533 precludes, as matter of law, coverage for damages arising from insured's sexual child molestation. *J.C. Penney Cas. Ins. Co. v. M.K. (1991) 52 Cal. 3d 1009, 1025, 1028, 278 Cal. Rptr. 64, 804 P.2d 689* ; *Allstate Ins. Co. v. Kim W. (1984) 160 Cal. App. 3d 326, 332-333, 206 Cal. Rptr. 609*

Insurer had no duty to defend or indemnify insured under mobile homeowner's policy with respect to intentional conduct alleged in third-party action for sexual assault; "no such thing as" negligent stalking, negligent harassment, or unintentional child molestation; insured cannot recharacterize clearly intentional and willful sexual misconduct as merely negligent or nonwillful, so as to trigger insurance coverage. *Northland Ins. Co. v. Briones (2000) 81 Cal. App. 4th 796, 809-810, 97 Cal. Rptr. 2d 127*

Ins. Code § 533 precludes coverage for damages arising from child molestation, regardless of whether child molester had subjective intent to harm his or her victim, because molestation is intentional act that is inherently and necessarily harmful. *Barbara B. v. Horace Mann Ins. Co. (1998) 61 Cal. App. 4th 158, 167, 71 Cal. Rptr. 2d 350*

Coverage under foster parents' liability policy for foster mother's negligent failure to protect minor plaintiff from sexual assault by foster father, not precluded by *Ins. Code § 533* or by public policy, because foster mother did not engage in criminal orintentional conduct. *National Union Fire Ins. Co. v. Lynette C. (1991) 228 Cal. App. 3d 1073, 1084-1086, 279 Cal. Rptr. 394* (finding coverage based on ambiguity created by exclusion regarding sexual conduct, when read in light of basic coverage)

Under homeowner's policy providing coverage for personal liability, insurer has duty to defend insured in action brought by third party based on transmission of a venereal disease, when complaint alleged both negligent and intentional torts, and insurer was potentially required to indemnify with regard to negligent conduct. *State Farm Fire & Cas. Co. v. Eddy (1990) 218 Cal. App. 3d 958, 965-966, 267 Cal. Rptr. 379*

[b] Application to Torts, Crimes, and Statutory Violations Generally

Insurer not entitled to summary judgment because in underlying litigation by bankruptcy trustee against corporate entities, officers, and directors, allegations of negligent conduct were not inseparably intertwined with allegations of willful conduct. *Unified W. Grocers, Inc. v. Twin City Fire Ins. Co. (9th Cir. 2006) 457 F.3d 1106, 1114*

Policy provision for defense of malicious prosecution claims also required insurer to defend claim for abuse of process. *Lunsford v. American Guarantee & Liab. Ins. Co. (9th Cir. 1994) 18 F.3d 653*

Homeowner's policy did not provide coverage for wrongful death, for which insured had been convicted of second-degree murder; stipulated judgment between survivors of victim and insured, establishing that insured caused victim's death without premeditation or intent to kill, had no collateral effect on dispute between survivors and insurer because insurer was not party or privy to underlying action. *State Farm Fire & Cas. Co. v. Engstrom (9th Cir. 1991) 933 F.2d 772, 773*

Ins. Code § 533 does not bar coverage for insured vicariously liable for willful acts of coinsured by reason of business partnership; insured's liability for partner's acts distinguished from ability to insure against that liability. *American States Ins. Co. v. Borbor (9th Cir. 1987) 826 F.2d 888, 892*

Ins. Code Section 533 does not automatically bar insurance coverage for violation of Section 10(b) of the Securities and Exchange Act of 1934 and federal *Rule 10b-5*; "scienter" requirement under statute and rule require only showing of recklessness, not necessarily willful conduct within meaning of *Ins. Code § 533*. *Raychem Corp. v. Federal Ins. Co. (N.D. Cal. 1994) 853 F. Supp. 1170, 1179-1180*

Since employment discrimination may involve disparate impact as well as intentional conduct, and disparate impact does not require showing of willfulness, *Ins. Code § 533* does not necessarily preclude coverage of employment discrimination claims. *Save Mart Supermarkets v. Underwriters (N.D. Cal. 1994) 843 F. Supp. 597, 606*

Nolo contendere plea to misdemeanor battery did not support willfulness of insured's conduct in throwing person into swimming pool resulting in unintentional harm because he landed on concrete steps instead of in water; intent to commit bodily injury is not element of misdemeanor battery. *State Farm Fire and Casualty Co. v. Superior Court (2008) 164 Cal. App. 4th 317, 329, 78 Cal. Rptr. 3d 828*

Garage liability policy provided potential for coverage for customer's injuries when employee claimed that he struck customer in self-defense after being attacked; trial court improperly decided as matter of law that deliberate acts in self-defense can never be an "accident" within meaning of insuring clause. *Jafari v. EMC Ins. Cos. (2007) 155 Cal. App. 4th 885, 900-901, 66 Cal. Rptr. 3d 359 , vacated, transferred Jafari (Davar) v. EMC Insurance Companies (2009) 102 Cal. Rptr. 3d 283, 220 P.3d 241, 2009 Cal. LEXIS 12811*

Willful conduct required for liability under *Corp. Code § 25500* (fraudulent manipulation of securities market) must be knowing and deliberate and, therefore, necessarily constitutes willful act under *Ins. Code § 533*. *California Amplifier, Inc. v. RLI Ins. Co. (2001) 94 Cal. App. 4th 102, 108, 113 Cal. Rptr. 2d 915* (no liability coverage under D&O policy)

General liability policy that expressly promised coverage for claim of malicious prosecution obligated insurer to provide defense of malicious prosecution action against insured. *Downey Venture v. LMI Ins. Co. (1998) 66 Cal. App. 4th 478, 507-509, 78 Cal. Rptr. 2d 142*

Attorneys' fees imposed on insured as fine or restitution for felony drunk driving under *Code Civ. Proc. § 1021.4* are not covered because *Ins. Code § 533* precludes, as matter of public policy, fines or restitution imposed as result of criminal conviction. *Baker v. Mid-Century Ins. Co. (1993) 20 Cal. App. 4th 921, 926, 25 Cal. Rptr. 2d 34*

Manufacturer of products containing asbestos not entitled to defense or indemnification of claims based on conspiracy theories because conspiracy, by definition, cannot occur by accident and therefore cannot be "occurrence" under liability policy. *Fibreboard Corp. v. Hartford Accident & Indem. Co. (1993) 16 Cal. App. 4th 492, 510-511, 20 Cal. Rptr. 2d 376 .*

Teenaged boy's fatal shooting of teenaged girl, caused by his pulling trigger of gun that he thought would not fire because he had removed two bullets, in attempt to scare victim, was willful act within meaning of *Ins. Code § 533*, precluding coverage under his father's homeowner's policy; conduct was more than merely reckless, exposing victim to high probability of injury in egregiously wrongful manner. *Studley v. Benicia Unified Sch. Dist. (1991) 230 Cal. App. 3d 454, 459, 281 Cal. Rptr. 631*

Insured's fatal shooting of brother during discussion about real property they owned jointly was not "accident" within terms of homeowners' policy when insured brought gun with her, left it in her pocket, brandished it during argument, and ultimately used it to shoot victim four times in head, four minutes later shooting him again at close range; evidence showed that she did not act in self-defense. *United Servs. Auto. Ass'n v. Cavanaugh (1991) 227 Cal. App. 3d 1277, 1285-1287, 278 Cal. Rptr. 214*

Insurer has no duty under homeowners' policy to defend insured in criminal prosecution following insured's shooting of his wife and her lawyer when they attempted to take inventory of his store for purposes of dissolution proceedings; rationale against imposing liability on insurer similar to that precluding insurance coverage for punitive and exemplary damages, because restitution is ordered as punishment in criminal case. *State Farm Fire & Cas. Co. v. Superior Court (1987) 191 Cal. App. 3d 74, 77-78, 236 Cal. Rptr. 216*

Insurance coverage of corporation for willful tort prohibited by *Ins. Code § 533* when tortious act constituted act of corporation but not when corporation vicariously liable for willful act of employee. *City Prods. Corp. v. Globe Indem. Co. (1979) 88 Cal. App. 3d 31, 39, 151 Cal. Rptr. 494*

[c] Application to Wrongful Discharge

No potential liability for coverage, and therefore no duty to defend, arising from wrongful-termination action against insured when liability policy extends coverage only for claims resulting from accidental event. *Lipson v. Jordache*

Enters., Inc. (1992) 9 Cal. App. 4th 151, 159, 11 Cal. Rptr. 2d 271 (causes of action for wrongful termination and breach of employment contract); *Loyola Marymount Univ. v. Hartford Accident & Indem. Co. (1990) 219 Cal. App. 3d 1217, 1224-1225, 271 Cal. Rptr. 528* ; *Commercial Union Ins. Co. v. Superior Court (1987) 196 Cal. App. 3d 1205, 1209, 242 Cal. Rptr. 454*

Employer who wrongfully terminated employee, in violation of public policy, had no reasonable expectation of defense; *Ins. Code § 533* precluded insurer's duty to defend. *B & E Convalescent Ctr. v. State Comp. Ins. Fund (1992) 8 Cal. App. 4th 78, 102, 9 Cal. Rptr. 2d 894*

Under comprehensive general liability policy defining covered "occurrence" as "an accident, an event or a continuous or repeated exposure to conditions which results, during the policy period, in bodily injury or property damage neither expected nor intended by the insured," issue whether policy provides potential coverage regarding action against insured for wrongful termination and related causes of action, was question of fact; summary judgment for insurer as improper. *United Pac. Ins. Co. v. McGuire Co. (1991) 229 Cal. App. 3d 1560, 1564-1567, 281 Cal. Rptr. 375*

[d] Statutory Prohibition

Ins. Code § 533 and *Civ. Code § 1668* (contracts exempting person from responsibility for willful injury against policy of law) prohibit only contracts that indemnify for"loss" or "responsibility" resulting from willful wrongdoing, and do not invalidate contract for legal defense against action charging conduct. *Gray v. Zurich Ins. Co. (1966) 65 Cal. 2d 263, 277, 54 Cal. Rptr. 104, 419 P.2d 168*

Ins. Code § 533, codifying general rule that insurance policy indemnifying insured against liability due to insured's own willful wrong is void as against public policy, has no application when insured is not personally at fault. *Arenson v. National Auto. & Cas. Ins. Co. (1955) 45 Cal. 2d 81, 84, 286 P.2d 816*

Ins. Code § 533, implied in every contract, provides that insurer is not liable for loss caused by willful act of insured. *Tradewinds Escrow, Inc. v. Truck Ins. Exch. (2002) 97 Cal. App. 4th 704, 714, 118 Cal. Rptr. 2d 561* (commercial automobile liability policy)

Legal Topics:

For related research and practice materials, see the following legal topics:
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Comment, *Void Ab Initio: Application Fraud as Grounds for Avoiding Directors' and Officers' Liability Insurance Coverage, 74 Cal. L. Rev. 929 (1986)*

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Comment, *The Emerging Fiduciary Obligations and Strict Liability in Insurance Law, 14 Cal. W. L. Rev. 358 (1978)*

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Legal Topics:

For related research and practice materials, see the following legal topics:
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Abandonment of subject matter of marine insurance to insurer. *Ins. Code §§ 1970-1986*

"Bottomry." *Harb. & Nav. Code § 450*

"Charter party." *Civ. Code § 1959*

Classes of insurance. *Ins. Code § 100*

Concealment and representations. *Ins. Code §§ 330-361, 1900-1905*

"Domestic vessel." *Harb. & Nav. Code § 402*

"Foreign vessel." *Harb. & Nav. Code § 402*

"Freightage." *Ins. Code § 1882*; *Civ. Code § 2110*

Insurable interest. *Ins. Code §§ 281-286, 1880-1886*

Insurance Code section inapplicable to marine insurance. *Ins. Code § 2010* Marine carrier's liability. *Harb. & Nav. Code § 420*

Marine and inland marine insurance distinguished for purpose of insurance rates. *Ins. Code § 1851*

"Marine insurance." *Ins. Code § 103*

Marine insurance policy. *Ins. Code §§ 1880-1927*

"Open policies." *Ins. Code §§ 410, 411*

"Perils of the sea." *Harb. & Nav. Code § 422*

Personal property floater risks as included in fire and burglary insurance. *Ins. Code §§ 102, 112*

"Running policies." *Ins. Code § 413*

Surplus line broker provisions of Insurance Code as inapplicable to marine insurance. *Ins. Code § 1760.5*

"Valued policies." *Ins. Code §§ 410, 412*

Vessels as engaged in foreign or domestic navigation or fisheries. *Harb. & Nav. Code § 401*

Warranties. *Ins. Code §§ 440-449, 1920-1927*; see also *Civ. Code § 1621* (defining "implied contract")

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Marine insurance. *10 Cal. Code Reg §§ 2320-2322*

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§ 308.312 Decisions

[1] Abandonment

Abandonment of ship as relinquishment by insured of his interest in it to insurer; conditions for abandonment. *Hilton v. Federal Ins. Co. (1931) 118 Cal. App. 495, 501, 5 P.2d 648* (citing former Civ. Code § 2716 [*now Ins. Code § 1970*]); *see also Standard Marine Ins. Co. v. Nome Beach Lighterage & Transp. Co. (1904) 133 F. 636, 643*

[2] Assignment

Whether policy provision voiding marine insurance for assignment without insurer's written consent is waived as question of fact. *Hilton v. Federal Ins. Co. (1931) 118 Cal. App. 495, 498, 5 P.2d 648*

[3] Barratry

Master of vessel as committing barratry when acting in bad faith he sells cargo of ship for purpose of serving his own ends or against what he knew or believed to be the law though he thought he was advancing interests of owners of cargo; fact that master is part owner of vessel as not incapacitating him from committing barratry, especially with reference to cargo. *Meyer v. Great W. Ins. Co. (1894) 104 Cal. 381, 387, 38 P. 82*

[4] Concealment

As general rule, unless inqury is made, insured as not required to communicate such facts as are covered by warranty, express or implied, but rule as subject to exceptions, such as facts relating to unseaworthiness of vessel. *Tremaine v. Phoenix Assurance Co. (1935) 6 Cal. App. 2d 552, 554-555, 45 P.2d 210*

[5] Construction

Marine insurance policy's "all-risks" provision as not covering loss of trawler seized by police as stolen vessel because of defective title; policy broadly categorized as "casualty" policy as convertible to title insurance policy because insureds encountered difficulty for which they were not insured. *Commercial Union Ins. Co. v. Sponholz (9th Cir. 1989) 866 F.2d 1162, 1163*

Marine insurance policies as construed liberally in favor of insured. *Victoria S.S. Co. v. Western Assurance Co. (1914) 167 Cal. 348, 353, 139 P. 807*

Ambiguity or uncertainty in marine insurance policy as resolved against insurer and, if semantically permissible, contract as given such construction as will fairly achieve its object of providing indemnity for loss to which insurance relates; this rule as particularly applicable to exclusions, since burden rests on insurer to phrase exceptions and exclusions in clear and unmistakable language. *Harris v. Glens Falls Ins. Co. (1972) 6 Cal. 3d 699, 701, 100 Cal. Rptr. 133, 493 P.2d 861*

Construction of endorsement on back of marine policy (which permitted vessel to prosecute voyages anywhere on navigable waters of the globe, with specified exceptions) providing vessel was "to be employed on the Gulf of California and captain is privileged to act as his own pilot without prejudice to this insurance." *Gulf of Cal. Navigation & Express Co. v. State Inv. & Ins. Co. (1886) 70 Cal. 586, 587-590, 12 P. 473*

"Held-covered" clause in marine insurance as not designed to permit insured to voluntarily change scope of risk by willfully breaching warranty and thereupon tendering increased premium; but as intended to protect insured from particular hazard, namely, that despite his best efforts to contrary, he or his crew fail to comply with terms of warranty. *Campbell v. Hartford Fire Ins. Co. (1976) 533 F.2d 496, 497-498 n.1*

Yacht insurance policy as covering loss of yacht by sinking on trial trip few miles from San Francisco Bay where policy was ambiguous in that it admittedly covered trial trips "within the specified waters" but failed to specify any waters and in blank space in policy left for purpose of specifying waters words "Laid up and out of commission in Sausalito, California" had been typed. *Harris v. Glens Falls Ins. Co. (1972) 6 Cal. 3d 699, 701, 100 Cal. Rptr. 133, 493 P.2d 861*

Temporary stop for pickup by drivers as not breaking requisite continuity of transportation, and cargo stolen during such stop as covered by inland marine insurance clause which covers losses occurring while cargo in transit or in ordinary course of transportation. *Aetna Cas. & Sur. Co. v. Burbank Generators, Inc. (1981) 121 Cal. App. 3d 813, 816-817* Policy insuring vessel owner and providing that "The assured is protected and indemnified as shipowner in respect of liabilities and expenses which he shall have become liable to pay and shall have in fact paid" as, in respect to liability for cargo loss, a policy of indemnity for liability and not indemnity for reimbursement for actual payment since limiting phrase requiring payment applied only to "expenses" and not to "liabilities." *Orion Ins. Co. v. Firemen's Ins. Co. (1975) 46 Cal. App. 3d 374, 378-381, 120 Cal. Rptr. 222*

Policy insuring vessel owner and providing that "The assured is protected and indemnified as shipowner in respect of liabilities and expenses which he shall have become liable to pay and shall have in fact paid" as, in respect to liability for cargo loss, a policy of indemnity for liability and not indemnity for reimbursement for actual payment since limiting phrase requiring payment applied only to "expenses" and not to "liabilities." *Orion Ins. Co. v. Firemen's Ins. Co. (1975) 46 Cal. App. 3d 374, 378-381, 120 Cal. Rptr. 222*

[6] Definitions

"Stranded" as meaning that vessel must remain stationary for a time and as implying a settling of vessel and interruption of voyage under extraordinary circumstances; burden of proof. *Amok Gold Mining Co. v. Canton Ins. Office, Ltd. (1918) 36 Cal. App. 265, 269-270, 171 P. 1098*

"Transit insurance" defined. *Lindo v. Ocean Marine Ins. Co. (1928) 27 F.2d 956, 957 , aff'd, Ocean Marine Ins. Co. v. Lindo (1929) 30 F.2d 782, 784*

[7] Effect of Change of Ships on Cargo Insurance

Insurer of cargo as discharged from liability under policy where before commencement of or during voyage ship named in policy is changed without necessity or consent of underwriters since unnecessary or unsanctioned change of ship produces alteration of risk run by underwriters. *Schroeder v. S. Schweizer Lloyd Transp. (1882) 60 Cal. 467, 476-477*

[8] Evidence

In action against insurance company to recover for injury to insured goods, policy itself, or evidence of its terms, as required to be introduced in evidence to show risks covered by insurance and extent of defendant's obligation. *California Canneries Co. v. Canton Ins. Office, Ltd. (1914) 25 Cal. App. 303, 309, 143 P. 549*

[9] Insurable Interest

Under former Civ. Code § 2662 [now *Ins. Code § 1883*], owner of ship as having insurable interest in expected freightage which he would have certainly earned but for intervention of peril insured agains. *Victoria S.S. Co. v. Western Assurance Co. (1914) 167 Cal. 348, 352, 139 P. 807*

[10] Losses

Marine insurance as recognizing two distinct classes of insurance: (1) against total loss only; and (2) against total or partial loss. *California Canneries Co. v. Canton Ins. Office, Ltd. (1914) 25 Cal. App. 303, 311, 143 P. 549*

Total losses under marine insurance policies as either actual or constructive. *Victoria S.S. Co. v. Western Assurance Co. (1914) 167 Cal. 348, 361, 139 P. 807*

Marine insurance policy providing that law of England shall govern in determination of what constitutes constructive total loss under policy as not violative of public policy, notwithstanding former Civ. Code §§ 2705 and 2717 [now *Ins. Code §§ 1963, 1971*], which differ from English law as to what constitutes constructive total loss. *Boole v. Union Marine Ins. Co., Ltd. (1921) 52 Cal. App. 207, 210, 198 P. 416*

Explosion of boiler causing ship to sink as not constituting loss from danger peculiar to sea within meaning of former Civ. Code § 2199 [now *Harb. & Nav. Code § 422(g)*] enumerating perils of sea. *Miller v. California Ins. Co. (1888) 76 Cal. 145, 147-149, 18 P. 155*

[11] Mortgagee Insurance

"Hull Mortgagee Endorsement" providing that interest of mortgagee shall not be impaired or invalidated by any act or neglect of mortgagor, provided that loss would have been loss recoverable under policy, as providing coverage to

mortgagee for loss incurred by "scuttling" (deliberate sinking by owner) of vessel. *Zurich Ins. Co. v. Wheeler (9th Cir. 1988) 838 F.2d 338, 339*

[12] Statute of Limitations

Covenant shortening period of limitations as valid provision of insurance contract as long as limitation is not so unreasonable as to show imposition or undue advantage; one-year limitation period as fair. *C & H Foods Co. v. Hartford Ins. Co. (1984) 163 Cal. App. 3d 1055, 1064, 211 Cal. Rptr. 765*

[13] Types of Policies

"Open marine cargo insurance" covered shipment of imported goods from abroad to U.S.; coverage provided for invoice price of goods, freight, duty, plus 10 percent. *Filippo Industries, Inc. v. Sun Ins. Co. (1999) 74 Cal. App. 4th 1429, 88 Cal. Rptr. 2d 881* (policy containing special warehouse endorsement)

[14] Warranties

Failure of vessel (28-foot ketch) to have two-way radio aboard as not constituting breach of implied warranty of seaworthiness [see *Ins. Code § 1920*] where neither statute nor regulation requires vessel of type involved to be so equipped and there is no evidence compelling conclusion that boat was rendered unseaworthy as matter of law by reason of absence of radio. *Harris v. Glens Falls Ins. Co. (1972) 6 Cal. 3d 699, 703, 100 Cal. Rptr. 133, 493 P.2d 861*

Action by charter operator's insurer against owner's insurer for indemnity of judgment paid to shippers for loss of cargo due to unseaworthness of vessel. *Orion Ins. Co. v. Firemen's Ins. Co. (1975) 46 Cal. App. 3d 374, 377-378, 120 Cal. Rptr. 222*

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For related research and practice materials, see the following legal topics:
Insurance LawBusiness InsuranceMarine InsuranceBarratryInsurance LawBusiness InsuranceMarine InsuranceConcealmentInsurance LawBusiness InsuranceMarine InsuranceConstructive Total LossInsurance LawBusiness InsuranceMarine InsuranceExpress WarrantiesInsurance LawBusiness InsuranceMarine InsuranceImplied WarrantiesInsurance LawBusiness InsuranceMarine InsuranceSeaworthinessInsurance LawClaims & ContractsPolicy InterpretationAmbiguous TermsConstruction Against Insurers

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Griese, *Marine Insurance Contracts in the Conflict of Laws: A Comparative Study of the Case Law*, *55 UCLA L. Rev. 55 (1959)*

Derby, *What Are Warlike Operations Under F.C. & S. ["free capture and seizure"] Clause in Marine Policies*, *33 Cal. L. Rev. 128 (1945)*

Legal Topics:

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28 Cal. Jur. 2d, *Insurance*, §§ 452-465, *557*, 558

10 Cal. Jur. 3d, *Boats and Boating*, § 46

45 C.J.S., *Insurance*, §§ 642-656, *852-876*, *944-965*, 1083-1087

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Arbitration generally. *Code Civ. Proc. §§ 1280-1294.2*

Policy provision in standard fire insurance policy. *Ins. Code § 2071*

Required provisions (loss, appraisal, adjusters) in residential property insurance [*Ins. Code § 10087*]; policies, endorsements, or certificates of insurance regarding earthquake coverage [*Ins. Code § 10020 et seq.*]; basic residential earthquake policies [*Ins. Code § 10089.5 et seq.*]. *Ins. Code § 10082.3* (applicable to policies originated or renewed after December 31, 2001)

Waiver of appraisement of loss by special agreement endorsed on policy and advance valuation. *Ins. Code § 2075*

Legal Topics:

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

Judgment that does not conform to appraisal award made pursuant to *Ins. Code § 2071*, on which it is based, violates *Code Civ. Proc. § 1287.4*. *Devonwood Condominium Owners Assn. v. Farmers Ins. Exchange (2008) 162 Cal. App. 4th 1498, 1506-1507, 77 Cal. Rptr. 3d 88*

Appraisal hearings are form of arbitration and are generally subject to rules governing arbitration; judicial review of arbitration or appraisal award is circumscribed. *Kacha v. Allstate Ins. Co. (2006) 140 Cal. App. 4th 1023, 1031*

By consistently disputing appraiser's authority to determine coverage issues, insured did not waive protection of *Safeco Ins. Co. v. Sharma (1984) 160 Cal. App. 3d 1060, 1063, 207 Cal. Rptr. 104* , and *Ins. Code § 2071*, requiring appraisers to act only within limits of their authority. *Kacha v. Allstate Ins. Co. (2006) 140 Cal. App. 4th 1023, 1034-1035*

Insured did not waive his challenge of appraisal award by accepting and retaining insurer's checks in payment of arbitration award, because he did not cash checks, applied to appraisal panel for reconsideration within statutory limitations period, and petitioned superior court for order vacating arbitration award within limitations period. *Kacha v. Allstate Ins. Co. (2006) 140 Cal. App. 4th 1023, 1037*

Clause in earthquake and flood insurance policy that provided that parties would select appraisers if parties failed to agree as to "amount of loss" and that appraisers would then appraise "the loss" did not provide for appraisal of replacement cost for purpose of determining amount of deductible based on replacement cost. *Unetco Indus. Exch. v. Homestead Ins. Co. (1997) 57 Cal. App. 4th 1459, 1467-1469, 67 Cal. Rptr. 2d 784*

Order compelling arbitration and setting scope of appraisal as not appealable; agreement providing for appraisal as included within concept of agreements to arbitrate, and as governed by *Code Civ. Proc. §§ 1280-1294.2*; order denying cross petition regarding scope of appraisal as not within *Code Civ. Proc. § 1294(a)*, which provides that aggrieved party

may appeal from order dismissing or denying petition to compel arbitration. *State Farm Fire & Cas. Co. v. Hardin (1989) 211 Cal. App. 3d 501, 506-507, 259 Cal. Rptr. 433*

Appraisers acted in excess of their authority when they valued something other than lost items as described by insured; if insurer believes insured lost something other than items described in claim, insurer is entitled to litigate that issue, but appraisers are required to value item(s) described in claim. *Safeco Ins. Co. v. Sharma (1984) 160 Cal. App. 3d 1060, 1063-1065, 207 Cal. Rptr. 104* ; *see Kacha v. Allstate Ins. Co. (2006) 140 Cal. App. 4th 1023, 1032-1033*

Arbitration award in insurance appraisal proceeding as required to be vacated when fact that "neutral" appraiser had done business with appraiser selected by insurance company while proceeding was pending was not disclosed to insured. *Figi v. New Hampshire Ins. Co. (1980) 108 Cal. App. 3d 772, 775-778, 166 Cal. Rptr. 774*

Insurer's submission to suit under service of suit provision as not barring insurer from reliance on *Ins. Code § 2071* standard Appraisal Clause because there is no connection between the two clauses. *Appalachian Ins. Co. v. Rivcom Corp. (1982) 130 Cal. App. 3d 818, 827-828, 182 Cal. Rptr. 11*

Waiver of right to arbitration as not established by insurer's partial payment of claim filed when amount of loss was not fixed. *Appalachian Ins. Co. v. Rivcom Corp. (1982) 130 Cal. App. 3d 818, 826, 182 Cal. Rptr. 11*

Waiver of appraisement. *Case v. Insurance Co. (1889) 82 Cal. 263, 268, 22 P. 1083*

Function of appraisers as being to determine amount of damage resulting to various items submitted for their consideration; resolution of questions of coverage and interpretation of policy provisions as not within their function. *Hughes v. Potomac Ins. Co. (1962) 199 Cal. App. 2d 239, 253, 18 Cal. Rptr. 650*

Although arbitrators are frequently, by terms of agreement providing for arbitration, given broad powers, appraisers as generally having more limited powers; function of appraisers as being to determine amount of damage resulting to various items submitted for their consideration. *Jefferson Ins. Co. v. Superior Court (1970) 3 Cal. 3d 398, 403, 90 Cal. Rptr. 608, 475 P.2d 880* ; *Kacha v. Allstate Ins. Co. (2006) 140 Cal. App. 4th 1023, 1032*

Where appraisers misinterpret meaning of "actual cash value" as used in fire insurance policy and therefore fail to decide factual issue submitted to them, insured as properly invoking jurisdiction of superior court to vacate award and order rehearing. *Jefferson Ins. Co. v. Superior Court (1970) 3 Cal. 3d 398, 403, 90 Cal. Rptr. 608, 475 P.2d 880*

Where appraisal award is based on misconception of law, this fact as permitted to be proved to court by extrinsic evidence, including declaration of one of appraisers; declaration of appraiser as properly received to show what appraisers considered issue to be, for purpose of determining whether they exceeded their powers by making error of law. *Jefferson Ins. Co. v. Superior Court (1970) 3 Cal. 3d 398, 403, 90 Cal. Rptr. 608, 475 P.2d 880*

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Witkin, Summary of California Law, Vol. 2, *Torts*, §§ 208, 209, 211, 213-215 (10th ed. 2005)

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Ability of insurer to defend physician regarding act requiring professional medical certificate. *Ins. Code § 533.7*

Form and content of answers. *Code Civ. Proc. § 431.30*

Grounds for objection to complaint. *Code Civ. Proc. § 430.10*

Insurer's nonliability for defense or coverage of fine, penalty, or restitution in certain actions brought by prosecutor. *Ins. Code § 533.5*

Insurer's nonliability for loss caused by insured's willful act. *Ins. Code § 533*

Liability of insurer for loss resulting from rescue from peril insured against. *Ins. Code § 531*

Motions to strike complaint. *Code Civ. Proc. §§ 435-437*

Summary adjudication. *Code Civ. Proc. § 437c*

Summary judgment. *Code Civ. Proc. § 437c*

Verification of answer. *Code Civ. Proc. §§ 446, 2015.5*

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§ 308.331 Decisions

[1] Burden of Proof

Burden of proving affirmative defenses on defendant. *Mayfield v. Fidelity & Cas. Co. (1936) 16 Cal. App. 2d 611, 616, 61 P.2d 83*

[2] Collusion

Collusion between injured party and insured in procuring judgment for amount invoking excess liability policy was breach of both cooperation clause and covenant of good faith and fair dealing. *Andrade v. Jennings (1997) 54 Cal. App. 4th 307, 327-328, 62 Cal. Rptr. 2d 787*

[3] Fraud

Generally, if policy precludes recovery as result of fraud on part of "the" insured, recovery is precluded only as to particular insured who committed fraud, while innocent coinsured is allowed to recover; by contrast, if policy precludes recovery as result of fraud on the part of "any" insured, effect of fraudulent acts of one insured preclude recovery as to all insureds, which precludes innocent coinsured from recovery. *Watts v. Farmers Ins. Exch. (2002) 98 Cal. App. 4th 1246, 1258, 120 Cal. Rptr. 2d 694* (case remanded for determination of whether coinsured in question was innocent spouse entitled to recover based on his one-half interest in damaged property)

[4] Impostor Defense

After contestability period expired, insurance company could not assert as defense to life insurance claim that impostor took mandatory medical examination, when named insured had personally applied for insurance; court left open

question of whether "impostor defense" may be asserted if impostor both applies for insurance and takes medical examination using someone else's name. *Amex Life Assurance Co. v. Superior Court (1997) 14 Cal. 4th 1231, 1243-1245, 930 P.2d 1264*

[5] Limitation Period

Insurer may be estopped from raising one-year suit provision as defense if it did not comply with regulations (*10 Cal. Code Reg. § 2695.4(a)*) requiring every insurer to disclose to first-party claimant all time limits that might apply to claim presented by claimant. *Spray, Gould & Bowers v. Associated Int'l Ins. Co. (1999) 71 Cal. App. 4th 1260, 1267-1269, 84 Cal. Rptr. 2d 552* ; *see also Neufeld v. Balboa Ins. Co. (2000) 84 Cal. App. 4th 759, 761, 101 Cal. Rptr. 2d 151* (*Spray, Gould & Bowers* applied retroactively because does not create new law)

Policy provision requiring filing of suit within one year after inception of loss enforceable, and specifically authorized by *Ins. Code § 2071*. *State Farm Fire & Cas. Co. v. Superior Court (1989) 210 Cal. App. 3d 604, 608-609, 258 Cal. Rptr. 413* ; *see also Abari v. State Farm Fire & Cas. Co. (1988) 205 Cal. App. 3d 530, 535, 252 Cal. Rptr. 565*)

Limitations provisions in policy, requiring filing of claim within 60 days of proof of loss and filing of complaint within three years after written proof of loss is required, bars action against insurer regarding recovery of benefits under health-insurance policy. *NN Investors Life Ins. Co. v. Superior Court (1989) 208 Cal. App. 3d 1070, 1073-1074*

Cause of action under limitation period discovery rule as accruing when plaintiff discovers or should have discovered all facts essential to cause of action. *Abari v. State Farm Fire & Cas. Co. (1988) 205 Cal. App. 3d 530, 535, 252 Cal. Rptr. 565*

Insurer as not estopped from asserting limitation period by reason of its failure to informinsured that although earth subsidence was excluded risk, third-party negligence was covered risk, because insurer is under no obligation to explain to insured all possible legal theories of recovery. *Lawrence v. Western Mut. Ins. Co. (1988) 204 Cal. App. 3d 565, 572-574, 251 Cal. Rptr. 319*

[6] Pleading

General demurrer to complaint by insured against insurer for actual and punitive damages for malicious nonpayment of fire insurance as properly sustained without leave to amend where complaint shows on its face that plaintiff was adjudicated a bankrupt after his cause of action accrued and that plaintiff's rights which he seeks to assert have passed to his trustee in bankruptcy under § 70 of the Federal Bankruptcy Act former *11 U.S.C.S. § 110*; *see* present *11 U.S.C.S. § 541(a)(1)* and Revision Notes thereto. *Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 829-830, 69 Cal. Rptr. 321, 442 P.2d 377*

[7] Proof of Loss

Insured's failure to produce adequate proof of loss as specified in policy defeats claim for recovery of benefits; in portfolio policy covering contents of warehouse, "mysterious disappearance" exclusion applied to missing property absent physical evidence to show what happened to it, and insured's failure to provide any physical evidence that property was stolen precluded claim for replacement value of property. *Blasiar, Inc. v. Fireman's Fund Ins. Co. (1999) 76 Cal. App. 4th 748, 757, 90 Cal. Rptr. 2d 374*

[8] Rescission

Under *Ins. Code § 650*, whenever right to rescind policy is authorized by that portion of Insurance Code, including for concealment or misrepresentations in application, right to rescind applies to all insureds, permitting attribution of culpable conduct unless policy provides otherwise. *TIG Ins. Co. of Mich. v. Homestore, Inc. (2006) 137 Cal. App. 4th 749, 758, 40 Cal. Rptr. 3d 528*

Because copy of corporation's latest "form 10-Q" (quarterly SEC financial report) was required to be filed with insurance application, after former CFO pleaded guilty to filing false form 10-Q, insurer properly obtained rescission of D&O policy against corporation and its officers and directors, based on falsified form. *TIG Ins. Co. of Mich. v. Homestore, Inc. (2006) 137 Cal. App. 4th 749, 755-756, 40 Cal. Rptr. 3d 528* (policy language allowed rescission regarding insureds in addition to officer who concealed material facts)

Under liability policy covering insured's fruit stand, which was located on property leased from State, endorsement naming State as additional insured, based on State's representation to insured that it was required pursuant to lease, as subject to rescission when insurer later discovered that lease contained no such requirement. *Merced County Mut. Fire Ins. Co. v. State of California (1991) 233 Cal. App. 3d 765, 775, 284 Cal. Rptr. 680*

[9] Waiver and Estoppel

Insurer as bound by judgment against its insured because it had opportunity to defend where, even though it received notice one day before default hearing, it had six months to apply for relief pursuant to *Code Civ. Proc. § 473*. *Clemmer v. Hartford Ins. Co. (1978) 22 Cal. 3d 865, 884-885, 151 Cal. Rptr. 285, 587 P.2d 1098*

Issuance of policy by insurer on known facts as waiving all conditions inconsistent therewith. *Allen v. Home Ins. Co. (1901) 133 Cal. 29, 33, 65 P. 138*

Insurers by their acts and conduct as being estopped from availing themselves of defense which they interpose to actions on their policies or as waiving their right to avail themselves of such defense. *West Coast Lumber Co. v. State Inv. & Ins. Co. (1893) 98 Cal. 502, 508, 33 P. 258*

Insurer that simply denies coverage, without expressly reserving right to assert defenses based on policy provisions that could limit amount of benefits available under policy if coverage ultimately is found to exist, does not waive right to assert those defenses in the event coverage is found; unreasonable to require insurer that is denying coverage to assert at outset an inconsistent theory that coverage is limited under policy terms. *Alta Cal. Reg'l Ctr. v. Fremont Indem. Co. (1994) 25 Cal. App. 4th 455, 459, 30 Cal. Rptr. 2d 841* (involving carrier's attempt to assert applicability of "other insurance" clause to limit benefits); *see Zumbrun v. United Servs. Auto. Ass'n (E.D. Cal. 1989) 719 F. Supp. 890, 897*

Defense under primary policy, accompanied by a reservation of rights, did not constitute an estoppel against denial of coverage under an excess policy written by same insurer. *State Farm Fire & Cas. Co. v. Jioras (1994) 24 Cal. App. 4th 1619, 1626-1627, 29 Cal. Rptr. 2d 840*

If action is brought against insured, and insurer, with knowledge of a ground of noncoverage under policy, assumes and conducts defense without disclaiming liability and giving notice of its rights, insurer waives right to assert noncoverage. *Phoenix Ins. Co. v. United States Fire Ins Co. (1987) 189 Cal. App. 3d 1511, 1527, n.15, 235 Cal. Rptr. 185* ; *Miller v. Elite Ins. Co. (1980) 100 Cal. App. 3d 739, 755, 161 Cal. Rptr. 322*

Requirements contained in policy of insurance as subject to waiver by parties; what constitutes waiver. *Chase v. National Indem. Co. (1954) 129 Cal. App. 2d 853, 858, 278 P.2d 68*

Actual knowledge of breach of policy provision as not essential to establish waiver of provision; possession by insurer of information which if pursued with reasonable diligence would lead to discovery of breach as sufficient. *Dalzell v. Northwestern Mut. Ins. Co. (1963) 218 Cal. App. 2d 96, 102, 32 Cal. Rptr. 125*

Insurance company as able to waive provisions placed in policy for its own benefit and by its conduct may be estopped to assert defenses which might otherwise be available. *Dalzell v. Northwestern Mut. Ins. Co. (1963) 218 Cal. App. 2d 96, 101, 32 Cal. Rptr. 125* (adding, "This rule applies to a provision requiring that suit papers be forwarded to the insurer")

General agent as having authority to waive conditions in insurance policy by mere parol, even though policy itself requires waivers to be in writing. *Chase v. National Indem. Co. (1954) 129 Cal. App. 2d 853, 859, 278 P.2d 68*

Printed stipulation that any waiver must be made in writing and attached to policy as not preventing conduct of officers of insurer from constituting waiver or estoppel of insurer, based on its presumed knowledge, when its proper officer had knowledge, where such conduct led insured to rely on policy as valid policy, although there was a breach of condition of which insurer knew; in such case, insurer as not permitted to rely on such breach against claim for subsequent loss. *Arnold v. American Ins. Co. (1906) 148 Cal. 660, 667-668, 84 P. 182*

Question of waiver of policy provision by insurer as usually a question of fact; courts of California as having ruled that there may be allowance of waiver of provisions by some agent of insurer even where policy expressly states that no change may be made in its terms unless endorsed on policy itself and unless such changes are made by designated officer of insurer, particularly where there is evidence of ratification ofagent's acts by insurer. *Phillips v. Reserve Life Ins. Co. (1954) 128 Cal. App. 2d 540, 547, 275 P.2d 554*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewInsurance LawClaims & ContractsCancellation & NonrenewalGeneral OverviewInsurance LawClaims & ContractsEstoppel & WaiverGeneral OverviewInsurance LawClaims & ContractsIncontestabilityTime Limitations

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8. Defenses

26-308 California Forms of Pleading and Practice--Annotated § 308.332

§ 308.332 Law Reviews

Antogni, *When Will My Troubles End? The Loss in Progress Defense in Progressive Loss Insurance Cases, 25 Loy. L.A. L. Rev. 419 (1992)*

Comment, *The Exclusion Clause: A Simple and Genuine Solution to the Insurance for Punitive Damages Controversy, 12 U.S.F. L. Rev. 743 (1978)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityRemediesPunitive DamagesGeneral OverviewInsurance LawClaims & ContractsFortuity Doctrine

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26-308 California Forms of Pleading and Practice--Annotated § 308.333

§ 308.333 Text References

28 Cal. Jur. 2d, *Insurance*, § 598

Legal Topics:

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

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[Reserved]

§§ 308.334[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.340

§ 308.340 California Points and Authorities

For memoranda of points and authorities regarding contracts, see California Points and Authorities, Ch. 50, *Contracts*

For memoranda of points and authorities regarding damages, see California Points and Authorities, Ch. 64, *Damages: Tort* , and Ch. 65, *Damages: Contract*

For memoranda of points and authorities regarding employment relationships, see California Points and Authorities, Ch. 100, *Employer and Employee*

For memoranda of points and authorities regarding fraud, see California Points and Authorities, Ch. 105, *Fraud and Deceit*

For memoranda of points and authorities regarding tort actions against insurance agents, employees, and brokers, see California Points and Authorities, Ch. 120, *Insurance*

For memoranda of points and authorities regarding negligence, see California Points and Authorities, Ch. 165, *Negligence*

For memoranda of points and authorities regarding principal and agent, see California Points and Authorities, Ch. 182, *Principal and Agent*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawGeneral OverviewLabor & Employment LawEmployment RelationshipsGeneral OverviewTortsDamagesGeneral OverviewTortsMalpractice & Professional LiabilityProfessional ServicesTortsNegligenceGeneral Overview

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26-308 California Forms of Pleading and Practice--Annotated § 308.341

§ 308.341 State Constitution

Legal rate of interest as 10 percent pursuant to legislature's enactment of *Code Civ. Proc. § 685.010(a). Cal. Const. art. XV, § 1*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawNational BanksInterest & UsuryInterest

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26-308 California Forms of Pleading and Practice--Annotated § 308.342

§ 308.342 State Statutes

[1] Damages

Interest on damages. *Civ. Code §§ 3287-3291*

Punitive damages. *Civ. Code § 3294*

Contract damages. *Civ. Code §§ 3300, 3302*

Tort damages. *Civ. Code § 3333*

[2] Definitions

Insurance agent. *Ins. Code §§ 31, 1621*

Life licensee. *Ins. Code §§ 32, 1622, 1626*

Insurance broker. *Ins. Code §§ 33, 1623*

Fire and casualty broker-agent. *Ins. Code § 33.5*

Insurance solicitor. *Ins. Code §§ 34, 1624*

Fire and casualty licensee. *Ins. Code § 1625*

License. *Ins. Code § 1627*

License year. *Ins. Code § 1629*

License term. *Ins. Code § 1630*

[3] Employment duties

Duty of employee to account to employer for transactions. *Lab. Code § 2861*

[4] Licensing

Authority of insurance agents, life agents, and fire and casualty broker-agents to transact 24-hour coverage. *Ins. Code §§ 31, 32, 1625, 1749.02*

Licensing of fire and casualty broker-agents and life agents. *Ins. Code § 1631 et seq.*

Person authorized to act as insurance solicitor not eligible to act as insurance agent or broker at same time, and vice versa. *Ins. Code § 1640*

Authorization of fire and casualty broker-agent, or life licensee, to transact disability insurance also. *Ins. Code § 1673*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawIndustry RegulationInsurance Company OperationsRepresentativesAgentsGeneral AgentsInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesAgentsLicensesInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesAgentsSpecial AgentsInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesBrokers

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26-308 California Forms of Pleading and Practice--Annotated § 308.343

§ 308.343 Decisions

[1] Broker's Duty

[a] General Scope of Duty

Because jewelry store owner asked her insurance agent to obtain commercial coverage including theft, and insurer that provided policy at insurance agent's request did not include theft due to store's failure to meet structural requirements for theft coverage, insured's agent, who failed to notify insured of lower coverage and failed to provide her with policy until after theft loss, was responsible in negligence to insured; in cause of action by insured against surplus lines broker through whom coverage was placed, and surplus lines broker's owner, for breach of contract, bad faith, and other torts, summary judgment against insured was proper because policy did not provide coverage for theft loss, insured's agent's misrepresentations could not be imputed to surplus lines broker, and insured's agent was not agent for either defendant. *Rios v. Scottsdale Ins. Co. (2004) 119 Cal. App. 4th 1020, 1025-1027, 15 Cal. Rptr. 3d 18*

Insurance broker owes no duty of care to named insured to provide named insured with notice of insurer's intent to cancel policy for nonpayment of premiums for commercial general liability policy; instead, *Ins. Code § 677.2* imposes duty on insurer to notify named insureds of its intent to cancel policy, negating need for court to impose that duty on broker. *Kotlar v. Hartford Fire Ins. (2000) 83 Cal. App. 4th 1116, 1123, 100 Cal. Rptr. 2d 246*

[b] Duty to Account to Insurer for Premiums Collected

Loan company as not mere agent of insurance company, and as liable for breach of fiduciary duty when insurance is of mutual benefit to loan company and plaintiff, and when loan company fails to notify insurer of disability claim as required by *Ins. Code § 779.19*. *Wilson v. Household Fin. Corp. (1982) 131 Cal. App. 3d 649, 653-655, 182 Cal. Rptr. 590*

Fiduciary duty to insurer with respect to premiums received as imposed on any person receiving premium payments

while acting as insurance agent, whether licensed or not, and as giving rise to civil action by insurer in event of breach by failure to transmit premiums. *Middlesex Ins. Co. v. Mann (1981) 124 Cal. App. 3d 558, 570-571, 177 Cal. Rptr. 495*

Insurance broker as becoming actual agent of insurer to deliver policy and collect premium and as owing fiduciary duty to insurer to transmit premium to it when insurance policy is delivered by insurer to broker for delivery to insured and insured delivers to broker premium to be delivered to insurer. *Maloney v. Rhode Island Ins. Co. (1953) 115 Cal. App. 2d 238, 244-247, 251 P.2d 1027*

[c] Duty to Recommend Additional Coverage

Broker did not breach his fiduciary duty to insured by failing to advise them of availability of personal umbrella policy that would have provided additional underinsured motor vehicle coverage at no additional charge, when insured did not inquire into availability of excess coverage and insurer did not hold out broker as having special expertise in area of personal insurance. *Fitzpatrick v. Hayes (1997) 57 Cal. App. 4th 916, 927-930, 67 Cal. Rptr. 2d 445*

[2] Contracts

In action by agent against insurer arising from agent's termination, in which good cause for termination was required by agency agreement, jury finding that no good cause existed supported by evidence that insurer terminated agent because agent had filed lawsuit against insurer. *Wallis v. Farmers Group, Inc. (1990) 220 Cal. App. 3d 718, 733-734, 269 Cal. Rptr. 299 , overruled in part by Dore v. Arnold Worldwide, Inc. (2006) 39 Cal. 4th 384, 46 Cal. Rptr. 3d 688, 139 P.3d 56*

In action by insurance agency corporation against insurance company regarding commissions dispute, asserting breach of covenant of good faith and fair dealing and breach of contract, special relationship such as that between insured and insurer does not exist, and bad faith remedy in tort not available because only usual commercial contract remedies apply. *Multiplex Ins. Agency, Inc. v. California Life Ins. Co. (1987) 189 Cal. App. 3d 925, 937-938, 235 Cal. Rptr. 12*

Ambiguous termination provisions in insurance agency contract, stating that agent will return policy-holder files and not compete with insurer's agents for one year on payment by insurer of contract value, entitlted agent to escape obligation to return files by refusing tender of contract-value payment, based on parol evidence of representation by insurer that agent would be self-employed independent contractor. *Heston v. Farmers Ins. Group (1984) 160 Cal. App. 3d 402, 412, 206 Cal. Rptr. 585*

Promise of adequate compensation by insurance company to person who secured placement of health and accident insurance with it prior to time person undertook to act for company was binding. *Shore v. Commercial Bankers Life Ins. Co. (1972) 24 Cal. App. 3d 226, 229-231, 100 Cal. Rptr. 802*

[3] Fraud of Agent

In suit by insured against insurer and its agent, alleging sale of whole life insurance policy by falsely promising that earnings from policy would be sufficient to pay premium costs after 11 years ("vanishing premium" policy), delayed discovery rule may apply when insured did not discover facts constituting fraud until 12th year, i.e., when insurer required him to continue paying out-of-pocket premiums because dividends had declined; when plaintiff reasonably should have discovered facts for purposes of accrual of cause of action or application of delayed discovery rule is generally question of fact; question of fact remained regarding effectiveness of disclaimer "buried" in policy. *Broberg v. The Guardian Life Ins. Co. of America (2009) 171 Cal. App. 4th 912, 917-923, 90 Cal. Rptr. 3d 225*

In prosecution for capping under *Ins. Code § 750*, defendant's claim that he believed that referring insureds to lawyers and doctors was legal is immaterial; ignorance of a law is not a defense to a charge of its violation. *People v. Meneses (2008) 165 Cal. App. 4th 1648, 1663-1664, 82 Cal. Rptr. 3d 100*

Attorney retained by insurer to provide coverage advice in lawsuit against its insureds may be liable to plaintiff in that lawsuit for making fraudulent statement about coverage; third parties adequately pled cause of action for fraud against insurer's coverage counsel, who advised insurer to provide coverage for willful acts so that insurer would not have to pay for *Cumis* counsel, then represented to third parties that willful acts were not covered so that insurer would not have to pay total amount due on judgment for third parties against insureds; counsel retained by insurer has duty to describe insurance coverage truthfully to third-party beneficiary. *Shafer v. Berger (2003) 107 Cal. App. 4th 54, 80-81, 131 Cal. Rptr. 2d 777*

Action by insured employer against insurer and its agent for fraud in inducement when agent, to induce insured to terminate existing workers' compensation insurance and take out insurance with defendant insurer, represented that stated percentage of premiums would be returned, and insured, unaware that such rebates were illegal [*see Ins. Code §§ 750-752* (repealed by Prop. 103, approved by voters in Nov. 1988)] was induced to terminate existing insurance and take out insurance with defendant insurer. *R.D. Reeder Lathing Co. v. Cypress Ins. Co. (1970) 3 Cal. App. 3d 995, 999-1000, 84 Cal. Rptr. 98*

Plaintiffs could not recover for fraud based on agent's misrepresentations about coverage provided by health insurance policy when plaintiffs did not read policy and a reading would clearly have disclosed policy's limitations on available benefits. *Hadland v. NN Investors Life Ins. Co. (1994) 24 Cal. App. 4th 1578, 1587-1589, 30 Cal. Rptr. 2d 88*

Showing required by plaintiff to establish cause of action for damages based on fraud and deceit. *Andrew v. Bankers & Shippers Ins. Co. (1929) 101 Cal. App. 566, 575, 281 P. 1091*

Insurance agent and insurance company both liable to injured third party for agent's false representations contained in insurance policy rider where agent acted for company. *Andrew v. Bankers & Shippers Ins. Co. (1929) 101 Cal. App.566, 579, 281 P. 1091*

[4] Fraud of Broker

Insurer can sue broker for fraud based on forged insurance application; insurance broker is not exempt from consequences of own fraud; rescission is not insurer's exclusive remedy against insured. *Century Sur. Co. v. Crosby Ins., Inc. (2004) 124 Cal. App. 4th 116, 122-127, 21 Cal. Rptr. 3d 115*

[5] Independent Claims Adjuster

Independent insurance adjuster was not liable to insured on breach-of-fiduciary-duty theory, in connection with insurer's ultimate denial of claim, when adjuster is hired by insurance company to adjust disputed claim with insured; adjuster owes no fiduciary duty to insured absent facts evidencing relationship of trust, confidence, integrity, and fidelity. *Thompson v. Cannon (1990) 224 Cal. App. 3d 1413, 1418, 274 Cal. Rptr. 608*

Independent claims adjuster of self-employed insurer imbued with same immunity from civil suit as principal, so long as adjuster discloses agency role and commits no intentional tort while investigating claim in question. *Mottola v. R. L. Kautz & Co.(1988) 199 Cal. App. 3d 98, 109, 244 Cal. Rptr. 737*

Independent claims adjuster was simply alter ego of self-insured employer. *Mottola v. R. L. Kautz & Co. (1988) 199*

Cal. App. 3d 98, 108, 244 Cal. Rptr. 737

[6] Limitation of Actions

Action for breach of oral agreement to obtain reinsurance contracts by insurer against its broker as barred by two-year statute of limitations [*Code Civ. Proc. § 339(1)*]. *Citizens Cas. Co. v. Otis Clark & Co. (1971) 19 Cal. App. 3d 294, 298-301, 96 Cal. Rptr. 838*

[7] Malpractice of Agent

Agent, who forged client's name on agreement to reduce limits of uninsured motorist coverage, as subject to liability for professional malpractice. *Saunders v. Cariss (1990) 224 Cal. App. 3d 905, 909, 274 Cal. Rptr. 186* (reversing dismissal of poorly pleadedaction that stated causes of action in fraud and intentional infliction of emotional distress)

[8] Negligence of Agent or Broker

Although insurance agent does not generally have duty to volunteer that insured should procure additional or different insurance coverage, rule changes when either: (1) agent misrepresents nature, extent, or scope of coverage being offered or provided; (2) insured requests or inquires about particular type or extent of coverage; or (3) agent assumes additional duty by either express agreement or by holding itself out as having expertise in given field of insurance sought. *Williams v. Hilb, Rogal & Hobbs Ins. Svcs. of Cal., Inc. (2009) 177 Cal. App. 4th 624, 635-636, 98 Cal. Rptr. 3d 910*

Agent holding itself out as having expertise in insurance being sought by insured may be liable to insured for losses resulting from breach of that special duty. *Williams v. Hilb, Rogal & Hobbs Ins. Svcs. of Cal., Inc. (2009) 177 Cal. App. 4th 624, 636, 98 Cal. Rptr. 3d 910*

Agent who held herself out as having expertise in insurance needs of particular dealerships that install spray-on linings onto beds of pickup trucks breached duty she assumed when she failed to advise insured dealership of need for workers' compensation insurance and failed to include that coverage in her package for those dealerships. *Williams v. Hilb, Rogal & Hobbs Ins. Svcs. of Cal., Inc. (2009) 177 Cal. App. 4th 624, 637, 98 Cal. Rptr. 3d 910*

Insurance agent generally has no duty to volunteer that insured should obtain different or additional insurance coverage; exceptions occur only when either (1) agent misrepresents nature, extent, or scope of coverage being offered or provided, (2) insured requests or inquires about particular type or extent of coverage, or (3) agent assumes additional duty either by express agreement or by professing to have expertise in given field of insurance sought by insured. *Roberts v. Assurance Co. of America (2008) 163 Cal. App. 4th 1398, 1403-1404, 78 Cal. Rptr. 3d 361*

When insured requested only "course of construction" insurance, agent had no duty to obtain liability coverage for insured. *Roberts v. Assurance Co. of America (2008) 163 Cal. App. 4th 1398, 1403-1404, 78 Cal. Rptr. 3d 361*

In case in which musical group sued its insurer, insurance broker, and business manager based on insurer's failure to defend and broker's and manager's failure to advise it of ramifications of "FELE" policy exclusion excluding liability coverage for former group member's underlying copyright infringement suit, and failure to advise that it needed to obtain E&O coverage, trial court's finding that insurer had duty to defend did not preclude negligence actions. *Third Eye Blind, Inc. v. Near N. Entm't Ins. Servs., LLC (2005) 127 Cal. App. 4th 1311, 1323, 26 Cal. Rptr. 3d 452*

If insurance broker knows of actual misstatements in insurance application, broker may be liable to insurer for transmitting those misrepresentations in application, knowing insurer will reasonably rely on them. *Century Sur. Co.*

v. Crosby Ins., Inc. (2004) 124 Cal. App. 4th 116, 129, 21 Cal. Rptr. 3d 115

Because jewelry store owner asked her insurance agent to obtain commercial coverage including theft, and insurer that provided policy at insurance agent's request did not include theft due to store's failure to meet structural requirements for theft coverage, insured's agent, who failed to notify insured of lower coverage and failed to provide her with policy until after theft loss, was responsible in negligence to insured; in cause of action by insured against surplus lines broker through whom coverage was placed, and surplus lines broker's owner, for breach of contract, bad faith, and other torts, summary judgment against insured was proper because policy did not provide coverage for theft loss, insured's agent's misrepresentations could not be imputed to surplus lines broker, and insured's agent was not agent for either defendant. *Rios v. Scottsdale Ins. Co. (2004) 119 Cal. App. 4th 1020, 1025-1027, 15 Cal. Rptr. 3d 18*

Stipulated judgment for $6 million (containing covenant not to execute) in action between nightclub owner, who was insured under comprehensive general liability policy containing broad assault and battery exclusion, and third party assaulted while leaving nightclub, did not establish amount of damages in resulting assigned action against insurance broker based on broker's negligence in not clarifying that exclusion to insured; judgment correctly limited broker's liability to $1 million coverage that would have been available under policy, rather than $6 million under stipulated judgment; stipulated judgment containing covenant not to execute cannot create presumption of liability or damages in suit against negligent broker. *Valentine v. Membrila Ins. Servs., Inc. (2004) 118 Cal. App. 4th 462, 473-475, 13 Cal. Rptr. 3d 125*

Contractor A subcontracted work to contractor B, which in turn subcontracted certain part of that work to subcontractor C; in B's suit against C's insurance broker for negligence in failure to name B as additional insured in C's commercial general liability policy, as required in contract between B and C, C's insurance broker was not entitled to summary judgment because triable issues of fact remained concerning whether underlying claim by A against B based on faulty work sought to recover at least some damages stemming from "property damage" according to policy language; furthermore, B's settlement with C, resulting in dismissal with prejudice in favor of C, did not operate as retraxit barring B's cause of action against C's broker. *Roger H. Proulx & Co. v. Crest-Liners, Inc. (2002) 98 Cal. App. 4th 182, 189-200, 119 Cal. Rptr. 2d 442*

Agent whose misrepresentations regarding scope of insured's existing coverage caused insured to forego procuring additional insurance that would have covered claims in question may be held liable for negligent misrepresentation. *Clement v. Smith (1993) 16 Cal. App. 4th 39, 44-47, 19 Cal. Rptr. 2d 676*

Duty to use reasonable care as arising when insurance agent elects to respond to inquiries regarding adequacy of insured's homeowners policy; demurrer reversed. *Free v. Republic Ins. Co. (1992) 8 Cal. App. 4th 1726, 1729-1730, 11 Cal. Rptr. 2d 296*

Broker's violation of statutes prohibiting procurement of insurance from nonadmitted insurer as proper basis for liability to claimants as well as insured; broker's failure to obtain type of insurance requested by insured may constitute actionable negligence and proximate cause of injury. *Nowlon v. Koram Ins. Ctr., Inc. (1991) 1 Cal. App. 4th 1437, 1446-1447, 2 Cal. Rptr. 2d 683*

Insurance broker with twenty years experience who procures replacement primary policy containing lower liability limits than original primary policy which results in $200,000 gap in coverage between liability limits of primary insurance policy and excess insurance policy and who fails to notify insured of potential gap in coverage as 75 percent negligent. *Reserve Ins. Co. v. Pisciotta (1982) 30 Cal. 3d 800, 816-817, 180 Cal. Rptr. 628, 640 P.2d 764*

Insurance agent as not having duty to inform insured of advantages of additional coverage, or to elicit additional facts from insured applicable to that coverage, absent express agreement or holding out that establishes special duty; general duty of reasonable care that insurance agent owes client as not including obligation to procure policy affording client

complete liability protection. *Jones v. Grewe (1987) 189 Cal. App. 3d 950, 954, 956, 234 Cal. Rptr. 717*

Long relationship between agency and client, client's previous questions about coverage of existing policy, and client's request for additional insurance for recently purchased vehicles as creating duty in agent to warn client not to drive such vehicles before purchasing additional insurance even though agent did not expressly promise to procure additional insurance; nonfeasance in failing to provide any information as not distinguished from misfeasance in providing misinformation for purposes of imposing liability. *Westrick v. State FarmInsurance (1982) 137 Cal. App. 3d 685, 691-692, 187 Cal. Rptr. 214*

Insurance company and not applicant as charged with agent's error, if any, in selecting and completing application blank for insurance. *Home Indem. Co. v. Mission Ins. Co. (1967) 251 Cal. App. 2d 942, 951, 60 Cal. Rptr. 544*

[9] Negligence of Principal

Insurer as not liable to insured on special duty theory, independent of insurance contract, for failure to recommend increase in liability insurance coverage, in action for negligence based on agent's advice regarding inadequate coverage. *Shultz Steel Co. v. Hartford Accident & Indem. Co. (1986) 187 Cal. App. 3d 513, 524, 231 Cal. Rptr. 715*

[10] Nonrecovery From Agent Where Principal Held Liable

Recovery against agent for failure to secure requested insurance as prohibited where his principal is properly held liable on loss. *Home Indem. Co. v. Mission Ins. Co. (1967) 251 Cal. App. 2d 942, 967, 60 Cal. Rptr. 544*

[11] Prejudgment Interest

Propriety of award of prejudgment interest in action based on negligence and fraud of insurance brokerage in failing to obtain business interruption insurance policy covering mechanical breakdown of automobile shredder. *Greenfield v. Insurance Inc. (1971) 19 Cal. App. 3d 803, 810-814, 97 Cal. Rptr. 164*

[12] Principals and Agents

Rules of principal and agent as applicable between insurer and insurance agent. *Goldstone v. Columbia Life & Trust Co. (1917) 33 Cal. App. 119, 122, 164 P. 416* ; see *Shultz Steel Co. v. Hartford Accident & Indem. Co. (1986) 187 Cal. App. 3d 513, 518, 231 Cal. Rptr. 715*

Insurance broker as agent of insured and not of insurer. *Arthur v. London Guarantee & Accident Co. (1947) 78 Cal. App. 2d 198, 202, 177 P.2d 625*

[13] Relationship of Parties

Actual relationship between insurer, insured, and broker as determined by what parties do and say, not by name they are called. *Maloney v. Rhode Island Ins. Co. (1953) 115 Cal. App. 2d 238, 245, 251 P.2d 1027*

Employer whose employees are covered under group insurance policy as agent of insurer and not of its employees in undertaking functions necessary to administer insurance provided by policy. *Elfstrom v. New York Life Ins. Co. (1967) 67 Cal. 2d 503 , disapproving, Eason v. Aetna Life Ins. Co. (1963) 28 Cal. Rptr. 291*)

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsTypesInsurance Agent & Insurance CompanyInsurance LawClaims & ContractsFiduciary ResponsibilitiesInsurance LawClaims & ContractsGood Faith & Fair DealingAgents & BrokersTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsMalpractice & Professional LiabilityProfessional Services

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26-308 California Forms of Pleading and Practice--Annotated § 308.344

§ 308.344 Law Reviews

Hallett, *Life Insurance Agent Fraud in California: Rebating and Related Misconduct*, *17 Loy. L.A. L. Rev. 809 (1984)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsGood Faith & Fair DealingAgents & BrokersInsurance LawLife InsuranceGeneral Overview

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§ 308.345 Text References

27 Cal. Jur. 2d, *Insurance, §§ 114-145*

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26-308 California Forms of Pleading and Practice--Annotated §§ 308.346-308.349

[Reserved]

§§ 308.346[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.350

§ 308.350 State Constitution

Legal rate of interest. *Cal. Const. art XV, § 1*; *Code Civ. Proc. § 685.010(a)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawNational BanksInterest & UsuryInterest

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26-308 California Forms of Pleading and Practice--Annotated § 308.351

§ 308.351 Decisions

President's power to act in foreign affairs preempts California Holocaust Victim Insurance Relief Act of 1999 (*Ins. Code §§ 13800-13807*). *American Ins. Ass'n v. Garamendi (2003) 539 U.S. 396, 420-428, 123 S. Ct. 2374, 156 L. Ed. 2d 376*

In declaratory relief action by insurer to determine duty to defend, arising from damaged aircraft that was insured under CGL, intervenor (company that owned aircraft) permitted to defend on its own, despite default against insured that was entered because insured failed to appear for his deposition. *Westchester Fire Ins. Co. v. Mendez (9th Cir. 2009) 585 F.3d 1183, 1189*

Notice-prejudice rule, requiring insurer to establish actual and substantial prejudice to avoid liability based on insured's breach of notice clause, held applicable to contracts of reinsurance. *Insurance Co. of Pa. v. Associated Int'l (9th Cir. 1990) 922 F.2d 516, 524*

Primary insurer held wholly responsible for obligation to defend in underlying third-party action when both primary and excess policies provided that excess insurer's duty to defend would begin only when primary insurer made "payment" of its liability limit to excess insurer, and it had not done so; primary insurer as required to pay for total defense costs despite fact that large proportion of eventual settlement or judgment would be covered by excess policy. *Hartford Accident & Indem. Co. v. Continental Nat'l Am. Ins. (9th Cir. 1988) 861 F.2d 1184, 1186-1187*

In declaratory relief action by excess insurer against primary insurers, primary insurers not liable for defense or indemnity of insured when primary policy exclusion regarding advertising activities was basis for denial of coverage. *Aetna Cas. & Sur. Co. v. Centennial Ins. Co. (9th Cir. 1988) 838 F.2d 346, 351-352*

When two or more applicable policies contain excess insurance clauses, liability is prorated according to amount of coverage afforded. *James B. Lansing Sound, Inc. v. Nat'l Union Fire Ins. Co. (9th Cir. 1986) 801 F.2d 1560, 1567*

In action by insurer to rescind employment liability insurance policy, insured's untruthful negative answer to application questions concerning any previous discrimination, harassment, or wrongful discharge claims were material misrepresentations, supporting motion for summary adjudication for insurer; insurer did not unreasonably delay action for rescission, precluding defense of laches. *Admiral Ins. Co. v. Debber (E.D. Cal. 2006) 442 F. Supp. 2d 958, 967-969, 972*

Excess insurer has no duty to defend if primary insurer refused tender of defense; so long as primary insurer had duty to defend and provide coverage for insured's legal expenses in defending underlying lawsuit, then excess policy did not step down and provide coverage, even if claim involved type of damage covered by umbrella policy. *Republic W. Ins. Co. v. Fireman's Fund Ins. Co. (N.D. Cal. 2003) 241 F.Supp. 2d 1090, 1096-1099* ; *see Ticor Title Ins. Co. v. Employers Ins. of Wausau (1995) 40 Cal. App. 4th 1699, 1707, 48 Cal. Rptr. 2d 368*

If primary coverage is not exhausted, then excess insurer's duty not triggered, even if insured withdrew claim with primary insurer, and regardless of whether primary insurer refused to defend. *Republic W. Ins. Co. v. Fireman's Fund Ins. Co. (N.D.Cal.2003) 241 F. Supp. 2d 1090, 1099*

In case arising out of remedial action order requiring environmental cleanup and remediation, primary coverage cannot be exhausted until approval of remediation plan that clearly establishes that cost of remediation will exceed primary limits; primary insurer can then tender its policy limits and extinguish its duty to defend, thereby triggering excess carrier's defense obligation. *County of Santa Clara v. United States Fid. & Guar. Co. (N.D. Cal. 1994) 868 F. Supp. 274, 280*

Insurer under standard CGL policy, having properly reserved its rights, may advance sums to defend its insured against third-party lawsuit, and may thereafter recoup those costs from insured if it is determined, as matter of law, that no duty to defend ever arose because third-party suit never suggested possibility of covered claim. *Scottsdale Ins. Co. v. MV Transp. (2005) 36 Cal. 4th 643, 662, 31 Cal. Rptr. 3d 147, 115 P.3d 460*

If applicant for life insurance misrepresents his or her history as smoker to obtain nonsmoker rate, insurer may rescind policy. *O'Riordan v. Federal Kemper Life Assurance (2005) 36 Cal. 4th 281, 287, 30 Cal. Rptr. 3d 507, 114 P.3d 753* (triable issues of material fact existed with respect to whether insured concealed or failed to communicate material information to insurer regarding use of cigarettes in 36 months preceding application, precluding summary judgment for insurer)

In single action brought by insured against both primary and excess insurers, primary and excess insurance carriers do not necessarily have "substantially adverse interests" for purposes of entitling an after-named excess insurance carrier to exercise a separate challenge pursuant to *Code Civ. Proc. § 170.6* (permitting exercise of one challenge against assigned trial judge by each "side" in litigation), after previous exercise of that challenge by primary insurance carrier. *Home Ins. Co. v. Superior Court (2005) 34 Cal. 4th 1025, 1037, 22 Cal. Rptr. 3d 885, 103 P.3d 283* (no challenge allowed after trial court found interests of coparties were not substantially adverse)

In context of claim alleging continuous and/or progressively deteriorating bodily injury and/or property damage resulting from discharge of hazardous substances over 28-year period, insurer who issued standard comprehensive general liability insurance policy covering part of period had duty to defend entire claim, because part of claim was potentially covered; however, insurer could seek reimbursement from insured for defense costs that could be allocated solely to that part of claim that was not even potentially covered by policy. *Aerojet-Gen. Corp. v. Transport Indem. Co. (1997) 17 Cal. 4th 38, 69-71, 70 Cal. Rptr. 2d 118, 948 P.2d 909*

In context of claim alleging continuous injury resulting from discharge of hazardous substances over 28-year period, insurer could not seek equitable contribution for defense costs from insured based on insured's decision to avail itself of "fronting" policies that did not cover insured's defense costs for eight of those years; equitable contribution applies only

between insurers and cannot be required of uninsured or self-insured party. *Aerojet-Gen. Corp. v. Transport Indem. Co. (1997) 17 Cal. 4th 38, 71-72, 70 Cal. Rptr. 2d 118, 948 P.2d 909* ; *see also County of San Bernardino v. Pacific Indem. Co. (1997) 56 Cal. App. 4th 666, 690-691, 65 Cal. Rptr. 2d 657*

Under standard general commercial liability policy, insurer has obligation imposed by law to defend against entire action if at least one claim is potentially covered. *Buss v. Superior Court (1997) 16 Cal. 4th 35, 47-49, 65 Cal. Rptr. 2d 366, 939 P.2d 766*

Insurer may seek reimbursement from insured for costs of defending claims not even potentially covered by standard general commercial liability policy; insurer may recover only those costs that can be allocated solely to those claims that are not even potentially covered; insurer has burden of proof by preponderance of evidence. *Buss v. Superior Court (1997) 16 Cal. 4th 35, 49-52, 65 Cal. Rptr. 2d 366, 939 P.2d 766*

Insurer's right of reimbursement is implied in law as quasi-contractual, whether or not right is implied in fact in the policy as contractual; right of restitution runs against person who benefits from "unjust enrichment" and in favor of person who suffers loss thereby. *Buss v. Superior Court (1997) 16 Cal. 4th 35, 50, 939 P.2d 766* ; *Prichard v. Liberty Mut. Ins. Co. (2000) 84 Cal. App. 4th 890, 905-906, 101 Cal. Rptr. 2d 298*

Under standard general commercial liability policy, insurer must reserve right to seek reimbursement from insured for defense costs for claims that are not even potentially covered; insurer may reserve right of reimbursement without insured's agreement. *Buss v. Superior Court (1997) 16 Cal. 4th 35, 61 n.27, 65 Cal. Rptr. 2d 366, 939 P.2d 766*

Under "continuous injury" theory adopted for third-party liability insurance cases in California, bodily injury and/or property damage that is continuous or progressively deteriorating throughout several policy periods is covered by *all* policies in effect during those periods, not merely by policy in effect at time damage is first manifested; coverage is triggered when complaining party is actually damaged, not when wrongful act causing damage was committed. *Montrose Chem. Corp. v. Admiral Ins. Co. (1995) 10 Cal. 4th 645, 669-670, 689, 42 Cal. Rptr. 2d 324, 913 P.2d 878*

Under "manifestation" theory adopted for first-party property insurance cases in California, damage that is continuous or progressive throughout several periods is covered by policy in effect at time damage is first manifested (that point in time at which appreciable damage occurs, so that reasonable insured would be on notice of potentially insured loss); insurers whose policy terms commence after initial manifestation of loss are not responsible for any potential claim relating to previously discovered and manifested loss. *Prudential-LMI Commercial Ins. v. Superior Court (1990) 51 Cal. 3d 674, 685, 699, 274 Cal. Rptr. 387, 798 P.2d 1230*

In action for declaratory relief brought by primary insurance carrier, when insured had replacement policy limiting primary coverage to $100,000 per occurrence for injuries to one person and excess insurance covering liabilities over $300,000, and primary insurer was found liable up to policy limits by trial court for injury to insured's stepson, postjudgment insolvency of primary carrier was properly considered by reviewing court; excess insurer was liable for coverage that primaryinsurer should assume but not liable for insured's liabilities within coverage gap, because maintenance clause of excess policy was breached by procurement of replacement primary policy with lower limit than original primary policy. *Reserve Ins. Co. v. Pisciotta (1982) 30 Cal. 3d 800, 813-816, 180 Cal. Rptr. 628, 640 P.2d 764*

In insurance context, right to contribution arises when several insurers are obligated to indemnify or defend same loss or claim, and one insurer has paid more than its share of loss or defended action without any participation by the others; when multiple insurers insure same insured and cover same risk, each insurer has independent standing to assert cause of action against its coinsurers for equitable contribution when it has undertaken defense or indemnification of common insured. *Scottsdale Ins. Co. v. Century Surety Co. (2010) 182 Cal. App. 4th 1023, 1031, 105 Cal. Rptr. 3d 896*

Equitable contribution permits reimbursement to insurer that paid on loss for excess it paid over its proportionate share of obligation, on theory that debt it paid was equally and concurrently owed by other insurers and should be shared by them pro rata in proportion to their respective coverage of risk; purpose of rule of equity is to accomplish substantial justice by equalizing common burden shared by coinsurers, and to prevent one insurer from profiting at expense of others. *Scottsdale Ins. Co. v. Century Surety Co. (2010) 182 Cal. App. 4th 1023, 1031, 105 Cal. Rptr. 3d 896*

In choosing appropriate method of allocating defense costs among multiple liability insurers, each insuring same insured, trial court must determine which method of allocation will most equitably distribute obligation among insurers pro rata in proportion to their respective coverage of risk, as matter of distributive justice and equity; trial court's determination of which method of allocation will produce most equitable results is necessarily matter of its equitable judicial discretion. *Scottsdale Ins. Co. v. Century Surety Co. (2010) 182 Cal. App. 4th 1023, 1032, 105 Cal. Rptr. 3d 896* (reversing determination)

In action between insurers, insurer seeking equitable contribution must prove that it had paid more than its fair share of defense and indemnity costs for common insureds, and bears burden of producing evidence necessary to calculate the fair share; one insurer cannot recover equitable contribution from another any amount that would result in the first insurer paying less than its fair share, even if that means that the otherwise liable second insurer will have paid nothing. *Scottsdale Ins. Co. v. Century Surety Co. (2010) 182 Cal. App. 4th 1023, 1034-1036, 105 Cal. Rptr. 3d 896*

In action between insurers, insurer seeking equitable contribution can recover only based on evidence that it paid more than its fair share under allocation agreements it made with other insurers; it cannot recover an amount from a nonparticipating insurer that would result in its paying less than its fair share under those same agreements. *Scottsdale Ins. Co. v. Century Surety Co. (2010) 182 Cal. App. 4th 1023, 1037-1038, 105 Cal. Rptr. 3d 896*

In action for equitable contribution between CGL insurers, arising from plaintiff's alleged overpayment towards settlement of underlying action against mutual insured contractor, relief denied because plaintiff did not pay its proportionate share of benefits; "contractors warranty endorsement" in defendant's primary policy excluded liability coverage for operations completed by independent contractor unless insured obtained both a hold-harmless agreement from contractor, and a certificate of insurance showing that contractor was insured. *North American Capacity Ins. Co. v. Claremont Liability Ins. Co. (2009) 177 Cal. App. 4th 272, 276, 295-297, 99 Cal. Rptr. 3d 225*

In action for equitable contribution between CGL insurers, arising from plaintiff's alleged overpayment towards settlement of underlying action against mutual insured contractor, relief denied because plaintiff did not pay its proportionate share of benefits; defendant's umbrella policy contained "contractors warranty endorsement" virtually identical to endorsement in its primary policy, which does not apply to operations performed by independent contractors unless insured: (1) will receive written agreement from each independent contractor; and (2) will obtain certificates of insurance from each independent contractor indicating that it will maintain similar coverage. *North American Capacity Ins. Co. v. Claremont Liability Ins. Co. (2009) 177 Cal. App. 4th 272, 287-293, 99 Cal. Rptr. 3d 225*

In action for equitable contribution between CGL insurers, arising from plaintiff's alleged overpayment towards settlement of underlying action against mutual insured contractor, relief denied because plaintiff did not pay its proportionate share of benefits; defendant's umbrella policy did not drop down to cover losses for which there was no coverage under its primary policy. *North American Capacity Ins. Co. v. Claremont Liability Ins. Co. (2009) 177 Cal. App. 4th 272, 291-293, 99 Cal. Rptr. 3d 225*

Multiple insurers on the same risk have reciprocal rights and duties that arise out of equitable principles; loss is distributed in a ratio that reflects percentage of total coverage provided by each insurer's policy; various methods a trial court may choose for determining equitable allocation include time on the risk, policy limits, combined policy limits/time on the risk, equal shares, and maximum loss. *Employers Mut. Cas. Co. v. Philadelphia Indem. Ins. Co. (2008) 169 Cal. App. 4th 340, 348, 86 Cal. Rptr. 3d 383*

In case involving multiple CGL insurers of mobilehome park, insurer that did not provide defense in action against "failure to maintain" claims of park's residents, owed contribution of defense costs and statutory attorney fees to insurers that provided defense and obtained settlement for $3 million, allocating $1.2 million to damages and $1.8 million for attorney fees under *Civil Code § 798.85*. *Employers Mut. Cas. Co. v. Philadelphia Indem. Ins. Co. (2008) 169 Cal. App. 4th 340, 353-354, 86 Cal. Rptr. 3d 383*

When insured subcontractor was suspended as corporation and previous construction jobs resulted in third-party lawsuits against contractor, subcontractor and contractor, and insurer and contractor entered into settlement agreements; on subsequent breach of settlement agreements by contractor, insurer had standing to bring suit against contractor because insurer was either party to or third-party beneficiary of all settlement agreements made. *Performance Plastering v. Richmond American Homes of Cal., Inc. (2007) 153 Cal. App. 4th 659, 665-668, 63 Cal. Rptr. 3d 537*

Insurer of holder of life estate on residence and insurer of trust holding remainder interest properly pro rated benefits after destruction of home by fire, based on relative insured interests of parties, pursuant to "other insurance" provisions in policies; multiple insureds cannot recover more than value of property destroyed on fire insurance claim resulting from single occurrence. *Burns v. California FAIR Plan Assn. (2007) 152 Cal. App. 4th 646, 656-659, 61 Cal. Rptr. 3d 809*

As general rule, when multiple insurance carriers insure same insured and cover same risk, each insurer may assert claim against coinsurer for equitable contribution when it has undertaken defense or paid liability on behalf of insured; modern trend is to require contribution when there is same level of insurance for same risk, regardless of "other insurance" language. *Edmondson Property Management v. Kwock (2007) 156 Cal. App. 4th 197, 202-203, 67 Cal. Rptr. 3d 243*

In absence of any contractual provision converting coinsurer's primary policy to excess policy, trial court properly applied general rules of equitable contribution; because both insurers issued primary insurance policies covering same risk at same level of insurance, coinsurer must pay its fair share of liability paid by other insurer in settlement of personal injury action. *Edmondson Property Management v. Kwock (2007) 156 Cal. App. 4th 197, 209, 67 Cal. Rptr. 3d 243*

In declaratory relief action between primary and excess insurers, arising from homeowner's liability for landslide causing damage to neighbor's backyard, event of landslide constituted only one occurrence of property damage, paid by primary insurer in amount of $500,000; resultant damaged condition in neighbor's backyard, left unrepaired for extended period, did not constitute continuation of damage through other policy periods, e.g., for loss of use; and did not give rise to multiple occurrences; primary insurer's liability determined on "per occurrence" basis. *Safeco Ins. Co. of Am. v. Fireman's Fund Ins. Co. (2007) 148 Cal. App. 4th 620, 632-639, 55 Cal. Rptr. 3d 844*

In action for equitable contribution against nonparticipating insurer, settling insurer meets its burden of proof by making prima facie showing of coverage under nonparticipating insurer's policy (same showing of potential coverage necessary to trigger nonparticipating insurer's duty to defend); burden of proof then shifts to recalcitrant insurer to prove absence of actual coverage. *Safeco Ins. Co. of Am. v. Superior Court (2006) 140 Cal. App. 4th 874, 881-882, 44 Cal. Rptr. 3d 841*

Excess insurer cannot maintain subrogation action against primary insurer, based on unreasonable refusal to settle underlying tort claim, if tort claim did not go to trial, and no excess judgment was entered against insured. *RLI Ins. Co. v. CNA Cas. of Cal. (2006) 141 Cal. App. 4th 75, 82-83, 45 Cal. Rptr. 3d 667* ; *see also* *Hamilton v. Maryland Cas. Co. (2002) 27 Cal. 4th 718, 117 Cal. Rptr. 2d 318, 41 P.3d 128* (judgment in excess of policy must be entered before there can be claim for breach of primary insurer's duty to settle); *but see* *Fortman v. Safeco Ins. Co. (1990) 221 Cal. App. 3d 1394, 271 Cal. Rptr. 117*

Central insuring clause in umbrella policy covering "ultimate net loss in excess of ... applicable underlying limit [that] insured shall become legally obligated to pay as damages," and defining "ultimate net loss" as "sum actually paid or payable in cash in ... settlement or satisfaction of any claim or suit for which ... insured is liable either by adjudication or settlement with ... written consent" of insurer, imposes duty to indemnify limited to court-rendered damages. *CDM Investors v. Travelers Cas. & Sur. Co. (2006) 139 Cal. App. 4th 1251, 1263-1266, 43 Cal. Rptr. 3d 669*

"Other insurance" issue arises only between carriers on same level of coverage. *Carmel Dev. Co. v. RLI Ins. Co. (2005) 126 Cal. App. 4th 502, 513-514, 24 Cal. Rptr. 3d 588*

In action by real estate developer's excess insurer against subcontractors' insurers naming developer as "additional insured," excess insurer's duty to defend underlying action was triggered when specified primary insurance was exhausted, pursuant to excess policy provisions, regardless of existence or exhaustion of subcontractor's policies. *Travelers Cas. & Sur. Co. v. Transcontinental Ins. Co. (2004) 122 Cal. App. 4th 949, 959, 19 Cal. Rptr. 3d 272*

Right to contribution arises if policies of two or more insurers of common insured, providing primary coverage for same risk, contain conflicting "other insurance" clauses, and if one insurer pays more than its share of loss or defense costs without participation from other insurers; in action for declaratory relief and contribution between two commercial general liability insurers who provided primary insurance coverage at different times to common insured, insurer on policy declared to be "excess" to other insurance was obligated to contribute, on pro rata basis, to defense and indemnification costs that other insurer incurred on insured's behalf. *Travelers Cas. & Sur. Co. v. Century Sur. Co. (2004) 118 Cal. App. 4th 1156, 1160, 13 Cal. Rptr. 3d 526* ; *Fireman's Fund Ins. Co. v. Maryland Cas. Co. (1998) 65 Cal. App. 4th 1279, 1304, 77 Cal. Rptr. 2d 296*

Primary insurer could not enforce its "excess" other-insurance clause to avoid contribution and allocation claims of other insurers that had discharged their primary coverage duty to insured; if primary insurer "excess" other-insurance clause and pro rata clauses of other three insurers are mutually repugnant, only proper result is to ignore all clauses and require some equitable pro rata apportionment. *Century Sur. Co. v. United Pac. Ins. Co. (2003) 109 Cal. App. 4th 1246, 1256-1260, 135 Cal. Rptr. 2d 879*

Insurer's declaratory relief action to determine its duty to indemnify is not strategic litigation against public participation (SLAPP) suit; therefore, insurer not subject tomotion to strike by defendant in declaratory relief action who was plaintiff (and third-party claimant) in underlying personal injury action against insured. *State Farm Gen. Ins. Co. v. Majorino (2002) 99 Cal. App. 4th 974, 977-979, 121 Cal. Rptr. 2d 719* ; *see Code Civ. Proc. § 425.16*

Equitable contribution did not apply to require one insurer to reimburse second insurer with respect to claim paid to common insured; insured failed to comply with special condition endorsement in policy of insurer that denied claim; endorsement required insured to obtain both certificates of insurance from all subcontractors and hold harmless agreements from all subcontractors indemnifying insured against all losses for work performed and that insured be named an additional insured on all subcontractor general liability policies. *Scottsdale Ins. Co. v. Essex Ins. Co. (2002) 98 Cal. App. 4th 86, 90-98, 119 Cal. Rptr. 2d 62*

Privilege under *Civil Code § 47(b)* precludes action by claimants' insurer against tortfeasors' insurer for fraudulently misrepresenting applicable policy limits toclaimant's counsel during settlement negotiations, causing claimants to execute full release and to obtain underinsured motorist benefits from their own insurer. *Home Ins. Co. v. Zurich Ins. Co. (2002) 96 Cal. App. 4th 17, 116 Cal. Rptr. 2d 583*

County that negligently referred high-risk patient to hospital was primarily liable and equitably responsible for entire obligation; comprehensive hospital liability insurer that provided medical malpractice defense established right of subrogation against county subject to any applicable defenses that county may have; county's status as additional

insured on hospital policy does not negate its responsibility for injuries caused by its own negligence. *Truck Ins. Exch. v. County of Los Angeles (2002) 95 Cal. App. 4th 13, 21-22, 25-26, 115 Cal. Rptr. 2d 179*

Insurer may not deny coverage for third-party claims, settle insured's subsequent bad faith claim based on its denial of coverage, and then obtain reimbursement for bad faith settlement from another insurer that provided coverage to insured and settled underlying case. *United Servs. Auto. Ass'n v. Alaska Ins. Co. (2001) 94 Cal. App. 4th 638, 648, 114 Cal. Rptr. 2d 449*

California insurers stated cause of action for declaratory relief that defendant violated unfair competition law (UCL) (*Bus. & Prof. Code § 17200 et seq.*) by transferring its asbestos and environment policies to parent company's Pennsylvania subsidiary created only to pay off future claims, and disclaiming further liability for those claims, without consent of California policyholders, or alternatively, for sending California policyholders misleading and incomplete notice of the transfers; UCL violation based on violation of *Civil Code § 1457* (transferring burden of obligation with consent of party). *AICCO, Inc. v. Insurance Co. of N. Am. (2001) 90 Cal. App. 4th 579, 590-598, 109 Cal. Rptr. 2d 359* (reversing sustaining of demurrer and dismissal of complaint)

Hospital's insurer that settled medical malpractice suit was not entitled to equitable contribution from insurer of nurse who was involved in incident, but was not named as defendant; nurse's insurer never had any duty to indemnify her with respect to injury. *American Cont'l Ins. Co. v. American Cas. Co. (2001) 86 Cal. App. 4th 929, 938-941, 103 Cal. Rptr. 2d 632* (case of first impression)

Trial court has discretion to select method of allocating defense costs among multiple insurers to effect most equitable results based on facts and circumstances of each case. *Centennial Ins. Co. v. United States Fire Ins. Co. (2001) 88 Cal. App. 4th 105, 112, 105 Cal. Rptr. 2d 559*

Multiple insurers with disproportionate (90 percent/10 percent) amounts of time in which their policies covered loss were properly ordered to pay defense costs according to "time on the risk" method rather than "equal shares" approach. *Centennial Ins. Co. v. United States Fire Ins. Co. (2001) 88 Cal. App. 4th 105, 113-114, 105*

Ins. Code § 11580 permits insurer to intervene in action against insured for personal injury or property damage; insurer may intervene to assert defenses of suspended corporation; in negligence action in which suspended corporate defendant would have defaulted, defendant's insurer permitted to intervene if insurer remains liable for any default judgment against insured and has no means other than intervention to litigate liability or damage issues. *Reliance Ins. Co. v. Superior Court (2000) 84 Cal. App. 4th 383, 386-388, 100 Cal. Rptr. 2d 807*

Principles of equitable contribution, rather than equitable subrogation, applied to apportion defense costs between insurers because each insurer remained primarily responsible for defense. Maryland Cas. Co. v. Nationwide Mut. Ins. Co. *(2000) 81 Cal. App. 4th 1082, 1089, 97 Cal. Rptr. 2d 374* ; *see also* *Carmel Dev. Co. v. RLI Ins. Co. (2005) 126 Cal. App. 4th 502, 509, 24 Cal. Rptr. 3d 588* ; *Travelers Cas. & Sur. Co. v. American Equity Ins. Co. (2001) 93 Cal. App. 4th 1142, 1150-1152, 113 Cal. Rptr. 2d 613* .

Defense costs of insurer, which defended action under policy with "excess only" other-insurance clause, were prorated with insurer covering same loss under policy with "pro rata" other-insurance clause. *Pacific Indem. Co. v. Bellefonte Ins. Co. (2000) 80 Cal. App. 4th 1226, 1237, 95 Cal. Rptr. 2d 911*

Multiple primary policies with conflicting "other insurance" clauses require proration of loss between carriers, if first policy contains "excess only" clause and second policy contains hybrid "pro rata/escape" clause. *Commerce & Indus. Ins. Co. v. Chubb Custom Ins. Co. (1999) 75 Cal. App. 4th 739, 748-749, 89 Cal. Rptr. 2d 415*

With respect to suit by insurer against car rental company for declaratory relief, equitable subrogation, indemnity, and

violation of *Bus. & Prof. Code § 17200*, and cross-complaint for indemnity, breach of contract, and declaratory relief against two individual insureds, regarding automobile liability coverage on rental car, costs and attorney fees expended by rental company in defending insurer's subrogation claim were properly recoverable by rental company under rental agreement, pursuant to *Civ. Code § 2778*. *United Servs. Auto. Ass'n v. Snappy Car Rental, Inc. (1999) 74 Cal. App. 4th 461, 465, 87 Cal. Rptr. 2d 742*

If conflict exists between "excess only other insurance" clause and "pro rata other insurance" clause, current trend in California is to prorate settlement and defense costs between two policies; however, amount not prorated if one policy provides that its exposure is not to be reduced by existence of other insurance, if this insurance is primary, and if other insurance is excess or contingent. *American Cont'l Ins. Co. v. American Cas. Co. (1999) 73 Cal. App. 4th 508, 515-516, 86 Cal. Rptr. 2d 560*

Primary coverage is insurance coverage under which, under terms of policy, liability attaches immediately on happening of occurrence giving rise to liability; excess or secondary coverage applies if, under terms of policy, liability attaches only after predetermined amount of primary coverage has been exhausted. *Reliance Nat'l Indem. Co. v. General Star Indem. Co. (1999) 72 Cal. App. 4th 1063, 1076, 85 Cal. Rptr. 2d 627*

In action between insurers for contribution and indemnification, insurer that provided defense to insured who was found liable in underlying suit could not recover from additional insurer because court found no potential coverage under liability policies, even though policies of different insurers were substantially identical, and there was final judicial determination that coverage existed under other policy; this court was not bound by that determination. *Old Republic Ins. Co. v. Superior Court (1998) 66 Cal. App. 4th 128, 155-156, 77 Cal. Rptr. 2d 642*

Liability insurer that undertook defense of insured contractor in third party actions should have been permitted to intervene on behalf of insured in action by co-insurers for rescission of their liability policies, when insured was barred by statute from defending itself and insurer would lose its ability to seek equitable contribution from co-insurers if default judgment of rescission were granted. *Truck Ins. Exch. v. Superior Court (1997) 60 Cal. App. 4th 342, 346-350, 70 Cal. Rptr. 2d 255*

Court's confirmation of good faith settlement between liability insurer and insured did not bar nonsettling co-insurers from asserting future claims for equitable contribution or indemnity against settling insurer. *Rohr Indus., Inc. v. First State Ins. Co. (1997) 59 Cal. App. 4th 1480, 1487-1490, 69 Cal. Rptr. 2d 872*

In declaratory relief action brought by public entity self-insurance pool against commercial excess insurer, court found that self-insurance pool was not "other insurance" subject to excess insurer's policy provision that its coverage would not apply until all other insurance was exhausted. *Orange County Water Dist. v. Association of Cal. Water Agencies Joint Powers Ins. Auth. (1997) 54 Cal. App. 4th 772, 777-779, 63 Cal. Rptr. 2d 182*

Excess liability insurer that contributed to settlement of third party action against insured without reserving any rights against insured did not waive its right to seek equitable indemnity from insured's other insurers on grounds of non-coverage. *Mitchell, Silberberg & Knupp v. Yosemite Ins. Co. (1997) 58 Cal. App. 4th 389, 393-395, 67 Cal. Rptr. 2d 906*

Excess carrier's ability to sue primary carrier for bad faith rests exclusively on subrogation principles, not on any independent duty of primary carrier to excess carrier; excess insurer cannot maintain bad faith suit on theory that it is third-party beneficiary of contract between insured and primary insurer. *Fireman's Fund Ins. Co. v. Maryland Cas. Co. (1994) 21 Cal. App. 4th 1586, 1600-1601, 26 Cal. Rptr. 2d 762*

In bad faith action between insurers based on primary insurer's rejection of settlement offer within policy limits, evidence that primary insurer engaged qualified legal counsel, financed exhaustive investigation, and carefully weighed

settlement offers was sufficient to support judgment in its favor. *Walbrook Ins. Co. v. Liberty Mut. Ins. Co. (1992) 5 Cal. App. 4th 1445, 1458-1459, 7 Cal. Rptr. 2d 513*

Under terms of excess policy, insured was required to contribute its self-insured retention after it gave excess insurer permission to settle third-party action; insured was obligated to contribute to settlement despite its contention that, although it gave excess carrier permission to settle, it did not agree to settlement. *Harbor Ins. Co. v. City of Ontario (1991) 231 Cal. App. 3d 927, 934-935, 282 Cal. Rptr. 701*

Under umbrella policy providing that insurer has no duty to defend but has right to associate with underlying insurers for that purpose, and containing "no action" clause allowing insured to make claim of loss after insured's liability is established by final judgment after trial or by written agreement of insured, claimant, and excess carrier, primary insurer has right to enter into good-faith settlement of claim in amount that invades excess coverage without consent of excess insurer (subject to certain conditions); excess insurer waives rights under "no action" clause if it rejects reasonable settlement and at same time fails to offer to undertake defense. *Diamond Heights Homeowners Ass'n v. National Am. Ins. Co. (1991) 227 Cal. App. 3d 563, 581-583, 277 Cal. Rptr. 906*

Excess policy providing that coverage in event of "exhaustion or reduction" of underlying policy "by reason of losses paid thereunder" triggered on exhaustion ofunderlying insurance by payment only; excess insurer not liable for underlying or "first dollar" coverage on insolvency of primary insurer. *Span, Inc. v. Associated Int'l Ins. Co. (1991) 227 Cal. App. 3d 463, 480, 277 Cal. Rptr. 828*

Excess insurer that is on notice of primary insurer's insolvency has increased duty to inquire about its potential liability because ordinary presumption that primary carrier will provide experienced defense no longer applies. *Span, Inc. v. Associated Int'l Ins. Co. (1991) 227 Cal. App. 3d 463, 483, 277 Cal. Rptr. 828*

Excess carrier has no duty or right to participate in insured's defense absent policy language to the contract; in subrogation action by excess carrier against primary carrier based on primary carrier's bad faith refusal to settle, primary carrier was not entitled to raise affirmative defense of excess carrier's conduct because excess carrier had no duty to ascertain that primary carrier had fulfilled its duty to insured prior to exhaustion of primary limits. *Continental Cas. Co. v. Royal Ins. Co. (1990) 219 Cal. App. 3d 111, 119, 268 Cal. Rptr. 193*

Respective insurers of three defendants, who voluntarily made payments to plaintiff in settlement of underlying action and then obtained arbitration award apportioning responsibility among them, could not disturb arbitration ruling in subsequent declaratory relief action in which trial court found that none of their policies provided any coverage; doctrines of subrogation, contribution, and indemnification were inapplicable when parties voluntarily assumed obligations by making payments they had no positive duty to make. *United Pac. Ins. Co. v. Hanover Ins. Co. (1990) 217 Cal. App. 3d 925, 936-943, 266 Cal. Rptr. 231*

Ambiguities in primary policy construed to compel broadest coverage under that policy, without regard to effect on excess policy issued by another insurer, even if ultimate effect is insured's inability to obtain payment under either policy. *United States Elevator Corp. v. Associated Int'l Ins. Co. (1989) 215 Cal. App. 3d 636, 646-649, 263 Cal. Rptr. 760* .

When carrier is expressly designated as excess insurer, neither insured nor primary carrier is entitled to expect that excess carrier would participate in defense costs beyond the express terms of its policy. *Signal Co. v. Harbor Ins. Co. (1980) 27 Cal. 3d 359, 369, 165 Cal. Rptr. 799, 612 P.2d 889* ; *Chubb/Pac. Indem. Group v. Insurance Co. of N. Am. (1987) 188 Cal. App. 3d 691, 697-698, 233 Cal. Rptr. 539*

Reinsurance agreement concerning group policy of medical insurance, containing exclusion clause provided by successor insurer regarding insureds "eligible" for extension of benefits after discontinuance of policy, found ambiguous

and inadequately defining basic terms of contract; summary judgment in favor of original insurer and against successor insurer improper on ground that several issues regarding administration of group plan remained to be determined. *Stratton v. First Nat'l Life Ins. Co. (1989) 210 Cal. App. 3d 1071, 1091, 258 Cal. Rptr. 721*

Material misrepresentation or concealment of facts that insurer has right to know as ground for rescission of policy; actual intent to deceive not necessary; materiality determined solely by probable and reasonable effect that truthful answers would have had on insurer. *Imperial Cas. & Indem. Co. v. Sogomonian (1988) 198 Cal. App. 3d 169, 179, 243 Cal. Rptr. 639*

Trial court's apportionment of liability among multiple malpractice insurers, based on allocation of malpractice activity at different periods of time, held proper when court files of underlying actions provided accurate historical records, and judge had expertise to study evidence and apportion liability. *Phoenix Ins. Co. v. United States Fire Ins. Co. (1987) 189 Cal. App. 3d 1511, 1529, 235 Cal. Rptr. 185*

When excess coverage exists, primary insurer held solely liable for costs of defense if judgment does not exceed primary coverage; though claim against insured may be for sum in excess of primary coverage, primary insurer is obligated to provide defense and is unable to seek contribution from excess carrier even when its successful settlement or defense relieves excess insurer from indemnifying injured party. *Phoenix Ins. Co. v. United States Fire Ins. Co. (1987) 189 Cal. App. 3d 1511, 1528, 235 Cal. Rptr. 185*

Primary insurance carrier has no equitable right to have excess carrier assume costs of defense covered by primary insurance when excess coverage policy expressly excludes defense obligation and excludes coverage for expenses covered by primary insurance, and when primary coverage imposes duty to defend all claims (including those outside policy limits) and expressly provides that costs of defense are payable in addition to policy limits. *Chubb/Pac. Indem. Group v. Insurance Co. of N. Am. (1987) 188 Cal. App. 3d 691, 698, 233 Cal. Rptr. 539*

In action by insurer against insured to recover costs and fees incurred in defense of third-party action that insurer had no duty to undertake, judgment for nonsuit held proper on ground that insurer's letter to insured reserving its rights was insufficient as matter of law to entitle insurer to reimbursement, because letter did not imply that insurer intended to seek reimbursement later. *Travelers Ins. Co. v. Lesher (1986) 187 Cal. App. 3d 169, 203, 231 Cal. Rptr. 791 , disapproved in part, Buss v. Superior Court (1997) 16 Cal. 4th 35, 65 Cal. Rptr. 2d 366, 939 P.2d 766*

In determining whether one of multiple policies provides coverage, court must consider that particular policy alone as if no other insurance is available, to ensure uniformity in interpretation of insurance contracts. *Employers Reinsurance Corp. v. Phoenix Ins. Co. (1986) 186 Cal. App. 3d 545, 554, 230 Cal. Rptr. 792*

In action for declaratory relief brought by excess carrier, summary judgment properly granted to primary insurer when policy unambiguously covered only bodily injury occurring during policy period, and injury claimed by insured occurred after policy period expired. *Schrillo Co. v. Hartford Accident & Indem. Co. (1986) 181 Cal. App. 3d 766, 771-778, 226 Cal. Rptr. 717*

Insurer was under no duty to defend action alleging bodily injury based on fraud and deceit when comprehensive business insurance policy provided for coverage for bodily injury caused by occurrence defined as accident. *Royal Globe Ins. Co. v. Whitaker (1986) 181 Cal. App. 3d 532, 536-538, 226 Cal. Rptr. 435*

When policy excludes coverage for unreported claims against insured who has obtained similar insurance issued after termination, and subsequent insurer issues policy of similar insurance prior to unreported claim being made, prior insurer's obligation to cover unreported claim under its policy is extinguished. *Pacific Indem. Co. v. Imperial Cas. & Indem. Co. (1986) 176 Cal. App. 3d 622, 627*

Excess carriers has duty to defend excess portion of claim. *Pacific Indem. Co. v. Fireman's Fund Ins. Co. (1985) 175 Cal. App. 3d 1191, 1200-1201, 223 Cal. Rptr. 312*

Statute of limitations does not bar declaratory relief action by insurer regarding insurer's duty to defend tort action prior to breach of insurance contract, because limitations period does not begin to run until breach occurs. *United Pac.-Reliance Ins. Co. v. DiDomenico (1985) 173 Cal. App. 3d 673, 675-677, 219 Cal. Rptr. 119*

In declaratory action to establish liability between two insurance carriers that consecutively insured garagekeeper, reviewing court held "occurrence" of accident was not time when wrongful act committed, but when complaining party was damaged. *Atlantic Mut. Ins. Co. v. Travelers Ins. Co. (1983) 147 Cal. App. 3d 1054, 1056, 195 Cal. Rptr. 476*

P.U.C. endorsement appended to policy providing for coverage within policy limits whether or not vehicle specifically described in policy did not make insurer qualitatively more liable relative to another insurer than it would have been without endorsement. *Employers Ins. of Wausau v. Ohio Cas. Co. (1983) 146 Cal. App. 3d 871, 878, 194 Cal. Rptr. 535*

Action by insurer against coinsurer to recover money paid out to defendant's insured held not barred by doctrine of unclean hands because plaintiff insurer initially wrongfully refused tender of defense when plaintiff's refusal caused defendant no harm; rule that insurer that in good faith refused tender of defense is nevertheless liable to insured for all damages caused by refusal as inapplicable when issue concerns rights of one coinsurer vis-a-vis another. *Insurance Co. of N. Am. v. Liberty Mut. Ins. Co. (1982) 128 Cal. App. 3d 297, 307-308, 180 Cal. Rptr. 244*

Settlement paid by insurer to injured party prior to judicial determination that insured's policy did not cover injury did not establish resulting trust in favor of insurer, and insurer was not permitted to seek reimbursement from injured party in absence of provision in settlement agreement allowing to do so. *American Motorists Ins. Co. v. Cowan (1982) 127 Cal. App. 3d 875, 886, 179 Cal. Rptr. 747*

In declaratory judgment action among three insurers, homeowner's carrier, rather than either auto insurer, held liable for injuries caused by gun which accidentally discharged in car, since discharge of gun did not result from use of car. *Aetna Cas. & Sur. Co. v. Safeco Ins. Co. (1980) 103 Cal. App. 3d 694, 701, 163 Cal. Rptr. 219*

In suit by excess insurer against policyholder for unreasonable refusal to settle, settlement clause in policy permitting policyholder to refuse consent to settlement did not permit unreasonable rejection of settlement by insured but provided insured with opportunity to convince judge or jury that refusal to settle was reasonable under all circumstances, including concern for professional reputation. *Transit Cas. Co. v. Spink Corp. (1979) 94 Cal. App. 3d 124, 136, 156 Cal. Rptr. 360 , disapproved on other grounds, Commercial Union Assurance Cos. v. Safeway Stores, Inc. (1980) 26 Cal. 3d 912, 164 Cal. Rptr. 709, 610 P.2d 1038*

In action by excess insurer against policyholder and primary insurer for refusal to settle wrongful death and injury claims, excess insurer's right of recovery was not limited to equitable subrogation theory; insurer permitted to recover on basis of direct duty of care which existed among three parties involved. *Transit Cas. Co. v. Spink Corp. (1979) 94 Cal. App. 3d 124, 132-135, 156 Cal. Rptr. 360 , disapproved on other grounds, Commercial Union Assurance Cos. v. Safeway Stores, Inc. (1980) 26 Cal. 3d 912, 164 Cal. Rptr. 709, 610 P.2d 1038* ; *but see Fireman's Fund Ins. Co. v. Maryland Cas. Co. (1994) 21 Cal. App. 4th 1586, 1600-1601, 26 Cal. Rptr. 2d 762* (primary insurer has no independent duty to excess insurer may maintain bad faith action against insurer only on equitable subrogation theory)

Insurance company entitled to reimbursement of pro rata share of claim paid on its mistaken assumption that it had validly contracted to be participant in defendant's insurance pool, when pool manager misrepresented that express contractual condition on which plaintiff's obligations were based had been fulfilled. *Harbor Ins. Co. v. Resolute Ins. Co. (1972) 23 Cal. App. 3d 190, 197-198, 99 Cal. Rptr. 916*

Action by insurer in interpleader to determine who is entitled to proceeds of life insurance policy, decedent's former wife or decedent's widow. *Union Cent. Life Ins. Co. v. Pepe (1970) 8 Cal. App. 3d 502, 504-509, 87 Cal. Rptr. 610*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsGeneral OverviewInsurance LawClaims & ContractsCoinsuranceGeneral OverviewInsurance LawClaims & ContractsDeclaratory ReliefGeneral OverviewInsurance LawExcess InsuranceGeneral OverviewInsurance LawGeneral Liability InsuranceObligationsGeneral OverviewInsurance LawIndustry RegulationHolocaust Victims

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§ 308.352 Law Reviews

Note, *Commercial Union Assurance Companies v. Safeway Stores, Inc.: Liability of Insureds and Primary Insurers to Excess Insurers for Unreasonable Failure to Settle Claims, 69 Cal. L. Rev. 1124 (1981)*

Note, *Toward a More Equitable Method of Prorating Liability Insurance Policies, 51 S. Cal. L. Rev. 943 (1978)*

Comment, *Applying the Bad Faith Doctrine to the Primary and Excess Insurance Carrier Relationship in California, 7 Loy. L.A. L. Rev. 277 (1974)*

Legal Topics:

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

§§ 308.253[Reserved]

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§ 308.360 State Constitution

Taxation of insurance companies. *Cal. Const. art. XIII, § 28*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawIndustry RegulationInsurance Company OperationsAccounting RequirementsAnnual Financial StatementsInsurance LawIndustry RegulationInsurance Company OperationsTaxes on Premiums

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§ 308.361 State Statutes

[1] Bail Licenses

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Suspension or revocation of license. *Ins. Code §§ 1807, 1807.5*

[2] Definitions

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[4] Insurance Adjusters

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[5] Insurance Agents, Brokers, Solicitors, and Life Agents

Prelicensing and continuing education. *Ins. Code § 1749 et seq.*

Damages recoverable against unlicensed persons who provided goods or performed services for which specific license required. *Code Civ. Proc. § 1029.8*

Licensing generally. *Ins. Code § 1631 et seq.*

Applications for license. *Ins. Code § 1652 et seq.*

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License terms. *Ins. Code § 1716 et seq.*

Disciplinary actions. *Ins. Code § 1737 et seq.*

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Fees. *Ins. Code § 1750 et seq.*

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[6] Insurance Commissioner

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Powers and duties. *Ins. Code §§ 12919-12957*

Publication of insurance rate comparison, regarding personal lines of coverage, by Insurance Commissioner on January 1, 1990, and yearly thereafter. *Ins. Code § 12959*

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[7] Insurers

Certificate of authority. *Ins. Code § 699 et seq.*

Health-care insurers under jurisdiction of Department of Insurance. *Ins. Code § 740(a)*

Restrictions on underwriting. *Ins. Code § 800 et seq.*

Suspension or revocation of certificate to sell securities. *Ins. Code § 852*

Registration of names of insurers. *Ins. Code § 880 et seq.*

Financial statements of insurer. *Ins. Code § 900 et seq.*

Revocation of certificate of authority for securities deficiency. *Ins. Code § 954*

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Withdrawal of insurers. *Ins. Code §§ 1070-1076*

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Restrictions on activities regarding real estate, assets, and charitable contributions. *Ins. Code § 1150 et seq.*

Holding company regulations. *Ins. Code § 1215 et seq.* (generally); *Ins. Code § 1215.12* (suspension, revocation of license)

Finances. *Ins. Code § 1370 et seq.*

Hearings, procedure, and judicial review regarding rates or underwriting. *Ins. Code § 1858 et seq.*

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Limitations and restrictions regarding mortgage guaranty insurance. *Ins. Code § 12640.01 et seq.*

[8] Life and Disability Insurance

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Insurance in connection with sales and loans. *Ins. Code § 770 et seq.*

Suspension or revocation of license for statutory violation regarding condition precedent of use of particular agent or broker to obtaining financing. *Ins. Code § 773*

Prohibition against offering insurance as inducement for property purchase or rental. *Ins. Code § 777.1 et seq.*

[10] Subpoenas

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Appointment of receivers regarding delinquent insurers. *Ins. Code §§ 1064.2, 1064.3*

Filing of claims. *Ins. Code §§ 1064.4-1604.6*

Priority of claims. *Ins. Code §§ 1064.7, 1064.8*

Stay of execution against delinquent insurer and its assets. *Ins. Code § 1064.9*

Standing of domiciliary receiver. *Ins. Code § 1064.10*

Severability of provisions of Act. *Ins. Code § 1064.11*

Purpose of Act as uniformity of laws of participating states. *Ins. Code § 1064.12*

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Unlawful practices regarding collection of commissions and representations on which premiums are based. *Ins. Code § 755 et seq.*

Misrepresentation of policies. *Ins. Code § 780 et seq.*

Unfair practices. *Ins. Code § 790 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawIndustry RegulationInsurance Company OperationsConducting BusinessCertificates of AuthorityInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesAdjusters & InvestigatorsLicensesInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesAgentsLicensesInsurance LawIndustry RegulationState Insurance Commissioners & DepartmentsCease & Desist OrdersInsurance LawIndustry RegulationState Insurance Commissioners & DepartmentsJudicial ReviewGeneral OverviewInsurance LawIndustry RegulationUnfair Business PracticesGeneral Overview

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§ 308.362 Decisions

[1] Conservatorship Proceedings

Award of attorney's fees to counsel for insurance company defending itself against conservatorship [*see Ins. Code § 1011*]. *Roddis v. All-Coverage Ins. Exch. (1967) 250 Cal. App. 2d 304, 306, 58 Cal. Rptr. 530* ; *McConnell v. All-Coverage Ins. Exch. (1964) 229 Cal. App. 2d 735, 740-743, 40 Cal. Rptr. 587*

[2] Definition of Insurance Business

Collision damage waiver (CDW) contained in automobile rental agreements as not constituting insurance contract for purposes of statutory regulation. *Truta v. Avis Rent A Car Sys. Inc. (1987) 193 Cal. App. 3d 802, 812-815, 238 Cal. Rptr. 806*

Whether particular arrangement constitutes insurance as turning not on whether risk is involved or assumed, but on whether that or something else to which it is related in particular plan is principal object and purpose of arrangement. *Truta v. Avis Rent A Car Sys. Inc. (1987) 193 Cal. App. 3d 802, 812, 238 Cal. Rptr. 806*

[3] Denial of Application for License

Insurance Commissioner's denial of application for life and disability agent license [*now see Ins. Code §§ 32, 1622* ("life licensee")] as supported by substantial evidence where reports of insurance departments of sister states contain allegations involving violations of laws, various other misdealings, mismanagement, and missing company property [*Ins. Code § 1668(d)* (not of good business reputation)] and where applicant is under federal indictment in sister state in connection with operation of his insurance company [*Ins. Code § 1668(b)* (against public interest)]. *Goldberg v. Barger (1974) 37 Cal. App. 3d 987, 991, 995-996, 112 Cal. Rptr. 827*

Meaning of "public interest" as used in *Ins. Code § 1668(b)*, providing that Insurance Commissioner may deny application for any license if granting of license will be against public interest. *Goldberg v. Barger (1974) 37 Cal. App. 3d 987, 995-996, 112 Cal. Rptr. 827*

Ins. Code § 1668(d), providing that Insurance Commissioner may deny application for any license if applicant is not of good business reputation, as constitutionally valid. *Goldberg v. Barger (1974) 37 Cal. App. 3d 987, 991-994, 112 Cal. Rptr. 827*

[4] Disciplinary Proceedings

Revocation of licenses to engage in insurance business as proper when licensee knowingly made false representations in processing claim and acted as agent forand aided and abetted foreign insurance company to transact insurance in California without obtaining certificate of authority. *Mor-Ben Ins. Mkts. Corp. v. Department of Ins. (1986) 179 Cal. App. 3d 1233, 1235-1239, 225 Cal. Rptr. 281*

Suspension of agent's license under *Ins. Code § 1738* for "incompetency" to conduct insurance agent's business [*see Ins. Code § 1668*] as not justified if licensee, capable of performing duties of such business, was guilty only of single negligent act respecting one policy. *Pollak v. Kinder (1978) 85 Cal. App. 3d 833, 836-839, 149 Cal. Rptr. 787*

Dismissal of felony complaint pursuant to *Penal Code § 1203.4* (relating to statutory rehabilitation) as factor to be considered by Insurance Commissioner in license revocation proceeding. *Ready v. Grady (1966) 243 Cal. App. 2d 113, 52 Cal. Rptr. 303*

Determination of Insurance Commissioner in disciplinary proceeding against licensee as subject in mandate proceeding [*Code Civ. Proc. § 1094.5*] to trial de novo in superior court and court as entitled to exercise its independent judgment on evidence. *Ready v. Grady (1966) 243 Cal. App. 2d 113, 118, 52 Cal. Rptr. 303*

[5] Foreign Insurers

Ins. Code § 1631, requiring license, as not imposing undue burden on interstate commerce. *Robertson v. California (1946) 328 U.S. 440, 447-449, 66 S. Ct. 1160*

Foreign insurers who retained agents in state to investigate some claims arising under policies sold by mail to Californians as constitutionally subject to California tax on premiums under *Cal. Const. art. XIII, § 28*, and *Rev. & Tax. Code § 12201*. *Illinois Commercial Men's Ass'n v. State Bd. of Equalization (1983) 34 Cal. 3d 839, 850, 196 Cal. Rptr. 198, 671 P.2d 349*

California as constitutionally permitted to regulate insurance transactions of foreign insurance companies that, although they have no agents in this state, solicit and negotiate transactions with California residents exclusively by mail from offices outside this state. *People v. United Nat'l Life Ins. Co. (1967) 66 Cal. 2d 577, 580, 58 Cal. Rptr. 599, 427 P.2d 199*

Foreign insurers soliciting and negotiating insurance transactions with California residents exclusively by mail from offices outside state as subject to *Ins. Code § 700*, relating to admission to transact insurance business in this state, and as required, as condition precedent to engaging in such transactions, to secure from California Insurance Commissioner certificate of authority. *People v. United Nat'l Life Ins. Co. (1967) 66 Cal. 2d 577, 580-581, 58 Cal. Rptr. 599, 427 P.2d 199*

Insurers that have no agents in California and that solicit and negotiate their insurance business with California

residents exclusively by mail from outside state as subject to *Ins. Code § 700(a)*, requiring insurer to be certified. *Trihedron Int'l Assurance, Ltd. v. Superior Court (1990) 218 Cal. App. 3d 934, 949, 267 Cal. Rptr. 418*

[6] Injunctive Relief

Commissioner properly issued cease and desist order preventing mortgage insurance carrier from selling "Lien Protection" policies, which protect lenders from borrower's default for range of losses, including "losses due to undisclosed liens," marketed as less expensive alternative to title insurance; those policies are actually title insurance, which only title insurance carriers are allowed to sell. *Radian Guar., Inc. v. Garamendi (2005) 127 Cal. App. 4th 1280, 1288-1293, 26 Cal. Rptr. 3d 464*

Issuance of preliminary injunction against seller of automobile repair contracts (which provided coverage for damages resulting from, inter alia, collision, fire, and theft), prohibiting violation of *Ins. Code §§ 700(a)* (transacting insurance business without certificate of authority) and 703 (acting for nonadmitted insurer) as proper, based on showing that conduct of defendant would constitute threat of continuing public harm. *People ex rel. Gillespie v. Neu (1989) 209 Cal. App. 3d 1066, 1073-1074, 257 Cal. Rptr. 778*

[7] Licensing

Licensing of insurance agent as administrative statutory and as not involving a constitutional or common-law right. *Ready v. Grady (1966) 243 Cal. App. 2d 113, 117, 52 Cal. Rptr. 303* ; *see also Goldberg v. Barger (1974) 37 Cal. App. 3d 987, 997, 112 Cal. Rptr. 827*

Purpose of insurance licensing as protection of public by requiring and maintaining professional standards of conduct on part of licensees in California. *Goldberg v. Barger (1974) 37 Cal. App. 3d 987, 996* ; *see also Ins. Code § 1737*

[8] Nature of Insurance Business

Business of insurance as one affected with public interest and subject to police power of state. *People v. United Nat'l Life Ins. Co. (1967) 66 Cal. 2d 577, 595, 58 Cal. Rptr. 599, 427 P.2d 199* ; *Carpenter v. Pacific Mut. Life Ins. Co. (1937) 10 Cal. 2d 307, 329, 74 P.2d 761*

[9] Reciprocal Insurance

Attorneys-in-fact for subscribers of reciprocal insurance exchanges may be sued by subscribers to recover alleged excessive fees that attorneys-in-fact collected in breach of their fiduciary duty to subscribers, when fees were collected from premiums subscribers paid to the exchanges, and premiums were based on rates approved by Commissioner; attorneys-in-fact are entities distinct from exchanges, with fiduciary relationships with each subscriber. *Fogel v. Farmers Group, Inc. (2008) 160 Cal. App. 4th 1403, 1414-1418, 74Cal. Rptr. 3d 61*

Reciprocal insurance exchange defined. *Fogel v. Farmers Group, Inc. (2008) 160 Cal. App. 4th 1403, 1406-1407, 74Cal. Rptr. 3d 61 Industrial Indem. Co. v. Golden State Co. (1953) 117 Cal. App. 2d 519, 522-523, 256 P.2d 677*

Reciprocal exchange as entity for purposes of liquidations as well as for purposes of regulation and supervision. *Mitchell v. Pacific Greyhound Lines (1939) 33 Cal. App. 2d 53, 63, 91 P.2d 176*

Levy of assessment on policyholders of reciprocal insurer after appointment of conservator as governed by *Ins. Code §*

1062, which does not authorize assessment to restore surplus. *Barger v. All-Coverage Ins. Exch. (1971) 20 Cal. App. 3d 675, 679-681, 97 Cal. Rptr. 888*

[10] Regulation by State

Police power of state to regulate insurance business as not subject to removal by contract; economic interest of state as justifying exercise of its continuing protective power notwithstanding interference with existing contracts. *Hinckley v. Bechtel Corp. (1974) 41 Cal. App. 3d 206, 215, 116 Cal. Rptr. 33*

[11] Taxation

Imposition of sales taxes on retail sales of personal property to insurance companies as not violation of *Cal. Const. art. XIII, § 28(f)*, and *Rev. & Tax. Code § 12204*; legal incidence of tax as on retailer. *Occidental Life Ins. Co. v. State Bd. of Equalization (1982) 135 Cal. App. 3d 845, 847, 851-852, 185 Cal. Rptr. 779*

Imposition of retaliatory tax on foreign insurance company doing business in California as properly imposed pursuant to *Cal. Const. art. XIII, § 28(f)(3)*, and *Ins. Code § 685.1*; insurance company had to pay less in California than hypothetical citizen of state would have had to pay for privilege of doing business in insurance company's home state. *American Alliance Ins. Co. v. State Bd. of Equalization (1982) 134 Cal. App. 3d 601, 606-608, 184 Cal. Rptr. 674*

Tax exemption for insurers and their property set out in *Cal. Const. art. XIII, § 28(f)*, as not applying to property owned by insurers being used in operation of active business not generating gross premiums and not reasonably related or incidental to activities traditionally associated with insurance companies. *Massachusetts Mut. Life Ins. Co. v. City & County of San Francisco (1982) 129 Cal. App. 3d 876, 886, 181 Cal. Rptr. 370*

Retaliatory tax authorized by *Ins. Code § 685* as not unconstitutional as affecting interstate commerce or as violating equal protection and due process clauses of *U.S. Const. amend. XIV*. *Western & S. Life Ins. Co. v. Board of Equalization (1979) 99 Cal. App. 3d 410, 414, 415, 159 Cal. Rptr. 539 , aff'd, 451 U.S. 648, 101 S. Ct. 2070, 68 L. Ed. 2d 514 (1981)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawIndustry RegulationInsurance Company OperationsConducting BusinessForeign InsurersInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesAdjusters & InvestigatorsLicensesInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesAgentsLicensesInsurance LawIndustry RegulationInsurance Company OperationsTaxes on Premiums

California Forms of Pleading and Practice--Annotated

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Volume 26: Injunctions thru Insurance-Chs. 303-313
Chapter 308 INSURANCE
PART III. RESEARCH GUIDE
D. Certification and Licensing

26-308 California Forms of Pleading and Practice--Annotated § 308.363

§ 308.363 Attorney General Opinions

Home maintenance service contract offered by real estate broker under homeowner's protection plan or warranty as insurance. *61 Ops. Cal. Att'y Gen. 214 (1978)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceHomeowners InsuranceGeneral Overview

California Forms of Pleading and Practice--Annotated

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26-308 California Forms of Pleading and Practice--Annotated §§ 308.364-308.369

[Reserved]

§§ 308.364[Reserved]

California Forms of Pleading and Practice--Annotated

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Volume 26: Injunctions thru Insurance-Chs. 303-313
Chapter 308 INSURANCE
PART IV. FORMS
A. Actions Against Insurance Companies to Recover Insurance Contract Benefits
1. In General

26-308 California Forms of Pleading and Practice--Annotated § 308.370

§ 308.370 Complaint by Beneficiary, Insured, or Loss-Payable Payee Against Insurance Company to Recover Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--General Form

[1] FORM Complaint by Beneficiary, Insured, or Loss-Payable Payee Against Insurance Company to Recover Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--General Form

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONEY
_____ [*names*],	)	(Breach of Insurance Contract)
Defendants.	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California [, with its principal place of business in this state situated in _____ County,] and authorized [by the California Insurance Commissioner] to transact, and transacting, business in this state as a _____ [*class of insurance*] insurer [*or other allegation of capacity and authority as appropriate*].

2. On or about _____ [*date*], [in consideration of the payment of _____ (an annual *or* a semiannual or a monthly *or* a weekly *or specify other terms of payment*) premium of $_____, made by _____ (*name of person securing issuance of policy*),] defendant, by its duly authorized

agents, executed and delivered to _____ [*name of insured*] in _____ [*city, county, and state*], its policy of insurance bearing number _____ hereinafter referred to as "the policy," in and by which defendant undertook to and did insure _____ [*allege risk assumed by insurer, e.g.,* the life of _____ (*name*) or the building located at _____ (*streetaddress, city, and state*) against loss or damage by fire] in the sum of $_____. On the occurrence of the insured event, defendant promised to _____ [pay *or* indemnify] plaintiff [as his/her/its interest might appear] [up to] the sum of $_____. The policy by its terms was effective from _____ [*time*], on _____ [*date*], to _____ [*time*], on _____ [*date*]. [A copy of the policy is attached hereto as Exhibit A and made a part hereof.]

3. _____ [*Where necessary, allege insurable interest of plaintiff, e.g.,* At the time the policy was issued and the insurance took effect, plaintiff was _____ (wholly *or* partially) dependent on _____ (*name of insured*) for his/her _____ (support *or* education *or* support and education) *or* At the time the policy was issued and the insurance took effect and at (all times since to and including) the time the loss as herein alleged occurred, plaintiff was the owner of the property described in the policy].

4. On or about _____ [*date*], while the policy was in full force and effect, _____ [*allege occurrence of insured event, e.g.,* _____ (*name of insured*) died in _____ (*city, county, state*) or the property described in and covered by the policy was destroyed by fire to plaintiff's loss and damage in the sum of $_____]. By reason thereof, under the terms of the policy, plaintiff became entitled to receive from defendant, and defendant became obligated to pay to plaintiff _____ [on or before _____ (*date*) *or* no later than _____ (*date*) *or* within _____ (*number*) days after submission by plaintiff to defendant of written proof of loss *or specify other circumstances signifying obligation of payment*], The sum of $_____. [Plaintiff delivered written proof of loss to defendant on or about _____ (*date*), and, under the terms of the policy payment by defendant to plaintiff was required on or before _____ (*date*).]

5. _____ [*Allege performance of conditions precedent, e.g.,*

Plaintiff _____ (has *or* and the insured have) performed all conditions of the policy on his/her/its/their part to be performed and, in accordance with the terms of the policy, gave defendant due and timely notice and _____ (proof or claim of loss (*or allege excuse for nonperformance, if any*)].

6. _____ [Plaintiff has demanded of defendant payment of the sum of $_____, as alleged in Paragraph 4, *above*, but defendant has failed and refused, and continues to fail and refuse, to pay plaintiff that sum or any part of it *or allege fact of partial payment and failure and refusal to pay balance if such are the facts*], and there is now due and owing from defendant to plaintiff the sum of $_____.

[7. _____ (*Allege any acts by defendant that would render its breach of contract tortious and any intent on the part of defendant showing that the acts were done maliciously, oppressively, or fraudulently*).]

8. As a proximate result of defendant's failure and refusal as herein alleged, plaintiff has been damaged in the sum of $_____, [*amount due under policy and unpaid*] with interest on that sum at the legal rate [from _____ (*date payment should have been made*)].

[9. _____ (*Allege any personal or other injuries and damages proximately resulting from defendant's breach if the breach was tortious*).]

[10. In committing the acts described in Paragraph 7 of this complaint, defendant acted in conscious disregard of the rights of plaintiff and was guilty of _____ (malice *and/or* oppression *and/or* fraud) in that

_____ (*specify facts constituting malice, oppression, or fraud*). The conduct of defendant warrants an assessment of punitive damages in an amount appropriate to punish defendant and deter others from engaging in similar wrongful conduct.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ [*benefit payable under policy*], with interest thereon at the legal rate [from and after _____ (*date*), until paid];

[2. For general damages in the sum of $_____;]

[3. _____ (*Allege amount of special damages suffered, if any*);]

[4. For exemplary damages;]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of complaint is for use by a person entitled to receive money under an insurance policy after the occurrence of a covered loss where the insurer has failed to pay it after demand. For a procedural guide which may be adapted for use in the prosecution or defense of the action, see Ch. 140, *Contracts* . For complaints alleging tortious breach of contract, see *§§ 308.379, 308.380*.

[3] Copies of Complaint and Summons

The following copies of the complaint will be prepared:

- Original to be filed with court clerk.

- One conformed (stamped "Endorsed-Filed" by court clerk) copy to be served with the summons on defendant (or a separate conformed copy to be served on each defendant if there is more than one defendant) served in person pursuant to *Code Civ. Proc. § 415.10*, by mail pursuant to *Code Civ. Proc. § 415.30* (in which case two copies of the notice and acknowledgment of service will be prepared to be sent to the defendant with the complaint and summons and a postage prepaid return envelope), or by mail out of state pursuant to *Code Civ. Proc. § 415.40*, or two conformed copies if service is made pursuant to *Code Civ. Proc. § 415.20(a)* (combination of substituted service and service by mail).

- One copy to be presented with original to court clerk to be stamped "Endorsed-Filed" and returned to office file.

- One copy for office file to be retained until "Endorsed-Filed" copy is returned from court.

- One conformed ("Endorsed-Filed") copy for client, if desired.

- Other copies as desired.

In the case of a single defendant, the summons will be prepared in the following number of copies:

- Original to be issued by court clerk and returned to court with executed proof of service [*see Code Civ. Proc. §§ 412.10, 417.10, 417.20, 583.210*].

- Conformed copy to be served on defendant if served in person pursuant to *Code Civ. Proc. § 415.10*, by mail pursuant to *Code Civ. Proc. § 415.30*, or by mail out of state pursuant to *Code Civ. Proc. § 415.40*, or two conformed copies if service is made pursuant to *Code Civ. Proc. § 415.20(a)*.

- Office copy.

- Other copies as desired.

For additional copies to be prepared in the case of multiple defendants, a discussion of the manner of service, and who may be served, as well as forms of summonses, see Ch. 518, *Service of Summons and Papers* .

[4] Pleading

An action on an insurance policy is an action on contract. The essential elements required to be pleaded in an action for damages for breach of contract are: (1) the contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) the resulting damages to plaintiff [*Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377]* . In the case of an action on an insurance policy, an allegation of a loss covered by the contract must also be included, since it is only when a loss occurs that the duty to pay, as evidenced by the insurance contract, arises [*see Blasingame v. Home Ins. Co. (1888) 75 Cal. 633, 635, 17 P. 925]* .

It is also common to allege the insurer's capacity as a corporation, unincorporated association, or other, its authority to issue insurance policies of the class involved in the action, and, if venue is to be based on the location of defendant insurer's place of business, the county in California in which its principal place of business is situated [*see Code Civ. Proc. §§ 395.2, 395.5*].

If the policy is in writing, as is normally the case, its execution may be pleaded by (1) pleading the policy *in haec verba*,

(2) attaching a copy as an exhibit and incorporating it by a reference, or (3) pleading its legal effect [*see Evans v. Holly Corp. (1971) 15 Cal. App. 3d 1020, 1023, 93 Cal. Rptr. 712* (legal effect of policy alleged); *see also* Ch. 140, *Contracts*].

[5] Allegations

Paragraph 1 alleges defendant insurer's capacity as a California corporation (an insurer may be a foreign corporation or an unincorporated association instead of a domestic corporation), its authority to issue insurance of the class involved, and the location of its principal place of business in California.

Paragraph 2 alleges the contract--that is, the issuance of the policy by defendant for a consideration. (Because the policy in this case is alleged to be in writing, consideration is presumed [*Civ. Code § 1614*] and, therefore, need not be specifically alleged.) It also alleges that the policy covers a specific risk or loss. These allegations establish a duty on the part of the defendant to plaintiff. The loss, itself, is alleged in a later paragraph (Paragraph 4). The policy is attached asan exhibit to the complaint and incorporated in the pleading by reference. It is also permissible to plead the legal effect of the policy or the entire policy or relevant portions of it *in haec verba* without attaching it as an exhibit.

Paragraph 4, as already mentioned, alleges the occurrence of a loss covered by the policy, and hence a duty on the part of defendant to perform its obligations under the policy.

Paragraph 5 alleges plaintiff's performance of all conditions on plaintiff's part to be performed [*see Code Civ. Proc. § 457*]. For alternative allegations, see *§ 308.377*.

Paragraph 6 alleges plaintiff's demand for performance by the defendant and defendant's refusal to perform, that is, defendant's breach of the contract.

Paragraph 7 is optional because it is for use only if the defendant's breach of the contract have been tortious. That is, if defendant breached its implied covenant of good faith and fair dealing [*see § 308.379[3]*]. If Paragraph 7 is used, Paragraph 9 will also be used. For allegations that may be adapted for incorporation as Paragraph 9, see *§§ 308.379* and *308.380*, Ch. 177, *Damages* , and Ch. 362, *Mental Suffering and Emotional Distress* . If the complaint shows that defendant has been guilty of malice, oppression, or fraud, optional Paragraph 10, alleging punitive or exemplary damages [*see Civ. Code § 3294*], will also be included.

Paragraph 8 alleges plaintiff's damages proximately caused by defendant's breach [*see Civ. Code §§ 3300, 3302*]--that is, plaintiff's loss of the policy benefit and interest on that amount.

The complaint also includes an allegation of plaintiff's insurable interest (Paragraph 3) [*see Ins. Code §§ 281-286, 10110*; *Breedlove v. Norwich Union Fire Ins. Soc'y (1899) 124 Cal. 164, 168, 56 P. 770]* .

The complaint concludes with a prayer and is verified. On the effect of verification, see *§ 308.370[7]*.

[6] Dating and Signing Complaint

There is no legal requirement that the complaint be dated, but this is nevertheless frequently done so that counsel may have a record of it. This is particularly helpful when the original and copies are sent to the court clerk by mail for filing; the retained office file copy will have the date on it that the complaint was executed and will allow counsel or his secretary to properly follow through if the conformed copies are not received back from the court within a reasonable time.

The complaint, of course, is a pleading [*Code Civ. Proc. § 422.10*] and must be signed by either the plaintiff or

plaintiff's attorney [*Code Civ. Proc. § 446*]. Complaints must be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, by the party [*Code Civ. Proc. § 128.7*]. Complaints must include the signer's address and telephone number, if any. An unsigned paper will be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party [*Code Civ. Proc. § 128.7(a)*].

[7] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[8] Variations in Caption

If the action is prosecuted by a plaintiff in a representative capacity or by a plaintiff by and through a guardian or guardian ad litem, or by a public or legal entity, the caption will be changed accordingly and the first paragraph of the complaint will allege the capacity of the plaintiff. For further discussion, see Ch. 20, *Allegations Commonly Used* , Ch. 61, *Associations and Clubs* , Ch. 108, *Captions and Introductions* , Ch. 160, *Corporations: Capacity* et seq., Ch. 181, *Death and Survival Actions* , Ch. 291, *Guardians ad Litem* , Ch. 364, *Minors* , and Ch. 440, *Probate: Is Probate Necessary ?* et seq.

[9] Venue and Jurisdiction

Venue of actions against corporations and associations is governed by *Code Civ. Proc. §§ 395.2, 395.5*. For further discussion, see Ch. 571, *Venue* .

The superior court has jurisdiction of the action, which is classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it is classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[10] Damages

The measure of damages for breach of contract is set forth in *Civ. Code§§ 3300* and *3301* and interest is provided for in *Civ. Code § 3287*. The detriment[*see Civ. Code § 3282*] caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation with interest on it [*Civ. Code § 3302*].

If the breach is tortious, the measure of damages is set forth in *Civ. Code § 3333* [*see § 308.379*].

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought if they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*]; see *Ch. 177, Damages, § 177.40* et seq., and Ch. 205, *Defaults and Default Judgments* .

[11] State Statutes

Damages generally. *Civ. Code § 3281 et seq.*

Inception hour in policies; exceptions. *Ins. Code § 460*

Interest as damages. *Civ. Code §§ 3287-3290*

Interest payable on life insurance proceeds where insurer fails to pay proceeds within 30 days of death. *Ins. Code § 10172.5*

Indemnity contracts. *Civ. Code §§ 2772-2778*

Insurable interest in person. *Ins. Code §§ 286, 10110*

Insurable interest in property. *Ins. Code §§ 281-286*

Insurer as prohibited from transacting any claim of insurance not authorized by the charter. *Ins. Code § 680*

Interpretation of contracts generally. *Civ. Code §§ 1635-1662*

Notice and proofs of loss. *Ins. Code §§ 550-557.6*

Presumption that writing is truly dated. *Evid. Code § 640*

"Transact" defined. *Ins. Code § 35*

[12] Decisions

[a] Accrual of Action

Cause of action for breach of insurance contract as accruing at time of breach. *Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830-831, 69 Cal. Rptr. 321, 442 P.2d 377*

[b] Interest

Insured entitled to recovery of prejudgment interest from insurer, pursuant to *Civ. Code § 3287(a),* when insured had furnished insurer with data from which loss could be ascertained and insurer substantially disputed that data. *James B. Lansing Sound, Inc. v. Nat'l Union Fire Ins. Co. (9th Cir. 1986) 801 F.2d 1560, 1570*

Interest on damages as recoverable under *Civ. Code § 3287* from date payment was due under terms of insurance contract where insured had by such time furnished insurer with data from which loss could be ascertained and where such data was not substantially disputed by insurer. *Executive Aviation, Inc. v. National Ins. Underwriters (1971) 16 Cal. App. 3d 799, 808, 94 Cal. Rptr. 347* (under circumstances of case, insured was entitled to interest on value of destroyed aircraft from date insurer denied liability); *see also Koyer v. Detroit Fire & Marine Ins. Co. (1937) 9 Cal. 2d 336, 345, 70 P.2d 927 ; Atlantic Mut. Ins. Co. v. Cooney (1962) 303 F.2d 253, 270*

When evidence in action on fire insurance policy shows total loss of property insured and compliance with all terms of

policy on part of insured, except such as have been waived by insurer, interest as properly included on amount of obligation due under terms of policy from date loss was payable. *Jacobs v. Farmers' Mut. Fire Ins. Co. (1935) 5 Cal. App. 2d 1, 11, 41 P.2d 960*

Insurers issuing policies insuring equipment for actual cash value less deductible against loss or damage arising from collision or upset, and for actual cash value against loss arising from fire, transportion, or theft, as liable to insured for interest at legal rate on sums due and payable under policies after occurrence of covered loss where they should have made payment under their policies but failed to do so; date from which interest accrues as not later than that on which insurer repudiated liability or finally refused to pay. *Chase v. National Indem. Co. (1954) 129 Cal. App. 2d 853, 865, 278 P.2d 68*

In action on liability policy, insurer, as general rule, as liable for interest from date judgment is entered against insured; if policy is one of indemnity, interest as accruing from date of payment; under certain circumstances, where settlement is rightly made, interest as accruing from date of payment by insured. *Atlantic Mut. Ins. Co. v. Cooney (1962) 303 F.2d 253, 270*

Award of prejudgment interest under *Civ. Code § 3287* on damages certain or capable of being made certain as proper although complaint fails to allege plaintiff's entitlement to it or to contain specific prayer for it. *Greenfield v. Insurance Inc. (1971) 19 Cal. App. 3d 803, 813, 97 Cal. Rptr. 164*

Judgment awarding principal and interest in lump sum against insurer as improper since if judgment is not immediately paid insurer would be liable for payment of interest on interest; in such case judgment should be for principal amount with statement it is to bear interest at seven percent per annum (the legal rate) from specified date (date it should have been paid). *Metz v. Universal Underwriters Ins. Co. (1973) 10 Cal. 3d 45, 58-59, 109 Cal. Rptr. 698, 513 P.2d 922*

Civ. Code § 3287(a) as not authorizing prejudgment interest as matter of law where amount of damage as opposed to only determination of liability depends on judicial determination based on conflicting evidence and is not ascertainable from truthful data supplied by claimant. *Esgro Cent. Inc. v. General Ins. Co. of Am. (1971) 20 Cal. App. 3d 1054, 1062, 98 Cal. Rptr. 153*

Award of prejudgment interest in judgment awarding value of stolen tractor as error where actual cash value of tractor was unliquidated prior to judgment. Benton v. *Cravens, Dargan & Co. (1961) 188 Cal. App. 2d 637, 645, 10 Cal. Rptr. 740* (amount awarded was less than half that demanded in complaint)

Underwriters of certificate of errors and omissions insurance as not liableto assured for interest on sum paid by assured to injured party pursuant to arbitrators' award prior to time assured paid money after judgment of superior court confirming award became final. *Hertzka & Knowles v. Salter (1970) 6 Cal. App. 3d 325, 336-340, 86 Cal. Rptr. 23*

[c] Pleading

Action on insurance policy as action on contract; essential elements required to be pleaded in action for damages for breach of contract. *Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377*

Party as required to allege every fact he or she is required to prove and as precluded from proving any fact not alleged. *Allen v. Home Ins. Co. (1901) 133 Cal. 29, 30, 65 P. 138* ; see also *Arnold v. American Ins. Co. (1906) 148 Cal. 660, 662, 84 P. 182*

In action on insurance contract so much of contract as will show right to recover as required to be set out in complaint in terms or in substance. *Allen v. Home Ins. Co. (1901) 133 Cal. 29, 30, 65 P. 138*

Pleading written policy by its legal effect. *Evans v. Holly Corp. (1971) 15 Cal. App. 3d 1020, 1023, 93 Cal. Rptr. 712*

Court as taking judicial notice of standard fire insurance policy since form is prescribed by statute; setting out policy in pleading as not required. *Northern Ins. Co. v. National Union Fire Ins. Co. (1917) 35 Cal. App. 481, 484, 170 P. 434*

Class action complaint alleging that members of class purchased insurance and were billed for premiums based on coverage requested and part of coverage initially purchased was deleted but that defendant insurer refused to make any adjustment in premium other than to establish book credit available only to reduce premium to be billed in future policy year if policy is renewed, as not stating cause of action where plaintiff failed to plead terms of insurance policies involved. *Jensen v. Allstate Ins. Co. (1973) 32 Cal. App. 3d 789, 793-794, 108 Cal. Rptr. 498*

Allegation of insurable interest as essential in most cases. *Breedlove v. Norwich Union Fire Ins. Soc'y (1899) 124 Cal. 164, 168, 56 P. 770*

Complaint in action to recover on insurance policy as required to aver loss and show that loss occurred by reason of peril insured against, but as not required to aver performance of conditions subsequent, negative prohibited acts, or deny that loss occurred from excepted risks. *Blasingame v. Home Ins. Co. (1888) 75 Cal. 633, 635, 17 P. 925* ; see also *Arnold v. American Ins. Co. (1906) 148 Cal. 660, 662-663, 668, 84 P. 182*

In action on insurance policy, complaint as fatally defective if it contains no allegation of insurer's nonpayment or allegation from which nonpayment can be inferred. *Richards v. Travelers' Ins. Co. (1889) 80 Cal. 505, 506* In action on fire insurance policy, allegation of neglect and refusal of insurer to pay as sufficient allegation of nonpayment. *Irwin v. Insurance Co. of N. Am. (1911) 16 Cal. App. 143, 145, 116 P. 294* ; *see also Arnold v. American Ins. Co. (1906) 148 Cal. 660, 663, 84 P. 182*

In action on fire insurance policy complaint which alleges that insured was owner of property at time of insurance and at time of fire, its value at those times, and that it was totally destroyed by fire as sufficiently showing damage sustained by insured by reason of fire. *Blasingame v. Home Ins. Co. (1888) 75 Cal. 633, 638, 17 P. 925*

Objection to complaint that specific allegation therein is contradicted by exhibit to which reference is made as not subject to attack by general demurrer; such contradiction as rendering complaint ambiguous and subject to demurrer on that ground. *Blasingame v. Home Ins. Co. (1888) 75 Cal. 633, 637, 17 P. 925*

[d] Splitting Cause of Action

Action against tortfeasor on subrogated claim by partial subrogee (insurer), which had paid insured to extent of policy limit for loss by fire resulting from tortfeasor's negligence, in which both tortfeasor and insured (on ground insured was an unwilling plaintiff) were named as defendants, where insured filed cross complaint against tortfeasor for full amount of damages sustained by him and tortfeasor, before cross complaint was filed, paid plaintiff full amount of its subrogated claim, as not constituting a splitting of a cause of action, but as preventing a splitting since (1) there was but a single action rather than vexatious multiple litigation, and (2) there was no earlier action at which claims of plaintiff and insured against tortfeasor could and should have been settled. *Phillips v. Western Pac. R.R. Co. (1971) 22 Cal. App. 3d 441, 444-446, 99 Cal. Rptr. 451*

[e] Waiver of Conditions

General agent as having authority to waive conditions in insurance policy by mere parol, even though policy itself requires waivers to be in writing. *Chase v. National Indem. Co. (1954) 129 Cal. App. 2d 853, 859, 278 P.2d 68*

[13] Law Reviews

Comment, *To Protect You From the Medical Bills That Can Ruin You-- Silberg v. California Life Insurance Company*, 3 USFV L. Rev. 127 (1974)

Conley and Sayre, *Indemnity Revisited: Insurance of the Shifting Risk, 22 Hastings L.J. 1201 (1971)*

[14] Text References

Witkin, Summary of California Law, Vol. 5, *Torts*, § 459

28 Cal. Jur. 2d, *Insurance*, §§ 587-597

[15] Cross References

See generally Ch. 140, *Contracts*

For illustrative allegations that may be adapted for use in this complaint generally, see Ch. 20, *Allegations Commonly Used* , Ch. 177, *Damages* , and Ch. 362, *Mental Suffering and Emotional Distress*

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26-308 California Forms of Pleading and Practice--Annotated § 308.371

§ 308.371 Allegations--Oral Insurance Contract Entered Into by Defendant Through Authorized Agent

[1] FORM Allegations--Oral Insurance Contract Entered Into by Defendant Through Authorized Agent

2. _____ [*Name of agent*] [is and] at all times herein mentioned was a duly licensed insurance agent authorized by the defendant to transact insurance on its behalf and, in doing the things herein alleged, was acting within the course and scope of his/her agency.

3. On or about _____ [*date*], _____ [*name of agent*], on behalf of defendant, orally agreed with _____ [plaintiff *or* _____ (*name*)] to insure _____ [*describe, e.g.*, plaintiff's (interest in the) premises located at _____ (*address*) and consisting of a one-story five-room detached single family residence against loss or damage by fire] in the sum of $_____ from _____ [*time*], on _____ [*date*], to _____ [*time*], on _____ [*date*]; the premiums on the insurance were to be computed by _____ [*name of agent*] and billed to _____ [*name of insured*] as was the custom of _____ [*name of community where insurance contract was entered into*].

[2] Use of Form

The allegations in this form are for use in lieu of Paragraph 2 of the *form in § 308.370*.

[3] State Statutes

"Insurance agent" defined. *Ins. Code §§ 31, 1621*

[4] Decisions

[a] Oral Contracts

Oral insurance contract as enforceable and binding. *Law v. Northern Assurance Co. (1913) 165 Cal. 394, 400-401, 132 P. 590*

Oral contracts to insure as valid; insurance as effective from time orally agreed on irrespective of any delivery of policy. *Spott Elec. Co. v. Industrial Indem. Co. (1973) 30 Cal. App. 3d 797, 805, 106 Cal. Rptr. 710*

Where valid parol contract of insurance has been entered into, policy to be issued as simply memorial of prior parol contract; even though policy be not delivered until after loss occurs, insurance as deemed effective from time agreed on in parol agreement, irrespective of any delivery of policy. *Metts v. Central Standard Life Ins. Co. (1956) 142 Cal. App. 2d 445, 450-451, 298 P.2d 621*

New insurance in various forms, as well as increased coverage on existing insurance, as commonly ordered by phone; if application is accepted by clerk who undertakes to speak for agent, enforceable insurance contract as resulting. *Guipre v. Kurt Hitke & Co. (1952) 109 Cal. App. 2d 7, 15, 240 P.2d 312*

[b] Pleading

Oral agreement of insurance which is basis of action as required to be set forth in complaint. *Law v. Northern Assurance Co. (1913) 165 Cal. 394, 401, 132 P. 590*

Sufficiency of complaint for damages for breach of oral agreement to renew fire insurance policy. *Gold v. Sun Ins. Co. (1887) 73 Cal. 216, 217-218, 14 P. 786*

[c] Usages of Trade

Contracts in reference to usages of trade. *Guipre v. Kurt Hitke & Co. (1952) 109 Cal. App. 2d 7, 14, 240 P.2d 312*

[5] Text References

27 Cal. Jur. 2d, *Insurance*, §§ 181-183

44 C.J.S., *Insurance*, §§ 249-261

[6] Cross References

For forms in support of and in opposition to plaintiff's motion for summary judgment in action against insurance company on alleged oral contract by agent, see California Points and Authorities, Ch. 120, *Insurance*

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26-308 California Forms of Pleading and Practice--Annotated § 308.372

§ 308.372 Allegation--Execution and Delivery of Binder by Defendant Insurer's Agent

[1] FORM Allegation--Execution and Delivery of Binder by Defendant Insurer's Agent

2. On or about _____ [*date*], in consideration of the payment of an annual premium of $_____ to be made by _____ [plaintiff *or name of insured if other than plaintiff*], defendant _____ [*name of insurance company*], by and through its duly authorized agent _____ [*name*], executed and delivered to _____ [plaintiff *or name of insured*] in _____ [*city, county, and state*] its _____ [binder *or* binding receipt *or* open-cover certificate *or* covering note *or specify other type of temporary coverage*], a copy of which is attached hereto as Exhibit A and made a part hereof, wherein defendant, insured _____ [plaintiff *or name of insured*] for the period from _____ [*date*], to _____ [*date*], against _____ [*risk assumed by insurer, e.g.*, loss or damage by fire of the premises therein described], in the sum of $_____, payable to plaintiff. Defendant failed to deliver any policy to _____ [plaintiff *or name of insured*] [, and plaintiff is unaware of the provisions usually inserted in such policies, except as herein set forth]. Moreover, defendant did not terminate this application for insurance by rejecting the application and notifying plaintiff of such reject and by refunding the premium payment to plaintiff prior to the date of the loss covered under the policy as hereinafter alleged.

[2] Use of Form

The allegation in this form is for use in place of Paragraph 2 of the *form in § 308.370*.

[3] Binders

A binder, binding receipt, open-cover certificate, or covering note is a written memorandum which affords the insured temporary coverage until the policy is issued by the insurer. Such binders are frequently written by agents to give the insured coverage while the insurer investigates the risk.

Such binders often are ambiguous as to when the temporary coverage under the binder is terminated either by rejection of the application or the issuance of a permanent policy. Because of this ambiguity provisions in a binder which make issuance of a permanent policy subject to company approval of the application but which are silent as to how and when the temporary coverage immediately created on its execution may, or will, be otherwise effectively terminated if and when the insurer rejects the application give rise to a contract of insurance immediately on receipt of the application and payment of the premium. Any provision that the company must be satisfied that the insured was acceptable at the date of the application creates only a right to terminate the contract if the company becomes dissatisfied with the risk before a policy is issued [*Ransom v. Penn Mut. Life Ins. Co. (1954) 43 Cal. 2d 420, 424, 274 P.2d 633]* . If the insurer does decide to reject the application for insurance, the contract of insurance immediately created on the receipt of the application and payment of the premium is not terminated until (a) the insurer has actually rejected the application and by appropriate notice communicated such rejection to the insured and (b) refunded the premium payment to the insured [*Smith v. Westland Life Ins. Co. (1975) 15 Cal. 3d 111, 121, 123 Cal. Rptr. 649, 539 P.2d 433* ; *see Hodgson v. Banner Life Ins. Co. (2004) 124 Cal. App. 4th 1358, 1369, 21 Cal. Rptr. 3d 907]* .

Practicality dictates that a temporary insurance binder issued on an application for insurance cannot contain all the details and terms of the proposed insurance contract. The imposition of such a requirement would frustrate the beneficial purpose of providing temporary coverage pending consideration of the application and would necessitate the immediate issuance of an entire written policy. Hence, insurance binders are adequate if they indicate the subject matter, the coverage period, the rate, and the amount of the insurance. Such binders are governed by the terms, conditions, and exclusions customarily contained in the standard policy issued by the issuer of the binder and in standard insurance policies used by insurance companies in general for the same or essentially similar coverage. That is, the binder is construed as being subject to the terms and conditions of the policy to be issued or of the policy ordinarily issued by the company, or, if there is a standard policy in the jurisdiction, according to the terms and conditions of that policy, and it is presumed that the parties contemplated such a policy, containing such conditions and limitations [*National Emblem Ins. Co. v. Rios (1969) 275 Cal. App. 2d 70, 76, 79 Cal. Rptr. 583]* .

[4] State Statutes

Binder changing inception hour of insurance contract. *Ins. Code § 460*

Covering notes as binding insurance pending issuance of policy. *Ins. Code § 382*

Inapplicability of *Ins. Code § 382* to mutual fire insurers and title insurers. *Ins. Code §§ 7060, 12400*

Violation of *Ins. Code § 382* as misdemeanor. *Ins. Code § 383*

Execution by admitted insurer of insurance contracts outside state on subject matter in state by temporary binders. *Ins. Code § 802*

[5] Decisions

Rule that insurance policies are to be construed liberally in favor of assured and that any uncertainty or ambiguity in insurance contract is to be interpreted most strongly against insurer as applying with greater force to covering agreements. *Victoria S.S. Co. v. Western Assurance Co. (1914) 167 Cal. 348, 353, 139 P. 807* (involving marine insurance)

Covering note as itself a contract of present insurance. *Law v. Northern Assurance Co. (1913) 165 Cal. 394, 402, 132 P. 590*

Covering notes or binding slips omitting to specify premium rate for insurance as construed by courts as implying customary rates. *Law v. Northern Assurance Co. (1913) 165 Cal. 394, 403, 132 P. 590*

Ins. Code § 10115, which imposes coverage obligation whenever conditions for issuance of life insurance policy have been satisfied, but formalities of issuance and deliverance have not occurred, does not rest on "reasonable expectation" of parties, based on language of conditional receipt and acceptance of initial premium payment. *Hodgson v. Banner Life Ins. Co. (2004) 124 Cal. App. 4th 1358, 1372-1373, 21 Cal. Rptr. 3d 907* ; *cf. Ransom v. Penn Mut. Life Ins. Co. (1954) 43 Cal. 2d 420, 425, 274 P.2d 633*

Assigned risk insurer is not bound on ground of ostensible agency by representation made by producer of policy that policy was to be effective immediately rather than on date it was issued as specified by insurer since producer could not and did not say what particular insurer was bound and insurer to assume risk was to be designated by manager of assigned risk plan and not by producer of policy. *Interinsurance Exch. v. Garrett (1975) 46 Cal. App. 3d 368, 373, 120 Cal. Rptr. 216*

Binder as temporary contract of insurance. *Spott Elec. Co. v. Industrial Indem. Co. (1973) 30 Cal. App. 3d 797, 805, 106 Cal. Rptr. 710*

Insurance company as obligated to issue policy when it provides binder policy; one-month liability policy binder of prior insurer as cancelled by substitution of new oral binder policy. *Spott Elec. Co. v. Industrial Indem. Co. (1973) 30 Cal. App. 3d 797, 805-808, 106 Cal. Rptr. 710*

Effect of binders. *National Emblem Ins. Co. v. Rios (1969) 275 Cal. App. 2d 70, 76, 79 Cal. Rptr. 583*

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26-308 California Forms of Pleading and Practice--Annotated § 308.373

§ 308.373 Allegation--Renewal of Policy

[1] FORM Allegation--Renewal of Policy

On or about _____ [*date*], defendant _____ [*name of insurance company*], in consideration of the payment of a premium of $_____, made by _____ [plaintiff *or name of insured if other than plaintiff*], executed and delivered to _____ [plaintiff *or name of insured*] its certificate of renewal of the policy, thereby extending coverage under the policy until _____ [*time*] on _____ [*date*]. A copy of the certificate of renewal is attached hereto as Exhibit B and made a part hereof.

[2] Use of Form

The allegation in this form is for use in conjunction with Paragraph 2 of the *form in § 308.370*, if the loss occurred during the policy renewal period.

[3] Decisions

Renewal of policy is affected by knowledge and acts of insurer and its agent in issuing original policy. *Allen v. Home Ins. Co. (1901) 133 Cal. 29, 33, 65 P. 138*

Insured's acceptance of offer to renew insurance estops insurer from subsequently asserting nonrenewal by retroactively cancelling the renewal policy from its inception; whether or not insured has accepted a renewal policy is determined from the totality of the circumstances. *Golden Eagle Ins. Co. v. Foremost Ins. Co. (1993) 20 Cal. App. 4th 1372, 1387-1389, 25 Cal. Rptr. 2d 242*

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26-308 California Forms of Pleading and Practice--Annotated § 308.374

§ 308.374 Allegation--Premium Paid During Grace Period

[1] FORM Allegation--Premium Paid During Grace Period

Page _____, paragraph _____, lines _____ of the policy, Exhibit A attached, provides that _____ [*specify, e.g.,* a grace period of 31 days will be granted for the payment of each premium falling due after the first premium, during which grace period the policy shall continue in full force and effect]. _____ [Plaintiff *or name of insured if other than plaintiff*], on _____ [*date*], during the grace period, paid to defendant the sum of $_____, the full amount of the premium that fell due on _____ [*date*].

[2] Use of Form

The allegation in this form is for use in conjunction with Paragraph 2 of the *form in § 308.370*.

[3] Grace Period

Insurance policies frequently contain a provision granting an extension of a certain number of days after the due date of renewal premiums within which the premium can be paid without resulting in a lapse of coverage for failure to pay on or before the due date. Such periods are referred to as "grace periods" [*see, e.g., Ins. Code §§ 10244(1)* (funeral insurance contract), 10291.5(b)(12), 10350.3 (disability insurance policies)].

Payment of the renewal premium within the grace period is to be distinguished from a reinstatement of a policy lapsed for nonpayment of premium by acceptance of a late renewal premium [*see § 308.375*].

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26-308 California Forms of Pleading and Practice--Annotated § 308.375

§ 308.375 Allegation--Reinstatement of Policy by Acceptance of Late Renewal Premium

[1] FORM Allegation--Reinstatement of Policy by Acceptance of Late Renewal Premium

Page _____, paragraph _____, lines _____, of the policy, Exhibit A attached, provides that _____ [*specify, e.g.,* if any renewal premium be not paid within the time granted the insured for payment, a subsequent acceptance of premium by the insurer or by any agent duly authorized by the insurer to accept such premium, without requiring in connection therewith an application for reinstatement, shall reinstate the policy]. _____ [Plaintiff *or name of insured if other than plaintiff,* failed to pay the premium due on _____ [*date*], and, by its terms, the policy lapsed on _____ [*date*], for nonpayment of premiums. On or about _____ [*date*], _____ [plaintiff *or name of insured*] tendered to defendant [a check in] the sum of $_____, which was the full amount of the premium then due, and defendant accepted the payment without requiring an application for reinstatement. [A copy of the canceled check is attached hereto as Exhibit B and made a part hereof.]

[2] Use of Form

The allegation in this form is for use in conjunction with Paragraph 2 of the *form in § 308.370* if the loss occurred after application for reinstatement of the policy was made.

[3] Reinstatement of Policy

Insurance policies frequently contain provisions for their reinstatement after lapse for nonpayment of premium by the insurer's acceptance of a late payment of the premium [*see, e.g.,* Ins. Code §§ 10334, *10350.4* (reinstatement of accident, sickness, and disability policies)].

[4] Renewal of Policy

To effect the renewal of an insurance policy, both an offer to renew and acceptance of the offer are required [*Fujimoto v. Western Pioneer Ins. Co. (1978) 86 Cal. App. 3d 305, 313, 150 Cal. Rptr. 88]* .

[5] Waiver of Late Payment

When the insured relies on waiver of prompt payment of the premium to impose liability on the insurer, that waiver must be pleaded or else the court may not consider if acceptance of a past due premium with knowledge that a loss was sustained during the period of default constitutes a waiver and restores the policy to its full effect, without interruption, from the beginning of the renewal period and not from the date of receipt of the payment [*Fujimoto v. Western Pioneer Ins. Co. (1978) 86 Cal. App. 3d 305, 310*].

[6] State Statutes

Payment of premium in connection with renewal of automobile insurance policy. *Ins. Code § 663*

Reinstatement provisions in accident and sickness policies. Ins. Code § 10334

Reinstatement provisions in disability insurance policies. *Ins. Code § 10350.4*

[7] Decisions

Waiver by insurer of clause in policy requiring prompt payment of renewal premiums. *Lincke v. Mutual Benefit Health & Accident Ass'n (1946) 76 Cal. App. 2d 222, 226-230, 172 P.2d 912*

By receiving and depositing insured's check in payment of premium tendered after lapse of grace period provided in disability insurance policy [*Ins. Code § 10350.4*] before apprising insured that money was being retained conditionally and that application would be required for reinstatement, insurer as having "accepted" premium within meaning of policy and policy as immediately reinstated. *Ryman v. American Nat'l Ins. Co. (1971) 5 Cal. 3d 620, 627, 96 Cal. Rptr. 728, 488 P.2d 32*

Termination of policy for nonpayment of balance of annual premium as not operating as condition subsequent to terminate liability attaching while policy was in force. *Joyce v. United Ins. Co. (1962) 202 Cal. App. 2d 654, 667, 21 Cal. Rptr. 361*

Failure of insurer to give insured 20-day notice required by *Ins. Code § 663* of its intention not to renew policy as operating to effect automatic renewal of policy beyond its renewal-expiration date irrespective of insured's nonpayment of renewal premium on that date. *State Farm Mut. Auto. Ins. Co. v. Brown (1974) 40 Cal. App. 3d 385, 391, 398, 115 Cal. Rptr. 213* (interpreting *Ins. Code § 663* prior to 1974 reenactment); *see also Fujimoto v. Western Pioneer Ins. Co. (1978) 86 Cal. App. 3d 305, 312, 150 Cal. Rptr. 88* (interpreting *State Farm* in light of 1975 reenactment of *Ins. Code § 663*)

Insured's misrepresentation in application to reinstate life insurance policy that lapsed for nonpayment of premium as possibly voiding policy though he did not intend to deceive. *McAuliffe v. John Hancock Mut. Life Ins. Co. (1966) 245 Cal. App. 2d 855, 857, 54 Cal. Rptr. 288*

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26-308 California Forms of Pleading and Practice--Annotated § 308.376

§ 308.376 Allegation--Execution of Reinsurance Agreement by Which Reinsurer Assumed Outstanding Policies of Insured

[1] FORM Allegation--Execution of Reinsurance Agreement by Which Reinsurer Assumed Outstanding Policies of Insured

On or about _____ [*date*], _____ [*name of defunct insurance company*] and defendant _____ [*name of reinsurer*] entered into a reinsurance agreement by the terms of which the latter assumed all the outstanding policies of the former and agreed to settle and pay all claims arising therefrom. [A copy of the agreement is attached hereto as Exhibit B and made a part hereof.]

[2] Use of Form

The allegation in this form is for use in conjunction with Paragraph 2 of the *form in § 308.370*.

[3] Interest of Insured

The original insured has no interest in a contract of reinsurance [*Ins. Code § 623*; *see also Ascherman v. General Reinsurance Corp. (1986) 183 Cal. App. 3d 307, 311, 228 Cal. Rptr. 1* ; *Grbavach v. Casualty Co. of Am. (1919) 40 Cal. App. 376, 377, 180 P. 835]* . But the insured does have an interest where the reinsurer assumes all the outstanding policies and agrees to settle and pay all claims arising from them [*Sawyer v. Sunset Mut. Life Ins. Co. (1937) 8 Cal. 2d 492, 496, 66 P.2d 641]* . Such a contract is not, in effect, a contract of reinsurance, but rather, a contract made for the benefit of third parties [*Columbia Cas. Co. v. Industrial Accident Comm'n (1936) 5 Cal. 2d 770, 778, 56 P.2d 527]* .

[4] State Statutes

"Reinsurance contract" defined. *Ins. Code § 620*

Nature of contract. *Ins. Code § 621*

Interest of original insured. *Ins. Code § 623*

Reinsurance and rehabilitation agreements in insolvency and delinquency proceedings. *Ins. Code § 1043*

Approval of reinsurance plans. *Ins. Code § 1090*

[5] Decisions

Trial court as properly ruling that insured did not state cause of action for declaratory relief under reinsurance contract when terms of reinsurance contract reveal that it was intended to benefit insurance company, not original insured. *Ascherman v. General Reinsurance Corp. (1986) 183 Cal. App. 3d 307, 312, 228 Cal. Rptr. 1*

Interest of original insured in contract of reinsurance. *Sawyer v. Sunset Mut. Life Ins. Co. (1937) 8 Cal. 2d 492, 496, 66 P.2d 641* ; *Columbia Cas. Co. v. Industrial Accident Comm'n (1936) 5 Cal. 2d 770, 778, 56 P.2d 527* ; *Grbavach v. Casualty Co. of Am. (1919) 40 Cal. App. 376, 377, 180 P. 835*

Rehabilitation agreement [*see Ins. Code § 1043*] as one in which Insurance Commissioner and reinsurer agree that reinsurer will assume all or part of risks of insolvent insurer. *Caminetti v. Pacific Mut. Life Ins. Co. (1943) 22 Cal. 2d 344, 351, 139 P.2d 908*

[6] Law Reviews

Staring, *The Law of Reinsurance Contracts in California in Relation to Anglo-American Common Law, 23 U.S.F. L. Rev. 1 (1988)*

Comment, *Reinsurance and Insurer Insolvency: The Problem of Direct Recovery by the Original Insured or Injured Claimant, 29 UCLA L. Rev. 872 (1982)*

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§ 308.377 Allegations--Performance of Conditions Precedent [Code Civ. Proc. § 457] Under Insurance Policy

[1] FORM Allegations--Performance of Conditions Precedent [Code Civ. Proc. § 457] Under Insurance Policy

Plaintiff [and the insured] performed all the conditions on his/her/its/their part to be performed under the terms of the policy.

[*OR*]

Plaintiff [and the insured] performed each and every act and thing required of him/her/it/them to be performed in accordance with the terms and conditions of the policy.

[*OR*]

Plaintiff [and the insured] performed all conditions and agreements not otherwise waived or excused, as provided in the policy.

[*OR*]

In compliance with the terms of the policy, plaintiff [and the insured] furnished defendant insurer with notice and _____ [proof *or* loss] of loss and _____ [has or have] otherwise performed all the conditions of the policy on his/her/its/their part to be performed.

[*OR*]

Plaintiff [and the insured] performed all conditions of the policy on his/her/its/their part to be performed; up to the time of loss, as herein alleged, all premiums on the policy were fully paid; in accordance with the terms of the policy, written notice and _____ [proof *or* loss] of loss were furnished to defendant on or about _____ [*date within time required by policy*], [on a form furnished by the defendant].

[2] Use of Form

The allegations in this form are alternatives to the allegation set forth in Paragraph 5 of the form in *§ 308.370*.

[3] State Statutes

Alleging performance of conditions precedent. *Code Civ. Proc. § 457*

[4] Decisions

Requirement that plaintiff's performance or excuse for nonperformance be alleged in action on insurance contract. *Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377*

Code Civ. Proc. § 457, which provides that in pleading performance of conditionsprecedent in contract it is not necessary to state facts showing such performance, but it may be stated generally that party duly performed all conditions on his part and if such allegation be controverted, party pleading must establish on trial facts showing such performance, as applicable in actions on insurance policies. *Phillips v. Reserve Life Ins. Co. (1954) 128 Cal. App. 2d 540, 546, 275 P.2d 554*

In action on fire insurance policy, plaintiff insured as required to aver performance of all conditions on his part to be kept and performed; hence, pleading of performance of all promissory warranties as required. *Breedlove v. Norwich Union Fire Ins. Soc'y (1899) 124 Cal. 164, 168, 56 P. 770*

Pleading of conditions precedent, such as giving of any required notice of loss, and performance of all promissory warranties, as essential; but limitations, stipulations, and conditions which are in nature of conditions subsequent and go to defeat liability of insurer as matters of defense which, to be available to in surer, must be alleged in answer. *Arnold v. American Ins. Co. (1906) 148 Cal. 660, 668, 84 P. 182*

Allegation that all conditions required by policy to be performed by insured were duly performed and kept as sufficient allegation under *Code Civ. Proc. § 457* of performance of conditions precedent. *Blasingame v. Home Ins. Co. (1888) 75 Cal. 633, 638, 17 P. 925*

In action on fire insurance policy providing for payment within 60 days after proof and ascertainment of loss, complaint as required to allege that such period of 60 days had expired before suit; allegation that plaintiff duly performed all conditions on his part as not aiding complaint with respect to lapse of requisite period. *Cowan v. Phoenix Ins. Co. (1889) 78 Cal. 181, 188, 20 P. 408*

While allegations of performance of conditions precedent are essential to statement of cause of action on insurance policy, failure to so allege as waived where by its answer defendant alleges that terms and conditions of policy had not been performed, thus treating issue as properly made and curing defect. *Zimmerman v. Continental Life Ins. Co. (1929) 99 Cal. App. 723, 725-726, 279 P. 464*

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§ 308.378 Allegation--Loss Payable Clause

[1] FORM Allegation--Loss Payable Clause

The policy was made for the benefit of plaintiff _____ [*name*] as the insured, and _____ [plaintiff *or* defendant] _____ [*name of loss-payable payee*]; as provided in the policy, payment of loss under the terms of the policy became due and payable to _____ [plaintiff *or* defendant] _____ [*name of loss-payable payee*] as the loss-payable payee, as his/her/its interest may appear. [Plaintiff has requested defendant _____ (*name of loss-payable payee*) to join as a party plaintiff in this action, but said defendant failed and refused to do so and is, therefore, made a party defendant herein.]

[2] Use of Form

The allegations in this form are usually included if the insurance policy contains a loss-payable clause (or a mortgage clause in which case the allegation would be appropriately reworded), providing that in the event of loss a certain part, or all, of the proceeds should be paid to the loss payable payee, as the payee's interest may appear. The allegations are usually inserted in the complaint after the allegations of execution of the insurance contract. For example, see Paragraph 2 of the form in *§ 308.370*.

[3] State Statutes

Joining unwilling plaintiff as defendant. *Code Civ. Proc. § 382*

[4] Decisions

Provisions of loss-payable indorsement attached to insurance policy as controlling over any contrary provisions in body of policy. *Chase v. National Indem. Co. (1954) 129 Cal. App. 2d 853, 859, 278 P.2d 68*

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Volume 26: Injunctions thru Insurance-Chs. 303-313
Chapter 308 INSURANCE
PART IV. FORMS
A. Actions Against Insurance Companies to Recover Insurance Contract Benefits
1. In General

26-308 California Forms of Pleading and Practice--Annotated § 308.379

§ 308.379 Complaint by Insured Against Insurance Company for Actual [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for Tortious Breach of Insurance Contract--General Form

[1] FORM Complaint by Insured Against Insurance Company for Actual [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for Tortious Breach of Insurance Contract--General Form

[*Caption, introduction. See § 308.370.*]

1. Defendant is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of _____ with its principal place of business in _____ County, California, and authorized to transact, and transacting, business in California as _____ [*specify, e.g.,* an automobile liability] insurer [*or other allegation of capacity and authority as appropriate*].

2. At all times herein mentioned, plaintiff had in full force and effect a written _____ [*specify, e.g.,* automobile] insurance policy, number _____, hereinafter referred to as "the policy," issued to plaintiff as the insured by defendant and covering _____ [*specify, e.g.,* a _____ (*year, make, and model*) automobile, California license number _____, hereinafter referred to as "the automobile," of which plaintiff was the registered owner]. Implied in the policy was a covenant by the defendant that it would act in good faith and deal fairly with the insured and that it would do nothing to interfere with the rights of the insured to receive the benefits of the agreement.

3. The policy, among other things, provided coverage _____ [*specify, e.g.,* for injuries and damages sustained by occupants of the automobile as a result of the negligence of uninsured motorists] as follows: _____ [*set forth policy provision, e.g.,* "The Company will pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness, or disease, including death resulting therefrom, hereinafter called 'bodily injury', sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured

automobile, provided, for the purpose of this policy, determination as to whether the insured or such representative is legally entitled to recover such damages and, if so, the amount thereof shall be made by agreement between the insured or such representative and the Company or, if they fail to agree, by arbitration"]. The limit of liability under the _____ [*specify, e.g.*, uninsured motorist] coverage was $_____ [*specify, e.g.*, $15,000 for each person and $30,000 for each accident].

4. On or about _____ [*date*], _____ [*specify occurrence of covered loss, e.g.*, near Grants, New Mexico, plaintiff was riding as an occupant in the automobile which was being operated by plaintiff's wife, _____ (*name*), when, without any fault on the part of plaintiff or his wife, who had at the time been married to each other for over 30 years, the automobile was negligently struck by an uninsured motorist which proximately resulted in the immediate death of plaintiff's wife. At the time of her death, plaintiff's wife was _____ (*specify, e.g.*, 58) years of age and up to the time of her death had been working part time with earnings of approximately $_____ (*specify, e.g.*, $100 per week)].

5. By the provisions of the policy defendant represented to plaintiff that if plaintiff complied with all the terms and conditions of the policy defendant would _____ [*specify, e.g.*, pay to plaintiff the amount of damages up to the policy limit which he was "legally entitled to recover" from the uninsured motorist in the event of injury to or death of occupants in the automobile caused by the uninsured motorist]. Plaintiff duly complied with all the terms and conditions of the policy on his part to be performed and _____ [*specify, e.g.*, was "legally entitled to recover" damages in excess of $_____ (*specify, e.g.*, $100,000) from the uninsured motorist for the wrongful death of his wife. Consequently, plaintiff became entitled to receive from defendant payment in the amount of $15,000, the policy limit, for the death of his wife as hereinabove alleged].

[*Allege defendant's wrongful conduct, of which the following Paragraphs 6-10 are illustrative.*]

6. Defendant's above-stated representation in its policy was false and fraudulent in that defendant never intended _____ [*specify, e.g.*, to pay a sum equal to its policy limit in settlement of a claim under the uninsured motorist provision of the policy where the insured was "legally entitled to recover" at least that amount from the uninsured motorist, but instead had a fixed and firm policy of contesting all uninsured motorist claims where it could not negotiate a settlement for a sum of money which was substantially less than the policy limit]. At the time defendant entered into the insurance contract with plaintiff, defendant willfully concealed the above facts, all for the purpose of defrauding and deceiving plaintiff and inducing him to purchase the policy.

7. Plaintiff, at the time the representation was made, believed it to be true and, in reliance on it, was induced to, and did, enter into the insurance contract with defendant; had plaintiff known the true facts, he would not have purchased the policy.

8. At all times herein material, defendant knew that _____ [*specify, e.g.*, the amount plaintiff was "legally entitled to recover" as damages from the uninsured motorist for the wrongful death of his wife exceeded the sum of $15,000 and that defendant was therefore obligated to pay plaintiff the full $15,000].

9. Notwithstanding defendant's knowledge of its obligation _____ [*specify, e.g.*, to pay plaintiff the full $15,000] it _____ [*specify, e.g.*, admitted to plaintiff that it was liable under the uninsured motorist provision of thepolicy but offered plaintiff only the sum of $5,000. Plaintiff rejected this offer and demanded payment of the full $15,000].

10. For the sole purposes of _____ [*specify, e.g.*, compelling plaintiff to accept a lesser sum in settlement of his claim or, if he persisted in seeking more, to incur substantial detriment, delay, and additional expenditures in pursuing enforcement of his claim, all during which time defendant would retain use of the money],

defendant, in breach of its covenant of good faith and fair dealing, intentionally, maliciously, and oppressively refused and failed to _____ [*specify, e.g.*, pay plaintiff the $15,000] in accordance with the terms of the policy.

11. As a direct and proximate result of defendant's wrongful conduct as herein alleged, plaintiff _____ [*specify, e.g.*, was compelled to present his claim in arbitration and in connection therewith to incur attorney's fees in the sum of $_____ (*specify, e.g.*, $2,000) and costs in the sum of $_____ (*specify, e.g.*, $40). At the hearing before the arbitrator defendant stipulated to all fundamental proofs and admitted all of plaintiff's contentions except the issue of damages. Consequently, the only issue to be decided by the arbitrator was the amount of damages to be awarded plaintiff for the death of his wife. The arbitrator awarded plaintiff the full $15,000, the policy limit. A copy of the arbitrator's decision and a copy of his award are attached hereto as Exhibits A and B, respectively, and made a part hereof].

[*If defendant has fully paid the policy limit of coverage, specifically allege nature and extent of economic damages caused by interim breach, as illustrated in Paragraph 12.*]

12. As a direct and proximate result of defendant's unreasonable delay in paying policy benefits until _____ [*date*], _____ [*specify, e.g.*, plaintiff lacked sufficient funds to pay his mortgage and lost his home of 15 years in foreclosure proceedings on _____ (*date*)].

[*CONTINUE*]

13. As a further direct and proximate result of defendant's wrongful conduct as herein alleged, plaintiff sustained emotional and mental distress and anguish, embarrassment, mortification, humiliation, and indignity, all to his general damage in the additional sum of $_____ [*specify, e.g.*, $20,000].[Set forth any additional special or general damages in separately numbered paragraphs.]

[14. In committing the acts described in this complaint, defendant acted in conscious disregard of the rights of plaintiff and was guilty of _____ [malice *and/or* oppression *and/or* fraud] in that _____ [*specify facts constituting malice, oppression, or fraud*]. The conduct of defendant warrants an assessment of punitive damages in an amount appropriate to punish defendant and deter others from engaging in similar wrongful conduct.]

[*Set forth prayer. The following is based on the illustrative fact situation alleged above*.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ [*specify, e.g.*, $2,000] as attorney's fees, plus legal costs in the sum of $_____ [*specify, e.g.*, $40], incurred in the handling of the claim before the arbitrator;

2. For interest at the legal rate on the sum of $_____ [*specify, e.g.*, $15,000] from the date it should have been paid to _____ [*date*], the date it was finally paid;

3. For general damages for mental suffering and emotional distress;

[4. *Allege amount of additional special damages, if any*;]

[5. For exemplary and punitive damages;]

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 308.370.*]

[2] Use of Form

This complaint is for use in an action by an insured against his or her insurer for damages for tortious breach of contract. The illustrative fact situation is adapted from the one that gave rise to the contempt proceeding reported in *In re Bongfeldt (1971) 22 Cal. App. 3d 465, 99 Cal. Rptr. 428* . For a discussion of the essential allegations of the complaint, the number of copies to prepare, and verification, see *§ 308.370*. For a form of complaint alleging the insurer's fraud and intentional infliction of mental distress, see *§ 308.380*. For complaints against liability insurers for damages for breach of the duty to defend or to settle, see *§§ 308.462* and *308.463*.

[3] Covenant of Good Faith

There is an implied covenant of good faith and fair dealing in every contract, including insurance policies, that neither party will do anything that will injure the right of the other to receive the benefits of the agreement. Hence, an insurer has a duty to act in good faith and fairly in handling the claim of an insured, namely, a duty not to withhold unreasonably payments due under a policy. Thatresponsibility is not the requirement mandated by the terms of the policy, but rather an obligation imposed by law under which the insurer must act fairly and in good faith in discharging its contractual responsibilities. An insurer's refusal, without proper cause, to compensate its insured for a loss covered by the policy may give rise to a cause of action in tort for breach of the implied covenant of good faith and fair dealing [*Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 563-574, 108 Cal. Rptr. 480, 510 P.2d 1032* (fire policy); *Mustachio v. Ohio Farmers Ins. Co. (1975) 44 Cal. App. 3d 358, 363, 118 Cal. Rptr. 581* (same); *see also Richardson v. Employers Liab. Assurance Corp. (1972) 25 Cal. App. 3d 232, 239, 102 Cal. Rptr. 547 , disapproved on other grounds, Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032* (indemnity under uninsured motorist provision of automobile liability policy); *Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 401-402, 89 Cal. Rptr. 78* (disability policy)].

The insurer's duty to act in good faith and fairly is unconditional and independent of the performance of the insured's contractual obligations. It is absolute [*Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 578, 108 Cal. Rptr. 480, 510 P.2d 1032* ; *see also Cain v. State Farm Mut. Auto. Ins. Co. (1975) 47 Cal. App. 3d 783, 797, 121 Cal. Rptr. 200]* .

For further discussion, see *§ 308.24*.

[5] When Cause of Action Arises

The covenant of good faith and fair dealing does not arise prior to the existence of a contractual relationship between the contracting parties. Consequently, for example, an insurer's precontractual conduct in evaluating the health of an applicant for insurance is not conduct that will support a cause of action for bad faith [*Hess v. Transamerica Occidental Life Ins. Co. (1987) 190 Cal. App. 3d 941, 945, 235 Cal. Rptr. 715]* .

If a contractual relationship does exist between the insurer and insured, and a complaint for bad faith is filed prior to the insurer's denial of the claim, the defect in the cause of action is considered to be procedural in nature, and the pleading is not subject to dismissal as long as the insurer's conduct that was anticipated by the plaintiff occurred prior to litigation of the case [*Virgin v. State Farm Fire & Cas. Co. (1990) 218 Cal. App. 3d 1372, 1375-1377, 267 Cal. Rptr. 704]* .

[6] Preemption by Federal Law

[a] ERISA

An action brought under state law, asserting improper processing of a claim for benefits under an employee benefit plan subject to the Employee Retirement Income Security Act of 1974 [*29 U.S.C.S. § 1001 et seq.*] is preempted by federal law [*Pilot Life Ins. Co. v. Dedeaux (1987) 481 U.S. 41, 57, 107 S. Ct. 1549, 95 L. Ed. 2d 39]* . However, under ERISA's "insurance saving clause," laws that "regulate insurance" are saved from preemption [*29 U.S.C.S. § 1144(b)(2)(A)*]. In an action regarding a disability employee benefit plan under a group insurance policy, the United States Supreme Court held that the applicable state common law of bad faith did not "regulate insurance" for purposes of the exemption under *29 U.S.C.S. § 1144(b)(2)(A)*, because, even though the state law was associated with the insurance industry, the law developed from general principles of tort and contract law available in any breach of contract case in that state [*Pilot Life Ins. Co. v. Dedeaux (1987) 481 U.S. 41, 50-51, 107 S. Ct. 1549, 95 L. Ed. 2d 39]* . For a state law to be deemed a "law ... [that] regulates insurance" under *29 U.S.C.S. § 1144(b)(2)(A)*, it must satisfy two requirements: (1) it must be specifically directed toward entities engaged in insurance; and (2) it must substantially affect the risk pooling arrangement between the insurer and the insured [*Kentucky Ass'n of Health Plans, Inc. v. Miller (2003) 538 U.S. 329, 341-342, 123 S. Ct. 1471, 155 L. Ed. 2d 468* (Kentucky "Any Willing Provider" statutes, which prohibit health insurers from discriminating against any willing provider who is located within geographic coverage area of health benefit, fell within purview of *29 U.S.C.S. § 1144(b)(2)(A)* and were not preempted by ERISA as asserted by HMOs)].

Although the United States Supreme Court has not decided the issue, other courts have held that statutory bad faith actions are also preempted by ERISA, the savings clause notwithstanding [*Kanne v. Connecticut Gen. Life Ins. Co. (9th Cir. 1988) 867 F.2d 489, 493-494* ; *Commercial Life Ins. Co. v. Superior Court (1988) 47 Cal. 3d 473, 483-485, 253 Cal. Rptr. 682, 764 P.2d 1059]* . Moreover, both *Pilot Life* and *Commercial Life* are fully retroactive in effect [*Faria v. Northwestern Nat'l Life Ins. Co. (1989) 216 Cal. App. 3d 1129, 1134, 265 Cal. Rptr. 309]* . In any event, the California Supreme Court has abrogated prospectively the right of a third-party claimant to sue under *Ins. Code § 790.03(h)*, and held that no private cause of action was intended by the enactment of the Unfair Claims Settlement Practices Act (*Ins. Code § 790 et seq.*) [*Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58* , overturning *Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, 885-888, 153 Cal. Rptr. 842, 592 P.2d 329* prospectively; *see § 308.126*]. Absent the enactment of legislation to the contrary, elimination of first-party standing under the analysis of *Moradi-Shalal* will leave only a common-law bad faith remedy in California, which will be subject to preemption by ERISA under the appropriate circumstances.

Moreover, state common law claims asserting the improper processing of a claim for benefits under an ERISA-regulated employee benefit plan are not only preempted by ERISA, but are also so completely displaced by ERISA's civil enforcement provision under *29 U.S.C.S. § 1132(a)(1)(B)* that complaints pur porting to plead those common law causes of action are removable to federal court, even if only the defenses thereto arise under federal law [*Metropolitan Life Ins. Co. v. Taylor (1987) 481 U.S. 58, 63-67, 107 S. Ct. 1542, 95 L. Ed. 2d 55* (suit was necessarily federal in character pursuant to congressional intent in enacting ERISA civil enforcement provisions)].

[b] Federal Labor Laws

The federal Labor-Management Relations Act (*29 U.S.C.S. § 141 et seq.*) may preempt state bad faith actions that arise from a collective bargaining agreement [*see* *Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202, 208-213, 105 S. Ct.*

1904, 85 L. Ed. 2d 206] . When resolution of a state law claim is substantially dependent on analysis of the terms of an agreement in a labor contract, preemption of a bad faith action is required to preserve the central role of arbitration in labor-management relations and to prevent parties from sidestepping grievance procedures by bringing tort actions in state court [*Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202, 215-220, 105 S. Ct. 1904, 85 L. Ed. 2d 206]* .

[c] Other Federal Laws

The Federal Employee Health Benefits Act (*5 U.S.C.S. § 8901 et seq.*) preempts an insured's state-law bad faith claims, pursuant to its preemption clause under *5 U.S.C.S. § 8902(m)(1)*, if the state law claims invariably expand the insurer's obligations under the terms of the federal plan, and are therefore inconsistent with it [*Hayes v. Prudential Ins. Co. of Am. (9th Cir. 1987) 819 F.2d 921, 925-926* ; *Hartenstine v. Superior Court (1987) 196 Cal. App. 3d 206, 217, 241 Cal. Rptr. 756]* .

[7] Affirmative Defense of Comparative Negligence

A court of appeal has held that the affirmative defense of comparative negligence is available to an insurer in a bad faith action [*Patrick v. Maryland Cas. Co. (1990) 217 Cal. App. 3d 1566, 1575, 267 Cal. Rptr. 24]* . In that case, the insurer was held entitled to a jury instruction regarding comparative negligence principles in a bad faith action arising from the insurer's delay of benefit payments, in which the insured sought to recover physical injury damages that he alleged were proximately caused by the delay. The insurer alleged that the insured's negligent conduct in falling off the roof of his house while attempting to make the repairs entitled it to a comparative negligence instruction under *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226* , and the court of appeal agreed [*Patrick v. Maryland Cas. Co. (1990) 217 Cal. App. 3d 1566, 1571-1575, 267 Cal. Rptr. 24]* . However, counsel should note that it is not clear that damages other than for physical injuries should be reduced, if they were not affected by the plaintiff's negligence [*cf. Franklin v. Gibson (1982) 138 Cal. App. 3d 340, 343-344, 188 Cal. Rptr. 23* (raising issue of apportionment of plaintiff's fault among severable elements of damage when that fault did not contribute to all injuries)].

In *Kransco v. American Empire Surplus Lines Ins. Co. (2000) 23 Cal. 4th 390, 97 Cal. Rptr. 2d 151, 2 P.3d 1* , the California Supreme Court discussed *Patrick* in the context of a case in which it held that an insurer may not raise an affirmative defense of comparative bad faith in a negligence action [*Kransco v. American Empire Surplus Lines Ins. Co. (2000) 23 Cal. 4th 390, 394, 97 Cal. Rptr. 2d 151, 2 P.3d 1 , see § 308.110* et seq.]. In *Kransco*, the insurer appealed a bad faith judgment against it in a case in which the insurer had raised both "comparative bad faith," and comparative negligence as affirmative defenses against the insured. Review was granted on the issue of comparative bad faith, but the Court also discussed the issue of comparative negligence in the context of this case, a third-party liability case. The Court noted that the insurer based this defense on *Patrick*. The Court emphasized that it did not grant review on the propriety of the comparative negligence instructions given at trial and accordingly did not address that issue in its opinion. It did however, discuss *Patrick*, noting that the extension of comparative negligence principles to first party insurance bad faith actions in *Patrick* was inapposite to the third party insurance bad faith action before it, which was factually distinguishable. The Court stated, however, that *Patrick* does not shield a third party insurer from full responsibility for its bad faith failure to settle a case, even if the insured's litigation misconduct or mishandling of the claim inflated the size of the verdict, although evidence of misconduct may support contract defenses, cross-claims, or separate causes of action for breach of the terms of the insurance contract that are otherwise available to the insurer [*Kransco v. American Empire Surplus Lines Ins. Co. (2000) 23 Cal. 4th 390, 412, 97 Cal. Rptr. 2d 151, 2 P.3d 1]* .

[8] Damages

A breach of the covenant of good faith and fair dealing by the insured sounds in both contract and tort [*Johansen v. California State Auto. Ass'n Inter-Ins. Bureau (1975) 15 Cal. 3d 9, 18, 123 Cal. Rptr. 288* ; *see also Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 575, 108 Cal. Rptr. 480, 510 P.2d 1032]* . The insured may recover damages for all

detriment resulting from the breach, including mental distress [*Silberg v. California Life Ins. Co. (1974) 11 Cal. 3d 452, 561-561, 113 Cal. Rptr. 711, 521 P.2d 1103* ; *Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 940, 122 Cal. Rptr. 470* ; *Civ. Code § 3333*] and, in a proper case, may recover punitive damages under *Civ. Code § 3294* as well [*Cain v. State Farm Mut. Auto. Ins. Co. (1975) 47 Cal. App. 3d 783, 793, 121 Cal. Rptr. 200]* . Attorney's fees reasonably incurred in compelling an insurer to pay benefits wrongfully withheld, including fees incurred in bringing breach of contract action against the insurer, are recoverable as damages in a separate action in tort against the insurer for breach of the covenant of good faith. The attorney'sfees incurred in bringing the tort action itself, however, are not recoverable [*Brandt v. Superior Court (1985) 37 Cal. 3d 813, 819-820, 210 Cal. Rptr. 211, 693 P.2d 796]* . Furthermore, if contingent fees are involved, the trier of fact must determine the percentage of the legal fees paid to the attorney that reflects the work attributable to obtaining the contract recovery. No portion of legal fees attributable to a punitive damages award can be recovered as *Brandt* fees [*Cassim v. Allstate Ins. Co. (2004) 33 Cal. 4th 780, 811-812, 16 Cal. Rptr. 3d 374, 94 P.3d 513]* .

[9] Mental Suffering

Mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of. Hence, in an action by an insured against the insurer for damages for breach of the duty of good faith and fair dealing, it is not essential to plaintiff's claim for damages for emotional distress that the insured allege, as is required in an action for damages based on the independent tort of intentional infliction of emotional distress, "extreme" and "outrageous" conduct by the defendant [*see* Restatement (Second) of Torts § 46], but, rather, it is sufficient that the insured allege, in addition to mental distress, facts showing that the insured has suffered substantial economic losses as a result of defendant's conduct, apart from the mental distress [*Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 579-580, 108 Cal. Rptr. 480, 510 P.2d 1032* ; *see Frazier v. Metropolitan Life Ins. Co. (1985) 169 Cal. App. 3d 90, 107-108, 214 Cal. Rptr. 883]* . The losses sustained need not be compensable, however. The courts may adjudicate negligence claims for mental distress when sufficient guarantees of genuineness are found in the facts of the case--for example, when the plaintiff has suffered substantial damage apart from the alleged emotional injury [*Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 937, 122 Cal. Rptr. 470* (affirming judgment for four plaintiffs for $50,000 each for emotional distress where plaintiffs' financial and property interests had been damaged in the amount of $7,270 ($170 for loss of use of portion of land subject to recorded but unreported easement and $7,100 attorney's fees in action to quiet title against easement) which sum was also awarded to plaintiffs in the judgment)].

In customary bad faith cases, the essence of the emotional distress suffered usually is anxiety arising from financial deprivation caused by the nonpayment of an insurance claim [*Blake v. Aetna Life Ins. Co. (1979) 99 Cal. App. 3d 901, 924-925, 160 Cal. Rptr. 528]* . However, a plaintiff who meets the threshold requirement of showing economic loss may recover damages for emotional distress caused by the insurer's bad faith without showing any causal link between the economic loss and emotional distress [*Clayton v. United Servs. Auto. Ass'n (1997) 54 Cal. App. 4th 1158, 1160-1162, 63 Cal. Rptr. 2d 419]* .

[10] Decisions

[a] Arbitration

Arbitrator's decision on insured's right to uninsured motorist coverage as not precluding subsequent civil action by insured against insurer based on breach of covenant of good faith; theories of res judicata and collateral estoppel as not applicable because issues in arbitration not identical to issues in civil action. *Corral v. State Farm Mut. Auto Ins. Co. (1979) 92 Cal. App. 3d 1004, 1009-1014, 155 Cal. Rptr. 342* ; *contra Rios v. Allstate Ins. Co. (1977) 68 Cal. App. 3d 811, 818-819, 137 Cal. Rptr. 441*

[b] Attorney's Fees

In bad faith action against insurer, attorney's fees as improperly awarded with respect to legal services attributable to any portion of plaintiff's recovery which exceeded amount due under policy. *Dinkins v. American Nat'l Ins. Co. (1979) 92 Cal. App. 3d 222, 234, 154 Cal. Rptr. 775*

[c] Covenant of Good Faith

Insurer's course of conduct, designed to mislead insured into forfeiting contractual right to impartial review of claim denial, constitutes a breach of covenant of good faith and fair dealing; judgment on directed verdict for plaintiff on that issue is proper. *Sarchett v. Blue Shield of Cal. (1987) 43 Cal. 3d 1, 13-15, 233 Cal. Rptr. 76, 729 P.2d 267*

Insurer did not commit bad faith by refusing policy-limits settlement offer that included release of only one of its three insureds; insurer may, within boundaries of good faith, reject settlement offer that does not include a complete release of all its insureds. *Strauss v. Farmers Ins. Exch. (1004) 26 Cal. App. 4th 1017, 1021-1022, 31 Cal. Rptr. 2d 811* ; *Heredia v. Farmers Ins. Exch. (1991) 228 Cal. App. 3d 1345, 1355, 279 Cal. Rptr. 511* ; *see also Lehto v. Allstate Ins. Co (1994) 31 Cal. App. 4th 60, 73-74, 36 Cal. Rptr. 2d 814* (rejecting argument that insurer has a duty to accept such a settlement when it would not increase potential liability of remaining insured, by crediting policy-limits settlement against any recovery ultimately obtained against remaining insured)

Ultimate test of liability in first-party bad faith action is whether refusal to pay policy benefits was unreasonable; bad faith implies unfair dealing rather than mistaken judgment. *Congleton v. National Union Fire Ins. Co. (1987) 189 Cal. App. 3d 51, 59, 234 Cal. Rptr. 218*

When alleged bad faith conduct consists of insurer's interpretation of its ambiguous policy to exclude coverage, that interpretation is not conclusive evidence of bad faith unless inherently unreasonable. *Congleton v. National Union Fire Ins. Co. (1987) 189 Cal. App. 3d 51, 59, 234 Cal. Rptr. 218*

In general, insured is unable to base bad faith action on nonrenewal of policy, even if coverage dispute exists between insurer and insured over prior claim, because unless policy provides otherwise, insurer has no legal duty to renew insurance policy when its term has expired. *Travelers Ins. Co. v. Lesher (1986) 187 Cal. App. 3d 169, 194, 231 Cal. Rptr. 791* , *overruled on other grounds,* Buss v. *Superior Court (1997) 16 Cal. 4th 35, 50, 65 Cal Rptr. 2d 366, 939 P.2d 766*)

In bad faith action in which insurer had actual and constructive notice of insured's intention to pursue rights against third party, insurer has fiduciary duty not to interfere with those rights; insurer's third-party settlement and inducement of dismissal, precluding insured's claim against third party, is actionable, even though insurer had no express duty under policy to file counterclaim or to provide legal advice, and despite fact that insured had independent attorney. *Barney v. Aetna Cas. & Sur. Co. (1986) 185 Cal. App. 3d 966, 974-981, 230 Cal. Rptr. 215*

Common law bad faith cause of action embodies the same factors as statutory cause of action under *Ins. Code § 790.03(h),* because statute is merely codification of tortious breach of implied covenant of good faith and fair dealing as applied to insurance. *California State Auto. Ass'n Inter-Ins. Bureau v. Superior Court (1986) 184 Cal. App. 3d 1428, 1432 n. 5, 229 Cal. Rptr. 409* ; *but see Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58* (prospectively overruling *Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, 885-888, 153 Cal. Rptr. 842, 592 P.2d 329* , which allowed private statutory third-party standing)

Insured's cross complaint for breach of good faith and fair dealing is properly filed in action by insurer for declaratory relief regarding rights to coverage under policy; issues of coverage, liability, and damages as not requiring determination prior to filing of insured's cross complaint. *California State Auto. Ass'n Inter-Ins. Bureau v. Superior*

Court (1986) 184 Cal. App. 3d 1428, 1431-1433, 229 Cal. Rptr. 409

Health insurer as breaching its duty of good faith and fair dealing by failing to advise insureds of availability of arbitration, thereby waiving insurer's right to compel arbitration. *Davis v. Blue Cross of N. Cal. (1979) 25 Cal. 3d 418, 431, 158 Cal. Rptr. 828, 600 P.2d 1060*

Substantial evidence as present that insurer breached covenant of good faith and fair dealing when it rejected insured's offer that insurer pay $10,000 of $15,000 under uninsured motorist policy provision, reserving $5,000 for future arbitration as offset for amount already paid under medical payment provisions of policy, where the offer detailed sufficient evidence to show that uninsured motorist was negligent to some extent and that damages suffered by insured greatly exceeded $10,000. *Neal v. Farmers Ins. Exch. (1978) 21 Cal. 3d 910, 921*

Plaintiff's counsel's erroneous reference to value of injuries suffered by plaintiff in argument before jury respecting amount of compensatory damages to be awarded for breach of covenant of good faith and fair dealing based on insured's failure to accept reasonable offer of settlement under uninsured motorist provision as not prejudicial where extent and severity of plaintiff's injuries were relevant to award of punitive damages and court had clearly instructed jury to ignore value of plaintiff's injuries as element of compensatory damages. *Neal v. Farmers Ins. Exch. (1978) 21 Cal. 3d 910, 925, 148 Cal. Rptr. 389, 582 P.2d 980*

Covenant of good faith and fair dealing that neither party will do anything that will injure right of other to receive benefits of agreement as implied in every contract, including insurance policies. *Johansen v. California State Auto. Ass'n Inter-Ins. Bureau (1975) 15 Cal. 3d 9, 14, 123 Cal. Rptr. 288, 538 P.2d 744* ; *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 575, 108 Cal. Rptr. 480, 510 P.2d 1032* ; *Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A.G. (1970) 3 Cal. 3d 434, 447, 91 Cal. Rptr. 6, 476 P.2d 406* ; *Comunale v. Traders & Gen. Ins. Co. (1958) 50 Cal. 2d 654, 658, 328 P.2d 198*

Scope of insurer's duty to deal fairly with its insured as prescribed by law as not subject to being delineated entirely by customs of insurance industry. *Silberg v. California Life Ins. Co. (1974) 11 Cal. 3d 452, 462, 113 Cal. Rptr. 711, 521 P.2d 1103*

Insurer as breaching covenant of good faith and fair dealing by its failure to make payments under policy providing for payment of costs of hospital care and surgeon's fees up to maximum amount stated on ground that loss was excluded from policy where policy was ambiguous as to whether or not loss was excluded, and, therefore, as liable to insured for physical and mental distress proximately caused by its conduct. *Silberg v. California Life Ins. Co. (1974) 11 Cal. 3d 452, 460, 113 Cal. Rptr. 711, 521 P.2d 1103*

Violation of insurer's duty implied in covenant of good faith and fair dealing as sounding in tort and insured as permitted to recover for all detriment resulting from violation, including mental distress. *Silberg v. California Life Ins. Co. (1974) 11 Cal. 3d 452, 460-461, 113 Cal. Rptr. 711, 521 P.2d 1103*

Insurer that unreasonably and in bad faith withholds payment of claim of its insured as subject to liability in tort; sufficiency of plaintiff's claim for damages for emotional distress; rules governing actions for independent tort of intentional infliction of mental distress as inapplicable where mental distress results from substantive invasion of property interests. *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 575-581, 108 Cal. Rptr. 480, 510 P.2d 1032*

Bad faith as implying unfair dealing rather than mistaken judgment; implied covenant of good faith and fair dealing as mutual, running from insured to insurer as well as vice versa. *California Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 Cal. App. 3d 1, 55, 221 Cal. Rptr. 171* (insurer not liable for breach of implied covenant when mistake regarding identity of party claiming policy benefits was reasonable and contributed to by insured)

Implied covenant of good faith and fair dealing as not extended beyond contract terms. *Gibson v. Government Employees Ins. Co. (1984) 162 Cal. App. 3d 441, 446-452, 208 Cal. Rptr. 511* (insurer has no duty to advise insured of availability of particular kind of insurance or of coverage inadequacies obvious to reasonable person)

Insurer as not necessarily excused from duty of good faith when item of information is omitted from claim form; if such omission exists, insurer as having duty, in some circumstances, of conducting independent investigation of insured's claim for benefits; bad faith as not precluded simply because insurer unduly delays payment of benefits rather than denying them outright. *McCormick v. Sentinel Life Ins. Co. (1984) 153 Cal. App. 3d 1030, 1036, 200 Cal. Rptr. 732*

Evidence regarding handling of past claims as admissible against insurer in bad faith action to prove pattern of unfair claims practices when antecedent practice is substantially similar to practice in present case; past claims as not needing to beidentical if differences immaterial to purpose for which evidence offered. *Moore v. American United Life Ins. Co. (1984) 150 Cal. App. 3d 610, 625-626, 197 Cal. Rptr. 878*

In certain situations, to be determined as question of fact, insurer's failure to properly investigate insured's legitimate claim as giving rise to liability for breach of implied covenant of good faith and fair dealing; however, duty to investigate as not arising unless and until good faith effort by insured to comply with claims procedure is made. *Paulfrey v. Blue Chip Stamps (1983) 150 Cal. App. 3d 187, 195-196, 197 Cal. Rptr. 501*

Directed verdict against insurer for breach of covenant of good faith and fair dealing as proper where settlement offer within policy limits (not communicated to insured) was rejected to save insurer money, and where insurer failed to inform its insured that policy's exclusionary clause might apply. *Miller v. Elite Ins. Co. (1980) 100 Cal. App. 3d 739, 757, 161 Cal. Rptr. 322*

Insurance group as liable for breach of implied covenant of good faith and fair dealing although group was not party of insurance contract where group was formed to render management services for insurer for which it received percentage of premiums paid by insurer's policy holders. *Delos v. Farmers Group, Inc. (1979) 93 Cal. App. 3d 642, 652, 155 Cal. Rptr. 843*

Action alleging defendant's bad faith in refusing to pay or settle claim as not subject to demurrer on ground that it should have been litigated at arbitration hearing where arbitration agreement limited jurisdiction of arbitrator to disputes involving the terms, conditions, or benefits of the insurance agreement. *Mansdorf v. California Physicians' Serv., Inc. (1978) 87 Cal. App. 3d 412, 416-417, 151 Cal. Rptr. 388*

Breach of covenant of good faith and fair dealing as providing injured party with tort action for "bad faith," notwithstanding that acts complained of may also constitute breach of contract; rule as applying to all insurance policies, including policies of title insurance; insured as entitled to recover for any emotional distress suffered as result of insurer's bad faith, as well as any other detriment proximately resulting from breach. *Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 940, 122 Cal. Rptr. 470*

Insurance company which has no defense to claim for recovery under fire insurance policy as having no business threatening to retire its file if insured does not accept its first offer; to intimate to insured that he is suspected of arson when any basis for such a charge has been eliminated by only investigator employed by insurer to look into matter as violating every principle of good faith and fair dealing. *Mustachio v. Ohio Farmers Ins. Co. (1975) 44 Cal. App. 3d 358, 362, 118 Cal. Rptr. 581*

Insurer which deliberately breaches its obligation to insured as not permitted to profit thereby, whether at expense of insured or of another insurer which faithfully discharges its obligation. *Smith v. Travelers Indem. Co. (1973) 32 Cal. App. 3d 1010, 1019, 108 Cal. Rptr. 643*

Bad faith of plaintiff's disability insurer in maliciously trying to cause plaintiff to surrender his policy or disadvantageously set tle nonexistent dispute with it as essentially tortious and as basis for action for damages for intentional infliction of emotional distress and for tortious interference with protected property right of insured for which damages may be recovered to compensate for all detriment proximately resulting therefrom, including economic loss as well as emotional distress resulting from conduct or from economic losses caused by insurer's conduct, and in proper case, punitive damages. *Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 401-402, 89 Cal. Rptr. 78*

Implied-in-law duty of good faith and fair dealing as imposing on disability insurer duty not to threaten to withhold or actually withhold payments, maliciously and without probable cause, for purpose of injuring insured by depriving him of benefits of policy; violation of that duty as sounding in tort notwithstanding that it also constitutes breach of contract. *Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 401, 89 Cal. Rptr. 78* (nevertheless reversing judgment for plaintiff because of misconduct of plaintiff's counsel and prejudicially erroneous jury instruction, but holding that punitive damages in such case are proper)

[d] Damages

In contingent fee context, *Brandt* fees are determined by calculating percentage of legal fees paid to attorney that reflects work attributable to obtaining contract recovery; no portion of legal fees attributable to punitive damages award can be recovered as *Brandt* fees. *Cassim v. Allstate Ins. Co. (2004) 33 Cal. 4th 780, 811-812, 16 Cal. Rptr. 3d 374*

Attorney's fees reasonably incurred to compel payment of policy benefits as element of damages resulting from insurer's tortious withholding of benefits. *Brandt v. Superior Court (1985) 37 Cal. 3d 813, 819-820, 210 Cal. Rptr. 211, 693 P.2d 796* , *Austero v. Washington Nat'l Ins. Co. (1982) 132 Cal. App. 3d 408, 182 Cal. Rptr. 919*

Accident insurer as liable in excess of its policy limits where it denied benefits on ground that accident was covered by workmen's compensation although workmen's compensation carrier denied coverage, serious question was present on that issue, and accident carrier would have had lien on workmen's compensation award had it been granted. *Silberg v. California Life Ins. Co. (1974) 11 Cal. 3d 452, 461, 113 Cal. Rptr. 711, 521 P.2d 1103*

Ratio of punitive to compensatory damages as given little weight when purpose of punitive damages award was obviously to punish insurer and discourage general pattern of fraudulant claims practices going beyond mishandling of plaintiff's claim alone. *Moore v. American United Life Ins. Co. (1984) 150 Cal. App. 3d 610, 637, 197 Cal. Rptr. 878*

Factors in determining extent of punitive damages merited by insurer's conduct as including whether lay persons are unliklely to discover deception and whether punitive damages were necessary to deter future misconduct as well as to punish past acts. *Moore v. American United Life Ins. Co. (1984) 150 Cal. App. 3d 610, 637, 197 Cal. Rptr. 878*

Net income for purposes of determining punitive damages as including dividends, but excluding federal income taxes. *Moore v. American United Life Ins. Co. (1984) 150 Cal. App. 3d 610, 637, 197 Cal. Rptr. 878*

Future policy benefits as properly included in award for damages arising frominsurer's tortious breach of covenant of good faith and fair dealing. *Pistorius v. Prudential Ins. Co. (1981) 123 Cal. App. 3d 541, 551, 176 Cal. Rptr. 660*

In action by deceased's wife against insurance company for damages for emotional distress for defendant's bad faith failure to pay accidental death benefits evidence as not supporting jury's award of damages where wife testifies that no financial hardship resulted from nonpayment and physical symptoms she suffered were caused by outrage that insurance company thought husband's death was caused by suicide since in customary bad faith cases, essence of emotional

distress is anxiety arising from financial deprivation caused by claim's nonpayment. *Blake v. Aetna Life Ins. Co. (1979) 99 Cal. App. 3d 901, 924-925, 160 Cal. Rptr. 528* ; *but see Clayton v. United Servs. Auto. Ass'n (1997) 54 Cal. App. 4th 1158, 1160-1162, 63 Cal. Rptr. 2d 419* (rejecting *Blake v. Aetna Life Insurance Co.*; plaintiff who meets threshold requirement of showing economic loss may recover damages for emotional distress caused by insurer's bad faith without showing any causal link between economic loss and emotional distress)

Title insurance company which insures buyer of real property against liens and encumbrances of record and negligently fails to discover or disclose recorded lien or encumbrance or fails to exclude a known recorded lien or encumbrance from coverage, and, on being notified of existence of recorded lien or encumbrance unjustifiably refuses to take any legal action to clear title or eliminate cloud, as liable to insured in compensatory damages for any emotional distress which results. *Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 926, 122 Cal. Rptr. 470* (affirming judgment for four plaintiffs and against insurer for $200,000 in emotional distress)

In action based on bad-faith refusal to settle fire claim, plaintiff as entitled to introduce evidence on issue of attorney's fees incurred in connection with negotiations leading up to settlement. *Mustachio v. Ohio Farmers Ins. Co. (1975) 44 Cal. App. 3d 358, 361-364, 118 Cal. Rptr. 581*

Ins. Code § 10111, providing that in life or disability insurance only measure of liability and damage is sum or sums payable in manner and at times as provided in policy, as not restricting recovery of damages from insurer in case sounding in tort to amounts due under policy. *Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 400-401, 89 Cal. Rptr. 78*

Measure of damages for breach of contract and tort distinguished. *Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 400, 89 Cal. Rptr. 78*

[e] Evidence

In common-law bad faith action by insured, defendant's responsive pleading, filed after payment of uninsured motorists benefits, as irrelevant to prove that defendant acted in bad faith when it initially denied claim; admission of that evidence resulting in jury verdict for plaintiff as requiring reversal. *Nies v. National Auto. & Cas. Ins. Co. (1988) 199 Cal. App. 3d 1192, 1200-1202, 245 Cal. Rptr. 518*

[f] Litigation Tactics

"Defensive pleading," including assertion of affirmative defenses, in insurance bad faith action is communication protected by absolute litigation privilege of *Civ. Code § 47(b),* and as such is precluded from forming basis for complaint's allegations of ongoing bad faith. *California Physicians' Serv. v. Superior Court (1992) 9 Cal. App. 4th 1321, 1330, 12 Cal. Rptr. 2d 95*

[g] Postjudgment Conduct by Insurer

When insured obtains bad faith judgment against insurer, entry of judgment absolves insurer of any further contractual obligations; insured therefore may not assert still another bad faith claim based on insurer's refusal to pay the first judgment, nor can insured maintain such a claim by virtue of its status as judgment creditor. *Tomaselli v. Transamerica Ins. Co. (1994) 25 Cal. App. 4th 1766, 1771, 31 Cal. Rptr. 2d 224* ; *but see Hand v. Farmers Ins. Exch. (1994) 23 Cal. App. 4th 1847, 1857, 29 Cal. Rptr. 2d 258* (third party who obtains judgment against insured may maintain direct cause of action against insurer under *Ins. Code § 11580* for insurer's postjudgment bad faith refusal to pay amount of judgment); *see generally § 308.464*

[h] Preemption by Federal Law

Action brought under state law, asserting improper processing of claim for benefits under employee benefit plan subject to Employee Retirement Income Security Act of 1974 (*29 U.S.C.S. §§ 1001-1461*) as preempted by federal law. *Pilot Life Ins. Co. v. Dedeaux (1987) 481 U.S. 41, 107 S. Ct. 1549, 95 L. Ed. 2d 39, 54F* ederal Labor-Management Relations Act (*29 U.S.C.S. §§ 141-187*) as preempting state bad faith actions when resolution of state law claim is substantially dependent on analysis of labor agreement. *Allis-Chalmers Corp. v. Lueck (1985) 471 U.S. 202, 215-220, 105 S. Ct. 1904, 85 L. Ed. 2d 206*

ERISA preempts bad faith action based on violation of *Ins. Code § 790.03(h)* notwithstanding ERISA provision exempting from preemption laws that regulate insurance. *Kanne v. Connecticut Gen. Life Ins. Co. (9th Cir. 1988) 867 F.2d 489, 493-494*

Employer that (in order to provide employees with any benefits specified in ERISA) purchases group insurance policy, contributes toward premiums, remits to insurer, and retains authority to terminate policy or to change terms, as establishing or maintaining ERISA plan regardless of whether it also processes claims or otherwise administers policy. *Marshall v. Bankers Life & Cas. Co. (1992) 2 Cal. 4th 1045, 1057, 10 Cal. Rptr. 2d 72*

Summary judgment in favor of insurer, in action to recover benefits under policy issued by insured's employer, as improper when policy is ambiguous and uncertain because neither original nor copy of policy is available, and insured is entitled to have trier of fact determine terms of policy; summary judgment as improper when facts regarding existence of ERISA plan are disputed. *Rogers v. Prudential Ins. Co. (1990) 218 Cal. App. 3d 1132, 1137-1139, 267 Cal. Rptr. 499*

Existence of "welfare benefit plan" for purposes of applying ERISA as shown by: (1) plan (evidenced by employee benefit booklet), with plan administrator (employee of company), source of financing (employer), and procedure to apply for and collect benefits (2) established by employer (3) for purpose of providing medical benefits to participant employees and beneficiaries. *Faria v. Northwestern Nat'l Life Ins. Co. (1989) 216 Cal. App. 3d 1129, 1137*

Defense of ERISA preemption as waivable issue; failure to raise ERISA defense at trial as precluding insurer from raising it on appeal, based on factors including insured's lack of opportunity to refute defense at trial; issue as one of "choice of law" rather than "choice of forum," which arises when issue is subject-matter jurisdiction regarding exclusive, rather than concurrent, federal jurisdiction. *Hughes v. Blue Cross of N. Cal. (1989) 215 Cal. App. 3d 832, 849-859*

Such factors as employer's payment of policy premiums and other involvement, and its administration of the plan, as evidencing that group insurance plan was ERISA plan as matter of law. *Lambert v. Pacific Mut. Life Ins. Co. (1989) 211 Cal. App. 3d 456, 463-465, 259 Cal. Rptr. 398*

Tort claim arising out of manner in which benefit claim is handled as not separable from terms of contract; claim as relating to plan under Federal Employee Health Benefits Act (*5 U.S.C.S. §§ 8901-8913*) as long as it has connection with or refers to plan. *Hartenstine v. Superior Court (1987) 196 Cal. App. 3d 206, 218, 241 Cal. Rptr. 756*

Preemption defense to tort claims as jurisdictional, and as not waived by failure to raise in responsive pleading; therefore, preemption issue as properly raised for first time in appellate brief. *Hartenstine v. Superior Court (1987) 196 Cal. App. 3d 206, 214, 241 Cal. Rptr. 756* (regarding Federal Employee Health Benefits Act (*5 U.S.C.S. §§ 8901-8913*))

[i] Proper Plaintiffs

Lessee of property could not sue lessor's insurer for bad faith because lessee was neither an implied-in-law coinsured nor a third-party beneficiary of contract between lessor and lessee, despite fact that lessor was obligated under lease agreement to maintain rental income insurance with loss payable to lessor in event of damage or destruction of leased property; fact that lease provided that lessee's rent would be reduced during any repairs to premises after damage or destruction to extent lessor received insurance proceeds held insufficient to confer third-party beneficiary status on lessee. *Jones v. Aetna Cas. & Sur. Co. (1994) 26 Cal. App. 4th 1717, 1722-1725, 33 Cal. Rptr. 2d 291*

[j] Punitive Damages

Amendments to *Civ. Code § 3294* referring to "despicable" conduct impose new substantive limitation on punitive damage awards; "despicable" is a powerful term that connotes base, vile or contemptible behavior, and indicates that "malice" requires more than a willful and conscious disregard of a plaintiff's rights under current law. *College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 725, 34 Cal. Rptr. 2d 898, 882 P.2d 894*

Punitive damages award reversed when court concluded that although the evidence supported finding that carrier had been negligent, overzealous, legally incorrect, and callous, no evidence existed of behavior that was evil, criminal, recklessly indifferent, or done wth an intent to injure. *Tomaselli v. Transamerica Ins. Co. (1994) 25 Cal. App. 4th 1269, 1286-1288, 31 Cal. Rptr. 2d 433*

Substantial evidence that punitive damages were properly awarded when insurer's refusal to accept reasonable offer of settlement and its subsequent submission of matter to its attorney were part of conscious course of conduct, firmly grounded in established company policy (evidenced by excerpt from claims representative manual stressing need to take advantage of insured's importunate circumstances), designed to utilize lamentable circumstances of insured and her family to force settlement more favorable to company than facts would otherwise have warranted. *Neal v. Farmers Ins. Exch. (1978) 21 Cal. 3d 910, 923, 148 Cal. Rptr. 389, 582 P.2d 980*

Punitive damages as not available in action for bad faith based solely on contract theory. *Frazier v. Metropolitan Life Ins. Co. (1985) 169 Cal. App. 3d 90, 105-107, 214 Cal. Rptr. 883*

Breach of covenant of good faith and fair dealing as supporting only compensatory damages; punitive damages as only justified by insured's proving that insurer willfully and deliberately failed to take steps necessary to avoid adverse consequences of unwarranted denial of claim. *Weisman v. Blue Shield of Cal. (1984) 163 Cal. App. 3d 61, 67, 209 Cal. Rptr. 169*

Nature of defendant's acts in light of record, amount of compensatory damages awarded, and wealth of defendants as proper factors to consider in determining punitive damage award. *Pistorius v. Prudential Ins. Co. (1981) 123 Cal. App. 3d 541, 554, 176 Cal. Rptr. 660*

Conscious disregard of insured's rights as proper grounds for award of punitive damages in tort action for breach of covenant of good faith and fair dealing. *Pistorius v. Prudential Ins. Co. (1981) 123 Cal. App. 3d 541, 553, 176 Cal. Rptr. 660*

Award of $150,000 in punitive damages against insurer for breach of implied covenant of good faith and fair dealing, as proper where insurer never informed insured of settlement offer, never allowed insured to contribute towards possible settlement, and exposed insured to damages of $11,000 when claim could have been compromised for half that amount. *Miller v. Elite Ins. Co. (1980) 100 Cal. App. 3d 739, 758, 161 Cal. Rptr. 322*

Punitive damages as awardable in action arising out of breach of covenant of good faith and fair dealing which is

implied in every liability insurance policy. *Cain v. State Farm Mut. Auto. Ins. Co. (1975) 47 Cal. App. 3d 783, 793, 121 Cal. Rptr. 200* (affirming judgment for injured party against insurer in amount of $32,883.69 (excess of judgment over policy limit) and in favor of insured against insurer in amount of $25,000 compensatory damages and $115,000 punitive damages)

Requirements for awarding punitive damages against insurer and its employees for bad faith refusal to pay medical benefits due insured under his automobile insurance policy. *Hale v. Farmers Ins. Exch. (1974) 42 Cal. App. 3d 681, 689-702, 117 Cal. Rptr. 146 , overruled in part, Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822, 169 Cal. Rptr. 691, 620 P.2d 141*

[k] Statute of Limitations

Action on implied covenant of good faith and fair dealing as action on policy to which four-year statute of limitations [*Code Civ. Proc. § 337(1)*] applies. *Comunale v. Traders & Gen. Ins. Co. (1958) 50 Cal. 2d 654, 662, 328 P.2d 198*

Cause of action for breach of covenant of good faith and fair dealing as accruing whenclaim for benefits was denied. *Frazier v. Metropolitan Life Ins. Co. (1985) 169 Cal. App. 3d 90, 103, 214 Cal. Rptr. 883*

Bad faith cause of action as sounding in both contract and tort; unless plaintiff irrevocably elects to proceed in tort, plaintiff as entitled to proceed on contract theory to which four-year statute of limitations of *Code Civ. Proc. § 337(1)* applies. *Frazier v. Metropolitan Life Ins. Co. (1985) 169 Cal. App. 3d 90, 102-103, 214 Cal. Rptr. 883*

[11] Law Reviews

Note, *Attorney's Fee Recovery in Bad Faith Cases: New Directions for Change, 57 S. Cal. L. Rev. 503 (1984)*

Comment, *The Emerging Fiduciary Obligations and Strict Liability in Insurance Law, 14 Cal. W. L. Rev. 358 (1978)*

Comment, *An Independent Duty of Good Faith and Fair Dealing in Insurance Contracts--Gruenberg v. Aetna Insurance Co., 11 San Diego L. Rev. 492 (1974)*

Note, *Good Faith and Fair Dealing in Insurance Contracts: Gruenberg v. Aetna Insurance Co., 25 Hastings L.J. 699 (1974)*

Note, *Contracting for Punitive Damages: Fletcher v. Western National Life Insurance Company, 4 Loy. L. Rev. 208 (1971)*

[12] Text References

Levy, Golden, and Sacks, California Torts, Ch. 82, (Matthew Bender)

Shernoff, Gage, and Levine, Insurance Bad Faith Litigation (Matthew Bender)

[13] Cross References

For a related form, see *§ 308.370*

For allegations of mental injuries generally, see Ch. 362, *Mental Suffering and Emotional Distress*

For discussion and forms involving contracts generally, see Ch. 140, *Contracts*

For discussion and forms of allegations of actual and exemplary or punitive damages, see Ch. 177, *Damages*

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Volume 26: Injunctions thru Insurance-Chs. 303-313
Chapter 308 INSURANCE
PART IV. FORMS
A. Actions Against Insurance Companies to Recover Insurance Contract Benefits
1. In General

26-308 California Forms of Pleading and Practice--Annotated § 308.380

§ 308.380 Complaint by Insured Against Insurance Company for Declaratory Relief [Code Civ. Proc. § 1060] and Actual [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for Fraud [Civ. Code § 1710(4)] and Intentional Infliction of Mental Distress--Disability Policy [Ins. Code § 106]

[1] FORM Complaint by Insured Against Insurance Company for Declaratory Relief [Code Civ. Proc. § 1060] and Actual [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for Fraud [Civ. Code § 1710(4)] and Intentional Infliction of Mental Distress--Disability Policy [Ins. Code § 106]

[*Caption, introduction. See § 308.370.*]

FIRST CAUSE OF ACTION

1. Defendants DOE 1 through DOE _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. [Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.]

2. Defendant is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of _____ with its principal place of business in _____ County, California, and authorized to transact, and transacting, business in California as an insurer [*or other allegation of capacity and authority as appropriate*].

3. On or about _____ [*date*], plaintiff purchased from defendant insurer a policy of health and accident insurance, hereinafter referred to as "the policy," in which plaintiff was the named insured. Under the terms of the policy, defendant insurer agreed to pay plaintiff a monthly indemnity of $_____ [*specify, e.g.,*

$150 per month for a maximum period of 30 years], if plaintiff were disabled as the result of an injury. The policy further provided in part as follows: _____ [*set forth definitions of injury and sickness contained in policy, e.g.,*

" 'Injury' wherever used in this policy means bodily injury caused by an accident occurring while this policy is in force and resulting directly and independently of all other causes in loss covered by this policy. 'Sickness' wherever used in this policy means sickness or disease contracted and commencing after the Policy Date and resulting in loss covered by this policy."]

4. At all times herein mentioned, plaintiff paid all premiums on the policy as they became due and payable and has otherwise performed all the terms and conditions of the policy on his/her part to be performed. At all times herein mentioned, the policy was, and now is, in full force and effect.

5. On or about _____, plaintiff was injured _____ [*specifymanner and place of injury*]. From and after that date, plaintiff has at all times been, and now is, disabled as the result of that injury.

6. From and after the date of the aforementioned injury, defendant insurer commenced monthly payments to plaintiff of $_____ [*specify, e.g.,* $150] in accordance with the provisions of the policy.

7. On or about _____ [*date*], defendant insurer advised plaintiff that it would make no further payments to plaintiff under the provisions of the policy. Thereafter, one of the grounds raised for the failure to continue payments was _____ [*specify, e.g.,* that plaintiff had a congenital back defect which contributed to plaintiff's condition and therefore the defendant insurer was not liable under the terms of the policy].

8. An actual controversy has arisen between the parties as to whether plaintiff's condition constitutes an injury within the meaning of the policy.

SECOND CAUSE OF ACTION

1. Plaintiff refers to Paragraphs 1-7, inclusive, of his/her First Cause of Action and by this reference makes them a part hereof.

2. Within _____ [*specify, e.g.,* 60 days] prior to issuance of the policy on _____ [*date*], plaintiff was solicited by and had conversations with the agent for defendant insurer. These meetings and conversations were held for the purpose of soliciting plaintiff as a policy holder with defendant insurer. During the course of these conversations defendant insurer, through its agent, falsely and fraudulently represented to plaintiff that if plaintiff were injured and thereafter disabled, plaintiff would be entitled to the monthly indemnity of $_____ [*specify, e.g.,* $150]. The agent further represented that if plaintiff were disabled, defendant insurer would take good care of him/her and he/she would not have to worry about anything.

3. The representations so made by defendant insurer, through its agent, were in fact false and fraudulent. The true facts were that defendant insurer did not intend to cover all disability, and further that defendant insurer intended to deal with plaintiff and other assureds in bad faith and with the intention of using any methods at their disposal to avoid legitimate payments under the policy.

4. When defendant insurer, through its agent, made the representations, it knew them to be false; the statements were made with the intent to defraud and deceive plaintiff and to induce him/her to purchase the policy, as hereinbefore alleged.

5. Plaintiff, at the time the representations were made, was ignorant of their falsity and believed them to be true. In reliance on them plaintiff was induced to and did enter into the contract of accident and health insurance, as hereinbefore alleged. Had plaintiff known the true facts, he/she would not have purchased the policy.

6. As a direct and proximate result of defendant insurer's false representations and its subsequent failure to pay under the policy, plaintiff was forced to employ the services of an attorney in an attempt to secure payments to which he/she was entitled, all to his/her detriment in the sum of $_____ [*specify, e.g.*, $1,000].

7. At all times herein mentioned defendant insurer knew that the insurance benefits were essential to plaintiff's sustenance, and at all times defendant insurer was, and now is, aware that it is obligated to continue to pay the benefits to plaintiff. The conduct of defendant insurer, as herein alleged, has been malicious and oppressive to plaintiff. As a result of this fraudulent, malicious, and oppressive conduct, plaintiff has suffered great mental anguish, mortification, humiliation, and shame, and has become sick and ill, all to his/her damage in the sum of $_____ [*specify, e.g.*, $100,000].

8. In committing the acts described in this complaint, defendant acted in conscious disregard of the rights of plaintiff and was guilty of _____ [malice *and/or* oppression *and/or* fraud] in that _____ [*specify facts constituting malice, oppression, or fraud*]. The conduct of defendant warrants an assessment of punitive damages in an amount appropriate to punish defendant and deter others from engaging in similar wrongful conduct.

THIRD CAUSE OF ACTION

1. Plaintiff refers to Paragraphs 1-7, inclusive, of his/her First Cause of Action and to Paragraphs 2-8, inclusive, of his/her Second Cause of Action and by this reference makes them a part hereof.

2. Plaintiff is informed and believes and thereon alleges that sometime prior to _____ [*date*], and continuing up to the present the defendants _____ [*name of insurer*], _____ [*name of representative of insurer*], and DOES 1-_____, inclusive, and each of them, conspired to defraud plaintiff. Pursuant to this conspiracy, defendants, and each of them did on _____ [*date*], write a letter to plaintiff accusing him/her of misrepresentation with implied threats of criminal prosecution and civil litigation to recover the sum of $_____ [*specify, e.g.*, $2,250] which had been paid by defendant _____ [*name of insurer*] to plaintiff under the terms of the policy, at a time when each of these defendants knew that the statements in the letter were false. Further, pursuant to this conspiracy, the letter was mailed to plaintiff for the sole and exclusive purpose of frightening him/her into releasing defendant insurer from any further obligation under the policy at a time when defendants, and each of them, knew full well that they were obligated to make continued payments. A copy of the letter is attached hereto as Exhibit A, and made a part hereof.

3. At the time the letter was written, defendants, and each of them, were awarethat plaintiff was totally disabled; [that he/she was the parent of _____ (*number*) children who were dependent on this indemnity for their livelihood;] that it had been represented that defendants would deal with plaintiff in good faith and take good care of him/her; that plaintiff was suffering from a severe _____ [*specify, e.g.*, back injury]; [that plaintiff is a person of limited education]; that the demand for repayment of the $_____ [*specify, e.g.*, $2,250] contained in Exhibit A was a total impossibility; that plaintiff throughout the negotiations leading to the purchase of the insurance policy was extremely fearful of his/her family's welfare.

4. Plaintiff is informed and believes and thereon alleges that with all of the knowledge as hereinbefore alleged, defendants, and each of them, conspired to implant fear and terror in the mind of plaintiff by writing the letter attached as Exhibit A at a time when each of the defendants knew there was no justifiable cause and knew there was no basis for the cancellation of the indemnity payments. That at the time the letter was written, it was the intention of defendants,

and each of them, to write a subsequent letter that would permit plaintiff to cancel his/her insurance policy in exchange for defendants' forebearing to bring suit or other proceedings against plaintiff at a time when defendants, and each of them, knew there was no basis for such threats. In furtherance of the conspiracy, on _____ [*date*], defendants did in fact write a letter to plaintiff, a copy of which is attached hereto as Exhibit B and made a part hereof. This letter was written in furtherance of the conspiracy to frighten plaintiff and to implant fear and terror in his/her mind so that he/she would agree to the demands set forth in plaintiff's Exhibit B and in particular that he/she would agree to cancel his/her policy at a time when defendants, and each of them, knew full well they were obligated to make continued disability payments thereunder. In furtherance of this conspiracy, defendants, and each of them, did further threaten litigation [, possible criminal action,] and additional costs by way of attorney's fees, all for the purpose of frightening plaintiff into relinquishing rights which defendant, and each of them, knew were undisputed and which defendants, and each of them, knew they were fully obligated to make under the terms of the policy.

5. As a proximate result of the acts performed by defendants, and each of them, in furtherance of this conspiracy as alleged, plaintiff suffered extreme nervous and mental strain, all to his/her damage in the sum of $_____ [*specify, e.g.,* $100,000].

6. In doing the things herein alleged, defendants, and each of them, acted willfully and maliciously and without right in carrying out the hereinbefore alleged conspiracy, and by reason thereof plaintiff is entitled to punitive damages against defendants, and each of them.

WHEREFORE, plaintiff prays judgment against defendants as follows:

1. For a declaration of plaintiff's rights under his/her policy of insurance;

2. For general damages in the sum of $_____ [*specify, e.g.,* $100,000];

3. For punitive damages in the sum of $_____ [*specify, e.g.,* $1,500,000];

4. For costs of suit herein incurred; and

5. For such other and further relief as to the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[*Verification, if desired. See § 308.370.*]

[2] Use of Form

This form of complaint is adapted from that filed in *Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 89 Cal. Rptr. 78* , and illustrates a complaint by the insured setting forth multiple causes of action against the insurer for declaratory relief and for damages for a bad-faith breach of a disability policy. For a discussion of the essential allegations of a complaint for breach of an insurance contract, the number of copies to prepare, and verification, see *§ 308.370*. For a discussion of the convenant of good faith and fair dealing, see *§ 308.379*.

[3] Cross References

For related forms, see *§§ 308.370 -308.379*

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26-308 California Forms of Pleading and Practice--Annotated §§ 308.381-308.389

[Reserved]

§§ 308.381[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.390

§ 308.390 Complaint by Insured Against Insurer to Recover Cash Surrender Value of Life Insurance Policy [Civ. Code §§ 3300, 3302; Ins. Code § 10152]

[1] FORM Complaint by Insured Against Insurer to Recover Cash Surrender Value of Life Insurance Policy [Civ. Code §§ 3300, 3302; Ins. Code § 10152]

[*Caption, introduction. See § 308.370.*]

1. Defendant is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of _____ with its principal place of business in _____ County, California, and authorized [by the California Insurance Commissioner] to transact, and transacting, business in this state as a life insurer [*or other allegation of capacity and authority as appropriate*].

2. On or about _____ [*date*], in consideration of the payment of an annual premium of $_____ made by plaintiff, defendant, by its duly authorized agents, executed and delivered to plaintiff in _____ [*city, county and state*], its policy of insurance, bearing number _____, hereinafter referred to as "the policy," [a copy of which is attached hereto as Exhibit A and made a part hereof,] wherein defendant insured plaintiff's life in the sum of $_____ for the term from _____ [*time*] on _____ [*date*], to _____ [*time*] on _____ [*date*]. This term was extended for a like period by payment of the annual premiums in the years of _____ [*specify*], and at all times herein mentioned the policy was [, and is,] in full force and effect.

3. The policy [, Exhibit A attached,] among other things, provides: _____ [*set forth provisions authorizing surrender of policy for its cash value*].

4. Plaintiff has performed all of the conditions of the policy on his/her part to be performed, including the payment of premiums as hereinabove alleged.

5. On _____ [*date*], the cash surrender value of the policy was $_____. On that date, plaintiff, in accordance with the terms of the policy, demanded of defendant payment of that sum as the cash surrender value of the policy and duly tendered the policy to defendant. Defendant failed and refused, and continues to fail and refuse, to accept surrender of the policy or to pay plaintiff the whole or any part of the cash surrender value of the policy.

6. Neither all nor any part of that sum has been paid or tendered to plaintiff and there is now due and owing from defendant to plaintiff that sum. As a proximate result of defendant's failure and refusal as herein alleged, plaintiff has been damaged in the aforementioned sum together with interest thereon at the legal rate from and after _____ [*date specified in Paragraph 5*].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ [*cash surrender value*] with interest thereon at the legal rate from and after _____ [*date*];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[*Verification, if desired. See § 308.370.*]

[2] Use of Form

This form of complaint is for use to recover the cash surrender value of a life policy where the insurer, after demand, has refused to pay it in accordance with the terms of the policy. For a discussion of the essential allegations of the complaint, the number of copies to prepare, and verification, see *§ 308.370*.

[3] State Statutes

Cash surrender value. *Ins. Code § 10152*

Waiver of provision prohibited. *Ins. Code § 10153*

Amount of cash surrender value. *Ins. Code § 10161*

Computation of cash surrender value. *Ins. Code § 10164*

[4] Decisions

When consent of beneficiary is required for surrender of life insurance policy. *Griffith v. Life Ins. Co. (1894) 101 Cal. 627, 635-637, 36 P. 113* , 40 Am State Rep 96; see also *Denike v. Denike (1927) 86 Cal. App. 493, 495-496, 261 P. 322* (involving unsuccessful attempt by insured to change beneficiary from mother who paid premiums for first ten years to wife where policy permitted such change only on death of named beneficiary)

Ins. Code § 481 (return of premiums on cancellation) does not apply to cash-surrender option of life insurance policy that specifies that surrender value, even before end of policy period, will be calculated with reference to tables contained in policy and other matters, and does not include refund of premiums in the calculation. *Lambros v. Metropolitan Life Ins. Co. (2003) 111 Cal. App. 4th 43, 49, 3 Cal. Rptr. 3d 320* ; *see also* *Jennings v. Prudential Ins. Co. (1975) 48 Cal. App. 3d 8, 17-18, 121 Cal. Rptr. 125*

When consent of beneficiary is not required for surrender of life insurancepolicy. *Blackburn v. Merchants Life Ins. Co. (1928) 90 Cal. App. 362, 365-366, 265 P. 882* ; see also *North British & Mercantile Ins. Co. v. Ingalls (1930) 109 Cal. App. 147, 153, 292 P. 678*

Unless insured has reserved right to change beneficiary, insurance contractas not subject to being varied or canceled without consent of beneficiary. *MacDonald v. California-W. States Life Ins. Co. (1962) 203 Cal. App. 2d 440, 453-454, 21 Cal. Rptr. 659*

Parties to life insurance policy as having power to contract that on insured's decision to surrender policy amount to be returned to insured shall be governed by terms of cash value option and tables contained in policy, excluding return of so-called unearned premiums as provided in *Ins. Code § 481*. *Jennings v. Prudential Ins. Co. (1975) 48 Cal. App. 3d 8, 18, 121 Cal. Rptr. 125*

When insured surrenders his life insurance policy to insurance company for its cash surrender value, insurer's liability for risk covered in policy as terminated. *Jennings v. Prudential Ins. Co. (1975) 48 Cal. App. 3d 8, 17, 121 Cal. Rptr. 125*

[5] Text References

27 Cal. Jur. 2d, *Insurance*, § 291

[6] Cross References

For a related form, see *§ 308.370*

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26-308 California Forms of Pleading and Practice--Annotated § 308.391

§ 308.391 Complaint by Named Beneficiary Under Group Life Insurance Policy [Ins. Code §§ 100(1), 101, 10200] Against Insurance Company to Recover Life Insurance Proceeds [Civ. Code §§ 3300, 3302]

[1] FORM Complaint by Named Beneficiary Under Group Life Insurance Policy [Ins. Code §§ 100(1), 101, 10200] Against Insurance Company to Recover Life Insurance Proceeds [Civ. Code §§ 3300, 3302]

[*Caption, introduction. See § 308.370.*]

[1. *Allegations of capacity and authority of defendant. See § 308.390[1], Paragraph 1.*]

2. At all times herein mentioned until the time of his/her death as hereinafter alleged, _____ [*name*], hereinafter referred to as "the decedent," was employed by _____ [*name of employer*].

3. On or about _____ [*date*], defendant, in consideration of the payment to it of specified premiums, by its duly authorized agents, executed and delivered to _____ [*name of employer*] in _____ [*city, county, and state*], its Group Life Insurance Policy, hereinafter referred to as "the policy," bearing number _____, wherein defendant insured the lives of the employees of _____ [*name of employer*]. On or about _____ [*date*], defendant [caused to be] issued to the decedent its certificate of insurance, number _____, hereinafter referred to as "the certificate," whereby decedent's life was insured in the amount of $_____. A copy of the certificate is attached hereto as Exhibit A and made a part hereof.

4. As shown by the certificate, Exhibit A attached, plaintiff is the [sole] beneficiary therein named.

5. On or about _____ [*date*], while the policy and certificate were in full force and effect and decedent was employed by _____ [*name of employer*], decedent died in _____ [*city,*

county, and state].

6. Plaintiff [and decedent] performed all the conditions of the policy on his/her/its/their part to be performed, and, in accordance with the terms of the policy, plaintiff gave defendant due and timely notice and proof of death.

7. Plaintiff has demanded of defendant payment of $_____, the amount in which decedent's life was insured as alleged in Paragraph 3, *above*, but defendant failed and refused, and continues to fail and refuse, to pay the whole or any part of that amount.

8. As a proximate result of defendant's failure and refusal as herein alleged, plaintiff has been damaged in the sum of $_____ [*amount due and unpaid*], together with interest thereon at the legal rate from and after _____ [*date proceeds should have been paid*].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ with legal interest thereon from and after _____ [*date*], until paid;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[*Verification, if desired. See § 308.370[1].*]

[2] Use of Form

This form of complaint is for use by the named beneficiary to recover insurance proceeds payable on the death of an employee covered by a group life insurance policy where the insurer has refused to pay. With appropriate modifications, it may also be used by the decedent's personal representative where the proceeds are payable to the decedent's estate.

For a discussion of the essential allegations of the complaint, the number of copies to prepare, and verification, see *§ 308.370*.

[3] State Statutes

Group life policies generally. *Ins. Code §§ 10200-10214*

[4] Decisions

[a] Agency

Employer as agent of insurer issuing group policy and insurer as bound by such agent's acts. *Bareno v. Employers*

Life Ins. Co. (1972) 7 Cal. 3d 875, 883, 103 Cal. Rptr. 865, 500 P.2d 889 ; *see also Hinckley v. Bechtel Corp. (1974) 41 Cal. App. 3d 206, 211, 116 Cal. Rptr. 33* ; *Pantzalas v. Superior Court (1969) 272 Cal. App. 2d 499, 504, 77 Cal. Rptr. 354*

[b] Applicability of General Laws

Ins. Code § 10172, requiring written notice to insurer's home office of adverse claim, as applicable to group life insurance policies; legislature's exclusion of group insurance policies from application of specific provisions of Insurance Code as strongly persuasive that group policies were otherwise included in purview of other provisions of the code. *Cooper v. United Benefit Life Ins. Co. (1971) 17 Cal. App. 3d 911, 914-917, 95 Cal. Rptr. 320*

[c] Certificate

Certificate issued to employee under group insurance policy as binding on insurer, regardless of purported terms of master policy. *Bareno v. Employers Life Ins. Co. (1972) 7 Cal. 3d 875, 881-882, 103 Cal. Rptr. 865, 500 P.2d 889* ; *Evans v. Holly Corp. (1971) 15 Cal. App. 3d 1020, 1023, 93 Cal. Rptr. 712*

[d] Conversion

Insurer and employer as having no duty to give employee notice of right to conversion of life policy on retirement other than delivery of individual certificate. *Hinckley v. Bechtel Corp. (1974) 41 Cal. App. 3d 206, 216, 116 Cal. Rptr. 33*

Group policy granting employee privilege of converting to individual policyon application and payment of premium within 31 days after termination of employment as not of itself opera ting to keep insurance in force during 31-day period. *Juhl v. John Hancock Mut. Life Ins. Co. (1951) 107 Cal. App. 2d 188, 190-192, 236 P.2d 628*

[e] Coverage

Insurer of group life policy as bound by error of agent in including plaintiff's decedent within covered group where there was no basis for concluding that fraudulent intent existed on part of anyone concerned. *Amberg v. Bankers Life Co. (1971) 3 Cal. 3d 973, 980, 92 Cal. Rptr. 273, 479 P.2d 633*

[f] Parties to Action

Cause of action for group life insurance benefits as against insurance company, not employer, where employer did not pay premiums on employee in mistaken belief that employee had waived coverage. *Bass v. John Hancock Mut. Life Ins. Co. (1974) 10 Cal. 3d 792, 797, 112 Cal. Rptr. 195, 518 P.2d 1147*

[g] Preexisting Disease or Illness

Preexisting disease or illness, although contributing to loss resulting from accident, as not relieving insurer of liability where accident is proximate cause of loss. *Arata v. California-W. States Life Ins. Co. (1975) 50 Cal. App. 3d 821, 825, 123 Cal. Rptr. 631* (insured under group policy providing double indemnity for accidental death slipped and fell, an accidental occurrence, resulting in subdural bleeding that, as result of preexisting condition of hemophilia type 8, a congenital condition since birth, continued to, and was direct and immediate cause of, his death several days later); *see also Slobojan v. Western Travelers Life Ins. Co. (1969) 70 Cal. 2d 432, 443, 74 Cal. Rptr. 895, 450 P.2d 271*

[h] Premiums

Employer's nonpayment of premium as not affecting employee's right to enforce coverage which insurer agreed to extend to all of employer's employees. *Bass v. John Hancock Mut. Life Ins. Co. (1974) 10 Cal. 3d 792, 797, 112 Cal. Rptr. 195, 518 P.2d 1147*

"Premium due date," in context of group insurance, as reasonably referring either to date on which group's collective premium is due from employer, or alternatively, to date on which premium is paid by payroll deduction and thus ambiguous. *Williams v. American Cas. Co. (1971) 6 Cal. 3d 266, 273, 98 Cal. Rptr. 814, 491 P.2d 398*

[i] Waiver of Coverage by Employee

Waiver by employee of group life and disability coverage offered free to employee as not applying to subsequent group coverage under renegotiated union contract where waiver by employee of new coverage was not solicited, where there is absence of renewed rejection or disclaimer from employee or other clear and convincing evidence of waiver, and where employee's wife testified that deceased employee was happy to be covered under new coverage; burden as on party claiming waiver to prove it by clear and convincing evidence that does not leave matter to speculation; doubtful cases as decided against waiver. *Bass v. John Hancock Mut. Life Ins. Co. (1974) 10 Cal. 3d 792, 796-797, 112 Cal. Rptr. 195, 518 P.2d 1147*

[5] Text References

27 Cal. Jur. 2d, *Insurance*, § 188

28 Cal. Jur. 2d, *Insurance, § 391*

[6] Cross References

For a related form, see *§ 308.370*

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26-308 California Forms of Pleading and Practice--Annotated § 308.392

§ 308.392 Allegation--Insured Disappeared More Than Five Years Earlier and Is Presumed Dead [Evid. Code § 667]

[1] FORM Allegation--Insured Disappeared More Than Five Years Earlier and Is Presumed Dead [Evid. Code § 667]

1. On or about _____ [*date more than five years ago*] at a time when the policy was in full force and effect, the insured disappeared and has been missing and unheard from since.

2. The policy, Exhibit A, requires that "proof of death" be given to defendant. In compliance with this requirement, plaintiff, on or about _____ [*date more than five years after disappearance of insured*] gave defendant written notice of proof of death pointing out the facts of the insured's disappearance, that he/she has been missing and not heard from since, and that the five year period prescribed by *Section 667 of the Evidence Code* after which a missing person is presumed dead expired on _____ [*date*]. A copy of the written proof of death is attached hereto as Exhibit B and made a part hereof.

[2] Use of Form

The allegations in this form, appropriately renumbered, are for use in a complaint to recover life insurance proceeds where the insured's death is established by the statutory presumption that a person not heard from in five years is dead [*Evid. Code § 667*].

[3] Presumption of Death

[a] Lack of Statutory Procedure

A person not heard from in five years is presumed to be dead [*Evid. Code § 667*]. There is, however, no statutory procedure for establishing the fact of death for the purposes of claiming insurance proceeds by the beneficiary of a life

insurance policy. *Health & Safety Code §§ 103450-103490*, authorizing a judicial proceeding to establish the fact of death, apply only to persons who are known to be dead. Former *Prob. Code §§ 280-294* (effective July 1, 1988) [*see Prob. Code § 12400 et seq.*], relating to administration of estates, apply only where a person owns property in California subject to probate administration and has been missing five years [*see 1 Ops. Cal. Att'y Gen. 543 (1943)* (opinion rendered when time period was seven years)]. Former Prob. Code §§ 1170-1175 [*now see Prob. Code § 200 et seq.*], authorizing a proceeding to establish the fact of death, apply only to persons claiming an interest in real or personal property and whose title is affected by the death [see *Pollack v. Hamm (1970) 3 Cal. 3d 264, 269, 90 Cal. Rptr. 181, 475 P.2d 213]* .

[b] Proof of Death

Where payment to the beneficiary of the proceeds under a life insurance policyis made to depend not on the fact of death but on proof of death and the insured disappears and is not heard from for five years, presentation of the proof of death cannot ordinarily be made without the aid of the statutory presumption that a person missing five years is dead [*Evid. Code § 667*]; that is, it cannot be made until after the lapse of the five-year period. Once it is established that the person has been missing and not heard from in five years, then evidence is admissible to show the date of death and that death occurred while the policy was in full force and effect. That is, the statutory presumption establishes the fact of death but not the date of death. Any facts or circumstances relating to the character, habits, condition, state of mind, or any of those things which usually control a person's conduct are competent evidence from which the date of death may be inferred [*Benjamin v. District Grand Lodge No. 4, Indep. Order B'nai B'rith (1915) 171 Cal. 260, 263-267*].

The presumption created by *Evid. Code § 667* is not exclusive and, where there is evidence of a specific peril to which the missing person was subjected, death may be found to have occurred in a shorter period. Although the general rule is that the presumption of life continues during the entire period of five years following the disappearance of a person, such presumption may be overcome by evidence showing either that within such time the missing person was subjected to some specific peril, or that other circumstances or conditions intervened sufficient to quicken the ordinary five-year period of time necessary to create the presumption of death. But in that regard, it is unnecessary that the evidence be direct or positive; it need only be of such character as to make it more probable that the person died at a particular time than that he or she survived [*Pollack v. Hamm (1970) 3 Cal. 3d 264, 269-270, 90 Cal. Rptr. 181, 475 P.2d 213]* .

Consequently, if there is evidence that the insured died prior to expiration of the statutory period, the beneficiary may present proof of death to the insurer and, if the latter refuses to pay, commence an action to recover on the policy. As to the circumstantial evidence required in such action to raise a presumption of death at a time prior to the lapse of five years, "no specific statement can be made that will apply in all cases" [*Rogers v. Manhattan Life Ins. Co. (1903) 138 Cal. 285, 289, 71 P. 348* (where circumstances indicate suicide it is a question of fact for the jury)]. But a finding or verdict that the insured did not die at the time indicated and that he or she is alive will be res judicata in any subsequent action to recover the insurance proceeds after lapse of the five-year period [see *Minnis v. Equitable Life Assurance Soc'y (1928) 204 Cal. 180, 182-184, 267 P. 538]* .

[4] State Statutes

Presumption that person not heard from in five years is dead. *Evid. Code § 667*

Judicial proceeding to establish fact of death. *Health & Safety Code §§ 10550-10558*

Establishing and reporting fact of death affecting interest in real or personal property. *Prob. Code § 200 et seq.*

Administration of estates of persons missing for five years. Prob. Code § 1350 et seq.

[5] Decisions

NOTE:
In 1983, *Evid. Code § 667* was amended to reduce the seven-year period to five years.

Statutory presumption that person missing seven years is dead as establishing fact of death but as not fixing time within seven-year period at which missing person died. *Benjamin v. District Grand Lodge No. 4, Indep. Order B'nai B'rith (1915) 171 Cal. 260, 264, 152 P. 731* ; *Linneweber v. Supreme Council (1916) 30 Cal. App. 315, 318, 158 P. 229*

Once fact of death is established by virtue of statutory presumption that person missing seven years is dead, evidence as to date of death as admissible. *Benjamin v. District Grand Lodge No. 4, Indep. Order B'nai B'rith (1915) 171 Cal. 260, 266* ; *see also Linneweber v. Supreme Council (1916) 30 Cal. App. 315, 318, 158 P. 229*

Presumption of death of person not heard from in seven years as not arising until expiration of seven years unless circumstantial evidence establishes that death occurred at earlier time. *Rogers v. Manhattan Life Ins. Co. (1903) 138 Cal. 285, 289, 71 P. 348* ; see also *Minnis v. Equitable Life Assurance Soc'y (1928) 204 Cal. 180, 184, 267 P. 538*

Any facts or circumstances relating to character, habits, condition, state of mind, or any of those things which usually control person's conduct as competent evidence from which death of one absent and not heard from whatever may have been duration of his absence may be inferred. *Benjamin v. District Grand Lodge No. 4, Indep. Order B'nai B'rith (1915) 171 Cal. 260, 267*

Statutory presumption that person not heard from for seven years is dead as not exclusive; presumption that life continued throughout seven-year period as subject to being overcome by evidence showing either that within such time missing person was subjected to some specific peril or that circumstances of conditions intervened sufficient to quicken ordinary seven-year period necessary to create presumption of death. *Pollack v. Hamm (1970) 3 Cal. 3d 264, 269-270, 90 Cal. Rptr. 181, 475 P.2d 213* (executive appointment to fill vacancy in judicial office resulting from loss at sea in boating accident of incumbent judge whose body was not found)

Fact and exact date of death in action against insurance company prior to expiration of seven years after which time person not heard from is presumed dead as provable by circumstantial evidence. *Lesser v. New York Life Ins. Co. (1921) 53 Cal. App. 236, 238-240, 200 P. 22*

Finding by trial court in action to recover on life insurance policy prior to expiration of seven-year period that insured was not drowned accidentally or at all on certain date, which was date insured disappeared and which plaintiff had sought by circumstantial evidence to prove was date of death and that, because plaintiff had failed to prove by preponderance of evidence that insured was dead, insured was not dead as res judicata and conclusive on parties as to issue of insured's deathduring time referred to in judgment and as a bar to subsequent action commenced after expiration of seven years from date of insured's disappearance. *Minnis v. Equitable Life Assurance Soc'y (1928) 204 Cal. 180, 182-184, 267 P. 538*

In proceeding before Industrial Accident Commission (predecessor to Workers' Compensation Appeals Board) to recover compensation for death of employee claimed to have been murdered in course of his employment, burden as on applicant to establish by competent evidence fact of such death; proof as permitted to be made by circumstantial evidence; actual finding of body as not an indispensable requisite to conclusion that employee met his death by violence. *Western Grain & Sugar Prod. Co. v. Pillsbury (1916) 173 Cal. 135, 138, 159 P. 423*

Beneficiary under life insurance policy which does not require that evidence of death be presented within any given period following death of insured as not required to furnish insurer with proof of death until such proof is possible under circumstances of case; statute of limitations as not beginning to run on cause of action until such proof is available to beneficiary. *Benjamin v. District Grand Lodge No. 4, Indep. Order B'nai B'rith (1915) 171 Cal. 260, 264-265* ; *see*

also Linneweber v. Supreme Council (1916) 30 Cal. App. 315, 318, 158 P. 229 (involving interpretation of policy provision)

Delay in presenting proof of death as excusable where insurance policy requires proof of death within six months after its occurrence and insured disappeared, his body being discovered too late to allow presentation of proof of death within six-month period. *Benjamin v. District Grand Lodge No. 4, Indep. Order B'nai B'rith (1915) 171 Cal. 260, 264*

Where life insurance policy provides for payment on proof of death of insured, interest as not running on insurance proceeds prior to time proof of death is made or fact of death is admitted by insurer. *Rogers v. Manhattan Life Ins. Co. (1903) 138 Cal. 285, 297, 71 P. 348*

[6] Cross References

For forms for use in proceedings to establish the fact of death under *Health & Safety Code §§ 10550-10558*, see Ch. 99, *Birth and Death, Establishing the Fact of*

For forms for use in proceedings to establish the fact of death under *Prob. Code § 200 et seq.*, see Ch. 441, *Probate: Disposition Without Administration*

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Chapter 308 INSURANCE
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2. Life and Disability Insurance
II. Disability Insurance

26-308 California Forms of Pleading and Practice--Annotated § 308.400

§ 308.400 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Disability Insurance Policy [Ins. Code § 106]--General Form

[1] FORM Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Disability Insurance Policy [Ins. Code § 106]--General Form

[*Caption, introduction. See § 308.370[1].*]

1. Defendant is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of _____ with its principal place of business in _____ County, California, and authorized [by the California Insurance Commissioner] to transact, and transacting, business in this state as a disability insurer [*or other allegation of capacity and authority as appropriate*].

2. On or about _____ [*date*], in _____ [*city, county, and state*], defendant executed, issued, and delivered to plaintiff, as the named insured, its written policy of disability insurance, number _____, hereinafter referred to as "the policy," in consideration of an initial premium of $_____, which premium was paid by plaintiff to defendant and accepted by defendant as a consideration for the execution, issuance, and delivery of the policy, and in further consideration of the payment to defendant of a monthly premium of $_____ during each succeeding month. [A copy of the policy is attached hereto as Exhibit A and made a part hereof.]

[*Allege policy provisions setting forth coverage. The following alternative paragraphs are examples.*]

[*EITHER*]

3. _____ [*Allege total disability, e.g.*, The policy provides that if plaintiff should sustain accidental bodily injuries while the policy is in full force and effect and if such injuries, within _____ (*number*) days after the date of the accident, should result (directly and independently of all other causes) in total disability which should continuously prevent the insured from performing the normal and usual duties pertaining to his/her occupation for a period of _____ (*number*) consecutive days, defendant would pay the insured the sum of $_____ per month for the period of such continuous total disability, commencing on the first day of such total disability, but not exceeding _____ consecutive months. (The policy further provides that if premiums have been paid for a period of 12 consecutive months before the disabling accident occurs, defendant would continue payment of the sum of $_____ per month beyond the _____ -month period referred to above so long as the insured should continue to be totally disabled and prevented by his/her injuries from engaging in any occupation or employment for wage or profit)].

[*OR*]

3. _____ [*Allege partial disability, e.g.*, The policy provides that if the insured should sustain accidental bodily injuries while the policy is in full force and effect and if such injuries, within _____ (*number*) days after the date of the accident (, or immediately following the period of total disability covered by the provisions of the policy,) should result (directly and independently of all other causes) in partial disability (as defined in the policy) which continuously prevents the insured from performing important daily duties pertaining to his/her occupation, defendant would pay the insured for the period of such continuous partial disability the sum of $_____ monthly, but not exceeding _____ consecutive months].

4. At the time the policy was issued, to and including the time plaintiff sustained accidental bodily injuries as herein alleged, plaintiff was employed as a _____ [*specify*].

5. On or about _____ [*date*], while the policy was in full force and effect, plaintiff _____ [*allege manner and place of accident*], hereinafter referred to as "the accident," as a result of which plaintiff sustained the following bodily injuries: _____ [describe].

6. _____ [*Allege disability, e.g.*, These injuries, within _____ (*number*) days after the date of the accident and within the time specified in the policy, proximately resulted in plaintiff's _____ (total *or* partial) disability, within the meaning of the policy, in that plaintiff, as a proximate result of his/her injuries as herein alleged, _____ (has been *or* has been and continues to be or was, between the dates of _____ (*date*), and _____ (*date*)), prevented from performing _____ (the normal and usual duties or important daily duties) of his/her occupation as follows: _____ (*specify*)].

7. On or about _____ [*date*], plaintiff furnished defendant written notice of his/her claim and proof of loss and has otherwise performed all the terms and conditions of the policy on his/her part to be performed.

8. There is, under the terms of the policy, now due and owing to plaintiff from defendant the sum of $_____. Plaintiff has demanded payment of this sum from defendant, but defendant has failed and refused, and continues to fail and refuse, to pay that sum or any part of it.

9. As a proximate result of defendant's failure and refusal as herein alleged, plaintiff has been damaged in the sum of $_____ [*sum alleged in Paragraph 8*], together with interest thereon at the legal rate from the date payment should have been made under the terms of the policy until it is paid.

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____, together with interest thereon at the legal rate;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[*Verification, if desired. See § 308.370[1].*]

[2] Use of Form

This form of complaint is for use by an insured to recover insurance benefits under an individual accident policy where the insurer has refused to pay. With appropriate modifications, it may also be used to recover such benefits under a group policy or under a disease, surgical, medical, hospital, or other like policy.

For a discussion of the essential allegations of the complaint, the number of copies to prepare, and verification, see *§ 308.370*.

If the insurer's refusal to pay results from a dispute between the parties as to the coverage provided by the policy, the insured (or insurer) may file a complaint for declaratory relief [*Code Civ. Proc. § 1060*], rather than for breach of contract, to secure a judicial declaration of the respective rights and duties of the parties under the policy. For complaints for declaratory relief and a procedural guide for use in such actions, see Ch. 182, *Declaratory Relief* .

[3] Decisions

[a] Definitions

"Accident." *Price v. Occidental Life Ins. Co. (1915) 169 Cal. 800, 802*

"Accidental means." *Moore v. Fidelity & Cas. Co. (1928) 203 Cal. 465, 471, 265 P. 207*

[b] Evidence

Occurrence of accident as susceptible to proof by circumstantial evidence. *Frenzer v. Mutual Benefit Health & Accident Ass'n (1938) 27 Cal. App. 2d 406, 411, 81 P.2d 197*

[c] Process of Nature Rule

Process of nature rule as not applicable to defeat insured's reasonable expectation that preexisting injury would be covered. *Delgado v. Heritage Life Ins. Co. (1984) 157 Cal. App. 3d 262, 274, 203 Cal. Rptr. 672*

Disability that follows from accidental injury within such time as processes of nature consume in bringing affected person to state of total incapacity to prosecute every kind of business pertaining to his occupation as "immediate" within terms of policy. *Frenzer v. Mutual Benefit Health & Accident Ass'n (1938) 27 Cal. App. 2d 406, 413, 81 P.2d 197* ; *see also Schilk v. Benefit Trust Life Ins. Co. (1969) 273 Cal. App. 2d 302, 306-307, 78 Cal. Rptr. 60*

[d] Return to Work

Futile effort by insured to return to work, notwithstanding existence of disability, as not precluding recovery of benefits under disability policy providing benefits in event of total disability once claimant's condition has become stationary and permanent. *McMackin v. Great Am. Reserve Ins. Co. (1971) 22 Cal. App. 3d 428, 438, 99 Cal. Rptr. 227*

[e] Test of Disability

Test of disability as being not what insured actually did in effort to perform his occupational duties but what, in exercise of due prudence, he was reasonably expected to do. *Joyce v. United Ins. Co. (1962) 202 Cal. App. 2d 654, 665, 21 Cal. Rptr. 361*

[f] Total Disability

Test of total disability as requiring consideration of real world job market and insured's age, education, training, and experience. *Moore v. American United Life Ins. Co (1984) 150 Cal. App. 3d 610, 621-621, 631-632*

Definition of "total disability" in *Bareno v. Employers Life Ins. Co. (1972) 7 Cal. 3d 875, 886-887, 103 Cal. Rptr. 865, 500 P.2d 889* , as applicable to so-called occupational disability insurance. *Austero v. National Cas. Co. (1978) 84 Cal. App. 3d 1, 19-22, 148 Cal. Rptr. 653*

"Total disability" defined. *Bareno v. Employers Life Ins. Co. (1972) 7 Cal. 3d 875, 886-887, 103 Cal. Rptr. 865, 500 P.2d 889* ; *Hurwit v. Prudential Ins. Co. of Am. (1941) 45 Cal. App. 2d 74, 80-81, 113 P.2d 691*

Total disability as either temporary or permanent. *McMackin v. Great Am. Reserve Ins. Co. (1971) 22 Cal. App. 3d 428, 437, 99 Cal. Rptr. 227*

Total disability, within meaning of disability insurance policy provision captioned "Total Disability Accident Benefits" and providing that insurer will pay specified sum from date of first medical treatment and so long as insured lives and is disabled, if such injury shall within 20 days from date of accident wholly and continuously disable insured, cause total loss of time, and require regular attendance by licensed physician, surgeon, osteopath, or chiropractor other than insured, as meaning a disability which prevents insured from working with reasonable continuity in his customary occupation or in any other occupation in which he might reasonably be expected to engage in view of his station and physical and mental capacity. *Joyce v. United Ins. Co. (1962) 202 Cal. App. 2d 654, 664, 21 Cal. Rptr. 361*

[4] Cross References

For a related form, see *§ 308.370*

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[Reserved]

§§ 308.401[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.410

§ 308.410 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Property Insurance Policy--General Form

[1] FORM Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Property Insurance Policy--General Form

[*Caption, introduction. See § 308.370[1].*]

1. Defendant is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of _____ with its principal place of business in _____ County, California, and authorized [by the California Insurance Commissioner] to transact, and transacting, business in this state as a _____ [*class of insurance, e.g.,* fire] insurer [*or other allegation of capacity and authority as appropriate*].

2. At all times herein mentioned, [to the time of loss as herein alleged], plaintiff was [and is] the _____ [*allege relationship to property establishing insurable interest, e.g.,* owner] of that certain [real] property described as follows: _____ [*describe*].

3. On or about _____ [*date*], [in consideration of the payment of an annual premium of $_____ made by plaintiff,] defendant, by its duly authorized agents, executed and delivered to plaintiff [in _____ (*city, county, and state*)] its policy of insurance bearing number _____, hereinafter referred to as "the policy," wherein and whereby defendant insured plaintiff in the sum of $_____ for the term from _____ [*date*], to _____ [*date*], against _____ [*specify risks assumed by insurer, e.g.,* damage by fire *or* plate glass breakage *or* loss due to burglary] to the property described in Paragraph 2, *above*, and described in the policy as follows: _____ [*set forth policy description*]. [A copy of the policy is attached hereto as Exhibit A and made a

part hereof.]

4. On or about _____ [*date*], while the policy was in full force and effect, the above-described property was _____ [totally destroyed *or* partially destroyed *or* damaged *or* lost *or* broken *or specify other casualty loss*] by _____ [*risk insured against, e.g.*, fire *or* flood *or* windstorm *or* burglary or specify other risk insured against], to plaintiff's loss and damage in the sum of $_____.

5. Plaintiff has performed all conditions of the policy on his/her part to be performed and, in accordance with the terms of the policy, gave defendant due and timely written notice of and proof of loss [*or allege excuse for nonperformance, if any*].

6. Plaintiff has demanded of defendant payment of the sum of $_____, as alleged in Paragraph 4, *above*, but defendant has failed and refused, and continues to fail and refuse, to pay plaintiff that sum or any part of it [*or allege fact of partial payment and failure and refusal to pay balance if such are the facts*], and there is now due, owing, and unpaid to plaintiff from defendant the sum of $_____.

7. As a proximate result of defendant's failure and refusal as herein alleged, plaintiff has been damaged in the sum of $_____ [*amount due under policy and unpaid*], with interest on that sum at the legal rate [from and after _____ (*date payment should have been made under terms of policy*)].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____, together with interest thereon at the legal rate [from and after _____ (*date*)];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[*Verification if desired. See § 308.370.*]

[2] Use of Form

This form is a general form of complaint by an insured to recover damages for the insurer's breach of an insurance contract covering property. For a discussion of the essential allegations of the complaint, the number of copies to prepare, and verification, see *§ 308.370*.

If the refusal to pay resulted from a dispute between the insured and insurer as to the coverage provided by the policy, the insured (or insurer) may file a complaint for declaratory relief [*Code Civ. Proc. § 1060*], rather than for breach of contract, to secure a judicial determination of the parties' rights and duties under the policy. For complaints for declaratory relief and a procedural guide for use in such actions, see Ch. 182, *Declaratory Relief* .

[3] Cross References

For a related form, see *§ 308.370*

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26-308 California Forms of Pleading and Practice--Annotated § 308.411

§ 308.411 Allegation of Insurable Interest in Property--Transferee and Assignee

[1] FORM Allegation of Insurable Interest in Property--Transferee and Assignee

On or about _____ [*date*], _____ [*name*], the owner of the property hereinabove described, _____ [transferred or conveyed] all his/her right, title, and interest in the property to plaintiff and, as a part of that transaction, assigned the policy herein sued on to plaintiff. Defendant was given written notice of the transfer and assignment and on _____ [*date*], consented to that assignment by endorsement on the policy in the following words: _____ [*state*].

[2] Use of Form

This allegation is for use in a complaint by an assignee of the policy against the insurer to recover under the provisions of the policy. For discussions of the effect of a change of interest in the property and assignment, see *§§ 308.19* and *308.20*.

[3] Statutes

Change of interest in property insured on insurable interest. *Ins. Code §§ 300-305*

[4] Decisions

Purported assignment of fire insurance policy requiring consent of insurer for assignment as ineffective without such consent; assignment of right to recover on policy after loss, however, as assignable without insurer's consent. *Greco v. Oregon Mut. Fire Ins. Co. (1961) 191 Cal. App. 2d 674, 682, 12 Cal. Rptr. 802*

[5] Cross References

See generally Ch. 60, *Assignments*

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§ 308.412 Allegation of Loss or Damage to Property--Vandalism

[1] FORM Allegation of Loss or Damage to Property--Vandalism

On or about _____ [*date*], while the policy was in full force and effect, the premises at _____ [*street address*], in _____ [*city*], California, were invaded by vandals and, at that time and place, the vandals cut, marred, and destroyed the premises, draperies, carpeting, other furnishings, and furniture and, by virtue of the conduct of these vandals, plaintiff suffered damages in the sum of $_____.

[2] Use of Form

This allegation is for insertion in a complaint by an insured against the insurer to recover under an insurance policy covering loss due to acts of vandalism or malicious mischief.

[3] Decisions

Action against insurance company to recover loss due to vandalism. *Belgrade v. National Am. Ins. Co. (1962) 204 Cal. App. 2d 44, 22 Cal. Rptr. 21* (affirming judgment for defendant on ground building was vacant and unoccupied for more than 30 consecutive days immediately prior to loss and hence coverage was excluded under terms of policy)

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26-308 California Forms of Pleading and Practice--Annotated § 308.413

§ 308.413 Allegation of Loss or Damage to Property--Windstorm

[1] FORM Allegation of Loss or Damage to Property--Windstorm

On or about _____ [*date*], while the policy was in full force and effect, the _____ [*state property affected, e.g.*, dwelling house herein described and the furniture and furnishings in it] were damaged by windstorm as follows: _____ [*specify, e.g.*, the wind uprooted trees causing them to fall on the house and to tear holes in its roof and sides; the wind ripped shingles from the roof, tore window shutters from their hinges, and broke windows and doors; the interior ceiling and walls, as well as the furniture in and furnishings of the house were damaged by the direct force of wind and rain entering through the openings in the roof and sides of the house caused by the wind and fallen trees and from rain water seeping into other parts of the house once it had entered]. As a result, plaintiff was damaged in the sum of $_____.

[2] Use of Form

This allegation is for insertion in a complaint by an insured against an insurer to recover under an insurance policy covering loss from windstorm.

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26-308 California Forms of Pleading and Practice--Annotated § 308.414

§ 308.414 Complaint by Insured Against Several Insurance Companies for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--On Property Insurance Policies and for Declaration of Liability of Each Insurer Where Amount of Loss Not in Dispute

[1] FORM Complaint by Insured Against Several Insurance Companies for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--On Property Insurance Policies and for Declaration of Liability of Each Insurer Where Amount of Loss Not in Dispute

[*Caption, introduction. See § 308.370[1].*]

[1. *In separate, consecutively numbered paragraphs allege existence and capacity of each insurance company involved in action. See § 308.410[1], Paragraph 1.*]

[2. *In separate, consecutively numbered paragraphs allege execution and delivery of each insurance policy by each defendant insurance company. See § 308.410[1], Paragraph 3.*]

3. On the date the various policies of insurance by the several defendants to plaintiff were issued as herein set forth and on _____ [*date*], the date of the happening of the loss and damage herein mentioned, plaintiff was the owner of _____ [*property insured*] [and the lawful possessor of all the contents of the premises, consisting of the buildings and additions situated and commonly known as _____ (*street address*), in _____ (*city*), California].

4. At the time of the loss herein referred to, the total amount of all insurance carried on the property by plaintiff was the sum of $_____.

5. While the insurance policies, and each of them, hereinabove described were in full force and effect, to wit, on

_____ [*date*], _____ [*allege casualty loss, e.g.,* a fire occurred in the insured premises].

6. Defendants, and each of them, have stipulated and agreed that plaintiff's loss due to the _____ [risk insured against] of _____ [*date*] was and is in the total amount of $_____.

[7. *Allege plaintiff's performance of conditions precedent or excuse for nonperformance. See § 308.377.*]

8. On receipt of notice of loss, defendants appointed adjusters to settle and adjust plaintiff's claim against them arising out of the _____ [*risk insured against*]; the adjusters negotiated with plaintiff as to the amount of loss and damage and as to other matters incidental to the _____ [*risk insured against*], but failed and refused to agree with plaintiff that the loss was caused by a peril insured against under the above-described policies.

9. On or about _____ [*date*], plaintiff served written proofs of loss on defendants, and each of them; defendants acknowledged receipt thereof but unconditionally denied any liability under their respective policies.

10. Neither all nor any of the defendants has paid to plaintiff, or to anyone else in plaintiff's behalf, the amount of the loss and damage sustained by plaintiff as a result of the _____ [*risk insured against*] herein alleged, to wit, the sum of $_____, or their proportionate share of it, or any part of it, and plaintiff has received no payment whatsoever on account of the policies from any of the defendants herein.

11. As a result of the _____ [*risk insured against*] herein alleged, plaintiff sustained loss and damage covered by the policies hereinabove described in the total sum of $_____ [*sum alleged in Paragraph 6*]. As a proximate result of the denial by defendants, and each of them, of any and all liability under their respective policies as herein alleged, plaintiff has been damaged in that sum, together with interest thereon at the legal rate from the date that payment should have been made under the terms of the policy until it is made.

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____ with interest thereon at the legal rate;

2. That the proportionate liability of each defendant under the terms of its policy be declared;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[*Verification, if desired. See § 308.370[1].*]

[2] Use of Form

This form of complaint illustrates an action by an insured against several insurers on multiple policies covering the same risk. For a discussion of the essential allegations of the complaint, number of copies to prepare, and verification,

see *§ 308.370*.

The insured (or the insurers) may file a complaint for declaratory relief [*Code Civ. Proc. § 1060*] instead of one for breach of contract to secure a judicial determination of the rights and duties of the parties under the respective policies. For forms of complaints for declaratory relief and a procedural guide for use in such actions, see Ch. 182, *Declaratory Relief* .

[3] State Statutes

Joinder of parties defendant. *Code Civ. Proc. § 379*

Misjoinder of parties defendant. *Code Civ. Proc. §§ 430.10(d), 430.30*

Declaratory relief. *Code Civ. Proc. § 1060*

[4] Decisions

Joinder of party-defendants as inappropriate when insurer's right to declaratory relief against numerous insureds did not arise out of same transactions or occurrence within meaning of *Code Civ. Proc. § 379*. *Farmers Ins. Exch. v. Adams (1985) 170 Cal. App. 3d 712, 722, 216 Cal. Rptr. 287 , disapproved, Garvey v. State Farm Fire & Casualty Co. (1989) 48 Cal. 3d 395, 411, 257 Cal. Rptr. 292, 770 P.2d 704*

[5] Cross References

For a related form, see *§ 308.370*

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[Reserved]

§§ 308.415[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.420

§ 308.420 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Fire Insurance Policy [Ins. Code § 102]--Defendant Estopped [Evid. Code § 623] to Rely on 12-Month Policy Provision for Filing Action [Ins. Code § 2071]

[1] FORM Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Fire Insurance Policy [Ins. Code § 102]--Defendant Estopped [Evid. Code § 623] to Rely on 12-Month Policy Provision for Filing Action [Ins. Code § 2071]

[*Caption, introduction. See § 308.370[1].*]

1. Plaintiff [is, and] at all times herein mentioned was [,] the owner of _____ [*specify, e.g.,* a dwelling house] and personal property located therein at _____ [*street address and city*], County, California, hereinafter referred to as "the insured premises" [, more particularly described as follows: _____ (*describe*)]

2. Defendant is, and at all times herein mentioned was, a corporation organized and existing under the laws of _____ [*state or foreign country*] [, with its principal place of business in this state situated in _____ County,] and authorized to transact, and transacting, business in California as a[n] [foreign] insurance corporation [*or other allegation of capacity and authority as appropriate*].

3. At all times herein mentioned, defendant was engaged in this state in the business of writing insurance policies insuring against, among other things, loss by fire, and in such policies providing for payment of the amount fixed therein in the event of loss by fire of the property described and covered by such policies.

4. On or about _____ [*date*], defendant [, in consideration of the payment by plaintiff to defendant of the premium of $_____,] issued a written policy of insurance, number _____,

hereinafter referred to as "the policy," to plaintiff. By the terms of the policy [and in consideration of the aforesaid payment], defendant insured plaintiff for a period of _____ [*number*] year(s) from _____ [*date*], to _____ [*date*], against loss by fire of the property mentioned in Paragraph 1 as follows: _____ [*enumerate, e.g.:*

	COVERAGE	LIMITS OF LIABILITY
A.	Dwelling house at _____ _____ [address]	$50,000.00
B.	Appurtenant private structures at _____ _____ [address]	5,000.00
C.	Personal property in the premises at _____ _____ [address]	25,000.00
D.	Personal property away from the insured premises	2,500.00
E.	Additional living expense incurred by plaintiff caused by fire loss	5,000.00
F.	Comprehensive personal liability	25,000.00 each occurrence
G.	Medical payments	1,000.00 each person.

[*A copy of the policy is attached hereto as Exhibit A and made a part hereof.*]

5. On or about _____ [*date*], while the policy was in full force and effect, the above-described _____ [*specify, e.g.,* dwelling house] and personal property therein were _____ [totally destroyed or partially destroyed or damaged] by fire, thereby causing plaintiff to sustain a loss in the sum of $_____ for the _____ [*specify, e.g.,* dwelling house] and the further sum of $_____ for loss of personal property therein. [Plaintiff has, from the date of the loss, suffered, and shall continue to suffer, additional loss at the rate of $_____ per _____ (week *or* month *or specify other time period*) as additional living expense incurred as a direct result of the destruction by fire of his/her house as herein alleged.]

6. Immediately after sustaining the loss, to wit, on _____ [*date*], plaintiff gave defendant written notice of the fire and loss, and on or about _____ [*date*], delivered to defendant a complete inventory of the destroyed, damaged, and undamaged property and a written proof of the loss and the facts surrounding it.

7. After receipt of the notice, inventory, and proof of loss, defendant, on or about _____ [*date*], commenced negotiations with plaintiff with reference to the loss, and these negotiations continued until on or about _____ [*date*], at which time they were terminated by defendant. Defendant has failed and refused to pay plaintiff the amount of loss sustained by him/her as a result of the fire and within the policy limits [as set forth in Exhibit A] as alleged in Paragraph 5 and continues to fail and refuse to pay to plaintiff that sum or any part of it.

8. Plaintiff has performed all of the conditions of the policy to be performed on his/her part, except for the requirement that this action be commenced within 12 months from the date of loss. Defendant waived this requirement and is estopped to rely on it for the following reasons: _____ [*specify, e.g.,* (1) on issuing the contract of

insurance, defendant sent the original of the policy to _____ (*name*), the holder of the mortgage on the insured premises, andsent plaintiff an eight-page printed document bearing the designation "HOMEOWNERS POLICY CALIFORNIA MEMORANDUM OF INSURANCE"; (2) this document, a copy of which is attached hereto as Exhibit B and made a part hereof, has the appearance of a facsimile of the policy and purports to set forth all the essential terms thereof but contains no reference to the 12 month limitation for the commencement of an action on the policy; (3) plaintiff was never informed of this period of limitation until long after its expiration; (4) after receiving notice of the loss, defendant participated with plaintiff in negotiations looking to a compromise settlement of the amount of his/her claim; (5) these negotiations extended over a period beyond the 12 months following the loss; and (6) defendant at all times admitted that plaintiff had suffered a loss covered by the policy but never gave him/her any indication of its intention to rely on the contractual limitation on the time within which he/she might file suit on his/her claim until after that time limitation had expired].

9. As a direct and proximate result of defendant's failure and refusal to pay plaintiff the full or any of the amounts agreed by it to be paid in the event of loss by fire, plaintiff has been damaged in the sum of $_____ for the destruction of his/her _____ [*specify, e.g.,* dwelling house] [,] [and] the sum of $_____ for the destruction of his/her personal property therein [, and the further sum of $_____ to date for additional living expense incurred by plaintiff as a result of the loss of his/her house by fire]. [Plaintiff is continuing to incur additional living expense as a direct result of the fire loss and will seek leave to amend this complaint to insert the true amount thereof when ascertained.]

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____ for loss of _____ [*specify, e.g.,* the dwelling house] and personal property, plus interest thereon at the legal rate from _____ [*date payment should have been made under the terms of the policy*];

[2. For the sum of $_____ as additional living expense incurred to date, together with such further sum as plaintiff is required to pay for such expense after the filing of this complaint and before judgment, subject to the policy limit;]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[*Verification if desired. See § 308.370[1].*]

[2] Use of Form

This complaint is adapted from the one filed in *Elliano v. Assurance Co. of Am. (1970) 3 Cal. App. 3d 446, 83 Cal. Rptr. 509* and illustrates the pleading of an estoppel against the defendant insurer. For a discussion of the essential allegations of the complaint, the number of copies to prepare, and verification, see *§ 308.370*. For a complaint for use if the insurer denies liability or coverage, see *§ 308.410*.

[3] Decisions

Standard form fire insurance policy as required under California Law [*Ins. Code §§ 2070, 2071*] to contain provisions: (1) requiring insured to render to insurer within 60 days after loss formal proof of loss; and (2) stating that no suit or action on policy for recovery of any claim shall be sustainable in any court unless commenced within 12 months next after inception of loss. *Elliano v. Assurance Co. of Am. (1970) 3 Cal. App. 3d 446, 448, 83 Cal. Rptr. 509*

Omission from a Homeowners Policy California Memorandum of Insurance of the statutorily required provision to be inserted in fire insurance policies that no suit or action on the policy for recovery of any claim shall be sustainable in any court unless commenced within 12 months next after inception of loss, although included in actual policy delivered to holder of mortgage on insured premises, where Memorandum contained all other material provisions of policy and in effect appeared to be a duplicate copy as estopping insurer from relying on that defense in action by insured where there was no dispute as to fact of loss and negotiations for settlement of claim had been carried on between insurer and insured all during that period and beyond. *Elliano v. Assurance Co. of Am. (1970) 3 Cal. App. 3d 446, 450-455, 83 Cal. Rptr. 509*

When prejudgment interest may be recovered. *Koyer v. Detroit Fire & Marine Ins. Co. (1937) 9 Cal. 2d 336, 345-346, 70 P.2d 927* ; *Esgro Cent., Inc. v. General Ins. Co. of Am. (1971) 20 Cal. App. 3d 1054, 1060-1062, 98 Cal. Rptr. 153*

[4] Cross References

For a related form, see *§ 308.370*

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26-308 California Forms of Pleading and Practice--Annotated § 308.421

§ 308.421 Proceedings to Determine Liability Under Oral Fire Insurance Contract--Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--By Insured Against Several Insurance Companies and Their Mutual Agent

[1] FORM Proceedings to Determine Liability Under Oral Fire Insurance Contract--Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--By Insured Against Several Insurance Companies and Their Mutual Agent

[*Caption, introduction. See § 308.370[1].*]

1. At all times herein mentioned plaintiff was the owner of _____ [*property destroyed by fire*] hereinafter referred to as "the subject property" located at _____ [*street address and city*], _____ County, California.

2. Defendants _____ [*names of insurance companies*], hereinafter collectively referred to as "defendant insurers," are, and at all times herein mentioned were, corporations organized and existing under the laws of the State of California and authorized to transact, and transacting, business in this state as fire insurers [*or allege capacity and authority of each defendant insurer in separately numbered paragraphs*].

3. Defendant _____ [*name*], hereinafter referred to as "defendant agent," at all times herein mentioned was a duly authorized and acting insurance agent of defendant insurers, and of each of them individually, as to agreements of insurance coverage and, in doing the things herein alleged was acting within the course and scope of his/her agency and authority.

4. On or about _____ [*time*], on _____ [*date*], defendant agent orally agreed with plaintiff to insure plaintiff against destruction or damage by fire of the subject property up to a total amount of $_____, for a premium _____ [of $_____ to be *or* later to be computed by defendant agent and] billed to plaintiff. The insurance was to be effective forthwith and continue for a

period of _____ [*specify*]. Defendant insurers did thereby insure plaintiff against any and all loss by fire not exceeding the amount of $_____, this amount to be allocated among defendant insurers by defendant agent, their duly delegated and authorized agent in this regard.

5. Plaintiff, in complete reliance on the oral agreement with defendant agent to insure his/her property, placed no other insurance with any other person, or persons, with respect to the subject property and considered himself/herself wholly and completely insured and protected by defendants, and each of them.

6. On or about _____ [*date*], while the agreement was in full force and effect, the subject property was totally destroyed by fire. The fair market value of the property immediately before the fire was $_____; after the fire, the property had no market value whatsoever. As a result of the fire and loss of property, plaintiff was injured in the sum of $_____. By reason thereof, plaintiff became entitled to receive $_____ from defendants, the sum which defendants agreed to pay plaintiff in the event the subject property was destroyed or damaged by fire.

7. Immediately thereafter, to wit, on or about _____ [*date*, plaintiff gave defendants, and each of them, written notice of the loss and destruction of the subject property by fire and duly furnished the required inventory and written proof of loss. Notwithstanding said notice, inventory, and proof, defendants, and each of them, have failed and refused, and continue to fail and refuse, to pay plaintiff the sum of $_____ or any part of it.

8. Plaintiff has duly performed each and every condition on his/her part to be performed under the agreement.

9. Plaintiff contends that defendant insurers are liable to plaintiff in the full amount of the policy purchased by plaintiff and that if they are not so liable then defendant agent is liable to plaintiff in that amount on the ground that there was a valid agreement between plaintiff and defendant agent for the purchase and sale of insurance and that by failing to do whatever was necessary in order to complete that sale from defendant insurers, defendant agent breached its agreement with plaintiff.

10. Defendant insurers deny any liability to plaintiff and contend that no policy was in existence at the time of the loss, that they had not agreed at that time to the issuance of such a policy, and that defendant agent had no authority to bind them to an agreement to issue the policy. Defendant agent contends that he/she is not personally liable to the plaintiff for the loss, that at all times he/she was acting as an agent for defendant insurers, his/her disclosed principals, and that he/she had authority from defendant insurers, and each of them, to bind them to issue policies on oral agreements such as the one herein alleged.

11. By reason of the foregoing, an actual controversy exists between plaintiff and defendants herein as to the rights and obligations of the parties.

WHEREFORE, plaintiff prays judgment as follows:

1. That the court declare the rights and obligations of the parties with respect to the oral agreement and insurance policies herein referred to;

2. That plaintiff recover judgment from the defendants, in accordance with the declaration of the court, for the total amount of $_____, together with interest thereon from and after the date that payment under the policies should have been made;

3. For costs of suit herein incurred; and

4. For such other and further relief as court may deem proper.

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[*Verification, if desired. See § 308.370[1].*]

[2] Use of Form

This form of complaint is for use where the agreement to insure was orally made by an agent of two or more insurers, the loss occurred after the agreement was entered into but before any policy was issued, and the insurers deny liability under the agreement [see *Rimington v. General Accident Group of Ins. Cos. (1962) 205 Cal. App. 2d 394, 395, 23 Cal. Rptr. 40]* . With appropriate modifications, it may also be used where an oral covering agreement or binder was made by an agent acting for a single insurance company [*see §§ 308.371* and *308.372*]. For a complaint against an insurance broker for damages for negligence in failing to place insurance and secure issuance of a fire policy, see *§ 308.511*.

[3] Statutes

Declaratory relief. *Code Civ. Proc. § 1060*

[4] Decisions

Complaint for declaratory relief as legally sufficient if it sets forth facts showing existence of actual controversy relating to legal rights and liabilities of respective parties and requests that these rights and liabilities be adjudged by court. *Rimington v. General Accident Group of Ins. Cos. (1962) 205 Cal. App. 2d 394, 397, 23 Cal. Rptr. 40*

[5] Cross References

For related forms, see *§§ 308.370 -308.372, 308.410, 308.420*

For alternative forms of complaints for declaratory relief and a procedural guide, see Ch. 182, *Declaratory Relief*

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26-308 California Forms of Pleading and Practice--Annotated § 308.422

§ 308.422 Proceedings to Determine Liability Under Oral Fire Insurance Contract--Cross Complaint by Defendant Insurance Agent Against Codefendant Insurance Companies for Declaratory Relief [Code Civ. Proc. §§ 86, 428.70, 1060]

[1] FORM Proceedings to Determine Liability Under Oral Fire Insurance Contract--Cross Complaint by Defendant Insurance Agent Against Codefendant Insurance Companies for Declaratory Relief [Code Civ. Proc. §§ 86, 428.70, 1060]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	
_____ [*names*], et al.,	)	
Defendants.	)	NO. _____
_____	)	CROSS COMPLAINT FOR DECLARATORY RE-
_____ [*name*],	)	LIEF
Cross Complainant,	)	[*Code Civ. Proc. § 1060*]
vs.	)	
_____ [*names*],	)	
Cross Defendants.	)	
	)	
	)	

Cross Complainant alleges:

1. Cross defendants are, and at all times herein mentioned were, corporations organized and existing under the laws of the State of California and authorized to transact, and transacting, business in this state as fire insurers [*or allege capacity and authority of each cross defendant in separately numbered paragraphs.*]

2. Cross complainant is, and at all times herein mentioned was, licensed to transact, and transacting, business as an insurance agent in the State of California and at all times herein mentioned was the duly appointed, authorized, and acting agent of cross defendants, and of each of them. At all times herein mentioned, cross complainant, as such agent, had authority on behalf of cross defendants, and each of them, to receive and accept proposals for fire insurance on property located in _____ [*city*] and vicinity, and to bind an insurance coverage on such risks orally or in writing. In all of his/her dealings with plaintiff and cross defendants relating to insurance coverage for plaintiff, as alleged in the complaint on file herein, cross complainant at all times acted and purported to act only and solely on behalf of and as agent for cross defendants, and each of them, and not as a principal.

3. The above-entitled action was commenced by plaintiff against cross complainant and cross defendants and seeks a declaration of plaintiff's rights in respect to an [alleged] agreement to insure plaintiff against loss by fire of certainproperty owned by plaintiff and allegedly destroyed by fire, all as more fully set forth in the complaint on file herein.

4. If there is any liability to plaintiff in the main action on the part of any defendant named in the complaint, all of such liability rests on and is the ultimate liability of one or more of the defendant insurers (cross defendants herein), and does not rest on nor is it the ultimate liability of cross complainant.

5. [Cross complainant is informed and believes and thereon alleges that] [C]ross defendants, and each of them, contend that ay liability to plaintiff in the main action herein rests on and is the ultimate liability of cross complainant and that it does not rest on nor is it the ultimate liability of cross defendants, or any of them. Cross complainant is [further] informed and believes and thereon alleges that if a judgment is rendered in the main action herein in favor of plaintiff and against cross defendants, or any of them, such cross defendants will file legal proceedings against cross complainant in which they will seek to recover from cross complainant any amounts they are required to pay under any such judgment.

6. Cross complainant has been made a party defendant by plaintiff in the main action herein solely as a result of his/her actions for and in behalf of cross defendants as their agent acting within the course and scope of his/her authority as such agent and the subsequent repudiation of his/her actions by cross defendants, and each of them; as a proximate result thereof, cross complainant has been, is, and will continue to be compelled to incur expenses, costs of litigation, and attorney's fees in amounts not yet ascertainable. Cross complainant prays leave to amend this cross complaint to insert such amounts when they are ascertained.

7. As a further proximate result of the actions of cross defendants in repudiating the authority of cross complainant to act in their behalf and bind them to the issuance of insurance policies as herein alleged, cross complainant has been damaged by loss of and damage to his/her heretofore excellent reputation as an insurance agent in the business community of _____ [*city*] and vicinity, and loss and damage to his/her insurance business, all to his/her damage in the sum of $_____.

8. In the respects herein alleged, there is an actual controversy and dispute between cross complainant and cross defendants, and each of them, concerning the rights and liabilities of the parties with respect to the [alleged] oral agreement sued on in the complaint herein. Cross complainant is without an adequate remedy at law, and the filing and maintenance of this cross complaint is necessary to prevent a multiplicity of actions should the judgment rendered in the main action herein be in favor of plaintiff and against defendants, or any of them.

WHEREFORE, cross complainant prays:

1. For judgment declaring the respective rights and liabilities of the parties concerning the matters in dispute as alleged herein, and, in the event a money judgment is rendered in the main action in favor of plaintiff against cross defendants, or any of them (whether or not plaintiff also recovers judgment against this cross complainant), for judgment declaring that cross complainant has no obligation or liability to the cross defendants, or any of them, with respect to such money judgment or any part of it;

2. In the event a money judgment is rendered in the main action in favor of plaintiff against cross complainant (whether or not plaintiff also recovers judgment against other defendants, cross defendants herein), for judgment that cross complainant is to be fully indemnified by cross defendants, and each of them, for all sums he/she is required by the judgment for plaintiff to pay;

3. For judgment against cross defendants, and each of them, in favor of cross complainant for loss and damage to cross complainant's reputation and to his/her insurance business in the sum of $_____, and for all expenses, costs of litigation, and attorney's fees incurred by cross complainant in defense of plaintiff's action according to proof; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[*Verification if desired. See § 308.370[1].*]

[2] Use of Form

This form of cross complaint is for use by an agent sued on an oral contract of insurance placed through the agent for a declaration of his or her rights to be indemnified by the insurers, whether or not they are named defendants in plaintiff's action, in the event that plaintiff should recover judgment against him or her [*see § 308.421*].

[3] State Statutes

Declaratory relief. *Code Civ. Proc. § 1060*

Limited civil cases for declaratory relief. *Code Civ. Proc. § 86(a)(7)*

[4] Decisions

Agent pursuing instructions of his principal and acting within scope of hisauthority who then becomes personally liable for performance of contract made for his principal as able to look to his principal for indemnity for damage sustained. *Rimington v. General Accident Group of Ins. Cos. (1962) 205 Cal. App. 2d 394, 397, 23 Cal. Rptr. 40*

Insurance agent sued on oral contract made on behalf of insurancecompany as able to file cross complaint against insurance company in same action for declarationof his right to be indem nified by insurance company should plaintiff

be awarded judgment against agent. *Rimington v. General Acci. Group of Ins. Cos. (1962) 205 Cal. App. 2d 394,397-398, 23 Cal. Rptr. 40*

Recovery against agent for failure to secure requested insurance as prohibited where his principal is properly held liable on loss. *Home Indem. Co. v. Mission Ins. Co. (1967) 251 Cal. App. 2d 942, 967, 60 Cal. Rptr. 544*

[5] Cross References

For format of cross complaints, see Ch. 123, *Complaints and Cross Complaints*

For complaints for declaratory relief and a procedural guide for use in such actions, see Ch. 182, *Declaratory Relief*

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[Reserved]

§§ 308.423[Reserved]

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III. Burglary and Theft Insurance

26-308 California Forms of Pleading and Practice--Annotated § 308.430

§ 308.430 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Burglary Insurance Policy [Ins. Code § 112]--General Form

[1] FORM Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Burglary Insurance Policy [Ins. Code § 112]--General Form

[*Caption, introduction. See § 308.370[1].*]

1. Defendant is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State _____ with its principal place of business in _____ County, California, and authorized [by the California Insurance Commissioner] to transact, and transacting, business in this state as an insurance company issuing policies insuring against various risks, including burglary [*or other allegations of capacity and authority as appropriate*].

2. On or about _____ [*date*], defendant, for a premium of $_____ paid by plaintiff, executed and delivered to plaintiff its policy of burglary insurance, number _____, hereinafter referred to as "the policy," a copy of which is attached hereto as Exhibit A and made a part hereof. By the terms of the policy defendant agreed to insure plaintiff for the term of _____ [*specify, e.g.*, one year], commencing at _____ [*time*], on _____ [*date*] and ending at _____ [*time*], on _____ [*date*]. The policy insured plaintiff in the sum of $_____ against loss by burglary or theft of _____ [*specify, e.g.*, the general stock, consisting of _____ (*describe*), fixtures, and furniture in the premises occupied by plaintiff at _____ (*street address and city*), California].

3. On or about _____ [*date*], while the policy was in full force and effect, a burglary was committed in the premises described in the policy, and the following described property covered by the policy was removed,

without plaintiff's knowledge or consent, from the interior of the premises: _____ [*describe*].

Neither all nor any part of the property has been recovered or returned to plaintiff. By reason of this felonious removal, plaintiff sustained a loss by burglary in the sum of $_____.

4. Plaintiff has fully performed all conditions of the policy on his/her part to be performed and, in accordance with the terms of the policy, gave defendant due and timely notice of the burglary and proof of loss [*or allege excuse for nonperformance, if any*].

5. Plaintiff has demanded of defendant payment of the sum of $_____, as alleged in Paragraph 3, *above*, but defendant has failed and refused, and continues to fail and refuse, to pay plaintiff that sum or any part of it [*or allegefact of partial payment and failure and refusal to pay balance if such are the facts*], and there is now due, owing, and unpaid from defendant to plaintiff the sum of $_____.

6. As a proximate result of defendant's failure and refusal as herin alleged, plaintiff has been damaged in the sum of $_____ [*amount due under policy and unpaid*], together with interest on that sum at the legal rate [from and after _____ (*date payment should have been made under terms of policy*)].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ together with interest thereon at the legal rate [from and after _____ (*date*)];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification if desired. See § 308.370[1].*]

[2] Use of Form

This form of complaint is for use by an insured against the insurer to recover under a policy insuring against burglary where the insurer has denied coverage or liability. For a discussion of the essential allegations and format of the complaint, the number of copies to prepare, and verification, see *§ 308.370*.

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[Reserved]

§§ 308.431[Reserved]

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IV. Comprehensive Dwelling Insurance

26-308 California Forms of Pleading and Practice--Annotated § 308.440

§ 308.440 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Comprehensive Dwelling Insurance Policy--Collapse of Foundation and Additional Living Expenses

[1] FORM Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Comprehensive Dwelling Insurance Policy--Collapse of Foundation and Additional Living Expenses

[*Caption, introduction. See § 308.370[1].*]

1. Plaintiff is, and at all times herein mentioned was, the owner of a dwelling house, hereinafter referred to as "the dwelling," known as _____ [*street address or other description, city, and county*], California.

2. Defendant is, and at all times herein mentioned was, a corporation organized and existing under the laws of _____ [*state or country*] [, with its principal place of business in this state situated in _____ County,] and authorized to transact, and transacting, business in California as a[n] [foreign] insurance corporation [*or other allegation of capacity and authority as appropriate*].

3. On or about _____ [*date*], [in consideration of the payment of an annual premium of $_____ made by plaintiff,] defendant, by its duly authorized agents, executed and delivered to plaintiff in _____ [*city and county*], California, its _____ [Comprehensive Dwelling or Homeowners *or specify other type of coverage*] Policy, number _____, hereinafter referred to as "the policy," in and by which defendant insured plaintiff against _____ [*allege coverage assumed by insurer on which insured is basing his/her action, e.g.,* all physical loss and damage to the dwelling caused by other than normal settling, shrinking, or expansion of the foundation, walls, floors, or ceilings] for the term beginning at _____ [*time*], on _____ [*date*] and ending at _____ [*time*], on _____ [*date*]. [A copy of the policy is attached hereto as Exhibit A and made a part hereof.]

4. On or about _____ [*date*], while the policy was in full force and effect, a portion of the foundation, wall, and floors of the dwelling collapsed as a result of _____ [*specify*]. By reason of the collapse and the resulting damage to the dwelling, plaintiff incurred a loss in the sum of $_____, which sum is the reasonable cost of repairs and replacements to restore the dwelling to its former condition immediately before the collapse.

5. Under the provisions of the policy defendant agreed to pay the insured up to $_____ per _____ [day *or* week or month] as additional living expenses in the event of destruction of or damage to the dwelling by any of the perils insured against.

6. At the time of the collapse as alleged in Paragraph 4, *above*, plaintiff was occupying the dwelling as his/her home. As a result of the collapse, the dwelling became uninhabitable and plaintiff has been required to rent other quarters and incur additional living expenses in the amount of $_____ per _____ [day *or* week *or* month]. By reason thereof, plaintiff has sustained additional loss to date in the sum of $_____. Plaintiff is informed and believes and thereon alleges that the making of the repairs and replacements to restore the dwelling to its former condition will require approximately _____ [*number*] _____ [day(s) *or* week(s) *or* month(s)], during which period the dwelling will remain uninhabitable and plaintiff will be required to maintain other living accommodations and incur additional living expense to his/her further loss in the sum of $_____.

7. Plaintiff has performed all of the terms and conditions of the policy on his/her part to be performed, including the giving to defendant due, timely, and written notice and proof of loss [*or allege excuse for nonperformance*].

8. Plaintiff has demanded of defendant payment of the sums herein alleged, but defendant has failed and refused, and continues to fail and refuse, to pay these sums or any part of them.

9. As a proximate result of defendant's failure and refusal as herein alleged, plaintiff has been damaged in the sum of $_____, which is the reasonable cost of repairing the damage to his/her dwelling caused by the collapse as herein alleged, together with interest thereon at the legal rate from and after _____ [*date payment should have been made under terms of policy*], the sum of $_____ as additional living expenses incurred to date by plaintiff as a result of the collapse and resultant uninhabitability of the dwelling, and the further sum of $_____ as additional living expenses to be incurred in the future until such time as the dwelling is restored to habitability.

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____, the reasonable cost of repairing the dwelling, together with interest on this sum at the legal rate from and after _____ [*date*];

2. For the sum of $_____ as additional living expenses incurred to date;

3. For the sum of $_____ as additional living expenses to be incurred between now and the time the dwelling is restored to habitability;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification if desired. See § 308.370[1].*]

[2] Use of Form

This form of complaint is for use by the insured in an action against the insurer to recover under a comprehensive dwelling policy for a loss resulting from the collapse of the dwelling's foundation where the policy insured against collapse and the insurer has denied coverage or liability and refused to pay. For a discussion of the essential allegations of the complaint, the number of copies to prepare, and verification, see *§ 308.370*.

[3] Decisions

Provision in property insurance policy covering "loss or damage caused by or resulting from risks of direct physical loss involving collapse of a building or any part of a building" covered both actual and imminent collapse, but did not cover "substantial impairment of structural integrity." *Doheny W. Homeowners' Ass'n v. American Guarantee & Liab. Ins. Co. (1997) 60 Cal. App. 4th 400, 403-409, 70 Cal. Rptr. 2d 260*

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26-308 California Forms of Pleading and Practice--Annotated § 308.441

§ 308.441 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Landslide

[1] FORM Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Landslide

[*Caption, introduction. See § 308.370[1].*]

[1-3. *Allege plaintiff's insurable interest in real property, e.g., ownership, the capacity and authority of the defendant, and the execution and delivery of the policy. See § 308.440[1], Paragraphs 1-3.*]

4. On or about _____ [*date*], the soil underlying and surrounding the dwelling [and appurtenant private structures] began to move laterally and to subside, setting up severe stresses and strains within the dwelling [and structures], and causing numerous cracks and fissures to appear in the walls and floors thereof and, on or about the same date, _____ [*specify, e.g.*, the major] portion of the _____ [*specify, e.g.*, back yard] of the premises collapsed and slid completely away _____ [*describe damage, e.g.*, causing the foundation of the dwelling to collapse, its frame to twist, and its walls to crumble, and leaving it overhanging a newly formed 30-foot cliff].

5. Immediately prior to the earth movement, subsidence, and sliding, as herein alleged, the dwelling, trees, and other appurtenance covered by the policy had an actual cash value in excess of $_____. Immediately thereafter, they had no cash value and were valueless, to plaintiff's loss in the sum of $_____.

6. As a further result of the earth movement, subsidence, and sliding, and the damage to the dwelling and appurtenances as herein alleged, plaintiff sustained a loss in the sum of $_____ to personal property covered by the policy.

7-10. [*Allege the costs for additional living expenses incurred as a result of the loss if the policy provides for payment, plaintiff's performance of conditions precedent, defendant's breach of the policy, and plaintiff's damages as a result of the breach. See § 308.440, Paragraphs 6-9.*]

[*Prayer, date, and signature. See § 308.440[1].*]

[*Verification if desired. See § 308.370[1]* .]

[2] Use of Form

This form of complaint is for use by the insured in an action against the insurer to recover under a comprehensive dwelling policy for a loss resulting from a landslide where the policy insured against landslide and the insurer has denied coverage or liability and refused to pay. For a discussion of the essential allegations of the complaint, the number of copies to prepare, and verification, see *§ 308.370*.

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26-308 California Forms of Pleading and Practice--Annotated §§ 308.442-308.449

[Reserved]

§§ 308.442[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.450

§ 308.450 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Fidelity Policy [Ins. Code § 105]--Comprehensive Dishonesty, Disappearance, and Destruction Policy

[1] FORM Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Fidelity Policy [Ins. Code § 105]--Comprehensive Dishonesty, Disappearance, and Destruction Policy

[*Caption, introduction. See § 308.370[1]* .]

1. At all times herein mentioned plaintiff was, and is, a corporation organized and existing under the laws of the State of California and engaged in the business of _____ [*specify*] [*or other allegation of capacity as appropriate*].

2. At all times herein mentioned defendant was, and is, a corporation organized and existing under the laws of _____ [*state or country*] [, with its principal place of business in this state situated in _____ County,] and authorized to transact, and transacting, business in this state as a surety insurer [*or other allegation of capacity and authority as appropriate*].

3. On or about _____ [*date*], defendant, by its duly authorized agents, executed and delivered to plaintiff, as the insured therein named, its fidelity policy of insurance, bearing number _____, hereinafter referred to as "the policy," a copy of which is attached hereto as Exhibit A and made a part hereof.

4. On or about _____ [*date*], while the policy was in full force and effect, _____ [*name*] was an employee of the plaintiff and on that date took from plaintiff's possession and appropriated to himself/herself without plaintiff's knowledge or consent, certain _____ [*specify property taken, e.g.,* negotiable stocks and bonds] having a fair market value on that date of $_____. At all times since, said employee has concealed and withheld this property from plaintiff and failed and refused to return it, or any part of

it, to plaintiff. As a result of said taking, appropriation, concealment, and withholding plaintiff sustained a loss in the sum of $_____ [*value of property taken*].

5. On or about _____ [*date*], plaintiff gave defendant due and timely written notice and proof of this loss and has otherwise performed all terms and conditions of the policy on its part to be performed.

6. Defendant has failed and refused, and continues to fail and refuse, to indemnify plaintiff for the loss herein alleged or to pay plaintiff any portion of it, and there is now due, owing, and unpaid from defendant to plaintiff the sum of $_____.

7. As a proximate result of defendant's failure and refusal as herein alleged, plaintiff has been damaged in the sum of $_____ [*amount of loss*],together with interest thereon at the legal rate [from and after _____ (*date payment should have been made under terms of policy*)].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____, together with interest thereon at the legal rate [from and after _____ (*date*)];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification if desired. See § 308.370[1]* .]

[2] Use of Form

This form of complaint illustrates an action by the insured against the insurer under a fidelity insurance policy where a loss covered by the policy has occurred and the insurer has failed to pay it. For a discussion of the essential allegations of the complaint, the number of copies to prepare, and verification, see *§ 308.370*.

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26-308 California Forms of Pleading and Practice--Annotated § 308.451

§ 308.451 Allegations of Coverage and Loss Under Surety Policy [Ins. Code § 105]--Broker's Bond Policy Covering Transportation of Money

[1] FORM Allegations of Coverage and Loss Under Surety Policy [Ins. Code § 105]--Broker's Bond Policy Covering Transportation of Money

1. On or about _____ [*date*], defendant, by its duly authorized agents, executed and delivered to plaintiff as the insured therein named, its Broker's Bond Policy of insurance, bearing number _____, hereinafter referred to as "the policy," which contains the following provision:

"The losses covered by this bond are as follows: While in transit ... (c) any loss of property (occurring with or without negligence) through robbery, common law or statutory larceny, embezzlement, theft, misappropriation, holdup, misplacement, mysterious unexplained disappearance, being lost or otherwise made away with, damage or destruction and any loss of subscription, conversion, redemption or deposit privileges through the misplacement or loss of property, while the property is in transit anywhere in the custody of any of the employees or of any other person acting as messenger, except while in the mail or with a carrier for hire other than an armored motor vehicle company for the purpose of transportation, such transit to begin immediately on receipt of such property by the transporting employee or such other person, and to end immediately on the delivery thereof at destination."

2. On or about _____ [*date*], while the policy was in full force and effect, _____ [*describe loss covered by policy, e.g.*, plaintiff's employee, _____ (*name*), had custody of and was transporting money owned by plaintiff to be delivered to _____ (*destination*). Said employee disappeared with the money on that date and plaintiff has not seen or heard from him/her since.

Neither all nor any portion of the money ever reached its intended destination, nor has all or any portion of it been returned to or recovered by plaintiff].

[2] Use of Form

These allegations may be inserted in place of Paragraphs 3 and 4 of the *form in § 308.450* when suit is brought on a broker's bond insurance policy.

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26-308 California Forms of Pleading and Practice--Annotated § 308.452

§ 308.452 Allegations of Coverage and Loss Under Surety Policy [Ins. Code § 105]--Indemnification Against Loss From Embezzlement

[1] FORM Allegations of Coverage and Loss Under Surety Policy [Ins. Code § 105]--Indemnification Against Loss From Embezzlement

1. Under the terms of the policy, defendant agreed to indemnify plaintiff for all loss he/she/it might sustain through any fraudulent or dishonest act or acts committed anywhere by any of plaintiff's employees. At all times herein mentioned the agreement was in full force and effect.

2. During the effective term of the policy plaintiff had in his/her/its employ as _____ [*position of employment, e.g.,* manager of its accounts receivable department] a person by the name of _____ [*specify*], hereinafter referred to as "the employee," who received _____ [*specify, e.g.,* salary or wages and commissions] as his/her/ compensation for services rendered.

3. _____ [*Allege facts of embezzelment, e.g.,* On not less than _____ (*number*) occasions during the year _____ (*date*), and between the dates from on or about _____ to on or about _____, the employee, in the course and scope of his/her employment by plaintiff, collected moneys belonging to plaintiff, the aggregate of which was the sum of $_____; the employee did embezzle, steal, and convert to his/her own use this entire sum and did not account to plaintiff for all or any part of it, all to plaintiff's loss in the sum of $_____. This loss was discovered by plaintiff on or about _____ (*date*), as follows: _____ (*specify*)].

[2] Use of Form

These allegations may be inserted in place of Paragraph 4 of the *form in § 308.450* if the loss occurred due to embezzlement and is covered by a surety policy.

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26-308 California Forms of Pleading and Practice--Annotated §§ 308.453-308.459

[Reserved]

§§ 308.453[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.460

§ 308.460 Complaint by Insured's Judgment Creditor Against Insurer for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Liability Policy [Ins. Code § 108]--Refusal of Insurer to Pay Judgment Against Insured [Ins. Code § 11580(b)(2)]

[1] FORM Complaint by Insured's Judgment Creditor Against Insurer for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Liability Policy [Ins. Code § 108]--Refusal of Insurer to Pay Judgment Against Insured [Ins. Code § 11580(b)(2)]

[*Caption, introduction. See § 308.370[1]* .]

1. At all times herein mentioned defendant was, and is, a corporation organized and existing under the laws of _____ [*state or foreign country*][, with its principal place of business in this state situated in _____ County,] and authorized to transact, and transacting, business in California as a liability insurer [*or other allegation of capacity and authority as appropriate*].

2. On or about _____ [*date*], [in consideration of the payment of a(n) _____ (annual *or* semiannual or monthly *or* weekly *or specify other terms of payment*) premium of $_____, made by _____ (*name of person securing issuance of policy*),] defendant, by its duly authorized agents, executed and delivered to _____ [*name of insured*], hereinafter referred to as "the insured," in _____ [*city, county, and state*], its _____ [*specify, e.g.*, comprehensive general liability] policy of insurance bearing number _____, hereinafter referred to as "the policy." By the terms of the policy, defendant undertook and agreed to _____ [*specify, e.g.*, "pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence." "Property damage" is defined as "physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period"]. The policy by its terms was effective

from _____ [*time*], on _____ [*date*], to _____ [*time*], on _____ [*date*]. [A copy of the policy is attached hereto as Exhibit "A" and made a part hereof.]

3. On or about _____ [*date*], when the policy was in full force and effect, _____ [*allege happening of insured event, e.g.,* plaintiff's forklift, leased to the insured on _____ (*date*), for the period of _____ (*date*), to _____ (*date*), and on the premises of the insured for the purposes for which it was leased, was crushed by a load of cargo negligently dropped by the insured's employees. Those events will hereinafter be referred to as "the occurrence." Damage to the forklift was total.] The insured gave defendant due and proper notice of the occurrence.

4. On _____ [*date*], plaintiff commenced an action against the insured in the _____ Court of _____, entitled _____ vs. _____, case number _____, hereinafter referred to as "the underlying action," in which plaintiff sought recovery of damages for his/her injuries in _____ [the amount of $_____ *or* an undisclosed amount], proximately resulting from the occurrence. A copy of the complaint in the underlying action is attached hereto as Exhibit B and made a part hereof.

5. The underlying action proceeded to trial by _____ [jury *or* the court], and on _____ [*date*], judgment in that action was rendered awarding plaintiff damages in the sum of $_____. That judgment became final on _____ [*date*]. A copy of the judgment is attached hereto as Exhibit C and made a part hereof.

6. After the judgment became final, on or about _____ [*date*], plaintiff delivered a conformed copy of the judgment to the defendant and demanded that defendant pay the judgment recovered by the plaintiff herein in the action, but defendant failed and refused, and continues to fail and refuse, to pay it or any portion of it.

7. Plaintiff has been paid neither the whole nor any portion of the judgment by defendant or by the insured or by anyone else, and there is now due and owing to plaintiff the whole amount of the judgment.

8. As a proximate result of defendant's failure and refusal as herein alleged, plaintiff has been damaged in the sum of $_____ [*amount of judgment*], together with interest thereon at the legal rate from the date the judgment was entered and continuing until the date it is paid.

9. The policy _____ [provides *or* is deemed by law to provide] that _____ [*specify language regarding judgment creditor's right to bring action, e.g.,* "whenever judgment is secured against the insured, ... then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment"].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ [*amount of judgment*] with interest thereon at the legal rate;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 308.370[1]* .]

[2] Use of Form

This complaint is for use by a judgment creditor of an insured to recover from the insurer the amount of the underlying judgment against the insured after the insurer's failure to pay the amount of the judgment [*see Ins. Code § 11580(b)(2)*].

For a complaint for use by a judgment creditor of an insured to recover from the insurer on an assigned cause of action the amount of the underlying judgment against the insured in excess of the insurance policy limits, including allegations of bad faith, see *§ 308.463*.

[3] Allegations

This complaint alleges the following [*see Ins. Code § 11580(b)(2)*]:

- Defendant's capacity as a California corporation, its authority to issue liability insurance, and the location of its principal place of business in California (Paragraph 1).
- The issuance of the policy by defendant to the insured, and the relevant policy terms (Paragraph 2).
- The occurrence of a loss to plaintiff covered by the policy, giving rise to defendant's liability (Paragraph 3).
- The filing of the underlying action by plaintiff (Paragraph 4).
- The terms of the underlying judgment (Paragraph 5).
- Plaintiff's demand to defendant for payment of the underlying judgment (Paragraph 6).
- A statement that defendant has paid nothing on the underlying judgment (Paragraph 7).
- A statement of damages in the amount of the underlying judgment (Paragraph 8).
- Plaintiff's authority to bring suit (Paragraph 9).

[4] Defenses

In an action brought under *Ins. Code § 11580(b)(2)*, the insurer may assert defenses based on the insured's breach of a policy condition, such as a cooperation or notice clause [*see, e.g., § 308.502*]. However, the breach is not a valid defense unless the insurer was substantially prejudiced by it. The burden of proving prejudice is on the insurer [*Campbell v. Allstate Ins. Co. (1963) 60 Cal. 2d 303, 305-306, 32 Cal. Rptr. 827, 384 P.2d. 155*].

A potential for coverage cannot be based on an unresolved legal dispute concerning policy interpretation which is ultimately resolved in favor of the insurer [*Lebas Fashion Imps. of USA, Inc. v. ITT Hartford Ins. Group (1996) 50 Cal. App. 4th 548, 556, 59 Cal. Rptr. 2d 36]* .

The insurer may also assert the defense that the loss was not covered by the policy, provided, however, that if it undertook a defense of the action against the insured it properly reserved its right to assert noncoverage at a later time [

see § 308.119[9]].

For a form alleging that the insured failed to comply with the "no action" clause of the standard liability policy by bringing the action against the insurer before the amount of the insurer's obligation was finally determined, see *§ 308.494*. For discussion of the "no action" clause, the interaction of that clause with *Ins. Code § 11580(b)(2)*, and cases interpreting the "actual trial" requirement found in the standard "no action" clause, see *§ 308.494[2]* et seq.

[5] Declaratory Relief Action

If there is a dispute between the insured and the insurer regarding policy coverage of the loss, either may bring an action for declaratory relief to have the issue adjudicated [*see Code Civ. Proc. § 1060*; *Tomerlin v. Canadian Indem. Co. (1964) 61 Cal. 2d 638, 643, 394 P.2d 571* (action by insured)]. This may be done either before or after termination of the third-party action against the insured. Those actions have precedence on the trial calendar [*see Code Civ. Proc. § 1062.3*]. For discussion and forms regarding declaratory relief, see Ch. 182, *Declaratory Relief* .

[6] State Statutes

Procedure for obtaining court determination that settlement in underlying action was made in good faith. *Code Civ. Proc. § 877.6*

Declaratory relief. *Code Civ. Proc. § 1060*

Liability policy provision authorizing judgment creditor of insured to sue insurer to recover on judgment. *Ins. Code § 11580(b)(2)*

[7] Decisions

Right of injured party to sue insurer on liability policy after obtaining judgment against insured is established by *Ins. Code § 11580*. *Campbell v. Allstate Ins. Co. (1963) 60 Cal. 2d 303, 305, 32 Cal. Rptr. 827, 384 P.2d 155*

Third party judgment creditor's loss of use of money during insurer's 81-day delay in paying full amount of judgment with interest failed to meet threshold economic loss requirement necessary to recover emotional distress damages for bad faith. *Maxwell v. Fire Ins. Exch. (1998) 60 Cal. App. 4th 1446, 1450-1452*

Stipulated judgment after uncontested proceeding constitutes "actual trial" for purposes of policy's 'no action" clause and *Ins. Code § 11580(b)(2)* when following exist: (1) an independent adjudication of facts based on a evidentiary showing; and (2) a process that does not create the potential for abuse, fraud, or collusion. *National Union Fire Ins. Co. v. Lynette C. (1994) 27 Cal. App. 4th 1434, 1451, 33 Cal. Rptr. 2d 496*

Liability policy provision, prohibiting action against insurer unless judgment entered against insured "after actual trial," is not more restrictive than *Ins. Code § 11580* (specifying only that judgment be "secured" against insured). *Rose v. Royal Ins. Co. (1991) 2 Cal. App. 4th 709, 714, 3 Cal. Rptr. 2d 483*

Judgment creditor of insured unable to maintain cause of action against insurer under *Ins. Code § 11580(b)(2)* until final judgment entered in favor of judgment creditor and against insured. *Fireman's Fund Ins. Co. v. City of Turlock (1985) 170 Cal. App. 3d 988, 1004, 216 Cal. Rptr. 796*

[8] Cross References

For a related form, see *§ 308.370*

For alternative allegations regarding agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, § 177.140* et seq.

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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26-308 California Forms of Pleading and Practice--Annotated § 308.461

§ 308.461 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302] and Compensatory and Punitive Damages [Civ. Code §§ 3294, 3333] for Breach of Implied Covenant of Good Faith and Fair Dealing--Liability Policy [Ins. Code § 108]--Refusal of Insurer to Pay Third-Party Judgment in Excess of Policy Limits After Wrongful Refusal to Settle

[1] FORM Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302] and Compensatory and Punitive Damages [Civ. Code §§ 3294, 3333] for Breach of Implied Covenant of Good Faith and Fair Dealing--Liability Policy [Ins. Code § 108]--Refusal of Insurer to Pay Third-Party Judgment in Excess of Policy Limits After Wrongful Refusal to Settle

[*Caption, introduction. See § 308.370[1]* .]

[1. *Allegation of capacity and authority of defendant. See § 308.460[1], Paragraph 1*.]

2. On or about _____ [*date*] [in consideration of the payment of a(n) _____ (annual *or* semiannual *or* quarterly *or* monthly *or specify other time period*) premium of $_____,] defendant, by its duly authorized agents, executed and delivered to plaintiff in _____ [*city, county, and state*] its _____ [*specify, e.g.*, comprehensive liability] policy of insurance, number _____, hereinafter referred to as "the policy," by the terms of which defendant undertook to and did insure plaintiff against _____ [*specify, e.g.*, loss by reason of liability imposed on him or her by law for damages, among other things, because of accidental injury to, or destruction of, property other than that owned, leased, occupied, or used by or in the care, custody, or control of plaintiff or his or her employees. The policy was intended to and did insure plaintiff against accidental injury to or destruction of property of another caused by the operation of that certain steam shovel described in the policy].

[3. *If plaintiffs' policy covered a business operation, add:* Plaintiff insured, at all times herein mentioned, was engaged in business as _____ (*specify*) at _____ (*address*).]

4. _____ [*Allege happening of event out of which liability arose, e.g.,* On or about _____ (*date*), while the policy was in full force and effect and plaintiff was engaged in the construction of _____ (*construction project*), plaintiff's employee, _____ (*name*), in operating the steam shovel hereinabove referred to, accidentally caused an injury to the property of one _____ (*name of injured party*), said property being situated at _____ (*street address and city*), California. Plaintiff gave defendant prompt written notice of the accident.]

5. By reason of that injury, _____ [*name of injured party*], hereinafter referred to as "the third party," on or about _____ [*date*], instituted an action, hereinafter referred to as "the underlying action," against plaintiff herein in the _____ Court of _____, entitled _____ vs. _____, file number _____.

6. Plaintiff herein was served with the summons and complaint in the underlying action on or about _____ [*date*], promptly gave defendant due notice of the underlying action pursuant to the terms and conditions of the policy, forwarded the complaint and summons to defendant, and otherwise performed all terms and conditions of the policy on his/her part to be performed.

[7. Pursuant to the terms of the policy, defendant took exclusive charge of, conducted, and controlled the investigation, preparation, and defense of the action, and at all relevant times, assumed complete and exclusive control of and responsibility for the investigation and negotiations for settlement and defense.]

8. On or about _____ [*date*], the third party's attorneys communicated to defendant a settlement offer of $_____, which amount is within policy limits, to defendant. This settlement offer was reasonable under the circumstances because _____ [*set forth facts supporting conclusion that offer was reasonable, e.g.,* it was clear that the damages suffered by the third party exceeded the policy limits, and plaintiff's liability for the third party's injuries was reasonably clear]. At that time and at all relevant times, defendant refused to accept the offer.

[9. _____ (*Allege any acts by defendant that would render its breach of its duty to settle tortious, e.g.,* Prior to the entry of judgment in the underlying action, and at all times relevant to its refusal to settle that action, defendant failed to undertake an adequate investigation of the claim. Specifically, defendant asserted in a letter mailed to plaintiff, a copy of which is attached hereto as Exhibit "B" and made a part hereof, that the third party's property damage was valued at $_____, despite the third party's submission of written itemized estimates of the repair costs of his property, copies of which are attached hereto as Exhibits "C" and made a part hereof. Despite repeated attempts by plaintiff and the third party's attorneys to ascertain from defendant the grounds for its assertion, or to negotiate defendant's counteroffer, defendant failed and refused to communi- cate with plaintiff or to answer his inquiries, or those of the third party's attorneys, or to discuss or consider the settlement offer further.]

10. On _____ [*date*], a judgment was rendered against plaintiff herein in the underlying action in the sum of $_____. Plaintiff herein demanded of defendant that it pay the judgment.

[*EITHER*]

11. Defendant paid to the third party the amount of $_____, which represents the amount of the policy limits regarding the third party's claim. Defendant refused and continued to refuse to pay the remaining $_____ due on the judgment.

[*OR*]

11. Defendant has failed and refused to pay the amount of the judgment in the underlying action, or any portion of that judgment.

[*CONTINUE*]

[12. As a proximate result of defendant's failure and refusal to pay the (excess) judgment, plaintiff, on or about _____ (*date*), paid _____ (the judgment in its entirety or the remaining $_____ due on the judgment).]

[13. On payment of the judgment as herein alleged, plaintiff demanded reimbursement by defendant, but defendant failed and refused, and continues to fail and refuse, to reimburse plaintiff the sums paid by him/her in satisfaction of the judgment or any part of them.]

14. As a proximate result of defendant's failure and refusal to pay the (excess) judgment, plaintiff has been damaged in the sum of $_____, the amount of the [portion due on the] judgment [paid by plaintiff], together with interest on that sum at the legal rate from _____ [*date judgment satisfied by plaintiff, or if judgment remains unsatisfied, date of judgment*].

[15. _____ (*Allege any personal or other injuries and damages proximately caused by defendant's tortious conduct, e.g.,* emotional-distress damages).]

[16. In committing the acts described in Paragraph 9 of this complaint, defendant acted in conscious disregard of the rights of plaintiff and others and was guilty of _____ (malice *and/or* oppression *and/or* fraud) in that _____ (*specify facts constituting malice, oppression, or fraud*). The conduct of defendant warrants an assessment of punitive damages in an amount appropriate to punish defendant and deter others from engaging in similar wrongful conduct.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ [*amount of judgment and postjudgment interest paid*] together with interest thereon at the legal rate from and after _____ [*date*] until paid;

[2. For general damages in the sum of $_____;]

[3. For _____ (*specify special damages*) [according to proof *or* in the sum of $_____);]

[4. For exemplary damages;]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 308.370[1]* .]

[2] Use of Form

This form of complaint is for use by an insured against its insurer to recover the amount of a third-party judgment in excess of the policy limits, and compensatory and punitive damages in appropriate cases, based on the insurer's unreasonable failure to accept an offer to settle within the policy limits.

For a form of complaint brought by an insured's judgment creditor against the insurer to recover the amount of the third-party judgment, see *§ 308.460*. For a form of complaint brought by an insured's judgment creditor against the insurer to recover on an assigned cause of action for breach of contract when the judgment exceeded the policy limits, see *§ 308.463*.

[3] Allegations

This form of complaint alleges:

- The issuance of the policy by defendant and the relevant policy terms (Paragraph 2);
- The occurrence of a loss covered by the policy (Paragraph 4);
- The filing of the underlying third-party action (Paragraph 5);
- Service of summons and complaint in the third-party action, notice of that action to defendant, and a statement that the plaintiff has performed all his or her duties under the policy (Paragraph 6);
- A statement regarding a reasonable settlement offer within policy limits made by the third party to defendant, defendant's refusal of the offer, and a statement that there was a substantial likelihood that the underlying judgment would result in an award of damages in excess of the policy limits (Paragraph 8) [*see Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 941, 132 Cal. Rptr. 424, 553 P.2d 584]* ;
- The terms of the underlying judgment, and plaintiff's demand to defendant to satisfy the judgment (Paragraph 10);
- A statement that defendant paid either none of the judgment, or a portion representing the policy limits (Paragraph 11); and
- Damages in the amount of the judgment either satisfied by plaintiff, or remaining unsatisfied (Paragraph 14) [*see Civ. Code §§ 3300* (compen satory damages generally), *3302* (damages for breach of obligation to pay money); *see also Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 941, 132 Cal. Rptr. 424, 553 P.2d 584* (insurer that wrongfully fails to settle within policy limits when there is substantial likelihood of recovery in excess of limits as subject to liability for whole amount of judgment notwithstanding policy limits)].

Optional Paragraph 3 is for use if plaintiff wishes to allege that the plaintiff insured is engaged in a particular type of business.

Optional Paragraph 7 may be used to allege that defendant undertook and controlled the defense of the underlying action.

Optional Paragraph 9 is for use if plaintiff wishes to allege acts regarding defendant's tortious breach of the insurer's duty to settle, in support of the award of exemplary, or punitive, damages [*see, e.g., Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 817-819, 157 Cal. Rptr. 482, 598 P.2d 452* (first-party case in which insurer's failure to thoroughly investigate foundation of its denial of medical benefits under policy supported cause of action for breach of implied covenant of good faith and fair dealing)].

Optional Paragraph 12 may be used to allege that plaintiff paid the entire amount of the judgment, or the portion in excess of policy limits [*see Brown v. Guarantee Ins. Co. (1957) 155 Cal. App. 2d 679, 689-690, 319 P.2d 69* (when injured party offers to settle for amount within policy limits, and insurer's wrongful failure to settle results in excess judgment against insured, insured entitled to recover amount of underlying judgment from insurer without first satisfying judgment)].

Optional Paragraph 13 is for use to allege plaintiff's demand for reimbursement from defendant after payment of all or a portion of the underlying judgment.

Optional Paragraph 15 is for use if plaintiff wishes to allege compensatory damages caused by defendant's tortious failure to settle [*see Civ. Code § 3333*; *see, e.g., Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 817, 824, n.11, 157 Cal. Rptr. 482, 598 P.2d 452* (insured entitled to emotional-distress damages proximately caused by insurer's bad faith breach of duty of good faith and fair dealing)].

Optional Paragraph 16 is for use if plaintiff wishes to allege that he or she may recover exemplary damages based on defendant's tortious conduct [*see Civ. Code § 3294* (punitive damages generally)].

[4] Personal Injury and Punitive Damages

In an action brought to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included--for example, a statement that the damages for a particular loss or harm sustained are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment [*see Civ. Code §§ 3281, 3282*].

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see *Ch. 177, Damages, § 177.40* et seq., and Ch. 205, *Defaults and Default Judgments* .

[5] Insurer's Assumption of Defense

[a] Duty to Defend

If the insurer wrongfully refused to defend the third-party action, Paragraphs 5-7 of the *form in § 308.462[1]* may be incorporated into this form to allege that the defendant breached its duty to defend.

This form includes an allegation that the insurer assumed defense of the underlying action, pursuant to its duty to defend under the terms of the policy.

[b] Duty to Appoint Independent Counsel

If the criteria set forth in *Civ. Code § 2860* apply, the insurer has a duty to appoint independent counsel to represent the insured, to avoid a conflict of interest between the insurer and the insured. For further discussion, see *§ 308.118* and Levy, Golden & Sacks, California Torts, Ch. 82.

[6] State Statutes

Punitive damages generally. *Civ. Code § 3294*

Contract damages generally. *Civ. Code §§ 3300, 3302*

Tort damages generally. *Civ. Code § 3333*

[7] Decisions

Insurer that wrongfully fails to settle within policy limits when there is substantial likelihood of recovery in excess of limits as subject to liability for whole amount of judgment notwithstanding policy limits. *Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 941, 132 Cal. Rptr. 424, 553 P.2d 584* ; *Johansen v. California State Auto. Ass'n Inter-Ins. Bureau (1975) 15 Cal. 3d 9, 19-20, 123 Cal. Rptr. 288, 538 P.2d 744*

Size of judgment recovered in personal injury action against insured when it exceedspolicy limits, although not conclusive, as furnishing inference that value of claim is equivalent of amount of judgment, and that acceptance of offer within those limits was most reasonable method of handling claim. *Johansen v. California State Auto. Ass'n Inter-Ins. Bureau (1975) 15 Cal. 3d 9, 17, 123 Cal. Rptr. 288, 538 P.2d 744* ; *see also* *Crisci v. Security Ins. Co. (1967) 66 Cal. 2d 425, 431, 58 Cal. Rptr. 13, 426 P.2d 173*

When there is great risk of recovery beyond policy limits so that most reasonable manner of disposing of claim is settlement within those limits, consideration in good faith of insured's interest as requiring insurer to settle claim; unwarranted refusal to do so as constituting breach of implied covenant of good faith and fair dealing. *Comunale v. Traders & Gen. Ins. Co. (1958) 50 Cal. 2d 654, 659, 328 P.2d 198* ; *Kelley v. British Commercial Ins. Co. (1963) 221 Cal. App. 2d 554, 562, 34 Cal. Rptr. 564* ; *see also* *Johansen v. California State Auto. Ass'n Inter-Ins. Bureau (1975) 15 Cal. 3d 9, 14-16, 123 Cal. Rptr. 288, 538 P.2d 744* ; *but see* *Camelot by Bay Condo. Owners' Ass'n v. Scottsdale Ins. Co. (1994) 27 Cal. App. 4th 33, 53-54, 32 Cal. Rptr. 2d 354* (insurer not required to accept settlement demand within policy limits if no threat of excess judgment against insured)

Insured as not permitted to maintain separate action against insurer to recover damages for emotional distress resulting from insurer's wrongful failure to settle third party's action against insured within policy limit when judgment in excess of policy limit was recovered and insured assigned cause of action against insurer to third-party judgment creditor. *Purcell v. Colonial Ins. Co. (1971) 20 Cal. App. 3d 807, 810-814, 97 Cal. Rptr. 874*

[8] Cross References

For related forms, see *§§ 308.370, 308.463*

For discussion and forms regarding automobile liability policies, see Ch. 88, *Automobiles: Automobile Insurance*

For discussion and forms regarding damages generally, see Ch. 177, *Damages*

For discussion and forms regarding damages for mental distress, see Ch. 362, *Mental Suffering and Emotional Distress*

For memoranda of points and authorities regarding damages generally, see California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

For memoranda of points and authorities regarding the insurer's refusal to defend, see California Points and Authorities, Ch. 120, *Insurance* (Matthew Bender)

For memoranda of points and authorities regarding the insurer's breach of the implied covenant of good faith and fair dealing in refusing to settle, see California Points and Authorities, Ch. 120 *Insurance* , (Matthew Bender)

For discussion of insurance liability policies generally, see Levy, Golden, & Sacks, California Torts, Ch. 81 (Matthew Bender)

For discussion of an insurer's duty to settle a third-party action, see Levy, Golden & Sacks, California Torts, Ch. 82 (Matthew Bender)

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Volume 26: Injunctions thru Insurance-Chs. 303-313
Chapter 308 INSURANCE
PART IV. FORMS
A. Actions Against Insurance Companies to Recover Insurance Contract Benefits
5. Liability Insurance

26-308 California Forms of Pleading and Practice--Annotated § 308.462

§ 308.462 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302] and Damages [Civ. Code §§ 3294, 3333] for Breach of Implied Covenant of Good Faith and Fair Dealing--Liability Policy [Ins. Code § 108]--Refusal of Insurer to Defend Action Against Insured

[1] FORM Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302] and Damages [Civ. Code §§ 3294, 3333] for Breach of Implied Covenant of Good Faith and Fair Dealing--Liability Policy [Ins. Code § 108]--Refusal of Insurer to Defend Action Against Insured

[*Caption, introduction. See § 308.370[1]* .]

[1. *Allegation of capacity and authority of defendant. See § 308.460[1], Paragraph 1*].

2. On or about _____ [*date*], [in consideration of the payment of a(n) _____ (annual *or* semiannual *or* quarterly *or* monthly *or specify other time period*) premium of $_____,] defendant, by its duly authorized agents, executed and delivered to plaintiff in _____ [*city, county, and state*] its _____ [*specify, e.g.*, comprehensive liability] policy of insurance, number _____, hereinafter referred to as "the policy," by the terms of which defendant undertook to and did insure plaintiff against _____ [*specify, e.g.*, any and all liability and agreed to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage] to a maximum amount of $_____ [per person and $_____ per occurrence] during the term of the policy. The policy further provided that defendant "shall defend any action against the insured alleging such _____ [*specify e.g.*, bodily injury or property damage] and seeking damages which are payable under the terms of this policy, even if any such action is groundless, false, or fraudulent." The policy took effect at _____ [*time*], on _____ [*date*], and was in full force and effect at all times hereinafter mentioned. [A copy of the policy is attached hereto as Exhibit A and made a part hereof.]

3. On or about _____ [*date*], _____ [*specify occurrence giving rise to liability claim*

or manner in which claim was asserted against plaintiff, e.g., plaintiff received (written) notice of a claim for damages on account of _____ (*specify, e.g.,* bodily injuries) alleged to have been suffered by one _____ (*name of injured person*), hereinafter referred to as "the third party," on _____ (that date *or specify date*) as a result of _____ (*specify risk covered by policy, e.g.,* accident, to wit, a fall through the front stairs of plaintiff's home at _____ (*street address and city*), California, caused by plaintiff's alleged negligence in failing to maintain the stairway in a safe condition)]. On _____ [*specify, e.g.,* the same day or or about _____ (*date*)], plaintiff _____ [forwarded *or* delivered *or* gave (written) notice of] this claim [by mail] to defendant.

4. Thereafter, to wit, on or about _____ [*date*], the third partycommenced an action against plaintiff herein in the _____ Court of _____, entitled _____ vs. _____, file number _____, hereinafter referred to as "the third-party action," by which the third party sought to recover damages for _____ [*specify, e.g.,* the bodily injuries] mentioned in Paragraph 3, *above*. On or about _____ [*date*], plaintiff herein was served with a copy of the summons and a copy of the complaint in the third-party action. Plaintiff _____ [forthwith on the same day or on _____ (*specify date*)] _____ [forwarded or delivered] these papers [by mail] to the defendant with the request that defendant, as required by the policy, undertake the defense of the action.

5. Plaintiff, at all times herein mentioned, had and has performed all the terms and conditions of the policy on his/her part to be performed.

6. Notwithstanding plaintiff's request, defendant denied all liability under the policy and refused to undertake the defense of the third party's action against this plaintiff.

[7. _____ (*Allege any unreasonable conduct by defendant that would support a breach of the implied covenant of good faith and fair dealing, e.g.,* Prior to defendant's refusal to defend or indemnify plaintiff in the third-party action, and at all relevant times, defendant failed to undertake an adequate investigation of the claim. Specifically, defendant asserted in a letter mailed to plaintiff, a copy of which is attached hereto as Exhibit "D" and made a part hereof, that the loss was excluded under the policy, but failed to specify which policy provision excluded the loss. Despite repeated attempts by plaintiff and the third party's attorneys to ascertain from defendant the grounds for its assertion, defendant failed and refused to communicate with plaintiff or to answer his inquiries, or those of the third party's attorneys.)]

[8. On or about _____ (*date*), the third party's attorneys communicated a reasonable settlement offer of $_____, which amount is within policy limits, to defendant. At that time and at all relevant times, defendant refused to consider or accept the offer.]

[*EITHER, if plaintiff engaged counsel in the underlying action:*]

9. As a proximate result of defendant's refusal as herein alleged, plaintiff was compelled to engage counsel to defend him/her in the third-party action and to incur an attorney's fee therefor in the sum of $_____ and other costs and expenses in the preparation and trial of that action in the sum of $_____. [Plaintiff has paid these sums.]

10. On or about _____ [*date*], _____ [the third party's action was settled for the sum of $_____, which this plaintiff _____ (has or has not yet) paid or after trial by _____ (jury or the court) judgment was entered in third-party action in favor of _____ (this plaintiff against the third party or the third party and against this plaintiff in the sum of $_____, together with costs in the sum of $_____, for a total sum of

$_____). That judgment became final on _____ (*date*)].

[*OR, if plaintiff suffered a default in the underlying action:*]

9. As a proximate result of defendant's refusal as herein alleged, plaintiff was unable to defend against the third party action and a default judgment was entered on _____ [*date*] against plaintiff in the third party action in the sum of $_____, together with costs in the sum of $_____, for a total sum of $_____. That judgment became final on _____ [*date*].

[*CONTINUE WITH:*]

[11. On or about _____ (*date*) plaintiff demanded of defendant that it pay said _____ (settlement or judgment), but defendant failed and refused to do so. As a proximate result of defendant's failure and refusal, plaintiff, on or about _____ (*date*), paid that _____ (settlement *or* judgment) and thereby sustained damages in the sum of $_____, the amount of the _____ (settlement *or* judgment), together with interest on that sum at the legal rate from and after the date it was paid.]

[12. _____ (*Allege any personal or other injuries and damages proximately caused by defendant's tortious conduct, e.g., emotional-distress damages*).]

[13. In committing the acts described in Paragraph 7 of this complaint, defendant acted in conscious disregard of the rights of plaintiff and was guilty of _____ (malice *and/or* oppression *and/or* fraud) in that _____ (*specify facts constituting malice, oppression, or fraud*). The conduct of defendant warrants an assessment of punitive damages in an amount appropriate to punish defendant and deter others from engaging in similar wrongful conduct.

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____ as attorney's fees and the sum of $_____ as costs and expenses incurred [and paid] by this plaintiff in defending the third-party action against him/her [,together with interest on those sums at the legal rate from and after the date they were paid];

[2. For the sum of $_____ as reimbursement of the amount paid by this plaintiff in _____ (settlement of the third-party action *or* satisfaction of the judgment in favor of the third party and against this plaintiff), together with interest on that sum at the legal rate from and after _____ (*date paid*);]

[3. For general damages (in the sum of $_____) for _____ (*specify detriment, e.g.,* physical pain and mental distress);]

[4. For exemplary and punitive damages;]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 308.370[1]* .]

[2] Use of Form

This form of complaint is for use by an insured against his or her insurer to recover damages resulting from the insurer's wrongful failure to defend a third-party action against the insured on a claim within the actual or potential coverage of the policy.

[3] Allegations

The complaint alleges:

- The issuance of the policy and its relevant provisions (Paragraph 2).
- The occurrence of a loss covered by the policy (Paragraph 3).
- The filing of the underlying third-party action (Paragraph 4).
- A statement that the plaintiff has performed all his or her duties under the policy (Paragraph 5).
- Defendant's refusal to defend plaintiff in the third-party action (Paragraph 6).
- Plaintiff's damages proximately caused by defendant's refusal to defend (Paragraph 9) [*see Civ. Code §§ 3300* (compensatory damages generally), 3302 (damages for breach of obligation to pay money)].
- A statement that the underlying action was resolved in the third party's favor (Paragraph 10).

Optional Paragraph 7 is for use if plaintiff wishes to allege facts regarding defendant's breach of the implied covenant of good faith and fair dealing [*see, e.g., Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 817-819, 157 Cal. Rptr. 482, 598 P.2d 452* (first-party case in which insurer's failure to thoroughly investigate foundation of its denial of medical benefits under policy supported cause of action for breach of implied covenant of good faith and fair dealing)]. Optional Paragraph 8 is for use to allege defendant's refusal to accept a reasonable settlement offer within policy limits [*see Samson v. Transamerica Ins. Co. (1981) 30 Cal. 3d 220, 227-228, 237, 178 Cal. Rptr. 343, 636 P.2d 32* (insurer that rejects reasonable settlement offer within policy limits, in addition to refusing to defend, is subject to liability for underlying judgment in excess of policy limits)].

Optional Paragraph 11 is for use to allege that defendant refused to pay the amount of the settlement or judgment in the underlying action.

Optional Paragraph 12 is for use if plaintiff wishes to allege compensatory damages caused by defendant's tortious conduct [*see Civ. Code § 3333*; *see, e.g., Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 817, 824, n.11, 157 Cal. Rptr. 482, 598 P.2d 452* (insured entitled to emotional-distress damages proximately caused by insurer's bad faith breach of duty of good faith and fair dealing; award of future policy benefits also proper)].

Optional Paragraph 13 is for use if plaintiff wishes to allege that he or she may recover exemplary damages based on

defendant's tortious conduct [*see Civ. Code § 3294* (punitive damages generally)].

[4] Decisions

Institution of underlying third-party "suit" triggering insurer's duty to defend must be actual filing of complaint that initiates court proceeding, rather than substantive or functional equivalent of court proceedings, e.g., notice or order issued by administrative agency. *Foster-Gardner, Inc. v. National Union Fire Ins. Co. (1998) 18 Cal. 4th 857, 879, 888-889, 77 Cal. Rptr. 2d 107, 959 P.2d 265* ; *Consolidated Am. Ins. v. Mike Soper Marine (9th Cir. 1991) 951 F.2d 186, 190*

Insurer that rejects reasonable settlement offer within policy limits, in addition to refusing to defend, as subject to liability for underlying third-party judgment in excess of policy limits. *Samson v. Transamerica Ins. Co. (1981) 30 Cal. 3d 220, 227-228, 237, 178 Cal. Rptr. 343, 636 P.2d 32* ; *Consolidated Am. Ins. v. Mike Soper Marine (9th Cir. 1991) 951 F.2d 186, 190*

In action by insured against insurer for reimbursement based on breach of contractual duty to defend, reasonable settlement made by insured to terminate underlying claim is presumptive evidence of fact and amount of insured's liability on claim. *Peter Culley & Assocs. v. Superior Court (1992) 10 Cal. App. 4th 1484, 1493-1494, 13 Cal. Rptr. 2d 624*

Emotional distress damages and future policy benefits as recoverable compensatory damages under *Civ. Code § 3333* in tort cause of action for breach of implied covenant of good faith and fair dealing. *Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 824 n.11, 157 Cal. Rptr. 482, 598 P.2d 452*

Insurer's failure to thoroughly investigate foundation of denial of benefits under policy as supporting cause of action for breach of implied covenant of good faith and fair dealing. *Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 817-819, 157 Cal. Rptr. 482, 598 P.2d 452*

Insurer that tortiously breaches duty to defend liable for full amount of default entered against insured in underlying action; insured need not prove that judgment would have been less had insurer undertaken defense. *Amato v. Mercury Cas. Co. (1997) 53 Cal. App. 4th 825, 835-839, 61 Cal. Rptr. 2d 909*

In action by insured against insurer for reimbursement based on breach of contractual duty to defend, reasonable settlement made by insured to terminate underlying claim is presumptive evidence of fact and amount of insured's liability on claim. *Peter Culley & Assocs. v. Superior Court (1992) 10 Cal. App. 4th 1484, 1493-1494, 13 Cal. Rptr. 2d 624*

[5] Text References

Witkin, Summary of California Law, Vol. 2, *Insurance*, §§ 270-276, *282-292*, 294, 297, 298, 320 (10th ed. 2005)

[6] Cross References

For related forms, see *§§ 308.370*, 308, 379, 308.461.

For memoranda of points and authorities regarding the insurer's refusal to defend, see California Points and Authorities, Ch. 120, *Insurance* (Matthew Bender)

For memoranda of points and authorities regarding the insurer's breach of the implied covenant of good faith and fair dealing generally, see California Points and Authorities, Ch. 120, *Insurance* (Matthew Bender)

For discussion of the insurer's duty to defend a third-party action against the insured, see Levy, Golden, & Sacks, California Torts, Ch. 82 (Matthew Bender)

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26-308 California Forms of Pleading and Practice--Annotated § 308.463

§ 308.463 Complaint by Judgment Creditor on Assigned Claim of Insured Against Insurer for Damages for Breach of Contract [Civ. Code § 3300] [and Breach of Implied Covenant of Good Faith and Fair Dealing (Civ. Code §§ 3294, 3333)]--Liability Policy [Ins. Code § 108]--To Recover Judgment in Excess of Policy Limit After Wrongful Refusal to Settle

[1] FORM Complaint by Judgment Creditor on Assigned Claim of Insured Against Insurer for Damages for Breach of Contract [Civ. Code § 3300] [and Breach of Implied Covenant of Good Faith and Fair Dealing (Civ. Code §§ 3294, 3333)]--Liability Policy [Ins. Code § 108]--To Recover Judgment in Excess of Policy Limit After Wrongful Refusal to Settle

[*Caption, introduction. See § 308.370[1]* .]

[1. *Allegation of capacity and authority of defendant. See § 308.460[1], Paragraph 1*].

2. On or about _____ [*date*] [in consideration of the payment of a(n) _____ (annual *or* semiannual *or* quarterly *or* monthly *or specify other time period*) premium of $_____,] defendant, by its duly authorized agents, executed and delivered to _____ [*name of insured*], hereinafter referred to as "the insured," in _____ [*city, county, and state*] its _____ [*specify, e.g.*, homeowner's liability] policy of insurance, number _____, hereinafter referred to as "the policy," by the terms of which defendant undertook agreed to _____ [*specify, e.g.*, pay all sums that the insured shall become legally obligated to pay as damages because of bodily injury or property damages to which this insurance applies and caused by an occurrence." The term "bodily injury" is defined as "bodily injury, sickness or decease sustained by any person which occurs during the policy period, including death at any time resulting therefrom"]. The policy further provided that the insurer _____ [*specify duty to defend, e.g.*, "shall defend any suit against the insured alleging a claim of liability covered by this policy and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient"].

3. On or about _____ [*date*], while the policy was in full force and effect, _____ [*describe occurrence giving rise to coverage under policy, e.g.*, plaintiff, while on the insured's premises at the insured's invitation, was struck by scaffolding planks adjacent to the insured's garage, after the scaffolding collapsed because of negligent construction]. Those events will hereinafter be referred to as "the occurrence." Plaintiff gave defendant due and timely notice of the occurrence, and defendant, through its employees and agents, undertook to investigate the claim and to represent the insured in the settlement negotiations [and in the defense of the underlying action] hereinafter mentioned.

4. _____ [*Allege facts showing that likelihood of plaintiff's recovery in excess of policy limit was great, e.g.*, At the time of the occurrence, plaintiff was employed as a highly skilled aerospace engineer at a yearly salary of$_____ with promising prospects for continued employment, future advancement, and regular increases in income. Evidence of the accident clearly indicated that the plaintiff's injuries were the result of the insured's sole negligence. Medical and hospital records indicate that plaintiff's injuries include severe neurological damage to his right hand and will require a series of surgeries before full use of his right hand and arm is restored. Related injuries include severe and frequent headaches, which impair plaintiff's ability to concentrate and to perform his normal professional duties. Those records also indicate that plaintiff's injuries significantly impair his professional abilities; consequently, his earning potential will be impaired until he fully recovers from those injuries, or approximately _____ (*date*)].

[5. Prior to instituting the underlying action, plaintiff made an offer to defendant within policy limits, in settlement of the claim as follows: _____ (*specify, e.g.*, After defendant completed its preliminary investigation of the occurrence and received the reports and accounts hereinabove described, and, through its agents and employees, discussed the facts of the claim with plaintiff, on or about _____ (*date*), plaintiff delivered to defendant a writing in which he offered to settle the claim for damages against the insured for the sum of $_____, which was less than the policy limit. A copy of this offer is attached hereto as Exhibit A and made a part hereof. Defendant rejected the offer on or about _____ (*date*), at which time defendant offered to pay plaintiff the sum of $_____ in complete settlement of all his claims against the insured. That counteroffer was and is completely inadequate to cover plaintiff's damages. Plaintiff rejected the counteroffer).]

6. On _____ [*date*], plaintiff commenced an action against the insured in the _____ Court of _____, entitled _____ vs. _____, case number _____, hereinafter referred to as "the underlying action," in which plaintiff sought recovery of damages for his injuries in the amount of $_____, proximately resulting from the occurrence. A copy of the complaint in the underlying action is attached hereto as Exhibit B and made a part hereof.

7. On or about _____ [*date*], plaintiff offered [in writing] to settle his/her cause of action against the insured for the sum of $_____. [Of this sum, the insured agreed to contribute $_____ and the remaining $_____, which was the policy limit, was to be paid by defendant under the terms of the policy. The insured was ready, willing, and able to accept the offer and requested that defendant do likewise.] [A copy of the offer is attached hereto as Exhibit C and made a part hereof.] Defendant rejected the offer [, and offered to pay plaintiff the sum of $_____ in complete settlement of all his claims against the insured. That counteroffer was and is completely inadequate to cover plaintiff's damages].

8. The underlying action proceeded to trial by _____ [jury *or* the court], and on _____ [*date*], judgment in that action was rendered awarding plaintiff damages in the sum of $_____. That judgment became final on _____ [*date*]. A copy of the judgment is attached hereto as Exhibit D and made a part hereof.

9. Thereafter, on or about _____ [*date*], defendant remitted to plaintiff the sum of

$_____, which represents that portion of the damages awarded in the underlying action within policy limits [, with a cover letter in which defendant disclaimed any liability for the balance of the judgment.] [A photocopy of the check and cover letter are attached hereto as Exhibits E and F, respectively, and made a part hereof.]

[10. _____ (*Allege any acts by defendant that would render its breach of its duty to settle a breach of the implied covenant of good faith and fair dealing as well, e.g.,* Prior to the entry of judgment in the underlying action, and at all times relevant to its refusal to settle that action, defendant failed to undertake an adequate investigation of the claim. Specifically, defendant asserted in a letter mailed to plaintiff, a copy of which is attached hereto as Exhibit "B" and made a part hereof, that defendant assessed plaintiff's damages at $_____, despite plaintiff's submission of medical reports indicating that plaintiff would incur hospital bills alone far in excess of that amount, copies of which are attached hereto as Exhibits "C" and made a part hereof. Despite repeated attempts by plaintiff and the insured to ascertain from defendant the grounds for its assertion, or to negotiate defendant's counteroffer, defendant failed and refused to communicate with plaintiff or to answer his inquiries, or those of the insured, or to further discuss or consider the settlement offer.]

11. As a proximate result of defendant's failure and refusal to accept plaintiff's settlement offer[s] as herein alleged, the insured was damaged in the sum of $_____ together with interest thereon at the legal rate.

12. Plaintiff is informed and believes and thereon alleges that the insured performed all the terms and conditions of the policy to be performed.

[13. _____ (*Allege any personal or other injuries and damages proximately caused by defendant's tortious conduct, e.g., emotional-distress damages*).]

[14. In committing the acts described in Paragraph 10 of this complaint, defendant acted in conscious disregard of the rights of plaintiff and was guilty of _____ (malice *and/or* oppression *and/or* fraud) in that _____ (*specify facts constituting malice, oppression, or fraud*). The conduct of defendant warrants an assessment of punitive damages in an amount appropriate to punish defendant and deter others from engaging in similar wrongful conduct.

15. Prior to the commencement of this action, on or about _____ [*date*], the insured in writing and for a valuable consideration assigned to plaintiff herein all of his/her rights, title, and interest in and to his/her cause of action as herein alleged against defendant. A copy of the assignment is attached hereto as Exhibit G and made a part hereof.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ [*amount of judgment*], together with interest thereon at the legal rate from _____ [*date*] until paid;

[2. For general damages in the sum of $_____;]

[3. For _____ (*specify special damages*) (according to proof *or* in the sum of $_____);]

[4. For exemplary damages;]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 308.370[1]* .]

[2] Use of Form

This form of complaint is for use by a judgment creditor of an insured to recover from the insurer on an assigned cause of action, the amount of the underlying judgment against the insured in excess of the insurance policy limits, based on the insurer's wrongful failure to settle the claim within policy limits.

For a form of complaint brought by an insured to recover the amount of a third-party judgment in excess of policy limits, see *§ 308.461*.

[3] Allegations

This form of complaint alleges (1) the issuance of the policy by defendant to the insured, and the relevant policy terms (Paragraph 2); (2) the occurrence of a loss to plaintiff covered by the policy, giving rise to defendant's liability (Paragraph 3); (3) a statement that there was a substantial likelihood that plaintiff's recovery would exceed the policy limits (Paragraph 4) [*see Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 941, 132 Cal. Rptr. 424, 553 P.2d 584]* ; (4) the filing of the underlying action by plaintiff (Paragraph 6); (5) a statement that plaintiff made a reasonable settlement offer within policy limits to the insurer in the underlying action following filing of suit, and that defendant refused the offer (Paragraph 7); (6) the terms of the underlying judgment (Paragraph 8); (7) defendant's payment to plaintiff of the portion of the underlying judgment within policy limits (Paragraph 9); (8) a statement of damages in the amount of the balance of the judgment not paid together with interest (Paragraph 11); (9) a statement that the insured performed all his or her duties under the policy (Paragraph 12); and (10) facts regarding the assignment of the insured's claim to plaintiff (Paragraph 15) [*see Ins. Code § 11580(b)(2)*].

Optional Paragraph 5 is for use if plaintiff wishes to allege that the plaintiff made a reasonable settlement offer, requesting an amount within policy limits to defendant prior to filing of the underlying action, and defendant's refusal of the offer. Optional Paragraph 10 is for use if plaintiff wishes to allege acts regarding defendant's tortious breach of the insurer's duty to settle, in support of the award of exemplary, or punitive, damages [*see, e.g., Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 817-819, 157 Cal. Rptr. 482, 598 P.2d 452* (first-party case in which insurer's failure thoroughly to investigate foundation of its denial of medical benefits under policy supported cause of action for breach of implied covenant of good faith and fair dealing)]. Optional Paragraph 13 is for use if plaintiff wishes to allege compensatory damages caused by defendant's tortious failure to settle [*see Civ. Code § 3333*]. Optional Paragraph 14 is for use if plaintiff wishes to request exemplary damages based on defendant's tortious conduct [*see Civ. Code § 3294* (punitive damages generally)].

[4] Entitlement and Assignability of Damages

A single cause of action for a wrongful failure to settle within policy limits can give rise to two forms of damages: (1) compensation for pecuniary loss (which would include the amount of the judgment in excess of the policy limit), and (2) general damages for mental distress [*see Purcell v. Colonial Ins. Co. (1971) 20 Cal. App. 3d 807, 812, 97 Cal. Rptr. 874]* . The first type of damages may be assigned to the insured's judgment creditor but the second type may not, although an as signment of the cause of action to the judgment creditor without a reservation of the cause of action

insofar as it is based on a claim for damages for mental suffering will result in a waiver of the latter claim [*see Cain v. State Farm Mut. Auto. Ins. Co. (1975) 47 Cal. App. 3d 783, 784-795, 121 Cal. Rptr. 200* ; *Purcell v. Colonial Ins. Co. (1971) 20 Cal. App. 3d 807, 814, 97 Cal. Rptr. 874]* .

In the case of a partial assignment (assignment with reservation), both the partial assignee and the partial assignor must join in the same action if they are to recover damages [*see Cain v. State Farm Mut. Auto. Ins. Co. (1975) 47 Cal. App. 3d 783, 794-795, 121 Cal. Rptr. 200* ; *see also Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 946, 132 Cal. Rptr. 424, 553 P.2d 584]* . With proper modifications, this complaint may be used in that case.

For discussion of the insurer's duty to settle, *see § 308.123[1]*.

[5] State Statutes

Assignability of things in action. *Civ. Code § 954*; *Code Civ. Proc. § 377.22*

[6] Decisions

Assignment by insured to insured's judgment creditor of claim against insurer for bad faith breach of duty to settle claim against insured within policy limits. *Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 942-947, 132 Cal. Rptr. 424, 553 P.2d 584* ; *Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 832, 69 Cal. Rptr. 321, 442 P.2d 377* ; *Cain v. State Farm Mut. Auto. Ins. Co. (1975) 47 Cal. App. 3d 783, 795, 121 Cal. Rptr. 200* ; *Purcell v. Colonial Ins. Co. (1971) 20 Cal. App. 3d 807, 810-814, 97 Cal. Rptr. 874*

Judgment on pleadings in favor of defendant insurer against plaintiff, insured's judgment creditor, to recover excess judgment over policy limit on ground of defendant's failure to accept settlement offer, as proper when plaintiff failed to allege that insured had assigned cause of action against insurer to plaintiff. *Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 942-947, 132 Cal. Rptr. 424, 553 P.2d 584*

Action for damages in excess of policy limits based on insurer's failure to settle held assignable. *Johansen v. California State Auto. Ass'n Inter-Ins. Bureau (1975) 15 Cal. 3d 9, 14 n.3, 123 Cal. Rptr. 288, 538 P.2d 744* ; *Comunale v. Traders & Gen. Ins. Co. (1958) 50 Cal. 2d 654, 661, 328 P.2d 198*

[7] Text References

Witkin, Summary of California Law, Vol. 2, *Insurance*, §§ 241, 246, 257-269 (10th ed. 2005)

[8] Cross References

For a related form, see *§ 308.461*

For discussion and forms regarding assignments, see Ch. 60, *Assignments*

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5. Liability Insurance

26-308 California Forms of Pleading and Practice--Annotated § 308.464

§ 308.464 Complaint by Insured's Judgment Creditor Against Insurer to Recover Amount of Judgment Against Insured, and for Compensatory and Punitive Damages Based on Insurer's Bad Faith Refusal to Pay Amount of Judgment After Judgment Became Final [Ins. Code § 11580]

[1] FORM Complaint by Insured's Judgment Creditor Against Insurer to Recover Amount of Judgment Against Insured, and for Compensatory and Punitive Damages Based on Insurer's Bad Faith Refusal to Pay Amount of Judgment After Judgment Became Final [Ins. Code § 11580]

[*Caption, introduction. See § 308.370[1]* .]

1. At all times herein mentioned, defendant was, and is, a corporation organized and existing under the laws of _____ [*state or foreign country*] [, with its principal place of business in this state situated in _____ County,] and authorized to transact, or transacting, business in California as a liability insurer [*or other allegation of capacity and authority as appropriate*].

2. On _____ [*date*], plaintiff obtained a judgment against _____ [*name of insured*] (the "insured") in the _____ Court of _____, in an action entitled _____ v. _____, case number _____, for damages in the amount of $_____, for _____ [*specify, e.g.*, personal injuries suffered by plaintiff on the business premises of the insured as the proximate result of the negligence of the insured and its employees]. A copy of that judgment is attached as Exhibit A and incorporated herein. That judgment became final on _____ [*date*] and is not subject to further appeal.

3. At all times during which the events forming the basis for the above-mentioned action occurred, the insured was insured by defendant under a policy of _____ [*e.g.*, business general liability *or* homeowners *or* automobile] insurance, policy number _____ (the "policy"), under which defendant agreed to _____ [*specify relevant policy terms, e.g.*, "pay all sums that the insured shall become legally

obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies."]

4. Plaintiff is informed and believes, and alleges, that the insured performed all the terms and conditions that the insured was required to perform under the policy.

5. Under the terms of the policy, defendant was obligated to pay the damages awarded to plaintiff against the insured in above-mentioned action. [*If insurer represented or conceded the existence of coverage, or failed to deny coverage, add statement to that effect*.]

6. The policy _____ [provides *or* is deemed by operation of California Insurance Code Section 11850 to provide] that _____ [*set out relevant statutory language as follows, or give language used in policy if it varies from statutory language:* "whenever judgment is secured against the insured ... in an action based upon bodily injury, death, or property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations, by such judgment creditor to recover on the judgment."]

7. When the aforementioned judgment became final, plaintiff, as a judgment creditor of the insured, became a third-party beneficiary of the contract between defendant and the insured by virtue of the operation of [the policy provision quoted above and] California Insurance Code Section 11850. As a third party beneficiary, plaintiff was [and is] entitled to immediate payment from defendant of the entire amount awarded to plaintiff in the above-mentioned action.

8. On _____ [*date*], [and repeatedly since then,] plaintiff demanded that defendant pay the amount of the judgment obtained by plaintiff in the above-mentioned action.

9. Defendant _____ [has repeatedly refused, and still refuses to pay plaintiff _____ (all or any portion of the judgment *or specify portion of judgment, e.g.,* any portion of the judgment in excess of $50,000) as required by the policy *or* delayed paying plaintiff the amount of the judgment until _____ (*date*)].

10. By virtue of plaintiff's status as a third party beneficiary of the insurance contract between defendant and the insured, defendant also _____ [owed *or* owes] directly to plaintiff a duty of good faith and fair dealing in connection with payment of the judgment in the above-mentioned action.

11. Defendant's _____ [refusal *or* delay] was unreasonable and made in bad faith, in that defendant had no lawful or reasonable ground on which to _____ [refuse to pay *or* delay paying] plaintiff the amount of the judgment.

[*Add if insurer's failure to pay judgment has not been cured by the time action is filed:* 12. As a proximate result of defendant's _____ (failure and refusal to pay *or* delay in paying) plaintiff the full amount of the judgment as herein alleged, plaintiff has been damaged in the sum of $_____ (*amount of judgment*), together with interest thereon at the legal rate from the date the judgment was entered and continuing until the date it _____ (was *or* is) paid.]

[13. _____ (*Allege any other injuries or damages proximately caused by defendant's conduct, e.g., emotional distress damages*).]

14. In committing the acts described in Paragraphs 9 and 11 of this complaint, defendant acted in conscious disregard of the rights of plaintiff and was guilty of _____ [malice *and/or* oppression *and/or* fraud] in that _____ [*specify facts constituting malice, oppression, or fraud*]. The conduct of defendant warrants an assessment of punitive damages in an amount appropriate to punish defendant and deter others from engaging in similar

wrongful conduct.

WHEREFORE, plaintiff prays judgment against defendant as follows:

[1. For the sum of $_____ [*amount of judgment*], together with interest thereon at the legal rate from and after _____ [*date*], until paid;]

2. For general damages in the sum of $_____;

3. For special damages _____ [according to proof *or* in the sum of $_____;

4. For exemplary damages;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court deems proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification if desired. See § 308.370[1].*]

[2] Use of Form

This form is a complaint for use by a judgment creditor against an insurer that refuses to pay a judgment against its insured after that judgment has become final [*see Ins. Code § 11580*]. The complaint seeks recovery of the amount of the judgment, if that amount has not already been paid, and compensatory and punitive damages based on the insurer's unreasonable failure to pay all or part of the judgment (or delay in paying the judgment) after the judgment has become final.

For a complaint by a judgment creditor against an insurer to recover only the amount of the underlying judgment against an insured, see *§ 308.460*. For a complaint by a judgment creditor seeking damages for breach of the insurer's covenant of good faith and fair dealing to its insured, based on an assignment of the insured's claims to the judgment creditor, see *§ 308.463*. For complaints by an insured against the insured's own insurance carrier generally and for damages for breach of the covenant of good faith and fair dealing, see *§§ 308.379, 308.461*, and *308.462*.

[3] Right of Judgment Creditor to Recover Judgment From Insurer

Ins. Code § 11580, which is often referred to as the "direct action" statute, permits the judgment creditor of an insured to sue the insurer directly on the policy to recover the amount of the judgment, subject to the terms and limitations of the policy. It has been held that by virtue of this statute, the judgment creditorbecomes a third-party beneficiary of the insurance contract after the judgment against the insurer becomes final [*Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 943, 132 Cal. Rptr. 424, 553 P.2d 584* ; *Hand v. Farmers Ins. Exch. (1994) 23 Cal. App. 4th 1847, 1857, 29 Cal. Rptr. 2d 258]* . For a complaint by an insured's judgment creditor against the insurer seeking only the amount of the underlying judgment, see *§ 308.460*.

Paragraph 12 of this form seeks recovery of the underlying judgment in situations when that judgment has not been

paid, and to that extent duplicates the allegations of the form in *§ 308.460*. If the underlying judgment has already been paid, and the action seeks recovery for unreasonable delay in paying the judgment rather than an ongoing refusal to do so, Paragraph 12 should be eliminated, and the appropriate alternative language should be used in other paragraphs.

[4] Right of Judgment Creditor to Maintain Direct Action Against Insurer for Breach of Covenant of Good Faith and Fair Dealing

The general rule is that persons not a party to the insurance contract cannot directly sue an insurer for breach of the covenant of good faith and fair dealing [*Coleman v. Gulf Ins. Group (1986) 41 Cal. 3d 782, 795, 226 Cal. Rptr. 90, 718 P.2d 77* ; *Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 943-944, 132 Cal. Rptr. 424, 553 P.2d 584]* . Ordinarily, the third party must first obtain an assignment of the insured's claims against the insurer, and then assert those claims against the insurer in the insured's place. For a form suitable for use when an assignment of the insured's rights has been obtained, see *§ 308.463*.

Under a limited exception to this rule, a judgment creditor has been permitted to bring a direct action for breach of the covenant of good faith and fair dealing against an insurer that refuses, unreasonably and in bad faith, to pay the entire amount of a judgment after it becomes final [*Hand v. Farmers Ins. Exch. (1994) 23 Cal. App. 4th 1847, 1857, 29 Cal. Rptr. 2d 258]* . In this limited situation, since a direct right of action exists, it is unnecessary for the insurer to obtain an assignment of the claim from the insured. The rationale for this exception is that by virtue of *Ins. Code § 11580*, a judgment creditor of an insured enjoys third party beneficiary status and rights under the policy. These rights include the covenant of good faith and fair dealing. Moreover, from the point the judgment becomes final, the insurer's duty to pay runs contractually to the judgment creditor as well as the insured. Thus, the insurer owes the judgment creditor the duty to exercise good faith in not withholding adjudicated damages, and the judgment creditor may maintain an action against the insurer for breach of that duty [*Hand v. Farmers Ins. Exch. (1994) 23 Cal. App. 4th 1847, 1856-1858, 29 Cal. Rptr. 2d 258* ; *see Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 943-944, 132 Cal. Rptr. 424, 553 P.2d 584]* .

The judgment creditor may maintain a direct action against the insurer only with respect to duties that are directly owed to the judgment creditor. For example, the insurer's duty to settle, which forms the basis for a high percentage of third-party bad faith claims, runs only to the insured, and may not be enforced by the judgment creditor since it occurs before the judgment creditor acquires any rights by virtue of *Ins. Code § 11580* [*Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 943-944, 132 Cal. Rptr. 424, 553 P.2d 584* ; *Hand v. Farmers Ins. Exch. (1994) 23 Cal. App. 4th 1847, 1856-1858, 29 Cal. Rptr. 2d 258]* .

As with other bad faith claims, a judgment creditor's cause of action for bad faith nonpayment of a finally adjudicated claim may sound in tort as well as contract [*Hand v. Farmers Ins. Exch. (1994) 23 Cal. App. 4th 1847, 1860, 29 Cal. Rptr. 2d 258]* , and tort damages therefore may be available.

[5] Single Action Seeking Recovery of Underlying Judgment and Damages for Bad Faith

If the insurer has not paid the amount of the underlying judgment, the judgment creditor may seek recovery of that amount, as well as damages for the insurer's bad faith refusal to pay it, in a single action [*Hand v. Farmers Ins. Exch. (1994) 23 Cal. App. 4th 1847, 1859-1860, 29 Cal. Rptr. 2d 258]* . The insurer is free, however, to assert defenses in such an action, including the defense of noncoverage [*see Hand v. Farmers Ins. Exch. (1994) 23 Cal. App. 4th 1847, 1852, 1859, 29 Cal. Rptr. 2d 258]* .

[6] Cautionary Note

Tomaselli v. Transamerica Ins. Co. (1994) 25 Cal. App. 4th 1766, 31 Cal. Rptr. 2d 224 , restricts the right of an insured to bring an action against its own insurer after the insured obtains a bad faith judgment and the insurer refuses to

pay that judgment. In *Tomaselli*, the court held that the entry of judgment absolves the insurer of any further contractual obligations, and that the insureds therefore cannot assert a second bad faith claim based on the insurer's failure to pay the first judgment, either on the basis of the covenant of good faith and fair dealing or by virtue of their status as judgment creditors [*Tomaselli v. Transamerica Ins. Co. (1994) 25 Cal. App. 4th 1766, 1771, 31 Cal. Rptr. 2d 224]* . *Thomaselli* appears to be distinguishable from *Hand v. Farmers Ins. Exch. (1994) 23 Cal. App. 4th 1847, 29 Cal. Rptr. 2d 258* , on the basis that *Thomaselli* involved a claim by an insured as judgment creditor (a situation in which *Ins. Code § 11580* is inapplicable), rather than a third party as judgment creditor as was the case in *Hand*. Nevertheless, *Thomaselli* contains some very broad language to the effect that the covenant of good faith and fair dealing is extinguished once the insurer's contractual duties to pay have been transformed from a contract right into a judgment [*Tomaselli v. Transamerica Ins. Co. (1994) 25 Cal. App. 4th 1766, 1771-1772, 31 Cal. Rptr. 2d 224]* . Pending further developments in the case law, it appears that other courts could applyelements of this rationale to deny recovery in similar circumstances involving third-party claims.

[7] State Statutes

"Direct action" statute permitting judgment creditor to recover amount of judgment directly from insurer. *Ins. Code § 11580.2*

[8] Decisions

General rule that third party claimants may not bring actions directly against insurer for breach of covenant of good faith and fair dealing. *Coleman v. Gulf Ins. Group (1986) 41 Cal. 3d 782, 795, 226 Cal. Rptr. 90, 718 P.2d 77* ; *Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 943-944, 132 Cal. Rptr. 424, 553 P.2d 584*

"Direct action" statute makes judgment creditor a third-party beneficiary of insurance contract and allow judgment creditor to enforce implied contractual covenants to extent that those covenants or their duties run in its favor. *Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 943-944, 132 Cal. Rptr. 424, 553 P.2d 584* ; *Hand v. Farmers Ins. Exch. (1994) 23 Cal. App. 4th 1847, 1857, 29 Cal. Rptr. 2d 258*

Judgment creditor may maintain direct action against insurer that refuses, unreasonably and in bad faith, to pay judgment creditor claimant entire amount of judgment after it becomes final. *Hand v. Farmers Ins. Exch. (1994) 23 Cal. App. 4th 1847, 1857-1859, 29 Cal. Rptr. 2d 258*

Judgment creditor may not maintain direct action against insurer for bad-faith failure to settle a claim against its insured, absent an assignment of insured's rights. *Murphy v. Allstate Ins. Co. (1976) 17 Cal. 3d 937, 943-944, 132 Cal. Rptr. 424, 553 P.2d 584* ; *see Hand v. Farmers Ins. Exch. (1994) 23 Cal. App. 4th 1847, 1857-1858, 29 Cal. Rptr. 2d 258*

[9] Cross References

For related forms, see *§ 308.460 -308.463*

For discussion of *Ins. Code § 11580*, see California Insurance Law and Practice, Ch. 41 (Matthew Bender)

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[Reserved]

§§ 308.465[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.470

§ 308.470 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Marine Policy [Ins. Code § 103]--Valued Policy [Ins. Code § 412] Insuring Ship

[1] FORM Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Marine Policy [Ins. Code § 103]--Valued Policy [Ins. Code § 412] Insuring Ship

[*Caption, introduction. See § 308.370[1]* .]

1. At all times herein mentioned defendant was, and is, a corporation organized and existing under the laws of _____ [*state or country*] [, with its principal place of business in California situated in _____ County,] and authorized to transact, and transacting, business in this state as a marine insurer [*or other allegation of capacity and authority as appropriate*].

2. At all times herein mentioned plaintiff was the _____ [*specify insurable interest, e.g.,* owner] of the _____ [*nationality of ship, e.g.,* American] Steamship _____ [*name*], hereinafter referred to as "the ship," which was engaged in commerce _____ [*specify, e.g.,* between the United States and foreign countries].

3. On or about _____ [*date*], defendant [, in consideration of the payment of the premium of $_____,] duly issued its valued policy of marine insurance, number _____, hereinafter referred to as "the policy,"in and by which it insured the ship in the amount of $_____ from _____ [*date*], midnight, to _____ [*date*], midnight, from loss resulting from perils of the sea.

4. On or about _____ [*date*], while the policy was in full force and effect, the ship was lost at sea through a peril insured against, to wit: _____ [*cause of loss, e.g.,* a storm off the island of _____ (*name*) in the _____ Ocean], and plaintiff became entitled to payment of the

sum of $_____ under the terms of the policy.

5. Plaintiff gave defendant timely written notice and proof of loss and has otherwise performed all conditions of the policy on his/her part to be performd.

6. Plaintiff duly demanded from defendant payment of the sum of $_____, as provided in the policy, but defendant failed and refused, and continues to fail and refuse, to pay that sum or any part of it, and there is now due and owing from defendant to plaintiff that sum.

7. As a proximate result of defendant's failure and refusal as herein alleged, plaintiff has been damaged in the sum of $_____ [*policy amount*], together with interest thereon at the legal rate from and after _____ [*datepayment should have been made under terms of policy*].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ with interest thereon at the legal rate;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 308.370[1]* .]

[2] Use of Form

This form of complaint is for use by the insured against the insurer under a valued marine insurance policy to recover for loss of the insured ship from a covered peril where the insurer has refused to pay. With appropriate modifications it may also be used to recover for partial loss of the ship or for total or partial loss of cargo under a valued policy. For a discussion of the essential allegations of a complaint for breach of an insurance contract, the number of copies to prepare, and verification, see *§ 308.370*. For complaints seeking damages for a tortious breach of contract which may be adapted for use under a marine policy, see *§§ 308.379* and 308, 380.

[3] "Valued Policy" Defined

A valued policy is one which expresses on its face an agreement that the thing insured shall be valued at a specified sum [*Ins. Code § 412*].

[4] Effect of Valuation

Except where a valuation is fraudulent in fact or the subject matter has been hypothecated by bottomry or respondentia before its insurance and without the knowledge of the person actually procuring the insurance, a valuation in a marine insurance policy is conclusive between the parties in the adjustment of either a partial or total loss if the insured has some interest at risk and there is no fraud on his or her part [*Ins. Code § 1987*].

[5] State Statutes

Abandonment. *Ins. Code §§ 1970-1986*

Contribution rights. *Ins. Code § 1996*

Course of voyage. *Ins. Code §§ 1940-1945*

General average loss. *Ins. Code § 1995*

Liability of insurer for expenses for recovery of property. *Ins. Code § 1994*

"Marine insurance" defined. *Ins. Code § 103*

Marine policy. *Ins. Code §§ 1880-1927*

Partial loss. *Ins. Code §§ 1988, 1993, 1997*

"Perils of the sea" defined. *Harb. & Nav. Code § 422*

Presumption of actual loss. *Ins. Code § 1964*

Profits. *Ins. Code §§ 1989-1991*

Total loss. *Ins. Code §§ 1960-1963, 1967-1969*

Valuation. *Ins. Code § 1987*

"Valued policy" defined. *Ins. Code §§ 410, 412*

[6] Decisions

"Open," "valued," and "running" marine insurance policies distinguished. *Victoria S.S. Co. v. Western Assurance Co. (1914) 167 Cal. 348, 356-357, 139 P. 807*

In case of valued policy of marine insurance where value of in- sured's interest in property exceeds amount of insurance, insured as deemed a coinsurer as to such uninsured part and underwriter as liable only for such proportion of loss as amount of insurance bears to value of insured's interest. *Hilton v. Federal Ins. Co. (1931) 118 Cal. App. 495, 502, 5 P.2d 648*

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26-308 California Forms of Pleading and Practice--Annotated § 308.471

§ 308.471 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Marine Policy [Ins. Code § 103]--Open Policy [Ins. Code § 411]--General Form

[1] FORM Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Marine Policy [Ins. Code § 103]--Open Policy [Ins. Code § 411]--General Form

[*Caption, introduction. See § 308.370[1]* .]

[1. *Allegation of capacity and authority of defendant. See § 308.470[1], Paragraph 1*].

2. At all times herein mentioned plaintiff was the _____ [*specify insurable interest. e.g.*, owner] of [a] certain _____ [*specify, e.g.*, American ship, the S.S. Moonstar], hereinafter referred to as _____ [*specify, e.g.*, "the ship,"] which was _____ [*specify, e.g.*, engaged in commerce between the United States and foreign countries].

3. On or about _____ [*date*], defendant [, in consideration of certain premiums paid (and to be paid) by plaintiff,] made, executed, and delivered to plaintiff its written policy of marine insurance, number _____, hereinafter referred to as "the policy," in and by which it insured plaintiff against all loss or damage resulting from loss or destruction of, or injury to, _____ [*specify, e.g.*, the ship] [and freightage or cargo] during its voyage from _____ [*name*] to _____ [*name*], hereinafter referred to as "the insured voyage," _____ [by perils of the sea as follows: _____ (*set forth insuring clause of policy*) *or* by perils of the sea. A copy of the policy is attached hereto as Exhibit A and made a part hereof].

4. On or about _____ [*date*], during the insured voyage and while the policy was in full force and effect, _____ [*specify, e.g.*, the ship] was _____ [*specify, e.g.*, wrecked by storm *or specify other peril of the sea*] and _____ [*specify, e.g.*, totally lost].

5. Plaintiff gave defendant due and timely notice and proof of loss and has otherwise performed all the conditions of the policy on his/her part to be performed.

6. Plaintiff duly demanded from defendant payment of the sum of $_____, which sum was the value of _____ [*specify, e.g.*, the ship at the beginning of the insured voyage], but defendant failed and refused, and continues to fail and refuse, to pay that sum or any part of it, and there is now due and owing from defendant to plaintiff that sum.

7. As a proximate result of defendant's failure and refusal as herein alleged, plaintiff has been damaged in the sum of $_____ [*specify, e.g.*, value of ship], together with interest thereon at the legal rate from and after _____ [*date payment should have been made under terms of policy*].

[*Prayer, date, and signature. See § 308.470[1]* .]

[*Verification if desired. See § 308.370[1].*]

[2] Use of Form

This form of complaint is for use by the insured against the insurer under an open marine insurance policy to recover for loss of the property insured where the insurer has refused to pay.

[3] "Open Policy" Defined

An open policy is one in which the value of the subject matter is not agreed on but is left to be ascertained in case of loss [*Ins. Code § 411*].

[4] Rules for Estimating Loss Under Open Policy

In estimating a loss under an open policy of marine insurance, the following rules must be observed:

- The value of a ship is its value at the beginning of the risk, including all articles or charges which add to its permanent value or which are necessary to prepare it for the voyage insured.

- The value of cargo is either its actual cost to the insured, when laden on board, or, where that cost cannot be ascertained, its market value at the time and place of lading, adding the charges incurred in purchasing and placing it on board, but without reference to:

  - Any losses incurred in raising money for its purchase;

  - Any drawback on its exportation;

  - The fluctuations of the market at the port of destination; or

  - Expenses incurred on the way or on arrival.

- The value of freightage is the gross freightage, exclusive of primage, without reference to the cost of earning it.

- The cost of insurance is in each case to be added to the value thus estimated [*Ins. Code § 1992*].

[5] Partial Loss of Ship or Equipments

In the case of a partial loss of a ship or its equipments, the old materials are to be applied towards payment for the new. Whether the ship is new or old, a marine insurer is liable for only two-thirds of the remaining cost of the repairs after such deduction, except that anchors and cannon must be paid for in full, and sheathingmetal at a depreciation of only two and one-half percent for each month that it has been fastened to the ship [*Ins. Code § 1997*].

[6] Damaged Cargo

If cargo insured against partial loss arrives at the port of destination ina damaged condition, the loss of the insured is computed as follows:

- Deduct the market price, at the port of destination, of the damaged subject matter from its market price there when sound; and

- Take that proportion of the value which the remainder thus ascertained bears to such market price when sound [*Ins. Code § 1993*].

[7] State Statutes

"Open policy" defined. *Ins. Code §§ 410, 411*

Rules for estimating loss under open policy. *Ins. Code § 1992*

[8] Cross References

For a related form, see *§ 308.470*

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26-308 California Forms of Pleading and Practice--Annotated § 308.472

§ 308.472 Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Marine Policy [Ins. Code § 103]--Personal Property Floater [Ins. Code § 103(a)]

[1] FORM Complaint by Insured Against Insurance Company for Damages for Breach of Contract [Civ. Code §§ 3300, 3302]--Marine Policy [Ins. Code § 103]--Personal Property Floater [Ins. Code § 103(a)]

[*Caption, introduction. See § 308.370[1]* .]

1. At all times herein mentioned, plaintiff was the owner of _____ [*describe personal property*], hereinafter referred to as "the property."

2. _____ [*Allegation of capacity and authority of defendant. See § 308.470[1], Paragraph 1*].

3. On or about _____ [*date*], defendant [, for a valuable consideration,] duly issued its _____ [valued or open] policy of insurance, number _____, hereinafter referred to as "the policy," in and by which it insured plaintiff, for the term commencing on _____ [*date*], at _____ [*time*], and terminating on _____ [*date*], at _____ [*time*], _____ [in or not to exceed] the sum of $_____ against _____ [*specify, e.g.*, all risks of physical loss] of the property [while on exhibition and in transit to or from such exhibitions]. [A copy of the policy is attached hereto as Exhibit A and made a part hereof.]

4. On or about _____ [*date*], while the policy was in full force and effect, the property was _____ [*specify, e.g.*, on exhibition at _____ (*location*)] and was on that date _____ [*specify manner of loss, e.g.*, feloniously taken from plaintiff's possession at gunpoint by a person whose identity was and is unknown to plaintiff and who, to plaintiff's knowledge, has not been apprehended by the police], to plaintiff's loss in the sum of $_____ [*value of property*]. Plaintiff has neither recovered nor received return of the property or any part of it.

5. Plaintiff gave defendant due and timely notice and proof of loss and has otherwise performed all the terms and conditions of the policy on his/her part to be performed.

6. Plaintiff duly demanded from defendant payment of the sum of $_____ [the value of the property *or* as provided in the policy], but defendant failed and refused, and continues to fail and refuse, to pay that sum or any part of it, and there is now due and owing from defendant to plaintiff that sum.

7. As a proximate result of defendant's failure and refusal as herein alleged, plaintiff has been damaged in the sum of $_____ [*value of property or value stated in policy*], together with interest on that sum at the legal rate from and after _____ [*date payment should have been made under terms of policy*].

[*Prayer, date, and signature. See § 308.470[1].*]

[*Verification if desired. See § 308.370[1]* .]

[2] Use of Form

This form of complaint is for use by the insured against the insurer under a personal property floater in a marine insurance policy.

[3] State Statutes

Inland marine insurance. *Ins. Code § 103(b)*

Marine insurance as including personal property floaters. *Ins. Code § 103(a)*

Personal property floater insurance as included in fire and burglary insurance. *Ins. Code §§ 102, 112*

[4] Administrative Regulations

Personal property floater risks covered in marine policies. *10 Cal. Code Reg § 2321(E)*

[5] Cross References

For a related form, see *§ 308.470*

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26-308 California Forms of Pleading and Practice--Annotated §§ 308.473-308.479

[Reserved]

§§ 308.473[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.480

§ 308.480 Demand for Appraisal of Value or Loss

[1] FORM Demand for Appraisal of Value or Loss

To _____ [*name and address of insured or insurer on whom demand is made*]:

NOTICE IS HEREBY GIVEN that, pursuant to the provisions of policy number _____ issued by _____ [you or _____ (*name*) Insurance Company] to _____ [*name of insured or* you] on _____ [*date*] in and by which _____ [you *or* the company] insured _____ [*name of insured or* you] against loss or damage by _____ [*specify, e.g.*, fire] to that certain property described in the policy as _____ [*set forth policy description*], _____ [*name of party demanding appraisal, whether insured or insurer*] demands that the actual cash value of and amount of loss to the above-described property _____ [lost *or* destroyed *or* damaged *or any combination thereof*] by _____ [*specify, e.g.*, fire] occurring on _____ [*date*], be appraised and that _____ [*name of insured or* the company] has selected _____ [*name and address*] as his/her/its appraiser to proceed as provided in the policy.

NOTICE IS FURTHER GIVEN that, pursuant to the provisions of the policy, _____ [*name of insured or* the company] demands that you select a competent and disinterested appraiser on your part, that you notify the undersigned of your selection within _____ [*specify, e.g.*, 20] days after receipt of this demand, and that the apraisers elect a competent and disinterested umpire and proceed to appraise the actual cash value of and amount of loss to the described property.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*party demanding appraisal*]

[2] Use of Form

This form is for use by either the insured or insurer to demand appraisal of the actual cash value of and amount of loss to property under a policy insuring against the risk causing the loss where the parties cannot agree on the value or loss and the policy provides for appraisal on demand of either party. The demand for appointment of appraisers and an umpire will, of course, comply with whatever requirements are specified in the policy. The demand may be, and frequently is, made in the form of a letter rather than in notice form. This form may be recast in letter form. For a letter form demanding arbitration pursuant to an arbitrationclause, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

[3] Changes in Standard Fire and Residential Property Policies Issued or Renewed After December 31, 2001

In the aftermath of the Northridge earthquake, the California legislature enacted and amended certain Insurance Code provisions to increase the rights of insureds under residential property policies sold in California that originated or were renewed after December 31, 2001. Among other provisions enacted for this purpose, *Ins. Code § 2071* sets forth an appraisal clause for inclusion in the standard form of fire insurance policy. Similarly, *Ins. Code § 10082.3* sets forth the same appraisal provision applicable to residential property insurance policies [*see Ins. Code § 10087*], to policies, endorsements, or certificates of insurance regarding earthquake coverage [*see Ins. Code § 10020 et seq.*], and to basic residential earthquake policies [*see Ins. Code § 10089.5 et seq.*].

The appraisal provision under these statutes contains significant new language providing, for example, that appraisals are requested, rather than demanded, that appraisals are informal unless otherwise stipulated, and that appraisals may not be compelled in the event of an official disaster) [*Ins. Code §§ 2071, 10082.3*]. For the complete text of this new appraisal provision, see *§§ 308.150* and *308.151[1]*.

[4] State Statutes

Standard form of fire insurance policy. *Ins. Code § 2071*

Required provisions (loss, appraisal, adjusters) in residential property insurance (*Ins. Code § 10087*), in policies, endorsements, or certificates of insurance regarding earthquake coverage (*Ins. Code § 10020 et seq.*), and in basic residential earthquake policies (*Ins. Code § 10089.5 et seq.*). *Ins. Code § 10082.3* (applicable to policies originated or renewed after December 31, 2001)

[5] Decisions

Under fire insurance policy providing that in case insured and insurer shall fail to agree as to actual cash value or amount of loss, then, on written demand of either, each shall select a competent and disinterested appraiser and notify other of appraiser selected within 20 days of such demand, insured as having right to demand appraisal where there was disagreement as to amount of loss but as not obligated to do so. *Cox v. English-Am. Underwriters (9th Cir. 1957) 245 F.2d 330, 333*

Demand for appraisal. *J.M. Winchester v. North British & Mercantile Ins. Co. (1911) 160 Cal. 1, 4-5, 116 P. 63* ; *Covey v. National Union Fire Ins. Co. (1916) 31 Cal. App. 579, 587-589, 161 P. 35*

No cause of action as arising on fire insurance policy containing stipulation that in case of difference of opinion as to amount of loss or damage such difference should be submittd to judgment of two disinterested and competent men, mutually chosen, who, in case of disagreement, shall select a third, whose award shall be conclusive and binding on parties, until submission to arbitration is made or fair effort on part of insured has been made to obtain it. *Old*

Saucelito Land & Dry Dock Co. v. Commercial Union Assurance Co. (1884) 66 Cal. 253, 256-259, 5 P. 232 ; *see also Carroll v. Girard Fire Ins. Co. (1887) 72 Cal. 297, 301-302, 13 P. 863* ; *Adams v. South British & Nat'l Fire & Marine Ins. Cos. (1886) 70 Cal. 198, 201, 11 P. 627*

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26-308 California Forms of Pleading and Practice--Annotated § 308.481

§ 308.481 Petition to Order Appraisal of Loss to Insured Property

[1] FORM Petition to Order Appraisal of Loss to Insured Property

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Appraisal of Loss to Insured Property Between _____ [*name*], Petitioner, and _____ [*names*], Respondent.	)	NO. _____ PETITION TO COMPEL APPRAISAL

Petitioner alleges:

1. At all times herein mentioned _____ [petitioner *or* respondent], hereinafter referred to as "the insured," was _____ [*specify relationship to property showing insurable interest, e.g.*, the owner] of _____ [*describe property*], hereinafter referred to as "the property."

2. At all times herein mentioned _____ [respondent or petitioner], hereinafter referred to as "the company," was, and is, a corporation organized and existing under the laws of _____ [*state or country*] [, with its principal place of business in California situated in _____ County,] and authorized to transact, and transacting, business in this state as an insurance company [*or other allegation of capacity and authority as appropriate*].

3. On or about _____ [*date*], the company issued its policy of insurance, number _____, hereinafter referred to as "the policy," in and by which it insured the insured against loss of or damage to the property by _____ [*specify, e.g.*, fire] to an amount not exceeding $_____. [A copy of the policy is attached hereto as Exhibit A and made a part hereof.]

4. The policy provides: _____ [*set forth appraisal provision, e.g.*, "Appraisal. In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon such umpire, then, on request of the insured or this company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall appraise the loss, stating separately actual cash value and loss to each item; and failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally"].

5. On or about _____ [*date*], while the policy was in full force and effect, the property _____ [was partially destroyed *or* was totally destroyed or sustained damage] by _____ [*specify, e.g.*, fire].

6. The _____ [insured *or* company] has performed all the terms and conditions of the policy on his/her/its part to be performed.

7. On or about _____ [*date*], the insured rendered to the company in writing a verified proof of loss claiming the sum of $_____ as the _____ [actual cash value of *or* amount of loss to *or both*] the property.

8. The company rejected the sum of $_____ stated by the insured as the _____ [actual cash value of *or* amount of loss to *or both*] the property, and the parties ever since have been unable to agree on what the true sum is.

9. On failure of the parties to agree, the _____ [insured *or* company] on or about _____ [*date*], _____ [*specify, e.g.*, selected one _____ (*name and address*) as his/her/its competent and disinterested appraiser, notified the _____ (company *or* insured) of the appraiser selected, and demanded that the _____ (company *or* insured) select a competent and disinterested appraiser on its/his/her part, that the two appraisers so selected select a competent and disinterested umpire),] and that the _____ [actual cash value of *or* amount of loss to *or both*] the property be appraised as provided in the policy. [A copy of the notice and demand is attached hereto as Exhibit B and made a part hereof.]

10. The _____ [company *or* insured] has failed and refused, and continues to fail and refuse, to select an appraiser on its/his/her part or to otherwise submit the claim to appraisal proceedings in accordance with the terms of the policy.

WHEREFORE, petitioner prays:

1. For an order of this court directing the _____ [company *or* insured] to _____ [*specify, e.g.*, select a competent and disinterested appraiser and to otherwise proceed with the appraisal in accordance with the terms of the policy];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].

_____ [*signature*]

CAUTION:
A copy of the petition and any papers on which it is based and a written notice of the time and place of hearing must be served on the respondent [*see Code Civ. Proc. § 1290.4*].

[2] Use of Form

This form is for use by either party to the insurance contract to secure an order compelling the other party to the contract to appoint an appraiser as required by the policy and proceed with appraisal of the loss sustained by the insured as a result of a risk insured against where the other party has failed and refused, after demand, to do so. For forms of petition to compel arbitration, notice of hearing on the petition, and response to the petition that may be adapted for use in appraisal proceedings, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

[3] State Statutes

Appointment of arbitrators. *Code Civ. Proc. § 1281.6*

Appraisal provision in standard form fire insurance policy. *Ins. Code § 2071*

Costs. *Code Civ. Proc. § 1293.2*

Limited civil cases concerning arbitration-related petitions. *Code Civ. Proc. § 86(a)(10)*

Petition to compel arbitration. *Code Civ. Proc. §§ 1281.2, 1290, 1292.4*

Venue. *Code Civ. Proc. § 1292*

Waiver of appraisal by special agreement in advance of loss. *Ins. Code § 2075*

[4] Decisions

Effect of failure of appraisers to agree on umpire on right of insured to bring action on policy. *Koyer v. Detroit Fire & Marine Ins. Co. (1937) 9 Cal. 2d 336, 341, 70 P.2d 927*

Provisions for arbitration in insurance policies. *Farnum v. Phoenix Ins. Co. (1890) 83 Cal. 246, 262-263, 23 P. 869*

Standard *Ins. Code § 2071* Appraisal Clause in fire insurance policy as not unconstitutionally depriving insured of right to jury trial. *Appalachian Ins. Co. v. Rivcom Corp. (1982) 130 Cal. App. 3d 818, 825, 182 Cal. Rptr. 11*

Standard *Ins. Code § 2071* Appraisal Clause in fire insurance policy as enforceable even if contract of adhesion. *Appalachian Ins. Co. v. Rivcom Corp. (1982) 130 Cal. App. 3d 818, 828-829, 182 Cal. Rptr. 11*

Insurer's refusal to comply with demand for appraisal as not estopping it from contesting amounts that have to be fixed before its liability can be determined. *Palma v. Watson Surplus Lines Agency (1957) 148 Cal. App. 2d 879, 882-883, 307 P.2d 689*

Insurer's repudiation of its obligation under fire insurance policy by asserting that policy was rendered void on various grounds as a waiver on insurer's part of provision of policy with respect to arbitration. *Jacobs v. Farmers' Mut. Fire Ins. Co. (1935) 5 Cal. App. 2d 1, 6, 41 P.2d 960*

Provision in fire insurance policy that insurer shall be deemed to have assented to amount of loss claimed by insured in preliminary proof of loss required by policy unless within specified time insurer shall notify insured in writing of its disagreement with amount claimed, and of amount admitted by insurer, as binding condition or contract. *Victoria Park Co. v. Continental Ins. Co. of N.Y. (1919) 39 Cal. App. 347, 349-350, 178 P. 724*

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26-308 California Forms of Pleading and Practice--Annotated § 308.482

§ 308.482 Order Directing Party to Appoint Appraiser and Proceed With Appraisal

[1] FORM Order Directing Party to Appoint Appraiser and Proceed With Appraisal

[*Caption. See § 308.481.*]

The above-entitled matter came on for hearing on _____ [*date*], pursuant to the petition of _____ [*name of party seeking appraisal, whether the insured or the insurer*] for an order directing respondent _____ [*name*] to select a competent and disinterested appraiser and proceed to an appraisal of the loss sustained under insurance policy number _____, issued by _____ [*specify, e.g.*, respondent as the insurer] to _____ [*specify, e.g.*, petition as the insured]. _____ [*name*] appeared as counsel for petitioner and _____ [*name*] appeared as counsel for respondent. It appearing to the satisfaction of the court that due and proper notice of hearing of the petition was given and that respondent has failed and refused to appoint an appraiser in accordance with the provisions of the insurance policy, and good cause appearing therefor:

IT IS HEREBY ORDERED that respondent _____ [*name*] select a competent and disinterested appraiser, that the appraiser so selected, together with the appraiser heretofore selected by petitioner, proceed to appraise the loss under and in accordance with the provisions of insurance policy number _____, and that petitioner recover his/her/its costs in the sum of $_____ incurred in this proceeding.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is for use where the court orders the unwilling party to an insurance contract to select an appraiser and

proceed with the appraisal of a loss in accordance with the terms of the policy. For a form of order granting a petition to compel arbitration and for a form of order denying a petition to compel arbitration which may be adapted for use where the court denies the petition to compel appraisal of an insured's loss under the policy, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

[3] State Statutes

Order to arbitrate. *Code Civ. Proc. § 1281.2*

Court as required to make statement of decision on request pursuant to *Code Civ. Proc. § 632* when order or judgment appealable. *Code Civ. Proc. § 1291*

[4] Decisions

Code Civ. Proc. § 1291, requiring findings of fact and conclusions of law on orders made appealable by *Code Civ. Proc. § 1294*, as required to be read together with *Code Civ. Proc. § 632* and no specific findings and conclusions as necessary if petition or motion presented no question of fact and only one law. *Johnston v. Security Ins. Co. (1970) 6 Cal. App. 3d 839, 844, 86 Cal. Rptr. 133* ; *see also* *Charlton Co. v. Aerfab Corp. (1976) 56 Cal. App. 3d 808, 813, 128 Cal. Rptr. 878* (construing *Code Civ. Proc. § 1291* prior to 1983 amendment)

Power of court to order party to appoint appraiser in accordance with policy provision and to reserve power to conduct appraisal in court proceeding if insurer fails to comply. *Palma v. Watson Surplus Lines Agency (1957) 148 Cal. App. 2d 879, 885-886, 307 P.2d 689*

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26-308 California Forms of Pleading and Practice--Annotated § 308.483

§ 308.483 Petition for Appointment of Umpire on Failure of Appraisers to Select

[1] FORM Petition for Appointment of Umpire on Failure of Appraisers to Select

[*Caption, introduction. See § 308.481[1].*]

[*Incorporate Paragraphs 1-5 of § 308.481[1].*]

6. The insured and the company thereafter failed to agree as to the _____ [actual cash value of *or* the amount of loss to *or both*] the insured property, and on _____ [*date*], an appraisal under the above-quoted provisions of the policy was demanded by the _____ [insured or company]. The insured selected one _____ [*name*] as his/her/its competent and disinterested appraiser on _____ [*date*], and the company selected one _____ [*name*] as its competent and disinterested appraiser on _____ [*date*].

7. The appraisers so selected have failed to select a competent and disinterested umpire as required by the policy, and more than _____ [*specify, e.g.,* 15] days have elapsed since the appraisers were selected.

WHEREFORE, petitioner prays:

1. That this court select and appoint a competent and disinterested person to act as umpire in the appraisal proceedings in accordance with the provisions of the policy;

2. That this court order that the appraisal proceed before the appraisers and umpire so designated;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification if desired. See § 308.371[1]*.]

[2] Use of Form

This form is for use to secure appointment of an umpire by the court where the policy requires that each party to the insurance contract select an appraiser to appraise the actual cash value of and/or amount of loss to the insured property and that the appraisers so selected select an umpire, and the parties have each selected an appraiser but the appraisers selected have failed to select an umpire and do not agree on the actual cash value of the property and/or the amount of loss [*see § 308.481*].

[3] State Statutes

Appointment by court of neutral arbitrator. *Code Civ. Proc. § 1281.6*

[4] Decisions

Where appraisal agreement requires each party to appoint "disinterested" appraiser and authorizes either party to apply to court for appointment of disinterested umpire where appraisers fail to agree on such umpire, question of disinterestedness of appraiser as properly raised in such court proceeding. *Falloon v. Caledonian Ins. Co. (1958) 327 P.2d 18*

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26-308 California Forms of Pleading and Practice--Annotated § 308.484

§ 308.484 Order Appointing Umpire

[1] FORM Order Appointing Umpire

[*Caption. See § 308.481[1].*]

The petition of _____ [*name of insured or insurer*] for an order selecting and appointing an umpire to act with the appraisers heretofore designated by the respective parties in appraising a loss under a policy of insurance, number _____, having come on regularly before me this day, _____ [*name*] appearing as attorney for petitioner and _____ [*name*] appearing as attorney for respondent, and, it appearing to the satisfaction of the court that a controversy exists between the parties to the insurance contract as to the actual cash value and amount of loss involved in a loss under the policy, and that appraisers heretofore appointed by the parties have failed to appoint an umpire within _____ [*specify, e.g.*, 15] days as required by the policy, and the court having read all the documents and papers offered, having heard argument of counsel, and being fully advised in the matter, and good cause appearing therefor,

IT IS ORDERED that _____ [*name and address*] is appointed an umpire in the appraisal proceedings now pending in the above-entitled matter [and that petitioner recover his/her/its costs in the sum of $_____ incurred in this proceeding].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is for use where the court grants the petition for an order appointing an umpire. For a form of order appointing a neutral arbitrator pursuant to *Code Civ. Proc. § 1281.6*, see Ch. 33, *Contractual Arbitration: Appointment*

of Arbitrator and Conduct of Proceeding .

[3] Decisions

Failure of neutral umpire chosen by appraisers selected by parties to disclose his acquaintanceship with insured's counsel and insured's appraiser as resulting in vacation of appraisers' award. *Johnston v. Security Ins. Co. (1967) 6 Cal. App. 3d 839, 842-844, 86 Cal. Rptr. 133*

[4] Cross References

For related forms, see *§§ 308.482, 308.483*

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26-308 California Forms of Pleading and Practice--Annotated § 308.485

§ 308.485 Notice of Appraisers' Award and Tender of Payment

[1] FORM Notice of Appraisers' Award and Tender of Payment

To _____ [*name(s) of insured and/or* insurer], and to _____ [*name(s)*], his/her/its/their attorney(s) [, respectively]:

NOTICE IS HEREBY GIVEN that the [attached] award was rendered in the _____ [above-entitled appraisal proceedings *or* appraisal proceedings in the above-entitled action] on _____ [*date*], signed by _____ [*name(s)*], appraiser(s), [and _____ (*name*), umpire,] wherein the actual cash value of the property involved was determined to be $_____, and the amount of damage and loss thereto sustained in the _____ [*specify, e.g.*, fire] occurring on _____ [*date*], was determined to be $_____.

[Pursuant to the award, _____ (*name of insurer*) hereby tenders the sum of $_____ (*amount awarded*) in full satisfaction of its liability under the policy in connection with the above-entitled matter (and the same will be forthwith deposited in the above-entitled court for payment to you subject to any conditions or deductions ordered by the court).]
Dated: _____.

_____ [*signature*]
_____ [umpire *or name of party or*
Attorney for _____ (*name of party*)]

[2] Use of Form

This form is for use by the umpire to give notice to the parties of the appraisers' award or by a party to the insurance contract, or a party's attorney, to give such notice to the other party to the contract. If the notice is given by or on behalf of the insurer, the insurer may at the same time tender payment of the award.

The umpire generally serves signed copies of the written award of the appraisers on the parties [*see Code Civ. Proc. §§ 1283.4, 1283.6*]. For forms of arbitrators' awards which may be adapted for use as an appraisers' award, see Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* .

For the correction, confirmation, or vacation of an arbitrators' award, see *Code Civ. Proc. § 1284 et seq.*, which may be involved in the case of an appraisers' award where the matter is not covered by the policy. For forms for use to secure the correction, confirmation, or vacation of an arbitrators' award which may be adapted for use to secure correction, confirmation, or vacation of an appraisers' award, see Ch. 34, *Contractual Arbitration: Judicial Review* .

[3] Decisions

Appraisers' award, where question of amount of loss sustained by insured was onlyquestion submitted and where in submission there was express provision to effect that award to be made should not operate or be taken as waiver by insurer of any provision or condition of policy only determined amount to be paid in event there is liability under policy and not as fixing liability of insurer to pay. *Stockton Combined Harvester & Argric. Works v. Glen's Falls Ins. Co. (1893) 98 Cal. 557, 575-577, 33 P. 633*

Fraud vitiates appraisers' award. *Stockton Combined Harvester & Agric. Works v. Glen's Falls Ins. Co. (1893) 98 Cal. 557, 575-577, 33 P. 633*

Judgment that does not conform to appraisal award made pursuant to *Ins. Code § 2071*, on which it is based, violates *Code Civ. Proc. § 1287.4*. *Devonwood Condominium Owners Assn. v. Farmers Ins. Exchange (2008) 162 Cal. App. 4th 1498, 1506-1507, 77 Cal. Rptr. 3d 88*

"Appraisers" empowered by terms of policy of fire insurance to determine "cash value" and "loss" utilized to ascertain amount payable on policy as arbitrators within meaning of *Code Civ. Proc. § 1280*, and award of appraisers unchallenged within time prescribed by *Code Civ. Proc. §§ 1288, 1288.2* (relating to serving and filing petition to vacate or correct award or response to petition to confirm requesting that award be vacated or corrected) and confirmed by superior court as final. *Klubnikin v. California Fair Plan Ass'n (1978) 84 Cal. App. 3d 393, 395, 148 Cal. Rptr. 563*

Award by umpire and appraisers as not fatally defective because umpire's signature on letter evidencing award was not acknowledged as required by former *Code Civ. Proc. § 1287* where insurer considered it sufficiently reliable to justify initiation of proceeding to vacate award and where, during course of such proceeding, both umpire and insured's appraiser filed affidavits that this was in fact their award. *Falloon v. Caledonian Ins. Co. (1958) 161 Cal. App. 2d 522, 529, 327 P.2d 18*

Award by umpire and appraisers not fatally defective because not originally signed by insured's appraiser if umpire declared in award signed by him that he concurred in findings made by insured's appraiser and if insured's appraiser filed affidavit in proceeding to vacate award in which he declared he submitted his findings in writing to umpire and that they were his honest and disinterested appraisal of loss suffered by insured. *Falloon v. Caledonian Ins. Co. (1958) 161 Cal. App. 2d 522, 529-530, 327 P.2d 18*

Appraisers appointed under terms of standard form of fire policy as required, in making appraisal, to itemize separately actual cash value and loss to each item; such itemization as essential to valid award; but when insured sues directly on policy without prior appraisal, requirement of itemization as not present. *Palma v. Watson Surplus Lines Agency (1957) 148 Cal. App. 2d 879, 883-884, 307 P.2d 689*

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26-308 California Forms of Pleading and Practice--Annotated § 308.490

§ 308.490 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Policy Canceled Before Loss

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Policy Canceled Before Loss

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that: the policy sued on was canceled _____ [*specify, e.g.,* by mutual agreement of the parties *or* for nonpayment of premium *or specify other ground for cancellation*], effective _____ [*date*], which was before the date of the loss sued on in the complaint.

[2] Use of Form

This form of defense is for insertion in an answer where the fact of cancellation does not appear on the face of the complaint or from matter of which the court must or may take judicial notice [*see Code Civ. Proc. §§ 430.10, 430.30*] and the issue is not raised by an affirmative allegation in the complaint controverted by the answer [*see Code Civ. Proc. §§ 431.20(a), 590(1)*]. Because the allegations of the affirmative defense are deemed denied by the plaintiff [*Code Civ. Proc. § 431.20(b)*], the defendant may not move for judgment on the pleadings on the basis of it. The defendant may, however, if the defense can be established by affidavits, declarations under penalty of perjury, or other proper papers, move for summary judgment under *Code Civ. Proc. § 437c*. For procedure and forms which may be adapted for use in such a case, see Ch. 537, *Summary Judgment* . For points and authorities in support of and in opposition to the motion, see California Points and Authorities, Ch. 221, *Summary Judgments* (Matthew Bender).

[3] State Statutes

Acknowledgment in policy of receipt of premium as conclusive evidence of its payment. *Ins. Code § 484*

Cancellation notwithstanding acknowledgment for nonpayment of premium where cancellation right is reserved to insurer in policy. *Ins. Code § 484*

Cancellation of policies when premium financed. *Ins. Code § 673*

Cancellation or change of policy executed by insurer at request of named insured as binding on any other insured or named insured absent contrary provision in policy; notice to insureds of request by named insured. *Ins. Code § 667.5*

Cancellation or nonrenewal of commercial excess and umbrella policies. *Ins. Code § 676.6*

Grounds for cancellation of automobile liability, damage, or collision policy. *Ins. Code §§ 661, 1861.03(c)(1)*

Grounds for cancellation of certain property and liability policies. *Ins. Code § 676*

Notice of cancellation. *Ins. Code §§ 662, 664, 665, 668.5, 667*

Prohibited cancellation of motor vehicle liability policy covering drivers hired by commercial business establishment. *Ins. Code § 670*

[4] Decisions

[a] Cancellation of Policy

Where insurer has received application for insurance together with payment of premium and thereafter decides to reject it, contract of insurance immediately created on receipt of application and payment of premium is not terminated until (a) insurer has actually rejected application and, by appropriate notice, communicated such rejection to insured and (b) refunded premium payment to insured. *Smith v. Westland Life Ins. Co. (1975) 15 Cal. 3d 111, 121, 123 Cal. Rptr. 649, 539 P.2d 433*

Cancellation [*Ins. Code § 660*] and rescission [*Ins. Code § 650*] of insurance policies distinguished. *Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 663-664 n.3, 79 Cal. Rptr. 106, 456 P.2d 674*

"Grace period" under policy, which continued policy in force for 31 days after nonpayment of premiums, as having no effect with respect to cancellation by insured; no statutory provision as effecting grace period for that purpose. *Coe v. Farmers New World Life Ins. Co. (1989) 209 Cal. App. 3d 600, 607, 257 Cal. Rptr. 411*

Automatic cancellation of group coverage upon termination of 31-day option period for conversion to individual coverage as not affected by extension of option period. *Daniels v. Equitable Life Assurance Soc'y (1981) 123 Cal. App. 3d 467, 473, 176 Cal. Rptr. 670*

Insurance contracts as subject to cancellation only pursuant to their termsor by mutual consent. *Spott Elec. Co. v. Industrial Indem. Co. (1973) 30 Cal. App. 3d 797, 806, 106 Cal. Rptr. 710* ; *see also Ohio Cas. Ins. Co. v. Northwestern Mut. Ins. Co. (1971) 17 Cal. App. 3d 204, 208-209, 94 Cal. Rptr. 586*

Surrender of insurance policy by insured and its acceptance by insurer as usually prima facie evidence of cancellation of policy. *Ohio Cas. Ins. Co. v. Northwestern Mut. Ins. Co. (1971) 17 Cal. App. 3d 204, 209, 94 Cal. Rptr. 586*

Sole requirement to effect cancellation of policy by insured as being definite and unconditional request for cancellation actually communicated to company. *Knox-Seeman Motor Parts, Inc. v. American Ins. Co. (1969) 2 Cal. App. 3d 173, 179, 82 Cal. Rptr. 451*

Cancellation of insurance by insurer or insured as required to be strictly in accordance with provisions of loss payable endorsement to be effective as to loss payee. *Chase v. National Indem. Co. (1954) 129 Cal. App. 2d 853, 860, 278 P.2d 68*

[b] Estoppel

Insurer as estopped to claim cancellation of automoile liability policy where, after sending notice of cancellation to insured who understood but little English, did not understand notice, and construed it as notice to send further payment on premium due, which he did, it retained, through its agent, partial premium submitted for period of several weeks and until after accident giving rise to liability occurred. *Walker v. Home Indem. Co. (1956) 145 Cal. App. 2d 318, 322-323, 302 P.2d 361*

[c] Pleading

Complaint as not stating cause of action and hence subject to demurrer where it appears from policy, incorporated by reference in complaint, that premium was to be paid on specified date and if not paid on that date policy was terminated and complaint failed to allege such payment. *Johnson v. Mutual Benefit Health & Accident Ass'n (1932) 123 Cal. App. 41, 43-44, 10 P.2d 772* (life insurance policy)

[d] Premiums

Acknowledgment of payment of premium in insurance policy which has been delivered as, in absence of fraud, conclusive evidence of its payment so as to make policy binding notwithstanding any stipulation therein that it shall not be binding until premium is paid; rule as involved to foreclose insurer's claim that policy had not gone into effect at all for reason premium had not been in fact paid and to bar cancellation where admittedly policy had already become effective. *Sawyer v. State Farm Fire & Cas. Co. (1968) 69 Cal. 2d 801, 807-808, 73 Cal. Rptr. 232, 447 P.2d 344* (automobile liability insurance policy)

Express provision in policy that insurer shall not be liable until premium is actually paid as waived by unconditional delivery of policy to insured as completed and executed contract under express or implied agreement that credit shall be given for premium, and insurer as liable for loss which occurs during period of credit. *Farnum v. Phoenix Ins. Co. (1890) 83 Cal. 246, 252, 23 P. 869* ; *Phillips v. Reserve Life Ins. Co. (1954) 128 Cal. App. 2d 540, 547, 275 P.2d 554*

Insured's failure to pay renewal premium on automobile liability policy as not a nonrenewal within meaning of *Ins. Code § 661* or *662* (insurer required to transmit effective notice of cancellation) thus not effective cancellation of coverage. *State Farm Mut. Auto Ins. Co. v. Brown (1974) 40 Cal. App. 3d 385, 115 Cal. Rptr. 213* (construction of Insurance Code provisions since repealed or amended)

Life insurance company as not able to insist on forfeiture of policy for nonpayment of premium when it has in its possession sufficient dividends accumulated to insured's account to cover premium due. *Gaunt v. Prudential Ins. Co. of Am. (1967) 255 Cal. App. 2d 18, 26-27, 62 Cal. Rptr. 624*

[5] Cross References

For the format of answers, see Ch. 26, *Answers*

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26-308 California Forms of Pleading and Practice--Annotated § 308.491

§ 308.491 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Policy Rescinded [Ins. Code § 650]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Policy Rescinded [Ins. Code § 650]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that: the policy was rescinded by defendant effective _____ [*date*], which was before commencement of this action, _____ [on the ground that *or* for] _____ [*specify ground*].

[2] Use of Form

For use of this form, see *§ 308.490[2]*. For discussion of grounds for rescission, see *§ 308.10* et seq.

[3] State Statutes

Rescission of automobile liability policy. *Ins. Code § 651*

Rescission of contracts generally. *Civ. Code § 1689*

Rescission of policy for concealment or false representation. *Ins. Code §§ 331, 338, 359, 361*

Rescission of policy for violation of material warranty or material provisions of policy. *Ins. Code § 447*

Time for exercising right to rescind and applicability of rescission. *Ins. Code § 650*

[4] Decisions

Material misrepresentation or concealment of facts regarding applicant's state of health and medical insurance as ground for rescission of life insurance policy. *Thompson v. Occidental Life Ins. Co. (1973) 9 Cal. 3d 904, 915-916, 109 Cal. Rptr. 473, 513 P.2d 353*

Pursuant to *Ins. Code §§ 331, 359,* insurer may rescind fire insurance policy based on insured's negligent or unintentional misrepresentation of material fact in insurance application, notwithstanding willful misrepresentation clause included in required standard form fire insurance policy. *Mitchell v. United Nat'l Ins. Co. (2005) 127 Cal. App. 4th 457, 468, 472-474, 479, 25 Cal. Rptr. 3d 627* ; *Ins. Code §§ 2070, 2071*

No right to avoid or rescind polity as arising from insured's violation of policy provision unless such provision materially affects risk or policy specifically provides that breach will avoid policy. *Los Angeles Mut. Ins. Co. v. Cawog (1973) 30 Cal. App. 3d 378, 383, 106 Cal. Rptr. 307*

Contract as, under certain circumstances, subject to rescission for unilateral mistake; but mistake of fact to be urged as defense to action on contract as permitted only if mistake is material to contract. *Pechtel v. Universal Underwriters Ins. Co. (1971) 15 Cal. App. 3d 194, 205, 93 Cal. Rptr. 53*

Insurer misled by false representations made in application for medical malpractice insurance as entitled to rescind policy under *Ins. Code § 331*. *Mirich v. Underwriters at Lloyd's London (1944) 64 Cal. App. 2d 522, 529-530, 149 P.2d 19*

Fact that insurer continues to represent insured in trial against him by third party after it learns, during course of trial, of facts justifying it in rescinding liability policy as not constituting waiver of its right to rescind. *Mirich v. Underwriters at Lloyd's London (1944) 64 Cal. App. 2d 522, 530-531, 149 P.2d 19*

[5] Text References

Witkin, Summary of California Law, Vol. 2, *Insurance,* § 224, 225 (10th ed. 2005)

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26-308 California Forms of Pleading and Practice--Annotated § 308.492

§ 308.492 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Plaintiff's Lack of Insurable Interest [Ins. Code § 286]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Plaintiff's Lack of Insurable Interest [Ins. Code § 286]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that: the policy sued on became effective on _____ [*date*], the alleged _____ [loss *or* death of the insured] occurred on _____ [*date*], as alleged in the complaint, and the policy is void in that plaintiff had no insurable interest in the _____ [property which is the subject matter of the policy on the date the _____ (policy took effect *or* loss occurred *or both*) *or* _____ (life *or* health] of the insured at the time the policy took effect].

[2] Use of Form

For use of this form, see *§ 308.490*. For a discussion of insurable interest, see *§ 308.10* et seq.

[3] State Statutes

Insurable interest in life or health of insured. *Ins. Code § 10110*

Insurable interest in property. Ins. Code §§ 275, *281*

Insurable interests peculiar to marine insurance. *Ins. Code § 1880*

Lack of insurable interest as rendering insurance contract void. *Ins. Code § 280*

Waiver of requirement of insurable interest as void. *Ins. Code § 387*

When insurable interest must exist. *Ins. Code § 286*

[4] Decisions

Veteran's insurable interest in home purchased under contract with California Department of Veterans Affairs as terminated by interlocutory divorce decree awarding property to veteran's wife; hence, insurer as not liable on insurance policy where veteran dies during interlocutory period. *Decker v. Occidental Life Ins. Co. (1969) 70 Cal. 2d 842, 845, 76 Cal. Rptr. 470, 452 P.2d 686*

Both vendor and purchaser under conditional sales contract as having insurable interest in chattel sold. *Fageol Truck & Coach Co. v. Pacific Indem. Co. (1941) 18 Cal. 2d 731, 744, 117 P.2d 661*

Defense that plaintiff had no interest in property insured. *West Coast Lumber Co. v. State Inv. & Ins. Co. (1893) 98 Cal. 502, 505, 33 P. 258*

Innocent purchaser for value of stolen automobile as having insurable interest [*Ins. Code §§ 280, 281*]. *Riley v. Mid-Century Ins. Exch. (1981) 118 Cal. App. 3d 195, 200, 173 Cal. Rptr. 257*

Notwithstanding *Civ. Code § 1668* (providing that contracts which exempt persons for violation of law whether willful or negligent are against policy of law), losses caused by insured's negligence as insurable and another as permitted to agree to pay premiums on such insurance. *Gordon v. J.C. Penney Co. (1970) 7 Cal. App. 3d 280, 283, 86 Cal. Rptr. 604* (fire insurance policy purchased by lessor for benefit of lessor and lessee)

Burden of proving affirmative defense of no insurable interest in life of insured as on insurer. *Mayfield v. Fidelity & Cas. Co. (1936) 16 Cal. App. 2d 611, 616, 61 P.2d 83*

Vendor of vehicle under conditional sales contract as having insurable interest in vehicle. *Kleiber Motor Truck Co. v. International Indem. Co. (1930) 106 Cal. App. 709, 716, 289 P. 865*

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26-308 California Forms of Pleading and Practice--Annotated § 308.493

§ 308.493 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action Premature--Appraisal Proceeding Pending

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action Premature--Appraisal Proceeding Pending

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that: the policy sued on provides that in the event the parties fail to agree on the amount of loss and either party makes written demand on the other the loss shall be submitted to appraisers as specified in the policy, and that no action on the policy shall be commenced in any court of law until termination of the appraisal proceeding. Plaintiff and defendant failed to agree on the amount of loss and on or about _____ [*date*], pursuant to the written demand of defendant made on plaintiff, the parties submitted the matter to appraisers in accordance with the provisions of the policy. The appraisal proceeding is pending and has not been terminated, and plaintiff's action is therefore premature.

[2] Use of Form

For use of this form, see *§ 308.490[2]*. For discussion of appraisal provisions, see *§ 308.150* et seq.

[3] State Statutes

Appraisal provision required in standard form fire insurance policy. *Ins. Code § 2071*

Requirement that motor vehicle liability policy, under uninsured motorist provision, provide that determination of whether insured shall be legally entitled to recover damages and, if so, amount be made by agreement between insured and insurer or, in event of disagreement, by arbitration. *Ins. Code § 11580.2(f)*

[4] Decisions

Noncompliance with condition of policy making appraisal or arbitration of amount of loss condition precedent to action on policy as required to be specially pleaded. *Jacobs v. Farmers' Mut. Fire Ins. Co. (1935) 5 Cal. App. 2d 1, 7, 41 P.2d 960*

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26-308 California Forms of Pleading and Practice--Annotated § 308.494

§ 308.494 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action Against Liability Insurer--Failure of Insured to Comply With "No Action" Clause

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action Against Liability Insurer--Failure of Insured to Comply With "No Action" Clause

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that: the policy sued on contains the provision that no action shall be brought under the policy until _____ [*recite relevant term of policy, e.g.,* the amount of the insured's obligations shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant, and the company]. That provision has not been complied with inasmuch as _____ [*state specifics of noncompliance, e.g.,* defendant never agreed with respect to the amount of its insured's obligations, nor were the amount of those obligations ever determined by a judgment following actual trial].

[2] Use of Form

This form, for use in an action against a liability insurer, states as an affirmative defense noncompliance with the terms of the "no action" clause in the insurer's policy. For additional information on affirmative defenses, see *§ 308.490[2]*.

[3] "No Action" Clause

Standard liability policies contain a clause typically labeled "Action Against Company" (1973 ISO CGL Form) or "Legal Action Against Us" (1986 ISO CGL Form), and more commonly referred to as the "no action" clause. The precise language of the "no action" clause depends on the policy form being used, but the clause typically provides that no party has a right to sue the insurer on the policy unless all terms of the policy have been fully complied with and until the amount of the insured's obligation has been finally determined "either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the insurer." A more recent variation of this language states that suit may be brought upon "an agreed settlement or on a final judgment against an insured against an

actual trial ... An agreed settlement means a settlement and release of liability signed by us, the insured, and the claimant or the claimant's legal representative."

[4] "Actual Trial" Requirement

The permissible scope of the "no action" clause is limited by *Ins. Code § 11580(b)(2)*, which requires that all liability policies issued in California contain a provision that whenever judgment is secured against the insured in anaction based on bodily injury, death, or property damage, an action may be brought against the insurer by the judgment creditor to recover on the judgment, subject to the policy terms and limitations. This statutory language arguably conflicts with the "actual trial" requirement of the no-action clause. Although the law on this point may not be fully settled, a judgment creditor has been permitted to sue an insurer under *Ins. Code § 11580(b)(2)* when the insured enters into a stipulated judgment without trial after the insurer has wrongfully refused to defend, assuming that there is no fraud or collusion in the settlement [*Sanchez v. Truck Ins. Exch. (1994) 21 Cal. App. 4th 1778, 1786-1787, 26 Cal. Rptr. 2d 812]* . On the other hand, it has been held that if the insurer provides independent counsel or otherwise participates in the defense, the "actual trial" requirement of the "no action" clause bars an action based on a stipulated judgment entered into without the insurer's consent [*Wright v. Fireman's Fund Ins. Cos. (1992) 11 Cal. App. 4th 998, 1016-1017, 14 Cal. Rptr. 2d 588* ; *Rose v. Royal Ins. Co. (1991) 2 Cal. App. 4th 709, 716, 3 Cal. Rptr. 2d 483]* .

One case interpreting the "actual trial" requirement focused not on whether the insurer provided a defense in the underlying action, but rather on the essential fairness of the process used to determine the result in the underlying action. In that case, the court, after examining prior authority, concluded that two elements are necessary to satisfy the "actual trial" requirement in the standard "no action" clause: (1) an independent adjudication of facts based on an evidentiary showing; and (2) a process that does not create the potential for abuse, fraud, or collusion [*National Union Fire Ins. Co. v. Lynette C. (1994) 27 Cal. App. 4th 1434, 1449, 33 Cal. Rptr. 2d 496]* . In that case, the parties to the underlying action stipulated that in exchange for a covenant not to execute and a nondisclosure agreement, the action would proceed as an uncontested matter. Plaintiff's counsel presented evidence on liability and damages to a judge, who rendered a decision on those issues (the insurer's counsel was involved in the negotiations at an earlier stage, but took a "neutral" posture in the uncontested action). In the subsequent declaratory relief action under *Ins. Code § 11580*, the court concluded that the uncontested proceeding in the underlying action satisfied the two-part test stated above, and therefore met the "actual trial" requirement of the policy's "no action" clause [*National Union Fire Ins. Co. v. Lynette C. (1994) 27 Cal. App. 4th 1434, 1451, 33 Cal. Rptr. 2d 496]* .

[5] State Statutes

Procedure for obtaining court determination that settlement was made in good faith. *Code Civ. Proc. § 877.6*

Right of judgment creditor to bring action against insurer after obtaining judgment against insured in action based on bodily injury, death, or property damage, subject to policy terms and limitations. *Ins. Code § 11580(b)(2)*

[6] Decisions

Owner of apartment complex (contractually required to be added as additional insurer on contractor's liability policy) and its insurer, properly named subcontractors on construction project in question and subcontractors' liability insurer as defendants in same suit; prohibition against suing insurer and insured in same action does not apply if insured is not injured third party (in this suit, tenants no longer involved in dispute because their claims were settled); moreover, if building owner is additional insured, then is first party and is not prohibited from suing both insurer and insured in same suit. *Royal Surplus Lines Ins. Co. v. Ranger Ins. Co. (2002) 100 Cal. App. 4th 193, 200-201, 122 Cal. Rptr. 2d 459*

"Actual trial" requirement of "no action" clause has two components: (1) independent adjudication of facts based on

evidentiary showing; and (2) process that does not create potential for abuse, fraud, or collusion. Procedure under which, in exchange for covenant not to execute and nondisclosure agreement, underlying action would proceed as uncontested matter in which insurer's counsel took neutral posture and evidence on liability and damages was presented to judge who made decision on those issues, was sufficient to satisfy these requirements. *National Union Fire Ins. Co. v. Lynette C. (1994) 27 Cal. App. 4th 1434, 1449, 33 Cal. Rptr. 2d 496*

Insurer could not rely on "no action" clause to defeat assigned bad faith cause of action. *Camelot by Bay Condo. Owners' Ass'n v. Scottsdale Ins. Co. (1994) 27 Cal. App. 4th 33, 43 n.4, 32 Cal. Rptr. 2d 354*

Insurer that refuses to defend its insured cannot rely on "no action" clause to preclude action under *Ins. Code § 11580* when stipulated judgment was obtained against insured in good faith. *Sanchez v. Truck Ins. Exch. (1994) 21 Cal. App. 4th 1778, 1783-1785, 26 Cal. Rptr. 2d 812*

For purposes of claimant's right under *Ins. Code § 11580(b)(2)* to recover from insurer, and apart from "no action" clause, stipulated judgment entered into by its insured cannot bind insurer when insurer provided insured with defense and there is no evidence insurer rejected any reasonable settlement offer; cases in which judgments not on merits were found binding on insurer were based on principle tnat insurer who has opportunity to defend and wrongfully fails to do so is liable on judgment. *Wright v. Fireman's Fund Ins. Cos. (1992) 11 Cal. App. 4th 998, 1013 n.6, 1016, 14 Cal. Rptr. 2d 588*

"Actual trial" requirement of "no action" clause is valid under *Ins. Code § 11580(b)(2)*; consent judgment entered into by parties and approved by court exercising administrative function in simply recording what had been agreed on did not satisfy "actual trial" requirement because term "judgment after actual trial" presupposes contest of issues leading up to final determination by court or jury. *Rose v. Royal Ins. Co. (1991) 2 Cal. App. 4th 709, 715-716, 3 Cal. Rptr. 2d 483*

Settlement negotiated by primary insurer and confirmed as good-faith settlement by court was binding on excess insurer, despite fact that settlement invaded excess coverage and excess insurer did not consent to settlement; excess insurer may waive its rights under "no action" clause if it rejects reasonable settlement and at same time fails to undertake defense. *Diamond Heights Homeowners Ass'n v. National Am. Ins. Co. (1991) 227 Cal. App. 3d 563, 581-581, 277 Cal. Rptr. 906*

[7] Text References

California Insurance Law and Practice, Ch. 41 (Matthew Bender)

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26-308 California Forms of Pleading and Practice--Annotated § 308.495

§ 308.495 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action Barred by Failure to File Within Time Specified in Policy

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action Barred by Failure to File Within Time Specified in Policy

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. The policy sued on contains the following provision: "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commmenced within _____ [*specify, e.g.,* 12] months next after inception of the loss."

Plaintiff, in Paragraph _____, lines _____, page _____ of his/her/its complaint herein, alleges that the loss occurred on _____ [*date*]. As appears from the court's records and files herein, the complaint was filed on _____ [*date*], which is more than _____ [*specify, e.g.,* 12] months after inception of plaintiff's loss.

[2] Use of Form

For discussion of the use of this form, see *§ 308.490[2]*.

[3] State Statutes

Requirement that all California fire insurance policies contain provisions specified by statute. *Ins. Code § 2070*

Insurer's notice requirement regarding applicable statute of limitations after filing of claim for loss due to corrosive soils. *Ins. Code § 2070.1*

California Standard Form Fire Insurance Policy. *Ins. Code § 2071*

[4] Decisions

In case involving first-party progressive property loss claim under homeowner's policy, one-year suit provision of *Ins. Code § 2071* begins running from date of "inception of the loss," defined as point in time when appreciable damage occurs and is or should be known to insured, such that reasonable insured would be aware that notification duty under policy has been triggered; one-year period is tolled from time insured gives notice of damage to insurer, under applicable policy notice provisions, until formal written denial of claim. *Prudential-LMI Commercial Ins. v. Superior Court (1990) 51 Cal. 3d 674, 679, 686-687, 693, 274 Cal. Rptr. 387, 798 P.2d 1230*

Insurer may be estopped from raising one-year suit provision as defense if it did not comply with regulations (*10 Cal. Code Reg. § 2695.4(a)*) requiring every insurer to disclose to first-party claimant all time limits that might apply to claim presented by claimant. *Spray, Gould & Bowers v. Associated Int'l Ins. Co. (1999) 71 Cal. App. 4th 1260, 1267-1269, , 84 Cal. Rptr. 2d 552* ; *see also Neufeld v. Balboa Ins. Co. (2000) 84 Cal. App. 4th 759, 761, 101 Cal. Rptr. 2d 151* (*Spray, Gould & Bowers* applied retroactively because does not create new law)

Insurer's cancellation of policy does not render limitations clause ambiguous for purposes of bad faith action; summary judgment upheld on grounds that action was barred by limitations clause. *Velasquez v. Truck Ins. Exch. (1991) 1 Cal. App. 4th 712, 719, 5 Cal. Rptr. 2d 1*

Bad faith action based on denial of claim in underlying policy constitutes action on policy, even though claimant seeks damages in addition to policy benefits; summary judgment based on defense of limitations clause in policy held proper. *Velasquez v. Truck Ins. Exch. (1991) 1 Cal. App. 4th 712, 722, 5 Cal. Rptr. 2d 1*

Standard form fire insurance policy is required by California law [*Ins. Code §§ 2070, 2071*] to contain provisions (1) requiring insured to render to insurance company, within 60 days after loss, formal proof of loss, and (2) stating that no suit or action on policy for recovery of any claim will be sustainable in any court unless commenced within 12 months next after inception of loss. *Elliano v. Assurance Co. of Am. (1970) 3 Cal. App. 3d 446, 448, 83 Cal. Rptr. 509*

Insurer as waiving 12-month limitation for suing on fire policy and as estopped to assert limitation by its conduct; waiver and estoppel distinguished. *Elliano v. Assurance Co. of Am. (1970) 3 Cal. App. 3d 446, 449-455, 83 Cal. Rptr. 509*

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26-308 California Forms of Pleading and Practice--Annotated § 308.496

§ 308.496 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Concealment or False Representation in Application for Insurance

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Concealment or False Representation in Application for Insurance

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. On or about _____ [*date*], _____ [plaintiff or _____ (*name of insured*), hereinafter referred to as "the insured"] made and signed a written application to defendant, hereinafter referred to as "the application," for the issuance of a[n] _____ [*type of insurance*] insurance policy, hereinafter referred to as "the policy" in the sum of $_____. A copy of the application is attached hereto as Exhibit A and made a part hereof.

2. In the application _____ [plaintiff or the insured] stated and agreed that his/her/its statements and answers contained therein were correct and wholly true and should form the basis of a contract of insurance if one were issued.

3. In the application _____ [plaintiff or the insured] made representations, statements, and answers to questions as follows: _____ [*set forth false statements*].

4. Defendant relied on the truth of the representations, statements, and answers and on or about _____ [*date*] issued and delivered to _____ [plaintiff *or* the insured] its _____ [*type of insurance*] insurance policy number _____ in the sum of $_____ in consideration of a stated annual premium of $_____. The application was annexed to the policy at the time the policy was issued and delivered, and by the terms of the policy the application

was expressly made a part of it.

5. The representations, statements, and answers hereinabove set forth in the application were false and untrue in material respects as follows: _____ [*specify*].

6. In issuing the policy defendant relied on the truth of the representations, statements, and answers contained in the application and had it known the true facts it would not have issued the policy.

[2] Use of Form

For discussion of concealment and misrepresentation, see *§ 308.10* et seq.

[3] State Statutes

Concealment. *Ins. Code §§ 330-339*

Incontestability clauses in life insurance policies limiting period during which defense of fraud may be asserted. *Ins. Code §§ 10113.5, 10206*

Representations. *Ins. Code §§ 350-361*

[4] Decisions

In action by beneficiaries of deceased insured against insurer to recover life insurance policy benefits, triable issues of material fact existed with respect to whether insured concealed or failed to communicate material information to insurer regarding use of cigarettes in 36 months preceding application for life insurance at nonsmoker rate, precluding summary judgment for insurer, which had rescinded policy and denied claim as improper. *O'Riordan v. Federal Kemper Life Assurance (2005) 36 Cal. 4th 281, 286-287, 30 Cal. Rptr. 3d 507, 114 P.3d 753*

To constitute grounds for avoidance of insurance policy on ground of misrepresentation or concealment [*Ins. Code §§ 331, 332, 359*], misrepresentation or concealment required to relate to material fact. *Holz Rubber Co., Inc. v. American Star Ins. Co. (1975) 14 Cal. 3d 45, 61, 120 Cal. Rptr. 415, 533 P.2d 1055*

Materiality [*Ins. Code §§ 334, 360*] determined by probable and reasonable effect that truthful disclosure would have had on insurer in determining advantages of proposed contract. *Holz Rubber Co., Inc. v. American Star Ins. Co. (1975) 14 Cal. 3d 45, 61, 120 Cal. Rptr. 415, 533 P.2d 1055*

Incorrect answer on insurance application does not give rise to defense of fraud where true facts, if known, would not have made insurance contract less desirable to insurer. *Thompson v. Occidental Life Ins. Co. (1973) 9 Cal. 3d 904, 916, 109 Cal. Rptr. 473, 513 P.2d 353*

Automobile liability insurer required to undertake reasonable investigation of insured's insurability within reasonable period of time from acceptance of application and issuance of policy; duty directly inures to benefit of third persons injured by insured; injured party, who has obtained unsatisfied judgment against insured, permitted to proceed directly against insurer who cannot defend on ground of its own failure reasonably to investigate application. *Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 663, 79 Cal. Rptr. 106, 456 P.2d 674* ; *see Philadelphia Indem. Ins. Co. v. Findley (9th Cir. 2005) 395 F.3d 1046* (certifying question of whether duty of insurer to investigate insurability of insured applies to automobile liability insurer that issues excess liability insurance policy in context of rental car transaction)

Failure of insurer to establish its compliance with contract provision for furnishing copy of application for coverage under group life insurance policy to beneficiaries or to insured prior to latter's death precludes insurer from relying on misrepresentations of insured in his application in action by insured's beneficiaries to recover under policy. *Metzinger v. Manhattan Life Ins. Co. (1969) 71 Cal. 2d 423, 427-429, 78 Cal. Rptr. 463, 455 P.2d 391*

After contestability period expired, insurance company could not assert as defense to life insurance claim that impostor took mandatory medical examination, when named insured had personally applied for insurance; court left open question of whether "impostor defense" may be asserted if impostor both applies for insurance and takes medical examination using someone else's name. *Amex Life Assurance Co. v. Superior Court (1997) 14 Cal. 4th 1231, 1243-1245, 930 P.2d 1264*

Accident insurance policy as void where introductory clause to application provides that applicant understands and agrees that right to recovery under any policy which may be issued on basis of application "shall be barred in the event that any one of the following statements, material either to the acceptance of the risk or the hazard assumed by the company is false, or in the event that any one of the following statements is false and made with intent to deceive," where among following statements made by applicants were statement by male applicant that female beneficiary named was his sister and statement made by female applicant that beneficiary named was her brother when no such relationship existed. *Boyer v. United States Fid. & Guar. Co. (1929) 206 Cal. 273, 277-281, 274 P. 57*

Materiality under *Ins. Code § 334* as mixed question of law and fact that can be decided as matter of law if reasonable minds could not disagree on materiality of misrepresentations. *Cummings v. Farmers Ins. Exch. (1988) 202 Cal. App. 3d 1407, 1417, 249 Cal. Rptr. 568* (affirming grant of summary judgment for insurer based on affirmative defense allegation)

Misrepresentation and concealment are distinct alternative defenses in the context of insurance coverage. *Dinkins v. American Nat'l Ins. Co. (1979) 92 Cal. App. 3d 222, 233, 154 Cal. Rptr. 775*

Law as permitting rescission of insurance contract where insured has simply negligently or inadvertently failed to reveal certain facts which, if known to insurer, would have caused it to refuse to issue policy in question. *Dinkins v. American Nat'l Ins. Co. (1979) 92 Cal. App. 3d 222, 232, 154 Cal. Rptr. 775*

Questions in applications for life insurance concerning illness or disease do not relate to minor indispositions but refer to serious ailments which undermine general health; moreover, failure to mention in application existence of condition of which applicant has no knowledge or appreciation not misrepresentation affecting validity of policy. *MacDonald v. California-W. States Life Ins. Co. (1962) 203 Cal. App. 2d 440, 448, 21 Cal. Rptr. 659*

Untruth or incompleteness of insured's qualified statement regarding material matter to effect he makes statement only according to his knowledge of fact or condition involved as not amounting to breach of warranty. *Russ-Field Corp. v. Underwriters at Lloyd's (1958) 164 Cal. App. 2d 83, 95, 330 P.2d 432*

Burden of proving fraudulent statements in application for policy is on insurer. *Mayfield v. Fidelity & Cas. Co. (1936) 16 Cal. App. 2d 611, 616, 61 P.2d 83*

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26-308 California Forms of Pleading and Practice--Annotated § 308.497

§ 308.497 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--False or Fraudulent Statements in Proof of Loss

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--False or Fraudulent Statements in Proof of Loss

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. The policy sued on by plaintiff herein provides that it shall be void in case of any fraud or false swearing by the insured touching any matter relating to the insurance or the subject thereof, whether before or after loss. It is further provided by the policy that plaintiff, in case of loss, shall furnish proof thereof to defendant, signed and sworn to by plaintiff, stating _____ [*specify, e.g.,* the cash value of each item of property damaged or destroyed and the amount of loss sustained by him/her/it].

2. On or about _____ [*date*], plaintiff furnished defendant what purported to be a proof of loss sustained by plaintiff, as alleged in the complaint herein; in and by that proof of loss, plaintiff under oath swore that _____ [*specify, e.g.,* the property covered by the policy was injured or destroyed to the amount of $_____]. A copy of the proof of loss is attached hereto as Exhibit A and made a part hereof.

3. The statements made in the proof of loss were materially false and fraudulent in that _____ [*specify*].

4. The false and fraudulent statements in the proof of loss were made by plaintiff for the purpose of defrauding defendant and, by reason thereof, the policy sued on became and is void.

[2] Use of Form

For discussion of the use of this form, see *§ 308.490[2]*.

[3] State Statutes

Civil penalties for presenting, or assisting, abetting, soliciting or conspiring with any person to present, false or fraudulent claims under insurance contract. *Penal Code § 550*

Criminal penalties for presenting, or assisting, abetting, soliciting, or conspiring with any person who presents, false or fraudulent claims under insurance contract. *Penal Code § 550*

Defrauding insurer constitutes felony. Penal Code § 548 Provision voiding policy in case of fraud or false swearing relating to loss in standard form fire insurance policy. *Ins. Code § 2071*

Double insurance. *Ins. Code §§ 590, 591*

[4] Decisions

Only willful misstatements in proof of loss avoid policy. *Raulet v. Northwestern Nat'l Ins. Co. (1910) 157 Cal. 213, 236, 107 P. 292* ; *West Coast Lumber Co. v. State Inv. & Ins. Co. (1893) 98 Cal. 502, 510, 33 P. 258*

"Loss" under former *Ins. Code § 556* (false or fraudulent claims) [*now see Penal Code § 550*] inapplicable to claims filed with health maintenance organization for payment of services rendered; proper definition of "loss" destruction, damage, or deprivation of person, thing, or amount. *People v. Newman (1991) 233 Cal. App. 3d 646, 648-650, 284 Cal. Rptr. 628*

Provision in standard form fire insurance policy [*Ins. Code § 2071*] voiding policy in event of fraud or false swearing by insured before or after loss inapplicable to false testimony in action to recover under policy. *Ichthys, Inc. v. Guarantee Ins. Co. (1967) 249 Cal. App. 2d 555, 557, 57 Cal. Rptr. 734*

Willfully false statements in proof of loss voids policy pursuant to its terms when knowingly and intentionally made by insured with knowledge of falsity and with intention of defrauding insurer; whether false statement was so made is question of fact. *Singleton v. Hartford Fire Ins. Co. (1932) 127 Cal. App. 635, 646, 16 P.2d 293*

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26-308 California Forms of Pleading and Practice--Annotated § 308.498

§ 308.498 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Noncoverage of Policy or Loss Resulting From Excluded or Excepted Risk

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Noncoverage of Policy or Loss Resulting From Excluded or Excepted Risk

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. The policy sued on expressly _____ [*specify limitation or exclusion, e.g.,* provides that it does not cover accounts, bills, currency, deeds, evidences of debt, money, or securities or provides that it does not cover loss resulting directly or indirectly from earth movement or excludes any loss resulting from earthquake].

2. [As shown by the complaint herein,] plaintiff seeks to recover for loss _____ [*allege facts showing loss was excluded from coverage, e.g.,* by fire of currency, money, and securities or resulting from earth movement or proximately and immediately resulting from an earthquake].

[2] Use of Form

For discussion of the use of this form, see *§ 308.490[2]*. On the effect of a wrongful denial of coverage by the insurer and its failure to defend the insured under a liability policy, see *§ 308.110* et seq.

[3] Loss From Excepted Peril

If a peril is specially excepted in an insurance contract and there is a loss that would not have occurred but for that peril, the loss is excepted even though the immediate cause of the loss was a peril that was not excepted [*Ins. Code § 532*].

Ins. Code § 532 must be read in conjunction with *Ins. Code § 530*, which provides, "An insurer is liable for a loss of

which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause." When *Ins. Code § 532* is read along with *Ins. Code § 530*, the "but for" clause of *Ins. Code § 532* necessarily refers to a "proximate cause" of the loss, and the "immediate cause" refers to the cause most immediate in time to the damage [*Garvey v. State Farm Fire & Cas. Co. (1989) 48 Cal. 3d 395, 402, 257 Cal. Rptr. 292, 770 P.2d 704* ; *Sabella v. Wisler (1963) 59 Cal. 2d 21, 33-34, 27 Cal. Rptr. 689, 377 P.2d 889]* . Furthermore, because the "but for" clause of *Ins. Code § 532* refers to the efficient proximate cause of the loss, coverage would not exist if the covered risk was simply a remote cause of the loss, or if an excluded risk was the efficient proximate (that is, predominant) cause of the loss [*Garvey v. State Farm Fire & Cas. Co. (1989) 48 Cal. 3d 395, 402-403, 257 Cal. Rptr. 292, 770 P.2d 704]* . On the other hand, the fact that an excluded risk contributed to the loss would not preclude coverage if that risk was a remote cause of the loss [*Garvey v. State Farm Fire & Cas. Co. (1989) 48 Cal. 3d 395, 402-403, 257 Cal. Rptr. 292, 770 P.2d 704]* .

The special pleading requirement of former *Code Civ. Proc. § 437a* (*now see Code Civ. Proc. § 431.50*), with respect to the answer, when the defendant insurer claims exemption from liability on the ground that, although the proximate cause of the loss was a peril insured against, the loss was remotely caused by or would not have occurred but for a peril excepted in the insurance contract, has been held unconstitutional [*Coolidge v. Standard Accident Ins. Co. (1931) 114 Cal. App. 716, 723-724, 300 P. 885* ; *Board of Educ. v. Alliance Assurance Co. (1908) 159 F. 994, 1000]* .

[4] Coverage Regarding Multiple Causation of Loss

[a] Nature of Coverage is Determinative

The determination of whether coverage exists when there are multiple causes of the loss, some covered and some excluded under the policy, depends initially on the nature of the coverage, that is, whether it is in the context of first-party property damage or third-party liability [*Garvey v. State Farm Fire & Cas. Co. (1989) 48 Cal. 3d 395, 405-408, 257 Cal. Rptr. 292, 770 P.2d 704]* .

[b] First-Party Property Damage

If the loss caused by both included and excluded perils occurred within the context of first-party property damage (such as structural damage to a dwelling insured by a homeowners' policy), the existence of coverage is determined by the "efficient proximate cause" rule. In determining whether a loss is within a policy exception, the efficient cause--the one that sets others in motion--is the cause to which the loss is to be attributed, though the other causes may follow it and operate more immediately in producing the disaster [*Garvey v. State Farm Fire & Cas. Co. (1989) 48 Cal. 3d 395, 402, 257 Cal. Rptr. 292, 770 P.2d 704* (damage to dwelling allegedly caused by negligent construction (covered) and soil subsidence (excluded)), citing *Sabella v. Wisler (1963) 59 Cal. 2d 21, 31-32, 27 Cal. Rptr. 689, 377 P.2d 889* (damage to dwelling allegedly caused by water-pipe leakage (covered) and soil settlement (excluded))]. This rule derives from an earlier case in which the Court examined the issue of coverage in first-party multiple-cause coverage and relied on the determination of the "prime or moving cause" of the loss [*Garvey v. State Farm Fire & Cas. Co. (1989) 48 Cal. 3d 395, 403, 257 Cal. Rptr. 292, 770 P.2d 704* ; *see Brooks v. Metropolitan Life Ins. Co. (1945) 27 Cal. 2d 305, 309-310, 163 P.2d 689* (death of insured caused by fire in house (covered) and insured's disease of cancer (excluded))]. The rule in *Garvey* applies retroactively [*La Bato v. State Farm Fire & Cas. Co. (1989) 215 Cal. App. 3d 336, 343, 263 Cal. Rptr. 382]* .

A "classic *Garvey*" situation was found to exist when a homeowner's policy contained a natural groundwater and earth movement exclusion, but did not exclude third-party negligence, and structural damage to a house built on a mountain slope allegedly involved several levels of causation: (1) prior to the land's development, the state government removed a portion of the slope to create a highway, decreasing the stability of the hillside; (2) various third parties failed to provide adequate water drainage following the development of the slope; and (3) resultant rising groundwater levels caused

earth movement beneath the house [*see State Farm Fire & Cas. Co. v. Von Der Lieth (1991) 54 Cal. 3d 1123, 1132-1133, 2 Cal. Rptr. 2d 183, 820 P.2d 285]* . Under the facts of that case, the efficient proximate cause was held to be the covered risk of third-party negligence [*State Farm Fire & Cas. Co. v. Von Der Lieth (1991) 54 Cal. 3d 1123, 1131-1136, 2 Cal. Rptr. 2d 183, 820 P.2d 285]* .

Policy exclusions are unenforceable to the extent that they conflict with *Ins. Code § 530* and the efficient proximate cause doctrine [*Julian v. Hartford Underwriters Ins. Co. (2005) 35 Cal. 4th 747, 754, 27 Cal. Rptr. 3d 648, 110 P.3d 903]* . Insurers are therefore prohibited from attempting to contract around the proximate cause doctrine through sweeping language that would have rendered the policies' coverage terms virtually illusory [*Julian v. Hartford Underwriters Ins. Co. (2005) 35 Cal. 4th 747, 756, 27 Cal. Rptr. 3d 648, 110 P.3d 903]* . Under *Ins. Code § 530* and the efficient proximate cause doctrine, reasonable insureds consider themselves insured against losses proximately caused by perils covered under a first-party insurance policy, regardless of contrary language employed in connection with excluded perils [*Julian v. Hartford Underwriters Ins. Co. (2005) 35 Cal. 4th 747, 756, 27 Cal. Rptr. 3d 648, 110 P.3d 903* ; *see Garvey v. State Farm Fire & Cas. Co. (1989) 48 Cal. 3d 395, 412-413, 257 Cal. Rptr. 292, 770 P.2d 704* ; *Howell v. State Farm Fire & Cas. Co. (1990) 218 Cal. App. 3d 1446, 1454, 1459, 267 Cal. Rptr. 708]* .

This concept has engendered some confusion with respect to whether the exclusion of coverage for losses caused by weather conditions that contribute to excluded losses violates *Ins. Code § 530* and the efficient proximate cause doctrine. The California Supreme Court has held that one such policy did exclude coverage for the loss and that the result did not violate *Ins. Code § 530*. In that case, the insurer that issued an "open peril" policy (analogous to an "all risk" policy) denied coverage for a loss resulting from a rain-induced landslide by invoking a provision that excluded coverage for losses caused by weather conditions that "contribute in any way with" an excluded cause or event such as a landslide. That policy covered losses proximately caused by weather conditions that do not "contribute in any way with" another excluded cause or event. The insurer's investigative engineering report concluded that a landslide, triggered by heavy rainfall, caused the damage to the insureds' house. The Court preliminarily held that *Ins. Code § 530* and the efficient proximate cause doctrine do not inflexibly prohibit an insurer from insuring against some manifestations of weather conditions, but not others [*Julian v. Hartford Underwriters Ins. Co. (2005) 35 Cal. 4th 747, 759, 27 Cal. Rptr. 3d 648, 110 P.3d 903]* . Addressing only the application of the weather conditions clause to a loss occasioned by a rain-induced landslide, the Court concluded that to the extent the weather conditions clause excludes the specific peril of rain inducing a landslide, there is no violation of *Ins. Code § 530* or the efficient proximate cause doctrine [*Julian v. Hartford Underwriters Ins. Co. (2005) 35 Cal. 4th 747, 760-761, 27 Cal. Rptr. 3d 648, 110 P.3d 903]* . The Court noted, however, that the phrase "contribute in any way with" that links weather conditions with earth movement in this case "seems particularly designed to circumvent the efficient proximate cause doctrine." A construction of the weather conditions clause that would deny a fair result within the reasonable expectations of both the insured and the insurer would therefore be open to attack on the ground that the application of the clause impermissibly circumvents the efficient proximate cause doctrine [*see Julian v. Hartford Underwriters Ins. Co. (2005) 35 Cal. 4th 747, 760, 27 Cal. Rptr. 3d 648, 110 P.3d 903]* .

Notwithstanding the rule in *Garvey*, the parties have the right to enlarge coverage beyond the language of *Ins. Code §§ 530* and *532*. If they do so, the broad coverage language in the policy prevails over the statutory rules of causation. For example, an all-risks policy that covered damage to a construction project "contributed to or aggravated by" a flood, provided coverage when a flood damaged the project, despite the jury's finding that a design defect, an excluded peril, was the "efficient cause" of the damage [*Mission Nat'l Ins. Co. v. Coachella Valley Water Dist. (1989) 210 Cal. App. 3d 484, 497, 258 Cal. Rptr. 639]* .

In *Garvey*, the Court projected that a case might arise in which courts should distinguish between types of negligence when determining whether a loss caused by negligence is covered under a similar policy. Specifically, the Court observed that if construction is undertaken on the insured premises for the sole purpose of protecting against the operation of a specifically excluded risk under the policy, and that improvement subsequently fails to serve its purpose because it was negligently designed or constructed, the damage to the structure should arguably not be covered. On the

other hand, ordinary negligence that contributes to property loss, but does not involve acts undertaken to protect against an excluded risk, may give rise to coverage under an all-risk policy [*Garvey v. State Farm Fire & Cas. Co. (1989) 48 Cal. 3d 395, 408-409 n.7, 257 Cal. Rptr. 292, 770 P.2d 704]* . As the Supreme Court later clarified, that observation simply indicates that an insured cannot automatically transform an uncovered loss into a covered one by claiming a negligent construction job existed in the chain of causation [State *Farm Fire & Cas. Co. v. Von Der Lieth (1991) 54 Cal. 3d 1123, 1135, 2 Cal. Rptr. 2d 183, 820 P.2d 285]* .

Therefore, an insurer cannot rely on that language in *Garvey* to exclude coverage based on a landslide or earth movement precipitated by the negligent acts of third parties, when those acts exposed the property to greater danger danger of landslides and earth movement without taking precautionary measures against those occurrences, rather than having been undertaken for the *purpose* of lessening those dangers [*State Farm Fire & Cas. Co. v. Von Der Lieth (1991) 54 Cal. 3d 1123, 1134-1135, 2 Cal. Rptr. 2d 183, 820 P.2d 285* (citing with approval *Davis v. United Servs. Auto. Ass'n (1990) 223 Cal. App. 3d 1322, 1329-1330, 273 Cal. Rptr. 224* (finding coverage under policy excluding risk of settlement, when contractor failed to reinforce foundation, but improvements were made for purpose of grading land and supporting structure, not merely for earth-movement prevention), and *Winans v. State Farm Fire & Cas. Co. (1990) 743 F. Supp. 733, 736* (construction negligence resulting in earth settling is separate act not excluded under earth-movement exclusion))]. In other words, the observation in *Garvey* regarding different types of negligence was never intended to exclude coverage for negligence when the record establishes that the negligently constructed improvements were the type undertaken for reasons other than prevention of an excluded occurrence [*State Farm Fire & Cas. Co. v. Von Der Lieth (1991) 54 Cal. 3d 1123, 1135, 2 Cal. Rptr. 2d 183, 820 P.2d 285* ; *Davis v. United Servs. Auto. Ass'n (1990) 223 Cal. App. 3d 1322, 1329, 273 Cal. Rptr. 224]* . To hold otherwise would render third-party negligence coverage illusory [*State Farm Fire & Cas. Co. v. Von Der Lieth (1991) 54 Cal. 3d 1123, 1135, 2 Cal. Rptr. 2d 183, 820 P.2d 285]* .

[c] Third-Party Liability

If the loss caused by both included and excluded perils occurred within the context of third-party liability, the existence of coverage is determined by the "concurrent proximate cause" rule. Although there may be some question whether either of the causes can be characterized as the "prime," "moving," or "efficient" cause of the accident, coverage under a liability insurance policy is equally available to an insured whenever an insured risk constitutes simply a concurrent cause of the injuries [*State Farm Mut. Auto. Ins. Co. v. Partridge (1973) 10 Cal. 3d 94, 104-105, 109 Cal. Rptr. 811, 514 P.2d 123* (car passenger injured by insured's firing of pistol in car, caused by insured's filing of "hair trigger" and negligent driving)].

In contrast, when the cause of an injury can occur only through the operation of an excluded peril, the exclusion cannot be avoided. For example, an exclusion for injury arising from the use of a vehicle would apply to injuries caused by the negligent welding of the chassis. Although the welding was a separate act of negligence from negligent driving, the plaintiffs could have been exposed to the negligent welding only through the use of the vehicle. [*Gurrola v. Great Sw. Ins. Co. (1993) 17 Cal. App. 4th 65, 67, 21 Cal. Rptr. 2d 749* , discussing *State Farm Mut. Auto. Ins. Co. v. Partridge (1973) 10 Cal. 3d 94, 109 Cal. Rptr. 811, 514 P.2d 123* and *State Farm Fire & Cas. Co. v. Camara (1976) 63 Cal. App. 3d 48, 133 Cal. Rptr. 600]* .

The "concurrent proximate cause" rule for third-party liability is inapplicable in the first-party context [*Garvey v. State Farm Fire & Cas. Co. (1989) 48 Cal. 3d 395, 410-413, 257 Cal. Rptr. 292, 770 P.2d 704]* .

[5] State Statutes

Proximate and remote causes of loss. *Ins. Code § 530*

Specially excepted perils. *Ins. Code § 532*

Exclusions and limitations regarding medical malpractice coverage. *Ins. Code § 676.3*

Change in use of property not increasing risk. *Ins. Code § 2031*

[6] Decisions

[a] Conditions Precedent to Coverage

Insurance company as not precluded from imposing conditions precedent to effectiveness of insurance coverage despite advance payment of first premium; but any such condition as required to be stated in conspicuous, unambiguous, and unequivocal language that ordinary layman can understand. *Thompson v. Occidental Life Ins. Co. (1973) 9 Cal. 3d 904, 912, 109 Cal. Rptr. 473, 513 P.2d 353* (life insurance)

[b] Exclusions From Coverage

"Weather conditions" clause, excluding coverage for losses incurred when weather conditions contribute to loss caused by an excluded peril, did not violate *Ins. Code § 530* with respect to exclusion of coverage under "open peril" policy for damage to home caused by rain-induced landslide, under particular policy language and facts of case. *Julian v. Hartford Underwriters Ins. Co. (2005) 35 Cal. 4th 747, 761, 27 Cal. Rptr. 3d 648, 110 P.3d 903*

Family exclusion in watercraft liability insurance policy as inapplicable to insured's stepson injured in boating accident when definition of family members in exclusion clause was ambiguous so that insured could reasonably believe term "family" did not include his stepchildren. *Reserve Ins. Co. v. Pisciotta (1982) 30 Cal. 3d 800, 811, 180 Cal. Rptr. 628, 640 P.2d 764*

Burden as resting on insurer to phrase exceptions and exclusions in clear and unmistakable language. *Reserve Ins. Co. v. Pisciotta (1982) 30 Cal. 3d 800, 807, 180 Cal. Rptr. 628, 640 P.2d 764* ; *State Farm Mut. Auto. Ins. Co. v. Jacober (1973) 10 Cal. 3d 193, 202, 110 Cal. Rptr. 1, 514 P.2d 953* ; *Harris v. Glens Falls Ins. Co. (1972) 6 Cal. 3d 699, 701, 100 Cal. Rptr. 133, 493 P.2d 861*

General provision defining "insured" in insuring clause as required to yield tolimitation found in other parts of policy. *National Ins. Underwriters v. Carter (1976) 17 Cal. 3d 380, 384, 131 Cal. Rptr. 42, 551 P.2d 362*

Ins. Code § 11580.1(b), relating to motor vehicle liability insurance and requiring that insurer designate by explicit description purposes for which coverage is specifically excluded, as incorporating well-established rule that exclusionary clause in insurance policy cannot be upheld unless clause is phrased in clear and unmistakable language. *California State Auto. Ass'n v. Warwick (1976) 17 Cal. 3d 190, 194, 130 Cal. Rptr. 520, 550 P.2d 1056*

Coverage clauses in insurance contracts as interpreted broadly to afford greatest possible protection to insured; exlusionary clauses, on other hand, as interpreted narrowly against insurer. *State Farm Mut. Auto. Ins. Co. v. Partridge (1973) 10 Cal. 3d 94, 101, 109 Cal. Rptr. 811, 514 P.2d 123* ; *Mid-Century Ins. Co. v. Hauck (1973) 35 Cal. App. 3d 293, 297, 110 Cal. Rptr. 707*

When insurance policy in plain language excludes particular peril from coverage, language as required to be respected, especially when policy is drafted by insured or insured's agent. *Young's Mkt. Co. v. American Home Assurance Co. (1971) 4 Cal. 3d 309, 316, 93 Cal. Rptr. 449, 481 P.2d 817*

Insurer of manufacturer as properly denying coverage on basis of exclusion of preexisting conditions, in insured's action for wrongful denial of claim for cost of toxic-waste removal, when extensive evidence showed that insured knew of waste spill, and knew that correction would be costly, prior to issuance of policy, but on insurance application denied existence of present claim under policy. *Advanced Micro Devices, Inc. v. Great Am. Surplus Lines Ins. Co. (1988) 199 Cal. App. 3d 791, 801-802, 245 Cal. Rptr. 44*

Rule that existing ambiguity in exclusion clause is exacerbated by placement of clause under policy heading other than "Exclusions" as inapplicable when language is not ambiguous; courts as refusing to manufacture ambiguity when it does not exist. *Allstate Ins. Co. v. Condon (1988) 198 Cal. App. 3d 148, 155, 243 Cal. Rptr. 623*

Placement of exclusion of previously provided coverage at end of benefit-granting provisions of annual plan brochure rather than in exclusion section as not meeting requirement of clear, conspicuous notice; clear and conspicuous rule as applicable whether or not group insurance contract one of adhesion. *Fields v. Blue Shield of Cal. (1985) 163 Cal. App. 3d 570, 579, 582, 209 Cal. Rptr. 781*

Insurer as entitled to limit coverage of policy, and limitation drafted in plain and understandable language as required to be respected; summary judgment for insurer as therefore proper in action on policy for insured's death due to falling pipe being loaded on insured's vehicle, because policy had low premium, was clearly labeled as limited in coverage, and coverage was clearly limited to insured's injuries sustained by reason of accident to truck. *Garcia v. Trans Pac. Life Ins. Co. (1984) 156 Cal. App. 3d 900, 903-908, 203 Cal. Rptr. 325*

Exclusion from liability coverage for operation of aircraft for illegal purposes as relieving insurer of liability for damage to transmission line hit by insured aircraft that was being used for smuggling of marijuana, despite lack of causal connection be tween accident and illegal use. *Middlesex Mut. Ins. Co. v. Bright (1980) 106 Cal. App. 3d 282, 291, 165 Cal. Rptr. 45*

Insurance company as having right to limit coverage of policy issued by it, and when it has done so, plain language of limitation as required to be respected. *Aas v. Avemco Ins. Co. (1976) 55 Cal. App. 3d 312, 317, 127 Cal. Rptr. 192* ; *Cravens, Dargan & Co. v. Pacific Indem. Co. (1972) 29 Cal. App. 3d 594, 600, 105 Cal. Rptr. 607* ; *Kincer v. Reserve Ins. Co. (1970) 11 Cal. App. 3d 714, 718, 90 Cal. Rptr. 94* ; *see also Allen v. Home Ins. Co. (1901) 133 Cal. 29, 32, 65 P. 138*

When statutes governing content of insurance policy permit limitation or exclusion, validity of exclusion as not subject to being questioned. *Aas v. Avemco Ins. Co. (1976) 55 Cal. App. 3d 312, 322, 127 Cal. Rptr. 192*

Exclusionary clauses in insurance contracts as interpreted narrowly against insurer. *Glens Falls Ins. Co. v. Rich (1975) 49 Cal. App. 3d 390, 395, 122 Cal. Rptr. 696* ; *Burke Concrete Accessories, Inc. v. Tolson (1972) 27 Cal. App. 3d 237, 241, 103 Cal. Rptr. 513*

When policy has not yet been issued, all standard exclusions to insurance coverage, which insured would not reasonably expect, as required to be called clearly and plainly to attention of insured if insurer is to rely on those exclusions to avoid payment of benefits under policy. *Logan v. John Hancock Mut. Life Ins. Co. (1974) 41 Cal. App. 3d 988, 996, 116 Cal. Rptr. 528* ; *see also Russell v. Bankers Life Co. (1975) 46 Cal. App. 3d 405, 413-414, 120 Cal. Rptr. 627*

Exclusion of coverage in boat and yacht liability insurance policy of bodily injury to any member of same household as insured except residence employee or named insured does not exclude coverage for death of wife, both member of insured's household and named insured, sustained while water skiing when policy failed to define "bodily injury" to include death. *Mid-Century Ins. Co. v. Hauck (1973) 35 Cal. App. 3d 293, 295-296, 110 Cal. Rptr. 707*

[c] Multiple Causation of Loss

"Weather conditions" clause, excluding coverage for losses incurred when weather conditions contribute to loss caused by an excluded peril, did not violate *Ins. Code § 530* with respect to exclusion of coverage under "open peril" policy for damage to home caused by rain-induced landslide, under particular policy language and facts of case. *Julian v. Hartford Underwriters Ins. Co. (2005) 35 Cal. 4th 747, 761, 27 Cal. Rptr. 3d 648, 110 P.3d 903*

In first-property property damage case involving included and excluded perils, jury instruction under literal "moving cause" language, pursuant to *Sabella v. Wisler (1963) 59 Cal. 2d 21, 31, 27 Cal. Rptr. 689, 377 P.2d 889* , instead of broader "efficient proximate cause" language of *Garvey v. State Farm Fire & Cas. Co. (1989) 48 Cal. 3d 395, 403-404, 257 Cal. Rptr. 292, 770 P.2d 704* , is not basis for reversal, when it is not reasonably probable that different result would have been reached under Garvey definition. *State Farm Fire & Cas. Co. v. Von Der Lieth (1991) 54 Cal. 3d 1123, 1132-1133, 2 Cal. Rptr. 2d 183, 820 P.2d 285*

Existence of coverage when loss caused by both included and excluded perils in context of first-party property damage determined by "efficient proximate cause" rule. *Garvey v. State Farm Fire & Cas. Co. (1989) 48 Cal. 3d 395, 401-413, 257 Cal. Rptr. 292, 770 P.2d. 704* ; *Sabella v. Wisler (1963) 59 Cal. 2d 21, 31-32, 27 Cal. Rptr. 689, 377 P.2d 889*

"Concurrent proximate cause" rule for determination of coverage in third-party liability context inapplicable to first-party property damage cases. *Garvey v. State Farm Fire & Cas. Co. (1989) 48 Cal. 3d 395, 410-413, 257 Cal. Rptr. 292, 770 P.2d 704*

Existence of coverage when loss caused by both included and excluded perils in context of third-party liability, determined by "concurrent proximate cause" rule. *State Farm Mut. Auto. Ins. Co. v. Partridge (1973) 10 Cal. 3d 94, 104-105, 109 Cal. Rptr. 811, 514 P.2d 123*

Existence of coverage when loss caused by both included and excluded perils in context of first-party loss dependent on "prime or moving cause" of loss. *Brooks v. Metropolitan Life Ins. Co. (1945) 27 Cal. 2d 305, 309-310, 163 P.2d 689*

[d] Prohibited Exclusions

Invalidity of automobile insurance policy provisions purporting to exclude coverage of automobiles "when operated by a permissive user," and "while rented to others." *Metz v. Universal Underwriters Ins. Co. (1973) 10 Cal. 3d 45, 50-53, 109 Cal. Rptr. 698, 513 P.2d 922*

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26-308 California Forms of Pleading and Practice--Annotated § 308.499

§ 308.499 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Policy Assigned Without Consent of Insurer

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Policy Assigned Without Consent of Insurer

AS A [_____ (*if more than one, specify number, e.g.*, FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.*, SECOND) CAUSE OF ACTION], defendant alleges that:

1. The policy sued on contains the following provision: "Assignment of this policy shall not be valid except with the written consent of this company."

2. _____ [*Allege facts showing invalid assignment, e.g.*, This policy was issued by defendant to _____ (*name*) as the insured on _____ (*date*), and covered loss by _____ (*specify, e.g.*, fire) of _____ (*describe property*), hereinafter referred to as "the covered property." On or about _____ (*date*), _____ (*name of insured*) _____ (*specify, e.g.*, sold, transferred, and coveyed all his/her title and interest in and to) the covered property to plaintiff herein, and, as a part of that transaction, purported to assign the policy sued on to plaintiff. No notice of the change of interest was given to defendant until after occurrence of the loss for which recovery under the policy is sought and at no time did defendant consent (orally or) in writing to the assignment of the policy].

[2] Use of Form

For discussion of the use of this form, see *§ 308.490[2]*. For the effect of a change of interest in the subject insured on the insurance, see *§ 308.10* et seq. For a discussion of the assignability of a claim against the insurer, as opposed to assignability of a policy, see *§§ 308.10 et seq. and 308.463*.

[3] State Statutes

Prohibition against assignment of policy without insurer's consent in standard form fire insurance policy. *Ins. Code § 2071*

Transfer of life or disability policy. *Ins. Code § 10130*

Effect of assignment of life or disability policy. *Ins. Code §§ 10173, 10174*

Assignment by insured under group life insurance policy of incidents of ownership. *Ins. Code § 10209.3*

[4] Decisions

Defense that policy was assigned without consent of insurer. *West Coast Lumber Co. v. State Inv. & Ins. Co. (1893) 98 Cal. 502, 506, 33 P. 258*

Purported assignment of fire insurance policy requiring consent of insurer for assignment ineffective without consent; assignment of right to recover on policyafter loss, however, assignable without insurer's consent. *Greco v. Oregon Mut. Fire Ins. Co. (1961) 191 Cal. App. 2d 674, 682, 12 Cal. Rptr. 802*

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26-308 California Forms of Pleading and Practice--Annotated § 308.500

§ 308.500 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Breach of Condition--Insured's Failure to Give Notice and Proof of Loss

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Breach of Condition--Insured's Failure to Give Notice and Proof of Loss

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. The policy sued on provides in part as follows: _____ [*set forth policy provision requiring notice and proof of loss, e.g.,* "The insured shall give written notice to this company of any loss without unnecessary delay ... and within 60 days after the loss, unless such time is extended in writing by this company, the insured shall render to this company a proof of loss, signed and sworn to by the insured ..."].

2. [The first notice defendant received of the loss for which recovery is sought was in the complaint herein on its service on defendant on _____ and] [A]t no time, within 60 days after the loss or otherwise, has plaintiff rendered to defendent a proof of loss as required by the terms of the policy or any proof of loss at all. Nor has the time within which the proof of loss was to be rendered pursuant to the above policy provision been extended by defendant in writing or at all.

3. Plaintiff's failure to [give notice and] render proof of loss as herein alleged substantially prejudiced defendant's rights in that _____ [*specify facts showing prejudice*].

[2] Use of Form

This form of defense is for insertion in an answer to a complaint seeking recovery of a loss covered by a policy insuring against risks to property when the insured failed to give timely notice and proof of loss, and that failure prejudiced the insurer [*see § 308.463*]. With appropriate modifications it may be used in an answer to a complaint seeking recovery

under any type of policy when the insured failed to give notice or proof of the accident, injury, death, claim, or loss [*see, e.g., Ins. Code §§ 550* (fire), *551* (casualty), *555* (proof by third party), *10350.5, 10350.7* (disability)] as required by the terms of the policy.

[3] "Notice-Prejudice" Rule

California courts follow the so-called "notice-prejudice" rule. Under that rule, the insured's failure to give timely notice under the policy will not defeat the insured's right to recovery unless the insurer has been substantially prejudiced by that failure [*see Campbell v. Allstate Ins. Co. (1963) 60 Cal. 2d 303, 306, 32 Cal. Rptr. 827, 384 P.2d 155]* . Prejudice is not presumed as a matter of law to result from late notice, and the insured has the burden of proving actual prejudice [Moev. *Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 289, 302, 98 Cal. Rptr. 547]* . However, the notice-prejudice rule has been held inapplicable to "claims-made" insurance policies [*Helfand v. National Union Fire Ins. Co. (1992) 10 Cal. App. 4th 869, 888, 13 Cal. Rptr. 2d 295]* . For additional discussion of the notice-prejudice rule and notice requirements in insurance policies generally, *see* California Insurance Law and Practice, Chs. 12 and 41 (Matthew Bender).

[4] State Statutes

Notice and proofs of loss. *Ins. Code §§ 550-552, 555*

Waiver of defects in proof or delay. *Ins. Code §§ 553, 554*

Standard form fire insurance policy must include notice of loss, inventory, and proof of loss. *Ins. Code § 2071*

Duty of insurer under standard form of fire insurance policy to notify insured of right to obtain claim-related documents. *Ins. Code § 2071(a)*

[5] Decisions

[a] Defense

Defense that neither plaintiff nor anyone on his behalf gave notice or proof of loss as required by the policy. *West Coast Lumber Co. v. State Inv. & Ins. Co. (1893) 98 Cal. 502, 506-507, 33 P. 258*

[b] Delay in Giving Notice

Unless requirement for notice to insurer in event of loss is made condition precedent to recovery on policy or a forfeiture is provided for, failure to give notice does not defeat recovery. *Abrams v. American Fid. & Cas. Co. (1948) 32 Cal. 2d 233, 236-237, 195 P.2d 797*

Compliance with policy requirement for notice is shown if reasonable explanation for delay is given; accepted excuse restores timeliness of notice. *Wasson v. Atlantic Nat'l Ins. Co. (1962) 207 Cal. App. 2d 464, 468, 24 Cal. Rptr. 665 , disapproved on other grounds, Campbell v. Allstate Ins. Co. (1963) 60 Cal. 2d 303, 307, 32 Cal. Rptr. 827, 384 P.2d 155*

[c] Discovery of Loss

"Discovery of loss" for notice purposes under bond means time when insured discovers it has suffered loss, not time

when insured discovers potential loss; discovery of loss regarding embezzlement liability occurred when insured paid plaintiff to settle third-party lawsuit. *Downey Sav. & Loan Ass'n v. Ohio Cas. Ins. Co. (1987) 189 Cal. App. 3d 1072, 1089, 234 Cal. Rptr. 835*

[d] Duty of Court

Court, in absence of fraud on part of insured, is under obligation to carefully examine evidence regarding failure to furnish proof of loss by fire so as to avoid forfeiture of legitimate claims merely because of technical omissions. *Elliano v. Assurance Co. of Am. (1970) 3 Cal. App. 3d 446, 449, 83 Cal. Rptr. 509*

[e] Prejudice Required to Be Shown

To defeat liability because of insured's breach of notice clause of policy, insurer is required to show that it was prejudiced by breach. *Campbell v. Allstate Ins. Co. (1963) 60 Cal. 2d 303, 306, 32 Cal. Rptr. 827, 384 P.2d 155* ; *Downey Sav. & Loan Ass'n v. Ohio Cas. Ins. Co. (1987) 189 Cal. App. 3d 1072, 1089, 234 Cal. Rptr. 835*

Where there is no valid contractual agreement requiring that notice of loss be given within specific (other than a reasonable) period, trial court's findings on sufficient evidence, that 41 day delay in notifying insurer concerning accident did not prejudice it in defending action against insured arising out of accident, is binding on appellate court. *Abrams v. American Fid. & Cas. Co. (1948) 32 Cal. 2d 233, 239, 195 P.2d 797*

Insurer suffered actual prejudice when insured failed to give any notice of lawsuit against it, thereby permitting a default judgment to be entered against insured for more than plaintiff's actual property damage and preventing insurer from offering any defense to the charges against its insured. *Collin v. American Empire Ins. Co. (1994) 21 Cal. App. 4th 787, 819-821, 26 Cal. Rptr. 2d 391* .

"Notice-prejudice" rule inapplicable to "claims-made" insurance policies; insured must give notice during policy period or there is no coverage. *Helfand v. National Union Fire Ins. Co. (1992) 10 Cal. App. 4th 869, 888, 13 Cal. Rptr. 2d 295* ; *Slater v. Lawyers' Mut. Ins. Co. (1991) 227 Cal. App. 3d 1415, 1421-1423, 278 Cal. Rptr. 479* ; *Pacific Employers Ins. Co. v. Superior Court (1990) 221 Cal. App. 3d 1348, 1360-1361, 270 Cal. Rptr. 779*

Breach of notice clause by insured is no defense to insurer unless latter was substantially prejudiced by it; prejudice not presumed as a matter of law from breach; and insurer has burden of proving actual prejudice and not just mere possibility of prejudice. *Moe v. Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 289, 302, 98 Cal. Rptr. 547* ; *Northwestern Title Sec. Co. v. Flack (1970) 6 Cal. App. 3d 134, 141, 85 Cal. Rptr. 693*

Requirement of *Ins. Code § 11580.2*, relating to uninsured motorist coverage in automobile liability insurance policy and defining uninsured motor vehicle as including one whose owner or operator is unknown, that insured must have, inter alia, filed with insurer within 30 days after accident statement of facts designed to prevent frauds and not to lessen coverage extended to innocent motorists; hence, failure to comply with requirement as not defeating coverage unless insurer was prejudiced by delay in filing statement. *Hanover Ins. Co. v. Carroll (1966) 241 Cal. App. 2d 558, 563-566, 50 Cal. Rptr. 704*

Whether insured has failed to comply with notice provisions of his policy and whether failure has resulted in prejudice to insurer are questions of fact. *Joyce v. United Ins. Co. (1962) 202 Cal. App. 2d 654, 662, 21 Cal. Rptr. 361*

[f] Waiver

[i] Of Notice or Proof of Loss

Pursuant to *Ins. Code § 554*, delay in presentation to insurer of notice or proof of loss is waived if caused by act of insurer, or if insurer fails to object promptly and specifically on that ground; delay alone is insufficient to constitute waiver absent some element of misconduct by insurer or detrimental reliance by insured. *Oakland-Alameda County Coliseum, Inc. v. National Union Fire Ins. Co. (N.D. Cal. 2007) 480 F. Supp. 2d 1182 , ___, 2007 U.S. Dist. LEXIS 24381* , pp.21-22

Waiver under *Ins. Code § 554* requires insurer intentionally to relinquish its right to deny coverage; denial of coverage on one ground does not, absent clear and convincing evidence to suggest otherwise, impliedly waive grounds not stated in the denial. *Oakland-Alameda County Coliseum, Inc. v. National Union Fire Ins. Co. (N.D. Cal. 2007) 480 F. Supp. 2d 1182 , ___, 2007 U.S. Dist. LEXIS 24381* , p.23

Forfeiture of insured mortgagor's rights under policy by failure to give notice or proof of loss not waived by insurer's payment of loss to mortgagee. *Clark v. Casselman (1917) 177 Cal. 82, 86, 169 P. 1005*

Because insured sought reimbursement only for pre-tender expenses incurred to defend underlying action and incurred no expenses after tendering claim, *Ins. Code § 554* did not preclude insurer from denying liability for costs under no-voluntary-payments provision. *Insua v. Scottsdale Ins. Co. (2002) 104 Cal. App. 4th 737, 744, 129 Cal. Rptr. 2d 138*

Insurer's failure to object to delay in submitting proof of loss or defects in contents of proof of loss constitutes waiver. *Elliano v. Assurance Co. of Am. (1970) 3 Cal. App. 3d 446, 448-449, 83 Cal. Rptr. 509* (fire insurance)

Insurer which denies coverage not permitted to insist on strict compliance with notice provisions of policy. *Eichler Homes, Inc. v. Underwriters at Lloyd's, London (1965) 238 Cal. App. 2d 532, 539, 47 Cal. Rptr. 843*

Failure of fire insurer to object to proof of loss on ground it was not made by insured (it was made by implied assignee of insurance proceeds) constitutes waiver of objection. *Greco v. Oregon Mut. Fire Ins. Co. (1961) 191 Cal. App. 2d 674, 685, 12 Cal. Rptr. 802*

Denial by insurer of all liability under policy constitutes waiver of conditions of policy relating to time of notice and proof of disability. *Lincke v. Mutual Benefit Health & Accident Ass'n (1946) 76 Cal. App. 2d 222, 231, 172 P.2d 912* ; *see also Wasson v. Atlantic Nat'l Ins. Co. (1962) 207 Cal. App. 2d 464, 469, 24 Cal. Rptr. 665 , disapproved on other grounds, Campbell v. Allstate Ins. Co. (1963) 60 Cal. 2d 303, 307, 32 Cal. Rptr. 827, 384 P.2d 155*

[ii] Of Payment of Premium

Act of mailing termination notice does not constitute waiver by insurer of its right to rely on automatic termination provision of life insurance policy for nonpayment of premium. *Silva v. National Am. Life Ins. Co. of Cal. (1976) 58 Cal. App. 3d 609, 612, 130 Cal. Rptr. 211*

Insurer's acceptance of partial premium payment is waiver of its right to treat contract as forfeited for nonpayment of full premium. *Pierson v. John Hancock Mut. Life Ins. Co. (1968) 262 Cal. App. 2d 86, 89-91, 68 Cal. Rptr. 487*

[6] Cross References

California Insurance Law and Practice, Chs. 12 and 41 (Matthew Bender)

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26-308 California Forms of Pleading and Practice--Annotated § 308.501

§ 308.501 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Breach of Condition--Insured's Failure to Keep Accurate Books and Accounts

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Breach of Condition--Insured's Failure to Keep Accurate Books and Accounts

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. The policy sued on contains the following provision: "The company shall not be liable unless books and accounts are kept by the insured and are kept in such manner that the exact amount of loss can be accurately determined therefrom."

2. Plaintiff failed to keep books and accounts as required by the above provision [or at all] and defendant has been unable to determine the amount, if any, of plaintiff's loss.

[2] Use of Form

This form of defense is for breach of condition for an insured's failure to keep books and accounts in such a manner that the exact amount of loss can be accurately determined therefrom. Review the applicable policy and substitute policy language as quoted material.

[3] Decisions

Insurer that wishes to condition its contractual liability on insured's conformance with certain conduct as required to do so in clear, unambiguous language. *Holz Rubber Co., Inc. v. American Star Ins. Co. (1975) 14 Cal. 3d 45, 59, 120 Cal. Rptr. 415, 533 P.2d 1055*

Insurance company, before it may be absolved from liability on showing breach of condition, as required to show that condition was a material one and that violation was prejudicial to it. *Dalzell v. Northwestern Mut. Ins. Co. (1963) 218 Cal. App. 2d 96, 105, 32 Cal. Rptr. 125*

[4] Cross References

For a related form, see *§ 308.500*

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26-308 California Forms of Pleading and Practice--Annotated § 308.502

§ 308.502 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Breach of Condition--Insured's Failure to Cooperate

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Breach of Condition--Insured's Failure to Cooperate

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. The policy sued on conditions the following provision: _____ [*state, e.g.,* "Assistance and Cooperation of the Insured. The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident." The policy further provides: "Action Against Company. No action shall be against the compnay unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy"].

2. The insured failed to cooperate with defendant herein in that _____ [*specify acts of noncooperation*].

3. Defendant was substantially prejudiced by the insured's failure as herein alleged in that had the insured cooperated with defendant there was a substantial likelihood the trier of fact in plaintiff's action against the insured would have found in the insured's favor.

[2] Use of Form

This form of defense is for use in an answer to a complaint by an injured party against a tortfeasor's insurer to recover

on the judgment obtained by the injured party against the tortfeasor [*see Ins. Code § 11580(b)(2)*; *see also § 308.480*].

[3] Cooperation Clauses

Liability policies frequently contain clauses requiring the cooperation of the insured in the event of a claim. The clause illustrated in the above defense was taken from the automobile liability policy involved in *Hall v. Travelers Ins. Co. (1971) 15 Cal. App. 3d 304, 306 n.1, 93 Cal. Rptr. 159* .

[4] Breach of Cooperation Clause

In an action against the insurer by an injured party who has obtained a judgment against the insured, the insurer under a liability policy may assert the insured's breach of the cooperation clause on which the policy was conditioned in defense of its obligation under the policy, provided the insurer exercised reasonable diligence to procure the cooperation of the insured and the insurer was substantially prejudiced by the insured's failure to cooperate. To prove substantial prejudice by the insured's failure to cooperate in defense of the action against the insured, the insurer must establish at the very least that had the cooperation clause not been breached there was a substantial likelihood the trier of fact would have found in the insured's favor. The burden of proving the insurer was substantially prejudiced by the insured's failure to cooperate is on the insurer [*State Farm Fire & Cas. Co. v. Miller (1970) 5 Cal. App. 3d 837, 840, 85 Cal. Rptr. 288* ; *see also Hall v. Travelers Ins. Co. (1971) 15 Cal. App. 3d 304, 308, 93 Cal. Rptr. 159]* .

[5] Decisions

Defense of lack of notice, tender of defense, or cooperation as not supported by showing of substantial prejudice without showing that if a timely tender of defense had occurred, insurer would have undertaken the defense. *Clemmer v. Hartford Ins. Co. (1978) 22 Cal. 3d 865, 881-883, 151 Cal. Rptr. 285, 587 P.2d 1098*

Holding of substantial prejudice to insurer by insured's breach of cooperation clause not supportable on tenuous foundation that there might have been advanced valid defense which finder of fact could reasonably have accepted. *Billington v. Interinsurance Exch. (1969) 71 Cal. 2d 728, 733, 79 Cal. Rptr. 326, 456 P.2d 982*

To establish prejudice insurer required to establish at very least that if cooperation clause had not been breached there was substantial likelihood that trier of fact would have found in insured's favor; burden of proving that insured's breach resulted in substantial prejudice is on insurer. *Billington v. Interinsurance Exch. (1969) 71 Cal. 2d 728, 737, 744, 79 Cal. Rptr. 326* ; *see also Hall v. Travelers Ins. Co. (1971) 15 Cal. App. 3d 304, 308, 93 Cal. Rptr. 159* ; *Northwestern Title Sec. Co. v. Flack (1970) 6 Cal. App. 3d 134, 141, 85 Cal. Rptr. 693* (rule applies whether policy is "occurrence-type" or "claims-type"); *State Farm Fire & Cas. Co. v. Miller (1970) 5 Cal. App. 3d 837, 840, 85 Cal. Rptr. 288* ; *Allstate Ins. Co. v. King (1967) 252 Cal. App. 2d 698, 706, 60 Cal. Rptr. 892*

Objection that answer is defective in that it failed to plead affirmative defense of violation of cooperation clause by insured lacks merit when answer disclaimed liability on basis of insured's refusal to comply with cooperation clause, plaintiff did not object to introduction at trial of evidence based on cooperation clausedefense, and objection was raised for first time on appeal. *Billington v. Interinsurance Exch. (1969) 71 Cal. 2d 728, 736-737, 79 Cal. Rptr. 326, 456 P.2d 982*

Insurer, in action against it by injured party which first obtained judgment against insured, permitted to assert defenses based on insured's breach of condition of policy, such as cooperation clause, but breach not valid defense unless insurer was substantially prejudicd by it. *Campbell v. Allstate Ins. Co. (1963) 60 Cal. 2d 303, 305, 32 Cal. Rptr. 827, 384 P.2d 155*

"No voluntary payments" provision precludes insurance coverage for repair expenses voluntarily incurred by home

developer, who neither notified insurer nor sought its consent before presenting it with fait accompli of completed settlements with homeowners; California law enforces "no voluntary payments" provisions in absence of economic necessity, insurer breach, or other extraordinary circumstances. *Jamestown Builders, Inc. v. General Star Indem. Co. (1999) 77 Cal. App. 4th 341, 346, 349-350, 91 Cal. Rptr. 2d 514*

Collusive assistance between insured and injured person in procurement of judgment as breach of both cooperation clause and covenant of good faith and fair dealing. *Andrade v. Jennings (1997) 54 Cal. App. 4th 307, 327-328, 62 Cal. Rptr. 2d 787* ; *Span, Inc. v. Associated Int'l Ins. Co. (1991) 227 Cal. App. 3d 463, 484, 277 Cal. Rptr. 828*

When insurer has reserved it rights, resulting in a declaratory relief action, policy's "cooperation clause" does not effect a waiver of insured's attorney-client or work product privileges with respect to documents sought by insurer. *Rockwell Int'l Corp. v. Superior Court (1994) 26 Cal. App. 4th 1255, 1266, 1269-1270, 32 Cal. Rptr. 2d 153*

Requirement of cooperation by policyholder assumes that insurer has complied in good faith with conditions of policy; hence, any settlement agreement between insured and injured third party after judgment by which latter acquires former's rights against insurer when insurer has repeatedly denied any coverage does not constitute breach of cooperation clause or estop insured and injured third party from enforcing default judgment against insurer. *Drinnon v. Oliver (1972) 24 Cal. App. 3d 571, 583, 101 Cal. Rptr. 120*

Insurer as not required to continue defense of its insured where insured has breached cooperation clause of policy resulting in substantial prejudice to insurer. *Hall v. Travelers Ins. Co. (1971) 15 Cal. App. 3d 304, 308-309, 93 Cal. Rptr. 159*

Nonliability of insurer to operator of radio broadcasting station under libel-slander insurance policy issued by it and indemnifying operator against loss from broadcasting slanderous matter, when operator failed to broadcast retraction or correction of defamatory statements as required by policy and as demanded by subject of defamation who subsequently recovered general and punitive damages from operator. *Mulrooney v. Employers Reinsurance Corp. (1969) 1 Cal. App. 3d 942, 944-945, 81 Cal. Rptr. 907*

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26-308 California Forms of Pleading and Practice--Annotated § 308.503

§ 308.503 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Reservation of Right to Raise Defense of Noncoverage of Policy

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Reservation of Right to Raise Defense of Noncoverage of Policy

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. The policy sued on does not cover the loss on which judgment against the insured was recovered by plaintiff, as alleged in the complaint, in that _____ [*specify*].

2. In undertaking defense of the cause of action by plaintiff against the insured, defendant and the insured executed a written agreement by the terms of which defendant expressly reserved its right to deny that the policy issued by defendant to the insured covered the loss on which the insured was sued by plaintiff. A copy of the agreement is attached hereto as Exhibit A and made a part thereof.

[2] Use of Form

This form of defense is for use in an answer to a complaint by a third party who recovered judgment against defendant's insured and now sues defendant insurer to recover under the judgment [*see Ins. Code § 11580(b)(2)*; *see also § 308.460*] where the insurer undertook defense of the insured in the action by plaintiff but entered into an agreement with the insured reserving its right to contest coverage of the loss by the policy at a later date [*see § 308.462*].

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26-308 California Forms of Pleading and Practice--Annotated § 308.504

§ 308.504 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Willful Act of Insured

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Willful Act of Insured

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that: the loss herein sued on resulted from the willful and intentional act of the plaintiff in _____ [*specify, e.g.,* _____ (setting fire or procuring the setting of fire) to the property covered by the policy and the loss sought to be recovered in this action consists of the value of the property destroyed or damaged in that fire].

[2] Use of Form

This form of defense is for insertion in an answer to a complaint by the insured in an action against the insurer seeking to recover for a loss under a property policy. It may also be used by an insurer in its answer to a complaint under a liability policy, for example, by the insured, who has paid a judgment against him or her, for indemnity [*see § 308.461*; *Evans v. Pacific Indem. Co. (1975) 49 Cal. App. 3d 537, 539-540, 122 Cal. Rptr. 680* (assault and battery)], or by the injured party who has recovered a judgment against the insured and seeks to recover under the policy [*see § 308.460*], provided the insurer, in defending the action against the insured, reserved the right to contest coverage at a later time [*see §§ 308.462, 308.503*], or the issue of coverage, or the facts on which the issue of coverage turns, were not necessarily adjudicated in the third party's action against the insured [*see Hogan v. Midland Nat'l Ins. Co. (1970) 3 Cal. 3d 553, 564-565, 91 Cal. Rptr. 153, 476 P.2d 825]* .

If, however, the insurer wrongfully refused to defend the action against the insured in which the complaint set forth alternative theories of liability, one of which was within policy coverage, and it is not clear whether the jury's verdict in that case was based on the theory covered by the policy, the matter of coverage is res judicata and the insurer is liable [*see Hogan v. Midland Nat'l Ins. Co. (1970) 3 Cal. 3d 553, 566, 91 Cal. Rptr. 153, 476 P.2d 825* ; *see also § 308.462*].

[3] Nonliability of Insurer for Insured's Willful Act

Ins. Code § 533 provides that an insurer is not liable for a loss caused by the willful act of the insured, but that the insurer is not exonerated by the negligence of the insured or of the insured's agents or others. For public policy regarding contracts exempting a person from responsibility for willful injury to the person or property of another, see also *Civ. Code § 1668*. *Ins. Code § 533* is a part of every insurance contract and is equivalent to an exclusionary clause in the contract itself. For the exclusion to be effective it is not required that it be set forth in the policy [*Evans v. Pacific Indem. Co. (1975) 49 Cal. App. 3d 537, 540, 122 Cal. Rptr. 680]* .

However, conduct amounting to a conscious disregard of the safety of others does not constitute a willful act so as to preclude any indemnification under *Ins. Code § 533* [*Peterson v. Superior Court (1982) 31 Cal. 3d 147, 158-159, 181 Cal. Rptr. 784, 642 P.2d 1305]* .

For discussion of the issue of willfulness generally, including the preclusion of coverage for acts of sexual molestation of children, see *§ 308.115*.

[4] State Statutes

Insurer's nonliability for defense or coverage of fine, penalty, or restitution in certain actions brought by prosecutor. *Ins. Code § 533.5*

Ability of insurer to defend physician regarding act requiring professional medical certificate. *Ins. Code § 533.7*

Nonliability of insurer for insured's willful acts. *Ins. Code § 533*

Contracts exempting one from responsibility for his or her own fraud, willful injury to person or property of another, or violation of law as against policy of law. *Civ. Code § 1668*

[5] Decisions

Civ. Code § 1668 and *Ins. Code § 533* as establishing public policy to prevent insurance coverage from encouragement of willful tort but recovery under subsequent estoppel as not offending such public policy. *Tomerlin v. Canadian Indem. Co. (1964) 61 Cal. 2d 638, 648, 39 Cal. Rptr. 731, 394 P.2d 571*

Ins. Code § 533, providing that insurer is not liable for loss caused by willful act of insured, is equivalent of exclusionary clause contained within every insurance contract. *Fireman's Fund Ins. Co. v. City of Turlock (1985) 170 Cal. App. 3d 988, 1000, 216 Cal. Rptr. 796* ; *United States Fid. & Guar. Co. v. American Employer's Ins. Co. (1984) 159 Cal. App. 3d 277, 283, 205 Cal. Rptr. 460* (fire-setting; disapproved in *J. C. Penney Cas. Ins. Co. v. M. K. (1991) 52 Cal. 3d 1009, 1019-1020 n.8, 278 Cal. Rptr. 64, 804 P.2d 689* , to extent opinion implies that insurance policy can provide coverage for acts excluded by *Ins. Code § 533*)

Malicious prosecution constitutes willful misconduct under *Ins. Code § 533* and homeowner's policy exclusion, and insurer therefore has no duty to defend or indemnify insured against such cause of action. *State Farm Fire & Cas. Co. v. Drasin (1984) 152 Cal. App. 3d 864, 867-869, 199 Cal. Rptr. 749*

Under *Ins. Code § 533* and policy clause excluding liability for intentional acts, insurer relieved from liability for intentional killing by insured. *State Farm Fire & Cas. Co. v. Dominguez (1982) 131 Cal. App. 3d 1, 4-5, 182 Cal. Rptr. 109*

Automobile manufacturer not entitled to indemnity from insurer for punitive damages resulting from products liability action involving injuries caused by manufacturer's conduct which was done in conscious disregard of public's safety. *Ford Motor Co. v. Home Ins. Co. (1981) 116 Cal. App. 3d 374, 383-384, 172 Cal. Rptr. 59*

Public policy frustrated if liability for punitive damages in cases involving fraud,oppression, or malice could be passed on to insurance carrier. *City Prod. Corp. v. Globe Indem. Co. (1979) 88 Cal. App. 3d 31, 42, 151 Cal. Rptr. 494*

Ins. Code § 533 is part of every insurance contract and applicable to liability policies. *Evans v. Pacific Indem. Co. (1975) 49 Cal. App. 3d 537, 540, 541-542, 122 Cal. Rptr. 680*

Willful destruction of property on part of insured with intent to defraud insurance company as totally avoiding policy and relieving insurer from liability thereunder. *Singleton v. Hartford Fire Ins. Co. (1930) 105 Cal. App. 320, 327, 287 P. 529*

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[Reserved]

§§ 308.505[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.510

§ 308.510 Complaint by Customer Against Licensed Insurance Broker--For Damages [Civ. Code §§ 1709, 3333] for Fraud [Civ. Code § 1710] and Negligence [Civ. Code § 1714(a)]--Failure to Procure Business Interruption Insurance Covering Mechanical Breakdown of Equipment

[1] FORM Complaint by Customer Against Licensed Insurance Broker--For Damages [Civ. Code §§ 1709, 3333] for Fraud [Civ. Code § 1710] and Negligence [Civ. Code § 1714(a)]--Failure to Procure Business Interruption Insurance Covering Mechanical Breakdown of Equipment

[*Caption, introduction. See § 308.370[1]* .]

1. At all times herein mentioned defendant was, and is, an insurance broker, licensed under the laws of the State of California engaged in business as such in _____ [*city and county*], California.

2. At all times herein mentioned plaintiff was, and is, engaged in _____ [*type of business, e.g.,* the scrap iron and metal business] in _____ [*city and county*], California.

3. _____ [*Allege facts establishing need for business interruption insurance coverage for mechanical breakdown, e.g.,* On or about _____ [*date*], plaintiff purchased an auto shredder for use in his/her business. The cost of the shredder was in excess of $_____ (*specify, e.g.,* $200,000) and its purchase was financed through _____ (*name of bank or other lender*), which required monthly payments on the shredder in excess of $_____ (*specify, e.g.,* $5,000). *Continue, setting forth facts showing why operation of shredder was essential to business.*]

4. For some _____ [*specify, e.g.,* 10 years] prior to the events herein alleged, defendant had acted as plaintiff's insurance broker and had handled all of plaintiff's insurance needs. Defendant intended that plaintiff rely, and plaintiff did rely, on defendant's expertise and advice in connection with plaintiff's insurance matters.

5. _____ [*Allege negotiations for coverage, e.g.,* While the shredder was being shipped from its place

of manufacture to plaintiff's place of business, plaintiff and defendant discussed fire and extended coverage on the shredder. Plaintiff informed defendant of the financing arrangement between plaintiff and _____ (*name of lender*) and specifically requested that business interruption insurance covering a mechanical breakdown of the shredder be obtained].

6. Pursuant to these negotiations, defendant, on or about _____ [*date*], advised plaintiff that he/she had obtained the type of coverage plaintiff wanted and that "everything would be covered" [except breakdown caused by _____ (*specify, e.g.*, flood or earthquake)] and that the insurance would provide payments of $_____ [*specify, e.g.*, $500] a day for each day thebreakdown continued. Defendant made these statements with the intent that plaintiff rely on them and plaintiff did rely on them in that he/she did not seek or obtain the desired coverage elsewhere.

7. On or about _____ [*date*], plaintiff received from defendant the original of a policy, number _____, hereinafter referred to as "the policy," issued by _____ [*name*], hereinafter referred to as "the insurance company," in which plaintiff was the named insured. Enclosed with the policy was a cover letter from defendant to plaintiff in which he/she stated that the policy was "just what you [plaintiff] wanted," provided all the coverage requested, and that the policy term was _____ [*specify, e.g.*, three years], commencing _____ [*date*]. Defendant further stated in his/her letter that he/she was retaining a copy of the policy for his/her files and that the premium for the policy was $_____ [*specify, e.g.*, $11,948]. Defendant made the statements in his/her letter intending that plaintiff should rely on them and plaintiff did rely on them in that he/she failed to read the policy itself. Plaintiff paid the stated premium and is informed and believes and thereon alleges that of this premium paid the sum of $_____ [*specify, e.g.*, $1,823] was for the business interruption coverage. Plaintiff is informed and believes and thereon alleges that the policy issued complied with the coverage requested by defendant to the insurance company and since that coverage, as hereinafter alleged, was materially different from that requested by plaintiff, defendant had no reasonable ground for believing that the statements as to coverage in his/her letter to plaintiff were true.

8. The policy issued provided for payments to the insured for business interruption due to "perils insured" at the rate of $_____ [*specify, e.g.*, $500] for each workday during the period of suspension of business, [excluding the first three days of breakdown,] but if specifically excluded loss caused by a mechanical breakdown. This latter exclusion was diametrically opposed to the coverage plaintiff had specifically requested defendant to obtain and to the representation in defendant's above-mentioned letter that the policy provided all the coverage requested by plaintiff.

9. _____ [*Allege mechanical breakdown, e.g.*, On or about _____ (*date*), there was a mechanical breakdown of the shredder and it was out of operation from that date until on or about _____ (*date*). (It then ran until on or about _____ (*date*), when it broke down a second time and was inoperative this time from that date until on or about _____ (*date*).) The shredder was thus out of operation because of mechanical breakdown for a total of _____ (*number, e.g.*, 86) days]. Plaintiff expended the sum of $_____ [*specify, e.g.*, $1,345.42] to expedite repairs on the _____ [*specify, e.g.*, shredder during the [two] breakdown[s].

10. Plaintiff duly notified the insurance company of the loss and on or about _____ [*date*], the insurance company notified plaintiff that the loss was not covered by the policy and that the company did not write policies providing coverage for losses resulting from mechanical breakdown of equipment.

11. On learning his/her loss was not covered by the policy, plaintiff contacted _____ [*name*], an insurance company specializing in _____ [*specify, e.g.*, boiler and machinery coverage], ascertained that the company issued policies indemnifying against business interruption due to mechanical breakdown, and secured issuance of such a policy on _____ [*date*]. This policy covered the _____ [*specify, e.g.*, auto shredder] and insured against mechanical breakdown for a period of _____ [*specify, e.g.*,

three years], commencing _____ [*date*]. The policy covers the amount actually expended by the insured to repair or replace property damaged by an accidental breakdown and provides $_____ [*specify, e.g.*, $500] per day coverage for each day of total prevention of operation. The premium for this policy was the sum of $_____ [*specify, e.g.*, $6,229], which plaintiff paid.

12. As a proximate result of defendant's negligent failure to secure issuance of a policy with the coverage specifically requested by plaintiff and of defendant's misrepresentation to plaintiff that the policy issued provided the coverage requested, plaintiff was damaged in the following sums: the sum of $_____ [*specify, e.g.*, $43,000] for the _____ [*number, e.g.*, 86] days that the _____ [*specify, e.g.*, shredder] was inoperative due to mechanical breakdown at the rate of $_____ [*specify, e.g.*, $500] per day; the sum of $_____ [*specify, e.g.*, $1,823] which is that portion of the premium paid to the insurance company for business interruption coverage under the policy of a kind not requested by plaintiff; less the sum of $_____ [*specify, e.g.*, $6,229] which is the premium paid for the subsequent policy providing business interruption insurance of a kind plaintiff requested; plus the sum of $_____ [*specify, e.g.*, $1,345.42], which sum was expended by plaintiff in expediting repair of the _____ [*specify, e.g.*, shredder], for a total sum of $_____ [*specify, e.g.*, $39,939.42], together with interest on that sum at the legal rate from and after _____ [*date plaintiff received notice of noncoverage as alleged in Paragraph 10*].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ [*specify, e.g.*, $39,939.42] with interest thereon at the legal rate from and after _____ [*date*];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 308.370[1]* .]

[2] Use of Form

This form of complaint illustrates an action after loss by an insured against an insurance broker for damages based on the latter's negligent failure to secure issuance of a policy providing the coverage specifically requested by the insured and negligent mirepresentation that a policy providing the requested coverage had been obtained. The fact situation illustrated is adapted from *Greenfield v. Insurance Inc. (1971) 19 Cal. App. 3d 803, 97 Cal. Rptr. 164* . *Greenfield* was a consolidated appeal from two judgments. The first was a judgment in favor of the insured against the broker based on the facts set forth in this complaint. The appellate court modified the judgment with respect to damages and affirmed the judgment as modified. The second was a judgment of dismissal following the sustaining of the broker's demurrer to the insured's complaint without leave to amend on the ground that the matter was res judicata. In this action, based on the same acts of the broker, the insured sought to recover additional damages in the sum of $250,000 for loss of value of his business. The court of appeal affirmed the judgment of dismissal saying: "[T]he demurrer was properly sustained. A party may not split a cause of action, using the same wrong as the basis for separate suits. Greenfield [plaintiff] was

bound in the first action to prove all prospective damages caused by the wrongful acts of Insurance [defendant]. The first action is a bar to the second action." Therefore, if a plaintiff is to recover additional damages, that plaintiff must set them forth together in the same complaint. Paragraph 12 of the complaint can be amended to include any addtional damages plaintiff may have sustained or additional paragraphs which set them forth may be inserted in the complaint.

For a discussion of the general format of the complaint, the number of copies to prepare, and verification, see *§ 308.370*.

[3] Statement of Action

In the first of the two cases consolidated in *Greenfield*, the complaint alleged breach of an oral contract, negligence, and fraud based on defendant's failure to obtain a business interruption insurance policy covering mechanical breakdown. Judgment after a court trial was entered for plaintiff based on the negligence and fraud allegations. Although these separate theories are referred to by the court of appeal as "causes of action" [*Greenfield v. Insurance Inc. (1971) 19 Cal. App. 3d 803, 808, 97 Cal. Rptr. 164]* , they are in reality only counts, that is, different theories of recovery based on the same cause of action of the same invasion of a primary right. Both counts and causes of action may be separately stated.

Contrary to the former rule, however [see former *Code Civ. Proc. §§ 427, 430(5)*, repealed 1971, operative July 1, 1972], separate counts or causes of action need not be separately stated, but if they are, they must be separately numbered [*see Cal. Rules of Ct., Rule 2.112*].

Where the facts are simple, the parties the same, and only the theory of recovery changes from one count to another, the better practice, for the sake of brevity, would be to combine the separate counts into a single statement as is done in this complaint.

[4] Allegations

The complaint alleges defendant's capacity (Paragraph 1). It states a cause of action for negligence in failing to secure issuance of a policy containing the coverage requested in that it alleges: (1) the facts giving rise to a duty on the part of defendant to exercise ordinary care (Paragraphs 4-6), including plaintiff's need for insurance and insurable interest (Paragraphs 2, 3); (2) breach of that duty by defendant (Paragraphs 8, 10); (3) loss (Paragraph 9); and (4) proximate cause and damages (Paragraph 12).

It also states a cause of action for fraud based on negligent misrepresentation in that it alleges: (1) the relationship between the parties giving rise to a duty on the part of defendant not to misrepresent (Paragraphs 4, 5), including plaintiff's need for insurance and insurable interest (Paragraphs 2, 3); (2) representations by defendant (Paragraphs 6, 7); (3) defendant's intention that plaintiff rely on the representations and plaintiff's justifiable reliance on them (Paragraphs 4, 6, 7); (4) defendant's lack of reasonable ground for believing the representations made to plaintiff were true (Paragraph 7); (5) the falsity of the representations (Paragraphs 8, 10); (6) loss (Paragraph 9); and (7) proximate cause and damages (Paragraph 12).

For a discussion of negligence and a procedural guide for use in such actions, see Ch. 380, *Negligence* . For a further analysis of complaints for and discussion of fraud and for a procedural checklist for use in such actions, see Ch. 269, *Fraud and Deceit* .

[5] State Statutes

[a] Broker

"Broker" defined. *Ins. Code §§ 33, 1623*

[b] Damages

Actual damages. *Civ. Code § 3333*

Damages for deceit. *Civ. Code § 1709*

Measure of damages for fraud in purchase, sale, or exchange of property. *Civ. Code § 3343*

Punitive damages for fraud. *Civ. Code § 3294*

[c] Deceit

Defined. *Civ. Code § 1710*

Liability for. *Civ. Code § 1709*

[d] Fraud

Actual fraud. *Civ. Code §§ 1571, 1572*

Actual fraud as question of fact. *Civ. Code § 1574*

Consent to contract as not free or real when obtained through fraud. *Civ. Code §§ 1567, 1568*

Constructive fraud. *Civ. Code §§ 1571, 1573*

Interest on damages. *Civ. Code §§ 3287-3291*

Limitation on actions for relief on ground of fraud as three years; when period commences to run. *Code Civ. Proc. § 338(d)*

Negligence. *Civ. Code § 1714(a)*

Rescission of contract on ground of fraud or failure of consideration; restitution. *Civ. Code §§ 1689, 1692*

[6] Decisions

Broker as having duty to exercise reasonable care in seeking coverage as requested by insured; violation of that duty by not obtaining coverage requested or by failing to notify insured that policy as issued by insurer excluded requested coverage as negligence. *Greenfield v. Insurance Inc. (1971) 19 Cal. App. 3d 803, 810, 97 Cal. Rptr. 164*

Negligent misrepresentations by broker to insured as to coverage as fraud. *Greenfield v. Insurance Inc. (1971) 19 Cal. App. 3d 803, 810-811, 97 Cal. Rptr. 164*

Award of prejudgment interest on damages certain or capable of being made certain [*Civ. Code § 3287*] as proper

although complaint fails to allege plaintiff's entitlement to such interest or to contain a specific prayer for it. *Greenfield v. Insurance Inc. (1971) 19 Cal. App. 3d 803, 813, 97 Cal. Rptr. 164*

Liability of one who breaches contract to procure insurances as being to paydamages and as not being that of an insurer. *Mid-Century Ins. Co. v. Hutsel (1970) 10 Cal. App. 3d 1065, 1069, 89 Cal. Rptr. 421*

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26-308 California Forms of Pleading and Practice--Annotated § 308.511

§ 308.511 Complaint by Customer Against Licensed Insurance Broker--For Damages [Civ. Code § 3333] for Negligence [Civ. Code § 1714(a)]--Failure to Procure Fire Insurance [Ins. Code § 102] Ordered by Plaintiff

[1] FORM Complaint by Customer Against Licensed Insurance Broker--For Damages [Civ. Code § 3333] for Negligence [Civ. Code § 1714(a)]--Failure to Procure Fire Insurance [Ins. Code § 102] Ordered by Plaintiff

[*Caption, introduction. See § 308.370[1]* .]

1. At all times herein mentioned defendant was, and is, an insurance broker, licensed under the laws of the State of California and engaged in business as such in _____ [*city and county*], California.

2. At all times herein mentioned [until its destruction by fire as hereinafter alleged,] plaintiff was the owner [and in possession] of certain [real] property, hereinafter referred to as "the property," [located in _____ (*city and county*), California,] described as follows: _____ [*describe*].

3. On or about _____ [*date*], plaintiff and defendant entered into a[n] _____ [oral *or* written] contract by the terms of which defendant agreed to secure issuance of an insurance policy covering the property effective [no later than] _____ [*date*], and by the terms of which plaintiff would be indemnified against loss or damage by fire to the property in the sum of $_____.

4. [On or about _____ [*date*], defendant informed plaintiff that coverage had been secured effective _____ [*date*], and that the policy was being forwarded to him/her from the insurer.]

5. Notwithstanding defendant's agreement that he/she would secure issuance of a fire policy on the property [and his/her advice that such insurance had been placed], defendant failed and neglected to place such insurance coverage.

6. On or about _____ [*date*], the property was _____ [damaged *or* destroyed] by fire to plaintiff's loss in the sum of $_____.

7. As a proximate result of defendant's negligent omission as herein alleged, plaintiff was damaged in the sum of $_____ [*amount of loss not exceeding amount for which policy was to be issued*], with interest thereon at the legal rate from and after the date payment would have been made under the policy had it been issued.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the sum of $_____, with interest thereon at the legal rate;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 308.370[1]* .]

[2] Use of Form

This form of complaint illustrates an action against a broker for damages based on his or her negligent failure to secure issuance of a fire insurance policy, where the property to be covered by the insurance is destroyed by the peril to be insured against before any policy is issued. For a complaint for declaratory relief as to the liability of insurers and their mutual agent for failure of the mutual agent to secure issuance of a fire policy, see also *§ 308.421*.

For a discussion of the general format of the complaint, the number of copies to prepare, and verification, see *§ 308.370*.

[3] Allegations

The complaint alleges: (1) defendant's capacity (Paragraph 1); (2) plaintiff's insurable interest (Paragraph 2); (3) the transaction giving rise to defendant's duty to exercise ordinary care (Paragraph 3); (4) breach of duty (Paragrah 5); (5) loss (Paragraph 6); and (6) proximate cause and damages (Paragraph 7). Paragraph 4 is an optional paragraph to be included if appropriate. For a discussion of negligence and a procedural guide for use in such actions, see Ch. 380, *Negligence* .

[4] State Statutes

"Broker" defined. *Ins. Code §§ 33, 1623*

[5] Cross References

For a related form, see *§ 308.510*

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26-308 California Forms of Pleading and Practice--Annotated § 308.512

§ 308.512 Complaint by Insured Against Licensed Insurance Agent--For Damages [Civ. Code § 3333] for Negligence [Civ. Code § 1714(a)]--Failure to Procure Issuance of Automobile Liability Insurance Policy [Ins. Code § 108] in Amount Ordered--Insurance Company Joined

[1] FORM Complaint by Insured Against Licensed Insurance Agent--For Damages [Civ. Code § 3333] for Negligence [Civ. Code § 1714(a)]--Failure to Procure Issuance of Automobile Liability Insurance Policy [Ins. Code § 108] in Amount Ordered--Insurance Company Joined

[*Caption, introduction. See § 308.370[1]* .]

1. At all times herein mentioned defendant _____ [*name*], hereinafter referred to as "defendant agent," was, and is, an insurance agent licensed under the laws of the State of California and engaged in business as such in _____ County, California.

2. At all times herein mentioned defendant _____ [*name*], hereinafter referred to as "defendant insurance company," was, and is, a corporation organized and existing under the laws of the State of California and authorized to transact, and transacting, business in this state as an insurance company [*or other allegation of capacity and authority as appropriate*].

3. At all times herein mentioned defendant agent was, and is, the duly authorized agent and employee of defendant insurance company and in doing the things hereinafter mentioned was acting within the course and scope of his/her agency and employment.

4. At all times herein mentioned plaintiff was the owner of a certain _____ [*description: year, make, model*] automobile, bearing California license number _____, hereinafter referred to as "the automobile."

5. On or about _____ [*date*], plaintiff _____ [orally or in writing] placed with

defendant agent an order for an automoile liability insurance policy covering operation of the automobile with limits up to $_____ [*specify, e.g.*, $50,000] for bodily injury to one person, to be effective for a term of _____ [*specify, e.g.*, one year], from _____ [*date*], to _____ [*date*]. Defendant agent accepted the order on behalf of defendant insurance company and subsequently issued to plaintiff an invoice for the premium which plaintiff paid.

6. Defendant agent negligently failed to secure issuance of a policy having the policy limit as herein described, but instead secured issuance from defendant insurance company of an automobile liability policy number _____, hereinafter referred to as "the policy," with a policy limit of only $_____ [*lesser amount than ordered, e.g.*, $15,000] for bodily injury to one person.

7. At no time prior to the accident hereinafter alleged did either defendant call plaintiff's attention to the policy limit as imposed by the policy issued, nor didthey in any way indicate to plaintiff that the policy issued provided less coverage than that which was ordered.

8. On or about _____ [*date*], while the policy was in full force and effect, plaintiff while operating the automobile was involved in a collision with an automobile operated by one _____ [*name*], hereinafter referred to as "the injured person," in which the injured person sustained substantial bodily injuries. Thereafter the injured person commenced an action against plaintiff in the _____ Court of _____, number _____, hereinafter referred to as "the action," to recover damages for the personal injuries sustained by him/her in the accident.

9. The action was thereafter regularly tried and resulted in the rendition of a judgment, hereinafter referred to as "the judgment," on _____ [*date*], in favor of the injured person and against plaintiff herein for damages in the sum of $_____ [*sum in excess of limit imposed by policy issued, e.g.*, $35,000] and costs in the sum of $_____.

10. Pursuant to the judgment and as required by the terms of the policy, defendant insurance company paid the injured person the sum of $_____ [*specify, e.g.*, $15,000 plus costs and interest] and no more. The balance of the judgment in the amount of $_____ [*specify, e.g.*, $20,000] was paid by plaintiff to the injured person on _____ [*date*].

11. As a proximate result of the negligence of defendant agent as herein alleged, plaintiff was damaged in the sum of $_____ [*specify, e.g.*, $20,000], which is _____ [*if amount of judgment recovered was less than maximum limit of policy as ordered, state:* that portion of the judgment paid by plaintiff *or if amount of judgment exceeded maximum limit of policy as ordered, state:* the difference between the maximum limit of the policy as written and the maximum limit of the policy as ordered by plaintiff], together with interest thereon at the legal rate from and after _____ (*date plaintiff paid injured person*)].

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For damages in the sum of $_____, together with inter est thereon at the legal rate from and after _____ [*date*], until paid;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 308.370[1]* .]

[2] Use of Form

This form of complaint is for use by an insured to recover damages for negligence in issuing a policy with lower maximum limits than that which was ordered. The complaint was adapted from the complaint in *Walker v. Pacific Indem. Co. (1960) 183 Cal. App. 2d 513, 6 Cal. Rptr. 924* . In that action, which was brought by the injured person-judgment creditor as the insured's assignee, the insurance company was joined on the theory that its agent had obligated it to issue the larger policy. The jury's verdict was against the agent but for the insurer. Plaintiff did not appeal from the judgment in favor of the insurer. It is, therefore, assumed that the jury determined that the agent in accepting plaintiff's order for the policy was acting as a broker rather than as the insurance company's agent, or that the issue of agency had not been properly presented to the jury. For complaints against the broker alone, see *§§ 308.510, 308.511*.

For a discussion of the general format of the complaint, the number of copies to prepare, and verification, see *§ 308.370*. For a discussion of negligence and a procedural guide for use in negligence actions, see Ch. 380, *Negligence*

[3] Allegations

The complaint alleges:

- The capacity and authority of the defendants (Paragraphs 1, 2);
- Agency (Paragraph 3);
- The transaction that gave rise to a duty on the part of the defendants to exercise ordinary care (Paragraphs 4, 5);
- Breach of duty (Paragraphs 6, 7);
- Injury (Paragraphs 8-10); and
- Proximate cause and damages (Paragraph 11).

[4] State Statutes

"Agent" defined. *Ins. Code §§ 31, 1621*

[5] Decisions

Applicability of comparative negligence doctrine in action by insurer against agent to recover amount of judgment against insurer in favor of insured on theory of indemnity; indemnity distinguished. *New Hampshire Ins. Co. v. Sauer (1978) 83 Cal. App. 3d 454, 457-460, 147 Cal. Rptr. 879* (judgment on jury verdict apportioning liability affirmed)

Agent's letter to lessor-owner of vehicle advising it that lessee had secured coverage he contracted to obtain, which

included naming lessor-owner as additional insured, as estopping agent's principal (insurance company) from denying that lessor-owner was additional insured under policy issued. *Home Indem. Co. v. Mission Ins. Co. (1967) 251 Cal. App. 2d 942, 952, 60 Cal. Rptr. 544*

Nonrecovery against agent for failure to secure insurance requested where his principal is properly held liable for the loss. *Home Indem. Co. v. Mission Ins. Co. (1967) 251 Cal. App. 2d 942, 967, 60 Cal. Rptr. 544*

As general rule, agent pursuing instructions of his principal and acting within scope of his authority who then becomes personally liable for performance of contract made for his principal as able to look to principal for indemnity for damage sustained. *Rimington v. General Accident Group of Ins. Cos. (1962) 205 Cal. App. 2d 394, 397, 23 Cal. Rptr. 40*

In absence of special facts, cause of action by insured against insurance broker for negligently procuring automobile liability insurance policy in amount less than that ordered by insured as not accruing until accident occurs, bodily injury is inflicted on another, and liability in excess of coverage actually obtained is incurred. *Walker v. Pacific Indem. Co. (1960) 183 Cal. App. 2d 513, 516, 6 Cal. Rptr. 924*

[6] Cross References

For a related form, see *§ 308.510*

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26-308 California Forms of Pleading and Practice--Annotated § 308.513

§ 308.513 Complaint by Insurance Agent or Broker Against Insurance Company--For Accounting and Damages [Civ. Code § 3300] for Breach of Contract (Unpaid Commissions)

[1] FORM Complaint by Insurance Agent or Broker Against Insurance Company--For Accounting and Damages [Civ. Code § 3300] for Breach of Contract (Unpaid Commissions)

[*Caption, introduction. See § 308.370[1]* .]

1. At all times herein mentioned plaintiff was [, and is,] a licensed insurance _____ [agent *or* broker].

2. At all times herein mentioned defendant was, and is, a corporation organized and existing under the laws of the State of _____ with its principal place of business in _____ County, California, and authorized to transact, and transacting, business in this state as an insurance company [*or other allegation of capacity and authority as appropriate*].

3. On or about _____ [*date*], plaintiff and defendant entered into a written agreement, hereinafter referred to as "the contract," by the terms of which defendant [employed plaintiff as an insurance agent, authorized plaintiff to transact insurance by and on its behalf, and] promised and agreed to pay plaintiff a commission, to be determined in accordance with a schedule attached to the contract, on each insurance policy sold by plaintiff _____ [on defendant's behalf or and placed with defendant] and on each renewal thereof. A copy of the contract and schedule is attached hereto as Exhibit A and made a part hereof.

4. Pursuant to the terms of the contract, plaintiff between _____ [*date*], and _____ [*date*], sold a large number of policies _____ [on defendant's behalf *or* which were placed with the defendant] and has otherwise performed all the terms and conditions of the contract on his/her part to be performed.

5. Plaintiff is informed and believes and thereon alleges that the commissions earned by plaintiff pursuant to the terms of the contract and schedule on policies sold by plaintiff _____ [on defendant's behalf *or* and placed

with defendant] and renewed _____ [are *or* exceed] the sum of $_____.
_____ [Neither all nor any part of this sum has been paid *or* Of this sum defendant has paid plaintiff the sum of $_____ only], and there is now due, owing, and unpaid to plaintiff a
_____ [sum *or* balance] [in excess] of $_____.

6. A determination of the true amount of commissions earned by plaintiff can be made only from defendant's records which contain the only information available as to the premiums paid on issuance and renewal of the policies sold by plaintiff and which, if any, of these policies have lapsed. These records are in defendant's exclusive possession and control and defendant has denied plaintiff access to them. Plaintiff has no records or copies of records from which the trueamount of his/her commissions, calculated in accordance with the contract and schedule, can be determined.

7. The amount of money due as commissions from defendant to plaintiff cannot be ascertained without an accounting of all initial and renewal premiums received by defendant on policies sold by plaintiff _____ [on defendant's behalf *or* and placed with defendant] pursuant to the terms of the contract.

8. Plaintiff has demanded of defendant an accounting of all premiums so received and payment by defendant to plaintiff of the sum found to be due and owing as a result of the accounting, but defendant has failed and refused, and continues to fail and refuse, to render such accounting.

WHEREFORE, plaintiff prays judgment as follows:

1. That this court determine the rights and duties of plaintiff and defendant in the premises and render judgment for an accounting between the parties of the matters herein set forth in order to determine the true and correct amount of defendant's indebtedness to plaintiff;

2. On completion of the accounting, plaintiff have judgment against defendant for the amount of indebtedness thereby found due with intest thereon at the legal rate from the time payment of this amount should have been made pursuant to the terms of the contract;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 308.370[1]* .]

[2] Use of Form

This form of complaint is for use by an insurance agent or broker to secure an accounting by the insurance company and payment of unpaid commissions pursuant to contract. For a discussion of the general format of a complaint, the number of copies to prepare, and verification, see *§ 308.370*. For a further analysis of complaints for accounting, see Ch. 7, *Accounting, Action for*.

[3] Allegations

This complaint alleges:

- The licensed capacity of plaintiff (Paragraph 1);
- The capacity of the defendant and its authority to transact insurance business (Paragraph 2; the bracketed statement re principal place of business will be included without the brackets only if it is used to lay venue [*see Code Civ. Proc. § 395.5* and Ch. 571, *Venue*]; otherwise, it will be omitted);
- The relationship between the parties giving rise to the duty to account (Paragraph 3);
- Plaintiff's performance of the contract (Paragraph 4);
- That there is an unknown sum due plaintiff from defendant which cannot be ascertained without an accounting (Paragraphs 5-7); and
- That plaintiff has demanded an accounting and that defendant has refused it (Paragraph 9).

[4] State Statutes

Agency generally. *Civ. Code § 2295 et seq.*

Damages. *Civ. Code §§ 3300, 3302*

Interest on damages. *Civ. Code §§ 3287, 3289*

References and trials by referees. *Code Civ. Proc. § 638 et seq.*

Agent defined. *Ins. Code §§ 31, 1621*

Broker defined. *Ins. Code §§ 33, 1623*

Criminal penalties for unlawful rebates or other consideration regarding insurance claims. *Ins. Code §§ 750, 750.4, 750.5*

Receipt of continuing commissions on life or disability insurance or surety bond. *Ins. Code § 755.2*

[5] Cross References

For a related form, see *§ 308.510*.

For additional forms of complaints for an accounting which may be adapted for use in an action by an insurance agent or broker against an insurance company and a procedural guide, see Ch. 7, *Accounting, Action for*

For forms for use on references to take an accounting, see Ch. 38, *Reference*

See also generally Ch. 103, *Brokers* (relating to real estate brokers), Ch. 248, *Employer's Liability for Employee's Torts*, Ch. 249, *Employment Law: Termination and Discipline*, Ch. 250, *Employment Law: Wage and Hour Disputes*, and Ch. 427, *Principal and Agent*

For memoranda of points and authorities regarding accounting, see California Points and Authorities, Ch. 12, *Accounting* (Matthew Bender)

For memoranda of points and authorities regarding agency generally, see California Points and Authorities, Ch. 182, *Principal and Agent* (Matthew Bender)

For memoranda of points and authorities regarding reference generally, see California Points and Authorities, Ch. 201, *Reference and Referees* (Matthew Bender)

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26-308 California Forms of Pleading and Practice--Annotated § 308.514

§ 308.514 Complaint by Former General Manager Against Insurance Company for Damages [Civ. Code § 3300] for Breach of Employment Contract

[1] FORM Complaint by Former General Manager Against Insurance Company for Damages [Civ. Code § 3300] for Breach of Employment Contract

[*Caption, introduction. See § 308.370[1]* .]

1. _____ [*Allegation of capacity and authority of defendant. See § 308.513[1], Paragraph 2.*]

2. On or about _____ [*date*], plaintiff and defendant entered into a written contract, hereinafter referred to as "the contract," by the terms of which defendant employed and appointed plaintiff as its General Manager, effective _____ [*date*], for a term of _____ [*number*] years. Under the terms of the contract, defendant agreed to compensate plaintiff at the rate of $_____ per month [plus a sum equal to the amount that _____ (*specify, e.g.,* five) percent of the underwriting profit of the company exceeded the amount of salary for a year]. A copy of the contract is attached hereto as Exhibit A and made a part hereof.

3. Pursuant to the contract, plaintiff entered into the performance of his/her duties on _____ [*date*], and until the time of his/her wrongful discharge as hereinafter alleged he/she fully, faithfully, and conscientiously performed each and every obligation on his/her part to be performed under the contract and, since the time of his/her discharge, he/she has remained and is ready, willing, and able to perform all the terms, conditions, and requirements of the contract on his/her part to be performed.

4. _____ [On *or* By written notice dated] _____ [*date*], defendant, without any just cause [or reason whatsoever], purported to cancel and rescind the contract, discharged plaintiff as its General Manager, refused to pay plaintiff any sums that were to accrue thereafter under the terms of the contract, and refused, and continues to refuse, to permit plaintiff to perform his/her duties as required by the contract. [A copy of the notice is attached hereto as Exhibit B and made a part hereof.]

5. Under the terms of the contract, defendant was obligated to pay plaintiff a total salary amounting to $_____ [plus the additional compensation based on the underwriting profit of the company]. Of this sum, defendant paid plaintiff up to and including the time of his/her discharge the sum of $_____ [plus $_____ as additional compensation based on the underwriting profit], and no other sums. As a proximate result of defendant's wrongful discharge of plaintiff and its refusal to pay him/her under the terms of the contract from and after _____ [*date of discharge*], plaintiff has been damaged in the sum of $_____, which is the difference between the sumof $_____ [*sum paid on salary*] and the sum of $_____ [*total salary*] [plus additional compensation based on the underwriting profit of the company]. Plaintiff has demanded payment of this sum from the defendant, but defendant has failed and refused, and continues to fail and refuse, to pay it or any part of it.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ [*difference between amount paid as salaryand amount to be paid*] [with interest thereon at the legal rate] [plus such additional compensation as the court finds due based on defendant's underwriting profit];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 308.370[1]* .]

[2] Use of Form

This form illustrates a complaint by an employee against an insurance company for breach of an employment contract. For a discussion of the general format of the complaint, the number of copies to prepare, and verification, see *§ 308.370*.

[3] Allegations

The complaint alleges:

- The capacity of the defendant and its authority to transact business (Paragraph 1; the bracketed statement re principal place of business will be included without the brackets only if it is used to lay venue [*see Code Civ. Proc. § 395.5* and Ch. 571, *Venue*]; otherwise, it will be omitted);

- Execution of the contract, that is, the existence of duty (Paragraph 2);

- Plaintiff's performance of conditions precedent until prevented from performance by defendant's wrongful act (Paragraph 3); defendant's breach of contract (Paragraph 4); and proximate cause and damages (Paragraph 5).

For a further analysis of complaints for breach of an employment contract and potential defenses, see Ch. 249, *Employment Law: Termination and Discipline* . For additional allegations for use in such complaints and a procedural guide for use in actions for breach of contract, see Ch. 140, *Contracts* .

[4] Decisions

Proper measure of damages for wrongful termination of employment as amount of salary provided in contract for entire remaining uncompensated period of service, unless employer is able to affirmatively establish mitigation by showing other comparable employment available to employee. *De Angeles v. Roos Bros., Inc. (1966) 244 Cal. App. 2d 434, 441-442, 52 Cal. Rptr. 783*

Action by discharged general manager against insurance and investment companies with interlocking directorship for breach of employment contract. *Jensen v. Western Pioneer Ins. Co. (1957) 151 Cal. App. 2d 570, 312 P.2d 285*

[5] Cross References

For a related form, see *§ 308.510*

For alternative forms of complaints for breach of an employment contract, see Ch. 249, *Employment Law: Termination and Discipline*

For alternative forms of allegations for use in complaints for breach of employment contracts and a procedural guide, see Ch. 140, *Contracts*

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[Reserved]

§§ 308.515[Reserved]

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26-308 California Forms of Pleading and Practice--Annotated § 308.520

§ 308.520 Complaint by Insurance Company Against Insured to Recover Premium [Civ. Code §§ 3300, 3302]

[1] FORM Complaint by Insurance Company Against Insured to Recover Premium [Civ. Code §§ 3300, 3302]

[*Caption, introduction. See § 308.370[1]* .]

1. Plaintiff is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California and authorized to transact, and transacting, business in this state as an insurance company [*or other allegation of capacity and authority as appropriate*].

2. [*If venue (see Code Civ. Proc. § 395) is based on defendant's residence, add:* Defendant is, and at all times herein mentioned was, a resident of _____ County, California.]

3. On or about _____ [*date*], in consideration of defendant's promise and agreement to pay plaintiff the sum of $_____, as the premium therefor on _____ [*specify when payment was to have been made*], plaintiff issued and delivered to defendant a certain policy of insurance, number _____, hereinafter referred to as "the policy" [, which was placed for defendant with plaintiff by and through _____ (*name*), a licensed insurance broker]. The policy insured _____ [*specify class and subject of insurance*], subject to the terms and conditions therein set forth for a period of _____ [*specify, e.g.*, one year] from the date of its issuance.

4. Plaintiff has performed all the terms and conditions of the contract between it and defendant on its part to be performed.

5. Plaintiff has demanded of defendant payment of the premium as hereinabove specified, but defendant has failed and refused, and continues to fail and refuse, to pay that sum or any part of it.

6. As a proximate result of defendant's failure and refusal as herein alleged, plaintiff has been damaged in the sum of

$_____ [*amount of premium*] together with interest thereon at the legal rate from and after _____ [*date payment should have been made pursuant to agreement or terms of policy*].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____, with interest thereon at the legal rate from and after _____ [*date*];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 308.370[1]* .]

[2] Use of Form

This form of complaint is for use by an insurance company to recover the unpaid premium from the insured. With appropriate modifications it may also be used to recover the balance of a premium due where a portion of it has been paid, or to recover the unpaid premium from a person other than the insured who is liable for its payment.

For a discussion of the format of the complaint, the number of copies to prepare, and verification, see *§ 308.370*.

[3] Right to Premium

An insurer is entitled to payment of the premium as soon as the subject matter insured is exposed to the peril insured against [*Ins. Code § 480*]. On cancellation of policies for nonpayment of premium, see *Ins. Code §§ 484, 661(a)(1), 676(a), 1861.03(c)(1)*. On when the insured is entitled to return of the premium or a portion of it, see *Ins. Code §§ 481-483* and *485-487*. On the prohibition against increasing premiums of certain automobile insurance policies, see *Ins. Code §§ 488* and *488.5*.

[4] State Statutes

Insurance premiums. *Ins. Code §§ 480-488.5*

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26-308 California Forms of Pleading and Practice--Annotated § 308.521

§ 308.521 Complaint by Insurance Company Against Insured to Recover Payment Made Under Policy and Damages [Civ. Code §§ 1709, 3287, 3333] for Fraudulent Representations [Civ. Code §§ 1572, 1710] in Claim or Proof of Loss

[1] FORM Complaint by Insurance Company Against Insured to Recover Payment Made Under Policy and Damages [Civ. Code §§ 1709, 3287, 3333] for Fraudulent Representations [Civ. Code §§ 1572, 1710] in Claim or Proof of Loss

[*Caption, introduction. See § 308.370[1]* .]

1. _____ [*Allegation of capacity and authority of plaintiff. See § 308.520[1], Paragraph 1*].

[2. *If venue (see Code Civ. Proc. § 395) is based on defendant's residence, add:* Defendant is (, and at all times herein mention was,) a resident of _____ County, California.]

3. On or about _____ [*date*], plaintiff issued and delivered to defendant a policy of insurance, number _____, hereinafter referred to as "the policy," effective from _____ [*date*], to _____ [*date*], by the terms of which plaintiff undertook to insure defendant against loss _____ [*specify, e.g.*, by fire of the property therein described, hereinafter referred to as "the property"]. [The policy, among other things, provides: _____ (*specify e.g.*, "This entire policy shall be void if, whether before after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto").]

4. On or about _____ [*date*], while the policy was in full force and effect, defendant, pursuant to the terms and conditions of the policy, caused to be delivered to plaintiff a written notice of loss in which defendant notified plaintiff that _____ [*specify, e.g.*, the property was wholly destroyed by fire on _____ (*date*)]. A copy of the notice of loss is attached hereto as Exhibit A and made a part hereof.

[5. *Specify any steps taken by plaintiff to verify loss.*]

6. On or about _____ [*date*], defendant furnished plaintiff with what purported to be [an inventory of the destroyed, damaged, and undamaged property showing in detail quantities, costs, actual cash value, and amount of loss claimed and] a written and sworn _____ [claim *or* proof] of loss in which defendant, under oath, swore that _____ [*specify, e.g.*, the property covered by the policy was damaged or destroyed to defendant's loss in the sum of $_____]. A copy of the [inventory and] _____ [claim *or* proof] of loss is attached hereto as Exhibit B and made a part hereof.

7. Defendant furnished the notice of loss[, inventory,] and _____ [claim *or* proof] of loss to plaintiff with the intent that plaintiff rely on them, and plaintiff did rely on them in that it paid defendant the sum of $_____ pursuant thereto in accordance with the terms of the policy.

8. On or about _____ [*date*], plaintiff _____ [*specify, e.g.*, discovered] that the statements made in the [inventory and] _____ [claim *or* proof] of loss were materially false and fraudulent as follows: _____ [*specify*].

9. Thereupon, on or about _____ [*date*], plaintiff notified defendant of its _____ [*specify, e.g.*, discovery] of the fraud and demanded return of the money plaintiff had paid defendant as herein alleged. A copy of the notice and demand is attached hereto as Exhibit C and made a part hereof. Defendant failed and refused, and continues to fail and refuse, to repay that sum or any part of it.

10. Defendant at all times herein mentioned knew that the statements made in [inventory and] _____ [claim or proof] of loss were materially false and fraudulent as herein alleged and he/she made such statements under oath for the sole purpose of defrauding plaintiff.

11. As a proximate result of defendant's fraud as herein alleged, plaintiff has been damaged in the sum of $_____ [*amount paid defendant*], together with interest on that sum at the legal rate from and after _____ [*date paid*].

12. As a further result of defendant's fraud as herein alleged, plaintiff is entitled to exemplary and punitive damages.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ with interest thereon at the legal rate from and after _____ [*date*];

2. For exemplary and punitive damages;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 308.370[1]* .]

[2] Use of Form

This form of complaint is for use by an insurer to recover payment made by itto its insured based on a materially false and fraudulent claim or proof of loss. For a discussion of the general format of the complaint, the number of copies to prepare, and verification, see *§ 308.370*. For a form of affirmative defense based on materially false and fraudulent statements contained in a proof of loss in an action by the insured against the insurer to recover under the policy, see *§ 308.497*.

[3] Allegations

The complaint alleges:

- Plaintiff's capacity (Paragraph 1);
- Defendant's residence (Paragraph 2; this allegation will be included only if venue [*see Code Civ. Proc. § 395*] is to be based on it; otherwise, it will be omitted);
- The relationship between the parties giving rise to the duty not to misrepresent (Paragraph 3);
- Defendant's representations (Paragraphs 4, 6);
- Defendant's intention that plaintiff rely on the representations and plaintiff's reliance thereon (Paragraph 7);
- Discovery and falsity of the representations (Paragraph 8);
- Defendant's knowledge that the representations when made were false and of defendant's intent to defraud (Paragraph 10);
- Plaintiff's demand for restitution and defendant's refusal (Paragraph 9); and
- Proximate cause and damages (Paragraph 11).
- Plaintiff's entitlement to recover exemplary and punitive damages (Paragraph 12 [*see Civ. Code § 3294*]).

For a further analysis of complaints for and discussion of actionable fraud and for a procedural checklist for use in such actions, see Ch. 269, *Fraud and Deceit* .

[4] Civil Penalties and Restitution

Ins. Code § 1879.1 permits local district attorneys and other specified law enforcement officials to bring an action against persons convicted of insurance fraud to recover a civil penalty approximating the amount of the illegal profits realized as a result of the fraudulent activity [*see Ins. Code § 1879.1(a)* (amount of penalty and actions for recovery)]. A private litigant may not bring an action to recover these penalties. However, penalties collected under this section, after reinbursement of costs to the prosecuting agency, will be reimbursed to the victims of the insurance fraud as restitution.

In some cases, this civil penalty procedure may provide an alternative to the type of action contemplated by this form. It does not preclude the use of other legal and equitable remedies, such as the type of action contemplated by this form, to recoup losses from insurance fraud [*Ins. Code §§ 1879.1(f), 1879.8*]. However, any restitution paid to the victim in an action under *Ins. Code § 1879.1* will be credited against compensation obtained by the victim against the defendant for the same or related conduct [*Ins. Code § 1879.1(f)*].

[5] State Statutes

Violation of *Penal Code § 550* (false insurance claims) or *Ins. Code § 1871.4* (false workers compensation claims) constitutes ground for disbarment or suspension. *Bus. & Prof. Code § 6106.5*

Consent obtained through fraud is subject to rescission. *Civ. Code §§ 1566-1568*

Cancellation of policy on discovery of insured's fraud or material misrepresentation. *Ins. Code §§ 1861.03(c)(1), 661(a)(3), (4)*

Civil penalties providing restitution to victims of insurance fraud. *Ins. Code § 1871.7(b), (c), (d)*

Provision voiding policy in case of fraud or false swearing relating to loss in standard form fire insurance policy. *Ins. Code § 2071*

Willfully destroying insured property with intent to defraud insurer. *Penal Code § 548*

Presenting, or assisting, abetting, soliciting or conspiring to present, false or fraudulent claim for payment of loss under insurance contract. *Penal Code § 550*

[6] Decisions

Gravamen of insurer's action against husband and wife, to recover amount paid them under policy covering jewelry and insuring them against loss by robbery on ground that claim of loss was fraudulent in that no robbery occurred, as fraud and not conspiracy which would require corroboration of testimony of wife as accomplice. *Williams v. Continental Ins. Co. of N.Y. (9th Cir. 1946) 152 F.2d 958*

Former *Ins. Code § 556* (*now see Penal Code § 550*), making it criminal offense to present fraudulent claim for payment of loss under insurance contract, as extending to acts of attorney in knowingly presenting, on behalf of client, fraudulent claim for payment of loss under insurance contract. *Scofield v. State Bar (1965) 62 Cal. 2d 624, 628-629, 43 Cal. Rptr. 825, 401 P.2d 217* (attorney suspended for 30 days; in subsequent proceedings, attorney was disbarred after conviction under same statute [*see In re Scofield (1973) 10 Cal. 3d 383, 384, 110 Cal. Rptr. 329, 515 P.2d 273]*); *see also Sampson v. State Bar (1974) 12 Cal. 3d 70, 83, 115 Cal. Rptr. 43, 524 P.2d 139* (attorney's knowing submission of false claims to insurance companyas involving act of dishonesty and moral turpitude within meaning of *Bus. & Prof. Code § 6106*)

Taken as whole, *Ins. Code § 1871.7* is specifically tailored toward preventing and punishing making of fraudulent claims to insurance companies; provision not directed against insurers that receive and handle insured's claim, or insurer's agents and affiliates who process claim, whether insurer entity is stock insurance company or reciprocal exchange. *State of California ex rel. Metz v. Farmers Group, Inc. (2007) 156 Cal. App. 4th 1063, 1071, 67 Cal. Rptr. 3d 842*

Under *Ins. Code § 1871.7(e)(5)*, only district attorney or Commissioner may bring related action based on facts

underlying pending action; qui tam action by relator against company that provided insurer with comparable automobile values was related to his previous qui tam action against insurer, which involved that company's same comparable figures. *State of Cal. ex rel. Metz v. CCC Info. Svcs. (2007) 149 Cal. App. 4th 402, 407, 408, 57 Cal. Rptr. 3d 156, 2007 Cal. App. LEXIS 500*

Under *Ins. Code § 1871.7*(*l*)(1), action pursuant to § 1871.7 may not be filed more than three years after discovery of facts constituting grounds for commencing action. *State of Cal. ex rel. Metz v. CCC Info. Svcs. (2007) 149 Cal. App. 4th 402, 414, 57 Cal. Rptr. 3d 156, 2007 Cal. App. LEXIS 500*

Insurer not subject to qui tam action brought under *Ins. Code § 1871.7* based on its marketing and claims handling practices; *Ins. Code § 1871.7* is specifically tailored toward preventing and punishing making of fraudulent claims to insurance companies. *California v. Unumprovident Corp. (2006) 140 Cal. App. 4th 442, 449-452, 44 Cal. Rptr. 3d 491*

Ins. Code § 1871.7 gives private parties right to sue based on any act stated in *Ins. Code § 1871.7(a), (b)* that could subject defendant to civil penalties and damages. *People ex rel. Allstate Ins. Co. v. Muhyeldin (2003) 112 Cal. App. 4th 604, 609, 5 Cal. Rptr. 3d 492*

In criminal action under former *Ins. Code § 556* [*now see Penal Code § 550*], intent to defraud is inferable from insured's reporting of value in excess of actual value of stolen item. *People v. De Caro (1981) 123 Cal. App. 3d 454, 464, 176 Cal. Rptr. 509*

[7] Cross References

See generally Ch. 140, *Contracts* , Ch. 177, *Damages* , Ch. 269, *Fraud and Deceit* , and Ch. 490, *Rescission and Restitution*

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Volume 26: Injunctions thru Insurance-Chs. 303-313
Chapter 308 INSURANCE
PART IV. FORMS
C. Actions by Insurance Companies

26-308 California Forms of Pleading and Practice--Annotated § 308.522

§ 308.522 Complaint by One Insurance Company Against Another Insurance Company for Declaratory Relief [Code Civ. Proc. § 1060]--To Secure Judicial Declaration Concerning Which Liability Policy Provides Primary Coverage

[1] FORM Complaint by One Insurance Company Against Another Insurance Company for Declaratory Relief [Code Civ. Proc. § 1060]--To Secure Judicial Declaration Concerning Which Liability Policy Provides Primary Coverage

[*Caption, introduction. See § 308.370[1]* .]

1. Plaintiff _____ [*name*] is, and at all times herein mentioned was, _____ [a corporation organized and existing under the laws of _____ (*state or foreign country*) and authorized to transact, and transacting, business in California as an insurance company *or other allegation of capacity and authority as appropriate*].

2. On or about _____ [*date*], plaintiff issued to _____ [*name of insured*], hereinafter referred to as "the insured," a[n] _____ [*specify, e.g.*, professional] liability insurance policy, number _____, hereinafter referred to as "plaintiff's policy," insuring the insured against _____ [*specify, e.g.*, "acts or omissions committed during the policy period, and/or prior to the policy period if claim is made or suit is brought against the insured during the policy period"]. The policy provides that _____ [*specify excess provision, e.g.*, "with respect to acts or omissions which occur prior to the policy period, the insurance hereunder shall apply only as excess insurance over any other valid and collectible insurance"].

3. Defendant _____ [*name*] is, and at all times herein mentioned was, _____ [a corporation organized and existing under the laws of _____ (*state or foreign country*) and authorized to transact, and transacting, business in California as an insurance company with its principal place of business in this state situated in _____ County *or other allegation of capacity, authority, and place of business as appropriate*].

4. On or about _____ [*date*], defendant issued to the insured a[n] _____ [*specify e.g.*, professional] liability insurance policy, number _____, hereinafter referred to as "defendant's policy," insuring the insured against _____ [*specify, e.g.*, "damages caused by an act or omission of the insured and arising out of the performance of professional services for others in the insured's capacity as a lawyer as respects claims arising out of such acts or omissions occurring during any indemnity period or as respects claims first made against the insured during any indemnity period and arising out of such acts or omissions occurring prior to the effective date of this policy"]. The policy provides that _____ [*specify excess provision, e.g.*, "If, but for the insurance afforded by this policy, the insured would have other insurance against a loss otherwise covered hereby, the insurance afforded by this policy shall be excess over such other insurance"].

5. On or about _____ [*date*], while both policies were in full force and effect, _____ [*specify facts giving rise to liability, e.g.*, a complaint for damages based on professional negligence was filed against the insured by _____ (*name*), a copy of which is attached hereto as Exhibit "A" and madea part hereof, concerning acts and omissions that occurred on or about _____ (*date*)].

6. An actual controversy between plaintiffs and defendants now exists as to their rights and duties under their respective policies.

7. Plaintiff contends that its policy provides excess coverage only and that defendants' policy provides primary coverage, on the ground[s] that: _____ [*specify*].

8. Defendant contends that its policy provides excess coverage only and that plaintiffs' policy provides primary coverage, on the ground[s] that: _____ [*specify*].

9. A judicial determination concerning which policy provides primary insurance and which excess is necessary and appropriate so that plaintiff and defendant can ascertain their rights and duties with respect to the third-party claimant [and to the defense of the insured].

WHEREFORE, plaintiffs pray judgment as follows:

1. That the rights and duties of the parties under the respective policies be declared;

2. For costs of suit herein incurred; and

3. Such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 308.370[1]* .]

[2] Use of Form

This form of complaint is for use by one insurer against another insurer, both of which issued a liability policy covering the same insurable event, to seek a declaration regarding which of the policies is primary and which is excess [*see Code*

Civ. Proc. § 1060 (declaratory relief); *see also Employers Reinsurance Corp. v. Phoenix Ins. Co. (1986) 186 Cal. App. 3d 545, 230 Cal. Rptr. 792]* .

For a form of complaint brought by one insurer and its insured against another insurer and its insured, to seek a declaration regarding excess and primary coverage of automobile liability policies based on presumptions under *Ins. Code § 11580.9*, see Ch. 88, *Automobiles: Automobile Insurance* .

[3] Allegations

This form of complaint alleges:

- The plaintiff insurer's capacity as a California corporation, its authority to issue insurance, and the location of its principal place of business in California (Paragraph 1);
- The issuance of a liability policy by the plaintiff insurer to the insured, and the relevant terms of the policy (Paragraph 2);
- The defendant insurer's capacity as a California corporation, its authority to issue insurance, and the location of its principal place of business in California (Paragraph 3);
- The issuance of a liability policy by the defendant insurer to the insured, and the relevant terms of the policy (Paragraph 4);
- A description of the incident giving rise to liability (Paragraph 5);
- The existence of a controversy between plaintiffs and defendants (Paragraph 6);
- A statement regarding plaintiff insurer's contention that its policy provides only excess coverage (Paragraph 7);
- A statement regarding defendant insurer's contention that its policy provides only excess coverage (Paragraph 8); and
- A statement that a judicial determination is required so that plaintiff and defendant insurers can ascertain their rights and duties (Paragraph 11) [*see Code Civ. Proc. § 1060*].

[4] Jurisdiction

This action for declaratory relief is in the jurisdiction of the superior court as an unlimited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86, 580(b)(4), 1060*; *see Code Civ. Proc. § 86(a)(7)(A)* (restricted extent to which declaratory relief may be maintained as limited civil case); *see also* Ch. 182, *Declaratory Relief*].

[5] Multiple Insurance Coverage

[a] Types of Coverage

When two or more insurance policies apply to the same risk, the application ofeach policy is generally determined by the explicit provisions of the respective "other insurance" clauses [*see, e.g., American Auto. Ins. Co. v. Republic Indem. Co. (1959) 52 Cal. 2d 507, 510, 341 P.2d 675* ; *Continental Cas. Co. v. Pacific Indem. Co. (1982) 134 Cal. App. 3d 389, 394, 184 Cal. Rptr. 583]* . In multiple coverage insurance cases, there are three types of policies: (1) a primary policy in which the insurer bears the entire costs of defense and of payment up to its policy limits, (2) an escape

policy in which the insurer is liable only if the insured has no other valid and collectible insurance, and (3) an excess policy in which the insurer is liable for any liability of the insured over and above the policy limits of a primary policy [*Continental Cas. Co. v. Pacific Indem. Co. (1982) 134 Cal. App. 3d 389, 394, 184 Cal. Rptr. 583* ; *see also Signal Cos., Inc. v. Harbor Ins. Co. (1980) 27 Cal. 3d 359, 365, 165 Cal. Rptr. 799, 612 P.2d 889* (excess policy)].

Although a claim for contribution among insurers providing overlapping coverage for the same insured rests on equitable principles, in cases involving multiple policies covering the same loss, courts have allocated the burden of paying among several insurers without reference to questions of the comparative fault or negligence of such insurers, because their obligation to protect the insured arises from a contract, not because the insurers were negligent or at fault [*Topa Ins. Co. v. Fireman's Fund Ins. Cos. (1995) 39 Cal. App. 4th 1331, 1333, 46 Cal. Rptr. 2d 516]* . Thus, in cases involving duplicate or overlapping insurers, courts have prorated the responsibility by focusing on contractual issues rather than on "fault" concepts, and have ordered proration based on the proportion each insurer's coverage bore to the total coverage provided by all policies [*Topa Ins. Co. v. Fireman's Fund Ins. Cos. (1995) 39 Cal. App. 4th 1331, 1333, 46 Cal. Rptr. 2d 516]* .

[b] Effect of Escape Clauses

Escape clauses are not favored in the law. An escape clause will not be given effect when the underlying primary policy does not fully protect the insured [*Continental Cas. Co. v. Pacific Indem. Co. (1982) 134 Cal. App. 3d 389, 396-397, 184 Cal. Rptr. 583]* .

[c] Effect of Excess Clauses

When two or more applicable policies contain excess insurance clauses, both liability and the costs of defense should be prorated according to the amount of coverage afforded, even when either policy is sufficient to fully absorb the excess liability over the underlying policy [*Continental Cas. Co. v. Pacific Indem. Co. (1982) 134 Cal. App. 3d 389, 396-397, 184 Cal. Rptr. 583* ; *see Argonaut Ins. Co. v. Transport Indem. Co. (1972) 6 Cal. 3d 496, 507, 99 Cal. Rptr. 617, 492 P.2d 673* ; *see also Employers Reinsurance Corp. v. Phoenix Ins. Co. (1986) 186 Cal. App. 3d 545, 557, 230 Cal. Rptr. 792]* .

[6] State Statutes

Declaratory relief. *Code Civ. Proc. § 1060*

[7] Decisions

Public entity self-insurance pool is not "other insurance" subject to excess insurer's policy provision that its coverage would not apply until all "other insurance" was exhausted. *Orange County Water Dist. v. Association of Cal. Water Agencies Joint Powers Ins. Auth. (1997) 54 Cal. App. 4th 772, 777-779, 63 Cal. Rptr. 2d 182*

Liability under excess policy as attaching only after all primary coverage has been exhausted; "other insurance" provision in primary policy (stating that if other collective insurance with another insurer is available, coverage is in excess of that other insurance) as not transforming policy to "excess" policy with respect to another policy providing "contingent excess" coverage. *North River Ins. Co. v. American Home Assurance Co. (1989) 210 Cal. App. 3d 108, 112-116, 257 Cal. Rptr. 129*

Conflicting excess insurance clauses as essentially irreconcilable; when multiple policies contain excess insurance clauses, both liability and costs of defense as ordinarily prorated according to amount of coverage afforded. *Employers Reinsurance Corp. v. Phoenix Ins. Co. (1986) 186 Cal. App. 3d 545, 557, 230 Cal. Rptr. 792*

When multiple insurance policies apply to same risk, relative application is generally determined by explicit provisions of respective "other insurance" clauses. *Employers Reinsurance Corp. v. Phoenix Ins. Co. (1986) 186 Cal. App. 3d 545, 556, 230 Cal. Rptr. 792*

Issuer of primary and excess policy coverage as owing duty to settle underlying claim in good faith, and second excess insurer as not estopped from attacking amount of settlement as excessive when amount in excess of primary policy coverage, even though amount is within excess policy coverage of both insurers and second insurer had declined to participate in defense and settlement of underlying claim of insured. *Continental Cas. Co. v. Pacific Indem. Co. (1982) 134 Cal. App. 3d 389, 398, 184 Cal. Rptr. 583*

Escape clauses as not favored in law, and when in conflict with "other insurance" clause in another policy covering same risk, as disregarded if insured not fully protected and "other insurance" clauses in both policies will be given effect according to applicable proration. *Continental Cas. Co. v. Pacific Indem. Co. (1982) 134 Cal. App. 3d 389, 396, 184 Cal. Rptr. 583*

Liability under secondary policy as not attaching until all primary insurance is exhausted, even if total amount of primary insurance exceeds amount contemplated in secondary policy; if proration among multiple primary policies exceeds amount contemplated in secondary policy, insurer under secondary policy as incurring no liability. *Olympic Ins. Co. v. Employers Surplus Lines Ins. Co. (1981) 126 Cal. App. 3d 593, 600-601, 178 Cal. Rptr. 908*

Allocation of liability between two insurers; underlying coverage and excess insurance; umbrella coverage as excess over and above all underlying coverage. *Otter v. General Ins. Co. (1973) 34 Cal. App. 3d 940, 944-953*

In action by one insurer against another to determine primary liability, liability as required to be prorated in accordance with policy limits where each policy provides that insurer is not liable for greater proportion of loss than applicable limit of liability stated in declaration bears to total applicable limit of liability of all valid and collectible insurance against such loss. *Liberty Mut. Ins. Co. v. Colonial Ins. Co. (1970) 8 Cal. App. 3d 427, 433-434, 87 Cal. Rptr. 348*

[8] Cross References

For a discussion and forms regarding automobile liability policies, including a complaint for declaratory relief regarding excess and primary coverage, see Ch. 88, *Automobiles: Automobile Insurance*

For a discussion and forms regarding declaratory relief actions generally, see Ch. 182, *Declaratory Relief*

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26-308 California Forms of Pleading and Practice--Annotated § 308.523

§ 308.523 Complaint by Insurance Company Against Insured's Independent (*Cumis*) Counsel for Damages Caused by Independent Counsel's Negligent Breach of Statutory Duties [Civ. Code § 2860(d), (f)] to Cooperate and Exchange Information With Insurer's Counsel

[1] FORM Complaint by Insurance Company Against Insured's Independent (***Cumis***) Counsel for Damages Caused by Independent Counsel's Negligent Breach of Statutory Duties [Civ. Code § 2860(d), (f)] to Cooperate and Exchange Information With Insurer's Counsel

[*Caption, introduction. See § 308.370[1]* .]

1. Plaintiff is, and at all times mentioned in this complaint was, a corporation organized and existing under the laws of the State of _____, authorized to transact and transacting business in California as an insurance company.

2. On or about _____ [*date*], plaintiff entered into a written policy of liability insurance with _____ [*name of insured*] (hereafter referred to as the "policy"). The terms of the policy generally require plaintiff to _____ [*specify relevant basic policy obligation, e.g.,* defend and indemnify anyone qualifying as an insured under the policy against any claims for bodily injury or property damage coming within the coverage provided by the policy].

3. One or about _____ [*date*], an action (hereafter referred to as the "underlying action") was filed against _____ [*name of defendant/insured*] in _____ [*court, e.g.,* the Superior Court of Marin County, California], File No. _____, seeking damages for _____ [bodily injury *and/or* property damage *or specify other damages*] allegedly arising out of _____ [*describe accident or occurrence forming basis for underlying claim, e.g.,* a chemical spill occurring on _____'s premises *or* an incident in which the plaintiff in the underlying action was struck by a bat in the course of a softball game]. Specifically, the complaint in the underlying action alleged that _____ [*specify basic allegations in underlying complaint, e.g.,* during an altercation that occurred in the course of the softball

game, _____ (*name of defendant in underlying action*) flung or threw a bat in the direction of _____ (*name of plaintiff in underlying action*), striking _____ (*name*) in the face and causing severe injuries to his nose and right eye)]. _____ [*Name of defendant in underlying action*] referred the claim to the plaintiff in this action, contending that plaintiff was required by the terms of the policy to defend and indemnify _____ [*name of defendant in underlying action*].

4. Upon reviewing the claim, plaintiff made a good-faith determination that a question existed as to whether or not the claim was covered by the policy, specifically _____ [*describe issue, e.g.,* whether the bat was intentionally thrown at the plaintiff in the underlying action, thereby barring coverage under the terms of the policy and *Ins. Code § 533*]. Plaintiff thereupon elected to defend _____ [*name of defendant in underlying action*] subject to a reservationof plaintiff's right to deny coverage in the event that it was ultimately determined that _____ [*e.g.,* defendant's actions were intentional]. Plaintiff thereafter concluded that its defense of _____ [*name of defendant in underlying action*] subject to a reservation of rights created a conflict of interest within the meaning of *Civil Code Section 2860*, and notified _____ [*name of defendant in underlying action*] of his/her/its right to independent counsel under *Civil Code Section 2860*. _____ [*Name of defendant in underlying action*] retained _____ [*name of attorney or law firm*], the defendant in this action, as independent counsel under *Civ. Code § 2860*.

5. Under *Civil Code Section 2860(d)*, defendant had a duty to disclose to plaintiff all information concerning the action except privileged materials relevant to coverage disputes, and to inform and consult with plaintiff in a timely matter on all matters relating to the underlying action. Moreover, under *Civil Code Section 2860(f)*, defendant had a duty to allow plaintiff's own counsel in the underlying action to participate in all aspects of the litigation in the underlying action, and to cooperate fully in the exchange of information that is consistent with each counsel's ethical and legal obligation to the defendant in the underlying action.

6. Defendant negligently breached his/her/its duties to plaintiff as described in Paragraph 5, above, by _____ [*describe nature of breach being alleged, e.g.,* failing to inform plaintiff or plaintiff's counsel in a timely manner of matters relevant to the underlying litigation *and/or* refusing to cooperate with plaintiff or plaintiff's counsel and to permit plaintiff and plaintiff's counsel to participate fully in the litigation of the underlying action]. Specifically, _____ [*describe breach, e.g.,* defendant knew but failed to disclose to plaintiff facts indicating that the statute of limitations on the underlying claim had expired prior to the date on which the underlying action was filed, and plaintiff had no opportunity to discover these facts because defendant precluded plaintiff from participating in the litigation].

7. As a direct and proximate result of defendant's breach of its duty to plaintiff, _____ [*describe consequences of breach, e.g.,* plaintiff was precluded from timely asserting a complete defense to the underlying action, in that plaintiff's counsel was unaware of the existence of a defense based on the statute of limitations and that defendant would not assert that defense in the underlying action].

[*EITHER*]

8. As a direct and proximate result of defendant's breach of its duty to plaintiff, judgment in the amount of $_____ was entered against _____ [*name of defendant in underlying action*] in the underlying action. Plaintiff paid the amount of that judgment on behalf of its insured, in accordance with the policy terms.

[*OR*]

8. As a direct and proximate result of defendant's breach of its duty to plaintiff, plaintiff was effectively compelled to settle the underlying action, and did settle that action by paying $_____ to the plaintiff in the underlying action. Plaintiff was compelled to settle the action because if it failed to do so, a strong likelihood existed that the verdict in the underlying action would be substantially in excess of of the policy limits and plaintiff might then be found liable to its own insured for breach of the covenant of good faith and fair dealing.

[*CONTINUE*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ [*specify the lesser of (1) the policy limits, or (2) the amount of the judgment or settlement in the underlying action*], representing the amount paid by plaintiff to satisfy the _____ [judgment *or* settlement] against its insured in the underlying action;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 308.370[1]* .]

[2] Use of Form

This form is a complaint by an insurer against a law firm that acted as independent (*Cumis*) counsel for the insured. The complaint seeks damages for tortious breach of the law firm's duties to the insurer under *Civ. Code § 2860(d)* and *(f)* [*see § 308.523[3][b]*]. The complaint alleges that as a result of the law firm's negligent breach of those duties, the insurer was compelled to pay a judgment or settlement against the insured.

[3] Independent (*Cumis*) Counsel

[a] Requirement

The language of the standard liability policy typically reserves control of the defense to the insurer. However, in *San Diego Fed. Credit Union v. Cumis Ins. Soc'y, Inc. (1984) 162 Cal. App. 3d 358, 375, 208 Cal. Rptr. 494* (" *Cumis*"), the court held that when an insurer reserves its rights to contest coverage, and the determination of whether or not coverage exists depends on the resolution of factsat issue in the underlying lawsuit, a conflict of interest arises. This conflict is based on the presumptive inability of a defense attorney, hired by the insurer to represent the insured, to represent the divergent interests of the joint client.

Under these circumstances, the insurer must notify the insured of the conflict and either obtain the written consent of the insured or cease the joint representation. If the insured does not consent to joint representation, the insurer must pay for the insured to retain separate counsel of the insured's choice, and must permit the insured and the insured's independent counsel to control the litigation [*San Diego Fed. Credit Union v. Cumis Ins. Soc'y, Inc. (1984) 162 Cal. App. 3d 358, 375, 208 Cal. Rptr. 494]* . Independent counsel appointed in this manner is commonly referred to as " *Cumis* counsel."

The *Cumis* requirements, with some additional controls, have been codified in *Civ. Code § 2860*. For discussion of these requirements, see *§ 308.118* and California Insurance Law and Practice, Ch. 13 (Matthew Bender).

[b] Statutory Rights and Duties of *Cumis* Counsel

Civ. Code § 2860(d) provides that when *Cumis* counsel is appointed, that counsel (and the insured) has a duty to (1) disclose to the insurer all information concerning the action, except privileged materials relevant to coverage disputes; and (2) timely inform and consult with the insurer on all matters relating to the action. Moreover, *Civ. Code § 2860(f)* provides that both *Cumis* counsel and the insurer's own counsel must be allowed "to participate in all aspects of the litigation." Both counsel are required to cooperate fully in the exchange of information that is consistent with each counsel's ethical and legal obligation to the insured [*Civ. Code § 2860(f)*].

[c] Liability of *Cumis* Counsel to Insurer for Breach of Statutory Duties

Cumis counsel may be liable to an insurer for breach of counsel's statutory duties under *Civ. Code § 2860(d)* and *(f)* [*Assurance Co. of Am. v. Haven (1995) 32 Cal. App. 4th 78, 83, 38 Cal. Rptr. 2d 25]* . However, there are significant limitations on the basis for this liability.

First and most importantly, *Cumis* counsel may not be held liable for negligently failing to investigate, prepare, assert, establish, or perform similar functions with respect to the defense of the action [*Assurance Co. of Am. v. Haven (1995) 32 Cal. App. 4th 78, 83, 38 Cal. Rptr. 2d 25]* . Permitting the insurer to impose liability on the insured's *Cumis* counsel for negligent conduct of the insured's defense has been held inconsistent with the independent nature of the representation and *Cumis* counsel's ethical obligations to the insured, and has also been held inconsistent with *Cumis* counsel's right to control the defense of the case [*Assurance Co. of Am. v. Haven (1995) 32 Cal. App. 4th 78, 86-88, 38 Cal. Rptr. 2d 25]* . Thus, *Cumis* counsel is under no duty to the insurer to investigate or make determinations regarding how the case will be handled. It is the insurer's duty to make its own investigation and determinations, if needed, using (among other sources) the information provided by *Cumis* counsel [*Assurance Co. of Am. v. Haven (1995) 32 Cal. App. 4th 78, 89, 38 Cal. Rptr. 2d 25]*

Cumis counsel may, however, be held liable for breach of those statutory duties that are specifically owed to the insurer [*Assurance Co. of Am. v. Haven (1995) 32 Cal. App. 4th 78, 88, 38 Cal. Rptr. 2d 25]* . Thus, *Cumis* counsel may be liable for damages incurred by the insurer as the result of counsel's failure to:

- Disclose to the insurer all information concerning the action (except privileged material relevant to coverage disputes) [*Civ. Code § 2860(d)*];

- Timely inform and consult with the insurer on all matters relating to the action [*Civ. Code § 2860(d)*];

- Allow the insurer's counsel to "participate in all aspects of the litigation" [*Civ. Code § 2860(f)*], subject to the right of *Cumis* counsel to control the litigation [*see* *Assurance Co. of Am. v. Haven (1995) 32 Cal. App. 4th 78, 87-88, 38 Cal. Rptr. 2d 25]* ; or

- Cooperate fully in the exchange of information that is consistent with each counsel's ethical and legal obligation to the insured [*Civ. Code § 2860(f)*].

In *Assurance Co. of Am. v. Haven (1995) 32 Cal. App. 4th 78, 88, 38 Cal. Rptr. 2d 25* , the insurer alleged that *Cumis* counsel failed to keep the insurer properly informed of the facts, theories, status, procedural developments, and evaluations in the underlying action, failed to disclose all nonprivileged information relating to the action, and failed to

timely inform and consult with the insurer on all matters related to that action. These failures allegedly precluded the insurer from timely presenting a valid defense regarding the statute of limitations and peculiar risk, with the result that the insurer was effectively compelled to settle the action to avoid an excess judgment against its insured. The court concluded that while the insurer could not directly sue *Cumis* counsel for negligent conduct of the defense, it could recover for negligent breach of statutory duty under *Civ. Code § 2860(d)* and *(f)*, when that breach precluded the insurer from timely asserting a complete defense to the action [*Assurance Co. of Am. v. Haven (1995) 32 Cal. App. 4th 78, 92, 38 Cal. Rptr. 2d 25]* .

[4] Cross References

For discussion and forms relating to legal malpractice generally, see Ch. 76, *Attorney Professional Liability*

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§ 314.01 Scope of Chapter

This chapter discusses and contains forms for use in actions and cross actions in interpleader.

The chapter contains the following forms:

- Complaints in interpleader [*see § 314.60 et seq.*].
- Cross complaint in interpleader [*see § 314.70 et seq.*].
- Answer in an interpleader action [*see § 314.80 et seq.*].
- Forms of an order to show cause and temporary restraining order, preliminary injunction to restrain the prosecution or institution of other actions affecting the rights and obligations of the parties to the interpleader [*see § 314.90 et seq.*].
- Forms for use in proceeding for discharge of an interpleading party, such as stipulation and order, notice of motion and order [*see § 314.100 et seq.*].
- Forms of statement of decision directing final judgment on complaint in interpleader and judgment [*see § 314.130 et seq.*].

Legal Topics:

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

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§ 314.02 Cross References

- For a discussion and forms for use in actions involving assignments or attachments, see Ch. 60, *Assignments* and Ch. 62, *Attachments* , respectively.

- For forms of complaints in interpleader involving bank deposits, see Ch. 95, *Banks, Deposits, and Checks* .

- For discussions and other forms for use in action involving life insurance policies, see Ch. 122, *Community Property* , and Ch. 308, *Insurance* .

- For alternative forms of cross complaints, see Ch. 123, *Complaints and Cross Complaints* .

- For a form of complaint in interpleader by warehouseman to determine conflicting claims of bailor and claimant, see Ch. 213, *Documents of Title* .

- For forms of complaints in interpleader by an escrow holder in an action against a buyer and seller after a notice of rescission has been given by the buyer and in an action to determine the status of property held in escrow, as well as by an attorney escrow holder of a liquor license transfer in an action to compel a seller and his or her creditors to interplead, see Ch. 253, *Escrows* .

- For discussion and forms for use in actions involving indemnity agreements, see Ch. 300, *Indemnity and Contribution* .

- For discussions and forms for use in actions involving leases, see Ch. 334, *Landlord and Tenant: Claims for Damages* , Ch. 363, *Mining* , and Ch. 393, *Oil and Gas* .

- For a form of complaint in interpleader by a construction lender or by a county, where total amount of stop notices exceeds the amount withheld, see Ch. 361, *Mechanics' Liens* and Ch. 481, *Public Works* , respectively.

- For a form of complaint in interpleader by a surety against claimants either on a statutory bond, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsGeneral OverviewCivil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCommercial Law (UCC)Documents of Title (Article 7)ObligationsInsurance LawLife InsuranceGeneral OverviewReal Property LawPurchase & SaleEscrow

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[Reserved]

§§ 314.03[Reserved]

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§ 314.10 Nature of Suit in Interpleader

[1] Codified Equitable Remedy Requiring Adjudication in Single Suit of Multiple Claims

The provisions of *Code Civ. Proc. §§ 386-386.6* codify the equitable remedy known as a bill of interpleader or suit in interpleader. This equitable suit historically provided a means for a debtor or obligor to avoid a multiplicity of actions on claims based on a single obligation, by compelling the various claimants to interplead and litigate their claims among themselves. The obligor could thus avoid facing multiple, vexatious litigation with respect to a single obligation [*see Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 508, 150 P.2d 463* ; *City of Morgan Hill v. Brown (1999) 71 Cal. App. 4th 1114, 1122, 84 Cal. Rptr. 2d 361* ; *see also Code Civ. Proc. § 386(a)*].

Interpleader was originally a limited device of equity courts, bound by restrictions both on the nature of the multiple claims made on an interpleading debtor and also on the debtor's position with respect to the subject matter in dispute. However, notwithstanding the technical restrictions on interpleader that existed historically or that prevail in other jurisdictions, the remedy of interpleader in California, as codified under *Code Civ. Proc. §§ 386-386.6*, is to be broadly interpreted to give effect to the remedial nature of the codifying provisions and to promote justice. Thus, the conditions under which interpleader may be utilized are limited only by the codifying provisions, which broaden and enlarge the historic equitable remedy [*see Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 508, 150 P.2d 463* ; *City of Morgan Hill v. Brown (1999) 71 Cal. App. 4th 1114, 1122-1123, 84 Cal. Rptr. 2d 361]* .

Although *Code Civ. Proc. § 386* has broadened the scope of the interpleader remedy, the claimants still must seek the same thing, debt, or duty. If the claims do not relate to the same thing, debt, or duty, then interpleader is improper [*City of Morgan Hill v. Brown (1999) 71 Cal. App. 4th 1114, 1123, 84 Cal. Rptr. 2d 361]* .

[2] Equitable Principles Generally Apply

A suit in interpleader is an equitable proceeding in which the rights of the parties, as between themselves, are governed by principles in equity [*Union Mut. Life Ins. Co. v. Broderick (1925) 196 Cal. 497, 502, 238 P. 1034* ; *Williams v. Gilmore (1942) 51 Cal. App. 2d 684, 689, 125 P.2d 539]* .

Thus, there is generally no right to a jury in a suit in interpleader. Except in cases in which a right to jury trial is now

given by the law, conflicting claims to funds, property, or the value of funds or property that have been deposited or delivered under *Code Civ. Proc. § 386* are deemed to be issues triable by the court and may be first tried by the court [*Code Civ. Proc. § 386(e)*]. Even before the 1951 amendment that added this statutory language, it was clear that the right to a jury trial did not exist for factual issues that were raised by the pleadings among the interpleaded adverse claimants, which normally would have been triable by jury [*see Union Mut. Life Ins. Co. v. Broderick (1925) 196 Cal. 497, 502, 238 P. 1034]* . This is because the gist of an interpleader action--the apportionment of claimants' rights to the deposited funds or property--is governed by principles of equity. That the equitable issue of apportionment may be partially dependent on the resolution of legal issues does not change the essentially equitable nature of the interpleader action, and there is ordinarily no right to a jury trial of such an action [*Shopoff & Cavallo LLP v. Hyon (2008) 167 Cal. App. 4th 1489, 1512-1515, 85 Cal. Rptr. 3d 268* ; *see also Corder v. Corder (2007) 41 Cal. 4th 644, 653-654, 61 Cal. Rptr. 3d 660, 161 P.3d 172* (in action to apportion proceeds of damages award among heirs following settlement of underlying wrongful death suit, general equitable nature of apportionment proceedings precludes jury trial, even if court takes additional evidence regarding competing interests in proceeds)]. However, if the amount deposited, or the value of property delivered, is less than that claimed by one or more of the claimants, any factual issues involved in determining whether there is a deficiency in the deposit or delivery may be tried by a jury [*Code Civ. Proc. § 386(e)*; *see § 314.19*].

Because of the equitable nature of a suit in interpleader, traditional equitable defenses would also appear to be available to a claimant opposing the right of the stakeholder to proceed in interpleader. For example, when the stakeholder has been an active participant in the wrongful act which results in the stakeholder's possession of the property or funds in dispute, the stakeholder may be denied any relief by way of interpleader [*see Young v. Colyear (1921) 54 Cal. App. 232, 234, 201 P. 623* (noting in dictum that warehouseman would be barred right to proceed in interpleader when property held by warehouseman had been taken unlawfully); *see also Williams v. Gilmore (1942) 51 Cal. App. 2d 684, 689, 125 P.2d 539* (fact that judgment was based on tort was not moral wrong barring interpleader in suit by judgment debtors to determine to whom proceeds of judgment should be paid)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityGeneral OverviewCivil ProcedurePartiesInterpleadersRequirements

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§ 314.11 Examples of Situations in Which Interpleader Remedy Is Available

Examples of situations in which interpleader has been used to adjudicate conflicting claims include the following:

- Claims made on an insurance company for the proceeds of certain insurance policies [*see Union Mut. Life Ins. Co. v. Broderick (1925) 196 Cal. 497, 500, 238 P. 1034* (involving issue of claims of two alleged beneficiaries under policy in which name of beneficiary had been changed); *Lincoln Nat'l Life Ins. Co. v. Mitchell (1974) 41 Cal. App. 3d 16, 18, 115 Cal. Rptr. 723* (claim of trustee under alleged trust created by beneficiary opposed by such beneficiary)].

- Claims made on an obligor by an assignor and assignee under alleged assignment [*see Great-West Life Assur. Co. v. Superior Court (1969) 271 Cal. App. 2d 124, 125, 76 Cal. Rptr. 284]* .

- Claims consisting of the garnishment of funds held by the stakeholder as obligee under a contract or judgment when the obligor has demanded the performance of the garnished obligation [*see Leroy v. Bella Vista Investment Co. (1963) 222 Cal. App. 2d 369, 375-376, 35 Cal. Rptr. 128* (contract); *Williams v. Gilmore (1942) 51 Cal. App. 2d 684, 686, 125 P.2d 539* (in case of conflicting claims arising out of garnishment of obligation, judgment debtor is permitted to maintain action in interpleader, despite having knowledge of conflicting claims before judgment)].

- Claims made by adverse claimants on tenant for rent due under lease [*see Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 501, 504-505, 150 P.2d 463]* .

- Claims made by adverse claimants to funds held by bank in loan or checking account [*see Camp v. Oakland Mortg. & Finance Co., (1931) 212 Cal. 433, 434-435, 298 P. 974* (rival claimants to loan proceeds); *Conner v. Bank of Bakersfield (1920) 183 Cal. 199, 190 P. 801* (rival claimants to proceeds of negotiable certified check)].

- Claims by buyer and seller of real estate and other interested parties, made on an escrow holder for funds held on deposit and evidences of title [*see Security Trust & Sav. Bank v. Carlsen (1928) 205 Cal.*

309, 314-315, 271 P. 470 ; *Contra Costa County Title Co. v. Waloff (1960) 184 Cal. App. 2d 59, 61-62, 7 Cal. Rptr. 358]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedureRemediesProvisional RemediesGarnishmentsReal Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawPurchase & SaleEscrow

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§ 314.12 Scope of Interpleader Remedy

[1] Two Basic Situations in Which Interpleader May Is Available

There are two basic types of interpleader remedy, set out respectively in *Code Civ. Proc. § 386(a)* and *Code Civ. Proc. § 386(b)*. The traditional remedy set out in *Code Civ. Proc. § 386(a)* is for use when a stakeholder or debtor is subject to two or more claims against an amount owed under contract or against personal property that is admittedly owing, at least in part [*see* [2], *below*]. This remedy was enlarged in 1975 with the enactment of *Code Civ. Proc. § 386(b)*, which permits interpleader by a person or entity who does not necessarily admit liability even in part, but who might nevertheless be subject to double or multiple liability on a single obligation [*see* [3], *below*].

Either remedy may, in turn, be pleaded in two or more procedural contexts [*see § 314.13*]. The type of remedy and the type procedure available in a given case depends on a number of factors including the following:

- Whether the interpleading stakeholder has been made a defendant in an action brought by any one of the adverse or multiple claimants.
- Whether the stakeholder claims any interest in the disputed property or funds.
- Whether any independent liability on the part of the stakeholder has arisen.
- Whether any of the claims remain unliquidated.

[2] Conflicting Claims to Personal Property or Contract Obligation

As discussed in [1], *above*, there are two types of interpleader remedies. The first, set out in *Code Civ. Proc. § 386(a)*, is the codified version of the traditional equitable remedy. It is generally available to give relief to a debtor who acknowledges owing to someone all or part of a contractual obligation or specified personal property, but who cannot ascertain to which of two or more adverse claimants it should be paid or delivered. The debtor may, in good faith, bring into court all persons who make conflicting claims to the performance of the obligation, or to the personal property, and compel them to interplead and litigate their claims [*see Krassner v. Veneman (1962) 206 Cal. App. 2d 299, 303, 23*

Cal. Rptr. 673 ; *Williams v. Gilmore (1942) 51 Cal. App. 2d 684, 689, 125 P.2d 539]* . The debtor deposits into court the amount, property, or value of property that is acknowledged to be owing, and is discharged from liability to the interpleaded claimants [*see Code Civ. Proc. § 386(a)*].

[3] Claims Involving Multiple Liability for Single Obligation

Of the two types of interpleader remedy [*see* [1], *above*], the second, set out in *Code Civ. Proc. § 386(b)*, allows any person or entity against whom double or multiple claims have been made, or may be made, which may give rise to double or multiple liability, to compel the claimants to interplead and litigate their claims in a single proceeding without necessarily admitting any liability to any of these claimants.

This second type of remedy was added in 1975, broadening the prior codified interpleader remedy [*see* [2], *above*]. The legislative history indicates that it was enacted primarily in order to allow insurance companies faced with multiple claims under a particular liability insurance policy, exceeding that policy's limit, to deposit the limit in court and compel the claimants to interplead and thereby apportion the proceeds of the policy among themselves. By interpleading claimants who are or may be making claims under the policy, the insurance company avoids the problems of making settlements within the limits of the policy or of paying out on adjudicated claims when to do so leaves other claimants without any relief under the policy.

Although the primary intent of *Code Civ. Proc. § 386(b)* was to provide a means by which an insurance company and claimants under a liability policy issued by the company could more fairly adjudicate the claims under the policy, *Code Civ. Proc. § 386(b)* does not by its terms limit the remedy to insurance companies faced with multiple claims under liability policies. The remedy appears to be available to any person or entity against whom double or multiple claims are made, or may be made [*see also § 314.14[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesInterpleadersRule Interpleaders

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§ 314.13 Procedural Contexts in Which Interpleader May Be Raised

There are several procedures by which a stakeholder or debtor may utilyze one of the two statutory interpleader remedies summarized in *§ 314.12*. When the stakeholder has not yet been sued by any of the potential adverse claimants, the stakeholder may invoke either remedy by means of a complaint in interpleader [*see § 314.14*].

When a stakeholder has been named as a defendant in an action brought by one or more of the adverse claimaints, that defendant has one or more of the following options, depending on which interpleader remedy is sought:

- If the defendant is invoking the more traditional interpleader remedy under *Code Civ. Proc. § 386(a)* [*see § 314.12[2]*], that defendant may, before answering the complaint, apply for a court order directing that one or more claimants adverse to the plaintiff but not named in the action be substituted in defendant's place [*see § 314.15[1]*]. If such a defendant is sued for payment of a stated amount alleged to be wrongfully held, has no interest in that amount, and all conflicting claimants are already parties to the action, the defendant may instead move to be dismissed under *Code Civ. Proc. § 386.5* [*see § 314.15[2]*].

- A defendant may invoke the interpleader remedy under either *Code Civ. Proc. § 386(a)* or *Code Civ. Proc. § 386(b)* [*see* respectively *§ 314.12[2]* and *[3]*], by filing a cross complaint in interpleader, to compel the plaintiff and one or more nonparties to interplead and litigate their claims [*see § 314.15[3]*].

- If the defendant is invoking the interpleader remedy against mulitple liability under *Code Civ. Proc. § 386(b)* [*see § 314.12[3]*], that defendant may, as an alternative to cross complaining, initiate a separate action in interpleader to compel the claimants to interplead and litigate their claims [*see § 314.15[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 314.14 Interpleader by Plaintiff

[1] Conflicting Claims to Personal Property or Contract Obligation

Whenever conflicting claims are or may be made on a person for or relating to personal property, or the performance of an obligation, or any portion thereof, that person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims [*Code Civ. Proc. § 386(a)*].

In bringing an action in interpleader under *Code Civ. Proc. § 386(a)*, a plaintiff is only required to allege facts in the complaint showing that the parties to be called in make claims on him or her for the same thing, that the respective claims are adverse to each other, and that the plaintiff cannot safely determine for himself or herself which claim is right and lawful [*Fidelity Sav. & L. Ass'n v. Rodgers (1919) 180 Cal. 683, 684-685, 182 P. 426]* . The plaintiff cannot maintain the action on allegations of a suspicion of double vexation. He or she must allege facts showing a reasonable probability of double vexation [*Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 510, 150 P.2d 463]* .

A defendant may not object to a complaint in interpleader because it failed to show that the interpleaded claims were well founded since, by necessity, some of the claims are not well founded. It is sufficient to allege that the plaintiff cannot safely determine which claim is right and lawful [*Fidelity Sav. & L. Ass'n v. Rodgers (1919) 180 Cal. 683, 684, 182 P. 426]* . Even this requirement, however, has been questioned. To express a doubt regarding which adverse claimant a plaintiff is liable to is an admission that the basis on which the right to interpleader rests is the avoidance of double liability, when the right to the remedy is, in fact, founded on the fact that the plaintiff is threatened with double vexation in respect to one liability [*see Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 510, 150 P.2d 463]* . However, this reasoning, at least, would be limited to actions under *Code Civ. Proc. § 386(a)*, since the purpose of action in interpleader under *Code Civ. Proc. § 386(b)* is to prevent double or multiple liability [*see Code Civ. Proc. § 386(b)* and discussion in [2], *below*].

For forms of complaint in interpleader under *Code Civ. Proc. § 386(a)*, see *§§ 314.60[1], 314.62, 314.64*.

[2] Claims Involving Multiple Liability for Single Obligation

Any person, firm, corporation, association, or other entity against whom double or multiple claims are made, or may be

made, by two or more persons that are such that they may give rise to double or multiple liability may bring an action [*see §§ 314.60[2], 314.61*] against the claimants to compel them to interplead and litigate their claims [*Code Civ. Proc. § 386(b)*].

An action of interpleader may be maintained under *Code Civ. Proc. § 386(b)* even though the claims made on the party bringing the action are unliquidated and no liability on the part of such party has arisen [*Code Civ. Proc. § 386(b)*].

As discussed in *§ 314.12[3]*, the intent of *Code Civ. Proc. § 386(b)* was to give relief to insurance companies and claimants under liability insurance policies when the claims under a particular policy exceed the amount of the policy. Actions in interpleader under *Code Civ. Proc. § 386(b)* are not, however, limited to such situations by the statutory language. In this respect, the interpleader remedy under *Code Civ. Proc. § 386(b)* resembles, and was patterned after, the expanded federal interpleader remedy set out in *Fed. R. Civ. P., Rule 22(1)*, in which persons having claims against a plaintiff may be joined as defendants and be required to interplead when the claims are such that the plaintiff is or may be exposed to double or multiple liability.

Thus, by analogy to *Fed. R. Civ. P., Rule 22(1)*, interpleader actions under *Code Civ. Proc. § 386(b)* do not appear to require a "stake" or "fund" as such [*see Xerox Corp. v. Nashua Corp. (SD NY 1970) 314 F. Supp. 1187, 1189, 166 U.S.P.Q. 344* (interpleader of rival patent claims)]. This is in contrast to interpleader actions under *Code Civ. Proc. § 386(a)*, in which the conflicting claims relate to personal property or a contract obligation, liability for which is wholly or partly admitted by the stakeholder [*see* discussion in [1], *above*].

Also by analogy to *Fed. R. Civ. P., Rule 22(1)*, an interpleader action under *Code Civ. Proc. § 386(b)* appears to be available when the claims made on the interpleading party involve a threat to multiple liability on what is in fact but a single claim or obligation [*Texas v. Florida (1938) 306 U.S. 398, 412, 59 S. Ct. 563, 83 L. Ed. 817* ; Fulton v. Kaiser Steel Corp. (5th Cir. [Ala] 1968) *397 F.2d 580, 582-583]* . This includes the situation in which multiple claims, although not mutually exclusive, exceed in the aggregate the limits on the stakeholder's liability, such as claims made on an insurance company or a surety in excess of the insurer's obligation under a particular policy or the surety's liability under a particular bond [*see State Farm Fire & Cas. Co. v. Tashire (1967) 386 U.S. 523, 530-533, 87 S. Ct. 1199, 18 L. Ed. 2d 270* ; *American Fid. Fire Ins. Co. v. Construcciones Werl, Inc. (D St. Croix 1975) 407 F. Supp. 164, 172-173* ; *see also* discussion in *§ 314.17*].

For forms of complaint in interpleader under *Code Civ. Proc. § 386(b)*, see *§§ 314.60[2], 314.61, 314.63*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesInterpleadersRule Interpleaders

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27-314 California Forms of Pleading and Practice--Annotated § 314.15

§ 314.15 Interpleader by Defendant

[1] Substitution of Nonparty Claimant for Defendant

[a] Application for Substitution Before Filing Answer

A defendant, against whom an action is pending on a contract, or for specific personal property, may apply to the court for an order to substitute a person who is not a party to the action in the place of the defendant, and to discharge the defendant from liability to either party. The defendant may make the application on depositing in court the amount claimed on the contract, or delivering the property or its value to such person as the court may direct [*Code Civ. Proc. § 386(a)*].

The application may be made upon affidavit (or declaration under *Code Civ. Proc. § 2015.5*) at any time before the defendant files an answer. The declaration must state that a person who is not a party to the action has made against the defendant a demand on the contract, or for the property, and the demand was made without any collusion with the defendant. The application must be made on notice both to the person who is not a party and to the adverse party [*Code Civ. Proc. § 386(a)*]. For forms of application and supporting declaration, see respectively *§ 314.110* and *§ 314.111*.

The court may in its discretion make the order requested [*Code Civ. Proc. § 386(a)*]. For a form of proposed order, see *§ 314.112*.

[b] Proceedings After Substitution Governed by Interpleader Rules

A proceeding in interpleader by which a defendant before answering applies for an order of substitution is not, strictly speaking, an action of interpleader, since the action is instituted by one of the persons making claim to the fund or property in dispute [*Hellman Commercial T. & S. Bk. v. Alden (1929) 206 Cal. 592, 600, 275 P. 794]* .

If, however, the court grants the application and makes the order substituting in the applicant's place an adverse claimant who was not a party to the action, the proceeding is between the contesting claimants to the fund deposited in court, and it is governed by the same rules that apply to actions of interpleader [*see Hellman Commercial T. & S. Bk. v. Alden (1929) 206 Cal. 592, 600, 275 P. 794* ; *see also Camp v. Oakland Mortgage & Fin. Co. (1931) 212 Cal. 433,*

435-436, 298 P. 974 (original interpleading defendant is not adverse party on whom service of papers incident to appeal is required to be made)]. For discussion of rules applicable to interpleader actions generally, see *§ 314.16*.

[c] Failure to Apply Before Filing Answer

Failure to comply with the procedural requirement of *Code Civ. Proc. § 386(a)*, that the application for substitution be made before filing an answer to the complaint, does not render the court powerless to consider the application. Rather, the court may, in its discretion, permit the answer to be withdrawn and grant additional time to file an answer, within which time the applicant may reapply for the order of substitution [*Israel v. Bryan (1921) 52 Cal. App. 66, 71-72, 197 P. 121]* .

[2] Stakeholder Alleged to Have Wrongfully Withheld Sum of Money

When the only relief sought against one of two or more defendants is the payment of a stated amount of money alleged to be wrongfully withheld, that defendant may apply to the court for an order discharging him or her from liability and dismissing him or her from the action, upon deposit of the claimed amount with the clerk of the court [*Code Civ. Proc. § 386.5*]. The application is to be made on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) that he or she is a mere stakeholder with no interest in the amount whatever, and that conflicting demands have been made on him or her for the amount by parties to the action. The application is to be made on notice to the parties with the conflicting demands [*Code Civ. Proc. § 386.5*].

The court may, in its discretion, make the order requested [*Code Civ. Proc. § 386.5*]. The conditions that must be met before the court may grant such and order are that the relief sought against the defendant be the payment of a stated amount of money allegedly wrongfully withheld, and that the money is also claimed adversely to plaintiff by a codefendant [*see Pasadena Inv. Co. v. Peerless Casualty Co. (1955) 134 Cal. App. 2d Supp. 902, 904, 286 P.2d 1014* (holding these conditions not met in action in which plaintiff claimed payment of money, but co-defendant was seeking only declaratory relief regarding money as distinguished from payment)].

For forms of noticed application and supporting declaration, see respectively *§ 314.110* and *§ 314.111*.

[3] Cross Complaint in Interpleader

[a] Conflicting Claims to Personal Property or Contract Obligation

Rather than apply for an order of substitution [*see* [1], *above*], a defendant who is being sued for a contract obligation or specified personal property may alternatively file a verified cross complaint in interpleader [*Code Civ. Proc. § 386(a)*].

The cross complaint must do all of the following [*Code Civ. Proc. § 386(a)*]:

- Admit that the defendant has no interest in the amount or property claimed, or in a portion of that amount or that property.

- Allege that all or a portion of the amount or property is demanded by parties to the action or cross action. (By requiring an allegation that the amount or property is demanded by parties to the "action or cross action," it appears that any claimants not already made parties to the original complaint may simply be named in the cross complaint.)

- Apply to the court, on notice to the parties, for an order to deliver all or part of the property or its value to such persons as the court may direct.

For a form of verified cross-complaint in interpleader for use under *Code Civ. Proc. § 386(a)*, see *§ 314.70*.

[b] Claims Involving Multiple Liability for Single Obligation

Similar to the cross complaint procedure in *Code Civ. Proc. § 386(a)* [*see* [a], *above*], when a person, firm, corporation, association, or other entity is subject to double or multiple claims that have been or may be made by two or more persons, and these claims may give rise to double or multiple liability, that person or entity, as a defendant in an action brought on one or more of the claims, may file a verified cross complaint in interpleader [*Code Civ. Proc. § 386(b)*].

The cross complaint must must do all of the following [*Code Civ. Proc. § 386(b)*]:

- Admit that defendant has no interest in the money or property claimed, or has no interest in a portion of the money or property.

- Allege that all or part of the money or property is demanded by the parties to the action and cross action.

- Apply to the court on notice to such parties for an order to deliver all or part of the money or property to such person or persons as the court may direct.

In the alternative, the person, firm, corporation, association, or other entity, instead of filing a verified cross complaint in interpleader, may bring a separate action against the claimants to compel them to interplead and litigate their several claims [*Code Civ. Proc. § 386(b)*].

Because a cross complaint must include an admission that the cross complainant has no interest, at least in part, in the money or property claimed, it appears that a defendant must use the alternative procedure, bringing a separate action in interpleader, when that defendant wishes to contest liability to any of the claimants for the money or property claimed.

For a form of verified cross-complaint in interpleader for use under *Code Civ. Proc. § 386(b)*, see *§ 314.70*. For forms of complaint in interpleader for use under *Code Civ. Proc. § 386(b)*, see *§§ 314.60[2]*, *314.61*, and *314.63*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-314 California Forms of Pleading and Practice--Annotated § 314.16

§ 314.16 Action in Interpleader as Two-Stage Proceeding

[1] Determination That Claims May Be Interpleaded Followed by Determination of Interpleaded Claims

The manner in which an action or cross action in interpleader is maintained and the procedure for discharging the interpleading plaintiff or cross complainant are not spelled out in *Code Civ. Proc. § 386*. These have developed through case law [*see Great-West Life Assur. Co. v. Superior Court (1969) 271 Cal. App. 2d 124, 126, 76 Cal. Rptr. 284]* .

In general, an action or cross action in interpleader is a two-stage process contest that can involve two sets of pleadings. The first set of pleadings concern only the threshhold issue: whether plaintiff or cross complainant is entitled to compel the defendants or cross defendants to interplead their claims.

The second set of pleadings come into play if and when the defendants or cross defendants are compelled to interplead. They involve the interpleaded claims of the defendants, which are usually pleaded as affirmative causes of action in the defendants' respective answers to the complaint or cross complaint in interpleader [*see San Francisco Sav. Union v. Long (1898) 123 Cal. 107, 109, 55 P. 708* ; *Great-West Life Assur. Co. v. Superior Court (1969) 271 Cal. App. 2d 124, 126, 76 Cal. Rptr. 284* ; *see also City of Morgan Hill v. Brown (1999) 71 Cal. App. 4th 1114, 1126-1127, 84 Cal. Rptr. 2d 361* (discussing two-step procedure)].

Because an interpleading party may now deny liability in whole or in part to any or all of the adverse or conflicting claimants, at least when bringing a separate action in interpleader under *Code Civ. Proc. § 386(b)* [*see § 314.14[2]* and *§ 314.15[3][b]*], the second stage of an interpleader action may involve a determination of the interpleading party's liability, in addition to the determination of the claims of the interpleaded parties [*see State Farm Fire & Cas. Co. v. Pietak (2001) 90 Cal. App. 4th 600, 612-614, 109 Cal. Rptr. 2d 256* (defendant in interpleader action probably can assert compulsory cross-claim against interpleading plaintiff arising out of transaction related to interpleader action, although "there is respectable body of law" suggesting that such cross-claims are precluded in interpleader action); *see also* [3], *below, § 314.19*].

[2] Determination That Claims May Be Interpleaded

[a] Adjudicating Objections to Interpleader

In the first stage of an interpleader action, the court determines whether the interpleading party is entitled to maintain an action in interpleader. If the court determines this issue in the affirmative, it enters an interlocutory decree requiring the adverse claimants to litigate their claims between themselves [*see San Francisco Sav. Union v. Long (1898) 123 Cal. 107, 109, 55 P. 708* ; *Great-West Life Assur. Co. v. Superior Court (1969) 271 Cal. App. 2d 124, 127, 76 Cal. Rptr. 284* ; *see also § 314.100* (form of proposed interlocutory order)].

The interpleaded or adverse claimants may contest the issue of the interpleading party's entitlement to the remedy of interpleader at the time the trial court is determining that issue. They may raise this objection by demurrer to the complaint or cross complaint in interpleader [*see Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 501-502, 510, 150 P.2d 463* ; *Los Angeles v. Amidor (1903) 140 Cal. 400, 401, 73 P. 1049]* or in the answer [*see San Francisco Sav. Union v. Long (1898) 123 Cal. 107, 109, 55 P. 708* ; *Williams v. Gilmore (1942) 51 Cal. App. 2d 684, 689, 125 P.2d 539]* .

If the interpleaded or adverse claimants fail to object to the interpleading party's right to maintain an interpleader action at the first stage of the proceeding, but proceed without objection to litigate their claims fully in the action, they are deemed to have consented to the interpleader remedy, and may not later object that the complaint did not state a cause of action for interpleader, or that the facts were such that the interpleading party was not entitled to compel the claimants to interplead [*Conner v. Bank of Bakersfield (1920) 183 Cal. 199, 202-203, 190 P. 801* ; *O'Connell v. Zimmerman (1958) 157 Cal. App. 2d 330, 337, 321 P.2d 161* ; *see City of Morgan Hill v. Brown (1999) 71 Cal. App. 4th 1114, 1127, 84 Cal. Rptr. 2d 361* (discharge of interpleading party deposit of money into court was not erroneous when neither claimant objected)].

The first stage may require a full trial on the issue of whether interpleader lies in the particular action. The court may, however, issue an interlocutory decree on the pleadings alone, when the allegations of the complaint, coupled with admissions in the answer or answers, show that the interpleading party is entitled to the relief asked [*see Willims v. Gilmore (1942) 51 Cal. App. 2d 684, 689-690, 125 P.2d 539]* .

If the interpleaded claimants have agreed to submit their claims to private arbitration, but the interpleading party is not a party to that agreement, the arbitration agreement does not deprive the court of subject-matter jurisdiction to determine whether the claims can be interpleaded and whether the interpleading party should be discharged [*Dial 800 v. Fesbinder (2004) 118 Cal. App. 4th 32, 44-46, 55, 12 Cal. Rptr. 3d 711* (after deciding that interpleading party is entitled to discharge, court has discretion to stay resolution of interpleaded claims pending outcome of arbitration)].

[b] Effect of Interlocutory Decree Requiring Interpleader

Following the entry of the interlocutory decree, requiring the adverse claimants to litigate their claims between themselves, the interpleading party ceases to be a party to the action [*San Francisco Sav. Union v. Long (1898) 123 Cal. 107, 109, 55 P. 708* ; *Great-West Life Assur. Co. v. Superior Court (1969) 271 Cal. App. 2d 124, 127, 76 Cal. Rptr. 284]* .

An interlocutory order will not, however, completely discharge the interpleading party, even though by its terms it purports to do so, in either of the following situations [*Great-West Life Assur. Co. v. Superior Court (1969) 271 Cal. App. 2d 124, 127-128, 76 Cal. Rptr. 284]* :

- When the interlocutory order fails to discharge the interpleading party from the claims of all the adverse or conflicting claimants, if it specifically directs the interpleading party to deposit additional sums with the clerk as they become due when such sums may not be necessary to satisfy the conflicting claimants.

- When the order states that costs and attorney's fees will be paid to interpleading party, but defers the determination of this award until the trial between the claimants [*see* discussion in *§ 314.23*].

In each of these cases, the first stage of the two-stage interpleader action remains partially undetermined, and the interpleading party necessarily remains an active participant in the case [*Great-West Life Assur. Co. v. Superior Court (1969) 271 Cal. App. 2d 124, 127-128, 76 Cal. Rptr. 284]* .

[3] Determination of Interpleaded Claims

[a] Determination of Interpleaded Claims

In the second stage of an interpleader action, the trial court adjudicates the claimants' rights to the subject in controversy. The claimants, as defendants or cross defendants in a complaint for interpleader, typically plead their respective causes of action when answering the complaint or cross complaint. These answers are treated as cross complaints [*see § 314.80*], and are served on each answering party [*see San Francisco Sav. Union v. Long (1898) 123 Cal. 107, 109, 55 P. 708]* .

This rule is codified in *Code Civ. Proc. § 386(d)*, which applies to defendants named in a complaint to compel conflicting claimants to interplead and litigate their claims, or to defendants named in a cross complaint in interpleader. These defendants may, in lieu of or in addition to any other pleading, file an answer to the complaint or cross complaint, and this answer must include the following [*Code Civ. Proc. § 386(d)*]:

- Allegations of fact regarding his or her ownership of or other interest in the amount or property.
- Any affirmative defenses.
- The relief requested.

The answer must be served on all other parties to the action [*Code Civ. Proc. § 386(d)*].

The allegations of each answer are deemed denied by all other parties to the action, unless otherwise admitted in the pleadings [*Code Civ. Proc. § 386(d)*].

If the interpleaded claimants have agreed to submit their claims to private arbitration, a claimant may seek an order compelling arbitration and staying the court's proceedings; on the completion of the arbitration, a claimant may move for an order confirming the arbitration award [*Dial 800 v. Fesbinder (2004) 118 Cal. App. 4th 32, 44-45, 55, 12 Cal. Rptr. 3d 711]* .

It is unclear whether the second stage of an interpleader action may include an interpleaded party's compulsory cross-claim against the interpleading party arising out of a transaction related to the interpleader action [*see Code Civ. Proc. § 386(d)* (possible alternative pleadings filed by interpleaded parties in addition to their answers to complaint or cross-complaint for interpleader); *State Farm Fire & Cas. Co. v. Pietak (2001) 90 Cal. App. 4th 600, 612-614, 109 Cal. Rptr. 2d 256* (defendant in interpleader action probably can assert compulsory cross-claim against interpleading plaintiff, although "there is respectable body of law" suggesting that such cross-claims are precluded in interpleader action)].

An interlocutory order discharging the stakeholder at stage one does not preclude summary judgment at stage two when the undisputed facts show that one of the claimants has the right to the property, at least in cases in which the claimants did not dispute the stakeholder's right to be discharged [*City of Morgan Hill v. Brown (1999) 71 Cal. App. 4th 1114, 1127-1128, 84 Cal. Rptr. 2d 361]* .

[b] Scope of Issues to Be Tried

It is unclear whether the trial court is confined to a trial of only those issues raised by the pleadings that relating to the ownership of or interest in the amount of property in dispute [*see State Farm Fire & Cas. Co. v. Pietak (2001) 90 Cal. App. 4th 600, 612-614, 109 Cal. Rptr. 2d 256* (defendant in interpleader action probably can assert compulsory cross-claim against interpleading plaintiff arising out of transaction related to interpleader action, although "there is respectable body of law" suggesting that such cross-claims are precluded in interpleader action)]. In any event, any objections in the second stage of the proceeding relating to the adjudication of issues not directly dependent on the adjudication of the claimants' respective rights in the disputed amount or property may not be raised for the first time on appeal from an adverse judgment [*see Weingetz v. Cheverton (1951) 102 Cal. App. 2d 67, 79-81, 226 P.2d 742]* .

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§ 314.17 Abrogation of Requirement of Identical Claims of Common Origin

An order of substitution may be made or an action of interpleader may be maintained under *Code Civ. Proc. § 386(a)* or *(b)*, and the applicant or interpleading party may be discharged from liability to all or any of the conflicting claims, although the claims or titles of the adverse claimants do not have a common origin, or are not identical but are adverse to and independant of one another [*Code Civ. Proc. § 386(a), (b)*].

This provision of *Code Civ. Proc. § 386* abrogates two essential elements of the historic equitable remedy of interpleader. These two requirements were: (1) that the same thing, debt, or duty must be claimed by both or all the parties against whom the relief of interpleader was demanded, and (2) that all of the adverse titles or claims must be dependent, or be derived from a common source [*see Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 502-503, 150 P.2d 463]* .

The abrogation of the requirement that the claims be identical does not mean that the claims of the parties need not relate to the same obligation. It does mean that interpleader is allowed when one person claims all of a fund held by the interpleading party and another person claims only a portion of the fund [*see Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 504, 150 P.2d 463* ; *see* further discussion in *§§ 314.12[3], 3.14[2]*]. The claimants must, however, seek the same thing, debt, or duty. If the claims do not relate to the same thing, debt, or duty, then interpleader is improper [*City of Morgan Hill v. Brown (1999) 71 Cal. App. 4th 1114, 1123, 84 Cal. Rptr. 2d 361]* .

Thus, for example, interpleader is proper if a tenant pleads that the lessor and a third party assert conflicting claims concerning the obligation to pay the rent and royalties reserved by the lease [*see Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 504-505, 150 P.2d 463]* .

On the other hand, interpleader by a client regarding attorney's fees was not proper where a law firm and a former member of the firm had a dispute over the amount due the attorney from the law firm, but it was undisputed that the client owed the fee to the firm. The fact that the amount due the attorney might be partly based on the amount of fees from the client did not alter the fact that the attorney's claim was based on agreements with the firm, not the client [*City of Morgan Hill v. Brown (1999) 71 Cal. App. 4th 1114, 1123, 1126, 84 Cal. Rptr. 2d 361]* .

The requirement that the claims of the conflicting claimants must relate to the same obligation derives from the fact that the right to relief in interpleader results from the double vexation the interpleading party faces with respect to one obligation [*see Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 504, 510, 150 P.2d 463* ; *City of Morgan Hill v. Brown (1999) 71 Cal. App. 4th 1114, 1122, 84 Cal. Rptr. 2d 361]* .

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27-314 California Forms of Pleading and Practice--Annotated § 314.18

§ 314.18 Partial Interpleader and Relaxation of Requirement of Disinterested Plaintiff

One essential element of the historic equitable remedy of interpleader was that the one seeking the relief may not have or claim any interest in the subject matter [*see Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 502-503, 150 P.2d 463]* . This element was retained in California in former *Code Civ. Proc. § 386*. Thus, a plaintiff in interpleader was required to be a disinterested stakeholder, that is, the plaintiff did not contest liability for the amount or property, but merely a judicial determination of how the payment or property was to be distributed among two or more claimants [*see Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 505, 150 P.2d 463* ; *Conner v. Bank of Bakersfield (1920) 183 Cal. 199, 203, 190 P. 801]* . Any dispute or objection to liability on the part of the interpleading party was fatal to the action.

For example, any uncertainty about the amount of the interest due on an obligation would be fatal to the action [*see Conner v. Bank of Bakersfield (1920) 183 Cal. 199, 203, 190 P. 801* ; *Williams v. Gilmore (1942) 51 Cal. App. 2d 684, 688, 125 P.2d 539* (holding, however, that when determination of amount of interest required nothing more than computation, interpleader action could be maintained)].

Even though courts still require the determination of the propriety of interpleader to turn in part on whether the stakeholder is truly a disinterested party [*see Lincoln Nat'l Life Ins. Co. v. Mitchell (1974) 41 Cal. App. 3d 16, 19, 115 Cal. Rptr. 723]* , this requirement has been relaxed by amendments to *Code Civ. Proc. § 386* in 1951 and 1975. The amendments permit a stakeholder partially to interplead the adverse claimants and claim, at least, a partial interest in the subject matter. Thus, for example, a defendant against whom an action is pending on a contract obligation or with respect to specific personal property, who chooses to file a verified cross complaint in interpleader under *Code Civ. Proc. § 386(a)* [*see* discussion in *§ 314.15[3][a]*], may admit in such cross complaint that he or she either has no interest in the amount or property claimed *or* has no interest in a specified portion of the amount or property [*see Code Civ. Proc. § 386(a)*].

Further, the requirement of disinterested stakeholder has been virtually abolished for an applicant or interpleading party who proceeds under *Code Civ. Proc. § 386(b)* [*see* discussion in *§§ 314.12[3], 314.14[2]*]. Such an interpleading party may deny liability in whole or in part to any or all of the claimants sought to be interpleaded [*Code Civ. Proc. § 386(b)*; *but see* discussion in *§ 314.15[3][b]* (defendant denying liability in whole should bring separate action rather than filing cross complaint)].

No provision is made in *Code Civ. Proc. § 386(a)* for a plaintiff to deny all liability on any interpleaded claims, although such plaintiff may bring an action to compel conflicting claimants to interplead on only a portion of the claims made against the plaintiff [*see Code Civ. Proc. § 386(a)*]. Thus, the requirement of a disinterested stakeholder still applies, at least in part, to such a plaintiff.

Legal Topics:

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§ 314.19 Trial of Issues Raised by Partial Interpleader

Although a jury trial may not ordinarily be had in either stage of the action in interpleader [*see* discussion in *§ 314.10[2]*], in the event that the amount deposited is less than the amount claimed to be due by one or more of the conflicting claimants thereto, or in the event the property or the value thereof delivered is less than all of the property or the value thereof claimed by one or more of such conflicting claimants, any issues of fact involved in determining whether there is a deficiency in such deposit or delivery must be tried by the court or a jury as provided in *Code Civ. Proc. §§ 607-630* (trial by jury) or *Code Civ. Proc. §§ 631-636* (trial by court) [*Code Civ. Proc. § 386(e)*].

These issues would normally be tried after the adjudication of the issues involved in the conflicting claims to funds or property, since *Code Civ. Proc. § 386(e)* provides that conflicting claims are issues triable by the court and may be first tried. This order of adjudication would conform to the general rule concerning the order of adjudication of equitable and legal issues that gives a court discretion to try the equitable issues first [*see Jaffe v. Albertson (1966) 243 Cal. App. 2d 592, 609, 53 Cal. Rptr. 25]* . This rule is normally invoked, however, when the decision regarding the equitable issues is such as to make a jury trial of the legal issues unnecessary.

Since the order of proof in a trial rests largely within the discretion of the trial court [*see County of San Luis Obispo v. Bailey (1971) 4 Cal. 3d 518, 527, 93 Cal. Rptr. 859, 483 P.2d 27]* , and since the language of *Code Civ. Proc. § 386(e)* is permissive, it would seem that in appropriate cases the trial court may order the adjudication of the issue of the stakeholder's liability before the adjudication of the issues involved in the trial of the suit in interpleader.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedureTrialsJury TrialsActions in Equity

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27-314 California Forms of Pleading and Practice--Annotated § 314.20

§ 314.20 Independent Liability of Interpleading Party to Claimant

Another essential element of the historic equitable remedy of interpleader was that the interpleading party had incurred no independent liability to either of the claimants [*see Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 502-503, 150 P.2d 463]* .

This element closely resembles the present requirement that the claims of the conflicting or adverse claimants must relate to the same obligation or property [*see* discussion in *§ 314.17*]. To this extent it appears still to be a requirement that an interpleading party must satisfy before a court will order interpleader. That is, a stakeholder may not have incurred some personal obligation to any of the claimants that is independent of the title or right of possession of the fund or property in question [*Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 505, 150 P.2d 463]* .

To justify dismissal of an interpleader action, this independent obligation must be such that it will not be resolved by the litigation between the interpleaded defendants [*Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 505, 150 P.2d 463]* . Thus, the rationale for the rule that a plaintiff's independent liability defeats a right of interpleader is that if such liability exists, a decision regarding which of the conflicting claimants was right would not absolve the party seeking interpleader from performing his or her independent contract [*Security Trust & Sav. Bank v. Carlsen (1928) 205 Cal. 309, 314, 271 P. 100]* .

This requirement is satisfied, then, if the relations of the parties are such that the court's decision would determine the responsibility of the interpleading party, rendering the party a mere stakeholder for the purposes of *Code Civ. Proc. §§ 386-386.6* [*see Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 505-506, 150 P.2d 463* (interpleader of adverse claimants to rent held by tenant not barred by independent obligation of tenant to landlord under terms of lease); *Security Trust & Sav. Bank v. Carlsen (1928) 205 Cal. 309, 316-317, 271 P. 100* (obligations of escrow holder to pay money and deliver documents deposited with it under terms of escrow does not bar interpleader when rightful owner could hold holder liable if holder delivered property to party not entitled thereto and court's decision would thus determine escrow holder's responsibility)].

Legal Topics:

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

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27-314 California Forms of Pleading and Practice--Annotated § 314.21

§ 314.21 Immunity of Interpleader Plaintiff from Tort Liability

As a matter of law and public policy, an interpleader plaintiff is not liable in tort for naming someone as a potential claimant when filing an interpleader action. Thus, a claimant to the fund at issue may not successfully sue the interpleader plaintiff for malicious prosecution, abuse of process, or intentional infliction of emotional distress [*Cantu v. Resolution Trust Corp. (1992) 4 Cal. App. 4th 857, 873, 6 Cal. Rptr. 2d 151]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewTortsIntentional TortsDefensesGeneral Overview

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27-314 California Forms of Pleading and Practice--Annotated § 314.22

§ 314.22 Deposit of Amount in Dispute or Delivery of Property

[1] General Rules Regarding Deposit

Any amount that a plaintiff or cross complainant admits is payable in the interpleader action may be deposited by him or her with the clerk of the court at the time of the filing of the complaint or cross complaint in interpleader without first obtaining an order of the court therefor [*Code Civ. Proc. § 386(c)*]. This provision changed the prior rule that stated that in a proceeding in interpleader the moneys in question do not come into legal custody until actually paid into the court on an order of the court therefor [*see Durkin v. Durkin (1955) 133 Cal. App. 2d 283, 294, 284 P.2d 185]* .

When in the legal custody of the court, the funds deposited no longer are subject to further claims being made to them, such as claims consisting of writs of attachment or execution that purport to levy on all or part of the funds in question [*see Van Orden v. Anderson (1932) 122 Cal. App. 132, 141, 9 P.2d 572* (attachment); *Durkin v. Durkin (1955) 133 Cal. App. 2d 283, 293, 284 P.2d 185* (execution)].

In the case of substitution of defendants under *Code Civ. Proc. § 386(a)* or discharge of a defendant under *Code Civ. Proc. § 386.5*, a court order is required by those sections before the money in dispute may be deposited with the court.

When a deposit has been made pursuant to *Code Civ. Proc. § 386*, the court shall, on application of any party to the action, order such deposit to be invested in an insured interest-bearing account. Interest on such amount is allocated to the parties in the same proportion as are the original funds [*Code Civ. Proc. § 386.1*]. Thus, if the eventual judgment allocates none of the deposited funds to the plaintiff, the plaintiff has no claim to interest earned by the funds while on deposit; that interest belongs to the parties to whom allocations were made [*Canal Ins. Co. v. Tackett (2004) 117 Cal. App. 4th 239, 243-246, 11 Cal. Rptr. 3d 626]* .

When the subject matter of the dispute is personal property, the property may be delivered only pursuant to court order to such person as the court shall, in its order, direct [*Code Civ. Proc. § 386(a),(b)*].

[2] Liability for Interest on Deposited Fund or Damages on Delivered Property

Any interest on amounts deposited with the court clerk and any right to damages for detention of property that has been

delivered to the court, either itself or its value, pursuant to court order, ceases to accrue after the date of deposit or delivery [*Code Civ. Proc. § 386(c)*]. Prior to such deposit or delivery, the stakeholder may be liable to the successful interpleaded claimant for interest on the money or damages for wrongful withholding of the property claimed [*see Conner v. Bank of Bakersfield (1917) 174 Cal. 400, 402-403, 163 P. 353* (interest)].

Before 1951, none of the interpleaded defendants in an action in interpleader could obtain affirmative relief against the interpleading plaintiff, and their claims against the plaintiff, if any, arising out of the subject matter of the action could not be put in issue in the interpleader suit because there could be no uncertainty concerning the amount of funds or property deposited. Hence, a successful adverse claimant could bring a separate action for damages for wrongful withholding of the disputed funds or property [*see Conner v. Bank of Bakersfield (1920) 183 Cal. 199, 203-204, 190 P. 801]* .

However, the 1951 amendment to *Code Civ. Proc. § 386* permits a defendant to file a cross complaint in interpleader even though such defendant admits to having an interest in a portion of the money or property in dispute, and the 1975 amendment to *Code Civ. Proc. § 386* permits an interpleading party proceeding under *Code Civ. Proc. § 386(b)* to deny liability in whole or in part to any or all of the claimants. Therefore, it would appear that all questions concerning the amount of the plaintiff's liability, even though these issues may not be raised by the interpleading party, should be adjudicated in the interpleader action.

There may be no res judicata effect regarding those issues concerning an interpleading plaintiff's liability when the plaintiff is proceeding under *Code Civ. Proc. § 386(a)*, since that subdivision does not permit a plaintiff to deny liability on any conflicting claims that have been made on plaintiff [*see Code Civ. Proc. § 386(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPartiesInterpleadersGeneral OverviewCivil ProcedureRemediesDeposits in Court

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§ 314.23 Costs and Attorney Fees

[1] Request for Allowance of Costs and Attorney Fees

A party to an action who follows the procedure set forth in *Code Civ. Proc. § 386* (complaints and cross complaints in interpleader and application for substitution) or *Code Civ. Proc. § 386.5* (application for dismissal), may insert in his or her motion, petition, complaint, or cross complaint a request for allowance of costs and reasonable attorney fees that such party has incurred in such action. In ordering the discharge of such party, the court may, in its discretion, award such party his or her costs and reasonable attorney fees from the disputed amount which has been deposited with the court [*Code Civ. Proc. § 386.6(a)*].

A party is not entitled to costs and attorney fees under *Code Civ. Proc. § 386.6(a)* unless he or she has completed all the steps provided in *Code Civ. Proc. § 386* or *386.5*. For example, it is not sufficient for a defendant stakeholder under Code Civ. Proc. § 385.5 to have answered that he or she was a mere stakeholder in the action with no interest in the amount claimed in order to qualify for costs and attorney fees. The stakeholder must, in addition, have paid the money into court or have sought a discharge from liability [*see Phillips v. Barton (1962) 207 Cal. App. 2d 488, 495, 24 Cal. Rptr. 527]* .

At the time of the final judgment in the action, the court may make such further provisions for assumption of such costs and attorney fees by one or more of the adverse claimants as may appear proper [*Code Civ. Proc. § 386.6(a)*]. This provision involving the question of which of the adverse claimants may bear the burden of costs and attorney fees should not be confused with the requirement that the court determine at the time of its order of discharge the amount of costs and attorney fees which should be awarded. A court is in error if it deferred this determination until the trial between the adverse claimants, that is, the second phase of the two-stage proceeding [*see Great-West Life Assur. Co. v. Superior Court (1969) 271 Cal. App. 2d 124, 128, 76 Cal. Rptr. 284* , and discussion in *§ 314.16[2][b]*].

[2] Determination of Amount of Award

The authorization of costs and attorney fees to be paid to a party who has followed the procedure set forth in *Code Civ. Proc. § 386* or *386.5*, in effect, operates as a preference to the funds or property in dispute. Hence, a court does not abuse its discretion in making an award under *Code Civ. Proc. § 386.6*, even though in doing so the court seriously

depletes an already inadequate fund [*see Sweeney v. McClaran (1976) 58 Cal. App. 3d 824, 828-830, 130 Cal. Rptr. 205]* .

However, attorney fees must be limited to only those incurred in pursuit of the stakeholder's remedy. An award thus is improper to the extent that it includes fees for legal work done in connection with other causes of action that were originally included in the interpleading stakeholder's complaint [*Sweeney v. McClaran (1976) 58 Cal. App. 3d 824, 830, 130 Cal. Rptr. 205]* .

It appears, however, that an award of attorney fees incurred in successfully defending an appeal by a claimant disputing a stakeholder's right to interpleader is proper [*see Lincoln Nat'l Life Ins. Co. v. Mitchell (1974) 41Cal. App. 3d 16, 20, 115 Cal. Rptr. 723* (stating that amount of fee for defending appeal is more effectively determined in trial court)].

[3] Right of Attorney Stakeholder to Fees

A party may not be denied the attorney fees authorized by *Code Civ. Proc. § 386.6(a)* for the reason that such party is an attorney, appeared in pro se, and performed his or her own legal services [*Code Civ. Proc. § 386.6(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesSubstitutionsMotions for SubstitutionCivil ProcedureDismissalsInvoluntary DismissalsMotionsCivil ProcedureRemediesCosts & Attorney FeesGeneral Overview

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27-314 California Forms of Pleading and Practice--Annotated § 314.24

§ 314.24 Appealability of Order of Discharge

Although an order discharging a plaintiff or defendant under *Code Civ. Proc. § 386* has a substantial effect in that it removes one party from litigation and further requires the remaining parties to litigate or settle their dispute, it makes no final disposition of the funds or property on deposit [*see Lincoln Nat'l Life Ins. Co. v. Mitchell (1974) 41 Cal. App. 3d 16, 19, 115 Cal. Rptr. 723]* . Therefore, a court order, either granting a judgment of interpleader that discharges a plaintiff in interpleader or substituting a party defendant in the place of a defendant who has applied for an order of substitution under *Code Civ. Proc. § 386(a)*, is considered interlocutory and nonappealable until such time as a final judgment has been entered disposing of the claims of the remaining litigants [*see Code Civ. Proc. § 904.1(a)*; *Camp v. Oakland Mortgage & Fin. Co. (1928) 205 Cal. 380, 381-383, 270 P. 685* ; *Neilsen v. Saylors (1956) 146 Cal. App. 2d 139, 140, 303 P.2d 781* (order of substitution); *Lincoln Nat'l Life Ins. Co. v. Mitchell (1974) 41 Cal. App. 3d 16, 19, 115 Cal. Rptr. 723* (judgment of interpleader)].

However, the general rule rendering interlocutory orders nonappealable does not apply when the order requires the payment of money by a complaining party [*see Fish v. Fish (1932) 216 Cal. 14, 16, 13 P.2d 375]* . Thus, a provision for costs and attorney fees in a court order granting a judgment of interpleader renders the order appealable [*Sweeney v. McClaran (1976) 58 Cal. App. 3d 824, 828, 130 Cal. Rptr. 205]* .

Moreover, a summary judgment that constitutes a final determination as to the complaint in interpleader, by awarding the disputed fund to one of the claimants, is appealable even though cross complaints between the claimants remain to be litigated [*City of Morgan Hill v. Brown (1999) 71 Cal. App. 4th 1114, 1128, 84 Cal. Rptr. 2d 361]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPartiesInterpleadersGeneral OverviewCivil ProcedureSummary JudgmentAppellate ReviewAppealabilityCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

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[Reserved]

§§ 314.25[Reserved]

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27-314 California Forms of Pleading and Practice--Annotated § 314.40

§ 314.40 Related Matthew Bender Publications

For forms of memoranda of points and authorities relating to interpleader actions generally, see California Points and Authorities, ch. 123, *Interpleader* (Matthew Bender)

Legal Topics:

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

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27-314 California Forms of Pleading and Practice--Annotated § 314.41

§ 314.41 Federal Statutes

District courts have original jurisidiction in action of interpleader or in nature of interpleader when amount in dispute is $500 or more, two or more adverse claimants of diverse citizenship are claiming to be entitled to disputed amount, and District courts have original jurisidiction in action of interpleader or in nature of interpleader when amount in dispute is $500 or more, two or more adverse claimants of diverse citizenship are claiming to be entitled to disputed amount, and plaintiff has deposited amount in dispute, paid amount into registry of court, or given bond. *28 U.S.C. § 1335(a)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedurePartiesInterpleadersStatutory Interpleaders

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27-314 California Forms of Pleading and Practice--Annotated § 314.42

§ 314.42 Federal Rules of Civil Procedure

Persons having claims against plaintiff are permitted to be joined as defendants and required to interplead when their claims are such that plaintiff is or may be exposed to double or multiple liability. *Fed. R. Civ. P., Rule 22*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureParties InterpleadersRule Interpleaders

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27-314 California Forms of Pleading and Practice--Annotated § 314.43

§ 314.43 State Statutes

[1] Jurisdiction

Interpleader is limited civil case when amount of money or value of property involved is $25,000 or less. *Code Civ. Proc. § 86(a)(2)*

[2] Actions and Cross Actions in Interpleader

[a] Abrogation of Requirement of Identical Claims of Common Origin

Interpleader proceedings are permitted to be maintained under *Code Civ. Proc. § 386(a)* or *(b)* although titles or claims of conflicting claimants have no common origin or are not identical. *Code Civ. Proc. § 386(a),(b)*

[b] Order of Trial

Issues raised by adverse claims to disputed money or property are to be tried before issues raised by dispute over amount of money or of property deposited. *Code Civ. Proc. § 386(e)*

[3] Defendant's and Cross Defendant's Pleadings

Defendant or cross defendant in interpleader is permitted in answer to allege facts showing interest in disputed amount or property. *Code Civ. Proc. § 386(d)*

When cross complaint may be filed. *Code Civ. Proc. § 428.50*

[4] Deposit of Disputed Funds

Right to deposit amount admitted to be payable without court order. *Code Civ. Proc. § 386(c)*

Disposition of funds deposited. *Code Civ. Proc. § 386.1*

[5] Injunction to Restrain Related Proceedings

Right to order restraining parties to interpleader action from instituting or further prosecuting other proceedings affecting rights and obligations of parties to interpleader. *Code Civ. Proc. § 386(f)*

[6] Particular Actions

[a] By Bailee

Bailee as defined in *Com. Code § 7102* on whom conflicting claims have been made to goods in his or her possession is permitted to bring action to compel claimants to interplead. *Com. Code § 7603*

[b] By Property Taxpayer

When real property is assessed by assessors of two or more counties for same year owner is permitted to file action in interpleader to compel counties to interplead and litigate their claims as provided in *Code Civ. Proc. § 386. Rev. & Tax Code § 4988*

[c] By Taxpayer on Whom Conflicting Federal and State Levies Have Been Made

Any employer or person required under *Rev. & Tax. Code §§ 18661-18677* to withhold payments from taxpayer may file action in interpleader when bona fide dispute has arisen as to priority of lien between tax levied and that of federal taxing agency. *Rev. & Tax Code § 18674(c)*

[d] To Interplead Claimants Under Stop Notices

On motion of owner or construction lender, court is required to implead all claimants to moneys withheld pursuant to stop notices and bonded stop notices. *Civ. Code § 3175*

[e] Obligation Acknowledged but Proper Claimant Not Ascertained

Action by person against conflicting claimants to compel them to interplead and litigate their several claims relating to personal property or performance of obligation. *Code Civ. Proc. § 386(a)*

Person on whom conflicting claims have been made relating to personal property or performance of obligation is permitted to bring action in interpleader. *Code Civ. Proc. § 386(a)*

Defendant is permitted to file cross action in interpleader interpleading plaintiff and person who have made claims on contract or specific personal property. *Code Civ. Proc. § 386(a)*

[f] Multiple Claimants Compelled to Interplead Conflicting Claims

Person, firm, corporation, association, or other entity against whom double or multiple claims are made, or may be made, which are such that they may give rise to double or multiple liability is permitted to bring action in interpleader. *Code Civ. Proc. § 386(b)*

Defendant described in *Code Civ. Proc. § 386(b)* is permitted to bring cross action in interpleader or separate action in interpleader. *Code Civ. Proc. § 386(b)*

Interpleader action or cross action is permitted to be maintained under *Code Civ. Proc. § 386(b)* even though claims are unliquidated, no liability on part of party bringing action or cross action has arisen, and such party denies liability in whole or in part to any or all of claimants. *Code Civ. Proc. § 386(b)*

Interpleading party under *Code Civ. Proc. § 386(b)* is permitted to join as defendant in action or cross action any other party against whom claims are made when such claims arise out of same transaction or occurrence. *Code Civ. Proc. § 386(b)*

[7] Costs and Attorney Fees

Costs and attorney fees are permitted to be granted interpleading party. *Code Civ. Proc. § 386.6(a)*

Interpleading party is not permitted to be denied costs and attorney fees by reason of fact that he or she was attorney and performed own legal services. *Code Civ. Proc. § 386.6(b)*

[8] Motions for Discharge by Defendant

Application for order to substitute person not party to action in place of defendant and to discharge such defendant. *Code Civ. Proc. § 386(a)*

Application for order to dismiss defendant from action when only relief sought is payment of stated amount of money alleged to be wrongfully withheld. *Code Civ. Proc. § 386.5*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesInterpleadersStatutory InterpleadersCivil ProcedurePartiesSubstitutionsMotions for SubstitutionCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesDeposits in Court

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27-314 California Forms of Pleading and Practice--Annotated § 314.44

§ 314.44 Decisions

[1] Jurisdiction

Municipal court has jurisdiction to grant leave to plaintiff to amend complaint in order to force transfer of action in interpleader to superior court when amounts periodically deposited with clerk raised total funds deposited to over $5,000. *Great-West Life Assur. Co. v. Superior Court (1969) 271 Cal. App. 2d 124, 126, 128-129, 76 Cal. Rptr. 284* (decided under prior lawregarding jurisdictional amounts and jurisdiction over what are now termed limited civil cases)

[2] Venue of Action Commenced Against Defendant Stakeholder

Proper county for venue of action against corporate defendant stakeholder is county of its principal place of business when corporation, although admitting no interest in disputed property other than possessory lien, did not before answer apply for order of substitution as provided in *Code Civ. Proc. § 386(a)*. *Independent Iron Works v. American President Lines (1950) 35 Cal. 2d 858, 861-862, 221 P.2d 939*

[3] Nature of Remedy

[a] In General

Conditions under which remedy of interpleader may be invoked as prescribed by statute and such remedy has been broadened and enlarged. *Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 508, 150 P.2d 463*

Interpleading party is not permitted to maintain action on mere pretext of suspicion of double vexation; such party is required to allege facts showing reasonable probability of double vexation. *Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 508, 150 P.2d 463*

Code Civ. Proc. § 386 concerning remedy of interpleader is remedial statute and has purpose to avoid multiplicity of suits and prevent vexatious litigation. *Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 508, 150 P.2d 463*

Right to remedy on interpleader is founded, not on consideration that stateholder may be subjected to double liability, but on fact that such stakeholder is threatened with double vexation in respect to one liability. *Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 510, 150 P.2d 463*

Person who may be subject to conflicting claims for money or property may bring interpleader action to compel claimants to litigate their claims among themselves; once person admits liability and deposits money with court, he or she is discharged from liability and freed from obligation of participating in litigation between claimants; purpose of interpleader is to prevent multiplicity of suits and double vexation. *City of Morgan Hill v. Brown (1999) 71 Cal. App. 4th 1114, 1122, 84 Cal. Rptr. 2d 361*

Action in interpleader to adjudicate conflicting claims of possession is appropriate for bailee when person other than bailor presents reasonably compelling evidence demonstrating entitlement to possession; award of costs and attorney's fees as within discretion of court under *Code Civ. Proc. § 386.6*, and ordinarily should be awarded to diligent bailee. *Messerall v. Fulwider (1988) 199 Cal. App. 3d 1324, 1332-1333, 245 Cal. Rptr. 548*

Dilemma of debtor who knows that he or she owes sum of money to someone but cannot ascertain to which of two or more claimants it should be paid is met in California by *Code Civ. Proc. § 386* permitting debtor to interplead contending parties and deposit money with clerk of court. *Krassner v. Veneman (1962) 206 Cal. App. 2d 299, 303, 23 Cal. Rptr. 673*

Code Civ. Proc. § 386 permits any person who owes obligation to bring into court, in good faith, all persons who make conflicting claims to performance of obligation and compel them to litigate their claims. *Williams v. Gilmore (1942) 51 Cal. App. 2d 684, 689, 125 P.2d 539*

[b] Equitable Proceeding

Suit in interpleader is equitable proceeding in which rights of parties as between themselves are governed by principles of equity, including absence of right to trial by jury. *Union Mut. Life Ins. Co. v. Broderick (1925) 196 Cal. 497, 502, 238 P. 1034*

Stakeholder is barred from asserting right to exercise of remedy of interpleader when property in dispute was obtained by such stakeholder as active participant in wrongful act, since interpleader is of equitable nature. *Young v. Colyear (1921) 54 Cal. App. 232, 234, 201 P. 623*

[4] Action in Interpleader Is Two-Stage Proceeding

[a] In General

Action in interpleader is two-fold contest when plaintiff's right to maintain such action is first determined, and, if his or her right is sustained, court enters interlocutory decree, requiring defendants to litigate their claims between themselves. *San Francisco Sav. Union v. Long (1898) 123 Cal. 107, 109, 55 P. 708* ; *Great-West Life Assur. Co. v. Superior Court (1969) 271 Cal. App. 2d 124, 126, 76 Cal. Rptr. 284*

Two-step procedure generally followed in interpleader action; first, determine whether plaintiff may bring suit and force claimants to interplead; second, if so, court will discharge plaintiff from liability and action may proceed for determination of rights of various claimants to property then in custody of court. *City of Morgan Hill v. Brown (1999) 71 Cal. App. 4th 1114, 1126-1127, 84 Cal. Rptr. 2d 361*

Procedure of discharging interpleading plaintiff is not spelled out in statute, but, rather, was developed through case law. *Great-West Life Assur. Co. v. Superior Court (1969) 271 Cal. App. 2d 124, 126, 76 Cal. Rptr. 284*

[b] Determination of Right to Maintain Interpleader

Defendants and interpleading party who have fully litigated their claims without objection are deemed to have consented to remedy invoked and are not permitted later to object that complaint did not state cause of action for interpleader. *Conner v. Bank of Bakersfield (1920) 183 Cal. 199, 202-203, 190 P. 801* ; *O'Connell v. Zimmerman (1958) 157 Cal. App. 2d 330, 337, 321 P.2d 161*

Defendant who considers complaint in interpleader insufficient is required to demur to it. *Los Angeles v. Amidor (1903) 140 Cal. 400, 401, 73 P. 1049*

Determination of propriety of interpleader turns on whether stakeholder is truly disinterested party whose discharge still leaves parties in litigation with substantial rights to be resolved. *Lincoln Nat'l Life Ins. Co. v. Mitchell (1974) 41 Cal. App. 3d 16, 19, 115 Cal. Rptr. 723*

Despite court order discharging plaintiff from further liability and finding that case was proper one for interpleader, when court requires further deposits from plaintiff, plaintiff remains active party litigant if there is possibility that further deposits are not necessary for plaintiff's protection. *Great West Life Assur. Co. v. Superior Court (1969) 271 Cal. App. 2d 124, 127-128, 76 Cal. Rptr. 284*

Trial of issue of whether interpleader lies in particular case is not necessary when allegations of complaint coupled with admissions in answer show that interpleading plaintiffs were entitled to relief asked. *Williams v. Gilmore (1942) 51 Cal. App. 2d 684, 689, 125 P.2d 539*

[c] Contest Between Adverse Claimants

Answers to complaint of interpleader are in nature of cross complaint. *San Francisco Sav. Union v. Long (1898) 123 Cal. 107, 109, 55 P. 708*

Adverse defendant is not permitted to argue for first time on appeal that trial of issues among adverse defendants were outside scope of issues raised by complaint in interpleader. *Weingetz v. Cheverton (1951) 102 Cal. App. 2d 67, 79-81, 226 P.2d 742*

[5] Elements of Common-Law Bill of Interpleader

Four essential elements of common-law bill of interpleader as: (1) same thing, debt, or duty must be claimed adverse or conflicting claimants; (2) all adverse titles or claims must be dependant, or be derived from common source; (3) one seeking relief must not have nor claim any interest in subject matter; and (4) interpleading party must have incurred no independent liability to claimants. *Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 502-503, 150 P.2d 463* ; *City of Morgan Hill v. Brown (1999) 71 Cal. App. 4th 1114, 1122, 84 Cal. Rptr. 2d 361*

[6] Interpleader by Defendant

[a] Application to Substitute Adverse Party

Proceeding under *Code Civ. Proc. § 386(a)* for substitution of defendant is not strictly speaking action in interpleader,

but, on granting application for substitution, proceeding is between contesting claimants and is governed by same rules applicable to actions in interpleader. *Hellman Commercial T. & S. Bk. v. Alden (1929) 206 Cal. 592, 600, 275 P. 794*

Court has discretionary power to grant request to withdraw answer and permit defendant to make motion under *Code Civ. Proc. § 386(a)* for order of substitution and dismissal. *Israel v. Bryan (1921) 52 Cal. App. 66, 71, 197 P. 121*

Defendant is permitted to file answer after making application for order to substitute person not party to action as provided in *Code Civ. Proc. § 386(a)*, and is not required to risk default by awaiting court's determination of application. *Cassidy v. Norton (1914) 25 Cal. App. 433, 435, 143 P. 1057*

[b] Notice of Appeal

On order of substitution and dismissal of defendant under *Code Civ. Proc. § 386(a)*, such party is not adverse party on whom service need be made of papers incident to appeal from judgment determining adverse claims. *Camp v. Oakland Mortgage & Fin. Co. (1931) 212 Cal. 433, 435-436, 298 P. 974*

[7] Interpleader by Plaintiff

[a] Claims Giving Rise to Double or Multiple Liability

Interpleader action is permitted to be maintained under *Fed. R. Civ. P., Rule 22(1)* when claims made on interpleading party involve threat to multiple liability on what is in fact but single claim or obligation. *Texas v. Florida (1938) 306 U.S. 398, 412, 59 S. Ct. 563, 83 L. Ed. 817* ; Fulton v. Kaiser Steel Corp. (5th Cir. [Ala] 1968) *397 F.2d 580, 582-583*

Interpleader is permitted under *Fed. R. Civ. P., Rule 22(1)* when claims, although not in theory mutually exclusive, in aggregate exceed limits on stakeholder's liability. *State Farm Fire & Cas. Co. v. Tashire (1967) 386 U.S. 523, 530-533, 87 S. Ct. 1199, 18 L. Ed. 2d 270* ; *American Fid. Fire Ins. Co. v. Construcciones Werl, Inc. (D St. Croix 1975) 407 F. Supp. 164, 172-173*

Fed. R. Civ. P., Rule 22(1) does not require stake or fund as such since action will lie when all that is involved is threat of multiple liability on what is in fact but single claim or obligation. *Xerox Corp. v. Nashua Corp. (SD NY 1970) 314 F. Supp. 1187, 1189, 166 U.S.P.Q. 344*

In bringing action in interpleader under *Code Civ. Proc. § 386(a)*, nothing more is required of plaintiff than to show that parties to be called in make claims for same thing, that respective claims are adverse to each other, and that plaintiff cannot safely determine which claim is right and lawful. *Fidelity Sav. & L. Ass'n v. Rodgers (1919) 180 Cal. 683, 684-685, 182 P. 426*

[b] Claims Relating to Personal Property or Performance of Obligation

Tenant is not permitted to maintain suit in interpleader on mere pretext or suspicion of double vexation; such tenant is required to allege facts showing a reasonable probability of double vexation. *Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 508, 150 P.2d 463*

Code Civ. Proc. § 386(a) requires nothing more of interpleading stakeholder than to show that parties to be called in make claims against such stakeholder for same thing, that respective claims are adverse to each other, and that stakeholder cannot safely determine which claim is right and lawful. *Fidelity Sav. & L. Ass'n v. Rodgers (1919) 180 Cal. 683, 684, 182 P. 426*

Complaint in interpleader under *Code Civ. Proc. § 386(a)* is not required to state facts showing that claims of adverse or conflicting claimants are well founded, since action by its nature as its underlying basis assumes that only one claimant is entitled to property. *Fidelity Sav. & L. Ass'n v. Rodgers (1919) 180 Cal. 683, 684, 182 P. 426*

[8] Independent Liability of Interpleading Party to Claimant

Obligation referred to in rule requiring interpleading party to have incurred no independent liability is required to be such that litigation between defendants to action in interpleader will not determine it, in order to warrant dismissal of action. *Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 505, 150 P.2d 463*

Mere fact that contractual relation exists between plaintiff and one defendant in interpleader action under which fund is required to be paid to such claimant does not defeat right of interpleader. *Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 505, 150 P.2d 463*

Requirement of no independent liability rarely construed to prohibit relief. *City of Morgan Hill v. Brown (1999) 71 Cal. App. 4th 1114, 1123, 84 Cal. Rptr. 2d 361*

Rationale for rule of independent liability defeating right to interpleader is that, when such liability exists, decision as to which conflicting claimant was right would not absolve party asking interpleader from performing his or her independent contract. *Security Trust & Sav. Bank v. Carlsen (1928) 205 Cal. 309, 314, 271 P. 100*

Provisions of escrow agreement that no rescission or modification of its terms should take place without consent of parties thereto does not deprive escrow holder of right to interplead rival claimants because such holder has, based on such terms, independent liability to parties under escrow agreement. *Security Trust & Sav. Bank v. Carlsen (1928) 205 Cal. 309, 316-317, 271 P. 100*

Independent liability requirement does not preclude interpleader when liability asserted is duty of stakeholder to deliver property to claimant. *Pacific Loan Management Corp. v. Superior Court (1987) 196 Cal. App. 3d 1485, 1489-1490, 242 Cal. Rptr. 547*

[9] Claimant's Remedies

Interpleader action is not permitted to be brought by claimant to fund, but such claimant is permitted to take initiative and bring action for declaratory relief. *Pasadena Inv. Co. v. Peerless Cas. Co. (1955) 134 Cal. App. 2d Supp. 902, 903, 286 P.2d 1014*

Complaint in interpleader is not required to express doubt as to which adverse claimant plaintiff is liable. *Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 510, 150 P.2d 463*

[10] Deposit of Fund in Dispute

Interpleading party is not required to deposit or pay into court money or property in controversy. *Fox v. Sutton (1900) 127 Cal. 515, 519, 59 P. 939*

When fund in question does not come into legal custody of court, fund is subject to further claims being made on it, such as liens created by service of writs of attachment or execution. *Durkin v. Durkin (1955) 133 Cal. App. 2d 283, 293-294, 284 P.2d 185* (execution); *Van Orden v. Anderson (1932) 122 Cal. App. 132, 141, 9 P.2d 572* (attachment)

[11] Liability for Interest on Deposited Fund or Property

Successful adverse claimant is permitted to bring action for interest as damages accruing from time of claimant's demand up to time money was paid into court. *Williams v. Gilmore (1942) 51 Cal. App. 2d 684, 687-688, 125 P.2d 539* (decided prior to amendment to *Code Civ. Proc. § 386(a)* permitting plaintiff's partial interpleader)

[12] Partial Interpleader and Relaxation of Requirement of Disinterested Plaintiff

Defendants in action to compel interpleader are not permitted to obtain affirmative relief against plaintiff; any claims against plaintiff arising out of subject matter of interpleader suit are permitted to be considered only when presented in another and different action. *Conner v. Bank of Bakersfield (1920) 183 Cal. 199, 203, 190 P. 801* (decided prior to amendment to *Code Civ. Proc. § 386* permitting partial interpleader)

[13] Order to Enjoin Prosecution of Related Proceedings

Jurisdiction to restrain further prosecution of another action in connection with interpleader proceeding as including jurisdiction to restrain collecting on claim already reduced to judgment. *Surety Co. of the Pacific v. Piver (1983) 149 Cal. App. 3d Supp. 29, 32, 197 Cal. Rptr. 531*

Denial of preliminary injunction as abuse of discretion when plaintiff made showing of actual (not merely hypothetical) danger of multiplicity of suits, and when real parties did not give any explanations of why pending interpleader action was inadequate to preserve their rights to funds or how they would be damaged by such injunction. *Board of Educ. v. Superior Court (1979) 97 Cal. App. 3d 977, 979, 159 Cal. Rptr. 265*

Since purpose of interpleader action is to avoid multiplicity of suits, preliminary injunction against prosecution of other actions, pending determination of rights of various claimants, is permitted to be granted by court in exercise of its discretion. *Fidelity & Deposit Co. v. Santa Monica Fin. Co. (1960) 182 Cal. App. 2d 211, 216, 6 Cal. Rptr. 213*

When liability of surety on bond is different from that of its principal, surety is not entitled to injunction to restrain prosecution of action on bond is part of its interpleader action. *Fidelity & Deposit Co. v. Santa Monica Fin. Co. (1960) 182 Cal. App. 2d 211, 217-219, 6 Cal. Rptr. 213*

[14] Specific Situation in Which Interpleader Permitted

Tenant has right to interplead landlord and adverse claimant to determine to whom rent must be paid. *Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 510, 150 P.2d 463*

Escrow holder is permitted to maintain action in interpleader despite having obligations by virtue of provisions of escrow instruction to pay money and deliver documents deposited when court's decision in such action would determine such holder's responsibility. *Security Trust & Sav. Bank v. Carlsen (1928) 205 Cal. 309, 314-315, 271 P. 470*

Judgment debtor is permitted to interplead claimants to proceeds of judgment, regardless of whether debtor had knowledge of conflicting claims before judgment or of whether judgment was based on tort. *Williams v. Gilmore (1942) 51 Cal. App. 2d 684, 689, 125 P.2d 539*

[15] Costs and Attorney Fees

Stakeholder is entitled to determination of costs and reasonable attorney fees at time of court's order of discharge. *Great-West Life Assur. Co. v. Superior Court (1969) 271 Cal. App. 2d 124, 128, 76 Cal. Rptr. 284*

Right to recover attorney fees in interpleader is statutory and conditioned by *Code Civ. Proc. § 386.6* on following procedure set forth in *Code Civ. Proc. § 386* or *386.5*. *Phillips v. Barton (1962) 207 Cal. App. 2d 488, 495-496, 24 Cal. Rptr. 527*

[16] Appealability of Order of Discharge

Order discharging defendant stakeholder from liability and dismissing such stakeholder from plaintiff's action which provides for costs and attorney fees is appealable. *Sweeney v. McClaran (1976) 58 Cal. App. 3d 824, 828, 130 Cal. Rptr. 205*

Award under *Code Civ. Proc. § 386.6* of attorney fees are required to be limited to only those incurred in pursuit of stakeholder's remedy, whether by complaint or cross complaint. *Sweeney v. McClaran (1976) 58 Cal. App. 3d 824, 830, 130 Cal. Rptr. 205*

Award under *Code Civ. Proc. § 386.6* of costs and attorney fees out of penal sum of contractor's license bond is permitted, even though such award may seriously deplete amount of such sum. *Sweeney v. McClaran (1976) 58 Cal. App. 3d 824, 828-830, 130 Cal. Rptr. 205*

Judgment of interpleader, discharging interpleading stakeholder and leaving adverse claimants to litigate their claims, is interlocutory and nonappealable, and is subject to review on appeal only after ultimate resolution of claims of adverse claimants. *Lincoln Nat'l Life Ins. Co. v. Mitchell (1974) 41 Cal. App. 3d 16, 20, 115 Cal. Rptr. 723*

Stakeholder is not bound by promise to pay all costs of collection and reasonable attorney fees incurred by holder of promissory note on account of note's collection when stakeholder has properly filed suit in interpleader alleging there are adverse claimants to proceeds of note. *Leroy v. Bella Vista Investment Co. (1963) 222 Cal. App. 2d 369, 377, 35 Cal. Rptr. 128*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityGeneral OverviewCivil ProcedurePartiesInterpleadersRequirementsCivil ProcedurePartiesSubstitutionsMotions for SubstitutionCivil ProcedureRemediesDeposits in CourtCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

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27-314 California Forms of Pleading and Practice--Annotated § 314.45

§ 314.45 Law Reviews

Review of Selected 1975 California Legislation, "Civil Procedure; Interpleader," *7 Pac. L.J. 316 (1976)*

Friedenthal, "Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revisions of the California Provisions," *23 Stan. L. Rev. 1 (1970)*

Alexander, "Claims in Interpleader," 44 State B.J. 211 (1969)

Hazard and Moskovitz, "An Historical and Critical Analysis of Interpleader," *52 Cal. L. Rev. 706 (1964)*

Comment, "Class Actions and Interpleader: California Procedure and the Federal Rules," *6 Stan. L. Rev. 120 (1953)*

Note, "Interpleader--Right of Tenant to Interplead Landlord and Third Person--Construction of *Section 386 of Code of Civil Procedure*," *18 So Cal. L. Rev. 158 (1944)*

Comment, "Interpleader: The Remedy of Interpleader in California," *29 Cal. L. Rev. 35 (1940)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedurePartiesInterpleadersRule InterpleadersCivil ProcedurePartiesJoinderGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview

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§ 314.46 Text References

California Civil Procedure Before Trial, ch. 35 (Cal. CEB 3d ed. 2000)

Witkin, California Procedure, vol. 4, *Pleading*, § 216 et seq. (4th ed. 1997)

Legal Topics:

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

§§ 314.47[Reserved]

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Chapter 314 INTERPLEADER
PART IV. FORMS
A. Complaints in Interpleader

27-314 California Forms of Pleading and Practice--Annotated § 314.60

§ 314.60 Complaint Alleging Adverse Claims Made on Plaintiff With Respect to One Liability

[1] General Form of Complaint

[a] FORM Complaint Alleging Adverse Claims Made on Plaintiff With Respect to One Liability

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT IN INTERPLEADER
[and DOES I through _____,]	)	
Defendant(s).	)	
	)	
	)	

Plaintiff alleges:

1. Defendants _____ [*names*] are, and at all times mentioned herein were, residents of _____ County, California [*or allege other capacity and residence of defendants*].

[2. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.)] (Plaintiff is informed and

believes and thereon alleges that each of these fictitiously named defendants is making or has a claim to the _____ [personal property *or* funds *or* obligation] herein described which is conflicting with the claims of defendants herein and which may subject plaintiff to vexatious litigation with respect to such _____ [property *or* funds *or* obligation].)]

3. _____ [*Describe personal property or obligation, or portion thereof, to which conflicting claims have been made, e.g.,* On or about _____(*date*), plaintiff entered into a written contract with defendant _____ (*name*) for the construction of a sidewalk over plaintiff's property. Under this contract defendant _____ (*name*) promised to perform all necessary labor and supply all necessary materials for the construction of the sidewalk and plaintiff promised to pay defendant _____ (*name*) the sum of $_____ on completion of the sidewalk. Defendant _____ (*name*) has fully performed all conditions, covenants, and promises under the contract and plaintiff now holds the sum of $_____, _____ (the sum due under the contract *or* after deduction of all sums of money consisting of prior payments *or specify other portion of sum that is not in dispute*)].

4. _____ [*State conflicting claims that have been made on plaintiff relating to personal property or performance of obligation, or portion thereof, so that plaintiff shows reasonable probability of vexatious litigation, e.g.,* Defendant _____ (*name of claimant under contract*) has made (a) demand(s) on plaintiff for the payment of the sum due under the contract (, specifically making a written demand for this sum on _____ [*date*], a copy of which is attached hereto as Exhibit A and made a part hereof). However, plaintiff has refused to pay such sum because defendant _____ (*name of assignee*) has claimed that this sum is now due and owing to him/her under an alleged assignment of all right, title, and interest in and to the aforementioned contract, which assignment was made by defendant _____ (*name of claimant under contract*) to defendant _____ (*name of assignee*) on or about _____ [*date*], and of which plaintiff was given notice by _____ (*specify manner in which notice was given*) (, a copy of which notice is attached hereto as Exhibit B and made a part hereof)].

5. Plaintiff is indifferent with respect to which defendant plaintiff should _____ [deliver the above-described personal property *or* pay the sum of money *or* perform the above-described obligation] and _____ [claims no interest in such _____ (personal property *or* sum) *or* does not dispute that he/she is required to perform such obligation].

6. The respective claims made by defendants _____ [*names*] are adverse and conflicting and are made without plaintiff's collusion. Plaintiff is unable to safely determine which of the claims is valid.

7. [Plaintiff has deposited the sum of $_____, being the entire amount in dispute which is due and unpaid at this time with the clerk of this court on the filing of this complaint.]

8. [Defendants _____ (*names*) have commenced separate actions against plaintiff on their respective claims. These actions have been commenced in _____ (*list title of court and number of each action*). Defendants _____ (*names*) have threatened to file actions against plaintiff on their respective claims and plaintiff fears that unless restrained by an order of the court, these defendants will file such actions on their claims. Therefore, it is necessary to restrain the prosecution of those actions which have been commenced against plaintiff and to restrain the filing of those actions which have been threatened to be filed, in order to prevent a multiplicity of judicial proceedings and to prevent plaintiff from facing vexatious litigation with respect to the above-described _____ (personal property *or* sum of money *or* obligation).]

9. Plaintiff has incurred attorney fees and costs as a result of these proceedings.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. That defendants be ordered to interplead and litigate their respective rights to the above-described _____ [personal property *or* sum of money *or* obligation];

2. That plaintiff be discharged from any and all liability on account of the claims of each of the defendants;

[3. That defendants _____ (*names*) be restrained from prosecution of their actions against plaintiff on their respective claims and that defendants _____ (*names*) be restrained from instituting any actions against plaintiff on their respective claims;]

4. That plaintiff be awarded costs and reasonable attorney fees to be determined by the court [and to be paid out of the money deposited with the court]; and

5. For such other and further relief as the court may deem proper.

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[b] Use of Form

The form of complaint set out in [a], *above*, is for use by a plaintiff on whom conflicting claims have been or may be made for or relating to personal property, or the performance of an obligation, or any portion thereof, when the plaintiff seeks to compel the conflicting claimants to interplead and litigate their several claims [*see Code Civ. Proc. § 386(a)*].

Although the form under [a], *above*, may be used when only a portion of the personal property or obligation is being demanded by some or all of the conflicting claimants, it does not include an allegation that the plaintiff claims an interest in the property in question or disputes the nature of the obligation being demanded of the plaintiff. By the terms of *Code Civ. Proc. § 386(a)*, only a cross complainant may assert such an interest in the amount or property claimed by the conflicting claimants.

For a form of such cross complaint and a form of complaint in interpleader under *Code Civ. Proc. § 386(b)* under which a plaintiff may deny all liability to any claimant, see *§§ 314.61* and *314.70*.

[c] Allegations

In bringing an action in interpleader under *Code Civ. Proc. § 386(a)*, nothing more is required of a plaintiff than to show in the complaint that the parties to be called in make claims on him or her for the same thing, that the respective claims are adverse to each other, and that the plaintiff cannot safely determine which claim is right and lawful [

Fidelity Sav. & Loan Asso. v. Rodgers, (1919) 180 Cal. 683, 684-685, 182 P. 426] .

Therefore, the complaint set out in [a], *above,* alleges:

- Facts showing that plaintiff is the holder of personal property or is obligated to do some thing (Paragraph 3) to which conflicting claims have been made to the whole, or to any portion thereof, such that plaintiff faces a reasonable probability of vexatious litigation with respect to one liability (Paragraph 4) [*see Code Civ. Proc. § 386(a)*; *Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 510, 150 P.2d 463* ; *Fidelity Sav. & L. Ass'n v. Rodgers (1919) 180 Cal. 683, 684-685, 182 P. 426]* ;

- That plaintiff is indifferent and claims no interest in the property or does not dispute the nature of the obligation (Paragraph 5) [*see Code Civ. Proc. § 386(a)* which does not permit partial interpleader]; and

- That the claims are adverse and conflicting and that plaintiff is unable to safely determine which claim is valid (Paragraph 6) [*see Fidelity Sav. & L. Ass'n v. Rodgers (1919) 180 Cal. 683, 684-685, 182 P. 426]* .

The requirement that the complaint contain an allegation that the plaintiff express a doubt as to which adverse claimant he or she is liable does not mean that the plaintiff must allege the legal probability of recovery by each conflicting claimant [*see Fidelity Sav. & L. Ass'n v. Rodgers (1919) 180 Cal. 683, 684, 182 P. 426]* . Moreover, the need for such an allegation has been called into question, since it implies that the plaintiff may be subjected to double liability, rather than be threatened with double vexation with respect to one liability [*see Hancock Oil Co. v. Hopkins (1944)24 Cal. 2d 497, 510, 150 P.2d 463]* . However, the allegation is included in the form under [a], *above,* in Paragraph 8 as a precaution and because it appears to be included as a matter of general practice.

In addition, the form under [a], *above,* alleges that plaintiff has incurred attorney fees and costs as a result of the proceedings in interpleader (Paragraph 9) [*see Code Civ. Proc. § 386.6(a)*].

[d] Deposit of Amount in Dispute

The complaint in [a], *above,* includes an optional allegation that the sum of money in dispute has been deposited with the clerk of the court (Paragraph 7) [*see Code Civ. Proc. § 386(c)*]. A plaintiff or cross complainant may so deposit the amount in dispute without receiving a prior court order [*see Code Civ. Proc. § 386(c)*]. The allegation is not essential to the action since *Code Civ. Proc. §§ 386-386.6* do not require that the party deposit or pay into the court the money in controversy [*Fox v. Sutton (1900) 127 Cal. 515, 519, 59 P. 939]* . However, by depositing the amount in dispute, any interest on the money deposited with the court ceases to accrue after the date of the deposit [*Code Civ. Proc. § 386(c)*], and all funds deposited would be in the custody of the court and free from any further dispute which may arise when the funds remain, in effect, in the hands of the interpleading party [*see Van Orden v. Anderson (1932) 122 Cal. App. 132, 141, 9 P.2d 572* (under prior law when funds deposited would be considered voluntarily deposited, funds as still subject to garnishment or attachment even though in hands of clerk)].

Code Civ. Proc. § 386(c) also provides that any right to damages for detention of property "so delivered," or its value, shall cease to accrue after the date of such delivery. *Code Civ. Proc. § 386(c)* was originally a part of what is today *Code Civ. Proc. § 386(a),* and the term, "so delivered," of course, refers to property delivered pursuant to court order as provided in *Code Civ. Proc. § 386(a)* or *(b).*

[e] Order to Enjoin Prosecution of Other Actions

The complaint in [a], *above,* alleges as an optional allegation that actions were pending against plaintiff with respect to the disputed personal property or obligation and that other such actions were threatened to be commenced against the

plaintiff (Paragraph 8) [*see Code Civ. Proc. § 386(f)*].

Code Civ. Proc. § 386(f) provides that after any complaint to compel conflicting claimants to interplead and litigate their claims or cross complaint in interpleader has been filed, the court in which it is filed may enter its order restraining all parties to the action from instituting or further prosecuting any other proceeding in any court in California affecting the rights to the interpleader until further order of the court. It would not appear to be necessary to allege the prosecution of other proceedings or the threat of such prosecutions in order to obtain the injunctive relief, and a prayer in the complaint or cross complaint for such relief as set forth in the form under [a], *above*, should be sufficient [*see Van Orden v. Anderson (1932) 122 Cal. App. 132, 137, 9 P.2d 572]* . However, the allegation is included in the form under [1], *above*, as a precautionary measure [*see Fidelity & Deposit Co. v. Santa Monica Fin. Co. (1960) 182 Cal. App. 2d 211, 214, 6 Cal. Rptr. 213]* .

[f] Verification

Unlike a cross complaint in interpleader, which must be verified [*Code Civ. Proc. § 386(a),(b)*], a complaint in interpleader is not required to be verified, although verification of the complaint will require the defendant to file a verified answer in an unlimited civil case in superior court [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case when the action is a claim assigned to a third party for collection [*see Code Civ. Proc. § 431.30(d)*].

However, if a temporary restraining order or a preliminary injunction, or both, is sought on the basis of facts alleged in the complaint establishing the ground for pendente lite injunctive relief, and, in the case of a temporary restraining order, that great or irreparable injury would result to the plaintiff before the matter can be heard on notice, the complaint must be verified. Otherwise, these facts must be set forth in a separate affidavit [*Code Civ. Proc. § 527(a)-(c)*] (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]), which is then attached to, or incorporated in, the ex parte application for a temporary restraining order and order to show cause re preliminary injunction, or attached to the notice of motion for a preliminary injunction, as the case may be.

Since the function of a complaint is to allege ultimate facts and that of an affidavit is to state evidentiary facts, the better practice would be to use an affidavit or declaration under penalty of perjury in which to set forth the operative evidentiary facts. For forms and procedure, see Ch. 393, *Injunctions* .

[g] Certification re Notice

When a temporary restraining order is sought without notice to the adverse party or parties, it must appear from facts shown by declaration or verified complaint that irreparable injury will result to the applicant before the matter can be heard on notice [*Code Civ. Proc. § 527(c)(1)*].

Further, the applicant or the applicant's attorney is required to certify to the court under oath one of the following [*Code Civ. Proc. § 527(c)(2)*]:

- Within a reasonable time prior to the application he or she informed the opposing party (or his or her attorney, if any) of the time and place the application would be made.

- He or she in good faith attempted to inform the opposing party (or attorney) but was unable to do so, specifying the efforts made to do so.

- For reasons specified he or she should not be required to inform the opposing party (or attorney) [*Code Civ. Proc. § 527(c)(2)*].

This certificate may be appended to the ex parte application (affidavit or declaration) for the temporary restraining order and order to show cause re preliminary injunction. For procedure and forms, see Ch. 393, *Injunctions* .

[h] Discharge of Interpleading Party

The procedures for determining the propriety of interpleader are not spelled out in *Code Civ. Proc. §§ 386-386.6* and are only partially dealt with in the cases [*see Great-West Life Assur. Co. v. Superior Court (1969) 271 Cal. App. 2d 124, 127, 76 Cal. Rptr. 284]* . However, after the filing of the complaint or cross complaint and after the time for answer has passed, there are two ways by which an interpleading plaintiff or cross complainant may obtain a discharge from liability in the interpleader action.

The first is for the interpleading party and the conflicting claimants to stipulate that the party is a mere stakeholder in the action and on deposit of the disputed funds or delivery of the property will be discharged from all liability to the claimants and to obtain an order on the stipulation [*see Conner v. Bank of Bakersfield (1920) 183 Cal. 199, 202, 190 P. 801* ; *Pinecrest Prod., Inc. v. RKO Teleradio Pictures, Inc. (1970) 14 Cal. App. 3d 6, 10, 92 Cal. Rptr. 44* ; *see also § 314.101*].

The second is for the interpleading party to serve and file a notice of motion for an order of discharge [*see Sweeney v. McClaran (1976) 58 Cal. App. 3d 824, 827, 130 Cal. Rptr. 205]* , or for a judgment of interpleader [*see Lincoln Nat'l Life Ins. Co. v. Mitchell (1974) 41 Cal. App. 3d 16, 18, 115 Cal. Rptr. 723]* which discharges the party from liability and dismisses the party from the action on his or her depositing the disputed funds with the court clerk, if this has not already been done, or delivering the disputed property as the court shall order [*see San Francisco Sav. Union v. Long (1898) 123 Cal. 107, 109 55 P. 708* ; *Great-West Life Assur. Co. v. Superior Court (1969) 271 Cal. App. 2d 124, 127, 76 Cal. Rptr. 284* ; *see also §§ 314.102* and *314.103*].

If there is no dispute as to the propriety of bringing an action in interpleader or to the amount or property in dispute, such a stipulation or motion is an efficient and expeditious means to dispose of the first stage in the interpleader contest and to proceed with the main action between the conflicting claimants.

[i] Jurisdiction of Actions in Interpleader

An action in interpleader is classified as a limited civil case that is within the jurisdiction of the municipal court or, if there is none in the county, of the superior court, when amount of money or value of property involved is $25,000 or less [*Code Civ. Proc. § 86(a)(2)*]. In all other actions of interpleader, the superior courts have original jurisdiction [*see Cal. Const., Art VI, § 10*; *Great-West Life Assur. Co. v. Superior Court (1969) 271 Cal. App. 2d 124, 126, 128-129, 76 Cal. Rptr. 284* (holding that, in action in which amounts periodically deposited with clerk raised total fund deposited to over jurisdictional limit, municipal court had jurisdiction to grant leave to plaintiff to amend complaint in order to force transfer of cause to superior court)].

[j] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to Fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

[2] Alternative Form of Complaint

[a] FORM Alternative Form of Complaint

[*Caption. See Form 1.*]

Plaintiff alleges:

1. [At all times herein mentioned plaintiff _____ (*name*) Insurance Corporation was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California, and authorized to do business, and doing business as an insurer by the Insurance Commissioner of the State of California (*or allege other capacity of plaintiff as firm, corporation, association, or other entity*).]

[2. *Capacity and residence of defendants, if appropriate. See [1][a], above, Paragraph 1.*]

[3. *Fictitious name allegation, if appropriate. See [1][a], above, Paragraph 2.*]

[4. *Allegation of agreement or other means by which plaintiff may be liable to conflicting claimants. See, e.g.,[1][a], above, Paragraph 3.*]

[5. *Allegation of event or condition giving rise to double or multiple liability. See, e.g.,[1][a], above, Paragraph 4.*]

[6. *Allegation of claims made or which may be made against plaintiff. See, e.g.,[1][a], above, Paragraph 4.*]

7. [_____ (Plaintiff denies all liability to defendants _____ (*names*) arising out of any obligations plaintiff may have under the aforementioned agreement *or specify other obligation or* Plaintiff claims an interest in the _____ (proceeds of the contract *or specify other property*) in that _____ (*allege facts showing plaintiff's lack of liability or plaintiff's partial interest in subject matter in dispute, e.g.*, defendant _____ (*name*) negligently and improperly performed the work required under aforementioned contract, requiring plaintiff to employ other persons and to obtain other materials to repair the negligently and improperly done work, to plaintiff's damage in the sum of $_____.]

8. Each of defendants _____ [*names*] is claiming that _____ [plaintiff is obligated under the abovementioned agreement to pay each of them the total amount provided for in the agreement *or, if appropriate, state specific claims*]. Each of them is claiming to be the only person entitled to receive payment of the amount provided in the _____ [agreement *or, if appropriate, state specific obligation*] and has made a demand [, in writing,] for payment thereof. [Copies of these demands are attached hereto as Exhibits A and B and made

a part hereof.]

9. By reason of these multiple, conflicting claims of the defendants, and each of them, plaintiff is in great doubt as to which defendant, if any, is entitled to be paid the amount _____ [specified in the agreement *or state other obligation*] and cannot pay any part of this amount without danger of being compelled to pay the same amount to each of the defendants herein.

[10. *Allegation of deposit of subject matter in dispute. See [1][a], above, Paragraph 7*.]

[11. *Cost and attorney fees. See [1][a], above, Paragraph 9*.]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

[1. _____ (That none of the defendants is entitled to recover from plaintiff the amount provided for in the aforementioned _____ (agreement *or specify other*) *or* For general damages in the sum of $_____against defendant(s) _____ (name(s)) to be deducted from any amount which may be determined by the court to be owing to defendants, and each of them;]

2. That [, if the court determines that plaintiff is required to pay the amount provided for in the aforementioned _____ (agreement *or specify other*),] defendants, and each of them, be required to interplead between themselves their rights to _____ [such amount *or* the amount due under the aforementioned _____ (agreement *or specify other*)], and that plaintiff be discharged from all liability to defendants, and each of them, except to the person whom the court adjudges to be entitled to such amount;

3. That the court enter its order restraining defendants, and each of them, from instituting or further prosecuting any other proceeding in any court in California affecting the rights and obligations as between the parties to the interpleader until further order of the court;

4. That plaintiff be awarded costs and reasonable attorney fees to be determined by the court and to be paid out of the _____ [sum of money deposited with the clerk of this court *or* total amount plaintiff may be obligated to pay under the aforementioned _____ (agreement *or specify other*)];

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See [1][a], above*.]

[b] Use of Form

The form of complaint set out in [a], *above*, is for use by a plaintiff, who may be a person, firm, corporation, association, or other entity in an action against two or more persons who have made or may make claims against the plaintiff to compel such persons to interplead and litigate their several claims when the claims are such that they may

give rise to double or multiple liability on the part of plaintiff with respect to one potential obligation [*see Code Civ. Proc. § 386(b)*].

The form under [a], *above*, is an alternative form to [1][a], *above*, and is for general use by a plaintiff in interpleader seeking to prevent vexatious litigation with respect to one obligation. However, unlike the form of complaint in [1][a], *above*, the form under [a], *above*, may be used even though the claims are unliquidated and no liability on the part of the plaintiff has arisen and even if the plaintiff denies liability in whole or in part to any or all of the adverse claimants [*see Code Civ. Proc. § 386(b)*].

In addition, when the person, firm, corporation, association, or other entity against whom such claims are made, or may be made, is a defendant in an action brought on one or more of such claims, the form under [a], *above*, may be used, in lieu of a verified cross complaint in interpleader, in a separate action against the claimants to compel them to interplead and litigate their several claims [*see Code Civ. Proc. § 386(b)*].

With appropriate modifications, the form under [a], *above*, of complaint may be adapted for use as a cross complaint by a defendant to an action brought on one or more claims described in *Code Civ. Proc. § 386(b)* [*see Code Civ. Proc. § 386(b)*]. In such a case, the cross complaint must be verified [*Code Civ. Proc. § 386(b)*]. Although *Code Civ. Proc. § 386(b)* provides that a cross complainant may deny liability in whole or in part to any or all of the claimants, a defendant who files such a cross complaint, by virtue of the statute, admits that he, she, or it has, if liability is established, no interest in the money or property claimed or in only a portion of it [*see Code Civ. Proc. § 386(b)*]. For a form of cross complaint under *Code Civ. Proc. § 386(a)*, see *§ 314.70*.

See also discussion in [1][b]-[j], *above*.

[c] Allegations

The complaint set out in [a], *above*, alleges, in pertinent part, the following:

- The capacity, when appropriate, of plaintiff (Paragraph 1) [*see Code Civ. Proc. § 386(b)* permitting person, firm, corporation, association, or other entity to bring interpleader action)];

- The nature of plaintiff's obligation (Paragraph 4);

- The event or other condition giving rise to double or multiple liability (Paragraph 5);

- The claims made or which may be made on plaintiff (Paragraph 6);

- Facts showing when appropriate, that plaintiff denies all liability to any or all defendants or that plaintiff claims an interest in the subject matter in dispute (Paragraph 7) [*see Code Civ. Proc. § 386(b)*]; and

- That the claims are such that they may give rise to double or multiple liability on the part of plaintiff with respect to but one obligation (Paragraph 9) [*see Code Civ. Proc. § 386(b)*; *see also* discussion in *§ 314.14[2]*].

[d] Trial of Issues Raised by Denial of Plaintiff's Liability

When the plaintiff denies liability in whole or in part to any or all of the defendant claimants, it is unclear what procedures the court should follow in determining the propriety of bringing the interpleader action, the right and obligations between the conflicting claimants, and the total amount of plaintiff's obligation, if any. Although *Code Civ.*

Proc. § 386(e) provides that, except in cases in which by the law a right to a jury trial is now given, conflicting claims to deposited or delivered funds or property or the value thereof are issues that must be tried by the court, and any issues of fact involved in determining whether there is a deficiency in such deposit or delivery are to be tried by the court or a jury as provided in *Code Civ. Proc. § 577 et seq.* (trial and judgments in civil actions), that section does not specifically provide for the trial of those issues raised when plaintiff denies liability and disputes owing any obligation to any or all of the defendants.

It appears, however, that a dispute over the plaintiff's liability is in essence a dispute over the amount claimed to be due from the plaintiff by one or more of the conflicting claimants [*see Code Civ. Proc. § 386(e)*; *see also §§ 314.10[2], 314.19*]. Thus, if the plaintiff's liability depends on the resolution of legal questions, factual issues relating to those questions may be tried by a jury [*see Shopoff & Cavallo LLP v. Hyon (2008) 167 Cal. App. 4th 1489, 1513, 85 Cal. Rptr. 3d 268* (jury trial is available if nature of rights at issue and remedy sought are legal rather than equitable)]. Then, once the plaintiff's liability has been established, the question of apportionment among the defendants will be tried by the court as an equitable matter [*see Shopoff & Cavallo LLP v. Hyon (2008) 167 Cal. App. 4th 1489, 1513-1515, 85 Cal. Rptr. 3d 268]* .

[e] Joinder of Parties

An interpleading party may join as a defendant in such action any other party against whom claims are made by one or more of the claimants or such other party may interplead by cross complaint; provided, however, that such claims arise out of the same transaction or occurrence [*Code Civ. Proc. § 386(b)*].

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27-314 California Forms of Pleading and Practice--Annotated § 314.61

§ 314.61 Complaint Alleging Double or Multiple Claims Made on Plaintiff in Excess of Plaintiff's Total Potential Liability

[1] FORM Complaint Alleging Double or Multiple Claims Made on Plaintiff in Excess of Plaintiff's Total Potential Liability

[*Caption. See § 314.60[1][a]* .]

Plaintiff alleges:

[1. *Capacity of plaintiff, if appropriate. See § 314.60[2][a], Paragraph 1.*]

[2. *Capacity and residence of defendants, if appropriate. See § 314.60[1][a], Paragraph 1.*]

[3. *Fictitious name allegation, if appropriate. See § 314.60[1][a], Paragraph 2.*]

4. _____ [*Describe agreement or other means by which plaintiff became liable or obligated or potentially liable or obligated to pay certain or specified sums of money to defendant claimants, e.g.,* On or about _____ (*date*), in the City of _____, County of _____, State of _____, plaintiff executed, issued, and delivered to defendant _____ (*name*) its written _____ (*description of insurance policy, e.g.,* Negligent Act, Error, or Omission) Policy, bearing No. _____. This policy was issued and delivered in consideration of an initial premium of $_____ and an annual premium of $_____ (, which premiums have been paid to plaintiff in accordance with the terms of the policy when the premiums became due, to and including the time when the loss herein alleged occurred *or allege nonpayment of premiums or describe other pertinent terms of policy and defendant insured's failure to comply with such terms*). By the terms of the policy, plaintiff agreed to indemnify defendant _____ (*name*) against loss by reason of liability imposed on him/her by law for damages, among other things, because of accidental injury to, or destruction of, property other than that owned, leased, occupied,

or used by or in the care, custody, or control of defendant _____ (*name*) (*or describe other or further relevant particulars of policy*). (A copy of the insurance policy is attached hereto as Exhibit A and made a part hereof.)]

5. _____ [*Allege event, incident, or other condition which has caused or may cause double or multiple claims to be made on plaintiff, e.g.*, On or about _____ [*date*], (while this policy was in full force and effect and,) while defendant _____ (*name*) was engaged in _____ (*describe activity*), _____ (he/she caused multiple injuries to the persons and properties of defendants _____ [*names*] *or allege incident or other event which caused injuries to defendant claimants*). (Plaintiff is informed and believes and thereon alleges that defendants DOES I- _____, and each of them, have incurred injuries to their persons and property and are potential claimants under the insurance policy, as herein described.)]

6. _____ [*Describe claims made or which may be made against plaintiff, e.g.*, On or about _____ [*date*], defendant _____ (*name of claimant*) instituted an action against defendant _____ (*name of insured*) in the _____ Court of _____ County, California, entitled _____ vs. _____, bearing file Number _____ in the files of the court, to recover damages for personal injuries and injuries to his/her property arising out of the _____ (accident *or describe event, incident, or condition*). On or about _____ [*date*], judgment in this action was duly rendered in favor of defendant _____ (*name of claimant*) for damages in the sum of $_____. (*Describe other actions filed, or which have been threatened to be filed, and judgments, if any, recovered thereon*.) For the loss of this sum, defendant _____ (*name of insured*) has now demanded in writing that he/she be indemnified by plaintiff under the terms of the policy. (A copy of the judgment and of the demand are attached hereto as Exhibit B and made a part hereof.)]

7. [_____ (*Allege any or all denial of liability on the part of plaintiff to any or all defendants, e.g.*, Plaintiff has informed defendant _____ (*e.g., name of insured*) that it denies all liability to him/her arising out of the recovery by defendant(s) _____ (*name*(*s*)) of the aforementioned judgments against him/her on the grounds that _____ (*specify reason, e.g.*, plaintiff's loss was excluded by that provision set forth in the policy of insurance which provides _____ [*state provision and allege facts showing such exclusion*]). (A copy of this writing is attached hereto as Exhibit C and made a part hereof.)]

8. The total amount of claims which have been asserted by defendants, and each of them, against _____ [plaintiff *or* defendant _____ (*e.g., name of insured*)] [, including the aforementioned judgment(s) which has/have been recovered against defendant _____ (*name*) for the total sum of $_____ and those claims on which actions have been threatened to be commenced,] exceeds the total amount of plaintiff's obligation under _____ [*describe agreement or other means by which plaintiff became obligated or potentially obligated to pay certain sum, e.g.*, the insurance policy]. Plaintiff cannot ascertain _____ [the validity of the aforesaid claims made by each defendant *or* what part of the amount of plaintiff's obligation should be paid to each defendant *or both, if appropriate*]. By reason of these multiple, and potentially conflicting, claims plaintiff is in doubt as to which of these defendants, if any, plaintiff may be required to satisfy and what proportion of the total amount of plaintiff's obligation should be equitably distributed between or among the defendants, and each of them, if the total number of valid claims exceeds the total amount of plaintiff's obligation.

8. [Because of the (potentially) conflicting claims of defendants, and each of them, which have been made on _____ (plaintiff *or* defendant _____ [*e.g., name of insured*] for which plaintiff may be potentially liable), plaintiff has paid to the clerk of this court on the filing of this complaint the sum of $_____, being the total amount of plaintiff's obligation.]

9. Plaintiff has incurred attorney fees and costs as a result of these proceedings.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. That defendants, and each of them, be ordered to interplead and litigate their respective rights against defendant _____ [*e.g., name of insured*] and to the sums of money which plaintiff may be obligated to pay defendants, and each of them;

[2. That the court determine the respective rights and duties of plaintiff and defendant _____ (*e.g., name of insured*) under the aforementioned insurance policy with respect to the _____ (*event, incident, or other condition giving rise to multiple claims*);]

3. That the court enter its order restraining defendants, and each of them, from instituting or further prosecuting any other proceeding in any court in California affecting the rights and obligations as between the parties to the interpleader until further order of the court;

4. That plaintiff be awarded costs and reasonable attorney fees to be determined by the court and to be paid out of the _____ [sum of money deposited with the clerk of this court *or* the sum of $_____, being the total amount of plaintiff's obligation to defendant(s) _____ (*name*(*s*)); and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 314.60(1)(a).*]

[2] Use of Form

The form of complaint set out in [1], *above,* is for use by a plaintiff, such as an insurer, indemnifier, or surety, in an action against two or more persons who have made or may make claims against the plaintiff to compel such person to interplead and litigate their several claims when the claims are such that they may give rise to double or multiple liability in excess of the total potential obligation which plaintiff may owe to any or all of the persons [*see Code Civ. Proc. § 386(b)* and discussion in *§ 314.14[2]*].

See also discussion in *§ 314.60[1][b] et seq.*

[3] Allegations

The complaint set out in [1], *above,* alleges in pertinent part the following:

- The nature of plaintiff's obligation (Paragraph 4).

- The event, incident, or other condition which caused or may cause double or multiple claims to be made on plaintiff (Paragraph 5) [*see Code Civ. Proc. § 386(b)*].

- Facts showing the nature of the claims made or which may be made against plaintiff (Paragraph 6).

- Facts showing, when appropriate, that plaintiff denies liability, in whole or in part, to any or all of the claimants (Paragraph 7) [*see Code Civ. Proc. § 386(b)*].

- That the claims are such that they may give rise to double or multiple liability on the part of plaintiff in excess of the total potential obligation which plaintiff may owe to any or all of the defendants (Paragraph 8) [*see Code Civ. Proc. § 386(b)*].

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27-314 California Forms of Pleading and Practice--Annotated § 314.62

§ 314.62 Complaint by Promissor on Promissory Note Seeking to Interplead Promisee, Assignee, and Garnishor

[1] FORM Complaint by Promissor on Promissory Note Seeking to Interplead Promisee, Assignee, and Garnishor

[*Caption. See § 314.60[1][a].*]

Plaintiff alleges:

[1. *Capacity and residence of defendants. See § 314.60[1][a], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate, See § 314.60[1][a], Paragraph 3.*]

3. On or about _____ [*date*], plaintiff executed and delivered to defendant _____ [*name of promisee*] a promissory note in the sum of $_____, in consideration for _____ [*specify*], which note was payable in monthly installments of $_____, commencing on _____ [*date*]. A copy of the promissory note is attached hereto as Exhibit A and made a part hereof.

4. [Plaintiff is informed and believes and thereon alleges that] [O]n or about _____ [*date*], at _____ (*city*), California, _____ [*name of promisee*] assigned in writing all of his/her right to the money then due or thereafter to become due to him/her under the terms of the promissory note. Thereafter, and on or about _____ [*date*], defendant _____ [*name of promisee*] gave notice in writing of this assignment. A copy of the notice is attached hereto as Exhibit B and made a part hereof.

5. On or about _____ [*date*], plaintiff was served with a Writ of Attachment and Notice of Attachment, in an action brought by defendant _____ [*name of garnishor*] against defendant _____ [*name of promisee*] in the _____ Court of _____ County, State of California, being action No. _____, in the files of the court. By the writ and notice of

attachment, defendant _____ [*name of garnishor*] purported to garnish the debt then due or thereafter to become due defendant _____ [*name of promisee*] from plaintiff herein under the terms of the promissory note. A copy of the writ and notice of attachment is attached hereto as Exhibit C and made a part hereof.

6. Defendant _____ [*name of promisee*] has demanded that payment of the promissory note be made to him/her as provided under the terms of the note. Defendant _____ [*name of assignee*] has demanded such payment in the manner provided in the note be made to him/her as of the date that plaintiff received the aforementioned written notice of assignment. Defendant _____ [*name of garnishor*] has demanded that such payment be made to _____ [him/her *or* the levying officer who served the writ and notice of attachment pursuant to the lien created by such service] under the writ and notice of attachment.

7. There is now due and owing under the terms of the promissory note the sum of $_____, which sum plaintiff now holds and is willing to pay to whomever is rightfully entitled. Furthermore, under the provisions of the note, plaintiff is required to pay defendant _____ [*name of promisee*] sums which will come due and owing at the rate of $_____ per month until the full principal and interest of the note are paid.

8. The claims of defendants, and each of them, are made without plaintiff's collusion and plaintiff claims no interest in the proceeds of the note and is indifferent between and among the defendants, and each of them, as to whom the proceeds of the note should be paid.

9. The claims of defendants, and each of them, are adverse and conflicting. Plaintiff is unable to decide the validity of any of them and cannot safely determine for himself/herself to whom the proceeds of the note now due and owing should be paid or to whom the future monthly payments should be paid when such payments become due and owing.

10. Plaintiff has deposited the sum of $_____, being the entire amount due and unpaid under the note at this time, with the clerk of this court contemporaneously with the filing of this complaint. Plaintiff has not deposited any further sums concerning future payments with the clerk of the court since such payments are not now due and owing, but will deposit with the clerk of this court such payments when they become due and owing.

[11. *Costs and attorney fees. See § 314.60[1][a], Paragraph 9.*]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. That defendants, and each of them, be ordered to interplead and litigate their respective rights to the proceeds of the monthly payments of the promissory note;

2. That plaintiff be discharged from any and all liability on account of the claims of any defendant provided that plaintiff pay into the court, or to the party designated by the court, the monthly payments of $_____, when they become due;

3. That each of the defendants be restrained from instituting or further proceeding with any action against plaintiff for recovery of the amount due and payable under the note, so long as plaintiff pays the monthly payments to the court, or to the party designated by the court;

4. That plaintiff be awarded his/her costs and reasonable attorney fees to be determined by the court, from the sums deposited with the clerk of this court; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 314.60[1][a]*.]

[2] Use of Form

The form of complaint set out in [1], *above*, is for use by a promissor on a promissory note in an action to compel the promissee, an assignee, and a garnishor who all make claims to the proceeds of the note to interplead and litigate their claims to the proceeds.

See also discussion in *§ 314.60[1][b] et seq*.

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§ 314.63 Complaint by Issuer of Life Insurance Policy Against Claimants to Proceeds of Policy

[1] FORM Complaint by Promissor on Promissory Note Seeking to Interplead Promisee, Assignee, and Garnishor

[*Caption. See § 314.60[1][a].*]

Plaintiff alleges:

[1. *Capacity of plaintiff. See § 314.60[2][a], Paragraph 1.*]

[2. *Capacity and residence of defendants. See § 314.60[1][a], Paragraph 1.*]

[3. *Fictitious name allegation, if appropriate. See § 314.60[1][a], Paragraph 3.*]

4. On or about _____ [*date*], plaintiff issued its life insurance policy No. _____, in the face amount of $_____, naming _____ [*name of insured*] as the insured thereunder. This policy _____ [was payable to the executors, administrators, and assigns of the insured *or*, when issued and delivered, named as beneficiary thereof _____ (*state names or other, e.g.*, husband of the insured)]. [A copy of this life insurance policy is attached hereto as Exhibit A and made a part hereof.]

5. [The policy required the payment by _____ (*name of insured*) of a stipulated premium on _____ (*date*), and annually thereafter as a condition precedent to its continuance in force. No part of the premium due _____ (*date*), was ever paid and the policy ceased to have any force or effect on _____ (*date*) *or allege other failure of covenant or condition in policy*.]

6. On or about _____ [*date*], _____ [*name of insured*] died in the City of _____, County of _____, State of California, of which death plaintiff received certain proofs on or about _____ [*date*]. [Copies of these proofs are attached hereto as Exhibit B and made a

part hereof.]

7. _____ [*In this paragraph and following paragraphs, set out each of the claims which have been made to insurance proceeds, e.g.,* On or about _____ (*date*), plaintiff received a claimant's certificate from defendant _____ (*name of claimant*) stating that the insured had died on _____ (*date*); that on or about _____ (*date*), the insured executed and delivered to defendant _____ (*name of claimant*) a request for change of beneficiary making the policies payable to defendant _____ (*name of claimant*) as beneficiary, and that, as beneficiary and transferee of the policy, he/she was entitled to receive the entire amount payable thereunder. (A copy of the claimant's certificate is attached hereto as Exhibit C and made a part hereof.)]

8. [On or about _____ (*date*), plaintiff received written notification from defendant _____ (*name of claimant*) that he/she claims to be entitled to all or a portion of the proceeds of the policy by reason of being the duly appointed, qualified, and acting Special Administrator of the Estate of _____ (*name*), deceased, with general powers. (A copy of this notification is attached hereto as Exhibit D and made a part hereof.)]

9. [Defendant _____ (*name of executor*) _____ (claims *or* may claim) to be entitled to all or a portion of the proceeds of the policy on the basis that as the named Executor on the Will of _____ (*name of insured*), he/she is entitled to the amount due on the policy under the original designation in the policy, designating as beneficiary thereof the executors, administrators, and assigns of the insured. (Plaintiff is informed and believes and thereon alleges that defendant _____ [*name of executor*] has filed objections to the appointment of defendant _____ [*name of claimant*] as Special Administrator of the Estate of _____, (*name*), deceased, and has sought and still seeks to have the aforementioned Will admitted to probate with himself/herself as executor thereof.)]

10. [Defendants _____ (*name of minors*) _____ (claim *or* may claim) to be entitled to all or a portion of the proceeds of the insurance policy by reason of being heirs of _____ (*name of insured*). (Plaintiff is informed and believes and thereon alleges that defendant _____ [*name of minor*], by _____ [*name of guardian*] has filed a Contest of Will before the probate court with respect to the Will of _____ [*name of insured*].)]

11. [Plaintiff does not know whether the aforementioned request for change of beneficiary is or is not effective and valid as between the defendants, and the validity and effectiveness of the request cannot be ascertained until the conflicting claims have been settled. Plaintiff also cannot determine, if such request is found to be ineffective, whether the claims of the defendant minors have any validity or who is entitled under the law to administer the estate of _____ (*name of insured*) and would thus be entitled to the proceeds of the policy under the terms of the original beneficiary designation in the policy to the proceeds of the policy *or allege other facts showing basis for doubt as to who is entitled to insurance proceeds*.]

12. Plaintiff files this complaint in good faith and without any collusion with any of the parties hereto. [Plaintiff claims no beneficial interest in the sum of $_____, the amount of the proceeds under the policy, and is a mere stakeholder.] Plaintiff cannot determine which of the defendants is entitled to payment of the amount due on the policy and cannot pay any part of the sum without danger of being compelled to pay the same part to each of the defendants herein.

13. [Plaintiff has deposited with the clerk of this court at the time of the filing of this complaint, there to remain subject to the outcome of this action, the sum of $_____, the amount which _____ (is *or* would be) payable under the policy.]

[14. *Costs and attorney fees. See § 314.60[1][a], Paragraph 9.*]

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

[1. That none of the defendants is entitled to recover from plaintiff the amount of the aforementioned life insurance policy No. _____;]

2. That [, if the court should determine that the policy was in effect and in force at the death of _____ (*name of insured*),] the defendants, and each of them, be required to interplead and litigate between themselves their rights to the money due under the policy, and that plaintiff be discharged from all liability to the defendants, and each of them, except to the person whom the court should adjudge is entitled to the amount of the policy;

3. That the court enter its order restraining defendants, and each of them, from instituting or further prosecuting any other proceeding in any court in California affecting the rights and obligations as between the parties to the interpleader until further order of the court;

4. That plaintiff be awarded costs and reasonable attorney fees to be determined by the court and to be paid out of the proceeds of the policy; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 314.60[1][a].*]

[2] Use of Form

The form of complaint set out in [1], *above,* is for use by an issuer of a life insurance policy in an action to compel various claimants to the proceeds of the policy to interplead and litigate their several claims to the proceeds.

See also discussion in *§ 314.60[1][b] et seq.*

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Chapter 314 INTERPLEADER
PART IV. FORMS
A. Complaints in Interpleader

27-314 California Forms of Pleading and Practice--Annotated § 314.64

§ 314.64 Complaint by Lessee Against Lessor and Conflicting Claimant

[1] FORM Complaint by Lessee Against Lessor and Conflicting Claimant

[*Caption. See § 314.60[1][a].*]

Plaintiff alleges:

[1. *Capacity of plaintiff, if appropriate. See § 314.60[2][a], Paragraph 1.*]

[2. *Capacity and residence of defendants. See § 314.60[1][a], Paragraph 1.*]

[3. *Fictitious name allegation, if appropriate. See § 314.60[1][a], Paragraph 3.*]

4. On or about _____ [*date*], defendant _____ [*name*] and plaintiff entered into a certain written lease agreement designated _____ [*specify, e.g.*, "Oil and Gas Lease"] under the terms of which plaintiff was to _____ [*specify business or activity, e.g.*, drill certain oil wells for the purpose of the removal of oil and gas] on the following described _____ [real property *or* premises]: _____ [*set out legal description or, if appropriate, state street address and city*]. [A copy of the lease is attached hereto as Exhibit A and made a part hereof.]

5. _____ [*Allege terms for payment of rental or royalties in lease, e.g.*, Under the terms of the lease plaintiff was to pay defendant _____ (*name*) as rent and royalties for _____ (*describe activity, e.g.*, the removal of oil and gas from the leased property) a sum equal to _____ percent of _____ (net profits *or* gross sales *or specify other*) from the sale(s) by plaintiff of _____ (*specify, e.g.*, oil and gas), computed and payable as more particularly set out in the lease].

6. Plaintiff entered into possession of the above-described _____ [real property *or* premises] for the

purposes set forth in the lease and _____ [occupied the _____ (property *or* premises) until _____ (*date*) *or* continues to occupy the _____ (property *or* premises)].

7. Plaintiff has paid the sum of $_____ as rent and royalty to defendant for that period of time commencing with the date on which plaintiff entered into possession of the _____ [real property *or* premises] and continuing until _____ [*date*]. Plaintiff now holds the sum of $_____ as accumulated rent and royalties owing under the lease for that period of time commencing on _____ [*date*], and continuing until _____ [the date on which this complaint was filed *or specify date*].

8. _____ [*Allege conflicting claim to rent or royalties, e.g.*, On or about _____ (*date*), defendant _____ (*name of claimant*) instituted an action against plaintiff in the _____ Court of _____ County, California, entitled _____ vs. _____, bearing file Number _____ in the files of the court, in which action defendant _____ (*name*) asserted that he/she/it held the _____ (real property *or* premises) described in the lease in trust for _____ (*name*(*s*)) and sought as relief an accounting of the rents and royalties of the _____ (real property *or* premises)].

9. Both defendants _____ [*name of lessor*] and _____ [*name(s) of claimant(s)*] claim to be the owners of the _____ [real property *or* premises] leased to plaintiff and claim to be entitled to all of the rents [and royalties] which have accrued since _____ [*date*], and which plaintiff has not paid to any of the defendants. Plaintiff claims no interest in these rents [and royalties] and as to them is a mere stakeholder. By reason of these conflicting claims plaintiff cannot safely determine to whom the rents [and royalties] should be paid and cannot pay any part of such rents [and royalties] without danger of being compelled to pay the same part to each defendant.

10. [Plaintiff has deposited the sum of $_____, being the entire amount of accrued rents (and royalties) due and owing under the lease which have not been paid to defendant _____ (*name of lessor*). (Plaintiff will continue to deposit all rents [and royalties] which accrue and become due and owing under the lease with the clerk of this court until the time when the court determines which defendant(s) is entitled to such rents [and royalties].)]

[11. *Costs and attorney fees. See § 314.60[1][a], Paragraph 9.*]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. That defendants be ordered to interplead and litigate their respective rights to the rents [and royalties] which have accrued [and will continue to accrue] under the terms of the above-described lease;

2. That plaintiff be discharged from any and all liability on account of the claims of [the *or* any of the] defendant(s), [provided that plaintiff pay into the court, or to the party designated by the court, those rents (and royalties) which have accrued under the lease after the date of the filing of this complaint];

3. That the court enter its order restraining the defendants, and each of them, from further prosecuting or instituting any other proceeding in any court in California affecting the rights and obligations as between the parties to the interpleader until further order of the court;

4. That plaintiff be awarded costs and reasonable attorney fees to be determined by the court and to be paid out of the accrued rents [and royalties]; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 314.60[1][a]*.]

[2] Use of Form

The form of complaint set out in [1], *above,* is for use by a lessee in an action to compel the landlord and a conflicting claimant who each assert an exclusive right to the rents and/or royalties to be paid by the lessee under the terms of the lease to compel them to interplead and litigate their claims to the rent and/or royalties.

See also discussion in *§ 314.60[1][b]* et seq.

[3] Continual Deposits Into Court

When a court orders the plaintiff to make continual deposits with the clerk of the court as such deposits become due, the propriety of interpleading further amounts may be left open.

Although a court may find that a plaintiff is subject to the risk of double vexation for the amount then on deposit, such a finding is not the same as a finding that there may be conflicting claims to all sums that may become due under the contract or other agreement in question in any amount forever, since there may well be a time when the amount deposited with the court is in excess of the amount owing to any or all of the conflicting claimants. In such a case, a plaintiff cannot continue to allege that further deposits are necessary for its protection and, as a result, the plaintiff remains an active party litigant with respect to such amounts in excess [*see Great-West Life Assur. Co. v. Superior Court (1969) 271 Cal. App. 2d 124, 127-128, 76 Cal. Rptr. 284]* .

However, it would appear that a plaintiff would not remain an active party litigant on receiving a discharge from the interpleader action, conditioned on the making of continual deposits into court as they become due, if the adjudication of the rights and obligations between the remaining defendant litigants would decide completely plaintiff's obligations with respect to the amounts due and to become due [*see Signal Oil & Gas Co. v. Taliaferro (1962) 207 Cal. App. 2d 271, 273-276, 24 Cal. Rptr. 593* (affirming plaintiff's right to interplead conflicting claimants to rent and court's order of discharge conditioned on plaintiff's making continual deposits of rent payments into court)].

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A. Complaints in Interpleader

27-314 California Forms of Pleading and Practice--Annotated §§ 314.65-314.69

[Reserved]

§§ 314.65[Reserved]

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B. Cross Complaints in Interpleader

27-314 California Forms of Pleading and Practice--Annotated § 314.70

§ 314.70 Cross Complaint by Defendant Against Plaintiff and Third Party

[1] FORM Cross Complaint by Defendant Against Plaintiff and Third Party

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	
_____ [*name*], [and DOES I	)	NO. _____
through _____,] Defendants.	)	CROSS COMPLAINT IN INTERPLEADER
_____ [*name*], Cross Complain-	)	
ant,	)	
vs.	)	
_____ [*name*], Cross Defend-	)	
ants.		
_____		

Cross Complainant alleges:

[1. *Capacity of cross defendants, if appropriate. See § 314.60[1][a], Paragraph 1.*]

2. _____ [*Allege facts giving rise to cross complainant's obligation to pay money or deliver property, e.g.*, On or about _____ [*date*], plaintiff _____ (*name*) and cross complainant entered into a written contract by the terms of which plaintiff agreed to _____ (*specify performance*) and cross complainant agreed to pay plaintiff therefor the sum of $_____ on _____ (*specify date*)].

3. [_____ (*Allege facts showing cross complainant's partial interest in amount or specific personal*

property sued for, e.g., On or about _____ [*date*], plaintiff breached the contract by _____ (*specify*), as a proximate result of which cross complainant has _____ (*specify detriment suffered*), (all) to his/her damage in the sum of $_____. Cross complainant is entitled to set off this sum against the amount owing under the contract. The difference is $_____, and this is the total amount cross complainant admits is owing to cross defendants or to either of them.]

[4. *Allegation of cross complainant's lack of interest in the amount admitted to be owing or in the entire subject matter in dispute. See § 314.60[1][a], Paragraph 5.*]

[5. *Allegation of new party cross defendant's adverse claim to proceeds of contract or specific personal property. See § 314.60[1][a], Paragraph 4.*]

[6. *Allegation of adverse nature of claims. See § 314.60[1][a], Paragraph 6.*]

[7. *Deposit of full sum in dispute or undisputed portion of sum with court clerk. See § 314.60[1][a], Paragraph 8.*]

[8. *Costs and attorney fees. See § 314.60[1][a], Paragraph 9.*]

WHEREFORE, cross complainant prays judgment against cross defendants as follows:

[1. That cross complainant is entitled to set off against the amount prayed for in the complaint herein the sum of $_____ as compensatory damages for plaintiff's breach of the contract;]

2. That cross defendants be ordered to interplead and litigate their respective claims to the _____ [money sued for (and admittedly owing) *or describe specific property sued for*];

3. That cross complainant be discharged from any and all liability on account of the claims of each of the cross defendants [on delivery of the property or its value to such person as the court directs];

4. That each of the cross defendants be restrained from instituting or further prosecuting any proceeding or action against cross complainant for recovery of the _____ [amount *or describe personal property*] sued for;

5. That cross complainant be awarded [from the money deposited with the clerk of this court] his/her costs and reasonable attorney fees [incurred in pursuing the interpleader remedy] in an amount to be determined by the court; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Cross Complainant _____ [*name*]

[*Verification. See § 314.60[1][a].*]

[2] Use of Form

The form of cross complaint set out in [1], *above,* is for use by a defendant against whom an action is pending on a contract, or for specific personal property, and on whom a demand for the money due on the contract, or for the property, has been made by a person not a party to the action to compel the plaintiff and such other person to interplead and litigate their claims to the money or property [*see Code Civ. Proc. § 386(a)*].

In lieu of filing a cross complaint in interpleader, a defendant who has no interest in the money or property sued for may, before answer, move by noticed motion for the substitution of the nonparty in place of defendant and defendant's discharge from liability [*Code Civ. Proc. § 386(a)*; *see § 314.110*], or, in the case of multiple defendants, when the only relief sought against one of them is the payment of a stated amount of money alleged to be wrongfully withheld, that defendant may, by noticed motion, move for his or her discharge from liability and dismissal from the case as a mere stakeholder [*Code Civ. Proc. § 386.5*; *see § 314.116*].

The form under [1], *above,* of cross complaint in interpleader is intended only to present a suggested format which may be followed when a defendant seeks to interplead the plaintiff and a person not a party to the action as provided in *Code Civ. Proc. § 386(a)*. It may, however, be adapted for use by a defendant against whom an action has been brought on one or more claims as described in *Code Civ. Proc. § 386(b)* [*see* discussion in *§ 314.60[2]*].

See also discussion in *§ 314.60[1][b] et seq.*

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B. Cross Complaints in Interpleader

27-314 California Forms of Pleading and Practice--Annotated §§ 314.71-314.79

[Reserved]

§§ 314.71[Reserved]

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PART IV. FORMS
C. Answer to Complaint or Cross Complaint in Interpleader

27-314 California Forms of Pleading and Practice--Annotated § 314.80

§ 314.80 Answer to Complaint or Cross Complaint in Interpleader

[1] FORM Answer to Complaint or Cross Complaint in Interpleader

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*EITHER, if answer to complaint in interpleader*]

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], [and DOES I	)	ANSWER TO COMPLAINT IN INTERPLEADER
through _____,] Defendant(s).	)	
	)	

_____

[*OR, if answer to cross complaint in interpleader*]

_____ [*name*], Plaintiff,	)	
vs.	)	
_____ [*name*], [and DOES I	)	NO. _____
through _____,] Defendant(s).	)	ANSWER TO CROSS COMPLAINT IN INTER-
_____ [*name*], Cross Complain-	)	PLEADER
ant,	)	
vs.	)	
_____ [*name*], Cross Defend-	)	
ants.		

_____

[*CONTINUE*]

_____ [Defendant *or* Cross defendant] _____ [*name*] answers the _____ [complaint *or* cross complaint] herein as follows:

1. _____ [Defendant *or* Cross defendant] admits each and every allegation set forth in Paragraph(s) _____ of the _____ [complaint *or* cross complaint] herein, and, in particular, the allegation that _____[plaintiff *or* cross complainant] has no interest in the _____ [sum of $_____ *or describe personal property*] [, or in any portion thereof,] as alleged in Paragraph(s) _____ thereof.

2. _____ [Defendant *or* Cross defendant] denies each and every allegation set forth in Paragraph(s) _____ of the _____ [complaint *or* cross complaint] [and, in particular, the allegation that there is a conflict between this answering (cross) defendant and (cross) defendant _____ (*name of other interpleaded claimant*) over the _____ (sum of money *or* property) as alleged in Paragraph(s) _____ thereof (and affirmatively alleges that there is no such conflict)].

3. This answering [cross] defendant further denies that [cross] defendant _____ [*name of adverse claimant*] has any right to or interest in the _____ [sum of $_____ as alleged *or* property described] in Paragraph(s) _____ of the _____ [complaint *or* cross complaint] herein [, other than _____ (the sum of $_____ *or describe property*),] for the reason that _____ [*specify*].

4. _____ [*Allege facts in this paragraph, and in succeeding paragraphs if required, showing (cross) defendant's right to the money or property in dispute, e.g.*, On or about _____ (*date*), the contract referred to in Paragraph _____ of the _____, (complaint *or* cross complaint) herein was duly assigned in writing by (cross) defendant _____ (*name of adverse claimant*) to this answering (cross) defendant, and, thereafter, on or about _____ (*date*), notice of the assignment was given to _____ (plaintiff *or* cross complainant). A copy of the assignment and a copy of the notice are attached hereto as Exhibits A and B, respectively, and made a part hereof. By the terms of the assignment, this answering (cross) defendant has been and now is entitled to the full sum of $_____].

[AS A (FIRST) SEPARATE AND AFFIRMATIVE DEFENSE, (cross) defendant alleges:

_____ (*Set forth any facts constituting affirmative defense*).]

[*Continue as above, setting forth each affirmative defense in a separate paragraph.*]

WHEREFORE, this answering [cross] defendant prays judgment as follows:

[1. For a determination that this is not a proper case for interpleader and that _____ (plaintiff *or* cross complainant) is therefore not entitled to compel (cross) defendants to interplead and litigate their claims to the _____ (money *or* property) in question;]

2. That the _____ [money *or* property] in question be awarded to this answering [cross] defendant; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for [Cross] Defendant _____ [*name*]

[*Verification, if required. See § 314.60[1][a]*.]

[2] Use of Form

The form of answer set out in [1], *above*, is for use by a defendant or cross defendant in an action or cross action in interpleader. A defendant or cross defendant in interpleader is permitted, in lieu of or in addition to any other pleading, to file an answer to a complaint or cross complaint in interpleader which may contain allegations of fact as to such defendant's or cross defendant's ownership of or other interest in the amount of property, any affirmative defenses, and the relief requested [*see Code Civ. Proc. § 386(d)*; *San Francisco Sav. Union v. Long (1898) 123 Cal. 107, 109, 55 P. 708]* .

The answer must be served on all other parties to the action and its allegations are deemed denied by the other parties, unless otherwise admitted in the pleadings [*see Code Civ. Proc. § 386(d)*].

The form of answer under [1], *above*, is intended only to present a suggested format which may be followed by a defendant or cross defendant in interpleader under *Code Civ. Proc. § 386(a)*. It may, however, be adapted for use by a defendant or cross defendant in interpleader under *Code Civ. Proc. § 386(b)*.

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27-314 California Forms of Pleading and Practice--Annotated §§ 314.81-314.89

[Reserved]

§§ 314.81[Reserved]

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D. Enjoining Actions Affecting Parties in Interpleader

27-314 California Forms of Pleading and Practice--Annotated § 314.90

§ 314.90 Order to Show Cause and Temporary Restraining Order Enjoining Defendants From Prosecuting or Instituting Actions Affecting Rights and Obligations of Parties in Interpleader

[1] FORM Order to Show Cause and Temporary Restraining Order Enjoining Defendants From Prosecuting or Instituting Actions Affecting Rights and Obligations of Parties in Interpleader

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], [and DOES I	)	
through _____,] Defendant(s).	)	
	)	

_____

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

On reading and filing the verified complaint of plaintiff herein, and good cause appearing therefor,

IT IS HEREBY ORDERED THAT all of the defendants named in this action be and appear before the above-entitled court in the courtroom of _____ [*specify department, judge, or other*] at _____ [*address*], on _____ [*date*], at the hour of _____ [*time*], then and there to show cause, if any they have, why the above-entitled court should not make its order restraining and enjoining during the pendency of this action defendants, and each of them, and their agents, servants, employees, representatives, and all persons acting in concert or participating with them from prosecuting any and all proceedings and all actions at law now pending, or from bringing any proceeding or action against plaintiff affecting the rights and obligations as between the parties in this action with respect to the _____ [money *or* property *or specify subject matter in dispute*

more particularly] which is the subject matter of this action [and which plaintiff has deposited with the clerk of this court].

IT IS FURTHER ORDERED that pending the hearing and determination of the order to show cause herein, the defendants, and each of them, and their agents, servants, employees, representatives, and all persons acting in concert or participating with them be, and they are hereby, restrained and enjoined from prosecuting any and all proceedings and all actions at law now pending against plaintiff or from bringing any proceeding or action against plaintiff affecting the rights and obligations as between the parties in this action with respect to the _____ [money *or* property *or specify subject matter in dispute more particularly*].
Dated:_____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is an order to show cause and temporary restraining order for use by plaintiff in an action in interpleader in order to restrain the prosecution or institution of any action or proceeding which affects the rights and obligations as between the parties to the interpleader [*see Code Civ. Proc. §§ 386(f), 527*]. If plaintiff does not seek a temporary restraining order, he or she may obtain preliminary injunctive relief by the noticed motion procedure [*see Fidelity & Deposit Co. v. Santa Monica Fin. Co. (1960) 182 Cal. App. 2d 211, 214, 6 Cal. Rptr. 213* ; *see also* Ch. 393, *Injunctions*].

See also discussion in *§ 314.60[1][b]* et seq.

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27-314 California Forms of Pleading and Practice--Annotated § 314.91

§ 314.91 Preliminary Injunction Enjoining Defendants From Prosecuting or Instituting Actions Affecting Rights and Obligations of Parties in Interpleader

[1] FORM Preliminary Injunction Enjoining Defendants From Prosecuting or Instituting Actions Affecting Rights and Obligations of Parties in Interpleader

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], [and DOES I	)	PRELIMINARY INJUNCTION
through _____,] Defendant(s).	)	
	)	

_____

The order heretofore issued by the above-entitled court on _____ [*date*] requiring the defendants, and each of them, to show cause why the above-entitled court should not make an order for a preliminary injunction herein, restraining and enjoining during the pendency of this action, defendants, and each of them, and their agents, servants, employees, representatives, and all persons acting in concert or participating with them from doing the things herein mentioned came on regularly for hearing before the above-entitled court on the _____ day of _____ [*date*]. _____ [*Name*] appeared as counsel for plaintiff and _____ [*names*] appeared as counsel for defendants.

Proof having been made to the satisfaction of the court, and good cause appearing therefor,

IT IS HEREBY ORDERED that all defendants named in this action, their agents, servants, employees, representatives, and all persons acting in concert or participating with them, and each of them, is hereby restrained and enjoined until further notice and order from this court from prosecuting any and all proceedings and any and all actions at law now

pending, or from bringing any proceeding or action against plaintiff affecting the rights and obligations as between the parties in the action with respect to the _____ [money *or* property *or specify subject matter in dispute more particularly*] which is the subject matter of this action [and which plaintiff has deposited with the clerk of this court].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form set out in [1], *above*, is a proposed order of preliminary injunction for use by a plaintiff in interpleader after a hearing has been held on an order to show cause why the defendants in plaintiff's interpleader action should not be restrained from prosecuting or instituting any other action affecting the rights and obligations of the parties to the interpleader.

See also discussion under *§ 314.90*.

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27-314 California Forms of Pleading and Practice--Annotated §§ 314.92-314.99

[Reserved]

§§ 314.92[Reserved]

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E. Proceedings for Discharge of Interpleading Party

27-314 California Forms of Pleading and Practice--Annotated § 314.100

§ 314.100 Interlocutory Order of Discharge Directing Parties to Interplead

[1] FORM Interlocutory Order of Discharge Directing Parties to Interplead

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], [and DOES I	)	INTERLOCUTORY ORDER OF DISCHARGE
through _____,] Defendant(s).	)	
	)	

_____

This cause came regularly for trial on _____ [*date*], in Department No. _____ of the above-entitled court, the Honorable _____, Judge, presiding, sitting without a jury. Plaintiff appeared by _____ [*name of attorney*], defendant _____ [*name*] appeared by his/her attorney _____ [*name*], and defendant _____ [*name*] appeared by his/her attorney _____ [*name*], and oral and documentary evidence having been presented and the cause having been argued and submitted for decision [, and the court having heretofore filed its written findings of fact and conclusions of law herein,] and the court having found that this cause in interpleader has been properly brought,

[NOW, THEREFORE, IT IS ORDERED that plaintiff be, and he/she is hereby, relieved and discharged from this case and from further liability or responsibility arising out of the rights and obligations of the parties to this action with respect to _____ (sum of money which plaintiff has deposited with the clerk of the court *or* following described personal property: _____ [*give description or specify subject matter in dispute more particularly*]).]

_____ [IT IS FURTHER ORDERED *or* NOW, THEREFORE, IT IS ORDERED] that defendant

_____ [*name*] and defendant _____ [*name*] be, and they hereby are, directed to interplead and litigate their claims to the above-described _____ [sum of money *or* property *or specify other*] amongst themselves.

[*EITHER*]

IT IS FURTHER ORDERED that plaintiff have and recover the sum of $_____ as costs for suit herein and the sum of $_____ as reasonable attorney fees incurred in this action, to be paid from the _____ [fund heretofore deposited with the clerk of this court by plaintiff *or* fund *or* property *or specify subject matter in dispute more particularly*].

[*OR*]

[IT IS FURTHER ORDERED that the court hereby retain jurisdiction over all matters affecting the rights and obligations of each of the above-named defendants with respect to the _____ (sum of money [deposited with clerk of the court by plaintiff] *or* above-described property *or specify subject matter in dispute more particularly*) (and that plaintiff deposit _____ [this sum *or* this property *or specify subject matter in dispute more particularly*] to await) a determination of the total _____ (amount *or* value *or specify more particularly*) for which plaintiff may be liable to any of the above-named defendants and a determination of the sum of money to which plaintiff may be entitled for the costs of suit and attorney fees incurred herein and the manner in which payment of such sum should be made.]

[*CONTINUE*]

Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above,* is an interlocutory order of discharge for use by a plaintiff in interpleader when a trial was necessary concerning the issues involving the propriety of the plaintiff's right to bring the action in interpleader. It should be noted that such a trial is not necessary when the allegations of the complaint, coupled with the admissions in the answer, show that the plaintiff was entitled to the relief requested [*see Williams v. Gilmore (1942) 51 Cal. App. 2d 684, 689, 125 P.2d 539]* . Moreover, even when there is a dispute as to the propriety of interpleader, the action may normally be disposed of on plaintiff's motion for discharge as discussed in *§ 314.60[1]*.

The form in [1], *above,* may be used when the plaintiff is not completely discharged and the court retains jurisdiction over the manner of plaintiff's discharge. This would be required when the court orders the plaintiff to make further deposits into the court and there is a possibility that such deposits would not be necessary for the plaintiff's protection [*see Great-West Life Assur. Co. v. Superior Court (1969) 271 Cal. App. 2d 124, 127-128, 76 Cal. Rptr. 284]* or fails to make a determination of the amount of costs and attorney fees to which the plaintiff is entitled [*see Great-West Life Assur. Co. v. Superior Court (1969) 271 Cal. App. 2d 124, 128, 76 Cal. Rptr. 284]* or in the event that the amount deposited is less than the amount claimed to be due, or that the property or the value thereof is lessthan all of the property or the value thereof claimed by any of the conflicting claimants [*see Code Civ. Proc. § 386(e)*].

See also discussion in *§ 314.60[1][b]* et seq.

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27-314 California Forms of Pleading and Practice--Annotated § 314.101

§ 314.101 Stipulation for Interlocutory Order of Discharge and Award of Costs and Attorney Fees

[1] FORM Stipulation for Interlocutory Order of Discharge and Award of Costs and Attorney Fees

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], [and DOES I	)	STIPULATION FOR ORDER OF DISCHARGE
through _____,] Defendant(s)	)	AND AWARD OF COSTS AND ATTORNEY FEES
	)	AND ORDER THEREON
_____		

It is hereby stipulated by and between the parties to the above-entitled action that an order discharging plaintiff herein and awarding him/her costs and attorney fees, in the manner described in the form of order attached hereto and made a part hereof, may be made and entered in the above-entitled action.

Dated: _____.

[*Set forth signatures of parties and attorneys as appropriate, e.g.:*]

_____ [*signature*]

_____ [*typed name*] Plaintiff

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

_____ [*signature*]

_____ [*typed name*]

Defendant

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

_____ [*signature*]

_____ [*typed name*]

Defendant

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

ORDER

On reading [and filing] the stipulation of the parties hereto for an order discharging plaintiff herein, and the _____ [amount of $_____ which plaintiff admits to be payable to one of the defendants herein *or* property in dispute, namely: _____ (*give description*) which plaintiff admits to having no interest in], _____ [having been deposited by plaintiff with the clerk of the above-entitled court at the time of the filing of the complaint herein *or* being held by plaintiff for delivery to whichever defendant the court may find is entitled to such _____ (amount *or* property)],

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. That plaintiff be and is hereby discharged from any and all liability to any or all of the defendants in the above-entitled action for, or on account of, any transaction, matter, happening, or thing in any way arising out of the rights and obligations of the parties with respect to _____ [the amount of $_____ *or* the above-described property *or specify subject matter more particularly*], and that defendants, and each of them, be and by this order are restrained from taking any proceeding or commencing any action against plaintiff, for, or on account of, any transaction, matter, happening, or thing in any way arising out of the rights and obligations of the parties with respect to such _____ [amount *or* property *or specify more particularly*] [on the deposit of this _____ (amount *or* property *or specify other conditions*)].

2. That the sum of $_____ as costs and $_____ as attorney fees be paid to plaintiff as costs and attorney fees incurred by plaintiff in this action, and to be paid _____ [out of the sum of money deposited with the clerk of this court *or specify other manner of payment*].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form set out in [1], *above*, of stipulation for an interlocutory order of discharge and accompanying proposed order, is for use by a plaintiff in interpleader when there is no dispute as to the propriety of the interpleader action, or the amount or property deposited or offered for deposit or delivery.

See also discussion in *§ 314.60[1][b] et seq.*

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27-314 California Forms of Pleading and Practice--Annotated § 314.102

§ 314.102 Notice of Motion for Order of Discharge and Award of Costs and Attorney Fees

[1] FORM Notice of Motion for Order of Discharge and Award of Costs and Attorney Fees

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR OR-
vs.	)	DER OF DISCHARGE AND AWARD OF COSTS
_____ [*name*],	)	AND ATTORNEY FEES
[and DOES I through _____,]	)	Date: _____
Defendant(s).	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To defendant _____ [*name*] and to _____ [*name*], his/her attorney of record:

To defendant _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], plaintiff will, and hereby does, move for an order that plaintiff be discharged from this case and from all liability involving the rights and obligations of the parties to this action arising out of the _____ [sum of money which plaintiff has deposited with the

clerk of the court *or* following described personal property: _____ (*give description*) *or specify subject matter in dispute more particularly*] to which the above-named defendants have made claims and that plaintiff be awarded costs and reasonable attorney fees incurred in bringing his/her action in interpleader. The motion will be made on the ground that plaintiff holds this _____ [sum of money *or* property *or specify subject matter in dispute more particularly*] without claiming any right or interest therein and that plaintiff _____ [has deposited this money with the clerk of the court to be delivered *or* is willing to deposit this _____ (sum *or* property *or specify subject matter in dispute more particularly*) for delivery] to whichever defendant may establish his/her right therein.

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum of points and authorities servedand filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing on the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The form set out in [1], *above*, of notice of motion for an order of discharge and award of costs and attorney fees, is for use by a plaintiff in interpleader either in lieu of a stipulation for such an order or when plaintiff was unable to obtain a stipulation for such an order because of a dispute as to the propriety of the interpleader action, the amount in dispute, or the amount of costs and attorney fees to which plaintiff may be entitled.

A memorandum in support of the motion must be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

See also discussion in *§ 314.60[1][b]* et seq.

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27-314 California Forms of Pleading and Practice--Annotated § 314.103

§ 314.103 Interlocutory Order Granting Motion for Discharge and Award of Costs and Attorney Fees

[1] FORM Interlocutory Order Granting Motion for Discharge and Award of Costs and Attorney Fees

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER GRANTING MOTION FOR DISCHARGE
[and DOES I through _____,]	)	AND ATTORNEY FEES
Defendant(s).	)	
	)	
	)	

The motion of plaintiff for an order discharging plaintiff from this case and from all liability and awarding plaintiff costs and reasonable attorney fees came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant _____ [*name*] appeared by counsel _____ [*name*] and defendant _____ [*name*] appeared by counsel _____ [*name*].

Upon proof made to the satisfaction of the court, the court finds that plaintiff properly brought the complaint in interpleader, [and] that he/she held the _____ [sum of money which plaintiff has deposited with the clerk of the court *or* following described property: _____ (*give description*) *or specify subject matter in dispute more particularly*] without claiming any right or interest therein [, and that plaintiff is willing to deposit with the clerk of the court this _____ (sum *or* property *or specify subject matter in dispute more particularly*) for delivery to whichever defendant may establish his/her right therein]. The court further finds that plaintiff has incurred costs of $_____ and reasonable attorney fees of $_____ in

this action.

THEREFORE, IT IS ORDERED that the motion be and it hereby is granted and that plaintiff be and hereby is discharged from this case and discharged from all liability on or arising out of the rights and obligations of the parties to this action with respect to the _____ [sum of money *or* property *or specify subject matter in dispute more particularly*] [on the deposit by plaintiff of such _____ (sum of money *or* property *or specify subject matter in dispute more particularly*) with the clerk of this court].

IT IS FURTHER ORDERED that plaintiff be and hereby is awarded the sum of $_____ as costs and the sum of $_____ as reasonable attorneyfees incurred by plaintiff in this action to be paid out of the proceeds [to be] deposited with the clerk of this court.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use by a plaintiff in interpleader when the court has granted the plaintiff's motion for a discharge and award of costs and attorney fees incurred in the interpleader action.

See also discussion in *§§ 314.60[1][b] et seq.* and *314.102[2]*.

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[Reserved]

§§ 314.104[Reserved]

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27-314 California Forms of Pleading and Practice--Annotated § 314.110

§ 314.110 Notice of Motion for Order to Substitute Adverse Claimant in Place of Defendant and for Costs and Attorney Fees

[1] FORM Notice of Motion for Order to Substitute Adverse Claimant in Place of Defendant and for Costs and Attorney Fees

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR OR-
vs.	)	DER FOR SUBSTITUTION AND DISCHARGE OF
_____ [*name*],	)	DEFENDANT
[and DOES I through _____,]	)	Date: _____
Defendant(s).	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To plaintiff and to _____ [*name*], his/her attorney of record:

To _____ [*name of claimant to be substituted as party defendant*]:

NOTICE IS HEREBY GIVEN that on_____ [*date*], at_____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], defendant will, and hereby does,

move for an order to substitute _____ [*name of claimant to be substituted*] as defendant in this action in the place of defendant herein and to discharge defendant herein from liability to either plaintiff _____ [*name of claimant to be substituted*] on the _____ [deposit of the sum of $_____ with the clerk of this court *or* delivery of the property described in plaintiff's complaint herein or its value to such person as the court may direct]. Defendant will also move for an order allowing him/her to recover costs and reasonable attorney fees incurred in the action herein to be paid out of the _____ [sum of money to be deposited *or* value of the property to be delivered *or specify other subject matter in dispute*].

The motion will be made on the grounds that the cause of action alleged in plaintiff's complaint is _____ [on a contract *or* for specific personal property], namely: _____ [*describe contract or property*]; that _____ [*name of claimant to be substituted*] has made a demand consisting of _____ [*describe claim*] _____ [on such contract *or* for such property], without any collusion with defendant herein; that defendant herein has no interest in _____ [the proceeds of such contract *or* such property] claimed by plaintiff and _____ [*name of claimant tobe substituted*]; and that defendant cannot safely determine which claim is valid.

The motion will be based on this notice of motion, on the declaration of _____ [*name*], defendant herein, and the memorandum of points and authorities served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing on the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

for Defendant _____ [*name*]

[2] Use of Form

The form of notice of motion set out in [1], *above*, is for use by a defendant, against whom an action is pending on a contract, or for specific personal property, in applying, before answer, for an order to substitute a person who has made a demand against the defendant on such contract, or for such property, in the place of defendant, and to discharge the defendant from liability to either the party or the person, on the deposit in court of the amount claimed on the contract, or the delivery of the property or its value to such person as the court directs [*see Code Civ. Proc. § 386(a)*].

A defendant who makes such application must accompany the form under [1], *above*, with an affidavit (or declaration under penalty of perjury under *Code Civ. Proc. § 2015.5*) stating that such person has made a demand on such contract, or for such property, against the defendant without defendant's collusion [*see § 314.111*].

A memorandum in support of the motion must be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[3] Filing of Answer Before Making Application or Granting of Order

The requirement that a defendant apply for an order to substitute a person not a party to the action in the place of defendant before filing an answer, as is required under *Code Civ. Proc. § 386(a)*, is not a jurisdictional prerequisite. Hence, the court in the exercise of its discretion has the power to permit an answer which has been filed before the defendant applied for an order of substitution under *Code Civ. Proc. § 386(a)* to be withdrawn and to grant the

defendant time within which to file the answer [*Israel v. Bryan (1921) 52 Cal. App. 66, 197 P. 121]* .

On making the application, the defendant may then file his or her answer. *Code Civ. Proc. § 386(a)* does not require a defendant to take the risk of being in default, by not filing an answer and not knowing whether the court will grant the application for substitution [*Cassidy v. Norton (1914) 25 Cal. App. 433, 435, 143 P. 1057]* .

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27-314 California Forms of Pleading and Practice--Annotated § 314.111

§ 314.111 Declaration in Support of Motion for Order to Substitute Adverse Claimant in Place of Defendant and for Costs and Attorney Fees

[1] FORM Declaration in Support of Motion for Order to Substitute Adverse Claimant in Place of Defendant and for Costs and Attorney Fees

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name of defendant*] IN SUPPORT OF MOTION FOR ORDER FOR SUBSTITUTION AND DISCHARGE OF DEFENDANT
vs.	)	
_____ [*name*],	)	
[and DOES I through _____,]	)	
Defendant(s).	)	Date: _____
	)	Time _____
	)	Dept.: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name of defendant*], declare:

1. I am the defendant in the above-entitled action, now pending in the above-entitled court, wherein the plaintiff is seeking to recover the _____ [amount of $_____ *or* following described personal property: _____ (*give description*)]. I have not answered the complaint and my time to do so has not expired.

2. _____ [*Set out plaintiff's claim*].

3. _____ [*Set out claim of claimant to be substituted*].

4. These claims are adverse and conflicting and I am unable to decide the validity of either of them. These claims are made without my collusion and I claim no interest in or to the _____ [proceeds *or* property] in dispute.

5. I am indifferent to either claimant and have no interest in the fund, and hereby offer to _____ [deposit the entire amount with the clerk of this court *or* deliver the above-described personal property to such person as the court may direct] on being discharged from all liability to either plaintiff or claimant, in order that they may interplead and settle their claims as between themselves.

6. As a result of this action I have incurred attorney fees and costs.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form of declaration set out in [1], *above*, is for use in support of a defendant's application under *Code Civ. Proc. § 386(a)* for an order to substitute a person who is not a party to the action in the place of defendant and to discharge defendant from the action [*see Code Civ. Proc. § 386(a)* and discussion in *§ 314.110[2]*].

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27-314 California Forms of Pleading and Practice--Annotated § 314.112

§ 314.112 Order to Substitute Adverse Claimant in Place of Defendant and to Award Defendant Costs and Attorney Fees

[1] FORM Order to Substitute Adverse Claimant in Place of Defendant and to Award Defendant Costs and Attorney Fees

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER OF SUBSTITUTION OF CLAIMANT
vs.	)	AND DISCHARGE OF DEFENDANT
_____ [*name*],	)	Date: _____
[and DOES I through _____,]	)	Time: _____
Defendant(s).	)	Dept.: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

The motion of defendant for the order hereinafter made came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*]; and claimant _____ [*name*] appeared by counsel [*name*].

Upon proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be and it hereby is granted and that defendant be and he/she hereby is discharged from this action and from all liability to either plaintiff or claimant on his/her _____ [depositing with the

clerk of the court the sum of $_____, _____ (the sum demanded by plaintiff and the above-named claimant and which defendant admits to be due and owing *or* the value of the personal property demanded by plaintiff and the above-named claimant and in which defendant admits to having no interest) *or* delivering to _____ (*specify person*) the personal property demanded by plaintiff and the above-named claimant and in which defendant admits to having no interest], less the sum of $_____ for costs, and the sum of $_____ as reasonable attorney fees incurred by defendant in this action [*or specify other manner in which costs and attorney fees are to be deducted*].

IT IS FURTHER ORDERED that the above-named claimant be substituted as defendant in the place of defendant _____ [*name*].

IT IS FURTHER ORDERED that plaintiff, within _____ [*number*] days, serve a copy of the complaint in this action showing each substitution and of this order on claimant or his/her attorney, and that the above-namedclaimant may appear and plead to the complaint or make such motion as he/she may be advised within _____ [*number*] days after such service.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use by a defendant when the court grants the defendant's application under *Code Civ. Proc. § 386(a)* for an order to substitute a person who is not a party to the action and to discharge the defendant from the action.

See also discussion in *§ 314.110[2]*.

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[Reserved]

§§ 314.113[Reserved]

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27-314 California Forms of Pleading and Practice--Annotated § 314.116

§ 314.116 Notice of Motion for Order to Dismiss Defendant as Mere Stakeholder and for Costs and Attorney Fees

[1] FORM Notice of Motion for Order to Dismiss Defendant as Mere Stakeholder and for Costs and Attorney Fees

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR OR-
vs.	)	DER FOR DISMISSAL OF DEFENDANT
_____ [*name*],	)	Date: _____
[and DOES I through _____,]	)	Time: _____
Defendant(s).	)	Dept.: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To plaintiff _____ [*name*] and to _____ [*name*], his/her attorney of record:

To defendant _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], defendant _____ [*name*] will move for an order to discharge him/her from liability and to dismiss him/her from

this action on his/her depositing with the clerk of this court the amount in dispute herein, namely, the sum of $_____. The motion will be made on the grounds that the only relief sought in this action against defendant _____ [*name of moving party*] is the payment of the sum of $_____ which sum plaintiff _____ [*name*] has alleged in his/her complaint herein and defendant _____ [*name of adverse claimant*] *claim has been wrongfully withheld from them, and that defendant* _____ [*name of moving party*] is a mere stakeholder with no interest in this sum or in any portion thereof.

The motion will be based on this notice of motion, on the declaration of defendant _____ [*name*] and the memorandum of points and authorities served and filed herewith, on the papers and records filed herein, and on such oral and documentary evidence as may be presented at the hearing of this motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The form of notice of motion set out in [1], *above*, is for use by a defendant in applying to the court for an order discharging him or her from liability and dismissing him or her from the action on the deposit with the clerk of the court the amount in dispute when the only relief which is sought against the defendant is the payment of such amount which is alleged to be wrongfully withheld and to which conflicting demands have been made on the defendant by parties to the action [*see Code Civ. Proc. § 386.5*].

A defendant who makes such application must accompany the form under [1], *above*, with an affidavit (or declaration under penalty of perjury under *Code Civ. Proc. § 2015.5*) stating that the defendant is a mere stakeholder with no interest in the amount or any portion thereof and that conflicting demands have been made on him or her for the amount in dispute by parties to the action [*see also § [2]*].

A memorandum in support of the motion must be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

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27-314 California Forms of Pleading and Practice--Annotated § 314.117

§ 314.117 Declaration in Support of Motion for Order to Dismiss Defendant as Mere Stakeholder and for Costs and Attorney Fees

[1] FORM Declaration in Support of Motion for Order to Dismiss Defendant as Mere Stakeholder and for Costs and Attorney Fees

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*
vs.	)	*of defendant*] IN SUPPORT OF MOTION FOR DIS-
_____ [*name*],	)	MISSAL OF DEFENDANT
[and DOES I through _____,]	)	Date: _____
Defendant(s).	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name of defendant stakeholder*], declare:

1. I am one of the defendants to the action herein. The only relief sought against me in this action is for the payment of a stated amount of money, namely, the sum of $_____. In his/her complaint on file herein, plaintiff _____ [*name*] has alleged that this sum has been wrongfully withheld from him/her by me. Defendant _____ [*name*] has also claimed [in a writing received by me on or about _____ (*date*),] that this sum has been wrongfully withheld from him/her by me in that _____ [*state basis for*

claim] [, a copy of which demand is attached hereto as Exhibit A and made a part hereof] [*or state other manner in which defendant claimant has demanded sum*].

2. I am a mere stakeholder with no interest in this sum of money, or in any portion thereof. I am willing and ready to deposit the sum with the clerk of the court to await disposition of these claims to the sum by order of this court.

3. As a result of this action I have incurred costs and attorney fees.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form of declaration set out in [1], *above*, is for use in support of a defendant's application under *Code Civ. Proc. § 386.5* for an order to dismiss the defendant from an action when the only relief sought is the payment of a stated amount of money which is alleged to be wrongfully withheld and to which conflicting demands have been made on the defendant by parties to the action [*see Code Civ. Proc. § 386.5*; *see also* discussion in *§ 314.116*].

See also discussion in *§ 314.116[2]*.

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Chapter 314 INTERPLEADER
PART IV. FORMS
E. Proceedings for Discharge of Interpleading Party

27-314 California Forms of Pleading and Practice--Annotated § 314.118

§ 314.118 Order to Dismiss Defendant as Mere Stakeholder and for Costs and Attorney Fees

[1] FORM Order to Dismiss Defendant as Mere Stakeholder and for Costs and Attorney Fees

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER FOR DISMISSAL OF DEFENDANT
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
[and DOES I through _____,]	)	Dept.: _____
Defendant(s).	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of defendant _____ [*name*] for the order hereinafter made came on regularly for hearing by the court this date. Plaintiff _____ [*name*] appeared by counsel _____ [*name*]; defendant _____ [*name*] appeared by counsel _____ [*name*]; and defendant _____ [*name*] appeared by counsel _____ [*name*].

Upon proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be and it hereby is granted and that defendant _____ [*name*] be and he/she hereby is discharged from all liability in this action to either plaintiff _____ [*name*] or defendant _____ [*name*] and is dismissed from this action on his/her deposit with the clerk of this

court the sum of $_____, which sum is the amount in dispute in this action.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above*, is for use by a defendant when the court grants the defendant's application under *Code Civ. Proc. § 386.5* for an order discharging him or her from liability and dismissing him or her from the action on the deposit with the clerk of the court of the amount in dispute [*see Code Civ. Proc. § 386.5*].

See also discussion in *§ 314.116[2]*.

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27-314 California Forms of Pleading and Practice--Annotated §§ 314.119-314.129

[Reserved]

§§ 314.119[Reserved]

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PART IV. FORMS
F. Disposition of Proceedings in Interpleader

27-314 California Forms of Pleading and Practice--Annotated § 314.130

§ 314.130 Proposed Statement of Decision Directing Final Judgment on Complaint in Interpleader

[1] FORM Proposed Statement of Decision Directing Final Judgment on Complaint in Interpleader

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	STATEMENT OF DECISION
[and DOES I through _____,]	)	
Defendant(s).	)	
	)	
	)	

The above-entitled cause came on regularly for trial on _____ [*date*], in Department _____ of the above-entitled court, the Honorable _____, Judge, presiding, without a jury, and was actually tried on that date [and on _____ (*state additional dates of trial*)]. Plaintiff appeared by _____ [*name*], his/her attorney; defendant _____ [*name*] appeared by _____ [*name*], his/her attorney.

Oral and documentary evidence was introduced on behalf of the respective parties and the cause was argued and submitted for decision. The court, having considered the evidence and heard the arguments of counsel and being fully advised, issues the following statement of decision:

[*Set out factual determinations explaining court's decision, e.g.*:]

1. On or about _____ [*date*], plaintiff and defendant _____ (*name*) entered into an agreement whereby defendant was to construct a sidewalk over plaintiff's property, and on the completion thereof, plaintiff was to pay defendant _____ (*name*) the sum of $_____].

2. On or about_____ [*date*], defendant _____ (*name*) finished work on this sidewalk _____ (in accordance with the terms of the agreement *or specify manner of breach*) (with which condition defendant _____'s [*name*] failure to comply resulted in plaintiff expending the sum of $_____ in order to complete the sidewalk in the manner specified in the contract)].

3. On or about _____ [*date*], defendant _____ (*name*) assigned in writing all of his/her right to the money then due or thereafter to become due to him/her under the provisions of the contract. Thereafter, on orabout _____ [*date*], while plaintiff held the sum of $_____, the total sum due and owing under the contract (after subtracting the sum of money plaintiff expended in completing the sidewalk in the manner specified in the contract), defendant _____ (*name*) gave plaintiff wrtten notice of this assignment].

4. _____ [*Set out any other specific relevant facts*].

5. It was reasonably necessary for plaintiff to employ the firm of _____ [*name*] as his/her attorney, and to expend costs and a reasonable fee to be allowed his/her attorney.

6. All of the facts alleged in the complaint and not specifically found above to be true are true.

7. Plaintiff is liable under the aforementioned _____ [*e.g.*, contract] in the sum of $_____, plus interest thereon at the rate of _____ percent per year, for the total sum of $_____ [*or state other liability*].

8. That defendant _____ [*name*] have and recover against defendant _____ [*name*] the sum of $_____ to be paid out of the sum of $_____ which has been deposited with the clerk of this court [*or state other recovery*].

9. That the sum of $_____ as attorney fees and costs be paid to plaintiff out of the sum of $_____ which has been deposited with the clerk of the court.

[10. That any and all remaining sums which have been deposited with the clerk of this court plus all interest therein be returned to plaintiff.]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The proposed statement of decision set out in [1], *above*, is for use by a plaintiff in interpleader who has remained an active party litigant in the interpleader action [*see* discussion in *§ 314.100[2]*], when the court has announced its intended decision in the second stage of the interpleader action (that is, the adjudiation of the claimant's conflicting claims) and the court does not draft the judgment itself.

Code Civ. Proc. § 632 provides that, on the request of any party appearing at the trial, the court must issue a statement of decision explaining the factual and legal bases for its decision as to each of the principal controverted issues at trial [*see also Cal. Rules of Ct., Rule 3.1590*]. For discussion and forms relating to statements of decision generally, see Ch. 529, *Statement of Decision* .

For related form of judgment, see *§ 314.131*.

See also discussion in *§§ 314.60[1][b] et seq. and 314.100[2]*.

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27-314 California Forms of Pleading and Practice--Annotated § 314.131

§ 314.131 Final Judgment on Complaint in Interpleader

[1] FORM Final Judgment on Complaint in Interpleader

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	JUDGMENT
[and DOES I through _____,]	)	
Defendant(s).	)	
	)	
	)	

The above-entitled cause came on regularly for trial on _____ [*date*], in Department _____ of the above-entitled court, the Honorable _____, Judge, presiding, without a jury, and was actually tried on that date [and on _____ (*state additional dates of trial*)]. Plaintiff appeared by _____ [*name*], his/her attorney; defendant _____ [*name*] appeared by _____ *name*], his/her attorney, and defendant _____ [*name*] appeared by _____ [*name*], his/her attorney.

Evidence, both oral and documentary, was introduced on behalf of the parties, and the cause was argued and submitted for decision, and _____ [the court(, on request of _____ (plaintiff *or* defendant),) having caused its written statement of decision to be made and filed or a statement of decision not having been requested,]

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. The total amount due and owing under the _____ [*describe obligation, e.g.,* contract] described in the complaint on file herein is _____ [the sum of $_____ *or describe other subject matter in dispute*];

2. Defendant _____ [*name*] was, at the commencement of this action, and now is, the owner and entitled to possession of _____ [the sum of $_____ *or describe other subject matter in dispute*] described in the complaint on file herein, and that defendant _____ [*name*] has no estate, interest, right, or title, either legal or equitable, present or future, vested or contingent, or otherwise, in or to _____ [such sum *or specify subject matter in dispute more particularly*] or any part thereof [*or state amount or property to be apportioned to each defendant*];

3. The sum of $_____ be paid from _____ [the aforementioned sum heretofore deposited by plaintiff with the clerk of this court *or specify other manner of payment*] as and for attorney fees and costs;

4. The clerk of the court _____ [pay *or* deliver] the _____ [balance of the sum deposited by plaintiff *or* sum of $_____ *or specify subject matter in dispute more particularly*], after deducting the sum of $_____ for attorney fees and costs as aforementioned, to the defendant _____ [*name*], and that defendant _____ [*name*] recover from defendant _____ [*name*] his/her costs taxed at $_____;

[5. The clerk of the court _____ [pay *or* deliver] the balance of the _____ [sum deposited with him/her *or specify subject matter in dispute more particularly*], after deducting all of the aforementioned _____ [sum *or specify subject matter in dispute more particularly*] to plaintiff.]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

Judgment entered on _____ [*date*], in Judgment Book Vol. _____, page _____.

Clerk of the Superior Court

By _____ [*signature*]

Deputy

[*seal*]

[2] Use of Form

The form of proposed judgment set out in [1], *above,* is for use when a plaintiff in interpleader has remained an active party litigant in the interpleader action [*see* discussion in *§ 314.100[2]*].

For related form of statement of decision, see *§ 314.130*.

See also discussion in *§§ 314.60[1][b] et seq.* and *314.100[2]*.

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27-314 California Forms of Pleading and Practice--Annotated § 314.132

§ 314.132 Order for Payment of Funds Deposited by Interpleading Party in Proceedings in Interpleader

[1] FORM Order for Payment of Funds Deposited by Interpleading Party in Proceedings in Interpleader

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER DIRECTING PAYMENT OF FUNDS DE-
_____ [*name*], Plaintiff,	)	POSITED
vs.	)	Date: _____
_____ [*name*], [and DOES I	)	Time: _____
through _____,] Defendant(s).	)	Dept.: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

It appearing that _____ [plaintiff *or* defendant (and cross complainant)] _____ [*name*] did on _____ [*date*], deposit with the clerk of the above-entitled court the sum of $_____ on _____ [filing the _____ (complaint or cross complaint in interpleader on file herein) *or* order of the above-entitled court];

It appearing that this sum of money was thereafter deposited with the county treasurer of _____ County, State of California [for investment in an insured interest bearing account on order of the above-entitled court].

[*EITHER*]

It appearing that _____ [plaintiff *or* defendant (and cross complainant)] was [thereafter] discharged from any and all liability to [plaintiff and] defendant(s), and each of them, and from this action on order of the above-entitled court and was awarded in this order the sum of $_____ as costs and attorney fees incurred in this action [*or state other adjudication resulting in dismissal of interpleading party and award of costs and attorney fees*].

[*OR*]

It appearing that [plaintiff and cross defendant _____ (*name*) and] defendant(s) [and cross defendant] _____ [*name(s)*] claimed an interest in the sum of money deposited, that on _____ [*date*], the above-entitled action was regularly tried before the above-entitled court, and that judgment was thereafter rendered in favor of _____ [plaintiff and cross defendant *or* defendant (and cross defendant)] _____ [*name*] for the sum of $_____ [*or state other adjudication and manner of apportionment of funds on deposit*].

[*CONTINUE*]

It appearing that this _____ [order *or* judgment became final on _____ (*date*), that this judgment] _____ [has never been appealed from and the time for appealing has expired *or if appealed and affirmed, so state*] and has never been vacated or modified.

NOW, THEREFORE, it is ordered that the [auditor *or* controller] of _____ County, State of California, draw his/her warrant for the sum of $_____, in favor of _____ [plaintiff (and cross defendant) *or* defendant (and cross complainant)] _____ [*name*] and that the treasurer of the above-named county pay this warrant with the money heretofore deposited.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form of proposed order set out in [1], *above,* for the payment of funds deposited by an interpleading party in a proceeding in interpleader, is for use by either the interpleading party when he or she has been awarded costs and attorney fees under *Code Civ. Proc. § 386.6(a)* that are to be paid out of the deposited funds, or by a party for whom judgment has been rendered in the action between the interpleaded parties.

The form in [1], *above,* is for use in any court in which local court rules do not require either additional forms or information to be inserted in the court order or the use of a local court form of order directing payment of deposited funds. Counsel should consult local rules and practice to determine whether there are any such additional requirements or court forms.

[3] Disposition of Funds Deposited With Court

When any money is deposited with the clerk or judge of a superior court pursuant to an action or proceeding in the court, or pursuant to any order, decree, or judgment of the court, that money must be deposited as soon as practicable

with the treasurer and a duplicate receipt of the treasurer, for it must be filed with the auditor [*Gov. Code § 68084(a)*]. If any money so deposited is to be withdrawn or paid out, the order directing the payment or withdrawal must require the auditor to draw a warrant for it and the treasurer to pay it [*Gov. Code § 68084(b)*].

When a deposit has been made pursuant to *Code Civ. Proc. § 386*, and the court has ordered such deposit to be invested in an insured interest bearing account as is permitted under *Code Civ. Proc. § 386.1*, such interest is then allocated to the parties in the same proportion as the original funds are allocated [*Code Civ. Proc. § 386.1*]. Thus, if the eventual judgment allocates none of the deposited funds to the plaintiff, the plaintiff has no claim to interest earned by the funds while on deposit; that interest belongs to the parties to whom allocations were made [*Canal Ins. Co. v. Tackett (2004) 117 Cal. App. 4th 239, 243-246, 11 Cal. Rptr. 3d 626]* .

For further discussion and forms relating general to deposits in court, see Ch. 211, *Deposit in Court* . See also discussion in *§ 314.60[1][b] et seq.*

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Chapter 315 IRRIGATION

27-315 California Forms of Pleading and Practice--Annotated 315.syn

§ 315.syn Synopsis to Chapter 315: IRRIGATION

§ 315.01 Scope of Chapter

§ 315.02 Cross References

§§ 315.03-315.09 [Reserved]

§ 315.10 Irrigation Defined

§ 315.11 Irrigation Districts

[1] Formation of Districts

[2] Delivery of Water by Districts

[3] Requirement to Apportion Water Ratably and to Distribute It Equitably

[4] Diversion of Water

§ 315.12 Administrative Remedies Available

§ 315.13 Review of State Water Resources Control Board Decisions

§ 315.14 Injunctive Relief Available When Natural Flow Diverted

[1] Notice Requirements; Exceptions

[2] Required Showings

[3] Denial of Injunction in Court's Discretion if Defendant Gives Bond

[4] Ascertaining Damages at Trial

§ 315.15 When Injunctive Relief Sought to Prevent Diversion of Irrigation Water

[1] Dissolution or Modification

[a] Application to Dissolve or Modify Injunction

[b] Dissolution or Modification Is in Court's Discretion and Is Dependant on Certain Factors, Including Payment of Bond

[2] Ascertaining Damages at Trial

[3] Action on Bond

§ 315.16 Action for Injunctive Relief to Prevent Diversion of Water

[1] Answer Based on Diversion of Water for Irrigation

[2] Plaintiff's Reply to Answer

[3] Plaintiff's Right to Implead Other Parties

[4] Right to Jury Trial

[5] Trial Procedure

[a] Evidence

[b] When Allegations in Answer Found to Be True

[c] Ascertaining Damages

[d] Effect of Deposit

[6] Appeal

[a] Right to Appeal

[b] Stay Pending Appeal; Deposit Required

§ 315.17 Interference With Easement Prohibited; Injunctive Relief Available

§ 315.18 Damages Awarded in Addition to Injunctive Relief

§ 315.19 Rights Among Cotenants

§ 315.20 Duty of Care

[1] When Diverting Water

[2] When Constructing and Maintaining Canals and Ditches

[3] Preventing Excess Drainage

§§ 315.21-315.29 [Reserved]

§ 315.30 Related Matthew Bender Publications

[1] California Environmental Law and Land Use Practice

[2] Environmental Law Practice Guide

§ 315.31 California Constitution

§ 315.32 State Statutes

[1] Administrative Remedies Available

[2] Availability of Injunctive Relief

[3] Irrigation Defined

[4] Irrigation Districts

§ 315.33 State Regulations

§ 315.34 Decisions

[1] Availability of Injunctive Relief

[2] Damages Awarded in Addition to Injunctive Relief

[3] Duty of Care

[a] Construction and Maintenance of Ditches and Canals

[b] Diverting Water

[c] Drainage and Drainage Systems

[d] Excess Drainage

[e] Liability

[4] Interference With Easement

[5] Irrigation Defined

[6] Irrigation Districts

[7] Rights Among Cotenants

§ 315.35 Law Reviews

§ 315.36 Text References

§§ 315.37-315.49 [Reserved]

§ 315.50 Complaint for Temporary Restraining Order, Preliminary [Code Civ. Proc. §§ 526, 527] and Permanent [Civ. Code § 3422] Injunction, and Damages [Civ. Code § 3333] to Prevent Interference With and Diversion of Irrigation Water [Code Civ. Proc. § 530]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Certification re Notice

[6] Jurisdiction

[7] Venue

§ 315.51 Answer to Complaint by Riparian Owner to Enjoin Diversion of Water--Water Diverted or Proposed to Be Diverted for Irrigation of Land or for Other Public Use [Code Civ. Proc. § 534]

[1] FORM

[2] Use of Form

[3] Allegations

§ 315.52 Complaint for Damages [Civ. Code § 3333]--For Injury to Real Property Based on Negligent Irrigation [Civ. Code § 1714(a)]--Flooding of Irrigation Ditches Causing Flooding on Plaintiff's Land

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction

[6] Venue

§ 315.53 Allegations--Diversion of Waters Causing Flooding

[1] FORM

[2] Use of Form

§ 315.54 Allegations--Interference With Waters Causing Stoppage or Flooding

[1] FORM

[2] Use of Form

§ 315.55 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages--Intentional Trespass and Intentional Destruction of Gates and Valves of Plaintiff's Irrigation Pipeline

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction

[6] Venue

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27-315 California Forms of Pleading and Practice--Annotated § 315.01

§ 315.01 Scope of Chapter

This chapter discusses the wrongful use of, or wrongful interference with the use of, irrigation water. The Legal Background discusses irrigation districts, including the formation of these districts under the Irrigation District Law [*Water Code § 20500 et seq.*] and the delivery and diversion of water by districts [*see § 315.11*]. Also covered in the Legal Background is (1) the California State Water Resources Control Board's (SWRCB) authority to initiate legal action to prevent the diversion or unauthorized use of water [*see § 315.12*], and the review of SWRCB decisions [*see § 315.13*]; (2) the procedures applicable to obtaining injunctive relief to restrain or prevent the diversion or diminution of irrigation water [*see* §§ 315.14-315.17]; (3) damages that are available in these circumstance [*see § 315.18*]; (4) the rights among cotenants [*see § 315.19*]; and (5) the duty of care applicable when diverting water [*see § 315.20*].

The chapter also includes the following forms for use in proceedings dealing with issues related to irrigation and water usage:

- A complaint to enjoin the interference with and diversion of irrigation water [*see § 315.50*], and an answer to a complaint by a riparian owner to enjoin the diversion of water [*see § 315.51*];

- A complaint for damages based on negligent irrigation when negligent maintenance of irrigation ditches causes flooding of the plaintiff's property [*see § 315.52*];

- Allegations for use in actions alleging that the diversion of irrigation waters causes flooding [*see § 315.53*] and when the interference with irrigation waters causes either stoppage or flooding [*see § 315.54*]; and

- A complaint seeking compensatory and punitive damages for the intentional trespass and destruction of the gates and valves controlling an irrigation pipeline [*see § 315.55*].

Legal Topics:

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

GovernmentsState & Territorial GovernmentsWater RightsReal Property LawTortsNuisanceGeneral OverviewReal Property LawWater RightsGeneral Overview

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27-315 California Forms of Pleading and Practice--Annotated § 315.02

§ 315.02 Cross References

For discussion and forms related to actions involving irrigation and water rights, including the adjudication of claims to water rights under *Water Code § 1200 et seq.* and *23 Cal. Code Reg. § 951 et seq.*, see Ch. 575, *Waters* .

For discussion and forms surrounding the rights and duties of adjacent landowners, see Ch. 11, *Adjoining Landowners* .

For discussion and forms for use in asserting adverse possession, see Ch. 13, *Adverse Possession* .

For discussion and forms for determining rights with regard to easements, see Ch. 240, *Easements* .

For discussion and forms for ousting persons from real property, see Ch. 241, *Ejectment* .

For discussion and forms for seeking direct or inverse condemnation, see Ch. 247, *Eminent Domain* .

For discussion, procedural checklist, and forms relevant to obtaining and opposing injunctive relief, see Ch. 303, *Injunctions* .

For discussion and forms for interpleading parties in an action, see Ch. 314, *Interpleader* .

For discussion and forms for use when rights of cotenants are asserted, see Ch. 316, *Joint Tenancy and Tenancy in Common* .

For discussion and forms for use when rights of landlords and tenants are asserted, see Chs. 330-335, *Landlord and Tenant* .

For discussion and forms for use in a petition for mandate, see Ch. 358, *Mandate and Prohibition* .

For discussion and forms for use in complaints for injuries to person and property based on negligence, see Ch. 380, *Negligence* .

For discussion and forms for use in complaints to enjoin nuisances, see Ch. 391, *Nuisance* .

For discussion and forms relevant to civil actions relating to environmental matters generally, see Ch. 418, *Pollution and Environmental Matters* .

For discussion and forms for establishing claims and actions against public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

For discussion and forms for quieting title to real property, see Ch. 482, *Quieting Title* .

For discussion and forms for use in complaints against persons or entities controlling sanitation and sewerage districts, see Ch. 511, *Sanitation and Sewage Districts* .

For discussion and forms for use in complaints for trespass to real property and damages arising from trespass, see Ch. 550, *Trespass* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewReal Property LawAdjoining LandownersGeneral OverviewReal Property LawAdverse PossessionGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawEstatesConcurrent OwnershipGeneral OverviewReal Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsEjectmentReal Property LawWater RightsGeneral Overview

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[Reserved]

§§ 315.03[Reserved]

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27-315 California Forms of Pleading and Practice--Annotated § 315.10

§ 315.10 Irrigation Defined

Irrigation can generally be defined as the operation of watering lands for agricultural purposes by artificial means. The California Code of Regulations defines irrigation use in the section governing the State Water Resources Control Board as any application of water to the production of irrigated crops or for the maintenance of large areas of lawn, shrubbery, or gardens [*23 Cal. Code Reg § 662*].

Within California water districts, irrigation includes subirrigation, percolation, underground storage, and well replenishment [*Water Code § 34029*]. It is the established general state policy in California that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation [*Water Code § 106*].

Within California's irrigation districts [*see § 315.11*], irrigation works are defined as dams, reservoirs, wells, conduits, pumps, power houses, power generating equipment, power lines, and their appurtenances [*Water Code § 20530*]. For this same purpose, conduits are defined as canals, laterals, ditches, flumes, pipes, and their appurtenances [*Water Code § 20531*].

For further definition of and forms for use in the acquisition and determination of rights to irrigation water, see Ch. 575, *Waters* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsWater RightsReal Property LawWater RightsGeneral OverviewReal Property LawWater RightsDomestic Use

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27-315 California Forms of Pleading and Practice--Annotated § 315.11

§ 315.11 Irrigation Districts

[1] Formation of Districts

Irrigation districts are agencies of the State of California and are formed and exist for governmental purposes [*Water Code § 20570*]. A majority of the holders of title to land susceptible of irrigation from a common source and by the same system of works, who are also holders of title to a majority in value of the land may propose the formation of a district in accordance with *Water Code § 20500 et seq.* (the Irrigation District Law) [*Water Code § 20700*]. The formation of a district may also be proposed by not less than 500 petitioners, each of whom is an elector residing in the proposed district or the holder of title to land in the district where the petitioners include the holders of title to not less than 20 percent in value of the land included within the proposed district [*Water Code § 20700*]. The land to be formed into a district need not consist of contiguous parcels [*Water Code § 20701*].

[2] Delivery of Water by Districts

Generally, an irrigation district may do any act necessary to furnish sufficient water in the district for any beneficial use [*Water Code § 22075*], including all of the following:

- Controlling, distributing, and spreading water [*Water Code § 22078*];
- Providing for drainage [*Water Code § 22095*];
- Constructing the necessary works for collection of water [*Water Code § 22226*]; and
- Acquiring and operating necessary equipment [*Water Code § 22231*].

Districts may also be involved in electric power [*see Water Code § 22115*], airports [*see Water Code § 22140*], and flood control [*see Water Code § 22160*].

A district may refuse to deliver water through a ditch which is not clean or not in suitable condition to prevent waste of water and may determine through which of two or more available ditches it will deliver water [*Water Code § 22257*].

The district may also regulate the amount of water to be used when seepage from irrigation would damage adjacent land inside or outside the district [*see Water Code § 22255*].

[3] Requirement to Apportion Water Ratably and to Distribute It Equitably

All water distributed by districts for irrigation purposes must be apportioned ratably to each landowner on the basis of the ration which the last assessment against the owner's land for district purposes bears to the whole sum assessed in the district, except as otherwise provided [*see Water Code § 22250*]. However, rights to water are assignable [*Water Code § 22251*].

Water must be distributed equitably among those offering to make the required payment [*Water Code § 22252*]. Each district must establish equitable rules for the distribution and use of water and must print and distribute its rules [*Water Code § 22257*]. Rights to water from the irrigation district sources are obtained by application to the board of the district [*Water Code § 22252.1*].

[4] Diversion of Water

The Irrigation District Law [*Water Code § 20500 et seq.*] does not authorize the diversion of water from any stream or conduit from its channel to the detriment of any person having any interest in the stream, in the conduit, or in the water in it, unless compensation is previously ascertained and paid [*Water Code § 22263*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsWater Rights

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27-315 California Forms of Pleading and Practice--Annotated § 315.12

§ 315.12 Administrative Remedies Available

The State Water Resources Control Board (SWRCB) exercises the adjudicatory and regulatory functions of the state in the field of water resources and is empowered to hold hearings and investigations to provide for the orderly and efficient administration of the water resources of the state [*Water Code §§ 174, 183*]. The diversion or unauthorized use of water is a trespass, and SWRCB may institute in the superior court in and for any county where this diversion or use is attempted appropriate action to have the trespass enjoined [*Water Code § 1052*; *see Water Code §§ 22650, 22654, 22655* for actions which may be instituted by, intervened in, or defended by irrigation districts; *see also § 315.55* (form of complaint for damages for trespass)]. SWRCB may also impose civil liability in the amount of $500 for each day in which the trespass occurs [*see Water Code § 1052*]. In addition, SWRCB may take appropriate actions before the executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water [*Water Code § 275*].

All claims for money or damages brought against an irrigation district are governed by *Gov. Code § 900 et seq.* [*Water Code § 22727*; *see C. A. Magistretti Co. v. Merced Irrigation Dist. (1972) 27 Cal. App. 3d 270, 274-276, 103 Cal. Rptr. 555]* . For a discussion and forms for bringing claims and actions against irrigation districts as public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsWater RightsReal Property LawWater RightsProcedure

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§ 315.13 Review of State Water Resources Control Board Decisions

If a water user desires judicial review of the State Water Resources Control Board's (SWRCB) order either (1) licensing less water or water use than specified in the user's permit or (2) granting or refusing to grant permission to change the place of water diversion, place of water use, or purpose of water use, the water user may bring a petition for a writ of mandate [*see Water Code §§ 1615, 1705.5* (applicable to proceedings for the judicial review of a decision or order of the board pending on December 31, 1996); *Water Code § 1126* (applicable after that date); *see also Code Civ. Proc. § 1094.6*]. For discussion and forms for use in bringing a petition for a writ of mandate, see the Ch. 358, *Mandate and Prohibition*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusGovernmentsState & Territorial GovernmentsWater RightsReal Property LawWater RightsProcedure

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§ 315.14 Injunctive Relief Available When Natural Flow Diverted

[1] Notice Requirements; Exceptions

In all actions which are brought when a temporary restraining order is applied for to prevent the diversion, diminution, or increase of the flow of water in its natural channels to the ordinary flow of which the plaintiff claims to be entitled, the court must first require due notice of the application to be served on the defendant [*Code Civ. Proc. § 530*]. However, notice is not required unless it appears from the verified complaint or affidavits (or declarations under penalty or perjury [*Code Civ. Proc. § 2015.5*]) on which the application for injunctive relief is made either [*Code Civ. Proc. § 530*]:

- That within 10 days before the time of the application, the plaintiff was in the peaceable possession of the water's flow and that, within this time, the plaintiff was deprived of the flow thereof by the wrongful diversion of the flow by the defendant; or

- That the plaintiff, at the time of the application, is and for 10 days before thereto was, in possession of the flow of the water and that the defendant is threatening to divert the water's.

[2] Required Showings

In addition to giving due notice [*see* [1], *above*], when a plaintiff seeks an injunction to restrain the diversion of water above his or her lands, the plaintiff must show the following [*Carlsbad Mut. Water Co. v. San Luis Rey Dev. Co. (1947) 78 Cal. App. 2d 900, 914, 178 P.2d 844]* :

- There is a wrongful diversion of water above his or her lands; and

- The amount of water wrongfully diverted would be rightfully used by him or her for reasonable and beneficial purposes.

[3] Denial of Injunction in Court's Discretion if Defendant Gives Bond

If the notice of application is given [*see* [1], *above*] and on the application's hearing it is made to appear to the court that the plaintiff is entitled to the preliminary injunction but that issuance of the injunction pending the litigation will entail great damage on the defendant and that the plaintiff will not be greatly damaged by the acts complained of pending the litigation and can be fully compensated for any damage he or she may suffer, the court may refuse the injunction. However, the defendant must give bond as provided for in *Code Civ. Proc. § 532* [*Code Civ. Proc. § 530*].

[4] Ascertaining Damages at Trial

At the trial, the same proceedings with regard to ascertaining damages must be had, and with the same effect, as provided in *Code Civ. Proc. § 532* [*Code Civ. Proc. § 530*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceRemediesDamagesGeneral OverviewReal Property LawTortsNuisanceRemediesInjunctionsPrerequisitesGeneral OverviewReal Property LawTortsNuisanceRemediesInjunctionsTemporary InjunctionsReal Property LawWater RightsProcedure

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§ 315.15 When Injunctive Relief Sought to Prevent Diversion of Irrigation Water

[1] Dissolution or Modification

[a] Application to Dissolve or Modify Injunction

If an injunction is granted without notice to the person enjoined, the person may apply, on reasonable notice to the judge who granted the injunction, or to the court in which the action was brought, to dissolve or modify the injunction [*Code Civ. Proc. § 532(a)*]. The application may be made on the complaint or the affidavit on which the injunction was granted, or on affidavit on the part of the person enjoined, with or without the answer [*Code Civ. Proc. § 532(a)*].

[b] Dissolution or Modification Is in Court's Discretion and Is Dependant on Certain Factors, Including Payment of Bond

In all actions in which an injunction or restraining order has been or may be granted or applied for, to prevent the diversion, pending the litigation, of water used, or to be used, for irrigation or domestic purposes only, the court may in its discretion dissolve or modify the injunction [*Code Civ. Proc. § 532(b)*]. However, to obtain the injunction's dissolution or modification, it must be made to appear to the court (1) that great damage will be suffered by the person enjoined, in case the injunction is continued, and (2) that the person in whose behalf the injunction issued can be fully compensated for any damages suffered by reason of the continuance of the acts enjoined during the litigation [*Code Civ. Proc. § 532(b)*]. In addition, the dissolution or modification is subject to the person enjoined giving a bond in an amount as may be fixed by the court or judge, conditioned that the enjoined person will pay all damages that the person in whose behalf the injunction issued may suffer by reason of the continuance, during the litigation, of the acts complained of [*Code Civ. Proc. § 532(b)*].

[2] Ascertaining Damages at Trial

At trial, the amount of damages must be ascertained and in case judgment is rendered for the person in whose behalf the injunction was originally granted, the amount fixed as such damages must be included in the judgment, together with reasonable attorney's fees [*Code Civ. Proc. § 532(b)*].

[3] Action on Bond

In any suit brought on the bond, the amount of the damages as fixed in the judgment is conclusive [*Code Civ. Proc. § 532(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceRemediesInjunctionsGeneral OverviewReal Property LawWater RightsProcedure

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§ 315.16 Action for Injunctive Relief to Prevent Diversion of Water

[1] Answer Based on Diversion of Water for Irrigation

In any action brought by a riparian owner to enjoin the diversion of water appropriated or proposed to be appropriated, or the use thereof, against any person or persons appropriating or proposing to appropriate such waters, the defendant may set up in his or her answer that the water diverted or proposed to be diverted is for the irrigation of land or other public use [*Code Civ. Proc. § 534*]. In this case, he or she must also in the answer set forth all of the following [*Code Civ. Proc. § 534*]:

- The quantity of water desired to be taken and necessary to the irrigation of land or the public use;
- The nature of this use;
- The place where the water is used or proposed to be used;
- The duration and extent of the diversion or proposed diversion, including the stages of the flow of the stream at and during the time in which the water is to be diverted;
- That the water may be diverted without interfering with the actual and necessary beneficial uses of the plaintiff; and
- That the defendant desires that the court ascertain and fix the damages, if any, that will result to the plaintiff or to his or her riparian lands from the appropriation of the water so appropriated or intended to be appropriated by defendant.

[2] Plaintiff's Reply to Answer

The plaintiff may serve and file a reply to the defendant's answer stating plaintiff's rights to the water and the damage plaintiff will suffer by the defendant's taking of the water [*Code Civ. Proc. § 534*].

[3] Plaintiff's Right to Implead Other Parties

Plaintiff may implead as parties to the action all persons necessary to a full determination of plaintiff's rights to the water and the damages plaintiff will suffer by the proposed taking by defendant [*Code Civ. Proc. § 534*]. The court has jurisdiction to hear and determine all the plaintiff's rights to water as well as all the rights to water of other parties to the action. The other parties have a right to state and prove their rights, and must be bound by the judgment rendered the same as though made parties plaintiff at the commencement of the action [*Code Civ. Proc. § 534*].

[4] Right to Jury Trial

On the filing of an answer as provided for in *Code Civ. Proc. § 534*, the parties plaintiff or other parties and defendant are entitled to a jury trial on the issues as to damages raised in the action, as provided in *Code Civ. Proc. §§ 1230.010-1273.050* (eminent domain proceedings) [*Code Civ. Proc. § 534*].

[5] Trial Procedure

[a] Evidence

At the trial, the court must receive and hear evidence on behalf of the respective parties [*Code Civ. Proc. § 534*].

[b] When Allegations in Answer Found to Be True

If the court finds that (1) the allegations of the answer are true, (2) the appropriation and diversion of the waters is for irrigation of land or other public use, and (3) after allowing sufficient water for the actual and necessary beneficial uses of the plaintiff and other parties, there is water available to be beneficially appropriated by the defendant, then the court must fix the time and manner and extent of the appropriation and the actual damages, if any, resulting to the plaintiff or other parties on account of the same [*Code Civ. Proc. § 534*].

[c] Ascertaining Damages

In fixing the damages set forth in [b], *above*, the court must be guided by *Code Civ. Proc. §§ 1263.410-1263.450* (compensation for injury to remainder in eminent domain proceedings) [*Code Civ. Proc. § 534*].

[d] Effect of Deposit

If, on the ascertainment and fixing of damages [*see* [b] and [c], *above*], within 30 days the defendant either (1) pays into court the amount of damages fixed and the costs adjudged to be paid by the defendant or (2) gives a good and sufficient bond to pay the damages and costs on the case's final settlement, the injunction prayed for by the plaintiff must be denied to the extent of the amount that the defendant is permitted to appropriate. In addition, any preliminary injunction that was granted must be vacated [*Code Civ. Proc. § 534*].

[6] Appeal

[a] Right to Appeal

Any of the parties may appeal from the judgment as in other cases [*Code Civ. Proc. § 534*].

[b] Stay Pending Appeal; Deposit Required

If the judgment is in the defendant's favor and if on and pending the appeal the defendant keeps on deposit with the clerk of the court the amount of the damages and costs, or the bond, if it is given, so awarded to be paid to the plaintiff or other parties in the event the judgment is affirmed, no injunction against the appropriation of the amount the

defendant is permitted to appropriate may be granted or enforced pending the appeal [*Code Civ. Proc. § 534*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsImpleaderReal Property LawWater RightsProcedureReal Property LawWater RightsRiparian Rights

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§ 315.17 Interference With Easement Prohibited; Injunctive Relief Available

The purchaser of land subject to an irrigation easement takes subject to that easement and may not interfere with its use by the easement owner. When a purchaser maintains an obstruction in the ditch or canal which prevents drainage, he or she may be enjoined from maintaining the obstruction and ordered to restore the ditch to its previous state [*Morris v. George (1943) 57 Cal. App. 2d 665, 676, 681-682, 135 P.2d 195]* . Thus, when the right to a water-carrying ditch is jeopardized by the contemplated operations of another, the easement holder is entitled to injunctive relief [*McLaughlin v. Del Re (1886) 71 Cal. 230, 231, 236, 16 P. 881]* . In addition, when a smaller conduit is substituted for a larger one causing the water right's owner to obtain insufficient water for irrigation needs, this interference may be enjoined [*Enos v. Harmon (1958) 157 Cal. App. 2d 746, 750-752, 321 P.2d 810]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLimited Use RightsEasementsInterference

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§ 315.18 Damages Awarded in Addition to Injunctive Relief

Damages may be awarded in addition to injunctive relief. For instance, an award of damages has been sustained against a defendant who negligently moved an immense timber jam existing in a stream above plaintiff's property which caused the breaking of plaintiff's dike and the flooding of plaintiff's lands [*Sacchi v. Bayside Lbr. Co. (1910) 13 Cal. App. 72, 85, 108 P. 885]* . In addition, when the continuing discharge of sewage prevents a landowner from widening and deepening creek beds in accordance with flood control requirements before developing his or her property, the city's knowing discharge of sewage constitutes an actionable taking of property compensable by damages [*Amador Valley Investors v. Livermore (1974) 43 Cal. App. 3d 483, 491-492, 117 Cal. Rptr. 749]* .

For a discussion of inverse condemnation, see generally Ch. 247, *Eminent Domain* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawInverse CondemnationProcedureReal Property LawTortsNuisanceRemediesDamagesGeneral OverviewReal Property LawWater RightsProcedure

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§ 315.19 Rights Among Cotenants

One cotenant, insofar as he or she interferes with the joint property to the damage or injury of his or her cotenant, is a trespasser to that extent. A cotenant cannot, simply because he or she has a certain interest in the common property, deal with it or use it to the detriment of other co-owners; each of the parties in this case has the right to protect his or her respective interest. The use by a tenant of more than his or her share of the water may therefore be enjoined [*see Barton Land & Water Co. v. Crafton Water Co. (1915) 171 Cal. 89, 97, 152 P. 48* ; *De La Cuesta v. Bazzi (1941) 47 Cal. App. 2d 661, 672-673, 118 P.2d 909]* .

For discussion and forms for use in asserting rights and duties among cotenants, see Ch. 316, *Joint Tenancy and Tenancy in Common* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawTortsTrespass to Real PropertyReal Property LawWater RightsRiparian RightsTortsPremises Liability & PropertyTrespassRemediesInjunctions

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27-315 California Forms of Pleading and Practice--Annotated § 315.20

§ 315.20 Duty of Care

[1] When Diverting Water

One who artificially changes the condition of a watercourse has a continuing duty to maintain that diversion or changed condition within the reasonable capacity of the system which effected the change. For example, when public works are not planned and constructed in accordance with good engineering standards and are negligently maintained, plaintiff may recover for damage to his or her crops caused by flood water breaching the banks of the channel [*Granone v. County of Los Angeles (1965) 231 Cal. App. 2d 629, 649, 42 Cal. Rptr. 34]* . Similarly, negligence exists when the obstruction of a watercourse causes an overflow of water beyond that which would have occurred in the absence of the obstruction [*Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 375, 82 Cal. Rptr. 689]* .

[2] When Constructing and Maintaining Canals and Ditches

The owners of canals and ditches that are maintained for the purpose of conveying water for irrigation purposes either for private use or for sale to the public are liable for damages to the crops or property of adjacent owners resulting from the overflow or leakage from the canal or ditch on account of negligence on the part of the owners in the construction, maintenance, or operation of the system [*Massetti v. Madera Canal & Irrigation Co. (1937) 20 Cal. App. 2d 708, 714, 68 P.2d 260]* . The owner of ditches, canals, or other works is under a duty to construct them as far as possible so that the water will not seep or percolate therefrom to the injury of the lands of others below. The owner is not held to be the insurer against all damages incurred, but he or she is held liable in damages for all injuries that are the direct and proximate result of his or her actual negligence or the failure to exercise ordinary and reasonable care [*Ketcham v. Modesto Irrigation Dist. (1933) 135 Cal. App. 180, 187, 26 P.2d 876* ; *see Diamond Springs Lime Co. v. American River Constructors (1971) 16 Cal. App. 3d 581, 596-597, 94 Cal. Rptr. 200]* .

When actual physical damage is caused to real property as the proximate result of the construction of a public work which is deliberately planned and carried out by a public agency, then plaintiff should consider filing an action for damages for inverse condemnation. For discussion and forms concerning inverse condemnation, see Ch. 247, *Eminent Domain* .

[3] Preventing Excess Drainage

No essential difference is usually recognized between damages caused by surface overflow and damages caused by direct percolation. Whether the seeping nature of the soil is known or unknown at the time of construction, the responsibility of the builder of an irrigation conduit is usually held to be the same, that is, use of effective intercepting trenches, cementing, and other scientific methods. The receptacle built for holding water must be made and maintained as nearly waterproof as human agency can reasonably and prudently make it [*Kall v. Carruthers (1922) 59 Cal. App. 555, 559, 211 P. 43]* . To knowingly construct a canal through loose sand or gravel incapable of holding water, without taking any steps to prevent or control seepage, constitutes negligence [*Tormey v. Anderson-Cottonwood Irrigation Dist. (1921) 53 Cal. App. 559, 564, 200 P. 814]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsWater RightsReal Property LawWater RightsNonconsumptive UsesGeneral OverviewTortsNegligenceDutyGeneral Overview

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[Reserved]

§§ 315.21[Reserved]

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§ 315.30 Related Matthew Bender Publications

[1] California Environmental Law and Land Use Practice

For detailed coverage of water quality control, including coverage of the agencies that regulate water quality and water quality control planning, see California Environmental Law And Land Use Practice, Chs. 30-32 (Matthew Bender)

For coverage of issues surrounding the preservation of agriculture in California, see California Environmental Law And Land Use Practice, Ch. 70, *Agricultural Preservation* (Matthew Bender)

[2] Environmental Law Practice Guide

For coverage of floodplain regulation, see Environmental Law Practice Guide Ch. 21, *Flood Control and Floodplain Regulation* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 315.31 California Constitution

General welfare requires that water resources of California be put to beneficial use to fullest extent to which they are capable, and that waste or unreasonable use or unreasonable method of use of water be prevented. *Cal. Const., art. X, § 2*

Restriction on riparian rights in stream or watercourse. *Cal. Const., art. X, § 2*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsWater RightsReal Property LawWater RightsRiparian Rights

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§ 315.32 State Statutes

[1] Administrative Remedies Available

Petition for writ of mandate, generally. *Code Civ. Proc. § 1094.6*

Nonliability of public entity for dangerous condition of reservoir, canal, conduit, drain, unlined flood control channels, or adjacent groundwater recharge spreading grounds when used by injured person for any purpose other than that for which it was intended. *Gov. Code § 831.8*

Liability for injury proximately caused by condition or use of unlined flood control channels or adjacent groundwater recharge spreading grounds where injured person was 16 years or younger. *Gov. Code § 831.8(c), (f)* (becomes inoperative January 1, 2013)

Bringing of claims and actions against public entities. *Gov. Code § 900 et seq.*

Function of State Water Resources Control Board. *Water Code §§ 174, 183*

Board's actions to prevent waste or unreasonable use. *Water Code § 275*

Board may request imposition of injunctive relief and civil liability for unauthorized use of water. *Water Code §§ 1052, 1055-1055.3*

Petition for writ of mandate to review orders of State Water Resources Control Board. *Water Code §§ 1615, 1705.5* (applicable to proceedings for the judicial review of a decision or order of the board pending on December 31, 1996); *Water Code § 1126* (applicable thereafter)

Actions which may be instituted by, intervened in, or defended by irrigation districts. *Water Code §§ 22650, 22654, 22655*

Bringing of claims and actions against irrigation district governed by *Gov. Code § 900 et seq. Water Code § 22727*

[2] Availability of Injunctive Relief

Grounds for issuance of injunctions. *Civ. Code § 3422*; *Code Civ. Proc. § 526*

Procedure to obtain temporary restraining order or preliminary injunction. *Code Civ. Proc. § 527*

Injunctive relief available when natural water flow diverted. *Code Civ. Proc. § 530*

Notice required for injunctive relief; exceptions to notice requirement. *Code Civ. Proc. § 530*

Denial of injunction in court's discretion if defendant gives bond; ascertaining damages at trial. *Code Civ. Proc. § 530*

Dissolution or modification of temporary restraining order on bond when injunctive relief sought to prevent diversion of irrigation water; ascertaining damages at trial; in action on bond, amount of judgment is conclusive. *Code Civ. Proc. § 532*

Answer based on diversion of water for irrigation in response to action for injunctive relief to prevent diversion of water; plaintiff's reply to answer; plaintiff's right to implead other parties; right to jury trial; trial procedure; court's action when allegation found to be true; ascertaining damages at trial; effect of deposit on preliminary injunction; right to appeal from judgment; stay pending appeal; deposit required pending appeal. *Code Civ. Proc. § 534*

[3] Irrigation Defined

Use of water for irrigation. *Water Code § 106*

Irrigation works defined. *Water Code § 20530*

Irrigation conduits defined. *Water Code § 20531*

Irrigation includes subirrigation, percolation, underground storage, and well replenishment. *Water Code § 34029*

[4] Irrigation Districts

Proceedings for adjudication of claims to water rights before State Water Resources Control Board. *Water Code § 1200 et seq.*

Right to appropriate or to use water subject to appropriation acquired exclusively under Division 2 of Water Code (*Water Code § 1000 et seq.*). *Water Code § 1225*

Formation of irrigation district. *Water Code § 20500 et seq.*

Irrigation districts are agencies of state of *California. Water Code § 20570*

Formation of irrigation district on petition. *Water Code § 20700*

Lands to be formed into irrigation district are not required to be contiguous. *Water Code § 20701*

Irrigation district as furnishing sufficient water to district for beneficial use. *Water Code § 22075*

Irrigation district are required to control, distribute, and spread water. *Water Code § 22078*

Irrigation district as providing for drainage. *Water Code § 22095*

Involvement of irrigation districts in electric power. *Water Code § 22115*

Involvement of irrigation districts in airports. *Water Code § 22140*

Involvement of irrigation districts in flood control. *Water Code § 22160*

Irrigation district's role in constructing necessary works for collection of water. *Water Code § 22226*

Acquisition and operation of necessary equipment by irrigation district. *Water Code § 22231*

Basis on which irrigation water is distributed. *Water Code § 22250*

Equitable distribution of water to those making required payment; water rights assignable. *Water Code § 22251*

How rights to irrigation water are obtained in each irrigation district. *Water Code § 22252.1*

Irrigation district's refusal to deliver water through unclean ditches; determination of alternative means of delivery. *Water Code § 22255*

Equitable distribution rules are formulated and distributed by each irrigation district. *Water Code § 22257*

No diversion of water to detriment of other persons authorized without compensation. *Water Code § 22263*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusGovernmentsState & Territorial GovernmentsWater RightsReal Property LawTortsNuisanceRemediesInjunctionsGeneral OverviewReal Property LawWater RightsGeneral OverviewReal Property LawWater RightsProcedure

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§ 315.33 State Regulations

Irrigation use defined. *23 Cal. Code Reg. § 662*

Proceedings for adjudication of claims to water rights before State Water Resources Control Board. *23 Cal. Code Reg §§ 951-969*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsWater RightsReal Property LawWater RightsProcedure

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§ 315.34 Decisions

[1] Availability of Injunctive Relief

Embankments erected by defendant and causing water to flow on another's land which would not flow there naturally create a nuisance per se; its continuance ripens into a right in the nature of an easement or servitude; mandatory injunction issues to prevent creation of these easement. *Learned v. Castle (1889) 78 Cal. 454, 461-462, 21 P. 11*

Plaintiff seeking an injunction to restrain diversion of water above his or her lands must show (1) that there is a wrongful diversion of water above his or her lands, and (2) that the amount of water wrongfully diverted would be rightfully used by him or her for reasonable and beneficial purposes. *Carlsbad Mut. Water Co. v. San Luis Rey Dev. Co. (1947) 78 Cal. App. 2d 900, 914, 178 P.2d 844*

[2] Damages Awarded in Addition to Injunctive Relief

City's knowing discharge of sewage is actionable as a taking of property compensable by damages when continuing discharge prevents the landowner from widening and deepening creek beds in accordance with flood control requirements before developing his or her property. *Amador Valley Investors v. Livermore (1974) 43 Cal. App. 3d 483, 491-492, 117 Cal. Rptr. 749*

When there has been a grant of a right of way for a drainage ditch by the landowner to an irrigation district, the landowner is not precluded from recovering for damages to his or her lands from all seepage; the landowner is estopped from afterward prosecuting action for part damages or for future damages reasonably to be expected by reason of necessary, natural, and ordinary use of utility. *Lourence v. West Side Irrigation Dist. (1965) 233 Cal. App. 2d 532, 536, 43 Cal. Rptr. 889* (district is not relieved from liability for seepage because of land grant, thus landowner entitled to instruction for negligence)

Award of damages is proper when a smaller conduit substituted for a larger one causes the owner of a water right to obtain insufficient water for his or her irrigation needs. *Enos v. Harmon (1958) 157 Cal. App. 2d 746, 751-752, 321*

P.2d 810

Damages are appropriate, in addition to injunctive relief, against a defendant negligently moving immense timber jam existing in a stream above plaintiff's property and thus causing the breaking of plaintiff's dike and the flooding of plaintiff's lands. *Sacchi v. Bayside Lbr. Co. (1910) 13 Cal. App. 72, 85, 108 P. 885*

[3] Duty of Care

[a] Construction and Maintenance of Ditches and Canals

Liability of public works contractor for damage caused by collapse of partially constructed dam. *Diamond Springs Lime Co. v. American River Constructors (1971) 16 Cal. App. 3d 581, 596-598, 94 Cal. Rptr. 200*

Owners of canals and ditches maintained for purpose of conveying water for irrigation purposes either for private use or for sale to public are liable for damages to crops or property of adjacent landowner resulting from overflow or leakage from the canals or ditches on account of negligence on the part of owners in the construction, maintenance, or operation of the system. *Massetti v. Madera Canal & Irrigation Co. (1937) 20 Cal. App. 2d 708, 714, 68 P.2d 260* ; *Ketcham v. Modesto Irrigation Dist. (1933) 135 Cal. App. 180, 187, 26 P.2d 876*

Owners of ditches, canals, or other works are not held as insurers against all damages incurred but are held liable in damages for all injuries which are a direct and proximate result of their actual negligence or of their failure to exercise ordinary and reasonable care. *Ketcham v. Modesto Irrigation Dist. (1933) 135 Cal. App. 180, 187, 26 P.2d 876*

[b] Diverting Water

In action by adjoining owner alleging defendants diverted stream and storm drain from defendants' adjoining property onto plaintiffs' property by bulldozing ditch on plaintiffs' property resulting in erosion during and after each rain, three-year statute of limitations of *Code Civ. Proc. § 338* is applicable and runs from each occurrence of erosion. *Polin v. Cho (1970) 8 Cal. App. 3d 673, 676-679, 87 Cal. Rptr. 591*

Negligence exists when obstruction of watercourse causes overflow of water beyond that which would have occurred in the absence of the obstruction. *Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 375, 82 Cal. Rptr. 689*

Person is not permitted with impunity to obstruct or divert flow of natural watercourse to "damage of others" property; when natural watercourse is obstructed, the diverter is under a continuing duty of providing proper facilities for handling of diverted waters so as to prevent damage to property of others. *Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 373, 82 Cal. Rptr. 689*

Plaintiff seeking to recover damages under same state of facts but under different theories of recovery, that is, private nuisance and negligence, has but one cause of action. *Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 372, 82 Cal. Rptr. 689*

One who artificially changes condition of watercourse has a continuing duty to maintain that diversion or changed condition within reasonable capacity of its system which effected the change. *Granone v. County of Los Angeles (1965) 231 Cal. App. 2d 629, 649, 42 Cal. Rptr. 34*

[c] Drainage and Drainage Systems

Upper landowner has right to discharge reasonable and noninjurious amounts of irrigation water through natural areas of flow onto lower landowner's property, and lower landowner has coequal burden to receive reasonable and noninjurious amounts of irrigation water through natural flowage channels. *Martinson v. Hughey (1988) 199 Cal. App. 3d 318, 328, 244 Cal. Rptr. 795*

Construction of artificial drainage systems by upper landowner is permitted to increase velocity, but not volume, of discharge. *Martinson v. Hughey (1988) 199 Cal. App. 3d 318, 328, 244 Cal. Rptr. 795*

When lower landowner and predecessors built berm on property and obliterated natural water course for receiving waters from above and built compensating ditch to receive waters that servient tenement had duty to receive, lower landowner was not permitted to pare down rights of upslope owners to discharge waters from their properties into compensating ditch by blocking it, even in absence of prescriptive easement. *Martinson v. Hughey (1988) 199 Cal. App. 3d 318, 329, 244 Cal. Rptr. 795*

[d] Excess Drainage

Responsibility of builder of irrigation conduit when seeping nature of soil known or unknown at time of construction; duty of builder to make and maintain conduit as nearly waterproof as human agency can reasonably and prudently make it. *Kall v. Carruthers (1922) 59 Cal. App. 555, 559, 211 P. 43*

Knowingly constructing canal through loose sand and gravel incapable of holding water, without taking any steps to prevent or control seepage, constitutes negligence. *Tormey v. Anderson-Cottonwood Irrigation Dist. (1921) 53 Cal. App. 559, 564, 200 P. 814*

[e] Liability

Liability of flood control district for negligently owning and maintaining debris basin. *Miller v. Los Angeles County Flood Control Dist. (1973) 8 Cal. 3d 689, 694-696, 106 Cal. Rptr. 1, 505 P.2d 193*

Water companies are immune from civil liability for loss by fire due to failure to maintain their systems properly; liability of developers and engineers designing water system. *Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 806-812, 110 Cal. Rptr. 543*

Irrigation of crops is not an ultrahazardous activity carrying risk of absolute liability. *Clark v. Di Prima (1966) 241 Cal. App. 2d 823, 829, 51 Cal. Rptr. 49*

[4] Interference With Easement

Water right holder is entitled to injunctive relief when the right to water-carrying ditch is jeopardized by the contemplated operations of another. *McLaughlin v. Del Re (1886) 71 Cal. 230, 231, 236, 16 P. 881*

Injunctive relief is appropriate when a smaller conduit substituted for a larger one causing the owner of the water right to obtain insufficient water for irrigation needs. *Enos v. Harmon (1958) 157 Cal. App. 2d 746, 751, 321 P.2d 810*

Purchaser of land subject to an irrigation ditch easement is a taking subject to that easement and is prohibited from interfering with its use by the easement owner; the purchaser maintaining obstruction to ditch or canal which prevents drainage is enjoined from maintaining obstruction and ordered to restore ditch to previous state. *Morris v. George (1943) 57 Cal. App. 2d 665, 676, 681-682, 135 P.2d 195*

[5] Irrigation Defined

Watercourse defined. *Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 374, 82 Cal. Rptr. 689*

Right to water for irrigation is a right in real property. *Chrisman v. Southern Cal. Edison Co. (1927) 83 Cal. App. 249, 258, 256 P. 618*

[6] Irrigation Districts

Agreement purporting to discharge water district from liability for damages from flooding is contrary to public policy; water district has mandatory duty to avoid wasting water and to prevent flooding. *Salton Bay Marina, Inc. v. Imperial Irrigation Dist. (1985) 172 Cal. App. 3d 914, 938-940, 218 Cal. Rptr. 839*

Irrigation district is required to provide drainage made necessary by irrigation within district; district is not liable to landowner outside district absent evidence of its direct participation in actual discharge of water or failure to construct or maintain its distribution systems to avoid water loss, such as seepage from district canal. *Hagemann v. West Stanislaus Irrigation Dist. (1983) 144 Cal. App. 3d 910, 913-914, 193 Cal. Rptr. 70*

Gov. Code § 910, requiring presentation of notice of claim to public entity, is applicable to action against board of directors of irrigation district for damages sustained from their failure to obtain statutory labor and materials bond. *C. A. Magistretti Co. v. Merced Irrigation Dist. (1972) 27 Cal. App. 3d 270, 274-276, 103 Cal. Rptr. 555*

Landowners having proprietary interest in water rights (as distinguished from a mere right to receive water) represented by shares of irrigation company are interested and proper parties to in rem action validating contract between water districts when contract sought to be validated affects landowners' water rights. *Empire W. Side Irrigation Dist. v. Lovelace (1970) 5 Cal. App. 3d 911, 913-914, 85 Cal. Rptr. 552*

An irrigation district that grants voting rights to landowners in proportion to assessed value of landholdings meets constitutional standard. *Schindler v. Palo Verde Irrigation Dist. (1969) 1 Cal. App. 3d 831, 838-839, 82 Cal. Rptr. 61*

[7] Rights Among Cotenants

One cotenant insofar as he or she interferes with the joint property to the damage or injury of his or her cotenant (1) is a trespasser to that extent, (2) is unable to assume, simply because he or she has a certain interest in the common property, to deal with it or use it to the detriment of other co-owners, and (3) has the right to protect his or her respective interests by enjoining the use. *Barton Land & Water Co. v. Crafton Water Co. (1915) 171 Cal. 89, 97, 152 P. 48* ; *De La Cuesta v. Bazzi (1941) 47 Cal. App. 2d 661, 673, 118 P.2d 909*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawLimited Use RightsEasementsInterferenceReal Property LawTortsNuisanceRemediesDamagesCompensatory DamagesReal Property LawTortsNuisanceRemediesInjunctionsPrerequisitesGeneral OverviewReal Property LawWater RightsGeneral OverviewTortsNegligenceDutyGeneral Overview

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§ 315.35 Law Reviews

Note, *The Thirst for Population Control: Water Hookup Moratoria and the Duty to Augment Supply, 27 Hastings L.J. 753 (1976)* Taylor, *Mexican Migration and the 160-Acre Water Limitation, 63 Cal. L. Rev. 732 (1975)*

Note, *Battle of the Heavyweights: In This Corner Environmental Rights and in the Far Corner Free Travel Rights, 1 Hastings Const. L.Q. 153 (1974)*

Mahoney and Ausness, *A Modern Proposal for State Regulation of Consumptive Uses of Water, 22 Hastings L.J. 523 (1971)*

Note, *A Challenge to the California Water Plan, 22 Hastings L.J. 732 (1971)*

Weatherford, *Legal Aspects of Interregional Water Diversion, 15 UCLA L. Rev. 1299 (1968)*

Note, *The Ownership of Diffused Surface Waters in the West, 20 Stan. L. Rev. 1205 (1968)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawWater QualityGeneral OverviewGovernmentsState & Territorial GovernmentsWater RightsReal Property LawWater RightsRiparian Rights

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§ 315.36 Text References

California Farm and Ranch Law, ch. 1, *Leases*, §§ 1.42-1.46; ch. 8, *Rights to Beneficial Use*; ch. 9, *Purchasing*; ch. 10, *Protecting Rights* (Cal. C.E.B. 1967)

Cartwright, Farm and Ranch Real Estate Law, ch. 7, *Water Rights and Sources for Farm and Ranch*

Hutchins, The California Law of Water Rights

Witkin, Summary of California Law, vol. 12, *Real Property*, §§ 962-972 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsWater RightsReal Property LawWater RightsBeneficial Use

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[Reserved]

§§ 315.37[Reserved]

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27-315 California Forms of Pleading and Practice--Annotated § 315.50

§ 315.50 Complaint for Temporary Restraining Order, Preliminary [Code Civ. Proc. §§ 526, 527] and Permanent [Civ. Code § 3422] Injunction, and Damages [Civ. Code § 3333] to Prevent Interference With and Diversion of Irrigation Water [Code Civ. Proc. § 530]

[1] FORM Complaint for Temporary Restraining Order, Preliminary [Code Civ. Proc. §§ 526, 527] and Permanent [Civ. Code § 3422] Injunction, and Damages [Civ. Code § 3333] to Prevent Interference With and Diversion of Irrigation Water [Code Civ. Proc. § 530]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR TEMPORARY RESTRAINING
_____ [*name(s)*],	)	ORDER, PRELIMINARY AND PERMANENT IN-
Defendant(s).	)	JUNCTION, AND DAMAGES
	)	

Plaintiff alleges:

1. Plaintiff is now, and at all times herein mentioned was, the owner and in possession and control of a certain parcel of real property situated in _____ County, California, more particularly described as follows:_____ [*give legal description*]. Plaintiff's property is highly improved, devoted to _____ [*describe type of crop*], and is of great value to plaintiff.

2. Defendant _____ [*name*] is now, and at all times herein mentioned was, the owner and in possession and control of a certain parcel of real property situated in _____ County, California, more particularly described as follows:_____ [*give legal description*]. Defendant's property adjoins plaintiff's property

on the _____ [*indicate direction, e.g.*, north and west].

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

[4. (Plaintiff is informed and believes and thereon alleges that) (A)t all times herein mentioned defendant _____ (*name of agent*) was authorized and empowered by defendant _____ (*name of principal*) to act and did act as the agent of defendant _____ (*name of principal*), and each and all of the things herein alleged to have been done by him/her/it were done in the capacity of and as agent for defendant _____ (*name of principal*).]

5. _____ [*Allege basis for plaintiff's right to irrigation water, e.g.*, Plaintiff is the owner of a pipeline located on defendant's property with the right to appropriate irrigation water through the pipeline *or* On or about _____ (*date*), plaintiff and defendant entered into a(n) _____ (written *or* oral) agreement in which defendant promised to allow plaintiff to appropriate irrigation water from defendant's well by means of a pipeline located on defendant's property].

6. The pipeline is the only practical method by which plaintiff can convey water to his/her property; if cut off from the use of the pipeline, plaintiff could not, as a practical matter, irrigate his/her property. Plaintiff's property is presently in need of irrigation and, in the normal operation, would and should have been irrigated before the date of this complaint.

[*EITHER, if water has been diverted*]

7. Within the 10 days before the filing of this complaint, plaintiff was in peaceful possession of the flow of water through such pipeline and, within such time, plaintiff has been deprived of the flow of water by the wrongful diversion of such flow by the defendant.]

[*OR, if diversion of water has been threatened*]

7. Within the 10 days before the filing of this complaint, plaintiff was in possession of the flow of water through such pipeline and, within such time, defendant is wrongfully threatening to divert the flow of such water.]

[*CONTINUE*]

8. Defendant _____ [*name*] has willfully and without just cause or provocation _____ [closed *or* threatened to close] the pipeline, thus _____ [preventing *or* threatening to prevent] irrigation water flowing through the pipeline to plaintiff's land, and has _____ [diverted *or* threatened to divert] the irrigation water to his/her/its own use. Unless restrained and enjoined from closing the pipeline and diverting the waters from the pipeline, defendant will permanently prevent the transmission of water to plaintiff's land and will thus greatly damage and impair plaintiff's growing crops. Unless irrigation water reaches plaintiff's land immediately, the _____ [*year*] crops now growing on plaintiff's land will be permanently damaged. For this reason, plaintiff has no plain, speedy, or adequate remedy at law.

9. The maturing crops on plaintiff's property are presently being damaged by the lack of irrigating water; therefore, the exact amount of the damage is not known. Plaintiff will move to amend this complaint to state this amount when the same becomes known to him/her, or on proof thereof.

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

1. For an order requiring defendants to show cause, if any, why they should not be enjoined as hereinafter set forth, during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendants:

a. From shutting off the pipeline and thus preventing the flow of irrigation water to plaintiff's property; and

b. From interfering with the flow of irrigation water through the pipeline to plaintiff's property in any manner;

3. For damages according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

CERTIFICATION RE NOTICE

I hereby certify that _____ [on _____ (*date*), I informed defendant of what time and where the foregoing application for a temporary restraining order would be made *or* in good faith I attempted to inform defendant of what time and where the foregoing application for a temporary restraining order would be made, by _____ (*specify efforts*), but I was unable to do so *or* notice to defendant of the foregoing application for a temporary restraining order should not be required for the reason that _____ (*specify*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[Attorney for] Plaintiff

[2] Use of Form

The form in [1], *above*, is a complaint for an injunction to prohibit interference with a landowner's right to obtain irrigation water through a given pipeline. The complaint also prays for damages for injury sustained by plaintiff's crops due to the absence of water.

It should be noted that some of the allegations in this complaint are based on the requirements of *Code Civ. Proc. § 530*. It should also be noted, however, that the meaning of the term "natural" in *Code Civ. Proc. § 530* is not certain. It may refer to natural watercourses in the sense of streams or creeks, or it may refer to "natural" in the sense of "customary" or "regular." The complaint in [1], *above*, is based on the assumption that the latter reference is intended since the complaint involves a factual situation based on the diversion of water from an irrigation pipeline, not a natural watercourse.

[3] Allegations

The complaint alleges:

- plaintiff's right to irrigation water by means of a specific pipeline located on defendant's property (Paragraph 5);

- plaintiff's immediate need for the irrigation water (Paragraph 6);

- plaintiff's possession of the flow of irrigation water within 10 days before the complaint's filing (Paragraph 7) [*see Code Civ. Proc. § 530*; *see also Higgins v. Kadjevich (1960) 186 Cal. App. 2d 520, 521-522, 9 Cal. Rptr. 115]* ;

- defendant's interference with the flow of irrigation water to plaintiff (Paragraph 8); and

- damage to plaintiff (Paragraph 9) [*see Higgins v. Kadjevich (1960) 186 Cal. App. 2d 520, 521-522, 9 Cal. Rptr. 115]* .

[4] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*]) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Certification re Notice

No temporary restraining order will be granted without notice to the opposing party unless the applicant or the applicant's attorney certifies one of the following to the court under oath: (1) that within a reasonable time before the application the applicant informed the opposing party or the opposing party's attorney at what time and where the application would be made; (2) that the applicant in good faith attempted but was unable to inform the opposing party and the opposing party's attorney, specifying the efforts made to contact them; or (3) that for reasons specified the applicant should not be required to so inform the opposing party or the opposing party's attorney [*Code Civ. Proc. § 527(c)*].

For discussion of this requirement and the procedure and additional forms for obtaining a temporary restraining order, see Ch. 303, *Injunctions* .

[6] Jurisdiction

An action seeking permanent injunctive relief is in the jurisdiction of the superior court and is not a limited civil case except as otherwise provided by statute [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*].

[7] Venue

Subject to the court's power to transfer actions and proceedings as provided in *Code Civ. Proc. §§ 392-402*, the county in which the real property which is the subject matter of the action, or some part of the action, is situated, is the proper county for the trial of actions to recover real property, or of estates and interests in real property, or for the determination in any form of such right or interest, and for injuries to real property [*Code Civ. Proc. § 392(a)(1)*].

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27-315 California Forms of Pleading and Practice--Annotated § 315.51

§ 315.51 Answer to Complaint by Riparian Owner to Enjoin Diversion of Water--Water Diverted or Proposed to Be Diverted for Irrigation of Land or for Other Public Use [Code Civ. Proc. § 534]

[1] FORM Answer to Complaint by Riparian Owner to Enjoin Diversion of Water--Water Diverted or Proposed to Be Diverted for Irrigation of Land or for Other Public Use [Code Civ. Proc. § 534]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*]	)	
Plaintiff,	)	NO. _____
vs.	)	ANSWER
_____ [*name(s)*],	)	
Defendant(s).	)	
	)	

_____

Defendant answers the complaint as follows:

1. Defendant's purpose in interfering with or diverting the flow of water through the irrigation pipeline is to irrigate defendant's crops on the property belonging to defendant and adjoining the irrigation pipeline. Without the use of these irrigation waters defendant cannot, as a practical matter, irrigate his/her/its crops.

2. Defendant proposes to use these irrigation waters solely for defendant's crops on defendant's land to the following extent and duration: _____ [*indicate extent and duration, e.g.,* for 10 days per month during the irrigation season of April through August of each year]. Defendant proposes to take only _____ gallons of water per day.

3. Defendant's diversion of the flow of water from the pipeline will not interfere with plaintiff's actual or necessary

beneficial use. _____ [*Allege amount of use remaining to plaintiff, e.g.,* Plaintiff shall have full use of the irrigation water in such pipeline for a period of 20 days per month during the irrigation season of April through August of each year.]

4. Defendant's diversion of the flow of water from the pipeline is fully compensable in that _____ [*describe condition indicating compensable damages, e.g.,* the gages and control valves can register the amount of water diverted by defendant].

5. Unless defendant has use of the flow of water from this pipeline, defendant will be unable to transmit water to his/her/its land to the damage and impairment of his/her/its growing crops.

WHEREFORE, defendant prays:

1. That plaintiff's application be denied;

2. That the court fix compensatory damages for plaintiff;

3. For defendant's costs in this action; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant

[*Verification, if desired. See § 315.50.*]

[2] Use of Form

The answer in [1], *above*, is based on *Code Civ. Proc. § 534*. It is for use in responding to an action by a riparian owner to enjoin the diversion of water and alleges, basically, that the water which is being diverted or is proposed to be diverted is for either the irrigation of land or other public use [*see Code Civ. Proc. § 534*].

[3] Allegations

The answer alleges:

- Defendant's purpose in interfering with or diverting irrigation water (Paragraph 1) [*Code Civ. Proc. § 534*];

- The nature, place, duration, and extent of use (Paragraph 2) [*Code Civ. Proc. § 534*];

- No resulting interference with plaintiff's actual or necessary beneficial use (Paragraph 3) [*Code Civ. Proc. § 534*]; and

- Damages as fully compensating plaintiff for any loss (Paragraph 4) [*see Code Civ. Proc. §§ 532(b), 534*].

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27-315 California Forms of Pleading and Practice--Annotated § 315.52

§ 315.52 Complaint for Damages [Civ. Code § 3333]--For Injury to Real Property Based on Negligent Irrigation [Civ. Code § 1714(a)]--Flooding of Irrigation Ditches Causing Flooding on Plaintiff's Land

[1] FORM Complaint for Damages [Civ. Code § 3333]--For Injury to Real Property Based on Negligent Irrigation [Civ. Code § 1714(a)]--Flooding of Irrigation Ditches Causing Flooding on Plaintiff's Land

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name(s)*], Defendant(s).	)))))))))	NO. _____ COMPLAINT FOR DAMAGES (Negligence) [Amount demanded _____ (exceeds *or* does not exceed) $10,000] [LIMITED CIVIL CASE]

Plaintiff alleges:

1. Plaintiff is now, and at all times herein mentioned was, the owner and in possession and control of a certain parcel of real property situated in _____ County, California, more particularly described as follows: _____ [*give legal description*]. Plaintiff's property is highly improved, devoted to _____ [*describe type of crop*], and is of great value to plaintiff.

[*EITHER*]

2. Defendant is now, and at all times herein mentioned was, the owner and in possession and control of a certain parcel of real property situated in _____ County, California, more particularly described as follows: _____ [*give legal description*]. Defendant's property adjoins plaintiff's property on the _____ [*indicate direction, e.g.,* north and west].

[*OR*]

2. Defendant is now, and at all times herein mentioned was, _____ [*specify type of governmental entity, e.g.,* an irrigation district] controlling and operating an irrigation pipeline system situated in _____ County, California, and adjacent to plaintiff's property on the _____ [*indicate direction, e.g.,* north and west].

[*EITHER*]

3. During the season of _____ [*year*], defendant brought quantities of water onto his/her/its property for the purpose of irrigation.

[*OR*]

3. During the season of _____ [*year*], defendant brought quantities of water into his/her/its irrigation pipeline system.

[*CONTINUE*]

4. Defendant maintained his/her/its irrigation ditches in such a careless and negligent manner as to allow excessive amounts of water to seep under and onto plaintiff's lands. The seepage was excessive, extraordinary, and unnatural and therefore could not have been reasonably anticipated by plaintiff. As a proximate result of this excessive seepage, approximately _____ acres of plaintiff's _____ [*specify, e.g.,* orchard] were destroyed, all to plaintiff's damage in the sum of $_____.

[5. On or about _____ (*date*), plaintiff presented to _____ (*name of governmental entity*) by _____ (delivering *or* mailing) a claim to the _____ (clerk *or* secretary *or* auditor) for the damages sustained as a result of the above-described occurrence, all in compliance with the requirements of *Government Code Section 905*. A copy of the claim is attached to this complaint as Exhibit A and made a part of this complaint.]

[6. On or about _____ (*date*), _____ (*name of governmental entity*) _____ (rejected the claim in its entirety *or* allowed the claim in the amount of $_____ and rejected it as to the remainder *or* failed to act on the claim within the period of 45 days after its presentation, and the claim was thus deemed rejected, under the provisions of *Government Code Section 912.4* at the expiration of the 45-day period, to wit, on _____ (*date*)).]

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

1. For damages in the sum of $_____;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 315.50.*]

[2] Use of Form

This form is a complaint for damages to real property caused by the negligence of a private landowner or governmental entity. It is brought by a landowner whose land has been flooded.

[3] Allegations

The complaint alleges (1) defendant's control and/or ownership of the irrigation system (Paragraph 2); and (2) breach of defendant's duty and damages (Paragraph 4) [*see generally Civ. Code § 1714(a)*]. The complaint also alleges the filing of a claim with a public entity and either its total or partial rejection (Paragraphs 5 and 6). This allegation must be used if damages resulted from an irrigation pipeline or system owned, controlled, or operated by an irrigation district, water district, or the like because *Gov. Code § 905* requires that such a claim be presented to the appropriate public entity as a prerequisite to filing suit against it. For further discussion, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[4] Verification

Although verification of a complaint for damages for injury to real property is not required, verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case, unless the defendant is a public entity [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*].

If the action is a limited civil case, the caption must state whether the demand exceeds or does not exceed $10,000 and must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[6] Venue

Subject to a court's power to transfer actions and proceedings, the superior court in the county where the real property

that is the subject of the action, or some part of the real property, is situated is the proper county for trial for injuries to real property [*see Code Civ. Proc. § 392(a)(1)*].

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Chapter 315 IRRIGATION
PART IV. FORMS

27-315 California Forms of Pleading and Practice--Annotated § 315.53

§ 315.53 Allegations--Diversion of Waters Causing Flooding

[1] FORM Allegations--Diversion of Waters Causing Flooding

1. On or about _____ [*date*], defendant constructed a _____ [*specify, e.g.,* ditch *or* dike] for the purpose of diverting and rechanneling the natural flow of _____ [*specify, e.g.,* waters along the Dominquez Channel *or* rainfall along a creekbed on defendant's property].

2. Defendant maintained his/her/its diversion in such a careless and negligent manner as to _____ [*specify, e.g.,* allow water to flood onto plaintiff's lands]. As a proximate result of this flooding, approximately _____ acres of plaintiff's _____ [*specify, e.g.,* orchard] were destroyed, all to plaintiff's damage in the sum of $_____.

[2] Use of Form

These allegations are for use in a complaint by a landowner in an action for damages when the negligent maintenance of a diversion or rechanneling of a natural watercourse has resulted in flooding of real property. These allegations can be substituted for Paragraphs 3 and 4 in the form in *§ 315.52[1]*.

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PART IV. FORMS

27-315 California Forms of Pleading and Practice--Annotated § 315.54

§ 315.54 Allegations--Interference With Waters Causing Stoppage or Flooding

[1] FORM Allegations--Interference With Waters Causing Stoppage or Flooding

1. Defendant maintained his/her/its irrigation ditches in such a careless and negligent manner so as to interfere with the passage of irrigation water onto plaintiff's lands.

[*EITHER*]

2. As a proximate result of this stoppage, plaintiff's crops withered and dried up for lack of water, all to plaintiff's damage in the sum of $_____.

[*OR*]

2. As a proximate result of this flooding, plaintiff's crops were destroyed, all to plaintiff's damage in the sum of $_____.

[2] Use of Form

These allegations are for use in a complaint by a landowner in an action for damages when there has been a negligent interference with the passage of irrigation water to such landowner and when the resulting stoppage or flooding has destroyed the landowner's crops. These allegations can be substituted for Paragraph 4 in the form in *§ 315.52[1]*.

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27-315 California Forms of Pleading and Practice--Annotated § 315.55

§ 315.55 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages--Intentional Trespass and Intentional Destruction of Gates and Valves of Plaintiff's Irrigation Pipeline

[1] FORM Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages--Intentional Trespass and Intentional Destruction of Gates and Valves of Plaintiff's Irrigation Pipeline

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name(s)*], Defendant(s).	)))))))))	NO. _____ COMPLAINT FOR DAMAGES [Amount demanded _____ (exceeds *or* does not exceed) $10,000] [LIMITED CIVIL CASE]

Plaintiff alleges:

1. Plaintiff is now, and at all times mentioned in this complaint was, the owner and in possession and control of a certain parcel of real property situated in _____ County, California, more particularly described as follows: _____ [*give legal description*]. On plaintiff's property there is a well and pipeline together with necessary gates and valves to provide for the irrigation of plaintiff's property.

2. Defendant is now, and at all times mentioned in this complaint was, the owner and in possession and control of a certain parcel of real property situated in _____ County, California, more particularly described as follows: _____ [*give legal description*]. Defendant's property adjoins plaintiff's property on the

_____ [*indicate direction, e.g.,* north and west].

3. On or about _____ [*date*], defendant wrongfully entered onto plaintiff's property and by force broke plaintiff's gates and valves, directing water through plaintiff's pipeline to defendant's nearby _____ [*specify, e.g.,* field *or* orchard]. Plaintiff did not give defendant permission to enter the property, use the pipeline, or break the gates and valves; plaintiff did, in fact, expressly forbid defendant's entry and use of plaintiff's pipeline, gates, and valves. As a result of defendant's actions, plaintiff has been damaged.

4. Defendant's actions were deliberate, malicious, and oppressive toward plaintiff. Plaintiff is therefore entitled to punitive damages against defendant.

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

1. For compensatory damages in the sum of $_____;

2. For punitive damages;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 315.50.*]

[2] Use of Form

This form is a complaint for use in an action for damages for trespass when a defendant has wrongfully entered a landowner's property, destroyed the irrigation network on the property, and appropriated the water.

[3] Allegations

The complaint alleges:

- Plaintiff's possession of the premises (Paragraph 1) [*Williams v. Goodwin (1974) 41 Cal. App. 3d 496, 508, 116 Cal. Rptr. 200]* .

- The identity of the defendant (Paragraph 2).

- The time, place, and circumstances of the trespass and injury and the damages arising from the trespass (Paragraph 3).

- Malice on the part of defendant entitling plaintiff to punitive damages (Paragraph 4) [*Civ. Code §*

3294].

[4] Verification

Although verification of a complaint for damages for injury to real property is not required, verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case, unless the defendant is a public entity [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*].

If the action is a limited civil case, the caption must state whether the demand exceeds or does not exceed $10,000 and must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[6] Venue

Subject to a court's power to transfer actions and proceedings, the superior court in the county where the real property that is the subject of the action, or some part of the real property, is situated is the proper county for trial for injuries to real property [*see Code Civ. Proc. § 392(a)(1)*].

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27-316 California Forms of Pleading and Practice--Annotated 316.syn

§ 316.syn Synopsis to Chapter 316: JOINT TENANCY AND TENANCY IN COMMON

§ 316.01 Scope of Chapter

§ 316.02 Cross References

§§ 316.03-316.09 [Reserved]

§ 316.10 Definitions

[1] Cotenancy

[2] Joint Tenancy; Survivorship as Distinguishing Feature

[3] Tenancy in Common; Tenancies in Common Preferred

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§ 316.11 Confidential Relation Between Cotenants

§ 316.12 Creation of Joint Tenancy

[1] Methods of Creation; Express Declaration Is Required

[2] Safe-Deposit Boxes

[3] Motor Vehicles

§ 316.13 Creation of Tenancy in Common

§ 316.14 Effect of Unsuccessful Attempts to Create Joint Tenancy

[1] Tenancy in Common Created Generally

[2] Attempted Testamentary Gift

[3] Undue Influence Involved

§ 316.15 Joint Accounts at Financial Institutions

[1] Scope of Law

2] Testamentary Formalities Not Necessary

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[4] "Joint Account" Defined; Community Property and Tenancy in Common Accounts

[5] Ownership of Account While All Parties Are Living

[a] Nonspouses

[b] Accounts Owned by Spouses

[6] Changes in Account Terms

[7] Ownership After Death of Party

[a] Determined by Terms of Account

[b] Death of Party to Joint Account

[c] Death of Party to Tenancy in Common Account

[8] Withdrawals

[9] Levies and Setoffs

[10] Notice From Party Restraining Payment From Account

§ 316.16 Property Owned by Husband and Wife

[1] Presumption

[2] As Joint Tenants

[3] Execution on Property Held in Joint Tenancy by Spouse

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§ 316.17 Joint Tenancy with Former Spouse

§ 316.18 Nonprobate Transfer to Former Spouse

§ 316.19 Termination of Joint Tenancy Generally

[1] Acts Constituting Termination

[a] Deed, Declaration, or Other Written Instrument

[b] Application of Statutory Rules

[c] Unilateral Conversion by Spouse

[2] Agreement or Course of Dealing

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[4] Intent as Factor

[5] Consent of Joint Tenant Not Required

[6] Unilateral Termination of Joint Tenancy in Personal Property

§ 316.20 Termination of Joint Tenancy by Death

[1] Survivor Takes All

[2] Exceptions

[a] Simultaneous Death

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§ 316.21 Termination of Cotenancy by Partition

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[2] Right to Demand Partition

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[5] Partition of Joint Tenancy Required Before Death

[6] Effect of Partition

§ 316.22 Right to Possession of Property

[1] Generally

[2] Inference of Permissive Use or Possession

[3] Contracts Between Joint Tenants for Exclusive Possession

[4] Reasonable Restriction of Cotenants

[5] Presumption of Possession for All Cotenants

[6] Adverse Possession by Cotenant Requires Notice and Ouster

[a] Evidence of Ouster

[b] Establishing Ouster by Demand for Concurrent Possession

[c] Cotenants' Remedies Against Adversely Possessing Cotenant

§ 316.23 Right to Rents and Profits

[1] Cotenants' Fractional Share

[2] Cotenants in Exclusive Possession

[3] Cotenants in Oil and Mineral Rights

§ 316.24 Right to Contribution

[1] Advances to Preserve Common Estate

[2] Payment of Taxes

[3] Cotenants in Oil Rights

§ 316.25 Right to Encumber Property

[1] Cotenant's Undivided Interest

[2] Implied Consent of Cotenants Required

§ 316.26 Duty Not to Commit Waste

§ 316.27 No Duty to Insure

§ 316.28 Tortious Acts Not Imputed to Other Cotenants

§ 316.29 Cotenants' Remedies Against Third Parties

§§ 316.30-316.49 [Reserved]

§ 316.50 Related Matthew Bender Publications

§ 316.51 State Statutes

[1] Creation of Joint Tenancy

[2] Creation of Tenancy in Common

[3] Definitions

[4] Duty Not to Commit Waste

[5] Effects of Unsuccessful Attempts to Create Joint Tenancy

[6] Husband and Wife

[7] Right to Possession of Property

[8] Termination of Cotenancy by Partition

[9] Termination of Joint Tenancy

§ 316.52 Decisions

[1] Confidential Relationship Between Cotenants

[2] Cotenants' Remedies Against Third Parties

[3] Creation of Joint Tenancy

[a] By Writing

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[a] Joint Tenancy--Survivorship as Distinguishing Feature of Joint Tenancy

[b] Tenancy in Common

[i] Undivided Interest

[ii] Tenancies in Common Preferred

[5] Duty Not to Commit Waste

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[a] Tenancy in Common Created

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[7] Husband and Wife

[a] As Joint Tenants

[b] As Tenants in Common

[c] Execution on Property Held in Joint Tenancy by Spouses

[8] No Duty to Insure

[9] Presumption of Community Property

[10] Right to Contribution

[a] Advances to Preserve Common Estate

[b] Payment of Taxes

[c] Cotenants in Oil Rights

[11] Right to Encumber Property

[a] Cotenant's Undivided Interest

[b] Implied Consent of Cotenants Required

[12] Right to Possession of Property

[a] Generally

[b] Adverse Possession by Cotenant Requires Notice and Ouster

[i] Evidence of Ouster

[ii] Cotenant's Remedies Against Adversely Possessing Cotenant

[c] Contracts Between Joint Tenants for Exclusive Possession

[d] Inference of Permissive Use or Possession

[e] Presumption of Possession for All Cotenants

[f] Reasonable Restriction of Cotenants

[13] Right to Rents and Profits

[a] Cotenants' Fractional Share

[b] Cotenants in Exclusive Possession

[c] Cotenants in Oil and Mineral Rights

[14] Termination of Cotenancy by Partition

[a] Effect of Partition

[b] Of Joint Tenancy

[c] Only Cotenants May Bring Action

[d] Right to Demand Partition

[i] Absolute Right

[ii] Modification or Waiver by Contract

[15] Termination of Joint Tenancy

[a] Acts Constituting Termination

[b] Acts Not Constituting Termination

[i] Examples in General

[ii] Fraud

[c] Consent of Joint Tenants Not Required

[d] Effect of Termination by Death

[i] Interest Passes by Survivorship

[ii] Exception: Murder of Cotenant

[e] Intent as Factor

[f] Interference With Survivorship

[i] Agreement; Effect

[ii] Agreement or Course of Dealing

[16] Tortious Acts Not Imputed to Other Cotenants

§ 316.53 Law Reviews

§§ 316.54-316.69 [Reserved]

§ 316.70 Complaint [Code Civ. Proc. § 425.10] for Declaratory Relief [Code Civ. Proc. § 1060] by Personal Representative of Decedent--Instrument Allegedly Creating Joint Tenancy Fails to Establish Intent Necessary to Create

Joint Tenancy

[1] FORM

[2] Use of Form

[3] Allegations

[4] Alternative Theories of Liability

[5] Verification

[6] Jurisdiction and Venue

[7] State Statutes

[8] Decisions

[9] Cross References

[10] Text References

§ 316.71 Allegations--Attempted Testamentary Gift of Personal Property

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

§ 316.72 Allegations--Undue Influence of Person Named as Joint Tenant

[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

§ 316.73 Demand for Concurrent Possession [Civ. Code § 843]

[1] FORM

[2] Use of Form

[3] Required Contents

[4] Service

[5] Effect of Failure to Yield Possession Pursuant to Demand

[6] When Demand Is Not Proper

[7] State Statutes

§ 316.74 Complaint [Code Civ. Proc. § 425.10] to Quiet Title [Code Civ. Proc. §§ 760.020(a), 761.020] to Real Property by Cotenant Out of Possession Against Cotenant in Possession Claiming Adversely

[1] FORM

[2] Use of Form

[3] Required Allegations

[4] Who Must Be Made Defendants

[5] Unknown Defendants

[6] Verification

[7] Jurisdiction and Venue

[8] Service of Summons

[9] Lis Pendens

[10] State Statutes

[11] Decisions

[12] Cross References

§ 316.75 Complaint for Contribution [Civ. Code § 1432] by Cotenant Against Cotenant--Payment of Tax Assessment to Prevent Condemnation of Real Property

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction and Venue

[6] State Statutes

[7] Decisions

[8] Cross References

§ 316.76 Complaint for Treble Damages [Code Civ. Proc. § 732] and for Permanent Injunction [Civ. Code § 3422]--By Cotenant out of Possession Against Cotenant in Possession for Waste

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction and Venue

[6] State Statutes

[7] Decisions

[8] Cross References

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PART I. SCOPE

27-316 California Forms of Pleading and Practice--Annotated § 316.01

§ 316.01 Scope of Chapter

This chapter discusses the rights and duties of joint tenants and tenants in common between themselves and against third persons.

It includes a form of complaint for declaratory relief for use when a joint tenant has died and an instrument which allegedly created a joint tenancy fails to establish the intent necessary to create a joint tenancy [*see § 316.70*] and forms of allegations of a failed testamentary gift [*see § 316.71*] and of undue influence [*see § 316.72*] for potential inclusion in that complaint.

It also includes a form of demand by a cotenant out of possession to regain concurrent possession or establish ouster [*see § 316.73*], and a form of complaint for use by a cotenant out of possession to bring an action to quiet title against a cotenant in possession who is claiming adversely [*see § 316.74*].

In addition, it includes forms of complaint for use by a cotenant to bring an action against another cotenant for contribution for the payment of a tax assessment to prevent the condemnation of real property [*see § 316.75*], and for use by a cotenant out of possession to bring an action against a cotenant in possession for treble damages and a permanent injunction when the cotenant in possession has been committing waste [*see § 316.76*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipTenancies in Common

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27-316 California Forms of Pleading and Practice--Annotated § 316.02

§ 316.02 Cross References

For discussion and forms for demanding an accounting from cotenants, see Ch. 7, *Accounting, Action for*.

For discussion and forms for determining the rights and obligations of adjacent landholders, see Ch. 11, *Adjoining Landowners* .

For discussion of adverse possession generally and forms of complaints by an adverse possessor to quiet title based on 20 years' adverse possession and five years' payment of taxes or to quiet title based on 10 years' adverse possession and 10 years' payment of taxes, see Ch. 13, *Adverse Possession* .

For discussion and forms for establishing the death of a cotenant, see Ch. 99, *Birth and Death, Establishing Fact of.*

For discussion and forms for seeking the return of wrongfully withheld personal property, see Ch. 119, *Claim and Delivery* .

For discussion and forms for asserting the rights of spouses in marital property, see Ch. 122, *Community Property* .

For discussion and forms for seeking declaratory relief, see Ch. 182, *Declaratory Relief* .

For discussion and forms for seeking the division of spouses' marital property, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

For discussion and forms for granting or seeking use of easements on cotenancy property, see Ch. 240, *Easements* .

For discussion and forms for ouster from real property, see Ch. 241, *Ejectment* .

For discussion and forms for remedies when there has been a fraudulent conveyance, see Ch. 270, *Fraudulent Conveyances* .

For discussion and forms for establishing rights and duties with respect to homesteaded property, see Ch. 294, *Homesteads* .

For discussion and forms for seeking contribution from joint nontort obligors, including cotenants, see Ch. 300, *Indemnity and Contribution* .

For additional discussion and forms for seeking injunctive relief, see Ch. 303, *Injunctions* .

For discussion and forms seeking rights or exemptions under a lien, see Ch. 342, *Liens and Wage Preferences* .

For discussion and forms for determining the rights and obligations of successive and concurrent coowners, as well as a form of complaint seeking treble damages and a permanent injunction for use by a remainderman against a life tenant committing waste, see Ch. 344, *Life Estates and Remainders* .

For discussion and forms for asserting the rights of cotenants in logging operations on the cotenancy premises, see Ch. 350, *Logs and Timber* .

For discussion and forms for determining the rights and duties of cotenants in extracting mineral deposits from the cotenancy premises, see Ch. 363, *Mining* .

For discussion and forms for determining the rights and duties of cotenants in producing oil or gas from the cotenancy premises, see Ch. 393, *Oil and Gas* .

For discussion and forms for partitioning real or personal property of cotenants, see Ch. 397, *Partition* .

For discussion and forms for determining the rights and duties of partners in a partnership or joint venture, see Ch. 401, *Partnerships: Actions Between General Partners and Partnership* .

For discussion and forms for determining the rights and obligations of cotenants in the real and personal property of a deceased cotenant, see Ch. 440, *Probate : Is it Necessary?* through Ch. 458E, *Probate: Discharge*.

For discussion and forms for cotenancies, see Ch. 440, *Probate : Is it Necessary?* through Ch. 458E, *Probate: Discharge*.

For discussion and forms for establishing title to real property, see Ch. 482, *Quieting Title* .

For discussion and forms for seeking relief against trespassers, see Ch. 550, *Trespass* .

For discussion and forms for determining the rights of cotenants with respect to trust deeds and real property mortgages, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesEquitable AccountingsGeneral OverviewReal Property LawAdjoining LandownersGeneral OverviewReal Property LawAdverse PossessionGeneral OverviewReal Property LawEstatesConcurrent OwnershipPartition ActionsReal Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawPurchase & SaleFraudulent TransfersReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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[Reserved]

§§ 316.03[Reserved]

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PART II. LEGAL BACKGROUND

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§ 316.10 Definitions

[1] Cotenancy

The ownership of property by several persons can be of joint interests, partnership interests, interests in common, or community interests of husband and wife [*Civ. Code §§ 682, 682.1*]. A partnership interest is one owned by several persons in partnership for partnership purposes [*Civ. Code § 684*], and community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either [*Civ. Code § 687*; *Fam. Code §§ 760, 770*]. For discussion and forms related to the law of community property, see Ch. 122, *Community Property* . For discussion and forms related to partnerships and joint ventures, see Ch. 401, *Partnerships: Actions Between General Partners and Partnership* .

As used throughout this chapter, the term "cotenancy" includes both joint tenancies and tenancies in common; similarly, the term "cotenant" includes both joint tenants and tenants in common.

[2] Joint Tenancy; Survivorship as Distinguishing Feature

A "joint tenancy" is an interest owned by two or more persons in equal shares when expressly declared in the instrument conferring title [*Civ. Code § 683*; *but see Prob. Code § 5130* ("joint account" subject to Multiple-Party Accounts Law, discussed in *§ 316.15*, is not required to mention right of survivorship)].

A joint tenancy is distinguished from a tenancy in common by its feature of survivorship; on the death of a joint tenant, the surviving joint tenant becomes the sole owner of the entirety, not by descent but by survivorship and by virtue of the original grant creating the tenancy [*King v. King (1951) 107 Cal. App. 2d 257, 259, 236 P.2d 912]* . Thus, no interest in the property passes to the heirs, devisees, or personal representatives of the joint tenant first to die [*Santoro v. Carbone (1972) 22 Cal. App. 3d 721, 729, 99 Cal. Rptr. 488* (disapproved on other ground in *Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 30, 216 Cal. Rptr. 130, 702 P.2d 212*); *Clark v. Carter (1968) 265 Cal. App. 2d 291, 294, 70 Cal. Rptr. 923]* .

[3] Tenancy in Common; Tenancies in Common Preferred

An interest in common is one owned by several persons not in joint ownership or partnership [*Civ. Code § 685*]. Holding an undivided interest in property is the very essence of tenancy in common [*Davis v. Davis (1963) 222 Cal. App. 2d 691, 693, 35 Cal. Rptr. 281]* .

Common law favored joint tenancies over tenancies in common, and thus it was necessary to use restrictive words to limit the estate to a tenancy in common. The common law rule is abrogated by *Civ. Code § 683(a)*. In most instances, an intention to create a joint tenancy must be expressed in the instrument granting title [*see Civ. Code § 683(a)*; *Abbey v. Lord (1959) 168 Cal. App. 2d 499, 503, 336 P.2d 226]* . Note, however, that after July 1, 1990, *Civ. Code § 683(a)* no longer applies to joint accounts that are governed by the Multiple-Party Accounts Law (*Prob. Code §§ 5100-5407*) [*Civ. Code § 683(b)*; *see § 316.15*.. See also the discussions under §§ (creation of tenancy in common) and 316.14[1]/]

[4] "Community Property With Right of Survivorship" Distinguished

Spouses may also hold title to property as "community property with right of survivorship" [*Civ. Code § 682.1*]. When real or personal property is held in this manner, and one of the spouses dies, the property passes to the surviving spouse without estate administration, pursuant to the terms of the instrument and subject to the same procedures as property held in joint tenancy [*Civ. Code § 682.1(a)*]. The right of survivorship inherent in assets held as community property with right of survivorship may be terminated before the death of either spouse using the same procedures by which a joint tenancy may be severed [*Civ. Code § 682.1(a)*]. In addition, the community property character ensures that both spouse's interests receive an automatic step-up in basis when the first spouse dies [*I.R.C. § 1014(a)(1), (b)(6)*; *see Civ. Code § 682.1(a)*].

Certain joint accounts in financial institutions governed by *Prob. Code § 5100 et seq.* may not be held in this manner [*Civ. Code § 682.1(b)*]. Specifically, this manner of holding property is not authorized for joint, P.O.D., and Totten trust accounts including checking accounts, savings accounts, certificates of deposit, share accounts, and similar arrangements [*see Civ. Code §§ 682.1(b), 683(b)*; *see also Prob. Code §§ 5122(a), 5132*].

Civ. Code § 682.1(a) applies to instruments created on or after July 1, 2001 [*Civ. Code § 682.1(c)*]. For property held in joint tenancy before this operative date, spouses should consider whether their circumstances suggest that the manner of holding title be changed. Spouses may establish their clear intent to hold their joint tenancy property as community property before the death of either spouse [*see Rev. Rul. 87-98, 1987-2 C.B. 206* ; *see also Fam. Code §§ 850-853*]. For example, the spouses might execute a transmutation agreement to establish a clear intent to hold the subject property as community property. In general, transmutation agreements must be made in writing, in the form of an express declaration, consented to or accepted by the spouse whose interest in the property is adversely affected, but need not be recorded [*see Fam. Code § 852(a)*; *In re Marriage of Campbell (1999) 74 Cal. App. 4th 1058, 1062-1065, 88 Cal. Rptr. 2d 580]* .

For additional discussion, see Ch. 122, *Community Property* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsJoint AccountsFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipTenancies in Common

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27-316 California Forms of Pleading and Practice--Annotated § 316.11

§ 316.11 Confidential Relation Between Cotenants

Cotenants stand in such confidential relation to one another with respect to the common property and the common title to it that it would be inequitable to permit one, without the consent of the others, to buy an outstanding adversary claim or title or to assert it for that cotenant's exclusive benefit, thereby undermining the common title and prejudicing the interests of the other cotenants. A partner and cotenant cannot gain the sanction of the courts in an endeavor to freeze out a copartner and cotenant [*Ferry v. McNeil (1963) 214 Cal. App. 2d 411, 416, 29 Cal. Rptr. 577]* .

However, when cotenants acquire their interests at different times by different instruments and no relation of trust and confidence exists between them, no fiduciary relationship exists. Thus, when a cotenant's interest is acquired by foreclosure, the new owner is not a fiduciary to other cotenants and can acquire an adverse interest [*Wilson v. S.L. Rey, Inc. (1993) 17 Cal. App. 4th 234, 242-243, 21 Cal. Rptr. 2d 552]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesConcurrent OwnershipTenancies in Common

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27-316 California Forms of Pleading and Practice--Annotated § 316.12

§ 316.12 Creation of Joint Tenancy

[1] Methods of Creation; Express Declaration Is Required

A joint tenancy, other than one in a joint account in a financial institution that is subject to the Multiple-Party Accounts Law [*see § 316.15*], may be created in the following ways: (1) by a title created in a single will or transfer when expressly declared therein; (2) by a transfer from a sole owner to himself or herself and others when expressly declared therein; (3) by a transfer from tenants in common or joint tenants to themselves, to some of them, or to any of them and others, when expressly declared therein; (4) by a transfer from a husband and wife when holding title as community property or otherwise to themselves, to themselves and others, or to one of them and to another or others, when expressly declared therein; or (5) when granted or devised to executors or trustees as joint tenants. A joint tenancy in personal property may be created by a written transfer, instrument, or agreement [*Civ. Code § 683(a)*].

Joint tenancies may be created only by a writing [*see Civ. Code § 683(a)*; *California Trust Co. v. Bennett (1949) 33 Cal. 2d 694, 697, 204 P.2d 324* ; *Allen v. Samuels (1962) 204 Cal. App. 2d 710, 715, 22 Cal. Rptr. 528]* . The fact that a deed is taken in joint tenancy establishes a prima facie case that the property is actually owned in joint tenancy [*Weak v. Weak (1962) 202 Cal. App. 2d 632, 638, 21 Cal. Rptr. 9]* .

The sole technical requisite is an express declaration of joint tenancy in the instrument [*Gonzales v. Gonzales (1968) 267 Cal. App. 2d 428, 435, 73 Cal. Rptr. 83]* . Generally, the term "or" between the names of cotenants without the designation of joint tenancy is insufficient to create a joint tenancy [*Cooke v. Tsipouroglou (1963) 59 Cal. 2d 660, 664, 31 Cal. Rptr. 60, 381 P.2d 940* ; *but see §§ 316.12[3]* (motor vehicles), 316.15[4] ("joint account")].

Some cases require delivery, actual or symbolic, when a donor intends to make a present gift by putting his or her property in joint tenancy with another [*see Berl v. Rosenberg (1959) 169 Cal. App. 2d 125, 130-134, 336 P.2d 975* (gift of securities in possession of broker requires delivery, but letter of instructions to broker constituted sufficient delivery); *Hill v. Donnelly (1942) 56 Cal. App. 2d 387, 392-393, 132 P.2d 867* (recordation of deed is sufficient delivery although donor retained possession of recorded deed)]. Other cases involving joint bank accounts do not require the donor to part with the passbook or certificate in order to create the joint tenancy [*Kennedy v. McMurray (1915) 169 Cal. 287, 293-295, 146 P. 647]* .

[2] Safe-Deposit Boxes

No contract or other arrangement between persons, firms, or corporations renting safe-deposit boxes and renters thereof can create a joint tenancy in the safe-deposit box or in its contents. Any contract or arrangement purporting to do so is void [*Civ. Code § 683.1*; *see also American Trust Co. v. Fitzmaurice (1955) 131 Cal. App. 2d 382, 387, 280 P.2d 545]*
.

[3] Motor Vehicles

A vehicle may be registered in or transferred to the names of two or more persons as coowners in the alternative by the use of the word "or." A vehicle registered or transferred in this way is deemed held in joint tenancy. Each coowner is deemed to have granted his or her coowners the absolute right to dispose of title and interest in the vehicle. On the death of a coowner, the interest of the decedent passes to the survivor as though title and interest had been held in joint tenancy, unless a contrary intention is set forth in writing on the application for vehicle registration [*Veh. Code §§ 4150.5(a), 5600.5(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesConcurrent OwnershipJoint Tenancies

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§ 316.13 Creation of Tenancy in Common

Every interest created in favor of several persons in their own right is an interest in common unless it is (1) acquired in partnership, for partnership purposes, (2) declared in its creation to be a joint interest, or (3) acquired as community property [*Civ. Code § 686*; *see also Civ. Code §§ 683(a)* (declaration of joint tenancy), 684 (partnership interest defined), 687 (community property defined); *Fam. Code §§ 760, 770*; *see Parker v. Walker (1992) 5 Cal. App. 4th 1173, 1182-1183, 6 Cal. Rptr. 2d 908* (payment of judgment in favor of two plaintiffs without any allocation of their interests creates tenancy in common; each is presumed to have half interest, and one claiming larger share has burden to prove entitlement)].

For additional discussion, see *§§ 316.10[3], 316.14[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesConcurrent OwnershipTenancies in Common

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27-316 California Forms of Pleading and Practice--Annotated § 316.14

§ 316.14 Effect of Unsuccessful Attempts to Create Joint Tenancy

[1] Tenancy in Common Created Generally

Although common law favored joint tenancies, California prefers tenancies in common, except in the case of joint accounts governed by the Multiple-Party Accounts Law (*discussed under § 316.15*) [*see Civ. Code §§ 683, 686*; *Reiss v. Reiss (1941) 45 Cal. App. 2d 740, 747*]. Thus, a tenancy in common is a residual form of ownership so that if an estate is conveyed or transferred and it is not expressly declared in the conveyance or transfer to be an estate in joint tenancy and was not acquired in partnership for partnership purposes or as community property, it is held by the grantees or transferees as tenants in common [*Estate of Horn (1951) 102 Cal. App. 2d 635, 640, 228 P.2d 99]* . For example, when a bill of sale by which a sole owner conveyed real property to herself and another person did not expressly declare the transfer to be a joint tenancy as required by *Civ. Code § 683(a)*, a tenancy in common was created [*see Bill Froelich Motor Co. v. Estate of Kohler (1966) 240 Cal. App. 2d 897, 900-901, 50 Cal. Rptr. 200]* . See also the discussions in *§§ 316.10[3], 316.13*.

[2] Attempted Testamentary Gift

Except in the case of a gift in the form of an account governed by the Multiple-Party Accounts Law [*see Prob. Code § 5304, discussed under § 316.15[2]*], if a donor puts property into joint tenancy form but the transaction does not qualify as a gift *causa mortis* (that is, a gift made in contemplation of approaching death) and the donor intends the gift to take place after his or her death, the transaction is treated as a testamentary disposition. The disposition cannot be upheld, however, unless effected in conformity with the statutes regulating the execution of wills [*Estate of Franco (1975) 50 Cal. App. 3d 374, 381, 123 Cal. Rptr. 458]* .

[3] Undue Influence Involved

The rules applicable to proof of undue influence in a will contest also apply to the creation of joint tenancies if a question of undue influence is involved. To set aside a joint tenancy agreement on the ground of undue influence, it is necessary to establish that the influence was such as to destroy the free agency of the party claimed to have been unduly influenced. It is not sufficient to prove general influence, however strong and controlling, but it must be shown that the influence was used directly to procure the joint tenancy. It must amount to coercion destroying the free agency of the

party claimed to have been unduly influenced. Opportunity to influence the mind of such a party, even coupled with an interest, isnot sufficient [*Estate of Kreher (1951) 107 Cal. App. 2d 831, 839, 238 P.2d 150]* . Influence is not undue if no deceit is practiced and the gift is a voluntary act of the donor [*Goldman v. Goldman (1953) 116 Cal. App. 2d 227, 235, 253 P.2d 474]* . For example, a joint tenancy relationship was upheld based on evidence that the parties, two brothers, had for some years previous pursued a policy, or plan, by which, at various times, individual accounts held in the name of either brother were converted by them into joint tenancy accounts with one another [*Estate of Kreher (1951) 107 Cal. App. 2d 831, 840, 238 P.2d 150]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-316 California Forms of Pleading and Practice--Annotated § 316.15

§ 316.15 Joint Accounts at Financial Institutions

[1] Scope of Law

Operative July 1, 1990, the most common types of personal joint accounts in state and federal banks, savings and loan associations, credit unions, and similar organizations and in industrial loan companies are governed by the California Multiple-Party Accounts Law (*Prob. Code §§ 5100-5407*) [*see Prob. Code § 5128* (defining "financial institution")]. The Multiple-Party Accounts Law applies to accounts in existence on July 1, 1990, and accounts established thereafter [Stats. 1989, ch. 397, § 41]. "Account" within the meaning of that law means a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account, and other like arrangement [*Prob. Code § 5122(a)*]. Joint accounts, "P.O.D. accounts," and Totten trust accounts are "multiple-party accounts" within the meaning of the California Multiple-Party Accounts Law [*Prob. Code § 5132*]. Most business and true fiduciary accounts, for example, regular fiduciary or trust accounts maintained in connection with relationships established other than by the deposit agreement and accounts for the estate of a ward, conservatee, or decedents, are excluded from the coverage of the Multiple-Party Accounts Law [*see Prob. Code § 5122(b)* (also excluding accounts of unincorporated associations or charitable or civic organizations)].

Accounts that are governed by the Multiple-Party Accounts Law may be used with a special power of attorney authorized by *Prob. Code § 5204* and discussed in Ch. 95, *Banks, Deposits, and Checks* . Totten trust accounts are discussed in Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* , while P.O.D. accounts are discussed in Ch. 95, *Banks, Deposits, and Checks* .

Prob. Code §§ 5301-5307 concerning beneficial ownership as between parties, or as between parties and P.O.D. payees or beneficiaries of multiple-party accounts, govern controversies between those persons and their creditors and other successors, but have no bearing on the power of withdrawal of those persons as determined by the terms of account contracts [*Prob. Code § 5201(a)*].

Prob. Code §§ 5401-5407 govern the liability of financial institutions who make payments pursuant to that chapter and are discussed in more detail in Ch. 95, *Banks, Deposits, and Checks* [*Prob. Code § 5201(b)*].

2] Testamentary Formalities Not Necessary

Any transfers resulting from the application of *Prob. Code § 5302* are effective by reason of the account contracts involved and are not to be considered as testamentary. However, these are subject to the provisions governing nonprobate transfers to a former spouse [*see § 316.18*]. The right of a surviving party to a joint account [*see Prob. Code § 5302(a)*], or of a beneficiary [*see Prob. Code § 5302(c)*], or of a P.O.D. payee [*see Prob. Code § 5302(b)*] to the sums on deposit on the death of a party to a multiple-party account may not be denied, abridged, or affected because that right has not been created by a writing executed in accordance with the laws of California prescribing the requirements to effect a valid testamentary disposition of property [*Prob. Code § 5304*].

[3] Delivery Not Necessary

When a donor makes a present gift of funds by placing separate property funds in a joint tenancy account, the joint tenancy is not defeated because the donor retains possession of the passbook or certificate [*Kennedy v. McMurray (1915) 169 Cal. 287, 295, 146 P. 647]* .

[4] "Joint Account" Defined; Community Property and Tenancy in Common Accounts

"Joint account" means an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship [*Prob. Code § 5130*]. That definition reverses the rule applicable to joint tenancies in most other types of property and allows creation of a joint tenancy without an express statement of survivorship. Instead, an express description of the account as a tenancy in common account is necessary to overcome the right of survivorship [*see Prob. Code § 5306* (discussed in *§ 316.15[7][c]*].

The Multiple-Party Accounts Law includes provisions that set forth the exact wording sufficient to create a specific type of account such as a joint account, tenancy in common account, or community property account [*see Prob. Code § 5203*]. For definitions of the accounts applicable under the Multiple-Party Accounts Law, see Ch. 95, *Banks, Deposits, and Checks* .

[5] Ownership of Account While All Parties Are Living

[a] Nonspouses

During the lifetime of all parties, an account belongs to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent [*Prob. Code § 5301(a)*; *see Prob. Code §§ 5134* (net contribution defined), 5150 (sums on deposit defined); *see also* definitions under Multiple-Party Accounts Law in Ch. 95, *Banks, Deposits, and Checks*].

[b] Accounts Owned by Spouses

For the purposes of *Prob. Code §§ 5301-5307*, except to the extent the account or deposit agreement expressly provide otherwise, if the parties to an account are married to each other and the account is expressly described in the account agreement as a "community property" account, the ownership of the account during lifetime and after the death of a spouse is governed by the law governing community property generally [*Prob. Code § 5307*; *see § 316.16*]. *Prob. Code § 5307* is one exception to the general rule that a right of survivorship arising from the express terms of the account or under *Prob. Code § 5302*, a beneficiary designation in a Totten trust account, or a P.O.D. payee designation may not be changed by will [*Prob. Code § 5305(c)*].

Notwithstanding *Prob. Code §§ 5301-5303*, if parties to an account are married to each other, whether or not they are so described in the deposit agreement, their net contribution to the account is presumed to be and remain their community property [*Prob. Code § 5305(a)*].

For further discussion of *Prob. Code § 5305*, including the presumption established by that section, see Ch. 95, *Banks, Deposits, and Checks* .

[6] Changes in Account Terms

During the lifetime of a party, the terms of the account may be changed as provided in *Prob. Code § 5303(b)* to eliminate or to add rights of survivorship. Withdrawal of funds from the account by a party with a present right of withdrawal during the lifetime of a party also eliminates rights of survivorship on the death of that party with respect to the funds withdrawn [*Prob. Code § 5303(c)*].

Once established, the terms of a multiple-party account can be changed only by one of the methods prescribed by statute [*see Prob. Code § 5303(b)*; *see also* Ch. 95, *Banks, Deposits, and Checks*].

[7] Ownership After Death of Party

[a] Determined by Terms of Account

The provisions of *Prob. Code § 5302* regarding rights of survivorship are determined by the form of the account at the death of a party [*Prob. Code § 5303(a)*]. A right of survivorship arising from the express terms of the account or under *Prob. Code § 5302* cannot be changed by will [*Prob. Code § 5302(e)*].

[b] Death of Party to Joint Account

Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent. If there are two or more surviving parties, their respective ownerships during lifetime are in proportion to their previous ownership interests under *Prob. Code § 5301*, augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before the decedent's death; and the right of survivorship continues between the surviving parties [*Prob. Code § 5302(a)*; *see also Prob. Code § 5144* (proof of death, discussed in *§ 316.15[8]*) and *Prob. Code § 5600 et seq.* (*see §§ 316.17, 316.18*)].

[c] Death of Party to Tenancy in Common Account

If an account is expressly described in the deposit agreement as a "tenancy in common" account, no right of survivorship arises from the terms of the account or under *Prob. Code § 5302* unless the terms of the account or deposit agreement expressly provide for survivorship [*Prob. Code § 5306*; *see also Prob. Code § 5144* (proof of death, discussed in *§ 316.15[8]*)]. The death of a party to a tenancy in common account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of the decedent's estate [*Prob. Code § 5302(d)*; *see Prob. Code § 5600 et seq.* and § 316.17].

[8] Withdrawals

Financial institutions' rights and duties are discussed in more detail in Ch. 95, *Banks, Deposits, and Checks* . In general, the financial institution at which the account is maintained must honor withdrawal requests that are made in accordance with the terms of the account agreement, and may do so without regard to whether any other party is incapacitated or deceased at the time the payment is demanded; but payment may not be made to the personal representative or heirs of a deceased party unless proof of death is presented to the financial institution showing that the decedent was the last surviving party or unless there is no right of survivorship under *Prob. Code § 5302* [*Prob. Code §§ 5401(b), 5402*]. Proof of death includes an original, attested, or certified copy of a death certificate, or a record or report that is prima facie evidence of death under *Health & Safety Code § 103550, Evid. Code §§ 1530-1532*, or another California statute [*Prob. Code § 5144*].

The financial institution has no obligation to inquire regarding the source of funds received for deposit to a multiple-party account or the proposed application of funds withdrawn [*Prob. Code § 5401(c)(1)*]. A financial institution is not required to determine any party's net contribution or to limit withdrawals based on a party's net contribution [*Prob. Code § 5401(c)(2), (3)*]. Unless the financial institution has received a court order restraining payment, payment made pursuant to *Prob. Code § 5401* discharges the financial institution from all claims for amounts so paid whether or not the payment is consistent with the beneficial ownership ofthe account as between parties, P.O.D. payees, or beneficiaries, or their successors [*Prob. Code § 5405(a), (b)*].

[9] Levies and Setoffs

All funds in an account, unless otherwise agreed in writing by the financial institution and the parties to the account, remain subject to liens, security interests, rights of setoff, and charges, notwithstanding the determination or allocation of net contributions with respect to the parties [*Prob. Code § 5401(d)*].

[10] Notice From Party Restraining Payment From Account

A party to a joint account may give written notice to the financial institution, at the branch or office at which the account is carried, not to permit withdrawals in accordance with the terms of the account, other than a checking account, share draft account, or other similar third-party payment instrument, except with the signatures of more than one of the parties during their lifetimes or of more than one of the survivors after the death of any one of the parties. Unless the notice is withdrawn by a subsequent writing, after receipt of such a notice, the financial institution may only pay the sums on deposit in accordance with the written instructions pending determination of the rights of the parties or their successors [*Prob. Code § 5405(c)*; *see Prob. Code § 5146* (absent account terms to contrary, receipt of notice is receipt at branch or office where account is carried)]. No liability attaches to the financial institution for complying with the terms of any written notice provided pursuant to *Prob. Code § 5405(c)* [*Prob. Code § 5405(c)*; *see also Prob. Code § 5405(b)* (court order restraining payments by financial institution, discussed in Ch. 95, *Banks, Deposits, and Checks*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsJoint AccountsEstate, Gift & Trust LawNonprobate TransfersJointly Held PropertyBank AccountsFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipTenancies in Common

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27-316 California Forms of Pleading and Practice--Annotated § 316.16

§ 316.16 Property Owned by Husband and Wife

[1] Presumption

A husband and wife may hold property as joint tenants or tenants in common, or as community property or community property with a right of survivorship [*Fam. Code § 750*]. All real property in this state and all personal property wherever situated acquired during marriage by either spouse is presumed community property [*see Fam. Code § 760*]. For additional discussion of the presumptions with respect to property held by spouses, see Ch. 122, *Community Property* .

[2] As Joint Tenants

For purposes of division of property on dissolution of marriage or legal separation, property acquired by the parties during marriage in joint form, including property held in joint tenancy, is presumed to be community property [*Fam. Code § 2580*; *see In re Marriage of Buol (1985) 39 Cal. 3d 751, 757, 763, 218 Cal. Rptr. 31, 705 P.2d 354* ; *see also In re Marriage of Hilke (1992) 4 Cal. 4th 215, 220-224, 14 Cal. Rptr. 2d 371, 841 P.2d 891* (presumption applies when one spouse dies after bifurcated judgment dissolving marital status and reserving property issues for later adjudication)]. This is a presumption affecting the burden of proof and may be rebutted by either of the following [*Fam. Code § 2580*]:

- A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property; or

- Proof that the parties have made a written agreement that the property is separate property.

If a spouse is unable to rebut the community property presumption of *Fam. Code § 2580*, he or she may obtain reimbursement for traceable separate property contributions, unless a written waiver has been executed [*see Fam. Code § 2640*].

The law that applies to characterize property acquired in joint form on dissolution or legal separation is unclear.

The above-mentioned community property presumption and separate property reimbursement statute were first enacted

in 1983 as *Civ. Code §§ 4800.1* and *4800.2*, respectively. As originally enacted, both former *Civ. Code §§ 4800.1* and *4800.2* applied to proceedings commenced on or after January 1, 1984, but the enacting legislation also provided that they applied to proceedings commenced before that date, to the extent that proceedings on the division of property were not yet final on that date [*see* 1983 Stats., ch. 342, § 4]. However, the California Supreme Court held that retroactive application of both sections to proceedings commenced before January 1, 1984, unconstitutionally impaired vested property rights without due process of law [*see In re Marriage of Fabian (1986) 41 Cal. 3d 440, 450, 224 Cal. Rptr. 333, 715 P.2d 253* ; *In re Marriage of Buol (1985) 39 Cal. 3d 751, 757, 218 Cal. Rptr. 31, 705 P.2d 354* ; *see also In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1213, 44 Cal. Rptr. 2d 155, 899 P.2d 1349* ; *In re Marriage of Hilke (1992) 4 Cal. 4th 215, 222-223, 14 Cal. Rptr. 2d 371, 841 P.2d 891]* .

Urgency legislation was then enacted, which became operative on April 10, 1986, to provide that (now former) *Civ. Code §§ 4800.1* and *4800.2* applied to proceedings for dissolution of marriage or legal separation commenced on or after January 1, 1984, regardless of when the property was acquired or the date of any agreement affecting the property [1986 Stats., ch. 49, § 1]. This legislation was also held unconstituional when retroactively applied to property acquired before January 1, 1984 [*see In re Marriage of Griffis (1986) 187 Cal. App. 3d 156, 166, 231 Cal. Rptr. 510* ; *see also In re Marriage of Hopkins & Axene (1987) 199 Cal. App. 3d 288, 289, 245 Cal. Rptr. 433]* .

Later 1986 legislation amended former *Civ. Code § 4800.1* to provide that former *Civ. Code §§ 4800.1* and *4800.2*, in the forms operative on January 1, 1987, applied to all property held in joint title regardless of the date of acquisition of the property or the date of any agreement affecting the character of the property. This amendment also provided that the sections would apply to proceedings begun after January 1, 1984, unless property settlements or judgments had already been executed before January 1, 1987 [former *Civ. Code § 4800.1(a)(3)*, as amended by 1986 Stats., ch. 539]. In 1988, appellate courts held this legislation unconstitutional as applied to property acquired before January 1, 1984 [*In re Marriage of Bankovich (1988) 203 Cal. App. 3d 49, 54-56, 249 Cal. Rptr. 713]* . Then, in 1990, former *Civ. Code § 4800.2* was held unconstitutional as applied to quasi-community property acquired before January 1, 1984 [*In re Marriage of Craig (1990) 219 Cal. App. 3d 683, 686-687, 268 Cal. Rptr. 396]* .

Notwithstanding the above, the California Supreme Court, in *In re Marriage of Hilke* [*In re Marriage of Hilke (1992) 4 Cal. 4th 215, 14 Cal. Rptr. 2d 371, 841 P.2d 891]* , later upheld the retroactive application of former *Civ. Code § 4800.1* to property acquired before January 1, 1984, in a proceeding involving joint tenancy property that was commenced after that date. The Court rejected the claim that such a retroactive application impairs a vested property right without due process of law. It reasoned that a vested property right is one not subject to a condition precedent, and a joint tenant's survivorship interest is subject to the condition precedent that he or she survive the other joint tenant. It concluded that a joint tenant has no present vested interest in being a surviving joint tenant [*see In re Marriage of Hilke (1992) 4 Cal. 4th 215, 222-223 n.4, 14 Cal. Rptr. 2d 371, 841 P.2d 891]* . Thus, it appears that so long as the retroactive application of the community property presumption only impairs an unvested right, such as a right of survivorship, it may be applied to property acquired before January 1, 1984 [*see In re Marriage of Hilke (1992) 4 Cal. 4th 215, 222-223, 223 n.4, 14 Cal. Rptr. 2d 371, 841 P.2d 891]* .

The *Hilke* Court did not address the applicability of former *Civ. Code § 4800.2* to pre-1984 acquisitions [*see In re Marriage of Hilke (1992) 4 Cal. 4th 215, 222-224, 14 Cal. Rptr. 2d 371, 841 P.2d 891]* . However, in *In re Marriage of Heikes* [*In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 44 Cal. Rptr. 2d 155, 899 P.2d 1349]* , the Court held that former *Civ. Code § 4800.2* (and its Family Code successor) may not constitutionally be applied to property acquired before January 1, 1984 [*In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1225, 44 Cal. Rptr. 2d 155, 899 P.2d 1349]* , thereby validating a number of prior appellate decisions that had forbidden retroactive application of the reimbursement statute [*see, e.g., In re Marriage of Bankovich (1988) 203 Cal. App. 3d 49, 54-56, 249 Cal. Rptr. 713]* . Thus, a spouse who made a separate property contribution to the acquisition of community property before 1984 may not seek reimbursement for the contribution unless there was a qualifying reimbursement agreement--as provided under pre-1984 law [*see In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1218, 44 Cal. Rptr. 2d 155, 899 P.2d 1349* ; *In re Marriage of Lucas (1980) 27 Cal. 3d 808, 816, 166 Cal. Rptr. 853, 614 P.2d 285]* .

For further discussion of these presumptions, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

[3] Execution on Property Held in Joint Tenancy by Spouse

With respect to execution on property held in joint tenancy by husband and wife by a judgment creditor of one spouse, the other spouse's interest in the joint tenancy property is not subject to execution. No basis exists for affording the creditor a stronger hand against property held in joint tenancy with the exemption claimant's spouse than against property in which the exemption claimant is not married to the cotenant [*Schoenfeld v. Norberg (1970) 11 Cal. App. 3d 755, 764, 90 Cal. Rptr. 47* (decided prior to enactment of former *Civ. Code § 5120.130(b)(1), now see Fam. Code § 913(b)(1)*)].

[4] As Tenants in Common

When husband and wife own property as tenants in common, one spouse's undivided interest in the property is his or her separate property [*see Estate of Adams (1964) 228 Cal. App. 2d 264, 266, 39 Cal. Rptr. 522]* .

Beginning on January 1, 1987, for the purpose of division of property on dissolution of marriage or legal separation, property acquired by the parties during marriage in joint form, including tenancy in common, is rebuttably presumed to be community property [*see Fam. Code § 2580*]. For further discussion of *Fam. Code § 2580, see § 316.16[2],* and Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationSeparate PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionPresumptionsCommunity PropertyReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipTenancies in Common

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27-316 California Forms of Pleading and Practice--Annotated § 316.17

§ 316.17 Joint Tenancy with Former Spouse

A joint tenancy between a decedent and the decedent's former spouse, created before or during the marriage, is severed as to the decedent's interest if, at the time of the decedent's death, the former spouse is not the decedent's surviving spouse (as defined in *Prob. Code § 78*) as a result of the dissolution or annulment of the marriage. This also applies to property held as community property with a right of survivorship [*Prob. Code § 5601(a), (d)*; *see Civ. Code § 682.1*]. A judgment of legal separation that does not terminate the status of husband and wife is not a dissolution for these purposes [*Prob. Code § 5601(a)*]. In any case, a joint tenancy is not severed by this provision in either of the following situations [*Prob. Code § 5601(b)*]:

- If the joint tenancy is not subject to severance by the decedent at the time of the decedent's death.

- If there is clear and convincing evidence that the decedent intended to preserve the joint tenancy in favor of the former spouse.

In addition, this provision does not affect the rights of a subsequent purchaser or encumbrancer for value in good faith who relies on an apparent severance under these provisions, or who lacks knowledge of a severance under these provisions [*Prob. Code § 5601(c)*]. Similarly, this does not affect the rights of a purchaser or encumbrancer of real property for value who in good faith relies on an affidavit or a declaration under penalty of perjury that includes the information and statements specified by statute [*Prob. Code § 5602(a)*]. A person relying on the affidavit or declaration has no duty to inquire into the truth of these statements [*Prob. Code § 5602(b)*; *see Prob. Code § 5602(c)* (affidavit or declaration may be recorded)].

These provisions apply to instruments creating a joint tenancy, whether the instrument was executed before, on, or after the operative date of January 1, 2002 [*Prob. Code § 5604(a), (b)*; *see Prob. Code § 5604(c)* (when provisions not applicable)]. Nothing in these provisions is intended to limit the court's authority to order a party to a dissolution or marriage to preserve a joint tenancy in favor of the former spouse [*Prob. Code § 5603*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawNonprobate TransfersJointly Held PropertyGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionCharacterizationCommunity PropertyReal Property LawEstatesConcurrent OwnershipJoint Tenancies

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27-316 California Forms of Pleading and Practice--Annotated § 316.18

§ 316.18 Nonprobate Transfer to Former Spouse

A nonprobate transfer to the transferor's former spouse, in an instrument executed by the transferee before or during the marriage, fails if the former spouse is not the transferor's surviving spouse [*see Prob. Code § 78* (definition)] at the time of the transferor's death as a result of the dissolution or annulment of the marriage [*Prob. Code § 5600(a)*; *see Prob. Code § 5600(e)* (definition of nonprobate transfer)]. A judgment of legal separation that does not terminate the status of husband and wife is not a dissolution for these purposes [*Prob. Code § 5600(a)*]. However, a nonprobate transfer does not fail in the following situations [*Prob. Code § 5600(b)*]:

- If the nonprobate transfer is not subject to revocation by the transferor at the time of the transferor's death.

- If there is clear and convincing evidence that the transferor intended to preserve the nonprobate transfer for the former spouse.

- If a court order requiring that the nonprobate transfer be maintained on behalf of the former spouse is in effect at the time of the transferor's death.

These provisions apply to instruments making a nonprobate transfer, whether the instrument was executed before, on, or after the operative date of January 1, 2002 [*Prob. Code § 5604(a), (b)*; *see Prob. Code § 5604(c)* (when provisions not applicable)]. Nothing in these provisions is intended to limit the court's authority to order a party to a dissolution or marriage to maintain the former spouse as a beneficiary on any nonprobate transfer [*Prob. Code § 5603*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawNonprobate TransfersJointly Held PropertyGeneral Overview

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27-316 California Forms of Pleading and Practice--Annotated § 316.19

§ 316.19 Termination of Joint Tenancy Generally

[1] Acts Constituting Termination

[a] Deed, Declaration, or Other Written Instrument

A joint tenant may sever a joint tenancy in real property as to the joint tenant's interest without the joinder or consent of the other joint tenants by either of the following means [*Civ. Code § 683.2(a)*]:

- Execution and delivery of a deed that conveys legal title to the joint tenant's interest to a third person, whether or not pursuant to an agreement that requires the third person to reconvey legal title to the joint tenant; or

- Execution of a written instrument that evidences the intent to sever the joint tenancy, including a deed that names the joint tenant as transferee, or of a written declaration that, as to the interest of the joint tenant, the joint tenancy is severed.

Civ. Code § 683.2 does not authorize severance of a joint tenancy contrary to a written agreement of the joint tenants, but a severance contrary to a written agreement does not defeat the rights of a purchaser or encumbrancer for value in good faith and without knowledge of the written agreement [*Civ. Code § 683.2(b)*].

Severance of a joint tenancy of record by deed, written declaration, or other written instrument is not effective to terminate the right of survivorship of the other joint tenants as to the severing joint tenant's interest unless one of the following requirements are satisfied [*Civ. Code § 683.2(c)*]:

- Before the death of the severing joint tenant, the deed, written declaration, or other written instrument effecting the severance is recorded in the county where the real property is located; or

- The deed, written declaration, or other written instrument effecting the severance is executed and acknowledged before a notary public by the severing joint tenant not earlier than three days before the death of that joint tenant and is recorded in the county where the real property is located not later than

seven days after the death of the severing joint tenant.

This recording requirement does not limit the manner or effect of the following [*Civ. Code § 683.2(d)*]:

- A written instrument executed by all the joint tenants that severs the joint tenancy.

- A severance made by or pursuant to a written agreement of all the joint tenants.

- A deed from a joint tenant to another joint tenant [*see Re v. Re (1995) 39 Cal. App. 4th 91, 98-99, 46 Cal. Rptr. 2d 62* (plain language of*Civ. Code § 683.2(d)(3)* sets forth exception to requirement in *Civ. Code § 683.2(c)* that deed be recorded before severing joint tenant's death; thus, execution of deeds to each other by two of three joint tenants, one of whom died before deeds were recorded, resulted in severance of joint tenancy)].

[b] Application of Statutory Rules

The provisions of *Civ. Code § 683.2(a)* and *(b)* apply to all joint tenancies in real property, whether the joint tenancy was created before, on, or after January 1, 1985, except that in the case of the death of a joint tenant before January 1, 1985, the validity of the severance is determined by the law in effect at the time of death. The provisions of *Civ. Code § 683.2(c)* and *(d)* do not apply to or affect a severance made before January 1, 1986, of a joint tenancy [*Civ. Code § 683.2(e)*].

Civ. Code § 683.2 is a statutory recognition of the rule that a joint tenant can sever the tenancy in real property by a conveyance to himself or herself, rather than a conveyance to and from a strawman [*see Riddle v. Harmon (1980) 102 Cal. App. 3d 524, 528-530, 162 Cal. Rptr. 530* ; *see Estate of Carpenter (1983) 140 Cal. App. 3d 709, 711-712, 189 Cal. Rptr. 651* ; *Clark v. Carter (1968) 265 Cal. App. 2d 291, 294, 70 Cal. Rptr. 923* (giving common law rule)].

[c] Unilateral Conversion by Spouse

A spouse can unilaterally convert a joint tenancy to a tenancy in common by conveying the property to himself or herself directly or through a strawman even though the property has been declared by both spouses to be their homestead. Such a conversion in the manner in which title is held common does not affect the homestead [*Estate of Grigsby (1982) 134 Cal. App. 3d 611, 618, 184 Cal. Rptr. 886]* .

[2] Agreement or Course of Dealing

Any interference with the right of survivorship by the terms of an agreement between joint tenants severs the joint tenancy relationship [*Rich v. Silver (1964) 226 Cal. App. 2d 60, 64, 37 Cal. Rptr. 749* ; *California Trust Co. v. Anderson (1949) 91 Cal. App. 2d 832, 836, 205 P.2d 1127]* . When the survivorship feature of a joint tenancy is destroyed, a tenancy in common is created [*see Davis v. Davis (1963) 222 Cal. App. 2d 691, 693, 35 Cal. Rptr. 281]* . For instance, by awarding joint tenancy property on dissolution of marriage to the spouses "jointly, each [spouse] to hold an undivided one-half interest," the court changed the property from joint tenancy to tenancy in common [*Davis v. Davis (1963) 222 Cal. App. 2d 691, 693, 35 Cal. Rptr. 281]* .

A joint tenancy may also be terminated by any conduct or course of dealing sufficient to indicate that all parties have mutually treated the joint tenancy as terminated. For instance, when joint tenants contracted with each other for the sale by one and purchase by the other of one of the joint tenancy interests, the joint tenancy was held to have been terminated because the right of either party to insist on a sale is wholly inconsistent with the joint tenancy relationship and because such an agreement negates the intent of the survivor to succeed to the other's interest [*Smith v. Morton (1972) 29 Cal. App. 3d 616, 621, 106 Cal. Rptr. 52]* . Similarly, in interpreting a stipulated property settlement

agreement, the court of appeal inferred that the two divorced spouses did not intend to preserve the attribute of survivorship inherent in the original joint tenancy relationship. The court held that the informal understanding resulting from the stipulation was sufficient to accomplish the transmutation from joint tenancy to tenancy in common [*Rich v. Silver (1964) 226 Cal. App. 2d 60, 65-66, 37 Cal. Rptr. 749]* .

[3] Acts Not Constituting Termination

The following acts do not terminate a joint tenancy: execution of a mortgage by a joint tenant; execution of a trust deed by a joint tenant; execution of a lease by a joint tenant; conveyance of a life estate by one joint tenant to another; a judgment lien against the interest of one joint tenant; or the giving right of possession to one joint tenant during the lifetime of the other [*County of Fresno v. Kahn (1962) 207 Cal. App. 2d 213, 217, 24 Cal. Rptr. 394* ; *People v. Nogarr (1958) 164 Cal. App. 2d 591, 593-594, 330 P.2d 858* (mortgage)]. Encumbrance by one joint tenant without consent of the other only creates a lien on that joint tenant's undivided one-half interest in the property [*Kane v Huntley Financial (1983) 146 Cal. App. 3d 1092, 1096-1097, 194 Cal. Rptr. 880]* .

The filing of a partition action for the purpose of terminating a joint tenancy is not sufficient to terminate the relationship in the event the joint tenant filing the action in partition dies before the granting of the judgment [*Clark v. Carter (1968) 265 Cal. App. 2d 291, 295, 70 Cal. Rptr. 923]* .

A deed by which one joint tenant attempts to obtain fraudulently the other joint tenant's interest by deed is voidable; a court may set the deed aside as if it had never been executed [*Estate of Casella (1967) 256 Cal. App. 2d 312, 323, 64 Cal. Rptr. 259]* . Execution of a holographic will purporting to sever a joint tenancy is not effective to sever the tenancy if the will is not notarized or recorded [*Estate of England (1991) 233 Cal. App. 3d 1, 4-6, 284 Cal. Rptr. 361]* .

[4] Intent as Factor

Intent of the joint tenants is an important factor in determining whether their acts in dealing with the property terminate the joint tenancy [*County of Fresno v. Kahn (1962) 207 Cal. App. 2d 213, 216, 24 Cal. Rptr. 394* (contract of sale of real property); *but see Estate of Propst (1990) 50 Cal. 3d 448, 457-459, 268 Cal. Rptr. 114, 788 P.2d 628* (rule applicable to severance of joint tenancy in personal property, discussed in *§ 316.19[6]*)].

[5] Consent of Joint Tenant Not Required

A joint tenant may dispose of his or her interest without the consent of the other joint tenant [*Wilk v. Vencill (1947) 30 Cal. 2d 104, 108-109, 180 P.2d 351]* . Similarly, neither notification of the other joint tenant nor recordation of the deed terminating the joint tenancy is required to make the transmutation from joint tenancy to tenancy in common legally effective [*Burke v. Stevens (1968) 264 Cal. App. 2d 30, 35, 70 Cal. Rptr. 87]* . In the *Burke* case, one spouse conveyed a power of attorney to her attorney who, in turn, executed a quitclaim deed to his associate; the associate subsequently deeded his interest back to the wife. The court upheld the termination of the joint tenancy relationship by the wife even though there had been no notice to the husband and no recordation of the deed [*Burke v. Stevens (1968) 264 Cal. App. 2d 30, 35-36, 70 Cal. Rptr. 87]* .

[6] Unilateral Termination of Joint Tenancy in Personal Property

In the absence of a prior agreement to the contrary, a joint tenant of personal property may unilaterally sever his or her own interest from the joint tenancy and thereby nullify the right of survivorship, as to that interest, of the other joint tenant or tenants without their consent [*Estate of Propst (1990) 50 Cal. 3d 448, 457-459, 268 Cal. Rptr. 114, 788 P.2d 628* (overruling *Fish v. Security Pacific Nat. Bank (1948) 31 Cal. 2d 378, 387, 189 P.2d 10* , *Estate of Harris (1937) 9 Cal. 2d 649, 72 P.2d 873* , and *In re Kessler (1932) 217 Cal. 32, 34, 17 P.2d 117* , and disapproving inconsistent statements in several other cases)]. Severance of the joint tenancy converts the joint tenancy to a tenancy in common. Because the tenant in common also has an undivided fractional interest in the property, the unilateral

severance of the joint tenancy by a joint tenant does not deprive the other joint tenants of their fractional shares [*Estate of Propst (1990) 50 Cal. 3d 448, 457-459, 268 Cal. Rptr. 114, 788 P.2d 628]* .

Propst involved withdrawal of funds in joint tenancy bank accounts and establishment of new accounts solely in the withdrawing joint tenant's name before *Prob. Code § 5303(c)* governed the situation [Stats. 1989, ch. 397, § 41 (operative July 1, 1990, applies to accounts in existence on July 1, 1990, and accounts established thereafter); *see § 316.15[6]*]. The holding in *Propst* applies to all types of joint tenancy personal property and is retroactive unless the party claiming the right of survivorship proves that application of the rule allowing unilateral severance would cause that party substantial detriment as a result of the party's reasonable reliance on the prior rule. Retroactivity does not apply to judgments that were final before *Propst* became fi nal and that upheld a right of survivorship under the now abrogated rule. Nor does retroactivity apply to give rise to a claim on property that had already been transferred to a surviving party, in reliance on the prior rule, before *Propst* became final [*Estate of Propst (1990) 50 Cal. 3d 448, 457-459, 268 Cal. Rptr. 114, 788 P.2d 628]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesConcurrent OwnershipJoint Tenancies

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27-316 California Forms of Pleading and Practice--Annotated § 316.20

§ 316.20 Termination of Joint Tenancy by Death

[1] Survivor Takes All

On the death of a joint tenant, the surviving joint tenant becomes the sole owner of the entirety, not by descent, but by survivorship and by virtue of the original grant creating the tenancy [*King v. King (1951) 107 Cal. App. 2d 257, 259, 236 P.2d 912]* . Thus, no interest in the property passes to the heirs, devisees, or personal representatives of the joint tenant first to die [*Santoro v. Carbone (1972) 22 Cal. App. 3d 721, 729, 99 Cal. Rptr. 488* ; *Clark v. Carter (1968) 265 Cal. App. 2d 291, 294, 70 Cal. Rptr. 923]* .

A mortgage executed by one joint tenant is a lien or charge on that joint tenant's interest only and does not sever the joint tenancy estate; when the joint tenant so encumbering his or her interest dies, his or her interest in the property, therefore, ceases to exist and the surviving joint tenant takes the property free of the lien [*People v. Nogarr (1958) 164 Cal. App. 2d 591, 593-594, 330 P.2d 858]* . Likewise, the title of the surviving joint tenant is not subject to a trust deed executed by the other joint tenant without the surviving joint tenant's knowledge or consent [*Hamel v. Gootkin (1962) 202 Cal. App. 2d 27, 30, 20 Cal. Rptr. 372]* .

[2] Exceptions

[a] Simultaneous Death

If property is held by two joint tenants, both of whom have died, and it cannot be established by clear and convincing evidence that one of them survived the other, the property held in joint tenancy is administered or distributed, or otherwise dealt with, one-half as if one joint tenant had survived and one-half as if the other joint tenant had survived [*Prob. Code § 223(b)*]. If property is held by more than two joint tenants, all of whom have died, and it cannot be established by clear and convincing evidence that any of them survived the others, the property held in joint tenancy is divided into as many portions as there were joint tenants, and the share of each joint tenant is administered, distributed, or otherwise dealt with as if that joint tenant had survived the other joint tenants [*Prob. Code § 223(c)*].

[b] Murder of Joint Tenant

A joint tenant who intentionally and feloniously kills another joint tenant effects a severance of the decedent's interest so that the decedent's share passes as the decedent's property and the killer has no rights by survivorship [*Prob. Code §§ 251, 257*]. The killer, or in the case of a murder-suicide,the killer's heirs, are still entitled to his or her one-half interest [*Estate of Hart (1982) 135 Cal. App. 3d 684, 687, 691, 185 Cal. Rptr. 544* ; *Johansen v. Pelton (1970) 8 Cal. App. 3d 625, 630, 87 Cal. Rptr. 784] . Prob. Code § 251* codifies the better reasoned rule under prior case law and abrogates the rule that made the killer a constructive trustee of the whole for the victim's heirs or estate [*see* 17 Law Rev. Comm. 493, 505 (1984) (citing *Estate of Hart (1982) 135 Cal. App. 3d 684, 185 Cal. Rptr. 544* , and *Johansen v. Pelton (1970) 8 Cal. App. 3d 625, 87 Cal. Rptr. 784*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 316.21 Termination of Cotenancy by Partition

[1] When Applicable

Proceedings for partition of real and personal property are governed by *Code Civ. Proc. §§ 872.010-874.240*. A partition action may be brought by (1) a coowner of personal property, or (2) an owner of an estate of inheritance or an estate for life or years in real property if the property or estate is owned by several persons concurrently or successively [*Code Civ. Proc. § 872.210*]. Real and personal property may be partitioned in one action [*Code Civ. Proc. § 872.240*].

For discussion of the procedure and forms for use in an action for partition, see Ch. 397, *Partition* .

[2] Right to Demand Partition

Partition of concurrent interests in property is a right unless barred by a valid waiver [*Code Civ. Proc. § 872.710(b)*]. A joint tenant or a tenant in common possesses the absolute right to have his or her interests severed from that of his or her contenants [*see Lazzarevich v. Lazzarevich (1952) 39 Cal. 2d 48, 50, 244 P.2d 1* ; *see also De Roulet v. Mitchel (1945) 70 Cal. App. 2d 120, 123, 160 P.2d 574]* . The cotenant demanding partition need not specify any reason for the demand; the only indispensable requirement is that clear title be shown [*see Code Civ. Proc. § 872.220*]. Partition may not be denied for the reason that severance will result in financial loss to the cotenants [*De Roulet v. Mitchel (1945) 70 Cal. App. 2d 120, 124, 160 P.2d 574]* .

[3] Waiver or Modification by Contract

Although partition is a matter of right when a cotenant desires it, that right may be waived by contract, either expressly or by implication [*see Penasquitos, Inc. v. Holladay (1972) 27 Cal. App. 3d 356, 358, 103 Cal. Rptr. 717]* . Thus, if cotenants contract that a selling owner must first offer his or her interest to the coowners before selling to a third party, the absolute right to partition has been modified. To allow a partition action prior to offering the right to purchase to the other cotenants would permit a circumvention of contractual obligation. On the nonselling owner's refusal or failure to exercise his or her right to purchase within a reasonable time, the seller has discharged his or her obligation to the coowner and may proceed with partition [*Schwartz v. Shapiro (1964) 229 Cal. App. 2d 238, 253, 40 Cal. Rptr. 189]* . The right to partition property is not always absolute and may be defeated by an agreement between cotenants

permitting a variance from the ordinary incidents of their cotenancy. An example of such a variance agreed to between cotenants occurs if (1) property is taken under a deed naming two persons as joint tenants, (2) one of the joint tenants is to retain the property for his or her lifetime and to enjoy a life estate therein while the other joint tenant holds a remainder interest, and (3) the remainder interest would terminate on the death of the holder of that interest [*see Rowland v. Clark (1949) 91 Cal. App. 2d 880, 882, 206 P.2d 59]* .

Likewise, an agreement operating to limit or modify the right to partition of cotenancy property is implied if the purpose for which the property was acquired would be defeated by partition. If parties have committed property for a specific use for a certain period of time, such as committing land to a specific purpose for the term of a 50-year lease, frustration of purpose would result if partition were permitted [*see Pine v. Tiedt (1965) 232 Cal. App. 2d 733, 739-740, 43 Cal. Rptr. 184]* .

Partition is not available without consent of the other cotenant if it would conflict with a previous agreement of the parties to the use of the property; under those circumstances, the cotenant seeking partition is held to be estopped to assert or has waived the right to demand partition [*Heber v. Yaeger (1967) 251 Cal. App. 2d 258, 262-263, 59 Cal. Rptr. 353]* .

[4] Only Cotenants May Bring Action

Only cotenants may bring actions for partition. It is the cotenancy that gives the right to partition. Several persons may own a thing without being cotenants thereof, and, in those cases, no partition can be had [*Akagi v. Ishioka (1975) 47 Cal. App. 3d 426, 431, 120 Cal. Rptr. 807]* .

[5] Partition of Joint Tenancy Required Before Death

The severance or attempted severance of a joint tenancy must take place before the death of the one joint tenant and before the other joint tenant, as a consequence, becomes the owner of the whole by virtue of his or her right of survivorship [*Green v. Skinner (1921) 185 Cal. 435, 438, 197 P. 60]* .

[6] Effect of Partition

If a court finds a plaintiff entitled to partition, the court (1) makes an interlocutory judgment determining the interests of the parties in the property, (2) orders the partition of the property in accordance with their interests, and (3) specifies the manner of partition unless the manner ofpartition is to be determined later [*see Code Civ. Proc. §§ 872.720(a), 872.810*]. In a partition there is no change of title between the tenants in common as there is in a grant deed; there is simply a dividing up of what the parties already own. After the partition, each tenant in common has exactly the same proportional interest in the property that he or she had previously; the only difference is that now the interest is in severalty while previously it was in common [*Rancho Santa Margarita v. Vail (1938) 11 Cal. 2d 501, 539, 81 P.2d 533]* .

A court may order the property sold and the proceeds divided among the parties in accordance with their interests where either (1) the parties agree to such relief, or (2) the court determines that sale and division of the proceeds would be more equitable under the circumstances than division of the property [*Code Civ. Proc. § 872.820*]. However, the fact that real property is held in joint tenancy does not compel equal division of the proceeds on a sale following a partition action; by seeking a partition and accounting, a joint tenant puts in issue the interest of each party to the real property in question [*Kershman v. Kershman (1961) 192 Cal. App. 2d 23, 26, 13 Cal. Rptr. 290]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesConcurrent OwnershipPartition ActionsReal Property LawEstatesConcurrent

OwnershipTenancies in Common

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27-316 California Forms of Pleading and Practice--Annotated § 316.22

§ 316.22 Right to Possession of Property

[1] Generally

Survivorship is the distinguishing feature of joint tenancies, as discussed in *§ 316.10[2]*. In other respects, the rights of joint tenants and tenants in common are the same.

Each cotenant is equally entitled to share in the possession of the entire property, and neither may exclude the other from any part of it [*see Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 548, 176 P.2d 1* (applicable to tenancy in common of real property); *see also Krum v. Malloy (1943) 22 Cal. 2d 132, 135, 137 P.2d 18* (applicable to coowners of automobile)]. In addition, a single cotenant may confer occupancy rights on a third person [*Atlantic Oil Co. v. Los Angeles County (1968) 69 Cal. 2d 585, 602, 72 Cal. Rptr. 886, 446 P.2d 1006]* .

For a discussion and forms for use in recovering cotenants' personal property from third parties, see Ch. 119, *Claim and Delivery* . For a discussion and forms for use in ousting a third party claiming real property adversely to cotenants, see Ch. 241, *Ejectment* . And for a discussion and forms for use in asserting adverse title to real property, see Ch. 13, *Adverse Possession* .

[2] Inference of Permissive Use or Possession

The mere fact of common ownership does not necessarily or conclusively establish that cotenants have consented to any usage or possession among themselves of a type for which permission is essential [*Krum v. Malloy(1943) 22 Cal. 2d 132, 136, 137 P.2d 18* (permission is necessary when coowner desires exclusive possession and use of automobile for a time)]. However, in the absence of other evidence on the issue but on proof of ownership and use of the property by one cotenant, an inference normally arises that the other cotenant consented to the use [*Bruce v. Ullery (1962) 58 Cal. 2d 702, 712, 25 Cal. Rptr. 841, 375 P.2d 833]* .

[3] Contracts Between Joint Tenants for Exclusive Possession

A contract between joint tenants concerning exclusive possession of the property is not incompatible with the existence of joint tenancy [*Hammond v. McArthur (1947) 30 Cal. 2d 512, 516, 183 P.2d 1* ; *Taylor v. Taylor (1961) 197 Cal.*

App. 2d 781, 787, 17 Cal. Rptr. 512] . This is true even when the contract for possession is contemporaneous with the creation of the joint tenancy [*Toth v. Crawford (1963) 212 Cal. App. 2d 827, 830, 28 Cal. Rptr. 343]* .

[4] Reasonable Restriction of Cotenants

Each cotenant is entitled to possession of the entire premises and may by lease or license transfer that right to possession to another or authorize another to exercise it, but he or she may not do any act to the prejudice of his or her cotenants in their estate. A cotenant's right of privacy in a cotenancy residence is not completely at the mercy of another with whom he or she shares legal possession, but is subject to reasonable restrictions on the right to exercise full control over the property in disregard of the wishes of another cotenant present on the premises [*Tompkins v. Superior Court (1963) 59 Cal. 2d 65, 69, 27 Cal. Rptr. 889, 378 P.2d 113* (one joint tenant who is away from premises is unable to authorize police officers to enter and search premises over objection of joint tenant who is present at time where no prior warning is given, no emergency exists, and officer fails to disclose his or her purpose to occupant who is present or to inform that occupant of absent occupant's consent); *see also Verdier v. Verdier (1957) 152 Cal. App. 2d 348, 352, 313 P.2d 123* (one joint tenant exceeds his or her right as joint tenant when entering joint tenancy premises with intent to remain and oust person occupying premises with consent of other joint tenant)].

[5] Presumption of Possession for All Cotenants

The possession by one cotenant is deemed the possession by all, and each may assume that another in exclusive possession is possessing for all and not adversely to the others. Thus, one cotenant cannot, merely by exclusive possession, gain title by adverse possession against the other cotenants. Such possession is presumed to be by permission and rightful unless notice is brought home to the others that it has become hostile [*Dimmick v. Dimmick (1962) 58 Cal. 2d 417, 422, 24 Cal. Rptr. 856*]. The exclusive occupancy by one cotenant is deemed permissive only and does not become adverse until the tenant out of possession has had either actual or constructive notice that the possession of the cotenant is hostile [*Hunter v. Schultz (1966) 240 Cal. App. 2d 24, 28, 49 Cal. Rptr. 315* ; *Weller v. Chavarria (1965) 233 Cal. App. 2d 234, 243, 43 Cal. Rptr. 364* ; *West v. Evans (1946) 29 Cal. 2d 414, 418, 175 P.2d 219]* .

[6] Adverse Possession by Cotenant Requires Notice and Ouster

[a] Evidence of Ouster

One cotenant cannot acquire the title of his or her cotenant by mere exclusive possession of the premises [*see Hunter v. Schultz (1966) 240 Cal. App. 2d 24, 28, 49 Cal. Rptr. 315]* . Ouster is the wrongful dispossession or exclusion of one cotenant by his or her cotenant or cotenants from the common property to which they are entitled to possession [*Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 548, 176 P.2d 1]* . The occupying cotenant must impart notice of intended ouster to the cotenant out of possession by acts of ownership of the most open, notorious, and unequivocal character [*Hunter v. Schultz (1966) 240 Cal. App. 2d 24, 28, 49 Cal. Rptr. 315* ; *see Code Civ. Proc. § 760.010 et seq.* for actions to quiet title to real property].

Ouster may be found in acts of an adverse character such as claiming the whole by one cotenant, denying the title of other cotenants, or refusing to allow other cotenants to enter [*Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 548, 176 P.2d 1]* . Evidence of ouster must be stronger than that required to establish title by adverse possession in a stranger [*Russell v. Lescalet (1967) 248 Cal. App. 2d 310, 314, 56 Cal. Rptr. 399* ; *Hunter v. Schultz (1966) 240 Cal. App. 2d 24, 28, 49 Cal. Rptr. 315* ; *see Code Civ. Proc. § 760.010 et seq.* for actions to quiet title to real property]. A cotenant's filing of a petition alleging that the property is community property and entirely belongs to the cotenant is an ouster of other cotenants. It triggers an obligation to pay rent but also commences the limitation period for adverse possession [*Estate of Hughes (1992) 5 Cal. App. 4th 1607, 1614-1616, 7 Cal. Rptr. 2d 742]* .

[b] Establishing Ouster by Demand for Concurrent Possession

If real property is owned concurrently by two or more persons, a tenant out of possession may establish an ouster from possession by serving on a tenant in possession a written demand for concurrent possession of the property. The written demand must make specific reference to *Civ. Code § 843* and to the time within which concurrent posession must be offered. Service of the written demand must be made in the same manner as service of summons in a civil action. An ouster is established 60 days after service is complete if within that time the tenant in possession does not offer and provide unconditional concurrent possession of the property to the tenant out of possession [*Civ. Code § 843(a), (b)*; for a form of demand, see *§ 316.73*].

Civ. Code § 843 does not apply to the extent the tenant out of possession is not entitled to possession or an alternative remedy is provided under the terms of an agreement between the cotenants or the instrument creating the cotenancy or another written instrument that indicates the possessory rights or remedies of the cotenants. *Civ. Code § 843* supplements and does not limit any other means by which an ouster may be established [*Civ. Code § 843(a)*].

A claim for damages for an ouster established by this notice may be asserted by an independent action or in an action for possession or partition of the property or another appropriate action or proceeding subject to the applicable statute of limitations. Nothing in *Civ. Code § 843* precludes the cotenants, at any time before or after a demand is served, from seeking partition of the property or from making an agreement as to the right of possession among the cotenants, the payment of reasonable rental value in lieu of possession, or any other terms that may be appropriate [*Civ. Code § 843(c), (d)*].

[c] Cotenants' Remedies Against Adversely Possessing Cotenant

On proof of ouster and a demand for entry by the cotenant out of possession and a refusal by the cotenant in possession, the ousted cotenant is entitled to recover common possession of the premises. One cotenant ousted by another is entitled to recover damages resulting from the ouster, which ordinarily amounts to his or her share of the value of the use and occupation of the land from the time of the ouster [*Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 548, 176 P.2d 1* ; *see also Code Civ. Proc. §§ 318, 321* for statutory period in which to bring actions for recovery of real property and *Code Civ. Proc. § 338* for statutory period in which to bring actions for recovery of personal property]. If there is no showing that the ousted cotenant cannot regain common possession of the premises or that the ouster was permanent, damages for loss of use afford the cotenant out of possession adequate relief [*Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 549, 176 P.2d 1]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsGeneral Overview

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§ 316.23 Right to Rents and Profits

[1] Cotenants' Fractional Share

When there is common ownership, each of the owners is entitled to realize the value of his or her own interest and, in considering such a situation, a court is entitled to view all contiguous lands owned by the persons involved so that if one of them takes no more than his or her legitimate fractional interest of the total the other common owners may not complain. This rule is qualified by another rule that one owner incommon cannot take more than his or her fractional share in value of the products of the common property involved [*Garibaldi v. Garibaldi (1968) 264 Cal. App. 2d 9, 11, 70 Cal. Rptr. 92]* .

For a cotenant's remedies against a common owner who realizes in excess of his or her fractional share, see *§ 316.26*.

[2] Cotenants in Exclusive Possession

A cotenant out of possession has no right against another cotenant in exclusive possession of the premises to recover a share of the profits derived from the common property by reason of the labor and expenditure of the cotenant in possession. Likewise, a cotenant out of possession may not recover rental value for occupancy and use of the property when he or she has not been ousted or excluded and when there has been no agreement between cotenants that the premises were occupied by the cotenant in possession as a receiver or bailiff for a share of the rents and profits [*Teixeira v. Verissimo (1966) 239 Cal. App. 2d 147, 155, 48 Cal. Rptr. 496]* . However, in a partition action between the cotenants, the amount expended by the cotenant in possession to protect or preserve the property may be offset by the reasonable value of that cotenant's occupancy [*Hunter v. Schultz (1966) 240 Cal. App. 2d 24, 31-32, 49 Cal. Rptr. 315]* . And, when a cotenant receives rents from third persons for use of the cotenancy lands, that cotenant must account to his or her cotenants for their share [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 656, 52 P.2d 237]* .

[3] Cotenants in Oil and Mineral Rights

In view of the fact that no enjoyment can be had of an estate in oil or mineral rights except through removal, it is not waste for a cotenant to go upon the cotenancy land and produce oil or minerals. The cotenant producing such substances

must account to the other cotenants for their percentages of the material produced [*see Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 655-656, 52 P.2d 237]* . Thus, any of several cotenants individually may enter the cotenancy property and explore for oil and gas. In doing so, the cotenant is compelled to bear the entire expense and risks of operation if unsuccessful. And, if the cotenant is successful, he or she cannot exclude the other cotenants who desire to drill. As to the remaining cotenants, he or she is required to render an accounting for profits [*Gerhard v. Stephens (1968) 68 Cal. 2d 864, 894, 69 Cal. Rptr. 612, 442 P.2d 692]* .

See also the discussions in *§§ 316.24[3]*, 316.2[2]. For a discussion and forms for use in demanding an accounting to determine profits of cotenancy property, see Ch. 7, *Accounting, Action for*. For a discussion and forms for use in asserting cotenants' rights in oil, gas, and minerals, see Ch. 393, *Oil and Gas* , and Ch. 363, *Mining* , respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawOil, Gas & Mineral InterestsConcurrent & Successive InterestsGeneral OverviewReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawOil & Gas

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§ 316.24 Right to Contribution

[1] Advances to Preserve Common Estate

When a cotenant makes advances from his or her own pocket to preserve the common estate, his or her investment in the property increases by the entire amount advanced. On sale of the estate, he or she is entitled to be reimbursed for the entire advancement before the balance is equally divided [*Southern Adjustment Bureau v. Nelson (1964) 230 Cal. App. 2d 539, 541, 41 Cal. Rptr. 148]* . But when one cotenant asserts exclusive possession, he or she is not entitled to contribution for money allegedly paid for insurance premiums, interest, and repairs when these expenditures were not necessary to protect the interests of the cotenant out of possession [*Regalado v. Regalado (1961) 198 Cal. App. 2d 549, 552, 18 Cal. Rptr. 468]* .

[2] Payment of Taxes

A cotenant who pays taxes assessed against the common property is, in the absence of an agreement to the contrary, entitled to a ratable contribution from his or her defaulting cotenants, even though the payment may have been made without the latter's consent or over the latter's objection [*see* *Marsh v. Edelstein (1970) 9 Cal. App. 3d 132, 141, 88 Cal. Rptr. 26]* . A cotenant, being an owner and under a moral and legal obligation to pay taxes on the cotenancy property, cannot by neglecting to pay the taxes and thus allowing the property to be sold, hope to strengthen his or her title by purchasing the property at the sale or from a stranger who bought it at the sale [*People v. Taliaferro (1961) 188 Cal. App. 2d 372, 374, 10 Cal. Rptr. 724* (rule applied to condemnation sale of real property held in joint tenancy)]. An individual so purchasing the property does not acquire any right or title thereto, and the purchase is deemed one mode of paying taxes [*Weisberg v. Loughridge (1967) 253 Cal. App. 2d 416, 420, 61 Cal. Rptr. 563* (rule applied to personal property sold at foreclosure sale)].

[3] Cotenants in Oil Rights

When one cotenant produces oil from the cotenancy property, he or she is entitled to charge the interests of the nonproducing cotenants for their proportionate share of drilling and operating expenses. The nonconsenting cotenants may either ratify the oil lease and thus receive their fractional share of royalties or reject the oil lease and receive their fractional part of the oil produced less their proportionate part of the costs of discovery and production [*Little v.*

Mountain View Dairies (1950) 35 Cal. 2d 232, 234-235, 217 P.2d 416 ; *Robinson v. Southwestern Dev. Co. (1954) 130 Cal. App. 2d 1, 5, 277 P.2d 825]* .

See also the discussions in *§§ 316.23[3], 316.25[2]*. For discussion and forms that may be used in demanding contribution from cotenants, seeCh. 300, *Indemnity and Contribution* For a discussion and forms for use in asserting cotenants' rights in oil, gas, and minerals, see Ch. 393, *Oil and Gas* , and Ch. 363, *Mining* , respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawOil, Gas & Mineral InterestsConcurrent & Successive InterestsGeneral OverviewReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawOil & GasTortsProcedureMultiple DefendantsContributionGeneral Overview

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§ 316.25 Right to Encumber Property

[1] Cotenant's Undivided Interest

One cotenant, whether a joint tenant or tenant in common, may dispose of or encumber his or her undivided interest without the consent, knowledge, or approval of the other cotenants [*Schoenfeld v. Norberg (1970) 11 Cal. App. 3d 755, 765-766, 90 Cal. Rptr. 47* ; *Thompson v. Thompson (1963) 218 Cal. App. 2d 804, 807, 32 Cal. Rptr. 808]* . However, the encumbrance affects that cotenant's interest only. Thus, a creditor may levy only on the interest of a debtor joint tenant [*Schoenfeld v. Norberg (1970) 11 Cal. App. 3d 755, 765-766, 90 Cal. Rptr. 47* (rule applicable to writ of execution levied on joint tenancy property to enforce money judgment against one spouse); *Hamel v. Gootkin (1962) 202 Cal. App. 2d 27, 30, 20 Cal. Rptr. 372* (rule applicable to trust deeds executed by deceased joint tenant in real property); *People v. Nogarr (1958) 164 Cal. App. 2d 591, 594, 330 P.2d 858* (rule applicable to mortgage on real property executed by deceased joint tenant)].

One cotenant may not act for another cotenant without special authority and thus bind the entire estate with respect to matters that constitute a burden on the property [*Gordon v. City Council (1961) 188 Cal. App. 2d 680, 687-688, 10 Cal. Rptr. 776* ; *see § 316.25[2]*]. Hence, when a note is made payable to two persons as joint tenants and the trust deed securing the note named them beneficiaries in a joint tenancy capacity, an accord and satisfaction with one tenant that was unknown to the other is not binding on the other as to his or her interest [*Stark v. Coker (1942) 20 Cal. 2d 839, 844-845, 129 P.2d 390]* .

Similarly, as to interests in cotenancy real property, a cotenant is unable to create an easement or servitude upon the common land against his or her cotenants in favor of adjoining lands [*see* *People ex rel. Dept. of Pub. Wks. v. Silveira (1965) 236 Cal. App. 2d 604, 628, 46 Cal. Rptr. 260]* . And because it is impossible to sever the right to encroach for the benefit of an improvement on another's land [*see* *Mecchi v. Picchi (1966) 245 Cal. App. 2d 470, 487, 54 Cal. Rptr. 1]* , when one joint tenant owning a right to encroach conveys his or her interest in the joint tenancy, the grantees on the grantor's death are deemed to hold the right to encroach for the common benefit of themselves and their cotenants [*Mecchi v. Picchi (1966) 245 Cal. App. 2d 470, 487-488, 54 Cal. Rptr. 1]* .

[2] Implied Consent of Cotenants Required

One cotenant may not act for another cotenant without special authority in binding the entire estate with respect to matters that constitute a burden on the property; however, the consent of one is deemed the consent of all the cotenants as to matters that constitute a benefit to the property [*Gordon v. City Council (1961) 188 Cal. App. 2d 680, 687-688, 10 Cal. Rptr. 776]* . Accordingly, a cotenant is without authority to contract for the cutting and removal of timber from the common property, especially when there exists the potential for improper cutting that could seriously impair the value of the land [*Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1032, 84 Cal. Rptr. 538* (when one cotenant purported to exercise dominion over, and to convey, the entire property under claim of right against all heirs)]. And, when one tenant in common makes an oil and gas lease with respect to the common property with a third person, the lease binds the other cotenants who ratify the lease by their acceptance of benefits under the lease [*Atlantic Oil Co. v. Los Angeles County (1968) 69 Cal. 2d 585, 602, 72 Cal. Rptr. 886, 446 P.2d 1006* ; *see §§ 316.23[3], 316.24[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 316.26 Duty Not to Commit Waste

If a joint tenant or tenant in common of real property commits waste on the property, any aggreived person may bring an action for waste against him or her [*Code Civ. Proc. § 732*]. The judgment in any such action may be for treble damages [*Code Civ. Proc. § 732*]. For example, when trees form a boundary line between two landowners, the trees are owned by them as tenants in common; each such owner has the right to demand that his or her cotenant use his or her part so as not to injure or destroy the whole. In assessing a cotenant's use of the common property, a court may look to the environmental qualities of the surrounding land to determine if the use constitutes legitimate enjoyment of the property [*Scarborough v. Woodill (1907) 7 Cal. App. 39, 41-42, 93 P. 383]* .

A cotenant of real property cannot lawfully do any act that would impair the rights of his or her cotenants [*Garibaldi v. Garibaldi (1968) 264 Cal. App. 2d 9, 14, 70 Cal. Rptr. 92]* . Likewise, he or she cannot transfer to another the right to do what he or she cannot do lawfully [*see Garibaldi v. Garibaldi (1968) 264 Cal. App. 2d 9, 14, 70 Cal. Rptr. 92* ; *see also Fuller v. Montafi (1921) 55 Cal. App. 314, 320, 203 P. 406]* . Thus, when one tenant in common contracts with a third party without the other tenant's consent to cut and remove timber on the common property, the nonconsenting tenant may seek an injunction to prevent waste; the enjoined third party may not seek damages for breach of contract from either cotenant [*see Garibaldi v. Garibaldi (1968) 264 Cal. App. 2d 9, 14-15, 70 Cal. Rptr. 92* ; *Fuller v. Montafi (1921) 55 Cal. App. 314, 320, 203 P. 406]* . And, logging must be performed in such manner that the rights of those cotenants who do not consent to the contract are protected [*Garibaldi v. Garibaldi (1968) 264 Cal. App. 2d 9, 15, 70 Cal. Rptr. 92]* . For a discussion and forms for use when logging rights are involved, see Ch. 350, *Logs and Timber* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawTortsWasteElementsReal Property LawTortsWasteRemedies

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§ 316.27 No Duty to Insure

There is no obligation on the part of one cotenant to insure the other cotenant against loss of the latter's interest in the cotenancy property [*Russell v. Williams (1962) 58 Cal. 2d 487, 491, 24 Cal. Rptr. 859, 374 P.2d 827]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 316.28 Tortious Acts Not Imputed to Other Cotenants

A cotenant of real property is not liable for the tort of his or her cotenant unless he or she actively participates in it directly or through an agent, or ratifies the tortious acts [*Daly v. Smith (1963) 220 Cal. App. 2d 592, 604, 33 Cal. Rptr. 920]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 316.29 Cotenants' Remedies Against Third Parties

A cotenant may recover possession of the cotenancy premises from all persons except his or her cotenants, and the recovery inures to the benefit of all cotenants [*McCormick v. Marcy (1913) 165 Cal. 386, 392, 132 P. 449]* . Likewise, a cotenant in sole possession of the cotenancy property may maintain an action to protect the property from injury or destruction [*see* *Fortain v. Smith (1896) 114 Cal. 494, 498, 46 P. 381]* .

However, a cotenant has no right to oust a person who holds possession with the consent of another cotenant. Thus, when a cotenant leases to a third party, he or she confers on that person the same right to possession as he or she has; by either lease or license a cotenant confers on another person the right to occupy and use the property of the cotenancy as fully as the landlord or licenser might have used or occupied it if the lease or license had not been granted. If either cotenant expels the tenant or licensee, he or she is guilty of trespass [*Verdier v. Verdier (1957) 152 Cal. App. 2d 348, 352, 313 P.2d 123]* .

Legal Topics:

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

§§ 316.30[Reserved]

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27-316 California Forms of Pleading and Practice--Annotated § 316.50

§ 316.50 Related Matthew Bender Publications

California Real Estate Law And Practice, Ch. 345, *Cotenancies: Creation, Characteristics, and Estate Planning* ; Ch. 371, *Partition and Other Terminations of Cotenancies* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesConcurrent OwnershipGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 27: Interpleader thru Juries and Jury Selection-Chs. 314-322
Chapter 316 JOINT TENANCY AND TENANCY IN COMMON
PART III. RESEARCH GUIDE

27-316 California Forms of Pleading and Practice--Annotated § 316.51

§ 316.51 State Statutes

[1] Creation of Joint Tenancy

How joint tenancies created. *Civ. Code § 683*

Joint tenancies prohibited with respect to safe-deposit boxes. *Civ. Code § 683.1*

Joint tenancies in bank accounts. *Fin. Code § 852*; *Prob. Code §§ 5130, 5203, 5301-5306*

Joint tenancies in savings and loan association certificates. *Fin. Code § 6800*; *Prob. Code §§ 5130, 5203, 5301-5306*

Registration or transfer of motor vehicle in joint tenancy. *Veh. Code §§ 4150.5(a), 5600.5(a)*

[2] Creation of Tenancy in Common

How tenancies in common created. *Civ. Code § 686*

Devises and legacies to more than one person are held as tenancies in common unless provided otherwise. *Prob. Code § 29*

[3] Definitions

Forms of ownership by several persons. *Civ. Code § 682*

Community property with right of survivorship. *Civ. Code § 682.1*

Joint tenancy interest defined. *Civ. Code § 683*

Partnership interest defined. *Civ. Code § 684*

Tenancy in common interest defined. *Civ. Code § 685*

Community property interest defined. *Fam. Code § 760*

[4] Duty Not to Commit Waste

Action for waste; judgment for treble damages. *Code Civ. Proc. § 732*

[5] Effects of Unsuccessful Attempts to Create Joint Tenancy

Preference for tenancies in common. *Civ. Code §§ 683, 686*

[6] Husband and Wife

Acceleration of maturity date of principal and accrued interest on loans barred when transfer or transmutation of title between spouses. *Civ. Code § 2924.6*

Husband and wife may hold property as joint tenants or tenants in common, or as community property or community property with right of survivorship. *Fam. Code § 750*

Community property presumptions with respect to acquisitions by wife or husband and wife. *Fam. Code §§ 760, 2580*

[7] Right to Possession of Property

Right to serve demand for possession of property on cotenant. *Civ. Code § 843*

Statutory period in which to bring actions for recovery of real property. *Code Civ. Proc. §§ 318, 321*

Period of limitation in which to bring actions for recovery of personal property. *Code Civ. Proc. § 338*

Actions to quiet title to real property. *Code Civ. Proc. §§ 760.010-764.080*

[8] Termination of Cotenancy by Partition

Proceedings for partition of real and personal property. *Code Civ. Proc. §§ 872.010-874.240*

Who may bring action for partition. *Code Civ. Proc. § 872.210*

Requirement that clear title shown for property for which partition demanded. *Code Civ. Proc. § 872.220*

Partition of real and personal property in one action. *Code Civ. Proc. § 872.240*

Right to partition when no waiver. *Code Civ. Proc. § 872.710(b)*

Court's action when plaintiff found entitled to partition. *Code Civ. Proc. §§ 872.720(a), 872.810*

Sale of property and division of proceeds in lieu of partition. *Code Civ. Proc. § 872.820*

[9] Termination of Joint Tenancy

Involuntary trustee is created when property gained by fraud, accident, or mistake. *Civ. Code § 2224*

Person causing death of decedent is not entitled to share of decedent's estate. *Prob. Code § 258*

Administration and distribution of property when joint tenants die simultaneously. Prob. Code § 296.2

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipPartition ActionsReal Property LawEstatesConcurrent OwnershipTenancies in Common

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Chapter 316 JOINT TENANCY AND TENANCY IN COMMON
PART III. RESEARCH GUIDE

27-316 California Forms of Pleading and Practice--Annotated § 316.52

§ 316.52 Decisions

[1] Confidential Relationship Between Cotenants

Inequitable for one cotenant to buy adversarial claim or title or assert it for his or her exclusive benefit without consent of other cotenants. *Ferry v. McNeil (1963) 214 Cal. App. 2d 411, 416, 29 Cal. Rptr. 577*

[2] Cotenants' Remedies Against Third Parties

If, under state law and deposit contract, delinquent taxpayer joint tenant can withdraw all funds, IRS levy pursuant to *I.R.C. § 6331(d)* reaches all funds and bank is required to pay over all sums owed even if only one joint tenant is delinquent taxpayer; third parties' rights are determinable in post-seizure hearings. *United States v. National Bank of Commerce (1985) 472 U.S. 713, 721-728, 105 S. Ct. 2919, 86 L. Ed. 2d 565*

Cotenant is able to recover possession of cotenancy premises from all persons except his or her cotenants; such recovery inures to benefit of all cotenants. *McCormick v. Marcy (1913) 165 Cal. 386, 392, 132 P. 449*

Cotenant in sole possession of cotenancy property is empowered to maintain action to protect property from injury or destruction. *Fortain v. Smith (1896) 114 Cal. 494, 498, 46 P. 381*

Cotenant is without right to oust person who holds possession with consent of another cotenant. *Verdier v. Verdier (1957) 152 Cal. App. 2d 348, 352, 313 P.2d 123*

[3] Creation of Joint Tenancy

[a] By Writing

Term "or" between names of cotenants without designation of joint tenancy is insufficient to create joint tenancy. *Cooke v. Tsipouroglou (1963) 59 Cal. 2d 660, 664, 31 Cal. Rptr. 60, 381 P.2d 940*

Joint tenancies are created only by writing. *California Trust Co. v. Bennett (1949) 33 Cal. 2d 694, 697, 204 P.2d 324* ; *Allen v. Samuels (1962) 204 Cal. App. 2d 710, 715, 22 Cal. Rptr. 528*

Fact that deed is taken in joint tenancy establishes prima facie case that property is actually owned in joint tenancy. *Weak v. Weak (1962) 202 Cal. App. 2d 632, 638, 21 Cal. Rptr. 9*

Sole technical requisite of creation of joint tenancy is express declaration of joint tenancy in instrument. *Gonzales v. Gonzales (1968) 267 Cal. App. 2d 428, 435, 73 Cal. Rptr. 83*

[b] Safe-Deposit Boxes

No joint tenancy exists in safe-deposit box when all funds belong to one of purported joint tenants. *American Trust Co. v. Fitzmaurice (1955) 131 Cal. App. 2d 382, 387, 280 P.2d 545*

[c] Savings and Loan Association Certificates

Joint tenancy form of savings and loan association certificate is conclusive evidence of intention to create joint tenancy in absence of fraud or undue influence. *Estate of Friedman (1971) 20 Cal. App. 3d 399, 403, 97 Cal. Rptr. 653*

[4] Definitions

[a] Joint Tenancy--Survivorship as Distinguishing Feature of Joint Tenancy

Right of survivorship is "grand" and "distinguishing" incident of joint tenancy estate. *Estate of Blair (1988) 199 Cal. App. 3d 161, 166, 244 Cal. Rptr. 627*

Decedent is unable to bequeath half of any joint tenancy property because on death other joint tenant becomes sole owner of property by right of survivorship. *Estate of Kennedy (1982) 135 Cal. App. 3d 676, 681, 185 Cal. Rptr. 540*

No interest passes to heirs or devisees of first joint tenant to die. *Santoro v. Carbone (1972) 22 Cal. App. 3d 721, 729, 99 Cal. Rptr. 488* ; *Clark v. Carter (1968) 265 Cal. App. 2d 291, 294, 70 Cal. Rptr. 923*

On death of one joint tenant, survivor is sole owner by virtue of original grant creating tenancy. *King v. King (1951) 107 Cal. App. 2d 257, 259, 236 P.2d 912*

[b] Tenancy in Common

[i] Undivided Interest

Holding an undivided interest in property is very essence of tenancy in common. *Davis v. Davis (1963) 222 Cal. App. 2d 691, 693, 35 Cal. Rptr. 281*

[ii] Tenancies in Common Preferred

Express intention is required to create joint tenancy. *Abbey v. Lord (1959) 168 Cal. App. 2d 499, 503, 336 P.2d 226*

[5] Duty Not to Commit Waste

Where trees form boundary line between two landowners, trees are owned by them as tenants in common; each owner has right to demand that his or her cotenant so use his or her part so as not to injure or destroy the whole; in assessing cotenant's use of common property, court is able to look to environmental qualities of surrounding land to determine if use constitutes legitimate enjoyment of property or waste. *Scarborough v. Woodhill (1907) 7 Cal. App. 39, 41-42, 93 P. 383*

Cotenant of real property is unable to lawfully do any act such as acts constituting waste, which would impair rights of his or her cotenants; cotenant is unable to transfer right to do what he or she cannot lawfully do to another. *Garibaldi v. Garibaldi (1968) 264 Cal. App. 2d 9, 14-15, 70 Cal. Rptr. 92* ; *Fuller v. Montafi (1921) 55 Cal. App. 314, 320, 203 P. 406*

Nonconsenting cotenant is entitled to seek injunction to prevent waste where one cotenant contracts with third party to cut and remove timber from cotenancy premises; enjoined third party is unable to seek damages for breach of contract from either cotenant. *Garibaldi v. Garibaldi (1968) 264 Cal. App. 2d 9, 14-15, 70 Cal. Rptr. 92* ; *Fuller v. Montafi (1921) 55 Cal. App. 314, 320, 203 P. 406*

Rights of nonconsenting cotenants are required to be protected from waste in logging operation. *Garibaldi v. Garibaldi (1968) 264 Cal. App. 2d 9, 15, 70 Cal. Rptr. 92*

[6] Effect of Attempts to Create Joint Tenancy

[a] Tenancy in Common Created

Instrument conveying title is required to state expressly that property is to be held in joint tenancy; intent to create joint tenancy is required to be set forth in instrument creating it. *Bill Froelich Motor Co. v. Estate of Kohler (1966) 240 Cal. App. 2d 897, 901, 50 Cal. Rptr. 200*

Tenancy in common is residual form of ownership. *Estate of Horn (1951) 102 Cal. App. 2d 635, 640, 228 P.2d 99*

Preference for tenancies in common over joint tenancies. *Reiss v. Reiss (1941) 45 Cal. App. 2d 740, 747, 114 P.2d 718*

[b] Testamentary Gift

Testamentary disposition is attempted where stock held jointly by brother and sister with sole intent that stock transfer

title to sister after her brother's death; such disposition conforms to statutes regulating execution of wills or failing as gift at death. *Estate of Franco (1975) 50 Cal. App. 3d 374, 381, 123 Cal. Rptr. 458*

[c] Undue Influence

No undue influence if no deceit exists and gift is voluntary. *Goldman v. Goldman (1953) 116 Cal. App. 2d 227, 235, 253 P.2d 474*

Undue influence defined. *Estate of Kreher (1951) 107 Cal. App. 2d 831, 839, 238 P.2d 150*

No undue influence if policy or plan of giving is found. *Estate of Kreher (1951) 107 Cal. App. 2d 831, 840, 238 P.2d 150*

[7] Husband and Wife

[a] As Joint Tenants

Requirements of California transmutation statute [*Fam. Code § 852(a)*] do not apply when realty is transferred from third party to spouses as joint tenants; property therefore is held in joint tenancy rather than as community property. *In re Summers (9th Cir. 2003) 332 F.3d 1240, 1245*

Severance of joint tenancy by recording declaration of severance [*Civ. Code § 683.2*] is not "transfer" or "disposition" of "property" and therefore does not violate either automatic temporary restraining order in dissolution proceeding or similarly worded court-ordered temporary restraining order or preliminary injunction enjoining spouse from "transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether community, quasi-community, or separate, without the written consent of the other party or an order of the court, except in the usual course of business or for the necessities of life." *Estate of Mitchell (1999) 76 Cal. App. 4th 1378, 1395, 91 Cal. Rptr. 2d 192*

Husband's separate property residence that he deeded "for a gift" to himself and wife as joint tenants during marriage was community property, subjectto reimbursement provisions of *Civ. Code § 4800.2* (superseded by *Fam. Code § 2640*). *In re Marriage of Perkal (1988) 203 Cal. App. 3d 1198, 1202-1203, 250 Cal. Rptr. 296*

For purposes of determining character of real property on one spouse's death, property is presumed to be as described in deed and burden of proving otherwise is on party seeking to rebut presumption. *Estate of Blair (1988) 199 Cal. App. 3d 161, 167, 244 Cal. Rptr. 627*

Fact that deed was taken in joint tenancy established prima facie case that property was in fact held in joint tenancy; devisee was permitted to test surviving joint tenant's claim by showing, through extrinsic evidence, that property held under joint tenancy deed was in fact community property. *Estate of Blair (1988) 199 Cal. App. 3d 161, 167, 244 Cal. Rptr. 627*

Parties to dispute over whether property passing by will is community property or is held in joint tenancy were not

bound by writing requirement of *Civ. Code § 5110.730* (superseded by *Fam. Code § 852*, operative January 1, 1994) for agreement or understanding between husband and wife made before 1985, because retroactive application of statute would contravene due process, substantially affecting vested property right. *Estate of Blair (1988) 199 Cal. App. 3d 161, 168, 244 Cal. Rptr. 627*

Absent other independent or corroborating evidence, evidence is insufficient to support trial court's finding of transmutation of property from joint tenancy to community property when evidence fails to show when transmutation occurred and court is thus unable to apply proper standard of proof. *Estate of Blair (1988) 199 Cal. App. 3d 161, 167-168, 244 Cal. Rptr. 627*

In cases arising under former Prob. Code § 229 (descent of community property passing by intestacy when decedent died before January 1, 1985), community property presumption of *Civ. Code § 5110* (superseded by *Fam. Code § 760*, operative January 1, 1994), rather than common law form-of-title presumption, is applicable, because courts must look to source of property before it was placed in joint tenancy; this presumption is consistent with legislative intent that intestate succession should reflect decedent's contribution to estate. *In re Estate of Luke (1987) 194 Cal. App. 3d 1006, 1015, 240 Cal. Rptr. 84*

Acquisition of real property in joint tenancy prior to marriage does not create presumption of community property under former *Civ. Code § 4800.1* (superseded by *Fam. Code § 2580*). *In re Marriage of Leversee (1984) 156 Cal. App. 3d 891, 896-897, 203 Cal. Rptr. 481*

Testimony of one spouse's hidden intent does not overcome presumption created by deed that property is held in joint tenancy. *Estate of Levine (1981) 125 Cal. App. 3d 701, 705, 178 Cal. Rptr. 275*

Spouse's voluntary contribution of money to joint account creates presumption that money is joint tenancy money and is gift from contributing spouse. *In re Marriage of Mahone (1981) 123 Cal. App. 3d 17, 24-25, 176 Cal. Rptr. 274*

Property settlement agreement effectively terminated joint tenancy and subjected property to disposition by husband's will. *Estate of Gebert (1979) 95 Cal. App. 3d 370, 379, 157 Cal. Rptr. 46*

Presumption of equal interests of spouses in joint tenancy property in absence of evidence to contrary. *Johansen v. Pelton (1970) 8 Cal. App. 3d 625, 630, 87 Cal. Rptr. 784*

Joint tenancy in real property creates rebuttable presumption that property is held in joint tenancy; evidence of common understanding or agreement overcomes presumption. *Clark v. Carter (1968) 265 Cal. App. 2d 291, 294-295, 70 Cal. Rptr. 923*

When property is conveyed to a husband and wife as joint tenants, form of the conveyance destroys statutory presumption that property is community even though consideration for conveyance consists of community funds or assets; such instrument creates a tenancy in which interests of husband and wife are separate property; form of the instrument is not conclusive as to status of property; and property acquired by a husband and wife as joint tenants is capable of being shown to be actually community property or separate property of one spouse according to intention, understanding, or agreement of parties. *Lovetro v. Steers (1965) 234 Cal. App. 2d 461, 468, 44 Cal. Rptr. 604*

[b] As Tenants in Common

Spouses' undivided interest in property held in tenancy in common is separate property of each. *Estate of Adams (1964) 228 Cal. App. 2d 264, 266, 39 Cal. Rptr. 522*

[c] Execution on Property Held in Joint Tenancy by Spouses

With respect to execution on jointly held property of husband and wife by judgment creditor of husband, wife's interest in joint tenancy property is not subject to execution; no basis for affording the creditor stronger hand against property held in cotenancy with exemption claimant's spouse than against property in which cotenant is not married to claimant. *Schoenfeld v. Norberg (1970) 11 Cal. App. 3d 755, 764, 90 Cal. Rptr. 47*

[8] No Duty to Insure

No obligation exists on part of one cotenant to insure other cotenant against loss of latter's interest in cotenancy property. *Russell v. Williams (1962) 58 Cal. 2d 487, 491, 24 Cal. Rptr. 859, 374 P.2d 827*

[9] Presumption of Community Property

Requirement of former *Civ. Code § 4800.1* (superseded by *Fam. Code § 2580*, operative January 1, 1994) that community presumption concerning joint tenancy property be rebutted by statement in deed or other documentary evidence of title or proof that parties made written agreement that property is separate, is inapplicable to proceedings for dissolution of marriage or legal separation commenced before January 1, 1984, in which proceedings for division of property are not final on January 1, 1984, because retroactive application of statute unconstitutionally impairs vested property rights without due process of law. *In re Marriage of Buol (1985) 39 Cal. 3d 751, 757, 763, 218 Cal. Rptr. 31, 705 P.2d 354* (superseded by statute: *see In re Marriage of Heikes, 10 Cal. 4th 1211, 44 Cal. Rptr. 2d 155, 899 P.2d 1349 (1995))*

Presumption that residence conveyed to husband and wife as joint tenants is community property is overcome only by evidence of agreement that spouses intended that there be separate interests in property. *In re Marriage of Lucas (1980) 27 Cal. 3d 808, 813-815, 166 Cal. Rptr. 853, 614 P.2d 285* (decided before, and partially abrogated by, 1983 enactment of *Civ. Code §§ 4800.1* and *4800.2*, superseded by *Fam. Code §§ 2580* and *2640*, operative January 1, 1994)

Community property presumption arising from joint tenancy title was overcome by evidence that wife told husband several times that residence was really her separate property and if she died, husband could live in it if he obtained custody of wife's children, and if not, he must sell house and put proceeds in trust for wife's children. *In re Marriage of Milse (1986) 182 Cal. App. 3d 203, 206, 227 Cal. Rptr. 70*

Trial court's finding under former *Civ. Code § 5110* (superseded by *Fam. Code § 760*, operative January 1, 1994) that residence acquired by husband before marriage remained his separate property, subject to *pro tanto* community interest, despite title change to joint tenancy during marriage, was supported by substantial evidence of oral agreement that change was made for survivorship purposes only. *In re Marriage of Scherr (1986) 177 Cal. App. 3d 314, 319-320, 222 Cal. Rptr. 872*

Community presumption arising from joint tenancy title was overcome by evidence that wife's mother deeded realty to spouses in joint tenancy solely to permit wife to have property in event of her death and so informed her son-in-law, who said he had no desire to be named on deed; therefore *Civ. Code § 4800.1* was inapplicable. *In re Marriage of Delgado (1986) 176 Cal. App. 3d 666, 669, 222 Cal. Rptr. 119*

Presumption of community property when single-family residence taken as joint tenants was applicable when property was being acquired by sales contract that provided for buyers to take title as joint tenants. *In re Marriage of Tucker (1983) 141 Cal. App. 3d 128, 133-135, 190 Cal. Rptr. 127*

[10] Right to Contribution

[a] Advances to Preserve Common Estate

When unmarried cohabitants had implied agreement to own property as true joint tenants, trial court's decision to divide proceeds of sale equally, with no reimbursement to party making greater contribution to acquisition, was proper. *Milian v. De Leon (1986) 181 Cal. App. 3d 1185, 1193, 226 Cal. Rptr. 831*

Where cotenant makes advances from his or her own pocket to preserve common estate, his or her investment in property increases by amount advanced; on sale of estate, he or she is entitled to reimbursement of entire advancement before balance is equally divided. *Southern Adjustment Bureau v. Nelson (1964) 230 Cal. App. 2d 539, 541, 41 Cal. Rptr. 148*

When one cotenant asserts exclusive possession, he or she is not entitled to contribution for money allegedly paid for insurance premiums, interest, and repairs when such expenditures not necessary to protect interests of cotenant out of possession. *Regalado v. Regalado (1961) 198 Cal. App. 2d 549, 552, 18 Cal. Rptr. 468*

[b] Payment of Taxes

In absence of an agreement to contrary, cotenant who pays taxes assessed against common property is entitled to ratable contribution from his or her defaulting cotenants even though payment may have been made without latter's consent or over latter's objection. *Marsh v. Edelstein (1970) 9 Cal. App. 3d 132, 141, 88 Cal. Rptr. 26*

Cotenant, being an owner and under moral and legal obligation to pay taxes on cotenancy property, is not capable, by neglecting to pay taxes and thus allowing land to be sold in a condemnation proceeding, of strengthening his or her title by purchasing the land at sale or by purchasing land from a stranger who bought it at sale. *People v. Taliaferro (1961) 188 Cal. App. 2d 372, 374, 10 Cal. Rptr. 724*

Cotenant purchasing cotenancy property at tax sale to acquire superior title does not acquire any right or title and purchase deemed one mode of paying taxes. *Weisberg v. Loughridge (1967) 253 Cal. App. 2d 416, 420, 61 Cal. Rptr. 563*

[c] Cotenants in Oil Rights

Where one cotenant produces oil from cotenancy property, he or she is entitled to charge the interests of nonproducing

cotenants for their proportionate share of drilling and operating expenses; nonconsenting cotenants either ratify oil lease and thus receive fractional share of royalties or reject oil lease and receive their fractional part of oil produced less their proportionate part of costs of discovery and production. *Little v. Mountain View Dairies (1950) 35 Cal. 2d 232, 234-235, 217 P.2d 416* ; *Robinson v. Southwestern Dev. Co. (1954) 130 Cal. App. 2d 1, 5, 277 P.2d 825*

[11] Right to Encumber Property

[a] Cotenant's Undivided Interest

One cotenant disposing of or encumbering his or her undivided interest without consent, knowledge, or approval of other cotenants. *Schoenfeld v. Norberg (1970) 11 Cal. App. 3d 755, 765-766, 90 Cal. Rptr. 47* ; *Thompson v. Thompson (1963) 218 Cal. App. 2d 804, 807, 32 Cal. Rptr. 808*

Encumbrance only affects encumbering cotenant's interest. *Schoenfeld v. Norberg (1970) 11 Cal. App. 3d 755, 765-766, 90 Cal. Rptr. 47*

Encumbrance by one cotenant affects that cotenant's interest only if trust deed was executed by deceased joint tenant to real property. *Hamel v. Gootkin (1962) 202 Cal. App. 2d 27, 30, 20 Cal. Rptr. 372*

Encumbrance by one cotenant affects that cotenant's interest only when mortgage on real property is executed by deceased joint tenant. *People v. Nogarr (1958) 164 Cal. App. 2d 591, 594, 330 P.2d 858*

One cotenant does not act for another cotenant without special authority and thus does not bind the entire estate with respect to matters constituting a burden on property. *Gordon v. City Council (1961) 188 Cal. App. 2d 680, 687-688, 10 Cal. Rptr. 776*

Where note made payable to two persons as joint tenants and trust deed securing note named them as beneficiaries in joint tenancy capacity, an accord and satisfaction with one tenant which was unknown to other is not binding on other's interest. *Stark v. Coker (1942) 20 Cal. 2d 839, 844-845, 129 P.2d 390*

Cotenant is unable to create an easement or servitude on common land against his or her cotenants in favor of adjoining lands. *People ex rel. Dept. of Public Works v. Silveira (1965) 236 Cal. App. 2d 604, 628, 46 Cal. Rptr. 260*

Impossibility of severance of right to encroach; grantees deemed to hold right for common benefit. *Mecchi v. Picchi (1966) 245 Cal. App. 2d 470, 487-488, 54 Cal. Rptr. 1*

[b] Implied Consent of Cotenants Required

One cotenant does not act for another cotenant without special authority and thus does not bind entire estate with respect to matters that constitute a burden on property; however, consent of one is deemed consent of both cotenants as to matters that constitute benefit in favor of their property. *Gordon v. City Council (1961) 188 Cal. App. 2d 680, 687-688, 10 Cal. Rptr. 776*

Cotenant is without authority to contract for cutting and removal of timber from common property, especially if there exists potential for improper cutting that could seriously impair value of land. *Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1032, 84 Cal. Rptr. 538*

When one tenant in common makes an oil and gas lease with respect to common property with a third person, lease binds other cotenants who ratify lease by their acceptance of benefits under lease. *Atlantic Oil Co. v. Los Angeles County (1968) 69 Cal. 2d 585, 602, 72 Cal. Rptr. 886, 446 P.2d 1006*

[12] Right to Possession of Property

[a] Generally

Each cotenant is equally entitled to share in possession of entire property; neither is capable of excluding other from any part of it. *Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 548, 176 P.2d 1* ; *Krum v. Malloy (1943) 22 Cal. 2d 132, 135, 137 P.2d 18*

Single cotenant may confer occupancy rights on third person. *Atlantic Oil Co. v. Los Angeles County (1968) 69 Cal. 2d 585, 602, 72 Cal. Rptr. 886, 446 P.2d 1006*

[b] Adverse Possession by Cotenant Requires Notice and Ouster

[i] Evidence of Ouster

One cotenant does not acquire title of his or her cotenant by mere exclusive possession of premises. *Hunter v. Schultz (1966) 240 Cal. App. 2d 24, 28, 49 Cal. Rptr. 315*

Ouster is wrongful dispossession or exclusion of one cotenant by his or her cotenant or cotenants from common property to which they are entitled to possession. *Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 548, 176 P.2d 1*

Occupying cotenant is required to impart notice of intended ouster to cotenant out of possession by acts of ownership of most open, notorious, and unequivocal character. *Hunter v. Schultz (1966) 240 Cal. App. 2d 24, 28, 49 Cal. Rptr. 315*

Ouster is found in acts of an adverse character such as claiming whole by one cotenant, denying title of other cotenants, or refusing to allow other cotenants to enter. *Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 548, 176 P.2d 1*

Evidence of ouster by cotenant is required to be stronger than that offered by stranger to establish title by adverse possession. *Russell v. Lescalet (1967) 248 Cal. App. 2d 310, 314, 56 Cal. Rptr. 399* ; *Hunter v. Schultz (1966) 240 Cal. App. 2d 24, 28, 49 Cal. Rptr. 315*

[ii] Cotenant's Remedies Against Adversely Possessing Cotenant

On proof of ouster and a demand for entry by cotenant out of possession and refusal by cotenant in possession, ousted

cotenant is entitled to recover common posession of premises; one cotenant ousted by another is entitled to recover damages resulting from ouster which ordinarily amount to his or her share of value of use and occupation of land from time of ouster. *Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 548, 176 P.2d 1*

When there is no showing that ousted cotenant cannot regain common possession of premises or that ouster was permanent, damages for loss of use afford cotenant out of possession adequate relief. *Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 549, 176 P.2d 1*

[c] Contracts Between Joint Tenants for Exclusive Possession

Contract between joint tenants concerning exclusive possession of property is not incompatible with existence of a joint tenancy. *Hammond v. McArthur (1947) 30 Cal. 2d 512, 516, 183 P.2d 1* ; *Taylor v. Taylor (1961) 197 Cal. App. 2d 781, 787, 17 Cal. Rptr. 512*

Contract for exclusive possession of joint tenancy property is not incompatible with existence of joint tenancy even when contract is contemporaneous with creation of joint tenancy. *Toth v. Crawford (1963) 212 Cal. App. 2d 827, 830, 28 Cal. Rptr. 343*

[d] Inference of Permissive Use or Possession

In absence of other evidence on issue, but on proof of ownership and use of property by one cotenant, inference ordinarily arises that other cotenant consented to such use. *Bruce v. Ullery (1962) 58 Cal. 2d 702, 712, 25 Cal. Rptr. 841, 375 P.2d 833*

[e] Presumption of Possession for All Cotenants

Possession by one cotenant is deemed possession by all; each assumes that another in exclusive possession is possessing for all and not adversely toothers. *Dimmick v. Dimmick (1962) 58 Cal. 2d 417, 422, 24 Cal. Rptr. 856, 374 P.2d 824*

Exclusive occupancy by one cotenant is deemed permissive only and is not adverse until tenant out of possession has had either actual or constructive notice that possession of cotenant is hostile. *Weller v. Chavarria (1965) 233 Cal. App. 2d 234, 243, 43 Cal. Rptr. 364* ; *Hunter v. Schultz (1966) 240 Cal. App. 2d 24, 28, 49 Cal. Rptr. 315* ; *West v. Evans (1946) 29 Cal. 2d 414, 418, 175 P.2d 219*

[f] Reasonable Restriction of Cotenants

Cotenant is not entitled to act to prejudice of his or her cotenants in their estate; cotenant's right of privacy in a cotenancy residence is not completely at mercy of another with whom he or she shares legal possession, but is subject to reasonable restrictions on right to exercise full control over property in disregard of wishes of another joint occupant present on premises. *Tompkins v. Superior Court (1963) 59 Cal. 2d 65, 69, 27 Cal. Rptr. 889, 378 P.2d 113*

Joint tenant exceeds his or her right as joint tenant when entering joint tenancy premises with intent to remain and oust person occupying premises with consent of other joint tenant. *Verdier v. Verdier (1957) 152 Cal. App. 2d 348, 352,*

313 P.2d 123

[13] Right to Rents and Profits

[a] Cotenants' Fractional Share

Each common owner is entitled to realize value of his or her own interest; in considering such situation, court is entitled to view all contiguous lands owned by persons involved so that none of them takes more than his or her fractional share of total; preceding rule is modified by rule that one co-owner is unable to take more than his or her fractional share in value of products of common property. *Garibaldi v. Garibaldi (1968) 264 Cal. App. 2d 9, 11, 70 Cal. Rptr. 92*

[b] Cotenants in Exclusive Possession

Cotenant out of possession has no right against another in exclusive possession of premises to recover share of profits derived from common property by labor and expenditure of tenant in possession; likewise, tenant out of possession has no right to recover rental value for occupancy or use of property by tenant in possession when there is neither an ouster or exclusion of one tenant by other nor an agreement between cotenants that tenant in possession of premises act as a receiver or bailiff for rents and profits of all cotenants. *Teixeira v. Verissimo (1966) 239 Cal. App. 2d 147, 155, 48 Cal. Rptr. 496*

Amount expended by one cotenant in possession to protect or preserve property offset by reasonable value of that cotenant's occupancy in partition action between cotenants. *Hunter v. Schultz (1966) 240 Cal. App. 2d 24, 31-32, 49 Cal. Rptr. 315*

Cotenant receiving rents from third persons for use of cotenancy lands is accountable to his or her cotenants for their share. *Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 656, 52 P.2d 237*

[c] Cotenants in Oil and Mineral Rights

Any of several cotenants is entitled to explore for oil and minerals; if successful exploration, cotenant is prohibited from excluding other cotenants who desire to drill; and, as to other cotenants, exploring cotenant is required to render accounting for profits. *Gerhard v. Stephens (1968) 68 Cal. 2d 864, 894, 69 Cal. Rptr. 612, 442 P.2d 692*

No waste when one cotenant produces oil or minerals on cotenancy property; producing cotenant is required to account to other cotenants for their percentages of material produced. *Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 655-656, 52 P.2d 237*

[14] Termination of Cotenancy by Partition

[a] Effect of Partition

In a partition, no change of title occurs between tenants in common like there does in a grant deed, but rather a dividing up of what parties already own occurs; after partition, each tenant in common has exact same proportional interest in property that he or she had previously, only difference being that now interest is in severalty while previously it was in

common. *Rancho Santa Margarita v. Vail (1938) 11 Cal. 2d 501, 539, 81 P.2d 533*

Once trial court in partition action determines that true joint tenancy exists, order for reimbursement or contribution on account of differences in amounts each party has paid towards property's acquisition is improper, unless agreement for reimbursement exists. *Milian v. De Leon (1986) 181 Cal. App. 3d 1185, 1195, 226 Cal. Rptr. 831*

Fact that real property is held in joint tenancy does not compel equal division of proceeds on sale following partition action; by seeking partition and accounting, joint tenant puts in issue interest of each party to real property in question. *Kershman v. Kershman (1961) 192 Cal. App. 2d 23, 26, 13 Cal. Rptr. 290*

[b] Of Joint Tenancy

Severance or attempted severance of joint tenancy is required before death of one joint tenant and before other joint tenant, as a result, becomes owner of whole by virtue of his or her right of survivorship. *Green v. Skinner (1921) 185 Cal. 435, 438, 197 P. 60*

[c] Only Cotenants May Bring Action

Only cotenants are capable of bringing actions for partition; cotenancy gives right to partition; when several persons own thing without being cotenants thereof, no partition is available. *Akagi v. Ishioka (1975) 47 Cal. App. 3d 426, 431, 120 Cal. Rptr. 807*

[d] Right to Demand Partition

[i] Absolute Right

Joint tenant or tenant in common possesses absolute right to have his or her interests severed from those of his or her cotenant. *Lazzarevich v. Lazzarevich (1952) 39 Cal. 2d 48, 50, 244 P.2d 1* ; *De Roulet v. Mitchel (1945) 70 Cal. App. 2d 120, 123, 160 P.2d 574*

Absent action for partition, cotenant has no right to force another cotenant to change boundaries of possessory interest; probate court therefore lacked jurisdiction to order individual who was cotenant with trust estate and also beneficiary of trust to execute documents for lot line adjustment. *Dabney v. Dabney (2002) 104 Cal. App. 4th 379, 383, 127 Cal. Rptr. 2d 917*

Cotenant demanding partition is not required to specify any reasons for demand; only indispensable requirement is a showing of clear title; partition must not be denied for reason that severance will result in financial loss to cotenants. *De Roulet v. Mitchel (1945) 70 Cal. App. 2d 120, 124, 160 P.2d 574*

[ii] Modification or Waiver by Contract

Right to partition is capable of being waived by express or implied contract. *Penasquitos, Inc. v. Holladay (1972) 27 Cal. App. 3d 356, 358, 103 Cal. Rptr. 717*

Absolute right of cotenant to demand partition of cotenancy premises is capable of being modified or waived by contract. *Schwartz v. Shapiro (1964) 229 Cal. App. 2d 238, 253, 40 Cal. Rptr. 189*

When property is taken in joint tenancy and there is an agreement between cotenants that one holds a life estate with remainder over to other cotenant, right to partition is defeated by variance from ordinary incidents of cotenancy. *Rowland v. Clark (1949) 91 Cal. App. 2d 880, 882, 206 P.2d 59*

Waiver of right to partition is found when cotenants entered into contracts leasing cotenancy property and when reason for which tenants acquired their term of years would be frustrated by partition. *Pine v. Tiedt (1965) 232 Cal. App. 2d 733, 739-740, 43 Cal. Rptr. 184*

Partition is not available without consent of other cotenant when it would conflict with previous agreement of parties to use of property; under these circumstances, cotenant seeking partition is estopped to assert or has waived right to partition. *Heber v. Yaeger (1967) 251 Cal. App. 2d 258, 262-263, 59 Cal. Rptr. 353*

[15] Termination of Joint Tenancy

[a] Acts Constituting Termination

Joint tenancy is severed by voluntary conveyance by tenant to stranger or to his or her cotenant, by judgment in partition, or by execution sale; joint tenancy is terminated when one joint tenant transfers his or her entire interest in estate to trustee for use and benefit of grantor. *Hammond v. McArthur (1947) 30 Cal. 2d 512, 514-515, 183 P.2d 1* ; *Clark v. Carter (1968) 265 Cal. App. 2d 291, 294, 70 Cal. Rptr. 923*

Plain language of *Civ. Code § 683.2(d)(3)* sets forth exception to requirement in *Civ. Code § 683.2(c)* that deed be recorded prior to severing joint tenant's death; thus, execution of deeds to each other by two of three joint tenants, one of whom died before deeds were recorded, resulted in severance of joint tenancy. *Re v. Re (1995) 39 Cal. App. 4th 91, 98-99, 46 Cal. Rptr. 2d 62*

Execution levy on one joint tenancy interest does not sever joint tenancy when joint tenant dies before execution sale. *Grothe v. Cortlandt Corp. (1992) 11 Cal. App. 4th 1313, 1316-1324, 15 Cal. Rptr. 2d 38*

Stipulated court order that joint tenancy property be divided and sold severs joint tenancy. *Estate of Seibert (1990) 226 Cal. App. 3d 338, 341-342, 276 Cal. Rptr. 508*

One joint tenant's execution of quitclaim deed to another, to defraud creditor, is effective in severing joint tenancy and creating tenancy in common even though deed is later declared void with respect to creditor. *Estate of Baumann (1988) 201 Cal. App. 3d 927, 936-937, 247 Cal. Rptr. 532*

In addition to methods of severance authorized by *Civ. Code § 683.2*, agreement between joint tenants to dispense with right of survivorship terminates joint tenancy relationship. *Estate of Blair (1988) 199 Cal. App. 3d 161, 168-169, 244 Cal. Rptr. 627*

Agreement between joint tenants that is inconsistent by its terms with one or more of four essential unities of joint tenancy is considered severance, even though agreement does not expressly terminate joint tenancy. *Estate of Blair (1988) 199 Cal. App. 3d 161, 169, 244 Cal. Rptr. 627*

Cotenant's transfer of property by forging other cotenant's signature to deed affects severance of joint tenancy and transfer of only forger's interest in property. *Handy v. Shiells (1987) 190 Cal. App. 3d 512, 517-518, 235 Cal. Rptr. 543*

Joint tenant's grant of his or her separate property subject to reservation of life estate severs joint tenancy; as a result, at severing joint tenant's death, his or her grantees take half interest in property conveyed as tenants in common with former joint tenant who survived grantor. *Mecchi v. Picchi (1966) 245 Cal. App. 2d 470, 487, 54 Cal. Rptr. 1*

[b] Acts Not Constituting Termination

[i] Examples in General

Following acts do not terminate joint tenancy: execution of mortgage by joint tenant; execution of trust deed by joint tenant; execution of lease by one joint tenant to another; judgment lien against interest of one joint tenant; or giving right of possession to one joint tenant during lifetime of other. *County of Fresno v. Kahn (1962) 207 Cal. App. 2d 213, 217, 24 Cal. Rptr. 394*

Mere withdrawal of one-half of amount in joint tenancy account by one of joint tenants does not destroy joint tenancy when withdrawing joint tenant makes no attempt to destroy joint tenancy holding prior to death of nonwithdrawing joint tenant. *Cordasco v. Scalero (1962) 203 Cal. App. 2d 95, 108, 21 Cal. Rptr. 339 , disapproved on other grounds, Estate of Propst (1990) 50 Cal. 3d 448, 461-462, 268 Cal. Rptr. 114, 788 P.2d 628*

Filing of partition action to terminate joint tenancy is insufficient to terminate relationship if filing joint tenant dies before granting of judgment. *Clark v. Carter (1968) 265 Cal. App. 2d 291, 295, 70 Cal. Rptr. 923*

[ii] Fraud

Joint tenancy unities are not destroyed when one of joint tenants is fraudulently induced to convey his or her interest in joint tenancy property to other joint tenant; status of title remains in joint tenancy. *Estate of Casella (1967) 256 Cal. App. 2d 312, 323, 64 Cal. Rptr. 259*

[c] Consent of Joint Tenants Not Required

Joint tenant is able to dispose of his or her interest without consent of other joint tenant. *Wilk v. Vencill (1947) 30 Cal. 2d 104, 108-109, 180 P.2d 351*

Neither notification of other joint tenant nor recordation of deed terminating joint tenancy is required to make transmutation from joint tenancy to tenancy in common legally effective. *Burke v. Stevens (1968) 264 Cal. App. 2d 30, 35, 70 Cal. Rptr. 87*

[d] Effect of Termination by Death

[i] Interest Passes by Survivorship

Cause of action for damage to property passes to surviving joint tenant and is not part of decedent's estate. *Ferk v. County of Lake (1988) 205 Cal. App. 3d 268, 274-276, 252 Cal. Rptr. 196*

On death of joint tenant, surviving joint tenant is sole owner of entirety, not by descent, but by survivorship and by virtue of original grant creating tenancy. *King v. King (1951) 107 Cal. App. 2d 257, 259, 236 P.2d 912*

No interest in joint tenancy property passes to heirs, devisees, or personal representatives of joint tenant first to die. *Santoro v. Carbone (1972) 22 Cal. App. 3d 721, 729, 99 Cal. Rptr. 488* ; *Clark v. Carter (1968) 265 Cal. App. 2d 291, 294, 70 Cal. Rptr. 923*

Mortgage executed by one joint tenant is lien or charge on that joint tenant's interest only and does not sever joint tenancy estate; when joint tenant so encumbering his or her interest dies, his or her interest in property ceases to exist and surviving joint tenant takes property free of lien. *People v. Nogarr (1958) 164 Cal. App. 2d 591, 594, 330 P.2d 858*

Title of surviving joint tenant is not subject to trust deed executed by other joint tenant without surviving joint tenant's knowledge or consent. *Hamel v. Gootkin (1962) 202 Cal. App. 2d 27, 30, 20 Cal. Rptr. 372*

[ii] Exception: Murder of Cotenant

When there is murder-suicide of joint tenants, equitable policy of treating joint tenancy property as if there had been a simultaneous death adopted; slayer's act terminates joint tenancy as to both parties, and property devolves to estates of deceased joint tenants according to their respective interests. *Johansen v. Pelton (1970) 8 Cal. App. 3d 625, 632-633, 87 Cal. Rptr. 784*

[e] Intent as Factor

Intent of joint tenants is important factor in determining whether their acts in dealing with property terminate joint tenancy. *County of Fresno v. Kahn (1962) 207 Cal. App. 2d 213, 216, 24 Cal. Rptr. 394* (contract of sale of real property); *but see Estate of Propst (1990) 50 Cal. 3d 448, 461-462, 268 Cal. Rptr. 114, 788 P.2d 628* (rule applicable to severance of joint tenancy in personal property)

[f] Interference With Survivorship

[i] Agreement; Effect

Agreement to dispense with right of survivorship terminates joint tenancy. *Estate of Blair (1988) 199 Cal. App. 3d 161, 169, 244 Cal. Rptr. 627*

Any interference with right of survivorship by terms of agreement between joint tenants severs joint tenancy

relationship. *Rich v. Silver (1964) 226 Cal. App. 2d 60, 64, 37 Cal. Rptr. 749* ; *California Trust Co. v. Anderson (1949) 91 Cal. App. 2d 832, 836, 205 P.2d 1127*

Creation of tenancy in common when survivorship feature of joint tenancy is destroyed. *Davis v. Davis (1963) 222 Cal. App. 2d 691, 693, 35 Cal. Rptr. 281*

[ii] Agreement or Course of Dealing

Joint tenancy is terminated either by mutual agreement between parties or by any conduct or course of dealing sufficient to indicate that all parties have mutually treated joint tenancy as terminated. *Smith v. Morton (1972) 29 Cal. App. 3d 616, 621, 106 Cal. Rptr. 52*

Survivorship feature of joint tenancy is destroyed by stipulation in property settlement agreement between divorced spouses. *Rich v. Silver (1964) 226 Cal. App. 2d 60, 65-66, 37 Cal. Rptr. 749*

[16] Tortious Acts Not Imputed to Other Cotenants

Real property cotenant is not liable for tort of his or her cotenant unless he or she actively participates in it directly or through agent or unless he or she ratifies tortious acts. *Daly v. Smith (1963) 220 Cal. App. 2d 592, 604, 33 Cal. Rptr. 920*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionPresumptionsCommunity PropertyReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawTortsWasteGeneral Overview

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Chapter 316 JOINT TENANCY AND TENANCY IN COMMON
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27-316 California Forms of Pleading and Practice--Annotated § 316.53

§ 316.53 Law Reviews

Hughes, *Determining the Advantages and Disadvantages of Joint Ownership*, 32(3) Prac. Law. 39 (1986)

Abney, *Joint Tenancy/Community Property Presumption and Separate Property Reimbursement: Legislative History of California Law Provides Guidance*, 11 Com. Prop. J. 275 (1984)

Freshman, *Group Ownership and Tenancies in Common, 11 U. West L.A. L. Rev. 1 (1979)*

Comment, *Consequences of a Lease to a Third Party Made by One Joint Tenant, 66 Cal. L. Rev. 69 (1978)*

Thomas, *Tax Consequences of Tenancies, 22 Prac. Law. 57 (1976)*

Comment, *Joint Tenancy in California Revisited: A Doctrine of Partial Severance, 61 Cal. L. Rev. 231 (1973)*

Crawford, *Destructibility of Joint Tenancies in Real Property*, 45 Cal. St. B.J. 222 (1970)

Comment, *Internal Revenue Code § 2040: Allocation of Contribution Problems, 5 U.S.F. L. Rev. 166 (1970)*

Griffith, *Community Property in Joint Tenancy Form, 14 Stan. L. Rev. 87 (1961)*

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27-316 California Forms of Pleading and Practice--Annotated §§ 316.54-316.69

[Reserved]

§§ 316.54[Reserved]

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Volume 27: Interpleader thru Juries and Jury Selection-Chs. 314-322
Chapter 316 JOINT TENANCY AND TENANCY IN COMMON
PART IV. FORMS

27-316 California Forms of Pleading and Practice--Annotated § 316.70

§ 316.70 Complaint [Code Civ. Proc. § 425.10] for Declaratory Relief [Code Civ. Proc. § 1060] by Personal Representative of Decedent--Instrument Allegedly Creating Joint Tenancy Fails to Establish Intent Necessary to Create Joint Tenancy

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Declaratory Relief [Code Civ. Proc. § 1060] by Personal Representative of Decedent--Instrument Allegedly Creating Joint Tenancy Fails to Establish Intent Necessary to Create Joint Tenancy

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], as	)	
_____ [Executor of the Will *or*	)	NO. _____
Administrator of the Estate (with Will Annexed)] of	)	COMPLAINT FOR DECLARATORY RELIEF
Personal Representative of	)	[*Code Civ. Proc. § 1060*]
_____ [*name*], Deceased,	)	
Plaintiff,		
vs.		
_____ [*name*,] [and DOES I		
through _____,] Defendant(s).		
_____		

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times mentioned in this complaint was, a resident of _____ County, California [*or allege other capacity and residence*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued as DOES I-_____, inclusive, and therefore sues these defendants by fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

3. _____ [*Name of decedent*] died on _____ [*date*], at _____ [*city*], California and at the time of his/her death was a resident of _____ County, California. Thereafter, on _____ [*date*], an order was made appointing plaintiff _____ [executor *or* administrator (with the will annexed)] of the estate of _____ [*name of decedent*]; letters _____ [testamentary *or* of administration] were issued to plaintiff on _____ [*date*]. Since that date plaintiff has acted, and is now acting, as _____ [executor *or* administrator] of the estate.

4. At the time of decedent's death on _____ [*date*], _____ [*specify personal property, e.g.,* bank account number _____, at _____ Bank, hereinafter "bank account"] was purportedly held in joint tenancy by decedent and defendant _____ [*name*]. Defendant claims title to _____ [*specify personal property, e.g.,* the bank account] as a surviving joint tenant.

5. _____ [*Set out essential facts giving rise to adverse contentions of parties, e.g.,* On or about _____ [*date*], decedent, while terminally ill and confined in a hospital from which he was never released, signed a signature card, which defendant also signed, furnished by _____ Bank. A copy of this signature card is attached to this complaint as Exhibit A and made a part of this complaint. After the signing of the card, defendant from time to time withdrew various sums from the account for his/her own use and, on decedent's death, defendant withdrew the entire balance for his/her own use.]

6. An actual controversy has arisen and now exists between plaintiff and defendant concerning their respective rights and duties. Plaintiff contends _____ [*set forth plaintiff's contentions, e.g.,* that (1) decedent did not understand the nature of a joint tenancy account and did not intend the bank account to become the property of the surviving joint tenant, (2) creation of the bank account was induced by the fraud, undue influence, and duress of defendant, (3) the bank account was created pursuant to defendant's representations that defendant, acting as decedent's agent, would use the money in the bank account solely to pay decedent's bills and other financial obligations and for no other purpose while decedent was confined in the hospital, and defendant was to have no other interest, right, or title in or to the account, (4) all funds withdrawn from the account in violation of the above representations by defendant for his/her own use are held by defendant as trustee for the benefit of decedent's estate, and (5) defendant is legally obligated to pay over these funds to the plaintiff]. Defendant disputes these contentions and contends _____ [*specify, e.g.,* that (1) the agreement between decedent and the bank created a joint tenancy of the bank account between decedent and defendant, (2) decedent intended that title to the money in the bank account was to immediately vest in defendant, (3) either decedent or defendant could, while both of them lived, withdraw sums from the bank account each for his/her own use, (4) any balance remaining in the bank account on the death of either of them was to be paid to the survivor, and (5) defendant, having survived decedent, was and is entitled to the entire balance in the bank account].

7. Plaintiff desires a judicial determination of his/her rights and duties, and a declaration as to _____ [*set forth specific determination sought, e.g.,* whether the written agreement between decedent and the bank created a true joint tenancy vesting in defendant title to the money in the bank account with the right of survivorship or whether decedent was induced to create the joint tenancy bank account by the fraud, undue influence, and duress of defendant and solely on defendant's representations that he/she would use the money to pay decedent's bills and other financial obligations and for no other purpose].

8. A declaration of rights and duties with respect to _____ [*specify personal property, e.g.,* the bank account] is necessary and appropriate at this time so that the parties may ascertain their respective rights and duties. [*In addition, allege any financial or other burden caused to plaintiff by the unsettled state of affairs with respect to the property in question.*]

WHEREFORE, plaintiff prays judgment as follows:

1. For a declaration _____ [*state the determination court is requested to render, e.g.,* that decedent at no time intended to transfer all or any part of the funds in the bank account to defendant for his/her own use, that decedent was induced to create the joint bank account by fraud, undue influence, and duress, and on defendant's representations as alleged in this complaint, and that defendant has no interest, right, or title in or to the bank account other than to the extent that funds in the account were withdrawn during decedent's lifetime by defendant and used for the payment during decedent's lifetime of decedent's bills and other financial obligations];

[2. That defendant render an accounting of all sums withdrawn by him/her from the bank account and the purpose and disposition of each withdrawal;]

[3. That defendant be declared a constructive trustee of all sums withdrawn from the account for his/her personal use or for any use other than for paying the bills and other financial obligations of the decedent;]

[4. That defendant be ordered to pay over to plaintiff all sums of which he/she is declared a constructive trustee, together with interest at the legal rate from the date each such sum was withdrawn from the bank account;]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form is a complaint for use to secure a declaration of rights under an instrument creating a joint tenancy in personal property originally belonging to one of the two joint tenants if the plaintiff contends that no true joint tenancy was created. For example, this form may be used if execution of the instrument creating the joint tenancy was secured by the fraud or undue influence of the defendant or if a joint tenancy was created in form only, subject to a collateral agreement between the parties negating the existence of a true joint tenancy. A joint account is one that is payable on request to one or more of two or more parties, whether or not mention is made of any right of survivorship [*Prob. Code § 5130*; *see* Stats. 1989, ch. 397, § 41 (applicable to accounts in existence on or created after July 1, 1990)]. An account

expressly described as a tenancy in common has no right of survivorship, unless the terms of account or deposit agreement expressly provide for survivorship [*see Prob. Code § 5306*; *§ 316.15[7][c]*].

With appropriate modifications, this form may also be used to secure a declaration of the rights of the parties under a written instrument purporting to create a joint tenancy in real property [*see Code Civ. Proc. § 1060*].

[3] Allegations

This complaint alleges (1) facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument (Paragraph 6), and (2) a request that these rights and duties be adjudged (Paragraph 7) [*see Strozier v. Williams (1960) 187 Cal. App. 2d 528, 531, 9 Cal. Rptr. 683]* .

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers where inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[4] Alternative Theories of Liability

In this form the plaintiff, as the personal representative of a deceased joint tenant, seeks (1) a declaration that no true joint tenancy was established, that the decedent was induced to create the joint bank account by the fraud, undue influence, duress, and false representations of the defendant, and that defendant is a constructive trustee of the sums withdrawn by him or her from the joint tenancy account for his or her own use, and (2) an order requiring defendant to pay over these sums to plaintiff.

In the fact situation illustrated by this form, counsel may wish to set forth a separate cause of action expressly seeking to impress a constructive trust on the sums withdrawn either in addition to, or in lieu of, the action for declaratory relief [*see, e.g., Estate of Aiello (1980) 106 Cal. App. 3d 669, 165 Cal. Rptr. 207* (judgment for plaintiff impressing constructive trust on money withdrawn by defendant from joint tenancy savings account and ordering defendant to transfer this sum to estate affirmed in proceeding pursuant to former Prob. Code § 851.5 (*now see Prob. Code §§ 9860-9865*) by administratrix on behalf of named beneficiaries to determine ownership of money held in joint tenancy savings account); *Casa Colina Convalescent Home v. Wiest (1963) 214 Cal. App. 2d 161, 29 Cal. Rptr. 407* (judgment for defendant affirmed in action to impress constructive trust on bank accounts held in joint tenancy)]. For forms for use in an action to impress a constructive trust, see Ch. 561, *Trusts: Constructive Trusts* .

If there are any funds remaining in the account, counsel may wish to join the bank as a party defendant and seek a preliminary injunction enjoining the bank's payment of the balance to defendant pending determination of the litigation. For forms for use to secure temporary injunctive relief, see Ch. 303, *Injunctions* . Counsel may wish to give written notice to the financial institution not to honor withdrawals without the signature of his or her client [*see Prob. Code § 5405(c)* (discussed in *§ 316.15[10]*); *see also Prob. Code § 5405(b)* (court order restraining payments by financial institution, discussed in Ch. 95, *Banks, Deposits, and Checks*)].

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Jurisdiction and Venue

An action for declaratory relief is within the jurisdiction of the superior court and is not a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. § 1060*; *see Code Civ. Proc. §§ 85, 86(a)(7), 580(b)(4)*; *see also Code Civ. Proc. § 580(b)(3)* (court in limited civil case is not authorized to determine title to real property)]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

The superior court in the county where the subject real property, or some part of it, is situated is the proper court for the trial of an action for the determination of a right or interest in real property [*Code Civ. Proc. § 392(a)(1)*].

[7] State Statutes

How joint tenancies created. *Civ. Code § 683*

Joint tenancies prohibited with respect to safe-deposit boxes. *Civ. Code § 683.1*

Person who gains thing by fraud, accident, mistake, undue influence, violation of trust, or other wrongful act, as involuntary trustee. *Civ. Code § 2224*

Joint tenancies in bank accounts. *Fin. Code § 852*; *Prob. Code §§ 5130, 5203, 5301-5307*

Joint tenancies in savings and loan association certificates. *Fin. Code § 6800*; *Prob. Code §§ 5130, 5203, 5301-5307*

Presumption of violation of fiduciary duty in transactions between trustee and beneficiary. *Prob. Code § 16004(c)*; *but see Prob. Code § 16015* (compensated services provided by regulated financial institution or its affiliates is not a violation)

[8] Decisions

Term "or" between names of cotenants without designation of joint tenancy is insufficient to create joint tenancy. *Cooke v. Tsipouroglou (1963) 59 Cal. 2d 660, 664, 31 Cal. Rptr. 60, 381 P.2d 940*

Evidence supported trial court's judgment holding defendant constructive trustee of joint tenancy bank account. *Estate of Aiello (1980) 106 Cal. App. 3d 669, 676-677, 165 Cal. Rptr. 207*

Joint tenancy form of instrument is conclusive evidence of intention to create joint tenancy in absence of fraud or undue influence. *Estate of Friedman (1971) 20 Cal. App. 3d 399, 403, 97 Cal. Rptr. 653* (savings account)

Sole technical requisite of creation of joint tenancy is express declaration of joint tenancy in instrument. *Gonzales v. Gonzales (1968) 267 Cal. App. 2d 428, 435, 73 Cal. Rptr. 83* (real property)

Instrument conveying title is required to state expressly that property is to be held in joint tenancy; intent to create joint tenancy is required to be set forth in instrument creating it. *Bill Froelich Motor Co. v. Estate of Kohler (1966) 240 Cal. App. 2d 897, 901, 50 Cal. Rptr. 200*

Elements of joint tenancy required for joint tenancy in bank account to be found. *Casa Colina Convalescent Home v. Wiest (1963) 214 Cal. App. 2d 161, 167, 29 Cal. Rptr. 407* (decided under former *Fin. Code § 852*; *now see Prob. Code §§ 5130, 5203, 5301-5307*)

Tenancy in common is residual form of ownership. *Estate of Horn (1951) 102 Cal. App. 2d 635, 640, 228 P.2d 99*

Preference for tenancies in common over joint tenancies. *Reiss v. Reiss (1941) 45 Cal. App. 2d 740, 747, 114 P.2d 718*

[9] Cross References

For alternative allegations of capacity and residence, see Ch. 20, *Allegations Commonly Used*

For a discussion and forms for establishing the death of a cotenant, see Ch. 99, *Birth and Death, Establishing Fact of*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For additional discussion and forms for seeking declaratory relief, see Ch. 182, *Declaratory Relief*

For forms for use in suing to establish a constructive trust, see Ch. 550, *Trespass*

For forms for use in securing pendente lite injunctive relief, see Ch. 303, *Injunctions*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* and Ch. 572, *Verification*

For additional discussion and forms relating to the rights and obligations of cotenants in real and personal property of a deceased cotenant, and to termination of cotenancies, see Ch. 440, *Probate : Is it Necessary?* through Ch. 458E, *Probate: Discharge*

[10] Text References

Witkin, Summary of California Law, vol 12, *Real Property*, §§ 33-83; vol. 13, *Personal Property*, §§ 30-35 (10th ed. 2005)

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Volume 27: Interpleader thru Juries and Jury Selection-Chs. 314-322
Chapter 316 JOINT TENANCY AND TENANCY IN COMMON
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27-316 California Forms of Pleading and Practice--Annotated § 316.71

§ 316.71 Allegations--Attempted Testamentary Gift of Personal Property

[1] FORM Allegations--Attempted Testamentary Gift of Personal Property

1. _____ [*Set out essential facts of the transaction giving rise to the adverse contentions of the parties, e.g.,* On or about _____ (*date*), decedent purchased 100 shares of General Electric stock with his/her own funds and had the stock registered in his/her name and that of defendant as joint tenants. Decedent retained possession of the certificates. With some of the dividends, decedent purchased additional shares that were also registered in the name of defendant and decedent as joint tenants. Decedent cashed other dividend checks and used the proceeds for his/her own purposes. Defendant did not know of the existence of the stock until _____ (*date*), when decedent told him/her that they would be his/hers when he/she died].

2. An actual controversy has arisen and now exists between plaintiff and defendant concerning their respective rights and duties. Plaintiff contends _____ [*set forth plaintiff's contentions as to legal consequences resulting from facts alleged in preceding paragraph, e.g.,* that decedent's sole intention in creating the purported joint tenancy was to create a testamentary disposition in favor of defendant and not to create a present possessory interest in defendant]. Defendant disputes these contentions and contends _____ [*set forth defendant's contentions, e.g.,* that decedent intended and did create a present and existing joint tenancy relationship between himself/herself and defendant].

[2] Use of Form

This form's allegations are for use in a complaint for declaratory relief by the personal representative of a decedent who attempted to make a testamentary disposition by means of a purported joint tenancy instrument that did not comply with the requirements for execution of wills [*see, e.g., Prob. Code §§ 6110-6113*; *Estate of Franco (1975) 50 Cal. App. 3d 374, 381, 123 Cal. Rptr. 458]* . Note, however, that since July 1, 1984, a testamentary disposition may be made by placing the funds in a deposit account subject to the Multiple-Party Accounts Law (*Prob. Code §§ 5100-5407*) [*see Prob. Code § 5304* (discussed in *§ 316.15[2]*)].

These allegations can be substituted for Paragraphs 5 and 6 in § 316.70[1]. These allegations may be modified, if appropriate, for use in an action for declaratory relief with respect to real property [*see Code Civ. Proc. § 1060*].

[3] State Statutes

Execution of will. *Prob. Code §§ 6110-6113*

Transfers resulting from application of *Prob. Code § 5302* are effective and not to be denied, abridged, or affected for failure to comply with requirements for testamentary disposition of property. *Prob. Code § 5304*

Joint tenancy between decedent and decedent's former spouse or nonprobate transfer to former spouse, created before or during marriage, is severed or fails if, at time of decedent's death, former spouse is not decedent's surviving spouse (as defined in *Prob. Code § 78*) as result of dissolution or annulment of marriage. *Prob. Code § 5600 et seq.*

[4] Decisions

When purchaser took title to stock in name of self and another as joint tenants with intent that interest of other would not vest until purchaser's death, attempted testamentary disposition was established but invalidated for failure to conform to statutes regulating execution of wills. *Estate of Franco (1975) 50 Cal. App. 3d 374, 381, 123 Cal. Rptr. 458*

[5] Cross References

See also *§ 316.70*

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27-316 California Forms of Pleading and Practice--Annotated § 316.72

§ 316.72 Allegations--Undue Influence of Person Named as Joint Tenant

[1] FORM Allegations--Undue Influence of Person Named as Joint Tenant

1. _____ [*Set out essential facts of the transaction giving rise to the adverse contentions of the parties, e.g.,* On or about _____ (*date*), while defendant was living in decedent's household, defendant induced decedent to sign an agreement with _____ Bank changing decedent's bank account from one in decedent's sole name to one in which decedent and defendant were purportedly joint tenants. At the time of this transaction, decedent was _____ years of age, senile, and suffering from _____ (*name ailment*), and could not and did not comprehend what he/she was doing or the consequences of his/her acts].

2. An actual controversy has arisen and now exists between plaintiff and defendant concerning their respective rights and duties. Plaintiff contends _____ [*set forth plaintiff's contentions as to legal consequences resulting from facts alleged in preceding paragraph, e.g.,* that as a result of decedent's age, senility, and illness, decedent was unable to form an intention to create a joint tenancy with defendant and that the purported joint tenancy was a result of defendant's moral coercion on decedent that overcame decedent's free agency]. Defendant disputes these contentions and contends _____ [*set forth defendant's contentions, e.g.,* that decedent fully intended to and did create a joint tenancy relationship between himself/herself and defendant with the understanding that defendant would take the proceeds of the account as a surviving joint tenant in the event of decedent's death].

[2] Use of Form

This form contains allegations for use in a complaint for declaratory relief by the personal representative of a decedent if the decedent created a joint tenancy between himself or herself and another person, and the other person exercised undue influence as inducement for creation of the joint tenancy. These allegations may be substituted for Paragraphs 5 and 6 in § 316.70[1]. These allegations may be modified, if appropriate, for use in an action for declaratory relief with respect to real property [*see Code Civ. Proc. § 1060*].

[3] Decisions

Rules applicable to exercise of undue influence in testamentary matters are also applicable to creation of purported joint tenancy when question of undue influence is involved; if there is no moral coercion destroying grantor's free agency to execute joint tenancy deed, joint tenancy created is valid. *Kelly v. McCarthy (1936) 6 Cal. 2d 347, 360, 364, 57 P.2d 118*

Proceeds of joint tenancy savings account, in absence of fraud or undue influence, vest in survivor. *Estate of Friedman (1971) 20 Cal. App. 3d 399, 403, 97 Cal. Rptr. 653*

Lack of deceit and finding that gift was voluntary negates undue influence. *Goldman v. Goldman (1953) 116 Cal. App. 2d 227, 235, 253 P.2d 474*

Undue influence defined; no undue influence is established if policy of giving gifts is found. *Estate of Kreher (1951) 107 Cal. App. 2d 831, 839-840, 238 P.2d 150*

[4] Cross References

See also *§ 316.70*

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27-316 California Forms of Pleading and Practice--Annotated § 316.73

§ 316.73 Demand for Concurrent Possession [Civ. Code § 843]

[1] FORM Demand for Concurrent Possession [Civ. Code § 843]

DEMAND FOR CONCURRENT POSSESSION

I, _____ [*name of coowner out of possession*], hereby demand that you, _____ [*name of owner in possession*], provide me with unconditional concurrent possession of the following property that we own concurrently: _____ [*address and/or legal description of property*].

This demand is made pursuant to *Civil Code Section 843*. You must meet this demand within 60 days from the date that it is served on you, or your ouster of me from the property will be established.
Dated: _____.

_____ [*Name of person*

making demand]

[2] Use of Form

This form is for use by a coowner to gain concurrent possession of or to establish an ouster from jointly owned real property [*Civ. Code § 843(b)*]. *Civ. Code § 843* supplements and does not limit any other means by which an ouster may be established [*Civ. Code § 843(a)*].

[3] Required Contents

The demand must be in writing and make specific reference to *Civ. Code § 843* and to the time within which concurrent posession must be offered [*Civ. Code § 843(b)*]. Because this form is not a pleading, it does not have to meet pleading requirements and may be prepared on ordinary stationery.

[4] Service

Service of the written demand must be made in the same manner as service of summons in a civil action [*Civ. Code § 843(b)*]. For a discussion and forms relating to service of summons, see Ch. 518, *Service of Summons and Papers* .

[5] Effect of Failure to Yield Possession Pursuant to Demand

A claim for damages for an ouster established by this notice may be asserted by an independent action or in an action for possession or partition of the property or another appropriate action or proceeding, subject to the applicable statute of limitations [*Civ. Code § 843(c)*]. This right to establish an ouster by service of notice does not preclude the cotenants, at any time before or after a demand is served, from seeking partition of the property or from making an agreement as to the right of possession among the cotenants, the payment of reasonable rental value in lieu of possession, or any other terms that may be appropriate [*Civ. Code § 843(d)*].

[6] When Demand Is Not Proper

The right to make a demand under *Civ. Code § 843* does not apply to the extent the tenant out of possession is not entitled to possession or an alternative remedy is provided under the terms of an agreement between the cotenants or the instrument creating the cotenancy or another written instrument that indicates the possessory rights or remedies of the cotenants [*Civ. Code § 843(a)*].

[7] State Statutes

Right of concurrent owner to demand concurrent possession of jointly owned real property and to establish ouster if demand is not met. *Civ. Code § 843*

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27-316 California Forms of Pleading and Practice--Annotated § 316.74

§ 316.74 Complaint [Code Civ. Proc. § 425.10] to Quiet Title [Code Civ. Proc. §§ 760.020(a), 761.020] to Real Property by Cotenant Out of Possession Against Cotenant in Possession Claiming Adversely

[1] FORM Complaint [Code Civ. Proc. § 425.10] to Quiet Title [Code Civ. Proc. §§ 760.020(a), 761.020] to Real Property by Cotenant Out of Possession Against Cotenant in Possession Claiming Adversely

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO QUIET TITLE
_____ [*name(s)*],	)	[*Code Civ. Proc. §§ 760.020(a), 761.020*]
Defendant(s).	)	
	)	
	)	

_____

Plaintiff alleges:

[*EITHER*]

1. _____ [*Set out plaintiff's joint tenancy interest in the property (and the interest(s) of defendant(s)), e.g.*, Plaintiff is the owner as a joint tenant with defendant(s) _____ (*name*(*s*)), of a _____ (fee interest *or specify other estate of inheritance, or estate for life or lives or for years*) in a certain parcel of real property situated in _____ County, California, and more particularly described as follows: _____ (*give legal description and street address or common designation, if any*)].

[*OR*]

1. _____ [*Set out plaintiff's tenancy in common interest in the property and the interest(s) of defendant(s), e.g.*, Plaintiff is the owner as a tenant in common with defendant(s) _____ (*name*(*s*)), of an undivided _____ (*specify fraction or percentage*) of the _____ (fee interest *or specify other estate of inheritance, or estate for life or lives or for years*) in a certain parcel of real property situated in _____ County, California, and more particularly described as follows: _____ (*give legal description and street address or common designation, if any*)].

[*CONTINUE*]

2. The real property described above was acquired by plaintiff in _____ [*describe basis of title, e.g.*, a deed from _____ (*name of grantor*) granting the above-described property in fee simple to plaintiff and defendant(s) dated _____ (*date*), and recorded in the Official records of the County of _____ Book/Reel _____ page/image _____].

[3. *If plaintiff claims ownership of a present interest in real property, allege:* Plaintiff _____ (*name*) was _____ (seised *or* possessed) of the above-described property within five years of the commencement of this action.]

4. Plaintiff is seeking to quiet title against defendant's (defendants') claim of full ownership to the above-described property and claim that plaintiff has no interest in the property.

5. _____ [*Specify any acts by cotenant evidencing adverse claim, e.g.*, Defendant(s) maintained a road across the cotenancy property and posted signs at the western end of the road indicating his/her/their claim of full ownership adverse to plaintiff]. Defendant's (Defendants') claims are without any right whatever and the defendant(s) has/have no right, title, estate, lien, or interest whatever in the above-described property or any part thereof [except _____ (*set forth any adverse claims of which plaintiff(s) admit(s) the validity, e.g.*, its/their _____ (joint tenancy *or* tenancy in common) interest described above)].

6. Plaintiff seeks to quiet title as of _____ [*date*].

[_____ (*If the date is a date other than the date the complaint is filed, allege why a determination as of that date is sought*).]

WHEREFORE, plaintiff prays:

1. For a judgment quieting title in plaintiff's interest in the above-described property and determining the ownership rights in the property of plaintiff and defendant(s);

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification. See § 316.70[1].*]

[2] Use of Form

This form is a complaint for use in a quiet title action brought by a cotenant out of possession against a cotenant in possession who claims title to real property adversely to the cotenant out of possession.

CAUTION:

This form does not contain any allegations regarding fictitious defendants [*Code Civ. Proc. § 474*; *see § 316.74[5]*], nor any allegations regarding unknown defendants [*Code Civ. Proc. § 762.020(a)*], defendants who are personal representatives [*Code Civ. Proc. § 762.030(a)*], heirs, intestate or testate successors [*Code Civ. Proc. § 762.030(b)*], or for unknown, uncertain, or contingent claims [*Code Civ. Proc. § 762.020(b)*], on the assumption that a cotentant in the fact situation used as the basisof this form would know all his or her cotenants and that the additional expense and complication of an "all persons" quiet title action would thus not be warranted [***see, e.g.,*** *Code Civ. Proc. §§ 762.040(b), 762.060(b)*]. If any of these assumptions do not apply to your particular situation, modify the caption and include additional allegations as appropriate from Ch. 482, ***Quieting Title*** .

[3] Required Allegations

By statute, a quiet title complaint must include all of the following allegations [*Code Civ. Proc. § 761.020*]:

- A description of the property that is the subject of the action (Paragraph 1). In the case of tangible personal property, the description must include its usual location. In the case of real property, the description must include both its legal description and its street address or common designation, if any.

- The title of the plaintiff as to which a determination is sought and the basis of the title (Paragraphs 1, 2).

- The adverse claims to the title of the plaintiff against which a determination is sought (Paragraphs 4, 5). If the plaintiff admits the validity of any adverse claim, the complaint must so state [*Code Civ. Proc. § 762.060(c)*]. If the claim or the share or quantity of the claim of a person required to be named as a defendant is unknown, uncertain, or contingent, the plaintiff must so state in the complaint. If the lack of knowledge, uncertainty, or contingency is caused by a transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, the plaintiff must also state in the complaint, so far as is known to the plaintiff, the name, age, and legal disability, if any, of the person in being who would be entitled to the claim had the contingency on which the claim depends occurred prior to the commencement of the action [*Code Civ. Proc. § 762.020(b)*].

- The date as of which the determination is sought (Paragraph 6). If the determination is sought as of a date other than the date the complaint is filed, the complaint must include a statement of the reasons why a determination as of that date is sought.

- A prayer for the determination of the title of the plaintiff against the adverse claims.

To recover real property, or possession of real property, a plaintiff must allege and prove that he or she, or his or her ancestor, predecessor, or grantor, was seised or possessed of the property in question within five years before the commencement of the action (Paragraph 3) [*Code Civ. Proc. § 318*; *see Civ. Code § 689* (owner of present interest in real property is entitled to immediate possession)]. Nevertheless, the requirement of seisin under *Code Civ. Proc. § 318*

is met if plaintiff had record title even though the defendant may have been in actual possession [*Tobin v. Stevens (1988) 204 Cal. App. 3d 945, 949-951, 251 Cal. Rptr. 587* ; *Schoenfeld v. Pritzker (1967) 257 Cal. App. 2d 117, 121, 64 Cal. Rptr. 592]* . Thus, in many cases, the allegation will not be necessary.

[4] Who Must Be Made Defendants

The plaintiff must name as defendants the persons having adverse claims to the title of the plaintiff against which a determination is sought [*Code Civ. Proc. § 762.010*]. If the name of a person required to be named as a defendant is not known to plaintiff, the plaintiff must state this in the complaint and must name as parties all persons unknown in the manner described in *§ 316.74[5]* [*Code Civ. Proc. § 762.020(a)*].

The court on its own motion may, and on motion of any party must, make such orders as appear appropriate for joinder of such additional parties as are necessary or proper [*Code Civ. Proc. § 762.040(a)*].

If a person required to be named as a defendant is dead and the plaintiff knows of a personal representative, the plaintiff must join the personal representative [*Code Civ. Proc. § 762.030(a)*]. If a person required to be named as a defendant is dead, or is believed by the plaintiff to be dead, and the plaintiff knows of no personal representative, the plaintiff must state these facts in an affidavit filed with the complaint. When it is stated in the affidavit that the person is dead, the plaintiff may join as defendants "the testate and intestate successors of _____ (*name of deceased person*), deceased, and all persons claiming by, through, or under such decedent," naming them in that manner [*Code Civ. Proc. § 762.030(b)(2)*; *see also* Ch. 15, *Affidavits, Certificates, and Declarations* , for general forms of affidavits or declarations under penalty of perjury].

If a person required to be named as a defendant is believed by plaintiff to be deceased, the person believed to be deceased may be named as a defendant as may that person's successors. The successors must be denominated as follows: "the testate and intestate successors of _____ (*name of person believed to be deceased*), believed to be deceased, and all persons claiming by, through, or under such person" [*Code Civ. Proc. § 762.030(b)(3)*].

[5] Unknown Defendants

In addition to the persons required to be named as defendants in the action, the plaintiff may name as defendants "all persons unknown, claiming any legal or equitable right, title, estate, lien or interest in the property described in the complaint adverse to plaintiff's title, or any cloud upon plaintiff's title thereto," naming them in that manner [*Code Civ. Proc. § 762.060(a)*]. If unknown defendants are named, the plaintiff must nameas defendants the persons having adverse claims that are of record or known to the plaintiff or reasonably apparent from an inspection of the property [*Code Civ. Proc. § 762.060(b)*]. Naming unknown defendants and serving them by publication [*see § 316.74[8]*] will entitle the plaintiff to an in rem judgment against the whole world [*Code Civ. Proc. § 764.030*], except that a person who is in open and actual possession of the property cannot be named as an unknown defendant [*Code Civ. Proc. § 763.010(c)*].

The plaintiff may also name unknown defendants as DOES pursuant to *Code Civ. Proc. § 474* [*see Code Civ. Proc. § 760.060* (rules governing civil actions generally as applicable in quiet title actions unless they are inconsistent with quiet title provisions)].

[6] Verification

The complaint must be verified [*Code Civ. Proc. § 761.020*].

[7] Jurisdiction and Venue

The superior court has jurisdiction over a quiet title action [*Code Civ. Proc. § 760.040(a)*]; the action is not a limited

civil action [*see Code Civ. Proc. §§ 85, 86, 580(b)(3)*]. Subject to the power of the court to transfer actions, the proper county for the trial of an action to quiet title to real property is the county in which the property, or some of it, is located [*Code Civ. Proc. § 760.050(a)*].

[8] Service of Summons

The form, content, and manner of the service of summons in a quiet title action is the same as in civil actions generally [*Code Civ. Proc. § 763.010(a)*]. If unknown defendants are named, there must also be service by publication and posting [*Code Civ. Proc. § 763.010(b)*]. The requirements for service by publication and posting are discussed in Ch. 482, *Quieting Title* . The procedure for service of summons is set forth in Ch. 518, *Service of Summons and Papers* .

[9] Lis Pendens

Immediately on the commencement of a quiet title action by filing the complaint, the plaintiff must file a lis pendens in the office of the county recorder of each county in which any real property described in the complaint is located [*Code Civ. Proc. § 761.010(b)*]. The lis pendens gives constructive notice of the pendency of the action to subsequent purchasers or encumbrancers [*Code Civ. Proc. § 405.24*]. For forms of lis pendens, see Ch. 348, *Lis Pendens* .

[10] State Statutes

Sufficiency of occupancy without prescription in satisfying quiet title requirements. *Civ. Code § 1006*

Full period adverse possession or prescription. *Civ. Code § 1007*

Five years is period of limitation to bar action against adverse possessor. *Code Civ. Proc. § 322*

Procedure for and effect of quiet title action. *Code Civ. Proc. § 760.010 et seq.*

[11] Decisions

Possession by one cotenant is deemed possession by all; each assumes that another in exclusive possession is possessing for all and not adversely to others. *Dimmick v. Dimmick (1962) 58 Cal. 2d 417, 422, 24 Cal. Rptr. 856, 374 P.2d 824*

Quieting title is relief granted once court determines that title belongs in plaintiff. *Leeper v. Beltrami (1959) 53 Cal. 2d 195, 216, 1 Cal. Rptr. 12, 347 P.2d 12* (when contract of purchase exists between plaintiff and defendant, something must be found wrong with contract before quiet title action can be brought by plaintiff seller)

Contract between joint tenants concerning exclusive possession of property is not incompatible with the existence of a joint tenancy. *Hammond v. McArthur (1947) 30 Cal. 2d 512, 516, 183 P.2d 1* ; *Taylor v. Taylor (1961) 197 Cal. App. 2d 781, 787, 17 Cal. Rptr. 512*

Each cotenant is equally entitled to share in possession of entire property; neither is capable of excluding the other from any part of it. *Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 548, 176 P.2d 1*

No cotenant is entitled to a possession or usage that excludes for any period of time a like possession or usage by his or her cotenants. *Krum v. Malloy (1943) 22 Cal. 2d 132, 135, 137 P.2d 18*

[12] Cross References

See also *§ 316.70*

For forms of complaint to quiet title brought by an adverse possessor, see Ch. 13, *Adverse Possession*

For a discussion and forms for seeking the return of wrongfully withheld personal property, see Ch. 119, *Claim and Delivery*

For forms of complaint to recover possession of real property from an adverse possessor, see Ch. 241, *Ejectment*

For forms of complaint to establish title to real property, see Ch. 482, *Quieting Title*

For a discussion and forms for seeking relief against trespassers, see Ch. 550, *Trespass*

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27-316 California Forms of Pleading and Practice--Annotated § 316.75

§ 316.75 Complaint for Contribution [Civ. Code § 1432] by Cotenant Against Cotenant--Payment of Tax Assessment to Prevent Condemnation of Real Property

[1] FORM Complaint for Contribution [Civ. Code § 1432] by Cotenant Against Cotenant--Payment of Tax Assessment to Prevent Condemnation of Real Property

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR CONTRIBUTION
_____ [*name(s)*],	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is jointly and severally liable with defendant and plaintiff on the obligation set forth herein.)]

3. _____ [*Set forth the nature of the obligation and how plaintiff and defendant became jointly liable*

on it, e.g., Plaintiff and defendant _____ (*name*) are the owners as _____ (joint tenants *or* tenants in common), each owning an undivided _____ (*specify fraction or percentage*) of the same in a certain parcel of real property situated in _____ County, California, and more particularly described as follows: _____ (*give legal description*). On or about _____ (*date*), _____ County assessed the property for taxes in the sum of $_____, payable within 90 days].

4. _____ [*Set forth manner in which plaintiff has paid more than his/her share, e.g.,* At the date set for payment on _____ (*date*), _____ County demanded payment from plaintiff and defendant. Defendant _____ (*name*) failed and refused to pay the same. As a result, on _____ (*date*), plaintiff was compelled to and did pay the entire amount assessed to _____ County to prevent condemnation sale of the property for nonpayment of taxes].

5. Defendant has failed and refused, and continues to fail and refuse, to contribute to plaintiff his/her share of the obligation in the sum of $_____ [*amount of defendant's pro rata share*] or any part thereof, despite plaintiff's demand for the same.

WHEREFORE, plaintiff prays judgment as follows:

1. For contribution in the amount of $_____;

2. For interest on the foregoing sum at _____ percent from _____ [*date obligation was paid*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 316.70[1].*]

[2] Use of Form

This form of complaint is for use in an action for contribution [*see Civ. Code § 1432*] brought by one cotenant against another cotenant for pro rata reimbursement for property taxes paid by the former to preserve the cotenancy estate.

[3] Allegations

This complaint alleges:

- That the cotenants are liable jointly on the obligation (Paragraph 3) [*see Civ. Code § 1432*].

- That the plaintiff has satisfied more than his or her pro rata share while the defendant has not (Paragraph 4) [*see Civ. Code § 1432*].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive ofinterest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

In limited civil cases, the first page of the first paper must state that it is a limited civil case and whether the amount demanded exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

The superior court in the county where the subject real property, or some part of it, is situated is the proper court for the trial of an action for the determination of a right or interest in real property [*Code Civ. Proc. § 392(a)(1)*].

[6] State Statutes

Proportionate contribution among joint obligors. *Civ. Code § 1432*

[7] Decisions

When one cotenant produces oil from cotenancy property, he or she is entitled to charge interests of nonproducing cotenants for their proportionate share of drilling and operating expenses; nonconsenting cotenants may either ratify oil lease and thus receive fractional share of royalties or reject oil lease and receive fractional part of oil produced less their proportionate part of costs of discovery and production. *Little v. Mountain View Dairies (1950) 35 Cal. 2d 232, 234-235, 217 P.2d 416* ; *Robinson v. Southwestern Dev. Co. (1954) 130 Cal. App. 2d 1, 5, 277 P.2d 825*

In absence of agreement to the contrary, cotenant who pays taxes against common property is entitled to ratable contribution from his or her defaulting cotenants even though a payment may have been made without the latter's consent or over the latter's objection. *Marsh v. Edelstein (1940) 9 Cal. App. 3d 132, 141, 88 Cal. Rptr. 26*

Cotenant purchasing cotenancy property at tax sale to acquire superior title does not acquire any right or title; purchase is deemed one mode of paying taxes. *Weisberg v. Loughridge (1967) 253 Cal. App. 2d 416, 420, 61 Cal. Rptr. 563* (no interest acquired by sublessee purchasing property at tax sale as against former owners)

When cotenant makes advances from his or her own pocket to preserve the common estate, his or her investment in

property is increased by amount advanced; upon sale of estate, he or she is entitled to reimbursement of entire advancement before balance is equally divided. *Southern Adjustment Bureau v. Nelson (1964) 230 Cal. App. 2d 539, 541, 41 Cal. Rptr. 148*

When one cotenant asserts exclusive possession, he or she is not entitled to contribution for money allegedly paid for insurance premiums, interest, and repairs when these expenditures not necessary to protect interests of cotenant out of possession. *Regalado v. Regalado (1961) 198 Cal. App. 2d 549, 552, 18 Cal. Rptr. 468*

Cotenant, being an owner and under moral and legal obligation to pay taxes on cotenancy property, is not capable, by neglecting to pay taxes and thus allowing land to be sold in a condemnation proceeding, of strengthening his or her title by purchasing the land at the sale or by purchasing the land from a stranger who bought it at the sale. *People v. Taliaferro (1961) 188 Cal. App. 2d 372, 374, 10 Cal. Rptr. 724*

[8] Cross References

See also *§ 316.70*

For a discussion and forms for demanding an accounting from cotenants, see Ch. 7, *Accounting, Action for*

For a discussion and forms for seeking contribution from cotenants, see Ch. 300, *Indemnity and Contribution*

For a discussion and forms for asserting the rights of cotenants in logging operations on the cotenancy premises, see Ch. 350, *Logs and Timber*

For a discussion and forms for determining the rights and duties of cotenants in extracting mineral deposits from the cotenancy premises, see Ch. 363, *Mining*

For a discussion and forms for determining the rights and duties of cotenants in producing oil or gas from the cotenancy premises, see Ch. 393, *Oil and Gas*

For a discussion and forms for determining the rights and duties of partners in a partnership or joint venture, see Ch. 401, *Partnerships: Actions Between General Partners and Partnership*

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Volume 27: Interpleader thru Juries and Jury Selection-Chs. 314-322
Chapter 316 JOINT TENANCY AND TENANCY IN COMMON
PART IV. FORMS

27-316 California Forms of Pleading and Practice--Annotated § 316.76

§ 316.76 Complaint for Treble Damages [Code Civ. Proc. § 732] and for Permanent Injunction [Civ. Code § 3422]--By Cotenant out of Possession Against Cotenant in Possession for Waste

[1] FORM Complaint for Treble Damages [Code Civ. Proc. § 732] and for Permanent Injunction [Civ. Code § 3422]--By Cotenant out of Possession Against Cotenant in Possession for Waste

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AND FOR PER-
_____ [*name(s)*],	)	MANENT INJUNCTION
Defendant(s).	)	(Waste)
	)	
	)	

_____

Plaintiff alleges:

[*EITHER*]

1. _____ [*Set out plaintiff's joint tenancy interest in the property and the interest(s) of defendant(s), e.g.*, Plaintiff is the owner as a joint tenant with defendant _____ (*name*), of a _____ (*either* fee interest *or specify other estate of inheritance, or estate for life or lives or for years*) in a certain parcel of real property situated in _____ County, California, and more particularly described as follows: _____ (*give legal description*)].

[*OR*]

1. _____ [*Set out plaintiff's tenancy in common interest in the property and the interest(s) of defendant(s), e.g.,* Plaintiff is the owner as a tenant in common with defendant _____ (*name*), of an undivided _____ (*specify fraction or percentage*) of the _____ (*either* fee interest *or specify other estate of inheritance, or estate for life or lives or for years*) in a certain parcel of real property situated in _____ County, California, and more particularly described as follows: _____ (*give legal description*)].

[*CONTINUE*]

2. On or about _____ [*date*], defendant entered into exclusive possession of the cotenancy premises and has remained in possession ever since.

3. Commencing on or about _____ [*date*], and since that time, defendant has caused injury to the premises by committing waste thereon by _____ [*specify defendant's acts or omissions constituting waste, e.g.,* cutting and removing more than his/her fractional share of the standing timber on the cotenancy property].

4. _____ [*Allege other facts showing the threatened or continuing consequences of the acts described above, e.g.,* A large part of the growing timber cut or threatened to be cut is young and too immature for cutting. The continued cutting of young growing timber has caused and will cause great and irreparable injury to the cotenancy property, and has caused and will cause a decrease in value of the cotenancy premises].

5. The cotenancy property will be further wasted, resulting in a multiplicity of judicial proceedings, unless defendant's conduct is forthwith and henceforth enjoined.

6. Prior to the commencement of defendant's conduct, the above-described premises had a fair market value of $_____; presently its fair market value is $_____.

7. Each act and omission of defendant as alleged above was done intentionally and over the objection of plaintiff. Defendant willfully and maliciously engaged in this conduct with the full knowledge that it would result in substantial damage to the cotenancy premises and plaintiff's interest therein. Therefore, plaintiff is entitled to recover treble damages from defendant.

WHEREFORE, plaintiff prays judgment as follows:

1. For actual damages in the sum of $_____, to be trebled pursuant to *Code of Civil Procedure Section 732,* for total damages in the sum of $_____;

2. For a permanent injunction compelling defendant to refrain from _____ [*specify acts or omissions constituting waste, e.g.,* cutting and removing more than his/her fractional share of the standing timber on the cotenancy property (and from cutting or threatening to cut young and immature timber)].

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 316.70[1].*]

[2] Use of Form

This complaint is for use in an action for treble damages for waste and for a permanent injunction to prevent waste on the cotenancy property.

[3] Allegations

The complaint alleges the following:

- The cotenancy interest of plaintiff and defendant (Paragraph 1).
- Defendant's exclusive possession of the cotenancy property (Paragraph 2).
- The acts of defendant that constitute waste (Paragraph 4).
- The amount of depreciation of the market value of the cotenancy property as a result of defendant's acts (Paragraph 6) [*see Civ. Code § 3422*; *see also Sallee v. Daneri (1942) 49 Cal. App. 2d 324, 327, 121 P.2d 781]* .
- The fact that defendant acted willfully and maliciously, which thus entitles plaintiff to treble damages (Paragraph 7) [*see Kanner v. Globe Bottling Co. (1969) 273 Cal. App. 2d 559, 568, 78 Cal. Rptr. 25]* .
- The fact that the defendant will continue to commit this waste unless enjoined (Paragraphs 4, 5) [*see Civ. Code § 3422*].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

An action seeking permanent injunctive relief is in the jurisdiction of the superior court and is not a limited civil case [*see Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(3)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

The superior court in the county where the subject real property, or some part of it, is situated is the proper court for the trial of an action for the determination of a right or interest in real property [*Code Civ. Proc. § 392(a)(1)*].

[6] State Statutes

Grounds for issuance of permanent injunction. *Civ. Code § 3422*

Treble damages for waste. *Code Civ. Proc. § 732*

[7] Decisions

Cotenant is without authority to contract for the cutting and removal of timber from the common property, especially when there exists the potential for improper cutting that could seriously impair the value of the land. *Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1032, 84 Cal. Rptr. 538*

Rights of nonconsenting cotenant must be protected in logging operation. *Garibaldi v. Garibaldi (1968) 264 Cal. App. 2d 9, 15, 70 Cal. Rptr. 92*

Nonconsenting cotenant is entitled to seek injunction to prevent waste when one cotenant contracts with third party to cut and remove timber from cotenancy premises; enjoined third party is unable to seek damages for breach of contract from either cotenant. *Garibaldi v. Garibaldi (1968) 264 Cal. App. 2d 9, 14-15, 70 Cal. Rptr. 92* ; *Fuller v. Montafi (1921) 55 Cal. App. 314, 320, 203 P. 406*

Each cotenant has right to attempt to realize monetary value of his or her individual ownership while not exceeding his or her fractional share of total; in addition, when question arises as to share taken by one cotenant, whole land ownership of all of cotenants is considered. *Garibaldi v. Garibaldi (1968) 264 Cal. App. 2d 9, 15, 70 Cal. Rptr. 92* (action for waste brought by cotenants against cotenant contracting with third party for cutting and removal of timber from cotenancy property)

In assessing a cotenant's use of common property, court is able to look to environmental qualities of surrounding land to determine if use constitutes legitimate enjoyment of property. *Scarborough v. Woodill (1907) 7 Cal. App. 39, 41-42, 93 P. 383*

[8] Cross References

See also Comments and References to *§ 316.70*

For a discussion and forms for demanding an accounting from cotenants, see Ch. 7, *Accounting, Action for*

For a discussion and forms for determining the rights and obligations of adjacent landholders, see Ch. 11, *Adjoining Landowners*

For additional discussion and forms for seeking injunctions against cotenants or third persons, see Ch. 303, *Injunctions*

For a discussion and forms for seeking an injunction to prevent waste on leased premises, see Ch. 334, *Landlord and Tenant: Claims for Damages*

For a discussion and forms for seeking an injunction to prevent waste brought by remainderman against life tenant, see Ch. 344, *Life Estates and Remainders*

For a discussion and forms for asserting the rights and duties of cotenants in logging operations on the cotenancy premises, see Ch. 350, *Logs and Timber*

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Volume 27: Interpleader thru Juries and Jury Selection-Chs. 314-322
Chapter 317 JUDGES

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27-317 California Forms of Pleading and Practice--Annotated § 317.01

§ 317.01 Scope of Chapter

This chapter discusses and contains forms related to:

- The statutory and constitutional authorization for and the duties and powers of court commissioners [*see § 317.10* et seq., for forms, *see § 317.170* et seq.].

- The appointment and disqualification of attorneys and court commissioners as temporary judges [*see § 317.20* et seq., for forms, *see § 317.180* et seq.].

- The disqualification of judges for cause pursuant to *Code Civ. Proc. §§ 170-170.5* [*see § 317.30* et seq., for forms, *see § 317.190* et seq.].

- The peremptory disqualification of judges [*see § 317.70* et seq., for forms, *see § 317.210*].

The forms relating to commissioners and attorneys are:

- A stipulation for a commissioner to act as a temporary judge [*see § 317.170*].

- An exception to a commissioner's report [*see § 317.171*].

- A notice of motion to set aside a commissioner's report [*see § 317.172*].

- An order sustaining, setting aside, or modifying a court order that adopted a commissioner's findings [*see § 317.173*].

- An appointment on stipulation by the parties of an attorney as temporary judge [*see § 317.180*].

- An oath of office for a temporary judge [*see § 317.181*].

The discussion of the disqualification of judges for cause pursuant to *Code Civ. Proc. §§ 170-170.5* includes discussion of the Code of Judicial Ethics [*see* Cal. Rules of Ct., Appen., Div. II, Code of Judicial Ethics]. The forms relating to disqualification of judges for cause are:

- A written statement of disqualification [*see § 317.190*].
- Allegations for use in disqualifying a judge for cause [*see §§ 317.191 -317.196*].
- A stipulation by the parties waiving a judge's disqualification for cause [*see § 317.197*].
- A stipulation by the parties agreeing on a judge to hear the question of disqualification [*see § 317.198*].
- A stipulation by the parties agreeing on a transfer to another judge [*see § 317.199*].

The following forms are included with respect to peremptory disqualification of judges, court commissioners, and referees pursuant to *Code Civ. Proc. § 170.6*:

- Written motion for peremptory disqualification [*see § 317.210*].
- Statutory form of affidavit supporting the written motion [*see § 317.211*].
- Declaration supporting the written motion [*see § 317.212*].
- Order of transfer [*see § 317.213*].
- Petition for writ of mandate following refusal to reassign a case subsequent to a peremptory disqualification challenge [*see § 317.214*].

This chapter also discusses judicial administration, with a review of California judicial agencies, and judicial administration rules of court and standards of judicial administration [*see §§ 317.83, 317.84*]. Forms associated with judicial administration and court records include:

- Notice of intent to destroy superior court records, and an offer to transfer possession [*see § 317.215*].
- Request for transfer or extension of time for retention of superior court records [*see § 317.216*].
- Notice of hearing on request for transfer or extension of time for retention of superior court records; court record; release and receipt of records [*see § 317.217*].
- Release and receipt of superior court records [*see § 317.218*].
- Report to the Judicial Council: superior court records destroyed, preserved, and transferred [*see § 317.219*].

This chapter also discusses judicial ethics and discipline, as well as the process for bringing a complaint about a California judge, court commissioner, or referee [*see §§ 317.85, 317.86*]. Forms associated with judicial administration and court records include:

- Complaint about a California judge, court commissioner, or referee [*see § 317.220*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersReferencesGovernmentsCourtsJudgesLegal EthicsJudicial Conduct

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§ 317.02 Cross References

- For discussion of and for other forms of affidavits, certificates, and declarations, see Ch. 15, *Affidavits, Certificates, and Declarations* .

- For discussion and forms for use in an action or proceeding which is assigned to a referee in whole or in part, including a form of referee's report and forms for excepting to a referee's report, see Ch. 38, *Reference* .

- For discussion, procedural checklists, and forms relating to proceedings seeking a writ of prohibition, see Ch. 358, *Mandate and Prohibition* .

- For discussion of and other forms of motions and orders, see Ch. 372, *Motions and Orders* .

- For discussion of and forms of oaths and affirmations, see Ch. 392, *Oath and Affirmation* .

- For discussion and forms relating to disqualification of administrative law judges, see *Ch. 473E, Public Administrative Law Judges, § 473.21* et seq.

- For discussion and forms regarding discovery referees and their powers and duties, see Ch. 38, *Reference* .

- For discussion of and forms of stipulations, see Ch. 533, *Stipulations* .

For a treatise covering the structure and operation of the Judicial Council of California, the Administrative Office of California Courts, the Commission on Judicial Appointments, the Commission on Judicial Performance, the California Judges Association, a directory of courts, and biographies of judges, see Arnold, California Courts and Judges Handbook (7th ed., 1995, James Publishing).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersReferencesCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureRemediesWritsCommon Law WritsProhibitionGovernmentsCourtsJudges

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[Reserved]

§§ 317.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Court Commissioners

27-317 California Forms of Pleading and Practice--Annotated § 317.10

§ 317.10 Constitutional and Statutory Authorization

The California Constitution states that the Legislature may provide for the appointment by trial courts of record of officers such as commissioners to perform subordinate judicial duties [*Cal. Const., art. VI, § 22*; *see also Rooney v. Vermont Investment Corp. (1973) 10 Cal. 3d 351, 362, 110 Cal. Rptr. 353, 515 P.2d 297* ; *Branson v. Martin (1997) 56 Cal. App. 4th 300, 305, 65 Cal. Rptr. 2d 401]* . Accordingly, the Legislature has provided that superior court judges may appoint a specified number of court commissioners, depending on the size of the counties in which they sit [*see Gov. Code § 70141(a)*]. Judges of the superior courts of two or more counties may appoint the same person as court commissioner [*Gov. Code § 70143*].

Appointment of a court commissioner is made by minute order [*Gov. Code § 70144*]. The official title is "court commissioner" of a particular county [*Gov. Code § 70141(a)*].

Appointment of additional commissioners to act as temporary judges in actions to enforce child support orders under *Fam. Code §§ 4251* and *4253* is authorized by *Gov. Code § 70141(e)*.

Salaries and travel expenses of superior court commissioners are prescribed in *Gov. Code §§ 70141.4 et seq.*, and *70145-70148a*. Because court commissioners are salaried judicial officials, they are prohibited from receiving fines or fees for their own use [*Cal. Const., art. VI, § 17*; *Code Civ. Proc. § 259(e)*].

Superior court commissioners hold office during the pleasure of the courts that appoint them, and both are forbidden to engage in the private practice of law [*Gov. Code §§ 68082, 70142, 72190*].

There are a number of other statutes that provide for similar officers who have narrower functions or more limited powers [*Code Civ. Proc. §§ 195, 196* (jury commissioner); *Fam. Code §§ 1814-1816* (counselor of conciliation)].

Legal Topics:

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

Civil ProcedureJudicial OfficersRefereesAppointmentsCivil ProcedureJudicial OfficersReferencesGovernmentsCourtsSpecial Judges

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§ 317.11 Qualifications

A superior court commissioner must be a citizen of the United States, a resident of California, and, if required by the court for which he or she is to be a commissioner, must have been admitted to practice before the California Supreme Court for a specified period of time preceding his or her appointment [*Gov. Code § 70142*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesGovernmentsCourtsSpecial Judges

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A. Court Commissioners

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§ 317.12 Powers and Duties

[1] Generally

The powers and duties of court commissioners are defined by statute [*see Code Civ. Proc. § 259*, discussed in *[2]-[11], below*]. At the direction of the judges, commissioners may have the same jurisdiction and exercise the same powers and duties as the judges of the court with respect to any infraction or small claims action [*Gov. Code § 72190*; *see Branson v. Martin (1997) 56 Cal. App. 4th 300, 305, 65 Cal. Rptr. 2d 401]* . Not included within the statutory powers and duties is the power to punish for contempt [*Marcus v. Workmen's Comp. Appeals Bd. (1973) 35 Cal. App. 3d 598, 603, 111 Cal. Rptr. 101]* .

[2] Ex Parte Motions and Writs

A commissioner, subject to the court's supervision, has power to hear and determine ex parte motions for orders and alternative writs and writs of habeas corpus in the superior court for which the commissioner is appointed [*Code Civ. Proc. § 259(a)*; *see also Lewis v. Neblett (1961) 188 Cal. App. 2d 290, 296-297, 10 Cal. Rptr. 441* (commissioner empowered to issue order for judgment creditor to appear); *Estate of Roberts (1942) 49 Cal. App. 2d 71, 77, 120 P.2d 933* (commissioner empowered to approve or reject probate claim)].

[3] To Take Proof and Report Findings

[a] Advisory Capacity

A commissioner, subject to the court's supervision, has power to take proof and make and report findings thereon as to any matter of fact on which information is required by the court [*Code Civ. Proc. § 259(b)*; *Gov. Code § 72190*; *see International Jet Ski Boating Assn., Inc. v. Superior Court (1991) 232 Cal. App. 3d 112, 115-116, 283 Cal. Rptr. 33* (under *Code Civ. Proc. § 259(b)* referral to commissioner is not appropriate to determine motion for summary judgment or summary adjudication without parties' stipulation because those motions involve only issues of law)].

The commissioner's findings are, however, advisory only [*Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 723, 269*

P.2d 3 ; *Crocker Citizens Nat. Bank v. Knapp (1967) 251 Cal. App. 2d 875, 881, 60 Cal. Rptr. 66]* , and the court order remains interlocutory throughout the period for filing and hearing exceptions to the commissioner's report [*Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 724, 269 P.2d 3* ; *Weinfeld v. Weinfeld (1958) 159 Cal. App. 2d 608, 614, 324 P.2d 342]* .

[b] Exceptions to Report

Any party to a contested proceeding may except to the commissioner's report [*see § 317.171* (form)] and the subsequent court order made on it within five days after written notice of the court's action [*Code Civ. Proc. § 259(b)*; *see also Goetz v. Superior Court (1958) 49 Cal. 2d 784, 787, 322 P.2d 217* ("written notice" requires service of copies of commissioner's recommendations and court order on opposing counsel by prevailing party's attorney of record to commence running of five-day period for filing of exceptions)]. A copy of the exceptions must be filed and served on the opposing party or the opposing party's counsel within the five days allowed for excepting. A party may then argue his or her exceptions before the court on giving notice of motion for that purpose within 10 days of entry of the order [*see § 317.172* (notice of motion)]. After the hearing on the exceptions, the court may sustain, set aside, or modify its order theretofore made [*Code Civ. Proc. § 259(b)*; *see also Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 724, 269 P.2d 3* ; *Crocker Citizens Nat. Bank v. Knapp (1967) 251 Cal. App. 2d 875, 881, 60 Cal. Rptr. 66]* . An order setting aside the original order approving the commissioner's finding is not appealable [*see Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 724, 269 P.2d 3* (appeal dismissed on motion)].

[c] Commissioner and Referee Compared

In certain instances the court may appoint a court commissioner of the court where the cause is pending as a referee [*see Code Civ. Proc. § 640(b)*]. When a court commissioner is appointed to act as a referee under *Code Civ. Proc. § 638* or *639*, his or her authority is derived from the order appointing him or her and not from the statute defining the duties and powers of a commissioner [*Jackson v. Puget Sound Lumber Co. (1896) 123 Cal. 97, 101*].

Thus, for example, in the case of a consensual general reference under *Code Civ. Proc. § 638*, the decision of the referee or commissioner on the whole issue must stand as the decision of the court, and on filing of the statement of decision with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court [*Code Civ. Proc. § 644(a)*]. In the case of all other references, however, the decision of the referee or commissioner is only advisory. The court may adopt the referee's recommendations, in whole or in part, after independently considering the referee's findings and any objections and responses to them filed with the court [*Code Civ. Proc. § 644(b)*]. For discussion of a general or special reference under *Code Civ. Proc. § 638* or *639*, *see Ch. 38, Reference, §§ 38.11, 38.12*.

On the other hand, when a commissioner is authorized under *Code Civ. Proc. § 259(b)* to make and report findings "as to any matter of fact uponwhich information is required by the court", the hearing before the commissioner is not had on stipulation of the parties, and therefore cannot be a general reference [*see Code Civ. Proc. § 638(a)*] during which an entire matter may be considered, but is similar to a special reference [*see Code Civ. Proc. §§ 638(b), 639*] in that a commissioner reports only on matters of fact on which information is required by the court [*see Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 723, 269 P.2d 3* ; *Weinfeld v. Weinfeld (1958) 159 Cal. App. 2d 608, 613, 324 P.2d 342]* . A special reference does not determine the whole issue, and the report of the commissioner does not become the decision of the court without further action by the trial judge [*see Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 723, 269 P.2d 3]* .

Under *Code Civ. Proc. § 259(b)* the commissioner's report and subsequent court order on it may be excepted to in the time provided for in that section. For discussion of the time in which to except to that report and order, *see* [b], *above*. With regard a referee appointed under *Code Civ. Proc. § 639*, the time in which to object to the referee's report or recommendations is specified in *Code Civ. Proc. § 643(c)*. For discussion of the time in which to make such an

objection, *see* Ch. 38, *Reference* .

For discussion of a general or special reference under *Code Civ. Proc. § 638* or *639* to a referee, *see* Ch. 38, *Reference* .

A court commissioner is a different and separate statutory creature from a juvenile court referee. There is no provision for the use of commissioners in Juvenile Court Law. The appointment of juvenile court referees is provided for in Welf. & Ins. Code § 247 [*see In re Courtney H. (1995) 38 Cal. App. 4th 1221, 1224-1226, 45 Cal. Rptr. 2d 560* (declining to treat commissioner as juvenile court referee when commissioner had not been formally so appointed)]. For further discussion of juvenile court referees, see *Ch. 327, Juvenile Courts: Jurisdiction and General Procedures, § 327.20*.

[4] To Take and Approve Bonds and Determine Objections to Bonds

A commissioner, subject to the court's supervision, has power to take and approve bonds and undertakings, and to determine objections to bonds and undertakings [*Code Civ. Proc. § 259(c)*; *Gov. Code § 72190*].

[5] To Act as Temporary Judge

A commissioner, subject to the court's supervision, may act as a temporary judge when otherwise qualified so to act and when appointed for that purpose, or by written consent of an appearing party, but while so acting the commissioner shall receive no compensation therefor other than the compensation as commissioner [*Code Civ. Proc. § 259(d)*; *Gov. Code § 72190*]. However, a court commissioner may act as a temporary judge only when the parties to the proceeding so stipulate [*Rooney v. Vermont Investment Corp. (1973) 10 Cal. 3d 351, 360, 110 Cal. Rptr. 353* ; *In re Courtney H. (1995) 38 Cal. App. 4th 1221, 1224, 45 Cal. Rptr. 2d 560* ; *see also* discussion at *§ 317.20* et seq.].

For discussion of *Fam. Code § 4250 et seq.*, which establish specific procedures for commissioners to act as temporary judges in actions filed by the local child support agency to enforce child support orders, see Ch. 258, *Family Law Enforcement* .

[6] To Hear Preliminary Matters

A commissioner, subject to the court's supervision, may hear all preliminary matters, including motions or petitions for the custody and support of children, the allowance of temporary alimony, costs, and attorneys' fees, and issues of fact in contempt proceedings in "divorce, maintenance, and annulment of marriage cases" [*sic*, dissolution of marriage, legal separation, and nullification of marriage cases] and to report findings and conclusions to the court for approval, rejection, or change [*Code Civ. Proc. § 259(e)*].

[7] To Hear Actions for Paternity and Support

A commissioner, subject to the court's supervision, may hear actions to establish paternity and to establish or enforce child support pursuant to *Fam. Code § 4251(a)* [*Code Civ. Proc. § 259(f)*].

For discussion of *Fam. Code § 4250 et seq.*, particularly provisions that provide for commissioners to act as temporary judges in actions filed by the local child support agency for an order to establish, modify, or enforce child or spousal support, including actions to establish paternity, *see Ch. 259, Family Law Enforcement: Special Remedies For Support Enforcement, § 259.153[4][o]*.

[8] To Hear Uncontested Cases

A commissioner, subject to the court's supervision, has power to hear, report on, and determine all uncontested actions and proceedings, subject to the requirements of *Code Civ. Proc. § 259(d)* [*Code Civ. Proc. § 259(g)*; *Gov. Code § 72190*]. *Code Civ. Proc. § 259(d)* provides that a commissioner may act as a temporary judge when otherwise qualified

so to act and when appointed for that purpose, or by written consent of a party appearing at the hearing.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesGovernmentsCourtsSpecial Judges

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[Reserved]

§§ 317.13[Reserved]

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B. Appointment and Disqualification of Temporary Judges

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Definitions and Distinction Between Court-Appointed Temporary Judges and Temporary Judges Requested by Parties

A "judge pro tempore," or "temporary judge" is an attorney or court commissioner who is performing the function of a judge. The terms are used interchangeably in case law, although the latter term seems to be preferred now because *Cal. Const., art. VI, § 21*, uses the term "temporary judge" in lieu of the phrase "judge pro tempore" as was used in former *Cal. Const., art. VI, § 5*, which was repealed in 1966. Moreover, *Cal. Rules of Ct., Rule 2.810 et seq.* use the term temporary judge.

The Rules of Court distinguish between temporary judges appointed by the trial courts [*Cal. Rules of Ct., Rule 2.810 et seq.*] and temporary judges requested by the parties [*Cal. Rules of Ct., Rule 2.830 et seq.*]. These two types of temporary judges are subject to different qualification standards and different disqualification criteria and procedures. Court-appointed temporary judges have more standards to meet before appointment, such as training and continuing education, and there are more instances where other activities may disqualify the attorney from serving. Temporary judges requested by the parties, are privately compensated, and do not have the degree of standards required for court-appointed temporary judges. These differences are discussed in the following sections.

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§ 317.21 Appointment and Disqualification of Court-Appointed Temporary Judges

[1] Governing Law and Definitions

The appointment of a temporary judge is governed by *Cal. Const., art VI § 21*. The power of court commissioners to so act is governed by *Code. Civ. Proc. § 259* and *Gov. Code § 72190*. The procedure for a court-appointed temporary judge is governed by *Cal. Rules of Ct., Rule 2.810 et. seq.* These rules do not apply to subordinate judicial officers, or to attorneys designated by the courts to serve as temporary judges at the parties' request [*Cal. Rules of Ct., Rule 2.810(a)*].

A "court-appointed temporary judge" means an attorney who has satisfied the requirements for appointment under *Cal. Rules of Ct., Rule 2.812* and has been appointed by the court to serve as a temporary judge in that court [*Cal. Rules of Ct., Rule 2.810(b)*].

[2] Nature of Appointment and Relationship to Court

The purpose of court appointment of attorneys as temporary judges is to assist the public by providing the court with a panel of trained, qualified, and experienced attorneys who may serve as temporary judges at the discretion of the court if the court needs judicial assistance that it cannot provide using its full-time judicial officers [*Cal. Rules of Ct., Rule 2.811(a)*].

The appointment of attorneys to serve as temporary judges is the responsibility of the presiding judge, who may designate another judge or committee of judges to perform this responsibility. In carrying out this responsibility, the presiding judge is assisted by a Temporary Judge Administrator as prescribed by *Cal. Rules of Ct., Rule 10.743* [*Cal. Rules of Ct., Rule 2.811(d)*].

Court-appointed attorneys are appointed and serve as temporary judges solely at the discretion of the presiding judge [*Cal. Rules of Ct., Rule 2.811(b)*].

Court appointment and service of an attorney as a temporary judge do not establish an employment relationship between the court and the attorney [*Cal. Rules of Ct., Rule 2.811(c)*].

[3] Attorney Experience, Training Requirements, and Continuing Education

The presiding judge may not appoint an attorney to serve as a temporary judge unless the attorney has been admitted to practice as a member of the State Bar of California for at least 10 years before the appointment. However, for good cause, the presiding judge may permit an attorney who has been admitted to practice for at least five years to serve as a temporary judge [*Cal. Rules of Ct., Rule 2.812(a)*].

The presiding judge may appoint an attorney to serve as a temporary judge only if the attorney [*Cal. Rules of Ct., Rule 2.812(b)*]:

- Is a member in good standing of the State Bar and has no disciplinary action pending;

- Has not pled guilty or no contest to a felony, or has not been convicted of a felony that has not been reversed;

- Has satisfied the education and training requirements in [*Cal. Rules of Ct., Rule 2.812(c)*].

- Has satisfied all other general conditions that the court may establish for appointment of an attorney as a temporary judge in that court; and

- Has satisfied any additional conditions that the court may require for an attorney to be appointed as a temporary judge for a particular assignment or type of case in that court.

An attorney may not serve as a court-appointed temporary judge if [*Cal. Rules of Ct., Rule 2.818(b)*]:

- If the attorney, in any type of case, is appearing on the same day in the same courthouse as an attorney or as a party;

- If the attorney, in the same type of case, is presently a party to any action or proceeding in the court; or

- If, in a family law or unlawful detainer case, one party is self-represented and the other party is represented by an attorney or is an attorney.

For good cause, the presiding judge may waive these limitations [*Cal. Rules of Ct., Rule 2.818(b)*].

"Good standing" means the attorney is currently eligible to practice law in the State of California, may be with an active or voluntarily inactive member of the State Bar, and the court may appoint voluntary inactive members to serve as temporary judges if the court decides to do so [*Cal. Rules of Ct., Rule 2.812* (Advisory Committee Comment)]

The presiding judge may appoint an attorney to serve as a temporary judge only if the following minimum training requirements are satisfied [*Cal. Rules of Ct., Rule 2.812(c)*]:

- *(Mandatory training on bench conduct and demeanor)* Before appointment, the attorney must have attended and successfully completed, within the previous three years, a course of at least three hours' duration on the subjects identified in Rule 2.813 approved by the court in which the attorney will serve. This course must be taken in person and be taught by a qualified judicial officer.

- *(Mandatory training in ethics)* Before appointment, the attorney must have attended and successfully completed, within the previous three years, a course of at least three hours duration on the subjects

identified in Rule 2.813(b) approved by the court in which the attorney will serve. This course may be taken by any means approved by the court, including in-person, by broadcast with participation, or online.

- *(Substantive training)* Before appointment, the attorney must have attended and successfully completed, within the previous three years, a course on the substantive law in each subject area in which the attorney will serve as a temporary judge. These courses may be taken by any means approved by the court, including in-person, by broadcast with participation, or online. The substantive courses have the following minimum requirements:

- *(Small claims)* An attorney serving as a temporary judge in small claims cases must have attended and successfully completed, within the previous three years, a course of at least three hours' duration on the subjects identified in Rule 2.813(c) approved by the court in which the attorney will serve.

- *(Traffic)* An attorney serving as a temporary judge in traffic cases must have attended and completed, within the previous three years, a course of at least three hours' duration on the subjects identified in Rule 2.813(d) approved by the court in which the attorney will serve.

- *(Other subject areas)* If the court assigns attorneys to serve as temporary judges in other substantive areas such as civil law, family law, juvenile law, unlawful detainers, or case management, the court must determine what additional training is required and what additional courses are required before an attorney may serve as a temporary judge in each of those subject areas. The training required in each area must be of at least three hours duration. The court may also require that an attorney possess additional years of practical experience in each substantive area before being assigned to serve as a temporary judge in that subject area.

- *(Settlement)* An attorney need not be a temporary judge to assist the court in settlement conferences. However, an attorney assisting the court with settlement conferences who performs any judicial function, such as entering a settlement on the record under *Code Civ. Proc. § 664.6*, must be a qualified temporary judge who has satisfied the training requirements under *Cal. Rules of Ct., Rule 2.813(c)(1), (2)*.

- The substantive training requirements in *Cal. Rules of Ct., Rule 2.812(c)(3)(A)-(C)* do not apply to courts in which temporary judges are used fewer than 10 times altogether in a calendar year.

The contents of the training programs to meet the standards for appointment are governed by *Cal. Rules of Ct., Rule 2.813*.

The presiding judge in each court should establish additional experience and training requirements for temporary judges beyond the minimum requirements provided in this rules if it is feasible for the court to do so [*Cal. Rules of Ct., Rule 2.813(d)*].

A court that uses temporary judges must maintain records verifying that each attorney who serves as a temporary judge in that court has attended and successfully completed the courses required under Rule 2.813 [*Cal. Rules of Ct., Rule 2.813(e)*].

To serve as a temporary judge, an attorney must complete the application required under *Cal. Rules of Ct., Rule 10.744*, must satisfy the requirements prescribed in these standards rule, and must satisfy such other requirements as the court appointing the attorney in its discretion may determine are appropriate [*Cal. Rules of Ct., Rule 2.813(f)*].

Each attorney appointed as a temporary judge must attend and successfully complete every three years a course on

bench conduct and demeanor, an ethics course, and a course in each substantive area in which the attorney will serve as a temporary judge. The courses must cover the same subjects and be of the same duration as the courses prescribed in Rule 2.812. These courses must be approved by the court that appoints the attorney [*Cal. Rules of Ct., Rule 2.815(a)*].

Commencing five years after last serving in a judicial position either as a full-time judicial officer or as an assigned judge, a retired judicial officer serving as a temporary judge must satisfy all the education and training requirements of this rule [*Cal. Rules of Ct., Rule 2.812(d)*]. However, a retired judicial officer serving as a temporary judge in a small claims case must satisfy all the requirements of *Code Civ. Proc. § 116.240(b)* and the rules in Ch. 1, Div. 6, Tit. *2 of the Cal. Rules of Ct.* before serving in the case [*Cal. Rules of Ct., Rule 2.812(d)*].

[4] Appointment by Court, Oath of Office, and Stipulation of Parties

The appointment of attorneys to serve as temporary judges is the responsibility of the presiding judge, who may designate another judge or committee of judges to perform this responsibility. In carrying out this responsibility, the presiding judge is assisted by a Temporary Judge Administrator as prescribed by *Cal. Rules of Ct., Rule 10.743* [*Cal. Rules of Ct., Rule 2.811(d)*].

An attorney may serve as a temporary judge for the court only after the court has issued an order appointing him or her to serve. Before serving, the attorney must subscribe the oath of office and must certify that he or she is aware of and will comply with applicable provisions of Canon 6 of the Code of Judicial Ethics and the California Rules of Court [*Cal. Rules of Ct., Rule 2.814*]. For a form of oath of office, see § 317.18. A temporary judge must make all disclosures required under the Code of Judicial Ethics [*Cal. Rules of Ct., Rule 2.817*].

After notice has been given under *Cal. Rules of Ct., Rule 2.816(a), (b),* a party stipulates to a court-appointed temporary judge by either of the following [*Cal. Rules of Ct., Rule 2.816(d)*]:

- The party is deemed to have to have stipulated to the attorney serving as a temporary judge if the party fails to object to the matter being heard by the temporary judge before the temporary judge begins the proceeding; or

- The party signs a written stipulation agreeing that the matter may be heard by the temporary judge.

For a form of stipulation, see § 317.18.

A stipulation to a temporary judge will be valid so long as the basic constitutional requirement of the parties' consent is present. The litigants interest in having his or her dispute heard in a competent and unbiased tribunal requires consent to the individual appointee. The specific consent cannot be expanded to encompass consent to another judge [*Kim v. Superior Court (1998) 64 Cal. App. 4th 256, 260-261, 75 Cal. Rptr. 2d 468]* . For example, when the judge from Judicial Arbitration & Mediation Services, Inc. (JAMS) whom the parties stipulated to hear a matter died, the court was not authorized, over one party's objection, to rely on the stipulation to appoint new judge from JAMS to hear the matter [*Kim v. Superior Court (1998) 64 Cal. App. 4th 256, 260-261, 75 Cal. Rptr. 2d 468]* .

[5] Required Notices Before Taking of Evidence

Before the swearing in of the first witness at a small claims hearing, before the entry of a plea by the defendant at a traffic arraignment, or before the commencement of any other proceeding, the court must give notice to each party that [*Cal. Rules of Ct., Rule 2.816(b)*]:

- A temporary judge will be hearing the matters for that calendar;

- The temporary judge is a qualified member of the State Bar and the name of the temporary judge is provided; and

- The party has a right to have the matter heard before a judge, commissioner, or referee of the court.

The court may give the notice by either of the following methods [*Cal. Rules of Ct., Rule 2.816(c)*]:

- A conspicuous sign posted inside or just outside the courtroom, accompanied by oral notification or notification by videotape or audiotape by a court officer on the day of the hearing; or

- A written notice provided to each party.

After notice has been given, a party stipulates to a court-appointed temporary judge by either of the following [*Cal. Rules of Ct., Rule 2.816(d)*]:

- The party is deemed to have to have stipulated to the attorney serving as a temporary judge if the party fails to object to the matter being heard by the temporary judge before the temporary judge begins the proceeding; or

- The party signs a written stipulation agreeing that the matter may be heard by the temporary judge.

[6] Withdrawal of Stipulation

An application or motion to withdraw a stipulation for the appointment of a temporary judge must be supported by a declaration of facts establishing good cause for permitting the party to withdraw the stipulation [*Cal. Rules of Ct., Rule 2.816(e)*]. In addition:

- The application or motion must be served and filed, and the moving party must mail or deliver a copy to the presiding judge.

- A declaration that a ruling by a temporary judge is based on an error of fact or law does not establish good cause for withdrawing a stipulation.

- The application or motion must be heard by the presiding judge or a judge designated by the presiding judge.

- If the application or motion for withdrawing the stipulation is based on grounds for the disqualification of, or limitation of the appearance by, the temporary judge first learned or arising after the temporary judge has made one or more rulings, but before the temporary judge has completed judicial action in the proceeding, the temporary judge, unless the disqualification or termination is waived, must disqualify himself or herself, but in the absence of good cause the rulings the temporary judge has made up to that time must not be set aside by the judicial officer or temporary judge who replaces the temporary judge.

[7] Disqualification of Attorney and Request for Disqualification

[a] Disclosure and Disqualification Requirements

A temporary judge must make all disclosures required under the Code of Judicial Ethics [*Cal. Rules of Ct., Rule 2.818*], and a temporary judge must disqualify himself or herself as a temporary judge in proceedings as provided under the

Code of Judicial Ethics [*Cal. Rules of Ct., Rule 2.818(a)*].

An attorney may not serve as a court-appointed temporary judge if [*Cal. Rules of Ct., Rule 2.818(b)*]:

- The attorney, in any type of case, is appearing on the same day in the same courthouse as an attorney or as a party;

- The attorney, in the same type of case, is presently a party to any action or proceeding in the court; or

- In a family law or unlawful detainer case, one party is self-represented and the other party is represented by an attorney or is an attorney.

For good cause, the presiding judge may waive these limitations [*Cal. Rules of Ct., Rule 2.818(b)*].

[b] Waiver of Disqualifications or Limitations

After a temporary judge who has determined himself or herself to be disqualified under the Code of Judicial Ethics or prohibited from serving under *Cal. Rules of Ct., Rule 2.818(b)* has disclosed the basis for his or her disqualification or limitation on the record, the parties and their attorneys may agree to waive the disqualification or limitation and the temporary judge may accept the waiver. The temporary judge must not seek to induce a waiver and must avoid any effort to discover which attorneys or parties favored or opposed a waiver. The waiver must be in writing, must recite the basis for the disqualification or limitation, and must state that it was knowingly made. The waiver is effective only when signed by all parties and their attorneys and filed in the record [*Cal. Rules of Ct., Rule 2.818(c)(1)*].

No waiver is permitted where the basis for the disqualification is any of the following [*Cal. Rules of Ct., Rule 2.818(c)(2)*]:

- The temporary judge has a personal bias or prejudice concerning a party;

- The temporary judge has served as an attorney in the matter in controversy; or

- The temporary judge has been a material witness in the controversy.

[c] Late Discovery of Grounds for Disqualification or Limitation

In the event that grounds for disqualification or limitation are first learned of or arise after the temporary judge has made one or more rulings in a proceeding, but before the temporary judge has completed judicial action in the proceeding, the temporary judge, unless the disqualification or limitation is waived, must disqualify himself or herself. But in the absence of good cause the rulings the temporary judge has made up to that time must not be set aside by the judicial officer or temporary judge who replaces the temporary judge [*Cal. Rules of Ct., Rule 2.818(d)*].

[d] Notification of the Court

Whenever a temporary judge determines himself or herself to be disqualified or limited from serving, the temporary judge must notify the presiding judge or the judge designated by the presiding judge of his or her withdrawal and must not further participate in the proceeding, unless his or her disqualification or limitation is waived by the parties as provided in Rule 2.818(c) [*Cal. Rules of Ct., Rule 2.818(e)*].

[e] Requests for Disqualifications

Requesting disqualification of a court-appointed temporary attorney is a different procedure from seeking disqualification of a judge under *Code Civ. Proc. § 170.3* [*Cal. Rules of Ct., Rule 2.818* (Advisory Committee Comment)].

A party may request that a temporary judge withdraw on the ground that he or she is disqualified or limited from serving. If a temporary judge who should disqualify himself or herself or who is limited from serving in a case fails to withdraw, a party may apply to the presiding judge under *Cal. Rules of Ct., Rule 2.816(e)* for a withdrawal of the stipulation. The presiding judge or the judge designated by the presiding judge must determine whether good cause exists for granting withdrawal of the stipulation [*Cal. Rules of Ct., Rule 2.818(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsWaiversGovernmentsCourtsSpecial Judges

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§ 317.22 Appointment and Disqualification of Temporary Judge Requested by Parties

[1] Definitions and Governing Law

Cal. Rules of Ct., Rules 2.830-2.834 apply to attorneys designated as temporary judges under *Cal. Const., art VI, § 21* at the request of the parties rather than by prior appointment of the court [*see Cal. Rules of Ct., Rule 2.816 et seq.*] including privately compensated temporary judges and attorneys who serve as temporary judges pro bono at the request of the parties [*Cal. Rules of Ct., Rule 2.830(a)*].

"Privately compensated" means that the temporary judge is paid by the parties [*Cal. Rules of Ct., Rule 2.830(b)*].

Cal. Rules of Ct., Rules 2.830-2.834 do not apply to subordinate judicial officers or to attorneys who are appointed by the court to serve as temporary judges for the court [*Cal. Rules of Ct., Rule 2.830(c)*].

[2] Compensation

A temporary judge selected by the parties may not be compensated by the parties unless the parties agree in writing on a rate of compensation that they will pay [*Cal. Rules of Ct., Rule 2.832*].

[3] Stipulation

When the parties request that an attorney be designated by the court to serve as a temporary judge on a case, the stipulation of the parties that a case may be tried by a temporary judge must be in writing and must state the name and office address of the member of the State Bar agreed on. The stipulation must be submitted for approval to the presiding judge or the judge designated by the presiding judge [*Cal. Rules of Ct., Rule 2.831(a)*; *see In re Marriage of Crook (1991) 235 Cal. App. 3d 30, 33-34, 286 Cal. Rptr. 537* (signature of attorneys on stipulation sufficient to bind parties)].

Under case law interpreting former Cal. Rules of Ct., Rule 244, failure to obtain a written stipulation was not jurisdictional because the duty under the former rule for a written stipulation was directory rather than mandatory; therefore, when the requirements of *Cal. Const., art VI § 21* were otherwise met, the parties' oral stipulation or

stipulation by conduct waived any claim of error based on strict compliance with Rule 244 [*see In re Richard S. (1991) 54 Cal. 3d 857, 864-866, 2 Cal. Rptr. 2d 2, 819 P. 2d 843* ; *In re Julio N. (1992) 3 Cal. App. 4th 1120, 1122-1124, 5 Cal. Rptr. 2d 86]* . Whether this interpretation stands for the new language under *Cal. Rules of Ct., Rule 2.831* is a question that remains open.

[4] Order, Oath, and Certification

The order designating the temporary judge must be signed by the presiding judge or the presiding judge's designee and refer to the stipulation. The stipulation and order must then be filed. The temporary judge must take and subscribe the oath of office and certify that he or she is aware of and will comply with applicable provisions of canon 6 of the Code of Judicial Ethics and the California Rules of Court [*Cal. Rules of Ct., Rule 2.831(b)*].

The temporary judge may proceed with the hearing, trial, and determination of the cause after the stipulation, order, oath, and certification have been filed [*Cal. Rules of Ct., Rule 2.831(c)*].

[5] Disclosure to the Parties

In addition to any other disclosure required by law, no later than five days after designation as a temporary judge or, if the temporary judge is not aware of his or her designation or of a matter subject to disclosure at that time, as soon as practicable thereafter, a temporary judge must disclose to the parties any matter subject to disclosure under the Code of Judicial Ethics [*Cal. Rules of Ct., Rule 2.831(d)*].

[6] Disqualification

In addition to any other disqualification required by law, a temporary judge requested by the parties and designated by the court under this rule must disqualify himself or herself as provided under the Code of Judicial Ethics [*Cal. Rules of Ct., Rule 2.831(e)*].

[7] Withdrawing Stipulation

A motion to withdraw a stipulation for the appointment of a temporary judge must be supported by a declaration of facts establishing good cause for permitting the party to withdraw the stipulation, and must be heard by the presiding judge or a judge designated by the presiding judge. A declaration that a ruling is based on error of fact or law does not establish good cause for withdrawing a stipulation. Notice of the motion must be served and filed, and the moving party must mail or deliver a copy to the temporary judge. If the motion to withdraw the stipulation is based on grounds for the disqualification of the temporary judge first learned or arising after the temporary judge has made one or more rulings, but before the temporary judge has completed judicial action in the proceeding, the provisions of Rule 2.816(e)(4) apply. If a motion to withdraw a stipulation is granted, the presiding judge must assign the case for hearing or trial as promptly as possible [*Cal. Rules of Ct., Rule 2.831(f)*].

[8] Notices, Court Facilities, Hearing Site

In each case in which he or she is appointed, a temporary judge requested by the parties must file a statement that provides the name, telephone number, and mailing address of a person who may be contacted to obtain information about the date, time, location, and general nature of all hearings and other proceedings scheduled in the matter that would be open to the public if held before a judge. This statement must be filed at the same time as the temporary judge's certification under *Cal. Rules of Ct., Rule 2.831(b)*. If there is any change in this contact information, the temporary judge must promptly file a revised statement with the court [*Cal. Rules of Ct., Rule 2.834(b)(1)*]. In addition, the statement filed by a temporary judge may also provide the address of a publicly accessible website at which the temporary judge will maintain a current calendar setting forth the date, time, location, and general nature of any hearings scheduled in the matter that would be open to the public if held before a judge [*Cal. Rules of Ct., Rule*

2.834(b)(2)]. The clerk must post the information from the statement filed by the temporary judge in the court facility [*Cal. Rules of Ct., Rule 2.834(b)(3)*].

A party who has elected to use the services of a temporary judge requested by the parties is deemed to have elected to proceed outside court facilities. Court facilities, court personnel, and summoned jurors may not be used in proceedings pending before a temporary judge requested by the parties except on a finding by the presiding judge or his or her designee that their use would further the interests of justice [*Cal. Rules of Ct., Rule 2.834(c)*].

The presiding judge or his or her designee, on application of any person or on the judge's own motion, may order that a case before a temporary judge requested by the parties must be heard at a site easily accessible to the public and appropriate for seating those who have made known their plan to attend hearings. The application must state facts showing good cause for granting the application, and must be served on all parties and the temporary judge and filed with the court. The proceedings are not stayed while the application is pending unless the presiding judge or his or her designee orders that they be stayed. The issuance of an order for an accessible and appropriate hearing site is not a ground for withdrawal of a stipulation that a case may be heard by a temporary judge [*Cal. Rules of Ct., Rule 2.834(d)(1)*]. If a court staff mediator or evaluator is required to attend a hearing before a temporary judge requested by the parties, unless otherwise ordered by the presiding judge or his or her designee, that hearing must take place at a location requiring no more than 15 minutes' travel time from the mediator's or evaluator's work site [*Cal. Rules of Ct., Rule 2.834(d)(2)*].

[9] Sealed Records

A motion or application to seal records in a case pending before a temporary judge requested by the parties must be filed with the court and must be served on all parties that have appeared in the case and the temporary judge. The motion or application must be heard by the trial court judge to whom the case is assigned or, if the case has not been assigned, by the presiding judge or his or her designee. *Cal. Rules of Ct., Rules 2.550-2.551* on sealed records apply to motions or applications filed under Rule 2.835 [*Cal. Rules of Ct., Rule 2.835(a)*].

[10] Complaint for Intervention

A motion for leave to file a complaint for intervention in a case pending before a temporary judge requested by the parties must be filed with the court and served on all parties and the temporary judge. The motion must be heard by the trial court judge to whom the case is assigned or, if the case has not been assigned, by the presiding judge or his or her designee. If intervention is allowed, the case must be returned to the trial court docket unless all parties stipulate in the manner prescribed in *Cal. Rules of Ct., Rule 2.831(a)* to proceed before the temporary judge [*Cal. Rules of Ct., Rule 2.835(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionMotions to InterveneCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewGovernmentsCourtsSpecial Judges

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B. Appointment and Disqualification of Temporary Judges

27-317 California Forms of Pleading and Practice--Annotated § 317.23

§ 317.23 Superior Court Commissioner as Temporary Judge

[1] Authority to Act

Every superior court commissioner has power to act as a temporary judge when otherwise qualified so to act and when appointed for that purpose, or by written consent of an appearing party [*Code Civ. Proc. § 259(d)*]. Consent of only one party in a contested proceeding, however, is not adequate for appointment of a commissioner because the California Constitution requires that the parties litigant must stipulate to the appointment of a temporary judge [*see Cal. Const., art. VI, § 21* and discussion under *[3][a], below*].

[2] Membership in State Bar

A superior court commissioner need not be admitted to the State Bar unless required by the court appointing him or her [*see Gov. Code § 70142*; *see also Barfield v. Superior Court (1963) 216 Cal. App. 2d 476, 477 n.1, 31 Cal. Rptr. 30]* . But if not admitted to the State Bar, he or she would not be eligible to serve as a temporary judge by stipulation or otherwise [*see Cal. Const., art. VI, § 21*].

[3] Stipulation

[a] Requirement to Act

Although no statute or rule requires a stipulation for the appointment of a court commissioner as a temporary judge, *Cal. Const., art. VI, § 21* authorizes the appointment of temporary judges only "on stipulation of the parties litigant." Therefore, a commissioner cannot act as a temporary judge except on stipulation of the parties who have appeared in the litigation [*Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 6, 118 Cal. Rptr. 21, 529 P.2d 53* ; *People v. Tijerina (1969) 1 Cal. 3d 41, 49, 81 Cal. Rptr. 264, 459 P.2d 680* ; *In re Courtney H. (1995) 38 Cal. App. 4th 1221, 1227, 45 Cal. Rptr. 2d 560]* .

Code Civ. Proc. § 259(d) authorizes a court commissioner to act as a temporary judge when otherwise qualified so to act and when appointed for that purpose, or "by written consent of an appearing party." The statutory power of a

commissioner to act as a temporary judge, however, is subject to the constitutional requirement of a stipulation by the parties litigant [*Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 6, 118 Cal. Rptr. 21, 529 P.2d 53]* . *Code Civ. Proc. § 259(g)* further authorizes a commissioner to act as temporary judge in an uncontested action or proceeding, subject to the requirements of *Code Civ. Proc. § 259(d)*. When subsection (d) is read together with subsection (h), subject to the requirement of *Cal. Const., art. VI, § 21*, it is arguable that the clause of subsection (d) permitting the appointment of a temporary judge by written consent of "an appearing party" applies only when the action or proceeding is uncontested. For discussion of the appointment of a court commissioner as a temporary judge after one party has defaulted, see *§ 317.23[4][b]*.

A stipulation to a temporary judge will be valid so long as the basic constitutional requirement of the parties consent is present. The litigants interest in having his or her dispute heard in a competent and unbiased tribunal requires consent to the individual appointee. The specific consent cannot be expanded to encompass consent to another judge [*Kim v. Superior Court (1998) 64 Cal. App. 4th 256, 260-261, 75 Cal. Rptr. 2d 468* (involving stipulation to appointment of judge from Judicial Arbitration & Mediation Services, Inc.)].

[b] Implied Stipulations

A stipulation that a matter can be heard by a court commissioner sitting as a temporary judge may be implied from the parties' conduct. Conduct short of an express oral or written stipulation may be tantamount to a stipulation that a commissioner may sit as a temporary judge [*In re Horton (1991) 54 Cal. 3d 82, 91-92, 100, 284 Cal. Rptr. 305, 813 P. 2d 1335 , modified on other grounds, People v. Horton (1995) 11 Cal. 4th 1068, 1068, 47 Cal. Rptr. 2d 516, 906 P. 2d 478*); *see Estate of Fain (1999) 75 Cal. App. 4th 973, 988-989, 89 Cal. Rptr. 2d 618* (implied stipulation to retired judge as temporary judge)].

Thus, voluntary participation in the proceedings on the part of a party and his or her attorney is deemed tantamount to a stipulation that a commissioner can hear the case sitting as a temporary judge [*see Estate of Lacy (1975) 54 Cal. App. 3d 172, 182, 126 Cal. Rptr. 432* ; *Estate of Soforenko (1968) 260 Cal. App. 2d 765, 766, 67 Cal. Rptr. 563* (in both cases parties were represented by attorneys who appeared, voiced no objections to the matter being heard by a commissioner, participated fully in the hearing, and strenuously examined the witnesses and argued the evidence)].

For example, an implied stipulation was found in a criminal case in which [*In re Horton (1991) 54 Cal. 3d 82, 91-92, 100, 284 Cal. Rptr. 305, 813 P. 2d 1335* (modified on other grounds in *People v. Horton (1995) 11 Cal. 4th 1068, 1068, 47 Cal. Rptr. 2d 516, 906 P. 2d 478*)]:

- Counsel participated without objection in a trial heard by a commissioner acting as temporary judge;
- All parties knew the temporary judge's status;
- Counsel stated his intention to obtain an express stipulation; and
- The parties treated the temporary judge as having authority to make binding rulings.

Conduct of the attorney may justify an implied stipulation that a matter may be heard by a commissioner sitting as a temporary judge without the need for an express stipulation by the client [*In re Horton (1991) 54 Cal. 3d 82, 92-93, 284 Cal. Rptr. 305, 813 P. 2d 1335* (modified on other grounds in *People v. Horton (1995) 11 Cal. 4th 1068, 1068, 47 Cal. Rptr. 2d 516, 906 P.2d 478*); *Estate of Fain (1999) 75 Cal. App. 4th 973, 989-990, 89 Cal. Rptr. 2d 618]* .

The reason for the tantamount stipulation doctrine is to prevent a party from sitting back, fully participating in a trial and then claiming that the court was without jurisdiction on obtaining an unfavorable result [*see Estate of Fain (1999) 75 Cal. App. 4th 973, 989, 89 Cal. Rptr. 2d 618* ; *In re Courtney H. (1995) 38 Cal. App. 4th 1221, 1227, 45 Cal. Rptr.*

2d 560 (although compelling argument could be made that parties never given opportunity to stipulate cannot do so impliedly, court bound by tantamount stipulation doctrine as explained by California Supreme Court)].

The following cases exemplify situations in which an implied stipulation was not established:

- Party appeared in propria persona to seek an order to show cause re: child support. The Judicial Council form used by that party did not have the notice required by *Fam. Code § 4251(b)* that the matter would be heard by a commissioner acting as temporary judge unless the party objected. The commissioner who heard the matter never disclosed that he was a commissioner sitting as a temprorary judge and that the party could object. Therefore, even though the party participated fully in two hearings, no implied stipulation was involved [*Monge v. Gerig (2001) 93 Cal. App. 4th 911, 916-919, 113 Cal. Rptr. 2d 524]* .

- Petitioner's counsel believed the commissioner was scheduling the case for jury trial, and interposed a timely objection to the commissioner's authority [*Yetenekian v. Superior Court (1983) 140 Cal. App. 3d 361, 367, 189 Cal. Rptr. 458]* .

- Petitioner agreed to defer adjudication and requested a continuance after first having refused to stipulate and after having objected to the commissioner's hearing of a contempt cause [*Nierenberg v. Superior Court (1976) 59 Cal. App. 3d 611, 619, 130 Cal. Rptr. 847]* .

[4] Parties Litigant

[a] Requirement

The parties litigant are those parties before the court taking part in the litigation [*see* *Estate of Kent (1936) 6 Cal. 2d 154, 162-163, 57 P.2d 901* ; *In re Plotkin (1976) 54 Cal. App. 3d 1014, 1017, 127 Cal. Rptr. 190]* . If no stipulation has been entered into by the parties litigant pursuant to *Cal. Const., art. VI, § 21*, an order issued by a commissioner acting as temporary judge is invalid and in excess of the commissioner's jurisdiction [*In re Plotkin (1976) 54 Cal. App. 3d 1014, 1017, 127 Cal. Rptr. 190* (order holding plaintiff's expert witness in contempt for refusing to appear and give deposition to defendant was invalid; although plaintiff and defendant had entered stipulation, it was defendant and expert witness who were parties litigant in that cause, and they had not entered into stipulation)].

[b] Exception When Default Prior to Hearing

When a default has been entered against a party prior to the hearing of an action, an exception to the constitutional requirement of a stipulation of the parties litigant exists [*see* *Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 6-8, 118 Cal. Rptr. 21, 529 P.2d 53* ; *Barfield v. Superior Court (1963) 216 Cal. App. 2d 476, 479, 31 Cal. Rptr. 30]* . However, the statute authorizing a court commissioner to hear, report, and determine uncontested actions or proceedings also requires that there be written consent of an appearing party [*Code Civ. Proc. § 259(d), (g)*].

If a default has been entered, a stipulation that a court commissioner may act as a temporary judge need not be signed by the party in default [*Barfield v. Superior Court (1963) 216 Cal. App. 2d 476, 479, 31 Cal. Rptr. 30* ; *Bill Benson Motors, Inc. v. Macmorris Sales Corp. (1965) 238 Cal. App. 2d Supp. 937, 943, 48 Cal. Rptr. 123]* because the party in default is no longer considered a "party litigant" therein [*Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 10-11, 118 Cal. Rptr. 21, 529 P.2d 53* ; *Barfield v. Superior Court (1963) 216 Cal. App. 2d 476, 479, 31 Cal. Rptr. 30*]. The constitution requires a stipulation "of" and not "between" the parties litigant [*see Cal. Const., art. VI, § 21*; *see also Barfield v. Superior Court (1963) 216 Cal. App. 2d 476, 479, 31 Cal. Rptr. 30*] and has been construed to mean an agreement between the court and any one party litigant rather than to an agreement between the parties or their attorneys [*see* *Barfield v. Superior Court (1963) 216 Cal. App. 2d 476, 479, 31 Cal. Rptr. 30*]. Thus, an interlocutory decree of

divorce was properly entered by a temporary judge pursuant to a stipulation executed by counsel for plaintiff wife only when the default of defendant husband had first been duly entered in the cause [*Barfield v. Superior Court (1963) 216 Cal. App. 2d 476, 477-479, 31 Cal. Rptr. 30*]. When a defendant husband was in default with respect to an application for temporary support for failure to appear at the hearing, a stipulation executed by his wife and counsel for temporary support was therefore sufficient to empower a commissioner to act as temporary judge [*Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 10-11, 118 Cal. Rptr. 21, 529 P.2d 53*].

For purposes of this exception, the term "default" has been broadly defined [*see Sarracino v. Superior Court (1974) 13 Cal. 3d 1* (petitioner's failure to appear after notice at hearing on application for temporary support put him in default for purposes of entering orders against him); *Bill Benson Motors, Inc. v. Macmorris Sales Corp. (1965) 238 Cal. App. 2d Supp. 937, 944, 238 Cal. App. 2d Supp. 937, 48 Cal. Rptr. 123* (equating defendant's refusal to appear at trial with default entered on failure to answer)]. For example, defendants were not a "party litigant" in a case in which defendants failed to file any response to a motion or appear at the hearing, instructed a former attorney to give up the file in the case but made no arrangements for the successor attorney to appear for them, and did no other acts of litigation after plaintiff's complaint was filed. Under these circumstances, the stipulation of the plaintiff was sufficient to empower a commissioner to act as temporary judge [*Reisman v. Shahverdian (1984) 153 Cal. App. 3d 1074, 1089-1090, 201 Cal. Rptr. 194]* .

[5] Term "Cause" as Distinct From Principal Case

The term "cause" as used in the phrase "sworn and empowered to act until final determination of the cause" refers to the proceeding before the court [*see Cal. Const., art. VI, § 21*; *see also Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 9, 118 Cal. Rptr. 21, 529 P.2d 53* ; *In re Plotkin (1976) 54 Cal. App. 3d 1014, 1017, 127 Cal. Rptr. 190*]. A temporary judge may hear "causes" connected with but distinct from the underlying principal case [*Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 9-10, 118 Cal. Rptr. 21, 529 P.2d 53* (temporary support); *In re Steven A. (1993) 15 Cal. App. 4th 754, 769-770, 19 Cal. Rptr. 2d 576* (dispositional hearing under *Welf. & Inst. Code § 358* is direct progeny of jurisdictional hearing under *Welf. & Inst. Code § 356*); *Estate of Soforenko (1968) 260 Cal. App. 2d 765, 67 Cal. Rptr. 563* (executor's first account); *Quezada v. Superior Court (1959) 171 Cal. App. 2d 528, 530, 340 P.2d 1018* (civil contempt to enforce temporary support order)]. However, an appointment as a temporary judge does not authorize him or her to act in distinct proceedings, although ancillary to the principal action, without being appointed and qualified for that purpose [*Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 10, 118 Cal. Rptr. 21, 529 P.2d 53* (commissioner's power as temporary judge to render temporary support orders against petitioner would not include power to hold petitioner in contempt for noncompliance with those orders); *Nierenberg v. Superior Court (1976) 59 Cal. App. 3d 611, 618, 130 Cal. Rptr. 847* (parties' original stipulation that commissioner could sit as temporary judge in criminal proceeding was no longer effective to confer judicial power on commissioner to adjudicate contempt cause which had arisen during criminal action)].

"Ancillary" proceedings are those proceedings on a separate record independent of the ruling in the stipulated cause. Proceedings that question the finality of the temporary judge's ruling, or that are a part of or a continuation of the stipulated cause, are not ancillary but direct progeny of the stipulated cause. Therefore, no further stipulation is needed for a temporary judge to determine a subsequent motion for relief from his or her ruling, such as a motion to reconsider the sustaining of a demurrer without leave to amend, a motion to vacate the judgment, or a motion to vacate an order for new trial [*McCartney v. Superior Court (1990) 223 Cal. App. 3d 1334, 1338-1339, 273 Cal. Rptr. 250*].

Basic principles of contract law may be applied to determine whether a subsequent hearing is ancillary to or the direct progeny of earlier proceedings. For example, a stipulation in a dependency proceeding authorized a temporary judge to hear "the within action" and "any new proceedings," but also allowed the parties to withdraw the stipulation "at such new proceedings." In trying to give effect to all the provisions and to reconcile any apparent conflicts, the court construed the term "within action" to include the jurisdictional and dispositional hearings, but to exclude a permanancy planning hearing as a "new proceeding" [*In re Steven A. (1993) 15 Cal. App. 4th 754, 770-772, 19 Cal. Rptr. 2d 576*

(father should have been allowed to withdraw the stipulation before the permanancy planning hearing)].

Legal Topics:

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[Reserved]

§§ 317.24[Reserved]

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§ 317.30 Governing Law

Disqualification of judges for cause is governed by *Code Civ. Proc. §§ 170-170.5*. Former *Code Civ. Proc. § 170* provides that a judge has a duty to decide any proceeding in which he or she is not disqualified. *Code Civ. Proc. § 170.1* sets forth the various grounds on which a judge shall be disqualified in accordance with certain definitions in *Code Civ. Proc. § 170.5*. *Code Civ. Proc. § 170.2* distinguishes certain relationships that do not constitute grounds for disqualification. *Code Civ. Proc. § 170.3* describes procedures by which a judge may disqualify himself or herself and by which a party may disqualify a judge. *Code Civ. Proc. § 170.4* describes the authority still left to a judge after disqualification or after the filing of a statement of disqualification by a party.

Requesting disqualification of a court-appointed temporary attorney is a different procedure from seeking disqualification of a judge under *Code Civ. Proc. § 170.3* [*Cal. Rules of Ct., Rule 2.817* (Advisory Committee Comment)]. For disqualification of a court-appointed temporary judge, see *§ 317.21[7]*. Disqualification of a party requested temporary judge also utilizes a different procedure that involves the withdrawal of the stipulation of the temporary judge. For disqualification of a party requested temporary judge, see *§ 317.22[6], [7]*.

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§ 317.31 Judge Defined

For purposes of *Code Civ. Proc. §§ 170-170.5*, "judge" means judges of the superior courts and court commissioners and referees [*Code Civ. Proc. § 170.5(a)*].

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§ 317.32 Disqualification of Appellate Justices

Code Civ. Proc. § 170 et seq. do not apply to appellate-level justices. The federal rule applies in California for the disqualification of appellate judges, whereby each appellate judge himself or herself decides whether or not the facts require recusal. The only question remaining for a higher court is whether or not an appellate proceeding wherein a biased justice participated became illegally and prejudicially unfair [*Kaufman v. Court of Appeal (1982) 31 Cal. 3d 933, 939, 940, 184 Cal. Rptr. 302, 647 P.2d 1081]* . *Code Civ. Proc. § 170.1(b)* does, however, state that a judge before whom a proceeding was tried or heard shall be disqualified from participating in any appellate review of that proceeding.

Legal Topics:

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§ 317.33 Disqualification on Remand

An appellate court, on its own motion or at the request of a party, shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order is reviewed by it [*Code Civ. Proc. § 170.1(c)*]. The power to disqualify a judge under *Code Civ. Proc. § 170.1(c)* should be used sparingly and only when the interests of justice require it [*Livingston v. Marie Callenders, Inc. (1999) 72 Cal. App. 4th 830, 840, 85 Cal. Rptr. 2d 528*].

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27-317 California Forms of Pleading and Practice--Annotated § 317.34

§ 317.34 Orders Rendered by Judge After Disqualification Void

[1] In General

Except as provided in *Code Civ. Proc. § 170.4*, a disqualified judge has no power to act in any proceeding after his or her disqualification or after the filing of a statement of disqualification until the question of disqualification has been determined [*Code Civ. Proc. § 170.4(d)*]. Disqualification occurs when the facts creating disqualification arise, not when the disqualification is established [*Christie v. City of El Centro (2006) 135 Cal. App. 4th 767, 776, 37 Cal. Rptr. 3d 718]* , and a disqualified judge's orders are void, regardless of whether they happen to have been legally correct [*Rossco Holdings, Inc. v Bank of America (2007) 149 Cal. App. 4th 1353, 1367, 58 Cal. Rptr. 3d 141]* . Orders made by a judge after disqualification are void [*Noorthoek v. Superior Court (1969) 269 Cal. App. 2d 600, 607, 75 Cal. Rptr. 61* (judge had previously disqualified self without specifying grounds)].

A judge has no authority to grant a motion for limited, partial, or conditional disqualification because no actions, other than those set forth in *Code Civ. Proc. § 170.4*, are permitted after disqualification [*Geldermann, Inc. v. Bruner (1991) 229 Cal. App. 3d 662, 665, 280 Cal. Rptr. 264* (tentative statement of decision issued before disqualification could not be adopted as statement of decision once judge disqualified self from determining posttrial issues)].

[2] Exceptions

[a] Powers Retained

A disqualified judge, notwithstanding his or her disqualification may do any of the following [*Code Civ. Proc. § 170.4(a)*]:

(1) Take any action or issue any order necessary to maintain the jurisdiction of the court pending the assignment of a judge not disqualified.

(2) Request any other judge agreed on by the parties to sit and act in his or her place.

(3) Hear and determine purely default matters.

(4) Issue an order for possession prior to judgment in eminent domain proceedings.

(5) Set proceedings for trial or hearing.

(6) Conduct settlement conferences.

[b] Power to Strike Statements of Disqualification

If a statement of disqualification is untimely filed or if on its face it discloses no legal grounds for disqualification, the trial judge against whom it was filed may order it stricken [*Code Civ. Proc. § 170.4(b)*]. A party may file no more than one statement of disqualification against a judge unless new grounds for disqualification are first learned of or arise after the first statement was filed. A judge against whom repetitive statements of disqualification, not alleging new grounds, are filed has the power to and shall strike the repetitive statements [*Code Civ. Proc. § 170.4(c)(3)*].

[c] Power to Continue Trial When Statement of Disqualification Filed After Commencement of Trial

If a statement of disqualification is filed after a trial or hearing has commenced by the start of voir dire, by the swearing of the first witness, or by the submission of a motion for decision, the judge against whom a statement of disqualification is filed may order the trial or hearing to continue, notwithstanding the filing of the statement of disqualification [*Code Civ. Proc. § 170.4(c)(1)*].

For purposes of *Code Civ. Proc. § 170.4(c)(1)*, trial has commenced when the judge has heard and ruled on motions in limine [*Eckert v. Superior Court (1999) 69 Cal. App. 4th 262, 266-267, 81 Cal. Rptr. 2d 467* (trial had commenced when motion was made after rulings on motions in limine and before voir dire had started)].

If it is determined that the judge is disqualified, all orders and rulings of that judge made after the filing of the statement of disqualification shall be vacated [*Code Civ. Proc. § 170.4(c)(1)*]. For purposes of *Code Civ. Proc. § 170.4(c)*, the trial or hearing is deemed to have commenced 10 days prior to the date scheduled for trial or hearing, as to any grounds for disqualification known before that time if [*Code Civ. Proc. § 170.4(c)(2)*]:

(1) A proceeding is filed in a single judge court or has been assigned to a single judge for comprehensive disposition; and

(2) The proceeding has been set for trial or hearing 30 or more days in advance before a judge whose name was known at the time.

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27-317 California Forms of Pleading and Practice--Annotated § 317.35

§ 317.35 Validity of Rulings Made Before Disqualification

[1] Before Disqualified Judge Has Completed Action

If grounds for disqualification are first learned of or arise after the judge has made one or more rulings in a proceeding, but before the judge has completed judicial action in a proceeding, the rulings he or she has made up to that time shall not be set aside by the judge who replaces the disqualified judge in the absence of good cause [*Code Civ. Proc. § 170.3(b)(4)*; *see, e.g.,* *Sincavage v. Superior Court (1996) 42 Cal. App. 4th 224, 231, 49 Cal. Rptr. 2d 615* (disqualification before sentencing did not invalidate judgment of conviction for criminal offenses when judge conducted trial impartially)]. The good cause exception of *Code Civ. Proc. § 170.3(b)(4)* does not apply if the grounds for disqualification arise and are learned of by the judge, but the judge mistakenly interprets the legal conclusion of the grounds requiring disqualification [*Rossco Holdings, Inc. v Bank of America (2007) 149 Cal. App. 4th 1353, 1363-1364, 58 Cal. Rptr. 3d 141]* .

It appears that case law decided prior to January 1, 1985, when *Code Civ. Proc. § 170.3* became effective, might still apply to void a judgment in a situation when the trial judge, after rendition of judgment but before hearing of a motion for new trial, remembers a ground for disqualification that existed all along [*Tatum v. Southern Pacific Co. (1967) 250 Cal. App. 2d 40, 43, 58 Cal. Rptr. 238* (trustee of stock; reasoning that it is not the establishment of disqualification but the fact of disqualification which controls)].

[2] After Disqualified Judge Has Completed Judicial Action

Neither *Code Civ. Proc. § 170.4(d)* (judge's power to act after disqualification) nor *Code Civ. Proc. § 170.3(b)(4)* (validity of judge's rulings made before disqualifying facts are discovered, but before completion of judicial action in the proceeding) applies when the disqualifying facts are discovered after judgment has been entered [*Urias v. Harris Farms, Inc. (1991) 234 Cal. App. 3d 415, 422-423, 285 Cal. Rptr. 659*].

As discussed below, it is clear that if a party raises the disqualification issue in a timely manner after the judge has completed judicial action in the proceeding and before judgment is final, the judgment is voidable [*see* *Christie v. City of El Centro (2006) 135 Cal. App.4th 767, 780, 37 Cal. Rptr. 3d 718* ; *Urias v. Harris Farms, Inc. (1991) 234 Cal.*

App. 3d 415, 424, 285 Cal. Rptr. 659]. Whether a judgment may be avoided after it is final is less clear.

More recent cases have held that when a disqualification is discovered after a judgment is rendered, the judgment is voidable, not void. The party seeking disqualification must properly raise the issue and allege facts that show the grounds for the disqualification [*Urias v. Harris Farms, Inc. (1991) 234 Cal. App. 3d 415, 423-424, 285 Cal. Rptr. 659* ; *see Church of Scientology of California v. Wollersheim (1996) 42 Cal. App. 4th 628, 655-658, 49 Cal. Rptr. 2d 620* (plaintiff's action to set aside judgment against it in prior case, filed while appeal of prior case was pending, based on alleged newly discovered evidence of judge's bias and prejudice; dismissal upheld because, due to lack of evidence and untimeliness of action, plaintiff could not show likelihood of success needed to withstand defendant's *Code Civ. Proc. § 425.16* SLAPP suit motion to strike); *Betz v. Pankow (1993) 16 Cal. App. 4th 931, 938-940, 20 Cal. Rptr. 2d 841* (extending rule to disqualified arbitrators)]. The statement of disqualification is timely if submitted at the earliest practicable opportunity after the disqualifying facts are discovered [*Urias v. Harris Farms, Inc. (1991) 234 Cal. App. 3d 415, 424-425, 285 Cal. Rptr. 659* (statement filed two days after counsel learned facts showing grounds for disqualification of judge who had granted summary judgment motion); *see Church of Scientology of California v. Wollersheim (1996) 42 Cal. App. 4th 628, 658, 49 Cal. Rptr. 2d 620* (plaintiff's action to set aside judgment against based on alleged newly discovered evidence of judge's bias and prejudice filed seven years after issue of alleged bias was first raised in the prior action was clearly too late; plaintiff failed to show likelihood of success necessary to defeat defendant's *Code Civ. Proc. § 425.16* motion to strike action as a SLAPP Suit)].

Earlier California Supreme Court cases stated that judgments made before disqualification is raised are void [*Giometti v. Etienne (1934) 219 Cal. 687, 689, 28 P.2d 913* ; *Cadenasso v. Bank of Italy (1932) 214 Cal. 562, 569, 6 P.2d 944* ; *Lindsay-Strathmore Irrigation Dist. v. Superior Court of Tulare County (1920) 182 Cal. 315, 333, 187 P. 1056*]. The recent cases, holding the judgments to be voidable rather than void, have noted that the earlier cases, based on earlier versions of the disqualification statutes, do not clearly state their underlying theory and do not uniformly accept the rule in its broadest form [*Urias v. Harris Farms, Inc. (1991) 234 Cal. App. 3d 415, 423-424, 285 Cal. Rptr. 659*]. *Cadenasso,* for example, although stating that the judgment was void and subject to attack at any time before the judgment becomes final, expressly indicated that it was not addressing the issue of whether an action to vacate the judgment would lie after the judgment became final [*Cadenasso v. Bank of Italy (1932) 214 Cal. 562, 569, 6 P.2d 944]* . Moreover, both *Giometti* and *Lindsay-Strathmore I. Dist.* involved judgments that were not yet final.

For discussion of collateral attack on judgments for lack of jurisdiction and discussion of void versus voidable judgments, see Ch. 489, *Relief From Judgments and Orders* .

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§ 317.36 Code of Judicial Ethics; Canons as Guidelines

The Code of Judicial Ethics establishes standards for ethical conduct of judges on and off the bench and is binding on them [Cal. Rules of Ct., Code Jud. Ethics, Preamble].

The Canons require a judge to disqualify himself or herself in any proceeding in which disqualification is required by law. In addition, in all trial court proceedings, a judge is required to disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification [Cal. Rules of Ct., Code Jud. Ethics, Canon 3E].

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§ 317.37 Interest in Proceeding

[1] Disqualifying Interests

The three types of interest for which a judge may be disqualified are:

- Being a party to the proceeding [*Code Civ. Proc. § 170.1(a)(4)*];

- Having personal knowledge of disputed evidentiary facts concerning the proceeding [*Code Civ. Proc. § 170.1(a)(1)*]; and

- Having a financial interest in the subject matter of, or in a party to, the proceeding [*Code Civ. Proc. § 170.1(a)(3)*; *see § 317.38*].

A "proceeding" is the action, case, cause, motion or special proceeding to be tried or heard by the judge [*Code Civ. Proc. § 170.5(f)*].

The statutory grounds for disqualification embody the ancient maxim that no person ought to be a judge in his or her own cause [*Cadenasso v. Bank of Italy (1932) 214 Cal. 562, 570, 6 P.2d 944* ; *Meyer v. City of San Diego (1898) 121 Cal. 102, 104, 53 P. 434]* , a maxim which appeals so forcefully to one's sense of justice that it has been said to be a natural right. Both natural justice and enlightened public policy demand strict observance of this principle. For in addition to being judicially sound, a decision must be rendered by a court free from the charge of interest or the taint of partiality. Otherwise, public confidence will be destroyed and judicial usefulness undermined [*see Meyer v. City of San Diego (1898) 121 Cal. 102, 104, 53 P. 434]* .

[2] Judge Is Party to Proceeding

A judge shall be disqualified from sitting or acting in any action or proceeding to which the judge, or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person is a party or an officer, director, or trustee of a party [*Code Civ. Proc. § 170.1(a)(4)*]. The third degree of relationship is to be calculated

according to the civil law system [*Code Civ. Proc. § 170.5(d)*]. The expression "to which he or she is a party" in former *Code Civ. Proc. § 170(1)* was held to mean to which he or she is a real party [*Younger v. Superior Court (1902) 136 Cal. 682, 685, 69 P. 485* (judge made party defendant to complaint in action for partition of land)] or "quasi" party, meaning a member of a group in a representative suit to protect the rights of that group and in which the judge could intervene [*Lindsay-Strathmore Irrigation Dist. v. Superior Court. (1920) 182 Cal. 315, 326, 187 P. 1056*] and made so in good faith [*Younger v. Superior Court (1902) 136 Cal. 682, 685, 69 P. 485*]. Thus, a plaintiff cannot make all the superior judges in the state save one parties to the action and thereby select his or her own judge [*Younger v. Superior Court (1902) 136 Cal. 682, 685, 69 P. 485*]. But when a judge is made a party on proper allegation, the judge cannot arbitrarily determine that this has been done in bad faith in order to work a disqualification [*see Younger v. Superior Court (1902) 136 Cal. 682, 685, 69 P. 485* (writ of certiorari issued to annul trial judge's ex parte order striking from court files a complaint making judge party defendant to action)]. A judge who is related to an officer of a corporation that is not a party of record, but is nonetheless a real party in interest, is disqualified [*see Lynip v. Alturas School District (1915) 29 Cal. App. 158, 160-161, 155 P. 109*].

[3] Judge Has Knowledge of Disputed Facts

A judge shall be disqualified if he or she has personal knowledge of disputed evidentiary facts concerning the proceeding. A judge shall be deemed to have personal knowledge if the judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is to the judge's knowledge likely to be a material witness in the proceeding [*Code Civ. Proc. § 170.1(a)(1)*]; *see People v. Williams (1997) 16 Cal. 4th 635, 653, 66 Cal. Rptr. 2d 573, 941 P.2d 752* (method of calculating degrees of relationship; finding witness to be related to judge, if at all, in fifth degree)].

This disqualifying provision is triggered only when a person with the requisite relationship to the judge is likely to be a material witness [*People v. Williams (1997) 16 Cal. 4th 635, 653, 66 Cal. Rptr. 2d 573, 941 P.2d 752*]. A material witness is one "who can give testimony ... no one else, or at least very few, can give" [*People v. Williams (1997) 16 Cal. 4th 635, 653, 66 Cal. Rptr. 2d 573, 941 P.2d 752* (quoting from Black's Law Dict. (6th ed. 1990) p. 977, col.2)]. Testimony is material only if it is "important," "more or less necessary," "going to the merits," or if it has some likelihood of affecting the outcome of the case [*People v. Williams (1997) 16 Cal. 4th 635, 653, 66 Cal. Rptr. 2d 573, 941 P.2d 752]* (quoting from Black's Law Dict. (6th ed. 1990) p. 976, col.2); witness not material witness when witness's testimony was not important or necessary to merits of case and could not have affected outcome.

For a form alleging the judge to have knowledge of disputed facts that can be included in a statement of disqualification, see *§ 317.191*.

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§ 317.38 Having Financial Interest

[1] Disqualification

A judge shall be disqualified if he or she, or a spouse, or a minor child living in the household, has a financial interest in the subject matter in the proceeding or in a party to the proceeding or if the judge or the judge's spouse is a fiduciary who has a financial interest [*Code Civ. Proc. § 170.1(a)(3)(A), (B)*; *see also* Cal. Rules of Ct., Code Jud. Ethics, Canon 4D; for a form alleging this ground that can be included in a statement of disqualification, *see § 317.192*]. Fiduciary includes any executor, trustee, guardian, or administrator [*Code Civ. Proc. § 170.5(g)*; *see also* Cal. Rules of Ct., Code Jud. Ethics, Terminology, Canon 4E]; and a judge has a duty to make reasonable efforts to inform himself or herself about his or her personal and fiduciary interests and those of his or her spouse and the personal financial interests of children living in the household [*Code Civ. Proc. § 170.1(a)(3)(C)*].

Disqualification is merited even though the judge discovers his or her holding only after judgment is rendered and even though the outcome of the case cannot substantially affect the judge's interest as trustee [*Tatum v. Southern Pacific Co. (1967) 250 Cal. App. 2d 40, 43, 58 Cal. Rptr. 238* (judgment of disqualified judge vacated; see discussion of the case at *§ 317.35[1]*)]. Furthermore, disqualification occurs whether or not the corporation in which the judge is a stockholder is a named party to the action [*City of Vallejo v. Superior Court (1926) 199 Cal. 408, 416-418, 249 P. 1084* (plaintiff in condemnation action did not make bank owning deed of trust on property sought to be condemned a party to the action; though bank could have required that it be made party)], and even if the judge disposes of his or her stock after hearing evidence in the case but before rendition of judgment [*Adams v. Minor (1898) 121 Cal. 372, 375, 53 P. 815* (judge disposed of bank stock)].

[2] "Financial Interest" Defined

"Financial interest" is defined as ownership of more than a one percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value in excess of $1,500, or a relationship as director, advisor, or other active participant in the affairs of a party, except as follows [*Code Civ. Proc. § 170.5(b)*]:

(1) Ownership in a mutual or common investment fund that holds securities is not a financial interest in

those securities unless the judge participates in the management of the fund.

(2) An office in an educational, religious, charitable, fraternal, or civic organization is not a financial interest in securities held by the organization.

(3) The proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a financial interest in the organization only if the outcome of the proceeding could substantially affect the value of the interest.

It is not clear whether "equitable interest" as used in *Code Civ. Proc. § 170.5(b)* will be interpreted so broadly as to overrule prior law holding an interest as stockholder of a holding company that owned practically all the stock of a subsidiary that was the holder of mortgage on property sought to be condemned was too remote to disqualify the trial judge [*Central Pac. Ry. Co. v. Superior Court (1931) 211 Cal. 706, 719-720, 296 P. 883*].

Code Civ. Proc. § 170.5(b) defines "financial interest" only in terms of an interest in a party and thus seems inconsistent with *Code Civ. Proc. § 170.1(a)(3)*, which specifies that a financial interest in the subject matter is also grounds for disqualification [*Code Civ. Proc. §§ 170.1(a)(3), 170.5(b)*]. If the two sections are harmonized to require disqualification for financial interest in the subject matter, or if a financial interest in the subject matter is deemed a ground for disqualification under *Code Civ. Proc. § 170.1(a)(6)* (interests of justice require recusal or substantial doubt as to judge's capacity to be impartial), the following cases decided under former *Code Civ. Proc. § 170(a)(1)* may be helpful. They have stated the test of "interest" as follows:

"If a judge has an interest in the subject matter of an action, or property which may be directly affected by the result of a judgment that may be rendered, the court does not consider the extent of the interest nor inquire into the effect it would have on rulings. It is sufficient to disqualify a judge if there is a certain, definable, pecuniary, or proprietary interest or relation which will be directly affected by a judgment that may be rendered" [*Hall v. Superior Court (1926) 198 Cal. 373, 379, 245 P. 814* ; *Lindsay-Strathmore I. Dist. v. Superior Court (1920) 182 Cal. 315, 329-330, 187 P. 1056* ; *see Meyer v. City of San Diego (1898) 121 Cal. 102, 104, 53 P. 434*].

For example, if the validity of a special property tax is the subject of the litigation whose outcome will, without any further official action, prevent or impose a tax on the judge's property, he or she is disqualified [*Meyer v. City of San Diego (1898) 121 Cal. 102, 110-111, 53 P. 434* (action to set aside contract and enjoin issuance and sale of bonds to carry out contract)].

The same rule applies if the judge's property is directly affected by his or her decision. For example, it applies when a judge's decision will stop the flow of mining tailings onto his or her property [*North Bloomfield G.M. Co. v. Keyser (1881) 58 Cal. 315, 323*], prevent the diversion of underground water under his or her land [*Lindsay-Strathmore I. Dist. v. Superior Court (1920) 182 Cal. 315, 336, 187 P. 1056*], or enjoin the use of a canal by an irrigation district within which he or she owns land [*Hall v. Superior Court (1926) 198 Cal. 373, 383, 245 P. 814]* .

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§ 317.39 Interests That Do Not Disqualify Judge

It shall not be grounds for disqualification that the judge [*Code Civ. Proc. § 170.2*]:

(1) Is or is not a member of a racial, ethnic, religious, sexual or similar group and the proceeding involves the rights of such a group [*see also Savage v. Trammell Crow Co. (1990) 223 Cal. App. 3d 1562, 1570, 1581, 273 Cal. Rptr. 302* (action relating to free speech right to spread gospel by leafletting in a shopping center parking lot; *Section 170.2(a)* precludes disqualification on basis that judge is Roman Catholic)];

(2) Has in any capacity expressed a view on a legal or factual issue presented in the proceeding, except as provided in *Code Civ. Proc. § 170.1(a)(2)* (as lawyer to party or in similar proceeding), or *Code Civ. Proc. § 170.1(b)* or *(c)* (as judge) [*see Roth v. Parker (1997) 57 Cal. App. 4th 542, 549, 67 Cal. Rptr. 2d 250* (mere fact that judge has participated in settlement discussions is not proper ground for disqualification under *Code Civ. Proc. 170.2(b)*)]; or

(3) Has as a lawyer or public official participated in the drafting of laws or in the effort to pass or defeat laws, the meaning, effect or application of which is at issue in the proceeding unless the judge believes that his or her prior involvement was so well known as to raise a reasonable doubt in the public mind as to his or her capacity to be impartial.

Thus, a judge is not disqualified if he or she has an interest in a similar suit against the same or other defendants, or an interest in a point of law or issue of fact as such, or an interest in any general or special phase of the case, for that type of interest does not give rise to a definite, material, financial stake in the direct outcome of a particular case [*see County of Nevada v. Superior Court (1974) 10 Cal. 3d 663, 664, 111 Cal. Rptr. 568, 517 P.2d 832* ; *Goodspeed v. Great Western P. Co. (1937) 19 Cal. App. 2d 435, 444, 65 P.2d 1342*]. For example, not all nonretired superior court judges were, as such, disqualified from hearing, or proceeding in, an action in which the validity of the Governmental Conflict of Interest Act, [*see* former *Gov. Code §§ 3600-3760*] was challenged [*County of Nevada v. Superior Court (1974) 10 Cal. 3d 663, 664, 111 Cal. Rptr. 568, 517 P.2d 832* (superior court had refused to exercise its jurisdiction)].

And the mere fact that the outcome of litigation might have a conceivable effect upon a tax rate will not disqualify a judge-taxpayer [*see* *Cuyamaca Water Co. v. Superior Court of California (1924) 193 Cal. 584, 593, 226 P. 604* (action to quiet title); *Oakland v. Oakland Water Front Co. (1897) 118 Cal. 249, 252, 50 P. 268* (company claimed interest in land adverse to city's interest); *Central & West Basin Water etc. Dist. v. Wong (1976) 55 Cal. App. 3d 191, 195, 127 Cal. Rptr. 448* (action against water district might lower property taxes and water rates paid by judge presiding at trial)].

In summary, the rule is that a judge will not be disqualified unless the decision to be made would have a direct and ascertainable impact on the judge or his or her property. The impact will not be deemed to exist unless the effect of the judge's decision on his or her interest can be predicted in advance with assurance. For instance, if the decision will actually raise or lower taxes on the judge's property, or if his or her costs for water will be increased or reduced, the judge is disqualified. But if these predictions cannot be made with some degree of certainty because an independent determination must be made by an independent body whose action is not a foregone conclusion, the judge is not disqualified [*Central & West Basin Water etc. Dist. v. Wong (1976) 55 Cal. App. 3d 191, 195, 127 Cal. Rptr. 448*].

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§ 317.40 Rule of Necessity Precluding Disqualification

In certain instances the rule of necessity may allow a judge to hear a case. The rule of necessity means that a judge is not disqualified to try the case because of his or her personal interest in the matter at issue if no other judge is available to hear and decide the case [*People v. Superior Court (Mudge) (1997) 54 Cal. App. 4th 407, 410, 62 Cal. Rptr. 2d 721*]. For example, when members of an appellate court panel belonged to the California Judges Association, which had filed an amicus curiae brief in support of the trial court's ruling, and the brief indicated that the majority of California trial judges and appellate justices, approximately 90 percent, belong to the Association, membership in that organization by the appellate court panel was held not to disqualify them from hearing the matter. Under *Code Civ. Proc. § 170.2(a)*, it is not a grounds of disqualification that the judge is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of the group. Some appellate panel had to hear the case and the rule of necessity allowed the appellate panel to do so in the pending matter [*People v. Superior Court (Mudge) (1997) 54 Cal. App. 4th 407, 410, 62 Cal. Rptr. 2d 721* (*Code Civ. Proc. § 170.65* declared unconstitutional); *see Olson v. Cory (1980) 27 Cal. 3d 203, 27 Cal. 3d 532, 537, 164 Cal. Rptr. 217, 178 Cal. Rptr. 568, 609 P. 2d 991, 636 P.2d 532* (rule of necessity provides that judge is not to be disqualified because of personal financial interest if no other judge or court is available)].

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§ 317.41 Related to Lawyer in Proceeding

A judge shall be disqualified if a lawyer or a spouse of a lawyer in the proceeding is the spouse, former spouse, child, sibling, or parent of the judge or the judge's spouse or if that person is associated in the private practice of law with a lawyer in the proceeding [*Code Civ. Proc. § 170.1(a)(5)*]. In construing a similar provision under prior law, disqualification was upheld despite evidence that the relative of the judge had discontinued his partnership with the attorney of record [*Johnston v. Brown (1897) 115 Cal. 694, 696, 47 P. 686*]. However, a judge is not disqualified by relationship to an attorney whose signature on papers does not constitute a bona fide appearance in the case [*Benton v. Budd (1898) 120 Cal. 329, 331, 52 P. 851*]. For a form alleging this ground that can be included in a statement of disqualification, see *§ 317.193*.

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§ 317.42 Lawyer or Former Lawyer of Party

[1] Disqualification

A judge shall be disqualified in any proceeding when he or she has served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for any party in the present proceeding or gave advice to any party in the present proceeding on any matter involved in the action or proceeding [*Code Civ. Proc. § 170.1(a)(2)(A)*]. For a form alleging this ground that can be included in a statement of disqualification, see *§ 317.194*.

A judge shall be deemed to have served as a lawyer in the proceeding if within the past two years [*Code Civ. Proc. § 170.1(a)(2)(B)*]:

- A party to the proceeding or an officer, director, or trustee of a party was a client of the judge when the judge was in the private practice of law or a client of a lawyer with whom the judge was associated in the private practice of law; or

- A lawyer in the proceeding was associated in the private practice of law with the judge.

[2] Private Practice of Law Defined

"Private practice of law" includes a fee for service, retainer, or salaried representation of private clients or public agencies, but excludes lawyers as full-time employees of public agencies or lawyers working exclusively for legal aid offices, public defender offices, or similar nonprofit entities whose clientele is by law restricted to the indigent [*Code Civ. Proc. § 170.5(e)*]. Nevertheless, a judge who served as a lawyer for or an officer of a public agency that is a party to the proceeding shall be deemed to have served as a lawyer in the proceeding if he or she personally advised or in any way represented the public agency concerning the factual or legal issues in the proceeding [*Code Civ. Proc. § 170.1(a)(2)(C)*]. "Officer of a public agency" does not include a Member of the Legislature or a state or local agency official acting in a legislative capacity [*Code Civ. Proc. § 170.5(c)*].

[3] Representation or Advice Involving Same Issues

Disqualification for having served as a lawyer for, or given advice to, any party in the present proceeding in any other proceeding or on any matter involving the same issues as the present proceeding applies to representation or advice whether or not it occurred within two years before the present proceeding. Any attorney-client relationship between the judge or any associate of the judge and any party or officer, director, or trustee of a party, as well as an association between the judge and any lawyer in the proceeding, is deemed to constitute serving in the proceeding if it occurred within the past two years [*see Code Civ. Proc. § 170.1(a)(2)(B)*]. Thus, so long as the attorney-client relationship between the judge and a party occurred more than two years before the proceeding, a judge is not necessarily prohibited from acting if the same issues are not involved [*see Reeve v. Jahn (1937) 9 Cal. 2d 244, 250, 70 P.2d 610* (judge was not disqualified when at least 30 years before he had acted as attorney and guardian ad litem for minor children of deceased wife in partition proceeding but that property was not in question in subsequent quiet title action); *Morrissey v. Gray (1911) 160 Cal. 390, 393, 117 P. 438* (judge who had previously acted as attorney for widow to secure letters of administration on estate and to set apart probate homestead was not disqualified from trying action to foreclose mortgage against estate despite having drafted mortgage being foreclosed; applying former *Code Civ. Proc. § 170* prior to 1927 amendment adding the two-year provision)]. Some "issue" must be put into controversy before disqualification is properly raised [*see Muller v. Muller(1965) 235 Cal. App. 2d 341, 343-344, 45 Cal. Rptr. 182* (no issue in controversy when defendant allowed default to be entered against him)]. Under former *Code Civ. Proc. § 170(4)*, it has been held that there must be some indication of actual participation by the judge in the previous action before grounds exist for disqualification [*People v. Peralez (1971) 14 Cal. App. 3d 368, 376, 92 Cal. Rptr. 256* (judge's name appeared as district attorney in record of defendant's prior robbery conviction)].

[4] Requirement That Advice Have Been Given to Party

Although a judge may be disqualified for having given advice to any party on any matter involved in the case [*see Code Civ. Proc. § 170.1(a)(2)(A)*], the prohibition does not extend to advice given to persons not parties to an action who are alleged to have similar causes of action with the one involved [*Lassen Irr. Co. v. Superior Court (1907) 151 Cal. 357, 362-363, 90 P. 709* (judge had counseled persons who had claims against water company similar to plaintiff's)], nor to advice given as a friend rather than in a professional capacity [*Lassen Irr. Co. v. Superior Court (1907) 151 Cal. 357, 363, 90 P. 709* (dictum)].

Under prior law when a party had served as an agent for a former client of the judge, the principal was not a party within the contemplation of former *Code Civ. Proc. § 170(a)(4)*; thus, the judge was not disqualified from acting [*see O.A. Graybeal Co. v. Cook (1936) 16 Cal. App. 2d 231, 234, 60 P.2d 525* (judge was former attorney for bank (not a party) of which holding corporation, the party, was an agent)].

[5] Served as Lawyer Within Previous Two Years

A judge shall be disqualified if he or she or a lawyer with whom he or she was associated in private practice, has served as a lawyer for a party within the past two years [*see Code Civ. Proc. § 170.1(a)(2)*]. The purpose of this provision is not only to guard jealously the actual impartiality of a judge, but also to insure public confidence; it should be liberally construed with a view to effect its objects and to promote justice [*People v. Thomas (1972) 8 Cal. 3d 518, 520, 105 Cal. Rptr. 366, 503 P.2d 1374* (decided under former *Code Civ. Proc. § 170(4)*]. Thus, when a law firm (then headed by the judge in the present case) has represented the present defendant within the past two years the judge is disqualified [*see Mayo v. Beber (1960) 177 Cal. App. 2d 544, 549, 2 Cal. Rptr. 405* (dictum decided under former *Code Civ. Proc. § 170(4)*) (but motion for new trial on grounds of disqualification was properly denied because plaintiff impliedly waived the judge's disqualification)]. On the other hand, a judge who had formerly been employed as an assistant district attorney within two years before the commencement of a prosecution for taking a vehicle in violation of former *Veh. Code § 10851* was not an "attorney or counsel for any party" within this provision of former *Code Civ. Proc. § 170(4)* [*People v. Thomas (1972) 8 Cal. 3d 518, 520-521, 105 Cal. Rptr. 366, 503 P.2d 1374*]. The court reasoned that where the offense was not committed until more than a year after the assistant district attorney's elevation to the

bench, it was unreasonable to assume that his prior representation of the People would result in conscious or unconscious bias for two years in all criminal cases in the county in which the judge had formerly served as assistant district attorney [*People v. Thomas (1972) 8 Cal. 3d 518, 520-521, 105 Cal. Rptr. 366, 503 P.2d 1374*].

[6] Waiver of Disqualification

Express waiver of disqualification for having served as an attorney in the matter in controversy is not authorized [*Code Civ. Proc. § 170.3(b)(2)*].

However, even this non-waivable ground for disqualification can be waived if the party is aware of the ground of disqualification and fails to challenge the non-disqualification by a timely petition for writ of mandate pursuant to *Code Civ. Proc. § 170.3(d)* [*People v. Barrera (1999) 70 Cal. App. 4th 541, 552, 82 Cal. Rptr. 2d 755* (treating time when parties decided to waive disqualification as the time of notice to parties of the decision that sets in motion the 10-day period for seeking review by writ of mandate)].

For further discussion of an express waiver of disqualification, see *§ 317.54*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPrior InvolvementsCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsWaivers

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27-317 California Forms of Pleading and Practice--Annotated § 317.43

§ 317.43 Bias or Prejudice

[1] Disqualification

A judge shall be disqualified in any proceeding when for any reason [*Code Civ. Proc. § 170.1(a)(6)(A)*]:

(1) The judge believes his or her recusal would further the interests of justice;

(2) The judge believes there is a substantial doubt as to his or her capacity to be impartial; or

(3) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.

Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification [*Code Civ. Proc. § 170.1(a)(6)(B)*; for a form alleging this ground that can be included in a statement of disqualification, *see § 317.195*].

Under *Code Civ. Proc. § 170.1(a)(6)(A)(iii)*, a court need not determine whether there is actual bias to order disqualification. The objective test is whether a reasonable member of the public at large, aware of all the facts, would fairly entertain doubts as to the judge's impartiality [*Christie v. City of El Centro (2006) 135 Cal. App. 4th 767, 776, 37 Cal. Rptr. 3d 718* ; *Housing Authority of the County of Monterey v. Jones (2005) 130 Cal. App. 4th 1029, 1041-1042, 30 Cal. Rptr. 3d 676* ; *Briggs v. Superior Court (2001) 87 Cal. App. 4th 312, 318-319, 104 Cal. Rptr. 2d 445* ; *Ng v. Superior Court (1997) 52 Cal. App. 4th 1010, 1024, 61 Cal. Rptr. 2d 49*]. *Code Civ. Proc. § 170.1(a)(6)* is broader than the former *Code Civ. Proc. § 170(a)(5)* which provided for disqualification when it appeared probable that, by reason of bias or prejudice on the part of the judge, a fair and impartial trial could not be had before that judge [*see Ensher, Alexander & Barsoom v. Ensher (1964) 225 Cal. App. 2d 318, 322-323, 37 Cal. Rptr. 327]* . The cases discussed in this section and the following sections that were decided under prior law and may be subject to reinterpretation under the statutory scheme enacted in 1984. For discussion of whether a financial interest in the subject matter of the proceeding could be used as a basis for disqualification under *Code Civ. Proc. § 170.1(a)(6)*, see *§ 317.38*.

Bias or prejudice consists of a mental attitude or disposition of a judge toward a party to the litigation [*Ensher, Alexander & Barsoom v. Ensher (1964) 225 Cal. App. 2d 318, 323, 37 Cal. Rptr. 327*], and if it is sufficiently serious to impair a judge's impartiality so that it appears probable that a fair trial cannot be held, a judge will be disqualified [*see* *Ensher, Alexander & Barsoom v. Ensher (1964) 225 Cal. App. 2d 318, 322-323, 37 Cal. Rptr. 327*]. A judge's remarks about the veracity of a witness who is not a party [*Evans v. Superior Court (1930) 107 Cal. App. 372, 379, 290 P. 662* (judge stated that witness had committed perjury in another matter)], and under prior law, a judge's strained relations with a party's attorney [*Higgins v. San Diego (1899) 126 Cal. 303, 314-315, 58 P. 700*] do not merit a judge's disqualification.

It has been held under former *Code Civ. Proc. § 170(5)* that disqualification requires not only a showing of bias or prejudice, but also a determination that by reason thereof, a fair and impartial trial cannot be had [*Briggs v. Superior Court (1932) 215 Cal. 336, 343, 10 P.2d 1003* (when judge charged that petitioners had misstated truth in their affidavit, it was not probable that he could preside fairly and impartially over a contempt proceeding against them); *Rohr v. Johnson (1944) 65 Cal. App. 2d 208, 211, 150 P.2d 5* (although judge had indicated that he thought the defendant honest, it was probable that he could be fair and impartial in an action to recover personal property when only issues presented were plaintiff's incompetence at time she gave property to defendant and whether gift was induced by undue influence on defendant's part)].

[2] No Disqualification for Bias to Pass on Question of Law

There can be no disqualification of a judge for bias to pass on questions of law alone [*Calhoun v. Superior Court (1958) 51 Cal. 2d 257, 260-261, 331 P.2d 648* (but judge was disqualified because issues before court not limited to issues of law where conviction of criminal defendant might result in motion for new trial and in passing on that motion, court's duty would be to consider weight of evidence); *but see* *McKay v. Superior Court (1950) 98 Cal. App. 2d 770, 777, 220 P.2d 945* (holding in case involving trial for murder there was no distinction in disqualifying effect of statements of judge based on whether case was to be tried before jury or before judge sitting without a jury)]. If decided correctly, all issues of law must be decided the same way regardless of whether the judge be biased. If the issue is decided incorrectly in a lower court, presumably the error will be corrected on appeal [*Calhoun v. Superior Court (1958) 51 Cal. 2d 257, 260-261, 331 P.2d 648*].

[3] When Judge Has Belief in Perjury by Party

In deciding questions of fact, a judge may often reject the testimony of a party, but this does not necessarily indicate that he or she believes that the party was guilty of deliberate falsification [*Keating v. Superior Court of San Francisco (1955) 45 Cal. 2d 440, 443*]. The rejection of the testimony may have been the result of a consideration of the ability of the party to observe or remember, and in that situation failure to accept a party's version of the facts does not show that the judge is biased or prejudiced against him or her [*Keating v. Superior Court of San Francisco (1955) 45 Cal. 2d 440, 444*]. Nor is a judge disqualified from proceeding to try and decide a case or pass on a motion for new trial because he or she states during the course of the trial that in his or her opinion a party has deliberately given false testimony, provided the opinion of the judge is based upon a consideration of the evidence produced [*see* *Kreling v. Superior Court (1944) 25 Cal. 2d 305, 312-313, 153 P.2d 734* (judge rendered decision as to affirmative defense raised in one case which was to be raised in other subsequent cases; because cases were consolidated, however, subsequent hearings were not considered to be retrials and judge was not disqualified from hearing them); *Fishbaugh v. Fishbaugh (1940) 15 Cal. 2d 445, 456, 101 P.2d 1084* (judge was not disqualified when claim of disqualification was not made in connection with retrial of action)]. It is the duty of a judge when acting as the trier of the facts to pass on the credibility of witnesses, and if he or she believes that a party has testified falsely, and chooses to say so rather than remain silent, he or she is not disqualified from proceeding to render judgment [*Keating v. Superior Court (1955) 45 Cal. 2d 440, 444*].

The rule is different, however, and a judge is disqualified from the retrial of a case when he or she has stated during the

course of the prior trial that he or she believes a party has done one of the following things:

- Willfully sworn falsely [*Keating v. Superior Court (1955) 45 Cal. 2d 440, 444, 289 P.2d 209* (judge so stated after conclusion of testimony in fraudulent conversion action); but see *Taliaferro v. Taliaferro (1962) 203 Cal. App. 2d 642, 647, 21 Cal. Rptr. 864* (judge not disqualified when, in a wholly different prior action, he had "thought of" referring the defendant to the district attorney for perjury but had subsequently apologized to defendant in chambers and had not referred the matter); *McEwen v. Occidental Life Ins. Co. (1916) 172 Cal. 6, 11, 155 P. 86* (when judge commented that he did not see how jurors could possibly have reached their particular verdict, he was not considered to have charged any party with perjury)];

- Has willfully misstated the facts [*Evans v. Superior Court (1930) 107 Cal. App. 372, 382-383, 290 P. 662* (judge likened defendant's conduct to that of a pirate)]; or

- Has knowingly made false statements in an affidavit [*Briggs v. Superior Court of Los Angeles County (1932) 215 Cal. 336, 343, 10 P.2d 1003* (constructive contempt action)].

In these circumstances, a judge is disqualified even though his or her belief may have been founded on evidence produced during the prior trial [*see* *Keating v. Superior Court (1955) 45 Cal. 2d 440, 444, 289 P.2d 209* ; *Briggs v. Superior Court of Los Angeles County (1932) 215 Cal. 336, 343, 10 P.2d 1003]* and whether the subsequent trial is to be of the entire case or only a retrial of a single issue [*Keating v. Superior Court (1955) 45 Cal. 2d 440, 446, 289 P.2d 209* (single issue of damages)].

The rationale be hind the rule that a judge is disqualified from the retrial of a cause when he or she has expressed an opinion to the effect that a party has committed perjury in testifying at a former trial is that every litigant has the right to have his or her cause tried by one who has no preconceived opinion against his or her veracity which may preclude a full and fair consideration of the facts and the law involved [*Chastain v. Superior Court (1936) 14 Cal. App. 2d 97, 103, 57 P. 2d 982*].

[4] When Judge Has Fixed Opinion

A judge who has a fixed opinion as to some characteristic of a party such that the judge is prevented from deciding the case according to the evidence is disqualified [*see* *Adoption of Richardson (1967) 251 Cal. App. 2d 222, 232, 59 Cal. Rptr. 323* (prior to hearing at which deaf-mutes were to seek adoption of child, judge wrote to adoption bureau director and said adoption should be "nipped in the bud"; at hearing, judge indicated that he would not approve an adoption of a normal child by deaf-mutes under any circumstances); *but see* *Adoption of Schroetter (1968) 261 Cal. App. 2d 365, 369-370, 67 Cal. Rptr. 819* (judge was not disqualified for having indicated concern over fact that prospective adoptive parent had had psychiatric treatment in past)].

The *Richardson* decision court elaborated on the meaning of bias or prejudice as follows:

> "Bias equates here with partiality. Here the judge had a fixed opinion of the unfitness of petitioners solely because they were deaf-mutes. He was under some influence which so swayed his mind in one direction as to prevent his deciding the case according to the evidence. This leaning or inclination against all deaf-mutes without regard to their character, abilities and demonstrated fine qualities is inconsistent with a state of mind fully open to conviction which the evidence might produce. One whose opinion is preconceived and expressed in writing with reference to particular persons or situations is obviously inclined to that view, and considerable evidence would ordinarily be necessary before those positively expressed impressions could be removed and his mind restored to the straight line of impartiality" [*Adoption of Richardson (1967) 251 Cal. App. 2d 222, 232, 59 Cal. Rptr. 323*].

[5] Nondisqualifying Matters

[a] Listed

Examples of alleged causes of bias or prejudice that have been held under prior law to be insufficient to disqualify a judge are numerous and varied. Despite this fact, many of the cases which discuss this issue may be classified under the following five headings [*see Kreling v. Superior Court (1944) 25 Cal. 2d 305, 310-312, 153 P.2d 734* ; *In re Morelli (1970) 11 Cal. App. 3d 819, 843-844, 91 Cal. Rptr. 72* ; *Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 116-117, 62 Cal. Rptr. 274* ; *Rohr v. Johnson (1944) 65 Cal. App. 2d 208, 211, 150 P.2d 5]* :

- Erroneous rulings against a litigant.
- Opinion uttered in the discharge of judicial duty.
- Error on a question of law.
- Opinion based on actual observance in participation in legal proceedings.
- Prior information without hostility.

[b] Erroneous Rulings Against Litigant

Erroneous rulings against a litigant, even when numerous and continuous, form no ground for a charge of bias and prejudice, especially when they are subject to review on appeal [*McEwen v. Occidental Life Ins. Co. (1916) 172 Cal. 6, 10-11, 155 P. 86* (plaintiff complained that judge had generally ruled against her counsel's objections to admitting certain evidence); *Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 116, 62 Cal. Rptr. 274*)].

[c] Opinion Uttered in Discharge of Official Duty

An expression of opinion uttered by a judge, in what he or she conceives to be the discharge of official duties, is not evidence of bias or prejudice [*Kreling v. Superior Court (1944) 25 Cal. 2d 305, 310-312, 153 P.2d 734* ; *see People v. Brown (1993) 6 Cal. 4th 322, 336-337, 24 Cal. Rptr. 2d 710, 862 P.2d 710* (judge's ex parte communications with juror, defense investigator, and defense counsel arising out of frustration with counsel's investigation of irrelevant matters did not rise to level requiring disqualification); *McEwen v. Occidental Life Ins. Co. (1916) 172 Cal. 6, 11, 155 P. 86* (judge's remark that he did not know how jury could possibly have reached such verdict indicated perhaps that he had formed an opinion regarding the legal questions presented in the case); *Taliaferro v. Taliaferro (1962) 203 Cal. App. 2d 642, 646-647, 21 Cal. Rptr. 864* (judge "thought of" referring defendant to district attorney for perjury but later apologized and did not refer matter); *Wampler v. Muller (1953) 121 Cal. App. 2d 396, 398, 262 P.2d 853* (judge stated in writing to counsel that he believed that counsel's motion for a new trial had more than usual merit when it was hard to believe jury's verdict)].

[d] Error on Question of Law

A judge's error as to a question of law does not constitute bias or prejudice [*In re Morelli (1970) 11 Cal. App. 3d 819, 849, 91 Cal. Rptr. 72* (judge refused to shorten or extend time for court procedures); *Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 116, 62 Cal. Rptr. 274* (judge denied petitions for stay of judgment on three occasions); *Estate of Buchman (1955) 132 Cal. App. 2d 81, 104, 281 P.2d 608* (judge denied due process to executor); *Ryan v. Welte (1948) 87 Cal. App. 2d 888, 895, 198 P.2d 351* (judge ruled that plaintiff could not state a cause of action)]. This is true no matter how gross the error, since a litigant cannot substitute proceedings for disqualification for his or her remedy of appeal [*Ryan v. Welte (1948) 87 Cal. App. 2d 888, 893, 895, 198 P.2d 351*].

[e] Opinion Based on Observance of Proceedings

When a judge's state of mind appears to be adverse to a party, but the adversity is based on his or her actual observance of witnesses and evidence given, the judge's attitude does not amount to that prejudice against a party which disqualifies the judge [*People v. Yeager (1961) 55 Cal. 2d 374, 391, 10 Cal. Rptr. 829, 359 P.2d 261* (judge's remand of juvenile defendant to justice court and raising amount of bail were determinations based on facts before him); *Kreling v. Superior Court (1944) 25 Cal. 2d 305, 312, 153 P.2d 734* (judge decided question of fact during first of four consolidated trials); *Haldane v. Haldane (1965) 232 Cal. App. 2d 393, 395, 42 Cal. Rptr. 828* (judge's attitude toward parties to divorce action developed during course of trial)]. The rationale behind this rule is that it is the judge's duty to consider and pass on evidence produced and, when it is in conflict, to resolve the conflict in favor of the party whose evidence outweighs that of the opposing party [*People v. Yeager (1961) 55 Cal. 2d 374, 391, 10 Cal. Rptr. 829, 359 P.2d 261* (criminal prosecution for robbery)].

[f] Prior Information Without Hostility

A judge's prior knowledge or opinions on the background of a case or a party to the case, which are so inconsequential as to be no indication whatsoever of hostility, are not probative of any bias or prejudice [*In re Morelli (1970) 11 Cal. App. 3d 819, 845-846, 91 Cal. Rptr. 72* (actions of judge which were not pertinent to issues of contempt action); *Rohr v. Johnson (1944) 65 Cal. App. 2d 208, 211, 150 P.2d 5* (judge believed in honesty and uprightness of defendant but issues involved did not necessarily concern his honesty); *Goodspeed v. Great Western P. Co. (1937) 19 Cal. App. 2d 435, 447-449, 65 P.2d 1342* (judge had acquired data as to status of defendant's predecessor company during an investigation some 15 years before when he was attorney; any informed member of community would have same knowledge)].

[6] Review in Superior Court Appellate Division

Code Civ. Proc. § 170.1(a)(6)(C) is broad enough to require the disqualification of a judge from an appellate panel reviewing a judgment where that same judge heard a pretrial matter involving a contested factual or legal issue related to the merits, or made a procedural determination that had a substantial effect on the ultimate outcome, or where the determination, though not directly appealable, is related to an issue on appeal from the final judgment [*Housing Authority of the County of Monterey v. Jones (2005) 130 Cal. App. 4th 1029, 1041-1042, 30 Cal. Rptr. 3d 676*]. Disqualification under these circumstances is required under *Code Civ. Proc. § 170.1(a)(6)(C)* even though the pretrial proceeding heard by the judge is not the one on appeal [*Housing Authority of the County of Monterey v. Jones (2005) 130 Cal. App. 4th 1029, 1042, 30 Cal. Rptr. 3d 676*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsAppearance of PartialityCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPersonal Bias

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§ 317.44 Physical Impairment

A judge must be disqualified when, by reason of permanent or temporary physical impairment, he or she is unable to properly perceive the evidence or properly conduct the proceedings [*Code Civ. Proc. § 170.1(a)(7)*; for a form alleging this ground that can be included in a statement of disqualification, *see § 317.196*]. However, this ground of disqualification is waived by failure to urge it at the earliest practicable opportunity after the facts constituting the ground of disqualification were discovered [*People v. Pratt (1962) 205 Cal. App. 2d 838, 846, 23 Cal. Rptr. 469* (objection that trial judge was blind and unable to perceive evidence in criminal prosecution was waived when party failed to timely raise it in trial court)].

For a further discussion of waiver, see *§§ 317.55, 317.56*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-317 California Forms of Pleading and Practice--Annotated § 317.44A

§ 317.44A Prospective Employment as Dispute Resolution Professional

A judge must be disqualified when he or she has a current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral or is participating in, or, within the last two years has participated in, discussions regarding prospective employment or service as a dispute resolution neutral, or has been engaged in such employment or service, and any of the following applies [*Code Civ. Proc. § 170.1(a)(8)(A)*]:

- The arrangement is, or the discussion was, with a party to the proceeding;

- The matter before the judge includes issues relating to the enforcement of an agreement to submit a dispute to alternative dispute resolution or the appointment or use of a dispute resolution neutral;

- The judge directs the parties to participate in an alternative dispute resolution process in which the dispute resolution neutral will be an individual or entity with whom the judge has the arrangement, has previously been employed or served, or is discussing or has discussed the employment or service; or

- The judge will select a dispute resolution neutral or entity to conduct an alternative dispute resolution process in the matter before the judge, and among those available for selection is an individual or entity with whom the judge has the arrangement, with whom the judge has previously been employed or served, or with whom the judge is discussing or has discussed the employment or service.

The statute specifies that "party" includes the parent, subsidiary, or other legal affiliate of any entity that is a party and is involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding. "Dispute resolution neutral" means an arbitrator, mediator, temporary judge, referee, special master, neutral evaluator, settlement officer, or settlement facilitator. "Participating in discussions" or "has participated in discussion" means that the judge solicited or otherwise indicated an interest in accepting or negotiating possible employment or service as an alternative dispute resolution neutral or responded to an unsolicited statement regarding, or an offer of, such employment or service by expressing an interest in that employment or service, making any inquiry regarding the employment or service, or encouraging the person making the statement or offer to provide additional information about that possible employment

or service. If a judge's response to an unsolicited statement regarding, a question about, or offer of, prospective employment or other compensated service as a dispute resolution neutral is limited to responding negatively, declining the offer, or declining to discuss such employment or service, that response does not constitute participating in discussions [*Code Civ. Proc. § 170.1(a)(8)(B)*].

Grounds for disqualification under *Code Civ. Proc. § 170.1(a)(8)(A)* apply when they both arise and are learned of, not when the judge understands their legal significance [*Rossco Holdings, Inc. v Bank of America (2007) 149 Cal. App. 4th 1353, 1363, 58 Cal. Rptr. 3d 141]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-317 California Forms of Pleading and Practice--Annotated § 317.45

§ 317.45 Voluntary Disqualification by Judge

If a judge determines himself or herself to be disqualified, the judge must notify the presiding judge of the court of his or her recusal and must not further participate in the proceeding, except as provided in *Code Civ. Proc. § 170.4* (powers of disqualified judge), unless his or her disqualification is waived by the parties pursuant to *Code Civ. Proc. § 170.3(b)* [*Code Civ. Proc. § 170.3(a)(1)*; for discussion of *Code Civ. Proc. § 170.3(b), see § 317.54*].

If the judge disqualifying himself or herself is the only judge or the presiding judge of the court, the notification must be sent to the person having authority to assign another judge to replace the disqualified judge [*Code Civ. Proc. § 170.3(a)(2)*; for discussion of who has authority to replace a judge, *see § 317.51*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-317 California Forms of Pleading and Practice--Annotated § 317.46

§ 317.46 Statement of Disqualification by Party

If a judge who should disqualify himself or herself refuses or fails to do so, any party may file with the clerk a written, verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting grounds for disqualification [*see §§ 317.190 -317.196*]. The statement must be presented at the earliest practicable opportunity after discovery of the facts constituting the grounds for disqualification, and copies of the statement must be served on each party or his or her attorney who has appeared and must be personally served on the judge alleged to be disqualified, or on his or her clerk, provided that the judge is present in the courthouse or in chambers [*Code Civ. Proc. § 170.3(c)(1)*].

The verified statement of disqualification must set forth facts, not conclusions, from which a judge's disqualification for cause appears probable as to an issue or issues to be tried [*see Calhoun v. Superior Court (1958) 51 Cal. 2d 257, 260, 331 P.2d 648* (statement declaring fixed belief of judge that party was dishonest and that his testimony was unworthy of belief showed bias); *Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 117, 62 Cal. Rptr. 274* (statement declaring judge had natural bias or prejudice against constitutional rights of individual showed so little bias as to be sham and frivolous); *Ensher, Alexander & Barsoom v. Ensher (1964) 225 Cal. App. 2d 318, 323, 37 Cal. Rptr. 327* (statement declaring that, at most, judge would be unable to continue with case on remittitur if further matters would be lengthy because of judge's appointment as administrator of state agency showed no bias)]. For a form of statement, see *§ 317.190*.

It has been suggested that if there are numerous parties, one of whom challenges the qualification of a judge in the manner provided by the Code of Civil Procedure, the challenge inures to all parties [*Turkington v. Municipal Court (1948) 85 Cal. App. 2d 631, 639, 193 P.2d 795* (dictum)]. It is the fact of disqualification that is important, not who raises it [*Turkington v. Municipal Court (1948) 85 Cal. App. 2d 631, 639, 193 P.2d 795* (dictum)].

The statement must be verified in the manner provided by *Code Civ. Proc. § 446* for the verification of pleadings [*Code Civ. Proc. § 170.3(c)(1)*] or as provided in *Code Civ. Proc. § 2015.5* (declaration under penalty of perjury) or *Code Civ. Proc. § 2015.6* (written affirmation).

The written statement must be served on each party, or his or her attorney, who has appeared in the action and on the

judge alleged to be disqualified. The judge may be served personally or by service on his or her clerk, provided the judge is present in the courthouse or in chambers [*Code Civ. Proc. § 170.3(c)(1)*].

For forms of proof of service, see Ch. 518, *Service of Summons and Papers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-317 California Forms of Pleading and Practice--Annotated § 317.47

§ 317.47 Striking Legally Insufficient Statement

If a statement of disqualification is legally insufficient, a judge may disregard it or strike it from the files [*Code Civ. Proc. § 170.4(b), (c)(3)*; *Keating v. Superior Court (1955) 45 Cal. 2d 440, 443, 289 P.2d 209* (statement was adequate and therefore improperly stricken); *In re Morelli (1970)11 Cal. App. 3d 819, 850, 91 Cal. Rptr. 72* (statement was inadequate and properly stricken)], whereupon the procedure provided by *Code Civ. Proc. § 170.3(c)* is inapplicable [*Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 118, 62 Cal. Rptr. 274*]. A statement of disqualification for cause [*Code Civ. Proc. § 170.3(c)*], and the papers supporting it, may be stricken from the files when all that the papers contain are any of the following [*see In re Morelli (1970) 11 Cal. App. 3d 819, 843, 91 Cal. Rptr. 72* ; *see also In re Marriage of Lemen (1980) 113 Cal. App. 3d 769, 789-791, 170 Cal. Rptr. 642*]:

- Conclusions.
- References to copious transcripts without citation to specific excerpts.
- Allegations of facts not pertinent or appropriate to the issues to be determined in the hearing.
- Material not legally indicative of bias or prejudice, such as judicial opinions expressed in discharge of litigation and judicial ruling.
- Judicial reactions based on actual observations in legal proceedings.
- References to circumstances so inconsequential as to be no indication whatsoever of hostility and nonprobative of any bias or prejudice.

A judge may not disregard a statement of disqualification even if it is legally insufficient as a matter of law or untimely. The judge must strike the insufficient statement from the file within the 10-day period for filing a consent or answer [*Urias v. Harris Farms, Inc. (1991) 234 Cal. App. 3d 415, 421, 285 Cal. Rptr. 659]* .

A judge's powers to file an answer to a statement of disqualification under *Code Civ. Proc. § 170.3(c)(3)* and to strike a statement of disqualification under *Code Civ. Proc. § 170.4(b)* are not mutually exclusive; in other words, a judge may first file an answer and then strike a statement of disqualification as long as he or she complies with the 10-day time limit of *Code Civ. Proc. § 170.3(c)* [*PBA, LLC v. KPOD, Ltd. (2003) 112 Cal. App. 4th 965, 972-973, 5 Cal. Rptr. 3d 532*].

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§ 317.48 Additional Statements of Disqualification

A party may file no more than one statement of disqualification against a judge unless facts suggesting new grounds for disqualification are first learned of or arise after the first statement of disqualification was filed. Repetitive statements of disqualification not alleging facts suggesting new grounds for disqualification shall be stricken by the judge against whom they are filed [*Code Civ. Proc. § 170.4(c)(3)*].

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§ 317.49 Consent or Answer by Judge

Within 10 days after the statement of disqualification is filed or within 10 days after it is served, whichever is later, the judge may file a consent to the disqualification, in which case the judge shall notify the presiding judge or the person authorized to appoint a replacement of his or her recusal, or the judge may file a written verified answer admitting or denying any or all of the allegations contained in the party's statement and setting forth any additional facts material or relevant to the question of his or her disqualification [*Code Civ. Proc. § 170.3(c)(3)*; *see also Oak Grove School Dist. v. City Title Ins. Co. (1963) 217 Cal. App. 2d 678, 702, 32 Cal. Rptr. 288]* . The clerk must forthwith transmit a copy of the consent or answer to each party or his or her attorney who has appeared in the proceeding [*Code Civ. Proc. § 170.3(c)(3)*].

Without conceding his or her disqualification, a judge whose impartiality has been challenged by the filing of a written statement may request any other judge agreed on by the parties to sit and act in his or her place [*Code Civ. Proc. § 170.3(c)(2)*; for a stipulation by the parties, *see § 317.199*].

A judge who fails to file a consent or answer within the time allowed shall be deemed to have consented to his or her disqualification and the clerk shall notify the presiding judge or person authorized to appoint a replacement [*Code Civ. Proc. § 170.3(c)(4)*]. This automatic disqualification for failure to answer under *Code Civ. Proc. § 170.3(c)(4)* does not require that the statement of disqualification be sufficient as a matter of law or timely. The judge may not ignore such a statement. Even if the statement is insufficient or untimely, the judge will be disqualified if he or she does not answer or strike the statement from the file within the 10-day period for filing a consent or answer [*Urias v. Harris Farms, Inc. (1991) 234 Cal. App. 3d 415, 421, 285 Cal. Rptr. 659* (construing *Code Civ. Proc. §§ 170.3(c)(4), 170.4(b)*)].

For a discussion of a judge's power to strike or ignore an insufficient statement of disqualification see *§ 317.47*.

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§ 317.50 Determination of Disqualification

A judge who refuses to recuse himself or herself shall not pass on his or her own disqualification. Rather, all questions concerning the judge's disqualification must be heard and determined by another judge [*Code Civ. Proc. § 170.3(c)(5)*]. The judge to hear the questions may be agreed on by the parties who have appeared in the case [*see § 317.198*] or, if they fail to agree within five days after notification of the judge's answer, the clerk must notify the Executive Officer of the Judicial Council of the need for a selection. The chairperson of the Judicial Council, or the vice-chairperson if the chairperson is unable to act, will make the selection as expeditiously as possible. No challenge may be made, for cause or otherwise, against the judge selected to decide the question of disqualification [*Code Civ. Proc. § 170.3(c)(5)*]. Additionally, the parties may impliedly agree on a judge to determine disqualification as would be the case if the party claiming disqualification voluntarily chooses to have the hearing before a named judge and the other party makes no objection and participates in the hearing [*Donovan v. Superior Court (1952) 39 Cal. 2d 848, 853, 250 P.2d 246*].

If a judge chooses to appear and contest a disqualification for cause under *Code Civ. Proc. § 170.1*, he or she may request representation by the county counsel [*see Gov. Code § 27647*].

The judge deciding the question of disqualification may decide the question on the basis of the statement of disqualification and answer and any written arguments the judge requests, or the judge may set the matter for hearing as promptly as practicable. If a hearing is ordered, the judge shall permit the parties and the judge alleged to be disqualified to argue the question of disqualification and shall for good cause shown hear evidence on any disputed issue of fact. If the judgment deciding the question of disqualification determines that the judge is disqualified, the judge hearing the question shall notify the presiding judge or the person having authority to appoint a replacement of the disqualified judge [*Code Civ. Proc. § 170.3(c)(6)*].

Apparently, the qualified judge selected by both parties to hear and determine the matter of a judge's disqualification need not be a judge of the same court. Furthermore, any judge selected by the parties to hear and determine the matter of a judge's disqualification must be an active, not a retired, judge, and the judge selected may refuse to serve unless assigned by the presiding judge of the court where the matter is pending or by the Chairperson of the Judicial Council [*see 62 Ops. Cal. Att'y Gen. 295 (1979)]* .

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§ 317.51 Selection of Nondisqualified Judge to Try Main Case

If a judge is disqualified by in any of the following ways, the main case must be heard and determined by another judge who is not disqualified [*see Code Civ. Proc. § 170.3(a)(1), (c)(6)*]:

- Admitting disqualification.
- Filing a written consent to disqualification.
- Failing to file an answer within 10 days.
- Being determined to be disqualified in a hearing.

There are several methods for selecting a new judge. The parties may agree on a nondisqualified judge [*see § 317.199*], and if this is done, the disqualified judge may request that the new judge sit and act in his or her place [*Code Civ. Proc. § 170.4(a)(2)*]. Or, if the parties fail to agree, the presiding judge must assign a nondisqualified judge to hear and determine the case [*Code Civ. Proc. § 170.3(a), (c)(6)*]. If the disqualified judge is the presiding judge, the judge appointed to act in the absence or inability of the presiding judge would make the appointment [*see Code Civ. Proc. § 170.3(a)(2), (c)(6)*]. When the disqualified judge is the only judge of the court or there is no judge of the court who is qualified to hear the matter, the chairperson of the Judicial Council must assign a judge to hear the matter [*Code Civ. Proc. §§ 170.3(a)(2), (c)(6), 170.8*].

A determination of the question of the disqualification of a judge is reviewable only by writ of mandate from the appropriate court of appeal sought within 10 days of notice to the parties of the decision [*Fink v. Shemtov (2010) 180 Cal. App. 4th 1160, 1176, 103 Cal. Rptr. 3d 509]* .

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§ 317.52 Review of Determination Regarding Disqualification

A determination of the question of a judge's disqualification is not an appealable order. It may be reviewed only by writ of mandate from the appropriate court of appeal and sought only by the parties to the proceeding. The petition for the writ must be filed and served within 10 days after service of written notice of the entry of the court's order determining the question of disqualification [*Code Civ. Proc. § 170.3(d)*]. *Code Civ. Proc. § 170.3(d)* bars review of the issue on appeal after the final judgment [*see People v. Williams (1997) 16 Cal. 4th 635, 652, 66 Cal. Rptr. 2d 573, 941 P.2d 752* (*Code Civ. Proc. § 170.1* disqualification claim was not properly raised on appeal because of defendant's failure to pursue *Code Civ. Proc. § 170.3(d)* procedure); *People v. Hull (1991) 1 Cal. 4th 266, 269-270, 276, 2 Cal. Rptr. 2d 526, 820 P.2d 1036* (applying *Code Civ. Proc. § 170.3(d)* to peremptory challenges under *Code Civ. Proc. § 170.6*); *Fink v. Shemtov (2010) 180 Cal. App. 4th 1160, 1176, 103 Cal. Rptr. 3d 509* (attempt to challenge trial court's order striking party's statement of disqualification by way of appeal is improper); *Roth v. Parker (1997) 57 Cal. App. 4th 542, 549, 67 Cal. Rptr. 2d 250* (order denying *Code Civ. Proc. § 170.1* motion not appealable); *In re Sheila B. (1993) 19 Cal. App. 4th 187, 194-195, 23 Cal. Rptr. 2d 482* (order granting *Code Civ. Proc. § 170.6* motion not appealable)].

It has been held that *Code Civ. Proc. § 170.3(d)* does not insulate a final judgment from appellate attack on a constitutional due process claim that a judge was biased. *Section 170.3(d)* applies to all statutory judicial disqualification claims, even if based on statutory provisions that appear to codify due process grounds. But *Section 170.3(d)* does not bar review, on appeal from a final judgment, of nonstatutory claims that a final judgment is constitutionally invalid because of judicial bias [*People v. Brown (1993) 6 Cal. 4th 322, 335-336, 24 Cal. Rptr. 2d 710, 862 P.2d 710* ; *see People v. Williams (1997) 16 Cal. 4th 635, 652 n.5, 66 Cal. Rptr. 2d 573, 941 P.2d 752*]. However, a party may forfeit the constitutional claim by failing to raise the issue by statutory means [*Roth v. Parker (1997) 57 Cal. App. 4th 542, 548-549, 67 Cal. Rptr. 2d 250* (constitutional issue waived); *see People v. Brown (1993) 6 Cal. 4th 322, 336, 24 Cal. Rptr. 2d 710, 862 P.2d 710* (litigant should use statutory procedure and negligent failure to do so may constitute forfeiture of the constitutional claim; finding no forfeiture because defendant had sought writ relief as required by *Section 170.3(d)*, but relief was summarily denied)]. Moreover, in civil cases constitutional questions must be raised at the earliest opportunity or will be considered to be waived [*Roth v. Parker (1997) 57 Cal. App. 4th 542, 549, 67 Cal. Rptr. 2d 250]* .

If a party is afforded oral argument and a written opinion on writ review, the law-of-the-case doctrine may preclude assertion of the issue on appeal [*People v. Brown (1993) 6 Cal. 4th 322, 336 n.11, 24 Cal. Rptr. 2d 710, 862 P.2d 710]* .

Only parties to the proceeding can petition for the writ [*Code Civ. Proc. § 170.3(d)*].

Prohibition may, however, be the appropriate remedy if a judge exceeds the limited powers of a disqualified judge, as opposed to making a determination of the question of disqualification [*compare Code Civ. Proc. § 170.3(d)* (mandate to review determination of question of disqualification) with *Code Civ. Proc. § 1102* (prohibition to arrest proceedings in excess of jurisdiction of tribunal)].

In addition, disqualification may become a basis for attack by action or motion on the judgment itself when the ground of disqualification is not known until after judgment [*see Cadenasso v. Bank of Italy (1932) 214 Cal. 562, 566-567, 6 P.2d 944* ; *see also § 317.56*].

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§ 317.53 Who Are "Parties to the Proceedings" for Purposes of Review of Determination Under Code Civ. Proc. § 170.3(d)

Only parties to the proceeding can petition for a writ of mandate on the question of a judge's disqualification [*Code Civ. Proc. § 170.3(d)*]. In construing the term "parties to the proceeding" for purposes of *Code Civ. Proc. § 170.3(d)*, the Supreme Court has held that even assuming the word "parties" in *Section 170.3(d)* were susceptible to an interpretation that includes an allegedly disqualified judge who files an answer to a statement of disqualification, the governing statutes compel the conclusion that such a judge is not one of "the parties *to the proceeding*" [*italics added*] referred to in *Section 170.3(d)* [*Curle v. Superior Court (2001) 24 Cal. 4th 1057, 1062-1066, 103 Cal. Rptr. 2d 751*]. Although the hearing to decide a disqualification motion pursuant to *Code Civ. Proc. § 170.3* might be considered a proceeding as that term ordinarily is understood, such a hearing is not a proceeding as defined in *Code Civ. Proc. § 170.5*, which sets forth controlling definitions of several terms used in *Code Civ. Proc. § 170* through *Code Civ. Proc. § 170.5* [*Curle v. Superior Court (2001) 24 Cal. 4th 1057, 1064-1066, 103 Cal. Rptr. 2d 751]* .

The Supreme Court noted that a "proceeding" is defined as "the action, case, cause, motion, or special proceeding *to be tried or heard by the judge*" [*Code Civ. Proc. § 170.5(f), italics added*]. Thus the only reasonable construction of this language is that "the judge" is the individual alleged to be disqualified from hearing or trying a matter that has not yet been decided; therefore, the proceeding referred to must be the underlying proceeding. The court concluded that, because *Section 170.5(f)*, establishes that the "proceeding" to which *Section 170.3(d)* refers is the underlying proceeding, the "parties to the proceeding" within the meaning of *Section 170.3(d)* are the litigants in the underlying action or proceeding--and not the judge alleged to be disqualified from presiding over that action or proceeding. Likewise, because *Section 170.3(d)* expressly states that *only* the parties to the proceeding may seek writ review of a disqualification order, the Supreme Court reasoned that the Legislature clearly intended that those parties possess the exclusive right to file a petition for writ of mandate pursuant to this provision [*Curle v. Superior Court (2001) 24 Cal. 4th 1057, 1065-1066, 103 Cal. Rptr. 2d 751* (this view was further bolstered by analysis of draft legislation stating that "The right to seek review by mandate is limited to the parties (thereby excluding the judge). ..." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 598 (1983-1984 Reg. Sess.) at p.15)].

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§ 317.54 Express Waiver of Disqualification

A judge who determines himself or herself to be disqualified, may, after disclosing the basis for his or her disqualification on the record, ask the parties and their attorneys whether they wish to waive the disqualification. A waiver of disqualification must recite the basis for the disqualification, and is effective only when signed by all parties and their attorneys and filed in the record [*Code Civ. Proc. § 170.3(b)(1)*]. Waiver is not available, however, if the basis of disqualification is either of the following [*Code Civ. Proc. § 170.3(b)(2)*]:

(1) The judge has a personal bias or prejudice concerning a party, or

(2) The judge served as an attorney in the matter in controversy, or has been a material witness concerning that matter.

The judge shall not seek to induce a waiver and shall avoid any effort to discover which lawyers or parties favored or opposed a waiver of disqualification [*Code Civ. Proc. § 170.3(b)(3)*]. For a form of stipulation waiving disqualification, see *§ 317.197*.

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§ 317.55 Waiver of Chance to Disqualify Judge by Default

Notwithstanding his or her disqualification or the existence of grounds for disqualification, a judge may still hear and determine purely default matters [*Code Civ. Proc. § 170.4(a)(3)*].

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§ 317.56 Waiver of Chance to Disqualify Judge by Delay

[1] Earliest Practicable Opportunity

The statement of disqualification must be presented at the earliest practicable opportunity after discovery of the facts constituting the ground of disqualification [*Code Civ. Proc. § 170.3(c)(1)*; *see Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal. App. 3d 143, 150* ; *Mayo v. Beber (1960) 177 Cal. App. 2d 544, 550, 2 Cal. Rptr. 405]* ; otherwise, it is deemed waived [*see Caminetti v. Pac. Mutual L. Ins. Co. (1943) 22 Cal. 2d 386, 391, 139 P.2d 930* ; *Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal. App. 3d 143, 150, 91 Cal. Rptr. 193* ; *Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 115, 62 Cal. Rptr. 274* ; *Mayo v. Beber (1960) 177 Cal. App. 2d 544, 550, 2 Cal. Rptr. 405*]. This rule applies even if grounds for disqualification are not discovered until after entry of judgment [*see Urias v. Harris Farms, Inc. (1991) 234 Cal. App. 3d 415, 424-425, 285 Cal. Rptr. 659* ; *see also Church of Scientology of California v. Wollersheim (1996) 42 Cal. App. 4th 628, 655-656, 49 Cal. Rptr. 2d 620*].

The rationale behind the rule is that it is intolerable to permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he or she is aware, and thereby permitting the proceedings to go to a conclusion which a party may acquiesce in if favorable and which he or she might avoid if not [*see Keating v. Superior Court (1955) 45 Cal. 2d 440, 446, 289 P.2d 209* ; *Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal. App. 3d 143, 150, 91 Cal. Rptr. 193]* .

However, even if the issue is not raised at trial, an appellate court may consider a claim that the judge was biased against a party on the basis of gender in presiding at trial. A party need not confront a judge with his or her alleged bias in presiding at trial, and does not waive the claim by failing to raise it at trial [*see Catchpole v. Brannon (1995) 36 Cal. App. 4th 237, 244-245, 42 Cal. Rptr. 2d 440* ; for discussion, *see Ch. 41, Appeal: Review Standards and Appellate Rule of Law, § 41.10[4][b]*].

[2] Determining Timeliness

Although there is no pat formula for determining timeliness in these situations, the key factor, rather than being the time which elapses before the challenge is made, seems to be whether or not the party knew of the disqualifying facts, but

delayed to raise them until the time an unfavorable judgment or ruling is made. In the following cases, for example, the parties waived the claimed grounds of disqualification by asserting them too late:

- *Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 838, 69 Cal. Rptr. 321, 442 P.2d 377* (motion to disqualify pursuant to former *Code Civ. Proc. § 170(4)* [former counsel] made orally at time of argument on demurrer to second amended complaint when same judge had heard and ruled on demurrer to first amended complaint two months before);

- *Sacramento and San Joaquin Drainage Dist. v. Jarvis (1959) 51 Cal. 2d 799, 802, 336 P.2d 530* (disqualification pursuant to former *Code Civ. Proc. § 170(6)* [public works] was orally waived at trial; then an objection was raised several years after trial);

- *Caminetti v. Pac. Mutual L. Ins. Co. (1943) 22 Cal. 2d 386, 391-392, 139 P.2d 930* (party knew during trial that judge's sister owned stock and had joined in written stipulation waiving that ground of disqualification in a connected action; party failed to challenge in present action until three months later when judge denied motion to set aside voting trust);

- *Tri Counties Bank v. Superior Court (2008) 167 Cal. App. 4th 1332, 1338, 84 Cal. Rptr. 3d 835* (disqualification claim untimely where party waited seven months before asserting the alleged ground for disqualification, even where appellate court stay of trial court proceedings was in effect for part of that time);

- *In re Farr (1974) 36 Cal. App. 3d 577, 582-583, 111 Cal. Rptr. 649* (at commencement of contempt hearing petitioner had said no challenge for bias [former *Code Civ. Proc. § 170(5)*] would be raised then later raised challenge for first time in hearing to purge contempt);

- *Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal. App. 3d 143, 149, 150, 91 Cal. Rptr. 193* (motion to disqualify for bias [former *Code Civ. Proc. § 170(5)*] which was filed first time in motion for new trial could have been urged during trial when judge made challenged comments);

- *Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 115, 62 Cal. Rptr. 274* (motion to disqualify for bias [former *Code Civ. Proc. § 170(5)*] filed 11 days before appeal was calendared for oral argument when counsel had known for over one year that judge sought to be disqualified was judge scheduled to hear appeal);

- *Mayo v. Beber (1960) 177 Cal. App. 2d 544, 551-552, 2 Cal. Rptr. 405* (motion to disqualify pursuant to former *Code Civ. Proc. § 170(4)* [former counsel] when plaintiff's counsel had known about previous case in which law firm then headed by judge had represented defendant, but counsel waited until after adverse verdict was recorded to make motion);

- *Lagies v. Copley (1981) 110 Cal. App. 3d 958, 965-966, 168 Cal. Rptr. 368 , overruled on other grounds in Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 738 n.23, 257 Cal. Rptr. 708, 771 P.2d 406* (plaintiff learned of facts forming basis for disqualification before hearing on demurrer, but did not urge disqualification until after judge had sustained demurrer).

On the other hand, a statement of disqualification is timely when it is presented promptly after the complaining party learns, after reversal, that the case is to be set for trial before the same judge [*Keating v. Superior Court (1955) 45 Cal. 2d 440, 447, 289 P.2d 209]* ; when it is filed two days after counsel learns facts showing grounds for disqualification of the judge who had granted a summary judgment motion [*Urias v. Harris Farms, Inc. (1991) 234 Cal. App. 3d 415, 424-425, 285 Cal. Rptr. 659]* ; when it is filed immediately after a judge's voluntary disqualification

is set aside on the ground that the judge should not have disqualified himself pursuant to *Code Civ. Proc. § 170.6* [*Oak Grove School Dist. v. City Title Ins. Co. (1963) 217 Cal. App. 2d 678, 704, 32 Cal. Rptr. 288*]; or when parties to an action have no way of knowing of the grounds of disqualification until after the hearing, then promptly move to vacate judgment and hold a new trial [*Adoption of Richardson (1967) 251 Cal. App. 2d 222, 236-237, 59 Cal. Rptr. 323* (petitioners in adoption case had no way of knowing extent of judge's bias and prejudice until after the hearing when they read judge's letter to adoption bureau director)].

[3] Power of Challenged Judge to Strike Untimely Statement

Just as a challenged judge may determine a statement of disqualification to be legally insufficient and disregard it or strike it from the file [*see* discussion under *§ 317.46*], so may he or she determine the statement to be not timely filed and disregard it or strike it from the record on that basis [*Code Civ. Proc. § 170.4(b)*; *see* *Blackwell v. Blackwell (1961) 190 Cal. App. 2d 520, 524, 12 Cal. Rptr. 201* (affidavit was neither legally sufficient nor timely)].

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§ 317.57 Sanctions for Challenge That Is Frivolous or Delaying Tactic

An inappropriate challenge for cause may be subject to sanctions. For complaints or petitions filed on or after January 1, 1995, and any pleadings, notices of motion, or other similar papers filed in such a matter, a motion for sanctions may be available under *Code Civ. Proc. § 128.7* [*see Code Civ. Proc. § 128.7(i), (j)* (statute applicable to actions filed after January 1, 1995; for discussion, *see* Ch. 510, *Sanctions*)].

Code Civ. Proc. § 128.5 applies to actions or tactics arising from a complaint filed or proceeding initiated on or before December 31, 1994. Under that section, a judge who has been challenged for cause is a "party" within the meaning of Section 128.5 and is entitled to seek sanctions against the challenger [*Estate of Di Grazia (1993) 13 Cal. App. 4th 681, 685, 16 Cal. Rptr. 2d 621]* . Thus, when the judge was represented in the proceedings by county counsel, the court may order the challenger to reimburse the county for its reasonable attorney's fees in opposing the statement of disqualification [*Estate of Di Grazia (1993) 13 Cal. App. 4th 681, 685, 16 Cal. Rptr. 2d 621* ($3,000 sanction for reasonable attorney's fees upheld)].

For discussion and forms relating to sanctions, see Ch. 510, *Sanctions* .

Legal Topics:

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

§§ 317.58[Reserved]

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27-317 California Forms of Pleading and Practice--Annotated § 317.70

§ 317.70 Governing Statutes

The peremptory disqualification of judges, court commissioners, and referees is governed by *Code Civ. Proc. § 170.6*. That section, by its own terms, applies to both civil and criminal actions in superior courts. It does not apply, however, to a judge designated or assigned to serve on the appellate department of a superior court in his or her capacity as a judge of such department [*Code Civ. Proc. § 170.7*], or to a justice of the Supreme Court or court of appeal. *Code Civ. Proc. § 170.1(b)*, however, disqualifies an appellate justice judge from determining, on appeal, a matter he or she tried or heard in the trial court [*Code Civ. Proc. § 170.1(b)*]. Specific time limitations for disqualification of referees appointed for discovery matters are set forth in *Code Civ. Proc. § 639(b)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-317 California Forms of Pleading and Practice--Annotated § 317.71

§ 317.71 Nature of Peremptory Challenges

In general, *Code Civ. Proc. § 170.6* permits a party to disqualify a judge, court commissioner, or referee who is alleged to be prejudiced against any party, any attorney, or the interest of any party or attorney by bringing a simple charge supported by a formal affidavit (declaration [*Code Civ. Proc. § 2015.5*]) [*see Code Civ. Proc. § 170.6*]. The right to contest qualification of the judge may be waived by not tendering a peremptory challenge and acquiescing to the jurisdiction, or by failing to file a timely objection to the ruling on that motion when made by another party [*In re Christian J. (1984) 155 Cal. App. 3d 276, 278-279, 280-281, 202 Cal. Rptr. 54*].

If a *Code Civ. Proc. § 170.6* motion is timely filed in proper form, the court must accept it without further inquiry, the disqualification is effective immediately, and as a remedial statute the statute is liberally construed in favor of the allowing the peremptory challenge and a challenge should be denied only if the statute absolutely forbids it [*Bravo v. Superior Court (2007) 149 Cal. App. 4th 1489, 1493, 57 Cal. Rptr. 3d 910* , *citing Davcon, Inc. v. Roberts & Morgan (2003) 110 Cal. App. 4th 1355, 1360, 2 Cal. Rptr. 3d 782 and Stephens v. Superior Court (2002) 96 Cal. App. 4th 54, 61-62, 116 Cal. Rptr. 2d 616]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPersonal BiasCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsWaiversCivil ProcedureJudicial OfficersRefereesRemovalsGovernmentsCourtsSpecial Judges

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27-317 California Forms of Pleading and Practice--Annotated § 317.72

§ 317.72 Constitutionality of Code Civ. Proc. § 170.6 in Civil Actions

Code Civ. Proc. § 170.6 has been upheld as constitutional as applied in civil cases [*Johnson v. Superior Court (1958) 50 Cal. 2d 693, 697-699, 329 P.2d 5* (malpractice action)]. The *Johnson* case affirmed the authority of the Legislature to enact *Code Civ. Proc. § 170.6* by noting that the Legislature may adopt reasonable rules and regulations regarding the disqualification of judges and that prejudice on the part of a judge was properly made a ground of disqualification by *Code Civ. Proc. § 170.6* [*Johnson v. Superior Court (1958) 50 Cal. 2d 693, 696, 329 P.2d 5*]. The Legislature has the power to determine that prejudice may be established by the filing of an affidavit sworn to by a party or his or her attorney, without judicial determination of the existence of that fact, as provided in *Code Civ. Proc. § 170.6* [*Johnson v. Superior Court (1958) 50 Cal. 2d 693, 697, 329 P.2d 5*]. Although this procedure for disqualification might be open to abuse by some parties, this fact does not constitute grounds for holding the provision to be unconstitutional [*see McCartney v. Commission on Judicial Qualifications (1974) 12 Cal. 3d 512, 538, 116 Cal. Rptr. 260, 526 P.2d 268* (removal of judge); *Johnson v. Superior Court (1958) 50 Cal. 2d 693, 697, 329 P.2d 5* (malpractice action)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-317 California Forms of Pleading and Practice--Annotated § 317.73

§ 317.73 Constitutionality of Code Civ. Proc. § 170.6 in Criminal and Juvenile Actions

The Supreme Court has also upheld the constitutionality of *Code Civ. Proc. § 170.6* as applied in criminal cases [*Solberg v. Superior Court (1977) 19 Cal. 3d 182, 187, 137 Cal. Rptr. 460, 561 P.2d 1148*]. The Legislature acted reasonably in making *Code Civ. Proc. § 170.6* available to obtain disqualification of a judge without having to establish prejudice as a fact, in order to ensure confidence in the judiciary and avoid the suspicion that might arise from the belief of a litigant that the judge is biased in a case when it might be difficult or impossible for the litigant to persuade a court that his or her belief is justified [*Solberg v. Superior Court (1977) 19 Cal. 3d 182, 187, 137 Cal. Rptr. 460, 561 P.2d 1148]* . An appellate court has upheld the constitutionality of *Code Civ. Proc. § 170.6* as applied in juvenile court cases as well [*Pamela H. v. Superior Court (1977) 68 Cal. App. 3d 916, 918, 137 Cal. Rptr. 612* (writ issued directing county to reassign case of minor charged with running away from home and resisting arrest to a different judge)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-317 California Forms of Pleading and Practice--Annotated § 317.74

§ 317.74 Code Civ. Proc. § 170.6 Is Cumulative Remedy to Code Civ. Proc. §§ 170-170.5 and to Venue Procedures

Code Civ. Proc. § 170.6 is not intended to limit the provisions of *Code Civ. Proc. §§ 170-170.5* (*see § 317.30* et seq.) or of *Code Civ. Proc. § 392 et seq.* (place of trial of civil actions) and is required to be construed as cumulative to those sections [*see Code Civ. Proc. § 170.6(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-317 California Forms of Pleading and Practice--Annotated § 317.75

§ 317.75 Disqualification Requirement

No judge, court commissioner, or referee may try any action or special proceeding of any kind or character or hear any matter involving a contested issue of law or of fact when it is established that he or she is prejudiced against any party or attorney appearing in the case or the interest of any such party or attorney [*Code Civ. Proc. § 170.6(a)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-317 California Forms of Pleading and Practice--Annotated § 317.76

§ 317.76 Establishing Prejudice

[1] Motion Without Notice

Any party or attorney appearing in the case may establish the prejudice by oral or written motion without notice [*Code Civ. Proc. § 170.6(a)(2)*; for written motion, *see § 317.210*].

[2] Affidavit, Declaration, or Oral Statement Required to Support Motion

The motion must be supported by an affidavit [*see § 317.211* (form)] or a declaration under penalty of perjury [*see § 317.212* (form)] or by an oral statement made under oath that the judge, commissioner, or referee before whom the case is pending or to whom it has been assigned is prejudiced against the party or attorney or the interest of the party or attorney so that the party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial or hearing before the judge, commissioner, or referee [*Code Civ. Proc. § 170.6(a)(2)*]. The party's right to disqualify a judge, commissioner, or referee for prejudice is automatic in the sense that the party's good-faith belief in the prejudice is sufficient without proof of any facts showing actual prejudice [*see Code Civ. Proc. § 170.6(a)(3)*; *see also McCartney v. Commission on Judicial Qualifications (1974) 12 Cal. 3d 512, 531-532, 116 Cal. Rptr. 260, 526 P.2d 268* (judicial removal); *Mayr v. Superior Court (1964) 228 Cal. App. 2d 60, 61, 39 Cal. Rptr. 240* (dissolution action)].

The Supreme Court has stated that it is important not only that the integrity and fairness of the judiciary be maintained, but also that the business of the courts be conducted in such a manner as will avoid suspicion of unfairness. Prejudice, being a state of mind, is very difficult to prove and, when a judge asserts that he or sheis unbiased, courts are naturally reluctant to determine that he or she is prejudiced. In order to ensure confidence in the judiciary and avoid the suspicion that might arise from the belief of a litigant that the judge is biased in a case when it may be difficult or impossible for the litigant to persuade a court that his or her belief is justified, the Legislature could reasonably conclude that a party should have an opportunity to obtain the disqualification of a judge for prejudice, on a sworn statement, without being required to establish it as a fact to the satisfaction of a judicial body [*Johnson v. Superior Court (1958) 50 Cal. 2d 693, 697, 329 P.2d 5*].

NOTE: Whether to Serve Written Motion on Parties and Challenged Judge.

Code Civ. Proc. § 170.6(a)(2) does not expressly require service of the written motion and supporting affidavit or declaration on each party, or his or her attorney, who has appeared in the action, or on the judge alleged to be prejudiced. However, the better practice is to serve such persons. If time allows, service may be by mail; otherwise, service should be by fax, overnight delivery, electronic, or personal. Depending on the stage of the proceedings at which the written motion is presented and filed, the written motion may be presented to the judge supervising the master calendar, or to the judge assigned to the trial.

For forms of proof of service, see Ch. 518, *Service of Summons and Papers* .

NOTE: Better Practice to File Declaration or Affidavit, If Written.
While *Code Civ. Proc. § 170.6(a)(3)* requires that the supporting affidavit or declaration be filed, it does not expressly require that the motion be filed. Better practice would be to file the written motion with the supporting paper.

Thus, once an affidavit (declaration) of prejudice has been filed under *Code Civ. Proc. § 170.6*, the court has no jurisdiction to hold further proceedings in the matter except to inquire into the affidavit's (declaration's) timeliness or technical sufficiency under the statute [*McCartney v. Commission on Judicial Qualifications (1974) 12 Cal. 3d 512, 531-532, 116 Cal. Rptr. 260, 526 P.2d 268* ; *Andrews v. Joint Clerks etc. Committee, (1966) 239 Cal. App. 2d 285, 294, 48 Cal. Rptr. 646* ; *Lewis v. Linn (1962) 209 Cal. App. 2d 394, 399-400, 26 Cal. Rptr. 6]* . If a minor technical deficiency is noted by the court and correction is immediately offered, the court may not refuse the correction and deny the motion to disqualify on that basis [*Retes v. Superior Court (1981) 122 Cal. App. 3d 799, 807, 176 Cal. Rptr. 160* (denial of motion as error when based on attorney's inadvertent failure to sign declaration)]. If an affidavit (declaration) is timely and properly made, the challenged judge is vested with no discretion to determine the question of his or her actual prejudice [*see* *Mayr v. Superior Court (1964) 228 Cal. App. 2d 60, 62, 39 Cal. Rptr. 240*], and immediate disqualification is mandatory [*McCartney v. Commission on Judicial Qualifications (1974) 12 Cal. 3d 512, 532, 116 Cal. Rptr. 260, 526 P.2d 268* (judicial removal); *Jacobs v. Superior Court (1959) 53 Cal. 2d 187, 190, 1 Cal. Rptr. 9, 347 P.2d 9* (custody and guardianship of minors); *Mayr v. Superior Court (1964) 228 Cal. App. 2d 60, 62, 39 Cal. Rptr. 240* (dissolution)].

[3] Form of Affidavit

Any affidavit (declaration) of prejudice must be in substantially the form set forth in *Code Civ. Proc. § 170.6(a)(5)* [*Code Civ. Proc. § 170.6(a)(5)*; *see also §§ 317.211* and *317.212* (forms)]. Any oral statement under oath or declaration under penalty of perjury must include substantially the same contents as the affidavit [*Code Civ. Proc. § 170.6(a)(6)*].

[4] Inquiry Into Moving Party's Good Faith

[a] Impropriety in General

The law assumes that a party who peremptorily disqualifies a judge does so in good faith [*Brown v. Superior Court (1981) 124 Cal. App. 3d 1059, 1061, 177 Cal. Rptr. 756*], and generally, when a sufficient affidavit or declaration is timely filed, the judge is bound to accept it without further inquiry [*McCartney v. Commission on Judicial Qualifications (1974) 12 Cal. 3d 512, 532, 116 Cal. Rptr. 260, 526 P.2d 268*]. Therefore, an inquiry into the challenging party's good faith is not proper unless a prima facie showing is made that the peremptory challenge was exercised on the ground of an unconstitutional group bias [*People v. Superior Court (Williams) (1992) 8 Cal. App. 4th 688, 698-699, 707-708, 10 Cal. Rptr. 2d 873* ; *see [b], below*].

[b] Propriety in Case of Unconstitutional Discrimination

A peremptory challenge may not be used to engage in purposeful discrimination. Thus, it cannot be used to disqualify a

judge based on group bias, such as race, and *Code Civ. Proc. § 170.6* may not be implemented in such a way as to preclude inquiry into whether the statute has been used for such a discriminatory purpose [*People v. Superior Court (Williams) (1992) 8 Cal. App. 4th 688, 706-707, 10 Cal. Rptr. 2d 873*]. An inquiry into the good faith of a Section 170.6 challenge is not required by the naked assertion that a challenge was race-based. However, if the opposing party makes a prima facie showing that the peremptory challenge was exercised solely on the ground of group bias, the party exercising the challenge will assume the burden of proving that the peremptory challenge was not predicated on group bias alone. If the challenging party establishes a neutral basis for the peremptory challenge, the trial court will determine whether or not the opposing party has established purposeful discrimination [*People v. Superior Court (Williams) (1992) 8 Cal. App. 4th 688, 707-713, 10 Cal. Rptr. 2d 873*]. It may even be appropriate to require a higher standard than prima facie showing before permitting an inquiry into the good faith of a peremptory challenge [*People v. Superior Court (Williams) (1992) 8 Cal. App. 4th 688, 708 n.2, 10 Cal. Rptr. 2d 873* (suggesting this, but not needing to reach the issue)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPersonal BiasCivil ProcedureJudicial OfficersRefereesRemovalsGovernmentsCourtsSpecial Judges

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§ 317.77 Limitations on Right to Peremptory Disqualification Under Code Civ. Proc. § 170.6

[1] In General

The right to disqualify a judge by peremptory challenge is limited generally as to the number of challenges that a party or attorney is permitted to make, the time at which a motion to disqualify may be made, and the stage of the action or proceedings at which a motion may be presented [*see Code Civ. Proc. § 170.6(a)(1), (a)(2)*].

[2] Only One Motion Permitted Per Case Basic Restriction to One Motion

With one exception, no party or attorney will be permitted to make more than one Section 170.6 motion to disqualify a judge in any one action or proceeding [*Code Civ. Proc. § 170.6(a)(3)*]. The exception, provided for in *Code Civ. Proc. § 170.6(a)(2)*, relates to motions made after reversal on appeal, and is discussed in [6][e], *below*.

The phrase "any one action" in *Code Civ. Proc. § 170.6(a)(3)* is interpreted to encompass several stages of the same proceeding; and in general, a party that has disqualified a judge pursuant to *Code Civ. Proc. § 170.6* may not exercise a challenge against a substituted judge either during the trail or in any later proceeding that is a "continuation" of the original proceeding [*Home Ins. Co. v. Superior Court (2005) 34 Cal. 4th 1025, 1033 n.4, 22 Cal. Rptr. 3d 885, 103 P.3d 283*].

The one motion restriction of *Section 170.6(a)(3)* refers to one "duly filed" motion. If a party's initial peremptory challenge is dismissed as untimely, it was not "duly filed," and the party retains the right to exercise a peremptory challenge in the proceeding should a new judge be assigned, for example, in the event of the first judge's retirement [*Truck Ins. Exchange v. Superior Court (1998) 67 Cal. App. 4th 142, 148-149, 78 Cal. Rptr. 2d 721]* .

[3] Multiple Parties on One Side

If there is more than one plaintiff or similar party or more than one defendant or similar party appearing in the case, only one motion for each side may be made [*Code Civ. Proc. § 170.6(a)(3)*]. However, if parties on the same side have adverse interests to other parties on the same side, they may be treated as a separate side for the purposes of making a

motion under *Code Civ. Proc. § 170.6* [*Home Ins. Co. v. Superior Court (2005) 34 Cal. 4th 1025, 1035, 22 Cal. Rptr. 3d 885, 103 P.3d 283* ; *see* *Johnson v. Superior Court (1958) 50 Cal. 2d 693, 700, 329 P.2d 5* (suggesting such might be the situation in which two drivers whose automobiles collide and injure the plaintiff are joined as defendants)], and this rule is equally applicable in criminal cases [*Pappa v. Superior Court (1960) 54 Cal. 2d 350, 353-354, 5 Cal. Rptr. 703, 353 P.2d 311* (murder prosecution)].

The burden is on the party seeking an additional challenge to establish the adverse interest; that is, the party seeking a subsequent disqualification of the trial judge has the burden of demonstrating that its interests are substantially adverse to those of a coparty that previously exercised a peremptory challenge [*Home Ins. Co. v. Superior Court (2005) 34 Cal. 4th 1025, 1035, 22 Cal. Rptr. 3d 885, 103 P.3d 283*]. Substantially adverse interests are not presumed and mere speculation of potential conflict is insufficient [*Home Ins. Co. v. Superior Court (2005) 34 Cal. 4th 1025, 1035, 22 Cal. Rptr. 3d 885, 103 P.3d 283* (the interests of primary insurers and excess insurers are not inherently substantially adverse, both parties may take the same position of no coverage, thus a factual showing of adverse interests is required); *Pappa v. Superior Court (1960) 54 Cal. 2d 350, 354, 5 Cal. Rptr. 703, 353 P.2d 311* (difference of opinion between codefendants as to procedural matters and fact that codefendant chose to be represented by separate counsel did not show substantial adverse interest); *Welch v. Superior Court (1974) 41 Cal. App. 3d 50, 53, 115 Cal. Rptr. 729* (mere form declaration speculating how the coparties' adverse interests might arise, rather than how they had arisen, was insufficient to support subsequent disqualification of the trial judge)].

When a plaintiff belatedly names a party as a defendant, that circumstance alone does not establish that the party's interests are substantially adverse to earlier named defendants [*Home Ins. Co. v. Superior Court (2005) 34 Cal. 4th 1025, 1037, 22 Cal. Rptr. 3d 885, 103 P.3d 283* ; *see* *School Dist. of Okaloosa County v. Superior Court (1997) 58 Cal. App. 4th 1126, 1134-1135, 68 Cal. Rptr. 2d 612* ; *cf.* *Industrial Indem. Co. v. Superior Court (1989) 214 Cal. App. 3d 259, 264, 262 Cal. Rptr. 544* (upholding Judicial Council rule limiting to 20 days the right of "add-on" parties in coordinated cases to exercise a *section 170.6* challenge, and observing that such a challenge is particularly subject to abuse in "add-on" cases because, due to the trial judge's lengthy participation in a coordinated case, the nature and extent of his or her rulings is well known--presenting an "unusual opportunity" to challenge for reasons unrelated to bias or prejudice)].

A party is not entitled to severance of a cross-complaint in order to enable it to avoid the burden of establishing interests substantially adverse to another party that had exercised an earlier peremptory challenge in the proceeding [*Sunkyong Trading (H.K.) Ltd. v. Superior Court (1992) 9 Cal. App. 4th 282, 289-290, n.4, 11 Cal. Rptr. 2d 504*].

[4] Time for Making Motion

[a] In General

A motion directed to the trial of a cause may not be made after the trial has commenced, and a motion directed to a hearing may be made no later than the commencement of the hearing. When there is a master calendar, the motion must be made not later than the time that the cause is assigned for trial. When the cause has been assigned to a judge for all purposes, the motion must be made within 10 days after notice of that assignment or, if the party has not yet appeared in the action, within 10 days after his or her appearance. When the judge, other than one assigned to the cause for all purposes, is known at least 10 days before the date set for trial or hearing, the motion must be made at least 5 days before that date [*Code Civ. Proc. § 170.6(a)(2)*]. For discussion of the time for making a motion under *Code Civ. Proc. § 639(b)* concerning discovery referees, see [e][ii], *below*.

The interplay among the rules set forth in *Code Civ. Proc. § 170.6(a)(2)* has been clarified by the California Supreme Court as follows [*People v. Superior Court (Lavi) (1993) 4 Cal. 4th 1164, 1185, 17 Cal. Rptr. 2d 815, 847 P.2d 1031]* :

- The master calendar rule applies when a trial-ready case is assigned to a court that is ready and able to hear the case [*see* [f], *below*];

- When the master calendar rules are not met, either the all purpose assignment rule [*see* [g], *below*] or the 10-day/5-day rule [*see* [e], *below*] may apply;

- The all purpose assignment rules applies when a litigant shows that a case assignment instantly identifies the judge who is reasonably certain to preside over substantial remaining matters from that point forward, including the trial;

- When neither the master calendar rule nor the all-purpose assignment rule controls, a litigant may invoke the 10-day/5-day rule as soon as the case is assigned to a known judge;

- When no reasonable certainty exists as to the trial judge's identity, the general rule applies permitting a challenge at any time before trial.

The label used to identify the assigning court as a "master calendar" court or an assignment as an "all purpose" assignment is not conclusive. The label may, however, be viewed as prima facie evidence of the type of assignment that occurred [*People v. Superior Court (Lavi) (1993) 4 Cal. 4th 1164, 1175, 1179, 17 Cal. Rptr. 2d 815, 847 P.2d 1031*].

If the court in which the action is pending is authorized to have no more than one judge and the motion claims that the duly elected or appointed judge of that court is prejudiced, the motion must be made before the expiration of 30 days from the date of the first appearance in the action of the party who is making the motion or whose attorney is making the motion [*Code Civ. Proc. § 170.6(a)(2)*].

[b] Cases Subject to Trial Delay Reduction Rules

Notwithstanding *Code Civ. Proc. § 170.6*, in cases subject to the Trial Court Delay Reduction Act, parties must exercise any peremptory challenge within 15 days of the party's first appearance in a direct calendar court [*Gov. Code § 68616(i)*].

When a direct calendar assignment is made more than 15 days after a complaint is filed, the plaintiff's first appearance, or defendant's first appearance when defendant has already responded to the complaint in a direct calendar court, coincides with the direct calendar assignment [*Fight for the Rams v. Superior Court (1996) 41 Cal. App. 4th 953, 958, 48 Cal. Rptr. 2d 851* (rejecting contention that there is no right to peremptory challenge when case is reassigned more than 15 days after filing of complaint or more than 15 days after defendant's first appearance)]. Thus, in the *Fight for the Rams* court's implicit view, the trial court does not become a "direct calendar court" until a direct calendar assignment is made, and it is only at that time that party makes "first appearance" in that court and time in which a peremptory challenge must be made begins to run [*Stubblefield Construction Co. v. Superior Court (2000) 81 Cal. App. 4th 762, 767, 97 Cal. Rptr. 2d 121*].

ILLUSTRATION:

Time for Challenge Runs from Direct Assignment. A judge who was assigned a lawsuit for all purposes recused himself at the hearing on defendant's demurrer, motion to strike, and motion for protective order. On the continued hearing date, more than a month later, the clerk advised the parties by phone that the previous order assigning a new department was in error and gave them a new hearing date (six days later) and department for the hearing, after which minute order and certificate of mailing was sent confirming all-purpose assignment to a new judge. The new judge sustained the demurrer as to seven causes of action with leave to amend and as to three others without leave to amend and deferred ruling on the motion to strike. Thereafter, but within ten days of the notice of assignment, plaintiff filed a

Code Civ. Proc. § 170.6 challenge. Was that challenge timely? Yes. Under *Gov. Code § 68616(i)*, when a direct calendar assignment is made more than 15 days after the complaint was filed, plaintiff's first appearance, or defendant's first appearance when defendant already responded to complaint in direct calendar court, coincides with the direct calendar assignment. Any other rule would deprive that parties of the right to make challenges whenever a judge was assigned more than 15 days after the case was filed. The judge did not make a determination of contested fact issues relating to the merits. For the purposes of the demurrer, he simply accepted plaintiff's factual allegations as true. He deferred a ruling on the motion to strike, and the protective order did no more than stay any discovery efforts by plaintiff until a hearing on defendant's response to a second amended complaint [*Fight for the Rams v. Superior Court (1996) 41 Cal. App. 4th 953, 955-958, 48 Cal. Rptr. 2d 851*].

A peremptory challenge to a case management judge who was assigned to a case for all purposes except trial was governed by the time limits set forth in *Code Civ. Proc. § 170.6(a)(2)* rather than the *Gov. Code § 68616(i)* time limits governing a peremptory challenge to a judge in a direct calendar court [*Zilog Inc. v. Superior Court (2001) 86 Cal. App. 4th. 1309, 1317-1320, 104 Cal. Rptr. 2d 173*]. The phrase "direct calendar court" means that a case is assigned to one judge for all purposes, including trial [*Zilog Inc. v. Superior Court (2001) 86 Cal. App. 4th. 1309, 1318-1319, 104 Cal. Rptr. 2d 173*]. The court's case management system lacked the defining characteristic of a direct calendar court because it did not instantly pinpoint the judge who would try the case, despite the fact that under the system one judge was assigned to aggressively manage a complex case until trial [*Zilog Inc. v. Superior Court (2001) 86 Cal. App. 4th. 1309, 1321, 104 Cal. Rptr. 2d 173*].

If the individual calendar judge assigned to the case is changed after a party has appeared in the matter, the party must file its challenge within 15 days of receiving notice of the change [*Cybermedia, Inc. v. Superior Court (1999) 72 Cal. App. 4th 910, 913, 82 Cal. Rptr. 2d 126* (general notice mailed by superior court's public information was officer insufficient to trigger 15-day time period)].

When a direct calendar assignment is made more than 15 days after the first appearance of a party, the time limits of *Gov. Code § 68616(i)* run from the date that the party receives notice of the assignment [*Motion Picture & Television Fund Hospital v. Superior Court (2001) 88 Cal. App. 4th 488, 492-494, 105 Cal. Rptr. 2d 872]* .

In a master calendar court, peremptory challenges are governed solely by *Code Civ. Proc. § 170.6* [*Gov. Code § 68616(i)*]. For discussion of time limits under *Section 170.6*, see *[c]* and *[d], below*.

No action or proceeding may be removed from a delay reduction program because of a challenge filed under *Code Civ. Proc. § 170.6* [*Gov. Code § 68607.5*].

Gov. Code § 68616 does not apply when a judgment has been reversed on appeal and returned to the trial court for retrial [*Stubblefield Construction Co. v. Superior Court (2000) 81 Cal. App. 4th 762, 769, 97 Cal. Rptr. 2d 121*].

[c] No Motion After Trial Commenced

In no event shall any judge, commissioner, or referee entertain a peremptory motion to disqualify if it is made after trial of a cause has commenced [*see Code Civ. Proc. § 170.6(a)(2)*].

In the case of a jury trial, a motion may not be made after the drawing of the name of the first juror [*Code Civ. Proc. § 170.6(a)(2)*].

If there is no jury, the motion may not be made after the making of an opening statement by counsel for plaintiff or, if there is no such statement, after swearing in the first witness or the giving of any evidence [*Code Civ. Proc. § 170.6(a)(2)*].

[d] No Motion After Hearing Commenced

Any motion directed to a hearing (other than the trial of a cause) must be made not later than the commencement of the hearing [*Code Civ. Proc. § 170.6(a)(2)*; *see also Andrews v. Joint Clerks etc. Committee (1966) 239 Cal. App. 2d 285, 294, 48 Cal. Rptr. 646* (hearing on order to show cause, demurrer, and response in labor dispute); *Mayr v. Superior Court (1964) 228 Cal. App. 2d 60, 62, 39 Cal. Rptr. 240* (hearing on matter concerning child custody)].

When an otherwise timely peremptory challenge to disqualify a judge is made after argument on demurrers and motions to strike and while rulings on them are deferred pending additional briefing on specified issues, the challenge is untimely with respect to the hearing on the demurrers and motions to strike because it should have been filed before commencement of the hearing. Thus, the trial judge retains jurisdiction to rule on the demurrers and motions to strike and must do so before granting the Section 170.6 motion [*Cybermedia, Inc. v. Superior Court (1999) 72 Cal. App. 4th 910, 913, 82 Cal. Rptr. 2d 126*].

[e] 10-Day/5-Day Provision

[i] Application to Judge, Commissioner or Referee Other Than Discovery Referee

If the judge (other than a judge assigned to the case for all purposes), commissioner, or referee assigned or scheduled to try the cause or hear the matter is known at least 10 days before the date set for trial or hearing, the motion must be made at least five days before that date [*Code Civ. Proc. § 170.6(a)(2)*]. If a trial or hearing date has been set, and the trial or hearing is postponed, a motion filed five days prior to the postponed date is timely [*see Eagle Maintenance & Supply Co. v. Superior Court (1961) 196 Cal. App. 2d 692, 695, 16 Cal. Rptr. 745* (trial was postponed for 97 days, but motion presented at least five days before last scheduled date for trial was timely)].

Responding to confusion among the appellate courts concerning the degree of certainty with which a judge must be "known" before the 10-day/5-day rule may apply [*compare Bouchard v. Insona (1980) 105 Cal. App. 3d 768, 774, 164 Cal. Rptr. 505* (rule inapplicable when case was assigned to department by number rather than to particular judge), *and Retes v. Superior Court (1981) 122 Cal. App. 3d 799, 806, 176 Cal. Rptr. 160* (rule requires judge to be known with certainty and is inapplicable even when assigned judge is named if there is evidence of frequent reassignment), *with Thomas Realty Co. v. Superior Court (1988) 199 Cal. App. 3d 91, 94-95, 244 Cal. Rptr. 733* (rule applies if case is assigned to identified department with a known judge regardless of reassignment practices)], the California Supreme Court has stated in dicta that a judge need not be known with absolute certainty. Rather, when a judge is known to the parties to be assigned to the case, there must be reasonable assurance that the judge will in fact hear the case. Thus, an assignment to a department by number may provide reasonable assurance that a particular judge will hear the case, if the judge regularly sits in that department. In such a case, even if a party has no actual knowledge that a particular judge presides over a department, the rule applies if the judge's identity may be determined with further investigation or inquiry [*People v. Superior Court (Lavi) (1993) 4 Cal. 4th 1164, 1183-1185, 17 Cal. Rptr. 2d 815, 847 P.2d 1031*].

With respect to jurisdictions that have tentative ruling procedures, a party who has already received a tentative ruling on a motion may attempt to disqualify the judge at the time of the hearing only if the regularly assigned judge does not in fact rule on the motion or if the regular assignment has been changed without sufficient notification to the parties [*Kaiser Foundation Hospitals v. Superior Court (1987) 190 Cal. App. 3d 721, 725-726, 235 Cal. Rptr. 630*].

The statute does not require that five full days intervene between the date of the hearing and the date of filing the motion for disqualification [*Pamela H. v. Superior Court (1977) 68 Cal. App. 3d 916, 919, 137 Cal. Rptr. 612*] because such an interpretation would clearly fly in the face of *Code Civ. Proc. § 12*, which provides that the time in which any act provided by law is to be done is computed by excluding the first day and including the last unless the last day is a holiday, and then it is also excluded [*Code Civ. Proc. § 12*]. Thus, when a hearing was scheduled for June 30, a motion to disqualify filed on June 25 was timely [*Pamela H. v. Superior Court (1977) 68 Cal. App. 3d 916, 919, 137*

Cal. Rptr. 612 (juvenile court proceeding)].

The purpose of the 10-day/5-day time limitation is to effect a compromise between the rights of the litigant and the efficient operation of the court. The litigant, on assignment to a particular department (that is, a particular judge regularly sitting in that department), has a few days to assess his or her position, and the court has a few days to make the necessary adjustment after disqualification [*see Villarruel v. Superior Court (1973) 35 Cal. App. 3d 559, 561-562, 110 Cal. Rptr. 861* (criminal defendant sought writ of prohibition to prohibit superior court from trying his case before judge who allegedly had been disqualified); *People v. Escobedo (1973) 35 Cal. App. 3d 32, 37-38, 110 Cal. Rptr. 550* (criminal defendant attempted to have trial judge disqualified and moved to suppress evidence obtained by search and seizure)].

The 10-day/5-day time limitation also applies to a motion to disqualify made by an intervener in an action who became a "party" at the time of the court's order authorizing the intervention. For purposes of determining the timeliness of such a motion, time begins to run from the date of the court's order, rather than from the later date of filing of a formal petition in intervention [*see Hospital Council of Northern Cal. v. Superior Court (1973) 30 Cal. App. 3d 331, 339, 106 Cal. Rptr. 247* (motion was made only two days, not five days, before new trial date that had been set after intervener became party)].

For further discussion of the 10-day/5-day provision as applied in criminal actions, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 60, *Disqualification* (Matthew Bender).

[ii] Application to Discovery Referees

In a discovery matter, a motion to disqualify an appointed referee under *Code Civ. Proc. § 170.6* must be made to the court by a party either [*Code Civ. Proc. § 639(b)*]:

- Within 10 days after notice of the appointment, or if the party has not yet appeared in the action, a motion must be made within 10 days after the appearance, if a discovery referee has been appointed for all discovery purposes.

- At least five days before the date set for hearing, if the referee assigned is known at least 10 days before the date set for hearing and the discovery referee has been assigned only for limited discovery purposes.

A party who previously made a peremptory challenge to a judge may not thereafter peremptorily challenge a discovery referee due to the one motion per side restriction of *Code Civ. Proc. § 170.6(a)(3)* [*Baugh v. Garl (2006) 137 Cal. App. 4th 737, 746, 40 Cal. Rptr. 3d 539]* .

[f] Master Calendar Provision

A superior court is required to adopt a master calendar if it determines that such a calendaring system will advance the goals of caseflow management and delay reduction, as set forth in Cal. Rules of Ct., Stds. Jud. Admin., Std. 2 (statement of general principles) [*see Cal. Rules of Ct., Rule 3.700 et seq.*; for further discussion of delay reduction rules, *see* Ch. 552, *Trial Court Delay Reduction*]. Under the master calendar system, all civil cases assigned trial dates must be placed on a master calendar composed of all cases set for trial on that day [*see, e.g., People v. Escobedo (1973) 35 Cal. App. 3d 32, 38, 110 Cal. Rptr. 550]* ; the cases on the master calendar ready for trial must be transferred to any department of the court that is available [*see People v. Escobedo (1973) 35 Cal. App. 3d 32, 38, 110 Cal. Rptr. 550*].

If the motion to disqualify is directed to the trial of a cause in which there is a master calendar, the motion must be

made to the judge supervising the master calendar not later than the time the cause is assigned for trial [*Code Civ. Proc. § 170.6(a)(2)*].

If a case is assigned from a master calendar for immediate trial in a ready trial department, *Code Civ. Proc. § 170.6(a)(2)* requires that the motion to disqualify the judge be made to the supervising judge immediately on the announcement of the assignment [*People v. Superior Court (Lavi) (1993) 4 Cal. 4th 1164, 1177, 17 Cal. Rptr. 2d 815, 847 P.2d 1031* ; *see* *Ruiz v. Appellate Division of the Superior Court (2004) 119 Cal. App. 4th 282, 292, 14 Cal. Rptr. 3d 190* (master calendar rule did not apply to "direct set" court that did not bear the label of master calendar court yet functioned as such due to lack of official designation or informal notice to counsel); *Stevens v. Superior Court (1997) 52 Cal. App. 4th 55, 59-61, 60 Cal. Rptr. 2d 397* (master calendar exception not applicable when assignment made via telephone by court clerk; master calendar exception provides that challenge be made immediately to master calendar judge, not to court clerk); *Villarruel v. Superior Court (1973) 35 Cal. App. 3d 559, 564, 110 Cal. Rptr. 861* (case was not assigned from master calendar when presiding judge set criminal defendant's trial date in another department over month in advance)]. This procedure permits the presiding judge to make an immediate assignment to another department and to immediately utilize the challenged judge for some other pending case [*People v. Superior Court (Lavi) (1993) 4 Cal. 4th 1164, 1176, 17 Cal. Rptr. 2d 815, 847 P.2d 1031* ; *see* *Stevens v. Superior Court (1997) 52 Cal. App. 4th 55, 59, 60 Cal. Rptr. 2d 397* ; *People v. Escobedo (1973) 35 Cal. App. 3d 32, 38, 110 Cal. Rptr. 550*]. *Code Civ. Proc. § 170.6(a)(2)* may not be construed as meaning that, whenever a case is transferred from the department of the supervising judge, often denominated as the master calendar department, to another department, the motion to disqualify must be made at that time or be forever barred [*Villarruel v. Superior Court (1973) 35 Cal. App. 3d 559, 563, 110 Cal. Rptr. 861*]. Thus, if an assignment is merely from the "master calendar department" to another department for future trial, the reasons for applying the master calendar time limitation do not exist [*see* *Villarruel v. Superior Court (1973) 35 Cal. App. 3d 559, 564, 110 Cal. Rptr. 861*], and a motion to disqualify is timely if made more than five days in advance of the hearing pursuant to the 10-day/5-dayprovision of *Code Civ. Proc. § 170.6(2)* [*People v. Superior Court (Lavi) (1993) 4 Cal. 4th 1164, 1176, 17 Cal. Rptr. 2d 815, 847 P.2d 1031* ; *see* *People v. Escobedo (1973) 35 Cal. App. 3d 32, 39, 110 Cal. Rptr. 550]* .

A local court's policy that permitted fast track litigants to exercise two peremptory challenges, one to the case management judge under *Gov. Code § 68616(i)* and a second under the master calendar rule of *Code Civ. Proc. § 170.6(a)(2)* exceeded the statutory boundaries of *section 170.6(a)(2)*, which provides, subject to certain exceptions, that only one peremptory challenge is allowed in a case [*Zilog Inc. v. Superior Court (2001) 86 Cal. App. 4th. 1309, 1321-1322, 104 Cal. Rptr. 2d 173]* .

[g] All-Purpose Assignment Provision

If the motion to disqualify is directed to the trial of a cause that has been assigned to a judge for all purposes, a party must make the motion to the assigned judge or to the presiding judge within 10 days after notice of the all-purpose assignment or, if the party has not yet appeared in the action, within 10 days after his or her appearance [*Code Civ. Proc. § 170.6(a)(2)*; *see* *La Seigneurie U.S. Holdings, Inc. v. Superior Court (1994) 29 Cal. App. 4th 1500, 1504-1506, 35 Cal. Rptr. 2d 175* (10-day time period commences after party's general appearance); *cf. Gov. Code § 68616(i)* (challenge must be made within 15 days of party's first appearance in direct calendar court for case subject to Trial Court Delay Reduction Act; discussed under [b], *above*)]. When notice of the all-purpose assignment is served by mail, the 10-day period in which to make the motion has been held to be extended under *Code Civ. Proc. § 1013(a)* [*California Business Council v. Superior Court (1997) 52 Cal. App. 4th 1100, 1102, 1106, 62 Cal. Rptr. 2d 7* (10-day period extended 5 days when notice given by service by mail to California address; *Swenson v. Superior Court (1988) 202 Cal. App. 3d 348* , which held that *Section 1013* did not apply to local court rule which commenced the prescribed period simply on "notice" and *Beverly Union Co. v. Superior Court (1988) 206 Cal. App. 3d 40, 253 Cal. Rptr. 359* , which concerned same local court rule, distinguished as no longer applicable in light of subsequent amendment of *Section 1013*by Stats. 1995, Ch. 576, § 3.8 providing extension applies in absence of specific exception)].

Thus, for example, a trial court must grant a late named defendant's peremptory challenge to a judge assigned for all purposes even when the time within which the other defendants could have challenged the judge has long since expired, and even though the case has been assigned to one judge as complex litigation, when the late appearing defendant exercises its right to disqualify a judge within 10 days after appearing [*School Dist. of Okaloosa County v. Superior Court (1997) 58 Cal. App. 4th 1126, 1129, 1134-1135, 68 Cal. Rptr. 2d 612* (defendant named as Doe defendant and served over three years after litigation commenced)]. Under these circumstances, the rules governing coordination cases do not apply to cases designated as "complex litigation" [*School Dist. of Okaloosa County v. Superior Court (1997) 58 Cal. App. 4th 1126, 1135-1136, 68 Cal. Rptr. 2d 612* ; for discussion of rules governing coordinated cases, *see* [5], *below*]. If, however, another defendant on the same side has already exercised its right to disqualify a judge, a late appearing defendant has no right to challenge the then-current judge because that side has used its one challenge [*School Dist. of Okaloosa County v. Superior Court (1997) 58 Cal. App. 4th 1126, 1134-1135, 68 Cal. Rptr. 2d 612* ; *see* [2], *above*]. Similarly, a late appearing party in a case assigned to a judge for all purposes cannot make a peremptory challenge within ten days after appearing in the case if the judge already has decided a contested fact issue relating to the merits [*Stephens v. Superior Court (2002) 96 Cal. App. 4th 54, 60,116 Cal. Rptr. 2d 616]* .

ILLUSTRATION:

Peremptory Challenge of Late Appearing Party Precluded By Previous Determination of Contested Facts. Father/husband created a trust for wife and their six children. The trust was to have three of the children as co-trustees. If any resigned or otherwise failed or refused to serve, the remaining children were to assume the position in order of their age. One of the initial three co-trustees resigned and the two remaining (John and James) petitioned for instructions as to whether Gail or Gwen was to be the third co-trustee and seeking to modify the trust so that a majority of the co-trustees could act, rather than requiring unanimous decisions. Judge Cline heard both petitions together, denied the request to modify the trust so that a majority of co-trustees could act, and determined that Gwen was the third co-trustee. John and James appealed those determinations. While the matter was on appeal, Gwen filed a petition seeking several things, including access to the books of the trust, the appointment of an interim independent trustee, or, alternatively, the freezing of distributions from the trust during the pendency of the appeal. David made his first appearance in the matter by joinder in James' and John's response and objections, and five days after his appearance, filed a peremptory challenge to Judge Cline. Was the challenge timely? No. The language in *Code Civ. Proc. § 170.6(a)(2)* that a judge's determination of contested facts issues relating to the merits precludes "the later making of the motion provided for herein at the times and in the manner hereinbefore provided" limits the right of a late appearing party to make a peremptory challenge. A late appearing party in a case assigned to a judge for all purposes is precluded from challenging the judge if the judge, prior to the party's appearance, had determined a contested fact issue relating to the merits and the party appears in the proceeding in which the judge made the determination or a subsequent proceeding that is a continuation of the proceeding in which the judge made the determination [*Stephens v. Superior Court (2002) 96 Cal. App. 4th 54, 61, 116 Cal. Rptr. 2d 616]* . Gwen's petitions were continuations of the original petition because they were directly related to the controversy adjudicated in that proceeding [*Stephens v. Superior Court (2002) 96 Cal. App. 4th 54, 63, 116 Cal. Rptr. 2d 616]* .

To qualify as an all-purpose assignment, the method of assigning cases must instantly pinpoint the judge whom the parties can expect to ultimately preside at trial. In addition, the same judge must be expected to process the case in its totality from the time of the assignment. The first requirement is satisfied if the assignment pinpoints the judge with reasonable certainty. For example, an assignment to a department by number may qualify if a particular judge regularly presides in that department and that judge's identity is either known to the party or discoverable on reasonable inquiry [*People v. Superior Court (Lavi) (1993) 4 Cal. 4th 1164, 1180, n.11, 17 Cal. Rptr. 2d 815, 847 P.2d 1031*]. The second requirement is satisfied if at the time of the assignment, substantial matters remain to be processed in addition to trial, and the assigned judge is expected to process all those matters from that point on [*People v. Superior Court (Lavi) (1993) 4 Cal. 4th 1164, 1180 n.12, 17 Cal. Rptr. 2d 815, 847 P.2d 1031*].

If a disqualification motion has been denied as untimely, an assignment under a duly adopted local court policy that is not inconsistent with existing statutory law is presumed to be "for all purposes" unless the petitioner demonstrates otherwise [*Shipp v. Superior Court (1992) 5 Cal. App. 4th 147, 151-154, 6 Cal. Rptr. 2d 685* (involving former Manual of Procedures for the Family Law Department of the Los Angeles Superior Court)].

[h] Consolidated Proceedings

When more than one case involving the same party is consolidated for trial before one of the judges, the party may bring a separate peremptory challenge against that judge even though the judge was not challenged before the consolidation. The challenge is limited to the cases that were pending before other judges unless the challenge is otherwise permitted by the time limits. Thus, for example, when three cases against the same defendant were consolidated for trial before one of the pending judges, the defendant's peremptory challenge was not untimely with respect to the two transferred cases when it was brought within 10 days after notice of the consolidation. This was true even though the challenge would have been untimely as to the matter that was not transferred [*Nissan Motor Corp. v. Superior Court (1992) 6 Cal. App. 4th 150, 154-156, 7 Cal. Rptr. 2d 801*].

[5] Coordinated Proceedings

When actions have been coordinated, any motion or affidavit of prejudice regarding an assigned judge shall be submitted in writing to the assigned judge within 20 days after service of the order assigning the judge to the coordination proceeding. All plaintiffs or similar parties in the included or coordinated actions shall constitute a side and all defendants or similar parties in the actions shall constitute a side for purposes of applying *Code Civ. Proc. § 170.6* [*Cal. Rules of Ct., Rule 3.516*]. The term "assigned judge" in Rule 1515 refers to any judge assigned pursuant to *Code Civ. Proc. § 404* or *404.3*, including a "coordination motion judge," who determines whether coordination is appropriate, and a "coordination trial judge," who hears and determines the coordinated action [*see Cal. Rule of Court, Rule 3.501(7), (9)*]. Because the statutory scheme for coordination of actions provides for two separate assignments, and hence, the possibility of two different judges, the party challenging the assignment of a judge pursuant to *Code Civ. Proc. § 170.6* has 20 days after each specific assignment to file an affidavit of prejudice [*see Stone v. Superior Court (1994) 25 Cal. App. 4th 1144, 1146-1147, 31 Cal. Rptr. 2d 56*].

[6] Stage of Action or Proceeding at Which Motion May Be Presented

[a] Before Hearing on Contested Issue

A motion to disqualify for prejudice under *Code Civ. Proc. § 170.6* may be presented and filed either after preliminary proceedings but before commencement of a trial or hearing, or after a trial or hearing but before the undertaking of any subsequent proceedings [*see McClenny v. Superior Court (1964) 60 Cal. 2d 677, 683, 36 Cal. Rptr. 459, 388 P.2d 691*], and, in either case, before a hearing is commenced on a contested issue [*Doty v. Doty (1975) 52 Cal. App. 3d 672, 677, 125 Cal. Rptr. 153* (in case involving partition of real property, judge's entry of order finding that property was not divisible and that it should be sold as a whole was resolution of contested issue and motion filed thereafter was not timely); *Miller v. Miller (1970) 11 Cal. App. 3d 197, 202, 89 Cal. Rptr. 643* (in case involving reduction of alimony and support payments, when defendant's answer denied allegations of complaint requesting attorney's fees and costs, joinder of issue of denial made matter contested one and plaintiff's subsequent motion was not timely filed); *Mayr v. Superior Court (1964) 228 Cal. App. 2d 60, 62-63, 39 Cal. Rptr. 240* (in dissolution action, no contested issue of fact was raised until point at which court determinedto question parties' agreement concerning child custody, and only then was husband obligated to challenge judge)].

Thus, when all orders issued by a judge are made pursuant to ex parte application or stipulation of the parties [*see Mayr v. Superior Court (1964) 228 Cal. App. 2d 60, 62, 39 Cal. Rptr. 240* (issue of child custody did not become contested until court ordered investigation at ex parte hearing); *Estate of Cuneo (1963) 214 Cal. App. 2d 381, 385, 29*

Cal. Rptr. 497 (hearings and orders in probate action involved matters that were acted on in concert and without conflicting interest by opposing parties); *Thompson v. Superior Court of Los Angeles County (1962) 206 Cal. App. 2d 702, 709, 23 Cal. Rptr. 841* (judge had issued orders to show cause on application of each party, temporary restraining orders ex parte, and various orders of continuance)], there has been no hearing on a contested issue, and an affidavit of prejudice is timely when filed for the first time prior to a subsequently held hearing [*see* *Mayr v. Superior Court (1964) 228 Cal. App. 2d 60, 64, 39 Cal. Rptr. 240* ; *Estate of Cuneo (1963) 214 Cal. App. 2d 381, 386, 29 Cal. Rptr. 497* ; *Thompson v. Superior Court (1962) 206 Cal. App. 2d 702, 710, 23 Cal. Rptr. 841* (motion to disqualify was filed prior to hearing to modify child custody order)].

[b] Motion After Assignment of Judge but Before Hearing Set

At least one court has held that a *Code Civ. Proc. § 170.6* motion may be made prematurely, and that the 10-day/5-day rule is measured from the trial or hearing; therefore, a *Section 170.6* motion challenge may not be filed until there is a hearing scheduled [*Grant v. Superior Court (2001) 90 Cal. App. 4th 518, 526* ; *108 Cal. Rptr. 2d 825* (motion was premature when filed after judge had ruled on two ex parte applications but before any further hearing had been set)]. However, the *Grant* court noted that its opinion disagreed with other courts of appeal [*see* *Pedus Services, Inc. v. Superior Court (1999) 72 Cal. App. 4th 140, 84 Cal. Rptr. 2d 771* ; *Moreira v. Superior Court (1989) 215 Cal. App. 3d 42, 265 Cal. Rptr. 437*].

[c] Motion After Pretrial Hearing or Proceeding Not Precluded

[i] In General

The 1965 amendment to *Code Civ. Proc. § 170.6(a)(2)* stated that the fact that a judge, court commissioner, or referee has presided at or acted in connection with a pretrial conference or other hearing, proceeding, or motion prior to trial and not involving a determination of contested fact issues relating to the merits does not preclude the later making of the motion provided for in *Code Civ. Proc. § 170.6(a)(2)* at the time and in the manner provided for in the subsection [*see Code Civ. Proc. § 170.6(a)(2)*]. Under the 1965 legislative amendment, a motion to disqualify now can be made after a hearing or proceeding held prior to trial that does not involve a determination of contested fact issue relating to the merits of the case [*see* *School Dist. of Okaloosa County v. Superior Court (1997) 58 Cal. App. 4th 1126, 1133-1134, 68 Cal. Rptr. 2d 612* ; *Kohn v. Superior Court (1966) 239 Cal. App. 2d 428, 430, 48 Cal. Rptr. 832* (criminal prosecution)].

Prior to this amendment to *Code Civ. Proc. § 170.6(a)(2)*, a motion to disqualify was not timely if filed after a judge had decided any preliminary contested matters [*McClenny v. Superior Court (1964) 60 Cal. 2d 677, 683, 36 Cal. Rptr. 459, 388 P.2d 691* ; *see* *People v. Ashley (1963) 59 Cal. 2d 339, 360, 29 Cal. Rptr. 16, 379 P.2d 496* (motion filed after preliminary sanity hearing but prior to guilt trial); *Ball v. City Council (1967) 252 Cal. App. 2d 136, 146, 60 Cal. Rptr. 139* (because 1965 amendment was not retroactive, motion was not timely when filed after judge had heard and overruled demurrer prior to date on which amendment became effective); *Swartzman v. Superior Court (1964) 231 Cal. App. 2d 195, 200, 41 Cal. Rptr. 721* (motion not timely when made after judge heard contested motions to amend complaint and to specially set and petitioners' contested demurrer, motion to strike, and motion to reconsider prior ruling); *Michaels v. Superior Court (1960) 184 Cal. App. 2d 820, 824-825, 7 Cal. Rptr. 858* (motion not timely when made following defendant's appearance specially to challenge jurisdiction); *but see* *Mayr v. Superior Court (1964) 228 Cal. App. 2d 60, 64, 39 Cal. Rptr. 240* (submission of contested matter, not time judge decides matter, should fix time when right to invoke disqualification privilege is lost)]. For further discussion of the effect of the 1965 amendment to *Code Civ. Proc. § 170.6(a)(2)*, see [ii], *below*.

[ii] Prior Motion Not on Merits

The 1965 amendment to *Code Civ. Proc. § 170.6(a)(2)* has been interpreted to mean that a judge, court commissioner, or referee must actually determine contested fact issues relating to the merits prior to trial before a party will have lost

the right to make a motion to disqualify [*see School Dist. of Okaloosa County v. Superior Court (1997) 58 Cal. App. 4th 1126, 1131-1134, 68 Cal. Rptr. 2d 612* ; *Zdonek v. Superior Court (1974) 38 Cal. App. 3d 849, 852, 853, 113 Cal. Rptr. 669* (held incorrectly decided based on another point by same division of appellate district in *Woodman v. Superior Court (1987) 196 Cal. App. 3d 407, 410, 241 Cal. Rptr. 818*), which in turn was abrogated by a 1989 amendment of *Code Civ. Proc. § 170.6*; *see Mackey v. Superior Court (1990) 221 Cal. App. 3d 1124, 1127 n.3, 270 Cal. Rptr. 905*); *Kohn v. Superior Court (1966) 239 Cal. App. 2d 428, 431, 48 Cal. Rptr. 832* (criminal prosecution)], and, if a determination relates to but does not actually resolve a contested fact issue relating to the merits, a motion to disqualify filed thereafter can still be timely [*see School Dist. of Okaloosa County v. Superior Court (1997) 58 Cal. App. 4th 1126, 1131-1134, 68 Cal. Rptr. 2d 612* (court's ruling motions to quash service of summons not a determination of contested fact issues relating to merits of case); *Kohn v. Superior Court (1966) 239 Cal. App. 2d 428, 431, 48 Cal. Rptr. 832* (motion to disqualify made after judge had denied motion to setaside indictment for lack of probable cause pursuant to *Penal Code § 995* was timely filed)]. Thus, pursuant to *Code Civ. Proc. § 170.6(a)(2)* as amended in 1965, a party should be permitted to preserve his or her right to disqualify a judge for trials and other fact determinations, notwithstanding that the judge has earlier made a pretrial determination of a motion for judgment on the pleadings [*Hospital Council of Northern Cal. v. Superior Court (1973) 30 Cal. App. 3d 331, 337, 106 Cal. Rptr. 247* (motion was not timely when made only two days before new trial date)]. Other proceedings in which a judge does not determine a contested fact issue relating to the merits under *Code Civ. Proc. § 170.6(a)(2)* include the tentative acceptance and later rejection of a plea bargain [*Fraijo v. Superior Court (1973) 109 Cal. Rptr. 909*], and the determination of a date on which a motion for security will be heard [*Woodman v. Selvage (1968) 263 Cal. App. 2d 390, 394, 69 Cal. Rptr. 687*], and a ruling on a motion for pretrial punitive damages discovery under *Civ. Code § 3295(c)* that a plaintiff has demonstrated a substantial probability that he or she will prevail on a claim for punitive damages [*Guardado v. Superior Court (2008) 163 Cal. App. 4th 91, 93, 77 Cal. Rptr. 3d 149]* . A motion to disqualify is not untimely for the sole reason that it is made subsequent to such proceedings.

With regard to demurrers, there is authority that has permitted a party to proceed under Section 170.6 to disqualify a judge even though the judge had earlier ruled on a demurrer, when the peremptory challenge had been otherwise filed timely, the court reasoning that the ruling on the demurrer was not a determination of a contested fact issue going to the merits [*Fight for the Rams v. Superior Court (1996) 41 Cal. App. 4th 953, 958-959, 48 Cal. Rptr. 2d 851* (disqualified judge earlier sustained demurrer to seven causes of action with leave to amend and to three causes of action without leave to amend); *see Zdonek v. Superior Court (1974) 38 Cal. App. 3d 849, 852, 113 Cal. Rptr. 669* (disqualified judge earlier overruled demurrer; case held incorrectly decided based on another point by same division of appellate district in *Woodman v. Superior Court (1987) 196 Cal. App. 3d 407, 410, 241 Cal. Rptr. 818*); *but see Appl v. Lee Swett Livestock Co. (1987) 192 Cal. App. 3d 466, 469, 237 Cal. Rptr. 433* (disqualification denied when judge earlier sustained demurrer without leave to amend and Section 170.6 motion was brought following entry of judgment; court noted *Section 170.6* motion surely untimely when made after judge ruled on subject issue)].

A trial judge's resolution of a summary judgment motion, or a determination of a motion to reconsider summary judgment, has been held not to involve a determination of contested fact issues relating to the merits of the action within the meaning of *Code Civ. Proc. § 170.6*. In ruling on a summary judgment motion the judge does not pass on or determine issues of fact, but rather decides whether a triable issue of fact exists [*Bambula v. Superior Court (1985) 174 Cal. App. 3d 653, 655, 657, 220 Cal. Rptr. 223* (judge subject to peremptory challenge)]. At least one case has held that a ruling on a motion for summary adjudication may, at least in a complex case involving contract interpretation, constitute a determination of contested fact issues relating to the merits of the action within themeaning of *Code Civ. Proc. § 170.6* [*California Fed. Sav. & Loan Assn. v. Superior Court (1987) 189 Cal. App. 3d 267, 270-271, 234 Cal. Rptr. 413* (acknowledging that *Bambula* might be appropriate in a simple case, but declining to apply it when the motion for summary adjudication involved complex questions of law, including a contractual interpretation issue that would make or break the case)]. Declining to follow the holding in *California Fed. Sav.*, another court has held that in a complex toxic tort action in which a judge previously ruled on a motion for summary adjudication, that judge has determined only legal issues and remains subject to a later peremptory challenge under *Code Civ. Proc. § 170.6* [*Zilog Inc. v. Superior Court (2001) 86 Cal. App. 4th. 1309, 1322 104 Cal. Rptr. 2d 173*].

The mere fact that a judge considering discovery motions and sanctions may draw upon his or her knowledge regarding the parties' past conduct in the case is insufficient to broaden the category of cases in which a peremptory challenge is considered untimely [*Swift v. Superior Court (2009) 172 Cal. App. 4th 878, 885, 91 Cal. Rptr. 3d 504*].

In a criminal case, however, a motion to disqualify pursuant to *Code Civ. Proc. § 170.6* will not be considered timely if it is made after a pretrial hearing that involves a determination of the admissibility of evidence tending to establish the guilt or innocence of the accused, because such a hearing involves a determination of contested fact issues relating to the merits [*In re Abdul Y (1982) 130 Cal. App. 3d 847, 857, 860-861, 182 Cal. Rptr. 146* ; *but see Woods v. Superior Court (1987) 190 Cal. App. 3d 885, 886-887, 235 Cal. Rptr. 687* (judge erred in rejecting peremptory challenge that was filed subsequent to evidentiary hearing on motion to suppress as untimely because she had honored peremptory challenge based on identical affidavit of prejudice in another case simultaneously pending against same defendant, and granting one while rejecting other created appearance of impropriety)].

[iii] Prior Ruling on the Merits; Waiver by Judge

If a disqualification motion is untimely because of a prior ruling on the merits by the disqualified judge, the disqualified judge may not waive the timeliness requirement and accept the disqualification [*Briggs v. Superior Court (2001) 87 Cal. App. 4th 312, 318, 104 Cal. Rptr. 2d 445*].

[d] No Motion in Continued Proceeding

[i] General Rules

A motion to disqualify for prejudice is timely if filed prior to a proceeding that is subsequent to, but separate and independent from, the principal trial or hearing [*see McClenny v. Superior Court (1964) 60 Cal. 2d 677, 681, 36 Cal. Rptr. 459, 388 P.2d 691* ; *Oksner v. Superior Court (1964) 229 Cal. App. 2d 672, 689-690, 40 Cal. Rptr. 621* (motion to vacate ex parte order made after judgment in case by one who was never party to action was not continuation of or supplement to anything previously done in action)]. However, because former *Code Civ. Proc. § 170(2)* requires that a motion to disqualify must be made before a trial or hearing has commenced, it follows that such a motion is not timely if filed before a subsequent proceeding that is a part or a continuation of the original action [*see Jacobs v. Superior Court (1959) 53 Cal. 2d 187, 190, 1 Cal. Rptr. 9, 347 P.2d 9* (proceeding to modify custody order was continuation of original action during which custody was determined)].

A proceeding is a continuation of the original action out of which it arises if it involves "substantially the same issues" as the original action [*McClenny v. Superior Court (1964) 60 Cal. 2d 677, 684, 36 Cal. Rptr. 459, 388 P.2d 691* (issues to be raised in pending contempt proceeding were substantially same as those raised in previous domestic relations action); *Jacobs v. Superior Court (1959) 53 Cal. 2d 187, 191, 1 Cal. Rptr. 9, 347 P.2d 9* (issues presented by motion to modify custody order were substantially same as those presented in prior proceeding involving guardianship and custody)]. Matters raised in a subsequent proceeding that are necessarily relevant and material to the issues involved in the original action are "substantially the same" so that the proceeding is considered to be a continuation of the original action [*see Oak Grove School Dist. v. City Title Ins. Co. (1963) 217 Cal. App. 2d 678, 700, 32 Cal. Rptr. 288* (issues raised in claim for costs and disbursements were relevant to issues involved in original eminent domain action)]. In *Jacobs, above*, the Supreme Court reasoned that if a disqualification were permitted under *Code Civ. Proc. § 170.6* in matters that are continuations of a prior proceeding, it would mean that the judge who tried the case, and who is ordinarily in the best position to pass on the questions involved could, by a mere general allegation of prejudice and without any judicial determination of the facts, be disqualified from hearing such matters as motions for modification of a support order, for an injunction, and for change of custody of children. This procedure would make it possible for litigants to gamble on obtaining a favorable decision from one judge and, then, if confronted with an adverse judgment, allow them to disqualify him or her without presenting facts showing prejudice in the hope of securing a different ruling

from another judge in supplementary proceedings involving substantially the same issues [*Jacobs v. Superior Court (1959) 53 Cal. 2d 187, 191, 1 Cal. Rptr. 9, 347 P.2d 9*].

The holding in *Jacobs* has been applied, restated, and amplified to hold a motion to disqualify filed prior to the subsequent hearing to be not timely in the following situation:

- A hearing on attorney's fees and sanctions has been held to be a continuation of a contested proceeding for the appointment of a conservator [*Conservatorship of Durham (1988) 205 Cal. App. 3d 548, 553-555, 252 Cal. Rptr. 414*].

- A proceeding on indirect contempt has been held to be a continuation of an original domestic relations action [*McClenny v. Superior Court (1964) 60 Cal. 2d 677, 684, 36 Cal. Rptr. 459, 388 P.2d 691]* .

- A proceeding to obtain modification of an order for arbitration has been held a continuation of the original proceeding [*Andrews v. Joint Clerks etc. Committee (1966) 239 Cal. App. 2d 285, 294, 48 Cal. Rptr. 646*].

- A claim for costs and disbursements has been held to be a continuation of an original eminent domain proceeding [*Oak Grove School Dist. v. City Title Ins. Co. (1963) 217 Cal. App. 2d 678, 699, 32 Cal. Rptr. 288]* .

- A hearing to determine an attorney's fees has been held a continuation of the original divorce action [*Haldane v. Haldane (1962) 210 Cal. App. 2d 587, 596, 26 Cal. Rptr. 670*].

- An order to show cause hearing why plaintiff should not complete a jail sentence has been held to be a continuation of a hearing on contempt [*Stafford v. Russell (1962) 201 Cal. App. 2d 719, 721, 20 Cal. Rptr. 112*].

- A hearing on a motion to continue an injunction in effect pending appeal has been held a continuation of the original action [*Dennis v. Overholtzer (1960) 179 Cal. App. 2d 110, 111-112, 3 Cal. Rptr. 458*].

Even if there is a subject matter connection between the original action and the subsequent proceeding, however, the subsequent proceeding is not necessarily a continuation of the original action for purposes of making a timely motion to disqualify. For example, the continued proceeding rule does not apply if the subsequent proceeding does not affect the validity or enforceability of any order reached by the judge in the original action or if the subsequent proceeding otherwise raises distinct legal issues, seeks different relief, includes new parties, and is broader in scope than the original action [*City of Hanford v. Superior Court (1989) 208 Cal. App. 3d 580, 592-593, 256 Cal. Rptr. 274* (new case filed by defendant to enjoin codefendant from voluntarily taking action favorable to plaintiffs during pendency of defendants' appeal as not continuation of earlier case under appeal)]. Although two cases may involve the same parties (e.g., same employee and the same employer), if the second action arises out of later events distinct from those in the previous action, the second action does not constitute a continuation of the previous action and a party's peremptory challenge may be timely [*Bravo v. Superior Court (2007) 149 Cal. App. 4th 1489, 1494, 57 Cal. Rptr. 3d 910]* .

In addition, a motion to disqualify may be made following reversal on appeal if the same judge is assigned to the new trial [*Code Civ. Proc. § 170.6(a)(2)*; *see* discussion under [e], *below*].

[ii] New Judge Exception

A litigant who has not previously challenged a judge, court commissioner, or referee for prejudice may, in a proceeding supplemental to the original action, challenge an official other than one who had previously heard any phase of the matter, provided that the challenge is made before the commencement of the hearing of the supplemental proceedings and within the time limitations specified [*see Spector v. Superior Court (1961) 55 Cal. 2d 839, 843, 13 Cal. Rptr. 189, 361 P.2d 909* (judicial dissolution of corporation); *Thompson v. Superior Court (1962) 206 Cal. App. 2d 702, 706-707, 23 Cal. Rptr. 841* (child custody hearing)].

[e] Motion on Retrial Not Precluded

[i] If Case Assigned to Same Judge for Retrial

A motion to disqualify may be made following reversal on appeal of a trial court's decision or final judgment if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter [*Code Civ. Proc. § 170.6(a)(2)*; *see Peracchi v. Superior Court (2003) 30 Cal. 4th 1245, 1253, 135 Cal. Rptr. 2d 639* (discussing rules)]. The motion must be made within 60 days after the party or the party's attorney has been notified of the assignment [*Code Civ. Proc. § 170.6(a)(2)*]. The time limit for peremptory challenges found in the Trial Court Delay Reduction Act (*see Gov. Code § 68616(i)*) does not apply when a judgment has been reversed on appeal and returned to the trial court for retrial. The 60-day provision of *Code Civ. Proc. § 170.6* controls [*Stubblefield Construction Co. v. Superior Court (2000) 81 Cal. App. 4th 762, 769, 97 Cal. Rptr. 2d 121]* .

The party who filed the appeal that resulted in the reversal of a final judgment of a trial court may make a Seciton 170.6 motion regardless of whether that party or side had previously done so. This is an express exception to the one motion per case restriction of *Code Civ. Proc. § 170.6(a)(3)* [*Code Civ. Proc. § 170.6(a)(2)*; *see Stubblefield Construction Co. v. Superior Court (2000) 81 Cal. App. 4th 762, 765, 97 Cal. Rptr. 2d 121*]. A party who challenged a prior trial judge upon remand for a new trial may not thereafter exercise a second peremptory challenge against another judge [*Casden v. Superior Court (2006) 140 Cal. App. 4th 417, 423, 44 Cal.Rptr.3d 474]* . The party who unsuccessfully responded to the appeal may also exercise a peremptory challenge to the judge on remand, but only if that party has not previously exercised a peremptory challenge [*Pfeiffer Venice Properties v. Superior Court (2003) 107 Cal. App. 4th 761, 764, 132 Cal. Rptr. 2d 400*].

[ii] Motion Available Whether Prior Trial Was to Court or to Jury

A party has a right to file a peremptory challenge to the original trial judge after the reversal of a judgment or order on appeal, regardless of whether the judgment originated from a judge's decision or a jury verdict [*Pandazos v. Superior Court (1997) 60 Cal. App. 4th 324, 326, 70 Cal. Rptr. 2d 669]* .

[iii] Motion Available When Appellate Action Was Granted as Relief on a Writ

A party is also entitled to timely demand a new judge if a new trial is granted as part of writ relief [*see Overton v. Superior Court (1994) 22 Cal. App. 4th 112, 115, 27 Cal. Rptr. 2d 274]* .

[iv] Motion Available in Case of Retrial Even on Limited Issue, but Not on Remand to Perform Ministerial Act

The availability of peremptory disqualification on retrial before the same judge does not turn on whether the issues to be resolved on remand are limited, but on what the court must do to resolve them. Disqualification after remand on a limited issue is appropriate if the trial court must conduct an actual retrial, even if only on one issue. If, however, the court's function on remand is merely ministerial, for example, to recalculate interest, disqualification is not available under *Code Civ. Proc. § 170.6(a)(2)* [*Hendershot v. Superior Court (1993) 20 Cal. App. 4th 860, 864, 24 Cal. Rptr. 2d 645* (disqualification available); *Stegs Investments v. Superior Court (1991) 233 Cal. App. 3d 572, 574, 284 Cal. Rptr. 495* (disqualification available); *but see C.C. v. Superior Court (2008) 166 Cal. App. 4th 1019, 1022, 83 Cal.*

Rptr. 3d 225 (disqualification not available where appellate court order to juvenile court was clearly for the performance of ministerial acts, i.e., entering an order denying reunification services and setting a permanent plan selection hearing); *Paterno v. Superior Court (2004) 123 Cal. App. 4th 548, 561, 20 Cal. Rptr. 3d 282* (issue turns not on whether the judge is performing discretionary or ministerial tasks, but whether the postappeal hearing requires reexamination of contested issues of fact or law); *see also Geddes v. Superior Court (2005) 126 Cal. App. 4th 417, 424, 23 Cal. Rptr. 3d 857* (disqualification on remand not available where summary judgment was reversed solely due to trial judge's failure to state the facts and law on which it based its decision as required by *Code Civ. Proc. § 437c(g)*); *Peracchi v. Superior Court (2003) 30 Cal. 4th 1245, 1249, 135 Cal. Rptr. 2d 639* ; *Stubblefield Construction Co. v. Superior Court (2000) 81 Cal. App. 4th 762, 765, 97 Cal. Rptr. 2d 121* (discussing rules)].

For example, peremptory disqualification is available when a case is remanded to retry an issue after erroneous evidentiary rulings in the first trial had excluded evidence on that issue [*see Stegs Investments v. Superior Court (1991) 233 Cal. App. 3d 572, 574, 284 Cal. Rptr. 495* ; *see also Stubblefield Construction Co. v. Superior Court (2000) 81 Cal. App. 4th 762, 765, 97 Cal. Rptr. 2d 121* (peremptory disqualification after reversal of summary judgment)]. Disqualification may also be available on remand to deal with posttrial matters that involve trial court discretion or fact determination [*see Hendershot v. Superior Court (1993) 20 Cal. App. 4th 860, 864-865, 24 Cal. Rptr. 2d 645* (appropriate when judgment was reversed against defendant who had paid it pending appeal and remand order required resolution of factual issue as to whether he paid judgment for himself or on behalf of corporate defendant against which judgment was affirmed; noting that proceedings would likely involve reexamination of alter ego issue contested in the original trial)]. However, the California Supreme Court has ruled that a remand solely for resentencing in a criminal proceeding does not constitute a new trial and a disqualification motion under former *Cal. Code Civ. Proc. § 170.6(2)* [*see now Code Civ. Proc. 170.6(a)(2)*] is not allowed [*Peracchi v. Superior Court (2003) 30 Cal. 4th 1245, 1249, 135 Cal. Rptr. 2d 639* (third conviction had been reversed for *potential* retrial and for resentencing and prosecutor chose not to retry the charge in the reversed count, leaving only resentencing)]. The California Supreme Court ruled in *Peracchi* that the meaning of "new trial" in the context of criminal proceedings and the nature of sentencing hearings does not permit a challenge following a remand solely for resentencing. The potential for bias is not great and is restricted by state constitutional limits on sentencing. The California Supreme Court ruled that a defendant's interest in a full and fair sentencing hearing usually is best served when the hearing is presided over by the same judge who heard the evidence at trial. The Penal Code defines "new trial" differently from the civil cases, and what constitutes a "new trial" in a civil case is not the same as in a criminal case [*Peracchi v. Superior Court (2003) 30 Cal. 4th 1245, 1260-1262, 135 Cal. Rptr. 2d 639*].

[v] Motion Available When Order Appealed From Was Dismissal

The phrase "new trial" in *Code Civ. Proc. § 170.6(a)(2)* encompasses the situation where a case is reversed and remanded by the court of appeal after the trial judge has dismissed the case [*People v. Superior Court (2001) 91 Cal. App. 4th 391, 396-397, 109 Cal. Rptr. 2d 897* (trial judge's denial of Section 170.6 motion because the prior order was a dismissal and the proceeding after a remand would not be a "new trial" reversed on appeal)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 317.78 Procedure to Be Used in Proceedings Not Specified in Code Civ. Proc. § 170.6

In the case of trials or hearings not specifically provided for in *Code Civ. Proc. § 170.6*, the procedure for disqualification specified in that section must be followed as nearly as may be [*Code Civ. Proc. § 170.6(a)(2)*]. For discussion of special provisions under *Code Civ. Proc. § 639(b)* concerning discovery referees, see *§ 317.77[4][e][ii]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 317.79 Motion for Disqualification Divests Court of Jurisdiction

[1] In General

If a motion for disqualification for prejudice is timely made and supported by sufficient affidavit, declaration, or oral statement, the judge or commissioner against whom the peremptory challenge is directed is without jurisdiction to proceed with the trial or hearing [*see Code Civ. Proc. § 170.6(a)(1)*; *see also Andrews v. Joint Clerks etc. Committee (1966) 239 Cal. App. 2d 285, 294, 48 Cal. Rptr. 646* (labor dispute)], and any subsequent order or judgment entered by that judge or commissioner is null and void [*see Louisiana-Pacific Corp. v. Philo Lumber Co. (1985) 163 Cal. App. 3d 1212, 1221, 210 Cal. Rptr. 368* ; *Woodman v. Selvage (1968) 263 Cal. App. 2d 390, 396, 69 Cal. Rptr. 687* (shareholder's derivative action); *Andrews v. Joint Clerks etc. Committee (1966) 239 Cal. App. 2d 285, 294, 48 Cal. Rptr. 646* (labor dispute); *Estate of Cuneo (1963) 214 Cal. App. 2d 381, 384, 29 Cal. Rptr. 497* (probate action)]. It should be noted that, although the subsequent orders or judgments of a disqualified judge are frequently described as absolutely void for lack of jurisdiction, they are not void in any fundamental sense but rather are voidable if a party properly raises an objection [*Guedalia v. Superior Court (1989) 260 Cal. Rptr. 99* ; *In re Christian J. (1984) 155 Cal. App. 3d 276, 280, 202 Cal. Rptr. 54]* . The error of having a disqualified judge preside at a trial may be waived, and a party who consents to proceed without objection may not later attack the judgment as void for lack of subject matter jurisdiction [*Stebbins v. White (1987) 190 Cal. App. 3d 769, 782-783, 235 Cal. Rptr. 656* (party withdrew motion to disqualify)].

The challenged judge may, however, rule on the timeliness of the motion and reject the motion if it is not timely [*Micro/Vest Corp. v. Superior Court (1984) 150 Cal. App. 3d 1085, 1089, 198 Cal. Rptr. 404*]. No judge who has been disqualified under *Code Civ. Proc. § 170.6(a)(1)* can hear any matter that involves a contested issue of law or fact. Disqualification is not limited to the particular motion, but deprives the judge of jurisdiction in all further contests in that action [*Brown v. Swickard (1985) 163 Cal. App. 3d 820, 830-831, 209 Cal. Rptr. 844]* . A judge disqualified under *Code Civ. Proc. § 170.6*, however, is enjoined by the statute only from trying the case or hearing any matter involving a disputed issue of law or fact. For example, because a settlement conference is not a hearing in which contested issues of law or fact are determined, a judge who has been challenged under *Code Civ. Proc. § 170.6* is not disqualified from conducting the settlement conference in the case in question [*Mezzetti v. Superior Court (1979) 94*

Cal. App. 3d 987, 990, 993, 156 Cal. Rptr. 802 ; *see People v. Wilks (1978) 21 Cal. 3d 460, 466, 146 Cal. Rptr. 364, 578 P.2d 1369* (dictum in accord)].

[2] Review by Writ of Mandate

An order on a peremptory challenge to a judge is not an appealable order. It may be reviewed only by writ of mandate from the appropriate court of appeal and sought only by the parties to the proceeding. The petition for the writ must be filed and served within 10 days after service of written notice of the entry of the court's order determining the question of disqualification [*Code Civ. Proc. § 170.3(d)*; *People v. Hull (1991) 1 Cal. 4th 266, 276, 2 Cal. Rptr. 2d 526, 820 P. 2d 1036* (*Section 170.3(d)* applies to peremptory challenges as well as challenges for cause); *see also Sears, Roebuck and Co. v. National Union Fire Ins. Co. of Pittsburgh (2005) 131 Cal. App. 4th 1342, 1349, 32 Cal. Rptr. 3d 717* (appellate court has the discretion to treat an appeal of a decision on a peremptory challenge as a petition for writ of mandate under extraordinary circumstances)]. The *Hull* decision resolves a conflict among the courts of appeal over whether mandate is the exclusive remedy for reviewing both challenges for cause and peremptory challenges [*compare Guedalia v. Superior Court (1989) 211 Cal. App. 3d 1156, 1160, 260 Cal. Rptr. 99* (mandate is exclusive remedy for reviewing peremptory challenges under *Code Civ. Proc. § 170.6*) *with Woodman v. Superior Court (1987) 196 Cal. App. 3d 407, 414, 241 Cal. Rptr. 818* (mandate is exclusive only with respect to challenges for cause)]. Mandate in accordance with *Section 170.3(d)* is the exclusive remedy whether the challenge was denied or granted [*In re Sheila B. (1993) 19 Cal. App. 4th 187, 194-195, 23 Cal. Rptr. 2d 482]* .

Only the parties to the action may file a petition for writ of mandate; the disqualified judge may not [*Curle v. Superior Court (2001) 24 Cal. 4th 1057, 1059, 103 Cal. Rptr. 2d 751*].

For further discussion of *Section 170.3(d)*, see *§ 317.52*.

Legal Topics:

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§ 317.80 Reassignment of Trial or Hearing to Another Judge

Once a motion to disqualify for prejudice is duly presented and an affidavit, declaration, or oral statement is made, thereupon and without any further act or proof, the judge supervising the master calendar must assign another judge, court commissioner, or referee to try the cause or hear the matter. If there is no master calendar, the trial or hearing must be assigned or transferred to another judge, court commissioner, or referee of the court in which the trial or matter is pending [for form, *see § 317.213*]. If there is no other judge, commissioner, or referee of the court, the Chairman of the Judicial Council must assign some other judge, commissioner, or referee to try the cause or hear the matter, as the case may be, as promptly as possible [*Code Civ. Proc. § 170.6(a)(3)*]. In this latter situation, the clerk must notify the Chairman of the Judicial Council that there is no judge, commissioner, or referee to hear the case. The chairman must then assign a judge, commissioner, or referee to hear the action or proceeding at the time fixed or, if no time has been fixed or good cause appears for changing the time, the judge, commissioner, or referee must fix a time for hearing in accordance with law and rules and hear the action or proceeding at the time so fixed [*see Code Civ. Proc. § 170.8*].

If a judge, commissioner, or referee is disqualified pursuant to a challenge under *Code Civ. Proc. § 170.6*, not only is it the duty of the court to assign another judge, commissioner, or referee if one is available or, if none is available to procure his or her assignment through the Chairman of the Judicial Council, but also the period between disqualification of the judge, commissioner, or referee and assignment of the trial or action to another is to be disregarded in considering any subsequent motion to dismiss for delay in bringing the action to trial [*see Code Civ. Proc. § 583.340*; *see also Nail v. Osterholm (1970) 13 Cal. App. 3d 682, 686, 91 Cal. Rptr. 908]* .

When a motion for peremptory disqualification is duly made, with a sufficient supporting affidavit, by a cross defendant, severance of the cross action, with recusal of the challenged judge in only the severed action, is improper. There is no statutory authority to sever the cross action; rather, *Code Civ. Proc. § 170.6* requires that the entire case must be assigned to another judge [*Sunkyong Trading (H.K.) Ltd. v. Superior Court (1992) 9 Cal. App. 4th 282, 287-290, 11 Cal. Rptr. 2d 504]* .

Legal Topics:

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§ 317.81 Continuance

No continuance of a trial or hearing will be granted because of such a motion unless required for the convenience of the court or unless good cause is shown. If a continuance is granted, the cause or matter will be continued for limited periods and will be reassigned or transferred for trial or hearing as promptly as possible [*see Code Civ. Proc. § 170.6(a)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPersonal BiasCivil ProcedureJudicial OfficersRefereesRemovalsCivil ProcedurePretrial MattersContinuancesGovernmentsCourtsSpecial Judges

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§ 317.82 Reconsideration of Motion by Assigned Judge

While a judge that has been disqualified has no authority to act on substantive matters, the new judge assigned to the case may hear a motion for reconsideration under *Code Civ. Proc. § 1008* on the basis that the disqualified judge is "unavailable." If the new judge finds the disqualification is erroneous, the disqualified judge's authority to rule on the matter is reinstated [*Geddes v. Superior Court (2005) 126 Cal. App. 4th 417, 425-426, 23 Cal. Rptr. 3d 857]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesSuccessorsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

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§ 317.83 California's Judicial Agencies

[1] Judicial Council of California

[a] Governing Law

The authorization for the Judicial Council is contained in *Cal. Const., art. VI, § 6*, which also specifies the Council's membership (along with terms of office) and functions. *Cal. Rules of Ct., Rules 10.1-10.71* contain the Council's mission statement, guiding principles, and nominating procedures, and describe the function and duties of each of the Council's committees.

Judicial Administration Rules relevant to the Judicial Council are codified at *Cal. Rules of Ct., Rule 10.1 et seq.*, and Standards of Judicial Administration are codified at Cal. Rules of Ct., Stds. Jud. Admin., Std. 2.1 et seq.

[b] Authority/Scope

Chaired by the Chief Justice, the Judicial Council is responsible for improving the administration of justice in California. The Judicial Council sets the direction for improving the quality of justice and advancing the consistent, independent, impartial, and accessible administration of justice by the judicial branch for the benefit of the public. The Judicial Council Governance Policies, located in Appendix D of the California Rules of Court, describe the Council's purposes; responsibilities; policymaking role; members and officers and their roles; internal organization; relationship with its advisory groups; relationship with the Administrative Director of the Courts and with the Administrative Office of the Courts, the staff agency that he or she directs; and internal policies and procedures [*Cal. Rules of Ct., Rule 10.1(a)(3)*]. The Council establishes policies and sets priorities for the judicial branch of government. It may seek advice and recommendations from committees, task forces, and the public [*Cal. Rules of Ct., Rule 10.1(a)(2)*].

The Judicial Council develops judicial branch goals in its strategic and operational plans. At six-year intervals, the Council develops and approves a long-range strategic plan. At three-year intervals, the Council develops and approves an operational plan for the implementation of the strategic plan. Each plan is developed in consultation with branch stakeholders and justice system partners [*Cal. Rules of Ct., Rule 10.1(c)*].

The Council performs its constitutional and other functions with the support of its staff agency the Administrative Office of the Courts, under the leadership of the Administrative Director of the Courts, who serves as Secretary of the Judicial Council [*Cal. Rules of Ct., Rule 10.1(d)*].

[c] Duties

The constitutional authority and duties of the Judicial Council are to:

- Survey judicial business [*Cal. Const., art. VI, § 6(d)*; *Cal. Rules of Ct., Rule 10.1(b)(1)*];

- Make recommendations to the courts [*Cal. Const., art. VI, § 6(d)*; *Cal. Rules of Ct., Rule 10.1(b)(2)*];

- Make annual recommendations to the Governor and the Legislature [*Cal. Const., art. VI, § 6(d)*; *Cal. Rules of Ct., Rule 10.1(b)(3)*];

- Adopt rules for court administration and rules of practice and procedure that are not inconsistent with statute [*Cal. Const., art. VI, § 6(d)*; *Cal. Rules of Ct., Rule 10.1(b)(4)*]; and

- Perform other functions prescribed by statute [*Cal. Const., art. VI, § 6(d)*; *Cal. Rules of Ct., Rule 10.1(b)(5)*].

Pursuant to *Cal. Rules of Ct., Rule 10.101(b)*, the Judicial Council must also perform the following duties:

- Establish responsible fiscal priorities that best enable the judicial branch to achieve its goals and the Judicial Council to achieve its mission [*Cal. Rules of Ct., Rule 10.101(b)(1)*];

- Develop the budget of the judicial branch based on the priorities established and the needs of the courts [*Cal. Rules of Ct., Rule 10.101(b)(2)*];

- Communicate and advocate the budget of the judicial branch to the Governor and the Legislature [*Cal. Rules of Ct., Rule 10.101(b)(3)*];

- Allocate funds in a manner that ensures equal access to justice for all citizens of the state, ensures the ability of the courts to carry out their functions effectively, promotes implementation of statewide policies as established by statute and the Judicial Council, and promotes implementation of efficiencies and cost-saving measures [*Cal. Rules of Ct., Rule 10.101(b)(4)*];

- Resolve appeals on budget and allocation issues [*Cal. Rules of Ct., Rule 10.101(b)(5)*]; and

- Ensure that the budget of the judicial branch remains within the limits of the appropriation set by the Legislature [*Cal. Rules of Ct., Rule 10.101(b)(6)*].

[d] Membership

The Judicial Council consists of the Chief Justice and one other justice of the Supreme Court, three justices of Courts of Appeal, 10 judges of superior courts, two nonvoting court administrators, and such other nonvoting members as determined by the voting membership of the council, each appointed by the Chief Justice to three-year terms; four members of the State Bar appointed by its governing body to three-year terms; and one member of each house of the Legislature appointed as provided by the house [*Cal. Const., art. VI, § 6(a)*; see also *Cal. Rules of Ct., Rule 10.2(a)(1)*].

Council membership terminates if a member ceases to hold the position that qualified the member for appointment. A vacancy must be filled by the appointing power for the remainder of the term [*Cal. Const., art. VI, § 6(b)*; see also *Cal. Rules of Ct., Rule 10.2(a)(2)*].

[e] Advisory Committees/Task Forces

The Judicial Council carries out its mission primarily through the work of its advisory committees and task forces. The chair of the Council may appoint advisory committees and task forces, comprising judges, court officials, attorneys, and members of the public, to advise the Council in studying the condition of court business, improving judicial administration, and performing other Council responsibilities. Advisory committees monitor areas of continuing significance to the justice system, whereas task forces handle particular projects or proposals. Both make recommendations to the Council. The Judicial Council currently maintains the following advisory committees and task forces:

Advisory Committees

- Access and Fairness
- Administrative Presiding Justices
- Appellate
- Civil and Small Claims
- Civil Jury Instructions
- Criminal Jury Instructions
- Center for Judicial Education and Research (CJER) Governing Committee
- Collaborative Justice Courts
- Court Executives
- Court Interpreters
- Court Technology
- Criminal Law
- Family and Juvenile Law
- Judicial Service
- Probate and Mental Health
- Traffic
- Trial Court Presiding Judges

Task Forces

- Appellate Indigent Defense Oversight
- Children in Foster Care
- Court Facilities Transitional
- Domestic Violence Practice and Procedure
- Judicial Ethics Issues
- Legal Services Trust Fund
- Probate Conservatorship
- Science and the Law
- Self-Represented Litigants

[f] Internal Committees

Under the Judicial Council's own governance principles, each of its members is appointed by the Chief Justice to serve on one or more internal committees. The following committees consider matters and then report to the Council:

- The Executive and Planning Committee oversees the Council's strategic planning process; oversees the Council's policies and procedures regarding court facilities, including development of policies, procedures, and guidelines for facilities, site selection, and capital appropriations; ensures that proposed judicial branch budgets, allocation schedules, and related budgetary issues are brought to the Judicial Council in a timely manner and in a format that permits the Council to establish funding priorities in the context of the Council's annual program objectives, statewide policies, and long-range strategic and operational plans; establishes agendas for Council meetings; develops a schedule of topics that the council intends to consider for making policy and receives updates from the Administrative Director of the Courts or Administrative Office of the Courts staff; makes recommendations to the Council regarding governance and oversees the Council's review of its governance policies and principles; recommends candidates to the Chief Justice for appointment to the Judicial Council and its advisory bodies; oversees advisory committees and task forces as assigned by the Chief Justice; and promotes effective policies for communications between the Judicial Council and the judicial branch [*Cal Rules of Ct., Rule 10.11(b)-(j)*]. The Committee may take action on behalf of the Council between Council meetings, except for adopting rules of court, standards of judicial administration, and forms; making appointments that by statute must be made by the Council; and taking actions that are delegated to other council internal committees [*Cal. Rules of Ct., Rule 10.11(a)*].

- The Policy Coordination and Liaison Committee takes a position on behalf of the Council on pending legislative bills, makes recommendations to the Council on all proposals for Council-sponsored legislation and on an annual legislative agenda, and represents the Council's position before the Legislature and other bodies or agencies and acting as liaison with other governmental entities, the Bar, the media, the judiciary, and the public regarding Council-sponsored legislation, pending legislative bills, and the Council's legislative positions and agendas; builds consensus on issues of importance to the

judicial branch consistent with the Council's strategic plan with entities and individuals outside of the branch; develops an annual plan for communication and interaction with other branches and levels of government, components of the justice system, the Bar, the media, and the public; and may direct any advisory committee to provide it with analysis or recommendations on any pending or proposed legislation, and reviews all recommendations from advisory committees regarding pending or proposed legislation [*Cal. Rules of Ct., Rule 10.12*].

- The Rules and Projects Committee establishes and maintains a rule-making process that is understandable and accessible to justice system partners and the public. The Committee identifies the need for new rules, standards, and forms; establishes and publishes procedures for the proposal, adoption, and approval of rules of court, forms, and standards of judicial administration that ensure that relevant input from the public is solicited and considered; reviews proposed rules, standards, and forms and circulates those proposals for public comment in accordance with its procedures and guidelines; provides guidelines for the style and format of rules, forms, and standards and ensures that proposals are consistent with the guidelines; ensures that proposals for new or amended rules, standards, and forms do not conflict with statutes or other rules; and determines whether proposals for new or amended rules, standards, or forms have complied with its procedures [*Cal. Rules of Ct., Rule 10.13(a)*]. The Committee also establishes and maintains a process for obtaining public comment on the jury instructions and assists the council in making informed decisions about jury instructions [*Cal. Rules of Ct., Rule 10.13(b)*].

- The Litigation Management Committee oversees litigation and claims against trial court judges, appellate court justices, the Judicial Council, the Administrative Office of the Courts, the trial and appellate courts, and the employees of those bodies in which the likely monetary exposure is $100,000 or more or that raise issues of significance to the judicial branch by reviewing and approving any proposed settlement, stipulated judgment, or offer of judgment; and consulting with the Administrative Director or General Counsel, on request, regarding important strategy issues [*Cal. Rules of Ct., Rule 10.14(a)*]. The Committee also makes recommendations to the Judicial Council for policies governing the management of litigation involving the courts [*Cal. Rules of Ct., Rule 10.14(b)*] and resolves written objections described in *Cal Rules of Ct., Rule 10.202(d)* presented by the Office of the General Counsel [*Cal. Rules of Ct., Rule 10.14(c)*].

[2] Administrative Office of the Courts

[a] Governing Law

The Judicial Council is constitutionally authorized to appoint an Administrative Director of the Courts [*Cal. Const., Art. VI, § 6(a)*]. *Cal. Rules of Ct., Rule 10.81* authorizes the Director to employ, organize, and direct a staff, known as the Administrative Office of the Courts (AOC).

[b] Duties

The AOC assists the Council and its chair in carrying out their duties under the Constitution and laws of the state [*Cal. Rules of Ct., Rule 10.81(b)*]. It provides professional services to the courts and the Council, including programs for implementing trial court funding and unification, and legal services, including litigation management. It also provides various programs to improve justice administration and to enhance court technology, judicial branch education, and human resources support.

The Administrative Director of the Courts implements the directives of the Judicial Council and must [*Cal. Rules of Ct., Rule 10.101(d)*]:

- Develop policies and procedures for the creation and implementation of a yearly budget for the judicial branch [*Cal. Rules of Ct., Rule 10.101(d)(1)*];

- Present the judicial branch budget in negotiations with the Governor and the Legislature [*Cal. Rules of Ct., Rule 10.101(d)(2)*]; and

- Allocate to the trial courts, on behalf of the Judicial Council, a portion of the prior fiscal year baseline allocation for the trial courts following approval of the State Budget and before the allocation of state trial court funding by the Judicial Council. The portion of the prior fiscal year baseline allocation that may be so allocated is limited to the amount estimated to be necessary for the operation of the courts pending action by the Judicial Council, and may not exceed 25 percent of the prior fiscal year baseline allocation for each trial court [*Cal. Rules of Ct., Rule 10.101(d)(3)*].

[c] Departments

The AOC is organized based on functional responsibilities that are rooted in judicial administration and court operations areas. Although these responsibilities are carried out across the organization, certain roles and activities are department specific. Current AOC departments include the following:

- The Appellate and Trial Court Judicial Services Unit manages the court-appointed counsel program, provides comprehensive and timely staff support services to the Administrative Presiding Justices Advisory Committee and its subcommittees, acts as a liaison to appellate court justices and staffs, and implements the policies of the Chief Justice for the Assigned Judges Program. The unit also manages the administrative activities related to processing petitions for civil case coordination and compiles and disseminates the vexatious litigant's list.

- The Center for Families, Children & the Courts (CFCC) works to improve the quality of justice and services to meet the diverse needs of families, youth, children, and self-represented litigants in the California courts. Many of CFCC's projects relate to family, juvenile, child support, custody, visitation, and domestic violence law and procedure. Ongoing projects include developing rules, forms, and standards; providing training, education, and grants; and coordinating research and statistical analysis. The center also initiates projects involving issues of juvenile dependency, victim reconciliation, and court access.

- The Education Division/Center for Judicial Education and Research (CJER) serves as the council's educational resource for the judicial branch, offering a comprehensive educational program to judges, court staffs, and the agency. The division offers a comprehensive statewide educational program to judges and judicial branch staff at the superior and appellate court levels. The division also provides the AOC with editing and graphics services, copy and production, mail, transportation, travel, conference services, clerical assistance, and records retention through its Administrative Services Unit.

- The Executive Office Programs Division provides support for the Executive Office and other parts of the agency, and includes the Center for Court Research, Planning and Effective Practices; Court Programs Services; Office of Communications; and Secretariat.

- The Finance Division provides an integrated program of budget planning, asset management, accounting, procurement, contract management, and facility coordination to the judicial branch and the superior courts.

- The Office of Court Construction and Management enhances the administration of justice by

providing responsible and efficient professional stewardship of California's court facilities; promotes excellence in the built environment with the aim of facilitating equal access to justice; and provides leadership in the design and management of judicial architecture.

- The Office of the General Counsel provides quality, timely, and ethical legal advice and services to the Chief Justice, the Judicial Council and its committees and task forces, the AOC, and the courts. The office has two major functions: (1) house counsel and (2) rules and projects.

- The Office of Governmental Affairs, based in Sacramento, promotes and maintains positive relations with the legislative and executive branches and advocates on legislative and budget matters on behalf of the council.

The AOC's three regional offices, covering the northern/central, southern, and northern coastal regions of the state, facilitate the delivery of services and improve communication between the AOC at the state level and courts at the local level. Their primary focus is on operations, especially in the areas of technology, finance, legal issues, and human resources.

[3] Commission on Judicial Appointments

[a] Governing Law

The Commission on Judicial Appointments is a constitutionally established body [*Cal. Const., art. VI, § 7*]. Guidelines for the Commission are not adopted as part of the Cal. Rules of Ct., but are often printed following the Rules.

[b] Authority/Scope

The Commission convenes after the Governor nominates or appoints a person to fill a vacancy on either the Supreme Court or a Court of Appeal. One or more public hearings are held by the commission to review the appointee's qualifications. The Commission may confirm or veto the appointment. No appellate appointment is final until the Commission has filed its approval with the Secretary of State [*Cal. Const., art. VI, § 16*].

[c] Membership

The Commission on Judicial Appointments consists of the Chief Justice, the Attorney General, and the presiding justice of the court of appeal of the affected district or, if there are two or more presiding justices, the one who has presided longest or, when a nomination or appointment to the Supreme Court is to be considered, the presiding justice who has presided longest on any court of appeal [*Cal. Const., Art. VI, § 7*].

[4] Commission on Judicial Performance

[a] Governing Law

The Commission on Judicial Performance was established by voter referendum in 1960. The Commission's authority is set forth in *Cal. Const., art. VI, §§ 8, 18, 18.1, 18.5*. The Commission also is subject to *Gov. Code §§ 68701-68755*. Commission determinations on disability retirement applications are governed by *Gov. Code §§ 75060-75064* and §§ 75560-75564.

In addition, the Commission is responsible for enforcement of the restrictions on judges' receipt of gifts and honoraria, set forth in *Code of Civ. Proc. § 170.9*.

[b] Cross Reference

For further discussion of the Commission on Judicial Performance, see *§ 317.86*.

Legal Topics:

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

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§ 317.84 Judicial Administration Rules of Court and Standards of Judicial Administration

[1] Governing Law

The Judicial Administration Rules are codified at *Cal. Rules of Ct., Rule 10.1 et seq.* The Standards of Judicial Administration are codified at Cal. Rules of Ct., Stds. Jud. Admin., Std. 2.1 et seq. [*see also* Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.1 for Standards for Judicial Administration].

[2] Role of Judiciary in Community

Judicial participation in community outreach activities should be considered an official judicial function to promote public understanding of and confidence in the administration of justice. This function should be performed in a manner consistent with the California Code of Judicial Ethics [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.5].

[3] Minimum Education Requirements, Expectations, and Recommendations

[a] Goals

Cal. Rules of Ct., Rule10.452 et seq. set forth minimum education requirements, expectations, and recommendations for justices, judges, subordinate judicial officers, and court personnel. The minimum education requirements, expectations, and recommendations set forth in *Cal. Rules of Ct., Rules 10.461*-10.479 are intended to achieve two complementary goals:

- To ensure that both individuals who are new to the bench or the court and those who are experienced on the bench or court but are beginning a new assignment or role obtain education on the tasks, skills, abilities, and knowledge necessary to be successful in the new roles [*Cal. Rules of Ct., Rule 10.452(b)(1)*]; and

- To establish broad parameters, based on time, for continuing education for individuals who are experienced both on the bench or court and in their assignments or roles, while preserving the ability of

the individual, working with the individual who oversees his or her work, to determine the appropriate content and provider [*Cal. Rules of Ct., Rule 10.452(b)(2)*].

[b] Relationship of Minimum Education Requirements and Expectations to Education Recommendations

The education requirements and expectations set forth in *Cal. Rules of Ct., Rules 10.461*-10.462 and 10.471-10.474 are minimums. Justices, judges, and subordinate judicial officers should participate in more judicial education than is required and expected, related to each individual's responsibilities and particular judicial assignment or assignments and in accordance with the judicial education recommendations set forth in *Cal. Rules of Ct., Rule 10.469*. Additional education requirements related to the specific responsibility of hearing family law matters are set forth in *Cal. Rules of Ct., Rule 10.463*. Clerk/administrators, court executive officers, and other court personnel should participate in more education than is required, related to each individual's responsibilities and in accordance with the education recommendations set forth in *Cal. Rules of Ct., Rule 10.479*.

[4] Judicial Administration Rules Applicable to All Courts

[a] Judicial Sabbatical Pilot Program

Sabbatical leave is a privilege available to jurists by statute. The objective of sabbatical leave is to facilitate study, teaching, research, or another activity that will benefit the administration of justice and enhance judges' performance of their duties [*Cal. Rules of Ct., Rule 10.502(a)*].

A judge or justice is eligible to apply for a paid sabbatical under *Gov. Code § 77213* if he or she has served for at least seven years as a California judicial officer, including service as a subordinate judicial officer [*Cal. Rules of Ct., Rule 10.502(b)(1)(A)*], he or she has not taken a sabbatical within seven years of the date of the proposed sabbatical [*Cal. Rules of Ct., Rule 10.502(b)(1)(B)*], and he or she agrees to continue to serve as a judicial officer for at least three years after the sabbatical [*Cal. Rules of Ct., Rule 10.502(b)(1)(C)*].

Any judge is eligible to apply for an unpaid sabbatical under *Gov. Code § 68554* [*Cal. Rules of Ct., Rule 10.502(b)(2)*].

[b] Use of Recycled Paper by All Courts

All courts must use recycled paper for all purposes except for uses for which recycled paper is not practically available [*Cal. Rules of Ct., Rule 10.503*].

[c] Smoking Prohibited in All Courts

Smoking is prohibited in all court facilities [*Cal. Rules of Ct., Rule 10.504(b)*], defined as courthouses and all areas of multipurpose buildings used for court operations [*Cal. Rules of Ct., Rule 10.504(a)*]. Conspicuous no-smoking signs must be placed in all court facilities [*Cal. Rules of Ct., Rule 10.504(c)*].

[d] Judicial Robes

The judicial robe required by *Gov. Code § 68110* must be black, must extend in front and in back from the collar and shoulders to below the knees, and must have sleeves to the wrists [*Cal. Rules of Ct., Rule 10.505(a)*]. The judicial robe must conform to the style customarily worn in courts in the United States [*Cal. Rules of Ct., Rule 10.505(b)*].

[5] Trial Court Administration

[a] General Rules on Trial Court Management

[i] Superior Court Management

The provisions in Cal. Rules of Ct., Tit. 10, Div. 4 establish a system of trial court management that promotes equal access to the courts [*Cal. Rules of Ct., Rule 10.601(a)(1)*]; establishes decentralized management of trial court resources [*Cal. Rules of Ct., Rule 10.601(a)(2)*]; and enables the trial courts to operate in an efficient, effective, and accountable manner in serving the people of California [*Cal. Rules of Ct., Rule 10.601(a)(3)*]. The rules are intended to ensure the authority and responsibility of the superior courts to do the following, consistent with statutes, rules of court, and standards of judicial administration:

- Manage their day-to-day operations with sufficient flexibility to meet the needs of those served by the courts [*Cal. Rules of Ct., Rule 10.601(b)(1)*];

- Establish the means of selecting presiding judges, assistant presiding judges, executive officers or court administrators, clerks of court, and jury commissioners [*Cal. Rules of Ct., Rule 10.601(b)(2)*];

- Manage their personnel systems, including the adoption of personnel policies [*Cal. Rules of Ct., Rule 10.601(b)(3)*];

- Manage their budget and fiscal operations, including allocating funding and moving funding between function or line items [*Cal. Rules of Ct., Rule 10.601(b)(4)*];

- Provide input to the Judicial Council, the Trial Court Budget Working Group, and the Administrative Office of the Courts on the trial court budget process [*Cal. Rules of Ct., Rule 10.601(b)(5)*]; and

- Develop and implement processes and procedures to improve court operations and responsiveness to the public [*Cal. Rules of Ct., Rule 10.601(b)(6)*].

[ii] Selection and Term of Presiding Judge

Each court that has three or more judges must select a presiding judge. Selection of the presiding judge may be by secret ballot. The court should establish an internal local rule or policy for the selection of the presiding judge and assistant presiding judge, if any [*Cal. Rules of Ct., Rule 10.602(a)(1)*].

In a court having two judges, the selection of the presiding judge must conform to *Gov. Code § 69508.5*. If selection cannot be agreed upon on and neither judge has at least four years of experience, the senior judge must hold the office of presiding judge until both judges have at least four years of experience [*Cal. Rules of Ct., Rule 10.602(a)(2)*].

A presiding judge must have at least four years of experience as a judge, unless this requirement is waived by a majority vote of the judges of the court. Nomination and selection of a presiding judge should take into consideration the judge's management and administrative ability; interest in serving in the position; experience and familiarity with a variety of trial court assignments; ability to motivate and educate other judicial officers and court personnel; ability to evaluate the strengths of the court's bench officers and make assignments based on those strengths as well as the best interests of the public and the court; and other appropriate factors [*Cal. Rules of Ct., Rule 10.602(b)*].

A presiding judge in a court with two judges must be elected for a term of not less than one year. A presiding judge in a court with three or more judges must be elected for an initial term of not less than two years. The presiding judge may be elected for additional terms. The court may change the duration of the initial or additional term by local rule or policy so long as the initial term is not less than the duration specified in *Cal. Rules of Ct., Rule 10.602*. A presiding judge may be removed by a majority vote of the judges of the court [*Cal. Rules of Ct., Rule 10.602(c)*].

The court may elect an assistant presiding judge [*Cal. Rules of Ct., Rule 10.602(d)(1)*]. If the court's internal local rule

or policy does not provide for the designation of an acting presiding judge to serve if the presiding judge is absent or unable to act, the presiding judge must designate one [*Cal. Rules of Ct., Rule 10.602(d)(2)*]. The court should provide the assistant presiding judge with training to foster an orderly succession to the office of presiding judge [*Cal. Rules of Ct., Rule 10.602(d)(3)*].

To the extent possible, the judicial caseload should be adjusted to provide the presiding judge with sufficient time and resources to devote to the management and administrative duties of the office [*Cal. Rules of Ct., Rule 10.602(e)*].

[iii] Authority and Duties of Presiding Judge

The presiding judge is responsible, with the assistance of the court executive officer, for leading the court, establishing policies, and allocating resources in a manner that promotes access to justice for all members of the public, provides a forum for the fair and expeditious resolution of disputes, maximizes the use of judicial and other resources, increases efficiency in court operations, and enhances service to the public. The presiding judge is responsible for:

- Ensuring the effective management and administration of the court, consistent with any rules, policies, strategic plan, or budget adopted by the Judicial Council or the court [*Cal. Rules of Ct., Rule 10.603(a)(1)*];

- Ensuring that the duties of all judges specified under *Cal. Rules of Ct., Rule 10.608* are timely and orderly performed [*Cal. Rules of Ct., Rule 10.603(a)(2)*]; and

- Ensuring that the court has adopted written policies and procedures allowing the presiding judge to perform efficiently the administrative duties of that office [*Cal. Rules of Ct., Rule 10.603(a)(3)*].

The presiding judge is authorized to assign judges to departments and designate supervising judges for divisions, districts, or branch courts; apportion the business of the court, including assigning and reassigning cases to departments; call meetings of the judges; appoint standing and special committees of judges; act as the spokesperson for the court; authorize and direct expenditures from the court's Trial Court Operations Fund; and perform all acts necessary to accomplish the duties specified by the rules of court [*Cal. Rules of Ct., Rule 10.603(b)(1)*]. No local rule or policy may limit the authority of the presiding judge as granted in the California Rules of Court [*Cal. Rules of Ct., Rule 10.603(b)(2)*].

The presiding judge has ultimate authority to make judicial assignments. The duties of the presiding judge are set forth in *Cal. Rules of Ct., Rule 10.603(c)*, and include the following:

- Designate a judge to preside in each department, including a master calendar judge when appropriate, and designate a presiding judge of the juvenile division and a supervising judge for each division, district, or branch court. In making judicial assignments, the presiding judge must take into account the needs of the public and the court, as they relate to the efficient and effective management of the court's calendar; the knowledge and abilities demanded by the assignment; the judge's judicial and nonjudicial experience, including specialized training or education; the judge's interests; the need for continuity in the assignment; the desirability of exposing the judge to a particular type of assignment; and other appropriate factors. Judicial assignments must not be based solely or primarily on seniority [*Cal. Rules of Ct., Rule 10.603(c)(1)(A)*];

- Assign to a master calendar judge any of the duties that may more appropriately be performed by that department [*Cal. Rules of Ct., Rule 10.603(c)(1)(B)*];

- Supervise the court's calendar, apportion the business of the court among the several departments of

the court as equally as possible, and publish for general distribution copies of a current calendar specifying the judicial assignments of the judges and the times and places assigned for hearings [*Cal. Rules of Ct., Rule 10.603(c)(1)(C)*];

- Reassign cases between departments as convenience or necessity requires [*Cal. Rules of Ct., Rule 10.603(c)(1)(D)*];

- Supervise and monitor the number of causes under submission before the judges of the court and ensure that no cause under submission remains undecided and pending for more than 90 days [*Cal. Rules of Ct., Rule 10.603(c)(3)*];

- Notify the Commission on Judicial Performance of:

  - A judge's substantial failure to perform judicial duties, including but not limited to any habitual neglect of duty, persistent refusal to carry out assignments as assigned by the presiding judge, or persistent refusal to carry out the directives of the presiding judge as authorized by the rules of court [*Cal. Rules of Ct., Rule 10.603(c)(4)(A)(i)*]; or

  - Any absences caused by disability totaling more than 90 court days in a 12-month period, excluding absences authorized under *Cal. Rules of Ct., Rule 10.603(c)(2)* [*Cal. Rules of Ct., Rule 10.603(c)(4)(A)(ii)*];

- Be responsible for the recruitment, training, supervision, approval, and performance of temporary judges [*Cal. Rules of Ct., Rule 10.603(c)(4)(D)*];

- Establish responsible budget priorities and submit budget requests that will best enable the court to achieve its goals [*Cal. Rules of Ct., Rule 10.603(c)(6)(B)*];

- Establish a process for consulting with the judges of the court and may call meetings of the judges as needed [*Cal. Rules of Ct., Rule 10.603(c)(7)*];

- Prepare, with the assistance of appropriate court committees and appropriate input from the community, a long-range strategic plan that is consistent with the plan and policies of the Judicial Council [*Cal. Rules of Ct., Rule 10.603(c)(9)(A)*];

- Ensure the timely preparation of records on appeal [*Cal. Rules of Ct., Rule 10.603(c)(10)*]; and

- Prepare, with the assistance of appropriate court committees, proposed local rules to expedite and facilitate court business in accordance with *Gov. Code § 68071* and *Cal. Rules of Ct., Rules 2.100, 3.20,* and *10.613* [*Cal. Rules of Ct., Rule 10.603(c)(11)*].

[iv] Executive Committee

In accordance with the internal policies of the court, an executive committee may be established by the court to advise the presiding judge or to establish policies and procedures for the internal management of the court. An executive committee may be appointed by the presiding judge to advise the presiding judge [*Cal. Rules of Ct., Rule 10.605*].

[v] Duties of All Judges

Each judge must hear all assigned matters unless he or she is disqualified [*Cal. Rules of Ct., Rule 10.608(1)(A)*] or he or

she has stated in writing the reasons for refusing to hear a cause assigned for trial, and the presiding judge, supervising judge, or master calendar judge has concurred [*Cal. Rules of Ct., Rule 10.608(1)(B)*]. Each judge must also:

- Immediately notify the master calendar judge or the presiding judge upon on the completion or continuation of a trial or any other matter assigned for hearing [*Cal. Rules of Ct., Rule 10.608(2)*];

- Request approval of the presiding judge for any intended absence of one-half day or more, within a reasonable time before the intended absence [*Cal. Rules of Ct., Rule 10.608(3)*];

- Follow the court's personnel plan in dealing with employees [*Cal. Rules of Ct., Rule 10.608(4)*]; and

- Follow directives of the presiding judge in matters of court management and administration, as authorized by the rules of court and the local rules and internal policies of the court [*Cal. Rules of Ct., Rule 10.608(5)*].

[vi] Duties of Court Executive Officer

Acting under the direction of the presiding judge, the court executive officer is responsible for overseeing the management and administration of the nonjudicial operations of the court and allocating resources in a manner that promotes access to justice for all members of the public, provides a forum for the fair and expeditious resolution of disputes, maximizes the use of judicial and other resources, increases efficiency in court operations, and enhances service to the public [*Cal. Rules of Ct., Rule 10.610(b)*].

Cal. Rules of Ct., Rule 10.610(c) lists the duties that the court executive officer must perform under the direction of the presiding judge and consistent with the law and rules of court, where they are not inconsistent with the authorized duties of the clerk of the court. Those duties include the following:

- Provide general direction to and supervision of the employees of the court, and draft for court approval and administer a personnel plan for the court employees that complies with *Cal. Rules of Ct., Rule 10.670* [*Cal. Rules of Ct., Rule 10.610(c)(1)*];

- Make recommendations to the presiding judge on budget priorities, and prepare and implement court budgets [*Cal. Rules of Ct., Rule 10.610(c)(2)*]; and

- Manage the jury system in the most efficient and effective way [*Cal. Rules of Ct., Rule 10.610(c)(6)*].

[vii] Nondiscrimination in Court Appointments

Each court should select attorneys, arbitrators, mediators, referees, masters, receivers, and other persons appointed by the court on the basis of merit. No court may discriminate in such selection on the basis of gender, race, ethnicity, disability, sexual orientation, or age [*Cal. Rules of Ct., Rule 10.611*].

[viii] Use of Gender-Neutral Language

Each court must use gender-neutral language in all new local rules, forms, and documents and must review and revise those now in use to ensure that they are written in gender neutral language [*Cal. Rules of Ct., Rule 10.612*].

[ix] Local Court Rules--Adopting, Filing, Distributing, and Maintaining

Cal. Rules of Ct., Rule 10.613 sets forth provisions for adopting, filing, distributing, and maintaining local court rules.

Among other thing, the section requires that each court must make its local rules available for inspection and copying in every location of the court that generally accepts filing of papers [*Cal. Rules of Ct., Rule 10.613(b)*]. Except for rules specifying the time of hearing and similar calendaring matters, the court must distribute each proposed rule for comment at least 45 days before it is adopted [*Cal. Rules of Ct., Rule 10.613(g)(1)*]. Each court must periodically review its local rules and repeal rules that have become outdated, unnecessary, or inconsistent with stateside rules or statutes [*Cal. Rules of Ct., Rule 10.613(h)*].

[x] Local Court Forms

Cal. Rules of Ct., Rule 10.614 sets forth requirements for local forms. Among other things, the section requires that the court must make copies of its forms available in the clerk's office or, as an alternative, make its forms available in a booklet from which photocopies of the forms may be made [*Cal. Rules of Ct., Rule 10.614(2)*]. Each court must make available a current list of forms adopted or approved by that court [*Cal. Rules of Ct., Rule 10.614(5)*].

[xi] Public Access to Administrative Decisions of Trial Courts

Each trial court must seek input from the public before making the following decisions:

- Recommendations from the trial courts concerning judicial branch budget priorities [*Cal. Rules of Ct., Rule 10.620(b)*];

- Recommendations on items to be included in the judicial branch budget that is submitted annually to the Governor and the Legislature [*Cal. Rules of Ct., Rule 10.620(c)*];

- Request for permission from the Administrative Office of the Courts to reallocate budget funds from one program component to another in an amount greater than $400,000 or 10% percentof the total trial court budget, whichever is greater [*Cal. Rules of Ct., Rule 10.620(d)(1)*];

- The execution of a contract without competitive bidding in an amount greater than $400,000 or 10 percent of the total trial court budget, whichever is greater (not applicable to a contract entered into between a court and a county that is provided for by statute) [*Cal. Rules of Ct., Rule 10.620(d)(2)*];

- The planned permanent closure of any court location for an entire day or for more than one-third of the hours the court location was previously open for either court sessions or filing of papers [*Cal. Rules of Ct., Rule 10.620(d)(3)*]; and

- The cessation at a court location of the Family Law Facilitator or the Family Law Information Center [*Cal. Rules of Ct., Rule 10.620(d)(4)*].

When a trial court is required to seek public input under *Cal. Rules of Ct., Rule 10.620*, it must provide public notice of the request at least 15 court days before the date on which the decision is to be made or the action is to be taken [*Cal. Rules of Ct., Rule 10.620(e)*]. Any interested person or entity who wishes to comment must send the comment to the court in writing or electronically unless the court requires that all public comment be sent either by e-mail or through a response system on the Court's web site [*Cal. Rules of Ct., Rule 10.620(e)*]. For good cause, in the event an urgent action is required, a trial court may take immediate action if it give notice of the action as provided in *Cal. Rules of Ct., Rule 10.620(f)*, states the reasons for urgency, and gives any public input received to the person or entity making the decision [*Cal. Rules of Ct., Rule 10.620(e)*].

[xii] Reporting of Reciprocal Assignment Orders

A "reciprocal assignment order" is an order issued by the Chief Justice that permits judges in courts of different counties to serve in each other's courts. A court must report to the Administrative Office of the Courts, on a monthly basis, each assignment of a judge from another county to its court under a reciprocal assignment order [*Cal. Rules of Ct., Rule 10.630*].

[b] Trial Court Management of Human Resources

[i] Trial Court Employee Labor Relations

The Court Employee Labor Relations Rules are set forth at *Cal. Rules of Ct., Rules 10.650-10.659*. The purpose of these rules is to extend to trial court employees the right, and to require trial courts, to meet and confer in good faith over matters that the court, as opposed to the county, has authority to determine that are within the scope of representation [*Cal. Rules of Ct., Rule 10.651*]. Matters not included within the scope of representation are:

- The merits and administration of the court system [*Cal. Rules of Ct., Rule 10.654(b)(1)*];
- Coordination, consolidation, and merger of trial courts and support staff [*Cal. Rules of Ct., Rule 10.654(b)(2)*];
- Automation, including but not limited to fax filing, electronic recording, and implementation of information systems [*Cal. Rules of Ct., Rule 10.654(b)(3)*];
- Design, construction, and location of court facilities [Cal. Rules of Ct., Rule 10.65(b)(4)];
- Delivery of court services [*Cal. Rules of Ct., Rule 10.654(b)(5)*]; and
- Hours of operation of the courts and court system [*Cal. Rules of Ct., Rule 10.654(b)(6)*].

Impact from the matters set forth in *Cal. Rules of Ct., Rule 10.654(b)* must be included within the scope of representation as those matters affect wages, hours, terms, and conditions of employment of court employees, to the extent such matters are within the court's authority to determine [*Cal. Rules of Ct., Rule 10.654(c)*].

[ii] Other Human Resources Rules

Provisions regarding trial court personnel plans are set forth in *Cal. Rules of Ct., Rule 10.670*. The rule establishes the authority and responsibility of the superior courts, on a countywide basis, to create and implement a system of personnel management designed to achieve lawful, uniform, and fair employment practices and procedures [*Cal. Rules of Ct., Rule 10.670(a)*]. The superior courts of each county must establish a single personnel plan on a countywide basis, consistent with applicable statutes, rules, and standards of judicial administration [*Cal. Rules of Ct., Rule 10.670(b)*]. The personnel plan must ensure that treatment of employees complies with current law, and should address the elements set forth in *Cal. Rules of Ct., Rule 10.670(c)*.

[c] Subordinate Judicial Officers

[i] Role of Subordinate Judicial Officers

Cal. Rules of Ct., Rule 10.700, specifying the role of subordinate judicial officers, applies to all subordinate judicial officers except those acting as child support commissioners under *Fam. Code § 4251* [*Cal. Rules of Ct., Rule 10.700(a)*]. The primary role of subordinate judicial officers is to perform subordinate judicial duties. However, a presiding judge may assign a subordinate judicial officer to sit as a temporary judge where lawful, if the presiding judge determines that, because of a shortage of judges, it is necessary for the effective administration of justice [*Cal. Rules of*

Ct., Rule 10.700(b)].

[ii] Qualifications and Education of Subordinate Judicial Officers

Generally, a person is ineligible to be a subordinate judicial officer unless the person is a member of the State Bar and:

(1) Has been admitted to practice law in California for at least 10 years or, upon on a finding of good cause by the presiding judge, for at least five years [*Cal. Rules of Ct., Rule 10.701(b)(1)* ; or

(2) Is serving as a subordinate judicial officer in a trial court as of January 1, 2003 [*Cal. Rules of Ct., Rule 10.701(b)(2)*].

However, a person appointed as a juvenile referee or as a hearing officer under *Welf. & Inst. Code §§ 247, 255,* or *5256.1* must meet the qualification requirements established by those sections. Such a person is ineligible to exercise the powers and perform the duties of another type of subordinate judicial officer unless he or she meets the qualifications established in *Cal. Rules of Ct., Rule 10.701(b)* [*Cal. Rules of Ct., Rule 10.701(d)*].

A subordinate judicial officer must comply with the education requirements of any position to which he or she is assigned, even if it is not his or her principal assignment. Such requirements include the following, as applicable: *Cal. Rules of Ct., Rules 5.30, 5.340,* and *10.501* and *Welf. & Inst. Code § 304.7* [*Cal. Rules of Ct., Rule 10.701(c)*].

[iii] Subordinate Judicial Officers: Practice of Law

A subordinate judicial officer may practice law only to the extent permitted by the Code of Judicial Ethics [*Cal. Rules of Ct., Rule 10.702*].

[iv] Complaints Against Subordinate Judicial Officers

A court that employs a subordinate judicial officer must use the procedures in *Cal. Rules of Ct., Rule 10.703* for processing complaints against the subordinate judicial officer if the complaint alleges conduct that if alleged against a judge would be within the jurisdiction of the Commission on Judicial Performance under *Cal. Const. art. VI, § 18* [*Cal. Rules of Ct., Rule 10.703(c)(1)*]. If a complaint against a subordinate judicial officer does not allege conduct that would be within the jurisdiction of the Commission, the court must process the complaint following local procedures adopted under *Cal. Rules of Ct., Rule 10.603(c)(4)(C)* [*Cal. Rules of Ct., Rule 10.703(c)(2)*].

The presiding judge must ensure that the court processes each complaint promptly. To the extent reasonably possible, the court must complete action on each complaint within 90 days after the complaint is submitted [*Cal. Rules of Ct., Rule 10.703(d)*]. All proceedings by a presiding judge must be conducted in a manner that is as confidential as is reasonably possible consistent with the need to conduct a thorough and complete investigation and the need for proper administration of the court [*Cal. Rules of Ct., Rule 10.703(e)(1)*].

A complaint about the conduct of a subordinate judicial officer must be in writing and be submitted to the presiding judge [*Cal. Rules of Ct., Rule 10.703(f)(1)*]. Persons who are unable to file a written complaint because of a disability may present an oral complaint, which the presiding just must commit to writing [*Cal. Rules of Ct., Rule 10.703(f)(2)*].

The presiding judge must review each complaint and determine if the complaint may be closed after initial review [see *Cal. Rules of Ct., Rule 10.703(h)*], needs preliminary investigation [see *Cal. Rules of Ct., Rule 10.703(i)*], or requires formal investigation [see *Cal. Rules of Ct., Rule 10.703(j)*] [*Cal. Rules of Ct., Rule 10.703(g)(1)*].

If after a formal investigation the complaint results in the written reprimand, suspension, or removal of the subordinate

judicial officer for conduct that if alleged against a judge would be within the jurisdiction of the Commission on Judicial Performance under *Cal. Const., art. VI, § 18*, the presiding judge must promptly forward to the Commission a copy of the portions of the court file on the complaint that reasonably reflect the basis of the action taken by the court, including the complaint and the subordinate judicial officer's response [*Cal. Rules of Ct., Rule 10.703(k)(1)*]. If the subordinate judicial officer resigns while an investigation is pending, the presiding judge must within 15 days of the resignation, or as soon thereafter as is reasonably possible, forward to the Commission the entire court file on any pending complaint [*Cal. Rules of Ct., Rule 10.703(k)(2)*]. On request by the Commission, the presiding judge must forward to the Commission any requested information about a complaint against a subordinate judicial officer [*Cal. Rules of Ct., Rule 10.703(k)(3)*].

For detailed discussion of the handling of complaints against subordinate judicial officers, see *§ 317.86* [7].

[d] Temporary Judges

Each trial court that uses temporary judges must develop, institute, and operate, by itself or in collaboration with another court or courts, a program to recruit, select, train, and evaluate attorneys qualified to serve as temporary judges [*Cal. Rules of Ct., Rule 10.740*]. For detailed discussion of temporary judges, see *§ 317.20*.

[e] Court Interpreters

[i] Regional Court Interpreter Employment Relations Committees

Gov. Code §§ 71807-71809 establish four Regional Court Interpreter Employment Relations Committees. Each committee has the authority, for spoken language court interpreters within its region as defined under *Gov. Code § 71807(a)*, to:

- Set the terms and conditions of employment for court interpreters, subject to meet and confer in good faith, as authorized by *Gov. § 71808* [*Cal. Rules of Ct., Rule 10.761(a)(1)*];

- Adopt reasonable rules and regulations for the administration of employer employee relations with recognized employee organizations, as authorized by *Gov. Code § 71823(a)* [*Cal. Rules of Ct., Rule 10.761(a)(2)*]; and

- Act as the representative of the superior courts within the region in bargaining with a recognized employee organization as authorized by *Gov. Code § 71809* [*Cal. Rules of Ct., Rule 10.761(a)(3)*].

[ii] Cross-Assignments for Court Interpreter Employees

Under *Gov. Code § 71804.5(b)*, a court interpreter employed by a superior court is not permitted to be an employee of more than one superior court. A court interpreter employed by a superior court may not contract with another court, but may accept appointments to provide services to more than one court through cross-assignments [*Cal. Rules of Ct., Rule 10.762(c)(1)*]. A superior court may attempt to fill an interpreting assignment with the employee of another court before hiring an independent contract court interpreter [*Cal. Rules of Ct., Rule 10.762(c)(2)*]. If a superior court wants to fill an interpreting assignment with the employee of another court, the court must notify the regional court interpreter coordinator to locate an employee of a court within or across regions [*Cal. Rules of Ct., Rule 10.762(c)(3)*]. Each local court interpreter coordinator must provide the schedule of each court interpreter employee available for cross-assignment to the regional court interpreter coordinator [*Cal. Rules of Ct., Rule 10.762(c)(4)*]. A superior court may adopt additional internal procedures for cross-assigning a court interpreter employee that are not inconsistent with *Gov. Code § 71810* and *Cal. Rules of Ct., Rule 10.762* [*Cal. Rules of Ct., Rule 10.762(c)(5)*]. A Regional Court Interpreter Employment Relations Committee may approve alternative procedures for cross-assigning a court interpreter employee that permit the interpreter to directly arrange cross-assignments with an "away" court, provided that the

procedures require notice to the regional coordinator [*Cal. Rules of Ct., Rule 10.762(c)(6)*].

[f] Alternative Dispute Resolution Programs

[i] Administration of Alternative Dispute Resolution (ADR) Programs

Cal. Rules of Ct., Rule 10.780 et seq. contains rules concerning alternative dispute resolution (ADR) programs administered by trial courts [*Cal. Rules of Ct., Rule 10.780*].

[ii] Court-Related ADR Neutrals

If a court makes available to litigants a list of ADR neutrals, the list must contain, at a minimum, the following information concerning each neutral listed:

- The types of ADR services available from the neutral [*Cal. Rules of Ct., Rule 10.781(a)(1)*];
- The neutral's resume, including ADR training and experience [*Cal. Rules of Ct., Rule 10.781(a)(2)*]; and
- The fees charged by the neutral for each type of service [*Cal. Rules of Ct., Rule 10.781(a)(3)*].

In order to be included on a court list of ADR neutrals, an ADR neutral must sign a statement or certificate agreeing to comply with all applicable ethics requirements and rules of court [*Cal. Rules of Ct., Rule 10.781(b)(1)*] and serve as an ADR neutral on a pro bono or modest-means basis in at least one case per year, not to exceed eight hours, if requested by the court. The court must establish the eligibility requirements for litigants to receive and the application process for them to request ADR services on a pro bono or modest-means basis [*Cal. Rules of Ct., Rule 10.781(b)(2)*].

Inclusion on a court list of ADR neutrals and eligibility to be recommended, appointed, or compensated by the court to serve as a neutral are privileges that are revocable and confer no vested right on the neutral [*Cal. Rules of Ct., Rule 10.781(c)*]. A court has absolute discretion to determine who may be included on a court list of ADR neutrals or is eligible to be recommended, selected, appointed, or compensated by the court to serve as a neutral (except as otherwise expressly provided by statute or rule of court).

[iii] ADR Program Information

Each court must report information on its ADR programs to the Judicial Council, as requested by the Administrative Office of the Courts [*Cal. Rules of Ct., Rule 10.782(a)*]. Subject to applicable limitations, including the confidentiality requirements in *Evid. Code § 1115 et seq.*, courts must require parties and ADR neutrals, as appropriate to supply pertinent information for the reports required under *Cal. Rules of Court, Rule 10.782(a)* [*Cal. Rules of Ct., Rule 10.782(b)*].

[iv] ADR Program Administration

The presiding judge in each trial court must designate the clerk or executive officer, or another court employee who is knowledgeable about ADR processes, to serve as ADR program administrator. The duties of the ADR program administrator must include:

- Developing informational material concerning the court's ADR programs [*Cal. Rules of Ct., Rule 10.783(a)(1)*];
- Educating attorneys and litigants about the court's ADR programs [*Cal. Rules of Ct., Rule*

10.783(a)(2)];

- Supervising the development and maintenance of any panels of ADR neutrals maintained by the court [*Cal. Rules of Ct., Rule 10.783(a)(3)*]; and

- Gathering statistical and other evaluative information concerning the court's ADR programs [*Cal. Rules of Ct., Rule 10.783(a)(4)*].

In each superior court that has 18 or more authorized judges, there must be an ADR committee. The members of the ADR committee must include, insofar as is practicable, the presiding judge or a judge designated by the presiding judge; one or more other judges designated by the presiding judge; the ADR program administrator; two or more active members of the State Bar chosen by the presiding judge as representatives of those attorneys who regularly represent parties in general civil cases before the court, including an equal number of attorneys who represent plaintiffs and who represent defendants in these cases; one or more members of the court's panel of arbitrators chosen by the presiding judge; and if the court makes available to litigants a list of any ADR neutrals other than arbitrators available to litigants, one or more neutrals chosen by the presiding judge from that list [*Cal. Rules of Ct., Rule 10.783(b)*]. The ADR committee is responsible for overseeing the court's alternative dispute resolution programs for general civil cases, including those responsibilities relating to the court's judicial arbitration program specified in *Cal. Rules of Ct., Rule 3.813(b)* [*Cal. Rules of Ct., Rule 10.783(b)(5)*].

[g] Trial Court Budget and Fiscal Management

[i] Superior Court Budgeting

Cal. Rules of Ct., Rule 10.800 et seq. provides for local authority and accountability for development of budget requests and management of court operations within the authorized funding level. Superior courts must manage their budgets in a manner that is responsive to local needs, ensures equal access to justice, is consistent with Judicial Council policy and legislative direction, and does not exceed the total allocated budget [*Cal. Rules of Ct., Rule 10.800(a)*].

Each superior court must prepare and submit to the Administrative Office of the Courts a budget according to the schedule and procedures established by the Judicial Council [*Cal. Rules of Ct., Rule 10.800(b)*].

[ii] Superior Court Budget Procedures

The Administrative Office of the Courts must adopt superior court budget procedures to be included in the *Trial Court Financial Policies and Procedures Manual*, the annual Baseline Budget Development Package, and the annual *Budget Change Request Package* [*Cal. Rules of Ct., Rule 10.801(a)*]. These procedures include, but are not limited to, the following:

- Procedures permitting the superior courts to comment on the proposed budget procedures [*Cal. Rules of Ct., Rule 10.801(a)(1)*];

- Procedures for budget development, submission, and appeal [*Cal. Rules of Ct., Rule 10.801(a)(2)*];

- Procedures for budget implementation, including expenditure and revenue reporting [*Cal. Rules of Ct., Rule 10.801(a)(3)*];

- Reasonable time frames to comply with requirements or changes in the budget procedures [*Cal. Rules of Ct., Rule 10.801(a)(4)*];

- Procedures to ensure the reporting to the Judicial Council of relevant information on the implementation of programs funded [*Cal. Rules of Ct., Rule 10.801(a)(5)*];

- Procedures for providing timely management information to the Judicial Council on the baseline budget, revenues, and expenditures [*Cal. Rules of Ct., Rule 10.801(a)(6)*];

- An annual budget development and implementation calendar [*Cal. Rules of Ct., Rule 10.801(a)(7)*];

- Procedures for a superior court to follow if it projects that its budget will be exhausted before the end of the fiscal year, preventing the court from meeting its financial obligations or continuing operations [*Cal. Rules of Ct., Rule 10.801(a)(8)*]; and

- Procedures governing the transfer of funds between individual programs and operations of expenditure [*Cal. Rules of Ct., Rule 10.801(a)(9)*].

[iii] Maintenance of and Public Access to Budget and Management Information

Cal. Rules of Ct., Rule 10.501(a) and *(b)* require each superior court and the Administrative Office of the Courts to maintain for a period of three years from the close of the fiscal year to which the following relate specified information, such as official documents of the superior court pertaining to the approved superior court budget allocation adopted by the Judicial Council and actual final year-end superior court revenue and expenditure reports as required in budget procedures issued by the AOC to be maintained or reported to the Council, including budget allocation, revenue, and expenditure reports [*Cal. Rules of Court, Rule 10.501(a)(1)*].

[iv] Information Access Disputes--Writ Petitions

Notwithstanding *Code Civ. Proc. §§ 1085* and *1003* requiring the issuance of a writ to an inferior tribunal, in the event that a trial court employee, an employee organization, or a member of the public believes there has been a violation of *Cal. Rules of Ct., Rule 10.501* concerning the maintenance of, and public access to, budget and management information concerning the Judicial Council or the trial courts, that party may petition the superior court for relief pursuant to *Gov. Code § 71675(b)*.

The petition must state the following on the first page, below the case number, in the statement of the character of the proceeding: "Writ petition filed under rule 10.500(j)(i) and *Government Code section 71675*--Assignment of Court of Appeal justice required" [*Cal. Rules of Ct., Rule 10.803(b)(1)*].

If an assignment is made, the judge assigned to hear the petition in the superior court must be a justice from a Court of Appeal for a district other than the district for that superior court [*Cal. Rules of Ct., Rule 10.803(b)(3)*]. The panel of judges who may hear the petitions in the superior court must consist of Court of Appeal justices selected by the Chief Justice as follows:

- The panel must include at least one justice from each district of the Court of Appeal [*Cal. Rules of Ct., Rule 10.803(e)(1)*

- Each justice assigned to hear a petition must have received training on hearing the petitions as specified by the Chief Justice [*Cal. Rules of Ct., Rule 10.803(e)(2)*].

[v] Superior Court Financial Policies and Procedures

The AOC must prepare and adopt a financial policies and procedures manual for the superior courts (the "*Trial Court*

Financial Policies and Procedures Manual"), consistent with the rules of court and policies adopted by the Judicial Council. The manual must include accounting standards for superior courts and policies and procedures for procurement and contracting by superior courts. These policies and procedures must not modify superior courts' existing authority to procure, contract for, or use goods or services or the requirement that a court have authorized funding available in order to procure or contract for any good or service [*Cal. Rules of Ct., Rule 10.804(a)*]. Before issuing or amending the *Trial Court Financial Policies and Procedures Manual*, the AOC must make it available for comment from the superior court and from the Department of Finance and the State Controller's Office for thirty days [*Cal. Rules of Ct., Rule 10.804(b)*].

[vi] Notice of Change in Court-County Relationship

If, under *Gov. Code § 77212*, the county gives notice to the superior court that the county will no longer provide a specific county service or the court gives notice to the county that the court will no longer use a specific county service, the court must, within 10 days of receiving or giving such notice, provide a copy of this notice to the AOC's Finance Division [*Cal. Rules of Ct., Rule 10.805*].

[vii] Court Operations

Costs for court operations must be appropriated in county budgets for superior courts [*Cal. Rules of Ct., Rule 10.810(c)*]. Court operations include judicial salaries and benefits, nonjudicial salaries and benefits, services and supplies, collective bargaining, and indirect costs [*Cal. Rules of Ct., Rule 10.810(a)*]. Excluded from the definition of court operations are law library operations conducted by a trust pursuant to statute; courthouse construction and site acquisition, including space rental, alterations/remodeling, or relocating court facilities; district attorney services; probation services; indigent criminal and juvenile delinquency defense; civil and criminal grand jury expenses and operations (except for selection); pretrial release services; equipment and supplies for use by official reporters of the courts to prepare transcripts as specified by statute; and county costs as provided in *Cal. Rules of Ct., Rule 10.810(d)* as unallowable [*Cal. Rules of Ct., Rule 10.810(b)*].

[viii] Reimbursement of Costs Associated With Homicide Trials

Cal. Rules of Ct., Rule 10.811 permits courts that meet certain criteria to request reimbursement of extraordinary costs of homicide trials [*Cal. Rules of Ct., Rule 10.811(a)*]. A court that requests reimbursement of extraordinary costs of a homicide trial must meet all the following criteria:

- Be located in a county with a population of 300,000 or less [*Cal. Rules of Ct., Rule 10.811(b)(1)*];
- Have incurred extraordinary costs of a homicide trial [*Cal. Rules of Ct., Rule 10.811(b)(2)*]; and
- Demonstrate an actual need for reimbursement [*Cal. Rules of Ct., Rule 10.811(b)(3)*].

A request for reimbursement must be submitted by the court's presiding judge or executive officer to the AOC. All requests for reimbursement must comply with guidelines approved by the Judicial Council and include a completed *Request for Reimbursement of Extraordinary Homicide Trial Costs* form.

[ix] Fees to Be Set by the Court

Under *Gov. Code § 70631*, a superior court may charge a reasonable fee for a service or product not to exceed the costs of providing the service or product, if the Judicial Council approves the fee [*Gov. Code § 70631, Cal. Rules of Ct., Rule 10.815(a)*]. The Judicial Council authorizes courts to charge a reasonable fee not to exceed costs for the following products and services unless courts are prohibited by law from charging a fee for, or providing, the product or service:

- Forms [*Cal. Rules of Ct., Rule 10.815(b)(1)*];

- Packages of forms [*Cal. Rules of Ct., Rule 10.815(b)(2)*];
- Information materials [*Cal. Rules of Ct., Rule 10.815(b)(3)*];
- Publications, including books, pamphlets, and local rules [*Cal. Rules of Ct., Rule 10.815(b)(4)*];
- Compact discs [*Cal. Rules of Ct., Rule 10.815(b)(5)*];
- DVDs [*Cal. Rules of Ct., Rule 10.815(b)(6)*];
- Audiotapes [*Cal. Rules of Ct., Rule 10.815(b)(7)*];
- Videotapes [*Cal. Rules of Ct., Rule 10.815(b)(8)*];
- Microfiches [*Cal. Rules of Ct., Rule 10.815(b)(9)*];
- Envelopes [*Cal. Rules of Ct., Rule 10.815(b)(10)*];
- Postage [*Cal. Rules of Ct., Rule 10.815(b)(11)*];
- Shipping [*Cal. Rules of Ct., Rule 10.815(b)(12)*];
- Off-site retrieval of documents [*Cal. Rules of Ct., Rule 10.815(b)(13)*];
- Direct fax filing under *Cal. Rules of Ct., Rule 2.304* (fee per page) [*Cal. Rules of Ct., Rule 10.815(b)(14)*];
- Returning filed-stamped copies of documents by fax to persons who request that a faxed copy be sent to them [*Cal. Rules of Ct., Rule 10.815(b)(15)*];
- Training programs for attorneys who serve as court-appointed temporary judges, including the materials and food provided to the participants [*Cal. Rules of Ct., Rule 10.815(b)(16)*]; and
- Other training programs or events, including materials and food provided to the participants [*Cal. Rules of Ct., Rule 10.815(b)(17)*].

The fee charged for any product or service listed above may not exceed the court's cost in providing the product or service. In determining the costs of a product or service, the court must identify the specific product or service and prepare an analysis of the direct and indirect costs on which the fee is based [*Cal. Rules of Ct., Rule 10.815(c)*].

In deciding what specific fee or fees, if any, to charge for a product or service listed above, the court must determine that the fee charged is reasonable considering relevant factors such as the benefits to the court and the public from providing the product or service and the effects of charging the fee on public access to the court [*Cal. Rules of Ct., Rule 10.815(d)*].

Each court that charges a fee under this rule must provide AOC with a description of the fee, how the amount of the fee was determined, and how the fee is applied [*Cal. Rules of Ct., Rule 10.815(e)*].

The court must notify the public of any fee that it charges under this rule by providing information concerning the fee in

a conspicuous place such as the court's fee schedule [*Cal. Rules of Ct., Rule 10.815(f)*]. If a court proposes to change any fee authorized under *Cal. Rules of Ct., Rule 10.815(b)* that it is already charging or to charge any new fee authorized that provision, the court must follow the procedures for adopting or amending a local rule under *Cal. Rules of Ct., Rule 10.613* [*Cal. Rules of Ct., Rule 10.815(g)*].

[x] Acceptance of Credit Cards by the Superior Courts

The Administrative Director of the Courts is authorized, under *Cal. Rules of Ct., Rule 10.80*, to approve on behalf of the Judicial Council requests from the superior courts to accept credit cards for the payment of court fees or to impose a charge for the use of credit cards. The authority is given to the Judicial Council by *Gov. Code § 6159* [*Cal. Rules of Ct., Rule 10.820(a)*].

The Administrative Director of the Courts is authorized to approve requests for acceptance of credit cards if all of the following are true:

- The court imposes a fee for the use of the credit card, or demonstrates that the cost of acceptance of credit cards is not greater than the cost of acceptance of other means of payment of fees, or demonstrates that it can absorb the cost of the acceptance of the credit card [*Cal. Rules of Ct., Rule 10.820(b)(1)*].

- The court has obtained a credit card acceptance contract that is competitive with other possible contracts the court could obtain [*Cal. Rules of Ct., Rule 10.820(b)(2)*].

- The court provides alternative means for a person to pay court fees [*Cal. Rules of Ct., Rule 10.820(b)(3)*].

The Administrative Director of the Courts is authorized to approve requests for the imposition of a charge for the use of credit cards if the proposed fee is not greater than the cost for acceptance of a credit card, and the proposed fee would not result in an undue hardship on people wishing to use credit cards for payment of fees [*Cal. Rules of Ct., Rule 10.820(c)*].

The Administrative Director of the Courts may refer any request for the imposition of a charge for the use of credit cards to the Judicial Council for its action [*Cal. Rules of Ct., Rule 10.820(d)*]. The approval of any board of supervisors for any trial superior court to accept credit cards or charge a fee for the use of credit cards that was effective as of December 31, 1999, is ratified by the Council as of January 1, 2000 [*Cal. Rules of Ct., Rule 10.820(d)*].

[xi] Acceptance of Checks and Other Negotiable Paper

A personal check, bank cashier's check, money order, or traveler's check tendered in payment of any fee, fine, or bail deposit under *Gov. Code § 71386* or *Veh. Code § 40510* or *40521* must be accepted by the court:

- If the personal check is drawn on a banking institution located in California by a person furnishing satisfactory proof of residence in California, is payable to the court without a second party endorsement, and is in an amount not exceeding the amount of the payment and is not postdated or staledated, unless the person drawing the check is known to have previously tendered worthless checks [*Cal. Rules of Ct., Rule 10.821(a)(1)*]; or

- If the bank cashier's check or money order is drawn on a banking institution located in the United States and is in an amount not exceeding the amount of the payment [*Cal. Rules of Ct., Rule 10.821(a)(2)*]; or

- If the person presenting the traveler's check shows satisfactory identification [*Cal. Rules of Ct., Rule 10.821(a)(3)*].

Except for checks tendered under the conditions specified in *Veh. Code § 40521(a)*, a court may require that a person drawing a personal check furnish satisfactory proof of good credit by showing a valid recognized credit card or by any other reasonable means [*Cal. Rules of Ct., Rule 10.821(b)*].

A court may accept or reject any check or money order not meeting the requirements of this rule, under a written policy adopted by the court under *Gov. Code § 71386(a)* [*Cal. Rules of Ct., Rule 10.821(c)*].

[xii] Disposal of Surplus Court Personal Property

With specified exceptions discussed below, a trial superior court may:

- Sell, at fair market value, any personal property of the court that is no longer needed for court use [*Cal. Rules of Ct., Rule 10.830(a)(1)*];

- Trade or exchange any surplus personal property of the court, according to such terms and conditions as are agreed on, for personal property of another court, the state, a county, a city, a federal agency, a community redevelopment agency, a housing authority, a community development commission, a surplus property authority, a school district, or any irrigation, flood control, county board of education, or other special district, if the property to be acquired by the court is needed for court use [*Cal. Rules of Ct., Rule 10.830(a)(2)*];

- Donate, sell at less than fair market value, or otherwise transfer to another court, the state, a county, a city, a federal agency, a community redevelopment agency, a housing authority, a community development commission, a surplus property authority, a school district, or any irrigation, flood control, county board of education, or other special district, according to such terms and conditions as are agreed on, any personal property of the court that is no longer needed for court use [*Cal. Rules of Ct., Rule 10.830(a)(3)*]; and

- Dispose of any personal property of the court that is no longer needed for court use, and that has negligible or no economic value, in any manner the court deems appropriate [*Cal. Rules of Ct., Rule 10.830(a)(4)*].

A superior court that wishes to dispose of surplus technology equipment to which the court acquired title on or after July 1, 2000, must provide a written description of such technology equipment to the Administrative Director of the Courts. If, within 60 days of receipt of the description, the Administrative Director determines that another court of record of the State of California is in need of the surplus technology equipment, the court holding title to the equipment must donate it to the court determined to be in need. If the Administrative Director determines that no other court needs the equipment or makes no determination within 60 days of receiving the written description of it, the court holding title to the equipment may dispose of it as provided in *Cal. Rules of Ct., Rule 10.830(a)*, *(c)*, and *(d)*. The Administrative Director must provide to the courts a definition of the term "technology equipment" as used in this rule and must provide 30 days' notice of any amendment to the definition [*Cal. Rules of Ct., Rule 10.830(b)*].

Unless the property to be transferred under this rule is valued at $500 or less or the entity to which the property is to be transferred is another court of record of the State of California, the transferring superior court must, at least one week prior to before the transfer, place a notice of its intended action in three public places, or on the court's web site, or in a newspaper of general circulation published in the county [*Cal. Rules of Ct., Rule 10.830(c)*].

Any proceeds of a sale or other transfer under this rule must be deposited in the superior court's operations fund [*Cal. Rules of Ct., Rule 10.830(d)*].

[h] Trial Court Records Management

[i] Court Indexes--Automated Maintenance

The clerk of each trial court may create, maintain, update, and make accessible the indexes required by law by photographic, microphotographic, photocopy, mechanical, magnetic, or electronic means. The clerk must make provision for preserving the information on a medium that will ensure its permanence and protect it from loss or damage arising from electronic failure or mechanical defect [*Cal. Rules of Ct., Rule 10.851(a)*].

A single alphabetic index may be maintained so long as the plaintiff-defendant distinction is retained [*Cal. Rules of Ct., Rule 10.851(b)*]. The indexes maintained under automated procedures must be accessible for public examination and use [*Cal. Rules of Ct., Rule 10.851(c)*].

[ii] Superior Court Records Sampling Program

Cal. Rules of Ct., Rule 10.855 establishes a program to preserve in perpetuity for study by historians and other researchers all superior court records filed before 1911 and a sample of superior court records filed after December 31, 1910, to document the progress and development of the judicial system, and to preserve evidence of significant events and social trends. Section 10.855 is not intended to restrict a court from preserving more records than the minimum required [*Cal. Rules of Ct., Rule 10.855(a)*].

"Records" of the superior court, as used in section 10.855, does not include records of limited civil, small claims, misdemeanor, or infraction cases [*Cal. Rules of Ct., Rule 10.855(b)*]. Each superior court must preserve forever comprehensive court records as follows:

- All records filed before 1911 [*Cal. Rules of Ct., Rule 10.855(c)(1)*];
- If practicable, all records filed after 1910 and before 1950 [*Cal. Rules of Ct., Rule 10.855(c)(2)*];
- All case indexes [*Cal. Rules of Ct., Rule 10.855(c)(3)*];
- All judgment books if the court maintains judgment records separate from the case files [*Cal. Rules of Ct., Rule 10.855(c)(4)*];
- All minute books if the court maintains minutes separate from the case files [*Cal. Rules of Ct., Rule 10.855(c)(5)*]; and
- All registers of action if the court maintains them [*Cal. Rules of Ct., Rule 10.855(c)(6)*].

If a superior court destroys court records without preserving them in a medium described in *Cal. Rules of Ct., Rule 10.855(h)*, the court must preserve forever a sample of each year's court records as provided by this rule of all cases, including sealed, expunged, and other confidential records to the extent permitted by law [*Cal. Rules of Ct., Rule 10.855(d)*].

For purposes of section 10.855, the term court record consists of the following:

- All papers and documents in the case folder; but if no case folder is created by the court, all papers

and documents that would have been in the case folder if one had been created [*Cal. Rules of Ct., Rule 10.855(e)(1)*]; and

- The case folder, unless all information on the case folder is in papers and documents preserved in a medium described in *Cal. Rules of Ct., Rule 10.855(h)* [*Cal. Rules of Ct., Rule 10.855(e)(2)*]; and

- If available, corresponding depositions, paper exhibits, daily transcripts, and tapes of electronically recorded proceedings [*Cal. Rules of Ct., Rule 10.855(e)(3)*].

Three courts assigned in rotation by the Judicial Council must preserve 100 percent of their court records for a calendar year ("longitudinal sample"). All other courts must preserve a systematic sample of 10 percent or more of each year's court records and a 2 percent subjective sample of the court records scheduled to be destroyed, as follows:

- The "systematic sample" must be selected as follows after grouping all cases scheduled to be destroyed by filing year [*Cal. Rules of Ct., Rule 10.855(f)(1)*]:

  - If the cases scheduled to be destroyed for a filing year number more than 1,000 cases, the sample must consist of all cases in which the last digit of the case number (0-9) coincides with the last digit of the year in which the case was filed [*Cal. Rules of Ct., Rule 10.855(f)(1)(A)*].

  - If the cases scheduled to be destroyed for a filing year number from 100 to 1,000, the sample must consist of cases selected by (1) dividing the number of cases filed by 100, rounding fractions down to the next lower number, and (2) counting the cases and preserving each case with a position number in the files or other record that corresponds with the number computed (for example, 670 cases / 100 = 6.7; select every sixth case) [*Cal. Rules of Ct., Rule 10.855(f)(1)(B)*].

  - If fewer than 100 cases of a filing year are scheduled to be destroyed, all of the cases must be preserved [*Cal. Rules of Ct., Rule 10.855(f)(1)(C)*].

  - If the records to be destroyed are old, unnumbered cases, the sample must consist of cases identified by counting the cases (0-9) and preserving each case with a position number in the file or other record that corresponds with the number determined under *Cal. Rules of Ct., Rule 10.855(f)(1)(A)* or *(B)*, unless fewer than 100 cases are to be destroyed [*Cal. Rules of Ct., Rule 10.855(f)(1)(D)*].

- The "subjective sample" must consist of at least 2 percent of all cases scheduled to be destroyed, but not fewer than the court records of 20 cases, and must include (1) all cases accepted for review by the California Supreme Court, (2) "fat files" or the thickest perceived case files, and (3) cases deemed by the court to be of local, national, or international significance. These cases must be identified by stamp or mark to distinguish them from the systematic sample. The Judicial Council will provide each court with a list of cases accepted for review by the California Supreme Court each year.

The Judicial Council may designate a consultant to review, under the guidance of a qualified historian or archivist, court records scheduled for destruction and determine if the court's systematic sample should be augmented to improve representation of the variety of cases filed [*Cal. Rules of Ct., Rule 10.855(g)(1)*]. The court should give the designated consultant 60 days' notice of intent to destroy any court records that it does not plan to retain for the sample [*Cal. Rules of Ct., Rule 10.855(g)(2)*]. The designated consultant's role is advisory to the court. If the consultant determines that the systematic sample does not represent the variety of cases filed in a sample year, the court should select a random sample

of cases to augment the systematic sample [*Cal. Rules of Ct., Rule 10.855(g)(3)*]. Final selection of the court records to augment the sample is to be made by the clerk of the superior court [*Cal. Rules of Ct., Rule 10.855(g)(4)*].

For form of Notice of Intent to Destroy Superior Court Records; Offer to Transfer Possession, see *§ 317.215*.

Comprehensive court records under *Cal. Rules of Ct., Rule 10.855(c)* filed before 1911 must be preserved in their original paper form unless the paper is not available [*Cal. Rules of Ct., Rule 10.855(h)(1)*]. If practicable, courts should preserve paper records filed after January 1, 1911, because they are preferred by historians and researchers. Courts may, however, reproduce such paper records on microfilm or other electronic or micrographic media, if the records are maintained and reproduced in accordance with archival standards recommended by the American National Standards Institute or the Association for Information and Image Management and the condition of the paper records permits reproduction without damage to the originals.

As of the effective date of *Cal. Rules of Ct., Rule 10.855*, optical disk storage is not recognized as an archival medium, although it may become so with advances in the technology [*Cal. Rules of Ct., Rule 10.855(h)(2)*].

Until statewide or regional archival facilities are established, each court is responsible for maintaining its comprehensive and sample court records in a secure and safe environment consistent with the archival significance of the records. The court may deposit the court records in a suitable California archival facility such as a university, college, library, historical society, museum, archive, or research institution whether publicly supported or privately endowed. The court must ensure that the records are kept and preserved according to commonly recognized archival principles and practices of preservation [*Cal. Rules of Ct., Rule 10.855(i)*].

The court must ensure the following with regard to access:

- The comprehensive and sample court records must be made reasonably available to all members of the public [*Cal. Rules of Ct., Rule 10.855(j)(1)*].

- Sealed and confidential records must be made available to the public only as provided by law [*Cal. Rules of Ct., Rule 10.855(j)(2)*].

- If the records are preserved in a medium other than paper, equipment must be provided to permit public viewing of the records [*Cal. Rules of Ct., Rule 10.855(j)(3)*].

- Reasonable provision must be made for duplicating the records at cost [*Cal. Rules of Ct., Rule 10.855(j)(4)*].

If a local archival facility is maintaining the court records, the court may continue to use that facility's services if it meets the storage and access requirements under *Cal. Rules of Ct., Rule 10.855(i)* and *(j)*. If the court solicits archival facilities interested in maintaining the comprehensive and sample court records, the court must follow the procedures specified under *Cal. Rules of Ct., Rule 10.856*, except that the comprehensive and sample court records must not be destroyed. Courts may enter into agreements for long-term deposit of records subject to the storage and access provisions of section 10.855 [*Cal. Rules of Ct., Rule 10.855(k)*].

Each superior court must submit semiannually to the Judicial Council a Report to the Judicial Council: Superior Court Records Destroyed, Preserved, and Transferred (form REC-003), including the following information:

- A list by year of filing of the court records destroyed [*Cal. Rules of Ct., Rule 10.855*(*l*)(1)];

- A list by year of filing and location of the court records of the comprehensive and sample court

records preserved [*Cal. Rules of Ct., Rule 10.855*(*l*)(2)]; and

- A list by year of filing and location of the court records transferred to entities under *Cal. Rules of Ct., Rule 10.856* [*Cal. Rules of Ct., Rule 10.855*(*l*)(3)].

For form of Report to the Judicial Council: Superior Court Records Destroyed, Preserved, and Transferred, see *§ 317.219*.

[iii] Notice of Superior Court Records Destruction

The superior court must give 30 days' written notice of its intent to destroy court records open to public inspection to entities maintained on a master list by the Judicial Council and to any other entities that have informed the court directly that they wish to be notified [*Cal. Rules of Ct., Rule 10.856(b)*]. "Records" of the superior court, as used in Rule 10.856, do not include records of limited civil, small claims, misdemeanor, or infraction cases [*Cal. Rules of Ct., Rule 10.856(a)*].

Records scheduled for destruction must be permanently transferred to the entity requesting possession of the records on written order of the presiding judge unless the request is denied for good cause shown. The cost of transferring the records must be paid by the requesting party [*Cal. Rules of Ct., Rule 10.856(c)*].

If two or more entities request the same records, the presiding judge must order the transfer of those records to the entity that shows the greatest capability of caring for and preserving the records according to commonly recognized archival principles and practices of preservation and access, and that provides the greatest likelihood of making them available for historical or research purposes [*Cal. Rules of Ct., Rule 10.856(d)*]. No entity may receive the records unless the entity agrees to make the records reasonably available to all members of the public. Provision must be made for duplicating the records at cost [*Cal. Rules of Ct., Rule 10.856(e)*].

If after 30 days no request for transfer of records scheduled for destruction has been received by the court, the clerk may destroy the records not designated for the historical and research program under *Cal. Rules of Ct., Rule 10.855*, under a written order of the presiding judge of the court and in accordance with provisions of the Government Code [*Cal. Rules of Ct., Rule 10.856(f)*].

The time for retention of any of the court records specified in the notice may be extended by order of the court on its own motion, or on application of any interested member of the public for good cause shown and on such terms as are just. No fee may be charged for making the application [*Cal. Rules of Ct., Rule 10.856(g)*].

For forms related to the destruction of superior court records, see *§ 317.215 -317.219*.

[i] Trial Court Automation

Each superior court that acquires, develops, enhances, or maintains automated accounting or case management systems through funding provided under *Gov. Code § 68090.8* must comply with the standards approved by the Judicial Council. The approved standards are stated in Judicial Council Trial Court Automation Standards published by the Administrative Office of the Courts [*Cal. Rules of Ct., Rule 10.870*].

[j] Trial Court Management of Civil Cases

[i] Case Management and Calendaring System

Each superior court must adopt a case management and calendaring system for general civil cases that will advance the goals stated in Cal. Rules of Ct., Stds. Jud. Admin,. Std. 2.1 [*Cal. Rules of Ct., Rule 10.900*].

For additional discussion of case management system and classification of civil cases, see *Ch. 425, Pretrial Proceedings, § 425.30* et seq.

[ii] Internal Management Procedures

Each court must:

- Maintain a calendar and caseflow management system that will ensure that a sufficient number of cases are set for trial, based on the court's experience, so that all departments will be occupied with judicial business [*Cal. Rules of Ct., Rule 10.901(1)*];

- Adopt for judges and court personnel an internal operations manual of policies and procedures necessary for the efficient operation and management of the court [*Cal. Rules of Ct., Rule 10.901(2)*];

- Maintain and periodically review for accuracy written local court procedures, policies, and operating practices not contained in local rules for quick, accurate, and complete reference [*Cal. Rules of Ct., Rule 10.901(3)*]; and

- Ensure that calendaring functions are performed as directed by the court and that personnel rendering direct and immediate service to the court are within its administrative control to the maximum extent consistent with the existing organizational structures [*Cal. Rules of Ct., Rule 10.901(4)*].

[iii] Assigned Cases to Be Tried or Dismissed--Notification to Presiding Judge

In a court employing the master calendar, each case transferred to a trial department must be tried, ordered off the calendar, or dismissed unless, for good cause arising after the commencement of the trial, the judge of the trial department continues the case for further hearing or, with the consent of the judge supervising the master calendar, reassigns the case to the judge supervising the master calendar for further disposition [*Cal. Rules of Ct., Rule 10.910(a)*].

A judge who has finished or continued the trial of a case or any special matter must immediately notify the judge supervising the master calendar. The judge to whose department a cause is assigned for trial or for hearing must accept the assignment unless disqualified or, for other good cause stated to the judge supervising the master calendar, the judge supervising the master calendar determines that in the interest of justice the cause should not be tried or heard before the judge. When the judge has refused a cause and is not disqualified, the judge must state the reasons in writing unless the judge supervising the master calendar has concurred [*Cal. Rules of Ct., Rule 10.910(b)*].

[k] Trial Court Management of Criminal Cases

[i] Role of Presiding Judge, Supervising Judge, Criminal Division, and Master Calendar Department in Courts Having More Than Three Judges

The presiding judge of a court having more than three judges may designate one or more departments primarily to hear criminal cases. Two or more departments so designated must be the criminal division. The presiding judge may designate supervising judges for the criminal division, but retains final authority over all criminal and civil case assignments [*Cal. Rules of Ct., Rule 10.950*].

[ii] Duties of Supervising Judge of the Criminal Division

In addition to any other duties assigned by the presiding judge or imposed by *Cal. Rules of Ct., Rule 10.950 et seq.*, a

supervising judge of the criminal division must assign criminal matters requiring a hearing or cases requiring trial to a trial department [*Cal. Rules of Ct., Rule 10.951(a)*]. The presiding judge, supervising judge, or other designated judge must conduct arraignments, hear and determine any pretrial motions, preside over readiness conferences, and, where not inconsistent with law, assist in the disposition of cases without trial [*Cal. Rules of Ct., Rule 10.951(b)*]. To the extent that the business of the court requires, the presiding judge may designate additional judges under the direction of the supervising judge to perform the duties specified in Rule 10.951 [*Cal. Rules of Ct., Rule 10.951(c)*]. In a court having no supervising judge, the presiding judge performs the duties of a supervising judge [*Cal. Rules of Ct., Rule 10.951(d)*].

[iii] Meetings Concerning the Criminal Court System

The supervising judge, or, if none, the presiding judge must designate judges of the court to attend regular meetings to be held with the district attorney, public defender, representatives of the local bar, probation department, court personnel, and other interested persons to identify and eliminate problems in the criminal court system and to discuss other problems of mutual concern [*Cal. Rules of Ct., Rule 10.952*].

[iv] Procedures for Disposition of Cases Before the Preliminary Hearing

Superior courts having more than three judges must, in cooperation with the district attorney and defense bar, adopt procedures to facilitate dispositions before the preliminary hearing and at all other stages of the proceedings. The procedures may include:

- Early, voluntary, informal discovery, consistent with part 2, title 6, chapter 10 of the Penal Code (commencing with section 1054) [*Cal. Rules of Ct., Rule 10.953(a)(1)*]; and

- The use of superior court judges as magistrates to conduct readiness conferences before the preliminary hearing and to assist, where not inconsistent with law, in the early disposition of cases [*Cal. Rules of Ct., Rule 10.953(a)(2)*].

Pleas of guilty or no contest resulting from proceedings under Rule 10.953(a) must be disposed of as provided in *Cal. Rules of Ct., Rule 4.114* [*Cal. Rules of Ct., Rule 10.953(b)*].

[6] Appellate Court Administration

[a] Transfer of Causes

The Supreme Court may transfer a cause:

- To itself from a Court of Appeal [*Cal. Rules of Ct., Rule 10.1000(a)(1)(A)*];

- From itself to a Court of Appeal [*Cal. Rules of Ct., Rule 10.1000(a)(1)(B)*];

- Between Courts of Appeal [*Cal. Rules of Ct., Rule 10.1000(a)(1)(C)*]; or

- Between divisions of a Court of Appeal [*Cal. Rules of Ct., Rule 10.1000(a)(1)(D)*].

The clerk of the transferee court must promptly send each party a copy of the transfer order with the new case number, if any [*Cal. Rules of Ct., Rule 10.1000(a)(2)*].

A Court of Appeal administrative presiding justice may transfer causes between divisions of that court as follows:

- If multiple appeals or writ petitions arise from the same trial court action or proceeding, the presiding

justice may transfer the later appeals or petitions to the division assigned the first appeal or petition [*Cal. Rules of Ct., Rule 10.1000(b)(1)(A)*].

- If, because of recusals, a division does not have three justices qualified to decide a cause, the presiding justice may transfer it to a division randomly selected by the clerk [*Cal. Rules of Ct., Rule 10.1000(b)(1)(B)*].

The clerk must promptly notify the parties of the division to which the cause was transferred [*Cal. Rules of Ct., Rule 10.1000(b)(2)*].

[b] Court of Appeal Administrative Presiding Justice

In a Court of Appeal with more than one division, the Chief Justice may designate a presiding justice to act as administrative presiding justice. The administrative presiding justice serves at the pleasure of the Chief Justice for the period specified in the designation order [*Cal. Rules of Ct., Rule 10.1004(a)(1)*]. The administrative presiding justice must designate another member of the court to serve as acting administrative presiding justice in the administrative presiding justice's absence. If the administrative presiding justice does not make that designation, the Chief Justice must do so [*Cal. Rules of Ct., Rule 10.1004(a)(2)*]. In a Court of Appeal with only one division, the presiding justice acts as the administrative presiding justice [*Cal. Rules of Ct., Rule 10.1004(a)(3)*].

The administrative presiding justice is responsible for leading the court, establishing policies, promoting access to justice for all members of the public, providing a forum for the fair and expeditious resolution of disputes, and maximizing the use of judicial and other resources [*Cal. Rules of Ct., Rule 10.1004(b)*].

The administrative presiding justice must perform any duties delegated by a majority of the justices in the district with the Chief Justice's concurrence. In addition, the administrative presiding justice has responsibility for the following matters:

- Personnel: The administrative presiding justice has general direction and supervision of the clerk/administrator and all court employees except those assigned to a particular justice or division [*Cal. Rules of Ct., Rule 10.1004(c)(1)*];

- Unassigned matters: The administrative presiding justice has the authority of a presiding justice with respect to any matter that has not been assigned to a particular division [*Cal. Rules of Ct., Rule 10.1004(c)(2)*];

- Judicial Council: The administrative presiding justice cooperates with the Chief Justice and any officer authorized to act for the Chief Justice in connection with the making of reports and the assignment of judges or retired judges under *article VI, section 6 of the California Constitution* [*Cal. Rules of Ct., Rule 10.1004(c)(3)*];

- Transfer of cases: The administrative presiding justice cooperates with the Chief Justice in expediting judicial business and equalizing the work of judges by recommending, when appropriate, the transfer of cases by the Supreme Court under *Cal. Const., art. VI, § 12* [*Cal. Rules of Ct., Rule 10.1004(c)(4)*];

- Administration: The administrative presiding justice supervises the administration of the court's day-to-day operations, including personnel matters, but must secure the approval of a majority of the justices in the district before implementing any change in court policies [*Cal. Rules of Ct., Rule 10.1004(c)(5)*];

- Budget: The administrative presiding justice has sole authority in the district over the budget as allocated by the Chair of the Judicial Council, including but not limited to budget transfers, execution of purchase orders, obligation of funds, and approval of payments [*Cal. Rules of Ct., Rule 10.1004(c)(6)*]; and

- Facilities: The administrative presiding justice, except as provided in Rule 10.1004(d), has sole authority in the district over the operation, maintenance, renovation, expansion, and assignment of all facilities used and occupied by the district [*Cal. Rules of Ct., Rule 10.1004(c)(6)*].

Under the general oversight of the administrative presiding justice, the presiding justice of a geographically separate division generally directs and supervises all of the division's court employees not assigned to a particular justice [*Cal. Rules of Ct., Rule 10.1004(d)(1)*]; has authority to act on behalf of the division regarding day-to-day operations [*Cal. Rules of Ct., Rule 10.1004(d)(2)*]; administers the division budget for day-to-day operations, including expenses for maintenance of facilities and equipment [*Cal. Rules of Ct., Rule 10.1004(d)(2)*]; and operates, maintains, and assigns space in all facilities used and occupied by the division [*Cal. Rules of Ct., Rule 10.1004(d)(4)*].

[c] Courts of Appeal With More Than One Division

Appeals and original proceedings filed in a Court of Appeal with more than one division, or transferred to such a court without designation of a division, may be assigned to divisions in a way that will equalize the distribution of business among them. The Court of Appeal clerk must keep records showing the divisions in which cases and proceedings are pending [*Cal. Rules of Ct., Rule 10.1008*].

[d] Supervising Progress of Appeals

The administrative presiding justices of Courts of Appeal with more than one division in the same city and the presiding justices of all other Courts of Appeal are generally responsible for ensuring that all appellate records and briefs are promptly filed. Staff must be provided for that purpose, to the extent that funds are appropriated and available [*Cal. Rules of Ct., Rule 10.1012(a)*]. Notwithstanding any other rule, the administrative presiding justices and presiding justices referred to in Rule 10.1012(a) may:

- Grant or deny applications to extend the time to file records, briefs, and other documents, except that a presiding justice may extend the time to file briefs in conjunction with an order to augment the record [*Cal. Rules of Ct., Rule 10.1012(b)(1)*];

- Order the dismissal of an appeal or any other authorized sanction for noncompliance with these rules, if no application to extend time or for relief from default has been filed before the order is entered [*Cal. Rules of Ct., Rule 10.1012(b)(2)*]; and

- Grant relief from default or from a sanction other than dismissal imposed for the default [*Cal. Rules of Ct., Rule 10.1012(b)(3)*].

[e] Notice of Failure to Perform Judicial Duties

The Chief Justice or presiding justice must notify the Commission on Judicial Performance of a reviewing court justice's substantial failure to perform judicial duties, including any habitual neglect of duty [*Cal. Rules of Ct., Rule 10.1016(a)(1)(A)*] or disability-caused absences totaling more than 90 court days in a 12-month period, excluding absences for authorized vacations and for attending schools, conferences, and judicial workshops [*Cal. Rules of Ct., Rule 10.1016(a)(1)(B)*]. If the affected justice is a presiding justice, the administrative presiding justice must give the

notice [*Cal. Rules of Ct., Rule 10.1016(a)(2)*]. The Chief Justice, administrative presiding justice, or presiding justice must give the affected justice a copy of any such notice [*Cal. Rules of Ct., Rule 10.1016(b)*].

[f] Reviewing Court Clerk/Administrator

A reviewing court may employ a clerk/administrator selected in accordance with procedures adopted by the court [*Cal. Rules of Ct., Rule 10.1020(a)*]. Acting under the general direction and supervision of the administrative presiding justice, the clerk/administrator is responsible for planning, organizing, coordinating, and directing, with full authority and accountability, the management of the clerk's office and all nonjudicial support activities in a manner that promotes access to justice for all members of the public, provides a forum for the fair and expeditious resolution of disputes, and maximizes the use of judicial and other resources [*Cal. Rules of Ct., Rule 10.1020(b)*].

Under the direction of the administrative presiding justice, the clerk/administrator has the following duties:

- Personnel: The clerk/administrator directs and supervises all court employees assigned to the clerk/administrator by the administrative presiding justice and ensures that the court receives a full range of human resources support [*Cal. Rules of Ct., Rule 10.1020(c)(1)*];

- Budget: The clerk/administrator develops, administers, and monitors the court budget and develops practices and procedures to ensure that annual expenditures are within the budget [*Cal. Rules of Ct., Rule 10.1020(c)(2)*];

- Contracts: The clerk/administrator negotiates contracts on the court's behalf in accord with established contracting procedures and applicable laws [*Cal. Rules of Ct., Rule 10.1020(c)(3)*];

- Calendar management: The clerk/administrator employs and supervises efficient calendar and caseflow management, including analyzing and evaluating pending caseloads and recommending effective calendar management techniques [*Cal. Rules of Ct., Rule 10.1020(c)(4)*];

- Technology: The clerk/administrator coordinates technological and automated systems activities to assist the court [*Cal. Rules of Ct., Rule 10.1020(c)(5)*];

- Facilities: The clerk/administrator coordinates facilities, space planning, court security, and business services support, including the purchase and management of equipment and supplies [*Cal. Rules of Ct., Rule 10.1020(c)(6)*];

- Records: The clerk/administrator creates and manages uniform record-keeping systems, collecting data on pending and completed judicial business and the court's internal operation as the court and Judicial Council require [*Cal. Rules of Ct., Rule 10.1020(c)(7)*];

- Recommendations: The clerk/administrator identifies problems and recommends policy, procedural, and administrative changes to the court [*Cal. Rules of Ct., Rule 10.1020(c)(8)*];

- Public relations: The clerk/administrator represents the court to internal and external customers--including the other branches of government--on issues pertaining to the court [*Cal. Rules of Ct., Rule 10.1020(c)(9)*];

- Liaison: The clerk/administrator acts as liaison with other governmental agencies [*Cal. Rules of Ct., Rule 10.1020(c)(10)*];

- Committees: The clerk/administrator provides staff for judicial committees [*Cal. Rules of Ct., Rule 10.1020(c)(11)*];

- Administration: The clerk/administrator develops and implements administrative and operational programs and policies for the court and the clerk's office [*Cal. Rules of Ct., Rule 10.1020(c)(12)*]; and

- Other: The clerk/administrator performs other duties as the administrative presiding justice directs [*Cal. Rules of Ct., Rule 10.1020(c)(13)*].

Under the general oversight of the clerk/administrator, an assistant clerk/administrator of a geographically separate division has responsibility for the nonjudicial support activities of that division [*Cal. Rules of Ct., Rule 10.1020(d)*].

[g] Court of Appeal Minutes

Court of Appeal minutes should record the court's significant public acts and permit the public to follow the major events in the history of cases coming before the court. The minutes must include the filing date of each opinion, showing whether it was ordered published; orders granting or denying rehearings or modifying opinions; orders affecting an opinion's publication status, if issued after the opinion was filed; summaries of all courtroom proceedings, showing at a minimum the cases called for argument, the justices hearing argument, the name of the attorney arguing for each party, and whether the case was submitted at the close of argument or the court requested further briefing; the date of submission, if other than the date of argument; orders vacating submission, including the reason for vacating and the resubmission date; orders dismissing appeals for lack of jurisdiction; orders consolidating cases; orders affecting a judgment or its finality date; and orders changing or correcting any of the above [*Cal. Rules of Ct., Rule 10.1024(b)*]. At the court's discretion, the minutes may include such other matter as assignments of justices by the Chief Justice; reports of the Commission on Judicial Appointments confirming justices; and memorials [*Cal. Rules of Ct., Rule 10.1024(c)*].

[h] Preservation and Destruction of Court of Appeal Records

Court of Appeal records may be preserved in any appropriate medium, including paper or an optical, electronic, magnetic, photographic, or microphotographic medium or other her technology capable of accurately reproducing the original. The medium used must comply with the minimum standards or guidelines for the preservation and reproduction of the medium adopted by the American National Standards Institute or the Association for Information and Image Management. If records are preserved in a medium other than paper, the following provisions of *Gov. Code § 68150* apply: subdivisions (b)-(d), (f) excluding subdivision (f)(1), and (g)-(h) [*Cal. Rules of Ct., Rule 10.1028(a)*].

The Court of Appeal clerk must permanently keep the court's minutes and a register of appeals and original proceedings [*Cal. Rules of Ct., Rule 10.1028(b)*]. The clerk may destroy all other records in a case 10 years after the decision becomes final, as ordered by the administrative presiding justice or, in a court with only one division, by the presiding justice [*Cal. Rules of Ct., Rule 10.1028(c)(1)*], except that in a criminal case in which the court affirms a judgment of conviction, the clerk must keep the original reporter's transcript for 20 years after the decision becomes final [*Cal. Rules of Ct., Rule 10.1028(c)(2)*].

[i] Local Rules of Courts of Appeal

A Court of Appeal must submit any local rule it adopts to the Reporter of Decisions for publication in the advance pamphlets of the Official Reports [*Cal. Rules of Ct., Rule 10.1030(a)(1)*]. As used in Rule 10.1030, "publication" means printing in the manner in which amendments to the California Rules of Court are printed [*Cal. Rules of Ct., Rule 10.1030(a)(2)*]. A local rule cannot take effect sooner than 45 days after the publication date of the advance pamphlet in which it is printed [*Cal. Rules of Ct., Rule 10.1030(b)*].

[7] Miscellaneous Standards of Judicial Administration

[a] Model Code of Ethics for Court Employees

Each trial and appellate court should adopt a code of ethical behavior for its support staff, and in doing so should consider *Cal. Rules of Ct., Rule 10.650(c)(12)*, and the model Code of Ethics for the Court Employees of California approved by the Judicial Council on May 17, 1994, and any subsequent revisions. The approved model code is published by the Administrative Office of the Courts [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.16].

[b] Trial Court Performance Standards

[i] Purpose

Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17 sets forth standards that are intended to be used by trial courts, in cooperation with the Judicial Council, for purposes of internal evaluation, self-assessment, and self-improvement. They are not intended as a basis for cross-court comparisons, nor are they intended as a basis for evaluating the performance of individual judges [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17(a)].

[ii] Standards

The standards for trial court performance are as follows:

- *Access to justice*
  - The court conducts its proceedings and other public business openly [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17(b)(1)(A)].
  - Court facilities are safe, accessible, and convenient to use [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17(b)(1)(B)].
  - All who appear before the court are given the opportunity to participate effectively without undue hardship or inconvenience [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17(b)(1)(C)].
  - Judges and other trial court personnel are courteous and responsive to the public and accord respect to all with whom they come into contact [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17(b)(1)(D)].
  - The costs of access to the trial court's proceedings and records--whether measured in terms of money, time, or the procedures that must be followed--are reasonable, fair, and affordable [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17(b)(1)(E)].
- *Expedition and timeliness*
  - The trial court establishes and complies with recognized guidelines for timely case processing while, at the same time, keeping current with its incoming caseload [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17(b)(2)(A)].
  - The trial court disburses funds promptly, provides reports and information according to required schedules, and responds to requests for information and other services on an established schedule that assures their effective use [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17(b)(2)(B)].

- The trial court promptly implements changes in law and procedure [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17(b)(2)(C)].

- *Equality, fairness, and integrity*

  - Trial court procedures faithfully adhere to relevant laws, procedural rules, and established policies [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17(b)(3)(A)].

  - Jury lists are representative of the jurisdiction from which they are drawn [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17(b)(3)(B)].

  - Trial courts give individual attention to cases, deciding them without undue disparity among like cases and upon on legally relevant factors [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17(b)(3)(C)].

  - Decisions of the trial court unambiguously address the issues presented to it and make clear how compliance can be achieved [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17(b)(3)(D)].

  - The trial court takes appropriate responsibility for the enforcement of its orders [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17(b)(3)(E)].

  - Records of all relevant court decisions and actions are accurate and properly preserved [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17(b)(3)(F)].

- *Independence and accountability*

  - A trial court maintains its institutional integrity and observes the principle of comity in its governmental relations [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17(b)(4)(A)].

  - The trial court responsibly seeks, uses, and accounts for its public resources.

  - The trial court uses fair employment practices [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17(b)(4)(B)].

  - The trial court informs the community of its programs [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17(b)(4)(C)].

  - The trial court anticipates new conditions or emergent events and adjusts its operations as necessary [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17(b)(4)(D)].

- *Public trust and confidence*

  - The trial court and the justice it delivers are perceived by the public as accessible [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17(b)(5)(A)].

  - The public has trust and confidence that the basic trial court functions are conducted expeditiously and fairly and that its decisions have integrity [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17(b)(5)(B)].

- The trial court is perceived to be independent, not unduly influenced by other components of government, and accountable [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.17(b)(5)(C)].

[c] Court's Duty to Prohibit Bias

[i] General

To preserve the integrity and impartiality of the judicial system, each judge should:

- Ensure that courtroom proceedings are conducted in a manner that is fair and impartial to all of the participants [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.20(a)(1)].

- Refrain from and prohibit biased conduct in all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.20(a)(2)].

- Ensure that all orders, rulings, and decisions are based on the sound exercise of judicial discretion and the balancing of competing rights and interests and are not influenced by stereotypes or biases [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.20(a)(3)].

[ii] Creation of Local Committee on Bias

Each court should establish a local committee with local bar associations to assist in maintaining a courtroom environment free of bias or the appearance of bias. Courts within one or more counties may choose to form a single committee. The local committee should:

- Be composed of representative members of the court community, including but not limited to judges, lawyers, court administrators, and representatives and individuals from minority, women's, and gay and lesbian bar associations and from organizations that represent persons with disabilities [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.20(b)(1)];

- Sponsor or support educational programs designed to eliminate bias within the court and legal communities, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.20(b)(2)]; and

- Develop and maintain an informal procedure for receiving complaints relating to bias in the courtroom, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.20(b)(3)].

[iii] Minimum Components of a Complaint Procedure

An informal complaint procedure developed and maintained by a local committee on bias should:

- Contain a provision specifying that the intent of the procedure is to educate with the purpose of ameliorating the problem rather than disciplining the person who is the subject of the complaint [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.20(c)(1)];

- Accommodate local needs and allow for local flexibility [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.20(c)(2)];

- Apply to all participants in courtroom proceedings [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.20(c)(3)];

- Apply only to complaints as to which the identity of the complainant is known [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.20(c)(4)];

- To the extent possible and unless disclosure is required by law, protect the confidentiality of the complainant, the person who is the subject of the complaint, and other interested persons [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.20(c)(5)];

- Relate to incidents of behavior or conduct occurring in courtroom proceedings [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.20(c)(6)];

- Apply to incidents of bias whether they relate to race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.20(c)(7)];

- Contain a provision that exempts activities constituting legitimate advocacy when matters of race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status are relevant to issues in the courtroom proceeding [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.20(c)(8)];

- Focus on incidents that do not warrant discipline but that should be corrected [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.20(c)(9)];

- With respect to those incidents that if substantiated would warrant discipline, advise the complaining party of the appropriate disciplinary authority [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.20(c)(10)];

- Contain a provision specifying that nothing in the procedure in any way limits the ability of any person to submit a complaint of misconduct to the appropriate disciplinary body [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.20(c)(11)]; and

- To the extent possible and unless disclosure is required by law, prohibit retention of written records of complaints received but permit collection of data on types of complaints or underlying anecdotes that might be useful in educational programs [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.20(c)(12)].

[iv] Application of Local Rules

The existence of the local committee, its purpose, and the features of the informal complaint procedure should be memorialized in the applicable local rules of court [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.20(d)].

[d] Appointment of Attorneys, Arbitrators, Mediators, Referees, Masters, Receivers, and Other Persons

[i] Nondiscrimination in Appointment Lists

In establishing and maintaining lists of qualified attorneys, arbitrators, mediators, referees, masters, receivers, and other persons who are eligible for appointment, courts should ensure equal access for all applicants regardless of gender, race, ethnicity, disability, sexual orientation, or age [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.21(a)].

[ii] Nondiscrimination in Recruitment

Each trial court should conduct a recruitment procedure for the appointment of attorneys, arbitrators, mediators, referees, masters, receivers, and other persons appointed by the court (the "appointment programs") by publicizing the existence of the appointment programs at least once annually through state and local bar associations, including specialty bar associations. This publicity should encourage and provide an opportunity for all eligible individuals, regardless of gender, race, ethnicity, disability, sexual orientation, or age, to seek positions on the rosters of the appointment programs. Each trial court also should use other methods of publicizing the appointment programs that maximize the opportunity for a diverse applicant pool [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.21(b)].

[iii] Nondiscrimination in Application and Selection Procedure

Each trial court should conduct an application and selection procedure for the appointment programs that ensure that the most qualified applicants for an appointment are selected, regardless of gender, race, ethnicity, disability, sexual orientation, or age [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.21(c)].

[e] Children's Waiting Room

Each court should endeavor to provide a children's waiting room located in the courthouse for the use of minors under the age of 16 who are present on court premises as participants or who accompany persons who are participants in court proceedings. The waiting room should be supervised and open during normal court hours. If a court does not have sufficient space in the courthouse for a children's waiting room, the court should create the necessary space when court facilities are reorganized or remodeled or when new facilities are constructed [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.21(d)].

[f] Reasonable Accommodations for Court Personnel

At least to the extent required by state and federal law, each court should evaluate existing facilities, programs, and services available to employees to ensure that no barriers exist to prevent otherwise qualified employees with known disabilities from performing their jobs or participating fully in court programs or activities [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.25].

[g] Master Jury List

The jury commissioner should use the National Change of Address System or other comparable means to update jury source lists and create as accurate a master jury list as reasonably practical [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.31].

[h] Court Security

[i] Court Security Officer

Each trial court should designate a specified peace officer as Court Security Officer to be responsible to the court for all matters relating to its security, including security of courtrooms, buildings, and grounds. The peace officer designated as Court Security Officer should be the sheriff or the sheriff's designee, except that where local conditions dictate otherwise another peace officer may be designated. The Court Security Officer should be in operational command of all peace officers and others charged with a court security function while acting in that capacity and should be responsible for the adequacy of security equipment, the competence training and assignment of security forces, and the effective execution of the Court Security Plan [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.40(a)].

[ii] Preparation of Court Security Plan

Each court should require the Court Security Officer to prepare a Court Security Plan for its review and consideration. The Court Security Plan should:

- Be the operational plan for achieving the desired level of security for courtrooms, buildings, and grounds, including the planned allocation of security forces and equipment [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.40(b)(1)];

- Describe the place and functional assignment and the dress and arming of all security forces (e.g., bailiffs), and propose plans for maintaining courtroom decorum and safety within courthouses and grounds in high-risk situations [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.40(b)(2)]; and

- Include an evaluation of the court's security needs, and an assessment of the adequacy and effectiveness of the equipment and forces available to meet those needs [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.40(b)(3)].

[iii] Adoption and Review of Court Security Plan

Each trial court should adopt, reject, or request modification of the proposed Court Security Plan after giving due consideration to all local conditions affecting its security and to the effect of the plan on the conduct of trials and other proceedings. Each trial court should provide for a periodic review of its security plan and for a periodic assessment of the effectiveness of its execution [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.40(c)].

[iv] Wearing of Firearms in Court

No trial court should approve a Court Security Plan that does not limit the wearing of firearms in the courthouse or courtrooms to peace officers and proscribe the wearing of firearms in such places by all other persons [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.40(d)].

[v] Security of Courts of Appeal

Each Court of Appeal should review its security needs and, if necessary, should request personnel and equipment deemed necessary to maintain the desired level of security [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.40(e)].

[i] Court Sessions at or Near State Penal Institutions

[i] Provision of Adequate Protection

Facilities used regularly for judicial proceedings should not be located on the grounds of or immediately adjacent to a state penal institution unless the location, design, and setting of the court facility provide adequate protection against the possible adverse influence that the prison facilities and activities might have on the fairness of judicial proceedings [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.41(a)].

[ii] Factors to Be Considered

In determining whether adequate protection is provided, the following factors should be considered:

- The physical and visual remoteness of the court facility from the facilities and activities of the prison [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.41(b)(1)];

- The location and appearance of the court facility with respect to the adjacent public areas through which jurors and witnesses would normally travel in going to and from the court [Cal. Rules of Ct., Stds.

Jud. Admin., Std. 10.41(b)(2)];

- The accessibility of the facility to the press and the general public [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.41(b)(3)]; and

- Any other factors that might affect the fairness of the judicial proceedings [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.41(b)(3)].

[iii] Compelling Reasons of Safety or Court Convenience

Unless the location, design, and setting of the facility for conducting court sessions meet the criteria in Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.41(a) and (b):

- Court sessions should not be conducted in or immediately adjacent to a state penal institution except for compelling reasons of safety or convenience of the court [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.41(c)(1)]; and

- Court sessions should not be conducted at such a location when the trial is by jury or when the testimony of witnesses who are neither inmates nor employees of the institution will be required [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.41(c)(2)].

[j] Juror Complaints

Each court should establish a reasonable mechanism for receiving and responding to juror complaints [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.51].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawGovernmental InformationRecordkeeping & ReportingCivil ProcedureTrialsGeneral OverviewGovernmentsCourtsJudges

California Forms of Pleading and Practice--Annotated

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Volume 27: Interpleader thru Juries and Jury Selection-Chs. 314-322
Chapter 317 JUDGES
PART II. LEGAL BACKGROUND
F. Judicial Ethics and Discipline

27-317 California Forms of Pleading and Practice--Annotated § 317.85

§ 317.85 California Code of Judicial Ethics

[1] Governing Law

The Constitution requires the Supreme Court to make rules to be referred to as the Code of Judicial Ethics [*Cal. Const., art. VI, § 18(m)*].

[2] Scope/Authority

The six Canons of the Code of Judicial Ethics contain broad declarations governing the conduct of judges, both on and off the bench, and for judicial candidates in the conduct of their campaigns [*Cal. Const., art. VI, § 18(m)*].

[3] Canons

[a] Canon 1--Integrity and Independence

Canon 1 provides in part that a judge must uphold the integrity and independence of the judiciary [Cal. Rules of Ct., Cal. Rules of Ct., Code Jud. Ethics, Canon 1]. Although Canon 1 provides that a judicial decision later determined to be incorrect legally is not itself a violation of the Code of Ethics, legal error does not preclude a finding of misconduct, and the Commission properly may consider surrounding factors in ascertaining whether discipline may be in order. The determination whether a legal error provides the basis for discipline thus requires an inquiry into additional factors that demonstrate more than legal error, alone [*Oberholzer v. Commission on Judicial Performance (1999) 20 Cal. 4th 371, 398, 84 Cal. Rptr. 2d 466]* .

[b] Canon 2--Impropriety

Canon 2 provides in part that a judge must avoid impropriety and the appearance of impropriety in all of the judge's activities [Cal. Rules of Ct., Cal. Rules of Ct., Code Jud. Ethics, Canon 2]. The Canon's specific provisions include the following:

- A judge must respect and comply with the law and must act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary [Cal. Rules of Ct., Code Jud. Ethics, Canon 2(A)].

- A judge must not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment, nor must a judge convey or permit others to convey the impression that any individual is in a special position to influence the judge [Cal. Rules of Ct., Code Jud. Ethics, Canon 2(B)(1)].

- A judge must not lend the prestige of judicial office to advance the pecuniary or personal interests of the judge or others; nor shall a judge testify voluntarily as a character witness [Cal. Rules of Ct., Code Jud. Ethics, Canon 2(B)(2)].

- A judge must not use the judicial title in any written communication intended to advance the personal or pecuniary interest of the judge [Cal. Rules of Ct., Code Jud. Ethics, Canon 2(B)(4)].

- A judge must not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation [Cal. Rules of Ct., Code Jud. Ethics, Canon 2(C)].

The commentary to this Canon provides an objective test for the appearance of impropriety: the question is not whether the judge is actually biased, but "whether a person aware of the facts might reasonably entertain a doubt that the judge would be able to act with integrity, impartiality, and competence" [Cal. Rules of Ct., Code Jud. Ethics, Canon 2(A), Advisory Committee Commentary; *see also Yaqub v. Salinas Valley Memorial Healthcare System (2004) 122 Cal. App. 4th 474, 486, 18 Cal. Rptr. 3d 780]* .

[c] Canon 3--Impartiality and Diligence

Canon 3 provides in part that a judge must perform the duties of judicial office impartially and diligently [Cal. Rules of Ct., Code Jud. Ethics, Canon 3]. The Canon's specific provisions include the following:

- All of the judicial duties prescribed by law must take precedence over all other activities of every judge. In the performance of these duties, the following standards apply [Cal. Rules of Ct., Code Jud. Ethics, Canon 3(A)].

- A judge must be faithful to the law regardless of partisan interests, public clamor, or fear of criticism, and must maintain professional competence in the law [Cal. Rules of Ct., Code Jud. Ethics, Canon 3(B)(2)].

- A judge must require order and decorum in proceedings before the judge [Cal. Rules of Ct., Code Jud. Ethics, Canon 3(B)(3)].

- A judge must be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and must require similar conduct of lawyers and of all court staff and personnel under the judge's direction and control [Cal. Rules of Ct., Code Jud. Ethics, Canon 3(B)(4)].

- A judge must perform judicial duties without bias or prejudice [Cal. Rules of Ct., Code Jud. Ethics, Canon 3(B)(5)].

- A judge must require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status against parties, witnesses, counsel, or others [Cal. Rules of Ct., Code Jud. Ethics, Canon 3(B)(6)].

- A judge must accord to every person who has a legal interest in a proceeding, or that person's lawyer, full right to be heard according to law. A judge must not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows [Cal. Rules of Ct., Code Jud. Ethics, Canon 3(B)(7)]:

    - A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond [Cal. Rules of Ct., Code Jud. Ethics, Canon 3(B)(7)(a)].

    - A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges [Cal. Rules of Ct., Code Jud. Ethics, Canon 3(B)(7)(b)].

    - A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge [Cal. Rules of Ct., Code Jud. Ethics, Canon 3(B)(7)(c)].

    - A judge may initiate ex parte communications, where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters provided: (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond [Cal. Rules of Ct., Code Jud. Ethics, Canon 3(B)(7)(d)].

    - A judge may initiate or consider any ex parte communication when expressly authorized by law to do so [Cal. Rules of Ct., Code Jud. Ethics, Canon 3(B)(7)(e)].

- A judge must not make any public comment about a pending or impending proceeding in any court, and must not make any nonpublic comment that might substantially interfere with a fair trial or hearing [Cal. Rules of Ct., Code Jud. Ethics, Canon 3(B)(9)].

- A judge must not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community [Cal. Rules of Ct., Code Jud. Ethics, Canon 3(B)(10)].

- A judge must require staff and court personnel under the judge's direction and control to observe appropriate standards of conduct and to refrain from manifesting bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status in the performance of their official duties [Cal. Rules of Ct., Code Jud. Ethics, Canon 3(C)(2)].

- Whenever a judge has reliable information that another judge has violated any provision of the Code of Judicial Ethics, the judge must take or initiate appropriate corrective action, which may include

reporting the violation to the appropriate authority [Cal. Rules of Ct., Code Jud. Ethics, Canon 3(D)(1)].

- Whenever a judge has personal knowledge that a lawyer has violated any provision of the Rules of Professional Conduct, the judge must take appropriate corrective action [Cal. Rules of Ct., Code Jud. Ethics, Canon 3(D)(2)].

- A judge who is charged by prosecutorial complaint, information, or indictment or convicted of a crime in the United States, other than one that would be considered a misdemeanor not involving moral turpitude or an infraction under California law, but including all misdemeanors involving violence (including assaults), the use or possession of controlled substances, the misuse of prescriptions, or the personal use or furnishing of alcohol, must promptly and in writing report that fact to the Commission on Judicial Performance [Cal. Rules of Ct., Code Jud. Ethics, Canon 3(D)(3)].

- A judge must disqualify himself or herself in any proceeding in which disqualification is required by law [Cal. Rules of Ct., Code Jud. Ethics, Canon 3(E)(1)].

- In all trial court proceedings, a judge must disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification [Cal. Rules of Ct., Code Jud. Ethics, Canon 3(E)(2)].

A judge must not independently investigate facts in a case and must consider only the evidence presented, unless otherwise authorized by law. For example, a judge is statutorily authorized to investigate and consult witnesses informally in small claims cases [Cal. Rules of Ct., Code Jud. Ethics, Canon 3(B)(7), Advisory Committee Commentary].

The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. This Canon does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly [Cal. Rules of Ct., Code Jud. Ethics, Canon 3(B)(9), Advisory Committee Commentary].

[d] Canon 4--Quasi-Judicial and Extrajudicial Activities

Canon 4 provides in part that a judge must so conduct the judge's quasi-judicial and extrajudicial activities as to minimize the risk of conflict with judicial obligations [Cal. Rules of Ct., Code Jud. Ethics, Canon 4]. The Canon's specific provisions include the following:

- A judge may speak, write, lecture, teach, and participate in activities concerning legal and nonlegal subject matters, subject to the requirements of the Code of Judicial Ethics [Cal. Rules of Ct., Code Jud. Ethics, Canon 4(B)].

- A judge must not appear at a public hearing or officially consult with an executive or legislative body or public official except on matters concerning the law, the legal system, or the administration of justice or in matters involving the judge's private economic or personal interests [Cal. Rules of Ct., Code Jud. Ethics, Canon 4(C)(1)].

- A judge must not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice [Cal. Rules of Ct., Code Jud. Ethics, Canon 4(C)(2)].

- Subject to the other requirements of the Code of Ethics, a judge may serve as an officer, director, trustee, or nonlegal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice provided that such position does not constitute a public office within the meaning of the *Cal. Const., art. VI, § 17*; and a judge may serve as an officer, director, trustee, or nonlegal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for profit [Cal. Rules of Ct., Code Jud. Ethics, Canon 4(C)(3)].

- Under no circumstance shall a judge accept a gift, bequest, or favor if the donor is a party whose interests have come or are reasonably likely to come before the judge. A judge must discourage members of the judge's family residing in the judge's household from accepting similar benefits from parties who have come or are reasonably likely to come before the judge [Cal. Rules of Ct., Code Jud. Ethics, Canon 4(D)(5)].

- A judge must not practice law [Cal. Rules of Ct., Code Jud. Ethics, Canon 4(G)].

The prohibition on the practice of law refers to the practice of law in a representative capacity and not in a pro se capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or member of the judge's family [Cal. Rules of Ct., Code Jud. Ethics, Canon 4(G), Advisory Committee Commentary].

[e] Canon 5--Political Activities

Canon 5 provides in part that a judge or judicial candidate must refrain from inappropriate political activity [Cal. Rules of Ct., Code Jud. Ethics, Canon 5]. The Canon's specific provisions include the following:

- Judges and candidates for judicial office must not act as leaders or hold any office in a political organization [Cal. Rules of Ct., Code Jud. Ethics, Canon 5(A)(1)]; make speeches for a political organization or candidate for nonjudicial office or publicly endorse or publicly oppose a candidate for nonjudicial office [Cal. Rules of Ct., Code Jud. Ethics, Canon 5(A)(2)]; or personally solicit funds for a political organization or nonjudicial candidate; or make contributions to a political party or political organization or to a nonjudicial candidate in excess of $500 in any calendar year per political party or political organization or candidate, or in excess of an aggregate of $1,000 in any calendar year for all political parties or political organizations or nonjudicial candidates [Cal. Rules of Ct., Code Jud. Ethics, Canon 5(A)(3)].

- A candidate for election or appointment to judicial office must not make statements to the electorate or the appointing authority that commit the candidate with respect to cases, controversies, or issues that could come before the courts [Cal. Rules of Ct., Code Jud. Ethics, Canon 5(B)(1)], or knowingly, or with reckless disregard for the truth, misrepresent the identity, qualifications, present position, or any other fact concerning the candidate or his or her opponent [Cal. Rules of Ct., Code Jud. Ethics, Canon 5(B)(2)].

Canon 5A does not prohibit a judge from signing a petition to qualify a measure for the ballot without the use of the judge's official title [Cal. Rules of Ct., Code Jud. Ethics, Canon 5(A), Advisory Committee Commentary].

[f] Canon 6--Compliance With Code of Judicial Ethics

Canon 6 mandates compliance with the Code of Judicial Ethics [Cal. Rules of Ct., Code Jud. Ethics, Canon 6]. The

Canon's specific provisions include the following:

- Anyone who is an officer of the state judicial system and who performs judicial functions, including, but not limited to, a subordinate judicial officer, magistrate, court-appointed arbitrator, judge of the State Bar Court, temporary judge, and special master, is a judge within the meaning of the Code of Judicial Ethics. Except as provided in Canon 6, all judges must comply with the Code [Cal. Rules of Ct., Code Jud. Ethics, Canon 6(A)].

- A candidate for judicial office must comply with the provisions of Canon 5 [Cal. Rules of Ct., Code Jud. Ethics, Canon 6(E)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 317.86 Commission on Judicial Performance

[1] Governing Law

The Commission on Judicial Performance was established by voter referendum in 1960. The Commission's authority is set forth in *Cal. Const., art. VI, §§ 8, 18, 18.1* and *18.5*. The Commission also is subject to *Gov. Code §§ 68701-68755*.

In addition, the Commission is responsible for enforcement of the restrictions on judges' receipt of gifts and honoraria, set forth in *Code of Civ. Proc. § 170.9*.

[2] Authority/Scope of Actions Against Judge

The Commission has authority to conduct proceedings against any California judge after its investigation of cases of willful misconduct in office, persistent failure or inability to perform the duties of office, habitual intemperance, conduct prejudicial to the administration of justice that may be detrimental to the judicial office itself, or a disability of a permanent character that seriously interferes with the performance of duties [*Cal. Const., art. VI, § 18*]. The Commission is authorized to take the following actions:

- Retire a judge for disability that seriously interferes with the performance of the judge's duties and is or is likely to become permanent [*Cal. Const., art. VI, § 18(d)(1)*];

- Censure a judge or former judge or remove a judge for action occurring not more than six years prior to the commencement of the judge's current term or of the former judge's last term that constitutes willful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute [*Cal. Const., art. VI, § 18(d)(2)*]; and

- Publicly or privately admonish a judge or former judge found to have engaged in an improper action or dereliction of duty [*Cal. Const., art. VI, § 18(d)(3)*].

The Commission may also bar a former judge who has been censured from receiving an assignment, appointment, or reference of work from any California state court [*Cal. Const., art. VI, § 18(d)*].

Pursuant to *Cal. Const., art. VI, § 18(i)*, the Commission has adopted Rules 101-139 that govern investigations and formal proceedings. The Commission has also adopted Policy Declarations, which further detail internal procedures and existing policy.

[3] Commission Proceedings

[a] Interested Party

Judges who are members of the Commission or of the Supreme Court may not participate as such in any Commission proceedings involving themselves [Comm. Jud. Perf., Rule 101].

[b] Confidentiality and Disclosure

[i] Scope of Rule

Except as provided in Comm. Jud. Perf., Rule 102, all papers filed with and proceedings before the Commission are confidential. Nothing in Rule 102 prohibits the respondent judge or anyone other than a Commission member or member of Commission staff from making statements regarding the judge's conduct underlying a complaint or proceeding [Comm. Jud. Perf., Rule 102(a)].

[ii] Disclosure After Institution of Formal Proceedings

When the Commission institutes formal proceedings, the following is not confidential:

- The notice of formal proceedings and all subsequent papers filed with the commission and the special masters, all stipulations entered, all findings of fact and conclusions of law made by the special masters and by the commission, and all determinations of removal, censure and public admonishment made by the commission [Comm. Jud. Perf., Rule 102(b)(1)];

- The formal hearing before the special masters and the appearance before the Commission [Comm. Jud. Perf., Rule 102(b)(2)].

[iii] Explanatory Statements

The Commission may issue explanatory statements under *Cal. Const., art. VI, § 18(k)* [Comm. Jud. Perf., Rule 102(c)].

[iv] Submission of Proposed Statement of Clarification and Correction Regarding Commission Proceedings by Judge

Notwithstanding Comm. Jud. Perf., Rule 102(a), if public reports concerning a Commission proceeding result in substantial unfairness to the judge involved in the proceeding, including unfairness resulting from reports that are false or materially misleading or inaccurate, the involved judge may submit a proposed statement of clarification and correction to the Commission and request its issuance. The Commission must either issue the requested statement, advise the judge in writing that it declines to issue the requested statement, or issue a modified statement [Comm. Jud. Perf., Rule 102(d)].

[v] Disclosure to Complainant

Upon completion of an investigation or proceeding, the Commission must disclose to the person complaining against the judge that the Commission:

- Has found no basis for action against the judge or determined not to proceed further in this matter [Comm. Jud. Perf., Rule 102(e)(1)];

- Has taken an appropriate corrective action, the nature of which must not be disclosed [Comm. Jud. Perf., Rule 102(e)(2)]; or

- Has publicly admonished, censured, removed, or retired the judge, or has found the person unfit to serve as a subordinate judicial officer [Comm. Jud. Perf., Rule 102(e)(3)].

Where a matter is referred to the Commission by a presiding judge or other public official in his or her official capacity, disclosure concerning that matter must be made to the individual serving in that office at the time the matter is concluded. The name of the judge must not be used in any written communication to the complainant, unless formal proceedings have been instituted or unless the complainant is a presiding judge or other public official in his or her official capacity. Written communications in which the judge's name is not used must include the date of the complaint as a cross-reference [Comm. Jud. Perf., Rule 102(e)].

[vi] Public Safety

When the Commission receives information concerning a threat to the safety of any person or persons, information concerning such a threat may be provided to the person threatened, to persons or organizations responsible for the safety of the person threatened, and to law enforcement and/or any appropriate prosecutorial agency [Comm. Jud. Perf., Rule 102(f)].

[vii] Disclosure of Information to Prosecuting Authorities

The Commission may release to prosecuting authorities at any time information that reveals possible criminal conduct by the judge or former judge or by any other individual or entity [Comm. Jud. Perf., Rule 102(g)].

[viii] Disclosure of Records to Public Entity Upon Request or Consent of Judge

If a judge or former judge requests or consents to release of Commission records to a public entity, the Commission may release that judge's records [Comm. Jud. Perf., Rule 102(h)].

[ix] Disclosure of Records of Disciplinary Action to Appointing Authorities

The Commission must, upon request, provide to the Governor of any State of the Union, the President of the United States, or the Commission on Judicial Appointments the text of any private admonishment or advisory letter issued after March 1, 1995, or any other disciplinary action together with any information that the Commission deems necessary to a full understanding of the Commission's action, with respect to any applicant under consideration for any judicial appointment, provided that:

- The request is in writing [Comm. Jud. Perf., Rule 102(i)(1)]; and

- Any information released to the appointing authority is simultaneously provided to the applicant [Comm. Jud. Perf., Rule 102(i)(2)].

All information disclosed to appointing authorities under this subdivision remains privileged and confidential. Private admonishments and advisory letters issued before March 1, 1995, must only be disclosed under this section with the

judge's written consent [Comm. Jud. Perf., Rule 102(i)].

[x] Disclosure of Information Regarding Pending Proceedings to Appointing Authorities

The Commission may, upon request, in the interest of justice or to maintain public confidence in the administration of justice, provide to the Governor of any State of the Union, the President of the United States, the Commission on Judicial Appointments, or any other state or federal authorities responsible for judicial appointments information concerning any pending investigation or proceeding with respect to any applicant under consideration for any judicial appointment, provided that:

- The request is in writing [Comm. Jud. Perf., Rule 102(j)(1)]; and

- Any information released to the appointing authority is simultaneously provided to the applicant [Comm. Jud. Perf., Rule 102(j)(2)].

If a disclosure about a pending matter is made and that matter subsequently is closed by the Commission without discipline being imposed, disclosure of the latter fact must be made promptly to the appointing authority and the judge. All information disclosed to appointing authorities under Rule 102(j) remains privileged and confidential [Comm. Jud. Perf., Rule 102(j)].

[xi] Disclosure of Information to Regulatory Agencies Upon Retirement or Resignation

If a judge retires or resigns from office or if a subordinate judicial officer retires or resigns from employment after a complaint is filed with the commission, or if a complaint is filed with the commission after the retirement or resignation, the commission may, in the interest of justice or to maintain public confidence in the administration of justice, release information concerning the complaint, investigation and proceedings to the State Bar or to other regulatory agencies, provided that the commission has commenced a preliminary investigation or other proceeding and the judge has had an opportunity to respond to the commission's inquiry or preliminary investigation letter [Comm. Jud. Perf., Rule 102(k)].

[xii] Disclosure of Information About Subordinate Judicial Officers to Presiding Judges

The Commission may release to a presiding judge or his or her designee information concerning a complaint, investigation, or disposition involving a subordinate judicial officer, including the name of the subordinate judicial officer, consistent with the Commission's jurisdiction under *Cal. Const., art. VI, § 18.1* [Comm. Jud. Perf., Rule 102(l)].

[xiii] Disclosure of Information Regarding Disciplinary Action and Pending Proceedings to the Chief Justice

With respect to any judge who is under consideration for judicial assignment following retirement or resignation, or is sitting on assignment, the Commission may, upon the request of the Chief Justice of California and with the consent of that judge, in the interest of justice or to maintain public confidence in the administration of justice, provide the Chief Justice information concerning any record of disciplinary action or any pending investigation or proceeding with respect to that judge, provided that:

- The request and consent are in writing [Comm. Jud. Perf., Rule 102(m)(1)];

- If the disclosure involves a pending investigation or proceeding, the judge has had an opportunity to respond to the pending investigation or proceeding [Comm. Jud. Perf., Rule 102(m)(2)]; and

- Any information released to the Chief Justice is simultaneously provided to the judge seeking assignment [Comm. Jud. Perf., Rule 102(m)(3)].

If the disclosure involves disciplinary action, the Commission may include any information the Commission deems necessary to a full understanding of its action. If a disclosure about a pending matter is made and that matter subsequently is closed by the Commission without discipline being imposed, disclosure of the latter fact must be made promptly to the Chief Justice and the judge. All information disclosed to the Chief Justice under Rule 102(m) remains privileged and confidential [Comm. Jud. Perf., Rule 102(m)].

[xiv] Disclosure of Information to Presiding Judges About Possible Lack of Capacity or Other Inability to Perform

The Commission may release to a presiding judge or his or her designee information concerning an investigation involving possible lack of capacity or other inability to perform judicial duties on the part of a judge of that court, except that no confidential medical information concerning the judge may be released [Comm. Jud. Perf., Rule 102(n)].

[c] Protection From Liability for Statements

The making of statements to the Commission, the filing of papers with or the giving of testimony before the Commission, or before the masters appointed by the Supreme Court pursuant to Rule 121, must not give rise to civil liability for the person engaged in such acts. This privilege extends to any motions or petitions filed in the Supreme Court, as well as papers filed in connection therewith. No other publication of such statements, papers or proceedings must be so privileged [Comm. Jud. Perf., Rule 103].

[d] Duty to Cooperate; Response by Respondent Judge

A respondent judge must cooperate with the Commission in all proceedings in accordance with *Gov. Code § 68725*. The judge's cooperation or lack of cooperation may be considered by the Commission in determining the appropriate disciplinary sanction or disposition as well as further proceedings to be taken by the Commission but may not be considered in making evidentiary determinations [Comm. Jud. Perf., Rule 104(a)].

A respondent judge must, within the time limits set forth in Rules 110(a) and 111(a), respond to the merits of a staff inquiry letter or preliminary investigation letter [Comm. Jud. Perf., Rule 104(b)]. A respondent judge must, within the time limits set forth in Rule 119(b), file an answer to a notice of formal proceedings which comports with the requirements set forth in Rule 119(c) [Comm. Jud. Perf., Rule 104(c)].

A respondent judge must file all other responses and documents required in Commission proceedings within such reasonable time as the Commission may prescribe, and must comply with all other requirements of Commission proceedings, including the discovery requirements set forth in Rule 122 [Comm. Jud. Perf., Rule 104(d)].

In accordance with *Evid. Code § 913*, no inference shall be drawn as to any matter in issue or to the credibility of the judge based on a refusal to respond as required by Rule 104 or to respond to a question at a hearing under Rule 123 when such refusal is based on the exercise of the privilege against self-incrimination or of any other Evidence Code privilege or of any other privilege recognized by law [Comm. Jud. Perf., Rule 104(e)].

[e] Medical Examination

Upon a finding of good cause by seven members of the Commission and within such reasonable time as the Commission may prescribe, a judge must submit to a medical examination ordered by the Commission. The examination must be limited to the conditions stated in the finding of good cause. No examination by a specialist in psychiatry may be required without the consent of the judge [Comm. Jud. Perf., Rule 105].

[f] Judge's Representation by Counsel

A judge may be represented by counsel in all Commission proceedings. The written communications of counsel shall be deemed to be the written communications of the judge. Counsel has the authority to bind the judge as to all matters except a stipulation as to discipline [Comm. Jud. Perf., Rule 106].

Any paper filed with the Commission and any written statement made to the Commission or to its staff must be signed by the judge or the judge's counsel. A stipulation as to discipline must be signed by the judge. The signing of any document or statement warrants that the signer has personal knowledge of the matter contained in the document or statement or has investigated the matter and has a good faith belief in the accuracy of the representations contained in the document or statement [Comm. Jud. Perf., Rule 106].

Comm. Jud. Perf., Rule 106 applies to the filing of responses to staff inquiry letters and preliminary investigation letters under Comm. Jud. Perf., Rules 110 and 111, to the filing of answers in formal proceedings under Comm. Jud. Perf., Rule 119, and to all other filings with the Commission and the masters and all other correspondence with the Commission [Comm. Jud. Perf., Rule 106].

[g] Notice Requirements

All notices of a staff inquiry, preliminary investigation, or intended private admonishment or public admonishment must be sent to the judge at chambers unless otherwise requested, and a copy thereof must be mailed to counsel of record. If the notice relates to a staff inquiry, the notice must be given by first-class mail. If the notice relates to a preliminary investigation or intended private admonishment or public admonishment, the notice must be given by prepaid certified mail return receipt requested. Envelopes containing such notices must be marked "personal and confidential"; the inscription "Commission on Judicial Performance" must not be used on the envelopes [Comm. Jud. Perf., Rule 107(a)].

After institution of formal proceedings, the service of the notice of formal proceedings must be made as set forth in Comm. Jud. Perf., Rule 118, and the giving of notice or sending of other correspondence in connection with the formal proceedings must be accomplished as set forth in Comm. Jud. Perf., Rule 126 [Comm. Jud. Perf., Rule 107(b)].

[h] Extensions of Time

A judge may, upon submission of a written request for extension to the chairperson prior to the expiration of time for filing a response to a staff inquiry letter under Comm. Jud. Perf., Rule 110, obtain a 30-day extension of time for filing the response to the staff inquiry letter [Comm. Jud. Perf., Rule 108(a)].

Upon a showing of good cause submitted by the judge, the chairperson, chairperson's designee or other member designated by the Commission may extend the time for filing a response to a preliminary investigation letter under Comm. Jud. Perf., Rule 111 or for filing an answer to a notice of formal proceedings [Comm. Jud. Perf., Rule 108(b)].

The chairperson of the Commission or the presiding master may extend the time for commencing a hearing before the special masters upon a showing of good cause to permit either party to obtain reasonable discovery as provided in these rules, or for other reasons set forth in a showing of good cause [Comm. Jud. Perf., Rule 108(c)].

The chairperson may, upon request of the masters, extend the time for the filing of the report of the masters under Comm. Jud. Perf., Rule 129 [Comm. Jud. Perf., Rule 108(d)].

The judge or the examiner may, upon submission of a written request for extension to the chairperson prior to the expiration of time for filing opening briefs to the Commission under Comm. Jud. Perf., Rule 130(a), obtain a 30-day extension of time for filing opening briefs to the Commission [Comm. Jud. Perf., Rule 108(e)].

Any other or further extension of time may be granted by the chairperson of the Commission only upon a showing of good cause [Comm. Jud. Perf., Rule 108(f)].

[i] Commencement of Commission Action

[i] Receipt of Written Statement

Upon receiving a written statement alleging facts indicating that a judge is guilty of willful misconduct in office, persistent failure or inability to perform the duties of office, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or that the judge has a disability that seriously interferes with the performance of the duties of office and is or is likely to become permanent, or that the judge has engaged in an improper action or a dereliction of duty, the Commission may:

- In an appropriate case, determine that the statement is obviously unfounded or frivolous and dismiss the proceeding [Comm. Jud. Perf., Rule 109(a)(1)];

- If the statement is not obviously unfounded or frivolous, make a staff inquiry to determine whether sufficient facts exist to warrant a preliminary investigation [Comm. Jud. Perf., Rule 109(a)(2)]; or

- If sufficient facts are determined in the course of a staff inquiry or otherwise, make a preliminary investigation to determine whether formal proceedings should be instituted and a hearing held [Comm. Jud. Perf., Rule 109(a)(3)].

Commission staff will evaluate anonymous complaints for merit; if a complaint is deemed sufficiently meritorious, it will be placed on the oversight agenda for consideration by the Commission as to whether or not it should be docketed [Comm. Jud. Perf., Pol. Decl. 1.1].

For form of complaint about a California judge, court commissioner, or referee, see *§ 317.219*.

[ii] Staff Inquiry or Preliminary Investigation on Commission's Own Motion

The Commission may make a staff inquiry or preliminary investigation on the basis of information received by the Commission not contained in a written report indicating that a judge is guilty of willful misconduct in office, persistent failure or inability to perform the duties of office, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or that the judge has a disability that seriously interferes with the performance of the duties of office and is or is likely to become permanent, or that the judge has engaged in an improper action or a dereliction of duty [Comm. Jud. Perf., Rule 109(b)].

In instances where a matter comes to the attention of the Commission between meetings, which on its face appears to warrant a staff inquiry or a preliminary investigation and there has already been direct communication with the subject judge or other exigent circumstances exist, an effort should be made, whenever possible, to poll all of the Commission members for authorization of a staff inquiry or preliminary investigation. If, in the discretion of the chairperson or acting chairperson, polling all of the members is not feasible, the chairperson or acting chairperson may authorize the staff inquiry or preliminary investigation. When a staff inquiry or preliminary investigation is authorized without a poll of the members, the members must be promptly notified of the action taken [Comm. Jud. Perf., Pol. Decl. 1.6].

[iii] Staff Inquiry or Preliminary Investigation of Subordinate Judicial Officers

The Commission may make a staff inquiry or a preliminary investigation of a subordinate judicial officer whenever:

- The Commission receives from a complainant a written request within 30 days after the complainant has been advised by the local court of the disposition of a complaint against a subordinate judicial officer, and the commission concludes that the local court may have abused its discretion in its disposition of such complaint [Comm. Jud. Perf., Rule 109(c)(1)];

- The Commission receives from a local court a request that the Commission investigate or adjudicate a complaint against a subordinate judicial officer [Comm. Jud. Perf., Rule 109(c)(2)];

- The Commission receives from a local court information that a complaint resulted in the written reprimand, suspension, or removal of the subordinate judicial officer [Comm. Jud. Perf., Rule 109(c)(3)]; or

- The Commission receives from a local court information that a subordinate judicial officer resigned while an investigation was pending and before a final decision was made by the local court [Comm. Jud. Perf., Rule 109(c)(4)].

Comm. Jud. Perf., Rule 109(c) applies only to complaints about a subordinate judicial officer received in the local court on or after June 3, 1998; Comm. Jud. Perf., Rule 109(c)(1) applies only in cases in which the complainant was apprised by the local court of the 30-day time limit for seeking review by the Commission [Comm. Jud. Perf., Rule 109(c)].

[iv] Notification of Disposition at the Judge's Request

Upon written request from a judge who is the subject of a complaint before the Commission, the Commission must notify the judge in writing of the disposition of the complaint if:

- The judge's request to the Commission specifically describes the underlying incident giving rise to the complaint [Comm. Jud. Perf., Rule 109(d)(1)];

- The pendency of the complaint has become generally known to the public [Comm. Jud. Perf., Rule 109(d)(2)]; or

- The judge has received written notice of the complaint from someone who is not associated with the Commission [Comm. Jud. Perf., Rule 109(d)(3)].

[j] Staff Inquiry; Advisory Letter After Staff Inquiry

[i] Purpose of Staff Inquiry

The staff inquiry is one of the Commission's two levels of investigation. A staff inquiry may, but need not, precede a preliminary investigation [Comm. Jud. Perf., Pol. Decl. 1.2]. The purpose of a staff inquiry is to determine whether sufficient facts exist to warrant a preliminary investigation [Comm. Jud. Perf., Pol. Decl. 1.2].

[ii] Contents of Staff Inquiry Letter

An inquiry letter will include specification of the allegations and may include [Comm. Jud. Perf., Pol. Decl. 1.3]:

- The date of the conduct;

- The location(s) where the conduct occurred;

- If applicable, the name(s) of the case(s) or identification of the court proceeding(s) in relation to

which the conduct occurred.

If the inquiry concerns statements made by or to the judge, the letter may also include the text or summaries of the comments. The purpose of the inquiry letter is to afford the judge an opportunity to provide such matters as the judge may choose, including information about the factual aspects of the allegations and other relevant comment [Comm. Jud. Perf., Pol. Decl. 1.3].

[iii] Notice Prior to Issuance of Advisory Letter

If the Commission makes a staff inquiry, the judge must be notified of the inquiry and the nature of the charge, before the Commission issues an advisory letter. The respondent judge so notified must be afforded a reasonable opportunity in the course of the inquiry to present such matters as the judge may choose. A reasonable time for a judge to respond to an inquiry letter must be 20 days from the date the letter was mailed to the judge unless the time is extended pursuant to Comm. Jud. Perf., Rule 108 [Comm. Jud. Perf., Rule 110(a)].

[iv] Termination of Staff Inquiry

If the staff inquiry does not disclose sufficient cause to warrant issuance of a confidential advisory letter or further proceedings, the Commission must terminate the staff inquiry and notify the judge in writing of such action if the judge was notified of the staff inquiry pursuant to Comm. Jud. Perf., Rule 110(a) [Comm. Jud. Perf., Rule 110(b)].

[v] Advisory Letter

At any time after notice of a staff inquiry and a reasonable opportunity to respond has been given to the judge, the Commission may determine that the judge's conduct does not constitute a basis for further proceedings and issue a confidential advisory letter to the judge [Comm. Jud. Perf., Rule 110(c)].

As noted in *Oberholzer v. Commission on Judicial Performance (1999) 20 Cal. 4th 371, 388, 84 Cal. Rptr. 2d 466* , the California Judges Association has opined that the advisory letter, also known as the stinger letter, "is used when a judge's conduct is deemed to be marginal: not worthy of formal discipline, but not to be condoned. The stinger is supposed to be a form of constructive criticism or advice as well as a harbinger of future bad tidings if the advice is not followed." In *Oberholzer*, the petitioner judge claimed that the Commission's procedures in issuing the advisory letter violated his right to due process of law, and urged the California Supreme Court to invalidate procedures followed by the Commission in issuing advisory letters. He claimed that prior to its issuance, he was he was entitled to a hearing, the right to review the evidence considered by the Commission, the right to confront adverse witnesses or evidence, and the right to judicial review--in other words, the functional equivalent of a trial. The California Supreme Court disagreed, noting that the procedural protections petitioner contends were improperly withheld from him are of the type more appropriately required whenever action by the state significantly impairs an individual's freedom to pursue a private occupation: "Advisory letters may range from a mild suggestion to a severe rebuke; although they may reduce a judge's chance of being elevated to a higher court (or appointed to some other office), such letters do not inexorably subject a judge to public opprobrium or other inevitable consequences that might impair the individual's freedom to pursue his or her chosen occupation" [*Oberholzer v. Commission on Judicial Performance (1999) 20 Cal. 4th 371, 393, 84 Cal. Rptr. 2d 466]* .

[k] Preliminary Investigation

[i] Purpose of Preliminary Investigation

The preliminary investigation is the second of the Commission's two levels of investigation [Comm. Jud. Perf., Pol. Decl. 1.4]. A preliminary investigation may follow a staff inquiry or may be instituted without a staff inquiry having been conducted. Where the allegations, if true, would warrant consideration of Commission action greater than issuance

of an advisory letter or when the use of investigation subpoenas and more formal investigative procedures are contemplated, the Commission may commence with a preliminary investigation. The purpose of a preliminary investigation is to determine whether formal proceedings should be instituted and a hearing held [Comm. Jud. Perf., Pol. Decl. 1.4].

[ii] Notice

If the Commission commences a preliminary investigation, the judge must be notified of the investigation and the nature of the charge, and be afforded a reasonable opportunity in the course of the preliminary investigation to present such matters as the judge may choose. A reasonable time for a judge to respond to a preliminary investigation letter must be 20 days from the date the letter was mailed to the judge unless the time is extended pursuant to Comm. Jud. Perf., Rule 108 [Comm. Jud. Perf., Rule 111(a)].

A preliminary investigation letter provides the judge notice of the investigation and the nature of the charge under review and may include the following [Comm. Jud. Perf., Pol. Decl. 1.5]:

- The date of the conduct;
- The location(s) where the conduct occurred, if applicable;
- The name of the case(s) or identification of the court proceeding(s) in relation to which the conduct occurred.

If the investigation concerns statements made by or to the judge, the letter may also include the text or summaries of the comments. The purpose of the preliminary investigation letter is to afford the judge an opportunity to provide such matters as the judge may choose including information about the factual aspects of the allegations and other relevant comment [Comm. Jud. Perf., Pol. Decl. 1.5].

[iii] Termination of Investigation

If the preliminary investigation does not disclose sufficient cause to warrant further proceedings, the Commission must terminate the investigation and notify the judge in writing [Comm. Jud. Perf., Rule 111(b)].

[iv] Advisory Letter

At any time after notice of a preliminary investigation and a reasonable opportunity to respond has been given to the judge, the Commission may determine that the judge's conduct does not constitute a basis for further proceedings and may terminate the investigation by issuing a confidential advisory letter to the judge [Comm. Jud. Perf., Rule 111(c)].

As noted in *Oberholzer v. Commission on Judicial Performance (1999) 20 Cal. 4th 371, 388, 84 Cal. Rptr. 2d 466* , the California Judges Association has opined that the advisory letter, also known as the stinger letter, "is used when a judge's conduct is deemed to be marginal: not worthy of formal discipline, but not to be condoned. The stinger is supposed to be a form of constructive criticism or advice as well as a harbinger of future bad tidings if the advice is not followed." In *Oberholzer*, the petitioner judge claimed that the Commission's procedures in issuing the advisory letter violated his right to due process of law, and urged the California Supreme Court to invalidate procedures followed by the Commission in issuing advisory letters. He claimed that prior to its issuance, he was he was entitled to a hearing, the right to review the evidence considered by the Commission, the right to confront adverse witnesses or evidence, and the right to judicial review--in other words, the functional equivalent of a trial. The California Supreme Court disagreed, noting that the procedural protections petitioner contends were improperly withheld from him are of the type more appropriately required whenever action by the state significantly impairs an individual's freedom to pursue a private

occupation: "Advisory letters may range from a mild suggestion to a severe rebuke; although they may reduce a judge's chance of being elevated to a higher court (or appointed to some other office), such letters do not inexorably subject a judge to public opprobrium or other inevitable consequences that might impair the individual's freedom to pursue his or her chosen occupation" [*Oberholzer v. Commission on Judicial Performance (1999) 20 Cal. 4th 371, 393, 84 Cal. Rptr. 2d 466]* .

[l] Monitoring

The Commission may defer termination of a preliminary investigation for a period not to exceed two years for observation and review of a judge's conduct. The judge must be advised in writing of the type of behavior for which the judge is being monitored. Such disclosure shall not limit the Commission's consideration of misconduct involving other types of behavior which may be observed or reported during the period of monitoring [Comm. Jud. Perf., Rule 112].

[m] Notice of Intended Private Admonishment

If after a preliminary investigation the Commission determines that there is good cause for a private admonishment, it may issue a notice of intended private admonishment to the judge by certified mail. The notice must include a statement of facts found by the Commission and the reasons for the proposed admonishment. The notice must also contain an advisement as to the judge's options under Comm. Jud. Perf., Rule 114 [Comm. Jud. Perf., Rule 113].

[n] Private Admonishment Procedure

A judge who receives a notice of intended private admonishment pursuant to Comm. Jud. Per., Rule 113 has the following options discussed below [Comm. Jud. Perf., Rule 114].

[i] Acceptance of Private Admonishment

The judge may choose not to contest the intended private admonishment. If the judge does not contest the intended private admonishment within 30 days after the mailing of a notice of intended private admonishment, the admonishment becomes effective [Comm. Jud. Perf., Rule 114(a)].

[ii] Appearance Before Commission

The judge may, within 30 days of the mailing of a notice of intended private admonishment, file with the Commission written objections to the intended private admonishment, waive the right to formal proceedings pursuant to Comm. Jud. Perf., Rule 118, and demand an appearance before the Commission to contest the intended private admonishment [Comm. Jud. Perf., Rule 114(b)].

After the time set for the appearance before the Commission, the Commission may:

- Close the matter without disciplinary action [Comm. Jud. Perf., Rule 114(b)(1)];
- Close the matter with a confidential advisory letter [Comm. Jud. Perf., Rule 114(b)(2)]; or
- Issue a private admonishment [Comm. Jud. Perf., Rule 114(b)(3)].

[iii] Formal Proceedings

The judge may, within 30 days of the mailing of a notice of intended private admonishment, file with the Commission a demand for formal proceedings pursuant to Comm. Jud. Perf., Rule 118 [Comm. Jud. Perf., Rule 114(c)].

[o] Notice of Intended Public Admonishment

If the Commission determines following a preliminary investigation that there is good cause for public discipline, it may issue a notice of intended public admonishment to the judge by certified mail. The notice must include a statement of facts found by the Commission and the reasons for the proposed admonishment. The notice must also contain an advisement as to the judge's options under Comm. Jud. Perf., Rule 116 [Comm. Jud. Perf., Rule 115].

[p] Public Admonishment Procedure

A judge who receives a notice of intended public admonishment pursuant to Comm. Jud. Perf., Rule 115 has the following options [Comm. Jud. Perf., Rule 116]:

[i] Acceptance of Public Admonishment

The judge may choose not to contest the intended public admonishment. If the judge does not contest the intended public admonishment within 30 days after the mailing of a notice of intended public admonishment, the admonishment becomes effective [Comm. Jud. Perf., Rule 116(a)].

[ii] Appearance Before Commission

The judge may, within 30 days of the mailing of a notice of intended public admonishment, file with the Commission written objections to the intended public admonishment, waive the right to formal proceedings under Comm. Jud. Perf., Rule 118, and demand an appearance before the Commission to contest the intended public admonishment [Comm. Jud. Perf., Rule 116(b)].

After the time set for the appearance before the Commission, the Commission may:

- Close the matter without disciplinary action [Comm. Jud. Perf., Rule 116(b)(1)];
- Close the matter with a confidential advisory letter [Comm. Jud. Perf., Rule 116(b)(2)];
- Issue a private admonishment [Comm. Jud. Perf., Rule 116(b)(3)]; or
- Issue a public admonishment [Comm. Jud. Perf., Rule 116(b)(4)].

[iii] Formal Proceedings

The judge may, within 30 days of the mailing of a notice of intended public admonishment, file with the Commission a demand for formal proceedings pursuant to Comm. Jud. Perf., Rule 118 [Comm. Jud. Perf., Rule 116(c)].

[q] Use and Retention of Commission Records

[i] Use of Records Outside the Limitation Period

Commission records of complaints against a judge must not be used for any purpose if the complaints (1) relate to actions occurring more than six years prior to the commencement of the judge's current term, and (2) did not result in issuance of an advisory letter, public or private admonishment, censure, or removal of the judge [Comm. Jud. Perf., Rule 117(a)].

[ii] Records Disposition Program

The Commission must adopt a records disposition program designed to dispose of those records which cannot be used for any purpose under this rule or which are no longer necessary for the performance of its duties [Comm. Jud. Perf., Rule 117(b)].

[r] Notice of Formal Proceedings

[i] Issuance of Notice

After the preliminary investigation has been completed, if the Commission concludes that formal proceedings should be instituted, it must without delay issue a written notice to the judge advising the judge of the institution of formal proceedings to inquire into the charges against the judge [Comm. Jud. Perf., Rule 118(a)]. Such proceedings must be entitled:

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE Inquiry Concerning Judge _____, No. _____.

Absent unusual circumstances, the evidentiary hearing on the charges set forth in a notice of formal proceedings must be set to commence two to four months following the issuance under Comm. Jud. Perf., Rule 118 of the notice of formal proceedings [Comm. Jud. Perf., Pol. Decl. 2.2].

[ii] Content of Notice

The notice must specify in ordinary and concise language the charges against the judge and the alleged facts upon which such charges are based, and must advise the judge of the duty to file a written answer to the charges within 20 days after service of the notice upon the judge [Comm. Jud. Perf., Rule 118(b)].

[iii] Service of Notice

After a notice of formal proceedings is signed by the chairperson of the Commission, the chairperson's designee or other member designated by the Commission, the notice must be served by personal service of a copy thereof on the judge, unless the judge personally or through counsel waives personal service and consents to service by mail. If there is no consent to service by mail and it appears to the chairperson of the Commission upon affidavit that, after reasonable effort for a period of 10 days, personal service could not be had, service may be made upon the judge by mailing, by prepaid certified mail, copies of the notice addressed to the judge at the judge's chambers and last known residence [Comm. Jud. Perf., Rule 118(c)].

[iv] Public Announcement

Not less than five days after service of the notice of formal proceedings as set forth above, the Commission must issue a public announcement advising that formal proceedings have been instituted, and make public the notice of formal proceedings. The public announcement must set forth the date the judge's answer to the notice of formal proceedings is due, and indicate that the answer to the notice of formal proceedings will be made public [Comm. Jud. Perf., Rule 118(d)].

[s] Answer

[i] Pleadings and Motions

The notice of formal proceedings and answer shall constitute the pleadings. No further pleadings shall be filed and no motion or demurrer shall be filed against any of the pleadings [Comm. Jud. Perf., Rule 119(a)].

[ii] Filing of Answer

Within 20 days after service of the notice of formal proceedings the judge must serve, in accordance with Comm. Jud, Perf., Rule 119.5, and file with the Commission an answer, which must be verified and must conform in style to *Cal. Rules of Ct., Rule 8.204(b)*. The chairperson, the chairperson's designee or other member designated by the Commission may grant an extension of time only upon timely written request establishing good cause for an extension of time [Comm. Jud. Perf., Rule 819(b)].

[iii] Content of Answer

The answer must be as complete and straightforward as the information reasonably available to the respondent judge permits. The answer must (1) admit each allegation which is true, (2) deny each allegation which is untrue, and (3) specify each allegation as to the truth of which the judge lacks sufficient information or knowledge. If a respondent judge gives lack of information or knowledge as a reason for a failure to admit or deny any allegation, the respondent judge must state in the answer that a reasonable inquiry concerning the matter in the particular allegation has been made, and that the information known or readily obtainable is insufficient to enable the respondent judge to admit or deny the matter [Comm. Jud. Perf., Rule 119(c)].

[t] Filing With the Commission

After institution of formal proceedings, documents required to be filed with the Commission must be delivered to Commission staff at the Commission office during regular business hours and must be accompanied by a proof of service of the document upon the other party or parties. A document is filed with the Commission when the original is stamped or otherwise marked "filed" with the date. The Commission's agent for purposes of filing documents is the Commission Counsel or the Commission Counsel's designee. A filing may be evidenced by a conformed copy of the cover page of each document submitted for filing [Comm. Jud. Perf., Rule 119.5].

Unless otherwise specified, documents submitted in conjunction with a hearing before special masters are not required to be filed with Commission Counsel. Such documents must be delivered to the presiding master accompanied by a proof of service on the other masters and other parties, or as otherwise requested by the masters [Comm. Jud. Perf., Rule 119.5].

[u] Disqualification

[i] Disqualification Upon Determination to Remove, Retire or Bar From Assignments

If the Commission determines that a judge should be removed or retired from office, it will, in its order of removal or retirement, also order pursuant to *Cal. Const., art. VI, § 18(b)* that the judge be disqualified from acting as a judge, without loss of salary, until the Commission's determination becomes final or until any decision by the Supreme Court on any petition for review becomes final. If the Commission determines to censure and bar a former judge from receiving assignments, it will, in its order of censure, also order that the judge be barred from receiving assignments until the Commission's determination becomes final or until any decision by the Supreme Court on any petition for review becomes final [Comm. Jud. Perf., Rule 120(a)].

[ii] Disqualification Upon Notice of Formal Proceedings

Before the Commission has reached a determination regarding removal or retirement of a judge, it may temporarily disqualify a judge without loss of salary upon notice of formal proceedings pursuant to *Cal. Const., art. VI, § 18(b)* if it determines that the continued service of the judge is causing immediate, irreparable, and continuing public harm [Comm. Jud. Perf., Rule 120(b)].

If good cause for disqualification is apparent, the Commission may issue a notice of intention to temporarily disqualify

the judge along with a notice of formal proceedings. Subsequent to the filing of a notice of formal proceedings, the examiner may file with the Commission a motion to temporarily disqualify the judge. The Commission's notice of intention to disqualify or the examiner's motion to disqualify must be by personal service or service upon the judge's counsel. If such service cannot be effectuated, service must be by prepaid certified mail upon the judge at his or her chambers and last known residence. If service is by mail, the notice must be accompanied by an affidavit or certificate of mailing and an affidavit must be filed regarding the inability to effectuate personal service or service upon counsel [Comm. Jud. Perf., Rule 120(b)].

The judge must have an opportunity to respond in writing within 10 days of receipt of the Commission's notice of intention to disqualify or the examiner's motion to disqualify, or within 15 days after the mailing of the notice, whichever occurs first. The time for filing a response must not be subject to extension under Comm. Jud. Perf., Rule 108. The judge's response may include points and authorities in support of any legal arguments, and may include verified statements, other testimony, medical or other expert reports and any other evidence in opposition to the facts on which the Commission's notice of intention to disqualify or the examiner's motion to disqualify is based. Upon the filing of a response or expiration of time for filing a response, the Commission may issue an order of temporary disqualification [Comm. Jud. Perf., Rule 120(b)].

[iii] Accelerated Disposition of Charges

In cases in which a judge is temporarily disqualified under Comm. Jud. Perf., Rule 120(b), the disposition of the charges in the notice of formal proceedings are accelerated and the formal proceedings must proceed without appreciable delay. In such cases, the Commission may reduce the number of days provided in Comm. Jud. Perf., Rules 122, 129, and 130 for the filing of papers in connection with the formal proceedings [Comm. Jud. Perf., Rule 120(c)].

[iv] Duration of Temporary Disqualification

An order for temporary disqualification of a judge under Comm. Jud. Perf., Rule 120(b) must remain in effect until further order of the Commission or until the pending formal proceedings have been concluded by the commission [Comm. Jud. Perf., Rule 120(d)].

[v] Setting for Hearing Before Commission or Masters

[i] Time for Setting for Hearing

On filing or on expiration of the time for filing an answer, the Commission must set the matter for hearing [Comm. Jud. Perf., Rule 121(a)].

[ii] Appointment of Special Masters or Master

Unless the Commission determines to hold the hearing before itself, it may request the Supreme Court to appoint three special masters to hear and take evidence in the matter, and to report to the Commission. On a vote of seven members of the Commission and with the consent of the judge involved, the Commission may request the Supreme Court to appoint one special master in place of three special masters. Consent of the judge must be defined as (1) written agreement by the judge or counsel of record, or (2) failure to object in writing within 30 days of notice of the Commission's intention to request the appointment of one special master [Comm. Jud. Perf., Rule 121(b)].

[iii] Requirements for Special Masters

Special masters must be judges. When there are three special masters, not more than two of them may be retired judges from courts of record [Comm. Jud. Perf., Rule 121(c)].

[iv] Notice to Respondent Judge of Appointment of Special Masters and Examiner

Upon appointment of special masters or a single special master by the Supreme Court and appointment of an examiner by the Commission, the respondent judge must be given notice of the orders appointing the masters and the examiner, and the examiner must be given notice of the order appointing the special masters [Comm. Jud. Perf., Rule 121(d)].

[v] Notice of Hearing

The Commission must set a time and place for hearing before itself or before the masters and must give notice by mail confirming the date and place of the hearing to the judge and the examiner at least 20 days before the hearing [Comm. Jud. Perf., Rule 121(e)].

[w] Discovery Procedures

[i] Exclusive Procedures

The procedures in Comm. Jud. Perf., Rule 122 constitute the exclusive procedures for discovery. Discovery may be obtained only after a written notice of formal proceedings is issued [Comm. Jud. Perf., Rule 122(a)].

[ii] Applicability to Both Parties

The examiner and the judge are each entitled to discovery from the other in accordance with the procedures set forth in Comm. Jud. Perf., Rule 122 [Comm. Jud. Perf., Rule 122(b)].

[iii] Initial Discovery by Trial Counsel

At the time of service of the notice of formal proceedings, the judge must be provided copies of all documents and other information specified in Comm. Jud. Perf., Rule 122(e) that is not privileged and is in the possession of the Commission. Such information must be made available at the Commission offices [Comm. Jud. Perf., Rule 122(c)].

[iv] Discovery Requests

Discovery requests may be made in writing at any time after the filing of the notice of formal proceedings. All requests for discovery must be made in writing to the opposing side within 30 days after service of the answer to the written notice of formal proceedings or within 30 days after service of the written notice of formal proceedings if no answer has yet been filed, or within 15 days after service of any amendment to the notice [Comm. Jud. Perf., Rule 122(d)].

[v] Inspection and Copying

The following items may be inspected or copied by the side requesting discovery:

- The names, and if known, the business addresses and business telephone numbers of persons the opposing side then intends to call as witnesses at the hearing [Comm. Jud. Perf., Rule 122(e)(1)];

- The names, and if known, the business addresses and business telephone numbers of those persons who may be able to provide substantial material information favorable to the judge. Substantial material information favorable to the judge is evidence bearing directly on the truth of the charges relevant to the credibility of a witness intended to be called [Comm. Jud. Perf., Rule 122(e)(2)];

- All statements about the subject matter of the proceedings, including any impeaching evidence, made by any witness then intended to be called by either side [Comm. Jud. Perf., Rule 122(e)(3)];

- All statements about the subject matter of the proceedings made by a person named or described in the notice, or amendment to the notice, other than the judge when it is claimed that an act or omission of the judge as to the person described is a basis for the formal proceeding [Comm. Jud. Perf., Rule 122(e)(4)];

- All investigative reports made by or on behalf of the commission, the examiner, or the judge, about the subject matter of the proceeding [Comm. Jud. Perf., Rule 122(e)(5)];

- All writings, including reports of mental, physical, and blood examinations, then intended to be offered in evidence by the opposing side [Comm. Jud. Perf., Rule 122(e)(6)];

- All physical items of evidence then intended to be offered in evidence [Comm. Jud. Perf., Rule 122(e)(7)];

- All writings or physical items of evidence which would be admissible in evidence at the hearing [Comm. Jud. Perf., Rule 122(e)(8)].

[vi] Compliance With Request

If either side receives a written request for discovery in accordance with these procedures, the side receiving the request must have a continuing duty to provide discovery of items listed in the request until proceedings before the masters are concluded. When a written request for discovery is made in accordance with these rules, discovery must be provided within a reasonable time after any discoverable items become known to the side obligated to provide discovery [Comm. Jud. Perf., Rule 122(f)].

[vii] Depositions

After initiation of formal charges against the judge, the Commission or the masters must order the taking of the deposition of any person upon a showing by the side requesting the deposition that the proposed deponent is a material witness who is unable or cannot be compelled to attend the hearing. If a deposition is ordered, the procedures stated in *Gov. Code § 68753* must be followed. The side requesting the deposition must bear all costs of the deposition [Comm. Jud. Perf., Rule 122(g)].

[viii] Failure to Comply With Discovery Request

If any party fails to comply with a discovery request as authorized by these procedures, the items withheld must be suppressed or, if the items have been admitted into evidence, must be stricken from the record. If testimony is elicited during direct examination and the side eliciting the testimony withheld any statement of the testifying witness in violation of these discovery procedures, the testimony must be ordered stricken from the record. Upon a showing of good cause for failure to comply with a discovery request, the Commission, master, or masters may admit the items withheld or direct examination testimony of a witness whose statement was withheld upon condition that the side against whom the evidence is sought to be admitted is granted a reasonable continuance to prepare against the evidence, or may order the items or testimony suppressed or stricken from the record. The Commission may, upon review of any hearing, order any evidence stricken from the record for violation of a valid discovery request if the evidence could have been ordered stricken by the masters for violation of a valid discovery request [Comm. Jud. Perf., Rule 122(h)].

[ix] Applicable Privileges

Nothing in these procedures shall authorize the discovery of any writing or thing that is privileged from disclosure by law or is otherwise protected or made confidential as the work product of the attorney, including memoranda by

Commission staff and examiners. Statements of any witness interviewed by the examiner, by any investigators for either side, by the judge, or by the judge's attorney shall not be protected as work product [Comm. Jud. Perf., Rule 122(i)].

[x] Definition of Statement

For purposes of these procedures, the term "statement" must mean either (1) a written statement prepared by or at the direction of the declarant or signed by the declarant, or (2) an oral that has been videotaped, transcribed, or summarized in writing [Comm. Jud. Perf., Rule 122(j)].

[xi] Return of Discovery; Continued Confidentiality of Discovery

Upon the completion or termination of Commission proceedings, the respondent judge must return to the Commission all materials provided to the judge under Comm. Jud. Perf., Rule 122 that have not become part of the public record. All items provided in discovery pursuant to this rule remain confidential under Comm. Jud. Perf., Rule 102 until and unless those items become part of the public record [Comm. Jud. Perf., Rule 122(k)].

[xii] Protective Orders

The Commission or the masters may, upon application supported by a showing of good cause, issue protective orders to the extent necessary to maintain in effect such privileges and other protections as are otherwise provided by law [Comm. Jud. Perf., Rule 122(l)].

[x] Hearing

[i] Hearing Without Answer or Appearance by Judge

At the time and place set for hearing, the Commission, or the masters when the hearing is before masters, must proceed with the hearing whether or not the judge has filed an answer or appears at the hearing. The examiner must present the case in support of the charges in the notice of formal proceedings [Comm. Jud. Perf., Rule 123(a)].

[ii] Consideration of Failure to Answer, Appear, or Respond to Questions

The failure of the judge to answer or to appear at the hearing must not, standing alone, be taken as evidence of the truth of the facts alleged to constitute grounds for censure, removal, retirement or public or private admonishment. In accordance with *Evid. Code § 913*, no inference must be drawn from the exercise of the privilege not to respond to questions on grounds of self-incrimination or the exercise of any other Evidence Code privilege, or of any other recognized privilege, as to any matter in issue or to the credibility of the judge. In accordance with *Evid. Code § 413*, in reviewing the evidence and facts in the case against the judge, the Commission and the masters may consider the judge's failure to explain or deny evidence or facts in the case or any willful suppression of evidence if that is the case, unless the failure or suppression is due to the judge's exercise of any legally recognized privilege. A lack of cooperation by the judge may be considered by the Commission under Comm. Jud. Perf., Rule 104 [Comm. Jud. Perf., Rule 123(b)].

[iii] Reporting of Hearing

A verbatim record must be made of the proceedings at the hearing [Comm. Jud. Perf., Rule 123(c)].

[iv] Number of Commission Members at Hearing

When the hearing is before the Commission, not fewer than six members must be present when the evidence is produced [Comm. Jud. Perf., Rule 123(d)].

[y] Media at Hearing

All applications for film or electronic coverage of hearings in formal proceedings are to be submitted to the Commission a reasonable time prior to the commencement of the hearing. The Commission must promptly inform the respondent judge of any requests for film or electronic coverage of the hearing. Applications for film or electronic coverage of the hearing are to be decided by the chairperson of the Commission or the chairperson's designee after conferring with the masters or presiding master, if masters have been appointed [Comm. Jud. Perf., Rule 124].

[z] Evidence

[i] Applicable Law and Agreed Statement

The California Evidence Code must be applicable to all hearings before the Commission or masters. Oral evidence must be taken only on oath or affirmation. The examiner or the judge may propose to the other party an agreed statement in place of all or a part of the testimony. An agreed statement must not foreclose argument to the Commission or masters [Comm. Jud. Perf., Rule 125(a)].

[ii] Prior Disciplinary Action

Any prior disciplinary action may be received in evidence to prove that conduct is persistent or habitual or to determine what action should be taken regarding discipline. Prior disciplinary action includes any disciplinary action which is in effect before the conclusion of a Commission proceeding, including review by the Supreme Court [Comm. Jud. Perf., Rule 125(b)].

[aa] Procedural Rights of Judge in Formal Proceedings

[i] Enumeration of Rights, Subpoenas

When formal proceedings have been instituted, a judge must have the right and reasonable opportunity to defend against the charges by the introduction of evidence, to be represented by counsel, and to examine and cross-examine witnesses. The judge must also have the right to the issuance of subpoenas for attendance of witnesses to testify or produce books, papers, and other evidentiary matter. Subpoenas are to be issued by the chairperson of the Commission, the chairperson's designee, or the special masters. Subpoenas addressed to the Commission or its staff may only be obtained from the special masters upon a showing of good cause with notice to the Commission [Comm. Jud. Perf., Rule 126(a)].

[ii] Transcripts

When a transcript of the testimony has been prepared at the expense of the Commission, a copy thereof must, upon request, be available for use by the judge and his counsel in connection with the proceedings at the judge's expense, or the judge may arrange to procure a copy from the reporter at the judge's expense. The judge must have the right, without any order or approval, to have all or any portion of the testimony in the proceedings transcribed at the judge's expense [Comm. Jud. Perf., Rule 126(b)].

[iii] Manner of Service

Subject to Comm. Jud. Perf., Rule 118(c), concerning service of a notice of formal proceedings, all notices and correspondence in connection with formal proceedings must be sent to the judge's chambers, unless otherwise requested, and a copy thereof must be mailed to counsel of record [Comm. Jud. Perf., Rule 126(c)].

[iv] Appointment of Conservator

If the judge is adjudged insane or incompetent, or if it appears to the Commission at any time during the proceedings

that the judge is not competent to act for himself or herself, the Commission must appoint a conservator unless the judge has a conservator who will represent the judge. In the appointment of such conservator, preference must be given, whenever possible, to members of the judge's immediate family. The conservator may claim and exercise any right and privilege and make any defense for the judge with the same force and effect as if claimed, exercised, or made by the judge, if competent, and whenever these rules provide for serving or giving notice or sending any matter to the judge, such notice or matter must be served, given, or sent to the conservator [Comm. Jud. Perf., Rule 126(d)].

[bb] Discipline by Consent

[i] Negotiations

Either respondent or the examiner may initiate negotiations on discipline by consent. Both the examiner and respondent must agree to any proposed disposition before submission to the Commission. No agreement between the examiner and respondent is binding until approved by the Commission [Comm. Jud. Perf., Rule 127(a)].

[ii] Submission to Commission

At any time after the initiation of formal charges and before final disposition, the respondent may agree with the examiner that the respondent must admit to any or all of the charges in exchange for a stated sanction. The agreement must be submitted to the Commission, which must accept or reject the agreement [Comm. Jud. Perf., Rule 127(b)].

[iii] Rejection of Agreement

If the stated sanction is rejected by the Commission, the admission must be withdrawn and cannot be used against the respondent in any proceedings [Comm. Jud. Perf., Rule 127(c)].

[iv] Affidavit of Consent

A respondent who consents to a stated sanction must personally execute an affidavit stating that:

- The respondent consents to the sanction [Comm. Jud. Perf., Rule 127(d)(1)];
- The consent is freely and voluntarily rendered [Comm. Jud. Perf., Rule 127(d)(2)];
- The respondent admits the truth of the charges as alleged [Comm. Jud. Perf., Rule 127(d)(3)]; and
- The respondent waives review by the Supreme Court [Comm. Jud. Perf., Rule 127(d)(4)].

[cc] Amendments to Notice or Answer; Dismissals

[i] Amendments

The masters, at any time prior to the conclusion of the hearing, or the Commission, at any time prior to its determination, may allow or require amendments to the notice of formal proceedings and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearing. In case such an amendment is made, the judge must be given reasonable time both to answer the amendment and to prepare and present his or her defense against the matters charged thereby [Comm. Jud. Perf., Rule 128(a)].

[ii] Dismissals by Examiner

At any time after the filing of formal charges and before final disposition, where exigent circumstances prevent consideration by the full Commission, the examiner, with the concurrence of the director/chief counsel and the chairperson, may dismiss any charge from the notice of formal proceedings, if it appears that the available evidence is insufficient to sustain the charge or that dismissal is otherwise in the interest of justice, and such dismissal is not tantamount to dismissal of the proceedings as a whole [Comm. Jud. Perf., Rule 128(b)].

[dd] Report of Masters

[i] Transcript

Upon the completion of a hearing before the masters, a transcript of the hearing must be prepared [Comm. Jud. Perf., Rule 129(a)].

[ii] Submission of Proposed Findings of Fact and Conclusions of Law

Within 20 days after completion of the hearing transcript, the examiner and the respondent judge must submit to the masters proposed findings of fact and conclusions of law, with citations to the transcript and exhibits, unless the masters waive the submission of such proposed findings and conclusions [Comm. Jud. Perf., Rule 129(b)].

[iii] Preparation of Final Report of Masters

Within 60 days after completion of the hearing transcript, the masters must submit a final report to the Commission. Within the 60-day period, the masters may require such additional briefing and argument by the examiner and the respondent judge as the masters may desire [Comm. Jud. Perf., Rule 129(c)].

[iv] Content of Final Report of Masters

The final report of the masters must contain findings of fact and conclusions of law, along with an analysis of the evidence and reasons for the findings and conclusions, but must not contain a recommendation as to discipline [Comm. Jud. Perf., Rule 129(d)].

[v] Copy of Report to Judge and Examiner

Upon receiving the report of the masters, the Commission must promptly mail a copy to the judge and the examiner [Comm. Jud. Perf., Rule 129(e)].

[ee] Briefs to the Commission

[i] Filing of Opening Briefs

Within 15 days after the date of mailing of the copy of the masters' report to the judge as reflected on the proof of service by mail, the examiner or the judge may file with the Commission opening briefs which may consist of objections to the report of the special masters and points and authorities concerning the issues in the matter, including the issue of sanctions. Objections to the masters' report and all factual statements must be specific and must be supported by reference to the book and page number of the record. Briefs must conform in style and comply with length limitations set forth in *Cal. Rules of Ct., Rule 8.204(b)*, and, when filed by the examiner, a copy must be sent by first-class mail to the judge [Comm. Jud. Perf., Rule 130(a)].

[ii] Response to Briefs

Within 10 days after the filing of opening briefs, the examiner or the judge may file with the commission a response [Comm. Jud. Perf., Rule 130(b)].

[iii] Reply to Response

Within five days after the filing of a response, the examiner or the judge may file a reply to the response [Comm. Jud. Perf., Rule 130(c)].

[ff] Participation by Non-Parties

Briefs of amicus curiae will be considered by the Commission if they present legal issues or represent perspectives not otherwise presented or represented by the parties. An amicus curiae brief may not be used to present inadmissible or non-admitted evidentiary materials to the Commission [Comm. Jud. Perf., Rule 131].

A brief of an amicus curiae may be filed only if accompanied by the written consent of all parties, or upon a motion demonstrating to the chairperson of the Commission or the chairperson's designee that the filing of the brief would be helpful to the Commission in the resolution of the pending matter. When consent to the filing of a brief of an amicus curiae is refused by a party to the case, a motion for leave to file the brief, accompanied by the proposed brief, may be presented to the chairperson or the chairperson's designee. The motion must concisely state the nature of the applicant's interest and set forth facts or questions of law that have not been, or reasons for believing that they will not be, presented by the parties and their relevancy to the disposition of the case. The motion may be in letter form but may not exceed four pages. The Commission must forward copies of any such motion and proposed brief to both the examiner and the judge [Comm. Jud. Perf., Rule 131].

The cover of the amicus brief must identify the party supported, and the brief must not exceed 50 pages in length. Evidentiary references must include citation to the record before the Commission [Comm. Jud. Perf., Rule 131].

An amicus brief must be submitted or filed within the time limits prescribed for the party that the brief supports. No reply briefs or briefs of an amicus curiae in support of reconsideration must be received [Comm. Jud. Perf., Rule 131].

Any brief of an amicus curiae that fails to comply with this rule will not be considered by the Commission [Comm. Jud. Perf., Rule 131].

[gg] Appearance Before Commission

Upon receipt of the masters' report and any objections, the Commission must give the judge and the examiner an opportunity to be heard orally before the Commission, and written notice of the time and place of such hearing must be mailed to the judge, at least 10 days prior thereto [Comm. Jud. Perf., Rule 132].

[hh] Hearing Additional Evidence

The Commission may order a hearing for the taking of additional evidence at any time while the matter is pending before it. The order must set the time and place of hearing and must indicate the matters on which the evidence is to be taken. A copy of such order must be sent by mail to the judge at least 10 days prior to the date of hearing [Comm. Jud. Perf., Rule 133(a)].

In any case in which masters have been appointed, the hearing of additional evidence must be before such masters, and the proceedings therein must be in conformance with the provisions of Comm. Jud. Perf., Rules 121 to 130, inclusive [Comm. Jud. Perf., Rule 133(b)].

[ii] Commission Vote

The Commission may privately or publicly admonish, censure, remove or retire a judge, or find a person unfit to serve as a subordinate judicial officer. The affirmative vote of six members of the Commission who have considered the

record and report of the masters and who were present at any oral hearing as provided in Comm. Jud. Perf., Rule 121 or, when the hearing was before the Commission without masters, of six members of the Commission who have considered the record, and at least four of whom were present when the evidence was produced, is required for a private or public admonishment, censure, removal or retirement of a judge, or a finding that a person is unfit to serve as a subordinate judicial officer, or for dismissal of the proceedings [Comm. Jud. Perf., Rule 134].

[jj] Record of Commission Proceedings

The Commission must maintain records of all actions taken it concerning a judge. Notice of any disciplinary determination and notice of any disqualification under *Cal. Const., art. VI, § 18(b)* must be mailed to the judge. In all formal proceedings, the Commission must prepare a transcript of the testimony and of all proceedings and must make written findings of fact and conclusions of law [Comm. Jud. Perf., Rule 135].

[kk] Finality

A Commission determination to impose discipline upon a judge following formal proceedings under Comm. Jud. Perf., Rule 118 must become final 30 days after the date of the order regarding the disciplinary determination [Comm. Jud. Perf., Rule 136].

[ll] Retroactivity

Those cases in which formal proceedings were instituted on or before February 28, 1995, are governed by the provisions of *Cal. Const,. art. VI, § 18*, which were operative and in effect as of February 28, 1995. Those cases in which formal proceedings are instituted on or after March 1, 1995, are governed by the provisions of *Cal. Const., art. VI, § 18* operative as of March 1, 1995 [Comm. Jud. Perf., Rule 137].

[4] Commission Discipline Statistics

In 2005, 1,610 judgeships were within the Commission's jurisdiction. In addition to jurisdiction over active judges, the Commission has authority to impose certain discipline upon former judges and the state's 460 commissioners and referees. Also, the Director-Chief Counsel of the Commission is designated as the Supreme Court's investigator for complaints involving the eight judges of the State Bar Court.

In 2005, 965 new complaints about active and former California judges were considered by the Commission. The 965 complaints named a total of 1,196 judges (748 different judges). The complaints set forth a wide array of grievances. A substantial percentage alleged legal error not involving misconduct or expressed dissatisfaction with a judge's discretionary handling of judicial duties.

For 2005, the Commission reported that the following types of conduct resulted in discipline (numbers of discipline cases are identified in parenthesis):

- Ex parte communications (7);
- Failure to ensure rights (7);
- Disqualification, disclosure, and related retaliation (6);
- On-bench abuse of authority in performance of judicial duties (5);
- Demeanor, decorum (includes inappropriate humor) (4);

- Administrative malfeasance (includes conflicts between judges, failure to supervise staff, delay in responding to complaints about commissioners) (2);

- Bias or appearance of bias (not directed toward a particular class; includes embroilment, prejudgment, favoritism) (2);

- Decisional delay, tardiness, attendance (2);

- Gifts/loans/favors/ticket-fixing (2);

- Off-bench abuse of office (includes improper use of office stationery) (2);

- Sexual harassment/inappropriate workplace gender comments (2);

- Alcohol or drug-related criminal conduct (1);

- Failure to cooperate/lack of candor (1);

- Improper business activities (1);

- Miscellaneous off-bench conduct (1); and

- Misuse of court resources (1).

[5] Review of Determinations by Commission on Judicial Performance

[a] Time for Petition for Review to Supreme Court

A petition to the Supreme Court by a judge or former judge to review a determination by the Commission on Judicial Performance to retire, remove, censure, admonish, or disqualify the judge or former judge must be served and filed within 60 days after:

- The Commission, under its rules, notifies the judge or former judge that its determination has been filed or entered in its records [*Cal. Rules of Ct., Rule 9.60(a)(1)*]; or

- The determination becomes final as to the Commission under its rules, whichever event is later [*Cal. Rules of Ct., Rule 9.60(a)(2)*].

[b] Time for Answer to Petition for Review and Reply

Within 45 days after service of the petition, the Commission may serve and file an answer [*Cal. Rules of Ct., Rule 9.60(b)*]. Within 20 days after service of the answer, the judge or former judge may serve and file a reply. Each petition, answer, or reply submitted for filing must be accompanied by proof of service, including service on the Commission of three copies of any petition or reply filed by a judge or former judge. Extensions of time to file the petition, answer, or reply are disfavored and will be granted only upon a specific and affirmative showing of good cause. Good cause does not include ordinary press of business [*Cal. Rules of Ct., Rule 9.60(b)*].

[c] Contents and Form

The petition, answer, and reply must address both the appropriateness of review and the merits of the Commission's determination, and they will serve as briefs on the merits in the event review is granted [*Cal. Rules of Ct., Rule 9.60(c)*].

Except as provided in Cal. Rules of Ct., the form of the petition, answer, and reply must, insofar as practicable, conform to *Cal. Rules of Ct., Rule 8.504* except that the lengths of the petition, answer, and reply must conform to the limits specified in Rule 8.204(c) [*Cal. Rules of Ct., Rule 9.60(c)*]. Each copy of the petition must contain:

- A copy of the Commission's determination [*Cal. Rules of Ct., Rule 9.60(c)(1)*];

- A copy of the notice of filing or entry of the determination in the records of the Commission [*Cal. Rules of Ct., Rule 9.60(c)(2)*];

- A copy of any findings of fact and conclusions of law [*Cal. Rules of Ct., Rule 9.60(c)(3)*]; and

- A cover that bears the conspicuous notation "PETITION FOR REVIEW OF DETERMINATION BY COMMISSION ON JUDICIAL PERFORMANCE (RULE 9.60)" or words of like effect [*Cal. Rules of Ct., Rule 9.60(c)(4)*].

[d] Transmission of the Record

Promptly upon the service and filing of the petition, the Commission must transmit to the Clerk of the Supreme Court the original record, including a transcript of the testimony, briefs, and all original papers and exhibits on file in the proceeding [*Cal. Rules of Ct., Rule 9.60(d)*].

[e] Applicable Rules on Review

In the event review is granted, the rules adopted by the Judicial Council governing appeals from the superior court in civil cases, other than *Cal. Rules of Ct., Rule 8.272* relating to costs, apply to proceedings in the Supreme Court for review of a determination of the Commission except where express provision is made to the contrary or where such application would otherwise be clearly impracticable or inappropriate [*Cal. Rules of Ct., Rule 9.60(e)*].

[6] Proceedings Involving Public or Private Admonishment, Censure, Removal or Retirement of a Judge of the Supreme Court

[a] Selection of Appellate Tribunal

Immediately on the filing of a petition to review a determination by the Commission on Judicial Performance to retire, remove, censure, admonish, or disqualify a justice of the Supreme Court, the Clerk of the Supreme Court must select, by lot, seven Court of Appeal justices who must elect one of their number presiding justice and perform the duties of the tribunal created under *Cal. Const., art. VI, § 18(f)* [*Cal. Rules of Ct., Rule 9.61(a)*]. This selection must be made upon notice to the Commission, the justice, and the counsel of record in a proceeding open to the public. No court of appeal justice who has served as a master or a member of the Commission in the particular proceeding or is otherwise disqualified may serve on the tribunal [*Cal. Rules of Ct., Rule 9.61(a)*].

[b] Clerk of Supreme Court as Clerk of Tribunal

The Clerk of the Supreme Court serves as the clerk of the tribunal [*Cal. Rules of Ct., Rule 9.61(b)*].

[7] Complaints Against Subordinate Judicial Officers

[a] Intent

The procedures in *Cal. Rules of Ct., Rule 10.703* for processing complaints against subordinate judicial officers do not:

- Create a contract of employment [*Cal. Rules of Ct., Rule 10.703(a)(1)*];

- Change the existing employee-employer relationship between the subordinate judicial officer and the court [*Cal. Rules of Ct., Rule 10.703(a)(2)*]; or

- Change the status of a subordinate judicial officer from an employee terminable at will to an employee terminable only for cause [*Cal. Rules of Ct., Rule 10.703(a)(3)*].

[b] Subordinate Judicial Officer Defined

Unless the context requires otherwise, the term "subordinate judicial officer," as used in *Cal. Rules of Ct., Rule 10.703*, means an attorney employed by a court to serve as a commissioner or referee, whether the attorney is acting as a commissioner, referee, or temporary judge. The term does not include any other attorney acting as a temporary judge [*Cal. Rules of Ct., Rule 10.703(b)*].

[c] Application

A court that employs a subordinate judicial officer must use the procedures in *Cal. Rules of Ct., Rule 10.703* for processing complaints against the subordinate judicial officer if the complaint alleges conduct that if alleged against a judge would be within the jurisdiction of the Commission under *Cal. Const., art. VI, § 18* [*Cal. Rules of Ct., Rule 10.703(c)(1)*].

If a complaint against a subordinate judicial officer does not allege conduct that would be within the jurisdiction of the Commission, the court must process the complaint following local procedures adopted under *Cal. Rules of Ct., Rule 10.603(c)(4)(C)*. The local process may include any procedures from Rule 10.703 for the court's adjudication of the complaint other than the provisions for referring the matter to the Commission under Rule 10.702(g) or giving notice of Commission review under Rule 10.702(l)(2)(B) [*Cal. Rules of Ct., Rule 10.703(c)(2)*].

A court may adopt additional policies and procedures for the adjudication of complaints against subordinate judicial officers not inconsistent with Rule 10.703 [*Cal. Rules of Ct., Rule 10.703(c)(3)*].

[d] Promptness Required

The presiding judge must ensure that the court processes each complaint promptly. To the extent reasonably possible, the court must complete action on each complaint within 90 days after the complaint is submitted [*Cal. Rules of Ct., Rule 10.703(d)*].

[e] Confidentiality

All proceedings by a presiding judge under this rule must be conducted in a manner that is as confidential as is reasonably possible consistent with the need to conduct a thorough and complete investigation and the need for proper administration of the court [*Cal. Rules of Ct., Rule 10.703(e)(1)*].

Cal. Rules of Ct., Rule 10.703 does not prohibit access by the Commission to any information relevant to the investigation of a complaint against a subordinate judicial officer [*Cal. Rules of Ct., Rule 10.703(e)(2)*].

[f] Written Complaints to Presiding Judge

A complaint about the conduct of a subordinate judicial officer must be in writing and be submitted to the presiding judge [*Cal. Rules of Ct., Rule 10.703(f)(1)*]. Persons who are unable to file a written complaint because of a disability may present an oral complaint, which the presiding judge must commit to writing [*Cal. Rules of Ct., Rule 10.703(f)(2)*].

The presiding judge must give written notice of receipt of the complaint to the complainant [*Cal. Rules of Ct., Rule 10.703(f)(3)*].

[g] Initial Review of the Complaint

The presiding judge must review each complaint and determine if the complaint:

- May be closed after initial review [*Cal. Rules of Ct., Rule 10.703(g)(1)(A)*];
- Needs preliminary investigation [*Cal. Rules of Ct., Rule 10.703(g)(1)(B)*]; or
- Requires formal investigation [*Cal. Rules of Ct., Rule 10.703(g)(1)(C)*].

A presiding judge may request that the Commission investigate and adjudicate the complaint if a local conflict of interest or disqualification prevents the court from acting on the complaint [*Cal. Rules of Ct., Rule 10.703(g)(2)*]. In exceptional circumstances a presiding judge may request the Commission to investigate a complaint on behalf of the court and provide the results of the investigation to the court for action [*Cal. Rules of Ct., Rule 10.703(g)(3)*]. The court must maintain a file on every complaint received, containing the following:

- The complaint [*Cal. Rules of Ct., Rule 10.703(g)(4)(A)*];
- The response of the subordinate judicial officer, if any [*Cal. Rules of Ct., Rule 10.703(g)(4)(B)*];
- All evidence and reports produced by the investigation of the complaint, if any [*Cal. Rules of Ct., Rule 10.703(g)(4)(C)*]; and
- The final action taken on the complaint [*Cal. Rules of Ct., Rule 10.703(g)(4)(D)*].

[h] Closing a Complaint After Initial Review

After a preliminary review the presiding judge may close without further action any complaint that:

- Relates to the permissible exercise of judicial or administrative discretion by the subordinate judicial officer [*Cal. Rules of Ct., Rule 10.703(h)(1)(A)*]; or
- Does not allege conduct that if alleged against a judge would be within the jurisdiction of the Commission under *Cal. Const., art. VI, § 18* [*Cal. Rules of Ct., Rule 10.703(h)(1)(B)*].

The presiding judge must notify the complainant in writing of the decision to close the investigation on the complaint; the notice must include the information required under *Cal. Rules of Ct., Rule 10.703(h)(1)* [*Cal. Rules of Ct., Rule 10.703(h)(2)*]. The presiding judge must advise the subordinate judicial officer in writing of the disposition [*Cal. Rules of Ct., Rule 10.703(h)(3)*].

[i] Complaints Requiring Preliminary Investigation

If after an initial review of the complaint the presiding judge finds a basis for further inquiry, the presiding judge must conduct a preliminary investigation appropriate to the nature of the complaint [*Cal. Rules of Ct., Rule 10.703(i)(1)*]. The investigation may include interviews of witnesses and a review of court records [*Cal. Rules of Ct., Rule 10.703(i)(2)*]. The presiding judge may give the subordinate judicial officer a copy of the complaint or a summary of its allegations and allow him or her an opportunity to respond. The presiding judge must give the subordinate judicial officer a copy of

the complaint or a summary of its allegations and allow the subordinate judicial officer an opportunity to respond before the presiding judge takes appropriate informal action as described in *Cal. Rules of Ct., Rule 10.703(i)(4)(B)* [*Cal. Rules of Ct., Rule 10.703(i)(3)*].

After completing the preliminary investigation, the presiding judge must:

- Terminate the investigation and close action on the complaint if the presiding judge finds the complaint lacks merit [*Cal. Rules of Ct., Rule 10.703(i)(4)(A)*]; or

- Terminate the investigation and close action on the complaint by taking appropriate informal action, which may include a reprimand or warning to the subordinate judicial officer, if the presiding judge finds a basis for taking informal action [*Cal. Rules of Ct., Rule 10.703(i)(4)(B)*]; or

- Proceed with a formal investigation under (j) if the presiding judge finds a basis for proceeding further [*Cal. Rules of Ct., Rule 10.703(i)(4)(C)*].

If the presiding judge terminates the investigation and closes action on the complaint, the presiding judge must:

- Notify the complainant in writing of the decision to close the investigation on the complaint. The notice must include the information required under *Cal. Rules of Ct., Rule 10.703(l)* [*Cal. Rules of Ct., Rule 10.703(i)(5)(A)*]; and

- Advise the subordinate judicial officer in writing of the disposition [*Cal. Rules of Ct., Rule 10.703(i)(5)(B)*].

[j] Complaints Requiring Formal Investigation

If after a preliminary investigation the presiding judge finds a basis for proceeding with the investigation, the presiding judge must conduct a formal investigation appropriate to the nature of the complaint [*Cal. Rules of Ct., Rule 10.703(j)(1)*]. The investigation may include interviews of witnesses and a review of court records [*Cal. Rules of Ct., Rule 10.703(j)(1)(A)*]. As soon as practicable, the presiding judge must give the subordinate judicial officer a copy of the complaint or a summary of its allegations and allow the subordinate judicial officer an opportunity to respond [*Cal. Rules of Ct., Rule 10.703(j)(1)(B)*].

Within 10 days after the completion of the investigation or as soon thereafter as is reasonably possible, the presiding judge must give the subordinate judicial officer the following in writing:

- Notice of the intended final action on the complaint [*Cal. Rules of Ct., Rule 10.703(j)(2)(A)*]; and

- The facts and other information forming the basis for the proposed action and the source of the facts and information, sufficient to allow a meaningful response to the allegations [*Cal. Rules of Ct., Rule 10.703(j)(2)(B)*].

Final action on the complaint may include:

- A finding that no further action need be taken on the complaint [*Cal. Rules of Ct., Rule 10.703(j)(3)(A)*];

- An oral or written warning to the subordinate judicial officer [*Cal. Rules of Ct., Rule 10.703(j)(3)(B)*];

- A private written reprimand to the subordinate judicial officer [*Cal. Rules of Ct., Rule 10.703(j)(3)(C)*];

- A public written reprimand to the subordinate judicial officer [*Cal. Rules of Ct., Rule 10.703(j)(3)(D)*];

- Suspension of the subordinate judicial officer [*Cal. Rules of Ct., Rule 10.703(j)(3)(E)*];

- Termination of the subordinate judicial officer [*Cal. Rules of Ct., Rule 10.703(j)(3)(F)*]; and

- Any other action the court may deem appropriate [*Cal. Rules of Ct., Rule 10.703(j)(3)(G)*].

The notice of the intended final action on the complaint in *Cal. Rules of Ct., Rule 10.703(j)(2)(A)* must include the following advice:

- The subordinate judicial officer may request an opportunity to respond within 10 days after service of the notice [*Cal. Rules of Ct., Rule 10.703(j)(4)(A)*]; and

- If the subordinate judicial officer does not request an opportunity to respond within 10 days after service of the notice, the proposed action will become final [*Cal. Rules of Ct., Rule 10.703(j)(4)(B)*].

If the subordinate judicial officer requests an opportunity to respond, the presiding judge should allow the subordinate judicial officer an opportunity to respond to the notice of the intended final action, either orally or in writing as specified by the presiding judge, in accordance with local rules [*Cal. Rules of Ct., Rule 10.703(j)(5)*].

Within 10 days after the subordinate judicial officer has responded, the presiding judge must give the subordinate judicial officer and the complainant written notice of the final action taken on the complaint. The notice to the complainant must include the information required under *Cal. Rules of Ct., Rule 10.703(l)* [*Cal. Rules of Ct., Rule 10.703(j)(6)*].

If the subordinate judicial officer does not request or has not been given an opportunity to respond, the presiding judge must promptly give written notice of the final action to the complainant. The notice must include the information required under *Cal. Rules of Ct., Rule 10.703(l)* [*Cal. Rules of Ct., Rule 10.703(j)(7)*].

[k] Report to the Commission on Judicial Performance

If after a formal investigation the complaint results in the written reprimand, suspension, or removal of the subordinate judicial officer for conduct that if alleged against a judge would be within the jurisdiction of the Commission under *Cal. Const., art. VI, § 18*, the presiding judge must promptly forward to the Commission a copy of the portions of the court file on the complaint that reasonably reflect the basis of the action taken by the court, including the complaint and the subordinate judicial officer's response [*Cal. Rules of Ct., Rule 10.703(k)(1)*].

If the subordinate judicial officer resigns while an investigation is pending, the presiding judge must within 15 days of the resignation, or as soon thereafter as is reasonably possible, forward to the Commission the entire court file on any pending complaint [*Cal. Rules of Ct., Rule 10.703(k)(2)*].

On request by the Commission, the presiding judge must forward to the Commission any requested information about a complaint against a subordinate judicial officer [*Cal. Rules of Ct., Rule 10.703(k)(3)*].

[l] Notice of Final Court Action

When the court has completed its action on a complaint, the presiding judge must promptly notify the complainant and the subordinate judicial officer of the final court action [*Cal. Rules of Ct., Rule 10.703(l)(1)*]. The notice to the complainant of the final court action must:

- Provide a general description of the action taken by the court consistent with any law limiting the disclosure of confidential employee information [*Cal. Rules of Ct., Rule 10.703(l)(2)(A)*]; and

- Include the following statement [*Cal. Rules of Ct., Rule 10.703(l)(2)(B)*]: If you are dissatisfied with the court's action on your complaint, you have the right to request the Commission on Judicial Performance to review this matter under its discretionary jurisdiction to oversee the discipline of subordinate judicial officers. No further action will be taken on your complaint unless the commission receives your written request within 30 days after the date this notice was mailed. The commission's address is:

  Commission on Judicial Performance
  455 Golden Gate Avenue, Suite 14400
  San Francisco, California 94102-3660

Legal Topics:

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

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[Reserved]

§§ 317.87[Reserved]

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§ 317.90 State Constitution

Appointment of officers such as commissioners. *Cal. Const., art. VI, § 22*

Subordinate judicial duties. *Cal. Const., art. VI, § 22*

Oaths. *Cal. Const., art. XX, § 3*

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27-317 California Forms of Pleading and Practice--Annotated § 317.91

§ 317.91 State Statutes

[1] Commissioner's Report and Court's Order

Excepting to commissioner's report and subsequent court order. *Code Civ. Proc. § 259(b)*

[2] Reference

Reference by consent of parties. *Code Civ. Proc. § 638*

Reference on motion of party or court's own motion. *Code Civ. Proc. § 639*

[3] Special Types of Commissioners

Jury commissioner. *Code Civ. Proc. §§ 195, 196*

Counselor of conciliation. *Fam. Code §§ 1814-1816*

Commissioners to act as temporary judges in actions by local child support agency to enforce child support orders. *Fam. Code § 4250 et seq.*; *Gov. Code § 70141(e)*

[4] Superior Court Commissioners

[a] Appointment

Method of appointment of superior court commissioners. *Gov. Code §§ 70143, 70144*

[b] Disqualification

Disqualification for bias and prejudice. *Code Civ. Proc. § 170.6*

[c] Number and Designation

Number and designation of superior court commissioners to be appointed. *Gov. Code § 70141 et seq.*

[d] Powers and Duties

Powers and duties generally. *Code Civ. Proc. § 259*

[e] Qualifications

Qualifications of superior court commissioners. *Gov. Code § 70142*

Superior court commissioner not required to be admitted to State Bar unless required by court appointing him or her. *Gov. Code § 70142*

Requirement that superior court commissioner neither hold office nor engage in practice of law. *Gov. Code §§ 68082, 70142*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersReferencesGovernmentsCourtsSpecial Judges

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§ 317.92 Decisions

[1] Constitutional and Statutory Authorization

Court commissioners is appointed under authority of *Cal. Const., art. VI, § 22* which permits legislature to provide for appointment by trial courts of record of commissioners "to perform subordinate judicial duties." *Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 5, 118 Cal. Rptr. 21, 529 P.2d 53* (dictum)

Assignment to commissioners of duties with respect to uncontested matters falls squarely within scope of legislative authority conferred by *California Constitution, art. VI, § 22*. *Rooney v. Vermont Investment Corp. (1973) 10 Cal. 3d 351, 366, 110 Cal. Rptr. 353, 515 P.2d 297*

Gov. Code § 72190, authorizing court commissioner to exercise power of judge with respect to traffic infraction cases without defendant's consent, is valid exercise of power given to Legislature by *Cal. Const., art. VI, § 22*. *People v. Lucas (1978) 147 Cal. Rptr. 235*

[2] Findings and Exceptions

Notification by deputy court clerk of commissioner's recommendations and court order is insufficient to commence running of five-day period for filing exceptions to commissioner's report and subsequent court order. *Goetz v. Superior Court of State (1958) 49 Cal. 2d 784, 787, 322 P.2d 217*

Written notice of court's action originating with counsel of record makes certain date from which five-day period for filing of exceptions is to run. *Goetz v. Superior Court (1958) 49 Cal. 2d 784, 786, 322 P.2d 217* Hearing pursuant to former *Code Civ. Proc. § 259a(2)* [*now see Code Civ. Proc. § 259(b)*] is not had on stipulation of parties and commissioner's findings are advisory only. *Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 723, 269 P.2d 3* ; *Weinfeld v. Weinfeld (1958) 159 Cal. App. 2d 608, 613-614, 324 P.2d 342*

By enacting 1949 amendment to former *Code Civ. Proc. § 259a(2)* [*now see Code Civ. Proc. § 259(b)*], changing time at which order based on court commissioner's report might become effective, Legislature did not intend to grant to party against whom exceptions are sustained additional remedy for reviewing trial court's determination, but rather intended that order remain interlocutory throughout period for filing and hearing exceptions to commissioner's report. *Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 724, 269 P.2d 3* ; *Weinfeld v. Weinfeld (1958) 159 Cal. App. 2d 608, 614, 324 P.2d 342*

When special reference is made pursuant to former *Code Civ. Proc. § 259a(2)* [*now see Code Civ. Proc. § 259(b)*], and hearing is not had on stipulation of parties, commissioner's findings are advisory only, and interlocutory order is subject to modification by court. *Crocker Citizens Nat. Bank v. Knapp (1967) 251 Cal. App. 2d 875, 880-881, 60 Cal. Rptr. 66*

After defendants' motion to satisfy judgment and quash writ of execution was referred to commissioner, court did not err in amending commissioner's findings of fact to show that attorney had acted in his or her own behalf in purchasing judgment, rather than as representative of one of defendants. *Crocker Citizens Nat. Bank v. Knapp (1967) 251 Cal. App. 2d 875, 880-881, 60 Cal. Rptr. 66*

No abuse of discretion was committed by court in modifying court commissioner's report without transcript of proceedings before commissioner when husband objected to report within time provided for that action in former *Code Civ. Proc. § 259a* [*now see Code Civ. Proc. § 259(b)*]. *Weinfeld v. Weinfeld (1958) 159 Cal. App. 2d 608, 612, 324 P.2d 342*

Judge's immediate approval of recommendation by commissioner that contempt citation be dismissed does not have effect of then disposing of contempt proceeding, because order is interlocutory in character and remains so throughout period for filing and hearing exceptions to commissioner's report. *McLaughlin v. Superior Court (1954) 128 Cal. App. 2d 62, 65, 274 P.2d 745*

When on hearing of exceptions to commissioner's report that contempt citation be dismissed, judge overruled exceptions and affirmed order dismissing citation, contempt proceeding was disposed of and dismissal was "final and conclusive" (*see Code Civ. Proc. § 1222*). *McLaughlin v. Superior Court (1954) 128 Cal. App. 2d 62, 65, 274 P.2d 745*

When judgment and orders of court in contempt proceeding are final and conclusive (*see Code Civ. Proc. § 1222*) and contempt citation has been dismissed, court has no authority to make subsequent order purporting to set aside its order overruling exceptions to commissioner's report recommending that contempt citation be dismissed, to grant those exceptions, and to set aside order dismissing contempt proceedings. *McLaughlin v. Superior Court (1954) 128 Cal. App. 2d 62, 66, 274 P.2d 745*

[3] Powers and Duties

Court commissioner is able to act as temporary judge only when parties to proceeding so stipulate. *Rooney v. Vermont Investment Corp. (1973) 10 Cal. 3d 351, 360, 110 Cal. Rptr. 353, 515 P.2d 297*

Court commissioner's authority to render stipulated judgment is not dependent on qualifying as temporary judge if, in fact, authority to so act is conferred on him or her as court commissioner. *Rooney v. Vermont Investment Corp. (1973) 10 Cal. 3d 351, 360-361, 110 Cal. Rptr. 353, 515 P.2d 297*

Court's "order" that commissioner act pursuant to former *Code Civ. Proc. § 259a(6)* [*now see Code Civ. Proc. § 259(g)*] may take any form that establishes court's official determination that proceeding is one that commissioner

should hear and determine. *Rooney v. Vermont Investment Corp. (1973) 10 Cal. 3d 351, 368, 110 Cal. Rptr. 353, 515 P.2d 297*

Commissioner may hear and determine ex parte application for rendition of judgment under terms of stipulation for judgment because stipulation eliminates contested nature of action and makes rendition of stipulated judgment determination of uncontested action within meaning of former *Code Civ. Proc. § 259a(6)* [*now see Code Civ. Proc. § 259(g)*]. *Rooney v. Vermont Investment Corp. (1973) 10 Cal. 3d 351, 367, 110 Cal. Rptr. 353, 515 P.2d 297*

Trial court's broad order for reference to court commissioner of a domestic relations case with multiple factual issues, when parties did not consent to reference, was an improper delegation of judicial duties requiring vacating of order and entry of new order specifying proper factual issues to be resolved. *Settlemire v. Superior Court (2003) 105 Cal. App. 4th 666, 675, 129 Cal. Rptr. 2d 560*

Where the parties agree that pretrial proceedings will be heard by a certain commissioner, and that commissioner thereafter executes a settlement agreement providing that "[t]he Court retains jurisdiction" to perform certain post-judgment tasks, it is clear that the parties have, in effect, agreed that the commissioner who previously conducted pretrial hearings and approved and executed the parties' settlement agreement was to perform those tasks specified in the stipulation; therefore, the stipulation contained within the stipulated order for entry of judgment meant that the Commissioner was authorized to preside over the post-judgment proceedings as specified in the parties' settlement agreement. *Fine v. Superior Court (2002) 97 Cal. App. 4th 651, 664, 119 Cal. Rptr. 2d 376*

Because it was not otherwise expressly specified, as dictated by Sonoma County Local Rule 12.3, that the commissioner in a child custody case was acting as anything other than a temporary judge, the commissioner was exercising all the powers of a superior court judge; therefore, appellant's assertion that the commissioner was sitting as a referee rather than a temporary judge was incorrect. *In re Brittany (2002) 96 Cal. App. 4th 805, 812, 117 Cal. Rptr. 2d 813*

No case or statute authorizes commissioner to issue warrants other than bench warrants for arrest; none of express duties set forth in *Code Civ. Proc. § 259* involve issuance of warrants. *Flahive v. City of Dana Point (1999) 72 Cal. App. 4th 241, 247 n.10, 85 Cal. Rptr. 2d 51*

Purpose of having commissioners is to assist overburdened judiciary with performance of subordinate judicial duties; adjudication of traffic infraction constitutes subordinate judicial duty; under *Gov. Code § 72190* alone, or additionally under authority of *Penal Code §§ 807* and *808* and *Gov. Code §§ 72190.1* and *72190.2*, commissioner is qualified as magistrate within meaning of *Veh. Code § 40502(a)* before whom appearance concerning traffic infraction was to be made. *Branson v. Martin (1997) 56 Cal. App. 4th 300, 305-306, 65 Cal. Rptr. 2d 401*

Commissioner, as temporary judge, has power under former *Code Civ. Proc. § 259(g)* (*now see Code Civ. Proc. § 259(g)*) to hear and determine uncontested petition to confirm arbitration award in attorney fee dispute case, but does not have power to hear and determine subsequent proceedings in which party absent at original proceeding has later become party litigant and refuses to stipulate to commissioner as temporary judge. *Reisman v. Shahverdian (1984) 153 Cal. App. 3d 1074, 1096-1097, 201 Cal. Rptr. 194*

Entry of judgment in accordance with allegations and prayer of complaint after default hearing by commissioner in paternity, child support, and welfare reimbursement action is subordinate judicial duty within meaning of *Cal. Const., art. VI, § 22*. *E.N.W. v. Michael W. (1983) 149 Cal. App. 3d 896, 899, 198 Cal. Rptr. 355*

Former *Code Civ. Proc. § 259a(6)* [*now see Code Civ. Proc. § 259(g)*], providing that court commissioner shall have power to hear and determine uncontested actions when ordered to do so by court, does not affect commissioner's power under former *Code Civ. Proc. § 259a(1)* [*now see Code Civ. Proc. § 259(a)*] to hear and determine ex parte matters.

People v. Surety Ins. Co. (1975) 48 Cal. App. 3d 123, 127-128, 121 Cal. Rptr. 438

Power to punish for contempt is not included within statutory powers and duties of court commissioner. *Marcus v. Workmen's Comp. Appeals Bd. (1973) 35 Cal. App. 3d 598, 603, 111 Cal. Rptr. 101*

Court commissioner has power to hear, determine, and sign judgment in cause assigned him or her by superior court as "uncontested action" when parties entered into valid stipulation for entry of final judgment in superior court, and when assignment was tantamount to order appointing commissioner to determine action. *People v. Superior Court (1965) 239 Cal. App. 2d 99, 103, 48 Cal. Rptr. 445*

Legislature has left it to court to say whether commissioner should "hear and determine" or merely "hear and report on" matter submitted under former *Code Civ. Proc. § 259a(6)* [*now see Code Civ. Proc. § 259(g)*]. *West v. U.L.C. Corp. (1965) 232 Cal. App. 2d 85, 89, 42 Cal. Rptr. 603*

Court commissioner has power pursuant to former *Code Civ. Proc. § 259a* [*now see Code Civ. Proc. § 259*] to make ex parte order appointing referee and to require appearance before referee of judgment debtor who became judgment debtor in action in probate court. *Lewis v. Neblett (1961) 188 Cal. App. 2d 290, 296-297, 10 Cal. Rptr. 441*

Neither *Code Civ. Proc. § 259* nor former *Code Civ. Proc. § 259a*, defining powers of court commissioners, give her or him power to order discharge of attachment. *Oppenheimer v. Union Pac. R.R. Co. (1955) 284 P.2d 208*

Power conferred on court commissioners pursuant to *Code Civ. Proc. § 259a* [*now see Code Civ. Proc. § 259*] extends to and includes approval and rejection of probate claims. *Estate of Roberts (1942) 49 Cal. App. 2d 71, 77, 120 P.2d 933*

[4] Referee and Commissioner Compared

Proceeding authorized by former *Code Civ. Proc. § 259a* [*now see Code Civ. Proc. § 259*] does not contemplate hearing on whole issue within meaning of code provisions relating to reference. *Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 723, 269 P.2d 3* ; *Weinfeld v. Weinfeld (1958) 159 Cal. App. 2d 608, 613, 324 P.2d 342*

Under *Code Civ. Proc. § 259* and former *Code Civ. Proc. § 259a*, defining powers of court commissioners, procedure to be followed is in all of its essential features the same as that to be followed by referee; and when collateral matter, for information of court, is referred to referee for report, referee's findings are not indispensable and finding with respect to fact does not become binding on court unless and until adopted by it. *Chiarodit v. Chiarodit (1933) 218 Cal. 147, 150, 21 P.2d 562*

The functions and powers of a referee are more limited than those of a temporary judge, and more subject to the agreement and consent of the parties; therefore, the subordinate judicial classifications of referee and temporary judge are distinct, vested with different powers, and subject to differing procedural constraints. *In re Brittany K. (2002) 96 Cal. App. 4th 805, 811*

Code sections relating to proceedings before referees and commissioners [*see Code Civ. Proc. § 638 et seq.*] preserve traditional distinction between general reference, that is, trial before referee on all issues of fact or of law, and special reference, in which he or she considers only part of issues. *Weinfeld v. Weinfeld (1958) 159 Cal. App. 2d 608, 613, 324 P.2d 342*

General reference may be had only with consent of parties [*see Code Civ. Proc. § 638(a)*]. *Weinfeld v. Weinfeld (1958) 159 Cal. App. 2d 608, 613, 324 P.2d 342*

Decision of referee on general reference may be attacked as one made by court, and order vacating decision and directing rehearing is properly appealable as order granting new trial. *Weinfeld v. Weinfeld (1958) 159 Cal. App. 2d 608, 613, 324 P.2d 342*

Special reference does not determine whole issue, and report of referee does not become decision of court without further action by trial judge. *Weinfeld v. Weinfeld (1958) 159 Cal. App. 2d 608, 613, 324 P.2d 342*

Until adoption of referee's report on special reference and filing of findings of fact and conclusions of law of trial court, report may be set aside without necessity of granting new trial. *Weinfeld v. Weinfeld (1958) 159 Cal. App. 2d 608, 613, 324 P.2d 342*

Order vacating report of referee on special reference is merely interlocutory. *Weinfeld v. Weinfeld (1958) 159 Cal. App. 2d 608, 613, 324 P.2d 342*

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§ 317.93 Attorney General Opinions

Court commissioner's office not vacant for failure to take and subscribe oath of office when commissioner's oath of office as deputy county clerk was on file with the county clerk-recorder; oath of office need not be repeated due to change in position unless the office had a fixed term or there was a break in service. *83 Ops. Cal. Att'y Gen. 63 (2000)*

Board of Supervisors of El Dorado County does not have power to approve or veto appointment of particular candidate for court commissioner selected by majority of judges of superior court. *79 Ops. Cal. Att'y Gen. 51 (1996)*

Superior court commissioner appointed to act as juvenile court referee may preside over any hearing assigned by presiding judge of juvenile court and related to juvenile delinquency proceedings (except jurisdictional hearing), in absence of stipulation and subject to hearing de novo by juvenile court judge. *76 Ops. Cal. Att'y Gen. 25, 31 (1993)*

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§§ 317.95[Reserved]

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§ 317.101 State Constitution

Appointment of temporary judges on stipulation of parties. *Cal. Const., art. VI, § 21*

Oath of office required of public officers. *Cal. Const., art. XX, § 3*

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§ 317.102 State Statutes

Power of superior court commissioner to act as temporary judge. *Code Civ. Proc. § 259(d)*

Oath required; who may take it. *Gov. Code §§ 1360, 1362*

Superior court commissioner is not required to be admitted to State Bar unless required by court appointing him or her. *Gov. Code § 70142*

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Temporary judges appointed by the trial courts. *Cal. Rules of Ct., Rule 2.810*

Court appointment of temporary judges. *Cal. Rules of Ct., Rule 2.811*

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Appointment of temporary judge. *Cal. Rules of Ct., Rule 2.814*

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Disclosures to party. *Cal. Rules of Ct., Rule 2.817*

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Continuing duty to disclose and disqualify. *Cal. Rules of Ct., Rule 2.819*

Temporary judges requested by parties. *Cal. Rules of Ct., Rule 2.830*

Stipulation, order, oath, assignment, disclosure, and disqualification of party-requested temporary judge. *Cal. Rules of Ct., Rule 2.831*

Compensation of party-requested temporary judge. *Cal. Rules of Ct., Rule 2.832*

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Notices, use of court facilities, and order for hearing site of party-requested temporary judge. *Cal. Rules of Ct., Rule 2.834*

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§ 317.104 Decisions

[1] Attorney as Temporary Judge

Purpose of commission in proposing revision to *Cal. Const., art. VI, § 21* in 1966 was to restate substance of former art. VI, § 5 concisely in modern terms and to extend authority to use temporary judges to justice courts. *People v. Tijerina (1969) 1 Cal. 3d 41, 48, 81 Cal. Rptr. 264, 459 P.2d 680* (criminal action)

Judgments and orders of judge pro tempore are entitled to same presumption of regularity as those of court with regular judge presiding. *Estate of Kent (1936) 6 Cal. 2d 154, 163, 57 P.2d 901*

Power of judge pro tempore is not exclusive and does not oust duly elected and qualified judge of superior court of county of jurisdiction to hear and determine motion to vacate judgment rendered by pro tempore judge. *Graziani v. Denny (1917) 174 Cal. 176, 179-180, 162 P. 397*

Judge pro tempore can exercise all functions of judge in matter assigned him or her. *Graziani v. Denny (1917) 174 Cal. 176, 179, 162 P. 397* ; *Amos v. Superior Court (1960) 182 Cal. App. 2d 343, 349-350, 6 Cal. Rptr. 252*

Judge pro tempore has authority to hear matter until its final determination, but that power does not prohibit party from seeking equitable relief when that temporary judge is unavailable. *New Tech Developments v. Bank of Nova Scotia (1987) 191 Cal. App. 3d 1065, 1070, 236 Cal. Rptr. 746*

[2] Retired Superior Court Judge as Temporary Judge

Proceeding was neither arbitration nor reference when counsel stipulated to use named retired superior court judge to try case, and matter was tried before retired judge with all parties treating proceeding as trial; court of appeal concluded that parties entered into stipulation that retired judge would try contested probate matter as temporary judge despite retired judge's decision referring to matter as binding arbitration; retired judge clearly met requirement of sworn judicial

officer and was empowered to act; thus all requirements of *Cal. Const. art. VI, § 21* were met. *Estate of Fain (1999) 75 Cal. App. 4th 973, 980-991, 89 Cal. Rptr. 2d 618*

[3] Superior Court Commissioner as Temporary Judge

[a] In General

Major part of assistance which commissioners give courts is presiding as temporary judges under distinct provisions of *Cal. Const., art. VI, § 21*. *Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 6, 118 Cal. Rptr. 21, 529 P.2d 53* (dictum)

[b] Term "Cause" as Distinct From Principal Case

Term "cause" as used in *Cal. Const., art. VI, § 21* is proceeding before court. *Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 9, 118 Cal. Rptr. 21, 529 P.2d 53* ; *In re Plotkin (1976) 54 Cal. App. 3d 1014, 1017, 127 Cal. Rptr. 190*

Appointment of temporary judge to hear particular "cause" carries with it power to act until final determination of that proceeding. *Sarracino v. Superior Court of Los Angeles County (1974) 13 Cal. 3d 1, 10, 118 Cal. Rptr. 21, 529 P.2d 53* ; *Nierenberg v. Superior Court (1976) 59 Cal. App. 3d 611, 618, 130 Cal. Rptr. 847* ; *Anderson v. Bledsoe (1934) 139 Cal. App. 650, 651, 34 P.2d 760*

Temporary judge can be appointed to hear causes connected with but distinct from underlying principal case. *Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 9-10, 118 Cal. Rptr. 21, 529 P.2d 53* ; *Estate of Soforenko (1968) 260 Cal. App. 2d 765, 67 Cal. Rptr. 563* ; *Quezada v. Superior Court (1959) 171 Cal. App. 2d 528, 530, 340 P.2d 1018*

Appointment does not authorize temporary judge to act in distinct proceedings, although ancillary to same principal action, without being appointed and qualified for that purpose. *Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 10, 118 Cal. Rptr. 21, 529 P.2d 53* ; *Nierenberg v. Superior Court (1976) 59 Cal. App. 3d 611, 618, 130 Cal. Rptr. 847*

Contempt proceeding is ancillary to underlying criminal prosecution but is cause distinct from principal case. *Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 9-10, 118 Cal. Rptr. 21, 529 P.2d 53* ; *Nierenberg v. Superior Court (1976) 59 Cal. App. 3d 611, 618, 130 Cal. Rptr. 847* ; *In re Plotkin (1976) 54 Cal. App. 3d 1014, 1016-1017, 127 Cal. Rptr. 190*

Civil contempt proceeding may be tried before court commissioner appointed as judge pro tempore by stipulation of parties pursuant to former *Cal. Const., art. VI, § 5* (*now Cal. Const., art. VI, § 21*). *Quezada v. Superior Court (1959) 171 Cal. App. 2d 528, 530, 340 P.2d 1018*

Authority of judge pro tempore of superior court continues until final disposition of case; judge pro tempore has right to hear motion to vacate order granting new trial, even though that order has become final so far as direct appeal therefrom is concerned. *Anderson v. Bledsoe (1934) 139 Cal. App. 650, 651, 34 P.2d 760*

[c] Parties Litigant

[i] Defined

Parties litigant are those taking part in the litigation or those who have appeared therein. *Estate of Kent (1936) 6 Cal. 2d 154, 162-163, 57 P.2d 901*

Party who was formerly absent at original proceeding and not party litigant to that proceeding, becomes party litigant to subsequent proceeding if party appears therein, and thus has right to stipulate, or refuse to stipulate, to temporary judge's power. *Reisman v. Shahverdian (1984) 153 Cal. App. 3d 1074, 1096-1097, 201 Cal. Rptr. 194*

Although *Cal. Const., art. VI, § 21* allows court to order case tried by temporary judge on stipulation of parties litigant, defendant, in later action to set aside default, forfeits status as party litigant by failing to appear at trial though notice had been properly mailed; temporary judge has authority to enter default. *Lint v. Chisholm (1981) 121 Cal. App. 3d 615, 621-622, 177 Cal. Rptr. 314*

Parties litigant are those who are before court. *In re Plotkin (1976) 54 Cal. App. 3d 1014, 1017, 127 Cal. Rptr. 190*

Order holding expert witness retained by plaintiff in civil action in contempt for failure to appear and give deposition to defendant as ordered by commissioner was invalid and in excess of commissioner's jurisdiction when stipulation was not entered into by defendant and witness. *In re Plotkin (1976) 54 Cal. App. 3d 1014, 1017, 127 Cal. Rptr. 190*

[ii] Exception When Default Prior to Hearing

Defendant, being in default with respect to application for temporary support for failure to appear at hearing, is not party litigant within meaning of Cal. *Const., art. VI, § 21*; stipulations executed by applicants for temporary support are therefore sufficient to empower commissioner to act as temporary judge. *Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 10-11, 118 Cal. Rptr. 21, 529 P.2d 53*

Default with respect to applications for temporary support is indistinguishable from that of default entered in civil action following failure to plead within required time. *Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 10, 118 Cal. Rptr. 21, 529 P.2d 53*

One whose default has been entered at date prior to hearing is not party litigant and therefore stipulation need not be executed by that person in order to constitute commissioner as judge pro tempore of that court. *Bill Benson Motors, Inc. v. Macmorris Sales Corp. (1965) 238 Cal. App. 2d Supp. 937, 943, 48 Cal. Rptr. 123* ; *Barfield v. Superior Court of Los Angeles County (1963) 216 Cal. App. 2d 476, 479*

Defendant whose default has been duly entered in divorce action is not party litigant therein. *Barfield v. Superior Court (1963) 216 Cal. App. 2d 476, 479, 31 Cal. Rptr. 30*

Default in legal sense is not confined to failure to file pleadings; for certain purposes, it means failure to appear at trial as well. *Bill Benson Motors, Inc. v. Macmorris Sales Corp. (1965) 238 Cal. App. 2d Supp. 937, 943-944, 48 Cal. Rptr. 123* ,

[d] Stipulation

[i] Characterization

Because it was not otherwise expressly specified, as dictated by Sonoma County Local Rule 12.3, that the commissioner in a child custody case was acting as anything other than a temporary judge, the commissioner was exercising all the powers of a superior court judge; therefore, appellant's assertion that the commissioner was sitting as a referee rather than a temporary judge was incorrect. *In re Brittany (2002) 96 Cal. App. 4th 805, 812, 117 Cal. Rptr. 2d 813*

When stipulation provided that parties submitted to binding arbitration of all issues raised in complaint and cross-complaint before named retired superior court judge, that arbitration was to be conducted under rules of evidence applicable to trial by court, that judges's decision would be final and binding on all parties, filed with superior court, and treated as judgment and would have same force and effect as superior court judgment and would be appealable as such, court treated proceeding as being before temporary judge rather than as arbitration, despite fact that parties labeled proceeding as arbitration, and judge's decision was labeled "Judgment Following Arbitration"; thus, decision was not arbitration award, but appealable judgment. *City of Shasta Lake v. County of Shasta (1999) 75 Cal. App. 4th 1, 10-12, 88 Cal. Rptr. 2d 863*

[ii] Necessity and Validity

Stipulations executed by applicants for temporary support were sufficient to empower commissioner to act as temporary judge. *Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 10, 118 Cal. Rptr. 21, 529 P.2d 53*

Statutory power of commissioner "to act as judge pro tempore when otherwise qualified so to act and when appointed for that purpose" is subject to dictates of California Constitution, and, accordingly commissioner cannot act as temporary judge except "on stipulation of parties litigant." *Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 6, 118 Cal. Rptr. 21, 529 P.2d 53* ; *Rooney v. Vermont Investment Corp. (1973) 10 Cal. 3d 351, 360, 110 Cal. Rptr. 353, 515 P.2d 297* ; *People v. Tijerina (1969) 1 Cal. 3d 41, 48-49, 81 Cal. Rptr. 264, 459 P.2d 680*

Stipulation for settlement of litigation specifying only conditions under which court may enter judgment was not equivalent to stipulation that judgment may be rendered by court commissioner acting as temporary judge. *Rooney v. Vermont Investment Corp. (1973) 10 Cal. 3d 351, 360, 110 Cal. Rptr. 353, 515 P.2d 297*

Neither former Cal. Rules of Ct., Rule 244 [*see now Cal. Rules of Ct., Rule 2.810 et seq.*] nor former *Code Civ. Proc. § 259a(4)* [*now see Code Civ. Proc. § 259(d)*] authorize court commissioner to act as temporary judge if he or she is not "otherwise qualified so to act," and in absence of stipulation of parties, he or she is not so qualified. *People v. Tijerina (1969) 1 Cal. 3d 41, 48-49, 81 Cal. Rptr. 264, 459 P.2d 680*

Contempt order issued by court commissioner acting as temporary judge was void when neither contemnor nor his attorney stipulated that commissioner might hear matter nor were aware that commissioner was not judge. *In re Frye (1983) 150 Cal. App. 3d 407, 409, 197 Cal. Rptr. 755*

Judgment confirming arbitrator's award and minute order directing execution on judgment was void, when rendered and made by court commissioner, and when parties had not stipulated either orally or in writing, as provided in *Cal. Const., art. VI, § 21*, that commissioner could sit as temporary judge. *Lovret v. Seyfarth (1972) 22 Cal. App. 3d 841, 852-853, 101 Cal. Rptr. 143*

[iii] Implied Stipulations

Stipulation to temporary judge need not be in writing or expressly stated, but may be implied from parties' conduct; conduct short of express oral or written stipulation may be tantamount to stipulation that court commissioner may sit as temporary judge; doctrine of tantamount stipulation can be based entirely on conduct of party's attorney; matter was properly referred to retired judge by "tantamount stipulation" of parties. *Estate of Fain (1999) 75 Cal. App. 4th 973, 977, 988-991, 89 Cal. Rptr. 2d 618*

No implied stipulation that court commissioner might serve as judge pro tempore when subsequent to petitioner's express refusal to stipulate and his or her objection to commissioner's hearing contempt cause, petitioner agreed to defer adjudication and requested continuance. *Nierenberg v. Superior Court (1976) 59 Cal. App. 3d 611, 619, 130 Cal.*

Rptr. 847

Complaint that probate matter was heard before superior court commissioner and that no stipulation was entered into authorizing him to sit as temporary judge was meritless in view of appellant parties' acquiescence in that procedure. *Estate of Lacy (1975) 54 Cal. App. 3d 172, 182, 126 Cal. Rptr. 432*

Implied stipulation of parties litigant that commissioner might act as temporary judge. *People v. Oaxaca (1974) 39 Cal. App. 3d 153, 161 , 114 Cal. Rptr.178* ; *Estate of Soforenko (1968) 260 Cal. App. 2d 765, 766, 67 Cal. Rptr. 563*

Constitutional provision requiring stipulation by parties litigant that commissioner sit as judge pro tempore were complied with when deportment on part of appellant's attorney was tantamount to stipulation that matter could be heard by commissioner. *Estate of Soforenko (1968) 260 Cal. App. 2d 765, 766, 67 Cal. Rptr. 563*

[4] Temporary Judge's Powers

Temporary judges who act under stipulation have full judicial powers until final determination of the cause, including the power to punish for contempt. *Fine v. Superior Court (2002) 97 Cal. App. 4th 651, 664, 119 Cal. Rptr. 2d 376*

The functions and powers of a referee are more limited than those of a temporary judge, and more subject to the agreement and consent of the parties; therefore, the subordinate judicial classifications of referee and temporary judge are distinct, vested with different powers, and subject to differing procedural constraints. *In re Brittany K. (2002) 96 Cal. App. 4th 805, 811*

Temporary judge is inherently empowered to regulate court proceedings by awarding sanctions in discovery hearing. *Estate of Ruchti (1993) 12 Cal. App. 4th 1593, 1602, 16 Cal. Rptr. 2d 151*

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§ 317.105 Attorney General Opinions

In conducting arraignment in criminal case, municipal court commissioner who is not temporary judge is limited to subordinate judicial duties not involving serious, complex, or diverse issues of fact or law; municipal court commissioner who is not temporary judge lacks authority to preside over preliminary examination of felony defendant. *67 Ops. Cal. Att'y Gen. 162 (1984)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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Note, *Sarracino v. Superior Court, 64 Cal. L. Rev. 655 (1976)*

Note, *Right to an Attorney Judge in Justice Courts, 63 Cal. L. Rev. 227 (1975)*

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§ 317.107 Text References

Witkin, Cal. Procedure, vol. 2, *Courts*, § 353 et seq. (4th ed. 1996)

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[Reserved]

§§ 317.108[Reserved]

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§ 317.110 Related Matthew Bender Publications

For memoranda in support of and in opposition to a petition for a writ to restrain a judge from trying a cause after denying a motion to disqualify himself or herself pursuant to former *Code Civ. Proc. § 170*, see California Points and Authorities, Ch. 130, *Judges* (Matthew Bender)

For memoranda in support of and in opposition to a petition of a writ of mandate generally, see California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender)

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27-317 California Forms of Pleading and Practice--Annotated § 317.111

§ 317.111 State Constitution

Disqualification of judge by reason of indictment or information pending against him or her, or proceedings to compel his or her removal or retirement. *Cal. Const., art. VI, § 18(a)*

Legal Topics:

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§ 317.112 State Statutes

Judge has duty to decide any proceeding in which he or she is not disqualified. *Code Civ. Proc. § 170*

Grounds for disqualifying judge for cause. *Code Civ. Proc. §§ 170.1, 170.2, 170.5*

Judge before whom case tried or heard is disqualified as appellate judge. *Code Civ. Proc. § 170.1(b)*

Procedure for recusal and for determination of disqualification after filing of statement by party. *Code Civ. Proc. § 170.3*

Determination of disqualification is reviewable only by writ of mandate sought within 10 days of notification of decision. *Code Civ. Proc. § 170.3(d)*

Powers retained by disqualified judge. *Code Civ. Proc. § 170.4(a), (b), (c)(1), (3)*

Jurisdiction of challenged judge after filing of statement of disqualification. *Code Civ. Proc. § 170.4(d)*

Judicial Council appoints judge when no non-disqualified judge remains on court. *Code Civ. Proc. §§ 170.3(c)(5), (6), 170.8*

Definitions. *Code Civ. Proc. § 170.5*

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§ 317.113 California Rules of Court

Presiding judge can delegate responsibility for master calendar. *Cal. Rules of Ct., Rule 10.603(1)(B)*

Cal. Rules of Ct., Code Jud. Ethics, Canons 1-6

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§ 317.114 Decisions

[1] Bias or Prejudice

[a] Nature of Disqualifying Bias or Prejudice

Discussion about case between trial judge and previously challenged judge resulted in disqualification of trial judge from ruling on defendant's motion for nonsuit under former *Code Civ. Proc. § 170.1(a)(6)(C)* (*see now Code Civ. Proc. § 170.1(a)(6)(A)(iii)*) because a person aware of the facts might reasonably entertain a doubt that the judge would be impartial. *Christie v. City of El Centro (2006) 135 Cal. App. 4th 767, 776, 37 Cal. Rptr. 3d 718*

Judge who heard pretrial motion for protective order but had not presided at trial was disqualified from hearing the appeal of the case under *CCP § 170.1(a)(6)(C)*; a person aware of her ruling on the pretrial motion and the degree to which that ruling was relevant on appeal might reasonably entertain doubts that she would be able to be impartial in hearing the appeal although she was not disqualified under *CCP § 170.1(b)*. *Housing Authority of the County of Monterey v. Jones (2005) 130 Cal. App. 4th 1029, 1042, 30 Cal. Rptr. 3d 676*

Test under *Code Civ. Proc. § 170.1(a)(6)(C)*; on undisputed facts this is question of law for independent appellate review; record did not support judge's self-disqualification under *Code Civ. Proc. § 170.1(a)(6)* in proceeding to commit sex offender as sexually violent predator when decision was based on rumors that district attorney's office believed judge was prejudiced against prosecution's interests in his interpretation of law, which accusation judge believed to be untrue; judge did not declare doubt about his own capacity to be impartial [*Code Civ. Proc. § 170.1(a)(6)(B)*]. *Briggs v. Superior Court (2001) 87 Cal. App. 4th 312, 318-319, 104 Cal. Rptr. 2d 445*

Malicious prosecution case was subject to reversal when trial judge revealed clear bias regarding defendant's profession, i.e., that attorneys tend to initiate and churn litigation for financial gain, regardless of merits of case or damage to defendant, and then made credibility determinations against defendant on probable cause issue that was central to case. *Hall v. Harker (1999) 69 Cal. App. 4th 836, 841-843, 82 Cal. Rptr. 2d 44*

Judge who made several negative comments when referring to acts of one of the parties, i.e., "government tyranny" and "tyrannical behavior," was not necessarily biased against that party to extent that would require reversal, when comments were viewed against the entire record. *Buckley v. California Coastal Commission (1998) 68 Cal. App. 4th 178, 202, 80 Cal. Rptr. 2d 562*

Code Civ. Proc. § 170.1(a)(6) provides standard by which reviewing court determines if trial judge is to be disqualified; derogatory and apparently unfounded statements concerning counsel, coupled with evidence presented in support of earlier petitions for extraordinary writs (each of which sought orders from the court of appeal to disqualify trial judge, after judge appointed under *Code Civ. Proc. § 170.3(c)(5)* had denied motion to disqualify), and court's unusual and inappropriate desire to keep case, lead to conclusion that interests of justice required that further proceedings be heard before trial judge other than presently assigned judge. *Ng v. Superior Court (1997) 52 Cal. App. 4th 1010, 1023-1024, 61 Cal. Rptr. 2d 49*

Judge who impartially conducted criminal trial in which defendant was convicted held disqualified under former *Code Civ. Proc. § 170.1(a)(6)(C)* [*see now Code Civ. Proc. § 170.1(a)(B)(iii)*] when it was discovered before sentencing and hearing on defendant's motion to strike prior convictions that judge had, as deputy district attorney, conducted preliminary examination in connection with one of the priors approximately 13 years earlier. *Sincavage v. Superior Court (1996) 42 Cal. App. 4th 224, 230, 49 Cal. Rptr. 2d 615*

Judge's use of term "good boy" when addressing adult male of African-American descent during prior criminal action, taken in context, did not disqualify judge from sitting on criminal case involving defendant on grounds of bias or prejudice under *Code Civ. Proc. § 170.1(a)(6)(C).* *Flier v. Superior Court (1994) 23 Cal. App. 4th 165, 172, 28 Cal. Rptr. 2d 383*

In action against university challenging certain on-campus development, judge was not disqualified under *Code Civ. Proc. § 170.1(a)(6)(C)* on basis of prior involvement in university's law school alumni organizations; those activities were so remote and so unrelated to university's land management as to raise no doubt of judge's ability to be impartial. *Stanford University v. Superior Court (1985) 173 Cal. App. 3d 403, 407-408, 219 Cal. Rptr. 40*

[b] No Disqualification to Pass on Question of Law

No disqualification of judge was merited for bias under former *Code Civ. Proc. § 170(5)* in passing on questions of law alone. *Calhoun v. Superior Court (1958) 51 Cal. 2d 257, 260-261, 331 P.2d 648*

All issues of law are decided same way regardless of whether judge is biased or not biased; issue decided incorrectly in lower court is presumably corrected on appeal. *Calhoun v. Superior Court (1958) 51 Cal. 2d 257, 260-261, 331 P.2d 648*

No distinction exists in disqualifying effect of statements of judge based on whether case tried before jury or before judge sitting without jury. *McKay v. Superior Court of Shasta County (1950) 98 Cal. App. 2d 770, 777*

[c] Nondisqualifying Matters

[i] Multiple Grounds

Alleged causes of bias or prejudice held insufficient to disqualify judge include: (1) erroneous rulings against litigant; (2) opinion uttered in discharge of judicial duty; (3) error on question of law; (4) opinion based on actual observance in participation in legal proceedings; and (5) prior information without hostility. *In re Morelli (1970) 11 Cal. App. 3d 819, 843-844, 91 Cal. Rptr. 72*

[ii] Erroneous Rulings Against Litigant

Petitioners contention that on three different occasions they were required to file petitions to overturn discovery orders requiring disclosure of attorney work product does not demonstrate bias or whimsy on behalf of the court, but merely frustration and a desire tom manage a complex case. Request for assignment to a new judge was denied. *Hernandez v. Superior Court (Acheson Industries) (2003) 112 Cal. App. 4th 285, 303, 4 Cal. Rptr. 3d 883*

Record of contempt hearing failed to show that trial judge was so prejudiced against contemner as to deny him fair trial, when there was no indication of prejudgment, and although judge ruled sua sponte that certain questions were objectionable, rulings were within judge's prerogative and discretion, and were not arbitrary. *In re Morelli (1970) 11 Cal. App. 3d 819, 850, 91 Cal. Rptr. 72*

Fact that court on three separate occasions denied petitions for stay of judgment was not evidence of bias and prejudice under former *Code Civ. Proc. § 170(5)* and did not provide grounds for disqualification. *Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 116, 62 Cal. Rptr. 274*

[iii] Error on Question of Law

Wrong opinion of law of case did not disqualify judge and was not any evidence of bias or prejudice under former *Code Civ. Proc. § 170(5)*. *In re Morelli (1970) 11 Cal. App. 3d 819, 849, 91 Cal. Rptr. 72* ; *Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 116, 62 Cal. Rptr. 274* ; *Estate of Buchman (1955) 132 Cal. App. 2d 81, 104, 281 P.2d 608* ; *Ryan v. Welte (1948) 87 Cal. App. 2d 888, 895, 198 P.2d 351*

[iv] Member of Racial, Ethnic, Religious, Sexual, or Similar Group

Justices' memberships in California Judges Association, which had filed amicus curiae brief in support of trial court's ruling, held not to disqualify them from hearing case; under *Code Civ. Proc. § 170.2(a)*, it is not ground of disqualification that judge is or is not a member of racial, ethnic, religious, sexual, or similar group whose rights are involved in case. *People v. Superior Court (Mudge) (1997) 54 Cal. App. 4th 407, 410, 62 Cal. Rptr. 2d 721*

[v] Opinion Based on Observance of Proceedings

When state of mind of trial judge appears to be adverse to party but is based on actual observance of witnesses and evidence given, attitude does not amount to that prejudice against party under former *Code Civ. Proc. § 170(5)* which disqualifies judge in trial of action. *People v. Yeager (1961) 55 Cal. 2d 374, 391, 10 Cal. Rptr. 829, 359 P.2d 261*

Opinion formed by judge as result of judicial hearing did not amount to bias and prejudice contemplated by former *Code Civ. Proc. § 170(5)*; duty of judge is to consider and pass on evidence produced, and when evidence is in conflict, to resolve conflict in favor of party whose evidence outweighs that of opposing party. *Kreling v. Superior Court (1944) 25 Cal. 2d 305, 312, 153 P.2d 734*

Judge did not properly try case when he or she has formed partisan opinions from outside sources; trial judge is normally and properly forms opinions on law, evidence, and witnesses, from the presentation of case at trial. *Haldane v. Haldane (1965) 232 Cal. App. 2d 393, 395, 42 Cal. Rptr. 828*

[vi] Opinion Uttered in Discharge of Official Duty

Expressions of opinion uttered by judge, in what he or she conceived to be discharge of official duties, was not evidence of bias or prejudice under former *Code Civ. Proc. § 170(5)*. *Kreling v. Superior Court (1944) 25 Cal. 2d 305, 310-312, 153 P.2d 734*

Insufficient grounds for judge's disqualification were shown when judge, "thought of" referring defendant to district attorney for perjury but later apologized for anger and stated he would not refer matter. *Taliaferro v. Taliaferro (1962) 203 Cal. App. 2d 642, 646-647, 21 Cal. Rptr. 864*

Trial judge was not disqualified from hearing defendants' motion for new trial by reason of stating that it was judge's belief and that amount of damages allowed required further consideration. *Wampler v. Muller (1953) 121 Cal. App. 2d 396, 398, 262 P.2d 853*

[vii] Participating in Settlement Negotiations

Mere fact that judge has participated in settlement discussions is not proper ground for disqualification under *Code Civ. Proc. 170.2*. *Roth v. Parker (1997) 57 Cal. App. 4th 542, 549, 67 Cal. Rptr. 2d 250*

[viii] Prior Information Without Hostility

No knowledge, experience, or opinion gave rise to bias or prejudice under former *Code Civ. Proc. § 170(5)* on part of trial judge unless it resulted in hostility or ill will. *In re Morelli (1970) 11 Cal. App. 3d 819, 845-846, 91 Cal. Rptr. 72* ; *Goodspeed v. Great Western P. Co. (1937) 19 Cal. App. 2d 435, 450, 65 P.2d 1342*

Mere fact that judge entertains general belief in honesty of someone he or she knows is neither unusual nor indicative that he or she has such fixed opinion as to impair ability to weigh any evidence involving acts of that person. *Rohr v. Johnson (1944) 65 Cal. App. 2d 208, 211, 150 P.2d 5*

[d] When Judge Has Belief in Perjury by Party

In deciding question of fact, judge may often reject testimony of party, but this does not necessarily indicate that judge believes party was guilty of deliberate falsification. *Keating v. Superior Court (1955) 45 Cal. 2d 440, 443, 289 P.2d 209*

Because rejection of party's testimony may be result of consideration of ability of party to observe or remember, failure to accept party's version of facts does not show that judge is biased or prejudiced against party under former *Code Civ. Proc. § 170(5)*. *Keating v. Superior Court (1955) 45 Cal. 2d 440, 443-444, 289 P.2d 209*

Judge is not disqualified from proceeding to try and decide case or pass on motion for new trial because he or she states during course of trial that in his or her opinion, party has deliberately given false testimony, provided opinion of judge is based on consideration of evidence produced. *Keating v. Superior Court (1955) 45 Cal. 2d 440, 444, 289 P.2d 209*

Judge's duty when acting as trier of facts to pass on credibility of witnesses, and if he or she believes party testified falsely, and chooses to say so rather than remain silent, he or she as not disqualified from proceeding to render judgment. *Keating v. Superior Court (1955) 45 Cal. 2d 440, 444, 289 P.2d 209*

When judge has stated that party has given false testimony, even though belief is founded on evidence before judge, he or she is disqualified from retrying case. *Keating v. Superior Court (1955) 45 Cal. 2d 440, 444, 289 P.2d 209* ; *Briggs v. Superior Court of Los Angeles County (1932) 215 Cal. 336, 343, 10 P.2d 1003* ; *Chastain v. Superior Court*

(1936) 14 Cal. App. 2d 97, 101, 57 P.2d 982 ; *Evans v. Superior Court (1930) 107 Cal. App. 372, 380-384, 290 P. 662*

When judge is about to retry case after having stated during course of prior trial that he or she believes party has willfully sworn falsely, judge is disqualified from retrying case though belief may have been founded on evidence before him or her. *Keating v. Superior Court (1955) 45 Cal. 2d 440, 444-445, 289 P.2d 209*

Judge is disqualified if he or she has stated that party has willfully sworn falsely and that judge would have no confidence in his or her testimony, or that party has deliberately perjured himself or herself, willfully misstated facts, or knowingly made false statements in affidavit. *Taliaferro v. Taliaferro (1962) 203 Cal. App. 2d 642, 647, 21 Cal. Rptr. 864*

Generally, when judge has stated that party has given false testimony, although belief is founded on evidence before judge, he or she is disqualified from retrying case. *Aluisi v. County of Fresno (1960) 178 Cal. App. 2d 443, 451, 2 Cal. Rptr. 779*

[e] When Judge Has Fixed Opinion

Judge's gratuitously offered opinion on matter not yet pending before him showed bias or prejudice against party. *Pacific etc. Conference of the United Methodist Church v. Superior Court (1978) 82 Cal. App. 3d 72, 84, 147 Cal. Rptr. 44*

Judge, who knew of own prejudiced attitude and state of mind at time of adoption hearing, was required to have disqualified self in first instance and not attempt to hear matter. *Adoption of Richardson (1967) 251 Cal. App. 2d 222, 236-237, 59 Cal. Rptr. 323*

[f] Superior Court Appellate Division Panel

Code Civ. Proc. § 170.1(a)(6)(C) is broad enough to require the disqualification of a judge from an appellate panel reviewing a judgment where that same judge heard a pretrial matter involving a contested factual or legal issue related to the merits, or made a procedural determination that had a substantial effect on the ultimate outcome, or where the determination, though not directly appealable, is related to an issue on appeal from the final judgment. *Housing Authority of the County of Monterey v. Jones (2005) 130 Cal. App. 4th 1029, 1041-1042, 30 Cal. Rptr. 3d 676*

[2] Consent or Answer by Judge

A judge's powers to file an answer to a statement of disqualification under *Code Civ. Proc. § 170.3(c)(3)* and to strike a statement of disqualification under *Code Civ. Proc. § 170.4(b)* are not mutually exclusive; in other words, a judge may first file an answer and then strike a statement of disqualification as long as he or she complies with the 10-day time limit of *Code Civ. Proc. § 170.3(c)*. *PBA, LLC v. KPOD, Ltd. (2003) 112 Cal. App. 4th 965, 972-973, 5 Cal. Rptr. 3d 532*

If statement is legally sufficient and judge fails to file answer thereto within five (now 10) days, facts alleged in statement must be taken as true and judge becomes disqualified automatically. *Calhoun v. Superior Court (1958) 51 Cal. 2d 257, 262, 331 P.2d 648* ; *Oak Grove School Dist. v. City Title Ins. Co. (1963) 217 Cal. App. 2d 678, 702, 32 Cal. Rptr. 288*

Judge whose answer denies disqualification is not precluded from requesting that matter be transferred to another qualified judge of the same court; transfers are not confined to cases in which actual disqualification has been either

admitted or determined after hearing. *People Ex Rel. Air Resources Bd. v. Superior Court (1981) 125 Cal. App. 3d 10, 17, 177 Cal. Rptr. 816*

[3] Determination of Disqualification

On hearing of motion to disqualify judge on ground of bias and prejudice, under former *Code Civ. Proc. § 170(5)* moving party has burden to establish bias or prejudice. *Estate of Buchman (1955) 132 Cal. App. 2d 81, 104, 281 P.2d 608*

Once statement of disqualification is filed, challenged judge is deprived of power to pass on question of own disqualification; question to be passed on by another judge and until question is decided, challenged judge is without jurisdiction to proceed. *Rosenfield v. Vosper (1945) 70 Cal. App. 2d 217, 223, 160 P.2d 842*

[4] Lawyer or Former Lawyer to Party

[a] Representation of Same Party

Judge not disqualified because he or she counseled or advised persons not parties to action on similar issues. *Lassen Irrigation Co. v. Superior Court of Lassen County (1907) 151 Cal. 357, 362-363, 90 P. 709*

Ground for disqualification that judge once represented defendant, which cannot be expressly waived under *Code Civ. Proc. § 170.3(b)(2)*, can be waived by party who does not object to known ground of disqualification and does not timely challenge judge's failure to disqualify himself or herself by petition for writ of mandate pursuant to *Code Civ. Proc. § 170.3(d)*. *People v. Barrera (1999) 70 Cal. App. 4th 541, 552, 82 Cal. Rptr. 2d 755*

Complaint did not allege facts disqualifying trial judge when trial judge's former client was not party and agency relationship of party and former client was not adequately alleged. *O.A. Graybeal Co. v. Cook (1936) 16 Cal. App. 2d 231, 234, 60 P.2d 525*

[b] Representation or Advice Involving Same Issue

Trial judge, former attorney and guardian ad litem for minor children of deceased wife in partition proceedings, was not disqualified to hear subsequent quiet title action. *Reeve v. Jahn (1937) 9 Cal. 2d 244, 250, 70 P.2d 610*

Judge who as attorney drew mortgage and secured letters of administration on estate was not disqualified from trying action to foreclose mortgage against estate. *Morrissey v. Gray (1911) 160 Cal. 390, 393, 117 P. 438*

Judge's counseling was not done in professional capacity but as friend. *Lassen Irrigation Co. v. Superior Court of Lassen County (1907) 151 Cal. 357, 363, 90 P. 709* (dictum)

Under former *Code Civ. Proc. § 170(4)*, there must be some indication of actual participation by judge in previous action before grounds exist for disqualification. *People v. Peralez (1971) 14 Cal. App. 3d 368, 376, 92 Cal. Rptr. 256*

Motion to vacate default judgment on ground that judge was disqualified as former attorney for party was properly denied; defendant's failure to appear put nothing into controversy. *Muller v. Muller (1965) 235 Cal. App. 2d 341, 343-344, 45 Cal. Rptr. 182*

[c] Served as Lawyer Within Previous Two Years

Object of *Code Civ. Proc. § 170.1(a)(2)* is not only to guard jealously actual impartiality of judge, but also to insure public confidence; statute should be liberally construed with view to effect its objects and to promote justice. *People v. Thomas (1972) 8 Cal. 3d 518, 520, 105 Cal. Rptr. 366, 503 P.2d 1374* (criminal prosecution)

Judge's former employment as assistant district attorney within two years of prosecution did not make him "attorney or counsel for any party," under former *Code Civ. Proc. § 170(4)*; no disqualification when offense was not committed until more than one year after assistant district attorney's elevation to bench. *People v. Thomas (1972) 8 Cal. 3d 518, 520-521, 105 Cal. Rptr. 366, 503 P.2d 1374* (criminal prosecution)

When law firm then headed by judge had represented present defendant within two years of present action, judge was disqualified on assumption that entire firm is so engaged. *Mayo v. Beber (1960) 177 Cal. App. 2d 544, 549, 2 Cal. Rptr. 405* (dictum)

No judge should preside in case in which he or she is not wholly free, disinterested, impartial, and independent. *Wickoff v. James (1958) 159 Cal. App. 2d 664, 670, 324 P.2d 661*

Party who seeks to have judgment declared void on ground that judge was disqualified, must allege and prove facts that clearly show that disqualification existed. *Wickoff v. James (1958) 159 Cal. App. 2d 664, 670, 324 P.2d 661*

In malpractice action, insufficient showing to disqualify when only stated ground of disqualification was that judge was, at one time, retained as attorney for defendant hospital in matters involving one or more of same issues. *Wickoff v. James (1958) 159 Cal. App. 2d 664, 669-671, 324 P.2d 661*

[5] Orders Rendered by Judge After Disqualification Void

Disqualified judge has no power to make even relatively discretionary order; order made by disqualified judge is void. *Noorthoek v. Superior Court (1969) 269 Cal. App. 2d 600, 604-607, 75 Cal. Rptr. 61*

[6] Physical Impairment

Physical impairment is cause for disqualification. *People v. Pratt (1962) 205 Cal. App. 2d 838, 845, 23 Cal. Rptr. 469*

[7] Procedures

Code Civ. Proc. § 170.3(d) provides that the determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding. A party's attempt to challenge the trial court's order striking that party's statement of disqualification by way of appeal is improper. *Fink v. Shemtov (2010) 180 Cal. App. 4th 1160, 1176, 103 Cal. Rptr. 3d 509*

Procedure for disqualification of judge set forth in *Code Civ. Proc. § 170.3* pertains only to disqualification of judge for cause pursuant to *Code Civ. Proc. § 170.1*. *Hollingsworth v. Superior Court (1987) 191 Cal. App. 3d 22, 26 n.5, 236 Cal. Rptr. 193*

[8] Related to Lawyer in Proceeding

In order to disqualify judge by reason of relationship to person appearing as attorney for party thereto, under former *Code Civ. Proc. § 170(3)* it was not necessary that related person should be attorney of record, nor did relation as attorney depend on obligation of client to pay compensation for services, nor on continuance of partnership between relative attorney and attorney of record. *Johnston v. Brown (1897) 115 Cal. 694, 695, 47 P. 686*

Fact that at previous trial of similar action between same parties, attorney, who was relative of judge, sat at table in court with partner, who was attorney of record, took notes of evidence, and assisted in trial of case, was sufficient to warn court that relative was in fact attorney in cause. *Johnston v. Brown (1897) 115 Cal. 694, 696, 47 P. 686*

Judge was not disqualified under former *Code Civ. Proc. § 170(3)* by relationship to attorney whose signature on papers does not constitute bona fide appearance in case. *Benton v. Budd (1898) 120 Cal. 329, 331, 52 P. 851*

[9] Selection of Nondisqualified Judge to Try Main Case

Provision under former *Code Civ. Proc. § 170* for transfer of case to qualified judge when there are two or more judges of same court is intended to provide simple and expeditious method for disposition by admittedly qualified judges of cases in which claims of disqualification might be made. *Donovan v. Superior Court (1952) 39 Cal. 2d 848, 854, 250 P.2d 246*

Qualified judge of same court can have case transferred to him or her in any case in which claim of disqualification may be made against one of other judges; operation is not confined to cases in which actual disqualification has been either admitted or determined after hearing. *Donovan v. Superior Court (1952) 39 Cal. 2d 848, 854, 250 P.2d 246*

[10] Statement of Disqualification by Party

Stated facts in verified statement of disqualification are required to make bias appear probable as to issue or issues to be tried. *Calhoun v. Superior Court (1958) 51 Cal. 2d 257, 260, 331 P.2d 648* ; *Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 117, 62 Cal. Rptr. 274*

Moving papers to disqualify trial judge for cause were inadequate and properly stricken by trial judge. *In re Morelli (1970) 11 Cal. App. 3d 819, 850, 91 Cal. Rptr. 72*

In determining whether papers in support of motion to disqualify judge for cause specify sufficient pertinent fact material to frame issue and warrant hearing before another judge, reviewing court cannot take into consideration oral explanations of such material as analyzed by challenged judge. *In re Morelli (1970) 11 Cal. App. 3d 819, 845, 91 Cal. Rptr. 72*

If written statement setting forth facts constituting alleged bias or prejudice of judge is timely and states sufficient facts, duty of judge is to file answer within five days (now 10) or be disqualified from sitting until matter of bias is passed on by another judge; however, when statement is legally insufficient, judge may ignore it or strike it from files. *Ensher, Alexander & Barsoom v. Ensher (1964) 225 Cal. App. 2d 318, 323, 37 Cal. Rptr. 327*

When statement of disqualification of trial judge for bias or prejudice showed, at most, that judge would be unable to continue with case on remittitur if further matters would be lengthy because of judge's appointment as administrator of state agency, judge properly struck statement from files as it failed to allege facts showing bias and prejudice. *Ensher, Alexander & Barsoom v. Ensher (1964) 225 Cal. App. 2d 318, 323, 37 Cal. Rptr. 327*

Allegations setting forth mere general conclusion of petitioner as to judge's prejudice without pleading any specific

facts to show justiciable controversy under former *Code Civ. Proc. § 170(5)* were insufficient. *Taliaferro v. Locke (1960) 182 Cal. App. 2d 752, 757-758, 6 Cal. Rptr. 813*

Allegations in statement charging bias and prejudice of judge are required to set forth specifically facts on which charge is predicated; statement containing nothing but conclusions and setting forth no facts constituting ground of disqualification may be ignored or stricken from files by trial judge. *Mackie v. Dyer (1957) 154 Cal. App. 2d 395, 399, 316 P.2d 366*

Once judge is challenged on grounds of bias and prejudice, his or her right to proceed over entire proceedings is suspended until basic question of qualifications is determined. *Turkington v. Municipal Court (1948) 85 Cal. App. 2d 631, 639, 193 P.2d 795*

[11] Types of Prohibited Interests in Proceeding

[a] Judge Is Party to Proceeding

Judge is "quasi" party in representative suit to protect rights of class of which judge was member and in which judge could intervene. *Lindsay-Strathmore Irrigation Dist. v. Superior Court (1920) 182 Cal. 315, 326, 187 P. 1056*

Supreme Court justices who concurred in issuing citation to appellant's attorney to show cause why attorney should not be suspended from practice for contempt of court in brief stricken from files do not become parties to action nor disqualified from participating in decision of appeal on its merits. *Philbrook v. Newman (1905) 148 Cal. 172, 177, 82 P. 772*

Expression "to which he is party" in former *Code Civ. Proc. § 170(1)* means to which he or she is real party and made so in good faith. *Younger v. Superior Court (1902) 136 Cal. 682, 685, 69 P. 485*

When judge was made party defendant to complaint in action for partition of land, as alleged claimant of interest in land, which interest was denied in complaint, court exceeded its jurisdiction in making ex parte order, of its own motion, without notice to other parties, or any hearing, striking complaint from files on ground that it was false, deceitful, and abusive in its allegation making judge party, and that it was done solely for purpose of disqualifying judge. *Younger v. Superior Court (1902) 136 Cal. 682, 684-685, 69 P. 485*

Both attorney and client can be held in contempt of court when judge is made party in bad faith. *Younger v. Superior Court (1902) 136 Cal. 682, 684, 69 P. 485*

Ancient maxim applicable in civil or criminal cases is that no person ought to be judge in his or her own cause. *Meyer v. City of San Diego (1898) 121 Cal. 102, 104, 53 P. 434*

Judge is disqualified under former *Code Civ. Proc. § 170(3)* from sitting or acting in action in which bank is real party at interest, when judge's brother is director of bank, notwithstanding fact that action is brought in name of private individual. *Lynip v. Alturtas School Dist. (1915) 29 Cal. App. 158, 160-161, 155 P. 109*

Judge who is presented affidavit showing contemptuous conduct toward his or her court is not disqualified as party to hear and determine proceeding. *Hughes v. Moncur (1915) 28 Cal. App. 462, 470, 152 P. 968*

[b] Judge Has Knowledge of Disputed Facts

Relationship of judge and witness not within third degree did not require disqualification under *Code Civ. Proc. §*

170.1(a)(1) when prosecution witness was judge's daughter's husband's nephew. *People v. Williams (1997) 16 Cal. 4th 635, 651-653, 66 Cal. Rptr. 2d 573, 941 P.2d 752*

[c] Judge Has Financial Interest

In action by city to condemn land for uses and purposes of city, fact that plaintiff prior to inception of action had knowledge that judge before whom case was pending was stockholder and director in bank holding deed of trust on property had no bearing on question of disqualification of judge to hear and determine action, if in fact any disqualification existed. *City of Vallejo v. Superior Court (1926) 199 Cal. 408, 415, 249 P. 1084*

Fact that plaintiff in condemnation suit did not make bank owning deed of trust on property party to suit was immaterial to question of disqualification of judge, because bank had present proprietary interest in subject matter of action which it had right to have considered and determined therein. *City of Vallejo v. Superior Court (1926) 199 Cal. 408, 416-418, 249 P. 1084*

Interest of bank owning and holding deed of trust on property sought to be condemned by city for its uses was sufficient to create and constitute disqualification of judge before whom action is pending when judge was stockholder and director of bank. *City of Vallejo v. Superior Court (1926) 199 Cal. 408, 418, 249 P. 1084*

When action for damages and for injunctive relief based on seepage of water from given canal directly affects irrigation district that has become owner of canal, and judge before whom action is pending, as owner of property within district, is one of equitable owners of property of district, and, therefore, has direct, proprietary interest in property involved in action, he or she is disqualified from acting judicially therein. *Hall v. Superior Court (1926) 198 Cal. 373, 383-384, 245 P. 814*

"Corporation" in former *Code Civ. Proc. § 170(2)*, requiring disqualification of any judge who owned securities of corporate party, applied only to private corporations, not public entities, so as not to disqualify judge who owned public utility debentures. *Gottlieb v. Department of Water & Power (1980) 110 Cal. App. 3d 505, 510, 168 Cal. Rptr. 54*

Judge disqualified was interested in action or proceeding pursuant to former *Code Civ. Proc. § 170(1)* when validity of special property tax was subject of litigation whose outcome would, without any further official action, prevent or impose tax on judge's property. *Central & West Basin Water etc. Dist. v. Wong (1976) 55 Cal. App. 3d 191, 194-195, 127 Cal. Rptr. 448*

[d] Nondisqualifying Types of Interest

Nonretired superior court judges as not, was such, disqualified under former *Code Civ. Proc. § 170(1)* from hearing action in which validity of Governmental Conflict of Interest Act set forth in former *Gov. Code §§ 3600-3760*, was challenged. *Nevada County v. Superior Court (1974) 10 Cal. 3d 663, 664, 111 Cal. Rptr. 568, 517 P.2d 832*

Taxpayer is permitted to prosecute actions for alleged violations of public rights wherein plaintiff taxpayer's situation is one in nature of beneficiary of public trust, and he or she is allowed to litigate question on behalf of self and all taxpayers similarly situated; to hold taxpaying judge, whose rights might be said theoretically to be affected same as rights of plaintiff and all other taxpayers, disqualified on ground of "interest" is unwarranted extension of rule. *Cuyamaca Water Co. v. Superior Court of California (1924) 193 Cal. 584, 593, 226 P. 604*

Word "interested" in former *Code Civ. Proc. § 170(1)* embraced only interest that was direct, proximate, substantial, and certain, not remote, indirect, contingent, uncertain, and shadowy interest. *Oakland v. Oakland Water Front Co. (1897) 118 Cal. 249, 252, 50 P. 268* ; *Central & West Basin Water etc. Dist. v. Wong (1976) 55 Cal. App. 3d 191, 194,*

127 Cal. Rptr. 448

Fact that plaintiffs in action against water district were seeking decree that could possibly lower property taxes and water rates paid by judge presiding at trial, who was taxpayer and water ratepayer residing within district, did not constitute grounds to disqualify judge for interest under former *Code Civ. Proc. § 170(1)*; *Central & West Basin Water etc. Dist. v. Wong (1976) 55 Cal. App. 3d 191, 195, 127 Cal. Rptr. 448*

Litigation, outcome of which could result in no change in district's tax rate or water rate, had only contingent, remote, and attenuated effect on judge, and, therefore, was not disqualifying "interest" within meaning of former *Code Civ. Proc. § 170*. *Central & West Basin Water etc. Dist. v. Wong (1976) 55 Cal. App. 3d 191, 195, 127 Cal. Rptr. 448*

"Interest" does not mean interest in similar suit against same or other defendants, or interest in point of law as such, or issue of fact as such, or in any general or special phase of case; it means definite, material, financial stake in direct outcome of particular case. *Goodspeed v. Great Western Power Co. (1937) 19 Cal. App. 2d 435, 444, 65 P.2d 1342*

[12] Voluntary Disqualification by Judge

Record did not support judge's self-disqualification under *Code Civ. Proc. § 170.1(a)(6)* in proceeding to commit sex offender as sexually violent predator when decision was based on rumors that district attorney's office believed judge was prejudiced against prosecution's interests in his interpretation of law, which accusation judge believed to be untrue. *Briggs v. Superior Court (2001) 87 Cal. App. 4th 312, 318-319, 104 Cal. Rptr. 2d 445*

Judge's voluntary statement of disqualification is binding. *Noorthoek v. Superior Court (1969) 269 Cal. App. 2d 600, 606, 75 Cal. Rptr. 61*

Preferably, disqualified judge will record facts showing ground for disqualification so parties may know if ground is one which can be waived. *Noorthoek v. Superior Court (1969) 269 Cal. App. 2d 600, 604, 75 Cal. Rptr. 61*

[13] Waiver of Chance to Disqualify Judge by Delay

Disqualification of judge can be urged after judgment when ground of disqualification is not known until that time. *Keating v. Superior Court (1955) 45 Cal. 2d 440, 447, 289 P.2d 209* ; *Adoption of Richardson (1967) 251 Cal. App. 2d 222, 236-237, 59 Cal. Rptr. 323* ; *Muller v. Muller (1965) 235 Cal. App. 2d 341, 345, 45 Cal. Rptr. 182* ; *Oak Grove School Dist. v. City Title Ins. Co. (1963) 217 Cal. App. 2d 678, 704, 32 Cal. Rptr. 288*

Code Civ. Proc. § 170-170.5 is not designed to deprive litigant of right to object to disqualification of trial judge by reason of his or her interest in action, when litigant did not discover facts constituting ground of disqualification until after commencement of action. *Cadenasso v. Bank of Italy (1932) 214 Cal. 562, 570, 6 P.2d 944*

Disqualification of judge was not waived under *Code Civ. Proc. § 170.1(a)(6)(C)* when judge, who impartially conducted criminal trial in which defendant, appearing pro se, was convicted, told defendant during course of trial that judge had only been calendar deputy district attorney at time of defendant's conviction approximately 14 years earlier and lulled defendant to believe grounds for challenge for cause did not exist, and after conviction, but before hearing on defendant's motion to strike prior convictions and sentencing, defendant's newly appointed counsel learned that the judge had conducted preliminary examination in connection with earlier criminal proceeding. *Sincavage v. Superior Court (1996) 42 Cal. App. 4th 224, 227-228, 232, 49 Cal. Rptr. 2d 615*

Disqualification of judge is waived if not asserted at earliest practical opportunity after learning of ground therefor. *Develop-Amatic Eng'r v. Republic Mortgage Co. (1970) 12 Cal. App. 3d 143, 150, 91 Cal. Rptr. 193*

Notice of disqualification of judge to be filed at earliest practicable opportunity in order to prevent dishonest litigants or unscrupulous lawyers from deliberately withholding making of disqualification statement until they know that filing of statement would disrupt orderly processes of court. *Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 115, 62 Cal. Rptr. 274*

When no motion to disqualify judge was ever made, issue could not be raised for first time on appeal. *Page v. Principe (1963) 220 Cal. App. 2d 151, 160, 33 Cal. Rptr. 836*

Denial of modification of divorce decree was not erroneous on ground that judge should have disqualified self when affidavit alleging disqualification was not presented at earliest practicable opportunity and fell short of alleging facts showing disqualification. *Blackwell v. Blackwell (1961) 190 Cal. App. 2d 520, 524, 12 Cal. Rptr. 201*

While 1927 amendment to former *Code Civ. Proc. § 170* does not specify in so many words a penalty for failure to urge disqualification at "earliest practicable opportunity," intention is clear that failure to comply with provision constitutes waiver. *Mayo v. Beber (1960) 177 Cal. App. 2d 544, 550, 2 Cal. Rptr. 405*

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Municipal court judge not disqualified from criminal calendar for being married to deputy district attorney, having been police officer, or having represented police in past. *75 Ops. Cal. Att'y Gen. 58 (1992)*

Who parties may agree on as judge to determine disqualification of judges under former *Code Civ. Proc. § 170(5)*. *62 Ops. Cal. Att'y Gen. 295 (1979)*

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§ 317.116 Law Reviews

Gavison, *The Implications of Jurisprudential Theories for Judicial Election, Selection, and Accountability, 61 S. Cal. L. Rev. 1617 (1988)*

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Walker, *Desirability of Proposals for Disciplining Judges*, 32 L.A. Bar. B. 73 (1957)

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§ 317.117 Text References

Arnold, California Courts and Judges Handbook, Ch. III, *Function of the Judges*, §§ 3.27-3.36 (3d ed.)

California Civil Procedure During Trial Ch. 16, *Misconduct of Counsel and Court*, §§ 16.53 et seq., 16.130 et seq. (Cal C.E.B. 3rd ed.)

Witkin, California Procedure, Vol. 2, *Courts*, § 91 et seq. (4th ed. 1996)

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[Reserved]

§§ 317.118[Reserved]

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§ 317.120 Related Matthew Bender Publications

For memoranda in support of and in opposition to a petition for a writ of prohibition to restrain a judge from trying a cause after denying a motion to disqualify himself or herself pursuant to *Code Civ. Proc. § 170.6*, see California Points and Authorities, Ch. 130, *Judges* (Matthew Bender)

For memoranda in support of and in opposition to a petition for a writ of prohibition generally, see California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender)

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§ 317.121 State Statutes

Peremptory disqualification of judge. *Code Civ. Proc. § 170.6*

Peremptory disqualification does not apply to judge of superior court appellate department. *Code Civ. Proc. § 170.7*

Assignment of judge by Chairman of Judicial Council when no judge qualified to hear matter. *Code Civ. Proc. § 170.8*

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§ 317.122 Decisions

[1] Class Actions

Defendant's peremptory challenge of trial judge under *Code Civ. Proc. § 170.6* in class action was untimely to disqualify judge from ruling on any matter relating to class certification when class certification procedure was in progress when peremptory challenge was made; challenge was otherwise untimely because court had ruled on complex summary adjudication motions involving contractual interpretation. *California Federal Sav. & Loan Assn. v. Superior Court (1987) 189 Cal. App. 3d 267, 270, 234 Cal. Rptr. 413*

[2] Constitutionality of Code Civ. Proc. § 170.6 in Civil Actions

Legislature foresaw that peremptory challenge procedure would be open to abuses but intended that affidavits be honored notwithstanding misuse. *McCartney v. Commission on Judicial Qualifications (1974) 12 Cal. 3d 512, 539, 116 Cal. Rptr. 260, 526 P.2d 268* ; *Johnson v. Superior Court (1958) 50 Cal. 2d 693, 697, 329 P.2d 5* ; *Mayr v. Superior Court (1964) 228 Cal. App. 2d 60, 64, 39 Cal. Rptr. 240*

Code Civ. Proc. § 170.6 makes exercise of privilege to disqualify for prejudice subject to certain requirements designed to minimize abuses. *McClenny v. Superior Court (1964) 60 Cal. 2d 677, 685-686, 36 Cal. Rptr. 459, 388 P.2d 691*

Code Civ. Proc. § 170.6, providing for disqualification of trial judge on filing of affidavit of prejudice, is not unconstitutional as violation of doctrine of separation of powers. *Johnson v. Superior Court (1958) 50 Cal. 2d 693, 697-699, 329 P.2d 5* (civil action)

Code Civ. Proc. § 170.6 is neither an unconstitutional delegation of legislative and judicial power, nor unwarranted interference with courts. *Johnson v. Superior Court (1958) 50 Cal. 2d 693, 697, 329 P.2d 5* (civil action)

Legislature can adopt reasonable rules and regulations regarding disqualification of judges, and prejudice on part of

judge is properly made ground for disqualification. *Johnson v. Superior Court (1958) 50 Cal. 2d 693, 696, 329 P.2d 5* (civil action)

Legislature acted within its power to adopt reasonable regulations when it provided that, for limited purposes of *Code Civ. Proc. § 170.6*, prejudice of judge may be established by filing of affidavit sworn to by party or attorney, without judicial determination of existence of fact. *Johnson v. Superior Court (1958) 50 Cal. 2d 693, 697, 329 P.2d 5* (civil action)

California Supreme Court, in upholding constitutionality of *Code Civ. Proc. § 170.6*, relied on safeguards such as provision requiring timely making of challenge before trial to minimize possibility of abuse by litigants and their counsel. *Johnson v. Superior Court (1958) 50 Cal. 2d 693, 697, 329 P.2d 5* (civil action)

1937 predecessor of *Code Civ. Proc. § 170.6* held to be unconstitutional as unwarranted and unlawful interference with constitutional and orderly processes of courts. *Austin v. Lambert (1938) 11 Cal. 2d 73, 79, 77 P.2d 849*

Code Civ. Proc. § 170.6, providing for disqualification of trial judge on filing of affidavit of prejudice is not unconstitutional in violation of doctrine of separation of powers. *Journey v. Superior Court (1975) 47 Cal. App. 3d 408, 411, 120 Cal. Rptr. 897*

Judge was disallowed from arguing invalidity of *Code Civ. Proc. § 170.6* under equal protection and due process clauses of state and federal constitutions when issues were not considered when motion to disqualify was ruled on and were not raised by party whose rights were involved. *Journey v. Superior Court (1975) 47 Cal. App. 3d 408, 411, 120 Cal. Rptr. 897* (probation revocation hearing)

[3] Constitutionality of Code Civ. Proc. § 170.6 in Criminal and Juvenile Actions

Code Civ. Proc. § 170.6 is constitutional as applied in criminal cases. *Solberg v. Superior Court (1977) 19 Cal. 3d 182, 187, 137 Cal. Rptr. 460, 561 P.2d 1148*

Code Civ. Proc. § 170.6 is constitutional as applied in juvenile cases. *Pamela H. v. Superior Court (1977) 68 Cal. App. 3d 916, 918, 137 Cal. Rptr. 612*

[4] Establishing Prejudice

[a] Affidavit, Declaration, or Oral Statement Required to Support Motion

Once affidavit of prejudice has been filed, court has no jurisdiction to hold further proceedings in matter except to inquire into timeliness of affidavit or its technical sufficiency under statute. *McCartney v. Commission on Judicial Qualifications (1974) 12 Cal. 3d 512, 531-532, 116 Cal. Rptr. 260, 526 P.2d 268*

Court is bound to accept proper affidavit of prejudice without any further inquiry. *McCartney v. Commission on Judicial Qualifications (1974) 12 Cal. 3d 512, 531-532, 116 Cal. Rptr. 260, 526 P.2d 268* ; *Johnson v. Superior Court (1958) 50 Cal. 2d 693, 698, 329 P.2d 5*

Immediate disqualification of judge is mandatory when affidavit of prejudice is timely and properly made. *McCartney v. Commission on Judicial Qualifications (1974) 12 Cal. 3d 512, 532, 116 Cal. Rptr. 260, 526 P.2d 268* ; *Jacobs v. Superior Court (1959) 53 Cal. 2d 187, 190, 1 Cal. Rptr. 9, 347 P.2d 9*

Oral statement of prejudice was timely made. *Woodman v. Selvage (1968) 263 Cal. App. 2d 390, 392, 69 Cal. Rptr.*

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Motion striking from files affidavit of prejudice on oral motion for disqualification of judge is proper when name of judge was known more than 10 days before date set for hearing and affidavit was not filed within time required by statute [former *Code Civ. Proc. § 170.6(2) now see Code Civ. Proc. 170.6(a)(2)*]. *Schoenberg v. Romike Properties (1967) 251 Cal. App. 2d 154, 164, 59 Cal. Rptr. 359*

Prejudice of judge may be established by affidavit in general and conclusionary terms in substantially same form as provided by *Code Civ. Proc. § 170.6(5)*. *Andrews v. Joint Clerks Port Labor Relations Committee (1966) 239 Cal. App. 2d 285, 294, 48 Cal. Rptr. 646*

Judge against whom affidavit is filed may determine whether it is timely because he or she may properly try or hear matter if it is not. *Andrews v. Joint Clerks etc. Committee (1966) 239 Cal. App. 2d 285, 294, 48 Cal. Rptr. 646*

Challenged judge has no discretion in determining his or her actual prejudice; party's or attorney's belief is decisive and disqualification is mandatory. *Mayr v. Superior Court (1964) 228 Cal. App. 2d 60, 62, 39 Cal. Rptr. 240*

Determination of timeliness and sufficiency of affidavit to disqualify judge, even affidavit purporting to allege facts charging actual bias, may be made by judge against whom affidavit is filed, because he or she may properly try very issue as to which he or she is challenged if affidavit is either insufficient or not timely. *Lewis v. Linn (1962) 209 Cal. App. 2d 394, 399-400, 26 Cal. Rptr. 6*

[b] Motion Without Notice

Extraordinary rights granted by Legislature to litigants to disqualify judge pursuant to *Code Civ. Proc. § 170.6* are "automatic" in sense that good-faith belief in prejudice is alone sufficient, proof of facts showing actual prejudice is not required. *McCartney v. Commission on Judicial Qualifications (1974) 12 Cal. 3d 512, 531, 532, 116 Cal. Rptr. 260, 526 P.2d 268*

No requirement that moving parties must have filed general appearance in order to avail themselves of motion to disqualify. *Hospital Council of Northern Cal. v. Superior Court (1973) 30 Cal. App. 3d 331, 339, 106 Cal. Rptr. 247*

Motion to disqualify judge under former *Code Civ. Proc. § 170* can be made only by party who has appeared in action; no such restriction is placed on peremptory challenge authorized by *Code Civ. Proc. § 170.6*; motion under *Code Civ. Proc. § 170.6* is special appearance. *Loftin v. Superior Court (1971) 19 Cal. App. 3d 577, 579, 97 Cal. Rptr. 215*

Disqualification for prejudice cannot be raised first time on appeal. *Whistler v. Ondulando Highlands Corp. (1970) 13 Cal. App. 3d 108, 117-118, 91 Cal. Rptr. 879*

Possibility of abuse by some attorneys of privilege of "automatic" disqualification of judges was within contemplation of Legislature and was weighed against obvious advantages when principle was established. *Mayr v. Superior Court (1964) 228 Cal. App. 2d 60, 64-65, 39 Cal. Rptr. 240*

Prejudice is established by motion, supported by affidavit or oral statement under oath, that judge is so prejudiced that party or attorney cannot or believes that he or she cannot have fair and impartial trial or hearing. *Mayr v. Superior Court (1964) 228 Cal. App. 2d 60, 61, 39 Cal. Rptr. 240*

Judge who is challenged by procedure under *Code Civ. Proc. § 170.6* is without discretion to determine whether he or she is prejudiced. *Mayr v. Superior Court (1964) 228 Cal. App. 2d 60, 61, 39 Cal. Rptr. 240*

[5] Motion for Disqualification Divests Court of Jurisdiction

Peremptory challenge that is "duly presented" with the necessary affidavit is effective immediately without any further act or proof. Since the peremptory challenge is effective immediately it does not act to extend the time for deciding a defendant's motion for a new trial. *Davcon, Inc. v. Roberts & Morgan (2003) 110 Cal. App. 4th 1355, 1360-1362, 2 Cal. Rptr. 3d 782*

Subsequently entered orders and judgments of challenged judge remain valid if challenging party does not resort to review of order determining issue of disqualification as provided under *Code Civ. Proc. § 170.3(d)* (i.e., by petition for mandate filed within 10 days of notice of decision). *Guedalia v. Superior Court (1989) 211 Cal. App. 3d 1156, 1162-1163, 260 Cal. Rptr. 99*

Timely motion filed under *Code Civ. Proc. § 170.6* by defendant as to whom action was subsequently dismissed, divests court of jurisdiction to proceed with action as to codefendants; timely challenge by one defendant under *Code Civ. Proc. § 170.6* inures to benefit of codefendants. *Louisiana-Pacific Corp. v. Philo Lumber Co. (1985) 163 Cal. App. 3d 1212, 1218-1220, 210 Cal. Rptr. 368*

Judge who fails to disqualify self on filing of timely motion under *Code Civ. Proc. § 170.6* is without jurisdiction to take further action in case and if he or she does so, all subsequent orders and judgments are void. *Woodman v. Selvage (1968) 263 Cal. App. 2d 390, 396, 69 Cal. Rptr. 687* ; *Andrews v. Joint Clerks etc. Committee (1966) 239 Cal. App. 2d 285, 294, 48 Cal. Rptr. 646*

When party properly makes motion under *Code Civ. Proc. § 170.6* and judge against whom it is directed fails to disqualify self from hearing matter, his or her action thereon is void. *Estate of Cuneo (1963) 214 Cal. App. 2d 381, 384, 29 Cal. Rptr. 497*

[6] Only One Motion Permitted Per Case

If parties on the same side have adverse interests to other parties on the same side, they may be treated as a separate side for the purposes of making a motion under *Code Civ. Proc. § 170.6*. *Home Ins. Co. v. Superior Court (2005) 34 Cal. 4th 1025, 1035, 22 Cal. Rptr. 3d 885, 103 P.3d 283*

When a plaintiff belatedly names a party as a defendant, that circumstance alone does not establish that the party's interests are substantially adverse to earlier named defendants; substantially adverse interests are not presumed and mere speculation of potential conflict is insufficient. *Home Ins. Co. v. Superior Court (2005) 34 Cal. 4th 1025, 1037, 22 Cal. Rptr. 3d 885, 103 P.3d 283*

Rule that though there are ordinarily two "sides" to case, there may be more if codefendants have substantially adverse interests is equally applicable in civil and criminal cases. *Pappa v. Superior Court (1960) 54 Cal. 2d 350, 353-354, 5 Cal. Rptr. 703, 353 P.2d 311* (criminal action)

Burden of establishing adverse interest is on defendant. *Pappa v. Superior Court (1960) 54 Cal. 2d 350, 354, 5 Cal. Rptr. 703, 353 P.2d 311* ; *Welch v. Superior Court (1974) 41 Cal. App. 3d 50, 53, 115 Cal. Rptr. 729* (criminal actions)

Defendant must make showing in trial court that conflict of interest exists between defendants before commencing proceeding in prohibition in Supreme Court to prevent trial judge from hearing case. *Pappa v. Superior Court (1960) 54 Cal. 2d 350, 355, 5 Cal. Rptr. 703, 353 P.2d 311* (criminal action)

Fact that codefendants in criminal action are represented by separate counsel does not necessarily establish their interests are adverse. *Pappa v. Superior Court (1960) 54 Cal. 2d 350, 354, 5 Cal. Rptr. 703, 353 P.2d 311* (criminal action); *People v. Escobedo (1973) 35 Cal. App. 3d 32, 41, 110 Cal. Rptr. 550*

"Only one motion for each side" does not mean that several parties have only one motion regardless of conflicting interests; when coplaintiffs or codefendants have substantially adverse interests, there are more than two sides in the case. *Johnson v. Superior Court (1958) 50 Cal. 2d 693, 700, 329 P.2d 5*

Although as a rule party is limited to single peremptory challenge in case, former *Code Civ. Proc. § 170.6(2)* [*now see Code Civ. Proc. 170.6(a)(2)*] clearly permits an additional challenge following reversal of judgment if same judge is assigned to hear case on remand. *Stubblefield Construction Co. v. Superior Court (2000) 81 Cal. App. 4th 762, 765, 97 Cal. Rptr. 2d 121*

When initial peremptory challenge is dismissed on procedural grounds, and original trial judge changes for reasons other than peremptory challenge, initial challenge is not deemed "duly filed," and challenge of new judge is permitted. *Truck Ins. Exchange v. Superior Court (1998) 67 Cal. App. 4th 142, 148-149, 78 Cal. Rptr. 2d 721* (untimely challenge to judge who subsequently retired not barred by former *Code Civ. Proc. § 170.6(3)* [*now see Code Civ. Proc. 170.6(a)(3)*] restriction to one motion)

When another defendant on same side has exercised its right to disqualify a judge, later appearing defendant has no right to challenge then-current judge because that side has used its one challenge. *School Dist. of Okaloosa County v. Superior Court (1997) 58 Cal. App. 4th 1126, 1134-1135, 68 Cal. Rptr. 2d 612*

A party is not entitled to severance of a cross-complaint in order to enable it to avoid the burden of establishing interests substantially adverse to another party that had exercised an earlier peremptory challenge in the proceeding. *Sunkyong Trading (H.K.) Ltd. v. Superior Court (1992) 9 Cal. App. 4th 282, 289-290, n.4, 11 Cal. Rptr. 2d 504*

Denial of *Code Civ. Proc. § 170.6* motion was improper when codefendant has already made such motion but counsel established adverse interest between codefendants because each defendant claimed other defendant was responsible for murder. *Avital v. Superior Court (1981) 114 Cal. App. 3d 297, 301-303, 170 Cal. Rptr. 588*

Provision providing that only one motion for disqualifying judge for prejudice for each side may be made thereunder in any one action or special proceeding does not arbitrarily discriminate against multiple parties. *Welch v. Superior Court (1974) 41 Cal. App. 3d 50, 52, 115 Cal. Rptr. 729* (criminal action)

Defendant in criminal proceeding did not meet burden of establishing adverse interest between himself or herself and codefendant who had filed declaration of prejudice against judge when defendant's attorney filed mere form declaration asserting prejudice with no specific factual showing of adverse interest. *Welch v. Superior Court (1974) 41 Cal. App. 3d 50, 52-53, 115 Cal. Rptr. 729* (criminal action)

[7] Reassignment of Trial or Hearing to Another Judge

The new judge assigned to the case may hear a motion for reconsideration under *Code Civ. Proc. § 1008* on the basis that the disqualified judge is"unavailable," and the disqualified judge's authority is reinstated if the disqualification is found erroneous. *Geddes v. Superior Court (2005) 126 Cal. App. 4th 417, 425-426, 23 Cal. Rptr. 3d 857*

If judge is disqualified pursuant to *Code Civ. Proc. § 170.6* challenge, duty of court is to assign another judge if one is available, or if none is available to procure assignment of outside judge through *Chairman of Judicial Council. Nail v. Osterholm (1970) 13 Cal. App. 3d 682, 686, 91 Cal. Rptr. 908*

Motion to disqualify pursuant to *Code Civ. Proc. § 170.6* tolls five-year period for mandatory dismissal of action for failure to bring to trial *Code Civ. Proc. § 583.310 et seq.* *Nail v. Osterholm (1970) 13 Cal. App. 3d 682, 686, 91 Cal. Rptr. 908* (applying former *Code Civ. Proc. § 583*)

[8] Review of Determination Regarding Disqualification

Only parties to the action may file petition for writ of mandate; disqualified judge may not. *Curle v. Superior Court (2001) 24 Cal. 4th 1057, 1059, 103 Cal. Rptr. 2d 751*

Code Civ. Proc. § 170.3(d) applies to peremptory challenges as well as challenge for cause and precludes review of unsuccessful *Code Civ. Proc. § 170.6* challenge on appeal of judgment. *People v. Hull (1991) 1 Cal. 4th 266, 269-270, 276, 2 Cal. Rptr. 2d 526, 820 P.2d 1036* ; *Guedalia v. Superior Court (1989) 211 Cal. App. 3d 1156, 1160-1163, 260 Cal. Rptr. 99*

Code Civ. Proc. § 170.3(d) provides exclusive remedy for party aggrieved by grant of request for disqualification. *In re Sheila B. (1993) 19 Cal. App. 4th 187, 194-195, 23 Cal. Rptr. 2d 482*

One uninjured by erroneous denial of peremptory challenge made by another party does not have standing to contest that ruling on appeal. *In re Christian J. (1984) 155 Cal. App. 3d 276, 281, 202 Cal. Rptr. 54*

[9] Rule of Necessity

Rule of necessity requires that judge not be disqualified because of personal financial interest if no other judge or court is available to adjudicate cause. *Olson v. Cory (1980) 27 Cal. 3d 203, 27 Cal. 3d 532, 537, 164 Cal. Rptr. 217, 178 Cal. Rptr. 568, 609 P.2d 991, 636 P.2d 532*

[10] Stage of Action or Proceeding at Which Motion May Be Presented

[a] Before Hearing on Contested Matter

A ruling on a motion for pretrial punitive damages discovery under *Civ. Code § 3295(c)* that a plaintiff has demonstrated a substantial probability that he or she will prevail on a claim for punitive damages is not a "determination of contested fact issues relating to the merits" for purposes of asserting a peremptory challenge to a judge pursuant to *Code Civ. Proc. § 170.6(a)(2).* *Guardado v. Superior Court (2008) 163 Cal. App. 4th 91, 93, 77 Cal. Rptr. 3d 149*

Trial court directed to enter order granting defendants' *Code Civ. Proc. § 170.6* motion when individual calendar judge assigned to case changed, defendants first learned of it on day of hearing on their demurrers and motion to strike, judge allowed counsel to argue but deferred ruling, and defendants filed peremptory challenge to judge on following Monday; harmonizing former *Code Civ.Proc. § 170.6(2)* [*now see Code Civ. Proc. 170.6(a)(2)*] and *Gov. Code § 68616(i)*, challenge filed within 15 days of receiving notice of change was timely; however, challenge was untimely regarding hearing on demurrers and motion to strike because it should have been filed before commencement of hearing; thus, trial court had jurisdiction to rule on demurrers and motion to strike and was directed to so rule before granting defendants' *Section 170.6* motion. *Cybermedia, Inc. v. Superior Court (1999) 72 Cal. App. 4th 910, 914, 82 Cal. Rptr. 2d 126*

Peremptory challenge under *Code Civ. Proc. § 170.6* is timely when filed subsequent to ex parte proceeding concerning temporary restraining order and prior to hearing on preliminary injunction, when challenge is filed in accord

with statutory time periods set forth in former *Code Civ. Proc. § 170.6(2)* [*now see Code Civ. Proc. 170.6(a)(2)*]. *Landmark Holding Group, Inc. v. Superior Court (1987) 193 Cal. App. 3d 525, 529, 238 Cal. Rptr. 475*

Motion to disqualify for prejudice is not timely if filed in any case after any contested matter in relation to litigation has been submitted to judge sought to be disqualified. *Doty v. Doty (1975) 52 Cal. App. 3d 672, 677, 125 Cal. Rptr. 153* ; *Mayr v. Superior Court (1964) 228 Cal. App. 2d 60, 64, 39 Cal. Rptr. 240*

Rule that petition to disqualify judge for prejudice is untimely when filed after contested matter has been submitted to judge applies to preliminary hearings and determinations. *Doty v. Doty (1975) 52 Cal. App. 3d 672, 677, 125 Cal. Rptr. 153*

Motion to disqualify judge pursuant to *Code Civ. Proc. § 170.6* is not timely when filed after judge has decided preliminary contested matters. *Miller v. Miller (1970) 11 Cal. App. 3d 197, 202, 89 Cal. Rptr. 643*

Motion to disqualify judge for bias or prejudice must be made at earliest practical opportunity after litigants make appearance in action and discovery of facts constituting grounds of disqualification. *Mancini v. Superior Court (1964) 230 Cal. App. 2d 547, 556-557, 41 Cal. Rptr. 213*

Motion for disqualification of judge is timely under both spirit and letter of *Code Civ. Proc. § 170.6* if party moves as expeditiously as possible after agreed on matter becomes litigated. *Mayr v. Superior Court (1964) 228 Cal. App. 2d 60, 64, 39 Cal. Rptr. 240*

Allowance of right to disqualify judge on ground of belief in prejudice is not intended to permit halting of already commenced hearings and trials. *Mayr v. Superior Court (1964) 228 Cal. App. 2d 60, 62, 39 Cal. Rptr. 240*

Mere issuance of order to show cause is not trial or hearing within contemplation of *Code Civ. Proc. § 170.6* and section does not contemplate filing of affidavit of disqualification in such matters as orders made pursuant to ex parte applications or on stipulation of parties without contest of issues. *Mayr v. Superior Court (1964) 228 Cal. App. 2d 60, 64, 39 Cal. Rptr. 240* ; *Thompson v. Superior Court (1962) 206 Cal. App. 2d 702, 709, 23 Cal. Rptr. 841*

When petitioner for prohibition against enforcement of order for modification of child custody decree filed affidavit of disqualification first time she appeared before judge on hearing which involved contested issue and had not previously exercised her right to do so, judge hearing matter of change of custody was disqualified from taking further action. *Thompson v Superior Court (1962) 206 Cal. App. 2d 702, 710, 23 Cal. Rptr. 841*

Code Civ. Proc. § 170.6 applies only to trial of cause or hearing of matter and is not limited in its prohibition to hearing after cause is at issue. *Thompson v. Superior Court (1962) 206 Cal. App. 2d 702, 707-708, 23 Cal. Rptr. 841*

[b] Motion After Pre-Trial Hearing or Proceeding Not Precluded if Prior Motion Not on Merits

Trial court erred when it struck a peremptory challenge filed pursuant to *Code Civ. Proc. § 170.6* on the ground that it had previously made a determination of contested fact issues relating to the merits, when the trial court's only factual determinations were made in connection with discovery motions and did not relate to the merits of the case. The mere fact that a judge considering discovery motions and sanctions may draw upon his or her knowledge regarding the parties' past conduct in the case is insufficient to broaden the category of cases in which a peremptory challenge is considered untimely. *Swift v. Superior Court (2009) 172 Cal. App. 4th 878, 885, 91 Cal. Rptr. 3d 504*

Late-named defendant's motion under *Code Civ. Proc. § 170.6* to disqualify judge assigned for all purposes filed within 10 days after defendant's appearance held timely even though court had earlier ruled on other defendants' motions to

quash service of summons because although motion to quash service of summons on ground that court lacks in personam jurisdiction may and probably will involve determination of contested facts concerning extent of defendant's contacts with California, motion does not require determination of contested facts related to merits of case. *School Dist. of Okaloosa County v. Superior Court (1997) 58 Cal. App. 4th 1126, 1131-1134, 68 Cal. Rptr. 2d 612*

Challenge pursuant to *Code Civ. Proc. § 170.6* held proper even though filed after ruling on demurrer because judge in ruling on demurrer was not called on to make nor did judge make a determination of contested fact issues relating to the merits, and plaintiff filed peremptory challenge within ten days of the court's notice of assignment for all purposes. *Fight for the Rams v. Superior Court (1996) 41 Cal. App. 4th 953, 958-960, 48 Cal. Rptr. 2d 851*

When case is assigned for all purposes to specific named judge, motion to disqualify that judge must be made immediately on announcement of assignment. *Woodman v. Superior Court (1987) 196 Cal. App. 3d 407, 410, 419, 241 Cal. Rptr. 818* (overruling its prior conflicting decision in *Zdonek v. Superior Court (1974) 38 Cal. App. 3d 849, 852, 113 Cal. Rptr. 669*)

Judge's issuance of temporary restraining order at ex parte proceeding did not determine any contested fact issue relating to merits of action within meaning of former *Code Civ. Proc. § 170.6(2)* [*now see Code Civ. Proc. 170.6(a)(2)*]; motion to disqualify after issuance of TRO was not precluded. *Landmark Holding Group, Inc. v. Superior Court (1987) 193 Cal. App. 3d 525, 527-529, 238 Cal. Rptr. 475*

Peremptory challenge pursuant to *Code Civ. Proc. § 170.6* was proper even though made subsequent to evidentiary hearing on motion to suppress that involved determination of contested fact issues relating to merits because judge had honored peremptory challenge based on identical affidavit of prejudice in another case simultaneously pending against same defendant, and granting one while rejecting other created appeara nce of impropriety. *Woods v. Superior Court (1987) 190 Cal. App. 3d 885, 886-887, 235 Cal. Rptr. 687*

Defendant's peremptory challenge of trial judge under *Code Civ. Proc. § 170.6* in class action was untimely and did not deprive judge of jurisdiction over other issues in addition to class certification, when judge, aside from certification, had ruled on motions for summary adjudication of issues that involved complex questions of law, including contractual interpretation, that would "make or break" case. *California Federal Sav. & Loan Assn. v. Superior Court (1987) 189 Cal. App. 3d 267, 270-271, 234 Cal. Rptr. 413*

Motion to disqualify judge pursuant to *Code Civ. Proc. § 170.6*, when made after pretrial hearing to determine competence of defendant's counsel, was timely, because only issue before court was one of law rather than fact, and in any case hearing on motion to disqualify counsel as incompetent had nothing to do with merits of defendant's case. *People v. Whitfield (1986) 183 Cal. App. 3d 299, 304, 228 Cal. Rptr. 82*

Judge did not pass on or determine contested issues of fact in rulings on summary judgment but rather decided whether triable issue of fact existed, thus petitioners were entitled to peremptory writ of mandate to compel assigned judge to disqualify self under *Code Civ. Proc. § 170.6*. *Bambula v. Superior Court (1985) 174 Cal. App. 3d 653, 657, 220 Cal. Rptr. 223*

Intent of 1965 amendment to *Code Civ. Proc. § 170.6* was to permit preservation of right to disqualify judge for trials and other fact determinations, notwithstanding that judge had earlier heard demurrers and motions without challenge. *Zdonek v. Superior Court (1974) 38 Cal. App. 3d 849, 852, 113 Cal. Rptr. 669* (overruled on another ground by court's later decision in *Woodman v. Superior Court (1987) 196 Cal. App. 3d 407, 410, 419, 241 Cal. Rptr. 818*)

Trial judge's tentative acceptance and later rejection of plea bargain did not constitute determination of contested fact issues relating to merits of case, so as to preclude granting of motion to disqualify judge pursuant to *Code Civ. Proc. § 170.6*; evaluation of facts admitted by plea of guilty, to determine whether to refuse or accept proposed plea bargain, did

not involve fact finding function in respect of issue to be tried. *Fraijo v. Superior Court (1973) 34 Cal. App. 3d 222, 224-225, 109 Cal. Rptr. 909* (criminal prosecution)

Judge's pretrial determination of motions for judgment on pleadings did not determine any contested fact issue relating to merits of action within meaning of former *Code Civ. Proc. § 170.6(2)* [*now see Code Civ. Proc. 170.6(a)(2)*], providing that motion for disqualification of judge must be made before his or her determination of any fact issues related to merits. *Hospital Council of Northern Cal. v. Superior Court (1973) 30 Cal. App. 3d 331, 337, 106 Cal. Rptr. 247*

Motion for judgement on pleadings is in nature of general demurrer, and issues raised by it are legal and not factual, and as such admits material facts alleged in pleadings of adverse party. *Hospital Council of Northern Cal. v. Superior Court (1973) 30 Cal. App. 3d 331, 337-338, 106 Cal. Rptr. 247*

Court's determination that defendants' motions for security would be heard on particular date was not proceeding involving determination of contested fact issues relating to merits. *Woodman v. Selvage (1968) 263 Cal. App. 2d 390, 394, 69 Cal. Rptr. 687*

Probable cause hearing and summary judgment proceeding are similar in that both test whether there are facts stated to comprise actionable cause and both involve determination which relates to contested fact issues; but before right to disqualify is lost, judge must have actually resolved or determined conflicting factual contentions relating to merits prior to trial. *Kohn v. Superior Court (1966) 239 Cal. App. 2d 428, 431, 48 Cal. Rptr. 832* (criminal prosecution)

1965 amendment to former *Code Civ. Proc. § 170.6(2)* [*now see Code Civ. Proc. 170.6(a)(2)*] changed law so that motion to disqualify judge can now be made after hearing or proceeding held prior to trial which does not involve determination of contested fact issue relating to merits; Section 170.6 motion to disqualify trial judge after his or her determination of probable cause under *Penal Code § 995* is made before determination of factual issues relating to merits of case and is timely. *Kohn v. Superior Court (1966) 239 Cal. App. 2d 428, 430, 48 Cal. Rptr. 832* (criminal prosecution)

[c] Following Reversal on Appeal When Case Assigned to Same Judge for Retrial

Remand solely for resentencing in a criminal proceeding does not constitute a new trial and a disqualification motion under former *Cal.Code Civ. Proc. § 170.6(2)* [*now see Code Civ. Proc. 170.6(a)(2)*] is not allowed. *Peracchi v. Superior Court (2003) 30 Cal. 4th 1245, 1249, 135 Cal. Rptr. 2d 639* (third conviction had been reversed for *potential* retrial and for resentencing and prosecutor chose not to retry the charge in the reversed count, leaving only resentencing)

Disqualification is not available where appellate court order to juvenile court was clearly for the performance of ministerial acts, i.e., entering an order denying reunification services and setting a permanent plan selection hearing. *C.C. v. Superior Court (2008) 166 Cal. App. 4th 1019, 1022, 83 Cal. Rptr. 3d 225*

Reversal of summary judgment motion based solely on grounds that trial judge had not specified the reasons for its determination as required by *Code Civ. Proc. § 437c(g)* did not necessitate that parties be permitted a peremptory challenge following reversal on appeal under *CCP § 170.6(a)(2)*. *Geddes v. Superior Court (2005) 126 Cal. App. 4th 417, 424, 23 Cal. Rptr. 3d 857*

Trial court's decision on motions regarding conflicts of laws issues did not constitute a "trial" such that parties would be entitled to make peremptory challenge pursuant to *CCP § 170.6(a)(2)* after remand. *State Farm v. Superior Court (2004) 121 Cal. App. 4th 490, 503, 17 Cal. Rptr. 3d 146*

The party who unsuccessfully responds to an appeal may also exercise a peremptory challenge to the judge on remand, but only if that party has not previously exercised a peremptory challenge. *Pfeiffer Venice Properties v. Superior Court (2003) 107 Cal. App. 4th 761, 764, 132 Cal. Rptr. 2d 400*

Although as a rule party is limited to single peremptory challenge in case, former *Code Civ. Proc. § 170.6(2)* [*now see Code Civ. Proc. 170.6(a)(2)*] clearly permits additional challenge following reversal of judgment if same judge is assigned to hear case on remand. *Stubblefield Construction Co. v. Superior Court (2000) 81 Cal. App. 4th 762, 765, 769, 97 Cal. Rptr. 2d 121*

Remand order encompassing receipt of evidence and resolution of factual issue regarding whether individual defendant paid judgment on behalf of himself alone or on behalf of corporate defendant constituted "new trial" within meaning of former *Code Civ. Proc. § 170.6(2)* [*now see Code Civ. Proc. 170.6(a)(2)*], thereby rendering motion to disqualify made after remand timely. *Hendershot v. Superior Court (1993) 20 Cal. App. 4th 860, 864-865, 24 Cal. Rptr. 2d 645*

[d] Continuation of Original Proceeding

[i] Motion Not Allowed

Because motion for disqualification under *Code Civ. Proc. § 170.6* must be made before trial has commenced, it cannot be entertained as to subsequent hearings which are part or continuation of original proceedings. *McClenny v. Superior Court of Los Angeles County (1964) 60 Cal. 2d 677, 684, 36 Cal. Rptr. 459* (contempt proceeding arising out of other litigation); *Jacobs v. Superior Court (1959) 53 Cal. 2d 187, 190, 1 Cal. Rptr. 9, 347 P.2d 9* (modification of child custody)

Proceeding is continuation of original action out of which it arises if it involves substantially same issues as original action. *McClenny v. Superior Court (1964) 60 Cal. 2d 677, 684, 36 Cal. Rptr. 459, 388 P.2d 691*

Notice of motion to disqualify trial judge for prejudice is not timely when filed before proceeding on indirect contempt that was supplementary to domestic relations action when there was substantial degree of similarity and even identity between issues to be raised in contempt proceeding and issues previously presented to judge. *McClenny v. Superior Court (1964) 60 Cal. 2d 677, 684-685, 36 Cal. Rptr. 459, 388 P.2d 691*

That contempt proceeding which is supplementary to domestic relations action is quasi criminal in nature does not make it separate proceeding for purpose of determining when motion to disqualify judge for prejudice may be made. *McClenny v. Superior Court (1964) 60 Cal. 2d 677, 686-689, 36 Cal. Rptr. 459, 388 P.2d 691*

That one accused of contempt in proceeding supplementary to domestic relations action may suffer criminal sanctions is no reason to resolve all judicial doubt in his or her favor when determining whether his or her motion to disqualify judge for prejudice, made before contempt proceeding, was timely filed. *McClenny v. Superior Court (1964) 60 Cal. 2d 677, 685-686, 36 Cal. Rptr. 459, 388 P.2d 691*

In situations involving guardianship and custody orders, subsequent proceedings to obtain changes in custody are continuations of original proceeding to determine custody. *Jacobs v. Superior Court (1959) 53 Cal. 2d 187, 190, 1 Cal. Rptr. 9, 347 P.2d 9*

Contempt proceeding for disobedience of injunction is continuation of action in which injunction was issued. *Astourian v. Superior Court (1990) 226 Cal. App. 3d 720, 725, 276 Cal. Rptr. 657*

Motion to disqualify judge hearing motion to set aside interlocutory decree of divorce was properly denied when judge had previously acted in whole case without any prior attempt to disqualify him or her and he or she had heard case and decided it on its merits. *Meridith v. Meridith (1968) 264 Cal. App. 2d 504, 509-510, 70 Cal. Rptr. 631*

If proceeding is merely continuation of former proceeding, plaintiff is not permitted to make proceedings independent through vehicle of newly filed and separately numbered action. *Andrews v. Joint Clerks etc. Committee (1966) 239 Cal. App. 2d 285, 298, 48 Cal. Rptr. 646*

Motion to vacate ex parte order made after judgment in case by one who was never party to action was not continuation of or supplement to anything previously done in action and therefore challenge of disqualification of judge made at commencement of hearing on motion was not asserted too late. *Oksner v. Superior Court (1964) 229 Cal. App. 2d 672, 689-690, 40 Cal. Rptr. 621*

Judge was disqualified and without jurisdiction to make any order with respect to nonparty when nonparty's motion before court to vacate ex parte order was in no sense continuation of or supplement to anything previously done in that action and nonparty's counsel at hearing on day when ex parte order was served on him filed notice of motion to vacate and declaration of disqualification. *Oksner v. Superior Court (1964) 229 Cal. App. 2d 672, 689-690, 40 Cal. Rptr. 621*

[ii] New Judge Exception

Litigant who has not exercised right to disqualify judge for prejudice on original hearing may do so on subsequent proceedings supplemental to original action as to judge other than one who has previously heard any phase of matter in litigation. *Spector v. Superior Court (1961) 55 Cal. 2d 839, 843, 13 Cal. Rptr. 189, 361 P.2d 909* ; *Thompson v. Superior Court (1962) 206 Cal. App. 2d 702, 707, 23 Cal. Rptr. 841*

Litigant may exercise privilege to disqualify judge for prejudice in proceeding supplemental to original action as to judge other than any judge who has previously heard any phase of matter, provided he or she does so before commencement of hearing of supplemental proceedings and within time limitations specified. *People v. Smith (1961) 196 Cal. App. 2d 854, 858-860, 17 Cal. Rptr. 330* (violation of probation hearing)

[11] Time for Making Motion

[a] No Motion After Hearing Commenced

A late appearing party in a case assigned to a judge for all purposes has the right to exercise a peremptory challenge within ten days after appearing in the case; however, that right is subject to two exceptions under former *Code Civ. Proc. § 170.6(2)* [*now see Code Civ. Proc. 170.6(a)(2)*]: a party cannot exercise a peremptory challenge after the commencement of trial, and a peremptory challenge is precluded after the judge has decided a contested fact issue relating to the merits or in a subsequent proceeding that qualifies as a continuation of such a proceeding. *Stephens v. Superior Court (2002) 96 Cal. App. 4th 54, 60, 116 Cal. Rptr. 2d 616*

Otherwise timely *Code Civ. Proc. § 170.6* challenge made after argument on demurrers and motion to strike, while ruling on those matters was deferred, was untimely regarding demurrers and motion to strike because it should have been filed before commencement of hearing; thus, trial court had jurisdiction to rule on demurrers and motion to strike and was directed to so rule before granting defendants' Section 170.6 motion. *Cybermedia, Inc. v. Superior Court (1999) 72 Cal. App. 4th 910, 914, 82 Cal. Rptr. 2d 126*

Motion to disqualify judge made under *Code Civ. Proc. § 170.6* was untimely when made after judge has already ruled on demurrer. *Appl v. Lee Swett Livestock Co. (1987) 192 Cal. App. 3d 466, 469, 237 Cal. Rptr. 433*

Except in those situations involving trial of cause appearing on master calendar, when judge assigned or scheduled to try cause or hear matter is known at least 10 days before trial or hearing date, motion must be made at least five days before that date, and if directed to hearing other than trial of cause, must be made not later than commencement of hearing. *Andrews v. Joint Clerks etc. Committee. (1966) 239 Cal. App. 2d 285, 294, 48 Cal. Rptr. 646*

Motion for disqualification of judge for prejudice directed to hearing other than trial of cause must be made not later than commencement of hearing. *Mayr v. Superior Court (1964) 228 Cal. App. 2d 60, 62, 39 Cal. Rptr. 240*

[b] No Motion After Trial Commenced

Plaintiff waived right to have judge step down and not try case at opening of trial before juror's name had been drawn; plaintiff's subsequent motion for disqualification filed after case had been tried and verdict returned was not timely. *Agnew v. Cronin (1961) 197 Cal. App. 2d 535, 540-541, 17 Cal. Rptr. 273*

[c] Ruling on Timeliness of Challenge

Disqualification claim untimely where party waited seven months before asserting the alleged ground for disqualification, even where appellate court stay of trial court proceedings was in effect for part of that time. *Tri Counties Bank v. Superior Court (2008) 167 Cal. App. 4th 1332, 1338, 84 Cal. Rptr. 3d 835*

If disqualification motion is untimely because of prior ruling on merits by disqualified judge, disqualified judge may not waive timeliness requirement and accept disqualification. *Briggs v. Superior Court (2001) 87 Cal. App. 4th 312, 318, 104 Cal. Rptr. 2d 445*

Judge against whom peremptory challenge has been made may rule on timeliness of challenge. *Micro/Vest Corp. v. Superior Court (1984) 150 Cal. App. 3d 1085, 1089, 198 Cal. Rptr. 404*

Denial of peremptory challenge as untimely by judge who subsequently recuses self is not subject to review by succeeding judge in case. *Micro/Vest Corp. v. Superior Court (1984) 150 Cal. App. 3d 1085, 1089, 198 Cal. Rptr. 404*

[d] 10-Day/5-Day Provision

Ten-day/five-day provision does not apply when matter is assigned to law and motion department even if specific law and motion judge is named. *Retes (1981) 122 Cal. App. 3d 799, 805, 176 Cal. Rptr. 160* ; *but see People v. Superior Court (Lavi) (1993) 4 Cal. 4th 1164, 1183-1185, 17 Cal. Rptr. 2d 815, 847 P.2d 1031* (dicta, judge must only be known with reasonable certainty)

Possible for motion to be made prematurely; 10-day/5-day rule is measured from trial or hearing; therefore, motion may not be filed until there is scheduled hearing; noting that other courts of appeal disagree. *Grant v. Superior Court (2001) 90 Cal. App. 4th 518, 526* ; *108 Cal. Rptr. 2d 825* (motion was premature when filed after judge had ruled on two ex parte applications but before any further hearing had been set); *contra Pedus Services, Inc. v. Superior Court (1999) 72 Cal. App. 4th 140, 84 Cal. Rptr. 2d 771* ; *Moreira v. Superior Court (1989) 215 Cal. App. 3d 42, 265 Cal. Rptr. 437*

Ten-day/five-day rule held inapplicable when matter to be heard was assigned to department, and not to judge by name. *Moreira v. Superior Court (1989) 215 Cal. App. 3d 42, 45, 265 Cal. Rptr. 437* ; *but see People v. Superior Court (Lavi) (1993) 4 Cal. 4th 1164, 1183-1185, 17 Cal. Rptr. 2d 815, 847 P.2d 1031* (dicta, judge must only be known with

reasonable certainty)

Application of 10-day/5-day rule does not require *actual* knowledge by party or party's attorney but only that, on further investigation or inquiry, identity of judge assigned to particular department is ascertainable. *Lawrence v. Superior Court (1988) 206 Cal. App. 3d 611, 617, 253 Cal. Rptr. 748*

Ten-day/five-day provision applies when matter is scheduled for hearing in identified department and name of judge assigned to that department is known at least 10 days before hearing; if judge other than previously assigned judge is presiding on hearing date, party may challenge that judge not later than commencement of hearing. *Thomas Realty Co. v. Superior Court of Los Angeles County (1988) 199 Cal. App. 3d 91, 95, 244 Cal. Rptr. 733* ; *but see People v. Superior Court (Lavi) (1993) 4 Cal. 4th 1164, 1183-1185, 17 Cal. Rptr. 2d 815, 847 P.2d 1031* (dicta, judge must only be known with reasonable certainty)

Ten-day/five-day rule does not apply when matter to be heard is assigned to department, and not to particular judge. *Bouchard v. Insona (1980) 105 Cal. App. 3d 768, 772, 164 Cal. Rptr. 505* ; *but see People v. Superior Court (Lavi) (1993) 4 Cal. 4th 1164, 1183-1185, 17 Cal. Rptr. 2d 815, 847 P.2d 1031* (dicta, judge must only be known with reasonable certainty)

Motion for disqualification of judge made by interveners, who came into case after it had been assigned date for trial, must be made at least five days before date set for trial or hearing, pursuant to *Code Civ. Proc. § 170.6*, so providing when, as was true with interveners, assigned or scheduled judge was known at least 10 days before that date. *Hospital Council of Northern Cal. v. Superior Court (1973) 30 Cal. App. 3d 331, 338-340, 106 Cal. Rptr. 247*

Interveners became parties on order authorizing intervention, and time ran from that date, rather than from later date of filing of formal petition in intervention. *Hospital Council of Northern Cal. v. Superior Court (1973) 30 Cal. App. 3d 331, 339, 106 Cal. Rptr. 247*

No requirement that interveners in action must have filed general appearance in order to avail themselves of motion to disqualify judge; interveners were parties "appearing" in action within meaning of *Code Civ. Proc. § 170.6*, pertaining to disqualification of judges, once they had participated in action prior to filing petition in intervention. *Hospital Council of Northern Cal. v. Superior Court (1973) 30 Cal. App. 3d 331, 339, 106 Cal. Rptr. 247*

When defendants filed notice of motion for security on December 1 stating they would bring motion for hearing on December 13, but on that date parties agreed to subsequent date for hearing, plaintiffs' December 13 oral motion to disqualify was timely because that was as soon as it became known to plaintiffs' counsel when motion for security would be heard. *Woodman v. Selvage (1968) 263 Cal. App. 2d 390, 394, 395-396, 69 Cal. Rptr. 687*

When, following trustee's filing of notice of default under trust deed, trustors filed action for declaratory relief denying default and beneficiaries petitioned to intervene as indispensable parties and moved to disqualify judge for prejudice, petitioners were parties within *Code Civ. Proc. § 170.6* and filing of motion for disqualification was within proceeding pending before court. *Cuneo v. Superior Court (1963) 213 Cal. App. 2d 452, 456-457, 28 Cal. Rptr. 791*

Motion and affidavit to disqualify trial judge is timely filed if presented at least five days before last scheduled date for trial if judge assigned or scheduled to try cause is known to party of attorney at least 10 days before that date. *Eagle Maintenance & Supply Co. v. Superior Court of Los Angeles County (1961) 196 Cal. App. 2d 692, 695, 16 Cal. Rptr. 745*

Under 10-day/5-day provision, motion supported by sufficient affidavit and made prior to setting of cause for trial, had to be granted by trial court. *Lowry v. Superior Court (1960) 186 Cal. App. 2d 22, 24, 8 Cal. Rptr. 720*

[e] When Master Calendar Exists

Immediate challenge by motion to judge supervising master calendar applies only if case is assigned from master calendar; if assignment is merely from master calendar department, to another department for future trial, challenge is timely if made more than five days in advance of hearing. *Zdonek v. Superior Court (1974) 38 Cal. App. 3d 849, 855, 113 Cal. Rptr. 669*

Civil master calendar system makes it impracticable to allow five days for peremptory challenge for prejudice. *People v. Escobedo (1973) 35 Cal. App. 3d 32, 38, 110 Cal. Rptr. 550* (criminal action)

Civil master calendar judge may make immediate assignment to another department and assign challenged judge to another pending case. *People v. Escobedo (1973) 35 Cal. App. 3d 32, 38, 110 Cal. Rptr. 550* (criminal action)

When case was assigned from master calendar, motion to disqualify was untimely because petitioner did not make and file motion of prejudice to judge supervising master calendar, but awaited outcome of ruling of judge to which case was assigned. *Michaels v. Superior Court (1960) 184 Cal. App. 2d 820, 824-825, 826-827, 7 Cal. Rptr. 858*

[f] When Judge Is Replaced After Party Appears

If individual calendar judge assigned to case is changed, harmonizing former *Code Civ. Proc. § 170.6(2)* [*now see Code Civ. Proc. 170.6(a)(2)*] and Gov. Code § 68616(i), party that already appeared in action must file its challenge within 15 days of receiving notice of change. *Cybermedia, Inc. v. Superior Court (1999) 72 Cal. App. 4th 910, 913, 82 Cal. Rptr. 2d 126*

[g] When Case Assigned to Same Judge for Retrial After Reversal on Appeal

Remand solely for resentencing in a criminal proceeding does not constitute a new trial and a disqualification motion under former *Cal.Code Civ. Proc. § 170.6(2)* [*now see Code Civ. Proc. 170.6(a)(2)*] is not allowed. *Peracchi v. Superior Court (2003) 30 Cal. 4th 1245, 1249, 135 Cal. Rptr. 2d 639* (third conviction had been reversed for *potential* retrial and for resentencing and prosecutor chose not to retry the charge in the reversed count, leaving only resentencing)

Gov. Code § 68616 does not apply when judgment has been reversed on appeal and returned to trial court for retrial; 60-day provision of *Code Civ. Proc. § 170.6* controls. *Stubblefield Construction Co. v. Superior Court (2000) 81 Cal. App. 4th 762, 765, 769, 97 Cal. Rptr. 2d 121*

[h] Who May Bring Motion

In dicta, court suggested that a nonparty cited for contempt may have a right to exercise a peremptory challenge against a discovery referee despite prior cases holding that nonparties generally do not have peremptory challenge rights under *Code Civ. Proc. § 170.6*. *Sears, Roebuck and Co. v. National Union Fire Ins. Co. of Pittsburgh (2005) 131 Cal. App. 4th 1342, 1349, fn. 4, 32 Cal. Rptr. 3d 717*

Public agency on which subpoena duces tecum was served but that was not party to action is without authority to bring motion for peremptory disqualification of judge hearing discovery matters. *Avelar v. Superior Court (1992) 7 Cal. App. 4th 1270, 1274, 9 Cal. Rptr. 2d 536*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsRule of NecessityCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsCourtsJudges

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27-317 California Forms of Pleading and Practice--Annotated § 317.123

§ 317.123 Text References

Witkin, California Procedure, vol. 2, *Courts*, § 135 et seq. (4th ed. 1996)

Legal Topics:

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27-317 California Forms of Pleading and Practice--Annotated § 317.124

§ 317.124 State Constitution

Administrative Office of the Courts, authority for, *Cal. Const., art. VI, § 6(a)*

Commission on Judicial Appointments, authority for, *Cal. Const., art. VI, § 7*

Commission on Judicial Appointments, finality of appellate appointment, *Cal. Const., art. VI, § 16*

Commission on Judicial Performance, authority, *Cal. Const., art. VI, §§ 8, 18, 18.1*, and *18.5*

Judicial Council, authority for, *Cal. Const., art. VI, § 6*

Judicial Council membership, terms of office, functions, *Cal. Const., art. VI, § 6*

Legal Topics:

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27-317 California Forms of Pleading and Practice--Annotated § 317.125

§ 317.125 State Statutes

Commission on Judicial Performance, *Gov. Code §§ 68701-68755*

Commission on Judicial Performance, determinations on disability retirement applications, *Gov. Code §§ 75060-75064*, §§ 75560-75564

Commission on Judicial Performance, enforcement of the restrictions on judges' receipt of gifts and honoraria, *Code of Civ. Proc. § 170.9*

Eligibility for paid sabbatical, *Gov. Code § 77213*

Eligibility for unpaid sabbatical, *Gov. Code § 68554*

Judicial robe requirement, *Gov. Code § 68110*

Selection of presiding judge in court having two judges, *Gov. Code § 69508.5*

Regional Court Interpreter Employment Relations Committees, authority, *Gov. Code §§ 71807-71809*

Relief for violation of *Cal. Rules of Ct., Rule 10.501* concerning the maintenance of, and public access to, budget and management information concerning the Judicial Council or the trial courts, *Gov. Code § 71675(b)*

Superior court authority to charge reasonable fee for service or product, *Gov. Code § 70631*

Judicial Council, authority to requests from superior courts to accept credit cards for the payment of court fees or to impose a charge for the use of credit cards, *Gov. Code § 6159*

Legal Topics:

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27-317 California Forms of Pleading and Practice--Annotated § 317.126

§ 317.126 California Rules of Court

Judicial Administration Rules, *Cal. Rules of Ct., Rule 10.1 et seq.*

Standards of Judicial Administration, Cal. Rules of Ct., Stds. Jud. Admin., Std. 2.1 et seq.

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27-317 California Forms of Pleading and Practice--Annotated § 317.127

§ 317.127 State Constitution

Code of Judicial Ethics, authority, *Cal. Const., art. VI, § 18(m)*

Commission on Judicial Performance, authority, *Cal. Const., art. VI, §§ 8, 18, 18.1* and *18.5*

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-317 California Forms of Pleading and Practice--Annotated § 317.128

§ 317.128 State Statutes

Commission on Judicial Performance, *Gov. Code §§ 68701-68755*

Commission on Judicial Performance, enforcement of the restrictions on judges' receipt of gifts and honoraria, *Code of Civ. Proc. § 170.9*

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27-317 California Forms of Pleading and Practice--Annotated § 317.129

§ 317.129 California Rules of Court

Requirement of judge to uphold integrity and independence of judiciary, Cal. Rules of Ct., Code Jud. Ethics, Canon 1

Requirement of judge to avoid impropriety and appearance of impropriety, Cal. Rules of Ct., Code Jud. Ethics, Canon 2

Requirement of judge to perform duties impartially and diligently, Cal. Rules of Ct., Code Jud. Ethics, Canon 3

Requirement of judge to conduct quasi-judicial and extrajudicial activities as to minimize risk of conflict with judicial obligations, Cal. Rules of Ct., Code Jud. Ethics, Canon 4

Requirement of judge or judicial candidate to refrain from inappropriate political activity, Cal. Rules of Ct., Code Jud. Ethics, Canon 5

Mandated compliance with Code of Judicial Ethics, Cal. Rules of Ct., Code Jud. Ethics, Canon 6

Legal Topics:

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A. Court Commissioners

27-317 California Forms of Pleading and Practice--Annotated § 317.130

§ 317.130 Stipulation to Court Commissioner to Act as Temporary Judge

☐ Ascertain whether a court commissioner may act as a temporary judge in the case [for discussion, *see § 317.12[6]*].

☐ Determine whether the court commissioner is qualified to act as a temporary judge.

☐ Determine whether all other parties to the action will stipulate to the appointment of the court commissioner as temporary judge.

☐ Prepare stipulation of court commissioner to act as temporary judge [for form, *see § 317.170*] in the following number of copies:

☐ Original for filing.

☐ One copy for each party or his or her attorney, if he or she has one.

☐ One copy for the attorney who is to act as temporary judge.

☐ One office copy.

☐ Additional copies as desired.

☐ Sign the stipulation and obtain the signature of the other party, or if the party has an attorney, the

signature of the party's attorney.

☐ Have the commissioner selected as temporary judge sign the consent part of the combined form.

☐ Present the combined form to the presiding judge, or the supervising judge of a branch court, or to the judge in whose department the case is pending if the court does not have a presiding judge, and have the judge endorse his or her approval and order designating the person selected as temporary judge on the form.

☐ File the combined form containing the stipulation, consent, and the endorsed court approval and order, as well as the oath, with the court clerk.

Legal Topics:

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

§§ 317.131[Reserved]

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27-317 California Forms of Pleading and Practice--Annotated § 317.140

§ 317.140 Disqualification of Court-Appointed Temporary Judges

[1] Review of Attorney's Qualifications, Training, and Limitations

☐ Court-appointed temporary judge must be:

☐ Member of State Bar in good standing.

☐ Not plead guilty or no contest to a felony.

☐ Satisfied the training requirements of *Cal. Rules of Ct., Rule 2.812*.

☐ Satisfied all other court conditions for appointment.

☐ Attorney cannot serve if:

☐ The attorney, in any type of case, is appearing on the same day in the same courthouse as an attorney or a party.

☐ The attorney, in the same type of case, is presently a party to any action or proceeding in the court.

☐ In a family law or unlawful detainer case, one party is self-represented and the other party is reprented by an attorney or is an attorney.

[2] Moving for Disqualification and Withdrawal of Stipulation

- ☐ Prepare motion to withdraw stipulation.
- ☐ Prepare declaration of facts establishing good cause for party to withdraw stipulation.
- ☐ Serve and file motion.
- ☐ Mail or deliver a copy of the motion with the presiding judge.

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-317 California Forms of Pleading and Practice--Annotated § 317.141

§ 317.141 Appointment of Temporary Judge Requested by Parties

☐ Prepare the combined form containing the stipulation, consent by attorney to act as temporary judge, and the court approval and order appointing attorney as temporary judge [for form, *see § 317.180*] in the following number of copies:

☐ Original for filing.

☐ One copy for each party or his or her attorney, if he or she has one.

☐ One copy for the attorney who is to act as temporary judge.

☐ One office copy.

☐ Additional copies as desired.

☐ Prepare one original of the oath of office [for form, *see § 317.181*].

☐ Check with the county court clerk to obtain preprinted forms for the oath of office.

☐ Sign the stipulation and obtain the signature of the other party, or if the party has an attorney, the signature of the party's attorney.

☐ Have the attorney selected as temporary judge sign the consent part of the

combined form.

☐ Present the combined form to the presiding judge, or or the judge designated by the presiding judge.

☐ File the stipulation and signed order of appointment with the court clerk.

☐ Have person appointed as temporary judge take and subscribe oath of office [for form, *see § 317.181*].

☐ File the oath and certification signed by the temporary judge with the court clerk.

☐ The temporary judge may proceed with the hearing, trial, and determination of the cause after the stipulation, order, oath, and certification have been filed.

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-317 California Forms of Pleading and Practice--Annotated § 317.142

§ 317.142 Disqualification of Temporary Judge Requested by Parties

- ☐ Prepare motion to withdraw stipulation.
- ☐ Prepare declaration of facts establishing good cause for party to withdraw stipulation.
- ☐ Serve and file motion.
- ☐ Mail or deliver a copy of the motion to the temporary judge.

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-317 California Forms of Pleading and Practice--Annotated §§ 317.141-317.149

[Reserved]

§§ 317.141[Reserved]

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27-317 California Forms of Pleading and Practice--Annotated § 317.150

§ 317.150 Disqualification for Cause

☐ Prepare the verified written statement [for forms, *see §§ 317.190 -317.196*] objecting to the hearing of any matter or the trial of any issue of fact by a judge disqualified for cause under *Code Civ. Proc. §§ 170-170.5* in the following number of copies:

☐ Original for filing with clerk [*see Code Civ. Proc. § 170.3(c)(1)*].

☐ One copy for service on each party, or his or her attorney, who has appeared in the action [*Code Civ. Proc. § 170.3(c)(1)*].

☐ One copy for service on the judge alleged in the written statement to be disqualified [*Code Civ. Proc. § 170.3(c)(1)*].

☐ One office copy.

☐ Additional copies as may be desired.

☐ Sign the verification or have it signed.

☐ Prepare the proof of service in the same number of copies as the written statement and execute it or have it executed.

☐ Serve the written statement on each party, or his or her attorney, and on the judge

alleged to be disqualified.

☐ File original of written statement with the clerk.

☐ The statement of a party objecting to the judge on the ground of his or her disqualification must be presented at the earliest practicable opportunity after the discovery of the facts constituting the ground of the judge's disqualification [*Code Civ. Proc. § 170.3(c)(1)*].

☐ If the challenged judge answers the statement, file any agreement with other parties to the action on a judge to hear the disqualification statement with the court clerk within five days of notification of the answer [for discussion, *see § 317.50*; for form, *see § 317.198*].

☐ If the judge deciding the disqualification sets a hearing, attend the hearing and present argument and, if allowed, evidence of grounds for disqualification.

☐ Stipulate to hearing of action or proceeding by a particular judge, if desired [for form, *see § 317.199*]._____

NOTE:
Right to Stipulate. Parties had the right to stipulate to a judge to hear the action or proceeding under former *Code Civ. Proc. § 170(f)*. Although this right is no longer expressly provided for by statute, if the parties agree on a judge before the matter is reassigned by the presiding judge or the master calendar department, under *Code Civ. Proc. §§ 170.3(c)(2)* and *170.4(a)(2)*, without conceding his or her disqualification, a challenged judge may request any other judge agreed upon by the parties to sit and act in his or her place [*Code Civ. Proc. §§ 170.3(c)(2)* and *170.4(a)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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C. Disqualification of Judges for Cause Under Code Civ. Proc. §§ 170-170.5

27-317 California Forms of Pleading and Practice--Annotated §§ 317.151-317.159

[Reserved]

§§ 317.151[Reserved]

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D. Peremptory Disqualification of Judges Under Code Civ. Proc. § 170.6

27-317 California Forms of Pleading and Practice--Annotated § 317.160

§ 317.160 Peremptory Disqualification

☐ Determine whether to file an oral or written motion for peremptory disqualification.

☐ If an oral motion is desired, prepare text of motion and oral statement under oath in support of the motion before making motion and statement in court [*see CCP § 170.6(a)(2)*].

☐ If a written motion is desired, follow the steps in the remainder of this checklist.

☐ Prepare the written motion for peremptory disqualification [for form, *see § 317.210*] in the following number of copies:

- ☐ One original for presentment to the court [*see Code Civ. Proc. § 170.6(2), (a)(3)*].
- ☐ Duplicate original for filing with the court clerk [*see Code Civ. Proc. § 170.6(a)(3)*].
- ☐ One courtesy copy for service on each party, or his or her attorney if he or she is represented by counsel, who has appeared in the action.
- ☐ One courtesy copy for service on the judge or court commissioner subject to the written motion to disqualify.
- ☐ If the copy presented to the court is presented to the judge alleged to be prejudiced,

courtesy copy is not needed.

☐ One office copy.

☐ Additional copies as may be desired.

☐ Prepare the supporting affidavit [for form, *see § 317.211*] or declaration under penalty of perjury [for form, *see § 317.212*] in the same number of copies as the written motion.

☐ If the supporting paper is a declaration under penalty of perjury, sign it or have it signed. If an affidavit, sign it or have it signed before an officer authorized to take oaths [*see* Ch. 15, *Affidavits, Certificates, and Declarations*].

☐ If service on each party, or if he or she has an attorney, on his or her attorney, who has appeared in the action, and on the judge, is contemplated [for discussion, see *§ 317.76[2]*], prepare the proof of service in the same number of copies as the written motion.

☐ Serve each party, or if he or she has an attorney, his or her attorney, and the judge, if service on them is contemplated.

☐ Present original copy to court, and file the duplicate original of written motion, supporting affidavit or declaration, and proof of service, if any, with the court clerk.

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-317 California Forms of Pleading and Practice--Annotated §§ 317.161-317.169

[Reserved]

§§ 317.161[Reserved]

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PART V. FORMS
A. Court Commissioners

27-317 California Forms of Pleading and Practice--Annotated § 317.170

§ 317.170 Stipulation for Appointment of Court Commissioner as Temporary Judge

[1] FORM Stipulation for Appointment of Court Commissioner as Temporary Judge

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	STIPULATION FOR COURT COMMISSIONER
Defendants.	)	AS TEMPORARY JUDGE
	)	
	)	

_____

It is hereby stipulated by and between the undersigned attorneys that the above-entitled matter may be heard and tried until final determination by _____ [*full name*], a Court Commissioner in the County of _____ [*name*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

APPROVAL AND ORDER DESIGNATING TEMPORARY JUDGE

The stipulation of the parties hereto that _____ [*name*], a Court Commissioner in the County of _____ [*name*], act as temporary judge is hereby approved and it is hereby ordered that _____ [*name*] be, and he/she hereby is, appointed temporary judge in the above-entitled matter until final determination.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form combines the stipulation by the parties and approval and order of appointment of a temporary judge by a superior court. It should be noted, though, that many counties provide a form for use in this procedure. Hence, the county clerk should be contacted to determine if such a form is available.

[3] Procedure

The stipulation must be in writing and must set out in full the name and office address of the court commissioner agreed on to act as temporary judge, and must be submitted to the presiding judge, or to the judge in whose department the case is pending in courts which do not have a presiding judge. If the commissioner agreed on consents to act and if his or her selection is approved by the court, the approval and order designating him or her as temporary judge is endorsed on the stipulation, which is then filed.

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A. Court Commissioners

27-317 California Forms of Pleading and Practice--Annotated § 317.171

§ 317.171 Proceedings to Except to Report of Commissioner and Order of Court Thereon--General Form [Code Civ. Proc. § 259(b)]

[1] FORM Proceedings to Except to Report of Commissioner and Order of Court Thereon--General Form [Code Civ. Proc. § 259(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	EXCEPTION(S) TO REPORT OF COMMISSION-
Defendants.	)	ER AND ORDER OF COURT THEREON
	)	
	)	

_____ [Plaintiff *or* Defendant] excepts to the Report of the Commissioner and to the Order of the Court thereon dated _____ [*date*], on the following grounds:

[*LIST as appropriate, e.g.:*]

1. The evidence does not support the decision of the Commissioner.

2. The decision does not support the Order.

3. Errors of law were committed in the introduction or exclusion of evidence.

4. The Order is erroneous as a matter of law.

5. Newly discovered evidence.

6. Accident or surprise.

[*CONTINUE*]

SUMMARY STATEMENT

_____ [*Summary Statement of proceedings immediately leading to Report of Commissioner and Order of the Court to which exceptions are being taken, e.g.,* Defendant began the pending proceedings by an Order to Show Cause for the purpose of modifying the Court's order dated _____ (*date*), ordering defendant to pay _____ the sum of $_____ per _____ to plaintiff for support of the minor children. The pending matter was heard before Commissioner _____ (*name*) commencing on _____ (*date*), who made a report dated _____ (*date*), in favor of defendant which the court summarily approved by its order dated _____ (*date*)].

[*STATE grounds of exceptions as headings and develop each ground in the paragraph following the heading, e.g.:*]

1. The Evidence Does Not Support the Decision of the Commissioner.

The commissioner decided _____ (*set forth decision excepted to*). The only evidence before the commissioner on that issue was the testimony of _____ (*name*) who testified that _____ (*specify pertinent testimony*). There was no testimony or other evidence to rebut or contradict this evidence and no evidence to support the commissioner's decision.]

[*CONTINUE with additional grounds of exceptions stated as numbered headings and develop each ground in the paragraph following the heading*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This form of exception is for use by a party to a contested proceeding who wishes to take exception under *Code Civ. Proc. § 259(b)* to the report of a court commissioner and the court's order on the commissioner's decision [*see Chiarodit v. Chiarodit (1933) 218 Cal. 147, 149, 21 P.2d 562* ; *Weinfeld v. Weinfeld (1958) 159 Cal. App. 2d 608, 611, 324 P.2d 342* (grounds for exception); *see also Crocker Citizens Nat. Bank v. Knapp (1967) 251 Cal. App. 2d 875, 882, 60 Cal. Rptr. 66* (court's failure to make certain specific findings was not error when findings that were made amply justified its order); discussion at *§ 317.12[3][a] -[b]*].

[3] Filing and Serving

The exception must be filed within five days after receiving written notice of the court's action [*Code Civ. Proc. § 259(b)*; *see also Goetz v. Superior Court (1958) 49 Cal. 2d 784, 787, 322 P.2d 217]* . That five-day period commences to run when the written notice is signed and served by the prevailing party's attorney of record [*see Goetz v. Superior Court (1958) 49 Cal. 2d 784, 787, 322 P.2d 217* (notification by deputy court clerk of commissioner's recommendations and court order was insufficient to commence running of five-day period for filing exceptions)]. The party filing the exceptions must filed and serve a copy on the opposing party or his or her counsel within that same five-day period [*Code Civ. Proc. § 259(b)*].

[4] Hearing

The excepting party may argue the exceptions before the court on giving notice of motion for that purpose within 10 days from the entry of the court's order [*Code Civ. Proc. § 259(b)*].

[5] No Need to Grant New Trial to Set Aside Report

A special reference usually calls for a decision as to certain, specified issues only, without conclusions of law, and the report of the commissioner does not become the decision of the court without further action by the trial judge [*see Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 723, 269 P.2d 3]* . Thus, the report may be set aside by the court without the necessity of granting a new trial [*see Ellsworth v. Ellsworth (1954) 42 Cal. 2d 719, 723, 269 P.2d 3]* .

However, a party who does not file a written objection to the contents of the report or does not properly move to set aside the report waives his or her right to object to the findings [*see Martino v. Denevi (1986) 182 Cal. App. 3d 553, 557, 227 Cal. Rptr. 354* (referee)].

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27-317 California Forms of Pleading and Practice--Annotated § 317.172

§ 317.172 Notice of Motion to Set Aside Court's Order on Commissioner's Report

[1] FORM Notice of Motion to Set Aside Court's Order on Commissioner's Report

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION TO SET
Plaintiff,	)	ASIDE COURT'S ORDER ON COMMISSIONER'S
vs.	)	REPORT AND SUPPORTING MEMORANDUM
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*e.g.*, defendant] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.*, plaintiff] will, and hereby does, move for an order that the Report of the Commissioner dated _____ [*date*], and the Order approving that Report, be set aside by this court, and that the court hold and conduct further hearings with regard thereto. The motion will be made on the grounds set forth in

_____ [defendant's *or* plaintiff's] exceptions to the Report of the Commissioner and the Order of the Court thereon.

The motion will be based on this notice of motion, the Report of the Commissioner and Order of the Court thereon, exceptions of _____ [defendant *or* plaintiff] [attached hereto *or* heretofore filed and served], the attached memorandum in support of motion, the papers and records on file, and such oral and documentary evidence as may be presented at the hearing of this motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This form is for use by a party who wishes to notify another party that he or she will argue exceptions to the commissioner's report [for a form of exceptions, *see § 317.171*; for discussion, *see § 317.12[3][b]*]. *Code Civ. Proc. § 259(b)* provides that any party to any contested proceeding may except to the commissioner's report and subsequent court order made on it and may argue any exceptions before the court on giving notice of motion for that purpose within 10 days from entry "thereof." Because the exceptions and the notice of motion are filed and only the order is entered, it would appear that the "thereof" used in *Code Civ. Proc. § 259(b)* refers to the entry of the court's order. Under this construction, the notice of motion and supporting papers should be served within 10 days from entry of the order. Unless shortened by court order, the motion will still have to be made on 16 court days notice, plus additional time when service is by mail, fax, overnight delivery, or electronic service, unless time is shortened by court order [*Code Civ. Proc. §§ 1005(b), 1010.6(a)(6)*]. A motion is deemed made on the due service and filing of the notice of motion [*Code Civ. Proc. § 1005.5*].

[3] Accompanying Papers

A supporting memorandum must be filed and a copy served with this notice of motion [*Cal. Rules of Ct., Rules 3.1100, 3.1103, 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*; *see also Crocker Citizens Nat. Bank v. Knapp (1967) 251 Cal. App. 2d 875, 877, 60 Cal. Rptr. 66* ; *Sturm v. Sturm (1955) 138 Cal. App. 2d 25, 27, 291 P.2d 527* ; for discussion and forms, *see* Ch. 417, *Points and Authorities*].

At the time of the hearing, the moving party may want to have before the court affidavits that were before the commissioner [*see Crocker Citizens Nat. Bank v. Knapp (1967) 251 Cal. App. 2d 875, 881, 60 Cal. Rptr. 66* (not error for court to amend commissioner's findings of fact when court had before it all affidavits that commissioner considered in preparing findings)].

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27-317 California Forms of Pleading and Practice--Annotated § 317.173

§ 317.173 Order Sustaining, Setting Aside, or Modifying Court Order Which Adopted Commissioner's Findings

[1] FORM Order Sustaining, Setting Aside, or Modifying Court Order Which Adopted Commissioner's Findings

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	ORDER
Defendants.	)	
	)	
	)	

The motion of _____ [*moving party*] for an order to _____ [set aside *or* modify] the Order dated _____ [*date*], _____ [*specify contents of order*] came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

Upon proof made to the satisfaction of the court that the motion ought to be _____ [granted *or* denied],

[*EITHER*]

IT IS ORDERED that the motion be and it hereby is granted and _____ [*set out the particular order sought, e.g.,* the Order is set aside *or* the Order is modified as follows: _____ (*set forth manner in*

which Order is modified)].

[*OR*]

IT IS ORDERED that the motion be and it hereby is denied.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use by the court in sustaining, setting aside, or modifying a previous court order approving a commissioner's findings [*Code Civ. Proc. § 259(b)*; for a form of exceptions, *see § 317.171*; for discussion, *see § 317.12[3][b]*].

The court can modify the commissioner's report without a transcript of the proceedings before commissioner [*Weinfeld v. Weinfeld (1958) 324 P.2d 342]* or can rely on the affidavits that the commissioner considered in preparing his or her findings [*Crocker Citizens Nat. Bank v. Knapp (1967) 251 Cal. App. 2d 875, 881, 60 Cal. Rptr. 66]* .

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[Reserved]

§§ 317.174[Reserved]

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PART V. FORMS
B. Appointment and Disqualification of Temporary Judges

27-317 California Forms of Pleading and Practice--Annotated § 317.180

§ 317.180 Stipulation for Appointment of Attorney as Temporary Judge, Consent to Serve, and Court Approval and Order of Appointment [Cal. Const., art. VI, § 21; Cal. Rules of Ct., Rule 2.831]--General Form

[1] FORM Stipulation for Appointment of Attorney as Temporary Judge, Consent to Serve, and Court Approval and Order of Appointment [Cal. Const., art. VI, § 21; Cal. Rules of Ct., Rule 2.831]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	STIPULATION FOR APPOINTMENT OF ATTOR-
Defendants.	)	NEY AS TEMPORARY JUDGE
	)	
	)	

_____

It is hereby stipulated by and between the undersigned attorneys that the above-entitled matter may be heard and tried until final determination by _____ [*full name*], a member of the California State Bar, whose office address is _____ [*street*], _____ [*city*], California.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Defendant _____ [*name*]

CONSENT

I, the undersigned, am a member of the California State Bar and hereby consent to act as temporary judge until final determination of the above-entitled matter.
Dated: _____.

_____ [*signature of attorney*]

APPROVAL AND ORDER DESIGNATING TEMPORARY JUDGE

The stipulation of the parties hereto that _____ [*name*], a member of the State Bar of California, act as temporary judge is hereby approved and it is hereby ordered that _____ [*name*] be, and he/she hereby is, appointed temporary judge in the above-entitled matter until final determination, on his/her taking and subscribing the oath of office.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form combines the stipulation by the parties, consent by an attorney to act as temporary judge, and approval and order of appointment of a temporary judge by a superior court [*see Cal. Const., art. VI, § 21*; *Cal. Rules of Ct., Rule 2.831*; for discussion, *see § 317.22*]. It should be noted, though, that many counties provide a form for use in this procedure. Hence, the county clerk should be contacted to determine if such a form is available.

[3] Procedure

The stipulation must be in writing and must set out in full the name and office address of the attorney agreed on to act as temporary judge, and must be submitted to the presiding judge, or to the judge in whose department the case is pending in courts which do not have a presiding judge. If the attorney agreed on consents to act and if his or her selection is approved by the court, the approval and order designating him or her as temporary judge is endorsed on the stipulation, which is then filed. The temporary judge must take the oath of office [for form, *see § 317.181*], which must be attached to the stipulation and order of approval, and the case is then assigned to him or her for trial. At any time after the filing of the oath of office, the temporary judge may proceed with the hearing, trial, and determination of the cause [*Cal. Rules of Ct., Rule 2.831(c)*].

[4] Cross References

For discussion relating to criminal actions, see *California Criminal Defense Practice, § 2.08[1]* (Matthew Bender)

Note, *Right to an Attorney Judge in Justice Courts*, 63 Cal. L. Rev. (1975)

Witkin, Cal. Procedure, vol. 2, *Courts*, § 354 et seq. (4th ed. 1996)

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B. Appointment and Disqualification of Temporary Judges

27-317 California Forms of Pleading and Practice--Annotated § 317.181

§ 317.181 Oath of Office of Temporary Judge [Cal. Const., art. XX, § 3; Gov. Code §§ 1360-1369; Cal. Rules of Ct., Rule 2.814]--General Form

[1] FORM Oath of Office of Temporary Judge [Cal. Const., art. XX, § 3; Gov. Code §§ 1360-1369; Cal. Rules of Ct., Rule 2.814]--General Form

Oath of Office

I, _____ [*name*], do solemnly _____ [swear *or* affirm] that I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

And I do further _____ [swear *or* affirm] that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means; that within the five years immediately preceding the taking of this _____ [oath *or* affirmation] I have not been a member of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means except as follows: _____ [*if no affiliations, write in the words* No Exceptions] and that during such time as I hold the office of temporary judge _____ [*e.g.,* for the Superior Court of California for the County of _____], I will not advocate nor become a member of any party or organization, political or otherwise, that advocates the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means.

_____
[*signature of temporary judge*]

Subscribed and _____ [sworn to *or* affirmed before] me this _____ day of _____ [*date*].

_____
[*signature and official title*]
[*seal*]

[2] Source of Form

This form of oath is taken from *Cal. Const., art. XX, § 3*. Although the second paragraph of the oath in this form was held unconstitutional as a violation of the *First Amendment* in *Vogel v. County of Los Angeles (1967) 68 Cal. 2d 18, 26, 64 Cal. Rptr. 409, 434 P.2d 961* , *Cal. Const. art. XX, § 3* has not been amended to remove the invalid paragraph.

Many counties have printed forms of the oath of office available. Hence, counsel should contact the county clerk to determine if such a form is provided.

[3] Use of Form

The above form is for use as the oath of office required of an attorney to act as a temporary judge [*see Cal. Const., art. VI, § 21, art. XX, § 3*; *Gov. Code §§ 1360, 1362*; *Cal. Rules of Ct., Rule 2.831(b)*].

After the temporary judge has taken and subscribed the oath of office, the oath is attached to the stipulation and order of approval, and the case is then assigned to the temporary judge for trial. At any time after the filing of the oath, the temporary judge may proceed with the hearing, trial, and determination of the cause [*Cal. Rules of Ct., Rule 2.831(c)*].

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[Reserved]

§§ 317.182[Reserved]

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PART V. FORMS
C. Disqualification of Judges for Cause Under Code Civ. Proc. §§ 170-170.5

27-317 California Forms of Pleading and Practice--Annotated § 317.190

§ 317.190 Proceedings on Disqualification of Judge for Cause [Code Civ. Proc. §§ 170-170.5]--Written Statement of Disqualification [Code Civ. Proc. § 170.3(c)(1)]--General Form

[1] FORM Proceedings on Disqualification of Judge for Cause [Code Civ. Proc. §§ 170-170.5]--Written Statement of Disqualification [Code Civ. Proc. § 170.3(c)(1)]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	STATEMENT OF DISQUALIFICATION OF
Defendants.	)	JUDGE
	)	
	)	

_____

1. I, _____ [*name*], declare:

2. I am an attorney at law duly admitted to practice before all the courts of California and the attorney of record herein for the _____ [plaintiff *or* defendant]. In opposition to the selection of the Honorable _____ [*name of judge*], I now state and allege that:

3. The Honorable _____ [*name*] is disqualified from hearing the above-entitled matter because _____ [*state facts constituting the ground(s) of disqualification for cause under the appropriate subdivision(s) of Code Civ. Proc. § 170.1*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

VERIFICATION

I, _____ [*name*], am the attorney for the _____ [plaintiff *or* defendant] in the above-entitled matter. I have read the foregoing written statement for the disqualification for cause of the Honorable _____ [*name*] as Judge and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

This form is for general use as a written statement regarding the disqualification for cause of a judge, court commissioner, or referee [*Code Civ. Proc. § 170.5(a)*]. Whenever a judge who should disqualifiy himself or herself fails or refuses to do so, any party to the action or proceeding may file with the clerk a written statement objecting to the hearing or trial before that judge, and setting forth the facts constituting the ground of the disqualification of the judge [*Code Civ. Proc. § 170.3(c)(1)*; *see* discussion at *§§ 317.46, 317.48*]. For forms alleging grounds of disqualification that may be used in place of Paragraph 3 of this form, see *§§ 317.191 -317.196*.

[3] Requirement That Facts Be Set Forth

The statement must set forth facts, not conclusions, from which a judge's disqualification for cause appears probable as to an issue or issues to be tried [*see Calhoun v. Superior Court (1958) 51 Cal. 2d 257, 260, 331 P.2d 648* ; *Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 117, 62 Cal. Rptr. 274* ; *Ensher, Alexander & Barsoom v. Ensher (1964) 225 Cal. App. 2d 318, 323, 37 Cal. Rptr. 327]* and if a statement of disqualification is legally insufficient, a judge may disregard it or strike it from the files [*Code Civ. Proc. § 170.4(b)*; *Keating v. Superior Court (1955) 45 Cal. 2d 440, 443, 289 P.2d 209* ; *In re Morelli (1970) 11 Cal. App. 3d 819, 850, 91 Cal. Rptr. 72]* . For further discussion of the requirement that a judge strike an insufficient statement, see *§ 317.47*

[4] Verification

Every statement must be verified in the manner prescribed by *Code Civ. Proc. § 446* for the verification of pleading [*Code Civ. Proc. § 170.3(c)(1)*] or by declaration under penalty of perjury as in the foregoing form [*see Code Civ. Proc. § 2015.5*].

[5] Timely Filing Required

The statement of a party objecting to the judge on the ground of his or her disqualification for cause must be presented at the earliest practicable opportunity after discovery of the facts constituting the ground of the judge's disqualification [*Code Civ. Proc. § 170.3(c)(1)*; *see also Schorr v. Superior Court (1980) 105 Cal. App. 3d 568, 571, 164 Cal. Rptr. 478* ; *Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal. App.3d 143, 150, 91 Cal. Rptr. 193* ; *Mayo v. Beber (1960) 177 Cal. App. 2d 544, 550, 2 Cal. Rptr. 405]* ; otherwise, it is deemed waived [*see Caminetti v.*

Pac. Mutual L. Ins. Co. (1943) 22 Cal. 2d 386, 391, 139 P.2d 930 ; *Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal. App. 3d 143, 150, 91 Cal. Rptr. 193* ; *Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 115, 62 Cal. Rptr. 274* ; *Mayo v. Beber (1960) 177 Cal. App. 2d 544, 550, 2 Cal. Rptr. 405]* . Obviously, the statement cannot be required to be presented before it is known which judge will hear the matter [*Hollingsworth v. Superior Court (1987) 191 Cal. App. 3d 22, 27-28, 236 Cal. Rptr. 193]* . In any event, the statement should be presented before commencement of the trial or hearing to avoid the possibility of having to continue the trial or hearing with that judge only to have the matter tried or heard again if the judge is found to be disqualified [*Code Civ. Proc. § 170.4(c)*]. Note that when the proceeding has been set for trial or hearing more than 30 days in advance before a judge whose name was known at the time, or when a proceeding is filed in a single judge court or has been assigned to a single judge for comprehensive disposition, the trial or hearing will be deemed to have commenced for purposes of *Code Civ. Proc. § 170.4(c)* 10 days prior to the date scheduled for the trial or hearing as to any grounds for disqualification known before that time [*Code Civ. Proc. § 170.4(c)(2)*]. In other situations commencement is indicated by the start of voir dire, by the swearing of the first witness, or by the submission of a motion to the judge for decision [*Code Civ. Proc. § 170.4(c)(1)*; *see also* discussion at *§ 317.56*].

[6] Service

Copies of the written statement must be served on each party or his or her attorney who has appeared and shall be personally served on the judge alleged to be disqualified, or on his or her clerk, provided that the judge is present in the courthouse or in chambers [*Code Civ. Proc. § 170.3(c)(1)*].

[7] Filing

The written statement is filed with the court clerk [*Code Civ. Proc. § 170.3(c)(1)*]. When a party has filed a written statement regarding a judge's disqualification, which meets the requirements of *Code Civ. Proc. § 170.3(c)(1)*, the judge has no power to act in the proceeding until the question of his or her disqualification has been determined except as provided in *Code Civ. Proc. § 170.4* [*Code Civ. Proc. § 170.4(d)*; for discussion of a judge's powers under *Code Civ. Proc. § 170.4*, see *§ 317.34[2]*].

[8] Cross References

For memoranda regarding writs of mandate to restrain judge from acting after alleged disqualification for cause pursuant to *Code Civ. Proc. §§ 170-170.5*, see California Points and Authorities, Ch. 130, *Judges*

Frankel, *Judicial Conduct and Removal of Judges for Cause in California*, *36 So. Cal. L. Rev. 72 (1962)*

Witkin, California Procedure, Vol. 2, *Courts*, § 125 (4th ed. 1996)

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27-317 California Forms of Pleading and Practice--Annotated § 317.191

§ 317.191 Allegations Supporting Disqualification--Judge Is a Party or Has Knowledge of Disputed Evidentiary Facts [Code Civ. Proc. § 170.1(a)(1), (4)]

[1] FORM Allegations Supporting Disqualification--Judge is a Party or Has Knowledge of Disputed Evidentiary Facts [Code Civ. Proc. § 170.1(a)(1), (4)]

The Honorable _____ [*name*] is disqualified from hearing the above-entitled matter in that _____ [*state the facts constituting grounds for disqualification as a party under Code Civ. Proc. § 170.1(a)(4) or as a person with knowledge of disputed facts under Code Civ. Proc. § 170.1(a)(1), e.g.,* contrary to Section _____ (170.1(a)(4) *or* 170.1(a)(1)) of the Code of Civil Procedure, Judge _____ (*name*) _____ (is a defendant *or* has knowledge of disputed evidentiary facts and is likely to be a material witness) in the present action as a result of his/her involvement in an automobile accident on _____ (*date*)].

[2] Use of Form

The form of allegation in *[1], above*, is for inclusion in a statement of disqualification of a judge who is involved in a pending action as a party or as a relative, officer, director, or trustee of a party [*Code Civ. Proc. § 170.1(a)(4)*; *see* discussion at *§ 317.37[2]*], or who has knowledge of disputed evidentiary facts concerning the proceeding or is related to someone who is likely to be called as a material witness [*Code Civ. Proc. § 170.1(a)(1)*; *see* discussion at *§ 317.37[3]*]. It may be used in place of the third paragraph in the form of statement of disqualification in § 317.190[1].

For comparison, see discussion of interests that would not disqualify a judge at § 317.39.

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27-317 California Forms of Pleading and Practice--Annotated § 317.192

§ 317.192 Allegations Supporting Disqualification--Judge Has Financial Interest in Subject Matter or Party [Code Civ. Proc. § 170.1(a)(3)]

[1] FORM Allegations Supporting Disqualification--Judge Has Financial Interest in Subject Matter or Party [Code Civ. Proc. § 170.1(a)(3)]

The Honorable _____ [*name*] is disqualified from hearing the above-entitled matter in that _____ [*state the facts constituting the ground or grounds of disqualification for financial interest under Code Civ. Proc. § 170.1(a)(3), e.g.,* contrary to *Sections 170.1(a)(3)* and *170.5(b) of the Code of Civil Procedure*, the Honorable _____ (*name*) owns shares of the defendant XYZ Corporation having a fair market value in excess of $30,000].

[2] Use of Form

The form of allegation in *[1], above*, is for inclusion in a statement of disqualification of a judge when the judge, the judge's spouse, or a minor child living in the household has a financial interest in the subject matter of the proceeding, or in a party to the proceeding. In the case of the judge and the judge's spouse, this includes an interest as a fiduciary. A judge has a duty to remain informed about the financial affairs of his or her spouse and any children living in the household [*Code Civ. Proc. § 170.1(a)(3)(C)*]. Financial interest is defined as an ownership of more than a one- percent legal or equitable interest in a party or any interest in a party of a fair market value excess of $1500, and includes relationships such as any active participant or advisor [*Code Civ. Proc. § 170.5(b)*]. Certain other interests, including a policyholder of a mutual insurance company, which were disqualifying interests under prior law, are now excepted from the definition of financial interest [*Code Civ. Proc. § 170.5(b)*]; for further discussion see *§§ 317.38* and *317.39*. This allegation may be used in place of the third paragraph in the form of statement of disqualification in *§ 317.190[1]*.

[3] Cross References

Witkin, California Procedure, Vol. 2, *Courts*, § 104 et seq. (4th ed. 1996)

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27-317 California Forms of Pleading and Practice--Annotated § 317.193

§ 317.193 Allegations Supporting Disqualification--Judge Has Relationship to Attorney [Code Civ. Proc. § 170.1(a)(5)]

[1] FORM Allegations Supporting Disqualification--Judge Has Relationship to Attorney [Code Civ. Proc. § 170.1(a)(5)]

The Honorable _____ [*name*] is disqualified from hearing the above-entitled matter in that _____ [*state the facts constituting grounds for disqualification pursuant to for relationship to an attorney under Code Civ. Proc. § 170.1(a)(5), e.g.,* contrary to *Section 170.1(a)(5) of the Code of Civil Procedure*, the Honorable _____ (*name*) is the _____ (*state relationship, e.g.,* father *or* mother), of _____ (*name of attorney*) who is counsel for _____ (*name*), a party to this action].

[2] Use of Form

The form of allegation in *[1], above*, is for inclusion in a statement of disqualification of a judge when a lawyer or a spouse of a lawyer in the proceeding is the spouse, former spouse, child, sibling, or parent of the judge or the judge's spouse, or when such a person is associated in the private practice of law with a lawyer in the proceeding [see *Code Civ. Proc. § 170.1(a)(5)*; *see* discussion at *§ 317.41*]. This allegation may be used in place of the third paragraph in the form of statement of disqualification in *§ 317.190[1]*.

[3] Cross References

Witkin, California Procedure, Vol. 2, *Courts*, §§ 111, 112 (4th ed. 1996)

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27-317 California Forms of Pleading and Practice--Annotated § 317.194

§ 317.194 Allegations Supporting Disqualification--Judge Was Former Counsel [Code Civ. Proc. § 170.1(a)(2)]

[1] FORM Allegations Supporting Disqualification--Judge Was Former Counsel [Code Civ. Proc. § 170.1(a)(2)]

The Honorable _____ [*name*] is disqualified from hearing the above-entitled matter in that _____ [*state the facts constituting grounds for disqualification as former counsel under Code Civ. Proc. § 170.1(a)(2), e.g.,* he/she was employed and retained as attorney and counsel for the _____ (*state, e.g.,* defendant), herein, contrary to *Section 170.1(a)(2) of the Code of Civil Procedure.* The Honorable _____ (*name*) was attorney of record in _____ (*name of court, e.g.,* Los Angeles Superior Court) for _____ (*specify, e.g.,* defendant) in a case involving exactly the same issues as those involved in this case, that is _____ (*describe nature of case, e.g.,* defendant's malpractice of medicine), the title of which case was _____ (*state title and number of case*). That case was _____ (*give disposition of case, e.g.,* settled out of court) on _____ [*date*], and the above-entitled case was filed on _____ [*d ate*], less than _____ (*state time, e.g.,* a year) after the Honorable _____ (*name*) made his/her appearance as one of the attorneys of record for _____ (*state, e.g.,* defendant)].

[2] Source of Form

The form of allegation in *[1], above*, was adapted from the affidavit filed in *Mayo v. Beber (1960) 177 Cal. App. 2d 544, 546-547, 2 Cal. Rptr. 405* .

[3] Use of Form

The form of allegation in *[1], above*, is for inclusion in a statement of disqualification when the judge served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for any party in the present proceeding or gave advice to any party in the present proceeding on any matter involved in the action or proceeding. In some situations, a judge is deemed to have served as a lawyer in the proceeding [*Code Civ. Proc. § 170.1(a)(2)*; for further discussion, see *§ 317.42*]. When one of those situations is the basis of the disqualification [*see Code Civ. Proc. § 170.1(a)(2)* (*set forth in § 317.42[1]*)], it is necessary to allege that the prior

representation took place within the past two years, as is done in this form [*see Wickoff v. James (1958) 159 Cal. App. 2d 664, 669-671, 324 P.2d 661* (showing was insufficient to establish ground of disqualification when it did not appear how far in past judge was employed as attorney for defendant)].

This allegation may be used in place of the third paragraph in the form of statement of disqualification in § 317.190[1].

[4] Cross References

Witkin, California Procedure, Vol. 2, *Courts*, § 113-115 (4th ed. 1996)

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27-317 California Forms of Pleading and Practice--Annotated § 317.195

§ 317.195 Allegations Supporting Disqualification--Judge Is Biased or Prejudiced [Code Civ. Proc. § 170.1(a)(6)]

[1] FORM Allegations Supporting Disqualification--Judge is Biased or Prejudiced [Code Civ. Proc. § 170.1(a)(6)]

The Honorable _____ [*name*] is disqualified from hearing the above-entitled matter in that _____ [*state the facts constituting grounds for disqualification for bias or prejudice under Code Civ. Proc. § 170.1(a)(6), e.g.,* contrary to *Section 170.1(a)(6) of the Code of Civil Procedure*, the Honorable _____ (*name*) has indicated his/her grave reservations about hearing the above-entitled matter, an _____ (*describe action, e.g.,* adoption hearing) at which the two petitioners who are _____ (*describe characteristic about which judge is biased or prejudiced, e.g.,* deaf-mutes) are seeking to _____ (*explain, e.g.,* adopt a three-month-old baby girl). (The petitioners are healthy and qualified in every respect and have been recommended as prospective parents by numerous experts and professionals.)

The Honorable _____ (*name*) has indicated his/her bias or prejudice in the following ways: _____ (*describe conduct, e.g.,* he/she has stated his/her uncertainty as to whether he/she can go through with hearing the case at all; he/she has stated that he/she believes petitioners' home is not a "normal" one; and he/she has written a letter to the Bureau of Adoptions with reference to the cause suggesting that "this adoption should be nipped in the bud" before it reaches the hearing stage).

Thus, the Honorable _____ (*name*) is prevented from deciding the case according to the evidence and is unable to conduct a fair, unbiased, or unprejudiced hearing on any of the issues of fact or of law which will arise].

[2] Source of Form

The form of allegation in [a], *above*, is adapted from the facts of *Adoption of Richardson (1967) 251 Cal. App. 2d 222, 232-237, 59 Cal. Rptr. 323* .

[3] Use of Form

The form of allegation in *[1], above*, is for inclusion in a statement of disqualification of a judge in a case when, by

reason of the judge's bias or prejudice, a person aware of the facts might reasonably entertain a doubt that a fair and impartial trial would be had before him or her, when there is substantial doubt about the judge's capacity to be impartial, or when the interests of justice require the judge's recusal. Bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification [*see Code Civ. Proc. § 170.1(a)(6)(B)(iii)* (discussed at *§ 317.43*)]. This allegation may be used in place of the third paragraph in the form of statement of disqualification in *§ 317.190[1]*.

[4] Hearing on Disqualification

If a judge denies his or her disqualification for bias or prejudice, the judge is unable to pass on the question of disqualification [*see Code Civ. Proc. § 170.3(c)(5)* (discussed at *§ 317.50*)]. The question of disqualification is to be heard and determined by some other judge agreed on by the parties who have appeared in the action or proceeding [*Code Civ. Proc. § 170.3(c)(5)*]. Apparently, however, the parties are often unable to agree on another judge because of the fact that the judges may all be acquainted. If the parties agree, some other judge will be assigned by the Chairman of the Judicial Council to hear and determine the question of disqualification for bias and prejudice [*see Code Civ. Proc. § 170.3(c)(5)*].

[5] Bias or Prejudice

Bias or prejudice under former *Code Civ. Proc. § 170(5)* (*now see Code Civ. Proc. § 170.1(a)(6)*) consists of a mental attitude or disposition of a judge toward a party to the litigation [*Ensher, Alexander & Barsoom v. Ensher (1964) 225 Cal. App. 2d 318, 323, 37 Cal. Rptr. 327]* . If it is sufficiently serious to impair a judge's impartiality so that it appears probable that a fair trial cannot be held, a judge will be disqualified [*see Ensher, Alexander & Barsoom v. Ensher (1964) 225 Cal. App. 2d 318, 322-323, 37 Cal. Rptr. 327]* .

Code Civ. Proc. § 170.1(a)(6)(A)(iii), providing for disqualification whenever a judge's impartiality might reasonably be questioned, establishes a fundamentally objective standard for disqualification, and the party seeking disqualification no longer need prove that the judge is actually biased. Rather, disqualification is mandated if a reasonable person would entertain doubts concerning the judge's impartiality [*United Farm Workers of America v. Superior Court (1985) 170 Cal. App. 3d 97, 103-104, 216 Cal. Rptr. 4* ; *see Ng v. Superior Court (1997) 52 Cal. App. 4th 1010, 1024, 61 Cal. Rptr. 2d 49* (for disqualification under *Code Civ. Proc. § 170.1(a)(6)(C)* court need not determine whether there is actual bias)].

[6] Belief in Perjury by Party

A judge is disqualified under former *Code Civ. Proc. § 170(5)* (*now see Code Civ. Proc. § 170.1(a)(6)*) from retrying a case if, during the prior trial, he or she has stated that a party has willfully sworn falsely and that he or she would have no confidence in the party's testimony [*Keating v. Superior Court (1955) 45 Cal. 2d 440, 444, 289 P.2d 209* ; *see also* discussion in *§ 317.43[3]*].

[7] Fixed Opinion

A judge is disqualified under former *Code Civ. Proc. § 170(5)* (*now see Code Civ. Proc. § 170.1(a)(6)*) if he or she has a fixed opinion as to some characteristic of a party such that the judge is prevented from deciding the case according to the evidence [*see Adoption of Richardson (1967) 251 Cal. App. 2d 222, 232, 59 Cal. Rptr. 323* ; *see also* further discussion in *§ 317.43[4]*].

[8] Nondisqualifying Matters

Examples of alleged causes of bias or prejudice that have been held to be insufficient to disqualify a judge under former *Code Civ. Proc. § 170(5)* (*now see Code Civ. Proc. § 170.1(a)(6)*) are numerous and varied [*see* discussion in *§ 317.43[5]*], but many of the cases which discuss this issue may be classified under the following five headings [*see*

Kreling v. Superior Court (1955) 25 Cal. 2d 305, 310-312, 153 P.2d 734 ; *In re Morelli (1970) 11 Cal. App. 3d 819, 843-844, 91 Cal. Rptr. 72* ; *Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 116-117, 62 Cal. Rptr. 274* ; *Rohr v. Johnson (1944) 65 Cal. App. 2d 208, 211, 150 P.2d 5]* :

- Erroneous rulings against a litigant.
- Opinion uttered in the discharge of judicial duty.
- Error on a question of law.
- Opinion based on actual observance in participation in legal proceedings.
- Prior information without hostility.

[9] Cross References

Witkin, California Procedure, Vol. 2, *Courts*, § 116 et seq. (4th ed. 1996)

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27-317 California Forms of Pleading and Practice--Annotated § 317.196

§ 317.196 Allegations Supporting Disqualification--Judge Has Physical Impairment [Code Civ. Proc. § 170.1(a)(7)]

[1] FORM Allegations Supporting Disqualification--Judge Has Physical Impairment [Code Civ. Proc. § 170.1(a)(7)]

The Honorable _____ [*name*] is disqualified from hearing the above-entitled matter in that _____ [*state the facts constituting grounds for disqualification for physical impairment under Code Civ. Proc. § 170.1(a)(7), e.g.,* the Honorable _____ (*name*) was hospitalized as a result of an accident, the continuing effects from which have prevented him/her from keeping regular court hours, and on numerous occasions have caused in the hours in which the above-entitled court could sit and hear a cause to be uncertain and not regular. Contrary to *Section 170.1(a)(7) of the Code of Civil Procedure*, the judge's inability to properly conduct the proceedings would work a hardship on _____ (plaintiff *or* defendant)].

[2] Use of Form

The form of allegation in [a], *above*, is for inclusion in a statement of disqualification of a judge who has a physical impairment which renders him or her unable to properly perceive the evidence or properly conduct the proceedings [*see Code Civ. Proc. § 170.1(a)(7)*; *see* discussion at *§ 317.44*]. This allegation may be used in place of the third paragraph in the form of statement of disqualification in § 317.190[1].

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27-317 California Forms of Pleading and Practice--Annotated § 317.196A

§ 317.196A Allegations Supporting Disqualification--Judge Has Prospective Employment As Dispute Resolution Professional [Code Civ. Proc. § 170.1(a)(8)]

[1] FORM Allegations Supporting Disqualification--Judge Has Prospective Employment As Dispute Resolution Professional [Code Civ. Proc. § 170.1(a)(8)]

The Honorable _____ [name] is disqualified from hearing the above-entitled matter in that _____ [*state the facts constituting grounds for disqualification for a current arrangement for prospective employment as a dispute resolution neutral or participation in discussions regarding the same in the past two years under Code Civ. Proc. § 170.1(a)(8), e.g.,* contrary to *Section 170.1(a)(8) of the Code of Civil Procedure,* he/she has a current arrangement for future employment as a _____ (*type of dispute resolution neutral, e.g.,* arbitrator, mediator, temporary judge, etc., *or if there is no current arrangement, specify that the judge has participated in discussions regarding employment as a dispute resolution neutral in the past two years within the definition of Code Civ. Proc. § 170.1(a)(8)(B)(i)*) with _____ (*party to the proceeding within the definition of Code Civ. Proc. § 170.1(a)(8)(B)(ii)*) and that party _____ (*e.g., is involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding, or, if the party is not involved in the proceeding, specify that the matter before the judge relates to the enforcement of an agreement to submit a matter to dispute resolution or the appointment of a dispute resolution professional*)].

[2] Use of Form

The form of allegation in *[1], above,* is for inclusion in a statement of disqualification of a judge when the judge either has a current arrangement or has been involved in discussions regarding an arrangement to become a dispute resolution neutral and either the arrangement or discussion was with a party to the case or the case before the judge includes issues pertaining to the enforcement of an agreement to submit a dispute to alternative dispute resolution or the appointment or use of a dispute resolution neutral [*see Code Civ. Proc. § 170.1(a)(8)*; *see* discussion at *§ 317.44A*]. This allegation may be used in place of the third paragraph in the form of statement of disqualification in *§ 317.190[1]*.

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27-317 California Forms of Pleading and Practice--Annotated § 317.197

§ 317.197 Stipulation by Parties Waiving Disqualification of Judge [Code Civ. Proc. § 170.3(b)(1), (2)]

[1] FORM Stipulation by Parties Waiving Disqualification of Judge [Code Civ. Proc. § 170.3(b)(1), (2)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	STIPULATION BY PARTIES WAIVING DIS-
Defendants.	)	QUALIFICATION
	)	
	)	

The parties to the above-entitled matter hereby stipulate in writing that the above-entitled matter may be heard by the Honorable _____ [*name of judge*], a judge of the above-entitled court. The disqualification for cause that is being waived by this written stipulation is a disqualification of that judge under _____ [*specify subsection e.g.*, (a)(1)] of *Section 170.1 of the Code of Civil Procedure* _____ [*set forth basis of disqualification e.g.*, because the judge's daughter-in-law is likely to be a material witness in this proceeding].
Dated: _____.

_____ [*signature*]
Plaintiff
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

_____ [*signature*]
Defendant
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant

[2] Use of Form

The form of stipulation at *[1], above,* is for use when parties choose to waive the judge's disqualification. A judge may, after disclosing the basis of his or her disqualification on the record, ask the parties and their attorneys whether they wish to waive the disqualification, but the judge must not seek to include a waiver and must avoid any effort to discover which lawyers or parties favored or opposed a waiver of disqualification [*Code Civ. Proc. §§ 170.3(b)(1), (2)*].

Disqualification cannot be waived if is based on the fact that the judge either [*Code Civ. Proc. § 170.3(b)(2)*]:

- Has a personal bias or prejudice concerning a party, or

- Served as an attorney in the matter in controversy, or has been a material witness concerning that matter.

A waiver of disqualification must recite the basis for disqualification, and is effective only when signed by all parties and their attorneys and filed in the record [*Code Civ. Proc. § 170.3(b)(1)*]. For further discussion, see *§ 317.54.*

[3] Cross Reference

Witkin, California Procedure Vol. 2, *Judges*, § 134 (4th ed. 1996)

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27-317 California Forms of Pleading and Practice--Annotated § 317.198

§ 317.198 Stipulation by Parties Agreeing on Judge to Hear Question of Disqualification [Code Civ. Proc. § 170.3(c)(5)]

[1] FORM Stipulation by Parties Agreeing on Judge to Hear Question of Disqualification [Code Civ. Proc. § 170.3(c)(5)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	STIPULATION BY PARTIES ON JUDGE TO
_____ [*names*],	)	HEAR QUESTION OF DISQUALIFICATION
Defendants.	)	
	)	
	)	

The parties to the above-entitled matter hereby stipulate and agree through their respective counsel that the question of the disqualification of the Honorable _____ [*name*], a Judge of the above-entitled court, who has denied his/her disqualification as judge to hear the above-entitled matter, may be heard and determined at a time and place set by the Honorable _____ [*name*], a Judge of the above-entitled court.

This stipulation and agreement is made pursuant to subparagraph (c)(5) of *Section 170.3 of the Code of Civil Procedure*
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant

[2] Use of Form

This form is for use when the parties have agreed on a particular judge to hear the question of the disqualification of the judge who is alleged in the written statement to be disqualified. No judge of a court of record, who denies his or her disqualification, may hear or pass on the question of his or her own disqualification; but in every case, the question of the judge's disqualification must be heard and determined by some other judge agreed on by the parties who have appeared in the action [*Code Civ. Proc. § 170.3(c)(5)*; *see also § 317.50*].

[3] Parties' Failure to Agree

[a] Assignment of Judge

In the event that the parties fail to agree on a judge to hear and determine the question of disqualification, the question must be heard and determined by a judge assigned by the Chairperson of the Judicial Council [*Code Civ. Proc. § 170.3(c)(5)*].

[b] Duty of Clerk

If the parties fail to agree on a judge to determine the question of the disqualification, within five days of notification of the judge's answer, it is the duty of the clerk to notify the executive officer of the Judicial Council of the need for a selection [*Code Civ. Proc. § 170.3(c)(5)*].

[c] Selection by Judicial Council

The selection shall be made as expeditiously as possible by the chairperson of the Judicial Council, or if the chairperson is unable to act, the vice-chairperson [*Code Civ. Proc. § 170.3(c)(5)*].

[d] No Challenge to Judge Determining Disqualification

No challenge, either for cause or peremptory, may be made against the judge selected to decide the question of disqualification [*Code Civ. Proc. § 170.3(c)(5)*].

[4] Cross Reference

Witkin, California Procedure, Vol. 2, *Courts*, § 128 (4th ed. 1996)

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27-317 California Forms of Pleading and Practice--Annotated § 317.199

§ 317.199 Stipulation by Parties for Transfer to Judge Agreed on [Code Civ. Proc. §§ 170.3(c)(2), 170.4(a)(2)]

[1] FORM Stipulation by Parties for Transfer to Judge Agreed on [Code Civ. Proc. §§ 170.3(c)(2), 170.4(a)(2)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	STIPULATION BY PARTIES FOR TRANSFER
Defendants.	)	TO JUDGE AGREED ON
	)	
	)	

The parties to the above-entitled matter hereby stipulate and agree through their respective counsel that the above-entitled matter may be heard by the Honorable _____ [*name*], a Judge of the above-entitled court.

This stipulation and agreement is made as a result of the fact that _____ [*set forth basis of stipulation, e.g.*, the Honorable _____ (*name*) has recused himself/herself *or* a statement of disqualification has been filed challenging the Honorable _____ (*name*) *or* the Honorable _____ (*name*) has filed his/her written consent to disqualification in the above-entitled matter *or* the Honorable _____ (*name*) has admitted his/her disqualification *or* the Honorable _____ (*name*) has failed to answer the written statement re his/her disqualification within the time allowed *or* it has been determined after hearing that the Honorable _____ (*name*) is disqualified as a judge to hear the above-entitled matter].

This stipulation and agreement authorizes the Honorable _____ (*name of disqualified or challenged judge*) to request pursuant to Code of Civil Procedure Section _____ [170.4(a)(2) *or* 170.3(c)(2)] that the Honorable _____ (*insert name of judge to whom matter is being transferred*) sit and act in his/her place in this matter.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant

[2] Use of Form

The form at *[1], above*, is for use when the parties have agreed on a particular judge to hear an action or a proceeding after a judge has been alleged or declared himself or herself to be disqualified. A challenged judge may request any other judge agreed on by the parties to sit and act in his or her place without conceding his or her disqualification [*Code Civ. Proc. § 170.3(c)(2)*; *see* discussion in *§ 317.51*].

A disqualified judge, notwithstanding his or her disqualification, still has the power to request any other judge agreed on by the parties to sit and act in his or her place [*Code Civ. Proc. § 170.4(a)(2)*].

[3] Transfer to Another Judge of Same Court

Under former *Code Civ. Proc. § 170(f)* the parties had a right to choose the judge to try or hear the matter so long as they could agree on a judge. There is no longer any statutory authority giving the parties the right to choose the trial judge, so parties wishing to so stipulate must do so before the presiding judge or master calendar department reassigns the matter.

When there is no judge of a court qualified to hear a proceeding, the chairperson of the Judicial Council assigns a judge to hear it [*Code Civ. Proc. § 170.8*].

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[Reserved]

§§ 317.200[Reserved]

California Forms of Pleading and Practice--Annotated

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Volume 27: Interpleader thru Juries and Jury Selection-Chs. 314-322
Chapter 317 JUDGES
PART V. FORMS
D. Peremptory Disqualification of Judges Under Code Civ. Proc. § 170.6

27-317 California Forms of Pleading and Practice--Annotated § 317.210

§ 317.210 Proceedings to Obtain Peremptory Disqualification of Judge, Court Commissioner, or Referee--Written Notice [Code Civ. Proc. § 170.6(a)(2)]

[1] FORM Proceedings to Obtain Peremptory Disqualification of Judge, Court Commissioner, or Referee--Written Notice [Code Civ. Proc. § 170.6(2)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	MOTION FOR PEREMPTORY DISQUALIFICA-
Defendants.	)	TION AND [AFFIDAVIT *or* DECLARATION] IN
	)	SUPPORT OF MOTION
	)	

TO THE HONORABLE _____ [*name*], _____ [*e.g.*, PRESIDING JUDGE OF THE ABOVE-ENTITLED COURT *or* THE JUDGE OF THE MASTER CALENDAR DEPARTMENT OF THE CIVIL DIVISION OF THE ABOVE-ENTITLED COURT *or other appropriate allegation*]:

The attorney for the _____ [plaintiff *or* defendant] in the above-entitled matter hereby moves that _____ [*specify matter to be heard, e.g.*, trial of the above-entitled matter *or other appropriate statement*], which involves a contested issue of law or fact, and which has been assigned to the Honorable _____ [*name*], _____ [Judge *or* Court Commissioner *or* Referee] of the above-entitled Court, be reassigned from that _____ [Judge *or* Court Commissioner *or* Referee], and that no matters hereinafter arising in this cause be heard by or assigned to the Honorable _____ [*name*], on the ground that said _____ [Judge *or* Court Commissioner *or* Referee] is prejudiced against

the _____ [plaintiff *or* defendant *or* attorney for the plaintiff *or* attorney for the defendant *or* interest of the _____ (*specify, e.g.,* plaintiff *or* defendant *or* attorney for the plaintiff *or* attorney for the defendant)] in this action.

This motion is based on the matters contained herein, on *Code of Civil Procedure Section 170.6*, and on the supporting _____ [Affidavit *or* Declaration Under Penalty of Perjury] of _____ [*name*] attached hereto and filed herewith.

WHEREFORE, _____ [plaintiff *or* defendant] prays that the relief herein requested be granted.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Use of Form

The form of motion in *[1], above*, is for use when a written motion to disqualify under *Code Civ. Proc. § 170.6* is made and is supported by an affidavit or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]. An oral motion supported by an oral statement under oath or declaration is also permitted [*Code Civ. Proc. § 170.6(a)(2), (a)(6)*]. For further discussion, see *§ 317.76*.

The motion lies if the judge, court commissioner, or referee before whom the action or proceeding is pending or to whom it is assigned is prejudiced against any party or attorney or the interest of any party or attorney so that party or attorney cannot or believes that he or she cannot have a fair and impartial trial or hearing before the challenged judge, court commissioner, or referee [*Code Civ. Proc. § 170.6(a)(2)*].

[3] Supporting Declaration or Statement Required

Whether the motion to disqualify the judge, court commissioner, or referee is made orally or in writing and without notice, a supporting affidavit [for form, *see § 317.211*], declaration [for form, *see § 317.212*], or oral statement under oath must be submitted [*Code Civ. Proc. § 170.6(a)(2), (3), (5)*; for further discussion, *see § 317.76[2] -[3]*].

[4] Time for Making Motion

A motion directed to the trial of a cause may not be heard after the trial has commenced, and a motion directed to a hearing may be made no later than the commencement of the hearing. When there is a master calendar, the motion must be made not later than the time that the cause is assigned for trial. When the cause has been assigned to a judge for all purposes, the motion must be made within 10 days after notice of that assignment, or, if the party has not yet appeared in the action, within 10 days after his or her appearance. When the judge, other than one assigned to the cause for all purposes, is known at least 10 days before the date set for trial or hearing, the motion must be made at least five days before that date [*Code Civ. Proc. § 170.6(a)(2)*; for further discussion, *see § 317.77[4]* and *[6]*].

The interplay among these rules has been clarified by the California Supreme Court as follows [*People v. Superior Court (Lavi) (1993) 4 Cal. 4th 1164, 1185, 17 Cal. Rptr. 2d 815, 847 P.2d 1031]* :

- The master calendar rule applies when a trial-ready case is assigned to a court that is ready and able to hear the case [*see § 317.77[4][f]*];

- When the master calendar rules are not met, either the all-purpose assignment rule [*see §*

317.77[4][g]] or the 10-day/5-day rule [*see § 317.77[4][e]*] may apply;

- The all-purpose assignment rule applies when a litigant shows that a case assignment instantly identifies the judge who is reasonably certain to preside over substantial remaining matters from that point forward, including the trial;

- When neither the master calendar rule nor the all purpose assignment rule controls, a litigant may invoke the 10-day/5-day rule as soon as the case is assigned to a known judge;

- When no reasonable certainty exists as to the trial judge's identity, the general rule applies permitting a challenge at any time before trial.

If the court in which the action is pending is authorized to have no more than one judge and the motion claims that the duly elected or appointed judge of that court is prejudiced, the motion must be made before the expiration of 30 days from the date of the first appearance in the action of the party who is making the motion or whose attorney is making the motion [*Code Civ. Proc. § 170.6(a)(2)*].

[5] Only One Motion Permitted per Case

With one exception, no party or attorney will be permitted to make more than one Section 170.6 motion to disqualify a judge in any one action or proceeding [*Code Civ. Proc. § 170.6(a)(3)*; *see* discussion at *§ 317.76[2]*]. The exception, provided for in *Code Civ. Proc. § 170.6(a)(2)*, relates to motions made after reversal on appeal [*see* [f], *below*, and *§ 317.77[2]*].

If there is more than one plaintiff or similar party or more than one defendant or similar party appearing in the case, only one motion for each side may be made [*Code Civ. Proc. § 170.6(a)(3)*]. However, when parties on the same side have adverse interests to other parties on the same side, they may be treated as a separate side for the purposes of making the motion [*Home Ins. Co. v. Superior Court (2005) 34 Cal. 4th 1025, 1035, 22 Cal. Rptr. 3d 885, 103 P.3d 283* ; *see* *Johnson v. Superior Court (1958) 50 Cal. 2d 693, 700, 329 P.2d 5* (suggesting this might be situation when two drivers whose automobiles collide and injure plaintiff are joined as defendants)], and this rule is equally applicable in criminal cases [*Pappa v. Superior Court (1960) 54 Cal. 2d 350, 353-354, 5 Cal. Rptr. 703, 353 P.2d 311* (murder prosecution); *see* discussion at *§ 317.77[3]*].

[6] Motion on New Trial After Appeal

A motion to disqualify may be made following reversal on appeal of a trial court's decision or final judgment if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter. The motion must be made within 60 days after the party or the party's attorney has been notified of the assignment [*Code Civ. Proc. § 170.6(a)(2)*; *Hendershot v. Superior Court (1993) 20 Cal. App. 4th 860, 864-865, 24 Cal. Rptr. 2d 645* ; *see* *Stubblefield Construction Co. v. Superior Court (2000) 81 Cal. App. 4th 762, 769, 97 Cal. Rptr. 2d 121]* . The time limit for peremptory challenges found in the Trial Court Delay Reduction Act (*see Gov. Code § 68616(i)*) does not apply when a judgment has been reversed on appeal and returned to the trial court for retrial [*Stubblefield Construction Co. v. Superior Court (2000) 81 Cal. App. 4th 762, 769, 97 Cal. Rptr. 2d 121]* . For further discussion, see *§ 317.77[6][e]*.

[7] Cross Reference

Witkin, California Procedure, Vol. 2, *Courts*, § 135 et seq. (4th ed. 1996)

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27-317 California Forms of Pleading and Practice--Annotated § 317.211

§ 317.211 Affidavit in Support of Written or Oral Motion--Statutory Form [Code Civ. Proc. § 170.6(a)(5)]

[1] FORM Affidavit in Support of Written or Oral Motion--Statutory Form [Code Civ. Proc. § 170.6(5)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	AFFIDAVIT IN SUPPORT OF PEREMPTORY
Defendants.	)	CHALLENGE
	)	
	)	

_____ [*name*], being first duly sworn, deposes and says:

That he/she is a[n] _____ [party *or* attorney for a party] to the within _____ [action *or* special proceeding]. That _____ [*name*] the _____ [judge *or* court commissioner *or* referee] _____ [before *or* to] whom _____ [the trial of *or* a hearing in] the above-mentioned _____ [action *or* special proceeding] _____ [is pending *or* has been assigned], is prejudiced against the _____ [party *or* party's attorney *or* interest of the _____ (party *or* party's attorney)] so that affiant cannot or believes that he/she cannot have a fair and impartial trial or hearing before such _____ [judge *or* court commissioner *or* referee].

_____ [*signature*]
Subscribed and sworn to before me this _____ day of _____.
_____ [*signature*]

[Clerk *or* Notary Public *or other officer administering oath*]

[2] Source of Form

This form of affidavit in *[1], above*, is substantially in the form set forth in *Code Civ. Proc. § 170.6(a)(5)*.

[3] Use of Form

The form in [1], *above* may be used if counsel desires to use an affidavit to support a written or oral motion for peremptory disqualification of the judge, court commissioner, or referee. An affidavit filed pursuant to *Code Civ. Proc. § 170.6* must be in substantially the form set forth in *Code Civ. Proc. § 170.6(a)(5)*.

A declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*] may also be used and is specifically authorized by *Code Civ. Proc. § 170.6(a)(2), (3), (6)*.

A motion to disqualify may be without notice and may be written or oral. Whether written or oral, it must be supported by an affidavit, declaration under penalty of perjury, or oral statement under oath [*Code Civ. Proc. § 170.6(a)(2)*]. An oral statement under oath, as well as a declaration under penalty of perjury, must be in substantially the form set forth in *Code Civ. Proc. § 170.6(5)* [*Code Civ. Proc. § 170.6(a)(6)*]. The better practice is to use the written affidavit or declaration whether the motion is written or oral. For further discussion, see *§ 317.76[2] -[3]*.

[4] Automatic Disqualification

The party's right to disqualify a judge, court commissioner, or referee for prejudice is automatic in the sense that the party's good-faith belief in the prejudice is sufficient without proof of any facts showing actual prejudice [*see Code Civ. Proc. § 170.6(a)(3)*; *see also McCartney v. Commission on Judicial Qualifications (1974) 12 Cal. 3d 512, 531-532, 116 Cal. Rptr. 260, 526 P.2d 268* (judicial removal); *Mayr v. Superior Court (1964) 228 Cal. App. 2d 60, 61, 39 Cal. Rptr. 240* (dissolution action)]. Thus, once an affidavit of prejudice has been filed under *Code Civ. Proc. § 170.6*, the court has no jurisdiction to hold further proceedings in the matter except to inquire into the affidavit's timeliness or technical sufficiency under statute [*McCartney v. Commission on Judicial Qualifications (1974) 12 Cal. 3d 512, 531-532, 116 Cal. Rptr. 260, 526 P.2d 268* ; *Andrews v. Joint Clerks etc. Committee (1966) 239 Cal. App. 2d 285, 294, 48 Cal. Rptr. 646* ; *Lewis v. Linn (1962) 209 Cal. App. 2d 394, 399-400, 26 Cal. Rptr. 6]* . If an affidavit is timely and properly made, the challenged judge is vested with no discretion to determine the question of his or her actual prejudice [*see Mayr v. Superior Court (1964) 228 Cal. App. 2d 60, 62, 39 Cal. Rptr. 240]* , and immediate disqualification is mandatory [*McCartney v. Commission on Judicial Qualifications (1974) 12 Cal. 3d 512, 532, 116 Cal. Rptr. 260, 526 P.2d 268* ; *Jacobs v. Superior Court (1959) 53 Cal. 2d 187, 190, 1 Cal. Rptr. 9, 347 P.2d 9* ; *Mayr v. Superior Court (1964) 228 Cal. App. 2d 60, 62, 39 Cal. Rptr. 240]* .

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27-317 California Forms of Pleading and Practice--Annotated § 317.212

§ 317.212 Declaration in Support of Written or Oral Motion [Code Civ. Proc. §§ 170.6(a)(2), (6), 2015.5]

[1] FORM Declaration in Support of Written or Oral Motion [Code Civ. Proc. §§ 170.6(a)(2), (6), 2015.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	DECLARATION IN SUPPORT OF MOTION FOR
Defendants.	)	PEREMPTORY CHALLENGE
	)	
	)	

_____

I, _____ [*name*], declare that:

I am the _____ [*specify, e.g.,* attorney for the plaintiff *or* attorney for the defendant *or* plaintiff *or* defendant] in the above-entitled matter.

The Honorable _____ [*name*], _____ [Judge *or* Court Commissioner *or* Referee] _____ [before *or* to] whom _____ [the trial of *or* a hearing in] the above-entitled matter _____ [is pending *or* has been assigned], is prejudiced against the _____ [*specify, e.g.,* plaintiff *or* defendant *or* attorney for the plaintiff *or* attorney for the defendant *or* interest of the _____ (*specify, e.g.,* plaintiff *or* defendant *or* attorney for the plaintiff *or* attorney for the defendant)] so that declarant cannot or believes that he/she cannot have a fair and impartial _____ [trial *or* hearing] before such _____ [Judge *or* Court Commissioner *or* Referee].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form of declaration in *[1], above*, is for use as a declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*], in support of a written or oral motion for peremptory disqualification of a judge, court commissioner, or referee. Any party to or any attorney appearing in any action or special proceeding may establish prejudice of the judge, court commissioner, or referee, by a written or oral motion supported by a declaration under penalty of perjury that the judge, court commissioner, or referee before whom the action or proceeding is pending or to whom it is assigned is prejudiced against any such party or attorney or the interest of such party or attorney so that such party or attorney cannot or believes that he or she cannot have a fair and impartial trial or hearing before such judge, court commissioner, or referee [*Code Civ. Proc. § 170.6(a)(2)*].

A motion to disqualify may be without notice and may be written or oral. Whether written or oral, it must be supported by an affidavit, declaration under penalty of perjury, or oral statement under oath [*Code Civ. Proc. § 170.6(a)(2)*]. The declaration under penalty of perjury and the oral statement under oath must be in substantially the form set forth in *Code Civ. Proc. § 170.6(a)(5)* [*Code Civ. Proc. § 170.6(a)(6)*]. The better practice is to use the written affidavit or declaration whether the motion is written or oral.

For further discussion, see *§ 317.76[2] -[3]*.

[3] Cross Reference

For other forms of declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

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27-317 California Forms of Pleading and Practice--Annotated § 317.213

§ 317.213 Order of Transfer [Code Civ. Proc. § 170.6(a)(3)]

[1] FORM Order of Transfer [Code Civ. Proc. § 170.6(3)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	ORDER OF TRANSFER
Defendants.	)	
	)	
	)	

The _____ [oral *or* written] motion of the _____ [plaintiff *or* defendant] in the above-entitled matter for the peremptory disqualification of the Honorable _____ [*name*], _____ [Judge *or* Court Commissioner *or* Referee] of the above-captioned Court, and the supporting _____ [affidavit *or* declaration under penalty of perjury *or* oral statement under oath] of _____ [*name*], having been duly presented and _____ [made *or* filed], it is established, as provided in *Section 170.6 of the Code of Civil Procedure*, that the Honorable _____ [*name*], _____ [Judge *or* Court Commissioner *or* Referee] is prejudiced against the _____ [*specify, e.g.*, plaintiff *or* defendant *or* attorney for the plaintiff *or* attorney for the defendant] or the interest of that _____ [party *or* attorney] in the above-entitled matter.

THEREFORE, IT IS HEREBY ORDERED that the Honorable _____ [*name*], _____ [Judge *or* Court Commissioner *or* Referee] is relieved from his/her assignment _____ [*specify, e.g.*, as trial judge in the above-entitled matter *or* of hearing the motion of the _____ (plaintiff *or* defendant),

now set for hearing on _____ (*date*) *or other appropriate allegation*], and from any and all further assignments in this cause, and that the _____ [*specify, e.g.,* trial *or* hearing on the motion *or other*] shall proceed before the Honorable _____ [*name*], _____ [Judge *or* Court Commissioner *or* Referee], in Department _____ of this Court, at the time now set for _____ [*specify, e.g.,* trial of the above-entitled action *or* hearing on the motion *or other*].
Dated: _____.

_____ [*signature*]
[*designation of judge signing order, e.g.,* Judge of the Master Calendar Department of the Civil Division]

[2] Use of Form

The form of order in *[1], above*, is for use as the order of transfer that is made on a motion for peremptory disqualification of a judge, court commissioner, or referee. No judge, court commissioner, or referee of any superior court may try any civil or criminal action or any special proceeding when it is established as provided in *Code Civ. Proc. § 170.6* that he or she is prejudiced against any party or attorney or the interest of any party or attorney appearing in the action [*Code Civ. Proc. § 170.6(a)(1)*; *see also* discussion at *§ 317.80*].

[3] Reassignment

Once the motion is duly made and supported by affidavit, declaration, or oral statement under oath, without any further act or proof, the judge supervising the master calendar, if any, is required to assign some other judge, court commissioner, or referee to try the cause or hear the matter [*Code Civ. Proc. § 170.6(a)(3)*]. In other cases, the trial of the cause or the hearing of the matter must be assigned or transferred to another judge, court commissioner, or referee of the court in which the trial or matter is pending or, if there is no other judge, court commissioner, or referee of the court in which the trial or matter is pending, the Chairman of the Judicial Council must assign some other judge, court commissioner, or referee to hear such matter as promptly as possible [*Code Civ. Proc. § 170.6(a)(3)*].

Appointment of a court commissioner to try the case, however, requires the stipulation of the parties [*see* discussion in *§ 317.23[3]*].

[4] Cross Reference

Witkin, California Procedure, vol. 2, *Courts*, § 140 (4th ed. 1996)

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27-317 California Forms of Pleading and Practice--Annotated § 317.214

§ 317.214 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Following Refusal to Reassign Case Subsequent to Peremptory Disqualification Challenge [Code Civ. Proc. § 170.6]

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--Following Refusal to Reassign Case Subsequent to Peremptory Disqualification Challenge [Code Civ. Proc. § 170.6]

[*Caption. See Ch. 358, Mandate and Prohibition*]

[*If the petition is an original proceeding in the Supreme Court or Court of Appeal, include:*

TO THE HONORABLE _____ (CHIEF *or* PRESIDING) JUSTICE AND ASSOCIATE JUSTICES OF THE _____ (SUPREME *or* COURT OF APPEAL OF THE _____ (*number*) APPELLATE DISTRICT, DIVISION _____ (*number*)) OF THE STATE OF CALIFORNIA:]

Petitioner alleges:

1. Petitioner is _____ [*identify petitioner and describe capacity in which the proceeding is being brought, e.g.,* plaintiff in Action No. _____, which is currently on file with and pending before the Superior Court of the State of California, _____ County, and which is entitled _____ (*name*), Plaintiff, vs. _____ (*name*), Defendant].

2. _____ [*Allege capacity of respondents, e.g.,* Respondents are the Superior Court of California, _____ County, and the Honorable _____ (*name*), a Judge of that Court.]

3. _____ [*Allege capacity of real party in interest, e.g.,* The real party in interest is _____ (*specify, e.g.,* the defendant in the action described in Paragraph 1, *above*).]

4. _____ [*Summarize previous proceedings to demonstrate that the judge before whom the present action is pending, should be enjoined from proceeding, e.g.,* Petitioner is one of the _____ (*e.g.,* defendants) in two civil actions pending in the Superior Court. On _____ (*date*), the judge presiding in the civil master calendar department consolidated the two cases and assigned the consolidated action to Judge _____ (*name*) for purposes of ruling on a demurrer to the complaints. On _____ (*date*), Judge _____ (*name*) heard and overruled the demurrer. On _____ (*date*), the judge presiding in the civil master calendar assigned the consolidated action to Judge _____ (*name*) for all further proceedings. A motion to test the propriety of the case as a class action was set for _____ (*date*).]

5. Immediately on the assignment to Judge _____ (*name*) for all further proceedings, and in due compliance with the provisions of *Code of Civil Procedure Section 170.6*, petitioner filed his/her motion in writing to disqualify the respondent Judge from hearing the motion or any further proceedings in the action and filed in support of the motion his/her affidavit in substantially the form provided for by *Code of Civil Procedure Section 170.6(a)(5)*. A copy of the affidavit is attached to this petition as Exhibit A and made a part of it; a copy of the motion is also attached to this petition as Exhibit B and made a part of it. Because of the timely peremptory motion to disqualify, the respondent judge abused his/her discretion in retaining jurisdiction in this case.

6. On _____ [*date*], after being apprized of the motion of disqualification, the judge presiding in the master calendar department, contrary to the express directions of *Code of Civil Procedure Section 170.6(a)(3)*, denied the motion to disqualify on the grounds that it was not timely filed, refused to assign immediately some other judge _____ [*specify judicial function to be performed by respondent judge, e.g., to hear the motion to test the propriety of the case as a class action*], and set the matter for hearing on _____ [*date*], at _____ [*time*] on the law and motion calendar. The hearing has been continued to _____ [*date*], at _____ [*time*] and it is the intention of the respondent Judge to hear and decide the motion unless restrained by order of this court.

7. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition, in that _____ [*state specific facts showing absence of an adequate remedy such as appeal, e.g.,* under the California Supreme Court ruling in *People v. Hull (1991) 1 Cal. 4th 266, 276, 2 Cal. Rptr. 2d 526, 820 P.2d 1036* , a writ of mandate under *Code of Civil Procedure Section 170.3(d)* is the exclusive remedy to review a trial court's refusal of a motion to disqualify brought under *Code of Civil Procedure Section 170.6*].

WHEREFORE, petitioner prays:

1. That the court issue an alternative writ of mandate restraining the Honorable _____ [*name*], _____ [*specify, e.g.,* Judge of the Superior Court of California, _____ County], from _____ [*describe judicial function sought to be enjoined, e.g.,* hearing on motion to test propriety of the case as a class action] or to show cause before this court at a time specified by court order why it has not so done and why a peremptory writ should not issue;

2. That on return of the alternative writ and the hearing of this petition, this court issue its peremptory writ of mandate restraining the Honorable _____ [*name*], from _____ [*describe judicial function sought to be enjoined, e.g.,* hearing on motion to test propriety of the case as a class action];

3. For costs of this proceeding; and

4. For such other and further relief as the court deems just and proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

VERIFICATION

[*EITHER*]

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[*OR*]

I, _____ [*name*], am an attorney at law duly admitted and licensed to practice before all courts of this State and I have my professional office at _____ [*street address and city*], _____ County, California. I am [one of] the attorney(s) of record for petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

This form of petition is for use to file a petition for a writ of mandate in a superior court [*Cal. Const., art. VI, § 10*], a court of appeal, or the Supreme Court [*Cal. Const., art. VI, § 10*] for the purpose of restraining a particular judge from acting after he or she has been disqualified by reason of petitioner's having filed a peremptory challenge under the terms of *Code Civ. Proc. § 170.6* [*see* discussion at *§ 317.79[2]*; *see also Cal. Rules of Ct., Rules 8.204, 8.40,* 8.486 (form of appellate court briefs, number of copies and cover information, form of supporting documents for writ of mandate)].

[3] Allegations

A petition for a writ of mandate should allege:

- The identity and interest of petitioner (Paragraph 1) [*see Code Civ. Proc. § 1086*].
- The identity of respondent (Paragraph 2).

- The identity and interest of real party in interest (Paragraph 3) [*see Cal. Rules of Ct., Rule 8.486(a)(2)*].

- A summary of the proceedings giving rise to peremptory challenge (Paragraph 4).

- The filing of a timely and proper peremptory challenge divesting judge of jurisdiction to proceed (Paragraph 5) [*Code Civ. Proc. §§ 170.3(d), 170.6*; *see People v. Hull (1992) 1 Cal. 4th 266, 276, 2 Cal. Rptr. 2d 526, 820 P. 2d 1036* (*Code Civ. Proc. § 170.3* applies to peremptory challenges as well as challenges for cause)].

- The case was not reassigned and, unless compelled to reassign the case, the judge will continue to act without or in excess of jurisdiction (Paragraph 6).

- The absence of plain, speedy, and adequate remedy in ordinary course of law (Paragraph 7) [*Code Civ. Proc. § 1085*].

[4] Verification

In a superior court, a petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*; *see Cariaga v. Dryden (1866) 30 Cal. 244, 245* (verification by attorney)].

In an original proceeding in a court of appeal or the Supreme Court, the petition must be verified [*Cal. Rules of Ct., Rule 8.486(a)(4)*].

[5] Mandate Is Exclusive Remedy to Compel Judge to Disqualify Himself or Herself

The proper remedy to compel a judge to disqualify himself or herself is a writ of mandate [*People v. Hull (1992) 1 Cal. 4th 266, 276, 2 Cal. Rptr. 2d 526, 820 P. 2d 1036* (*Code Civ. Proc. § 170.3(d)*, making mandate exclusive remedy to review order refusing motion to disqualify judge, applies to peremptory challenges as well as to challenges for cause)]. The writ of mandate should be brought within 10 days of notice of the trial court's decision [*People v. Hull (1992) 1 Cal. 4th 266, 276, 2 Cal. Rptr. 2d 526, 820 P.2d 1036]* .

[6] When Judge Should Be Named Respondent

In a case in which a petitioner seeks to compel a particular judge to disqualify himself or herself, the judge is a proper party respondent to the proceeding. The main party, however, is the court, and the first respondent named in the petition should be the court followed by the name of the judge [*see Cal. Rules of Ct., Rule 8.486(a)(2)*].

[7] Service and Proofs of Service

Proof of service of a copy of the petition on each respondent and real party in interest must accompany the petition when it is offered for filing (except if, in its discretion and for good cause, the superior court has granted the application for the writ ex parte) [*Code Civ. Proc. § 1107*].

The proof of service must name each party represented by each attorney served. A petition accompanied by a defective proof of service will be filed, but, if a proper proof of service is not filed within five days, the court may strike the petition or impose a lesser sanction. However, a court may, in its discretion and for good cause, grant the petition ex parte without notice or service of the petition on the respondent and any real party in interest [*Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.486(e)*].

[8] Accompanying Papers

Proof of service of a copy of the petition on each respondent and real party in interest must accompany the petition when it is offered for filing (except if, in its discretion and for good cause, the superior court has granted the application for the writ ex parte) [*Code Civ. Proc. § 1107*].

In addition, the petition must be accompanied by a supporting memorandum and by proof of service of copies of the petition and accompanying memorandum on the respondent and any real party in interest named in the petition [*Cal. Rules of Ct., Rule 8.486(a)*]. If the writ petition seeks review of a trial court ruling, it must also be accompanied by a record adequate to permit the review, including

- Copies of the order or judgment.
- All documents and exhibits.
- A transcript or a declaration that a transcript has been ordered and is expected to be filed on a certain date or, if no transcript is available, an explanation of its unavailability and a summary of the proceedings.

If the petition requests a temporary stay, it must comply with the following or the reviewing court may decline to consider the request for a temporary stay [*Cal. Rules of Ct., Rule 8.486(a)(7)*]:

- The petition must explain the urgency [*Cal. Rules of Ct., Rule 8.486(a)(7)(A)*].
- The cover of the petition must prominently display the notice "STAY REQUESTED" and identify the nature and date of the proceeding or act sought to be stayed [*Cal. Rules of Ct., Rule 8.486(a)(7)(B)*].

The trial court and department involved and the name and telephone number of the trial judge whose order the request seeks to stay must appear either on the cover or at the beginning of the text [*Cal. Rules of Ct., Rule 8.486(a)(7)(C)*]; *see also Cal. Rules of Ct., Rule 8.486(c)* (format for documents and exhibits)].

A memorandum also customarily accompany a petition filed in a superior court [*see Code Civ. Proc. § 1090*; *Cal. Rules of Ct., Rule 3.1113*]. For a form of memorandum for use in accompanying the foregoing petition, see California Points and Authorities, Ch. 130, *Judges* (Matthew Bender).

[9] Cross References

For discussion, procedural guide, and forms related to proceedings seeking a writ of mandate, see Ch. 358, *Mandate and Prohibition*

For alternative forms of verification, see Ch. 572, *Verification*

Witkin, California Procedure, vol. 8, *Extraordinary Writs* (4th ed. 1997)

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27-317 California Forms of Pleading and Practice--Annotated § 317.215

§ 317.215 Judicial Council Form REC-001(N) Notice of Intent to Destroy Superior Court Records; Offer to Transfer Possession

[1] FORM Judicial Council Form REC-001(N) Notice of Intent to Destroy Superior Court Records; Offer to Transfer Possession

Click here to view image.

[2] Use of Form

The form of notice, *above*, is a mandatory Judicial Council form [*Cal. Rules of Ct., Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis*(R) *Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

For discussion of trial court records management, see *§ 317.84[5][h]*.

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27-317 California Forms of Pleading and Practice--Annotated § 317.216

§ 317.216 Judicial Council Form REC-001(R) Request for Transfer or Extension of Time for Retention of Superior Court Records

[1] FORM Judicial Council Form REC-001(R) Request for Transfer or Extension of Time for Retention of Superior Court Records

Click here to view image.

[2] Use of Form

The form of request, *above*, is an optional Judicial Council form [*Cal. Rules of Ct., Rule 1.35*]. This form is available in an interactive, electronic format in *LexisNexis*(R) *Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

For discussion of trial court records management, see *§ 317.84[5][h]*.

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27-317 California Forms of Pleading and Practice--Annotated § 317.217

§ 317.217 Judicial Council Form REC-002(N) Notice of Hearing on Request for Transfer or Extension of Time for Retention of Superior Court Records; Court Record; Release and Receipt of Records

[1] FORM Judicial Council Form REC-002(N) Notice of Hearing on Request for Transfer or Extension of Time for Retention of Superior Court Records; Court Record; Release and Receipt of Records

Click here to view image.

[2] Use of Form

The form of notice, *above*, is a mandatory Judicial Council form [*Cal. Rules of Ct., Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis*(R) *Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

For discussion of trial court records management, see *§ 317.84[5][h]*.

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27-317 California Forms of Pleading and Practice--Annotated § 317.218

§ 317.218 Judicial Council Form REC-002(R) Release and Receipt of Superior Court Records

[1] FORM Judicial Council Form REC-002(R) Release and Receipt of Superior Court Records

Click here to view image.

[2] Use of Form

The form of release, *above*, is a mandatory Judicial Council form [*Cal. Rules of Ct., Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis*(R) *Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

For discussion of trial court records management, see *§ 317.84[5][h]*.

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§ 317.219 Judicial Council Form REC-003 Report to the Judicial Council: Superior Court Records Destroyed, Preserved, And Transferred

[1] FORM Judicial Council Form REC-003 Report to the Judicial Council: Superior Court Records Destroyed, Preserved, And Transferred

Click here to view image.

[2] Use of Form

The form of report, *above*, is a mandatory Judicial Council form [*Cal. Rules of Ct., Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis*(R) *Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

For discussion of trial court records management, see *§ 317.84[5][h]*.

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27-317 California Forms of Pleading and Practice--Annotated § 317.220

§ 317.220 Complaint About a California Judge, Court Commissioner, or Referee

[1] FORM Complaint About a California Judge, Court Commissioner, or Referee

Confidential under California Constitution

Article VI, Section 18, and Commission Rule 102

Today's date:

Your name:

Your telephone number:

Your address:

Your attorney's name:

Your attorney's telephone number:

Name of judge:

OR

Name of court commissioner or referee:

(If your complaint involves a court commissioner or referee, you must first submit your complaint to the local court.

If you have done so, please attach copies of your correspondence to and from that court.)

Court:

County:

Name of case and case number:

Please specify what action or behavior of the judge, court commissioner or referee is the basis of your complaint.

Provide relevant dates and the names of others present. (Use additional sheets if necessary.)

Please indicate how you became aware of the Commission on Judicial Performance.

Return to: Commission on Judicial Performance
455 Golden Gate Avenue, Suite 14400
San Francisco, California 94102

Telephone: (415) 557-1200

Fax: (415) 557-1266

[2] Use of Form

The form of complaint, *above*, is reproduced from the Commission on Judicial Performance. For additional information on filing a complaint about a judge, court commissioner, or referee, see the Commission's website at http://cjp.ca.gov/.

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[2] Use of Form

[3] Constitutionality

[4] Entry of Judgment

[5] Fees

[6] State Statutes

[7] Cross References

§ 318.323 Proceedings for Entry of Judgment Pursuant to Terms of Stipulated Settlement [Code Civ. Proc. § 664.6] --Stipulation to Settlement of All or Part of Case

[1] FORM

[2] Use of Form

[3] Cross References

[4] Decisions

§ 318.324 Proceedings for Entry of Judgment Pursuant to Terms of Stipulated Settlement [Code Civ. Proc. § 664.6]--Notice of Motion [Code Civ. Proc. § 1010]

[1] FORM

[2] Use of Form

[3] Cross References

§ 318.325 Proceedings for Entry of Judgment Pursuant to Terms of Stipulated Settlement [Code Civ. Proc. § 664.6] --Order [Code Civ. Proc. § 1003] Granting Motion

[1] FORM

[2] Use of Form

[3] Cross References

§ 318.326 Stipulation for Entry of Judgment Pursuant to Terms of Stipulated Settlement [Code Civ. Proc. § 664.6] and Order [Code Civ. Proc. § 1003] Granting Motion

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

[5] Decisions

[6] Text References

§ 318.327 Proceedings for Entry of Judgment Pursuant to Terms of Stipulated Settlement [Code Civ. Proc. § 664.6]--Stipulation for Judgment Payable in Installments

[1] FORM

[2] Use of Form

[3] Cross References

§ 318.328 Proceedings for Entry of Separate Judgment Pursuant to Terms of Stipulated Settlement [Code Civ. Proc. § 664.6]

[1] FORM

[2] Use of Form

[3] Cross References

§ 318.329 Judgment Pursuant to Stipulation of Facts--General Form

[1] FORM

[2] Use of Form

[3] Cross References

§ 318.330 Proceedings to Obtain Judgment When One Party Fails to Appear at Trial [Code Civ. Proc. § 594]--Notice of Time Set for Trial [Code Civ. Proc. § 594(a)]

[1] FORM

[2] Use of Form

[3] Notice Requirements

[4] State Statutes

[5] Decisions

§ 318.331 Proceedings to Obtain Judgment When One Party Fails to Appear at Trial [Code Civ. Proc. § 594]--Certificate in Proof of Service of Notice of Trial on Adverse Party [Code Civ. Proc. §§ 594(b), 1013a, 2015.5]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 318.332 Proceedings to Obtain Judgment When One Party Fails to Appear at Trial [Code Civ. Proc. § 594]--Judgment After Trial by Court

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

[5] Decisions

§ 318.333 Judgment on General Verdict for Plaintiff in Superior Court [Code Civ. Proc. §§ 624, 664]--Example: Money Judgment or in the Alternative That Plaintiff Take Nothing

[1] FORM

[2] Use of Form

[3] General and Special Verdicts

[4] Where Conflict Exists

[5] Sufficiency of Judgment

[6] Stated Amount of Judgment

[7] Entry of Judgment

[8] Finding on Amount of Recovery

[9] State Statutes

[10] California Rules of Court

[11] Decisions

[12] Text References

§ 318.334 Judgment on Special Verdict for Plaintiff in Superior Court [Code Civ. Proc. §§ 624, 626]--Example: Recovery of Either Personal Property or Value and Damages [Code Civ. Proc. § 667]

[1] FORM

[2] Use of Form

[3] Entry of Verdict or Judgment

[4] Recovery of Personal Property

[5] Cross References

[6] State Statutes

[7] Decisions

§ 318.335 Judgment After Trial by Superior Court [Code Civ. Proc. § 632]--General Form

[1] FORM

[2] Use of Form

[3] Announcement of Decision Not Judgment

[4] Statement of Decision

[5] State Statutes

[6] California Rules of Court

[7] Decisions

§ 318.336 Notice of Entry of Judgment or Order [Code Civ. Proc. § 664.5(a)]--Judicial Council Form CIV-130

[1] FORM

[2] Use of Form

[3] State Statutes

[4] California Rules of Court

[5] Decisions

§ 318.337 Proceedings to Obtain Insertion of Interest on Judgment--Notice of Motion [Code Civ. Proc. § 1010]

[1] FORM

[2] Use of Form

[3] Prejudgment Interest

[4] Cross References

[5] California Points and Authorities

[6] State Statutes

[7] California Rules of Court

[8] Decisions

[9] Text References

§ 318.338 Proceedings to Obtain Insertion of Interest on Judgment--Order [Code Civ. Proc. § 1003]

[1] FORM

[2] Use of Form

[3] Cross References

§ 318.339 Judgment in Foreign Currency [Code Civ. Proc. § 676.7(f)]

[1] FORM

[2] Use of Form

[3] Definitions

[4] Entry of Money Judgment in Foreign Currency

[a] In General

[b] Contract for Payment in Foreign Currency; Distribution Proceedings

[c] Proceeding Involving Defense, Setoff, Recoupment, or Counterclaim

[5] State Statutes

[6] Law Reviews

[7] Cross References

§ 318.340 Judgment [Code Civ. Proc. §§ 585, 664.6]--Optional Judicial Council Form JUD-100

[1] FORM

[2] Use of Form

§§ 318.341-318.359 [Reserved]

§ 318.360 Proceedings to Correct Clerical Error in Judgment and to Amend Judgment Nunc Pro Tunc [Code Civ. Proc. § 473]--Notice of Motion

[1] FORM

[2] Use of Form

[3] Amendment, Modification, and Correction

[4] Antedating Judgment

[5] Notice and Time Requirements

[6] State Statutes

[7] Decisions

[8] Text References

§ 318.361 Proceedings to Correct Clerical Error in Judgment and to Amend Judgment Nunc Pro Tunc [Code Civ. Proc. § 473]--Order

[1] FORM

[2] Use of Form

[3] Cross References

§§ 318.362-318.379 [Reserved]

§ 318.380 Abstract of Judgment [Code Civ. Proc. § 674]--Mandatory Judicial Council Form EJ-001

[1] FORM

[2] Use of Form

[3] Contents of Abstract of Judgment

[4] Amendment to Abstract of Judgment

[5] Service

[6] Notice

[7] Cross References

[8] State Statutes

[9] California Rules of Court

[10] Decisions

§ 318.381 Affidavit of Identity [Code Civ. Proc. § 680.135]

[1] FORM

[2] Use of Form

[3] Contents of Affidavit

[4] State Statutes

§ 318.382 Application for Renewal of Judgment [Code Civ. Proc. § 683.140]--Judicial Council Form EJ-190

[1] FORM

[2] Use of Form

[3] Amount of Renewed Judgment

[4] Filing Fee

[5] Entry of Renewal by Court Clerk

[6] State Statutes

[7] Decisions

[8] Cross References

§ 318.383 Notice of Renewal of Judgment [Code Civ. Proc. § 683.160]--Judicial Council Form EJ-195

[1] FORM

[2] Use of Form

[3] Service of Notice of Renewal

[4] State Statutes

[5] California Rules of Court

[6] Cross References

§ 318.384 Notice of Judgment Lien on Personal Property [Code Civ. Proc. §§ 697.510, 697.550, 697.570]--Secretary of State Form J-1

[1] FORM

[2] Use of Form

[3] Execution

[4] Contents

[5] Service

[6] State Statutes

§ 318.385 Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Notice of Lien

[1] FORM

[2] Use of Form

[3] Service of Notice

[4] Cross References

[5] State Statutes

§ 318.386 Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings for Order Authorizing Compromise, Dismissal, Settlement, or Satisfaction of Pending Action or Proceeding, or Enforcement of Subsequent Judgment [Code Civ. Proc. § 708.440(b)]--Notice of Motion

[1] FORM

[2] Use of Form

[3] State Statutes

§ 318.387 Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings for Order Authorizing Compromise, Dismissal, Settlement, or Satisfaction of Pending Action or Proceeding, or Enforcement of Subsequent Judgment [Code Civ. Proc. § 708.440(b)]--Declaration in Support of Motion

[1] FORM

[2] Use of Form

[3] Cross References

§ 318.388 Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings for Order Authorizing Dismissal, Settlement, or Satisfaction of Pending Action or Proceeding, or Enforcement of Subsequent Judgment [Code Civ. Proc. § 708.440(b)]--Order

[1] FORM

[2] Use of Form

[3] Cross References

§ 318.389 Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings to Terminate Lien on Exempt Property [Code Civ. Proc. § 708.450]--Notice of Motion

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

§ 318.390 Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings to Terminate Lien on Exempt Property [Code Civ. Proc. § 708.450]--Declaration in Support of Motion

[1] FORM

[2] Use of Form

[3] Contents of Declaration; Financial Statement

[4] State Statutes

[5] Cross References

§ 318.391 Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings to Terminate Lien on Exempt Property [Code Civ. Proc. § 708.450]--Order

[1] FORM

[2] Use of Form

[3] Cross References

§ 318.392 Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings for Order Applying Judgment Debtor's Rights Under Judgment to Satisfaction of Lien [Code Civ. Proc. § 708.470]--Notice of Motion

[1] FORM

[2] Use of Form

[3] State Statutes

§ 318.393 Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings for Order Applying Judgment Debtor's Rights Under Judgment to Satisfaction of Lien [Code Civ. Proc. § 708.470]--Declaration in Support of Motion

[1] FORM

[2] Use of Form

[3] Cross References

§ 318.394 Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings for Order Applying Judgment Debtor's Rights Under Judgment to Satisfaction of Lien [Code Civ. Proc. § 708.470]--Order

[1] FORM

[2] Use of Form

[3] Cross References

§ 318.395 Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Acknowledgment of Satisfaction of Lien

[1] FORM

[2] Use of Form

§ 318.396 Proceedings to Release Property of Erroneously Identified Property Owner [Code Civ. Proc. §§ 697.410, 697.660]--Demand for Release

[1] FORM

[2] Use of Form

[3] Duty to Release From Lien on Demand

§ 318.397 Proceedings to Release Real Property of Erroneously Identified Property Owner [Code Civ. Proc. §§ 697.370, 697.410]--Lien Release

[1] FORM

[2] Use of Form

[3] Preparation of Lien Release

[4] Substantial Compliance Sufficient

[5] Execution of Release or Subordination

[6] Filing of Release

[7] Title Insurance Company Form

[8] State Statutes

§ 318.398 Proceedings to Release Property of Erroneously Identified Property Owner [Code Civ. Proc. §§ 697.410, 697.660]--Notice of Motion

[1] FORM

[2] Use of Form

[3] State Statutes

§ 318.399 Proceedings to Release Property of Erroneously Identified Property Owner [Code Civ. Proc. §§ 697.410, 697.660]--Declaration in Support of Motion

[1] FORM

[2] Cross References

§ 318.400 Proceedings to Release Property of Erroneously Identified Property Owner [Code Civ. Proc. §§ 697.410, 697.660]--Order Granting or Denying Motion to Release Property From Judgment Lien

[1] FORM

[2] Use of Form

§ 318.401 Statement of Release From or Subordination of Judgment Lien--Personal Property [Code Civ. Proc. § 697.650]--Secretary of State Form

[1] FORM

[2] Use of Form

[3] Filing of Statement

[4] Effect of Statement

[5] State Statutes

§ 318.402 Statement of Release From or Subordination of Judgment Lien--Real Property [Code Civ. Proc. §§ 697.370, 697.410]

[1] FORM

[2] Use of Form

[3] All Affected Judgment Debtors Must Be Named

[4] Cross References

§§ 318.403-318.419 [Reserved]

§ 318.420 Acknowledgment of Satisfaction of Judgment [Code Civ. Proc. §§ 724.060, 724.120, 724.250]--Judicial Council Form

[1] FORM

[2] Source of Form

[3] Use of Form

[4] Entry of Satisfaction

[5] State Statutes

§ 318.421 Proceedings to Compel Acknowledgment of Satisfaction of Judgment--Demand for Acknowledgment [Code Civ. Proc. §§ 724.050, 724.110, 724.220]

[1] FORM

[2] Use of Form

[3] Necessity of Acknowledgment of Satisfaction

[4] Demand for Acknowledgment of Satisfaction; Full or Partial Satisfaction

[5] State Statutes

§ 318.422 Proceedings to Compel Acknowledgment of Satisfaction of Judgment--Notice of Motion [Code Civ. Proc. §§ 724.050(d), 724.110(b), 724.230]

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] State Statutes

[5] Decisions

[6] Cross References

§ 318.423 Proceedings to Compel Acknowledgment of Satisfaction of Judgment--Declaration in Support of Motion [Code Civ. Proc. §§ 724.050(d), 724.110(b), 724.230]

[1] FORM

[2] Use of Form

[3] Use of Supporting Declaration

[4] Cross References

§ 318.424 Proceedings to Compel Acknowledgment of Satisfaction of Judgment--Order [Code Civ. Proc. §§ 724.050(d), 724.110(b), 724.230]

[1] FORM

[2] Use of Form

[3] Cross References

§ 318.425 Proceedings to Vacate Satisfaction of Judgment--Notice of Motion to Vacate

[1] FORM

[2] Use of Form

[3] Grounds for Vacating Satisfaction

[4] California Points and Authorities

[5] Decisions

§ 318.426 Proceedings to Vacate Satisfaction of Judgment--Declaration in Support of Motion

[1] FORM

[2] Use of Form

[3] Cross References

§ 318.427 Proceedings to Vacate Satisfaction of Judgment--Order

[1] FORM

[2] Use of Form

[3] Cross References

§§ 318.428-318.439 [Reserved]

§ 318.440 Assignment of Judgment--General Form

[1] FORM

[2] Use of Form

[3] Decisions

§ 318.441 Assignment of Judgment--With Warranty

[1] FORM

[2] Use of Form

[3] Cross References

§ 318.442 Acknowledgment of Assignment of Judgment [Code Civ. Proc. § 673]

[1] FORM

[2] Use of Form

[3] Effect of Filing of Acknowledgment of Assignment

[4] State Statutes

§§ 318.443- 318.459 [Reserved]

§ 318.460 Complaint on Domestic Money Judgment--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Pleading and Proving Judgment

[5] Verification

[6] State Statutes

[7] Decisions

[8] Text References

§ 318.461 Complaint [Code Civ. Proc. § 425.10] on Domestic Money Judgment--By Assignee of Judgment Creditor

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Cross References

§ 318.462 Complaint on Sister State Money Judgment--General Form

[1] FORM

[2] Use of Form

[3] Effect of Sister State Judgment

[4] Types of Sister State Judgments Enforceable

[5] Relation of Action to Sister State Money-Judgments Act

[6] State Statutes

[a] Effect of Sister State Judgment

[b] Relation of Action to Sister State Money-Judgments Act

[7] Decisions

[8] Text References

§ 318.463 Application for Entry of Judgment on Sister State Judgment [Code Civ. Proc. § 1710.15(a)]--Judicial Council Form EJ-105

[1] FORM

[2] Use of Form

[3] Attaching Copy of Sister State Judgment Required

[4] Jurisdiction and Venue

[5] Entering Judgment

[6] State Statutes

[7] Decisions

[8] Text References

[9] Cross References

§ 318.464 Notice of Entry of Judgment on Sister State Judgment [Code Civ. Proc. § 1710.30]--Judical Council Form EJ-110

[1] FORM

[2] Use of Form

[3] Notice of Entry of Judgment

[4] State Statutes

[5] Text References

[6] Cross References

§ 318.465 Notice of Motion to Vacate Money Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money-Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]

[1] FORM

[2] Use of Form

[3] Grounds to Vacate Sister State Judgment

[4] Motion to Vacate

[5] State Statutes

[6] Decisions

[7] Cross References

§ 318.466 Notice of Motion to Stay Enforcement of Judgment [Code Civ. Proc. § 1710.50] Entered Pursuant to Sister State Money-Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]

[1] FORM

[2] Use of Form

[3] Situations in Which Court May Grant Stay

[4] Conditions on Which Court Can Grant Stay

[5] Procedures by Which Court May Grant Stay

[6] Cross References

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Chapter 318 JUDGMENTS
PART I. SCOPE

27-318 California Forms of Pleading and Practice--Annotated § 318.01

§ 318.01 Scope of Chapter

This chapter starts with a general review of judgments, including definition, scope, effect, and other general topics [*see § 318.10 et seq*.]. This chapter then discusses obtaining and entering judgments on such topics as: judgments on submitted controversies; confession judgments; default judgments; judgments on the pleadings; judgments obtained in the absence of the adverse party; judgments obtained by stipulation; judgments on offers to compromise; judgments after motions for nonsuit or dismissal; judgments after trial by superior or municipal court; judgments upon the separate trial of special defenses; judgments in small claims court; the procedures used for recording the entry of a judgment; the procedures used for notification of the entry of a judgment; and the awarding of costs, interest, and attorney's fees [*see § 318.40 et seq*.].

It should be noted that this chapter only briefly discusses some of the topics listed above. Counsel should refer to the other chapters in this publication which are specified throughout this part for further discussion of particular types of judgments as well as judgments in particular types of actions.

This chapter contains forms relating to several types of proceedings:

- Proceedings to obtain a judgment by confession:
    - An attorney's declaration in support of a statement confessing judgment [*see § 318.320*].
    - A statement confessing judgment [*see § 318.321*].
    - A judgment pursuant to such a statement confessing judgment [*see § 318.322*].
- Proceedings for entry of a stipulated judgment:
    - A stipulation for the entry of a judgment and an order thereon [*see § 318.326*].

- A judgment entered pursuant to a stipulation of facts [*see § 318.329*].

- Proceedings to obtain a judgment when one party fails to appear at trial:

  - A notice of the time set for trial [*see § 318.330*].

  - A declaration in proof of service of the notice of trial on the adverse party [*see § 318.331*].

  - A judgment entered after the trial by the court [*see § 318.332*].

- A judgment for plaintiff on a general verdict in superior court using, by way of example, a money judgment or in the alternative that plaintiff take nothing [*see § 318.333*].

- A judgment on a special verdict for plaintiff in superior court using, by way of example, the recovery of either personal property or value and damages [*see § 318.334*].

- A general form of judgment after trial by a superior court [*see § 318.335*].

- A notice of entry of judgment [*see § 318.336*].

- Proceedings seeking to obtain the insertion of interest on a judgment:

  - A notice of motion for insertion of interest [*see § 318.337*].

  - An order on that motion [*see § 318.338*].

- A judgment on a foreign-money claim [*see § 318.339*].

- The Judicial Council form judgment, JUD-100, approved for optional use [*see § 318.340*].

This chapter then discusses those instances in which a judgment may be amended, modified, or corrected. Specifically, it contains a discussion of the power of a judge to antedate a judgment, to modify a judgment prior to its entry, and to correct or modify a judgment after its entry [*see § 318.70 et seq.*]. This chapter also contains discussion and forms for an order to amend and correct a judgment nunc pro tunc [*§§ 318.360, 318.361*].

For discussion of methods and procedures for use in attacking a judgment, see Ch. 489, *Relief From Judgments and Orders* .

This chapter discusses the methods by which a judgment may be enforced [*see § 318.90 et seq.*]. Because many methods of enforcement are treated extensively in other chapters in this set, such as Ch. 135, *Contempt,* Ch. 254, *Executions and Enforcement of Judgments,* Ch. 276, *Garnishment,* and Ch. 486, *Receivers,* these methods of enforcement are mentioned only briefly here. This chapter specifically focuses on several types of judgment liens: money judgment liens on real property under *Code Civ. Proc. §§ 697.310-697.410*, money judgment liens on personal property under *Code Civ. Proc. §§ 697.510-697.670*, and judgment creditors' liens on a judgment debtor's cause of action under *Code Civ. Proc. §§ 708.410-708.480*.

This chapter also contains the mandatory Judicial Council form of abstract of judgment [*see § 318.380*], forms of an application for and notice of renewal of judgment [*§§ 318.382*, 318.380.2], a form of notice of lien used by a judgment creditor to obtain a lien on a judgment debtor's cause of action [*see § 318.385*], forms relating to proceedings by the

judgment debtor to obtain an order permitting the resolution of his or her cause of action or enforcement of a judgment obtained therein [*see* §§ 318.386-318.388], and forms relating to a judgment debtor's claim of exemption [*see* §§ 318.389-318.391]. It also contains forms relating to the application of a judgment debtor's rights under a judgment to satisfaction of the judgment creditor's lien [*see* §§ 318.392-318.394], and a form for an acknowledgment of satisfaction of the lien [*see § 318.395*]. This chapter also contains forms relating to the release of a judgment lien from the property of a person erroneously identified as the judgment debtor [*see* §§ 318.396-318.400].

For a list of those methods of enforcement discussed elsewhere in this publication, see *§ 318.02*.

This chapter discusses the methods and procedures by which judgments may be discharged and a satisfaction of judgment entered [*see § 318.120 et seq.*]. Methods by which judgments may be discharged that are briefly discussed include payment or compromise by a judgment debtor, payment by a joint obligor or surety, equitable setoffs, and discharge in bankruptcy. This part also discusses the entry of a satisfaction of judgment as well as the situations in which an acknowledgment of satisfaction must be furnished by a judgment creditor or assignee and the liabilities for the failure to do so. In addition, this part discusses waiver of the right to appeal by voluntarily satisfying a judgment and the procedure and grounds upon which a satisfaction may be vacated.

This chapter also includes the Judicial Council form for an acknowledgment of full satisfaction of a judgment [*see § 318.420*]; a form for an written demand for acknowledgement of satisfaction [*see § 318.421*]; a form for an notice of motion to compel acknowledgment of satisfaction of judgment [*see § 318.422*] as well as a form for a declaration to support the notice of motion [*see § 318.423*] and a form for order thereon [*see § 318.424*]; and forms for a notice of motion and order to vacate satisfaction of a judgment [*see* §§ 318.425-318.427].

This chapter also discusses the assignment of judgments, including the power to assign the judgment; requirements for a valid assignment; the advisability of notification of the assignment to the judgment debtor; the effect of the assignment with respect to legal title and the right to collect the sums due on the judgment; the right of the judgment debtor to appeal notwithstanding the assignment; the right of the judgment debtor to assert a setoff or claim against the original judgment creditor; the rights of the assignee on appeal by the judgment debtor; the assignment of the judgment to one of several judgment debtors; and the effect of a partial assignment [*see § 318.150 et seq.*].

This chapter also contains a form for an assignment of a judgment without warranty [*see § 318.440*] and a form for an assignment of a judgment with warranty [*see § 318.441*].

This chapter discusses actions on domestic judgments, sister state judgments, and foreign money judgments as well as the special statutory schemes of the Sister State Money-Judgments Act [*Code Civ. Proc. §§ 1710.10-1710.65*; *see § 318.300* et seq.] and the Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*].

This chapter contains a form for a complaint on a domestic money judgment [*see § 318.460*], a form for a complaint on a domestic money judgment brought by an assignee of the judgment creditor [*see § 318.461*], a form for a complaint on a sister state money judgment [*see § 318.462*], the Judicial Council form for an application for entry of a sister state judgment pursuant to the Sister State Money-Judgments Act [*see § 318.463*], the Judicial Council form for a notice of entry of judgment on a sister state judgment pursuant to that Act [*see § 318.464*], a form for a notice of motion to vacate a sister state judgment entered pursuant to that Act [*see § 318.465*], and a form for a notice of motion to stay enforcement of a sister state judgment entered pursuant to that Act [*see § 318.466*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedureJudgmentsGeneral Overview

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27-318 California Forms of Pleading and Practice--Annotated § 318.02

§ 318.02 Cross References

For discussion and forms relating to the recovery of personal property, see Ch. 119, *Claim and Delivery*

For discussion, procedural guide, and forms relating to the awarding of costs, see Ch. 174, *Costs and Attorney's Fees*

For discussion and forms relating to the awarding of interest, see Ch. 177, *Damages*

For discussion, procedural guide, and forms relating to actions for declaratory relief, see Ch. 182, *Declaratory Relief*

For discussion, procedural guide, and forms relating to default judgments, see Ch. 205, *Defaults and Default Judgments*

For discussion, procedural guides, and forms relating to judgments on the pleadings, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

For discussion, procedural guide, and forms relating to motions for dismissal, see Ch. 212, *Dismissal*

For discussion and forms relating to actions to set aside fraudulent conveyances, see Ch. 270, *Fraudulent Conveyances*

For discussion and forms relating to verdicts, see Ch. 326A, *Jury Verdicts*

For discussion, procedural checklist, and forms relating to writs of mandate, see Ch. 358, *Mandate and Prohibition*

For discussion and forms relating to statements of decision, see Ch. 529, *Statement of Decision*

For discussion, procedural guide, and forms relating to judgments notwithstanding the verdict, see *Ch. 371, Motions After Trial, § 371.10* et seq.

For discussion, procedural guide, and forms relating to actions for partition, see Ch. 397, *Partition*

For discussion, procedural guide, and forms relating to judgments in probate proceedings generally, see Ch. 440, *Probate: Is Probate Necessary ?* et seq.

For discussion, procedural checklist, and forms relating to writs of prohibition, see Ch. 358, *Mandate and Prohibition*

For discussion, procedural checklist, and forms relating to judgments in quo warranto proceedings, see Ch. 483, *Quo Warranto*

For discussion and forms relating to the use of stipulations of fact, see Ch. 533, *Stipulations*

For discussion and forms relating to actions against bonded or indemnified persons, see Ch. 538, *Suretyship, Bonds, and Undertakings*

For discussion and forms relating to actions on debts secured by real property, see Ch. 555, *Trust Deeds and Real Property Mortgages*

For discussion, procedural guide, and forms relating to actions for unlawful detainer, see Ch. 333, *Landlord and Tenant: Eviction Actions*

For discussion and forms relating to contempt proceedings, see Ch. 135, *Contempt*

For discussion, procedural checklist, and forms relating to the execution of judgments, see Ch. 254, *Executions and Enforcement of Judgments*

For discussion and forms relating to exemptions, see Ch. 254, *Executions and Enforcement of Judgments* , and Ch. 294, *Homesteads*

For discussion and forms relating to the enforcement of judgments and orders in family law proceedings, including enforcement of out-of-state proceedings under the Uniform Interstate Family Support Act (*Fam. Code § 4900 et seq.*), see Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* , Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* , and Ch. 260, *Family Law Enforcement: Foreign Judgments*

For discussion, procedural checklist, and forms relating to garnishment proceedings, see Ch. 276, *Garnishment*

For discussion and forms relating to homesteads, see Ch. 294, *Homesteads*

For discussion and forms relating to unlawful detainer proceedings, see Ch. 333, *Landlord and Tenant: Eviction Actions*

For discussion and forms for use in proceedings under the Family Code (*Fam. Code § 3500 et seq.*), relating to wife, child, and parental support, see Ch. 394, *Parent and Child*

For discussion and forms for use in establishing and enforcing custody orders of sister states under the Uniform Child Custody Jurisdiction Act (*Fam. Code § 3400 et seq.*), see Ch. 394, *Parent and Child*

For discussion, procedural guide, and forms relating to the use of receivers, see Ch. 486, *Receivers*

For discussion and forms for use in proceedings for foreclosure of deeds of trust by judicial sales, see Ch. 555, *Trust Deeds and Real Property Mortgages*

For discussion and forms relating to partial payment of judgments by accord and satisfaction, see Ch. 6, *Accord and Satisfaction*

For discussion and forms relating to cross complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to proceedings between joint debtors in discharge of judgment, see Ch. 254, *Executions and Enforcement of Judgments*

For discussion and forms relating to the payment of judgments by joint obligors, see Ch. 300, *Indemnity and Contribution*

For discussion and forms relating to the payment of judgments by surety, see Ch. 538, *Suretyship, Bonds, and Undertakings*

For discussion and forms for assignments generally see Ch. 60, *Assignments*

For discussion and forms relating to judgments in actions for abatement, see Ch. 3, *Abatement of Actions*

For a discussion and form of judgment in an action for accounting, see Ch. 7, *Accounting, Action for*

For discussion and forms of judgments in adoption proceedings, see Ch. 12, *Adoptions: Nature and Effect* , through Ch. 12E, *Adoptions: Attack on Decree*

For a discussion and form relating to judgments quieting title based on adverse possession, see Ch. 13, *Adverse Possession*

For discussion and forms relating to commonly used allegations in a judgment, see Ch. 20, *Allegations Commonly Used*

For a discussion and form of judgment in an annulment proceeding, see Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights*

For discussion and forms involving appeals generally, see Ch. 40, *Appeal: An Overview* , et seq.

For discussion and forms involving arbitration proceedings, see Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding*

For a discussion and form of judgment involving the establishment of the fact of birth and death, see Ch. 99, *Birth and Death, Establishing Fact of*

For a discussion and form relating to a judgment canceling an instrument, see Ch. 107, *Cancellation of Instruments*

For discussion and forms of judgments involving disputes of claim and delivery, see Ch. 119, *Claim and Delivery*

For discussion and forms of judgments involving corporations, see Ch. 160, *Corporations: Capacity* et seq.

For discussion and forms involving the award of costs, see Ch. 174, *Costs and Attorney's Fees*

For discussion and forms of judgments involving deeds, see Ch. 184, *Deeds*

For discussion and forms of default judgments, see Ch. 205, *Defaults and Default Judgments*

For discussion and forms of demurrers and motions for judgment on the pleadings, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* . For discussions and forms of motions to strikes, see Ch. 375, *Motions to Strike: Pleadings* , and Ch. 376, *Motions to Strike: Anti-SLAPP*

For discussion and forms of judgments involving actions for dissolution or separation, see Ch. 220, *Dissolution of Marriage: Master Procedural Guide*

For discussion and forms of judgments involving elections, see Ch. 243, *Elections*

For discussion and forms of judgments in eminent domain proceedings, see Ch. 247, *Eminent Domain*

For a discussion and form of judgment in an action involving an escrow, see Ch. 253, *Escrows*

For discussion and forms relating to executions of judgments and enforcement of judgments, see Ch. 254, *Executions and Enforcement of Judgments*

For discussion and forms relating to the enforcement of support orders and other orders and judgments in family law proceedings, see Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* , Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* , and Ch. 260, *Family Law Enforcement: Foreign Judgments*

For discussion and forms of judgments involving guardianships and conservatorships, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , through Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships*

For discussion and forms relating to insolvency proceedings, see Ch. 307, *Insolvency*

For discussion and forms relating to proceedings involving insurance, see Ch. 308, *Insurance*

For discussion and forms relating to interpleader, see Ch. 314, *Interpleader*

For discussion and forms relating to jurisdiction, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For a discussion and form relating to proceedings involving a landlord and tenant dispute, see Ch. 334, *Landlord and Tenant: Claims for Damages*

For discussion and forms relating to other types of Liens, see Ch. 342, *Liens and Wage Preferences*

For a discussion and form relating to a judgment involving lost papers, see Ch. 356, *Lost Papers*

For discussion and forms relating to judgments in mandamus proceedings, see Ch. 358, *Mandate and Prohibition*

For a discussion and form relating to a judgment involving machanics' liens, see Ch. 361, *Mechanics' Liens*

For a discussion and form relating to a judgment involving a mining dispute, see Ch. 363, *Mining*

For discussion and forms involving judgments notwithstanding the verdict, see Ch. 371, *Motions After Trial*

For discussion and forms on judgments involving newspapers, see Ch. 386, *Newspapers*

For discussion and forms relating to the joinder of parties, see Ch. 395, *Parties*

For discussion and forms of judgments involving actions for partition, see Ch. 397, *Partition*

For a discussion and form of judgment involving partnerships and and joint ventures, see Ch. 406, *Partnerships: Dissolution*

For discussion and forms of judgments involving paternity disputes and illegitimate children, see Ch. 412, *Paternity*

For discussion and forms of judgments involving issues of probate generally, see Ch. 440, *Probate: Is Probate Necessary :* et seq.

For discussion and forms of judgments in quiet title actions, see Ch. 482, *Quieting Title*

For a discussion and form of judgment in a quo warrranto proceeding, see Ch. 483, *Quo Warranto*

For discussion and forms relating to the use of receivers, see Ch. 486, *Receivers*

For a discussion and form involving a judgment after an action has been assigned to a referee, see Ch. 38, *Reference*

For discussion and forms relating to proceedings to vacate, avoid or otherwise obtain relief from judgments and order, see Ch. 489, *Relief From Judgments and Order*

For a discussion and form of judgment relating to an action for rescission and restitution, see Ch. 490, *Rescission and Restitution*

For discussion and forms of judgments relating to issues involving res judicata and collateral estoppel, see Ch. 491, *Res Judicata*

For discussion and forms of judgments relating to settlements, see Ch. 520, *Settlement and Release*

For a discussion and form relating to a judgment after submission of a controversy, see Ch. 534, *Submitted Controversy (Agreed Case)*

For discussion and forms relating to summary judgments, see Ch. 537, *Summary Judgment*

For a discussion and form relating to suretyship, bonds, and undertakings, see Ch. 538, *Suretyship, Bonds, and Undertakings*

For discussion and forms relating to trust deeds and real property mortgages, see Ch. 555, *Trust Deeds and Real Property*

For discussion and forms relating to judgments involving disputes between vendors and purchasers, see Ch. 569, *Vendor and Purchaser*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsGeneral OverviewReal Property LawLandlord & TenantGeneral Overview

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[Reserved]

§§ 318.03[Reserved]

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§ 318.10 Governing Statutes

The general statutory provisions relating to judgments are contained in *Code Civ. Proc. § 577 et seq.* The statutory provisions relating to the giving, entering, and satisfaction of judgments are contained in *Code Civ. Proc. § 664 et seq.* The statutory provisions relating to the Uniform Foreign-Money Claims Act are set out in *Code Civ. Proc. § 676 et seq.* The statutory provisions relating to the enforcement of liens are contained in *Code Civ. Proc. § 1180 et seq.* The statutory provisions relating to sister state and foreign money judgments are contained in *Code Civ. Proc. § 1710.10 et seq.*

Legal Topics:

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

[1] Judgment

A judgment is the final determination of the rights of the parties in an action or proceeding [*Code Civ. Proc. § 577*]. Similarly, a judgment in a special proceeding such as a proceeding for review, mandate, or prohibition is the final determination of the rights of the parties [*Code Civ. Proc. § 1064*].

Every direction of a court or judge, made or entered in writing, and not included in a judgment, is an order [*Code Civ. Proc. § 1003*]. Thus, an order for a judgment, or a written opinion of a judge, is not a judgment [*Grable v. Grable (1960) 180 Cal. App. 2d 353, 359, 4 Cal. Rptr. 353]* .

[2] Final Judgment

[a] In General

Only one final judgment is rendered in an action. That judgment is the one that in effect ends the suit in the court in which it was instituted and finally determines the rights of the parties in relation to the matter in controversy. No judgment will be regarded as final within the meaning of the statutes governing appeals, unless all issues of law and fact necessary to be determined were determined and the case completely disposed of, so far as the court had power to do so [*Vallera v. Vallera (1944) 64 Cal. App. 2d 266, 271, 148 P.2d 694]* .

Once a judgment is properly characterized as final for purposes of the trial court, however, an appeal may follow. At this stage, the action is deemed pending from the time of its commencement in the trial court until its final determination on appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied [*Code Civ. Proc. § 1049*; *Pacific Gas & Elec. Co. v. Nakano (1939) 12 Cal. 2d 711, 714, 87 P.2d 700]* .

Unless a statute or *Cal. Rules of Ct., Rule 8.108* provides otherwise, a notice of appeal must be filed on or before the earliest of the following [*Cal. Rules of Ct., Rule 8.104(a)*]:

- 60 days after the superior court clerk serves the party filing the notice of appeal with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment showing the date either was served.

- 60 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by proof of service.

- 180 days after entry of judgment.

Should these time periods pass without the filing of a notice of appeal and no other procedures are instituted to prosecute an appeal, the judgment may be deemed final [*Pacific Gas & Elec. Co. v. Nakano (1939) 12 Cal. 2d 711, 714, 87 P.2d 700]* .

As used in *Cal. Rules of Ct., Rule 8.104(a)* and *(e)*, governing the normal time to file a notice of appeal and what constitutes an entry of judgment, "judgment" means "appealable order" if the appeal is from an appealable order [*Cal. Rules of Ct., Rule 8.104(f)*].

For further discussion regarding the time to file a notice of appeal generally, see Ch. 42, *Appeal: Notice of Appeal* .

[b] Final Judgments Subject to Modification

In some instances, a judgment may be deemed final for all purposes as the final determination of the rights of the parties, but still may be subject to modification by the court. For example, a statutory right to continue jurisdiction may allow a court to make additional necessary orders, as in the case of the maintenance and support of minor children pursuant to a divorce [*see Fam. Code §§ 2010, 3651*; *Allen v. Allen (1956) 138 Cal. App. 2d 706, 708, 292 P.2d 581]* . Even without statutory authority, courts of equity are recognized as having the inherent power, with or without an express reservation of such right in the judgment, to change the mode or procedure in executing its decrees although the decree itself specifies a particular method [*Lesser & Son v. Seymour (1950) 35 Cal. 2d 494, 500*]. Such a power to change or modify an equitable decree is limited, however, to matters of procedure only. It may not be exercised in such a fashion as to materially change a substantial adjudicated portion of the judgment [*Orban Lumber Co. v. Fearrien (1966) 240 Cal. App. 2d 853, 858, 50 Cal. Rptr. 41]* .

[3] Interlocutory Judgments

As a general test, which must be adapted to particular circumstances of individual cases, where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the decree, the decree is final; where anything further in the nature of a judicial action on the part of the court is essential to the final determination of the rights of the parties, the decree is deemed interlocutory [*Olmstead v. West (1960) 177 Cal. App. 2d 652, 655, 2 Cal. Rptr. 443]* . Moreover, a decree may properly be final in its determination of all the issues of fact and law and interlocutory as to its mode of execution [*Wynn v. Treasure Co. (1956) 146 Cal. App. 2d 69, 79*].

For a listing of those types of actions in which a statutory provision for an interlocutory judgment exists, see *§ 318.11[3]*.

[4] Alternative or Contingent Judgments

In some cases, the court may properly render judgment in the alternative or upon the happening of a certain contingency. Such judgments may be proper in actions for the recovery of personal property or where casting the judgment upon the determination of an ultimate fact will afford the practical advantage of eliminating subsequent

litigation [*Code Civ. Proc. § 667*; *Chandler v. Hibberd (1958) 165 Cal. App. 2d 39, 50, 332 P.2d 133]* .

[5] Conditional Judgments

In some cases, the court may properly render judgment in favor of one party upon that party's compliance with a specific condition set forth by the court. Such conditional judgments may be properly rendered in a variety of proceedings, including rescission of a contract, injunctive relief, quiet title actions, or specific performance [*Civ. Code § 1692* (rescission); *San Diego v. Southern Cal. Tel. Corp. (1954) 42 Cal. 2d 110, 120, 266 P.2d 14* (injunctive relief); *Stein v. Simpson (1951) 37 Cal. 2d 79, 87, 230 P.2d 816* (quiet title action); *Goldsworthy v. Dobbins (1952) 110 Cal. App. 2d 802, 809, 243 P.2d 883* (specific performance)]. Such judgments may not be rendered, however, if to do so would deny a substantial right of a party or work a forfeiture or inequitable requirement [*see*.

[6] Deficiency Judgments

A deficiency judgment is a money judgment rendered against a mortgagor in foreclosure proceedings in which the sale of the property is insufficient to cover the debt [*Code Civ. Proc. § 726*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

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§ 318.12 Judicial Duty to Render Judgment

It is not within the discretion of the court to refuse to give judgment declaring a right which is properly pleaded and well established by evidence. Where good grounds exist for the granting of legal or equitable relief, judgment is given to the party entitled thereto as a matter of right and not of grace [Collins v. Collins *(1957) 48 Cal. 2d 325, 333-334, 309 P.2d 420]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.13 Conformity of Judgment to Pleadings

[1] Uncontested Cases

In an uncontested case in which no answer is filed, the relief granted to the plaintiff cannot exceed that which was demanded in the complaint [*Code Civ. Proc. § 580*]. The rule is also applicable to relief granted upon a cross complaint to which no answer is filed [*Swycaffer v. Swycaffer (1955) 44 Cal. 2d 689, 692-693, 285 P.2d 1]* .

[2] Contested Cases

In a contested case in which an answer is filed, the court may grant relief which is consistent with the case made by the complaint and embraced within the issue [*Code Civ. Proc. § 580*].

As to the theory upon which liability is based, a court may resolve all issues in accordance with the evidence, whether presented by one side or the other, and grant judgment in accordance with any legal theory raised by the pleadings [*Halagan v. Ohanesian (1967) 257 Cal. App. 2d 14, 17, 64 Cal. Rptr. 792]* .

Even the general rule that a party must recover on the cause of action alleged in the pleadings and not on another cause of action disclosed by the evidence may yield when a case is tried on the theory that a matter was in issue and evidence is received without objection. For instance, where the complaint alleges breach of contract and damages are based upon the tort of interference with business relations, a recovery may be permitted on the second theory of liability where the trial court defines the issues during trial to include the second theory and counsel proceeds to accept that theory of liability without objection [*Weissensee v. Chronicle Pub. Co. (1976) 59 Cal. App. 3d 723, 729]* . If the parties proceed throughout a trial on the theory that a certain issue has been presented for adjudication, the parties are estopped from claiming that the issue was not raised in the pleadings [*George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd. (1986) 186 Cal. App. 3d 94, 104, 230 Cal. Rptr. 428]* . However, the principle of estoppel operates in this situation only when the issue was actually and intentionally tried by the introduction of pertinent evidence. Furthermore, evidence that is relevant to an issue raised in the pleadings cannot be considered as raising an issue outside the pleadings [*George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd. (1986) 186 Cal. App. 3d 94, 104, 230 Cal. Rptr. 428]* .

As to the type and amount of relief granted, the court in a contested case is authorized to grant any relief consistent with the case made by the complaint and embraced within the issue regardless of the theory upon which the facts were pleaded, the title of the pleading, or what relief was sought by the prayer [*Knoblock v. Waale-Camplan Co. (1956) 141 Cal. App. 2d 870, 873-874, 297 P.2d 765]* . Therefore, a court may grant any relief justified by the allegations of the complaint and the evidence, even though the relief is greater or different than that requested [*Lawrence v. Shutt (1969) 269 Cal. App. 2d 749, 767, 75 Cal. Rptr. 533]* . The rule is followed as well in an equitable proceeding under a prayer for general relief so that a court may grant relief conformable to the case made by the pleadings and the evidence, even though it may not be the relief asked by a special prayer. The rule is based upon the fundamental principle of chancery that a court of equity will endeavor to finally dispose of litigation so as to preclude further litigation between the same parties upon the same subject matter [*Coons v. Henry (1960) 186 Cal. App. 2d 512, 519, 9 Cal. Rptr. 258]* .

This latitude in the type of relief granted does not allow the court in a limited civil case to grant relief that is beyond that authorized in a limited civil case [*see Code Civ. Proc. §§ 85, 580(b)*; for discussion of the relief authorized in limited civil cases, *see Ch. 324, Jurisdiction: Subject Matter, § 324.62*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsJudgment on the Pleadings

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§ 318.14 Conformity of Judgment to Memorandum Opinion Not Required

The fact that a judgment is not in conformity with a memorandum opinion does not affect the validity of the judgment. A memorandum opinion is not a decision. Although it may purport to decide issues in a case, it is merely an informal statement of the views of the trial judge. It does not constitute findings of fact. No antecedent expression of the judge, whether casual or cast in the form of an opinion, can in any way restrict the absolute power to declare a final conclusion by filing the decision (findings of fact and conclusions of law) provided for by the Code of Civil Procedure [*Taormino v. Denny (1970) 1 Cal. 3d 679, 684, 83 Cal. Rptr. 359, 463 P.2d 711* ; *Kawasho Internat. (U.S.A.), Inc. v. Lakewood Pipe Service, Inc. (1983) 152 Cal. App. 3d 785, 796, 201 Cal. Rptr. 640]* .

Legal Topics:

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

[1] Generally

It is the general rule that a judgment may not be entered either for or against a person who is not a party to the proceeding; any judgment which does so is void to that extent [*Fazzi v. Peters (1968) 68 Cal. 2d 590, 594, 68 Cal. Rptr. 170, 440 P.2d 242]* .

[2] Multiple Plaintiffs

All persons may join in one action as plaintiffs if they either (1) assert any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action or (2) have a claim, right, or interest adverse to the defendant in the property or controversy which is the subject of the action [*Code Civ. Proc. § 378(a)*]. It is not necessary that each plaintiff be interested as to every cause of action or as to all relief prayed for. Judgment may be given for one or more of the plaintiffs according to their respective right to relief [*Code Civ. Proc. § 378(b)*]. When two or more defendants are sued and the judgment for plaintiffs runs against only one defendant, it is necessarily in favor of the other defendant [*Amerson v. Christman (1968) 261 Cal. App. 2d 811, 822, 68 Cal. Rptr. 378]* .

[3] Multiple Defendants

All persons may be joined in one action as defendants if there is asserted against them any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action or a claim, right, or interest adverse to them in the property or controversy which is the subject of the action [*Code Civ. Proc. § 379(a)*]. It is not necessary that each defendant be interested as to every cause of action or as to all relief prayed for. Judgment may be given against one or more defendants according to their respective liabilities [*Code Civ. Proc. § 379(b)*].

Where the plaintiff is in doubt as to the person from whom he or she is entitled to redress, two or more defendants may be joined with the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be

determined between the parties [*Code Civ. Proc. § 379(c)*].

For discussion, procedural guide, and forms relating to the joinder of parties, see Ch. 395, *Parties* , Pt. I.

[4] Several Judgments

Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves [*Code Civ. Proc. § 578*].

In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper [*Code Civ. Proc. § 579*].

[5] Parties Affected by Judgment

The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination in that case could have been made between them alone, although other parties were joined with both or either [*Code Civ. Proc. § 1910*].

For discussion and forms relating to the principles of res judicata and collateral estoppel, see Ch. 491, *Res Judicata* .

[6] Judgment Entered Before Death

[a] Death of Judgment Debtor

The enforceability of a judgment after the death of the judgment debtor is governed by the Probate Code [*Code Civ. Proc. § 686.020*]. Generally, after an individual's death, all money judgments against the decedent or the personal representative on a claim against the decedent or estate are not enforceable against property in the decedent's estate under the Enforcement of Judgments Law (*Code Civ. Proc. § 680.010 et seq.*) but are payable in the course of administration [*Prob. Code § 9300(a)*]. These money judgments must be filed in the same manner as other claims [*Prob. Code § 9300(b)*; *see also Prob. Code § 9150* (filing of creditor claims)]. If property of the decedent is subject to an execution lien at the time of his or her death, however, enforcement against the property may proceed under the Enforcement of Judgments Law to satisfy the judgment. If the judgment is not satisfied, the balance of the judgment remaining unsatisfied is payable in the course of administration [*Prob. Code § 9303*].

Notwithstanding an individual's death, a judgment for possession or sale of property may be enforced under the Enforcement of Judgments Law. The only property in the decedent's estate subject to enforcement, however, is the property described in the judgment for possession or sale [*Prob. Code § 9302(a)*]. A demand for money that is not satisfied from the property described in a judgment for sale of property must be filed as a claim in the same manner as other claims and is payable in the course of administration [*Prob. Code § 9302(b)*; *see also Prob. Code § 9150* (filing of creditor claims)].

On enforcement of a judgment rendered against a personal representative on a claim for money against a decedent's estate, see *Prob. Code §§ 9300* and *9301*. On conversion of an attachment lien to a judgment lien, see *Prob. Code § 9304*.

[b] Death of Judgment Creditor

After the death of the judgment creditor, the judgment may be enforced as provided in *Code Civ. Proc. §§ 680.010-724.260* by the judgment creditor's executor or administrator or successor in interest [*Code Civ. Proc. § 686.010*].

For discussion and forms relating to the execution of judgments under the Code of Civil Procedure, see Ch. 254, *Executions and Enforcement of Judgments* .

[7] Judgment Entered After Death

If a party dies after trial and submission of the case to a judge sitting without a jury for decision or after a verdict on any issue of fact, and before judgment, the court may nevertheless render judgment thereon [*Code Civ. Proc. § 669*]. For discussion of the enforceability and payment of money judgments under *Prob. Code § 9300* and of judgments for the possession or sale of property under *Prob. Code § 9302*, see *§ 318.15[6]*.

The court only has the right to enter a nunc pro tunc judgment against a particular party as of a date prior to that party's death if the evidence has been completed and the case is in such position that the court could have decided it before the death of the party occurred. The death of a party pending suit does not oust the jurisdiction of the court, and hence the judgment is voidable only, not void. This does not mean that a judgment can be rendered for or against a dead person, but only that it can be nominally for or against that individual, as his or her representing heirs or other successors who are the real parties intended. In the absence of prejudice to the complaining party, even a judgment entered after the death of a party which was rendered upon evidence taken after the death may be considered valid and not subject to reversal [*Collison v. Thomas (1961) 55 Cal. 2d 490, 495, 496, 11 Cal. Rptr. 555, 360 P.2d 51]* .

When a plaintiff has died during a jury trial before the jury is instructed and the verdict rendered, so that his or her claim for noneconomic damages has abated, the trial court may not enter judgment nunc pro tunc as of the time before the plaintiff's death in an effort to save the claim. Nor may the trial court do so in a bifurcated jury trial when a verdict in the final phase of the trial has not been rendered, because no verdict has been rendered determining all facts necessary for judgment [*Williamson v. Plant Insulation Co. (1994) 23 Cal. App. 4th 1406, 1414-1418, 28 Cal. Rptr. 2d 751]* .

[8] Indispensable Parties

Failure to join indispensable parties is not jurisdictional; even in the absence of an indispensable party the court has the power to render a binding decision as to parties before it even though it cannot bind the absent party [*Kraus v. Willow Park Public Golf Course (1977) 73 Cal. App. 3d 354, 364, 368, 140 Cal. Rptr. 744]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderIndispensable PartiesCivil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & PartiesCivil ProcedureJudgmentsEntry of JudgmentsNonparties

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§ 318.16 Scope and Effect of Judgment

[1] Issues Determined

Only those matters in a judgment which appear upon its face to have been so adjudged, or which were actually and necessarily included or necessary, are deemed to have been adjudged [*Code Civ. Proc. § 1911*]. Any judgment that goes beyond the issues litigated is void insofar as it exceeds those issues [*In re Wren (1957) 48 Cal. 2d 159, 163, 308 P.2d 329]* .

Where a case is tried on the merits, the issues are thoroughly explored during the course of the trial, and the theory of the trial is well known to court and counsel, the fact that the issues were not pleaded does not preclude an adjudication of those litigated issues and a review of that adjudication on appeal [*Davis v. Cordova Recreation & Park Dist. (1972) 24 Cal. App. 3d 789, 794*].

[2] Conclusiveness and Effect of Judgment

The effect of a judgment or final order in an action or special proceeding before a court or judge of California, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows [*Code Civ. Proc. § 1908(a)*]:

- In case of a judgment or order against a specific thing, or in respect to the probate of a will, or the administration of the estate of a decendent, or in respect to the personal, political, or legal condition or relation of a particular person, the judgment or order is conclusive upon the title to the thing, will, or administration, or the condition or relation of the person.

- In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding.

A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the

adjudications of litigated matters as if he or she were a party if he or she has a proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction; if the other party has notice of such participation, the other party is equally bound [*Code Civ. Proc. § 1908(b)*].

At any time prior to a final judgment, as defined in *Code Civ. Proc. § 577*, a determination of whether the judgment, the verdict upon which it was entered, or a finding upon which it was entered is to be binding on a nonparty pursuant to *Code Civ. Proc. § 1908(b)* or whether such nonparty is entitled to the benefit of *Code Civ. Proc. § 1908(b)* may, on the noticed motion of any party or any nonparty that may be affected, be made in the court in which the action was tried or in which the action is pending on appeal. If no such motion is made before the judgment becomes final, the determination may be made in a separate action. If appropriate, a judgment may be entered or ordered to be entered pursuant to such a determination [*Code Civ. Proc. § 1908(b)*].

[3] Presumption Created

A judgment, when not conclusive, is presumed to correctly determine or set forth the rights of the parties, but there is no presumption that the facts essential to the judgment have been correctly determined [*Evid. Code § 639*].

[4] Effect of Class Action Judgment

Although judgments in class actions are binding on all members of the class, including persons coming subsequently into the class, the effect of the class action decree is that it is a judgment which can be availed of by every member of the represented class, present or future [*Williams v. State of California (1976) 62 Cal. App. 3d 960, 965, 133 Cal. Rptr. 539]* .

[5] Determination of Cross Complaint

In general, the judgment in an action in which there is a cross complaint should decide all issues including those raised by the cross complaint. This is so where the plaintiff and the defendant in the cause of action set forth in the complaint are respectively cross defendant and cross plaintiff in the cross complaint [*see Bristol Convalescent Hosp. v. Stone (1968) 258 Cal. App. 2d 848, 866, 66 Cal. Rptr. 404]* . A purported judgment on a cross complaint is not a final judgment, and represents an attempt to improperly split a single cause of action. Such a judgment is entirely unauthorized and is void upon its face [*Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1030, 84 Cal. Rptr. 538]* .

If a claim asserted in a cross complaint is established at the trial and the amount so established exceeds the demand established by the party against whom the cross complaint is asserted, judgment for the party asserting the cross complaint must be given for the excess; or if it appears that the party asserting the cross complaint is entitled to any other affirmative relief, judgment must be given accordingly. When the amount found due to either party exceeds the sum for which the court is authorized to enter judgment, the party may remit the excess, and judgment may be rendered for the residue [*Code Civ. Proc. § 666*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsMultiple Claims & Parties

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§ 318.17 Single Judgment Rule

There can be but one final judgment in an action, and that is one which in effect ends the suit in the court in which it was entered and finally determines the rights of the parties in relation to the matter in controversy. The rule is interrelated with the right of appeal, because no order or judgment may be appealed from unless it finally disposes of the case in the trial court. A disposition hat determines completely all issues between two opposing parties is final within the meaning of the basic rule; but a disposition hat leaves undetermined essential issues is not final, even though it purports to dispose of some issues [*In re Marriage of Fink (1976) 54 Cal. App. 3d 357, 361, 126 Cal. Rptr. 626]* .

It should be noted, however, that the rule as to single judgments has no application to actions in which separate and independent relief is sought against several defendants. When the plaintiff seeks separate and independent relief, a several judgment as to each defendant is proper [*Stafford v. Yerge (1956) 139 Cal. App. 2d 851, 854, 294 P.2d 721]* . Moreover, courts have not inflexibly adhered to the single or final judgment rule. When an otherwise premature or partial judgment, in its own right, is appealable, and unnecessary delay and economic hardship can be avoided by hearing an appeal, an appellate court may assert jurisdiction and entertain the appeal instead of dismissing it [*McClure v. County of San Diego (1987) 191 Cal. App. 3d 807, 811, 236 Cal. Rptr. 653]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

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§ 318.18 Finality

A judgment is final only when it determines all of the rights of the parties and requires no further judicial action to give effect to its provisions [*Associated Convalescent Enterprises v. Carl Marks & Co., Inc. (1973) 33 Cal. App. 3d 116, 121, 108 Cal. Rptr. 782]* . A judgment is not final so long as the action in which it is rendered is pending, and an action is deemed to be pending until its final determination on appeal or until the time for appeal has passed, unless the judgment is sooner satisfied [*Estate of Molera (1972) 23 Cal. App. 3d 993, 998, 100 Cal. Rptr. 696]* . For further discussion of final judgments, see *§ 318.11[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionFinal Judgment Rule

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§ 318.19 Construction of Judgment

[1] Validity Favored

All intendments favor the validity of a judgment. Courts should interpret judgments in such a manner as to make them valid and with reference to the law regulating the rights of the parties [*Bruce v. Gregory (1967) 65 Cal. 2d 666, 678, 56 Cal. Rptr. 265, 423 P.2d 193* ; *People v. Landon White Bail Bonds (1991) 234 Cal. App. 3d 66, 77, 285 Cal. Rptr. 575]* . A judgment must be given a construction that will support it if this may be done within reason and the accepted rules of construction. Particularly when it appears that an ambiguity is the result of oversight and inadvertence, the judgment as entered should be liberally construed with a view to giving effect to the manifest intent of the court [*People v. Landon White Bail Bonds (1991) 234 Cal. App. 3d 66, 76, 285 Cal. Rptr. 575]* .

When a judgment fails to express the court's true intentions as they existed at the time of rendition, the court generally has the power to correct the judgment to reflect those intentions [*see Code Civ. Proc. § 473(d)*; *People v. Landon White Bail Bonds (1991) 234 Cal. App. 3d 66, 77, 285 Cal. Rptr. 575* ; *Russ v. Smith (1968) 264 Cal. App. 2d 385, 390-391, 70 Cal. Rptr. 813]* . For discussion and forms relating to the procedure for correction of a judgment due to court's inadvertence or clerical error, see *§ 318.70 et seq.*

[2] Rules of Interpretation of Writings Govern

The meaning and effect of a judgment is determined according to the rules governing the interpretation of writings generally [*Nunes v. Nunes (1964) 62 Cal. 2d 33, 39, 41 Cal. Rptr. 5, 396 P.2d 37* ; *Estate of Careaga (1964) 61 Cal. 2d 471, 475, 39 Cal. Rptr. 215, 393 P.2d 415* ; *People v. Landon White Bail Bonds (1991) 234 Cal. App. 3d 66, 76, 285 Cal. Rptr. 575]* .

The entire document is to be taken by its four corners and construed as a whole to effectuate the obvious intention [*Lazar v. Superior Court (1940) 16 Cal. 2d 617, 622, 107 P.2d 249* ; *People v. Landon White Bail Bonds (1991) 234 Cal. App. 3d 66, 76, 285 Cal. Rptr. 575]* . Thus, the language of the writing is to govern its interpretation, if the language is clear and explicit and does not involve an absurdity [*Estate of Careaga (1964) 61 Cal. 2d 471, 475, 39 Cal. Rptr. 215, 393 P.2d 415* ; *cf. Civ. Code § 1638* (interpretation of contract)]. Further, in construing the effect of a

judgment, the law respects the form of words less than their substance [*In re Marriage of Farner (1989) 216 Cal. App. 3d 1370, 1376, 265 Cal. Rptr. 531* ; *see Civ. Code § 3528*].

Individual clauses or provisions of a judgment, just as in a contract or in any other document, are not to be separately considered and construed [*Lazar v. Superior Court (1940) 16 Cal. 2d 617, 622, 107 P.2d 249]* . No particular part or clause in the judgment is to be seized on and given the power to destroy the remainder if that effect can be avoided [*People v. Landon White Bail Bonds (1991) 234 Cal. App. 3d 66, 76, 285 Cal. Rptr. 575]* .

[3] Resolving Ambiguities

When an ambiguity exists, the court may examine the entire record to determine the judgment's scope and effect [*Estate of Careaga (1964) 61 Cal. 2d 471, 475, 39 Cal. Rptr. 215, 393 P.2d 415* ; *People v. Landon White Bail Bonds (1991) 234 Cal. App. 3d 66, 76, 285 Cal. Rptr. 575]* . The court may also refer to the circumstances surrounding the making of the judgment, and to the condition of the cause in which it was entered. Subsequent actions by the rendering judge may be considered as bearing on the judgment's intended meaning and effect [*People v. Landon White Bail Bonds (1991) 234 Cal. App. 3d 66, 76, 285 Cal. Rptr. 575]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.20 Incorporation of Documents Permitted

A document may be incorporated either expressly or by apt reference into a judgment or decree so as to make it an operative part of the order of the court [*Flynn v. Flynn (1954) 42 Cal. 2d 55, 59, 265 P.2d 865]* .

Legal Topics:

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§ 318.21 Penalty for Disobeying Judgment

Disobedience of any lawful judgment, order or process of the court constitutes contempt of the court [*Code Civ. Proc. § 1209*]. For discussion and forms related to contempt proceedings generally, see Ch. 135, *Contempt* .

Legal Topics:

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

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§ 318.22 Pleading and Proof of Judgment

When a judgment or order of a court is conclusive, the judgment or order must be alleged in the pleadings if there is an opportunity to do so; if there is no such opportunity, the judgment or order may be used as evidence [*Code Civ. Proc. § 1908.5*].

In pleading a judgment or other determination of a court, officer, or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made and to have become final. If such an allegation is controverted, the party pleading must establish on the trial the facts conferring jurisdiction and creating finality [*Code Civ. Proc. § 456*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewEvidenceHearsayExceptionsJudgmentsGeneral Overview

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§ 318.23 Judgments as Evidence

Evidence of a final judgment is not made inadmissible by the hearsay rule when offered by the judgment debtor to prove any fact which was essential to the judgment in an action in which he or she seeks to (1) recover partial or total indemnity or exoneration for money paid or liability incurred because of the judgment, (2) enforce a warranty to protect the judgment debtor against the liability determined by the judgment, or (3) recover damages for breach of warranty substantially the same as the warranty determined by the judgment to have been breached [*Evid. Code § 1301*].

When the liability, obligation, or duty of a third person is in issue in a civil action, evidence of a final judgment against that person is not made inadmissable by the hearsay rule when offered to prove such liability, obligation, or duty [*Evid. Code § 1302*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.24 Presumption Regarding Copies of Writing in Public Custody

[1] In General

A purported copy of a writing in the custody of a public entity, or of an entry in such a writing, is prima facie evidence of the existence and content of such writing or entry if either of the three conditions set forth in *Evid. Code § 1530(a)* is met [*see Evid. Code § 1530(a)*]. The presumptions established by *Evid. Code § 1530(a)* are presumptions affecting the burden of producing evidence [*Evid. Code § 1530(b)*].

[2] Certification

For the purpose of evidence, whenever a copy of a writing is attested or certified, the attestation or certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be [*Evid. Code § 1531*].

[3] Official Records

The official record of a writing is prima facie evidence of the existence and content of the original recorded writing if (1) the record is in fact a record of an office of a public entity and (2) a statute authorized such a writing to be recorded in that office [*Evid. Code § 1532(a)*]. The presumption established by *Evid. Code § 1532(a)* is a presumption affecting the burden of producing evidence [*Evid. Code § 1532(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDocumentary EvidenceWritingsGeneral OverviewEvidenceInferences & PresumptionsPresumptions

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§ 318.25 Use of Receivers

A receiver may be appointed after judgment to carry the judgment into effect or to dispose of the property according to the judgment or to preserve it during the pendency of an appeal [*Code Civ. Proc. § 564(b)(3), (4)*]. For discussion, procedural guides, and forms related to receivers, see Ch. 486, *Receivers* .

Legal Topics:

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

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[Reserved]

§§ 318.26[Reserved]

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§ 318.40 Judgments on Submitted Controversies

Judgments rendered on the basis of submitted controversies are governed by *Code Civ. Proc. §§ 1138-1140*. For discussion of those statutes and for forms for use in submitting a controversy as an agreed case, see Ch. 534, *Submitted Controversy (Agreed Case)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.41 Confession Judgments

[1] Defined

A confession judgment may be entered without an action for money due or to become due, to secure any person against contingent liability on behalf of the defendant, or both. If executed pursuant to *Code Civ. Proc. § 1132 et seq.*, it may be entered in any superior court [*Code Civ. Proc. § 1132(a)*].

A confession of judgment is in effect a private admission to liability for a debt without trial, upon which a court places its imprimatur when submitted to the clerk for entry; it is a creditor's remedy not used widely in California [*Isbell v. County of Sonoma (1978) 21 Cal. 3d 61, 64, 66, 74, 145 Cal. Rptr. 368, 577 P.2d 188* ; *Efstratis v. First Northern Bank of Dixon (1997) 59 Cal. App. 4th 667, 672, 69 Cal. Rptr. 2d 445]* . A confession judgment may, for example, be required to be executed by a debtor as a precondition to a creditor's extension of credit [*see, e.g., Efstratis v. First Northern Bank of Dixon (1997) 59 Cal. App. 4th 667, 669-670, 69 Cal. Rptr. 2d 445]* .

[2] Due Process Requirements

Generally, a court cannot render judgment against a defendant without according the due process rights of notice and an opportunity to be heard, unless the defendant voluntarily, knowingly, and intelligently waives these rights [*Isbell v. County of Sonoma (1978) 21 Cal. 3d 61, 64, 66, 74, 145 Cal. Rptr. 368, 577 P.2d 188* ; *Efstratis v. First Northern Bank of Dixon (1997) 59 Cal. App. 4th 667, 672, 69 Cal. Rptr. 2d 445]* . In light of its inconsistency with due process, a confessed judgment is considered an extreme procedure, and courts construe the authorizing statutes strictly [*Efstratis v. First Northern Bank of Dixon (1997) 59 Cal. App. 4th 667, 672, 69 Cal. Rptr. 2d 445* ; *Wax v. Infante (1982) 138 Cal. App. 3d 138, 140, 187 Cal. Rptr. 686* ; *Barnes v. Hilton (1953) 118 Cal. App. 2d 108, 111, 257 P.2d 98]* .

In particular, a confession of judgment is not valid when it is not accompanied by an independent attorney's certificate or declaration such as that required under *Code Civ. Proc. § 1132(b)*, so that the confessed judgment is shown clearly on its face to been given voluntarily, knowingly, and intelligently after receiving independent legal advice [*Isbell v. County of Sonoma (1978) 21 Cal. 3d 61, 74 n.7, 75, 145 Cal. Rptr. 368, 577 P.2d 188* (holding confessed judgment without such declaration invalid and noting it was not deciding the constitutionality of a procedure in which the required

declaration is filed); *see* discussion in *§ 318.41[4]*].

[3] Statement in Support of Judgment

A statement in writing [*see § 318.321*] must be made, signed by the defendant, and verified by his or her oath, to the following effect [*Code Civ. Proc. § 1133*]:

- It must authorize the entry of judgment for a specified sum;

- If it is for money due or to become due, it must state concisely the facts out of which it arose and show that the sum confessed is justly due or to become due; and

- If it is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability and show that the sum confessed does not exceed that amount.

[4] Attorney's Certificate in Support of Statement Confessing Judgment

A judgment by confession may be entered if any attorney independently representing the defendant signs a certificate (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) [*see § 318.320*] stating that he or she has examined the proposed judgment and has advised the defendant with respect to the waiver of rights and defenses under the confession of judgment procedure and has advised the defendant to utilize the confession of judgment procedure. The certificate or declaration must be filed with the filing of the statement [*Code Civ. Proc. § 1132(b)*].

It is essential that the certificate or declaration be signed by an attorney independently representing the defendant. A confessed judgment is not valid if the certificate or declaration is signed only by the defendant, even if the defendant is an attorney [*Efstratis v. First Northern Bank of Dixon (1997) 59 Cal. App. 4th 667, 674, 69 Cal. Rptr. 2d 445]* . It also is invalid if it is signed by an attorney who is shown to have represented both plaintiff and defendant, even if defendant acknowledges the potential conflict [*Wax v. Infante (1982) 138 Cal. App. 3d 138, 140, 187 Cal. Rptr. 686]* , or if it is signed by an attorney purporting to represent the defendant but in fact acting for another seeking to protect or further plaintiff's interest [*see Rivercourt Co., Ltd. v. Dyna-Tel, Inc. (1996) 41 Cal. App. 4th 1477, 1479-1482, 49 Cal. Rptr. 2d 279]* . In these situations, the confessed judgment is not valid because there is no real "independent" advice necessary to satisfy due process requirements [*§ 318.41[2]*].

[5] Procedure for Entry of Judgment

The statement required by *Code Civ. Proc. § 1133* [*see § 318.321*] must be filed with the clerk of the court in which the judgment is to be entered, who must endorse on it and enter a judgment of the court [*see § 318.322*] for the amount confessed with the costs provided in *Code Civ. Proc. § 1134(b)* [*Code Civ. Proc. § 1134(a)*]. At the time of filing, the plaintiff must pay as court costs that become a part of the judgment the amount specified by statute [*Code Civ. Proc. § 1134(b)*]. No fee may be collected from defendant [*Code Civ. Proc. § 1134(b)*]. The statement and affidavit, with the judgment endorsed on them, together with the certificate filed pursuant to *Code Civ. Proc. § 1132*, becomes the judgment roll [*Code Civ. Proc. § 1134(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsJudgment by Confession

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§ 318.42 Default Judgments

Generally, except when a defendant has been served by publication, the clerk, on written application by the plaintiff with proof of service of summons, must enter the default of a defendant so served, if, within the time specified in the summons, that defendant has not filed one of the following responses [*Code Civ. Proc. § 585(a), (b)*]: an answer, demurrer, notice of motion to strike, notice of motion to dismiss for delay in prosecution, notice of motion for transfer, notice of motion to quash service of summons, notice of motion to stay or dismiss for inconvenient forum, or notice of the filing of a petition for a writ of mandate.

The clerk must also enter the default of a defendant who, within the legal time required to do so, fails to file any of the following:

- An answer, demurrer, or notice a motion to strike, following the plaintiff's filing of an amended complaint [*Code Civ. Proc. § 586(a)(1)*].

- An answer to a complaint, after a demurrer is overruled or motion to strike denied [*Code Civ. Proc. § 586(a)(2)*].

- An answer to any unstricken portion of the complaint, after the grant of a motion to strike [*Code Civ. Proc. § 586(a)(3)*].

- An answer, demurrer, or motion to strike, after the denial of a motion to quash service of summons, denial of a motion to stay or dismiss for inconvenient forum, or denial of a petition for writ of mandate [*Code Civ. Proc. § 586(a)(4), (b)*].

- An amended answer, after a demurrer to that answer has been sustained [*Code Civ. Proc. § 586(a)(5)*].

- An answer, after the granting or denial of a motion for transfer [*Code Civ. Proc. § 586(a)(6)*].

- An amended answer, after a motion to strike is granted [*Code Civ. Proc. § 586(a)(7)*].

- An answer, demurrer, or motion to strike, after denial of a motion to dismiss for delay in service [*Code Civ. Proc. § 586(a)(8), (b)*].

The Judicial Council-approved form for optional use for a judgment [*see § 318.340*] may be used for a default judgment. For detailed discussion and forms relating to the entry of default judgments and relief from default judgments, see respectively Ch. 205, *Defaults and Default Judgments* , and Ch. 489, *Relief From Judgments and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault Judgments

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§ 318.43 Judgments on the Pleadings

The grounds for a motion for judgment on the pleadings are the same as those for a general demurrer [*Carlson v. Lindauer (1953) 119 Cal. App. 2d 292, 301, 259 P.2d 925]* . Such a motion may be made, however, even though a demurrer on the same grounds has been overruled [*Hardy v. Admiral Oil Co. (1961) 56 Cal. 2d 836, 839-840, 16 Cal. Rptr. 894, 366 P.2d 310]* . A complaint is subject to such a motion only if there is an entire absence of some essential allegation [*Rannard v. Lockheed Aircraft Corp. (1945) 26 Cal. 2d 149, 151, 157 P.2d 1]* . An answer is subject to such a motion only if the complaint states a cause of action and the answer raises no material issue and states no defense [*MacIsaac v. Pozzo (1945) 26 Cal. 2d 809, 812-813, 161 P.2d 449]* .

The motion for judgment on the pleadings may be made before, at, or during trial [*Shabrick v. Moore (1961) 195 Cal. App. 2d 56, 59, 15 Cal. Rptr. 310]* .

An order granting the motion must be followed by the filing of a judgment terminating the action in favor of the prevailing party and granting the relief requested in the pleading [*Le Breton v. Stanley Contracting Co. (1911) 15 Cal. App. 429, 434, 114 P. 1028]* .

For a complete discussion and forms related to this topic, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.44 Judgments in Absence of Adverse Party

[1] Circumstances Giving Rise to Judgment

Either party may bring an issue to trial or to a hearing and, in the absence of the adverse party, unless the court for good cause otherwise directs, may proceed with the case and take a dismissal, verdict, or judgment [*see §§ 318.332, 318.340*], as the case may require if proper notice as prescribed in *Code Civ. Proc. § 594(a), (b)* has been made [*Code Civ. Proc. § 594(a)*].

[2] Notice to Adverse Party; Service; Proof

If the issue to be tried is an issue of fact, proof must first be made to the satisfaction of the court that the adverse party has had 15 days' notice of the trial or five days' notice of the trial in an unlawful detainer action [*see § 318.330*]. If the adverse party has served notice of trial upon the party seeking the dismissal, verdict, or judgment at least five days prior to the trial, the adverse party is deemed to have had such notice [*Code Civ. Proc. § 594(a)*; *Berris & Seaton v. Meyers (1984) 210 Cal. Rptr. 444]* .

The notice to the adverse party required when judgment is to be rendered upon an issue of fact is served by mail on all the parties by the clerk of the court not less than 20 days prior to the date set for trial and not less than 10 days prior to the date set for trial in an unlawful detainer action. If the notice is not served by the clerk as required, it may be served by mail by any party on the adverse party not less than 15 days prior to the date set for trial, and in an unlawful detainer action not less than 10 days prior to the date set for trial. The time provisions of *Code Civ. Proc. § 1013* do not serve to extend the notice of trial requirements under *Code Civ. Proc. § 594(b)* for unlawful detainer actions. If notice is served by the clerk, proof of that notice may be made by introduction into evidence of the clerk's certificate or other competent evidence. If notice is served by a party, proof may be made by introduction into evidence of an affidavit or certificate [*see § 318.331*] or other competent evidence. These provisions for notice are exclusive [*Code Civ. Proc. § 594(b)*]. If no competent evidence is actually introduced before the court at the time set for trial that notice of trial has been served on defendant as required by *Code Civ. Proc. § 594(a)*, a judgment for plaintiff will be reversed, since it is essential to the jurisdiction of the trial court in proceeding in the absence of defendant that proof must first be made that defendant has been given statutory notice [*Irvine National Bank v. Han (1982) 130 Cal. App. 3d 693, 694, 697, 181 Cal. Rptr. 864*

(plaintiff failed to place notice of trial in evidence at trial or to request court to take judicial notice of file in case which contained notice of trial)].

A judgment made after trial held without the notice required by *Code Civ. Proc. § 594* is not merely error; rather, it is an act in excess of the court's jurisdiction. Such a judgment is not only subject to attack under *Code Civ. Proc. § 473*, it is also subject to collateral attack at any time [*Wilson v. Goldman (1969) 274 Cal. App. 2d 573, 576, 79 Cal. Rptr. 309* ; *see also Irvine National Bank v. Han (1982) 130 Cal. App. 3d 693, 697, 181 Cal. Rptr. 864]* .

[3] Default Judgments Distinguished

It is important to note that the procedure by which a dismissal, verdict, or judgment is entered pursuant to *Code Civ. Proc. § 594* is distinct from that by which a default judgment is entered. A default judgment refers to that judgment which is entered when the defendant fails to file an answer. Entry of default is not authorized in any case where an answer is on file, whether the defendant does or does not appear at the time the action is called for hearing. A judgment entered pursuant to *Code Civ. Proc. § 594* is not, therefore, a default judgment for failure to answer, but one for failure to be present at the proceedings [*Wilson v. Goldman (1969) 274 Cal. App. 2d 573, 576, 79 Cal. Rptr. 309]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessProofGeneral OverviewCivil ProceduresPleading & PracticeService of ProcessTime LimitationsGeneral OverviewCivil ProceduresPretrial JudgmentsDefaultDefault JudgmentsCivil ProceduresJudgmentsEntry of JudgmentsGeneral Overview

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§ 318.45 Judgments on Stipulations

[1] In Nature of Contract

Inasmuch as a stipulation is a contract, a consent judgment [*see §§ 318.329, 318.340*] based upon that stipulation is regarded as an executed contract which the trial court will assume as having a binding effect upon the parties stipulating to the judgment [*Larsen v. Beekmann (1969) 276 Cal. App. 2d 185, 191, 80 Cal. Rptr. 654* ; *Sanserino v. Shamberger (1966) 245 Cal. App. 2d 630, 633, 54 Cal. Rptr. 206]* .

As long as the court has fundamental jurisdiction of the subject matter and parties, a party may not collaterally attack a stipulated judgment even if the judgment would otherwise be in excess of the court's jurisdiction, absent exceptional circumstances. The reason for this limitation is that judicial acts that are merely in excess of jurisdiction are often subject to principles of consent, estoppel, and waiver. Parties by their consent cannot, however, confer fundamental jurisdiction [*see In re Marriage of Hinman (1992) 6 Cal. App. 4th 711, 716-718, 8 Cal. Rptr. 2d 245]* .

[2] Authority of Attorney to Bind Client

An attorney has the authority to bind his or her client in any steps of the action or proceeding by an agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise [*Code Civ. Proc. § 283*].

The retention of counsel vests in the attorney the right to do many acts in respect to the cause which are ancillary or incidental to the general authority conferred. Among these is included the authority to enter into stipulations and agreements in all matters of procedure during the progress of the trial. Stipulations, so far as they are simply necessary or incidental to the management of the suit and affect only procedure or the remedy as distinguished from the cause of action itself and the essential rights of the client, are binding on the client [*Linsk v. Linsk (1969) 70 Cal. 2d 272, 277, 74 Cal. Rptr. 544, 449 P.2d 760]* .

This general authority, however, does not vest the attorney with authority to impair, compromise, or destroy a client's cause of action without the client's consent [*Roscoe Moss Co. v. Roggero (1966) 246 Cal. App. 2d 781, 786, 54 Cal. Rptr. 911]* . Although the attorney's stipulation will be presumed to be authorized by the client, when the court or

adverse party is made aware that the attorney is acting in opposition to the client's instructions or wishes, the court may not act upon the stipulation and the adverse party may not claim a right to enforce a judgment rendered by reason of that stipulation [*Linsk v. Linsk (1969) 70 Cal. 2d 272, 277, 74 Cal. Rptr. 544, 449 P.2d 760]* .

[3] Sufficiency of Stipulation

If a written stipulation sets forth all the terms of a judgment agreed to by the parties, the filing of the stipulation normally provides a sufficient basis for entry of the judgment on the ex parte application of either party. But if the stipulation omits any essential element of a complete judgment, a judgment may not be entered until the missing element or elements are established by proof or by further stipulation. Similarly, if a material term of the stipulation is ambiguous, judgment may not be entered until the ambiguity is appropriately resolved [*Rooney v. Vermont Investment Corp. (1973) 10 Cal. 3d 351, 368-369, 110 Cal. Rptr. 353, 515 P.2d 297]* .

If the stipulation on which judgment is to be entered predicates entry of judgment on the occurence of a condition, the court must satisfy itself that the condition did, in fact, occur, and thus must be fully apprised of the circumstances surrounding the occurrence of the condition. Such an assessment cannot be made without some form of hearing or trial unless the stipulation also contains an express waiver of the right to a hearing [*S.E.P. Associates, Inc. v. Peto (1975) 49 Cal. App. 3d 305, 308, 122 Cal. Rptr. 514]* .

[4] Authority of Court to Enter Judgment

If the parties to pending litigation stipulate in writing or orally before the court for settlement of the case, or part thereof, the court, on motion, may enter judgment pursuant to the terms of the settlement [*Code Civ. Proc. § 664.6*]. However, parties engaged in private dispute resolution may not stipulate to the appointment of a judicial referee or judge pro tempore to secure a settlement enforceable by the court under *Code Civ. Proc. § 664.6* unless they seek the reference in pending litigation [*Housing Group v. United Nat. Ins. Co. (2001) 90 Cal. App. 4th 1106, 109 Cal. Rptr. 2d 497]* .

For forms of stipulation to settlement, notice of motion, and order to enter judgment pursuant to the stipulation, see §§ 318.323-318.325. For additional discussion of *§ 664.6* motions, see *Ch. 520, Settlement and Release, § 520.10 et seq.*

[5] Judgment Required to Conform to Stipulation

A trial court is under a duty to render a judgment that is in exact conformity with an agreement or stipulation of the parties. If interpretation of a stipulation is in order, the rules applied are those applied to the interpretation of contracts. It is not the province of the court to add to the provisions, to insert a term not found, or to make a new stipulation for the parties [*Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 840, 131 Cal. Rptr. 674]* .

Entry of a stipulated judgment is a judicial act that a court has discretion to perform. Although a court may not add to or make a new stipulation without mutual consent of the parties (*see § 318.45[5]*), it may reject a stipulation that is contrary to public policy, or one that incorporates an erroneous rule of law [*California State Auto. Ass'n Inter-Ins. Bureau v. Superior Court (1990) 50 Cal. 3d 658, 664, 268 Cal. Rptr. 284, 788 P.2d 1156]* .

[6] Judgment Binding Only as to Matter Stipulated

A judgment by consent in an action in which the court had jurisdiction of the subject matter and of the parties is res judicata and conclusive between the parties and those deriving under them, and will bind them and those claiming under them as efficaciously as if it had been entered after a trial of the issues [*Avery v. Avery (1970) 10 Cal. App. 3d 525, 529, 89 Cal. Rptr. 195]* . Similarly, a stipulated judgment may properly be given collateral estoppel effect, at least if the parties manifest an intent to be bound collaterally by its terms [*California State Auto. Ass'n Inter-Ins. Bureau v. Superior Court (1990) 50 Cal. 3d 658, 664 n.2, 268 Cal. Rptr. 284, 788 P.2d 1156]* . A judgment based on a stipulation

of the parties is binding, however, only as to the matter consented to by the stipulation and is confined only to those issues within the stipulation [*Pardee Construction Co. v. City of Camarillo (1984) 37 Cal. 3d 465, 471, 208 Cal. Rptr. 228, 690 P.2d 701* ; *Larsen v. Beekmann (1969) 276 Cal. App. 2d 185, 191, 80 Cal. Rptr. 654]* .

Moreover, a judgment that awards greater relief than that to which the parties have agreed by their written stipulation renders the judgment void as being beyond the jurisdiction of the court and is subject to collateral attack [*Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 847, 131 Cal. Rptr. 674]* . However, if a judgment is simply erroneous, even though the error appears on the face of the judgment or record, it is not subject to collateral attack [*Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 840, 131 Cal. Rptr. 674]* .

[7] Waiver of Rights

Consent to the entry of a judgment is a waiver of any errors in it, and it will not be disturbed on appeal by the party who expressly consented to the making of it [*Browand v. Scott Lbr. Co. (1954) 125 Cal. App. 2d 68, 73, 269 P.2d 891]* .

If consent was given merely to facilitate an appeal following adverse determination of a critical issue, a party will not lose his or her right to be heard on appeal. An appeal may also be heard from a judgment to which a party consented if the party did not really consent to a judgment but, for example, merely acknowledged that it could not win its case if it had the burden of proof [*Building Industry Assn. v. City of Camarillo (1986) 41 Cal. 3d 810, 817, 226 Cal. Rptr. 81, 718 P.2d 68* ; *Villano v. Waterman Convalescent Hospital, Inc. (2010) 181 Cal. App. 4th 1189, 1198-1203, 105 Cal. Rptr. 3d 276* (stipulated judgment is appealable, but prejudicial error is difficult to prove when court's rulings were tentative); *Dong v. Board of Trustees (1987) 191 Cal. App. 3d 1572, 1577, 236 Cal. Rptr. 912]* .

To determine whether a consent judgment may be attacked on appeal, the court will consider whether the parties intended to settle their dispute fully and finally or intended merely to hasten the transfer of the dispute to the appellate court. If the parties intended merely to hasten the transfer of the dispute to the appellate court, then the appellant's objections to the judgment have not been waived [*Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 401, 87 Cal. Rptr. 2d 453, 981 P.2d 79]* .

Because a stipulated judgment authorizes entry of judgment without a hearing and without further notice until after judgment has been entered against the defendant, it is viewed as a form of confession of judgment and is constitutional only if it constitutes a valid waiver of due process rights. To be valid, a waiver of due process rights must be knowing, intelligent, and voluntary. The court must determine the validity of such waiver before entry of the stipulated judgment. Absent such determination, the judgment is void [*County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 112-115, 183 Cal. Rptr. 741]* .

Additionally, if a judgment is allegedly void on other constitutional grounds, the judgment exceeds the court's jurisdiction and is subject to attack at any time. In this case, a party may move the trial court to vacate the consent judgment, unless there is a clear and compelling waiver of the constitutional rights [*City of Glendale v. George (1989) 208 Cal. App. 3d 1394, 1397-1398, 256 Cal. Rptr. 742]* .

[8] Construction and Interpretation

Because a consent judgment is regarded as a contract between the parties, it must be construed as any other contract [*Pardee Construction Co. v. City of Camarillo (1984) 37 Cal. 3d 465, 471, 208 Cal. Rptr. 228, 690 P.2d 701* ; *Cottom v. Bennett (1963) 214 Cal. App. 2d 709, 716, 29 Cal. Rptr. 715]* . Despite its contractual status, a consent judgment is as conclusive as one entered on contest and trial [*Stevens v. Stevens (1968) 268 Cal. App. 2d 426, 435, 74 Cal. Rptr. 54]* .

For discussion of the interpretation of contracts generally, see Ch. 140, *Contracts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.46 Judgments on Offers to Compromise

In some instances, the parties may wish to employ statutory procedures for entry of judgments after an offer to compromise [*Code Civ. Proc. §§ 997, 998*]. For discussion of and forms relevant to this procedure, see Ch. 520, *Settlement and Release* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.47 Judgments After Motions for Judgment, Nonsuit, or Dismissal

After a party has completed his or her presentation of evidence in a trial by the court, the other party, without waiving the right to offer evidence in support of the defense or in rebuttal in the event the motion is not granted, may move for judgment. The court as trier of the facts must weigh the evidence and may render a judgment in favor of the moving party, in which case the court must make a required statement of decision [*see Code Civ. Proc. §§ 632, 634*], or may decline to render any judgment until the close of all the evidence. The court may consider all evidence received, provided that the party against whom the motion for judgment has been made shall have had an opportunity to present additional evidence to rebut evidence received during the presentation of evidence deemed by the presenting party to have been adverse to him or her, and to rehabilitate the testimony of a witness whose credibility has been attacked by the moving party. Such a motion may also be made and granted as to any cross complaint [*Code Civ. Proc. § 631.8(a)*].

For a more complete discussion of and forms relating to motions for judgment, and for a discussion of and forms relating to motions for nonsuit, see Ch. 389, *Nonsuit and Motions for Judgment* . For a discussion of and forms relating to motions for dismissal of an action, see Ch. 212, *Dismissal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.48 Judgments After Trial

[1] Announcement of Tentative Decision

On the trial of a question of fact by the court, the court will announce its tentative decision by an oral statement, entered in the minutes, or by a written statement filed with the clerk. Unless the announcement is made in open court in the presence of all parties that appeared at the trial, the clerk must immediately serve on all parties that appeared at the trial a copy of the minute entry or written tentative decision [*Cal. Rules of Ct., Rule 3.1590(a)*]. The tentative decision does not constitute a judgment and is not binding on the court. If the court subsequently modifies or changes its announced tentative decision, the clerk must serve a copy of the modification or change on all parties that appeared at the trial [*Cal Rules of Ct., Rule 3.1590(b)*; *see Neptune Society Corp. v. Longanecker (1987) 194 Cal. App. 3d 1233, 1245, 240 Cal. Rptr. 117* (decided under former Cal. Rules of Ct., Rule 232 finding concerning alternative basis for decision added even though not initially included in oral announcement)].

It is a violation of due process for a judge other than the one who heard the case to enter a judgment on the basis of a tentative decision entered in the minutes or filed with the clerk [*In re Marriage of Colombo (1987) 197 Cal. App. 3d 572, 581-582, 242 Cal. Rptr. 100* ; *see* Cal. Rules of Ct., Rule decided under former *Cal. Rules of Ct., Rule 3.1590(a)*].

The court may also direct that the tentative decision will become the statement of decision unless, within 10 days after announcement or service of the tentative decision, a party specifies those principal controverted issues as to which the party is requesting a statement of decision or makes proposals not included in the tentative decision [*Cal. Rules of Ct., Rule 3.1590(c)(4)*].

[2] Request for Statement of Decision

A request for a statement of decision by any party appearing at the trial must be made within 10 days after the court announces a tentative decision or, if the trial has lasted less than one calendar day or less than eight hours over more than one day, made before submission of the matter for decision [*Code Civ. Proc. § 632*]. Within 10 days after announcement or service of the tentative decision, whichever is later, any party that appeared at trial may request a statement of decision to address the principal controverted issues. The principal controverted issues must be specified in

the request [*Cal. Rules of Ct., Rule 3.1590(d)*]. If a party requests a statement of decision, any other party may make proposals as to the content of the statement of decision within 10 days after the date of request for a statement of decision [*Cal. Rules of Ct., Rule 3.1590(e)*]. The court may order a hearing on the proposals [*Cal. Rules of Ct., Rule 3.1590(k)*].

For a complete discussion and forms for preparation of a statement of decision, see Ch. 529, *Statement of Decision* .

[3] Preparation of Judgment When Statement of Decision Requested

If a party requests a statement of decision, the court must, within 30 days of announcement or service of the tentative decision, prepare and serve a proposed statement of decision and a proposed judgment on all parties that appeared at the trial, unless the court has ordered a party to prepare the statement. A party that has been ordered to prepare the statement must, within 30 days after the announcement or service of the tentative decision, serve and submit to the court a proposed statement of decision and a proposed judgment. If the proposed statement of decision and judgment are not served and submitted within that time, any other party that appeared at the trial may within 10 days thereafter: (1) prepare, serve, and submit to the court a proposed statement of decision and judgment, or (2) serve on all other parties and file a notice of motion for an order that a statement of decision be deemed waived [*Cal. Rules of Ct., Rule 3.1590(f)*].

[4] Objections to Proposed Statement of Decision and Judgment

Any party may, within 15 days after the proposed statement of decision and judgment are served, serve and file objections to the proposed statement of decision or judgment [*Cal. Rules of Ct., Rule 3.1590(g)*]. For discussion and forms relating to objections to proposed statement of decision, see Ch. 529, *Statement of Decision* .

The court may order a hearing on objections to the proposed statement of decision [*Cal. Rules of Ct., Rule 3.1590(k)*]. For discussion and forms relating to an order for a hearing on such objections, see Ch. 529, *Statement of Decision* .

[5] Preparation of Judgment When No Party Requests Statement of Decision

[a] By Court

If no party requests or is ordered to prepare a statement of decision and a written judgment is required, the court must prepare and serve a proposed judgment on all parties that appeared at the trial within 20 days after the announcement or service of the tentative decision or the court may order a party to prepare, serve, and submit the proposed judgment to the court within 10 days after the date of the order [*Cal. Rules of Ct., Rule 3.1590(h)*].

[b] By Party in Court's Discretion

The court may order a party to prepare, serve, and submit the proposed judgment to the court within 10 days after the date of the order [*Cal. Rules of Ct., Rule 3.1590(h)*].

[c] Objections to Proposed Judgment

Any party may, within 10 days after service of the proposed judgment, serve and file objections [*Cal. Rules of Ct., Rule 3.1590(i)*]. The court may order a hearing on objections to the proposed judgment [*Cal. Rules of Ct., Rule 3.1590(i)*].

[d] Signing and Filing of Judgment

If a written judgment is required, the court must sign and file the judgment within 50 days after the announcement or service of the tentative decision, whichever is later, or, if a hearing was held under *Cal. Rules of Ct., Rule 3.1590(k),*

within 10 days after the hearing. The judgment constitutes the decision on which judgment is to be entered under *Code Civ. Proc. § 664* [*Cal. Rules of Ct., Rule 3.1590(l)*].

Under the former statute, if the court signed the proposed judgment before the expiration of 10 days after service of the proposed judgment, thus not allowing a party time to serve and file objections, the court's error is not reversible per se, but will be reviewed for prejudice to a party [*In re Marriage of Steiner (2004) 117 Cal. App. 4th 519, 524-525, 11 Cal. Rptr. 3d 671* (in marital dissolution action, court's signing of proposed judgment prepared by husband within two days of receipt was harmless, where wife did not identify any substantial right she lost as result of trial court's premature signing of judgment before reading her objections since her objections would have been of no aid to trial judge had he waited)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.49 Judgments on Verdict After Trial by Jury

[1] Distinction Between General and Special Verdict

The verdict of a jury is either general or special. A general verdict is that by which the jury pronounces generally on all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury finds the facts only, leaving the judgment to the court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them. Those conclusions of fact must be so presented that nothing shall remain to the court but to draw from them conclusions of law [*Code Civ. Proc. § 624*; *see McCoy v. Gustafson (2009) 180 Cal. App. 4th 56, 6970, 103 Cal. Rptr. 3d 37*].

[2] Entry of Verdict in Minutes of Court

In superior courts, on receipt of a verdict, an entry must be made in the minutes of the court, specifying the time of trial and the names of the jurors and witnesses, and setting out the verdict at length. If a special verdict is found, either the judgment [*see § 318.334*] rendered pursuant to the verdict or, if the case is reserved for argument or further consideration, the order reserving it, must be entered in the minutes of the court [*Code Civ. Proc. § 628*].

For a more complete discussion of verdicts after trial by jury, see Ch. 326A, *Jury Verdicts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawPostverdict JudgmentsCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts

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§ 318.50 Judgments Notwithstanding the Verdict

The court, before the expiration of its power to rule on a motion for a new trial, either on its own motion after five days' notice or on motion of a party against whom a verdict has been rendered, must render judgment in favor of the aggrieved party, notwithstanding the verdict, whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made [*Code Civ. Proc. § 629*].

For a complete discussion and forms relating to motions notwithstanding the verdict, see *Ch. 371, Motions After Trial, § 371.10* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.51 Judgments on Separate Trial of Special Defenses

Judgments rendered on the separate trial of special defenses are governed by *Code Civ. Proc. § 597*. For discussion and forms relating to such forms, see *Ch. 3, Abatement of Actions, § 3.110* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.52 Judgments on Particular Causes of Action

[1] Form and Substance

The test of the sufficiency of a judgment rests in its substance rather than its form. The form of the judgment is not very material, provided that, in substance, it shows distinctly and not inferentially that the matter has been determined in favor of one of the litigants or that the rights of the parties in litigation have been adjudicated [*Oppenheimer v. Deutchman (1958) 161 Cal. App. 2d 501, 503, 326 P.2d 883]* .

There are certain statutory requirements for particular types of judgments, one of which is discussed below.

[2] Money Judgments

In any judgment, or execution on such judgment, the amount must be computed and stated, rejecting fractions, in dollars and cents [*Code Civ. Proc. § 577.5*].

[3] Foreign-Money Judgments

[a] In General

Judgments for claims on an obligation to pay, or for recovery of a loss, expressed in or measured by foreign money are governed by the Uniform Foreign-Money Claims Act (*Code Civ. Proc. § 676 et seq.*) [*Code Civ. Proc. § 676.1(6)*]. The Act applies to foreign-money claims in an action or distribution proceeding, as defined (*see* discussion in *§ 318.52[3][b]*), and authorizes entry of a money judgment in a foreign currency in actions or distribution proceedings that were commenced on or after January 1, 1992 [*Code Civ. Proc. § 676.16*]. For actions commenced before that date, courts generally apply the judgment-day rule or the breach-day rule [*see Pecaflor Construction Co. v. Landes (1988) 198 Cal. App. 3d 342, 345-346, 350, 243 Cal. Rptr. 605* ; *Levi Strauss & Co. v. Aetna Casualty & Surety Co. (1986) 184 Cal. App. 3d 1479, 1486-1487, 237 Cal. Rptr. 473]* .

Under the Act, parties to a transaction could agree to payment in whole or in part in a foreign currency [*see Code Civ.*

Proc. § 676.3(b)]. The Act establishes rules for determining the currency applicable to a transaction for which no currency is designated by the parties [*see Code Civ. Proc. § 676.4(b)*]. For further discussion of provisions under the Act relating to the assertion of a foreign-money claim, see *Ch. 177, Damages, § 177.140 et seq.*

For a form for a judgment on a foreign-money claim, and discussion of provisions under the Act relating to entry of a foreign-money judgment, see *§ 318.339*.

For a discussion of the conclusive effect of foreign money judgments under the Uniform Foreign-Country Money Judgments Recognition Act (*Code Civ. Proc. § 1713 et seq.*), see *§ 318.180 et seq.*

[b] Definitions

An "action," under the Act, means a judicial proceeding or arbitration in which a payment in money may be awarded or enforced with respect to a foreign-money claim. A "distribution proceeding" means a judicial or nonjudicial proceeding for the distribution of a fund in which one or more foreign-money claims is asserted and includes an accounting, an assignment for the benefit of creditors, a foreclosure, the liquidation or rehabilitation of a corporation or other entity, and the distribution of an estate, trust, or other fund [*Code Civ. Proc. § 676.1(1), (4)*].

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§ 318.53 Judgments in Small Claims Court

For discussion and forms relating to small claims court judgments under *Code Civ. Proc. § 116.110 et seq.*, see Ch. 526, *Small Claims* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewGovernmentsCourtsSmall Claims Courts

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§ 318.54 Recording Entry of Judgment

[1] Ministerial Act

Whereas the rendition of the judgment by the court is considered a judicial act by the court, the entry of the judgment in the records of the court is considered a ministerial act by the clerk [*Brown v. Superior Court (1925) 70 Cal. App. 732, 735, 234 P. 409]* .

[2] Time of Entry

When an action is tried by jury, judgment must be entered by the clerk in conformity to the verdict within 24 hours after the rendition of the verdict, whether or not a motion for judgment notwithstanding the verdict is pending, unless the court orders the case to be reserved for argument or further consideration, or unless the court grants a stay of proceedings. If the action is tried by the court, judgment must be entered by the clerk in conformity to the decision of the court immediately on the filing of the decision. In no case is a judgment effectual for any purpose until entered [*Code Civ. Proc. § 664*].

[3] Place of Entry

[a] In Court Records

In those counties in which the clerk of the superior court places individual judgments in the file of actions and a microfilm copy of the individual judgments is made prior to their placement in the file of actions, or in which the judgment is entered in the register of actions or into the court's electronic data-processing system prior to their placement in the file of actions, the clerk is not required to enter judgments in a judgment book, and the date of filing the judgment with the clerk constitutes the date of its entry [*Code Civ. Proc. § 668.5*]. Except as provided in *Code Civ. Proc. § 668.5*, the clerks of the superior courts must keep, with the records of the court, a book called the "judgment book," in which judgments must be entered [*Code Civ. Proc. § 668*].

[b] Notation on Written Instrument of Obligation to Pay Money

In all cases in which judgment is rendered on a written obligation to pay money, the clerk, at the time of the entry of judgment, unless otherwise ordered, must note over the clerk's official signature and across the face of the writing, the fact of the rendition of judgment, the date, and the title of the court and case [*Cal. Rules of Ct., Rule 3.1806*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

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§ 318.55 Notification of Entry of Judgment

In any contested action or special proceeding, except as noted below, the party submitting an order or judgment for entry must prepare and mail a copy of the notice of entry of judgment to all parties who have appeared in the action or proceeding. This party must also file with the court the original notice of entry of judgment, together with the proof of service by mail [*Code Civ. Proc. § 664.5(a)*]. This requirement does not apply in the following actions or proceedings [*Code Civ. Proc. § 664.5(a)*]:

- A small claims action.
- An action or proceeding in which a prevailing party is not represented by counsel.
- A proceeding for dissolution of marriage, for nullity of marriage, or for legal separation.

For purposes of the requirements set out in *Code Civ. Proc. § 664.5*, "judgment" includes any judgment, decree, or signed order from which an appeal lies [*Code Civ. Proc. § 664.5(c)*].

For a form for notice of entry of judgment, see *§ 318.336*.

In a contested action or special proceeding in which the court has declared a state statute or regulation to be unconstitutional, the prevailing party, unless otherwise ordered by the court, must mail a copy of the judgment and a notice of entry of judgment to the Attorney General and file a proof of service of that notice within 10 days after the court has entered judgment [*Cal. Rules of Ct., Rule 2.1100*; *see Code Civ. Proc. § 664.5(e)*].

In a contested action or special proceeding in which a prevailing party is not represented by counsel, the clerk of the court is required, promptly upon entry of judgment, to mail notice of entry of judgment to all parties who have appeared in the action or special proceeding, and must execute a certificate of mailing and place it in the court's file in the cause [*Code Civ. Proc. § 664.5(b)*]. The clerk is also required to mail notice of entry of any judgment or ruling, whether or not appealable, whenever the court so orders in any action or special proceeding [*Code Civ. Proc. § 664.5(d)*]. When the

clerk is required to provide notice, it need not be in same form as that mailed by a party; for example, a copy of the minute order is sufficient when a final order is entered in the permanent minutes by court order under *Code Civ. Proc. § 664.5(d)* [*Pacific City Bank v. Los Caballeros Racquet & Sports Club, Ltd. (1983) 148 Cal. App. 3d 223, 228, 195 Cal. Rptr. 776* ; *see Cal. Rules of Ct., Rule 8.104(d)* (what constitutes date of entry of judgment or order for purposes of appeal)].

Failure to meet the statutory requirements for notice of entry of judgment set forth in *Code Civ. Proc. § 664.5(a), (b)* does not render the judgment void. When both the court clerk and the party submitting the judgment fail to serve the statutorily mandated notice of entry of judgment, the sole consequence is that a longer statutory period for filing the notice of appeal comes into play. Thus, rather than the 60-day period that would have run from notice of entry of the judgment, an appellant has 180 days from entry of judgment to file the notice of appeal. There is also no basis for voiding a judgment based on a party's noncompliance with *Cal. Rules of Ct., Rule 8.25* [*Kimball Avenue v. Franco (2008) 162 Cal. App. 4th 1224, 1228-1229, 78 Cal. Rptr. 3d 352* (trial court could not vacate and reenter judgment because notice of entry was not served on plaintiff)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessMethodsMailCivil ProceduresPleading & PracticeService of ProcessProofGeneral OverviewCivil ProceduresJudgmentsEntry of JudgmentsGeneral Overview

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§ 318.56 Awarding of Costs

In general, the prevailing party is entitled to have included within the judgment costs and necessary disbursements included in the judgment [*Code Civ. Proc. §§ 1032-1034*; *Cal. Rules of Ct., Rules 3.1700 et seq.*]. For a detailed discussion, procedural guide, and forms relating to the award of costs, see Ch. 174, *Costs and Attorney's Fees* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

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§ 318.57 Awarding of Interest

[1] As Part of Damages

In some cases, a party may be entitled to interest as a part of the damages recovered in the action [*Civ. Code §§ 3287-3291*]. For a detailed discussion of the award of interest as part of damages, see Ch. 177, *Damages* .

[2] Following Verdict or Decision

Whether or not interest is included in the damages awarded either by the court or the jury, all monetary awards must bear interest at the legal rate during the period following rendition of the verdict or decision until entry of the judgment, and thereafter until discharged by the debtor [*see Cal. Const., art. XV, § 1*; *Code Civ. Proc. § 685.010*; *Cal. Rules of Ct., Rule 3.1802*; *Dixon Mobile Homes, Inc. v. Walters (1975) 48 Cal. App. 3d 964, 975, 122 Cal. Rptr. 202* ; *cf. Bullis v. Security Pac. Nat'l Bank (1978) 21 Cal. 3d 801, 815 n.18, 148 Cal. Rptr. 22, 582 P.2d 109* (disapproving *Dixon Mobile Homes* to extent it is inconsistent)].

The current rate of interest on judgments is 10 percent [*Code Civ. Proc. § 685.010(a)*]. Judgments against public entities are exempted from the general rule by *Gov. Code § 970.1(b)*. Interest in such cases accrues at the rate of seven percent per annum pursuant to *Cal. Const., art. XV, § 1* [*California Fed. Savings & Loan Assn. v. City of Los Angeles (1995) 11 Cal. 4th 342, 344, 352-353, 45 Cal. Rptr. 2d 279, 902 P.2d 297]* .

[3] Cumulation or Compounding of Interest

Cal. Const., art. XV, § 1, does not allow the postjudgment interest rate to exceed 10 percent per annum [*see Morris v. Department of Real Estate (1988) 203 Cal. App. 3d 1109, 1112, 250 Cal. Rptr. 432]* . In some cases, interest on the judgment may be governed by more than one statute. The interest awarded may not, however, offend the constitutional interest limitation. For example, if a plaintiff is entitled to prejudgment interest under *Civ. Code § 3291* (judgment obtained in personal injury action is more favorable than pretrial offer of compromise rejected by defendant) for the period following entry of the judgment and until its satisfaction, recovery of interest is governed by both *Civ. Code § 3291* and *Code Civ. Proc. § 685.010*. In this situation, the plaintiff may not combine the interest recoverable under the

two statutes because the sum would be twice the allowable rate for the period [*Mendez v. Kurten (1985) 170 Cal. App. 3d 481, 487, 215 Cal. Rptr. 924* (*Civ. Code § 3291* merely restates, but does not duplicate or abrogate, allowance of interest under *Code Civ. Proc. § 685.010* for cases qualifying for prejudgment interest)]. However, accrued postjudgment interest on a judgment may be incorporated into the principal when a judgment is renewed [*OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp. (2008) 168 Cal. App. 4th 185, 193, 85 Cal. Rptr. 3d 350]* .

Compound interest generally is not allowable on a judgment. However, prejudgment interest accrued under *Civ. Code § 3291* is not part of the judgment, and the plaintiff cannot obtain interest on that prejudgment interest [*Hess v. Ford Motor Co. (2002) 27 Cal. 4th 516, 530-533, 117 Cal. Rptr. 2d 220, 41 P.3d 46]* . Case law has established, however, that a judgment bears interest on the whole amount from its date even though the amount is in part made up of interest. As a consequence, compound interest may in effect be recovered on a judgment whereby the aggregate amount of principle and interest is turned into a new principal [*see* *Big Bear Properties, Inc. v. Gherman (1979) 95 Cal. App. 3d 908, 913, 157 Cal. Rptr. 443]* .

[4] Interest on Judgment

The clerk must include in the judgment any interest awarded by the court and the interest accrued since the entry of the verdict [*Cal. Rules of Ct., Rule 3.1802*]. In addition, except as provided in *Code Civ. Proc. § 685.020(b)* regarding installment judgments, interest will commence to accrue on any money judgment from the date of entry of the judgment [*Code Civ. Proc. § 685.020(a)*; *see* Stockton *Theatres, Inc. v. Palermo (1961) 55 Cal. 2d 439, 442-443, 11 Cal. Rptr. 580, 360 P.2d 76* ; § 318.57[5]]. Postjudgment interest runs from the date of entry of judgment on an original jury verdict rather than from a judgment entered following a remittitur on appeal [*Ehret v. Congoleum Corp. (2001) 87 Cal. App. 4th 202, 104 Cal. Rptr. 2d 370]* .

[5] Interest on Installment Judgment

Unless the judgment provides otherwise, interest on a money judgment payable in installments commences to accrue as to each installment on the date the installment becomes due [*Code Civ. Proc. § 685.020(b)*].

[6] Effect of Appeal

A judgment bears legal interest from the date of its entry in the trial court even though the judgment is subject to direct attack. If a judgment is modified on appeal, whether upward or downward, the new sums draw interest from the date of the entry of the original order, and not from the date of the new judgment. If a judgment is reversed on appeal, the new award subsequently rendered by the trial court bears interest only from the date of the entry of the new judgment [*Stockton Theatres, Inc. v. Palermo (1961) 55 Cal. 2d 439, 442-443, 11 Cal. Rptr. 580, 360 P.2d 76* ; *Munoz v. City of Union City (2009) 173 Cal. App. 4th 199, 204-220, 92 Cal. Rptr. 3d 527*].

[7] When Interest Ceases to Accrue

If a money judgment is satisfied in full pursuant to a writ, interest ceases to accrue on the judgment on the date of levy if the proceeds of collection are paid in a lump sum [*Code Civ. Proc. § 685.030(a)(1)*]. Interest also ceases to accrue if the money judgment is satisfied pursuant to an earnings withholding order, on the date and in the manner provided in *Code Civ. Proc. § 706.024* or *706.028* [*Code Civ. Proc. § 685.030(a)(2)*; for discussion relating to earnings withholding orders generally, *see* Ch. 276, *Garnishment*]. In any other case, accrual ceases on the date the proceeds of sale or collection are actually received by a levying officer [*Code Civ. Proc. § 685.030(a)(3)*]. If the judgment is satisfied in full other than by writ, the interest ceases to accrue on the date of full satisfaction [*Code Civ. Proc. § 685.030(b)*]. If a money judgment is partially satisfied, interest ceases to accrue as to the part satisfied on the date of satisfaction [*Code Civ. Proc. § 685.030(c)*].

For the purposes of determining the date of satisfaction, the date a money judgment is satisfied in full or in part is either the date satisfaction is actually received by the judgment creditor, the date satisfaction is tendered to the judgment creditor or deposited in court, or the date of any other performance having the effect of satisfaction, whichever is earliest [*Code Civ. Proc. § 685.030(d)*].

The clerk of a court may enter in the Register of Actions a writ of execution on a money judgment as returned wholly satisfied when the judgment amount, as specified on the writ, is fully collected and only an interest deficit of no more than an amount specified by statute exists, due to automation of the continual daily interest accrual calculation [*Code Civ. Proc. § 685.030(e)*].

For discussion and forms relating to costs on a judgment, see Ch. 174, *Costs and Attorney's Fees* . For discussion of costs and interest to be entered on writs of execution, sale, or possession, see Ch. 254, *Executions and Enforcement of Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral Overview

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§ 318.58 Awarding of Attorney's Fees

In some cases, the prevailing party may be entitled to an award of attorney's fees. For a more complete discussion of the procedure by and instances in which such an award may be made, see Ch. 174, *Costs and Attorney's Fees* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesEnglish Rule

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[Reserved]

§§ 318.59[Reserved]

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§ 318.70 Antedating a Judgment by Nunc Pro Tunc Order

All courts have the inherent power to enter orders for judgments nunc pro tunc so that the judgment will be held effective prior to the date on which it was actually entered [*Martin v. Martin (1970) 2 Cal. 3d 752, 760-761, 87 Cal. Rptr. 526, 470 P.2d 662]* . The general rule is that the inherent power of the court to enter a judgment nunc pro tunc which relates back to the time when it should have been entered will be exercised only to avoid injustice in order to preserve the rights of the litigants. Accordingly, the entry of such a judgment is granted or refused in view of the circumstances of a particular case. The only grounds for antedating a judgment are (1) the preservation of the legitimate fruits of the litigation which would otherwise be lost to the prevailing party, (2) the correction of a deficiency in the recordation of a previous decision so as to express the true intention of the court as of the earlier date, or (3) to correct a clerical error [*Young v. Gardner-Denver Co. (1966) 244 Cal. App. 2d 915, 919, 53 Cal. Rptr. 522* ; *see In re Marriage of Padgett (2009) 172 Cal. App. 4th 830, 852-855, 91 Cal. Rptr. 3d 475* (court exceeded power to issue nunc pro tunc order by creating interest in retirement plan); *Scalice v. Performance Cleaning Systems (1996) 50 Cal. App. 4th 221, 238-239, 57 Cal. Rptr. 2d 711* (trial court did not abuse discretion by entering judgment 27 days earlier than date actually rendered, when delay was not attributable to plaintiff but to court's unavailability)].

When a plaintiff has died during a jury trial before the jury is instructed and the verdict rendered, so that his or her claim for noneconomic damages has abated, the trial court may not enter judgment nunc pro tunc as of the time before the plaintff's death in an effort to save the claim. Nor may the trial court do so in a bifurcated jury trial when a verdict in the final phase of the trial has not been rendered, because no verdict has been rendered determining all facts necessary for judgment [*Williamson v. Plant Insulation Co. (1994) 23 Cal. App. 4th 1406, 1414-1418, 28 Cal. Rptr. 2d 751]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsNunc Pro Tunc Relief

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§ 318.71 Modification Prior to Entry

The court retains power to amend or change the conclusions of law so as to point to a different judgment and to enter a judgment different from the first one announced. This power continues until the entry of the judgment and such change may be made by a judge other than the one who tried the case [*Kelly v. Sparling Water Co. (1959) 52 Cal. 2d 628, 633, 343 P.2d 257]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

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§ 318.72 Correction of Clerical Error After Entry of Judgment or Order

[1] General Rule

The court, on motion of the injured party [*see § 318.360*], or on its own motion, may correct clerical mistakes in its judgments or orders as entered, so as to conform to the judgment or order as directed. Additionally, the court may, on motion of either party after notice to the other party, set aside any void judgment or order [*Code Civ. Proc. § 473*]. Although expressly recognized by statute, courts have the power to correct clerical errors independently of any statute; moreover, that power is unaffected by the pendency of an appeal or a habeas corpus proceeding [*see In re Candelario (1970) 3 Cal. 3d 702, 705, 91 Cal. Rptr. 497, 477 P.2d 729]* .

[2] No Correction of Judicial Error

A trial court may correct, by a nunc pro nunc order, an inadvertent or clerical error, such that the form of the judgment does not comport with the substance as intended at the time of rendition of the judgment [*Hamilton v. Laine (1997) 57 Cal. App. 4th 885, 890, 67 Cal. Rptr. 2d 407]* . The trial court may, however, correct a judicial error only on a motion for new trial or on a motion under *Code Civ. Proc. § 663* to vacate the order or judgment and enter a different one [*Greene v. Superior Court (1961) 55 Cal. 2d 403, 405-406, 10 Cal. Rptr. 817, 359 P.2d 249* ; *see West Shield Investigations & Security Consultants v. Superior Court (2000) 82 Cal. App. 4th 935, 950-951, 98 Cal. Rptr. 2d 612* ; *Hamilton v. Laine (1997) 57 Cal. App. 4th 885, 891, 67 Cal. Rptr. 2d 407* (not proper to amend order nunc pro tunc to correct judicial inadvertence, omission, oversight or error, not to show what court might or should have done as distinguished from what it actually did)].

[3] Judicial Error Distinguished

The distinction between a clerical error and a judicial error does not depend so much on the person making it as it does on whether it was the deliberate result of judicial reasoning and determination. The distinction between clerical error and judicial error is whether the error was made in rendering the judgment or in recording the judgment rendered [*People v. Anderson (1976) 59 Cal. App. 3d 831, 839, 131 Cal. Rptr. 104]* . When there is no mistake in the entry of the judgment in that it expresses in apt and definite terms the conclusion at which the trial court arrived during the trial of

the action, the error in question is not clerical if committed as a result of the court's misconstruing the evidence or misapplying the law or its misplaced reliance upon the presentation of counsel [*Lankton v. Superior Court (1936) 5 Cal. 2d 694, 696, 55 P.2d 1170]* . For example, even though the judge states that he or she intended to render a decision in accord with a particular document, when the evidence discloses that he or she has not actually read the document, the error will be termed judicial rather than clerical inasmuch as at the time of signing the decree the judge could not have had in mind an interpretation of the decree which he or she then failed to embody or record [*Estate of Harris (1963) 200 Cal. App. 2d 578, 590, 19 Cal. Rptr. 510]* .

When, however, the judgment as signed does not express the actual judicial intention of the court, but is contrary to that decision, the signing of such a purported judgment is a clerical error rather than a judicial one. In such a case, the judge has the authority to set aside the erroneous judgment and to make a correct one on the basis of the court's inherent power to annul judgments inadvertently or improvidently made [*People v. Landon White Bail Bonds (1991) 234 Cal. App. 3d 66, 77, 285 Cal. Rptr. 575* ; *Zisk v. Roseville (1976) 56 Cal. App. 3d 41, 47, 127 Cal. Rptr. 896]* .

[4] Types of Clerical Errors

[a] Omission or Mistake in Judgment

In many instances, a trial court may properly correct and amend a judgment to include matters inadvertently omitted from the judgment. Such omissions or mistakes may include an omission in the determination of an account and decree of distribution [*Estate of Soboslay (1935) 4 Cal. 2d 177, 179, 47 P.2d 714]* , failure to include a direction that one party pay another's attorney's and accountant's fees [*Denton v. Denton (1971) 18 Cal. App. 3d 708, 714-716, 96 Cal. Rptr. 136]* , failure to expressly name defendants and state liability to the plaintiff, failure to fill in blank spaces in the judgment [*Lang v. Superior Court of Orange County (1961) 198 Cal. App. 2d 16, 18, 18 Cal. Rptr. 67]* , or failure to include a party's name [*Kohlstedt v. Hauseur (1937) 24 Cal. App. 2d 60, 61, 74 P.2d 314]* . A clerical error may also consist of a failure to credit defendant with payment of damages before judgment, by reducing the verdict in the amount of damages already paid (such as worker's compensation benefits paid by an employer defendant) and rendering judgment for the balance [*see* *Campbell v. Southern Pac. Co. (1978) 22 Cal. 3d 51, 62-63, 148 Cal. Rptr. 596, 583 P.2d 121]* .

[b] Misdescriptions in Judgment

The trial court may also correct and amend a judgment containing a misdescription of the name of the person or the property to be affected by the judgment [*Chula v. Superior Court (1962) 57 Cal. 2d 199, 206, 18 Cal. Rptr. 507, 368 P.2d 107]* .

[c] Inadvertent Error by Trial Judge in Signing Faulty Judgment

If the judgment signed does not express the actual judicial intention of the court, but is contrary to that decision, the signing of such a purported judgment is clerical error. For example, if the judge inadvertently signs a judgment prepared by counsel which does not reflect the decision of the court due to a typographical error in the drafting of the judgment, such an error is deemed clerical [*Zisk v. Roseville (1976) 56 Cal. App. 3d 41, 47, 127 Cal. Rptr. 896* ; *Wilson v. Wilson (1948) 88 Cal. App. 2d 382, 385, 198 P.2d 916]* .

[d] Clarification of Ambiguity

The power of the court to enter an order correcting a clerical error has been extended to cover even those situations in which the judge's inattention to the wording of a decree has rendered the judgment erroneous. A court, by means of a nunc pro tunc order, has the authority to clarify an ambiguity in a decree by removing a superfluous word where its removal does not alter the meaning or effect of the original decree. In that case, even the ambiguity created by the faulty wording of the decree may be deemed a clerical error [*Estate of Careaga (1964) 61 Cal. 2d 471, 474, 39 Cal. Rptr.*

215, 393 P.2d 415] . A judgment should be liberally construed to clarify an ambiguity, especially if inadvertant, in order to express a court's manifest intent [*Southern Pacific Pipe Lines, Inc. v. State Bd. of Equalization (1993) 14 Cal. App. 4th 42, 57, 17 Cal. Rptr. 2d 345]* .

[5] Error in Signing Judgment Which Does Not Express Judge's Intention to Rule Correctly

The inherent power of the court to correct clerical errors in the rendition of a judgment has even been extended to the correction of judgments which the judge later repudiates as contrary to his or her own intention at the time to rule correctly [*Estate of Doane (1964) 62 Cal. 2d 68, 71, 41 Cal. Rptr. 165, 396 P.2d 581* ; *Southern Pacific Pipe Lines, Inc. v. State Bd. of Equalization (1993) 14 Cal. App. 4th 42, 57, 17 Cal. Rptr. 2d 345]* . For example, if a judge testified that he had intended to render a judgment in conformity with a will, but signed a judgment the terms of which were contrary to those of the will, such an error is a clerical one and is subject to the court's power of correction [*Estate of Doane (1964) 62 Cal. 2d 68, 71, 41 Cal. Rptr. 165, 396 P.2d 581]* .

[6] Determination and Proof of Clerical Error

The power of the trial court is broad in determining whether or not an error is a clerical one subject to the trial court's power to correct it [*Nathanson v. Murphy (1957) 147 Cal. App. 2d 462, 469, 305 P.2d 710]* . The clerical nature of the error in recordation of the judgment is properly shown by any competent evidence, including the trial judge's statement based on his or her own recollection, the affidavit (declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) of a shorthand reporter, or the rough notes entered by the judge on the original docket [*In re Roberts (1962) 200 Cal. App. 2d 95, 97-98, 19 Cal. Rptr. 147]* .

When the trial judge's declaration as to the clerical nature of the mistake is supported by other competent evidence, a reviewing court will not be inclined to disturb the trial court's order correcting and amending the judgment [*Bastajian v. Brown (1941) 19 Cal. 2d 209, 215, 120 P.2d 9]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistake

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§ 318.90 Payment of Money Judgment in Limited Civil Case

In a limited civil case, if the defendant appeared and a judgment was entered for the payment of money by that defendant, the defendant must do one of the following [*Code Civ. Proc. § 582.5*; *see Code Civ. Proc. § 85* (limited civil case is essentially one brought in unified superior court but which would have been within the jurisdiction of a municipal court if the county still had such a court)]:

- Pay the judgment immediately.

- Pay at any time and upon terms and conditions, including installment payments, that the court may prescribe.

The court may amend the terms and conditions for payment of the judgment at any time in order to provide for payment by installments, upon showing of good cause on the motion of a party with notice to all affected parties. The court may do this regardless of the nature of the underlying debt and regardless of whether the party appeared before entry of the judgment [*Code Civ. Proc. § 582.5*]. In any determination regarding the imposition of terms and conditions upon payment of the judgment, the court may consider any of the following factors [*Code Civ. Proc. § 582.5*]:

- Those relevant to a determination of a claim for exemption under *Code Civ. Proc. § 703.010 et seq.*

- Those relevant to an examination of the judgment debtor under *Code Civ. Proc. § 708.110*.

For detailed discussion of the determination of exemptions under *Code Civ. Proc. § 703.010 et seq.*, and proceedings to examine a judgment debtor under *Code Civ. Proc. § 708.110*, see *Ch. 254, Executions and Enforcment of Judgments, § 254.40* et seq. and *§ 254.180* et seq., respectively.

Legal Topics:

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

Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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§ 318.91 Methods of Enforcing Judgments Generally

The most prevalent method by which judgments are enforced is by levying a writ of execution on the judgment debtor's property. For discussion and forms relating to proceedings involving writs of execution and execution sales, see Ch. 254, *Executions and Enforcement of Judgments* . Proceedings supplementary to execution under *Code Civ. Proc. §§ 708.010-708.205* and creditors' actions under *Code Civ. Proc. §§ 708.210-708.290* are also covered in Ch. 254, *Executions and Enforcement of Judgments* . For discussion and forms relating to actions on domestic judgments, sister state judgments, and foreign money judgments, as well as to the Sister State Money-Judgments Act (*Code Civ. Proc. § 1710.10 et seq.*) and the Uniform Foreign-Country Money Judgments Recognition Act (*Code Civ. Proc. § 1713 et seq.*), see *§ 318.180* et seq.

The remainder of this part discusses two methods by which security for a judgment may be obtained: (1) filing an abstract of judgment to create a judgment lien on the real property of the judgment debtor which he or she owns or later acquires [*see Code Civ. Proc. §§ 697.310-697.410*; *see § 318.380*]; and (2) obtaining a lien on a judgment debtor's cause of action [*see Code Civ. Proc. §§ 708.410-708.480*; *see* §§ 318.385-318.393.2].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.92 Power to Enforce Judgments

Every court has the power to compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending before it [*Code Civ. Proc. § 128(a)(4)*]. Moreover, a court of equity retains inherent jurisdiction to oversee and enforce execution of its decrees [*Vanderstok v. Bank of America (1972) 29 Cal. App. 3d 731, 734, 105 Cal. Rptr. 699]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.93 Period for Enforcement of Judgments

[1] Ten Years After Entry

A money judgment or judgment for possession or sale of property is enforceable for 10 years after the date of entry of the judgment [*Code Civ. Proc. § 683.020*]. If a money judgment is payable in installments, the 10-year period of enforceability runs as to each installment from the date the installment becomes due and runs as to costs from the date the costs are added to the judgment pursuant to *Code Civ. Proc. § 685.090* [*Code Civ. Proc. § 683.030*].

The 10-year period provided by *Code Civ. Proc. § 683.020* commences on the date of entry by the clerk. This rule applies to any money judgment or judgment for possession or sale of property, regardless of whether it is a modified or amended judgment and without regard to finality [*Iliff v. Dustrud (2003) 107 Cal. App. 4th 1201, 1207, 132 Cal. Rptr. 2d 848]* .

[2] Renewal of Judgments

[a] Availability and Timing

The period of enforceability of a money judgment or judgments for the possession or sale of property may be extended by renewal of the judgment for a period of 10 years from the date the application for renewal is filed [*see Code Civ. Proc. §§ 683.110-683.120*]. In the case of installment judgments, the amount of judgment as renewed is treated as a lump-sum judgment entered on the date the application for renewal is filed [*Code Civ. Proc. § 683.120(c)*]. For discussion of the amount as renewed for both lump-sum and installment judgments, *see § 318.380*.1. Except as otherwise provided in the Family Code, the provisions of *Code Civ. Proc. § 683.110 et seq.*, do not apply to a judgment or order made or entered pursuant to the Family Code [*Code Civ. Proc. § 683.310*; for enforcement of judgments or orders under the Family Code, *see* Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies*].

The application for renewal of a lump-sum money judgment or judgment for possession or sale may be filed at any time before the expiration of the 10-year period of enforceability [*see Iliff v. Dustrud (2003) 107 Cal. App. 4th 1201, 1207-1208, 132 Cal. Rptr. 2d 848* (10-year period of enforceability commences on date of entry of judgment by clerk)].

Subsequent renewals may also be applied for at any time between 5 years from the time of the previous renewal and the expiration of the 10-year renewal period [*see Code Civ. Proc. §§ 683.110(b), 683.130*; *see also Code Civ. Proc. §§ 683.020, 683.030* (period of enforceability)].

In the case of a money judgment payable in installments that was not previously renewed an application for renewal may be filed at any time as to past due amounts that at the time of filing are not barred by the expiration of the 10-year enforceability period [*Code Civ. Proc. § 683.130(b)(1)*]. If the installment judgment was previously renewed, a renewal application may be filed at any time within the 10-year period as to the amount of the judgment as previously renewed, and at any time within the 10-year period provided by *Code Civ. Proc. §§ 683.020* and *683.030* as to any past due amounts that became due and payable after the previous renewal [*Code Civ. Proc. § 683.130(b)(2)*].

For a form for Application for Renewal of Judgment, see *§ 318.382*.

For a form for Notice of Renewal of Judgment, along with discussion of the requirements for service of notice of renewal, see *§ 318.383*.

For discussion of the effect of renewal on a judgment lien on real property, see *§ 318.94[1]*.

[b] Extension of Liens

If a lien other than a judgment lien on real property or an execution lien has been created pursuant to the judgment, renewal of the judgment extends the duration of the lien until 10 years from the date of filing of the application for renewal if, before expiration of the lien, a certified copy of the application is served on or filed with the same person and in the same manner as the notice or order that created the lien [*Code Civ. Proc. § 683.190*].

[c] Continuation of Enforcement Proceedings

Any enforcement proceedings previously commenced pursuant to the judgment or to a writ or order issued pursuant to the judgment that would have ceased had the judgment not been renewed may be continued by the renewal if, before expiration of the prior 10-year period, a certified copy of the application for renewal is filed with the levying officer, receiver, or other officer acting pursuant to a writ or order, or in other cases, is filed in the enforcement proceeding [*Code Civ. Proc. § 683.200*].

[d] Renewal During Stay of Enforcement

The judgment may be renewed notwithstanding any stay of enforcement, but the renewal does not affect the stay [*Code Civ. Proc. § 683.210*].

[e] Period of Limitation

If a judgment is renewed, the filing date of the application for renewal commences the limitation period for actions on the renewed judgment [*Code Civ. Proc. § 683.220*; *see Code Civ. Proc. § 337.5*].

[f] Vacating Renewal

Renewal of a judgment may be vacated on any ground that would be a defense to an action on the judgment, including the ground that the amount of the renewed judgment as entered is incorrect [*Code Civ. Proc. § 683.170(a)*]. A complete failure to serve the judgment debtor with the summons and complaint in the action underlying the judgment is a ground for vacating the renewal, and the judgment debtor need not show that he or she had a meritorious defense to the action [*Fidelity Creditor Service, Inc. v. Browne (2001) 89 Cal. App. 4th 195, 106 Cal. Rptr. 2d 854]* . On the other hand, the defense of insufficient contacts with California to confer personal jurisdiction at the time of the renewal is unavailable

under the statutory renewal of judgment procedure as long as there was personal jurisdiction at the time of the judgment. The court has continuing jurisdiction, derived from its jurisdiction at the time of the original judgment, to enter the renewal [*Goldman v. Simpson (2008) 160 Cal. App. 4th 255, 260-264, 72 Cal. Rptr. 3d 729*]. The judgment debtor bears the burden of proving by a preponderance of the evidence that he or she is entitled to relief [*Fidelity Creditor Service, Inc. v. Browne (2001) 89 Cal. App. 4th 195, 199, 106 Cal. Rptr. 2d 854]* .

Renewal of a judgment must be vacated if the application for renewal was filed within five years from the time the judgment was previously renewed [*Code Civ. Proc. § 683.170(a)*]. Not later than 30 days after service of the notice of renewal pursuant to *Code Civ. Proc. § 683.160*, the judgment debtor may apply for an order of the court vacating the renewal by a noticed motion under *Code Civ. Proc. § 683.170* [*Code Civ. Proc. § 683.170(b)*]. The time limitations in *Code Civ. Proc. § 473.5* for a motion to set aside a default or default judgment do not apply to a motion under *Code Civ. Proc. § 683.170* [*Fidelity Creditor Service, Inc. v. Browne (2001) 89 Cal. App. 4th 195, 203-204, 106 Cal. Rptr. 2d 854]* . That the judgment debtor actually knew of a judgment despite being not served with the summons and complaint in the underlying action does not render a motion that is otherwise timely under *Code Civ. Proc. § 683.170(b)* untimely [*Fidelity Creditor Service, Inc. v. Browne (2001) 89 Cal. App. 4th 195, 204]* .

The notice of motion must be served on the judgment creditor personally or by mail [*Code Civ. Proc. § 683.170(b)*]. On hearing the motion, the court may order the renewal vacated on any ground that would be a defense to an action on the judgment. Another and different renewal may be entered, including, but not limited to, renewal in a different amount if the decision of the court is that the judgment creditor is entitled to renewal in a different amount [*Code Civ. Proc. § 683.170(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.94 Money Judgment Liens on Real Property

[1] Creation and Duration

A judgment lien on real property is created by filing an abstract of a money judgment with the county recorder [*Code Civ. Proc. § 697.310(a)*; *see Code Civ. Proc. § 674(a)*]. Unless the judgment is satisfied or the judgment lien is released, subject to *Code Civ. Proc. § 683.180* (renewal of judgment), the lien continues for 10 years from the date of the entry of the judgment [*Code Civ. Proc. § 697.310(b)*]. Renewal of a judgment extends the duration of the judgment lien until 10 years from the date of the filing of the application for renewal if, before the expiration of the judgment lien, a certified copy of the application for renewal is recorded with the county recorder of the county where the property is located [*Code Civ. Proc. § 683.180(a)*]. The lien is not extended, however, as to property that has been transferred subject to the lien if the transfer was recorded before the application for renewal was filed, unless a copy of the application for renewal is personally served on the transferee and proof of such service is filed with the court clerk within 90 days after the filing of the application [*Code Civ. Proc. § 683.180(b)*].

[2] Workers' Compensation Awards

Liens on real property arising from judgments entered pursuant to *Lab. Code §§ 3200-6002* (workers' compensation awards) are also created by recording an abstract of the judgment as provided in *Code Civ. Proc. § 697.310*, or if the judgment is for payment in installments, by recording a certified copy of the judgment as provided by *Code Civ. Proc. § 697.320* [*Code Civ. Proc. § 697.330(a)*]. Except as provided in *Lab. Code §§ 3200-6002*, these liens are governed by the provisions of *Code Civ. Proc. § 697.310* (for lump-sum judgments) or *697.320* (for installment judgments) [*Code Civ. Proc. § 697.330*].

[3] Installment Judgments for Support or Against Health Care Provider

A judgment lien on real property is also created by recording with the county recorder an abstract, an interstate lien form promulgated by the federal Secretary of Health and Human Services under *42 U.S.C. § 652(a)(11)*, or a certified copy of either a judgment for child, family, or spousal support payable in installments, or a judgment against a health

care provider requiring periodic payments [*Code Civ. Proc. § 697.320*].

A judgment lien for support continues for as long as the judgment remains enforceable [*Code Civ. Proc. § 697.320(b)*]. A judgment lien against a health care provider continues for a period of 10 years from the date of creation unless the judgment is satisfied or the judgment lien is released. The duration of the lien against a health care provider may be extended any number of times (each time for 10 years) during its existence by rerecording a certified copy of the judgment in the same manner as the initial recording [*Code Civ. Proc. § 697.320(b)*].

[4] Sister-State Money Judgments

Code Civ. Proc. § 697.310 applies only to judgments, orders, or decrees entered in a California court [*see Code Civ. Proc. § 680.230*]. Therefore, a sister-state judgment must first be reduced to a California judgment before it may serve as a basis for a judgment lien on real property located in California [*Kahn v. Berman (1988) 198 Cal. App. 3d 1499, 1504-1507, 244 Cal. Rptr. 575* (holding procedure does not violate full faith and credit clause)]. A judgment creditor may apply for the entry of a judgment based on a sister-state judgment by filing an application under *Code Civ. Proc. § 1710.20* and, with certain statutory exceptions, the new judgment has the same effect as an original California money judgment and may be enforced in the same manner [Code Civ. Proc. §§ 1710.5(a), *1710.35*; for further discussion of enforcement of sister-state judgments, see *§ 318.301[5]*].

[5] Scope of Lien

[a] In General

Once recorded, the lien attaches to the judgment debtor's interests in real property in the county where the lien is created that are subject to enforcement of a money judgment at the time the lien is created. These interests may be present, future, vested or contingent, legal or equitable [*Code Civ. Proc. § 697.340(a)*]. Any after-acquired interest in real property in the county on which a lien may be created is also subject to the judgment lien from the time of acquisition [*Code Civ. Proc. § 697.340(b)*].

The lien does not extend to the debtor's right to rents or to a leasehold estate with an unexpired term of less than two years or the interest of a beneficiary under a trust or to real property that is subject to an attachment lien in favor of the creditor and that was transferred before judgment [*Code Civ. Proc. § 697.340(a)*].

A judgment lien also cannot affect real property that has been previously transferred. This is because an abstract of judgment does not attach until it is recorded (*see § 318.94[1]*). Property is "previously transferred" within the meaning of this rule if the purchase price is paid and no equitable interest is retained, notwithstanding that some formality of transfer is incomplete at the time the abstract is recorded [*Casey v. Gray (1993) 13 Cal. App. 4th 611, 614, 16 Cal. Rptr. 2d 538]* .

The foregoing may be illustrated by the following example. On a certain date a money judgment is entered against a judgment debtor (but the judgment creditor does not record an abstract of judgment). Two years later, the judgment debtor transfers his or her interest in a particular parcel by quitclaim deed (but the transferee does not record the deed). Three weeks later, the judgment creditor finally records the abstract of judgment. Then, four months after the transfer, the transferee records the quitclaim deed. On these facts, a court held that, assuming delivery of the quitclaim deed had occurred, the transfer of the property was complete at the moment of delivery without regard to whether the deed was recorded. Thus, there was nothing to which the later-recorded abstract could attach [*see Casey v. Gray (1993) 13 Cal. App. 4th 611, 613, 16 Cal. Rptr. 2d 538* (remanding case to trial court to determine fact of delivery)].

[b] Joint Tenancy Interests

A judgment lien will attach to the interest of a joint tenant. The mere filing by a creditor of a joint tenant of a memorial

of the judgment in the registrar's office, prior to the death of the joint tenant/judgment debtor, does not operate as a severance and the survivor takes the whole free from the lien of the judgment, in the absence of any other steps taken by the creditor to sever the title. When the creditor has a judgment lien against the interest of one joint tenant, the creditor can immediately execute and sell the interest of the judgment debtor, and thus sever the joint tenancy or keep the lien alive and wait until the joint tenancy is terminated by the death of one of the joint tenants. If the judgment debtor survives, the judgment lien immediately attaches to the entire property. If the judgment debtor is the first to die, the lien is lost [*Zeigler v. Bonnell (1942) 52 Cal. App. 2d 217, 221, 126 P.2d 118]* .

[c] Attachable to Increase in Value of Equity

Since a judgment lien attaches not only to all real property owned by the judgment debtor in the county at the time it is perfected but also to all real property in the county which the debtor may afterwards acquire at any time within the 10-year life of the lien and since the creditor can thus reach wholly distinct parcels of property that the debtor did not even own when the abstract of judgment was recorded, a fortiori he or she can reach any and all increases in the value of the equity in property owned by the debtor at the time of such recordation and already subject to the lien. Hence, when the creditor enforces the lien, he or she is entitled to satisfy the judgment to the fullest extent possible out of the real property owned by the debtor, that is, out of the debtor's entire equity in the property valued as of that date, regardless of how or when the debtor may have acquired such equity [*Kinney v. Vallentyne (1975) 15 Cal. 3d 475, 478-479, 124 Cal. Rptr. 897, 541 P.2d 537* (decided under former *Code Civ. Proc. § 674*; *now see Code Civ. Proc. § 697.340(b)*)].

[6] Enforcement

During the lifetime of the judgment debtor, the usual and ordinary method of enforcement of a judgment lien is by execution sale. For discussion and forms related to writs of execution and execution sales, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq. and *§ 254.130* et seq. The judgment lien is designed to secure the priority of the judgment creditor over third persons who may acquire rights in the property between the creation of the judgment lien and the sale of the property on execution in satisfaction of the judgment. An equitable action to foreclose the judgment lien is not required [*Corporation of America v. Marks (1937) 10 Cal. 2d 218, 220, 73 P.2d 1215]* . If for some reason execution does not lie, however, the procedure for enforcement is an equitable action to foreclose the judgment lien [*see Corporation of America v. Marks (1937) 10 Cal. 2d 218, 220-221, 73 P.2d 1215* (on death of judgment debtor, judgment lien creditor as able under authority of former *Prob. Code § 716* [*now see Prob. Code § 9391*] to bring equitable action to foreclose his lien as well as to file a claim with the administrator or executor of the estate); *Wellborn v. Wellborn (1942) 55 Cal. App. 2d 516, 520, 131 P.2d 48* (execution as not issuing on a judgment which has granted a lien on real property but where no personal judgment has been given, no order for payment of money made, and no provision made in the judgment for enforcement of the lien; procedure for enforcement of lien as equitable action to foreclose the judgment lien in such a situation)]. For a general form of complaint to foreclose a nonpossessory statutory lien which may be adapted for use in foreclosing a judgment lien, see *Ch. 342, Liens and Wage Preferences, § 342.10* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.95 Determining Priority of Liens on Real Property

[1] Installment and Lump-Sum Liens

An installment judgment lien is a lien created under *Code Civ. Proc. § 697.320*. A lump-sum judgment lien is a lien created under *Code Civ. Proc. § 697.310* [*Code Civ. Proc. § 697.380(a)*; *see § 318.94[1]*].

Each lump-sum judgment lien takes priority over subsequently-created, lump-sum judgment liens [*Code Civ. Proc. § 697.380(c)*]. A lump-sum lien has priority over an installment lien as to installments that mature, interest that accrues, and costs that are added on the installment judgment after the lump-sum lien is created [*Code Civ. Proc. § 697.380(d)*]. However, an installment lien has priority over a lump-sum lien, as to installments that have matured, interest that has accrued, and costs that have been added to the installment judgment before the lump-sum lien is created [*Code Civ. Proc. § 697.380(e)*].

Installment liens take priority over subsequently created installment liens as to the installments that have matured on the judgment at the time the second installment lien is created, the interest that has accrued, and the costs that have been added to the judgment prior to that time. Thereafter, priorities are determined by the time at which each installment matures on a judgment, the time the interest accrues on a judgment, and the time costs are added to a judgment [*Code Civ. Proc. § 697.380(f)*].

If two judgment liens attach to the same after-acquired property at the same time under *Code Civ. Proc. § 697.340*, the first judgment lien created has priority as to all amounts that are due and payable on that judgment at the time the property is acquired [*Code Civ. Proc. § 697.380(g)*].

[2] Transfer or Encumbrance of Property

If an interest in real property that is subject to a lump-sum judgment lien under *Code Civ. Proc. § 697.310* is transferred or encumbered without satisfying the lien, that interest remains subject to the lien in the same amount as if the interest had not been transferred or encumbered [*Code Civ. Proc. § 697.390(a)*]. If the interest transferred or encumbered was subject to an installment lien under *Code Civ. Proc. § 697.320*, it remains subject to that lien in the amount of the lien at

the time of transfer or encumbrance plus interest thereafter accruing on such amount [*Code Civ. Proc. 697.390(b)*].

Notwithstanding the transfer or encumbrance of real property subject to a lien created under the Enforcement of Judgments Act, if the property remains subject to the lien after the transfer or encumbrance, the money judgment may be enforced against the property in the same manner and to the same extent as if it had not been transferred or encumbered [*Code Civ. Proc. § 695.070(a)*]. If the judgment debtor dies after the transfer of the property, the money judgment may be enforced against the property [*Code Civ. Proc. § 695.070(b)*].

[3] Release or Subordination of Real Property

The judgment creditor may either release from the judgment, or subordinate to another lien or encumbrance, all or a part of the real property subject to the lien [*Code Civ. Proc. § 697.370(a)*]. A release or subordination is sufficient if it is executed by the judgment creditor in the same manner as an acknowledgment of satisfaction of judgment and contains all of the following [*Code Civ. Proc. § 697.370(b)*]:

> (1) A description of the real property being released or on which the lien is being subordinated. If the judgment debtor does not have an interest of record in the real property, the release or subordination must show the name of the record owner. If all of the real property of the judgment debtor in a county in which the lien is recorded is being released from the judgment lien, or if the judgment debtor has no known interest in any real property in that county, the release shall, in lieu of containing a description of the property being released, contain a statement substantially as follows: "This is a release from the judgment lien described herein of all of the interests in real property in _____ County presently owned or hereafter acquired of the herein named judgment debtor subject to the lien."
>
> (2) The date the judgment lien was created and where in the records of the county the abstract of judgment or certified copy of the judgment was recorded to create the lien.
>
> (3) The title of the court in which the judgment is entered and the cause and number of the action.
>
> (4) The date of entry of the judgment and of any subsequent renewals and where entered in the records of the court.
>
> (5) The name and address of the judgment creditor, the judgment creditor's assignee, if any, and the judgment debtor whose interest in real property is released from the judgment lien or with respect to whom the judgment lien is subordinated.

A release or subordination substantially complying with the requirements of *Code Civ. Proc. § 697.370* is effective even though it contains minor errors that are not seriously misleading [*Code Civ. Proc. § 697.370(c)*].

The execution of a release or subordination of a judgment lien pursuant to the above-described requirements does not release or subordinate the judgment lien as to judgment debtors not named in the release pursuant to *Code Civ. Proc. § 697.370(b)(5)* (item 5, *above*) [*Code Civ. Proc. § 697.370(d)*].

For a form of release or subordination of a judgment lien regarding real property generally, *see* § 318.393.9. For a form of release of a judgment lien regarding real property whose owner was wrongfully identified as a judgment debtor, *see* § 318.393.4. For a form of release or subordination prescribed by the Secretary of State regarding personal property, *see* § 318.393.8.

[4] Effect of Bankruptcy Act

Former *11 U.S.C. § 107(a)(1)* provided that liens obtained by attachment, judgment, levy, or other legal or equitable process or proceeding within four months of the filing of the petition could be set aside if the debtor was insolvent when the lien was obtained or if the lien was sought and permitted in fraud of the provisions of the act. Although this provision was not carried over into the revised Bankruptcy Code, such "judicial liens," as they are defined in the new code [*see 11 U.S.C. § 101(36)*], may be avoided by the trustee under the provisions of *11 U.S.C. § 547(b)* when they are created within 90 days of filing for bankruptcy (or within one year when the lienholder is an "insider") [*see* Collier on Bankruptcy, Ch. 547, *Preferences* (Matthew Bender 15th ed. revised)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.96 Money Judgment Liens on Personal Property

[1] Creation and Duration

A money judgment lien on certain personal property is created by filing a notice of judgment lien in the office of the Secretary of State pursuant to *Code Civ. Proc. §§ 697.510-697.670*. A judgment lien on personal property may be created only if the judgment is a money judgment first entered in California after June 30, 1983 [*Code Civ. Proc. § 697.510(a)*]. A judgment lien on personal property may be created as an alternative or in addition to a lien created by levy under a writ of execution pursuant to *Code Civ. Proc. §§ 699.010-701.830* or by use of an enforcement procedure provided by *Code Civ. Proc. §§ 708.010-709.030* (miscellaneous creditor's remedies) [*Code Civ. Proc. § 697.520*].

Except as otherwise provided by statute, a judgment lien on personal property is for the full amount required to satisfy the money judgment [*Code Civ. Proc. § 697.540(a)*]. A lien created under a money judgment payable in installments is also in the full amount required to satisfy the judgment, but may not be enforced for the amount of unmatured installments unless the court so orders [*see Code Civ. Proc. § 697.540(b)*;*§ 318.261[2][b]*].

Unless the money judgment is satisfied or the judgment lien is terminated or released, the lien continues for 5 years from the date of filing [*Code Civ. Proc. § 697.510(b)*].

[2] Installment Judgments

A judgment lien on personal property may be created on a money judgment payable in installments pursuant to *Code Civ. Proc. § 582.5* (municipal courts) or *117* (small claims courts) or *Veh. Code § 16380* (financial responsibility laws) [*see, e.g.,* discussion in *§ 318.90*]. The lien is for the full amount required to satisfy the judgment, but the lien may not be enforced for the amount of unmatured installments unless the court so orders [*Code Civ. Proc. § 697.540(b)*]. Except as provided in *Code Civ. Proc. § 697.540(b)*, a judgment lien on personal property may not be created on an installment judgment unless all of the installments have become due and payable at the time the notice of judgment lien is filed [*Code Civ. Proc. § 697.510(a)*].

[3] Property Subject to Lien

A judgment lien on personal property is a lien on all interests in the following personal property that are subject to enforcement of the money judgment against the judgment debtor pursuant to *Code Civ. Proc. §§ 695.010-695.070* at the time when the lien is created if the personal property is, at that time, any of the following [*Code Civ. Proc. § 697.530(a)*]:

- Accounts receivable and the judgment debtor is located in California.
- Tangible chattel paper, as defined in Bus. & *Com. Code § 9102(a)(78)*, and the judgment debtor is located in California.
- Equipment, located within California.
- Farm products, located within California.
- Inventory, located within California.
- Negotiable documents of title, located within California.

If any interest in the property described above is acquired after the lien is created, the lien attaches to that interest at the time of acquisition [*Code Civ. Proc. § 697.530(b)*].

If property subject to a money judgment lien becomes a fixture, as defined in *Com. Code § 9102(a)(41)*, the lien is extinguished [*Code Civ. Proc. § 697.530(e)*].

[4] Property Not Subject to Lien

A judgment lien does not attach to a vehicle or vessel required to be registered with the Department of Motor Vehicles, a mobilehome or commercial coach required to be registered pursuant to the Health and Safety Code, or the inventory of a retail merchant held for sale, except to the extent that the inventory consists of durable goods with a unit retail value of at least $500 [*Code Civ. Proc. § 697.530(d)*]. In this context, "retail merchant" does not include either a person whose sales for resale exceeded 75 percent in dollar volume of the person's total sales of all goods during the 12 months preceding the filing of the notice of judgment lien, or a cooperative association organized under *Food & Agric. Code §§ 54001-54294* (agricultural cooperatives) or *Corp. Code §§ 13200-13356* (Fish Marketing Act) [*Code Civ. Proc. § 697.530(d)(3)*].

[5] Determining Priority of Lien

[a] Against Other Judgment Liens

A judgment lien on personal property has priority over any subsequent judgment lien created on the property [*Code Civ. Proc. § 697.600(a)*]. If two or more judgment liens attach to after-acquired property at the same time under *Code Civ. Proc. § 697.530(b)*, the judgment lien first filed has priority [*Code Civ. Proc. § 697.600(b)*].

[b] Against Security Interests

Except as provided in *Code Civ. Proc. § 697.590(d)* and *(e)*, priority between a judgment lien on personal property and a conflicting security interest in the same personal property is determined according to *Code Civ. Proc. § 697.590(b)*, which provides that conflicting interests rank according to priority in time of filing or perfection. In the case of a judgment lien, priority dates from the time filing is first made covering the personal property. In the case of a security interest, priority dates from the time a filing is first made covering the personal property or the time the security interest

is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection [*Code Civ. Proc. § 697.590(b)*]. A purchase money security interest, however, has priority over a conflicting judgment lien on the same personal property or its proceeds if the purchase money security interest is perfected at the time the judgment debtor receives possession of the personal property or within 20 days thereafter [*Code Civ. Proc. § 697.590(d)*]. If a purchase money security interest in inventory has priority over a judgment lien pursuant to *Code Civ. Proc. § 697.590(d)* and a conflicting security interest has priority over the purchase money security interest in the same inventory pursuant to *Com. Code § 9324*, the conflicting security interest also has priority over the judgment lien on the inventory subject to the purchase money security interest notwithstanding that the conflicting security interest would not otherwise have priority over the judgment lien [*Code Civ. Proc. § 697.590(e)*].

A date of filing or perfection as to personal property is also a date of filing or perfection as to proceeds [*Code Civ. Proc. § 697.590(c)*].

A judgment lien that has attached to personal property and that is also subordinate under *Code Civ. Proc. § 697.590(b)* to a security interest in the same personal property is subordinate to the security interest only to the extent that the security interest secures advances made before the judgment lien attached or within 45 days thereafter or made without knowledge of the judgment lien or pursuant to a commitment entered into without knowledge of the judgment lien [*Code Civ. Proc. § 697.590(f)*]. For the purpose of *Code Civ. Proc. § 697.590(f)*, a secured party shall be deemed not to have knowledge of a judgment lien on personal property until (1) the judgment creditor serves a copy of the notice of judgment lien on the secured party personally or by mail, and (2) the secured party has knowledge of the judgment lien on personal property, as "knowledge" is defined in *Com. Code § 1201*. If service is by mail, it shall be sent to the secured party at the address shown in the financing statement or security agreement [*Code Civ. Proc. § 697.590(f)*].

[6] Effect of Sale or Other Disposition of Property

Except as provided in *Com. Code § 9617* and *9622*, a judgment lien on personal property continues notwithstanding the sale, exchange, or other disposition of the property, unless the person receiving the property is one of the following [*Code Civ. Proc. § 697.610*]:

> (1) A buyer in the ordinary course of business (see *Com. Code § 1201*) who, under *Com. Code § 9320*, would take free of a security interest created by the seller [*see Ch. 503, Sales: Secured Transactions, § 503.24[3]*];
>
> (2) A lessee in the ordinary course of business, as defined in *Com. Code § 10103(a)(15)*, who, under *Com. Code § 9321*, would take free of a security interest created by the lessor [*see Ch. 503, Sales: Secured Transactions, § 503.24[3]*].
>
> (3) A holder to whom a negotiable document of title has been duly negotiated within the meaning of *Com. Code § 7501* [*see Ch. 213, Documents of Title, § 213.30 et seq.*]; or
>
> (4) A purchaser of chattel paper who, under *Com. Code § 9330*, would have priority over another security interest in the chattel paper [*see Ch. 503, Sales: Secured Transactions, § 503.50[3]*].

The judgment lien continues with the same priority in the proceeds of the property, except in the event of insolvency [*Code Civ. Proc. § 697.620(b)*]. If insolvency proceedings are instituted by or against the judgment debtor, the lien continues only in proceeds that are either in a separate deposit account containing only proceeds, or in the form of money, checks, and the like that are neither commingled with other money nor deposited in a deposit account prior to the insolvency proceedings [*see Code Civ. Proc. § 697.620(c)*].

[7] Release or Subordination

The judgment creditor may by a writing do any of the following [*Code Civ. Proc. § 697.650(a)*]:

(1) Release the judgment lien on all the personal property subject to the lien of a sole judgment debtor or of all the judgment debtors [*Code Civ. Proc. § 697.650(a)(1)*].

(2) If the notice of judgment lien names more than one judgment debtor, release the judgment lien on all the personal property subject to the lien of one or more but of less than all the judgment debtors [*Code Civ. Proc. § 697.650(a)(2)*].

(3) Release the judgment lien on all or a part of the personal property subject to the lien [*Code Civ. Proc. § 697.650(a)(3)*]. In this event, the statement of release must describe the property being released [*Code Civ. Proc. § 697.650(b)*].

(4) Subordinate to a security interest or other lien or encumbrance the judgment lien on all or a part of the personal property subject to the judgment lien [*Code Civ. Proc. § 697.650(a)(4)*]. In this event, the statement of subordination must also describe the property on which the judgment lien is being subordinated and describe the security interest or other lien or encumbrance to which the judgment lien is being subordinated [*Code Civ. Proc. § 697.650(b)*].

A statement of release or subordination is sufficient if it is signed by the judgment creditor and contains the name and address of the judgment debtor, the file number of the notice of judgment lien, and wording appropriate to bring the statement within one of the above-stated paragraphs of *Code Civ. Proc. § 697.650(a)*[*Code Civ. Proc. § 697.650(b)*].

For an illustration of the Statement of Release or Subordination prescribed by the Secretary of State, *see § 318.401*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral Overview

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27-318 California Forms of Pleading and Practice--Annotated § 318.97

§ 318.97 Relation Back of Liens

If a judgment lien is created on property that is already subject to an existing attachment lien under the same claim (*see Code Civ. Proc. §§ 481.010-493.060*), the priority of the later lien relates back to the date the earlier lien was created [*Code Civ. Proc. § 697.020(a)*]. Additionally, if a judgment lien is created and a later lien of the same or a different type is created on the same property under the same judgment while the earlier lien is still in effect, the priority of the later lien relates back to the date the earlier lien was created [*Code Civ. Proc. § 697.020(b)*]. These rules do not affect the rights and priorities of third persons established while the earlier lien was in effect under the law governing the earlier lien [*Code Civ. Proc. § 697.020(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-318 California Forms of Pleading and Practice--Annotated § 318.98

§ 318.98 Effect of Stay of Enforcement

If enforcement of the judgment is stayed on appeal by the giving of a sufficient undertaking under *Code Civ. Proc. §§ 916-923*, existing liens created under *Code Civ. Proc. §§ 695.010-709.030* (enforcement of money judgments) are extinguished. Also, new liens may not be created during the period of the stay [*Code Civ. Proc. § 697.040(a)*]. Unless the court expressly orders otherwise, however, these rules do not apply to judgment liens on real property created under *Code Civ. Proc. §§ 697.310-697.410*, or judgment liens on personal property created under *Code Civ. Proc. §§ 697.510-697.670* [*Code Civ. Proc. § 697.040(b)*]. However, unless the court otherwise expressly orders, no other liens may be created or continued under *Code Civ. Proc. §§ 695.010-709.030* during the period of the stay of enforcement [*Code Civ. Proc. § 697.040(c)*].

If a lien created for the enforcement of a money judgment is extinguished, property held subject to the lien must be released unless the property is to be held under another lien or the property is ordered by the court to be held pending resolution of a dispute concerning its proper disposition [*Code Civ. Proc. § 697.050*].

If enforcement of the judgment is stayed pursuant to *Fam. Code § 4853* (enforcement of a foreign support order) or *Code Civ. Proc. § 1710.50* (sister state judgments), existing liens are extinguished and no new liens may be created during the period of the stay [*Code Civ. Proc. § 697.040(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.99 Right to Record Abstract Prior to Appeal Bond

A person acquiring a judgment has the right to record an abstract of that judgment prior to the filing of an appeal bond. Despite the fact that existing liens are extinguished when enforcement of a judgment is stayed on appeal [*see Code Civ. Proc. § 697.040*], there is no statutory provision which allows the county recorder to expunge an abstract that has been properly filed from the records [*Crevolin v. Crevolin (1963) 217 Cal. App. 2d 565, 575, 31 Cal. Rptr. 622* (construing former *Code Civ. Proc. § 674*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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§ 318.100 Death of Judgment Debtor

After the death of the judgment debtor, enforcement of a judgment against property in the judgment debtor's estate is governed by the Probate Code [*Code Civ. Proc. § 686.020*; *see Prob. Code §§ 9300-9304*]. The holder of a judgment lien on property in a decedent's estate may, with certain exceptions, commence an action to enforce the lien against the subject property, without first filing a claim against the estate, if in the complaint the holder of the lien expressly waives all recourse against other property in the estate. *Code Civ. Proc. § 366.2* (allowing for commencement of survival actions within specified periods after expiration of statute of limitations) does not apply to such an action [*Prob. Code § 9391*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-318 California Forms of Pleading and Practice--Annotated § 318.101

§ 318.101 Release of Lien Against Erroneously Identified Property Owner

[1] Real Property

When a recorded abstract or certified copy of a money judgment appears to create a judgment lien on the real property of a person who is not the judgment debtor because the name of the property owner is the same as or similar to that of the judgment debtor, the erroneously identified owner may deliver to the judgment creditor a written demand for a recordable document releasing the lien [*see § 318.393*.3]. The demand must be accompanied by proof to the satisfaction of the judgment creditor that the property owner is not the judgment debtor and that the property is not subject to enforcement of the judgment [*Code Civ. Proc. § 697.410(a)*].

Within 15 days after receipt of the property owner's demand and satisfactory proof, the judgment creditor must deliver to the property owner a recordable document releasing the lien on the property [*see § 318.393*.4]. If the judgment creditor improperly fails to deliver a recordable document releasing the lien within this period, he or she will be liable to the property owner for all damages sustained from the failure plus the sum of $100 [*Code Civ. Proc. § 697.410(b)*].

[2] Personal Property

A similar provision with respect to personal property allows an erroneously identified property owner, or a person having a security interest in or a lien on the personal property, to deliver to the judgment creditor a written demand that the judgment creditor file in the office of the Secretary of State a statement releasing the lien as to the person's property [*see Code Civ. Proc. § 697.660(a)*; *see § 318.393*.3]. The demand must also be accompanied by satisfactory proof, and within 15 days after receipt of the demand and proof, the judgment creditor must file in the office of the Secretary of State a statement releasing the lien on the property. The judgment creditor is liable for damages plus the sum of $100 for improperly failing to file the statement of release within the time allowed [*see Code Civ. Proc. § 697.660(b)*].

[3] Motion for Order Releasing Lien

The person making the demand, with respect to either real or personal property, may apply to the court on noticed

motion for an order releasing the judgment lien on the property if the judgment creditor fails to comply with the demand [*Code Civ. Proc. §§ 697.410(c), 697.660(c)*; *see* §§ 318.398-318.393.7]. The prevailing party may recover reasonable attorney's fees in connection with proceedings for the order [*Code Civ. Proc. §§ 697.410(d), 697.660(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.102 Lien on Judgment Debtor's Cause of Action

[1] When Available

A judgment creditor who has a money judgment against a judgment debtor who is a party to a pending action or special proceeding may obtain a lien on the cause of action under *Code Civ. Proc. §§ 708.410-708.480*, to the extent required to satisfy the judgment creditor's money judgment. The lien may be obtained on any cause of action of the judgment debtor for money or property that is the subject of the action or proceeding, and on the rights of the judgment debtor to money or property under any judgment subsequently procured [*Code Civ. Proc. § 708.410(a)*]. An action or proceeding is pending until the time for appeal from the judgment has expired or, if an appeal is filed, until the appeal has been finally determined [*Code Civ. Proc. § 708.410(d)*].

[2] Creation

To obtain a lien, the judgment creditor must file a notice of lien and an abstract or certified copy of his or her judgment in the pending action or proceeding [*Code Civ. Proc. § 708.410(b)*; *see § 318.385*]. *Rule 3.1360 of the California Rules of Court* also requires a motion that a lien be granted on a judgment be accompanied by an authenticated record of the judgment and a declaration as to the identity of the party involved and the amount due. At the time of filing the notice, or promptly thereafter, the judgment creditor must also serve a copy of the notice and a statement of the date when the notice was filed on all parties who have appeared in the action or proceeding. The failure to serve all such parties does not affect the lien created by filing under *Code Civ. Proc. § 708.410(b)*, but the rights of a party are not affected by the lien until the party has notice of the lien [*Code Civ. Proc. § 708.410(c)*].

[3] Rights of Judgment Creditor

[a] Intervention

The court in which the action or special proceeding is pending may permit a judgment creditor who has obtained a lien on the judgment debtor's cause of action to intervene in the action or special proceeding pursuant to *Code Civ. Proc. § 387* [*Code Civ. Proc. § 708.430(a)*]. Even if the judgment creditor does not become a party to the action or proceeding

by intervening, he or she is deemed to be a party for the purpose of the determination of an exemption claim by the judgment debtor or the determination of an order applying the judgment debtor's rights to money or property to satisfaction of the lien [*Code Civ. Proc. § 708.430(b)*; *see Code Civ. Proc. §§ 708.450, 708.470*].

[b] Intervention Discretionary

Inasmuch as the judge may permit the judgment creditor to intervene, intervention is permitted, but not required. Further, because the section is remedial in nature, it is to be liberally construed to give effect to the remedy which it authorizes. Intervention must normally be permitted unless the intervention will disrupt the suit or change the position of the original parties [*In re Marriage of Kerr (1986) 185 Cal. App. 3d 130, 134, 229 Cal. Rptr. 610]* . Ordinarily, a lien claimant would have no reason to participate in the main action, and in most instances his or her needs would be satisfied by the granting of a lien against the prospective judgment [*McClearen v. Superior Court (1955) 45 Cal. 2d 852, 856, 291 P.2d 449* (discussing former *Code Civ. Proc. § 688.1*)].

[c] Consent to Enforcement or Resolution of Debtor's Judgment

Unless the judgment creditor's judgment is satisfied or the lien released, the judgment debtor may not enforce any judgment recovered in the action or special proceeding without the written consent of the judgment creditor or authorization by order of the court [*Code Civ. Proc. § 708.440(a)*]. Written consent by the judgment creditor or authorization by order of the court is also required for any compromise, dismissal, settlement, or satisfaction of the pending action or proceeding or the judgment procured therein [*Code Civ. Proc. § 708.440(a)*]. The judgment debtor may apply by noticed motion to the court for the authorization to enforce, compromise, dismiss, settle, or satisfy his or her judgment in the action or proceeding. The court may issue an authorizing order after a hearing [*Code Civ. Proc. § 708.440(b)*; see *§§ 318.386, 318.387*].

Facts regarding whether a settlement was structured to evade the lien of the judgment creditor are material to the approval of a settlement under *Code Civ. Proc. § 708.440*. The particular facts relevant to evasion of the lien will vary from case to case because of differences in the property interests involved, variations in the relationships among the entities involved, and differences in the way transfers of interests in property are structured. To make an informed and intelligent decision about the settlement, the superior court should have sufficient information to understand who benefits from the transfers contemplated by the proposed settlement and how they are benefitted. The court must understand the size of the settlement pie, how the pie is sliced, and who is getting which slice. Once the court knows if the judgment debtor or an entity closely connected to the judgment debtor is getting a settlement slice beyond the reach of the judgment creditor's lien, the court can determine if equitable considerations justify evasion of the lien, terms and conditions should be imposed on the settlement, or the court should withhold approval of the settlement [*Oldham v. California Capital Fund, Inc. (2003) 109 Cal. App. 4th 421, 430-432, 134 Cal. Rptr. 2d 744]* .

[4] Application of Judgment to Satisfaction of Lien

If the judgment debtor is entitled to money or property under the judgment in the action or special proceeding and a lien has been created under *Code Civ. Proc. §§ 708.410-708.480*, on application of any party to the action or special proceeding, the court may order that the judgment debtor's rights to money or property under the judgment be applied to the satisfaction of the lien. Application for an order must be made by noticed motion, which must be served on all other parties personally or by mail [*Code Civ. Proc. § 708.470(a)*; *see* §§ 318.392-318.393.1].

The court may order any party having custody or control of the property not to transfer the property until it can be levied on or otherwise applied to the lien [*Code Civ. Proc. § 708.470(b)*]. If the court determines that a party having notice of the lien created under *Code Civ. Proc. §§ 708.410-708.480* has transferred property that was subject to the lien or has paid an amount to the judgment debtor that was subject to the lien, the court must render judgment against the party in an amount equal to the lesser of (1) the value of the judgment debtor's interest in the property or the amount

paid the judgment debtor or (2) the amount of the judgment creditor's lien [*Code Civ. Proc. § 708.470(c)*].

The judgment creditor is deemed a party to the action or special proceeding for the purposes of *Code Civ. Proc. § 708.470*, even if he or she has not intervened under *Code Civ. Proc. § 708.430(a)*[*Code Civ. Proc. § 708.430(b)*].

[5] Exemption Claim by Judgment Debtor

If a lien is created under *Code Civ. Proc. §§ 708.410-708.480*, the judgment debtor may claim that all or any portion of the money or property that he or she may recover in the action or proceeding is exempt from enforcement of a money judgment. The claim must be made by application on noticed motion to the court in which the action or special proceeding is pending and must be filed and served, personally or by mail, on the judgment creditor not later than 30 days after the judgment debtor has notice of the creation of the lien. The judgment debtor must execute an affidavit in support of the application that includes all of the matters set forth in *Code Civ. Proc. § 703.520(b)*. No notice of opposition to the claim is required, however [*Code Civ. Proc. § 708.450(a)*; *see* §§ 318.389-318.390].

The court may determine the exemption claim at any time prior to the entry of judgment or may consolidate the exemption hearing with the hearing on a motion under *Code Civ. Proc. § 708.470* (for application of judgment debtor's rights to satisfaction of lien) [*Code Civ. Proc. § 708.450(b)*]. If the judgment debtor establishes the right to a total or partial exemption, the court must order the termination of the lien on the exempt portion of the money or property [*Code Civ. Proc. § 708.450(c)*; *see § 318.391*]. The judgment creditor is deemed a party to the action or special proceeding for the purposes of *Code Civ. Proc. § 708.450*, even if he or she has not intervened under *Code Civ. Proc. § 708.430(a)* [*Code Civ. Proc. § 708.430(b)*].

The judgment debtor's failure to make a claim of exemption under *Code Civ. Proc. § 708.450* constitutes a waiver of the exemption [*Code Civ. Proc. § 708.450(a)*].

[6] Priority of Liens

Code Civ. Proc. §§ 708.410-708.480, regarding liens on a judgment debtor's cause of action, are silent on the issue of priority, as was former *Code Civ. Proc. § 688.1*. Until new case law develops regarding liens created under *Code Civ. Proc. §§ 708.410-708.480*, therefore, case law governing liens created under former *Code Civ. Proc. § 688.1* may be viewed as persuasive. Under former *Code Civ. Proc. § 688.1*, the first judgment creditor to obtain a lien has priority [*Roseburg Loggers, Inc. v. U.S. Plywood-Champion Papers, Inc. (1975) 14 Cal. 3d 742, 750, 122 Cal. Rptr. 567, 537 P.2d 399]* . Although liens created under former *Code Civ. Proc. § 688.1* receive priority according to the time at which they were created, when a lien so established conflicts with another type of lien, equitable principles may be applied to subordinate one to another.

However, an attorney's contractual lien on a judgment to secure payment of legal fees is entitled to priority over a judgment creditor's lien filed pursuant to *Code Civ. Proc. §§ 708.410-708.480* when the attorney's contractual lien is created prior to the perfection of the judgment creditor's lien [*see Waltrip v. Kimberlin (2008) 164 Cal. App. 4th 517, 524-531, 79 Cal. Rptr. 3d 460* (attorney's lien for fees had priority over bank's liens because attorney lien was created by retainer agreement between plaintiffs and counsel before bank filed notice of lien in pending action, which did not relate back to prior liens because those liens covered different property)]. Since *Code Civ. Proc. §§ 708.410-708.480* contain no language relating to the priority of liens obtained in compliance with their terms, the standard rule of priority contained in *Civ. Code § 2897* (first in time has priority) applies. Furthermore, in such a situation, the attorney need not file a judgment creditor's lien in compliance with *Code Civ. Proc. §§ 708.410-708.480* since, by their terms, *Code Civ. Proc. §§ 708.410-708.480* relate only to liens of judgment creditors and do not purport to limit contractual liens on judgments [*Cetenko v. United California Bank (1982) 30 Cal. 3d 528, 533-535, 179 Cal. Rptr. 902, 638 P.2d 1299* ; *see also Pangborn Plumbing Corp. v. Carruthers & Skiffington (2002) 97 Cal. App. 4th 1039, 1047-1048, 119 Cal. Rptr. 2d 416* (contractual lien for attorney's fees entitled to priority as to settlement fund created by law firm's legal

work over judgment lien of judgment creditor)].

Legal Topics:

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

§§ 318.103[Reserved]

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27-318 California Forms of Pleading and Practice--Annotated § 318.120

§ 318.120 Discharge by Payment of Compromise of Judgment by Judgment Debtor

Payment by the judgment debtor satisfies and extinguishes the judgment [*Brochier v. Brochier (1941) 17 Cal. 2d 822, 826, 112 P.2d 602]* . Judgments may also be properly discharged by partial payment in accord and satisfaction [*Schwartz v. Cal. Claim Service (1942) 52 Cal. App. 2d 47, 52-53, 125 P.2d 883]* . For a more complete discussion of and forms relating to accord and satisfaction, see Ch. 6, *Accord and Satisfaction* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & Satisfaction

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§ 318.121 Discharge by Joint Nontort Judgment Debtor

In some instances, a judgment may be discharged by payment by a joint nontort judgment debtor [*see Code Civ. Proc. §§ 881-883*]. For a more complete discussion of and forms relating to proceedings in which either contribution or reimbursement may be sought by the party having paid the judgment, see Ch. 300, *Indemnity and Contribution* , and Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & Satisfaction

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27-318 California Forms of Pleading and Practice--Annotated § 318.122

§ 318.122 Discharge by Equitable Setoff

[1] Judgment Debtor's Right to Setoff

A judgment debtor who by assignment or otherwise becomes the owner of a claim against his or her judgment creditor may have a court in equity setoff the amount of that claim against the judgment [*Erlich v. Superior Court (1965) 63 Cal. 2d 551, 555, 47 Cal. Rptr. 473, 407 P.2d 649]* .

The offset of judgment against judgment is a matter of right absent the existence of facts that establish competing equities or an equitable defense precluding the offset [*Harrison v. Adams (1942) 20 Cal. 2d 646, 648-649, 128 P.2d 9* ; *Brienza v. Tepper (1995) 35 Cal. App. 4th 1839, 1848, 42 Cal. Rptr. 2d 690* ; *see Wm. R. Clarke Corp. v. Safeco Ins. Co. of America (2000) 78 Cal. App. 4th 355, 358-359, 92 Cal. Rptr. 2d 709* (right to setoff is not absolute and may be restricted when failure to do so would be inequitable)].

[2] Requirements and Limitations for Setoff

A judgment debtor seeking to offset a claim against a judgment creditor is required to have a present, valid, and subsisting claim against the judgment creditor. If the claim has been satisfied, for example, no setoff will be allowed [*see Blake v. Arp (1920) 48 Cal. App. 715, 717-718, 192 P. 452]* . The fact that the claim itself has not been reduced to judgment or that the claim is not liquidated will not bar a setoff against the judgment so long as any unliquidated claim has matured [*Erlich v. Superior Court (1965) 63 Cal. 2d 551, 555, 47 Cal. Rptr. 473, 407 P.2d 649]* .

Mutuality is, however, essential. The debtor must be the beneficial owner of a claim or judgment that he or she seeks to setoff and not merely a trustee on behalf of an assignor who has retained an equitable interest in the claim assigned or the holder of a claim merely for purposes of collection. In such cases, mutuality is destroyed because the person against whom the setoff is asserted has no opportunity to assert setoffs as well [*Norman v. Berney (1965) 235 Cal. App. 2d 424, 434, 45 Cal. Rptr. 467]* .

[3] Methods of Presenting Setoffs

A setoff may be presented to the court either by way of a cross complaint, a motion for such setoff, or an independent equitable action [*see Code Civ. Proc. § 428.10* (permissive cross complaint); *Harrison v. Adams (1942) 20 Cal. 2d 646, 648-649, 128 P.2d 9* ; *Norman v. Berney (1965) 235 Cal. App. 2d 424, 434, 45 Cal. Rptr. 467]* .

For a more complete discussion of and forms relating to cross complaints, see Ch. 123, *Complaints and Cross Complaints* .

[4] Effect of Asserting Claim

Because a claim that has not been reduced to judgment may be asserted as the basis for a setoff, a judgment debtor may wish to attempt to convince a court to enjoin execution of the original judgment pending resolution of a disputed claim. The decision to enjoin execution of a judgment pending resolution of a disputed claim rests in the discretion of the court. The court is required to consider such factors as the likelihood that the judgment debtor will collect, the probability and comparative amount of recovery, and the ability of the judgment creditor to respond should the judgment be rendered against him or her on the disputed claim [*Erlich v. Superior Court (1965) 63 Cal. 2d 551, 555-556, 47 Cal. Rptr. 473, 407 P.2d 649]* .

[5] Limits by One-Action and Security-First Rules

A judgment debtor who holds a security interest in property must exercise caution in determining whether to offset the secured obligation against the judgment, rather than commence nonjudicial foreclosure proceedings on the security interest. By virtue of the security interest, the judgment debtor is a *secured creditor* who is subject to the statutory scheme designed to protect debtors who own property subject to such interests [*see Aplanalp v. Forte (1990) 225 Cal. App. 3d 609, 614, 275 Cal. Rptr. 144]* . Under that scheme, a secured creditor is entitled to bring only one lawsuit to enforce his or her security interest and collect the debt ("One-action rule"), and the secured creditor is required to rely on his or her security before enforcing the debt ("Security-first" or "Collateral-first" rule) [*see Code Civ. Proc. § 726(a)*; *Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 997, 275 Cal. Rptr. 201, 800 P.2d 557* , citing *Walker v. Community Bank (1974) 10 Cal. 3d 729, 733-734, 111 Cal. Rptr. 897, 518 P.2d 329]* . Thus, if the judgment debtor elects to offset the judgment by a claim on the secured obligation, the judgment debtor is deemed to have made an election of remedies to obtain judicial relief and forfeit the security interest and its attendant right to obtain nonjudicial foreclosure [*see Aplanalp v. Forte (1990) 225 Cal. App. 3d 609, 614, 275 Cal. Rptr. 144]* .

Some courts of appeal have stated that in addition to waiving the balance of the security, a secured creditor seeking judicial relief on the underlying debt (including offset of a claim against a judgment creditor) waives any claim to the unpaid balance of the *debt* [*see, e.g., Aplanalp v. Forte (1990) 225 Cal. App. 3d 609, 614, 275 Cal. Rptr. 144* ; *Bank of America v. Daily (1984) 152 Cal. App. 3d 767, 772, 199 Cal. Rptr. 557]* . This result has, however, been disapproved by the Supreme Court [*Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 1004, 275 Cal. Rptr. 201, 800 P.2d 557]* . On electing to pursue judicial relief, the judgment debtor's status with regard to any balance owed him or her by the judgment creditor in excess of that applied to offset the judgment would be that of an unsecured creditor [*see Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 1004, 275 Cal. Rptr. 201, 800 P.2d 557]* .

For discussion relating to the limitations imposed by the one-action rule in transactions secured by personal property or in proceedings to foreclose on a deed of trust, see Ch. 500, *Sales and Secured Transactions* , and Ch. 555, *Trust Deeds and Real Property Mortgages* , respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & Satisfaction

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27-318 California Forms of Pleading and Practice--Annotated § 318.123

§ 318.123 Discharge in Bankruptcy

A judgment may be discharged if the judgment debtor is granted a discharge under the Bankruptcy Code [*11 U.S.C. § 101 et seq.*]. For a more complete discussion of bankruptcy law and procedure, see Ch. 94, *Bankruptcy* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawDischarge & DischargeabilityEffects of DischargeGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentDischarge, Release & Satisfaction

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27-318 California Forms of Pleading and Practice--Annotated § 318.124

§ 318.124 Entry of Satisfaction of Judgment

A satisfaction of a money judgment is entered in the register of actions by the court clerk when a writ is returned satisfied for the full amount of a lump-sum judgment, when an acknowledgment of satisfaction is filed with the court, or when the court orders entry of satisfaction of judgment [*Code Civ. Proc. § 724.020*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & Satisfaction

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27-318 California Forms of Pleading and Practice--Annotated § 318.125

§ 318.125 Acknowledgment of Satisfaction

[1] Creditor's Duty to File

[a] In General

When a money judgment is satisfied either by payment of the full amount required, or by acceptance by the judgment creditor of a lesser sum in full satisfaction, the judgment creditor must immediately file an acknowledgment of satisfaction with the court unless the judgment is satisfied in full pursuant to a writ [*Code Civ. Proc. §§ 724.010(a), 724.030*]. The contents of the acknowledgment are prescribed by *Code Civ. Proc. § 724.060* [*see § 318.420*].

[b] Satisfaction by Levy or Noncash Form of Payment

When a money judgment is satisfied by levy, the judgment creditor's obligation to give or file an acknowledgment arises only when he or she has received the full amount required to satisfy the judgment from the levying officer [*Code Civ. Proc. § 724.010(b)*]. Similarly, when the money judgment is satisfied by check or other noncash form of payment, the judgment creditor is obligated to give or file an acknowledgment only when the check or other form of payment has actually been honored [*Code Civ. Proc. § 724.010(c)*].

[c] When Abstract of Judgment Recorded

If an abstract of a money judgment has been recorded with the recorder of any county and the judgment is satisfied, the judgment creditor is required to immediately file an acknowledgment of satisfaction with the court, and serve the acknowledgment on the judgment debtor [*Code Civ. Proc. § 724.040*]. This rule applies whether the judgment is satisfied pursuant to a writ or by any other means.

[2] Demand for Acknowledgment of Satisfaction

[a] Contents and Service

If a money judgment has been satisfied, the judgment debtor, the owner of real or personal property subject to a lien created under the judgment, or a person having a security interest in or a lien on personal property subject to a lien created under the judgment may demand in writing that the judgment creditor (1) file an acknowledgment of satisfaction with the court, (2) execute, acknowledge, and deliver an acknowledgment of satisfaction to the person making the demand, or (3) do both. The demand may be served personally or by mail on the judgment debtor [*Code Civ. Proc. § 724.050(a)*; *see § 318.421*]. The noticed motion procedure in *Code Civ. Proc. § 724.050* is the exclusive method for obtaining an order for entry of satisfaction of judgment [*Quintana v. Gibson (2003) 113 Cal. App. 4th 89, 92-95, 5 Cal. Rptr. 3d 898* (but defendant's failure to comply with procedure did not result in prejudice to plaintiff under facts)].

[b] Failure to Comply With Demand

The judgment creditor must comply with the written demand for acknowledgment within 15 days of its receipt [*Code Civ. Proc. § 724.050(c)*]. If the judgment has been satisfied and the judgment creditor has failed without just cause to comply with the demand for acknowledgment, he or she will be liable to the person making the demand for all damages sustained as a result of the failure, plus the sum of $100 [*Code Civ. Proc. § 724.050(e)*]. If the judgment creditor fails without just cause to comply within the prescribed time period, the person making the demand may apply to the court on noticed motion for an order requiring compliance with the demand and payment of damages and the penalty, or directing the court clerk to enter satisfaction of the judgment [*Code Civ. Proc. § 724.050(d), (e)*; *see § 318.421*].

[3] Unjustified Conditioning of Delivery of Acknowledgment of Satisfaction; Liability

[a] In General

Any judgment creditor who intentionally conditions the delivery of an acknowledgment of satisfaction of judgment on the performance of any act or the payment of any amount in excess of that to which the judgment creditor is entitled pursuant to the judgment is liable to the judgment debtor for all damages sustained by reason of that action. However, in no event may such damages be for less than $250 [*Code Civ. Proc. § 724.070(a)*].

[b] Not Applicable When Security or Promissory Note Furnished

Code Civ. Proc. § 724.070(a) does not apply when a judgment creditor has agreed to deliver an acknowledgment of satisfaction of judgment to the judgment debtor prior to full satisfaction of the judgment in consideration for the judgment debtor having agreed either to furnish security or to execute a promissory note, or both, the principal amount of which does not exceed that to which the judgment creditor is entitled pursuant to the judgment [*Code Civ. Proc. § 724.070(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & Satisfaction

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27-318 California Forms of Pleading and Practice--Annotated § 318.126

§ 318.126 Certificate of Satisfaction

When a satisfaction of judgment has been entered in the register of actions, the court clerk will issue a certificate of satisfaction on application and the payment of the fee provided in *Gov. Code § 70626(a)* [*Code Civ. Proc. § 724.100(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & Satisfaction

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27-318 California Forms of Pleading and Practice--Annotated § 318.127

§ 318.127 Attorney's Fees for Prevailing Party

In any action maintained pursuant to *Code Civ. Proc. §§ 724.010-724.100*, the court shall award reasonable attorney's fees to the prevailing party [*Code Civ. Proc. § 724.080*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-318 California Forms of Pleading and Practice--Annotated § 318.128

§ 318.128 Damages Not Exclusive

The damages provided for in *Code Civ. Proc. §§ 724.010-724.100* are not in derogation of any other damages or penalties to which an aggrieved person may be entitled by law [*Code Civ. Proc. § 724.090*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-318 California Forms of Pleading and Practice--Annotated § 318.129

§ 318.129 Acknowledgment of Partial Satisfaction of Judgment

[1] Demand by Judgments Debtor or Owner

The judgment debtor or the owner of real or personal property subject to a money judgment lien may demand in writing that the judgment creditor execute, acknowledge, and deliver an acknowledgment of partial satisfaction of judgment to the person making the demand. The demand must be served personally or by mail. If the judgment has in fact been partially satisfied, the judgment creditor must comply with the demand within 15 days of its receipt [*Code Civ. Proc. § 724.110(a)*; *see § 318.421*].

[2] Failure to Comply With Demand

If the judgment creditor fails to comply with the demand for acknowledgment within the time period provided, the judgment debtor or the owner of property subject to the lien may apply to the court on noticed motion for an order [*see § 318.424*] requiring the judgment creditor to comply. If the court finds that the judgment has been partially satisfied, the court must make an order determining the amount of partial satisfaction and order the judgment creditor to comply with the demand [*Code Civ. Proc. § 724.110(b)*; *see Jhaveri v. Teitelbaum (2009) 176 Cal. App. 4th 740, 752-754, 98 Cal. Rptr. 3d 268*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & Satisfaction

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27-318 California Forms of Pleading and Practice--Annotated § 318.130

§ 318.130 Acknowledgment of Satisfaction of Matured Installments Under Installment Judgment

[1] Definitions

An installment judgment is a money judgment under which a lien may be created pursuant to *Code Civ. Proc. § 697.320* [*see § 318.96[2]*]. Matured installments are the sum of all amounts and installments that have matured under the installment judgment, the interest that has accrued on the judgment, and the costs that have been added to the judgment on or before the date specified in the demand for acknowledgment of satisfaction [*Code Civ. Proc. § 724.210*].

[2] Demand for Acknowledgment

[a] Contents and Service

If real property is subject to an installment judgment lien, the judgment debtor or the owner of the property may demand in writing that the judgment creditor execute, acknowledge, and deliver to the person making the demand an acknowledgment of satisfaction of matured installments under the judgment. The demand must be served on the judgment creditor either personally or by mail [*Code Civ. Proc. § 724.220(a)*; *see § 318.421*]. If the matured installments have been satisfied as of the date of the demand, the judgment creditor must comply within 15 days of receipt, or be held liable for damages resulting from the failure to comply plus $100 [*see Code Civ. Proc. §§ 724.220(c), 724.240(a)*].

[b] Order Compelling Compliance

The judgment debtor or owner of the real property subject to the lien may apply to the court on noticed motion for an order requiring the judgment creditor to comply with the demand [*see § 318.422*]. The court may alternatively order determining that the matured installments as of the date specified in the demand have been satisfied [*Code Civ. Proc. § 724.230*]. The judgment creditor's liability for failure to comply with the demand for acknowledgment may be determined in the proceedings on this motion [*Code Civ. Proc. § 724.240(a)*]. The contents of the acknowledgment are prescribed by *Code Civ. Proc. § 724.060* [*see § 318.420*].

[3] Orders for Child or Spousal Support

If any amount of child or spousal support provided in a support order has been directed to be made to an officer designated by statute, either by the court pursuant to *Civ. Code § 4702* (repealed and replaced by *Fam. Code § 4200*, operative January 1, 1994) or by any other provision of law, and the directive is set forth in the certified copy or abstract of the judgment that was recorded to create the judgment lien on real property, or in a similarly recorded certified copy or abstract of an amended or supplemental order, the acknowledgment of satisfaction of matured installments under the installment judgment is not effective and does not affect the judgment lien unless the acknowledgment is executed or approved in writing by the designated officer [*Code Civ. Proc. § 724.250(b)*].

[4] Attorney's Fees

In any action maintained pursuant to *Code Civ. Proc. §§ 724.210-724.260*, the court may award reasonable attorney's fees to the prevailing party [*Code Civ. Proc. § 724.260*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-318 California Forms of Pleading and Practice--Annotated § 318.131

§ 318.131 Acceptance of Benefits or Voluntary Satisfaction of Judgment as Waiver of Right to Appeal

[1] General Rule

It is the general rule that the voluntary acceptance by a judgment creditor of the benefits of a judgment or order is a bar to appeal by the creditor of the judgment or order [*see Mathys v. Turner (1956) 46 Cal. 2d 364, 365, 294 P.2d 947]* . Similarly, waiver by a judgment debtor is implied when he or she voluntarily complies with the judgment by way of compromise or with an agreement not to take or prosecute an appeal [*Lee v. Brown (1976) 18 Cal. 3d 110, 115, 132 Cal. Rptr. 649, 553 P.2d 1121]* .

[2] Exception

In the case of acceptance by a judgment creditor of benefits of a judgment as waiver, an exception exists when the creditor is concededly entitled to the benefits which are accepted and the entitlement will not be affected by a reversal on appeal. In such a case, acceptance of the benefits does not constitute waiver of the right to appeal [*Mathys v. Turner (1956) 46 Cal. 2d 364, 365, 294 P.2d 947]* .

In the case of voluntary satisfaction by the judgment debtor, a waiver is not implied when the satisfaction arises under compulsion of risk of forfeiture [*Lee v. Brown (1976) 18 Cal. 3d 110, 115-116, 132 Cal. Rptr. 649, 553 P.2d 1121]* . However, having to choose whether to file an appeal to pursue a greater award than the judgment provided does not make that choice involuntary [*see Satchmed Plaza Owners Association v. UWMC Hospital Corporation (2008) 167 Cal. App. 4th 1034, 1042-1043, 84 Cal. Rptr. 3d 585*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & Satisfaction

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27-318 California Forms of Pleading and Practice--Annotated § 318.132

§ 318.132 Vacating Satisfaction

A party to the record is able to have a satisfaction of judgment entered in fraud of his or her rights set aside on motion in the action in which the judgment is entered [*Wherry v. Rambo (1950) 97 Cal. App. 2d 569, 571, 218 P.2d 142* ; *see § 318.425*]. Fraud, undue influence, and mistake are generally recognized as sufficient grounds for vacating a satisfaction of judgment [*Remillard Brick Co. v. Dandini (1950) 98 Cal. App. 2d 617, 622, 220 P.2d 927]* . For example, payment of a judgment, even though voluntary, does not terminate the litigation unless the payment is made by way of compromise or with intent that the payment satisfy the judgment and end the litigation [*People ex rel. Dept. of Public Works v. Richman (1966) 242 Cal. App. 2d 380, 384, 385, 51 Cal. Rptr. 454]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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27-318 California Forms of Pleading and Practice--Annotated § 318.133

§ 318.133 Discharge and Satisfaction of Foreign-Money Claim

A foreign-money judgment may be discharged by payment [*Code Civ. Proc. § 676.7(h)*]. A judgment or award on a foreign-money claim is payable in that foreign money or, at the option of the debtor, in the amount of United States dollars that will purchase that foreign money on the conversion date at a bank-offered spot rate [*Code Civ. Proc. § 676.7(b)*]. Each payment in United States dollars is to be accepted and credited on a judgment or award on a foreign-money claim in the amount of the foreign money that could be purchased by the dollars at a bank-offered spot rate of exchange at or near the close of business on the conversion date for that payment [*Code Civ. Proc. § 676.7(d)*].

A satisfaction or partial payment made on the foreign judgment, on proof thereof, is to be credited against the amount of the foreign money specified in the judgment, notwithstanding entry of the judgment in California [*Code Civ. Proc. § 676.10(c)*].

For discussion of foreign-money judgments generally, see discussion in *§ 318.52[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & Satisfaction

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27-318 California Forms of Pleading and Practice--Annotated §§ 318.134-318.149

[Reserved]

§§ 318.134[Reserved]

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27-318 California Forms of Pleading and Practice--Annotated § 318.150

§ 318.150 Power to Assign Judgment

An unsatisfied judgment is deemed a thing in action [*Sunset Realty Co. v. Dadmun (1939) 88 P.2d 947]* . As such, the judgment may be transferred by assignment [*Civ. Code §§ 953, 954*; *Curtin v. Kowalsky (1904) 145 Cal. 431, 434, 78 P. 962]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewContracts LawPerformanceAssignmentGeneral Overview

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27-318 California Forms of Pleading and Practice--Annotated § 318.151

§ 318.151 Requirements for Valid Assignment

The validity of an assignment is generally governed by the law of contracts [*Northern Counties Bank v. Earl Himovitz & Sons Livestock Co. (1963) 216 Cal. App. 2d 849, 855-856, 31 Cal. Rptr. 551]* . Thus, in the absence of any statutory requirements as limitations on the power to assign a judgment, the assignment is not required to be in writing [*Painter v. Berglund (1939) 31 Cal. App. 2d 63, 66, 87 P.2d 360]* nor is it required to be supported by valuable consideration [*Curtin v. Kowalsky (1904) 145 Cal. 431, 434, 78 P. 962]* . Moreover, the assignee is not required to record the assignment or give notice of it to third persons [*Curtin v. Kowalsky (1904) 145 Cal. 431, 435, 78 P. 962]* .

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27-318 California Forms of Pleading and Practice--Annotated § 318.152

§ 318.152 Assignee's Rights Against Third Persons

Although under the common law the assignment need not be in writing and notice need not be given to third persons [*see § 318.151*], the assignee may want to perfect his or her rights by placing the assignment in writing and giving notice.

Subject to *Civ. Code § 954.5(b)* and *(c)*, a transfer of a right represented by a judgment that is excluded from the coverage of Division 9 of the Commercial Code (Secured Transactions; Sales of Accounts, Contract Rights and Chattel Paper) by *Com. Code § 9109(d)(9)* is deemed perfected as against third persons on the execution and delivery to the transferee of an assignment in writing [*Civ. Code § 954.5(a)*]. *Com. Code § 9109(d)(9)* provides that Division 9 of the Commercial Code does not apply to a right represented by a judgment (other than a judgment taken on a right to payment that was collateral). Thus, *Civ. Code § 954.5(a)* applies to most assignments of judgments.

Additionally, as between bona fide assignees of the same right for value without notice, the assignee who first becomes an assignee of record, by filing an acknowledgment of assignment of judgment with the court as provided in *Code Civ. Proc. § 673* or otherwise becoming an assignee of record, has priority [*Civ. Code § 954.5(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewContracts LawPerformanceAssignmentGeneral OverviewContracts LawThird PartiesDelegation of Performance

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27-318 California Forms of Pleading and Practice--Annotated § 318.153

§ 318.153 Advisability of Assignee Giving Actual Notice to Judgment Debtor

Actual notice to the judgment debtor is advisable because the judgment debtor will be protected from suit by the assignee if, in the absence of actual notice of the assignment, the judgment debtor pays the sums due to the assignor [*Curtin v. Kowalsky (1904) 145 Cal. 431, 434-435, 78 P. 962]* . It should also be noted that the mere filing of the assignment will not operate as either actual or constructive notice to the judgment debtor [*Kaplan v. Hacker (1952) 113 Cal. App. 2d 571, 573, 248 P.2d 464]* . Nor is the filing of an acknowledgment of assignment of judgment pursuant to *Code Civ. Proc. § 673*, of itself, notice to the judgment debtor so as to invalidate any payments made by the judgment debtor that would otherwise be applied to the satisfaction of the judgment [*Civ. Code § 954.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-318 California Forms of Pleading and Practice--Annotated § 318.154

§ 318.154 Executory Agreement to Pay Proceeds of Judgment Not Assignment

An executory agreement to pay the proceeds from the collection on a judgment does not constitute an assignment of the judgment [*Ott Hardware Co. v. Davis (1913) 165 Cal. 795, 801, 134 P. 973]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewContracts LawTypes of ContractsExecutory Contracts

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27-318 California Forms of Pleading and Practice--Annotated § 318.155

§ 318.155 Effect of Assignment

[1] Legal Title Vests in Assignee

An assignment of the total judgment carries with it the legal title to the judgment [*Curtin v. Kowalsky (1904) 145 Cal. 431, 434, 78 P. 962]* . For a discussion of the effect on title in the case of a partial assignment, see *§ 318.15*.

[2] Assignee's Right to Collect on Judgment

Although a judgment is not deemed a negotiable instrument, it is considered a thing in action vesting in the assignee the equitable right to the proceeds from it, with the right to the usual and legal means of collecting the amount due [*Anglo-Cal. Trust Co. v. Oakland Rys. (1924) 193 Cal. 451, 469, 225 P. 452]* .

An assignee of a judgment is not entitled to enforce the judgment under *Code Civ. Proc. §§ 680.010-724.260* (Enforcement of Judgments Law) unless an acknowledgment of assignment of judgment to the assignee has been filed under *Code Civ. Proc. § 673* or the assignee has otherwise become an assignee of record [*Code Civ. Proc. § 681.020*]. An assignee of a judgment may become an assignee of record by filing with the clerk of the court that entered the judgment an acknowledgment of assignment of judgment [*Code Civ. Proc. § 673(a)*]. The contents and requirements for an acknowledgment of assignment of judgment are set forth in *Code Civ. Proc. § 673(b)* and *(c)* [*see § 318.442*]. Once an assignee becomes an assignee of record, he or she becomes a judgment creditor and may proceed to enforce the judgment as such, pursuant to the Enforcement of Judgments Law (*Code Civ. Proc. §§ 680.010-724.260*) [*see Code Civ. Proc. § 680.240*; *California Coastal Commission v. Allen (2008) 167 Cal. App. 4th 322, 327, 83 Cal. Rptr. 3d 906* (*Code Civ. Proc. § 673* sets forth procedure for assignee to enforce judgment, not for judgment debtor to challenge assignment); for discussion and forms relating to enforcement of judgments, see Ch. 254, *Executions and Enforcement of Judgments*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewContracts

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27-318 California Forms of Pleading and Practice--Annotated § 318.156

§ 318.156 Right of Judgment Debtor to Appeal Notwithstanding Assignment

The assignee of the judgment creditor must take the assignment subject to the right of the obligor to present on appeal whatever arguments would have been made against the assignor [*Northam v. Gordon (1863) 23 Cal. 255]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral OverviewContracts LawPerformanceAssignmentGeneral Overview

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27-318 California Forms of Pleading and Practice--Annotated § 318.157

§ 318.157 Right of Judgment Debtor to Assert Setoff or Claim Against Original Judgment Creditor Notwithstanding Assignment

In the case of an assignment of a judgment, the action by the assignee is without prejudice to any setoff or other defense existing at the time of or before notice of the assignment [*Code Civ. Proc. § 368*]. Actual notice to the judgment debtor of the assignment is necessary to defeat this right [*Highsmith v. Lair (1955) 44 Cal. 2d 298, 303, 281 P.2d 865]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-318 California Forms of Pleading and Practice--Annotated § 318.158

§ 318.158 Rights of Assignee of Judgment Creditor on Appeal by Judgment Debtor

When a transfer of interest in an action has occurred before or during an appeal by way of an assignment of the judgment, the court may allow the person to whom transfer is made to be substituted in the action or proceeding [*Code Civ. Proc. § 368.5*]. Although the assignee may allow the prosecution of the appeal in the name of the original plaintiff (assignor), substitution may be desirable in that an assignee who does not give actual notice to the defendant of the assignment will not be entitled to receive notice of motions as a party unless actually substituted as a party under *Code Civ. Proc. § 368.5* [*Kaplan v. Hacker (1952) 113 Cal. App. 2d 571, 573, 248 P.2d 464* (decided under former *Code Civ. Proc. § 385*)].

It should also be noted that where an assignment of a judgment is based on an action for a debt upon which the judgment was obtained, reversal of the judgment will not affect the assignee's right to the underlying debt upon which the assignment was based [*North v. Evans (1934) 1 Cal. App. 2d 64, 67, 36 P.2d 133]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-318 California Forms of Pleading and Practice--Annotated § 318.159

§ 318.159 Assignment of Judgment on Tort Claim

Although a tort claim is not generally assignable, once the claim has been reduced to judgment, the claim becomes a debt which may then be assigned [*Pacific Gas & Elec. Co. v. Nakano (1939) 12 Cal. 2d 711, 713, 87 P.2d 700]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-318 California Forms of Pleading and Practice--Annotated § 318.160

§ 318.160 Assignment to One of Several Judgment Debtors Upon Payment

Where there is no right to contribution or indemnification, as in the case of joint tortfeasors, the payment of the judgment by one of the several judgment debtors in exchange for an assignment of the judgment will not thereby create a right to contribution nor prevent satisfaction of judgment from being entered [*Ramey v. Myers (1958) 159 Cal. App. 2d 82, 92, 323 P.2d 805]* . On the other hand, where a right to contribution or indemnification exists, one of several judgment debtors may pay the judgment creditor for an as signment of the judgment and thereby preserve his or her right to such contribution or indemnification [*Williams v. Riehl (1899) 127 Cal. 365, 368, 59 P. 762]* . Such payment and assignment must, however, be relatively contemporaneous so that it will not appear that the assignment is made to revise a judgment which has already been extinguished by payment [*see National Bank v. Los Angeles Iron & Steel Co. (1906) 2 Cal. App. 659, 662, 84 P. 466]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-318 California Forms of Pleading and Practice--Annotated § 318.161

§ 318.161 Partial Assignment

An assignment of a portion of a judgment has no effect against the judgment debtor unless made with the judgment debtor's consent or pursuant to his or her ratification [*Buckeye Refining Co. v. Kelly (1912) 163 Cal. 8, 12, 124 P. 536]* . Even in the absence of such consent or ratification, however, the assignee of a portion of the judgment will be protected as against the obligation of the assignor to pay to the assignee such sums of the judgment as were the subject of the partial assignment. For example, the assignor may not settle the case on appeal and stipulate to an amount of a final judgment which would defeat the rights of the assignee to payment of sums due on the partial assignment [*Rowe v. Holmes (1944) 63 Cal. App. 2d 46, 53, 146 P.2d 45]* .

Legal Topics:

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

§§ 318.162[Reserved]

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27-318 California Forms of Pleading and Practice--Annotated § 318.180

§ 318.180 Actions on Domestic Judgments

[1] Nature of Action

An action upon a judgment is an action based on a contract in that the judgment becomes a debt which the judgment debtor is obligated to pay. The law, in effect, implies a contract on the part of the judgment debtor to pay [*Minor v. Minor (1959) 175 Cal. App. 2d 277, 279, 345 P.2d 954]* . Such actions have long been recognized in California [*Thomas v. Thomas (1939) 14 Cal. 2d 355, 358, 94 P.2d 810]* .

An action on a judgment may be brought against both a private defendant [*see Code Civ. Proc § 683.050*; *Green v. Zissis (1992) 5 Cal. App. 4th 1219, 1222, 7 Cal. Rptr. 2d 406* ; *Pratali v. Gates (1992) 4 Cal. App. 4th 632, 636-637, 5 Cal. Rptr. 2d 733]* and a local public entity defendant [*see Barkley v. City of Blue Lake (1993) 18 Cal. App. 4th 1745, 1750-1751, 23 Cal. Rptr. 2d 315]* , if brought within 10 years after the judgment became final [*see Code Civ. Proc. § 337.5*; *Barkley v. City of Blue Lake (1993) 18 Cal. App. 4th 1745, 1750-1751, 23 Cal. Rptr. 2d 315* ; *Green v. Zissis (1992) 5 Cal. App. 4th 1219, 1222, 7 Cal. Rptr. 2d 406* ; *see also Pratali v. Gates (1992) 4 Cal. App. 4th 632, 636-637, 5 Cal. Rptr. 2d 733* (statute of limitations is tolled while judgment debtor is out of state)].

[2] Reasons for Bringing Action on Domestic Judgments

[a] To Invoke Contempt Powers of Another Court

Actions on domestic judgments are not limited to recovery on money judgments alone. They are allowed whenever the plaintiff will secure some advantage by bringing the action, including the convenience of prosecuting the judgment through the contempt powers of a local forum rather than through those of a distant court. For example, when one spouse is attempting to enforce a court order for the payment of alimony, an action on that judgment may be brought in another county in which the pursuit of such enforcement may be more convenient to plaintiff [*Thomas v. Thomas (1939) 14 Cal. 2d 355, 358-359, 94 P.2d 810]* .

[b] To Preserve Priority of Judgment Lien

When a judgment is rendered in an action on a prior judgment, the second judgment is regarded as an extension of the first. Accordingly, a judgment lien created under the first judgment is preserved and retains its priority after a subsequent action has been brought on the judgment [*Provisor v. Nelson (1965) 44 Cal. Rptr. 894]* .

[c] To Foreclose Lien

Execution will not lie on a judgment in which a lien is expressly created by the judgment on particular property in the absence of some provision in the judgment ordering sale of the security. In such a case, the judgment creditor must bring a separate action to foreclose the lien created by the judgment [*Roseburg Loggers, Inc. v. U.S. Plywood-Champion Papers, Inc. (1975) 14 Cal. 3d 742, 748, 122 Cal. Rptr. 567, 537 P.2d 399* ; *Wellborn v. Wellborn (1942) 55 Cal. App. 2d 516, 520, 131 P.2d 48]* .

[d] To Assert Statutory Cause of Action Against Third Person

In some instances, the judgment creditor may have a statutory right to bring an action on the judgment against a third party. For example, certain types of insurance polices cannot be issued without a provision that whenever judgment is secured against the insured or the executor or administrator of a deceased insured in an action based upon bodily injury, death, or property damage, then an action may be brought against the insurer on the policy and subject to its terms and limitations by the judgment creditor to recover on the judgment [*Ins. Code § 11580*]. For a detailed discussion and form relating to such actions, see Ch. 88, *Automobiles: Automobile Insurance* .

Similarly, a joint debtor against whom a judgment has been recovered has a statutory right to bring an action against other joint debtors [*Code Civ. Proc. § 989*]. For a detailed discussion and forms relating to joint debtor proceedings, see Ch. 254, *Executions and Enforcement of Judgments* .

[3] Requirement of Finality

An action on a judgment, as distinguished from execution on a judgment, may not be commenced until the judgment has become final either upon expiration of the period within which an appeal may be taken or, if an appeal is taken, upon the issuance of the re mittitur when the judgment has been affirmed [*Hoover v. Galbraith (1972) 7 Cal. 3d 519, 526, 102 Cal. Rptr. 733, 498 P.2d 981]* . The statute of limitations [*see Code Civ. Proc. § 337.5* (10 years)] on domestic judgments begins to run only after the date that the judgment becomes final [*Turner v. Donovan (1942) 52 Cal. App. 2d 236, 239, 126 P.2d 187* , *cert. denied, 317 U.S. 599]* . For an action to renew a stipulated judgment, the 10-year statute of limitations to renew the judgment under *Code Civ. Proc. § 337.5(3)* begins to run when the trial court enters the stipulated judgment, unless the parties agree to the judgment for the purpose of facilitating an appeal [*Cadle Co. II, Inc. v. Sundance Financial, Inc. (2007) 154 Cal. App. 4th 622, 624-626, 64 Cal. Rptr. 3d 824]* .

[4] Availability of Alternative Enforcement

The fact that one may be entitled to enforce an existing judgment by execution does not prohibit an action to obtain a new judgment on a balance due upon a former judgment. This is true since the enforcement of judgments by both execution and actions cannot be properly placed upon the same basis because they are different in theory and results [*Turner v. Donovan (1942) 52 Cal. App. 2d 236, 240, 126 P.2d 187* , *cert. denied, 317 U.S. 599]* .

A judgment creditor may decide to file an action on a judgment as an alternative to execution of judgment, if the period for obtaining an execution of judgment has expired but the period for filing an action on the judgment has not and there is no other means of enforcing the judgment except by action on the judgment [*Barkley v. City of Blue Lake (1993) 18 Cal. App. 4th 1745, 1749, 1751, 23 Cal. Rptr. 2d 315* ; *Green v. Zissis (1992) 5 Cal. App. 4th 1219, 1222, 7 Cal. Rptr. 2d 406]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.181 Actions on Sister State Judgments

[1] Generally

U.S. Const., art. IV, § 1, provides that full faith and credit must be given in each state to the public acts, records, and judicial proceedings of every other state. Hence, a sister state judgment must be given full faith and credit in California if it is valid and regular on its face, is rendered by a sister state that had jurisdiction over the parties and the subject matter, and all interested parties were given reasonable notice and opportunity to be heard, regardless of whether or not a strong public policy of the state of California would have precluded recovery in a California court on the original claim [*Silbrico Corp. v. Raanan (1985) 170 Cal. App. 3d 202, 207-208, 216 Cal. Rptr. 201* ; *Estate of Hart (1984) 165 Cal. App. 3d 392, 397, 209 Cal. Rptr. 272* ; *World Wide Imports, Inc. v. Bartel (1983) 145 Cal. App. 3d 1006, 1010-1011, 193 Cal. Rptr. 830* ; *Seabron v. Seabron (1955) 133 Cal. App. 2d 374, 375, 284 P.2d 117* ; *but see Medical Legal Consulting Services, Inc. v. Covarrubias (1991) 234 Cal. App. 3d 80, 90-91, 285 Cal. Rptr. 559* (acknowledging "important interest" exception to full faith and credit under Restatement (Second) of Conflict of Laws § 103, but holding exception inapplicable on facts)]. No greater effect can be given to any judgment of a court in another state than is given to it in the state where rendered. However, the usual and legitimate purpose of suing on a foreign judgment is to reach assets which cannot be reached elsewhere, thus giving greater efficacy to the judgment [*Weir v. Corbett (1964) 229 Cal. App. 2d 290, 294-295, 40 Cal. Rptr. 161]* .

The effect of a judicial record of a sister state is generally the same in California as in the state where it was made, except that it can only be enforced in California by an action or special proceeding [*see Code Civ. Proc. § 1913(a)* (as amended operative July 1, 1989)]. However, the authority of a guardian, conservator, or committee, or of a personal representative, does not extend beyond the jurisdiction of the government under which that person was invested with authority, except to the extent expressly authorized by statute [*Code Civ. Proc. § 1913(b)*].

[2] Types of Judgments Enforceable

The types of sister state judgments which have been enforced in California are numerous. They include child support orders [*Farmers & Merchants Trust Co. v. Madeira (1968) 261 Cal. App. 2d 503, 508, 68 Cal. Rptr. 184]* , money judgments [*Sanpietro v. Collins (1967) 250 Cal. App. 2d 203, 207, 58 Cal. Rptr. 219]* , child custody decrees [*In re*

Walker (1964) 228 Cal. App. 2d 217, 221-222, 39 Cal. Rptr. 243] , equity decrees [*Rozan v. Rozan (1957) 49 Cal. 2d 322, 331, 317 P.2d 11]* , divorce decrees [*Worthley v. Worthley (1955) 44 Cal. 2d 465, 474, 283 P.2d 19]* , deficiency judgments [*Gill v. Wolf (1948) 190 P.2d 52]* , and specific performance for the conveyance of real property located in California [*Redwood Inv. Co. v. Exley (1923) 64 Cal. App. 455, 459, 221 P. 973]* .

Penal judgments of sister states are not, however, enforceable [*Farmers & Merchants Trust Co. v. Madeira (1968) 261 Cal. App. 2d 503, 508, 68 Cal. Rptr. 184]* .

[3] Grounds for Denying Enforcement of Sister State Judgments

[a] Pending or Conditional Judgments

Generally, a sister state judgment must be final and unconditional in order to be the subject of a California action [Witkin, 8 California Procedure (3d ed 1985), *Enforcement of Judgment*, § 403; *but see* *Farmers & Merchants Trust Co. v. Madeira (1968) 261 Cal. App. 2d 503, 506-508, 68 Cal. Rptr. 184* (support order of sister state enforceable in California as a matter of comity, although subject to modification under the law of that state)]. A sister state judgment unstayed but under appeal in that state is, however, final for purposes of affording it full faith and credit [*Little v. Stevens (1972) 23 Cal. App. 3d 112, 113-114, 99 Cal. Rptr. 885]* .

[b] Judgment Void for Lack of Jurisdiction

A judgment of a sister state having no jurisdiction to render the judgment is not entitled to full faith and credit and enforcement by another state [*Sanpietro v. Collins (1967) 250 Cal. App. 2d 203, 208, 58 Cal. Rptr. 219]* . The invalidity of a foreign judgment is permitted to be shown by extrinsic evidence, including evidence that process on which the judgment was based was never served [*Nelson v. Horvath (1970) 4 Cal. App. 3d 1, 3, 84 Cal. Rptr. 101]* .

However, a collateral attack for jurisdictional defect is not available if the attacking party litigated or could have litigated the jurisdictional issue in the forum court. In such a case, the judgment is res judicata as to the forum court's jurisdiction and cannot be challenged by collateral attack in a later proceeding [*St. Sava Mission Corp. v. Serbian Eastern Orthodox Diocese (1990) 223 Cal. App. 3d 1354, 1364, 273 Cal. Rptr. 340* ; *In re Marriage of Hanley (1988) 199 Cal. App. 3d 1109, 1120, 245 Cal. Rptr. 441]* . For further discussion, see Ch. 491, *Res Judicata* .

[c] Judgment Not Enforceable in State of Rendition

The Full Faith and Credit Clause of the Constitution [U.S. Const., art. IV, § 1] demands only that the judgment of a sister state receive as much recognition in California as it would in the state rendering the judgment [*Farley v. Farley (1964) 227 Cal. App. 2d 1, 6, 38 Cal. Rptr. 357 , cert. denied, 379 U.S. 945]* . It is well settled that both the validity and effect of a judgment are governed by the laws of the state where it is rendered. It follows, then, that the use of the sister state judgment in an action on that judgment should not enlarge or extend its effect beyond that which would be accorded by the rendering state. For example, an action to enforce a personal liability cannot be maintained on a judgment unless it adjudicates such personal liability [*Gilmer v. Spitalny (1948) 84 Cal. App. 2d 39, 44, 189 P.2d 744]* . Similarly, if the judgment of the sister state is void for lack of jurisdiction and subject to collateral attack in that state, it is not binding in California [*Farley v. Farley (1964) 227 Cal. App. 2d 1, 6, 38 Cal. Rptr. 357 , cert. denied, 379 U.S. 945]* .

[d] Judgment Subsequently Superseded

A judgment rendered in one state will not be recognized or enforced in another state if an inconsistent, but valid, judgment is subsequently rendered in another action between the parties and if the earlier judgment is superseded by the later judgment under the law of the state in which the later judgment was rendered. This is the case even if the court that rendered the later judgment denied full faith and credit to the first judgment or made other errors of fact or law. The

rationale for this rule is based on principles of full faith and credit and res judicata. The losing party should be precluded from attacking the later inconsistent judgment if he or she has not sought appellate review of that judgment [*In re Marriage of Hanley (1988) 199 Cal. App. 3d 1109, 1117-1118, 245 Cal. Rptr. 441]* .

[e] Conflicting Judgment in State of Current Action

When courts of different jurisdictions have reached different results on the same issue and when the first of the conflicting decisions was rendered by a court of the state in which the current action is pending, that decision takes precedence over the court of a sister state [*Stuart v. Lilves (1989) 210 Cal. App. 3d 1215, 1221, 258 Cal. Rptr. 780]* . This result is based on the determination by California courts that the full faith and credit clause does not require California courts to give greater faith and credit to judgments of courts of other states than to those of California, or require California courts to ignore California judgments [*see* *Stuart v. Lilves (1989) 210 Cal. App. 3d 1215, 1221, 258 Cal. Rptr. 780* (citing *Hammell v. Britton (1941) 19 Cal. 2d 72, 84, 119 P.2d 333*)]. For example, when a plaintiff applied in a California court for entry of a favorable sister-state judgment, the defendant was entitled to an order vacating that judgment on the ground that the sister state failed to give full faith and credit to an earlier California judgment that was unfavorable to the plaintiff [*Stuart v. Lilves (1989) 210 Cal. App. 3d 1215, 1221, 258 Cal. Rptr. 780]* .

[4] Controlling Law

In the absence of a violation of federal constitutional rights, the law of the state where the judgment was rendered determines the validity and finality of the judgment [*Krofcheck v. Ensign Co. (1980) 112 Cal. App. 3d 558, 564, 169 Cal. Rptr. 516* ; *Smith v. Smith (1952) 115 Cal. App. 2d 92, 99, 251 P.2d 720]* . The enforcement procedures which will be afforded the foreign judgment, however, are governed by the law of the forum [*Weir v. Corbett (1964) 229 Cal. App. 2d 290, 293, 40 Cal. Rptr. 161]* . Accordingly, California courts have applied the California statute of limitations to actions on a sister state judgment, regardless of the fact that the local time limit is shorter than the period of limitation of the sister state [*Weir v. Corbett (1964) 229 Cal. App. 2d 290, 294, 40 Cal. Rptr. 161]* . Similarly, the enforcement of a sister state judgment may be pursued according to more liberal enforcement procedures in California [*Petersen v. Petersen (1972) 24 Cal. App. 3d 201, 206, 100 Cal. Rptr. 822]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditEnforcement of JudgmentsConstitutional LawRelations Among GovernmentsFull Faith & Credit

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§ 318.182 Sister State Money-Judgments Act

[1] Purpose

The Sister State Money-Judgments Act (*Code Civ. Proc. §§ 1710.10-1710.65*) provides a simplified alternative to the common law action of *debt sur record* for establishing a foreign money judgment as a judgment enforceable in California [*Epps v. Russell (1976) 62 Cal. App. 3d 201, 203, 133 Cal. Rptr. 30]* . Prior to the enactment of the Act, the exclusive way to enforce a sister state money judgment in California was to bring an action on the judgment; when that California judgment was obtained, execution could then issue. This process involves all of the procedures and requirements of an original action. The judgment creditor is required to file a complaint based upon personal or quasi in rem jurisdiction and thereafter obtain a writ of attachment to preserve the assets until such time as a writ of execution may issue. A trial must be held, at which time the judgment debtor may raise any defense to the validity of the sister state judgment. After entry of the California judgment, the judgment creditor may then seek execution on the debtor's assets in the sister state. This process was heavily criticized as time consuming and inefficient. Therefore, the Sister State Money-Judgments Act was enacted to offer, as an alternative to such actions, a registration procedure by which such sister state judgments may be enforced [California Law Revision Commission Recommendation to Enforcement of Sister State Money Judgments (November 1973) at page 457].

It is important to note, however, that the Act specifically provides that it does not affect any right a judgment creditor may have to bring an action to enforce a sister state judgment [*Code Civ. Proc. § 1710.60(a)*]. Further, the provisions of the Act specify that the entry of a judgment based on a sister state judgment pursuant to the Act does not limit the right of the judgment creditor to bring an action based on the part of a judgment of a sister state which does not require the payment of money, nor does the bringing of such an action limit the right of the judgment creditor to obtain entry of judgment based on the sister state judgment pursuant to the Act [*Code Civ. Proc. § 1710.65*; *see also Aspen Internat. Capital Corp. v. Marsch (1991) 235 Cal. App. 3d 1199, 1203, 286 Cal. Rptr. 921]* .

[2] Definitions

[a] Sister State Judgment

The term "sister state judgment" as used in the Act means that part of any judgment, decree, or order that a court of a state of the United States, other than California, which requires the payment of money, but does not include a support order [*Code Civ. Proc. § 1710.10(c)*; *see Neuman v. Barbera (1985) 164 Cal. App. 3d 437, 441-442, 210 Cal. Rptr. 556]* . The enforcement of support orders is governed by *Fam. Code § 4800 et seq.* (Uniform Reciprocal Enforcement of Support Act). For discussion and forms of support orders, see Ch. 260, *Family Law Enforcement: Foreign Judgments* .

[b] Judgment Creditor

The term "judgment creditor" as used in the Act means the person or persons who can bring an action to enforce a sister state judgment [*Code Civ. Proc. § 1710.10(a)*].

[c] Judgment Debtor

The term "judgment debtor" as used in the Act means the person or persons against whom an action to enforce a sister state judgment can be brought [*Code Civ. Proc. § 1710.10(b)*].

[3] Application by Judgment Creditor for Entry of Judgment

A judgment creditor may apply for the entry of a judgment based on a sister state judgment by filing an application [*see § 318.463*] with the proper court as determined under *Code Civ. Proc. § 1710.20* [*Code Civ. Proc. § 1710.15(a)*; *see* discussion in *§ 318.182[5]*].

[4] Contents of Application

[a] Statutory Requirements

The application must be executed under oath and include all of the following [*Code Civ. Proc. § 1710.15(b)*]:

- A statement that an action in California on the sister state judgment is not barred by the applicable statute of limitations.

- A statement, based on the applicant's information and belief, that no stay of enforcement of the sister state judgment is currently in effect in the sister state.

- A statement of the amount remaining unpaid under the sister state judgment. If accrued interest on the sister state judgment is sought to be included, a statement of its amount, a statement of the rate of interest applicable under the law of the sister state (by which the amount stated must be computed), and a citation to the sister state law establishing the rate of interest.

- A statement that no action based on the sister state judgment is currently pending in any court in California and that no judgment based on the sister state judgment has previously been entered in any proceeding in California.

- Where the judgment debtor is an individual, a statement setting forth the name and last known residence address of the judgment debtor. Where the judgment debtor is a corporation, a statement of the corporation's name, place of incorporation, and whether the corporation, if foreign, has qualified to do business in California. Where the judgment debtor is a partnership, a statement of the name of the partnership, whether it is a foreign partnership, and whether it has filed a statement designating an agent for service of process. Except for facts which are matters of public record in California, the statements required may be made on the basis of the judgment creditor's information and belief.

- A statement setting forth the name and address of the judgment creditor.

[b] Authenticated Copy of Sister State Judgment Required

A properly authenticated copy of the sister state judgment must be attached to the application [*Code Civ. Proc. § 1710.15(c)*].

[5] Jurisdiction and Venue

A case in which the sister state judgment amounts to $25,000 or less is a limited civil case [*Code Civ. Proc. § 1710.20(c)*]. In limited civil cases, the application must be filed in a superior court as a limited civil case. In all other cases it must be filed in a superior court as other than a limited civil case [*Code Civ. Proc. § 1710.20(a)*; *see also Code Civ. Proc. § 32.5*].

Subject to the court's power to transfer the proceedings under the venue statutes [*Code Civ. Proc. §§ 392-404.8*], the proper county for the filing of the application is (1) the county in which the judgment debtor resides; or, (2) any county in California if no judgment debtor is a resident [*Code Civ. Proc. § 1710.20(b)*; for detailed discussion and forms relating to venue, *see* Ch. 571, *Venue*].

[6] Entering Judgment

On the filing of the application, the clerk enters a judgment based on the application for the total of the following amounts as shown therein: (1) the amount remaining unpaid under the sister state judgment; (2) the amount of interest accrued on the sister state judgment; and (3) the amount of the fee for filing the application for entry of the sister state judgment. The interest on the sister state judgment is computed at the rate of interest applicable to the judgment under the law of the sister state [*Code Civ. Proc. § 1710.25(a)*].

Entry is made in the same manner as entry of an original judgment of the court. From the time of entry, interest accrues on the judgment so entered at the rate of interest applicable to a judgment in this state [*Code Civ. Proc. § 1710.25(b)*].

The judgment so entered may be amended to correct clerical errors [*Aspen Internat. Capital Corp. v. Marsch (1991) 235 Cal. App. 3d 1199, 1204-1205, 286 Cal. Rptr. 921* (amendment to conform to original Colorado decree)]. For discussion of clerical error generally, see *§ 318.360[3]*.

[7] Serving Notice of Judgment

Notice of entry of judgment must be served promptly by the judgment creditor upon the judgment debtor in the manner provided for service of summons by *Code Civ. Proc. §§ 415.10-415.50*. Notice must be in a form prescribed by the Judicial Council, [*see § 318.464*] and must inform the judgment debtor that he or she has 30 days within which to make a motion to vacate the judgment [*Code Civ. Proc. § 1710.30*; *see § 318.465*].

Actual knowledge by the judgment debtor of entry of judgment does not commence the running of the 30-day period [*Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd. (1993) 12 Cal. App. 4th 74, 84, 15 Cal. Rptr. 2d 585]* .

[8] Effect of Judgment; Enforcement

Except as otherwise provided by the Sister State Money-Judgments Act, a judgment entered in this fashion has the same effect as an original money judgment of the court and may be enforced or satisfied in the same manner [*Code Civ. Proc. § 1710.35*].

[9] Grounds for Vacating Judgment

A judgment entered in this fashion may be vacated on any ground which would be a defense to an action in California on the sister state judgment [*Code Civ. Proc. § 1710.40(a)*; *see, e.g., Arizona Dept. of Revenue v. Yuen (2009) 179 Cal. App. 4th 169, 178-180, 101 Cal. Rptr. 3d 525* (judgment void for lack of jurisdiction in Arizona not enforceable in California); *Airlines Reporting Corp. v. Renda (2009) 177 Cal. App. 4th 14, 19-22, 99 Cal. Rptr. 3d 66* (judgment void for lack of jurisdiction in sister state not enforceable in California)].

[10] Statute of Limitations

The filing of an application to register a sister state money judgment is governed by the 10-year statute of limitations provided in *Code Civ. Proc. § 337.5*. This filing tolls the statute with respect to the judgment creditor's right to bring the action [*Epps v. Russell (1976) 62 Cal. App. 3d 201, 204, 133 Cal. Rptr. 30]* .

[11] Motion to Vacate Judgment

Not later than 30 days after service of the notice of entry of judgment, the judgment debtor, on written notice [*see § 318.465*] to the judgment creditor, may make a motion to vacate the judgment [*Code Civ. Proc. § 1710.40(b)*].

[12] Issuance of Writ of Execution

In most instances, a writ of execution on a judgment entered pursuant to the Sister State Money-Judgments Act may not issue until at least 30 days after the judgment creditor serves notice of entry of the judgment [*see § 318.464*] upon the judgment debtor, proof of which has been made according to *Code Civ. Proc. § 417.10* [*Code Civ. Proc. § 1710.45(a)*]. However, a writ of execution may be issued before service of the notice of entry of judgment if the judgment debtor is any of the following [*Code Civ. Proc. § 1710.45(b)*]:

- An individual who does not reside in California.

- A foreign corporation not qualified to do business in California under the provisions of *Corp. Code §§ 2100-2116*.

- A foreign partnership which has not filed a statement pursuant to *Corp. Code § 15800* designating an agent for service of process.

In addition, the court may order that a writ of execution be issued before service of the notice of entry of judgment if the court finds upon an ex parte showing that great or irreparable injury would result to the judgment creditor if issuance of the writ were delayed for 30 days as provided in *Code Civ. Proc. § 1710.45(a)* [*Code Civ. Proc. § 1710.45(c)*].

Property levied on pursuant to a writ of execution issued under *Code Civ. Proc. § 1710.45(b)* or *(c)* must not be sold or distributed before 30 days after the judgment creditor serves notice of entry of judgment upon the judgment debtor, proof of which has been made in the manner provided by *Code Civ. Proc. §§ 417.10-417.40*. However, if the property levied upon is perishable, it may be sold in order to prevent its destruction or loss of value. The proceeds, however, must not be distributed to the judgment creditor before the date sale of nonperishable property is permissible [*Code Civ. Proc. § 1710.45(d)*].

[13] Stay of Enforcement

The court must grant a stay of enforcement when [*Code Civ. Proc. § 1710.50(a)*]:

- An appeal from the sister state judgment is pending or may be taken in the state which originally

rendered the judgment. Enforcement must be stayed until the proceedings on appeal have been concluded or the time for appeal has expired.

- A stay of enforcement of the sister state judgment has been granted in the sister state. Enforcement is then stayed until the sister state stay of enforcement is vacated or expires.

- The judgment debtor has made a motion to vacate pursuant to *Code Civ. Proc. § 1710.40*. Enforcement is then stayed until the motion to vacate is determined.

- Any other circumstance exists where the interests of justice require a stay of enforcement.

The court may grant a stay of enforcement on its own motion, on ex parte motion, or on noticed motion [*Code Civ. Proc. § 1710.50(b)*; *see § 318.466*].

The court can grant a stay of enforcement on such terms and conditions as are just, including but not limited to the following [*Code Civ. Proc. § 1710.50(c)*]:

- The court may require an undertaking in an amount it determines to be just, but the amount of the undertaking may not exceed double the amount of the judgment creditor's claim.

- If a writ of execution has been issued, the court may order that it remain in effect.

- If property of the judgment debtor has been levied under a writ of execution, the court may order the levying officer to retain possession of the property capable of physical possession and to maintain the levy on other property.

[14] Limitations on Entry of Judgment Based on Sister State Judgment

No judgment based on a sister state judgment may be entered in any of the following cases [*Code Civ. Proc. § 1710.55*]:

- A stay of enforcement of the sister state judgment is currently in effect in the sister state.

- An action based on the sister state judgment is currently pending in any court in California.

- A judgment based on the sister state judgment has previously been entered in any proceeding in California.

[15] Enforcing Sister State Judgments

Except as provided in *Code Civ. Proc. § 1710.60(b)*, the provisions of the Sister State Money-Judgments Act do not affect any right a judgment creditor may have to bring an action to enforce a sister state judgment [*Code Civ. Proc. § 1710.60(a)*]. However, no action to enforce a sister state judgment may be brought if a judgment entered under that Act has previously been entered [*Code Civ. Proc. § 1710.60(b)*].

[16] Entry of Judgment as No Limit to Other Actions

The entry of a judgment based on a sister state judgment pursuant to the Sister State Money-Judgments Act does not limit the right of the judgment creditor to bring an action based on the part of a judgment of a sister state which does not require the payment of money, nor does the bringing of such an action limit the right of the judgment creditor to obtain entry of judgment based on the sister state judgment pursuant to the Sister State Money-Judgments Act [*Code Civ.*

Proc. § 1710.65].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsLimited JurisdictionCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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§ 318.183 Former (Pre-2008) Uniform Foreign Money-Judgments Recognition Act

[1] Application and Definitions

The former (pre-2008) Uniform Foreign Money-Judgments Recognition Act [former *Code Civ. Proc. § 1713 et seq.*], which was repealed operative January 1, 2008 [*see* Stats 2007 ch. 212 § 1], continues to apply to all actions commenced before January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised [*Code Civ. Proc. § 1724(b)*]. Because of the continuing application of the former law to pending actions, detailed discussion of the former statute is included here.

Caution:

All actions commenced on or after January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised [*Code Civ. Proc. § 1724(a)*] are subject to the successor version of the statute, known as the Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1724(a)*; *see Code Civ. Proc. § 1713 et seq.*]. The Uniform Foreign-Country Money Judgments Recognition Act is discussed in *§ 318.184*.

A "foreign judgment" is one rendered by a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters [former *Code Civ. Proc. § 1713.1(2)* (repealed 1/1/08); *see In re Marriage of Lyustiger (2009) 177 Cal. App. 4th 1367, 1373-1377, 99 Cal. Rptr. 3d 922* , (former *Code Civ. Proc.§ 1713* inapplicable to foreign support order); *Java Oil Limited v. Sullivan (2008) 168 Cal. App. 4th 1178, 1186-1189, 86 Cal. Rptr. 3d 177* (attorney's fees award in foreign judgment not "penalty")]. A "foreign state" means any governmental unit other than the United States, or any state, district, commonwealth, territory, insular possession thereof, or the Panama Canal Zone or the Trust Territory of the Pacific Islands [former *Code Civ. Proc. § 1713.1(1)* (repealed 1/1/08)].

Based on the directive of former *Code Civ. Proc. § 1713.3* (repealed 1/1/08) that foreign judgments be enforced in the same manner as sister state judgments, the 10-year statute of limitations applicable to actions on sister state judgments set forth in *Code Civ. Proc. § 337.5* also applies to actions on foreign judgments [*Manco Contracting Company v. Bezdikian (2008) 45 Cal. 4th 192, 204-210, 85 Cal. Rptr. 3d 233, 195 P.3d 604]* . This is true regardless of whether the

action is styled as a claim for "recognition" or "enforcement" or "domestication" [*Manco Contracting Company v. Bezdikian (2008) 45 Cal. 4th 192, 208, 85 Cal. Rptr. 3d 233, 195 P.3d 604]* .

[2] Conclusiveness; Effect of Appeal

Except as discussed *below*, a foreign judgment as defined in [1], *above*, is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit, except that it may not be enforced in the same manner as a sister state money judgment under the Sister State Money-Judgments Act [former *Code Civ. Proc. § 1713.3* (repealed 1/1/08)]. Such recognition is afforded to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal [former *Code Civ. Proc. § 1713.2* (repealed 1/1/08)].

When a foreign judgment is appealed, and the foreign nation's law provides that a judgment on appeal is not final, former *Code Civ. Proc. § 1713.2* (repealed 1/1/08) does not permit a California court to recognize the judgment [*Manco Contracting Company v. Bezdikian (2008) 45 Cal. 4th 192, 198-204, 85 Cal. Rptr. 3d 233, 195 P.3d 604]* .

[3] Situations In Which Foreign Judgments Not Conclusive

[a] Due Process Violation

A foreign judgment is not conclusive if the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law [former *Code Civ. Proc. § 1713.4(a)(1)* (repealed 1/1/08)].

[b] Lack of Personal Jurisdiction

The foreign judgment is not conclusive if the foreign court did not have personal jurisdiction over the defendant [former *Code Civ. Proc. § 1713.4(a)(2)* (repealed 1/1/08)]. For example, a foreign country may acquire personal jurisdiction over the defendant only by effective service of process. Although service of process by mail in a foreign country is not automatically objectionable and, in appropriate instances, may result in the acquisition by a foreign court of personal jurisdiction over a defendant, the process served must give the defendant sufficient notice of the pending foreign proceeding to satisfy requirements of due process. Notice is legally sufficient if it is reasonably calculated to impact knowledge of an impending action. While documents in a foreign language are not required to be translated into English in order to be validly served, at minimum a defendant should be informed in the language of the jurisdiction in which he or she is served that a legal action of a specific nature is pending at a particular time and place. Normally, this information should include the location of the pending action, the amount involved, the date the defendant is required to respond, and the possible consequences of failure to respond [*Julen v. Larson (1972) 25 Cal. App. 3d 325, 327-328, 101 Cal. Rptr. 796]* .

[c] Lack of Subject Matter Jurisdiction

A foreign judgment is not conclusive if the foreign court did not have jurisdiction over the subject matter of the cause of action [former *Code Civ. Proc. § 1713.4(a)(3)* (repealed 1/1/08)].

[4] Situations In Which Foreign Judgment Need Not Be Recognized

A foreign judgment need not be recognized if [former *Code Civ. Proc. § 1713.4(b)* (repealed 1/1/08)]:

- The defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him or her to defend;

- The judgment was obtained by extrinsic fraud;

- The cause of action or defense on which the judgment is based is repugnant to the public policy of California [*see Pentz v. Kuppinger (1973) 31 Cal. App. 3d 590, 597, 107 Cal. Rptr. 540]* ;

- The judgment conflicts with another final and conclusive judgment;

- The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or

- In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

[5] Bases of Personal Jurisdiction

[a] In General

A foreign judgment must not be refused recognition for lack of personal jurisdiction if [former *Code Civ. Proc. § 1713.5(a)* (repealed 1/1/08)]:

- The defendant was served personally in the foreign state;

- The defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him or her;

- The defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction with respect to the subject matter involved;

- The defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;

- The defendant had a business office in the foreign state and the proceedings in the foreign court involved a cause of action arising out of business done by the defendant through that office in the foreign state; or

- The defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a cause of action arising out of such an operation.

[b] Judicial Recognition of Other Bases

The courts of the State of California may recognize other bases of jurisdiction as well as those listed above [former *Code Civ. Proc. § 1713.5(b)* (repealed 1/1/08)].

[6] Stay Pending Appeal

If the defendant satisfies the court either that an appeal is pending or that he or she is entitled and intends to appeal from the foreign judgment, the court may stay the proceedings until the appeal from the foreign judgment has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute an appeal [former

Code Civ. Proc. § 1713.6 (repealed 1/1/08)]. If the judgment debtor will provide adequate security for the payment of the judgment and no prejudice to the creditors appears, it is an abuse of discretion for the court to refuse the stay [*Stevens v. Superior Court (1972) 28 Cal. App. 3d 1, 4, 104 Cal. Rptr. 369]* .

[7] Conversion Date

When a foreign judgment for money in a foreign currency is established in California under the Uniform Foreign Money-Judgment Recognition Act [former *Code Civ. Proc. §§ 1713-1713.8* (repealed 1/1/08)], the amount of the judgment, together with any interest awarded, must normally be converted to American dollars, using the exchange rate that was in effect at the time the foreign judgment was rendered. The fact that there have been intervening fluctuations in the value of a foreign currency relative to American currency is not taken into account by the California courts unless the parties had an agreement that one side alone would bear the risk of postjudgment currency fluctuations [*Pecaflor Construction Co. v. Landes (1988) 198 Cal. App. 3d 342, 344-345, 350, 243 Cal. Rptr. 605]* .

[8] Foreign Judgments Not Covered by Act

Statutory provisions covering specific types of foreign judgments do not prevent the recognition or nonrecognition of other foreign judgments not specifically covered by Uniform Foreign Money-Judgments Recognition Act [former *Code Civ. Proc. § 1713.7* (repealed 1/1/08)].

[9] Enforcement After Recognition

Under the Foreign Money-Judgments Recognition Act, a foreign judgment cannot be enforced unless it is entitled to recognition [*Renoir v. Redstar Corp. (2004) 123 Cal. App. 4th 1145, 1150, 20 Cal. Rptr. 3d 603]* . However, enforcement of a foreign judgment is different than recognition [*see Manco Contracting Company v. Bezdikian (2008) 45 Cal. 4th 192, 205-206, 85 Cal. Rptr. 3d 233, 195 P.3d 604* ; former *Code Civ. Proc. § 1713.3* (repealed 1/1/08)]. A foreign judgment may be recognized for various purposes without being enforced [*Renoir v. Redstar Corp. (2004) 123 Cal. App. 4th 1145, 1150 n.1, 20 Cal. Rptr. 3d 603* (whether foreign judgment should be recognized may be in issue, for example, when defendant seeks to rely on prior adjudication of controversy (res judicata), or when either side in litigation seeks to rely on prior determination of issue of fact or law), citing Rest. 3d, The Foreign Relations Law of the United States, § 481, com. b, p. 595)].

A foreign judgment may not be enforced pursuant to the provisions of the Sister-State and Foreign Money-Judgments Act [*Renoir v. Redstar Corp. (2004) 123 Cal. App. 4th 1145, 1151, 20 Cal. Rptr. 3d 603* ; *see Code Civ. Proc. § 1710.10 et seq.*]. Foreign money judgments are enforced by bringing an action in California to obtain a domestic judgment [*Renoir v. Redstar Corp. (2004) 123 Cal. App. 4th 1145, 1151, 20 Cal. Rptr. 3d 603* ; *see Hamilton v. Superior Court (1974) 37 Cal. App. 3d 418, 423, 112 Cal. Rptr. 450*].

To enforce a foreign judgment recognized under the Foreign Money-Judgments Act, the party seeking enforcement must comply with the procedures applicable to civil actions, including service of a summons to establish personal jurisdiction. An enforcement proceeding under the Foreign Money-Judgments Act is not a special proceeding in which process is something other than a summons, such as a notice or order to show cause or citation or writ [*Renoir v. Redstar Corp. (2004) 123 Cal. App. 4th 1145, 1152, 20 Cal. Rptr. 3d 603* (by not serving summons, plaintiffs failed to take required steps to obtain personal jurisdiction over defendants to enforce French judgment in California, and brief references to issues related to whether trial court correctly enforced French judgment did not constitute general appearance by defendants); for discussion of service of summons generally, *see* Ch. 518, *Service of Summons and Papers*]. Knowledge by defendant of plaintiff's action does not satisfy the requirement of adequate service of a summons and complaint [*Renoir v. Redstar Corp. (2004) 123 Cal. App. 4th 1145, 1152-1153, 20 Cal. Rptr. 3d 603]* .

Nonmonetary portions of a foreign judgment are not covered by the Foreign Money-Judgments Act. The Act provides

for enforcement of any judgment of a foreign state granting or denying recovery of a sum of money [*Renoir v. Redstar Corp. (2004) 123 Cal. App. 4th 1145, 1152, 20 Cal. Rptr. 3d 603* ; *see Code Civ. Proc. § 1713.1(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.184 Current (post-2007) Uniform Foreign-Country Money Judgments Recognition Act

[1] Application

The Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. § 1713 et seq.*] applies to all actions commenced on or after January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised [*Code Civ. Proc. § 1724(a)*; for the definition of what constitutes a foreign-country judgment under the act, *see* [2], *below*].

CAUTION:
The former Uniform Foreign Money-Judgments Recognition Act [former *Code Civ. Proc. § 1713 et seq.* (repealed 1/1/08)] continues to apply to all actions commenced before January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised [*Code Civ. Proc. § 1724(b)*]. The former Uniform Foreign Money-Judgments Recognition Act is discussed in *§ 318.183*.

The Foreign-Country Money Judgments Recognition Act applies to a foreign-country judgment to the extent that the judgment does both of the following [*Code Civ. Proc. § 1715(a)*]:

- Grants or denies recovery of a sum of money; and
- Under the law of the foreign country where rendered, is final, conclusive, and enforceable.

However, the Act does not apply to a foreign-country judgment, even if the judgment grants or denies recovery of a sum of money, to the extent that the judgment is any of the following [*Code Civ. Proc. § 1715(b)*]:

- A judgment for taxes.
- A fine or other penalty.
- A judgment for divorce, support, or maintenance, or other judgment rendered in connection with

domestic relations. However, a judgment for divorce, support, or maintenance, or other judgment rendered in connection with domestic relations may be recognized by a California court pursuant to *Code Civ. Proc. § 1723* [*see below*].

In applying and construing the Uniform Foreign-Country Money Judgments Recognition Act, California courts are required to give consideration to the need to promote uniformity of the law with respect to its subject matter among states that enact it [*Code Civ. Proc. § 1722*].

The Uniform Foreign-Country Money Judgments Recognition Act does not prevent the recognition, under principles of comity or otherwise, of a foreign-country judgment not within the scope of the Act [*Code Civ. Proc. § 1723*].

[2] Definitions

A "foreign country" under the Uniform Foreign-Country Money Judgments Recognition Act is a government other than any of the following [*Code Civ. Proc. § 1714(a)*]:

- The United States.
- A state, district, commonwealth, territory, or insular possession of the United States.
- Any other government with regard to which the decision in California as to whether to recognize a judgment of that government's courts is initially subject to determination under the *Full Faith and Credit Clause of the United States Constitution*.

A "foreign-country judgment" is a judgment of a court of a foreign country. It also includes a judgment by any Indian tribe recognized by the government of the United States [*Code Civ. Proc. § 1714(b)*].

[3] General Rule Favoring Recognition

Except as otherwise provided in the Uniform Foreign-Country Money Judgments Recognition Act, a California court must recognize a foreign-country judgment to which the Act applies [*Code Civ. Proc. § 1716(a)*; for the definition of what constitutes a foreign-country judgment under the act, *see* [2], *above*].

[4] Burden of Establishing Grounds for Recognition or Nonrecognition

A party seeking recognition of a foreign-country judgment has the burden of establishing that the foreign-country judgment is entitled to recognition under the Act [*Code Civ. Proc. § 1715(c)*]. When the party seeking recognition of a foreign-country judgment has met its burden of establishing recognition of the foreign-country judgment [*see Code Civ. Proc. § 1715(c)*], a party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition exists [*Code Civ. Proc. § 1716(d)*; *see* [5], [6], *below*].

[5] Grounds for Nonrecognition

A California court cannot recognize a foreign-country judgment if any of the following apply [*Code Civ. Proc. § 1716(b)*]:

- The judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.
- The foreign court did not have personal jurisdiction over the defendant.

- The foreign court did not have jurisdiction over the subject matter.

However, a California court cannot refuse to recognize a foreign-country judgment for lack of personal jurisdiction if any of the following apply [*Code Civ. Proc. § 1717(a)*]:

- The defendant was served with process personally in the foreign country.

- The defendant voluntarily appeared in the proceeding, other than for the purpose of protecting property seized or threatened with seizure in the proceeding or of contesting the jurisdiction of the court over the defendant.

- The defendant, before the commencement of the proceeding, had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved.

- The defendant was domiciled in the foreign country when the proceeding was instituted or was a corporation or other form of business organization that had its principal place of business in, or was organized under the laws of, the foreign country.

- The defendant had a business office in the foreign country and the proceeding in the foreign court involved a cause of action or claim for relief arising out of business done by the defendant through that office in the foreign country.

- The defendant operated a motor vehicle or airplane in the foreign country and the proceeding involved a cause of action or claim for relief arising out of that operation.

The preceding list of bases for personal jurisdiction is not exclusive. California courts may recognize bases of personal jurisdiction other than those listed as sufficient to support a foreign-country judgment [*Code Civ. Proc. § 1717(b)*].

[6] Situations in Which Recognition Is Discretionary

A California court is not required to recognize a foreign-country judgment if any of the following apply [*Code Civ. Proc. § 1716(c)*]:

- The defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend.

- The judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case.

- The judgment or the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of California or of the United States.

- The judgment conflicts with another final and conclusive judgment.

- The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court.

- In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

- The judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment.

- The specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

[7] Procedure

If recognition of a foreign-country judgment in California is sought as an original matter, the issue of recognition must be raised by filing an action seeking recognition of the foreign-country judgment [*Code Civ. Proc. § 1718(a)*]. If recognition of a foreign-country judgment is sought in a pending action, the issue of recognition may be raised by counterclaim, cross-claim, or affirmative defense [*Code Civ. Proc. § 1718(b)*].

[8] Limitations Period

An action to recognize a foreign-country judgment must be commenced within the earlier of the time during which the foreign-country judgment is effective in the foreign country or 10 years from the date that the foreign-country judgment became effective in the foreign country [*Code Civ. Proc. § 1721*].

[9] Effect of Recognition

If the court in a recognition proceeding finds that the foreign-country judgment is entitled to recognition under the Uniform Foreign-Country Money Judgments Recognition Act, to the extent that the foreign-country judgment grants or denies recovery of a sum of money, the foreign-country judgment is both of the following [*Code Civ. Proc. § 1719*]:

- Conclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit in California would be conclusive.

- Enforceable in the same manner and to the same extent as a judgment rendered in California.

[10] Effect of Foreign Appeal

If a party establishes that an appeal from a foreign-country judgment is pending or will be taken in the foreign country, the California court may stay any proceedings with regard to the foreign-country judgment until the appeal is concluded, the time for appeal expires, or the appellant has had sufficient time to prosecute the appeal and has failed to do so [*Code Civ. Proc. § 1720*].

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[Reserved]

§§ 318.185[Reserved]

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27-318 California Forms of Pleading and Practice--Annotated § 318.200

§ 318.200 State Statutes

[1] Form and Substance

Judgment to correct defective certificate of proof. *Civ. Code § 1202*

Judgments for the recovery of real property. *Civ. Code § 3375*

Calculation of money judgments. *Code Civ. Proc. § 577.5*

Money judgment on debt secured by real property. *Code Civ. Proc. § 580a*

Prohibition against deficiency judgment. *Code Civ. Proc. § 580b*

Entry of default judgments. *Code Civ. Proc. § 586*

Judgment upon decision by referee or commissioner. *Code Civ. Proc. § 644*

Judgments for recovery of personal property. *Code Civ. Proc. § 667*

Judgments for the partition of property. *Code Civ. Proc. §§ 872.120, 874.210 et seq.*

Judgments in quo warranto proceedings. *Code Civ. Proc. §§ 803, 805, 809*

Judgment against bonded or indemnified person. *Code Civ. Proc. § 1055*

Judgment on writ of mandate. *Code Civ. Proc. §§ 1085, 1095*

Judgment on writ of prohibition. *Code Civ. Proc. §§ 1102, 1105*

Judgments for unlawful detainer. *Code Civ. Proc. § 1174*

Judgments in probate proceedings. Code Civ. Proc. § 1230

Judgments against representative of an estate. *Prob. Code §§ 9300, 9301*

[2] Generally

Power of attorney to bind client. *Code Civ. Proc. § 283*

Definition of judgment. *Code Civ. Proc. § 577*

Judgment upon separate trial of issues joined. *Code Civ. Proc. § 597*

Necessity of statement of decision. *Code Civ. Proc. § 632*

Signing of judgment by presiding judge or judge designated by presiding justice. *Code Civ. Proc. § 635*

Judgment as not effectual for any purpose until entered; entry as required to be made whether or not a motion for judgment notwithstanding the verdict is pending. *Code Civ. Proc. § 664*

Manner of giving, entering, and satisfying judgments generally. *Code Civ. Proc. §§ 664-674*

Notice of entry of judgment. *Code Civ. Proc. § 664.5*

Entry of judgment in judgment book. *Code Civ. Proc. § 668*

Entry of judgment of microfilm copy of individual judgment. *Code Civ. Proc. § 668.5*

Notice regarding potential effect of dissolution or annulment on estate planning and other documents required in judgment declaring marriage nullity or dissolving marriage. *Fam. Code § 2024(b)*

[3] Methods of Entry

Entry of verdict and judgment in minutes of court. *Code Civ. Proc. § 628*

Entry of judgment in conformity with verdict by clerk. *Code Civ. Proc. § 664*

[4] Proceedings Giving Rise to Entry

Judgment upon failure of one party to appear at proceedings. *Code Civ. Proc. § 594*

Conflict between general and special verdicts. *Code Civ. Proc. § 625*

Finding by jury on amount of recovery of money. *Code Civ. Proc. § 626*

Judgment notwithstanding the verdict. *Code Civ. Proc. § 629*

Motion for judgment after other party's presentation of evidence in a trial by the court. *Code Civ. Proc. § 631.8*

Offers to compromise. *Code Civ. Proc. § 998*

Confession of judgment. *Code Civ. Proc. § 1132 et seq.*

Judgment after submission of controversy. *Code Civ. Proc. §§ 1138-1140*

[5] Relief Granted

Interest on damages. *Civ. Code § 3287*

When awarding of interest within discretion of jury. *Civ. Code § 3288*

In contested case in which answer is filed, court as authorized to grant relief which is consistent with case made by complaint and embraced within the issue. *Code Civ. Proc. § 580*

Recovery of costs in action other than for monetary relief and in situations other than as specified. *Code Civ. Proc. § 1032(a)(4), (b)*

Prejudgment costs claimed and contested in accordance with rules adopted by Judicial Council. *Code Civ. Proc. §§ 1032-1034*; *Cal. Rules of Ct., Rules 3.1700 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsGeneral OverviewReal Property LawEstatesConcurrent OwnershipPartition ActionsReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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§ 318.201 California Rules of Court

Announcement and service of intended decision. *Cal. Rules of Ct., Rule 3.1590(a)*

Statement of decision. *Cal. Rules of Ct., Rule 3.1590(c)*

Request for statement of decision. *Cal. Rules of Ct., Rule 3.1590(d)-(f)*

Objections to statement of decision. *Cal. Rules of Ct., Rule 3.1590(g)*

Issuance of judgment when statement of decision not requested. *Cal. Rules of Ct., Rule 3.1590(h)*

Notation on written instrument of rendition of judgment. *Cal. Rules of Ct., Rule 3.1806*

Notice of judgment to Attorney General in contested action or proceeding in which court has declared state statute or regulation to be unconstitutional. *Cal. Rules of Ct., Rule 2.1100*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

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27-318 California Forms of Pleading and Practice--Annotated § 318.202

§ 318.202 Decisions

[1] Confession Judgments

Extraordinary practice of utilizing confession of judgment to collect legal fees characterized as presenting opportunities for overreaching that avoid judicial scrutiny in that practice creates a situation in which client's ignorance of legal matters makes it unlikely that he or she will understand character and effect of instrument; use of confession of judgment by an attorney to collect his or her fees for legal services is improper. *Hulland v. State Bar (1972) 8 Cal. 3d 440, 450, 105 Cal. Rptr. 152, 503 P.2d 608*

Confession of judgment was improperly entered when attorney signing attorney declaration under *Code Civ. Proc. § 1132* was not independently representing defendant. *Rivercourt Co. Ltd. v. Dyna-Tel, Inc. (1996) 41 Cal. App. 4th 1477, 1482, 49 Cal. Rptr. 2d 279*

Denial of motion to vacate judgment by confession was error when debtor was advised of rights by creditor's attorney because under *Code Civ. Proc. § 1132(b)*, judgment by confession can only be entered on certification of advisement of debtor's rights by attorney independently representing defendant debtor. *Wax v. Infante (1982) 138 Cal. App. 3d 138, 140-141, 187 Cal. Rptr. 686*

Confession of judgment procedure established in *Code Civ. Proc. §§ 1132(a), 1133*, and *1134* violates due process clauses of *U.S. Const., amend. XIV*, by providing insufficient safeguards to ensure that debtor executed voluntary, knowing, and intelligent waiver of due process rights. *Isbell v. County of Sonoma (1978) 21 Cal. 3d 61, 65, 145 Cal. Rptr. 368, 577 P.2d 188*

Judgment by confession, entered without knowledge or consent of creditor is invalid for all purposes prior to ratification, being operative neither as a lien, as an estoppel, nor as a merger of the demand. *Mechanics Bank of Richmond v. Thole (1971) 20 Cal. App. 3d 884, 887-889, 98 Cal. Rptr. 82*

Attorney's signature to a confession of judgment does not satisfy statutory requirements of *Code Civ. Proc. § 1133*

which dictate that debtor must personally sign document; judgment by confession without attorney's signature as void on its face and as able to be set aside at any time. *Barnes v. Hilton (1953) 118 Cal. App. 2d 108, 109, 257 P.2d 98*

Necessity for defendant's signature and verification of confession of judgment statement. *Barnes v. Hilton (1953) 118 Cal. App. 2d 108, 109, 257 P.2d 98*

Reversible error of trial court in denying plaintiff's motion to set aside judgment by confession where fee for filing statement of confession required by *Code Civ. Proc. § 1134* not paid by plaintiff but by defendant or some third person without knowledge or consent of plaintiff and plaintiff did not consent to entry of judgment; plaintiff's silence and failure to object for five months as not amounting to acceptance. *Mechanics Bank of Richmond v. Thole (1971) 20 Cal. App. 3d 884, 886-889, 98 Cal. Rptr. 82*

Consent in advance by debtor to judgment without notice of hearing is not, per se, violative of due process requirement of *Fourteenth Amendment of U.S. Constitution*. *D.H. Overmyer Co. v. Frick Co. (1972) 405 U.S. 174, 185-188, 92 S. Ct. 775, 31 L. Ed. 2d 124* ; *Swarb v. Lennox (1972) 405 U.S. 191, 200, 92 S. Ct. 767, 31 L. Ed. 2d 138*

[2] Costs and Interest

In Ninth Circuit, for civil money judgments in federal court, strong policy favors prejudgment rate of interest at rate paid on 52-week U.S. Treasury bills, and any departure from rate must be accompanied by reasoned justification. *Blanton v. Anzalone (9th Cir. 1987) 813 F.2d 1574*

State law governs award of interest in diversity cases brought in federal court. *Landsberg v. Scrabble Crossword Game Players, Inc. (9th Cir. 1986) 802 F.2d 1193, 1200*

Prejudgment interest accrued under *Civ. Code § 3291* is not part of judgment and plaintiff cannot obtain interest on that prejudgment interest. *Hess v. Ford Motor Co. (2002) 27 Cal. 4th 516, 530-533, 117 Cal. Rptr. 2d 220, 41 P.3d 46*

Accrued postjudgment interest on judgment may be incorporated into principal when judgment is renewed. *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp. (2008) 168 Cal. App. 4th 185, 193, 85 Cal. Rptr. 3d 350*

In wrongful death action, trial court correctly ruled that postjudgment interest runs from date of entry of original judgment on jury verdict rather than from judgment entered following remittitur on first appeal. *Ehret v. Congoleum Corp. (2001) 87 Cal. App. 4th 202, 104 Cal. Rptr. 2d 370*

Confession of judgment is improperly entered when attorney signing attorney declaration under *Code Civ. Proc. § 1132* was not independently representing defendant. *Rivercourt Co. Ltd. v. Dyna-Tel, Inc. (1996) 41 Cal. App. 4th 1477, 1482, 49 Cal. Rptr. 2d 279*

Local public entity is subject to postjudgment interest under *Cal. Const. art. XV, § 1* notwithstanding statement in *Gov. Code § 970.1(b)* (providing that judgment against local public entity is not enforceable under *Code Civ. Proc. § 680.010 et seq.*). *San Francisco Unified School Dist. v. San Francisco Classroom Teachers Assn. (1990) 222 Cal. App. 3d 146, 152, 272 Cal. Rptr. 38*

When prevailing party appeals on ground that it is entitled to larger recovery, and appellate court modifies recovery upward, new sum generally draws interest from date of entry of original judgment, not from date of new judgment; however, tender by losing party of full amount of judgment pending appeal by prevailing party stops running of interest on judgment when prevailing party refuses to accept payment. *General Ins. Co. v. Mammoth Vista Owners' Assn.*

(1985) 174 Cal. App. 3d 810, 829, 220 Cal. Rptr. 291

Civ. Code § 3291 (judgment bears 10 percent rate of interest from date of first rejected settlement offer under *Code Civ. Proc. § 998*) and *Code Civ. Proc. § 685.010(a)* (judgment bears 10 percent rate of interest from date judgment rendered) are applied separately or conjunctively, and not cumulatively, to permit recovery of no more than 10 percent rate of interest. *Mendez v. Kurten (1985) 170 Cal. App. 3d 481, 487, 215 Cal. Rptr. 924*

Amendment of *Code Civ. Proc. § 685.010* by Stats. 1982, ch. 150, increasing rate of interest on judgments to 10 percent, construed to become effective on January 1, 1983, despite express effective date of January 1, 1982. *American National Bank v. Peacock (1985) 165 Cal. App. 3d 1206, 1210-1212, 212 Cal. Rptr. 97*

Final judgment for money bears interest from date of entry. *Harvey v. Whyte (1958) 158 Cal. App. 2d 685, 688, 323 P.2d 162*

Waiver of interest on judgment where jury in its verdict fails to award interest and defect not called to attention of court before jury is discharged. *Wright v. Title Ins. & Trust Co. (1969) 274 Cal. App. 2d 252, 261-262, 79 Cal. Rptr. 12*

Policy of law is that judgment should bear interest from date of rendition of judgment even though subject to direct attack. *Myers v. Workmen's Compensation Appeals Bd. (1969) 2 Cal. App. 3d 621, 629, 83 Cal. Rptr. 427*

Judgment is not required to contain direction for payment of interest; obligation for interest follows automatically; where one party deprives another party of money which is rightfully theirs pursuant to court order, that money bears interest from date due at 7 percent. *Pinecrest Productions, Inc. v. RKO Teleradio Pictures, Inc. (1970) 92 Cal. Rptr. 44*

Tender of judgment, denied by plaintiff seeking new trial, stops running of interest on judgment. *Montano v. South Gate (1970) 13 Cal. App. 3d 446, 449, 91 Cal. Rptr. 523*

Judgment bears legal interest from date of its entry in trial court even though subject to direct attack. *Stockton Theatres, Inc. v. Palermo (1961) 55 Cal. 2d 439, 442-443, 11 Cal. Rptr. 580, 360 P.2d 76*

When judgment is modified upon appeal, whether upward or downward, new sum draws interest from date of entry of original order, and not from date of new judgment. *Stockton Theatres, Inc. v. Palermo (1961) 55 Cal. 2d 439, 442-443, 11 Cal. Rptr. 580, 360 P.2d 76*

When judgment is reversed on appeal, new award subsequently entered by trial court bears interest only from date of entry of new judgment. *Stockton Theatres, Inc. v. Palermo (1961) 55 Cal. 2d 439, 442-443, 11 Cal. Rptr. 580, 360 P.2d 76*

Judgment for costs is governed by the law applicable to judgments generally; such awards as separate and complete judgments in themselves. *Stockton Theatres, Inc. v. Palermo (1961) 55 Cal. 2d 439, 443, 11 Cal. Rptr. 580, 360 P.2d 76*

Whether or not interest is included in damage award by court or jury, award required to bear interest at legal rate during period following rendition of judgment until entry. *Dixon Mobile Homes, Inc. v. Walters (1975) 48 Cal. App. 3d 964, 975, 122 Cal. Rptr. 202*

Any final judgment for money bears interest from date of entry at legal rate regardless of whether original claim was liquidated or unliquidated. *Dixon Mobile Homes, Inc. v. Walters (1975) 48 Cal. App. 3d 964, 975, 122 Cal. Rptr. 202*

[3] Death of Trial Judge Before Decision Filed

Presiding judge of superior court properly signed and entered judgment in conformity with "Intended Decision" of trial judge who died before hearing on objections to Intended Decision (*see Code Civ. Proc. § 635*) when there was no indication that deceased judge had contemplated any modification of decision and proposed statement of decision provided complete and adequate basis for appellate review. *Leiserson v. City of San Diego (1986) 184 Cal. App. 3d 41, 48 n.8, 229 Cal. Rptr. 22*

[4] Finality

Judgment is final for all purposes when all avenues for direct review have been exhausted. *First Western Development Corp. v. Superior Court (1989) 212 Cal. App. 3d 860, 864, 261 Cal. Rptr. 116*

Judgment as final only when it determines all of the rights of the parties and requires no further judicial action to give effect to its provisions. *Associated Convalescent Enterprises v. Carl Marks & Co., Inc. (1973) 33 Cal. App. 3d 116, 121, 108 Cal. Rptr. 782*

[5] Form and Substance

Test of sufficiency of judgment as resting in its substance rather than in its form; form of judgment as not very material, provided that in substance it shows distinctly and not inferentially that matter has been determined in favor of one of the litigants or that the rights of the parties in litigation have been adjudicated. *Oppenheimer v. Deutchman (1958) 161 Cal. App. 2d 501, 503, 326 P.2d 883*

Judgment for recovery of specific personal property as properly specifying value of each item claimed so that if only part of the property can be found, the party obtaining judgment can recover the value of the items not found. *Black v. Black (1888) 74 Cal. 520, 521-522, 16 P. 311*

Sufficiency of judgment for possession alone where delivery of personal property made to plaintiff at beginning of action. *Claudius v. Aguirre (1891) 89 Cal. 501, 504, 26 P. 1077*

Description in a judgment affecting real property as required to be certain and specific; an impossible, wrong, or uncertain description, or no description at all, as rendering the judgment erroneous and void. *Newman v. Cornelius (1970) 3 Cal. App. 3d 279, 284, 83 Cal. Rptr. 435*

Where a case is tried on the merits, where the issues are thoroughly explored during trial, and where the theory of the trial is well known to court and counsel, the fact that issues were not pleaded as not precluding an adjudication of those litigated issues and a review of that adjudication on appeal. *Davis v. Cordova Recreation & Park Dist. (1972) 24 Cal. App. 3d 789, 794, 101 Cal. Rptr. 358*

Fact that a judgment is not in conformity with a memorandum opinion as not affecting validity of final judgment; no antecedent expression of judge, whether casual or cast in form of opinion, as able to restrict power to declare a final conclusion by filing decision. *Taormino v. Denny (1970) 1 Cal. 3d 679, 684, 83 Cal. Rptr. 359, 463 P.2d 711*

Findings of fact and conclusions of law constitute the decision. *Fish v. Hoffman (1961) 192 Cal. App. 2d 59, 63, 13 Cal. Rptr. 285* (decided prior to 1981 amendment of *Code Civ. Proc. § 632* and related statutes and rules substituting statement of decision for findings of fact and conclusions of law)

Judgment entered without findings, where findings required under *Code Civ. Proc. § 632* and former Cal. Rules of Ct., Rule 232 [*now see Cal. Rules of Ct., Rule 3.1590*], were nullity and as superseded by subsequent judgment based on

findings. *Ohio Cas. Ins. Co. v. Northwestern Mut. Ins. Co. (1971) 17 Cal. App. 3d 204, 206-207, 94 Cal. Rptr. 586* (decided prior to 1981 amendment of *Code Civ. Proc. § 632* and related statutes and rules substituting statement of decision for findings of fact and conclusions of law)

[6] Judgments on the Pleadings

Grounds for motion for judgment on the pleadings are being same as those for general demurrer. *Carlson v. Lindauer (1953) 119 Cal. App. 2d 292, 301, 259 P.2d 925*

Motion for judgment on the pleadings is properly made even though demurrer on same grounds has been overruled. *Hardy v. Admiral Oil Co. (1961) 56 Cal. 2d 836, 839-840, 16 Cal. Rptr. 894, 366 P.2d 310*

Complaint is subject to motion for judgment on the pleadings only where there is an entire absence of some essential allegation. *Rannard v. Lockheed Aircraft Corp. (1945) 26 Cal. 2d 149, 151, 157 P.2d 1*

Answer is subject to motion for judgment on the pleadings only where complaint states cause of action and answer raises no material issue and states no defense. *MacIsaac v. Pozzo (1945) 26 Cal. 2d 809, 812-813, 161 P.2d 449*

Motion for judgment on the pleadings is properly made before, at, or during trial. *Shabrick v. Moore (1961) 195 Cal. App. 2d 56, 59, 15 Cal. Rptr. 310*

Order granting motion for judgment on the pleadings is followed by filing of judgment terminating action in favor of prevailing party and granting relief requested in the pleadings. *Le Breton v. Stanley Contracting Co. (1911) 15 Cal. App. 429, 434, 114 P. 1028*

Trial court ruling on motion for judgment on the pleadings accepts allegations of a complaint as true precisely as it does when a complaint is subjected to a general demurrer; court grants such a motion only if essential allegations are missing. *Bass v. Great Western Sav. & Loan Assn. (1976) 58 Cal. App. 3d 770, 773, 130 Cal. Rptr. 123*

[7] Notice of Entry of Judgment

Trial court could not vacate and reenter judgment because notice of entry was not served on plaintiff, when failure to meet statutory requirements for notice of entry of judgment set forth in *Code Civ. Proc. § 664.5(a), (b)* did not render judgment void, but, rather, sole consequence was that longer statutory period for filing notice of appeal came into play; there was also no basis for voiding judgment based on party's noncompliance with *Cal. Rules of Ct., Rule 8.25*. *Kimball Avenue v. Franco (2008) 162 Cal. App. 4th 1224, 1228-1229, 78 Cal. Rptr. 3d 352*

Copy of final minute order entered in permanent minutes under former Cal. Rules Ct., Rule 2(b)(2) [*now see Cal. Rules Ct., Rule 8.104(d)(2)*], when ordered by court under *Code Civ. Proc. § 664.5(c)*, is sufficient notice of entry of judgment to start 60-day period to file notice of appeal under *Cal. Rules of Ct., Rule 8.104(a)*. *Pacific City Bank v. Los Caballeros Racquet & Sports Club, Ltd. (1983) 148 Cal. App. 3d 223, 228, 195 Cal. Rptr. 776*

[8] Stipulation for Judgment

Stipulated judgment is appealable, but prejudicial error is difficult to prove when court's rulings were tentative. *Villano v. Waterman Convalescent Hospital, Inc. (2010) 181 Cal. App. 4th 1189, 1198-1203, 105 Cal. Rptr. 3d 276*

Code Civ. Proc. § 664.6 does not apply in ordinary civil action after judgment, unrelated to alleged settlement and

therefore containing no provision for continuing jurisdiction to enforce it, has been entered and has become final, in sense that time for appeal has passed. *Walton v. Mueller (2009) 180 Cal. App. 4th 161, 171-172, 102 Cal. Rptr. 3d 605*

Code Civ. Proc. § 664.6 does not require that party to be bound consent to settlement "on the record," only that the party consent to it "orally before the court." *1538 Cahuenga Partners, LLC v. Turmeko Properties, Inc. (2009) 176 Cal. App. 4th 139, 143, 97 Cal. Rptr. 3d 552*

Judgment omitting material terms of parties' settlement failed to accurately reflect their agreement and therefore failed to comply with *Code Civ. Proc. § 664.6*. *Hines v. Lukes (2008) 167 Cal. App. 4th 1174, 1185, 84 Cal. Rptr. 3d 689*

Parties engaged in private dispute resolution may not stipulate to appointment of judicial referee to judge pro tempore to secure settlement enforceable by court under *Code Civ. Proc. § 664.6* when there was no pending litigation in which reference was sought. *Housing Group v. United Nat. Ins. Co. (2001) 90 Cal. App. 4th 1106, 109 Cal. Rptr. 2d 497*

Entry of judgment pursuant to *Code Civ. Proc. § 664.6* (settlement agreement orally stipulated to before court) over objections of one party was proper when court's determination that parties had entered into valid and binding settlement agreement in open court was supported by substantial evidence. *Estate of Dipinto (1986) 188 Cal. App. 3d 625, 629-630, 231 Cal. Rptr. 612*

Judgments entered on parties' stipulation has same effect as when action is tried on its merits. *John Siebel Associates v. Keele (1986) 188 Cal. App. 3d 560, 565, 233 Cal. Rptr. 231*

Stipulated judgment is subject to constitutional interest rates for judgments pursuant to *Cal. Const., art. XV, § 1,* providing that interest on judgment be set by Legislature at not more than 10 percent per annum. *John Siebel Associates v. Keele (1986) 188 Cal. App. 3d 560, 565, 233 Cal. Rptr. 231*

Judgment entered on parties' stipulation that is not absolutely enforceable, because judgment creditor could not execute on judgment until judgment debtor defaulted and failed to cure, is qualified judgment not subject to constitutional rate of interest at time of entry; once judgment creditor avails itself of judicial process to enforce stipulated judgment, judgment as absolute and, from that time on, subject to constitutional rate of interest. *John Siebel Associates v. Keele (1986) 188 Cal. App. 3d 560, 566-567, 233 Cal. Rptr. 231*

Consent judgment, being similar in nature to contract, is subject to rules of contract interpretation and construction. *Pardee Construction Co. v. City of Camarillo (1984) 37 Cal. 3d 465, 471, 208 Cal. Rptr. 228, 690 P.2d 701*

Consent judgment is confined to issues consented to and does not cover matters not within stipulation. *Pardee Construction Co. v. City of Camarillo (1984) 37 Cal. 3d 465, 471, 208 Cal. Rptr. 228, 690 P.2d 701* ; *Pacific Estates, Inc. v. Superior Court (1993) 13 Cal. App. 4th 1561, 1576, 17 Cal. Rptr. 2d 434*

Under authority of *Code Civ. Proc. § 578,* which provides that judgment may determine rights of all parties between themselves as justice requires, court properly entered judgment on stipulated settlement under *Code Civ. Proc. § 664.6,* even though judgment had effect of determining rights between parties who were not claiming adversely to one another. *Casa de Valley View Owner's Assn. v. Stevenson (1985) 167 Cal. App. 3d 1182, 1190-1191, 213 Cal. Rptr. 790*

Necessity that client authorize attorney to enter into stipulation for judgment. *Bice v. Stevens (1958) 160 Cal. App. 2d 222, 232, 325 P.2d 244*

Stipulation constitutes agreement between attorneys. *Baker v. Solari (1958) 166 Cal. App. 2d 472, 475, 333 P.2d 791*

When stipulation on which judgment is to be entered predicates entry of judgment upon the occurrence of a condition, court as required to satisfy itself that the condition did, in fact, occur, and that court is fully apprised of the circumstances surrounding the occurrence of the condition; such an assessment as unable to be made without some form of hearing or trial unless the stipulation also contains an express waiver of the right to a hearing. *S.E.P. Associates, Inc. v. Peto (1975) 49 Cal. App. 3d 305, 308, 122 Cal. Rptr. 514*

Ordinarily, necessity for findings of fact as dispensed with where case is submitted upon a stipulation of facts; where, however, stipulation sets forth evidentiary material only, trial court as properly making findings of ultimate facts. *Taylor v. George (1949) 34 Cal. 2d 552, 556, 212 P.2d 505*

Inasmuch as stipulation is a contract, stipulation as becoming an executed, not an executory contract; trial court, accordingly, as having the right to assume that it would be inequitable not to recognize the instrument's binding effect. *Sanserino v. Shamberger (1966) 245 Cal. App. 2d 630, 633, 54 Cal. Rptr. 206*

Judgment by consent in action in which court had jurisdiction of the subject matter and of parties as being res judicata and as conclusive between parties and those deriving under them as efficaciously as if it had been entered after trial of the issues. *Avery v. Avery (1970) 10 Cal. App. 3d 525, 529, 89 Cal. Rptr. 195*

Generally, consent to entry of judgment as a waiver of any errors in it; judgment as not disturbed on appeal by party who expressly consented to making of it. *Browand v. Scott Lbr. Co. (1954) 125 Cal. App. 2d 68, 73, 269 P.2d 891*

Judgment which awards greater relief than that to which parties have agreed by their written stipulation as rendering judgment void as being beyond jurisdiction of court and as subject to collateral attack. *Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 847, 131 Cal. Rptr. 674*

Judgment entered upon a stipulation which is simply erroneous, even though error appears on face of judgment or record, as not subject to collateral attack. *Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 840, 131 Cal. Rptr. 674*

If material term of stipulation is ambiguous, judgment as not able to be entered until such ambiguity is appropriately resolved. *Rooney v. Vermont Investment Corp. (1973) 10 Cal. 3d 351, 368-369, 110 Cal. Rptr. 353, 515 P.2d 297*

Trial court as under duty to render judgment that is in exact conformity with an agreement or stipulation of parties; if interpretation of stipulation is in order, rules applied as those applied to interpretation of contracts. *Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 840, 131 Cal. Rptr. 674*

Trial court as not having authority to add to provisions of stipulation, to insert term not found, or to make new stipulation for parties. *Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 840, 131 Cal. Rptr. 674*

Consent judgment, being regarded as a contract between parties, as construed as any other contract. *Cottom v. Bennett (1963) 214 Cal. App. 2d 709, 716, 29 Cal. Rptr. 715*

While consent judgment for purpose of interpretation and construction is regarded as contract between parties and must be interpreted and construed as any other contract, as to matters in issue it is as conclusive as judgment entered after contest and trial. *Stevens v. Stevens (1968) 268 Cal. App. 2d 426, 435, 74 Cal. Rptr. 54*

When written stipulation sets forth all terms of judgment agreed to by parties, filing of stipulation as normally providing sufficient basis for entry of judgment upon the ex parte application of either party. *Rooney v. Vermont Investment Corp. (1973) 10 Cal. 3d 351, 368-369, 110 Cal. Rptr. 353, 515 P.2d 297*

If stipulation upon which judgment is to be entered omits any essential element of a complete judgment, judgment as not properly entered until missing element is or elements are established by proof or by further stipulation. *Rooney v. Vermont Investment Corp. (1973) 10 Cal. 3d 351, 368-369, 110 Cal. Rptr. 353, 515 P.2d 297*

Consent judgment between parties as regarded as contract and as required to be construed like any other contract. *Larsen v. Beekmann (1969) 276 Cal. App. 2d 185, 191, 80 Cal. Rptr. 654*

Judgment based on stipulation of parties as binding only as to matter consented to by stipulation and as confined only to those issues within stipulation. *Larsen v. Beekmann (1969) 276 Cal. App. 2d 185, 191, 80 Cal. Rptr. 654*

In retaining counsel, right to do many acts in respect to the cause as embraced as ancillary or incidental to general authority conferred; among these acts is included the authority to enter into stipulations and agreements in all matters of procedure during progress of trial; stipulations thus made, so far as they are simply necessary or incidental to management of suit and affect only the procedure or remedy as distinguished from the cause of action itself and the essential rights of client, as binding on client. *Linsk v. Linsk (1969) 70 Cal. 2d 272, 277, 74 Cal. Rptr. 544, 449 P.2d 760*

If counsel merely employs best discretion in protecting client's rights and achieving fundamental goals, authority as unquestioned; if counsel abdicates a substantial right of client contrary to express instructions, counsel as exceeding authority. *Linsk v. Linsk (1969) 70 Cal. 2d 272, 277, 74 Cal. Rptr. 544, 449 P.2d 760*

General authority of attorney vests him or her with complete charge and supervision of procedures adopted, conduct of trial, and all cognate subjects, provided only attorney does not impair, compromise, or destroy client's cause of action without client's consent. *Roscoe Moss Co. v. Roggero (1966) 246 Cal. App. 2d 781, 786, 54 Cal. Rptr. 911*

Attorney's stipulation involving disposition of client's property as not binding on client in absence of specific authorization or where specific authorization is not given in valid form. *Roscoe Moss Co. v. Roggero (1966) 246 Cal. App. 2d 781, 786, 54 Cal. Rptr. 911*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsJudgment by ConfessionCivil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionFinal Judgment Rule

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§ 318.203 Law Reviews

Comment, *Creditors' Remedies--Due Process Confession of Judgment in California After Isbell v. County of Sonoma, 16 San Diego L. Rev. 377 (1979)*

Comment, *Confession of Judgment in California, 18 Pac. L.J. 99 (1977)*

Project, *Resort to the Legal Process in Collecting Debts From High Risk Credit Buyers in Los Angeles--Alternative Methods for Allocating Present Costs, 14 UCLA L.Rev. 879 (1967)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.204 Text References

California Trial Practice: Civil Procedure During Trial, Ch. 23, *Judgments* (Cal. CEB 3d ed. 2000)

Witkin, California Procedure, vol. 5, *Pleadings*, § 392, vol. 6, *Proceedings Without Trial*, § 300 et seq., vol. 7, *Judgments*, §§ 30-43 (4th ed. 1997)

Legal Topics:

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

§§ 318.205[Reserved]

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27-318 California Forms of Pleading and Practice--Annotated § 318.220

§ 318.220 California Points and Authorities

For memoranda in support of and in opposition to motions for orders correcting clerical errors in judgments, see Ch. 131, California Points and Authorities , *Judgments* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistake

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§ 318.221 State Statutes

Court has power, upon motion of injured party or on its own motion, to correct clerical mistakes in judgments or orders as entered so as to conform to judgment or order directed; court, on motion of either party after notice to the other party, has authority to set aside any void judgment or order. *Code Civ. Proc. § 473*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments

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§ 318.222 Decisions

[1] Amendment of Judgment

Court retains power to amend or change conclusions of law so as to point to different judgment and enter one different from one first announced; such power as continuing until entry of judgment. *Kelly v. Sparling Water Co. (1959) 52 Cal. 2d 628, 633, 343 P.2d 257*

Substantial evidence supported trial court's amendment of judgment under *Code Civ. Proc. § 187* adding new party as judgment debtor to judgment, where there was substantial evidence of party's successor liability as mere continuation of its predecessor corporation. *McClellan v. Northridge Park Townhome Owners Assn. (2001) 89 Cal. App. 4th 746, 107 Cal. Rptr. 2d 702*

Amendment of judgment to clarify identification of judgment debtors is improper when the effect is to add a new party, the new party was not served, and there is no evidence that new party gave authority to the attorney purporting to appear on its behalf. *Milrot v. Stamper Medical Corp. (1996) 44 Cal. App. 4th 182, 186, 51 Cal. Rptr. 2d 424*

Amendment of judgment to add alter ego after arbitration is within jurisdiction of court under *Code Civ. Proc. § 1287.4* (judgments confirming arbitration awards subject to all provisions of law relating to a judgment). *Hall, Goodhue, Haisley & Barker, Inc. v. Marconi Conf. Center Bd. (1996) 41 Cal. App. 4th 1551, 1555, 49 Cal. Rptr. 2d 286*

Amendment adding judgment debtor as liable for original defendant's obligations on alter ego theory is supported by *Code Civ. Proc. § 187* (court's implied powers to effectuate conferred powers); addition of spouse qua spouse is not authorized under such theory. *Oyakawa v. Gillett (1992) 8 Cal. App. 4th 628, 631, 10 Cal. Rptr. 2d 469*

Amendment adding additional judgment debtors is appropriate only when it can be demonstrated that newly added party in fact had control of previous litigation and thus was virtually represented in lawsuit; when no claim is made against new party personally and new party did not participate in defense of action or have any duty to appear and personally defend in that action, addition of new party as judgment debtor by postjudgment amendment is improper.

Oyakawa v. Gillett (1992) 8 Cal. App. 4th 628, 631, 10 Cal. Rptr. 2d 469

Court is able to set aside judgment only on motion for statutory grounds set forth in *Code Civ. Proc. § 473* or *663* or to correct its records; consent by parties to vacate judgment as not enabling court to modify judgment that it is otherwise unable to modify. *Southern Cal. White Trucks v. Teresinski (1987) 190 Cal. App. 3d 1393, 1407-1408, 236 Cal. Rptr. 159*

Court is empowered to amend judgment against corporate defendant to add judgment debtors found to be alter egos of defendant. *Dow Jones Co. v. Avenel (1984) 151 Cal. App. 3d 144, 149, 198 Cal. Rptr. 457*

[2] Antedating a Judgment by Nunc Pro Tunc Order

All courts have inherent power to enter orders nunc pro tunc to show that thing was done at one time which ought to have been shown at that time; order for entry of judgment is entry now for something previously done so that record may actually speak the truth. *Martin v. Martin (1970) 2 Cal. 3d 752, 760-761, 87 Cal. Rptr. 526, 470 P.2d 662*

Function of nunc pro tunc order is merely to correct record of the judgment and not to alter judgment actually rendered. *Estate of Careaga (1964) 61 Cal. 2d 471, 474, 39 Cal. Rptr. 215, 393 P.2d 415*

Court exceeded power to issue nunc pro tunc order by creating interest in retirement plan. *In re Marriage of Padgett (2009) 172 Cal. App. 4th 830, 852-855, 91 Cal. Rptr. 3d 475*

Trial court is without power to enter judgment nunc pro tunc as of a time before plaintiff's death, in effort to save plaintiff's pain and suffering damages which had abated; although live testimony had been completed at time of death, evidentiary exhibits had not yet been admitted or excluded, jury instructions had not yet been given, and jury argument had not yet been made; nor did phase-one special verdict qualify as verdict needed for nunc pro tunc order. *Williamson v. Plant Insulation Co. (1994) 23 Cal. App. 4th 1406, 1414-1418, 28 Cal. Rptr. 2d 751*

Failure to enter judgment pursuant to court order is recognized ground of entitlement to entry nunc pro tunc. *Milicevich v. Sacramento Medical Center (1984) 155 Cal. App. 3d 997, 1000 n.1, 202 Cal. Rptr. 484*

Only grounds for antedating judgment are preservation of legitimate fruits of litigation which would otherwise be lost to prevailing party, correction of deficiency in recordation of previous decision so as to express true intention of court as of the earlier date and thus conform to that intention, or to correct a clerical error. *Young v. Gardner-Denver Co. (1966) 244 Cal. App. 2d 915, 919, 53 Cal. Rptr. 522*

[3] Correction or Modification After Entry of Judgment

[a] Correction of Ambiguity in Judgment

Court, by means of nunc pro tunc order, has authority to clarify ambiguity by removing superfluous word where removal does not alter meaning or legal effect or original decree; ambiguity created by faulty wording is deemed clerical error. *Estate of Careaga (1964) 61 Cal. 2d 471, 474, 39 Cal. Rptr. 215, 393 P.2d 415*

[b] Correction of Inadvertent Error of Trial Judge

Trial court does not abuse its discretion in modifying judgment of $150,000 to $15,000 to conform to limits of respondent's liability under *Veh. Code § 17151* because court was empowered to correct clerical error under court's own

inherent power and under *Code Civ. Proc. § 473*. *Pettigrew v. Grand Rent-A-Car (1984) 154 Cal. App. 3d 204, 209, 212, 201 Cal. Rptr. 125*

Where judgment as signed does not express actual judicial intention of court, but is contrary to decision, signing of purported judgment is clerical error rather than judicial one, such that judge has authority to set aside erroneous judgment and make a correct one on basis of trial court's inherent power to annul judgments inadvertently or improvidently made. *Zisk v. Roseville (1976) 56 Cal. App. 3d 41, 47, 127 Cal. Rptr. 896*

Mistake inadvertently made in preparation of judgment by attorney's drafter is properly corrected by trial court where mistake renders judgment not in conformance with true decision of court. *Wilson v. Wilson (1948) 88 Cal. App. 2d 382, 385, 198 P.2d 916*

[c] Correction of Misdescriptions in Judgment

Mistake in designation or description of person affected by judgment is properly corrected by trial court. *Chula v. Superior Court (1962) 57 Cal. 2d 199, 206, 18 Cal. Rptr. 507, 368 P.2d 107*

Order amending judgment nunc pro tunc by substituting corporate defendant for individual defendant as judgment creditor to correct clerical error is supported by substantial evidence when cross complaint on which judgment was obtained was filed by corporate defendant and when parties clearly stipulated that individual and corporate defendants may be considered one party for purposes of litigation. *Bree v. Beall (1981) 114 Cal. App. 3d 650, 655-656, 171 Cal. Rptr. 73*

Correction and amendment of judgment is proper to designate real name of judgment debtor where original judgment incorrectly stated name. *Thomson v. L.C. Roney & Co. (1952) 112 Cal. App. 2d 420, 425, 246 P.2d 1017*

Mistake in description of property in judgment is properly corrected. *Meyer v. Porath (1952) 113 Cal. App. 2d 808, 811, 248 P.2d 984*

[d] Correction of Omission or Mistake in Judgment

Correction of error of omission in the determination of an account and decree of distribution is properly corrected by trial court. *Estate of Soboslay (1935) 4 Cal. 2d 177, 179, 47 P.2d 714*

Trial properly amended judgment nunc pro tunc three months after entry of judgment to fix date of promissory note referenced in settlement agreement and subsequent judgment to conform to settlement agreement, where trial court had inherent power to correct clerical error in judgment and inherent power to correct judgment to make it conform to terms of settlement agreement, and where it was uncontroverted that parties' agreement to date in settlement agreement and substantial evidence supported trial court's determination of date. *Ames v. Paley (2001) 89 Cal. App. 4th 668, 107 Cal. Rptr. 2d 515*

Judgment amended to preclude assertion of statute of limitations defense to express court's intent to permit escape assessments for all tax years in dispute. *Southern Pacific Pipe Lines, Inc. v. State Bd. of Equalization (1993) 14 Cal. App. 4th 42, 57, 17 Cal. Rptr. 2d 345*

Trial court does not abuse its discretion in setting aside portion of its orders stating that all acts of conservator were ratified, confirmed, and approved, when trial court issued declaration of contrary intent and record on appeal did not contradict court's declaration because hearing was not reported. *Conservatorship of Tobias (1989) 208 Cal. App. 3d 1031, 1036, 256 Cal. Rptr. 525*

Omission of date of entry of judgment from one of five abstracts of judgment, which were all recorded on date judgment was entered, is inadvertent clerical error that can be corrected by trial court. *Commonwealth Land Title Co. v. Kornbluth (1985) 175 Cal. App. 3d 518, 531, 220 Cal. Rptr. 774*

Trial court properly issued order modifying judgment of dissolution of marriage to include reservation of jurisdiction over spousal support, when both minutes and partial transcript clearly showed that court intended to reserve jurisdiction and that omission was clerical error. *In re Marriage of Sheridan (1983) 140 Cal. App. 3d 742, 746-747, 189 Cal. Rptr. 622*

Omission of direction that husband pay wife's attorney's and accountant's fees if proceeds from sale of community property are insufficient, in judgment of divorce, is clerical rather than judicial error and is properly corrected by postjudgment order. *Denton v. Denton (1971) 18 Cal. App. 3d 708, 714-716, 96 Cal. Rptr. 136*

Failure to expressly state that defendants, naming them, were personally liable for the debt in question, stating its amount, is a proper subject for correction by amendment. *Lang v. Superior Court of Orange County (1961) 198 Cal. App. 2d 16, 18, 18 Cal. Rptr. 67*

Failure to fill in blank spaces in judgment constitutes clerical error subject to nunc pro tunc amendment. *Lang v. Superior Court of Orange County (1961) 198 Cal. App. 2d 16, 17, 18 Cal. Rptr. 67*

Omission of party's name in judgment is properly corrected by court by insertion of name. *Kohlstedt v. Hauseur (1937) 24 Cal. App. 2d 60, 61, 74 P.2d 314*

[e] Determination and Proof of Clerical Error

Court of general jurisdiction has power to correct clerical errors made by court, clerk, or counsel after judgment, pending appeal, after affirmance on appeal, and regardless of lapse of time; appellete court can correct judgment containing obvious clerical error by modifying judgment; in specific performance action, when findings of fact set forth in statement of decision clearly show amount of purchase price payable and amount of and reasons for several offsets, mathematical error in judgment is clerical error. *Hennefer v. Butcher (1986) 182 Cal. App. 3d 492, 506-508, 227 Cal. Rptr. 318*

Declaration of judge as to his or her intention in signing judgment is entitled to great weight in determining whether error is clerical or judicial, since when error is made by judge, nature of error is seldom clear from extrinsic evidence or record. *Bowden v. Green (1982) 128 Cal. App. 3d 65, 71, 180 Cal. Rptr. 90]*

Where there is conflicting evidence as to whether error was clerical, reviewing court will probably accept conclusion of trial court; if record shows clearly that there was no clerical error, recital by trial court is not conclusive. *Nathanson v. Murphy (1957) 147 Cal. App. 2d 462, 469, 305 P.2d 710*

Clerical nature of error in recordation of judgment is properly shown by any competent evidence, including trial judge's statement based on his or her own recollection, affidavit of shorthand reporter, or rough notes entered on original docket. *In re Roberts (1962) 200 Cal. App. 2d 95, 97-98, 19 Cal. Rptr. 147*

Where trial judge's declaration as to the clerical nature of mistake is supported by other competent evidence, reviewing court is not inclined to disturb trial court's order correcting and amending judgment. *Bastajian v. Brown (1941) 19 Cal. 2d 209, 215, 120 P.2d 9*

[f] General Rule

Although expressly recognized by statute, courts have inherent power to correct clerical errors independently of statute; such power is unaffected by pendency of appeal or habeas corpus. *In re Candelario (1970) 3 Cal. 3d 702, 705, 91 Cal. Rptr. 497, 477 P.2d 729*

Although trial court can correct its own inadvertence or clerical error, court corrects judicial error only on motion for new trial or on motion pursuant to *Code Civ. Proc. § 633* to vacate order or judgment and enter different one. *Greene v. Superior Court (1961) 55 Cal. 2d 403, 405-406, 10 Cal. Rptr. 817, 359 P.2d 249*

Test for determining nature of error sought to be corrected. *In re Daoud (1976) 16 Cal. 3d 879, 882, 129 Cal. Rptr. 673, 549 P.2d 145*

[g] Judgment Entered Under Sister State Money Judgment Act

Judgment entered under Sister State Money Judgment Act (*Code Civ. Proc. § 1710.10 et seq.*) is subject to amendment to correct for clerical error to conform judgment entered with original judgment. *Aspen Internat. Capital Corp. v. Marsch (1991) 235 Cal. App. 3d 1199, 1204-1205, 286 Cal. Rptr. 921*

[h] Judicial Error Distinguished

Award of damages which are excessive as a matter of law is inherently judicial error which cannot be corrected on motion to set aside default judgment. *Don v. Cruz (1982) 131 Cal. App. 3d 695, 703, 182 Cal. Rptr. 581*

Order of dismissal entered deliberately but based on error of fact caused by mistake of counsel is judicial rather than clerical error. *Smith v. Superior Court (1981) 115 Cal. App. 3d 285, 290-291, 171 Cal. Rptr. 387*

Distinction between clerical error and judicial error does not depend so much on person making it as on whether it was deliberate result of judicial reasoning and determination; distinction is whether error was made in rendering judgment or in recording judgment rendered. *People v. Anderson (1976) 59 Cal. App. 3d 831, 839, 131 Cal. Rptr. 104*

While clerical error is no longer limited to only those made by clerk, nevertheless, clerical errors do not include those made by court because of failure to correctly interpret law or apply facts; corrective nunc pro tunc order is appropriate only when form of judgment fails to coincide with substance thereof, as intended at the time of the rendition of the judgment. *Estate of Careaga (1964) 61 Cal. 2d 471, 474, 39 Cal. Rptr. 215, 393 P.2d 415*

If court misconstrues evidence or misapplies law applicable to facts or is misled by counsel, such error is in no sense clerical which could thereafter be corrected by court or in any proceeding except on motion for new trial. *Lankton v. Superior Court (1936) 5 Cal. 2d 694, 696, 55 P.2d 1170*

Erroneous conclusion of trial court as to limitations of jurisdictional authority to render award greater than a particular sum is judicial, not clerical. *Lankton v. Superior Court (1936) 5 Cal. 2d 694, 696, 55 P.2d 1170*

Despite statement by judge that he intended to order a distribution decree in accord with particular will, where evidence disclosed that judge had not actually read will, error was judicial rather than clerical inasmuch as at the time of signing the decree the judge could not have had in mind an interpretation of the will which he failed to embody or record in decree. *Estate of Harris (1962) 200 Cal. App. 2d 578, 590, 19 Cal. Rptr. 510*

[i] Notice and Time Requirements

Correction of clerical error in judgment two and one-half years after entry of judgment was not barred by laches and estoppel where relief was sought promptly after error discovered. *In re Marriage of Kaufman (1980) 101 Cal. App. 3d 147, 150-151, 161 Cal. Rptr. 538*

Law is well settled that orders may be made correcting judgments nunc pro tunc as of their original date without notice and on court's own motion so as to make them conform to judicial decision actually made; this power exists regardless of lapse of time. *In re Roberts (1962) 200 Cal. App. 2d 95, 97, 19 Cal. Rptr. 147*

[j] Nunc Pro Tunc Correction of Judgment

Question presented on hearing for motion for nunc pro tunc order is what order was in fact made at time by trial judge. *Estate of Careaga (1964) 61 Cal. 2d 471, 474, 39 Cal. Rptr. 215, 393 P.2d 415*

Juvenile court's nunc pro tunc order correction of order granting minor's petition for emancipation, stating that all statutes of limitations be tolled until minor reaches age 18, over three years earlier, was of no legal effect where it did not properly correct clerical error as court did not state it originally intended to order that statute of limitations applicable to minor's claims be tolled despite her emancipation and that that ruling was inadvertently omitted for original order due to clerical error; and where, even assuming error was clerical, court did not have authority to make emancipation order preserving minor's legal disability regarding her right to sue and be sued. *West Shield Investigations & Security Consultants v. Superior Court (2000) 82 Cal. App. 4th 935, 950-951, 98 Cal. Rptr. 2d 612*

Trial court erred in refusing to enter amendment to judgment (which itself was unnecessary because *Prob. Code § 18201* allowed judgment creditor to directly reach assets in trust) nunc pro tunc to date on which it was originally entered and ordered; respondent was not bona fide encumbrancer and was presumed to have actual knowledge of § 18201, thus did not have defense to amendment being entered nunc pro tunc. *Bank One Texas v. Pollack (1994) 24 Cal. App. 4th 973, 980-982, 29 Cal. Rptr. 2d 510*

When clerical errors in judgment or order are corrected by court under its inherent power, order of correction can be made nunc pro tunc as of time of original entry of judgment, regardless of lapse of time, and appellate court can direct trial court to make order nunc pro tunc. *Commonwealth Land Title Co. v. Kornbluth (1985) 175 Cal. App. 3d 518, 531, 220 Cal. Rptr. 774*

Court by means of nunc pro tunc order has authority to clarify decree by removing superfluous word where removal does not alter meaning or legal effect of original decree; such error is clerical. *Estate of Careaga (1964) 61 Cal. 2d 471, 474, 39 Cal. Rptr. 215, 393 P.2d 415*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsNunc Pro Tunc ReliefCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

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California Trial Practice: Civil Procedure During Trial, Ch. 23, *Judgments* (Cal. CEB 3d ed. 2000)

Witkin, California Procedure, vol. 7, *Judgments*, § 62 et seq. (4th ed. 1997)

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§ 318.240 State Statutes

[1] Lien on Judgment Debtor's Cause of Action

Judgment creditor's lien on judgment debtor's cause of action, generally. *Code Civ. Proc. §§ 708.410-708.480*

Notice of lien. *Code Civ. Proc. § 708.420*

Intervention of judgment creditor. *Code Civ. Proc. § 708.430(a)*

Judgment creditor as party to action or proceeding. *Code Civ. Proc. § 708.430(b)*

Enforcement or other resolution of judgment debtor's judgment. *Code Civ. Proc. § 708.440*

Claim of exemption by judgment debtor. *Code Civ. Proc. § 708.450*

Order applying judgment to satisfaction of lien. *Code Civ. Proc. § 708.470*

Enforcement of lien after final judgment or appeal. *Code Civ. Proc. § 708.480*

[2] Money Judgment Liens on Personal Property

Creation of lien on personal property by filing notice of lien. *Code Civ. Proc. § 697.510(a)*

Duration of lien. *Code Civ. Proc. § 697.510(b)*

Property subject to lien. *Code Civ. Proc. § 697.530*

Installment judgment lien on personal property. *Code Civ. Proc. § 697.540(b)*

Notice of lien. *Code Civ. Proc. § 697.550*

Service of notice on judgment debtor. *Code Civ. Proc. § 697.560*

[3] Money Judgment Liens on Real Property

Creation of lien on real property by filing abstract of money judgment. *Code Civ. Proc. § 697.310(a)*

Duration of lien. *Code Civ. Proc. § 697.310(b), (c)*

Creation and duration of installment judgment lien. *Code Civ. Proc. § 697.320*

Creation of lien on workers' compensation award. *Code Civ. Proc. § 697.330*

Release or subordination of lien. *Code Civ. Proc. § 697.370*

Priority of liens. *Code Civ. Proc. § 697.380*

Transfer or encumbrance of property subject to lien. *Code Civ. Proc. § 697.390*

Recording of acknowledgment of satisfaction. *Code Civ. Proc. § 697.400*

Release of lien based on erroneous identification of property owner. *Code Civ. Proc. § 697.410*

Certificate of notice of lien. *Code Civ. Proc. § 697.580*

Priority of liens. *Code Civ. Proc. §§ 697.590, 697.600*

Sale or other transfer of property subject to lien. *Code Civ. Proc. §§ 697.610, 697.620*

Filing acknowledgment of satisfaction. *Code Civ. Proc. § 697.640*

Release or subordination of lien. *Code Civ. Proc. § 697.650*

Release of lien based on erroneous identification of property owner. *Code Civ. Proc. § 697.660*

Judgment lien is not attachable to declared homestead if declaration recorded prior to creation of lien. *Code Civ. Proc. § 704.950*

[4] Power to Enforce Judgments

Every court has power to compel obedience to its judgments, orders, and process. *Code Civ. Proc. § 128*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.241 California Rules of Court

Authenticated record of judgment and declaration as to identity of party and money due required to accompany motion that lien be granted on cause of action. *Cal. Rules of Ct., Rule 3.1360*

Legal Topics:

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

[1] Liens on Judgment Debtors' Causes of Action

[a] Approval of Settlement

Trial court properly denied judgment creditor's motion for order for satisfaction of its judgment lien against defendant in unrelated action under *Code Civ. Proc. § 708.470*, where judgment creditor's notice of lien was form "notice of judgment lien on personal property" against judgment debtor, specifically referencing *Code Civ. Proc. §§ 697.510, 697.550, 697.570*, which did not comply with mandatory requirements of *Code Civ. Proc. § 708.420* because notice contained none of requisite warnings that judgment creditor was invoking provisions of *Code Civ. Proc. § 708.410 et seq.* and specifying necessary procedures to be followed in settling with judgment debtor as judgment debtor as well as consequences of failing to do so, and reference to §§ 697.510, 697.550, 697.570 did nothing to inform parties to pending litigation of procedures to be followed or risks in failing to do so, so that notice was ineffective to create a lien under statute. Further, even if notice sufficed, there was no judgment entitling judgment debtor to money or property or determining that judgment debtor had interest in property as provided in *Code Civ. Proc. § 708.470(a), (b)*, so that trial court lacked jurisdiction to act under *§ 708.470(a), (b)*, and, under *Code Civ. Proc. § 708.470(c)*, court determined that judgment debtor received no money or property and, consequently, there was nothing subject to lien, because, in addition to subrogation rights they were entitled to pursue, judgment debtor's insurers obtained assignment of plaintiff's claims against nonsettling parties, and fact that insurers pursued this alternative or that their motive was to recoup their costs of defending judgment debtor and paying plaintiff on its behalf required court to grant judgment creditor's motion. *Casa Eva I Homeowners Assn. v. ANI Construction & Tile, Inc. (2005) 134 Cal. App. 4th 771, 779-784, 36 Cal. Rptr. 3d 401*

Trial court lacked basic information about who would benefit from transfers of interests in real property under settlement agreement and erred in approving settlement of action by judgment debtor against defendants under *Code Civ. Proc. § 708.440* in spite of judgment creditor's opposition, where settlement would permit, but not require, judgment debtor to record grant deed and hold title to property as trustee for company about which record did not reveal anything, and court could not tell if company, its investors or trust presently existed or existed in past, which was

significant because if trust did not exist or there were no beneficiaries to trust other than judgment debtor, he could dispose of property for his sole benefit without incurring liability to third parties, or, alternatively, if trust and other beneficiaries existed, there was no evidence showing why it was equitable for investors to realize benefits from settlement of judgment debtor's claims against defendants; without knowledge of material facts showing who was getting what slice of settlement pie, superior court could not consider equities of settlement excluding judgment creditor and lienholder from reaching any interest in property. *Oldham v. California Capital Fund, Inc. (2003) 109 Cal. App. 4th 421, 432-436, 134 Cal. Rptr. 2d 744*

[b] Bankruptcy

Title to cause of action for personal injuries is property of bankrupt and thus, under § 70a(5) of the Bankruptcy Act, as vested in trustee. *Carmona v. Robinson (9th Cir. [Cal] 1964) 336 F.2d 518, 520-521* ; *In re Calestini (ND Cal. 1971) 321 F. Supp. 1313, 1315*

[c] Constitutional Issues

Former *Code Civ. Proc. § 688.1* (*now see Code Civ. Proc. §§ 708.410-708.480*) does not arbitrarily restraining freedom of contract and thus is not unconstitutional. *Hersch v. Boston Ins. Co. (1953) 175 Cal. App. 2d 751, 755, 346 P.2d 796*

[d] Construction

Former *Code Civ. Proc. § 688.1* (*now see Code Civ. Proc. § 708.410*) is remedial in nature and liberally construed to give effect to remedy it authorizes. *McClearen v. Superior Court (1955) 45 Cal. 2d 852, 856, 291 P.2d 449* ; *Apostolos v. Estrada (1958) 163 Cal. App. 2d 8, 13, 328 P.2d 805*

[e] Intervention

Right to intervene under former *Code Civ. Proc. § 688.1* (*now see Code Civ. Proc. § 708.430*) rests with trial judge's discretion. *McClearen v. Superior McClearen (1955) 45 Cal. 2d 852, 856, 291 P.2d 449* ; *Apostolos v. Estrada (1958) 163 Cal. App. 2d 8, 12, 328 P.2d 805*

Judgment creditor is not required to intervene. *McClearen v. Superior Court (1955) 45 Cal. 2d 852, 856, 291 P.2d 449*

[f] Nature and Scope of Lien

Former *Code Civ. Proc. § 688.1* (*now see Code Civ. Proc. § 708.410*) is remedial in nature and liberally construed to give effect to remedy it authorizes. *McClearen v. Superior Court (1955) 45 Cal. 2d 852, 856, 291 P.2d 449* ; *Apostolos v. Estrada (1958) 163 Cal. App. 2d 8, 13, 328 P.2d 805*

Lien created under former *Code Civ. Proc. § 688.1* (*now see Code Civ. Proc. § 708.410*) as created upon the cause of action such that it arises before judgment and carries over to judgment. *Takehara v. H.C. Muddox Co. (1972) 8 Cal. 3d 168, 170, 104 Cal. Rptr. 345, 501 P.2d 913*

[g] Priority

Although bank had security interest in plaintiffs' collateral through collateral security agreement and later judgment lien on personal property, those liens did not cover commercial tort claims and settlement proceeds were from commercial tort claims; attorney lien created by retainer agreement between plaintiffs and counsel had priority because it was created before bank filed a notice of lien in the pending action, and bank's notice of lien did not relate back to prior liens because those liens covered different property. *Waltrip v. Kimberlin (2008) 164 Cal. App. 4th 517, 524-531, 79 Cal. Rptr. 3d 460*

[2] Money Judgment Liens on Real Property

[a] Attachable to Increase in Value of Equity

[i] In General

Judgment creditor as capable of reaching increases in value of equity in property owned by judgment debtor at time abstract of judgment recorded under former *Code Civ. Proc. § 674* (*now see Code Civ. Proc. § 697.310*). *Kinney v. Vallentyne (1975) 15 Cal. 3d 475, 478-479, 124 Cal. Rptr. 897, 541 P.2d 537*

[ii] Not Attachable to Mechanics' Liens

Judgment lien as not capable of attaching to mechanics' lien. *Mercantile Collection Bureau v. Roach (1961) 195 Cal. App. 2d 355, 357-358, 15 Cal. Rptr. 710*

[iii] Not Attachable to Naked Title

Lien of judgment as not attaching to naked title, only to debtor's interest in real estate; if debtor has no interest in property even though possessing naked title, judgment creditor as acquiring no lien and real owner as permitted by court of equity to show apparent ownership of another is not real. *Wheeler v. Trefftzs (1964) 228 Cal. App. 2d 271, 274, 39 Cal. Rptr. 507*

Judgment lien as attaching to judgment debtor's property when abstract of judgment is recorded, provided the judgment debtor has more than a bare legal title; when the abstract of judgment is filed after execution of conditional sales contract but before conditions have been satisfied, judgment lien as still attaching due to fact that legal title has not yet passed from judgment debtor to a third-party purchaser. *Lang v. Klinger (1973) 34 Cal. App. 3d 987, 991, 110 Cal. Rptr. 532*

[b] Child and Spousal Support

Exclusive method of establishing lien on real property of judgment debtor for child and spousal support ordered by court is that provided by former *Code Civ. Proc. § 674.5* (*now see Code Civ. Proc. § 697.320*). *Ellrott v. Bliss (1983) 147 Cal. App. 3d 901, 905, 195 Cal. Rptr. 446*

[c] Death of Judgment Debtor

Death of debtor as not terminating judgment lien. *Corporation of America v. Marks (1937) 10 Cal. 2d 218, 220, 73 P.2d 1215*

Prob. Code § 716 is applicable to judgment liens and permits judgment lien creditor to bring equitable action to foreclose his lien on death of judgment debtor. *Corporation of America v. Marks (1937) 10 Cal. 2d 218, 220, 73 P.2d 1215*

Death of debtor terminates right of judgment lien creditor to enforce lien by levy of execution and sale thereunder [former *Prob. Code § 732* (*now see Prob. Code § 9300 et seq.*)]. *Corporation of America v. Marks (1937) 10 Cal. 2d 218, 220, 73 P.2d 1215*

When married couple transferred their tenant in common interests in real property to one another in 1994 and created joint tenancy, wife took her interest in the property subject to judgment lien previously entered against husband's interest, and right of survivorship created after judgment lien had no effect. Further, under *Code Civ. Proc. §§ 697.340(b), 695.070(b)*, husband's death did not affect enforceability of lien. Thus, judgment creditor retained his lien against one-half interest in property as if transfer and husband's death never occurred. *Dieden v. Schmidt (2002) 104 Cal. App. 4th 645, 650-653, 128 Cal. Rptr. 2d 365*

Effect of death of joint tenant owning lands subject to money judgment lien. *Zeigler v. Bonnell (1942) 52 Cal. App. 2d 217, 221, 126 P.2d 118*

[d] Enforcement

During lifetime of debtor, ordinary method of enforcement of judgment lien is execution sale; equitable action to foreclose judgment lien is not required. *Corporation of America v. Marks (1937) 10 Cal. 2d 218, 220, 73 P.2d 1215*

Judgment liens are ordinarily enforced by execution levy and sale; when for some reason execution does not lie, procedure for enforcement is equitable action to foreclose judgment lien. *Wellborn v. Wellborn (1942) 55 Cal. App. 2d 516, 520, 131 P.2d 48*

[e] Immediate Effectiveness

Judgment liens under former *Code Civ. Proc. § 674* (now see *Code Civ. Proc. § 697.310*) are effective the instant the judgment debtor acquired the property in a middleman escrow situation; lien is effective irrespective of how little time judgment debtor holds property acquired. *Majewsky v. Empire Constr. Co., Ltd. (1970) 2 Cal. 3d 478, 484, 85 Cal. Rptr. 819, 467 P.2d 547*

Once lien is recorded, lien attaches automatically to any property acquired by judgment debtor to which he or she holds more than bare legal title. *Lang v. Klinger (1973) 34 Cal. App. 3d 987, 991, 110 Cal. Rptr. 532*

[f] Joint Tenancy

Unless exempt, any interest in real property is subject to levy and sale under writ of execution; joint interest of one cotenant is subject to sale on execution to enforce judgment against him. *Moore v. Hall (1967) 250 Cal. App. 2d 25, 28, 58 Cal. Rptr. 70*

Judgment lien under former *Code Civ. Proc. § 674* (now see *Code Civ. Proc. § 697.310*) on interest of one joint tenant prior to levy of execution is not severing joint tenancy; if judgment debtor dies first, lien is lost. *Zeigler v. Bonnell (1942) 52 Cal. App. 2d 217, 219-221, 126 P.2d 118*

[g] Nature and Purpose of Judgment Lien

Lien created upon filing of abstract of money judgment is purely a creature of statute, unknown at common law. *Mercantile Collection Bureau v. Roach (1961) 195 Cal. App. 2d 355, 357, 15 Cal. Rptr. 710*

Judgment creditor who causes attachment to be levied on debtor's real property acquires only lien on property and no interest in debtor's title [*see Civ. Code § 2888*]. *Monolith Portland Cement Co. v. Tendler (1962) 206 Cal. App. 2d 800, 805-806, 24 Cal. Rptr. 38*

Judgment creditor is not entitled to protection as bona fide purchaser for value but, rather, stands in shoes of judgment debtor and obtains by judgment lien only that interest in property which judgment debtor actually possesses. *City of Torrance v. Castner (1975) 46 Cal. App. 3d 76, 80, 120 Cal. Rptr. 23*

Purpose of judgment lien is giving the judgment creditor immediate security for subsequent enforcement of judgment. *Laubisch v. Roberdo (1954) 43 Cal. 2d 702, 707, 277 P.2d 9*

[h] No Authority to Expunge Abstract

Despite fact that former *Code Civ. Proc. § 674* (now see *Code Civ. Proc. § 697.040*) provides that lien of recorded abstract ceases when enforcement of judgment is stayed on appeal, court is not authorized to grant motion compelling county recorder to expunge an abstract from his or her records which was properly recorded. *Crevolin v. Crevolin (1963) 217 Cal. App. 2d 565, 575, 31 Cal. Rptr. 622*

[i] Right to Record Prior to Appeal Bond

Person acquiring judgment has right to record abstract of judgment under former *Code Civ. Proc. § 674* (now see *Code Civ. Proc. § 697.310*) prior to filing of appeal bond. *Crevolin v. Crevolin (1963) 217 Cal. App. 2d 565, 575, 31 Cal. Rptr. 622*

[j] Survivability of Liens After Bankruptcy

Generally, valid, perfected judicial liens that precede bankruptcy are enforceable and survive after bankruptcy; post-petition enforcement of valid liens is not prevented by bankruptcy discharge and secured creditor may proceed to enforce lien as in rem action and is not barred by injunctive terms of *11 U.S.C. § 524*. *Songer v. Cooney (1989) 214 Cal. App. 3d 387, 391, 264 Cal. Rptr. 1*

Order in bankruptcy proceeding avoiding lien is exception to general rule of survivability of liens. *Songer v. Cooney (1989) 214 Cal. App. 3d 387, 391, 264 Cal. Rptr. 1*

Judgment is secured only to value of debtor's interest in property, and to extent that judgment exceeds value of debtor's equity it is unsecured, under *11 U.S.C. § 506(a)*; to extent that unsecured portion of judgment creditor's claim is disallowed, lien is void, under *11 U.S.C. § 506(d)*. *Songer v. Cooney (1989) 214 Cal. App. 3d 387, 391, 264 Cal. Rptr. 1*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentDischarge,

Release & SatisfactionCivil ProcedureRemediesJudgment LiensEnforcementReal Property LawNonmortgage LiensJudgment Liens

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§ 318.243 Renewal of Judgment

Trial court properly denied defendant's motion to vacate renewal of money judgment in favor of plaintiff on ground renewal of judgment was void because defendant had insufficient contacts with California to confer personal jurisdiction when renewal was entered, where motion to vacate was untimely because it was filed nearly six months after plaintiff served and filed notice of renewal of judgment, and where ground of insufficient contacts with California to confer personal jurisdiction at time of renewal was unavailable under statutory renewal of judgment procedure, and trial court had continuing jurisdiction, derived from its jurisdiction at time of original judgment, to enter renewal. *Goldman v. Simpson (2008) 160 Cal. App. 4th 255, 260-264, 72 Cal. Rptr. 3d 729*

Independent action to enforce judgment after renewal did not require that California have personal jurisdiction over judgment debtor through current contacts, where judgment debtor entered into contract in California to be performed in California, which he breached when he failed to repay debt, after which he submitted himself to jurisdiction of California court by appearing in action, and where passage of time between original California litigation and revival action, during which he had no additional contacts with California, did not defeat personal jurisdiction. *Cadle Co. II, Inc. v. Fiscus (2008) 163 Cal. App. 4th 1232, 1236-1241, 78 Cal. Rptr. 3d 238*

Effective date of any judgment for purposes of enforceability and accrual of renewal period is date of entry; thus, renewal application was timely filed within 10 years from date of entry of amended judgment. *Iliff v. Dustrud (2003) 107 Cal. App. 4th 1201, 1207, 132 Cal. Rptr. 2d 848*

Legal Topics:

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§ 318.244 Law Reviews

Review of Selected 1982 California Legislation, *Civil Procedure; Attachments, 14 Pac. L.J. 441 (1983)*

Review of Selected 1982 California Legislation, *Civil Procedure; Enforcement of Judgments, 14 Pac. L.J. 397 (1983)*

Note, "Cognovit Revisited: Due Process and Confession of Judgment," *24 Hastings LJ 1045 (1973)*

Comment, "Rule 60(b): Survey and Proposal for General Reform," *60 Calif L Rev 531 (1972)*

Note, "A Purchaser's Rights in the Middleman Escrow," *22 Hastings LJ 1390 (1971)*

Note, "Property Law: Middleman Escrow: A Mecca for Judgment Creditors?" *11 Santa Clara Lawyer 484 (1971)*

Legal Topics:

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

§§ 318.245[Reserved]

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27-318 California Forms of Pleading and Practice--Annotated § 318.260

§ 318.260 California Points and Authorities

For memoranda of points and authorities relating to motions for orders compelling satisfaction of judgment, see California Points and Authorities, Ch. 131, *Judgments* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & Satisfaction

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§ 318.261 State Statutes

[1] Discharge of Judgment

Payment of judgment by joint nontort judgment debtor. *Code Civ. Proc. §§ 881-883*

[2] Acknowledgment of Satisfaction

[a] In General

Methods of satisfaction. *Code Civ. Proc. § 724.010*

Entry of satisfaction of judgment. *Code Civ. Proc. § 724.020*

Duty to provide acknowledgment of satisfaction. *Code Civ. Proc. § 724.030*

Filing of acknowledgment of satisfaction as required when abstract of judgment recorded; service of acknowledgment on judgment debtor. *Code Civ. Proc. § 724.040*

Demand for acknowledgment of satisfaction; liability for refusal. *Code Civ. Proc. § 724.050*

Contents of acknowledgment. *Code Civ. Proc. § 724.060*

Unjustified conditioning of delivery of acknowledgment of satisfaction; liability; not applicable where security or promissory note furnished. *Code Civ. Proc. § 724.070*

Attorney's fees for prevailing party. *Code Civ. Proc. § 724.080*

Damages provided in *Code Civ. Proc. §§ 724.010-724.100* as not in derogation of any other damages or penalties to which aggrieved person may be entitled by law. *Code Civ. Proc. § 724.090*

Certificate of satisfaction. *Code Civ. Proc. § 724.100*

Demand for acknowledgment of partial satisfaction of judgment. *Code Civ. Proc. §§ 724.110-724.120*

[b] Installment Judgments

Definitions. *Code Civ. Proc. § 724.210*

Demand for acknowledgment of satisfaction of matured installment. *Code Civ. Proc. § 724.220*

Proceedings to compel acknowledgment of satisfaction. *Code Civ. Proc. § 724.230*

Liability for failure to comply with demand. *Code Civ. Proc. § 724.240*

Manner and form of acknowledgment of satisfaction of matured installments. *Code Civ. Proc. § 724.250(a)*

Judgment for child or spousal support. *Code Civ. Proc. § 724.250(b)*

Attorney's fees to prevailing party. *Code Civ. Proc. § 724.260*

Legal Topics:

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

[1] Attorney's Agreement Not to Enforce Judgment

Plaintiff in civil action is bound by his or her attorney's agreement with one defendant not to enforce any judgment obtained against him or her; such agreements are equivalent to satisfaction of judgment. *Yanchor v. Kagan (1971) 22 Cal. App. 3d 544, 548-551, 99 Cal. Rptr. 367*

[2] Compelling Satisfaction

Motion for satisfaction of judgment under former *Code Civ. Proc. § 675* (*now see Code Civ. Proc. § 724.050(d)*) is not special proceeding under *Code Civ. Proc. § 23* and is not independent action; rather, proceeding on motion is part of original action. *LaFleur v. M.A. Burns Lbr. Co. (1922) 188 Cal. 321, 328, 205 P. 102*

Motion for entry of satisfaction of judgment may be brought only in compliance with demand requirements of *Code Civ. Proc. § 724.050*. However, although defendant did not comply with demand requirements prior to bringing noticed motion, plaintiff suffered no prejudice by defendant's lack of compliance, where parties brought to trial court's attention defendant's failure to comply, but trial court ordered entry of satisfaction of judgment without finding plaintiff had failed to comply without just cause with defendant's demand for acknowledgment of satisfaction, but found only that judgment had been satisfied by check tendered by defendant, trial court did not award defendant damages, penalty or attorney's fees, and plaintiff firmly and with just cause believed check tendered by defendant did not satisfy judgment and it was unlikely plaintiff would have complied with demand for acknowledgment of satisfaction, even had defendant made proper demand, including warning. *Quintana v. Gibson (2003) 113 Cal. App. 4th 89, 92-95, 5 Cal. Rptr. 3d 898*

Motion to compel satisfaction is proper method of claiming surplus from nonjudicial foreclosure as offset against outstanding judgment. *Passanisi v. Merit-McBride Realtors, Inc. (1987) 190 Cal. App. 3d 1496, 1512-1514, 236 Cal. Rptr. 59*

Court may order entry of satisfaction of judgment whenever judgment is satisfied in fact. *George S. Nolte Consulting Civil Eng'rs, Inc. v. Magliocco (1979) 93 Cal. App. 3d 190, 193, 155 Cal. Rptr. 348*

Judgment creditor is not permitted to refuse to acknowledge satisfaction of judgment without just cause. *George S. Nolte Consulting Civil Eng'rs, Inc. v. Magliocco (1979) 93 Cal. App. 3d 190, 194, 155 Cal. Rptr. 348*

Order compelling plaintiffs to execute satisfaction of judgment, imposing penalty of $100 pursuant to former *Code Civ. Proc. § 675* (*now see Code Civ. Proc. § 724.050(e)*), and quashing writ of execution, was proper when joint judgment substantially satisfied by certain defendants to whom assignment by plaintiffs was made, since assignment was evidence of intent to release those defendants and release of some of joint tortfeasors constitutes release of all. *Bartneck v. Dunkin (1969) 1 Cal. App. 3d 58, 60-62, 81 Cal. Rptr. 428*

[3] Discharge by Payment or Compromise

Payment by the judgment debtor satisfies and extinguishes judgment. *Brochier v. Brochier (1941) 17 Cal. 2d 822, 826, 112 P.2d 602*

Tender of payment by judgment debtor does not satisfy judgment but is effective to stop running of interest on judgment. *Ferrea v. Tubbs (1899) 125 Cal. 687, 692, 58 P. 308* ; *Skelly v. Richman (1970) 10 Cal. App. 3d 844, 863, 89 Cal. Rptr. 556*

Satisfaction of compromise settlement judgment entered under *Code Civ. Proc. § 998* does not discharge liability of defendants who are not parties to settlement agreement. *Milicevich v. Sacramento Medical Center (1984) 155 Cal. App. 3d 997, 1000-1007, 202 Cal. Rptr. 484*

Payment of entire judgment by one joint tortfeasor discharges liability to plaintiff of other joint tortfeasor. *Burton v. Gardner Motors, Inc. (1981) 117 Cal. App. 3d 426, 431, 172 Cal. Rptr. 647*

Judgments are properly discharged through partial payment in accord and satisfaction. *Schwartz v. California Claim Serv. (1942) 52 Cal. App. 2d 47, 52-53, 125 P.2d 883*

[4] Discharge by Equitable Setoff

[a] Enjoining Execution Pending Determination of Setoff

Power of court to enjoin execution of judgment pending resolution of disputed claim as setoff rests within discretion of court considering such factors as the likelihood that judgment debtor will collect, probability and comparative amount of recovery, and ability of judgment creditor to respond should judgment be rendered against him or her on disputed claim. *Erlich v. Superior Court (1965) 63 Cal. 2d 551, 556, 47 Cal. Rptr. 473, 407 P.2d 649*

[b] Judgment Debtor's Right to Setoff

Judgment debtor who, by assignment or otherwise, becomes owner of claim against judgment creditor in equity or capable of having claim setoff against judgment. *Erlich v. Superior Court (1965) 63 Cal. 2d 551, 555, 47 Cal. Rptr. 473, 407 P.2d 649*

In action by subcontractor against issuer of general contractor's payment bond to recover on bond, in which subcontractor's suppliers assigned their right to contractor to collect amounts owed by subcontractor, and in which

judgment was entered for subcontractor against issuer of bond, trial court did not abuse discretion in holding that bond issuer should have calculated post-judgment interest before crediting itself with setoff from principal amount for amounts assigned by suppliers; under *Code Civ. Proc. § 695.220(c), (d),* which provides that money received in satisfaction of money judgment is to be credited against accrued interest remaining unsatisfied and only "remaining money" can then be credited against principal amount of judgment, there was no admissible evidence to suggest there was any enforceable election to offset those amounts at time judgment was entered and could not have been offset until much later when bankruptcy court determined that suppliers had been paid; under *Code. Civ. Proc. § 685.030(c),* which provides that if money judgment is partially satisfied, interest ceases to accrue as to part satisfied on date part is satisfied, bond issuer did not partially satisfy judgment until it gave up right to collect on its offsets by setting off those amounts against amount owed to subcontractor. *Wm. R. Clarke Corp. v. Safeco Ins. Co. of America (2000) 78 Cal. App. 4th 355, 92 Cal. Rptr. 2d 709*

Judgment debtor who has, by assignment or otherwise, become owner of judgment or claim against judgment creditor, as able to go into court in which judgment against debtor was rendered and have judgment offset against first judgment. *Highsmith v. Lair (1955) 44 Cal. 2d 298, 302, 281 P.2d 865* ; *Koffman v. Modern-Imperial Co. 239 Cal. App. 2d 135, 136, 48 Cal. Rptr. 492*

[c] Methods of Presenting Setoff

Judgment debtor who acquires claim or debt against judgment creditor as able to maintain equitable action for setoff. *Harrison v. Adams (1942) 20 Cal. 2d 646, 648-649, 128 P.2d 9*

One method of asserting right to offset judgment against claim as being motion of debtor in action in which judgment has been given in favor of creditor. *Norman v. Berney (1965) 235 Cal. App. 2d 424, 434, 45 Cal. Rptr. 467*

[d] Requirements

Fact that claim has not itself been reduced to judgment or that claim is not liquidated as not barring setoff against judgment so long as unliquidated claim has matured. *Erlich v. Superior Court (1965) 63 Cal. 2d 551, 555, 47 Cal. Rptr. 473, 407 P.2d 649*

Mutuality as essential to setoff; debtor as required to be beneficial owner of claim or judgment which he or she seeks to set off and not merely trustee on behalf of assignor who has retained equitable interest in thing assigned. *Norman v. Berney (1965) 235 Cal. App. 2d 424, 434, 45 Cal. Rptr. 467*

Debtor as anot able to set off judgment or claim held merely as assignee for purposes of collection. *Norman v. Berney (1965) 235 Cal. App. 2d 424, 434, 45 Cal. Rptr. 467*

[5] Vacating Satisfaction

Stipulated vacation of satisfaction of judgment as permissible in absence of intervening rights of third parties. *Southern Cal. Edison Co. v. Harnischfeger Corp. (1979) 99 Cal. App. 3d 9, 16, 160 Cal. Rptr. 23*

Payment of judgment, even though voluntary, as not terminating litigation unless such payment is made by way of compromise or with intent that payment is made to satisfy judgment and end litigation. *People ex rel Dep't of Public Works v. Richman (1966) 242 Cal. App. 2d 380, 384, 51 Cal. Rptr. 454*

After inadvertent payment of judgment by mistake, plaintiff as having right at any time after finality of order granting

new trial to return judgment money. *People ex rel Dep't of Public Works v. Richman (1966) 242 Cal. App. 2d 380, 384, 51 Cal. Rptr. 454*

Fraud, undue influence, and mistake as generally recognized grounds for vacating a satisfaction of judgment. *Remillard Brick Co. v. Dandini (1950) 98 Cal. App. 2d 617, 622, 220 P.2d 927*

Lack of consideration alone as constituting insufficient grounds for vacating satisfaction of judgment. *Remillard Brick Co. v. Dandini (1950) 98 Cal. App. 2d 617, 622, 220 P.2d 927*

Party of record as capable of having satisfaction of judgment which was entered in fraud of his or her rights set aside on motion in the action in which judgment is entered. *Wherry v. Rambo (1950) 97 Cal. App. 2d 569, 571, 218 P.2d 142*

[6] Voluntary Satisfaction as Waiver of Right to Appeal

Waiver of right to appeal as implied where there is voluntary compliance with judgment, such as when judgment debtor satisfies judgment by making payment to prevailing party under its terms. *Lee v. Brown (1976) 18 Cal. 3d 110, 115, 132 Cal. Rptr. 649, 553 P.2d 1121*

General rule as being that voluntary acceptance of benefit of judgment or order is bar to prosecution of appeal since right to accept fruits of judgment and right to appeal therefrom are wholly inconsistent; an election to take one as being a renunication of the other. *Lee v. Brown (1976) 18 Cal. 3d 110, 114, 132 Cal. Rptr. 649, 553 P.2d 1121*

Exception to general rule that acceptance of fruits of judgment constitutes bar to prosecution of appeal as existing where appellant is concededly entitled to benefits accepted and reversal will not affect right to those benefits. *Lee v. Brown (1976) 18 Cal. 3d 110, 115, 132 Cal. Rptr. 649, 553 P.2d 1121*

Waiver of right to appeal as applied in context of voluntary compliance only where compliance was by way of compromise or agreement not to take or prosecute appeal. *Lee v. Brown (1976) 18 Cal. 3d 110, 115, 132 Cal. Rptr. 649, 553 P.2d 1121*

When compliance arises under compulsion of risk or forfeiture, waiver of appeal as not implied where defendants may lose right to homestead exemption which they are entitled if they do not accept exemption funds before exhausting appeal rights and such acceptance may constitute waiver of right of appeal. *Lee v. Brown (1976) 18 Cal. 3d 110, 116-118, 132 Cal. Rptr. 649, 553 P.2d 1121*

If party to judgment accepts payment or satisfaction of part thereof favorable to him or her, and that part is of such character that the part adverse cannot be reversed without affecting the part favorable and requiring reversal of that part, the party so accepting the fruits of part of that judgment as estopped from prosecuting appeal from those parts unfavorable. *Mathys v. Turner (1956) 46 Cal. 2d 364, 366, 294 P.2d 947*

Plaintiff's acts in accepting payment and executing and authorizing filing of complete satisfaction as constituting waiver of right to appeal when recordation of abstract was voluntary, no court order directing satisfaction was issued, and tender of money and demand for satisfaction did not involve legal or economic compulsion. *Mathys v. Turner (1956) 46 Cal. 2d 364, 366* , P.2d 947

Erroneous belief of plaintiff that he or she was compelled to accept tender as not preventing satisfaction from operating as bar to prosecution of appeal in the absence of other factors indicating coercion. *Mathys v. Turner (1956) 46 Cal. 2d 364, 366, 294 P.2d 947*

Having to choose whether to file appeal to pursue greater award than judgment provided does not make choice to appeal involuntary. *Satchmed Plaza Owners Association v. UWMC Hospital Corporation (2008) 167 Cal. App. 4th 1034, 1042-1043, 84 Cal. Rptr. 3d 585*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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[Reserved]

§§ 318.263[Reserved]

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27-318 California Forms of Pleading and Practice--Annotated § 318.280

§ 318.280 State Statutes

Thing in action defined. *Civ. Code § 953*

Transfer of thing in action. *Civ. Code § 954*

Transfer of judgment right to assignee; perfection of right; priorities as to third parties. *Civ. Code § 954.5(a), (b)*

Filing of acknowledgment of assignment as not notice to judgment debtor. *Civ. Code § 954.5(c)*

In case of assignment of thing in action, action by assignee as being without prejudice to any setoff or other defense existing at time of or before notice of assignment. *Code Civ. Proc. § 368*

Action or proceeding as not abated by death or disability of party, or by transfer of interest therein, if the cause of action survives or continues; in case of transfer of interest, action or proceeding as continued in name of original party, or court may allow person to whom transfer is made to be substituted in action or proceeding. *Code Civ. Proc. § 368.5*

Procedure to become assignee of record; acknowledgment of assignment of judgment. *Code Civ. Proc. § 673*

Assignee of record as judgment creditor. *Code Civ. Proc. § 680.240*

Enforcement by assignee. *Code Civ. Proc. § 681.020*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewContracts LawPerformanceAssignmentGeneral Overview

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27-318 California Forms of Pleading and Practice--Annotated § 318.281

§ 318.281 Decisions

[1] Advisability of Assignee Giving Actual Notice to Judgment Debtor

Although assignee is not required to record assignment or give notice of it to third persons, if, in absence of actual notice of assignment, judgment debtor pays sums due to assignor, judgment debtor as protected from suit by assignee. *Curtin v. Kowalsky (1904) 145 Cal. 431, 434-435, 78 P. 962*

Mere filing of assignment of judgment as not operating to give constructive notice to judgment debtor. *Kaplan v. Hacker (1952) 113 Cal. App. 2d 571, 573, 248 P.2d 464*

[2] Assignment of Judgment on Tort Claim

While a strictly tort claim as not itself assignable, such claim when merged in a final judgment as debt and as capable of becoming subject of assignment. *Pacific Gas & Elec. Co. v. Nakano (1939) 12 Cal. 2d 711, 713, 87 P.2d 700*

[3] Assignment to One of Several Judgment Debtors

When no right to contribution or indemnification exists, as in case of joint tortfeasors, payment of judgment by one of several judgment debtors in exchange for assignment of judgment as not creating right to contribution nor preventing satisfaction of judgment from being entered. *Ramey v. Myers (1958) 159 Cal. App. 2d 82, 92, 323 P.2d 805*

When right contribution or indemnification exists, one of several judgment debtors as able to pay judgment creditor for assignment of judgment and thereby preserve his or her right to such contribution or indemnification. *Williams v. Riehl (1899) 127 Cal. 365, 368, 59 P. 762*

Payment to judgment creditor and assignment as required to be relatively contemporaneous so that it will not appear

that assignment is made to revive judgment already extinguished by payment. *National Bank v. Los Angeles Iron & Steel Co. (1906) 2 Cal. App. 659, 662, 84 P. 466*

[4] Effect of Assignment

Individual acquiring judgment by assignment as acquiring property right; right to enforce payment thereof as substantial right of ownership. *Michal v. Adair (1944) 66 Cal. App. 2d 382, 389, 152 P.2d 490*

Judgment as not a negotiable instrument, but a mere chose in action vesting equitable right in assignee to proceeds of judgment, with right to usual and legal means of collecting amount due on it. *Anglo-Cal. Trust Co. v. Oakland Rys. (1924) 193 Cal. 451, 469, 225 P. 452*

[5] Effect of Partial Assignment

Assignment of portion of judgment as having no effect against judgment debtor unless made with judgment debtor's consent or pursuant to ratification. *Buckeye Refining Co. v. Kelly (1912) 163 Cal. 8, 12, 124 P. 536*

As in the case of partial assignment of judgment, where assignee has only an equitable interest, assignee as bound to show affirmatively that judgment debtor had notice of equitable interest before paying to party holding legal title in an action for such funds. *Buckeye Refining Co. v. Kelly (1912) 163 Cal. 8, 13, 124 P. 536*

Assignee of part of judgment as protected against obligation of assignor to pay to assignee such sums as are due under assignment. *Rowe v. Holmes (1944) 63 Cal. App. 2d 46, 53, 146 P.2d 45*

[6] Executory Agreement to Pay Proceeds

Executory agreement to pay proceeds as not constituting assignment of judgment. *Ott Hardware Co. v. Davis (1913) 165 Cal. 795, 801, 134 P. 973*

[7] Power to Assign Judgments

Under statutes, no limitations as existing upon the power to assign judgments; such an assignment as carrying legal title to judgment. *Curtin v. Kowalsky (1904) 145 Cal. 431, 434, 78 P. 962*

Unsatisfied judgment as deemed thing in action. *Sunset Realty Co. v. Dadmun (1939) 88 P.2d 947*

[8] Requirements for Valid Assignment

Validity of assignment as generally governed by law of contracts. *Northern Counties Bank v. Earl Himovitz & Sons Livestock Co. (1963) 216 Cal. App. 2d 849, 855-856, 31 Cal. Rptr. 551*

Assignment of judgments as not required to be in writing. *Painter v. Berglund (1939) 31 Cal. App. 2d 63, 66, 87 P.2d 360*

Transfer of title to judgment as not dependent upon existence of valuable consideration. *Curtin v. Kowalsky (1904) 145 Cal. 431, 434, 78 P. 962*

Assignee of judgment as not required to file notice or in any other manner give notice to persons who may take successive assign ment; such persons, although bona fide purchasers for value, as not acquiring title superior to first assignee inasmuch as they would take nothing where assignor has no title to assign. *Curtin v. Kowalsky (1904) 145 Cal. 431, 435, 78 P. 962*

[9] Right of Judgment Debtor to Appeal Notwithstanding Assignment

Assignee of judgment as taking subject to right of defendant to present on appeal whatever arguments would have been made against assignor. *Northam v. Gordon (1863) 23 Cal. 255*

Assignee of judgment as properly prosecuting appeal in name of original plaintiff. *Kaplan v. Hacker (1952) 113 Cal. App. 2d 571, 573, 248 P.2d 464*

Where an assignment of judgment is based on action for a debt for which it was obtained, reversal of judgment as not affecting assignment of underlying debt upon which it was based. *North v. Evans (1934) 1 Cal. App. 2d 64, 67, 36 P.2d 133*

Actual notice as required to defeat right of debtor to setoff claims against creditor which were acquired after assignment of judgment to third person but prior to notice to debtor of assignment. *Highsmith v. Lair (1955) 44 Cal. 2d 298, 301, 281 P.2d 865*

Judgment debtor who has, by assignment or otherwise, become owner of judgment or claim against judgment creditor, as able to go into court in which judgment was rendered and have judgment setoff against first judgment. *Highsmith v. Lair (1955) 44 Cal. 2d 298, 301, 281 P.2d 865*

Assignee who does not give actual notice to defendant of assignment as not entitled to receive a notice of motions as a party unless actually substituted as a party under former *Code Civ. Proc. § 385* (*now see Code Civ. Proc. § 368.5*). *Kaplan v. Hacker (1952) 113 Cal. App. 2d 571, 573, 248 P.2d 464*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewContracts LawPerformanceAssignmentGeneral OverviewContracts LawTypes of ContractsExecutory Contracts

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§§ 318.282[Reserved]

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27-318 California Forms of Pleading and Practice--Annotated § 318.300

§ 318.300 State Statutes

[1] Domestic Judgments

Action on judgment as required to be commenced within 10 years. *Code Civ. Proc. § 337.5*

In pleading judgment, statement of facts conferring jurisdiction as not necessary, but such judgment as stated to have been duly given or made and final; if allegation of jurisdiction is controverted, party pleading fact as required to establish at trial facts conferring jurisdiction and creating finality. *Code Civ. Proc. § 456*

If action is brought to enforce judgment of other jurisdiction expressed in foreign money and judgment is enforceable in California, enforcing judgment must be entered as provided in *Code Civ. Proc. § 676.7*, whether or not foreign judgment confers option to pay in equivalent amount of United States dollars. *Code Civ. Proc. § 676.10(a)*

Judgment creditor's right to bring action on judgment commenced within statutory period. *Code Civ. Proc. § 683.050*

Action on domestic judgment to assert statutory right against joint debtor. *Code Civ. Proc. § 989*

When judgment is conclusive, judgment must be alleged in pleadings if there is opportunity to do so; if there is no opportunity, judgment used as evidence. *Code Civ. Proc. § 1908.5*

Judgments as evidence. *Evid. Code §§ 1301, 1302*

Proving judgment as official, recorded writing. *Evid. Code §§ 1530-1532*

Action on domestic judgment to assert statutory right against insurance company. *Ins. Code § 11580*

[2] Sister State Money-Judgments Act

Terms "judgment creditor," "judgment debtor," and "sister state judgment" defined. *Code Civ. Proc. § 1710.10*

Application by judgment creditor. *Code Civ. Proc. §§ 1710.15, 1710.20*

Entering judgment. *Code Civ. Proc. § 1710.25*

Serving notice of judgment. *Code Civ. Proc. § 1710.30*

Effect of judgment. *Code Civ. Proc. § 1710.35*

Motion to vacate judgment. *Code Civ. Proc. § 1710.40*

Issuance of writ of execution. *Code Civ. Proc. § 1710.45*

Stay of enforcement. *Code Civ. Proc. § 1710.50*

Restriction on entry. *Code Civ. Proc. § 1710.55*

Enforcing judgment. *Code Civ. Proc. § 1710.60*

Limitations on other actions. *Code Civ. Proc. § 1710.65*

[3] Former Uniform Foreign Money-Judgments Recognition Act

Terms "foreign state" and "foreign judgment" defined. Former *Code Civ. Proc. § 1713.1*

Applicability of Act. Former *Code Civ. Proc. § 1713.2*

Recognition and enforcement of judgments. Former *Code Civ. Proc. § 1713.3*

Nonrecognition of judgments. Former *Code Civ. Proc. § 1713.4*

Basis for personal jurisdiction. Former *Code Civ. Proc. § 1713.5*

Stay of enforcement for appeal. Former *Code Civ. Proc. § 1713.6*

Act does not preclude recognition of other foreign judgments not covered by statute. Former *Code Civ. Proc. § 1713.7*

[4] Uniform Foreign-Country Money Judgments Recognition Act

Definitions. *Code Civ. Proc. § 1714*

Application to foreign-country money judgment; burden of establishing entitlement of judgment to recognition. *Code Civ. Proc. § 1715*

Recognition required, precluded, discretionary. *Code Civ. Proc. § 1716*

Effect of lack of personal jurisdiction. *Code Civ. Proc. § 1717*

Procedure for seeking recognition. *Code Civ. Proc. § 1718*

Effect of finding that judgment entitled to recognition. *Code Civ. Proc. § 1719*

Effect of foreign appeal. *Code Civ. Proc. § 1720*

Limitations period for commencing action for recognition. *Code Civ. Proc. § 1721*

Promotion of uniformity among states enacting. *Code Civ. Proc. § 1722*

Effect of comity. *Code Civ. Proc. § 1723*

Actions to which Act applies and former Uniform Foreign Money-Judgments Recognition Act apply. *Code Civ. Proc. § 1724*

Legal Topics:

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

[1] Actions on Domestic Judgments

[a] Allegations Necessary for Complaint

In action on judgment, complaint is sufficient if it alleges that judgment sued upon was duly given and made and that payment on judgment has not been made. *Bronzan v. Drobaz (1892) 93 Cal. 647, 650, 29 P. 254*

[b] Availability of Alternative Enforcement

Judgment creditor can file action on a judgment as alternative to execution of judgment when the period for obtaining an execution of judgment has expired but the period for filing an action on the judgment has not and there is no other means of enforcing the judgment except by action on the judgment. *Barkley v. City of Blue Lake (1993) 18 Cal. App. 4th 1745, 1749, 1751, 23 Cal. Rptr. 2d 315* ; *Green v. Zissis (1992) 5 Cal. App. 4th 1219, 1222, 7 Cal. Rptr. 2d 406*

Fact that one may be entitled to enforce existing judgment by execution does not prohibit action to obtain new judgment on balance due upon former judgment; enforcement of judgment by execution and by action cannot properly be placed upon same basis since they are different in theory and results. *Turner v. Donovan (1942) 52 Cal. App. 2d 236, 240, 126 P.2d 187 , cert. denied, 317 U.S. 599, 63 S. Ct. 260, 87 L. Ed. 489*

Fact that judgment may be revived pursuant to former *Code Civ. Proc. § 685* (*now see Code Civ. Proc. §§ 683.110-683.220*) does not constitute bar to action on judgment. *Turner v. Donovan (1942) 52 Cal. App. 2d 236, 240, 126 P.2d 187 , cert. denied, 317 U.S. 599, 63 S. Ct. 260, 87 L. Ed. 489*

[c] Limitations Period

Ten-year statute of limitations to renew judgment under *Code Civ. Proc. § 337.5(3)* began to run on action to renew

stipulated judgment when trial court entered stipulated judgment, unless parties agreed to judgment for purpose of facilitating appeal; thus, trial court properly dismissed action to renew stipulated judgment because it was filed more than 10 years after entry of stipulated judgment and there was no indication parties agreed to judgment to facilitate appeal. *Cadle Co. II, Inc. v. Sundance Financial, Inc. (2007) 154 Cal. App. 4th 622, 624-626, 64 Cal. Rptr. 3d 824*

Defense of laches is not available in action on judgment, which is action at law; action on judgment may be commenced at any time within 10-year statute of limitations prescribed by *Code Civ. Proc. § 337.5(3)*. *United States Capital Corp. v. Nickelberry (1981) 120 Cal. App. 3d 864, 867-868, 174 Cal. Rptr. 814*

[d] Nature of Action

Action on judgment may be brought against local public entity defendant, if brought within 10 years after the judgment became final. *Barkley v. City of Blue Lake (1993) 18 Cal. App. 4th 1745, 1750-1751, 23 Cal. Rptr. 2d 315*

Action on judgment may be brought against private defendant, if brought within 10 years after the judgment became final. *Green v. Zissis (1992) 5 Cal. App. 4th 1219, 1222, 7 Cal. Rptr. 2d 406* ; *Pratali v. Gates (1992) 4 Cal. App. 4th 632, 636-637, 5 Cal. Rptr. 2d 733*

Action on judgment is an action based on contract in that the judgment becomes debt which judgment debtor is obligated to pay; law implies a contract on the part of judgment debtor to pay. *Minor v. Minor (1959) 175 Cal. App. 2d 277, 279, 345 P.2d 954*

Action on domestic judgment has long been recognized. *Thomas v. Thomas (1939) 14 Cal. 2d 355, 358, 94 P.2d 810*

Actions on domestic judgment are not limited to money judgments alone, but are also appropriate on a judgment for sale of property subject to lien or on decree enforceable by contempt. *Thomas v. Thomas (1939) 14 Cal. 2d 355, 358, 94 P.2d 810*

[e] Reasons for Bringing Action on Domestic Judgment

[i] To Extend Statutory Limitation on Period of Enforcement

Party who has failed to obtain necessary writ of execution and faces risk of passing 10-year period of limitation without obtaining writ is able to extend period during which such enforcement may be sought by bringing action on judgment; once action is begun, creditor's right to recover remains alive, even though 10-year period may have expired. *Alonso Inv. Corp., Inc. v. Doff (1976) 17 Cal. 3d 539, 545, 131 Cal. Rptr. 411, 551 P.2d 1243* ; *Atkinson v. Adkins (1928) 92 Cal. App. 424, 426, 268 P. 461*

[ii] To Foreclose Lien

Inasmuch as execution will not lie on judgment in which lien is expressly created by judgment on particular property in absence of some provision in judgment ordering sale of security, judgment creditor is required to bring separate action on judgment to foreclose lien created by judgment. *Roseburg Loggers, Inc. v. U.S. Plywood-Champion Papers, Inc. (1975) 14 Cal. 3d 742, 748, 537 P.2d 399* ; *Wellborn v. Wellborn (1942) 55 Cal. App. 2d 516, 520, 131 P.2d 48*

[iii] To Invoke Contempt Power of Another Court

Action on domestic judgment as allowed whenever plaintiff will secure some advantage by bringing action, including

convenience of prosecuting judgment through contempt powers of local forum rather than those of distant court. *Thomas v. Thomas (1939) 14 Cal. 2d 355, 358-359, 94 P.2d 810*

[iv] To Preserve Priority of Judgment Lien

Action on judgment as serving to preserve judgment lien. *Provisor v. Nelson, 44 Cal. Rptr. 894*

When judgment is rendered in action on a prior judgment, second judgment as regarded as an extension of the first such that it would be inequitable and unfair to hold priority of lien under first judgment lost. *Provisor v. Nelson (1965) 44 Cal. Rptr. 894*

[f] Requirement of Finality

Cause of action upon judgment does not accrue until judgment becomes final. *Hoover v. Galbraith (1972) 7 Cal. 3d 519, 526, 102 Cal. Rptr. 733, 498 P.2d 981*

Statute of limitations on cause of action on domestic judgment begins running only after date of judgment becomes final. *Turner v. Donovan (1942) 52 Cal. App. 2d 236, 239, 126 P.2d 187 , cert. denied, 317 U.S. 599, 63 S. Ct. 260, 87 L. Ed. 489*

[2] Actions on Sister State Judgments-Controlling Law

Law of sister state constructed in harmony with decisions of sister state's highest court. *In re Marriage of Moore (1993) 14 Cal. App. 4th 1472, 1480, 18 Cal. Rptr. 2d 543*

[3] Actions on Sister State Money Judgments

[a] Controlling Law

Full faith and credit is not required for judgment of another state where it would violate a fundamental state public policy. *Smith v. Superior Court (1996) 41 Cal. App. 4th 1014, 1024, 49 Cal. Rptr. 2d 20*

In action to enforce money judgment obtained outside California, court applyies governmental interest approach to determine what state's law to apply; under government interest approach *Code Civ. Proc. § 337.5(3)* (statute of limitations) applied to action to enforce New Mexico judgment when that state had no interest in having its law applied in California. *American Bank of Commerce v. Corondoni (1985) 169 Cal. App. 3d 368, 371-373, 215 Cal. Rptr. 331*

Differing public policy or laws of enforcing state does not contravene U.S. *Const., art. IV, § 1* (full faith and credit clause), and California, despite policy objections, is required to recognize judgment of another state as res judicata; adoption decree rendered by Oklahoma court and upheld by Oklahoma appellate court, which litigated issue of jurisdiction, was protected by full faith and credit clause in California matter to determine heirship to estate of intestate decedent. *Estate of Hart (1984) 165 Cal. App. 3d 392, 394-395, 397, 209 Cal. Rptr. 272*

Law of state where judgment rendered controls its validity and finality. *Smith v. Smith (1952) 115 Cal. App. 2d 92, 99, 251 P.2d 720*

Enforcement procedures of each state are peculiar to it; method of enforcement of foreign judgment is governed by law of forum. *Weir v. Corbett (1964) 229 Cal. App. 2d 290, 293, 40 Cal. Rptr. 161*

California courts apply the California statute of limitations to action on sister state judgment, regardless of the fact that local time limit is shorter than period of limitations of sister state. *Weir v. Corbett (1964) 229 Cal. App. 2d 290, 294, 40 Cal. Rptr. 161*

Enforcement of sister state judgment is determined in some instances according to more liberal standards in California. *Petersen v. Petersen (1972) 24 Cal. App. 3d 201, 206, 100 Cal. Rptr. 822*

[b] Generally

Federal court, required to give full faith and credit to state-court judgment as another court of that state would give, was precluded from issuing injunction against enforcement of state-court judgment determining res judicata issue based on prior federal action, and precluded from claiming relitigation exception of Anti-Injunction Act (*28 U.S.C. § 2283*), which only applies if state court has not yet ruled on merits of res judicata issue. *Parsons Steel v. First Alabama Bank (1986) 474 U.S. 518, 106 S. Ct. 768, 88 L. Ed. 2d 877, 883-884*

Challenges of correctness of state court's determination of conclusive effect of federal judgment can be pursued only by way of appeal through state-court system and certiorari from United States Supreme Court, and not by seeking injunction of state court determination from federal court. *Parsons Steel v. First Alabama Bank (1986) 474 U.S. 518, 106 S. Ct. 768, 88 L. Ed. 2d 877, 884-885*

Trial court properly denied motion to vacate California judgment made pursuant to *Code Civ. Proc. § 1710.40(a)*, which was based on New York judgment entered on confession of judgment, when confession of judgment satisfied due process and trial court properly granted full faith and credit to New York judgment, since while defendant's affidavit acknowledging consultation with counsel did not strictly satisfy California's attorney affidavit requirements of *Code Civ. Proc. § 1132*, given fact that case involved sophisticated parties represented by counsel, affidavit was sufficient to allow conclusion defendant voluntarily waived its rights to due process. *Capital Trust, Inc. v. Tri-National Development Corp. (2002) 103 Cal. App. 4th 824, 831, 127 Cal. Rptr. 2d 360*

Code Civ. Proc. § 1710.40 may not be construed to deny full faith and credit to a sister-state judgment on showing that there would have been valid defense to judgment if action had been initiated in California. *Washoe Dev. Co. v. Irving Sav. Ass'n (1996) 47 Cal. App. 4th 1518, 1523, 55 Cal. Rptr. 2d 479*

Sister State Money-Judgment Act [*Code Civ. Proc. §§ 1710.10-1710.65*] as constitutional in that judgment debtor is afforded right to nullify effect of foreign judgment in California before proposed California judgment is effectve to divest judgment debtor of any assets through execution. *Magalnick v. Magalnick (1979) 98 Cal. App. 3d 753, 759, 159 Cal. Rptr. 889*

Applicable statutes of limitations under Sister State Money-Judgments Act. *Epps v. Russell (1976) 62 Cal. App. 3d 201, 204, 133 Cal. Rptr. 30*

No greater effect can be given to any judgment of a court of one state, in another state, than is given to it in the state where rendered; usual and legitimate purpose, however, of suing on a foreign judgment is to reach assets which cannot be reached elsewhere, thus giving greater efficacy to judgment. *Weir v. Corbett (1964) 229 Cal. App. 2d 290, 294-295, 40 Cal. Rptr. 161*

[c] Grounds for Denying Enforcement of Sister State Judgment

[i] Generally

Action to enforce sister state judgment is not permitted absent allegation that defendant has not complied with terms of foreign decree. *Young v. Young (1950) 100 Cal. App. 2d 85, 86, 223 P.2d 25*

Effect of mistake of law in judgment rendered by sister state. *Harrah v. Craig (1952) 113 Cal. App. 2d 67, 70, 247 P.2d 855*

Denial of enforcement of sister state judgment based upon misconduct of plaintiff. *Kubon v. Kubon (1958) 51 Cal. 2d 229, 231, 331 P.2d 636*

[ii] Judgment Not Enforceable in State of Rendition

If judgment of sister state void for lack of jurisdiction and subject to collateral attack, judgment is not binding in *California. Farley v. Farley (1964) 227 Cal. App. 2d 1, 6, 38 Cal. Rptr. 357*

Full Faith and Credit Clause of Constitution [U.S. *Const., Art IV, § 1*] demands only that judgment of sister state receive as much recognition in California as it would in state rendering judgment. *Farley v. Farley (1964) 227 Cal. App. 2d 1, 6, 38 Cal. Rptr. 357*

Effect and validity judgment is not to be expanded by virtue of its being used as basis for California judgment. *Gilmer v. Spitalny (1948) 84 Cal. App. 2d 39, 44, 189 P.2d 744*

Res judicata effect of judgment rendered by sister state court within fundamental jurisdiction but which granted relief exceeding statutory limits. *Farley v. Farley (1964) 227 Cal. App. 2d 1, 38 Cal. Rptr. 357*

[iii] Judgment Void for Lack of Jurisdiction

Judgment void for lack of jurisdiction in Arizona is not enforceable in *California. Arizona Dept. of Revenue v. Yuen (2009) 179 Cal. App. 4th 169, 178-180, 101 Cal. Rptr. 3d 525*

Judgment void for lack of jurisdiction in sister state is not enforceable in *California. Airlines Reporting Corp. v. Renda (2009) 177 Cal. App. 4th 14, 19-22, 99 Cal. Rptr. 3d 66*

Trial court erred in granting defendants' motion to vacate Ohio default judgment, when there was no basis to conclude Ohio court acted in excess of its jurisdiction or that judgment was not enforceable in Ohio. Issue before trial court was whether, under Ohio law, prayer for relief of amount "in excess of" specified dollar amount would result in award of "no more than" than that dollar amount, and defendants, whose burden it was to establish that judgment was not enforceable in Ohio, failed to provide any Ohio authority to support their assertion that Ohio law provides that "in excess of" language in prayer for relief constituted ceiling rather than floor for recoverable damages. *Traci & Marx. Co. v. Legal Options, Inc. (2005) 126 Cal. App. 4th 155, 158-160, 23 Cal. Rptr. 3d 685*

Cognovit with warrant of attorney in bank's preprinted promissory note form authorizing attorney to confess judgment against debtor as insufficient without more to show voluntary and knowing waiver of due process rights to notice and hearing, and out-of-state judgment based thereon should be vacated under *Code Civ. Proc. § 1710.40* as in excess of jurisdiction. *Commercial Nat. Bank of Peoria v. Kermeen (1990) 225 Cal. App. 3d 396, 402, 275 Cal. Rptr. 122*

Defendant in action to enforce foreign judgment is permitted to show that foreign judgment is in excess of jurisdiction, but in case in which party objecting to foreign judgment had retained attorney in foreign state, personal jurisdiction of foreign state in subsequent dispute over attorney's fees is proper. *Vorys, Sater, Seymour & Pease v. Ryan (1984) 154*

Cal. App. 3d 91, 93-94, 200 Cal. Rptr. 858

Judgment rendered by Indiana court against California defendant was not void for lack of jurisdiction, and enforceable under Sister State Money-Judgments Act [*Code Civ. Proc. §§ 1710.10-1710.65*], when accident occurred in Indiana with defendant's vehicle, driven by defendant's minor, uninsured son. *Indiana Ins. v. Pettigrew (1981) 115 Cal. App. 3d 862, 864-868, 171 Cal. Rptr. 770*

Necessity of according full faith and credit to judgment of court of sister state which is valid and regular on its face. *Seabron v. Seabron (1955) 133 Cal. App. 2d 374, 375, 284 P.2d 117*

Judgment of sister state having no jurisdiction to render judgment is not entitled to full faith and credit and enforcement by another state. *Sanpietro v. Collins (1967) 250 Cal. App. 2d 203, 208, 58 Cal. Rptr. 219*

Invalidity of foreign judgment can be shown by extrinsic evidence, including evidence that process on which judgment was based was never served. *Nelson v. Horvath (1970) 4 Cal. App. 3d 1, 3, 84 Cal. Rptr. 101*

Enforcement of sister state judgments rendered in excess of sister state's jurisdiction. *Bierl v. McMahon (1969) 270 Cal. App. 2d 97, 103, 75 Cal. Rptr. 473*

[iv] Pending or Conditional Judgment

Necessity that judgment of sister state be final and unconditional. *Farmers & Merchants Trust Co. v. Madeira (1968) 261 Cal. App. 2d 503, 507, 68 Cal. Rptr. 184*

Oklahoma judgment, unstayed but under appeal in that state, is final for purpose of Full Faith and Credit Clause under U.S. *Const., Art IV, § 1*. *Little v. Stevens (1972) 23 Cal. App. 3d 112, 113-114, 99 Cal. Rptr. 885*

[d] Procedural Differences

Procedural matters as governed by law of forum state; terms "practice" and "procedure" as including mode of procedure by which legal right is enforced are distinguished from substantive law which gives or declares right; standard on appeal for test of waiver of jury trial is procedural matter determined by local rules. *World Wide Imports, Inc., v. Bartel (1983) 145 Cal. App. 3d 1006, 1012-1013, 193 Cal. Rptr. 830*

[e] Public Policy Differences

California court is required to give full faith and credit to sister state judgment if sister state had jurisdiction over parties and subject matter, and all interested parties were given reasonable notice and opportunity to be heard, even though strong public policy of California would have precluded recovery in California court on original claim. *Silbrico Corp. v. Raanan (1985) 170 Cal. App. 3d 202, 207-208, 216 Cal. Rptr. 201*

California is required under full faith and credit clause of U.S. Constitution to recognize judgment of another state as res judicata, regardless of policy objections, even though action or proceeding which resulted in judgment could not have been brought under law or policy of California. *World Wide Imports, Inc., v. Bartel (1983) 145 Cal. App. 3d 1006, 1011, 193 Cal. Rptr. 830*

[f] Satisfaction of Sister State Judgment

Plaintiff's cashing of defendant's check offered by defendant as full settlement of claim constituted accord and satisfaction under Tennessee law resulting in satisfaction of Tennessee judgment. *Harris v. EMI Tel. Programs, Inc. (1980) 102 Cal. App. 3d 214, 219, 162 Cal. Rptr. 357*

[g] Scope of Inquiry

Scope of inquiry regarding full faith and credit to sister state judgment was limited to question of whether or not forum court had jurisdiction in case; if jurisdiction over parties and subject matter proper, and all interested parties given reasonable notice and opportunity to be heard, full faith and credit must be given. *Silbrico Corp. v. Raanan (1985) 170 Cal. App. 3d 202, 207-208, 216 Cal. Rptr. 201*

On claim that foreign judgment not entitled to full faith and credit, permissible scope of inquiry is limited to determination of whether court of forum had fundamental jurisdiction in case; judgment rendered by one state must be recognized by another state if state of rendition had jurisdiction over parties and subject matter and all interested parties were given reasonable notice and opportunity to be heard. *World Wide Imports, Inc., v. Bartel (1983) 145 Cal. App. 3d 1006, 1010, 193 Cal. Rptr. 830*

[h] Types of Judgments Enforceable

New York money judgments reduced to final judgment in California under Sister State Money-Judgments Act (*Code Civ. Proc. § 1710.10 et seq.*) was not subject to collateral attack by action under Revised Uniform Reciprocal Enforcement of Support Act (*Code Civ. Proc. § 1650 et seq.*; repealed and replaced by Uniform Reciprocal Enforcement of Support Act, *Fam. Code § 4800 et seq.*, operative January 1, 1994) when California court had personal and subject matter jurisdiction and made final adjudication of claims. *McCallum v. McCallum (1987) 190 Cal. App. 3d 308, 310, 314-315, 235 Cal. Rptr. 396*

Ex-spouse's arrearages in support payments, reduced to money judgment in sister state, was a support order under *Code Civ. Proc. § 1653(k)* (repealed and replaced by *Fam. Code § 155*, operative January 1, 1994), and therefore not enforceable under *Code Civ. Proc. § 1710.10*. *Morris v. Cohen (1983) 149 Cal. App. 3d 507, 513-514, 196 Cal. Rptr. 834* (criticizing contrary holding in *Liebow v. Superior Court (1981) 120 Cal. App. 3d 573, 579-581, 175 Cal. Rptr. 26*)

Ex-spouse's aggregate arrears in support payments due under sister state divorce decree when reduced to a nonmodifiable money judgment was enforceable under *Code Civ. Proc. § 1710.10*, rather than being unenforceable support order within *Code Civ. Proc. § 1653(k)*. *Liebow v. Superior Court (1981) 120 Cal. App. 3d 573, 581, 175 Cal. Rptr. 26*

Attorney's fees and costs awarded to wife in New York judgment of dissolution were enforceable in California under Sister State Money-Judgments Act since they were not support as defined by *Code Civ. Proc. § 1653(k)*, but rather a final, nonmodifiable money judgment for liquidated sum. *Fishman v. Fishman (1981) 117 Cal. App. 3d 815, 818-822, 173 Cal. Rptr. 59*

Default judgment obtained in District of Columbia is enforceable sister state judgment. *Richard A. Viguerire Co. v. Noble (1980) 101 Cal. App. 3d 62, 64, 65, 161 Cal. Rptr. 435*

Child support order of sister state was enforceable when, although action was brought by the state, it could have been brought by plaintiff and was not essentially dissimilar to civil action in *California. Farmers & Merchants Trust Co. v. Madeira (1968) 261 Cal. App. 2d 503, 508, 68 Cal. Rptr. 184*

Enforcement of money judgment is proper subject of action to enforce sister state judgment. *Sanpietro v. Collins (1967) 250 Cal. App. 2d 203, 207, 58 Cal. Rptr. 219*

Enforcement of child custody decrees of other states is matter of comity, rather than of strict full faith and credit. *In re Walker (1964) 228 Cal. App. 2d 217, 221, 39 Cal. Rptr. 243*

Equity decrees accorded full faith and credit are equivalent to any other kind of judgment. *Rozan v. Rozan (1957) 49 Cal. 2d 322, 331, 317 P.2d 11*

Divorce decree issued by sister state is enforceable in California under Full Faith and Credit Clause of Constitution [U.S. Const., Art IV, § 1]. *Worthley v. Worthley (1955) 44 Cal. 2d 465, 466, 283 P.2d 19*

Sister state judgment adjudging rights in deficiency judgment is enforceable. *Gill v. Wolf (1948) 190 P.2d 52*

Decree of specific performance for the conveyance of real property in sister state is subject to enforcement by courts in which land is located as evidence of the equities determined unless impeached for fraud. *Redwood Inv. Co. v. Exley (1923) 64 Cal. App. 455, 459, 221 P. 973*

Penal judgment is not entitled to enforcement under Full Faith and Credit Clause of Constitution [U.S. Const., Art IV, § 1]. *Farmers & Merchants Trust Co. v. Madeira (1968) 261 Cal. App. 2d 503, 508, 68 Cal. Rptr. 184*

[4] Orders Appealable

Order vacating notice of exception to sureties and demand for justification and for sanctions, which was entered after order granting stay of execution of sister state money judgment, conditioned on filing of undertaking, is appealable order under *Code Civ. Proc. § 904.1*, since entry of judgment pursuant to *Code Civ. Proc. §§ 1710.10-1710.65* is final judgment, issues presented could not have been heard on appeal from judgment itself, and order affects enforcement of judgment. *Williams v. Thomas (1980) 108 Cal. App. 3d 81, 84-85, 166 Cal. Rptr. 141*

[5] Sister State Money-Judgments Act

Motion based on mistake, excusable neglect and inadvertence under *Code Civ. Proc. § 473* is procedural remedy, not defense, and therefore may not be utilized vacate entry of sister state judgment in California; when default judgment was entered after defendant failed to attend New Jersey trial because he was ill and hospitalized, appropriate method of attack is under California's Sister State Money Judgments Act, not Section 473 motion. *Liquidator of Integrity Ins. Co. v. Hendrix (1997) 54 Cal. App. 4th 971, 978, 63 Cal. Rptr. 2d 240*

Sister State Money-Judgments Act (*Code Civ. Proc. §§ 1710.10-1710.65*) was not applicable to enforcement of out of state judgment for child support arrearages, which must be registered under RURESA to be enforceable, because legislature intended that all foreign support orders be enforced under RURESA, despite language indicating that RURESA's remedies are cumulative. *Neuman v. Barbera (1985) 164 Cal. App. 3d 437, 442-443, 210 Cal. Rptr. 556*

Conservator of judgment creditor may file application for entry of judgment under *Code Civ. Proc. § 1710.15* on behalf of conservatee whether or not conservator is attorney licensed to practice in California. *Kessler v. Kessler (1983) 141 Cal. App. 3d 94, 97, 190 Cal. Rptr. 109*

Purpose of Sister State Money-Judgments Act is to provide simplified alternative to common-law action of *debt sur record* for establishing a foreign money judgment as enforceable judgment in California. *Epps v. Russell (1976) 62*

Cal. App. 3d 201, 203, 133 Cal. Rptr. 30

Filing of application to register sister state money judgment is governed by 10-year statute of limitations in *Code Civ. Proc. § 337.5*; such filing as tolling statute. *Epps v. Russell (1976) 62 Cal. App. 3d 201, 204, 133 Cal. Rptr. 30*

[6] Former Uniform Foreign Money-Judgments Recognition Act

Note:

The Uniform Foreign Money-Judgments Recognition Act [former *Code Civ. Proc. §§ 1713-1713.8* (repealed 1/1/08)] has been repealed and replaced by the Uniform Foreign-Country Money Judgments Recognition Act [*Code Civ. Proc. §§ 1713-1724*] effective January 1, 2008. However, the former Uniform Foreign Money-Judgments Recognition Act continues to apply to actions commenced before January 1, 2008, in which the issue of recognition of a foreign-country judgment is raised [*Code Civ. Proc. § 1724(b)*]. For discussion, see *§§ 318.183[1], 318.184[1]*.

[a] In General

Foreign state had sufficient personal jurisdiction over defendant under former *Code Civ. Proc. § 1713.5(b)* (repealed 1/1/08) to allow enforcement of foreign judgment when defendant had sufficient minimum contracts with foreign state to meet American due process standards. *Bank of Montreal v. Kough (9th Cir. 1980) 612 F.2d 467, 470, 471* (deciding issue which lacked California precedent)

Reciprocity is not required to enforce foreign judgment under Former Uniform Foreign Money-Judgments Recognition Act [former *Code Civ. Proc. §§ 1713-1713.8* (repealed 1/1/08)]. *Bank of Montreal v. Kough (9th Cir. 1980) 612 F.2d 467, 471-472* (deciding issue which lacked California precedent)

When foreign judgment is appealed, and foreign nation's law provides that judgment on appeal is not final, former *Code Civ. Proc. § 1713.2* (repealed 1/1/08) does not permit California court to recognize judgment. *Manco Contracting Company v. Bezdikian (2008) 45 Cal. 4th 192, 198-204, 85 Cal. Rptr. 3d 233, 195 P.3d 604*

Based on directive former *Code Civ. Proc. § 1713.3* (repealed 1/1/08) that foreign judgments be enforced in same manner as sister state judgments, 10-year statute of limitations applicable to actions on sister state judgments set forth in *Code Civ. Proc. § 337.5* also applies to actions on foreign judgments. *Manco Contracting Company v. Bezdikian (2008) 45 Cal. 4th 192, 204-210, 85 Cal. Rptr. 3d 233, 195 P.3d 604*

Attorney's fees award in foreign judgment not "penalty" and was not repugnant to public policy. *Java Oil Limited v. Sullivan (2008) 168 Cal. App. 4th 1178, 1186-1192, 86 Cal. Rptr. 3d 177*

In action to enforce in French judgment in California, trial court erred in enforcing only portion of French judgment and denying enforcement of portion of judgment to be paid "as a reserve" on ground that it was a provisional remedy not enforceable under Uniform Foreign Money-Judgments Recognition Act, when, under former *Code Civ. Proc. § 1713.2* (repealed 1/1/2008), French court awarded sum of money that was final judgment, and that judgment was immediately enforceable. *Societe Civile Succession Richard Guino v. Redstar Corp. (2007) 153 Cal. App. 4th 697, 702-706, 63 Cal. Rptr. 3d 224*

After plaintiffs obtained French judgment against defendants and sought to have judgment enforced in California under former Foreign Money-Judgments Act, trial court erred in denying defendants' motion to set aside judgment as void for lack of personal jurisdiction based on plaintiffs' failure to serve summons on defendants, when enforcement proceeding under Act was not special proceeding in which process was something other than summons, and plaintiffs' label of "Petition" on pleading was of no significance, and defendants' knowledge of action did not satisfy requirement of

adequate service of summons and complaint. Defendants' brief references to issues related to whether trial court correctly enforced French judgment did not constitute general appearance because defendants expressly adhered to their position that trial court had no personal jurisdiction over them. *Renoir v. Redstar Corp. (2004) 123 Cal. App. 4th 1145, 1149-1154, 20 Cal. Rptr. 3d 603*

Requirement that foreign money judgment be conclusive to be recognized and enforced in same manner as judgment of sister state is entitled to full faith and credit; judgment is not conclusive if foreign court did not acquire personal jurisdiction over defendant; when no informative notice was given defendant in English, documents and correspondence served on defendant did not give him sufficient notice of pending Swiss action and consequently Swiss court never acquired basis on which to adjudicate claim of personal jurisdiction over defendant; trial court properly granted defendant's motion for summary judgment in action under former Uniform Foreign Money-Judgments Recognition Act [former *Code Civ. Proc. §§ 1713-1713.8* (repealed 1/1/08)]. *Julen v. Larson (1972) 25 Cal. App. 3d 325, 327-330, 101 Cal. Rptr. 796*

Foreign judgment is not required to be recognized if cause of action or defense on which judgment is based is repugnant to public policy of state. *Pentz v. Kuppinger (1973) 31 Cal. App. 3d 590, 597, 107 Cal. Rptr. 540*

Where judgment debtor provides adequate security for payment of judgment and no prejudice to creditors appears, refusal of stay of enforcement is abuse of discretion. *Stevens v. Superior Court (1972) 28 Cal. App. 3d 1, 4, 104 Cal. Rptr. 369*

[b] Satisfaction of California Judgment Establishing Foreign Judgment

When Canadian judgment against defendant expressed in Canadian dollars was established against defendant in California under former Uniform Foreign Money-Judgments Recognition Act (former *Code Civ. Proc. §§ 1713-1713.8* (repealed 1/1/08)), California judgment stated amount to be recovered in American dollars using exchange rate in effect at time of Canadian judgment, number of dollars awarded was greater in value than current value of Canadian dollars, and defendant subsequently satisfied Canadian judgment in Canada with Canadian dollars, trial court as properly ordering satisfaction of California judgment in full, over plaintiff's objection that defendant's payment was deficient due to intervening fall in value of Canadian dollar against American dollar. *Pecaflor Construction Co. v. Landes (1988) 198 Cal. App. 3d 342, 344-345, 243 Cal. Rptr. 605*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign Judgments

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27-318 California Forms of Pleading and Practice--Annotated § 318.302

§ 318.302 Law Reviews

Pielemeier, *Why We Should Worry About Full Faith and Credit to Laws, 60 S. Cal. L. Rev. 1299 (1987)*

Vetter, *Of Tribal Courts and "Territories": Is Full Faith and Credit Required? 23 Cal. W.L. Rev. 219 (1987)*

Whitten, *The Constitutional Limitations on State Choice of Law: Due Process, 9 Hastings Const. L.Q. 851 (1982)*

Feldman, "The Sister State and Foreign-Money Judgments Act of 1974," 50 State BJ 483 (1975)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 318.303 Text References

Witkin, California Procedure, vol. 8, *Enforcement of Judgment*, § 405 et seq. (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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[Reserved]

§§ 318.304[Reserved]

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PART IV. FORMS
A. Obtaining And Entering Judgments

27-318 California Forms of Pleading and Practice--Annotated § 318.320

§ 318.320 Proceedings to Obtain Judgment by Confession [Code Civ. Proc. §§ 1132-1135]--Attorney's Declaration in Support of Statement Confessing Judgment [Code Civ. Proc. § 1132(b)]

[1] FORM Proceedings to Obtain Judgment by Confession [Code Civ. Proc. §§ 1132-1135]--Attorney's Declaration in Support of Statement Confessing Judgment [Code Civ. Proc. § 1132(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Confession of Judgment by _____ [*name*], Defendant, vs. _____ [*name*], Plaintiff.	)))))))	NO. _____ ATTORNEY'S DECLARATION IN SUPPORT OF STATEMENT CONFESSING JUDGMENT

I, _____ [*name*], declare:

I am an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ [*name of defendant*], the party confessing judgment in the above-entitled cause.

I further declare that I have examined the proposed judgment and have advised _____ [*name of defendant*] with respect to the waiver of rights and defenses under the confession of judgment procedure and have advised _____ [*name of defendant*] to utilize the confession of judgment procedure.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

This form of declaration is for use in supporting a statement confessing judgment. A judgment by confession may be entered only if an attorney independently representing the defendant signs a certificate that he or she has examined the proposed judgment and has advised the defendant with respect to the waiver of rights and defenses under the confession of judgment procedure and has advised the defendant to utilize the confession of judgment procedure. The certificate is required to be filed along with the statement confessing judgment [*Code Civ. Proc. § 1132(b)*].

[3] Constitutionality

In a case not involving the attorney's certificate required by *Code Civ. Proc. § 1132(b)*, the Supreme Court held that the confession of judgment procedure authorized by *Code Civ. Proc. §§ 1132-1134* violates the *due process clause of the Fourteenth Amendment* by providing insufficient safeguards to assure that the debtor executed a voluntary, knowing, and intelligent waiver of his or her due process rights [*Isbell v. Sonoma County (1978) 21 Cal. 3d 61, 75, 145 Cal. Rptr. 368, 577 P.2d 188]* . The court specifically noted that it was not deciding the constitutionality of that procedure in a case where the required attorney's certificate is filed [*Isbell v. Sonoma County (1978) 21 Cal. 3d 61, 74 n. 7, 145 Cal. Rptr. 368, 577 P.2d 188]* .

[4] Decisions

Judgment by confession is entered only on certification of advisement of debtor's rights by attorney independently representing defendant debtor. *Wax v. Infante (1982) 138 Cal. App. 3d 138, 140-141, 187 Cal. Rptr. 686*

[5] Cross References

For related forms, see *§§ 318.321* and *318.322*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.321

§ 318.321 Proceedings to Obtain Judgment by Confession [Code Civ. Proc. §§ 1132-1135]--Statement Confessing Judgment [Code Civ. Proc. § 1133]--General Form

[1] FORM Proceedings to Obtain Judgment by Confession [Code Civ. Proc. §§ 1132-1135]--Statement Confessing Judgment [Code Civ. Proc. § 1133]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Confession of Judgment by	)	
_____ [*name*],	)	NO. _____
Defendant,	)	CONFESSION OF JUDGMENT STATEMENT
In Favor of	)	
_____ [*name*],	)	
Plaintiff.	)	
	)	

_____

I, _____ [*name of defendant*], hereby confess judgment in the above-entitled cause in favor of plaintiff in the sum of $_____, and authorize entry of judgment against me in that sum.

[*EITHER*]

[*If for money due or to become due, allege:* This confession of judgment is for a debt _____ (justly due *or* to become due) and arises out of the following factual situation: _____ (*set out facts giving rise to obligation*).]

[*OR*]

[*If for the purpose of securing contingent liability, allege:* This confession of judgment is for the purpose of securing a contingent liability which arises out of the following facts: _____ (*state facts which constitute such liability and show that the sum confessed does not exceed that amount*).]
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]
_____ [*signature*]
Defendent

VERIFICATION

I, _____ [*name*], am the defendant in the above-entitled cause. I have read the foregoing statement and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of statement is for use by a defendant in confessing judgment [*see Code Civ. Proc. § 1133*]. The statement must be accompanied by an attorney's certificate substantially as shown in *see § 318.320* [*see Code Civ. Proc. § 1132(b)*].

[3] Constitutionality

In a case not involving the attorney's certificate required by *Code Civ. Proc. § 1132(b)*, the Supreme Court held the confession of judgment procedure authorized by *Code Civ. Proc. §§ 1132-1134* to be unconstitutional [*Isbell v. Sonoma County (1978) 21 Cal. 3d 61, 75, 145 Cal. Rptr. 368, 577 P.2d 188]* . See Comments to *see § 318.320*.

[4] Filing of Statement

The statement must be filed with the clerk of the court in which the judgment is to be entered, who must endorse upon it, and enter a judgment of the court for the amount confessed with the costs as provided in *Code Civ. Proc. § 1134(b)* [*Code Civ. Proc. § 1134(a)*].

[5] State Statutes

Confession of judgment generally. *Code Civ. Proc. §§ 1132-1134*

Requirements of confession of judgment statement generally. *Code Civ. Proc. § 1133*

Procedure as to filing, endorsement, and entry of judgment by confession. *Code Civ. Proc. § 1134*

[6] Decisions

Confession of judgment procedure established in *Code Civ. Proc. §§ 1132(a), 1133,* and *1134* violates due process clause of *U.S. Const., amend. XIV*, by providing insufficient safeguards to assure that debtor executed voluntary, knowing, and intelligent waiver of due process rights. *Isbell v. County of Sonoma (1978) 21 Cal. 3d 61, 65, 145 Cal. Rptr. 368, 577 P.2d 188*

Necessity for defendant's signature and verification of confession of judgment statement. *Barnes v. Hilton (1953) 118 Cal. App. 2d 108, 109, 257 P.2d 98*

Reversible error of trial court in denying plaintiff's motion to set aside judgment by confession where fee for filing statement of confession required by *Code Civ. Proc. § 1134* not paid by plaintiff but by defendant or some third person without knowledge or consent of plaintiff and plaintiff did not consent to entry of judgment; plaintiff's silence and failure to object for five months as not amounting to acceptance. *Mechanics Bank of Richmond v. Thole (1971) 20 Cal. App. 3d 884, 886-889, 98 Cal. Rptr. 82*

Consent in advance by debtor to judgment without notice or hearing as not, per se, violative of due process requirement of *Fourteenth Amendment of U. S. Constitution*. *D.H. Overmyer Co. v. Frick Co. (1972) 405 U.S. 174, 92 S. Ct. 775, 31 L. Ed. 2d 124* ; *Swarb v. Lennox (1972) 405 U.S. 191, 92 S. Ct. 767, 31 L. Ed. 2d 138*

[7] Text References

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, §§ 102-105 (4th ed. 1997)

[8] Cross References

For related forms, *see §§ 318.320* and *318.322*.

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§ 318.322 Proceedings to Obtain Judgment by Confession [Code Civ. Proc. §§ 1132-1135]--Judgment [Code Civ. Proc. § 1134]

[1] FORM Proceedings to Obtain Judgment by Confession [Code Civ. Proc. §§ 1132-1135]--Judgment [Code Civ. Proc. § 1134]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the Confession of Judgment by	)	
_____ [*name*],	)	NO. _____
Defendant,	)	JUDGMENT
In Favor of	)	
_____ [*name*],	)	
Plaintiff.	)	
	)	

_____

Pursuant to the confession of judgment statement on file herein, the above-entitled court ordered the following judgment to be entered in the above-entitled cause:

IT IS ADJUDGED that plaintiff _____ [*name*] recover from defendant _____ [*name*] the following:

1. Principal in the amount of $_____;

2. Interest from _____ [*date*], to date in the amount of $_____;

3. Costs in the amount of $_____.
Dated: _____.

_____ [*signature*]
Clerk
By _____ [*signature*]
Deputy

[2] Use of Form

This form of judgment is for use by a plaintiff who has obtained a statement confessing judgment from a defendant [*see Code Civ. Proc. § 1133*]. Printed forms of such judgments are available and used in many counties.

[3] Constitutionality

In a case not involving the attorney's certificate required by *Code Civ. Proc. § 1132(b)* [*see § 318.320*], the Supreme Court held the confession of judgment procedure authorized by *Code Civ. Proc. §§ 1132-1134* to be unconstitutional [*Isbell v. Sonoma County (1978) 21 Cal. 3d 61, 75, 145 Cal. Rptr. 368, 577 P.2d 188]* . See Comments to *see § 318.320*.

[4] Entry of Judgment

The statement confessing judgment [*see § 318.321*] must be filed with the clerk of the court in which the judgment is to be entered. The clerk must endorse upon it, and enter a judgment of the court, for the amount confessed, with the costs provided in *Code Civ. Proc. § 1134(b)* [*Code Civ. Proc. § 1134(a)*].

[5] Fees

At the time of filing, the plaintiff must pay, as court costs that become a part of the judgment, a fee prescribed by statute [*see Code Civ. Proc. § 1134(b)*]. No fee may be collected from the defendant [*Code Civ. Proc. § 1134(b)*]. The statement and affidavit, with the judgment endorsed on them, together with the certificate filed pursuant to *Code Civ. Proc. § 1132*, become the judgment roll [*Code Civ. Proc. § 1134(c)*].

[6] State Statutes

Entry of judgment after filing of statement confessing judgment; fees; judgment roll. *Code Civ. Proc. § 1134*

[7] Cross References

For related forms, *see §§ 318.320* and *318.321*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.323

§ 318.323 Proceedings for Entry of Judgment Pursuant to Terms of Stipulated Settlement [Code Civ. Proc. § 664.6] --Stipulation to Settlement of All or Part of Case

[1] FORM Proceedings for Entry of Judgment Pursuant to Terms of Stipulated Settlement [Code Civ. Proc. § 664.6]--Stipulation to Settlement of All or Part of Case

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	STIPULATION FOR SETTLEMENT
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Dept: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

IT IS HEREBY STIPULATED by and between plaintiff _____ [*name*] and defendant _____ [*name*] through their respective counsel, that _____ [the case *or* part of the case] has been settled pursuant to *Code Civ. Proc. § 664.6* on the following terms: _____ [*specify terms e.g.*, dismissal of plaintiff's second cause of action, *or* for the sum of $_____, and for costs of suit in the amount of $_____]. [The respective parties shall each bear their own costs.] [The parties request that the court retain jurisdiction over them to enforce the settlement until performance in full of its terms.]
Dated: _____.

By:_____[*signature*]
_____ Plaintiff [*typed name*]
By:_____ [*signature*]
_____ Defendant [*typed name*]
By:_____ [*signature*]
_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff_____
_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____

[2] Use of Form

This form is for use by plaintiff and defendant to stipulate in writing to settlement of all or part of the case pending litigation [*Code Civ. Proc. § 664.6*]. Both parties and their attorneys should sign it. For a form of notice of motion for entry of the judgment on this stipulation, see *§ 318.324*. For a form of order for entering a stipulated judgment, see *§ 318.325*. For a form for use after an oral motion that combines the stipulation and order for entering judgment, see *§ 318.326*. For a form for entering a stipulated judgment payable in installments, see *§ 318.327*. For a form for entry of a separate judgment on stipulation, see *§ 318.328*.

[3] Cross References

For a related form, see *§ 318.326*.

[4] Decisions

Judgment omitting material terms of parties' settlement failed to accurately reflect their agreement and therefore failed to comply with *Code Civ. Proc. § 664.6*. *Hines v. Lukes (2008) 167 Cal. App. 4th 1174, 1185, 84 Cal. Rptr. 3d 689*

Code Civ. Proc. § 664.6 as making it unnecessary to file motion for summary judgment to enforce oral settlement agreement, even when material facts of the purported agreement are in dispute; Legislature has endorsed use of "speaking motions" to enforce disputed agreements by enacting *Code Civ. Proc. § 664.6*. *Richardson v. Richardson (1986) 180 Cal. App. 3d 91, 96, 225 Cal. Rptr. 370*

Code Civ. Proc. § 664.6 as authorizing what was formerly nonstatutory speaking motion and making it applicable to oral or written settlement stipulations; motion for entry of judgment pursuant to settlement as allowed under *Code Civ. Proc. § 664.6*. *Corkland v. Boscoe (1984) 156 Cal. App. 3d 989, 994-995, 203 Cal. Rptr. 356*

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27-318 California Forms of Pleading and Practice--Annotated § 318.324

§ 318.324 Proceedings for Entry of Judgment Pursuant to Terms of Stipulated Settlement [Code Civ. Proc. § 664.6]--Notice of Motion [Code Civ. Proc. § 1010]

[1] FORM Proceedings for Entry of Judgment Pursuant to Terms of Stipulated Settlement [Code Civ. Proc. § 664.6]--Notice of Motion [Code Civ. Proc. § 1010]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION FOR ENTRY OF JUDG-
vs.	)	MENT PURSUANT TO TERMS OF STIPULATED
_____ [*name*],	)	SETTLEMENT
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant] will move for an order to enter judgment pursuant to the terms of the stipulated settlement of _____ [the case *or* part of the case]. The motion will be made on the grounds that the

parties have entered into a stipulation pursuant to *Code Civ. Proc. § 664.6* on the following terms: _____ [*specify terms, e.g.,* dismissal of plaintiff's second cause of action, *or* for the sum of $_____, and for costs of suit in the amount of $_____]. [The respective parties shall each bear their own costs.] [The parties request that the court retain jurisdiction over them to enforce the settlement until performance in full of its terms.]

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

CAUTION:

A memorandum is required to be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005(b), 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*].

[2] Use of Form

This notice of motion is for use by any party to move for entry of judgment pursuant to the terms of a settlement stipulated to by defendant and plaintiff. [*Code Civ. Proc. § 664.6*]. For a form in writing to stipulate to a settlement, see *§ 318.323*. For a form of order for entering a stipulated judgment, see *§ 318.325*. For a form for use after an oral motion that combines a stipulation in writing and an order for entering judgment, see *§ 318.326*. For a form for entering a stipulated judgment payable in installments, see *§ 318.327*. For a form for entry of a separate judgment on stipulation, see *§ 318.328*.

[3] Cross References

For a related form, see *§ 318.326*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.325

§ 318.325 Proceedings for Entry of Judgment Pursuant to Terms of Stipulated Settlement [Code Civ. Proc. § 664.6] --Order [Code Civ. Proc. § 1003] Granting Motion

[1] FORM Proceedings for Entry of Judgment Pursuant to Terms of Stipulated Settlement [Code Civ. Proc. § 664.6]--Order [Code Civ. Proc. § 1003] Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.*, defendant] for an order to enter judgment pursuant to a stipulated settlement pursuant to *Code Civ. Proc. § 664.6* came on regularly for hearing by the court on _____, 19 _____. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that judgment be entered _____ [

describe judgment to be entered, e.g., dismissing plaintiff's second cause of action, *or* for the sum of $_____, and for costs of suit in the amount of $_____] pursuant to the terms of the settlement stipulated to by defendant and plaintiff. [The respective parties shall each bear their own costs.] The judgment entered pursuant to this stipulation _____ [shall *or* shall not] accrue interest. [The court retains jurisdiction over the parties at their request in order to enforce the settlement until performance in full of its terms.]
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use for entering a judgment pursuant to the terms of a settlement stipulated to by defendant and plaintiff [*see Code Civ. Proc. § 664.6*]. For a form in writing to stipulate a settlement, *see § 318.323*. For a form of notice of motion for entry of judgment pursuant to the terms of a stipulated settlement, see *§ 318.324*. For a form for use after an oral motion that combines a stipulation in writing and an order for entering judgment, see *§ 318.326*. For a form for entering a stipulated judgment payable in installments, see *§ 318.327*. For a form for entry of a separate judgment on stipulation, see *§ 318.328*.

[3] Cross References

For a related form, see *§ 318.326*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.326

§ 318.326 Stipulation for Entry of Judgment Pursuant to Terms of Stipulated Settlement [Code Civ. Proc. § 664.6] and Order [Code Civ. Proc. § 1003] Granting Motion

[1] FORM Stipulation for Entry of Judgment Pursuant to Terms of Stipulated Settlement [Code Civ. Proc. § 664.6] and Order [Code Civ. Proc. § 1003] Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	STIPULATION FOR
vs.	)	SETTLEMENT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Trial Date: _____
	)	

_____

IT IS HEREBY STIPULATED by and between plaintiff _____ [*name*] and defendant _____ [*name*] through their respective counsel, that _____ [the case *or* part of the case] has been settled pursuant to *Code Civ. Proc. § 664.6* on the following terms as stipulated by defendant and plaintiff: _____ [*specify terms, e.g.*, dismissal of plaintiff's second cause of action, *or* for the sum of $_____, and for costs of suit in the amount of $_____]. [The respective parties shall each bear their own costs.] [The parties request that the court retain jurisdiction over them in order to enforce the settlement until performance in full of its terms.]
Dated: _____.

By: _____[*signature*]
_____ Plaintiff [*typed name*]
By: _____ [*signature*]
_____ Defendant [*typed name*]
By: _____ [*signature*]
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____

ORDER

IT IS ORDERED that judgment be entered pursuant to the terms of the stipulated settlement between the parties, as follows: _____ [*describe judgment to be entered, e.g.,* dismissing plaintiff's second cause of action, *or* for the sum of $_____, and for costs of suit in the amount of $_____] pursuant to the terms of the settlement stipulated to by defendant and plaintiff. [The respective parties shall each bear their own costs.] The judgment entered pursuant to this stipulation _____ [shall *or* shall not] accrue interest. [The court retains jurisdiction over the parties at their request in order to enforce the settlement until performance in full of its terms.]
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of stipulation and order is for use in entering a judgment pursuant to a stipulation between the parties after an oral motion and without the filing of a notice of motion. Both parties and their attorneys should sign it. For a form of notice of motion to move for entry of judgment pursuant to the terms of a settlement, *see § 318.324*.

A stipulation may be a writing signed by the parties outside the presence of the court [*Code Civ. Proc. § 664.6*]. For a form in writing to stipulate a settlement that does not include the order, *see § 318.323*. The parties may also agree to a stipulated settlement orally before the court [*Code Civ. Proc. § 664.6*; *see § 318.324*, for a form of order that can be used with an oral stipulation *see § 318.323*]. The parties may request that the court retain jurisdiction over the parties to enforce the settlement until its terms are fully performed [*Code Civ. Proc. § 664.6*; *see § 318.327*, for a form for entering a stipulated judgment payable in installments].

Local court procedure may require that if the parties enter into a written stipulation for judgment, the form of the proposed judgment to be signed and filed should be a separate document [*see, e.g.,* Los Angeles Super. Ct. Rules, Rule 8.97]. In such instances, the attached form of order in the foregoing form should not be used and a separate form of judgment on stipulation for entry of judgment in *see § 318.328* should be used. A copy of the proposed judgment may be attached as an exhibit to, or incorporated by recital in, the stipulation.

[3] Cross References

For discussion and forms relating to setting aside stipulations, see Ch. 533, *Stipulations* , see §§ 318.322-318.329.

For discussion of motions under *Code Civ. Pro. § 664.6*, see Ch. 520, *Settlement and Release* .

[4] State Statutes

Power of attorney to bind client. *Code Civ. Proc. § 283*

Judgment by stipulation. *Code Civ. Proc. § 664.6*.

Judgment by stipulation--bringing up stay basis reserved argument. *Code Civ. Proc. § 665*.

[5] Decisions

Stipulation constitutes agreement between attorneys. *Baker v. Solari (1958) 166 Cal. App. 2d 472, 475, 333 P.2d 791*

Necessity that client authorize attorney to enter into stipulation for judgment. *Bice v. Stevens (1958) 160 Cal. App. 2d 222, 232, 325 P.2d 244*

Judgment based on a stipulation of the parties is binding only as to the matter consented to by the stipulation and as confined only to those issues within the stipulation. *Larsen v. Beekmann (1969) 276 Cal. App. 2d 185, 191, 80 Cal. Rptr. 654*

Judgment by consent in an action in which the court had jurisdiction of the subject matter and of the parties is res judicata and conclusive between the parties and those deriving under them and as binding them and those claiming under them as efficaciously as if it had been entered after trial of the issues. *Avery v. Avery (1970) 10 Cal. App. 3d 525, 529, 89 Cal. Rptr. 195*

Consent to the entry of judgment is waiver of any error and as not disturbed on appeal by the party who expressly consented to the making of it. *Browand v. Scott Lbr. Co. (1954) 125 Cal. App. 2d 68, 73, 269 P.2d 891*

Judgment which awards greater relief than that to which parties have agreed by their written stipulation is void beyond jurisdiction of court and as subject to collateral attack. *Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 847, 131 Cal. Rptr. 674*

If judgment is simply erroneous, even though error appears on the face of the judgment or record, judgment on stipulation is not subject to collateral attack. *Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 840, 131 Cal. Rptr. 674*

[6] Text References

Witkin, California Procedure (2d ed), Vol. 4, *Proceedings Without Trial*, § 158

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27-318 California Forms of Pleading and Practice--Annotated § 318.327

§ 318.327 Proceedings for Entry of Judgment Pursuant to Terms of Stipulated Settlement [Code Civ. Proc. § 664.6]--Stipulation for Judgment Payable in Installments

[1] FORM Proceedings for Entry of Judgment Pursuant to Terms of Stipulated Settlement [Code Civ. Proc. § 664.6]--Stipulation for Judgment Payable in Installments

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	STIPULATION FOR JUDGMENT PAYABLE IN
vs.	)	INSTALLMENTS
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Trial Date: _____

_____

IT IS HEREBY STIPULATED by and between plaintiff _____ [*name*] and defendant _____ [*name*] through their respective counsel, that _____ [the case *or* part of the case] has been settled pursuant to *Code Civ. Proc. § 664.6* for the sum of $_____, _____ [*set out terms of payment, including the dollar amount payable by each defendant, if appropriate, the date of commencement, and the frequency and duration of payment, and whether costs are included e.g.*, payable at the rate of $_____ per month for a period of _____ months, first payment to be made _____ days after the entry of judgment to this stipulation, together with costs of suit in the amount of $_____]. [The respective parties shall each bear their own costs.]

The judgment entered pursuant to this stipulation _____ [shall *or* shall not] accrue interest. Execution on the judgment shall be stayed provided that defendant regularly pays the installments in the manner provided herein. The parties request that the court retain jurisdiction over them to enforce the settlement until performance in full of its terms.
Dated: _____.

By: _____[*signature*]
Plaintiff _____ [*typed name*]
By: _____[*signature*]
Defendant _____ [*typed name*]
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____

[2] Use of Form

This form of stipulation for entry of judgment is for use when the judgment is to be paid in installments pursuant to *Code Civ. Proc. § 664.6*. Every judgment providing for periodic payment to a party or attorney should state the amount payable to each individual, the date of commencement, and the frequency and duration of payment [*see, e.g.*, Los Angeles Super. Ct. Rules, Rule 3.0(d)]. Both parties and their attorneys should sign it. For a form of notice of motion for entry of a stipulated judgment, see *§ 318.324*. For a form of order for entering a stipulated judgment, see *§ 318.325*. For a general form for use after an oral motion that combines the stipulation and order for entering judgment, see *§ 318.326*. For a form for entry of a separate judgment on stipulation, see *§ 318.328*.

[3] Cross References

For a related form, see *§ 318.326*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.328

§ 318.328 Proceedings for Entry of Separate Judgment Pursuant to Terms of Stipulated Settlement [Code Civ. Proc. § 664.6]

[1] FORM Proceedings for Entry of Separate Judgment Pursuant to Terms of Stipulated Settlement [Code Civ. Proc. § 664.6]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

	)	
	)	NO. _____
_____ [*name*],	)	SEPARATE JUDGMENT ON STIPULATION FOR
Plaintiff,	)	ENTRY OF JUDGMENT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Trial Date: _____

_____

In the above entitled cause, plaintiff _____ [*name*] and defendant _____ [*name*] having stipulated through their respective counsel, that judgment be entered _____ [*describe judgment to be entered, e.g.,* dismissing plaintiff's second cause of action, *or* for the sum of $_____, and for costs of suit in the amount of $_____]. [The respective parties shall each bear their own costs.]

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that judgment be entered _____ [*describe judgment to be entered, e.g.,* dismissing plaintiff's second cause of action, *or* for the sum of $_____, and for costs of suit in the amount of $_____] pursuant to the terms of the settlement stipulated to by defendant and plaintiff. [The respective parties shall each bear their own costs.] The

judgment entered pursuant to this stipulation _____ [shall *or* shall not] accrue interest. [The court retains jurisdiction over the parties at their request in order to enforce the settlement until performance in full of its terms.]
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of separate judgment entered on a stipulation for entry of judgment pursuant to *Code Civ. Proc. § 664.6* is for use when a separate document containing the judgment is desired or required [*see, e.g.,* Los Angeles Super. Ct. Rules, Rule 3.0(f) (judgment forms should be used whenever appropriate, and specially prepared judgment, if appropriate in form and content, is acceptable)]. For a form in writing to stipulate a settlement, *see § 318.323*. For a form of notice of motion to move for entry of a judgment pursuant to a stipulated settlement, *see § 318.324*. For a form of order for entering a stipulated judgment, *see § 318.325*. For a form for use after an oral motion that combines a stipulation in writing and an order for entering judgment, *see § 318.326*. For a form for entering a stipulated judgment payable in installments, *see § 318.327*.

[3] Cross References

For a related form, see *§ 318.326*.

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§ 318.329 Judgment Pursuant to Stipulation of Facts--General Form

[1] FORM Judgment Pursuant to Stipulation of Facts--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____[*name*],	)	JUDGMENT PURSUANT TO STIPULATION OF
Defendant.	)	FACTS
	)	
	)	

_____

The above-entitled cause having been submitted for decision by counsel for the respective parties to the Honorable _____ Judge of the above-entitled court, on a written stipulation of facts, a jury having been expressly waived, [and counsel for each party having filed written points and authorities,] [and the court having heretofore made and caused to be filed its written findings of fact and conclusions of law,]

IT IS ADJUDGED, ORDERED, AND DECREED that _____ [*specify nature of judgment, e.g.*, plaintiff _____ (*name*) take nothing by reason of his/her complaint filed herein and that the defendant _____ (*name*) recover from plaintiff _____ (*name*) costs and disbursements in the amount of $_____].
Dated: _____.

_____ [*signature*]

Judge of the [Superior] Court

[2] Use of Form

This form of judgment is for use in entering a judgment pursuant to a stipulation on the facts. A judgment on stipulation of facts differs from a stipulation for entry of judgment [*see § 318.326*] in that the stipulation of facts is not an admission of liability, but a submission of facts so that the court may rule thereon. A stipulation for judgment, on the other hand, constitutes an admission that defendant is liable for the amount of the judgment stipulated to.

For a more complete discussion of stipulations, see Ch. 533, *Stipulations* .

[3] Cross References

For discussion and forms related to stipulations with regard to any of the steps of an action or proceeding, see Ch. 533, *Stipulations*

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27-318 California Forms of Pleading and Practice--Annotated § 318.330

§ 318.330 Proceedings to Obtain Judgment When One Party Fails to Appear at Trial [Code Civ. Proc. § 594]--Notice of Time Set for Trial [Code Civ. Proc. § 594(a)]

[1] FORM Proceedings to Obtain Judgment When One Party Fails to Appear at Trial [Code Civ. Proc. § 594]--Notice of Time Set for Trial [Code Civ. Proc. § 594(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF TIME SET FOR TRIAL
_____[*name*],	)	[*Code Civ. Proc. § 594(a)*]
Defendant.	)	
	)	
	)	

_____

NOTICE IS HEREBY GIVEN that the above-entitled action has been set for trial on _____, 19 _____, at _____ _____.M., in [_____ (Department *or* Division) _____ of] the above-named court in the _____ [*name of building, e.g.,* Courthouse] at _____ [*street address*], _____ [*city*], _____ County, California.
Dated: _____, 19 _____.

_____ [*signature*]
Attorney for_____
[Plaintiff *or* Defendant]

[2] Use of Form

The foregoing form of notice is for use in giving notice of the time set for trial. It is intended for use by counsel when the party, rather than the clerk, serves notice of trial.

In superior and municipal courts, either party may bring an issue to trial or to a hearing and, in the absence of the adverse party, unless the court for good cause otherwise directs, may proceed with the case and take a dismissal, verdict, or judgment, as the case may require if proper notice as prescribed in *Code Civ. Proc. § 594(a)-(b)*has been made [*Code Civ. Proc. § 594(a)*]. This form is offered here for use by counsel in serving adequate notice to support such a judgment. It should be noted that printed forms are available from the court clerk in many counties.

[3] Notice Requirements

If the issue to be tried is an issue of fact, proof must first be made to the satisfaction of the court that the adverse party has had 15 days' notice of the trial or five days' notice of the trial in an unlawful detainer action. If the adverse party has served notice of trial upon the party seeking the dismissal, verdict, or judgment at least five days prior to the trial, the adverse party is deemed to have such notice [*Code Civ. Proc. § 594(a)*].

The notice to the adverse party required by *Code Civ. Proc. § 594(a)* shall be served by mail on all parties by the clerk not less than 20 days prior to the date set for trial and not less than ten days prior to the date set for trial in an unlawful detainer action. If not served by the clerk, notice may be served by mail by any party on an adverse party not less than 15 days prior to the date set for trial, and in an unlawful detainer action not less than ten days prior to the date set for trial. The time provisions of *Code Civ. Proc. § 1013* will not serve to extend the notice of trial requirements under *Code Civ. Proc. § 594(b)* for unlawful detainer actions [*Code Civ. Proc. § 594(b)*]. For a form of proof of service under *Code Civ. Proc. § 594(b), see § 318.331*.

[4] State Statutes

Either party as capable of bringing an issue to trial or to hearing and then taking dismissal, verdict, or judgment; proof of notice to adverse party as required to be 15 days generally and ten days in unlawful detainer actions. *Code Civ. Proc. § 594(a)*

[5] Decisions

Entry of judgment after trial held in party's absence without notice prescribed by *Code Civ. Proc. § 594* as in excess of court's jurisdiction. *Irvine National Bank v. Han (1982) 130 Cal. App. 3d 693, 697, 181 Cal. Rptr. 864* ; *Wilson v. Goldman (1969) 274 Cal. App. 2d 573, 577, 79 Cal. Rptr. 309*

Person to be served with notice under *Code Civ. Proc. § 594* as having burden of notifying court of any change of address; failure to do so as not enabling him or her to claim improper notice. *Westervelt v. Robertson (1981) 176 Cal. Rptr. 94*

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27-318 California Forms of Pleading and Practice--Annotated § 318.331

§ 318.331 Proceedings to Obtain Judgment When One Party Fails to Appear at Trial [Code Civ. Proc. § 594]--Certificate in Proof of Service of Notice of Trial on Adverse Party [Code Civ. Proc. §§ 594(b), 1013a, 2015.5]

[1] FORM Proceedings to Obtain Judgment When One Party Fails to Appear at Trial [Code Civ. Proc. § 594]--Certificate in Proof of Service of Notice of Trial on Adverse Party [Code Civ. Proc. §§ 594(b), 1013a, 2015.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	CERTIFICATE IN PROOF OF SERVICE OF NO-
vs.	)	TICE OF TRIAL ON ADVERSE PARTY
_____ [*name*],	)	[*Code Civ. Proc. §§ 594(b), 1013a, 2015.5*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Trial Date: _____

_____

I, _____ [*name*], declare:

I am, and at all times mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is _____ [*specify address*].

I served the notice of time set for trial on _____, 19 _____, by depositing [a copy *or* _____ (*number*) copies] of the notice of time set for trial in the United States mail at

_____ [*specify address*], _____ County, California, in a sealed envelope, with postage fully prepaid, addressed to _____ [*state full name and address as shown on the envelope*]. [_____ (*Specify name of addressee*) _____ (is *or* are) the attorney(s) of record for _____ (*specify party,* e.g., defendant) in the above-entitled cause.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date and place*].

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*party's status and name*]

[2] Use of Form

This form of certificate is for use as proof of service by an attorney on the adverse party of a notice of time set for trial [*see Code Civ. Proc. §§ 594(b), 1013a(4)*]. If notice is served by the clerk of the court, proof of that notice may be made by introducing into evidence the clerk's certificate made pursuant to *Code Civ. Proc. § 1013a(3),* or other competent evidence. If notice is served by a party, proof may be made by introducing into evidence the affidavit or certificate pursuant to *Code Civ. Proc. § 1013a(1)* or *(2),* or other competent evidence [*see Code Civ. Proc. §§ 594(b), 1013a, 2015.5*]. The provisions of *Code Civ. Proc. § 594(b)* are exclusive [*Code Civ. Proc. § 594(b)*]. For a form of declaration of service by mail when service is made by a non-attorney under *Code Civ. Proc. § 1013a(1),* see Ch. 518, *Service of Summons and Papers* .

[3] State Statutes

Proof of service of notice of trial on adverse party by affidavit. *Code Civ. Proc. § 594(b)*

Certificate of service by attorney. *Code Civ. Proc. § 1013a(2)*

Form of certificate under penalty of perjury. *Code Civ. Proc. § 2015.5*

[4] Cross References

For related forms, *see §§ 318.330* and *318.332*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.332

§ 318.332 Proceedings to Obtain Judgment When One Party Fails to Appear at Trial [Code Civ. Proc. § 594]--Judgment After Trial by Court

[1] FORM Proceedings to Obtain Judgment When One Party Fails to Appear at Trial [Code Civ. Proc. § 594]--Judgment After Trial by Court

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	JUDGMENT AFTER TRIAL BY COURT,
Defendant.	)	_____ [PLAINTIFF *or* DEFEND-
	)	ANT] FAILING TO APPEAR
	)	

This action came on regularly for trial on _____ [*date*] at _____ _____.M. _____ [*name*] appeared as attorney for _____ [*name*], _____ [*specify party appearing*, plaintiff *or* defendant] in the above-entitled action; _____ [*name*], _____ [*specify party failing to appear*, plaintiff *or* defendant] in the above-entitled action failed to appear. Proof having first been made to the satisfaction of the court that _____ [*name*], _____ [plaintiff *or* defendant] has had _____ [*number*] days notice of the time and place fixed for trial of this action and a jury trial having been waived, the court heard the testimony and considered the evidence,

[*EITHER*]

and the court having already filed its statement of decision on _____ [*date*],

[*OR*]

and the court, with regard to the issue(s) of _____ [*specify controverted issue(s) on which party requested a statement of decision pursuant to Code Civ. Proc. § 632*], makes the following statement of decision: _____ [*set forth factual and legal basis for decision*].

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED that _____ [*state terms of judgment*].
Dated: _____.

_____ [*signature*]
Judge of the [Superior] Court
Judgment entered on _____, in Vol. _____ of the Judgment Book, page _____.
_____ [*signature*]
Clerk
By _____ [*signature*]
Deputy

[2] Use of Form

This form of judgment is for use after one party has failed to appear at the proceedings. The Judicial Council-approved form for optional use for a judgment [JUD-100] may also be used after one party has failed to appear. See *§ 318.340*.

Either party may bring an issue to trial or to a hearing and, in the absence of the adverse party, unless the court for good cause otherwise directs, may proceed with the case and take a dismissal, verdict, or judgment, as the case may require [*Code Civ. Proc. § 594(a)*].

For a discussion and forms relating to the notice requirements for the entry of such a judgment, *see §§ 318.330* and *318.331*.

[3] Cross References

For related forms, *see §§ 318.330* and *318.331*.

For discussion, procedural guide, and forms relating to dismissals and nonsuits, see Ch. 212, *Dismissal* , and Ch. 389, *Nonsuit and Motions for Judgment*

For discussion and forms relating to judgments on verdicts, see Ch. 326A, *Jury Verdicts*

For discussion and forms relating to notice of setting of trial, see Ch. 551, *Trial*

[4] State Statutes

Power of court to render dismissal, verdict, or judgment in the absence of one party. *Code Civ. Proc. § 594(a)*

Notice requirements for rendition of judgment in the absence of a party when judgment based on issue of fact. *Code Civ. Proc. § 594(a)-(b)*

[5] Decisions

Failure to enter into evidence the notice of trial as required by *Code Civ. Proc. § 594(b)* does not constitute jurisdictional defect, but is subject to harmless error analysis. *In re Marriage of Goddard (2004) 33 Cal. 4th 49, 54-60, 14 Cal. Rptr. 3d 50,90 P.3d 1209*

Default judgment distinguished from judgment pursuant to *Code Civ. Proc. § 594* where one party fails to appear for proceedings. *Wilson v. Goldman (1969) 274 Cal. App. 2d 573, 576, 79 Cal. Rptr. 309*

Failure to give notice required by *Code Civ. Proc. § 594* is not merely error upon rendition of judgment; judgment is subject to collateral attack at any time. *Wilson v. Goldman (1969) 274 Cal. App. 2d 573, 576, 79 Cal. Rptr. 309*

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27-318 California Forms of Pleading and Practice--Annotated § 318.333

§ 318.333 Judgment on General Verdict for Plaintiff in Superior Court [Code Civ. Proc. §§ 624, 664]--Example: Money Judgment or in the Alternative That Plaintiff Take Nothing

[1] FORM Judgment on General Verdict for Plaintiff in Superior Court [Code Civ. Proc. §§ 624, 664]--Example: Money Judgment or in the Alternative That Plaintiff Take Nothing

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	JUDGMENT
Defendant.	)	
	)	
	)	

This cause came on regularly for trial on _____ [*date*], in [_____ (Department *or* Division) _____ of] the above-entitled court, the Honorable _____ Judge, presiding. Plaintiff appeared by his/her/its attorney _____ [*name*] and defendant appeared by his/her/its attorney _____ [*name*].

A jury of _____ [*number*] persons was regularly impaneled and sworn to try the action. Witnesses on the part of both plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider their verdict, subsequently returned to court, and being called, answered to their names and duly rendered their verdict in writing, in words and figures, as follows:

_____ [*Specify verdict, e.g.*, We, the jury in the above-entitled action, find for _____

(*specify party, e.g.*, plaintiff) and against _____ (*specify party, e.g.*, defendant).
Dated: _____

_____ Foreman].

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that

[*EITHER*]

plaintiff _____ [*name*] have and recover from defendant _____ [*name*] the sum of $_____ with interest thereon at the rate of _____ percent per annum from the date of the verdict until paid, together with costs and disbursements amounting to the sum of $_____.

[*OR*]

plaintiff take nothing by his/her/its complaint from defendant _____ [*name*] and that defendant _____ [*name*] have and recover from plaintiff _____ [*name*] costs and disbursements amounting to the sum of $_____.

[WITNESS, the Honorable _____, Judge of this court, and my hand and seal of this court, this _____ day of _____].

_____ [*signature*]
[Clerk *or* County Clerk]
By _____ [*signature*]
Deputy Clerk

[2] Use of Form

This form of judgment is a general form for use in the preparation of a judgment on a general verdict. By way of example only, the judgment is one awarding the plaintiff a monetary recovery or one in which the plaintiff takes nothing and the defendant recovers costs and disbursements. The format, insofar as it pertains to the rendition of a judgment on a general verdict, may be adapted as appropriate for other types of actions.

Printed forms of judgments on general verdicts, in substantially the same language as this form, are available from the county clerk's office in many counties.

Since *Code Civ. Proc. § 664* requires that once a trial by jury has been had, judgment must be entered by the clerk in conformity to the verdict within 24 hours after rendition of the verdict, it is not general practice for the attorney to prepare the judgment on the verdict or for the judge to sign the judgment form. Instead, most counties provide a standardized verdict form which is signed by the jury foreperson and then sent to the clerk who enters the judgment in the record.

[3] General and Special Verdicts

The verdict of a jury is either general or special. A general verdict is that by which the jurors pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury finds the facts only, leaving the judgment to the court [*Code Civ. Proc. § 624*; *see McCoy v. Gustafson (2009) 180 Cal. App. 4th*

56, 6970, 103 Cal. Rptr. 3d 37]. For a discussion and form of a special verdict, *see § 318.334*.

For discussion of verdicts generally, see Ch. 326A, *Jury Verdicts* .

[4] Where Conflict Exists

In all cases the court may direct the jury to find a special verdict in writing, on all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find on particular questions of fact, to be stated in writing, and may direct a written finding thereon. In all cases in which the issue of punitive damages is presented to the jury the court shall direct the jury to find a special verdict in writing separating punitive damages from compensatory damages [*Code Civ. Proc. § 625*].

The special verdict or finding must be filed with the clerk and entered in the minutes [*Code Civ. Proc. § 625*].

Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court must give judgment accordingly [*Code Civ. Proc. § 625*].

[5] Sufficiency of Judgment

The test of the sufficiency of a judgment rests in its substance rather than its form. The form of the judgment is not very material, provided that in substance it shows distinctly and not inferentially that the matter has been determined in favor of one of the litigants or that the rights of the parties in litigation have been adjudicated [*Oppenheimer v. Deutchman (1958) 161 Cal. App. 2d 501, 503, 326 P.2d 883]* .

[6] Stated Amount of Judgment

In a judgment awarding money, the amount is computed and stated in dollars and cents, rejecting fractions [*Code Civ. Proc. § 577.5*].

[7] Entry of Judgment

In superior courts, on receipt of a verdict, an entry must be made in the minutes of the court, specifying the time of the trial, the names of the jurors and witnesses, and setting out the verdict at length [*Code Civ. Proc. § 628*].

[8] Finding on Amount of Recovery

When a verdict is found for the plaintiff in an action for the recovery of money, or for the cross complainant when a cross complaint for the recovery of money is established, the jury must also find the amount of the recovery [*Code Civ. Proc. § 626*].

[9] State Statutes

Definition of judgment. *Code Civ. Proc. § 577*

In a contested case in which an answer is filed, court as authorized to grant relief which is consistent with case made by complaint and embraced within the issue. *Code Civ. Proc. § 580*

Judgment as not effectual for any purpose until entered; entry as required to be made whether or not a motion for judgment notwithstanding the verdict is pending. *Code Civ. Proc. § 664*

Manner of giving, entering, and satisfying judgments generally. *Code Civ. Proc. §§ 664-674*

[10] California Rules of Court

Notations by clerk on written instrument after judgment rendered on written obligation to pay money. *Cal. Rules of Ct., Rule 3.1806*

[11] Decisions

When case is tried on the merits, issues thoroughly explored during course of trial and theory of trial is well known to court and counsel, fact that issues were not pleaded does not preclude an adjudication of those litigated issues and a review of that adjudication on appeal. *Davis v. Cordova Recreation & Park Dist. (1972) 24 Cal. App. 3d 789, 794, 101 Cal. Rptr. 358*

Fact that judgment is not in conformity with memorandum opinion does not affect validity of final judgment; no antecedent expression of the judge, whether casual or cast in form of an opinion, restrict the power to declare a final conclusion by filing the decision. *Taormino v. Denny (1970) 1 Cal. 3d 679, 684, 83 Cal. Rptr. 359, 463 P.2d 711*

Judgment is final only when it determines all of the rights of the parties and requires no further judicial action to give effect to its provisions. *Associated Convalescent Enterprises v. Carl Marks & Co., Inc. (1973) 33 Cal. App. 3d 116, 121, 108 Cal. Rptr. 782*

When good grounds exist for granting of legal or equitable relief, judgment is given to party entitled thereto as a matter of right and not of grace. *Collins v. Collins (1957) 48 Cal. 2d 325, 333-334, 309 P.2d 420*

Order for judgment or written opinion of a judge is not judgment. *Grable v. Grable (1960) 180 Cal. App. 2d 353, 359, 4 Cal. Rptr. 353*

Only one final judgment is recognized in action and that one is one which in effect ends suit in court in which it was entered and finally determines rights of parties in relation to matter in controversy. *In re Marriage of Fink (1976) 54 Cal. App. 3d 357, 361, 126 Cal. Rptr. 626*

Rule as to single judgments has no application to actions in which separate and independent relief is sought against several defendants. *Stafford v. Yerge (1956) 139 Cal. App. 2d 851, 854, 294 P.2d 721*

In general, same rules apply in ascertaining meaning of court order or judgment as in ascertaining meaning of any other writing; language of writing governs its interpretation if language is clear and explicit and does not involve an absurdity. *In re Estate of Careaga (1964) 61 Cal. 2d 471, 475, 39 Cal. Rptr. 215, 393 P.2d 415*

When ambiguity exists in judgment, entire record, including findings of fact and conclusions of law, is properly examined to determine scope and effect of judgment. *Nunes v. Nunes (1964) 62 Cal. 2d 33, 39, 41 Cal. Rptr. 5, 396 P.2d 37* ; *In re Estate of Careaga (1964) 61 Cal. 2d 471, 475, 39 Cal. Rptr. 215, 393 P.2d 415*

General verdict as importing finding in favor of prevailing party on all averments in the pleading material to recovery. *Behr v. Santa Cruz County (1959) 172 Cal. App. 2d 697, 712, 342 P.2d 987*

[12] Text References

7 Witkin, California Procedure, *Judgment*, § 29 et seq. (4th ed. 1997)

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27-318 California Forms of Pleading and Practice--Annotated § 318.334

§ 318.334 Judgment on Special Verdict for Plaintiff in Superior Court [Code Civ. Proc. §§ 624, 626]--Example: Recovery of Either Personal Property or Value and Damages [Code Civ. Proc. § 667]

[1] FORM Judgment on Special Verdict for Plaintiff in Superior Court [Code Civ. Proc. §§ 624, 626]--Example: Recovery of Either Personal Property or Value and Damages [Code Civ. Proc. § 667]

[*Caption. See § 318.333.*]

This action came on regularly for trial by jury on _____ [*date*], with plaintiff _____ [*name*] appearing [in person and] by _____ [*name*], his/her attorney, and defendant appearing [in person and] by _____ [*name*], his/her attorney; a jury of _____ [*number*] persons was duly impaneled and sworn; witnesses testified; and after being duly instructed by the court, the jury deliberated and thereon duly returned the following special verdicts: "_____ [*incorporate verbatim copy of jury's special verdicts*]."

It appearing that by reason of those special verdicts, plaintiff is entitled to judgment against defendant for the possession of the following described personal property: _____ [*describe personal property*]; for damages; for interest; and for costs;

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED that plaintiff _____ [*name*] recover from defendant _____ [*name*] the possession of the following described personal property: _____ [*describe personal property*].

IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that in case possession of the property cannot be had, then plaintiff _____ [*name*] recover from defendant _____ [*name*] its value, which is fixed at $_____.

IT IS FURTHER ADJUDGED, ORDERED, AND DECREED that plaintiff recover from defendant the sum of

$_____ in damages for detention of the property, the further sum of $_____ in interest to the date of judgment herein, and costs at $_____.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of judgment is for use after a special verdict has been returned by a jury in superior court. By way of example only, this judgment awards the plaintiff recovery of personal property or its value in the event that delivery of the property cannot be made, damages for detention, interest, and costs. The procedural format of the form may be adapted for other types of judgments based on special verdicts.

[3] Entry of Verdict or Judgment

In superior courts, on receipt of a verdict an entry must be made in the minutes of the court, specifying the time of the trial, the names of the jurors and witnesses, and setting out the verdict at length. Where a special verdict is found, the jury must specify either the judgment rendered or, if the case is reserved for argument or further consideration, the order thus reserving it [*Code Civ. Proc. § 628*].

[4] Recovery of Personal Property

By way of example only, the foregoing judgment is structured in conformity with *Code Civ. Proc. § 667* in that it awards possession of the property to the plaintiff or, if such possession cannot be had, its value in a fixed amount, and damages for the detention of the property [*Code Civ. Proc. § 667*].

The judgment should specify the value of each item of personal property claimed so that if only part of the property can be found, the party obtaining the judgment can recover the value of the items not found [*see Black v. Black (1888) 74 Cal. 520, 521-522, 16 P. 311]* .

[5] Cross References

For a related form, see *§ 318.333*.

For discussion and forms relating to an action for the possession of personal property, see Ch. 119, *Claim and Delivery*

For discussion and forms relating to verdicts generally, see Ch. 326A, *Jury Verdicts*

[6] State Statutes

Entry of verdict or judgment. *Code Civ. Proc. § 628*

Alternative judgment in action to recover possession of personal property. *Code Civ. Proc. § 667*

Recovery of costs in action other than for monetary relief and in situations other than as specified. *Code Civ. Proc. § 1032(a)(4), (b)*

[7] Decisions

Sufficiency of judgment for possession alone where delivery made to plaintiff at beginning of action. *Claudius v. Aguirre (1891) 89 Cal. 501, 504, 26 P. 1077*

Test for determining inconsistency between general and special verdicts. *Lowen v. Finnila (1940) 15 Cal. 2d 502, 504, 102 P.2d 520*

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27-318 California Forms of Pleading and Practice--Annotated § 318.335

§ 318.335 Judgment After Trial by Superior Court [Code Civ. Proc. § 632]--General Form

[1] FORM Judgment After Trial by Superior Court [Code Civ. Proc. § 632]--General Form

[*Caption. See § 318.333.*]

This cause came on regularly for trial on _____, [*date*], in [_____ (Department *or* Division) _____ of] the above-entitled court, the Honorable _____, Judge, presiding, sitting without a jury, a jury having been duly waived. Plaintiff appeared by his/her attorney _____ [*name*]. Defendant appeared by his/her attorney _____ [*name*]. Evidence, both oral and documentary, having been presented by both parties, the cause having been argued and submitted for decision, and _____ [the court (, on request of _____ (plaintiff *or* defendant),) having caused to be made and filed herein its written statement of decision *or* a statement of decision not having been requested],

IT IS ORDERED, ADJUDGED, AND DECREED that

1. _____ [*Describe terms of judgment in this and following numbered paragraphs*].

[2. _____].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of judgment is for use by counsel in preparing a judgment for the designated party after trial by a superior court. It offers a general format which may be adapted for judgments in particular types of actions as required. The Judicial Council-approved form for optional use for a judgment [JUD-100] may also be used for judgment after court

trial. See *§ 318.340*.

[3] Announcement of Decision Not Judgment

On the trial of a question of fact by the court, the court must announce its tentative decision by an oral statement, entered in the minutes, or by a written statement filed with the clerk [*Cal. Rules of Ct., Rule 3.1590(a)*]. The tentative decision does not constitute a judgment and is not binding on the court. If the court subsequently modifies or changes its announced tentative decision, the clerk will serve a copy of the modification or change on all parties who appeared at the trial [*Cal. Rules of Ct., Rule 3.1590(b)*].

The court in its tentative decision may [*Cal. Rules of Ct., Rule 3.1590(c)*]:

- State that it is the court's proposed statement of decision, subject to a party's objection under *Cal. Rules of Ct., Rule 3.1590(g)*;
- Indicate that the court will prepare a statement of decision;
- Order a party to prepare a statement of decision; or
- Direct that the tentative decision will become the statement of decision unless, within 10 days after announcement or service of the tentative decision, a party specifies those principal controverted issues as to which the party is requesting a statement of decision or makes proposals not included in the tentative decision.

[4] Statement of Decision

On the request of any party appearing at a trial, the court must issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial [*Code Civ. Proc. § 632*].

For a more complete discussion of this topic, see Ch. 529, *Statement of Decision* .

[5] State Statutes

Interest awarded on amount certain from date same became vested in plaintiff. *Civ. Code § 3287*

Interest as awarded on unliquidated claim from date set by court. *Civ. Code § 3287(b)*

Statement of decision. *Code Civ. Proc. § 632*

Manner of giving, entering, and satisfying judgments. *Code Civ. Proc. § 664*

[6] California Rules of Court

Preparation of statement of decision and proposed judgment in superior court. *Cal. Rules of Ct., Rule 3.1590(f)*

[7] Decisions

Findings of fact and conclusions of law constitute decision. *Fish v. Hoffman (1961) 192 Cal. App. 2d 59, 63, 13 Cal.*

Rptr. 285 (decided before 1981 amendment of *Code Civ. Proc. § 632* substituting statement of decision for findings of fact and conclusions of law)

Judgment entered without findings, where findings required under *Code Civ. Proc. § 632* and former Cal. Rules of Ct., Rule 232 [*now see Cal. Rules of Ct., Rule 3.1590*], was nullity and as superseded by subsequent judgment based on findings. *Ohio Cas. Ins. Co. v. Northwestern Mut. Ins. Co. (1971) 17 Cal. App. 3d 204, 206-207, 94 Cal. Rptr. 586* (decided prior to 1981 amendment of *Code Civ. Proc. § 632* and former Cal. Rules of Ct., 232 substituting statement of decision for findings of fact and conclusions of law)

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27-318 California Forms of Pleading and Practice--Annotated § 318.336

§ 318.336 Notice of Entry of Judgment or Order [Code Civ. Proc. § 664.5(a)]--Judicial Council Form CIV-130

[1] FORM

Click here to view image.

[2] Use of Form

This form is an illustration of Judicial Council Form CIV-130, Notice of Entry of Judgment or Order, adopted by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.35*]. This form may be used to give notice of entry of judgment under *Code Civ. Proc. § 664.5(a)* by the party submitting the judgment for entry. Copies of the notice must be mailed to all parties who have appeared in the action or proceeding. The original notice of entry of judgment together with proof of service by mail must be filed with the court. For discussion of when the notice must be given, see *§ 318.55*. For a form of the required proof of service, see Ch. 518, *Service of Summons and Papers* .

The mailing of notice of entry, as opposed to filing proof of service, starts the time period for filing a motion for new trial [*Code Civ. Proc. § 659*], a motion for judgment notwithstanding the verdict [*Code Civ. Proc. §§ 629, 659*], and a motion to vacate the judgment [*Code Civ. Proc. § 663a*].

For a fillable version of this form in electronic format, see LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexis.com/forms.

[3] State Statutes

Service of notice of entry of judgment affects time to move for new trial. *Code Civ. Proc. § 659(2)*

Service of notice of entry of judgment affects time to move to vacate judgment. *Code Civ. Proc. § 663a(2)*

Judgment is not effective for any purpose until entered. *Code Civ. Proc. § 664*

Requirement that party submitting judgment serve and file notice of entry of judgment and proof of service by mail. *Code Civ. Proc. § 664.5(a)*

Judgments is entered in judgment books. *Code Civ. Proc. § 668*

[4] California Rules of Court

Time for filing notice of appeal. *Cal. Rules of Ct., Rules 8.104, 8.108*

[5] Decisions

Delivery to attorney's office during normal business hours of endorsed filed copy of judgment, second page of which noted entry of judgment, though not in accordance with procedure of *Code Civ. Proc. § 664.5*, was sufficient to trigger 60-day period for filing notice of appeal. *National Adver. Co. v. City of Rohnert Park (1984) 160 Cal. App. 3d 614, 618-619, 206 Cal. Rptr. 696*

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27-318 California Forms of Pleading and Practice--Annotated § 318.337

§ 318.337 Proceedings to Obtain Insertion of Interest on Judgment--Notice of Motion [Code Civ. Proc. § 1010]

[1] FORM Proceedings to Obtain Insertion of Interest on Judgment--Notice of Motion [Code Civ. Proc. § 1010]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION TO INSERT INTEREST ON
_____ [*name*],	)	JUDGMENT
Defendant.	)	Hearing Date: _____
	)	Time: _____
	)	Location: _____

_____

To _____ [*specify, e.g.,* defendant] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon therafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* plaintiff] will move for an order to insert interest on the judgment rendered in the above-entitled cause at the legal rate from _____ [*specify date on which interest first accrues, e.g.,* the date of judgment]. The motion will be made on the grounds that _____ [*specify*].

The motion will be based on this notice of motion, on the declaration of _____ [*name*], on the memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary

evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*signature*]
Attorney for _____
[Plaintiff *or* Defendant]

[2] Use of Form

This form is for use in preparing a notice of motion to insert interest on a judgment. Generally, the prejudgment interest sought will be specified in the prayer of the complaint. If the court determines that the plaintiff is entitled to prejudgment interest, it would normally be included in the total award without further court proceedings.

Regardless of whether or not a party is entitled to prejudgment interest, *Cal. Rules of Ct., Rule 3.1802*, requires that the clerk include in the judgment any interest awarded by the court and the interest accrued since the entry of the verdict. If for any reason such interest is not included, the party entitled to interest should either move orally for such interest or notice a motion in the format suggested here.

[3] Prejudgment Interest

The most appropriate time to assert one's right to prejudgment interest is prior to trial because an award of prejudgment interest may turn on a question of fact or may be within the court's discretion. There is, however, no uniform procedure for doing so. It is therefore suggested that the issue be raised and briefed in the party's trial brief.

After judgment, if a party contends that prejudgment interest has been incorrectly omitted (or included), this issue can be raised in a nonstatutory postjudgment motion in the foregoing format, in a motion to vacate the judgment on the grounds of excessive or inadequate damages [*Code Civ. Proc. § 657(5)*], or in a motion to vacate the judgment on the grounds of incorrect legal basis for the decision or because the judgment is not supported by the special verdict [*Code Civ. Proc. § 663*].

[4] Cross References

For a discussion of interest, see Ch. 177, *Damages*

[5] California Points and Authorities

For memoranda in support of and in opposition to contentions that a party is entitled to either postjudgment or prejudgment interest, see California Points and Authorities, Ch. 121, *Interest*

[6] State Statutes

Prejudgment interest on damages certain. *Civ. Code § 3287(a)*

Discretionary prejudgment interest in unliquidated contract action. *Civ. Code § 3287(b)*

Discretionary prejudgment interest in cases of oppression, fraud, or malice, or for breach of obligation not arising from contract. *Civ. Code § 3288*

Continuation of interest stipulated in contract following breach. *Civ. Code § 3289(a)*

Interest after breach of contract that does not stipulate legal rate. *Civ. Code § 3289(b)*

Waiver of interest by acceptance of principal. *Civ. Code § 3290*

Prejudgment interest in personal injury action. *Civ. Code § 3291*

Postjudgment interest rate established. *Code Civ. Proc. § 685.010(a)*

Inclusion of interest in judgment. *Code Civ. Proc. § 1033*

[7] California Rules of Court

Clerk is required to include in judgment any interest awarded by court and interest accrued since entry of verdict. *Cal. Rules of Ct., Rule 3.1802*

[8] Decisions

Civ. Code § 3291 (judgment bears 10-percent rate of interest from date of first rejected settlement offer under *Code Civ. Proc. § 998*) and *Code Civ. Proc. § 685.010(a)* (judgment bears 10-percent rate of interest from date judgment rendered) applied separately or conjunctively, and not cumulatively, to permit recovery of no more than 10-percent rate of interest. *Mendez v. Kurten (1985) 170 Cal. App. 3d 481, 487, 215 Cal. Rptr. 924*

Judgment not required to contain direction for payment of interest; obligation for interest follows automatically; if one party deprives another party of money that is rightfully theirs pursuant to court order, that money bears interest from date due at seven percent. *Pinecrest Prod., Inc. v. RKO Teleradio Pictures, Inc. (1970) 14 Cal. App. 3d 6, 11, 92 Cal. Rptr. 44*

Tender of judgment, denied by plaintiff seeking new trial, stopped running of interest on judgment. *Montano v. South Gate (1970) 13 Cal. App. 3d 446, 449, 91 Cal. Rptr. 523*

Policy of law is that judgment should bear interest from date of rendition even though subject to direct attack. *Myers v. Workmen's Compensation Appeals Bd. (1969) 2 Cal. App. 3d 621, 629, 83 Cal. Rptr. 427*

Waiver of interest on judgment if jury in its verdict fails to award interest and defect not called to attention of court before jury discharged [*Code Civ. Proc. § 619*]. *Wright v. Title Ins. & Trust Co. (1969) 274 Cal. App. 2d 252, 261-262, 79 Cal. Rptr. 12*

Final judgment for money bears interest from the date of entry. *Harvey v. Whyte (1958) 158 Cal. App. 2d 685, 688, 323 P.2d 162*

[9] Text References

Witkin, California Procedure, vol. 7, *Judgment*, §§ 270-279 (4th ed. 1997)

28 Cal. Jur. 2d Interest §§ 3-5, 9

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A. Obtaining And Entering Judgments

27-318 California Forms of Pleading and Practice--Annotated § 318.338

§ 318.338 Proceedings to Obtain Insertion of Interest on Judgment--Order [Code Civ. Proc. § 1003]

[1] FORM Proceedings to Obtain Insertion of Interest on Judgment--Order [Code Civ. Proc. § 1003]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [*name of moving party*] for an order to insert interest on the judgment in the above-entitled cause came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be _____ [granted *or* denied],

[*EITHER*]

IT IS ORDERED that the motion be and hereby is granted and _____ [*set out the particular award of interest sought*].

[*OR*]

IT IS ORDERED that the motion be, and hereby is, denied.
Dated: _____.

_____ [*signature*]
Judge of the [Superior] Court

[2] Use of Form

The foregoing form of order is for use in either granting or denying a motion to insert interest on a judgment.

[3] Cross References

For a related form, see *§ 318.337*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.339

§ 318.339 Judgment in Foreign Currency [Code Civ. Proc. § 676.7(f)]

[1] FORM Judgment in Foreign Currency [Code Civ. Proc. § 676.7(f)]

[*Caption. See § 318.333.*]

[*Body of judgment. See, e.g., §§ 318.322, 318.329, 8, 9, 10, 11.*]

IT IS ADJUDGED AND ORDERED, that Defendant _____ [*name*] pay to Plaintiff _____ [*name*] the sum of _____ [*amount in the foreign money*] plus interest on that sum at the rate of _____ [*specify rate; see Code Civ. Proc. § 676.9*] percent a year or, at the option of the judgment debtor, the number of United States dollars which will purchase the _____ [*name of foreign money*] with interest due, at a bank-offered spot rate at or near the close of business on the banking day next before the day of payment, together with assessed costs of $_____ United States dollars.

_____ [*date*]

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of judgment is for use in stating a judgment or award on a foreign money claim under the Uniform Foreign-Money Claims Act [*Code Civ. Proc. § 676 et seq.*]. The form conforms to the statutory language prescribed under *Code Civ. Proc. § 676.7(f)*; a judgment substantially in this form complies with *Code Civ. Proc. § 676.7(a)*. The judgment or award is payable in that foreign money, or, at the option of the debtor, in the amount of the United States dollars that will purchase that foreign money on the conversion date at a bank-offered spot rate [*Code Civ. Proc. § 676.7(b)* (*see* definition of "bank-offered spot rate" under Definitions, *below*)].

The foregoing form should be combined with other forms of judgment, showing that the rights of the parties in litigation have been adjudicated [*Code Civ. Proc. § 664*; *Oppenheimer v. Deutchman (1958) 161 Cal. App. 2d 501, 503, 326 P.2d 883* ; *see §§ 318.322, 318.329*].

[3] Definitions

"Spot rate" means the rate of exchange at which foreign money is sold by a bank or other dealer in foreign exchange for immediate or next-day availability or for settlement by immediate payment in cash or equivalent, by charge to an account, or by an agreed delayed settlement not exceeding two days [*Code Civ. Proc. § 676.1(11)*].

The "bank-offered spot rate" means the spot rate of exchange at which a bank will sell foreign money at a spot rate [*Code Civ. Proc. § 676.1(2)*].

The "conversion date" is the banking day next preceding the date on which money, in accordance with *Code Civ. Proc. § 676 et seq.*, is (1) paid to a claimant in an action or distribution proceeding; (2) paid to the official designated by law to enforce a judgment or award on behalf of a claimant; or (3) used to recoup, setoff, or counterclaim in different moneys in an action or distribution proceeding [*Code Civ. Proc. § 676.1(3)*].

[4] Entry of Money Judgment in Foreign Currency

[a] In General

A judgment is to be entered in foreign money in the same manner as other judgments [*Code Civ. Proc. § 676.7(h)*]. With the exception of assessed costs, which are entered in United States dollars, a judgment or award on a foreign-money claim is to be stated in the amount of the money of the claim [*Code Civ. Proc. § 676.7(a), (c)*].

[b] Contract for Payment in Foreign Currency; Distribution Proceedings

If a contract claim is of the type covered by *Code Civ. Proc. § 676.5(a)* (amount contracted to be paid in foreign money to be measured by specified amount of different money) or *Code Civ. Proc. § 676.5(b)* (amount contracted to be paid in foreign money to be measured by different money at rate of exchange prevailing on date before default), the judgment or award is to be entered for the amount of money stated to measure the obligation to be paid in the money specified for payment or, at the option of the debtor, the number of United States dollars that will purchase the computed amount of the money of payment on the conversion date at a bank-offered spot rate [*Code Civ. Proc. § 676.7(g)*].

The rate of exchange prevailing at or near the close of business on the day the distribution proceeding is initiated governs all exchanges of foreign money in a distribution proceeding [*Code Civ. Proc. § 676.8*].

[c] Proceeding Involving Defense, Setoff, Recoupment, or Counterclaim

A judgment or award made in an action or distribution proceeding on both (1) a defense, setoff, recoupment, or counterclaim and (2) the adverse party's claim, is to be netted by converting the money of the smaller into the money of the larger, and by subtracting the smaller from the larger, and to specify the rates of exchange used [*Code Civ. Proc. § 676.7(e)*].

[5] State Statutes

Uniform Foreign-Money Claims Act. *Code Civ. Proc. § 676 et seq.*

Effect of Judgment entered in foreign-money as same as lien. *Code Civ. Proc. § 676.7(h)*.

Prejudgment or preaward interest in foreign-money claims as generally governed by state conflict-of-law rules. *Code Civ. Proc. § 676.9(a), (b)*

Postjudgment interest in foreign-money claims as bearing interest at rate applicable to California judgments. *Code Civ. Proc. § 676.9(c)*

[6] Law Reviews

Note, *The Uniform Foreign-Money Claims Act: No Solution to an Old Problem, 69 Tex. L. Rev. 1203 (1991)*

[7] Cross References

For a related form, see *§ 318.335*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.340

§ 318.340 Judgment [Code Civ. Proc. §§ 585, 664.6]--Optional Judicial Council Form JUD-100

[1] FORM Judgment [Code Civ. Proc. §§ 585, 664.6]--Optional Judicial Council Form JUD-100

Click here to view image.

[2] Use of Form

This form of judgment is an illustrative reproduction of Judicial Council Form JUD-100, approved by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.30 et seq.*]

This form may be used for judgment obtained:

- On default. For detailed discussion and forms relating to the entry of default judgments, *see* Ch. 205, *Defaults and Default Judgments* .
- On stipulation. *See § 318.45*.
- After court trial. *See § 318.48*; see also *§ 318.335*.
- When defendant did not appear at trial. See *§§ 318.44, 318.332*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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27-318 California Forms of Pleading and Practice--Annotated §§ 318.341-318.359

[Reserved]

§§ 318.341[Reserved]

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B. Amendment, Correction, and Modification Of Judgments

27-318 California Forms of Pleading and Practice--Annotated § 318.360

§ 318.360 Proceedings to Correct Clerical Error in Judgment and to Amend Judgment Nunc Pro Tunc [Code Civ. Proc. § 473]--Notice of Motion

[1] FORM Proceedings to Correct Clerical Error in Judgment and to Amend Judgment Nunc Pro Tunc [Code Civ. Proc. § 473]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR ORDER TO CORRECT CLERICAL ERROR IN JUDGMENT AND AMEND JUDGMENT NUNC PRO TUNC
Defendant.	)	
	)	
	)	

_____

To _____ [*specify, e.g.*, defendant] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], California, _____ [*party, e.g.*, defendant] will, and hereby does, move the court for an order amending nunc pro tunc the judgment rendered in the above-entitled cause and entered on _____ [*date*], in the following manner and upon the following grounds:

1. That portion of the judgment which begins with the words "_____" on page _____, line _____, and continuing through the words "_____" on page _____, line _____, and which reads as follows: _____ [*set out portion of judgment to be amended*] be amended to read as follows: _____ [*set out amended version*] on the grounds that _____ [*set forth grounds*].

2. _____ [*Continue stating remaining portions of judgment, if any, which should be amended, together with the grounds therefor*].

The motion will be based on this notice of motion, on the declaration of _____ [*name*], on the memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*party's status and name*]

_____

CAUTION:
A memorandum is required to be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005(b), 1010*; Cal. Rules of Ct., Rule 3.113(a)].

_____

[2] Use of Form

This form of notice of motion is for use in amending a judgment nunc pro tunc.

[3] Amendment, Modification, and Correction

Both according to statute and by virtue of the inherent power of the court, a court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgments or orders as entered, so as to conform to the judgment or order directed [*Code Civ. Proc. § 473*; *In re Candelario (1970) 3 Cal. 3d 702, 705, 91 Cal. Rptr. 497, 477 P.2d 729]* .

Although the trial court may correct its own inadvertence or clerical error, it can correct judicial error only on a motion for new trial or on a motion under *Code Civ. Proc. § 663* to vacate the order or judgment and enter a different one [*Greene v. Superior Court (1961) 55 Cal. 2d 403, 405-406, 10 Cal. Rptr. 817, 359 P.2d 249]* . The distinction between clerical error and judicial error is whether the error was made in rendering the judgment or in recording the judgment rendered [*People v. Anderson (1976) 59 Cal. App. 3d 831, 839, 131 Cal. Rptr. 104]* .

[4] Antedating Judgment

The general rule is that the inherent power of the court to enter a judgment nunc pro tunc so as to relate back to the time when it should have been entered may be exercised only to avoid injustice and thus preserve the rights of the litigants. Accordingly, the entry of such a judgment is granted or refused in view of the circumstances of a particular case [*Young v. Gardner-Denver Co. (1966) 244 Cal. App. 2d 915, 919, 53 Cal. Rptr. 522]* .

[5] Notice and Time Requirements

The general rule regarding motions to correct or amend judgments with respect to clerical errors is that such motions may be made under the court's inherent power to correct judgments without notice and on the court's own motion so as to make them conform to judicial decision actually, and regardless of the lapse of time [*In re Roberts (1962) 200 Cal. App. 2d 95, 97, 19 Cal. Rptr. 147]* . However, counsel should notice the motion at the earliest possible date in order to avoid any later challenges as to procedures and timeliness [*see Badella v. Miller (1955) 44 Cal. 2d 81, 279 P.2d 729]* .

[6] State Statutes

Power of trial court to correct clerical errors in judgments on court's own motion or on motion of injured party. *Code Civ. Proc. § 473*

[7] Decisions

Function and purpose of nunc pro tunc order. *Martin v. Martin (1970) 2 Cal. 3d 752, 760-761, 87 Cal. Rptr. 526, 470 P.2d 662* ; *Young v. Gardner-Denver Co. (1966) 244 Cal. App. 2d 915, 919, 53 Cal. Rptr. 522*

Although expressly recognized by statute, courts as having been recognized as having the power to correct clerical errors independent of any statute; such power as unaffected by the pendency of appeal or habeas corpus proceedings. *In re Candelario (1970) 3 Cal. 3d 702, 705, 91 Cal. Rptr. 497, 477 P.2d 729*

Test for determining nature of error sought to be corrected. *In re Daoud (1976) 16 Cal. 3d 879, 882, 129 Cal. Rptr. 673, 549 P.2d 145*

Failure to fill in blank spaces in judgment as constituting clerical error subject to nunc pro tunc amendment. *Lang v. Superior Court of Orange County (1961) 198 Cal. App. 2d 16, 17, 18 Cal. Rptr. 67*

Failure to expressly state that the defendants, naming them, were personally liable for the debt in question, stating its amount, as a proper subject for correction by amendment. *Lang v. Superior Court of Orange County (1961) 198 Cal. App. 2d 16, 18, 18 Cal. Rptr. 67*

Omission of direction that husband pay wife's attorney's and accountant's fees if proceeds from sale of community property are insufficient, in judgment of divorce, as clerical rather than judicial error and properly corrected by post judgment order. *Denton v. Denton (1971) 18 Cal. App. 3d 708, 714-716, 96 Cal. Rptr. 136*

Where the judgment as signed does not express actual judicial intention of the court, but is contrary to that decision, signing of such a purported judgment as clerical error rather than judicial one. *Zisk v. Roseville (1976) 56 Cal. App. 3d 41, 47, 127 Cal. Rptr. 896*

The court as having the authority to correct an ambiguity in a decree by removing a superfluous word where its removal does not alter the meaning or legal effect of the original decree. *Estate of Careaga (1964) 61 Cal. 2d 471, 474, 39 Cal. Rptr. 215, 393 P.2d 415*

[8] Text References

California Trial Practice: Civil Procedure During Trial, ch. 23, *Judgments* (Cal. CEB 3d ed. 2000)

Witkin, California Procedure, vol. 7, *Judgments*, § 62 et seq. (4th ed. 1997)

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27-318 California Forms of Pleading and Practice--Annotated § 318.361

§ 318.361 Proceedings to Correct Clerical Error in Judgment and to Amend Judgment Nunc Pro Tunc [Code Civ. Proc. § 473]--Order

[1] FORM Proceedings to Correct Clerical Error in Judgment and to Amend Judgment Nunc Pro Tunc [Code Civ. Proc. § 473]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER CORRECTING CLERICAL ERROR AND
Defendant.	)	AMENDING JUDGMENT NUNC PRO TUNC
	)	
	)	

_____

The motion of _____ [*specify moving party*] for an order that the judgment in the above-entitled cause be amended nunc pro tunc as of the date of entry thereof came on regularly to be heard by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

Upon proof made to the satisfaction of the court that the motion ought to be granted and that the judgment heretofore entered on _____ [*date*], in Vol. _____ of the Judgment Book, page _____, is not in conformity with the decision of the court as intended and that such clerical error should be corrected in order that the judgment will conform to the court's decision in this cause,

IT IS HEREBY ORDERED that Paragraph(s) _____ of the judgment reading as follows

_____ [*set out paragraph(s)*] be and hereby is/are amended and corrected nunc pro tunc as of the date of entry of the judgment to read as follows: _____ [*set out paragraph(s) as amended*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use in amending and correcting a judgment nunc pro tunc.

[3] Cross References

For a related form, see *§ 318.360*.

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[Reserved]

§§ 318.362[Reserved]

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C. Enforcement Of Judgments And Judgment Liens

27-318 California Forms of Pleading and Practice--Annotated § 318.380

§ 318.380 Abstract of Judgment [Code Civ. Proc. § 674]--Mandatory Judicial Council Form EJ-001

[1] FORM Abstract of Judgment [Code Civ. Proc. § 674]--Mandatory Judicial Council Form EJ-001

Click here to view image.

[2] Use of Form

This form is the abstract of judgment [Judicial Council Form EJ-001], adopted by the Judicial Council for mandatory use [*see Cal. Rules of Ct., Rule 1.30 et seq.*]

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

The form is filed with the county recorder of the county in which the judgment debtor resides.

PRACTICE TIP:
The Judicial Council form of abstract of judgment is mandatory. However, this form has not been accepted for filing at some county recorder offices (e.g., Sacramento and Placer) because not enough space was provided in the top right hand corner for their seals. The Judicial Council revised this form effective January 1, 2002, to provide more room at the top for the county recorder's use, so those offices should not longer require the filing of a "leader sheet" at an additional cost as has been the practice.

This form is for use by a person who has recovered money from another person and needs to record an abstract of the judgment or decree with the recorder of the county in which the debtor's real property is situated. The recording of the abstract becomes a lien on all present or after-acquired interests of the judgment debtor in real property in the county that is not exempt from execution [*Code Civ. Proc. §§ 697.310-697.340*].

This form also may be used to amend a previously filed abstract of judgment that did not list the judgment debtor's

social security number and/or driver's license number [*Code Civ. Proc. § 674(b)*; *see § 318.380[4]*].

The abstract of judgment must be certified in the name of the judgment debtor as listed on the judgment and may also include the additional name or names by which the judgment debtor is know as set forth in the "Affidavit of Identity" [*see Code Civ. Proc. § 680.135*; *see § 318.381*]. Before the clerk of the court certifies the abstract of judgment containing additional names by which the judgment debtor is know that are not listed on the judgment, the court must approve the affidavit of identity [*Code Civ. Proc. § 674(c)(1)*; *see § 318.381*]. The remedies in *Code Civ. Proc. § 697.410* apply to a recorded abstract of a money judgment based on an affidavit of identity that appears to create a judgment lien on real property of a person who is not the judgment debtor [*Code Civ. Proc. § 674(c)(2)*; *see § 318.101[1]* and *see § 318.396 et seq.*].

This form should not be used when the judgment or decree involves an order for spousal, child, or family support [*see Fam. Code § 4506(a), (b)* (special requirements for abstract of judgment ordering support)].

[3] Contents of Abstract of Judgment

An abstract of judgment or decree requiring the payment of money must contain all of the following [*Code Civ. Proc. § 674(a)*]:

- The title of the court where the judgment or decree is entered and the cause and number of the action.
- The date of entry of the judgment or decree and of any renewals of the judgment or decree, and where entered in the records of the court.
- The name and last known address of the judgment debtor and the address at which the summons was either personally served or mailed to the judgment debtor or the judgment debtor's attorney of record.
- The name and address of the judgment creditor.
- The amount of the judgment or decree as entered or as last renewed.
- The last four digits of the social security number and driver's license number of the judgment debtor if they are known to the judgment creditor; and, if either or both of such numbers are not known to the judgment creditor, that fact is to be indicated on the abstract of judgment.
- Whether or not a stay of enforcement has been ordered by the court, and if so, the date the stay ends.
- The date of the issuance of the abstract.

[4] Amendment to Abstract of Judgment

This form also may be adapted for use as an "Amendment to Abstract of Judgment." An abstract of judgment recorded after January 1, 1979, that does not list the social security number and driver's license number of the judgment debtor, or either of them, as required by *Code Civ. Proc. § 674* may be amended by the recording of an "Amendment to Abstract of Judgment." This document must contain all the information required by *Code Civ. Proc. § 674*, must list both the social security number and driver's license number if both of those numbers were known at the date of recordation of the original abstract of judgment, or one of them, if only one was known, and must set forth the date of recording and the book and page location in the records of the county recorder of the original abstract of judgment [*Code Civ. Proc. § 674(b)*].

A recorded Amendment to Abstract of Judgment has priority as of the date of recordation of the original abstract of judgment, except as to any purchaser, encumbrancer, or lessee who obtained their interest after the recordation of the original abstract of judgment but before the recordation of the Amendment to Abstract of Judgment without actual notice of the original abstract of judgment. A purchaser, encumbrancer, or lessee without actual notice may assert as a defense against enforcement of the abstract of judgment the failure to comply with *Code Civ. Proc. § 674* regarding the contents of the original abstract of judgment, notwithstanding the subsequent recordation of an Amendment to Abstract of Judgment [*Code Civ. Proc. § 674(b)*].

If the abstract of judgment was recorded between January 1, 1979, and July 10, 1985, the defense against enforcement for failure to comply with *Code Civ. Proc. § 674* may not be asserted by the holder of another abstract of judgment or involuntary lien, recorded without actual notice of the prior abstract, unless refusal to allow the defense would result in prejudice and substantial injury [*Code Civ. Proc. § 674(b)*; *see Code Civ. Proc. § 475* (finding of prejudice and substantial injury)].

The recordation of an Amendment to Abstract of Judgment does not extend or otherwise alter the computation of the duration of the judgment lien [*Code Civ. Proc. § 674(b)*; *see Code Civ. Proc. § 697.310* (computation of lien's duration)].

[5] Service

The judgment creditor may serve upon the judgment debtor a copy of the abstract of judgment by personal delivery, leaving it at the person's residence or place of business, or by registered or certified mail [*Gov. Code § 27297.5(b)(1)-(3)*]. If the county recorder does not receive from the judgment debtor proof of service upon recordation of the abstract of judgment, the county recorder may within 10 days notify the judgment debtor or his or her attorney of record by mail of the recordation [*Gov. Code § 27297.5(a)*]. However, the failure of the county recorder or the judgment creditor to notify the judgment debtor against whom an abstract of judgment is recorded will not affect the constructive notice otherwise imparted by recordation, or the force, effect, or priority otherwise accorded the lien [*Gov. Code § 27297.5(f)*].

[6] Notice

The filing of the abstract of judgment imparts notice to all persons of its contents and any subsequent purchaser, mortgagee, and lienholder purchases and takes with the same notice and effect as if the copy of the decree were a duly recorded deed, grant, or transfer [*Gov. Code § 27326*].

[7] Cross References

For discussion and forms for use in attachment proceedings generally, see Ch. 62, *Attachments*

[8] State Statutes

Abstract of money judgment is lien on real property. *Code Civ. Proc. §§ 697.310-697.360*

Contents of abstract of judgment. *Code Civ. Proc. § 674(a)*

Notice to judgment debtor of recordation of abstract of judgment. *Gov. Code § 27297.5*

Recording fees. *Gov. Code § 27361*

Recording of judgment affecting title to real property constitutes notice. *Gov. Code § 27326*

[9] California Rules of Court

Form of abstract of judgment approved by Judicial Council must be used by all courts. *Cal. Rules of Ct., Rule 1.31*

[10] Decisions

Court of equity can permit real owner to show that apparent ownership of debtor is not real. *Wheeler v. Trefftzs (1964) 228 Cal. App. 2d 271, 274, 39 Cal. Rptr. 507*

Recordation of abstract of judgment with county recorder creates lien on all real property in county owned or thereafter acquired before expiration of lien by judgment debtor; lien attaches to real property held by judgment debtor, however briefly, as middleman in escrow. *Majewsky v. Empire Constr. Co., Ltd. (1970) 2 Cal. 3d 478, 483-484, 85 Cal. Rptr. 819, 467 P.2d 547*

Omission of judgment debtor's social security number when it was known or immediately accessible nullifies abstract and rendering lien against judgment debtor's property invalid; substantial compliance standard applies only when all required data is included. *Keele v. Reich (1985) 169 Cal. App. 3d 1129, 1131-1134, 215 Cal. Rptr. 756*

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27-318 California Forms of Pleading and Practice--Annotated § 318.381

§ 318.381 Affidavit of Identity [Code Civ. Proc. § 680.135]

[1] FORM Affidavit of Identity [Code Civ. Proc. § 680.135]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	AFFIDAVIT OF _____[*name of*
_____ [*name*],	)	*judgment creditor*]
Defendant.	)	OF IDENTITY OF
	)	_____
	)	[*name of judgment debtor*]

_____

	)	
State of California	)	ss.
[City and] County of _____	)	

_____

_____ [*Name of judgment creditor*], being [first] duly sworn [on (his *or* her) oath deposes and] says:

1. I am the judgment creditor in the above entitled and numbered action, which was brought in _____ [*name of court, e.g.:* the Superior Court of the County of Marin], and in which judgment was entered on _____ [*date*].

2. The name of the judgment debtor in this action is _____ [*name of judgment debtor*]. _____ is also known by the following name[s]: _____ [*Set forth additional name or names by which judgment debtor is known*].

3. _____ [*Set forth the facts upon which judgment creditor relied in obtaining judgment debtor's additional name or names*].

_____ [*signature of judgment debtor*]
Subscribed and sworn to before me on _____
[*date*].
_____ [*signature of officer*]
_____ [*typed name of officer*]
_____ [*officer, e.g.,* Notary Public]
[*Seal*]

[2] Use of Form

This form of affidavit of identity is filed by the judgment creditor with the application for issuance of the abstract of judgment [*see § 318.380*] when the abstract of judgment includes additional names by which the judgment debtor is know [*Code Civ. Proc. § 674(c)(1)*]. An "Affidavit of Identity" is an affidavit or declaration executed by a judgment creditor, under penalty of perjury, that is filed with the clerk of the court in which the judgment is entered at the time the judgment creditor files for a writ of execution or an abstract of judgment [*Code Civ. Proc. § 680.135*].

Before the clerk of the court certifies the abstract of judgment containing additional names by which the judgment debtor is know that are not listed on the judgment, the court must approve the affidavit of identity. If the court determines without a hearing or notice that the affidavit of identity states sufficient facts on which the judgment creditor has identified the additional names of the judgment debtor, the court must authorize the certification of the abstract of judgment with the additional name or names [*Code Civ. Proc. § 674(c)(1)*].

The remedies in *Code Civ. Proc. § 697.410* apply to a recorded abstract of a money judgment based on an affidavit of identity that appears to create a judgment lien on real property of a person who is not the judgment debtor [*Code Civ. Proc. § 674(c)(2)*; *see* discussion in *§ 318.101* and *see § 318.396 et seq*].

[3] Contents of Affidavit

The affidavit of identity must set forth the following [*Code Civ. Proc. § 680.135*]:

- The case name and number.
- The name of the judgment debtor stated in the judgment.
- The additional name or names by which the judgment debtor is known.
- The facts upon which the judgment creditor has relied in obtaining the judgment debtor's additional name or names.

The affidavit of identity must not include the name or names of persons, including any corporations, partnerships, or any legal entities not separately named in the judgment in which the judgment debtor is a partner, shareholder, or member, other than the judgment debtor [*Code Civ. Proc. § 680.135*].

[4] State Statutes

Contents, filing and certification of abstract of judgment. *Code Civ. Proc. § 674*

Abstract of money judgment as lien on real property. *Code Civ. Proc. § 697.310 et seq.*

Remedies for creation of judgment lien on real property of person who is not the judgment debtor. *Code Civ. Proc. § 697.410*

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27-318 California Forms of Pleading and Practice--Annotated § 318.382

§ 318.382 Application for Renewal of Judgment [Code Civ. Proc. § 683.140]--Judicial Council Form EJ-190

[1] FORM Application for Renewal of Judgment [Code Civ. Proc. § 683.140]--Judicial Council Form EJ-190

Click here to view image.

[2] Use of Form

This form of application for renewal of judgment, and renewal of judgment, is an illustrative reproduction of Judicial Council Form EJ-190, approved by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.30 et seq.*]

For a discussion of renewal of judgments see *§ 318.93[2]*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Amount of Renewed Judgment

In the case of a money judgment, the application must include the information necessary to compute the amount of the renewed judgment. This amount consists of the amount required to satisfy the judgment on the date of filing of the application, including the filing fee for the application [*see Code Civ. Proc. §§ 683.140(d), 683.150(c)*; *see OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp. (2008) 168 Cal. App. 4th 185, 193, 85 Cal. Rptr. 3d 350* (accrued postjudgment interest on judgment may be incorporated into principal when judgment is renewed)]. In the case of a money judgment payable in installments not previously renewed, the amount of the renewed judgment is the total of past due installments, the costs added to the judgment pursuant to *Code Civ. Proc. § 685.090*, and the accrued interest, which remains unsatisfied and is enforceable on the date of filing of the application and includes the filing fee [*Code Civ. Proc. § 683.150(d)*]. In the case of a money judgment payable in installments previously renewed, the amount of the judgment as renewed under the latest renewal is the total of the following which remains unsatisfied and is enforceable on the date of the filing of the application for the latest renewal [*Code Civ. Proc. § 683.150(e)*]:

(1) The amount of the judgment as renewed under the previous renewal.

(2) The past due installments that became due and payable after the previous renewal.

(3) The costs that have been added to the judgment pursuant to *Code Civ. Proc. § 685.090* after the previous renewal.

(4) The interest that has accrued on the amounts described in *Code Civ. Proc. § 683.150(e)(1), (2)* since the last renewal.

(5) The fee for filing the application for renewal.

In the case of a judgment for possession or sale of property, the entry of renewal must describe the performance remaining due [*Code Civ. Proc. § 683.150(f)*].

[4] Filing Fee

The fee for filing an application for renewal of judgment is as provided in *Gov. Code § 70626(b)* [*Code Civ. Proc. § 683.150(b)*].

[5] Entry of Renewal by Court Clerk

The court clerk must enter the renewal of judgment in the court records on the filing of the application [*Code Civ. Proc. § 683.150(a)*].

[6] State Statutes

Renewal of judgments. *Code Civ. Proc. § 683.110*

Application for renewal of judgment. *Code Civ. Proc. § 683.120*

Time for filing application. *Code Civ. Proc. § 683.130*

Contents of application. *Code Civ. Proc. § 683.140*

Entry of renewal in court records. *Code Civ. Proc. 683.150*

Filing fee. *Gov. Code § 26830(a)*

[7] Decisions

Accrued postjudgment interest on judgment may be incorporated into principal when judgment is renewed. *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp. (2008) 168 Cal. App. 4th 185, 193, 85 Cal. Rptr. 3d 350*

Debtor who waives protections of *Com. Code §§ 9504* and *9505* after default and stipulates to deficiency judgment is not entitled to require all collateral to be sold; judgment is properly renewed even though one item of collateral was retained by creditor after unsuccessful attempt to sell it at auction. *Brunzell Construction Co., Inc. v. Smith (1988) 200*

Cal. App. 3d 617, 620-623, 246 Cal. Rptr. 182

[8] Cross References

For a related form, see *§ 318.383*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.383

§ 318.383 Notice of Renewal of Judgment [Code Civ. Proc. § 683.160]--Judicial Council Form EJ-195

[1] FORM Notice of Renewal of Judgment [Code Civ. Proc. § 683.160]--Judicial Council Form EJ-195

Click here to view image.

[2] Use of Form

This form of notice of renewal of judgment is an illustrative reproduction of Judicial Council Form EJ-195. Although the Judicial Council has approved the form for optional use [*see Cal. Rules of Ct., Rule 1.30 et seq.*; *see also Code Civ. Proc. § 681.030(b)*], it nevertheless appears that it is mandatory to provide notice of renewal by using this form [*see* Code Civ. Proc. § 681.160(a)].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Service of Notice of Renewal

The judgment creditor must serve a notice of renewal of the judgment on the judgment debtor, either personally or by first class mail, and proof of service must be filed with the court clerk [*Code Civ. Proc. § 683.160(a)*]. A copy of the application for renewal of judgment must be attached to the notice [*Cal. Rules of Ct., Rule 3.1900*]. Until proof of service is filed, no writ may be issued, nor may any enforcement proceedings be commenced to enforce the judgment except to the extent that the judgment would be enforceable had it not been renewed [*Code Civ. Proc. § 683.160(b)*]. For forms of proof of service, see Ch. 518, *Service of Summons and Papers* .

[4] State Statutes

Service of notice of renewal. *Code Civ. Proc. § 683.160*

[5] California Rules of Court

Attachment of application to notice of renewal. *Cal. Rules of Ct., Rule 3.1900*

[6] Cross References

For a related form for Application for Renewal of Judgment, see *§ 318.382*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.384

§ 318.384 Notice of Judgment Lien on Personal Property [Code Civ. Proc. §§ 697.510, 697.550, 697.570]--Secretary of State Form J-1

[1] FORM Notice of Judgment Lien on Personal Property [Code Civ. Proc. §§ 697.510, 697.550, 697.570]--Secretary of State Form J-1

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Secretary of State Form J-1, Uniform Commercial Code Notice of Judgment Lien & Addendum. The form is for use to create a judgment lien on certain personal property by filing the notice in the office of the Secretary of State. This type of judgment lien may be created only if the judgment is a money judgment that was first entered in California after June 30, 1983 [*Code Civ. Proc. § 697.510(a)*]. The notice must be presented for filing on this form not more than 10 days after the date of the notice [*Code Civ. Proc. § 697.570*]. The form also contains an addendum for listing additional judgment debtors and/or creditors to the notice of judgment lien. For further discussion, see *§ 318.240[2]*.

Copies of the form may be obtained from stationery stores that carry legal forms. Copies may also be obtained from the Secretary of State, or downloaded from the Secretary's Internet site [*see* http://www.ss.ca.gov/business/ucc/ucc_formsfees.htm].

The form contains a special barcode patch in the upper left corner. For the Secretary of State's microfilming purposes, the patch should be clearly printed using a quality laser printer and kept free of damage. If the patch is altered, including by being stapled or photocopied, it could cause delays in the Secretary of State's microfilm process times.

[3] Execution

The notice of judgment lien must be executed under oath by the judgment creditor's attorney if the judgment creditor has an attorney of record or, if the judgment creditor does not have an attorney of record by the judgment creditor [*Code*

Civ. Proc. § 697.550].

[4] Contents

The notice must contain all of the following information [*Code Civ. Proc. § 697.550*]:

- The name and mailing address of the judgment creditor.
- The name and last known mailing address of the judgment debtor.
- A statement that: "All property subject to enforcement of a money judgment against the judgment debtor to which a judgment lien on personal property may attach under *Code Civ. Proc. § 697.530* is subject to this judgment lien."
- The title of the court where the judgment is entered and the cause and number of the action.
- The date of entry of the judgment and of any subsequent renewals and where entered in the records of the court.
- The amount required to satisfy the judgment at the date of the notice.
- The date of the notice.

[5] Service

The judgment creditor must serve a copy of the notice on the judgment debtor at the time of filing the notice of judgment lien or promptly thereafter. Service must be made personally or by mail. Failure to comply with this requirement does not, however, affect the validity of the judgment lien [*Code Civ. Proc. § 697.560*].

[6] State Statutes

Alternative or additional remedy. *Code Civ. Proc. § 697.520*

Creation of lien on personal property by filing notice of lien. *Code Civ. Proc. § 697.510(a)*

Duration of lien. *Code Civ. Proc. § 697.510(b)*

Property subject to lien. *Code Civ. Proc. § 697.530*

Service on judgment debtor. *Code Civ. Proc. § 697.560*

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27-318 California Forms of Pleading and Practice--Annotated § 318.385

§ 318.385 Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Notice of Lien

[1] FORM Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Notice of Lien

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF LIEN
Defendant.	)	
	)	
	)	

_____

To: _____ [*name*], Plaintiff
_____ [*name*], Plaintiff's Attorney
_____ [*name*], Defendant
_____ [*name*], Defendant's Attorney

PLEASE TAKE NOTICE that a lien has been created under *Sections 708.410-708.480 of the Code of Civil Procedureon* Cause No. _____, filed in _____ [*specify court, e.g.*, Superior] Court of _____ [*county*], California.

This lien is created pursuant to a judgment recovered by _____ [*name of judgment creditor*], whose

address is _____ [*specify address*] against _____ [*name of judgment debtor*], whose last known address is _____ [*specify address*], _____ [*specify recovery, e.g.*, in the sum of $_____] in Action No. _____, in the _____ [*specify court, e.g.*, Superior] Court in _____County, California, entitled _____ [*title of case*]. The judgment was duly entered in Volume _____, Page No. _____ of the _____ [*specify record, e.g.*, Judgment Book] of the above-entitled court on _____ [*date*] [and renewed on _____ [*date*]. _____ [The abstract of judgment *or* A certified copy of the judgment] is attached hereto as Exhibit A.

The amount required to satisfy the judgment creditor's money judgment as of _____ [*date notice is filed*] is $_____.

This lien attaches to any cause of action of _____ [*name of judgment debtor*] that is the subject of this _____ [action *or* proceeding] and to his/her rights to money or property under any judgment subsequently procured in the _____ [action *or* proceeding].

No compromise, dismissal, settlement, or satisfaction of this [action *or* proceeding] or of any of _____'s [*name of judgment debtor*] rights to money or property under any judgment procured herein may be entered into by or on behalf of _____ [*name of judgment debtor*], and he/she may not enforce his/her rights to money or property under any judgment procured in this _____ [action *or* proceeding], by a writ or otherwise, unless one of the following requirements is satisfied:

(1) The prior approval by order of the court in which the _____ [action *or* proceeding] is pending has been obtained;

(2) The written consent of _____ [*name of judgment creditor*] has been obtained or _____ [*name of judgment creditor*] has released the lien; or

(3) The money judgment of _____ [*name of judgment creditor*] has been satisfied.

_____ [*Name of judgment debtor*] may claim an exemption for all or any portion of the money or property within 30 days after he/she has notice of the creation of this lien. If the exemption is not claimed within the time allowed, it is waived.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*name of judgment creditor*]

[2] Use of Form

This notice of lien is for use by a judgment creditor to acquire a lien on a cause of action and any resultant judgment that belongs to his or her judgment debtor. The lien is obtained by filing the notice of lien and an abstract or certified copy of the judgment creditor's money judgment in the pending action or special proceeding to which the judgment debtor is a party [*Code Civ. Proc. § 708.410(b)*].

Cal. Rules of Ct., Rule 3.1860, requires that an authenticated record of the judgment on which the judgment creditor relies and a declaration as to the identity of the party involved and the amount due accompany a motion that a lien be

granted on a judgment. Although the notice of lien is not referred to as a motion in *Code Civ. Proc. §§ 708.410, 708.420*, counsel may wish to comply with *Cal. Rules of Ct., Rule 3.1360* when filing a notice of lien. For a general form of declaration, see Ch. 372, *Motions and Orders* .

Judicial Council Form AT-180/EJ-185, a form of notice of lien approved by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.30 et seq.*], may be used in lieu of the above form. For an illustration of this Judicial Council form, see Ch. 62, *Attachment* .

The form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Service of Notice

At the time of filing or promptly thereafter, a copy of the notice of lien and a statement of the date when the notice of lien was filed must be served on all parties who, prior thereto, have made an appearance in the action or special proceeding. Service is to be made personally or by mail. Failure to serve all the parties does not affect the creation of the lien, but the rights of a party are not affected by the lien until the party has notice of the lien [*Code Civ. Proc. § 708.410(c)*].

[4] Cross References

For discussion and forms relating to the enforcement of judgments generally, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40 et seq.*

[5] State Statutes

Lien for judgment creditor of party on cause of action and subsequent judgment. *Code Civ. Proc. § 708.410*

Notice of lien; contents. *Code Civ. Proc. § 708.420*

Court as having discretion to allow judgment creditor to intervene. *Code Civ. Proc. § 708.430(a)*

Status of judgment creditor. *Code Civ. Proc. § 708.430(b)*

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27-318 California Forms of Pleading and Practice--Annotated § 318.386

§ 318.386 Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings for Order Authorizing Compromise, Dismissal, Settlement, or Satisfaction of Pending Action or Proceeding, or Enforcement of Subsequent Judgment [Code Civ. Proc. § 708.440(b)]--Notice of Motion

[1] FORM Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings for Order Authorizing Compromise, Dismissal, Settlement, or Satisfaction of Pending Action or Proceeding, or Enforcement of Subsequent Judgment [Code Civ. Proc. § 708.440(b)]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	NOTICE OF MOTION AND MOTION FOR ORDER AUTHORIZING _____ [COMPROMISE *or* DISMISSAL *or* SETTLEMENT *or* SATISFACTION OF PENDING _____ (ACTION *or* PROCEEDING) *or* ENFORCEMENT OF SUBSEQUENT JUDGMENT]
Plaintiff,	[Telephone Appearance]
vs.	Date: _____
_____ [*name*],	Time: _____
Defendant.	Location: _____
	Judge: _____
	Date Action Filed: _____
	Trial Date: _____

_____

To _____ [*name of judgment creditor*] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*name of judgment debtor*] will, and hereby does, move for an order authorizing the _____ [compromise *or* dismissal *or* settlement *or* satisfaction of] the above-entitled _____ [action *or* proceeding]. The motion will be made on the grounds that _____ [*specify, e.g.*, settlement of the action would be in the best interests of the parties].

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion. Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*name of judgment debtor*]

CAUTION:

A memorandum is required to be served with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form of notice of motion is for use by a judgment debtor who is seeking to obtain an order authorizing the enforcement of a judgment that he or she recovered in an action or proceeding in which his or her judgment creditor has filed a lien. The form may also be used to give notice of a motion for an order authorizing the compromise, dismissal, settlement, or satisfaction of the action or proceeding. Such authorization must be obtained unless the judgment creditor's money judgment is first satisfied or the lien is released, or unless the judgment debtor was not served with notice of the lien on his or her cause of action, in which case he or she is not bound by the lien [*Code Civ. Proc. §§ 708.410(c), 708.440(a)*].

Notice of the motion must be served on the judgment creditor, either personally or by mail [*Code Civ. Proc. § 708.440(b)*].

[3] State Statutes

Enforcement of judgment debtor's judgment; compromise, dismissal, settlement, or satisfaction of action or proceeding subject to lien. *Code Civ. Proc. § 708.440*

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27-318 California Forms of Pleading and Practice--Annotated § 318.387

§ 318.387 Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings for Order Authorizing Compromise, Dismissal, Settlement, or Satisfaction of Pending Action or Proceeding, or Enforcement of Subsequent Judgment [Code Civ. Proc. § 708.440(b)]--Declaration in Support of Motion

[1] FORM Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings for Order Authorizing Compromise, Dismissal, Settlement, or Satisfaction of Pending Action or Proceeding, or Enforcement of Subsequent Judgment [Code Civ. Proc. § 708.440(b)]--Declaration in Support of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____[*name*]
vs.	)	IN SUPPORT OF MOTIONFOR ORDER AU-
_____ [*name*],	)	THORIZING _____
Defendant.	)	[ENFORCEMENT OF JUDGMENT IN *or*
	)	_____ (SETTLEMENT *or* COM-
	)	PROMISE *or* DISMISSAL *or* SATISFACTION) OF]
	)	PENDING _____ [ACTION *or*
	)	PROCEEDING]
		Date: _____
		Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

_____ [*Set forth facts supporting the motion, e.g.*, Defendant's motion for summary judgment has been denied. Defendant's settlement offer of $_____ is reasonable in light of the conflicting evidence, and is in excess of the amount required to satisfy the lien in favor of _____ (*name of judgment creditor*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date and place*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of declaration is for use in supporting a motion for an order authorizing the compromise, dismissal, settlement, or satisfaction of a judgment debtor's action or proceeding, or the enforcement of a subsequent judgment [*see Code Civ. Proc. § 708.440(b)*].

Code Civ. Proc. § 2015.5 authorizes a declaration under penalty of perjury, as in the above form, in lieu of an affidavit. For a form of affidavit, see Ch. 15, *Affidavits, Certificates, and Declarations* .

[3] Cross References

For a related form, see *§ 318.386*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.388

§ 318.388 Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings for Order Authorizing Dismissal, Settlement, or Satisfaction of Pending Action or Proceeding, or Enforcement of Subsequent Judgment [Code Civ. Proc. § 708.440(b)]--Order

[1] FORM Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings for Order Authorizing Dismissal, Settlement, or Satisfaction of Pending Action or Proceeding, or Enforcement of Subsequent Judgment [Code Civ. Proc. § 708.440(b)]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER _____ [AUTHORIZING
vs.	)	*or* DENYING] _____
_____ [*name*],	)	[ENFORCEMENT OF JUDGMENT IN *or*
Defendant.	)	_____ (COMPROMISE *or* DIS-
	)	MISSAL *or* SETTLEMENT *or* SATISFACTION)
	)	OF] PENDING _____ [ACTION
	)	*or* PROCEEDING]
	)	Date: _____
		Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

The motion of _____ [*name of judgment debtor*] for an order authorizing the _____ [enforcement of the judgment recovered in *or* _____ (compromise *or* dismissal *or* settlement *or* satisfaction) of] the above-entitled _____ [action *or* proceeding] came on regularly for hearing by the court this date. _____ [*Name of judgment debtor*] appeared by counsel _____ [*name*]; _____ [*specify party*] appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be _____ [granted *or* denied],

[*EITHER*]

IT IS ORDERED that the motion be, and hereby is, granted and that the _____[_____ (compromise *or* dismissal *or* settlement *or* satisfaction) of the above-entitled _____ (action *or* proceeding) *or* judgment procured therein] may be entered into _____ [by *or* on behalf of] _____ [*name of judgment debtor*].

It is also ordered that _____ [*specify such terms and conditions as the court may deem necessary to the authorization*].

[*OR*]

IT IS ORDERED that the motion be, and hereby is, granted and that the judgment recovered in the above-entitled _____ [action *or* proceeding] may be enforced in favor of _____ [*name of judgment debtor*].

[*OR*]

IT IS ORDERED that the motion be, and hereby is, denied.
Dated: _____

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use in granting or denying a motion of the judgment debtor for authorization to enforce a judgment obtained in the action or proceeding, or to compromise, dismiss, settle, or satisfy the action or proceeding [*see Code Civ. Proc. § 708.440*].

[3] Cross References

For a related form, see *§ 318.386*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.389

§ 318.389 Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings to Terminate Lien on Exempt Property [Code Civ. Proc. § 708.450]--Notice of Motion

[1] FORM Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings to Terminate Lien on Exempt Property [Code Civ. Proc. § 708.450]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION TO TER-
Defendant.	)	MINATE LIEN ON EXEMPT PROPERTY
	)	
	)	

_____

To _____ [*name of judgment creditor*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*] at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.*, defendant] will, and hereby does, move for an order terminating the lien on the following exempt property: _____ [*describe property; if real property, describe as on deed; if money, specify amount*]. This motion will be made on the grounds that the property described above is exempt from enforcement of a money judgment under Section _____ [*specify*] of the Code of Civil Procedure.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, on the papers, records, and file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant

CAUTION:
A memorandum is required to be served with this foregoing notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form of notice of motion is for use by a judgment debtor seeking to terminate the judgment creditor's lien as to money or property on grounds that the money or property is exempt from enforcement. The notice must be filed and served on the judgment creditor not later than 30 days after the judgment debtor has notice of the creation of the lien. Service must be made personally or by mail. Failure to move for exemption of the money or property within the time allowed waives the exemption [*Code Civ. Proc. § 708.450(a)*].

The motion must be accompanied by an affidavit or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*] in support of the application that includes all the matters set forth in *Code Civ. Proc. § 703.520(b)* [*Code Civ. Proc. § 708.450(a)*; *see § 318.389*].

[3] Cross References

For discussion and forms relating to statutory exemptions from enforcement of a money judgment, see Ch. 254, *Executions and Enforcement of Judgments* .

[4] State Statutes

Judgment debtor's claim of exemption for money or property recovered in action or special proceeding subject to lien. *Code Civ. Proc. § 708.450(a)*

Determination of exemption claim. *Code Civ. Proc. § 708.450(b)*

Court order terminating lien on exempt portion of money or property. *Code Civ. Proc. § 708.450(c)*

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27-318 California Forms of Pleading and Practice--Annotated § 318.390

§ 318.390 Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings to Terminate Lien on Exempt Property [Code Civ. Proc. § 708.450]--Declaration in Support of Motion

[1] FORM Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings to Terminate Lien on Exempt Property [Code Civ. Proc. § 708.450]--Declaration in Support of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DECLARATION OF _____ [*name*]
Defendant.	)	IN SUPPORT OF MOTION TO TERMINATE LIEN
	)	ON EXEMPT PROPERTY
	)	

_____

I, _____ [*name*], declare:

I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

The name and mailing address of the party claiming an exemption in this matter is _____ [*name and mailing address of judgment debtor*].

The property for which an exemption is claimed is _____ [*describe property claimed to be exempt*].

This claim is based on _____ [*cite statute on which exemption claim is based*].

The facts supporting this claim are as follows: _____ [*specify*].

[_____ (*Name*) is the spouse of the judgment debtor.

The following persons are dependent on the judgment debtor or his/her spouse for support: _____ (*list name, age, and relationship of all dependents*).

The following constitute all sources of income and earnings of _____ (*name of judgment debtor*), _____ (*name of judgment debtor's spouse*), and _____ (*names of judgment debtor's dependents*): _____ (*list sources and amounts of earnings and other income of the judgment debtor and his/her spouse and dependents*).

The following constitute all assets of _____(*name of judgment debtor*), _____ (*name of judgment debtor's spouse*), and _____ (*names of judgment debtor's dependents*): _____ (*list all assets and their value*).

The following constitute all outstanding obligations of _____ (*name of judgment debtor*), _____ (*name of judgment debtor's spouse*), and _____ (*names of judgment debtor's dependents*): _____ (*list outstanding obligations*)].

[*If exemption is claimed pursusant to Code Civ. Proc. § 704.010 (motor vehicles) or 704.060 (tools of trade), add*]

The following property, of the type described by Section _____ [*704.010 or 704.060*] of the Code of Civil Procedure, was _____ [solely owned *or* owned in combination with others] by defendant on _____ [*date of levy*]: _____ [*describe property*]. The property for which the exemption is sought is _____ [*identify property*].

[*If exemption is claimed pursuant to Code Civ. Proc. § 704.100* (*life insurance policies*), *add*]

The following property, of the type described by *Section 704.100 of the Code of Civil Procedure*, was _____ [solely owned *or* owned in combination with others] by _____ [defendant *or* defendant's spouse], on _____ [*date of levy*]: _____ [*state nature and amount of all such property*].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date and place*]

_____ [*signature*]
[*judgment debtor*]

_____ [*signature*]
[*judgment debtor's spouse*]

NOTE:
The judgment debtor's spouse must sign the declaration unless the spouses are living separate and apart [*Code Civ. Proc. § 703.530(c)*].

[2] Use of Form

This form of declaration is for use in supporting a motion to exempt property or money of the judgment debtor from the lien on his/her right under a judgment in the cause of action or proceeding [*see § 318.388*]. *Code Civ. Proc. § 2015.5* authorizes a declaration under penalty of perjury, as in the above form, in lieu of an affidavit. For a form of affidavit, see Ch. 15, *Affidavits, Certificates, and Declarations* .

[3] Contents of Declaration; Financial Statement

The declaration must contain the information required by *Code Civ. Proc. § 703.520(b)* [*Code Civ. Proc. § 708.450(a)*]. If an exemption is claimed pursuant to *Code Civ. Proc. § 704.010* (motor vehicles) or *704.060* (tools and money used in exercise of trade), the declaration must describe all other property of the same type, including exempt proceeds of property of the same type, owned by the judgment debtor alone or in combination with others on the date of levy and identify the property, whether or not levied on, to which the exemption is to be applied. If an exemption is claimed pursuant to *Code Civ. Proc. § 704.100* (unmatured life insurance policies), the declaration must state the nature and amount of all other property of the same type owned by the judgment debtor or the spouse of the judgment debtor alone or in combination with others on the date of levy [*Code Civ. Proc. § 703.520(b)(3)*].

If property is claimed to be exempt to the extent necessary for the support of the judgment debtor and his/her spouse and dependents, the declaration must also contain the financial statement set forth in *Code Civ. Proc. § 703.530(b)*[*Code Civ. Proc. §§ 703.520(b)(4), 703.530(a)*]. If the judgment debtor and his or her spouse are living together, both must sign the declaration when the financial statement is included pursuant to *Code Civ. Proc. § 703.530* [*Code Civ. Proc. § 703.530(c)*].

[4] State Statutes

Contents of affidavit. *Code Civ. Proc. §§ 703.520(b), 703.530*

Affidavit in support of application for exemption of money or property recovered by judgment debtor in action or proceeding subject to lien as required. *Code Civ. Proc. § 708.450(a)*

Declaration in lieu of affidavit. *Code Civ. Proc. § 2015.5*

[5] Cross References

For a related form, see *§ 318.389*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.391

§ 318.391 Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings to Terminate Lien on Exempt Property [Code Civ. Proc. § 708.450]--Order

[1] FORM Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings to Terminate Lien on Exempt Property [Code Civ. Proc. § 708.450]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER _____ [GRANTING *or*
Defendant.	)	DENYING] MOTION TO TERMINATE LIEN ON
	)	EXEMPT PROPERTY
	)	

_____

The motion of _____ [*name of moving party*] for an order determining certain property to be exempt from enforcement and terminating the lien of _____ [*name of judgment creditor*] on the _____ [action *or* proceeding] of _____ [*name of judgment debtor*] as to such property came on regularly for hearing by the court on _____ [*date*]. _____ [*Name of moving party*] appeared by counsel _____ [*name*]; _____ [*name(s) of other party(ies)*] appeared by counsel _____ [*name(s)*].

On proof made to the satisfaction of the court that the motion ought to be _____ [granted *or* denied],

[*EITHER*]

IT IS ORDERED that the motion be, and hereby is, granted and that the lien created in favor of _____ [*name of judgment creditor*] in the above-entitled _____ [action *or* proceeding] is hereby terminated with respect to the following exempt _____ [property, to wit: _____ (*describe property; if real property, describe as on deed*) *or* sum of money: _____ (*specify*)].

[*OR*]

IT IS ORDERED that the motion be, and hereby is, denied.
Dated: _____

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use in granting or denying the judgment debtor's motion for an order terminating the judgment creditor's lien on the portion of the money or property that may be recovered in the action or proceeding that has been determined to be exempt [*see § 318.389*].

[3] Cross References

For a related form, see *§ 318.389*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.392

§ 318.392 Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings for Order Applying Judgment Debtor's Rights Under Judgment to Satisfaction of Lien [Code Civ. Proc. § 708.470]--Notice of Motion

[1] FORM Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings for Order Applying Judgment Debtor's Rights Under Judgment to Satisfaction of Lien [Code Civ. Proc. § 708.470]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION TO APPLY
Defendant.	)	RIGHTS UNDER JUDGMENT TO SATISFAC-
	)	TION OF LIEN
	)	

_____

To _____ [plaintiff *or* cross plaintiff], _____ [*name*] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], [*specify party, e.g.,* defendant] will, and hereby does, move for an order applying the rights of _____ [*name of judgment debtor*] to money or property under the judgment in the above-entitled _____ [action *or* proceeding]

to the satisfaction of the lien created on behalf of _____ [*name of judgment creditor*] in this _____ [action *or* proceeding].

The motion will be made on the grounds that _____ [*specify, e.g.*, the judgment creditor has the right to the money or property by creation of the lien pursuant to *Sections 708.410-708.480 of the Code of Civil Procedure*, and that it may be applied to satisfaction of the lien pursuant to *Section 708.470* of the code of Civil Procedure].

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum served and filed herewith, on papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*party's status and name name*]

CAUTION:
A memorandum is required to be served with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form of notice of motion is for use in seeking an order to apply the judgment debtor's rights to money or property under a judgment to satisfaction of the lien created on the action or proceeding.

The motion may be made by any party to the action or proceeding. Notice must be served on all parties to the action or proceeding, either personally or by mail. For the purpose of proceedings relating to obtaining the order under *Code Civ. Proc. § 708.470*, the judgment creditor is considered a party, with the right both to make the motion and to receive notice [*see Code Civ. Proc. § 708.430(b)*].

[3] State Statutes

Order applying judgment debtor's rights to money or property under judgment to satisfaction of lien. *Code Civ. Proc. § 708.470(a)*

Order to party having custody or control of judgment debtor's property not to transfer until property applied to lien. *Code Civ. Proc. § 708.470(b)*

Judgment against party transferring judgment debtor's property with notice of lien. *Code Civ. Proc. § 708.470(c)*

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27-318 California Forms of Pleading and Practice--Annotated § 318.393

§ 318.393 Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings for Order Applying Judgment Debtor's Rights Under Judgment to Satisfaction of Lien [Code Civ. Proc. § 708.470]--Declaration in Support of Motion

[1] FORM Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings for Order Applying Judgment Debtor's Rights Under Judgment to Satisfaction of Lien [Code Civ. Proc. § 708.470]--Declaration in Support of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	DECLARATION OF _____
_____ [*name*],	)	[*name*] IN SUPPORT OF MOTION
Defendant.	)	FOR ORDER APPLYING RIGHTS UNDER JUDG-
	)	MENT TO SATISFACTION OF LIEN
	)	

_____

I, _____ [*name*], declare:

I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*party*) *or other statement as appropriate*].

A notice of lien was filed in the above-entitled action on _____ [*date*] pursuant to *Section 708.410(b) of the Code of Civil Procedure*, thus creating a lien in favor of _____ [*name of judgment creditor*] on

the cause of action of _____ [*name of judgment debtor*] and on the rights that _____ [he *or* she] has to _____ [money *or* property] under the judgment obtained therein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of declaration is for use in supporting a judgment debtor's motion for an order applying the rights of the judgment debtor to money or property under a judgment to satisfaction of the judgment creditor's lien [*see Code Civ. Proc. § 708.470(a)*].

Code Civ. Proc. § 2015.5 authorizes a declaration under penalty of perjury, as in the above form, in lieu of an affidavit. For a form of affidavit, see Ch. 15, *Affidavits, Certificates, and Declarations* .

[3] Cross References

For a related form, *see § 318.392*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.394

§ 318.394 Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings for Order Applying Judgment Debtor's Rights Under Judgment to Satisfaction of Lien [Code Civ. Proc. § 708.470]--Order

[1] FORM Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Proceedings for Order Applying Judgment Debtor's Rights Under Judgment to Satisfaction of Lien [Code Civ. Proc. § 708.470]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER _____ [GRANTING *or*
Defendant.	)	DENYING] MOTION TO APPLY JUDGMENT
	)	DEBTOR'S PROPERTY TO SATISFACTION OF
	)	LIEN

_____

The motion of _____ [*name of moving party*] for an order applying the rights of _____ [*name of judgment debtor*] to money or property under the judgment in the above-entitled _____ [action *or* proceeding] came on regularly for hearing by the court this date. _____ [*Name of moving party*] appeared by counsel _____ [*name*]; _____ [*name(s) of other party(ies)*] appeared by counsel _____ [*name(s)*].

On proof made to the satisfaction of the court that the motion ought to be _____ [granted *or* denied],

[*EITHER*]

IT IS ORDERED that the motion be, and hereby is, granted and that the rights of _____ [*name of judgment debtor*] to the following property, to wit: _____ [*describe property; if real property, describe as on deed; if money, specify amount*], obtained under the judgment in the above-mentioned _____ [action *or* proceeding] shall be applied to satisfaction of the lien created on behalf of _____ [*name of judgment creditor*].

[*OR*]

IT IS ORDERED that the motion be, and hereby is, denied.
Dated: _____

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use in granting or denying a party's motion for the application of the judgment debtor's rights to money or property under a judgment to the lien created on the action or proceeding by the judgment creditor under *Code Civ. Proc. § 708.410*.

[3] Cross References

For a related form, *see § 318.392*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.395

§ 318.395 Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Acknowledgment of Satisfaction of Lien

[1] FORM Judgment Creditor's Lien on Cause of Action of Judgment Debtor [Code Civ. Proc. § 708.410]--Acknowledgment of Satisfaction of Lien

[*Caption. As on papers previously filed in action.*]

For and in consideration of a valid draft in the amount of $_____, payable to the undersigned, full satisfaction is hereby acknowledged for the lien previously ordered and allowed in the above-entitled action on _____ [*date*] in favor of the undersigned. I hereby release _____ [*name of plaintiff or defendant*] and all other persons from any and all obligations, including principal, costs, and interest in connection with the lien as reflected by order of this court creating the lien.
Dated: _____

_____ [*signature*]
Judgment Creditor

[2] Use of Form

This form is for use by a judgment creditor to acknowledge satisfaction for the debt for which a lien had been granted under *Code Civ. Proc. § 708.410*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.396

§ 318.396 Proceedings to Release Property of Erroneously Identified Property Owner [Code Civ. Proc. §§ 697.410, 697.660]--Demand for Release

[1] FORM Proceedings to Release Property of Erroneously Identified Property Owner [Code Civ. Proc. §§ 697.410, 697.660]--Demand for Release

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	DEMAND FOR RELEASE OF JUDGMENT LIEN
_____ [*name*],	)	ON PROPERTY OF ERRONEOUSLY IDENTIFIED
Defendant.	)	PROPERTY OWNER
	)	[Code Civ. Proc. § _____
	)	(697.410(a) *or* 697.660(a))]

_____

To _____ [*name of judgment creditor*]:

[*EITHER*]

You are hereby notified that this document constitutes a demand that within 15 days after receipt of this demand, you file in the office of the Secretary of State a statement releasing the lien as to the property of _____ [*name of person making demand*].

[*OR*]

You are hereby notified that this document constitutes a demand for a recordable document releasing the judgment lien in the above-entitled action from the following property, to wit: _____ [*describe property, if real property, describe as on deed*].

This demand is made on the grounds that _____ [*name of property owner*] is not the judgment debtor and the property is not subject to enforcement of the judgment against the judgment debtor.

_____ [*signature*]
Attorney for _____
[*name of person making demand*]

[2] Use of Form

The foregoing form of demand is for use by the owner of property subjected to a judgment lien due to the erroneous identification of the property owner as the judgment debtor. In the case of personal property, the demand may also be made by a person holding a security interest in or a lien on the property [*Code Civ. Proc. §§ 697.410(a)* (real property), *697.660(a)* (personal property)].

[3] Duty to Release From Lien on Demand

The erroneously identified property owner, or in the case of personal property, the owner or a person having a security interest in or a lien on the property, may serve a written demand on the judgment creditor that the judgment creditor file a recordable document releasing the lien as to the property of the erroneously identified owner. The demand must be accompanied by proof to the satisfaction of the judgment creditor that the property owner is not the judgment debtor and that the property is not subject to enforcement of the judgment against the judgment debtor [*Code Civ. Proc. §§ 697.410(a), 697.660(a)*]. Within 15 days after receipt of the demand and proof, the judgment creditor must file the statement releasing the property. If the judgment creditor fails to comply with the demand, he or she will be liable to the person making the demand for all damages resulting from the failure, plus the sum of $100 [*Code Civ. Proc. §§ 697.410(b), 697.660(b)*].

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27-318 California Forms of Pleading and Practice--Annotated § 318.397

§ 318.397 Proceedings to Release Real Property of Erroneously Identified Property Owner [Code Civ. Proc. §§ 697.370, 697.410]--Lien Release

[1] FORM Proceedings to Release Real Property of Erroneously Identified Property Owner [Code Civ. Proc. §§ 697.370, 697.410]--Lien Release

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*], [et al.,]	)	
Plaintiff[s],	)	NO. _____
vs.	)	RELEASE FROM JUDGMENT LIEN
_____ [*name*], [et al.,]	)	[*Code Civ. Proc. §§ 697.370, 697.410*]
Defendant[s].	)	
	)	
	)	

_____

[*EITHER, if released real property is specified*]

This is a release from the judgment lien described herein of the real property located at _____ [*street address, and, if any, city*], _____ County, California, and more fully described as follows: _____ [*set forth legal description of property*].

It is hereby acknowledged that the record owner of the above-described property, _____ [*name*], whose address is _____ [*street address, city, and state of record owner*], is not the judgment debtor in the above-entitled action. The judgment debtor is _____ [*name*], and his/her address is

_____ [*street address, city, and state of judgment debtor*].

[*OR, if all real property within county is released, or if interest within county is unknown*]

This is a release from the judgment lien described herein of all of the interests in real property in _____ County, California, presently owned or hereafter acquired, of _____ [*name of erroneously identified property owner*], whose address is _____ [*street address, city, and state of erroneously identified property owner*].

It is hereby acknowledged that _____ [*name of erroneously identified property owner*] is not the judgment debtor in the above-entitled action. The judgment debtor is _____ [*name*], and his/her address is _____ [*street address, city, and state of judgment debtor*].

[*CONTINUE*]

This is a release from any lien that may be attached, or that may apparently have attached, to the above-described real property, with respect to _____ [*name of erroneously identified property owner*], arising from the judgment entered in the _____ Court of _____ County, California, in the cause of action _____ [*describe cause of action, e.g.,* in negligence for damages], Case No. _____, on _____ [*date*], and located in _____ [*describe where judgment was entered in court records, e.g.,* Volume _____ of the Judgment Book of _____County, page _____]. [A subsequent renewal was entered on _____ (*date*), in (*describe where judgment was entered in court records, e.g.,* Volume _____ of the Judgment Book of _____ County, page _____).]

The above-mentioned judgment lien was created on _____ [*date*], by recordation of _____ [an abstract of *or* a certified copy of the] judgment in _____ [*describe location of recordation in county records, e.g.,* the Official records of the County of _____, Book _____, page _____].

The judgment creditor is _____ [*name of judgment creditor*], and his/her address is _____ [*street address, city, and state of judgment creditor*].

[The judgment creditor's assignee is _____(*name of judgment creditor's assignee*), and his/her address is _____(*street address, city, and state of judgment creditor's assignee*).]

_____ [*signature*]
Attorney for _____
[*judgment creditor*]

ACKNOWLEDGMENT

_____

State of California,)
County of _____)

_____

On _____ [*date*], before me, _____ [*name and title of officer*], personally appeared _____ [*name*], _____ [personally known to me *or* proved to me on the basis of satisfactory evidence] to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that, by his/her signature on the instrument, the person, or the entity on behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

_____ [*signature*].....[*Seal of office*]
_____ [*name of office*]

[2] Use of Form

This form of lien release is for use by a judgment creditor who has recorded an abstract of judgment that apparently creates a lien against the real property of a person who is not the judgment debtor, because the name of the property owner is the same as or similar to the actual judgment debtor's name [*see Code Civ. Proc. §§ 697.370* (content of release), *697.410* (demand for release by wrongfully identified real property owner)].

For a form of release or subordination prescribed by the Secretary of State regarding a judgment lien on personal property, *see* § 318.393.8.

[3] Preparation of Lien Release

Although the governing statute requires the judgment creditor to prepare the lien release, it would be more prudent for the person making the demand to prepare it and send it along with the written demand for release. This assures that the property is correctly described in the release document.

[4] Substantial Compliance Sufficient

A release or subordination substantially complying with the requirements of *Code Civ. Proc. § 697.370* is effective even though it contains minor errors that are not seriously misleading [*Code Civ. Proc. § 697.370(c)*].

[5] Execution of Release or Subordination

A release or subordination is sufficient if it is executed by the judgment creditor in the same manner as an acknowledgment of satisfaction of judgment [*Code Civ. Proc. § 697.370(b)*]. An acknowledgment of satisfaction of judgment must be executed and acknowledged by one of the following [*Code Civ. Proc. § 724.060(c)*]:

(1) The judgment creditor.

(2) The assignee of record.

(3) The attorney for the judgment creditor or assignee of record, unless a revocation of the attorney's authority is filed.

(4) The local child support agency director or his or her designee, if the local child support agency has been providing child support services pursuant to *Fam. Code § 17400*. The acknowledgment of

satisfaction of judgment may be recorded by the local child support agency pursuant to *Gov. Code § 27282*.

[6] Filing of Release

In the case of real property, the release must be filed in the county recorder's office [*Code Civ. Proc. § 697.400(c)*].

[7] Title Insurance Company Form

The lien release should be given in a form acceptable to a title insurance company. The form illustrated here should satisfy that criterion in most cases; but a particular company might have its own form. If the property owner is concerned about clearing up an exception on a preliminary title report, the company that issued the report should be asked if it has a form of lien release that it prefers to have used.

[8] State Statutes

Acknowledgment. *Civ. Code §§ 1188, 1189*

Release or subordination of real property subject to lien. *Code Civ. Proc. § 697.370*

Demand for release of judgment lien by wrongfully identified real property owner. *Code Civ. Proc. § 697.410*

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27-318 California Forms of Pleading and Practice--Annotated § 318.398

§ 318.398 Proceedings to Release Property of Erroneously Identified Property Owner [Code Civ. Proc. §§ 697.410, 697.660]--Notice of Motion

[1] FORM Proceedings to Release Property of Erroneously Identified Property Owner [Code Civ. Proc. §§ 697.410, 697.660]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as approrpriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER RELEASING PROPERTY OF ERRONEOUSLY IDENTIFIED PROPERTY OWNER
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*name of judgment creditor*], and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____

[*name of person demanding release of property*] will, and hereby does, move for an order releasing the judgment lien on the property of _____ [*name of property owner*]. The motion will be made on the grounds that _____ [*name of owner of property*] was erroneously identified as the judgment debtor and is entitled to release of the lien.

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

CAUTION:
A memorandum is required to be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005(b), 1010*; Cal. Rules of Ct., Rule 3.113(a)].

[2] Use of Form

This notice of motion is for use by an owner of real or personal property subjected to a judgment lien due to the erroneous identification of the owner as the judgment debtor. In the case of personal property, it may also be used by a person having a security interest in or a lien on the property. The notice must be served on the judgment creditor, either personally or by mail [*Code Civ. Proc. §§ 697.410(c), 697.660(c)*].

A memorandum must be filed and a copy served with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[3] State Statutes

Notice of motion for order releasing property of erroneously identified property owner. *Code Civ. Proc. §§ 697.410(c), 697.660(c)*

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27-318 California Forms of Pleading and Practice--Annotated § 318.399

§ 318.399 Proceedings to Release Property of Erroneously Identified Property Owner [Code Civ. Proc. §§ 697.410, 697.660]--Declaration in Support of Motion

[1] FORM Proceedings to Release Property of Erroneously Identified Property Owner [Code Civ. Proc. §§ 697.410, 697.660]--Declaration in Support of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ (*name*)
vs.	)	IN SUPPORT OF MOTION FOR ORDER RELEAS-
_____ [*name*],	)	ING PROPERTY OF ERRONEOUSLY IDENTI-
Defendant.	)	FIED OWNER
	)	Date _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*Set forth facts establishing erroneous identification of property owner as judgment debtor, e.g.*, The judgment on which the lien is based was entered against John A. Smith, who resides at _____ (*address*) and has California Driver's License No. _____. The lien has attached or appeared to attach to property belonging to John B. Smith, who resides at _____ (*address*) and has California Driver's License No. _____].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

This form of declaration is for use in supporting a motion to release the property of an erroneously identified owner from the judgment lien [*see Code Civ. Proc. §§ 697.410(c), 697.660(c)*].

Code Civ. Proc. § 2015.5 authorizes a declaration under penalty of perjury, as in the above form, in lieu of an affidavit. For a form of affidavit, see Ch. 15, *Affidavits, Certificates, and Declarations* .

[2] Cross References

For a related form, see § 318.393.5

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27-318 California Forms of Pleading and Practice--Annotated § 318.400

§ 318.400 Proceedings to Release Property of Erroneously Identified Property Owner [Code Civ. Proc. §§ 697.410, 697.660]--Order Granting or Denying Motion to Release Property From Judgment Lien

[1] FORM Proceedings to Release Property of Erroneously Identified Property Owner [Code Civ. Proc. §§ 697.410, 697.660]--Order Granting or Denying Motion to Release Property From Judgment Lien
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*], [et al.,]	)	NO. _____
Plaintiff[s],	)	ORDER _____ [GRANTING *or*
vs.	)	DENYING] MOTION TO RELEASE PROPERTY
_____ [*name*], [et al.,]	)	FROM JUDGMENT LIEN
Defendant[s].	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

The motion of _____ [*name of moving party*] for an order releasing the property of _____ [*name of erroneously identified property owner*] from a judgment lien came on regularly for hearing by the court this date. _____ [*Name of moving party*] appeared by counsel _____ [*name*]; _____ [*name of judgment creditor*] appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be _____ [granted *or* denied],

[*EITHER*]

IT IS ORDERED that the following described property, to wit: _____ [*set forth description of personal property or of real property by address or other common designation, e.g.*, [123 Central Avenue, Midland, California], and more particularly described as follows:

_____ [*Set forth description of property as on deed; may be single-spaced (Cal. Rules of Ct., Rule 2.108(2))*]

be, and hereby is, released from any lien which may have attached, or which may apparently have attached, to it by reason of the _____ [recordation of the abstract of judgment in the above-entitled action, which abstract of judgment is recorded in the Official Records of the County of _____, Book _____, page _____ *or* filing of a notice of lien in the above-entitled action in the office of the Secretary of State].

IT IS FURTHER ORDERED that _____ [*name of judgment creditor*] shall pay to _____ [*name of person making demand*] damages in the sum of $_____, plus the sum of $100 as a penalty, pursuant to Section _____ [697.410(b) *or* 697.660(b)] of the Code of Civil Procedure plus reasonable attorney's fees in the sum of $_____.

[*OR*]

IT IS ORDERED that the motion be, and hereby is, denied and _____ [*name of moving party*] is ordered to pay to _____ [*name of judgment creditor*] reasonable attorney's fees in the sum of $_____.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use in granting or denying a motion for an order releasing property from an apparent judgment lien [*see Code Civ. Proc. §§ 697.410(c)* (real property), *697.660(c)* (personal property)]. A certified copy of the order may be, and should be, recorded [*see Gov. Code § 27326*].

When the court receives evidence to its satisfaction that the property owner is not the judgment debtor, and that the property is not subject to enforcement, the court must either order the judgment creditor to prepare and deliver a recordable document releasing the property, or itself order the release. The court order may be recorded with the county recorder's office, in the case of real property, or filed with the Secretary of State's office, in the case of personal property, with the same effect as the recordable document demanded by the property owner [*Code Civ. Proc. §§ 697.410(c), 697.660(c)*].

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27-318 California Forms of Pleading and Practice--Annotated § 318.401

§ 318.401 Statement of Release From or Subordination of Judgment Lien--Personal Property [Code Civ. Proc. § 697.650]--Secretary of State Form

[1] FORM Statement of Release From or Subordination of Judgment Lien--Personal Property [Code Civ. Proc. § 697.650]--Secretary of State Form

Click here to view image.

[2] Use of Form

This form is an illustration of the form prescribed by the Secretary of State for use in doing any of the following with respect to a judgment lien on personal property:

- Release the judgment lien on all the personal property subject to the lien of a sole judgment debtor or of all the judgment debtors [*Code Civ. Proc. § 697.650(a)(1)*].

- If the notice of judgment lien names more than one judgment debtor, release the judgment lien on all the personal property subject to the lien of one or more but of less than all the judgment debtors [*Code Civ. Proc. § 697.650(a)(2)*].

- Release the judgment lien on all or a part of the personal property subject to the lien [*Code Civ. Proc. § 697.650(a)(3)*].

- Subordinate to a security interest or other lien or encumbrance the judgment lien on all or a part of the personal property subject to the judgment lien [*Code Civ. Proc. § 697.650(a)(4)*].

- Change or update information on a previously filed judgment lien.

A statement of release or subordination is sufficient if it is signed by the judgment creditor and contains the name and address of the judgment debtor, the file number of the notice of judgment lien, and wording appropriate to bring the

statement within one of the paragraphs of *Code Civ. Proc. § 697.650(a)*. In the case of a release under *Code Civ. Proc. § 697.650(a)(3)*, the statement of release must also describe the property being released. In the case of a subordination under *Code Civ. Proc. § 697.650(a)(4)*, the statement of subordination must also describe the property on which the judgment lien is being subordinated and describe the security interest or other lien or encumbrance to which the judgment lien is being subordinated.

The form, if correctly filled out, is deemed to comply with the these statutory requirements [*see Code Civ. Proc. § 697.670(b)*]. A Notice of Judgment Lien Release or Subordination must be filed on this form. There is no limit to the number of these forms that can be submitted on any one filing. Copies of the form may be obtained from the Secretary of State or downloaded from the Secretary's Internet site [*see* http://www.ss.ca.gov/business/ucc/ucc_formsfees.htm].

The form contains a special barcode patch in the upper left corner. For the Secretary of State's microfilming purposes, the patch should be clearly printed using a quality laser printer and kept free of damage. If the patch is altered, including by being stapled or photocopied, it could cause delays in the Secretary of State's microfilm process times.

[3] Filing of Statement

The original and a first copy must be mailed to the Secretary of State for filing. A variable filing fee must accompany these [*see Code Civ. Proc. § 697.650(d)*; *Com. Code § 9525*; *Gov. Code § 12194*].

[4] Effect of Statement

The filing officer treats the filing of a statement of release of a judgment lien on personal property according to provisions of the Commercial Code. A complete release under *Code Civ. Proc. § 697.650(a)(1)* is treated in the same manner as a termination statement under *Com. Code §§ 9513* and *9519*. A release on all the personal property with respect to less than all of the judgment debtors under *Code Civ. Proc. § 697.650(a)(2)* is treated in the same manner as a comparable amendment under *Com. Code §§ 9512* and *9519*. A release on all or part of the property under *Code Civ. Proc. § 697.650(a)(3)* or the subordination of the lien under *Code Civ. Proc. § 697.650(a)(4)* is treated in the same manner as a statement of release filed under *Com. Code §§ 9512* and *9519*. For discussion of these provisions of the Commercial Code, see *Ch. 503, Sales: Secured Transactions, § 503.22[6][g], [k], [l]*.

[5] State Statutes

Release or subordination of personal property judgment lien. *Code Civ. Proc. § 697.650*

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27-318 California Forms of Pleading and Practice--Annotated § 318.402

§ 318.402 Statement of Release From or Subordination of Judgment Lien--Real Property [Code Civ. Proc. §§ 697.370, 697.410]

[1] FORM Statement of Release From or Subordination of Judgment Lien--Real Property [Code Civ. Proc. §§ 697.370, 697.410]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*], [et al.,]	)	
Plaintiff[s],	)	
vs.	)	NO. _____
_____ [*name*], [et al.,]	)	_____ [RELEASE FROM *or* SUB-
Defendant[s].	)	ORDINATION OF] JUDGMENT LIEN
	)	
	)	

_____

[*EITHER, if release or subordination of specified real property*]

This is a _____ [release from *or* subordination of] the judgment lien described herein of [_____ (*specify partial interest affected, e.g.,* the herein-described judgment debtor's remainder interest in)] the real property located at _____ [*street address, and, if any, city*], _____ County, California, and more fully described as follows: _____ [*set forth legal description of property*].

[*If the judgment debtor does not have an interest of record in the real property, add:* The record owner of the

above-described property is _____ (*name*).]

[The judgment lien described herein is hereby subordinated to _____ (*describe other lien or encumbrance to which judgment lien is subordinated*).]

[*OR, if release of all real property, known or unknown, within county*]

This is a release from the judgment lien described herein of all of the interests in real property in _____ County, California, presently owned or hereafter acquired, of the herein named judgment debtor subject to the lien.

[*CONTINUE*]

This is a _____ [release from *or* subordination of] any lien that may be attached, or that may apparently have attached, to the [judgment debtor's specified interest in the] above-described real property, arising from the judgment entered in the _____ Court of _____ County, California, in the cause of action _____ [*describe cause of action, e.g.,* in negligence for damages], Case No. _____, on _____ [*date*], and located in _____ [*describe where judgment was entered in court records, e.g.,* Volume _____ of the Judgment Book of _____ County, page _____]. [A subsequent renewal was entered on _____ (*date*) in (*describe where judgment was entered in court records, e.g.,* Volume _____ of the Judgment Book of _____ County, page _____).]

The above-mentioned judgment lien was created on _____ [*date*], by recordation of _____ [an abstract of *or* a certified copy of the] judgment in _____ [*describe location of recordation in county records, e.g.,* the Official records of the County of _____, Book _____, page _____].

The names and addresses of the interested parties are as follows:

Name	Capacity	Address
_____ _____	Judgment creditor	_____ _____
[_____ _____	Assignee of judgment creditor	_____ _____]
_____ _____	Judgment debtor	_____ _____
[_____ _____	Judgment debtor	_____ _____]

_____ [*signature*]
Attorney for _____
[*judgment creditor*]

)

STATE OF CALIFORNIA) ss.
COUNTY OF _____)
_____

On this _____ day of _____, in the year _____, before me _____ [*name and quality of officer*], personally appeared _____ [*name*], _____ [personally known to me *or* proved to me on the basis of satisfactory evidence] to be the person whose name is subscribed to this instrument, and acknowledged that he/she/they executed it.
Dated: _____.

_____ [*signature*]
_____ [*name of office*]
[*Seal of office*]

[2] Use of Form

This form of release or subordination is for use by a judgment creditor who has effected a judgment lien against real property of the judgment debtor, to release all or part of the property from the lien, or to subordinate the lien to another lien or an encumbrance with regard to all or part of the property [*see Code Civ. Proc. § 697.370*]. For a form of release from or subordination of a judgment lien against real property whose owner was wrongfully identified as a judgment debtor, *see § 318.397*. For a forms of release or subordination prescribed by the Secretary of State regarding personal property, *see § 318.401*.

[3] All Affected Judgment Debtors Must Be Named

The execution of a release or subordination of a judgment lien pursuant to *Code Civ. Proc. § 697.370* does not release or subordinate the judgment lien as to judgment debtors not named in the release pursuant to *Code Civ. Proc. § 697.370(b)(5)* (requiring name and address of affected judgment debtor) [*Code Civ. Proc. § 697.370(d)*].

[4] Cross References

For a related form, *see § 318.397*.

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[Reserved]

§§ 318.403[Reserved]

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27-318 California Forms of Pleading and Practice--Annotated § 318.420

§ 318.420 Acknowledgment of Satisfaction of Judgment [Code Civ. Proc. §§ 724.060, 724.120, 724.250]--Judicial Council Form

[1] FORM Acknowledgment of Satisfaction of Judgment [Code Civ. Proc. §§ 724.060, 724.120, 724.250]--Judicial Council Form

Click here to view image.

[2] Source of Form

Form EJ-100 was approved by the Judicial Council for optional use. Certain forms prescribed by the Judicial Council are mandatory [*see Cal. Rules of Ct., Rule 1.30*]; however, use of this form of acknowledgment is optional [*Cal. Rules of Ct., Rule 1.35*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Use of Form

This form is for use in preparing an acknowledgment of full satisfaction of judgment. A money judgment may be satisfied by payment of the full amount required to satisfy the judgment or by acceptance by the judgment creditor of a lesser sum in full satisfaction [*Code Civ. Proc. § 724.010(a)*]. For a discussion of the judgment creditor's duty to file an acknowledgment of satisfaction, see *§ 318.125[1]*.

[4] Entry of Satisfaction

The court clerk will enter satisfaction of a money judgment in the register of actions when either (1) a writ is returned satisfied for the full amount of a lump-sum judgment, (2) an acknowledgment of satisfaction is filed with the court, or (3) the court orders entry of satisfaction of judgment [*Code Civ. Proc. § 724.020*].

[5] State Statutes

Methods of satisfaction of money judgment. *Code Civ. Proc. § 724.010*

Duty to acknowledge satisfaction of judgment. *Code Civ. Proc. §§ 724.010(b), (c), 724.030*

Entry of satisfaction. *Code Civ. Proc. § 724.020*

Duty to file acknowledgment when abstract of judgment recorded. *Code Civ. Proc. § 724.040*

Contents of acknowledgment. *Code Civ. Proc. § 724.060*

Unjustified conditioning of delivery of acknowledgment. *Code Civ. Proc. § 724.070*

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27-318 California Forms of Pleading and Practice--Annotated § 318.421

§ 318.421 Proceedings to Compel Acknowledgment of Satisfaction of Judgment--Demand for Acknowledgment [Code Civ. Proc. §§ 724.050, 724.110, 724.220]

[1] FORM Proceedings to Compel Acknowledgment of Satisfaction of Judgment--Demand for Acknowledgment [Code Civ. Proc. §§ 724.050, 724.110, 724.220]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DEMAND FOR ACKNOWLEDGMENT OF
Defendant.	)	[PARTIAL] SATISFACTION OF JUDGMENT
	)	
	)	

_____

To _____ [*name and address of judgment creditor*]:

You are hereby notified that this document constitutes a demand for acknowledgment of _____ [full *or* partial] satisfaction of the _____ [judgment *or* matured installments under the installment judgment] in the above-entitled cause. It is demanded that you either execute, acknowledge, and deliver the acknowledgment of satisfaction to _____ [*name of person making demand*], or file an acknowledgment of satisfaction of judgment with the court. This demand is made on the grounds that the _____ [judgment *or* matured installments under the installment judgment] rendered in the above-entitled cause _____ [has *or* have] been satisfied _____ [in full *or* in part] in that _____ [*specify manner in which judgment was discharged, e.g.*, defendant has paid the full

amount due under the judgment].

[*If acknowledgment of full satisfaction of lump-sum judgment is demanded add:*]

IMPORTANT WARNING: If this judgment has been satisfied, the law requires that you comply with this demand not later than 15 days after you receive it. If a court proceeding is necessary to compel you to comply with this demand, you will be required to pay my reasonable attorney's fees in the proceeding if the court de-termines that the judgment has been satisfied and that you failed to comply with the demand. In addition, if the court determines that you failed without just cause to comply with this demand within the 15 days allowed, you will be liable for all damages I sustain by reason of such failure and will also forfeit one hundred dollars to me.

[*If acknowledgment of satisfaction of matured installments of an installment judgment is demanded add:*]

IMPORTANT WARNING: If the matured installments on this judgment have been satisfied as of the date specified in this demand, the law requires that you comply with this demand not later than 15 days after you receive it. (The "matured installments" are all amounts and installments that are due and payable on or before the date specified in this demand together with the accrued interest to that date and costs added to the judgment on or before that date.) If a court proceeding is necessary to compel you to comply with this demand, you will be required to pay my reasonable attorney's fees in the proceeding if the court determines that the matured installments have been satisfied and that you failed to comply with the demand. In addition, if the court determines that you failed without just cause to comply with this demand within the 15 days allowed, you will be liable for all damages I sustain by reason of such failure and will also forfeit one hundred dollars to me.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [Plaintiff *or* Defendant]

[2] Use of Form

This form of demand is for use by a judgment debtor in demanding that the judgment creditor execute a satisfaction of judgment. This form may be used to demand acknowledgment for either full or partial satisfaction of a lump-sum money judgment, or for the satisfaction of matured installments under an installment money judgment [*see Code Civ. Proc. §§ 724.050, 724.110, 724.220*].

[3] Necessity of Acknowledgment of Satisfaction

Whenever a judgment is satisfied in fact other than by writ, the judgment creditor or his or her attorney must deliver or file an acknowledgment [*Code Civ. Proc. § 724.030*].

[4] Demand for Acknowledgment of Satisfaction; Full or Partial Satisfaction

The judgment debtor or the owner of real or personal property subject to a judgment lien created under a money judgment may serve on the judgment creditor a demand in writing for the execution and delivery of an acknowledgment of satisfaction of judgment to the person making the demand. The right to make such a demand applies when a lump-sum judgment has been satisfied in part or in full, or in the case of real property only, when the judgment debtor has satisfied matured installments under an installment judgment [*see Code Civ. Proc. §§ 724.050(a)*, 724.110,]. In all instances, the judgment creditor must comply with the demand no later than 15 days after actual receipt of the demand [*Code Civ. Proc. §§ 724.050(b), 724.110, 724.220(c)*]. If the judgment has been satisfied in full, or if matured

installments as of the date specified in the demand have been satisfied, a failure to comply with the demand without just cause renders the judgment creditor liable to the person making the demand for all damages resulting from the failure, plus the sum of $100 [*Code Civ. Proc. §§ 724.050(e), 724.240(a)*].

If the judgment creditor does not comply with the demand within the time allowed, the judgment debtor or property owner may apply to the court on noticed motion for an order requiring the judgment creditor to comply with the demand [*Code Civ. Proc. §§ 724.050(d), 724.110(b), 724.230*; *see § 318.422*]. During the proceedings on the motion, the court may also determine the judgment creditor's liability for damages and the $100 penalty [*Code Civ. Proc. §§ 724.050(e), 724.240*].

[5] State Statutes

Demand for acknowledgment for full satisfaction of judgment. *Code Civ. Proc. § 724.050(a)*

Liability for failure to comply with demand for acknowledgment of full satisfaction. *Code Civ. Proc. § 724.050(e)*

Demand for acknowledgment of partial satisfaction of judgment. *Code Civ. Proc. § 724.110(a)*

Demand for acknowledgment of satisfaction of matured installments under installment judgment. *Code Civ. Proc. § 724.220*

Court order compelling compliance with demand. *Code Civ. Proc. §§ 724.050(d), 724.110(b), 724.230*

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D. Discharge And Satisfaction Of Judgments

27-318 California Forms of Pleading and Practice--Annotated § 318.422

§ 318.422 Proceedings to Compel Acknowledgment of Satisfaction of Judgment--Notice of Motion [Code Civ. Proc. §§ 724.050(d), 724.110(b), 724.230]

[1] FORM Proceedings to Compel Acknowledgment of Satisfaction of Judgment--Notice of Motion [Code Civ. Proc. §§ 724.050(d), 724.110(b), 724.230]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION TO COM-
Plaintiff,	)	PEL ACKNOWLEDGMENT OF [PARTIAL] SAT-
vs.	)	ISFACTION OF JUDGMENT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*specify, e.g.*, plaintiff] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [

party, e.g., defendant] will, and hereby does, move for an order compelling _____ [*name*], _____ [*party, e.g.*, plaintiff], to comply with _____ [*moving party's*] demand to acknowledge [partial] satisfaction of the [matured installments on the] judgment herein. [*If entire judgment or matured installments under installment judgment are satisfied and judgment creditor has failed without just cause to comply with demand for acknowledgement, add:*]

_____ [*specify party, e.g.*, Defendant] will also move the court to hold _____ [*specify party, e.g.*, plaintiff], _____ [*name of judgment creditor*], liable to _____ [*name of moving party*] for damages in the sum of $_____ sustained by reason of plaintiff's failure without just cause to comply with the demand for acknowledgment of satisfaction, plus $100. The motion will be made on the grounds that the _____ [judgment *or* matured installments under the installment judgment] rendered in the above-entitled cause _____ [has *or* have] been satisfied _____ [in full *or* in part] by _____ [*specify manner in which judgment was discharged, e.g.*, defendant paying the full amount due under the judgment] and that _____ [*name of judgment creditor*] has failed without just cause to comply with the demand for acknowledgment of satisfaction as required by _____ [*cite statute*].

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum served and filed herewith, on papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]
_____

CAUTION:
A memorandum is required to be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005(b), 1010*; Cal. Rules of Ct., Rule 3.113(a)].

_____

[2] Use of Form

This form of notice of motion is for use in obtaining an order to compel a judgment creditor to comply with a demand for acknowledgment of either partial or complete satisfaction of judgment, or in the case of an installment judgment, the satisfaction of matured installments. In the case of full satisfaction of judgment, the court may compel the judgment creditor to comply with the demand, or order the entry of satisfaction without the acknowledgment [*Code Civ. Proc. § 724.050(d)*]. In the case of partial satisfaction, the court must determine the amount of partial satisfaction and compel the judgment creditor to comply with the demand [*Code Civ. Proc. § 724.110(b)*; *see Jhaveri v. Teitelbaum (2009) 176 Cal. App. 4th 740, 752-754, 98 Cal. Rptr. 3d 268]* . In the case of satisfaction of matured installments under an installment judgment, the court may compel compliance with the demand, or make an order determining that the matured installments as of the date specified in the demand have been satisfied [*Code Civ. Proc. § 724.230*].

A memorandum must be filed and a copy served with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[3] California Points and Authorities

For memoranda supporting motion for order compelling satisfaction of a judgment, see California Points and Authorities, Ch. 131, *Judgments* (Matthew Bender)

[4] State Statutes

Entry of satisfaction of judgment. *Code Civ. Proc. § 724.020*

Duty to provide acknowledgment of full satisfaction. *Code Civ. Proc. § 724.030*

Demand for acknowledgment of full satisfaction; liability for refusal. *Code Civ. Proc. § 724.050(a), (e)*

Court's power to compel acknowledgment. *Code Civ. Proc. §§ 724.050(d), 724.110(b)*

Unjustified conditioning of delivery of acknowledgment of satisfaction; liability. *Code Civ. Proc. § 724.070*

Awarding of attorney's fees as required in actions maintained pursuant to *Code Civ. Proc. §§ 724.010-724.100*. *Code Civ. Proc. § 724.080*

Damages provided by *Code Civ. Proc. §§ 724.010-724.100* as not in derogation of any other damages or penalties. *Code Civ. Proc. § 724.090*

Demand for acknowledgment of partial satisfaction of judgment. *Code Civ. Proc. § 724.110(a)*

Demand for acknowledgment of satisfaction of matured installments under installment judgment. *Code Civ. Proc. § 724.220*

[5] Decisions

Sufficiency of notice of motion and affidavits in support of notice of motion to compel satisfaction of judgment. *Ramey v. Myers (1958) 159 Cal. App. 2d 82, 85-87, 323 P.2d 805*

[6] Cross References

For related forms, see *§§ 318.420* and *318.421*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.423

§ 318.423 Proceedings to Compel Acknowledgment of Satisfaction of Judgment--Declaration in Support of Motion [Code Civ. Proc. §§ 724.050(d), 724.110(b), 724.230]

[1] FORM Proceedings to Compel Acknowledgment of Satisfaction of Judgment--Declaration in Support of Motion [Code Civ. Proc. §§ 724.050(d), 724.110(b), 724.230]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____
vs.	)	[*name*] IN SUPPORT OF MOTION TO COMPEL
_____ [*name*],	)	ACKNOWLEDGMENT OF [PARTIAL] SATIS-
Defendant.	)	FACTION OF JUDGMENT
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*party*) *or* now, and at all times hereinafter mentioned was, a resident of California, presently residing at _____ (*address*), in

_____ (*city*) *or specify other capacity as appropriate*].

_____ [*Describe manner in which judgment was satisfied, e.g.,* on _____ [*date*], a check in the full amount of the judgment was delivered to _____ (*name of judgment creditor*) and the cancelled check was thereafter received by defendant].

A demand was made on _____ [*name of judgment creditor*] on _____ [*date*], to file an acknowledgment of satisfaction and _____ [*name of judgment creditor*] has not complied with the demand.

[*If moving party is seeking $100 penalty and damages, add:*]

The failure of plaintiff _____ [*name of judgment creditor*] to comply with the demand for acknowledgment of satisfaction was without just cause in that _____ [*specify facts supporting contention, e.g.*, defendant telephoned plaintiff twice after the demand was sent and was informed that plaintiff would execute the acknowledgment, and that no reason existed to prevent plaintiff from so doing, but to date the demand has not been complied with]. By reason of plaintiff's failure to comply with the demand, defendant _____ [*set forth facts regarding damages suffered by judgment debtor, e.g.*, has been unable to perform on a contract to sell property on which a lien was recorded pursuant to the judgment] and has suffered damages in the sum of $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of declaration is for use in supporting a motion to compel satisfaction of a judgment [*see § 318.422*].

[3] Use of Supporting Declaration

In some instances, a supporting declaration which specifies the grounds upon which a motion to compel satisfaction of judgment is made may serve to cure deficiencies in the motion itself. For example, where a motion fails to specify the grounds upon which the motion is made, but states that the motion is based upon notice, points and authorities, and certain affidavits, and where those affidavits do, in fact, apprise the adverse party of the grounds, the court may find that adequate notice has been provided [*see Ramey v. Myers (1958) 159 Cal. App. 2d 82, 85-86, 323 P.2d 805]* .

[4] Cross References

For a related form, see *§ 318.422*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.424

§ 318.424 Proceedings to Compel Acknowledgment of Satisfaction of Judgment--Order [Code Civ. Proc. §§ 724.050(d), 724.110(b), 724.230]

[1] FORM Proceedings to Compel Acknowledgment of Satisfaction of Judgment--Order [Code Civ. Proc. §§ 724.050(d), 724.110(b), 724.230]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER _____ [GRANTING *or* DENYING] MOTION TO COMPEL ACKNOWLEDGMENT OF [PARTIAL] SATISFACTION OF JUDGMENT
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

The motion of _____ [*name of moving party*] for an order to compel acknowledgment of [partial] satisfaction of judgment came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

Upon proof made to the satisfaction of the court that the motion ought to be _____ [granted *or*

denied].

[*EITHER*]

IT IS ORDERED that the motion be, and hereby is, granted and the clerk is hereby ordered to enter forthwith satisfaction herein in favor of _____ [*moving party*].

[*OR*]

IT IS ORDERED that the motion be, and hereby is, granted and _____ [*name of judgment creditor*] is hereby ordered to comply with the demand for acknowledgment of satisfaction made by _____ [*name of person making demand*].

[*OR*]

IT IS ORDERED that the motion be, and hereby is, granted and _____ [it is determined that the matured installments in the amount of $_____ under the judgment as of _____ (*date specified in demand*) have been satisfied *or* _____ (*name of judgment creditor*) is hereby ordered to comply with the demand for acknowledgment of satisfaction made by _____ (*name of person making demand*)].

[*OR*]

IT IS ORDERED that the motion be, and hereby is, granted and it is determined that the judgment has been partially satisfied in favor of _____ [*name of judgment debtor*] in the amount of $_____. [It is also ordered that _____ (*name of judgment creditor*) immediately execute, acknowledge, and deliver an acknowledgment of partial satisfaction of judgment to _____ (*name of judgment debtor*).]

[*If order is granting $100 penalty or penalty plus damages, add:*]

IT IS FURTHER ORDERED that _____ [*name of judgment creditor*] pay the sum of $100 [and damages in the sum of $_____] to _____ (*name of moving party*) pursuant to *Section 724.050(e) of the Code of Civil Procedure.*

[*OR*]

IT IS ORDERED that the motion be, and hereby is, denied.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use in either granting or denying a motion to compel satisfaction of judgment [*see § 318.422*].

When a judgment is satisfied in full, either the first or second alternative paragraph should be used in the notice of motion. When matured installments under an installment judgment have been satisfied, the third alternative paragraph should be used. When the judgment has been partially satisfied, the fourth alternative paragraph should be used.

[3] Cross References

For a related form, see *§ 318.422*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.425

§ 318.425 Proceedings to Vacate Satisfaction of Judgment--Notice of Motion to Vacate

[1] FORM Proceedings to Vacate Satisfaction of Judgment--Notice of Motion to Vacate

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION TO VA-
Defendant.	)	CATE SATISFACTION OF JUDGMENT
	)	
	)	

_____

TO _____ [*identify party, e.g.*, defendant] _____ [*name*] and to _____ his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Divison) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.*, plaintiff] will, and hereby does, move for an order vacating satisfaction of the judgment entered in the above-entitled action. The motion will be made on the grounds that _____ [*specify, e.g.*, the judgment was entered in fraud of plaintiff's rights under the judgment].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, on the papers, records, and file herein, and on such oral and documentary

evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

[2] Use of Form

This form of a notice of motion is for use in vacating satisfaction of judgment.

[3] Grounds for Vacating Satisfaction

A party to the record is able to have a satisfaction of judgment entered in fraud of his or her rights set aside on motion in the action in which the judgment is entered [*Wherry v. Rambo (1950) 97 Cal. App. 2d 569, 571, 218 P.2d 142]* . Fraud, undue influence, and mistake are the grounds generally recognized as sufficient for vacating a satisfaction of judgment [*Remillard Brick Co. v. Dandini (1950) 98 Cal. App. 2d 617, 622, 220 P.2d 927]* .

For discussion and forms relating to vacating a judgment on grounds of extrinsic fraud or mistake, see Ch. 489, *Relief from Judgments and Orders* ;.

[4] California Points and Authorities

For memoranda supporting and opposing a motion for order vacating satisfaction of judgment, see California Points and Authorities, Ch. 131, *Judgments* (Matthew Bender)

[5] Decisions

Fraud, undue influence, and mistake are grounds generally recognized as sufficient grounds for vacating satisfaction of judgment. *Remillard Brick Co. v. Dandini (1950) 98 Cal. App. 2d 617, 622, 220 P.2d 927*

Party to record is able to have satisfaction of judgment entered in fraud of his or her rights set aside on motion in action in which judgment is rendered. *Wherry v. Rambo (1950) 97 Cal. App. 2d 569, 571, 218 P.2d 142*

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27-318 California Forms of Pleading and Practice--Annotated § 318.426

§ 318.426 Proceedings to Vacate Satisfaction of Judgment--Declaration in Support of Motion

[1] FORM Proceedings to Vacate Satisfaction of Judgment--Declaration in Support of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____ DECLARATION OF
Plaintiff,	)	_____ [*name*] IN SUPPORT OF
vs.	)	MOTION TO VACATE SATISFACTION OF
_____ [*name*],	)	JUDGMENT
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*Set forth facts supporting motion to vacate the satisfaction, e.g.,* On _____ [*date*], plaintiff substituted counsel in the above-entitled action. Subsequent to the substitution,

plaintiff's former attorney accepted an amount from defendant in satisfaction of judgment without plaintiff's knowledge, consent, or authorization. The amount tendered was substantially less than that owed to plaintiff under the judgment and was accepted in fraud of plaintiff's rights under the judgment].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of declaration is for use in support of a motion to vacate satisfaction of judgment.

[3] Cross References

For a related form, *see § 318.425*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.427

§ 318.427 Proceedings to Vacate Satisfaction of Judgment--Order

[1] FORM Proceedings to Vacate Satisfaction of Judgment--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff	)	ORDER _____ [GRANTING *or*
vs.	)	DENYING] MOTION TO VACATE SATISFAC-
_____ [*name*],	)	TION OF JUDGMENT
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

The motion of _____ [*name of moving party*] for an order to vacate satisfaction of judgment came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

Upon proof made to the satisfaction of the court that the motion ought to be _____ [granted *or* denied],

[*EITHER*]

IT IS ORDERED that the motion be, and hereby is, granted and the clerk is hereby ordered to vacate the satisfaction of judgment.

[*OR*]

IT IS ORDERED that the motion be, and hereby is, denied.
Date: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use in either granting or denying a motion to vacate satisfaction of judgment.

[3] Cross References

For a related form, *see § 318.425*.

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27-318 California Forms of Pleading and Practice--Annotated §§ 318.428-318.439

[Reserved]

§§ 318.428[Reserved]

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E. Assignment Of Judgments

27-318 California Forms of Pleading and Practice--Annotated § 318.440

§ 318.440 Assignment of Judgment--General Form

[1] FORM Assignment of Judgment--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ASSIGNMENT OF JUDGMENT
Defendant.	)	
	)	
	)	

_____

For value received, I, _____ [*name*], plaintiff herein, assign to _____ [*name of assignee*] the money judgment rendered in the above-entitled action in favor of me and against _____ [*name of defendant*], entered on _____ [*date*]. I intend hereby to transfer all my right, title, and interest in any sums of money due by reason of that judgment to _____ [*name of assignee*].
Dated: _____.

_____ [*signature*]

[2] Use of Form

This form of assignment is for use in assigning a judgment.

[3] Decisions

No statutory limitations on power to assign judgment. *Curtin v. Kowalsky (1904) 145 Cal. 431, 434, 78 P. 962*

Rights as between successive assignees of judgments. *Curtin v. Kowalsky (1904) 145 Cal. 431, 434, 78 P. 962*

No requirement that assignment of judgment be in writing. *Painter v. Berglund (1939) 31 Cal. App. 2d 63, 66, 87 P.2d 360*

Transfer of title as not dependent upon the existence of valuable consideration. *Curtin v. Kowalsky (1904) 145 Cal. 431, 434, 78 P. 962*

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E. Assignment Of Judgments

27-318 California Forms of Pleading and Practice--Annotated § 318.441

§ 318.441 Assignment of Judgment--With Warranty

[1] FORM Assignment of Judgment--With Warranty

[*Caption. See § 318.440.*]

I, _____ [*name*], plaintiff herein, hereby sell, assign, and transfer to _____ [*name of assignee*], the judgment heretofore given, made, and entered in the above-entitled cause on _____ [*date*], and entered in Vol. _____ of the Judgment Book, page _____ of the above-entitled court, in favor of me and against _____ [*name of defendant*], and I hereby represent and warrant to _____ [*name of assignee*] that the judgment is wholly due and unpaid and owing from _____ [*name of defendant*].

I hereby authorize _____ [*name of assignee*] to collect, adjust, settle, compromise, or enforce the payment thereof in my name or otherwise.
Dated: _____.

_____ [*signature*]

[2] Use of Form

This form of assignment is for use in assigning a judgment with a warranty.

[3] Cross References

For a related form, *see § 318.440*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.442

§ 318.442 Acknowledgment of Assignment of Judgment [Code Civ. Proc. § 673]

[1] FORM Acknowledgment of Assignment of Judgment [Code Civ. Proc. § 673]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ACKNOWLEDGMENT OF ASSIGNMENT OF
Defendant.	)	JUDGMENT
	)	
	)	

_____

1. I/We hereby acknowledge assignment of the right to _____ [*describe assigned right, e.g.,* to collect the money judgment recovered in the above-entitled action, which is $_____].

2. Judgment creditor:

_____ [*name*]
_____ [*address*]

3. Judgment debtor:

_____ [*name*]
_____ [*last known address*]

4. Assignee:

_____ [*name*]
_____ [*address*]

5. a. Judgment was entered on _____ [*date*].

b. Judgment was entered in judgment book volume _____ [*number*], page _____[*number*].

[*ADD, if judgment was renewed*]

6. a. Judgment was renewed on _____ [*date*].

b. Renewal of the judgment was entered in judgment book volume _____ [*number*], page _____[*number*].
Date: _____

_____
[*signature of judgment creditor or, if any, of prior assignee of record*]

ACKNOWLEDGMENT

_____

State of California,)
County of _____)
_____)

On _____ [*date*], before me, _____ [*name and title of officer*], personally appeared _____ [*name*], _____ [personally known to me *or* proved to me on the basis of satisfactory evidence] to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that, by his/her signature on the instrument, the person, or the entity on behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

_____ [*signature*] .....[*Seal of office*]

_____ [*name of office*]

[2] Use of Form

This form is for use in preparing an acknowledgment of assignment of judgment. An assignee of a right represented by a judgment may become an assignee of record by filing with the clerk of the court that entered the judgment an

acknowledgment of assignment of judgment [*Code Civ. Proc. § 673(a)*].

An assignee of a judgment is not entitled to enforce the judgment under *Code Civ. Proc. § 680.010 et seq.* (Enforcement of Judgments Law) unless an acknowledgment of assignment of judgment to that assignee has been filed under *Code Civ. Proc. § 673* or the assignee has otherwise become an assignee of record [*Code Civ. Proc. § 681.020*]. *Code Civ. Proc. § 673(d)* states that the acknowledgment procedure is in addition to, and does not limit or restrict, any other means by which an assignee may become an assignee of record. However, it is unclear what other methods might be used to become an assignee of record.

[3] Effect of Filing of Acknowledgment of Assignment

The filing of an acknowledgment of assignment is not required in order to make a valid transfer of the interest in the judgment [*see Civ. Code § 954.5(a)*]. However, the filing of an acknowledgment of assignment of judgment gives the person who first files it priority over any other bona fide assignees of the same right for value without notice [*Civ. Code § 954.5(b)*].

The filing of the acknowledgment of assignment is not considered to be notice to the judgment debtor so as to invalidate any payments made by the judgment debtor to the original creditor to satisfy the judgment [*Civ. Code § 954.5(c)*].

[4] State Statutes

Acknoledgment; general form. *Civ. Code §§ 1188, 1189*

Acknowledgment of assignment. *Code Civ. Proc. § 673(a)*

Form and contents of acknowledgment of assignment. *Code Civ. Proc. § 673(b), (c)*

Enforcement of judgment by assignee. *Code Civ. Proc. § 681.020*

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E. Assignment Of Judgments

27-318 California Forms of Pleading and Practice--Annotated §§ 318.443- 318.459

[Reserved]

§§ 318.443[Reserved]

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F. Actions On Domestic, Sister State, And Foreign Judgments

27-318 California Forms of Pleading and Practice--Annotated § 318.460

§ 318.460 Complaint on Domestic Money Judgment--General Form

[1] FORM Complaint on Domestic Money Judgment--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	COMPLAINT ON DOMESTIC MONEY JUDG-
Defendant(s).	)	MENT
	)	
	)	

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____County, California.

2. On _____ [*date*] plaintiff recovered judgment against _____ [*name of defendant*] for _____ [*specify recovery, e.g.*, the sum of $_____] [and for costs in the sum of $_____] in Action No. _____, in _____ [this court *or* the _____ Court of _____County], entitled _____ [*name of plaintiff*] vs. _____ [*name of defendant*], which was duly entered in Vol. _____ of the Judgment Book of that court, page _____, on _____ [*date*]. The judgment bears interest at the rate of _____ percent per annum from _____ [*date*]. [Costs in the sum

of $_____ have accrued since that date.]

3. Judgment in the above-mentioned action has become final. It has not been vacated, modified, stayed, or set aside, and _____ [the time for appeal has expired *or* the judgment was affirmed on appeal to _____ (the Supreme Court of California *or* the Court of Appeal of California, _____ District)].

4. Plaintiff has demanded that defendant pay plaintiff the amount of $_____ due on the judgment, but defendant has failed and refused to pay that amount or any part thereof [except the sum of $_____]. [A copy of that demand is attached hereto as Exhibit A and made a part hereof.]

5. There is now due, owing, and unpaid on the judgment the sum of $_____, together with interest at the rate of _____percent per annum from _____ [*date*].

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____, together with interest at the legal rate of _____ percent per annum from _____ [*date*];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of complaint is for use in bringing an action on a domestic money judgment.

[3] Allegations

This complaint alleges: (1) the recovery of the judgment on which the action is brought, including interest and costs (Paragraph 2) [*Bronzan v. Drobaz (1892) 93 Cal. 647, 650, 29 P. 254]* ; (2) the finality of the prior judgment

(Paragraph 3) [*see Hoover v. Galbraith (1972) 7 Cal. 3d 519, 525-526, 102 Cal. Rptr. 733, 498 P.2d 981* ; *Code Civ. Proc. § 456*]; (3) the plaintiff's demand for payment and the defendant's refusal to make such payment (Paragraph 4); and (4) the amount due, owing, and unpaid on the judgment, together with interest thereon (Paragraph 5).

[4] Pleading and Proving Judgment

In pleading a judgment of a court, it is not necessary to state the facts conferring jurisdiction, but such judgment may be stated to have been duly given or made and to have become final. If the allegation of jurisdiction is controverted, the party pleading that fact must establish on the trial the facts conferring jurisdiction and creating finality [*Code Civ. Proc. § 456*].

When a judgment of a court is conclusive, the judgment must be alleged in the pleadings if there is an opportunity to do so; if there is no such opportunity, the judgment may be used as evidence [*Code Civ. Proc. § 1908.5*].

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[6] State Statutes

Declaration under penalty of perjury as verification. *Code Civ. Proc. § 2015.5*

An action upon a judgment or decree as required to be commenced within 10 years. *Code Civ. Proc. § 337.5*

Proving judgment as an official, recording writing. *Evid. Code §§ 1530-1532*

Judgments as evidence. *Evid. Code §§ 1301, 1302*

[7] Decisions

Action on judgment may be brought against local public entity defendant, if brought within 10 years after the judgment became final. *Barkley v. City of Blue Lake (1993) 18 Cal. App. 4th 1745, 1750-1751, 23 Cal. Rptr. 2d 315*

To extend life of judgment, separate action on judgment against private defendant authorized under *Code Civ. Proc. § 683.050* as alternative method to application for renewal. *Pratali v. Gates (1992) 4 Cal. App. 4th 632, 638*

10-year period provided by *Code Civ. Proc. § 683.020* and the 10-year statute of limitations provided by *Code Civ. Proc. § 337.5* as not coterminous, hence, Section 337.5 period may be tolled by debtor's absence from state. *Pratali v. Gates (1992) 4 Cal. App. 4th 632, 638*

Action on a judgment as an action based on contract in that judgment becomes debt which judgment debtor is obligated to pay. *Minor v. Minor (1959) 175 Cal. App. 2d 277, 279, 345 P.2d 954*

Action on domestic judgment as not limited to money judgments. *Thomas v. Thomas (1939) 14 Cal. 2d 355, 358, 94 P.2d 810*

Action on judgment, as distinguished from execution on judgment, as not capable of being commenced until judgment becomes final. *Hoover v. Galbraith (1972) 7 Cal. 3d 519, 102 Cal. Rptr. 733, 498 P.2d 981*

Fact that one may be entitled to enforce existing judgment through execution or pursuant to revival of judgment as not a bar to action on judgment. *Turner v. Donovan (1942) 52 Cal. App. 2d 236, 240, 126 P.2d 187 , cert. denied, 317 U.S. 599, 63 S. Ct. 260, 87 L. Ed. 489*

Payment on account as tolling statute of limitations to commence action on judgment. *Wilson v. Walters (1944) 66 Cal. App. 2d 1, 2, 151 P.2d 685*

[8] Text References

Witkin, California Procedure, vol. 8, *Enforcement of Judgment*, § 405 (4th ed. 1997)

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27-318 California Forms of Pleading and Practice--Annotated § 318.461

§ 318.461 Complaint [Code Civ. Proc. § 425.10] on Domestic Money Judgment--By Assignee of Judgment Creditor

[1] FORM Complaint [Code Civ. Proc. § 425.10] on Domestic Money Judgment--By Assignee of Judgment Creditor

[*Caption. See § 318.460* .]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 318.460, Paragraph 1.*]

2. On _____ [*date*], _____ [*name of plaintiff in prior action*] recovered judgment against _____ [*name of defendant*] for the sum of $_____ [and for costs in the sum of $_____] in Action No. _____, in the _____ Court of _____ County, entitled _____ [*name of plaintiff*] vs. _____ [*name of defendant*], which was duly entered in Vol. _____ of the Judgment Book of that court, page _____, on _____ [*date*]. The judgment bears interest at the rate of _____ percent per annum from _____ [*date*]. [Costs in the sum of $_____ have accrued since that date.]

3. [*Finality of prior judgment. See § 318.460, Paragraph 3.*]

4. Prior to the commencement of this action, the above-mentioned judgment was duly assigned in writing to plaintiff herein [, and written notice of the assignment was duly given to defendant]. Since then, plaintiff has been, and now is, the owner and holder of that judgment. [A copy of the assignment and a copy of the notice of assignment are attached hereto as Exhibits A and B, respectively, and made a part hereof.]

5. [*Demand of payment from defendant; nonpayment of amount by defendant. See § 318.460, Paragraph 4*.]

[*Prayer. See § 318.460* .]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 318.460* .]

[2] Use of Form

This form of complaint is for use by an assignee of a domestic money judgment in bringing an action on that judgment.

For discussion and forms related to the assignment of judgments, see Part V, above.

[3] Allegations

This complaint alleges: (1) the recovery by the plaintiff's assignor of a judgment against defendant, for a sum due, including costs and interest (Paragraph 2); (2) the finality of the prior judgment (Paragraph 3); (3) the assignment of that judgment to the present plaintiff assignee (Paragraph 4); and (4) the demand for payment from defendant and subsequent refusal by defendant to pay (Paragraph 5).

[4] State Statutes

Enforcement of judgment by assignee of judgment creditor. *Code Civ. Proc. § 681.020*

Procedure for becoming assignee of record. *Code Civ. Proc. § 673*

[5] Cross References

For a related form, *see § 318.460*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.462

§ 318.462 Complaint on Sister State Money Judgment--General Form

[1] FORM Complaint on Sister State Money Judgment--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT ON SISTER STATE JUDGMENT
Defendant.	)	
	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 318.460, Paragraph 1.*]

2. At all times herein mentioned, the _____Court of the State of _____ [*name of sister state*], for the _____ [*specify type of division, e.g.* County] of _____, was and now is a court of general jurisdiction.

3. On or about _____ [*date*], a judgment was duly given and made by the above-mentioned court in favor of plaintiff. A true and correct copy of that judgment is attached hereto as Exhibit A and made a part hereof.

[Plaintiff hereby requests that the court take judicial notice of the record of such judgment, pursuant to *Sections 452* and *453 of the Evidence Code*.]

4. The above-mentioned judgment has become final. It has never been vacated, modified, or set aside, and _____ [the time for appeal has expired *or* the judgment was affirmed on appeal to _____ (*specify sister state appellate court*)].

5. According to the terms of the above-mentioned judgment, plaintiff recovered judgment against _____ [*name of defendant*], the defendant herein, for the sum of $_____ [and for costs in the sum of $_____]. The judgment bears interest at the rate of _____ percent per annum from _____ [*date*]. [Costs in the sum of $_____ have accrued since that date.]

6. [*Demand of payment from defendant; nonpayment of amount by defendant. See § 318.460, Paragraph 4*.]

7. [*Amount due and unpaid on judgment. See § 318.460, Paragraph 5*.]

[*Prayer. See § 318.460* .]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 318.460* .]

[2] Use of Form

This form of complaint is for use in bringing an action based on a sister state money judgment.

[3] Effect of Sister State Judgment

The effect of a judicial record of a sister state is generally the same in California as in the state where it was made, except that it can only be enforced in California by an action or special proceeding [*see Code Civ. Proc. § 1913(a)*]. However, the authority of a guardian, conservator, or committee, or of a personal representative, does not extend beyond the jurisdiction of the government under which that person was invested with authority, except to the extent expressly authorized by statute [*Code Civ. Proc. § 1913(b)*].

[4] Types of Sister State Judgments Enforceable

The types of sister state judgments which have been enforced in California are numerous. They include child support orders [*Farmers & Merchants Trust Co. v. Madeira (1968) 261 Cal. App. 2d 503, 508, 68 Cal. Rptr. 184]* , money judgments [*Sanpietro v. Collins (1967) 250 Cal. App. 2d 203, 207, 58 Cal. Rptr. 219]* , child custody decrees [*In re Walker (1964) 228 Cal. App. 2d 217, 221-222, 39 Cal. Rptr. 243]* , equity decrees [*Rozan v. Rozan (1957) 49 Cal. 2d 322, 331, 317 P.2d 11]* , divorce decrees [*Worthley v. Worthley (1955) 44 Cal. 2d 465, 466, 283 P.2d 19]* , deficiency judgments [*Gill v. Wolf (1948) 190 P.2d 52]* , and specific performance for the conveyance of real property located in California [*Redwood Inv. Co. v. Exley (1923) 64 Cal. App. 455, 459, 221 P. 973]* .

Penal judgments of sister states are not, however, enforceable [*Farmers & Merchants Trust Co. v. Madeira (1968)*

261 Cal. App. 2d 503, 508, 68 Cal. Rptr. 184] .

[5] Relation of Action to Sister State Money-Judgments Act

Except as provided in *Code Civ. Proc. § 1710.60(b)*, the provisions of the Sister State Money-Judgments Act do not affect any right a judgment creditor may have to bring an action to enforce a sister state judgment [*Code Civ. Proc. § 1710.60(a)*]. However, no action to enforce a sister state judgment may be brought where a judgment entered under that Act has previously been entered [*Code Civ. Proc. § 1710.60(b)*].

Similarly, the entry of a judgment based on a sister state judgment pursuant to the Sister State Money-Judgments Act does not limit the right of the judgment creditor to bring an action based on the part of a judgment of a sister state which does not require the payment of money, nor does the bringing of such an action limit the right of the judgment creditor to obtain entry of judgment based on the sister state judgment pursuant to the Sister State Money-Judgments Act [*Code Civ. Proc. § 1710.65*].

[6] State Statutes

[a] Effect of Sister State Judgment

Judicial record of sister state as having same effect in California as in state where made, except that it can only be enforced in California by action or special proceeding. *Code Civ. Proc. § 1913*

[b] Relation of Action to Sister State Money-Judgments Act

Except as provided in *Code Civ. Proc. § 1710.60(b)*, Sister State Money-Judgments Act as not affecting any right judgment creditor may have to bring action to enforce sister state judgment. *Code Civ. Proc. § 1710.60(a)*

No action to enforce sister state judgment as permitted to be brought where judgment entered pursuant to Sister State Money-Judgments Act has previously been entered. *Code Civ. Proc. § 1710.60(b)*

Entry of judgment based on sister state judgment pursuant to Sister State Money-Judgments Act as not limiting right of judgment creditor to bring action based on part of judgment of sister state not requiring payment of money, nor does bringing of such action limit right of judgment creditor to obtain entry of judgment based on sister state judgment pursuant to Sister State Money-Judgments Act. *Code Civ. Proc. § 1710.65*

[7] Decisions

Child support order of sister state enforceable in California. *Farmers & Merchants Trust Co. v. Madeira (1968) 261 Cal. App. 2d 503, 508, 68 Cal. Rptr. 184*

Money judgment rendered by sister state as enforceable in California. *Sanpietro v. Collins (1967) 250 Cal. App. 2d 203, 207, 58 Cal. Rptr. 219*

Child custody decrees of sister states as enforceable in California. *In re Walker (1964) 228 Cal. App. 2d 217, 221-222, 39 Cal. Rptr. 243*

Equity decrees of sister state as enforceable in California. *Rozan v. Rozan (1957) 49 Cal. 2d 322, 331, 317 P.2d 11*

Divorce decrees of sister state as enforceable in California. *Worthley v. Worthley (1955) 44 Cal. 2d 465, 466, 283 P.2d 19*

Deficiency judgment of sister state as enforceable in California. *Gill v. Wolf (1948) 190 P.2d 52*

Specific performance decree for conveyance of real property in California rendered by sister state as enforceable in California. *Redwood Inv. Co. v. Exley (1923) 64 Cal. App. 455, 459, 221 P. 973*

Penal judgments of sister states as not enforceable in California. *Farmers & Merchants Trust Co. v. Madeira (1968) 261 Cal. App. 2d 503, 508, 68 Cal. Rptr. 184*

[8] Text References

Witkin, California Procedure, vol. 8, *Enforcement of Judgment*, § 414 et seq. (4th ed. 1997)

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27-318 California Forms of Pleading and Practice--Annotated § 318.463

§ 318.463 Application for Entry of Judgment on Sister State Judgment [Code Civ. Proc. § 1710.15(a)]--Judicial Council Form EJ-105

[1] FORM Application for Entry of Judgment on Sister State Judgment [Code Civ. Proc. § 1710.15(a)]--Judicial Council Form EJ-105

Click here to view image.

[2] Use of Form

This form of application for entry of judgment on a sister-state judgment is an illustrative reproduction of Judicial Council Form JC-105, approved by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.30 et seq.*]

The form is intended for use in the initial process by which a sister-state money judgment may be registered and thereby enforced in California under the Sister-State Money-Judgments Act (*Code Civ. Proc. § 1710.10 et seq.*). The judgment creditor may apply for the entry of a judgment based on a sister state judgment by filing an application under *Code Civ. Proc. § 1710.20* [*Code Civ. Proc. § 1710.15(a)*; *see § 318.463[4]*].

Blanks have been filled in to illustrate how the form might be used to apply for entry of judgment on a sister state judgment when neither a writ of execution nor other enforcement is sought prior to service of the notice of entry of judgment on the judgment debtor. For when a writ of execution may be issued or other enforcement sought prior to service of the notice, see *Code Civ. Proc. § 1710.45(b), (c).*

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Attaching Copy of Sister State Judgment Required

A properly authenticated copy of the sister state judgment must be attached to the application [*Code Civ. Proc. §*

1710.15(c)].

[4] Jurisdiction and Venue

If the sister state judgment amounts to $25,000 or less, the matter is a limited civil case. The application must be filed in a superior court [*Code Civ. Proc. § 1710.20(a)*]. The proper county for filing is that in which the judgment debtor resides or in any county in California if there is no resident judgment debtor, although the court retains power to transfer the proceedings under *Code Civ. Proc. §§ 392-404.8* (venue statutes) [*Code Civ. Proc. § 1710.20(b)*; for a discussion of the venue statutes, *see* Ch. 571, *Venue*].

[5] Entering Judgment

On the filing of the application, the clerk will enter a judgment based on the application for the total of the following amounts: (1) the amount remaining unpaid under the sister state judgment; (2) the amount of interest accrued (computed at the rate applicable to the judgment under the law of the sister state); and (3) the amount of the fee for filing the application for entry of the sister state judgment [*Code Civ. Proc. § 1710.25(a)*]. Entry is made in the same manner as entry of an original judgment of the court and from the time of entry interest accrues on the judgment at the rate of interest applicable to a judgment entered in this state [*Code Civ. Proc. § 1710.25(b)*].

[6] State Statutes

Definition of sister state judgment. *Code Civ. Proc. § 1710.10(c)*

Application for entry of sister state judgment. *Code Civ. Proc. § 1710.15*

Attachment of authenticated copy of judgment. *Code Civ. Proc. § 1710.15(c)*

Venue. *Code Civ. Proc. § 1710.20*

Entering judgment. *Code Civ. Proc. § 1710.25*

Serving notice of entry of judgment. *Code Civ. Proc. § 1710.30*

Effect of judgment; enforcement. *Code Civ. Proc. § 1710.35*

Grounds for vacating judgment. *Code Civ. Proc. § 1710.40(a)*

Motion to vacate judgment. *Code Civ. Proc. § 1710.40(b)*

Issuance of writ of execution. *Code Civ. Proc. § 1710.45(b)*

Stay of enforcement. *Code Civ. Proc. § 1710.50(c)*

Limitations on entry of judgment based on sister state judgment. *Code Civ. Proc. § 1710.55*

Enforcement of sister state judgment. *Code Civ. Proc. § 1710.60*

Entry of judgment as not limiting creditor's right to bring action on that part of sister state judgment not requiring payment of money. *Code Civ. Proc. § 1710.65*

Filing fees in superior courts. *Gov. Code § 70611*

[7] Decisions

Filing of application to register sister state money judgment as governed by 10-year statute of limitations in Code Civ. Proc. § 337.4; such filing as tolling statute with respect to judgment creditor's right to bring action. *Epps v. Russell (1976) 62 Cal. App. 3d 201, 204, 133 Cal. Rptr. 30*

[8] Text References

Witkin, California Procedure, vol. 8, *Enforcement of Judgment*, § 422 et seq. (4th ed. 1997)

[9] Cross References

For related forms, see §§ 318.464-318.466.

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27-318 California Forms of Pleading and Practice--Annotated § 318.464

§ 318.464 Notice of Entry of Judgment on Sister State Judgment [Code Civ. Proc. § 1710.30]--Judical Council Form EJ-110

[1] FORM Notice of Entry of Judgment on Sister State Judgment [Code Civ. Proc. § 1710.30]--Judical Council Form EJ-110

Click here to view image.

[2] Use of Form

This form of a notice of entry of a judgment on a sister state judgment is for use in giving such notice in California pursuant to the Sister State Money-Judgments Act. The form is approved by the Judicial Council. While the use of this form is not mandatory [*see Cal. Rules of Ct., Rule 1.30(b)*], any form of such notice prepared by counsel should follow its format closely [*see Code Civ. Proc. § 1710.30*].

Blanks in the foregoing form of notice and proof of service have been filled in to illustrate how the form might be used in conjunction with the application set out in *see § 318.463* when service of the notice is made by a registered process server personally on the judgment debtor's designated agent for service of process. For further discussion of service and proof of service, see Ch. 518, *Service of Summons and Papers* .

[3] Notice of Entry of Judgment

Notice of entry of judgment must be served promptly by the judgment creditor upon the judgment debtor in the manner provided for service of summons in *Code Civ. Proc. § 415.10*. Notice must be in the form prescribed by the Judicial Council and must inform the judgment debtor that he or she has 30 days within which to make a motion to vacate the judgment [*Code Civ. Proc. § 1710.30*].

[4] State Statutes

Service of notice of entry of judgment. *Code Civ. Proc. § 1710.30*

[5] Text References

Witkin, California Procedure (2d ed), *Enforcement of Judgment*, § 195C

[6] Cross References

For related forms, see *§§ 318.463, 318.465*.

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27-318 California Forms of Pleading and Practice--Annotated § 318.465

§ 318.465 Notice of Motion to Vacate Money Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State
Money-Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]

[1] FORM Notice of Motion to Vacate Money Judgment [Code Civ. Proc. § 1710.40(b)] Entered Pursuant to Sister State Money-Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION TO VA-
Plaintiff,	)	CATE MONEY JUDGMENT
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*specify, e.g.*, plaintiff], _____ [*name*], and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [*party, e.g.*, defendant] will, and hereby does, move for an order to vacate the above-entitled judgment, which was entered

pursuant to *Code of Civil Procedure section 1710.25* on the basis of a sister state money judgment. The motion will be made on the grounds that _____ [*specify grounds for motion, e.g.*, the judgment is void on its face for lack of personal jurisdiction].

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

[2] Use of Form

This form of notice of motion is for use in vacating a judgment entered pursuant to the Sister State Money-Judgments Act [*see Code Civ. Proc. § 1710.40(b)*].

[3] Grounds to Vacate Sister State Judgment

A judgment entered according to the Sister State Money-Judgments Act may be vacated on any ground which would be a defense to an action in California on the sister state judgment [*Code Civ. Proc. § 1710.40(a)*; *see Airlines Reporting Corp. v. Renda (2009) 177 Cal. App. 4th 14, 19-22, 99 Cal. Rptr. 3d 66* (judgment void for lack of jurisdiction in sister state not enforceable in California)].

[4] Motion to Vacate

Not later than 30 days after service of the notice of entry of judgment, the judgment debtor, on written notice to the judgment creditor, may make a motion to vacate the judgment [*Code Civ. Proc. § 1710.40(b)*].

[5] State Statutes

Judgment entered according to Sister State Money-Judgments Act is properly vacated on any ground which would be a defense to action in California on sister state judgment. *Code Civ. Proc. § 1710.40(a)*

Motion to vacate judgment is required to be made not later than 30 days after service of notice of entry of judgment; motion as required to be made on written notice to judgment creditor. *Code Civ. Proc. § 1710.40(b)*

[6] Decisions

Judgment void for lack of jurisdiction in sister state is not enforceable in *California. Airlines Reporting Corp. v. Renda (2009) 177 Cal. App. 4th 14, 19-22, 99 Cal. Rptr. 3d 66*

Judgment entered on sister state money judgment was properly vacated for lack of in personam jurisdiction where plaintiff did not exercise due diligence before seeking service by publication in sister state proceeding and thus failed to strictly comply with sister state substituted service statute. *Donel, Inc. v. Badalian (1978) 87 Cal. App. 3d 327, 332-334, 150 Cal. Rptr. 855*

[7] Cross References

For related forms, see *§§ 318.463*, *318.464*, and *318.466*.

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Chapter 318 JUDGMENTS
PART IV. FORMS
F. Actions On Domestic, Sister State, And Foreign Judgments

27-318 California Forms of Pleading and Practice--Annotated § 318.466

§ 318.466 Notice of Motion to Stay Enforcement of Judgment [Code Civ. Proc. § 1710.50] Entered Pursuant to Sister State Money-Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]

[1] FORM Notice of Motion to Stay Enforcement of Judgment [Code Civ. Proc. § 1710.50] Entered Pursuant to Sister State Money-Judgments Act [Code Civ. Proc. §§ 1710.10-1710.65]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION TO STAY
Plaintiff,	)	ENFORCEMENT OF MONEY JUDGMENT
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*specify, e.g.,* plaintiff], _____ [*name*], and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [*party, e.g.,* defendant] will, and hereby does, move for an order to stay enforcement of the above-entitled judgment based on a sister state judgment. The motion will be made on the grounds that _____ [*specify grounds for motion,*

e.g., a stay of enforcement of the sister state judgment has been granted in the sister state].

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

[2] Use of Form

This form of notice of motion is for use in staying enforcement of a sister state judgment [*see Code Civ. Proc. § 1710.50(b)*] that was entered pursuant to the Sister State Money-Judgments Act.

[3] Situations in Which Court May Grant Stay

A court must grant a stay of enforcement when (1) an appeal from the sister state judgment is pending or may be taken in the state that originally rendered the judgment (enforcement must be stayed until the proceedings on appeal have been concluded or the time for appeal has expired); (2) a stay of enforcement of the sister state judgment has been granted in the sister state (enforcement must be stayed until the sister state stay of enforcement expires or is vacated); (3) the judgment debtor has made a motion to vacate pursuant to *Code Civ. Proc. § 1710.40* (enforcement must be stayed until the judgment debtor's motion to vacate is determined); and (4) any other circumstance exists in which the interests of justice require a stay of enforcement [*Code Civ. Proc. § 1710.50(a)*].

[4] Conditions on Which Court Can Grant Stay

A court can grant a stay of enforcement under *Code Civ. Proc. § 1710.50* on any just terms and conditions, including but not limited to the following: (1) the court may require an undertaking in an amount it determines to be just, but the amount of the undertaking must not exceed double the amount of the judgment creditor's claim; (2) if a writ of execution has been issued, the court may order that it remain in effect; and (3) if property of the judgment debtor has been levied on under a writ of execution, the court may order the levying officer to retain possession of the property capable of physical possession and to maintain the levy on the other property [*Code Civ. Proc. § 1710.50(c)*].

[5] Procedures by Which Court May Grant Stay

A court may grant a stay of enforcement under *Code Civ. Proc. § 1710.50(b)* on its own motion, on ex parte motion, or on noticed motion [*Code Civ. Proc. § 1710.50(b)*].

[6] Cross References

For related forms, see §§ 318.463-318.465.

For forms and discussion relating to attacking judgments in the trial court, see Ch. 489, *Relief From Judgments and Orders* .

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[RESERVED]

Chapters 319[RESERVED]

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Chapter 321 JUDICIAL NOTICE

27-321 California Forms of Pleading and Practice--Annotated 321.syn

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§ 321.02 Cross References

§§ 321.03-321.09 [Reserved]

§ 321.10 Governing Law

§ 321.11 "Shall" and "May" as Used in California Codes

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[2] Law

[3] Public Entity

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§ 321.13 Presumptions

[1] Affecting Burden of Producing Evidence

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§ 321.14 Purpose and Effect of Judicial Notice

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[2] Matter Must Be Relevant

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[4] Hearsay

[a] Rules Generally Apply

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[ii] Judicial Notice of Statements in Record Allowed

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[A] Rule Stated

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§ 321.16 Mandatory Versus Permissive Judicial Notice

§ 321.17 Matters Subject to Judicial Notice

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[2] City and County Charters

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[5] Rules of Court

[6] Court Records

[7] Legislative, Executive, and Judicial Acts

[a] Official Acts of United States or Any State

[b] Type of Acts Subject to Notice in General

[c] Legislative History

[d] Notice Extends Only to Existence of Acts and Records

[8] Law of Foreign Nation or Organization of Nations

[9] English Words and Phrases; Legal Terms

[10] Matters of Universal Knowledge

[11] Matters of Common Knowledge

[12] Matters Immediately Determinable From Source of Undisputable Accuracy

§ 321.18 Making Permissive Judicial Notice Mandatory

[1] Requirements

[2] Notice Requirement

[3] Sufficient Information Requirement

[a] Plaintiff to Furnish Sufficient Information to Enable Judicial Notice

[b] Official Writings

[c] Specification of Matter in Court Records and File

§ 321.19 Invoking Judicial Notice

[1] In Pleadings Generally

[2] Demurrer, Motion for Judgment on the Pleadings, or Motion to Strike

[3] Summary Judgment

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§ 321.20 Burden of Persuasion

§ 321.21 Determining Propriety of Judicial Notice

[1] Sources Available and Advice of Learned Persons

[2] Exclusionary Rules and Privileges

[3] Record of Information Not Received in Open Court

[4] Opportunity to Be Heard

[5] Denial of Request

§ 321.22 Instructing Jury on Judicially Noticed Matter

§ 321.23 Effect of Court's Failure or Refusal to Take Judicial Notice or to Instruct Jury

§ 321.24 Judicial Notice in Reviewing Court

§ 321.25 Review of Trial Court's Determination

[1] Granting Judicial Notice

[2] Denying Judicial Notice

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§ 321.40 Federal Statutes

§ 321.41 State Statutes

[1] Administrative Law Judges

[2] Judicial Notice in Specific Actions

[3] Judicial Notice on Specific Motions

[4] Matters Subject to Judicial Notice

§ 321.42 California Rules of Court

§ 321.43 Decisions

[1] Appellate Courts

[2] California History

[3] Census Results

[4] Court Records

[5] Demurrers and Motions for Judgment on the Pleadings

[6] Federal Laws and Regulations

[6.1] Foreign Law

[7] Historical Works

[8] Juvenile Court File

[9] Mexican and Spanish Law in California Prior to Annexation

[10] Product Liability

[11] Public Entities

[a] Administrative Regulations

[b] Death Certificates

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[h] Reports

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[13] Statutes and Ordinances

[14] Truth of Statements in Documents

§§ 321.44-321.49 [Reserved]

Scope

§ 321.50 Requesting Party's Checklist

[1] Preliminary Determinations

[2] Ascertain Documents to Be Obtained

[3] Making Request for Judicial Notice in Pleading or Noticed Motion

[4] Separate Request to Take Judicial Notice

[5] Oral Motion During Trial

[6] Request for Judicial Notice on Appeal

§ 321.51 Adverse Party's Checklist

[1] Preliminary Determinations

[2] Preparation of Opposition

§§ 321.52-321.59 [Reserved]

§ 321.60 Request for Judicial Notice [Evid. Code § 453]

[1] FORM

[2] Use of Form

[3] Written vs. Noticed Motion

[4] Memorandum

[5] Request Made at Trial

[6] Contents of Request

[a] Caption

[b] Sufficient Information and Notice Requirement

[c] Notice of Court's Own Records or File

[d] Notice of Records and File of Another Court

[e] Notice of Existence of Writing Other Than Court Record

[f] Notice of Truth of Matters Stated

[g] Notice of Truth of Contents of Book, Treatise, or Report

[h] Motion to Appoint Learned Person

§ 321.61 Notice of Written Request [Evid. Code § 453(a)]

[1] FORM

[2] Use of Form

§ 321.62 Request for Judicial Notice [Evid. Code § 452]--In Complaint

[1] FORM

[2] Use of Form

§ 321.63 Request for Judicial Notice [Evid. Code § 452]--In Answer

[1] FORM

[2] Use of Form

§ 321.64 Request for Judicial Notice [Evid. Code § 452]--In Demurrer [Code Civ. Proc. §§ 430.10, 430.70]

[1] FORM

[2] Use of Form

[3] Procedure When Prior Action Was Filed in Court in Which Judicial Notice Is Requested

[4] Judicial Notice of Allegations of Complaint

[5] Memorandum

§ 321.65 Request for Judicial Notice [Evid. Code § 452]--In Notice of Motion [Code Civ. Proc. § 1010]

[1] FORM

[2] Use of Form

[3] Memorandum

§§ 321.66-321.79 [Reserved]

§ 321.80 Objections to Request for Judicial Notice [Evid. Code § 455(a)]

[1] FORM

[2] Use of Form

[3] Grounds of Objection

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27-321 California Forms of Pleading and Practice--Annotated § 321.01

§ 321.01 Scope of Chapter

This chapter discusses judicial notice [*see § 321.10* et seq.] and the manner of invoking it [*see § 321.19* et seq.]. The chapter includes a Research Guide [*see § 321.40* et seq.] and a Procedural Guide for requesting judicial notice [*see § 321.50*] and opposing the request [*see § 321.51*].

The chapter contains the following forms:

- Request for judicial notice [*see § 321.60*].
- Notice of the written request [*see § 321.61*].
- Examples of requests for judicial notice for use in:
  - Complaints [*see § 321.62*].
  - Answers [*see § 321.63*].
  - Demurrers [*see § 321.64*].
  - Notices of motion [*see § 321.65*].
- Objections that may be made to the taking of judicial notice [*see § 321.80*] is also included.

Legal Topics:

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

California Forms of Pleading and Practice--Annotated

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27-321 California Forms of Pleading and Practice--Annotated § 321.02

§ 321.02 Cross References

For discussion relating to judicial notice on appeal, and a form of motion requesting that such notice be taken, see Ch. 50, *Appeal: Briefs*

For discussion of judicial notice on demurrer and motion for judgment on pleadings, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

For discussion of judicial notice of court's records in actions for abuse of process, see Ch. 357, *Malicious Prosecution and Abuse of Process*

For discussion of motions to strike, see Ch. 375, *Motions to Strike: Pleadings* , and Ch. 376,. *Motions to Strike: Anti-SLAPP*

For discussion of official notice in administrative hearing proceedings of generally accepted technical or scientific matter within public agency's special field as well as facts subject to judicial notice in California courts, see *Ch. 473F, Agency Adjudication Hearings, § 473F.38*

For additional discussion of judicial notice of statutes and ordinances and forms for use in invoking judicial notice and pleading the existence of an ordinance, see Ch. 531, *Statutes and Ordinances*

For discussion of judicial notice on a summary judgment motion, see Ch. 537, *Summary Judgment*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceOfficial NoticeCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the PleadingsEvidenceJudicial NoticeGeneral

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[Reserved]

§§ 321.03[Reserved]

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27-321 California Forms of Pleading and Practice--Annotated § 321.10

§ 321.10 Governing Law

Judicial notice is governed by *Evid. Code §§ 450-460*. Manners of invoking judicial notice in specified proceedings are governed by various statutes scattered throughout several codes.

Legal Topics:

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

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27-321 California Forms of Pleading and Practice--Annotated § 321.11

§ 321.11 "Shall" and "May" as Used in California Codes

As used in the Evidence Code, "shall" is defined as mandatory and "may" as permissive [*Evid. Code § 11*].

Legal Topics:

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

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27-321 California Forms of Pleading and Practice--Annotated § 321.12

§ 321.12 Definitions

[1] In General

A number of the terms and phrases used in the Evidence Code are defined in *Evid. Code §§ 100-260*. Definitions most relevant to judicial notice are set forth below.

[2] Law

The term "law" includes constitutional, statutory, and decisional law [*Evid. Code § 160*]. The term "statute" is defined as including a treaty and a constitutional provision [*Evid. Code § 230*].

[3] Public Entity

"Public entity" incudes a nation, state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation, whether foreign or domestic [*Evid. Code § 200*].

[4] State

"State" means the State of California, unless applied to the different parts of the United States, in which case it includes any state, district, commonwealth, territory, or insular possession of the United States [*Evid. Code § 220*].

Legal Topics:

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

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27-321 California Forms of Pleading and Practice--Annotated § 321.13

§ 321.13 Presumptions

[1] Affecting Burden of Producing Evidence

The Evidence Code sets forth a number of presumptions affecting the burden of producing evidence [*see Evid. Code §§ 630-647*; *see also Evid. Code § 600* ("presumption" defined)]. Presumptions that generally impact on matter discussed in this chapter are set forth below.

[2] Writings

A writing is presumed to have been truly dated [*Evid. Code § 640*].

[3] Books

A book purporting to be printed or published by public authority is presumed to have been so printed or published [*Evid. Code § 644*]. A book purporting to contain reports of cases adjudged in the tribunals of the state or nation where the book is published is presumed to contain correct reports of those cases [*Evid. Code § 645*].

[4] Newspapers and Periodicals

Printed materials purporting to be a particular newspaper or periodical are presumed to be that newspaper or periodical if regularly issued at average intervals not exceeding three months [*Evid. Code § 645.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDocumentary EvidenceWritingsGeneral OverviewEvidenceInferences & PresumptionsPresumptionsEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

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27-321 California Forms of Pleading and Practice--Annotated § 321.14

§ 321.14 Purpose and Effect of Judicial Notice

The purpose of judicial notice is to expedite the production and introduction of otherwise admissible evidence [*Mozzetti v. City of Brisbane (1977) 67 Cal. App. 3d 565, 578, 136 Cal. Rptr. 751]* . Judicial notice is an evidentiary doctrine that permits a court to consider as established in a case a matter of law or fact that is relevant to an issue without the necessity of formal proof by any party. Thus, judicial notice is a substitute for formal proof, the fundamental theory being that matter judicially noticed cannot reasonably be disputed [*Post v. Prati (1979) 90 Cal. App. 3d 626, 633, 153 Cal. Rptr. 511* ; *see also People v. Moore (1997) 59 Cal. App. 4th 168, 185, 69 Cal. Rptr. 2d 56* (instruction premised on court having taken judicial notice of a fact was proper); *Sosinsky v. Grant (1992) 6 Cal. App. 4th 1548, 1564, 1566, 8 Cal. Rptr. 2d 552]* .

Legal Topics:

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

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27-321 California Forms of Pleading and Practice--Annotated § 321.15

§ 321.15 When Judicial Notice Must or May Be Taken

[1] Only When Authorized or Required by Law

Judicial notice may not be taken of any matter unless authorized or required by law [*Evid. Code § 450*]. Or, affirmatively stated, judicial notice is permitted only when it is authorized or required by law.

For discussion of when notice is mandatory under *Evid. Code § 451*, permissive under *Evid. Code § 452*, or mandatory on request under *Evid. Code § 453*, see *§ 321.16, below.*

[2] Matter Must Be Relevant

The matter to be given judicial notice must be relevant to the case [*Mangini v. R.J. Reynolds Tobacco Co. (1994) 7 Cal. 4th 1057, 1063, 31 Cal. Rptr. 2d 358, 875 P. 2d 73* ; *Del Mar Terrace Conservancy, Inc. v. City Council (1992) 10 Cal. App. 4th 712, 744, 12 Cal. Rptr. 2d 785* ; *see Evid. Code § 350* (relevance requirement); *see also ITT Telecom Products Corp. v. Dooley (1989) 214 Cal. App. 3d 307, 313 n.4, 262 Cal. Rptr. 773* (appellate court declining request to take judicial notice of order terminating federal court action when party failed to show its relevance)].

[3] Probative Value Outweighed by Time or Danger of Prejudice

Judicial notice of relevant matters may be denied under *Evid. Code § 352* [*Mozzetti v. City of Brisbane (1977) 67 Cal. App. 3d 565, 578, 136 Cal. Rptr. 751]* . *Section 352* permits the exclusion of any otherwise relevant evidence in the trial court's discretion if its probative value is substantially outweighed by the probability that its admission will either [*Evid. Code § 352*]:

- Necessitate undue consumption of time; or
- Create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

For additional discussion of exclusion of evidence under the Rules of Evidence, see Ch. 551, *Trial* .

[4] Hearsay

[a] Rules Generally Apply

Judicial notice of a matter may also be denied on the ground that the matter is hearsay and not subject to an exception to the hearsay rule [*see Osborn v. Irwin Memorial Blood Bank (1992) 5 Cal. App. 4th 234, 261 n.5, 7 Cal. Rptr. 2d 101]* . For example, the *Osborn* court, in 1992, refused to take judicial notice of an account in a book by a reporter of what transpired at a 1983 meeting, on the ground that the account was not admissible under the "historical works" exception to the hearsay rule [*Evid. Code § 1341*] and on the further ground that the account was not limited to facts "not reasonably subject to dispute" that can be judicially noticed under *Evid. Code § 452(h)* [*see Osborn v. Irwin Memorial Blood Bank (1992) 5 Cal. App. 4th 234, 261 n.5, 7 Cal. Rptr. 2d 101* ("historical works" exception is generally confined to "ancient facts" and does not extend to work of living author within reach of court process)].

For additional discussion of exclusion of hearsay evidence under the Rules of Evidence, see Ch. 551, *Trial* .

[b] Court Records

[i] No Judicial Notice of Statements in Record

Under *Evid. Code § 452(d)*, a court can take judicial notice of the existence of each document in a court file [*see, e.g., Sosinsky v. Grant(1992) 6 Cal. App. 4th 1548, 1564, 8 Cal. Rptr. 2d 552]* . The courts of appeal may, however, be in conflict as to when a court may take judicial notice that hearsay statements [defined in *Evid. Code § 1200*] appearing in a court record or file are true, although a court can take judicial notice, when relevant, of the fact that such hearsay statements were made [*Magnolia Square Homeowners Assn. v. Safeco Ins. Co. (1990) 221 Cal. App. 3d 1049, 1056-1057, 271 Cal. Rptr. 1]* . For discussion of instances in which courts have taken judicial notice of statements in a record, see *[ii], below.*

Many courts have said that a court cannot take judicial notice of the truth of hearsay statements simply because the statements are part of a court record or file [*see Sosinsky v. Grant (1992) 6 Cal. App. 4th 1548, 1564, 8 Cal. Rptr. 2d 552 (5th Dist.)* ; *Magnolia Square Homeowners Assn. v. Safeco Ins. Co. (1990) 221 Cal. App. 3d 1049, 1056, 271 Cal. Rptr. 1 (6th Dist.)* ; *Bach v. McNelis (1989) 207 Cal. App. 3d 852, 865, 255 Cal. Rptr. 232 (3rd Dist.)* ; *Garcia v. Sterling (1985) 176 Cal. App. 3d 17, 22, 221 Cal. Rptr. 349 (2nd Dist., Div. 6)* ; *People v. Surety Ins. Co. (1982) 136 Cal. App. 3d 556, 564, 186 Cal. Rptr. 385 (2nd Dist., Div. 5)* ; *In re Tanya F. (1980) 111 Cal. App. 3d 436, 440, 168 Cal. Rptr. 713 (2nd Dist., Div. 1)* ; *Day v. Sharp (1975) 50 Cal. App. 3d 904, 914, 123 Cal. Rptr. 918 (2nd Dist., Div. 3)]* . That is, although courts may take judicial notice that specified pleadings, affidavits, or declarations, for example, were filed, they do not judicially notice that the allegations or statements in the pleadings or affidavits and declarations are true [*see, e.g., Magnolia Square Homeowners Assn. v. Safeco Ins. Co. (1990) 221 Cal. App. 3d 1049, 1056-1057, 271 Cal. Rptr. 1* (allegations in complaint filed in another action); *Bach v. McNelis (1989) 207 Cal. App. 3d 852, 864-865, 255 Cal. Rptr. 232* (assertions in affidavit filed in another action)].

This rule has been applied to many types of papers, including the following:

- Deposition transcripts filed as part of court's record [*Garcia v. Sterling (1985) 176 Cal. App. 3d 17, 21, 221 Cal. Rptr. 349]* ;

- Statements made in a medical report and reports of social workers in a juvenile file made by persons not present in court [*In re David C. (1984) 152 Cal. App. 3d 1189, 1204-1205, 200 Cal. Rptr. 115]* ;

- Unsworn statements between the trial judge and an attorney in open court as to facts not established by the evidence [*People v. Surety Ins. Co. (1982) 136 Cal. App. 3d 556, 564, 186 Cal. Rptr. 385]* ;

- Hearsay statements in an arrest report [*Ramsden v. Western Union (1977) 71 Cal. App. 3d 873, 879, 138 Cal. Rptr. 426]* ; and

- A hearsay statement as to the value of Mexican stocks in an appendix to an executor's final account filed in a probate proceeding in another state [*Day v. Sharp (1975) 50 Cal. App. 3d 904, 914, 123 Cal. Rptr. 918]* .

[ii] Judicial Notice of Statements in Record Allowed

Unlike the predominant line of cases discussed in [i], *above*, some cases have taken, or have indicated a willingness to take, judicial notice of some hearsay statements as being true.

In *Salazar v. Upland Police Dept. (2004) 116 Cal. App. 4th 934, 946, 11 Cal. Rptr. 3d 22* , the court allowed judicial notice of a stipulation filed in a criminal case wherein the plaintiff, who was the defendant in the criminal case, stipulated to the existence of probable cause for her arrest. The court held that taking judicial notice of this stipulation did not amount to taking judicial notice of hearsay allegations. The fact that plaintiff admitted there was probable cause for her arrest was not considered hearsay within the meaning of the line of cases disallowing judicial notice of hearsay statements within court documents.

In *Del E. Webb Corp.*, the court said that, in considering a demurrer to a complaint, it would take judicial notice of records such as admissions, answers to interrogatories, affidavits, and the like if they contain statements of the plaintiff or plaintiff's agent that are inconsistent with the allegations of the pleading before the court. The court added, however, that the hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of such material [*Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal. App. 3d 593, 604-606, 176 Cal. Rptr. 824* (2nd Dist., Div. 5; concluding that nothing in the evidence constituted admissions so inconsistent with facts alleged by plaintiff as to render the complaint demurrable)]. Similarly, in ruling on whether a plaintiff could amend a complaint to substitute named defendants for doe defendants, a court has taken judicial notice of plaintiff's admission of a fact in a deposition [*see, e.g.,* *Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 616-617, 199 Cal. Rptr. 644* (4th Dist., Div. 2; admission held not to be determinative of the matter)]. An appellate court, affirming the dismissal of an action after the trial court sustained a demurrer to the amended complaint without leave to amend, has taken judicial notice of plaintiffs' affidavit filed in opposition to the demurrer, which contradicted the amended complaint and established that the defendants' conduct was not tortious [*Dwan v. Dixon (1963) 216 Cal. App. 2d 260, 264-265, 30 Cal. Rptr. 749 (1st Dist., Div. 2)* ; *see also* *Able v. Van Der Zee (1967) 256 Cal. App. 2d 728, 734, 64 Cal. Rptr. 481 (2nd Dist., Div. 1)]* .

These cases might be categorized as an exception to the general rule that judicial notice may not be taken of statements in court records. The exception would allow judicial notice of a pleading party's deposition or other sworn testimony when determining the truth or falsity of matters asserted in the party's pleadings. However, the existence of any such exception has been repudiated by one court of appeal that has criticized this line of cases [*see* *Garcia v. Sterling (1985) 176 Cal. App. 3d 17, 21,221 Cal. Rptr. 349]* . The *Garcia* court dismissed these cases as "prime examples of the widespread misunderstanding of the scope of judicial notice of court records." The court said that a mistaken notion exists that taking judicial notice of court records means noticing the existence of facts asserted in all the documents in a court file, but that a court cannot take judicial notice of hearsay allegations as being true simply because they are a part of a court record or file [*Garcia v. Sterling (1985) 176 Cal. App. 3d 17, 22, 221 Cal. Rptr. 349]* .

[iii] Orders, Statement of Decision, and Judgments

[A] Rule Stated

A number of cases, quoting or citing Jefferson, California Evidence Benchbook, *Judicial Notice*, § 47.2 (Cal. C.E.B. 2d ed. 1982), have said that a court may take judicial notice of the existence of each document in a court file, but may take judicial notice of the truth of facts asserted only in documents such as orders, findings of fact and conclusions of law (now statement of decision [*see Code Civ. Proc. § 632*]), and judgments. Most such cases, however, did not actually involve orders, findings of fact, or judgments, and therefore do not directly support the contention that judicial notice may be taken of statements in those types of records [*see, e.g.,* *Magnolia Square Homeowners Assn. v. Safeco Ins. Co. (1990) 221 Cal. App. 3d 1049, 1056, 271 Cal. Rptr. 1* (6th Dist.; complaint filed in another action); *Cote v. Henderson (1990) 218 Cal. App. 3d 796, 802, 267 Cal. Rptr. 274* (2nd Dist., Div. 3; stating, but not applying rule); *Bach v. McNelis (1989) 207 Cal. App. 3d 852, 865, 255 Cal. Rptr. 232* (3rd Dist.; affidavit filed in another action); *Garcia v. Sterling (1985) 176 Cal. App. 3d 17, 22, 221 Cal. Rptr. 349* (2nd Dist., Div. 6; deposition transcript filed as part of record); *In re David C. (1984) 152 Cal. App. 3d 1189, 1205, 200 Cal. Rptr. 115* (5th Dist.; entire juvenile file including facts asserted in a medical report and reports of social workers); *People v. Surety Insurance Co. (1982) 136 Cal. App. 3d 555-556, 136 Cal. App. 3d 556, 186 Cal. Rptr. 385 (2nd Dist., Div. 5;* dialogue in trial court between trial judge and counsel)].

One case quoting the Jefferson statement supports it more directly [*see* *In re Tanya F. (1980) 111 Cal. App. 3d 436, 440, 168 Cal. Rptr. 713* (2nd Dist., Div. 1; trial court took judicial notice of findings and orders of juvenile court in prior dependency proceedings in order to establish sequence of events that had been stipulated to)].

Statements of fact in appellate decisions are not within the scope of this rule, so that, although a court may take judicial notice of the existence of an opinion and the result it reached, it would ordinarily be error to use the statement of facts in it to establish the truth thereof [Jefferson, California Evidence Benchbook, *Judicial Notice*, § 47.2 (Cal. C.E.B. 2d ed. 1982) (criticizing *Weiner, below*); *Gilmore v. Superior Court (1991) 230 Cal. App. 3d 416, 418-419, 281 Cal. Rptr. 343* (holding error harmless under circumstances of case); *but see* *Rowe v. Dorrough (1984) 150 Cal. App. 3d 901, 905, 198 Cal. Rptr. 131* (1st Dist., Div. 1; taking notice of fact stated eight years earlier by another court in a reported opinion); *Weiner v. Mitchell, Silberberg & Knupp (1980) 114 Cal. App. 3d 39, 46, 170 Cal. Rptr. 533 (2nd Dist., Div. 3;* taking notice of pertinent facts and judgment in federal court opinion); see also, *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort (2001) 91 Cal. App. 4th 875, 882-884* ; *110 Cal. Rptr. 2d 877* (judicial notice of a factual statement in a concurring opinion of the court of appeal in a related action was improper where there was no evidence that factual statement was the product of any adversary hearing on the issue)].

[B] Rule Criticized

The court of appeal of the Fifth Appellate District has rejected that part of the Jefferson text stating that judicial notice may be taken of the truth of findings of fact. The court also distinguished or rejected the cases that have reiterated that rule (*see* [A], *above*) and held that the trial court in the case before it properly refused to take judicial notice of the truth of factual findings appearing in the trial court's findings of fact in another case [*Sosinsky v. Grant (1992) 6 Cal. App. 4th 1548, 1551, 1564-1567, 8 Cal. Rptr. 2d 552* ; *see* *People v. Moore (1997) 59 Cal. App. 4th 168, 178, 69 Cal. Rptr. 2d 56* (Fifth District; court can take judicial notice that a court made a particular ruling, but not of a factual finding made in another action)]. Although it may be proper to take judicial notice that the judge did in fact make a particular finding, it is not proper to take judicial notice that the facts found by the judge must necessarily be true. The taking of judicial notice that a judge believed A is different from the taking of judicial notice that A's testimony must necessarily have been true simply because the judge believed A and not B [*Sosinsky v. Grant (1992) 6 Cal. App. 4th 1548, 1551, 1565, 8 Cal. Rptr. 2d 552]* .

Sosinsky cited and discussed *People v. Tolbert (1986) 176 Cal. App. 3d 685, 690, 222 Cal. Rptr. 313* , and *People v. Rubio (1977) 71 Cal. App. 3d 757, 764-766, 139 Cal. Rptr. 750* (disapproved on other grounds in *People v. Freeman (1978) 22 Cal. 3d 434, 438-439, 149 Cal. Rptr. 396, 584 P.2d 533*), as cases illustrating the impropriety of taking judicial notice of the truth of a court's factual finding [*Sosinsky v. Grant (1992) 6 Cal. App. 4th 1548, 1567-1569, 8 Cal. Rptr. 2d 552]* . The court further criticized *Columbia Casualty Co. v. Northwestern Nat. Ins. Co. (1991) 231 Cal.*

App. 3d 457, 473, 282 Cal. Rptr. 389 , as improperly merging the doctrine of judicial notice with the doctrines of res judicata and collateral estoppel [*Sosinsky v. Grant (1992) 6 Cal. App. 4th 1548, 1569, 8 Cal. Rptr. 2d 552]* , even though *Columbia* had held that judicial notice of the content of court records for the purpose of establishing the truth of the content is distinctly improper [*Columbia Casualty Co. v. Northwestern Nat. Ins. Co. (1991) 231 Cal. App. 3d 457, 473, 282 Cal. Rptr. 389]* .

The Second Appellate District, citing *Sosinsky*, has reached the same conclusion that factual findings in a prior judicial opinion are not a proper subject of judicial notice *Kilroy v. State of California (2004) 119 Cal. App. 4th 140, 148, 14 Cal. Rptr. 3d 109* (denying judicial notice of factual assertions in prior order granting motion to suppress).

Evid. Code § 639 also seems inconsistent with the rule. Section 639 provides that, when a judgment is not conclusive, it is presumed to set forth correctly the parties' rights, but that no presumption exists that the facts essential to the judgment were correctly determined [*Evid. Code § 639*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceHearsayExceptionsJudgmentsGeneral OverviewEvidenceJudicial NoticeGeneral OverviewEvidenceJudicial NoticeAdjudicative FactsPublic RecordsEvidenceRelevanceConfusion, Prejudice & Waste of Time

California Forms of Pleading and Practice--Annotated

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Volume 27: Interpleader thru Juries and Jury Selection-Chs. 314-322
Chapter 321 JUDICIAL NOTICE
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27-321 California Forms of Pleading and Practice--Annotated § 321.16

§ 321.16 Mandatory Versus Permissive Judicial Notice

Judicial notice of the matters specified in *Evid. Code § 451* is mandatory, whether or not the court is requested to notice them [*see Evid. Code § 451*]. Judicial notice of the matters specified in *Evid. Code § 452* is permissive to the extent that they are not embraced in *Evid. Code § 451* [*Evid. Code § 452*; *see also Sosinsky v. Grant (1992) 6 Cal. App. 4th 1548, 1560-1561, 8 Cal. Rptr. 2d 552]* . This permissive notice, however, becomes mandatory, if the party requesting notice satisfies the requirements of *Evid. Code § 453* [for discussion of the requirements, *see § 321.18, below*].

Legal Topics:

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

California Forms of Pleading and Practice--Annotated

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§ 321.17 Matters Subject to Judicial Notice

[1] Case Law, Constitutions, and Statutes

Courts must take judicial notice of the decisional, constitutional, and public statutory law of California and of the United States [*Evid. Code § 451(a)*]. Courts may, and on proper request must, take judicial notice of the resolutions and private acts of the United States Congress and the California Legislature [*Evid. Code § 452(a)*] as well as, matters underlying California statutory law [*Estate of Joseph (1998) 17 Cal. 4th 203, 210 n.1, 70 Cal. Rptr. 2d 619, 949 P.2d 472* ; *see [7], below*].

Courts may, and on proper request must, also take judicial notice of the decisional, constitutional, and statutory law of any state of the United States [*Evid. Code § 452(a)*; *see, e.g.,* *Adams v. County of Sacramento (1991) 235 Cal. App. 3d 872, 878 n.1, 1 Cal. Rptr. 2d 138* (judicial notice of Kansas statute)]. "State" includes districts, territories, and possessions of the United States [*see Evid. Code § 220*; Assembly Committee on Judiciary Comment to *Evid. Code § 452*].

[2] City and County Charters

Courts must take judicial notice of the provisions of city and county charters described in *Cal. Const., art. XI, §§ 3, 4,* or *5* [*Evid. Code § 451(a)*].

[3] Regulations and Ordinances

Courts must take judicial notice of the following:

- California state agency regulations or orders of repeal filed with the Secretary of State [*Evid. Code § 451(b)*; *see Gov. Code § 11343.6*].

- Regulations published in the California Code of Regulations or California Code of Regulations Supplement [*Evid. Code § 451(b)*; *see Gov. Code § 11344.6*].

- Rules and amendments promulgated by the State Personnel Board or its executive officer [*Evid. Code § 451(b)*; *see Gov. Code § 18576*; *see also Gov. Code § 18521* (defining "board" as board and executive officer established by *Cal. Const., art. VII, § 2*)].

- Federal regulations, Presidential proclamations and Executive Orders published in the Federal Register [*Evid. Code § 451(b)*; *see 44 U.S.C. §§ 1505(a), (b), 1507*].

Courts may, and on proper request must, also take judicial notice of the following:

- Regulations and legislative enactments issued by or under the authority of the United States [*Evid. Code § 452(b)*].

- Regulations and legislative enactments issued by or under the authority of any public entity in the United States [*Evid. Code § 452(b), see, e.g., Franklin-McKinley School Dist. v. City of San Jose (1991) 234 Cal. App. 3d 1599, 1602 n.2, 286 Cal. Rptr. 656* (judicial notice of date ordinance was adopted); *Grant v. Hipsher (1967) 257 Cal. App. 2d 375, 380, n.2, 64 Cal. Rptr. 892* (judicial notice of city and county ordinances)]. "Public entity" is broadly defined [*Evid. Code § 200*, (*see § 321.12[3], above*)] and "state" extends to include districts, territories, and possessions of the United States [*see Evid. Code § 220*; Assembly Committee on Judiciary Comment to *Evid. Code § 452*]. *Section 452(b)* also allows for judicial notice of California and federal regulations that are not included in *Evid. Code § 451(b)*. "Regulations and legislative enactments" include such matters as ordinances and other similar legislative enactments [*see* Assembly Committee on Judiciary Comment to *Evid. Code § 452*].

A court, however, need not take judicial notice of a State Administrative Manual that has not been adopted as a regulation pursuant to the Administrative Procedure Act [*Willis v. State of California (1994) 22 Cal. App. 4th 287, 291, 27 Cal. Rptr. 2d 413]* .

[4] Rules of Professional Conduct

Courts must take judicial notice of the rules of professional conduct for members of the bar [*Evid. Code § 451(c)*; *Bus. & Prof. Code § 6076*].

[5] Rules of Court

Courts must take judicial notice of the rules of practice and procedure for California courts adopted by the Judicial Council, that is, the California Rules of Court [*Evid. Code § 451(c)*].

Courts must also take judicial notice of the rules of pleading, practice, and procedure prescribed by the U.S. Supreme Court, such as the Rules of the United States Supreme Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Admiralty Rules, the Rules of the Court of Claims, the Rules of the Customs Court, and the General Orders and Forms in Bankruptcy [*Evid. Code § 451(d)*].

Courts may, and on proper request must, also take judicial notice of rules of court of (1) any court of California or (2) any court of record of the United States or of any state of the United States [*Evid. Code § 452(e)*]. "State" extends to include districts, territories, and possessions of the United States [*see Evid. Code § 220*; Assembly Committee on Judiciary Comment to *Evid. Code § 452*].

To the extent that the permissive *Evid. Code § 452(e)* overlaps the mandatory *Evid. Code § 451(c)* and *(d)*, notice under *Evid. Code § 451* is mandatory [*see* Assembly Committee on Judiciary Comment to *Evid. Code § 452*].

[6] Court Records

Courts may, and on proper request must, take judicial notice of records of any court of California or any court of record of the United States or of any state of the United States [*Evid. Code § 452(d)*; *see, e.g., Munoz v. Florentine Gardens (1991) 235 Cal. App. 3d 1730, 1731-1732, n.2, 1 Cal. Rptr. 2d 609* ; for discussion of specification of court records, *see § 321.18[3][c] below*]. "State" includes districts, territories, and possessions of the United States [*see Evid. Code § 220*; Assembly Committee on Judiciary Comment to *Evid. Code § 452*]. A party requesting judicial notice of records in an allegedly related case must demonstrate that the matter as to which judicial notice is sought is both relevant to and helpful toward resolving the matters in the case [*Deveny v. Entropin, Inc. (2006) 139 Cal. App. 4th 408, 418, 42 Cal. Rptr. 3d 807]* .

[7] Legislative, Executive, and Judicial Acts

Courts may, and on proper request must, also take judicial notice of the official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States [*Evid. Code § 452(c)*].

"State" extends to include districts, territories, and possessions of the United States [*see Evid. Code § 220*; Assembly Committee on Judiciary Comment to *Evid. Code § 452*].

Under this provision, California courts have taken judicial notice of a wide variety of administrative and executive acts, such as proceedings and reports of the House Committee on Un-American Activities, records of the State Board of Education, and records of a county planning commission [*see* Assembly Committee on Judiciary Comment to *Evid. Code § 452*; *see also, e.g., City of Sacramento v. State Water Resources Control Bd. (1992) 2 Cal. App. 4th 960, 967 n.2, 972 n.5, 3 Cal. Rptr. 2d 643* (judicial notice of minutes of meeting of regional water quality control board)].

[a] Official Acts of United States or Any State

Courts may, and on proper request must, also take judicial notice of the official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States [*Evid. Code § 452(c)*].

"State" extends to include districts, territories, and possessions of the United States [*see Evid. Code § 220*; Assembly Committee on Judiciary Comment to *Evid. Code § 452*].

[b] Type of Acts Subject to Notice in General

Under *Evid. Code § 452(c)*, California courts have taken judicial notice of a wide variety of administrative and executive acts, such as proceedings and reports of the House Committee on Un-American Activities, records of the State Board of Education, and records of a county planning commission [*see* Assembly Committee on Judiciary Comment to *Evid. Code § 452*; *see also, e.g., City of Sacramento v. State Water Resources Control Bd. (1992) 2 Cal. App. 4th 960, 967 n.2, 972 n.5, 3 Cal. Rptr. 2d 643* (judicial notice of minutes of meeting of regional water quality control board)].

[c] Legislative History

The court may also take judicial notice of matters underlying California statutory law [*Estate of Joseph (1998) 17 Cal. 4th 203, 210 n.1, 70 Cal. Rptr. 2d 619, 949 P.2d 472* (records of Law Revision Commission)]. Many cases have taken judicial notice of legislative history [*see, e.g., People v. Superior Court (Williams) (1991) 233 Cal. App. 3d 477, 487 n.5, 284 Cal. Rptr. 601* (legislative history of statute); *Post v. Prati (1979) 90 Cal. App. 3d 626, 634, 153 Cal. Rptr. 511* (various materials presented to illuminate legislative history and objectives of legislative act)]. Failure to state the author of comments contained in the legislative history to a statute merits denial of judicial notice of these records on the grounds of lack of foundation [*Estate of Dye (2001) 92 Cal. App. 4th 966, 985, 112 Cal. Rptr. 2d 362]* .

The proper method to request judicial notice of a document is by motion [*Cal. Rules Ct., Rule 8.252(a)*]. In a 2005 decision, the Third District Court of Appeals offered a thorough guide to requesting judicial notice of legislative history materials. The court stressed that in order for legislative history to be cognizable, it must shed light on "the collegial view of the Legislature as a whole" [*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc. (2005) 133 Cal. App. 4th 26, 30, 34 Cal. Rptr. 3d 520]* .

Motions for judicial notice of legislative history materials must be in the following form [*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc. (2005) 133 Cal. App. 4th 26, 31, 34 Cal. Rptr. 3d 520]* :

- The motion must identify each separate document for which judicial notice is sought as a separate exhibit.
- The moving party must submit a memorandum of points and authorities citing authority why each such exhibit constitutes cognizable legislative history.

The court provides a list of legislative history documents that have been recognized by the California Supreme Court or the Third District as constituting cognizable legislative history, along with citations to the opinions supporting judicial notice of the documents [*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc. (2005) 133 Cal. App. 4th 26, 31-37, 34 Cal. Rptr. 3d 520]* :

- Ballot pamphlets.
- Conference committee reports.
- Different versions of the bill.
- Floor statements.
- House journals and final histories.
- Reports of the legislative analyst.
- Legislative committee reports and analyses.
- Legislative counsel's digest.
- Legislative counsel's opinions/supplementary reports.
- Legislative party's floor commentaries.
- Official commission reports and comments.
- Predecessor bills.
- Statements by sponsors, proponents, and opponents.
- Transcripts of committee hearings.
- Analyses by legislative party caucuses.

- Enrolled bill reports.

The following documents that do *not* constitute cognizable legislative history, and the *Kaufman* decision includes citations to the opinions denying judicial notice of the documents [*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc. (2005) 133 Cal. App. 4th 26, 37-39, 34 Cal. Rptr. 3d 520]* .

- Authoring legislator's files, letters, press releases, and statements not communicated to the Legislature as a whole.

- Documents with unknown author and purpose.

- Handwritten document copies, with author, contained in assembly member's files.

- Letters from consultants to the State Bar Taxation section to Governor.

- Letters from the Family Law section of the State Bar of California to assembly member or senator.

- Letters to Governor urging signing of bill.

- Letters to particular legislator, including bill's author.

- Magazine articles.

- Memoranda from a deputy district attorney to proponent of assembly bill.

- State Bar's view of the meaning of proposed legislation.

- Subjective intent reflected by statements of interested parties and individual legislators, including bill's author, not communicated to Legislature as a whole.

- Views of individual legislators, staffers, and other interested persons.

[d] Notice Extends Only to Existence of Acts and Records

However, taking judicial notice of a governmental agency's official acts and records does not require acceptance of their truth. Only the existence of the acts and records is to be noticed [*Mangini v. R.J. Reynolds Tobacco Co. (1994) 7 Cal. 4th 1057, 1063-1064, 31 Cal. Rptr. 2d 358, 875 P. 2d 73]* .

[8] Law of Foreign Nation or Organization of Nations

Courts may, and on proper request must, take judicial notice of the law of an organization of nations and of foreign nations and public entities in foreign nations [*Evid. Code § 452(f)*].

"Public entity" is broadly defined [*see Evid. Code § 200* (*see § 321.12[3], above*)]. *Section 452(f)* makes all law of the foregoing entities, in whatever form, subject to judicial notice. Thus, for example, a court can take judicial notice of a foreign treaty [*Chong v. Superior Court (1997) 58 Cal. App. 4th 1032, 1036, 68 Cal. Rptr. 2d 427* (treaty between Britain and China on status of Hong Kong; citing *Volkswagenwerk Aktiengesellschaft v. Superior Court (1981) 123 Cal. App. 3d 840, 851, 176 Cal. Rptr. 874* , which relied on *Evid. Code § 452(c), (f)* to take judicial notice of laws of West Germany and treaty between West Germany and the United States)].

The determination of the law of an organization of nations or the law of a foreign nation or of a public entity in a foreign nation is a question of law to be determined by judicial notice [*Evid. Code § 310*]. If it cannot be determined, the court may, as the ends of justice require, either apply California law, if to do so would be constitutional, or dismiss the action without prejudice (appellate court may remand to trial court with instructions to dismiss) [*Evid. Code § 311*].

If the court resorts to the advice of a person learned in the law of which notice is to be taken, the advice, if not received in open court, must be in writing [*Evid. Code § 454*].

[9] English Words and Phrases; Legal Terms

Courts must take judicial notice of the true signification of all English words and phrases and of all legal expressions [*Evid. Code § 451(e)*; *see also, e.g., Spitser v. Kentwood Home Guardians (1972) 24 Cal. App. 3d 215, 219, 100 Cal. Rptr. 798]* .

[10] Matters of Universal Knowledge

Courts must take judicial notice of facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute [*Evid. Code § 451(f)*]. A matter that fails to meet this test may nonetheless be admissible under *Evid. Code § 452(g)* (*see [11], below*) or under *Evid. Code § 452(h)* (*see [12], below*).

[11] Matters of Common Knowledge

Courts may, and on proper request must, take judicial notice of facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute [*Evid. Code § 452(g)*].

"Territorial jurisdiction," in this context, refers to the county in which a superior court is located or the judicial district in which a municipal court is located. The fact of which notice is taken need not be something physically located within the court's territorial jurisdiction, but common knowledge of the fact must exist within that jurisdiction. The California courts have taken judicial notice of a wide variety of matters of common knowledge [*see* Assembly Committee on Judiciary Comment to *Evid. Code § 452*; for further discussion, *see [12] below*]. If a matter subject to notice under *Evid. Code § 452(g)* is also subject to notice under *Evid. Code § 451(f)* [*see [10], above*], notice under *Evid. Code § 451* is mandatory [*see* Assembly Committee on Judiciary Comment to *Evid. Code § 452*].

[12] Matters Immediately Determinable From Source of Undisputable Accuracy

Courts may, and on proper request must, take judicial notice of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy [*Evid. Code § 452(h)*]. The facts need not be actually known if they are readily ascertainable and indisputable [*see* Assembly Committee on Judiciary Comment to *Evid. Code § 452*].

Sources of "reasonably indisputable accuracy" include not only treatises, encyclopedias, almanacs, and the like, but also persons learned in the subject matter. Both *Evid. Code § 452(g)* (*see [11], above*) and *(h)* include, for example, facts that are accepted as established by experts and specialists in the natural, physical, and social sciences, if those facts are of such wide acceptance that to submit them to the jury would be to risk irrational findings [*see* Assembly Committee on Judiciary Comment to *Evid. Code § 452*].

Matters subject to judicial notice under *Evid. Code § 452(h)* include the county in which a particular California city is located [*Ogle v. Superior Court (1992) 4 Cal. App. 4th 1007, 1012 n.2, 6 Cal. Rptr. 2d 205]* , certain publications of U.S. Department of Transportation on National Highway Traffic Safety [*Peretto v. Department of Motor Vehicles*

(1991) 235 Cal. App. 3d 449, 452 n.2, 459 n.8, 1 Cal. Rptr. 2d 392] , and statistical data provided by Jury Services Division of the superior court [*Powell v. Superior Court (1991) 232 Cal. App. 3d 785, 795 n.7, 283 Cal. Rptr. 777* (taking notice under both *Evid. Code § 452(g)* and *(h)*]. Subsections *452(g)* and *(h)* also include such matters as the geographical divisions and political history of the world [*see* Assembly Committee on Judiciary Comment to *Evid. Code § 452*]. A recorded deed may be a proper subject of judicial notice under *Evid. Code § 452(g)* when the deed's existence and authenticity cannot reasonably be controverted [*Evans v. California Trailer Court, Inc. (1994) 28 Cal. App. 4th 540, 549, 33 Cal. Rptr. 2d 646* (plaintiff had not objected to judicial notice and had admitted the truth of the matters evidenced by the deed)]. At least one court of appeals has held that while courts may appropriately take notice of the existence of a website pursuant to *Evid. Code § 452(h)*, the same is not true for the factual content found on the site [*Searles Valley Minerals Operations, Inc. v. State Bd. of Equalization (2008) 160 Cal. App. 4th 514, 518, 72 Cal. Rptr. 3d 857]* .

Reference works used in connection with *Evid. Code § 452(h)* are not to be received in evidence or sent to the jury room. Their use is limited to consultation by the judge and the parties for the purposes of determining whether or not to take judicial notice and determining the tenor of the matter to be noticed [*see* Assembly Committee on Judiciary Comment to *Evid. Code § 452*].

If a matter subject to notice under *Evid. Code § 452(h)* is also subject to notice under *Evid. Code § 451(f)* (discussed in *[10], above*), notice under *Evid. Code § 451* is mandatory [*see* Assembly Committee on Judiciary Comment to *Evid. Code § 452*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceJudicial NoticeAdjudicative FactsFacts Generally KnownEvidenceJudicial NoticeAdjudicative FactsProceedings in Other CourtsEvidenceJudicial NoticeAdjudicative FactsPublic RecordsEvidenceJudicial NoticeAdjudicative FactsVerifiable FactsEvidenceJudicial NoticeDomestic LawsEvidenceJudicial NoticeLaws of Foreign StatesEvidenceJudicial NoticeLegislative Facts

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§ 321.18 Making Permissive Judicial Notice Mandatory

[1] Requirements

A trial court must take judicial notice of the matters specified in *Evid. Code § 452* (discussed in *§ 321.17, above*) if a party requests it to do so [*Evid. Code § 453*] and:

- Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable him or her to prepare to meet the request [*Evid. Code § 453(a)*]; and

- Furnishes the court with sufficient information to enable it to take judicial notice of the matter [*Evid. Code § 453(b)*].

Thus, although a court may take judicial notice of the matters of law and fact specified in *Evid. Code § 452* without any request of a party to do so, it must, under *Evid. Code § 453*, take judicial notice of any of those matters if a party so requests and satisfies the requirements of *Section 453* [*see, e.g., Four Star Electric, Inc. v. F & H Construction (1992) 7 Cal. App. 4th 1375, 1379, 10 Cal. Rptr. 2d 1* ; *see also* Assembly Committee on Judiciary Comment to *Evid. Code § 452*]. The matters of law included under *Evid. Code § 452* may be neither known to the court nor easily discoverable by it because the sources of information are not readily available. Nevertheless, under *Evid. Code § 453*, if a party requests it and furnishes the court with sufficient information for it to take judicial notice, the court must do so if proper notice has been given to each adverse party. Thus, judicial notice of these matters of law is mandatory only if counsel adequately discharges his or her responsibility for informing the court as to the law applicable to the case. The simplified process of judicial notice can then be applied to all of the law applicable to the case, including such law as ordinances and the law of foreign nations. However, the matter need not be judicially noticed unless adequate information to support its truth is furnished to the court, and the burden of providing this information is on the party requesting that judicial notice be taken [*see* Assembly Committee on Judiciary Comment to *Evid. Code § 452*].

[2] Notice Requirement

Under *Evid. Code § 453*, the party requesting the court to judicially notice a matter must give the adverse parties ample notice so that they will have an opportunity to prepare to oppose the request and to obtain information relevant to the

tenor of the matter to be noticed. If the notice given does not satisfy this requirement, the court may refuse the request [*see* Cal. L. Revision Comm'n Comment to *Evid. Code § 453*].

[3] Sufficient Information Requirement

[a] Plaintiff to Furnish Sufficient Information to Enable Judicial Notice

The burden is on the party requesting judicial notice to supply the court with sufficient, reliable and trustworthy sources of information concerning the matter [*People v. Moore (1997) 59 Cal. App. 4th 168, 177, 69 Cal. Rptr. 2d 56]* . A court may refuse a request for judicial notice when the requesting party fails to furnish it with sufficient information to enable it to take judicial notice [*see, e.g.,* *Willis v. State of California (1994) 22 Cal. App. 4th 287, 291, 27 Cal. Rptr. 2d 413* (trial court properly excluded State Administrative Manual because offering party failed to append any information to request); *Baker v. Beech Aircraft Corp. (1979) 96 Cal. App. 3d 321, 339, 157 Cal. Rptr. 779* (trial court in personal injury action against airplane manufacturer properly excluded a government report on several grounds, including failure to provide sufficient information)].

For example, a party who requests the court to take judicial notice of the specific gravity of gold must furnish the judge with definitive information as to that fact. The judge is not required to undertake the necessary research to determine the fact, although, of course, the judge is not precluded from doing such research if he or she so desires [*see* Cal. L. Revision Comm'n Comment to *Evid. Code § 453*; *see also* *People v. Moore (1997) 59 Cal. App. 4th 168, 177, 69 Cal. Rptr. 2d 56]* .

Evid. Code § 453 does not define "sufficient information," which necessarily will vary from case to case, depending on the matter of which the court is requested to take judicial notice. Although parties will understandably use the best evidence they can produce under the circumstances, mechanical requirements that are ill-suited to the individual case should be avoided. The court justifiably might require that the party requesting judicial notice provide expert testimony to clarify especially difficult problems [*see* Cal. L. Revision Comm'n Comment to *Evid. Code § 453*].

[b] Official Writings

With respect to official publications or official records of writings, some guidance as to what might constitute sufficient information may be found in *Evid. Code §§ 1530* and *1532*, which create presumptions affecting the burden of producing evidence [*Evid. Code §§ 1530(b), 1532(b)*] with respect to writings and records in the custody of public entities.

Under *Evid. Code § 1530(a)*, a purported copy of a writing in the custody of a public entity, or of an entry in such a writing, is prima facie evidence of the existence and content of the writing if the following are true:

- The writing purports to be published by the authority of the nation or state, or public entity therein, in which the writing is kept [*Evid. Code § 1530(a)(1)*]; and

- The office in which the writing is kept is within the United States, the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands and the copy is attested or certified as a correct copy of the writing or entry by a public or deputy public employee, having the legal custody of the writing [*Evid. Code § 1530(a)(2)*]; or

- The office in which the writing is kept is located elsewhere and the copy is attested as a correct copy of the writing or entry, as prescribed in the statute [*Evid. Code § 1530(a)(3)*].

The attestation or certification must state in substance that the copy is a correct copy of the original or of a specified part

of it, as the case may be [*Evid. Code § 1531*]. The official record of a writing is prima facie evidence of the existence and content of the original recorded writing if the record is in fact a record of an office of a public entity and a statute authorized the writing to be recorded in that office [*Evid. Code § 1532(a)*].

[c] Specification of Matter in Court Records and File

In requesting the court to take judicial notice of matter in a court file [*see Evid. Code § 452(d)*; *see also § 321.17[6] above*], counsel should specify exactly the document or portion of it contained in the court file of which he or she is asking the court to take judicial notice [*In re David C. (1984) 152 Cal. App. 3d 1189, 1205, 200 Cal. Rptr. 115* (quoting Jefferson, California Evidence Benchbook, § 47.2 (Cal. C.E.B. 2d ed. 1982)); *see also Sosinsky v. Grant (1992) 6 Cal. App. 4th 1548, 1563-1565, 8 Cal. Rptr. 2d 552]* .

In a law and motion hearing, a party requesting judicial notice of material under *Evid. Code § 452* or *453* is required to provide each party with a copy of the material. If the material is a part of a file in the court in which the matter is being heard, the party must specify in writing the part of the court file sought to be judicially noticed and make arrangements with the clerk to have the file in the courtroom at the time of the hearing [*Cal. Rules of Ct., Rule 3.1306(c)*].

Legal Topics:

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

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§ 321.19 Invoking Judicial Notice

[1] In Pleadings Generally

Judicial notice may be requested in a pleading or otherwise [*Evid. Code § 453(a)*]. The pleadings in a civil action are complaints, demurrers, answers, and cross complaints [*Code Civ. Proc. § 422.10*; with respect to demurrers, *see* [2], *below*]. No particular form is required, but the request must be adequate to notify the opposing party of what is requested so that he or she may oppose the request if so desired, and the requesting party must furnish the court with sufficient information to enable the court to take judicial notice [*see Evid. Code § 453*, discussed in *§ 321.18*].

[2] Demurrer, Motion for Judgment on the Pleadings, or Motion to Strike

When a demurrer, a motion for judgment on the pleadings, or a motion to strike is based on matter of which the court may take judicial notice, the matter must be specified in the demurrer or notice of motion or in the supporting points and authorities, except as the court may otherwise permit [*Code Civ. Proc. §§ 430.70, 437(b), 438(d)*; *see also StorMedia Inc. v. Superior Court (1999) 20 Cal. 4th 449, 456 n.9, 84 Cal. Rptr. 2d 843, 976 P.2d 214* (rule stated as to demurrer)].

The California Rules of Court additionally provide that any request for judicial notice must be made in a separate document listing the specific items for which notice is requested and must comply with *Cal. Rules of Ct., Rule 3.1306(c)* [*Cal. Rules of Ct., Rule 3.1113(l)*].

Rule 3.1306 requires the party requesting notice to provide the court and each party with a copy of the material to be noticed, and includes additional requirements if the material is part of the court file, as discussed in *§ 321.18[3][c]*.

[3] Summary Judgment

The summary judgment statute does not specify the manner in which judicial notice may be invoked [*see Code Civ. Proc. § 437c(b)*], so the general discussion in [4], *below*, would apply. In the case of a motion for summary judgment, however, the request for judicial notice should be titled as indicated in *Cal. Rules of Ct., Rule 3.1350(c), (e)*. For discussion, see *§ 321.60[6][a]*.

[4] Other Motions

A party may, on any motion, request that the court take judicial notice of matter specified in *Evid. Code § 452* that is relevant to the determination of the motion [*see Cal. Rules of Ct., Rule 3.1306(a)* (evidence at law and motion hearing to be received by declaration, affidavit, and request for judicial notice)].

The request must be made in a separate document listing the specific items for which judicial notice is requested and complying with *Cal. Rules of Ct., Rule 3.1306* [*Cal. Rules of Ct., Rule 3.1113(l)*]. Rule 3.1306(b) requires the party requesting notice to provide the court and each party with a copy of the material to be noticed, and includes additional requirements if the material is part of the court file, as discussed in *§ 321.18[3][c]*. In addition, *Code Civ. Proc. § 1010* requires that a notice of motion state the grounds on which the motion will be made and the papers, if any, on which it is to be based, and that any such paper not previously served on the party to be notified and not filed by that party shall accompany the notice of motion. Consequently, if judicial notice is to be taken in a law and motion proceeding, the better practice apparently is to include a separate request for judicial notice in the moving papers, refer to that request in the notice of motion and have a copy of the material to be judicially noticed accompany the notice of motion, and provide the authority for taking judicial notice of the particular matter involved in the accompanying points and authorities. For a form of request for judicial notice *see § 321.60*.

Some statutes governing specific motions expressly refer to judicial notice. Examples are the statutes governing motions to strike all or a portion of a pleading [*Code Civ. Proc. § 437*; *see also, e.g., Garcia v. Sterling (1985) 176 Cal. App. 3d 17, 21, 221 Cal. Rptr. 349]* and motions for summary judgment [*Code Civ. Proc. § 437c(b)*; *see also, e.g., Columbia Casualty Co. v. Northwestern Nat. Ins. Co. (1991) 231 Cal. App. 3d 457, 468, 282 Cal. Rptr. 389]* .

[5] At Trial

If a party intends to invoke judicial notice at a trial and knows this before trial, apparently, he or she may serve and file a written request beforehand at some pretrial conference or the before-trial conference, if any, held in the judge's chambers [for discussion of the before-trial conference, *see* Ch. 551, *Trial*]. If the need results from evidence produced at trial, apparently, an oral request (motion) to the court to take judicial notice would be proper.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProceduresPretrial JudgmentsJudgment on the PleadingsCivil ProceduresSummary JudgmentEvidenceCivil ProceduresPretrial MattersConferencesPretrial ConferencesEvidenceJudicial NoticeGeneral Overview

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§ 321.20 Burden of Persuasion

The requesting party has the burden of persuading the judge that the matter properly may be noticed under *Evid. Code § 452* and of the tenor of the matter to be noticed. For example, if the matter is claimed to be a fact of common knowledge under *Evid. Code § 452(g)* (*see § 321.17[11], above*), the requesting party must persuade the judge that the fact is of such common knowledge within the territorial jurisdiction of the court that it cannot reasonably be subject to dispute, that is, that no reasonable person having the same information as is available to the judge could rationally disbelieve the fact. On the other hand, if the matter to be noticed is a city ordinance under *Evid. Code § 452(b)* (for discussion of regulations and ordinances, *see § 321.17[3], above*), the requesting party must persuade the judge that a valid ordinance exists and its tenor, but the judge need not believe that no reasonable person could conclude otherwise [*see* Cal. L. Revision Comm'n Comment to *Evid. Code § 453*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceJudicial NoticeGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofUltimate Burden of Persuasion

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§ 321.21 Determining Propriety of Judicial Notice

[1] Sources Available and Advice of Learned Persons

In determining the propriety of taking judicial notice of a matter, or of its tenor, the court may consult or use any source of pertinent information, including the advice of persons learned in the subject matter, whether or not furnished by a party [*Evid. Code § 454(a)(1)*]. When the advice of persons learned in the subject matter is required to enable the court to take judicial notice of a matter, the court on its own motion or on motion of any party may appoint one or more such persons to provide the advice. If the court determines to appoint such a person, the person must be appointed and compensated in the manner provided in *Evid. Code § 730 et seq.* [*Evid. Code § 460*; *see, e.g., In re Marriage of Hargrave (1985) 163 Cal. App. 3d 346, 355, 209 Cal. Rptr. 764]* . Usually, the parties will be expected to produce the advice of experts if it is needed. *Evid. Code § 460*, however, enables the court to appoint experts in those cases in which the advice of an expert not identified with a party seems desirable [Assembly Committee on Judiciary Comment to *Evid. Code § 460*]. For forms for appointing an expert under *Evid. Code § 730*, see Ch. 551, *Trial* .

[2] Exclusionary Rules and Privileges

In determining the propriety of taking judicial notice of a matter or of its tenor, the exclusionary rules of evidence (*see Evid. Code § 350 et seq.*), other than *Evid. Code § 352* (excluding time-consuming, prejudicial, confusing, and misleading evidence), and the rules of privilege (*see Evid. Code § 900 et seq.*) do not apply [*Evid. Code § 454(a)(2)*].

[3] Record of Information Not Received in Open Court

When the subject of judicial notice is the law of an organization of nations, a foreign nation, or a public entity in a foreign nation (*see Evid. Code § 452(f)*; *see § 321.17[8], above*), and the court resorts to the advice of persons learned in the subject matter, such advice, if not received in open court, must be in writing [*Evid. Code § 454(b)*].

If the trial court resorts to any source of information not received in open court, including the advice of persons learned in the subject matter, the information and its source must be made a part of the record in the action, and the court must afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken [*Evid. Code § 455(b)*].

[4] Opportunity to Be Heard

With respect to any matter specified in *Evid. Code § 452* (for discussion of matters subject to judicial notice, *see § 321.17, above*) or in *Evid. Code § 451(f)* (for discussion of universal knowledge, *see § 321.17[10], above*) that is of substantial consequence to the determination of the action, and the trial court has been requested to take or has taken or proposes to take judicial notice of the matter, the court must afford each party reasonable opportunity, before the jury is instructed or before the cause is submitted for decision by the court, to present to the court information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed [*Evid. Code § 455(a)*; *see also* Assembly Committee on Judiciary Comments to *Evid. Code §§ 452* and *455*].

[5] Denial of Request

If the trial court denies a request to take judicial notice of any matter, the court must at the earliest practicable time so advise the parties and indicate for the record that it has denied the request [*Evid. Code § 456*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceJudicial NoticeGeneral OverviewEvidenceJudicial NoticeLaws of Foreign StatesEvidencePrivilegesGeneral Overview

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§ 321.22 Instructing Jury on Judicially Noticed Matter

If a matter judicially noticed is a matter that would otherwise have been for the jury to determine, the trial court may, and on request must, instruct the jury to accept as a fact the matter judicially noticed [*Evid. Code § 457*; for a standard form of jury instruction, *see* California Forms of Jury Instruction, § 1.58 (Matthew Bender); *see People v. Moore (1997) 59 Cal. App. 4th 168, 179-187, 69 Cal. Rptr. 2d 56* (under facts of criminal case, trial court did not violate defendant's constitutional right to have jury determine existence of every element of offense charged by instructing jury on matter of which it took judicial notice, i.e., that particular water district was a district for purposes of Pen. Code § 424.1)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewEvidenceJudicial NoticeAdjudicative FactsGeneral Overview

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§ 321.23 Effect of Court's Failure or Refusal to Take Judicial Notice or to Instruct Jury

The trial court's failure or refusal to take judicial notice of a matter or to instruct the jury with respect to the matter does not preclude the trial court in subsequent proceedings in the action from taking judicial notice of the matter in accordance with the procedure specified in *Evid. Code § 450 et seq.* [*Evid. Code § 458*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewEvidenceJudicial NoticeGeneral Overview

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§ 321.24 Judicial Notice in Reviewing Court

Pursuant to *Evid. Code § 459*, a reviewing court generally must take judicial notice of matters that the trial court properly noticed or that it was required to notice, and it has the discretionary power to take judicial notice the same as the trial court. However, although a party may request that an appellate court take judicial notice of certain matters, an appellate court will, as a general rule, decline to take notice of matters that were not before the trial court [*see, e.g., Termo Co. v. Luther (2008) 169 Cal. App. 4th 394, 404, 86 Cal. Rptr. 3d 687* ; *Brosterhous v. State Bar of California (1995) 12 Cal. 4th 315, 325, 48 Cal. Rptr. 2d 87, 906 P.2d 1242]* .

A request that judicial notice be taken pursuant to *Evid. Code § 459* in a cause before the Supreme Court or a court of appeal must be made by means of formal appellate motion filed separately from a brief or other paper along with a proposed order [*Cal. Rules of Ct., Rule 8.252(a)(1)*]. The motion must state why the matter to be noticed is relevant to the appeal, whether the matter to be noticed was presented to the trial court and, if so, whether judicial notice was taken by that court and whether the matter to be noticed relates to proceedings occurring after the order or judgment that is the subject of the appeal [*Cal. Rules of Ct., Rule 8.252(a)(2)*]. If the matter to be noticed is not in the record, the party must serve and file a copy with the motion or explain why it is not practicable to do so [*Cal. Rules of Ct., Rule 8.252(a)(3)*].

For more detailed discussion of judicial notice in a reviewing court under *Evid. Code § 459* and *Cal. Rules of Ct., Rule 8.252*, and a form of appellate motion requesting judicial notice, see Ch. 50, *Appeal: Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsMotions on AppealEvidenceJudicial NoticeAdjudicative FactsProceedings in Other Courts

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§ 321.25 Review of Trial Court's Determination

[1] Granting Judicial Notice

The trial judge's determination to take judicial notice of a matter specified in *Evid. Code § 452* will be upheld on appeal if the matter was properly noticed. The reviewing court may resort to any information, whether or not available at the trial, to sustain the proper taking of judicial notice [*see* Cal. L. Revision Comm'n Comment to *Evid. Code § 453*].

[2] Denying Judicial Notice

Even though a party requested that judicial notice be taken under *Evid. Code § 453* (for discussion of the requirements of making permissive judicial notice mandatory, *see § 321.18[1], above*) and gave notice to each adverse party in compliance with *Evid. Code § 453(a)*, the decision of the judge not to take judicial notice will be upheld on appeal unless the reviewing court determines that the party furnished information to the judge that was so persuasive that no reasonable judge would have refused to take judicial notice of the matter [*see* Cal. L. Revision Comm'n Comment to *Evid. Code § 453*].

Although judicial notice of the matters specified in *Evid. Code § 451* (*see § 321.17, above*) is mandatory, whether or not the court is requested to notice them, and the court errs if it fails to take judicial notice of the matters specified, the error is not necessarily reversible error. Depending on the circumstances, the appellate court may hold that the error was "invited" (and, hence, not reversible error) or that points not urged in the trial court may not be advanced on appeal. These and similar principles of appellate practice are not abrogated by *Evid. Code § 451* [Assembly Committee on Judiciary Comment to *Evid. Code § 451*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsStandards of ReviewGeneral OverviewEvidenceJudicial NoticeGeneral Overview

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[Reserved]

§§ 321.26[Reserved]

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§ 321.40 Federal Statutes

Judicial notice of federal regulations, Presidential proclamations, and Executive Orders published in the Federal Register. *44 U.S.C. § 1507*

Legal Topics:

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

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§ 321.41 State Statutes

[1] Administrative Law Judges

Administrative law judges of Office of Administrative Hearings as permitted to take official notice of any fact that may be judicially noticed by California courts. *Gov. Code § 11515*

[2] Judicial Notice in Specific Actions

Judicial notice of recorded instruments in actions to declare discriminatory restrictions or prohibitions on transfer, use, or occupation of real property void under *Civ. Code § 53(a), (b). Civ. Code § 53(c)*

Matters of which judicial notice is authorized or required to be taken as not required to be stated in accusatory pleading in criminal proceedings. *Penal Code § 961*

Requirement that court in criminal proceeding take judicial notice of private statute or ordinance of county or municipal corporation when referred to by its title and day of passage. *Penal Code § 963*

[3] Judicial Notice on Specific Motions

Invoking judicial notice in support of demurrer to pleading. *Code Civ. Proc. §§ 430.30, 430.70*

Invoking judicial notice on motion to strike all or part of pleading. *Code Civ. Proc. § 437*

Motions for summary judgment as permitted to be supported by matters of which judicial notice shall or may be taken. *Code Civ. Proc. § 437c(b)*

[4] Matters Subject to Judicial Notice

Courts as required to take judicial notice of seal of California Commissioner of Corporations. *Corp. Code § 25603*

Matter of which court must or may take judicial notice and procedure. *Evid. Code §§ 450-460*

Requirement that courts take judicial notice of regulation or order repealing regulation filed with California Secretary of State. *Evid. Code § 451(b)*; *Gov. Code § 11343.6*

Judicial notice of contents of regulations printed or incorporated by appropriate reference in California Code of Regulations. *Evid. Code § 451(b)*; *Gov. Code § 11344.6*

"Board" defined, and requirement that judicial notice be taken of board rules and amendments. *Gov. Code §§ 18521, 18576* (Civil Service Act)

Courts as required to take judicial notice of charter ratified and approved in accordance with provisions of Gov. Code *§ 51900 et seq. Gov. Code* § 51951 (relating to Sacramento County, its incorporated cities, and its special districts)

Judicial notice of organization and existence of cities incorporated pursuant to Gov. Code *§ 57000 et seq. Gov. Code* § 57380

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceOfficial NoticeCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedureSummary JudgmentEvidenceEvidenceJudicial NoticeGeneral Overview

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27-321 California Forms of Pleading and Practice--Annotated § 321.42

§ 321.42 California Rules of Court

Motion procedure for requesting judicial notice in cause pending before Supreme Court or court of appeal. *Cal. Rules of Ct., Rule 8.252*

Preemption of local rules, including, among others, those relating to pleading, motions, and form and format of papers. *Cal. Rules of Ct., Rule 3.20*

Request for judicial notice to be in separate document. Cal. Rules of Ct., Rule 3.113(m)

Evidence received at law and motion hearing required to be by declaration and affidavit and by request for judicial notice without testimony or cross examination, except as allowed in court's discretion for good cause shown. *Cal. Rules of Ct., Rule 3.1306(a)*

Party requesting judicial notice of material under *Evid. Code § 452* or *453* required to provide court and each party with copy of material. *Cal. Rules of Ct., Rule 3.1306(c)*

If material to be judicially noticed is part of file in court in which matter is being heard, requesting party as required to specify in writing part of court file sought to be judicially noticed and to make arrangements with clerk to have file in courtroom at time of hearing. *Cal. Rules of Ct., Rule 3.1306(c)*

Legal Topics:

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

[1] Appellate Courts

Reviewing court may consider facts judicially noticed by trial court or those that trial court could properly have noticed. *StorMedia Inc. v. Superior Court (1999) 20 Cal. 4th 449, 456 n.9, 84 Cal. Rptr. 2d 843, 976 P.2d 214*

An appellate court may consider matters that are properly the subject of judicial notice. *Ross v. Creel Printing & Publishing Co., Inc. (2002) 100 Cal. App. 4th 736, 743, 122 Cal. Rptr. 2d 787* .

Reviewing court as able to consider all documents trial court determined to be appropriate for judicial notice. *Thorning v. Hollister School Dist. (1992) 11 Cal. App. 4th 1598, 1603, 15 Cal. Rptr. 2d 91*

Evid. Code § 459(a) as authorizing reviewing courts to take judicial notice of any matter specified in *Evid. Code § 452(d)*; *Evid. Code § 452(d)* as authorizing appellate court to take judicial notice of records on file in action before trial court whether or not they were in evidence in proceedings and whether or not trial judge relied on them, although appellate court as general rule as not taking judicial notice if, on examination of entire record, matter apparently was not presented to and considered by trial court in first instance. *People v. Preslie (1977) 70 Cal. App. 3d 486, 493, 138 Cal. Rptr. 828*

[2] California History

Historical facts concerning Spanish and Mexican settlement of California as proper subjects of judicial notice. *City of Los Angeles v. City of San Fernando (1975) 14 Cal. 3d 199, 231, 123 Cal. Rptr. 1, 537 P.2d 1250*

[3] Census Results

In appropriate case, court as authorized under *Evid. Code § 452(c)* and *(h)* to grant motion that it take judicial notice of

results of federal census. *People v. Howard (1992) 1 Cal. 4th 1132, 1160 n.6, 5 Cal. Rptr. 2d 268, 824 P.2d 1315*

[4] Court Records

Court took judicial notice of 1987 unpublished opinion of the court of appeal affirming a conviction of another person which not only cited deputy district attorney for prosecutorial misconduct, but identified the deputy district attorney as offending prosecutor in two other published appellate court decisions in which court of appeal found prosecutorial misconduct without indentfying prosecutor; 1987 unpublished opinion fell within category of court records for which judicial notice may be taken under *Evid. Code § 452(d)*; because court did not cite or rely on that opinion, judicial notice did not run afoul of Cal. Rules of Ct., Rule 977 (renumbered *Rule 8.115* in 2007). *People v. Hill (1998) 17 Cal. 4th 800, 847, 847 n.9, 72 Cal. Rptr. 2d 656, 952 P.2d 673*

A copy of a complaint which was neither certified nor provided under subpoena from the court is not a proper subject of judicial notice, as the court has no proof of its authenticity. *Ross v. Creel Printing & Publishing Co., Inc. (2002) 100 Cal. App. 4th 736, 743, 122 Cal. Rptr. 2d 787*

Both trial and appellate courts as properly taking judicial notice of party's earlier pleadings and positions as well as established facts from same case and other cases. *Cantu v. Resolution Trust Corp. (1992) 4 Cal. App. 4th 857, 877, 6 Cal. Rptr. 2d 151*

Appellate court as taking judicial notice under *Evid. Code §§ 452(d), 459* of reporter's transcripts of (1) prior hearing before county's Family Law Court and (2) detention hearing contained in petition for writ of mandate previously filed in appellate court. *In re Travis C. (1991) 233 Cal. App. 3d 492, 497 n.4, 498 n.5, 284 Cal. Rptr. 469*

Trial court as properly taking judicial notice of records of any court of record of any state of *United States. In re Tanya F. (1980) 111 Cal. App. 3d 436, 440, 168 Cal. Rptr. 713* ; *Day v. Sharp (1975) 50 Cal. App. 3d 904, 914, 123 Cal. Rptr. 918*

Although in ruling on demurrer courts may take judicial notice of files in other judicial proceedings, this as not meaning that they take judicial notice of the truth of factual matters asserted therein. *Ramsden v. Western Union (1977) 71 Cal. App. 3d 873, 879, 138 Cal. Rptr. 426*

[5] Demurrers and Motions for Judgment on the Pleadings

In ruling on demurrer court may consider facts of which it has taken judicial notice; this includes existence of document; when judicial notice is taken of document, however, truthfulness and proper interpretation of document is subject to dispute. *StorMedia Inc. v. Superior Court (1999) 20 Cal. 4th 449, 456 n.9, 84 Cal. Rptr. 2d 843, 976 P.2d 214*

In ruling on demurrer, complaint as read as if it contained matters judicially noticed, which may show that complaint fails to state cause of action though its bare allegations do not disclose defect. *Four Star Electric, Inc. v. F & H Construction (1992) 7 Cal. App. 4th 1375, 1379, 10 Cal. Rptr. 2d 1*

In determining sufficiency of complaint against demurrer, court as reading complaint as including matters subject to judicial notice. *Sirott v. Latts (1992) 6 Cal. App. 4th 923, 928, 8 Cal. Rptr. 2d 206*

In ruling on demurrer, complaint as to be read as containing judicially noticeable facts, even if pleading contains express allegation to contrary. *Cantu v. Resolution Trust Corp. (1992) 4 Cal. App. 4th 857, 877, 6 Cal. Rptr. 2d 151*

In ruling on demurrer, allegation in complaint contrary to law or to a fact of which court may take judicial notice as to be treated as a nullity. *Rauber v. Herman (1991) 229 Cal. App. 3d 942, 946, 280 Cal. Rptr. 785*

In ruling on demurrer, trial court as committing reversible error in judicially noticing contents of affidavit for truth of matters asserted and sustaining demurrer on that ground when complaint otherwise stated a cause of action. *Bach v. McNelis (1989) 207 Cal. App. 3d 852, 865, 255 Cal. Rptr. 232*

Trial court as erring in granting motion for judgment on pleadings when complaint on its face stated a cause of action and was not defeated by matters properly subject to judicial notice. *Bach v. McNelis (1989) 207 Cal. App. 3d 852, 865, 255 Cal. Rptr. 232*

Complaint otherwise good on its face as subject to demurrer if facts judicially noticed render it defective; however, demurrer as not appropriate procedure for determining truth of disputed facts, and hearing on demurrer as not to be turned into contested evidentiary hearing through guise of having court take judicial notice of documents whose truthfulness or proper interpretation is disputable. *Joslin v. H.A.S. Ins. Brokerage (1986) 184 Cal. App. 3d 369, 374, 228 Cal. Rptr. 878*

Because demurrer is not appropriate procedure for determining truth of disputed facts, judicial notice of matters on demurrer as dispositive only in those instances when there is not or cannot be factual dispute concerning that which is sought to be judicially noticed. *Joslin v. H.A.S. Ins. Brokerage (1986) 184 Cal. App. 3d 369, 375, 228 Cal. Rptr. 878* ; *Cruz v. County of Los Angeles (1985) 173 Cal. App. 3d 1131, 1134, 219 Cal. Rptr. 661*

Under *Code Civ. Proc. § 430.70*, judicial notice as taken by trial court in connection with demurrer and by appellate court conducting review. *Post v. Prati (1979) 90 Cal. App. 3d 626, 633-634, 153 Cal. Rptr. 511*

Under *Evid. Code § 452*, trial court as permitted to take judicial notice of prior judgment in determining whether to sustain demurrer based on res judicata, whether or not pleaded, provided only that (1) court has been correctly apprised of judgment and (2) plaintiff is given adequate notice and opportunity to be heard as to effect of prior judgment. *Carroll v. Puritan Leasing Co. (1978) 77 Cal. App. 3d 481, 486, 143 Cal. Rptr. 772*

In ruling on demurrer, trial court as permitted to take judicial notice of documents in file of case in which demurrer is interposed, and its own records, and files of another case pending in court. *Saltares v. Kristovich (1970) 6 Cal. App. 3d 504, 511, 85 Cal. Rptr. 866*

Law as settled that court may take judicial notice of its own records when ruling on demurrer. *Nulaid Farmers Assn. v. LaTorre (1967) 252 Cal. App. 2d 788, 791, 60 Cal. Rptr. 821*

[6] Federal Laws and Regulations

Court as taking judicial notice that, under laws of United States and regulations of land office, no sales of public lands are made until plat and field notes of subdivision survey of township in which they lie have been returned and approved; records as constituting public record and certified copies of plat and field notes of government surveyor as available in land office of each state. *Saunders v. Polich (1967) 250 Cal. App. 2d 136, 140, 58 Cal. Rptr. 198*

[6.1] Foreign Law

A court can take judicial notice of foreign treaty; treaty between Britain and China on status of Hong Kong judicially noticed. *Chong v. Superior Court (1997) 58 Cal. App. 4th 1032, 1036, 68 Cal. Rptr. 2d 427*

[7] Historical Works

"Historical works" exception to the hearsay rule (*Evid. Code § 1341*) as generally confined to "ancient facts" and as not extending to work of living author within reach of court's process. *Osborn v. Irwin Memorial Blood Bank (1992) 5 Cal. App. 4th 234, 261 n.5, 7 Cal. Rptr. 2d 101*

[8] Juvenile Court File

Judge as permitted to take judicial notice of facts asserted in findings and orders in prior juvenile court proceeding, but as unable to take judicial notice of entire juvenile file; court as unable to take judicial notice of truth of hearsay allegations, simply because they are part of court record or file. *In re David C. (1984) 152 Cal. App. 3d 1189, 1204-1205, 200 Cal. Rptr. 115* , criticized in *Sosinsky v. Grant (1992) 6 Cal. App. 4th 1548, 1567, 8 Cal. Rptr. 2d 552*

[9] Mexican and Spanish Law in California Prior to Annexation

Supreme Court of California as required to take judicial notice as part of law of this state that Spanish and Mexican laws governing property rights in California before annexation remained in effect after change of sovereignty unless duly repealed or altered. *City of Los Angeles v. City of San Fernando (1975) 14 Cal. 3d 199, 231, 123 Cal. Rptr. 1, 537 P.2d 1250*

[10] Product Liability

In action against foreign corporation allegedly arising out of plaintiff's use of motorcycle manufactured by defendant, appellate court, on motion to quash service of summons for lack of jurisdiction, as taking judicial notice of fact that a great number of defendant's motorcycles were and are sold in California and of reported cases against defendant. *Rowe v. Dorrough (1984) 150 Cal. App. 3d 901, 905, 198 Cal. Rptr. 131*

In reversing order dismissing action based on alleged defects in wheels on ground it could not be maintained as class action, appellate court as taking judicial notice of fact that defendant had, for many years, conducted national advertising stressing excellence and reliability of its products. *Anthony v. General Motors Corp. (1973) 33 Cal. App. 3d 699, 706, 109 Cal. Rptr. 254*

Court as taking judicial notice of fact that automobile manufacturers undertake large scale advertising programs over television, radio, in newspapers, magazines, and other media of communication in order to persuade public to buy their products. *Gherna v. Ford Motor Co. (1966) 246 Cal. App. 2d 639, 652, 55 Cal. Rptr. 94*

[11] Public Entities

[a] Administrative Regulations

Appellate court as taking judicial notice under *Evid. Code § 452(b)* of amended versions of city's Residential Rent Stabilization and Arbitration Board's Rules and Regulations adopted pursuant to city ordinance and supplied to court pursuant to its request in case in which court needed to determine whether rules conflicted with ordinance. *Da Vinci Group (1992) 5 Cal. App. 4th 24, 29 n.1, 6 Cal. Rptr. 2d 461*

Pursuant to notice to parties served under *Evid. Code § 455*, appellate court as taking judicial notice under *Evid. Code §§ 452(h), 459*, of county documents relating to duties of county probation department employee, certified copies of

which were served on counsel, and of juvenile court staff rules (*15 Cal. Code Reg. §§ 4278(a), 4295*). *In re Eddie D. (1991) 235 Cal. App. 3d 417, 423, 286 Cal. Rptr. 684*

[b] Death Certificates

Unopposed request for judicial notice of death certificate to establish fact of death as granted. *Sacks v. FSR Brokerage, Inc. (1992) 7 Cal. App. 4th 950, 956, 9 Cal. Rptr. 2d 306*

Although *Health & Safety Code § 10577* (repealed; *now see Health & Safety Code 103550*) provides properly certified death certificate is prima facie evidence in all courts of facts stated in it and *Evid. Code § 1281* provides death certificate is not made inadmissible by hearsay rule, no authority as existing for court, in wrongful death action, to take judicial notice of conclusion of suicide in death certificate; in sustaining demurrer without leave to amend, trial court as having misapplied Section 10577 by treating conclusion of suicide as conclusive presumption that plaintiff could not dispute. *Bohrer v. County of San Diego (1980) 104 Cal. App. 3d 155, 164, 163 Cal. Rptr. 419*

[c] Decisions of Administrative Agencies

Appellate court, after notifying parties of its intention to take judicial notice of all matters contained in decision of Public Utilities Commission (*Evid. Code § 455(a),* as taking judicial notice of decision. *Lua v. Southern Pacific Transportation Co. (1992) 6 Cal. App. 4th 1897, 1901 n.3, 9 Cal. Rptr. 2d 116*

[d] Legislative History

Court may judicially notice matters underlying such law; records of Law Revision Commission consisting of two page document titled "March '83 ECH--Notes", ECH referring to the notes' author, judicially noticed. *Estate of Joseph (1998) 17 Cal. 4th 203, 210 n.1, 70 Cal. Rptr. 2d 619, 949 P.2d 472*

Appellate court as taking judicial notice under *Evid. Code §§ 452(c), 459* of legislative history of California statute. *People v. Superior Court (Williams) (1991) 233 Cal. App. 3d 477, 487 n.5, 284 Cal. Rptr. 601*

[e] Licenses

Date of admission to State Bar of California as fact subject to judicial notice. *Bach v. McNelis (1989) 207 Cal. App. 3d 852, 870, 255 Cal. Rptr. 232*

Status of person as licensed broker or salesperson as matter of public record of which court can take judicial notice. *Fellom v. Adams (1969) 274 Cal. App. 2d 855, 864, 79 Cal. Rptr. 633*

[f] Minutes of Meetings

Official minutes of legislative body's meetings as subject to judicial notice. *Thorning v. Hollister School Dist. (1992) 11 Cal. App. 4th 1598, 1603, 15 Cal. Rptr. 2d 91*

Request for judicial notice of minutes of meetings of Regional Water Quality Control Board under *Evid. Code § 452(c)* as granted. *City of Sacramento v. State Water Resources Control Bd. (1992) 2 Cal. App. 4th 960, 967, 972 n.6, 3 Cal. Rptr. 2d 643*

Appellate court as taking judicial notice under *Evid. Code § 452* of minutes of meeting of city civil service commission. *Social Services Union v. City and County of San Francisco (1991) 234 Cal. App. 3d 1093, 1098 n.3, 285 Cal. Rptr. 905*

[g] Official Acts Generally

Trial court properly took judicial notice of 2007 report of the California Legislative Blue Ribbon Commission on Autism, where, although report was prepared by commission, not legislative committee, and was not prepared in connection with particular bill, reports of legislative committees and commissions are part of statute's legislative history, and may properly be subject to judicial notice as official acts of the Legislature under *Evid. Code § 452(c)*; and where commission that prepared report was established by Legislature pursuant to concurrent resolution, and recommendations of commission were expressly referenced by Legislature in approving Senate Bill No. 1563 (2007-*2008 Reg. Sess.). Arce v. Kaiser Foundation Health Plan, Inc. (2010) 181 Cal. App. 4th 471, 484-485, 104 Cal. Rptr. 3d 545*

Grant deeds are judicially noticeable under *Evid. Code § 452(c)*. *Lockhart v. MVM, Inc. (2009) 175 Cal. App. 4th 1452, 1460, 97 Cal. Rptr. 3d 206*

Judicial notice under *Evid. Code § 452(c)*, providing that judicial notice may be taken of official acts of legislative, executive, and judicial departments of United States and of any state in United States, as comprehending official acts of a county. *Cruz v. County of Los Angeles (1985) 173 Cal. App. 3d 1131, 1134, 219 Cal. Rptr. 661*

[h] Reports

Appellate court as taking judicial notice under *Evid. Code § 452(h)* of report published by U.S. Department of Transportation on National Highway Traffic Safety, entitled Fatal Accident Reporting System 1988. *Peretto v. Department of Motor Vehicles (1991) 235 Cal. App. 3d 449, 459 n.8, 1 Cal. Rptr. 2d 392*

[12] Relevance Requirement

Trial court's denial of plaintiff's motion for judicial notice could not have been prejudicial when, among other things, plaintiff did not explain how scientific study published in 1995 could be relevant to determination of defendant's alleged negligence almost 20 years earlier. *Ford v. Pacific Gas & Electric Co. (1997) 60 Cal. App. 4th 696, 705, 70 Cal. Rptr. 2d 359*

Judicial notice of irrelevant matter denied. *Wasko v. Department of Corrections (1989) 211 Cal. App. 3d 996, 1001-1002 n.1, 259 Cal. Rptr. 764* (mandate proceeding); *Baker v. Beech Aircraft Corp. (1979) 96 Cal. App. 3d 321, 339, 157 Cal. Rptr. 779* (personal injury action)

[13] Statutes and Ordinances

Court took judicial notice of Pomo Indians' tribal sovereign immunity ordinance, pursuant to *Evid. Code §§ 451, 452. Smith v. Hopland Band of Pomo Indians (2002) 95 Cal. App. 4th 1, 8, 115 Cal. Rptr. 2d 455*

Failure to state the author of comments contained in legislative history to statute merits denial of judicial notice for lack of foundation. *Estate of Dye (2001) 92 Cal. App. 4th 966, 985, 112 Cal. Rptr. 2d 362*

In action by county against state, state attorney general, and state board of corrections arising out of denial of county's claim for indemnification from state for costs and attorney fees incurred in defending class action against it in federal court alleging that jail conditions were inadequate under U.S. Constitution, appellate court as taking judicial notice under *Evid. Code § 451(a)* of facts that (1) county jails are used principally to incarcerate persons convicted of or charged with violations of law (*Penal Code § 4000*); and (2) state asserts substantial control over operation of county jails by virtue of *Penal Code §§ 4000 et seq.* and *6030 et seq.* and *15 Cal. Code Reg. § 1000 et seq.* *County of Lassen v. State of California (1992) 4 Cal. App. 4th 1151, 1154-1155, 6 Cal. Rptr. 2d 359*

Appellate court as taking judicial notice, under *Evid. Code §§ 452(b), 459*, of date city ordinance was adopted. *Franklin-McKinley School Dist. v. City of San Jose (1991) 234 Cal. App. 3d 1599, 1602 n.2, 286 Cal. Rptr. 656*

City and county ordinances as judicially noticed as regulations and legislative enactments issued by or under authority of public entity in United States (*Evid. Code § 452(b)*). *Grant v. Hipsher (1967) 257 Cal. App. 2d 375, 380 n.2, 64 Cal. Rptr. 892*

[14] Truth of Statements in Documents

The court allowed judicial notice of a stipulation filed in a criminal case wherein the plaintiff, who was the defendant in the criminal case, stipulated to the existence of probable cause for her arrest. Taking judicial notice of this stipulation did not amount to taking judicial notice of hearsay allegations. The fact that plaintiff admitted there was probable cause for her arrest was not considered hearsay within the meaning of the line of cases disallowing judicial notice of hearsay statements within court documents. *Salazar v. Upland Police Dept. (2004) 116 Cal. App. 4th 934, 946, 11 Cal. Rptr. 3d 22*

Judicial notice of 117 documents (newspaper articles, transcripts of radio and television broadcasts, and fact sheets distributed by state and federal governments for benefit of residents and other interested parties) not taken for truth of disputed issue of fact, that is, time and manner each plaintiff discovered his or her cause of action, but to show extent of widespread publicity about contamination of land around defendant's facilities; documents were offered to show that, at time outside of statute of limitations, plaintiffs had notice of or information of circumstances sufficient to put reasonable person on inquiry; accuracy of reporting was not relevant. *McKelvey v. Boeing North Am. (1999) 73 Cal. App. 4th 601, 612, 86 Cal. Rptr. 2d 645*

Taking judicial notice of document as not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning. *Joslin v. H.A.S. Ins. Brokerage (1986) 184 Cal. App. 3d 369, 374, 228 Cal. Rptr. 878*

Taking judicial notice of official acts of governmental entity does not in and of itself require acceptance of truth of factual matters that might be deduced therefrom, since, in many instances, what is being noticed, and thereby established, is no more than existence of such acts and not, without supporting evidence, what might factually be associated with or flow from them. *Cruz v. County of Los Angeles (1985) 173 Cal. App. 3d 1131, 1134, 219 Cal. Rptr. 661*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedureAppealsStandards of ReviewGeneral OverviewEvidenceJudicial NoticeAdjudicative FactsProceedings in Other CourtsEvidenceJudicial NoticeAdjudicative FactsPublic RecordsEvidenceJudicial NoticeAdjudicative FactsPublic RecordsEvidenceJudicial NoticeDomestic LawsEvidenceJudicial NoticeLaws of Foreign States

California Forms of Pleading and Practice--Annotated

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Volume 27: Interpleader thru Juries and Jury Selection-Chs. 314-322
Chapter 321 JUDICIAL NOTICE
PART III. RESEARCH GUIDE

27-321 California Forms of Pleading and Practice--Annotated §§ 321.44-321.49

[Reserved]

§§ 321.44[Reserved]

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Volume 27: Interpleader thru Juries and Jury Selection-Chs. 314-322
Chapter 321 JUDICIAL NOTICE
PART IV. PROCEDURAL CHECKLISTS

27-321 California Forms of Pleading and Practice--Annotated

NOTE:

The following guides are illustrative only of matters generally considered and procedures commonly followed. They are not exclusive. Any given case may require consideration of matters or utilization of procedures not discussed.

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27-321 California Forms of Pleading and Practice--Annotated § 321.50

§ 321.50 Requesting Party's Checklist

[1] Preliminary Determinations

- ☐ What jurisdiction's law must be established?
  - ☐ California.
  - ☐ Federal.
  - ☐ Other state or nation.
  - ☐ Public entity within California, another state, or nation.
- ☐ What type of law is to be established?
  - ☐ Statute.
  - ☐ Ordinance.
  - ☐ Rule or regulation.
  - ☐ Executive Order, treaty, or other miscellaneous source.

☐ Case law.

☐ What facts are admissible and must be presented in order to prevail at the hearing or trial, as the case may be?

☐ Which facts, if any, may be proved by judicial notice [*see Evid. Code §§ 451, 452*; [for discussion, *see § 321.17*]?

☐ Is judicial notice mandatory under *Evid. Code § 451* or permissive, but mandatory on request, under *Evid. Code § 452* [for discussion, *see § 321.16*]?

☐ If the court must take judicial notice under *Evid. Code § 451*, what, if anything, to present to the court to enable it to take judicial notice.

☐ If judicial notice is permissive, and only mandatory on request under *Evid. Code §§ 452, 453*, when to request it [for discussion of invoking judicial notice, *see § 321.19*] and what, if anything, to present to the court to enable it to take judicial notice.

☐ Is the advice of persons learned in the subject matter required to enable the court to take judicial notice [*see Evid. Code §§ 454(a)(1), 460*; for discussion, *§ 321.21[1], above*] and, if so, the person or persons who would be best qualified to provide the advice and their fees?

[2] Ascertain Documents to Be Obtained

☐ For requesting judicial notice of:

☐ Judicial decision of another state [for definition, *see § 321.12[4]*], obtain a copy of the volume containing the decision or a certified copy of the opinion from the court rendering it [*see Evid. Code § 452(a)*].

☐ Constitutional or statutory law of another state, obtain an official or authenticated copy of the constitution or statute as it read at the relevant time [*see Evid. Code § 452(a)*].

☐ Resolution or private act of Congress or of the California Legislature, obtain an official or authenticated copy of the resolution or act [*see Evid. Code § 452(a)*].

☐ Regulation issued by or under the authority of the United States, obtain either an authenticated copy of it or the publication in which it is officially published [*see Evid. Code § 452(b)*].

☐ Legislative enactment issued by or under the authority of the United States other than a public statutory law [*see Evid. Code § 451(a)* (mandatory judicial notice)], obtain either an authenticated copy of it or a copy of the publication in which it is officially

published [*see Evid. Code § 452(b)*].

☐ Regulation or legislative enactment issued by or under the authority of a "public entity" in the United States [for definition, *see § 321.12[3]*], obtain an authenticated copy of it and the date it was adopted or enacted [*see Evid. Code § 452(b)*].

☐ Official act of the legislative, executive, or judicial department of the United States or of a state [for definition, *see § 321.12[4]*], obtain either an authenticated copy of it or a copy of the publication in which it is officially published [*see Evid. Code § 452(c)*].

☐ California court's own records or files, arrange with the clerk of the court to have the record or file delivered to the judge at the time of the hearing or trial [*see Evid. Code § 452(d)(1), Cal. Rules of Ct., Rule 3.1306(c)*].

☐ Record or paper filed in another California court, obtain a certified copy of the relevant record or paper from that court [*see Evid. Code § 452(d)(1)*].

☐ Record or paper filed in a court of record of the United States or another state [for definition, *see § 321.12[4]*], obtain a certified or otherwise authenticated copy of the relevant records or papers from that court [*see Evid. Code § 452(d)(2)*].

☐ California court's own rules, a mere citation to the rule should be sufficient [*see Evid. Code § 452(e)*].

☐ Rules of another California court, obtain a certified copy of the relevant rule from that court or the publication in which the rule is officially published [*see Evid. Code § 452(e)*].

☐ Rules of court of record of United States or sister state [for definition, see *§ 321.12[4]*], obtain a certified or otherwise authenticated copy of it from that court or the publication in which it is officially published [*see Evid. Code § 452(e)*].

☐ Law of an organization of nations, a foreign nation, or a "public entity" [for definition, *see § 321.12[3]*] in a foreign nation [*see Evid. Code § 452(f)*]:

☐ Obtain an authenticated copy of the law.

☐ If the law is in a foreign language, have the law translated into English [*see Evid. Code §§ 750, 751(c), (d), 753*].

☐ Fact or proposition of such common knowledge within the territorial jurisdiction of the court that it cannot reasonably be the subject of dispute, provide a statement of the fact or proposition.

☐ If any written materials that would support the conclusion that the fact or

proposition is common knowledge locally are to be presented, obtain an authenticated copy if necessary [*see Evid. Code § 452(g)*].

☐ Fact or proposition that is not reasonably subject to dispute and is capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy, identify and obtain a copy of the source material, such as a treatise, encyclopedia, or almanac [*see Evid. Code § 452(h)*].

☐ Make sure that certification or authentication of a record or paper required to be certified or authenticated meets requirements of *Evid. Code §§ 1530, 1531* [for discussion, *see § 321.18[3][b]*].

[3] Making Request for Judicial Notice in Pleading or Noticed Motion

☐ If requesting judicial notice in a pleading other than a demurrer, in the pleading [for forms, *see §§ 321.62, 321.63*]:

☐ Identify the matter to be judicially noticed.

☐ If requesting judicial notice of a constitutional or statutory law of another state, specifically identify the portion of the law to be noticed.

☐ If requesting judicial notice of matter in the court's own records or files, precisely identify the matter by case title and number (if other than the present case) and the particular record or part of the file to be judicially noticed.

☐ Include the request.

☐ Attach copies of any properly authenticated written matter necessary to enable the court to take judicial notice.

☐ If the writing is too bulky to attach, check the local court rules to determine whether they cover the problem and, if not, check with the court clerk's office to ascertain the manner in which they should be presented.

☐ Make sure that the combined materials submitted [for discussion of notice requirements, *see § 321.18*]:

☐ Notify adverse party sufficiently to enable him or her to prepare to meet the request [*see Evid. Code § 453(a)*].

☐ Furnish the court with sufficient information to enable it to take judicial notice of the matter [*see Evid. Code § 453(b)*.

☐ If making the request in support of, or in opposition to, a demurrer or a noticed motion:

☐ Prepare:

☐ Request for judicial notice [for form, *see § 321.60*];

☐ Demurrer or notice of motion referring to the request [for forms, *see §§ 321.64, 321.65*]; and

☐ Memorandum of points and authorities referring to the request and including the basis for taking judicial notice.

☐ Provide necessary documentation of matter to be judicially noticed by, for each item, either:

☐ If the item is represented by a certified, authenticated, or other copy of it, attaching proper copies of it necessary to enable the court to take judicial notice, or

☐ If the paper to be judicially noticed is some matter in the court's file:

☐ Clearly identifying it in the demurrer, notice of motion, or points and authorities, and

☐ Making sure the clerk has the file in the courtroom at the time of the hearing, if previously arranged [*see Cal. Rules of Ct., Rule 3.1306(c)*].

[4] Separate Request to Take Judicial Notice

☐ If the need to request judicial notice arises after the party's pleading is filed and before trial and is not related to a pretrial motion, and local court rules do not otherwise provide, consider requesting judicial notice by a separate formal request.

☐ Prepare papers for separate request.

☐ Request for judicial notice [for form, *see § 321.60*].

☐ Points and authorities, if desired to support the request.

☐ Notice of request, [for form, *see § 321.61*] sufficient to enable the adverse party to prepare to meet the request [*see Evid. Code § 453(a)*; for discussion, *see § 321.18*].

☐ Attach copies of documents, if any, that are the subject of the request.

☐ Proof of service.

☐ Date and sign the original of the request and conform the copies.

☐ Serve papers.

☐ If service is by mail, Express Mail or other overnight method, or facsimile transmission, either [*Code Civ. Proc. § 1013(b), (d), (f)*]:

☐ Note the date and place of mailing, deposit, or transmission on the request and, if by facsimile transmission, the telephone number to which the transmission is made; or

☐ Include an unsigned copy of the proof of service with the papers served.

☐ Serve a copy of the request and supporting papers on the adverse party's attorney or, if he or she has no attorney, on the adverse party and on the attorney of each other party who may be adversely affected by the taking of judicial notice, or on the party if he or she has no attorney [*see Code Civ. Proc. § 1015*; *Evid. Code § 453(a)*].

☐ Have the person making service execute the original of the proof of service and conform the copies.

NOTE:
Timing. The Evidence Code does not prescribe any specific period of notice.

☐ File the originals of the request, supporting papers, and proof of service with the court clerk and have the copies conformed.

[5] Oral Motion During Trial

☐ If the need for judicial notice arises during trial, orally move the court to take judicial notice, specifically identifying the matter to be noticed.

☐ If the motion requires presentation of written materials [*see Evid. Code §§ 453(b), 454(a)(1)*] or the testimony of persons learned in the subject matter [*see Evid. Code §§ 454(a)(1), 460*; for discussion, *see § 321.21[1]*], counsel may request leave to present them later.

[6] Request for Judicial Notice on Appeal

☐ Determine whether the request to take judicial notice should be included in a brief or made by a separate request [for discussion, *see § 321.24[4], above*].

☐ Draft separate request, if desired [for form, *see § 321.60*].

☐ Furnish the court with sufficient information to enable it to take judicial notice [for checklist, *see § 321.50[2]*].

☐ If the matter to be judicially noticed was not presented to the trial court, counsel should explain why [*see, e.g., People v. Hardy (1992) 2 Cal. 4th 86, 134-135, 5 Cal. Rptr. 2d 796, 825 P.2d 781* ; *People v. Preslie (1977) 70 Cal. App. 3d 486, 493, 138 Cal. Rptr. 828]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureAppealsMotions on AppealEvidenceJudicial NoticeGeneral Overview

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27-321 California Forms of Pleading and Practice--Annotated § 321.51

§ 321.51 Adverse Party's Checklist

[1] Preliminary Determinations

☐ Is judicial notice of the matter requested authorized [*see Evid. Code §§ 451, 452*, for discussion, *see § 321.17*]?

☐ If subject to judicial notice, is the matter relevant to the case [*see Evid. Code § 350*; for discussion, *see § 321.15[2]*]?

☐ Is judicial notice sought of the truth of the matter stated in a document? If so, is the stated matter excludable as hearsay [*Evid. Code § 1200*] or subject to an exception to the hearsay rule [*Evid. Code § 1220 et seq.*;]? for discussion, *see § 321.15[4]*

☐ Is the matter subject to exclusion under any other rules of evidence [for discussion, *see, e.g., § 321.15[3]*]?

☐ If judicial notice is being requested in a reviewing court, was the issue raised at trial?

[2] Preparation of Opposition

☐ If all or a part of the matter sought to be judicially noticed on a demurrer or noticed motion is not subject to judicial notice, so state in the points and authorities in opposition to the demurrer or motion, and:

☐ Clearly identify the part objected to;

☐ State why it is not subject to judicial notice; and

☐ Set forth the applicable law.

☐ If all or a part of a matter other than demurrer or noticed motion sought to be judicially noticed by a formal request before trial is not subject to judicial notice or contains matter that is not subject to judicial notice:

☐ Prepare papers:

☐ Objection to the written request [for form, *see § 321.80*].

☐ Proof of service [for forms of proof of service, see Ch. 518, *Service of Summons and Papers* ; or, if service is to be by facsimile transmission, *see* Ch. 264, *Fax Filing and Service of Papers*].

☐ Date and sign the original of the request and conform the copies.

☐ Serve papers [for checklist see *§ 321.50[4]*]

☐ If the request to take judicial notice is made at trial and all or part of the matter sought to be judicially noticed is not subject to judicial notice, either:

☐ Object to the request, stating the ground for the objection and whether it goes to all or only part of the request, and if to a part, specifically identifying it [*see, e.g., In re Rocco M. (1991) 1 Cal. App. 4th 814, 819, 2 Cal. Rptr. 2d 429]* , or

☐ If counsel is unable to respond at the time the request is made, ask the court to delay its ruling until counsel has had an opportunity to examine the matter sought to be judicially noticed and researched the applicable law.

☐ Opposing request made on appeal.

☐ If the request to take judicial notice is made in an opening brief, state the objections in the respondent's brief.

☐ If the request is made in the respondent's brief, state the objections in the reply brief.

☐ If the request is made in a reply brief, draft, serve, and file a separate paper [*see Evid. Code §§ 453(a), 455(a), 459(c)*], entitled "Objections to Request for Judicial Notice."

☐ If the request is made by a written prehearing motion:

☐ Set forth any objections in a separate paper, entitled "Objections to Request for Judicial Notice.' "

☐ Serve a copy of it on the requesting party.

☐ File the original in the number of copies required by the appellate court with a proof of service.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaEvidenceJudicial NoticeGeneral Overview

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27-321 California Forms of Pleading and Practice--Annotated §§ 321.52-321.59

[Reserved]

§§ 321.52[Reserved]

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27-321 California Forms of Pleading and Practice--Annotated § 321.60

§ 321.60 Request for Judicial Notice [Evid. Code § 453]

[1] FORM Request for Judicial Notice [Evid. Code § 453]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	REQUEST FOR JUDICIAL NOTICE
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

TO THE [HONORABLE _____ (*name*), JUDGE OF THE] ABOVE ENTITLED COURT:

_____ [*Specify party, e.g.,* Plaintiff], under the provisions of *Evidence Code Sections 452, subdivision* _____, and *453*, requests that the court take judicial notice of _____ [*specify matter of which notice is requested to be taken, together with sufficient information to enable the court to take notice*]

[*FOR EXAMPLE, statute of a sister state*]

Ohio Revised Code Annotated Sections *4511.29* and *4511.30* (Baldwin 1992), which regulate driving left of the center of a road and were in effect at all times mentioned in the complaint on file herein.

[*OR, court record*]

the attached certified copies of the complaint and answer filed in the _____ [*specify court, e.g.,* Superior Court of California, County of _____,] in a prior action by plaintiff against this defendant on the same claim as alleged in the complaint on file herein, and the certified copy of the judgment entered in that case on _____ [*date*], after a full trial on the merits, adjudicating that plaintiff take nothing by his/her complaint.

[*OR, fact of common local knowledge*]

the fact that this city was severely damaged by an earthquake that struck without warning in the early morning hours of _____ [*date*], resulting in _____ [*specify, e.g.,* a portion of the city's moving some 5 feet to the north], on the ground that the earthquake and its results are facts of such common knowledge within the territorial jurisdiction of this court that they cannot reasonably be the subject of dispute.

[*OR set forth other matter and CONTINUE*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form in *[1], above,* is for use to request the court to take judicial notice of a matter authorized by *Evid. Code § 452* [for discussion, *see § 321.17, above*], so that it will become mandatory for the court to take judicial notice [*Evid. Code § 453*]. The form may be used in support of a demurrer or motion [*see Cal. Rules of Ct., Rule 3.1113(l)*], or may be used as an independent request.

A copy of the request must be served and filed with the other motion papers [*see Code Civ. Proc. § 1010*]. If the request is not in relation to a law and motion proceeding, a copy of the request, together with a notice of the request if one is prepared [for form, *see § 321.61*], should be served on the adverse party and filed.

With appropriate modifications, the form may also be used to request a reviewing court to take judicial notice on appeal of a matter set forth in *Evid. Code § 452*. For discussion of format requirements for papers presented for filing in an appellate court, see Ch. 45, *Appeal: Motion Procedure* .

For forms of requests for judicial notice in a complaint or answer, see *§§ 321.62* and *321.63*, respectively; for forms of requests for judicial notice in a demurrer or notice of motion, see *§§ 321.64* and *321.65*, respectively.

[3] Written vs. Noticed Motion

Evid. Code § 453 does not require that the request be made by a formal noticed motion and to require such a motion would appear to be contrary to the informality contemplated by that statute [*People v. Preslie (1977) 70 Cal. App. 3d*

486, 494 n.5, 138 Cal. Rptr 828] ; consequently, a written request, that is, a written motion [*see, e.g., California Auto. Assigned Risk Plan v. Garamendi (1991) 232 Cal. App. 3d 904, 914 n.13, 283 Cal. Rptr. 562]* , a copy of which is served on the adverse party, would appear, in the absence of any local court rule to the contrary, to be sufficient [*see People v. Preslie (1977) 70 Cal. App. 3d 486, 494, 138 Cal. Rptr. 828* (written request to appellate court to take judicial notice was sufficient; formal noticed motion under *Cal. Rules of Ct., Rule 8.54*, was not required)].

[4] Memorandum

If used as an independent request, this form should be accompanied by a memorandum supporting the request [*see Cal. Rules of Ct., Rules 3.1112(c), 3.1113(a)*].

If used in support of or opposition to another law and motion proceeding, the memorandum supporting or opposing the motion should include the authority and argument for taking or refusing to take judicial notice.

For discussion and general format of memoranda see Ch. 417, *Points and Authorities* .

[5] Request Made at Trial

If the request is made at trial as a result of some question requiring it that surfaced during the course of trial, apparently, the request may be made orally with a further request by counsel that any written matter of which judicial notice is sought or the testimony of persons learned in the subject matter be presented later, which would also give opposing counsel or, if none, the opposing party time to prepare to respond to the request [*see Evid. Code § 455* (right of parties to present information)]. For discussion and a script of oral motion, see E. Johnson, California Trial Guide, § 20.60 (Matthew Bender).

[6] Contents of Request

[a] Caption

There are no specific rules for the caption of a request for judicial notice except when it is part of the supporting or opposing papers on a motion for summary judgment or summary adjudication. In that situation, the paper must be titled as indicated below depending on whether the request supports or opposes the motion [*Cal. Rules of Ct., Rule 3.1350(c), (e)*]:

- REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF _____ [*moving party*]'S MOTION FOR _____ [SUMMARY JUDGMENT *or* SUMMARY ADJUDICATION *or* SUMMARY JUDGMENT OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION].

- _____ [*Opposing party*]'S REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO _____ [*moving party's*]. MOTION FOR _____ [SUMMARY JUDGMENT *or* SUMMARY ADJUDICATION *or* SUMMARY JUDGMENT OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION].

[b] Sufficient Information and Notice Requirement

If the court is furnished with sufficient information to enable it to take judicial notice, the request will make judicial notice mandatory, provided the matter is subject to judicial notice and sufficient notice is given to the adverse party to enable him or her to prepare to meet the request [*see Evid. Code § 453*, discussed in *§ 321.18, above*].

[c] Notice of Court's Own Records or File

If judicial notice is to be taken of the court's own records or of papers filed in the court, clearly identify them and the date of filing and arrange with the clerk to have them in the courtroom when the motion will be heard [*Cal. Rules of Ct., Rule 3.1306(c)*]. In the case of a record, specify the book and page number in which the record is kept or other appropriate information if the records are kept on an electronic data-processing system, and the date of the entry; in the case of a paper filed in the court, give the title and number of the case (if other than the present case). If the court is to take judicial notice of only a part of a record or document, specify the particular part, and the page and line number, if any, where it appears.

[d] Notice of Records and File of Another Court

If judicial notice is to be taken of the records or of papers filed in another court, clearly identify them by name of court, title of case, case number, and date filed; if the court is to take judicial notice of only a part of a record or document, specify the particular part, and the page and line number, if any, where it appears. Attach a certified copy of the record to the motion.

[e] Notice of Existence of Writing Other Than Court Record

If judicial notice is to be taken of the existence of a writing other than a court record or document filed in a court, clearly identify it; if the court is to take judicial notice of only a part of it, specify the particular part, and the page and line number, if any, where it appears in the writing. Attach a copy of the writing, authenticated as appropriate, to the motion.

[f] Notice of Truth of Matters Stated

If judicial notice is to be taken of facts stated in a writing, that is, the truth of such statements, identify not only the writing, but the precise statements of which judicial notice is to be taken and the page and line number, if any, on which they appear. Either in the request or supporting points and authorities, cite the authority making judicial notice of the truth of such matter proper [for discussion, *see § 321.15[4], above*].

[g] Notice of Truth of Contents of Book, Treatise, or Report

If judicial notice is to be taken of the truth of statements made in a book, treatise, report, or other publication, in addition to giving the name of the author, title of the book, publisher, and publication date and presenting a copy of the book to the court, specify the page on which the statements of which the court is requested to take judicial notice appear [*see, e.g., Osborn v. Irwin Memorial Blood Bank (1992) 5 Cal. App. 4th 234, 261 n.5, 7 Cal. Rptr. 2d 101]* . Attach a copy of the relevant parts of the publication to the motion, and have the publication available to present to the court.

[h] Motion to Appoint Learned Person

If the matter to be judicially noticed is to be established by the advice of one or more persons learned in the subject matter who will testify in court [*see Evid. Code §§ 454(a), 460*, discussed in *§ 321.21[1], above*], counsel may wish to include a motion under *Evid. Code § 730* to appoint such a person [*see, e.g., Osborn v. Irwin Memorial Blood Bank (1992) 5 Cal. App. 4th 234, 267-271, 7 Cal. Rptr. 2d 101]* . For forms, see Ch. 551, *Trial* . In most civil cases, the cost will be allocated among the parties as determined by the court and may thereafter be taxed and allowed as are other costs [*see Evid Code § 731*]. A party may, of course, produce an expert on its own, in which case that party will bear the fees, and only ordinary witness fees will be taxable as costs [*see Code Civ. Proc. § 1033.5(a)(8)*; *Evid. Code § 733*].

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27-321 California Forms of Pleading and Practice--Annotated § 321.61

§ 321.61 Notice of Written Request [Evid. Code § 453(a)]

[1] FORM Notice of Written Request [Evid. Code § 453(a)]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF REQUEST THAT COURT TAKE JUDICIAL NOTICE
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

TO _____ [*name of adverse party*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], _____ [*identify party*] will file with the court the attached request that the court take judicial notice of the matter therein stated [and appoint a person learned in the matter to advise the court], together with a memorandum of points and authorities [and _____ (*specify any written material attached to the request of which judicial notice is requested*)].
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]

_____ [*typed name*]
Attorney for_____ [*party's status and name*]

[2] Use of Form

The form of notice in *[1], above*, is for use to notify the adverse party of the filing of a request for judicial notice. There is no express statutory requirement that a formal notice be prepared and served. That is, the service of a copy of the request [*see § 321.60* (form of request)] and the execution and filing of a proof of service will apparently be sufficient.

Nevertheless, prudent counsel may wish to serve a formal notice of the request, not only as a reminder that the request must be served and a proof of service executed, but because the copy of the request served will not bear the clerk's stamped filed date or otherwise indicate when the request was or will be filed. The notice of request will enable counsel to have a formal statement of the service of the request showing the date the request will be filed in both the attorney's file and in the court's file. Conversely, the attorney may present the request to the clerk for filing without prior service, serve the request thereafter, and then file the proof of service, but a local court clerk may be hesitant about accepting the request without an executed proof of service on the adverse party attached [*see Evid. Code § 453(a)* (notice to adverse party required)].

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27-321 California Forms of Pleading and Practice--Annotated § 321.62

§ 321.62 Request for Judicial Notice [Evid. Code § 452]--In Complaint

[1] FORM Request for Judicial Notice [Evid. Code § 452]--In Complaint

On _____ [*date*], defendant, as plaintiff, filed against this plaintiff, as defendant, in _____ [this court *or specify other court*] a civil action, entitled _____ [*name*], Plaintiff, vs. _____ [*name*], Defendant, No. _____, for _____ [*specify relief sought*]. As shown by the certified copies of the complaint, answer, and judgment in that action, attached hereto as exhibits A, B, and C, respectively, of which this court is requested to take judicial notice as authorized by *Evidence Code Section 452(d)(1)*, the action was completely without merit and a defense motion for summary judgment was granted and entered.

[2] Use of Form

The form of allegation and request in [1], *above*, is for use in a complaint and illustrates the manner in which a party, pursuant to *Evid. Code § 453*, may, in a pleading, request the court in a pending action to take judicial notice of its own records or the records of another court in a prior action [*see Evid. Code § 452(d)*]. The example in the form illustrates a request to take judicial notice of a prior judgment that is the basis for a malicious prosecution complaint. For a discussion and complete forms of complaints for malicious prosecution, see Ch. 357, *Malicious Prosecution and Abuse of Process* .

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27-321 California Forms of Pleading and Practice--Annotated § 321.63

§ 321.63 Request for Judicial Notice [Evid. Code § 452]--In Answer

[1] FORM Request for Judicial Notice [Evid. Code § 452]--In Answer

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the action is barred under the doctrine of res judicata by the judgment in a prior action on the same cause by plaintiff against defendant in _____ [this court *or specify other court*] in an action entitled _____ [*name*], Plaintiff, vs. _____ [*name*], Defendant, No. _____, that, after a full trial on the merits, resulted in a judgment in favor of this defendant. The court is hereby requested to take judicial notice of that action, and specifically of the complaint and answer filed in that action and of the judgment entered, certified copies of which are attached hereto as Exhibits A, B, and C, respectively.

[2] Use of Form

The form of affirmative defense in *[1], above*, is for use in an answer and illustrates the manner in which a party, pursuant to *Evid. Code § 453*, may, in a pleading, request the court in a pending action to take judicial notice of its own records or the records of another court in a prior action [*see Evid. Code § 452(d)*]. The example in the form illustrates a request to take judicial notice of a prior judgment that is the basis for a res judicata defense to an action. For discussion of the doctrine of res judicata and forms of affirmative defenses, see Ch. 491, *Res Judicata* .

For a form requesting judicial notice in relation to a demurrer, see *§ 321.64[1], below.*

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27-321 California Forms of Pleading and Practice--Annotated § 321.64

§ 321.64 Request for Judicial Notice [Evid. Code § 452]--In Demurrer [Code Civ. Proc. §§ 430.10, 430.70]

[1] FORM Request for Judicial Notice [Evid. Code § 452]--In Demurrer [Code Civ. Proc. §§ 430.10, 430.70]

[*EITHER, for example*]

Defendant demurs to the complaint on the ground it fails to state facts sufficient to constitute a cause of action in that _____ [*specify, e.g.,* the action is res judicata and barred by a final judgment entered against plaintiff in that action between the same parties on the same cause entitled _____ [*name*] vs. _____ [*name*], No. _____, filed in _____ [this court *or specify other court*] on _____ [*date*]. In accordance with the attached request to take judicial notice, the court is hereby requested under the provisions of *Code of Civil Procedure Section 430.70* and *Evidence Code Section 452(d)(1)* to take judicial notice of the complaint, answer, and judgment filed in that action [, certified copies of which are attached hereto as Exhibits A, B, and C, respectively].

[*OR*]

Defendant demurs to the complaint on the ground it fails to state facts sufficient to constitute a cause of action in that it appears from matter of which the court may take judicial notice that the action is barred by the statute of limitations, and, in accordance with the attached request to take judicial notice, defendant requests that the court, pursuant to the provisions of *Code of Civil Procedure Section 430.70* and *Evidence Code Section 452(d)(1),* take judicial notice of the action entitled _____ [*name*] vs. _____ [*name*], No. _____, filed by the present plaintiff on _____ [*date*] in _____ [this court *or specify other court*], and specifically of the complaint in that action [, a certified copy of which is attached hereto as Exhibit A] and made a part hereof, in which plaintiff alleged, on page _____, line(s) _____, that _____ [*set forth allegation*], which shows that _____ [*specify, e.g.,* at least as of the date that complaint was filed, plaintiff had full knowledge of all the alleged construction defects on which the present action is based and that the statute of limitations on the present action seeking damages as a result of those alleged

defects started running no later than the date that complaint was filed and ended on _____ (*date prior to commencement of present action*)].

[2] Use of Form

The statements in the form in *[1], above*, are for use in a demurrer and illustrate the manner in which the court, pursuant to *Evid. Code § 453*, may be requested to take judicial notice of any of the matters specified in *Evid. Code § 452* in ruling on the demurrer. The examples given are for use when a court is asked to take judicial notice under *Evid. Code § 452(d)* of papers filed in the same or another California court (*Evid. Code § 452(d)(1)*) or in any court of record of the United States or another state (*Evid. Code § 452(d)(2)*), but with appropriate modifications may be used when judicial notice of any matter specified in *Evid. Code § 452* is requested.

For discussion, a procedural guide, and complete forms of demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* . For another form of demurrer on the ground of res judicata, see Ch. 491, *Res Judicata* . For a form of demurrer on the ground of another action pending, including a request for judicial notice, see *Ch. 3, Abatement of Actions, § 3.30* et seq.

For a form requesting judicial notice in an answer, see *§ 321.63*.

[3] Procedure When Prior Action Was Filed in Court in Which Judicial Notice Is Requested

If judicial notice is sought under *Evid. Code § 452(d)(1)* of the records or file of the court in which the request is made, there is no need to obtain certified copies of the papers and attach them to the demurrer. Nevertheless, the papers of which judicial notice is requested must be clearly and precisely identified in the demurrer, and the party requesting judicial notice must make arrangements with the court clerk to have the file in the courtroom at the time of the hearing [*see Cal. Rules of Ct., Rules 3.1103(c), 3.1306(c)*].

[4] Judicial Notice of Allegations of Complaint

With respect to the second example set forth in the form, judicial notice of a complaint filed in another action [*Evid. Code § 452(d)*] may be invoked to prove that the complaint was filed, but judicial notice may not be taken that the allegations of the complaint are true [*see § 321.15[4][a], above*]. Although a court may not judicially notice that the allegations are true, it may take judicial notice, when relevant, of the facts alleged in the prior action. For example, if notice or knowledge of those facts triggered the running of the statute of limitations on the present action, the court may take judicial notice of the prior complaint to the extent it shows the pleader had knowledge of those facts no later than the date the earlier complaint was filed. That the facts were alleged on information and belief does not alter this result [*see Magnolia Square Homeowners Assn. v. Safeco Ins. Co. (1990) 221 Cal. App. 3d 1049, 1056-1057, 271 Cal. Rptr. 1]* .

[5] Memorandum

The points and authorities submitted in support of the demurrer [*see Cal. Rules of Ct., Rules 3.1100, 3.1103, 3.1113*] should set forth, in addition to the authorities supporting the ground of the demurrer, the applicable authorities showing (1) that the court is authorized to take judicial of the particular matter and (2) the propriety of granting judicial notice under the circumstances of the case [*see Evid. Code §§ 453, 454*].

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§ 321.65 Request for Judicial Notice [Evid. Code § 452]--In Notice of Motion [Code Civ. Proc. § 1010]

[1] FORM Request for Judicial Notice [Evid. Code § 452]--In Notice of Motion [Code Civ. Proc. § 1010]

[*EITHER, for example*]

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*], the request for judicial notice, and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

[*OR*]

The motion will be based on this notice of motion, on the _____ [*specify document or publication of which judicial notice is requested to be taken, e.g.,* complaint filed on _____ (*date*) in the _____ Court of _____ in an action entitled _____ (*name*), Plaintiff, vs. _____ (*name*), Defendant, No. _____, (a certified copy of which is attached hereto as Exhibit _____, and)] of which this court is hereby requested to take judicial notice pursuant to the provisions of *Evidence Code Section 452, subdivision* _____, and *Section 453,* on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

[*OR*]

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, on the records and file herein, on such evidence as may be presented at the hearing of the motion, and on the fact that _____ [*specify fact of which notice is requested to be taken, e.g,* Beverly Hills is in Los Angeles County], of which the court is hereby requested to take judicial notice pursuant to

Evidence Code Section 452, subdivision _____, and *Section 453*.

[2] Use of Form

The form in *[1], above*, is for use as the final paragraph of a notice of motion and illustrates the manner in which the court may be requested to take judicial notice pursuant to *Evid. Code § 453* of any of the matters specified in *Evid. Code § 452* in ruling on the motion.

The first example given is for use when a court is asked to take judicial notice based on a request that is presented in a separate document [*see Cal. Rules of Ct., Rule 3.1113(l)*]. This would appear to be the preferred method when a proceeding is governed by the law and motion rules [*see Cal. Rules of Ct., Rules 3.1100-3.1103* (scope of rules)], given the requirement in 3.1113(j) that any request for judicial notice be made in a separate document. However, Rule 3.1113 governs points and authorities, so it is not certain that a request cannot be made in the notice of motion. Counsel may prefer to reiterate the request in more than one of the moving papers.

The second example given is for use when a court is asked to take judicial notice under *Evid. Code § 452(d)* of papers filed in another California court (*Evid. Code § 452(d)(1)*) or in any court of record of the United States or another state (*Evid. Code § 452(d)(2)*), but, with appropriate modifications, it may be used whenever a request is made to take judicial notice of any document or law listed in *Evid. Code § 452*.

The third example given is for use when a court is asked to take judicial notice of a fact under *Evid. Code § 452(g)* or *(h)*, rather than of a document.

For a discussion, procedural guide, and complete forms of notices of motion, see Ch. 372, *Motions and Orders* .

[3] Memorandum

The points and authorities submitted in support of the noticed motion [*see Cal. Rules of Ct., Rules 3.1100, 3.1113*] should set forth, in addition to the authorities supporting the motion, the applicable authorities showing (1) that the court is authorized to take judicial notice of the particular matter requested and (2) the propriety of granting judicial notice under the circumstances of the case [*see Evid. Code §§ 453, 454*].

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Volume 27: Interpleader thru Juries and Jury Selection-Chs. 314-322
Chapter 321 JUDICIAL NOTICE
PART V. FORMS

27-321 California Forms of Pleading and Practice--Annotated §§ 321.66-321.79

[Reserved]

§§ 321.66[Reserved]

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Volume 27: Interpleader thru Juries and Jury Selection-Chs. 314-322
Chapter 321 JUDICIAL NOTICE
PART V. FORMS

27-321 California Forms of Pleading and Practice--Annotated § 321.80

§ 321.80 Objections to Request for Judicial Notice [Evid. Code § 455(a)]

[1] FORM Objections to Request for Judicial Notice [Evid. Code § 455(a)]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	OBJECTIONS TO REQUEST FOR JUDICIAL NO-
Plaintiff,	)	TICE
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

TO THE [HONORABLE _____ (*name*), JUDGE OF THE] ABOVE-ENTITLED COURT:

_____ [*Specify party, e.g.,* Plaintiff], objects to the request of _____ [*specify party, e.g.,* Defendant] that the court take judicial notice of the matter specified in the request on the following grounds: _____

[*LIST grounds, for example, EITHER*]

1. It is not clear from the Request what the court is asked to take judicial notice of, and, consequently, _____ [*objecting party*] is unable to prepare to meet the request.

[*AND/OR*]

2. The _____ [*requesting party, e.g.,* plaintiff] has failed to attach to the request copies of the matter to be judicially noticed, and, consequently, _____ [*objecting party, e.g.,* defendant] is unable to prepare to meet the request.

[*AND/OR*]

3. The copies of the matter of which the court is requested to take judicial notice attached to the request are not certified or otherwise authenticated[, and _____ (*objecting party*) has been unable to verify their accuracy].

[*AND/OR*]

4. Judicial notice is neither required by *Evidence Code Section 451* nor authorized by *Evidence Code Section 452*.

[*AND/OR*]

5. The matter of which judicial notice is sought is irrelevant to this case.

[*AND/OR*]

6. The matter of which judicial notice is sought, although relevant, should be excluded under the provisions of *Evidence Code Section 352* on the ground its probative value is substantially outweighed by the probability that its admission will _____ [necessitate an undue consumption of time *and/or* create substantial danger of _____ (undue prejudice *and/or* confusing the issues *and/or* misleading the jury)], in that _____ [*specify*].

[*AND/OR*]

7. The matter of which judicial notice is sought is hearsay and not subject to judicial notice.

[*AND/OR*]

8. The matter of which judicial notice is sought contains hearsay, and it is clear from the tenor of the request that _____ [*requesting party*] wants this court to take judicial notice of the truth of those hearsay statements.
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]

_____ [*typed name*]
Attorney for_____ [*party's status and name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*ADD memorandum and points of authorities here*]

[2] Use of Form

The form of objections in *[1], above*, is for use to object to the court's taking judicial notice of matter requested in a written request for judicial notice [*see § 321.60* (form of request)]. The objections listed are examples only and not exclusive. The form may also be used in response to the court's proposal to take judicial notice of a matter on its own motion (*see Evid. Code § 455(a)*) and, with appropriate modifications, to object to a request for judicial notice made on appeal (*see Evid. Code § 459(c)*) [*see § 321.60[2]*]. In any of these situations, counsel should append or attach to the objections a memorandum of points and authorities supporting each ground of objection.

The individual objections set out in the form may also be included singly or in combination in the memorandum of points and authorities in opposition to a request for judicial notice in a noticed motion or demurrer.

[3] Grounds of Objection

Several grounds of objection are illustrated in the form.

Paragraphs 1, 2, and 3 are based on the failure of the party requesting judicial notice to give adequate notice of and information about the request [*see Evid. Code § 453*; for discussion, *see § 321.18, above*].

Paragraph 4 is based on the contention that the matter of which judicial notice is requested is not subject to judicial notice [*see Evid. Code §§ 451, 452*; for discussion, *see § 321.17, above*].

Paragraph 5 is based on irrelevance of the matter sought to be judicially noticed. Paragraph 6 is based on the prejudicial effect of the evidence outweighing its probative value. Paragraphs 7 and 8 are based on hearsay objections [*see Evid. Code § 450*; for discussion, *see § 321.15, above*].

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Volume 27: Interpleader thru Juries and Jury Selection-Chs. 314-322
Chapter 322 JURIES AND JURY SELECTION

27-322 California Forms of Pleading and Practice--Annotated 322.syn

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.syn Synopsis to Chapter 322: JURIES AND JURY SELECTION

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§ 322.10 Governing Law

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[1] Kinds of Juries

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[a] Right Where Common-Law Right Existed

[b] Right Dependent on Whether Action Is Legal or Equitable

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§ 322.16 Demand for Jury Trial

§ 322.17 Deposit of Fees and Expenses of Jury

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[2] Disposition of Fees When Case Is Settled or Continued

[3] Deposit of Jury Transportation Expenses Required After Impanelment

[4] Deposit of Jury Fees and Transportation Expenses Required Thereafter

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[b] Adverse Party's Waiver by Failure to Act

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[5] Effect on Waiver of Reversal on Appeal

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§ 322.30 Governing Statutes

§ 322.31 Definitions

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[2] Juror Lists

[a] Source Lists

[b] Master List

[c] Qualified Juror List

[3] Potential, Prospective, and Qualified Jurors

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[4] Juror Pool or Venire

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[6] Trial Jurors and Trial Jury

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§ 322.32 Competence and Qualification of Prospective Jurors

[1] Qualifications and Exclusions Generally

[2] Sufficient Knowledge of English

[3] Prospective Juror With Disability

§ 322.33 Compilation of Master and Qualified Prospective Juror Lists

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[1] Process to Summon Jurors for Service

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§ 322.35 Excuse and Exemption from Jury Service

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§ 322.37 Voir Dire Examination of Prospective Jurors

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[4] Exercise of Challenges for Cause

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§ 322.41 Grounds for Peremptory Challenges

§ 322.42 Prohibition Against Peremptory Challenges Based on Group Bias

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[2] Prohibition Applies to Civil and Criminal Cases

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§ 322.55 Jury's Viewing of Scene

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§ 322.57 Jury as Trier of Questions of Fact

[1] In General

[2] When Question of Fact May Be Submitted to Jury

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[1] Right to Jury Trial Under California Constitution

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§§ 322.95-322.99 [Reserved]

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[1] FORM

[2] Use of Form

[3] Cross References

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Chapter 322 JURIES AND JURY SELECTION
PART I. SCOPE

27-322 California Forms of Pleading and Practice--Annotated § 322.01

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.01 Scope of Chapter

Part A of this chapter discusses the right to, demand for, and waiver of trial by jury. Part B discusses the qualifications, summoning, voir dire, and challenges to prospective jurors. Part C discusses the duties and functions of juries during trial.

The chapter contains the following forms:

- Forms of motions requesting or waiving jury trial or vacating the setting of a jury trial [§§ *322.90-322.94*].
- Form of Judicial Council Juror Questionnaire for voir dire [*§ 322.100*].
- Form of stipulation and order for choosing alternative jurors [*§ 322.101*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsQualificationsCivil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury Trial

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27-322 California Forms of Pleading and Practice--Annotated § 322.02

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.02 Cross References

- For the official jury instructions for use in California, see Judicial Council of California Civil Jury Instructions (CACI) (LexisNexis Matthew Bender, Official Publisher).

- For additional discussion and forms for use in demanding or waiving a jury trial, see Chs. 425, *Pretrial Proceedings* , and 552, *Trial Court Delay Reduction* , and *California Trial Guide, Unit 3, Non-Evidentiary Motions, § 3.30, Making and Responding to Motion for Relief from Waiver of Jury Trial* (Matthew Bender).

- For additional discussion of voir dire, including model questions, see California Trial Guide, Unit 10, *Voir Dire Examination* (Matthew Bender).

- For discussion of argument to jury, see Ch. 551, *Trial* , and California Trial Guide, Unit 90, *Closing Argument* (Matthew Bender).

- For discussion and forms relating to proper instructions to the jury in civil actions, including coverage of the California Judicial Council's civil jury instructions (CACI), see Ch. 326, *Jury Instructions* , and California Forms of Jury Instruction (Matthew Bender).

- For discussion and forms related to jury verdicts and directed verdicts, see Ch. 326A, *Jury Verdicts* ; for discussion of jury deliberations and jury verdicts, see California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict* (Matthew Bender).

- For discussion and forms for use in seeking a new trial on the grounds of juror misconduct, see Ch. 371, *Motions After Trial* .

- For discussion and forms for use in seeking a mistrial, including on grounds of juror misconduct, see

Ch. 551, *Trial* , and *California Trial Guide, Unit 3, Non-Evidentiary Motions, § 3.32, Making and Responding to Motion for Mistrial* (Matthew Bender).

- For discussion and forms for use in requesting advance payment for food and lodging expenses of a jury, see Ch. 174, *Costs and Attorney's Fees* .

- For discussion and forms for use in contempt proceedings, see Ch. 135, *Contempt* , and California Trial Guide, Unit 95, *Contempt Proceedings During Trial* (Matthew Bender).

- For discussion and forms for use in eminent domain actions, see Ch. 247, *Eminent Domain* .

- For discussion and forms for use in seeking writs of mandate, see Ch. 358, *Mandate and Prohibition* .

- For discussion and forms for use in probate proceedings generally, see Ch. 440, *Probate: Is Probate Necessary ?*.

- For discussion and forms for use in quiet title proceedings, see Ch. 482, *Quieting Title* .

- For discussion and forms for use in making stipulations, see Ch. 533, *Stipulations* .

- For discussion relating to juries and verdicts in criminal proceedings, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Chs. 81 and 85 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionVoir DireCivil ProcedureTrialsJury TrialsJury DeliberationsCivil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral Overview

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Chapter 322 JURIES AND JURY SELECTION
PART I. SCOPE

27-322 California Forms of Pleading and Practice--Annotated §§ 322.03-322.09

AUTHOR: William G. McDevitt Editorial Consultant

[Reserved]

§§ 322.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Right to, Demand for, and Waiver of Juries

27-322 California Forms of Pleading and Practice--Annotated § 322.10

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.10 Governing Law

The right to trial by jury is guaranteed by both the federal and state constitutions [*U.S. Const., amend. VII*; *Cal. Const., art. I, § 16*; *see §§ 322.12*, *322.13*, respectively], and by *Code Civ. Proc. § 592*.

Waiver of jury trial is controlled by *Code Civ. Proc. § 631* and *Cal. Const., art. I, § 16* [*see § 322.18*]. Payment of jury fees and transportation is governed by *Code Civ. Proc. § 215* and *Code Civ. Proc. §§ 631.1-631.5* [*see § 322.17*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury TrialConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

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PART II. LEGAL BACKGROUND
A. Right to, Demand for, and Waiver of Juries

27-322 California Forms of Pleading and Practice--Annotated § 322.11

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.11 Kinds and Composition of Juries

[1] Kinds of Juries

There are three kinds of juries: trial juries, grand juries, and juries of inquest [*Code Civ. Proc. § 193*]. This chapter discusses trial juries. For discussion relating to grand juries, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 40 (Matthew Bender). For provisions relating to juries of inquest, see *Code Civ. Proc. §§ 194(f), 235, 236*.

[2] Number of Jurors

The California Constitution provides as to civil cases [*Cal. Const., art. I, § 16*]:

- The jury may consist of 12 or fewer jurors as agreed by the parties in open court.

- In municipal court, the Legislature is authorized to provide that the jury may consist of eight or fewer jurors agreed on by the parties in open court; it has not yet done so.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsGeneral OverviewCriminal Law & ProcedureGrand JuriesGeneral Overview

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PART II. LEGAL BACKGROUND
A. Right to, Demand for, and Waiver of Juries

27-322 California Forms of Pleading and Practice--Annotated § 322.12

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.12 Right to Jury Trial Under Federal Constitution

The United States Constitution guarantees the right to trial by jury in civil actions at common law in which the amount in controversy exceeds $20 [*U.S. Const., amend. VII*].

The right to a jury trial in civil actions provided for in the federal constitution is not binding on the states [*see Rankin v. Frebank Co. (1975) 47 Cal. App. 3d 75, 92, 121 Cal. Rptr. 348]* . Nevertheless, state courts are bound by the federal constitutional rule that a jury trial is required before serious contempt fines may be imposed, if those contempt fines are criminal rather than civil in nature [*United Mine Workers v. Bagwell (1994) 512 U.S. 821, 114 S. Ct. 2552, 129 L. Ed. 2d 642, 658-659]* .

ILLUSTRATION:

$52 Million Civil Fine. A state court imposed a $52 million fine on a union for violating the terms of an injunction that prohibited the union and its members from engaging in various activities. The state statute classifies the fine as civil in nature. A jury trial was required before the fine could be imposed. The fine was criminal in nature rather than a coercive civil fine, since the sanctionable conduct had not occurred in the court's presence or otherwise implicated the court's ability to maintain order and adjudicate the proceedings, and the contumacy did not involve merely simple, affirmative acts, but rather widespread, ongoing, out-of-court violations of a complex injunction [*United Mine Workers v. Bagwell (1994) 512 U.S. 821, 114 S. Ct. 2552, 129 L. Ed. 2d 642, 658-659]* .

Similarly, a potential conservatee, a person subject to the mentally disordered sex offender statutes, or a juvenile subject to treatment under juvenile court law who is subject to the risk of incarceration for a substantial period and to a lifetime stigma may be entitled to criminal procedural safeguards with respect to juries in certain actions concerning their rights. For a discussion of these safeguards in noncriminal proceedings, see Ch. 304, *Insane and Other Incompetent Persons* , and Ch. 329, *Juvenile Courts: Delinquency* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

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A. Right to, Demand for, and Waiver of Juries

27-322 California Forms of Pleading and Practice--Annotated § 322.13

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.13 Right to Jury Trial Under California Constitution

[1] 1850 Rule

[a] Right Where Common-Law Right Existed

The California Constitution states that trial by jury is an inviolate right secured to all persons [*Cal. Const., art. I, § 16*]. The right to trial by jury guaranteed by the Constitution is the right as it existed at common law in 1850, when the California Constitution was first adopted [*Cornette v. Dept. of Transportation (2001) 26 Cal. 4th 63, 75-76, 109 Cal. Rptr. 2d 1, 26 P.3d 332]* . Thus, in the absence of a statute that provides for a jury trial, the right to a trial by jury extends only to cases involving actions for which there was a common-law right to a jury in 1850 [*C & K Eng'g Contractors v. Amber Steel Co. (1978) 23 Cal. 3d 1, 8, 151 Cal. Rptr. 323, 587 P.2d 1136* ; *Interactive Multimedia Artists, Inc. v. Superior Court (1998) 62 Cal. App. 4th 1546, 1551, 73 Cal. Rptr. 2d 462* ; *Strauss v. Summerhays (1984) 157 Cal. App. 3d 806, 812, 204 Cal. Rptr. 227* ; *see* [b]-[d], *below*].

Whether an action is one in which there was a common-law right to a jury in 1850 is a purely historical question, a fact to be ascertained like any other social, political, or legal fact. The common law at the time the California Constitution was adopted includes not only the unwritten law, but also the written statutes enacted by Parliament [*People v. One 1941 Chevrolet Coupe (1951) 37 Cal. 2d 283, 286-287, 231 P.2d 832* ; *County of Sutter v. Davis (1991) 234 Cal. App. 3d 319, 322-323, 285 Cal. Rptr. 736]* .

ILLUSTRATIONS:

Corporate Dissolution Proceeding. There is no right to a jury trial in a corporate dissolution proceeding brought on petition of a minority shareholder. A court could not dissolve a corporation on petition by a minority of shareholders before 1931 [*Rankin v. Frebank Co. (1975) 47 Cal. App. 3d 75, 92, 121 Cal. Rptr. 348]* .

Punitive Damages. At common law, there was a right to a jury trial if exemplary, punitive, or vindictive

damage claims were alleged, if they were well-proven [*Looney v. Superior Court (1993) 16 Cal. App. 4th 521, 538, 20 Cal. Rptr. 2d 182* ; *Rowe v. Superior Court (1993) 15 Cal. App. 4th 1711, 1719, 19 Cal. Rptr. 2d 625* ; *see now Code Civ. Proc. § 625*, discussed in Ch. 326A, *Jury Verdicts*].

Fraudulent Conveyance. The right to trial by jury existed at common law in an action to recover an alleged fraudulent conveyance of a determinate sum of money [*Wisden v. Superior Court (2004) 124 Cal. App. 4th 750, 755-760, 21 Cal. Rptr. 3d 523]* .

[b] Right Dependent on Whether Action Is Legal or Equitable

[i] Gist of Action

Entitlement to jury trial depends on whether an action is legal or equitable [*Mendoza v. Ruesga (2008) 169 Cal. App. 4th 270, 283-284, 86 Cal. Rptr. 3d 610* (right to jury trial in immigration consultants act case); *Shopoff & Cavallo LLP v. Hyon (2008) 167 Cal. App. 4th 1489, 1512-1514, 85 Cal. Rptr. 3d 268* (no jury trial in interpleader action)]. Although the common-law forms of action have been abolished and law and equity are united in one forum, the problem of right to a jury trial still must be approached in the context of 1850 common-law pleading [Franchise Tax Bd. v. Superior Court (2009) 177 Cal. App. 4th 36, 41-42, 99 Cal. Rptr. 3d 73 (right to jury trial in tax refund action)].

If the "gist of an action," as framed by the pleadings, raises issues that would have been triable at law in 1850, a trial by jury is a matter of right [*Interactive Multimedia Artists, Inc. v. Superior Court (1998) 62 Cal. App. 4th 1546, 1551, 73 Cal. Rptr. 2d 462*]. However, as a general rule a party is not entitled to a jury trial in an equitable action; if the action is addressed to equity powers of the court, the matter ordinarily is one for the trial court alone [*Interactive Multimedia Artists, Inc. v. Superior Court (1998) 62 Cal. App. 4th 1546, 1551, 73 Cal. Rptr. 2d 462* ; *see [c], below*].

The "gist of the action" refers to the nature of the rights involved and the facts of the particular case [*see C & K Eng'g Contractors v. Amber Steel Co. (1978) 23 Cal. 3d 1, 9, 151 Cal. Rptr. 323, 587 P.2d 1136]* . In classifying a particular action as legal or equitable, the court looks to its substance, i.e., the nature of the rights at issue and the remedy sought. The label attached to a complaint or cause of action does not control [*Jogani v. Superior Court (2008) 165 Cal. App. 4th 901, 905, 81 Cal. Rptr. 3d 503* (determining quantum meruit is legal claim)].

The question of whether a party is entitled to a jury trial for a cause of action that did not exist in 1850 is also determined by application of the "gist of the action" rule [Franchise Tax Bd. v. Superior Court (2009) 177 Cal. App. 4th 36, 41-42, 99 Cal. Rptr. 3d 73 (right to jury trial in tax refund action); *Martin v. Los Angeles County (1996) 51 Cal. App. 4th 688, 694-696, 59 Cal. Rptr. 2d 303]* .

ILLUSTRATION:

Equitable Indemnity. A cause of action for equitable indemnity did not exist in 1850. If the claim for equitable indemnity requires a determination of legal rights and liabilities traditionally arising in common-law suits and the form of relief sought is a judgment for money damages, the parties would be entitled to a jury trial. Although the cause of action for equitable indemnity involves the application of equitable principles to determine whether liability exists, it is an action seeking legal relief and entitled to a jury trial [*Martin v. Los Angeles County (1996) 51 Cal. App. 4th 688, 694-696, 59 Cal. Rptr. 2d 303]* .

ILLUSTRATION:

Unfair Competition Claim. Although the "unlawful" prong of the Unfair Competition Law (UCL) [*see Bus. & Prof. Code § 17200*] borrows from other laws, the UCL is not simply a legislative conversion of a legal right into an equitable one. Thus, the UCL provides only for equitable remedies, and there is no right to a jury trial [*Hodge v. Superior Court (2006) 145 Cal. App. 4th 278, 284-285, 51 Cal. Rptr. 3d 519]* .

[ii] Form of Relief Sought

The legal or equitable nature of a cause of action ordinarily is determined by the type of relief sought [*C & K Eng'g Contractors v. Amber Steel Co. (1978) 23 Cal. 3d 1, 9, 151 Cal. Rptr. 323, 587 P.2d 1136* ; *Stell v. Jay Hales Development Co. (1992) 11 Cal. App. 4th 1214, 1221]* . A cause of action seeking damages usually is a legal cause of action [*Raedeke v. Gibraltar Sav. & Loan Ass'n (1974) 10 Cal. 3d 665, 672, 111 Cal. Rptr. 693, 517 P.2d 1157*].

However, the prayer for relief is not conclusive [*Stell v. Jay Hales Development Co. (1992) 11 Cal. App. 4th 1214, 1221* ; *C & K Eng'g Contractors v. Amber Steel Co. (1978) 23 Cal. 3d 1, 9, 151 Cal. Rptr. 323, 587 P.2d 1136* (despite claim for damages, action based on promissory estoppel was equitable)]. The fact that an action seeks equitable relief does not determine the right to jury trial. The seminal question is whether the issues are legal or equitable in nature [*Jogani v. Superior Court (2008) 165 Cal. App. 4th 901, 905, 81 Cal. Rptr. 3d 503* (looking at substance of claim, court determines quantum meruit claim is legal); *Interinsurance Exchange v. Savior (1975) 51 Cal. App. 3d 691, 693-694, 124 Cal. Rptr. 239]* .

Even though a case involves equitable principles, if it is one in which the common law courts could and would grant relief, trial by jury is preserved [Franchise Tax Bd. v. Superior Court (2009) 177 Cal. App. 4th 36, 43-50, 99 Cal. Rptr. 3d 73 (right to jury trial in tax refund action); *Interactive Multimedia Artists, Inc. v. Superior Court (1998) 62 Cal. App. 4th 1546, 1554, 73 Cal. Rptr. 2d 462* ; *Ripling v. Superior Court (1952) 112 Cal. App. 2d 399, 402, 247 P.2d 117]* . Conversely, the fact that damages are sought does not make the gist of the action legal. An action is one in equity if the only manner in which the legal remedy of damages is available is by application of equitable principles [*Interactive Multimedia Artists, Inc. v. Superior Court (1998) 62 Cal. App. 4th 1546, 1555, 73 Cal. Rptr. 2d 462* (breach of majority shareholders' fiduciary duty to minority shareholders); *see also Jones v. H. F. Ahmanson & Co (1969) 1 Cal. 3d 93, 107-109, 81 Cal. Rptr. 592, 460 P.2d 464* (same); *Van de Kamp v. Bank of Am. (1988) 204 Cal. App. 3d 819, 865, 251 Cal. Rptr. 530* ; *see [c], below*].

ILLUSTRATIONS:

Quiet Title to Prescriptive Easement. There is a right to a jury trial in a quiet title action, when the pleadings raise the issue of whether a prescriptive easement exists. In 1850, that issue would have fallen within the common-law remedy of an action on the case [*Arciero Ranches v. Meza (1993) 17 Cal. App. 4th 114, 125, 21 Cal. Rptr. 2d 127]* .

Interference With Right of Way. Similarly, the remedy for interference with or obstruction of a right of way is an action on the case. Thus, a defendant may be entitled to a jury trial on certain issues even though injunctive relief is being sought [*Frahm v. Briggs (1970) 12 Cal. App. 3d 441, 445-446, 90 Cal. Rptr. 725]* .

Rescission of Contract. An action for rescission of a contract is equitable when it seeks something other than a return of the consideration given by the plaintiff, and plaintiff is not entitled to a jury trial [*NMSBPCSLDHB v. County of Fresno (2007) 152 Cal. App. 4th 954, 958-966, 61 Cal. Rptr. 3d 425]* .

When an action for declaratory relief is used as a pretext for circumventing the right to jury trial, the action may be characterized as legal if the issues in controversy are legal [*Patterson v. Insurance Co. of N. Am. (1970) 6 Cal. App. 3d 310, 315, 85 Cal. Rptr. 665]* . For example, declaratory relief actions in which coverage under an insurance policy is at issue have been characterized as substitutes for actions at law for breach of contract and thus the parties are entitled to trial by jury [*Interinsurance Exchange v. Savior (1975) 51 Cal. App. 3d 691, 694, 124 Cal. Rptr. 239* (insurance company sought declaration that putative insureds not covered under existing policy); *Patterson v. Insurance Co. of N. Am. (1970) 6 Cal. App. 3d 310, 315, 85 Cal. Rptr. 665* (insured sought declaratory relief when insurance company refused to defend on policy)]. However, even though there is normally a right to a jury trial in a declaratory relief action to determine coverage under an insurance policy, it is not error to deny a jury trial if there is no real issue for a jury to

decide [*Manneck v. Lawyers Title Ins. Corp. (1994) 28 Cal. App. 4th 1294, 1300, 33 Cal. Rptr. 2d 771* (no error to deny jury trial when trial court correctly determined that insurance contract was unambiguous and coverage did not exist as matter of law)].

[c] No Right to Jury for Purely Equitable Claims

Juries are allowed in equity actions, if at all, only as an accomodation and not as a matter of right [*Stearns v. Los Angeles City Sch. Dist. (1966) 244 Cal. App. 2d 696, 725, 53 Cal. Rptr. 482* ; *see, e.g.,* *A-C Co. v. Security Pac. Nat. Bank (1985) 173 Cal. App. 3d 462, 472-474, 219 Cal. Rptr. 62* (equitable claim of promissory estoppel); *Dow Jones Co. v. Avenel (1984) 151 Cal. App. 3d 144, 148, 198 Cal. Rptr. 457* (corporate alter ego doctrine is not equitable doctrine)]. When a jury is allowed in an equity action, its function is to assist in the resolution of questions of fact. The jury is advisory only; its verdict may be disregarded by the court [*Stearns v. Los Angeles City Sch. Dist. (1966) 244 Cal. App. 2d 696, 725-726, 53 Cal. Rptr. 482]* .

[d] Right Where Mixed Equitable and Legal Issues

When legal and equitable issues are joined in the same action, the parties usually are entitled to a jury trial on the legal issues [*Frahm v. Briggs (1970) 12 Cal. App. 3d 441, 445, 90 Cal. Rptr. 725* ; *see* *Hoopes v. Dolan (2008) 168 Cal. App. 4th 146, 156-161, 85 Cal. Rptr. 3d 337* (in mixed trial of legal and equitable issues when legal issues are first tried to jury, court must follow jury's factual determinations on common issues of fact)].

Nevertheless, the fact that damages is one of the possible remedies does not guarantee the right to a jury [*see* *C & K Eng'g Contractors v. Amber Steel Co. (1978) 23 Cal. 3d 1, 9, 151 Cal. Rptr. 323, 587 P.2d 1136* ; *Stell v. Jay Hales Development Co. (1992) 11 Cal. App. 4th 1214, 1221, 15 Cal. Rptr. 2d]* . One aspect of an equitable action is the balancing of the parties' interests, and to do equity a trial court must have various options, including the option of awarding damages [*Stell v. Jay Hales Development Co. (1992) 11 Cal. App. 4th 1214, 1221, 15 Cal. Rptr. 2d 220]* . Further, a party is not entitled to a jury trial when it is not feasible for a court to sever a legal claim from an equitable one and the damages claims are only incidental to the equitable claims [*Stell v. Jay Hales Development Co. (1992) 11 Cal. App. 4th 1214, 1221, 15 Cal. Rptr. 2d 220* ; *Wolford v. Thomas (1987) 190 Cal. App. 3d 347, 353-354, 235 Cal. Rptr. 422]* .

When a case involves both legal and equitable issues, the trial court may proceed to try the equitable issue first, without a jury or with an advisory jury. If the court's determination as to those issues also is dispositive of the legal issues, nothing remains to be tried by jury [*Raedeke v. Gibraltar Sav. & Loan Ass'n (1974) 10 Cal. 3d 665, 671, 111 Cal. Rptr. 693, 517 P.2d 1157]* .

ILLUSTRATION:

Res Judicata Defense. A defense of res judicata may be properly raised in answer to a complaint for negligence and tried to the court prior to trial on the complaint. Even though res judicata is a legal defense rather than an equitable one, there is no right to a jury trial, because the issues often require mixed fact-law determinations [*Windsor Square Homeowners Assn. v. Citation Homes (1997) 54 Cal. App. 4th 547, 557, 62 Cal. Rptr. 2d 818]* .

If a plaintiff seeks mutually exclusive legal and equitable remedies in the same complaint, the plaintiff may sever the actions in order to have the equitable claim tried first without a jury, even if trial of the equitable claim implicates the legal issues. In that case, the defendant's right to a jury trial is not infringed even if the plaintiff does not subsequently pursue the legal remedy [*Walton v. Walton (1995) 31 Cal. App. 4th 277, 287, 292-295, 36 Cal. Rptr. 2d 901* (action for breach of contract damages and quasi-specificperformance of oral agreement to make will, severance granted to pursue equitable relief only in nonjury trial)].

When the matter of damages is not presented by the complaint but by the cross complaint, that issue may be subject to jury trial [*Tide Water Assoc. Oil Co. v. Superior Court (1955) 43 Cal. 2d 815, 821, 279 P.2d 35* (complaint for injunction to prevent unreasonable waste of gas; cross-complaint for injunction and damages for past waste); *Beasley v. Wells Fargo Bank (1991) 235 Cal. App. 3d 1383, 1393, 1 Cal. Rptr. 2d 446* ; *Escamilla v. California Ins. Guarantee Assn. (1983) 150 Cal. App. 3d 53, 57, 197 Cal. Rptr. 463]* .

[2] Condemnation Actions

The California Constitution provides that a person may not be deprived of property without "just compensation, ascertained by a jury unless waived" [*Cal. Const., art. I, § 19*]. Thus, *Cal. Const., art. I, § 19* sets forth the right to a jury in inverse condemnation actions. However, the right to a jury trial in inverse condemnation actions is limited solely to the question of damages. There is no right to a jury trial on the issue of whether there has been a taking [*Hensler v. City of Glendale (1994) 8 Cal. 4th 1, 15, 32 Cal. Rptr. 2d 244, 876 P.2d 1043* ; *see generally* Ch. 247, *Eminent Domain*]. Similarly, because an action of a rent control board in reducing rents does not amount to a "taking" of the landowner's profits, there is no right to a jury trial to contest a rent reduction [*see Yee v. Mobilehome Park Rental Review Bd. (1998) 62 Cal. App. 4th 1409, 1428, 1428 n. 15, 73 Cal. Rptr. 2d 227* ; *see also § 322.15[2][f]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsActions in EquityCivil ProcedureEminent Domain ProceedingsJury TrialsConstitutional LawBill of RightsFundamental RightsEminent Domain & TakingsConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

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PART II. LEGAL BACKGROUND
A. Right to, Demand for, and Waiver of Juries

27-322 California Forms of Pleading and Practice--Annotated § 322.14

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§ 322.14 Statute Requiring Jury in Certain Actions

Unless a jury is waived or the matter ordered to a referee, an issue of fact must be tried by a jury in the following actions [*Code Civ. Proc. § 592*]:

- Recovery of specific real or personal property, with or without damages.
- Money claimed as due on contract or as damages for breach of contract.
- Money claimed as damages for injuries.

Code Civ. Proc. § 592 was framed with a view toward adopting the principle that the constitutional guarantee of the right to jury trial applies only to common-law actions and not to suits in equity [*Abbott v. City of Los Angeles (1958) 50 Cal. 2d 438, 462, 326 P.2d 484]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury Trial

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27-322 California Forms of Pleading and Practice--Annotated § 322.15

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.15 Juries in Special Proceedings

[1] Special Proceeding Defined

A special proceeding is one that was neither an action at law nor a suit at equity under the common law or equity practice [*Tide Water Assoc. OilCo. v. Superior Court (1955) 43 Cal. 2d 815, 822, 279 P.2d 35* ; *see also Code Civ. Proc. § 23*]. These proceedings generally are commenced by petition or motion on notice to obtain special relief [*see Oak Grove Sch. Dist. v. City Title Ins. Co. (1963) 217 Cal. App. 2d 678, 710, 32 Cal. Rptr. 288]* . Under the 1850 rule (discussed in *§ 322.13[1]*), there is no right to a jury trial in a special proceeding unless that right is provided by statute [*Cornette v. Dept. of Transportation (2001) 26 Cal. 4th 63, 76, 109 Cal. Rptr. 2d 1, 26 P.3d 332]* . The most common special proceedings are discussed at *[2], below*.

[2] Particular Proceedings

[a] Forcible Entry and Detainer

Unless a jury trial is waived, any issue of fact presented by the pleadings in forcible entry and detainer proceedings must be tried by a jury [*Code Civ. Proc. § 1171*]. For a discussion of forcible entry and detainer proceedings, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

[b] Probate Proceedings

There is no right to a jury trial in probate proceedings unless the right is granted by statute [*see Prob. Code § 7200* (administration of decedents' estates)]. There is no recognized right to jury trial in a proceeding to resolve the exceptions to an executor's or administrator's account [*Estate of Beach (1975) 15 Cal. 3d 623, 642, 125 Cal. Rptr. 570, 542 P.2d 994]* . For a discussion of probate proceedings generally, see Ch. 440, *Probate: Is Probate Necessary ?*.

[c] Guardianship and Conservatorship Proceedings

There is no right to a trial jury in guardianship, conservatorship, and other protective proceedings pursuant to *Prob. Code §§ 1400-3803*, except as otherwise provided in those sections [*Prob. Code § 1452*]. Those sections do, however, authorize trial by jury if demanded by a proposed conservatee in a proceeding to establish or terminate a conservatorship [*Prob. Code §§ 1827, 1863*], and require that the proposed conservatee be advised of the right to jury trial [*Prob. Code § 1828(a)(6)*].

[d] Quiet Title Actions

Although a quiet title action is basically an equitable action, the right to a jury extends to the issue of whether a prescriptive easement exists, because in 1850 that issue would have fallen within the common-law remedy of an action on the case [*Arciero Ranches v. Meza (1993) 17 Cal. App. 4th 114, 125, 21 Cal. Rptr. 2d 127]* . In addition, when possession of real property is involved, there is a statutory right to a jury trial [*Code Civ. Proc. § 592*; *Thomson v. Thomson (1936) 7 Cal. 2d 671, 681-682, 62 P.2d 358* ; *see* Ch. 482, *Quieting Title*]. Even if title to real estate is to be decided, however, a litigant who has chosen to assert a third party claim in an attachment proceeding has effectively waived any right to jury trial by choosing that "expeditious and inexpensive means of resolution" [*Whitehouse v. Six Corp. (1995) 40 Cal. App. 4th 527, 536, 48 Cal. Rptr. 2d 600]* .

[e] Mandate and Prohibition

A trial court has discretion to order trial by jury as to any disputed question of fact when a return is made in response to application for a writ of mandate or prohibition that [*Code Civ. Proc. §§ 1090, 1105*]:

- Raises a question of fact essential to determination of the motion;
- Affects substantial rights of the parties; and
- Touches on the supposed truth of the allegations on which the application for the writ is based.

A trial court ordering a jury trial on a question of fact postpones argument until after trial. The matter to be tried by jury is stated distinctly and plainly in the order for trial; the order directs the jury to assess the damages, if any, sustained by the applicant in the event it finds for the applicant [*Code Civ. Proc. §§ 1090, 1105*]. For a discussion of the procedure for seeking writs of mandate or prohibition, see Ch. 358, *Mandate and Prohibition* .

[f] Administrative Proceedings

Once a court has determined that exercise of a challenged administrative power meets the "substantive limitations" requirement imposed by *Cal. Const., art. I, § 16* (judicial powers doctrine), the state constitution's jury trial provision does not operate to preclude administrative adjudication. Hence, a rent control board's adjudication of excess rent did not violate a landlord's state constitutional right to a jury trial [*McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 381, 386, 261 Cal. Rptr. 318, 777 P.2d 91]* . Nor does a rent control board's reduction of rents amount to a "taking" of the landowner's profits within the meaning of *Cal. Const., art. I, § 19*, so no right to a jury trial is available on that ground to contest a rent reduction [*see Yee v. Mobilehome Park Rental Review Bd. (1998) 62 Cal. App. 4th 1409, 1428, 1428 n.15, 73 Cal. Rptr. 2d 227]* .

The exercise of administrative power meets the substantive limitations requirements if the challenged activities are authorized by statute or legislation, and are reasonably necessary to, and primarily directed at, effectuating the administrative agency's primary, legitimate regulatory purposes [*McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 372, 380, 261 Cal. Rptr. 318, 777 P.2d 91]* . Resolution of the question might be different, however, in a situation in which an agency purports to adjudicate substantial "damage" claims such that recovery of damages

becomes the primary focus, as opposed to merely an incidental aspect ofthe regulatory scheme [*McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 381 n.53, 261 Cal. Rptr. 318, 777 P.2d 91]* .

In many situations, such as civil service proceedings, an employee's only recourse for judicial review of an administrative decision is a petition for writ of mandate. The employee has no right to a jury trial [*see DeCuir v. County of Los Angeles (1998) 64 Cal. App. 4th 75, 81, 83, 75 Cal. Rptr. 2d 102* (distinguishing two types of mandate depending on whether employee had evidentiary hearing before public agency)].

[g] Distribution of Settlement Proceeds of Wrongful Death Action

In an action arising from a wrongful death action involving several decedents, there is no right to have a jury apportion the proceeds of the settlement of the action. The apportionment proceeding is equitable and is a special proceeding [*Kim v. Yi (2006) 139 Cal. App. 4th 543, 546-550, 42 Cal. Rptr. 3d 841]* .

[h] Civil Forfeiture Proceedings

A forfeiture proceeding is a civil in rem action in which property is considered the defendant, based on the legal fiction that the property is the guilty party. A claimant has both a statutory and a California constitutional right to a jury trial in civil in rem forfeiture proceedings [*People v. $17,522.08 United States Currency (2006) 142 Cal. App. 4th 1076, 1081-1082, 48 Cal. Rptr. 3d 519* ; *People v. Superior Court (Plascencia) (2002) 103 Cal. App. 4th 409, 418, 126 Cal. Rptr. 2d 793]* .

In a civil forfeiture proceeding, when a person claims an interest in the property seized, the forfeiture proceeding must be set for a hearing, and the hearing must be by jury, unless waived by consent of all parties [*Health & Safety Code § 11488.5(c)(1), (2)*]. The provisions of the Code of Civil Procedure apply to forfeiture proceedings unless otherwise inconsistent with the provisions or procedures in *Health & Safety Code § 11469 et seq.* governing seizure and disposition of property [*Health & Safety Code § 11488.5(c)(3)*]. The provisions of *Code Civ. Proc. § 631* relating to waiver of jury trial apply to civil forfeiture proceedings because they are not inconsistent with *Health & Safety Code § 11488.5(c)(2)*. Thus, in forfeiture proceedings, the right to a jury trial may be waived by the means specified in *Code Civ. Proc. § 631* [*People v. $17,522.08 United States Currency (2006) 142 Cal. App. 4th 1076, 1081-1082, 48 Cal. Rptr. 3d 519* ; for discussion of the means of waiving jury trial set forth in *Code Civ. Proc. § 631*, see *§ 322.18[2][a]*]. A claimant in a civil forfeiture proceeding is not afforded the same protection against waiver of a jury trial that a defendant is afforded in a criminal proceeding [*People v. $17,522.08 United States Currency (2006) 142 Cal. App. 4th 1076, 1083, 48 Cal. Rptr. 3d 519]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury TrialCivil ProcedureRemediesForfeituresHearingsCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionEstate, Gift & Trust LawProbateProcedures in ProbateRight to Jury TrialReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawLandlord & TenantTenant's Remedies & RightsConstitutional RightsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 322.16 Demand for Jury Trial

A jury trial may be requested by using the Case Management Statement [*see Cal. Rules of Ct., Rule 3.725*]. The Case Management Statement is due no later than 15 calendar days before the date set for the case management conference or review [*Cal. Rules of Ct., Rule 3.725(a)*]. It is also a matter for discussion at the case management conference [*Cal. Rules of Ct., Rule 3.727(13)*].

For a form of demand for jury trial, see *§ 322.90*. For additional forms for use in demanding a jury trial, see Ch. 425, *Pretrial Proceedings* .

Generally, when an action involves some issues that are properly tried to the court and other issues that are properly tried to a jury, a party seeking a jury trial need not specify the particular issues on which it wants a jury trial in its demand [*Old Republic Ins. Co. v. FSR Brokerage, Inc. (2000) 80 Cal. App. 4th 666, 679, 95 Cal. Rptr. 2d 583]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury Demands

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AUTHOR: William G. McDevitt Editorial Consultant

§ 322.17 Deposit of Fees and Expenses of Jury

[1] Deposit of Advance Jury Fees Required

The party demanding a jury trial must deposit with the court clerk or judge an advance jury fee 25 days before the date set for trial; this fee may not exceed a total of $150 [*see Code Civ. Proc. § 631(a)(5)*; *see also* discussion of waiver of jury by failure to deposit fees at *§ 322.18[3][a]*]. If the action is for unlawful detainer, the fees must be deposited at least five days before the date set for trial [*see Code Civ. Proc. § 631(a)(5)*]. In all eminent domain cases, the party seeking condemnation deposits jury fees and mileage regardless of which party demanded a jury trial [*Code Civ. Proc. § 631.5*].

A county may pay jury fees in civil cases from its general fund; however, a county is not precluded from seeking reimbursement from the party to the litigation who is liable for payment of jury fees [*Code Civ. Proc. § 631.1*].

[2] Disposition of Fees When Case Is Settled or Continued

When a party has deposited jury fees and subsequently that party waives a jury or obtains a continuance, or the case is settled, the deposit is not refunded (1) if the court finds there was not sufficient time to notify thejurors that the trial would not proceed at the time set or (2) if the depositing party has not requested a refund, in writing, within 20 business days from the date the jury was waived or the action was settled, dismissed, or continued. Jury fees not refunded are transmitted to the Controller for deposit into the Trial Court Trust Fund [*Code Civ. Proc. § 631.3*].

[3] Deposit of Jury Transportation Expenses Required After Impanelment

The party demanding trial by jury must deposit with the clerk or judge promptly after the impanelment of the jury a sum equal to the mileage or transportation of the jury accrued up to that time [*Code Civ. Proc. § 631(a)(6)*].

[4] Deposit of Jury Fees and Transportation Expenses Required Thereafter

The party demanding trial by jury must deposit with the clerk or judge at the beginning of the second and each succeeding day's session a sum equal to one day's fees of the jury and the mileage or transportation, if any [*Code Civ. Proc. § 631(a)(7)*].

All provisions governing fees, expenses, and mileage or transportation of jurors apply to alternate jurors, except that in civil cases the sums for fees and mileage or transportation need not be deposited until the judge directs alternate jurors to be impaneled [*Code Civ. Proc. § 234*].

[5] Amount of Jury Fees

Beginning July 1, 2000, the fee for jurors in superior court civil cases is $15 a day after the first day [*Code Civ. Proc. § 215(a)*]. A juror who is employed by a federal, state, or local government entity, or by any other public entity as defined in *Code Civ. Proc. § 481.200*, and who receives regular compensation and benefits while performing jury service, may not be paid this fee [*Code Civ. Proc. § 215(b)*]. All jurors in superior court in civil cases must be reimbursed for mileage at the rate of 34 cents per mile for each mile, one way, actually traveled in attending court as a juror after the first day [*Code Civ. Proc. § 215(c)*].

[6] Jury Fees Recoverable as Costs

Juror fees and mileage reimbursement [*Code Civ. Proc. § 215*] are recoverable as costs by the prevailing party in civil cases [*Code Civ. Proc. §§ 1032, 1033.5(a)(1)*; *see also Code Civ. Proc. § 1033.5(a)(2)* (juror food and lodging as allowable costs); Ch. 174, *Costs and Attorney's Fees*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 27: Interpleader thru Juries and Jury Selection-Chs. 314-322
Chapter 322 JURIES AND JURY SELECTION
PART II. LEGAL BACKGROUND
A. Right to, Demand for, and Waiver of Juries

27-322 California Forms of Pleading and Practice--Annotated § 322.18

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§ 322.18 Waiver of Jury Trial

[1] Waiver by Contract

A predispute waiver of a jury trial is not authorized by *Code Civ. Proc. § 631*. Only waivers authorized by § 631 are consistent with *article I, section 16 of the California Constitution*. Thus, a predispute contractual waiver of a jury trial cannot waive a jury trial [*Grafton Partners v. Superior Court (2005) 36 Cal. 4th 944, 951-967, 32 Cal. Rptr. 3d 5, 116 P.3d 479* , overruling *Trizec Properties, Inc. v. Superior Court (1991) 229 Cal. App. 3d 1616, 280 Cal. Rptr. 885]* .

[2] Waiver in Course of Judicial Proceedings

[a] Statutory Grounds of Waiver

Under *Code Civ. Proc. § 631(a)*, trial by jury may be waived as to an issue of fact in any of the following ways:

- By failing to appear at the trial [*Code Civ. Proc. § 631(a)(1)*].

- By written consent filed with the clerk or judge [*Code Civ. Proc. § 631(a)(2)*; *see also Cal. Const., art. I, § 16*; for a form for use in waiving a jury trial, *see § 322.93*].

- By oral consent in open court entered in the minutes or docket [*Code Civ. Proc. § 631(a)(3)*; *see also Cal. Const., art. I, § 16*; *Cadle Co. v. World Wide Hospitality Furniture, Inc. (2006) 144 Cal. App. 4th 504, 510-511, 50 Cal. Rptr. 3d 480* (defense counsel's oral consent to jury waiver at final status conference, stated in open court and entered in court minutes, provided basis for jury waiver under *Code Civ. Proc. § 631(d)(3)*; fact that waiver was by counsel, not defendant, did not invalidate waiver)].

- By failing to announce that a jury is requested at the time the cause is first set for trial, if it is set on

notice or stipulation, or within five days after notice of setting if it is set without notice or stipulation [*Code Civ. Proc. § 631(a)(4)*].

- By failing to deposit with the clerk or judge the advance jury fee, not to exceed a total of $150, 25 days prior to the date set for trial (or at least five days prior to the date set for trial in unlawful detainer actions) [*Code Civ. Proc. § 631(a)(5)*; *see § 322.17[1]*]. Alternately, by failing to deposit the advance jury fee as provided in *Code Civ. Proc. § 631(b)* [*Code Civ. Proc. § 631(a)(5)*; for discussion of deposit under *Code Civ. Proc. § 631(b), see [4], below*].

- By failing to deposit with the clerk or judge promptly after the impanelment of the jury a sum equal to the mileage or transportation of the jury accrued up to that time [*Code Civ. Proc. § 631(a)(6)*; *see § 322.17[3]*].

- By failing to deposit with the clerk or judge at the beginning of the second and each succeeding day's session a sum equal to one day's fees of the jury and the mileage or transportation, if any [*Code Civ. Proc. § 631(a)(7)*; *see § 322.17[4]*].

Code Civ. Proc. § 631 presupposes a pending action, and relates only to the manner in which a party to an action can waive the right to a jury trial [*Madden v. Kaiser Found. Hosps. (1976) 17 Cal. 3d 699, 713, 131 Cal. Rptr. 882, 552 P.2d 1178* ; *Trizec Properties, Inc. v. Superior Court (1991) 229 Cal. App. 3d 1616, 1618, 280 Cal. Rptr. 885]* .

For further discussion and additional forms for use in waiving a jury trial, see Ch. 425, *Pretrial Proceedings* . For discussion of the court's discretion to permit a jury trial notwithstanding waiver, see [3], *below*.

[b] Adverse Party's Waiver by Failure to Act

If a party who has demanded a jury trial subsequently waives it, the adverse party also will waive its right to a jury trial by failing to promptly make a jury demand [*see Code Civ. Proc. § 631(b), (c)*]. For discussion of an adverse party's right to demand a jury trial, see *[4], below*. Although one appellate court held that the methods of waiver specified in *Code Civ. Proc. § 631* are exclusive [*see Cooks v. Superior Court (1990) 224 Cal. App. 3d 723, 727, 274 Cal. Rptr. 113 (Second District, Division Four)* ; *see also Old Republic Ins. Co. v. FSR Brokerage, Inc. (2000) 80 Cal. App. 4th 666, 679, 95 Cal. Rptr. 2d 583 (Second Dist., Div. Four; restating rule)]* , another court held that waiver may be shown by conduct that is inconsistent with the intent to exercise the right to a jury trial [*Escamilla v. California Ins. Guarantee Assn. (1983) 150 Cal. App. 3d 53, 59, 197 Cal. Rptr. 463 (Second District, Division Three)* ; *cf. Old Republic Ins. Co. v. FSR Brokerage, Inc. (2000) 80 Cal. App. 4th 666, 680, 95 Cal. Rptr. 2d 583* (distinguishing *Escamilla*)].

ILLUSTRATION:

Waiver by Conduct. A trial court stated that the matter before it, for which no jury had been demanded, was equitable and would be tried by the court, and asked, "Do you have any comments in that regard?" Counsel remained silent. The silence in that instance amounted to waiver of the right to jury trial. Having neither demanded a jury nor objected, counsel could not, after losing the case, complain that the case was not tried by a jury. The fact that the waiver had not been entered in the court's minutes was not determinative [*Escamilla v. California Ins. Guarantee Assn. (1983) 150 Cal. App. 3d 53, 59, 61, 197 Cal. Rptr. 463 (Second District, Division Three)]* .

[c] Waiver Caused by Violation of Local Rules

Superior courts may adopt local rules designed to expedite the court's business [*see Code Civ. Proc. § 575.1(a)*], and may include more stringent requirements for a jury demand. Under *Code Civ. Proc. § 575.2(a)*, local rules may impose

penalties for failure to comply with the requirements. It is the legislative intent that a failure to comply with local rules is the responsibility of counsel, not of the party, and any penalty must be imposed on counsel and may not adversely affect the party's causes of action or defenses [*Code Civ. Proc. § 575.2(b)*].

Hence, if a party is deemed to have waived the right to a jury trial because counsel failed to comply with a local rule, the trial court should permit a jury trial and impose any penalty only on the party's counsel, as long as the party was not responsible for counsel's failure and there is no prejudice to the opposing party [*Massie v. AAR W. Skyways, Inc. (1992) 4 Cal. App. 4th 405, 412, 5 Cal. Rptr. 2d 654* (trial court erred in denying motion for relief from waiver, notwithstanding counsel's failure to comply with local rule requiring posting of jury fees five days before joint disposition conference); *see also Cooks v. Superior Court (1990) 224 Cal. App. 3d 723, 724-726, 274 Cal. Rptr. 113* (mandate directing court to vacate order striking jury request based on counsel's failure to submit proposed jury instructions under fast-track-rules deadline)].

[3] Court's Discretion After Waiver

[a] Court May Allow Jury Trial Notwithstanding Waiver

The court may, in its discretion, allow a trial by jury even though there has been a waiver [*Code Civ. Proc. § 631(e)*; for a form of notice of motion for jury trial after waiver, *see § 322.94*]. The purpose of *Code Civ. Proc. § 631* is to provide a means by which the parties may waive a jury, not to impose conditions constituting an irrevocable waiver, and the trial court has discretion to allow a jury trial despite a prior waiver [*Massie v. AAR W. Skyways, Inc. (1992) 4 Cal. App. 4th 405, 411, 5 Cal. Rptr. 2d 654* ; *see Carpenson v. Najarian (1967) 254 Cal. App. 2d 856, 863, 62 Cal. Rptr. 687]* .

Doubt as to whether there has been a waiver of jury trial [*see Oakes v. McCarthy Co. (1968) 267 Cal. App. 2d 231, 265, 73 Cal. Rptr. 127]* , or concerning the propriety of granting relief from the waiver, should be resolved in favor of the party requesting trial by jury because of the constitutional guarantee of the right to a jury trial [*see Massie v. AAR W. Skyways, Inc. (1992) 4 Cal. App. 4th 405, 411, 5 Cal. Rptr. 2d 654* ; *see also Oakes v. McCarthy Co. (1968) 267 Cal. App. 2d 231, 264-265, 73 Cal. Rptr. 127* (trial court properly allowed trial by jury when timeliness of demand for trial by jury was in question); *Cal. Const., art. I, § 16*].

[b] Factors to Be Considered in Granting Relief

In exercising its discretion, a court may consider the following factors [*Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 1176, 217 Cal. Rptr. 89* ; *McIntosh v. Bowman (1984) 151 Cal. App. 3d 357, 363, 198 Cal. Rptr. 533]* :

- Delay in rescheduling the trial for jury.
- Lack of funds.
- Timeliness of the request.
- Prejudice to the litigants.
- Prejudice to the court or its calendar.
- Reason for the request.
- Whether the other parties desire a jury trial.

For example, when a party was advised approximately eight days before trial that his jury fees had not been posted, his motion for relief from the waiver on the morning of trial was properly denied [*see Still v. Plaza Marina Commercial Corp. (1971) 21 Cal. App. 3d 378, 388, 98 Cal. Rptr. 414]* .

A court does not abuse its discretion when any reasonable factors supporting denial of relief can be found, even if a reviewing court, as a question of first impression, might take a different view [*Gann v. Williams Bros. Realty, Inc. (1991) 231 Cal. App. 3d 1698, 1704, 283 Cal. Rptr. 128]* .

Because of the public policy favoring trial by jury, the trial court should grant relief from a jury waiver, except when granting the motion would work serious hardship to the objecting party [*Boal v. Price Waterhouse & Co. (1985) 165 Cal. App. 3d 806, 809, 212 Cal. Rptr. 42* ; *see Wharton v. Superior Court (1991) 231 Cal. App. 3d 100, 103, 282 Cal. Rptr. 349]* . The trial court abuses its discretion in denying relief if there has been no prejudice to the other party or to the court from an inadvertent waiver [*Massie v. AAR W. Skyways, Inc. (1992) 4 Cal. App. 4th 405, 411, 5 Cal. Rptr. 2d 654]* .

The opposing party must show prejudice from the granting of relief, not prejudice because of a jury trial [*Massie v. AAR W. Skyways, Inc. (1992) 4 Cal. App. 4th 405, 411, 5 Cal. Rptr. 2d 654]* . It will be presumed that the party had the benefit of a fair and impartial trial, even if the case was tried to the court rather than to a jury [*Gann v. Williams Brothers Realty, Inc. (1991) 231 Cal. App. 3d 1698, 1704, 283 Cal. Rptr. 128]* .

[4] [Reserved]

[5] Effect on Waiver of Reversal on Appeal

When a judgment has been reversed for a trial de novo, a party is not bound by its waiver of a jury at the first trial [*Frankel v. Four Star Int'l, Inc. (1980) 104 Cal. App. 3d 897, 904, 163 Cal. Rptr. 902]* . However, if the cause is remanded on appeal for further proceedings and determination of issues that could have been decided originally, a waiver of jury trial is binding as to the subsequent proceedings [*Frankel v. Four Star Int'l, Inc. (1980) 104 Cal. App. 3d 897, 904, 163 Cal. Rptr. 902* ; *see Spaulding v. Cameron (1954) 127 Cal. App. 2d 698, 703, 274 P.2d 177]* .

For example, in *Frankel*, the trial court on remand properly allowed a jury trial as to one cause of action as to which the judgment had been reversed on appeal. However, the trial court also properly made a new determination of damages and made new findings on another cause of action, as to which the appellate court had affirmed and remanded for clarification of the findings of fact supporting the amount of damages [*Frankel v. Four Star Int'l, Inc. (1980) 104 Cal. App. 3d 897, 900 n.1, 903-904, 163 Cal. Rptr. 902]* .

When a case is remanded to the trial court with instructions from the appellate court that imply that evidence should be considered by the trial judge who heard it and was familiar with it, it would be inconsistent with the instructions for the trial court to relieve the party from the waiver of jury trial, and the trial court properly refuses a request for a jury trial [*Spaulding v. Cameron (1954) 127 Cal. App. 2d 698, 703, 274 P.2d 177]* .

Similarly, on remand after jury trial is waived in the original action, a party cannot demand jury trial as a matter of right for trial of an ancillary or supplemental issue, such as a determination of attorney's fees on appeal that are to be added to the judgment [*Fidelity & Deposit Co. v. Whitson (1962) 205 Cal. App. 2d 713, 715-716, 23 Cal. Rptr. 491]* .

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27-322 California Forms of Pleading and Practice--Annotated §§ 322.19-322.29

AUTHOR: William G. McDevitt Editorial Consultant

[Reserved]

§§ 322.19[Reserved]

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27-322 California Forms of Pleading and Practice--Annotated § 322.30

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§ 322.30 Governing Statutes

The Trial Jury Selection and Management Act (*Code Civ. Proc. § 190 et seq.*), enacted in 1988, governs the following:

- The qualifications, summoning, excusing, and selection of jurors [*see §§ 322.32, 322.34, 322.35, 322.36*].
- The duties of jury commissioners.
- The voir dire examination of prospective jurors [*see § 322.37*].
- Challenges to jurors [*see § 322.39* et seq.].
- Jurors' fees [*see § 322.17*].
- The use of alternate jurors [*see § 322.44*].

The Act governs the the formation of trial juries for both civil and criminal cases in all trial courts of the state [*Code Civ. Proc. § 192*]. Procedures for selection, qualification, and management of prospective jurors, juror pools, and trial jury panels generally are set forth in *Code Civ. Proc. §§ 191-219*. Voir dire of prospective jurors and formation of the trial jury generally are governed by *Code Civ. Proc. §§ 220-234*.

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27-322 California Forms of Pleading and Practice--Annotated § 322.31

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.31 Definitions

[1] Jury Commissioner

Each county has a jury commissioner to aid the court in the selection of jurors for all trial courts within the county [*see Code Civ. Proc. §§ 195(c), 196-198*].

The jury commissioner is appointed by, and serves at the pleasure of, a majority of the superior court judges [*Code Civ. Proc. § 195(a)*; *see also Code Civ. Proc. § 195(b)* (appointment of deputy jury commissioners and salaries of commissioner and deputy commissioner)]. In any county in which there is a superior court administrator or executive officer, that person is the ex officio jury commissioner [*Code Civ. Proc. § 195(a)*; *see also Gov. Code §§ 69893, 69894.1, 69895* (appointment of jury commissioner or ex officio jury commissioner in particular superior courts)]. In any court jurisdiction where any person other than a court administrator or clerk/administrator is serving as jury commissioner, that person must continue to serve at the pleasure of a majority of the judges of the appointing court [*Code Civ. Proc. § 195(a)*].

[2] Juror Lists

[a] Source Lists

A "source list" is a list of persons in the area served by the court used as a source of potential jurors, such as voter registration and Department of Motor Vehicles lists [*Code Civ. Proc. § 194(m)*; *see Code Civ. Proc. § 197* (description of sources); *see also § 322.33*].

[b] Master List

A "master list" is a list of names of prospective jurors (discussed in *[3][b], below*) compiled randomly by the county jury commissioner from "source lists." The jury commissioner sends questionnaires to the prospective jurors on the

master list to determine whether they meet the statutory qualifications for service as jurors [*Code Civ. Proc. § 194(g)* (defining "master list"); *see Code Civ. Proc. § 198* (creation and use of master list); *see also § 322.33*].

[c] Qualified Juror List

A "qualified juror list" is a list of qualified jurors (discussed in *[3][c], below*), i.e., prospective jurors who meet the statutory qualifications for jury service, compiled by the county jury commissioner from answers to questionnaires sent to prospective jurors on the master list [*Code Civ. Proc. § 194(k)*; *see § 322.33*].

[3] Potential, Prospective, and Qualified Jurors

[a] Potential Juror

A "potential juror" is any person whose name appears on a source list (discussed in *[2][a], above*) [*Code Civ. Proc. § 194(h)* (defining "potential juror")].

[b] Prospective Juror

A "prospective juror" is a juror whose name appears on the "master list" (discussed in *[2][b], above*) [*Code Civ. Proc. § 194(i)* (defining "prospective juror"); *see Code Civ. Proc. § 198* (creation and use of master list)].

[c] Qualified Juror

A "qualified juror" is a person who meets the statutory qualifications for jury service and whose name appears on the "qualified juror list" (discussed in *[2][c], above*) [*Code Civ. Proc. § 194(j)*; *see Code Civ. Proc. § 203* (persons eligible and qualified to be prospective trial jurors); *see also § 322.33*].

[4] Juror Pool or Venire

The "juror pool" is a large group of qualified prospective jurors summoned by the jury commissioner from the qualified juror list and appearing for assignment to trial jury panels (discussed in *[5], below*) [*Code Civ. Proc. § 194(e)*; *see also § 322.34*]. This group also is known as the "venire" [*People v. Breaux (1991) 1 Cal. 4th 281, 296 n.2, 3 Cal. Rptr. 2d 81, 821 P.2d 585]* .

[5] Trial Jury Panel

A "trial jury panel" is a group of prospective jurors from the juror pool assigned to a particular courtroom for the purpose of voir dire, from which the trial jury is selected [*Code Civ. Proc. § 194(q)*; *see § 322.36*].

[6] Trial Jurors and Trial Jury

The trial jurors or trial jury are those jurors ultimately selected and sworn to receive the evidence and reach a verdict on all questions of fact [*see Code Civ. Proc. § 194(o)* (defining trial jurors); *Code Civ. Proc. § 194(p)* (defining trial jury); *Code Civ. Proc. § 232(b)* (swearing of jury); *see also §§ 322.43, 322.57*]. As provided in *Code Civ. Proc. § 194(o)*, "trial jurors" are "those jurors sworn to try and determine by verdict a question of fact." As provided by *Code Civ. Proc. § 194(p)*, a "trial jury" is "a body of persons selected from the citizens of the area served by the court and sworn to try and determine by verdict a question of fact."

A trial jury usually consists of 12 persons, although in civil actions or misdemeanor criminal cases the parties may agree to any lesser number [*Cal. Const., art. I, § 16*; *Code Civ. Proc. § 220*].

[7] Additional Definitions

For additional definitions of terms relating to jurors that are used in the Trial Jury Selection and Management Act (*Code Civ. Proc. § 190 et seq.*), see *Code Civ. Proc. § 194*.

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§ 322.32 Competence and Qualification of Prospective Jurors

[1] Qualifications and Exclusions Generally

Each state may prescribe relevant qualifications for its jurors. Each state remains free to confine its selection to citizens, to persons meeting specified qualifications of age and educational attainment, and to those persons possessing good intelligence, sound judgment, and fair character [*see People v. Superior Court (1970) 13 Cal. App. 3d 672, 681, 91 Cal. Rptr. 651]* .

No person will be excluded from eligibility for jury service in the state of California for any reason other than those reasons provided by *Code Civ. Proc. § 203* [*Code Civ. Proc. § 203(b)*]. All persons are eligible and qualified to be prospective trial jurors except the following [*Code Civ. Proc. § 203(a)*]:

- Persons who are not citizens of the United States.

- Persons who are less than 18 years of age.

- Persons who are not domiciliaries of California as determined pursuant to Article 2 (commencing with *Section 2020) of Chapter 1 of Division 2 of the Elections Code* (*see Elec. Code § 2020 et seq.*).

- Persons who are not residents of the jurisdiction in which they are summoned to serve.

- Persons who have been convicted of malfeasance in office or a felony, and whose civil rights have not been restored.

- Persons who are not possessed of sufficient knowledge of the English language, provided that no person will be deemed incompetent solely because of the loss of sight or hearing in any degree or other

disability that impedes the person's ability to communicate or that impairs or interferes with the person's mobility [*see also Civ. Code § 54.8* (assistive listening system required on request of hard-of-hearing juror)].

- Persons who are serving as grand or trial jurors in any California court.
- Persons who are the subject of conservatorship.

All qualified persons, as a policy matter, have an equal opportunity to be considered for jury service in the state and an obligation to serve as jurors when summoned for that purpose, in accordance with the Trial Jury Selection and Management Act (*Code Civ. Proc. § 190 et seq.*) [*Code Civ. Proc. § 191*]. For discussion of exemptions and excuses from jury service, see *§ 322.35*.

[2] Sufficient Knowledge of English

The requirement that a juror have sufficient knowledge of English is satisfied only by jurors who are fully able to understand spoken and written English [*People v. Jones (1972) 25 Cal. App. 3d 776, 783, 102 Cal. Rptr. 277* ; *but see Code Civ. Proc. § 203(a)(6)* (loss of sight or hearing or other disability that impedes ability to communicate is not ground for exclusion), discussed in [3], *below*]. An examination testing vocabulary and reading skills of prospective jurors can be a proper means of establishing a juror's competence to serve [*see People v. Powell (1974) 40 Cal. App. 3d 107, 134-142, 115 Cal. Rptr. 109* (decided under former *Code Civ. Proc. § 198*)].

[3] Prospective Juror With Disability

The Judicial Council has declared that it is the policy of the California courts to assure that qualified individuals with disabilities have equal and full access to the judicial system [*Cal. Rules of Ct., Rule 1.100(b)*]. *Cal. Rules of Ct., Rule 1.100* contains a procedure for implementing this policy by allowing any lawyer, party, witness, juror, or any other individual with an interest in attending any proceeding before a California court to request a reasonable accommodation of his or her disability to permit the disabled individual to attend and participate in the proceeding [*see Cal. Rules of Ct., Rule 1.100(c)-(h)*; *see also Judicial Council of California Civil Jury Instructions, CACI No. 110* (LexisNexis Matthew Bender, Official Publisher) (instructing that juror with disability will be assisted by service provider)].

Application for an accommodation may be presented ex parte in writing, on a form approved by the Judicial Council for this purpose, or orally as the court may allow [*Cal. Rules of Ct., Rule 1.100(c)(1)*]. For discussion of challenges for cause to prospective jurors with disabilities, see *§ 322.40[1]*.

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AUTHOR: William G. McDevitt Editorial Consultant

§ 322.33 Compilation of Master and Qualified Prospective Juror Lists

All persons selected for jury service are to be selected at random from the population of the area served by the court [*Code Civ. Proc. § 191*]. Generally, the county jury commissioner must create a master list, consisting of names randomly selected from source lists so as to include a representative cross section of the relevant population [*Code Civ. Proc. § 194(g)*]. The master list is used to select qualified prospective jurors [*see Code Civ. Proc. §§ 196-205*; *see also below*].

Allowable source lists for creating a master list include voter registration lists, DMV lists, customer mailing lists, telephone directories, and utility company lists [*see Code Civ. Proc. § 197(a), (b)*; *see also Blair v. Superior Court (2004) 119 Cal. App. 4th 532, 537, 14 Cal. Rptr. 3d 602* (list of registered voters and Department of Motor Vehicles' list of licensed drivers and identification cardholders resident within area served by court, when substantially purged of duplicate names, must be considered inclusive of representative cross section of population)]. The jury commissioner should use the National Change of Address System or other comparable means to update jury source lists and create as accurate a master jury list as reasonably practical [Cal. Rules of Ct., Stds. Jud. Admin., Std. 10.31].

The jury commissioner reduces the master list to a "qualified juror list" by eliminating prospective jurors who do not meet the statutory qualifications for jury service. The jury commissioner ordinarily qualifies prospective jurors by mailing questionnaires to each prospective juror on the master list, inquiring as to qualification and ability to serve as a prospective juror [*see Code Civ. Proc. § 205*]. From the responses, the commissioner eliminates those persons whose responses indicate they do not meet the minimum statutory requirements to be a juror [for discussion of statutory requirements for jurors, *see § 322.32*]. The remaining prospective jurors comprise the qualified juror list, from which the jury pool or venire is summoned [*see § 322.34*].

Selection of names for master and qualified lists in counties in which sessions of superior court are held in cities other than the county seat is governed by *Code Civ. Proc. § 198.5*.

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For related research and practice materials, see the following legal topics:
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AUTHOR: William G. McDevitt Editorial Consultant

§ 322.34 Summoning Juror Pool or Venire

[1] Process to Summon Jurors for Service

When jurors are required for the trial courts, the jury commissioner estimates the number of qualified prospective jurors needed and, from the qualified list, summons them for service [*see Code Civ. Proc. § 208*]. The jury commissioner is authorized to summon qualified prospective jurors by first class mail, by personal service, or in urgency situations, by attachment of the person [*Code Civ. Proc. § 208*; *see Code Civ. Proc. § 210* (contents of summons); *Code Civ. Proc. § 211* (attachment by sheriff or marshal authorized when incomplete jury panel jeopardizes party's right to jury trial)].

Response to the summons may be made by any person having knowledge that the prospective juror is unable to respond to the summons [*see Code Civ. Proc. § 196(b)*]. A prospective juror who fails to attend in compliance with a summons, or to respond and be excused from attendance, may be attached and compelled to attend. Following an order to show cause hearing, the court may find the prospective juror in contempt of court, punishable by fine, incarceration, or both, as otherwise provided by law [*Code Civ. Proc. § 209(a)*]. For discussion and forms for use in contempt proceedings generally, see Ch. 135, *Contempt* .

In lieu of imposing sanctions for contempt, the court may impose reasonable monetary sanctions on a prospective juror who failed to attend and who was not excused pursuant to *Code Civ. Proc. § 204* after first providing the prospective juror with notice and an opportunity to be heard [*Code Civ. Proc. § 209(b)*, repealed January 1, 2014; for discussion of *Code Civ. Proc. § 204* and excuses and exemptions from jury service, *see § 322.35*]. If a juror fails to respond to the initial summons, the court may issue a second summons indicating that the person failed to appear in response to a previous summons and ordering the person to appear for jury duty. The second summons may be issued no earlier than 90 days after the initial failure to appear. On the failure of the juror to appear in response to the second summons, the court may issue a failure to appear notice informing the person that failure to respond may result in the imposition of money sanctions. If the prospective juror does not attend the court within the time period as directed by the failure to appear notice, the court will issue an order to show cause. Payment of monetary sanctions does not relieve the person of

the obligation to perform jury duty [*Code Civ. Proc. § 209(b)*, repealed January 1, 2014; *see also Cal. Rules of Ct., Rule 2.1010(f)* (nothing in *Cal. Rules of Ct., Rule 2.1010*, governing juror's motion to set aside sanctions imposed by default, relieves prospective juror of obligation of jury service)]. The court may give notice of its intent to impose sanctions by either of the following means [*Code Civ. Proc. § 209(c)(1)*, repealed January 1, 2014]:

(1) Verbally to a prospective juror appearing in person in open court.

(2) The issuance on its own motion of an order to show cause requiring the prospective juror to demonstrate reasons for not imposing sanctions. The court may serve the order to show cause by certified or first-class mail.

The monetary sanctions may not exceed specified amounts for the first, second and third and subsequent violations. The court may not impose monetary sanctions on a prospective juror more than once during a single juror pool cycle. The prospective juror may be excused from paying sanctions pursuant to *Code Civ. Proc. § 204(b)* or in the interests of justice [*Code Civ. Proc. § 209(c)(2)*].

A prospective juror against whom the court imposed sanctions by default under *Code Civ. Proc. § 209* may move to set aside the default. The motion must be brought no later than 60 days after sanctions have been imposed [*Cal. Rules of Ct., Rule 2.1010(a)*]. The motion must contain a short and concise statement of the reasons the prospective juror was not able to attend when summoned for jury duty and any supporting documentation [*Cal. Rules of Ct., Rule 2.1010(b)*]. The motion may be made by completing and filing Judicial Council form MC-070, Juror's Motion to Set Aside Sanctions and Order [*Cal. Rules of Ct., Rule 2.1010(c)*; for form for use by juror for motion to set aside sanctions and order imposing them on juror for failure to attend when summoned, *see § 322.102*].

Form MC-070 is not to be used to move the court to set aside a finding of contempt. For discussion and forms for use in contempt proceedings generally, see Ch. 135, *Contempt* . The court may decide the motion with or without a hearing [*Cal. Rules of Ct., Rule 2.1010(d)*]. If the motion demonstrates good cause, the court must set aside sanctions imposed against the prospective juror [*Cal. Rules of Ct., Rule 2.1010(e)*]. The court must provide a copy of *Cal. Rules of Ct., Rule 2.1010*, to the prospective juror against whom sanctions have been imposed [Cal. Rules of Ct., Rule 2.010(g)].

Unless excused, all summoned prospective jurors must be available on one-hour notice by telephone to appear for service, and will receive credit toward their jury service obligation for each day they are so available [*Code Civ. Proc. § 213*]. The date, time, or place of appearance may be modified by the jury commissioner [*Code Civ. Proc. § 208*].

[2] Length and Manner of Juror Service

The process established by Cal. Rules of Ct., Rule 2.1102 is intended to make jury service more convenient and alleviate the problem of potential jurors refusing to appear for jury duty, by shortening the time a person is required to serve to one day or one trial. The exemptions authorized by Rule 2.1102 are of limited scope and duration, and must be applied with the goal of achieving full compliance [*Cal. Rules of Ct., Rule 2.1002(a)*; *Gov. Code § 68550* (implementing legislation)].

Each trial court system must implement a juror management program under which a person has fulfilled the jury service obligation when he or she has [*Cal. Rules of Ct., Rule 2.1002(c)*; *see Cal. Rules of Ct., Rule 2.1002(b)* (definitions)]:

- Served on one trial until discharged;

- Been assigned on one day to one or more trial departments for jury selection and served through the completion of jury selection or until excused by the jury commissioner;

- Attended court but was not assigned to a trial department for selection of a jury before the end of that day;

- Served one day on call; or

- Served no more than five court days on telephone standby.

The Judicial Council may grant an exemption from the requirements of Rule 2.1002 for a specified period of time if a trial court system demonstrates good cause by establishing that [*Cal. Rules of Ct., Rule 2.1002(d)(1)*]:

- The cost of implementing a one-day/one-trial system is so high that the trial court system would be unable to provide essential services to the public if required to implement the system; or

- The requirements of Rule 2.1002 cannot be met because of the size of the population in the county compared with the number of jury trials.

If the council finds good cause, it may grant an exemption for a limited period of time and on such conditions as it deems appropriate [*Cal. Rules of Ct., Rule 2.1002(d)(3)*].

The summoned prospective jurors appear at the court facility and assemble, usually in a jury assembly room or comparable facility [*see Code Civ. Proc. § 205*]. This group of qualified prospective jurors is referred to as the "juror pool" [*Code Civ. Proc. § 194(e)*] or the "venire" [*People v. Breaux (1991) 1 Cal. 4th 281, 296 n.2, 3 Cal. Rptr. 2d 81, 821 P.2d 585]* . The jury commissioner may excuse certain prospective jurors for undue hardship, either before or after appearance [*see § 322.35*], and then send "trial jury panels" to individual trial courts for voir dire [*see Code Civ. Proc. § 219*; for discussion of trial jury panels, *see § 322.36*; for discussion of voir dire, *see § 322.37*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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B. Summoning and Selecting Juries

27-322 California Forms of Pleading and Practice--Annotated § 322.35

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§ 322.35 Excuse and Exemption from Jury Service

[1] No Exemption from Jury Service

No eligible person may be exempt from service as a trial juror in a civil action by reason of occupation, economic status, or any characteristic listed or defined in *Gov. Code § 11135*, or for any other reason [*Code Civ. Proc. § 204(a)*]. *Gov. Code § 11135* prohibits discrimination on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, as defined in that section [for discussion of *Gov. Code § 11135*, *see Ch. 112, Civil Rights: Government-Funded Programs and Activities, § 112.11* et seq.].

No peace officer, as defined in *Pen. Code § 830.1* or *830.2(a)*, may be selected for voir dire in civil or criminal matters, and no peace officer, as defined in *Pen. Code § 830.2(b)* or *(c)*, may be selected for voir dire in criminal matters [*Code Civ. Proc. § 219(b)(1), (2)*; *see Code Civ. Proc. § 219(a)* (jury panels to be sent to courtrooms for voir dire)]. Hence, although none of the peace officers defined above is exempt from being summoned and appearing for jury service, none of them may be assigned to a trial jury panel and sent to a courtroom for voir dire.

Notwithstanding the general no-exemption rule noted above, the jury commissioner should accommodate a prospective juror's schedule by granting a request for a one-time deferral of jury service [*Cal. Rules of Ct., Rule 2.1004(a)*]. The jury commissioner must accommodate the schedule of prospective jurors who are peace officers as defined in *Penal Code § 830.5* [*Cal. Rules of Ct., Rule 2.1004(b)*].

[2] Excuse Only for Undue Hardship

No person will be excused from service as a trial juror except as specified in *Code Civ. Proc. § 204(b)* [*Code Civ. Proc. § 204(a)*]. *Code Civ. Proc. § 204(b)* provides that an eligible person may be excused from jury service only for undue hardship, on themselves or on the public, as defined by the Judicial Council. For discussion of grounds constituting undue hardship, see *[3], below*; for discussion of principles governing excuses, see *[5], below*.

[3] Grounds Constituting Undue Hardship

An excuse on the ground of undue hardship may be granted for any of the following reasons [*Cal. Rules of Ct., Rule 2.1008(d)*]:

- The prospective juror has no reasonably available means of public or private transportation to the court.

- The prospective juror must travel an excessive distance. Unless otherwise established by statute or local rule, an excessive distance is reasonable travel time that exceeds one and one-half hours from the prospective juror's home to the court.

- The prospective juror will bear an extreme financial burden. In determining whether to excuse the prospective juror, consideration must be given to the following:

  - The sources of the prospective juror's household income.

  - The availability and extent of income reimbursement.

  - The expected length of service.

  - Whether service can reasonably be expected to compromise that person's ability to support himself or herself or his or her dependents, or so disrupt the economic stability of any individual as to be against the interests of justice.

- The prospective juror will bear an undue risk of material injury to or destruction of the prospective juror's property or property entrusted to the prospective juror, and it is not feasible to make alternative arrangements to alleviate the risk. In determining whether to excuse the prospective juror, consideration must be given to the following:

  - The nature of the property.

  - The source and duration of the risk.

  - The probability that the risk will be realized.

  - The reason why alternative arrangements to protect the property cannot be made.

  - Whether material injury to or destruction of the property will so disrupt the economic stability of any individual as to be against the interests of justice.

- The prospective juror has a physical or mental disability or impairment, not affecting that person's competence to act as a juror, that would expose the potential juror to undue risk of mental or physical harm. In any individual case, unless the person is aged 70 years or older, the prospective juror may be required to furnish verification or a method of verification of the disability or impairment, its probable duration, and the particular reasons for the person's inability to serve as a juror.

- The prospective juror's services are immediately needed for the protection of the public health and safety, and it is not feasible to make alternative arrangements to relieve the person of these responsibilities during the period of service as a juror without substantially reducing essential public

services.

- The prospective juror has a personal obligation to provide actual and necessary care to another, including sick, aged, or infirm dependents, or a child who requires the prospective juror's personal care and attention, and no comparable substitute care is either available or practical without imposing an undue economic hardship on the prospective juror or person cared for. If the request to be excused is based on care provided to a sick, disabled, or infirm person, the prospective juror may be required to furnish verification or a method of verification that the person being cared for is in need of regular and personal care.

As an alternative to seeking an undue hardship excuse under *Cal. Rules of Ct., Rule 2.1008(d)(7)* (actual and necessary care of child), a mother who is breast-feeding an infant may obtain a postponement of jury duty, by means of a request that does not require her appearance in court. This postponement may be effective for up to one year and may be extended by another written request [*Cal. Rules of Ct., Rule 2.1006*]

In addition to the grounds listed above for excusing a person from jury service, a prospective juror who has served on a grand or trial jury service or was summoned and appeared for jury service in any state or federal court during the previous 12 months will be excused from service on request. The jury commissioner, in his or her discretion, may establish a longer period of repose [*Cal. Rules of Ct., Rule 2.1008(e)*].

Absent a showing of economic hardship, it is improper for a jury commissioner to excuse a prospective juror for the sole reason that the juror is a daily wage earner [*see People v. Milan (1973) 9 Cal. 3d 185, 196, 107 Cal. Rptr. 68, 507 P.2d 956]* .

[4] Procedure for Determining Undue Hardship

The jury commissioner is required to hear the excuses of jurors summoned, and has the discretion to accept an excuse for undue hardship without a personal appearance. All excuses must be in writing setting forth the basis of the request, and must be signed by the juror [*Code Civ. Proc. § 218*; *see Cal. Rules of Ct., Rule 2.1008(c)*]. The prospective juror should support the request with facts specifying the hardship and a statement why the circumstances constituting undue hardship cannot be avoided by deferring the prospective juror's service [*Cal. Rules of Ct., Rule 2.1008(c)*; *see also Cal. Rules of Ct., Rule 2.1004* (scheduling accommodations for jurors)].

[5] Principles Governing Excuse for Undue Hardship

An eligible person may be excused from jury service only for undue hardship, on themselves or on the public, as defined by the Judicial Council [*Code Civ. Proc. § 204(b)*]. *Cal. Rules of Ct., Rule 2.1008*, governs excuse from jury service on the ground of undue hardship under *Code Civ. Proc. § 204*. The granting of excuses is governed by the following principles [*Cal. Rules of Ct., Rule 2.1008(b)*]:

- No class or category of person will be automatically excluded from jury duty except as provided by law [*see Code Civ. Proc. § 203(b)*, discussed at *§ 322.35[1]*].

- Deferring jury service is preferred to excusing a prospective juror for a temporary or marginal hardship.

- Inconvenience to a prospective juror or an employer is not an adequate reason to be excused from jury duty, although it may be considered a ground for deferral.

- A statutory exemption from jury service will be granted only when the eligible person claims it.

However, *Code Civ. Proc. § 204(a)* (discussed at *§ 322.35[1]*) provides that no eligible person is exempt from jury service.

It is improper to routinely excuse persons 70 years of age and over who do not request excuses. However, persons of that age group do not constitute a distinctive or cognizable group such that their disproportionate excusal from jury service would violate constitutional principles [*People v. McCoy (1995) 40 Cal. App. 4th 778, 785-786, 47 Cal. Rptr. 2d 599]* .

Legal Topics:

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27-322 California Forms of Pleading and Practice--Annotated § 322.36

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§ 322.36 Trial Jury Panels

[1] Selection and Assignment of Trial Jury Panels

After hearing the excuses of jurors summoned, the jury commissioner randomly selects prospective jurors for trial jury panels, which are sent to courtrooms for voir dire [*see Code Civ. Proc. §§ 194(q), 219*; *People v. Breaux (1991) 1 Cal. 4th 281, 296 n.2, 3 Cal. Rptr. 2d 81, 821 P.2d 585* ("panel" defined as group of prospective jurors from venire assigned to court for selection of trial jury)]. For discussion of voir dire, see *§ 322.37*.

[2] Separate Panel for Each Judge

In any superior court, a separate trial jury panel may be impaneled for each judge. In addition, any one panel may be impaneled by any of the judges for service before any of the other judges, as the occasion may require [*Code Civ. Proc. § 201*].

When a panel of jurors is in attendance for service before one or more of the judges, whether impaneled for common use or not, the whole or any number of the jurors from the panel may be required to attend and serve, or to complete a panel, before any of the other judges [*see Code Civ. Proc. § 201*].

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27-322 California Forms of Pleading and Practice--Annotated § 322.37

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§ 322.37 Voir Dire Examination of Prospective Jurors

[1] Pre-Voir Dire Conference

A pre-voir dire conference should be held before examination of prospective jurors begins, outside the hearing of the prospective jurors and with a court reporter present. The judge should confer with counsel about specific questions or areas of inquiry that interest the parties. The court then should advise counsel of the questions or areas of inquiry the court will ask and will allow during the examination and the voir dire procedure.The court will obtain from counsel the names of the prospective witnesses and a brief summary of the nature of the case, including alleged injuries or damages. In an eminent domain proceeding, this information should include the parties' respective contentions concerning the value of the property taken and any alleged severance damages and special benefits [Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.25(b)].

The Judicial Council has suggested areas of inquiry and provided language that may be used in many common cases [*see* Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.25(c), (d) (eminent domain proceedings)].

Use of written questionnaires may be addressed at this conference [*see [3], below*].

[2] Seating of Prospective Jurors for Voir Dire

When an action is called for trial by jury, the clerk or judge randomly selects the names of the jurors for voir dire until the jury is selected or the panel is exhausted [*Code Civ. Proc. § 222(a)*]. However, if the jury commissioner has provided the court with a listing of the jury panel in random order, the court must seat prospective jurors for voir dire in the order provided by the list [*Code Civ. Proc. § 222(b)*].

[3] Written Questionnaires

The Judicial Council has approved a general form of juror questionnaire for optional use in appropriate civil cases [Jury

Questionnaire for Civil Cases, Judicial Council Form MC-001; *see § 322.100*]. A Personal Injury Supplement is intended to be used in personal injury cases along with the general questions.

The form indicates that the court should confer with counsel about voir dire before the jury panel is called. At that conference, the court may establish guidelines for the use of the form, any supplemental questions to be propounded by questionnaire, and the extent of the oral questioning by the court and by counsel. Counsel may draft proposed supplemental questions; these should be filed and served at least three court days before the pre-voir dire conference [Juror Questionnaire for Civil Cases, Judicial Council Form MC-001, § 2B]. For an illustrative reproduction of the Judicial Council form, see *§ 322.100*.

The judge may direct prospective jurors to answer questionnaires as proposed by counsel in a particular case to assist the voir dire process [*see Code Civ. Proc. § 205(c), (d)*]. The court should not arbitrarily or unreasonably refuse to submit reasonable written questionnaires when requested by counsel, and the court may determine the contents of the questionnaires [*Code Civ. Proc. § 222.5*]. For model juror questionnaires, see California Trial Guide, Trial Book volume, *Voir Dire Questions* (Matthew Bender). Examples of the questionnaires designed to reveal particular attitudes of prospective jurors:

- Authoritarian personality.
- Leadership role.
- Racial bias.
- Gender bias.
- Deep pockets.
- Attitude toward judicial process.

[4] Examination by Judge

To select a fair and impartial jury in civil jury trials, the trial judge is required to examine the prospective jurors [*Code Civ. Proc. § 222.5*; *Cal. Rules of Ct., Rule 3.1540(b)*]. In examining prospective jurors in civil cases, the judge should consider the policies and recommendations in Standard 3.25 of the Standards of Judicial Administration [*Cal. Rules of Ct., Rule 3.1540(b)*; *see* Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.25].

Initial voir dire is conducted by the judge, with follow-up questioning by counsel [*see Code Civ. Proc. § 222.5*; *Cal. Rules of Ct., Rule 3.1540(c)*]. Counsel may submit additional questions or request to supplement the judge's examination by direct questioning [*Cal. Rules of Ct., Rule 3.1540(c)*; *see [5][a], below*]. The trial judge has discretion to set reasonable limits on the scope of the additional questions or supplemental examination [*Cal. Rules of Ct., Rule 3.1540(c)*; *see [5][b], below*].

When the object of the examination is the exercise of a challenge for cause, a trial court may examine prospective jurors with several hypothetical situations based on the issues to be tried [*see Kelly v. Trans Globe Travel Bureau, Inc. (1976) 60 Cal. App. 3d 195, 209, 131 Cal. Rptr. 488]* . For discussion of grounds for challenges for cause, see *§ 322.40*.

Before examining the prospective jurors, the court administers an oath whereby the prospective jurors agree to answer questions accurately and truthfully under penalty of perjury [*Code Civ. Proc. § 232(a)* (court obtains "perjury acknowledgment and agreement" from panel)].

[5] Examination by Counsel

[a] Procedure

On completion of the judge's initial examination, counsel for each party has the right, in a civil case, to directly question any of the prospective jurors to enable counsel to intelligently exercise both peremptory challenges and challenges for cause [*Code Civ. Proc. § 222.5*; *see Rousseau v. West Coast House Movers (1967) 256 Cal. App. 2d 878, 883-884, 64 Cal. Rptr. 655* (decided under prior law); *cf. Code Civ. Proc. § 223* (in criminal cases, voir dire may be conducted only in aid of exercise of challenges for cause, not peremptory challenges)]. Also, a party may opt to submit additional questions that the trial judge will put to the jurors [*Cal. Rules of Ct., Rule 3.1540(c)*].

Prior submission of questions to the judge may be required if a particular counsel engages in improper questioning. For purposes of *Code Civ. Proc. § 222.5*, an "improper question" is any question that, as its dominant purpose, attempts to precondition the prospective jurors to a particular result,indoctrinate the jury, or question the prospective jurors concerning the pleadings or the applicable law [*Code Civ. Proc. § 222.5*].

The court may, on stipulation by counsel for all the parties appearing in the action, permit counsel to examine the prospective jurors outside a judge's presence [*Code Civ. Proc. § 222.5*; *Cal. Rules of Ct., Rule 3.1540(d)*].

[b] Scope

During any examination conducted by counsel, the trial judge should permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case [*Code Civ. Proc. § 222.5*]. The fact that a topic has been included in the judge's examination should not preclude additional nonrepetitive or nonduplicative questioning in the same area by counsel [*Code Civ. Proc. § 222.5*].

The scope of the examination conducted by counsel must be within reasonable limits in the judge's sound discretion. In exercising his or her sound discretion as to the form and subject matter of voir dire questions, the trial judge should consider, among other criteria, any unique or complex elements, legal or factual, in the case and the individual responses or conduct of jurors that may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case. Unreasonable or arbitrary time limits cannot be imposed [*Code Civ. Proc. § 222.5*]. The court must permit questioning about legal doctrines that are material to the trial and controversial in the sense that they are likely to invoke strong feelings and resistance to their application [*People v. Pinholster (1992) 1 Cal. 4th 865, 915, 4 Cal. Rptr. 2d 765, 824 P.2d 571]* .

The examination of prospective jurors should not be used to educate the jury panel to the particular facts of the case, to compel the jurors to commit themselves to vote a particular way, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law [*People v. Fierro (1991) 1 Cal. 4th 173, 209, 3 Cal. Rptr. 2d 426, 821 P.2d 1302* ; *see People v. Pinholster (1992) 1 Cal. 4th 865, 915, 4 Cal. Rptr. 2d 765, 824 P.2d 571* ; *see also* Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.25(f) (questions that are improper under standards of judicial administration recommended by Judicial Council)].

When counsel seeks to exercise a peremptory challenge, counsel should be allowed to inquire into matters about which the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law, yet may significantly skew deliberations. Further, if a particular juror has given the court reason to suspect that he or she harbors such feelings, even though the general population does not, further questioning is appropriate [*see People v. Williams (1981) 29 Cal. 3d 392, 407-408, 174 Cal. Rptr. 317, 628 P.2d 869* (superseded as to criminal cases by *Code Civ. Proc. § 223*)].

In a personal injury action, counsel may in good faith ask prospective jurors whether they have any interest in a

particular insurance company if the question does not necessarily convey the impression that the defendant was insured by that company [*see Hart v. Wielt (1970) 4 Cal. App. 3d 224, 230, 84 Cal. Rptr. 220]* . Also, counsel may ask prospective jurors in a defamation action if they had heard of the plaintiff's prior criminal trial for theft that was the basis for the later civil suit [*see Russell v. Geis (1967) 251 Cal. App. 2d 560, 569, 59 Cal. Rptr. 569]* .

Legal Topics:

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27-322 California Forms of Pleading and Practice--Annotated § 322.38

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§ 322.38 Types of Challenges to Jurors

A challenge is an objection made to the prospective jurors that may be exercised by any party to the action, and is of the following types [*Code Civ. Proc. § 225*]:

- A challenge to the entire trial jury panel for cause [*see Code Civ. Proc. § 225(a)*, discussed at *§ 322.39[3]*].

- A challenge to a prospective juror for cause [*see Code Civ. Proc. §§ 225(b)(1), 228, 229*, discussed at *§§ 322.39[4], 322.40*].

- A peremptory challenge to a prospective juror [*see Code Civ. Proc. § 225(b)(2)*, discussed at *§§ 322.39[5], 322.40, 322.41*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-322 California Forms of Pleading and Practice--Annotated § 322.39

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§ 322.39 Procedure for Making Challenges

[1] Before Jury Sworn

Any challenge, whether to a jury panel or an individual juror, must be made before the jury is sworn [*Code Civ. Proc. §§ 225(a)(1), 226(a)*; *Bly-Magee v. Budget Rent-A-Car Corp. (1994) 24 Cal. App. 4th 318, 323-324* ; *29 Cal. Rptr. 2d 330]* .

[2] Order of Challenges

All challenges for cause must be exercised before any peremptory challenges may be exercised [*Code Civ. Proc. § 226(c)*].

The challenges of either party for cause need not be taken all at once but may be taken separately, in the following order [*Code Civ. Proc. § 227*]:

- Challenges to the jury panel for cause [*Code Civ. Proc. § 227(a)*; *see § 322.39[3]*].
- Challenges to an individual juror for general disqualification [*Code Civ. Proc. § 227(b)*; *see § 322.40[1]*].
- Challenges to an individual juror for an implied bias [*Code Civ. Proc. § 227(c)*; *see § 322.40[2]*].
- Challenges to an individual juror for an actual bias [*Code Civ. Proc. § 227(d)*; *see § 322.40[3]*].

All challenges for cause to an individual juror must be taken first by the defendants and then by the plaintiffs [*Code Civ. Proc. § 226(d)*].

[3] Exercise of Challenge to Jury Panel

An objection to the entire trial jury panel may be exercised by any party to the action on the ground of cause [*see Code Civ. Proc. § 225(a)*]. The challenge must be reduced to writing, and must plainly and distinctly state the facts constituting the ground of challenge [*Code Civ. Proc. § 225(a)(1)*]. Reasonable notice of the jury panel challenge must be given to all parties and to the jury commissioner by service of a copy of the challenge [*Code Civ. Proc. § 225(a)(2)*; *see also Code Civ. Proc. § 225(a)(3)* (jury commissioner is permitted services of legal counsel in connection with challenges to jury panel)].

A challenge to the panel for cause must be taken before any challenges to individual jurors for cause are made [*see Code Civ. Proc. § 227*; *see also [2], above*].

[4] Exercise of Challenges for Cause

All challenges for cause to an individual juror must be taken first by the defendants and then by the plaintiffs [*Code Civ. Proc. § 226(d)*]. The challenge may be made orally or in writing [*Code Civ. Proc. § 226(b)*].

Challenges for cause are decided by the court, which must determine whether one of the statutory grounds exists. Ordinarily the court makes its determination based on the answers given by the prospective juror during voir dire, although other evidence may be presented [*Code Civ. Proc. § 230* (challenges for cause must be tried by court; juror challenged and any other person may be examined as witness in trial of challenge and must truthfully answer all questions propounded to them)].

The proper practice in the selection of a jury is to fill the panel and, when one of the jurors is challenged for cause or peremptorily, to immediately call another to take his or her place. Thus, a party has the benefit of examining the full panel before deciding whether to exercise a challenge [*Buckley v. Chadwick (1955) 45 Cal. 2d 183, 202, 289 P.2d 242* ; *see also Code Civ. Proc. § 231(d)* (each party is entitled to have panel full before exercising any peremptory challenge)].

Failure to object to the excuse of a prospective juror for cause waives the issue on appeal [*People v. Mills (2010) 48 Cal. 4th 158, 189, 106 Cal. Rptr. 3d 153, 226 P.3d 276* ; *People v. Holt (1997) 15 Cal. 4th 619, 658, 63 Cal. Rptr. 2d 782, 937 P.2d 213]* . Additionally, to raise a claim on appeal that a juror should have been excused for cause, a party must have exhausted its peremptory challenges or must justify its failure to do so [*People v. Mills (2010) 48 Cal. 4th 158, 185-187, 106 Cal. Rptr. 3d 153, 226 P.3d 276* ; *People v. Bolin (1998) 18 Cal. 4th 297, 315, 75 Cal. Rptr. 2d 412, 956 P.2d 374* ; *see [5][c], below*].

[5] Exercise of Peremptory Challenges

[a] Procedure Generally

Peremptory challenges, exercised after all challenges for cause [*Code Civ. Proc. § 226(c)*], must be taken or passed by the sides alternately, commencing with the plaintiff [*Code Civ. Proc. § 231(d)*]. Each party is entitled to have the panel full before exercising any peremptory challenge [*Code Civ. Proc. § 231(d)*]. The challenge may be made orally or in writing [*Code Civ. Proc. § 226(b)*].

Peremptory challenges generally are exercised under one of two methods. Under the "jury box" method, which is the system utilized in California, 12 prospective jurors are questioned, subjected to challenges for cause, and replaced until 12 qualified jurors remain. Both sides then exercise peremptory challenges. A juror removed by peremptory challenge is replaced by another juror, who is then questioned and challenged both for cause and peremptorily. This process continues until peremptory challenges have been exhausted or waived. Under the "struck jury" method, a large initial

panel of prospective jurors is drawn and subjected to challenges for cause before peremptory challenges are exercised. If, after each side exercises its peremptory challenges, there remain more than 12 jurors, the court decides which 12 will constitute the jury [*People v. Avila (2006) 38 Cal. 4th 491, 537, 43 Cal. Rptr. 3d 1, 133 P.3d 1076]* . *Code of Civil Procedure § 226* does not dictate that all challenges for cause must be exercised before any peremptory challenges may be exercised. A procedure in which challenges are exercised in groups, even if within each group challenges for cause are exercised before peremptory challenges, does not violate the statutory mandate [*People v. Avila (2006) 38 Cal. 4th 491, 537, 43 Cal. Rptr. 3d 1, 133 P.3d 1076* ; *see also Code Civ. Proc. § 231* (each party entitled to full panel before exercising any peremptory challenge, with panel apparently always having been understood by California courts as subset of members of whole venire called to fill jury box during voir dire)].

No reason need be given for a peremptory challenge, and the court must excuse any juror challenged peremptorily [*Code Civ. Proc. § 226(b)*], unless an objection is made that the challenge is based on group bias [*see § 322.42*].

When each side taking peremptory challenges passes consecutively, the jury is deemed accepted and then sworn, unless the court orders otherwise for good cause [*Code Civ. Proc. § 231(e)*].

[b] Number and Apportionment of Peremptory Challenges

Each party in a civil case is entitled to six peremptory challenges [*Code Civ. Proc. § 231(c)*]. The number of peremptory challenges remaining with a side is not diminished by the passing of a peremptory challenge, and the fact that a party had initially passed a given juror does not preclude a later challenge [*Code Civ.Proc. § 231(d)*; *Buckley v. Chadwick (1955) 45 Cal. 2d 183, 202, 289 P.2d 242]* .

If there are more than two parties, the court must divide the parties into two or more sides according to their respective interests in the issues for the purpose of allotting peremptory challenges, and each side is entitled to eight peremptory challenges. If there are several parties on a side, the court must divide the challenges among them as nearly equally as possible. If there are more than two sides, the court must grant such additional peremptory challenges to a side as the interests of justice may require; however, the peremptory challenges of one side must not exceed the aggregate number of peremptory challenges of all other sides. If any party on a side does not use that party's full share of peremptory challenges, the unused challenges may be used by the other party or parties on the same side [*Code Civ. Proc. § 231(c)*].

[c] Exhaustion Required to Challenge Composition of Jury

Exhaustion of peremptory challenges is a condition precedent to appeal based on jury composition [*People v. Bolin (1998) 18 Cal. 4th 297, 315, 75 Cal. Rptr. 2d 412, 956 P.2d 374* ; Burns v. 20th *Century Ins. Co. (1992) 9 Cal. App. 4th 1666, 1672-1673, 12 Cal. Rptr. 2d 462* ; *Kimbley v. Kaiser Found. Hosps. (1985) 164 Cal. App. 3d 1166, 1169, 211 Cal. Rptr. 148]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionChallenges for CauseCivil ProcedureTrialsJury TrialsJurorsSelectionPeremptory Challenges

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Chapter 322 JURIES AND JURY SELECTION
PART II. LEGAL BACKGROUND
B. Summoning and Selecting Juries

27-322 California Forms of Pleading and Practice--Annotated § 322.40

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§ 322.40 Grounds for Challenges for Cause

[1] General Disqualification

A challenge to an individual juror for cause may be exercised on the ground of general disqualification, that is, that the juror is disqualified from serving in the action [*Code Civ. Proc. § 225(b)(1)(A)*]. *Code Civ. Proc. § 228* provides that challenges for general disqualification may be taken only on one or both of the following grounds:

- A lack of any of the qualifications prescribed by the Code of Civil Procedure that render a person competent as a juror [*Code Civ. Proc. § 228(a)*]. Statutory qualifications for jurors are set out by *Code Civ. Proc. § 203* and discussed at *§ 322.32*.

- A loss of hearing, or the existence of any other incapacity that satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action [*Code Civ. Proc. § 228(b)*]. Even though an incapacity may be a sufficient ground for a successful challenge for cause in a particular case, it is not an initial ground for disqualification for jury service, because *Code Civ. Proc. § 203(a)(6)* provides, among other things, that no person may be deemed incompetent solely because of loss of sight or hearing in any degree or other disability that impedes the person's ability to communicate or that impairs or interferes with the person's mobility [*see also Code Civ. Proc. § 224* (providing special rules concerning sign language interpreters, oral interpreters, deaf-blind interpreters, readers, or speech interpreters who are provided for disabled jurors); *Judicial Council of California Civil Jury Instructions, CACI No. 110* (LexisNexis Matthew Bender, Official Publisher) (instructing that juror with disability will be assisted by service provider)].

[2] Implied Bias

A challenge to an individual juror for cause may be taken on the grounds of implied bias, that is, when the existence of the facts as ascertained disqualifies the juror as a matter of law [*Code Civ. Proc. § 225(b)(1)(B)*]. *Code Civ. Proc. § 229*

provides that a challenge for implied bias may be taken only for one or more of the following causes:

- Consanguinity or affinity within the fourth degree to any party, to an officer of a corporation that is a party, or to any alleged witness or victim in the case at bar [*Code Civ. Proc. § 229(a)*].

- Standing in the relation of, or being the parent, spouse, or child of one who stands in the relation of, guardian and ward, conservator and conservatee, master and servant, employer and clerk, landlord and tenant, principal and agent, or debtor and creditor, to either party or to an officer of a corporation that is a party, or being a member of the family of either party; or a partner in business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares of capital stock of a corporation that is a party; or having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party. A depositor of a bank or a holder of a savings account in a savings and loan association will not be deemed a creditor of that bank or savings and loan association for the purpose of this provision solely by reason of being a depositor or account holder [*Code Civ. Proc. § 229(b)*]. *Code Civ. Proc. § 229(b)* precludes an attorney who is a member of the law firm of counsel trying the case from serving on the jury if a challenge for cause is made.

- Having served as a trial or grand juror or on a jury of inquest in a civil or criminal action or been a witness on a previous or pending trial between the same parties, or involving the same specific offense or cause of action, or having served as a trial or grand juror or on a jury within one year previously in any criminal or civil action or proceeding in which either party was the plaintiff or defendant or in a criminal action in which either party was the defendant [*Code Civ. Proc. § 229(c)*].

- Interest on the part of the juror in the event of the action, or in the main question involved in the action, except for interest as a member or citizen or taxpayer of a county, city and county, incorporated city or town or other political subdivision of a county, or municipal water district [*Code Civ. Proc. § 229(d)*]. If a challenge for interest is presented, some showing of interest must be made in addition to alleging that an interest exists [*see Kimbley v. Kaiser Found. Hosps. (1985) 164 Cal. App. 3d 1166, 1170-1171, 211 Cal. Rptr. 148* (mere membership in defendant health plan is insufficient to constitute disqualifying interest)].

- Having an unqualified opinion or belief as to the merits of the action founded on knowledge of its material facts or of some of them [*Code Civ. Proc. § 229(e)*].

- The existence of a state of mind in the juror evincing enmity against, or bias towards, either party [*Code Civ. Proc. § 229(f)*].

- Being party to an action pending in the court for which he or she is drawn and the action is set for trial before the panel of which the juror is a member [*Code Civ. Proc. § 229(g)*].

- In a criminal case in which the offense charged is punishable with death, entertaining such conscientious opinions as would preclude the juror finding the defendant guilty, in which case the juror may neither be permitted nor compelled to serve [*Code Civ. Proc. § 229(h)*].

[3] Actual Bias

A challenge to an individual juror for cause may be taken on the grounds of actual bias, which is defined as a state of mind on the part of the juror in reference to the case or to any of the parties that will prevent the juror from acting with entire impartiality and without prejudice to the substantial rights of any party [*Code Civ. Proc. § 225(b)(1)(C)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionChallenges for Cause

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B. Summoning and Selecting Juries

27-322 California Forms of Pleading and Practice--Annotated § 322.41

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§ 322.41 Grounds for Peremptory Challenges

Peremptory challenges may be exercised by either party without showing any cause, without reason or for no reason, arbitrarily and capriciously [*Pointer v. United States (1894) 151 U. S. 396, 408, 14 S. Ct. 410, 38 L. Ed. 208* ; *People v. Jones (1998) 17 Cal. 4th 279, 294, 70 Cal. Rptr. 2d 793, 949 P.2d 890* ; *People v. Williams (1997) 16 Cal. 4th 635, 663, 66 Cal. Rptr. 2d 573, 941 P.2d 752]* , except that they may not be exercised in such a way as to prevent the jury from reflecting a representative cross section of the community served by the court [*People v. Wheeler (1978) 22 Cal. 3d 258, 280, 148 Cal. Rptr. 890, 583 P.2d 748* ; *Di Donato v. Santini (1991) 232 Cal. App. 3d 721, 734, 283 Cal. Rptr. 751* ; *Holley v. J & S Sweeping Co. (1983) 143 Cal. App. 3d 588, 592-593, 192 Cal. Rptr. 74]* . For discussion of the prohibition against use of peremptory challenges based on group bias, see *§ 322.42*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionPeremptory Challenges

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27-322 California Forms of Pleading and Practice--Annotated § 322.42

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§ 322.42 Prohibition Against Peremptory Challenges Based on Group Bias

[1] "Group Bias" and "Cognizable Group" Defined

A party may not use a peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds [*Code Civ. Proc. § 231.5*]. This provision codifies a rule of constitutional origin, prohibiting peremptory exclusion of prospective jurors on the basis of "group bias." "Group bias" is defined as a presumption that certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, or similar grounds [*People v. Johnson (1989) 47 Cal. 3d 1194, 1215, 255 Cal. Rptr. 569, 767 P.2d 1047* ; *Di Donato v. Santini (1991) 232 Cal. App. 3d 721, 732, 283 Cal. Rptr. 751* (reversing because of exclusion of women for discriminatory purpose through peremptory challenges)].

All "cognizable groups" in society come within the rule prohibiting the discriminatory exclusion of prospective jurors from the jury panel [*Di Donato v. Santini (1991) 232 Cal. App. 3d 721, 733, 283 Cal. Rptr. 751* (citing *People v. Wheeler (1978) 22 Cal. 3d 258, 265-272, 148 Cal. Rptr. 890, 583 P.2d 748*)]. A cognizable group exists if its members share a common perspective arising from their life experience in the group and no other members of the community are capable of adequately representing the perspective of the group assertedly excluded [*People v. Cervantes (1991) 233 Cal. App. 3d 323, 334, 284 Cal. Rptr. 410]* . Thus, for example, a party to a civil lawsuit may not use peremptory challenges to exclude women from the jury panel on the basis of their gender [*Di Donato v. Santini (1991) 232 Cal. App. 3d 721, 733, 283 Cal. Rptr. 751* ; *see also People v. Howard (1992) 1 Cal. 4th 1132, 1157-1159, 5 Cal. Rptr. 2d 268, 824 P.2d 1315* (recognizing gender as cognizable group)].

"Cognizable groups" identified by case law and codified by statute include race, color, religion, sex, national origin, and sexual orientation [*see Code Civ. Proc. § 231.5*]. This list is not exhaustive, however, and other groups may be recognized where the peremptory exclusion is attempted on "similar grounds" [*see Code Civ. Proc. § 231.5*]. For further discussion of the groups held by California courts to be "cognizable" and "not cognizable" for purposes of a peremptory

challenge based on group bias, see *California Trial Guide, Unit 10, Voir Dire Examination, § 10.80[3][d]* (Matthew Bender).

[2] Prohibition Applies to Civil and Criminal Cases

The rule forbidding group bias peremptory challenges extends to civil cases as well as criminal cases. The same three-part showing (*see* [5], *below*) is required to rebut the presumption of constitutional use of peremptory challenges in civil cases as is applied in criminal cases [*see Di Donato v. Santini (1991) 232 Cal. App. 3d 721, 734, 738, 283 Cal. Rptr. 751* ; *Holley v. J & S Sweeping Co. (1983) 143 Cal. App. 3d 588, 591-593, 192 Cal. Rptr. 74* ; *see also People v. Wheeler (1978) 22 Cal. 3d 258, 280, 148 Cal. Rptr. 890, 583 P.2d 748* (endorsing view that rejects conceptual distinction between criminal and civil proceedings in jury selection process)].

[3] Bases of Prohibition

[a] State Constitution and Statute

Peremptory challenges reflecting group bias and predicated on the challenged jurors' inclusion in an identifiable group distinguished on racial, gender, religious, ethnic, or similar grounds are unconstitutional under the California Constitution [*People v. Wheeler (1978) 22 Cal. 3d 258, 280, 148 Cal. Rptr. 890, 583 P.2d 748* ; *Holley v. J & S Sweeping Co. (1983) 143 Cal. App. 3d 588, 591-592, 192 Cal. Rptr. 74]* .

The constitutional prohibition against improper use of peremptory challenges is afforded by the representative-cross-section guarantee of *Cal. Const., art. I, § 16*, as implemented by the provisions of *Code Civ. Proc. §§ 191* (legislative policy statement), 197 (sources for juror selection), and 204 (exemption from jury service) [*see Di Donato v. Santini (1991) 232 Cal. App. 3d 721, 738 n.7, 283 Cal. Rptr. 751* ; *see also § 322.33*, discussing source lists for prospective jurors]. *Code Civ. Proc. § 231.5*, which sets out and codifies the rule prohibiting peremptory exclusions based on group bias, is based on "the constitutional concept of jury trial," that is, the representative-cross-section guarantee of *Cal. Const., art. I, § 16* [*see* 2000 Stats., ch. 43, § 1(a)(2)].

Additionally, the *equal protection clause* in *Cal. Const., art. I, § 7* prohibits discriminatory use of peremptory challenges [*see Di Donato v. Santini (1991) 232 Cal. App. 3d 721, 737-738 n.7, 283 Cal. Rptr. 751]* .

[b] Federal Constitution

The federal constitutional prohibition against the use of peremptory challenges to exclude potential jurors on the basis of group bias extends to the trial of civil cases in California courts [*see Di Donato v. Santini (1991) 232 Cal. App. 3d 721, 737-738, 283 Cal. Rptr. 751* (citing *Edmonson v. Leesville Concrete Co. (1991) 500 U.S. 614, 619, 111 S. Ct. 2077, 114 L. Ed. 2d 660*)]. In *Edmonson*, the United States Supreme Court applied the equal protection component of the *Fifth Amendment's Due Process Clause* to hold that a race-based exclusion of jurors in a civil case through peremptory challenge violates the equal protection rights of the challenged jurors [*Edmonson v. Leesville Concrete Co. (1991) 500 U.S. 614, 619, 111 S. Ct. 2077, 114 L. Ed. 2d 660* ; *see Montiel v. City of Los Angeles (9th Cir. 1993) 2 F.3d 335, 340* (*equal protection clause of Fourteenth Amendment of U.S. Constitution* precludes race-based exclusion of prospective juror who is of different race than defendant)].

Although *U.S. Const., amend. V*, is not directly applicable to the states, *U.S. Const., amend. XIV*, provides similar restraints on state action [*see Di Donato v. Santini (1991) 232 Cal. App. 3d 721, 737 n.7, 283 Cal. Rptr. 751* (citing *Brown v. Board of Educ. (1954) 347 U.S. 483, 495, 74 S. Ct. 686, 98 L. Ed. 873*); *see also J.E.B. v. Alabama ex rel. T.B. (1994) 511 U.S. 127, 145-146, 114 S. Ct. 1419, 128 L. Ed. 2d 89* (gender-based exclusion of jurors in paternity and child support suit violates *Fourteenth Amendment of United States Constitution*)]. In applying the test set forth in *Edmonson* for determining whether state action is present, the court in *Di Donato* concluded that the exercise of peremptory challenges in state court constitutes state action because [*Di Donato v. Santini (1991) 232 Cal. App. 3d*

721, 737, 283 Cal. Rptr. 751] :

- The right is entirely a creation of state law.

- The private litigant fairly may be deemed to be a governmental actor because he or she makes use of state procedures with the overt, significant assistance of the state and receives the benefits from it.

- The challenges are employed to select a "quintessential governmental body," the jury.

- The injury in the form of discrimination is aggravated in a unique way because the government has permitted it to occur within the courtroom.

[4] Presumption of Constitutional Exercise of Peremptory Challenges

A party exercising a peremptory challenge is presumed to be doing so on a constitutionally permissible ground. However, this presumption is rebuttable [*People v. Wheeler (1978) 22 Cal. 3d 258, 272, 276, 148 Cal. Rptr. 890, 583 P.2d 748]* .

To rebut the presumption of constitutionality, a party who believes the opponent is using peremptory challenges to strike jurors on the ground of group bias alone must raise the point in a timely fashion and make a prima facie case of discrimination to the satisfaction of the court [*People v. Mills (2010) 48 Cal. 4th 158, 173-174, 106 Cal. Rptr. 3d 153, 226 P.3d 276* ; *People v. Jones (1998) 17 Cal. 4th 279, 294, 70 Cal. Rptr. 2d 793, 949 P.2d 890*]. To be timely, the prima facie case must be made before the jury is sworn. Accordingly, the trial court may not delay its decision on a challenge to the selection process until after the panel has been sworn [*People v. Johnson (1989) 47 Cal. 3d 1194, 1216, 255 Cal. Rptr. 569, 767 P.2d 1047* ; *Di Donato v. Santini (1991) 232 Cal. App. 3d 721, 740-741, 283 Cal. Rptr. 751]* . For additional discussion, see *California Trial Guide, Unit 10, Voir Dire Examination, §§ 10.80, 10.90* (Matthew Bender).

[5] Rebutting Presumption of Constitutional Exercise of Peremptory Challenges

[a] Establishing Prima Facie Case of Group Bias

[i] Elements of Prima Facie Case

To rebut the presumption that the peremptory challenges were exercised on a constitutionally permissible ground, the party claiming group bias in the exercise of those challenges must do the following [*People v. Williams (1997) 16 Cal. 4th 635, 663-664, 66 Cal. Rptr. 2d 573, 941 P.2d 752* ; *People v. Williams (1997) 16 Cal. 4th 153, 187, 66 Cal. Rptr. 2d 123, 940 P.2d 710* ; *People v. Wheeler (1978) 22 Cal. 3d 258, 280, 148 Cal. Rptr. 890, 583 P.2d 748* ; *Di Donato v. Santini (1991) 232 Cal. App. 3d 721, 738-739, 283 Cal. Rptr. 751* ; *Holley v. J & S Sweeping Co. (1983) 143 Cal. App. 3d 588, 591, 192 Cal. Rptr. 74* ; *cf. People v. Walker (1998) 64 Cal. App. 4th 1062, 1086-1089, 75 Cal. Rptr. 2d 871* (no prima facie showing established despite challenging most black potential jurors)]:

- Make as complete a record as is feasible of the circumstances. In *Di Donato*, a demonstration of the number and identities of the excluded jurors was sufficient in light of the fact that a written record of proceedings, such as the reviewing court is able to scrutinize on appeal, was unavailable at the time the oral objections and written motion were made [*Di Donato v. Santini (1991) 232 Cal. App. 3d 721, 739, 283 Cal. Rptr. 751]* .

- Establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule; *see* [1] and [3][a], *above*.

- Show from all the circumstances there is a strong likelihood those persons are being challenged because of their group association rather than because of any specific bias.

For additional discussion, see *California Trial Guide, Unit 10, Voir Dire Examination, §§ 10.80, 10.90* (Matthew Bender).

[ii] Examples of Supporting Evidence

The California Supreme Court in *Wheeler* noted the following types of evidence as relevant to establish that the peremptory challenges were exercised on the basis of group bias [*People v. Wheeler (1978) 22 Cal. 3d 258, 280-281, 148 Cal. Rptr. 890, 583 P.2d 748]* :

- Most or all of the members of the identified group were struck from the venire [*see* *Holley v. J & S Sweeping Co. (1983) 143 Cal. App. 3d 588, 590, 592-593, 192 Cal. Rptr. 74* (peremptorily excused three of four black jurors without any preliminary voir dire questioning)].

- A disproportionate number of the offending parties' peremptory challenges were used against the group.

- The jurors in question share only this one characteristic--their membership in the group--and that, in all other respects, they are as heterogeneous as the community as a whole. In *Di Donato*, the appellate court did not believe respondent's claim on appeal that excuses were used because the women were divorced, not because they were women. Respondent had excused two females who had never been married and a female prospective alternate juror who was married, but retained one woman who had been divorced and one man who had terminated a long-term relationship [*Di Donato v. Santini (1991) 232 Cal. App. 3d 721, 742, 283 Cal. Rptr. 751]* .

- The offending party failed to engage the jurors against whom the peremptory challenges were exercised in more than desultory voir dire or to ask them any questions at all [*see* *Holley v. J & S Sweeping Co. (1983) 143 Cal. App. 3d 588, 590, 592-593, 192 Cal. Rptr. 74* (peremptorily excused three of four black jurors without any preliminary voir dire questioning)].

The criminal defendant (and, presumably, the objecting party in a civil action) need not be a member of the excluded group to complain of a violation of the representative cross-section rule [*see* *People v. Wheeler (1978) 22 Cal. 3d 258, 281, 148 Cal. Rptr. 890, 583 P.2d 748* (citing *Taylor v. Louisiana (1975) 419 U.S. 522, 535-537, 95 S. Ct. 692, 42 L. Ed. 2d 690* (reversal of state conviction of male defendant on ground that women had, in effect, been totally excluded from jury service), and *Peters v. Kiff (1972) 407 U.S. 493, 503-504, 92 S. Ct. 2163, 33 L. Ed. 2d 83* (reversal of state conviction of white defendant on showing that blacks had been arbitrarily excluded from grand and petit jury service)], but the defendant's or complaining party's membership in the excluded group can be an indicator of discriminatory exclusion [*People v. Turner (2001) 90 Cal. App. 4th 413, 417, 109 Cal. Rptr. 2d 138]* .

A prima facie showing may be made even though a member of the cognizable group remains on the jury [*see* *People v. Cervantes (1991) 233 Cal. App. 3d 323, 333, 284 Cal. Rptr. 410]* .

[b] Implied Finding of Prima Facie Case

Without expressly declaring so, a trial court may impliedly conclude that a party has established a prima facie case [*see* *Di Donato v. Santini (1991) 232 Cal. App. 3d 721, 741, 283 Cal. Rptr. 751]* . In determining whether to infer a trial court's finding of a prima facie case under *Wheeler*, one must look to the whole record and examine the court's remarks in context [*see* *Di Donato v. Santini (1991) 232 Cal. App. 3d 721, 741, 283 Cal. Rptr. 751* (citing *People v. Hayes*

(1990) 52 Cal. 3d 577, 605, 276 Cal. Rptr. 874, 802 P.2d 376)].

In the context of a criminal case, when a trial court inquires about the prosecutor's justifications, the court may, under the circumstances, be deemed to have made an implied finding of a prima facie showing [*see People v. Turner (1994) 8 Cal. 4th 137, 165-167, 32 Cal. Rptr. 2d 762, 878 P.2d 521* (distinguishing *People v. Fuentes (1991) 54 Cal. 3d 707, 716-717, n.5, 286 Cal. Rptr. 792, 818 P.2d 75* , and holding that prima facie finding by trial court may be inferred by court's request that prosecution justify its challenges, unless request was made only to clarify record in case of an appeal); *see also Hernandez v. New York (1991) 500 U.S. 352, 359, 111 S. Ct. 1859, 114 L. Ed. 2d 395* (lack of ruling on threshold issue irrelevant because prosecutor explained use of peremptory challenge without court's prompting or inquiry and court actually considered explanations)].

The mere asking of counsel whether he or she wishes to respond to a written motion raising group bias objections, however, cannot be construed as a request to explain or comment on counsel's exercise of peremptory challenges [*see Di Donato v. Santini (1991) 232 Cal. App. 3d 721, 741, 283 Cal. Rptr. 751]* . Further, when the court has inquired into the prosecutor's justifications for the sole purpose of completing the record for appeal, that inquiry does not negate or otherwise render moot any previous ruling that no prima facie showing was made [*People v. Turner (1994) 8 Cal. 4th 137, 167, 32 Cal. Rptr. 2d 762, 878 P.2d 521]* .

The California Supreme Court expressed and reiterated its concern that a trial court's ruling by implication may confuse the parties as to their respective obligations under *Wheeler* [*see People v. Fuentes (1991) 54 Cal. 3d 707, 716 n.5, 286 Cal. Rptr. 792, 818 P.2d 75* ; *People v. Turner (1986) 42 Cal. 3d 711, 719 n.3, 230 Cal. Rptr. 656, 726 P.2d 102]* . An express ruling as to whether a prima facie case has been established therefore is preferable [*see People v. Turner (1994) 8 Cal. 4th 137, 167, 32 Cal. Rptr. 2d 762, 878 P.2d 521* (citing *People v. Fuentes (1991) 54 Cal. 3d 707, 716-717, n.5, 286 Cal. Rptr. 792, 818 P.2d 75*)].

[6] Justifying Exercise of Peremptory Challenges

[a] Shift of Burden of Justification

Once the trial court rules a prima facie showing has been made, as discussed in [5][a], *above*, the peremptory attribute of the challenges is lost and the focus turns to justifying the challenges on some acceptable specific basis. The sole issue then pending is the adequacy of the justifications [*People v. Cervantes (1991) 233 Cal. App. 3d 323, 334, 284 Cal. Rptr. 410]* .

At this stage, the burden shifts to the party exercising the peremptory challenges to demonstrate that the challenges were exercised on a neutral basis related to the particular case to be tried [*Di Donato v. Santini (1991) 232 Cal. App. 3d 721, 740, 283 Cal. Rptr. 751* ; *cf. People v. Hayes (1990) 52 Cal. 3d 577, 605, 276 Cal. Rptr. 874, 802 P.2d 376]* . The allegedly offending party must satisfy the court that the party exercised the peremptory challenges on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses, that is, for reasons of specific bias, or at least for a neutral reason related to the issues of the case [*People v. Williams (1997) 16 Cal. 4th 153, 188, 66 Cal. Rptr. 2d 123, 940 P.2d 710* ; *People v. Johnson (1989) 47 Cal. 3d 1194, 1216, 255 Cal. Rptr. 569, 767 P.2d 1047* ; *People v. Tapia (1994) 25 Cal. App. 4th 984, 1012-1014, 30 Cal. Rptr. 2d 851* ; *Holley v. J & S Sweeping Co. (1983) 143 Cal. App. 3d 588, 592, 192 Cal. Rptr. 74* .

Once a trial court finds a prima facie case of group bias as to the excusal of one prospective juror, it need not *sua sponte* require the party exercising the peremptory challenge to provide race-neutral explanations for all challenges made thus far to the members of the group in question, including those upon which the court had ruled earlier. However, upon request it may do so when the party's subsequent challenge to a juror of a protected class casts the party's earlier challenges of the jurors of that same protected class in a new light, such that it gives rise to a prima facie showing of group bias as to those earlier jurors. But the burden is on the party making the later motion to so clarify, for that party

ultimately has the burden of proof [*People v. Avila (2006) 38 Cal. 4th 491, 548-553, 43 Cal. Rptr. 3d 1, 133 P.3d 1076]* .

The excusing party's failure to satisfy the burden to produce, for whatever reason, becomes evidence that is added to the inference of discrimination raised by the prima facie showing, but it does not end the inquiry. The trial court then moves on to consider all the evidence to determine whether the actual reason for the strike violated the opposing party's equal protection rights [*Yee v. Duncan (9th Cir. 2006) 463 F.3d 893, 898]* . Thus, for example, in a criminal proceeding, a prosecutor's failure to provide a reason for striking a potential juror is not an automatic violation of the defendant's equal protection rights. The prosecutor's failure, through, for example, an assertion of an inability to remember the reason for striking the prospective juror, is evidence of discrimination. That evidence notwithstanding, the court must still proceed to evaluate the prosecutor's asserted justifications before it can determine that purposeful discrimination has occurred [*Yee v. Duncan (9th Cir. 2006) 463 F.3d 893, 900]* .

For additional discussion, see *California Trial Guide, Unit 10, Voir Dire Examination, §§ 10.80, 10.90* (Matthew Bender).

[b] Evaluating Claims of Justification

In evaluating the justifications given, the trial court must address the challenged jurors individually to determine whether any one of them has been improperly excluded. That process requires the court to determine not only that a valid reason existed for the exercise of a particular peremptory challenge, but also that the reason actually prompted the exercise of the particular peremptory challenge [*People v. Fuentes (1991) 54 Cal. 3d 707, 711, 720, 286 Cal. Rptr. 792, 818 P.2d 75]* .

Reviewing courts accord great deference to the discretion of the trial court in distinguishing bona fide reasons from sham excuses [*see People v. Mills (2010) 48 Cal. 4th 158, 175-176, 106 Cal. Rptr. 3d 153, 226 P.3d 276* ; *People v. Fuentes (1991) 54 Cal. 3d 707, 714, 720, 286 Cal. Rptr. 792, 818 P.2d 75]* .

It is prejudicial error for a court to overrule a group bias objection in the absence of a rebuttal showing that the peremptory challenges were based on grounds of specific bias [*Di Donato v. Santini (1991) 232 Cal. App. 3d 721, 740, 283 Cal. Rptr. 751* ; *Holley v. J & S Sweeping Co. (1983) 143 Cal. App. 3d 588, 592, 192 Cal. Rptr. 74]* . Further, a prima facie case cannot be rebutted by a mere denial by the offending party that the party had a discriminatory motive [*see Di Donato v. Santini (1991) 232 Cal. App. 3d 721, 741-742, 283 Cal. Rptr. 751]* .

When a party has established a prima facie case of discrimination in the other party's use of a peremptory challenge during jury selection, and the other party is unable to recall the basis for the challenge, the trial court may not substitute findings of the other party's sincerity, together with circumstantial evidence indicating a lack of a discriminatory motive, for the other party's failure to offer a non-discriminatory explanation for the challenge [*see Yee v. Duncan (9th Cir. 2006) 441 F.3d 851, 856-863]* .

The evidentiary standard under which the justification should be examined is preponderance of the evidence; *i.e.*, the opponent of the peremptory challenge does not have the burden of proving purposeful race discrimination by clear and convincing evidence, but, rather, by preponderance of the evidence as to whether the neutral reasons offered to justify the peremptory challenge were genuine or pretextual [*People v. Hutchins (2007) 147 Cal. App. 4th 992, 996-999, 55 Cal. Rptr. 3d 105]* .

[c] Examples of Justified Use of Peremptory Challenges

The following are some examples of neutral, and hence appropriate use of, peremptory challenges:

- Challenged jurors had skeptical attitude toward the criminal justice system, which could not be seen to be so prevalent among African-Americans that it could be considered a proxy for race and, as a result, peremptory challenges based on such an attitude could not be deemed discriminatory [*People v. Calvin (2008) 159 Cal. App. 4th 1377, 1383-1389, 72 Cal. Rptr. 3d 300*].

- Challenged juror gave conflicting and possibly untrue answers to voir dire questions regarding whether juror had followed the case in the media [*People v. Jones (1998) 17 Cal. 4th 279, 294, 70 Cal. Rptr. 2d 793, 949 P.2d 890]* .

- Challenged juror's answers to voir dire questions were rambling, not entirely credible, and juror did not appear to be someone who was "emotionally of a mind to well and truly try a capital case" [*People v. Williams (1997) 16 Cal. 4th 635, 664-665, 66 Cal. Rptr. 2d 573, 941 P.2d 752]* .

- Family circumstances similar to defendant's, i.e., challenged juror hadsons the same age as defendant and all three sons had criminal records and drug problems [*People v. Williams (1997) 16 Cal. 4th 635, 664-665, 66 Cal. Rptr. 2d 573, 941 P.2d 752]* .

- Challenged juror was acquainted with defense attorney and worked with defense attorney's wife on volunteer committees [*People v. Williams (1997) 16 Cal. 4th 635, 664-665, 66 Cal. Rptr. 2d 573, 941 P.2d 752]* .

- Challenged juror could not vote for death penalty [*People v. Catlin (2001) 26 Cal. 4th 81, 115-119, 109 Cal. Rptr. 2d 31, 26 P.3d 357* ; *People v. Jones (1998) 17 Cal. 4th 279, 293-294, 70 Cal. Rptr. 2d 793, 949 P.2d 890* ; *People v. Williams (1997) 16 Cal. 4th 635, 665-666, 66 Cal. Rptr. 2d 573, 941 P.2d 752]* or had serious reservations and would be reluctant to impose the death penalty [*People v. Catlin (2001) 26 Cal. 4th 81, 115-119, 109 Cal. Rptr. 2d 31, 26 P.3d 357]* .

- Mistake on the part of the challenging attorney ("I got her confused") [*People v. Williams (1997) 16 Cal. 4th 153, 188-190, 66 Cal. Rptr. 2d 123, 940 P.2d 710]* .

- Although place of residence may be an ethnic badge and proxy for race, a prospective juror who had gone to a high school that was attended by members of the gang to which defendant had belonged, and could be expected to be sympathetic to members of that gang, was properly excluded [*People v. Williams (1997) 16 Cal. 4th 153, 190-191, 66 Cal. Rptr. 2d 123, 940 P.2d 710]* .

- Arrest or conviction of a juror's relative provides a legitimate, group-neutral basis for exclusion [*People v. Turner (2001) 90 Cal. App. 4th 413, 419, 109 Cal. Rptr. 2d 138]* .

- Prosecutor's belief that Jehovah's Witnesses "could not judge anybody at all" and seemed to have a hard time with criminal trials. Challenge on the basis of a juror's relevant personal values is not improper even though those views may be founded in the juror's religious beliefs [*People v. Martin (1998) 64 Cal. App. 4th 378, 381, 385, 75 Cal. Rptr. 2d 147]* .

- Challenged juror said she would hold prosecutor to higher standard of proof [*People v. Mills (2010) 48 Cal. 4th 158, 180-181, 106 Cal. Rptr. 3d 153, 226 P.3d 276]* .

[7] Procedure if Burden of Justification Is Not Sustained

If the court finds the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted [*see* *People v. Smith (1993) 21 Cal. App. 4th 342, 344-345, 25 Cal. Rptr. 2d*

850 (citing *Wheeler); People v. Cervantes (1991) 233 Cal. App. 3d 323, 333, 284 Cal. Rptr. 410]* . In that event, the court must dismiss the jurors thus far selected, quash any remaining venire, and summon a different venire, and the jury selection process may begin anew [*People v. Willis (2002) 27 Cal. 4th 811, 813, 118 Cal. Rptr. 2d 301, 43 P.3d 130* ; *Holley v. J & S Sweeping Co. (1983) 143 Cal. App. 3d 588, 592, 192 Cal. Rptr. 74* (citing *Wheeler*)].

The court does not have the option of merely reseating the improperly challenged juror. Failure to quash any remaining venire and call a new panel is prejudicial per se [*People v. Smith (1993) 21 Cal. App. 4th 342, 345-346, 25 Cal. Rptr. 2d 850]* .

For additional discussion, see *California Trial Guide, Unit 10, Voir Dire Examination, § 10.80[3][g]* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionPeremptory ChallengesCriminal Law & ProcedureJuries & JurorsPeremptory ChallengesProhibitionsEvidenceInferences & PresumptionsRebuttal of Presumptions

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PART II. LEGAL BACKGROUND
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27-322 California Forms of Pleading and Practice--Annotated § 322.43

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.43 "Swearing In" or Empaneling of Trial Jury

When each side taking peremptory challenges passes consecutively, the jury is deemed accepted and then sworn, unless the court orders otherwise for good cause [*Code Civ. Proc. § 231(e)*]. The swearing of the jury consists of obtaining an "acknowledgment and agreement" from the jurors, stating that they will well and truly try the matter before them and render a true verdict according to only the evidence and the instructions of the court [*Code Civ. Proc. § 232(b)*].

Once a jury has been passed for cause and sworn, the time for voir dire and exercising peremptory challenges is over [*Bly-Magee v. Budget Rent-A-Car Corp. (1994) 24 Cal. App. 4th 318, 323-324, 29 Cal. Rptr. 2d 330]* .

Under the Trial Jury Selection and Management Act [*Code Civ. Proc. § 190 et seq.*], a trial court does not have discretion to reopen jury selection after the trial jury has been impaneled, but before alternate jurors are sworn [*People v. Cottle (2006) 39 Cal. 4th 246, 253-258, 46 Cal. Rptr. 3d 86, 138 P.3d 230]* . If a juror becomes unable to serve, *Code Civ. Proc. §§ 233, 234* in civil cases provide for the removal of a juror on a showing of good cause [*People v. Cottle (2006) 39 Cal. 4th 246, 259, 46 Cal. Rptr. 3d 86, 138 P.3d 230* ; for discussion of discharge of a juror and its effect on the trial, *see § 322.53*].

For discussion of function and duties of trial jurors, see *§ 322.50* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionGeneral Overview

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27-322 California Forms of Pleading and Practice--Annotated § 322.44

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.44 Selecting Alternate Jurors

A superior court judge may direct the calling of additional jurors, known as alternate jurors, when a trial is likely to be protracted or on stipulationof the parties [*Code Civ. Proc. § 234*; *see* form for stipulation at § 322.101]. The court enters the reason for calling alternate jurors in the minutes of the court, and then, immediately after the jury is impaneled and sworn, the court directs the calling of one or more alternate jurors [*Code Civ. Proc. § 234*].

Alternate jurors are drawn from the same source and in the same manner as regular jurors. They must have the same qualifications as regular jurors and are subject to the same examination [*Code Civ. Proc. § 234*; for discussion of qualifications of jurors and voir dire examination, *see §§ 322.32, 322.37*, respectively]. They are also subject to the same challenges, except that each side, or each defendant, as provided in *Code Civ. Proc. § 231*, is entitled to as many peremptory challenges to the alternate jurors as there are alternate jurors called [*Code Civ. Proc. § 234*; *see* discussion of peremptory challenges at § 322.39[5]].

Alternate jurors take the same oath as regular jurors. They are seated so that they have equal power and facilities to hear and see the proceedings [*Code Civ. Proc. § 234*; *see generally Judicial Council of California Civil Jury Instructions, CACI Nos. 111* ("Instruction to Alternate Jurors"), 5014 ("Substitution of Alternate Juror") (LexisNexis Matthew Bender, Official Publisher)].

For discussion of duties of alternate jurors, see *§ 322.52*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionPeremptory ChallengesCriminal Law & ProcedureJuries & JurorsDisqualification & Removal of JurorsAlternate Jurors

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27-322 California Forms of Pleading and Practice--Annotated § 322.45

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.45 Statements to Jury Panel

Before the examination of prospective jurors, the trial judge may, in his or her discretion, permit brief opening statements by counsel to the jury panel [*Cal. Rules of Ct., Rule 2.1034*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsOpening StatementsGeneral Overview

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27-322 California Forms of Pleading and Practice--Annotated § 322.46

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.46 Jury Pre-Instructions

Immediately after the jury is sworn, the trial judge may, in his or her discretion, preinstruct the jury concerning the elements of the charges or claims, its duties, its conduct, the order of proceedings, the procedure for submitting written questions for witnesses as set forth in *Cal. Rules of Ct., Rule 2.1033* [*see § 322.57[4]*] if questions are allowed, and the legal principles that will govern the proceeding [*Cal. Rules of Ct., Rule 2.1035*; *see Code Civ. Proc. § 607* (order of proceedings)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview

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AUTHOR: William G. McDevitt Editorial Consultant

[Reserved]

§§ 322.47[Reserved]

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27-322 California Forms of Pleading and Practice--Annotated § 322.50

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.50 Juror Duties and Juror Misconduct

When jurors are permitted to separate during trial or after the case is submitted to them, they are admonished by the court that it is their duty [*Code Civ. Proc. § 611*; *see Judicial Council of California Civil Jury Instructions, CACI No. 100* ("Preliminary Admonitions") (LexisNexis Matthew Bender, Official Publisher)]:

- Not to converse with other persons or allow other persons to address them concerning the subject of the trial.

- Not to form or express an opinion on the subject of the trial until the case is submitted to them.

It is misconduct for a juror during trial to discuss the matter under investigation outside the court or to receive any information on the subject of the litigation except in open court and in the manner provided by law [*People v. Cissna (2010) 182 Cal. App. 4th 475, 486-487, -- Cal. Rptr. 3d* -- (juror spoke daily about merits of case with nonjuror friend); *People ex rel. Dep't of Public Works v. Curtis (1967) 255 Cal. App. 2d 378, 390, 63 Cal. Rptr. 138* (juror attended real estate course dealing directly with real estate appraiser during trial concerning property valuation and discussed appraiser's qualifications with other jurors during deliberationsbased on information from real estate course)]. For example, it was misconduct for a juror to say at recess that he could bring in a verdict already when that juror had stated on voir dire that he could keep an open mind until after the evidence and applicable law were presented [*Deward v. Clough (1966) 245 Cal. App. 2d 439, 443-445, 54 Cal. Rptr. 68]* .

Juror misconduct is a statutory ground for granting a motion for a new trial [*Code Civ. Proc. § 657(2)*] and a nonstatutory ground for granting a motion for mistrial [*Hilliard v. A. H. Robins Co. (1983) 148 Cal. App. 3d 374, 408-409, 196 Cal. Rptr. 117]* . For detailed discussion of juror misconduct, whether before or during deliberations, in the context of these motions, see respectively Ch. 371, *Motions After Trial*, § 357.60 et seq., and Ch. 551, *Trial*, § 551.150 et seq.

Legal Topics:

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

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27-322 California Forms of Pleading and Practice--Annotated § 322.51

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.51 Duty Not to Accept Bribes

Any juror who asks, receives, or agrees to receive any bribe on any understanding that his or her vote be influenced by the bribe is punishable by imprisonment [*Penal Code § 93*]. Any juror who promises to give a verdict for or against any party or who willfully and corruptly permits any communication to be made to him or her is punishable by imprisonment or a fine [*Penal Code § 93*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsMisconductCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsBriberyCommercial BriberyPenaltiesCriminal Law & ProcedureJuries & JurorsJury DeliberationsJuror Misconduct

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27-322 California Forms of Pleading and Practice--Annotated § 322.52

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.52 Duties of Alternate Jurors

Alternate jurors attend the trial in the company of regular jurors, are subject to punishment for contempt for failure to attend trial, and must obey court orders and admonitions [*see Judicial Council of California Civil Jury Instructions, CACI No. 111* (LexisNexis Matthew Bender, Official Publisher) (alternate jurors observe same trial and are bound by same rules that govern conduct of jurors sitting on panel)]. They are seated so that they have equal power and facilities to hear and see the proceeding. If, during trial, regular jurors are kept in custody, the alternate jurors are kept with them. On submission of the case to the jury, the alternate jurors are kept in custody of the sheriff or marshal and refused communication except on court order. Except as provided by *Code Civ. Proc. § 234*, alternate jurors are not discharged until the regular jurors are discharged [*Code Civ. Proc. § 234*].

Alternate jurors do not participate in deliberation unless ordered by the court [*Code Civ. Proc. § 234*]. Unless formally substituted, an alternate juror is prohibited from entering the jury room during the deliberations of regular jurors [*People v. Adame (1973) 36 Cal. App. 3d 402, 405, 111 Cal. Rptr. 462]* . For discussion of substituting an alternate juror on discharge of a regular juror, see *§ 322.53[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureSanctionsContemptGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesContemptGeneral OverviewCriminal Law & ProcedureJuries & JurorsDisqualification & Removal of JurorsAlternate Jurors

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27-322 California Forms of Pleading and Practice--Annotated § 322.53

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.53 Discharge of Juror and Effect on Trial

[1] Discharge of Juror

If, before the jury has returned its verdict, a juror dies, becomes ill, or for other good cause is unable to perform his or her duty, or if a juror requests a discharge for good cause, the court may order that juror discharged [*see Code Civ. Proc. §§ 233, 234*]. A juror may be discharged even though the juror is physically capable of deliberating.

ILLUSTRATION:

Failure to Perform Duty. The discharge of one juror was upheld because the trial court concluded the juror "failed to perform his duty to deliberate before reaching his decision. The juror did not answer the questions posed to him by other jurors, did not sit at the table with the other jurors during deliberations, acted as if he had already made up his mind before hearing the whole case, and did not look at the two victims in the courtroom." The juror's misconduct in taking his trial notes home despite the trial court's prohibition also justified his discharge [*People v. Thomas (1994) 26 Cal. App. 4th 1328, 1332-1333, 32 Cal. Rptr. 2d 177* ; *see also People v. Williams (2001) 25 Cal. 4th 441, 106 Cal. Rptr. 2d 295, 21 P.3d 1209* (juror who refuses to follow court's instructions and apply law as instructed is unable to perform duty; trial court did not abuse discretion in discharging juror who refused to adhere court's instruction to uphold law regarding rape and statutory rape because juror believed law to be wrong and would not hear discussion on subject)].

The court must exercise caution in determining whether a juror is refusing to deliberate and thus should be discharged in order to protect the sanctity of jury deliberations. The court may not dismiss a juror during deliberations because the juror harbors doubts about the sufficiency of the prosecution's evidence. It is often appropriate for the trial court that questions whether all of the jurors are participating in deliberations to reinstruct the jurors regarding their duty to deliberate and to permit the jury to continue before making further inquiries that could intrude on the sanctity of the deliberations. When reinstruction does not resolve the problem and the court is on notice that there may be grounds to discharge a juror during deliberations, it must conduct whatever inquiry is reasonably necessary to determine whether

grounds for discharge exist and discharge the juror if it appears as a demonstrable reality that the juror is unable or unwilling to deliberate [*People v. Cleveland (2001) 25 Cal. 4th 466, 106 Cal. Rptr. 2d 313, 21 P.3d 1225]* .

[2] When Alternate Juror Available

When a juror is discharged, the court may draw the name of an alternate juror. The alternate then takes the original juror's place in the jury boxand is subject to the same rules and regulations as an original juror [*see Code Civ. Proc. §§ 233, 234*; *see also §§ 322.50 -322.52*].

When a juror is dismissed for good cause after jury deliberations have begun and an alternate juror is substituted in, the court must instruct the jury to set aside and disregard all past deliberations and begin deliberating anew; to do otherwise may constitute reversible error [*Griesel v. Dart Indus., Inc. (1979) 23 Cal. 3d 578, 585, 153 Cal. Rptr. 213, 591 P.2d 503 , disapproved on other grounds by Privette v. Superior Court (1993) 5 Cal. 4th 689, 696, 21 Cal. Rptr. 2d 72, 854 P.2d 721* (construing former *Code Civ. Proc. § 605* to require instruction); *see Judicial Council of California Civil Jury Instructions, CACI No. 5014* ("Substitution of Alternate Juror") (LexisNexis Matthew Bender, Official Publisher); *see also People v. Collins (1976) 17 Cal. 3d 687, 131 Cal. Rptr. 782, 552 P.2d 742* (substitution of alternate juror in criminal case after commencement of deliberations does not infringe on constitutional right to jury trial so long as statute is construed to require that court instruct jury to set aside and disregard all past deliberations and begin deliberating anew); *Vaughn v. Noor (1991) 233 Cal. App. 3d 14, 20-21, 284 Cal. Rptr. 222]* .

The fact that a jury reaches its verdict less than an hour after an alternate juror is seated does not necessarily mean that the jury did not properly deliberate anew, even if the jury deliberated for several days before the alternate juror was seated. Such speculation ignores the fact that the alternate was also present during the trial. It is as proper for the alternate juror to reach a decision in a short period of time as it was for the original jury to deliberate for several days [*Mendoza v. Club Car, Inc. (2000) 81 Cal. App. 4th 287, 303, 309-311, 96 Cal. Rptr. 2d 605]* .

[3] When No Alternate Juror Available

If there is no available alternate juror, the court must [*Code Civ. Proc. § 233*]:

- Discharge the jury and impanel a new jury; or
- If all parties consent, continue the trial with the remaining jurors; or
- If all parties consent, swear in another juror and begin the trial anew.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsRemovalsCriminal Law & ProcedureJuries & JurorsDisqualification & Removal of JurorsAlternate JurorsCriminal Law & ProcedureJuries & JurorsDisqualification & Removal of JurorsHardship, Illness & Incapacity

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27-322 California Forms of Pleading and Practice--Annotated § 322.54

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.54 Jurors as Witnesses

Before a juror can be called to testify in a trial in which he or she sits as a member of the jury, that juror must inform the parties of the testimony he or she will give as a witness. The information regarding testimony to be given is conveyed to the parties in a proceeding held out of the presence of the remaining jurors [*Evid. Code § 704(a)*]. A juror is unable to testify if one of the parties to the action objects and, where a party objects, the court must declare a mistrial and order the action assigned for trial before another jury [*Evid. Code § 704(b)*]. When there is no objection, the juror is compelled to testify as a witness [*Evid. Code § 704(d)*].

Both the calling of a juror to testify before the jury as a witness and the objection to the calling of the juror are deemed motions for a mistrial [*Evid. Code § 704(c)*]. For discussion of mistrials generally, see *Ch. 551, Trial, § 551.150* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewEvidenceCompetencyJurorsGeneral Overview

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27-322 California Forms of Pleading and Practice--Annotated § 322.55

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.55 Jury's Viewing of Scene

The trial court may order the jury to view the property that is the subject of the litigation, the place where any relevant event took place, and any object or demonstration relevant and admissible as evidence [*Code Civ. Proc. § 651(a)*]. The entire court, including the jury, court reporter, judge, and necessary officers, then proceeds to the place, property, object, or demonstration to be viewed. The court remains in session throughout the viewing [*Code Civ. Proc. § 651(b)*].

Whether to grant a party's request for a jury viewing of premises where the plaintiff allegedly fell is a matter of discretion for the trial court. In one case, in which the court denied the motion on the ground that photographs adequately depicted the premises and that an injured juror would have difficulty viewing the premises, there was no abuse of discretion [*Akins v. Sonoma County (1967) 67 Cal. 2d 185, 201, 60 Cal. Rptr. 499, 430 P.2d 57]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral Overview

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C. Function and Duties of Juries During Trial

27-322 California Forms of Pleading and Practice--Annotated § 322.56

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.56 Jury Determines Effect and Value of Evidence

A jury determines the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants [*Evid. Code § 312(b)*; *see Judicial Council of California Civil Jury Instructions, CACI No. 106* (LexisNexis Matthew Bender, Official Publisher) (introductory evidence instruction)]. Weighing the evidence presented is the function of a jury [*People v. Rhodes (1971) 21 Cal. App. 3d 10, 23, 98 Cal. Rptr. 249]* .

For example, the jury, as the trier of fact, is the exclusive judge of the credibility of expert witnesses, and it may reject expert testimony in favor of nonexpert testimony or other evidence [*Lauderdale Assocs. v. Department of Health Servs. (1998) 67 Cal. App. 4th 117, 127, 78 Cal. Rptr. 2d 802]* . While it may not arbitrarily disregard uncontradicted and unimpeached testimony of an expert witness [*Krause v. Apodaca (1960) 186 Cal. App. 2d 413, 417, 9 Cal. Rptr. 10]* , it may disregard an expert's testimony and draw its own conclusions from the evidence when the evidence conflicts or the expert's testimony is rebutted [*Wirz v. Wirz (1950) 96 Cal. App. 2d 171, 176, 214 P.2d 839* ; *see also Abbott v. Taz Express (1998) 67 Cal. App. 4th 853, 858, 79 Cal. Rptr. 2d 360* (jury need not be instructed not to "arbitrarily" or "unreasonably" disregard expert testimony if facts on which opinion is based are in dispute or capable of being rejected by jury as untrue or unproved)].

It is within the province of a jury to draw reasonable inferences from the facts shown in evidence. The effect of inferences reasonably drawn is notdestroyed as a matter of law by the contradictory testimony of witnesses [*Donahue v. United Artists Corp. (1969) 2 Cal. App. 3d 794, 807, 83 Cal. Rptr. 131]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewEvidenceHearsayCredibility of DeclarantsGeneral OverviewEvidenceTestimonyCredibilityGeneral Overview

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27-322 California Forms of Pleading and Practice--Annotated § 322.57

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.57 Jury as Trier of Questions of Fact

[1] In General

Issues of fact are tried by a jury [*Code Civ. Proc. §§ 592, 1171* (forcible entry and detainer proceedings); *Evid. Code § 312(a)*; *see Judicial Council of California Civil Jury Instructions, CACI No. 106* (LexisNexis Matthew Bender, Official Publisher) (introductory evidence instruction)]. In addition, a question of fact not put in issue by the pleadings may be tried by a jury on a court order stating the question of fact distinctly and plainly [*Code Civ. Proc. § 309*].

An issue of fact is one in which the evidence introduced will support a decision on either side, that is, reasonable minds could fairly differ as to the answer to the question posed. An issue of fact may become an issue of law only when reasonable minds can draw but one conclusion from the evidence. Consequently, an issue of fact cannot be taken from the jury by a trial court and treated as an issue of law unless only one conclusion is legally deducible and any other conclusion cannot command the support of substantial evidence that will survive appellate review [*Pan Asia Venture Capital Corp. v. Hearst Corp. (1999) 74 Cal. App. 4th 424, 433, 88 Cal. Rptr. 2d 118]* . Issues of fact joined in probate proceedings are tried by a jury in conformity with the rules of civil procedure [Prob. Code § 1280].

For the kinds of cases triable by a jury, see *§ 322.13*.

[2] When Question of Fact May Be Submitted to Jury

To justify the submission of any question of fact to a jury, the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged. It must be such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists [*Mahoney v. Corralejo (1974) 36 Cal. App. 3d 966, 974, 112 Cal. Rptr. 61]* . When there is a conflict in the evidence from which either of two conclusions can be reached, the question must be submitted to a jury [*Dahl-Beck Elec. Co., Inc. v. Rogge (1969) 275 Cal. App. 2d 893, 900, 80 Cal. Rptr. 440]* .

Courts have held that the following questions of fact must be submitted to a jury:

- Whenever there is room for an honest difference of opinion between persons of average intelligence as to whether there has been a breach of duty in a negligence action [*Putensen v. Clay Adams, Inc. (1970) 12 Cal. App. 3d 1062, 1077, 91 Cal. Rptr. 319]* .

- Whether a given set of facts and circumstances creates a dangerous condition [*Bakity v. Riverside County (1970) 12 Cal. App. 3d 24, 30, 90 Cal. Rptr. 541]* .

- Whether there has been a waiver of the right to arbitration [*Sawday v. Vista Irrigation Dist. (1966) 64 Cal. 2d 833, 836, 52 Cal. Rptr. 1, 415 P.2d 816]* .

- What constitutes a reasonable time for removal of title defects after escrow is closed is a question of fact dependent on the situation of the parties, the nature of the transaction, and the facts of the particular case [*Nebo v. Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 222, 228, 98 Cal. Rptr. 237]* .

- Good or bad faith in the context of sharing settlement money between wrongful death and personal injury claimants [*River Garden Farms, Inc. v. Superior Court (1972) 26 Cal. App. 3d 986, 998, 103 Cal. Rptr. 498]* .

- Issues of good faith and sufficient performance of contractual obligations [*Thompson v. Price (1967) 251 Cal. App. 2d 182, 190, 59 Cal. Rptr. 174]* .

- Valuation of community property in a dissolution action [*Bensing v. Bensing (1972) 25 Cal. App. 3d 889, 895, 102 Cal. Rptr. 255]* .

- The existence of an implied contract to discharge only for good cause [*Haycock v. Hughes Aircraft Co. (1994) 22 Cal. App. 4th 1473, 1490, 28 Cal. Rptr. 2d 248]* .

The interpretation of a written instrument, even though it involves questions of fact, is essentially a judicial function to be exercised in accordance with generally accepted canons of interpretation [*see Civ. Code §§ 1635-1662*], so that the purpose of the instrument is given effect [*Parsons v. Bristol Dev. Co. (1965) 62 Cal. 2d 861, 865, 44 Cal. Rptr. 767, 402 P.2d 839]* . For this reason it is solely a judicial function to interpret a written instrument unless the interpretation turns on the credibility of extrinsic evidence [*Silva & Hill Constr. Co., Inc. v. Employers Mut. Liab. Ins. Co. (1971) 19 Cal. App. 3d 914, 921, 97 Cal. Rptr. 498* (insurance coverage for late charge in state construction contract)].

[3] Determination of Preliminary Fact

When a court admits proffered evidence conditionally on its relevance, personal knowledge, or authenticity being shown, the court must, on request, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless they find that it does exist. If the court subsequently determines that a jury could not reasonably find the preliminary fact to exist, it must instruct the jury to disregard the proffered evidence [*Evid. Code § 403(c)*; *see, e.g., Judicial Council of California Civil Jury Instructions, CACI Nos. 212, 213, 214* (LexisNexis Matthew Bender, Official Publisher)].

But when relevance, personal knowledge, authenticity, or self-incrimination are not disputed, the court need not inform the jury of the court's determination as to the existence or nonexistence of preliminary facts [*Evid. Code § 405(b)*].

[4] Juror Questions and Note-Taking

The trial judge should allow jurors to submit written questions directed to witnesses. An opportunity must be given to

counsel to object to such questions out of the presence of the jury [*Cal. Rules of Ct., Rule 2.1033*].

Jurors must be permitted to take written notes in all civil trials. At the beginning of a trial, the court must inform jurors that they may take written notes during the trial. The court must provide materials suitable for this purpose [*Cal. Rules of Ct., Rule 2.1031*].

The trial judge should encourage counsel in complex civil cases to include key documents, exhibits, and other appropriate materials in notebooks for use by jurors during trial to assist them in performing their duties [*Cal. Rules of Ct., Rule 2.1032*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DeliberationsCivil ProcedureTrialsJury TrialsProvince of Court & Jury

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27-322 California Forms of Pleading and Practice--Annotated § 322.58

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.58 When Case Can Be Taken From Jury

A court acts properly in taking a case from a jury when the issues are determinable by a sole question of law [*Estate of Torregano (1960) 54 Cal. 2d 234, 243, 5 Cal. Rptr. 137, 352 P.2d 505]* . All questions of law are decided by the court [*Evid. Code § 310(a)*]. It is error for a trial court to submit to a jury as a question of fact an issue that on the record was one of law [*Lysick v. Walcom (1968) 258 Cal. App. 2d 136, 157-158, 65 Cal. Rptr. 406]* .

Conversely, it is error to take an issue of fact from a jury unless the evidence is such that the issue has indeed become one of law rather than fact. To establish a fact as a matter of law, the record must show that no other reasonable conclusion may be legally deductible from the evidence so that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it on appeal [*Pan Asia Venture Capital Corp. v. Hearst Corp. (1999) 74 Cal. App. 4th 424, 433, 88 Cal. Rptr. 2d 118* ; *People v. Walker (1973) 32 Cal. App. 3d 897, 904, 108 Cal. Rptr. 548]* . For example, whether there has been a breach of duty in a negligence action may be resolved as a matter of law by the court only if the circumstances do not permit a reasonable doubt as to whether the defendant's conduct violates the required degree of care [*Putensen v. Clay Adams, Inc. (1970) 12 Cal. App. 3d 1062, 1077, 91 Cal. Rptr. 319]* .

A party may, after the evidence has been presented in a jury trial, move that the trial court direct the verdict as to the action, or as to some of the issues in the action [*see Code Civ. Proc. § 630*]. When the court grants a motion in this situation, it has, in effect, taken an entire cause of action or other severable issue away from the jury and treated it as a matter of law, determining that there is no substantial evidence tending to prove all the facts necessary to the adverse party's cause of action or defense [*see Paterno v. State of California (1999) 74 Cal. App. 4th 68, 102, 87 Cal. Rptr. 2d 754]* . For further discussion and forms relating to directed verdicts, see *Ch. 326A, Jury Verdicts, § 326A.30 et seq. and § 326A.80* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-322 California Forms of Pleading and Practice--Annotated § 322.59

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.59 Deliberations of Jury

"Predeliberation" jury instructions will typically be read to the jury after closing arguments and after the court has read instructions on the substantive law. These instructions include such items as choosing a presiding juror, using "common sense" during deliberations, and taking breaks [*see Judicial Council of California Civil Jury Instructions, CACI No. 5009* (LexisNexis Matthew Bender, Official Publisher)].

If a jury reports that it has reached an impasse in its deliberations, the court may, in counsel's presence, advise the jury of its duty to decide the case based on the evidence while keeping an open mind and talking about the evidence with each other. The court should ask the jury if it has specific concerns that, if resolved, might assist the jury in reaching a verdict [*Cal. Rules of Ct., Rule 2.1036(a)*]. The court may tell jurors that they should not surrender their beliefs merely to reach a verdict [*Inouye v. Pacific Southwest Airlines (1981) 126 CA3d 648, 652, 179 CR 13]* .

If the court determines that further action might assist the jury in reaching a verdict, the judge may [*Cal. Rules of Ct., Rule 2.1036(b)*]:

- Give additional instructions;
- Clarify previous instructions;
- Permit attorneys to make additional closing arguments; or
- Employ any combination of these measures.

For a discussion of juror conduct after the case is submitted to the jurors, their rendering of a verdict, or their failure to render a verdict, see Ch. 326A, *Jury Verdicts* . For discussion of juror misconduct during deliberations or other phases of trial, see Ch. 371, *Motions After Trial*, § 357.60 et seq., *Ch. 551, Trial, § 551.152*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury Deliberations

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27-322 California Forms of Pleading and Practice--Annotated § 322.60

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.60 Discharge of Jury

Ordinarily, a jury is discharged on rendering a complete verdict before the trial court and on any requested polling by the parties or any requested correction of defects by the trial court [*Code Civ. Proc. §§ 618, 619*]. When a jury is discharged without having rendered a verdict or is prevented from rendering a verdict, the action is tried again either immediately or at a future time, as the court directs, unless a directed verdict is called for [*Code Civ. Proc. § 616*; *see also Code Civ. Proc. § 630(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: William G. McDevitt Editorial Consultant

[Reserved]

§§ 322.61[Reserved]

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AUTHOR: William G. McDevitt Editorial Consultant

§ 322.70 Related Matthew Bender Publications

For discussion of selection of juries, including suggested questions and motions, see California Trial Guide, Unit 10, *Voir Dire Examination* (Matthew Bender).

For discussion of relief from waiver of jury trial, including oral motions and responses, see *California Trial Guide, Unit 3, Other Non-Evidentiary Motions, § 3.30* (Matthew Bender).

For discussion and forms relating to proper instructions to the jury in civil actions, see Judicial Council of California Civil Jury Instructions (CACI) (LexisNexis Matthew Bender, Official Publisher), and California Forms of Jury Instruction (Matthew Bender).

For discussion relating to juries and verdicts in criminal proceedings, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Chs. 81, 85 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCriminal Law & ProcedureJuries & JurorsGeneral OverviewCriminal Law & ProcedureVerdictsGeneral Overview

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27-322 California Forms of Pleading and Practice--Annotated § 322.71

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.71 Federal Constitution

Right to trial by jury in civil actions at common law. *U.S. Const., amend. VII*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

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27-322 California Forms of Pleading and Practice--Annotated § 322.72

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.72 State Constitution

Right to trial by jury; waiver of right. *Cal. Const., art. I, § 16*

Number of jurors in civil cases. *Cal. Const., art. I, § 16*

Three-fourths of jury may be sufficient to render verdict in civil cases. *Cal. Const., art. I, § 16*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

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27-322 California Forms of Pleading and Practice--Annotated § 322.73

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.73 State Statutes

[1] Right to Jury Trial

No right to trial by jury at hearing on appeal to superior court of small claims action. *Code Civ. Proc. § 116.770(b)*

When jury is required generally. *Code Civ. Proc. § 592*

Trial court's discretion to order trial by jury in proceeding for writ of mandate or prohibition; procedure after trial ordered. *Code Civ. Proc. §§ 1090, 1105*

Fact issues in forcible entry and detainer action are triable by jury. *Code Civ. Proc. § 1171*

No right to trial by jury in guardianship, conservatorship, and other protective proceedings pursuant to *Prob. Code §§ 1400-3803*, except as provided in those sections. *Prob. Code § 1452*

Right to jury trial if demanded by proposed conservatee in proceeding to establish conservatorship; informing proposed conservatee of right. *Prob. Code §§ 1827, 1828(a)(6)*

Right to jury trial if demanded by proposed conservatee in proceeding to terminate conservatorship. *Prob. Code § 1863*

[2] Payment of Jury Fees

Waiver of jury trial by failure of party demanding jury trial to deposit jury fees. *Code Civ. Proc. § 631(a)(5)-(7)*

County is authorized to pay jury fees from its general fund without precluding its right to reimbursement from party liable for fees. *Code Civ. Proc. § 631.1*

Deposited jury fees are refunded following waiver of jury, continuance on motion of depositing party, or settlement of action, only if depositing party makes timely written request for refund and court finds there is sufficient time to notify jurors that jury trial will not proceed as set; allocation of nonrefunded jury fees to Trial Court Trust Fund. *Code Civ. Proc. § 631.3*

Party seeking condemnation in eminent domain cases is liable for jury fees and mileage. *Code Civ. Proc. § 631.5*

[3] Waiver of Jury Trial

Waiver of jury trial. *Code Civ. Proc. § 631*

[4] Trial Jury Selection and Management Act

[a] General Provisions

Trial Jury Selection and Management Act. *Code Civ. Proc. § 190 et seq.*

Policy of Act. *Code Civ. Proc. § 191*

Application of Act. *Code Civ. Proc. § 192*

Kinds of juries. *Code Civ. Proc. § 193*

All persons serving on juries are selected at random, from sources inclusive of representative cross section of population of area served by court. *Code Civ. Proc. § 197(a)*

Persons eligible and qualified to be prospective jurors. *Code Civ. Proc. § 203(a)*

No person may be excluded from eligibility for jury service for any reason other than those provided under *Code Civ. Proc. § 203. Code Civ. Proc. § 203(b)*

Jurors' fees for attendance and travel expense. *Code Civ. Proc. § 215*

Number of jurors on trial jury. *Code Civ. Proc. § 220*

Number of jurors on trial jury in Los Angeles municipal court; experimental project. *Code Civ. Proc. § 221*

[b] Definitions

"County" and "court." *Code Civ. Proc. § 194(a), (b)*

"Deferred jurors." *Code Civ. Proc. § 194(c)*

"Excused jurors." *Code Civ. Proc. § 194(d)*

"Juror pool." *Code Civ. Proc. § 194(e)*

"Jury of inquest." *Code Civ. Proc. § 194(f)*

"Master list." *Code Civ. Proc. § 194(g)*

"Potential jurors." *Code Civ. Proc. § 194(h)*

"Prospective jurors." *Code Civ. Proc. § 194(i)*

"Qualified jurors." *Code Civ. Proc. § 194(j)*

"Qualified juror list." *Code Civ. Proc. § 194(k)*

"Random." *Code Civ. Proc. § 194(l)*

"Source list." *Code Civ. Proc. § 194(m)*

"Summons list." *Code Civ. Proc. § 194(n)*

"Trial jurors." *Code Civ. Proc. § 194(o)*

"Trial jury." *Code Civ. Proc. § 194(p)*

"Trial jury panel." *Code Civ. Proc. § 194(q)*

[c] Jury Commissioner

Appointment, compensation, and duties of jury commissioner. *Code Civ. Proc. §§ 195, 196, 198(b), 207, 208, 214, 218, 219*

[d] Master List of Prospective Jurors

Source lists used to compile master list. *Code Civ. Proc. § 197*

Compilation and maintenance of master list. *Code Civ. Proc. §§ 198(a), (b), 198.5, 207*

Use of master list by jury commissioner to mail questionnaires, create qualified juror list, and summon prospective jurors. *Code Civ. Proc. § 198(c)*

[e] Qualifying and Summoning Prospective Jurors

Inquiry by jury commissioner into qualifications of persons who are or may be summoned for jury service; response to inquiry or summons by persons other than prospective jurors. *Code Civ. Proc. § 196*

Use of mechanical devices in juror selection. *Code Civ. Proc. § 202*

Contents and use of juror questionnaires. *Code Civ. Proc. § 205*

Summoning of prospective jurors by jury commissioner. *Code Civ. Proc. § 208*

Compelling jurors' attendance by attachment, fine, and incarceration. *Code Civ. Proc. § 209*

Contents of summons. *Code Civ. Proc. § 210*

Summons of jurors by peace officer when no prospective jurors remain available for voir dire from panels furnished by jury commissioner. *Code Civ. Proc. § 211*

Summoned prospective jurors are required to be available on one-hour telephone notice. *Code Civ. Proc. § 213*

Judicial Council must adopt rule of court requiring every trial court to adopt, by January 2000, requirement limiting jury service to either one trial or one day on call per individual, except in counties demonstrating good cause why requirement is impractical. *Gov. Code § 68550*

[f] Excuses and Exemptions from Jury Service

No eligible person is exempt from service as trial juror by reason of occupation, economic status, or any characteristic listed or defined in *Gov. Code § 11135* (prohibiting discrimination on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability, as defined in that section), or for any other reason. *Code Civ. Proc. § 204(a)*

No person is excused from service as trial juror except as specified in *Code Civ. Proc. § 204(b). Code Civ. Proc. § 204(a)*

Eligible person may be excused from service as trial juror only for undue hardship on themselves or on public as defined by Judicial Council. *Code Civ. Proc. § 204(b)*

No peace officer as defined in *Penal Code §§ 830.1* and *830.2(a)* is permitted to be selected for voir dire in civil or criminal matters. *Code Civ. Proc. § 219(b)(1)*

No peace officer as defined in *Penal Code § 830.2(b), (c)* is permitted to be selected for voir dire in criminal case. *Code Civ. Proc. § 219(b)(2)*

[g] Trial Jury Panels

When two or more judges in superior or municipal court, separate jury panels are permitted to be drawn, summoned, and impaneled for each judge; court is authorized to require jurors of panel serving one judge to serve in panel or jury before any other judge. *Code Civ. Proc. § 201*

Jury commissioner is required to select jurors randomly for jury panels to be sent to courtrooms for voir dire. *Code Civ. Proc. § 219*

[h] Voir Dire Examination of Prospective Jurors

Examination of prospective jurors by judge and counsel; permissible scope of examination by counsel. *Code Civ. Proc. § 222.5*

[i] Challenges to Jurors

Types of challenges. *Code Civ. Proc. § 225*

Challenge to jury panel for cause; procedure. *Code Civ. Proc. § 225(a)*

Challenges to individual jurors for cause. *Code Civ. Proc. § 225(b)(1)*

Peremptory challenges to individual jurors. *Code Civ. Proc. § 225(b)(2)*

Procedure for making challenges to individual jurors. *Code Civ. Proc. § 226*

Order of making challenges for cause. *Code Civ. Proc. § 227*

Grounds for challenge for general disqualification. *Code Civ. Proc. § 228*

Grounds for challenge for implied bias. *Code Civ. Proc. § 229*

Challenges for cause are tried by court. *Code Civ. Proc. § 230*

Number of peremptory challenges in civil cases; procedure for making peremptory challenges. *Code Civ. Proc. § 231(c)-(e)*

Party may not use peremptory challenge to remove prospective juror on basis of assumption that juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds. *Code Civ. Proc. § 231.5*

Peremptory challenges to alternate jurors. *Code Civ. Proc. § 234*

[j] Facilities and Attendants for Jurors

Provision of jury deliberation rooms. *Code Civ. Proc. § 216*

Use of interpreters or readers for disabled jurors. *Code Civ. Proc. § 224*

Equipment for jurors who are hard of hearing. *Civ. Code § 54.8*

[k] Alternate Jurors

When alternate jurors called; method of calling alternate jurors. *Code Civ. Proc. § 234*

[l] Discharge of Juror

Discharge of juror on death, illness, or other incapacity to perform duties. *Code Civ. Proc. §§ 233, 234*

Procedure on discharge of juror when alternate juror available. *Code Civ. Proc. § 234*

[5] Jury as Trier of Questions of Fact

Issues of fact tried by jury. *Code Civ. Proc. § 592*; *Evid. Code § 312(a)*

Question of fact not put in issue by pleadings tried by jury on court order. *Code Civ. Proc. § 309*

Issues of fact in probate proceedings tried by jury. *Prob. Code §§ 1000*, 1280

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury TrialCivil ProcedureRemediesWritsCommon Law WritsMandamusEstate, Gift & Trust LawProbateProcedures in ProbateRight to Jury TrialReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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27-322 California Forms of Pleading and Practice--Annotated § 322.74

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.74 California Rules of Court

[1] Juror Motion to Set Aside Sanctions

Motion to set aside sanction for juror's failure to appear. *Cal. Rules of Ct., Rule 2.1010*

[2] Dealing With Jury

Juror note-taking. *Cal. Rules of Ct., Rule 2.1031*

Juror aids in complex cases. *Cal. Rules of Ct., Rule 2.1032*

Juror questions to witnesses. *Cal. Rules of Ct., Rule 2.1033*

Attorneys' statements to jury panel. *Cal. Rules of Ct., Rule 2.1034*

Judge's preinstructions to jurors. *Cal. Rules of Ct., Rule 2.1035*

Judge's admonishment to jury at impasse. *Cal. Rules of Ct., Rule 2.1036*

[3] Excuses and Exemptions From Jury Service

[a] In General

Scheduling accommodations for jurors. *Cal. Rules of Ct., Rule 2.1004*

Policy statement; jury service is duty of citizenship. *Cal. Rules of Ct., Rule 2.1008(a)*

No class or category of persons automatically excused from jury duty except as provided by law. *Cal. Rules of Ct., Rule 2.1008(b)(1)*

Statutory exemption from jury service granted only when eligible person claims it. *Cal. Rules of Ct., Rule 2.1008(b)(2)*

Deferring jury service is preferred to excusing prospective juror for temporary or marginal hardship. *Cal. Rules of Ct., Rule 2.1008(b)(3)*

Requests to be excused from jury service for undue hardship must be in writing or placed on court's record and supported with facts and circumstances, including why hardship cannot be avoided by deferring jury service. *Cal. Rules of Ct., Rule 2.1008(c)*

[b] Excuses Based on Undue Hardship

[i] Excessive Travel, Financial Burden, or Health Risk

Undue hardship is excuse if excessive travel distance or lack of available transportation. *Cal. Rules of Ct., Rule 2.1008(d)(1), (2)*

Undue hardship is excuse if extreme financial burden or undue risk of material injury or destruction of property exists and there are no feasible alternate arrangements. *Cal. Rules of Ct., Rule 2.1008(d)(3), (4)*

Undue hardship is excuse if physical or mental disability or impairment that would entail undue risk to juror's health exists; unless potential juror is 70 years of age or older, verification of disability or impairment may be required. *Cal. Rules of Ct., Rule 2.1008(d)(5)*

[ii] Necessary Care

Mother who is breastfeeding child may request deferral of jury service for up to one year and renew request as long as she is breastfeeding; if request is in writing, under penalty of perjury, jury commissioner must grant it without requiring prospective juror to appear in court. *Cal. Rules of Ct., Rule 2.1006*

Undue hardship is excuse if juror has personal obligation to provide necessary care to another and no comparable substitute is available or practical without financial hardship to juror; verification may be required to establish need for regular and personal care. *Cal. Rules of Ct., Rule 2.1008(d)(7)*

[iii] Prior Service

Juror excused if he or she has served or was summoned to serve on grand or trial jury, or was summoned and appeared for jury service in any state or federal court, during previous 12 months. *Cal. Rules of Ct., Rule 2.1008(e)*

[iv] Public Health and Safety

Undue hardship is excuse if juror's services required for protection of public health and safety and there are no feasible alternate arrangements. *Cal. Rules of Ct., Rule 2.1008(d)(6)*

[c] Inconvenience Is Not Excuse

Inconvenience to prospective juror or employer is not adequate excuse although it may be considered ground for deferring service. *Cal. Rules of Ct., Rule 2.1008(b)(4)*

[4] Voir Dire Examination of Prospective Jurors

Examination of prospective jurors by trial court judge; court's discretion to permit counsel additional questions; scope of additional questions. *Cal. Rules of Ct., Rule 3.1540*

Examination of prospective jurors. Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.25

[5] Facilities and Attendants for Jurors

Request for accommodation by juror with disability. *Cal. Rules of Ct., Rule 1.100*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DeliberationsCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsNotesCivil ProcedureTrialsOpening StatementsGeneral OverviewCivil ProcedureSanctionsContemptGeneral Overview

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Volume 27: Interpleader thru Juries and Jury Selection-Chs. 314-322
Chapter 322 JURIES AND JURY SELECTION
PART III. RESEARCH GUIDE

27-322 California Forms of Pleading and Practice--Annotated § 322.75

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.75 Local Rules of Court

[1] Los Angeles County

Selection of jurors; excuse from jury duty. Los Angeles Co. Super. Ct. Rules, Rule 5.0

[2] Sacramento County

Juror selection procedures; preparation of jury panels; rules of impanelment. Sacramento Co. Super. Ct. Rules, Rules 8.01, 8.02

[3] San Diego County

Jury fees. San Diego Co. Super. Ct. Rules, Div. 2, Rule 2.12

[4] Third Appellate District Uniform Rules

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[5] Fifth Appellate District Uniform Rules

Jury fees and expenses; selection of jurors. Fifth App. Dist. Uniform Local Super. Ct. Rules, Rule III

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionGeneral Overview

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Volume 27: Interpleader thru Juries and Jury Selection-Chs. 314-322
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PART III. RESEARCH GUIDE

27-322 California Forms of Pleading and Practice--Annotated § 322.76

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.76 Decisions

[1] Right to Jury Trial Under California Constitution

[a] In General

No state constitutional or statutory right to jury trial under summary contempt statute, *Code Civ. Proc. § 1209 et seq.*, in contrast to contempts constituting misdemeanor under *Penal Code § 166*. *Mitchell v. Superior Court (1989) 49 Cal. 3d 1230, 1240, 265 Cal. Rptr. 144, 783 P.2d 731*

Right to have jury determination of question of fact under constitution. *Dorsey v. Barba (1952) 38 Cal. 2d 350, 358, 240 P.2d 604* (disapproved on other grounds, *Jehl v. Southern Pacific Co. (1967) 66 Cal. 2d 821, 828, 59 Cal. Rptr. 276, 280, 427 P.2d 988, 992)*

In action by state to abate public nuisance based on operation of motel at which defendants allegedly permitted prostitution, defendant had no right to jury trial, when traditionally there is no right to jury trial in public nuisance case because action and remedies sought are both equitable, and when right of trial by jury did not exist at common law in suit to abate public nuisance. *People v. Bhakta (2008) 162 Cal. App. 4th 973, 977-979, 76 Cal. Rptr. 3d 421*

Plaintiff was entitled to jury trial on claim of fraudulent conveyance, when right to jury trial existed at English common law in action to recover alleged fraudulent conveyance of determinate sum of money, and there was no evidence that any change in English common law occurred between 1791 and 1850, so that California Constitution guarantees right to jury trial in similar action today. *Wisden v. Superior Court (2004) 124 Cal. App. 4th 750, 755-760, 21 Cal. Rptr. 3d 523*

In legal malpractice action, plaintiff had right to jury trial of both malpractice lawsuit for failure to opt plaintiff out of class action and underlying action against former employer for fraud, breach of fiduciary duty, negligent misrepresentation, breach of contract, intentional interference with prospective economic advantage, and unfair business

practices; determination of underlying case in legal malpractice action is part and parcel of element of causation, i.e., whether plaintiff would have prevailed in arbitration proceeding before New York Stock Exchange and obtained award against former employer absent attorney's negligence in failing to opt plaintiff out of class action, and issues were not so complex and numerous that lay jury, properly instructed, could not comprehend them. *Piscitelli v. Friedenberg (2001) 87 Cal. App. 4th 953, 969-971, 105 Cal. Rptr. 2d 88*

[b] 1850 Rule

There is right to jury trial in tax refund action, but not in tax collection action. Franchise Tax Bd. v. Superior Court (2009) 177 Cal. App. 4th 36, 43-50, 99 Cal. Rptr. 3d 73

Quantum meruit claim is quasi-contract claim for reasonable value of services rendered; because common-law courts entertained such claims and granted requested relief long before 1850, action is at law and carries right to jury trial. *Jogani v. Superior Court (2008) 165 Cal. App. 4th 901, 905-909, 81 Cal. Rptr. 3d 503*

Action between claimants in interpleader action is equitable and not subject to jury trial even if underlying action is legal. *Shopoff & Cavallo LLP v. Hyon (2008) 167 Cal. App. 4th 1489, 1512-1514, 85 Cal. Rptr. 3d 268*

Right to jury trial dependent on whether action is one to which there was common-law right to a jury in 1850. *Interinsurance Exch. v. Savior (1975) 51 Cal. App. 3d 691, 693, 124 Cal. Rptr. 239*

In absence of statute providing trial by jury, right limited by 1850 rule and no right to jury when minority shareholder brings petition for corporate dissolution, a proceeding unavailable prior to 1931. *Rankin v. Frebank Co. (1975) 47 Cal. App. 3d 75, 92, 121 Cal. Rptr. 348*

Juries are a matter of grace, not a matter of right, in equity actions. *Stearns v. Los Angeles City Sch. Dist. (1966) 244 Cal. App. 2d 696, 725, 53 Cal. Rptr. 482*

Function of jury in equity action is to assist in solution of question of fact; function advisory only and verdict susceptible to being disregarded. *Stearns v. Los Angeles City Sch. Dist. (1966) 244 Cal. App. 2d 696, 725-726, 53 Cal. Rptr. 482*

[c] Jury Required in Certain Actions

Code Civ. Proc. § 592 interpreted to apply to common law actions and not to suits in equity. *Abbott v. Los Angeles (1958) 50 Cal. 2d 438, 462, 326 P.2d 484*

When contract term is subject of conflicting extrinsic evidence and dependent on assessment of credibility of opposing witness, interpretation of term is properly made by jury as trier of fact. *Morey v. Vannucci (1998) 64 Cal. App. 4th 904, 914-915, 75 Cal. Rptr. 2d 573*

[d] Right Where Mixed Equitable and Legal Issues

When both equitable and legal issues exist, equitable issues are triable first; if equitable issues dispose of legal issues, there is no right to jury trial on legal issues. *Raedeke v. Gibraltar Sav. & Loan Ass'n (1974) 10 Cal. 3d 665, 671, 111 Cal. Rptr. 693, 517 P.2d 1157*

Damages issues raised by cross complaint to complaint for injunctive relief are subject to jury trial. *Tide Water*

Associated Oil Co. v. Superior Court (1955) 43 Cal. 2d 815, 821, 279 P.2d 35

In mixed trial of legal and equitable issues when legal issues are first tried to jury, court must follow jury's factual determinations on common issues of fact. *Hoopes v. Dolan (2008) 168 Cal. App. 4th 146, 156-161, 85 Cal. Rptr. 3d 337*

Jury trial on legal issues when legal and equitable issues joined in same action. *Frahm v. Briggs (1970) 12 Cal. App. 3d 441, 445, 90 Cal. Rptr. 725*

[e] No Right to Jury for Purely Equitable Claims

Doctrine of promissory estoppel is equitable in nature and consequently trial court, not jury, should weigh equitable considerations; trial by jury is not matter of right. *C & K Eng'g Contractors v. Amber Steel Co. (1978) 23 Cal. 3d 1, 9, 11, 151 Cal. Rptr. 323, 587 P.2d 1136* ; *A-C Company, Inc. v. Security Pac. National Bank (1985) 173 Cal. App. 3d 462, 472-473, 219 Cal. Rptr. 62*

Plaintiff was not entitled to jury trial on bifurcated issue of defendant's defense to plaintiff's Proposition 65 lawsuit, when essential character and purpose of Proposition 65 was equitable and remedies sought through enforcement action were equitable in nature, and when bulk of relief sought was cognizable at common law as equitable action to abate public nuisance; trial court's bifurcation and separate initial adjudication of warning exemption defense did not transform the case into action at law or require jury trial, because warning exemption defense was not separate legal claim or cause of action, nor was trial special proceeding engendering its own right to jury trial. *DiPirro v. Bondo Corp. (2007) 153 Cal. App. 4th 150, 178-186, 62 Cal. Rptr. 3d 722*

In action for rescission of contract for sale of unimproved parcel of land, seller's attempt to recover monetary damages for lost profits it allegedly could have made through other uses of the property rendered rescission claim equitable rather than legal because recovery sought was something other than consideration paid by plaintiff, and plaintiff therefore was not entitled to a jury trial. *NMSBPCSLDHB v. County of Fresno (2007) 152 Cal. App. 4th 954, 958-966, 61 Cal. Rptr. 3d 425*

In class action by employees brought under Unfair Competition Law (UCL) [*see Bus. & Prof. Code § 17200*] alleging that employees were improperly denied payment for overtime work, defendant-employer was not entitled to jury trial, when UCL provided only for equitable remedies, there was no right to jury trial, and complaint was not mere exercise in artful pleading to circumvent jury trial right because plaintiffs were not pursuing Labor Code claim under different label but different claim under UCL; fact that contract issues may have been implicated did not transform equitable action into legal one; when employer's affirmative defense based on wage order did not require jury trial; and existence of factual issue did not require jury trial, because even though contractual duties of employer implicitly included performance of mandatory statutory duties, such as payment of overtime wages, and application of statutory requirements included factual determinations, sole cause of action for violation of *Bus. & Prof. § 17200* was equitable in nature. *Hodge v. Superior Court (2006) 145 Cal. App. 4th 278, 284-287, 51 Cal. Rptr. 3d 519*

Trial court properly found defendant had no right to jury trial in plaintiffs' action gist of which was for enforcement of settlement agreement and to prevent interference with their rights as easement holders, even though complaint requested damages and injunctive relief, when prayer for relief was not conclusive, plaintiffs ultimately waived their claim for damages and judgment only granted equitable relief, so that gist of action was in equity; *Code Civ. Proc. § 592* did not mandate jury trial when plaintiffs waived their claim for damages for breach of contract or injuries and did not seek recovery of specific real or personal property, and when there was no substantial dispute that plaintiffs had right to easement so no action at law was necessary as prerequisite to injunction. *Baugh v. Garl (2006) 137 Cal. App. 4th 737, 740-741, 40 Cal. Rptr. 3d 539*

Trial court properly found no right to jury trial on claim of ownership of corporate common stock, when gist of action was equitable rather than legal since it was action to declare rights to stock based on agreement and to quiet title in stock; when declaratory relief action was not brought to circumvent right to jury trial on breach of contract claims, and when possession exception to equitable nature of quiet title action did not apply because possession exception is premised on fact that action is, in part, in case involving real property, but this case involved intangible personal property; even if it was possible to maintain action seeking to recover possession of intangible object, gist of this action was dispute over ownership of stock, not possession, and possession of stock not sought in complaint. *Caira v. Offner (2005) 126 Cal. App. 4th 12, 23-29, 24 Cal. Rptr. 3d 233*

Claim for damages for breach of contract was equitable, and thus plaintiff was not entitled to jury trial when defendant's liability could only be established by accounting. *De Guere v. Universal City Studios, Inc. (1997) 56 Cal. App. 4th 482, 507, 65 Cal. Rptr. 2d 438*

Action against trustee for breach of fiduciary duty is equitable, not legal, when amount of defendant's damages must be established by accounting. *Van de Kamp v. Bank of Am. (1988) 204 Cal. App. 3d 819, 864-865, 251 Cal. Rptr. 530*

Action to abate nuisance is equitable one in which there is no right to jury trial. *Wolford v. Thomas (1987) 190 Cal. App. 3d 347, 353, 235 Cal. Rptr. 422*

Action for rescission and declaratory relief relating to the formation of contract, its validity, construction, and effect is equitable one in which there is no right to jury trial. *Fowler v. Ross (1983) 142 Cal. App. 3d 472, 477-478, 191 Cal. Rptr. 183*

[f] Special Proceedings

[i] Special Proceeding Defined

Public entity's reliance on design immunity as defense to claim of liability for dangerous condition is not special proceeding, but is affirmative defense as to which plaintiff was entitled to jury trial. *Cornette v. Dept. of Transportation (2001) 26 Cal. 4th 63, 109 Cal. Rptr. 2d 1, 26 P.3d 332*

Special proceeding is one that is neither an action at law nor suit at equity under common law or equity practice. *Tide Water Associated Oil Co. v. Superior Court (1955) 43 Cal. 2d 815, 822, 279 P.2d 35*

Special proceeding is commenced on petition or motion with notice to obtain special relief. *Oak Grove Sch. Dist. v. City Title Ins. Co. (1963) 217 Cal. App. 2d 678, 710, 32 Cal. Rptr. 288*

[ii] Probate

When right to jury trial recognized in probate. *Estate of Beach (1975) 15 Cal. 3d 623, 642, 125 Cal. Rptr. 570, 542 P.2d 994*

[iii] Redemption of Property After Sheriff's Sale

Jury trial is not guaranteed in statutory special proceeding for redeeming property after sheriff's sale under former *Code Civ. Proc. § 702*. *Pacific Coast Club, Inc. v. Brown (1980) 107 Cal. App. 3d 171, 175, 176, 165 Cal. Rptr. 566*

[iv] Distribution of Settlement Proceeds of Wrongful Death Action

In action arising from wrongful death action involving several decedents, heirs were not entitled to jury apportion proceeds of settlement of action, when apportionment proceeding was equitable and special proceeding. *Kim v. Yi (2006) 139 Cal. App. 4th 543, 546-550, 42 Cal. Rptr. 3d 841*

[2] Waiver of Jury Trial

[a] In General

Contractual agreement between public accounting firm and client with provision waiving jury trial in event of dispute was unenforceable as jury trial waiver because contractual agreement entered into prior to any dispute arising between contracting parties is not means authorized by *Code Civ. Proc. § 631*, and only means specified in *Code Civ. Proc. § 631* are effective to waive jury trial. *Grafton v. Superior Court (2005) 36 Cal. 4th 944, 951-967, 32 Cal. Rptr. 3d 5, 116 P.3d 479*

Plaintiff did not waive jury trial by conceding that any penalty that could be imposed and any injunctive relief ordered would be determined by court, not jury, in opposition to defendant's motion to strike plaintiff's jury trial request; jury could not be waived by implication and concession was not express waiver. *DiPirro v. Bondo Corp. (2007) 153 Cal. App. 4th 150, 176-178, 62 Cal. Rptr. 3d 722*

Plaintiff did not forfeit right to challenge ruling on jury trial issue by failing to appear at hearing on motion to contest trial court's tentative decision, when, based on plaintiff's opposition, both defendant and trial court were aware of precise grounds for plaintiff's challenge to proposed ruling; after tentative decision was issued, repetition of same opposition at hearing on motion was not required to preserve issue. *DiPirro v. Bondo Corp. (2007) 153 Cal. App. 4th 150, 176-178, 62 Cal. Rptr. 3d 722*

Defendant's attorney's oral consent to jury waiver at final status conference, stated in open court and entered in court minutes, provided basis for jury waiver under *Code Civ. Proc. § 631(d)(3)*; fact that waiver was by counsel did not invalidate waiver, because trial counsel could exercise independent judgment with respect to strategic litigation decisions; and defendant neither repudiated decision nor alerted court that he disagreed with decision, did not attend trial or assert objection to stipulation to waive jury, did not file posttrial motion, did not retain new counsel to represent him, and did not make effort to seek relief from attorney's allegedly unauthorized jury waiver until he filed appellate briefs more than one year after trial concluded. *Cadle Co. v. World Wide Hospitality Furniture, Inc. (2006) 144 Cal. App. 4th 504, 510-511, 50 Cal. Rptr. 3d 480*

In forfeiture proceeding, claimant who represented herself waived jury trial by consent under *Code Civ. Proc. § 631* when she did not request jury trial or announce one was required and did not post required jury fees. *People v. $17,522.08 United States Currency (2006) 142 Cal. App. 4th 1076, 1081-1084, 48 Cal. Rptr. 3d 519*

Code Civ. Proc. § 631 specifies exclusive methods by which jury trial may be waived, which fall into three categories, which are failure to comply with statutory requirements, express consent, and nonappearance at trial; when cross-complainant (1) agreed to limited bench trial on one issue after having obtained clarification that trial court would not determine a related issue, (2) promptly objected when trial court began to hear evidence on second issue and (3) expressly demanded jury trial when trial court indicated it contemplated ruling on matter, cross-complaint did not waive right to jury trial on second issue, and trial court improperly denied cross-complainant jury trial on that issue. *Old Republic Ins. Co. v. FSR Brokerage, Inc. (2000) 80 Cal. App. 4th 666, 679-680, 95 Cal. Rptr. 2d 583*

Waiver was effective in rescission action based on both counsels' agreement with court that jury advisory only and jury

was matter for court's discretion, even though jury trial guaranteed by statute. *Radinsky v. T.W. Thomas, Inc. (1968) 264 Cal. App. 2d 75, 79-80, 70 Cal. Rptr. 150*

Ten-day written notice by clerk of court to adverse party of jury trial waiver by party originally requesting jury trial is required regardless of any informal notice already received and responded to by that adverse party. *Simmons v. Prudential Insurance Co. (1981) 123 Cal. App. 3d 833, 836-837, 177 Cal. Rptr. 37*

[b] Adverse Party's Right to Demand Jury at Trial after Waiver

No waiver occurred when plaintiff relied on defendant's demand and made explicit reservation should defendant withdraw demand. *Cohill v. Nationwide Auto Service (1993) 16 Cal. App. 4th 696, 701, 19 Cal. Rptr. 2d 924*

Party waived jury trial under former *Code Civ. Proc. § 631(8)* (*now see Code Civ. Proc. § 631(c)*) by failing to demand jury trial promptly after adverse party, who initially demanded jury trial, waived jury trial at time of assignment for trial to specific department of court. *McIntosh v. Bowman (1984) 151 Cal. App. 3d 357, 360-362, 198 Cal. Rptr. 533*

Failure of opposing party to make timely request for jury does not preclude right to request retention of jury when originally requesting party waives jury after trial commences. *Middlesex Insurance Co. v. Mann (1981) 124 Cal. App. 3d 558, 566, 177 Cal. Rptr. 495*

[c] Court's Discretion After Waiver

Court abused its discretion in refusing to grant relief from inadvertent waiver of jury trial when there had been no prejudice to other party or to court; writ of mandate prior to trial is proper remedy when trial court has abused its discretion in refusing to grant relief from waiver. *Winston v. Superior Court (1987) 196 Cal. App. 3d 600, 602-603, 242 Cal. Rptr. 113*

Court did not abuse its discretion in denying relief from defendant's waiver of jury trial, when relief would have required continuance inconvenient to witnesses and prejudicial to plaintiff; reversal for alleged abuse of discretion was also inappropriate because defendant failed to seek proper remedy by petition for writ for mandate before trial and failed to demonstrate prejudice from nonjury trial. *McIntosh v. Bowman (1984) 151 Cal. App. 3d 357, 363-364, 198 Cal. Rptr. 533*

Court's refusal to grant jury trial was abuse of discretion when no showing was made of prejudice to parties or of inconvenience to court, and court clerk had failed to send adverse party 10-day notice of waiver of jury trial by party originally requesting it as required by former *Code Civ. Proc. § 631(4)* (repealed by Stats. 1989, ch. 15). *Simmons v. Prudential Insurance Co. (1981) 123 Cal. App. 3d 833, 838, 177 Cal. Rptr. 37*

Court's refusal to grant jury trial was abuse of discretion when (1) plaintiffs made timely request to withdraw their initial waiver, (2) there was no possibility that rescheduling would be necessary, and (3) no prejudice to defendant was shown. *Bishop v. Anderson (1980) 101 Cal. App. 3d 821, 824, 825, 161 Cal. Rptr. 884*

Court abused its discretion by denying request for continuance after waiver of jury trial on first day of trial. *Leslie v. Roe (1975) 52 Cal. App. 3d 686, 688, 125 Cal. Rptr. 157*

[3] Prospective Jurors

[a] Competence and Qualifications

On appeal of verdict against it, insurer waived its objection to juror who was ex-felon, where fact juror disclosed grounds for disqualification was sufficient to trigger insurer's obligation to challenge juror for cause, and objection to juror's competency first made after trial is not cognizable on appeal. *George F. Hillenbrand, Inc. v. Ins. Co. of North America (2002) 104 Cal. App. 4th 784, 821-822, 128 Cal. Rptr. 2d 586*

States are entitled to prescribe relevant qualifications for jurors. *People v. Superior Court (1970) 13 Cal. App. 3d 672, 681, 91 Cal. Rptr. 651*

Requirement of sufficient knowledge of English is satisfied only by understanding of spoken and written *English. People v. Jones (1972) 25 Cal. App. 3d 776, 783, 102 Cal. Rptr. 277*

Vocabulary and reading examinations of prospective jurors is proper means ofestablishing competence. *People v. Powell (1974) 40 Cal. App. 3d 107, 134-142, 115 Cal. Rptr. 109*

[b] Sources and Exclusions

Systematic exclusion of women from juries by providing automatic exemption from jury service for any woman requesting not to serve that results in jury venires averaging less than 15 percent female violates fair-cross-section requirement of *U.S. Const., amends. VI, XIV*. *Duren v. Missouri (1978) 439 U.S. 357, 367-370, 99 S. Ct. 664, 58 L. Ed. 2d 579*

Systematic exclusion of women from jury panels (in Louisiana) is not representative of cross section of community and violative of right to jury trial guaranteed by *U.S. Const., amend. VI*. *Taylor v. Louisiana (1975) 419 U.S. 522, 531, 95 S. Ct. 692, 42 L. Ed. 2d 690*

Trial court need not and may not take into account Hispanics ineligible for jury service to determine whether Hispanics are underrepresented on grand jury venires. To determine whether Hispanics are underrepresented to unconstitutional degree in jury venires, court must rely on evidence most accurately reflecting jury pool's actual percentage of jury-eligible Hispanics. *United States v. Torres-Hernandez (9th Cir. 2006) 447 F.3d 699, 703-706*

In murder prosecution, defendant failed to establish prima facie case by showing systematic exclusion of young or low-income adults from Riverside County juries, where record revealed Riverside County has undertaken reasonable efforts to eliminate duplicate entries from voter registration lists and Department of Motor Vehicle records of registered drivers and holders of identification cards, which are merged into a master list for jury selection purposes, and there was no evidence how (if at all) remaining duplicates would have affected composition of jury draw, and where record also showed jury commissioner's guidelines for excusing prospective jurors from service were neutral as to age and, except as to economic hardship, as to income, and existence of hardship excuses did not deprive defendant of his right to fair cross-section of community. Further, as to African-American prospective jurors, substantial evidence supported trial court's finding of no significant disparity, but Supreme Court expressed grave doubt as to propriety of apparent (albeit infrequent) practice of Riverside County Superior Court in making race-conscious assignments to bolster minority representation in various courtrooms. *People v. Burgener (2003) 29 Cal. 4th 833, 855-863, 129 Cal. Rptr. 2d 747, 62 P.3d 1*

In murder prosecution, summary procedure by which trial court screened prospective jurors for economic hardship, while not best practice, substantially expedited jury selection process by culling out prospective jurors who probably would have been unable to serve as jurors in any event. Trial court's estimate of six months was not error, where

defense counsel conceded it was entirely possible case could last six months and failed to object when court stated counsel had indicated previously they would like to have up to possible six months. *People v. Burgener (2003) 29 Cal. 4th 833, 863, 129 Cal. Rptr. 2d 747, 62 P.3d 1*

Showing of statistical disparity occurring over time is insufficient, standing alone, to make out prima facie case of *U.S. Const., amend. VI* violation when county's jury selection criteria are neutral with respect to race, ethnicity, sex, and religion; defendant must identify some aspect of manner in which criteria are being applied that is (1) probable cause of disparity and (2) constitutionally impermissible. *People v. Sanders (1990) 51 Cal. 3d 471, 492, 273 Cal. Rptr. 537, 797 P.2d 561*

County's procedures to obtain pool of citizens for jury duty was race neutral and criminal defendant failed to establish prima facie case of significant underrepresentation or systematic exclusion of Hispanics from county's jury venires, where Hispanics are distinctive group within community, constituting 24 percent of population; where trial court erroneously utilized comparative disparity test to order jury commissioner to develop jury venires representing fair and reasonable cross section, because comparative disparity test should only apply if group is small and, although neither United States Supreme Court nor California Supreme Court has determined whether absolute or comparative disparity provides most accurate measure, in numerous opinions involving fair cross-section challenges, California Supreme Court consistently has used absolute disparity test to determine constitutionality of venire composition; and where although trial court acknowledged county's jury selection process was race neutral, it nevertheless found constitutional violation because county did not resend juror questionnaires to nonresponders unless new address was provided because Hispanics have nonresponse rate substantially higher than non-Hispanic community, but effect of race neutral procedures may not be basis for finding of systematic exclusion. *Blair v. Superior Court (2004) 119 Cal. App. 4th 532, 540-545, 14 Cal. Rptr. 3d 602*

Issue of vicinage, county from which jurors are summoned, is logically distinct concept from issue of venue, place of trial, and requires separate objection at trial to preserve issues for appeal. *People v. Campbell (1991) 230 Cal. App. 3d 1432, 1446-1447, 281 Cal. Rptr. 870*

Jury is impartial one if there was no systematic exclusion of identifiable segments of community from jury panel committed. *People v. Langdon (1976) 54 Cal. App. 3d 384, 388, 126 Cal. Rptr. 575*

Absent showing of discrimination, use of voter lists as sole source of jurors is constitutional procedure. *People v. Breckenridge (1975) 52 Cal. App. 3d 913, 921, 125 Cal. Rptr. 425*

Automatic exclusion of persons living over 25 miles from court is valid in absence of discrimination against any racial, social, or economic class. *People v. McDowell (1972) 27 Cal. App. 3d 864, 875-876, 104 Cal. Rptr. 181*

[c] Excuses and Exemptions From Jury Service

Fact that prospective juror is daily wage earner is not adequate excuse from jury duty. *People v. Milan (1973) 9 Cal. 3d 185, 196, 107 Cal. Rptr. 68, 507 P.2d 956*

In absence of fixed standard, determination whether undue hardship exists by jury commissioner is based on jurors' personal circumstances. *People v. Powell (1975) 40 Cal. App. 3d 107, 133-134, 115 Cal. Rptr. 109*

[4] Voir Dire Examination of Prospective Jurors

Counsel waives objections to the trial court's limitation of voir dire by failing to objectto that limitation before the jury is sworn. *Bly-Magee v. Budget Rent-A-Car Corp. (1994) 24 Cal. App. 4th 318, 324, 29 Cal. Rptr. 2d 330*

Counsel may voir dire on any matter that would be grounds for challenge for cause or would assist in intelligent exercise of peremptory challenges. *People v. Williams (1981) 29 Cal. 3d 392, 174 Cal. Rptr. 317, 628 P.2d 869* (superseded as to criminal cases by *Code Civ. Proc. § 223*)

Voir dire examination is not for purpose of instructing jurors in matters of law. *People v. De La Plane (1979) 88 Cal. App. 3d 223, 253, 151 Cal. Rptr. 843*

Voir dire examination that presented several hypothetical situations based on issues to be tried was permissible. *Kelly v. Trans Globe Travel Bureau, Inc. (1976) 60 Cal. App. 3d 195, 209, 131 Cal. Rptr. 488*

Questions addressed to prospective jurors in personal injury action that dealt with interest of jurors in particular insurance company was proper if impression not necessarily conveyed that defendant insured by that company. *Hart v. Wielt (1970) 4 Cal. App. 3d 224, 230, 84 Cal. Rptr. 220*

Objective of voir dire examination is to elicit information from prospective trial jurors that permits exercise of challenges for cause to arrive at impartial jury; reasonable examination by counsel directly or through court on subjects appropriate to exercise of challenges for cause. *Rousseau v. West Coast House Movers (1967) 256 Cal. App. 2d 878, 883, 884, 64 Cal. Rptr. 655*

Questions addressed to prospective jurors in defamation action that dealt with plaintiff's prior criminal trial for theft were proper when that trial was basis for later civil suit. *Russell v. Geis (1967) 251 Cal. App. 2d 560, 569, 59 Cal. Rptr. 569*

[5] Challenges to Prospective Jurors

[a] Challenges for Cause

In capital murder prosecution, trial court erroneously excused five prospective jurors for cause based solely on their written answers to jury questionnaire concerning their views relating to death penalty, and without any opportunity for follow-up questioning during which court and counsel might have been able to clarify responses and determine whether, in fact, prospective jurors were disqualified from service, because trial court erroneously equated nondisqualifying concept of very difficult decision by juror to impose death sentence with disqualifying concept of substantial impairment of juror's performance of his or her legal duty, and failed to recognize that one question in jury questionnaire standing alone, did not elicit sufficient information from which court properly could determine whether particular prospective juror suffered from disqualifying bias. *People v. Stewart (2004) 33 Cal. 4th 425, 440-455, 15 Cal. Rptr. 3d 656, 93 P.3d 271*

In capital murder prosecution, trial court did not err in granting prosecution's challenges for cause to two prospective jurors, where they made statements in their juror questionnaires that would disqualify them from serving as jurors in case, and although later statements during voir dire may not have been disqualifying, resolution of conflicts and contradictions was trial court's task and by granting challenges for cause, trial court impliedly found prospective jurors' views would prevent or substantially impair performance of their duties as jurors. *People v. McDermott (2002) 28 Cal. 4th 946, 983, 123 Cal. Rptr. 2d 654, 51 P.3d 874*

In capital murder prosecution, although trial court erred in refusing defendant's challenge for cause to pro-death penalty prospective juror whose views would have prevented or substantially impaired performance of his duties as juror in accordance with his instructions and his oath, relief was not warranted on theory that trial court's error forced defendant to use one of his peremptory challenges, thereby reducing number he had on hand later in trial, where error was

harmless because none of prospective jurors defendant found objectionable actually sat on his jury and loss of peremptory challenge does not constitute violation of constitutional right to impartial jury. *People v. Boyette (2002) 29 Cal. 4th 381, 416-419, 127 Cal. Rptr. 2d 544, 58 P.3d 391*

Selection of jury from full jury panel. *Buckley v. Chadwick (1955) 45 Cal. 2d 183, 202, 289 P.2d 242*

When trial court discovers during trial that juror misrepresented or concealed material information on voir dire tending to show bias, trial court may discharge juror if, after examination of juror, record discloses reasonable grounds for inferring bias as "demonstrable reality," even though juror continues to deny bias. *People v. Price (1991) 1 Cal. 4th 324, 400, 3 Cal. Rptr. 2d 106, 821 P.2d 610*

[b] Peremptory Challenges

[i] In General

Defendant's constitutional rights were not violated when prosecutor exercised peremptory challenges to excuse African-American jurors when each challenge was supported by constitutional reasons. *People v. Mills (2010) 48 Cal. 4th 158, 173-185, 106 Cal. Rptr. 3d 153, 226 P.3d 276*

Under variant of "jury box" method used in capital murder prosecution there was no violation of *Code Civ. Proc. § 226*, where *Code Civ. Proc. § 226* does not dictate that all challenges for cause must be exercised before any peremptory challenges may be exercised, and procedure like one trial court here used, whereby challenges were exercised in groups, even if within each group challenges for cause were exercised before peremptory challenges, did not violate statutory mandate, and where under *Code Civ. Proc. § 231*, entitling each party to full panel before exercising any peremptory challenge, "panel" always has been understood by California courts as subset of members of whole venire called to fill jury box during voir dire, so that defendant was entitled to panel of 12 jurors before he exercised any peremptory challenges, but governing statutes were never interpreted to require that entire venire be subjected to for-cause challenges before exercise of any peremptory challenges. *People v. Avila (2006) 38 Cal. 4th 491, 537-538, 43 Cal. Rptr. 3d 1, 133 P.3d 1076*

Although selection method using variation of "struck jury" requiring criminal defendant to direct peremptory challenges against potential jury of more than 12 persons departs from statutory selection procedures, absent showing of prejudice, defendant is not entitled to relief if defendant was not unduly prevented from exercising allotted challenges or selection or composition of petit jury is not otherwise fundamentally flawed. *People v. Wright (1990) 52 Cal. 3d 367, 399, 276 Cal. Rptr. 731, 802 P.2d 221*

Absolute right to challenge certain number of jurors peremptorily; right not cut off by previous passing of juror sought to be challenged. *Buckley v. Chadwick (1955) 45 Cal. 2d 183, 202, 289 P.2d 242*

In jury trial pursuant to the Sexually Violent Predator Act, defendant is entitled to six peremptory challenges as provided in *Code Civ. Proc. § 231(c)*, and neither state nor federal due process or equal protection principles require that state law provide defendant in SVPA proceeding same number of peremptory challenges as in most criminal cases. *People v. Calhoun (2004) 118 Cal. App. 4th 519, 523-530, 13 Cal. Rptr. 3d 166*

[ii] Prohibition Against Challenges Based on Group Bias

In murder prosecution, trial court committed clear error in overruling defendant's *Batson* objection with respect to African-American potential juror, which prosecutor explained as potential juror looking very nervous throughout questioning, and potential juror's being student teacher and prosecutor's concern that for that reason, that he might come

back with guilty of lesser verdict to go home quickly so there wouldn't be penalty phase, where record did not show that trial judge actually made determination concerning juror's demeanor, and, rather than making specific finding on record concerning juror's demeanor, trial judge simply allowed challenge without explanation; and where prosecutor anticipated short trial on record during voir dire, so that serving on jury would not have seriously interfered with juror's ability to complete his required student teaching, making prosecutor's second proffered justification for striking juror suspicious, and implausibility of explanation was reinforced by prosecutor's acceptance of white jurors who disclosed conflicting obligations that appeared to have been at least as serious as African-American potential juror's. *Snyder v. Louisiana (2008)552U.S.472, 128 S. Ct. 1203, 1209-1212, 170 L. Ed. 2d 175*

To establish prima facie case of improper exercise of peremptory challenges under *Batson v. Kentucky (1986) 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69* , objector is not required to show it is more likely than not other party's peremptory challenges, if unexplained, were based on impermissible group bias. *Johnson v. California (2005) 545 U.S. 162*

Criminal defendant showed prosecutor discriminatorily exercised peremptory challenges against African-American potential jurors, where out of 20 black members of 108-person venire panel, only one served, with nine excused for cause or by agreement, and 10 peremptorily struck by prosecution; where prosecution's reasons for exercising peremptory strikes against some black panel members appeared equally on point as to some white jurors who served; and where prosecution's shuffling of venire panel, inquiry into views on death penalty, and questioning about minimum acceptable sentences all indicated decisions probably based on race. Appearance of discrimination was confirmed by widely known evidence of general policy of district attorney's office to exclude black venire members from juries at time this jury was selected. *Miller-El v. Dretke (2005) 542 U.S. 231, 125 S. Ct. 2317, 2323-2340*

Criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not defendant and excluded juror share same race. *Powers v. Ohio (1991) 499 U.S. 400, 402, 111 S. Ct. 1364, 113 L. Ed. 2d 411*

After prosecutor struck three Native American women and one Asian woman from jury in state murder trial, trial court unreasonably accepted prosecutor's nonracial motives as genuine and erred in denying defendant's *Batson/Wheeler* motion after evidentiary hearing that resulted from prosecutor's strike of only Native American on regular panel because she worked for tribe and he feared she was inclined to favor Native American culture and institutions over "mainstream system" and because Native Americans were "resistive" and "suspicious" of criminal justice system and both potential alternate Native American jurors and only other minority in venire, when racial animus behind prosecutor's strikes was clear and in explaining peremptory challenge to eliminate one prospective Native American juror, he answered using blatant racial and cultural stereotypes, and when evaluation of voir dire transcript and juror questionnaires clearly and convincingly refuted each of prosecutor's nonracial grounds. *Kesser v. Cambra (9th Cir. 2006) 465 F.3d 351, 359-371*

In state prosecution for sexual crimes involving child victim, trial court properly denied defendant's *Batson/Wheeler* motion after finding prima facie case of gender discrimination, based on prosecutor's use of eight of ten peremptory challenges to strike male prospective jurors after prosecutor offered gender-neutral reasons for striking seven of male venire members, but failed to offer explanation for eighth male because she could not remember reason, when it was not objectively unreasonable for California Court of Appeal to conclude that defendant did not meet his ultimate burden of establishing purposeful discrimination by accepting prosecutor's statement that she forgot why she exercised eighth peremptory challenge as credible, and when voir dire testimony suggested gender-neutral reason for challenge. *Yee v. Duncan (9th Cir. 2006) 463 F.3d 893, 897-901*

In prosecution for second-degree robbery, African-American defendant made prima facie showing of purposeful discrimination under *Batson/Wheeler*, where defendant established that he was African-American and prosecutor used three of first four peremptory challenges to remove African-Americans from jury and only four of first 49 potential jurors were African-American, thus presenting statistical disparity, and defendant could make prima facie showing

based on statistical disparity alone under *Johnson v. California (2005) 545 U.S. 162, 125 S. Ct. 2410, 162 L. Ed. 2d 129* , and *Miller-El v. Dretke (2005) 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196* ; and where existing record, informed by *Johnson* and *Miller-El*, failed to disclose refutation of inference of bias raised by statistical disparity. *Williams v. Runnels (9th Cir. 2005) 432 F.3d 1102, 1105-1110*

In criminal prosecution arising out of alleged plot to kill one defendant's wife, state trial court did not err in denying white defendants' *Batson* challenge based on prosecutor's peremptory strike of four African-American potential jurors, where, although defendants made prima facie showing and trial court then required prosecutor to explain his reasons for exercise of peremptory challenges to African-American jurors, trial court properly determined that defendants did not prove purposeful racial discrimination; after prosecutor articulated his reasons for challenges, trial judge took recess to evaluate prosecutor's reasons and, recognizing it was close question, ruled that prosecutor was credible and that there existed valid basis for excusal, so that trial judge appreciated defense counsel's concerns, but determined prosecutor did not have discriminatory intent in making challenges. *Mitleider v. Hall (9th Cir. 2004) 391 F.3d 1039, 1047-1051*

In murder and robbery prosecution, process employed by trial court to evaluate defendant's objection to prosecutor's exercise of peremptory challenges as race based clearly contravened procedure outlined in *Batson v. Kentucky*, when trial court never permitted defense counsel to explain basis for his objection but instead interrupted defense counsel and offered sua sponte its speculation as to why prosecutor may have struck five potential jurors in question, trial court did not pause to require actual explanation from prosecutor, and only after trial court had made absolutely clear that it would overrule objection did it allow defense counsel unimpeded opportunity to make prima facie showing; both defendant and stricken jurors were black and thus members of cognizable racial group, and defendant raised inference of discrimination because over 83 percent of possible black jurors were excluded by prosecutor and state did not point to anything in record altering discriminatory import of prosecutor's use of five out of six peremptory challenges to strike five out of six potential black jurors. *Paulino v. Castro (9th Cir. 2004) 371 F.3d 1083, 1089-1092*

In murder prosecution based on drive-by gang shooting, prosecutor did not use peremptory challenges in racially discriminatory manner to excuse nine African-American prospective jurors, where record supported finding prosecutor did not purposefully discriminate against any prospective jurors, either individually or collectively, and reflected that jurors and alternate jurors selected and sworn were diverse group, further supporting inference prosecutor acted in good faith and without discriminatory purpose in exercising peremptory challenges. *People v. Watson (2008) 43 Cal. 4th 652, 669-682, 76 Cal. Rptr. 3d 208, 182 P.3d 543*

In capital prosecution for murder of sheriff's deputy and forcible escape, although record was less than clear as to whether trial court perceived that prospective juror was not of Hispanic origin when, several days after defendant's *Batson/Wheeler* motion was taken under submission, court proceeded to reach, address and reject merits of claim with regard to her excusal, which was dispositive of claim on appeal. As to second prospective juror, who was Hispanic, although trial court made good faith determination that prima facie case of improper excusal for group bias had been shown, prosecutor thereafter furnished ample reasons explaining why peremptory excusal of prospective juror was not motivated by discriminatory intent, and comparative juror analysis of jury questionnaire and voir dire responses of other prospective jurors identified by defendant as supportive of his claim that prospective juror was excused with discriminatory intent viewed in light of totality of evidence relevant on claim did not demonstrate purposeful discrimination. *People v. Cruz (2008) 44 Cal. 4th 636, 654-661, 187 P.3d 970*

Appellate court must perform comparative juror analysis for first time on appeal to evaluate whether advocate's stated reasons for peremptorily challenging prospective jurors are truthful or pretextual, because reviewing courts must consider all evidence bearing on trial court's factual finding regarding discriminatory intent, and comparative juror analysis is evidence that, while subject to inherent limitations, must be considered when reviewing claims of error at *Wheeler/Batson*'s third stage when defendant relies on such evidence and record is adequate to permit comparisons. In murder prosecution, trial court's finding that prosecutor's proffered explanations for exercising peremptory challenge against African-American prospective juror were not pretexts designed to disguise racial prejudice was reasonable and

supported by substantial evidence. *People v. Lenix (2008) 44 Cal. 4th 602, 612-631, 187 P.3d 946*

In capital murder prosecution, prosecutor's use of peremptory challenges to remove Black, Hispanic, and young persons from jury did not violate defendant's rights under *Fourteenth Amendment* and *Cal. Const., art. I, § 16*, where trial court denied defendant's motions only after observing relevant voir dire and listening to prosecutor's reasons supporting each strike and to any defense argument supporting motions, and nothing in record suggested trial court either was unaware of its duty to evaluate credibility of the prosecutor's reasons or that it failed to fulfill duty; and where young persons are not cognizable class under *Wheeler. People v. Lewis (2008) 43 Cal. 4th 415, 468-482, 75 Cal. Rptr. 3d 588, 181 P.3d 947*

Criminal defendant failed to make prima facie case of group bias sufficient to challenge prosecutor's challenge to one African-American prospective juror, where fact that defendant was himself African-American alone did not establish prima facie case of discrimination; where whether victim was member of group to which majority of remaining jurors belonged was debatable as record showed her biological mother was Blackfoot Indian, but, in any event, race of victim, by itself, did not also establish prima facie case of discrimination; where prosecutor used only one peremptory challenge against African-American, passed alternate jurors once with two African-American jurors remaining, and never challenged other African-American juror; where fact that prosecutor accepted jury panel once with both African-American jurors on it and exercised single challenge only after defense counsel exercised his own challenge strongly suggested race was not motive behind challenge; and where, although not required to do so, prosecutor also stated three race-neutral reasons for peremptory challenge. *People v. Kelly, 42 Cal. 4th 763, 778-781, 68 Cal. Rptr. 3d 531, 171 P.3d 548*

In capital murder prosecution, although trial court did not expressly rule that defendant failed to make prima facie case of purposeful discrimination in prosecutor's exercise of peremptory challenges, by reciting races of prospective jurors excused by prosecutor, trial court clearly and properly implied that prima facie case of discrimination had not been made, where voir dire provided prosecutor with ample grounds for reasonably challenging Hispanic male prospective juror, and where no prima facie showing was made as to challenge to African-American man, since he was one of six prospective alternates and four of six were persons of color and he declined to fill out substantial portions of jury questionnaire, marking "confidential" on almost all of his answers. Court would not engage in comparative juror analysis, because this was "first-stage" *Wheeler/Batson* case, in that the trial court denied defendant's motions after concluding he had failed to make out a prima facie case, and not a "third-stage" case, in which trial court concludes prima facie case has been made, solicits explanation of peremptory challenges from prosecutor, and only then determines whether defendant has carried burden of demonstrating group bias. *People v. Howard (2008) 42 Cal. 4th 1000, 1016-1020, 71 Cal. Rptr. 3d 264, 175 P.3d 13*

In penalty phase of capital murder prosecution, defendant made no prima facie showing of purposeful discrimination in prosecution's striking of only two African-Americans in 78-person juror pool, when information elicited in voir dire showed race-neutral reasons for excusing both prospective jurors. Prosecution's striking of all three Hispanic women but none of five Hispanic men in juror pool did not establish prima facie case, when statistical frequency with which prosecution struck Hispanics from juror pool provided no basis to infer discrimination. Prosecution's use of 20 strikes on women, of whom there were 30 in jury pool, and 10 on men did not make out prima facie case of group bias against women, when ultimate composition of jury mirrored that of juror pool, prosecution's pattern of peremptories did not suggest it attempted to or did deprive defendant of jury containing fair cross-section of men and women, and record disclosed gender-neutral reasons for strikes to which defendant objected under *Batson/Wheeler. People v. Bonilla (2007) 41 Cal. 4th 313, 343-350, 60 Cal. Rptr. 3d 209, 160 P.3d 84*

In capital murder prosecution, in which there was jury trial only in penalty phase after defendant pleaded guilty and admitted special circumstances of murder in course of rape and of burglary, trial court properly denied defendant's *Batson/Wheeler* motion on finding of no prima facie case of discrimination; trial court did not err in determining prima facie case had not been made as to two Hispanic jurors because after defendant challenged prosecutor's first exercise of

peremptory challenge against Hispanic juror, prosecutor articulated neutral bases for challenge, and defendant failed to request that court revisit prior challenge after second challenge to Hispanic juror; and trial court did not err in finding no prima facie case with respect to African-American juror, because significant number of his stepchildren and blood relatives had been in trouble with law and had been to prison, he had personally been involved in helping some of his relatives through criminal justice system, all of which taken together constituted substantial race-neutral basis for peremptory challenge, and he was only prospective black juror peremptorily challenged, when at time of challenge a black woman had been seated on jury and there was subsequent seating of another black juror. *People v. Williams (2006) 40 Cal. 4th 287, 308-313, 52 Cal. Rptr. 3d 268*

In capital robbery-murder prosecution, defendant did not carry burden of showing discriminatory challenges exercised by prosecution against potential African-American jurors, even though defendant presented prima facie case in prosecutor's exercise of peremptory challenges to four African-American female and one prospective African-American male jurors because they were only African-Americans in jury box, when defendant did not contest peremptory challenge to male prospective juror and court shared prosecutor's concerns as to one female prospective juror; and when trial court scrutinized sincerity and credibility of prosecutor's stated reason for exercising peremptory challenges against other female prospective jurors, which was "sympathy for defendant," and accepted proffered reason as sincere, and record of hearing on new trial motion lent considerable support to trial court's conclusion that prosecutor was sincere. *People v. Stanley (2006) 39 Cal. 4th 913, 935-945, 47 Cal. Rptr. 3d 420, 140 P.3d 736*

Trial court properly denied habeas corpus petition brought after capital murder conviction, when record did not support former prosecutor's later claim that he had acted on basis of standard procedure in district attorney's office with motive to discriminate on basis of religion by peremptorily challenging Jewish prospective jurors from death penalty cases, when prosecutor had determined all three jurors were undesirable and rated them unfavorably before he even allegedly considered their religion; when claim that prosecutor exercised peremptory challenges on impermissible basis rested entirely on his credibility, which was impeached at habeas corpus evidentiary hearing; and when prosecutor had motive to claim that he excused Jewish jurors from capital juries in accordance with standard practice in order to embarrass district attorney's office. *In re Freeman (2006) 38 Cal. 4th 630, 643-645, 42 Cal. Rptr. 3d 850, 133 P.3d 1013*

In capital murder prosecution, trial court properly denied defendant's and co-defendants' *Batson/Wheeler* motions challenging prosecutor's use of peremptory challenges against black and Hispanic prospective jurors, when comparative juror analysis was not employed in trial court because prosecutor used numerical scoring system, in which he compared jurors to each other, since prosecutor's system of scoring produced numerical score for each prospective juror based on his or her own answers to certain death-penalty-related questions on questionnaire and scores attributed to particular prospective jurors were not dependent on scores of others, and when side by side comparisons of black prospective juror as to whom prosecutor exercised peremptory challenge and white prospective juror as to whom prosecutor did not failed to demonstrate purposeful discrimination because side-by-side comparison revealed that they were not similarly situated. Further, trial court was not required to ask prosecutor to provide race-neutral explanations for earlier excusing black prospective juror because of suspect excusal of second black prospective juror, when although trial court noted that, in view of small number of African-Americans on panel, two excusals constituted prima facie showing, earlier excusal was merely a part of totality of relevant facts to be considered in determining prima facie case of group bias on *Wheeler* objection, which was made as to second black prospective juror only. *People v. Avila (2006) 38 Cal. 4th 491, 540-552, 43 Cal. Rptr. 3d 1, 133 P.3d 1076*

In capital murder prosecution, trial court properly denied defendant's *Batson/Wheeler* motion after first finding prima facie case of impermissible discrimination based on prosecutor's exclusion of eight African-American prospective jurors in course of exercising 15 peremptory challenges, when trial court found prosecutor's reasons for excusing prospective jurors to be genuine and candid and not pretextual, and trial court explained at length that many of prosecutor's observations of prospective jurors' demeanors and attitudes matched its own and commented that prosecutor's voir dire of black prospective jurors as opposed to other prospective jurors was not perfunctory, unsavory, shallow or desultory, but was thorough and lengthy and virtually same as his voir dire of other prospective jurors; and when given trial court's

well-reasoned and sincere effort to evaluate nondiscriminatory justifications prosecutor offered, its conclusions were entitled to deference on appeal. Further, on a comparative prospective juror analysis, substantial evidence supported trial court's ruling with regard to each prospective juror, and prosecutor gave reasons showing he honestly viewed prospective jurors he challenged as not similarly situated, in legitimate respects, to those he accepted. *People v. Huggins (2006) 38 Cal. 4th 175, 226-236, 41 Cal. Rptr. 3d 593, 131 P.3d 995*

In capital murder prosecution, prosecutor's peremptory challenges to African-American prospective jurors and alternate jurors did not violate defendant's rights under state and federal constitutions, when even assuming prima facie showing as to all challenged jurors, substantial evidence supported prosecutor's explanation with regard to prospective jurors and their attitudes toward death penalty and other issues. Further, five out of 12 sitting jurors were African-Americans, and four out of those five were women. *People v. Ward (2005) 36 Cal. 4th 186, 199-205, 30 Cal. Rptr. 3d 464*

In capital murder prosecution, trial court properly held defendant failed to make out prima facie case of discriminatory exercise of peremptory challenges in prosecutor's challenges to African-American female jurors, when, although African-American women are cognizable group, record suggested grounds on which prosecutor might have reasonably challenged these prospective jurors. *People v. Young (2005) 34 Cal. 4th 1149, 1170-1174, 24 Cal. Rptr. 3d 112, 105 P.3d 487*

In capital murder prosecution, trial court did not err by denying defendant's *Wheeler* motion by determining that defendant failed to establish prima facie case of purposeful discrimination by prosecution, when record disclosed grounds on which prosecutor properly might have made his peremptory challenge against African-American juror, including that he apparently had substantial acquaintance with persons engaged in criminal activity, he held negative view of nature of penalty of life imprisonment without possibility of parole and similarly negative view of administration of penalty of death as random, and his comments on various points suggested that he may have been lacking in attention, in conformity with trial court's observation, which was uncontradicted and unobjected to by defense counsel, that he was asleep during most of voir dire. Because defendant failed to satisfy *Wheeler*, he likewise failed to satisfy *Batson. People v. Griffin (2004) 33 Cal. 4th 536, 553-557, 15 Cal. Rptr. 3d 743, 93 P.3d 344*

In capital murder prosecution, trial court did not err in denying defense motions that prosecution improperly exercised peremptory challenges against four African-American prospective jurors based on their race, when valid reasons for the first excusal were apparent. A prospective juror expressed doubt she could handle sentencing someone to death or participating in decision. Other statements that she could follow law and return death verdict warranted court's denial of prosecutor's challenge for cause, but her overall reservations about death penalty provided race-neutral explanation for her challenge. A second prospective juror also expressed reservations about death penalty, a third prospective juror had son who had been in county jail on criminal charges and she had seen psychiatrist for stress following job-related injury, and a fourth prospective juror worked as "seamer" although she had licenses as nurse and psychiatric technician and her husband was starting some kind of group home. As to third and fourth prospective jurors, prosecutor requested court to ask follow-up questions and court denied the request. The prosecutor's attempt to question them further also suggested nonracial motivation for their excusal. Although defendants were themselves African-Americans, so too were their victims; although key prosecution witness was white, trial court reasonably concluded that circumstance did not compel finding of a prima facie case. Moreover, although at first prosecutor exercised peremptory challenges against African-Americans at somewhat higher rate than percentage of their presence on jury panel, overall statistics were not particularly suspicious. *People v. Cleveland (2004) 32 Cal. 4th 704, 732-734, 11 Cal. Rptr. 3d 236, 86 P.3d 302*

In prosecution for first degree murder, trial court properly rejected defense motion challenging prosecutor's peremptory excusal of two Hispanic jurors as unconstitutionally based on group bias, when prosecutor's reasons for excusing two jurors, one juror based on her being counselor for at-risk youth and feeling that she would have undue sympathy for defendants because they were young and if not at risk, past risk, and as to second juror because prosecutor felt she did not have enough educational experience and it seemed like she was not paying attention to proceedings, was not involved in process and would not be good juror, and when record did not contradict trial court's determination that no

Wheeler error occurred. *People v. Reynoso (2003) 31 Cal. 4th 903, 914-929, 3 Cal. Rptr. 3d 769, 74 P.3d 852*

In prosecution of African-American man for murder of child of his white girlfriend, trial court properly found that defendant failed to establish prima facie case that prosecutor used peremptory challenges improperly to challenge all three prospective African-American jurors, when trial court properly cited "strong likelihood" standard from *People v. Wheeler (1978) 22 Cal. 3d 258, 148 Cal. Rptr. 890, 583 P.2d 748* , which merely means that to state prima facie case, objector must show it is more likely than not other party's peremptory challenges, if unexplained, were based on impermissible group bias, in determining whether defendant had established a prima facie case, and "strong likelihood" standard was compatible with and did not violate *Batson v. Kentucky (1986) 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69* . Further, when objecting party presents comparative juror analysis to trial court, reviewing court must consider that evidence, along with everything else of relevance, in reviewing, deferentially, trial court's ruling, but when such analysis was not presented at trial, reviewing court should not attempt its own comparative juror analysis for first time on appeal, especially when record supports trial court's finding of no prima facie case. *People v. Johnson (2003) 30 Cal. 4th 1302, 1312-1328, 1 Cal. Rptr. 3d 1, 71 P.3d 270*

In capital murder prosecution, trial court did not err in finding that defense failed to make out prima facie case that prosecutor challenged two African American prospective jurors on basis of their race, when, on whole record, prosecutor could reasonably have concluded jurors would be unfavorable penalty phase jurors. *People v. Jones, 30 Cal. 4th 1084, 1102-1105, 135 Cal. Rptr. 2d 370, 70 P.3d 359*

Prosecutor's excusal of Spanish-surnamed prospective juror was not based on race within meaning of *Wheeler* challenge, when, although "Spanish surnamed" sufficiently describes cognizable class Hispanic under *Wheeler*, exercise of peremptory challenge on that basis violates constitutional rights only when no one knows at time of challenge whether Spanish-surnamed prospective juror is Hispanic, and prospective juror had twice indicated on her juror questionnaire she was white, and when trial court asked her for record whether she was Hispanic, she replied " *No." People v. Gutierrez (2002) 28 Cal. 4th 1083, 1123, 124 Cal. Rptr. 2d 373, 52 P.3d 572*

In capital murder prosecution, prosecution did not impermissibly use its peremptory challenges to remove prospective jurors on basis of race, when, although defense had established prima facie case, prosecutor challenged each of eight black prospective jurors because prospective juror's views and attitudes regarding death penalty were adverse to prosecution and prospective juror's views about death penalty are permissible race- and group-neutral basis for exercising peremptory challenge in capital case, and when trial court's review of prospective jurors' questionnaires and voir dire of challenged jurors showed each had expressed views prosecutor could reasonably regard as unfavorable on penalty issue and trial court apparently concluded, with defense acquiescence, that there was no need to compare their expressed views with those of remaining prospective jurors in jury pool. *People v. McDermott (2002) 28 Cal. 4th 946, 966-981, 123 Cal. Rptr. 2d 654, 51 P.3d 874*

In capital murder prosecution, trial court did not err in denying defendant's *Wheeler/Batson* motion claiming prospective juror was excluded because of his race, when trial court implicitly found defense made prima facie case of racial discrimination and substantial evidence supported determination; prosecutor then came forward with various reasons for excusing juror that did not reveal any racial intent, including that prosecutor objected to juror because of his possible reluctance to vote for death, his attitude toward court and counsel, his possible inability to get along with other jurors, and his seeming reluctance to serve, which court properly deemed to be race-neutral; and prosecutor's reasons were persuasive and not merely a pretext for discrimination, since prosecutor indicated her concern that juror might harbor anti-death bias based on his early religious training, trial court found concern to be valid position, religion was not only reason prosecutor gave, and trial court made sincere and reasoned effort to evaluate each stated reason for challenge to particular juror, to which reviewing court accords great deference, and trial court rejected defendant's claim of pretext, and prosecutor's reasons for excusing juror are not inherently implausible and find support in record. *People v. Cash (2002) 28 Cal. 4th 703, 723-725, 122 Cal. Rptr. 2d 545, 50 P.3d 332*

In capital murder case, given all circumstances before trial court, including number of African-American women left on jury, even assuming proper standard was more lenient reasonable-inference standard, trial court's ruling finding defendant had not established prima facie showing of group bias based on prosecutor's challenges to African-American prospective jurors was supportable. *People v. Boyette (2002) 29 Cal. 4th 381, 422-423, 127 Cal. Rptr. 2d 544, 58 P.3d 391*

In capital murder prosecution, substantial evidence supported trial court's determination that defendant failed to make prima facie showing of racial bias in jury selection, when defendant's only stated bases for establishing prima facie case were that four of first five peremptory challenges exercised by prosecution were for black prospective jurors, and very small minority of jurors on panel were black, since record disproved second factual assertion, and even assuming both assertions were factually accurate, they fell short of prima facie showing, when defendant was unable to show prosecutor had struck most or all of black members from venire, and when record disclosed ample grounds on which prosecution might reasonably have challenged excluded black jurors. *People v. Farnam (2002) 28 Cal. 4th 107, 131-139, 121 Cal. Rptr. 2d 106, 47 P.3d 988*

When defense counsel exercised discriminatory peremptory challenges due to group bias against white males, trial court did not err in denying defendant's motion to dismiss remaining venire and in continuing voir dire with original venire, when trial court, acting with prosecutor's consent, had discretion to consider and impose remedies or sanctions short of outright dismissal of entire venire. *People v. Willis (2002) 27 Cal. 4th 811, 118 Cal. Rptr. 2d 301, 43 P.3d 130*

During penalty phase of capital criminal trial, trial court erroneously and prejudicially denied defendant's motion to dismiss jury panel based on prosecutor's exercise of peremptory challenges against prospective jurors solely because of Hispanic ancestry or surnames, when after finding prima facie case of invidious discrimination, court erroneously permitted prosecutor to give reasons for peremptory challenges in ex parte hearings out of presence of defendant and defense counsel; and when, although record of voir dire failed to support some of prosecutor's reasons, trial court accepted every reason without inquiry and denied defense motion with result that no Hispanic served on jury that returned death verdict. *People v. Silva (2001) 25 Cal. 4th 345, 375-386, 106 Cal. Rptr. 2d 93, 21 P.3d 769*

In murder and attempted murder prosecution, record amply supported trial court's determination prosecutor offered race-neutral reasons for exercising his peremptory challenges to excuse prospective African-American jurors; accordingly, even if defendant had shown prima facie inference of discrimination, trial court did not err by concluding prosecutor's proffered reasons for strikes were genuine and not pretext for racial discrimination. *People v. Adanandus (2007) 157 Cal. App. 4th 496, 500-511, 69 Cal. Rptr. 3d 25*

Prosecutor did not violate constitutional rights of criminal defendant by using peremptory challenge to excuse sole African-American prospective juror who was pastor and whose spouse worked in county welfare department, where substantial evidence supported trial court's decision that prosecutor's reasons for excusing pastor were legitimate and race neutral. *People v. Semien (2008) 162 Cal. App. 4th 701, 706-708, 75 Cal. Rptr. 3d 880*

In murder prosecution, prosecutor's exercise of peremptory challenges against African-American potential jurors based on their skeptical attitudes toward criminal justice system expressed in their juror questionnaires was not racially discriminatory, where prosecutor reviewed questionnaires submitted by jurors and questioned jurors closely, and skeptical views for which he challenged them were not result of prosecutorial assumptions but were actually expressed by jurors themselves; and where fact that similar attitudes were held by many other African-Americans did not convert prosecutor's challenge into intentional race-based discrimination, since, assuming for purpose of argument attitudes reflected in jurors' questionnaire responses were common among African-Americans and rejecting jurors on those grounds would disproportionately exclude African-Americans as jurors, skepticism toward criminal justice system could not be seen to be so prevalent among African-Americans that it could be considered proxy for race. *People v. Calvin (2008) 159 Cal. App. 4th 1377, 1383-1389, 72 Cal. Rptr. 3d 300*

In murder prosecution, trial court properly determined that prosecutor did not use two peremptory challenges to excuse African-American women from jury venire for improper purpose, where although trial court determined defense counsel had established prima facie case because there was possible inference of discriminatory purpose, trial court properly performed its function in responding to defendant's *Wheeler* motion by making proper inquiry, requiring prosecutor to explain her peremptory challenges and allowing defense counsel to respond; where prosecutor's reasons were sufficient to sustain trial court's finding that peremptory challenges were not used in discriminatory manner; and where decision of United States Supreme Court in *Snyder v. Louisiana (2008) 552 U.S.472, 128 S. Ct. 1203, 170 L. Ed. 2d 175* , did not require reversal because, although prosecutor used element of demeanor with respect to one prospective juror, demeanor was shown on record from her lateness and inability to follow court's instructions, so no further finding was needed. *People v. Davis (2008) 164 Cal. App. 4th 305, 309-315, 78 Cal. Rptr. 3d 809*

In criminal prosecution for variety of crimes, trial court applied incorrect legal standard of clear and convincing evidence to determine whether prosecutor's peremptory challenge of one African-American female potential juror was based on purposeful race discrimination, when opponent of peremptory challenge did not have burden of proving purposeful race discrimination by clear and convincing evidence applicable under Antiterrorism and Effective Death Penalty Act of 1996, but, rather, by preponderance of evidence as to whether neutral reasons offered to justify peremptory challenge were genuine or pretextual. *People v. Hutchins (2007) 147 Cal. App. 4th 992, 996-999, 55 Cal. Rptr. 3d 105*

In robbery prosecution, it was proper for trial court to require explanations from prosecution for peremptory challenges to only two of three prospective African-American jurors who were subject of African-American defendant's *Batson/Wheeler* motion, when trial court properly determined facts did not support inference of discrimination against one prospective juror. Further, trial court did not fail to elicit sufficient reasons for peremptory challenges of other two jurors, when prosecuting attorney disclosed she had mistakenly dismissed one prospective juror because she relied on information in questionnaire of another juror with same last name, genuine mistake was race-neutral reason for exercising peremptory challenge, and trial court was not required to make further inquiry as to genuineness of prosecutor's mistake because prosecutor fully explained source of her mistake and because it involved jury questionnaires and prospective jurors with same surnames, error was subject to objective verification. Finally, prosecutor's reason for excusing one prospective juror based on his body language was not too vague to rebut prima facie showing of group bias, when peremptory challenges based on alienating looks and gestures were race-neutral and not improper and fact that prosecutor had passed several times on making peremptory challenges before excusing prospective juror tended to support her explanation it was conduct by juror, not his race, that precipitated challenge. *People v. Phillips (2007) 147 Cal. App. 4th 810, 814-819, 54 Cal. Rptr. 3d 678*

In robbery prosecution, trial court properly denied defendant's *Batson/Wheeler* motion based on prosecutor's use of three of 10 peremptory challenges against prospective jurors who were African-American women, which was 75 percent of African-American jurors in jury box; prosecutor gave reasons demonstrating that she distinguished between jurors she challenged and those she accepted on valid, race-neutral grounds, trial court accepted those reasons, and substantial evidence in record supported trial court's. *People v. Jordan (2006) 146 Cal. App. 4th 232, 245-259, 53 Cal. Rptr. 3d 18*

In carjacking prosecution, defendant did not establish prima facie case of *Batson* violations in prosecution's exercise of peremptory challenges to jurors, even though all three of prosecutor's peremptory challenges were to jurors with Hispanic surnames, when numerous Hispanics remained on panel of prospective jurors, and when statistical circumstances of prosecution's peremptory challenges was not sufficient to raise inference of discriminatory purpose. *People v. Buchanan (2006) 143 Cal. App. 4th 139, 145-149, 49 Cal. Rptr. 3d 137*

In prosecution for attempted murder and other crimes, after court granted defense's *Wheeler/Batson* motion as to prosecutor's challenge of black prospective juror, trial court properly exercised its discretion to reseat challenged juror

rather than dismiss venire, defense counsel implicitly consented to reseating of challenged juror, and defendant's personal consent was not required. However, it would be preferable and advisable for trial court to ensure that record reflects express consent of prevailing party when employing remedy other than dismissing entire venire. *People v. Overby (2004) 124 Cal. App. 4th 1237, 1242-1245, 22 Cal. Rptr. 3d 233*

Prosecutor impermissibly exercised peremptory challenges to remove two African-American women from jury requiring reversal of conviction for theft, receiving stolen property, possession of firearms and resisting arrest, when defendant made prima facie showing of discrimination by showing prosecutor excused only two African-American jurors in jury box, both of whom had experiences or contacts normally considered favorable to prosecution, and when whatever doubts there may have been as to sufficiency of prosecutor's explanation for challenging first juror, reasons for excusing second juror were incomprehensible and there was nothing in record to give them content. Inadequacy of prosecutor's explanation was compounded by manner in which trial court addressed defendant's motion by failing to make additional inquiry in light of vague and unsupported reasons offered by prosecutor. *People v. Allen (2004) 115 Cal. App. 4th 542, 551-553, 9 Cal. Rptr. 3d 374*

In murder prosecution, trial court properly ruled that prosecutor exercised peremptory challenges on basis of group bias and had no alternative but to dismiss remaining venire and grant motion for mistrial, when since challenged prospective jurors already had been excused, trial court did not have option of simply seating them notwithstanding challenge, and when trial court's finding of prosecutor's explanation for challenges, that prospective jurors would not understand technicalities of case, was entitled to deference. *People v. Muhammad (2003) 108 Cal. App. 4th 313, 321-323, 133 Cal. Rptr. 2d 308*

In prosecution for evading peace officer with willful disregard of safety of persons or property, possession of firearm by felon, and possession of marijuana, trial court properly denied defendant's *Wheeler* motion without finding prima facie case of group bias by prosecutor in excusing three black or Hispanic jurors, when record did not identify which of prosecutor's six peremptory challenges were at issue or race of any jurors. Record suggested race-neutral grounds on which prosecutor might have exercised some of her challenges, because brother of one challenged juror was public defender and prosecutor might reasonably believe he would be biased in favor of defendant or against prosecution, nephew of another challenged juror was incarcerated and prosecutor might reasonably be concerned this would make her sympathetic towards defendant, and a third challenged juror stated her close friend was "murdered" by prison guard, suggesting she might be biased against peace officers and all prosecution witnesses were peace officers; defendant failed to make record by which reviewing court could determine which challenged jurors were subject of his motion, waiving any assertion of error regarding denial of motion. *People v. Morris (2003) 107 Cal. App. 4th 402, 407-409, 131 Cal. Rptr. 2d 872*

Criminal defendant did not have standing to assert on appeal that, having found that defense counsel exercised peremptory challenges to exclude white males, in discriminatory manner, trial court erred in denying People's *Wheeler* motion to dismiss entire jury panel and venire and start voir dire with new venire; error was based on defendant's own counsel's improper exercise of peremptory challenges to exclude legally cognizable group. *People v. Morris (2003) 107 Cal. App. 4th 402, 409-414, 131 Cal. Rptr. 2d 872*

Trial court erroneously denied criminal defendant's motion to compel prosecution to justify exercise of peremptory challenges excusing only three African-American males in venire, when African-American males are cognizable class under *Wheeler*, and when defense counsel made prima facie case of discrimination on voir dire by showing there was no apparent legitimate reason to excuse one potential African-American male juror. *People v. Gray (2001) 87 Cal. App. 4th 781, 104 Cal. Rptr. 2d 848*

Trial court's finding of prima facie showing of group bias, subsequently refuted, was not binding as to subsequent motions alleging same group bias. *People v. Irvin (1996) 46 Cal. App. 4th 1340, 1351, 54 Cal. Rptr. 2d 450*

Selection of impartial jury in criminal proceedings is required under *U.S. Const., amend VI* as incorporated in *U.S. Const., amend XIV* and California law [*Cal. Const., art. I, § 16*] to be drawn from cross section of community; representatives of all economic, social, religious, racial, political, and geographical groups of community are not required to be contained in every jury, but prospective jurors must be selected without systematic and intentional exclusion of any of these groups. *People v. Wheeler (1978) 22 Cal. 3d 258, 265-278, 148 Cal. Rptr. 890, 583 P.2d 748* (at p. 282, n.29 pointing out that applicability of decision to civil cases was not reached)

Party believing opponent in criminal cases is using peremptory challenges to strike jurors on ground of group bias alone must raise point in timely fashion and make prima facie case of such discrimination to satisfaction of court; party is required: (1) to make as complete record of circumstances as is feasible; (2) to establish that persons excluded are members of cognizable group within meaning of representative cross-section rule; and (3) from all circumstances of case to show strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias. *People v. Wheeler (1978) 22 Cal. 3d 258, 280, 148 Cal. Rptr. 890, 583 P.2d 748*

If trial court in criminal case finds that prima facie case of group bias has been made in peremptorily challenging jurors, burden shifts to other party toshow, if party can, that peremptory challenges in question were not predicated on group bias alone. *People v. Wheeler (1978) 22 Cal. 3d 258, 281, 148 Cal. Rptr. 890, 583 P.2d 748* ; *see also People v. Johnson (1978) 22 Cal. 3d 296, 299, 148 Cal. Rptr. 915, 583 P.2d 774* (burden not sustained)

Prosecutor failed to demonstrate that juror was not excluded because of group bias, *i.e.*, being African-American, when prosecutor placed great emphasis on juror's place of residence and purported to base his distrust of jurors from that place on past experience, when population of that place is substantially African-American, and stating that jurors from that place have different attitude toward drug culture is stereotypical. *People v. Turner (2001) 90 Cal. App. 4th 413, 109 Cal. Rptr. 2d 138*

Trial court erred in denying defendant's *Wheeler* motion, made after prosecutor excused two prospective jurors who were professed lesbians; gays and lesbians do in fact meet "cognizable group" criteria under rule prohibiting use of peremptory challenges on basis of group bias. *People v. Garcia (2000) 77 Cal. App. 4th 1269, 1272, 1281-1282, 92 Cal. Rptr. 2d 339* ; *see also* 2000 Stats. ch. 43, § 1(b) (legislative intent in enacting *Code Civ. Proc. § 231.5* is to codify this decision)

Peremptory challenges reflecting group bias and predicated on challenged jurors' inclusion in identifiable group distinguished on racial, religious, ethnic or similar grounds are unconstitutional in civil cases. *Holley v. J & S Sweeping Co. (1983) 143 Cal. App. 3d 588, 591-592, 192 Cal. Rptr. 74*

[6] Number of Jurors

After both plaintiff and defendant consented to allow jury to begin deliberations without twelfth juror, who was being examined by doctor, trial court's instruction to jury to begin deliberations, choose foreman, and continue when other juror returned, was not reversible error. *Giouzelis v. McDonald (1981) 119 Cal. App. 3d 436, 444-446, 174 Cal. Rptr. 58*

Fewer than 12 jurors are permitted, even without formal stipulation for smaller jury on minutes in open court, if there has been express stipulation in chambers, and if parties ratify smaller jury by participation without objection in trial. *Meder v. Safeway Stores, Inc. (1979) 98 Cal. App. 3d 497, 504, 159 Cal. Rptr. 609*

[7] Alternate Jurors

Defendant could not contend on appeal that alternate's mere presence in jury room during deliberations (although she

did not participate in them and was not required to replace a juror) constituted reversible error because counsel for prosecution and defense in criminal case had stipulated that alternate juror could be sequestered with other jurors but was not to participate in jury deliberations so that, in event alternate had to replace regular juror, jury deliberations would not have to start all over again. *People v. Valles (1979) 24 Cal. 3d 121, 123, 154 Cal. Rptr. 543, 593 P.2d 240* (distinguishing *People v. Britton (1935) 4 Cal. 2d 622, 623, 52 P.2d 217* , on ground that case did not involve a stipulation of counsel, and discussing and rejecting contrary holding in *People v. Bruneman (1935) 4 Cal. App. 2d 75, 81, 40 P.2d 891* , which did involve stipulation)

In action for breach of contract and negligent misrepresentation, reversal was not required because alternate juror was present in jury room for 15 minutes at beginning of jury's deliberations before her presence was discovered and she was removed, when trial judge instructed jurors to completely disregard anything they heard alternate juror say and begin deliberations over again without consideration of input from alternate, simple presence of alternate in jury room did not make error reversible per se, and presumption of prejudice was rebutted. *Brassfield v. Moreland Sch. Dist. (2006) 141 Cal. App. 4th 67, 70-73, 45 Cal. Rptr. 3d 662*

Substitution of alternate juror after submission of case to jury does not offend constitutional proscriptions so long as reconstituted jury is instructed to start deliberations anew. *People v. Thomas (1990) 218 Cal. App. 3d 1477, 1486, 267 Cal. Rptr. 865*

Unless formally substituted, alternate juror is prohibited from entering jury room during deliberations. *People v. Adame (1973) 36 Cal. App. 3d 402, 405, 111 Cal. Rptr. 462*

[8] Duty of Jury on Separation During Trial

Juror may be discharged when trial court concludes that juror defied court's prohibition against taking his trial notes home and juror "failed to perform his duty to deliberate before reaching his decision." *People v. Thomas (1994) 26 Cal. App. 4th 1328, 1332-1333, 32 Cal. Rptr. 2d 177*

[9] Jury as Trier of Questions of Fact

Interpretation of contract, even though involving questions of fact, is judicial function, and only in rare cases, as when interpretation turns on credibility of extrinsic evidence, is party entitled to jury trial; even then, jury only determines facts; it does not interpret contract in light of those facts. *Oceanside 84, Ltd. v. Fidelity Fed. Bank (1997) 56 Cal. App. 4th 1441, 1451, 66 Cal. Rptr. 2d 487*

Issue of fact arises when presumption affecting burden of proof becomes operative. *Evid. Code §§ 115, 606*; *Haycock v. Hughes Aircraft Co. (1994) 22 Cal. App. 4th 1473, 1495, 28 Cal. Rptr. 2d 248*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsProvince of Court & JuryConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil Actions

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AUTHOR: William G. McDevitt Editorial Consultant

§ 322.77 Attorney General Opinions

Jury duty exemption for personnel on active duty with armed forces. *65 Ops. Cal. Att'y Gen. 430, 434-435 (1982)*

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§ 322.78 Judicial Council of California Civil Jury Instructions (CACI)

Preliminary admonitions to jury. *CACI No. 100*

Overview of trial. *CACI No. 101*

Taking notes during trial. *CACI Nos. 102, 5010*

Introductory evidence instructions. *CACI No. 106*

Service provider for juror with disability. *CACI Nos. 110, 5004*

Introductory instructions to alternate jurors. *CACI No. 111*

Duties of judge and jury. *CACI No. 5000*

Concluding evidence instructions. *CACI No. 5002*

Predeliberation instructions. *CACI No. 5009*

Deadlocked jury admonition. *CACI No. 5013*

Substitution of alternate juror. *CACI No. 5014*

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§ 322.79 Law Reviews

Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions, 6 S. Cal. Interdisc. L.J. 1 (1998)*

Plautz, Hanson, *Challenging Peremptories, 17 Cal. Law. 58 (1997)*

Note, *Branding Neutral Explanations Pretextual Under Batson v. Kentucky [106 S. Ct. 1712 (1986)] : An Explanation of the Role of the Trial Judge in Jury Selection, 48 Hastings L.J. 577 (1997)*

Note, *Developments in the Law--The Civil Jury, 110 Harv. L. Rev. 1408 (1997)*

Note, *Did the Markham [Markham v. Westview Instruments, Inc. 116 S. Ct. 1384 (1996)] Court Ignore Fact, Substance, and the Spirit of the Constitution in its Rush to Uniformity? 30 Loy. L.A. L. Rev. 1749 (1997)*

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Note, *Hardship Excuses and Occupational Exemptions: The Impairment of the "Fair Cross-Section of the Community," 69 S. Cal. L. Rev. 155 (1995)*

Landsman, *The Civil Jury in America: Scenes from an Unappreciated History, 44 Hastings L.J. 579 (1993)*

Rachlinski, *Scientific Jury Selection and the Equal Protection Rights of Venire Persons, 24 Pac. L.J. 1497 (1993)*

Casenote, *Georgia v. McCollum, Protecting Jurors from Race-Based Peremptory Challenges but Forcing Criminal Defendants to Risk Biased Juries, 24 Pac. L.J. 1887 (1993)*

Comment, *Reconstruction of the Peremptory Challenge System: A Look at Gender-Based Peremptory Challenges, 22*

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Goldman, *Toward a Color-Blind Jury Selection Process: Applying the "Batson Function" to Peremptory Challenges in Civil Trials, 31 Santa Clara L. Rev. 147 (1990)*

Note, *Voir Dire for California's Civil Trials: Applying the Williams Standard, 39 Hastings L.J. 517 (1988)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: William G. McDevitt Editorial Consultant

§ 322.80 Text References

Witkin, California Procedure, vol. 7, *Trial*, §§ 108-132 (4th ed. 1997)

Legal Topics:

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§§ 322.81[Reserved]

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A. Right to, Demand for, and Waiver of Juries

27-322 California Forms of Pleading and Practice--Annotated § 322.90

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.90 Demand for Jury Trial

[1] FORM Demand for Jury Trial

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	DEMAND FOR JURY TRIAL
Defendant(s).	)	
	)	
	)	

To the clerk of the above-entitled court, to each plaintiff/defendant, and to _____ [*name*], his/her/its/their attorney(s) of record:

NOTICE IS HEREBY GIVEN that _____ [plaintiff *or* defendant] demands a jury trial in the above-captioned action [and herewith deposits the sum of $_____ as advance jury fees].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

Ordinarily, a party would request a jury trial using the Case Management Statement [*see § 322.16*]. The form in *[1], above*, is for use only if [*see Code Civ. Proc. § 631*; *Taylor v. Union Pac. R.R. Corp. (1976) 16 Cal. 3d 893, 897, 130 Cal. Rptr. 23, 549 P.2d 855]* :

- There is no local printed form for demanding a jury trial.
- A party has previously filed an at-issue memorandum waiving jury trial.
- A party has filed an at-issue memorandum (or other appropriate form) demanding jury trial and thereafter has waived a jury.

[3] Cross References

For discussion and forms for use in motions, declarations, stipulations, and orders, see Ch.108, *Captions and Introductions*

For discussion and forms for use in making motions and orders, see Ch. 372, *Motions and Orders*

For additional forms for use in demanding a jury trial, see Ch. 425, *Pretrial Proceedings*

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AUTHOR: William G. McDevitt Editorial Consultant

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§§ 322.91[Reserved]

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27-322 California Forms of Pleading and Practice--Annotated § 322.93

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.93 Waiver of Jury Trial

[1] FORM Waiver of Jury Trial

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	WAIVER OF JURY TRIAL
Defendant(s).	)	
	)	
	)	

To the clerk of the above-entitled court, to each plaintiff/defendant and to _____ [*name*] his/her/its/their attorney(s) of record:

NOTICE IS HEREBY GIVEN that plaintiff/defendant waives trial by jury in the above-captioned action.

[This waiver supersedes plaintiff's/defendant's demand for a jury trial in the above-captioned action made and filed on _____ (*date*).]
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form in *[1], above,* is for use to waive a jury trial if [*Code Civ. Proc. § 631(a)(2)*; *see § 322.18[2]*]:

- There is no local printed form for that purpose, and
- The noticing party has previously demanded a jury trial.

Counties provide a printed form for the Memorandum That a Civil Case Is At Issue that includes a space reserved for an affirmative (e.g., demand) or negative (e.g., waiver) to the question of whether a party demands a jury. Before using this form, counsel should determine whether a local form is made available. If local forms are available and are applicable to the situation, they should be used instead of this form.

[3] Cross References

For additional forms for use in waiving a jury trial, see Ch. 425, *Pretrial Proceedings*

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PART IV. FORMS
A. Right to, Demand for, and Waiver of Juries

27-322 California Forms of Pleading and Practice--Annotated § 322.94

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.94 Motion for Jury Trial by Party Who Previously Waived Jury

[1] Notice of Motion

[a] FORM Motion for Jury Trial by Party Who Previously Waived Jury--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name(s)*],	)	MOTION AND NOTICE OF MOTION FOR JURY
Plaintiff(s),	)	TRIAL AFTER WAIVER
vs.	)	Date: _____
_____ [*name(s)*],	)	Time: _____
Defendant(s).	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To: Plaintiff/Defendant [*or other party*] _____ [*name*] and to _____ [*name*], his/her/its/their attorney(s) of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ (*number*) of] this court, located at _____ [*name of building and street address*],

_____ [*city*], California, _____ [*moving party, e.g.,* defendant] will, and hereby does, move, under *Section 631 of the California Code of Civil Procedure*, for a trial by jury in this action. This motion is made on the grounds that _____ [*state grounds for motion, e.g.,* this is an action to recover damages resulting from earth movement underlying plaintiff's lot and home and thus a proper case for jury trial under *Section 592 of the California Code of Civil Procedure*]. The interest of justice will be served by a jury trial in this matter.

The motion will be based on this notice of motion, on the attached memorandum, the papers and records on file herein, [on such supplemental affidavits or declarations and memoranda of points and authorities as may be filed subsequently herein,] and on such oral and documentary evidence as may be presented at the hearing on this motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[b] Use of Form

The form in *[a], above*, is to notice a motion for jury trial for use by a party who has previously waived a jury trial [*Code Civ. Proc. § 631(d)*; *Day v. Rosenthal (1985) 170 Cal. App. 3d 1125, 1176, 217 Cal. Rptr. 89* ; *McIntosh v. Bowman (1984) 151 Cal. App. 3d 357, 363, 198 Cal. Rptr. 533* ; *see § 322.18[3]*]. A memorandum must be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* . For a form of declaration to use in support of the motion, see *[2], below*.

The form is based on the factual situation in *Oakes v. McCarthy Co. (1968) 267 Cal. App. 2d 231, 264-265, 73 Cal. Rptr. 127* . There plaintiffs failed to demand a jury trial in their Memorandum That a Civil Case Is At Issue filed before two of the defendants had been served with summons and complaint. Subsequently, the pretrial conference that had been set pursuant to the memorandum was taken off calendar by stipulation of then plaintiffs' counsel and the appearing defendant's counsel. Therefore, an amended complaint was filed, the additional defendants served, and the case again set for trial [*see Oakes v. McCarthy Co. (1968) 267 Cal. App. 2d 231, 264-265, 73 Cal. Rptr. 127]* .

[c] Cross References

For discussion and forms for use in motions, declarations, stipulations, and orders, see Ch.108, *Captions and Introductions*

For discussion and forms for use in making motions and orders, see Ch. 372, *Motions and Orders*

For additional forms for use in demanding a jury trial, see Ch. 425, *Pretrial Proceedings*

[2] Declaration in Support of Motion

[a] FORM Motion for Jury Trial by Party Who Previously Waived Jury--Declaration in Support of Motion
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name(s)*],	)	DECLARATION OF _____ [*name*]
Plaintiff(s),	)	IN SUPPORT OF MOTION FOR JURY TRIAL
vs.	)	AFTER WAIVER

_____ [*name(s)*],	)	Date: _____
Defendant(s).	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

I am _____ [*e.g.,* the attorney for the plaintiff/defendant and moving party herein].

This is an action for _____ [*state type of action, e.g.,* damages resulting from earth movement underlying plaintiff's lot and home].

On or about _____ [*date*], I first learned that this action had been placed on the nonjury calendar of the Superior Court of _____ [*county*] and was scheduled to be tried by court and not by jury.

_____ [*State facts showing moving party did not actually waive jury trial or that the waiver was through mistake, inadvertence, surprise, or excusable neglect, e.g.,* Moving party's original counsel failed to demand a jury trial in his/her Memorandum That a Civil Case Is At Issue. The Memorandum was filed before two of the defendants in this action had been served with summons and complaint. Subsequently, the pretrial conference set pursuant to the Memorandum was taken off calendar by stipulation of then plaintiff's counsel and the appearing defendant's counsel. Thereafter, an amended complaint was filed, the additional defendants served, and the case again set for trial. Thus, plaintiff's present counsel did not waive the right to jury trial in the manner shown above].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[b] Use of Form

The form of declaration in *[a], above,* is for use in supporting a motion for jury trial by a party who has previously waived a jury trial [*Code Civ. Proc. § 631(d)*; *see [1], above*].

The caption of the declaration must state the name of the declarant and must specifically identify the motion or other proceeding that it supports or opposes [*Cal. Rules of Ct., Rule 3.1115(a)*].

[c] Cross References

For discussion and forms for use in declarations and affidavits, see Ch. 15, *Affidavits, Certificates, and Declarations*

For discussion and forms for use in making oaths, see Ch. 392, *Oath and Affirmation*

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Volume 27: Interpleader thru Juries and Jury Selection-Chs. 314-322
Chapter 322 JURIES AND JURY SELECTION
PART IV. FORMS
A. Right to, Demand for, and Waiver of Juries

27-322 California Forms of Pleading and Practice--Annotated §§ 322.95-322.99

AUTHOR: William G. McDevitt Editorial Consultant

[Reserved]

§§ 322.95[Reserved]

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Volume 27: Interpleader thru Juries and Jury Selection-Chs. 314-322
Chapter 322 JURIES AND JURY SELECTION
PART IV. FORMS
B. Summoning and Selecting Juries

27-322 California Forms of Pleading and Practice--Annotated § 322.100

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.100 Juror Questionnaire for Civil Cases--Judicial Council Form [MC-001]

[1] FORM Juror Questionnaire for Civil Cases--Judicial Council Form [MC-001]

Click here to view image.

[2] Use of Form

The form in *[1], above,* is a reproduction of the Judicial Council's form of juror questionnaire for civil cases [Judicial Council Form No. MC-001]. Use of this form is in the court's discretion to assist in the voir dire process or to ascertain whether a fair cross section of the population is represented as required by law [*Code Civ. Proc. § 205(c), (d)*; *cf. Code Civ. Proc. § 205(a), (b)* (juror questionnaire for use by jury commissioner to qualify prospective jurors)].

The notes on the use of the form suggest that the court hold a pre-voir dire conference before the jury panel is called. This conference would address the use of the questionnaire, any supplemental questions proposed by counsel, and the extent of oral inquiry by court and by counsel. The notes also state that proposed supplemental questions drafted by counsel should be filed and served at least three court days before the pre-voir dire conference.

[3] Contents of Form

The Judicial Council's form of juror questionnaire for civil cases includes the following:

- Notes for the court regarding its use (Page A).

- An introduction and instructions section (Page B) that may be given to potential jurors to explain to them the use of the form and caution them that their answers are under penalty of perjury.

- General questions (Pages C-1 through C-4).

- A supplement to be used in personal injury cases (Page D).
- A verification (Page E).

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Chapter 322 JURIES AND JURY SELECTION
PART IV. FORMS
B. Summoning and Selecting Juries

27-322 California Forms of Pleading and Practice--Annotated § 322.101

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.101 Stipulation and Order Regarding Calling Alternative Jurors

[1] FORM Stipulation and Order Regarding Calling Alternative Jurors

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name(s)*],	)	STIPULATION FOR ALTERNATE JURORS
Plaintiff(s),	)	Date: _____
vs.	)	Time: _____
_____ [*name(s)*],	)	Location: _____
Defendant(s).	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

IT IS HEREBY STIPULATED by and between the parties hereto, that _____ [*indicate number of juror alternates*] additional jurors may be called in the above-captioned matter to serve as alternate jurors during the course of trial and deliberations. This stipulation is made for the purpose of having a sufficient number of jurors available during a lengthy trial and deliberations.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant

IT IS SO ORDERED:

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of stipulation and order in *[1], above*, is for calling a specified number of additional jurors to serve as alternate jurors during a protracted trial and deliberations [*Code Civ. Proc. § 234*; *see §§ 322.44*, *322.52*].

[3] Cross References

For discussion and forms for use in motions, declarations, stipulations, and orders, see Ch.108, *Captions and Introductions*

For discussion and forms for use in making motions and orders, see Ch. 372, *Motions and Orders*

For discussion and forms for use in making stipulations, see Ch. 533, *Stipulations*

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Chapter 322 JURIES AND JURY SELECTION
PART IV. FORMS
B. Summoning and Selecting Juries

27-322 California Forms of Pleading and Practice--Annotated § 322.102

AUTHOR: William G. McDevitt Editorial Consultant

§ 322.102 Juror's Motion to Set Aside Sanctions and Order--Judicial Council Form [MC-070]

[1] FORM Juror's Motion to Set Aside Sanctions and Order--Judicial Council Form [MC-070]

Click here to view image.

[2] Use of Form

This form is a reproduction of the Judicial Council's form for a motion by a juror to set aside monetary sanctions imposed by the court by default in lieu of imposing sanctions for contempt for failure to attend when summoned [Judicial Council Form MC-070; *see Code Civ. Proc. § 209(b), (c)*]. Use of this form is optional.

After a potential juror is summoned but fails to appear, the court may impose monetary sanctions on the potential juror [*see Code Civ. Proc. § 209, Cal. Rules of Ct., Rule 2.1010*; for discussion, *see § 322.34*]. This form can be used to move the court to set aside those sanctions. However, this form is not to be used to set aside a finding of contempt for failure to appear when summoned for jury duty [*see Code Civ. Proc. § 209(a)*]. For forms to be used in contempt proceedings, see Ch. 135, *Contempt* .

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Cross References

For discussion and forms for use in contempt proceedings generally, see Ch. 135, *Contempt*

For discussion and forms for use in making motions and orders generally, see Ch. 372, *Motions and Orders*

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329
Chapter 323 JURISDICTION: PERSONAL JURISDICTION, INCONVENIENT FORUM, AND APPEARANCES

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§ 323.10 Governing Law

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[b] Due Process Required in All Types of Actions

[i] Minimum Contacts

[ii] Reasonable Notice and Opportunity for Hearing

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[d] In Rem Actions

[e] Quasi in Rem Actions

[i] Defined

[ii] Two Types of Quasi in Rem Proceedings Distinguished

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§ 323.13 Continuation of Jurisdiction Once Obtained

§ 323.14 Due Process Requirements Protecting Nonresident Defendants

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[b] Domicile

[c] Residence

[d] Nationality and Citizenship

[e] Consent

[f] General Appearance

[g] Doing Business in the State as Individual

[h] Doing Act in the State as Individual

[i] Causing Effect in the State by Act Done Elsewhere as Individual

[i] In General

[ii] Possible Situations

[j] Individual Ownership, Use, or Possession of Thing in the State

[k] Other Individual Relationships

[3] Over General Partnership and Partners

[4] Over Domestic Corporations

[5] Over Foreign Corporations

[a] Consent

[b] Appointment of Agent for Service of Process

[c] Appearance

[d] Doing Business in the State as Corporation

[e] Doing an Act in the State as Corporation

[f] Causing Effect in the State by Act Done Elsewhere as Corporation

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[2] Witnesses in Criminal Proceedings and Extradited Defendants

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§ 323.17 Establishing Lack of Personal Jurisdiction on Motion to Quash Service

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§ 323.30 Governing Law

§ 323.31 Terminology

§ 323.32 Doctrine of Inconvenient Forum

§ 323.33 Application of Doctrine Implies Proper Jurisdiction

§ 323.34 Forum Selection Clauses

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[1] Alternative Relief

[2] Burden of Proof on Motion

[3] Trial Court's Discretion

[4] Availability of Suitable Alternate Forum

[5] Evidentiary Showing Concerning Alternative Forum

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[c] Application of Factors

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[e] Effect of Party's Being a California Resident

[f] Effect of Forum Law More Favorable to Plaintiff

[7] Determining Whether to Grant Stay or Dismissal on Finding of Inconvenient Forum

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§ 323.50 Motion to Quash Service or to Stay or Dismiss Action

[1] Time for Making Motion

[2] Motion Extends Defendant's Time to Plead

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§ 323.51 Opposition to Motion

§ 323.52 Order

§ 323.53 Review of Order

[1] When Motion Denied--Writ of Mandate

[a] Appeal Not Available

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§ 323.60 Governing Law

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§ 323.83 Federal Statutes

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[g] Ownership, Use, or Possession of Thing in State

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[3] Corporate Directors and Officers

[4] Effect of Order or Judgment Entered by Court Without Personal Jurisdiction

[5] Immunity to Service of Process or Suit

[6] In Personam Jurisdiction

[a] Actions in Personam

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[c] Corporate Officers and Directors

[d] General vs. Limited Jurisdiction

[i] General Jurisdiction

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[f] Stockholders of Defendant Foreign Corporation

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[8] Minimum Contacts Requirement

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[3] Codification

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§ 323.111 State Statutes

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[a] Acts Constituting General Appearance

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[1] Ascertain Facts

[2] Make Preliminary Determinations

[3] Prepare Papers

[4] Serve and File Papers

[5] Responses to Opposing Party's Declarations, Affidavits, and Memorandum

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[1] Make Preliminary Determinations

[2] Prepare Opposition Papers

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§ 323.133 Post Hearing Proceedings

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§ 323.150 Notice of Motion to Quash Service of Summons on Ground of Lack of Personal Jurisdiction [Code Civ. Proc. § 418.10(a)(1)] or to Stay or Dismiss Action on Ground of Inconvenient Forum [Code Civ. Proc. §§ 410.30(a), 418.10(a)(2)] [Code Civ. Proc. §§ 418.10(b)]

[1] FORM

[2] Use of Form

[3] Motion to Dismiss for Lack of Subject Matter Jurisdiction

[4] Form and Contents

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[6] Copies to Prepare

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[a] Time Requirements

[b] Motion to Stay or Dismiss Made After General Appearance

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[1] FORM

[2] Use of Form

[3] Authority for Use of Affidavits or Declarations

[4] Form and Contents of Affidavit or Declaration

[5] Cross References

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[2] Use of Form

[3] Cross References

§ 323.153 Notice of Motion to Quash Service of Summons on Ground of Lack of Personal Jurisdiction [Code Civ. Proc. § 418.10(a)(1)] Because Defendant Is Immune to Service of Process or Suit [22 U.S.C. § 254d; Cal. Const., art. IV, § 14; Penal Code §§ 1334.4, 1334.5, 1555] [Code Civ. Proc. § 418.10(b)]

[1] FORM

[2] Use of Form

[3] Accompanying Papers

[4] Cross References

§ 323.154 Declaration in Support of Motion to Quash Service of Summons on Ground of Lack of Personal Jurisdiction Because Defendant Is Immune to Service of Process or Suit

[1] FORM

[2] Use of Form

[3] Cross References

§ 323.155 Petition for Writ of Mandate and Declaration to Compel Lower Court to Enter Order Quashing Service of Summons for Lack of Jurisdiction Over Defendant or Staying or Dismissing Action for Inconvenient Forum [Code Civ. Proc. § 418.10(c)]

[1] FORM

[2] Use of Form

[3] Requirements When Filed in Appellate Division of Superior Court

[4] Requirements When Filed in Appellate Court

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[6] Verification

[7] Proof of Service

[8] Cross References

§ 323.156 Notice of Filing of Petition for Writ of Mandate

[1] FORM

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[3] Cross References

§ 323.157 Notice of Motions and Motions to Vacate and Set Aside Default and Default Judgment [Code Civ. Proc. §§ 473, 473.5] and to Quash Service of Summons for Lack of Personal Jurisdiction or to Stay or Dismiss Action on Ground of Inconvenient Forum [Code Civ. Proc. §§ 410.30(a), 418.10(a), (d)] [Code Civ. Proc. §§ 418.10(b), 473.5(b)]

[1] FORM

[2] Use of Form

[3] Time Limitation on Motion to Quash or to Stay or Dismiss Action for Inconvenient Forum

[4] Joining Code Civ. Proc. § 473 or 473.5 Motion

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[6] Cross References

§ 323.158 Order Granting Motion to Vacate and Set Aside Default and Default Judgment and to Quash Service of Summons for Lack of Personal Jurisdiction or to Stay or Dismiss Action on Ground of Inconvenient Forum

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[2] Use of Form

[3] Variations of Order

[4] Findings

[5] Supporting Evidence

[6] Cross References

§§ 323.159-323.169 [Reserved]

§ 323.170 Notice of General Appearance by Defendant in Propria Persona [Code Civ. Proc. § 1014]

[1] FORM

[2] Use of Form

[3] Filing

[4] Copies to Prepare

[5] Cross References

§ 323.171 Notice of General Appearance by Attorney for Defendant

[1] FORM

[2] Use of Form

[3] Cross References

§ 323.172 Notice of Appearance and Waiving of Rights by Defendant, in Propria Persona, Consenting That Action or Proceeding Be Heard as Uncontested Matter

[1] FORM

[2] Use of Form

[3] Cross References

§ 323.173 Notice by Defendant, in Propria Persona, Admitting Service of Summons and Complaint, Waiving Further Notice, and Waiving Rights Under Servicemembers Civil Relief Act and State Statutes for Members of the National Guard and Military Reservists [50 U.S.C. App. § 501 et seq.; Mil. & Vet. Code § 402 et seq.]

[1] FORM

[2] Use of Form

[3] Cross References

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Chapter 323 JURISDICTION: PERSONAL JURISDICTION, INCONVENIENT FORUM, AND APPEARANCES
PART I. SCOPE

28-323 California Forms of Pleading and Practice--Annotated § 323.01

§ 323.01 Scope of Chapter

This chapter discusses personal jurisdiction and due process requirements, how personal jurisdiction is obtained, and persons who are immune to service of process or suit [*see § 324.10* et seq.], the doctrine of inconvenient forum [*see* § 324.30 et seq.], motions to quash service or to stay or dismiss an action [*see* § 324.50 et seq.], and general and special appearances [*see § 324.60* et seq.].

This chapter includes a procedural checklist for preparing motions to quash service of summons on ground of lack of personal jurisdiction or to stay or dismiss an action on the ground of inconvenient forum, as well as opposing such motions, hearings on the motions, and post hearing procedures, including appellate review [*see* § 324.130 et seq.].

This chapter includes the following forms relating to personal jurisdiction:

- Noticed motion, declaration, and order for proceedings to quash service of summons for lack of personal jurisdiction [*see* §§ 323.150-323.152].

- Noticed motion and declaration for proceedings to stay or dismiss actions for inconvenient forum [*see §§ 323.153* and *323.154*].

- Petition for writ of mandate and notice of filing petition to compel a trial court to quash service of summons or to stay or dismiss the action for inconvenient forum [*see §§ 323.155* and *323.156*].

- Combined noticed motion and order for proceedings to vacate and set aside a default and default judgment and to quash service of summons for lack of personal jurisdiction or to stay or dismiss the action for inconvenient forum [*see §§ 323.157* and *323.158*].

- Notice of appearance by a defendant in propria persona and by an attorney on behalf of a defendant [*see §§ 323.170* and *323.171*].

- Notice of general appearance waiving rights and consenting that the action or proceeding may be heard as an uncontested matter [*see § 323.172*].

- Notice of general appearance admitting service of the summons and complaint, waiving further notice, and waiving rights under the Servicemembers Civil Relief Act (formerly Known as the Soldiers' and Sailors' Civil Relief Act of 1940) and state statutes for members of the National Guard and military reservists [*see § 323.173*].

For whether a stipulation to extend time to plead is a general appearance within the meaning of *Code Civ. Proc. § 583.220* for the purposes of the mandatory dismissal statutes for failure to serve and return summons within a specified period (*Code Civ. Proc. § 583.210*), see Ch. 212, *Dismissal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureVenueForum Non ConveniensCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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Chapter 323 JURISDICTION: PERSONAL JURISDICTION, INCONVENIENT FORUM, AND APPEARANCES
PART I. SCOPE

28-323 California Forms of Pleading and Practice--Annotated § 323.02

§ 323.02 Cross References

- For discussion of the fundamentals of jurisdiction, including lack of jurisdiction, excess jurisdiction, jurisdiction required for a valid judgment, and jurisdiction to determine jurisdiction, see *Ch. 324, Jurisdiction: Subject Matter, § 324.10* et seq.

- For discussion of subject matter jurisdiction, including organization and subject matter of California courts, challenges to jurisdiction, and classification and reclassification of a superior court case, see Ch. 324, *Jurisdiction: Subject Matter* .

- For further discussion and forms for use in challenging judicial acts in excess of jurisdiction by petition for extraordinary writ, see Ch. 358, *Mandate and Prohibition* , and Ch. 492, *Review (Certiorari), Writ of.*

- For the jurisdictional issues that may be considered on a petition for a writ of mandate to determine the validity of a final administrative order or decision, see *Code Civ. Proc. § 1094.5(b)* and Ch. 474B, *Standards in Reviewing Agency Decisions* .

- For discussion and forms relating to the jurisdiction of federal courts, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

- For a discussion of venue and forms relating to change of venue generally, see Ch. 571, *Venue* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionCivil ProcedureAppealsAppellate JurisdictionState Court Review

California Forms of Pleading and Practice--Annotated

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329
Chapter 323 JURISDICTION: PERSONAL JURISDICTION, INCONVENIENT FORUM, AND APPEARANCES
PART I. SCOPE

28-323 California Forms of Pleading and Practice--Annotated §§ 323.03-323.09

[Reserved]

§§ 323.03[Reserved]

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329

Chapter 323 JURISDICTION: PERSONAL JURISDICTION, INCONVENIENT FORUM, AND APPEARANCES
PART II. LEGAL BACKGROUND
A. Personal Jurisdiction

28-323 California Forms of Pleading and Practice--Annotated § 323.10

§ 323.10 Governing Law

The guarantee of "due process of law" is set forth in *U.S. Const., amends. V, XIV*, and in *Cal. Const., art. I, § 7(a)*. Immunity to civil process is governed by 22 U.S.C. §§ 254a-254d (foreign diplomatic agents; *see also 28 U.S.C. § 1351*, relating to jurisdiction), *Cal. Const., art. IV, § 14* (California legislators), and *Penal Code § 1555* (person brought into California on or after waiver of extradition based on a criminal charge). The immunity to civil and criminal process of nonresidents who are in or passing through California pursuant to a subpoena to attend and testify in a criminal matter or grand jury proceeding pursuant to the Uniform Act to Secure the Attendance of Witnesses From Without the State in Criminal Cases [*Penal Code §§ 1334-1334.6*] is governed by *Penal Code §§ 1334.4* and *1334.5*. The venue and jurisdiction of actions against national banks for which the Federal Deposit Insurance Corporation has been appointed receiver are governed by *12 U.S.C. § 94*.

The basis on which a California court may exercise jurisdiction is set forth in *Code Civ. Proc. § 410.10*, the enactment of which was accompanied by the Judicial Council Comment to this section, entitled "Bases of Judicial Jurisdiction" [Bases of Judicial Jurisdiction, pp 69-91 of the 1969 Report of the Judicial Council of California to the Governor and the Legislature; *see* comments following *Code Civ. Proc. § 410.10*].

Code Civ. Proc. § 413.10 specifies the persons on whom a summons may be served, and *Code Civ. Proc. §§ 415.10-415.50* govern the manner of service of summons [*see also* Ch. 518, *Service of Summons and Papers*].

Code Civ. Proc. §§ 418.10 and *1005(a)(4), (b)* govern motions to quash service of summons for lack of personal jurisdiction, and *Code Civ. Proc. §§ 410.30, 418.10*, and *1005(a)(4), (b)* govern motions to stay or dismiss an action for inconvenient forum. *Code Civ. Proc. § 1167.4* also applies to such motions when made in a proceeding for unlawful detainer, forcible entry, or forcible detainer.

Code Civ. Proc. §§ 418.10(d) and *418.11* specify acts not constituting a general appearance [for additional discussion of acts not constituting a general appearance, *see § 323.63*].

Code Civ. Proc. § 418.10(e) provides that a defendant or cross-defendant may make a motion under *Code Civ. Proc. § 418.10* and simultaneously answer, demur, or move to strike the complaint or cross-complaint.

The judicial remedies available in California are set forth in *Code Civ. Proc. §§ 20-30*, and the forms of judicial relief available in Part One of Division 4 of the Civil Code, commencing with *Civ. Code § 3274*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral Overview

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28-323 California Forms of Pleading and Practice--Annotated § 323.11

§ 323.11 Definitions and Terminology

[1] Jurisdiction

Jurisdiction, in its broadest sense, means the power to hear and determine causes. Jurisdiction is generally divided into two components: subject matter jurisdiction and personal jurisdiction. Subject matter jurisdiction is the authority of a court to try actions of the type or class to which a suit belongs. Personal jurisdiction is the authority of a court over parties and properties. Stated another way, subject matter jurisdiction addresses whether a court has the authority to hear a particular type of suit, while personal jurisdiction addresses whether state and federal due process requirements are met based on the person's or property's relationship to the state.

The term "jurisdiction" does not have a single, fixed meaning, but has different meanings in different situations [*St. Sava Mission Corp. v. Serbian Eastern Orthodox Diocese (1990) 223 Cal. App. 3d 1354, 1365, 273 Cal. Rptr. 340]* . The word "jurisdiction," in its judicial sense, means the power to hear and determine causes [*Mueller v. Elba Oil Co. (1942) 21 Cal. 2d 188, 206, 130 P.2d 961* ; *Gray v. Hall (1928) 203 Cal. 306, 314-315, 265 P. 246* ; *see also In re Hughes (1911) 159 Cal. 360, 363, 113 P. 684* (jurisdiction, as applied to a particular claim or controversy, is the power to hear and determine that controversy); *Crew v. Pratt (1897) 119 Cal. 139, 151, 51 P. 38* (jurisdiction to pronounce judgment or order under *Code Civ. Proc. § 1908*, relating to conclusiveness and effect of judgment, refers to the court's right or power to adjudicate a point); *Ex Parte Bennett (1872) 44 Cal. 84, 88* (jurisdiction is the power to hear and determine, but includes the power to do both, to hear without determining, or to determine without hearing); *Burns v. Municipal Court (1961) 195 Cal. App. 2d 596, 599, 16 Cal. Rptr. 64* (jurisdiction is the power of a court to hear and determine, or to act in a certain manner, and is synonymous with the power to render a valid judgment against a person)].

Jurisdiction is, however, a term of large and comprehensive import and embraces every kind of judicial action. Thus, every movement by a court is necessarily the exercise of jurisdiction [*Harrington v. Superior Court (1924) 194 Cal. 185, 188, 228 P. 15]* . The term embraces a large number of ideas of similar character, some fundamental to the nature of any judicial system, some derived from the requirement of due process, some determined by the constitutional or

statutory structure of a particular court, and some based on mere procedural rules originally devised for convenience and efficiency, and by precedent made mandatory and jurisdictional [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 291 109 P.2d 942]* .

For a more extensive discussion of the fundamentals of jurisdiction, including lack of jurisdiction, excess jurisdiction, jurisdiction required for a valid judgment, and jurisdiction to determine jurisdiction, see *Ch. 324, Jurisdiction: Subject Matter, § 324.10* et seq.

For discussion of subject matter jurisdiction, including organization and subject matter of California courts, challenges to jurisdiction, and classification and reclassification of a superior court case, see Ch. 324, *Jurisdiction: Subject Matter* .

[2] Synonymous Terms

As used in this chapter, the terms "in personam jurisdiction" and "personal jurisdiction" are synonymous. The words "limited" and "specific," when referring to jurisdiction, are also synonymous [*see, e.g., Sinatra v. National Enquirer, Inc. (9th Cir. 1988) 854 F.2d 1191, 1195* ; *Hirsch v. Blue Cross, Blue Shield of Kansas City (9th Cir. 1986) 800 F.2d 1474, 1477]* .

The more common spelling, "domicile," is used in this part in lieu of the spelling "domicil," except when quoting another source.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral Overview

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28-323 California Forms of Pleading and Practice--Annotated § 323.12

§ 323.12 In Personam Jurisdiction

[1] Coextensive With Constitutional Limits

A California court may exercise jurisdiction on any basis not inconsistent with the Constitution of California or of the United States [*Code Civ. Proc. § 410.10*; *see, e.g., Cornelison v. Chaney (1976) 16 Cal. 3d 143, 147, 127 Cal. Rptr. 352, 545 P.2d 264* ; *In re Marriage of Martin (1989) 207 Cal. App. 3d 1426, 1433, 255 Cal. Rptr. 720* ; *Professional Travel, Inc. v. Kalish & Rice, Inc. (1988) 199 Cal. App. 3d 762, 765, 245 Cal. Rptr. 159]* .

Code Civ. Proc. § 410.10 is commonly referred to as California's "long-arm" statute [*see, e.g., Asahi Metal Industry Co. v. Superior Court (1987) 480 U.S. 102, 106, 107 S. Ct. 1026, 94 L. Ed. 2d 92* ; *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 535, 257 Cal. Rptr. 278]* . This is because the statute, with respect to personal jurisdiction, manifests an intent to confer on California courts the broadest possible jurisdiction, limited only by constitutional considerations [*Sibley v. Superior Court (1976) 16 Cal. 3d 442, 445, 128 Cal. Rptr. 34, 546 P.2d 322* ; *Jamshid-Negad v. Kessler (1993) 15 Cal. App. 4th 1704, 1707, 19 Cal. Rptr. 2d 621]* . Otherwise stated, *Code Civ. Proc. § 410.10* authorizes California courts to exercise jurisdiction on any basis not inconsistent with the United States or California constitutions [*Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 444, 58 Cal. Rptr. 2d 899, 926 P.2d 1085]* , and the statute has been construed to provide that the personal jurisdiction of the California state courts is coextensive with the outer limits of due process as defined by the U.S. Supreme Court [*Pacific Atlantic Trading Co. v. M/V Main Exp. (9th Cir. 1985) 758 F.2d 1325, 1327* ; *Paccar Intern., Inc. v. Commercial Bank of Kuwait (9th Cir. 1985) 757 F.2d 1058, 1062]* .

[2] Subject to Due Process Requirements

Due process requires that the defendant be given adequate notice of the suit and be subject to the personal jurisdiction of the court [*World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 291, 100 S. Ct. 559]* . Thus, a valid judgment imposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant [*Kulko v. California Superior Court (1978) 436 U.S. 84, 91, 98 S. Ct. 1690, 56 L. Ed. 2d 132* , *reh'g denied, 438 U.S. 908* ; *see International Shoe Co. v. Washington (1945) 326 U.S. 310,*

316, 66 S. Ct. 154, 90 L. Ed. 95 ; *Pennoyer v. Neff (1878) 95 U.S. 714, 732-733, 24 L. Ed. 565* ; *Kaiser Aetna v. Deal (1978) 86 Cal. App. 3d 896, 899, 150 Cal. Rptr. 615* ; *see also Code Civ. Proc. § 1917* [for discussion of this section, *see Ch. 324, Jurisdiction: Subject Matter, § 324.12*]].

To establish personal jurisdiction, the plaintiff must show that the law of the forum state confers jurisdiction, and that its exercise would not be inconsistent with federal due process [*Hirsch v. Blue Cross, Blue Shield of Kansas City (9th Cir. 1986) 800 F.2d 1474, 1477]* .

For discussion regarding the immunity of certain individuals from a court's exercise of personal jurisdiction, see *§ 323.16*.

[3] Classification of Actions for Jurisdictional Purposes

[a] Three Types: In Personam, In Rem, and Quasi in Rem

For jurisdictional purposes, civil actions and proceedings are classified as "in personam," "in rem," or "quasi in rem," depending on the nature of the judgment sought [*see Shaffer v. Heitner (1977) 433 U.S. 186, 199, 97 S. Ct. 2569, 53 L. Ed. 2d 683]* .

[b] Due Process Required in All Types of Actions

[i] Minimum Contacts

Whether classified as in personam, in rem, or quasi in rem, all actions and proceedings are really against persons. In other words, jurisdiction "over the thing" [*see Code Civ. Proc. § 1917*; for discussion of this section, *see Ch. 324, Jurisdiction: Subject Matter, § 324.12*], or the exercise of jurisdiction in rem or quasi in rem, refers to jurisdiction over the interests of persons in a thing. To justify an exercise of jurisdiction in rem or quasi in rem, the basis for jurisdiction must be sufficient to justify exercising jurisdiction over the interests of persons in a thing. The standard for determining whether an exercise of jurisdiction by a state court over the interests of persons is consistent with the due process clause of the *U.S. Const., amend. XIV* is the minimum contacts standard elucidated in *International Shoe Co. v. Washington (1945) 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95* [for discussion of this case, *see § 323.14*].

Thus, assertions of state court jurisdiction, whether the action is in personam, in rem, or quasi in rem, must comply with due process requirements and must be evaluated according to the minimum contacts standards set forth in decisions regarding in personam actions [*Shaffer v. Heitner (1977) 433 U.S. 186, 199 n.17, 207, 97 S. Ct. 2569, 53 L. Ed. 2d 683, 699-700* ; *see* Restatement (Second) of Conflict of Laws, §§ 24, 27-52]. This rule applies to federal actions as well, under the *due process clause of the Fifth Amendment to the U.S. Constitution* [*see, e.g., Pacific Atlantic Trading Co. v. M/V Main Exp. (9th Cir. 1985) 758 F.2d 1325, 1327* (action based on federal court's admiralty jurisdiction; *due process clause of Fifth Amendment* determines whether the court has personal jurisdiction over the defendant, and state's long-arm statute determines defendant's amenability to suit in the forum)].

[ii] Reasonable Notice and Opportunity for Hearing

The exercise of personal jurisdiction over a defendant is limited by the *due process clauses of the Fifth* and *Fourteenth Amendments to the U.S. Constitution*. Notice and opportunity to be heard are essential ingredients of due process [*see Hanson v. Denckla (1958) 357 U.S. 235, 245, 78 S. Ct. 1228, 2 L. Ed. 2d 1283* ; *In re Raner (1963) 59 Cal. 2d 635, 642-643, 30 Cal. Rptr. 814, 381 P.2d 638]* . Thus, under the *Fourteenth Amendment to the U.S. Constitution*, a state may not exercise judicial jurisdiction over a person, although the person is subject to its judicial jurisdiction, unless a reasonable method is employed to give the person notice of the action and unless the person is afforded a reasonable opportunity to be heard [*see* Restatement (Second) of Conflict of Laws, § 25 (1971)]. For a discussion of the methods of giving notice in civil actions, that is, service of summons, see *Code Civ. Proc. §§ 410.10-415.50* and Ch. 518, *Service of*

Summons and Papers .

The methods of giving notice may vary between actions in personam on the one hand and actions in rem or quasi in rem on the other. In the former type of action, personal service or substituted service (delivery of summons to third person for defendant) or service by mail is generally required, while in the latter types of actions constructive service (service by publication or by posting) may be sufficient. The statutes specifying the type of notice required in a given action, as well as the service statutes, must be consulted and complied with. However, in the case of substituted service, to be constitutionally sound the form of substituted service must be reasonably calculated to give an interested party actual notice of the proceedings and an opportunity to be heard in order that the traditional notions of fair play and substantial justice implicit in due process are satisfied [*Zirbes v. Stratton (1986) 187 Cal. App. 3d 1407, 1416, 232 Cal. Rptr. 653* ; *see also In re Emily R. (2000) 80 Cal. App. 4th 1344, 1351-1355, 96 Cal. Rptr. 2d 285* (sufficiency of notice to satisfy due process in context of dependency proceeding)].

[c] In Personam Actions

If the court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated in personam and the court can impose a personal obligation on the defendant in favor of the plaintiff [*Shaffer v. Heitner (1977) 433 U.S. 186, 199, 97 S. Ct. 2569, 53 L. Ed. 2d 683]* . Or, put another way, an action that seeks to impose a personal liability or obligation on the defendant in favor of another is an action in personam, and a judgment in personam is one that imposes a personal liability or obligation on one person in favor of another [*Hanson v. Denckla (1958) 357 U.S. 235, 246 n.12, 78 S. Ct. 1228, 2 L. Ed. 2d 1283]* . To impose such liability, the court must have jurisdiction over the person of the defendant [*see Pennoyer v. Neff (1878) 95 U.S. 714, 732-733, 24 L. Ed. 565* (leading case, overruled on other grounds in *Shaffer v. Heitner (1977) 433 U.S. 186, 212 n.39, 97 S. Ct. 2569, 53 L. Ed. 2d 683*); *see also Code Civ. Proc. § 1917*; *Kulko v. California Superior Court (1978) 436 U.S. 84, 91, 98 S. Ct. 1690, 56 L. Ed. 2d 132* ; *Hartford v. Superior Court (1956) 47 Cal. 2d 447, 454, 304 P.2d 1* ; *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 799, 100 Cal. Rptr. 477]* .

Jurisdiction over the person of a defendant is normally secured by the service on that defendant of a summons [*see Code Civ. Proc. § 410.50(a)*; for further discussion of service of summons, and forms of summonses, *see* Ch. 518, *Service of Summons and Papers*].

Common examples of in personam judgments, in which personal jurisdiction over the defendant or respondent is necessary, are actions imposing contract or tort liability on the defendant in favor of the plaintiff by awarding the plaintiff a sum of money, and actions to enforce a duty of support or some other personal obligation growing out of the parent-child relationship [*Hartford v. Superior Court (1956) 47 Cal. 2d 447, 454, 304 P.2d 1* ; *see also Kulko v. California Superior Court (1978) 436 U.S. 84, 91, 98 S. Ct. 1690, 56 L. Ed. 2d 132* ; *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 798-799, 100 Cal. Rptr. 477]* .

[d] In Rem Actions

If a court's jurisdiction is based on the court's power over property within its territory, the action is called "in rem" or "quasi in rem," and the effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he or she is not before the court [*Shaffer v. Heitner (1977) 433 U.S. 186, 199, 97 S. Ct. 2569, 53 L. Ed. 2d 683]* . A judgment in rem is one that affects the interests of all persons in designated property [*Shaffer v. Heitner (1977) 433 U.S. 186, 199 n.17, 97 S. Ct. 2569, 53 L. Ed. 2d 683* ; *Hanson v. Denckla (1958) 357 U.S. 235, 246 n.12, 78 S. Ct. 1228, 2 L. Ed. 2d 1283* ; *Title etc. Restoration Co. v. Kerrigan (1907) 150 Cal. 289, 306-308, 88 P. 356* ; *Estate of Davis (1902) 136 Cal. 590, 596, 69 P. 412* ; *Estate of Johnson (1965) 233 Cal. App. 2d 785, 791, 43 Cal. Rptr. 913]* .

An action or proceeding that determines the status of the parties, such as their marital status, is also an action or

proceeding in rem [*see, e.g.,* *In re Hanley (1988) 199 Cal. App. 3d 1109, 1119, 245 Cal. Rptr. 441* , overruled on other grounds in *Leadford v. Leadford (1992) 6 Cal. App. 4th 571, 575 n.5, 8 Cal. Rptr. 2d 9* ; *Mungia v. Superior Court (1964) 225 Cal. App. 2d 280, 284, 37 Cal. Rptr. 285]* .

In in rem actions or proceedings, personal jurisdiction over the defendant or respondent is ordinarily not required [*see Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 798, 100 Cal. Rptr. 477]* , but the court must have jurisdiction over the res, that is the thing which is the subject of the action [*see* *People v. $6,500 U.S. Currency (1989) 215 Cal. App. 3d 1542, 1546, 264 Cal. Rptr. 294* ; *In re Hanley (1988) 199 Cal. App. 3d 1109, 1119, 245 Cal. Rptr. 441* (overruled on other grounds in *Leadford v. Leadford (1992) 6 Cal. App. 4th 571, 575 n.5, 8 Cal. Rptr. 2d 9*); *see also Code Civ. Proc. § 1917*]. However, if the object of the action or proceeding is to fasten a relationship on the defendant, rather than to sever a relationship, the action is in personam rather than in rem, and personal jurisdiction over the defendant is required [*see* *Hartford v. Superior Court (1956) 47 Cal. 2d 447, 453-457, 304 P.2d 1* (action to declare defendant plaintiff's father)].

An in rem action or proceeding exists only where it is authorized by statute [*Lee v. Silva (1925) 197 Cal. 364, 371, 240 P. 1015]* . Founded on physical power, the in rem jurisdiction of a state court is limited by the extent of the state court's power and by the coordinate authority of sister states. The basis of in rem jurisdiction is the presence of the subject property or the status involved within the territorial jurisdiction of the forum state [*see* *Hanson v. Denckla (1958) 357 U.S. 235, 246, 78 S. Ct. 1228, 2 L. Ed. 2d 1283* (property); *In re Hanley (1988) 199 Cal. App. 3d 1109, 1119, 245 Cal. Rptr. 441* (marriage status; overruled on other grounds in *Leadford v. Leadford (1992) 6 Cal. App. 4th 571, 575 n.5, 8 Cal. Rptr. 2d 9*); *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 798, 100 Cal. Rptr. 477* (custody of children presently within California)].

A validation action is also a proceeding in rem [*Code Civ. Proc. § 860*; *see* *Bernardi v. City Council (1997) 53 Cal. App. 4th 718, 61 Cal. Rptr. 2d 895* (judgment in validation action held not to be modifiable because it was in rem, operating against property, rather than being injunctive in nature)].

[e] Quasi in Rem Actions

[i] Defined

If a court's jurisdiction is based on the court's power over property within its territory, the action is called "in rem" or "quasi in rem," and the effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he or she is not before the court [*Shaffer v. Heitner (1977) 433 U.S.186, 199, 97 S. Ct. 2569, 53 L. Ed. 2d 683]* . A judgment quasi in rem affects the interests of particular persons in designated property [*Shaffer v. Heitner (1977) 433 U.S. 186, 199 n.17, 97 S. Ct. 2569, 53 L. Ed. 2d 683* ; *Title etc. Restoration Co. v. Kerrigan (1906) 150 Cal. 289, 308, 88 P. 356]* . As in the case of an in rem action, the court must have jurisdiction over the res, that is, the thing or property that is the subject of the action [*see Code Civ. Proc. § 1917*].

[ii] Two Types of Quasi in Rem Proceedings Distinguished

There are two types of quasi in rem actions or proceedings. In the first type the plaintiff is seeking to secure a preexisting claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons [*Shaffer v. Heitner (1977) 433 U.S. 186, 199 n.17, 97 S. Ct. 2569, 53 L. Ed. 2d 683* ; *Hanson v. Denckla (1958) 357 U.S. 235, 246 n.12, 78 S. Ct. 1228, 2 L. Ed.2d 1283]* . Examples are actions to foreclose a street assessment lien [*Lee v. Silva (1925) 197 Cal. 364, 369, 240 P. 1015]* and actions to quiet title to land [*see* *Park v. Powers (1935) 2 Cal. 2d 590, 598, 42 P.2d 75]* .

In the second type of quasi in rem action, the plaintiff seeks to apply what he or she concedes to be the property of the

defendant to the satisfaction of a claim the plaintiff has against the defendant [*Shaffer v. Heitner (1977) 433 U.S. 186, 199 n.17, 97 S. Ct. 2569, 53 L. Ed. 2d 683* ; *Hanson v. Denckla (1958) 357 U.S. 235, 246 n.12, 78 S. Ct. 1228, 2 L. Ed. 2d 1283]* .

Before the second type of quasi in rem jurisdiction may be obtained, it is essential that some property of the defendant be actually subjected to the court's control prior to any judgment by a procedure such as attachment, garnishment, or receivership [*Fount Wip, Inc. v. Golstein (1973) 33 Cal. App. 3d 184, 189, 108 Cal. Rptr. 732* (quoting from Witkin, California Procedure, vol. 1, *Jurisdiction*, § 150 (2nd ed. 1970); *see, e.g.,* *Goodwine v. Superior Court (1965) 63 Cal. 2d 481, 483, 47 Cal. Rptr. 201, 407 P.2d 1* (attachment); *Atkinson v. Superior Court (1957) 49 Cal. 2d 338, 342, 316 P.2d 960* , *appeal dismissed, 357 U.S. 569 (1958)* (receivership); *Nichols v. Superior Court (1934) 1 Cal. 2d 589, 599, 36 P.2d 380* (same); *Murray v. Murray (1896) 115 Cal. 266, 276-277, 47 P. 37* (same); *Root v. Superior Court (1962) 209 Cal. App. 2d 242, 246, 25 Cal. Rptr. 784* (garnishment); *Guay v. Superior Court (1957) 147 Cal. App. 2d 764, 768, 305 P.2d 990* (same)]. For discussions and forms for use in attachment proceedings, see Ch. 62, *Attachment* , For discussions and forms for use in garnishment proceedings, see Ch. 276, *Garnishment* . For discussions and forms for use in receivership proceedings, see Ch. 486, *Receivers* .

[iii] Defendant's Interest and Nature of Property

The defendant's interest in the property must be a present interest [*Fount Wip, Inc. v. Golstein (1973) 33 Cal. App. 3d 184, 189, 108 Cal. Rptr.732]* , and the property must be of a kind subject to one of the provisional remedies mentioned in [ii], *above*. For example, contingent obligations may be so ephemeral as not to be subject to attachment, and their purported attachment cannot confer quasi in rem jurisdiction. Thus, an insurer's obligation under a motor vehicle policy to indemnify and defend its insured is so contingent and uncertain that it is not subject to garnishment and attachment and cannot be the basis of quasi in rem jurisdiction in an action arising out of an automobile accident involving the insured vehicle [*see* *Rush v. Savchuk (1980) 444 U.S. 320, 328-330, 100 S. Ct. 571, 62 L. Ed. 2d 516* ; *Javorek v. Superior Court (1976) 17 Cal. 3d 629, 632-647, 131 Cal. Rptr. 768, 552 P.2d 728* ; *see also* *Neihaus v. Superior Court (1977) 69 Cal. App. 3d 340, 344-345, 137 Cal. Rptr. 905]* .

[iv] Limitations in Quasi in Rem Jurisdiction

A court cannot obtain quasi in rem jurisdiction by attaching, garnishing, or putting a receiver in charge of defendant's property in the forum state if the court would not have personal jurisdiction over the defendant because of the defendant's lack of sufficient minimum contacts with the state to satisfy the *due process clause of the Fourteenth Amendment to the U.S. Constitution* [*see* *International Shoe Co. v. Washington (1945) 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95* ; for minimum contacts requirement, *see § 323.12[3][b][i]* and *§ 323.14[3]*]. That is, for a court to obtain quasi in rem jurisdiction over a defendant's property in the state, the defendant must have or have had certain minimum contacts with the state such that maintenance of the underlying action in the state would not offend traditional notions of fair play and substantial justice" [*see* *Shaffer v. Heitner (1977) 433 U.S. 186, 212-217, 97 S. Ct. 2569, 53 L. Ed. 2d 683* (holding unconstitutional Delaware's sequestration statute authorizing the court to compel the appearance of a nonresident defendant by the seizure and court-ordered sale of defendant's property within the state)].

California's long-arm statute (*Code. Civ. Proc. § 410.10*) allows process to be served on a defendant or respondent anywhere in the world [*see Code. Civ. Proc. §§ 413.10, 415.10-415.50*]. Thus, it would appear that the use of the second type of quasi in rem jurisdiction, in view of *Shaffer*, would be limited to cases where a nonresident defendant, having the required minimum contacts with California, has property in California subject to attachment, garnishment, or receivership in the action, but his or her present whereabouts are unknown or he or she is a California domiciliary who has avoided the service of process.

If the plaintiff can, in such a case, subject the defendant's real or personal California property to the court's control by the provisional remedy of attachment, garnishment, or receivership, the action can proceed to judgment and the claim

can be satisfied to the extent possible out of the property seized [*see Shaffer v. Heitner (1977) 433 U.S. 186, 199* ; *Goodwine v. Superior Court (1965) 63 Cal. 2d 481, 483, 47 Cal. Rptr. 201, 407 P.2d 1]* .

[4] Procedure for Obtaining Personal Jurisdiction

Provided there is a proper basis for exercising personal jurisdiction over a defendant or respondent [for specific bases of judicial jurisdiction, *see § 323.15*], a California court acquires personal jurisdiction over a defendant by the service on him or her of a summons in compliance with the service statutes (discussed in Ch. 518, *Service of Summons and Papers*) or by the defendant's general appearance in the action or proceeding [*see Code Civ. Proc. § 410.50(a)*; *see also, e.g., Neihaus v. Superior Court (1977) 69 Cal. App. 3d 340, 345, 137 Cal. Rptr. 905* ; for discussion of appearances, *see § 323.60* et seq.].

For example, with regard to nonresident defendants, there must exist a *basis* for exercising personal jurisdiction arising from the defendant's sufficient minimum contacts with California [for discussion of minimum contacts, *see § 323.14[3]*]. Given this basis, the court must then *acquire* personal jurisdiction by service or process in strict compliance with the requirements of the service statutes. On a by a specially appearing nonresident defendant under *Code Civ. Proc. § 418.10*, a plaintiff must establish that both criteria are met [*Ziller Electronics Lab GmbH v. Superior Court (1988) 206 Cal. App. 3d 1222, 1229, 254 Cal. Rptr. 410* ; for establishing a lack of jurisdiction, *see § 323.17*].

[5] Jurisdiction to Determine Personal Jurisdiction

A trial court's jurisdiction to determine personal jurisdiction is distinct from its general jurisdiction to make a binding determination against a defendant relating to the merits of the action. Special jurisdiction to determine jurisdiction is plenary and may not be terminated or inhibited by other courts until the jurisdictional issues are determined [*Ziller Electronics Lab GmbH v. Superior Court (1988) 206 Cal. App. 3d 1222, 1228, 254 Cal. Rptr. 410]* . While in personam jurisdiction over a defendant depends on valid service and demonstration of minimum contacts, the trial court's jurisdiction to determine jurisdiction arises from the act of service of the complaint and summons and from the defendant's special appearance in the action to compel a preliminary determination of jurisdictional issues [*Ziller Electronics Lab GmbH v. Superior Court (1988) 206 Cal. App. 3d 1222, 1229, 254 Cal. Rptr. 410]* .

Since jurisdiction to consider an issue is coextensive with jurisdiction to determine it, it follows that the trial courts have jurisdiction to make a determination as to each jurisdictional criterion that is raised by a motion to quash. This jurisdiction is not threatened by either a negative determination of one criterion or the particular priority in which the criteria are determined [*Ziller Electronics Lab GmbH v. Superior Court (1988) 206 Cal. App. 3d 1222, 1229, 254 Cal. Rptr. 410]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 323 JURISDICTION: PERSONAL JURISDICTION, INCONVENIENT FORUM, AND APPEARANCES
PART II. LEGAL BACKGROUND
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28-323 California Forms of Pleading and Practice--Annotated § 323.13

§ 323.13 Continuation of Jurisdiction Once Obtained

Once the court obtains jurisdiction over the parties, jurisdiction of the court over the parties and the subject matter of an action continues throughout subsequent proceedings in the action [*Code Civ. Proc. § 410.50(b)*; *see also Code Civ. Proc. § 410.60* (jurisdiction over trustees and stockholders or members of corporation which has forfeited its charter or right to do business or has dissolved); *Code Civ. Proc. § 410.70* (jurisdiction of court to proceed against defendant or defendants served in action on contract against two or more defendants jointly, jointly and severally, or severally liable)].

Once acquired, jurisdiction is not defeated by subsequent events which might have prevented jurisdiction had they occurred before personal service of the action was made [*Goldman v. Simpson (2008) 160 Cal. App. 4th 255, 263, 72 Cal. Rptr. 3d 729* (continuing jurisdiction to enforce money judgment; renewal is not subject to attack on the ground that the debtor has insufficient personal contacts with California to establish personal jurisdiction when the renewal is entered)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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28-323 California Forms of Pleading and Practice--Annotated § 323.14

§ 323.14 Due Process Requirements Protecting Nonresident Defendants

[1] Fourteenth Amendment

The *due process clause of the Fourteenth Amendment to the U.S. Constitution* operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants [*see Shaffer v. Heitner (1977) 433 U.S. 186, 198-200, 97 S. Ct. 2569, 53 L. Ed. 2d 683]* . In determining whether a particular exercise of a state court's jurisdiction is consistent with due process, the inquiry must focus on the relationship among the defendant, the forum, and the litigation [*Keeton v. Hustler Magazine, Inc. (1984) 465 U.S. 770, 775, 104 S. Ct. 1473, 79 L. Ed. 2d 790* ; *Rush v. Savchuk (1980) 444 U.S. 320, 327, 100 S. Ct. 571, 62 L. Ed. 2d 516* ; *Secrest Machine Corp. v. Superior Court (1983) 33 Cal. 3d 664, 668, 190 Cal. Rptr. 175, 660 P.2d 399* ; *Great-West Life Assurance Co. v. Guarantee Co. of North America (1988) 205 Cal. App. 3d 199, 205, 252 Cal. Rptr. 363]* .

[2] Effect of First Amendment Rights

In weighing the contacts with the forum state of a nonresident defendant for the purposes of due process, rights under the *First Amendment to the U.S. Constitution* do not enter into the jurisdictional analysis since the infusion of such considerations would needlessly complicate an already imprecise inquiry. Moreover, the chill on protected *First Amendment* activity stemming from libel and defamation actions, for example, is already taken into account in the constitutional limitations on the substantive law governing such suits, and to reintroduce those concerns at the jurisdictional stage would be a form of double counting [*Calder v. Jones (1984) 465 U.S. 783, 790, 104 S. Ct. 1482, 79 L. Ed. 2d 804* , *aff'g Jones v. Calder (1982) 138 Cal. App. 3d 128, 132, 187 Cal. Rptr. 825]* .

[3] Minimum Contacts Requirement

The *due process clause of the Fourteenth Amendment to the U.S. Constitution* does not contemplate that a state may make binding a judgment in personam against an individual or a corporate defendant with which the state has no contacts, ties, or relations [*World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 294, 100 S. Ct. 559, 62 L. Ed. 2d 490* ; *Perkins v. Benguet Consol. Min. Co. (1952) 342 U.S. 437, 447, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio*

Law Abs. 146 ; *Haisten v. Grass Valley Medical Reimbursement (9th Cir. 1986) 784 F. 2d 1392, 1396]* .

In a line of cases beginning with *International Shoe Co. v. Washington (1945) 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95* , the U.S. Supreme Court has defined the parameters of the powers of the states to compel nonresidents to defend suits brought against them in state courts [*Cornelison v. Chaney (1976) 16 Cal. 3d 143, 147, 127 Cal. Rptr. 352, 545 P.2d 264]* . The general rule is that for a state court to exercise in personam jurisdiction over a nonresident defendant, the defendant must have certain minimum contacts with the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice [*International Shoe Co. v. Washington (1945) 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95* ; *see Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1054, 85 Cal. Rptr. 2d 611]* .

The constitutional touchstone of the determination whether an exercise of personal jurisdiction comports with due process is whether the defendant purposefully established minimum contacts in the forum state [*Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 474, 105 S. Ct. 2174, 85 L. Ed. 2d 528* ; *see also World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 291, 100 S. Ct. 559, 62 L. Ed. 2d 490]* . The rule applies to individual defendants as well as to corporate defendants [*Arnesen v. Raymond Lee Organization, Inc. (1973) 31 Cal. App. 3d 991, 996, 107 Cal. Rptr. 744]* . It does not, however, apply to plaintiffs. That is, the U.S. Supreme Court has not yet required a plaintiff to have minimum contacts with the forum state before permitting that state to assert personal jurisdiction over a nonresident defendant [*Keeton v. Hustler Magazine, Inc. (1984) 465 U.S. 770, 779, 104 S. Ct. 1473, 79 L. Ed. 2d 790]* .

The fact that a state court may exercise jurisdiction over an out-of-state corporation does not necessarily mean that the court may also assert jurisdiction over its employees, nor does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary. Each defendant's contacts with the forum state must be assessed individually [*Keeton v. Hustler Magazine, Inc. (1984) 465 U.S. 770, 781 n.13, 104 S. Ct. 1473, 79 L. Ed. 2d 790* ; *see also Serafini v. Superior Court (1998) 68 Cal. App. 4th 70, 78-80, 80 Cal. Rptr. 2d 159* (contacts of nonresident officer and director of out of state parent corporation not sufficient to give rise to jurisdiction)]. The exercise of general jurisdiction over a parent corporation of another nation will be upheld under the representative services doctrine if a subsidiary in another state, over which personal jurisdiction is established, has performed functions that are compatible with and assist the parent corporation in the pursuit of the parent's own business as a foreign operating company [*Dorel Industries, Inc. v. Superior Court (2005) 134 Cal. App. 4th 1267, 1280, 36 Cal. Rptr. 3d 742]* .

A finding of sufficient minimum contacts as a basis for imposing personal jurisdiction is not necessary when a nonresident is served with summons while in the forum state. The nonresident's presence in California, for example, when service of process is effected satisfies the jurisdictional requirement [*see Silverman v. Superior Court (1988) 203 Cal. App. 3d 145, 150, 249 Cal. Rptr. 724* ; for discussion of presence as a basis for jurisdiction, *see § 323.15[2][a]*]. The court may, nevertheless, conclude that California is an inconvenient forum and decline to exercise jurisdiction on that ground [for discussion of inconvenient forum, *see § 323.30* et seq.].

The concept of minimum contacts performs two related, but distinguishable, functions: (1) it protects the defendant against the burdens of litigating in a distant or inconvenient forum, and (2) it acts to ensure that the states, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system [*World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 291-292, 100 S. Ct. 559 62 L. Ed. 2d 490* ; *see Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 445, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* ; *see also Cassiar Mining Corp v. Superior Court (1998) 66 Cal. App. 4th 550, 554, 78 Cal. Rptr. 2d 167* (requirement prevents defendants from being subjected to California jurisdiction solely as result of random, fortuitous, or attenuated contacts; it affords nonresidents some degree of predictability and certainty about when they will be subjected to jurisdiction of forum state)].

[4] Nonphysical Entry Into Forum State

[a] Commercial Efforts

Jurisdiction over a nonresident defendant may not be avoided merely because the defendant did not physically enter the forum state. Although territorial presence frequently will enhance a potential defendant's affiliation with a state and reinforce the reasonable foreseeability of suit there, it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a state in which business is conducted. So long as a commercial actor's efforts are purposefully directed toward residents of another state, the absence of physical contacts cannot defeat personal jurisdiction there [*Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528]* .

Thus, a forum state does not exceed its powers under the due process clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum state [*World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 297-298, 100 S. Ct. 559, 62 L. Ed. 2d 490]* . If the sale of a product of a manufacturer or distributor, for example, is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other states, it is not unreasonable to subject it to suit in one of those states if its allegedly defective merchandise has there been the source of injury to its owners or to others [*World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490* ; for discussion of limited jurisdiction over nonresident defendants, *see § 323.14[6][d]*].

By purposefully and successfully soliciting business of California residents, a foreign corporation can reasonably anticipate being subject to litigation in California in the event their solicitations caused an injury to a California resident. Personal jurisdiction is appropriate for Nevada hotels that conducted no business in California and had no bank accounts or employees in California, but are licensed to do business in California, have an Internet website advertising to California residents, have a wholly owned subsidiary operating offices in California to assist customers who contact those offices and attempt to attract a limited number of high-end gaming patrons to Nevada gaming hotel properties, advertised extensively in California through billboards, newspapers, and radio and television stations located in California, listed a toll-free phone number for making reservations at their hotels in their California advertisements and on their website, and many of their California patrons used this number to make reservations, and regularly sent mailings advertising their hotels to selected California residents [*Snowney v. Harrah's Entertainment, Inc. (2005) 35 Cal. 4th 1054, 1064-1065, 29 Cal. Rptr. 3d 33, 112 P.3d 28]* .

California may constitutionally assert personal jurisdiction over a nonresident telemarketing corporation when a California resident initiates a phone call to buy a product and reaches a telemarketer who handles the order, and the telemarketer then initiates a sale of a separate product (referred to as an "upsell") and allegedly makes misrepresentations during the sales pitch for the separate product. Telemarketers who upsell a product to residents of a forum state have purposefully availed themselves of the privileges of conducting activities within the forum state [*West Corp. v. Superior Court (2004) 116 Cal. App. 4th 1167, 1177-1178, 11 Cal. Rptr. 3d 145]* .

The minimal resales of a product in California by a distributor, standing alone, do not amount to the substantial, continuous, and systematic contacts with the forum state necessary for the exercise of general jurisdiction over a foreign manufacturer doing business in its home country. Random sales in Italy to a distributor who happens to have an office in California but may resell its products anywhere are not tantamount to an effort to serve the market in this state [*Carretti v. Italpast (2002) 101 Cal. App. 4th 1236, 1253-1254, 125 Cal. Rptr. 2d 126]* .

A manufacturer's placement of goods in the stream of commerce with the expectation that they will be purchased or used by consumers in California indicates an intention to serve the California market directly or indirectly and constitutes purposeful availment if the income earned by the manufacturer from sale or use of its product in California is substantial [*Bridgestone Corporation v. Superior Court of Los Angeles County (2002) 99 Cal. App. 4th 767, 775, 121 Cal. Rptr. 2d 673]* .

[b] Electronic Contact

In an appropriate case, the requisite minimum contacts can be electronic [*see Hall v. LaRonde (1997) 56 Cal. App. 4th 1342, 1347, 66 Cal. Rptr. 2d 399]* . In *Hall*, the court reversed a judgment of dismissal arising from the trial court's granting of defendant's motion to quash service of the summons holding that use of electronic mail and the telephone by a party in another state may establish sufficient minimum contacts with California to support personal jurisdiction [*Hall v. LaRonde (1997) 56 Cal. App. 4th 1342, 1344, 66 Cal. Rptr. 2d 399]* .

An attorney's mere physical presence or absence in California is not determinative of jurisdiction over the attorney and his or her firm where the practice of law in the state occurs by the attorney's advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means [*Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 Cal. 4th 119, 128-128, 70 Cal. Rptr. 2d 304, 949 P.2d 1* ; *Simons v. Steverson (2001) 88 Cal. App. 4th 693, 713, 106 Cal. Rptr. 2d 193* (sufficient minimum contacts for jurisdiction over out-of-state attorney and firm where attorney, a California licensed lawyer, performed legal services for California residents and therefore, practiced law in state]. Conversely, when an out-of-state resident's only contact with California is a one-time purchase from a California company for out-of-state delivery, minimum contacts are not established [*Hunt v. Superior Court (2000) 81 Cal. App. 4th 901, 906, 97 Cal. Rptr. 2d 215]* .

The California Supreme Court has reviewed the federal cases addressing Internet websites and their impact on personal jurisdiction, but has not adopted a particular approach whether a website available in California by itself is "doing business" in the state [*Snowney v. Harrah's Entertainment, Inc. (2005) 35 Cal. 4th 1054, 1064, 29 Cal. Rptr. 3d 33, 112 P.3d 28]* . However, the Court did find that a Nevada hotel chain website, by any standard, established purposeful availment by touting the proximity of their hotels to California, providing driving directions from California to their hotels, specifically targeting residents of California; many of their patrons come from California and some of these patrons undoubtedly made reservations using their website. As such, the hotel purposefully derived a benefit from their Internet activities in California [*Snowney v. Harrah's Entertainment, Inc. (2005) 35 Cal. 4th 1054, 1064-1065, 29 Cal. Rptr. 3d 33, 112 P.3d 28]* .

Traditional notions of fair play and substantial justice do not allow the exercise of jurisdiction over a defendant who merely maintains a website advertisement in one state and has no contacts with the forum state other than maintaining an essentially passive home page that is accessible to citizens of the forum state, and everyone else, over the Internet [*Cybersell, Inc. v. Cybersell, Inc. (9th Cir. 1997) 130 F.3d 414, 415, 420* (distinguishing cases involving interactive websites and greater levels of actual contact)]. Nor may California properly assert jurisdiction over nonresident defendants based on their contracting with one or more Internet service providers who happen to maintain offices in California, so as to permit defendants to operate passive website from their New York residence when the Internet providers were engaged by a corporate defendant from its computer in New York [*see Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1057-1062, 85 Cal. Rptr. 2d 611* (defamation action)]. By themselves, the acts of registering a nickname or alias with Yahoo!, a California-based Internet message board, agreeing to Yahoo!'s terms of service, and posting allegedly defamatory messages on Yahoo! do not justify subjecting a nonresident defendant to California jurisdiction for purposes of a lawsuit brought by a third party about whom the allegedly defamatory messages were about [*Nam Tai Electronics, Inc. v. Titzer (2001) 93 Cal. App. 4th 1301, 1311-1313, 113 Cal. Rptr. 2d 769* (terms of agreement included a promise not to post any content that is unlawful, defamatory, libelous, or otherwise objectionable, that the relationship between the person registering and Yahoo! shall be governed by the laws of the State of California, and that both agree to submit to the personal and exclusive jurisdiction of the California courts)].

The California Supreme Court has addressed the issue of personal jurisdiction involving the Internet and has concluded that where a defendant's sole contact with California is the posting of source code on his Internet website, accessible to any person with Internet access, and where he owned no property, had no telephone listing, and conducted no business in California, personal jurisdiction does not exist for California courts [*Pavlovich v. Superior Court (2002) 29 Cal. 4th*

262, 268-279, 127 Cal. Rptr. 2d 329] . In *Pavlovich*, the California Supreme Court considered for the first time the scope of personal jurisdiction based solely on Internet use, and concluded that a California court improperly exercised personal jurisdiction over a defendant based on a posting on an Internet website. This case involved a defendant whose sole contact with California was the posting of source code on his Internet website, accessible to any person with Internet access; the source code allowed users to decrypt data contained on DVDs and enable the placement of the decrypted data onto computer hard drives or other storage media. The defendant owned no property, had no telephone listing, and conducted no business in California. The website merely posted information and had no interactive features. Because of the defendant's apparent lack of minimum contacts with California, the court reduced the matter to the consideration of one question: whether the defendant's knowledge that his tortious conduct may harm certain industries centered in California (the motion picture, computer, and consumer electronics industries) is sufficient to establish express aiming at California. Although the record lacked any indication that the defendant knew that California residents would be detrimentally affected by his actions, plaintiffs suggested that jurisdiction exists solely because the defendant's tortious conduct had a foreseeable effect in California. The court rejected this argument, finding that mere foreseeability is not enough for jurisdiction: "Because finding jurisdiction in this case would effectively subject all intentional tortfeasors whose conduct may harm industries in California to jurisdiction in California, we decline to do so." [*Pavlovich v. Superior Court (2002) 29 Cal. 4th 262, 278*]. In a subsequent case, the Court of Appeals found a seller's maintenance of the website alone was insufficient to establish personal jurisdiction where the website did not target California residents, and the Florida seller presented evidence that it had never owned or leased property in California, had never directly advertised in the state, had never intentionally targeted any California resident as a prospective customer, and had sold only 10 vehicles to California residents out of a total of more than 40,000 vehicles sold [*Shisler v. Sanfer Sports Cars, Inc. (2006) 146 Cal. App. 4th 1254, 1261, 53 Cal. Rptr. 3d 335]* .

[5] Fair Play and Substantial Justice Requirements

[a] Reasonableness and Fairness

The strictures of the due process clause forbid a state from exercising personal jurisdiction over a defendant under circumstances that would offend "traditional notices of fair play and substantial justice" [*Asahi Metal Industry Co. v. Superior Court of California (1987) 480 U.S. 102, 113, 107 S. Ct. 1026, 94 L. Ed. 2d 92* ; *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 444, 58 Cal. Rptr. 2d 899, 926 P.2d 1085]* . Thus, once it has been decided that a defendant purposefully established minimum contacts with the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice [*Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528* ; *Cornelison v. Chaney (1976) 16 Cal. 3d 143, 147-148, 127 Cal. Rptr. 352, 545 P.2d 264* ; *Great-West Life Assurance Co. v. Guarantee Co. of North America (1988) 205 Cal. App. 3d 199, 209, 252 Cal. Rptr. 363]* .

The protection against inconvenient litigation is typically described in terms of "reasonableness" or "fairness" [*World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 292, 100 S. Ct. 559, 62 L. Ed. 2d 490* ; *see, e.g., Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 445, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* (state's exercise of personal jurisdiction is limited to ensure fairness to nonresident defendant and by mutual limits on state's sovereign power to exercise jurisdiction in a federal system); *Cornelison v. Chaney (1976) 16 Cal. 3d 143, 147, 127 Cal. Rptr. 352, 545 P.2d 264* (the general rule is that the forum state may not exercise jurisdiction over a nonresident unless his or her relationship to the state is such as to make the exercise of such jurisdiction reasonable); *Buckeye Boiler Co. v. Superior Court (1969) 71 Cal. 2d 893, 898, 80 Cal. Rptr. 113, 458 P.2d 57* (a defendant not literally present in the forum state may not be required to defend itself in that state's tribunals unless the quality and nature of the defendant's activity in relation to the particular cause of action makes it fair to do so)].

Consequently, while the interests of the forum state and of the plaintiff in proceeding with the cause in the plaintiff's forum of choice are to be considered in determining whether there is a proper basis for the exercise of in personam jurisdiction over the defendant, an essential criterion in all cases is whether the quality and nature of the defendant's

activity is such that it is reasonable and fair to require the defendant to conduct a defense in the state [*Kulko v. California Superior Court (1978) 436 U.S. 84, 92, 98 S. Ct. 1690, 56 L. Ed. 2d 132]* .

Thus, the minimum requirements inherent in the concept of "fair play and substantial justice" may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities [*Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 477-478, 105 S. Ct. 2174, 85 L. Ed. 2d 528]* . However, a defendant who purposefully has directed his or her activities at forum residents and who seeks to defeat jurisdiction, must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable [*Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 477, 105 S. Ct. 2174, 85 L. Ed. 2d 528* ; *Haisten v. Grass Valley Medical Reimbursement (9th Cir. 1986) 784 F. 2d 1392, 1397]* .

When California is asked to exercise specific jurisdiction over a particular claim and the court is satisfied the defendant purposefully availed itself of the benefits of conducting business within California, the appropriate inquiry becomes whether the plaintiff's cause of action arises out of or has a substantial connection with a business relationship defendant has purposefully established within California. The courts thus asks:

- What is the business relationship between the defendant and the California-based interests;

- What is the claim asserted by the plaintiff against the defendant; and

- Is there a substantial nexus or relationship between the two because the latter arises out of or it substantially connected to the former?

The first inquiry addresses the purposeful availment issue, and the latter two inquiries focus on whether the particular claim is substantially related to the defendant's forum contacts [*VirtualMagic Asia, Inc. v. Fil-Cartoons, Inc. (2002) 99 Cal. App. 4th 228, 239-240, 121 Cal. Rptr. 2d 1]* .

Where a complaint alleges that a defendant, during the course of his employment, acquired trade secrets and other confidential information regarding his California-based employer's products, customers, and employees, which he then used to cause harm to the employer and thus to the employer's customers and to its business revenues in California, a court may find that claims raised are directly related to the defendant's contacts with California in that they arise from the employment relationship, and that the requisite substantial nexus exists between the controversy at issue and the defendant's contacts with California [*Integral Development Corp. v. Weissenbach (2002) 99 Cal. App. 4th 576, 587, 122 Cal. Rptr. 2d 24]* .

[b] Mechanical Tests Are Inappropriate

The minimum contacts test, like any standard that requires a determination of reasonableness, is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite affiliating circumstances are present [*Kulko v. California Superior Court (1978) 436 U.S. 84, 92, 98 S. Ct. 1690, 56 L. Ed. 2d 132* ; *see also Floyd J. Harkness Co. v Amezcua (1976) 60 Cal. App. 3d 687, 691, 131 Cal. Rptr. 667]* . There are no talismanic jurisdictional formulas, and the facts of each case must always be weighed in determining whether personal jurisdiction would comport with fair play and substantial justice [*Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 485-486, 105 S. Ct. 2174, 85 L. Ed. 2d 528]* . Thus, the California Supreme Court, in the context of litigation involving food poisoning that occurred in Washington and brought against Washington franchisees based on their on-going relationship with their California franchisor, held that personal jurisdiction cannot turn on mechanical tests such as a narrow proximate cause test, a broader "but for" test, or a "substantive relevance" test. The Court questioned the utility of these tests when the court's basic task is determining whether the exercise of jurisdiction would comport with "fair play and substantial justice" [*Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 475, 58 Cal. Rptr. 2d 899, 926 P.2d 1085]* .

[c] Factors Considered

In determining whether the exercise of in personam jurisdiction would comport with fair play and substantial justice, the courts, in appropriate cases, may evaluate [*Asahi Metal Industry Co. v. Superior Court (1987) 480 U.S. 102, 113, 107 S. Ct. 1026, 94 L. Ed. 2d 92* ; *Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 476-477, 105 S. Ct. 2174, 85 L. Ed. 2d 528* ; *World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 292, 100 S. Ct. 559, 62 L. Ed. 2d 490* ; *Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1054, 85 Cal. Rptr. 2d 611* ; *Great-West Life Assurance Co. v. Guarantee Co. of North America (1988) 205 Cal. App. 3d 199, 209, 252 Cal. Rptr. 363]* :

I. The burden on the defendant.

II. The forum state's interest in adjudicating the dispute.

III. The plaintiff's interest in obtaining convenient and effective relief.

IV. The interstate judicial system's interest in obtaining the most efficient resolution of controversies.

V. The shared interest of the several states in furthering fundamental substantive social policies.

These considerations sometimes serve to establish the reasonableness of jurisdiction on a lesser showing of minimum contacts than would otherwise be required [*Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 476-477, 105 S. Ct. 2174, 85 L. Ed. 2d 528* ; *Haisten v. Grass Valley Medical Reimbursement (9th Cir. 1986) 784 F.2d 1392, 1397* ; *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 448, 58 Cal. Rptr. 2d 899, 926 P.2d 1085]* . For example, when the offending events occur outside California and there are insufficient contacts between the nonresident defendant and California to justify the exercise of general jurisdiction, limited jurisdiction may nevertheless be invoked when there exists a substantial nexus between plaintiff's cause of action and defendant's activities in California [*Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 448, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* ; *Cornelison v. Chaney (1976) 16 Cal. 3d 143, 149, 127 Cal. Rptr. 352, 545 P.2d 264* ; *see Keeton v. Hustler Magazine, Inc. (1984) 465 U.S. 770, 773-774, 104 S. Ct. 1473* (defendant corporation's regular circulation of magazines in forum state as sufficient to support assertion of jurisdiction in libel action by nonresident plaintiff based on contents of magazine); for discussion of general and limited jurisdiction over nonresidents, *see § 323.14[6]*]. Put another way, once it is established that the defendant has engaged in activity of the requisite quality and nature in the forum state and that the cause of action is sufficiently connected with this activity, the propriety of an assumption of jurisdiction depends on a balancing of the inconvenience to the defendant in having to defend itself in the forum state against both the interest of the plaintiff in suing locally and the interrelated interest of the state in assuming jurisdiction [*Buckeye Boiler Co. v. Superior Court (1969) 71 Cal. 2d 893, 899, 80 Cal. Rptr. 113, 458 P.2d 57* ; *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 539, 257 Cal. Rptr. 278]* .

In deciding whether jurisdiction may reasonably be assumed, the court must analyze the nature and quality of the defendant's activities in relation to the state, and this requires a consideration of the following criteria [*Belmont Industries, Inc. v. Superior Court (1973) 31 Cal. App. 3d 281, 286, 107 Cal. Rptr. 237]* :

(1) The interest of the state in providing a forum for its residents and in regulating the business involved;

(2) The relative availability of evidence and the burden of defense and prosecution in one place rather than another;

(3) The ease of access to an alternative forum;

(4) The avoidance of multiplicity of suits and conflicting adjudications; and

(5) The extent to which the cause of action arose out of the defendant's activities in the forum state.

Consequently, the factors considered in determining whether the court has in personam jurisdiction will overlap to some extent those factors considered in determining whether a court having in personam jurisdiction is nevertheless an inconvenient forum for the trial of the case.

[d] Additional Factors When Defendant Is National of Foreign Country

The unique burdens placed on a foreign national to defend itself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders, although when minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant [*Asahi Metal Industry Co. v. Superior Court (1987) 480 U.S. 102, 114, 107 S. Ct. 1026, 94 L. Ed. 2d 92* (holding that jurisdiction was not justified in the case before it, which involved a claim for indemnification by a Taiwanese corporation against a Japanese company)].

Great care and reserve should be exercised by state courts when extending American notions of personal jurisdiction into the international field. Thus, a court, in ruling on a motion to quash, should consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction by a state court. These procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case, but in every case those interests, as well as the federal interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff and or forum state [*Asahi Metal Industry Co. v. Superior Court (1987) 480 U.S. 102, 115, 107 S. Ct. 1026, 94 L. Ed. 2d 92]* .

[6] Two Types of Personal Jurisdiction Over Nonresident Defendants

[a] General and Limited Jurisdiction

In personam jurisdiction is of two types, general and limited [*Cornelison v. Chaney (1976) 16 Cal. 3d 143, 147-148, 127 Cal. Rptr. 352, 545 P.2d 264* ; *Great-West Life Assurance Co. v. Guarantee Co. of North America (1988) 205 Cal. App. 3d 199, 204, 252 Cal. Rptr. 363]* . That is, minimum contacts may give rise to the exercise of "general" or "limited" jurisdiction over the person of a nonresident defendant, depending on the nature of the defendant's contacts with California [*see Hirsch v. Blue Cross, Blue Shield of Kansas City (9th Cir. 1986) 800 F. 2d 1474, 1477* ; *Hunt v. Erie Ins. Group (9th Cir. 1984) 728 F.2d 1244, 1246* ; *Thiebaut v. Blue Cross of Indiana (1986) 178 Cal. App. 3d 1157, 224 Cal. Rptr. 277* ; *but see Boaz v. Boyle & Co. (1995) 40 Cal. App. 4th 700, 717, 46 Cal. Rptr. 2d 888* (while minimum contacts suffice for specific (*i.e.*, limited) personal jurisdiction, standard for general jurisdiction considerably more stringent)].

[b] Limited Jurisdiction Also Referred to as Specific Jurisdiction

Limited jurisdiction is frequently referred to as "specific" jurisdiction [*see, e.g., Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528* ; *Sinatra v. National Enquirer, Inc. (9th Cir. 1988) 854 F. 2d 1191, 1195* ; *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 445, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* ; *see also Tri-West Ins. Services, Inc. v. Seguros Monterrey Aetna, S.A. (2000) 78 Cal. App. 4th 672, 677, 93 Cal. Rptr. 2d 78* ; *Stone v. State of Texas (1999) 76 Cal. App. 4th 1043, 1047, 90 Cal. Rptr. 2d 657* . This chapter, however, generally uses the term "limited jurisdiction."].

[c] General Jurisdiction Defined

General jurisdiction arises when a nonresident defendant's activities in the forum are so substantial and continuous that due process does not require a connection between the cause of action pleaded and the nature of the defendant's activities in the state [*Perkins v. Benguet Consol. Min. Co. (1952) 342 U.S. 437, 446-447, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146* ; *Hunt v. Erie Ins. Group (9th Cir. 1984) 728 F.2d 1244, 1246]* . Thus, it has been said that a court has general jurisdiction when the defendant's activities within the state are extensive or wide-ranging, or substantial, continuous, and systematic [*Cornelison v. Chaney (1976) 16 Cal. 3d 143, 147, 127 Cal. Rptr. 352, 545 P.2d 264* ; *Henderson v. Superior Court (1978) 77 Cal. App. 3d 583, 590, 142 Cal. Rptr. 478* ; *see also Hirsch v. Blue Cross, Blue Shield of Kansas City (9th Cir. 1986) 800 F. 2d 1474, 1477* ; *Haisten v. GrassValley Medical Reimbursement (9th Cir. 1986) 784 F.2d 1392, 1396* ; *Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1054, 85 Cal. Rptr. 2d 611]* . In such a situation, there is a constitutionally sufficient relationship with the state to warrant jurisdiction for all causes of action asserted against the defendant and it is not necessary that the specific cause of action alleged be connected with the defendant's business relationship to the forum [*Cornelison v. Chaney (1976) 16 Cal. 3d 143, 147, 127 Cal. Rptr. 352, 545 P.2d 264* ; *see Perkins v. Benguet Consol. Min. Co. (1952) 342 U.S. 437, 446-448, 72 S. Ct. 413, 96 L. Ed. 485, 63 Ohio Law Abs. 146* (federal due process clause does not prohibit state court from entertaining cause of action against foreign corporation when cause of action arose from activities entirely distinct from corporation's activities within forum state); *Koninklijke L.M. v. Superior Court (1951) 107 Cal. App. 2d 495, 500-501, 237 P.2d 297* (California court has jurisdiction over properly served nonresident defendant in transitory action having no relation to any of defendant's business within state when defendant's activities within state were regular, continuous, and substantial, and, hence, sufficient to render it amenable to suit); *see also Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 444-446, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* ; *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 534, 257 Cal. Rptr. 278* ; *In re Marriage of Martin (1989) 207 Cal. App. 3d 1426, 1434, 255 Cal. Rptr. 720]* .

General jurisdiction in the case of a nonresident corporation, for example, is viewed analogously to the presence of a natural person. A nonresident corporation which is doing business of a sufficiently substantial and continuous nature is treated as if it had a physical presence in the forum, placing it within the jurisdiction of the state as to causes of action independent from that business [*Serafini v. Superior Court (1998) 68 Cal. App. 4th 70, 79-80, 80 Cal. Rptr. 2d 159]* . When a corporation purposefully avails itself of the privilege of conducting activities within the forum state, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to its customers, or, if the risks are too great, severing its connection with the state [*World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490* ; *St. Joe Paper Co. v. Superior Court (1981) 120 Cal. App. 3d 991, 999, 175 Cal. Rptr. 94* , *cert. denied, 455 U.S. 982 (1982)]* . When a corporation ceases to do business in the state there is no longer any general jurisdiction, that is, jurisdiction as to causes of action independent of that business [*Serafini v. Superior Court (1998) 68 Cal. App. 4th 70, 80, 80 Cal. Rptr. 2d 159]* .

The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state [*Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1058, 85 Cal. Rptr. 2d 611]* .

[d] Limited Jurisdiction Defined

If the defendant's activities within the state are not so pervasive as to justify the court's exercise of general jurisdiction, the court may nevertheless, in certain cases, exercise a limited, sometimes referred to as specific jurisdiction over the defendant with respect to a given cause of action [*Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 474-475, 105 S. Ct. 2174, 85 L. Ed. 2d 528* ; *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 446, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* ; *see Hall v. LaRonde (1997) 56 Cal. App. 4th 1342, 1345-1346, 66 Cal. Rptr. 2d 399]* .

A three-part test has been developed for determining whether a defendant is subject to the forum state's specific

jurisdiction: (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or results from the defendant's forum-related activities; and (3) exercise of jurisdiction must be reasonable [*Pedus Building Services, Inc. v. Allen (2002) 96 Cal. App. 4th 152, 116 Cal. Rptr. 2d 542* , citing *Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 85 Cal. Rptr. 2d 611]* .

Jurisdiction in these cases depends on the quality and nature of the defendant's activities in the forum in relation to the particular cause of action. That is, the cause of action must arise out of an act done or a transaction consummated in the forum, or the defendant must perform some other act by which he or she purposely availed himself or herself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws [*Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 474-475, 105 S. Ct. 2174, 85 L. Ed. 2d 528* ; *Kulko v. California Superior Court (1978) 436 U.S. 84, 93-94, 98 S. Ct. 1690, 56 L. Ed. 2d 132* , *reh'g denied, 438 U.S. 908* ; *Hanson v. Denckla (1958) 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283* ; *Sinatra v. National Enquirer, Inc. (9th Cir. 1988) 854 F.2d 1191, 1195* ; *Cornelison v. Chaney (1976) 16 Cal. 3d 143, 147-148, 127 Cal. Rptr. 352, 545 P.2d 264* ; *Great-West Life Assurance Co. v. Guarantee Co. of North America (1988) 205 Cal. App. 3d 199, 205, 252 Cal. Rptr. 363* ; *see also Hunt v. Erie Ins. Group (9th Cir. 1984) 728 F.2d 1244, 1247]* . Thus, for example, a contract with an out-of-state party does not automatically establish purposeful availment in the other party's home forum. Rather, a court must evaluate the contract terms and the surrounding circumstances to determine whether defendant purposefully established minimum contacts within the forum. In these circumstances, "purposeful availment" requires that the defendant have performed some type of affirmative conduct that allows or promotes the transaction of business within the forum state [*Goehring v. Superior Court (1998) 62 Cal. App. 4th 894, 907, 73 Cal. Rptr. 2d 105* ; *accord Stone v. State of Texas (1999) 76 Cal. App. 4th 1043, 1048, 90 Cal.Rptr. 2d 657* (place of contracting not dispositive; place where contract executed far less important than where consequences of performing contract come to be felt)].

Limited jurisdiction over a nonresident defendant may also be found to exist when the defendant's only contact with the forum state is the purposeful direction of a foreign act having an effect in the forum state and the cause of action arose out of that effect [*see Calder v. Jones (1984) 465 U.S. 783, 789, 104 S. Ct. 1482, 79 L. Ed. 2d 804* , *aff'g, Jones v. Calder (1982) 138 Cal. App. 3d 128, 134, 187 Cal. Rptr. 825* ; *Haisten v. Grass Valley Medical Reimbursement (9th Cir. 1986) 784 F. 2d 1392, 1397* ; *see also discussion under § 323.15[2][i]*], that is, when the defendant has purposefully directed his or her activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities [*Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 472, 105 S. Ct. 2174, 85 L. Ed. 2d 528* ; *see also Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1057, 85 Cal. Rptr. 2d 611* (in tort cases, purposeful availment requirement for specific jurisdiction can be satisfied by effects test)]. The mere causing of an effect, however, is not necessarily sufficient to afford a constitutional basis for jurisdiction. Jurisdiction may be invoked only if the actor committed an out-of-state act intending to cause effects in California or reasonably expecting that effects in California would result [*Goehring v. Superior Court (1998) 62 Cal. App. 4th 894, 908-909, 73 Cal. Rptr. 2d 105* ; *see also Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1057-1062, 85 Cal. Rptr. 2d 611* (in defamation action based on statements about plaintiff posted on passive website in New York, defendants' conduct of contracting via computer in New York with Internet service providers so as to permit them to operate passive website from their New York residence was insufficient to subject them to specific jurisdiction of California)].

Thus, the "purposeful availment" requirement is satisfied when a defendant takes deliberate actions within the forum state or creates continuing obligations to forum residents, or has "purposefully directed" his or her efforts or acts toward forum residents [*Hirsch v. Blue Cross, Blue Shield of Kansas City (9th Cir. 1986) 800 F. 2d 1474, 1478* ; *see also Sinatra v. National Enquirer, Inc. (9th Cir. (1988) 854 F. 2d 1191, 1195* ; *Hall v. LaRonde (1997) 56 Cal. App. 4th 1342, 1345-1347, 66 Cal. Rptr. 2d 399* (use of electronic mail and telephone by party in another state established minimum contacts with California)]. However, California does not recognize conspiracy as a basis for acquiring personal jurisdiction over a party [*Mansour v. Superior Court (1995) 38 Cal. App. 4th 1750, 1760-1761, 46 Cal. Rptr.*

2d 191 (although neither United States nor California Supreme Court have considered issue, both focus on individual defendant's forum-related activity when deciding whether personal jurisdiction exists); *but see Taylor-Rush v. Multitech Corp. (1990) 217 Cal. App. 3d 103, 114, 265 Cal.Rptr. 672* (dictum that acts of coconspirator within California may give rise to jurisdiction over coconspirator in another state)].

A claim need not arise directly from the defendant's forum contacts in order to be sufficiently related to the contact to warrant the exercise of limited jurisdiction. Rather as long as the claim bears a substantial connection to the nonresident's forum contacts, the exercise of limited jurisdiction is appropriate. The United States Supreme Court has not provided precise criteria regarding the necessary relationship between the plaintiff's cause of action and the defendant's contacts in the forum. Rather, the court has stated the applicable standard in broader terms requiring only that plaintiff's cause of action be related to or arise out of the defendant's contacts with the forum. Thus, a state may exercise limited jurisdiction if there is a substantial connection or nexus between forum contacts and the litigation [*Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 58 Cal. Rptr. 2d 899, 926 P.2d 1085]* . Defendant's forum activities need not be directed to the plaintiff to give rise to limited jurisdiction. Accordingly, a nonresident defendant may be subject to California limited jurisdiction if the defendant purposefully has availed itself of forum benefits through an ongoing franchise agreement and there is a substantial nexus or connection between the defendant's forum activities and the plaintiff's claim even though the plaintiff is not a party to the franchise contract [*Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* ; *see also Cassiar Mining Corp v. Superior Court (1998) 66 Cal. App. 4th 550, 555, 78 Cal. Rptr. 2d 167* (even if nonresident defendant had severed any California connection long before suit, it still may be subject to state's limited jurisdiction if it has purposefully derived benefits from California activities, and lawsuit is related to or arises out of California contacts)]. The nexus required to establish limited jurisdiction is between the defendant, the forum, and the litigation, not between the plaintiff and defendant. In deciding whether a defendant has minimum contacts or purposefully has availed itself of forum benefits, the relevant contacts are said to be with the forum, because it is the defendant's choice to take advantage of opportunities that exist in the forum that subjects it to jurisdiction [*Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 458, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* ; *accord Cassiar Mining Corp v. Superior Court (1998) 66 Cal. App. 4th 550, 555, 78 Cal. Rptr. 2d 167]* .

In addition, the exercise of jurisdiction must be reasonable [*Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 477, 105 S. Ct. 2174, 85 L. Ed. 2d 528* ; *Sinatra v. National Enquirer, Inc. (9th Cir. 1988) 854 F.2d 1191, 1195* ; *Haisten v. Grass Valley Medical Reimbursement (9th Cir. 1986) 784 F. 2d 1392, 1397* ; *Hunt v. Erie Ins. Group (9th Cir. 1984) 728 F.2d 1244, 1247* ; *Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1054, 85 Cal. Rptr. 2d 611* ; *see discussion under § 323.14[5]*].

Thus, for example, it is reasonable to exercise jurisdiction on the basis of the defendant intentionally causing effects in the state by an omission or act done elsewhere whenever (a) the effects are of a nature that the state treats as exceptional and subjects to special regulation or (b) the defendant has, in connection with causing such effects in the forum state, invoked the benefits and protections of its laws [*Mansour v. Superior Court (1995) 38 Cal. App. 4th 1750, 1761, 46 Cal. Rptr. 2d 191* ; *Jamshid-Negad v. Kessler (1993) 15 Cal. App. 4th 1704, 1708, 19 Cal. Rptr. 2d 621]* . Once minimum contacts are shown, a rebuttable presumption arises that the exercise of jurisdiction is reasonable, and the defendant bears the burden of ultimately proving that the exercise of jurisdiction is unreasonable [*Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 477-478, 105 S. Ct. 2174, 85 L. Ed. 2d 528* ; *Sinatra v. National Enquirer, Inc. (9th Cir. 1988) 854 F.2d 1191, 1195* ; *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 449, 58 Cal. Rptr. 2d 899, 926 P.2d 1085]* .

The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum state [*Hanson v. Denckla (1958) 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283* ; *see Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1056, 85 Cal. Rptr. 2d 611* ; *see also Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 474, 105 S. Ct. 2174, 85 L. Ed. 2d 528* ; *Kulko v. California Superior Court (1978) 436 U.S. 84, 93-94, 98 S. Ct. 1690, 56 L. Ed. 2d 132 , reh'g denied, 438 U.S. 908]* .

When, however, the contacts that create a substantial connection with the forum state proximately result from the defendant's own actions, jurisdiction is proper [*Asahi Metal Industry Co. v. Superior Court (1987) 480 U.S. 102, 109, 107 S. Ct. 1026, 94 L. Ed. 2d 92* ; *Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528]* .

The "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person [*Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528* ; *see, e.g., Yu v. Signet Bank/Virginia (1999) 69 Cal. App. 4th 1377, 1385, 1386-1388, 82 Cal. Rptr. 2d 304* (unsophisticated California consumers who, pursuant to credit card solicitation by Virginia corporation, signed up for card, used card, and made payments on card, not subject to personal jurisdiction in Virginia)].

Thus, as the relationship of the defendant with the state seeking to exercise personal jurisdiction grows more tenuous, the scope of jurisdiction also retracts, and fairness is assured by limiting the circumstances under which the plaintiff can compel the defendant to appear and defend. The crucial inquiry concerns the character of the defendant's activity in the forum, whether the cause of action arises out of or has a substantial connection with that activity, and on the balancing of the convenience of the parties and the interests of the state in assuming jurisdiction [*Cornelison v. Chaney (1976) 16 Cal. 3d 143, 148, 127 Cal. Rptr. 352, 545 P.2d 264* ; *Thiebaut v. Blue Cross of Indiana (1986) 178 Cal. App. 3d 1157, 224 Cal. Rptr. 277* ; *but see Boaz v. Boyle & Co. (1995) 40 Cal. App. 4th 700, 717, 46 Cal. Rptr. 2d 888* ; *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 534, 257 Cal. Rptr. 278* ; *see also discussion under § 323.14[5]*].

A defendant who has purposefully directed his or her activities at forum residents and who seeks to defeat jurisdiction must present a compelling case that the presence of other considerations would render jurisdiction unreasonable, although minimum requirements inherent in the concept of fair play and substantial justice may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities [*Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 477-478, 105 S. Ct. 2174, 85 L. Ed. 2d 528]* .

[7] Judgment Rendered in Violation of Due Process Void

The due process clause of *U.S. Const., amend. XIV*, limits the power of a state court to render a valid personal judgment against a nonresident defendant. A judgment rendered in violation of due process is void in the rendering state and is not entitled to full faith and credit elsewhere [*World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 291, 100 S. Ct. 559, 62 L. Ed. 2d 490]* . Consequently, while a valid final judgment of a sister state must be afforded full faith and credit in California, the defendant, in an action to enforce a default judgment rendered by a court of a sister state, has the right to show that the sister state court lacked in personam jurisdiction over the defendant, if that issue was not litigated in the sister state action [*Indiana Insurance Co. v. Pettigrew (1981) 115 Cal. App. 3d 862, 864, 171 Cal. Rptr. 770* ; *see Yu v. Signet Bank/Virginia (1999) 69 Cal. App. 4th 1377, 1385, 82 Cal. Rptr. 2d 304* (before court is bound by judgment rendered in another state, it may inquire into jurisdictional basis of foreign court's decree)]. When another state has fully and fairly litigated its jurisdiction, and has finally decided the question, however, a second state may not reexamine the question [*Yu v. Signet Bank/Virginia (1999) 69 Cal. App. 4th 1377, 1393-1394, 82 Cal. Rptr. 2d 304]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsPurposeful AvailmentCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsSubstantial ContactsConstitutional LawBill of RightsFundamental FreedomsGeneral OverviewConstitutional LawBill of RightsFundamental

RightsProcedural Due ProcessScope of Protection

California Forms of Pleading and Practice--Annotated

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329

Chapter 323 JURISDICTION: PERSONAL JURISDICTION, INCONVENIENT FORUM, AND APPEARANCES
PART II. LEGAL BACKGROUND
A. Personal Jurisdiction

28-323 California Forms of Pleading and Practice--Annotated § 323.15

§ 323.15 Specific Bases of Judicial Jurisdiction

[1] In General

The Judicial Council Comment to *Code Civ. Proc. § 410.10* [*see* Bases of Judicial Jurisdiction, pp 69-91 of the 1969 Report of the Judicial Council of California to the Governor and the Legislature (hereafter cited as *Code Civ. Proc. § 410.10*, Judicial Council Comment)], sets out the following recognized bases of judicial jurisdiction over an individual [*Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Individuals; *see also Quattrone v. Superior Court (1975) 44 Cal. App. 3d 296, 302-303, 118 Cal. Rptr. 548* ; *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 799, 100 Cal. Rptr. 477* ; *Restatement (Second) of Conflict of Laws § 27 (1971)*]:

(1) Presence;

(2) Domicile;

(3) Residence;

(4) Nationality or citizenship;

(5) Consent;

(6) Appearance in the action;

(7) Doing business in the state;

(8) Doing an act in the state;

(9) Causing an effect in the state by an act done elsewhere;

(10) Ownership, use, or possession of a thing in the state; and

(11) Other relationships to the state which make the exercise of judicial jurisdiction reasonable.

The recognized bases of judicial jurisdiction over a corporation are, in turn, as follows [*Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Corporations; *see also Restatement (Second) of Conflict of Laws §§ 41-52 (1971)*]:

(1) Incorporation in the state;

(2) Consent;

(3) Appointment of agent for service of process;

(4) Appearance;

(5) Doing business in the state;

(6) Doing an act in the state;

(7) Causing effects in the state by an act done elsewhere;

(8) Ownership, use, or possession of a tangible thing in the state; and

(9) Other relationships to the state which make the exercise of judicial jurisdiction reasonable.

In California, a partnership or other unincorporated association may be sued in the firm or common name [*see Code Civ. Proc. § 369.5*]. In such a case the court has power to exercise judicial jurisdiction over the partnership or association if under the circumstances it could exercise judicial jurisdiction over a corporation on a similar basis of jurisdiction [*see Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction over Partnerships or Other Unincorporated Associations; *see also Restatement (Second) of Conflict of Laws § 40 (1971)*].

[2] Over Individuals

[a] Presence

A state has power to exercise judicial jurisdiction over an individual who is physically present within its territory, whether permanently or temporarily, if at that time he or she is properly served with process [*see Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Individuals, (1) Presence; Restatement (Second) of Conflict of Laws § 28 (1971); *see also Silverman v. Superior Court (1988) 203 Cal. App. 3d 145, 150, 249 Cal. Rptr. 724]* .

This presence gives the state a basis for the exercise of jurisdiction over the individual in any action that may be there brought against him or her. Physical presence is the most common and least frequently d basis of jurisdiction. But such presence must usually be voluntary. The court may decline to exercise its jurisdiction if force or fraud was used to effect such presence [*see Guardianship of Smith (1957) 147 Cal. App. 2d 686, 691, 306 P.2d 86]* . Another qualification grants immunity to service of process or suit to various persons [*see Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Individuals; for further discussion of immunities to service or suit, *see § 323.16*].

In *Restatement (Second) of Conflict of Laws § 28 (1971), cmt. a*, the American Law Institute points out that physical presence in the state was the traditional basis of judicial jurisdiction at common law, that it is immaterial that the individual is only temporarily in the state, that the individual's presence in the state even for an instant gives the state judicial jurisdiction over him or her, and that if at that time exercise of this jurisdiction is initiated by proper service of process, and if the individual is afforded a reasonable opportunity to be heard, a valid judgment may be entered against the individual even though he or she leaves the state immediately after the service of process [*see also Silverman v. Superior Court (1988) 203 Cal. App. 3d 145, 150, 249 Cal. Rptr. 724]* .

Notwithstanding the foregoing discussion, the continued vitality of the rule, that presence in the state temporarily when summons is served is sufficient in and of itself to give the forum state personal jurisdiction over the person of a nonresident defendant for all causes of action, has been put in doubt. In *Burnham v. Superior Court of Cal. (1990) 495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631* , although the U.S. Supreme Court unanimously affirmed the exercise of jurisdiction over the nonresident defendant by a California court, only four justices held that presence alone is a sufficient contact with the state to support the exercise of in personam jurisdiction over the defendant in any cause of action, whether related to the defendant's presence or not. Four other justices were of the view that the exercise of in personam jurisdiction would have to comport with traditional notions of fair play and substantial justice, and consequently other factors would have to be considered. After discussing the other factors, they concluded that the exercise of jurisdiction over the defendant met the fairness requirement. The ninth justice believed that under either point of view, the affirmance of jurisdiction of the California court was required.

[b] Domicile

A state has power to exercise judicial jurisdiction over an individual who is domiciled in the state but may be absent from the state. A person's domicile is usually the place where the person has his or her home and, at least for the same purpose, no person has more than one domicile at a time [*see Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Individuals, (2) Domicil; *Restatement (Second) of Conflict of Laws, § 29 (1971)*; *see also Milliken v. Meyer (1940) 311 U.S.457, 462-464, 61 S. Ct. 339, 85 L. Ed. 278* ; *Allen v. Superior Court (1953) 41 Cal. 2d 306, 310-311, 259 P.2d 905]* .

[c] Residence

A state has power to exercise judicial jurisdiction over an individual who is a resident of the state unless the individual's relationship to the state is so attenuated as to make the exercise of such jurisdiction unreasonable [*see Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Individuals, (3) Residence; *Restatement (Second) of Conflict of Laws, § 30 (1971)*; for discussion of fair play and substantial justice requirements, *see § 323.14[5]*].

Although California has a manifest interest in providing effective means of redress for its residents, such interest coupled with the mere fact of past residency fail to provide sufficient contacts of such nature and quality to entertain personal jurisdiction over a defendant consistent with traditional notions of fair play and substantial justice [*Muckle v. Superior Court (2002) 102 Cal. App. 4th 218, 225-231, 125 Cal. Rptr. 2d 303]* .

[d] Nationality and Citizenship

A state has power to exercise judicial jurisdiction over an individual who is a national or citizen of the state unless the nature of the individual's relationship to the state makes the exercise of such jurisdiction unreasonable [*Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Individuals, (4) Citizenship; *Restatement (Second) of Conflict of Laws, § 31 (1971)*; *see U.S. Const., amend. XIV* (all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside); for

discussion of fair play and substantial justice requirements, *see § 323.14[5]*].

The factors to be considered in determining whether judicial jurisdiction based on citizenship exists are generally the same as in the case of jurisdiction based on residence [*Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Individuals, (4) Citizenship; for discussion of residence, *see § 323.15[2][c]*].

[e] Consent

A state has power to exercise judicial jurisdiction over a competent individual who has consented to the exercise of such jurisdiction [*Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Individuals, (5) Consent; *Restatement (Second) of Conflict of Laws, § 32 (1971)*; *see National Equipment Rental v. Szukhent (1964) 375 U.S. 311, 315-316, 84 S. Ct. 411, 11 L. Ed. 2d 354]* .

Although the consent of a party is effective to give a state jurisdiction over his or her person, it cannot enlarge the competency of the court to include a type of case which a court has not been authorized to hear by the state or a case involving either a greater or lesser amount in controversy [*Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Individuals, (5) Consent].

Actual consent to the exercise of jurisdiction is required, but such consent may be expressed by words or by conduct, and must be given by a person who is under no legal disability. Consent may be given with respect to a particular action either before the action is brought or afterwards, or it may be given generally with respect to actions which may thereafter be brought. Consent may be given (1) by a contractual provision that either waives service of process or authorizing extraterritorial service of process; (2) by a power of attorney to confess judgment, unless such confessions are illegal [for discussion of confessions of judgment in California, *see Ch. 318, Judgments, § 318.40* et seq.]; (3) by an acknowledgment of "due service"; (4) by a contractual provision for arbitration by a state arbitration board; or (5) by the designation of an agent to receive process [*Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Individuals, (5) Consent; for discussion of statutes appointing a California state official to receive service of summons on certain nonresidents as a result of some activity by them in California, *see* Ch. 518, *Service of Summons and Papers*].

[f] General Appearance

A state has power to exercise judicial jurisdiction over an individual who enters an appearance as a defendant in the action [*Code Civ. Proc. § 410.10*, Judicial Council Comments, Bases of Judicial Jurisdiction Over Individuals, (6) Appearance; *Restatement (Second) of Conflict of Laws § 33 (1971)*].

However, states do not usually choose to exercise judicial jurisdiction on the basis of an appearance that is not general [*Restatement (Second) of Conflict of Laws § 33, cmt. c (1971)*]. This is the rule in *California. Code Civ. Proc. § 410.50(a)* provides that except as otherwise provided by statute, the court in which an action is pending has jurisdiction over a party from the time summons is served on him or her and that a general appearance by a party is equivalent to personal service of summons on such party [*see, e.g., Neihaus v. Superior Court (1977) 69 Cal. App. 3d 340, 345, 137 Cal. Rptr. 905]* . For discussion of the distinction between a general appearance and a special appearance, see *§ 323.60* et seq.].

[g] Doing Business in the State as Individual

A state has power to exercise judicial jurisdiction over an individual (1) who does business in the state with respect to causes of action arising out of that business; (2) who has done business in the state, but has ceased to do business there at the time when the action is brought, with respect to causes of action arising from the business done in the state; and (3) who does business in the state, with respect to causes of action that do not arise from the business done in the state if

this business is so continuous and substantial as to make exercise of such jurisdiction reasonable [*Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Individuals, (7) Doing Business in State; *Restatement (Second) of Conflict of Laws, § 35 (1971)*; for due process factors to be considered and general versus limited jurisdiction, *see §§ 323.14[5]* and *[6]*].

[h] Doing Act in the State as Individual

A state has power to exercise judicial jurisdiction over an individual who has done, or has caused to be done, an act in the state (1) with respect to any cause of action in tort arising from the act; and (2) with respect to any cause of action not in tort arising from the act unless the nature of the act and of the individual's relationship to the state and to other states make the exercise of such jurisdiction unreasonable [*Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Individuals, (8) Doing an Act in State; *Restatement (Second) of Conflict of Laws § 36 (1971)*; *see Kaiser Aetna v. Deal (1978) 86 Cal. App. 3d 896, 900, 150 Cal. Rptr. 615* (tort action); *Floyd J. Harkness Co. v. Amezcua (1976) 60 Cal. App. 3d 687, 691, 131 Cal. Rptr. 667* (contract action); for due process factors to be considered and general versus limited jurisdiction, *see §§ 323.14[5]* and *[6]*].

The minimum contacts requirement is satisfied not only by doing business or owning property in the forum state, but also by doing an act, provided that (1) the cause of action alleged arises from the act done in the state, and (2) in light of the circumstances the exercise of the jurisdiction is reasonable [*County of Humboldt v. Harris (1988) 206 Cal. App. 3d 857, 860, 254 Cal. Rptr. 49* (citing *Restatement (Second) of Conflict of Laws § 36(2) (1971)*); for due process factors to be considered and general versus limited jurisdiction, *see §§ 323.14[5]* and *[6]*]. In determining reasonableness, a number of factors are to be considered: the nature and quality of the act, the extent of the relationship of the state to the defendant, and the plaintiff, and the degree of inconvenience to the defendant if forced to defend in the state. Moreover, it is also settled that the state's jurisdiction is likely to be upheld when it is based on a particular statute or regulation, when the isolated act has injurious consequences in the state, or both [*County of Humboldt v. Harris (1988) 206 Cal. App. 3d 857, 860, 254 Cal. Rptr. 49]* .

Thus, the exercise of judicial jurisdiction over a defendant by a state is reasonable as to causes of action arising from an act done, or caused to be done, by the defendant in the state which the state subjects to special regulation or when the act done by the defendant has substantial consequences there even though the act is an isolated act not constituting the doing of business in the state [*see Restatement (Second) of Conflict of Laws § 36, cmt. e (1971)*; *see also Fam. Code § 7620* (providing that person who has sexual intercourse or causes conception with the intent to become a legal parent by assisted reproduction in this state thereby submits to jurisdiction of courts of this state as to action brought under Uniform Parentage Act (*Fam. Code § 7600 et seq.*) with respect to child who may have been conceived by that act of intercourse or assisted reproduction); *County of Humboldt v. Harris (1988) 206 Cal. App. 3d 857, 861, 254 Cal. Rptr. 49* (paternity action by county against nonresident father based on act of sexual intercourse in California resulting in conception and birth of child)].

Conversely, although minimal contacts with this state essential to the exercise of jurisdiction over a nonresident defendant may be grounded in doing an act in this state, this state does not have jurisdiction if the maintenance of the suit offends traditional notions of fair play and substantial justice and the nature of the act done in this state and the nature of the individual's relationship to the state make the exercise of such jurisdiction unreasonable [*Floyd J. Harkness Co. v. Amezcua (1976) 60 Cal. App. 3d 687, 691, 131 Cal. Rptr. 667]* .

[i] Causing Effect in the State by Act Done Elsewhere as Individual

[i] In General

A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects, unless the nature of the effects and of the

individual's relationship to the state make the exercise of such jurisdiction unreasonable [*Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Individuals, (9) Causing Effect in State by Act or Omission Elsewhere; *Restatement (Second) of Conflict of Laws § 37*; *see Calder v. Jones (1984) 465 U.S. 783, 788-790, 104 S. Ct. 1482, 79 L. Ed. 2d 804 , aff'g, Jones v. Calder (1982) 138 Cal. App. 3d 128, 134, 187 Cal. Rptr. 825* ; *Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1057, 85 Cal. Rptr. 2d 611* ; *see also* discussion under *§ 323.14[6]*].

Restatement (Second) of Conflict of Laws § 37 (1971), was intended to reach wrongful activity outside of the state causing injury within the state, and even then, the assertion of jurisdiction over the defendant must not be unreasonable [*Kulko v. California Superior Court (1978) 436 U.S. 84, 96, 98 S. Ct. 1690, 56 L. Ed. 2d 132 , reh'g denied, 438 U.S. 908]* . That is, although minimal contacts with this state essential to the exercise of jurisdiction over a nonresident defendant may be grounded in causing an effect in this state by an act or omission which occurs elsewhere, this state does not have jurisdiction if the maintenance of the suit offends traditional notions of fair play and substantial justice and the nature of the effect of the act done elsewhere and the nature of the individual's relationship to the state make the exercise of such jurisdiction unreasonable [*Floyd J. Harkness Co. v. Amezcua (1976) 60 Cal. App. 3d 687, 691, 131 Cal. Rptr. 667* ; for due process factors to be considered and general versus limited jurisdiction, *see §§ 323.14[5]* and *[6]*].

[ii] Possible Situations

There are three possible situations in which an act done elsewhere may cause an effect in this state [*Kaiser Aetna v. Deal (1978) 150 Cal. Rptr. 615* ; *see Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Individuals, (9) Causing Effect in State by Act or Omission Elsewhere]:

- The act was done with the intention of causing effects in the state;

- The act, although not done with the intention of causing effects in the state, could reasonably have been expected to do so; and

- The act was not done with the intention of causing effects in the state and could not reasonably have been expected to do so.

With regard to the first possibility, the state may exercise the same judicial jurisdiction over the defendant as to any cause of action arising from the effects as it could have exercised had these effects resulted from an act done within its territory [*see Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Individuals, (9) *Causing Effect in State by Act or Omission Elsewhere; Kaiser Aetna v. Deal (1978) 86 Cal. App. 3d 896, 902, 150 Cal. Rptr. 615* ; *see also Serafini v. Superior Court (1998) 68 Cal. App. 4th 70, 80 Cal. Rptr. 2d 159* (despite not being present in state, natural person who commits tort while acting on corporation's behalf is subject to state's jurisdiction when delict intended to inflict tortious harm within state; rule inapplicable under facts) and discussion under *§ 323.14[6]*]. With regard to the third possibility, the state may not constitutionally exercise jurisdiction over the defendant unless the defendant is found to have an extensive relationship with the state [*Kaiser Aetna v. Deal (1978) 86 Cal. App. 3d 896, 904, 150 Cal. Rptr. 615* ; *see also Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Individuals, (9) Causing Effect in State by Act or Omission Elsewhere].

Concerning the second possibility, the mere causing of an effect in the forum is not sufficient, without more, to afford a constitutional basis for jurisdiction [*Mansour v. Superior Court (1995) 38 Cal. App. 4th 1750, 1761, 46 Cal. Rptr. 2d 191* ; *Kaiser Aetna v. Deal (1978) 86 Cal. App. 3d 896, 902, 150 Cal. Rptr. 615]* . Whether the forum state may exercise personal jurisdiction over the defendant in the second situation depends on a variety of factors, including the extent of the relationship of the state to the defendant and to the plaintiff, the nature and quality of the effects resulting from the act, and the degree of inconvenience which would result to the defendant from being forced to stand suit in the

state on the particular cause of action. The greater the defendant's relationship to the state, the greater is the likelihood that the state may exercise judicial jurisdiction over him or her as to causes of action arising from the effects of the act in the state. If, for example, the defendant does business in the state, or solicits business extensively in the state, or if a substantial quantity of goods manufactured by him or her are sold in the state, there is a greater likelihood that the state may exercise judicial jurisdiction over him or her as to causes of action arising from the effects in the state of an act done by him or her outside the state than if the defendant did not have this relationship to the state. This is so even though the defendant's relationship to the state is not related in any way to the act or to such of its effects in the state as are involved in the suit. The plaintiff's relationship to the state is also material. The greater the extent of this relationship is, the greater is the interest of the state in the plaintiff and consequently the more appropriate it will be that the state should be in the position to try the case in its courts. On the other hand, if the plaintiff has little or no relationship to the state, the defendant's relationship to the state must be correspondingly greater to give the state a sufficient interest to justify trial of the case in its courts. Another factor of significance is the nature and quality of the effects which occur in the state. The state may exercise judicial jurisdiction over the defendant if the effects which could have been anticipated and which actually occurred are of a sort highly dangerous to persons or things [*Kaiser Aetna v. Deal (1978) 86 Cal. App. 3d 896, 902-903, 150 Cal. Rptr. 615* , quoting *Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial JurisdictionOverIndividuals, (9) Causing Effect in State by Act or Omission Elsewhere; *see also Serafini v. Superior Court (1998) 68 Cal. App. 4th 70, 80 Cal. Rptr. 2d 159* (natural person may be subject to jurisdiction if delict could reasonably be expected to inflict tortious harm within state; rule inapplicable under facts)].

[j] Individual Ownership, Use, or Possession of Thing in the State

A state has power to exercise judicial jurisdiction over an individual who has owned, used, or possessed (1) an immovable thing in the state with respect to any cause of action arising from the thing while it was owned, used, or possessed by the individual, or (2) a chattel in the state with respect to any cause of action arising from the chattel while it was in the state and was so owned, used, or possessed unless the nature of the chattel and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable [*Restatement (Second) of Conflict of Laws, § 38 (1971)*; *see Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Individuals, (10) Ownership, Use or Possession of Thing in State; *Indiana Insurance Co. v. Pettigrew (1981) 115 Cal. App. 3d 862, 864-868, 171 Cal. Rptr. 770* ; for due process factors to be considered and general versus limited jurisdiction, *see §§ 323.14[5]* and *[6]*].

[k] Other Individual Relationships

A state has power to exercise judicial jurisdiction over an individual in other situations, not specifically enumerated, when the individual has such a relationship to the state that it is reasonable for the state to exercise such jurisdiction [*Restatement (Second) of Conflict of Laws, § 39 (1971)*; *see Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Individuals, (11) Other Relationships; for due process factors to be considered, *see § 323.14[5]*].

[3] Over General Partnership and Partners

Jurisdiction over a partnership does not necessarily permit a court to assume jurisdiction over the individual partners. Liability and jurisdiction are independent. Liability depends on the relationship between the plaintiff and the defendants and between the individual defendants. Jurisdiction depends only on each defendant's relationship with the forum. Thus, for example, although individual partners are jointly and severally liable for torts of the partnership, jurisdiction over each defendant must be established individually. Accordingly, a California court has jurisdiction over only those individual partners who personally established the requisite minimum contacts with California [*Goehring v. Superior Court (1998) 62 Cal. App. 4th 894, 904-905, 73 Cal. Rptr. 2d 105]* .

[4] Over Domestic Corporations

A state has power to exercise judicial jurisdiction over a domestic corporation [*Restatement (Second) of Conflict of Laws, § 41 (1971)*]. That is, a state has power to exercise judicial jurisdiction over a corporation incorporated in the state even though it does no business there. Incorporation in the state gives the state a basis for exercising juridical jurisdiction over the corporation in any action that may there be brought against it [*Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Corporations, (1) Incorporation in State-Domestic Corporations].

[5] Over Foreign Corporations

[a] Consent

A state has power to exercise judicial jurisdiction over a foreign corporation which has consented to the exercise of such jurisdiction [*Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Corporations, (2) Consent-Foreign Corporations; *Restatement (Second) of Conflict of Laws § 43*].

For a statutory example providing for jurisdiction over a foreign corporation or nonresident person based on consent to jurisdiction as expressed in specified contracts, see *Code Civ. Proc. § 410.40*.

[b] Appointment of Agent for Service of Process

A state has power to exercise judicial jurisdiction over a foreign corporation which has authorized an agent or a public official to accept service of process in actions brought against the corporation in the state as to all causes of action to which the authority of the agent or official to accept service extends [*Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Corporations, (3) Appointment of Agent-Foreign Corporation; *Restatement (Second) of Conflict of Laws § 44*].

[c] Appearance

A state has power to exercise judicial jurisdiction over a foreign corporation which enters an appearance as defendant in the action [*Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Corporations, (4) Appearance-Foreign Corporations; *Restatement (Second) of Conflict of Laws, § 45*]. The foregoing rule is the same as that which applies to individuals under *Restatement (Second) of Conflict of Laws § 33* [*Restatement (Second) of Conflict of Laws of § 45 comment a*; for discussion of appearance by an individual, *see § 323.15[2][f]*].

[d] Doing Business in the State as Corporation

A state has power to exercise judicial jurisdiction over a foreign corporation which does business in the state with respect to causes of action arising from the business done in the state, and with respect to causes of action that do not arise from the business done in the state if this business is so continuous and substantial as to make it reasonable for the state to exercise such jurisdiction [*Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Corporations, (5) Doing Business in State-Foreign Corporations; *Restatement (Second) of Conflict of Laws § 47*; for discussion of general versus limited jurisdiction, *see § 323.14[6]*].

By purposefully and successfully soliciting business of California residents, a foreign corporation can reasonably anticipate being subject to litigation in California in the event their solicitations caused an injury to a California resident [*Snowney v. Harrah's Entertainment, Inc. (2005) 35 Cal. 4th 1054, 1062-1070, 29 Cal. Rptr. 3d 33, 112 P.3d 28* (Nevada hotels purposefully and successfully soliciting the business of California residents; insufficient notice to guests of room surcharges)].

A state also has power to exercise judicial jurisdiction over a foreign corporation which has done business in the state, but has ceased to do business there at the time when the action is brought, with respect to causes of action arising from the business done in the state [*Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over

Corporations, (5) Doing Business in State-Foreign Corporations; *Restatement (Second) of Conflict of Laws § 48*; for discussion of general versus limited jurisdiction, *see § 323.14[6]*].

[e] Doing an Act in the State as Corporation

A state has power to exercise judicial jurisdiction over a foreign corporation which has done, or has caused to be done, an act in the state with respect to any cause of action in tort arising from the act, and any cause of action not in tort arising from the act unless the nature of the act and of the corporation's relationship to the state makes the exercise of such jurisdiction unreasonable [*Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Corporations, (6) Doing Act in State-Foreign Corporations; *Restatement (Second) of Conflict of Laws § 49*; for due process factors to be considered and general versus limited jurisdiction, *see §§ 323.14[5]* and *[6]*]. The foregoing rule is the same as that applicable to individuals under *Restatement (Second) of Conflict of Laws, § 36* [*Restatement (Second) of Conflict of Laws § 49 comment a*; for discussion of individual doing act in the state, *see § 323.15[2][h]*].

[f] Causing Effect in the State by Act Done Elsewhere as Corporation

A state has power to exercise judicial jurisdiction over a foreign corporation which causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of these effects and of the corporation's relationship to the state makes the exercise of such jurisdiction unreasonable [*Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Corporations, (7) Causing Effects in State by Act Done Elsewhere-Foreign Corporations; *Restatement (Second) of Conflict of Laws § 50*; *see Secrest Machine Corp. v. Superior Court (1983) 33 Cal. 3d 664, 669, 190 Cal. Rptr. 175, 660 P.2d 399* ; for due process factors to be considered and general versus limited jurisdiction, *see §§ 323.14[5]* and *[6]*].

[g] Corporate Ownership, Use, or Possession of Tangible Thing in the State

A state has power to exercise judicial jurisdiction over a foreign corporation that has owned, used, or possessed an immovable thing or a chattel in the state, with respect to any cause of action arising from the immovable thing while it was owned, used, or possessed by the corporation or arising from the chattel while it was in the state and was so owned, used, or possessed, unless the nature of the chattel and of the corporation's relationship to the state make the exercise of such jurisdiction unreasonable [*Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Corporations, (8) Ownership, Use or Possession of Thing in State-Foreign Corporations; *Restatement (Second) of Conflict of Laws § 5*; for due process factors to be considered and general versus limited jurisdiction, *see §§ 323.14[5]* and *[6]*].

[h] Other Corporate Relationships

A state has power to exercise judicial jurisdiction over a foreign corporation in other situations, not specifically enumerated, if the foreign corporation has such a relationship to the state that it is reasonable for the state to exercise such jurisdiction [*Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Corporations, (9) Other Relationships-Foreign Corporations; *Restatement (Second) of Conflict of Laws § 52*].

[6] Jurisdiction Over Plaintiff

A state has power to exercise judicial jurisdiction over an individual who brings an action in the state in that action and in any other action that the defendant may bring against him or her by way of counterclaim or independent cross action to the extent that the local law of the state so provides at the time of the bringing of the action [*Code Civ. Proc. § 410.10*, Judicial Council Comments, Bases of Judicial Jurisdiction Over Individuals, (6) Appearance; *Restatement (Second) of Conflict of Laws § 34*].

A state has power to exercise judicial jurisdiction over a foreign corporation that brings an action in the state in that

action and in any other action that the defendant may bring against it by way of counterclaim or independent cross action to the extent that the local law of the state so provides at the time of the bringing of the action [*Restatement (Second) of Conflict of Laws § 46*; *see also Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Corporations, (4) Appearance-Foreign Corporations].

Note that counterclaims have been abolished in California and that claims formerly asserted as counterclaims are now asserted in cross complaints [*see Code Civ. Proc. § 428.80*].

[7] Contractual

Parties may agree contractually, in advance, on the forum for resolving disputes between them, assuming that jurisdiction in that forum would, in any case, be proper. Such a forum selection clause is generally given effect unless it is unfair or unreasonable [*M/S Bremen v. Zapata Off-Shore Co. (1972) 407 U.S. 1, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513* ; *Smith, Valentino & Smith, Inc. v. Superior Court (1976) 17 Cal. 3d 491, 495-496, 131 Cal. Rptr. 374, 551 P.2d 1206* ; *Hunt v. Superior Court (2000) 81 Cal. App. 4th 901, 908, 97 Cal. Rptr. 2d 215* ; for discussion of forum selection clauses, *see* § 323.22].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsConsentCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsDoing BusinessCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsDomicile

California Forms of Pleading and Practice--Annotated

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329

Chapter 323 JURISDICTION: PERSONAL JURISDICTION, INCONVENIENT FORUM, AND APPEARANCES
PART II. LEGAL BACKGROUND
A. Personal Jurisdiction

28-323 California Forms of Pleading and Practice--Annotated § 323.16

§ 323.16 Immunities to Service or Suit

[1] Diplomats, Legislators, and Members of Congress

Heads of foreign diplomatic missions and members of their staffs having diplomatic rank are immune to civil actions and proceedings, but this immunity does not extend to consular officers who are mainly concerned with the commercial interests of their nationals [*see 22 U.S.C. § 254d*; Restatement (Second) of Foreign Relations Law of the United States §§ 73, 74, 81; *§ 323.83*]. Members of the California Legislature are immune to civil process during, and for five days before and after, a legislative session [*Cal. Const., art. IV, § 14*; *see Harmer v. Superior Court (1969) 275 Cal. App. 2d 345, 348, 79 Cal. Rptr. 855* ; *§ 323.83*]. Members of the United States Congress, on the other hand, although exempt from arrest under U.S. Const., art. I, § 6, cl. 1, while going to, attending, and returning from Congressional sessions, in all cases except treason, felony, and breach of the peace, are subject to civil process [*see Long v. Ansell (1934) 293 U.S. 76, 81-83, 55 S. Ct. 21, 79 L. Ed. 208]* .

[2] Witnesses in Criminal Proceedings and Extradited Defendants

A person who comes into California in obedience to a subpoena directing him or her to attend and testify in this state is not, while in California pursuant to the subpoena or order, subject to arrest or the service of process, civil or criminal, in connection with matters that arose before his or her entrance into this state under the subpoena [*Penal Code § 1334.4*]. A similar exemption exists in favor of a person passing through California while going to or returning from another state in obedience to a subpoena or order to attend and testify in that state [*Penal Code § 1334.5*; *see § 323.83*]. Moreover, a person brought into California on or after waiver of extradition based on a criminal charge is not subject to service of process in civil actions arising out of the same facts as the criminal proceedings for which he or she is returned until he or she has been convicted in the criminal proceeding, or, if acquitted, until he or she has had reasonable opportunity to return to the state from which he or she was extradited [*Penal Code § 1555*; for a form of noticed motion to quash service of summons on grounds of immunity, *see § 323.153*].

[3] Other Parties and Witnesses

Under California common law, a nonresident witness who voluntarily came into California for the purpose of testifying as a witness in a civil or criminal proceeding was, while attending the trial and for a reasonable time before and after, immune to service of process in any other nonrelated civil action or proceeding in California [*see, e.g., Velkov v. Superior Court (1953) 40 Cal. 2d 289, 291, 253 P.2d 25]* . The same rule applied to a nonresident who came into California to attend and testify in a civil action in which he or she was the defendant [*Minthorne v. Superior Court (1963) 213 Cal. App. 2d 748, 750, 29 Cal. Rptr. 265]* .

This immunity rule with respect to witnesses was abrogated by the court of appeal in *Severn v. Adidas Sportschuhfabriken (1973) 33 Cal. App. 3d 754, 756-762, 109 Cal. Rptr. 328* . *Severn* held that, in light of California's long-arm statutes (*Code Civ. Proc. §§ 410.10, 413.10, 415.10*), a person subject to the in personam jurisdiction of the California courts could properly be served with process while under a subpoena, because he or she could have been properly served at his or her place of domicile [*Severn v. Adidas Sportschuhfabriken (1973) 33 Cal. App. 3d 754, 757-762, 109 Cal. Rptr. 328* (foreign individual served with California summons while attending trial in Florida)].

The court pointed out that if the abrogation of the rule in any given case would result in the unfairness of an inconvenient forum to the defendant, *Code Civ. Proc. § 410.30* (relating to inconvenient forum and discussed under § 323.23[7]) provides an appropriate procedure for seeking relief [*Severn v. Adidas Sportschuhfabriken (1973) 33 Cal. App. 3d 754, 763-764, 109 Cal. Rptr. 328]* .

In *Silverman v. Superior Court (1988) 203 Cal. App. 3d 145, 149, 249 Cal. Rptr. 724* , the court of appeal, following the reasoning in *Severn*, held that the immunity from service rule with respect to nonresident parties, likewise, is no longer the law in California.

[4] National Banks

Any action or proceeding against a national banking association for which the Federal Deposit Insurance Corporation has been appointed receiver, or against the Federal Deposit Insurance Corporation as receiver of such association, must be brought in the district or territorial court of the United States held within the district in which the association's principal place of business is located, or, in the event any state, county, or municipal court has jurisdiction over such an action or proceeding, in such court in the county or city in which that association's principal place of business is located [*12 U.S.C. § 94*]. Under *12 U.S.C. § 94*, a national bank coming within its provisions and having no branch in California is not subject to suit in California [*see Citizens & Southern Nat. Bank v. Bougas (1977) 434 U.S. 35, 38, 98 S. Ct. 88, 54 L. Ed. 2d 218* ; *Kaiser Aetna v. Deal (1978) 86 Cal. App. 3d 896, 899, 150 Cal. Rptr. 615* (both involving statute prior to its 1982 amendment)].

A national bank may be subject to suit in California when it intentionally does an act elsewhere knowing that the effect of that act will be experienced in California. For example, it has been held that the exercise of jurisdiction by a California court over a bank incorporated in another state, in a declaratory relief action based on the foreign bank's intentionally causing an effect within this state, was proper when (1) the foreign bank issued a certificate of deposit with knowledge that the depositor, who was heavily indebted to it, intended to use the certificate in California to secure a loan and that the security would be worthless because it would be subject to the foreign bank's right of offset against the depositor's indebtedness to it; (2) the certificate was used as security for a substantial loan made to the depositor by a California bank; (3) the foreign bank subsequently exercised its right of offset by canceling the certificate of deposit; and (4) the depositor defaulted on its California loan and subsequently filed for bankruptcy [*United California Bank v. First Bank of Oak Park (1979) 98 Cal. App. 3d 439, 442-444, 159 Cal. Rptr. 607 , cert. denied, 447 U.S. 907 (1980)* ; for discussion of causing effect in the state by an act done elsewhere as a corporation, *see § 323.15[5][f]*].

Legal Topics:

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

Civil ProcedureFederal & State InterrelationshipsSovereign ImmunityGeneral OverviewGovernmentsFederal GovernmentClaims By & Against

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28-323 California Forms of Pleading and Practice--Annotated § 323.17

§ 323.17 Establishing Lack of Personal Jurisdiction on Motion to Quash Service

[1] Facts Showing Lack of Personal Jurisdiction

The court's lack of personal jurisdiction over a defendant may be established by facts showing the following:

(1) Plaintiff failed to serve the summons on a defendant who has not made a general appearance in the action [*see Code Civ. Proc. § 410.50(a)*].

(2) The service of the summons was defective [*see, e.g., Eagle Elec. Mfg. Co. v. Keener (1966) 247 Cal. App. 2d 246, 250, 55 Cal. Rptr. 444* ; *Kaplan v. Superior Court (1961) 191 Cal. App. 2d 492, 494-496, 12 Cal. Rptr. 781* ; *Bank of America v. Carr (1956) 138 Cal. App. 2d 727, 736-738, 292 P.2d 587]* .

(3) The summons was defective [*see, e.g., Tresway Aero, Inc. v. Superior Court (1972) 5 Cal. 3d 431, 435, 96 Cal. Rptr. 571, 487 P.2d 1211* ; *Schering Corp. v. Superior Court (1975) 52 Cal. App. 3d 737, 741, 125 Cal. Rptr. 337* ; *Greene v. Municipal Court (1975) 51 Cal. App. 3d 446, 451, 124 Cal. Rptr. 139* ; *National Union Fire Ins. Co. v. Superior Court (1966) 247 Cal. App. 2d 326, 328-329, 55 Cal. Rptr. 574* ; for discussion of the required contents of the summons, *see* Ch. 518, *Service of Summons and Papers*].

(4) The assertion of jurisdiction violates due process requirements (that is, a nonresident defendant served outside California lacks sufficient contacts with the state) [*see, e.g., Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 474, 105 S. Ct. 2174, 85 L. Ed. 2d 528* ; *World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 291, 100 S. Ct. 559* ; for further discussion of due process requirements, *see § 323.14*].

(5) Plaintiff did not serve defendant with a copy of the summons and the substituted service was not

reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard [*see Zirbes v. Stratton (1986) 187 Cal. App. 3d 1407, 1416, 232 Cal. Rptr. 653]* .

(6) The summons served on the defendant was not the one authorized for civil actions and provided a shorter period for response than that required by statute for civil actions [*see Delta Imports, Inc. v. Municipal Court (1983) 146 Cal. App. 3d 1033, 1035-1036, 194 Cal. Rptr. 685* (use of five-day unlawful detainer summons held improper because complaint did not state a cause of action for forcible entry or forcible or unlawful detainer); *see also* Ch. 333, *Landlord and Tenant: Eviction Actions*].

(7) Defendant is immune to service of process or to suit [*see, e.g., 22 U.S.C. § 254d*; *Cal. Const., art. IV, § 14*; for further discussion of immunity, *see § 323.16*].

A defendant may raise the issue of the court's lack of personal jurisdiction by means of a motion to quash service of summons under *Code Civ. Proc. §§ 418.10*. For further discussion of the procedure for making such motions, see *§ 323.50* et seq. For forms of a motion to quash service of summons, see *§§ 323.150, 323.153* and *323.157*.

A determination that personal jurisdiction is lacking only precludes the trial court from rendering any binding ruling against the defendant concerning the merits of the action; it does not retroactively divest the court of its jurisdiction to hear and determine all the jurisdiction issues raised by defendant's motion to quash [*Ziller Electronics Lab GmbH v. Superior Court (1988) 206 Cal. App. 3d 1222, 1229, 254 Cal. Rptr. 410]* . However, any judgment of a court lacking personal jurisdiction is void [*County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 110, 183 Cal. Rptr. 741 , cert. denied, 460 U.S. 1051 (1983)* (disapproved on another point in *County of Los Angeles v. Soto (1984) 35 Cal. 3d 483, 492 n.4, 198 Cal. Rptr. 779, 674 P.2d 750*); for discussion and forms relating to attacking a void judgment, *see* Ch. 489, *Relief From Judgments and Orders*].

[2] Burden of Proof on Motion to Quash

The plaintiff bears the burden of proving the existence of jurisdiction, including the element of reasonableness, although there is a presumption of reasonableness on a showing that the defendant purposefully directed his or her activities at forum residents [*Haisten v. Grass Valley Medical Reimbursement (9th Cir. 1986) 784 F.2d 1392, 1397]* .

Thus, when a defendant properly moves to quash out of state service of process for lack of jurisdiction, the burden of proof is on the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence [*Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 449, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* ; *Serafini v. Superior Court (1998) 68 Cal. App. 4th 70, 77, 80 Cal. Rptr. 2d 159* ; *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 533, 257 Cal. Rptr. 278* ; *Felix v. Bomoro Kommanditgesellschaft (1987) 196 Cal. App. 3d 106, 110, 241 Cal. Rptr. 670]* .That is, the plaintiff bears the burden of proof on the issue of validity of service of process [*Floveyor Internat., Ltd. v. Superior Court (1997) 59 Cal. App. 4th 789, 793, 69 Cal. Rptr. 2d 457* (plaintiff must prove facts requisite to an effective service)]. Similarly, the burden of proof is on the plaintiff to demonstrate that minimum contacts exist between the defendant and the forum state to justify imposition of personal jurisdiction and the plaintiff has the right to conduct discovery with regard to the issue of jurisdiction to develop the facts necessary to sustain that burden [*Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 533, 257 Cal. Rptr. 278* ; *see also Taylor-Rush v. Multitech Corp. (1990) 217 Cal. App. 3d 103, 110, 265 Cal. Rptr. 672* (plaintiff has burden of demonstrating by preponderance of evidence that all jurisdictional criteria are met)].

The plaintiff does not have to prove the truth of the allegations constituting the cause of action to justify the exercise of jurisdiction over the nonresident party, but plaintiff must present facts demonstrating that the defendant's conduct related to the pleaded causes of action is such as to constitute constitutionally cognizable minimum contacts [*Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 533, 257 Cal. Rptr. 278]* . Plaintiff must demonstrate by a preponderance of the evidence that all necessary jurisdictional criteria are met. This burden must be met by competent

evidence in affidavits and authenticated documentary evidence [*Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1054-1055, 85 Cal. Rptr. 2d 611* ; *see Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 533, 257 Cal. Rptr. 278* ; (evidence of those facts or their absence may be in form of declarations) *see also* discussion in § 323.25]. Allegations in an unverified complaint cannot be used to establish jurisdiction [*Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1055, 85 Cal. Rptr. 2d 611* ; *Goehring v. Superior Court (1998) 62 Cal. App. 4th 894, 908-909, 73 Cal. Rptr. 2d 105]* .

Once the plaintiff has established facts showing minimum contacts, for example, that the defendant has purposely directed his or her activity at forum residents, the burden then shifts to the defendant to supply facts demonstrating that the assumption of jurisdiction would be unreasonable [*Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 449, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* ; *Hall v. LaRonde (1997) 56 Cal. App. 4th 1342, 1347, 66 Cal. Rptr. 2d 399* ; *Dialysis at Sea, Inc. v. Superior Court (1989) 216 Cal. App. 3d 788, 793, 265 Cal. Rptr. 71* ; *see Serafini v. Superior Court (1998) 68 Cal. App. 4th 70, 77, 80 Cal. Rptr. 2d 159* ; *see also* discussion under *§ 323.14[6][d]*]. Until the plaintiff makes at least a prima facie showing of the validity of service and sufficient contacts with the State of California, the defendant may stand mute [*Floveyor Internat., Ltd. v. Superior Court (1997) 59 Cal. App. 4th 789, 794, 69 Cal. Rptr. 2d 457]* .

[3] Procedures

For discussion of time to plead a motion to quash service or to stay of dismiss and action, see *§ 323.50*. For discussion of opposition to this motion, see *§ 323.51*. For discussion of orders and review of orders on the motion, see *§§ 323.52, 323.53*.

Legal Topics:

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

§§ 323.18[Reserved]

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28-323 California Forms of Pleading and Practice--Annotated § 323.30

§ 323.30 Governing Law

The doctrine of forum non conveniens, or inconvenient forum is governed generally by *Code Civ. Proc. §§ 410.30, 418.10(a)(2).*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueForum Non Conveniens

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§ 323.31 Terminology

As used in this part, the terms "forum non conveniens" and "inconvenient forum" are synonymous.

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§ 323.32 Doctrine of Inconvenient Forum

Forum non conveniens, or inconvenient forum [*see Code Civ. Proc. §§ 410.30, 418.10(a)(2)*], is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere [*Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 751, 1 Cal. Rptr. 2d 556, 819 P.2d 14* ; *see also Price v. Atchison, T. & S.F. Ry. Co. (1954) 268 P.2d 457 , cert. denied, 348 U.S. 839* ; *Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney (1988) 202 Cal. App. 3d 1424, 1431, 249 Cal. Rptr. 559]* . In the case of dismissal, it is predicated on a determination that dismissal is just and will promote convenience to the parties and to the system [*Delfosse v. C.A.C.I., Inc.-Federal (1990) 218 Cal. App. 3d 683, 687, 267 Cal. Rptr. 224]* . The doctrine of inconvenient forum in effect tempers the exercise of personal jurisdiction conferred by long-arm statutes (*see Code Civ. Proc. §§ 410.10, 413.10, 415.40*), by authorizing the dismissal or stay of an action filed in California when the action possesses no substantial connection with defendant's activities in California, when California cannot provide an adequate forum, and when California has no interest in fostering the litigation [*Henderson v. Superior Court (1978) 77 Cal. App. 3d 583, 588, 142 Cal. Rptr. 478]* . The doctrine is codified in *Code Civ. Proc. §§ 410.30* and *413.10* [*see Archibald v. Cinerama Hotels (1976) 15 Cal. 3d 853, 857, 126 Cal. Rptr. 811, 544 P.2d 947* ; *Delfosse v. C.A.C.I., Inc.-Federal (1990) 218 Cal. App. 3d 683, 687, 267 Cal. Rptr. 224* ; *Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney (1988) 202 Cal. App. 3d 1424, 1431, 249 Cal. Rptr. 559]* . It is regarded as a drastic remedy to be exercised with caution and restraint [*Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney (1988) 202 Cal. App. 3d 1424, 1436, 249 Cal. Rptr. 559]* .

The doctrine of inconvenient forum is distinct from questions of jurisdiction and venue in that it permits a court to stay or dismiss an action even when jurisdiction and venue are technically proper [*see Outboard Marine Corp. v. Superior Court (1976) 59 Cal. App. 3d 434, 437, 130 Cal. Rptr. 642* ; *Great Northern Ry. Co. v. Superior Court (1970) 12 Cal. App. 3d 105, 108-109, 90 Cal. Rptr. 461 , cert. denied sub nom. Curtin v. Superior Court of California (1971) 401 U.S. 1013]* .

Code of Civ. Proc. § 418.10 provides requirements for bringing a forum non conveniens motion when a defendant has

not yet appeared in an action, and *Code of Civ. Proc. § 410.30* applies to a defendant bringing a forum non conveniens motion after having generally appeared in the action. Under *Code Civ. Proc. § 410.30(b)*, a defendant who has generally appeared may make a forum non conveniens motion at any time, not only on or before the last day to plead [*Britton v. Dallas Airmotive, Inc. (2007) 153 Cal. App. 4th 127, 133, 62 Cal. Rptr. 3d 487]* .

Legal Topics:

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§ 323.33 Application of Doctrine Implies Proper Jurisdiction

The doctrine of forum non conveniens is not jurisdictional. An argument that a court is an inconvenient forum concedes that court's jurisdiction, for it asks the court to decline to exercise the jurisdiction it constitutionally already has [*Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney (1988) 202 Cal. App. 3d 1424, 1430-1431 n.8, 249 Cal. Rptr. 559* ; *see also Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 173, 227 Cal. Rptr. 247* (disapproved on other grounds in *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 764, 1 Cal. Rptr. 2d 556, 819 P.2d 14*)]. Thus, in ruling that California is an inconvenient forum, a trial court necessarily implies that California does in fact have jurisdiction over the defendant. A motion to dismiss on the ground of forum non conveniens is inconsistent with and necessarily phrased in the alternative to a motion to quash service for lack of jurisdiction. This is because a court, in dismissing a suit on the grounds of forum non conveniens, relinquishes jurisdiction it already has over the action, whereas a court, in quashing service, determines that it never had jurisdiction over the parties and the cause. Once jurisdiction is established, the court, in its discretion, can stay or dismiss an action if it finds that in the interest of substantial justice the case should be heard in another forum [*Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney (1988) 202 Cal. App. 3d 1424, 1430-1431 n.8, 249 Cal. Rptr. 559]* .

However, in *Sinochem Int'l Co. v. Malay. Int'l Shipping (2007)--U.S.--, 127 S. Ct. 1184, 167 L. Ed. 2d 15* , the U.S. Supreme Court considered whether a district court can dismiss a case under the forum non conveniens doctrine before it determines definitively that it has both subject matter and personal jurisdiction. The Court held that a district court has discretion to respond at once to a defendant's forum non conveniens plea, and need not take up first any other threshold objection. In particular, a court need not resolve whether it has authority to adjudicate the cause (subject matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is the more suitable arbiter of the merits of the case.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 323.34 Forum Selection Clauses

[1] Enforced Unless Unreasonable

Parties may agree contractually in advance on the forum for resolving disputes between them. A forum selection clause is generally given effect unless it is unfair or unreasonable [*M/S Bremen v. Zapata Off-Shore Co. (1972) 407 U.S. 1, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513* (enforcing reasonable clause in international commercial transaction stipulating forum in England unless invalid for fraud or overreaching); *Smith, Valentino & Smith, Inc. v. Superior Court (1976) 17 Cal. 3d 491, 495-496, 131 Cal. Rptr. 374, 551 P.2d 1206* (enforcing clause does not contravene policy favoring access to courts by resident plaintiffs if plaintiff has freely and voluntarily negotiated away that right); *Intershop Communications v. Superior Court (2002) 104 Cal. App. 4th 191, 196, 127 Cal. Rptr. 2d 847* (fact that an adhesion contract existed did not invalidate the clause); *Nam Tai Electronics, Inc. v. Titzer (2001) 93 Cal. App. 4th 1301, 1311-1313, 113 Cal. Rptr. 2d 769* (forum clause in Internet agreement for registering a nickname or alias with Yahoo!, a California-based Internet message board, was not negotiable and therefor a contract of adhesion and unenforceable)]. For further discussion of challenges to forum selection clauses and void clauses, see [6] and [7], *below*.

In regard to potentially unconscionable choice-of-law clauses, the California Supreme Court has summarized the state's choice-of-law provisions as follows: "If the trial court finds that the ... claims [at issue] fall within the scope of a choice-of-law clause, it must next evaluate the clause's enforceability pursuant to the analytical approach reflected in *section 187, subdivision (2) of the Restatement Second of Conflict of Laws (Restatement)*. Under that approach, the court must first determine: '(1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law. If, however, either test is met, the court must next determine whether the chosen state's law is contrary to a fundamental policy of California. If there is no such conflict, the court shall enforce the parties' choice of law. If, however, there is a fundamental conflict with California law, the court must then determine whether California has a 'materially greater interest than the chosen state in the determination of the particular issue ... .' (*Rest., § 187, subd. (2)*.) If California has a materially greater interest than the chosen state, the choice of law shall not be enforced, for the obvious reason that in such circumstance we will decline to enforce a

law contrary to this state's fundamental policy' " [*Discover Bank v. Superior Court (2005) 36 Cal. 4th 148; 173-174, 30 Cal. Rptr. 3d 76*].

A distinction exists between mandatory and permissive forum selection clauses. The modern trend is to enforce mandatory forum selection clauses unless they are unfair or unreasonable, and the clause is usually given effect without extensive analysis of factors relating to convenience [*Berg v. MTC Electronics Technologies Co. (1998) 61 Cal. App. 4th 349, 358-359, 71 Cal. Rptr. 2d 523* ; *see Intershop Communications v. Superior Court (2002) 104 Cal. App. 4th 191, 196-198, 127 Cal. Rptr. 2d 847* (review of clauses found mandatory and permissive)].

The normal forum non conveniens analysis applies to permissive forum selection clauses. These are clauses that grant jurisdiction to a particular forum without expressly making that forum the mandatory situs for resolution of disputes; e.g. clauses that call for a party to submit to the jurisdiction of "any court of competent jurisdiction," known as "Lloyd's-type" clauses, or more narrowly focused clauses that state, e.g., that a party submits to jurisdiction in Los Angeles [*Berg v. MTC Electronics Technologies Co. (1998) 61 Cal. App. 4th 349, 358-359, 71 Cal. Rptr. 2d 523]* .

[2] Application to Contract and Tort Actions

A forum selection clause can be equally applicable to contractual and tort causes of action [*Bancomer, S.A. v. Superior Court (1996) 44 Cal. App. 4th 1450, 1461, 52 Cal. Rptr. 2d 435]* .

[3] Reciprocal Clauses

A forum selection clause may be reciprocal. For example, the court enforced the clause in *Smith, Valentino & Smith, Inc. v. Superior Court (1976) 17 Cal. 3d 491, 494, 131 Cal. Rptr. 374, 551 P.2d 1206* , by which Smith agreed to bring all actions arising out of the subject agency agreement only in Pennsylvania, home state of defendant corporation, and defendant agreed to bring all such actions only in Los Angeles, plaintiff's place of business.

[4] Enforcement by Motion to Stay or Dismiss and Timing

A defendant who seeks to challenge plaintiff's choice of forum on the basis of a forum selection clause may move to dismiss or stay the action on the grounds of inconvenient forum [*see Code Civ. Proc. §§ 410.30(a), 418.10(a)(2)*]. A court must stay or dismiss an action under any conditions that may be just if it finds that in the interest of substantial justice the action should be heard in a forum outside California [*Code Civ. Proc. § 410.30(a)*].

If a defendant has not yet made a general appearance, on or before the last day of his or her time to plead, he or she may move to stay or dismiss on the ground of inconvenient forum pursuant to *Code Civ. Proc. § 418.10(a)(2)* [for discussion on establishing inconvenient forum, *see* § 32.35; for motion procedure, *see § 323.50*]. The time limits of *Code Civ. Proc. § 418.10* do not apply to a defendant who has made a general appearance, and the defendant may make a forum non conveniens motion under *Code Civ. Proc. § 410.30* at any time, not only on or before the last day to plead [*Code Civ. Proc. 410.30(b)*; *Britton v. Dallas Airmotive, Inc. (2007) 153 Cal. App. 4th 127, 133, 62 Cal. Rptr. 3d 487]* . However, unreasonable delay in bringing a forum non conveniens motions may be grounds to deny the motion, and any delay would be relevant to whether the motion should be granted [*Van Keulen v. Cathay Pacific Airways, Ltd. (2008) 162 Cal. App. 4th 122, 75 Cal. Rptr. 3d 471 Britton v. Dallas Airmotive, Inc. (2007) 153 Cal. App. 4th 127, 135, 62 Cal. Rptr. 3d 487]* .

The failure to make a motion under *Code Civ. Proc. § 410.10* at the time of filing a demurrer or motion to strike constitutes a waiver of the issue of, among others, inconvenient forum [*CCP § 418.10(e)(3)*; *Britton v. Dallas Airmotive, Inc. (2007) 153 Cal. App. 4th 127, 133, 62 Cal. Rptr. 3d 487]* . If the issue has been waived in this manner, then the defendant may not raise it at any point in the litigation, even after general appearance under *Code Civ. Proc. § 410.30(b)* [*Britton v. Dallas Airmotive, Inc. (2007) 153 Cal. App. 4th 127, 134, 62 Cal. Rptr. 3d 487]* .

A forum selection clause may also be enforced against a plaintiff who is not a party to the contract in question if the plaintiff is closely related to the contractual relationship. The plaintiff challenging the forum selection clause has the burden of showing, in response to a defendant's motion to stay or dismiss, that enforcement of the clause would be unreasonable under the circumstances. Where an entity that is not itself a party to a contract sues in a representative capacity challenging certain contractual terms, it purports to assert the rights of those who are parties to the contract, and is thus "closely related" to the contractual relationship [*Net2Phone, Inc. v. Superior Court (2003) 109 Cal. App. 4th 583, 135 Cal. Rptr. 2d 149]* .

Although the procedure for enforcing a forum selection clause is a motion to stay or dismiss under *Code Civ. Proc. §§ 410.30, 418.10,* a motion based on a forum selection clause is a special type of forum non conveniens motion. The factors that apply generally to a forum non conveniens motion do not control in a case involving a mandatory forum selection clause [*Berg v. MTC Electronics Technologies Co. (1998) 61 Cal. App. 4th 349, 358-359, 71 Cal. Rptr. 2d 523* ; for discussion of challenging clause, *see* [6], *below*].

[5] Standing

A defendant who is a not a party to an agreement containing a forum selection clause lacks standing to assert the clause unless the defendant can establish that he or she either is a third party beneficiary to the agreement or was closely related to the contractual relationship between the parties to the agreement [*Bancomer, S.A. v. Superior Court (1996) 44 Cal. App. 4th 1450, 1458-1461, 52 Cal. Rptr. 2d 435* ; *see Berclain America Latina v. Baan Co. (1999) 74 Cal. App. 4th 401, 403, 405-408, 87 Cal. Rptr. 2d 745* (defendant who was neither intended third party beneficiary nor so closely involved in agreement or associated with party to transaction as to be functionally equivalent to that party lacked standing to assert clause)].

For a defendant to demonstrate that it was so closely related to the contractual relationship that it is entitled to en force the forum selection clause, it must show one of the following by specific conduct or express agreement [*Bancomer, S.A. v. Superior Court (1996) 44 Cal. App. 4th 1450, 1461, 52 Cal. Rptr. 2d 435* ; *accord Bugna v. Fike (2000) 80 Cal. App. 4th 229, 233, 95 Cal. Rptr. 2d 161]* :

- It agreed to be bound by the terms of the agreement.
- The contracting parties intended defendant to benefit from the agreement.
- There was sufficient evidence of a defined and intertwining business relationship with a contracting party.

The key to the "closely related" test is whether the nonsignatories were close to the contractual relationship, not whether they were close to the third party signator [*Bugna v. Fike (2000) 80 Cal. App. 4th 229, 235, 95 Cal. Rptr. 2d 161* (agents who negotiated contract could enforce clause)].

[6] Challenge to Forum Selection Clause

In the case of a mandatory forum selection clause, the test is simply whether application of the clause is unfair or unreasonable and the clause is usually given effect. A court will usually honor a mandatory forum selection clause without extensive analysis of factors relating to convenience [*Berg v. MTC Electronics Technologies Co. (1998) 61 Cal. App. 4th 349, 358-359, 71 Cal. Rptr. 2d 523]* .

A court must enforce a forum selection clause unless it would be unreasonable to do so on the facts of the case [*Smith, Valentino & Smith, Inc. v. Superior Court (1976) 17 Cal. 3d 491, 495-496, 131 Cal. Rptr. 374, 551 P.2d 1206* ;

Cal-State Business Products & Services, Inc. v. Ricoh (1993) 12 Cal. App. 4th 1666, 1679, 16 Cal. Rptr. 2d 417 ; *Furda v. Superior Court (1984) 161 Cal. App. 3d 418, 426-427, 207 Cal. Rptr. 646* ; *see also Lifeco Services Corp. v. Superior Court (1990) 222 Cal. App. 3d 331, 334, 271 Cal. Rptr. 385* ("[e]ven where there is jurisdiction over an out-of-state defendant based on a wrongful act with significant effects in California, nevertheless it may be improper to exercise that jurisdiction in the face of a contrary broad forum selection clause")].

The party opposing the enforcement of a forum selection clause (generally the plaintiff) bears the burden of proof. Thus, a plaintiff opposing enforcement of such a clause must demonstrate that enforcement of the clause would be unreasonable under the circumstances of the case, that is, that the selected forum would be unavailable or unable to accomplish substantial justice. Moreover, in determining reasonability the choice of law requirement must have some rational basis in light of the facts underlying the transaction. Neither inconvenience nor additional expense in litigating in the forum, however, is part of the test of unreasonability. Furthermore, a forum selection clause will not be enforced if enforcing it will bring about a result that is contrary to the forum's public policy [*CQL Original Products, Inc. v. National Hockey League Players' Assn. (1995) 39 Cal. App. 4th 1347, 1353-1354, 46 Cal. Rptr. 2d 412* (forum selection clause enforced; difference in law of two competing forums pertaining to forfeitures in license agreements did not amount to conflict involving fundamental policy in California); *Cal-State Business Products & Services, Inc. v. Ricoh (1993) 12 Cal. App. 4th 1666, 1680, 16 Cal. Rptr. 2d 417* (party opposing enforcement generally plaintiff)].

Enforcement of a nonnegotiated forum selection clause in a form contract is reasonable when [*Carnival Cruise Lines, Inc. v. Shute (1991) 499 U.S. 585, 593-595, 111 S. Ct. 1522, 113 L. Ed. 2d 622* (clause in cruise ticket selecting Florida enforced against plaintiffs from State of Washington)]:

- There was no indication that defendant had chosen the forum as a means of discouraging legitimate claims,

- There was no evidence that the plaintiffs' accession to the clause was obtained through fraud or overreaching, and

- Plaintiffs concede they had received notice of the clause and therefore presumably had the option of rejecting the contract with impunity.

If, however, the plaintiff challenging enforcement of the forum selection clausedid not have sufficient notice of the clause prior to entering into the contract, the requisite mutual consent to that contractual term is lacking, and no valid contract with respect to the clause exists [*Carnival Cruise Lines, Inc. v. Superior Court (1991) 234 Cal. App. 3d 1019, 1026-1027, 286 Cal. Rptr. 323* (remanding on the issue of notice; clause unenforceable as to any plaintiff with insufficient notice); *see Hunt v. Superior Court (2000) 81 Cal. App. 4th 901, 908-909, 97 Cal. Rptr. 2d 215* (forum selection clause contained in adhesion contract is enforceable even if defendant did not actually read it as long as clause provided adequate notice to defendant that defendant was agreeing to jurisdiction cited in contract; clause in question held not valid because it gave no such notice)].

In the case of a permissive forum selection clause, a forum non conveniens motion requires the weighing of a gamut of factors of public and private convenience. The normal forum non conveniens analysis applies. Although a permissive forum selection clause is always entitled to substantial weight, it is only one factor in the forum selection mix [*Berg v. MTC Electronics Technologies Co. (1998) 61 Cal. App. 4th 349, 358-359, 71 Cal. Rptr. 2d 523* (for definition of permissive forum selection clause, *see* [1], *above*; for discussion of factors considered in a motion to quash, *see § 323.35[6]*].

A challenge to a forum selection clause cannot properly be raised by demurrer [*Miller-Leigh v. Henson (2007) 152 Cal. App. 4th 1143, 1150, 62 Cal. Rptr. 3d 83]* .

[7] Void Clauses

[a] Provisions Made Invalid by Statute

Some forum selection provisions are declared to be void by statute, as noted in [b]-[e], *below*.

[b] In Franchise Agreements

A provision in a franchise agreement restricting venue to a forum outside California is void with respect to any claim arising under or relating to a franchise agreement involving a franchise business operating within California [*Bus. & Prof. Code § 20040.5*].

[c] In Agreements Between Equipment Dealers and Suppliers

A provision in any contract or agreement with a supplier that requires jurisdiction or venue outside California is void with respect to a claim otherwise enforceable under *Bus. & Prof. § 22900 et seq.*, relating to equipment dealers [*Bus. & Prof. Code § 22927*].

[d] In Beer Distribution Agreements

A provision in an agreement between a beer manufacturer and a beer wholesaler for the sale and distribution of beer in California, which restricts venue to a forum outside California, is void with respect to a claim arising under or relating to the agreement involving a beer wholesaler operating within California [*Bus. & Prof. Code § 25000.6*].

[e] In Contracts Between Contractors and Subcontractors

The following provisions of a contract between the contractor and a subcontractor with principal offices in California, for the construction of a public or private work of improvement in California are void and unenforceable [*Code Civ. Proc. § 410.42*]:

- A provision that purports to require any dispute between the parties to be litigated, to be arbitrated, or otherwise to be determined outside California.

- A provision that purports to preclude a party from commencing such a proceeding or obtaining a judgment or other resolution in California or the courts of California.

For purposes of these provisions, "construction" means any work or services performed on, or materials provided for, a work of improvement as defined in *Civ. Code § 3106*, and for which a lien may be claimed pursuant to *Civ. Code § 3110* (whether or not a lien is in fact claimed) or for which such a lien could be claimed but for *Civ. Code § 3109* [*Code Civ. Proc. § 410.42*].

[8] Standard of Review

The case law is in conflict on the standard of appellate review of a motion to enforce a forum selection clause [*Intershop Communications v. Superior Court (2002) 104 Cal. App. 4th 191, 199, 127 Cal. Rptr. 2d 847]* . One line of decisions finds that in a contractual forum non conveniens motion, the trial court must determine if there is sufficient evidence to satisfy the requirements for invalidating a binding contract, and if there are facts present that satisfy these criteria, it *must* act in a particular way; there is no discretion involved; the reviewing court is thus involved in determining the quantum of evidence adduced, not the manner in which factors were applied [*Cal-State Business Products & Services, Inc. v. Ricoh (1993) 12 Cal. App. 4th 1666, 1680-1681, 16 Cal. Rptr. 2d 417* (italics in original)]. Another line of cases holds that the abuse of discretion standard, not the substantial evidence standard, applies to the

review of a trial court's decision not to enforce a forum selection clause [*America Online, Inc. v. Superior Court (2001) 90 Cal. App. 4th 1, 9, 108 Cal. Rptr. 2d 699]* .

Language by the Supreme Court suggest that the trial court retains a measure of discretion regarding the choice of forum even when there is a forum selection clause: "Forum selection clauses are valid and may be given effect, *in the court's discretion* and in the absence of a showing that enforcement of such a clause would be unreasonable" [*Smith, Valentino & Smith, Inc. v. Superior Court (1976) 17 Cal. 3d 491, 496, 131 Cal. Rptr. 374]* . A case with similar reasoning held: "Although not even a 'mandatory' forum selection clause can completely eliminate a court's discretion to make appropriate rulings regarding choice of forum, the modern trend is to enforce mandatory forum selection clauses unless they are unfair or unreasonable" [*Berg v. MTC Electronics Technologies Co. (1998) 61 Cal. App. 4th 349, 358, 71 Cal. Rptr. 2d 523]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsConsentCivil ProcedureVenueForum Non ConveniensContracts LawContract Conditions & ProvisionsForum Selection Clauses

California Forms of Pleading and Practice--Annotated

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329

Chapter 323 JURISDICTION: PERSONAL JURISDICTION, INCONVENIENT FORUM, AND APPEARANCES
PART II. LEGAL BACKGROUND
B. Inconvenient Forum

28-323 California Forms of Pleading and Practice--Annotated § 323.35

§ 323.35 Establishing Inconvenient Forum on Motion to Stay or Dismiss Action

[1] Alternative Relief

A defendant may move to stay or dismiss on the ground of inconvenient forum pursuant to *Code Civ. Proc. § 418.10*. For further discussion of the procedure for making such motions, see *§ 323.50* et seq. For forms of motions to stay or dismiss an action on the ground of inconvenient forum, see *§ 323.150* and *§ 323.157*.

When a court finds, on the motion of a party or on its own motion, that in the interest of substantial justice an action should be heard in a forum outside California, it shall stay or dismiss the action in whole or in part on any conditions that may be just [*Code Civ. Proc. § 410.30(a)*; for additional discussion of whether to grant a stay or dismissal, *see § 323.35[7]*].

The inquiry on the motion is not whether the other forum is better than California, but whether California is a seriously inconvenient forum [*Ford Motor Co. v. Insurance Co. of North America (1995) 35 Cal. App. 4th 604, 611, 41 Cal. Rptr. 2d 342]* .

[2] Burden of Proof on Motion

The defendant, as the moving party, bears the burden of proof on a forum non conveniens motion [*Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 751, 1 Cal. Rptr. 2d 556, 819 P.2d 14* ; *Chong v. Superior Court (1997) 58 Cal. App. 4th 1032, 1036, 68 Cal. Rptr. 2d 427* ; *Boaz v. Boyle & Co. (1995) 40 Cal. App. 4th 700, 707, 46 Cal. Rptr. 2d 888]* . However, when the motion is based on a forum selection clause in a contract, the plaintiff bears the burden of proof in opposing enforcement of the clause and must demonstrate that enforcement of the clause would be unreasonable under the circumstances of the case [*see Nam Tai Electronics, Inc. v. Titzer (2001) 93 Cal. App. 4th 1301, 1311-1313, 113 Cal. Rptr. 2d 769* (forum clause in Internet agreement for registering a nickname or alias with Yahoo!, a California-based Internet message board, was not negotiable and therefor a contract of adhesion and unenforceable); *CQL Original Products, Inc. v. National Hockey League Players' Assn. (1995) 39 Cal. App. 4th 1347, 1354, 46 Cal. Rptr. 2d 412* ; for additional discussion of burden of proof in context of forum selection clause, *see § 323.34[6]*].

[3] Trial Court's Discretion

Other than the nondiscretionary threshold determination whether the alternative forum is a place suitable for trial [*American Cemwood Corp. v. American Home Assurance Co. (2001) 87 Cal. App. 4th 431, 436, 104 Cal. Rptr. 2d 670]* , the question whether the doctrine of inconvenient forum should be applied in a particular case rests in the discretion of the trial court. Its decision on a motion to stay or dismiss on the ground of inconvenient forum will be disturbed on appeal only when the order is unsupported by substantial evidence under apposite law, and an order granting the motion will not be overturned on appeal unless the balance of factors weigh strongly against the moving party [*Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney (1988) 202 Cal.App. 3d 1424, 1431, 249 Cal. Rptr. 559]* . That is, the granting or denial of the motion is within the discretion of the trial court, and substantial deference is accorded its determination by an appellate court in this regard [*Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 751, 1 Cal. Rptr. 2d 556, 819 P.2d 14* ; *Boaz v. Boyle & Co. (1995) 40 Cal. App. 4th 700, 707, 46 Cal. Rptr. 2d 888]* . A court has exercised discretion appropriately when it acts within the range of options available under governing legal criteria in light of the evidence before it [*Hansen v. Owens-Corning Fiberglas Corp. (1996) 51 Cal. App. 4th 753, 758, 59 Cal. Rptr. 2d 229]* . For the moving party to prevail, there must be evidence, not merely bald assertions, to support the trial court's determination [*Ford Motor Co. v. Insurance Co. of North America (1995) 35 Cal. App. 4th 604, 610, 41 Cal. Rptr. 2d 342]* .

The trial court's discretion may not, however, be arbitrary but must be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede the ends of substantial justice [*Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 173, 227 Cal. Rptr. 247* (reversing order staying action; disapproved on another ground in *Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 764, 1 Cal. Rptr. 2d 556, 819 P.2d 14*)]. If the balance does weigh heavily in a defendant's favor, it becomes the trial court's duty to apply the doctrine [*Outboard Marine Corp. v. Superior Court (1976) 59 Cal. App. 3d 434, 439, 130 Cal. Rptr. 642* (issuing writ of mandate directing trial court to dismiss action for inconvenient forum].

[4] Availability of Suitable Alternate Forum

In deciding whether to grant a forum non conveniens motion, a court must first determine whether the alternate forum is a "suitable" place for trial [*Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 751, 1 Cal. Rptr. 2d 556, 819 P.2d 14* (declining to follow *Holmes v. Syntex Laboratories, Inc. (1984) 156 Cal. App. 3d 372, 202 Cal. Rptr. 773* , which appeared to consider the "suitability" of the alternative forum as part of the discretionary determination of the balance of conveniences rather than as a threshold inquiry); *Chong v. Superior Court (1997) 58 Cal. App. 4th 1032, 1036, 68 Cal. Rptr. 2d 427]* . This is a nondiscretionary determination[*American Cemwood Corp. v. American Home Assurance Co. (2001) 87 Cal. App. 4th 431, 436, 104 Cal. Rptr. 2d 670* ; *Chong v. Superior Court (1997) 58 Cal. App. 4th 1032, 1036, 68 Cal. Rptr. 2d 427]* .

The question of a suitable alternative forum does not depend on the factors relevant to the convenience of the parties and the interests of the public, but on whether an action may be commenced in the alternative jurisdiction and a valid judgment obtained there against the defendant [*Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 752 n.3, 1 Cal. Rptr. 2d 556, 819 P.2d 14]* . A forum is suitable if there is jurisdiction and no statute of limitations bar to hearing the case on the merits. A forum is suitable if the action can be brought in that forum, although not necessarily won [*Chong v. Superior Court (1997) 58 Cal. App. 4th 1032, 1036-1037, 68 Cal. Rptr. 2d 427]* .

All the defendants must be subject to the jurisdiction of the alternative court [*American Cemwood Corp. v. American Home Assurance Co. (2001) 87 Cal. App. 4th 431, 436, 104 Cal. Rptr. 2d 670* (distinguishing *Hansen v. Owens-Corning Fiberglas Corp. (1996) 51 Cal. App. 4th 753, 59 Cal. Rptr. 2d 229* , and noting that it was decided in an narrow context)].

If a suitable alternative forum is not available to the plaintiff, the action will not be dismissed. Thus, a suit will be

entertained, no matter how inappropriate the forum may be, if the defendant cannot be subjected to jurisdiction in other states. The same is true if the plaintiff's cause of action would elsewhere be barred by the statute of limitations, unless the court is willing to accept the defendant's stipulation that he or she will not raise this defense in the second state [*Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 752, 1 Cal. Rptr. 2d 556, 819 P.2d 14]* , or presumably because the forum is in a foreign country in which a due process decision by an independent judiciary cannot be expected [*see Boaz v. Boyle & Co. (1995) 40 Cal. App. 4th 700, 711-712, 46 Cal. Rptr. 2d 888* ; *see also Chong v. Superior Court (1997) 58 Cal. App. 4th 1032, 1037, 68 Cal. Rptr. 2d 427* (in rare circumstances forum may not be suitable where alternative is in foreign country that lacks independent judiciary)].

A trial court must be flexible in its weighing of the *Stangvik* factors. Private and public interest factors must be applied flexibly, without giving undue emphasis to any one element. The doctrine of forum non conveniens may not be based on identification of a single factor rather than the balancing of several. An undue emphasis on a single factor is especially threatening to a balanced analysis because some of the matters to be weighed will by their nature point to a grant or denial of the motion. For example, the jurisdiction's interest in deterring future wrongful conduct of the defendant will usually favor retention of the action if the defendant is a resident of the forum, whereas the court congestion factor will usually weigh in favor of trial in the alternate jurisdiction. The court must consider the public policy considerations, such as California's interest in deciding actions against resident corporations whose conduct in the state causes injury to persons in other jurisdictions [*Morris v. AGFA Corp. (2006) 144 Cal. App. 4th 1452, 1465, 51 Cal. Rptr. 3d 301]* .

[5] Evidentiary Showing Concerning Alternative Forum

The principal evidentiary showing required by *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 1 Cal. Rptr. 2d 556, 819 P.2d 14* , is that trial may be had in the alternative forum and that some form of relief may be granted. Examination of the private and public interests at stake involve more general considerations [*Campbell v. Parker-Hannifin Corp. (1999) 69 Cal. App. 4th 1534, 1542-1543, 82 Cal. Rptr. 2d 202* (plaintiffs' argument that defendants failed to present any evidence to support their assertion that California was inconvenient rejected as ignoring much of analytical framework set forth in *Stangvik*; plaintiffs' further argument that defendants failed to show California was inconvenient rejected as incorrect because defendants made such showing in their briefs and during argument before trial court; scales not tipped on basis of this factor in any event)].

[6] Factors Relevant to Determination of Motion

[a] Private Versus Public Interests

If the alternate forum is a suitable place for trial, the next step is to consider the private interests of the litigants and the interests of the public in retaining the action for trial in California. The private interest factors are those that make trial and the enforceability of the ensuing judgment expeditious and relatively inexpensive, such as the ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the availability of compulsory process for attendance of unwilling witnesses. The public interest factors include avoidance of overburdening local courts with congested calendars, protecting the interests of potential jurors so that they are not called on to decide cases in which the local community has little concern, and weighing the competing interests of California and the alternate jurisdiction in the litigation [*Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 752, 1 Cal. Rptr. 2d 556, 819 P.2d 14* , citing *Piper Aircraft Co. v. Reyno (1981) 454 U.S. 235, 259-261, 102 S. Ct. 252, 70 L. Ed. 2d 419* , and *Gulf Oil Corp. v. Gilbert (1947) 330 U.S. 501, 507-509, 67 S. Ct. 839, 91 L. Ed. 1055* ; *Roulier v. Cannondale (2002) 101 Cal. App. 4th 1180, 1187, 124 Cal. Rptr. 2d 877* (California's strong interest in preventing sale of defective products in state); *Chong v. Superior Court (1997) 58 Cal. App. 4th 1032, 1037, 68 Cal. Rptr. 2d 427* ; *Ford Motor Co. v. Insurance Co. of North America (1995) 35 Cal. App. 4th 604, 610, 41 Cal. Rptr. 2d 342]* .

[b] Specific Factors Enumerated

In making its determination to stay or dismiss an action, the court may take into account any consideration that legitimately bears on the relative suitability or convenience of the alternative forums [*Delfosse v. C.A.C.I., Inc.-Federal (1990) 218 Cal. App. 3d 683, 687-688, 267 Cal. Rptr. 224]* . The following private and public interest factors have been variously articulated by courts as proper considerations in determining whether to stay or dismiss an action or proceeding for inconvenient forum [*see* *Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 751-761, 1 Cal. Rptr. 2d 556, 819 P.2d 14* ; *Delfosse v. C.A.C.I., Inc.-Federal (1990) 218 Cal. App. 3d 683, 688 n.3, 267 Cal. Rptr. 224* ; *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 539, 257 Cal. Rptr. 278* ; *Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 174 n.2, 227 Cal. Rptr. 247* (disapproved on another ground in *Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 764, 1 Cal. Rptr. 2d 556, 819 P.2d 14* , discussed); *Appalachian Ins. Company v. Superior Court (1984) 162 Cal. App. 3d 427, 435-436 n.2, 208 Cal. Rptr. 627* ; *Hemmelgarn v. Boeing Co. (1980) 106 Cal. App. 3d 576, 584-585, 165 Cal. Rptr. 190* (disapproved in effect on another ground in *Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 761, 1 Cal. Rptr. 2d 556, 819 P.2d 14* , discussed *above*); *Jagger v. Superior Court (1979) 96 Cal. App. 3d 579, 585-586, 158 Cal. Rptr. 163* ; *Henderson v. Superior Court (1978) 77 Cal. App. 3d 583, 595-597, 142 Cal. Rptr. 478* ; *Great Northern Ry. Co. v. Superior Court (1970) 12 Cal. App. 3d 105, 113-115, 90 Cal. Rptr. 461* , *cert. denied sub nom. Curtin v. Superior Court of California (1971) 401 U.S. 1013* ; *see also Code Civ. Proc. § 410.30,* Judicial Council Comment]:

(1) The amenability of the defendant to personal jurisdiction in the alternative forum;

(2) The relative convenience to the parties and witnesses of trial in the alternative forum;

(3) The choice of law, that is, the differences between conflict of law rules applicable in California and those applicable in the alternative forum;

(4) The defendant's principal place of business, and the inconvenience to the defendant to defend himself or herself in the local forum;

(5) The extent to which the situation, transaction, or events out of which the action arose exists, occurred in, or had a substantial relationship to this state, or, conversely, the absence of a substantial relationship to this state of the situation, transaction, or events out of which the action arose;

(6) Whether any party would be substantially disadvantaged by having to try the action either in California or in the forum suggested by the moving party;

(7) The relative enforceability of judgments rendered in California and in the alternative forum;

(8) Whether witnesses would be inconvenienced if the action were prosecuted either in California or in the forum suggested by the moving party;

(9) The relative expense to the parties of proceeding in California or in the alternative forum;

(10) Whether a view of the premises by the trier of fact will or might be necessary or helpful in deciding the case;

(11) Whether prosecution of the action in California will or may place a burden on the state judicial resources which is unfair, inequitable, or disproportionate to the relationship of the parties or cause of action to California;

(12) Whether the parties participating in the action have a relationship to this state which imposes on them an obligation to participate in judicial proceedings in the courts of this state;

(13) The interest of California in providing a forum for some or all of the parties to the action;

(14) The interest, if any, of this state in regulating the situation or conduct involved;

(15) The avoidance of a multiplicity of suits and inconsistent adjudications;

(16) The relative availability and access to sources of evidence, which would include relative ease of access to sources of proof;

(17) The availability of compulsory process to secure the attendance of witnesses in California as contrasted with such availability in the alternative forum;

(18) The relative advantages and obstacles to a fair trial in California and in the alternative forum;

(19) The California public interest in the case;

(20) Whether administrative difficulties and other inconveniences from crowded calendars and congested courts are more probable in California as opposed to the alternative forum;

(21) Whether imposition of jury duty is imposed on a community having no relation to the litigation;

(22) The injustice to and burden on local courts and taxpayers;

(23) The difficulties and inconvenience to the moving party, to the court, and to the jurors hearing the case, attending presentation of evidence by deposition; and

(24) The other practical considerations that make trial of a case convenient, expeditious, and inexpensive.

If the action is against a California manufacturer by a foreign plaintiff for an injury sustained outside the country, other factors to be considered are (1) the competitive disadvantage to California business that would result if California manufacturers were called on to defend lawsuits involving extraterritorial injuries, and (2) the interests and policy concerns in the litigation of the countries of residence of the foreign plaintiffs [*Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 760, 1 Cal. Rptr. 2d 556, 819 P.2d 14]* . In addition, the relative financial condition of the parties is a factor which every court must necessarily take into account to some degree in determining the convenience or inconvenience of the forum [*Allison v. Superior Court (1979) 99 Cal. App. 3d 993, 1001, 160 Cal. Rptr. 309]* .

[c] Application of Factors

The private and public interest factors must be applied flexibly, without giving undue emphasis to any one element. A court should not decide that there are circumstances in which the doctrine will always apply or never apply. Otherwise, the flexibility of the doctrine would be threatened, and its application would be based on identification of a single factor rather than on the balancing of several [*Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 753, 1 Cal. Rptr. 2d 556, 819 P.2d 14]* . An undue emphasis on a single factor is especially threatening to a balanced analysis because some of the matters to be weighed will by their nature point to a grant or denial of the motion. For example, the jurisdiction's interest in deterring future wrongful conduct of the defendant will usually favor retention of the action if the defendant is a resident of the forum, whereas the court congestion factor will usually weigh in favor of trial in the alternative jurisdiction [*Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 753 n.4, 1 Cal. Rptr. 2d 556, 819 P.2d 14]* .

[d] Plaintiff's Choice of Forum

The Supreme Court of California has pointed out that many cases hold that a plaintiff's choice of a forum should rarely be disturbed unless the balance is strongly in favor of the defendant, but that the reasons advanced for this rule apply only to residents of the forum state, namely: (1) if the plaintiff is a resident of the jurisdiction in which the suit is filed, the plaintiff's choice of forum is presumed to be convenient (citing *Piper Aircraft Co. v. Reyno (1981) 454 U.S. 235, 255-256, 102 S. Ct. 252, 70 L. Ed. 2d 419* ; *Thomson v. Continental Ins. Co. (1967) 66 Cal. 2d 738, 744-745, 59 Cal. Rptr. 101, 427 P.2d 765*); and (2) a state has a strong interest in assuring its own residents an adequate forum for the redress of grievances (citing *Archibald v. Cinerama Hotels (1976) 15 Cal. 3d 853, 859, 126 Cal. Rptr. 811, 544 P.2d 947*) [*Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 754-755, 1 Cal. Rptr. 2d 556, 819 P.2d 14* ; *see also Northrop Corp. v. American Motorists Ins. Co. (1990) 220 Cal. App. 3d 1553, 1560-1561, 270 Cal. Rptr. 233]* . The *Stangvik* Court said that it is difficult to justify giving preferential status to a plaintiff's choice of forum if the plaintiff is not a resident. Since the preference is based on factors that apply only to residents, it would appear that the underlying justification for the preference does not apply to nonresidents. The Court acknowledged, however, that the defendants did not make this argument, and that this view is admittedly contrary to *Piper*, which states that there is ordinarily a strong presumption in favor of the plaintiff's choice of forum [*Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 755 n.7, 1 Cal. Rptr. 2d 556, 819 P.2d 14]* .

Nonetheless, it remains the case in California that the plaintiff's choice of forum is entitled to great weight even though the plaintiff is a nonresident [*Hansen v. Owens-Corning Fiberglas Corp. (1996) 51 Cal. App. 4th 753, 760, 59 Cal. Rptr. 2d 229* ; *Ford Motor Co. v. Insurance Co. of North America (1995) 35 Cal. App. 4th 604, 610-611, 41 Cal. Rptr. 2d 342]* . Although the *Stangvik* court criticized the rule as applied to nonresidents, it declined to state a different one. The holding of *Stangvik*, as discussed *below*, is that a foreign, noncitizen plaintiff's choice of forum is entitled to less deference [*Ford Motor Co. v. Insurance Co. of North America (1995) 35 Cal. App. 4th 604, 611, 41 Cal. Rptr. 2d 342* ; *see Chong v. Superior Court (1997) 58 Cal. App. 4th 1032, 1038, 68 Cal. Rptr. 2d 427* (plaintiff from Hong Kong; foreign plaintiff's choice of forum is entitled to less deference than that of a citizen plaintiff)].

With respect to plaintiffs who are citizens of foreign countries, the *Stangvik* Court said that the Supreme Court of the United States, in *Piper Aircraft Co. v. Reyno (1981) 454 U.S. 235, 255, 259-261, 102 S. Ct. 252, 70 L. Ed. 2d 419* , held that when the plaintiff resides in a foreign country, the plaintiff's choice of forum is much less reasonable, and is not entitled to the same preference as a resident of the state in which the action is filed. The Court held that, under the rule laid down in *Piper*, the fact that plaintiffs (residents of Norway and Sweden) in the cases before it chose to file their complaint in California was not a substantial factor in favor of retaining jurisdiction here of their actions against a California heart valve manufacturer for negligence and strict liability arising out of the implant in plaintiffs' decedents of allegedly defective heart valves manufactured by the defendant [*Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 755, n.7, 1 Cal. Rptr. 2d 556, 819 P.2d 14* (disapproving the ruling in *Holmes v. Syntex Laboratories, Inc. (1984) 156 Cal. App. 3d 372, 202 Cal. Rptr. 773* , that substantial deference is accorded even a foreign plaintiff's choice of forum); *Campbell v. Parker-Hannifin Corp. (1999) 69 Cal. App. 4th 1534, 1543, 82 Cal. Rptr. 2d 202* (forum choice of plaintiff who resides outside United States is not a substantial factor in favor of retaining jurisdiction)].

[e] Effect of Party's Being a California Resident

Under case law prior to 1986, the trial court had no discretion, except in extraordinary cases, to dismiss an action for inconvenient forum when the *plaintiff* was a California resident [*see Archibald v. Cinerama Hotels (1976) 15 Cal. 3d 853, 858-859, 126 Cal. Rptr. 811, 544 P.2d 947* (noting rule was inapplicable when California resident was but a nominal plaintiff suing on behalf of a foreign beneficiary or creditor); *Thomson v. Continental Ins. Co. (1967) 66 Cal. 2d 738, 742, 59 Cal. Rptr. 101, 427 P.2d 765* ; *Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 176* (disapproved on another ground in *Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 764, 1 Cal. Rptr. 2d 556, 819 P.2d 14*)].

In 1986, the Legislature amended *Code Civ. Proc. § 410.30* to provide that the domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action. The purpose of the amendment was to overcome the holding of *Archibald, above*, and other cases, that a trial court was powerless to dismiss an action on the ground of forum non conveniens if the *plaintiff* was a California resident [*see Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 756, 1 Cal. Rptr. 2d 556, 819 P.2d 14]* . The Legislative intent was to abrogate the former case law rule and to broaden inconvenient forum stays or dismissals. Specifically, courts, under the amended statute, were required to assign less weight to the factor of the plaintiff's residence, and, instead, consider the justice, fairness, and convenience of California as a forum, without giving any special emphasis to the fact that a party to the action was a California resident [*Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney (1988) 202 Cal. App. 3d 1424, 1432, 1434, 249 Cal. Rptr. 559* ; *see also Delfosse v. C.A.C.I., Inc.-Federal (1990) 218 Cal. App. 3d 683, 688 n.3, 267 Cal. Rptr. 224]* .

The 1986 version of *Code Civ. Proc. § 410.30* was, however, repealed by its own terms effective January 1, 1992, at which time the pre-1986 version of the statute became reoperative. The reoperative version does not contain the provision that the domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action. It would therefore appear that the rule of *Archibald, above*, prohibiting the dismissal of an action if the plaintiff is a California resident is reinstated. In contrast to dismissal of an action, however, it has been held that in applying the doctrine of forum non conveniens, a California court has the power to stay an action even though the sole plaintiff is a California resident [*Hansen v. Owens-Corning Fiberglas Corp. (1996) 51 Cal. App. 4th 753, 761, 59 Cal. Rptr. 2d 229* ; *see Berg v. MTC Electronics Technologies Co. (1998) 61 Cal. App. 4th 349, 362, 71 Cal. Rptr. 2d 523]* . A stay of an action filed by a California resident, however, is rare [*Berg v. MTC Electronics Technologies Co. (1998) 61 Cal. App. 4th 349, 362, 71 Cal. Rptr. 2d 523* (case, however, was one in which stay justified)].

In addition, there was a presumption that the forum was convenient to a *defendant* who was a resident of California. This presumption of convenience, which follows from the defendant's residence in California, remained in effect despite the 1986 amendment of *Code Civ. Proc. § 410.30*. But this presumption is not conclusive, and a resident defendant may overcome the presumption of convenience by evidence that the alternate jurisdiction is a more convenient place for trial of the action, even if the defendant is a corporation that has its principal place of business in California and the tort was allegedly committed in this state [*Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 756, 760-761, 1 Cal. Rptr. 2d 556, 819 P.2d 14* (rejecting contrary analysis in *Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 181-182, 227 Cal. Rptr. 247*); *Hemmelgarn v. Boeing Co. (1980) 106 Cal. App. 3d 576, 580, 165 Cal. Rptr. 190* ; and *Brown v. Clorox Co. (1976) 56 Cal. App. 3d 306, 313-314, 128 Cal. Rptr. 385*); *see Campbell v. Parker-Hannifin Corp. (1999) 69 Cal. App. 4th 1534, 1541, 82 Cal. Rptr. 2d 202* ; *see also Northrop Corp. v. American Motorists Ins. Co. (1990) 220 Cal. App. 3d 1553, 1562, 270 Cal. Rptr. 233]* .

[f] Effect of Forum Law More Favorable to Plaintiff

The fact that the law in the forum state is more favorable to the plaintiff than the law in the alternative foreign jurisdiction should not be accorded any weight in deciding a motion for forum non conveniens provided, however, that the foreign jurisdiction affords some remedy [*Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 753-754 n.5, 764, 1 Cal. Rptr. 2d 556, 819 P.2d 14* ; *accord Roulier v. Cannondale (2002) 101 Cal. App. 4th 1180, 1187, 124 Cal. Rptr. 2d 877* ; *Campbell v. Parker-Hannifin Corp. (1999) 69 Cal. App. 4th 1534, 1541, 1543-1544, 82 Cal. Rptr. 2d 202* ; *see also Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney (1988) 202 Cal. App. 3d 1424, 1435 n.17, 249 Cal. Rptr. 559* (trial court may not consider probability that a California jury may be more generous in its award than the proper forum)]. In *Stangvik*, the Supreme Court disapproved *Holmes v. Syntex Laboratories, Inc. (1984) 156 Cal. App. 3d 372, 202 Cal. Rptr. 773* , to the extent it held that the factor of fundamental importance in favor of denying a forum non conveniens motion is that plaintiff would be substantially disadvantaged if the case were tried in Britain because that country did not afford recovery on the basis of strict liability [*Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 763-764, 1 Cal. Rptr. 2d 556, 819 P.2d 14]* . The Court said that, if substantial weight is given to the fact

that the law in the forum state is more favorable to a plaintiff than in the foreign jurisdiction, the balance will ordinarily favor denial of the motion, and that substantial weight should be given to this factor only if the alternative forum provides no remedy at all [*Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 764, 1 Cal. Rptr. 2d 556, 819 P.2d 14* (citing *Piper Aircraft Co. v. Reyno (1981) 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419*)]. The Court also disapproved *Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 227 Cal. Rptr. 247* , to the extent it held that the absence of a precise remedy in the foreign jurisdiction was entitled to some weight [*Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 764, 1 Cal. Rptr. 2d 556, 819 P.2d 14]* .

The Court explained that one basis underlying this doctrine is to avoid burdening the trial court by requiring it to interpret the law of foreign jurisdictions, which compels it to conduct complex exercises in comparative law, and that to impose such a burden on the trial court for the purpose of facilitating its consideration of a factor of only slight significance in the forum non conveniens balance would be unwarranted [*Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 754 n.5, 1 Cal. Rptr. 2d 556, 819 P.2d 14]* .

Thus, for example, the fact that a plaintiff has available a cause of action that is recognized by California law, but not by an alternative forum, cannot be considered by the court in determining the issue of a suitable place for trial. A showing that it would be more difficult or impossible to recover in the foreign forum does not demonstrate that the alternative forum is inadequate. A forum in which an action can be brought, although not necessarily won, is a suitable forum provided that [*Boaz v. Boyle & Co. (1995) 40 Cal. App. 4th 700, 710-711, 46 Cal. Rptr. 2d 888]* :

- The defendant is amenable to process there;

- There is no procedural bar that would prevent the foreign courts from reaching the issues raised on their merits (or if there is, typically the statute of limitations, defendants have waived such a bar); and

- Adjudication in the alternative forum is by an independent judiciary applying what is generally regarded by American courts as due process of law.

[7] Determining Whether to Grant Stay or Dismissal on Finding of Inconvenient Forum

Once the court determines that in the interest of substantial justice a forum other than California would be more convenient, the court may either dismiss or stay the action [*Code Civ. Proc. § 410.30(a)*]. If the court stays the action, it retains jurisdiction over the parties and the cause and can compel the foreign party to cooperate in bringing about a fair and speedy hearing in the foreign forum by resuming proceedings if the foreign action is unreasonably delayed or fails to reach a resolution on the merits. If the court dismisses the suit on the ground of forum non conveniens it has lost jurisdiction over the suit and thereby deprived itself of the power to protect the interests of the plaintiff [*see Archibald v. Cinerama Hotels (1976) 15 Cal. 3d 853, 857-858, 126 Cal. Rptr. 811, 544 P.2d 947* ; for discussion of the effect of a party being a California resident, *see § 323.34[6][e]*].

Ordinarily, dismissal is an exceptional remedy and a stay is the usual one, so that if obstacles to litigation develop in the convenient forum the parties may resume litigation in California [*Jagger v. Superior Court (1979) 96 Cal. App. 3d 579, 589, 158 Cal. Rptr. 163* ; *see, e.g., Chong v. Superior Court (1997) 58 Cal. App. 4th 1032, 1035, 1040, 68 Cal. Rptr. 2d 427* (California proceedings stayed; real party will have opportunity to apply to lift the stay if it can show a breakdown of the rule of law in Hong Kong)]. Dismissal of an action is appropriate only in the exceptional case when neither party resides in or has any connection with California [*see Henderson v. Superior Court (1978) 77 Cal. App. 3d 583, 598, 142 Cal. Rptr. 478* ; *see also Century Indemnity Co. v. Bank of America (1997) 58 Cal. App. 4th 408, 411, 68 Cal. Rptr. 2d 132* (action brought by California resident may not be dismissed on grounds of forum non conveniens except in extraordinary circumstances)].

[8] Conditions on Grant of Dismissal or Stay

The court may dismiss or stay the action in whole or in part on any conditions that may be just [*Code Civ. Proc. § 410.30(a)*; *see, e.g., Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 750 n.2, 1 Cal. Rptr. 2d 556, 819 P.2d 14]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueForum Non ConveniensCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedureJudicial OfficersJudgesDiscretionEvidenceProcedural ConsiderationsBurdens of ProofAllocation

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[Reserved]

§§ 323.36[Reserved]

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Chapter 323 JURISDICTION: PERSONAL JURISDICTION, INCONVENIENT FORUM, AND APPEARANCES
PART II. LEGAL BACKGROUND
C. Motion to Quash Service or to Stay or Dismiss Action

28-323 California Forms of Pleading and Practice--Annotated § 323.50

§ 323.50 Motion to Quash Service or to Stay or Dismiss Action

[1] Time for Making Motion

A defendant, on or before the last day of the time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion for one or more of the following purposes:

- To quash service of summons on the ground of lack of jurisdiction of the court over him or her [*Code Civ. Proc. § 418.10(a)(1)*].

- To stay or dismiss the action on the ground of inconvenient forum [*Code Civ. Proc. § 418.10(a)(2)*].

- To dismiss the action pursuant to the applicable provisions of *Code Civ. Proc. § 583.110 et seq.* for delay in prosecution [*Code Civ. Proc. § 418.10(a)(3)*].

Raising any other issues in this motion, even the issue of subject-matter jurisdiction, will usually result in the moving party making a general appearance, thereby waiving objections to personal jurisdiction [*see Greener v. Workers' Comp. Appeals Bd. (1993) 6 Cal. 4th 1028, 1036-1037, 25 Cal. Rptr. 2d 539, 863 P.2d 784* ; *cf. Great Western Casinos, Inc. v. Morongo Band of Mission Indians (1999) 74 Cal. App. 4th 1407, 1415-1418, 88 Cal. Rptr. 2d 828* (hybrid motion to quash/dismiss concerning claim of Indian sovereign immunity and federal preemption not construed as general appearance)]. On the other hand, a motion under *Code Civ. Proc. 473* or *473.5* when joined with a *Section 418.10* motion does not constitute a general appearance [*Code Civ. Proc. 418.10(d)*; *see Floveyor Internat., Ltd. v. Superior Court (1997) 59 Cal. App. 4th 789, 792 n.2, 69 Cal. Rptr. 2d 457]* . Also, neither an application to the court nor a stipulation of the parties for extension of the time to plead constitutes a general appearance by the defendant [*Code Civ. Proc. 418.10(d)*].

The mere fact that a defendant has previously moved to quash service under *Code Civ. Proc. § 418.10* and petitions the court of appeal to overturn denial of its motions does not grant the defendant immunity from making a general

appearance by subsequent participation in the litigation [*see Mansour v. Superior Court (1995) 38 Cal. App. 4th 1750, 1757, 46 Cal. Rptr. 2d 191]* . For discussion of general versus special appearances, see *§ 323.60* et seq.

The notice of motion must designate, as the time for making the motion, a date not more than 30 days after the *filing* of the notice [*Code Civ. Proc. § 418.10(b)*; *see also Code Civ. Proc. § 1167.4(a)*] (time for making motion in proceeding for unlawful detainer, forcible entry, or forcible detainer). The notice must be served in the same manner, and at the same times, prescribed in *Code Civ. Proc. § 1005(b)* [*Code Civ. Proc. § 418.10(b)*].

The provisions of *Code Civ. Proc. § 418.10* do not apply to a motion to stay or dismiss the action for inconvenient forum by a defendant who has made a general appearance [*Code Civ. Proc. § 410.30(b)*; for discussion of general appearances, *see § 323.31[3]*]. In such case, the motion to stay or dismiss for inconvenient forum is governed by *Code Civ. Proc. § 1005(b)* [*see Code Civ. Proc. § 1005(a)(13)*].

Code Civ. Proc. § 418.10(e) provides that a defendant or cross-defendant may make a motion under *Code Civ. Proc. § 418.10* and simultaneously answer, demur, or move to strike the complaint or cross-complaint. Notwithstanding *Code Civ. Proc. § 1014*, no act by a party who makes a motion under Section 418.10, including filing an answer, demurrer, or motion to strike constitutes an appearance, unless the court denies the motion made under Section 418.10. If the court denies the motion made under Section 418.10, the defendant or cross-defendant is not deemed to have generally appeared until entry of the order denying the motion [*Code Civ. Proc. § 418.10(e)(1)*]. If the motion made under Section 418.10 is denied and the defendant or cross-defendant petitions for a writ of mandate pursuant to *Code Civ. Proc. § 418.10(c)*, the defendant or cross-defendant is not deemed to have generally appeared until the proceedings on the writ petition have finally concluded [*Code Civ. Proc. § 418.10(e)(2)*]. Failure to make a motion under Section 418.10 at the time of filing a demurrer or motion to strike constitutes a waiver of the issues of lack of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in prosecution [*Code Civ. Proc. § 418.10(e)(3)*]. A defendant who chooses to demur or move to strike must also move to quash; he or she cannot reserve the jurisdictional objection and later file it with his or her answer if the challenge to the pleadings fails [*Roy v. Superior Court (2005) 127 Cal. App. 4th 337, 344, 25 Cal. Rptr. 3d 488]* .

Code Civ. Proc. § 418.10(e) does not change the essential rule that a defendant submits to the court's jurisdiction by making a general appearance in an action by participating in the action in a manner which recognizes the court's jurisdiction. It merely delays the effect of such actions until the motion to quash is denied or, if the defendant seeks writ review, until proceedings on the writ have concluded. Once the motion is denied or writ proceedings have concluded, the actions undertaken by the defendant while the motion or writ was pending which recognized the trial court's jurisdiction will be deemed to constitute a general appearance, and no further objection to jurisdiction will be permitted [*see State Farm General Ins. Co. v. JTs Frames, Inc. (2010) 181 Cal. App. 4th 429, 104 Cal. Rptr. 3d 573]* .

For a form of notice of motion to quash service on grounds of lack of personal jurisdiction or to stay or dismiss action on grounds of inconvenient forum, see *§ 323.150*. For discussion of the substantive grounds for making the motion for lack of personal jurisdiction, see *§ 323.17*. For discussion of the substantive grounds for making the motion on grounds of inconvenient forum, see *§ 323.35*.

For discussion and forms of motions to dismiss for delay in prosecution under *Code Civ. Proc. § 418.10(a)(3)*, see Ch. 212, *Dismissal* .

[2] Motion Extends Defendant's Time to Plead

The service and filing of the notice of motion extends the defendant's time to plead until 15 days after service on him or her of a written notice of entry of an order denying the motion, except that for good cause shown the court may extend the defendant's time to plead for an additional period not exceeding 20 days [*Code Civ. Proc. § 418.10(b)*; *see also Code Civ. Proc. § 1167.4(b)* (in proceeding for unlawful detainer, forcible entry, or forcible detainer, service and filing

of notice of motion extends the defendant's time to plead until five days after he or she is served with a written notice of the entry of an order denying the motion, except that for good cause shown the court may extend a defendant's time to plead for an additional period not exceeding 15 days)].

No default may be entered against the defendant before expiration of the time to plead. In addition, no motion under *Code Civ. Proc. § 418.10*, or under *Code Civ. Proc. § 473* or *473.5* (relating to relief from default) when joined with a Section 418.10 motion, and no application to the court or stipulation of the parties for an extension of time to plead, is deemed a general appearance by the defendant [*Code Civ. Proc. § 418.10(d)*].

[3] Burden of Proof

When a defendant properly moves to quash out of state service of process for lack of jurisdiction, the burden of proof is on the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence [*Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 449, 58 Cal. Rptr. 2d 899, 926 P.2d 1085]* . The defendant, as the moving party, bears the burden of proof on a forum non conveniens motion [*Stangvik v. Shiley, Inc. (1991) 54 Cal. 3d 744, 751, 1 Cal. Rptr. 2d 556, 819 P.2d 14]* ; For detailed discussion of burden of proof on grounds of lack of personal jurisdiction, see *§ 323.17[2]*; for detailed discussion of burden of proof on grounds of inconvenient forum, see *§ 323.35[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresPleading & PracticeMotion PracticeTime LimitationsEvidenceProcedural ConsiderationsBurdens of ProofBurden Shifting

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§ 323.51 Opposition to Motion

On a motion to quash service of summons for lack of jurisdiction, the burden of proof is on the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence. The plaintiff ordinarily seeks to carry this burden by the service and filing of opposing affidavits or declarations [*see Code Civ. Proc. §§ 2009, 2015.5*], setting forth the probative facts of jurisdiction, and of opposing points and authorities. Declarations, however, are insufficient to support the assertions for which they are offered if they consist primarily of vague assertions of ultimate facts rather then specific evidentiary facts permitting a court to form an independent conclusion on the issue [*Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1055, 85 Cal. Rptr. 2d 611]* .

A verified complaint may be treated as a counteraffidavit or counterdeclaration, if it alleges the essential probative facts establishing jurisdiction [*Arnesen v. Raymond Lee Organization, Inc. (1973) 31 Cal. App. 3d 991, 995, 107 Cal. Rptr. 744* ; *see Crea v. Busby (1996) 48 Cal. App. 4th 509, 514, 55 Cal. Rptr. 2d 513]* . But because affidavits or declarations relied on as probative must state probative facts, and because affidavits or declarations that recite only ultimate facts or conclusions of law are insufficient, a complaint that alleges only ultimate facts, which is normally the case, and that omits any allegation of probative facts cannot be used as a substitute for a counteraffidavit or counterdeclaration [*see Thomas J. Palmer, Inc. v. Turkiye Is Bankasi A.S. (1980) 105 Cal. App. 3d 135, 148-149, 164 Cal. Rptr. 181* ; *see also § 323.81[4]*].

Allegations in an unverified complaint cannot be used to establish jurisdiction [*Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1055, 85 Cal. Rptr. 2d 611* ; *Goehring v. Superior Court (1998) 62 Cal. App. 4th 894, 908-909, 73 Cal. Rptr. 2d 105]* .

On a motion to stay or dismiss an action for inconvenient forum, the plaintiff will want to set forth in his or her counterdeclaration all those factors that militate in favor of the court's retention of jurisdiction [*see, e.g., Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 173-174, 174 n.2, 176, 227 Cal. Rptr. 247* (disapproved on another ground in *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 764, 1 Cal. Rptr. 2d 556, 819 P.2d 14*); *see also* discussion under § 323.23[6]].

A plaintiff is generally entitled to conduct discovery with regard to a jurisdiction issue before the court rules on a motion to quash [*Goehring v. Superior Court (1998) 62 Cal. App. 4th 894, 911, 73 Cal. Rptr. 2d 105]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeOpposing Memoranda

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§ 323.52 Order

If the motion to quash service of summons or to stay or dismiss the action is granted, counsel for the defendant ordinarily prepares the formal order for the judge's signature. If the motion is denied, counsel for the plaintiff normally prepares the formal order, if any is required. In either event, the prevailing party must give to all other parties or their attorneys [*see Code Civ. Proc. § 1015*] the notice required by *Code Civ. Proc. § 1019.5(a)* in the manner provided in *Code Civ. Proc. §§ 1010-1020*, unless the court otherwise orders or unless notice is waived by all parties in open court and is entered in the minutes [*Code Civ. Proc. § 1019.5(a)*].

For forms of orders granting a motion to quash service or stay or dismiss the action, see *§ 323.152* and *§ 323.158*. For a form of notice of the court's ruling, see Ch. 372, *Motions and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedureDismissalsInvoluntary DismissalsMotions

California Forms of Pleading and Practice--Annotated

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329
Chapter 323 JURISDICTION: PERSONAL JURISDICTION, INCONVENIENT FORUM, AND APPEARANCES
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§ 323.53 Review of Order

[1] When Motion Denied--Writ of Mandate

[a] Appeal Not Available

An order denying a motion to quash service of summons is nonappealable [*Varra v. Superior Court (1960) 181 Cal. App. 2d 12, 14, 4 Cal. Rptr. 920* ; *Kneeland v. Ethicon Suture Laboratories, Inc. (1952) 113 Cal. App. 2d 335, 337-338, 248 P.2d 447.]*

[b] Time and Service Requirements

If a motion under *Code Civ. Proc. § 418.10* is denied, the defendant, within 10 days after being served with a written notice of entry of the court's order, or within such further time not exceeding 20 days that the trial court may for good cause allow, and before pleading, may petition an appropriate reviewing court for a writ of mandate to require the trial court to enter its order quashing the service of summons or staying or dismissing the action [*Code Civ. Proc. § 418.10(c)*; for form of a petition for writ of mandate, *see § 323.155*; for a form of notice to plaintiff of filing a petition for writ of mandate, *see § 323.156*]. The initial 10-day period is extended by the periods allowed by *Code Civ. Proc. § 1013(a)* when service is by mail [*Shearer v. Superior Court (1977) 70 Cal. App. 3d 424, 426, 138 Cal. Rptr. 824]* .

Code Civ. Proc. § 418.10(c) is not, however, jurisdictional in the sense that it deprives the trial court of the power to grant relief under *Code Civ. Proc. § 473(b)*, from a default judgment or order when the defendant failed to apply for an extension of time within the original 10-day period. Rather, during the period within which time could have been extended, the trial court may, on a proper showing grant relief from default in the form of an extension of time. When the trial court would have been authorized to grant relief from default under equitable principles or under *Code Civ. Proc. § 473*, a reviewing court may grant similar relief [*Cornell University Medical College v. Superior Court (1974) 38 Cal. App. 3d 311, 314-315, 113 Cal. Rptr. 291* ; *see also Quattrone v. Superior Court (1975) 44 Cal. App. 3d 296, 301, 118 Cal. Rptr. 548]* .

The defendant must file or enter his or her responsive pleading in the reviewing court within the time prescribed by *Code Civ. Proc. § 418.10(b)* unless, on or before the last day of the time to plead, the defendant serves on the adverse party and files with the court a notice that he or she has petitioned for a writ of mandate. The service and filing of the notice extends the defendant's time to ple ad until 10 days after the defendant is served with a written notice of the final judgment in the mandate proceeding. The time to plead may, however, for good cause shown, be extended by the trial court for an additional period not exceeding 20 days [*Code Civ. Proc. § 418.10(c)*; *see also Cal. Rules of Ct., Rule 8.491* (extension until 10 days after Supreme Court files order denying petition seeking review of court of appeal's denial of writ of mandate)].

[c] Petition Filed in Appellate Division of Superior Court

The appellate division of the superior court may grant a writ of mandate directed to the superior court for a limited civil case, and where the appellate division grants a writ of review directed to the superior court, the superior court is an inferior tribunal for purposes of the petition [*Code Civ. Proc. § 1085(b)*; for form of a petition for writ of mandate, *see § 323.155*; for a form of notice to plaintiff of filing a petition for writ of mandate, *see § 323.156*].

If the petition is to be filed in a superior court, the local rules, if any, of that court should be checked to determine what requirements are imposed on the writ petition. Even in the absence of such rules, however, counsel may wish to follow the requirements of a petition filed in an appellate court to show that the petition is meritorious, since, in the absence of such showing, the petition may be denied out of hand without a hearing. For further discussion of the requirements, see [c], *below*.

[d] Requirements of Petition Filed in Appellate Court

Whenever a writ petition filed in a court of appeal or the Supreme Court seeks review of a trial court ruling, it must be accompanied by an adequate record, including copies of (1) the ruling from which the petition seeks relief; (2) all documents and exhibits submitted to the trial court supporting and opposing the petitioner's position; (3) any other documents or portions of documents submitted to the trial court that are necessary for a complete understanding of the case and the ruling under review; and (4) a reporter's transcript of the oral proceedings that resulted in the ruling under review. If no transcript is available, the record must include a declaration by counsel (a) explaining why the transcript is unavailable and fairly summarizing the proceedings, including counsel's arguments and any statement by the court supporting its ruling; or (b) stating that the transcript has been ordered, the date it was ordered, and the date it is expected to be filed, which must be a date prior to any action requested of the reviewing court other than issuance of a temporary stay supported by other parts of the record. A declaration may omit a full summary of the proceedings if part of the relief sought is an order to prepare a transcript for use by an indigent criminal defendant in support of the petition and if the declaration demonstrates the petitioner's need for and entitlement to the transcript. In exigent circumstances, the petition may be filed without the required documents if counsel files a declaration that explains the urgency and the circumstances making the documents unavailable and fairly summarizes their substance. If the petitioner does not submit the required record or explanations or does not present facts sufficient to excuse the failure to submit them, the court may summarily deny a stay request, the petition, or both [*Cal. Rules of Ct., Rule 8.486(b)(4)*; *see also Cal. Rules of Ct., Rule 8.486(c)* (format for documents and exhibits); for form of a petition for writ of mandate, *see § 323.155*; for a form of notice to plaintiff of filing a petition for writ of mandate, *see § 323.156*].

Although an appellate court has original jurisdiction in any mandate proceeding involving an inferior court or other entity [*see Code Civ. Proc. § 1085*], it will not exercise this jurisdiction, absent a showing of exceptional circumstances, if the petition for a writ of mandate could have been made first to a lower court [*Funeral Dir. Assn. v. Bd. of Funeral Dirs. (1943) 22 Cal. 2d 104, 110, 136 P.2d 785* ; *Cohen v. Superior Court (1968) 267 Cal. App. 2d 268, 270, 274, 72 Cal. Rptr. 814]* . Thus, a petition for a writ of mandate filed in an appellate court, which could lawfully be made to a lower court in the first instance, must set forth the circumstances that, in the opinion of the petitioner, render it proper that the writ should issue originally from the reviewing court [*Cal. Rules of Ct., Rule 8.486(a)(1)*].

For further discussion of mandate proceedings generally, the format requirements of a petition for writ of mandate filed in a court of appeal or the Supreme Court of California, the essential allegations of the petition, and the number of copies to prepare, see Ch. 358, *Mandate and Prohibition* .

[e] Effect of General Appearance

The provisions of *Code Civ. Proc. § 418.10* do not apply to a motion to stay or dismiss the action for inconvenient forum by a defendant who has generally appeared in the case [*see Code Civ. Proc. § 410.30(b)*].

[2] When Motion Granted--Appeal

If a motion under *Code Civ. Proc. § 418.10* is granted, the plaintiff may appeal from the order [*Code Civ. Proc. §§ 904.1(a)(3), 904.2(d)*]. An order granting a motion to quash service of summons or to stay or dismiss action for inconvenient forum is appealable [*Thomas J. Palmer, Inc. v. Turkiye Is Bankasi A.S. (1980) 105 Cal. App. 3d 135, 138, 164 Cal. Rptr. 181* ; *Gould, Inc. v. Health Sciences, Inc. (1976) 54 Cal. App. 3d 687, 690 n.1, 126 Cal. Rptr. 726]* .

In reviewing a trial court order granting a motion to quash, the appellate court is guided by the following principles: (1) where a defendant properly moves to quash out of state service of process for lack of jurisdiction, the burden of proof is on the plaintiff to establish facts of jurisdiction by a preponderance of the evidence; (2) evidence of those facts or their absence may be in the form of declarations; (3) where there is a conflict in the declarations, resolution of the conflict by the trial court will not be disturbed on appeal if the determination of that court is supported by substantial evidence. Substantial evidence is not synonymous with any evidence, but, rather, is evidence of ponderable legal significance, that is, evidence which is reasonable in nature, credible, and of solid value [*Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 533, 257 Cal. Rptr. 278* ; *see also Serafini v. Superior Court (1998) 68 Cal. App. 4th 70, 77, 80 Cal. Rptr. 2d 159* ; *Crea v. Busby (1996) 48 Cal. App. 4th 509, 514, 55 Cal. Rptr. 2d 513* ; *Kroopf v. Guffey (1986) 183 Cal. App. 3d 1351, 1356, 228 Cal. Rptr. 807* , and *§ 323.88[5]*]. The appellate court may not, however, consider evidence not properly before the trial court [*see Crea v. Busby (1996) 48 Cal. App. 4th 509, 514, 55 Cal. Rptr. 2d 513* ; *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 533-534, 257 Cal. Rptr. 278]* .

When the evidence of jurisdictional facts is not conflicting, the question of whether defendant is subject to personal jurisdiction is one of law, and the lower court's determination is not binding on the reviewing court [*Hall v. LaRonde (1997) 56 Cal. App. 4th 1342, 1346, 66 Cal. Rptr. 2d 399* ; *Great-West Life Assurance Co. v. Guarantee Co. of North America (1988) 205 Cal. App. 3d 199, 204, 252 Cal. Rptr. 363* ; *accord Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1055, 85 Cal. Rptr. 2d 611]* .

After a defendant's motion to quash service of a summons is granted for lack of personal jurisdiction over the defendant, if the plaintiff fails to seek reconsid eration or appellate review, the plaintiff may be barred from relitigating the issue by direct estoppel [*Sabek, Inc. v. Engelhard Corp. (1998) 65 Cal. App. 4th 992, 997, 999-1000, 76 Cal. Rptr. 2d 882* (distinguishing and disagreeing with *GMS Properties, Inc. v. Superior Court of Fresno County (1963) 219 Cal. App. 2d 407, 33 Cal. Rptr. 163* ; for discussion of direct estoppel, *see* Ch. 491, *Res Judicata*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedureDismissalsInvoluntary DismissalsAppellate ReviewCivil ProcedureRemediesWritsCommon Law WritsMandamus

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§ 323.54 Jurisdiction Over Attorney Fee Motion Following Granting of Motion to Quash

While it is true that once a motion to quash is granted, the court may not review the merits of the underlying action, at least as far as they pertain to the defendant that prevailed on the motion to quash for lack of personal jurisdiction [*Nelson v. Horvath (1970) 4 Cal. App. 3d 1, 84 Cal. Rptr. 101*], it does not necessarily follow that the lack of power to rule on the merits of the lawsuit deprives the trial court of jurisdiction to rule upon a collateral motion for attorney fees. A defendant does not forfeit a collateral right to attorney fees by choosing to assert the right to challenge the court's in personam jurisdiction [*Shisler v. Sanfer Sports Cars, Inc. (2008) 167 Cal. App. 4th 1, 8, 83 Cal. Rptr. 3d 771*] (noting that it would be unfair to allow a plaintiff to sue an out-of-state defendant in California, force that defendant to the expense required to quash service, then preclude that defendant from collecting attorney fees that would be available had the defendant prevailed on the merits of the case)].

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[Reserved]

§§ 323.55[Reserved]

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§ 323.60 Governing Law

Acts constituting an appearance in civil actions and proceedings are listed in *Code Civ. Proc. § 1014*.

Acts constituting an appearance under the Family Law Act are set forth in *Cal. Rules of Ct., Rule 5.120*.

Statutes providing that specific acts are not general appearances are discussed under § 323.43.

The effect of a general appearance on in personam jurisdiction is set forth in *Code Civ. Proc. § 410.50(a)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsConsent

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§ 323.61 Definitions

[1] "Appearance"

The term "appearance" is defined as (1) a coming into court as a party to a suit, either in person or by attorney, whether as plaintiff or defendant; (2) the formal proceeding by which a defendant submits him or herself to the jurisdiction of the court; and (3) the voluntary submission to a court's jurisdiction [Black's Law Dictionary (5th ed. 1979)].

[2] "General" vs. "Special" Appearance

An "appearance" is either "general" or "special" [*see* Black's Law Dictionary (5th ed. 1979)]. By a general appearance, the defendant submits to the in personam jurisdiction of the court; in the case of a special appearance, he or she does not [*Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 800-801, 100 Cal. Rptr. 477]* .

[3] "General Appearance"

A general appearance is made when a defendant either enters an appearance in an action without limiting the purpose of the appearance or, except as otherwise provided by statute, when he or she asks for relief which only a court with personal jurisdiction over him or her can give [*see Davenport v. Superior Court (1920) 183 Cal. 506, 511, 191 P. 911* ; *Olcese v. Justice's Court (1909) 156 Cal. 82, 87, 103 P. 317* ; *see also Code Civ. Proc. § 410.10*, Judicial Council Comment].

Except as otherwise provided by statute, the court in which an action is pending has jurisdiction over a party from the time summons is served on him or her. A general appearance by a party is equivalent to personal service of summons on that party [*Code Civ. Proc. § 410.50(a)*; *see, e.g., Harrington v. Superior Court (1924) 194 Cal. 185, 189, 228 P. 15* ; *Southern Pac. Transportation Co. v. State Bd. of Equalization (1985) 175 Cal. App. 3d 438, 442, 221 Cal. Rptr. 12* ; *Neihaus v. Superior Court (1977) 69 Cal. App. 3d 340, 345, 137 Cal. Rptr. 905]* .

A general appearance made after the mandatory period for service of summons has run [*see Code Civ. Proc. § 583.210*]

does not give the court jurisdiction over the defendant when the summons has not been timely served [*Dale v. ITT Life Ins. Corp. (1989) 207 Cal. App. 3d 495, 499 n.4, 255 Cal. Rptr. 8]* .

[4] "Special Appearance"

A special appearance is made when a defendant appears in court for the sole purpose of objecting to the court's lack of jurisdiction over his or her person, without submitting to such jurisdiction [*see Greener v. Workers' Comp. Appeals Board (1993) 6 Cal. 4th 1028, 1036-1037, 25 Cal. Rptr. 2d 539, 863 P.2d 784* ; *Olcese v. Justice's Court (1909) 156 Cal. 82, 87, 103 P. 317* ; *Josephson v. Superior Court (1963) 219 Cal. App. 2d 354, 361, 33 Cal. Rptr. 196]* . No particular form is required, but a defendant must make it clear, normally by a formal motion to quash service of summons [*see § 323.80*], that he or she objects to such jurisdiction [*see Code Civ. Proc. § 410.10*, Judicial Council Comment, Bases of Judicial Jurisdiction Over Individuals, (6) Appearance, and Bases of Judicial Jurisdiction Over Corporations, (4) Appearance-Foreign Corporations].

Seeking any other relief, such as challenging subject matter jurisdiction, risks making a general appearance [*see Greener v. Workers' Comp. Appeals Board (1993) 6 Cal. 4th 1028, 1036-1037, 25 Cal. Rptr. 2d 539, 863 P.2d 784* ; *Janzen v. Workers' Comp. Appeals Bd. (1997) 61 Cal. App. 4th 109, 116-117, 71 Cal. Rptr. 2d 260* ; *see Great Western Casinos, Inc. v. Morongo Band of Mission Indians (1999) 74 Cal. App. 4th 1407, 1415-1418, 88 Cal. Rptr. 2d 828* (hybrid motion to quash/dismiss concerning claim of Indian sovereign immunity and federal preemption not construed as general appearance)]. There are, however, certain other acts that do not constitute general appearances [*see, e.g., Code Civ. Proc. § 418.10(d)*; for discussion of acts not constituting general appearance, *see § 323.63*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 323.62 Acts Constituting General Appearance

[1] Acts Listed in Statute

As used in the statutes, the word "appearance," standing alone, usually means a "general" and not a "special" appearance [*see O'Keefe v. Miller (1965) 231 Cal. App. 2d 920, 927, 42 Cal. Rptr. 343]* . Thus, the words "appear," "appeared," and "appearance," as used in *Code Civ. Proc. § 1014*, listing acts constituting an appearance, refer to and mean a general appearance [*see Goodwine v. Superior Court (1965) 63 Cal. 2d 481, 484, 47 Cal. Rptr. 201, 407 P.2d 1* ; *Chitwood v. County of Los Angeles (1971) 14 Cal. App. 3d 522, 526, 92 Cal. Rptr. 441]* .

A defendant appears in an action when he or she [*Code Civ. Proc. § 1014*]:

- Answers.
- Demurs.
- Files a notice of motion to strike.
- Files a notice of motion to transfer under *Code Civ. Proc. § 396b* (motion to change venue).
- Moves for reclassification under *Code Civ. Proc. § 403.040*.

These acts constitute an appearance whether done by the defendant appearing in propria persona or by an attorney authorized to represent the defendant [*see County of Merced v. Hicks (1885) 67 Cal. 108, 109, 7 P. 179* ; for discussion of appearance by attorney, *see § 323.65*].

In addition, a defendant appears in an action when he or she gives the plaintiff written notice of his or her appearance, or when an attorney gives notice of appearance for him or her [*Code Civ. Proc. § 1014*; for a forms of notice of general

appearance, *see §§ 323.170, 323.171*].

[2] Acts Not Listed in Statute

The acts constituting a general appearance under *Code Civ. Proc. § 1014* are not exclusive [*Hamilton v. Asbestos Corp. (2000) 22 Cal. 4th 1127, 1147-1149, 95 Cal. Rptr. 2d 701, 998 P.2d 403* ; *accord Creed v. Schultz (1983) 148 Cal. App. 3d 733, 739, 196 Cal. Rptr. 252]* .

The term "general appearance" may apply to various acts which, under all of the circumstances, are deemed to confer jurisdiction of the person. What is determinative is whether the defendant takes a part in the particular action which in some manner recognizes the authority of the court to proceed [*Hamilton v. Asbestos Corp. (2000) 22 Cal. 4th 1127, 1147, 95 Cal. Rptr. 2d 701, 998 P.2d 403* (defendant's participation in consolidated action constituted appearance in one of the actions in which defendant had not been served)].

Any act of a defendant is equivalent to a general appearance when, by that act, the defendant intentionally submits him or herself to the jurisdiction of the court for the purpose of obtaining any ruling or order of the court going to the merits of the case, and the act may reasonably be construed to imply that the court has acquired jurisdiction of the person of the defendant [*Davenport v. Superior Court (1920) 183 Cal. 506, 511, 191 P. 911* ; *see also Code Civ. Proc. § 410.10,* Judicial Council Comment; *Estateof Heil (1989) 210 Cal. App. 3d 1503, 1512, 259 Cal. Rptr. 28* ; *California Overseas Bank v. French American Banking Corp. (1984) 154 Cal. App. 3d 179, 184, 201 Cal. Rptr. 400* ; *Creed v. Schultz (1983) 148 Cal. App. 3d 733, 740, 196 Cal. Rptr. 252]* .

Thus, when a defendant appears in an action or proceeding and asks for some relief which can only be granted on the hypothesis that the court has jurisdiction of the cause and the person, the defendant has submitted him or herself to the jurisdiction of the court as completely as if he or she had been regularly served with process, whether the appearance by its terms is limited to a special appearance or not [*Goodwine v. Superior Court (1965) 63 Cal. 2d 481, 484, 47 Cal. Rptr. 201, 407 P.2d 1* ; *People v. Ciancio (2003) 109 Cal. App. 4th 175, 192-193, 134 Cal. Rptr. 2d 531* (where defendant filed a response to an order to show cause in which it argues the merits of the motions, challenged the relief sought, and expressly requested that motions be denied on their merits, the party made a general appearance, whether or not it was a the real party in interest or otherwise a party to the proceedings); *see also Greener v. Workers' Comp. Appeals Bd. (1993) 6 Cal. 4th 1028, 1036-1037, 25 Cal. Rptr. 2d 539, 863 P.2d 784* (even if movant designates motion to quash as "special appearance," if movant seeks relief on any basis other than lack of personal jurisdiction, he or she makes a general appearance); *California Overseas Bank v. French American Banking Corp. (1984) 154 Cal. App. 3d 179, 184, 201 Cal. Rptr. 400]* .

The mere fact that a defendant has previously moved to quash service under *Code Civ. Proc. § 418.10* and petitions the court of appeal to overturn denial of its motions does not grant the defendant immunity from making a general appearance by subsequent participation in the litigation [*see Mansour v. Superior Court (1995) 38 Cal. App. 4th 1750, 1757, 46 Cal. Rptr. 2d 191]* . Thus, for example, it has been held that defendants waived their right to a superior court's denial of their motions to quash service of summons by making a general appearance in the action when, after denial of their motions while their petitions for mandate were pending in the court of appeal, defendants' counsel pursuant to local court rules (1) participated in preparing a joint case management statement in which they listed additional discovery they anticipated to conduct before trial, (2) appeared at an evaluation conference without limiting their appearances to other clients that they were also representing who did not object to the exertion of jurisdiction over them, and (3) after the trial court denied a request to continue the matter due to the petitions pending before the court of appeal, defendants counsel actively participated in the evaluation conference [*Mansour v. Superior Court (1995) 38 Cal. App. 4th 1750, 1757-1758, 46 Cal. Rptr. 2d 191* (initiating discovery unrelated to issue of jurisdiction by issuing deposition subpenas to two treating doctors held also to constitute general appearance)].

An order to show cause for a preliminary injunction is not within the scope of *Code Civ. Proc. § 418.11,* which extends

only to ex parte applications for provisional relief. This is because a motion for a preliminary injunction involves a determination related to the merits of the case. Thus, by filing a motion for discovery in connection with the order to show cause for a preliminary injunction, a defendant has sought affirmative relief from the court, and is found to have made a general appearance in the action [*Factor Health Management v. Superior Court (2005) 132 Cal. App. 4th 246, 249-251, 33 Cal. Rptr. 3d 599]* .

California courts have found that parties have generally appeared under varying circumstances in which the defendants sought affirmative relief. A court is thus required to analyze the defendant's papers to determine if any affirmative relief could be granted on the merits, which is a general appearance [*Dial 800 v. Fesbinder (2004) 118 Cal. App. 4th 32, 53, 12 Cal. Rptr. 3d 711]* .

For acts constituting an appearance in a proceeding under the Family Law Act, see *Cal. Rules of Ct., Rule 5.120*.

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§ 323.63 Acts Not Constituting General Appearance

Certain appearances have been declared by statute or case law not to be a general appearance. For example, no motion under *Code Civ. Proc. § 418.10* (defendant's motion, made within time to respond to complaint, to quash service of summons for lack of personal jurisdiction, to stay or dismiss for inconvenient forum, or to dismiss for delay in prosecution under *Code Civ. Proc. § 583.110 et seq.*) or *Code Civ. Proc. § 473* or *473.5* (relief from default) when joined with a motion under *Code Civ. Proc. § 418.10*, or application to the court or stipulation of the parties for an extension of time to plead, shall be deemed a general appearance [*Code Civ. Proc. § 418.10(d)*]. A motion to reconsider the denial of such a motion also does not constitute a general appearance if it is limited to the same grounds as the original motion [*see Josephson v. Superior Court (1963) 219 Cal. App. 2d 354, 358, 362, 33 Cal. Rptr. 196* (reconsideration of denial of motion to quash service of summons on cross complaint)].

Code Civ. Proc. § 418.10(e) provides that a defendant or cross-defendant may make a motion under *Code Civ. Proc. § 418.10* and simultaneously answer, demur, or move to strike the complaint or cross-complaint. Notwithstanding *Code Civ. Proc. § 1014*, no act by a party who makes a motion under Section 418.10, including filing an answer, demurrer, or motion to strike constitutes an appearance, unless the court denies the motion made under Section 418.10. If the court denies the motion made under Section 418.10, the defendant or cross-defendant is not deemed to have generally appeared until entry of the order denying the motion [*Code Civ. Proc. § 418.10(e)(1)*]. If the motion made under Section 418.10 is denied and the defendant or cross-defendant petitions for a writ of mandate pursuant to *Code Civ. Proc. § 418.10(c)*, the defendant or cross-defendant is not deemed to have generally appeared until the proceedings on the writ petition have finally concluded [*Code Civ. Proc. § 418.10(e)(2)*]. Failure to make a motion under Section 418.10 at the time of filing a demurrer or motion to strike constitutes a waiver of the issues of lack of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in prosecution [*Code Civ. Proc. § 418.10(e)(3)*]. A defendant who chooses to demur or move to strike must also move to quash; he or she cannot reserve the jurisdictional objection and later file it with his or her answer if the challenge to the pleadings fails [*Roy v. Superior Court (2005) 127 Cal. App. 4th 337, 344, 25 Cal. Rptr. 3d 488]* .

An appearance at a hearing at which ex parte relief is sought, or an appearance at a hearing for which an ex parte

application for a provisional remedy is made, is also not a general appearance and does not constitute a waiver of the right to make a motion under *Code Civ. Proc. § 418.10* [*Code Civ. Proc. § 418.11*].

Other acts not constituting a general appearance include the following:

- The payment of the filing fee for filing a notice of motion to quash service [*Josephson v. Superior Court (1963) 219 Cal. App. 2d 354, 356-357, 362* & n.4, *33 Cal. Rptr. 196]* .

- An objection to interrogatories on the ground that they are oppressive, made during the pendency of a motion to quash service of summons [*1880 Corp. v. Superior Court (1962) 57 Cal. 2d 840, 843, 22 Cal. Rptr. 209, 371 P.2d 985]* .

Although the California Supreme Court formerly held that a motion to dismiss for lack of subject matter jurisdiction was not a general appearance [*Goodwine v. Superior Court (1965) 63 Cal. 2d 481, 484-485, 47 Cal. Rptr. 201, 407 P.2d 1]* , the Court, without overruling, or even citing, *Goodwine*, has stated that raising the issue of subject matter jurisdiction does constitute a general appearance [*Greener v. Workers' Comp. Appeals Bd. (1993) 6 Cal. 4th 1028, 1036-1037, 25 Cal. Rptr. 2d 539, 863 P.2d 784]* . The Court stated that it does not approve of the use of a motion to quash as an alternative to a demurrer and that notwithstanding a "special appearance" designation on a motion to quash, if the movant seeks relief on any basis other than lack of personal jurisdiction, he or she makes a general appearance [*Greener v. Workers' Comp. Appeals Bd. (1993) 6 Cal. 4th 1028, 1036-1037, 25 Cal. Rptr. 2d 539, 863 P.2d 784* (ultimately holding, however, that the court lacked subject matter jurisdiction)]. The Court acknowledged, without approving, the existence of an exception recognized by *Delta Imports, Inc. v. Municipal Court (1983) 146 Cal. App. 3d 1033, 1035-1036, 194 Cal. Rptr. 685* , that allows the issue of lack of subject matter jurisdiction to be raised on a motion to quash in unlawful detainer, in which demurrer is not available [*Greener v. Workers' Comp. Appeals Bd. (1993) 6 Cal. 4th 1028, 1036* & n.5, *25 Cal. Rptr. 2d 539, 863 P.2d 784* ; *see Great Western Casinos, Inc. v. Morongo Band of Mission Indians (1999) 74 Cal. App. 4th 1407, 1415-1418, 88 Cal. Rptr. 2d 828* (hybrid motion to quash/dismiss concerning claim of Indian sovereign immunity and federal preemption not construed as general appearance)].

For discussion of acts that do not constitute a general appearance for the purposes of *Code Civ. Proc. § 583.220* (relating to involuntary dismissal for delay in service), see Ch. 212, *Dismissal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsConsent

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28-323 California Forms of Pleading and Practice--Annotated § 323.64

§ 323.64 Appearance Confers Right to Notice of Proceedings

After an appearance, a defendant or a defendant's attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. However, service of notice or papers need not be made on a defendant who has not appeared [*Code Civ. Proc. § 1014*; *see also Code Civ. Proc. § 1010* (providing that no bill of exceptions, notice of appeal, or other notice or paper, other than amendments to the pleadings, or an amended pleading, need be served on any party who has not appeared in the action or proceeding); *Slaybaugh v. Superior Court (1977) 70 Cal. App. 3d 216, 221, 138 Cal. Rptr. 628*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsConsentCivil ProcedurePleading & PracticeService of ProcessGeneral Overview

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28-323 California Forms of Pleading and Practice--Annotated § 323.65

§ 323.65 Appearance by Attorney

[1] Presumption of Authority to Appear

In the absence of any statutory requirement that the authority of an attorney be evidenced by a writing, the act of an attorney in entering the appearance of a defendant carries with it a presumption of due authority to do so [*see Gagnon Co., Inc. v. Nevada Desert Inn (1955) 45 Cal. 2d 448, 459, 289 P.2d 466* ; *Voinich v. Rolleri (1928) 203 Cal. 379, 382, 264 P. 240* ; *Pacific Paving Co. v. Vizelich (1903) 141 Cal. 4, 8, 74 P. 352* ; *Garrison v. McGowan (1874) 48 Cal. 592, 600]* . However, the presumption is rebuttable [*Sullivan v. Dunne (1926) 198 Cal. 183, 190, 244 P. 343* ; *Wilson v. Barry (1951) 102 Cal. App. 2d 778, 780, 228 P.2d 331* ; *see Milrot v. Stamper Medical Corp. (1996) 44 Cal. App. 4th 182, 187* (foundation for presumption lacking in that there was no evidence that corporation was attorney's client at time of postjudgment motion, which was five months before its incorporation, or that attorney had any authority to appear on its behalf at the hearing)].

[2] Unauthorized Appearance

When an attorney, having no authority to do so, enters the appearance of a defendant in an action without service of jurisdictional process, and the fact of the lack of authority is made to appear, the proceeding is void as to the defendant whose appearance was so entered [*Garrison v. McGowan (1874) 48 Cal. 592, 599-600]* . That is, when the only basis for jurisdiction of the person in a particular case is appearance, the purported appearance by an unauthorized attorney cannot confer such jurisdiction [*Neihaus v. Superior Court (1977) 69 Cal. App. 3d 340, 346, 137 Cal. Rptr. 905* ; *see also Milrot v. Stamper Medical Corp. (1996) 44 Cal. App.4th 182, 186-188, 51 Cal. Rptr. 2d 424* (court without jurisdiction to add corporation as judgment debtor at hearing on motion to amend judgment based on attorney's appearance without actual or ostensible authority to represent corporation); *Zirbes v. Stratton (1986) 187 Cal. App. 3d 1407, 1414, 232 Cal. Rptr. 653* (trial court was without jurisdiction to enter judgment against unserved defendant represented by unauthorized attorney)].

Moreover, in an action against several defendants in which summons was not served on any of them, the appearance by an attorney at the request of one defendant, although purporting to be on behalf of all, is not binding on those who did

not authorize the appearance [*County of Merced v. Hicks (1885) 67 Cal. 108, 109, 7 P. 179]* . The fact that an attorney may possess the necessary authority to represent a client in one case is not evidence of the attorney's authority to represent the client in another and distinct proceeding [*Sullivan v. Dunne (1926) 198 Cal. 183, 190, 244 P. 343]* .

[3] Raising Issue of Unauthorized Appearance

[a] Issue to Be Promptly Raised in Trial Court

Any disputes as to the authority of the counsel of record to act for the party he or she purports to represent may be raised in the trial court [*Abeles v. State Bar (1973) 9 Cal. 3d 603, 609 n.7, 108 Cal. Rptr. 359, 510 P.2d 719* ; *Mills Land & Water Co. v. Golden West Refining Co. (1986) 186 Cal. App. 3d 116, 131, 230 Cal. Rptr. 461]* . A defendant who seeks to raise the issue of an unauthorized appearance by an attorney is required to do so promptly after discovery [*see* *Parkside Realty Co. v. MacDonald (1914) 167 Cal. 342, 347, 139 P. 805* ; *Machado v. Machado (1944) 66 Cal. App. 2d 401, 406, 152 P.2d 457]* .

[b] By Direct Attack Before Judgment

The issue as to the attorney's lack of authority may be raised by a motion to withdraw the appearance [*see* *Omega Video Inc. v. Superior Court (1983) 146 Cal. App. 3d 470, 476, 194 Cal. Rptr. 574* ; *Neihaus v. Superior Court (1977) 69 Cal. App. 3d 340, 346, 137 Cal. Rptr. 905* ; *Wilson v. Barry (1951) 102 Cal. App. 2d 778, 780, 228 P.2d 331* ; for a form of notice of motion to withdraw an appearance, *see Ch. 72, Attorney Practice and Ethics, § 72.190* et seq.].

Additionally or alternatively, if the attorney's unauthorized appearance was made by the filing of a demurrer, answer, or other paper constituting an appearance [*see Code Civ. Proc. § 1014*], the defendant may move to strike the pleading or paper [*see Code Civ. Proc. § 436(b)*; *Sullivan v. Dunne (1926) 198 Cal. 183, 186-187, 244 P. 343* (motion to strike demurrer); *People v. Honey Lake Valley Irr. Dist. (1926) 77 Cal. App. 367, 374, 246 P. 819* (motion to strike answer); *see also* *Kellar v. Hendey (1961) 189 Cal. App. 2d 86, 87-88, 10 Cal. Rptr. 748* (motion to strike answer); for a form of notice of motion to withdraw an appearance and strike the answer, *see Ch. 72, Attorney Practice and Ethics, § 72.190* et seq.; for additional forms of motions to strike, *see* Ch. 375, *Motions to Strike: Pleadings*]. If the motion is granted, the defendant will still be required to file a responsive pleading to avoid a default if the court has otherwise obtained jurisdiction over the defendant by service of the summons and complaint [*see Code Civ. Proc. § 585*]. If the service made was not valid, the defendant may wish to combine the motion to strike with a motion to quash service of summons on the ground of lack of jurisdiction of the court over his or her person [*see Code Civ. Proc. § 418.10(a)(1)*].

[c] By Direct Attack After Judgment

A motion under *Code Civ. Proc. § 473(b)*, or *473.5* (relief from default) is proper when a defendant not served with summons has had a judgment taken against him or her in an action in which he or she was represented by an attorney who had no authority from the defendant to do so [*see* *Zirbes v. Stratton (1986) 187 Cal. App. 3d 1407, 1410-1411, 232 Cal. Rptr. 653]* . A motion under *Code Civ. Proc. § 473* or *473.5* may be combined with a motion under *Code Civ. Proc. § 436(b)* to strike the pleading or paper that constitutes the unauthorized appearance. A motion under *Code Civ. Proc. § 473* or *473.5* may also be combined with a motion under *Code Civ. Proc. § 418.10(d)* to quash service of summons for lack of in personam jurisdiction or to stay or dismiss the action for inconvenient forum.

A void judgment may be set aside on the motion of either party after notice to the other [*Code Civ. Proc. § 473(d)*].

A judgment secured by extrinsic fraud may be set aside by an independent action in equity, or by means of a timely motion in the court that rendered the judgment to vacate and set it aside [*see* *Olivera v. Grace(1942) 19 Cal. 2d 570, 575-576, 122 P.2d 564* ; *Parkside Realty Co. v. MacDonald (1914) 167 Cal. 342, 347-348, 139 P. 805* ; *see also Code Civ. Proc. § 86(b)(3)* (limited civil cases); for discussion of collateral attack, *see* [e], *below*].

Thus, when, after a jury verdict in plaintiffs' favor and defendants' appeal from the judgment, plaintiffs brought a postjudgment motion to amend the judgment which resulted in the addition of another entity as a judgment debtor, a trial court has been held to have committed reversible error in not thereafter granting that entity's motion to set aside the judgment against it because the trial court that added it as a judgment debtor never had personal jurisdiction over it based on the following: (1) the entity was never named in the pleadings, or served with either a complaint or motion to amend the judgment, or a notice of appeal and thus proceeded to the status of judgment debtor without ever having been a defendant, (2) the record was devoid of any evidence that the attorney appearing on defendants' behalf at the hearing pursuant to plaintiffs' motion to amend the judgment had any actual or ostensible authority to represent the entity, but to the contrary, that attorney's declaration stated that he had no such authority and that he only had authority to act on the other defendants' behalf, and (3) the entity named as a judgment debtor did not exist in that form at the time of the hearing and was not incorporated until five months thereafter [*Milrot v. Stamper Medical Corp. (1996) 44 Cal. App. 4th 182, 51 Cal. Rptr. 2d 424]* . Moreover, under those circumstances, it was held that because a judgment entered without jurisdiction is void and a void judgment may be set aside anytime, the time limitations in *Code Civ. Proc. § 473* and *Code Civ. Proc. §§ 663, 663a* (motions to vacate a judgment) did not apply [*Milrot v. Stamper Medical Corp. (1996) 44 Cal. App. 4th 182, 188, 51 Cal. Rptr. 2d 424]* .

For further discussion and forms relating to direct attack after judgment by motion, see Ch. 489, *Relief For Judgments and Orders* .

[d] Pending Appeal

When an appeal has been taken from the judgment by the attorney who appeared for the party and is pending, the trial court has no power to vacate the judgment on the ground it lacked in personam jurisdiction because (1) the summons had not been served on the party and (2) the attorney who appeared for the party was not authorized to do so. In such case, the issue of an unauthorized appearance by the attorney in the trial court and in taking the appeal can be raised only in the appellate court [*Parkside Realty Co. v. MacDonald (1914) 167 Cal. 342, 346, 139 P. 805]* .

[e] By Collateral Attack

A judgment that is void on its face may be attacked at any time either directly or collaterally [*see, e.g., Ivory v. Superior Court (1938) 85 P.2d 894* ; *Forbes v. Hyde (1866) 31 Cal. 342, 347]* . Conversely, as a general rule, a judgment of a California state court may not be attacked collaterally unless the judgment is void on its face [*see Hill v. City Cab etc. Co. (1889) 79 Cal. 188, 190, 21 P. 728]* . That is, jurisdiction is presumed to exist unless lack of jurisdiction appears on the face of the record, which is defined normally as the judgment roll [*see, e.g., Gagnon Co., Inc. v. Nevada Desert Inn (1955) 45 Cal. 2d 448, 456, 289 P.2d 466* ; *Latta v. Tutton (1898) 122 Cal. 279, 282, 54 P. 844* ; *see also Code Civ. Proc. § 670* (judgment roll in a civil action)]. However, in a proceeding for dissolution of marriage, when the defendant's appearance had been by a notice of appearance and waiver without any pleading being filed by him, and there was, therefore, no judgment roll as defined by statute, it has been held that the court could, insofar as issues as to children of the marriage were concerned, look to other relevant papers filed in the case (probation officer's report) to establish that the judgment was void in part for lack of subject matter jurisdiction [*Swain v. Swain (1967) 250 Cal. App. 2d 1, 10-11, 58 Cal. Rptr. 83]* .

Consequently, a California judgment may not be impeached collaterally on the ground that a regularly licensed attorney appearing as such for a party to an action had no authority to act on the party's behalf, because that fact would not appear from the judgment roll [*Gagnon Co., Inc. v. Nevada Desert Inn (1955) 45 Cal. 2d 448, 456, 289 P.2d 466]* . But, in the case of an unauthorized appearance by counsel, if a party admits facts which show that the appearance was unauthorized and, therefore, that the judgment is void, or if he or she allows those facts to be established without opposition, then, as a question of law on such facts, the case is treated as one where the judgment is void on its face and the attack on the judgment will succeed [*Hill v. City Cab etc. Co. (1889) 79 Cal. 188, 191, 21 P. 728* ; *see also* discussion under § 323.45[3][b]; for further discussion of collateral attack after judgment, *see* Ch. 489, *Relief From*

Judgments and Orders].

[f] Action Based on Foreign Judgment

The clause of the U.S. Constitution which requires full faith and credit to be given in each state to the records and judicial proceedings of every other state (U.S. Const., art. IV, § 1) applies to the records and proceedings of courts only so far as they have jurisdiction, and the courts of one state are not required to give full faith and credit to, or regard as valid or conclusive, any judgment of a court of another state which had no jurisdiction of the subject matter, or of the parties, or, in proceedings in rem, of the res [*Gagnon Co., Inc. v. Nevada Desert Inn (1955) 45 Cal. 2d 448, 457, 289 P.2d 466]* . Accordingly, the jurisdiction of a court rendering a judgment is open to inquiry under proper averments when questioned in the court of another state, and this applies in the case of a foreign judgment entered on an attorney's unauthorized appearance for a party [*Gagnon Co., Inc. v. Nevada Desert Inn (1955) 45 Cal. 2d 448, 457, 461, 289 P.2d 466]* .

Thus, the lack of authority of an attorney to appear for the defendant in a sister state action may be alleged in a California state court in an answer to the complaint to establish the sister state judgment as a California judgment. That is, the sister state judgment is subject to collateral attack by the defendant showing that he or she made no appearance in the sister state action [*Slack v. Slack (1966) 241 Cal. App. 2d 530, 539, 50 Cal. Rptr. 763* ; *Raynum v. Wallace (1938) 28 Cal. App. 2d 136, 137-138, 82 P.2d 74]* . The issue as to the authority of an attorney to appear for a party in a sister state action and to dismiss the action with prejudice may also be raised in a California action against the defense of res judicata based on the sister state judgment in the case since the California court may inquire into the foreign court's jurisdiction [*Gagnon Co., Inc. v. Nevada Desert Inn (1955) 45 Cal. 2d 448, 457, 289 P.2d 466* (nevertheless affirming judgment sustaining defense)].

Legal Topics:

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

§§ 323.66[Reserved]

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28-323 California Forms of Pleading and Practice--Annotated § 323.80

§ 323.80 Related Publications from Matthew Bender

For discussion of service of summons and forms of summonses, see Ch. 518, *Service of Summons and Papers*

For discussion and forms relating to relief from defaults and default judgments and relief from void judgments generally, see Ch. 489, *Relief From Judgments and Orders*

For discussion and forms of notices of motion and orders generally, see Ch. 372, *Motions and Orders*

For memoranda supporting and opposing a motion to set aside and vacate a default and default judgment, see California Points and Authorities, Ch. 70, *Defaults, Default Judgments* , and *Relief From Judgments and Orders*

For memoranda supporting and opposing a motion to quash service of summons for lack of personal jurisdiction or to stay or dismiss an action for inconvenient forum, or to set aside and vacate a default and default judgment for lack of personal jurisdiction, see California Points and Authorities, Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresPleading & PracticeService of ProcessSummonsGeneral OverviewCivil ProceduresPretrial JudgmentsDefaultRelief From DefaultCivil ProceduresJudgmentsRelief From JudgmentVoid Judgments

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§ 323.81 Federal Constitution

Exemption from arrest, except for treason, felony, and breach of the peace, of U.S. Congress members while going to, attending, and returning from sessions of their respective houses. U.S. Const., art. I, § 6, cl. 1

Prohibition against depriving person of life, liberty, or property without due process of law. *U.S. Const, amends. V, XIV*

Requirement that full faith and credit be given in each statute to judicial proceedings of every other state. U.S. Const., art. IV

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawCongressional Duties & PowersSpeech & Debate ImmunityConstitutional LawRelations Among GovernmentsFull Faith & CreditConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionConstitutional LawSubstantive Due ProcessScope of Protection

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§ 323.82 State Constitution

Prohibition against depriving person of life, liberty, or property without due process of law. *Cal. Const., art. I, § 7(a)*

Immunity of California legislators to civil process during and for five days before and after legislative session. *Cal. Const., art. IV, § 14*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 323.83 Federal Statutes

Venue of actions against national banks. *12 U.S.C. § 94*

Requirement that action or proceeding against foreign officer entitled to diplomatic immunity be dismissed. *22 U.S.C. § 254d*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 323.84 State Statutes

[1] Appeal

Appeal of order granting motion to quash service of summons for lack of personal jurisdiction or to stay or dismiss action on ground of inconvenient forum. *Code Civ. Proc. §§ 904.1(a)(3), 904.2(d)*

[2] Immunity to Service of Process

Nonresident witness while in California under subpoena to testify in criminal matter is not subject to local civil or criminal process. *Penal Code § 1334.4*

Nonresident witness while passing through California to testify in another state under subpoena is not subject to local civil or criminal process. *Penal Code § 1334.5*

Person brought into California on or after waiver of extradition based on criminal charge is not subject to service of process in civil actions arising out of same facts as criminal proceedings for which he or she was returned until conviction or, if acquitted, until he or she has had reasonable opportunity to return to state from which he or she was extradited. *Penal Code § 1555*

[3] Jurisdiction

Authority of court to exercise jurisdiction on any basis not inconsistent with federal or state constitution. *Code Civ. Proc. § 410.10*

Jurisdiction over parties. *Code Civ. Proc. §§ 410.50-410.70*

Jurisdiction necessary to sustain judgment. *Code Civ. Proc. § 1917*

Authority of court to appoint an attorney to represent a service member, as defined, in any action or proceeding in which that service member is a party, if the service member does not personally appear therein or is not represented by an authorized attorney. *Mil. and Vet. Code § 401* (providing that no attorney so appointed to protect a service member shall have the power to waive any right of the person for whom he or she is appointed or bind him or her by his or her acts)

[4] Motion to Quash Service of Summons

Motion to quash service of summons for lack of personal jurisdiction over defendant. *Code Civ. Proc. § 418.10(a)(1), (b)*

Written notice of motion to quash summons as required to be given as prescribed in *Code Civ. Proc. § 1005(b). Code Civ. Proc. §§ 418.10(b), 1005(a)(4)*

[5] Motion to Vacate Default Judgment

Motion to set aside and vacate default and default judgment under *Code Civ. Proc. § 473* or *473.5*, when joined with motion under *Code Civ. Proc. § 418.10* to quash service of summons or to stay or dismiss action, is not to be deemed general appearance. *Code Civ. Proc. § 418.10(d)*

Grounds of motion to set aside and vacate default and default judgment. *Code Civ. Proc. §§ 473(b), (d), 473.5*

[6] Review of Denial of Motion

Mandate to review denial of motion to quash service of summons for lack of personal jurisdiction or to stay or dismiss action for inconvenient forum. *Code Civ. Proc. § 418.10(c)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 323.85 California Rules of Court

Time for responsive pleading under *Code Civ. Proc. § 418.10(c)* after Supreme Court denies petition to review Court of Appeal denial of writ of mandate that was sought to review trial court's denial of motion to quash. *Cal. Rules of Ct., Rule 8.491*

Legal Topics:

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§ 323.86 Decisions

[1] Bases of Jurisdiction

[a] Causing Effect in State by Act Done Elsewhere

California superior court had in personam jurisdiction over nonresident defendants in libel action by California resident against editor of national magazine, incorporated and having its principal place of business in Florida, and reporter employed by magazine, for libelous article written by reporter and edited by editor, both acts occurring in Florida, because their intentional conduct in Florida in writing and editing the libelous article for publication in the magazine was calculated to cause a tortious injury to plaintiff in California where the magazine had a wide circulation. *Calder v. Jones (1984) 465 U.S. 783, 790, 104 S. Ct. 1482, 79 L. Ed. 2d 804 , aff'g Jones v. Calder (1982) 138 Cal. App. 3d 128, 134, 187 Cal. Rptr. 825*

Out-of-state act having effect within state is permissibly sufficient to support jurisdiction in non-tort situation. *Haisten v. Grass Valley Medical Reimbursement (9th Cir. 1986) 784 F.2d 1392, 1399*

California has recognized that state may exercise jurisdiction over one who causes effects in state by act or omission done elsewhere with respect to causes of action arising from effects, unless nature of effects and of individual's relationship to state make exercise of jurisdiction unreasonable. *Secrest Machine Corp. v. Superior Court (1983) 33 Cal. 3d 664, 669, 190 Cal. Rptr. 175, 660 P.2d 399*

One of recognized bases for jurisdiction in California arises when defendant has caused an "effect" in California by act or omission which occurs elsewhere, although mere causing of effect in California is not necessarily sufficient to afford constitutional basis for jurisdiction if imposition of jurisdiction would be unreasonable. *Sibley v. Superior Court (1976) 16 Cal. 3d 442, 445-446, 128 Cal. Rptr. 34, 546 P.2d 322* ; *Brown v. Watson (1989) 207 Cal. App. 3d 1306, 1314, 255 Cal. Rptr. 507*

Under the "effects" test for determining purposeful availment in personal jurisdiction analysis, a defendant might be subject to jurisdiction in the forum state if the defendant engaged in intentional conduct expressly aimed at or targeting the forum state, and the defendant knew the intentional conduct would cause harm in the future. *Archdiocese of Milwaukee v. Superior Court (2003) 112 Cal. App. 4th 423, 5 Cal. Rptr. 3d 154*

Despite not being present in state, natural person who commits tort while acting on corporation's behalf is subject to state's jurisdiction when delict intended to inflict tortious harm within state; natural person may also be subject to jurisdiction if delict could reasonably be expected to inflict tortious harm within state. *Serafini v. Superior Court (1998) 68 Cal. App. 4th 70, 81, 80 Cal. Rptr. 2d 159*

Mere causing of effect is not necessarily sufficient to afford constitutional basis for jurisdiction; jurisdiction may be invoked only where actor committed out-of-state act intending to cause effects in California or reasonably expecting that effects in California would result. *Goehring v. Superior Court (1998) 62 Cal. App. 4th 894, 908-909, 73 Cal. Rptr. 2d 105*

In typical scenario when patient travels out of state to see doctor and there receives allegedly negligent treatment, courts consistently hold patient's home state cannot exercise personal jurisdiction over physician even though effects of doctor's negligence are felt in patient's home state; more difficult cases are those where some aspect of relationship crosses state lines; just because doctor and patient communicate across state lines, however, does not establish minimum contacts necessary for personal jurisdiction; follow-up consultation ancillary to examination and treatment made by the out-of-state doctor, telephone calls about patient's status, or arrangements for patient to continue with medication that doctor prescribed do satisfy minimum contacts requirement; out-of-state physician's follow-up care of patient by telephone, even when home state patient pays for it, is not sufficient basis for personal jurisdiction; distinguishing cases in which minimum contacts have been found sufficient for exercise of personal jurisdiction because interstate marketing scheme was involved or doctor's services were fundamentally interstate in nature from inception of relationship. *Prince v. Urban (1996) 49 Cal. App. 4th 1056, 1058, 1061, 1067, 57 Cal. Rptr. 2d 181*

California court lacked jurisdiction over out-of-state company in action by plaintiffs for alleged preconception torts based on plaintiffs' grandmothers ingesting drug diethylstilbestrol (DES) while pregnant with plaintiffs' mothers resulting in plaintiffs' mothers suffering disabilities manifesting themselves at various points after birth and plaintiffs suffering similar injuries when they were born when only one plaintiff was domiciled in California, none of plaintiffs' grandmothers ingested DES in California but rather in New York, and none of the grandmothers acquired the product as a result of defendant's activities related to California; plaintiffs lacked element to support specific (limited) jurisdiction, that is, that nonresident's acts must cause forum-related injury of which plaintiff complains. *Boaz v. Boyle & Co. (1995) 40 Cal. App. 4th 700, 715-719, 46 Cal. Rptr. 2d 888*

In plaintiff's action against out-of-state attorney and out-of-state law firm for defamation and false light invasions of privacy based on allegations to effect that attorney letter opinion contained defamatory statement and that others repeated the false statements in California, California lacked jurisdiction over defendants who denied living, maintaining an office, doing business or owning property in California and attorney declared only communications concerning plaintiff were with persons and entities in Arizona and that he never caused another to speak or write about plaintiff in California, when among other reasons, plaintiff failed to establish requisites for basing jurisdiction over nonresident who commits an act elsewhere causing an effect in the state, that is, plaintiff failed to establish that defendants' tortious conduct was subject to special regulation or that defendants in connection with causing an affect within the forum state invoked benefits and protections of its laws; it is reasonable to exercise jurisdiction on basis of defendant intentionally causing effects in state by omission or act done elsewhere whenever (a) effects are of nature that state treats as exceptional and subjects to special regulation or (b) defendant has, in connection with causing such effects in forum state, invoked benefits and protections of its laws. *Mansour v. Superior Court (1995) 38 Cal. App. 4th 1750, 1758-1762, 46 Cal. Rptr. 2d 191*

California court has jurisdiction over out-of-state parents of minor attending University of California based on parents intentionally causing effect of minor's unsupervised presence in California when action is based on parent's liability for minor's willful misconduct; exercise of jurisdiction is reasonable both because effect is of nature that state treats as exceptional and subjects to special regulation (*Civ. Code § 1714.1*) and because parents' invoked benefits and protections of California law by acquiescing in minor's choice of school and paying tuition. *Jamshid-Negad v. Kessler (1993) 15 Cal. App. 4th 1704, 1708-1709, 19 Cal. Rptr. 2d 621*

"Latticework" of contacts linking defendants and California, including act in another state of declaring California conservatorship an "event of default" terminating relationship to California limited partnership, constituted sufficient minimum contacts to justify jurisdiction over defendants. *Checker Motors Corp. v. Superior Court of Los Angeles County (1993) 13 Cal. App. 4th 1007, 1018, 17 Cal. Rptr. 2d 618*

Foreign corporation's alleged inducement outside California of codefendant to breach contract with plaintiff was insufficient effect to justify personal jurisdiction over corporation. *Beckman v. Thompson (1992) 4 Cal. App. 4th 481, 485, 6 Cal. Rptr. 2d 60*

Out-of-state act done with intention of causing effects in state is proper basis for state's exercise of judicial jurisdiction over actor, or over one who caused act to be done, as to causes of action arising from these effects to same extent it could have had effects resulted from act done within state. *Seagate Technology v. A.J. Kogyo Co. (1990) 219 Cal. App. 3d 696, 703, 268 Cal. Rptr. 586*

State has jurisdiction over action arising out of act done elsewhere having effects within state unless nature of effects and defendant's relationship to state make exercise of jurisdiction unreasonable; exercise of jurisdiction on this basis is reasonable whenever (1) act is of nature that state treats as exceptional and subject to special regulation, or (2) defendant has, in connection with his or her causing such effects in forum state, invoked benefits and protections of its laws; but merely causing an effect in California is not in and of itself sufficient to invoke jurisdiction. *Wolfe v. City of Alexandria (1990) 217 Cal. App. 3d 541, 547-548, 265 Cal. Rptr. 881*

Criminal nature of obscene telephone calls placed by out-of-state defendant to California plaintiffs and fact that they were intended to cause effects in California support California's exercise of in personam jurisdiction over defendant in action for damages for intentional infliction of emotional distress. *Schlussel v. Schlussel (1983) 141 Cal. App. 3d 194, 197-199, 190 Cal. Rptr. 95*

In action by wife against husband for child and spousal support, husband's acts and omissions outside California caused effect within state sufficient to confer jurisdiction, when husband and wife lived in California at various times prior to and during marriage, husband was traded to Chicago baseball team, altercations ensued, husband refused to support wife and two children, and wife returned to California with children to live on public assistance at her parents' residence. *McGlothen v. Superior Court (1981) 121 Cal. App. 3d 106, 111-113, 175 Cal. Rptr. 129*

Representation of mother by Louisiana attorney and his law firm, neither of which had any contact with the State of California, in child custody litigation in Louisiana pursuant to order of California court in proceeding in which California court had personal jurisdiction over both parents was insufficient basis for subjecting Louisiana attorney and his firm to suit in California for child abduction based on fact that attorney and his law firm performed acts outside California which had effects inside California. *Demarest v. Superior Court (1980) 103 Cal. App. 3d 791, 799, 165 Cal. Rptr. 641*

[b] Consent

Law is well settled that parties to contract may agree in advance to submit to jurisdiction of given court. *National*

Equipment Rental v. Szukhent (1964) 375 U.S. 311, 315-316, 84 S. Ct. 411, 11 L. Ed. 2d 354 ; *see also* *Smith, Valentino & Smith, Inc. v. Superior Court (1976) 17 Cal. 3d 491, 494-496, 131 Cal. Rptr. 374, 551 P.2d 1206*

Pennsylvania insurance guaranty association was not impliedly consenting to be sued in California since it stood in shoes of insolvent Pennsylvania insurer only for some purposes, extent of its liability was limited to statutorily defined claims, and it was not in the business of insurance for profit. *Pennsylvania Life & Health Ins. Guaranty Ass'n v. Superior Court (1994) 22 Cal. App. 4th 477, 485-487, 27 Cal. Rptr. 2d 507*

With respect to plaintiff, jurisdiction is conferred by consent and generally extends beyond plaintiff's particular cause of action to encompass any cross complaint of defendant as well; plaintiff impliedly consents to rendition of affirmative judgment against it within issues presented by its pleadings and affecting subject matter of its action. *In re Marriage of Aron (1990) 224 Cal. App. 3d 1086, 1095, 274 Cal. Rptr. 357*

[c] Doing Act in State

There is nothing unreasonable about subjecting a defendant to the jurisdiction of California courts in an independent action to renew a 1992 judgment. Defendant had entered into a contract in California (a promissory note) that was to be performed in California (i.e., payment of the debt), which he breached when he failed to repay the debt. An action on the note was filed in California, and defendant submitted himself to the jurisdiction of the California court when he appeared in the action. A money judgment was entered against defendant in California, and he has failed to pay his obligations. The passage of time between the original California litigation and the revival action, during which defendant has had no additional contacts with California, does not defeat personal jurisdiction as concerns the enforcement of the 1992 judgment. Such a conclusion could encourage judgment debtors to evade legal obligations imposed by a judgment of this state's courts by simply packing up their assets and leaving the jurisdiction. *The Cadle Co. II v. Fiscus (2008) 163 Cal. App. 4th 1232, 1240, 78 Cal. Rptr. 3d 238*

Where the only contact a Virginia university had with California was the university's recruiting coordinator visit to plaintiff in California to recruit him to play football for the university, and the execution of a scholarship agreement by plaintiff in California, the court found that the university had not purposely availed itself of the benefits of doing business in California such that it could expect to be subject to the jurisdiction of California courts. The nexus between the university's activities in California and the injury plaintiff suffered in Virginia was so attenuated as to be virtually nonexistent. *Roman v. Liberty University, Inc. (2008) 162 Cal. App. 4th 670, 680, 75 Cal. Rptr. 3d 828*

Where claim arises directly from services rendered by appellant law firm for services rendered to a former client in California, limited jurisdiction existed for resolution of the claim, even when respondent was dismissed from previous unrelated action based on insufficient contacts with California. *Daar & Newman v. VRL Int'l (2005) 129 Cal. App. 4th 482, 493, 28 Cal. Rptr. 3d 566*

Negotiation and execution in California of contract to provide medical treatment to California residents while passengers on cruise on foreign commercial vessel out of state was sufficient contact with state to support exercise of in personam jurisdiction by California court over nonresident defendants in action for negligently rendering that medical treatment, there being logically no reason why tort cannot grow out of contractual contact when contractual contact is a "but for" causative factor for tort. *Dialysis at Sea, Inc. v. Superior Court (1989) 216 Cal. App. 3d 788, 795, 265 Cal. Rptr. 71* , overruled by *Vons Cos., Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 468-469, 58 Cal. Rptr. 2d 899* (rejecting "but for" test as overly mechanical)

When California is asked to exercise specific jurisdiction over a particular claim and the court is satisfied the defendant purposefully availed itself of the benefits of conducting business within California, the appropriate inquiry becomes whether the plaintiff's cause of action arises out of or has a substantial connection with a business relationship defendant

has purposefully established within California. The courts thus asks (1) what is the business relationship between the defendant and the California-based interests, (2) what is the claim asserted by the plaintiff against the defendant, and (3) is there a substantial nexus or relationship between the two because the latter arises out of or it substantially connected to the former. The first inquiry addresses the purposeful availment issue, and the latter two inquiries focus on whether the particular claim is substantially related to the defendant's forum contacts. *VirtualMagic Asia, Inc. v. Fil-Cartoons, Inc. (2002) 99 Cal. App. 4th 228, 239-240, 121 Cal. Rptr. 2d 1*

Where a complaint alleges that a defendant, during the course of his employment, acquired trade secrets and other confidential information regarding his employer's products, customers, and employees, which he then used to cause harm to the employer and thus to the employer's customers and to its business revenues in California, a court may find that claims raised are directly related to the defendant's contacts with California in that they arise from the employment relationship, and that the requisite substantial nexus exists between the controversy at issue and the defendant's contacts with California. *Integral Development Corp. v. Weissenbach (2002) 99 Cal. App. 4th 576, 587, 122 Cal. Rptr. 2d 24*

State has special interest in exercising jurisdiction over those who commit tortious act within its territory; exercise of jurisdiction by state over those who commit or cause to be committed in state what is claimed to be a tortious act is reasonable; under California's long-arm statute and federal due process, tortious act, standing alone, is sufficient to find personal jurisdiction if act is aimed at resident of forum state or has effects in forum state. *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 535-536, 257 Cal. Rptr. 278* ; *Kaiser Aetna v. Deal (1978) 86 Cal. App. 3d 896, 900, 150 Cal. Rptr. 615*

California court had in personam jurisdiction over nonresident defendant in paternity action by county against nonresident defendant when act of sexual intercourse leading to conception and birth occurred in California. *County of Humboldt v. Harris (1988) 206 Cal. App. 3d 857, 860-861, 254 Cal. Rptr. 49*

Personal jurisdiction over any nonresident individual must be premised on forum-related acts personally committed by that individual; hence, personal jurisdiction in California over nonresidents who are alleged coconspirators does not attach on basis of fraudulent acts or omissions committed in California by another defendant. *Kaiser Aetna v. Deal (1978) 86 Cal. App. 3d 896, 901, 150 Cal. Rptr. 615*

State has power to exercise judicial jurisdiction over individual who has done, or has caused to be done, act in state with respect to cause of action in tort arising from such act, and any cause of action not in tort arising from such act unless nature of act and individual's relationship to state make exercise of jurisdiction unreasonable. *National Life of Florida Corp. v. Superior Court (1971) 21 Cal. App. 3d 281, 287, 98 Cal. Rptr. 435*

Defendant is clearly subject to the personal jurisdiction of California courts under both the general and specific categories of personal jurisdiction where complaint alleged that defendant systematically and continually does business in California, and the defendant did not deny that it maintains numerous offices and does extensive business in this state, and where the action (involving defendant's alleged recording of telephone conversations relating to business transactions) plainly arises directly out of defendant's business activity in this state. *Kearney v. Salomon Smith Barney, Inc. (2006) 39 Cal. 4th 95, 103-04, 45 Cal. Rptr. 3d 730*

[d] Doing Business in State

Corporation which purposefully avails itself of privilege of conducting activities within forum state has clear notice that it is subject to suit there, and can act to alleviate risk of burdensome litigation by procuring insurance, passing expected costs on to customers, or, if risks are too great, severing its connection with state. *World-Wide Volkswagen*

Corp. v. Woodson (1980) 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 ; *St. Joe Paper Co. v. Superior Court (1981) 120 Cal. App. 3d 991, 999, 175 Cal. Rptr. 94 , cert. denied, 455 U.S. 982 (1982)*

Even where a California resident initiates a phone call to a telemarketing corporation to buy a product, if the telemarketer who handles the order then initiates a sale of a separate product (referred to as an "upsell"), the telemarketing corporation has purposefully availed itself of the privileges of conducting activities within California. *West Corp. v. Superior Court (2004) 116 Cal. App.4th 1167, 1177-1178, 11 Cal. Rptr. 3d 145*

Corp. Code § 31420, a service of process statute, does not create an independent basis for personal jurisdiction for claims arising under the California Franchise Investment Law. Notwithstanding Section 31420, there must be grounds for exercising personal jurisdiction, pursuant to *Code Civ. Proc. § 410.10*, over a nonresident defendant that are consistent with the U.S. Constitution. *Thomson v. Anderson (2004) 113 Cal. App. 4th 258, 266-271, 6 Cal. Rptr. 3d 262*

Minimal resales of a product in California by a distributor, standing alone, do not amount to the substantial, continuous, and systematic contacts with the forum state necessary for the exercise of general jurisdiction over a foreign manufacturer doing business in its home country. *Carretti v. Italpast (2002) 101 Cal. App. 4th 1236, 1253-1254, 125 Cal. Rptr. 2d 126*

Meaning of term "doing business" in state. *Circus Circus Hotels, Inc. v. Superior Court (1981) 120 Cal. App. 3d 546, 563-567, 174 Cal. Rptr. 885* , disapproved to extent inconsistent with *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 58 Cal. Rptr. 2d 899*

[e] Domicile

Domicile in state is alone sufficient to bring absent defendant within reach of state's jurisdiction for purposes of personal judgment by means of appropriate substituted service. *Milliken v. Meyer (1940) 311 U.S. 457, 463-464, 61 S. Ct. 339, 85 L. Ed. 278* ; *Allen v. Superior Court (1953) 41 Cal. 2d 306, 310-311, 259 P.2d 905*

A refusal by California courts to exercise jurisdiction cannot be justified by the mere fact that a claim arising from California contacts is prosecuted by a nonresident. While the foreign status of an assignee might in some cases reduce the state's interest in adjudicating a dispute, that interest is at most a subsidiary consideration that cannot by itself justify a denial of access to California's courts. *Epic Communications, Inc. v. Richwave Technolgy, Inc. (2009) 179 Cal. App. 4th 314, 317-318, 101 Cal. Rptr. 3d 572*

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Mere fact of past residency fails to provide sufficient contacts of such nature and quality to entertain personal jurisdiction over a defendant consistent with traditional notions of fair play and substantial justice. *Muckle v. Superior Court (2002) 102 Cal. App. 4th 218, 225-231, 125 Cal. Rptr. 2d 303*

Former domicile of defendant in forum state is insufficient by itself to confer jurisdiction when domicile had no relation to litigation; but domicile at time cause of action arose, in addition to allegations that action was based on defendant's activities within forum state, affords state constitutional basis for personal jurisdiction. *Kroopf v. Guffey (1986) 183 Cal. App. 3d 1351, 1358, 228 Cal. Rptr. 807*

[f] Presence

Presence in California when service of process was effected meets jurisdictional requirement. *Silverman v. Superior Court (1988) 203 Cal. App. 3d 145, 150, 249 Cal. Rptr. 724* ; *see* *Burnham v. Superior Court of California (1990) 495 U.S. 604, 607-640, 110 S. Ct. 2105, 109 L. Ed. 2d 631* (lead opinion and separate opinions concurring in judgment only)

[g] Ownership, Use, or Possession of Thing in State

Ownership of car, agreement to be responsible for acts of minor son, and allowing uninsured son to take car from California to Indiana rendered owner liable under Indiana law for injuries sustained when car driven by son was involved in accident in Indiana and subjected owner to personal jurisdiction of Indiana court under Indiana's long-arm statute; default judgment subsequently entered in Indiana was enforceable in California. *Indiana Insurance Co. v. Pettigrew (1981) 115 Cal. App. 3d 862, 864-868, 171 Cal. Rptr. 770*

[2] Classification of Actions and Judgments

[a] In Personam

Valid judgment imposing personal obligation or duty in favor of plaintiff as permitted to be entered only by court having jurisdiction over person of defendant. *Kulko v. California Superior Court (1978) 436 U.S. 84, 91, 98 S. Ct. 1690, 56 L. Ed. 2d 132*

In personam action and judgment defined. *Shaffer v. Heitner (1977) 433 U.S. 186, 199, 97 S. Ct. 2569, 53 L. Ed. 2d 683* ; *Hanson v. Denckla (1958) 357 U.S. 235, 246 n.12, 78 S. Ct. 1228, 2 L. Ed. 2d 1283*

Any judgment purporting to bind person of defendant over whom court had not acquired in personam jurisdiction as void within state as well as outside state. *Hanson v. Denckla (1958) 357 U.S. 235, 250, 78 S. Ct. 1228, 2 L. Ed. 2d 1283*

State, being forbidden to enter judgment attempting to bind person over whom it has no jurisdiction, as having even less right to enter judgment purporting to extinguish interest of person in property over which court has no jurisdiction. *Hanson v. Denckla (1958) 357 U.S. 235, 250, 78 S. Ct. 1228, 2 L. Ed. 2d 1283*

For in personam jurisdiction to exist, court as required to have personal jurisdiction over defendant. *Hartford v. Superior Court (1956) 47 Cal. 2d 447, 454, 304 P.2d 1* ; *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 799, 100 Cal. Rptr. 477*

Although custody of children is question of in rem jurisdiction, attempt to impose child support payments on nonresident as question of in personam jurisdiction as court is seeking to fasten personal obligation on defendant. *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 797-805, 100 Cal. Rptr. 477*

[b] In Rem

When court's jurisdiction is based on court's power over property within its territory, action as called "in rem" or "quasi in rem." *Shaffer v. Heitner (1977) 433 U.S. 186, 199, 97 S. Ct. 2569, 53 L. Ed. 2d 683*

In rem judgment defined. *Shaffer v. Heitner (1977) 433 U.S. 186, 199 n.17, 97 S. Ct. 2569, 53 L. Ed. 2d 683* ;

Hanson v. Denckla (1958) 357 U.S. 235, 246 n.12, 78 S. Ct. 1228, 2 L. Ed. 2d 1283

All assertions of state jurisdiction, including jurisdiction of actions in rem, as required to be evaluated by "minimum contacts" standards. *Shaffer v. Heitner (1977) 433 U.S. 186, 207, 97 S. Ct. 2569, 53 L. Ed. 2d 683*

Because judicial jurisdiction over a thing refers to jurisdiction over interests of persons in a thing, in order to justify exercise of jurisdiction in rem, basis for jurisdiction as required to be sufficient to justify exercise of jurisdiction over interests of persons in a thing. *Shaffer v. Heitner (1977) 433 U.S. 186, 207, 97 S. Ct. 2569, 53 L. Ed.2d 683*

Basis of in rem jurisdiction as presence of subject property within territorial jurisdiction of forum state. *Hanson v. Denckla (1958) 357 U.S. 235, 246, 78 S. Ct. 1228, 2 L. Ed. 2d 1283*

Probate proceedings as proceedings in rem. *Estate of Neilson (1962) 57 Cal. 2d 733, 748, 22 Cal. Rptr. 1, 371 P.2d 745* (proceeding to determine heirship); *Estate of Neubauer (1958) 49 Cal. 2d 740, 745, 321 P.2d 741* (probate of will); *Estate of Plaut (1945) 27 Cal. 2d 424, 428, 164 P.2d 765* (will contest); *Lilienkamp v. Superior Court (1939) 14 Cal. 2d 293, 298, 93 P.2d 1008* (distribution of estate); *Security First Nat. Bk. v. Superior Court(1934) 1 Cal. 2d 749, 755, 37 P.2d 69* (administration of testamentary trust; overruled on another point by implication in *Estate of Charters (1956) 46 Cal. 2d 227, 293 P.2d 778* ; *see* *Estate of Auslender (1960) 53 Cal. 2d 615, 626 n.1, 2 Cal. Rptr. 769, 349 P.2d 537*)

In rem jurisdiction as required to be authorized by statute. *Lee v. Silva (1925) 197 Cal. 364, 371, 240 P. 1015*

Eminent domain proceedings as in nature of actions in rem. *Harrington v. Superior Court (1924) 194 Cal. 185, 189, 228 P. 15* ; *San Bernardino etc. Water Dist. v. Gage Canal Co. (1964) 226 Cal. App. 2d 206, 210, 37 Cal. Rptr. 856*

Validation action is a proceeding in rem. *Bernardi v. City Council (1997) 53 Cal. App. 4th 718, 61 Cal. Rptr. 2d 895*

Action affecting status of persons as action in rem. *In re Hanley (1988) 199 Cal. App. 3d 1109, 1119, 245 Cal. Rptr. 441* (marriage status); *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 798, 100 Cal. Rptr. 477* (status of children presently within state); *Mungia v. Superior Court (1964) 225 Cal. App. 2d 280, 284, 37 Cal. Rptr. 285* (marriage status); *but see* *Hartford v. Superior Court (1956) 47 Cal. 2d 447, 453-457, 304 P.2d 1* , overruled on other grounds in *Leadford v. Leadford (1992) 6 Cal. App. 4th 571, 8 Cal. Rptr. 2d 9* (action or proceeding seeking to fasten relationship on defendant, such as action seeking to declare defendant plaintiff's father, as in personam rather than in rem, and personal jurisdiction over defendant as required)

[c] Quasi in Rem

Defendant's insurer's obligation under policy to defend as not sufficient contact with forum state to permit exercise of quasi in rem jurisdiction over defendant when defendant's insurer did business in forum state but defendant was nonresident and accident which was basis of cause of action occurred outside of state. *Rush v. Savchuk (1980) 444 U.S. 320, 328, 330, 100 S. Ct. 571, 62 L. Ed. 2d 516*

When court's jurisdiction is based on court's power over property within its territory, action as called "in rem" or "quasi in rem." *Shaffer v. Heitner (1977) 433 U.S. 186, 199, 97 S. Ct. 2569, 53 L. Ed. 2d 683, 694*

Quasi in rem judgment defined. *Shaffer v. Heitner (1977) 433 U.S. 186, 199 n.17, 97 S. Ct. 2569, 53 L. Ed. 2d 683, 694* ; *Hanson v. Denckla (1958) 357 U.S. 235, 246 n.12, 78 S. Ct. 1228, 2 L. Ed. 2d 1283* ; *Estate of Johnson (1965) 233 Cal. App. 2d 785, 791, 43 Cal. Rptr. 913*

All assertions of state jurisdiction, including jurisdiction of quasi in rem actions, as required to be evaluated by "minimum contacts" standards. *Shaffer v. Heitner (1977) 433 U.S. 186, 200 n.17, 207, 97 S. Ct. 2569, 53 L. Ed. 2d 683*

Presence of property in state as perhaps decisive factor bearing on existence of jurisdiction by providing contacts among forum state, defendant, and litigation, such as when claims to property itself are source of underlying controversy between plaintiff and defendant or when cause of action is otherwise related to rights and duties growing out of defendant's ownership of property. *Shaffer v. Heitner (1977) 433 U.S. 186, 207, 97 S. Ct. 2569, 53 L. Ed. 2d 683*

When property which is sought to serve as basis for assertion of state court jurisdiction is completely unrelated to plaintiff's cause of action, in absence of existence of other ties among defendant, forum state, and litigation, such property as incapable of supporting exercise of jurisdiction. *Shaffer v. Heitner (1977) 433 U.S. 186, 203-204, 209-209, 97 S. Ct. 2569, 53 L. Ed. 2d 683* (overruling prior United States Supreme Court cases which permitted state court to assert jurisdiction over nonresident solely on basis of nonresident's property in state)

Writ of attachment levied against defendant's insurer's obligation to indemnify and defend as quashed because obligation was so contingent and uncertain that it was not subject to garnishment and attachment and could not be basis of quasi in rem jurisdiction. *Javorek v. Superior Court of Monterey County (1976) 17 Cal. 3d 629, 633-647, 131 Cal. Rptr. 768, 552 P.2d 728*

Action to invalidate redevelopment plan considered to be "reverse" validation action, which is quasi in rem. Co unty of *Riverside v. Superior Court (1997) 54 Cal. App. 4th 443, 445, 446 n.5, 62 Cal. Rptr. 2d 747*

Before quasi in rem jurisdiction may be obtained over party, some property of defendant within forum state as required to be subjected to court's control by procedure such as attachment, garnishment, or receivership. *Fount Wip, Inc. v. Golstein (1973) 33 Cal. App. 3d 184, 189, 108 Cal. Rptr. 732*

Court as acquiring no jurisdiction over defendant as result of attachment of property in which defendant no longer had any interest. *Fount Wip, Inc. v. Golstein (1973) 33 Cal. App. 3d 184, 190, 108 Cal. Rptr. 732*

[3] Corporate Directors and Officers

In action for wrongful termination, contacts of nonresident officer and director of out of state parent corporation not sufficient under facts to give rise to either general or specific jurisdiction; regarding general jurisdiction, defendant unequivocally ceased defendant's activities as a director and officer of out of state corporation before service of process in action; when corporation ceases to do business in state there is no longer any general jurisdiction, i.e., jurisdiction as to causes of action independent of that business; regarding specific jurisdiction, no showing that defendant caused tort to be committed against plaintiff in California for which defendant would be personally liable. *Serafini v. Superior Court (1998) 68 Cal. App. 4th 70, 78-82, 80 Cal. Rptr. 2d 159*

Corporate directors are not vicariously liable for corporation's torts in which they do not participate; their liability, if any, stems from their own tortious conduct, not from their status as directors or officers of enterprise; directors are jointly liable with corporation and may be joined as defendants if they personally directed or participated in tortious conduct; this rule has its roots in law of agency that agent is liable for his or her own acts, regardless of whether principal is liable or amenable to judicial action. *Seagate Technology v. A.J. Kogyo Co. (1990) 219 Cal. App. 3d 696, 701-702, 268 Cal. Rptr. 586*

[4] Effect of Order or Judgment Entered by Court Without Personal Jurisdiction

Order entered without personal jurisdiction over defendant is void; thus, personal service by party, in violation of *Code Civ. Proc. § 414.10*, is ineffective and renders any judgment or order arising from proceeding void, despite defendant's actual notice. *Caldwell v. Coppola (1990) 219 Cal. App. 3d 859, 863, 865, 268 Cal. Rptr. 453*

[5] Immunity to Service of Process or Suit

U.S. Const., art. I, § 6, cl. 1, conferring on members of U.S. Congress privilege from arrest in all cases except treason, felony, and breach of peace during their attendance at session of their respective houses and in going to and returning from same does not confer immunity from service of summons in a civil case. *Long v. Ansell (1934) 293 U.S. 76, 81-83, 55 S. Ct. 21, 79 L. Ed. 208*

Sister states that engage in activities within California are not immune from suit in California with respect to those activities. *Hall v. University of Nevada (1972) 8 Cal. 3d 522, 524, 105 Cal. Rptr. 355, 503 P.2d 1363 , cert. denied, 414 U.S. 820 (1973)* ; *Hall v. University of Nevada (1977) 74 Cal. App. 3d 280, 284, 141 Cal. Rptr. 439 , aff'd sub nom. Nevada v. Hall (1979) 440 U.S. 410, 99 S. Ct. 1182, 59 L. Ed. 2d 416* ; *State of Oregon v. Superior Court (1994) 24 Cal. App. 4th 1550, 1561-1562, 29 Cal. Rptr. 2d 909* (disapproved to extent it is inconsistent with opinion in *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 465 n.8, 58 Cal. Rptr. 2d 899, 926 P.2d 1085*)

Immunity from service rule with respect to nonresident parties to civil actions is no longer law in California. *Silverman v. Superior Court (1988) 203 Cal. App. 3d 145, 149, 249 Cal. Rptr. 724*

Rule granting nonresident witness in civil case immunity from service is no longer law of California. *Severn v. Adidas Sportschuhfabriken (1973) 33 Cal. App. 3d 754, 762-764, 109 Cal. Rptr. 328*

Cal. Const., art. IV, § 14, immunizing California legislators to civil process during legislative session and for five days before and after, creates exemption from civil process without qualification as to kind or subject matter of lawsuit; prohibition is proper remedy to restrain trial court from proceeding with action when claim of legislative immunity to service of process was made in trial court and denied. *Harmer v. Superior Court (1969) 275 Cal. App. 2d 345, 347-348, 79 Cal. Rptr. 855*

[6] In Personam Jurisdiction

[a] Actions in Personam

Court must have jurisdiction over person of defendant in order to impose personal obligation or duty in favor of plaintiff. *Kulko v. Superior Court of California (1978) 436 U.S. 84, 91, 98 S. Ct. 1690 , reh'g denied, 438 U.S. 908* ; *Pennoyer v. Neff (1878) 95 U.S. 714, 732-733, 24 L. Ed. 565* (leading case)

Because judicial jurisdiction over thing refers to jurisdiction over interests of persons in thing, in order to justify exercise of jurisdiction in rem or quasi in rem, basis for jurisdiction must be sufficient to justify exercise of jurisdiction over interests of persons in thing. *Shaffer v. Heitner (1977) 433 U.S. 186, 207, 97 S. Ct. 2569, 53 L. Ed. 2d 683*

Whether United States District Court has personal jurisdiction over defendant is determined by law of forum state. *Hunt v. Erie Ins. Group (9th Cir. 1984) 728 F.2d 1244, 1246*

Holding company's mere ownership of a subsidiary did not constitute purposeful availment where plaintiff did not show that the holding company purposefully directed its activities at California, either directly or through its subsidiary or any other person or entity. Absent evidence that the holding company purposefully directed the activities of the

subsidiary toward the state, there was no basis for personal jurisdiction over the holding company. *Healthmarkets, Inc. v. Superior Court (2009) 171 Cal. App. 4th 1160, 1168-69, 90 Cal. Rptr. 3d 527*

The exemption from the 10-year statute of limitations for "actions based on willful misconduct" applies to cross-complaints for indemnity, and a willful misconduct claim may be made in a cross-complaint by way of incorporating by reference allegations contained in the complaint. *Pine Terrace Apartments, LP v. Windscape, LLC (2009) 170 Cal. App. 4th 1, 87 Cal. Rptr. 3d 630*

The proper jurisdictional question is not whether a defendant can be liable for the acts of another person or entity under state substantive law, but whether the defendant has purposefully directed its activities at the forum state by causing a separate person or entity to engage in forum contacts. That constitutional question does not turn on the specific state law requirements of alter ego or agency, although the inquiry may be similar in some circumstances. *Anglo Irish Bank Corp. v. Superior Court (2008) 165 Cal. App. 4th 969, 983, 81 Cal. Rptr. 3d 535*

Once acquired, jurisdiction is not defeated by subsequent events that might have prevented jurisdiction had they occurred before personal service of the action was made; continuing jurisdiction to enforce money judgment is not subject to attack on the ground that the debtor has insufficient personal contacts with California to establish personal jurisdiction when the renewal is entered. *Goldman v. Simpson (2008) 160 Cal. App. 4th 255, 263, 72 Cal. Rptr. 3d 729*

A guarantee provided by an out-of-state utility for its subsidiary's financial obligations under a weather derivative contract did not destroy the separateness of the parent and subsidiary so as to justify application of the representative services doctrine. Therefore, the utility's motion to quash service of summons should have been granted. *Aquila, Inc. v. Superior Court (2007) 2007-1 Trade Cas. (CCH) P75633, 148 Cal. App. 4th 556, 576-580, 55 Cal. Rptr. 3d 803*

The Foreign Money-Judgments Act does not exempt compliance with the procedures applicable to civil actions, including service of a summons. Compliance with the statutory procedures for service of process is essential to establish personal jurisdiction. *Renoir v. Redstar Corp. (2004) 123 Cal. App. 4th 1145, 1152, 20 Cal. Rptr. 3d 603*

When a Native American undertakes to avail himself or herself of the services of a state court in a domestic relations matter, the state court has jurisdiction to act and to grant whatever relief is contemplated by the action initiated by the Native American. In *Re Marriage of Maria and Randy Jacobsen (2004) 121 Cal. App. 4th 1187, 1193, 18 Cal. Rptr. 3d 162*

The representative services doctrine, a species of agency, supports the exercise of jurisdiction when a local subsidiary performs a function that is compatible with, and assists the parent in the pursuit of, the parent's own business. If a parent uses a subsidiary to do what it otherwise would have done itself, it has purposely availed itself of the privilege of doing business in the forum. *Paneno v. Centres for Academic Programmes Abroad (2004) 118 Cal. App. 4th 1447, 1456, 13 Cal. Rptr. 3d 759*

Parent company's ownership or control of a subsidiary corporation does not, without more, subject parent corporation to the jurisdiction of the state where the subsidiary does business. Parent holding company may be subject to general jurisdiction only under limited circumstances, such as an alter ego relationship or the parent's exercise of such a degree of control of the subsidiary as to reflect the parent's purposeful disregard of the subsidiary's independent corporate existence. *DVI, Inc. v. Superior Court (2002) 104 Cal. App. 4th 1080, 1087, 128 Cal. Rptr. 2d 683 , agreeing with Sonora Diamond Corp. v. Superior Court (2000) 83 Cal. App. 4th 523, 99 Cal. Rptr. 2d 824*

Ins. Code §§ 1610, 1611 are simply service statutes providing that specified acts by nonresident insurer not admitted to do business in California constitute appointment by insurer of Insurance Commissioner as attorney for service of process; before *Ins. Code §§ 1610, 1611* may be utilized to obtain jurisdiction, power to exercise jurisdiction over that

insurer must be found to exist under *Code Civ. Proc. § 410.10*. *Tri-West Ins. Services, Inc. v. Seguros Monterrey Aetna, S.A. (2000) 78 Cal. App. 4th 672, 676, 93 Cal. Rptr. 2d 78*

California does not recognize conspiracy as basis for acquiring personal jurisdiction over party. *Mansour v. Superior Court (1995) 38 Cal. App. 4th 1750, 1760-1761, 46 Cal. Rptr. 2d 191* ; *but see Taylor-Rush v. Multitech Corp. (1990) 217 Cal. App. 3d 103, 114, 265 Cal. Rptr. 672* (dictum that acts of coconspirator within California may give rise to jurisdiction over coconspirator in another state)

Nonresident defendant corporation has liberty interest in not being subjected to jurisdiction of California courts if its connection with state falls below minimum contacts threshold, or if so doing will violate traditional notions of fair play and substantial justice. *Cassiar Mining Corp. v. Superior Court (1998) 66 Cal. App. 4th 550, 554, 78 Cal. Rptr. 2d 167*

Even if proper basis of personal jurisdiction is present and notice is given in manner to satisfy requirements of constitutional due process, if state by statute prescribes manner in which notice shall be given and considers compliance with procedure to be jurisdictional, no jurisdiction of person isacquired by court without compliance; defendant or unnamed party who was never served in action and who never appeared in proceedings but whose rights were directly adjudicated therein may attack judgment directly or collaterally as void for failure to obtain jurisdiction over his or her person; party seeking judgment binding on another cannot compel that person to intervene; rather, person must be joined. *St. Sava Mission Corp. v. Serbian Eastern Orthodox Diocese (1990) 223 Cal. App. 3d 1354, 1366, 1374, 1378, 273 Cal. Rptr. 340*

Proper service is required for court's exercise of personal jurisdiction; under *Code Civ. Proc. § 414.10*, party is prohibited from personally serving defendant, and although attorneys are competent to serve process, prohibition on service by opposing party is strictly enforced; when party makes service on defendant, court lacks personal jurisdiction over defendant. *Caldwell v. Coppola (1990) 219 Cal. App. 3d 859, 863, 865, 268 Cal. Rptr. 453*

Ins. Code §§ 1610, 1611, relating to substituted service on nonresident insurance companies under Unauthorized Insurers Process Act (*Ins. Code §§ 1610-1620*), are service of process statutes and do not constitute basis for jurisdiction over nonresident defendant; power to exercise jurisdiction over insurer must be found under *Code Civ. Proc. § 410.10*. *In re Marriage of Martin (1989) 207 Cal. App. 3d 1426, 1433, 255 Cal. Rptr. 720*

Code Civ. Proc. § 410.10, under which California court may exercise jurisdiction over nonresident defendants on any basis not inconsistent with United States or California constitutions, manifests intent to exercise broadest possible jurisdiction, limited only by constitutional considerations; as general constitutional principle, court may exercise personal jurisdiction over nonresident defendant as long as defendant has such minimum contacts with forum that maintenance of suit does not offend traditional notions of fair play and substantial justice. *Brown v. Watson (1989) 207 Cal. App. 3d 1306, 1311-1312, 255 Cal. Rptr. 507* ; *Rollins Burdick Hunter of So. Cal., Inc. v Alexander & Alexander Services, Inc. (1988) 206 Cal. App. 3d 1, 7, 253 Cal. Rptr. 338* ; *Great-West Life Assurance Co. v. Guarantee Co. of North America (1988) 205 Cal. App. 3d 199, 204, 252 Cal. Rptr. 363*

Personal jurisdiction over nonresident defendant depends on existence of essentially two criteria: (1) basis for jurisdiction due to defendant's minimum contacts with forum state, and (2) acquisition of jurisdiction by service of process in strict compliance with requirements of service statutes (*Code Civ. Proc. §§ 412.10-417.40*); on by specially appearing nonresident defendant under *Code Civ. Proc. § 418.10*, plaintiff must establish that both criteria are met. *Ziller Electronics Lab GmbH v. Superior Court (1988) 206 Cal. App. 3d 1222, 1229, 254 Cal. Rptr. 410*

While jurisdiction over wholly owned subsidiary does not alone give court jurisdiction over parent corporation, judicial jurisdiction over subsidiary corporation gives state judicial jurisdiction over parent corporation if parent so controls and dominates subsidiary as in effect to disregard latter's independent corporate existence; basic test is whether one

corporation is alter ego of the other. *Rollins Burdick Hunter of So. Cal., Inc. v Alexander & Alexander Services, Inc. (1988) 206 Cal. App. 3d 1, 9, 253 Cal. Rptr. 338*

Foreign parent corporation is not subject to personal jurisdiction in California based solely on independent activities of its wholly owned domestic subsidiary, even when parent owns subsidiary's outstanding shares of stock and shares overlapping officers and directors, and even when parent exercises general executive responsibility for operations of subsidiary and reviews its major policy decisions; so long as separation between parent and subsidiary corporations is real, even if merely formal, use of subsidiary to conduct business in California does not automatically subject parent to suit in this state; to establish general jurisdiction of California courts over parent, plaintiff must show "continuous and systematic" contacts of parent with California. *Sammons Enterprises, Inc. v. Superior Court (1988) 205 Cal. App. 3d 1427, 1434, 253 Cal. Rptr. 261*

Foreign corporation parent, which had granted exclusive master distribution rights to California subsidiary, was not subject to personal jurisdiction in California for allegedly conspiring in subsidiary's termination of plaintiff's distributorship when only forum-related activity, as opposed to relations of parent and subsidiary and on master distribution contract, were two electronic messages to subsidiary urging it not to eliminate wholesale distributors. *J.M. Sahlein Music Co., Inc. v. Nippon Gakki Co., Ltd. (1987) 197 Cal. App. 3d 539, 543-545, 243 Cal. Rptr. 4*

Unverified pleading provides sufficient factual basis for exercising jurisdiction over nonresident parties. *Lundgren v. Superior Court (1980) 111 Cal. App. 3d 477, 485, 168 Cal. Rptr. 717*

Requisites to court's acquisition of fundamental jurisdiction. *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288, 109 P.2d 942* ; *Harrington v. Superior Court (1924) 194 Cal. 185, 188-189, 228 P. 15*

Jurisdiction under *Code Civ. Proc. § 410.10*, providing that California courts may assert personal jurisdiction over nonresidents who are served with process beyond California's borders on any basis consistent with United States or California Constitutions, jurisdiction is to be exerted with full power of state limited only by due process guarantees. *University Financing Consultants, Inc. v. Barouche (1983) 148 Cal. App. 3d 1165, 1169, 196 Cal. Rptr. 484*

Recognized bases of judicial jurisdiction. *Quattrone v. Superior Court (1975) 44 Cal. App. 3d 296, 302-303, 118 Cal. Rptr. 548* ; *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 799, 100 Cal. Rptr. 477*

Out-of-state purchaser of services from California resident by way of contract negotiated through interstate communications was not subject to jurisdiction of California court in suit to enforce payment for services. *Belmont Industries, Inc. v. Superior Court (1973) 31 Cal. App. 3d 281, 285, 107 Cal. Rptr. 237*

[b] Class Actions

Because states place fewer burdens on absent class plaintiffs than they do on absent defendants in nonclass suits, due process clause does not afford absent class plaintiffs as much protection from state-court jurisdiction as it does absent defendants in nonclass suits. *Phillips Petroleum Co. v. Shutts (1985) 472 U.S. 797, 811, 105 S. Ct. 2965, 86 L. Ed. 2d 628*

Forum state may exercise jurisdiction over claim of an absent class-action plaintiff, even though that plaintiff may not possess the minimum contacts with forum which would support personal jurisdiction over a defendant; but forum state, if it wishes to bind absent plaintiff concerning claim for money damages or similar relief at law, must provide minimal procedural due process protection, that is, best practicable notice of action plus an opportunity to be heard or to opt out of class action. *Phillips Petroleum Co. v. Shutts (1985) 472 U.S. 797, 811-812, 105 S. Ct. 2965, 86 L. Ed. 2d 628, 641-642*

[c] Corporate Officers and Directors

In action for wrongful termination, contacts of nonresident officer and director of out-of-state parent corporation not sufficient under facts to give rise to either general or specific jurisdiction; regarding general jurisdiction, defendant unequivocally ceased defendant's activities as a director and officer of out-of-state corporation before service of process in action; when corporation ceases to do business in state there is no longer any general jurisdiction; regarding specific jurisdiction, there was no showing that defendant caused tort to be committed against plaintiff in California for which defendant would be personally liable. *Serafini v. Superior Court (1998) 68 Cal. App. 4th 70, 80 Cal. Rptr. 2d 159*

Corporate officers and directors as not ordinarily personally liable for acts or obligations of their corporation; however, liability as existing if they directly authorize or actively participate in wrongful or tortious conduct. *Taylor-Rush v. Multitech Corp. (1990) 217 Cal. App. 3d 103, 113, 265 Cal. Rptr. 672*

[d] General vs. Limited Jurisdiction

[i] General Jurisdiction

Constitutionally sufficient relationship to warrant jurisdiction for all causes of action asserted against nonresident defendant exists when nonresident's activities within state are extensive or wide-ranging, or substantial, continuous, and systematic. *Pacific Atlantic Trading Co. v. M/V Main Exp. (9th Cir. 1985) 758 F.2d 1325, 1327* ; *Cornelison v. Chaney (1976) 16 Cal. 3d 143, 147, 127 Cal. Rptr. 352, 545 P.2d 264* ; *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 534, 257 Cal. Rptr. 278* ; *Rollins Burdick Hunter of So. Cal., Inc. v. Alexander & Alexander Services, Inc. (1988) 206 Cal. App. 3d 1, 7, 253 Cal. Rptr. 338* ; *Rice Growers Assn. v. First National Bank (1985) 167 Cal. App. 3d 559, 567, 214 Cal. Rptr. 468* ; *University Financing Consultants, Inc. v. Barouche (1983) 148 Cal. App. 3d 1165, 1169, 196 Cal. Rptr. 484*

Nonresident defendant may be subject to general jurisdiction of forum if his or her contacts in forum state are substantial, continuous and systematic; in such case, specific cause of action alleged need not be connected with defendant's business relationship to forum; such defendant's contacts with forum are so wide ranging that they take place of physical presence in forum as basis for jurisdiction. *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 445-446, 58 Cal. Rptr. 2d 899, 926 P.2d 1085*

General jurisdiction arises if nonresident defendant has substantial, continuous, and systematic contacts in forum. *Tri-West Ins. Services, Inc. v. Seguros Monterrey Aetna, S.A. (2000) 78 Cal. App. 4th 672, 677, 93 Cal. Rptr. 2d 78*

Nonresident defendant may be subject to general jurisdiction of forum if his or her contacts in forum state are substantial, continuous and systematic; in such case, not necessary that specific cause of action alleged be connected with defendant's business relationship to forum. *Jewish DefenseOrganization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1054, 85 Cal. Rptr. 2d 611*

General jurisdiction in case of nonresident corporation viewed analogously to presence of natural person; nonresident corporation doing business of sufficiently substantial and continuous nature is treated as if it had physical presence in forum, placing it within jurisdiction of state as to causes of action independent from that business; when corporation ceases to do business in state, however, there is no longer any general jurisdiction, that is, jurisdiction as to causes of action independent of that business. *Serafini v. Superior Court (1998) 68 Cal. App. 4th 70, 80 Cal. Rptr. 2d 159*

California's long-arm statute permits California courts to exercise jurisdiction on any basis not inconsistent with federal or state constitution; under federal constitutional due process clause, court may assume jurisdiction over nonresident defendant if defendant has sufficient minimum contacts with forum state; court may assert jurisdiction over defendant if

defendant's contacts with forum state are substantial, continuous and systematic. *Goehring v. Superior Court (1998) 62 Cal. App. 4th 894, 904, 73 Cal. Rptr. 2d 105*

When nonresident's contacts with forum are substantial, continuous, and systematic, court may assert general jurisdiction over person of the nonresident; such jurisdiction does not require connection between specific transaction at issue and forum state. *Hall v. LaRonde (1997) 56 Cal. App. 4th 1342, 1345, 66 Cal. Rptr. 2d 399*

State has general jurisdiction over nonresident for all causes of action asserted against that nonresident if his or her activities within state are (1) extensive or wide-ranging, or (2) substantial, continuous, and systematic; nonresidents contacts with California are insufficient to justify exercise of general jurisdiction over nonresident when nonresident's only contact with state is maintaining California law license. *Crea v. Busby (1996) 48 Cal. App. 4th 509, 514-516, 55 Cal. Rptr. 2d 513*

In action for personal injuries sustained by guest in hotel in Mexico brought against membership organization to which hotel belonged, evidence established continuous and purposeful transactions with California for purposes of general jurisdiction where defendant was authorized to do business in California with designated agent for service of process, maintained business office in California from which it solicited guests for affiliate members and advertised collectively for affiliate members in *California. Hesse v. Best Western Internat., Inc. (1995) 32 Cal. App. 4th 404, 410, 38 Cal. Rptr. 2d 74*

Foreign corporation's designation of agent for service of process alone is insufficient to warrant exercise of general jurisdiction over corporation. *Gray Line Tours v. Reynolds Electrical & Engineering Co. (1987) 193 Cal. App. 3d 190, 193-195, 238 Cal. Rptr. 419*

Foreign bank's maintenance of California bank account and its participation, in California, in international banking transactions conducted exclusively among banks was insufficient basis for exercise of general jurisdiction over it by California court. *Thomas J. Palmer, Inc. v. Turkiye Is Bankasi A.S. (1980) 105 Cal. App. 3d 135, 145, 146-148, 164 Cal. Rptr. 181*

In action for damages for personal injuries sustained by plaintiff injured by exploding bottle in Arizona, California court had no jurisdiction over defendant liquor store in Arizona, which did no business in California, because when injury occurs outside forum, jurisdiction over nonresidents is proper only when substantial activity by nonresident exists within forum. *Spirits, Inc. v. Superior Court (1980) 104 Cal. App. 3d 918, 924-926, 164 Cal. Rptr. 101*

[ii] Limited Jurisdiction

When contacts that create substantial connection with forum state proximately result from defendant's own actions, as opposed to those of third party, jurisdiction is proper. *Asahi Metal Industry Co. v. Superior Court (1987) 480 U.S. 102, 109, 107 S. Ct. 1026, 94 L. Ed. 2d 92* ; *Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528*

When nonresident defendant's activities in forum are not so pervasive as to justify exercise of general jurisdiction over him or her, jurisdiction depends on quality and nature of his or her activity in forum in relation to particular cause of action; in such situation, cause of action must arise out of act done or transaction consummated in forum, or defendant must perform some other act by which he or she purposefully avails him or herself of privilege of conducting activities in forum thereby invoking benefits and protections of its laws. *Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 474-475, 105 S. Ct. 2174, 85 L. Ed. 2d 528* ; *Kulko v. California Superior Court (1978) 436 U.S. 84, 93-94, 98 S. Ct. 1690, 56 L. Ed. 2d 132 , reh'g denied, 438 U.S. 908* ; *Hanson v. Denckla (1958) 357 U.S. 235, 251, 78 S. Ct. 1228, 2 L. Ed. 2d 1283* ; *Sinatra v. National Enquirer, Inc. (9th Cir. 1988) 854 F.2d 1191, 1195* ; *Cornelison v. Chaney*

(1976) 16 Cal. 3d 143, 147-148, 127 Cal. Rptr. 352, 545 P.2d 264 ; *Buckeye Boiler Co. v. Superior Court (1969) 71 Cal. 2d 893, 898, 80 Cal. Rptr. 113, 458 P.2d 57* ; *Wolfe v. City of Alexandria (1990) 217 Cal. App. 3d 541, 547, 265 Cal. Rptr. 881* ; *Taylor-Rush v. Multitech Corp. (1990) 217 Cal. App. 3d 103, 112, 265 Cal. Rptr. 672* ; *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 531, 534-539, 257 Cal. Rptr. 278*

Unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy requirement of contact with forum state. *Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 474-475, 105 S. Ct. 2174, 85 L. Ed. 2d 528* ; *Kulko v. California Superior Court (1978) 436 U.S. 84, 93-94, 98 S. Ct. 1690, 56 L. Ed. 2d 132* , *reh'g denied, 438 U.S. 908* ; *Hanson v. Denckla (1958) 357 U.S. 235, 251, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283* ; *Circus Circus Hotels, Inc. v. Superior Court (1981) 120 Cal. App. 3d 546, 562, 568, 174 Cal. Rptr. 885* , disapproved to extent inconsistent with *Vons Cos., Inc. v. Seabest Foods, Inc. (1996) 14 Cal.4th 434, 58 Cal. Rptr. 2d 899*

In determining whether particular exercise of state-court jurisdiction is consistent with due process, inquiry must focus on relationship among defendant, forum, and litigation. *Keeton v. Hustler Magazine, Inc. (1984) 465 U.S. 770, 775, 104 S. Ct. 1473, 79 L. Ed. 2d 790* ; *Rush v. Savchuk (1980) 444 U.S. 320, 327, 100 S. Ct. 571, 62 L. Ed. 2d 516* ; *Secrest MachineCorp. v. Superior Court (1983) 33 Cal. 3d 664, 668, 190 Cal. Rptr. 175, 660 P.2d 399* ; *Great-West Life Assurance Co. v. Guarantee Co. of North America (1988) 205 Cal. App. 3d 199, 205, 252 Cal. Rptr. 363*

Personal jurisdiction over Swedish corporation and Swedish individuals did not comport with fair play and substantial justice when defendants lacked connections to United States and whose purposeful interjection into California was very limited. *Core-Vent Corp. v. Nobel Industries AB (9th Cir. 1993) 11 F.3d 1482, 1490*

"Purposeful availment" requirement is satisfied when defendant takes deliberate actions within forum state or creates continuing obligations to forum residents, or has purposefully directed his or her efforts or acts toward forum residents. *Hirsch v. Blue Cross, Blue Shield of Kansas City (9th Cir. 1986) 800 F.2d 1474, 1478*

If nonresident defendant's activities in forum are not sufficiently pervasive to support general jurisdiction, nature and quality of forum-related activities must be evaluated in relation to specific cause of action sued on to determine whether court can exercise limited in personam jurisdiction over nonresident defendant. *Pacific Atlantic Trading Co. v. M/V Main Exp. (9th Cir. 1985) 758 F.2d 1325, 1327*

To determine specific jurisdiction in context of ongoing franchise relationships, "proximate cause" test rejected as too narrow, "but for" test rejected as too broad and amorphous, and "substantive relevance" test rejected as inapplicable; reasoning of *Sklar v. Princess Properties International, Ltd. (1987) 194 Cal. App. 3d 1202, 240 Cal. Rptr. 102* , and *Circus Circus Hotels, Inc. v. Superior Court (1981) 120 Cal. App. 3d 546, 174 Cal. Rptr. 885* , applying "proximate cause" test, rejected as inconcistent with rational underlying specific jurisdiction in context of ongoing franchise relationship; reasoning of *State of Oregon v. Superior Court (1994) 24 Cal. App. 4th 1550, 29 Cal. Rptr. 2d 909* , and *Dialysis at Sea, Inc. v. Superior Court (1989) 216 Cal. App. 3d 788, 265 Cal. Rptr. 71* , applying "but see" test, similarly disapproved. *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 464, 465 n.8, 475, 58 Cal. Rptr. 2d 899, 926 P.2d 1085*

Nonresident defendant may be subject to specific jurisdiction of forum if defendant has purposefully availed himself or herself of forum benefits and controversy is related to or arises out of defendant's contacts with forum; forum contacts necessary to establish specific jurisdiction include nonresident who has purposely directed activities at forum residents, purposefully derived benefit from forum activities, or purposefully availed himself or herself of privilege of conducting activities in forum state, thus invoking benefits and protections of its laws; requisite forum contacts also include nonresident defendant who deliberately has engaged in significant activities within state, or created continuing obligations between himself or herself and residents of forum; it is fair to subject defendants to specific jurisdiction because their forum activities should put them on notice that they will be subject to litigation in that forum; once it is decided defendant purposefully established minimum contacts in forum state, these contacts may be considered in light

of other factors to determine if assertion of personal jurisdiction would comport with fair play and substantial justice; courts may evaluate burden on defendant in appearing in forum, forum state's interest in adjudicating claim, plaintiff's interest in convenience and effective relief within forum, judicial economy, and shared interest of several states in furthering fundamental substantive social policies. *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 446-448, 58 Cal. Rptr. 2d 899, 926 P.2d 1085*

In cases where jurisdiction is based on defendant's occasional activities, some act is essential by which defendant purposefully avails itself of privilege of conducting activities within forum state, thus invoking benefits and protections of its laws. *Secrest Machine Corp. v. Superior Court (1983) 33 Cal. 3d 664, 669, 190 Cal. Rptr. 175, 660 P.2d 399*

As relationship of defendant with state seeking to exercise personal jurisdiction grows more tenuous, scope of jurisdiction also retracts, and fairness is assured by limiting circumstances under which plaintiff can compel defendant to appear and defend; crucial inquiry concerns character of defendant's activity in forum, whether cause of action arises out of or has a substantial connection with that activity, and balancing of convenience of parties and interests of state in assuming jurisdiction. *Cornelison v. Chaney (1976) 16 Cal. 3d 143, 148, 127 Cal. Rptr. 352, 545 P.2d 264* ; *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 534, 257 Cal. Rptr. 278* ; *Brown v. Watson (1989) 207 Cal. App. 3d 1306, 1312-1313, 255 Cal. Rptr. 507*

Unless defendant's forum-related activity reaches such extensive or wide-ranging proportions as to make defendant sufficiently "present" in forum state to support jurisdiction over it concerning causes of action which are unrelated to that activity, particular cause of action must arise out of or be connected with defendant's forum-related activity. *Buckeye Boiler Co. v. Superior Court (1969) 71 Cal. 2d 893, 898-899, 80 Cal. Rptr. 113, 458 P.2d 57*

In action alleging child molestation by a priest, the California court did not have specific personal jurisdiction over defendant, an archdiocese located in Ireland. Substantial evidence showed that defendant did no more than accept tuition money and related expenses from a California diocese for the priest's seminary training, much the same as any other school that is a passive recipient of a student's tuition from a nonprofit scholarship fund. There was also substantial evidence to support findings that the priest was not an agent or employee of defendant, that defendant did not know the priest had a propensity to molest children, and that it did not assign or send him to the California diocese. The priest's alleged acts of molestation were very much attenuated from defendant's extremely limited contacts with *California. Doe v. Roman Catholic Archbishop of Cashel & Emly (2009) 177 Cal. App. 4th 209, 99 Cal. Rptr. 3d 158*

Where a California resident initiates a phone call to a telemarketing corporation to buy a product, and the telemarketer who handles the order then initiates a sale of a separate product (referred to as an "upsell"), the telemarketing corporation purposefully availed itself of the privilege of conducting business in California, such that minimum contacts existed for the assertion of specific jurisdiction. *West Corp. v. Superior Court (2004) 116 Cal. App. 4th 1167, 1177-1180, 11 Cal. Rptr. 3d 145*

A nonresident defendant who has not had substantial, continuous, and systematic contacts in forum may be subject to specific jurisdiction of forum if defendant has purposefully availed himself or herself of forum benefits and controversy is related to or arises out of defendant's contacts with forum; specific jurisdiction arises when nonresident defendant has purposefully directed his or her activities at forum residents, or has purposefully derived benefits from forum activities, or has purposefully availed himself or herself of privilege of conducting activities within forum, or has deliberately engaged in significant activities with a state or has created continuing obligations between himself or herself and residents of the forum; in such cases defendant has availed himself or herself of privilege of conducting business in forum, and because defendant's activities are shielded by benefits and protections of forum's laws it is presumptively not unreasonable to require defendant to submit to burdens of litigation in that forum. *Tri-West Ins. Services, Inc. v. Seguros Monterrey Aetna, S.A. (2000) 78 Cal. App. 4th 672, 677, 93 Cal. Rptr. 2d 78*

If nonresident defendant does not have substantial and systematic contacts in forum sufficient to establish general

jurisdiction, defendant still may be subject to specific jurisdiction of forum, if defendant has purposefully availed himself or herself of forum benefits, and controversy is related to or arises out of defendant's contacts with forum; purposeful availment requires that defendant have performed affirmative conduct that allows or promotes transaction of business within forum state; contract with out-of-state party does not automatically establish purposeful availment in other party's home forum; court must evaluate contract terms and circumstances to determine whether defendant purposefully established minimum contacts with forum; relevant factors include prior negotiations, contemplated future consequences, parties' course of dealings, and contract's choice of law provision; with respect to interstate contractual obligations, parties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to sanctions in other state for consequences of their activities; due process requires substantial connection between contract at issue and forum state. *Stone v. State of Texas (1999) 76 Cal. App. 4th 1043, 1047-1048, 90 Cal. Rptr. 2d 657*

If nonresident defendant does not have substantial and systematic contacts in forum sufficient to establish general jurisdiction, defendant may still be subject to forum's specific jurisdiction if defendant purposefully availed himself or herself of forum benefits and controversy is related to or arises out of defendant's contacts with forum; in analyzing exercise of specific jurisdiction, once it is decided that defendant purposefully established minimum contacts with forum state, these contacts may be considered in light of other factors to determine if assertion of personal jurisdiction comports with fair play and substantial justice; courts may evaluate burden of defendant appearing in forum, forum state's interest in adjudicating claim, plaintiff's interest in convenient and effective relief within forum, judicial economy, and shared interest of several states in furthering fundamental substantive social policies; thus, specific jurisdiction determined under three-part test: (1) nonresident defendant must do some act or consummate some transaction with forum or perform some act by which he or she purposefully avails himself or herself of privilege of conducting activities in forum, thereby invoking benefits and protections of its laws; (2) claim must be one that arises out of or results from defendant's forum related activities; and (3) exercise of jurisdiction must be reasonable; in tort cases, purposeful availment requirement can be satisfied by effects test set out in *Calder v. Jones (1984) 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804* , under which personal jurisdiction can be based on (1) intentional actions, (2) expressly aimed at forum state (3) causing harm, the brunt of which is suffered, and which defendant knows is likely to be suffered, in forum state. *Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1054, 1057, 85 Cal. Rptr. 2d 611*

With regard to specific jurisdiction, despite not being present in state, natural person who commits tort while acting on corporation's behalf subject to state's jurisdiction when delict intended to inflict tortious harm within state; natural person may also be subject to jurisdiction if delict could reasonably be expected to inflict tortious harm within state; rule inapplicable under facts. *Serafini v. Superior Court (1998) 68 Cal. App. 4th 70, 81, 80 Cal. Rptr. 2d 159*

Although nonresident defendant corporation's contacts with California do not appear to be so continuous and systematic as to establish California's general jurisdiction over any cause of action against defendant, regardless of its relationship with forum, inquiry does not end; even if nonresident defendant had severed any California connection long before suit, it still may be subject to state's specific jurisdiction if it has (1) purposefully derived benefits from California activities, and (2) the subject lawsuit is related to or arises out of California contacts. *Cassiar Mining Corp. v. Superior Court (1998) 66 Cal. App. 4th 550, 555, 78 Cal. Rptr. 2d 167*

When general jurisdiction over defendant cannot be established, court may assume specific jurisdiction over defendant in particular case if plaintiff shows (1) defendant has purposefully availed himself or herself of forum benefits, (2) the controversy is related to or arises out of defendant's contacts with forum, and (3) assertion of jurisdiction would comport with fair play and substantial justice. *Goehring v. Superior Court (1998) 62 Cal. App. 4th 894, 904, 73 Cal. Rptr. 2d 105*

Specific jurisdiction may be asserted when defendant has purposefully availed himself or herself of forum benefits and controversy is related to or arises out of defendant's contacts with forum; sufficient minimum contacts for specific

jurisdiction exist when nonresident deliberately has engaged in significant activities within state, or has created continuing obligations between himself or herself and residents of forum. *Hall v. LaRonde (1997) 56 Cal. App. 4th 1342, 1346, 66 Cal. Rptr. 2d 399*

For limited jurisdiction, crucial inquiry concerns character of defendant's activity in forum, whether cause of action arises out of or has substantial connection with that activity, and on balancing convenience of parties and state's interest in assuming jurisdiction; court must focus on nature and quality of the activity in forum state, not quantity; court must look to see if defendant purposefully availed itself of benefits and protections of California law to make it reasonably foreseeable to be haled into court in forum state to defend itself in action relating to its product; when manufacturer makes direct effort to serve market for its products in forum state, requisite level of foreseeability is met; enterprise obtains benefits and protection of California laws if as matter of commercial reality it has engaged in economic activity within state. *As You Sow v. Crawford Laboratories, Inc. (1996) 50 Cal. App. 4th 1859, 1869-1871, 58 Cal. Rptr. 2d 654*

When nonresident's activities are not substantial enough for state to exercise general jurisdiction over him or her, state may nevertheless exercise limited jurisdiction over nonresident if (1) quality and nature of nonresident's activities are such that cause of action arises out of act or transaction completed in state, (2) quality and nature of nonresident's activities indicate that he or she purposefully availed himself or herself of privileges of conducting activities in state, or (3) state has passed special legislation on subject matter at issue that supports exercise of jurisdiction over nonresident; nonresident's activities within California are insufficient for state to exercise limited jurisdiction over nonresident when nonresident's only contact with state is maintaining California law license. *Crea v. Busby (1996) 48 Cal. App.4th 509, 514-516, 55 Cal. Rptr. 2d 513* Foreseeability of causing injury in another state is not sufficient benchmark for exercising personal jurisdiction; California does not recognize conspiracy as basis for acquiring personal jurisdiction over party. *Mansour v. Superior Court (1995) 38 Cal. App. 4th 1750, 1759-1761, 46 Cal. Rptr. 2d 191* ; *but see Taylor-Rush v. Multitech Corp. (1990) 217 Cal. App. 3d 103, 114, 265 Cal. Rptr. 672* (dictum that acts of coconspirator within California may give rise to jurisdiction over coconspirator in another state)

California superior court may exercise limited personal jurisdiction over Japanese corporation for misappropriation of trade secrets where uncontroverted evidence established that person alleged to have stolen trade secrets from plaintiff was agent of Japanese corporation, which engaged in no business or other activities knowingly or purposefully directed toward United States, because corporations can operate only through their appointed agents and jurisdiction can be based on agents' activities within forum state. *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 531, 535, 538-539, 257 Cal. Rptr. 278*

When jurisdiction over individual is based solely on act or omission committed out of state but having effect within state, only claim for relief arising from such act or omission may be asserted against individual. *Rollins Burdick Hunter of So. Cal., Inc. v. Alexander & Alexander Services, Inc. (1988) 206 Cal. App. 3d 1, 8-9, 253 Cal. Rptr. 338*

Due process clause requires that individuals have fair warning that particular activity may subject them to jurisdiction of foreign sovereign; when forum seeks to assert specific jurisdiction over out of state defendant who has not consented to suit there, fair warning requirement is satisfied if defendant has purposefully directed its activities at residents of forum, and litigation results from alleged injuries that arise out of or relate to those activities. *Sammons Enterprises, Inc. v. Superior Court (1988) 205 Cal. App. 3d 1427, 1435, 253 Cal. Rptr. 261* California court had in personam jurisdiction over nonresident defendant in action for wrongful seizure of funds from resident judgment debtor's bank account when nonresident utilized California statutory collection procedures to enforce out-of-state federal court judgment against judgment debtor; even at common law, jurisdiction was proper if nonresident initiated judicial action in California directly relating to first action. *Professional Travel, Inc. v. Kalish & Rice, Inc. (1988) 199 Cal. App. 3d 762, 765-767, 245 Cal. Rptr. 159*

In action for breach of consulting contract brought by California corporation against Nevada resident, California had

jurisdiction over defendant when defendant came to California to negotiate contract, contract provided that its terms were to be governed by California law, defendant made monthly trips to California to consult with company, and five percent of defendant's activities under contract were directed at California. *Safe-Lab, Inc. v. Weinberger (1987) 193 Cal. App. 3d 1050, 1053, 238 Cal. Rptr. 712*

California had neither general nor limited jurisdiction over Texas corporation with principal place of business in Nevada when corporation's activities in California were extremely limited, cause of action arose in Nevada, and cause of action was unrelated to corporation's contacts with California. *Gray Line Tours v. Reynolds Electrical & Engineering Co. (1987) 193 Cal. App. 3d 190, 192-193, 238 Cal. Rptr. 419*

Personal jurisdiction attaches when cause of action arises out of breach of contract made and to be performed in California. *Kroopf v. Guffey (1986) 183 Cal. App. 3d 1351, 1358, 228 Cal. Rptr. 807* ; *Neadeau v. Foster (1982) 129 Cal. App. 3d 234, 240, 180 Cal. Rptr. 806*

Defendant who engages in economic activity within state as matter of "commercial actuality" obtains benefits and protections of forum, and defendant conducts economic activity within state as matter of "commercial actuality" whenever purchase or use of its product within state generates income for defendant and is not so fortuitous or unforeseeable as to negative existence of intent on its part to bring about this result. *Rice Growers Assn. v. First National Bank (1985) 167 Cal. App. 3d 559, 567, 214 Cal. Rptr. 468*

In order for California to exercise limited jurisdiction over nonresident, due process requires that nonresident have certain minimum contacts with state such that maintenance of suit does not offend traditional notions of fair play and substantial justice; some cases view minimum contacts requirement as distinct from fairness requirement; other cases imply that two requirements are incorporated, such that defendant's contacts with state are said to be minimum if it is fair to assert jurisdiction under circumstances; regardless of which construction court uses, imposition of jurisdiction must be constitutionally reasonable. *University Financing Consultants, Inc. v. Barouche (1983) 148 Cal. App. 3d 1165, 1169, 196 Cal. Rptr. 484*

Purchase of stock in California medical corporation by nonresident physician who was licensed to practice in California provided basis for in personam jurisdiction over physician in action against him for damages for breach of contract to purchase corporation. *Bresler v. Stavros (1983) 141 Cal. App. 3d 365, 369-372, 189 Cal. Rptr. 58*

To create basis for assertion of limited personal jurisdiction over nonresident, nonresident's forum-related contact must have put in motion events that ultimately gave rise to cause of action. *E.I.C., Inc. v. Bank of Virginia (1980) 108 Cal. App. 3d 148, 154, 166 Cal. Rptr. 317*

Creation of agency relationship by Missouri corporations, which were not qualified to do business in California and had no property here, with California investment corporation involved in nationwide marketing efforts to find investors for its clients, by sales agency agreement pursuant to which California corporation was to find purchasers for Missouri property, were insufficient contacts for California court to exercise jurisdiction over Missouri corporations in action by California corporation against them involving the sales agency agreement. *R.E. Sanders & Co. v. Lincoln-Richardson Enterprises, Inc. (1980) 108 Cal. App. 3d 71, 77-80, 166 Cal. Rptr. 269*

[e] Jurisdiction to Determine Personal Jurisdiction

Trial court has jurisdiction to make initial determination as to its own in personam jurisdiction or lack of it when challenged by "specially appearing" defendant; jurisdiction to determine personal jurisdiction is distinct from trial court's general jurisdiction to make binding determination against defendant relating to merits of action. *Ziller Electronics Lab GmbH v. Superior Court (1988) 206 Cal. App. 3d 1222, 1228, 254 Cal. Rptr. 410*

[f] Stockholders of Defendant Foreign Corporation

When foreign corporation is alter ego of its stockholders so as to justify disregard of corporate entity, jurisdiction over corporation supports jurisdiction over its stockholders. *Sheard v. Superior Court (1974) 40 Cal. App.3d 207, 210-212, 114 Cal. Rptr. 743*

[g] Voluntary Intrusion Into Lawsuit

Corporation, by voluntarily intruding into lawsuit in which it was not named a party, thereby consents to court's jurisdiction over its corporate being and is bound by adjudications made in case. *California Concrete Co. v. Beverly Hills Savings & Loan Assn. (1989) 215 Cal. App. 3d 260, 267-268, 261 Cal. Rptr. 484*

[7] Lack of Jurisdiction

Term "lack of jurisdiction" in its fundamental sense as meaning entire absence of power to hear or determine case, an absence of authority over subject matter or parties. *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288, 109 P.2d 942*

"Lack of jurisdiction" can take different forms and have different consequences; lack of jurisdiction in most fundamental or strict sense means an entire absence of power to hear or determine case, absence of authority over subject matter or parties; but in ordinary usage phrase "lack of jurisdiction" is also applied to case where, though court has jurisdiction over subject matter and parties in fundamental sense, it has no jurisdiction or power to act except in particular manner, or to give certain kinds of relief, or to act without occurrence of certain procedural prerequisites; distinction between lack of jurisdiction over cause and act in excess of jurisdiction has significant consequences; for instance, court cannot acquire subject matter jurisdiction through consent, estoppel or waiver; by contrast, when court has jurisdiction of subject, party who seeks or consents to act beyond court's power as defined by statute or decisional rule may be estopped to complain of ensuing action in excess of jurisdiction. *People v. National Automobile & Casualty Ins. Co. (2000) 82 Cal. App. 4th 120, 125-126, 97 Cal. Rptr. 2d 858*

Judgment of court lacking personal jurisdiction is violation of due process, and is null and void everywhere, including state in which it is rendered. *Yu v. Signet Bank/Virginia (1999) 69 Cal. App. 4th 1377, 1385, 82 Cal. Rptr. 2d 304*

Lack of jurisdiction in most fundamental or strict sense means entire absence of power to hear or determine case, an absence of authority over subject matter or parties; however, ordinary usage of phrase "lack of jurisdiction" is not limited to fundamental situation; for purpose of determining right to dismiss action, much broader meaning is recognized; it may be applied to case where, though court has jurisdiction over subject matter and parties in the fundamental sense, court has no jurisdiction or power to act except in a particular manner, or to give certain kinds of relief. *Dale v. Dale (1998) 66 Cal. App. 4th 1172, 1178, 78 Cal. Rptr. 2d 513*

"Lack of jurisdiction" describes situations in which court is without authority to act; in most fundamental sense, lack of jurisdiction means entire absence of power to hear particular subject matter of case; term also relates to court's inability to render judgments against individuals who have not properly been made parties to action; even when court has jurisdiction over subject matter and parties in fundamental sense, it may have no jurisdiction or power to make orders not authorized by statute. *Janzen v. Workers' Comp. Appeals Bd. (1997) 61 Cal. App. 4th 109, 113, 71 Cal. Rptr. 2d 260*

Judgment of court lacking jurisdiction over subject matter or over parties as void. *County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 110, 183 Cal. Rptr. 741 , cert. denied, 460 U.S. 1051 (1983)* (disapproved on another point in

County of Los Angeles v. Soto (1984) 35 Cal. 3d 483, 492 n.4, 198 Cal. Rptr. 779, 674 P.2d 750); *see also Kulko v. California Superior Court (1978) 436 U.S. 84, 91, 98 S. Ct. 1690, 56 L. Ed. 2d 132* ; *Hanson v. Denckla (1958) 357 U.S. 235, 250, 78 S. Ct. 1228, 2 L. Ed. 2d 1283*

In unusual instance in which court that originally had territorial jurisdiction to hear action loses jurisdiction during pendency of case because territory is transferred from boundaries of California to a neighboring state, court as unable to continue hearing matter in absence of legislation specially saving such jurisdiction. *River Farms, Inc. v. Superior Court (1967) 252 Cal. App. 2d 604, 607-609, 60 Cal. Rptr. 665*

[8] Minimum Contacts Requirement

[a] Due Process

Due process clause of Fourteenth Amendment protects individual's liberty interest in not being subject to binding judgments of forum with which he or she has established no meaningful contacts, ties, or relations; by requiring that individuals have fair warning that particular activity may subject them to jurisdiction of foreign sovereign, due process clause gives degree of predictability to legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit; when forum seeks to assert specific jurisdiction over out-of-state defendant who has not consented to suit there, this "fair warning" requirement is satisfied if defendant has purposefully directed his or her activities at residents of forum and litigation results from alleged injuries that arise out of or relate to those activities. *Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 471-472, 105 S. Ct. 2174, 85 L. Ed. 2d 528*

Individual's contract with out-of-state party alone does not automatically establish sufficient minimum contacts in other party's home forum for purpose of assertion of in personam jurisdiction; prior negotiations and contemplated future consequences, along with terms of contract and parties' actual course of dealing must be evaluated in determining whether defendant purposefully established minimum contacts within forum. *Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 478-479, 105 S. Ct. 2174, 85 L. Ed. 2d 528*

Unilateral activity of those who claim some relationship with nonresident defendant does not satisfy requirement of contact with forum state; although application of that rule will vary with quality and nature of defendant's activity, some act by which defendant purposefully availed itself of privilege of conducting activities within forum state, thus invoking benefits and protections of its laws, is required. *Helicopteros Nacionales de Colombia v. Hall (1984) 466 U.S. 408, 417, 104 S. Ct. 1868, 80 L. Ed. 2d 404* ; *Kulko v. California Superior Court (1978) 436 U.S. 84, 93-94, 98 S. Ct. 1690, 56 L. Ed. 2d 132 , reh'g denied, 438 U.S. 908, 98 S. Ct. 3127, 57 L. Ed. 2d 1150 (1978)* ; *Hanson v. Denckla (1958) 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283* ; *Hirsch v. Blue Cross, Blue Shield of Kansas City (9th Cir. 1986) 800 F.2d 1474, 1478* ; *J.M. Sahlein Music Co., Inc. v. Nippon Gakki Co., Ltd. (1987) 197 Cal. App. 3d 539, 544-545, 243 Cal. Rptr. 4*

In judging minimum contacts, court properly focuses on relationship among defendant, forum, and litigation. *Calder v. Jones (1984) 465 U.S. 783, 788, 104 S. Ct. 1482, 79 L. Ed. 2d 804 , aff'g Jones v. Calder (1982) 138 Cal. App. 3d 128, 187 Cal. Rptr. 825* ; *Keeton v. Hustler Magazine, Inc. (1984) 465 U.S. 770, 775, 104 S. Ct. 1473, 79 L. Ed. 2d 790* ; *Secrest Machine Corp. v. Superior Court (1983) 33 Cal. 3d 664, 668, 190 Cal. Rptr. 175, 660 P.2d 399*

Because plaintiff is not required to have minimum contacts with forum state in order for state to assert personal jurisdiction over nonresident defendant, nonresident plaintiff's lack of contacts with forum state does not defeat jurisdiction otherwise proper under both law of forum and due process clause. *Keeton v. Hustler Magazine, Inc. (1984) 465 U.S. 770, 775, 779-780, 104 S. Ct. 1473, 79 L. Ed. 2d 790*

In federal court action by nonresident plaintiff against nonresident magazine corporation for damages for libel contained in five issues of defendant's magazines, thousands of copies of which were sold regularly on monthly basis in forum state, court, in judging minimum contacts, properly focused on relationship among defendant, forum, and litigation; relevant to jurisdictional inquiry in libel action applying "single publication" rule is fact that plaintiff is seeking to recover damages suffered in all states in the one suit and contacts between defendant and forum must be judged in light of that claim, rather than a claim for only damages sustained in forum state; that is, contacts between defendant and forum state must be such that it is "fair" to compel defendant to defend multistate lawsuit in forum state seeking nationwide damages for all copies of five issues in question, even though only small portion of those copies were distributed in forum state. *Keeton v. Hustler Magazine, Inc. (1984) 465 U.S. 770, 775, 104 S. Ct. 1473, 79 L. Ed. 2d 790*

Requirement of minimum contacts protects defendant against burdens of litigation in distant or inconvenient forum and insures that states do not exceed limits of coequal sovereigns in federal system. *World-Wi de Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 291-292, 100 S. Ct. 559, 62 L. Ed. 2d 490*

"Minimum contacts" requires some act by which defendant purposefully avails himself or herself of privilege of conducting activities within forum state, thus invoking benefits and protections of state laws. *Hanson v. Denckla (1958) 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283* ; *Sibley v. Superior Court (1976) 16 Cal. 3d 442, 446-447, 128 Cal. Rptr. 34, 546 P.2d 322* ; *Buckeye Boiler Co. v. Superior Court (1969) 71 Cal. 2d 893, 898, 80 Cal. Rptr. 113, 458 P.2d 57* ; *In re Marriage of Lontos (1979) 89 Cal. App. 3d 61, 67, 152 Cal. Rptr. 271*

However minimal burden of defending in foreign tribunal might be, defendant is not required to do so unless he or she has had the minimal contacts with that state that are a prerequisite to its exercise of power over him. *Hanson v. Denckla (1958) 357 U.S. 235, 251, 78 S. Ct. 1228, 2 L. Ed. 2d 1283* ; *In re Marriage of Martin (1989) 207 Cal. App. 3d 1426, 1438, 255 Cal. Rptr. 720*

Trend since *Pennoyer v. Neff (1878) 95 U.S. 714, 733, 24 L. Ed. 565* , has been toward expanding permissible scope of state jurisdiction over foreign corporations and other nonresidents. *McGee v. International Life Ins. Co. (1957) 355 U.S. 220, 226, 78 S. Ct. 199, 2 L. Ed. 2d 223* ; *but see World-Wide Volkswagen Corp. v. Woodson (1980) 444 U.S. 286, 295-298, 100 S. Ct. 559, 62 L. Ed. 2d 490* (limiting foreseeability of litigation in forum state as criterion for establishing minimum contacts)

Due process requires that in order to subject defendant to judgment in personam, defendant who is not present within territory of forum state must have certain minimum contacts with forum state such that maintenance of suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington (1945) 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95* (leading case); *see also Asahi Metal Industry Co. v. Superior Court (1987) 480 U.S. 102, 105, 107 S. Ct. 1026, 94 L. Ed. 2d 92* ; *Burger King Corp. v. Rudzewicz (1985) 471 U.S. 462, 476, 105 S. Ct. 2174, 85 L. Ed. 2d 528* ; *Sinatra v. National Enquirer, Inc. (9th Cir. 1988) 854 F. 2d 1191, 1194* ; *Secrest Machine Corp. v. Superior Court (1983) 33 Cal. 3d 664, 668, 190 Cal. Rptr. 175, 660 P.2d 399* ; *Checker Motors Corp. v. Superior Court (1993) 13 Cal. App. 4th 1007, 1015, 17 Cal. Rptr. 2d 618* ; *County of Humboldt v. Harris (1988) 206 Cal. App. 3d 857, 860, 254 Cal. Rptr. 49*

Under *Code Civ. Proc. § 410.10,* California state court may exercise jurisdiction on any basis not inconsistent with California or United States Constitution; assertion of personal jurisdiction over nonresident defendant not served with process within state comports with requirements of due process clause of federal constitution if defendant has such minimum contacts with state that assertion of jurisdiction does not violate traditional notions of fair play and substantial justice. *Tri-West Ins. Services, Inc. v. Seguros Monterrey Aetna, S.A. (2000) 78 Cal. App. 4th 672, 676-677, 93 Cal. Rptr. 2d 78*

Under federal Constitution's due process clause, court may assume jurisdiction over nonresident if he or she has

constitutionally sufficient minimum contacts with forum state; defendant's conduct and connection with forum state must be such that defendant should reasonably anticipate being haled into court there. *Stone v. State of Texas (1999) 76 Cal. App. 4th 1043, 1047, 90 Cal. Rptr. 2d 657*

State's assertion of personal jurisdiction over nonresident defendant not served with process within state comports with due process requirements of federal constitution if defendant had such minimum contacts with state that assertion of jurisdiction does not violate traditional notions of fair play and substantial justices. *Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1054, 85 Cal. Rptr. 2d 611*

As matter of due process, personal jurisdiction over defendant who is outside forum requires that he or she have certain minimum contacts with it such that maintenance of suit does not offend traditional notions of fair play and substantial justice; must appear that defendant purposefully directed his or her activities at residents of forum such that he or she should reasonably anticipate being haled into court there; with respect to interstate contracts, parties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to latter state's jurisdiction; however, contract with out-of-state party does not alone automatically confer jurisdiction on other party's home forum; fortuitous, or attenuated contacts with forum are insufficient, and jurisdictional rules may not be employed in such a way to make litigation so gravely difficult and inconvenient that party unfairly is at severe disadvantage in comparison to opponent; jurisdiction may not be grounded on contract whose application would render litigation so gravely difficult and inconvenient that party will for all practical purposes be deprived of his or her day in court; jurisdictional rules may not be employed against small consumers to cripple their defense. *Yu v. Signet Bank/Virginia (1999) 69 Cal. App. 4th 1377, 1386-1388, 82 Cal. Rptr. 2d 304*

California's long-arm statute is intended to provide broadest possible jurisdiction subject only to federal constitutional limitations; nonresident defendant corporation has liberty interest in not being subjected to jurisdiction of California courts if its connection with state falls below minimum contacts threshold, or if so doing will violate traditional notions of fair play and substantial justice. *Cassiar Mining Corp. v. Superior Court (1998) 66 Cal. App. 4th 550, 554, 78 Cal. Rptr. 2d 167*

California's long-arm statute permits California courts to exercise jurisdiction on any basis not inconsistent with federal or state constitution; under federal constitutional due process clause, court may assume jurisdiction over nonresident defendant if defendant has constitutionally sufficient minimum contacts with forum state. *Goehring v. Superior Court (1998) 62 Cal. App. 4th 894, 904, 73 Cal. Rptr. 2d 105*

Speed and ease of electronic communications have increased number of transactions that are consummated without either party leaving the office; use of electronic mail and telephone by party in another state may establish sufficient minimum contacts with California to support personal jurisdiction. *Hall v. LaRonde (1997) 56 Cal. App. 4th 1342, 1344, 1347, 66 Cal. Rptr. 2d 399*

Only federal limitation on California's long-arm jurisdiction under *Code Civ. Proc. § 410.10* is whether party has "minimum contacts" with state so that prosecuting suit locally does not offend traditional notions of fair play and substantial justice; application of this standard requires that there be some act by which nonresident purposefully avails himself or herself of privilege of conducting activities within forum state; further, quality and nature of defendant's contacts with forum state must on balance be such that it is reasonable and fair to hale him or her before foreign court; fairness question necessitates balancing burden or inconvenience to defendant against state's interest in resolving dispute. *In re Marriage of Aron (1990) 224 Cal. App. 3d 1086, 1094-1095, 274 Cal. Rptr. 357*

Code Civ. Proc. § 410.10, California's long-arm statute, manifests intent to exercise broadest possible jurisdiction, limited only by constitutional considerations; state is constitutionally permitted to exercise personal jurisdiction over nonresident as long as he or she has "minimum contacts" with that forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Taylor-Rush v. Multitech Corp. (1990) 217 Cal. App. 3d*

103, 112, 265 Cal. Rptr. 672 ; *see also* *Wolfe v. City of Alexandria (1990) 217 Cal. App. 3d 541, 545, 265 Cal. Rptr. 881*

Because corporations by their nature can only operate through their appointed agents, courts consistently exercises personal jurisdiction over corporations based on their agents' activities within forum state. *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 535, 257 Cal. Rptr. 278*

"Minimum contacts" analysis required by *Code Civ. Proc. § 410.10* does not apply to establish personal jurisdiction over nonresident in action to partition his military retirement benefits when federal law established more restrictive jurisdictional standard. *In re Marriage of Hattis (1987) 196 Cal. App. 3d 1162, 1167, 1170, 242 Cal. Rptr. 410*

Under California's long-arm statute (*Code Civ. Proc. § 410.10*), California court may exercise jurisdiction over nonresident defendant on any basis not inconsistent with United States or California Constitutions; court as permitted to exercise personal jurisdiction over nonresident defendant as long as defendant has such minimum contacts with forum that maintenance of suit does not offend traditional notions of fair play and substantial justice. *Rice Growers Assn. v. First National Bank (1985) 167 Cal. App. 3d 559, 567, 214 Cal. Rptr. 468*

Plaintiff's connections with forum state are irrelevant to jurisdiction issue as it is only defendant's activities in forum state which are significant in deciding question of jurisdiction. *Circus Circus Hotels, Inc. v. Superior Court (1981) 120 Cal. App. 3d 546, 562, 174 Cal. Rptr. 885* , disapproved to extent inconsistent with *Vons Cos., Inc. v. Seabest Foods, Inc. (1996) 14 Cal.4th 434, 58 Cal. Rptr. 2d 899*

Contacts required for bringing suit for invasion of privacy based on out-of-state publication in newspaper. *Sipple v. Des Moines Register & Tribune Co. (1978) 82 Cal. App. 3d 143, 150-151, 147 Cal. Rptr. 59*

"Minimum contact" for due process purposes requires more than "foot-fall" within state, and requires at very least act by defendant which produces an effect within state so as to make exercise of jurisdiction reasonable. *Floyd J. Harkness Co. v. Amezcua (1976) 60 Cal. App. 3d 687, 693, 131 Cal. Rptr. 667* ; *Belmont Industries, Inc. v. Superior Court (1973) 31 Cal. App. 3d 281, 286, 107 Cal. Rptr. 237*

Jurisdiction based on minimum contacts may be exercised over both individuals and corporations. *Arnesen v. Raymond Lee Organization, Inc. (1973) 31 Cal. App. 3d 991, 996, 107 Cal. Rptr. 744*

California jurisdiction over foreign corporation, under so-called "long-arm" statute (*Code Civ. Proc. § 410.10*), depends on existence of certain minimum contacts with this state so that maintenance of action does not offend traditional notions of fair play and substantial justice. *Vibration Isolation Products, Inc. v. American Nat. Rubber Co. (1972) 23 Cal. App. 3d 480, 483, 100 Cal. Rptr. 269*

Financing by national bank of purchase and sales of airplanes within California is activity which may subject financing institution to jurisdiction of California courts with respect to disputes connected with such transactions, and jurisdiction may attend an isolated transaction. *Michigan Nat. Bank v. Superior Court (1972) 23 Cal. App. 3d 1, 6, 99 Cal. Rptr. 823*

[b] Minimum Contacts Requirement Satisfied

California court had jurisdiction of action against foreign insurer, served by registered mail at its principal place of business in Texas, based on insurance contract which had substantial connection with California, in that contract was delivered in California, premiums were mailed from California, and insured was resident of California when he died. *McGee v. International Life Ins. Co. (1957) 355 U.S. 220, 223, 78 S. Ct. 199, 2 L. Ed. 2d 223*

Solicitation of business in California, combined with unauthorized use of another's name in order to promote that business, with knowledge that such use will injure a California plaintiff in California constituted sufficient minimum contacts to establish purposeful direction. *Sinatra v. National Enquirer, Inc. (9th Cir. 1988) 854 F. 2d 1191, 1192-1198*

Minimum contacts were satisfied in declaratory judgment case involving ERISA and pendent state law claims, when plaintiff physician had moved to California and continued to employ Kansas resident defendant as accountant and defendant had traveled to California periodically for that purpose. *T.M. Hylwa, M.D., Inc. v. Palka (9th Cir. 1987) 823 F.2d 310, 314-315*

Arizona doctors and hospital had purposefully taken some action by which they invoked protection of California laws and, hence, were subject to jurisdiction in California malpractice suit, where doctors practiced in town on California border, hospital was located in that town, physicians and hospital had maintained white pages listing in telephone directories distributed in California, hospital had yellow pages advertising in same directory, physicians had applied for and received Medi-Cal numbers and received reiumbursement from Medi-Cal program, over one-quarter of hospital's patients were California residents, and suit was based on treatment of California patient. *Cubbage v. Merchent (9th Cir. 1984) 744 F.2d 665, 668-669 , cert. denied, 470 U.S. 1005 (1985)*

French winemakers' contacts were sufficient to support in personam jurisdiction in action for breach of contract and antitrust violations despite their having sent only one shipment of wine to California when contacts viewed in totality indicated that winemakers knew that their wine was going to California and that their actions would cause injury there. *Taubler v. Giraud (9th Cir. 1981) 655 F.2d 991, 994*

Assertion of specific jurisdiction is fair where a hotel advertised heavily in California, obtained a significant percentage of its business from California residents, and maintained an Internet website and toll-free phone number where visitors or callers could obtain room quotes and make reservations. The hotel purposefully availed itself of the privilege of doing business in California. The guest's causes of action were premised on alleged omissions during the hotel's consummation of transactions with California residents and in its California advertisements. Because the harm alleged by the guest related directly to the content of the hotel's promotional activities in California, an inherent relationship between the guest's claims and the hotel's contacts with California existed. By purposefully and successfully soliciting the business of California residents, the hotels could reasonably anticipate being subject to litigation in California in the event their solicitations caused an injury to a California resident. *Snowney v. Harrah's Entertainment, Inc. (2005) 35 Cal. 4th 1054, 1064-1065, 29 Cal. Rptr. 3d 33, 112 P.3d 28*

Exercise of jurisdiction by California court over Delaware corporation, which had its principal place of business in Virginia, in product liability case by worker who was severely injured while operating leveling machine designed and manufactured by Delaware corporation was proper when, although corporation did not regularly maintain any offices or have any agents, representatives, employees, or property in California and had never applied for authorization to do business in California, it sold machine to California buyer for use in California, sale was deliberate act generating substantial gross income and constituting economic activity in California, and, even though buyer approached seller out of state, seller sent an employee to California to assist in installing machine, communicated with buyer both by mail and phone between corporation's Virginia office and buyer in California, and, after sale, gave advice on maintenance of machine, sold spare parts, and sent drawings on spare parts for machine, as well as advertisements of special sales on its products, to buyer in California, and placed advertisements in a national trade publication which was distributed in California. *Secrest Machine Corp. v. Superior Court (1983) 33 Cal. 3d 664, 667, 670-672, 190 Cal. Rptr. 175, 660 P.2d 399*

Sufficient minimum contacts were present for in personam jurisdiction where manufacturer sold boilers to middleman under circumstances where it was deemed manufacturer knew or should have known that boilers would be incorporated

in products sold in California. *Buckeye Boiler Co. v. Superior Court (1969) 71 Cal. 2d 893, 902-905, 80 Cal. Rptr. 113, 458 P.2d 57*

California courts have personal jurisdiction over a nonresident who signed a settlement agreement in a California class action where the nonresident agreed to pay the administrator's fees and agreed that the trial court would retain jurisdiction over the settlement agreement, including disputes relating to the administrator. Although his mere presence in California to negotiate and sign the settlement agreement might not have been sufficient to confer personal jurisdiction over him, he also obtained the trial court's approval of the settlement while understanding that the trial court would retain jurisdiction, accepted the benefits of the administrator's services, and agreed to pay the administrator's fees. *Szynalski v. Superior Court (2009) 172 Cal. App. 4th 1, 9, 90 Cal. Rptr. 3d 683*

California's long-arm statute [*Code Civ. Proc. § 410.10*] gives California courts specific jurisdiction over an Italian olive oil company where the subject of the dispute was the company's alleged nondelivery of $406,000 worth of olive oil to a purchaser in California. The company purposefully availed itself of the California forum, conducting all negotiations in Italy and California via long-distance communications with the implicit understanding that the goods were only useful to the buyer if they were delivered to California, and the seller maintained responsibility for the goods until they arrived in *California. Luberski v. Oleificio F.Lli Amato S.R.L. (2009) 171 Cal. App. 4th 409, 419, 89 Cal. Rptr. 3d 774*

The exercise of general jurisdiction over a Canadian parent corporation in a personal injury/product liability action alleging that a child booster seat was defective was proper under the representative services doctrine because there was evidence that the grandparent corporation's Indiana subsidiary, over which there was no dispute as to jurisdiction, performed functions that were compatible with and assisted the grandparent corporation in the pursuit of the grandparent's own business as a Canadian operating company. *Dorel Industries, Inc. v. Superior Court (2005) 134 Cal. App. 4th 1267, 1280, 36 Cal. Rptr. 3d 742*

Where a California resident initiates a phone call to a telemarketing corporation to buy a product, and the telemarketer who handles the order then initiates a sale of a separate product (referred to as an "upsell"), the telemarketing corporation purposefully availed itself of the privilege of conducting business in California, such that minimum contacts existed for the assertion of specific jurisdiction. *West Corp. v. Superior Court (2004) 116 Cal. App. 4th 1167, 1177-1178, 11 Cal. Rptr. 3d 145*

Defendants who own and operate Nevada hotels have sufficient contacts with California to justify the exercise of personal jurisdiction based on their advertising in California, interactive Internet site, toll-free telephone number for hotel reservations, and other activities purposefully directed at California residents. *Snowney v. Harrah's Entertainment (2004) 116 Cal. App. 4th 996, 1004-1005, 11 Cal. Rptr. 3d 35*

A manufacturer's placement of goods in the stream of commerce with the expectation that they will be purchased or used by consumers in California indicates an intention to serve the California market directly or indirectly and constitutes purposeful availment if the income earned by the manufacturer from sale or use of its product in California is substantial. *Bridgestone Corporation v. Superior Court of Los Angeles County (2002) 99 Cal. App. 4th 767, 775,121 Cal. Rptr. 2d 673*

Where a complaint alleges that a defendant, during the course of his employment, acquired trade secrets and other confidential information regarding his California-based employer's products, customers, and employees, which he then used to cause harm to the employer and thus to the employer's customers and to its business revenues in California, a court may find that claims raised are directly related to the defendant's contacts with California in that they arise from the employment relationship, and that the requisite substantial nexus exists between the controversy at issue and the defendant's contacts with California. *Integral Development Corp. v. Weissenbach (2002) 99 Cal. App. 4th 576, 587, 122 Cal. Rptr. 2d 24*

The commission of an intentional tort that is directed at a California resident may provide sufficient minimum contacts to support the exercise of personal jurisdiction over the non-resident defendant. *Integral Development Corp. v. Weissenbach (2002) 99 Cal. App. 4th 576, 587, 122 Cal. Rptr. 2d 24*

Sufficient minimum contacts established for jurisdiction over out-of-state attorney and law firm where attorney, a California licensed lawyer, performed legal services for California residents and therefore, practiced law in state. *Simons v. Steverson (2001) 88 Cal. App. 4th 693, 713, 106 Cal. Rptr. 2d 193*

Sufficient minimum contacts satisfied for California to exercise specific jurisdiction over defendant when (1) defendant Canadian corporation for some 40 years admittedly sold raw asbestos directly to California manufacturers who incorporated it into finished products, (2) defendant had no further contacts with California once it halted its ordinary business operations in 1991, (3) plaintiffs, California workers, allegedly were exposed to asbestos fibers in California, although not at plants where defendant shipped asbestos, thereby sustaining progressive diseases, and (4) plaintiffs claimed defendant failed to warn adequately of health risks. *Cassiar Mining Corp. v. Superior Court (1998) 66 Cal. App. 4th 550, 553-558, 78 Cal. Rptr. 2d 167*

When complaint alleged parties had entered into contract authorizing New York defendant to sell licenses for use of computer software application to general public and providing for defendant to pay California plaintiff $1 for every license sold, and plaintiff received no payments after September, 1995, even though defendant continued to market software, sufficient minimum contacts were established with California to support specific jurisdiction over defendant when record showed that defendant's contacts with California consisted of more than simply purchasing software module from the plaintiff, but that plaintiff originally contacted defendant by electronic mail concerning software module plaintiff had written, defendant responded with idea of integrating plaintiff's module into defendant's software package, defendant worked with plaintiff to integrate module into defendant's software package by suggesting various modifications, plaintiff made modifications and module was incorporated into defendant's retail product, even after plaintiff finished module, plaintiff continued to assist defendant in upgrading its application to new and existing software, plaintiff performed all work on module in California, contract contemplated that defendant would make continuing royalty payments to plaintiff, all negotiations were conducted by electronic mail and telephone, and plaintiff had no other business or personal connections with New York. *Hall v. LaRonde (1997) 56 Cal. App. 4th 1342, 1344-1347, 66 Cal. Rptr. 2d 399*

Defendant insurance company, which was incorporated under the laws of Georgia and maintained its principal place of business in Georgia with no physical presence in state of California, had sufficient contacts with California to be subject to personal jurisdiction in action brought by its insured alleging wrongful refusal to defend losses arising in California where insurer provided nationwide commercial liability coverage. *Southeastern Express Systems v. Southern Guaranty Ins. Co. (1995) 34 Cal. App. 4th 1, 10-11, 40 Cal. Rptr. 2d 216*

Requirement of minimum contacts by defendant foreign corporation sufficient to sustain limited jurisdiction of California court in action for misappropriation of trade secrets was met by act of defendant's agent, within scope of his authority, allegedly tortiously misappropriating plaintiff's trade secrets in California. *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 531, 535-539, 257 Cal. Rptr. 278*

Alleged negligence of group of Texas attorneys with whom plaintiffs' California attorneys had associated themselves in personal injury and wrongful death actions arising out of automobile accident in Texas in failing to serve and file summons and complaint within period provided by Texas law, which resulted in dismissal of lawsuit, was sufficient for in personam jurisdiction over them by California court in legal malpractice action against them and California attorneys on ground their negligence caused an effect in California, and that act or omission causing effect in California is recognized basis for jurisdiction in California, when Texas attorneys purposefully availed themselves of privilege of conducting activities in California by associating themselves with California attorneys in representing plaintiffs, their

contacts with California attorneys and plaintiffs personally extended over four-year period, they were retained in California through California attorneys, to file and prosecute action in Texas, material and information necessary for prosecution of action were furnished to them by California attorneys, they telephoned and corresponded with plaintiffs and California attorneys regarding Texas lawsuit, and their fee was to be paid through fee-splitting arrangement with California attorneys. *Brown v. Watson (1989) 207 Cal. App. 3d 1306, 1314-1316, 255 Cal. Rptr. 507*

Requirement of minimum contacts may be satisfied not only by doing business or owning property in forum state, but also by doing an act, provided (1) cause of action alleged arises from act done in state and (2) in light of circumstances exercise of jurisdiction is reasonable; thus, nonresident putative father was lawfully subject to jurisdiction of California court in county's action on behalf of minor to establish paternity, set child support, and recover reimbursement of aid to families with dependent children funds expended by county for child's support; father's alleged act of sexual intercourse with child's mother in California, birth of child in California, and financial support by public assistance given in California constituted requisite miniumum contacts sufficient to satisfy due process requirements for personal jurisdiction. *County of Humboldt v. Harris (1988) 206 Cal. App. 3d 857, 859-864, 254 Cal. Rptr. 49*

Successor foreign corporation that assumes contracts solicited and executed in California between predecessor corporation and California residents had minimum contacts with state for purpose of residents' contract action, when California could have exercised personal jurisdiction over predecessor corporation in dispute arising from contracts. *Bruns v. DeSoto Operating Co. (1988) 204 Cal. App. 3d 876, 878, 881, 251 Cal. Rptr. 462*

In action for breach of consulting contract brought by California corporation against Nevada resident, California had jurisdiction over defendant when defendant came to California to negotiate contract, contract provided that its terms were to be governed by California law, defendant made monthly trips to California to consult with company, and five percent of defendant's activities under the contract were directed at California. *Safe-Lab, Inc. v. Weinberger (1987) 193 Cal. App. 3d 1050, 1053, 238 Cal. Rptr. 712*

Nonresident insurer who entered into insurance contracts in another jurisdiction but who derived substantial economic benefit from insuring California assets and activities had sufficient contacts with California for exercise of jurisdiction over it by California courts. *A.I.U. Ins. Co. v. Superior Court(1986) 177 Cal. App. 3d 281, 291, 222 Cal. Rptr. 880 , cert. denied sub nom. Oil Insurance Limited v. Superior Court of California (1986) 479 U.S. 821*

Person acting both as officer of corporation and as individual with intent to do business and litigate in California was subject to personal jurisdiction regarding cause of action arising from conduct in California. *Mihlon v. Superior Court (1985) 169 Cal. App. 3d 703, 711, 215 Cal. Rptr. 442*

Corporate counsel who allegedly committed intentional tort by inducing foreign corporation to breach contract with California resident was subject to personal jurisdiction to same extent as individual not connected to corporation; counsel was not in protected position of corporate officers and directors acting as corporation. *Mihlon v. Superior Court (1985) 169 Cal. App. 3d 703, 712-716, 215 Cal. Rptr. 442*

Substantial purchases of California goods, title to which was taken in California, by out-of-state buyer in transactions initiated by buyer and effected by recurrent telephone orders placed outside California to seller in California provided sufficient minimum contacts with state to sustain its jurisdiction over buyer in suit for breach of contract in failing to pay for goods. *Rocklin De Mexico, S.A. v. Superior Court (1984) 157 Cal. App. 3d 91, 93, 95-98, 203 Cal. Rptr. 547*

State has jurisdiction over foreign personal representative of decedent when decedent would have satisfied minimum contacts requirement by having entered into California contract, resided in California, and conducted California business. *Mitsui Manufacturers Bank v. Tucker (1984) 152 Cal. App. 3d 428, 430-431, 199 Cal. Rptr. 517*

Manufacturer of product placed in stream of commerce and sold in California is subject to state's jurisdiction in

products liability case when sale in California was not mere isolated occurrence but arose from manufacturer's efforts to directly or indirectly serve California market for its products. *Rowe v. Dorrough (1984) 150 Cal. App. 3d 901, 907-908, 198 Cal. Rptr. 131*

Nonresident defendants' signing of letters that they knew would be mailed and received in California for express purpose of defaming political candidate constituted sufficient forum-related activities to support jurisdiction by California court in defamation action resulting from letters. *Heilig v. Superior Court (1983) 149 Cal. App. 3d 978, 984-985, 197 Cal. Rptr. 371 , cert. denied, Heilig v. Miller (1984) 466 U.S. 966 (1984)*

California court had jurisdiction over defendants in action for breach of contract by California mortgage broker against Hawaiian condominium developers whose single connection with California was engagement of brokerage services from plaintiff through intermediary when plaintiff was licensed by California to perform services set forth in contract and defendants refused to acknowledge that plaintiff could obtain access to Hawaiian courts to prosecute action. *University Financing Consultants, Inc. v. Barouche (1983) 148 Cal. App. 3d 1165, 1170, 196 Cal. Rptr. 484*

Minimum contacts sufficient to permit exercise of jurisdiction over nonresident corporations exist when defendant corporations engaged in out-of-state conspiracy designed to affect prices charged in California and when corporations elected to serve market in California, making sales and deliveries at artificially fixed prices that harmed California consumers. *St. Joe Paper Co.v. Superior Court (1981) 120 Cal. App. 3d 991, 997-999, 175 Cal. Rptr. 94 , cert. denied, 455 U.S. 982 (1982)*

Jurisdiction under Indiana nonresident motorist statute, providing for jurisdiction over nonresident operator or "his duly authorized agent," was properly extended to California car owner pursuant to *Veh. Code § 17707*, which creates limited type of "agency" by imposing vicarious liability on parent who signs minor's application for driver's license; by allowing uninsured son to take car to Indiana where it was involved in automobile accident, defendant vicariously participated in operation of car by his son and such participation amounted to sufficient minimum contacts with that state such that maintenance of an action there did not offend traditional notions of fair play and substantial justice. *Indiana Insurance Co. v. Pettigrew (1981) 115 Cal. App. 3d 862, 865-867, 171 Cal. Rptr. 770*

California was reasonable and fair forum for action against nonresident husband to enforce judgment of dissolution of marriage and to obtain money judgment for alleged arrearages in support payments when California was marital domicile, all children of marriage were born in California, marriage was dissolved in California, and validity of judgment of dissolution which wife sought to enforce was not disputed by husband. *Bergan v. Bergan (1981) 114 Cal. App. 3d 567, 570-571, 170 Cal. Rptr. 751*

Conduct by person outside forum state purposefully availing him or herself of law of state for purpose of entering into contract with resident of forum is sufficient minimum contact for jurisdictional purposes. *Arnesen v. Raymond Lee Organization, Inc. (1973) 31 Cal. App. 3d 991, 996, 107 Cal. Rptr. 744*

Conduct outside forum state intended, or reasonably designed, to accomplish tort within forum state is sufficient minimum contact for jurisdictional purposes if tort occurs. *Arnesen v. Raymond Lee Organization, Inc. (1973) 31 Cal. App. 3d 991, 996-997, 107 Cal. Rptr. 744*

Defendant publisher and seller of books of tickets enabling purchaser to obtain two dinners for price of one at participating restaurants had sufficient minimum contacts with state to invoke long-arm statute when it first accepted and then canceled orders plaintiff had obtained. *Ault v. Dinner for Two, Inc. (1972) 27 Cal. App. 3d 145, 148-151, 103 Cal. Rptr. 572*

Federally chartered national bank, though located solely in State of Michigan, waived its right to rely on federal statute (*12 U.S.C. § 94*) limiting jurisdiction over it to that of place in which it was established and located, and was subject to

jurisdiction of California courts on proper service of summons effected through service on California Secretary of State, in action for taking and conversion of aircraft which plaintiff, a California resident, had purchased from a dealer in California, when bank refinanced purchase of aircraft and used its own forms to refinance purchase, to accept assignment of chattel mortgage on aircraft, and to assume dealer's obligations and duties, and exercised self-help to repossess aircraft knowing, that plane would be based in California, that plaintiff's payments would be made from California, and that title would pass in California on completion of payments. *Michigan Nat. Bank v. Superior Court (1972) 23 Cal. App. 3d 1, 4, 6, 8-11, 13, 99 Cal. Rptr. 823*

[c] Minimum Contacts Requirement Not Satisfied

Contacts of Columbian corporation to Texas were insufficient to establish jurisdiction when only contacts were sending chief officer to Texas to negotiate contract with Peruvian consortium, accepting checks drawn by consortium on Texas bank, purchasing helicopters, equipment, and training sessions from Texas manufacturer and sending personnel to manufacturer's facilities for training. *Helicopteros Nacionales de Colombia v. Hall (1984) 466 U.S. 408, 416-418, 104 S. Ct. 1868, 80 L. Ed. 2d 404*

Sending child from New York to California to live with mother were insufficient minimum contacts for California state courts to exercise in personam jurisdiction over nonresident, nondomiciliary father of minor children domiciled within this state in child support action. *Kulko v. California Superior Court (1978) 436 U.S. 84, 86, 91-98, 98 S. Ct. 1690, 56 L. Ed. 2d 132 , reh'g denied, 438 U.S. 908*

In California action by Canadian corporation against private Finnish corporation and two state-owned Finnish corporations for product disparagement, unfair competition, tortious interference with contract, intentional interference with prospective business advantage, and breach of implied covenant of good faith and fair dealing, minimum contacts test was not satisfied by showing that defendants, while in Finland, performed acts detrimental to corporation in Canada, and that conduct may have had foreseeable effects in United States when it was not shown that defendants' acts were purposefully directed towards *United States. Teledyne, Inc. v. Kone Corp. (9th Cir. 1989) 892 F.2d 1404, 1411*

Federal district court's personal jurisdiction over foreign corporation in diversity action is tested under forum state's jurisdictional standard; one party's execution of contract in California and delivery of payment in California as insufficient contact when subject matter and performance were in Fiji. *FDIC v. British-American Ins. Co., Ltd. (9th Cir. 1987) 828 F.2d 1439, 1441-1445*

Fact that company not doing business in California is parent of codefendant that does business in California is insufficient to establish personal jurisdiction over parent company. *Transure, Inc. v. Marsh and McLennan, Inc. (9th Cir. 1985) 766 F.2d 1297, 1299*

In deciding the existence of minimum contacts for purposes of exercising limited jurisdiction by U.S. District Court in California over east coast insurance company, which did no business and had no contact with California, in action by third party who was injured in a vehicle accident in Colorado as a result of negligence of defendant's insured, a resident of Pennsylvania, purposeful availment requirement was not established because plaintiff was compelled to relocate in California to take advantage of its Medi-Cal program as a result of defendant's refusal to assume unlimited liability for plaintiff's medical care, or because defendant sent payments concededly due under policy to plaintiff in California. *Hunt v. Erie Ins. Group (9th Cir. 1984) 728 F.2d 1244, 1247-1248*

Injury to California resident from defamation in local, privately owned Nevada newspaper was insufficiently foreseeable for in personam jurisdiction in California when paper was not qualified to do business, had no offices or agents for service, and solicited no subscriptions in California. *Demaris v. Greenspun (9th Cir. 1983) 712 F.2d 433, 434*

Jurisdiction was lacking under *Code Civ. Proc. § 410.10* over nonresident defendant who was not served in California, had only attended California trade show in corporate capacity, and had insufficient contacts or transactions with California over which jurisdiction may be asserted. *Kransco Mfg., Inc.v. Markwitz (9th Cir. 1981) 656 F.2d 1376, 1378-1380*

Insured, who was issued a long-term care insurance policy delivered to her Florida residence, subsequently relocated to California. The court found no basis to justify the imposition of either general or specific jurisdiction over the insurer in California. The insurer did not subject itself to either general or specific jurisdiction in the state merely by accepting premium payments from California and by processing and paying claims submitted by its California insureds for services rendered in California. The insurer did not solicit any business in California, nor could it do so, because it was not licensed or authorized to do business in the state. It was the unilateral decision of the insured and other insureds to relocate to California that caused the insurer to accept payments from California and to process and pay claims for services rendered in California. Those circumstances did not support a finding the insurer purposefully availed itself of forum benefits so as to make it subject to specific jurisdiction in *California. Elkman v. National States Ins. Co. (2009) 173 Cal. App. 4th 1305, 1318, 93 Cal. Rptr. 3d 768*

Where Canadian trade organization did not target its allegedly tortious conduct at California consumers, and where consumers did not establish sufficient California acts in furtherance of the alleged conspiracy such that the state courts could properly exercise specific jurisdiction over the trade organization on that basis, California courts could not exercise personal jurisdiction over the trade organization without violating due process. *In Re Automobile Antitrust Cases I & II (2005) 135 Cal. App. 4th 100, 108-126, 37 Cal. Rptr. 3d 258*

Trial court's exercise of jurisdiction over Swiss pharmaceutical company defendants based solely on the global exchange and management of medical and scientific information relative to drug safety and regulatory compliance offended due process considerations, where as to neither Swiss defendant was there any evidence of direct minimum contacts or purposeful availment of the forum such that the exercise of jurisdiction, whether general or specific, by a California court would be proper. *F. Hoffman-La Roche, Ltd. v. Superior Court (2005) 130 Cal. App. 4th 782, 805, 30 Cal. Rptr. 3d 407*

Minimal resales of a product in California by a distributor, standing alone, do not amount to the substantial, continuous, and systematic contacts with the forum state necessary for the exercise of general jurisdiction over a foreign manufacturer doing business in its home country. *Carretti v. Italpast (2002) 101 Cal. App. 4th 1236, 1253-1254, 125 Cal. Rptr. 2d 126*

When out-of-state resident's only contact with California is single purchase from California vendor of goods for delivery out of state, there are insufficient minimum contacts to establish personal jurisdiction even though California vendor supplies financing to buyer; although regular purchasing activities in California may be basis for jurisdiction over out-of-state buyer, predominant rule in federal courts and in California is that nonresident making one-time purchase of goods from seller in forum state cannot be constitutionally subject to exercise of personal jurisdiction by courts of seller state; choice of law clause appearing to provide that California law controls standing alone was insufficient to confer jurisdiction. *Hunt v. Superior Court (2000) 81 Cal. App. 4th 901, 906, 907 n.3, 97 Cal. Rptr. 2d 215*

Cross-defendant Mexican insurance company did not have minimum contacts with California for assertion of specific jurisdiction when cross-defendant (1) never had insurance agents in California, (2) never had office or conducted business in California, (3) never advertised or solicited business in California, (4) never delivered an insurance policy or collected premiums in California, (5) required its insureds to have business address in Mexico to which notices and bills could be sent, and (6) property policy it issued included no liability coverage and merely covered specified property while in transit in California to company that maintained address in California; cross-defendant did not volunteer to

litigate in California, but merely to pay claims to its insured for property loss; issuance of policy was not sufficient contact for exercise of jurisdiction. *Tri-West Ins. Services, Inc. v. Seguros Monterrey Aetna, S.A. (2000) 78 Cal. App. 4th 672, 675-680, 93 Cal. Rptr. 2d 78*

In action for breach of contract, breach of implied covenant of good faith and fair dealing, and violation of *Lab. Code § 970*, court lacked minimum contacts to exercise specific jurisdiction over Texas employer that solicited plaintiff in San Diego, when one-year employment contract was formed in Texas, all future consequences of employment were in Texas, and plaintiff alleged breach of his third one-year employment contract, which did not arise out of the initial recruitment in California, but out of contract entered into in Texas more than two years after plaintiff established residency there. *Stone v. State of Texas (1999) 76 Cal. App. 4th 1043, 1046-1049, 90 Cal. Rptr. 2d 657*

In defamation action, California could not properly assert jurisdiction over nonresident defendants based on their contracting with one or more Internet service providers who happen to maintain offices in California, so as to permit defendants to operate passive website from their New York residence; defendants' conduct of contracting via computer in New York, with Internet service providers, which may be California corporations or which may maintain offices or databases in California, insufficient to constitute purposeful availment and did not satisfy first prong of three-part test for specific jurisdiction. *Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1057-1062, 85 Cal. Rptr. 2d 611*

Unsophisticated California consumers who, pursuant to preapproved credit card solicitation received by mail from Virginia corporations, signed up for card, used card, and made payments on card, were not subject to personal jurisdiction in Virginia; consumers had no relationship with Virginia other than their card and it is fundamentally unfair to expect them to travel thousand of miles to litigate matters concerning their account. *Yu v. Signet Bank/Virginia (1999) 69 Cal. App. 4th 1377, 1385, 1386-1388, 82 Cal. Rptr. 2d 304*

Contract with out-of-state party does not automatically establish purposeful availment in other party's home forum; rather court must evaluate contract terms and surrounding circumstances to determine whether defendant purposefully established minimum contacts within forum; "purposeful averment" requires defendant to have performed some type of affirmative conduct that allows or promotes transaction of business within forum state; defendants did not purposefully avail themselves of California benefits by executing sales, security and escrow agreements so as to give rise to sufficient minimum contacts with forum to confer jurisdiction over them when (1) contract negotiations occurred in Texas, (2) sales, security agreements and promissory notes were governed by Texas law, (3) transaction documents were prepared by Texas law firm, (4) transactions closed in Texas, (5) documents were executed in Texas and payments to close transaction were provided to bank in Texas, (6) sales and security agreements concerned only Texas-based pay telephones that were required to remain in Texas; thus, all future consequences were in Texas; filing single California UCC-1 financial statement in California Secretary of State's office, signed by partner, considered alone or in connection sales and security agreements, did not demonstrate purposeful availment; filing financing statements is not akin to soliciting business in forum, introducing products into forum, or signing and performing contract in forum; moreover, jurisdiction could not be based on out-of-state conduct causing effect in California, i.e., injury to plaintiffs; mere causing of effect is not necessarily sufficient to afford constitutional basis for jurisdiction; jurisdiction may be invoked only if actor committed out-of-state act intending to cause effects in California or reasonably expecting that effects in California would result. *Goehring v. Superior Court (1998) 62 Cal. App. 4th 894, 907-909, 73 Cal. Rptr. 2d 105*

In typical scenario when patient travels out of state to see doctor and there receives allegedly negligent treatment, courts consistently hold patient's home state cannot exercise personal jurisdiction over physician even though effects of doctor's negligence are felt in patient's home state; when out-of-state doctor's contact with forum state consists of nothing more than telephonic follow-up on services rendered in doctor's own state, it is unreasonable for patient's home state to exercise jurisdiction over the doctor. *Prince v. Urban (1996) 49 Cal. App. 4th 1056, 1058-1059, 57 Cal. Rptr. 2d 181*

In plaintiff's action against out-of-state attorney and out-of-state law firm for defamation and false light invasions of privacy based on allegations to effect that an attorney letter opinion contained defamatory statement and that others repeated the false statements in California, California was without jurisdiction over defendants who denied living, maintaining an office, doing business or owning property in California and attorney declared only communications concerning plaintiff were with persons and entities in Arizona and that he never caused another to speak or write about plaintiff in California when (1) record devoid of any evidence indicating defendants had wide-ranging, systematic or continuous contacts with California permitting state to exercise general jurisdiction over them, (2) plaintiff failed to establish that causes of action arose out of act committed or transaction consummated in California, or that defendants performed some other act by which they purposefully availed themselves of privilege of conducting activities within state, thus invoking benefits and protections of state's law's, or (3) plaintiff failed to establish the requisites for basing jurisdiction over a nonresident who commits an act elsewhere causing an effect in the state, that is, plaintiff failed to establish that defendants' tortious conduct was subject to special regulation or that defendants in connection with causing an affect within the forum state invoked the benefits and protections of its laws. *Mansour v. Superior Court (1995) 38 Cal. App. 4th 1750, 1758-1762, 46 Cal. Rptr. 2d 191*

Minimum contacts were lacking in action against Hawaii attorney not admitted to practice in California for professional negligence arising out of Hawaii litigation when attorney's representation was confined to litigation in Hawaii action and extended after settlement to limited assistance in sale of real property in Hawaii, attorney did not author or cause to be sent documents constituting alleged breach of fiduciary duty, attorney's comments on them were de minimis in context of entire transaction and substantial evidence was lacking of defendant's tortious conduct in California or nexus between causes of action alleged and defendant's activities causing effect in California. *Edmunds v. Superior Court (1994) 24 Cal. App. 4th 221, 232-236, 29 Cal. Rptr. 2d 281*

Contacts of Pennsylvania insurance guaranty association to California were insufficient to establish jurisdiction when only contacts were sending two letters to insured in California as part of its effort to wind up affairs of insolvent Pennsylvania insurance company and thus association did not direct its activities toward California resident or "purposefully avail" itself of benefits and protections of California. *Pennsylvania Health & Life Ins.Guaranty Ass'n v. Superior Court (1994) 22 Cal. App. 4th 477, 483, 27 Cal. Rptr. 2d 507*

Dismissal by California court for lack of jurisdiction was proper in indemnity suit by Canadian corporation against Canadian insurance corporation based on fraudulent acts of employee in plaintiff's California office, when defendant had no contact with state; unilateral activity on plaintiff's part as unable to satisfy requirement of contact with forum state. *Great-West Life Assurance Co. v. Guarantee Co. of North America (1988) 205 Cal. App. 3d 199, 204-209, 252 Cal. Rptr. 363*

Ownership of locally incorporated subsidiary does not warrant exercise of jurisdiction over foreign corporation unless parent manipulates subsidiary to detriment of creditors or subsidiary is alter ego of parent. *J.M. Sahlein Music Co., Inc. v. Nippon Gakki Co., Ltd. (1987) 197 Cal. App. 3d 539, 543, 243 Cal. Rptr. 4*

Contacts were too fortuitous and tenuous to warrant exercise of personal jurisdiction over defendant when only possible contacts that defendant could be said to have in California were its design and manufacture of parts used in automobiles sold in California. *Felix v. Bomoro Kommanditgesellschaft (1987) 196 Cal. App. 3d 106, 115-117, 241 Cal. Rptr. 670*

In personal injury action no connection sufficient for jurisdictional purposes existed between plaintiff's slip and fall at defendant hotel and defendant's activities in California, consisting of selling accommodations. *Sklar v. Princess Properties International, Ltd. (1987) 194 Cal. App. 3d 1202, 1206-1209, 240 Cal. Rptr. 102* ; *but see Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 464, 475, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* (in context of ongoing franchise relationships, court rejected "proximate cause" test applied by *Sklar v. Princess Properties International, Ltd.*)

Foreseeability that product will enter forum state is not in itself sufficient for asserting jurisdiction over defendants when their contacts with state are so minimal that defendants could not reasonably have foreseen being sued in forum state; Oregon defendants who installed truck lift gate that later injured plaintiff, who drove truck to California and was injured there, did not have minimum contacts with forum state when defendants did not live, own property, advertise, or do business in California. *Alexander v. Heater (1987) 193 Cal. App. 3d 1241, 1243, 1245-1247, 238 Cal. Rptr. 795*

California had neither general nor limited jurisdiction over Texas corporation with principal place of business in Nevada when corporation's activities in California were extremely limited and cause of action arose in Nevada and was unrelated to corporation's contacts with California. *Gray Line Tours v. Reynolds Electrical & Engineering Co. (1987) 193 Cal. App. 3d 190, 193, 238 Cal. Rptr. 419*

Foreign corporation's designation of agent for service of process is insufficient by itself to warrant exercise of general jurisdiction over corporation. *Gray Line Tours v. Reynolds Electrical & Engineering Co. (1987) 193 Cal. App. 3d 190, 193-195, 238 Cal. Rptr. 419*

Minimum contacts are not present merely because California resident foreseeably loses money as result of defendant's tortious act in another state. *Farris v. Capt. J. B. Fronapfel Co. (1986) 182 Cal. App. 3d 982, 989-990, 227 Cal. Rptr. 619*

California had neither general nor limited jurisdiction over insurance companies incorporated and doing business only in Indiana when those companies did no business in California and were not licensed to do so, had never solicited or sold policies in California, had no offices in California, owned no property in California, and were not registered with California Commissioner of Insurance. *Thiebaut v. Blue Cross of Indiana (1986) 178 Cal. App. 3d 1157, 1160-1161, 224 Cal. Rptr. 277*

New Jersey man's numerous telephone calls to woman in California to induce her to leave her job and apartment in California to become his confidante and companion and his sending her money in California did not provide sufficient business or other contacts to establish in personam jurisdiction in breach of contract action. *Walter v. Superior Court (1986) 178 Cal. App. 3d 677, 680-682, 224 Cal. Rptr. 41*

Trial court properly granted Hong Kong defendants' motion to quash service of summons for lack of personal jurisdiction in action against religious organization and several individuals for allegedly libelous magazine editorial and misleading conduct in soliciting donations, when undisputed declarations showed that defendants' only contacts with California were that 600 out of 8,500 copies per month of magazine were sent to California readers and that allegedly misleading receipts for contributions were sent to California contributors, and when trial court was entitled to accept defendants' declaration that no information for magazine article was gathered in California and that the several defendants' only contact with California was while "in transit," vacationing, or visiting relatives and attending a funeral. *Evangelize China Fellowship, Inc. v. Evangelize China Fellowship (1983) 146 Cal. App. 3d 440, 444, 448-449, 194 Cal. Rptr. 240*

Under Warsaw Convention ("Convention for Unification of Certain Rules Relating to International Transportation by Air"), which is a treaty of the United States, California court lacks "treaty" jurisdiction over foreign chartered aircraft carrier, existing under laws of Indonesia, which was in business of providing charter aviation services in southeast Asia and which had no contacts with California or United States, in wrongful death action arising out of plane crash in Sumatra when carrier was bound by contract with deceased's employer to transport deceased only from Singapore to Sumatra and there was no contract within meaning of Warsaw Convention by which carrier undertook or promised to undertake to transport decedent on one leg of undivided trip on which he would ultimately arrive in California, and until such time as decedent presented himself for flight to Singapore from Sumatra on his return trip to United States, such a contract could not arise. *P. T. Airfast Services, Indonesia v. Superior Court (1983) 139 Cal. App. 3d 162, 166,*

168-170, 188 Cal. Rptr. 628

Foreign corporation composed of several hundred member insurance companies did not have sufficient minimum contacts with California to subject it to personal jurisdiction when alleged cause of action did not arise from corporation's activities within California and corporation had no offices, property, bank accounts, employees, or officers within California; fact that some member companies were located in California and corporation consultant spent 100 hours per year in state was insufficient to support jurisdiction. *Szabo v. Medical Information Bureau (1981) 127 Cal. App. 3d 51, 54-57, 179 Cal. Rptr. 368*

Assertion of jurisdiction over nonresident based solely on ownership, as opposed to use or possession, of property in forum state is improper unless property was brought into state with owner's knowledge or consent or owner has learned of its presence in state and has had opportunity to reclaim it. *500 Motors, Inc. v. Superior Court (1981) 122 Cal. App. 3d 827, 830, 176 Cal. Rptr. 349*

Jurisdiction over nonresident based on ownership of vehicle involved in accident in California was improper when defendant divested itself of ownership under Oregon law prior to accident and claim arose out of transferee's negligence; full faith and credit had to be given to Oregon transfer. *500 Motors, Inc. v. Superior Court (1981) 122 Cal. App. 3d 827, 832, 176 Cal. Rptr. 349*

Sales and sales promotion by nonexclusive agents or independent contractors in forum state is not "doing business" so as to extend jurisdiction to foreign corporation which retained services of nonexclusive agents or independent contractors for these purposes in forum state; merely advertising in forum state, together with maintaining an "800" telephone number there, confers no general in personam jurisdiction on forum state to try culpability of advertiser's allegedly tortious conduct occurring elsewhere; hence, advertising its hotel accommodations in California newspaper and maintaining 800 telephone number in California were insufficient contacts with California to confer in personam jurisdiction over Nevada corporation in action for adjudication of alleged wrongs (burglary of their hotel room) suffered by California plaintiffs exclusively in Nevada while traveling there solely for recreational purposes. *Circus Circus Hotels, Inc. v. Superior Court (1981) 120 Cal. App. 3d 546, 567-572, 174 Cal. Rptr. 885* ; *but see Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 464, 475, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* (in context of ongoing franchise relationships, court rejected "proximate cause" test applied by *Circus Circus Hotels, Inc.*)

Officer and shareholder of foreign corporation subject to California jurisdiction is not subject to such jurisdiction when he did not personally participate in corporation's activity in question and when law of foreign state does not impute to him legal responsibility for corporation's activity in question. *Lundgren v. Superior Court (1980) 111 Cal. App. 3d 477, 487, 168 Cal. Rptr. 717*

That two California customers maintained sizeable checking accounts in out-of-state bank, a third secured $1-million line of credit, and bank maintained correspondent banking relations with two California banks, keeping noninterest-bearing compensating balances of $500,000 with such banks, were insufficient contacts with California to give California personal jurisdiction over nonresident bank in action to enforce deficiency judgment obtained in Kentucky in which defendant cross complained against Virginia bank and resident of Virginia, alleging conspiracy to defraud. *E. I. C., Inc. v. Bank of Virginia (1980) 108 Cal. App. 3d 148, 153-154, 166 Cal. Rptr. 317*

Foreign corporation was not subject to California process based on its solicitation of medical students and holding banquet in California, when these activities were unrelated to subject matter of litigation. *Cornell University Medical College v. Superior Court (1974) 38 Cal. App. 3d 311, 316-317, 113 Cal. Rptr. 291*

California does not have jurisdiction over foreign parent corporation merely because its subsidiary does business in California. *Watson's Quality Turkey Products, Inc. v. Superior Court (1974) 37 Cal. App. 3d 360, 364-365, 112 Cal. Rptr. 345*

California lacks jurisdiction over foreign corporation when corporation's activities in forum are insufficient to justify exercise of general jurisdiction and cause of action involved does not arise out of and is not connected with corporation's forum-related activities. *Watson's Quality Turkey Products, Inc. v. Superior Court (1974) 37 Cal. App. 3d 360, 367, 112 Cal. Rptr. 345*

Presence of foreign corporation's president at California convention and erroneous listing in trade publication in California branch office six years prior to suit was insufficient to show, for jurisdictional purposes, course of "doing business" in California. *Frederick Fell, Inc. v. Superior Court (1973) 36 Cal. App. 3d 93, 95-96, 111 Cal. Rptr. 219*

Insufficient minimum contacts to subject foreign corp oration to California jurisdiction under *Code Civ. Proc. § 410.10* when goods involved in contract sued on were custom-designed and built to highly special specifications of buyer, but no representative of buyer ever came to California in connection with manufacture or purchase. *Interdyne Co. v. SYS Computer Corp. (1973) 31 Cal. App. 3d 508, 511-512, 107 Cal. Rptr. 499* ; *cf. Hall v. LaRonde (1997) 56 Cal. App. 4th 1342, 1346-1347, 66 Cal. Rptr. 2d 399* (court noted that unlike court in *Interdyne* it did not believe physical presence of representative of defendant in California should be determinative on question of sufficiency of minimum contacts requirement; no reason requisite minimum contacts cannot be electronic)

Out-of-state purchaser of services from California resident by way of contract negotiated through interstate communications consummated outside of California is not subject to judicial jurisdiction of California in suit to enforce payment for services. *Belmont Industries, Inc. v. Superior Court (1973) 31 Cal. App. 3d 281, 285, 107 Cal. Rptr. 237*

[9] Nonphysical Entry

[a] Electronic Contact

Traditional notions of fair play and substantial justice do not allow the exercise of jurisdiction over a defendant who merely maintains a website advertisement in one state and has no contacts with the forum state other than maintaining an essentially passive home page that is accessible to citizens of the forum state, and everyone else, over the Internet. *Cybersell, Inc. v. Cybersell, Inc. (9th Cir. 1997) 130 F.3d 414, 415, 420* (distinguishing cases involving interactive websites and greater levels of actual contact)

An attorney's mere physical presence or absence in California is not determinative of jurisdiction over the attorney and his or her firm where the practice of law in the state occurs by the attorney's advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means. *Birbrower, Montalbano, Condon & Frank v. Superior Court (1998) 17 Cal. 4th 119, 128-128, 70 Cal. Rptr. 2d 304, 949 P.2d 1*

Where there is no evidence of continuous and systematic contact with California, a car seller's maintenance of a web site alone was insufficient to establish personal jurisdiction. Purposeful availment was not shown because the web site did not target California residents and because there was no ongoing business relationship between the parties. *Shisler v. Sanfer Sports Cars, Inc. (2006) 146 Cal. App. 4th 1254, 1261, 53 Cal. Rptr. 3d 335*

California may constitutionally assert personal jurisdiction over a nonresident telemarketing corporation when a California resident initiates a phone call to buy a product and reaches a telemarketer who handles the order, and the telemarketer then initiates a sale of a separate product (referred to as an "upsell") and allegedly makes misrepresentations during the sales pitch for the separate product. Telemarketers who upsell a product to residents of a forum state have purposefully availed themselves of the privileges of conducting activities within the forum state. *West Corp. v. Superior Court (2004) 116 Cal. App. 4th 1167, 1177-1180, 11 Cal. Rptr. 3d 145*

By themselves, the acts of registering a nickname or alias with Yahoo!, a California-based Internet message board, agreeing to Yahoo!'s terms of service, and posting allegedly defamatory messages on Yahoo! do not justify subjecting a nonresident defendant to California jurisdiction for purposes of a lawsuit brought by a third party about whom the allegedly defamatory messages were about. *Nam Tai Electronics, Inc. v. Titzer (2001) 93 Cal. App. 4th 1301, 1311-1313, 113 Cal. Rptr. 2d 769*

Sufficient minimum contacts for jurisdiction over out-of-state attorney and firm exist where attorney, a California licensed lawyer, performed legal services for California residents and therefore, practiced law in state. *Simons v. Steverson (2001) 88 Cal. App. 4th 693, 713, 106 Cal. Rptr. 2d 193*

California may not properly assert jurisdiction over nonresident defendants based on their contracting with one or more Internet service providers who happen to maintain offices in California, so as to permit defendants to operate passive website from their New York residence when the Internet providers were engaged by a corporate defendant from its computer in New York. *Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1057-1062, 85 Cal. Rptr. 2d 611* (defamation action)

Use of electronic mail and the telephone by a party in another state may establish sufficient minimum contacts with California to support personal jurisdiction. *Hall v. LaRonde (1997) 56 Cal. App. 4th 1342, 1344, 66 Cal. Rptr. 2d 399*

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Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation, 28 U.C. Davis L. Rev. 871 (1995)*

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For discussion and forms relating to venue, see Ch. 571, *Venue*

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§ 323.101 State Statutes

[1] Motion to Stay or Dismiss Action for Inconvenient Forum

Motion to stay or dismiss action on ground of inconvenient forum. *Code Civ. Proc. §§ 410.30, 418.10(a)(2), (b)*

[2] Review of Denial of Motion

Mandate to review denial of motion to quash service of summons for lack of personal jurisdiction or to stay or dismiss action for inconvenient forum. *Code Civ. Proc. § 418.10(c)*

Legal Topics:

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

[1] Appeal

Grant of forum non conveniens motion is discretionary and is accorded substantial deference on appeal; because dismissal of action results in California's loss of jurisdiction over matter, action brought by California resident may not be dismissed on grounds of forum non conveniens except in extraordinary circumstances; trial court has wider discretion to grant stays because under stay California retains jurisdiction. *Century Indemnity Co. v. Bank of America (1997) 58 Cal. App. 4th 408, 411, 68 Cal. Rptr. 2d 132*

Trial court's decision to dismiss or stay action for inconvenient forum under *Code Civ. Proc. § 410.30(a)* on ground that it was in interest of substantial justice for matter to be heard in forum other than California is discretionary and is disturbed on appeal only if order is unsupported by substantial evidence under apposite law. *Northrop Corp. v. American Motorists Ins. Co. (1990) 220 Cal. App. 3d 1553, 1559, 270 Cal. Rptr. 233*

Decision to apply doctrine of inconvenient forum is within trial court's sound discretion and not disturbed on appeal unless unsupported by substantial evidence; order granting motion is not to be overturned on appeal unless balance of factors weighs strongly against moving party. *Celotex Corp. v. American Ins. Co. (1987) 199 Cal. App. 3d 678, 682, 245 Cal. Rptr. 429*

[2] Choice of Law

Questions of choice of law are determined in California by governmental interest analysis that requires forum to search to find proper law to apply based on interests of litigants and involved states; however, fact that two states are involved does not in itself indicate that there is "conflict of laws" or "choice of laws" problem; there is no problem when laws of two states are identical. *Rivera v. Southern Pacific Transportation Co. (1990) 217 Cal. App. 3d 294, 298, 266 Cal. Rptr. 11*

[3] Codification

Doctrine of forum non conveniens is codified in *Code Civ. Proc. § 410.30*. *Archibald v. Cinerama Hotels (1976) 15 Cal. 3d 853, 857, 126 Cal. Rptr. 811, 544 P.2d 947* ; *Ferreira v. Ferreira (1973) 9 Cal. 3d 824, 838, 109 Cal. Rptr. 80, 512 P.2d 304* ; *Credit Lyonnais Bank Nederland, N.V. v. Manatt, Phelps, Rothenberg & Tunney (1988) 202 Cal. App. 3d 1424, 1431, 249 Cal. Rptr. 559*

Code of Civ. Proc. § 418.10 provides rules for bringing a forum non conveniens motion when a defendant has not yet appeared in an action, and *Code of Civ. Proc. § 410.30* applies to a defendant bringing a forum non conveniens action after having generally appeared in the action. Under § 410.30(b), a defendant who has generally appeared may make a forum non conveniens motion at any time, not only on or before the last day to plead. *Britton v. Dallas Airmotive, Inc. (2007) 153 Cal. App. 4th 127, 133, 62 Cal. Rptr. 3d 487*

Equitable doctrine of forum non conveniens, codified as *Code Civ. Proc. § 410.30*, embraces discretionary power of court to decline to exercise jurisdiction it has over transitory cause of action when it believes action before it may be more appropriately and justly tried elsewhere; doctrine is drastic remedy to be exercised with caution and restraint. *Bechtel Corp. v. Industrial Indem. Co. (1978) 86 Cal. App. 3d 45, 47-53, 150 Cal. Rptr. 29* (motion to stay action on ground of inconvenient forum may not be granted when both plaintiff and defendant are California residents; reversing order granting motion and staying action)

[4] Conflict of Laws Problems

Untangling problems in conflict of law is itself a basis to apply doctrine of forum non conveniens. *Boaz v. Boyle & Co. (1995) 40 Cal. App. 4th 700, 713, 46 Cal. Rptr. 2d 888*

California courts have demonstrated willingness to assume burden of resolving conflict of laws problems and do not invoke forum non conveniens doctrine simply to avoid choice of law analysis. *Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 177, 227 Cal. Rptr. 247 , cert. denied, 479 U.S. 1049 (1987)*

[5] Discretion of Court

A district court has discretion to respond at once to a defendant's forum non conveniens plea, and need not take up first any other threshold objection. In particular, a court need not resolve whether it has authority to adjudicate the cause (subject matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is the more suitable arbiter of the merits of the case. *Sinochem Int'l Co. Ltd v. Malaysia Int'l Shipping Corp. (2007) 549 U.S 422, 127 S. Ct. 1184, 167 L. Ed. 2d 15*

Except in extraordinary cases, trial court has no discretion to dismiss action brought by California resident on grounds of forum non conveniens; this limitation on doctrine does not rest on any conclusion derived from balancing of conveniences, but reflects overriding state policy of assuring California residents adequate forum for redress of grievances. *Archibald v. Cinerama Hotels (1976) 15 Cal. 3d 853, 858-859, 126 Cal. Rptr. 811, 544 P.2d 947* ; *Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 176, 227 Cal. Rptr. 247*

The rule on forum non conveniens is an equitable doctrine invoking the discretionary power of a court to decline to exercise the jurisdiction it has over a transitory cause of action when it believes that the action may be more appropriately and justly tried elsewhere. *Roulier v. Cannondale (2002) 101 Cal. App. 4th 1180, 1186, 124 Cal. Rptr. 2d 877*

Granting or denial of motion for forum non conveniens is within trial court's discretion and substantial deference is accorded its determination in this regard. *Campbell v. Parker-Hannifin Corp. (1999) 69 Cal. App. 4th 1534, 1541, 82 Cal. Rptr. 2d 202*

Court has discretion to refrain from exercising jurisdiction if case may be more appropriately tried elsewhere; California codified this principle, known as forum non conveniens, in *Code Civ. Proc. § 410.30*; moving party bears burden of showing case should be tried elsewhere; in determining whether to grant motion, court must first determine if alternate forum is suitable place for trial, and if suitable, court must then balance private interests of litigants and interests of public in retaining action in California; forum is suitable if there is jurisdiction and no statute of limitations bar to hearing case on merits; forum is suitable if action can be brought in that forum, although not necessarily won; in rare circumstances, forum may not be suitable where proposed alternative is in foreign country that lacks independent judiciary; when China promised by international treaty that Hong Kong judiciary would remain independent, case was distinguishable from cases that found Iran, Ecuador, and Chile did not constitute suitable forums because there was evidence that the judiciary would not provide due process; because there was evidence that Hong Kong will continue to provide due process, Hong Kong remains suitable alternate forum; because real party will have opportunity to apply to lift stay of California proceedings if it can show breakdown of rule of law in Hong Kong, writ of mandate issued directing trial court to stay proceedings during pendency of Hong Kong proceedings. *Chong v. Superior Court (1997) 58 Cal. App. 4th 1032, 1035-1037, 68 Cal. Rptr. 2d 427*

Even though plaintiff's choice of forum is normally entitled to substantial deference, deference accorded nonresident plaintiff is less than that accorded California resident. *Celotex Corp. v. American Ins. Co. (1987) 199 Cal. App. 3d 678, 683, 245 Cal. Rptr. 429* ; *Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 176, 227 Cal. Rptr. 247 , cert. denied, 479 U.S. 1049 (1987)*

Act of staying action for inconvenient forum is act of discretion which may not be arbitrary, but must be exercised in conformity with spirit of law and in manner to subserve and not impede ends of substantial justice. *Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 173, 227 Cal. Rptr. 247 , cert. denied, 479 U.S. 1049 (1987)*

[6] Dismissal

When California plaintiffs failed to file suit in the proper forum for over four years, the trial court has discretionary authority to dismiss the action for a failure to diligently prosecute the actions when stayed on forum non conveniens grounds. *Van Keulen v. Cathay Pacific Airways, Ltd. (2008) 162 Cal. App. 4th 122, 75 Cal. Rptr. 3d 471*

On motion for forum non conveniens moving party bears burden of proof; because dismissal of action results in California's loss of jurisdiction over matter, action brought by California resident may not be dismissed on grounds of forum non conveniens except in extraordinary circumstances; trial court has wide discretion to grant stays because under stay California retains jurisdiction. *Century Indemnity Co. v. Bank of America (1997) 58 Cal. App. 4th 408, 411-412, 68 Cal. Rptr. 2d 132*

[7] Factors to Be Considered

Choice of law provisions in contracts are usually respected by California courts, and while parties may not deprive courts of their jurisdiction over causes by private agreement, courts possess discretion to decline to exercise jurisdiction in recognition of parties' free and voluntary choice of different forum. *Smith, Valentino & Smith, Inc. v. Superior Court (1976) 17 Cal. 3d 491, 494-495, 131 Cal. Rptr. 374, 551 P.2d 1206* (declining to follow *General Acceptance Corp. v. Robinson (1929) 207 Cal. 285, 289, 277 P. 1039*)

In challenging the trial court's granting of a motion based on forum non conveniens, plaintiff argued that no suitable

alternative forum is available because Virginia applies contributory, rather than comparative, negligence principles, and plaintiff's own negligence or assumption of the risk would completely bar his recovery under Virginia law. As a general rule, comparative law questions are irrelevant to a forum non conveniens analysis, except when the alternate forum provides no remedy at all. Accordingly, the court of appeal affirmed, holding that plaintiff has identified no bar to filing a negligence action in Virginia. If he proves his case, and proves that he was not contributorily negligent, he will be entitled to recover damages under Virginia law; a forum is suitable where an action can be brought, although not necessarily won. *Roman v. Liberty University, Inc. (2008) 162 Cal. App. 4th 670, 683, 75 Cal. Rptr. 3d 828*

Private and public interest factors must be applied flexibly, without giving undue emphasis to any one element. The doctrine of forum non conveniens may not be based on identification of a single factor rather than the balancing of several. An undue emphasis on a single factor is especially threatening to a balanced analysis because some of the matters to be weighed will by their nature point to a grant or denial of the motion. For example, the jurisdiction's interest in deterring future wrongful conduct of the defendant will usually favor retention of the action if the defendant is a resident of the forum, whereas the court congestion factor will usually weigh in favor of trial in the alternate jurisdiction. The court must consider the public policy considerations, such as California's interest in deciding actions against resident corporations whose conduct in the state causes injury to persons in other jurisdictions. *Morris v. AGFA Corp. (2006) 144 Cal. App. 4th 1452, 1465, 51 Cal. Rptr. 3d 301*

To satisfy threshold inquiry regarding suitability of alternative forum, all defendants must be subject to jurisdiction of proposed alternate forum. *American Cemwood Corp. v. American Home Assurance Co. (2001) 87 Cal. App. 4th 431, 104 Cal. Rptr. 2d 670* ; *Northrop Corp. v. American Motorists Ins. Co. (1990) 220 Cal. App. 3d 1553, 1562, 270 Cal. Rptr. 233*

Standards for determining whether to grant forum non conveniens motion are set forth in *Stangvik v. Shiley Inc. (1991) 54 Cal. 3d 744, 751, 1 Cal. Rptr. 2d 556, 819 P.2d 14* ; first court must determine if alternative forum is suitable place for trial; if it is, next step is to consider private interests of litigants and interests of public in retaining action for trial in California; defendant, as moving party, bears burden of proof; *Stangvik* does not require extensive evidentiary showing, but does require showing that trial may be had in alternative forum and that some form of relief may be granted; examination of public and private interests at stake involve more general considerations; no requirement that trial court make any express ruling on motion to stay/dismiss. *Campbell v. Parker-Hannifin Corp. (1999) 69 Cal. App. 4th 1534, 1540-1542, 82 Cal. Rptr. 2d 202*

If alternative forum is suitable, court must balance private interests of litigants and of the public in retaining action in California; trial court's balancing is given substantial deference; private interest factors are those that make trial and enforceability of ensuing judgment expeditious and relatively inexpensive, such as ease of access to sources of proof, cost of obtaining attendance of witnesses, and availability of compulsory process for attendance of unwilling witnesses; public interest factors include avoidance of overburdening local courts with congested calendars, protecting interests of potential jurors so they are not called on to decide cases in which local community has little concern, and weighing competing interests of California and alternate jurisdiction in litigation; no single factor is predominant; instead, all factors should be weighed together; when plaintiff is resident of forum state, plaintiff's choice of forum in that state is afforded substantial weight; nonresident plaintiff's choice of forum is entitled to less deference. *Chong v. Superior Court (1997) 58 Cal. App. 4th 1032, 1037-1038, 68 Cal. Rptr. 2d 427*

In deciding whether to issue stay, trial court should consider importance of discouraging multiple litigation designed solely to harass adverse party, and of avoiding unseemly conflicts with courts of other jurisdictions as well as whether rights of parties can best be determined by court of other jurisdiction because of nature of subject matter, availability of witnesses, or stage to which proceedings in other court have already advanced; trial court can take into account any consideration that bears on relative suitability or convenience of forums. *Century Indemnity Co. v. Bank of America (1997) 58 Cal. App. 4th 408, 411-412, 68 Cal. Rptr. 2d 132*

Action will be dismissed or stayed if suitable alternative forum exists and balance of private and public interests weigh in favor allowing litigation to proceed in alternative forum; if court determines that alternative forum is suitable place for trial, next step is to consider litigants' private interests and public interest in retaining action for trial in California; private interest factors are those that make trial and enforceability of ensuing judgment expeditious and relatively inexpensive, e.g., ease of access to sources of proof, cost of obtaining attendance of witnesses, and availability of compulsory process for attendance of unwilling witnesses; public factors include avoidance of overburdening local courts with congested calendars, protecting interests of jurors so that they are not called on to decide cases in which local community has little concern, and weighing competing interests of California and alternate jurisdiction in litigation. *Hansen v. Owens-Corning Fiberglas Corp. (1996) 51 Cal. App. 4th 753, 758-759, 59 Cal. Rptr. 2d 229*

Trial court's orders of dismissal as to nonresident plaintiffs based on doctrine of forum non conveniens affirmed when only basis for bringing action in California was prospect that law in California more hospitable to plaintiffs claims than New York Law; in deciding motion for forum non conveniens, court cannot consider that under California procedural or substantive law more favorable result will occur or even that cause of action is available to plaintiff under California law that is not recognized in alternative forum; showing that recovery more difficult or even impossible in foreign forum does demonstrate that alternative forum is inadequate; alternative forum is suitable if defendant amenable to process, there is no procedural bar to ability of foreign court to reach issues raised on merits (or if such bar exists, for example, statute of limitations, defendants waived it), and adjudication in alternative forum is by independent judiciary applying what is generally regarded by American courts as due process of law. *Boaz v. Boyle & Co. (1995) 40 Cal. App. 4th 700, 704, 710-711, 46 Cal. Rptr. 2d 888*

Trial court abused discretion in granting motion to dismiss on grounds of inconvenient forum in action brought by automobile manufacturer against numerous insurance companies to establish rights to insurance coverage for liabilities arising from environmental contamination of various sites in several states, including California, given following factors: insurance policies contained "service of suit" clauses, California bore substantial interest in regulating conduct at issue, California court had superior ability to decide case expeditiously, burden on California courts was not disproportionate, situation did not involve unfairness in imposing jury duty on community unrelated to action, there was no possibility of needless multiplicitous actions and inconsistent adjudication, and defendants failed to establish party and witness inconvenience. *Ford Motor Co. v. Insurance Co. of North America (1995) 35 Cal. App. 4th 604, 618, 41 Cal. Rptr. 2d 342*

Trial court did not abuse its discretion in granting motion to dismiss due to forum non conveniens in action brought by residents of Nevada against foreign vehicle manufacturer and California corporations, manufacturer's wholly owned subsidiaries, where substantial evidence established vehicle was purchased in Nevada from Nevada resident, accident occurred in Nevada, witnesses residing in Nevada declared extreme inconvenience by California trial, California corporations did not manufacture or design vehicle and lawsuit would burden California courts. *Rinauro v. Honda Motor Co. (1995) 31 Cal. App. 4th 506, 510, 37 Cal. Rptr. 2d 181*

Trial court as not abusing discretion in staying action arising from commercial contracts with enforceable forum-selection clause; boilerplate nature of clause as immaterial since plaintiff signed them voluntarily. *Cal-State Business Products & Services, Inc. v. Ricoh (1993) 12 Cal. App. 4th 1666, 1681, 16 Cal. Rptr. 2d 417*

In action arising out of employment contract containing a forum selection clause mandating Texas as forum for actions arising out of contract, factors to be considered by California court in determining whether to honor clause as including, in addition to forum selection clause, other relevant factors including: relative availability of evidence and burden of trial in one place rather than other; state's interest in providing its residents a forum or regulating activity involved; ease of access to alternative forums; avoidance of multiplicity of suits and conflicting adjudications; and closeness of connection between cause of action and defendant's local activities. *Lifeco Services Corp. v. Superior Court (1990) 222 Cal. App. 3d 331, 335, 271 Cal. Rptr. 385*

In determining applicability of forum non conveniens doctrine, courts must consider public interest as well as private interests of litigants. *Goodwine v. Superior Court (1965) 63 Cal. 2d 481, 485, 47 Cal. Rptr. 201, 407 P.2d 1* ; *Appalachian Ins. Company v. Superior Court (1984) 162 Cal. App. 3d 427, 434, 208 Cal. Rptr. 627*

Private interest factors are those that make trial and enforceability of ensuing judgment expeditious and relatively inexpensive, such as ease of access to sources of proof, cost of obtaining attendance of witnesses, and availability of compulsory process for attendance of unwilling witnesses; public interest factors include overburdening local courts with congested calendars, protecting interests of potential jurors so that they are not called on to decide cases in which local community has little concern, and weighing competing interests of California and alternate jurisdiction in litigation; in reviewing private interests, no weight should be given to fact California law is more beneficial to plaintiffs than law of alternative jurisdiction so long as alternative jurisdiction affords some remedy; when plaintiff resides outside United States, plaintiff's choice of forum is not a substantial factor in favor of retaining jurisdiction here; when defendant is California resident, California is presumptively convenient forum, but presumption may be overcome by showing that alternate jurisdiction is more convenient place for trial of action. *Campbell v. Parker-Hannifin Corp. (1999) 69 Cal. App. 4th 1534, 1541-1544, 82 Cal. Rptr. 2d 202*

Considerations pertaining to convenient forum includes, inter alia, interest of state in providing forum to its residents; choice of law; relative availability of evidence; ease of access to alternative forum; avoidance of multiplicity of suits and conflicting adjudications; and inconvenience to defendant to defend in local forum. *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 539, 257 Cal. Rptr. 278*

In declaratory relief action to determine insurers' obligations to defend and pay asbestos related property damage claims, trial court's grant of motion to stay on inconvenient forum grounds pending resolution of related cases in Ohio federal district court was proper when (1) all parties were before Ohio court, (2) issues in California case and Ohio cases were inextricably intertwined, (3) relevant insurance policy would likely be interpreted under Ohio law, and (4) neither California nor Ohio was demonstrably more convenient for prospective witnesses. *Celotex Corp. v. American Ins. Co. (1987) 199 Cal. App. 3d 678, 683-685, 245 Cal. Rptr. 429*

Stay of California action concerning defendants' allegedly fraudulent handling of Swiss decedent's estate was proper when plaintiffs had already instituted suit involving similar issues in Switzerland and such suit had both criminal and civil aspects; fact that defendants' invocation of self-incrimination privileges and related problems would require application of Swiss law and that California lawsuit would require defendants to defend themselves simultaneously in two languages and under two different legal systems weighed in favor of application of forum non conveniens. *Klein v. Superior Court (1988) 198 Cal. App. 3d 894, 901-905, 244 Cal. Rptr. 226*

Applicable law under choice of law principles is factor in determining whether to invoke doctrine of inconvenient forum; doctrine of inconvenient forum is not to be invoked if it will deprive plaintiff of remedy, but fact that applicable law in California is more favorable to plaintiff does not preclude finding of inconvenient forum. *Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 177-179, 227 Cal. Rptr. 247 , cert. denied, 479 U.S. 1049 (1987)*

In making its determination to stay or dismiss action for inconvenient forum, court may take into account any consideration which legitimately bears on relative suitability or convenience of the alternative forums; basically, court looks to relative convenience and fairness to parties and witnesses in favoring one forum over another, which forum will best serve interests of judicial efficiency, which forum is most able to obtain jurisdiction over parties and compel witnesses to testify, and relative interest of each state in adjudicating issue. *Corrigan v. Bjork Shiley Corp. (1986) 182 Cal. App. 3d 166, 173-174, 174 n.2, 227 Cal. Rptr. 247 , cert. denied, 479 U.S. 1049 (1987)*

Imposition of limited jurisdiction over foreign corporations was not precluded by doctrine of inconvenient forum when applicable law was that of forum, relative availability of evidence was in forum, and policy of avoiding multiplicity of suits and conflicting adjudications in other forums would be served. *Rice Growers Assn. v. First National Bank (1985)*

167 Cal. App. 3d 559, 579-580, 214 Cal. Rptr. 468

Balancing of criteria is appropriate on motion to dismiss for inconvenient forum even when contract contains clause in which parties submit to jurisdiction of any court of competent jurisdiction; court's enforcement of service of suit contract clause as error when public and private interests dictated otherwise. *Appalachian Ins. Company v. Superior Court (1984) 162 Cal. App. 3d 427, 436, 434-438, 208 Cal. Rptr. 627*

Fact that large national corporation conducts some business in California does not bring it within favored position, for forum non conveniens purposes, of plaintiff residing solely in California, although different situation would be presented if litigants were incorporated in California or had their principal place of business here. *Appalachian Ins. Company v. Superior Court (1984) 162 Cal. App. 3d 427, 436, 436 n.3, 208 Cal. Rptr. 627*

Existence of consolidated Nevada action involving most claims from Nevada hotel fire outweighed California plaintiff's interest in local action, despite presence of some California defendants. *Dendy v. MGM Grand Hotels, Inc. (1982) 137 Cal. App. 3d 457, 461-462, 187 Cal. Rptr. 95*

[8] Forum Selection Clauses

Non-negotiated forum selection clause in form ticket contract was reasonable and enforceable when (a) no indication that defendant had chosen Florida as forum to discourage legitimate passenger claims, (b) no evidence plaintiffs acceded to clause only through fraud or overreaching, and (c) plaintiffs, Washington residents, conceded receiving notice of clause and therefore presumably had option of rejecting contract with impunity. *Carnival CruiseLines, Inc. v. Shute (1991) 499 U.S. 585, 593-595, 111 S. Ct. 1522, 113 L. Ed. 2d 622*

Forum selection clause is generally given effect unless it is unfair or unreasonable, or invalid because of fraud or overreaching. *M/S Bremen v. Zapata Off-Shore Co. (1972) 407 U.S. 1, 15, 92 S. Ct. 1907, 32 L. Ed. 2d 513*

Inconvenience or additional expense not sufficient to render clause unreasonable; court stayed rather than dismissed jurisdiction, permitting opportunity to seek reinstatement of California action if necessary. *Smith, Valentino & Smith, Inc. v. Superior Court (1976) 17 Cal. 3d 491, 496, 131 Cal. Rptr. 374, 551 P.2d 1206*

A challenge to a forum selection clause cannot properly be raised by demurrer. *Miller-Leigh v. Henson (2007) 152 Cal. App. 4th 1143, 1150, 62 Cal. Rptr. 3d 83*

Forum selection clause may be enforced against a plaintiff who is not a party to the contract in question if the plaintiff is closely related to the contractual relationship. The plaintiff challenging the forum selection clause has the burden of showing, in response to a defendant's motion to stay or dismiss, that enforcement of the clause would be unreasonable under the circumstances. Where an entity that is not itself a party to a contract sues in a representative capacity challenging certain contractual terms, it purports to assert the rights of those who are parties to the contract, and is thus "closely related" to the contractual relationship. *Net2Phone, Inc. v. Superior Court (2003) 109 Cal. App. 4th 583, 135 Cal. Rptr. 2d 149*

Case law in conflict regarding standard of appellate review of a motion to enforce a forum selection clause; substantial evidence test versus abuse of discretion standard. *Intershop Communications v. Superior Court (2002) 104 Cal. App. 4th 191, 199, 127 Cal. Rptr. 2d 847*

Forum clause in Internet agreement for registering a nickname or alias with Yahoo!, a California-based Internet message board, was not negotiable and therefor a contract of adhesion and will not create personal jurisdiction. *Nam Tai Electronics, Inc. v. Titzer (2001) 93 Cal. App. 4th 1301, 1311-1313, 113 Cal. Rptr. 2d 769*

Forum selection clause in adhesion contract is enforceable even if defendant did not actually read it if clause provided adequate notice to defendant that defendant was agreeing to jurisdiction cited in contract; however, when clause does not give adequate notice to defendant that he or she is agreeing to jurisdiction cited in contract, requisite mutual consent to that contract is lacking and no valid contract with respect to that clause exists; thus, provision that defendants "Freely Consent to Personal Jurisdiction of the Applicable Jurisdiction ... ," held not to be valid forum selection compelling defendants to litigate in California because it did not give notice that defendants were consenting to have California exercise personal jurisdiction over them in dispute involving their transaction. *Hunt v. Superior Court (2000) 81 Cal. App. 4th 901, 908-909, 97 Cal. Rptr. 2d 215*

For defendant who is not party to contract to demonstrate it was so closely related to contractual relationship as to be entitled to enforce forum selection clause, defendant must show (1) agreement to be bound, (2) contracting parties' intent to benefit defendant, or (3) defined and intertwining business relationship with contracting party; key to "closely related" test is whether nonsignatories were close to contractual relationship, not whether they were close to third party signator; giving standing to all closely related entities serves judicial economy by making all parties closely allied to contractual relationship accountable in same forum, thereby abating proliferation of actions and inconsistent rulings. *Bugna v. Fike (2000) 80 Cal. App. 4th 229, 233-235, 95 Cal. Rptr. 2d 161*

One not party to agreement containing forum selection clause has no standing to assert clause unless it can show that it was either an intended third party beneficiary to agreement or so closely involved in agreement or associated with a party to the transaction as to be functionally equivalent to that party. *Berclain America Latina v. Baan Co. (1999) 74 Cal. App. 4th 401, 403, 405-408, 87 Cal. Rptr. 2d 745*

Modern trend is to enforce mandatory forum selection clause unless unfair or unreasonable; factors that apply to forum non conveniens motion do not control, and clause is usually given effect without extensive analysis of factors relating to convenience; clauses that grant jurisdiction to particular forum without expressly making that forum mandatory situs for resolution of disputes (*e.g.*, clauses that call for a party to submit to jurisdiction of "any court of competent jurisdiction" known as a "Lloyd's-type" clause, or more narrowly focused clause that, e.g., party submits to jurisdiction in Los Angeles) are considered permissive only; absent mandatory forum selection clause, forum non conveniens motion requires weighing factors of public and private convenience and normal forum non conveniens analysis applies; although permissive forum selection clause is always entitled to substantial weight, it is only one factor in forum selection mix. *Berg v. MTC Electronics Technologies Co. (1998) 61 Cal. App. 4th 349, 358-359, 71 Cal. Rptr. 2d 523*

Defendant who is nonparty to agreement that contains forum selection clause lacks standing to claim benefits from clause unless defendant can establish that defendant is third party beneficiary to agreement or was closely related to the contractual relationship between the parties to the agreement. *Bancomer, S.A. v. Superior Court (1996) 44 Cal. App. 4th 1450, 1458-1461, 52 Cal. Rptr. 2d 435*

Plaintiff bears burden of proof in opposing enforcement of forum selection clause and must demonstrate that enforcement of clause would be unreasonable under circumstances of case. *CQL Original Products, Inc. v. National Hockey League Players' Assn. (1995) 39 Cal. App. 4th 1347, 1354, 46 Cal. Rptr. 2d 412*

In contrast with abuse of discretion standard of review in noncontractual forum non conveniens motion, substantial evidence standard of review applies when forum is selected by contract. *CQL Original Products, Inc. v. National Hockey League Players' Assn. (1995) 39 Cal. App. 4th 1347, 1354, 46 Cal. Rptr. 2d 412* ; *but see* *Bancomer, S. A. v. Superior Court (1996) 44 Cal. App. 4th 1450, 1457, 52 Cal. Rptr. 2d 435* (abuse of discretion standard applies to review of trial court's decision to enforce or refuse to enforce forum selection clause; *Cal-State Business Products & Services, Inc. v. Ricoh (1993) 12 Cal. App. 4th 1666, 1680-1681, 16 Cal. Rptr. 2d 417* relied on for the appropriate standard of review in *CQL Original Products, Inc.* not followed in *Bancomer*)

Non-negotiated forum selection clause on form ticket contract is unenforceable as to any plaintiff with insufficient notice of clause since contract may lack mutual consent to that term; remand on issue of notice. *Carnival Cruise Lines, Inc. v. Superior Court (1991) 234 Cal. App. 3d 1019, 1027, 286 Cal. Rptr. 323*

Court is required to enforce forum selection clause unless it would be unreasonable to do so on facts of case. *Lifeco Services Corp. v. Superior Court (1990) 222 Cal. App. 3d 331, 334, 271 Cal. Rptr. 385*

[9] Motion to Stay or Dismiss Action

Dismissal of action between two east coast corporations respecting an east coast claim, was appropriate remedy, notwithstanding fact that both parties conducted some business in California and contract between parties authorized suit in any court of competent jurisdiction within United States, when California had no interest in lawsuit and neither party was a California resident. *Appalachian Ins. Company v. Superior Court (1984) 162 Cal. App. 3d 427, 438, 440, 208 Cal. Rptr. 627*

Balancing of criteria was appropriate on motion to dismiss action between two east coast corporations on east coast claim for inconvenient forum, although contract sued on contained clause in which parties submitted to jurisdiction of any court of competent jurisdiction within United States; trial court's enforcement of service of suit clause and denial of inconvenient forum motion was error when public interests dictated otherwise. *Appalachian Ins. Company v. Superior Court (1984) 162 Cal. App. 3d 427, 434-440, 208 Cal. Rptr. 627*

Motion to stay or dismiss action for inconvenient forum involves weighing process relative to convenience of forum. *Gould, Inc. v. Health Sciences, Inc. (1976) 54 Cal. App. 3d 687, 692, 126 Cal. Rptr. 726*

Motion to dismiss action for inconvenient forum encompasses motion under *Code Civ. Proc. § 389* to dismiss for lack of indispensable parties who are nonresidents and not subject to process of California courts. *Atlantic Richfield Co. v. Superior Court (1975) 51 Cal. App. 3d 168, 175, 124 Cal. Rptr. 63*

[10] Waiver

Forum non conveniens objection is waived if not interposed in trial court; in dependency litigation, nonjurisdictional issues must be subject of objection or appropriate motions in juvenile court, or are waived and may not be raised for first time on appeal; *Fam. Code § 3407* [repealed; *now see Fam. Code § 3427*] permits trial court to find its state to be inconvenient forum even after making initial decree. *In re Christopher B. (1996) 43 Cal. App. 4th 551, 558-559, 51 Cal. Rptr. 2d. 43* (distinguishing case in which foreign country, acting as amicus curiae, was permitted to raise forum non conveniens issue on appeal although not raised in trial court)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsConsentCivil ProcedureVenueForum Non ConveniensCivil ProcedureFederal & State InterrelationshipsChoice of LawGovernmental InterestsCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureAppealsStandards of ReviewSubstantial EvidenceGeneral OverviewContracts LawContract Conditions & ProvisionsForum Selection Clauses

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§ 323.103 Law Reviews

Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, *74 Cal. L. Rev. 1259 (1986)*

Comment, *Considerations of Choice of Law in the Doctrine of Forum Non Conveniens*, *74 Cal. L. Rev. 565 (1986)*

Note, *Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Law*, *94 Yale L.J. 1693 (1985)*

Comment, *Jagger v Superior Court: Forum Non Conveniens as a Protective Legal Device*, *13 U. West L.A. L. Rev. 221 (1981)*

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

§§ 323.104[Reserved]

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For discussion and forms of notices of motion and orders generally, see Ch. 372, *Motions and Orders*

For memoranda supporting and opposing a motion to set aside and vacate a default and default judgment, see California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders*

For memoranda supporting and opposing a motion to quash service of summons for lack of personal jurisdiction or to stay or dismiss an action for inconvenient forum, or to set aside and vacate a default and default judgment for lack of personal jurisdiction, see California Points and Authorities, Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum*

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28-323 California Forms of Pleading and Practice--Annotated § 323.111

§ 323.111 State Statutes

Motion to quash service of summons for lack of personal jurisdiction over defendant. *Code Civ. Proc. § 418.10(a)(1), (b)*

Written notice of motion to quash summons as required to be given as prescribed in *Code Civ. Proc. § 1005(b). Code Civ. Proc. §§ 418.10(b), 1005(a)(4)*

Appeal of order granting motion to quash service of summons for lack of personal jurisdiction or to stay or dismiss action on ground of inconvenient forum. *Code Civ. Proc. §§ 904.1(a)(3), 904.2(d)*

Mandate to review denial of motion to quash service of summons for lack of personal jurisdiction or to stay or dismiss action for inconvenient forum. *Code Civ. Proc. § 418.10(c)*

Time for responsive pleading under *Code Civ. Proc. § 418.10(c)* after Supreme Court denies petition to review Court of Appeal denial of writ of mandate that was sought to review trial court's denial of motion to quash. *Cal. Rules of Ct., Rule 8.491*

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329
Chapter 323 JURISDICTION: PERSONAL JURISDICTION, INCONVENIENT FORUM, AND APPEARANCES
PART III. RESEARCH GUIDE
C. Motions to Quash

28-323 California Forms of Pleading and Practice--Annotated § 323.112

§ 323.112 Decisions

[1] Appeal

In connection with motion to quash service of process on jurisdictional grounds, if there is conflict of evidence trial court's factual determinations are not disturbed on appeal if supported by substantial evidence; if there is no conflict in the evidence, however, question of jurisdiction is purely question of law and reviewing court engages in independent review of record. *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 449, 58 Cal. Rptr. 2d 899, 926 P.2d 1085*

Petition for writ of mandate is appropriate method to order denying motion to quash service of summons for lack of personal jurisdiction; appellate review is de novo because facts were undisputed and because controlling issue was proper construction of terms of written contract; abuse of discretion standard of review concerning a trial court's decision to enforce or not enforce a forum selection clause distinguished. *Hunt v. Superior Court (2000) 81 Cal. App. 4th 901, 905* & n.1, *97 Cal. Rptr. 2d 215*

When evidence undisputed, jurisdiction question is purely one of law subject to de novo review. *Stone v. State of Texas (1999) 76 Cal. App. 4th 1043, 1048, 90 Cal. Rptr. 2d 657*

When no conflict in evidence, question is one of law; in such case, lower court's determination is not binding on reviewing court. *Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1055, 85 Cal. Rptr. 2d 611*

With regard to motion to quash, when there is conflicting evidence, trial court's factual determinations will not be not disturbed on appeal if supported by substantial evidence; when no conflict in evidence, however, question of jurisdiction is purely one of law and reviewing court engages in independent review of record. *Serafini v. Superior Court (1998) 68 Cal. App. 4th 70, 77, 80 Cal. Rptr. 2d 159*

When evidence conflicts, appellate court reviews trial court for abuse of discretion, whereas when parties do not dispute facts, appellate court reviews issue of jurisdiction de novo. *As You Sow v. Crawford Laboratories, Inc. (1996) 50 Cal. App. 4th 1859, 1866, 58 Cal. Rptr. 2d 654*

When defendant moves to quash out-of-state service of process for lack of jurisdiction, plaintiff has burden of proof to establish facts of jurisdiction by preponderance of the evidence; evidence of those facts or their absence may be from declarations or verified complaint being treated as declaration for that purpose; if there is conflict in declarations, trial court's resolution of conflict will not be disturbed on appeal if substantial evidence supports that determination; evidence not before the trial court cannot be considered on appeal. *Crea v. Busby (1996) 48 Cal. App. 4th 509, 514, 55 Cal. Rptr. 2d 513*

In reviewing trial court order granting motion to quash service of summons, appellate court is guided by following principles: (1) where defendant properly moves to quash out of state service of process for lack of jurisdiction, burden of proof is on plaintiff to establish facts of jurisdiction by preponderance of the evidence; (2) evidence of those facts or their absence may be in form of declarations; (3) resolution by trial court of any conflict in declarations will not be disturbed on appeal if determination of that court is supported by substantial evidence. *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 533-534, 257 Cal. Rptr. 278*

In reviewing order on motion to quash service of summons, when evidence of jurisdictional facts is not conflicting, question of whether defendant is subject to personal jurisdiction is one of law, and lower court's determination is not binding on reviewing court. *Great-West Life Assurance Co. v. Guarantee Co. of North America (1988) 205 Cal. App. 3d 199, 204, 252 Cal. Rptr. 363* ; *Felix v. Bomoro Kommanditgesellschaft (1987) 196 Cal. App. 3d 106, 111, 241 Cal. Rptr. 670*

Facts are viewed most favorably to defendant on review of order granting motion to quash service of summons. *Sklar v. Princess Properties International, Ltd. (1987) 194 Cal. App. 3d 1202, 1208, 240 Cal. Rptr. 102* , disapproved on other grounds in *Vons Cos., Inc. v. Seabest Foods, Inc. (1996) 14 Cal.4th 434, 58 Cal. Rptr. 2d 899* ; *University Financing Consultants, Inc. v. Barouche (1983) 148 Cal. App. 3d 1165, 1168, 196 Cal. Rptr. 484* ; *Messerschmidt Development Co. v. Crutcher Resources Corp. (1978) 84 Cal. App. 3d 819, 825, 149 Cal. Rptr. 35*

When facts set out in affidavits and declarations are widely at variance, those affidavits favoring contention of prevailing party establish not only facts stated in them but also all facts which reasonably may be inferred from them; in event of substantial conflict in facts stated, determination of controverted facts by trial court as binding. *R.E. Sanders & Co. v. Lincoln-Richardson Enterprises, Inc. (1980) 108 Cal. App. 3d 71, 74, 166 Cal. Rptr. 269*

Failure to seek mandate after motion to quash service is denied and filing answer constitutes general appearance waiving jurisdictional objection; error, if any, in denying motion is not subject to review on appeal from subsequent judgment. *McCorkle v. City of Los Angeles (1969) 70 Cal. 2d 252, 256-258, 74 Cal. Rptr. 389, 449 P.2d 453*

Appellate courts have inherent power to grant extraordinary relief to prevent action by trial court in excess of its jurisdiction once trial court has rejected objection on that ground. *McIntire v. Superior Court (1975) 52 Cal. App. 3d 717, 719-720 n.4, 125 Cal. Rptr. 379*

Mandate was remedy to compel trial court to quash service of summons on former administratrix of estate of deceased tortfeasor when, prior to service of summons, order discharging administratrix and sureties was entered, and no notice of pendency of tort action was filed in estate proceeding as required by *Prob. Code § 714* (repealed, *now see Prob. Code § 9354(b)*). *Toledo v. Superior Court (1971) 19 Cal. App. 3d 450, 452-455, 96 Cal. Rptr. 842*

[2] Burden of Proof

On motion to quash service of summons, plaintiff bears burden of proving existence of jurisdiction, including element of reasonableness, although there is a presumption of reasonableness on a showing that defendant purposefully directed his or her activities at forum residents. *Haisten v. Grass Valley Medical Reimbursement (9th Cir. 1986) 784 F. 2d 1392, 1397*

When defendant moves to quash service of process on jurisdictional grounds, plaintiff has initial burden of demonstrating facts justifying jurisdiction; however, once facts showing minimum contacts with forum state established, defendant has burden to demonstrate exercise of jurisdiction would be unreasonable. *Vons Companies, Inc. v. Seabest Foods, Inc. (1996) 14 Cal. 4th 434, 449, 58 Cal. Rptr. 2d 899, 926 P.2d 1085* ; *Stone v. State of Texas (1999) 76 Cal. App. 4th 1043, 1048, 90 Cal. Rptr. 2d 657*

Once defendant files motion to quash, burden is on plaintiff to prove by preponderance of evidence validity of service and court's jurisdiction over defendant. *Bolkiah v. Superior Court (1999) 74 Cal. App. 4th 984, 991, 88 Cal. Rptr. 2d 540*

When nonresident defendant s personal jurisdiction burden shifts to plaintiff to demonstrate by preponderance of evidence that all necessary jurisdictional criteria are met; once facts showing minimum contacts with forum state established, however, it becomes defendant's burden to demonstrate exercise of jurisdiction would be unreasonable. *Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1054-1055, 85 Cal. Rptr. 2d 611*

When plaintiff moves to quash service of process on jurisdictional grounds, plaintiff has initial burden of demonstrating facts justifying exercise of jurisdiction; once facts showing minimum contacts with forum state established, however, it becomes defendant's burden to demonstrate that exercise of jurisdiction would be unreasonable. *Serafini v. Superior Court (1998) 68 Cal. App. 4th 70, 77, 80 Cal. Rptr. 2d 159*

When defendant moves to dismiss for lack of personal jurisdiction, plaintiff has initial burden of demonstrating facts justifying exercise of jurisdiction; once facts showing minimum contacts with forum state are established, it becomes defendant's burden to demonstrate that exercise of jurisdiction would be unreasonable; when there is conflicting evidence, trial court's factual determinations are not disturbed on appeal if supported by substantial evidence; when no conflict in evidence exists question of jurisdiction is one of law and reviewing court engages in independent review of record. *Goehring v. Superior Court (1998) 62 Cal. App. 4th 894, 903-904, 73 Cal. Rptr. 2d 105*

In connection with motion to dismiss or stay for forum non conveniens, although suit will not be dismissed if moving defendant cannot be subjected to jurisdiction in other states, court was unaware of any authority that a moving defendant must show all defendants are subject to jurisdiction in particular alternative forum; in asbestos cases such as that before the court, when there are 200 named defendants, it is unreasonable to expect moving defendant to prove all defendants are subject to jurisdiction in a particular alternative forum. *Hansen v. Owens-Corning Fiberglas Corp. (1996) 51 Cal. App. 4th 753, 758-759, 59 Cal. Rptr. 2d 229*

When defendant moves to quash out-of-state service of summons, plaintiff has burden of proving jurisdiction by preponderance of evidence. *As You Sow v. Crawford Laboratories, Inc. (1996) 50 Cal. App. 4th 1859, 1866, 58 Cal. Rptr. 2d 654*

When defendant moves to quash out-of-state service of process for lack of jurisdiction, plaintiff has burden of proof to establish facts of jurisdiction by preponderance of evidence; evidence of those facts or their absence may be from declarations or verified complaint being treated as declaration for that purpose. *Crea v. Busby (1996) 48 Cal. App. 4th 509, 514, 55 Cal. Rptr. 2d 513*

When defendant has moved to dismiss for lack of jurisdiction, plaintiff has burden of establishing that jurisdiction is

proper. *Seagate Technology v. A. J. Kogyo Co. (1990) 219 Cal. App. 3d 696, 700, 268 Cal. Rptr. 586*

On motion to quash service of summons for lack of personal jurisdiction, plaintiff bears burden of proof to establish facts of jurisdiction; trial court, in ruling on motion, considers evidence relevant to that issue which may be set forth in declarations, treating verified complaint as declaration; on appeal, any conflicts in evidence are resolved against appellant and in support of order. *Wolfe v. City of Alexandria (1990) 217 Cal. App. 3d 541, 546, 265 Cal. Rptr. 881*

On motion to quash service of summons, burden of proof is on plaintiff to demonstrate that minimum contacts exist between defendant and forum state to justify imposition of personal jurisdiction, and plaintiff as having right to conduct discovery with regard to issue of jurisdiction to develop facts necessary to sustain that burden. *Magnecomp Corp. v. Athene Co. (1989)209 Cal. App. 3d 526, 533, 257 Cal. Rptr. 278* ; *Omega Video Inc. v. Superior Court (1983) 146 Cal. App. 3d 470, 481, 194 Cal. Rptr. 574*

When defendant properly moves to quash out of state service of process for lack of jurisdiction, burden of proof is on plaintiff to establish facts of jurisdiction by a preponderance of the evidence. *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 533, 257 Cal. Rptr. 278* ; *Ziller Electronics Lab GmbH v. Superior Court (1988) 206 Cal. App. 3d 1222, 1232-1233, 254 Cal. Rptr. 410* ; *Felix v. Bomoro Kommanditgesellschaft (1987) 196 Cal. App. 3d 106, 110, 241 Cal. Rptr. 670* ; *Sklar v. Princess Properties International, Ltd. (1987) 194 Cal. App. 3d 1202, 1208, 240 Cal. Rptr. 102* , disapproved on other grounds in *Vons Cos., Inc. v. Seabest Foods, Inc. (1996) 14 Cal.4th 434, 58 Cal. Rptr. 2d 899*

Burden, on motion to quash, is on plaintiff to establish facts of jurisdiction by preponderance of evidence; when evidence of jurisdictional facts, which may be in form of declarations, is in conflict, trial court's resolution of them is not disturbed on appeal if supported by substantial evidence; on review of order granting motion to quash, facts must be viewed most favorably to defendant. *Kroopf v. Guffey (1986) 183 Cal. App. 3d 1351, 1356, 228 Cal. Rptr. 807* ; *Messerschmidt Development Co. v. Crutcher Resources Corp. (1978) 84 Cal. App. 3d 819, 825, 149 Cal. Rptr. 35*

[3] Evidence

When defendant moved to quash o n ground federal law preempted state jurisdiction of issues involving Indian gaming activities and on ground court lacked personal jurisdiction over tribe, its officers, members, and agents due to sovereign immunity, court concluded that, even assuming sovereign immunity relates to subject matter rather than personal jurisdiction, appellate court is not limited in its review of trial court's ruling to allegations of complaint as if defendant had demurred; trial court had reviewed parties' papers, including documentary evidence and affidavits and rendered judgment in defendants' favor; court of appeal affirmed. *Great Western Casinos, Inc. v. Morongo Band of Mission Indians (1999) 74 Cal. App. 4th 1407, 1415-1418, 88 Cal. Rptr. 2d 828*

Plaintiff's burden to demonstrate by preponderance of evidence that all necessary jurisdictional criteria are met must be by competent evidence in affidavits and authenticated documentary evidence; unverified complaint cannot supply necessary facts; moreover, declarations are insufficient to support assertions for which they are offered if they consist primarily of vague assertions of ultimate facts rather then specific evidentiary facts permitting court to form independent conclusion on issue. *Jewish Defense Organization, Inc. v. Superior Court (1999) 72 Cal. App. 4th 1045, 1054-1055, 85 Cal. Rptr. 2d 611*

Allegations in unverified complaint cannot be used to establish jurisdiction. *Goehring v. Superior Court (1998) 62 Cal. App. 4th 894, 909, 73 Cal. Rptr. 2d 105*

Plaintiff is not required to prove truth of allegations constituting causes of action in order to justify exercise of jurisdiction over nonresident parties; however, plaintiff must present facts demonstrating that conduct of defendants

related to pleaded causes is such as to constitute constitutionally cognizable "minimum contacts." *Magnecomp Corp. v. Athene Co. (1989) 209 Cal. App. 3d 526, 533, 257 Cal. Rptr. 278*

Plaintiff's burden of demonstrating by preponderance of evidence that all necessary jurisdictional criteria are met must be met by competent evidence in affidavits and authenticated documentary evidence; unverified complaint is not to be considered as affidavit supplying necessary facts. *Ziller Electronics Lab GmbH v. Superior Court (1988) 206 Cal. App. 3d 1222, 1232-1233, 254 Cal. Rptr. 410*

On defendant's motion to quash out of state service of process for lack of jurisdiction, evidence of facts establishing lack of jurisdiction, or their absence, may be in form of declarations; resolution by trial court of any conflict in declarations is not disturbed on appeal if resolution is supported by substantial evidence. *Sammons Enterprises, Inc. v. Superior Court (1988) 205 Cal. App. 3d 1427, 1430, 253 Cal. Rptr. 261* ; *Kroopf v. Guffey (1986) 183 Cal. App. 3d 1351, 1356, 1359, 228 Cal. Rptr. 807* ; *Messerschmidt Development Co. v. Crutcher Resources Corp. (1978) 84 Cal. App. 3d 819, 825, 149 Cal. Rptr. 35*

Motion to quash service may be made and determined on hearsay affidavits. *Kroopf v. Guffey (1986) 183 Cal. App. 3d 1351, 1358, 228 Cal. Rptr. 807*

[4] Grounds of Motion

Trial court erred in denying Canadian defendant's motion to quash service when service was improperly effected by publication due to plaintiff's failure to exercise reasonable diligence in attempting to locate defendant prior to seeking court permission for service by publication; service abroad under *Code Civ. Proc. § 413.10(c)* subject to Hague Service Convention; service void if not in compliance with Hague Service Convention even if valid under California law; only method under California law that does not implicate Hague Service Convention is service by publication. *Kott v. Superior Court (1996) 45 Cal. App. 4th 1126, 1133-1139, 53 Cal. Rptr. 2d 215*

Motion to quash service of summons is strictly limited to question of jurisdiction over defendant; determination of merits of complaint is not within scope of issues raised by motion. *Kroopf v. Guffey (1986) 183 Cal. App. 3d 1351, 1360, 228 Cal. Rptr. 807*

Noncompliance with *Code Civ. Proc. § 474*, relating to fictitiously named defendants, is proper ground of motion to quash. *Maier Brewing Co. v. Flora Crane Service, Inc. (1969) 270 Cal. App. 2d 873, 875, 76 Cal. Rptr. 219*

Service of summons on fictitiously named defendants was properly quashed when service was made after default judgment against named defendants had become final, and plaintiff had then amended its complaint without permission of court to substitute purported defendants in place of fictitiously named defendants. *Mason & Associates, Inc. v. Guarantee Sav. & Loan Asso. (1969) 269 Cal. App. 2d 132, 134, 74 Cal. Rptr. 669*

[5] Ruling on Motion

Determination that minimum contacts exist when motion to quash is granted on ground of defective service of process is binding on parties on subsequent motion to quash following second service of process, absent reconsideration by court on proper motion. *Ziller Electronics Lab GmbH v. Superior Court (1988) 206 Cal. App. 3d 1222, 1228-1230, 254 Cal. Rptr. 410*

Trial court erred in refusing to quash service of summons on nonresident when plaintiff's claim was based on ownership of vehicle involved in accident in California and defendant had transferred ownership under Oregon law prior to accident. *500 Motors, Inc. v. Superior Court (1981) 122 Cal. App. 3d 827, 832, 176 Cal. Rptr. 349*

In ruling on motion to quash service of summons when foreign defendant has insufficient minimum contacts with California to support in personam jurisdiction, court is not required to undertake additional process of balancing inconvenience of defending action in this state against interests of plaintiff in suing locally and of state in assuming jurisdiction. *Sibley v. Superior Court (1976) 16 Cal. 3d 442, 448, 128 Cal. Rptr. 34, 546 P.2d 322* ; *Sipple v. Des Moines Register & Tribune Co. (1978) 82 Cal. App. 3d 143, 153, 147 Cal. Rptr. 59*

[6] Jurisdiction Over Attorney Fee Motion Following Granting of Motion to Quash

Lack of power to rule on the merits of the lawsuit does not necessarily deprive the trial court of jurisdiction to rule upon a collateral motion for attorney fees. A defendant does not forfeit a collateral right to attorney fees by choosing to assert the right to challenge the court's in personam jurisdiction. *Shisler v. Sanfer Sports Cars, Inc. (2008) 167 Cal. App. 4th 1, 8, 83 Cal. Rptr. 3d 771*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresAppealsStandards of ReviewAbuse of DiscretionCivil ProceduresAppealsStandards of ReviewDe Novo ReviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

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§ 323.113 Law Reviews

Taylor, *The Forum Selection Clause: A Tale of Two Concepts*, *66 Temple L. Rev. 785 (1993)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsForum Selection Clauses

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[Reserved]

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§ 323.120 Related Publications from Matthew Bender

For further discussion relating to the authority of an attorney to appear and forms for use in proceedings to withdraw an appearance and to strike the answer filed by an attorney without defendant's authority, see *Ch. 72, Attorney Practice and Ethics, § 72.190* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsConsentCivil ProcedureCounselGeneral Overview

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§ 323.121 State Statutes

General appearance by party as equivalent to personal service of summons on such party. *Code Civ. Proc. § 410.50(a)*

Motion under *Code Civ. Proc. § 418.10 to (1)* quash service of summons for lack of personal jurisdiction, (2) stay or dismiss for inconvenient forum, or (3) dismiss for delay in prosecution under *Code Civ. Proc. §§ 583.110-583.430*, and *Code Civ. Proc. § 473* or *473.5* motion joined with Section 418.10 motion, as not constituting general appearance by defendant. *Code Civ. Proc. § 418.10(d)*

Application to court or stipulation of parties for extension of time to plead as not constituting general appearance by defendant. *Code Civ. Proc. § 418.10(d)*

Appearance at hearing at which ex parte relief is sought, or appearance at hearing for which ex parte application for provisional remedy is made, as not constituting general appearance or waiver of right to make motion under Code Civ. Proc. § 418 to quash service of summons or to stay or dismiss action. *Code Civ. Proc. § 418.11*

Stipulation of time within which service of summons must be made, motion to dismiss for want of prosecution, whether joined with motion to quash service or to set aside default judgment, or otherwise, or extension of time to plead after motion to dismiss is made as not constituting general appearance within meaning of *Code Civ. Proc. § 583.220* (providing that limit within which service of summons must be made does not apply time when defendant generally appears in action). *Code Civ. Proc. § 583.220*

Bill of exceptions, notice of appeal, or other notice or paper, other than amendments to pleadings, as not required to be served on party who has not appeared in action or proceeding. *Code Civ. Proc. § 1010*

Answer, demurrer, notice of motion to strike, notice of motion to transfer pursuant to *Code Civ. Proc. § 396b*, notice of motion to reclassification pursuant to *Code Civ. Proc. § 403.040* and written notice of appearance constitute

appearances. *Code Civ. Proc. § 1014*

After appearance, defendant as entitled to notice of subsequent proceedings. *Code Civ. Proc. § 1014*

Service of notice or papers on defendant who has not appeared as not required. *Code Civ. Proc. § 1014*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsConsentCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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§ 323.122 Decisions

[1] Appearance by Attorney

[a] Presumption and Effect

Presumption that attorney has authority to appear for any person for whom attorney professes to act. *Gagnon Co., Inc. v. Nevada Desert Inn (1955) 45 Cal. 2d 448, 459, 289 P.2d 466* ; *Voinich v. Rolleri (1928) 203 Cal. 379, 382, 264 P. 240* ; *Parkside Realty Co. v. MacDonald (1914) 167 Cal. 342, 346, 139 P. 805* ; *Pacific Paving Co. v. Vizelich (1903) 141 Cal. 4, 8, 74 P. 352* ; *Garrison v. McGowan (1874) 48 Cal. 592, 600* ; *People v. American Bankers Ins. Co. (1987) 191 Cal. App. 3d 742, 746, 236 Cal. Rptr. 501* ; *McGee v. Superior Court (1985) 176 Cal. App. 3d 221, 225, 221 Cal. Rptr. 421*

Settled law as being that attorney of record has exclusive right to appear in court for his or her client and to control court proceedings, so that neither party, nor another attorney, can be recognized by court in conduct or disposition of case. *Wells Fargo & Co. v. San Francisco (1944) 25 Cal. 2d 37, 42-43, 152 P.2d 625*

While litigant has duly employed attorney of record, that attorney as retaining exclusive right to appear and control court proceedings on trial or appeal of case, and litigant as precluded from appearing in his or her own behalf. *Electric Utilities Co. v. Smallpage (1934) 137 Cal. App. 640, 641-642, 31 P.2d 412*

Presumption of due authority of attorney as disputable. *Sullivan v. Dunne (1926) 198 Cal. 183, 190, 244 P. 343* ; *Wilson v. Barry (1951) 102 Cal. App. 2d 778, 780, 228 P.2d 331*

Attorney's notice of appearance for party under *Code Civ. Proc. § 1014* as not necessarily required to be in writing, since notice of such appearance may be given by attorney's act of appearing in open court on an application for affirmative relief which could only be granted on hypothesis that defendant had submitted him or herself to jurisdiction of court. *Salmonson v. Streiffer (1910) 13 Cal. App. 395, 397, 110 P. 144*

[b] Unauthorized Appearance

Fact that attorney may possess necessary authority to represent client in one case as no evidence of attorney's authority to represent client in another and distinct proceeding. *Sullivan v. Dunne (1926) 198 Cal. 183, 190, 244 P. 343*

Unauthorized appearance by attorney as not constituting appearance by party. *County of Merced v. Hicks (1885) 67 Cal. 108, 109, 7 P. 179*

When attorney at law, who has no authority to do so, enters appearance of defendant in action without service of process, and fact of want of authority is made to appear, entry of appearance as void. *Garrison v. McGowan (1874) 48 Cal. 592, 599-600*

Trial court as without jurisdiction to enter judgment against unserved defendant who was represented by unauthorized counsel. *Zirbes v. Stratton (1986) 187 Cal. App. 3d 1407, 1414, 232 Cal. Rptr. 653*

Defendant for whom general appearance has been entered by unauthorized counsel as able to withdraw from action on sufficient factual showing to overcome rebuttable presumption that attorney has authority to appear for person for whom attorney professes to act. *Omega Video Inc. v. Superior Court (1983) 146 Cal. App. 3d 470, 476, 194 Cal. Rptr. 574* ; *Wilson v. Barry (1951) 102 Cal. App. 2d 778, 780, 228 P.2d 331*

Nonexistent entity as unable to be effectively served with summons as named defendant and as not subjected to court's jurisdiction by general appearance on its behalf unless reasonable confusion by plaintiff and awareness by intended defendant of plaintiff's mistake are inferred from relationship and common financial interest of nonentity and entity making appearance. *Omega Video Inc. v. Superior Court (1983) 146 Cal. App. 3d 470, 477, 480, 194 Cal. Rptr. 574*

When only basis for jurisdiction of person in a particular case is appearance, purported appearance by an unauthorized attorney as not conferring such jurisdiction. *Neihaus v. Superior Court (1977) 69 Cal. App. 3d 340, 346, 137 Cal. Rptr. 905*

Attorney as not authorized to appear in action without authority from party on whose behalf he or she appears; hence, insurance company as not required under uninsured motorist provisions of policy to appear and defend action against defendant who has not been served with summons and is under no obligation to appear. *Lofberg v. Aetna Cas. & Sur. Co. (1968) 264 Cal. App. 2d 306, 308, 70 Cal. Rptr. 269*

[2] Appearance by Answer to Complaint in Intervention

Filing of answer to complaint in intervention does not constitute general appearance with respect to complaint in underlying action so as to prevent discretionary dismissal under *Code Civ. Proc. §§ 583.410(a), 583.420(a)(1)* for failure to serve summons within two years. *Kuchins v. Hawes (1990) 226 Cal. App. 3d 535, 538-541, 276 Cal. Rptr. 281*

[3] Appearance by Corporation

Corporation as unable in fact to appear in court except through an agent who, in actions in courts of record, must be a member of State Bar, and lay person who represents corporation as engaged in unlawful practice of law. *Merco Constr. Engineers, Inc. v. Municipal Court (1978) 21 Cal. 3d 724, 730, 147 Cal. Rptr. 631, 581 P.2d 636* ; *Rogers v. Municipal Court (1988) 197 Cal. App. 3d 1314, 1318, 243 Cal. Rptr. 530*

Corporate litigant, although it cannot proceed as moving party in propria persona, as not prevented by its own filing of invalid notice of substitution of attorneys from receiving, and being bound, by notices served on it. *Johnson v. Hayes Cal Builders, Inc. (1963) 60 Cal. 2d 572, 577, 35 Cal. Rptr. 618, 387 P.2d 394*

Corporation as unable to represent itself in court, either in propria persona or through officer or agent who is not an attorney; corporation as artificial entity created by law and as such can neither practice law nor appear or act in person; out of court it must act in its affairs through its agents and representatives and in matters in court it can act only through licensed attorneys. *Paradise v. Nowlin (1948) 86 Cal. App. 2d 897, 898, 195 P.2d 867* ; *see also Vann v. Shilleh (1975) 54 Cal. App. 3d 192, 199, 126 Cal. Rptr. 401*

By express statutory provision [*now see Code Civ. Proc. § 116.540(b)*], corporation as authorized to appear in small claims court in propria persona through some representative other than attorney. *Prudential Ins. Co. v. Small Claims Court (1946) 76 Cal. App. 2d 379, 386, 173 P.2d 38* ; *see also Merco Constr. Engineers, Inc. v. Municipal Court (1978) 21 Cal. 3d 724, 730-732, 147 Cal. Rptr. 631, 581 P.2d 636*

[4] Appearance by Fugitive From Justice

Due process clause of *U.S. Const., amend. XIV*, requires that fugitive from justice be permitted to appear through counsel when sued in civil action based on conduct for which he or she was convicted in criminal prosecution. *Doe v. Superior Court (1990) 222 Cal App. 3d 1406, 1407-1411, 272 Cal. Rptr. 474*

[5] Appearance by Nonparty

Right of party not named in complaint to appear. *Wilson v. Frakes (1960) 178 Cal. App. 2d 580, 582, 3 Cal. Rptr. 434*

Order allowing person not a party to action or a necessary party to its determination to file cross complaint as subject to motion to vacate under *Code Civ. Proc. § 473*. *Strauss v. Owens (1957) 148 Cal. App. 2d 570, 574, 307 P.2d 81*

[6] Appearance by Plaintiff

Plaintiff as appearing in action by filing complaint subscribed by him or herself or by his or her attorney. *In re Estate of Guilford (1885) 67 Cal. 380, 384, 7 P. 763* ; *Brown v. Swickard (1985) 163 Cal. App. 3d 820, 826-827, 209 Cal. Rptr. 844*

By commencing action for divorce, plaintiff as submitting not only him or herself to jurisdiction of court, but also the res, that is, his status as husband and father; court thereafter as having power to enter effective judgment for or against him, in personam, relative to any substantial allegation of the pleadings. *Mikulski v. Mikulski (1969) 2 Cal. App. 3d 1047, 1051, 83 Cal. Rptr. 15*

[7] Appearance by Unincorporated Association

Because an unincorporated association resembles a corporation more than it does an individual, unincorporated association is unable to appear in court except through an agent who, in actions in courts of record, must be a member of State Bar, and lay person who represents association is engaged in unlawful practice of law. *Clean Air Transport Systems v. San Mateo County Transit Dist. (1988) 198 Cal. App. 3d 576, 578-579, 243 Cal. Rptr. 799 , cert. denied, 488 U.S. 862 (1988)*

[8] General and Special Appearances

[a] Acts Constituting General Appearance

Code Civ. Proc. § 418.10(e) does not change the essential rule that a defendant submits to the court's jurisdiction by making a general appearance in an action by participating in the action in a manner which recognizes the court's jurisdiction. It merely delays the effect of such actions until the motion to quash is denied or, if the defendant seeks writ review, until proceedings on the writ have concluded. Once the motion is denied or writ proceedings have concluded, the actions undertaken by the defendant while the motion or writ was pending which recognized the trial court's jurisdiction will be deemed to constitute a general appearance, and no further objection to jurisdiction will be permitted. *State Farm General Ins. Co. v. JTs Frames, Inc. (2010) 181 Cal. App. 4th 429, 104 Cal. Rptr. 3d 573*

An order to show cause for a preliminary injunction is not within the scope of *Code Civ. Proc. § 418.11*, which extends only to ex parte applications for provisional relief. This is because a motion for a preliminary injunction involves a determination related to the merits of the case. Thus, by filing a motion for discovery in connection with the order to show cause for a preliminary injunction, a defendant has sought affirmative relief from the court, and is found to have made a general appearance in the action. *Factor Health Management v. Superior Court (2005) 132 Cal. App. 4th 246, 249-251, 33 Cal. Rptr. 3d 599*

A defendant who chooses to demur or move to strike must also move to quash; he or she cannot reserve the jurisdictional objection and later file it with his answer if his challenge to the pleadings fails. Active participation in the suit by filing a case management statement, attending conferences, propounding discovery, filing numerous motions to compel when satisfactory responses were not received, requesting various continuances, and filing a motion for summary judgment acts constituting a general appearance. *Roy v. Superior Court (2005) 127 Cal. App. 4th 337, 340-346, 25 Cal. Rptr. 3d 488*

Statutory list of acts constituting appearance under *Code Civ. Proc. § 1014* is not exclusive; rather term may apply to various acts which, under all of circumstances, are deemed to confer jurisdiction of the person; what is determinative is whether defendant's participation in particular action in some manner recognizes authority of court to proceed; defendant made general appearance in action in which defendant had not been served when trial court ordered action consolidated with another in which defendant had been served and defendant fully participated without objection in consolidated action. *Hamilton v. Asbestos Corp. (2000) 22 Cal. 4th 1127, 1147, 95 Cal. Rptr. 2d 701, 998 P.2d 403*

Party who has made special appearance for sole purpose of contesting subject matter jurisdiction waives objection to personal jurisdiction and is thereby deemed to have submitted to personal jurisdiction. *Janzen v. Workers' Comp. Appeals Bd. (1997) 61 Cal. App. 4th 109, 116-117, 71 Cal. Rptr. 2d 260* (*Goodwine v. Superior Court (1965) 63 Cal. 2d 481, 484, 47 Cal. Rptr. 201, 407 P.2d 1* distinguished)

Notwithstanding "special appearance" designation on motion to quash, if movant seeks relief on any basis other than lack of personal jurisdiction, he or she makes general appearance. *Greener v. Workers' Comp. Appeals Bd. (1993) 6 Cal. 4th 1028, 1037, 25 Cal. Rptr. 2d 539, 863 P.2d 784*

Acts listed in *Code Civ. Proc. § 1014* amount to general appearance, but list is not exhaustive. *Goodwine v. Superior Court (1965) 63 Cal. 2d 481, 484, 47 Cal. Rptr. 201, 407 P.2d 1* ; *Davenport v. Superior Court (1920) 183 Cal. 506, 511, 191 P. 911* ; *Brown v. Swickard (1985) 163 Cal. App. 3d 820, 827 n.10, 209 Cal. Rptr. 844* ; *Creed v. Schultz (1983) 148 Cal. App. 3d 733, 739, 196 Cal. Rptr. 252* ; *Chitwood v. County of Los Angeles (1971) 14 Cal. App. 3d 522, 526, 92 Cal. Rptr. 441*

A party who files a response to an order to show cause in which it argues the merits of the motions, challenges the relief sought, and expressly requests that the motions be denied on their merits, has made a general appearance in the matter, whether or not it was a the real party in interest or otherwise a party to the proceedings. *People v. Ciancio*

(2003) 109 Cal. App. 4th 175, 192-193, 134 Cal. Rptr. 2d 531

Initiating discovery unrelated to issue of jurisdiction by issuing deposition subpenas to two treating doctors constituted general appearance; also, while petitions for mandate were pending before court of appeal, participation by defendants' counsel in preparing joint case management statement and appearing and participating in evaluation conference pursuant to local court rules, without limiting appearance to other defendants they represented that did not object to exertion of jurisdiction over them, constituted general appearance thereby waiving objecting defendants rights to superior court's denial of their motion. *Mansour v. Superior Court (1995) 38 Cal. App. 4th 1750, 1757-1758, 46 Cal. Rptr. 2d 191*

Party, even one who has no minimum contacts with forum state, may consent to jurisdiction of court over him or her in particular case by taking part in action or proceeding; when party takes part in action or proceeding, for example, by pleading or participating in trial, party has made general appearance and has consented to jurisdiction. *Estate of Heil (1989) 210 Cal. App. 3d 1503, 1512, 259 Cal. Rptr. 28*

General appearance is not required to be formal technical step or act; rather term applies to various acts which, under all the circumstances, are deemed to confer jurisdiction of the person; what is determinative is whether defendant takes part in particular action which in some manner recognizes authority of court to proceed. *Sanchez v. Superior Court (1988) 203 Cal. App. 3d 1391, 1399, 250 Cal. Rptr. 787*

Defendant has made general appearance, thereby waiving objection to court's lack of jurisdiction over it, by appearing by counsel at hearing for temporary restraining order and order to show cause for preliminary injunction, at which counsel introduced himself as counsel for defendant, failed to confine his remarks to jurisdictional issue and addressed merits of case, and on basis of which trial court denied plaintiff's application. *California Overseas Bank v. French American Banking Corp. (1984) 154 Cal. App. 3d 179, 183-184, 201 Cal. Rptr. 400*

Service by defendant on plaintiff of notice to take deposition and produce documents constituted general appearance, although notice was not filed with court. *Creed v. Schultz (1983) 148 Cal. App. 3d 733, 739-740, 196 Cal. Rptr. 252*

Defendant's general appearance in action as obviating necessity of serving and returning summons. *Slaybaugh v. Superior Court (1977) 70 Cal. App. 3d 216, 221, 138 Cal. Rptr. 628*

Nonresident defendant not subject to judicial jurisdiction in California who appears by formally answering complaint makes general appearance and confers jurisdiction on California court, notwithstanding clause contained in answer to effect that defendant did not intend to subject his person to jurisdiction of court. *Neihaus v. Superior Court (1977) 69 Cal. App. 3d 340, 345, 137 Cal. Rptr. 905*

Answering interrogatories is general appearance. *Chitwood v. County of Los Angeles (1971) 14 Cal. App. 3d 522, 527-528, 92 Cal. Rptr. 441*

Appearance of defendant to object only to consideration of case or any procedure in it because court has not acquired jurisdiction over his or her person is special; appearance to ask for any relief which could be given only to party in pending case, or which itself would be regular proceeding in case, is general, regardless of how denominated. *Chitwood v. County of Los Angeles (1971) 14 Cal. App. 3d 522, 527, 92 Cal. Rptr. 441* ; *Armstrong v. Superior Court (1956) 144 Cal. App. 2d 420, 423, 301 P.2d 51*

Filing of motion predicated on theory that court has personal jurisdiction constitutes general appearance. *Wilson v. Barry (1951) 102 Cal. App. 2d 778, 781, 228 P.2d 331*

Filing of affidavit, other than for purpose of presenting matters bearing on court's jurisdiction is general appearance;

affidavit in support of defendant's motion for summary judgment constitutes general appearance. *Wilson v. Barry (1951) 102 Cal. App. 2d 778, 781, 228 P.2d 331*

[b] Acts Not Constituting General Appearance

Motion to dismiss for lack of subject matter jurisdiction is special, rather than general, appearance. *Goodwine v. Superior Court (1965) 63 Cal. 2d 481, 484, 47 Cal. Rptr. 201, 407 P.2d 1* ; *contra Greener v. Workers' Comp. Appeals Bd. (1993) 6 Cal. 4th 1028, 1036-1037, 25 Cal. Rptr. 2d 539, 863 P.2d 784*

Objection to interrogatories on ground that they are oppressive made during pendency of motion to quash, was not a general appearance. *1880 Corp. v. Superior Court (1962) 57 Cal. 2d 840, 843, 22 Cal. Rptr. 209, 371 P.2d 985*

Defendant makes special, rather than general, appearance when he or she appears in court for sole purpose of objecting to court's lack of jurisdiction over his or her person, without submitting to such jurisdiction. *Olcese v. Justice's Court (1909) 156 Cal. 82, 87, 103 P. 317* ; *Josephson v. Superior Court (1963) 219 Cal. App. 2d 354, 361, 33 Cal. Rptr. 196*

Filing by defendant of answer to complaint in intervention that was subsequently dismissed did not constitute general appearance in main action by plaintiff against him. *Duckett v. Superior Court (1989) 207 Cal. App. 3d 1419, 1422-1425, 255 Cal. Rptr. 733*

Appearance by defendant in one of two actions consolidated for trial does not constitute appearance in the other action. *Sanchez v. Superior Court (1988) 203 Cal. App. 3d 1391, 1397, 250 Cal. Rptr. 787*

Husband's motion to quash service of summons and to set aside default judgment, although he had entered general appearance in action after judgment, was proper because by enacting Jurisdiction and Service of Process Act (*Code Civ. Proc. §§ 410.10-418.10*), Legislature preempted common law rule that general appearance retroactively transforms invalid service into valid one. *In re Marriage of Smith (1982) 135 Cal. App. 3d 543, 546, 185 Cal. Rptr. 411*

Action on complaint must be distinguished from related action on cross complaint, and general appearance in one action does not necessarily constitute general appearance in other action; appearance by unserved defendant by way of answer to codefendant's cross complaint does not constitute general appearance with regard to original complaint so as to permit plaintiff to serve summons and complaint on defendant's attorney by mail; personal service on defendant is required. *Glenwood Homeowners Assn., Inc. v. Prosher Development Ltd. (1980) 111 Cal. App. 3d 1002, 1004-1008, 169 Cal. Rptr. 48*

On appeal from judgment of dismissal for lack of subject matter jurisdiction, appearance by defendants, whose motions to quash service of summons had been granted by trial court for lack of personal jurisdiction over them and order had long since become final, by filing of reply brief to merits of appeal, as well as to issue of in personam jurisdiction, as not constituting submission by them to jurisdiction of California courts. *League to Save Lake Tahoe v. Tahoe Regional Planning Agency (1980) 105 Cal. App. 3d 394, 399-400, 164 Cal. Rptr. 357*

General appearance in action on cross complaint as not constituting general appearance in action on complaint so as to avoid dismissal of complaint for failure to serve and return summons within three (now two) years after commencement of action. *Botsford v. Pascoe (1979) 94 Cal. App. 3d 62, 67-68, 156 Cal. Rptr. 177*

If, in proceeding begun by attachment in court which has no jurisdiction over defendant, defendant enters appearance for purpose of contesting validity of plaintiff's claim, defendant as not thereby subjecting him or herself personally to jurisdiction of court. *Fount Wip, Inc. v. Golstein (1973) 33 Cal. App. 3d 184, 190, 108 Cal. Rptr. 732*

Peremptory disqualification of trial judge for prejudice pursuant to *Code Civ. Proc. § 170.6* by party specially appearing for purposes of moving to quash service of summons as not a general appearance. *Loftin v. Superior Court (1971) 19 Cal. App. 3d 577, 579-580, 97 Cal. Rptr. 215*

Payment of filing fee for filing notice of motion to quash service of summons as not constituting general appearance. *Josephson v. Superior Court (1963) 219 Cal. App. 2d 354, 356-357, 362 n.4, 33 Cal. Rptr. 196*

Motion to reconsider denial of motion to quash service of summons as not constituting general appearance when it is limited to the same grounds as original motion. *Josephson v. Superior Court (1963) 219 Cal. App. 2d 354, 358, 362, 33 Cal. Rptr. 196*

Notice of motion by "special appearance" to dismiss action against nonresident defendant on ground it is not and has not been corporation licensed to do business in California and was not served in California as special appearance. *Hernandez v. National Dairy Products (1945) 126 Cal. App. 2d 490, 492-494, 272 P.2d 799*

[c] Effect of Appearance

Defendant who makes special appearance to court's personal jurisdiction but who simultaneously answers to merits as no longer entitled to personal jurisdiction. *California Dental Assn. v. American Dental Assn. (1979) 23 Cal. 3d 346, 351-352, 152 Cal. Rptr. 546, 590 P.2d 401*

General appearance of party without objection to failure of opposing party to serve process as conferring jurisdiction over person. *Harrington v. Superior Court (1924) 194 Cal. 185, 189, 228 P. 15* ; *Southern Pac. Transportation Co. v. State Bd. of Equalization (1985) 175 Cal. App. 3d 438, 442, 221 Cal. Rptr. 12* ; *Neihaus v. Superior Court (1977) 69 Cal. App. 3d 340, 345, 137 Cal. Rptr. 905*

A defendant who makes a general appearance forfeits any objection to personal jurisdiction based on defective service, even when the defendant does not know at the time that such an objection is available. Any rule that a general appearance does not waive objections to service unless the waiver is knowing and intelligent would exalt form over substance; a defendant who has actual knowledge of the action and who has submitted to the authority of the court should not be able to assert a violation of rules that exist only to bring about such knowledge and submission. *Fireman's Fund Ins. Co. v. Sparks Construction (2004) 114 Cal. App. 4th 1135, 1148, 8 Cal. Rptr. 3d 446*

Under *Code Civ. Proc. § 410.50(a)*, general appearance is equivalent of personal service of summons for jurisdictional purposes, dispensing with any need to effect such service and curing defective service or other lack of notice. *366-386 Geary St., L.P. v. Superior Court (1990) 219 Cal. App. 3d 1186, 1193, 268 Cal. Rptr. 678*

General appearance after period for service of summons has run as not giving court jurisdiction over defendant. *Dale v. ITT Life Ins. Corp. (1989) 207 Cal. App. 3d 495, 499 n.4, 255 Cal. Rptr. 8*

Defendant who has made formal appearance in case as having submitted him or herself to jurisdiction of court. *California Overseas Bank v. French American Banking Corp. (1984) 154 Cal. App. 3d 179, 184, 201 Cal. Rptr. 400*

Nonexistent entity as not subjected to court's jurisdiction by general appearance on its behalf unless reasonable confusion by plaintiff and awareness by intended defendant of plaintiff's mistake are inferred from relationship and common financial interest of nonentity and entity making appearance. *Omega Video Inc. v. Superior Court (1983) 146 Cal. App. 3d 470, 477, 480, 194 Cal. Rptr. 574*

By general appearance, defendant as submitting to in personam jurisdiction of court; by special appearance, he or she

as not so submitting. *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 800-801, 100 Cal. Rptr. 477*

Appearance in action as conferring jurisdiction on court to enter personal judgment. *Riggs v. Riggs (1963) 223 Cal. App. 2d 594, 602, 35 Cal. Rptr. 793*

Appearance and failure to answer as constituting admission of truth of allegations of complaint. *Haden v. Haden (1953) 120 Cal. App. 2d 722, 725, 262 P.2d 73*

[d] Relief Requested

Character of relief asked, not intention of party, controls whether appearance is special or general. *Goodwine v. Superior Court (1965) 47 Cal. Rptr. 201, 407 P.2d 1* ; *California Overseas Bank v. French American Banking Corp. (1984) 154 Cal. App. 3d 179, 184, 201 Cal. Rptr. 400* ; *Hernandez v. National Dairy Products Co. (1945) 126 Cal. App. 2d 490, 492, 272 P.2d 799*

California courts have found that parties have generally appeared under varying circumstances in which the defendants sought affirmative relief. A court is thus required to analyze the defendant's papers to determine if any affirmative relief could be granted on the merits, which is a general appearance. *Dial 800 v. Fesbinder (2004) 118 Cal. App. 4th 32, 53, 12 Cal. Rptr. 3d 711*

In determining whether party has made general appearance, court does not look to whether party characterizes its appearance as general or special; rather, court looks to character of relief asked; appearance is general if party contests merits of case or raises other than jurisdictional objections. 366- *388 Geary St., L.P. v. Superior Court (1990) 219 Cal. App. 3d 1186, 1193, 268 Cal. Rptr. 678*

[9] Notice of Appearance

Written notice of appearance as document drawn up especially for that purpose. *Russell v. Landau (1954) 127 Cal. App. 2d 682, 698, 274 P.2d 681*

Notice of appearance by party in propria persona as required under *Code Civ. Proc. § 1014* to be in writing. *Salmonson v. Streiffer (1910) 13 Cal. App. 395, 397, 110 P. 144*

[10] Sister State Judgments

U.S. Const., art. IV, § 1, which requires full faith and credit be given in each state to records and judicial proceedings of every other state, as applying to records and proceedings of courts only so far as they have jurisdiction, and courts of one state as not required to give full faith and credit to, or regard as valid or conclusive, any judgment of court of another state which had no jurisdiction of subject matter, or of parties, or, in proceedings in rem, of the res; accordingly, jurisdiction of court rendering judgment as open to inquiry, under proper averments, when questioned in court of another state; these rules as applied in case of foreign judgment entered on attorney's unauthorized appearance for party. *Gagnon Co., Inc. v. Nevada Desert Inn (1955) 45 Cal. 2d 448, 457, 461, 289 P.2d 466*

Lack of attorney's authority to appear and dismiss sister state action with prejudice as permitted to be raised in California action against affirmative defense that California action is barred, under doctrine of res judicata, by sister state judgment. *Gagnon Co., Inc. v. Nevada Desert Inn (1955) 45 Cal. 2d 448, 457, 289 P.2d 466*

Lack of authority of attorney to appear for defendant in sister state action as permitted to be alleged in California state

court in answer to complaint to establish sister state judgment as California judgment; that is, sister state judgment as subject to collateral attack by defendant showing that he or she made no appearance in sister state action. *Slack v. Slack (1966) 241 Cal. App. 2d 530, 539, 50 Cal. Rptr. 763* ; *Raynum v. Wallace (1938) 28 Cal. App. 2d 136, 137-138, 82 P.2d 74*

[11] Void Appearance

Appearance by guardian ad litem for minor not regularly served as void. *Redmond v. Peterson (1894) 102 Cal. 595, 599, 36 P. 923* ; *Bank of America v. Carr (1956) 138 Cal. App. 2d 727, 739, 292 P.2d 587*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsConsentCivil ProcedureCounselGeneral Overview

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§ 323.123 Law Reviews

Note, *Special Appearance in California*, *10 Stan. L. Rev. 711 (1958)*

Note, *Procedure: Motions to Quash, Strike, and Dismiss*, *43 Cal. L. Rev. 695 (1955)*

Comment, *Service of Process in Civil Actions in California*, *37 Cal. L. Rev. 80 (1949)*

Note, *Practice: Appearance; Effect of Motion to Dismiss Plaintiff's Action for Failure to Prosecute*, *31 Cal. L. Rev. 342 (1943)*

Note, *Practice: Objection to Jurisdiction Over the Person and the Subject Matter*, *30 Cal. L. Rev. 690 (1942)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsConsentCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeService of ProcessGeneral Overview

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§ 323.124 Text References

Witkin, California Procedure, vol. 2, *Jurisdiction*, §§ 184-216 (4th ed. 1996)

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[Reserved]

§§ 323.125[Reserved]

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PART IV. PROCEDURAL CHECKLIST

28-IV California Forms of Pleading and Practice--Annotated Scope

Scope

NOTE: The following guide is illustrative only of matters generally considered and procedures commonly followed. It is not exclusive. Any given case may require consideration of matters or utilization of procedures not discussed.

The guide is oriented to motions under *Code Civ. Proc. § 418.10*, that is, to motions by parties who have not previously appeared in the action to quash service of summons for lack of jurisdiction over the person of the defendant, cross defendant, or respondent and/or to stay or dismiss the action for inconvenient forum. The guide also contains some discussion of motions under *Code Civ. Proc. §§ 473* and *473.5*, because they are referred to in *Code Civ. Proc. § 418.10(d)*.

For discussion, procedure, and forms relating to *Code Civ. Proc. § 418.10(a)(3)* motions to dismiss for delay in prosecution, see Ch. 212, *Dismissal* .

However, motions to stay or dismiss actions for inconvenient forum may be made apart from *Code Civ. Proc. § 418.10* by parties who have generally appeared in the action [*see* *Code Civ. Proc. § 430.10*]. Moreover, with respect to the power to quash service of summons, all courts at law, in the exercise of their inherent power confirmed by statute [***see*** *Code Civ. Proc. §§ 86(b)(3), 473(d)*] to grant relief from void judgments and orders, have power on the motion of a party to grant relief from default judgments that are void for lack of jurisdiction over the person of the defendant [***see generally*** Ch. 489, ***Relief From Judgments and Orders***], and, in granting such relief, to order service of the summons quashed as well.

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§ 323.130 Moving Party's Guide

[1] Ascertain Facts

1. When, where, and how the summons and complaint were served; obtain the copies served.

2. What the plaintiff's claim against the client is.

3. If the client did not receive a copy of the summons and complaint, how he or she found out about the case.

4. The client's residence and business addresses, employment, and any personal information as to his or her background.

5. If the client is a nonresident, all contacts he or she has or has had with California, including any visits to, property owned, or business interests in this state.

6. Whether a proof of service of summons on the defendant has been filed; if so, obtain a copy).

7. Whether any default or default judgment has been entered against the client, and, if so, whether a Request to Enter Default was served on the client [*see Code Civ. Proc. § 587* and Ch. 205, *Defaults and Default Judgments* ; for discussion of a motion to vacate and set aside a default or default judgment and to quash service of summons, *see § 323.157*].

8. Any defenses the client may have that will defeat the complaint in whole or in part.

9. If the client is a nonresident of California, any facts that would show that California is an inconvenient forum. For discussion of the factors to be considered, see *§ 323.35*.

[2] Make Preliminary Determinations

1. When any responsive pleading or motion must be filed.

2. Whether the court has or lacks jurisdiction over the defendant. For discussion of the bases of judicial jurisdiction, see the *§ 323.15*. The court lacks personal jurisdiction over a defendant, for example, when:

a. The defendant was not served with the summons and complaint and has made no appearance in the action [*see Code Civ. Proc. §§ 410.50(a), 410.60*].

b. The service of the summons on the moving party was defective, for example:
(1) The summons was not served in a manner authorized either by statute or other law, or by court order [*see Code Civ. Proc. §§ 413.10, 413.30*], or

(2) The service was made by the plaintiff personally [*see Code Civ. Proc. § 414.10*; *see also Code Civ. Proc. § 413.40*].

NOTE:
For discussion of the manners in which a summons must be served, see Ch. 518, *Service of Summons and Papers* .

c. The summons served on the moving party was defective. For discussion of the required form and contents of a summons in a civil action, see Ch. 518, *Service of Summons and Papers* .

d. The moving party is a nonresident of California and has had no contacts of any kind with California, other than the present lawsuit [*see Code Civ. Proc. § 410.10*; and discussions in the *§ 323.14* and *§ 323.15*].

e. The moving party is a nonresident of California and lacks sufficient contacts with this state to support the exercise of general jurisdiction over him or her in that the cause of action did not arise out of, and does not relate to, the defendant's limited contacts with California [*see Code Civ. Proc. § 410.10*; for discussion of minimum contacts, *see § 323.14[3]*];

f. The defendant is by law immune to suit [for discussion of immunity, *see § 323.16*].

g. The defendant, although not generally immune to suit, was immune at the time the summons was served on him or her.

h. Defendant is a nonresident who was served while in or passing through California to attend and testify in a criminal matter or grand jury proceeding pursuant to the Uniform Act to Secure the Attendance of Witnesses From Without the State in Criminal Cases [*see Penal Code §§ 1334-1334.6*; for discussion of witnesses in criminal proceedings, *see § 323.16[2]*].

i. The defendant is a national bank having no branch in California [*see 12 U.S.C. § 94*; for discussion of national banks, *see § 323.16[4]*].

j. The defendant is an American Indian who has not waived his or her immunity or consented to the court's jurisdiction [*see generally 25 U.S.C. § 81*; *28 U.S.C. § 1360*; for discussion of American Indian subject matter jurisdiction, *see* Ch. 324, *Jurisdiction: Subject Matter*].

3. If the court has personal jurisdiction over the defendant, determine from the factors ascertained whether California is a convenient or an inconvenient forum for trial.

4. Determine the procedure to be followed. This will include any or all of the following:

a. If the court lacks jurisdiction over the defendant but a proof of service, whether true or false, has been filed, a motion to quash the service of the summons [*see Code Civ. Proc. § 418.10(a)(1)*; for a form of noticed motion to quash service of summons, *see § 323.150*].

b. If the court has jurisdiction, but California is an inconvenient forum, a motion to stay or dismiss the action on that ground [*see Code Civ. Proc. §§ 410.30(b)* (motion made after party has appeared in action), *418.10(a)(2)* (motion made before party has appeared in action); for a form of noticed motion to quash service of summons or to stay or dismiss on ground of inconvenient forum, *see § 323.150*].

c. If a default or a default and default judgment have been entered against the defendant, a motion under *Code Civ. Proc. § 473(b)*, to vacate and set them aside [for a notice motion to vacate and set aside a default or default judgment and to quash service of summons or to stay or dismiss on ground of inconvenient forum, *see § 323.157*; *see also* Ch. 489, *Relief From Judgments and Orders*].

[3] Prepare Papers

1. Notice of motion [for forms, *see §§ 323.150*, *323.153* and *323.157*].

The notice of motion must designate, as the time for making the motion, a date not more than 30 days after filing of the notice [*Code Civ. Proc. § 418.10(b)*].

2. Supporting declarations [for forms of declarations, *see §§ 323.151* and *323.154*].

3. Written statement setting forth the nature and extent of any oral evidence proposed to be introduced and a reasonable time estimate for the hearing.

4. Memorandum

For forms of memoranda supporting a motion to quash service of summons or to stay or dismiss the action for inconvenient forum, see California Points and Authorities, Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* (Matthew Bender). For memoranda supporting a motion to vacate and set aside a void default and default judgment, see California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* , Pt. II (Matthew Bender).

5. Proof of service.

For forms of proof of service of papers [*Code Civ. Proc. § 1013a*], see Ch. 518, *Service of Summons and Papers* .

6. Proposed order, if desired [for forms of orders, *see §§ 323.152* and *323.158*].

[4] Serve and File Papers

1. Serve a conformed copy of the notice of motion and accompanying papers on the other party's attorney, or on the other party if he or she has no attorney [*see Code Civ. Proc. § 1015*], at least 16 court days, plus any applicable additional period, before the hearing. The 16-day period is extended by a varying number of days depending if service is by mail, facsimile transmission, or overnight delivery [*see Code Civ. Proc. §§ 1005(a)(13), (b), 1010*; *Cal. Rules of Ct., Rules 3.1103, 3.1300(a)*; *see also Code*

Civ. Proc. § 1010.6(a)(6) (extension in case of electronic service that may apply)]. For a more complete outline of the procedures to follow in serving a notice of motion, see Ch. 372, *Motions and Orders* , and Ch. 518, *Service of Summons and Papers* .

a. Attach an unsigned copy of the proof of service to the papers to be served or:
(1) If service is to be by mail or overnight service, note the date and place of mailing or deposit with the delivery service on the papers served [*see Code Civ. Proc. § 1013(b), (d)*].

(2) If service is by facsimile transmission, note the date and place of transmission and the facsimile telephone number to which transmitted on the papers served [*see Code Civ. Proc. § 1013(f)*].

b. Have the person who made the service sign the original and conform the remaining copies.

2. Deliver the originals of the notice of motion and accompanying papers to the court clerk's office for filing [*see Cal. Rules of Ct., Rule 3.1302(a)*] at least 16 court days, plus any applicable additional period, before the hearing [*Code Civ. Proc. §§ 1005(b), 1010.6(a)(6)*; *Cal. Rules of Ct., Rule 3.1300(a)*], and pay the required fee [*see Gov. Code § 70611* (unlimited civil cases), *Gov. Code § 70613* (limited civil cases)]. If not filed with the original papers, deliver the proof of service of the moving papers for filing no later than five court days before the time appointed for the hearing [*Cal. Rules of Ct., Rule 3.1300(c)*].

3. If there is a statement regarding oral testimony, file it no later than three days before the hearing. If it is filed less than five court days before the hearing, serve a conformed copy of it on the opposing party, that is, on that party's attorney [*see Code Civ. Proc. § 1015*] in a manner to assure delivery to that person no later than two days before the hearing [*Cal. Rules of Ct., Rule 3.1306(b)*].

[5] Responses to Opposing Party's Declarations, Affidavits, and Memorandum

1. Prepare any reply declarations and any reply memorandum in response to any counterdeclarations and opposing memorandum filed by the opposing party.

2. Serve a conformed copy of each declaration and any reply memorandum on opposing counsel (or on the opposing party if he or she is appearing in pro per), and file the originals, at least five court days before the hearing [*Code Civ. Proc. §§ 1005(b), 1015*; *Cal. Rules of Ct., Rule 3.1300(a)*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to section *1010.6*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresPretrial JudgmentsDefaultRelief From Default

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28-323 California Forms of Pleading and Practice--Annotated § 323.131

§ 323.131 Opposing Party's Guide

[1] Make Preliminary Determinations

1. Whether the motion to quash service of summons or to stay or dismiss the action for inconvenient forum is timely. It must have been made [*see Code Civ. Proc. § 418.10(a)*]:

a. On or before the last day of defendant's time to plead or

b. Within any further time that the court allowed.

NOTE:
For when relief after the time specified in *Code Civ. Proc. § 418.10(a)* may be available, see the note at the beginning of this guide.

2. If a motion to vacate and set aside a default or a default and default judgment on the ground that they are void for lack of jurisdiction over the person of the defendant is included [*see Code Civ. Proc. § 418.10(d)*], or if it is the only motion made, whether it was filed within the time limitation specified in *Code Civ. Proc. § 473.5(a)*, which applies by analogy. It must have been made within a reasonable time, in no event exceeding the earlier of two years after entry of a default judgment or 180 days after service of written notice that the default or default judgment has been entered [*Code Civ. Proc. § 473.5(a)*].

NOTE:
For discussion of potential problems in joining this motion with the statutory motion to quash service of summons, *see* *§ 323.157*; for discussion of attacks on void judgments, ***see*** Ch. 489, ***Relief From Judgments and Orders*** .

3. If the motion is timely, whether it and its supporting papers establish a ground for relief. If they do, and there is no defense to the motion, counsel may wish to stipulate that the motion be granted [*see Code Civ. Proc. §§ 128.6, 128.7* (sanctions for bad-faith actions or tactics, which term includes both the making and opposing of motions)].

[2] Prepare Opposition Papers

1. Counterdeclarations.

2. Written statement setting forth the nature and extent of any oral evidence proposed to be introduced and a reasonable time estimate for the hearing.

3. Memorandum

For forms of memoranda opposing a motion to quash service of summons or to stay or dismiss the action for inconvenient forum, see California Points and Authorities, Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* (Matthew Bender). For memoranda opposing a motion to vacate and set aside a void default and default judgment, see California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief from Judgments and Orders* , Pt. II (Matthew Bender).

4. Proof of Service

For forms of proof of service of papers [*Code Civ. Proc. § 1013a*], see Ch. 518, *Service of Summons and Papers* .

5. Proposed order, if desired.

For form of order denying a motion, see Ch. 372, *Motions and Orders* .

[3] Serve and File Papers

1. Serve a conformed copy of each of the above described papers on the other party's attorney, or on the other party if he or she has no attorney [*see Code Civ. Proc. § 1015*], at least 10 calendar days before the hearing [*see Code Civ. Proc. §§ 418.10(b), 1005(a)(4), (b)*; *Cal. Rules of Ct. Rule 3.1300(a)*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to *section 1010.6*)]. Notwithstanding any other provision of *§ 1005*, all papers opposing a motion and all reply papers must be served by personal delivery, facsimile transmission, express mail, or other means consistent with sections *§§ 1010*, *1011*, *1012*, and *1013*, and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers, as applicable, are filed. This applies to the service of opposition and reply papers regarding motions for summary judgment or summary adjudication, in addition to the motions listed in *§ 1005(b)* [*Code Civ. Proc. § 1005(c)*].

a. Attach an unsigned copy of the proof of service to the papers to be served or:
(1) If service is to be by mail or overnight service, note the date and place of mailing or deposit with the delivery service on the papers served [*see Code Civ. Proc. § 1013(b), (d)*].

(2) If service is by facsimile transmission, note the date and place of transmission and the facsimile telephone number to which transmitted on the papers served [*see Code Civ. Proc. § 1013(f)*].

b. Have the person who made the service sign the original and conform the remaining copies.

2. Deliver the originals of each of the above described papers to the court clerk's office for filing [*see Cal. Rules of Ct., Rule 3.1302(a)*] at least 9 court days before the hearing [*Code Civ. Proc. § 1005(b)*]; *Cal. Rules of Ct., Rule 3.1300(a)*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to section 1010.6)]. The normal practice is to file the original of the proof of service with the originals of the opposition papers, although it may be filed separately. The latest a paper may be filed to be timely is at the close of business of the clerk's office on the day the paper is due [*Cal. Rules of Ct., Rule 3.1300(e)*].

3. If there is a statement regarding oral testimony, file it no later than three days before the hearing. If it is filed less than five court days before the hearing, serve a conformed copy of it on the opposing party, that is, on that party's attorney [*see Code Civ. Proc. § 1015*] in a manner to assure delivery to that person no later than two days before the hearing [*Cal. Rules of Ct., Rule 3.1306(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPretrial JudgmentsDefaultRelief From Default

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§ 323.132 Hearing and Ruling

[1] Attendance at Hearing

Both counsel should attend the hearing, have any witnesses testify, cross-examine witnesses for the other party, and argue the motion.

[2] Motion Granted

If counsel for the moving party has prepared a proposed order granting the motion, and it is in accord with how the judge ruled, present the original of the order to the courtroom clerk for the judge's signature. Otherwise, prepare the order after the hearing, have opposing counsel approve it as to form, and deliver the original to the judge or to the judge's courtroom clerk to deliver the original to the judge for signature. In either case, have the courtroom clerk conform the copies.

[3] Motion Denied

If the motion is denied, the entry of the order in the court's minute order may be all that is required. However, the judge may direct the prevailing party to draft a formal order. If the judge does so, counsel for the opposing party will prepare the order and present it to the judge, or to the judge's courtroom clerk, for signing, and after it is signed have the courtroom clerk conform the copies.

[4] Notice of Ruling

Unless otherwise ordered by the court, or unless waived by all parties in open court and the waiver is entered in the court's minutes, the prevailing party must [*see Code Civ. Proc. § 1019.5(a)*]:

1. Prepare a notice of the court's order and a proof of service; for a form of notice of order, see Ch. 372, *Motions and Orders* ;

2. Serve on opposing counsel; and

3. File the original of the notice and proof of service with the court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedureDismissalsInvoluntary DismissalsMotions

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§ 323.133 Post Hearing Proceedings

[1] Procedure When Motion Is Denied

1. Writ Review Not Sought.

If the motion is denied, the defendant, if he or she does not intend to seek writ review (*see* Paragraph (2), *below*) must, to avoid the entry of default [*see Code Civ. Proc. §§ 418.10(d), 585*], prepare, serve, and file a responsive pleading within 15 days after he or she has been served with a written notice of the entry of the order denying the motion, or within such additional time not exceeding 20 days as the court may allow on application for good cause shown (*see Code Civ. Proc. § 418.10(b)*). For procedure and forms that may be adapted for use in moving for an extension of time under *Code Civ. Proc. § 418.10*, see Ch. 524, *Shortening and Extension of Time* .

2. Writ Review Sought

a. If the defendant intends to seek writ review, he or she must, before pleading and within 10 days after he or she has been served with a written notice of the entry of the order denying the motion, or within such additional time not exceeding 20 days that the trial court may, on application for good cause shown, allow, prepare, serve, and file in the appropriate reviewing court a petition for writ of mandate to require the trial court to enter its order quashing the service of summons or staying or dismissing the action [*see Code Civ. Proc. § 418.10(c)*]. For discussion, forms, and a procedural guide for use in seeking a writ of mandate, see Ch. 358, *Mandate and Prohibiton* .

b. The defendant must also, on or before the last day of his or her time to plead [discussed in Paragraph (1), *above*], serve on the adverse party and file with the trial court a notice that a petition for writ of mandate has been filed. The timely service and filing of the notice extends the defendant's time to plead until 10 days after he or she has been

served with a written notice of the final judgment in the mandate proceeding, or such additional time not exceeding 20 days that the trial court may allow on application for good cause shown [*see Code Civ. Proc. § 418.10(c)*; *see Cal. Rules of Ct., Rule 8.491* (extension of time to plead until 10 days after Supreme Court files it order denying petition for review of court of appeal's denial of writ of mandate)]. Failure to timely serve and file this notice will require that the defendant file his or her responsive pleading as set forth in Paragraph (1), *above* [*see Code Civ. Proc. § 418.10(c)*].

c. If the writ of mandate is denied, prepare, serve, and file in the trial court a responsive pleading within the time discussed above.

[2] Procedure When Motion Is Granted

An order granting a motion to quash service of summons or to stay or dismiss the action on the ground of inconvenient forum is appealable [*Code Civ. Proc. §§ 904.1(a)(3), 904.2(d)*], and the plaintiff's remedy is, therefore, to file an appeal. For discussion, checklists, and forms relating to appeals, see Ch. 40, *Appeal: An Overview* , through Ch. 54, *Appeal: California Supreme Court Review* , and Ch. 345A, *Limited Civil Cases* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedureDismissalsInvoluntary DismissalsAppellate ReviewCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureRemediesWritsCommon Law WritsMandamus

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[Reserved]

§§ 323.134[Reserved]

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A. Personal Jurisdiction and Inconvenient Forum

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§ 323.150 Notice of Motion to Quash Service of Summons on Ground of Lack of Personal Jurisdiction [Code Civ. Proc. § 418.10(a)(1)] or to Stay or Dismiss Action on Ground of Inconvenient Forum [Code Civ. Proc. §§ 410.30(a), 418.10(a)(2)] [Code Civ. Proc. §§ 418.10(b)]

[1] FORM Notice of Motion to Quash Service of Summons on Ground of Lack of Personal Jurisdiction [Code Civ. Proc. § 418.10(a)(1)] or to Stay or Dismiss Action on Ground of Inconvenient Forum [Code Civ. Proc. §§ 410.30(a), 418.10(a)(2)] [Code Civ. Proc. §§ 418.10(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO
vs.	)	_____ [QUASH SERVICE OF
_____ [*name*],	)	SUMMONS *and/or* STAY OR DISMISS ACTION]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

To _____ [*name*], plaintiff, and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that defendant _____ [*name*] [appears specially to make this motion only and, so specially appearing,] hereby does and will, on _____ [*date*], at _____

[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], move for an order _____ [quashing the service of summons on this defendant *and/or* staying or dismissing the action]. The motion will be made on the ground(s) that _____ [the court lacks jurisdiction over the person of this defendant *and/or* California is an inconvenient forum and this action, in the interest of substantial justice, should be heard in a forum outside this state].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

The form in [1], *above*, is for use by a defendant who has not appeared generally in the action or proceeding to apply for (1) an order quashing the service of the summons on him or her for lack of personal jurisdiction, (2) an order staying or dismissing the action on the ground that California is an inconvenient forum, or both [*see Code Civ. Proc. § 418.10(a)(1), (2)*]. The form may also be used by a defendant after he or she has made a general appearance in the action or proceeding to move for an order staying or dismissing the action for inconvenient forum [*see Code Civ. Proc. § 410.30(a)*; for discussion of what constitutes a general appearance, *see § 323.60* et seq.; for discussion of enforcement of forum selection clauses by motion to stay or dismiss, *see § 323.34*]. With appropriate modifications, the form may also be used by a cross defendant to move to quash service of summons on the cross complaint.

For the showing required to establish the court's lack of in personam jurisdiction over the defendant, and for a list of the factors the court will consider in ruling on a motion to stay or dismiss the action for inconvenient forum, see *§§ 323.17, 323.35, 323.50* et seq.

For a notice of motion to quash service of summons based on immunity from service of process or suit, see *§ 323.153*. For a notice of motion on either or both of the grounds set forth in this form joined with a motion for relief under *Code Civ. Proc. § 473* or *473.5*, see *§ 323.157*.

For further discussion relating to notices of motion generally, including when appearances may be made by telephone in nonevidentiary law and motion hearings, and for a procedural guide that may be followed in making or opposing a noticed motion generally, see Ch. 372, *Motions and Orders* .

[3] Motion to Dismiss for Lack of Subject Matter Jurisdiction

The California Supreme Court has indicated that a motion to dismiss for lack of subject matter jurisdiction, even if raised on a motion to quash along with a to personal jurisdiction, constitutes a general appearance [*Greener v. Workers' Comp. Appeals Bd. (1993) 6 Cal. 4th 1028, 1036-1037, 25 Cal. Rptr. 2d 539, 863 P.2d 784]* . The Court did not expressly overrule or even cite earlier Supreme Court cases that allowed a motion to dismiss to be made as a special appearance [*see Boisclair v. Superior Court (1990) 51 Cal. 3d 1140, 1144 n.1, 276 Cal. Rptr. 62, 801 P.2d 305* ; *Goodwine v. Superior Court (1965) 63 Cal. 2d 481, 484-485, 47 Cal. Rptr. 201, 407 P.2d 1]* . Given *Greener*, counsel should not join a motion to dismiss for lack of subject matter jurisdiction with a motion to quash for lack of personal jurisdiction. Under *Greener*, joining the two might result in making a general appearance, which would waive the

personal jurisdiction objection [*see California Dental Assn. v. American Dental Assn. (1979) 23 Cal. 3d 346, 351-352, 152 Cal. Rptr. 546, 590 P.2d 401]* . For further discussion of appearances, see *§ 323.60* et seq.

[4] Form and Contents

A notice of motion under *Code Civ. Proc. § 418.10(a)* generally must designate, as the time for making the motion, a date not more than 30 days after the filing of the notice [*Code Civ. Proc. § 418.10(b)*; *see also* [7], *below*].

[5] Accompanying Papers

The evidentiary or probative facts establishing the court's lack of personal jurisdiction over the defendant or that in the interest of substantial justice the action should be heard outside California are set forth in an affidavit or declaration [*see Code Civ. Proc. §§ 2009, Code Civ. Proc. § 2015.5*], a copy of which must be served and filed with the notice of motion [*Code Civ. Proc. § 1010*; *see also Code Civ. Proc. § 1005(b)*].

Evidence received at a law and motion hearing must be by declaration and affidavit and by request for judicial notice [*see Evid. Code §§ 452-454*] without testimony or cross examination, except as allowed in the court's discretion for good cause shown or as permitted by local rule [*Cal. Rules of Ct., Rules 3.1306(a), (b)* (setting forth the procedure to follow to request permission to introduce oral evidence); *see also Cal. Rules of Ct., Rule 3.1306(c)* (additional requirements for invoking judicial notice in law and motion proceedings)]. For a form of supporting declaration, see *§ 323.151*.

The motion must also be accompanied by a supporting memorandum. The court may construe the absence of the memorandum as an admission that the motion is not meritorious and cause for its denial [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*].

For memoranda supporting and opposing a motion to quash service of summons for lack of personal jurisdiction or to stay or dismiss an action for inconvenient forum, see California Points and Authorities, Ch. 132, *Jurisdiction: Personal* .

[6] Copies to Prepare

The notice of motion, and its accompanying papers, should be prepared in an original for filing, one copy for service on the plaintiff or plaintiff's counsel [*see Code Civ. Proc. § 1015*], one office copy, and any additional copies that may be required by the court.

[7] Service and Filing

[a] Time Requirements

A defendant must serve and file the notice of motion no later than the last day of his or her time to plead, unless the court for good cause allows further time [*see Code Civ. Proc. § 418.10(a)*].

The notice of motion under *Code Civ. Proc. § 418.10(a)* must designate, as the time for making the motion, a date not more than 30 days after the *filing* of the notice [*Code Civ. Proc. § 418.10(b)*; *see also Code Civ. Proc. § 1167.4(a)* (in proceeding for unlawful or forcible detainer or forcible entry, time for making motion is not less than three or more than seven days after the filing of the notice)]. *Code Civ. Proc. § 418.10(b)* further provides that the notice must be *served* in the same manner, and at the same times, prescribed by *Code Civ. Proc. § 1005(b)* [*Code Civ. Proc. § 418.10(b)*; *see also Code Civ. Proc. § 1005(a)(4)*].

Code Civ. Proc. § 1005(b) provides that, unless otherwise ordered or specifically provided by law, copies of all moving

and supporting papers must be served (and the originals filed) at least 16 court days before the hearing, but that, if the notice is served by mail, the required 16-day period of notice before the hearing is increased by five calendar days if the place of mailing and the place of address are within California, 10 calendar days if either the place of mailing or the place of address is outside California but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States. If notice is served by facsimile transmission or overnight delivery, the required 16-day period of notice before the hearing is increased by two calendar days [*Code Civ. Proc. § 1005(b)*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to *section 1010.6*)]. The court, or judge of the court, may prescribe a shorter time [*Code Civ. Proc. § 1005(b)*; *see Cal. Rules of Ct., Rule 3.1300(b)*].

[b] Motion to Stay or Dismiss Made After General Appearance

Unlike a motion to quash service of summons, a motion to stay or dismiss an action for inconvenient forum can be made after the defendant has made a ge neral appearance in the action [*see Code Civ. Proc. § 410.30(a)*], in which case the provisions for service and filing under *Code Civ. Proc. § 418.10* do not apply [*Code Civ. Proc. § 410.30(b)*]. Instead, the motion is governed solely by *Code Civ. Proc. § 1005(b)* [*see Code Civ. Proc. § 1005(a)(13)*].

[8] Cross References

For a declaration in support of this motion, see *§ 323.151*

For an ordering granting a motion to quash service of summons of to stay or dismiss the action on grounds of inconvenient forum, see *§ 323.152*

See discussion and forms relating to affidavits and declarations generally, see Ch. 15, *Affidavits, Certificates, and Declarations*

For memoranda supporting and opposing a motion to quash service of summons for lack of personal jurisdiction or to stay or dismiss an action for inconvenient forum, see s California Points and Authorities, Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum*

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28-323 California Forms of Pleading and Practice--Annotated § 323.151

§ 323.151 Declaration in Support of Motion to Quash Service of Summons on Ground of Lack of Personal Jurisdiction or to Stay or Dismiss Action on Ground of Inconvenient Forum

[1] FORM Declaration in Support of Motion to Quash Service of Summons on Ground of Lack of Personal Jurisdiction or to Stay or Dismiss Action on Ground of Inconvenient Forum [Code Civ. Proc. § 2015.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF MOTION TO
_____ [*name*],	)	_____ [QUASH SERVICE OF
Defendant.	)	SUMMONS *and/or* STAY OR DISMISS ACTION]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		[Trial Date: _____]

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* the defendant herein *or* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for the defendant] and I make this declaration in support of _____ [*specify, e.g.,* my *or* defendant's] motion _____

[to quash service of summons for lack of jurisdiction *and/or* to stay or dismiss the action for inconvenient forum]. [My authority in this case is limited to appearing on behalf of defendant _____ (*name*) on this motion and for no other purpose.]

[*EITHER, if service of summons was defective*]

2. _____ [*Set forth specific evidentiary or probative facts which establish the ground of the motion to quash for defective service, e.g.,* On or about August 14, 1990, I was contacted by phone by _____ (*name*) (hereinafter referred to as "my client") who told me he/she had just received by mail a paper entitled "Amendment to Complaint" in which it was stated that the complaint in the action had been amended to show that my client was the person sued therein as "Doe I." I asked what the lawsuit was about and my client said he/she didn't know, that this was the first he/she had heard of it. I secured the file number from my client and went immediately to the courthouse, where I pulled the court file and examined it. I found that the original complaint named one person (not my client) and 50 Does as defendants. I examined the proofs of service and discovered one which stated that my client had been served on August 4, 1990, by leaving a copy of the summons and a copy of the complaint at my client's home address (which is stated as "1001 Windsor Street, Erehwon") with a "Rose Beam, a person over the age of 18 years and a competent member of defendant's household" and by "thereafter on the same day mailing a copy of the summons and a copy of the complaint to him/her at the same address." The court is hereby requested to take judicial notice of the foregoing return of summons in this case. My client is a childless widower/widow who lives alone at 1001 Tudor Street in Erehwon and has, to my knowledge, resided alone at that address and no other for the past 15 years. As shown by the declaration of my client, herewith submitted, my client has never heard of any Rose Beam, hasn't the slightest idea who she is, whether she resides at 1001 Windsor Street, Erehwon, or whether she exists at all (no person by that name is listed in the local phone directory), and has never been served with the summons and complaint, or either of them, in this action].

[*OR, if summons served was defective*]

2. _____ [*Set forth specific evidentiary or probative facts which establish the ground of the motion to quash for defective summons, e.g.,* The summons herein issued, served on _____ (*name*) (hereinafter referred to as "my client"), and returned to the court is a typewritten summons that neither contains the matter required by *Section 412.20 of the Code of Civil Procedure* nor is the form prescribed by the Judicial Council of California, use of which is mandatory. Specifically, the summons omits the following statements required by the foregoing code section: _____ (*specify*). Moreover, neither the complaint herein nor the summons specifically names my client as a defendant and if he/she is a defendant at all it must be because he/she is one of the defendants fictitiously named. Yet, the summons fails to state that my client is a person sued as one or any of the fictitiously named defendants and the return of service fails to indicate that he/she was so served. The court is hereby requested to take judicial notice of the complaint, summons, and return of summons filed in this case].

[*OR if defendant lacks sufficient minimum contacts with California or California is an inconvenient forum*]

2. _____ [*Set forth in this and the following paragraphs specific evidentiary or probative facts, and, if appropriate, reference to the court's records and file in the case, which establish the ground of the motion to quash service of summons for insufficient contacts with California or to stay or dismiss the action for inconvenient forum, e.g.,* As shown by the complaint herein, this action arose out of a vehicle collision in Colorado between a car owned and being driven by plaintiff, then a resident of Nevada and now a resident of California, and a car owned and being driven by defendant. As shown by defendant's declaration herewith submitted, defendant now is and at the time of the collision was a resident of Colorado and (at all times, other than for a brief 10-day vacation in Hawaii, hereinafter mentioned)

was _____ (served with process in this action in that state *or* and is amenable to service of process in that state). As further shown by defendant's declaration, defendant herewith submitted, my client has never resided or done business of any kind in California (and his/her only connection with this state was his/her laying over in San Francisco on August 14, 1990, on his/her way to vacation in Honolulu, Hawaii, at which time he/she was personally served with the summons and complaint herein.)]

3. On _____ [*date*], I phoned the _____ (*law enforcement investigative agency*) in Colorado and in response to my inquiry was informed that an accident report covering the subject collision had been prepared and filed by _____ (*name of investigating officer*), a _____ (*title or rank*) assigned to _____ (*investigating agency*) and whose unit address and phone number were _____. On the same day, I phoned the investigating officer who confirmed that he/she had prepared and filed an accident report and that he/she would send me a verified copy of it. Thereafter, on or about _____ (*date*), I received a copy of the accident report verified by the affidavit of _____ (*name*), the investigating officer. A copy of this report and affidavit are attached hereto as Exhibit A and made a part hereof. This report concludes that the collision was caused by plaintiff's _____ (*describe negligent act*). In his/her cover letter accompanying the report and affidavit, a copy of which is attached hereto as Exhibit B and made a part hereof, the investigating officer expresses a desire to furnish me with whatever information he/she has and a willingness to testify as a witness in any trial held in Colorado, but specifically declines to attend any trial in California. As further shown by the report, the names of the witnesses to the collision, all of whom gave a Colorado address, are as follows: _____ (*set forth names of witnesses*).]

4. [On _____ (*date*), I phoned each of these witnesses at his or her home in Colorado and ascertained from each facts from which I concluded that each was a percipient witness to the collision and that the testimony of each would be required at the trial of this action. Of these witnesses, _____ (*name(s)*) categorically stated that they would not come to California for trial or for any other purpose. Witness _____ (*name*) told me that he/she would come to California only if he/she could bring his wife and children and all their expenses were paid by the defendant. On the other hand, each of these witnesses would, if the action were filed in Colorado, either testify willingly or be subject to subpoena in that state.]

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, illustrates the contents of a declaration under penalty of perjury (*Code Civ. Proc. § 2015.5*) that might be filed in support of a either (1) motion to quash service of summons by a defendant, who has made no general appearance in the case, on the ground that the court lacks jurisdiction over his or her person, or (2) to stay or dismiss the action on the ground of inconvenient forum before or after the defendant has made a general appearance in the case [*Code Civ. Proc. § 418.10(a)(1), (2)*; *see Code Civ. Proc. § 410.30(a)*].

The declaration must set forth the facts, as opposed to conclusions, that establish the grounds of the motion. For further discussion regarding the showing required to establish the court's lack of in personam jurisdiction over the defendant, and for a list of the factors the court will consider in ruling on a motion to stay or dismiss the action for inconvenient forum, see *§§ 323.17, 323.35*.

[3] Authority for Use of Affidavits or Declarations

Code Civ. Proc. § 2009, which sets forth generally the purposes for which affidavits may be used, authorizes their use "upon a motion." The use of affidavits on a motion to quash service of summons has expressly been held to be authorized by *Code Civ. Proc. § 2009* [*Fuller v. Lindenbaum (1938) 29 Cal. App. 2d 227, 230, 84 P.2d 155* ; *see also Cal. Rules of Ct., Rule 3.1306*].

Nevertheless, in determining the authority for the use of affidavits on a motion to quash service of summons for lack of personal jurisdiction, one court of appeal has said that *Code Civ.Proc. § 2009* does not specifically set forth among the uses of an affidavit the support of a motion to quash service and that *Code Civ. Proc. § 418.10*, authorizing motions to quash, does not expressly permit such use of an affidavit [*Kroopf v. Guffey (1986) 183 Cal. App. 3d 1351, 1358 n.3, 228 Cal. Rptr. 807]* . Although the court in *Kroopf* was of the opinion that affidavits on a motion to quash were not specifically authorized by *Code Civ. Proc. § 2009*, it nevertheless concluded that case law does support the use of affidavits in support of a motion to quash service of summons [*Kroopf v. Guffey (1986) 183 Cal. App. 3d 1351, 1358 n.3, 228 Cal. Rptr. 807]* . In any event, even though *Code Civ. Proc. § 2009* does not specifically mention a motion to quash service of summons, neither does it mention any other motion; it is general statute authorizing the use of affidavits "upon a motion." Because *Code Civ. Proc. § 418.10* does not prohibit the use of affidavits on a motion to quash either expressly or by implication, it would appear that better view is that *Code Civ. Proc. § 2009* does authorize their use in a motion under *Code Civ. Proc. § 418.10*.

The use of declarations under penalty of perjury in lieu of affidavits is authorized by *Code Civ. Proc. § 2015.5*.

[4] Form and Contents of Affidavit or Declaration

An affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) normally has to set forth facts within the personal knowledge of the affiant, and show that the affiant, if sworn as a witness, would be competent to testify to the facts stated [*see Code Civ. Proc. § 2002*; *see also Evid. Code §§ 700, 702, 1200(b)*].

Although some statutes expressly require that affidavits or declarations filed on a motion be based on the personal knowledge of the affiant or declarant [*see, e.g., Code Civ. Proc. § 437c(d)* (motion for summary judgment)], and other statutes permit affidavits or declarations on information and belief [*see, e.g., Code Civ. Proc. § 482.040* (application for attachment orders)], most statutes relating to motions are silent as to the whether the affidavits or declarations must be based on personal knowledge or may be made on information and belief [*see, e.g., Code Civ. Proc. §§ 418.10* (motions to quash service of summons for lack of jurisdiction or to stay or dismiss an action for inconvenient forum), 2009 (authorizing the use of affidavits on a motion)].

The Supreme Court has stated that, while an affidavit is normally presumed to state matters personally known to the affiant and lacks evidentiary value when based on information and belief or hearsay, it is not true that an affidavit on information and belief is an anomaly in the law, bereft of legal significance. There are numerous exceptions to the general rule prohibiting affidavits on information and belief, either where the facts to be established are incapable of positive averment, or where expressly permitted by statute, and that it is incorrect to suggest that a statute which requires the filing of an affidavit necessarily implies a requirement of personal knowledge on the part of the affiant [*City of Santa Cruz v. Municipal Court (1989) 49 Cal. 3d 74, 88-89, 260 Cal. Rptr. 520, 776 P.2d 222* (involving a motion under *Evid. Code § 1043*)].

The Court in *City of Santa Cruz* cited *Davis-Heller-Pearce Co. v. Ramont (1924) 66 Cal. App. 778, 780, 226 P. 972* , involving a motion to quash service, as authority for its statement that affidavits on information and belief may be sufficient when the facts would otherwise be difficult or impossible to establish [*City of Santa Cruz v. Municipal Court (1989) 49 Cal. 3d 74, 88, 260 Cal. Rptr. 520, 776 P.2d 222]* . However, the Court's citation of *Davis-Heller-Pearce* should be regarded as implying that an affidavit on information and belief is sufficient to support a

motion to quash service of summons. The only issue involved in *Davis-Heller-Pearce* was the sufficiency of an affidavit for publication of the summons which was made by a stranger to the action and stated on information and belief that the defendant was no longer residing in California but was a resident of Tucson, Arizona; the court in *Davis-Heller-Pearce* held that an affidavit may be made by a stranger to the action and that the affidavit was sufficient to obtain the order for publication of summons because the affiant showed due diligence in acquiring the information and set forth the facts on which his belief was based. So holding, the court affirmed the order denying the motion to quash.

An affidavit to be used as evidence must be positive, direct, and not based on inadmissible hearsay to which a proper objection is made [*see Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 204, 151 Cal. Rptr. 721* ; *Flood v. Simpson (1975) 45 Cal. App. 3d 644, 649, 119 Cal. Rptr. 675]* . Thus, the better, if not required, practice, in the case of an affidavit or declaration in support of a motion to quash service of summons or to stay or dismiss an action for inconvenient forum, is to set forth probative facts within the affiant's or declarant's personal knowledge unless the facts are difficult or impossible to establish as so come within the exception discussed in *City of Santa Cruz*. In addition, any documents to be attached to a declaration in support of the motion should be properly authenticated [*see Evid. Code § 1400 et seq.* (writings); *see also Evid. Code §§ 1151 et seq.* (specific matters), 1200 et seq. (hearsay rule and exceptions)].

On the other hand, an affidavit or declaration based on information and belief is competent evidence unless an objection is interposed on the ground that the affiant or declarant has no personal knowledge of the matter [*McLellan v. McLellan (1972) 23 Cal. App. 3d 343, 359-360, 100 Cal. Rptr. 258]* . Moreover, hearsay or other incompetent evidence in an affidavit or declaration received without a proper objection or motion to strike, is to be regarded as competent evidence in support of the subsequent order [*Flood v. Simpson (1975) 45 Cal. App. 3d 644, 649, 119 Cal. Rptr. 675* ; *see also Kroopf v. Guffey (1986) 183 Cal. App. 3d 1351, 1358-1360, 228 Cal. Rptr. 807* (holding that 15 attachments to plaintiff's affidavit in opposition to a motion to quash service of summons were properly considered by the trial court which received them without any hearsay objection; motion to quash service of summons may be heard and determined on hearsay affidavits)].

[5] Cross References

For a notice of motion to quash service of summons of to stay or dismiss the action on grounds of inconvenient forum that is filed with this declaration, see *§ 323.150*

For an ordering granting a motion to quash service of summons of to stay or dismiss the action on grounds of inconvenient forum, see *§ 323.152*

See discussion and forms relating to affidavits and declarations generally, see Ch. 15, *Affidavits, Certificates, and Declarations*

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28-323 California Forms of Pleading and Practice--Annotated § 323.152

§ 323.152 Order Granting Motion to Quash Service of Summons on Ground of Lack of Personal Jurisdiction or to Stay or Dismiss Action on Ground of Inconvenient Forum

[1] FORM Order Granting Motion to Quash Service of Summons on Ground of Lack of Personal Jurisdiction or to Stay or Dismiss Action on Ground of Inconvenient Forum

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of defendant _____ [*name*] [,who appeared specially only,] for an order _____ [quashing service of summons on him/her *and/or* staying or dismissing the action on the ground of inconvenient forum] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that _____ [the court has no jurisdiction over the person of the defendant *and/or* California is an inconvenient forum for the trial of this action which, in the interest of substantial justice, should be tried in the proper court in the State of _____ (*specify, e.g.,* Colorado)], and that the motion, therefore, ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that the _____ [service of the summons on the defendant herein be and is quashed *and/or* the above-entitled action be and is _____ (stayed [on the condition that _____ (*specify*)] *or* dismissed)]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of order in [1], *above*, is for use to order that the service of summons on a defendant be quashed for lack of personal jurisdiction [*see Code Civ. Proc. § 418.10(a)(1)*] or that the action be stayed or dismissed on the ground of inconvenient forum [*see Code Civ. Proc. § 418.10(a)(2)*].

For a form of notice of the court's ruling to be served by the prevailing party on all other parties as provided in *Code Civ. Proc. § 1019.5(a), see* Ch. 372, *Motions and Orders* .

[3] Cross References

For a notice of motion to quash service of summons of to stay or dismiss the action on grounds of inconvenient forum that is filed with this declaration, see *§ 323.150*

For an a declaration in support of a motion to quash service of summons of to stay or dismiss the action on grounds of inconvenient forum, see *§ 323.151*

For discussion of orders by the court, see Ch. 372, *Motions and Orders*

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28-323 California Forms of Pleading and Practice--Annotated § 323.153

§ 323.153 Notice of Motion to Quash Service of Summons on Ground of Lack of Personal Jurisdiction [Code Civ. Proc. § 418.10(a)(1)] Because Defendant Is Immune to Service of Process or Suit [22 U.S.C. § 254d; Cal. Const., art. IV, § 14; Penal Code §§ 1334.4, 1334.5, 1555] [Code Civ. Proc. § 418.10(b)]

[1] FORM Notice of Motion to Quash Service of Summons on Ground of Lack of Personal Jurisdiction [Code Civ. Proc. § 418.10(a)(1)] Because Defendant Is Immune to Service of Process or Suit [22 U.S.C. § 254d; Cal. Const., art. IV, § 14; Penal Code §§ 1334.4, 1334.5, 1555] [Code Civ. Proc. § 418.10(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION TO QUASH
Plaintiff,	)	SERVICE OF SUMMONS
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

To _____ [*name*], Plaintiff, and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that defendant appears specially to make this motion only and, so specially appearing, will, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at

_____ [*street address*], _____ [*city*], move, and hereby does move, for an order quashing service of the summons on him/her. The motion will be made on the ground that the court lacks jurisdiction over the defendant for the reason that defendant is _____ [*specify, e.g.,* a nonresident] who was at the time the summons was served on him/her immune to _____ [service of process in this _____ (action *or* proceeding) *or* suit].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The notice of motion in [1], *above,* is for use by a defendant to secure an order quashing service of the summons on the ground that defendant was immune to service of process or to suit at the time the summons was served [*see, e.g., 22 U.S.C. § 254d*; *Cal. Const., art. IV, § 14*; for further discussion of this immunity, *see* the Introduction under Immunities From Service or Suit]. For a form of order granting the motion that may be adapted for use if the motion is granted, see *§ 323.152*.

It appears that a person who is immune to civil process would be immune to a subpoena issued in a civil case as well as to a summons [*see Code Civ. Proc. §§ 1985, 1987.1, 1989*; *Gov. Code § 22*]. For further discussion of subpoenas and general forms of notice of motion to quash service of subpoenas and related papers, see Ch. 535, *Subpoena* .

[3] Accompanying Papers

The evidentiary or probative facts establishing the court's lack of personal jurisdiction over the defendant or that in the interest of substantial justice the action should be heard outside California are set forth in an affidavit or declaration [*see Code Civ. Proc. §§ 2009, Code Civ. Proc. § 2015.5*], a copy of which must be served and filed with the notice of motion [*Code Civ. Proc. § 1010*; *see also Code Civ. Proc. § 1005(b)*]. For a form of declaration to accompany this notice of motion, see *§ 323.154*. For additional discussion of declarations and evidence to be received at the hearing on the motion, see *§ 323.150[5]*.

The motion must also be accompanied by a supporting memorandum. The court may construe the absence of the memorandum as an admission that the motion is not meritorious and cause for its denial [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*].

For memoranda supporting and opposing a motion to quash service of summons for lack of personal jurisdiction or to stay or dismiss an action for inconvenient forum, see California Points and Authorities, Ch. 132, *Jurisdiction: Personal* .

[4] Cross References

For a declaration in support of this motion, see *§ 323.154*

For an ordering granting a motion to quash service of summons that may be modified to provide that the defendant is

immune to service of process, see *§ 323.152*

For discussion of form and contents of the motion, copies, service, and filing requirements, see *§ 323.150*

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28-323 California Forms of Pleading and Practice--Annotated § 323.154

§ 323.154 Declaration in Support of Motion to Quash Service of Summons on Ground of Lack of Personal Jurisdiction Because Defendant Is Immune to Service of Process or Suit

[1] FORM Declaration in Support of Motion to Quash Service of Summons on Ground of Lack of Personal Jurisdiction Because Defendant Is Immune to Service of Process or Suit

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF MOTION TO QUASH SERVICE
_____ [*name*],	)	OF SUMMONS
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

I, _____ [*name*], declare:

1. I am the defendant herein and make this declaration in support of my motion to quash the service of the summons on me for lack of jurisdiction.

[*Specify fact or facts exempting defendant from service of process or suit, e.g.:*]

[*EITHER, if defendant has diplomatic immunity*]

2. I am the _____ [head of a foreign diplomatic mission *or* a member of the staff of a foreign diplomatic mission and have diplomatic rank] in that _____ [*specify title, position, and function showing foregoing status*], and am therefore immune to civil suit pursuant to the provisions of *Section 254d of Title 22 of the United States Code*.

[*OR, if defendant has legislative immunity*]

2. I am a duly qualified and acting member of the California State _____ [Assembly *or* Senate], having been elected from the _____ District. I was served with the summons in this _____ [action *or* proceeding] on _____ [*date*] as I was leaving a session of the California State _____ [Assembly *or* Senate] at the State Capitol in Sacramento for _____ [*specify, e.g.,* a lunch break]. At the time of service, I was immune to process under the provisions of *Article IV, Section 14, of the California Constitution*.

[*OR, if nonresident defendant was served while in California in response to subpoena in criminal case*]

2. I neither live nor reside [, and have never lived or resided,] in California and am a resident of the _____ (*e.g.,* State) of _____]. I arrived in California on _____ [*date*] [on my way to _____ [*city*] and was served with summons in this action on _____ [that date *or* on _____ (*date*)], at _____ [*place*]. As shown by the complaint herein, the cause of action sued on arose prior to my entry into California. At the time the summons was served on me, I was in California in response to a subpoena issued under the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases requiring my presence to testify in the _____ [matter *or* proceeding *or* case] of _____ [*title*], then pending before the _____ [*title of court*]. A copy of the subpoena is attached hereto as Exhibit A and made a part hereof. I _____ [attended the court proceeding to which I had been subpoenaed to testify as a witness from _____ (*date*) to _____ (*date*), on which latter date I was discharged and left California *or* commenced attendance at the court proceeding to which I had been subpoenaed as a witness to testify and I have not yet been discharged from such attendance, nor has the testimony closed. I will not leave California until the testimony is closed or until I am sooner discharged from attendance by the court].

[*OR, if nonresident defendant was served while passing through California in response to subpoena issued in criminal case*]

2. I neither live nor reside [, and have never lived or resided,] in California and am a resident of the _____ (*e.g.,* State) of _____]. I arrived in California on _____ [*date*] [on my way to _____ [*city and state*] and was served with summons in this action on _____ [that date *or* on _____ (*date*)], at _____ [*place*]. As shown by the complaint herein, the cause of action sued on arose prior to my entry into California. At the time the summons was served on me, I was passing through California on my way _____ [to *or* from] _____ [*city and state*] where I was obligated _____ [to go *or* to have gone] in response to a subpoena requiring my presence to testify in the _____ [matter *or* proceeding *or* case] of

_____ [*title*], then pending before the _____ [*title of court*]. A copy of the subpoena is attached hereto as Exhibit A and made a part hereof.

[*OR, if nonresident defendant was served while in California on or after waiver of extradition based on criminal charge and was acquitted*]

2. I neither live nor reside [, and have never lived or resided,] in California and am a resident of the _____ (*e.g.*, State) of _____]. I was brought into California _____ [on *or* after waiver of] extradition based on a criminal charge pending in the _____ [*title of court*] in the case entitled _____ [*title of case*], number _____, in which on _____ [*date*] I was acquitted. On that date, on leaving the courthouse after acquittal, I was served with a summons in this _____ [action *or* proceeding] which arose out of the same facts as the criminal proceedings for which I was returned, in that _____ [*specify*].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, of declaration is for use to support a motion to quash the service of the summons when the ground of objection is that the court lacks jurisdiction over the person of the defendant because the defendant at the time of service of the summons was immune to service or suit. The fact situations illustrated are those described in *22 U.S.C. § 254d*, *Cal. Const., art. IV, § 14*, and *Penal Code §§ 1334.4*, *1334.5*, and *1555*, respectively. For further discussion of immunity to service or suit, see *§ 323.16*.

[3] Cross References

For a notice of motion to quash service of summons on ground of lack of personal jurisdiction because defendant is immune to service of process or suit, see *§ 323.153*

For discussion of declarations and evidence to be received at the hearing on the motion, see *§ 323.151*

See discussion and forms relating to affidavits and declarations generally, see Ch. 15, *Affidavits, Certificates, and Declarations*

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28-323 California Forms of Pleading and Practice--Annotated § 323.155

§ 323.155 Petition for Writ of Mandate and Declaration to Compel Lower Court to Enter Order Quashing Service of Summons for Lack of Jurisdiction Over Defendant or Staying or Dismissing Action for Inconvenient Forum [Code Civ. Proc. § 418.10(c)]

[1] FORM Petition for Writ of Mandate and Declaration to Compel Lower Court to Enter Order Quashing Service of Summons for Lack of Jurisdiction Over Defendant or Staying or Dismissing Action for Inconvenient Forum [Code Civ. Proc. § 418.10(c)]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
APPELLATE DISTRICT _____

[*OR*]

IN THE APPELLATE DIVISION OF THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	
_____ [*name of court*],	)	NO. _____
Respondent,	)	PETITION FOR WRIT OF MANDATE TO COM-
_____ [*name*],	)	PEL TRIAL COURT TO _____
Real Party in Interest.	)	[QUASH SERVICE OF SUMMONS *and/or* STAY
	)	OR DISMISS ACTION]
	)	

_____

Petitioner alleges:

1. Petitioner is the defendant in the action hereinafter described [, is _____ (*describe capacity, if other than an individual prosecuting this proceeding in his or her own behalf*),] and is a party beneficially interested herein.

2. Respondent is the _____ Court of _____.

3. Real party in interest is the plaintiff in the action hereinafter described and is a party beneficially interested in this proceeding.

4. On _____ [*date*], real party in interest filed in respondent court against this petitioner, as defendant, a complaint, numbered _____ in the file and records of the respondent court, for _____ [*specify relief sought and basis of action as alleged in complaint, e.g.*, damages for personal injuries allegedly sustained in a vehicle collision occurring in the State of Colorado between a vehicle being operated and owned by real party in interest, a resident of the State of Nevada, and a vehicle being operated and owned by petitioner, a resident of the State of Colorado]. A copy of this complaint is attached hereto as Exhibit A and made a part hereof. On _____ [*date*], petitioner, as defendant, was [purportedly] served with summons in the above-described action in _____ [*city and state*] pursuant to the provisions of Section _____of the Code of Civil Procedure. [In due course, the summons was returned to respondent court with proof of service, a copy of which is attached hereto as Exhibit B and made a part hereof.]

5. Petitioner made no general appearance in respondent court. Rather, on _____ [*date*], petitioner appeared specially in respondent court and, pursuant to the provisions of Section(s) [*410.30(a)* and] 418.10(a) of the Code of Civil Procedure, moved for an order _____ [quashing service of summons *and/or* staying or dismissing the action] on the ground(s) that _____ [the court lacked jurisdiction of the person of the defendant *and/or* California is an inconvenient forum for the trial of this action and in the interest of substantial justice the action should be heard in a forum outside California]. A copy of petitioner's notice of motion and supporting papers is attached hereto as Exhibit C and made a part hereof. A copy of real party in interest's opposing papers is attached hereto as Exhibit D and made a part hereof. Respondent court denied the motion on _____ [*date*]. A certified copy of the court's order is attached hereto as Exhibit E and made a part hereof.

[*ADD, if petition is to be filed in court of appeal*]

6. _____ [Attached hereto as Exhibit F and made a part hereof is a copy of the transcript of the proceedings at the hearing on the motion *or* A transcript of the proceedings at the hearing of the motion was ordered on _____ (*date*) and will be transmitted to this court for filing as soon as it is available. It is expected that it will be filed on or before _____ (*date*) *or* No transcript of the oral proceedings at the hearing on the motion is available for the reason that the proceedings were not reported. However, a fair summary of the proceedings is set forth in the declaration of _____ (*name of counsel*) appended hereto and made a part hereof].

[*CONTINUE*]

7. Respondent court _____ [has no jurisdiction over the petitioner in the above-described action *and/or* is an inconvenient forum for the trial of the above-described action within the meaning of Section(s) [*410.30(a)*

and] *418.10(a) of the Code of Civil Procedure* for the reasons that _____ [*specify reasons as set forth in attached exhibits which were before respondent court*].

8. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law to compel respondent court to _____ [quash the service of the summons *and/or* stay or dismiss the action for inconvenient forum] in that this is the only proceeding authorized by statute to obtain the relief sought.

WHEREFORE, petitioner prays:

1. That this court issue an alternative writ of mandate directing respondent court to make and enter its order _____ [quashing the service of summons on this petitioner *and/or* staying or dismissing the action] or to show cause before this court at a specified time and place why it has not done so;

2. That, on the hearing of this petition and the return to it, if any, this court issue a peremptory writ of mandate directing respondent court to so order;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

Dated: _____.

_____ [*signature*]
Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the [attorney for] petitioner in the above-entitled proceeding. I have read the foregoing petition for writ of mandate and know the contents thereof. The same is true of my own knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[*Add if petition is to be filed in a court of appeal and no transcript of the proceedings at the hearing on the motion in respondent court is available*]

DECLARATION OF COUNSEL

I, _____ [*name*], declare:

I am the attorney for petitioner in this proceeding and represented the petitioner on the motion to _____ [quash service of summons and/or to stay or dismiss the action on the ground of inconvenient forum] in respondent court. No transcript of those proceedings is available for the reason that _____ [*specify, e.g.,* the proceedings were not reported]. Nevertheless, a fair summary of those proceedings is as follows:

_____ [*fairly summarize proceedings, including arguments of counsel and the basis of the trial court's decision, if it was stated*].
Dated: _____.

_____ [*signature*]

[2] Use of Form

The form in [1], *above,* is for use to petition a reviewing court for a writ of mandate to compel the trial court to enter an order quashing service of summons or staying or dismissing the action for inconvenient forum, or both, after it has denied petitioner's motion to do so [*Code Civ. Proc. § 418.10(c)*; for discussion of review of an order regarding a motion to quash service or to stay or dismiss an action for inconvenient forum, *see* § 323.27].

Paragraph 6 and the appended declaration of counsel are required to be included by *Cal. Rules of Ct., Rule 8.486(b)* when the petition is to be filed in a court of appeal or the Supreme Court.

[3] Requirements When Filed in Appellate Division of Superior Court

The appellate division of the superior court may grant a writ of mandate directed to the superior court for a limited civil case, and where the appellate division grants a writ of review directed to the superior court, the superior court is an inferior tribunal for purposes of the petition [*Code Civ. Proc. § 1085(b)*].

If the petition is to be filed in a superior court, the local rules, if any, of that court should be checked to determine what requirements are imposed on the writ petition. Even in the absence of such rules, however, counsel may wish to follow the requirements of a petition filed in an appellate court to show that the petition is meritorious, since, in the absence of such showing, the petition may be denied out of hand without a hearing. For further discussion of the requirements, see [4], *below*.

[4] Requirements When Filed in Appellate Court

Whenever a writ petition filed in a court of appeal or the Supreme Court seeks review of a trial court ruling, it must be accompanied by an adequate record, including copies of (1) the ruling from which the petition seeks relief; (2) all documents and exhibits submitted to the trial court supporting and opposing the petitioner's position; (3) any other documents or portions of documents submitted to the trial court that are necessary for a complete understanding of the case and the ruling under review; and (4) a reporter's transcript of the oral proceedings that resulted in the ruling under review. If no transcript is available, the record must include a declaration by counsel (a) explaining why the transcript is unavailable and fairly summarizing the proceedings, including counsel's arguments and any statement by the court supporting its ruling; or (b) stating that the transcript has been ordered, the date it was ordered, and the date it is expected to be filed, which must be a date prior to any action requested of the reviewing court other than issuance of a temporary stay supported by other parts of the record. A declaration may omit a full summary of the proceedings if part of the relief sought is an order to prepare a transcript for use by an indigent criminal defendant in support of the petition and if the declaration demonstrates the petitioner's need for and entitlement to the transcript. In exigent circumstances, the petition may be filed without the required documents if counsel files a declaration that explains the urgency and the

circumstances making the documents unavailable and fairly summarizes their substance. If the petitioner does not submit the required record or explanations or does not present facts sufficient to excuse the failure to submit them, the court may summarily deny a stay request, the petition, or both [*Cal. Rules of Ct., Rule 8.490(c)*; *see also Cal. Rules of Ct., Rule 8.486(c)*] (format for documents and exhibits).

Although an appellate court has original jurisdiction in any mandate proceeding involving an inferior court or other entity [*see Code Civ. Proc. § 1085*], it will not exercise this jurisdiction, absent a showing of exceptional circumstances, if the petition for a writ of mandate could have been made first to a lower court [*Funeral Dir. Assn. v. Bd. of Funeral Dirs. (1943) 22 Cal. 2d 104, 110, 136 P.2d 785* ; *Cohen v. Superior Court (1968) 267 Cal. App. 2d 268, 270, 274, 72 Cal. Rptr. 814]* . Thus, a petition for a writ of mandate filed in an appellate court, which could lawfully be made to a lower court in the first instance, must set forth the circumstances that, in the opinion of the petitioner, render it proper that the writ should issue originally from the reviewing court [*Cal. Rules of Ct., Rule 8.486(a)*].

For further discussion of mandate proceedings generally, the format requirements of a petition for writ of mandate filed in a court of appeal or the Supreme Court of California, the essential allegations of the petition, and the number of copies to prepare, see Ch. 358, *Mandate and Prohibition* .

[5] Accompanying Papers

The petition must be accompanied by a supporting memorandum [*see Cal. Rules of Ct., Rules 8.486(a)(5)* (petition filed as original proceeding in reviewing court), 3.1100, 3.1103(a)(2), 3.1113(a) (petition filed in superior court)]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[6] Verification

A petition for writ of mandate must be verified [*Code Civ. Proc. § 1086*] on the personal knowledge of the affiant or declarant and not on information and belief [*Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 204, 151 Cal. Rptr. 721* ; *see also City of Santa Cruz v. Municipal Court (1989) 49 Cal. 3d 74, 87, 260 Cal. Rptr. 520, 776 P.2d 222]* .

[7] Proof of Service

A petition for writ of mandate, when presented for filing, must be accompanied by proof of service of a copy of the petition on the respondent and real party in interest (except when the court, in its discretion and for good cause, grants the application for the writ ex parte) [*Code Civ. Proc. § 1107*]. For the method of serving the petition, see *Code Civ. Proc. §§ 1010-1020, 1107*, and Ch. 358, *Mandate and Prohibition* .

[8] Cross References

For a notice of filing of a petition of writ of mandate, see *§ 323.156*

For discussion of writs of mandate and prohibition, see Ch. 358, *Mandate and Prohibition*

For memoranda supporting and opposing a petition for writ of mandate generally, see California Points and Authorities, Ch. 150, *Mandate and Prohibition*

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329
Chapter 323 JURISDICTION: PERSONAL JURISDICTION, INCONVENIENT FORUM, AND APPEARANCES
PART V. FORMS
A. Personal Jurisdiction and Inconvenient Forum

28-323 California Forms of Pleading and Practice--Annotated § 323.156

§ 323.156 Notice of Filing of Petition for Writ of Mandate

[1] FORM Notice of Filing of Petition for Writ of Mandate

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF FILING OF PETITION FOR WRIT OF
Defendant.	)	MANDATE
	)	
	)	

_____

To _____ [*name*], plaintiff, and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that defendant has filed a petition in the _____ [*title of court*] for a writ of mandate to compel the above-named court to enter an order _____ [quashing the service of summons on defendant in *and/or* staying or dismissing] the above-entitled action on the ground(s) that _____ [the court lacks jurisdiction over the person of the defendant *and/or* California is an inconvenient forum and in the interest of substantial justice the action should be heard in a forum outside California]. The petition was filed on _____ [*date*].
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

This form is for use to give plaintiff notice of the filing of the petition for writ of mandate [*Code Civ. Proc. § 418.10(c)*; for discussion of a review of an order denying a motion to quash service of summons on ground of lack of personal jurisdiction or to stay or dismiss action on ground of inconvenient forum, *see § 323.53[1]*].

[3] Cross References

For a petition for writ of mandate and declaration to compel a lower court to enter an order quashing service of summons for lack of jurisdiction over the defendant or staying or dismissing action for inconvenient forum, see *§ 323.155*

For discussion of writs of mandate and prohibition, see Ch. 358, *Mandate and Prohibition*

For memoranda supporting and opposing a petition for writ of mandate generally, see California Points and Authorities, Ch. 150, *Mandate and Prohibition*

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PART V. FORMS
A. Personal Jurisdiction and Inconvenient Forum

28-323 California Forms of Pleading and Practice--Annotated § 323.157

§ 323.157 Notice of Motions and Motions to Vacate and Set Aside Default and Default Judgment [Code Civ. Proc. §§ 473, 473.5] and to Quash Service of Summons for Lack of Personal Jurisdiction or to Stay or Dismiss Action on Ground of Inconvenient Forum [Code Civ. Proc. §§ 410.30(a), 418.10(a), (d)] [Code Civ. Proc. §§ 418.10(b), 473.5(b)]

[1] FORM Notice of Motions and Motions to Vacate and Set Aside Default and Default Judgment [Code Civ. Proc. §§ 473, 473.5] and to Quash Service of Summons for Lack of Personal Jurisdiction or to Stay or Dismiss Action on Ground of Inconvenient Forum [Code Civ. Proc. §§ 410.30(a), 418.10(a), (d)] [Code Civ. Proc. §§ 418.10(b), 473.5(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTIONS AND MOTIONS TO VA-
vs.	)	CATE AND SET ASIDE DEFAULT AND DE-
_____ [*name*],	)	FAULT JUDGMENT AND TO
Defendant.	)	_____ [QUASH SERVICE OF
	)	SUMMONS *and/or* STAY OR DISMISS ACTION]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		[Trial Date: _____]

_____

To plaintiff _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], defendant will, and hereby does, move for an order vacating and setting aside the default and default judgment entered in the above-entitled cause [and for leave to defend the action] and for an order _____ [quashing service of summons on this defendant *and/or* staying or dismissing the action]. The motion to vacate and set aside the default and default judgment will be made on the ground(s) _____ [they were taken through defendant's _____ (mistake *or* inadvertence *or* surprise *or* excusable neglect *or any combination of these*) *or* they are void *or* the service of summons in this cause did not result in actual notice to the defendant in time to defend the action *or any combination of these grounds*], and the motion _____ [to quash service of summons *and/or* to stay or dismiss the action] will be made on the ground(s) _____ [the court lacks jurisdiction over the person of this defendant *and/or* California is an inconvenient forum and in the interest of substantial justice the cause should be heard in a forum outside California].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The notice of motion in [1], *above,* is for use by a defendant (1) to move to set aside a default and default judgment under *Code Civ. Proc. § 473(b)* or *(d)*, or *Code Civ. Proc. § 473.5*, or any combination of these, and (2) to move to quash service of summons for lack of jurisdiction over the defendant under *Code Civ. Proc. § 418.10(a)(1)* or to stay or dismiss the action for inconvenient forum under *Code Civ. Proc. §§ 410.30(a)* and *418.10(a)(2)*, or both. For the required contents of a notice of motion, the papers that must accompany it, and the number of copies to prepare, see *§ 323.80*.

For a discussion and forms of notices of motion for relief under *Code Civ. Proc. § 473(b)* or *(d)* or *473.5* that are not joined with a motion under *Code Civ. Proc. § 418.10* and forms of supporting declarations, as well as a discussion of (1) relief based on an attorney's affidavit of fault, (2) conditions that may be imposed on granting relief, and (3) sanctions that may be imposed on an offending attorney or party when granting relief under *Code Civ. Proc. § 473(d)* [*see Code Civ. Proc. § 473(c)* (sanctions)], see Ch. 489, *Relief From Judgments and Orders* .

For a form of declaration in support of a motion to quash service of summons for lack of jurisdiction or to stay or dismiss the action for inconvenient forum, or both, see *§ 323.151*.

[3] Time Limitation on Motion to Quash or to Stay or Dismiss Action for Inconvenient Forum

A defendant's notice of a *Code Civ. Proc. § 418.10(a)* motion (1) to quash service of summons on the ground the court lacks jurisdiction over him or her or (2) to stay or dismiss the action on the ground of inconvenient forum must be served and filed on or before the last day of his or her time to plead, or within any further time that the court may for good cause allow [*Code Civ. Proc. § 418.10(a)*]. Neither motion brought under this section and within this time frame

will constitute a general appearance [*Code Civ. Proc. § 418.10(d)*].

To avoid waiving the jurisdictional objection by inadvertently making a general appearance [*Code Civ. Proc. § 410.50(a)*], no motion should be joined with the *Code Civ. Proc. § 418.10(a)* motion to quash service of summons for lack of jurisdiction except for an inconvenient forum motion brought under the same section and/or a motion for relief under *Code Civ. Proc. § 473* or *473.5* [*see Code Civ. Proc. § 418.10(d)* (*473* and *473.5* motions do not constitute general appearance if joined with *418.10* motion)].

For discussion of time limitations on motions under *Code Civ. Proc. §§ 473* and *473.5*, see Ch. 489, *Relief From Judgments and Orders* .

[4] Joining Code Civ. Proc. § 473 or 473.5 Motion

A defendant's default and default judgment cannot lawfully be entered before the time to plead to the complaint has passed [*see Code Civ. Proc. § 585(a), (b)*]. Moreover, the filing of a motion to quash service of summons or to stay or dismiss the action for inconvenient forum under *Code Civ. Proc. § 418.10* extends the defendant's time to plead [*Code Civ. Proc. § 585(a), (b), (c)*] until after the denial of the motion and of any subsequent petition for writ of mandate [*Code Civ. Proc. § 586(a)(4)*].

Because a judgment cannot be lawfully entered until after the defendant's time to plead has passed, and a motion for relief under *Code Civ. Proc. § 473* or *473.5* cannot be made until after the judgment is entered, it is difficult to see how any motion for relief under those statutes could be joined with a motion to quash service of summons or to stay or dismiss the action for inconvenient forum under *Code Civ. Proc. § 418.10*, which must be made before the time to plead has expired.

However, apart from the time limitations set forth in *Code Civ. Proc. § 418.10(a)*, there obviously are situations where one would want to join a motion to vacate and set aside a default and default judgment with a motion to quash service of summons. For example, a nonresident defendant who has suffered entry of a default and default judgment that are not void on their face but are void in fact, as, for example, where a false return of service is filed, and who lacks sufficient contacts with California to support the exercise of jurisdiction over him or her by a court of this state, might want to move for relief both under *Code Civ. Proc. § 473(b)*, and for an order quashing service of summons. However, unless the phrase "or within any further time that the court may for good cause allow" in *Code Civ. Proc. § 418.10(a)* were to be construed to permit the motion after the time to plead has expired, the motion to quash would not be proper under the statute. Apart from *Section 418.10*, the aggrieved party might in such a case justify the motion on the ground it is a nonstatutory motion directed to the court's inherent power at law or in equity [for discussion and forms for use in attacks on void judgments at law or in equity, *see* Ch. 489, *Relief From Judgments and Orders*].

[5] Accompanying Papers

The evidentiary or probative facts establishing the court's lack of personal jurisdiction over the defendant or that in the interest of substantial justice the action should be heard outside California are set forth in an affidavit or declaration [*see Code Civ. Proc. §§ 2009, Code Civ. Proc. § 2015.5*], a copy of which must be served and filed with the notice of motion [*Code Civ. Proc. § 1010*; *see also Code Civ. Proc. § 1005(b)*].

The motion must also be accompanied by a memorandum to be relied on. The court may construed the absence of the memorandum as an admission that the motion is not meritorious and cause for its denial [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*].

For memoranda supporting and opposing a motion to quash service of summons for lack of personal jurisdiction or to stay or dismiss an action for inconvenient forum, see California Points and Authorities, Ch. 132, *Jurisdiction: Personal*

.

[6] Cross References

For discussion, forms, and a procedural checklist for use in obtaining entry of default and default judgment, see Ch. 205, *Defaults and Default Judgments*

For discussion, forms, and procedural checklists for use in moving for relief under *Code Civ. Proc. §§ 473* and *473.5*, see Ch. 489, *Relief From Judgments and Orders*

For memoranda supporting and opposing a motion to quash service of summons for lack of personal jurisdiction or to stay or dismiss an action for inconvenient forum, or to set aside and vacate a default and default judgment for lack of personal jurisdiction under *Code Civ. Proc. § 473(d)* (void judgments), see California Points and Authorities, Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* (Matthew Bender)

For memoranda supporting and opposing a motion for relief under *Code Civ. Proc. § 473* or *473.5*, see California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* , Pts. I and II (Matthew Bender)

For a notice of motion to quash service of summons on grounds other than immunity and to stay or dismiss the action on grounds of inconvenient forum, as well as discussion of required papers and service, see *§ 323.150*

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28-323 California Forms of Pleading and Practice--Annotated § 323.158

§ 323.158 Order Granting Motion to Vacate and Set Aside Default and Default Judgment and to Quash Service of Summons for Lack of Personal Jurisdiction or to Stay or Dismiss Action on Ground of Inconvenient Forum

[1] FORM Order Granting Motion to Vacate and Set Aside Default and Default Judgment and to Quash Service of Summons for Lack of Personal Jurisdiction or to Stay or Dismiss Action on Ground of Inconvenient Forum

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

_____

The motions of the above-named defendant, appearing specially, for an order vacating and setting aside the default and default judgment heretofore entered in the above-entitled cause [and for leave to defend the action] and for an order _____ [quashing service of the summons on defendant *and/or* staying or dismissing the action] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

Having read and considered the supporting and opposing declarations and points and authorities and having heard and considered the arguments of counsel, the court finds that the motion to vacate and set aside the default and default judgment was made within the time prescribed by law, that _____ [the default and default judgment were taken against defendant through the _____ (mistake *or* inadvertence *or* surprise *or* excusable

neglect *or any combination of these*) of _____ (defendant *or* defendant's counsel) *or* the default and default judgment are void for lack of jurisdiction over the person of the defendant *or* the service of the summons did not result in actual notice to the defendant in time to defend the action and defendant's lack of actual notice in time to defend was not caused by his/her avoidance of service or inexcusable neglect], and that _____ [this court has no jurisdiction over the person of the defendant *and/or* California is an inconvenient forum for the trial of this action and in the interest of substantial justice the action should be _____ (tried in a proper court in the _____ (*e.g.,* State) of _____ *or* dismissed)]. Therefore,

IT IS ORDERED that the motions be and are granted, that the _____ [*specify, e.g.,* default and default judgment be and are vacated and set aside, that service of the summons on defendant be and is quashed, and that the action be and is dismissed].

[IT IS FURTHER ORDERED that defendant's counsel, _____ (*name*), pay compensatory legal fees and costs in the sum of $_____ to _____ (*identify adverse party or adverse party's counsel to whom fees and costs are to be paid, e.g.,* plaintiff's counsel, _____ (*name*)].
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form in [1], *above,* is for use as a formal order in conjunction with the motion to vacate and set aside default and default judgment and to quash service of summons for lack of personal jurisdiction or to stay or dismiss action on ground of inconvenient forum [*see § 323.157*] when at least one of the multiple motions is granted. If all the motions are denied, a formal order is not normally required.

[3] Variations of Order

There can be several variations in the actual order when multiple motions are made. Assuming the motions were made on all the grounds indicated in the motion [*see § 323.157*], the court, if it grants any motion, must grant one of the motions to vacate and set aside the default and default judgment, since a motion to quash service of summons or to stay or dismiss the action could be effectively granted only when the default and judgment are first vacated and set aside.

Also, alternative motions under *Code Civ. Proc. § 473(b), 473(d),* and *473.5* may be made concurrently. The court could, for example, grant the motion under *Code Civ. Proc. § 473(b),* or *473.5* (both of which involve valid judgments) and deny the other motions. If it does this, the order should include (1) any terms imposed by the court, and (2) an order that the answer or other pleading proposed be filed [*see Code Civ. Proc. § 473(b), (c)*] or that the defendant be allowed to defend the action by the answer, motion, or other pleading proposed to be filed [*Code Civ. Proc. § 473.5(a), (c)*].

The court could also grant the motion under *Code Civ. Proc. § 473(d)* (which involves a void judgment) and the motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)* and deny the other motions, or it could grant the motion under *Code Civ. Proc. § 473(b),* or *473.5* and the motion to stay or dismiss the action for inconvenient forum and deny the other motions.

Another possibility is the one illustrated in this form; that is, the court could grant the motion under *Code Civ. Proc. § 473(d),* the motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1),* and the motion to dismiss the action under *Code Civ. Proc. § 418.10(a)(2)* and, by failing to mention them, deny the other motions that, in fact, seek the same relief as that granted under *Code Civ. Proc. § 473(d).* It would, however, be inconsistent for the court to grant the motion under *Code Civ. Proc. § 473(d),* because the judgment is void for lack of personal jurisdiction over the

defendant, yet to deny the motion to quash service when a return of service was made. It would be equally inconsistent for the court to grant the motion under *Code Civ. Proc. § 473(b)* (involving a valid judgment) and to grant the motion to quash service of summons on the ground that defendant was never properly served.

If the court grants relief under *Code Civ. Proc. § 473(b)*, based on an attorney's affidavit of fault as provided for in that statute, the court may direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties [*Code Civ. Proc. § 473(c)(1)*]. Therefore, if the motion to vacate and set aside the default and default judgment seeks relief under *Code Civ. Proc. § 473(b)*, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, the optional paragraph of the order, directing the payment of legal fees and costs, should be included in the form. However, where the court grants relief from a default or default judgment based on the affidavit (or declaration) of the defaulting party's attorney attesting to his or her mistake, inadvertence, surprise, or neglect, the relief shall not be made conditional on the attorney's payment of compensatory legal fees or costs or monetary penalties imposed by the court or on compliance with other sanctions ordered by the court [*Code Civ. Proc. § 473(c)(2)*].

[4] Findings

The general rule is that findings are not required on an order made on a motion [*see, e.g., Beckett v. Kaynar Mfg. Co., Inc. (1958) 49 Cal. 2d 695, 699, 321 P.2d 749* ; *Waymire v. California Trona Co. (1917) 176 Cal. 395, 399-400, 168 P. 563* ; *Allstate Ins. Co. v. Orlando (1968) 262 Cal. App. 2d 858, 867, 69 Cal. Rptr. 702]* . Neither *Code Civ. Proc. § 473(b)* or *(d)*, nor *Code Civ. Proc. § 418.10* requires that the court, in ruling on the motions under those sections, make findings and, hence, findings are not required. The general rule that findings are not required on a motion has specifically been applied to an order denying a motion for relief under *Code Civ. Proc. § 473* [*see In re Marriage of Simmons (1975) 49 Cal. App. 3d 833, 836, 123 Cal. Rptr. 213* ; *Costa v. Traina (1962) 200 Cal. App. 2d 655, 662, 19 Cal. Rptr. 521]* .

On the other hand, *Code Civ. Proc. § 473.5* expressly requires a "finding" by the court. That statute provides that on a finding by the court that the motion was made within the period permitted by *Code Civ. Proc. § 473.5(a)* and that the defendant's lack of actual notice in time to defend the action was not caused by his or her avoidance of service or inexcusable neglect, the court may set aside the default or default judgment on such terms as may be just and allow such party to defend the action [*Code Civ. Proc. § 473.5(c)*]. Although the section does not contemplate "findings of fact and conclusions of law" as formerly provided for in *Code Civ. Proc. § 632*, or in *Cal. Rules of Ct., Rule 3.1590(b)-(n)*, it would nevertheless seem to require that the court state in its order a finding that the required conditions exist [*see, e.g., Goya v. P.E.R.U. Enterprises (1978) 87 Cal. App. 3d 886, 890, 151 Cal. Rptr. 258* (trial court granted motion on finding that motion was made within the time specified by *Code Civ. Proc. § 473.5(a)*, and lack of actual notice was not caused by an avoidance of service or inexcusable neglect)].

Moreover, it would appear, at least from the standpoint of appellate review, that the better practice would be for the court to include in its recital in the order a finding that the particular ground supporting the order exists when any doubt concerning the basis of the order might arise from a failure to do so. This seems particularly true when motions seeking substantially the same relief under different but mutually exclusive statutory provisions are joined, such as motion for relief under *Code Civ. Proc. § 473(b), 473(d)*, and *473.5*, and the relief is granted on one or more but not all of the statutory grounds, or when a motion is made on multiple grounds but is granted on fewer than all of them. The finding could be stated in the form of an ultimate fact, as indicated in *Code Civ. Proc. § 473.5* and illustrated in the foregoing form, or by citation to the appropriate statute [*see, e.g., Gould, Inc. v. Health Sciences, Inc. (1976) 54 Cal. App. 3d 687, 691, 126 Cal. Rptr. 726* (trial court cited *Code Civ. Proc. §§ 410.30* and *418.10* in granting defendant's motion to quash service of summons and court upheld order on ground service of summons could properly be quashed under forum non conveniens doctrine)].

[5] Supporting Evidence

Whether the finding or order is supported by the evidence would be determined from the facts stated in the affidavits or declarations filed on the motion. The rule on appeal is that, when an issue is tried on affidavits or declarations, those favoring the contentions of the prevailing party establish not only the facts stated in them but also all facts that reasonably may be inferred from them. When there is a substantial conflict in the facts presented by the affidavits or declarations, the determination of the controverted facts by the trial court will not be disturbed on appeal [*Beckett v. Kaynar Mfg. Co., Inc. (1958) 49 Cal. 2d 695, 699, 321 P.2d 749]* . This rule has been held to apply to orders made on motions for relief from default under *Code Civ. Proc. §§ 473* and *473.5* [*see Goya v. P.E.R.U. Enterprises (1978) 87 Cal. App. 3d 886, 891, 151 Cal. Rptr. 258]* , as well as to orders made on motions under *Code Civ. Proc. § 418.10(a)* [*see R.E. Sanders & Co. v. Lincoln-Richardson Enterprises, Inc. (1980) 108 Cal. App. 3d 71, 74, 166 Cal.d b Rptr. 269* ; *Belmont Industries, Inc. v. Superior Court (1973) 31 Cal. App. 3d 281, 283 n.1, 107 Cal. Rptr. 237* ; *see also Serafini v. Superior Court (1998) 68 Cal. App. 4th 70, 77, 80 Cal. Rptr. 2d 159]* .

[6] Cross References

For discussion of orders by the court, see Ch. 372, *Motions and Orders*

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[Reserved]

§§ 323.159[Reserved]

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28-323 California Forms of Pleading and Practice--Annotated § 323.170

§ 323.170 Notice of General Appearance by Defendant in Propria Persona [Code Civ. Proc. § 1014]

[1] FORM Notice of General Appearance by Defendant in Propria Persona [Code Civ. Proc. § 1014]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF APPEARANCE
_____ [*name*],	)	[*Code Civ. Proc. § 1014*]
Defendant.	)	
	)	
	)	

_____

To _____ [*name*], plaintiff, and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that I, _____ [defendant _____ (*name*) *or* the above-named defendant], hereby appear in this _____ [action *or* proceeding].
Dated: _____.

_____ [*signature*]
Defendant

[2] Use of Form

The notice in [1], *above*, is for use by a defendant to make a general appearance in an action [*see Code Civ. Proc. § 1014*; for further discussion, *see* § 323.42]. For a form of notice of appearance given by defendant's attorney, see *§*

323.171.

[3] Filing

Code Civ. Proc. § 1014 does not expressly require that the notice of appearance be filed, but, rather, that it be "given" to the plaintiff. Nevertheless, it would appear that the better, if not required, practice is to deliver the original to the court clerk for filing [*see, e.g., Farmers etc. Nat. Bk. v. Superior Court (1945) 25 Cal. 2d 842, 846, 155 P.2d 823* (appearance invokes general jurisdiction of court over defendant when it is in form of written notice filed in action for that purpose); *Harrington v. Superior Court (1924) 194 Cal. 185, 189, 228 P. 15* (paper executed by defendant making an appearance in action filed with court)].

[4] Copies to Prepare

The notice should be prepared in an original for filing, one copy for service on the plaintiff or plaintiff's counsel [*see Code Civ. Proc. § 1015*], and one copy to be retained by the defendant.

[5] Cross References

For a notice of general appearance by an attorney of defendant, see *§ 323.171*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

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28-323 California Forms of Pleading and Practice--Annotated § 323.171

§ 323.171 Notice of General Appearance by Attorney for Defendant

[1] FORM Notice of General Appearance by Attorney for Defendant

[*Caption. See § 323.150.*]

To _____ [*name*], plaintiff, and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that I have been retained by, and hereby appear for, _____ [the above-named defendant *or* defendant _____ (*name*)] in this _____ [action *or* proceeding].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

The notice in [1], *above,* is for use by an attorney to give notice of a general appearance of a defendant in the action or proceeding [*see Code Civ. Proc. § 1014* [for discussion of appearance by attorney, *see § 323.65*]]. For a form of notice of appearance by a party in propria persona, see *§ 323.170*.

[3] Cross References

For discussion of filing and copies to prepare, see *§ 323.171*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

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28-323 California Forms of Pleading and Practice--Annotated § 323.172

§ 323.172 Notice of Appearance and Waiving of Rights by Defendant, in Propria Persona, Consenting That Action or Proceeding Be Heard as Uncontested Matter

[1] FORM Notice of Appearance and Waiving of Rights by Defendant, in Propria Persona, Consenting That Action or Proceeding Be Heard as Uncontested Matter

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	)))))))))	NO. _____ NOTICE OF APPEARANCE AND WAIVER OF RIGHTS [*Code Civ. Proc. § 1014*]

To _____ [*name*], plaintiff, and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that I, _____ [defendant _____ (*name*) *or* the above-named defendant], hereby appear in this _____ [action *or* proceeding], and that I waive service of the summons and complaint on me, waive time to answer, demur, and otherwise plead or move to the complaint herein, and notice of all subsequent proceedings of which notice is required to be given, and consent that this _____ [action *or* proceeding] may be heard as an uncontested matter.
Dated: _____.

_____ [*signature*]
Defendant

[2] Use of Form

The notice in [1], *above*, is for use by an unrepresented defendant to make a general appearance in an action or proceeding and expressly to waive service of the summons and the complaint, time to plead, and notice of subsequent proceedings, and to consent to the action's or proceeding's being heard as an uncontested matter. The waiver of service is not essential because the notice of appearance constitutes a general appearance, and a general appearance is equivalent to personal service of the summons on such party [*Code Civ. Proc. § 410.50(a)*]. The waiver of notice of subsequent proceedings, such as notice of the time and place of trial, is a waiver of the defendant's right to notice of all subsequent proceedings of which notice is required to be given [*see Code Civ. Proc. § 1014*].

[3] Cross References

For discussion of filing and copies to prepare, see *§ 323.171*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

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28-323 California Forms of Pleading and Practice--Annotated § 323.173

§ 323.173 Notice by Defendant, in Propria Persona, Admitting Service of Summons and Complaint, Waiving Further Notice, and Waiving Rights Under Servicemembers Civil Relief Act and State Statutes for Members of the National Guard and Military Reservists [50 U.S.C. App. § 501 et seq.; Mil. & Vet. Code § 402 et seq.]

[1] FORM Notice by Defendant, in Propria Persona, Admitting Service of Summons and Complaint, Waiving Further Notice, and Waiving Rights Under Soldiers' and Sailors' Civil Relief Act of 1940 [50 U.S.C. App. § 520]

[*Caption. See § 323.150.*]

To _____ [*name*], plaintiff, and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that I, _____ [defendant _____ (*name*) *or* the above-named defendant],

1. Admit due service of the summons and the complaint in this _____ [action *or* proceeding], copies of which were delivered to me on _____ [*date*];

2. Hereby appear in this _____ [action *or* proceeding], and waive time to answer, demur, or otherwise plead or move to the complaint;

3. Hereby waive notice of all subsequent proceedings of which notice is required to be given including, but not limited to, notice of the time and place of trial, and notice of the taking of any deposition; and

4. Specifically waive all rights and privileges which I may now have or hereafter acquire under the Servicemembers Civil Relief Act (*50 U.S.C. App. § 501 et seq.*), and amendments thereto.

5. Specifically waive all rights and privileges under California statutes for members of the National Guard and military

reservists (*Mil. & Vet. Code § 402 et seq.*).
Dated: _____.

_____ [*signature*]
Defendant

[2] Use of Form

The form in [1], *above*, is for use by a defendant in the U.S. military service to enter an appearance in the action or proceeding, to admit service of the summons and complaint, and to waive both notice of subsequent proceedings required to be given and defendants' rights under the Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*] and California statutes for members of the National Guard and military reservists [*Mil. & Vet. Code § 402 et seq.*]. With appropriate modifications, the foregoing form may be used by an attorney to give notice of appearance and waiver on behalf of the defendant [for discussion and related form, *see § 323.171*].

[3] Cross References

For discussion of filing and copies to prepare, see *§ 323.171*

For discussion of ascertaining a defendant's military status at the time of service of summons and its benefits and effect on subsequent proceedings, see *Ch. 518, Service of Summons and Papers, § 518.19*

For discussion and an application for a stay of a pending action or proceeding based on military service, see *Ch. 136, Continuances, §§ 136.20[2], 136.78A*

For discussion and a plaintiff's declaration under penalty of perjury setting forth facts showing that the defendant is not in the military service prior to entry of default judgment, see *Ch. 205, Defaults and Default Judgments, §§ 205.25[5],* 205.92-205.94

For detailed discussion of relief under the Servicemembers Civil Relief Act and related California legislation, see *Ch. 501, Sales: Retail Installment Contracts; §§ 501.60* et seq.

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[e] Eviction Actions

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[i] TROs, Preliminary Injunctive Relief, Accounts, and Receivers

[j] Determining Title to Personal Property

[k] Creditor's Suits

[l] Arbitration-Related Petitions

[i] Contractual Arbitration

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[m] Long-Term Care Health Care

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[b] Motion Does Not Extend Time to Respond

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[2] Make Preliminary Determinations

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[2] Motion to Dismiss for Failure to Pay

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[1] FORM

[2] Use of Form

[3] Motion is General Appearance

[4] Noticed Motion

[5] Accompanying Papers

[6] Copies to Prepare

[7] Service and Filing

[8] Opposition and Reply Papers

[9] Cross References

§ 324.101 Declaration [Code Civ. Proc. §§ 2009, 2015.5] in Support of Motion to Transfer or Dismiss Appeal or Petition on Ground Court Lacks Subject Matter Jurisdiction

[1] FORM

[2] Use of Form

[3] Form and Contents

[4] Cross References

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[1] FORM

[2] Use of Form

[3] Notice of Court's Ruling

[4] Cross References

§ 324.103 Proceedings to Dismiss Appeal or Petition for Failure to Pay Costs and Fees of Transfer [Code Civ. Proc. § 399]--Notice of Motion

[1] FORM

[2] Use of Form

[3] Accompanying Papers

[4] Who Must Pay Fees

[5] When Motion May Be Made

[6] Cross References

§ 324.104 Declaration [Code Civ. Proc. §§ 2009, 2015.5] in Support of Motion to Dismiss Appeal or Petition for Failure to Pay Costs and Fees of Transfer

[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

§ 324.106 Demurrer [Code Civ. Proc. § 430.30(a)] on Ground of Exclusive Concurrent Jurisdiction

[1] FORM

[2] Use of Form

[3] Exclusive Concurrent Jurisdiction

[4] Accompanying Papers

[5] Cross References

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[1] FORM

[2] Use of Form

[3] Accompanying Papers

[4] Copies to Prepare

[5] Service and Filing

[6] Length of Notice Required

[7] Opposition and Reply Papers

[8] Cross References

§ 324.121 Proceedings to Reclassify Case--By Defendant or Cross Defendant Within Time Allowed for Responding to Initial Pleading [Code Civ. Proc. § 403.040(a)]--Notice of Motion and Supporting Declaration

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[2] Use of Form

[3] Motion is General Appearance

[4] Accompanying Papers

[5] Copies to Prepare

[6] Service and Filing

[7] Length of Notice Required

[8] Opposition and Reply Papers

[9] Cross References

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[1] FORM

[2] Use of Form

[3] Cost and Fees

[4] Notice of Court's Ruling

[5] Cross References

§ 324.123 Proceedings to Reclassify Case- By Party After Time to Amend or Respond to Complaint or Other Pleading [Code Civ. Proc. § 403.040(b)]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Accompanying Papers

[4] Service and Filing

[5] Opposition and Reply Papers

[6] Cross References

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[1] FORM

[2] Use of Form

[3] Cost and Fees

[4] Cross References

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§ 324.01 Scope of Chapter

This chapter discusses the fundamentals of jurisdiction [*see § 324.10* et seq.], the California court system and subject matter jurisdiction of the California courts [*see § 324.20* et seq.], challenges to subject matter jurisdiction [*see § 324.40* et seq.], and the classification and reclassification of cases within the Superior Court [*see § 324.60* et seq.]. For analysis of personal jurisdiction and the related subjects of inconvenient forum and appearances, see Ch. 323, *Jurisdiction: Personal* .

This chapter includes the following forms relating to subject matter jurisdiction:

- A notice of motion, a supporting declaration, and an order for use in a proceeding to transfer a case from a court lacking subject matter jurisdiction to a court having such jurisdiction pursuant to *Code Civ. Proc. § 396* [*see* §§ 324.100-324.102].

- A notice of motion, a supporting declaration, and an order dismissing an action because of plaintiff's failure to pay the costs of transfer [*see* §§ 324.103-324.105].

- A form of demurrer on the ground of exclusive concurrent jurisdiction [*see § 324.106*].

- Notice of motion and order for use in a proceeding to reclassify a case as a limited or unlimited civil case within time allowed for amending initial pleading pursuant to *Code Civ. Proc. § 403.040(a)* [*see §§ 324.120-324.122*].

- Notice of motion and orders for use in a proceeding to reclassify a case as a limited or unlimited civil case after time to amend or respond to a complaint or other pleading pursuant to *Code Civ. Proc. § 403.040(b)* [*see* §§ 324.123-324.124].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral Overview

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§ 324.02 Cross References

- For discussion and forms relating to personal jurisdiction, see Ch. 323, *Jurisdiction: Personal* .

- Motions made under *Code Civ. Proc. § 396* reach only the question of jurisdiction and not that of improper venue [*see Apartments, Inc. v. Trott (1959) 172 Cal. App. 2d 7, 13, 342 P.2d 32]* . For a discussion of venue and forms relating to change of venue generally, see Ch. 571, *Venue* .

- For discussion and forms for use to demur to a complaint on the ground the court lacks jurisdiction of the subject of the action (*Code Civ. Proc. § 430.10(a)*), see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

- For discussion and forms for use in securing relief from defaults and judgments that are void for lack of jurisdiction, see Ch. 489, *Relief From Judgments and Orders* .

- For a discussion of the subject matter jurisdiction of the small claims courts (*Code Civ. Proc. § 116.110 et seq.*), which are not separate courts but, rather, the exercise of limited jurisdiction by the superior court, see Ch. 526, *Small Claims* .

- For discussion and forms relating to the jurisdiction of federal courts, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

- For a discussion and forms for use in securing the dismissal of a federal action for lack of subject matter jurisdiction and for removing an action within the original jurisdiction of the federal district courts from a California state court to a federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

- For further discussion and forms for use in challenging judicial acts in excess of jurisdiction by petition for extraordinary writ, see Ch. 358, *Mandate and Prohibition* and Ch. 492, *Review (Certiorari), Writ of.*

- For the jurisdictional issues that may be considered on a petition for a writ of mandate to determine the validity of a final administrative order or decision, see *Code Civ. Proc. § 1094.5(b)* and Ch. 474B, *Standards in Reviewing Agency Decisions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsAppellate JurisdictionState Court Review

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[Reserved]

§§ 324.03[Reserved]

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§ 324.10 Governing Law

The California court system is established by *Cal. Const., art. VI, § 1*.

Subject matter jurisdiction is governed by *Cal. Const., art. VI, §§ 10, 11*, and by *Code Civ. Proc. §§ 85, 86, 86.1* (limited civil cases) and *116.220* (small claims division).

Transfers of actions lacking proper subject matter jurisdiction are governed by *Code Civ. Proc. §§ 396, 399*.

The judicial remedies available in California are set forth in *Code Civ. Proc. §§ 20-30*, and the forms of judicial relief available in Part One of Division 4 of the Civil Code, commencing with *Civ. Code § 3274*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionJurisdictional SourcesConstitutional SourcesCivil ProcedureJurisdictionJurisdictional SourcesStatutory SourcesCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewConstitutional LawThe JudiciaryJurisdictionGeneral OverviewGovernmentsCourtsCreation & Organization

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§ 324.11 Definitions

[1] Jurisdiction

Jurisdiction, in its broadest sense, means the power to hear and determine causes. Jurisdiction is generally divided into two components: subject matter jurisdiction and personal jurisdiction. Subject matter jurisdiction is the authority of a court to try actions of the type or class to which a suit belongs. Personal jurisdiction is the authority of a court over parties and properties. Stated another way, subject matter jurisdiction addresses whether a court has the authority to hear a particular type of suit, while personal jurisdiction addresses whether state and federal due process requirements are met based on the person's or property's relationship to the state.

The term "jurisdiction" does not have a single, fixed meaning, but has different meanings in different situations [*St. Sava Mission Corp. v. Serbian Eastern Orthodox Diocese (1990) 223 Cal. App. 3d 1354, 1365, 273 Cal. Rptr. 340]* . The word "jurisdiction," in its judicial sense, means the power to hear and determine causes [*Mueller v. Elba Oil Co. (1942) 21 Cal. 2d 188, 206, 130 P.2d 961* ; *Gray v. Hall (1928) 203 Cal. 306, 314-315, 265 P. 246* ; *see also In re Hughes (1911) 159 Cal. 360, 363, 113 P. 684* (jurisdiction, as applied to a particular claim or controversy, is the power to hear and determine that controversy); *Crew v. Pratt (1897) 119 Cal. 139, 151, 51 P. 38* (jurisdiction to pronounce judgment or order under *Code Civ. Proc. § 1908*, relating to conclusiveness and effect of judgment, refers to the court's right or power to adjudicate a point); *Ex Parte Bennett (1872) 44 Cal. 84, 88* (jurisdiction is the power to hear and determine, but includes the power to do both, to hear without determining, or to determine without hearing); *Burns v. Municipal Court (1961) 195 Cal. App. 2d 596, 599, 16 Cal. Rptr. 64* (jurisdiction is the power of a court to hear and determine, or to act in a certain manner, and is synonymous with the power to render a valid judgment against a person)].

Jurisdiction is, however, a term of large and comprehensive import and embraces every kind of judicial action. Thus, every movement by a court is necessarily the exercise of jurisdiction [*Harrington v. Superior Court (1924) 194 Cal. 185, 188, 228 P. 15]* . The term embraces a large number of ideas of similar character, some fundamental to the nature of any judicial system, some derived from the requirement of due process, some determined by the constitutional or

statutory structure of a particular court, and some based on mere procedural rules originally devised for convenience and efficiency, and by precedent made mandatory and jurisdictional [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 291 109 P.2d 942]* .

[2] Lack of Jurisdiction

Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine a case; an absence of authority over either the *subject matter* or over the *parties* or over both the subject matter and the parties [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 287-288, 109 P.2d 942* ; *In re Jody R. (1990) 218 Cal. App. 3d 1615, 1622, 267 Cal. Rptr. 746* ; *People v. Ruiz (1990) 217 Cal. App. 3d 574, 584, 265 Cal. Rptr. 886* ; *Schwenke v. J & P Scott, Inc. (1988) 205 Cal. App. 3d 71, 76, 252 Cal. Rptr. 91]* , or over the thing, when a specific thing is the subject of the action [*see Code Civ. Proc. § 1917*]. For further discussion of the jurisdiction necessary to support judicial action, see *§ 324.12*. For discussion of challenging a court's act lacking jurisdiction, see *§ 324.41*.

[3] Excess of Jurisdiction

Excess of jurisdiction refers to a situation in which a court has jurisdiction in the fundamental sense over the subject matter and the parties, but exercises that jurisdiction in an unauthorized manner, that is, in excess of the authority possessed [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288-290, 109 P.2d 942* ; *In re Jody R. (1990) 218 Cal. App. 3d 1615, 1622, 267 Cal. Rptr. 746* ; *People v. Ruiz (1990) 217 Cal. App. 3d 574, 584, 265 Cal. Rptr. 886* ; *Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 846, 131 Cal. Rptr. 674* ; *see also People v. National Automobile & Casualty Co. (2000) 82 Cal. App. 4th 120, 125-126, 97 Cal. Rptr. 2d 858* ; *Lovett v. Carrasco (1998) 63 Cal. App. 4th 48, 54-55, 73 Cal. Rptr. 2d 496]* .

For example, a court may grant relief that it is not authorized to grant, or it may act in the absence of certain procedural prerequisites. Such acts are strictly in excess of jurisdiction, although in common usage they are frequently not distinguished from acts in which the court wholly lacks jurisdiction [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288, 109 P.2d 942* ; *People v. Nat'l Automobile and Casualty Ins. Co. (2000) 82 Cal. App. 4th 120, 125, 97 Cal. Rptr. 2d 858* ; *Jovine v. FHP, Inc. (1998) 64 Cal. App. 4th 1506, 1527 n.26, 76 Cal. Rptr. 2d 322* ; *see also Crittenden v. Superior Court (1964) 61 Cal. 2d 565, 567, 39 Cal. Rptr. 380, 393 P.2d 692* ; *Schwenke v. J & P Scott, Inc. (1988) 205 Cal. App. 3d 71, 76, 252 Cal. Rptr. 91* ; *compare Jovine v. FHP, Inc. (1998) 64 Cal. App. 4th 1506, 1527, 1531-1532, 76 Cal. Rptr. 2d 322* (while it is not uncommon for cases to state that act in excess of court's jurisdiction is void, only acts in excess of subject matter jurisdiction are void, while acts in excess of other kinds of jurisdiction are voidable) *with Plaza Hollister Ltd. Partnership v. County of San Benito (1999) 72 Cal. App. 4th 1, 20, 84 Cal. Rptr. 2d 715* (granting relief that court under no circumstances has any authority to grant has been considered an aspect of fundamental jurisdiction for purposes of declaring a judgment or order void)].

For discussion of a lack of jurisdiction, see [2], *above*. For discussion of challenging a court's act in excess of jurisdiction, see *§ 324.42*.

[4] Subject Matter Jurisdiction

Subject matter jurisdiction has been defined as the authority of a court to try actions of the type or class to which a suit belongs. A question of subject matter jurisdiction necessarily involves choice of forum: since all legally cognizable grievances may be considered in some forum, a claim that a particular agency has or does not have authority to adjudicate a case inevitably implies that another court or agency does not have or does have such power [*Hughes v. Blue Cross of Northern California (1989) 215 Cal. App. 3d 832, 849, 263 Cal. Rptr. 850]* .

[5] Personal Jurisdiction

While subject matter jurisdiction is the authority of a court to try particular types of actions, personal jurisdiction addresses whether a court may exercise jurisdiction over a person that is either 1) within the state, or 2) if not in the state, that the person has "certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice;" and that the person's due process rights are protected by giving sufficient notice of the action and an opportunity to be heard [*see Code Civ. Proc. § 410.10*; *International Shoe Co. v. Washington (1945) 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95]* .

For discussion and forms relating to personal jurisdiction, see Ch. 323, *Jurisdiction: Personal* .

[6] "Action," "Proceeding," "Cause of Action," and "Case" Distinguished

Judicial remedies in California civil cases are divided into actions and special proceedings [*Code Civ. Proc. § 21*]. An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right or for a redress or prevention of a wrong [*Code Civ. Proc. §§ 22, 30*]. Every other remedy is a special proceeding [*Code Civ. Proc. § 23*]. A number of special proceedings are covered in Part Three of the Code of Civil Procedure. *Code Civ. Proc. § 396*, governing the transfer of an action or proceeding from a court lacking subject matter jurisdiction, applies by its own terms to appeals or petitions filed in the superior court over which the superior court lacks jurisdiction but over which a court of appeal or the Supreme Court would have jurisdiction [*Code Civ. Proc. § 396(b)*].

The term "action," however, is not limited to the complaint but refers to the entire judicial proceeding at least through judgment, and is generally considered synonymous with "suit" [*Nassif v. Municipal Court (1989) 214 Cal. App. 3d 1294, 1298, 263 Cal. Rptr. 195]* . Moreover, "action" is not the same as "cause of action." Whereas "action" refers to the judicial remedy to enforce an obligation, "cause of action" refers to the obligation itself [*Nassif v. Municipal Court (1989) 214 Cal. App. 3d 1294, 1298, 263 Cal. Rptr. 195]* .

The term "case" is a word of larger import and is not synonymous with the term "action" or "cause of action." Rather, the word "case" applies whenever two or more causes of action (as opposed to counts) are prosecuted together, for example, when both a complaint and a cross complaint have been filed or when two or more plaintiffs join in a case but each has his or her own cause of action. The term also applies when a single plaintiff prosecutes a cause of action against two or more defendants in which several judgments will be entered, as, for example, in an action against a principal and his or her surety [*see Emery v. Pacific Employers Ins. Co. (1937) 8 Cal. 2d 663, 665-666, 67 P.2d 1046* (disapproved on another point in *Barrera v. State Farm Mut. Automobile Ins. Co. (1969) 71 Cal. 2d 659, 679, 79 Cal. Rptr. 106, 456 P.2d 674*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 324.12 Jurisdiction Required for Valid Judgment

The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment [*Code Civ. Proc. § 1917*]. Thus, the judgment of a court lacking this jurisdiction is void [for additional discussion of a judicial act lacking jurisdiction, *see § 324.41*].

In other words, a court, in order to exercise jurisdiction over a given action or proceeding, must have jurisdiction over the subject matter, that is, the constitutional and statutory power to adjudicate the matter in controversy [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288* ; *Harrington v. Superior Court (1924) 194 Cal. 185, 188, 228 P. 15* ; *Workmen's Comp. Appeals Bd. v. Small Claims Court (1973) 35 Cal. App. 3d 643, 645, 111 Cal. Rptr. 6]* . Subject matter jurisdiction cannot be conferred by consent, waiver or estoppel [*Buckley v. California Coastal Com. (1998) 68 Cal. App. 4th 178, 190, 80 Cal. Rptr. 2d 562]* , nor can parties expand a court's jurisdiction by contract [*Crowell v. Downey Community Hospital Foundation (2002) 95 Cal. App. 4th 730, 739, 115 Cal. Rptr. 2d 810]* .

To exercise jurisdiction over the subject matter, the court must, to render a judgment in personam, secure personal jurisdiction over the defendant [*Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 799, 100 Cal. Rptr. 477]* . Thus, in cases involving in personam actions or proceedings, the court must also have jurisdiction over the parties [*see Hartford v. Superior Court (1956) 47 Cal. 2d 447, 454, 304 P.2d 1* ; *see generally* Chapter 323]. To render a judgment in rem or quasi in rem, the court must have jurisdiction over the specific thing that is the subject of the action [*see Code Civ. Proc. § 1917*]. For further discussion of in personam, in rem, and quasi in rem judgments, see Chapter 323.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 324.13 Jurisdiction Is in Court Rather Than in Judge of Court

Jurisdiction lies in the court and not in a particular judge of the court. Thus, an individual judge, as distinguished from the court, is not empowered to retain jurisdiction of a cause. The cause is before the court, not the individual judge of the court, and the jurisdiction that the judge exercises is the jurisdiction of the court, not of the judge [*People v. Osslo (1958) 50 Cal. 2d 75, 103-104, 323 P.2d 397* ; *People v. Madrigal (1995) 37 Cal. App. 4th 791, 795-796, 43 Cal. Rptr. 2d 498* *In re Marriage of Regnery (1989) 214 Cal. App. 3d 1367, 1377, 263 Cal. Rptr. 243* ; *see also* *Sandco American, Inc. v. Notrica (1990) 216 Cal. App. 3d 1495, 1508, 265 Cal. Rptr. 587]* .

The jurisdiction of a multijudge, multidepartment superior court is vested in the court as a whole. If one department exercises authority in the matter that might properly be heard in another department, that action, although irregular, does not amount to a defect of jurisdiction [*People v. Madrigal (1995) 37 Cal. App. 4th 791, 795, 43 Cal. Rptr. 2d 498* ; *Shane v. Superior Court (1984) 160 Cal. App. 3d 1237, 1249, 207 Cal. Rptr. 210]* . The action, however, may constitute an act in excess of jurisdiction [*see, e.g.,* *People v. Malveaux (1997) 50 Cal. App. 4th 1425, 1439, 59 Cal. Rptr. 2d 371* (when defendant charged, detained, and sentenced in juvenile court before determination was made that defendant was over 18, because the crimes charged were within the jurisdiction of the superior court, they were within the juvenile court's fundamental jurisdiction, but the court's acts were in excess of jurisdiction); for discussion of excess of jurisdiction generally, *see §§ 324.11[3], 324.42*].

Similarly, the court rather than an individual judge retains jurisdiction of a cause. Court rules may properly provide that post trial proceeding shall be heard by the judge that tried the matter. An individual judge, however, cannot order that such matters be heard by himself or herself [*People v. Osslo (1958) 50 Cal. 2d 75, 104, 323 P.2d 397* ; *People v. Madrigal (1995) 37 Cal. App. 4th 791, 795, 43 Cal. Rptr. 2d 498* ; *Ayala v. Municipal Court (1982) 137 Cal. App. 3d 484, 487, 187 Cal. Rptr. 75]* .

For discussion of the exclusive jurisdiction of different departments within a superior court, see *§ 324.25[2][c]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 324.14 Jurisdiction to Determine Jurisdiction

Although a court may not act in a matter over which it has no jurisdiction, it has jurisdiction to determine its own jurisdiction [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 302-303, 109 P.2d 942* ; *Ziller Electronics Lab GmbH v. Superior Court (1988) 206 Cal. App. 3d 1222, 1228, 254 Cal. Rptr. 410]* . Thus, a court has inherent power to inquire into its jurisdiction of a matter on its own motion, regardless of whether the issue is raised by the litigants. The power of inquiry rests partially on the theory that until the court determines that it has jurisdiction and does some act in consequence, there can be no injury to the party who denies its jurisdiction. The exercise of jurisdiction to determine jurisdiction is a preliminary step, not a final one, and no interference in the tribunal's inquiry is permitted. However, once a court decides that it has jurisdiction, then any subsequent act is always subject to inquiry by a higher court [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 302-303, 109 P. 2d 942* ; *see Bernardi v. City Council (1997) 54 Cal. App. 4th 426, 63 Cal. Rptr. 2d 347]* . That is, once the determination is made, the question is no longer one of jurisdiction to determine jurisdiction, but, rather, one of jurisdiction to act, and, if the court acts, its action is subject to review by a higher court [*Harden v. Superior Court (1955) 44 Cal. 2d 630, 634, 284 P.2d 9* ; *Housing Authority v. Superior Court (1950) 35 Cal. 2d 550, 557, 219 P.2d 457* ; for further discussion relative to personal jurisdiction, *see* Ch. 323, *Jurisdiction: Personal*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 324.15 Primary Jurisdiction Doctrine and Administrative Remedies

Under the primary jurisdiction doctrine, a court has discretion to defer ruling on a claim within its original jurisdiction pending an administrative determination of the claim if the interests of justice so require. In exercising this discretion, the court may consider various factors, including the need for administrative expertise and the promotion of uniformity in the application of regulatory law. If, however, a claim is cognizable in the first instance by an agency alone, the doctrine of exhaustion of administrative remedies applies rather than the primary jurisdiction doctrine. The exhaustion doctrine is not a matter of judicial discretion, but is a fundamental rule of procedure under which relief must be sought from the administrative body and this remedy exhausted before the courts will act [*Economic Empowerment Foundation v. Quackenbush (1997) 57 Cal. App. 4th 677, 683-684, 67 Cal. Rptr. 2d 323* (dismissing action for failure to exhaust remedies); for discussion of the doctrine of exhaustion of administrative remedies and exceptions, *see Ch. 474A, Timing of Judicial Review of Agency Decisions, §§ 474A.11, 474A.12*].

When a claim is originally cognizable in the courts, the primary jurisdiction doctrine comes into play whenever enforcement of the claim requires resolution of issues that, under a regulatory scheme, have been placed within the special competence of an administrative body. The doctrine does not permanently foreclose judicial action, but provides the appropriate administrative agency with an opportunity to act if it chooses to do so [*Wise v. Pacific Gas & Electric Co. (1999) 77 Cal. App. 4th 287, 295-296, 298, 91 Cal. Rptr. 2d 479* (doctrine applied)]. Under the doctrine, a court has discretion to defer ruling on a claim within its original jurisdiction pending an administrative determination of the claim if the interests of justice so require [*Cundiff v. GTE California Inc. (2002) 101 Cal. App. 4th 1395, 1412-1413, 125 Cal. Rptr. 2d 445* ; *Wise v. Pacific Gas & Electric Co. (1999) 77 Cal. App. 4th 287, 295-296, 298, 91 Cal. Rptr. 2d 479* ; *Economic Empowerment Foundation v. Quackenbush (1997) 57 Cal. App. 4th 677, 683-684, 67 Cal. Rptr. 2d 323]* . In exercising this discretion, the court may consider various factors, including the need for administrative expertise and the promotion of uniformity in the application of regulatory law [*Economic Empowerment Foundation v. Quackenbush (1997) 57 Cal. App. 4th 677, 683-684, 67 Cal. Rptr. 2d 323]* .

The doctrine of primary jurisdiction advances two related policies: it enhances court decisionmaking and efficiency by allowing courts to take advantage of administrative expertise, and it helps assure uniform application of regulatory laws

[*Aicco, Inc. v. Insurance Co. of North America (2001) 90 Cal. App. 4th 579, 594, 109 Cal. Rptr. 2d 359* , citing *Farmers Ins. Exchange v. Superior Court (1992) 2 Cal. 4th 377, 390-391, 826 P.2d 730]* . No rigid formula exists for applying the primary jurisdiction doctrine. Instead, resolution generally hinges on a court's determination of the extent to which the policies noted above are implicated in a given case. This discretionary approach leaves courts with considerable flexibility to avoid application of the doctrine in appropriate situations, as required by interests of justice. [*Aicco, Inc. v. Insurance Co. of North America (2001) 90 Cal. App. 4th 579, 594, 109 Cal. Rptr. 2d 359* , citing *Farmers Ins. Exchange v. Superior Court (1992) 2 Cal. 4th 377, 390-391, 826 P.2d 730]* .

The proper procedure in applying the doctrine of primary jurisdiction is not to dismiss the action, but to stay it pending resolution of the issues within the administrative body's expertise [*Southbay Creditors Trust v. General Motors Acceptance Corp. (1999) 69 Cal. App. 4th 1068, 1081, 82 Cal. Rptr. 2d 1* ; *accord* *Wise v. Pacific Gas & Electric Co. (1999) 77 Cal.App. 4th 287, 296, 91 Cal. Rptr. 2d 479]* . Thus, the primary jurisdiction doctrine creates a timing issue, not a jurisdictional issue [*Piscioneri v. City of Ontario (2002) 95 Cal. App. 4th 1037, 1052-1053, 116 Cal. Rptr. 2d 38* , citing *Farmers Ins. Exchange v. Superior Court (1992) 2 Cal. 4th 377, 826 P.2d 730]* .

The primary jurisdiction doctrine obligates a litigant to apply to an outside regulatory agency for relief before pursuing a civil action. It, like the closely related doctrine of exhaustion of external administrative remedies, arises in the context of complex regulatory schemes utilizing expert administrative agencies. Both doctrines are, in the words of the Supreme Court, essentially doctrines of comity between courts and agencies. They are two sides of the timing coin: Each determines whether an action may be brought in a court or whether an agency proceeding, or further agency proceeding, is necessary [*Palmer v. Regents of the University of California (2003) 107 Cal. App. 4th 899, 132 Cal. Rptr. 2d 567]* .

A three-pronged test is used to determine whether a superior court action brought by private parties would impede the execution by the Public Utilities Commission (PUC) of its duties. These factors are: 1) whether the PUC is authorized to make a certain policy; 2) whether it has adopted regulations to effect that policy; and 3) whether maintenance of the superior court action would interfere with that policy [*Anaheim v. Pacific Bell Telephone Co. (2004) 119 Cal. App. 4th 838, 844, 14 Cal. Rptr. 3d 725]* .

A trucking company participating in the California Automobile Assigned Risk Plan (CAARP), a statutorily created program governed by the Insurance Commissioner designed to make automobile liability insurance available to those unable to obtain insurance through ordinary methods, is not required to exhaust the administrative remedies available to those participating in the CAARP before bringing a lawsuit in which the central issues was the determination of the proper premium to be charged, a matter governed by the CAARP's and the Insurance Commissioner's internal regulations. However, the doctrine of primary jurisdiction required the trial court to stay proceedings and refer the premium billing dispute to the Department of Insurance and the Insurance Commissioner [*Neil & Associates v. Jones (2004) 33 Cal. 4th 917, 930, 16 Cal. Rptr. 3d 849, 94 P.3d 1055]* .

The primary jurisdiction doctrine contemplates that a ruling issued by an agency is subject to judicial review. When primary jurisdiction is properly invoked, the doctrine requires that the suit be stayed until the agency resolves the issue, whereupon the lawsuit resumes if the agency's resolution (assuming it survives review by whatever court has jurisdiction to review the agency's decisions) has not resolved the entire controversy [*Wise v. Pacific Gas & Electric Co. (2005) 132 Cal. App. 4th 725, 741, 34 Cal. Rptr. 3d 222]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityJurisdiction & VenueCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDiscretion

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329
Chapter 324 JURISDICTION: SUBJECT MATTER JURISDICTION
PART II. LEGAL BACKGROUND
A. Fundamentals of Jurisdiction

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[Reserved]

§§ 324.16[Reserved]

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Chapter 324 JURISDICTION: SUBJECT MATTER JURISDICTION
PART II. LEGAL BACKGROUND
B. Organization and Jurisdiction of California Courts

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§ 324.20 Organization of California Courts

[1] Governing Law

The powers, or branches, of the government of this state, and the separation of these powers, are established by *Cal. Const., art. III, § 3*. The California court system is established by Cal. Const., art. VI.

Subject matter jurisdiction is conferred by *Cal. Const., art. VI, §§ 10, 11*, and by statute to the extent authorized by the Constitution.

Subject matter jurisdiction of the superior court in limited civil cases is covered in *Code Civ. Proc. §§ 85, 86*, and *86.1*, and that of small claims courts in *Code Civ. Proc. § 116.220*.

Subject matter jurisdiction of the appellate division of superior courts is governed by *Code Civ. Proc. § 77(e)*.

The transfer of an appeal or petition over which the superior court has no jurisdiction but over which a court of appeal or the Supreme Court would have jurisdiction is required by *Code Civ. Proc. § 396(b)*.

[2] Judicial Power of California

[a] Vested in Courts and Administrative Agencies

Cal. Const., art. III, § 3, provides that the powers of state government are legislative, executive, and judicial, and that persons charged with the exercise of one power may not exercise either of the others "except as permitted by this Constitution." *Cal. Const., art. VI, § 1*, provides that the judicial power of this state is vested in the Supreme Court, courts of appeal, and the superior courts.

Because the constitution creates certain statewide administrative agencies in which it vests limited judicial power, and other statewide administrative agencies have been legislatively endowed with judicial powers pursuant to a specific

constitutional authorization, these agencies exercise some of the judicial power of the state [*McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 355, 261 Cal. Rptr. 318, 777 P.2d 91* ; *see also* *Lentz v. McMahon (1989) 49 Cal. 3d 393, 404, 261 Cal. Rptr. 310, 777 P.2d 83* ; *Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 35-36, 112 Cal. Rptr. 805, 520 P.2d 29]* . These agencies include:

- The Department of Alcoholic Beverage Control [*see Cal. Const, art. XX, § 22*, and Ch. 18, *Alcoholic Beverage Licenses*];

- The Public Utilities Commission [*see Cal. Const., art. XII, §§ 4, 5*, and Ch. 480, *Public Utilities*]; and

- The Workers' Compensation Appeals Board [*see Cal. Const., art. XIV, § 4*, and Ch. 577, *Workers' Compensation*].

In addition, the state Senate exercises limited judicial power when it tries public officers or officials impeached by the state Assembly [*see Cal. Const. art. IV, § 18*].

Cal Const., art. III, § 3, and art. VI preclude the exercise of judicial power by nonconstitutional administrative agencies, that is, by those agencies whose authority is derived solely from a grant of power by the state or local government entity [*Lentz v. McMahon (1989) 49 Cal. 3d 393, 404, 261 Cal. Rptr. 310, 777 P.2d 83]* . Cal. Const., art. VI, disposes of all judicial power of the state not disposed of elsewhere in the constitution. Thus, agencies not vested by the constitution with judicial powers may not exercise such powers; although the Legislature has authority to grant a multitude of powers to local bodies pursuant to Cal. Const., art. XI, powers of a judicial nature are not at its disposal [*McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 356, 261 Cal. Rptr. 318, 777 P.2d 91]* . Nevertheless, limited judicial or quasi-judicial power is exercised by a number of legislatively created statewide administrative agencies and by various local public agencies. This has been held not to violate the judicial powers doctrine so long as (1) the exercise of such power is reasonably necessary to effectuate the administrative agency's primary, legitimate regulatory purposes; and (2) the essential judicial power remains ultimately in the courts, through review of agency determinations [*see* *McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 359, 261 Cal. Rptr. 318, 777 P.2d 91* ; *see also Code Civ. Proc. § 1094.5*; *Gov. Code § 11500 et seq.*; *Lentz v. McMahon (1989) 49 Cal. 3d 393, 404, 261 Cal. Rptr. 310, 777 P.2d 83* ; *Bixby v. Pierno (1971) 4 Cal. 3d 130, 137-140, 93 Cal. Rptr. 234, 481 P.2d 242* ; *Temescal Water Co. v. Dept. of Public Works (1955) 44 Cal. 2d 90, 101, 280 P.2d 1]* . For discussion concerning the scope of review by the courts of the decisions of such agencies, see Ch. 474, *Availability of Judicial Review of Agency Decisions* .

[b] Classification of California Courts

There are two classes of California courts:

- Appellate or reviewing courts

- Trial courts

The appellate courts are the Supreme Court of California, the courts of appeal, and the appellate divisions of the superior courts when exercising appellate or review jurisdiction over orders and judgments made in 1) specified limited civil cases on appeal from the superior court, and 2) small claims court.

The trial courts are the superior courts.

Juvenile courts, family law courts, probate courts, etc., are not separate courts but are merely departments of the

superior courts. Small claims courts are divisions of the superior courts [*see Code Civ. Proc. § 116.210*].

[3] Organization of California Courts

[a] Supreme Court

California has one Supreme Court [*Cal. Const., art. VI, § 1*]. It consists of the Chief Justice of California and six associate justices. The concurrence of four judges (justices), present at the argument is necessary for a judgment [*Cal. Const., art. VI, § 2*]. Statutory provisions relating to the Supreme Court are contained in *Gov. Code §§ 68801-68915* and *68926-68932*.

The Supreme Court of California is located in San Francisco, and its contact information is:

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4783
Office of the Clerk: 415-865-7000

[b] Courts of Appeal

Pursuant to constitutional mandate (*Cal. Const., art. VI, § 3*), the Legislature has divided the state into appellate districts, each district containing a court of appeal with one or more divisions. Each division (1) consists of a presiding justice and two or more associate justices, (2) has the power of a court of appeal, and (3) must conduct itself as a three-judge court. Concurrence of two judges present at the argument is necessary for a judgment [*Cal. Const., art. VI, § 3*]. At the present time, there are six appellate districts and, therefore, six courts of appeal [*see Gov. Code § 69100*; *see also Code Civ. Proc. § 38(a)* (statutory reference to judicial district as it relates to court of appeal refers to court of appeal district)]. Statutory provisions relating to the courts of appeal are contained in *Gov. Code §§ 68926-68932* and *69100-69154*. The appellate districts and the counties of which they are composed are listed below, and include the county seat of each county.

First Appellate District [District Office: San Francisco]:

- Alameda (Oakland)
- Contra Costa (Martinez)
- Del Norte (Crescent City)
- Humboldt (Eureka)
- Lake (Lakeport)
- Marin (San Rafael)
- Mendocino (Ukiah)
- Napa (Napa)
- San Francisco (San Francisco)

- San Mateo (Redwood City)
- Solano (Fairfield)
- Sonoma (Santa Rosa)

Second Appellate District [District Offices: Los Angeles, Ventura]:

- Los Angeles (Los Angeles)
- Ventura (Ventura)
- Santa Barbara (Santa Barbara)
- San Luis Obispo (San Luis Obispo)

Third Appellate District [District Office: Sacramento]:

- Alpine (Markleeville)
- Amador (Jackson)
- Butte (Oroville)
- Calaveras (San Andreas)
- Colusa (Colusa)
- El Dorado (Placerville)
- Glenn (Willows)
- Lassen (Susanville)
- Modoc (Alturas)
- Mono (Bridgeport)
- Nevada (Nevada City)
- Placer (Auburn)
- Plumas (Quicy)
- Sacramento (Sacramento)
- San Joaquin (Stockton)
- Shasta (Redding)

- Sierra (Downieville)
- Siskiyou (Yreka)
- Sutter (Yuba City)
- Tehama (Red Bluff)
- Trinity (Weaverville)
- Yolo (Woodland)
- Yuba (Marysville)

Fourth Appellate District [District Offices: San Diego, Riverside, Santa Ana]:

- San Diego (San Diego)
- Imperial (El Centro)
- Orange (Santa Ana)
- San Bernardino (San Bernardino)
- Riverside (Riverside)
- Inyo (Independence)

Fifth Appellate District [District Office: Fresno]:

- Fresno (Fresno)
- Kern (Bakersfield)
- Kings (Hanford)
- Madera (Madera)
- Mariposa (Mariposa)
- Merced (Merced)
- Stanislaus (Modesto)
- Tulare (Tulare)
- Tuolumne (Sonora)

Sixth Appellate District [District Office: San Jose]:

- Santa Clara (San Jose)
- Santa Cruz (Santa Cruz)
- San Benito (Hollister)
- Monterey (Salinas)

[c] Superior Courts

In each county there is a superior court with one or more judges [*Cal. Const., art. VI, § 4*]. There are 57 counties and one city and county in California; hence, there are presently 58 superior courts. Refer to [b], *above*, for a listing of counties per appellate district and their corresponding county seats.

A statutory reference to judicial district as it relates to a superior court or to a county means the county [*Code Civ. Proc. § 38(b), (d)*].

The number of judges and the officers and employees of each superior court are prescribed by the Legislature [*Cal. Const., art. VI, § 4*]. The general statutory provisions relating to superior courts are set forth in *Gov. Code §§ 69504-70148* and *71386*.

The process of each superior court extends throughout the state [*Code Civ. Proc. § 71*].

[d] Small Claims Courts

The small claims courts are divisions of the superior courts exercising limited jurisdiction [*see Code Civ. Proc. §§ 116.210, 116.220*; *see also* Ch. 526, *Small Claims*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionJurisdictional SourcesConstitutional SourcesCivil ProcedureJurisdictionJurisdictional SourcesStatutory SourcesCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsLimited JurisdictionConstitutional LawThe JudiciaryJurisdictionGeneral OverviewConstitutional LawSeparation of PowersGovernmentsCourtsCreation & OrganizationGovernmentsCourtsSmall Claims Courts

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28-324 California Forms of Pleading and Practice--Annotated § 324.21

§ 324.21 Subject Matter Jurisdiction of Supreme Court

[1] Original and Appellate Jurisdiction

[a] Original Jurisdiction

The Supreme Court and their judges have original jurisdiction in habeas corpus proceedings. The Court also has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition [*Cal. Const. art. VI, § 10*]. In exercising its original jurisdiction, the Supreme Court acts as a reviewing court rather than as an appellate court. It is appropriate for the Supreme Court to exercise its original jurisdiction when issues of great public importance are involved and should be promptly resolved [*Raven v. Deukmejian (1990) 52 Cal. 3d 336, 340, 276 Cal. Rptr. 326, 801 P.2d 1077]* .

[b] Appellate Jurisdiction and Transfer Between Courts

The Supreme Court has appellate jurisdiction when judgment of death has been pronounced [*Cal. Const., art. VI, § 11*; *see also Penal Code § 1506*]. Appeals from other superior court judgments and orders are taken to the courts of appeal [*see Cal. Const., art. VI, § 11*]. However, the Supreme Court may, before decision, transfer to itself a cause in a court of appeal and may, before decision, transfer a cause from itself to a court of appeal or from one court of appeal or division to another [*Cal. Const., art. VI, § 12(a)*; *see also Cal. Rules of Ct., Rules 8.516*]. The court to which a cause is transferred has jurisdiction [*Cal. Const. art. VI, § 12(a)*; *see Whittaker v. Superior Court (1968) 68 Cal. 2d 357, 360, 66 Cal. Rptr. 710, 438 P.2d 358]* . Moreover, the Supreme Court may decide one or more issues and transfer the cause to a Court of Appeal for decision of any remaining issues [*Cal. Const., art. VI, § 12*; *Cal. Rules of Ct, Rules 8.500* and *8.528(c)*; *Snukal v. Flightways Manufacturing, Inc. (2000) 23 Cal. 4th 754, 766, 772-776, 98 Cal. Rptr. 2d 1, 3 P.3d 286]* .

For discussion of the power of the Supreme Court, see Ch. 54, *Appeal: California Supreme Court Review* .

[c] Questions of California Law From Federal and Other State Courts

The Supreme Court may decide questions of state law on request of the United States Supreme Court, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth if the decision could determine the outcome of a matter pending in the requesting court, and there is no controlling precedent [*see Cal. Rules of Ct., Rule 8.548*; *Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal. 4th 352, 356-362, 93 Cal. Rptr. 2d 1, 993 P.2d 334* (certification request granted)].

[2] Jurisdiction to Review Decisions or Orders

[a] Of Courts of Appeal

The Supreme Court may review the decision of a court of appeal in any cause [*Cal. Const., art. VI, § 12(b)*; *see also Cal. Rules of Ct., Rules 8.500-8.552*, and Ch. 54, *Appeal: California Supreme Court Review*].

[b] Of Administrative Agencies

The Supreme Court has jurisdiction to review, reverse, correct, or annul any order or decision of the Public Utilities Commission [*Pub. Util. Code §§ 1756(a), (f), (g), 1759*], the Workers' Compensation Appeals Board [*Lab. Code § 5955*], and the Department of Alcoholic Beverage Control [*Bus. & Prof. Code § 23090*].

[3] Jurisdiction in Miscellaneous Proceedings

The Supreme Court has jurisdiction over petitions for review of the determinations of the Commission on Judicial Performance to retire, remove, censure, admonish, or disqualify a judge or former judge [*Cal. Const., art. VI, § 18(d)*]. It is also empowered to admit attorneys to practice in California, to suspend or disbar attorneys, and to review other State Bar proceedings relating to attorneys [*see Bus. & Prof. Code §§ 6060, 6062, 6081-6084, 6100, 6102*; *Cal. Rules. of Ct., Rule 9.13*; for further discussion and forms, *see* Ch. 70, *Attorney Admission* , and Ch. 71, *Attorney Discipline*].

A majority of the Supreme Court must agree to the Governor's grant of a pardon or commutation of a sentence of a person "twice convicted of a felony" [*Cal. Const., art. V, § 8(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityJurisdiction & VenueCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionState Court Review

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28-324 California Forms of Pleading and Practice--Annotated § 324.22

§ 324.22 Subject Matter Jurisdiction of Courts of Appeal

[1] Original and Appellate Jurisdiction

Courts of appeal and their judges have original jurisdiction in habeas corpus proceedings. These courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition [*Cal. Const., art. VI, § 10*]. In exercising their original jurisdiction, the courts of appeal act as reviewing courts rather than as appellate courts.

Except for criminal cases in which a death penalty has been imposed, the courts of appeal have appellate jurisdiction over all cases of which the superior courts have original jurisdiction and in other causes prescribed by statute [*Cal. Const., art. VI, § 11*; *see also Penal Code § 1506*]. Superior court judgments and orders appealable to the courts of appeal are listed in *Code Civ. Proc. § 904.1* (civil actions), *Prob. Code § 1300-1304* (proceedings governed by the Probate Code), and *Penal Code §§ 1237-1238* (criminal cases). Appellate jurisdiction vested in the courts of appeal by *Cal. Const., art. VI, § 11* encompasses review by extraordinary writ as well as review by direct appeal [*Leone v. Medical Board (2000) 22 Cal. 4th 660, 665, 668-670, 94 Cal. Rptr. 2d 61, 995 P.2d 191* (*Bus. & Prof. Code § 2337*, providing for review by writ rather than direct appeal of superior court administrative mandate judgments in physician licensing matters, does not violate *Cal. Const., art. VI, § 11*)].

Appeals are deemed taken to the court of appeal of the district in which the superior court sits [*see Cal. Rules of Ct., Rule 8.100(a)(2)*].

Other causes prescribed by statute include certification to a court of appeal of cases on appeal to the superior court [*see Code Civ. Proc. § 911*; *Penal Code § 1471*; *Cal. Rules of Ct., Rules 8.264(b), 8.1000-8.1018*]. When a court of appeal, in its discretion, has transferred to itself a case from the appellate department of the superior court to secure uniformity of decision or to settle important questions of law, under *Code Civ. Proc. § 911* and *Cal. Rules of Ct., Rules 8.1002, 8.1005, 8.1016* the court of appeal is not authorized to decide selected issues that are not dispositive of the appeal. Rather, the court must decide the issues necessary to resolution of the appeal and thereafter transmit the remittitur to the

superior court. *Code Civ. Proc. § 911*, however, does not appear to preclude the Judicial Council from revising the current rules of court to implement such a limited review and remand procedure [*Snukal v. Flightways Manufacturing, Inc. (2000) 23 Cal. 4th 754, 758, 761-762, 766, 773-776, 787, 98 Cal. Rptr. 2d 1, 3 P.3d 286]* . For discussion of powers of the courts of appeal, see Ch. 40, *Appeal: An Overview* , through Ch. 52, *Appeal: Rehearing* .

Once appellate jurisdiction has been conferred by the Constitution, it cannot be destroyed or abridged by legislative action. Any attempt to do so is void. Thus, the phrase in *Gov. Code § 6026* specifying that appeals of judgments deciding the issue of general-circulation newspaper petitions can be heard by the Supreme Court instead of or in addition to the Court of Appeal is void because it abridges the appellate jurisdiction constitutionally reserved for the Court of Appeal [In *Re Perris City News (2002) 96 Cal. App. 4th 1194, 1197-1198, 118 Cal. Rptr. 2d 38]* .

For discussion of the Supreme Court's power to transfer causes, before decision, either from itself to a court of appeal or from a court of appeal to itself, see § 323.24[1][b].

[2] Jurisdiction to Review Administrative Orders

The courts of appeal have jurisdiction to review, reverse, correct, or annul any order or decision of the Workers' Compensation Appeals Board [*Lab. Code § 5955*] and the Department of Alcoholic Beverage Control [*Bus. & Prof. Code § 23090*] and of most orders and decisions of the Public Utilities Commission [*Pub. Util. Code §§ 1756(a), (f), (g), 1759*]. For discussion of the primary jurisdiction doctrine as is relates to administrative remedies, see *§ 324.15*. For discussion of the doctrine of exhaustion of administrative remedies and exceptions, *see Ch. 474A, Timing of Judicial Review of Agency Decisions, §§ 474A.11, 474A.12*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityJurisdiction & VenueCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionState Court Review

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§ 324.23 Subject Matter Jurisdiction of Superior Courts

[1] Original Jurisdiction

Superior Courts and their judges have original jurisdiction in habeas corpus proceedings and original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition [*Cal. Const., art. VI, § 10*].

Superior courts also have original jurisdiction in all causes except those given by statute to other trial courts [*Cal. Const., art. VI, § 10*; *see Walker v. Superior Court (1991) 53 Cal. 3d 257, 264, 279 Cal. Rptr. 576, 807 P.2d 418* ; *Whittaker v. Superior Court (1968) 68 Cal. 2d 357, 362, 66 Cal. Rptr. 710, 438 P.2d 358* ; *Davis v. Superior Court (1972) 25 Cal. App. 3d 596, 599, 102 Cal. Rptr. 238]* . In other words, the superior courts are courts of general jurisdiction, but this jurisdiction is *residual* in that all original jurisdiction not delegated to other trial courts resides in the superior courts [*see* Arnold, California Courts and Judges Handbook, Part One, § 2.64 (Law Book Service Co., 6th ed. 1993)].

As of February 2001, all counties have elected to unify their trial courts and there are no municipal courts in the state. The superior court has jurisdiction over all causes which had been in the jurisdiction of the municipal court, that is, limited civil cases [*see Cal. Const., art. VI, § 5(e)*; for discussion of unlimited and limited civil cases, *see § 324.60* et seq.].

The appellate division of the superior court has original jurisdiction of proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court in limited civil cases [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 77(e), 85.1, 1068(b), 1085(b), 1103(b)*].

Parties cannot confer subject matter jurisdiction upon the court by consent, waiver, or estoppel [*Housing Group v. United Nat'l Ins. Co. (2001) 90 Cal. App. 4th 1106, 1113, 109 Cal. Rptr. 2d 497]* .

[2] Appellate Jurisdiction

Except for the cases placed in the appellate jurisdiction of the Supreme Court and courts of appeal by *Cal. Const. art. VI, § 11(a)*, the appellate divisions of superior courts have appellate jurisdiction in causes prescribed by statute [*Cal. Const. art. VI, § 11(b)*]. Thus, the superior court's appellate jurisdiction is purely statutory [*see Smith v. City of Los Angeles Dept. of Transportation (1997) 59 Cal. App. 4th Supp. 7, 9 , 73 Cal. Rptr. 2d 838]* .

By statute, the appellate divisions of superior courts have jurisdiction over appeals in limited civil cases [*see Code Civ. Proc. §§ 77(e), 904.2*]. These appeals may be from the superior court itself [*see Code Civ. Proc. §§ 77(e), 85.1*].

Appealable judgments and orders in limited civil cases are listed in *Code Civ. Proc. § 904.2* and *Penal Code § 1466*].

Superior courts also have appellate jurisdiction over appeals filed by defendants from small claims court judgments [*Code Civ. Proc. § 116.710*].

The powers of the superior courts on appeal are governed by *Code Civ. Proc. §§ 906-909* and *Penal Code § 1469*. *Cal. Const., art. VI, § 13*, and *Code Civ. Proc. § 475* limit the power of the superior courts to set aside a judgment or grant a new trial.

[3] Jurisdictional Classification of Civil Cases

Within the superior court, civil cases are to be classified as unlimited or limited civil cases depending on the amount of damages plead and the nature of relief sought [*see Code Civ. Proc. § 85 et seq.*]. For analysis of classifying and reclassifying cases, see *§ 324.60* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral JurisdictionCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCriminal Law & ProcedureHabeas CorpusProcedureFiling of PetitionJurisdiction

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§ 324.24 Jurisdiction Over Native Americans and Indian Nations

[1] Jurisdiction Over Individuals Not Tribe

Congress has given California courts jurisdiction over civil causes of action arising in Native American tribal territory and between individual Native Americans or to which Native Americans are parties to the same extent that those courts have jurisdiction over other civil causes of action [*28 U.S.C. § 1360*; *Hydrothermal Energy Corp. v. Fort Bidwell IndianCommunity Council (1985) 170 Cal. App. 3d 489, 494, 494 n.4, 216 Cal. Rptr. 59]* .

28 U.S.C. § 1360, however, confers jurisdiction only over individual Indians, not over Indian tribes themselves [*Great Western Casinos, Inc. v. Morongo Band of Mission Indians (1999) 74 Cal. App. 4th 1407, 1427, 88 Cal. Rptr. 2d 828* ; *Trudgeon v. Fantasy Springs Casino (1999) 71 Cal. App. 4th 632, 643, 84 Cal. Rptr. 2d 65]* . *28 U.S.C. § 1360* does not confer on California jurisdiction over disputes between tribal members and tribes [*Ackerman v. Edwards (2004) 121 Cal. App. 4th 946, 954, 17 Cal. Rptr. 3d 517]* .

For discussion of additional limitations on the jurisdiction conferred by Section 1360, see [4], *below*.

[1A] Jurisdiction and the Indian Child Welfare Act (ICWA)

Congress enacted the Indian Child Welfare Act (ICWA) to recognize the special relationship between the United States and the Indian tribes and their members by protecting the continued existence and integrity of Indian tribes and their children [*25 U.S.C. § 1901 et seq.*]. Federal law [*25 U.S.C. 1911(a)*] establishes exclusive jurisdiction in the tribal courts for proceedings concerning an Indian child who resides or is domiciled within the reservation of such tribe, as well as for wards of tribal courts regardless of domicile. In any State court proceeding for foster care placement or termination of parental rights, *25 U.S.C. § 1911(b)* creates a presumption that cases involving Indian children not domiciled on the reservation must be transferred to the tribal court upon the petition of either parent or the tribe, except in cases of objection by either parent, good cause to deny the transfer, or declination of jurisdiction by the tribal court. Further, in any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe must have a right to intervene at any point in the

proceeding. [*25 U.S.C. § 1911(c)*].

The United States Supreme Court has held that an Indian tribe has exclusive jurisdiction over an adoption matter involving a child born outside of a tribe's reservation, provided that the natural mother was domiciled on the reservation [*see Mississippi Band of Choctaw Indians v. Holyfield (1989) 490 U.S. 30, 48-49, 109 S. Ct. 1597, 104 L. Ed. 29*]. In *Mississippi Band of Choctaw Indians v. Holyfield (1989) 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 29* , the fact that the parents left the reservation prior to the birth of their twins did not change the children's domicile. The Court found that the appellant Indian tribe had exclusive jurisdiction over the adoption of the children [*Mississippi Band of Choctaw Indians v. Holyfield (1989) 490 U.S. 30, 48-49, 109 S. Ct. 1597, 104 L. Ed. 29*].

The Indian tribe status of the child need not be certain. Notice is required whenever the court knows or has reason to believe the child is an Indian child [ICWA, *25 U.S.C. § 1912*; *see In re Junious M. (1983) 144 Cal. App. 3d 786, 193 Cal. Rptr. 40* ; *In re Kahlen W. (1991) 233 Cal. App. 3d 1414, 285 Cal. Rptr. 507*]. Even in child custody cases where a minor child might be an "Indian child," the court is required to notify the tribe in question and seek its determination of the Indian child's status, and thus, whether the ICWA applies for jurisdiction [*In re Junious M. (1983) 144 Cal. App. 3d 786, 788, 193 Cal. Rptr. 40*]. Certified mail notification of custody proceedings was required to petitioner mother's Indian tribe; telephone contact was insufficient to provide the requisite notice under the Section 1912 of the ICWA [*In re Kahlen W. (1991) 233 Cal. App. 3d 1414, 1423, 285 Cal. Rptr. 507*].

In its decisions, the courts have adhered strictly to the provisions of the ICWA, and more specifically *25 U.S.C. § 1911* [*see In re M.A. (2006) 137 Cal. App. 4th 567, 40 Cal. Rptr. 3d 439* ; *Mississippi Band of Choctaw Indians v. Holyfield (1989) 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 29* ; *In re Baby Girl A. (1991) 230 Cal. App. 3d 1611, 282 Cal. Rptr. 105* ; *In re Kahlen W. (1991) 233 Cal. App. 3d 1414, 285 Cal. Rptr. 507*].

In a juvenile dependency proceeding, a trial court granted a tribe's petition, transferring the matter from the juvenile court to the tribal court pursuant to the ICWA, notwithstanding that the Secretary of the United States Department of the Interior (Secretary) had not approved its tribal court [*In re M.A. (2006) 137 Cal. App. 4th 567, 569-571, 40 Cal. Rptr. 3d 439*]. The tribal court did not decline jurisdiction; rather, the tribe had petitioned for transfer. No statutory good cause to reject the transfer was shown. In addition, neither parent objected to the transfer. Under the circumstances, *25 U.S.C. § 1911(b)* and Cal. Rules of Court, Rule 1439(c)(2) [*now see Cal. Rules of Court, Rule 5.664*], required the juvenile court to transfer the case to the tribal court [*In re M.A. (2006) 137 Cal. App. 4th 567, 573, 40 Cal. Rptr. 3d 439*]. The tribe's failure to obtain the Secretary's approval did not mean that it lacked jurisdiction to adjudicate the proceeding or to accept transfer of the case; thus, the Third District found that the juvenile court properly granted the transfer petition [*In re M.A. (2006) 137 Cal. App. 4th 567, 577-578, 40 Cal. Rptr. 3d 439*].

Further, in child custody proceedings for children who are found to be protected under the ICWA, the child's tribe has an absolute right to intervene at any point in the proceedings, regardless of whether or not the child resides on a reservation [*25 U.S.C. § 1911(c)*; *Welf. & Inst. Code § 224.4*; *In re Riva M. (1991) 235 Cal. App. 3d 403, 410, 286 Cal. Rptr. 592*]. In the adoption case of *In re Baby Girl A. (1991) 230 Cal. App. 3d 1611, 282 Cal. Rptr. 105* , the appellate court allowed the tribe to intervene, despite the facts that the mother was a former member of the tribe but had been raised by non-Indians since age 3, the father was a non-Indian man, and both the mother and father wanted to place the child with a non-Indian couple and opposed the tribe's intervention [*In re Baby Girl A. (1991) 230 Cal. App. 3d 1611, 1614, 1620-1621, 282 Cal. Rptr. 105*]. Congress made it very clear that the ICWA is intended to protect the rights of Indian tribes, as well as those of Indian children and families [*In re Baby Girl A. (1991) 230 Cal. App. 3d 1611, 1618, 282 Cal. Rptr. 105* , *citing 25 U.S.C. §§ 1901(3), 1902*].While the ICWA did not expressly permit the appellant tribe to intervene, the interests of protecting the tribe under the Act were sufficiently important to support allowing it to join the proceeding [*In re Baby Girl A. (1991) 230 Cal. App. 3d 1611, 1619, 282 Cal. Rptr. 105*].

Despite the court's strict application of the ICWA, the court did acknowledge in dicta the tribe's interest in actions involving Indian children living off the reservation is not as great [*In re Baby Girl A. (1991) 230 Cal. App. 3d 1611,*

1621, 282 Cal. Rptr. 105]. The court also stated in dicta that the tribe must be permitted to intervene despite the facts that both parents made it clear that they did not want the child placed with an Indian family, the child is only part-Indian, the child had never lived in a tribal environment, and that if the natural parents chose not to place the child for adoption, she would not have been raised in an Indian culture [*In re Baby Girl A. (1991) 230 Cal. App. 3d 1611, 1620, 282 Cal. Rptr. 105*].

For further discussion of the ICWA, *see* Hollinger, Adoption Law and Practice, Ch. 15 (Matthew Bender); Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2d ed., Ch. 176 (Matthew Bender); and §§ 12A.18, 12B.270 and 328.32A.

[2] Immunity of Native American Tribes and Officials

Native American tribes are immune to suit unless there has been an effective waiver or consent [*People ex rel. Dept. of Transportation v. Naegele Outdoor Advertising Co. (1985) 38 Cal. 3d 509, 519, 213 Cal. Rptr. 247, 698 P.2d 150* ; *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council (1985) 170 Cal. App. 3d 489, 494, 216 Cal. Rptr. 59* ; *see Trudgeon v. Fantasy Springs Casino (1999) 71 Cal. App. 4th 632, 636, 84 Cal. Rptr. 2d 65]* . Because tribal immunity emanates from federal law, the immunity is not subject to diminution by the states [*Trudgeon v. Fantasy Springs Casino (1999) 71 Cal. App. 4th 632, 636, 84 Cal. Rptr. 2d 65]* .

Sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation; rather, it presents a pure jurisdictional question. In determining whether sovereign immunity extends to a tort case against a separate business entity organized by an Indian tribe, as opposed to immunity from a tort claim against the tribe itself, the court applies a three-part test setting forth the relevant criteria to address the immunity issue, including these considerations: (1) whether the business entity is organized for a purpose that is governmental in nature, rather than commercial; (2) whether the tribe and the business entity are closely linked in governing structure and other characteristics; and (3) whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity [*Warburton/Buttner v. Superior Court (2002) 103 Cal. App. 4th 1170, 1182-1183, 127 Cal. Rptr. 2d 706* , *citing Trudgeon v. Fantasy Springs Casino (1999) 71 Cal. App. 4th 632, 84 Cal. Rptr. 2d 65]* .

Tribal immunity extends to individual tribal officials acting in their representative capacity and within the scope of their authority. This immunity applies to officials sued in their individual capacities [*Lamere v. Superior Court (2005) 131 Cal. App. 4th 1059, 1065, 31 Cal. Rptr. 3d 880* (where an enrollment committee is engaged in deciding issues of Band membership, the members are serving an essential tribal function)]. On the other hand, an agent of an immune sovereign may be held liable for an act that exceeds his or her authority. When, however, the plaintiff alleges no viable claim that tribal officials acted outside their authority, immunity applies [*see Trudgeon v. Fantasy Springs Casino (1999) 71 Cal. App. 4th 632, 643-644, 84 Cal. Rptr. 2d 65* ; *accord Great Western Casinos, Inc. v. Morongo Band of Mission Indians (1999) 74 Cal. App. 4th 1407, 1421-1424, 88 Cal. Rptr. 2d 828* (immunity also covered counsel in providing legal representation, even if allegedly conspiring with tribe to wrongfully terminate contract)]. To qualify as "tribal officials" for immunity purposes, defendants must show that they performed discretionary or policymaking functions within or on behalf of the tribe, so that exposing them to liability would undermine the immunity of the tribe itself. In addition to establishing that defendants qualify as tribal officials for immunity purposes, defendants must also satisfy the second requirement for tribal official immunity, *i.e.*, that the official must have acted within the scope of his or her authority [*Turner v. Martire (2000) 82 Cal. App. 4th 1042, 1044, 1046, 1054, 99 Cal. Rptr. 2d 587* (defendants, as law enforcement officers of Indian tribe, held not protected by tribe's sovereign immunity against liability for allegedly assaulting and improperly detaining plaintiffs)]. Sovereign immunity does not generally apply to acts of individual tribal members [*Great Western Casinos, Inc. v. Morongo Band of Mission Indians (1999) 74 Cal. App. 4th 1407, 1422, 88 Cal. Rptr. 2d 828* ; *see Turner v. Martire (2000) 82 Cal. App. 4th 1042, 1046, 1054-1055, 99 Cal. Rptr. 2d 587]* .

Depending on appropriate factors, tribal immunity may extend to a tribal entity such as a tribal corporation [*see Trudgeon v. Fantasy Springs Casino (1999) 71 Cal. App. 4th 632, 638-643, 84 Cal. Rptr. 2d 65* (in action for personal injuries, immunity extended to corporation formed to operate casino; applying three-factor analysis); *cf. Great Western Casinos, Inc. v. Morongo Band of Mission Indians (1999) 74 Cal. App. 4th 1407, 1427, 88 Cal. Rptr. 2d 828* (*28 U.S.C. § 1360* does not confer jurisdiction over tribal entities); *Redding Rancheria v. Superior Court (2001) 88 Cal. App. 4th 384, 105 Cal. Rptr. 2d 773* , *petition for cert.* Dec. 3, 2001 (court did not have jurisdiction over Indian tribal casino in tort action for injuries received off-reservation)].

In a case with limited applicability, the California Supreme Court has held that a tribe lacks immunity from suit for its alleged failure to follow the Political Reform Act's mandated reporting requirements. The Court reasoned that allowing tribal members to participate in the state electoral process while leaving the state powerless to effectively guard against political corruption would have put the state in an untenable and indefensible position, in light of the constitutionally significant importance of the state's ability to provide a transparent election process with rules applying equally to all parties in the electoral fray. In so holding, the Court recognized that its abrogation of the sovereign immunity doctrine is narrow and carefully circumscribed to apply only in cases where California, through its Fair Political Practices Commission, sues an Indian tribe for violations of state fair political practice laws [*Agua Caliente Band of Cahuilla Indians v. Superior Court (2006) 40 Cal. 4th 239, 261, 52 Cal. Rptr. 3d 659]* .

Similarly, *San Manuel Indian Bingo and Casino v. N.L.R.B. (D.C. Cir. 2007) 475 F.3d 1306, 1311-1315, 374 U.S. App. D.C. 435* considered whether an Indian tribe was subject to the provisions of the National Labor Relations Act [*29 U.S.C. § 151 et seq.*] relating to union organizing efforts at a casino it operated on its reservation. The U.S. Court of Appeals for the District of Columbia Circuit held that principles of tribal sovereign immunity did not preclude the enforcement of the Act's provisions relating to employment activities at the casino. In doing so, the circuit court recognized Congress's plenary authority to limit, modify, or eliminate the powers of local self-government that the tribes otherwise possess.

[3] Waiver of Immunity

Either Congress or the tribe can waive the tribe's immunity [*Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council (1985) 170 Cal. App. 3d 489, 494-495, 216 Cal. Rptr. 59* ; *see Trudgeon v. Fantasy Springs Casino (1999) 71 Cal. App. 4th 632, 636, 84 Cal. Rptr. 2d 65* (tribe subject to suit only when Congress authorized suit or tribe waived its immunity)].

Congressional authorization and tribal consent are separate and independent bases for jurisdiction. If a tribe elects to waive sovereign immunity and submit itself to state court jurisdiction, nothing in the language of *28 U.S.C. § 1360* stands as a bar to assumption of that jurisdiction [*Friends of East Willits Valley v. County of Mendocino (2002) 101 Cal. App. 4th 191, 203, 123 Cal. Rptr. 2d 708]* .

A tribe official cannot waive the tribe's immunity, unless the tribal council has expressly delegated that duty to the official [*Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council (1985) 170 Cal. App. 3d 489, 496, 216 Cal. Rptr. 59]* . Thus, for tribal immunity to be waived by a contract provision, the tribal officer signing the contract will need the authority of the tribal council [*Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council (1985) 170 Cal. App. 3d 489, 496, 216 Cal. Rptr. 59]* . Some contracts also require the approval of the Secretary of the Interior or the Secretary's designee [*25 U.S.C. § 81*; *see Mission Indians v. American Management & Amusement (9th Cir. 1987) 840 F.2d 1394, 1403-1404* (contracts "relative to [Indian] lands," including bingo management agreements with non-Indian contractors, require Secretary's signature)].

Agreeing to an arbitration clause, and to enforcement of an arbitration award in any court having jurisdiction thereof, constitutes an explicit waiver by a tribe of its sovereign immunity [*Smith v. Hoplandband of Pomo Indians (2002) 95 Cal. App. 4th 1, 115 Cal. Rptr. 2d 455* (relying on *C & L Enterprises v. Potawatomi Indian Tribe (2001) 532 U.S.*

411, 121 S. Ct. 1589, 149 L. Ed. 2d 623 , in which the U.S. Supreme Court resolved the split of authority that had emerged in the state and federal courts on the question whether, by agreeing to an arbitration clause, and to enforcement of an arbitral award, in any court having jurisdiction thereof, a tribe has waived its sovereign immunity)]. However, a Tribe's consent to arbitrate and to judicial enforcement of an award cannot be interpreted as its consent to be sued for all causes of action arising from a contract containing an arbitration clause [*Big Valley Band of Pomo Indians v. Superior Court (2005) 133 Cal. App. 4th 1185, 1195, 35 Cal. Rptr. 3d 357]* .

A waiver of tribal immunity cannot be implied but must be unequivocally expressed [*Trudgeon v. Fantasy Springs Casino (1999) 71 Cal. App. 4th 632, 643-644, 84 Cal. Rptr. 2d 65* ; *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council (1985) 170 Cal. App. 3d 489, 496, 216 Cal. Rptr. 59* (appearance by tribe; attorney and declaration by attorney that tribe was not waiving any aspect of its immunity by that appearance but was there to protest the proceedings constituted at best an implied waiver that was legally insufficient); *see Campo Band of Mission Indians v. Superior Court (2006) 137 Cal. App. 4th 175, 185, 39 Cal. Rptr. 3d 875* (tribe's compact with the state included a waiver of the tribe's tribal sovereign immunity relating to patron claims for negligence resulting in personal injury up to specific limits; court had limited subject matter jurisdiction over the patron's claim against the tribe); *Great Western Casinos, Inc. v. Morongo Band of Mission Indians (1999) 74 Cal. App. 4th 1407, 1419, 88 Cal. Rptr. 2d 828]* .

By entering into a gaming compact with the State of California, defendant Indian Tribe waived its sovereign immunity to certain negligence claims against it, but such waiver did not constitute a consent to suit in state court on negligence claims against it; instead, the tribal court was the exclusive forum for the resolution of such claims. The tribe did not waive its sovereign tribal immunity or otherwise consent to a suit against it in state court on the plaintiffs' claims. Although plaintiffs contended that the process established by the tribe for handling claims against the tribe did not provide for the fair resolution of such claims, none of the causes of action set forth in their complaint challenged the propriety of the Tribe's claims-handling procedures, nor did they contain any allegations relating thereto. While the Tribe agreed to waive its tribal sovereign immunity to certain claims against it, it was permitted to choose the forum for the resolution of those claims and the terms governing the process for such resolution. That the plaintiffs found the Tribe's choices unacceptable did not render the Tribe subject to suit in state court [*Lawrence v. Barona Valley Ranch Resort and Casino (2007) 153 Cal. App. 4th 1364, 1370-71, 64 Cal. Rptr. 3d 23]* .

[4] Limitations on Scope of Jurisdiction

Although *28 U.S.C. § 1360(a)* gives certain states, including California, jurisdiction over civil disputes that involve Native Americans and arise in Native American country, *28 U.S.C. § 1360(b)* provides that nothing in Section 1360 does any of the following [*28 U.S.C. § 1360(c)*; *see Inland Casino Corp. v. Superior Court (1992) 8 Cal. App. 4th 770, 777, 10 Cal. Rptr. 2d 497* (lack of jurisdiction over property installed on Indian realty)]:

- Authorizes the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Native American or to any Native American tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

- Authorizes the regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute, or any other regulation made pursuant to it.

- Confers jurisdiction on the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of that property or any interest in it.

[5] Applicability of Tribal Ordinance or Custom

Any tribal ordinance or custom adopted by a Native American tribe, band, or community in the exercise of any

authority that it may possess, if not inconsistent with any applicable civil law of the state, is to be given full force and effect in the determination of civil causes of action pursuant to *28 U.S.C. § 1360* [*28 U.S.C. § 1360(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewGovernmentsNative AmericansAuthority & JurisdictionGovernmentsNative AmericansEleventh Amendment Defense in Land Claims

California Forms of Pleading and Practice--Annotated

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§ 324.25 Concurrent Jurisdiction

[1] Between State and Federal Courts

Some federal statutes creating a right of action expressly give the state courts concurrent jurisdiction with the federal courts to enforce the right. Examples are *8 U.S.C. § 1421* (naturalization proceedings), *28 U.S.C. § 1352* (action on a bond executed under any law of the United States, except matters within the jurisdiction of the Court of International Trade), and *45 U.S.C. § 56* (claims under the Federal Employers' Liability Act, discussed in *Ch. 485, Railroads, § 485.30* et seq.).

Moreover, the general rule is that state courts may assume subject matter jurisdiction over a federal cause of action, absent a provision by Congress to the contrary or a disabling incompatibility between the federal claim and state court adjudication [*Tafflin v. Levitt (1990) 493 U.S. 455, 459, 110 S. Ct. 792, 107 L. Ed. 2d 887* ; *Gulf Offshore Co. v. Mobil Oil Corp. (1981) 453 U.S. 473, 477-478, 101 S. Ct. 2870, 69 L. Ed. 2d 784* (federal courts do not have exclusive jurisdiction over personal injury and indemnity cases under the federal Outer Continental Shelf Lands Act (*43 U.S.C. § 1331 et seq.*)); *see also* *S. P. Growers Asso. v. Rodriguez (1976) 17 Cal. 3d 719, 726, 131 Cal. Rptr. 761, 552 P.2d 721* ; *Miller v. Municipal Court (1943) 22 Cal. 2d 818, 836, 142 P.2d 297* ; *Garofalo v. Princess Cruises, Inc. (2000) 85 Cal. App. 4th 1060, 1080, 102 Cal. Rptr. 2d 754]* . This general rule is premised on the concurrent sovereignty exercised by the states and the national government [*Gulf Offshore Co. v. Mobil Oil Corp. (1981) 453 U.S. 473, 478, 101 S. Ct. 2870, 69 L. Ed. 2d 784]* .

The U.S. Supreme Court has pointed out that, in considering the propriety of state court jurisdiction over any particular federal claim, it begins with the presumption that state courts enjoy concurrent jurisdiction, but that Congress may confine jurisdiction to the federal courts either explicitly or implicitly. Hence, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state court jurisdiction and federal interests [*Gulf Offshore Co. v. Mobil Oil Corp. (1981) 453 U.S. 473, 478, 101 S. Ct. 2870, 69 L. Ed. 2d 784* ; *see also* *Kingston Constructors, Inc. v. Washington Metropolitan Area Transit Authority (1997) 14 Cal. 4th 939, 948, 59 Cal. Rptr. 2d 866, 928 P.2d 581* (presumption of

concurrent jurisdiction between federal courts and state courts arises when jurisdictional provision is silent as to jurisdiction of state courts, which, however, was not the case before the court); *Bunnell v. Department of Corrections (1998) 64 Cal. App. 4th 1360, 1367, 76 Cal. Rptr. 2d 58* (to give federal courts exclusive jurisdiction over federal cause of action, Congress must, in exercise of its powers under the Supremacy Clause, affirmatively divest state courts of their presumptively concurrent jurisdiction); *Aalgaard v. Merchants Nat. Bank, Inc. (1990) 224 Cal. App. 3d 674, 686, 274 Cal. Rptr. 81 , cert. denied, 502 U.S. 901 (1991)* (preemption applied)]. Justice Scalia, in a concurring opinion joined by Justice Kennedy in *Tafflin v. Levitt (1990) 493 U.S. 455, 110 S. Ct. 792, 107 L. Ed. 2d 887* , questioned that part of the language in *Gulf Offshore Co.* which suggested that exclusive jurisdiction in the federal courts could be found by unmistakable implication from legislative history, noting that if it were ever proper to find exclusive federal jurisdiction by implication, it would have to be from the language of the statute, not merely from legislative history. The concurring opinion also questioned whether exclusive federal jurisdiction could be found by implication at all, noting the paucity of cases that have actually done so [*Tafflin v. Levitt (1990) 493 U.S. 455, 471-473, 110 S. Ct. 792, 107 L. Ed. 2d 887]* .

Thus, for example, California courts lack jurisdiction over the subject matter of a cause of action when jurisdiction is vested by federal law exclusively in a federal court or agency [*see, e.g.,* *Kingston Constructors, Inc. v. Washington Metropolitan Area Transit Authority (1997) 14 Cal. 4th 939, 943-947, 59 Cal. Rptr. 2d 866, 928 P.2d 581* (involving action against transit authority established by a compact initiated and consummated by Congress for federal purposes entered into between District of Columbia, Maryland, and Virginia when compact provided that original jurisdiction vested with the United States District Courts concurrent with the courts of Maryland and Virginia concerning actions brought by or against transit authority); *Cairl v. Boeing Co. (1974) 39 Cal. App. 3d 137, 139-140, 113 Cal. Rptr. 925* (involving action under Federal Death on the High Seas Act (*46 U.S.C. § 761 et seq.*)); *Gordon v. Reynolds (1960) 187 Cal. App. 2d 472, 477-478, 10 Cal. Rptr. 73* (same)].

Notwithstanding the rule of concurrent jurisdiction, a defendant may in certain cases of concurrent jurisdiction between state and federal courts have an action removed from the state to the federal courts under *28 U.S.C. §§ 1441-1452*. For further discussion and forms relating to removal, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

Federal supremacy principles prohibit state courts of general jurisdiction from refusing to entertain suits under the Federal Employers' Liability Act (FELA) [*45 U.S.C.S. § 51 et seq.*], which is incorporated by reference into the Jones Act [*46 U.S.C.S. App. § 688 et seq.*], solely because suit is brought under federal law or because enforcement of the federal right of action is deemed contrary to state policy or apt to cause inconvenience and confusion because of differing state and federal standards. Thus, states must entertain suits timely filed under the Jones Act despite state limitation statutes that might otherwise bar suit [*Donaldson v. National Marine (2005) 35 Cal. 4th 503, 510, 25 Cal. Rptr. 3d 584, 107 P.3d 254]* .

[2] Between Courts of Same State

[a] Same Parties on Same Cause

When two state courts have concurrent jurisdiction over the same parties and subject matter, the tribunal that first acquires jurisdiction of the parties is entitled to retain it exclusively, and the other court must ordinarily abate its proceedings on demand [*Mission Imports, Inc. v. Superior Court (1982) 31 Cal. 3d 921, 926 n.3, 184 Cal. Rptr. 296, 647 P.2d 1075* ; *In re Hanley (1988) 199 Cal. App. 3d 1109, 1115, 245 Cal. Rptr. 441* (overruled on other grounds in *Leadford v. Leadford (1992) 6 Cal. App. 4th 571, 575 n.5, 8 Cal. Rptr. 2d 9* ; *see* *County of San Diego v. State of California (1997) 15 Cal. 4th 68, 87-88, 61 Cal. Rptr. 2d 134, 931 P.2d 312*)]. In applying this rule, it is the tribunal where process is served first that has priority, regardless of which action was filed first [*In re Hanley (1988) 199 Cal. App. 3d 1109, 1116, 245 Cal. Rptr. 441* (overruled on other grounds in *Leadford v. Leadford (1992) 6 Cal. App. 4th 571, 575 n.5, 8 Cal. Rptr. 2d 9* ; *Mungia v. Superior Court (1964) 225 Cal. App. 2d 280, 283, 37 Cal. Rptr. 285*)].

If there is another action pending between the same parties on the same cause of action, a plea in abatement pursuant to

Code Civ. Proc. § 430.10(c) may be made by demurrer or answer [*Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 787, 274 Cal. Rptr. 147* ; *see also People ex rel. Garamendi v. American Autoplan, Inc. (1993) 20 Cal. App. 4th 760, 770-771, 25 Cal. Rptr. 2d 192]* . In determining whether the causes of action are the same for purposes of pleas in abatement, the rule is that such a plea may be maintained only when a judgment in the first action would be a complete bar to the second action [*Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 787-788, 274 Cal. Rptr. 147* ; *see also People ex rel. Garamendi v. American Autoplan, Inc. (1993) 20 Cal. App. 4th 760, 770-771, 25 Cal. Rptr. 2d 192]* . If a demurrer is sustained on the ground of another action pending, the proper order is not a dismissal, but abatement of further proceedings pending termination of the first action [*Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 788, 274 Cal. Rptr. 147* ; *see also People ex rel. Garamendi v. American Autoplan, Inc. (1993) 20 Cal. App. 4th 760, 770-771, 25 Cal. Rptr. 2d 192* ; *see Ch. 3, Abatement of Actions, § 3.50*, for further discussion and forms; *see also* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , for a form of demurrer on the ground of another action pending)].

[b] Rule of Exclusive Concurrent Jurisdiction

[i] Defined

Although similar in effect to the statutory plea in abatement [for discussion *see* [a], *above*] the rule of exclusive concurrent jurisdiction may apply when the narrow grounds required for a statutory plea of abatement do not exist [*Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 788, 274 Cal. Rptr. 147* ; *see also People ex rel. Garamendi v. American Autoplan, Inc. (1993) 20 Cal. App. 4th 760, 769-771, 25 Cal. Rptr. 2d 192]* .

Under the rule of exclusive concurrent jurisdiction, as in the case of a statutory plea in abatement, if two trial courts of equal jurisdiction have concurrent jurisdiction over the subject matter and all parties involved in litigation, the first to assume jurisdiction has exclusive and continuing jurisdiction over the subject matter and all parties involved until such time as all necessarily related matters have been resolved [*Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 786-787, 274 Cal. Rptr. 147* ; *see Franklin & Franklin v. 7-Eleven Owners for Fair Franchising (2000) 85 Cal. App. 4th 1168, 102 Cal. Rptr. 2d 770* ; *Glade v. Glade (1995) 38 Cal. App. 4th 1441, 1450, 45 Cal. Rptr. 2d 695* (as between courts of different counties having coequal jurisdiction over a matter, exclusive jurisdiction is acquired by the first court of equal dignity to assume and exercise control over the matter; applying principle to case involving different departments of one superior court)].

Because the rule of exclusive concurrent jurisdiction, like the statutory plea in abatement, is a mandatory rather than a discretionary judicial action, the issue should be raised by demurrer if the issue appears on the face of the complaint and by answer if factual issues must be resolved [*People ex rel. Garamendi v. American Autoplan, Inc. (1993) 20 Cal. App. 4th 760, 770-771, 25 Cal. Rptr. 2d 192]* .

However, the rule of exclusive concurrent jurisdiction is not jurisdictional in the sense that failure to comply renders subsequent proceedings void [*People ex rel. Garamendi v. American Autoplan, Inc. (1993) 20 Cal. App. 4th 760, 772, 25 Cal. Rptr. 2d 192]* . Thus, a court's erroneous refusal to stay further proceedings does not render those further proceedings void for lack of jurisdiction [*County of San Diego v. State of California (1997) 15 Cal. 4th 68, 88, 61 Cal. Rptr. 2d 134, 931 P.2d 312* (court that refuses to defer to another court's primary jurisdiction is not without jurisdiction)]. Moreover, the defendant must properly raise the matter by demurrer or answer or by motion to dismiss, stay, or transfer. Prior to the filing of such an appropriate pleading, the trial court in the second action retains jurisdiction to act [*People ex rel. Garamendi v. American Autoplan, Inc. (1993) 20 Cal. App. 4th 760, 774, 25 Cal. Rptr. 2d 192* (raising issue in opposition to a request for a preliminary injunction held insufficient; injunction upheld)]. Thus, as there is no reason to divest the court of jurisdiction over the subsequent action until a final determination is made in the pending suit that definitely bars the instant action, the subsequent action should be stayed rather than dismissed [*Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 792, 274 Cal. Rptr. 147* ; *see County of San Diego v. State of California (1997) 15 Cal. 4th 68, 88, 61 Cal. Rptr. 2d 134, 931 P.2d 312]* .

[ii] Distinguished From Another Action Pending

Unlike the statutory plea of abatement, however, the rule of exclusive concurrent jurisdiction does not require absolute identity of parties, causes of action, or remedies sought in the initial and subsequent actions [*Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 788, 274 Cal. Rptr. 147]* . If the court exercising original jurisdiction has the power to bring before it all the necessary parties, the fact that the parties in the second action are not identical does not preclude application of the rule. Moreover, the remedies sought in the separate actions need not be precisely the same so long as the court exercising original jurisdiction has the power to litigate all the issues and to grant all the relief to which any of the parties might be entitled under the pleadings [*Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 788, 274 Cal. Rptr. 147]* . Finally, for the rule of exclusive concurrent jurisdiction to apply, the judgment rendered in the first action need not be res judicata in the second action [*Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 789, 274 Cal. Rptr. 147* (rejecting, as having not been followed, the contrary statement in *Stearns v. Los Angeles City School Dist. (1966) 244 Cal. App. 2d 696, 714, 53 Cal. Rptr. 482*)]; all that is required is that the first and second actions arise from the same transaction [*Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 789, 274 Cal. Rptr. 147]* .

[iii] As Ground for Abatement

The rule of exclusive concurrent jurisdiction may constitute a ground of abatement of the subsequent action. An order of abatement issues as a matter of right, not as a matter of discretion, when the conditions for its issuance exist [*People ex rel. Garamendi v. American Autoplan, Inc. (1993) 20 Cal. App. 4th 760, 772, 25 Cal. Rptr. 2d 192* ; *Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 787, 274 Cal. Rptr. 147]* . Abatement, however, is not appropriate if the first action cannot afford the relief sought in the second [*Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 787, 274 Cal. Rptr. 147]* . For a form of demurrer on the ground of exclusive concurrent jurisdiction, see *§ 324.106.*

[iv] Policy Underlying Rule

The rule of exclusive concurrent jurisdiction is based on the public policies of avoiding conflicts that might arise between courts if they were free to make contradictory decisions or awards relating to the same controversy, and of preventing vexatious litigation and multiplicity of suits [*Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 787, 274 Cal. Rptr. 147]* . The rule exists not so much to protect the rights of parties as to protect the rights of courts of coordinate jurisdiction to avoid conflict of jurisdiction, confusion, and delay in the administration of justice [*Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 787, 274 Cal. Rptr. 147]* .

[c] Exclusive Jurisdiction in Multidepartment Superior Court

A superior court, even if composed of several departments, is one tribunal. An order made in one department during the case's progress cannot be overlooked or ignored in another department because *Cal. Const., art. VI, § 4* vests jurisdiction in the court rather than a particular judge or department, and judges hold but one and the same court whether sitting separately or together. One superior court department cannot enjoin, restrain, or otherwise interfere with the judicial act of another superior court department. Exclusive jurisdiction is acquired by the first department to assume and exercise control over the matter. A judgment rendered by one superior court department is binding on the matter on all other departments until the judgment is overturned [*People v. Madrigal (1995) 37 Cal. App. 4th 791, 795-796, 43 Cal. Rptr. 2d 498* (trial judge acted in excess of jurisdiction when judge revoked defendant's probation after defendant's probation violation matter had been duly assigned to another judge in accordance with local court rules); *Silverman v. Superior Court (1988) 203 Cal. App. 3d 145, 150-151, 249 Cal. Rptr. 724]* .

When the presiding judge of a superior court, in conformity with that court's rules, duly assigns a proceeding for hearing and determination to a department within the court and the assigned proceeding is not finally disposed of or legally

removed from that department, it is beyond the jurisdictional authority of another department of the same court to interfere with the exercise of the power of the department to which the proceeding was assigned. Stated another way, while one department is exercising jurisdiction vested by the Constitution in a superior court in that county, other departments of that court are as distinct as other superior courts. If the law were otherwise, conflicting adjudications by different departments of the same court concerning the same subject matter would bring about an anomalous situation and lead to confusion [*Williams v. Superior Court (1939) 14 Cal. 2d 656, 662-663, 96 P.2d 334* ; *People v. Madrigal (1995) 37 Cal. App. 4th 791, 795-796, 43 Cal. Rptr. 2d 498]* . The superior court department rule applies equally to different superior court districts [*People v. Madrigal (1995) 37 Cal. App. 4th 791, 796, 43 Cal. Rptr. 2d 498* ; *Shane v. Superior Court (1984) 160 Cal. App. 3d 1237, 1249-1250, 207 Cal. Rptr. 210]* .

The principle that the first department to assume and exercise control over the matter has exclusive jurisdiction, and therefore has priority of jurisdiction, applies not only to ordinary departments but also to departments that exercise subject matter jurisdiction that is distinct [*Glade v. Glade (1995) 38 Cal. App. 4th 1441, 1450, 45 Cal. Rptr. 2d 695* , citing *Slone v. Inyo County Juvenile Court (1991) 230 Cal. App. 3d 263, 269, 282 Cal. Rptr. 126* , quoting Witkin, Cal. Procedure, vol. 2, *Courts*, § 192 (3d ed. 1985)]. Thus, for example, when a dissolution proceeding is pending in the family court, another department of the superior court may not act so as to interfere with the family court's exercise of its powers in that proceeding [*Dale v. Dale (1998) 66 Cal. App. 4th 1172, 1183, 78 Cal. Rptr. 2d 513]* . Accordingly, it has been held proper for a family law court in which a marital dissolution action was pending which vested it with jurisdiction over alleged community property to stay a latter commenced foreclosure action pending in another superior court department concerning a community property residence to avoid a multiplicity of actions and inconsistent verdicts that could undermine the family law court's ability to characterize and dispose of community property. The family law court had priority of jurisdiction [*Glade v. Glade (1995) 38 Cal. App. 4th 1441, 1456, 45 Cal. Rptr. 2d 695]* .

However, after a dissolution proceeding has been disposed of by a final judgment, a party to it may bring a subsequent civil action (in another department) under *Fam. Code § 2120 et seq.* to set aside the judgment on grounds of actual fraud, perjury, duress, mental incapacity, or mistake [*Rubenstein v. Rubenstein (2000) 81 Cal. App. 4th 1131, 1138 n.3, 1146-1147, 97 Cal. Rptr. 2d 707* (also holding that defrauded spouse may not bring tort action for concealment of community assets as alternative to moving to set aside the dissolution judgment; *Dale v. Dale (1998) 66 Cal. App. 4th 1172, 1178-1183, 78 Cal. Rptr. 2d 513* (holding that such a tort action may be brought, does not apply to judgments entered on or after January 1, 1993)]. Allowing plaintiff to proceed with the action would not interfere with the family court's exercise of its powers in the earlier proceeding [*see* *Dale v. Dale (1998) 66 Cal. App. 4th 1172, 1183, 1187, 78 Cal. Rptr. 2d 513]* .

[3] Between Courts of Sister States

[a] Priority in Time

The rule that the pendency of an earlier action growing out of the same transaction and between the same parties is a ground for abatement of the second action applies to determine which court may retain jurisdiction as between a California court and the court of another state. However, abatement is only mandatory when the multiple actions are pending in courts of the same state. When the actions are pending in courts of different states, the determination whether to stay the later-filed action is discretionary, not mandatory [*Leadford v. Leadford (1992) 6 Cal. App. 4th 571, 575 n.5, 8 Cal. Rptr. 2d 9* (disavowing *In re Hanley (1988) 199 Cal. App. 3d 1109, 1115-1116, 245 Cal. Rptr. 441* , to the extent it suggests abatement is mandatory); *In re Marriage of Gray (1988) 204 Cal. App. 3d 1239, 1250, 251 Cal. Rptr. 846]* .

Because the determination is discretionary, it should be raised by a motion to stay the proceedings, not by demurrer [*Leadford v. Leadford (1992) 6 Cal. App. 4th 571, 574, 8 Cal. Rptr. 2d 9]* .

Although a California court might have power to issue a temporary restraining order (TRO) to prevent multiple

proceedings, a court may not ignore additional proceedings that arise after the initial action commences, and the use of injunctive relief to prohibit a person from resorting to a foreign court is a power rarely and sparingly employed, for its exercise represents a challenge, albeit an indirect one, to the dignity and authority of that tribunal [*Advanced Bionics Corp. v. Medtronic, Inc. (2002) 29 Cal. 4th 697, 705, 128 Cal. Rptr. 2d 172]* . The first filed rule in California means that when two courts of the same sovereignty have concurrent jurisdiction, the first to assume jurisdiction over a particular subject matter of a particular controversy takes it exclusively, and the second court should not thereafter assert control over that subject matter; however, the first filed rule "was never meant to apply where the two courts involved are not courts of the same sovereignty... . Restraining a party from pursuing an action in a court of foreign jurisdiction involves delicate questions of comity and therefore requires that such action be taken only with care and great restraint" [*Advanced Bionics Corp. v. Medtronic, Inc. (2002) 29 Cal. 4th 697, 707, 128 Cal. Rptr. 2d 172]* .

[b] When Earlier Judgment Is Superseded

A judgment rendered in one state will not be recognized or enforced in sister states if an inconsistent but valid judgment is *subsequently* rendered in another action between the parties in another state and if the earlier judgment is superseded by the later judgment under the local law of the state in which the latter judgment was rendered [*In re Hanley (1988) 199 Cal. App. 3d 1109, 1117-1118, 245 Cal. Rptr. 441* (citing Restatement (Second) of Conflicts of Law § 114; overruled on other grounds in *Leadford v. Leadford (1992) 6 Cal. App. 4th 571, 575 n.5, 8 Cal. Rptr. 2d 9*)]. Moreover, if, in two actions, inconsistent final judgments are rendered, it is the later, not the earlier, judgment that is accorded conclusive effect in a third action under the rules of res judicata [*In re Hanley (1988) 199 Cal. App. 3d 1109, 1118, 245 Cal. Rptr. 441* (citing Restatement (Second) of Judgments § 15; overruled on other grounds in *Leadford v. Leadford (1992) 6 Cal. App.4th 571, 575 n.5, 8 Cal. Rptr. 2d 9*)]. This is the case even when the court that rendered the later judgment denied full faith and credit to the first judgment or made other errors of fact or law [*In re Hanley (1988) 199 Cal. App. 3d 1109, 1118, 245 Cal. Rptr. 441* , overruled on other grounds in *Leadford v. Leadford (1992) 6 Cal. App. 4th 571, 575 n.5, 8 Cal. Rptr. 2d 9* (citing Restatement (Second) of Conflicts of Law § 114, comment a)].

The rationale for the foregoing rule is based on principles of res judicata and full faith and credit. It is appropriate that the losing party should be precluded from attacking the later inconsistent judgment if he or she has not sought review of this judgment both by the appellate courts of the state of rendition and by the Supreme Court of the United States or if the judgment has been affirmed by these courts. So, if under these circumstances, the same issue has been differently decided in different actions between the parties, the determination that is later in time should control if it would have this effect under the local law of the state of rendition. The later judgment may be erroneous and the first judgment correct, but the parties had the opportunity to litigate the point at issue before the second court, to appeal from its judgment, and ultimately to seek review by the Supreme Court [*In re Hanley (1988) 199 Cal. App. 3d 1109, 1118, 245 Cal. Rptr. 441* (citing *Restatement (Second) of Conflict of Laws § 114 comment b (1971)*, overruled on other grounds in *Leadford v. Leadford (1992) 6 Cal. App.4th 571, 575 n.5, 8 Cal. Rptr. 2d 9*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsExclusive Jurisdiction

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[Reserved]

§§ 324.26[Reserved]

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28-324 California Forms of Pleading and Practice--Annotated § 324.40

§ 324.40 No Waiver of Defense of Lack of Subject Matter Jurisdiction

Lack of subject matter jurisdiction can be raised at any time, even for the first time on appeal [*DeTomaso v. Pan American World Airways, Inc. (1987) 43 Cal. 3d 517, 520 n.1, 235 Cal. Rptr. 292, 733 P.2d 614* ; *Consolidated Theatres, Inc. v. Theatrical Stage Employees Union (1968) 69 Cal. 2d 713, 721, 73 Cal. Rptr. 213, 447 P.2d 325* ; *Miranda v. 21st Century Ins. Co. (2004) 117 Cal. App. 4th 913, 920, 12 Cal. Rptr. 3d 159* ; *Parrott v. Mooring Townhomes Assn., Inc. (2003) 112 Cal. App. 4th 873, 875, 6 Cal. Rptr. 3d 116* ; *National Union Fire Ins. Co. v. Stites Prof. Law Corp. (1991) 235 Cal. App. 3d 1718, 1724, 1 Cal. Rptr. 2d 570* ; *see Kingston Constructors, Inc. v. Washington Metropolitan Area Transit Authority (1997) 14 Cal. 4th 939, 952, 59 Cal. Rptr. 2d 866, 928 P.2d 581* (party cannot waive based on lack of subject matter jurisdiction)].

For forms regarding a motion to transfer or dismiss for lack of subject matter jurisdiction, see *§ 324.100* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to Dismiss

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28-324 California Forms of Pleading and Practice--Annotated § 324.41

§ 324.41 Judicial Act Lacking Jurisdiction

The judgment of a court wholly lacking jurisdiction over the subject matter, parties, or specific thing, is void [*see Kulko v. California Superior Court (1978) 436 U.S. 84, 91, 98 S. Ct. 1690, 56 L. Ed. 2d 132* ; *Hanson v. Denckla (1958) 357 U.S. 235, 250, 78 S. Ct. 1228, 2 L. Ed. 2d 1283* ; *County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 110, 183 Cal. Rptr. 741 , cert. denied, 460 U.S. 1051 (1983)* (disapproved on another point in *County of Los Angeles v. Soto (1984) 35 Cal. 3d 483, 492 n.4, 198 Cal. Rptr. 779, 674 P.2d 750*); *see also Code Civ. Proc. § 1916* ("judicial record" may be impeached by evidence, among other things, of want of jurisdiction in the court or judicial officer)]. For additional discussion of a lack of jurisdiction, see *§ 324.11[2]*. For discussion of methods of review and attacking void judgments and orders, and related forms, *see* Ch. 489, *Relief From Judgments and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentVoid Judgments

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28-324 California Forms of Pleading and Practice--Annotated § 324.42

§ 324.42 Judicial Act in Excess of Jurisdiction

[1] Void or Voidable

It has been said that while it is not uncommon for cases to state that an act in excess of a court's jurisdiction is void, only acts in excess of *subject matter* jurisdiction are void. Acts in excess of other kinds of jurisdiction are voidable [*Jovine v. FHP, Inc. (1998) 64 Cal. App. 4th 1506, 1527, 1531-1532, 76 Cal. Rptr. 2d 322* (doctrine of waiver and estoppel apply to voidable acts, *i.e.,* to acts in excess of jurisdiction (when the court has subject matter jurisdiction)); *see People v. Malveaux (1996) 50 Cal. App. 4th 1425, 1434, 59 Cal. Rptr. 2d 371* (judgment void rather than voidable only if trial court lacked subject matter jurisdiction); *People v. Ruiz (1990) 217 Cal. App. 3d 574, 584, 265 Cal. Rptr. 886* (act in excess of jurisdiction is valid until set aside, and parties may be precluded from setting it aside by such things as waiver, estoppel or passage of time)].

On the other hand, granting relief that the court under no circumstances has any authority to grant has been considered an aspect of fundamental jurisdiction for the purposes of declaring a judgment or order void [*Plaza Hollister Ltd. Partnership v. County of San Benito (1999) 72 Cal. App. 4th 1, 20, 84 Cal. Rptr. 2d 715* ; *see also County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 110, 183 Cal. Rptr. 741 , cert. denied, 460 U.S. 1051* (judgment void on its face if court which rendered judgment lacked personal or subject matter jurisdiction or exceeded its jurisdiction in granting relief that court had no power to grant), disapproved on another point in *County of Los Angeles v. Soto (1984) 35 Cal. 3d 483, 492 n.4, 198 Cal. Rptr. 779, 674 P.2d 750]* . For discussion of methods of review and attacking judgments and orders, including *Code Civ. Proc. § 473(d)* and related forms, *see* Ch. 489, *Relief From Judgments and Orders* .

In determining whether a prematurely entered summary judgment is void or voidable, the court must look first to the language of the relevant statute. The court's failure to comply with *Penal Code § 1306* by prematurely entering summary judgment did not deprive it of jurisdiction over the subject matter of the bail bond forfeiture or personal jurisdiction over the surety, and thus the premature entry of summary judgment was voidable, not void [*People v. American Contractors Indemnity Co. (2004) 33 Cal. 4th 653, 662, 16 Cal. Rptr. 3d 76, 93 P.3d 1020]* .

[2] Challenge by Writ

Judicial acts made in excess of a court's jurisdiction may be challenged on petition for a writ of certiorari [*Code Civ. Proc. §§ 1067, 1068*] or prohibition [*Code Civ. Proc. §§ 1102, 1103*]. These writs will issue to review or prohibit acts in excess of jurisdiction when there is, in the case of prohibition, no plain, speedy, and adequate remedy in the ordinary course of law, and, in the case of certiorari, no appeal and no plain, speedy, and adequate remedy [*see Crittenden v. Superior Court (1964) 61 Cal. 2d 565, 567, 39 Cal. Rptr. 380, 393 P.2d 692* (prohibition granted); *Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 454-455, 20 Cal. Rptr. 321, 369 P.2d 937* (certiorari)]. Generally, any act that exceeds the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction and may be restrained by prohibition or annulled on certiorari [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 287-288, 109 P.2d 942* ; for further discussion and forms, *see* Ch. 358, *Mandate and Prohibition* , and Ch. 492, *Review (Certiorari), Writ of*].

Mandate is the appropriate remedy to inquire into the validity of any final administrative order or decision made without or in excess of jurisdiction [*Code Civ. Proc. § 1094.5(b)*], in any proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in an inferior tribunal, corporation, board, or officer [*Code Civ. Proc. § 1094.5(a)*; for further discussion and forms relating to *Code Civ. Proc. § 1094.5*, *see* Ch. 474, *Availability of Judicial Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsCivil ProcedureRemediesWritsCommon Law WritsProhibitionCivil ProcedureAppealsAppellate JurisdictionState Court Review

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1-324 California Forms of Pleading and Practice--Annotated § 324.43

§ 324.43 Transfer or Dismissal Based on Lack of Subject Matter Jurisdiction

[1] Transfer of Case from Court Lacking Jurisdiction

No appeal or petition filed in the superior court shall be dismissed solely because the appeal or petition was not filed in the proper state court [*Code Civ. Proc. § 396(a)*]. If the superior court lacks jurisdiction of an appeal or petition, and a court of appeal or the Supreme Court would have jurisdiction, the appeal or petition shall be transferred to the court having jurisdiction upon terms as to costs or otherwise as may be just, and proceeded with as if regularly filed in the court having jurisdiction [*Code Civ. Proc. § 396(b)*].

[2] Determining Lack of Subject Matter Jurisdiction

Jurisdiction may be exclusively in the higher courts. For example, under statutes governing some public agencies, the superior courts lack jurisdiction to render any judgment which would interfere with the administrative agency's performance of its official duties [*see Greener v. Workers' Comp. Appeals Bd. (1993) 6 Cal. 4th 1028, 1044-1046, 25 Cal. Rptr. 2d 539, 863 P.2d 784* ; *Sexton v. Atchison etc. Ry. Co. (1916) 173 Cal. 760, 762-763, 161 P. 748* (plaintiff's request for injunction to restrain the defendant railroad from providing free transportation to members of the railroad commission and its employees as it was required to do by the Public Utilities Act was beyond superior court's power)]. Thus, the superior court lacks subject matter jurisdiction to adjudicate a to the constitutionality of workers' compensation statutes because *Lab. Code § 5955* confers exclusive jurisdiction over such a on the Court of Appeal and the Supreme Court [*Greener v. Workers' Comp. Appeals Bd. (1993) 6 Cal. 4th 1028, 1044-1046, 25 Cal. Rptr. 2d 539, 863 P.2d 784]* .

California state courts lack subject matter jurisdiction of a local action arising in another state or to determine title to real property situated in another state [*see Ophir Silver Min. Co. v. Superior Court (1905) 147 Cal. 467, 473-478, 82 P. 70* (action for trespass on and injury to, and to quiet title to, real property in Nevada); *River Farms, Inc. v. Superior Court (1967) 252 Cal. App. 2d 604, 609, 60 Cal. Rptr. 665]* . In such a case, with no court of California having subject matter jurisdiction, the action would have to be dismissed rather than transferred [*see, e.g., Boisclair v. Superior Court (1990) 51 Cal. 3d 1140, 1156, 1158, 276 Cal. Rptr. 62, 801 P.2d 305]* .

California courts also lack subject matter jurisdiction when jurisdiction is vested by federal law exclusively in a federal court or agency [*see, e.g., 28 U.S.C. §§ 1251* (actions by and against foreign ambassadors), 1333 (admiralty, maritime, and prize cases)], or if jurisdiction of the cause is vested by the state constitution or state statute in an administrative tribunal or agency [*see, e.g., Ankeny v. Lockheed Missiles & Space Co. (1979) 88 Cal. App. 3d 531, 534-536, 151 Cal. Rptr. 828* (employee's action against employer and fellow employees for damages for intentional infliction of emotional distress, coupled with physical injury and disability barred by exclusive remedy provisions of Workers' Compensation Law (*Lab. Code §§ 3200 et seq.*)].

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28-324 California Forms of Pleading and Practice--Annotated § 324.44

§ 324.44 Transfer of Action When Another California Court Has Jurisdiction

[1] In General

On the making of an order for transfer, proceedings must be had as provided in *Code Civ. Proc. § 399*. When the transfer is sought solely, or is ordered, because the action or proceeding was commenced in a court other than that designated as proper by Tit. 4, Part 2 of the Code Civ. Proc., those costs and fees must be paid by the plaintiff before the transfer is made; and if the defendant has paid those costs and fees at the time of filing a notice of motion, the same shall be repaid to the defendant, upon the making of the transfer order [*Code Civ. Proc. § 399(a)*].

When an order is made transferring an action or proceeding under any of the provisions of Tit. 4, Part 2 of the Code Civ. Proc., the clerk must, after expiration of the time within which a petition for writ of mandate could have been filed pursuant to *Code Civ. Proc. § 400*, or if a writ petition is filed after judgment denying the writ becomes final, and upon payment of the costs and fees, transmit the pleadings and papers therein to the clerk of the court to which the same is transferred [*Code Civ. Proc. § 399(a)*].

If the costs and fees have not been so paid by the plaintiff within five days after service of notice of the transfer order, then any other party interested therein, whether named in the complaint as a party or not, may pay those costs and fees, and the clerk must thereupon transmit the papers and pleadings therein as if those costs and fees had been originally paid by the plaintiff, and the same must be a proper item of costs of the party so paying the same, recoverable by that party in the event that party prevails in the action; otherwise, the same shall be offset against and deducted from the amount, if any, awarded the plaintiff in the event the plaintiff prevails against that party in the action [*Code Civ. Proc. § 399(a)*].

[2] Dismissal for Nonpayment of Fees and Costs

The action may not be further prosecuted in any court until the costs and fees are paid [*Code Civ. Proc. § 399(a)*].

If the costs and fees are not paid within 30 days after service of notice of the transfer order, or within 30 days after

notice of the finality of the order of transfer (when a petition for writ of mandate is filed in the trial court under *Code Civ. Proc. § 400* or when an appeal is taken under *Code Civ. Proc. § 904.2*), the court on a duly noticed motion by any party may dismiss the action without prejudice to the cause on the condition that no other action on the cause may be commenced in another court prior to satisfaction of the court's order for costs and fees [*Code Civ. Proc. § 399(a)*]. When a petition for writ of mandate or appeal does not result in a stay of proceedings, the time for payment of those costs is 60 days after service of the notice of the order [*Code Civ. Proc. § 399(a)*].

[3] Notice of Transfer

At the time the papers and pleadings are transmitted, the clerk is required to mail notice to all parties who have appeared in the action or special proceeding stating the date on which transmittal occurred. Promptly on receipt of the papers and pleadings, the clerk of the court to which the action or proceeding was transferred is required to mail notice to all parties who have appeared in the case, stating the date of the filing of the case and number assigned to the case in the court [*Code Civ. Proc. § 399(b)*].

[4] Jurisdiction of Transferee Court

The court to which the action or proceeding is transferred has the same jurisdiction over the case that it would have had the action or proceeding been commenced there [*Code Civ. Proc. § 399(c)*].

[5] Effect on Power of Transferring Court

A court has no jurisdiction to hear or determine a case when the type of proceeding or the amount in controversy is beyond the jurisdiction defined for that particular court by statute or constitutional provision [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288, 109 P.2d 942]* . Hence, once it is clear from the pleadings that an action must be transferred under *Code Civ. Proc. § 396*, the only action which the court may take is to transfer the case to the appropriate court, and any other judicial action is improper [*see Eveleth v. American Brass & Iron Foundry (1962) 203 Cal. App. 2d 41, 42-45, 21 Cal. Rptr. 95* ; *Cal. Emp. etc. Com. v. Municipal Ct. (1944) 62 Cal. App. 2d 781, 783-786, 145 P.2d 361* ; *Brady v. Kobey (1938) 27 Cal. App. 2d 505, 507-508, 81 P.2d 263]* . When *Code Civ. Proc. § 396* applies, its provisions for transfer of the cause are mandatory, and any other orders relating to parties or pleadings are void [*Schwenke v. J & P Scott, Inc. (1988) 205 Cal. App. 3d 71, 77, 252 Cal. Rptr. 91* ; *see also Security Pac. Nat. Bank v. Lyon (1980) 165 Cal. Rptr. 95]* .

A court that renders a judgment without having subject matter jurisdiction may set aside its judgment and order the case transferred to the proper court [*see Kee v. Becker (1942) 54 Cal. App. 2d 466, 469, 129 P.2d 159]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionAmount in ControversyCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsGeneral Overview

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28-324 California Forms of Pleading and Practice--Annotated § 324.45

§ 324.45 Dismissal When No California Court Has Jurisdiction

If there is no court in California having jurisdiction of the subject matter, the action must be dismissed [*Cairl v. Boeing Co. (1974) 39 Cal. App. 3d 137, 138, 113 Cal. Rptr. 925]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral Overview

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28-324 California Forms of Pleading and Practice--Annotated § 324.46

§ 324.46 Review of Jurisdiction

[1] On Appeal

[a] Superior Court Orders Other Than in Limited Civil Cases

No order or judgment can be appealed unless the right of appeal is expressly authorized by the California Constitution or by statute [*Milliken v. Gray (1969) 276 Cal. App. 2d 595, 596, 81 Cal. Rptr. 525]* .

The only appeal expressly authorized by the Constitution is in death penalty cases [*see Cal. Const., art. VI, § 11*]. Appeals in all other cases are authorized by statute.

Code Civ. Proc. § 904.1, specifying the superior court orders and judgments in civil cases, other than limited civil cases, that are appealable, contains no provision authorizing an appeal from a superior court order transferring or refusing to transfer an action or proceeding from a court lacking to a court having subject matter jurisdiction. Hence, such an order is nonappealable [*see Milliken v. Gray (1969) 276 Cal. App. 2d 595, 599, 81 Cal. Rptr. 525* ; *see also Ash v. Hertz Corp. (1997) 53 Cal. App. 4th 1107, 1110-1112, 62 Cal. Rptr. 2d 192* , discussed under § 324.53[1][b], concerning appellate review of such an order on appeal from a final judgment].

For further discussion of statutes authorizing appeal, see Ch. 42, *Appeal: Notice of Appeal* .

[b] Superior Court Orders in Limited Civil Cases

Code Civ. Proc. § 904.2, specifying the orders and judgments in limited civil cases that are appealable, does not expressly authorize an appeal from an order transferring or refusing to transfer an action or proceeding from a court lacking to a court having subject matter jurisdiction. However, unlike *Code Civ. Proc. § 904.1*, it does authorize an appeal from orders in limited civil cases changing or refusing to change the place of trial [*Code Civ. Proc. § 904.2(c)*].

An appeal cannot be taken from a judgment of the appellate division of a superior court granting or denying a petition

for issuance of a writ of mandamus or prohibition directed to the superior court, or a judge thereof, in a limited civil case or a misdemeanor or infraction case [*Code Civ. Proc. § 904.3*]. An appellate court may, in its discretion, upon petition for extraordinary writ, review the judgment [*Code Civ. Proc. § 904.3*].

[2] By Extraordinary Writ

[a] Prohibition and Certiorari

The extraordinary writs of prohibition (*Code Civ. Proc. § 1102 et seq.*) and certiorari (*Code Civ. Proc. § 1067 et seq.*) are jurisdictional writs that arrest (prohibition) or review (certiorari) the proceedings of a lower tribunal that is acting or is threatening to act (prohibition), or has acted (certiorari), without or in excess of its jurisdiction [*see Code Civ. Proc. §§ 1068(a)* (certiorari), *1102(a)* (prohibition); *Crittenden v. Superior Court (1964) 61 Cal. 2d 565, 567, 39 Cal. Rptr. 380, 393 P.2d 692* (prohibition); *Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 454-455, 20 Cal. Rptr. 321, 369 P.2d 937* (certiorari); *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 287, 109 P.2d 942* (prohibition)]. The appellate division of the superior court may also direct these writs to the superior court in a limited civil case [*Code Civ. Proc. §§ 1068(b), 1102(b)*].

These writs are not available, however, to review mere error in the exercise of jurisdiction. For example, if a lower tribunal has power to make a correct determination of a particular issue, it clearly has power to make an incorrect determination, but that determination is subject only to appellate review [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 287, 109 P.2d 942]* .

However, when a court, lacking jurisdiction of the subject matter, refuses to transfer the case to a Cali fornia court having such jurisdiction, if one exists, prohibition will lie to restrain the court without jurisdiction from proceeding further with the case [*see Cal. Emp. etc. Com. v. Municipal Ct. (1944) 62 Cal. App. 2d 781, 787, 145 P.2d 361]* . The court issuing the writ may also issue a writ of mandate compelling the lower court to transfer the case as required by *Code Civ. Proc. § 396* on the ground the transfer is an act the performance of which is especially enjoined by law [*see Code Civ. Proc. § 1085*, discussed under § 324.53[2][b]].

For a discussion and forms for use in obtaining a writ of prohibition or a writ of certiorari, see Ch. 358, *Mandate and Prohibition* , and Ch. 492, *Review, (Certiorari), Writ of*, respectively.

Statutory law has in some instances substituted the normally nonjurisdictional writ of mandate for the writ of prohibition to review jurisdictional issues, also placing time limits on when the petition for writ of mandate may be filed.

[b] Mandate

[i] Traditional Writ

The writ of mandate compels the performance of an act which the law specially enjoins or compels the admission of a party to the use and enjoyment of a right or office to which he or she is entitled and from which or she is unlawfully excluded [*Code Civ. Proc. § 1085(a)*]. This is the historical use of the writ and this writ is sometimes referred to as "traditional" mandate.

With respect to jurisdiction, a writ of mandate may be issued to compel a lower court to assume jurisdiction of a matter when the lower court has erroneously refused to act under the mistaken view that it did not have jurisdiction to do so [*see Erlich v. Superior Court (1965) 63 Cal. 2d 551, 556, 47 Cal. Rptr. 473, 407 P.2d 649* ; *McMahon v. Municipal Court (1970) 6 Cal. App. 3d 194, 197, 85 Cal. Rptr. 782]* . The appellate division of the superior court may also direct the writ to the superior court in a limited civil case [*Code Civ. Proc. § 1085(b)*].

Mandate may also be issued to compel a court lacking jurisdiction of the subject matter to transfer the case to the California court having such jurisdiction, if one exists [*see Cal. Emp. etc. Com. v. Municipal Ct. (1944) 62 Cal. App. 2d 781, 787, 145 P.2d 361]* .

For a discussion of traditional mandate, a procedural checklist, and forms for use in securing issuance of the writ, see Ch. 358, *Mandate and Prohibition* .

[ii] Under Code Civ. Proc. § 400 to Review Superior Court Orders

Code of Civil Procedure § 400 provides that when an order is made by the superior court granting or denying a motion to change the "place of trial," the party aggrieved by such order may, within 20 days after service of a written notice of the order, petition the court of appeal for the district in which the court granting or denying the motion is situated for a writ of mandate requiring trial of the case in the proper court [*Code Civ. Proc. § 400*]. The statute further provides that [*Code Civ. Proc. § 400*]:

- The superior court may, for good cause, and prior to the expiration of the initial 20-day period, extend the time for one additional period not to exceed 10 days.

- The petitioner must file a copy of the petition in the trial court immediately after the petition is filed in the court of appeal.

- The court of appeal may stay all proceedings in the case, pending judgment on the petition becoming final.

- The clerk of the court of appeal must file with the clerk of the trial court a copy of any final order or final judgment immediately after such order or judgment becomes final.

It would appear that the phrase "place of trial" in *Code Civ. Proc. § 400* should have the same meaning it has in *Code Civ. Proc. § 904.2*, that is, that it should be limited to a review of orders relating to venue and not to jurisdiction [*see* discussion under § 324.53[1][b]].

[c] Administrative Mandate

First by case law, and then by statute [*Code Civ. Proc. § 1094.5*], the writ of mandate came into use as the remedy to review certain orders and decisions of administrative agencies, other than those agencies whose orders or decisions are reviewed as provided in the state Constitution or in state statutes enacted pursuant to constitutional directive (for example, the Workers' Compensation Appeals Board, the state Public Utilities Commission, and the state Department of Alcoholic Beverage Control). This writ was originally referred to by legal writers as "certiorarified" mandamus or mandate and is today referred to as "administrative" mandamus or mandate. The matters that may be inquired into by the court in reviewing the orders or decisions of administrative agencies include the questions whether the agency has proceeded without, or in excess, of jurisdiction [*see Code Civ. Proc. § 1094.5(b)*], and, to this extent, the writ resembles the writ of certiorari. For a full discussion of administrative mandate and forms for use in securing issuance of the writ, see Ch. 474, *Availability of Judicial Review of Agency Decisions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsLimited JurisdictionCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionCivil ProcedureAppealsAppellate

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[Reserved]

§§ 324.47[Reserved]

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28-324 California Forms of Pleading and Practice--Annotated § 324.60

§ 324.60 Jurisdictional Classification

The jurisdictional classification of a case means its classification as a limited civil case or an unlimited civil case [*Code Civ. Proc. § 32.5*]. A civil case that is not a limited civil case may be referred to as an unlimited civil case [*Code Civ. Proc. § 88*].

While the term limited civil case was used to denote an action filed in the limited jurisdiction of a municipal court, since 1998 the distinction of limited and unlimited civil cases was added to the Code of Civil Procedure to reflect unification of the trial courts [*see Cal. Const. art. VI, §§ 5(e)*; Cal. L. Revision Comm'n Comment to *Code Civ. Proc. § 85*]. On February 8, 2001, the superior and municipal courts of Kings County were the last courts to unify into a single superior court, and with this unification, municipal courts no longer exist in California. Superior courts are now the only California state trial courts.

While the limited and unlimited classification is a relatively new development, this classification system models portions of the prior court system by distinguishing cases in superior court that seek a limited amount of damages (limited civil cases have a jurisdictional limit of $25,000 or less and derives from the $25,000 jurisdictional limit that applied to the municipal courts) [*see* Cal. L. Revision Comm'n Comment to *Code Civ. Proc. § 85*; *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 144 (comment to *Code Civ. Proc. § 86* (limited civil case equivalent to matter within jurisdiction of municipal court under former law))]. Limited civil cases have abridged pleading, discovery, and evidentiary procedures relative to unlimited civil cases, with appeals to the appellate department of the superior court [*see Code Civ. Proc. § 90 et seq.*].

Reclassification has no effect on the fundamental jurisdiction of the court; the statutes governing reclassification strongly indicate that a matter may proceed to trial and judgment as a limited case even though it might be subject to reclassification [*Pajaro Valley Water Management Agency v. McGrath (2005) 128 Cal. App. 4th 1093, 1103, 27 Cal. Rptr. 3d 741]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsLimited Jurisdiction

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28-324 California Forms of Pleading and Practice--Annotated § 324.61

§ 324.61 Unlimited Civil Case

A civil case that is not a limited civil case may be referred to as an unlimited civil case [*Code Civ. Proc. § 88*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral Jurisdiction

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28-324 California Forms of Pleading and Practice--Annotated § 324.62

§ 324.62 Limited Civil Case

[1] Dependent on Amount in Controversy and Type of Relief

An action or special proceeding shall be treated as a limited civil case if all of the conditions listed below are satisfied [*Code Civ. Proc. § 85*].

No action or special proceeding may be treated as a limited civil case unless all of the conditions listed below are satisfied, notwithstanding any statute that classifies an action or special proceeding as a limited civil case [*Code Civ. Proc. § 85*].

The conditions that must be met for a case to be classified as a limited civil case are:

- The amount in controversy does not exceed $25,000. As used in this section, "amount in controversy" means the amount of the demand, or the recovery sought, or the value of the property, or the amount of the lien, that is in controversy in the action, exclusive of attorneys' fees, interest, and costs [*Code Civ. Proc. § 85(a)*].

- The relief sought is a type that may be granted in a limited civil case [*Code Civ. Proc. § 85(b)*; *see Code Civ. Proc. § 86*].

- The relief sought, whether in the complaint, a cross-complaint, or otherwise, is exclusively of a type described in one or more statutes that classify an action or special proceeding as a limited civil case, including, but not limited to, the following provisions [*Code Civ. Proc. § 85(c)*]:

  1. *Civ. Code § 798.61* (abandoned mobilehomes).

  2. *Civ. Code § 1719* (passing a check on insufficient funds).

3. *Civ. Code § 3342.5* (dog bites).

4. *Code Civ. Proc. § 86* (jurisdiction; for discussion, *see* [2]-[4], *below*).

5. *Code Civ. Proc. § 86.1* (long term health care).

6. *Code Civ. Proc. § 1710.20* (enforcement of sister state judgments).

7. *Food & Agric. Code §§ 7581, 12647, 27601, 52514, 53564* (abatement as public nuisance of various agricultural products that are contaminated or otherwise not in compliance with law).

8. *Food & Agric. Code § 31503* (loss or damage of livestock caused by dog).

9. *Food & Agric. Code § 31621* (vicious dogs).

10. *Gov. Code § 53069.4* (appeal of fine or penalty imposed under local ordinance).

11. *Gov. Code §§ 53075.6, 53075.61* (impounding taxicab operated by person without valid certificate, license, or permit).

12. *Pub. Util. Code § 5411.5* (arrest, seizure and impoundment of vehicle at airport or Mexican border).

13. *Veh. Code § 9872.1* (impoundment of vessel with hull identification number removed).

14. *Veh. Code § 10751* (disposition of vehicle or part the identification number of which has been removed, defaced, altered, or destroyed).

15. *Veh. Code § 14607.6* (impoundment and forfeiture of vehicle driven by unlicensed driver).

16. *Veh. Code § 40230* (parking violation appeals).

17. *Veh. Code § 40256* (notice of toll evasion appeals).

The existence of a statute relating to the court's authority in a limited civil case does not, by itself, imply that the same authority does or does not exist in an unlimited civil case [*Code Civ. Proc. § 89(a)*]. The converse is also true; the existence of a statute relating to the court's authority in an unlimited civil case does not, by itself, imply that the existence or nonexistence of the same authority in a limited civil case [*Code Civ. Proc. § 89(b)*].

[2] Amount in Controversy $25,000 or Less

[a] Cases at Law

All cases at law in which the demand, exclusive of interest, or the value of the property in controversy amounts to $25,000 or less are limited civil cases [*Code Civ. Proc. § 86(a)(1)*].

This includes actions to enforce payment of delinquent unsecured personal property taxes if the legality of the tax is not contested by the defendant, but otherwise, cases involving the legality of a tax, impost, assessment, toll, or municipal fine, are not limited civil cases [*Code Civ. Proc. § 86(a)(1)*; *see Minor v. Municipal Court (1990) 219 Cal. App. 3d 1541, 1547, 268 Cal. Rptr. 919* ; *Cal. Emp. etc. Com. v. Municipal Ct. (1944) 62 Cal. App. 2d 781, 784-785, 145 P.2d 361* ; *see also Crawford v. Herringer (1978) 85 Cal. App. 3d 544, 547-551, 149 Cal. Rptr. 578* (discussing whether various charges are "taxes," "imposts," "tolls," or "municipal fines" within the meaning of this provision)].

The court in a limited civil case may not grant relief exceeding $25,000, exclusive of attorney's fees, interest, and costs [*Code Civ. Proc. §§ 85(a), 580(b)(1)*].

Although the reclassification statutes have made numerous changes, the jurisdictional amount in controversy has not changed and continues to provide a basis for reclassification of cases at law [*Code Civ. Proc. §§ 85(a), 86(a)(1), 403.010 et seq.*], the statutory changes have not altered substantive and procedural law governing how a trial court values a case to determine the jurisdictional amount in controversy, and the *Walker* test [*Walker v. Superior Court (1991) 53 Cal. 3d 257, 262]* continues to govern the determination of the jurisdictional amount in controversy for reclassification as a limited civil case, *i.e.*, that the matter will "necessarily" result in a verdict below the jurisdictional amount [*Stern v. Superior Court (2003) 105 Cal. App. 4th 223, 229-231, 129 Cal. Rptr. 2d 275]* .

[b] Dissolution of Partnership

Actions to dissolve a partnership when the total partnership assets do not exceed $25,000 are limited civil cases [*Code Civ. Proc. § 86(a)(2)*; *see* Ch. 406, *Partnerships: Dissolution*].

[c] Interpleader Actions

Interpleader actions when the amount of money or the value of the property involved does not exceed $25,000 are limited civil cases [*Code Civ. Proc. § 86(a)(2)*; *see* Ch. 314, *Interpleader*].

[d] Cancel, Rescind or Revise Contract

Actions to cancel or rescind a contract sought in connection with an action to recover money not exceeding $25,000 or property of a value not exceeding $25,000 paid or delivered under, or in consideration of, the contract are limited civil cases [*Code Civ. Proc. § 86(a)(3)*; *see* Ch. 490, *Rescission and Restitution*].

Actions to revise a contract when sought in an action on the contract if the action is otherwise a limited civil case, is also a limited civil case [*Code Civ. Proc. § 86(a)(3)*; *see* Ch. 488, *Reformation of Instruments*].

[e] Eviction Actions

Proceedings in forcible entry, forcible detainer, or unlawful detainer when the whole amount of damages claimed is $25,000 or less are limited civil cases [*Code Civ. Proc. § 86(a)(4)*; *see* Ch. 333, *Landlord and Tenant: Eviction Action*].

[f] Enforcement of Personal Property Liens

Actions to enforce and foreclose liens on personal property when the amount of the lien is $25,000 or less [*Code Civ. Proc. § 86(a)(5)*; *see* Ch. 342, *Liens and Wage Preferences*].

[g] Enforcement of Mechanics' Liens and Similar Liens

The following actions are limited civil cases [*Code Civ. Proc. § 86(a)(6)*]:

- Actions to enforce and foreclose, or petitions to release, liens of mechanics, materialpersons, artisans, laborers, and of all other persons to whom liens are given under Chapter 2 of Title 15 of Part 4 of Division 3 of the Civil Code (*Civ. Code § 3109 et seq.* (relating to works of improvement) [*see* Ch. 361, *Mechanics' Liens*].

- Actions to enforce and foreclose an assessment lien on a common interest development as defined in *Civ. Code § 1351* when the amount of the lien is $25,000 or less [*see* Ch. 124, *Condominiums and Other Common Interest Developments*].

However, these actions are not limited civil cases [*Code Civ. Proc. § 86(a)(6)*]:

- When an action to enforce the lien affects property that is also affected by a similar pending action that is not a limited civil case, or

- When the total amount of the liens sought to be foreclosed against the same property aggregates an amount in excess of $25,000.

[h] Declaratory Relief

Declaratory relief actions are limited civil cases in two situations:

- When brought by way of cross complaint as to a right of indemnity with respect to the relief demanded in the complaint or a cross complaint in an action or proceeding that is otherwise a limited civil case [*Code Civ. Proc. §§ 86(a)(7)(A), 1060*; *see Minor v. Municipal Court (1990) 219 Cal. App. 3d 1541, 1547-1548, 268 Cal. Rptr. 919* ; *see also* Ch. 182, *Declaratory Relief*].

- When brought to conduct a trial after nonbinding fee arbitration between an attorney and client, pursuant to *Bus. & Prof. Code § 6200 et seq.* when the amount in controversy is $25,000 or less [*Code Civ. Proc. §§ 86(a)(7)(B), 1060*; for discussion of fee arbitration, *see Ch. 72, Attorney Practice and Ethics, § 72.350* et seq.].

Other than these two situations, declaratory relief may not be granted in a limited civil case [*Code Civ. Proc. § 580(b)(4)*].

[i] TROs, Preliminary Injunctive Relief, Accounts, and Receivers

The court in a limited civil case has jurisdiction as listed below when necessary to preserve the property or rights of any party to a limited civil case [*Code Civ. Proc. § 86(a)(8)*]:

- To issue temporary restraining orders and preliminary injunctions, and to take accounts, where necessary to preserve the property or rights of any party to a limited civil case.

- To make any order or perform any act, pursuant to the Enforcement of Judgments Law (*Code Civ. Proc. § 680.010 et seq.*) in a limited civil case [*see Ch. 254, Executions and Enforcement of Judgments, § 254.130* et seq., and Ch. 486, *Receivers*].

- To appoint a receiver [*see Code Civ. Proc. §§ 564-570*; Ch. 486, *Receivers*].

[j] Determining Title to Personal Property

The court in a limited civil case has jurisdiction to determine title to personal property seized in a limited civil case [*Code Civ. Proc. § 86(a)(8)*; *see* Ch. 119, *Claim and Delivery*].

[k] Creditor's Suits

Actions under *Code Civ. Proc. § 708.210 et seq.*, relating to creditors' suits, to recover an interest in personal property or to enforce the liability of the debtor of a judgment debtor when the interest claimed adversely is of a value not exceeding $25,000 or the debt denied does not exceed $25,000 is a limited civil case [*Code Civ. Proc. § 86(a)(9)*; *see Ch. 254, Executions and Enforcement of Judgments, § 254.180* et seq.].

[l] Arbitration-Related Petitions

[i] Contractual Arbitration

All arbitration-related petitions filed pursuant to *Code Civ. Proc. § 1292 et seq.*, except for uninsured motorist arbitration proceedings under *Ins. Code § 11580.2*, are limited civil cases if [*Code Civ. Proc. § 86(a)(10)(A)*; *see* Ch. 34, *Contractual Arbitration: Judicial Review*]:

- The petition is filed before the arbitration award becomes final and the matter to be resolved by arbitration is a limited civil case under *Code Civ. Proc. § 86(a)(1)-(9)*, or

- The petition if filed after the arbitration award becomes final and the amount of the award and all other rulings, pronouncements, and decisions made in the award are within *Code Civ. Proc. § 86(a)(1)-(9)*.

[ii] Attorney Fee Arbitration

All arbitration petitions filed to confirm, correct, or vacate a fee arbitration award between an attorney and client that is binding or has become binding, pursuant to *Bus. & Prof. Code § 6200 et seq.*, are limited civil cases if the arbitration award is $25,000 or less [*Code Civ. Proc. § 86(a)(10)(B)*; *see Ch. 72, Attorney Practice and Ethics, § 72.350* et seq.].

[m] Long-Term Care Health Care

An action brought pursuant to the Long-Term Care, Health, Safety, and Security Act of 1973 [*Health & Safety Code § 1417 et seq.*] is a limited civil case if civil penalties are not sought or amount to $25,000 or less [*Code Civ. Proc. § 86.1*].

An action under the act brought as a limited civil case in the superior court may be reclassified as an unlimited civil case for the superior court for consolidation with any other citation enforcement action pending in that court on the motion of either party [*Code Civ. Proc. § 86.1*].

[3] Cases in Equity

[a] Trying Title to Personal Property

A case in equity to try title to personal property is a limited civil case when the amount involved is not more than $25,000 [*Code Civ. Proc. § 86(b)(1)*].

[b] Defenses

A case when equity is pleaded as a defensive matter in any case that is otherwise a limited civil case is also a limited

civil case [*Code Civ. Proc. § 86(b)(2)*].

[c] Vacating Judgment or Order

A case to vacate a judgment or order of the court obtained in a limited civil case through extrinsic fraud, mistake, inadvertence, or excusable neglect is a limited civil case [*Code Civ. Proc. § 86(b)(3)*].

[4] Relief Not Available in Limited Civil Case

[a] In Excess of $25,000

The court in a limited civil case may not grant relief exceeding $25,000, exclusive of attorney's fees, interest, and costs [*Code Civ. Proc. §§ 85(a), 580(b)(1)*].

[b] Permanent Injunctive Relief

The court in a limited civil case may not grant a permanent injunction, except as authorized by statute [*Code Civ. Proc. § 580(b)(2)*].

[c] Determining Title to Real Property

The court in a limited civil case may not grant as relief a determination of the title to real property [*Code Civ. Proc. § 580(b)(3)*].

[d] Declaratory Relief

The court may not grant declaratory relief in a limited civil case, except as authorized by *Code Civ. Proc. § 86* [*Code Civ. Proc. § 580(b)(4)*; *see Code Civ. Proc. § 86(a)(7)*, discussed under § 324.27[3][e]].

[5] Costs and Attorney's Fees

The following discussion applies to the power of the court in a limited civil case [*see* Trial Court Unification: Revision of Codes, 28 Cal. L. Revision Comm'n Reports 51, 144 (comment to *Code Civ. Proc. § 86*; limited civil case equivalent to matter within jurisdiction of municipal court under former law)].

If the recovery on the substantive demand falls within the jurisdiction of the court in a limited civil case, that court retains jurisdiction to award costs and attorney's fees when appropriate, even though those items, when added to the substantive portion of the judgment, aggregate an amount in excess of the court's jurisdictional limit [*Stokus v. Marsh (1990) 217 Cal. App. 3d 647, 653, 266 Cal. Rptr. 90* ; *see Bakkebo v. Municipal Court (1981) 124 Cal. App. 3d 229, 235, 177 Cal. Rptr. 239]* . The court in *Bakkebo*, however, added that attorney's fees awarded as costs and incidental to the judgment "must be reasonable and bear some rational relationship to the amount of the substantive recovery, and *the award for attorney fees cannot in itself exceed the jurisdictional limit*" of the court [*Bakkebo v. Municipal Court (1981) 124 Cal. App. 3d 229, 236, 177 Cal. Rptr. 239* (italics added)]. The italicized language was characterized as nonbinding dicta without precedent and, as such, was rejected by the court of appeal in *Stokus*, which, on certification to it by the superior court, affirmed a municipal court judgment in unlawful detainer for possession of the property and $6,166 damages, and an award of attorney's fees as costs under *Civ. Code § 1717* in the sum of $75,000 [*Stokus v. Marsh (1990) 217 Cal. App. 3d 647, 651, 657, 266 Cal. Rptr. 90]* .

[6] Prior Law Assessing Amount in Controversy Before Court Unification

NOTE:

The cases in this subsection analyze the amount in controversy for purposes of determining if

jurisdiction was vested in the superior court or municipal court before court unification. While all trial courts are now unified into superior courts in California, the principles in these prior cases may be useful in assessing the amount in controversy for purposes of classifying a case as unlimited or limited. Counsel should be careful to inform the court of the nature of these cases if attempting to use them as persuasive authority.

[a] In General

The nature and amount of the demand are normally shown by the prayer of the complaint or cross complaint [*see Code Civ. Proc. § 425.10(b)*], but the pleading as a whole may be examined to determine whether the court has subject matter jurisdiction [*see Sellery v. Ward (1942) 21 Cal. 2d 300, 305, 131 P.2d 550* ; *Campbell v. Superior Court (1989) 213 Cal. App. 3d 147, 151, 261 Cal. Rptr. 509* ; *Security Pac. Nat. Bank v. Lyon (1980) 105 Cal. App. 3d Supp 8, 14, 165 Cal. Rptr. 95* ; *Babcock v. Antis (1979) 94 Cal. App. 3d 823, 828, 156 Cal. Rptr. 673]* . The amount of money sued for, exclusive of interest, normally is the test of jurisdiction in an action to recover money or damages [*see Code Civ. Proc. § 86(a)*; *Hoban v. Ryan (1900) 130 Cal. 96, 98, 62 P. 296]* . This amount includes all damages claimed, whether actual, special, compensatory, exemplary (punitive), statutory, or other [*Hoban v. Ryan (1900) 130 Cal. 96, 98-99, 62 P. 296* ; *see Wells Fargo Bk. & U. T. Co. v. Broad (1934) 3 Cal. App. 2d 45, 46-47, 39 P.2d 241]* .

Except for punitive damages [*see Civ. Code § 3295(e)*] and except for actions for actual or punitive damages for personal injury or wrongful death filed in a superior court, in which the amount of damages sought must not be stated, a complaint or cross complaint seeking recovery of money or damages must state the amount demanded [*Code Civ. Proc. § 425.10(a)(2)*]. The amount of damages in these superior court personal injury or wrongful death cases is determined in the first instance by the Statement of Damages requested and served as provided in *Code Civ. Proc. § 425.11*.

[b] Class Action

In a class action, jurisdiction is determined by the total amount sought on behalf of the represented class rather than on the amount of damages suffered by each individual member of the class [*Archibald v. Cinerama Hotels (1976) 15 Cal. 3d 853, 861, 126 Cal. Rptr. 811, 544 P.2d 947* ; *see, e.g., Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 702, 63 Cal. Rptr. 724, 433 P.2d 732]* .

[c] Action for Conversion

In an action for damages for conversion of personal property, the demand or prayer of the complaint made in good faith and reasonably supported by the allegations on which it is founded determines the amount in controversy [*Hall v. Cline (1920) 45 Cal. App. 616, 617, 188 P. 295]* .

[d] Action in Replevin

In an action to recover personal property (replevin, or claim and delivery), the value of the property determines the amount in controversy; any damages sought are incidental and may not be combined with the value of the property in computing the amount in controversy [*Holm v. Davis (1935) 8 Cal. App. 2d 328, 329-330, 47 P.2d 537]* .

[e] Proceeding in Unlawful or Forcible Detainer or Forcible Entry

The amount in controversy in proceedings in unlawful or forcible detainer or forcible entry is determined by the total amount of damages sought [*see Code Civ. Proc. § 86(a)(4)*, discussed under § 324.27[2][b][v]].

[f] Actions to Enforce Liens

In actions to enforce and foreclose liens on personal property, the amount in controversy is determined by the amount of

the lien [*Code Civ. Proc. § 86(a)(5)*, discussed under § 324.27[2][b][vi]]. This is also true of actions to enforce or foreclose other liens, including mechanics' liens, subject, however, to transfer and consolidation with other actions to foreclose liens relating to the same property [*Code Civ. Proc. § 86(a)(6)*].

[g] Single Plaintiff With Multiple Claims

The rules set out below apply in determining which trial court has subject matter jurisdiction of a case having a single plaintiff prosecuting multiple claims.

1. When a single plaintiff brings several claims against the same defendant, it is the total sum sued for which is the amount in controversy for purposes of subject matter jurisdiction, even if some of the claims have been assigned to plaintiff for collection only [*Emery v. Pacific Employers Ins. Co. (1937) 8 Cal. 2d 663, 666, 67 P.2d 1046* (disapproved on another point in *Barrera v. State Farm Mut. Automobile Ins. Co. (1969) 71 Cal. 2d 659, 679, 79 Cal. Rptr. 106, 456 P.2d 674*)].

2. When a single plaintiff brings several joinable causes of action against the same defendant, and one cause is within the superior court's jurisdiction, the superior court has jurisdiction of the whole case [*St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 358, 287 P.2d 387]* .

3. When a single plaintiff brings properly joinable causes of action against several defendants, the total claim against each being for an amount within the amount which would designate the matter as a limited civil case, the action must be brought in the court of limited jurisdiction, even if the total amount sued for is within the unlimited jurisdiction of the superior court [*Emery v. Pacific Employers Ins. Co. (1937) 8 Cal. 2d 663, 666, 67 P.2d 1046* (disapproved on another point in *Barrera v. State Farm Mut. Automobile Ins. Co. (1969) 71 Cal. 2d 659, 679, 79 Cal. Rptr. 106, 456 P.2d 674*)].

4. When a single plaintiff brings properly joinable causes of action against several defendants, the claim in one cause being within the unlimited jurisdiction of the superior court, the entire case is one of unlimited jurisdiction [*Kaufman v. Pacific Indem. Co. (1936) 5 Cal. 2d 761, 764, 56 P.2d 504]* .

[h] Multiple Plaintiffs

The rules set out below apply in determining which court has subject matter jurisdiction of a case involving multiple plaintiffs prosecuting multiple claims.

1. When multiple plaintiffs are properly joined in the same action, some plaintiffs with limited civil cases and others with unlimited civil cases, the unlimited jurisdiction court has jurisdiction over all the claims [*see* *Emery v. Pacific Employers Ins. Co. (1937) 8 Cal. 2d 663, 667-669, 67 P.2d 1046* (disapproved on another point in *Barrera v. State Farm Mut. Automobile Ins. Co. (1969) 71 Cal. 2d 659, 679, 79 Cal. Rptr. 106, 456 P.2d 674*); *Aldrich v. Transcontinental Land etc. Co. (1955) 131 Cal. App. 2d 788, 796, 281 P.2d 362]* .

2. When multiple plaintiffs are properly joined in the same action each with a limited civil case, the limited jurisdiction court has jurisdiction of the entire cause notwithstanding the aggregate of the claims is above the jurisdictional maximum of that court [*see* *Armstrong v. Transcon. L. & W. Co. (1955) 285 P.2d 1031]* .

[i] Cross Claims

The rules set out below apply in determining whether the court has subject matter jurisdiction of the case when a cross

complaint is filed. The rules are:

1. A superior court with unlimited jurisdiction having jurisdiction of the action set forth in the complaint has jurisdiction of a proper cross complaint even though the cross complaint involves determination of issues within the limited jurisdiction of the court [*Collison v. Thomas (1961) 55 Cal. 2d 490, 499, 11 Cal. Rptr. 555, 360 P.2d 51]* .

2. When an unlimited civil case is commenced on a demand within limited jurisdiction of the court and a cross complaint is thereafter filed within the original jurisdiction of the superior court, the court of unlimited jurisdiction may decide both claims [*Brix v. Peoples Mut. Life Ins. Co. (1935) 2 Cal. 2d 446, 449-450, 41 P.2d 537]* . But when the cross complaint sets up a limited jurisdiction demand, the court lacks jurisdiction over both the complaint and cross complaint and must transfer the case to the court of limited jurisdiction [*see* *Jacobson v. Superior Court (1936) 5 Cal. 2d 170, 174, 53 P.2d 756]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionAmount in ControversyCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsLimited JurisdictionCivil ProcedureEquityGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral Overview

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28-324 California Forms of Pleading and Practice--Annotated § 324.63

§ 324.63 Pleadings Required to Identify Limited Civil Case in Superior Court

In limited civil cases, the caption of every pleading must state that the case is a limited civil case, and the clerk classifies the case accordingly [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10), (11)*].

For discussion of what constitutes a limited civil case, see *§ 324.62*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsLimited JurisdictionCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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28-324 California Forms of Pleading and Practice--Annotated § 324.64

§ 324.64 Reclassification of Case by Plaintiff

If a plaintiff, cross complainant, or petitioner files an amended complaint or other amended initial pleading that changes the jurisdictional classification from limited to unlimited, the party at the time of filing the pleading shall pay the reclassification fee provided in *Code Civ. Proc. § 403.060*, and the clerk shall promptly reclassify the case. If the amendment changes the jurisdictional classification from unlimited to limited, no reclassification fee is required, and the clerk shall promptly reclassify the case [*Code Civ. Proc. §§ 403.020(a)*; for discussion of the fees, *see § 324.70*].

The same rule applies in the case of an amendment to a pleading [*Code Civ. Proc. § 403.010*].

If a case is reclassified by an amended complaint, cross-complaint, amended cross-complaint, or other pleading under *Code Civ. Proc. §§ 403.020* or *403.030*, the caption must indicate that the action or proceeding is reclassified by this pleading [*Cal. Rules of Ct., Rule 2.111(11)*]. If a case is reclassified by stipulation under *Code Civ. Proc. § 403.050*, the title of the stipulation must state that the action or proceeding is reclassified by this stipulation. The caption or title must state that the case is a limited civil case reclassified as an unlimited civil case, or an unlimited civil case reclassified as a limited civil case, or other words to that effect [*Cal. Rules of Ct., Rule 2.111(11)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsLimited JurisdictionCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral Overview

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28-324 California Forms of Pleading and Practice--Annotated § 324.65

§ 324.65 Reclassification of Case by Stipulation

The parties to the action or proceeding may stipulate to reclassification of the case within the time allowed to respond to the initial pleading [*Code Civ. Proc. § 403.050(a)*]. If the stipulation for reclassification changes the jurisdictional classification of the case from limited to unlimited, the reclassification fee provided in *Section 403.060* must be paid at the time the stipulation is filed. [*Code Civ. Proc. § 403.050(b)*]. Upon filing of the stipulation and the payment of the reclassification fee provided in *Section 403.060*, if required for changing from limited to unlimited, the clerk must promptly reclassify the case [*Code Civ. Proc. § 403.050(c)*].

If a case is reclassified by stipulation under *Code Civ. Proc. § 403.050*, the title of the stipulation must state that the action or proceeding is reclassified by this stipulation. The caption or title must state that the case is a limited civil case reclassified as an unlimited civil case, or an unlimited civil case reclassified as a limited civil case, or other words to that effect [*Cal. Rules of Ct., Rule 2.111(11)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsLimited Jurisdiction

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28-324 California Forms of Pleading and Practice--Annotated § 324.66

§ 324.66 Reclassification of Limited Civil Case by Filing of Cross Complaint

If a party in a limited civil case files a cross-complaint that causes the action or proceeding to exceed the maximum amount in controversy for a limited civil case, or otherwise fails to satisfy the requirements for a limited civil case as prescribed by *Code Civ. Proc. § 85*, the caption of the cross-complaint shall state that the action or proceeding is a limited civil case to be reclassified by cross-complaint, or words to that effect [*Code Civ. Proc. § 403.030*; *Cal. Rules of Ct., Rule 2.111(11)*]. The party at the time of filing the cross-complaint shall pay the reclassification fees provided in *Code Civ. Proc. § 403.060*, and the clerk shall promptly reclassify the case [*Code Civ. Proc. § 403.030*; for discussion of the fees, *see § 324.66[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionAmount in ControversyCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsLimited JurisdictionCivil ProceduresPleading & PracticePleadingsComplaintsCross-Complaints

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28-324 California Forms of Pleading and Practice--Annotated § 324.67

§ 324.67 Motion to Reclassify Case if Erroneously Classified in Initial Pleading

[1] By Party Within Time to Amend or Respond to Initial Pleading

[a] Motion Authorized

If the caption of the complaint, cross-complaint, petition, or other initial pleading erroneously states or fails to state, pursuant to *Code Civ. Proc. § 422.30(b)*, that the action or proceeding is a limited civil case, a party may file a motion for reclassification, within the time allowed for that party to amend or respond to the initial pleading [*Code Civ. Proc. §§ 403.010, 403.040(a)*].

For forms of motion and notices of motion to reclassify a case, see *§§ 324.120* and *324.121*.

[b] Motion Does Not Extend Time to Respond

A motion for reclassification does not extend the moving party's time to amend, answer, or otherwise respond [*Code Civ. Proc. § 403.040(a)*].

[c] Motion Constitutes Appearance

A defendant's motion for reclassification pursuant to *Code Civ. Proc. § 403.040* constitutes an appearance in the action [*Code Civ. Proc. § 1014*].

For discussion of appearances, see Ch. 323, *Jurisdiction: Personal* .

[2] By Party After Expiration of Time to Respond to Initial Pleading

A party may file a motion for reclassification after the time for that party to amend or respond to the complaint, cross complaint, or other initial pleading. The court is to grant the motion only if [*Code Civ. Proc. § 403.040(b)*]:

- The case is incorrectly classified.
- The moving party shows good cause for not seeking reclassification earlier.

For a form of motion and notice of motion to reclassify a case after time to amend or respond to a complaint, see *§ 324.123*.

[3] By the Court's Own Motion

The case may be reclassified on the court's own motion at any time [*Code Civ. Proc. § 403.040(a)*]. See [4], *below*, for notice and hearing requirements if court seeks reclassification on its own motion.

[4] Notice and Opportunity to be Heard Required

Whether a party makes a motion or the court raises the jurisdictional issue on its own motion, the court must provide sufficient opportunity to respond and offer reasons why reclassification should or should not be ordered, and even if no hearing is held, before ordering reclassification the court must afford the parties an opportunity to contest reclassification [*Stern v. Superior Court (2003) 105 Cal. App. 4th 223, 230-231, 129 Cal. Rptr. 2d 275]* .

[5] Determination of Amount in Controversy

Although the reclassification statutes have made numerous changes, the jurisdictional amount in controversy has not changed and continues to provide a basis for reclassification of cases at law [*Code Civ. Proc. §§ 85(a), 86(a)(1), 403.010 et seq.*], the statutory changes have not altered substantive and procedural law governing how a trial court values a case to determine the jurisdictional amount in controversy, and the *Walker* test [*Walker v. Superior Court (1991) 53 Cal. 3d 257, 262]* continues to govern the determination of the jurisdictional amount in controversy for reclassification as a limited civil case, *i.e.*, that the matter will "necessarily" result in a verdict below the jurisdictional amount [*Stern v. Superior Court (2003) 105 Cal. App. 4th 223, 229-231, 129 Cal. Rptr. 2d 275]* .

The *unlikeliness* of a judgment in excess of $25,000 is *not the test*. The trial court reviews the record to determine whether the result is obtainable. Simply stated, the trial court looks to the *possibility of a jurisdictionally appropriate verdict, not to its probability*. Accordingly under *Walker* the superior court must deny the motion to reclassify the case as limited (and thus keep the matter in the unlimited civil court) *unless* it appears to a legal certainty that the plaintiff's damages will necessarily be less than $25,000. This standard of "legal certainty" is not met when it appears a verdict within the unlimited court's jurisdiction is "possible" [*Ytuarte v. Superior Court (2005) 129 Cal. App. 4th 266, 277, 28 Cal. Rptr. 3d 474]* .

[6] Reclassification Not Required After Trial or Hearing Because Judgment Could Have Been Rendered in Limited Civil Case

Nothing in *Code Civ. Proc. § 403.040*, discussed above, is to be construed to require the superior court to reclassify any action or proceeding because the judgment to be rendered, as determined at the trial or hearing, is one that might have been rendered in a limited civil case [*Code Civ. Proc. § 403.040(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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28-324 California Forms of Pleading and Practice--Annotated § 324.68

§ 324.68 Continuation as Limited Civil Case if Amount in Excess of Jurisdiction Is Remitted

In any case where the erroneous classification is due solely to an excess in the amount of the demand, the excess may be remitted and the action may continue as a limited civil case [*Code Civ. Proc. § 403.040(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionAmount in ControversyCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsLimited Jurisdiction

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28-324 California Forms of Pleading and Practice--Annotated § 324.69

§ 324.69 Right to Amend Pleadings Not Affected

Nothing in *Code Civ. Proc. § 403.010 et seq.* expands or limits the law whether a plaintiff, cross complainant, or petitioner may file an amended complaint or other initial pleading [*Code Civ. Proc. § 403.010*].

Moreover, nothing in *Code Civ. Proc. § 403.010 et seq.* expands or limits the the law on whether, and to what extent, an amendment relates back to the date of filing of the original complaint or other pleading [*Code Civ. Proc. § 403.010(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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28-324 California Forms of Pleading and Practice--Annotated § 324.70

§ 324.70 Costs and Fees

[1] Reclassification From Limited to Unlimited Civil Case

When a court grants a motion for reclassification, if a party misclassified a case as a limited civil case, the party must pay as a reclassification fee the difference between the fee paid for filing the first paper in a limited civil case and the fee for filing the first paper in an unlimited civil case. A similar adjustment must be made for other fees paid before the reclassification. The payment of the reclassification fee shall be determined, unless the court orders otherwise, as set forth in *Code Civ. Proc. § 403.040(c)*.

[2] Reclassification From Unlimited to Limited Civil Case

When a court grants a motion for reclassification, if a party failed to classify a case as a limited civil case, the party is not required to pay a new fee for filing the first paper in a limited civil case [*Code Civ. Proc. § 403.040(c)(2)*].

[3] Payment

[a] Prompt Reclassification on Payment

If the court orders reclassification under *Code Civ. Proc. § 403.040*, discussed above, and fees have been paid as provided in *Code Civ. Proc. § 403.060*, the clerk is to reclassify the case promptly [*Code Civ. Proc. § 403.040(d)(1)*].

[b] Payment by Any Interested Party

If the fees have not been paid as provided in *Code Civ. Proc. § 403.040*, discussed above, within five days after service of notice of the order for reclassification, any party interested in the case, regardless of whether that party is named in the complaint, may pay the fees, and the clerk is to reclassify the case as if the fees had been paid as provided in *Code Civ. Proc. § 403.060* [*Code Civ. Proc. § 403.040(d)(2)*]. The fee shall then be a proper item of costs of the party paying it, recoverable if that party prevails in the action or proceeding; otherwise, the fee shall be offset against and deducted

from the amount, if any, awarded to the party responsible for the fee, if that party prevails in the action or proceeding [*Code Civ. Proc. § 403.040(d)(2)*].

[c] No Further Proceedings Until Payment Is Made

The cause of action cannot be further prosecuted in any court until the reclassification fees are paid [*see Code Civ. Proc. § 403.040(d)(2)*].

[d] Dismissal In Case of Nonpayment

If the reclassfication fees are not paid within 30 days after service of notice of an order for reclassification, the court on its own motion or motion of any party may order the case to proceed as a limited civil case, dismiss the action or cross-action without prejudice on the condition that no other action or proceeding on the same matters may be commenced in any other court until the reclassification fee is paid, or take such other action as the court may deem appropriate [*see Code Civ. Proc. § 403.040(d)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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28-324 California Forms of Pleading and Practice--Annotated § 324.71

§ 324.71 Continuation of Case as Reclassified

[1] Statute of Limitations Measured From Original Filing Not From Time of Reclassification

An action or proceeding that is reclassified shall be deemed to have been commenced at the time the complaint or petition was initially filed, not at the time of reclassification [*Code Civ. Proc. § 403.070(a)*; *see also Code Civ. Proc. § 403.010* (reclassification has no effect on rules relating to relation back of amended pleading)].

[2] Treated as Though Commenced as Reclassified With Prior Proceedings Saved

The court shall have and exercise over the reclassified action or proceeding the same authority as if the action or proceeding had been originally commenced as reclassified. All prior proceedings are saved [*Code Civ. Proc. § 403.070(b)*].

[3] Amendment of Pleadings for Proper Presentation and Determination Case as Reclassified

The court may allow or require whatever amendment of the pleadings, filing and service of amended, additional, or supplemental pleadings, or giving of notice, or other appropriate action, as may be necessary for the proper presentation and determination of the action or proceeding as reclassified [*Code Civ. Proc. § 403.070(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsLimited JurisdictionCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral Overview

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28-324 California Forms of Pleading and Practice--Annotated § 324.72

§ 324.72 Review of Order Granting or Denying Reclassification

[1] By Writ of Mandate

When an order is made by the superior court granting or denying a motion to reclassify an action or proceeding pursuant to *Code Civ. Proc. § 403.040*, the party aggrieved by the order may petition the court of appeal for the district in which the court granting or denying the motion is situated for a writ of mandate requiring proper classification of the action or proceeding pursuant to *Code Civ. Proc. § 403.040* [*Code Civ. Proc. § 403.080*].

The petitioner must file a copy of the petition in the trial court immediately after the petition is filed in the court of appeal [*Code Civ. Proc. § 403.080*].

[2] Time Limit for Filing Petition

The petition must be filed within 20 days after service of a written notice of the order. The superior court may, for good cause, and prior to the expiration of the initial 20-day period, extend the time for one additional period not to exceed 10 days [*Code Civ. Proc. § 403.080*].

[3] Stay of Proceedings

The court of appeal may stay all proceedings in the case, pending judgment on the petition becoming final [*Code Civ. Proc. § 403.080*].

[4] Notice to Trial Court of Court of Appeal Order or Judgment

The clerk of the court of appeal is required to file with the clerk of the trial court, a copy of any final order or final judgment immediately after the order or judgment becomes final [*Code Civ. Proc. § 403.080*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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28-324 California Forms of Pleading and Practice--Annotated §§ 324.73-324.79

[Reserved]

§§ 324.73[Reserved]

California Forms of Pleading and Practice--Annotated

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329
Chapter 324 JURISDICTION: SUBJECT MATTER JURISDICTION
PART III. RESEARCH GUIDE

28-324 California Forms of Pleading and Practice--Annotated § 324.80

§ 324.80 Related Publications from Matthew Bender

For discussion and forms for use in securing relief from judgments that are void for lack of jurisdiction, see Ch. 489, *Relief From Judgments and Orders*

For discussion and forms for use to demur to a complaint on the ground the court lacks subject matter jurisdiction of the action, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

For discussion and forms for use in securing dismissal of a federal action for lack of subject matter jurisdiction and for removing an action within the original jurisdiction of the federal district courts from a California state court to a federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For discussion, a procedural guide, and forms for use in obtaining a writ of mandate, see Ch. 358, *Mandate and Prohibition*

For discussion, procedural guide, and forms of notices of motions and orders generally, see Ch. 372, *Motions and Orders*

For discussion of the jurisdictional issues that may be considered on a petition for writ of mandate under *Code Civ. Proc. § 1094.5* to determine the validity of a final administrative order or decision, see Ch. 474B, *Standards in Reviewing Agency Decisions*

For a discussion, procedural guide, and forms for use in obtaining a writ of certiorari, see Ch. 492, *Review (Certiorari), Writ of*

For a discussion of the jurisdiction of the small claims courts, see Ch. 526, *Small Claims*

For a discussion of venue and forms relating to change of venue generally, see Ch. 571, *Venue*

For memoranda supporting and opposing a demurrer to a complaint for lack of subject matter jurisdiction, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , Pt. I

For memoranda supporting a motion to transfer an action from a court lacking to a court having subject matter jurisdiction, see California Points and Authorities, Ch. 133, *Jurisdiction: Subject Matter Jurisdiction*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalBasisGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsAppellate JurisdictionState Court ReviewGovernmentsCourtsSmall Claims Courts

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28-324 California Forms of Pleading and Practice--Annotated § 324.81

§ 324.81 Federal Constitution

Requirement that full faith and credit be given in each statute to judicial proceedings of every other state. U.S. Const., art. IV

Prohibition against depriving person of life, liberty, or property without due process of law. *U.S. Const., amends. V, XIV*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawRelations Among GovernmentsFull Faith & CreditConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionConstitutional LawSubstantive Due ProcessScope of Protection

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28-324 California Forms of Pleading and Practice--Annotated § 324.82

§ 324.82 State Constitution

Prohibition against depriving person of life, liberty, or property without due process of law. *Cal. Const., art. I, § 7(a)*

Courts of California judicial system. *Cal. Const., art. VI, § 1*

California Supreme Court. *Cal. Const., art. VI, §§ 1, 2, 10-12*

California courts of appeal. *Cal. Const., art. VI §§ 1, 3, 10, 11*

Superior courts. *Cal. Const., art. VI, §§ 1, 4, 10, 11*

Limitations on powers of courts to set aside judgment or grant new trial. *Cal. Const., art. VI, § 13*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionConstitutional LawSubstantive Due ProcessScope of ProtectionGovernmentsCourtsCreation & Organization

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28-324 California Forms of Pleading and Practice--Annotated § 324.83

§ 324.83 State Statutes

[1] Claim of Lack of Jurisdiction

Objection that court has no jurisdiction of subject of cause of action alleged in pleading is not waived by party's failure to raise objection by demurrer or answer. *Code Civ. Proc. § 430.80(a)*

[2] Courts of Appeal

Jurisdiction to review decisions of Department of Alcoholic Beverage Control. *Bus. & Prof. Code § 23090*

Powers on appellate review. *Code Civ. Proc. §§ 43, 906-909*

Statutory provisions governing courts of appeal generally. *Gov. Code §§ 68926-68932* and *69100-69154*

Court of appeal districts. *Gov. Code & sect; 69100*

Jurisdiction to review decisions of Workers' Compensation Appeals Board. *Lab. Code § 5955*

Jurisdiction to review decisions of Public Utilities Commission. *Pub. Util. Code §§ 1756(a), (f), (g), 1759*

[3] Limited Civil Cases

Limited civil cases defined. *Code Civ. Proc. §§ 85, 86, 86.1*

Appealable judgments and orders. *Code Civ. Proc. § 904.2*

[4] Reclassification of Civil Case

Reclassification of civil actions and proceedings. *Code Civ. Proc. § 403.010 et seq.*

[5] Small Claims Courts

Statutory provisions governing. *Code Civ. Proc. § 116.110 et seq.*

Jurisdiction. *Code Civ. Proc. § 116.220*

[6] Superior Courts

Appellate divisions. *Code Civ. Proc. § 77*

Appealable judgments and orders. *Code Civ. Proc. §§ 904.1, 904.2*

Powers on appellate review. *Code Civ. Proc. §§ 906-909*

Statutory provisions governing superior courts generally. *Gov. Code §§ 69504-70148* and *71386*

[7] Supreme Court

Jurisdiction to review decisions of Department of Alcoholic Beverage Control. *Bus. & Prof. Code § 23090*

Powers on appellate review. *Code Civ. Proc. §§ 43, 906-909*

Jurisdiction to review decisions of Workers' Compensation Appeals Board. *Lab. Code § 5955*

Jurisdiction to review orders of Public Utilities Commission. *Pub. Util. Code §§ 1756(a), (f), (g), 1759*

[8] Transfer to Court Having Subject Matter Jurisdiction

Costs and fees on transfer and procedure. *Code Civ. Proc. § 399*

Transfer of appeal or petition from court lacking to court having subject matter jurisdiction. *Code Civ. Proc. § 396*

Dismissal of action for failure to pay costs of transfer. *Code Civ. Proc. § 399*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityJurisdiction & VenueCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsLimited JurisdictionCivil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionState Court ReviewGovernmentsCourtsSmall Claims Courts

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28-324 California Forms of Pleading and Practice--Annotated § 324.84

§ 324.84 Decisions

[1] Advisory Opinions

High court's answer to a certified question under [former] Cal. Rules of Ct., Rule 29.5 is not improper advisory opinion if (1) court addresses only issues truly contested by parties and presented on factual record, and (2) court's opinion on certified question will be dispositive of issue and res judicata between parties. *Los Angeles Alliance for Survival v. City of Los Angeles (2000) 22 Cal. 4th 352, 362, 93 Cal. Rptr. 2d 1, 993 P.2d 334*

The controversy that is the subject of declaratory relief must be of a character which admits of specific and conclusive relief by judgment within the field of judicial determination, as distinguished from an advisory opinion upon a particular or hypothetical state of facts. *Gafcon, Inc. v. Ponsor & Associates (2002) 98 Cal. App. 4th 1388, 1402-1403, 120 Cal. Rptr. 2d 392*

To invoke the jurisdiction of a court of justice, it is primarily essential that there be involved a genuine and existing controversy, calling for present adjudication as involving present rights; normally, in a civil action, the court is apprized of such a controversy by the filing of a complaint, which must describe the facts giving rise to a cause of action and state a demand for appropriate relief [*Code Civ. Proc. § 425.10*]; in the absence of a present controversy between the parties, the superior court should not assume jurisdiction. *Housing Group v. United Nat'l Ins. Co. (2001) 90 Cal. App. 4th 1106, 1111, 109 Cal. Rptr. 2d 497*

Court may not issue rulings not ripe for review; trial court improperly issued advisory opinion in granting petition for writ of mandate brought by public employees association compelling city to refrain from reducing or eliminating retirement medical and dental benefits unless offsetting benefits were provided, when city and collective bargaining units simply agreed to meet and confer regarding retiree benefits, but did not agree to eliminate or modify those benefits. *San Bernardino Public Employees Assn. v. City of Fontana (1998) 67 Cal. App. 4th 1215, 1226-1227, 79 Cal. Rptr. 2d 634*

California courts are not empowered to render advisory opinions to satisfy curiosity of parties motivated by reasons

ulterior to resolution of an actual dispute. *Nowlin v. Department of Motor Vehicles (1997) 53 Cal. App. 4th 1529, 1539, 62 Cal. Rptr. 2d 409*

[2] Appellate Jurisdiction

Under *Cal. Const., art. VI, § 12* and Cal. Rules of Ct, Rules 29.2 and 29.4(b) [*now see Cal. Rules of Ct., Rules 8.500* and *8.528(c)*], Supreme Court may decide one or more issues and transfer cause to court of appeal for decision of any remaining issues; when, however, court of appeal, in its discretion, has transferred to itself case from appellate department of superior court to secure uniformity of decision or to settle important questions of law, under *Code Civ. Proc. § 911* and former Cal. Rules of Ct., Rules 62, 63 and 68 (now see *8.1002*, *8.1005* and *8.1016*) court of appeal is not authorized to decide selected issues that are not dispositive of appeal; rather, court of appeal must decide issues necessary to resolution of appeal and thereafter transmit remittitur to the superior court; *Code Civ. Proc. § 911*, however, does not appear to preclude Judicial Council from revising current rules of court to allow such limited review and remand procedure. *Snukal v. Flightways Manufacturing, Inc. (2000) 23 Cal. 4th 754, 758, 761-762, 766, 772-776, 787, 98 Cal. Rptr. 2d 1, 3 P.3d 286*

A court's lack of subject matter jurisdiction is never waived and can be raised for the first time on appeal. *Miranda v. 21st Century Ins. Co. (2004) 117 Cal. App. 4th 913, 920, 12 Cal. Rptr. 3d 159* ; *Parrott v. Mooring Townhomes Assn., Inc. (2003) 112 Cal. App. 4th 873, 875, 6 Cal. Rptr. 3d 116*

Appellate jurisdiction is solely within province of Legislature, since right to appeal is not conferred by California Constitution but by statute; court of appeal lacks power to bestow jurisdiction on itself, nor may parties create jurisdiction by consent, waiver, or estoppel. *Sy First Family Ltd. Partnership v. Cheng (1999) 70 Cal. App. 4th 1334, 1344-1345, 83 Cal. Rptr. 2d 340*

Appealable judgment or order is essential to appellate jurisdiction. *State Farm Fire & Casualty v. Hardin (1989) 211 Cal. App. 3d 501, 505, 259 Cal. Rptr. 433*

Although trial court is deprived of jurisdiction over case when appeal is perfected, wholly void judgment or order is subject to being disregarded by parties and trial court and set aside by trial court on its own motion though appeal from it is pending. *In re Marriage of McNaughton (1983) 145 Cal. App. 3d 845, 848, 194 Cal. Rptr. 176*

Appellate court is without jurisdiction to review any decision or order from which appeal might have been but was not timely taken. *League to Save Lake Tahoe v. Tahoe Regional Planning Agency (1980) 105 Cal. App. 3d 394, 399, 164 Cal. Rptr. 357*

Jurisdiction is not subject to being conferred on appellate court by consent or stipulation of parties, or by estoppel or waiver. *Todd v. Todd (1969) 272 Cal. App. 2d 786, 797, 78 Cal. Rptr. 131*

[3] Compelling Court to Take Jurisdiction

Mandate is proper remedy to compel lower court to assume jurisdiction of matter when lower court has erroneously refused to act under mistaken view that it did not have jurisdiction. *Erlich v. Superior Court (1965) 63 Cal. 2d 551, 556, 47 Cal. Rptr. 473, 407 P.2d 649* ; *McMahon v. Municipal Court (1970) 6 Cal. App. 3d 194, 197, 85 Cal. Rptr. 782*

Mandate is proper remedy to compel court having jurisdiction of matter to assume jurisdiction when neither it nor lower court would do so because each believed other had subject matter jurisdiction. *Great-West Life Assur. Co. v. Superior Court (1969) 271 Cal. App. 2d 124, 124, 76 Cal. Rptr. 284*

[4] Concurrent Jurisdiction

[a] California Courts

Under statutory procedure (*Gov. Code § 17500 et seq.*) for determining whether statute imposes state-mandated costs on local agency within meaning of Cal. Const., art. XIIIB, § 6, court hearing test claim has primary jurisdiction; thus, if action asserting same unfunded mandate claim is filed in any other superior court, that court, on being informed of pending test claim, should postpone proceeding before it and allow court having primary jurisdiction to determine test claim; however, court's erroneous refusal to stay further proceedings does not render those proceedings void for lack of jurisdiction; court that refuses to defer to another court's primary jurisdiction is not without jurisdiction. *County of San Diego v. State of California (1997) 15 Cal. 4th 68, 81-82, 88, 61 Cal. Rptr. 2d 134, 931 P.2d 312*

Pub. Util. Code § 1759(a) provides that only the Supreme Court and Courts of Appeal have jurisdiction to review, reverse, correct, or annul any order or decision of the Public Utilities Commission (PUC) or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the PUC in the performance of its official duties. Although *Pub. Util. Code § 2106* provides that a party may bring a civil action in superior court for damages against a utility that does any act prohibited (or omits to do any act required) by law of the state, section 1759 prevails over section 2106, unless the superior court action would not interfere with or obstruct the PUC in carrying out its own policies. *Anaheim v. Pacific Bell Telephone Co. (2004) 119 Cal. App. 4th 838, 844, 14 Cal. Rptr. 3d 725*

The primary jurisdiction doctrine contemplates that a ruling issued by an agency is subject to judicial review. When primary jurisdiction is properly invoked, the doctrine requires that the suit be stayed until the agency resolves the issue, whereupon the lawsuit resumes if the agency's resolution (assuming it survives review by whatever court has jurisdiction to review the agency's decisions) has not resolved the entire controversy. *Wise v. Pacific Gas & Electric Co. (2005) 132 Cal. App. 4th 725, 741, 34 Cal. Rptr. 3d 222*

Public Utilities Commission does not have exclusive jurisdiction over a case involving deception (defendants' alleged intentional or negligent misrepresentation about the true nature of their telephone equipment rental charges). This is not a topic about which the Commission would have more expertise than the trial court, or even as much expertise. Actions based on alleged deceit are not known to be within the technical expertise of the Commission. *Cundiff v. GTE California Inc. (2002) 101 Cal. App. 4th 1395, 1412-1413*

When two state courts have concurrent jurisdiction over same parties and subject matter, tribunal that first acquires jurisdiction of parties is entitled to retain it exclusively, and other court as required ordinarily to abate its proceedings on demand. *Mission Imports, Inc. v. Superior Court (1982) 31 Cal. 3d 921, 926 n.3, 184 Cal. Rptr. 296, 647 P.2d 1075* ; *In re Hanley (1988) 199 Cal. App. 3d 1109, 1115, 245 Cal. Rptr. 441* , overruled to extent inconsistent with *Leadford v. Leadford (1992) 6 Cal. App. 4th 571, 575*

Where two or more courts have concurrent subject matter jurisdiction over case, whichever court first asserts jurisdiction does so to exclusion of all other courts. Franklin & Franklin v. 7- *Eleven Owners for Fair Franchising (2000) 85 Cal. App. 4th 1168, 1175, 102 Cal. Rptr. 2d 770*

Rule of exclusive concurrent jurisdiction must be raised by request for affirmative relief by demurrer or answer or by motion to dismiss, stay, or transfer; second court retains jurisdiction to act until appropriate pleading is filed. *People ex rel. Garamendi v. American Autoplan, Inc. (1993) 20 Cal. App. 4th 760, 774, 25 Cal. Rptr. 2d 192*

Superior court and administrative board possess concurrent jurisdiction to determine jurisdiction, but first-filed superior court action takes priority; jurisdiction, once determined, will be exclusive, not concurrent. *Aetna Casualty & Surety Co. v. Aceves (1991) 233 Cal. App. 3d 544, 552-554, 284 Cal. Rptr. 477*

Abatement of action under rule of exclusive concurrent jurisdiction distinguished from abatement on statutory ground of another action pending between same parties on same cause (*Code Civ. Proc. § 430.10(c)*); requirements for applicability of rule. *Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 786-789, 274 Cal. Rptr. 147*

In applying rule that first court which acquires jurisdiction of parties is entitled to retain it exclusively, tribunal where process is served first as tribunal having priority, regardless of which action was filed first. *In re Hanley (1988) 199 Cal. App. 3d 1109, 1116, 245 Cal. Rptr. 441* , overruled to extent inconsistent with *Leadford v. Leadford (1992) 6 Cal. App. 4th 571, 575*

Between superior courts of different counties, having coequal jurisdiction over a matter, first court of equal dignity to assume and exercise jurisdiction over matter acquires exclusive jurisdiction. *Ford v. Superior Court (1986) 188 Cal. App. 3d 737, 742, 233 Cal. Rptr. 607*

When two or more California tribunals have concurrent jurisdiction over same parties and subject matter, tribunal of case in which process is served first has priority, regardless of which action was filed first; if other tribunal refuses to abate its proceedings on demand, remedy is by writ of prohibition. *Mungia v. Superior Court (1964) 225 Cal. App. 2d 280, 283, 37 Cal. Rptr. 285*

[b] Courts of Two or More States

The first filed rule in California means that when two courts of the same sovereignty have concurrent jurisdiction, the first to assume jurisdiction over a particular subject matter of a particular controversy takes it exclusively, and the second court should not thereafter assert control over that subject matter; however, the first filed rule "was never meant to apply where the two courts involved are not courts of the same sovereignty ... . Restraining a party from pursuing an action in a court of foreign jurisdiction involves delicate questions of comity and therefore requires that such action be taken only with care and great restraint." *Advanced Bionics Corp. v. Medtronic, Inc. (2002) 29 Cal. 4th 697, 707, 128 Cal. Rptr. 2d 172*

It has long been the rule in California that an intangible, unlike real or tangible personal property, has no physical characteristics that would serve as a basis for assigning it to a particular locality. The location assigned to it depends on what action is to be taken with reference to it. When the issue involves jurisdiction to compel an obligor to pay one claimant and not a competing claimant, the debt or claim is usually regarded as having a situs in any state in which personal jurisdiction of the debtor can be obtained. *Pacific Decision Sciences Corp. v. Superior Court of Orange County (2004) 121 Cal. App. 4th 1100, 1108, 18 Cal. Rptr. 3d 104*

Rule in California as being that when two courts have concurrent jurisdiction over same parties and subject matter, tribunal which first acquires jurisdiction is entitled to retain it exclusively, and other court, as ordinarily required to abate its proceedings on demand; in applying this rule, it is tribunal where process is served first that has priority, regardless of which action was filed first. *In re Hanley (1988) 199 Cal. App. 3d 1109, 1115-1116, 245 Cal. Rptr. 441* (finding State of Washington had same rule and holding that Washington court first obtained jurisdiction and right to proceed with divorce proceeding initiated by wife to exclusion of California court where wife first completed service of her complaint on husband in Washington proceeding, despite fact that husband's complaint was filed first in California), overruled to extent inconsistent with *Leadford v. Leadford (1992) 6 Cal. App. 4th 571, 575*

Judgment rendered in a state of the United States is not recognized or enforced in sister states if an inconsistent, but valid, judgment is subsequently rendered in another action between parties and if earlier judgment is superseded by later judgment under local law of state where latter judgment was rendered; moreover, when in two actions inconsistent final

judgments are rendered, it is later, not earlier, judgment that is accorded conclusive effect in third action under rules of res judicata; this is case even when court which rendered later judgment denied full faith and credit to first judgment or made other errors of fact or law. *In re Hanley (1988) 199 Cal. App. 3d 1109, 1117-1118, 245 Cal. Rptr. 441* , overruled to extent inconsistent with *Leadford v. Leadford (1992) 6 Cal. App. 4th 571, 575*

[c] State and Federal Courts

State courts may assume subject matter jurisdiction over federal cause of action absent provision by U.S. Congress to contrary or disabling incompatibility between federal claim and state court adjudication. *Gulf Offshore Co.v. Mobil Oil Corp. (1981) 453 U.S. 473, 477-478, 101 S. Ct. 2870, 69 L. Ed. 2d 784*

Federal district court erred in remanding to state court when forum selection clause referring to California courts in Orange County was permissive, not mandatory. *Hunt Wesson Foods, Inc. v. Supreme Oil Co. (9th Cir. 1987) 817 F. 2d 75, 77-78*

Presumption of concurrent jurisdiction between federal courts and state courts arises when jurisdictional provision in question is silent as to jurisdiction of state courts. *Kingston Constructors, Inc. v. Washington Metropolitan Area Transit Authority (1997) 14 Cal. 4th 939, 943-949, 928 P.2d 581*

Federal supremacy principles prohibit state courts of general jurisdiction from refusing to entertain suits under the Federal Employers' Liability Act (FELA) [*45 U.S.C.S. § 51 et seq.*], which is incorporated by reference into the Jones Act [*46 U.S.C.S. App. § 688 et seq.*], solely because suit is brought under federal law or because enforcement of the federal right of action is deemed contrary to state policy or apt to cause inconvenience and confusion because of differing state and federal standards. Thus, states must entertain suits timely filed under the Jones Act despite state limitation statutes that might otherwise bar suit. *Donaldson v. National Marine (2005) 35 Cal. 4th 503, 510, 25 Cal. Rptr. 3d 584, 107 P.3d 254*

Where a legal malpractice action presents substantial issues of federal patent law in the elements of causation and damages, the matter should have been adjudicated in federal court. *Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP (2010) 183 Cal. App. 4th 238, 248, 107 Cal. Rptr. 3d 373*

Where a matter has a core proceeding in bankruptcy law, the bankruptcy court has subject matter jurisdiction over it. Bankruptcy judges may hear and determine all cases under Title 11 and all core proceedings arising under Title 11, or arising in a case under Title 11, including matters concerning the administration of the estate and other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims. However, these provisions do not require the preemption of a subsequent malicious prosecution action based on an underlying fraud action, which was filed outside of bankruptcy and was not based in federal law. State court jurisdiction over the malicious prosecution case that is founded upon the unsuccessful fraud allegations will not improperly accomplish the adjustment of rights and duties within the bankruptcy process itself, which is uniquely and exclusively federal, nor will it interfere with uniformity of application of bankruptcy law. *Satten v. Webb (2002) 99 Cal. App. 4th 365, 384-387, 121 Cal. Rptr. 2d 234* .

State courts have inherent authority to adjudicate federal claims unless federal government expressly divests state courts of their concurrent jurisdiction; thus, claims under the Death on the High Seas Act (DOHSA), 46 Appen. U.S.C. § 761 et seq., may be litigated in state court. *Garofalo v. Princess Cruises, Inc. (2000) 85 Cal. App. 4th 1060, 1080, 102 Cal. Rptr. 2d 754*

State courts have concurrent jurisdiction over actions under Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C. § 1961 et seq.* *Cianci v. Superior Court (1985) 40 Cal. 3d 903, 908, 221 Cal. Rptr. 575, 710 P.2d*

375 ; *Gervase v. Superior Court (1995) 31 Cal. App. 4th 1218, 1228, 37 Cal. Rptr. 2d 875*

State courts have inherent authority, and are presumptively competent, to adjudicate claims arising under laws of United States; to give federal courts exclusive jurisdiction over federal cause of action, Congress must, in exercising its powers under Supremacy Clause, affirmatively divest state courts of their presumptively concurrent jurisdiction. *Bunnell v. Department of Corrections (1998) 64 Cal. App. 4th 1360, 1367, 76 Cal. Rptr. 2d 58*

Action brought under Financial Institutions Reform, Recovery, and Enforcement Act of 1989, *12 U.S.C. § 1811 et seq.*, did not deprive state courts of jurisdiction over lawsuits filed prior to appointment of Federal Deposit Insurance Corporation as receiver. *Robbins v. Foothill Nissan (1994) 22 Cal. App. 4th 1769, 1780-1783, 28 Cal. Rptr. 2d 190*

Rule of prior exclusive jurisdiction is merely discretionary when applied to potential conflict between state and federal courts. *Sumitomo Bank v. Davis (1992) 4 Cal. App. 4th 1306, 1312, 6 Cal. Rptr. 2d 381*

Even where Congress has not completely displaced state regulation in specific area, state law is nullified to extent it actually conflicts with federal law; conflict arises when compliance with both federal and state regulations is physical impossibility or state law stands as obstacle to accomplishment and execution of full purposes and objectives of Congress; action by former cashier of chartered national bank with fewer than 20 employees against bank and its officers for age discrimination under *Gov. Code § 12941(a)* (since repealed) and violation of employment covenants under California law were preempted by National Bank Act provision (*12 U.S.C. § 24* para. 5) granting bank power to dismiss cashier at pleasure. *Aalgaard v. Merchants Nat. Bank, Inc. (1990) 224 Cal. App. 3d 674, 677, 686-695, 274 Cal. Rptr. 81*

Concurrent jurisdiction of California courts over maritime torts. *Fahey v. Gledhill (1983) 33 Cal. 3d 884, 887, 191 Cal. Rptr. 639, 663 P.2d 197* ; *Dugas v. C. Brewer Co. (1985) 165 Cal. App. 3d 203, 208, 211 Cal. Rptr. 573*

Rule that when two or more tribunals have concurrent jurisdiction, tribunal first asserting jurisdiction retains it to exclusion of all others applies if tribunals are in same state but not when jurisdiction is taken by state and federal courts, in which case, first judgment rendered has res judicata effect in other court. *Fowler v. Ross (1983) 142 Cal. App. 3d 472, 476-477, 191 Cal. Rptr. 183*

Rule is well established that state court has concurrent jurisdiction to enforce right created by federal law unless law excludes concurrent jurisdiction or is incompatible with such jurisdiction. *S. P. Growers Asso. v. Rodriguez (1976) 17 Cal. 3d 719, 726, 131 Cal. Rptr. 761, 552 P.2d 721*

California courts lack jurisdiction over subject of cause of action when jurisdiction is vested by federal law exclusively in federal court or agency. *Cairl v. Boeing Co. (1974) 39 Cal. App. 3d 137, 139-140, 113 Cal. Rptr. 925* (involving action under Federal Death on the High Seas Act (*46 U.S.C. §§ 761-767*)); *Gordon v. Reynolds (1960) 187 Cal. App. 2d 472, 477-478, 10 Cal. Rptr. 73*

[d] Action Pending in a Foreign Country

As to the pendency of a dispute in the courts of another nation, the controlling rule of law is as follows: The pendency of the action in a foreign country is not a bar to the institution of another action between the same parties and for the same cause of action in the courts of California, nor is it the duty of the Superior Court to stay an action pending the determination of an earlier suit in a foreign country, even if the entire controversy might there be disposed of. However, a California judge has discretion to stay a trial in this state's court pending the outcome of a foreign action. *Dial 800 v. Fesbinder (2004) 118 Cal. App. 4th 32, 53, 12 Cal. Rptr. 3d 711*

[5] Conflict and Choice of Laws

When a bargained-for choice of law provision has been included in a contract, the analytical analysis is governed by the Restatement Second of Conflict of Laws, section 187. Such an analysis requires the court first to determine either: (1) whether the chosen state has a substantial relationship to the parties or their transaction or (2) whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law. If, however, either test is met, the court must next determine whether the chosen state's law is contrary to a fundamental policy of California. If there is no such conflict, the court shall enforce the parties' choice of law. If, however, there is a fundamental conflict with California law, the court must then determine whether California has a materially greater interest than the chosen state in the determination of the particular issue. *ABF Capital Corp. v. Grove Properties Co. (2005) 126 Cal. App. 4th 204, 216, 23 Cal. Rptr. 3d 803*

Choice of law questions in California are determined by "governmental interest analysis," which requires that forum court search to find proper law to apply based on interests of litigants and involved states; first step of analysis is to examine laws of states involved; "true conflict" of laws arises only if both states have an interest in having their own law applied. *Denham v. Farmers Ins. Co. (1989) 213 Cal. App. 3d 1061, 1065-1066, 262 Cal. Rptr. 146*

[6] Constitutionality of Subject Matter Classification of Courts

Neither *equal protection clause* of *U.S. Const., amend. XIV* nor those provisions of state Constitution which embody principle of equality before law as proscribing legislative classification of court system. *Whittaker v. Superior Court (1968) 68 Cal. 2d 357, 368, 66 Cal. Rptr. 710, 438 P.2d 358*

Legislative classification as to treatment and procedure within state judicial system according to factors such as geographical area, population, or other relevant considerations as not denying equal protection of laws unless such classification is shown to be palpably arbitrary and without a sound basis in reason. *Whittaker v. Superior Court (1968) 68 Cal. 2d 357, 370, 66 Cal. Rptr. 710, 438 P.2d 358*

The *First Amendment, U.S. Const. amend. I*, severely circumscribes the role that civil courts may play in resolving church property disputes. However, not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the *First Amendment*. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. Neutral principles of law, developed for use in all property disputes, can be applied without establishing churches to which property is awarded. However, *First Amendment* values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. The *First Amendment* enjoins the employment of organs of government for essentially religious purposes and commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. *Singh v. Singh (2004) 114 Cal. App. 4th 1264, 1278-1279, 9 Cal. Rptr. 3d 4*

[7] Excess of Jurisdiction

Trial court as acting in excess of jurisdiction when on mistrial of divorce case it assigns case by stipulation of counsel over express objection of plaintiff to another judge for decision on basis of record previously made. *Linsk v. Linsk (1969) 70 Cal. 2d 272, 275, 74 Cal. Rptr. 544, 449 P.2d 760*

Term "lack of jurisdiction," for purposes of determining right to review by certiorari or restraint by prohibition, as also applied to case where, although court has jurisdiction over subject matter and parties in fundamental sense, it has no jurisdiction or power to act except in particular manner, or to give certain kinds of relief, or to act without occurrence of

certain procedural prerequisites, that is, to situations in which court acts in excess of its jurisdiction. *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 289, 291, 109 P.2d 942*

Speaking generally, any acts which exceed defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by courts and followed under doctrine of stare decisis, as in excess of jurisdiction, insofar as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari. *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 291, 109 P.2d 942*

Trial court's failure to comply with *Penal Code § 1306* by prematurely entering summary judgment did not deprive it of jurisdiction over the subject matter of the bail bond forfeiture or personal jurisdiction over the surety, and thus the premature entry of summary judgment was voidable, not void. *People v. American Contractors Indemnity Co. (2004) 33 Cal. 4th 653, 662, 16 Cal. Rptr. 3d 76, 93 P.3d 1020*

Parties may not expand a court's jurisdiction by contract to include a review of an arbitration award on the merits *Crowell v. Downey Community Hospital Foundation (2002) 95 Cal. App. 4th 730, 739, 115 Cal. Rptr. 2d 810*

Generally, any acts that exceed defined power of court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by courts and followed under doctrine of stare decisis, are in excess of jurisdiction; when court has jurisdiction of subject, party who seeks or consents to act beyond court's power as defined by statute or decisional rule may be estopped to complain of ensuing action in excess of jurisdiction; thus, litigant who has stipulated or otherwise consented to procedure in excess of jurisdiction may be estopped to question it. *People v. National Automobile & Casualty Ins. Co. (2000) 82 Cal. App. 4th 120, 125-126, 97 Cal. Rptr. 2d 858*

While not uncommon for cases to state that act in excess of court's jurisdiction is void, only acts in excess of subject matter jurisdiction are void; acts in excess of other kinds of jurisdiction are merely voidable; doctrine of waiver and estoppel apply only to voidable acts, *i.e.*, to acts in excess of jurisdiction (when the court has subject matter jurisdiction). *Jovine v. FHP, Inc. (1998) 64 Cal. App. 4th 1506, 1527 n.26, 1531-1532, 76 Cal. Rptr. 2d 322* ; *but see Ruisi v. Thieriot (1997) 53 Cal. App. 4th 1197, 1208, 62 Cal. Rptr. 2d 766* (contrary to *Jovine* holding, invalid reference constitutes jurisdictional error that cannot be waived)

Unlike some other jurisdictional defects, a party may, by its conduct, be estopped from contesting action in excess of jurisdiction; lien claimants estopped from challenging procedure by which their claims were adjudicated because they stipulated to that procedure and expressly asked court to adjudicate their claims. *Lovett v. Carrasco (1998) 63 Cal. App. 4th 48, 54-55, 73 Cal. Rptr. 2d 496*

When defendant was charged, detained, and sentenced in juvenile court before determination was made that defendant was over 18, because crimes charged were within jurisdiction of superior court, they were within juvenile court's fundamental jurisdiction, but court's acts were in excess of jurisdiction; judgment is void rather than voidable only if trial court lacked subject matter jurisdiction; since juvenile court's judgment was in excess of jurisdiction, judgment was only voidable and not void; consequently, court lost jurisdiction over its own judgment after notice of appeal filed; trial court loses jurisdiction to vacate its own judgment once party files notice of appeal unless judgment is void; trial court may also enter orders that only determine ancillary or collateral matters. *People v. Malveaux (1997) 50 Cal. App. 4th 1425, 1434, 1439, 59 Cal. Rptr. 2d 371*

Trial judge who revoked defendant's probation after probation violation matter had been duly assigned to another judge in accordance with local court rules acted in excess of jurisdiction; superior court is but one tribunal even if composed of different departments and order made in one department during progress of cause can neither be ignored nor overlooked in another department; first department to assume jurisdiction over matter acquires exclusive jurisdiction and judgment rendered in one department is binding on that matter on all other departments until such time as judgment is overturned. *People v. Madrigal (1995) 37 Cal. App. 4th 791, 43 Cal. Rptr. 2d 498*

Where statute requires court to exercise its jurisdiction in particular manner, follow particular procedure, or subject to certain limitations, act beyond those limits as in excess of jurisdiction and void. *Burtnett v. King (1949) 33 Cal. 2d 805, 807, 205 P.2d 657* ; *Vershbow v. Reiner (1991) 231 Cal. App. 3d 879, 883, 282 Cal. Rptr. 684*

Even though court has subject matter jurisdiction and jurisdiction over parties, its actions may be in excess of its jurisdiction. *In re Marriage of Mansell (1989) 217 Cal. App. 3d 219, 229, 265 Cal. Rptr. 227*

Court exceeds its jurisdiction in making order not authorized by statute under which order was purportedly rendered. *Shane v. Superior Court (1984) 160 Cal. App. 3d 1237, 1248, 207 Cal. Rptr. 210*

Judgment of court which exceeds its jurisdiction by granting relief which it has no power to grant is void. *County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 110, 183 Cal. Rptr. 741 , cert. denied, 460 U.S. 1051 (1983)* (disapproved on another point in *County of Los Angeles v. Soto (1984) 35 Cal. 3d 483, 492 n.4, 198 Cal. Rptr. 779, 674 P.2d 750*)

[8] Exhaustion of Remedies

Trucking company participating in the California Automobile Assigned Risk Plan (CAARP), a statutorily created program governed by the Insurance Commissioner designed to make automobile liability insurance available to those unable to obtain insurance through ordinary methods, is not required to exhaust the administrative remedies available to those participating in the CAARP before bringing a lawsuit in which the central issues was the determination of the proper premium to be charged, a matter governed by the CAARP's and the Insurance Commissioner's internal regulations. However, the doctrine of primary jurisdiction required the trial court to stay proceedings and refer the premium billing dispute to the Department of Insurance and the Insurance Commissioner. *Neil & Associates v. Jones (2004) 33 Cal. 4th 917, 930, 16 Cal. Rptr. 3d 849, 94 P.3d 1055*

Unless party to quasi-judicial proceedings agency's adverse findings made in that proceeding, by means of mandate action in superior court, those findings are binding in later civil actions; this requirement of judicial remedies is to be distinguished from requirement of exhaustion of administrative remedies; exhaustion of administrative remedies is jurisdictional prerequisite to resort to courts; exhaustion of judicial remedies, on other hand, is necessary to avoid giving binding effect to administrative agency's decision, because that decision has achieved finality due to aggrieved party's failure to pursue the exclusive judicial remedy for reviewing administrative action. *Johnson v. City of Loma Linda (2000) 24 Cal. 4th 61, 70-71, 99 Cal. Rptr. 2d 316*

Ordinarily, counties seeking to pursue unfunded mandate claim under Cal. Const., art. XIIIB, § 6 must exhaust their administrative remedies; however, counties may pursue § 6 claims in superior court without first resorting to administrative remedies if they can establish an exception to exhaustion requirement; futility exception applies if county can state with assurance that Commission would rule adversely in its own particular case; county's failure to submit test claim to Commission before seeking judicial relief held not to affect superior court's jurisdiction. *County of San Diego v. State of California (1997) 15 Cal. 4th 68, 89-90, 61 Cal. Rptr. 2d 134, 931 P.2d 312* (applying futility exception)

Exhaustion of administrative remedies as jurisdictional prerequisite to resort to courts. *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 293, 109 P.2d 942*

Plaintiff's failure to pursue the remedy of administrative mandamus when challenging the decision of a Stanford University judicial panel following a formal hearing serves is a valid basis for demurrer under the doctrine of exhaustion of judicial remedies. Administrative mandamus is not limited to public agencies; rather it applies to private

organizations that provide for a formal evidentiary hearing. *Gupta v. Stanford Univ. (2004) 124 Cal. App. 4th 407, 411, 21 Cal. Rptr. 3d 192*

Failure by the Department of Fair Employment and Housing to issue a right-to-sue notice after one year does not preclude a determination that employee has exhausted her administrative remedies. *Grant v. Comp USA, Inc. (2003) 109 Cal. App. 4th 637, 135 Cal. Rptr. 2d 177*

Requirement of exhaustion of administrative remedy is jurisdictional prerequisite, not matter of judicial discretion; exhaustion doctrine operates as defense to litigation commenced by persons who have been aggrieved by action taken in administrative proceeding which has in fact occurred but who failed to exhaust remedy available to them in course of proceeding itself; failure to raise issue in administrative appeal after raising issue in first public or administrative hearing constitutes failure to exhaust administrative remedies and prevents issue from being raised in subsequent judicial action; requirement of standing, *i.e.*, that plaintiff is a person entitled to judicial relief, is sometimes confused with entirely separate issue of exhaustion of administrative remedies; person lacking standing may not bring action even if available administrative remedy was otherwise pursued. *Tahoe Vista Concerned Citizens v. County of Placer (2000) 81 Cal. App. 4th 577, 589-592, 96 Cal. Rptr. 2d 880*

When statute provides administrative remedy, relief must be sought from administrative body and that remedy exhausted before courts will act; state employees may pursue claims of employment discrimination with either State Personnel Board or Department of Fair Employment and Housing (DFEH); thus, plaintiff exhausted administrative remedies when plaintiff filed complaint with DFEH and DFEH sent right to sue letter to plaintiff before plaintiff filed suit. *Ruiz v. Department of Corrections (2000) 77 Cal. App. 4th 891, 899-900, 92 Cal. Rptr. 2d 139*

[9] Indian Tribes

28 U.S.C. § 1360(b) precludes states from asserting jurisdiction over disputes concerning Indian land, including disputes in which one party claims property is non-Indian; threshold question is whether one possible outcome of litigation is determination that disputed property is in fact Indian trust land; if that outcome is possible, then state court is barred from assuming jurisdiction and must dismiss case for want of subject matter jurisdiction. *Boisclair v. Superior Court (1990) 51 Cal. 3d 1140, 1146-1147, 1152-1153, 1156, 276 Cal. Rptr. 62, 801 P.2d 305*

Tribal officials who commit or conspire to commit tortious acts primary situs of which is outside Indian territorial boundaries act beyond their sovereign authority and are not protected by sovereign immunity. *Boisclair v. Superior Court (1990) 51 Cal. 3d 1140, 1158, 276 Cal. Rptr. 62, 801 P.2d 305*

Although entering into a gaming compact with the State of California meant that defendant Indian Tribe waived its sovereign immunity to certain negligence claims against it, such waiver did not constitute a consent to suit in state court on negligence claims against it; instead, the tribal court was the exclusive forum for the resolution of such claims. *Lawrence v. Barona Valley Ranch Resort and Casino (2007) 153 Cal. App. 4th 1364, 1370-71, 64 Cal. Rptr. 3d 23*

Public Law 280 [*28 U.S.C.S. § 1360*] cannot be viewed as a general grant of jurisdiction to state courts to determine intratribal disputes. Where a tribe has provided for an internal appeal of crucial decisions, there is no need for state courts to act as a tribal court. *Lamere v. Superior Court (2005) 131 Cal. App. 4th 1059, 1064, 1066, 31 Cal. Rptr. 3d 880*

28 U.S.C. § 1360 does not confer on California jurisdiction over disputes between tribal members and tribes. *Ackerman v. Edwards (2004) 121 Cal. App. 4th 946, 954, 17 Cal. Rptr. 3d 517*

Native American tribes are immune to suit unless there has been an effective waiver or consent. *People ex rel. Dept.*

of Transportation v. Naegele Outdoor Advertising Co. (1985) 38 Cal. 3d 509, 519, 213 Cal. Rptr. 247, 698 P.2d 150 , cert. denied, 475 U.S. 1045 (1986) ; *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council (1985) 170 Cal. App. 3d 489, 494, 216 Cal. Rptr. 59*

Sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation; rather, it presents a pure jurisdictional question. In determining whether sovereign immunity extends to a tort case against a separate business entity organized by an Indian tribe, as opposed to immunity from a tort claim against the tribe itself, the court applies a three-part test setting forth the relevant criteria to address the immunity issue, including these considerations: (1) whether the business entity is organized for a purpose that is governmental in nature, rather than commercial; (2) whether the tribe and the business entity are closely linked in governing structure and other characteristics; and (3) whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity. *Warburton/Buttner v. Superior Court (2002) 103 Cal. App. 4th 1170, 127 Cal. Rptr. 2d 706 , citing Trudgeon v. Fantasy Springs Casino (1999) 71 Cal.App. 4th 632, 84 Cal. Rptr. 2d 65*

Congressional authorization and tribal consent are separate and independent bases for jurisdiction. If a tribe elects to waive sovereign immunity and submit itself to state court jurisdiction, nothing in the language of *28 U.S.C. § 1360* stands as a bar to assumption of that jurisdiction. *Friends of East Willits Valley v. County of Mendocino (2002) 101 Cal. App. 4th 191, 203, 123 Cal. Rptr. 2d 708*

Agreeing to an arbitration clause, and to enforcement of an arbitration award in any court having jurisdiction thereof, constitutes an explicit waiver by a tribe of its sovereign immunity from suit. *Smith v. Hoplandband of Pomo Indians (2002) 95 Cal. App. 4th 1, 115 Cal. Rptr. 2d 455* (relying on *C & L Enterprises v. Potawatomi Indian Tribe (2001) 532 U.S. 411, 121 S. Ct. 1589, 149 L. Ed. 2d 623* , in which the U.S. Supreme Court resolved the split of authority that had emerged in the state and federal courts on the question whether, by agreeing to an arbitration clause, and to enforcement of an arbitral award, in any court having jurisdiction thereof, a tribe has waived its sovereign immunity from suit)

Indian tribes long recognized to possess common-law immunity from suit traditionally enjoyed by sovereign powers; tribal immunity generally does not immunize individual members of tribe, but has been extended to "tribal officials" acting "in their official capacity and within their scope of authority"; to qualify as "tribal officials" for immunity purposes, defendants must show that they performed discretionary or policymaking functions within or on behalf of tribe, so that exposing them to liability would undermine immunity of tribe itself; defendants must also satisfy second requirement for tribal official immunity, *i.e.*, that official must have acted within scope of his or her authority; defendants, as law enforcement officers of Indian tribe held not protected by tribe's sovereign immunity against liability for allegedly assaulting and improperly detaining plaintiffs; only evidence as to defendants' official duties established no more than fact defendants performed ordinary law enforcement duties; no facts were presented to show defendants performed discretionary or policymaking functions within or on behalf of tribe; moreover, defendants produced no evidence as to scope of their authority as tribal law enforcement officers. *Turner v. Martire (2000) 82 Cal. App. 4th 1042, 1044, 1046, 1054-1055, 99 Cal. Rptr. 2d 587*

Substantial number of opinions discussing sovereign immunity in context of Indian affairs generally presume a to a state's authority to act involves a to that court's subject matter jurisdiction; in holding that tribe did not waive its sovereign immunity for purpose of suit and individual defendants were similarly immune, court noted that Indian tribes long recognized as possessing common-law immunity from suit traditionally enjoyed by sovereign powers; this aspect of tribal sovereignty, like all others, is subject to superior and plenary control of Congress; but without congressional authorization, Indian Nations are exempt from suit; waiver of immunity cannot be implied, but must be unequivocally expressed; tribal officials are not necessarily immune from suit; when tribal officials act beyond their authority they lose their right to sovereign's immunity; on other hand, sovereign immunity does extend to tribal officials when they act in their official capacity and within scope of their authority; sovereign immunity does not generally apply to acts of individual tribal members; tribe's sovereign immunity also covers counsel in providing legal representation, even

allegedly advising, counseling and conspiring with tribe to wrongfully terminate contract, so that counsel immune from liability for those professional services; alternatively, court held federal law, the Indian Gaming Regulatory Act (*25 U.S.C. § 2701 et seq.*), has completely preempted field of indian gaming, thus state court had no jurisdiction over claims raised in complaint; plaintiff's action did not fall within *28 U.S.C. § 1360* as an exception to federal preemption because *28 U.S.C. § 1360* confers jurisdiction over individual Indians, not over Indian tribes or tribal entities. *Great Western Casinos, Inc. v. Morongo Band of Mission Indians (1999) 74 Cal. App. 4th 1407, 1417-1419, 1421-1427, 88 Cal. Rptr. 2d 828*

Tribal sovereignty over their members and their territory depends on and is subordinate only to federal government, not states; plaintiff barred from recovering gambling losses incurred at casino on Indian lands by strong California public policy against judicial resolution of claims arising out of lawful or unlawful gambling contracts or transactions; forum state may refuse to entertain lawsuit on sister state cause of action if enforcement is contrary to strong public policy of forum. *Kelly v. First Astri Corp. (1999) 72 Cal. App. 4th 462, 466, 477, 84 Cal. Rptr. 2d 810* (recognizing at p. 469 n.7 that "sister state" is misnomer when used in reference to Indian lands)

In action for personal injuries, tribal immunity extended to tribal corporation formed to operate casino; three-factor analysis applied; federal government has plenary and exclusive power to deal with Indian tribes; *28 U.S.C. § 1360* confers jurisdiction only over individual Indians, not over tribes; under federal law, Indian tribes possess common-law immunity from suit traditionally enjoyed by sovereign powers; as matter of federal law, Indian tribe is subject to suit only when Congress authorized suit or tribe waived immunity; any such authorization or waiver cannot be implied and must be unequivocally expressed; tribal immunity is not subject to diminution by state; tribe's sovereign immunity extends to commercial activities and to tort claims; tribal immunity extends to individual tribal officials acting in their representative capacity and within scope of their authority; this immunity applies to officials sued in their individual capacities, but agent of immune sovereign may be held liable for act that exceeds his or her authority; if plaintiff alleges no viable claim that tribal officials acted outside their authority, immunity applies. *Trudgeon v. Fantasy Springs Casino (1999) 71 Cal. App. 4th 632, 635-644, 84 Cal. Rptr. 2d 65*

Either Congress or tribe may waive tribe's immunity to suit. *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council (1985) 170 Cal. App. 3d 489, 494-495, 216 Cal. Rptr. 59*

Waiver of tribal immunity is not to be implied but must be unequivocally expressed. *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council (1985) 170 Cal. App. 3d 489, 496, 216 Cal. Rptr. 59*

Congress has given California courts jurisdiction over civil causes of action arising in Native American tribal territory and between individual Native Americans or to which Native Americans are parties to same extent that those courts have jurisdiction over other civil causes of action (*28 U.S.C. § 1360*). *Hydrothermal Energy Corp. v. Fort Bidwell Indian Community Council (1985) 170 Cal. App. 3d 489, 494, 494 n.4, 216 Cal. Rptr. 59*

[10] Jurisdiction Is In Court Rather Than in Judge of Court

Jurisdiction is in the court and not in particular judge; judge who conducted trial of parties' dissolution action improperly ruled that he had retained personal jurisdiction over all further family law issues in case. *In re Marriage of Regnery (1989) 214 Cal. App. 3d 1367, 1377, 263 Cal. Rptr. 243*

[11] "Jurisdiction Defined"

Jurisdiction, in its judicial sense, as power to hear and determine causes. *Mueller v. Elba Oil Co. (1942) 21 Cal. 2d 188, 206, 130 P.2d 961* ; *Gray v. Hall (1928) 203 Cal. 306, 314, 265 P. 246*

Concept of jurisdiction as embracing large number of ideas, some fundamental to nature of any judicial system, some derived from requirement of due process, some determined by constitutional or statutory structure of particular court, and some based on mere procedural rules. *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 291, 109 P.2d 942*

Jurisdiction as term embracing every kind of judicial action so that every movement by court as necessarily exercise of jurisdiction. *Harrington v. Superior Court (1924) 194 Cal. 185, 188, 228 P. 15*

[12] Jurisdiction to Determine Jurisdiction

Trial court as having jurisdiction to make initial determination as to its own jurisdiction or lack of it. *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 302-303, 109 P.2d 942* ; *Ziller Electronics Lab GmbH v. Superior Court (1988) 206 Cal. App. 3d 1222, 1228, 254 Cal. Rptr. 410*

Court always has jurisdiction to determine its own jurisdiction regardless of whether question is raised by litigants. *In re Corienna G. (1989) 213 Cal. App. 3d 73, 77, 261 Cal. Rptr. 462*

[13] "Jurisdictional" Defined

Term "jurisdictional" applies to situation in which court may act only in a certain way; for example, statute requiring dismissal of action for delay in prosecution is jurisdictional in sense that court has no power to excuse delay, or to refuse to act merely because party fails to make a motion for dismissal. *Gonsalves v. Bank of America (1940) 16 Cal. 2d 169, 172, 105 P.2d 118*

Standing to appeal is jurisdictional, and thus to that standing is not waivable. *Life v. County of Los Angeles (1990) 218 Cal. App. 3d 1287, 1292, 267 Cal. Rptr. 557*

Jurisdictional defect is act done without occurrence of certain procedural prerequisites. *Munns v. Stenman (1957) 152 Cal. App. 2d 543, 556, 314 P.2d 67*

"Jurisdictional" means going to root of authority to act; involving omission of step which could not have been dispensed with. *Jones v. Walker (1941) 47 Cal. App. 2d 566, 569, 118 P.2d 299*

[14] Lack of Subject Matter Jurisdiction

[a] Generally

Term "lack of jurisdiction" in its fundamental sense as meaning entire absence of power to hear or determine case, an absence of authority over subject matter or parties. *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288, 109 P.2d 942*

A judgment void on its face--because rendered when the court lacked subject matter jurisdiction or exceeded its jurisdiction in granting relief--is subject to collateral attack at any time. *Sindler v. Brennan (2003) 105 Cal. App. 4th 1350, 1353, 129 Cal. Rptr. 2d 888*

"Lack of jurisdiction" can take different forms and have different consequences; lack of jurisdiction in most fundamental or strict sense means an entire absence of power to hear or determine case, absence of authority over subject matter or parties; but in ordinary usage phrase "lack of jurisdiction" is also applied to case where, though court

has jurisdiction over subject matter and parties in fundamental sense, it has no jurisdiction or power to act except in particular manner, or to give certain kinds of relief, or to act without occurrence of certain procedural prerequisites; distinction between lack of jurisdiction over cause and act in excess of jurisdiction has significant consequences; for instance, court cannot acquire subject matter jurisdiction through consent, estoppel or waiver; by contrast, when court has jurisdiction of subject, party who seeks or consents to act beyond court's power as defined by statute or decisional rule may be estopped to complain of ensuing action in excess of jurisdiction. *People v. National Automobile & Casualty Ins. Co. (2000) 82 Cal. App. 4th 120, 125-126, 97 Cal. Rptr. 2d 858*

Lack of jurisdiction is entire absence of power to hear or determine case, an absence of authority over subject matter or parties; subject matter jurisdiction cannot be conferred by consent, waiver or estoppel. *Buckley v. California Coastal Com. (1998) 68 Cal. App. 4th 178, 190, 80 Cal. Rptr. 2d 562*

Lack of jurisdiction in most fundamental or strict sense means entire absence of power to hear or determine case, an absence of authority over subject matter or parties; however, ordinary usage of phrase "lack of jurisdiction" is not limited to fundamental situation; for purpose of determining right to dismiss action, much broader meaning is recognized; it may be applied to case where, though court has jurisdiction over subject matter and parties in the fundamental sense, court has no jurisdiction or power to act except in a particular manner, or to give certain kinds of relief. *Dale v. Dale (1998) 66 Cal. App. 4th 1172, 1178, 78 Cal. Rptr. 2d 513*

"Lack of jurisdiction" describes situations in which court is without authority to act; in most fundamental sense, lack of jurisdiction means entire absence of power to hear particular subject matter of case; term also relates to court's inability to render judgments against individuals who have not properly been made parties to action; even when court has jurisdiction over subject matter and parties in fundamental sense, it may have no jurisdiction or power to make orders not authorized by statute. *Janzen v. Workers' Comp. Appeals Bd. (1997) 61 Cal. App. 4th 109, 113, 71 Cal. Rptr. 2d 260*

Judgment of court lacking jurisdiction over subject matter or over parties as void. *County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 110, 183 Cal. Rptr. 741 , cert. denied, 460 U.S. 1051 (1983)* (disapproved on another point in *County of Los Angeles v. Soto (1984) 35 Cal. 3d 483, 492 n.4, 198 Cal. Rptr. 779, 674 P.2d 750*); *see also Kulko v. California Superior Court (1978) 436 U.S. 84, 91, 98 S. Ct. 1690, 56 L. Ed. 2d 132* ; *Hanson v. Denckla (1958) 357 U.S. 235, 250, 78 S. Ct. 1228, 2 L. Ed. 2d 1283*

[b] To Enjoin Other Department of Same Court

One department of superior court has no jurisdiction to review, enjoin, restrain, or otherwise interfere with judicial act of another department of same superior court. *Ford v. Superior Court (1986) 188 Cal. App. 3d 737, 742, 233 Cal. Rptr. 607*

[c] To Hear Local Actions Arising Out of State

California state courts lack jurisdiction of subject matter of local action arising in another state. *Ophir Silver Min. Co. v. Superior Court (1905) 147 Cal. 467, 473-477, 82 P. 70* (action for injury to, and to restrain continuing trespass on, mining property situated in Nevada)

California state courts lack subject matter jurisdiction to determine title to real property situated in another state. *Ophir Silver Min. Co. v. Superior Court (1905) 147 Cal. 467, 478, 82 P. 70* ; *River Farms, Inc. v. Superior Court (1967) 252 Cal. App. 2d 604, 609, 60 Cal. Rptr. 665*

Rule that court of one state cannot directly affect or determine title to land in another is rule of federal constitutional

magnitude. *St. Sava Mission Corp. v. Serbian Eastern Orthodox Diocese (1990) 223 Cal. App. 3d 1354, 1365, 273 Cal. Rptr. 340*

[d] Waiver and Estoppel

Subject matter jurisdiction is subject to at any time during course of action. *Boisclair v. Superior Court (1990) 51 Cal. 3d 1140, 1144 n.1, 276 Cal. Rptr. 62, 801 P.2d 305* ; *Long Beach Unified Sch. Dist. v. State of California (1990) 225 Cal. App. 3d 155, 177, 275 Cal. Rptr. 449*

Question of lack of subject matter jurisdiction as permitted to be raised on appeal, since parties cannot by their consent confer jurisdiction. *Emery v. Pacific Employers Ins. Co. (1937) 8 Cal. 2d 663, 665-666, 67 P.2d 1046* (disapproved on another point in *Barrera v. State Farm Mut. Automobile Ins. Co. (1969) 71 Cal. 2d 659, 679, 79 Cal. Rptr. 106, 456 P.2d 674*)

A court's lack of subject matter jurisdiction is never waived and can be raised for the first time on appeal. *Miranda v. 21st Century Ins. Co. (2004) 117 Cal. App. 4th 913, 920, 12 Cal. Rptr. 3d 159* ; *Parrott v. Mooring Townhomes Assn., Inc. (2003) 112 Cal. App. 4th 873, 875, 6 Cal. Rptr. 3d 116*

Parties cannot confer subject matter jurisdiction on court by consent. *Harrington v. Superior Court (1924) 194 Cal. 185, 188, 228 P. 15* Court cannot acquire subject matter jurisdiction through consent, estoppel or waiver. *People v. National Automobile & Casualty Ins. Co. (2000) 82 Cal. App. 4th 120, 125, 97 Cal. Rptr. 2d 858*

Court of appeal lacks power to bestow jurisdiction on itself, nor may parties create jurisdiction by consent, waiver, or estoppel. *Sy First Family Ltd. Partnership v. Cheng (1999) 70 Cal. App. 4th 1334, 1345, 83 Cal. Rptr. 2d 340*

Subject matter jurisdiction is not conferred by consent or estoppel; thus, parties to judicial proceeding are unable, either jointly or severally, to effectively stipulate or to concede that court either has or lacks jurisdiction to act in particular matter; and lack of jurisdiction renders judgment void, subject not only to reversal on appeal, but to collateral attack. *People v. Nguyen (1990) 222 Cal. App. 3d 1612, 1619-1620, 272 Cal. Rptr. 523*

Claim that trial court lacked subject matter jurisdiction is issue that may be raised for first time on appeal because claim of jurisdictional defect goes to lower court's jurisdiction in strictest, most fundamental sense. *Minor v. Municipal Court (1990) 219 Cal. App. 3d 1541, 1547, 268 Cal. Rptr. 919*

Jurisdiction over subject matter is conferred by law, and purported waiver of jurisdictional defects at beginning of trial is of no effect. *People v. Leney (1989) 213 Cal. App. 3d 265, 268 n.2, 261 Cal. Rptr. 541*

[15] Political Question

"Political question" rule relates to appropriate role of judiciary in tripartite system of government; court's function is to resolve cases and controversies before them and in process interpret and apply laws; in so doing, courts may not usurp the governmental functions of legislative or executive branches; thus, political question doctrine excludes from judicial review controversies that revolve around policy choices and value determinations constitutionally committed for resolution to legislative and executive branches; nevertheless, it is judicial function to interpret law, including constitution, and, when appropriately presented in case or controversy, to declare when legislative or executive act is beyond constitutional authority vested in those branches; lawsuit seeking adjudication of constitutionality of state budget act was justiciable. *Schabarum v. California Legislature (1998) 60 Cal. App. 4th 1205, 1213-1215, 70 Cal. Rptr. 2d 745*

[16] Prerequisites

Requirements for court to acquire jurisdiction in fundamental sense. *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288, 109 P.2d 942* ; *Harrington v. Superior Court of County of Placer (1924) 194 Cal. 185, 188-189, 228 P. 15*

[17] Sister-State Judgments

Clause of U.S. Constitution which requires full faith and credit be given in each state to records and judicial proceedings of every other state (U.S. Const., art. IV, § 1) applies to records and proceedings of courts only so far as they have jurisdiction, and courts of one state are not required to give full faith and credit to, or regard as valid or conclusive, any judgment of a court of another state which had no jurisdiction of subject matter, or of parties, or, in proceedings in rem, of the res; accordingly, jursidiction of court rendering judgment as open to inquiry under proper averments, when questioned in court of another state. *Gagnon Co., Inc. v. Nevada Desert Inn (1955) 45 Cal. 2d 448, 457, 289 P.2d 466*

In determining whether to give full faith and credit to sister state judgment, with certain exceptions not relevant in case, inquiry is limited to whether court had jurisdiction over subject matter and relevant parties; if court in first state expressly litigated question of jurisdiction, its determination is res judicata and is itself protected by full faith and credit clause; if sister state court had jurisdiction over subject matter and parties, sister state judgment is entitled to full faith and credit even as to matters of law or fact erroneously decided. *Bank of America v. Jennett (1999) 77 Cal. App. 4th 104, 108, 114, 118, 91 Cal. Rptr. 2d 359*

Judgment not entitled to full faith and credit unless rendering court had jurisdiction to render judgment; before court bound by judgment rendered in another state, it may inquire into jurisdictional basis of foreign court's decree; however, when another state has fully and fairly litigated its jurisdiction, and has finally decided question, second state may not reexamine question. *Yu v. Signet Bank/Virginia (1999) 69 Cal. App. 4th 1377, 1385, 1393-1394, 82 Cal. Rptr. 2d 304*

[18] Small Claims Courts

Small claims jurisdiction applies to actions arising out of either contract or tort. *Leuschen v. Small Claims Court (1923) 191 Cal. 133, 137, 215 P. 391*

When case within monetary limitation of small claims court is filed as a limited civil case, former *Code Civ. Proc. § 396* does not authorize superior court to transfer it to small claims court even if plaintiff agrees to waive damages in excess of $5,000 dollars; specifically noted, however, that court did not address any issues that may arise from consolidation of superior and municipal courts with regard to transfer from consolidated courts to small claims court. *Rosenberg v. Superior Court (1998) 67 Cal. App. 4th 860, 866-869, 869 n.3, 79 Cal. Rptr. 2d 365*

When subject matter of actions filed in small claims court was within exclusive jurisdiction of Workers' Compensation Appeals Board, small claims court was without jurisdiction to hear them. *Workmen's Comp. Appeals Bd. v. Small Claims Court (1973) 35 Cal. App. 3d 643, 647, 111 Cal. Rptr. 6*

[19] Standing to Sue

Contentions based on party's lack of standing to sue involve jurisdictional s and may be raised at any time in the proceeding. *Common Cause v. Board of Supervisors (1989) 49 Cal. 3d 432, 438, 261 Cal. Rptr. 574, 777 P.2d 610*

[20] Subject Matter Jurisdiction of Superior Courts

Entry of judgment divests a trial court of authority to rule on a motion for reconsideration. *Safeco Ins. Co. v. Architectural Facades Unlimited, Inc. (2005) 134 Cal. App. 4th 1477, 1482, 36 Cal. Rptr. 3d 754*

Under *Code Civ. Proc. § 916*, trial court is divested of subject matter jurisdiction over any matter embraced in or affected by an appeal from the denial of a special motion to strike under the anti-SLAPP statute during the pendency of that appeal. The effect of the appeal is to remove the subject matter of the order from the jurisdiction of the lower court. Thus, that court is without power to proceed further as to any matter embraced therein until the appeal is determined. *Code Civ. Proc. § 916* necessarily renders any subsequent trial court proceedings on matters embraced in or affected by the appeal void--and not merely voidable. *Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal. 4th 180, 193-197, 25 Cal. Rptr. 3d 298*

Code Civ. Proc. § 664.6 does not furnish subject matter jurisdiction to enforce a settlement after a judgment has been entered and become final. *Walton v. Mueller (2009) 180 Cal. App. 4th 161, 172-174, 102 Cal. Rptr. 3d 605*

Probate court, which is department of superior court, has jurisdiction over proceedings under Probate Code concerning administration of decedent's estate; although probate court has all powers of superior court when considering cases brought before it under Probate Code, its jurisdiction is limited in sense that it exercises only those powers over decedents' estates that are conferred on it by statute; if decedent's will makes no provision for disposition of decedent's remains, probate court has no jurisdiction over dispute regarding disposition of remains, remedy being civil action in superior court, or a petition under *Health & Safety Code § 7526*. *Estate of Jimenez (1997) 56 Cal. App. 4th 733, 739-742, 65 Cal. Rptr. 2d 710*

Superior court does not have subject matter jurisdiction over claim for injunction to restrain judicial action of another department of same superior court. *Ford v. Superior Court (1986) 188 Cal. App. 3d 737, 741-742, 233 Cal. Rptr. 607*

Probate jurisdiction is in superior court, with probate department of superior court exercising probate jurisdiction; however, jurisdiction and powers of probate court is wholly statutory and therefore limited. *Conservatorship of Coffey (1986) 186 Cal. App. 3d 1431, 1439, 231 Cal. Rptr. 421*

Neither jurisdictional provisions of *Gov. Code § 66801* (relating to bistate Tahoe Regional Planning Compact) nor fact that adverse effects might ensue in California, was sufficient to confer subject matter jurisdiction on California courts, when property in question was located in *Nevada. League to Save Lake Tahoe v. Tahoe Regional Planning Agency (1980) 105 Cal. App. 3d 394, 397-398, 164 Cal. Rptr. 357*

[21] Transfer of Action to Court Having Jurisdiction

Apart from former *Code Civ. Proc. § 396*, court has inherent power to transfer case. *Walker v. Superior Court (1991) 53 Cal. 3d 257, 267-268, 279 Cal. Rptr. 576, 807 P.2d 418*

Court has no jurisdiction to hear or determine case when type of proceeding or amount in controversy is beyond jurisdiction defined for that particular court by statute or constitutional provision. *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288, 109 P.2d 942*

A noticed motion prior to transfer of case to another court is preferable, but not mandatory so long as plaintiff is afforded adequate notice and opportunity to be heard prior to transfer. *Campisi v. Superior Court (1993) 17 Cal. App. 4th 1833, 1839-1840, 22 Cal. Rptr. 2d 335*

When former *Code Civ. Proc. § 396* applies, its provisions for transfer are mandatory, and any other orders relating to parties or pleadings is void. *Schwenke v. J & P Scott, Inc. (1988) 205 Cal. App. 3d 71, 77, 252 Cal. Rptr. 91*

Once transfer pursuant to former *Code Civ. Proc. § 396* is required, any other judicial action but transfer by original court is improper. *Eveleth v. American Brass & Iron Foundry (1962) 203 Cal. App. 2d 41, 42-45, 21 Cal. Rptr. 95* ; *Cal. Emp. etc. Com. v. Municipal Ct. (1944) 62 Cal. App. 2d 781, 783-786, 145 P.2d 361* ; *Brady v. Kobey (1938) 27 Cal. App. 2d 505, 507-508, 81 P.2d 263*

Entry of a default is not a step in acquiring jurisdiction, but an act done after jurisdiction has been acquired by court. *Eveleth v. American Brass & Iron Foundry (1962) 203 Cal. App. 2d 41, 45, 21 Cal. Rptr. 95*

Motion based on former *Code Civ. Proc. § 396* is determined by state of pleadings at time motion is made. *Apartments, Inc. v. Trott (1959) 172 Cal. App. 2d 7, 13, 342 P.2d 32*

[22] Reclassification of Case

Reclassification has no effect on the fundamental jurisdiction of the court; the statutes governing reclassification strongly indicate that a matter may proceed to trial and judgment as a limited case even though it might be subject to reclassification. *Pajaro Valley Water Management Agency v. McGrath (2005) 128 Cal. App. 4th 1093, 1103, 27 Cal. Rptr. 3d 741*

The superior court must deny the motion to reclassify the case as limited (and thus keep the matter in the unlimited civil court) *unless* it appears to a legal certainty that the plaintiff's damages will necessarily be less than $25,000. This standard of "legal certainty" is not met when it appears a verdict within the unlimited court's jurisdiction is "possible." *Ytuarte v. Superior Court (2005) 129 Cal. App. 4th 266, 277, 28 Cal. Rptr. 3d 474*

The *Walker* test [*Walker v. Superior Court (1991) 53 Cal. 3d 257, 262]* continues to govern the determination of the jurisdictional amount in controversy for reclassification as a limited civil case, i.e., that the matter will "necessarily" result in a verdict below the jurisdictional amount. *Stern v. Superior Court (2003) 105 Cal. App. 4th 223, 229-231, 129 Cal. Rptr. 2d 275*

[23] Review

Where the evidence is not in dispute, a determination of subject matter jurisdiction is a legal question subject to de novo review. Dial 800 v. *Fesbinder (2004) 118 Cal. App. 4th 32, 42, 12 Cal. Rptr. 3d 711* ; *Warburton/Buttner v. Superior Court (2002) 103 Cal. App. 4th 1170, 1180, 127 Cal. Rptr. 2d 706*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityExhaustion of RemediesGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent JurisdictionCivil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsAppellate JurisdictionState Court ReviewGovernmentsCourtsSmall Claims CourtsGovernmentsNative AmericansAuthority & Jurisdiction

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§ 324.85 Law Reviews

Cohen, *"Arising Under" Jurisdiction and the Copyright Laws, 44 Hastings L.J. 337 (1993)*

Selvin, *The Strange Case of Alienage Jurisdiction*, 27 Bev. Hills B. Ass'n J. 169 (Fall 1993)

Comment, *The Aftermath of Burnham v. Superior Court: A New Rule of Transient Jurisdiction? 32 Santa Clara L. Rev. 989 (1992)*

Twitchell, *The Myth of General Jurisdiction, 101 Harv. L. Rev. 610 (1988)*

Althouse, *How to Build a Separate Sphere: Federal Courts and State Power, 100 Harv. L. Rev. 1485 (1987)*

Luftig, *Blurring the Jurisdictional Line Between Municipal and Superior Courts*, 56 Cal. St. B.J. 114 (1981)

Hazard, *Requisites of a Valid Judgment*, 24(3) Prac. Law. 35 (1978)

Comment, *A Legal Lohengrin: Federal Jurisdiction Under the Alien Tort Claims Act of 1789, 14 U.S.F. L. Rev. 105 (1979)*

Note, *The Extension of County Jurisdiction Over Indian Reservations in California: Public Law 280 and the Ninth Circuit, 25 Hastings L.J. 1451 (1974)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCopyright LawCivil Infringement ActionsJurisdiction & VenueGeneral OverviewGovernmentsNative AmericansAuthority &

JurisdictionImmigration LawEnforcementCivil LiabilityGeneral Overview

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§ 324.86 Text References

Witkin, California Procedure, vol. 2, *Courts*, §§ 167-346; *Jurisdiction*, §§ 1-107, 387-400; vol. 3, *Actions*, §§ 71, 702, 708-709, 715, 848 (4th ed. 1996)

Legal Topics:

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

§§ 324.87[Reserved]

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§ 324.90 Moving Party's Guide

NOTE:
The following guide is illustrative only of matters generally considered and procedures commonly followed. It is not exclusive. Any given case may require consideration of matters or utilization of procedures not discussed.

[1] Ascertain Facts

1. What relief is sought in the pleading under consideration.

2. Whether the court has jurisdiction to grant that relief.

3. If the court lacks jurisdiction, what court or tribunal, if any, does have jurisdiction.

4. If the court has jurisdiction to grant the kind of relief sought generally:

a. Whether the amount in controversy is properly classified as a limited or unlimited civil case.

b. Whether the particular basis for the relief brings it within the exclusive jurisdiction of another court or tribunal.

NOTE:
Jurisdiction may be vested by law in a federal court, or in a California reviewing court, or in an entity such as the California Workers' Compensation Appeals Board.

c. Whether the pleading seeks relief on a local action that must be tried in some other jurisdiction, for example, an action involving adjudication of title to real property situated in another state or country which may be adjudicated only in the other state or country [*see Ophir Silver Min. Co. v. Superior*

Court (1905) 147 Cal. 467, 473-478, 82 P. 70] .

5. Whether any other action on the same cause has been filed in a court of concurrent jurisdiction, and, if so, in which action the summons was served first.

[2] Make Preliminary Determinations

1. Legal basis for lack of jurisdiction.

a. California or federal constitution or statute, of which the court must take judicial notice [*see Evid. Code § 451(a)*],

b. Ordinance or the records of another court, of which the court in which the action is pending may be requested to take judicial notice [*see Evid. Code §§ 452(d), 453*], or

c. Case law.

2. Whether the lack of jurisdiction appears from the face of the pleading filed and matters of which the court must or may take judicial notice or whether it must be shown by extrinsic evidence.

3. If the face of the pleading and judicial notice does not show the lack of jurisdiction, how the evidence to establish lack of jurisdiction will be presented. Ascertain the names, addresses, and phone numbers of all persons who can testify by affidavit, declaration, or oral examination to the facts showing the lack of jurisdiction, and determine whether they are amenable to the court's process and will be willing to testify at the hearing.

4. Whether another California state court has subject matter jurisdiction.

[3] Determine Manner of Raising Issue

1. At the beginning of the action or proceeding:

a. By demurrer, if the lack of jurisdiction appears from the face of the complaint or other pleading or from matter subject to judicial notice [*see Code Civ. Proc. §§ 430.10(a), 430.30(a), 430.70*; *Evid. Code § 451 et seq.*].

NOTE:
For discussion and a form of demurrer to a complaint for lack of subject matter jurisdiction, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

b. By affirmative defense in the answer, if the lack of jurisdiction does not appear from the face of the complaint or other pleading or from matters subject to judicial notice [*see Code Civ. Proc. § 430.30(b)*; *see Evid. Code §§ 451, 452*], and by a subsequent motion for separate trial of that defense [*see Code Civ. Proc. § 597*].

NOTE:
For forms for use in moving for separate trial of an affirmative defense, *see* *Ch. 3,* ***Abatement of Actions****, § 3.110 et seq.*

c. By a motion to transfer the action to a court of appeal or the Supreme Court having subject matter jurisdiction [*see Code Civ. Proc. § 396(b)*].

d. If no California court has subject matter jurisdiction, by a nonstatutory motion to dismiss the action for lack of jurisdiction.

2. Later in the action or proceeding, for example:

a. By a nonstatutory objection at trial to the introduction of evidence.

b. On appeal.

NOTE:

The objection that the court lacks jurisdiction of the subject matter is never waived [*see* *Code Civ. Proc. § 430.80(a)*] and can be initially made at any time.

[4] Move to Transfer or Dismiss

1. Prepare Papers

a. Notice of motion [Form: *see § 324.100*].

b. Supporting declarations [Form: *see § 324.101*].

c. Written statement setting forth the nature and extent of any oral evidence proposed to be introduced and a reasonable time estimate for the hearing.

d. Memorandum

For forms of memoranda supporting a motion to transfer or dismiss an action for lack of subject matter jurisdiction, see California Points and Authorities, Ch. 133, *Jurisdiction: Subject Matter Jurisdiction* (Matthew Bender).

e. Proof of Service.

For forms of proof of service of papers [*Code Civ. Proc. § 1013a*], see Ch. 518, *Service of Summons and Papers* .

f. Proposed order, if desired [Form: *see § 324.102*].

2. Serve and file papers.

a. Serve a conformed copy of the notice of motion and accompanying papers on the other party's attorney, or on the other party if he or she has no attorney [*see Code Civ. Proc. § 1015*], at least 16 court days, plus any applicable additional period, before the hearing. The 16-day period is extended by a varying number of days depending if service is by mail, facsimile transmission, or overnight delivery [*see Code Civ. Proc. §§ 1005(a)(13), (b), 1010*; *Cal. Rules of Ct., Rules 3.1103(a)(1), 3.1300(a)*; *see also Code Civ. Proc. § 1010.6(a)(6)* (extension in case of electronic service that may apply)]. For a more complete outline of the procedures to follow in serving a notice of motion, see Ch. 372, *Motions and Orders* , and Ch. 518, *Service of Summons and Papers* .

(1) Attach an unsigned copy of the proof of service to the papers to be served or:

(a) If service is to be by mail or overnight service, note the date and place of mailing or

deposit with the delivery service on the papers served [*see Code Civ. Proc. § 1013(b),(d)*].

(b) If service is by facsimile transmission, note the date and place of transmission and the facsimile telephone number to which transmitted on the papers served [*see Code Civ. Proc. § 1013(f)*].

(2) Have the person who made the service sign the original and conform the remaining copies.

b. Deliver the originals of the notice of motion and accompanying papers to the court clerk's office for filing [*see Cal. Rules of Ct., Rule 3.1302(a)*] at least 16 court days, plus any applicable additional period, before the hearing [*see Code Civ. Proc. §§ 1005(a)(13),(b), 1010.6(a)(6)*; *Cal. Rules of Ct., Rule 3.1300(a)*], and pay the required fee [*see Gov. Code §§ 70611* (other than in a limited civil case), *70613* (limited civil cases)]. If not filed with the original papers, deliver the proof of service of the moving papers for filing no later than five court days before the time appointed for the hearing [*Cal. Rules of Ct., Rules 3.1100, 3.1300(c)*].

c. If there is a statement regarding oral testimony, file it no later than three days before the hearing. If it is filed less than five court days before the hearing, serve a conformed copy of it on the opposing party, that is, on that party's attorney [*see Code Civ. Proc. § 1015*] in a manner to assure delivery to that person no later than two days before the hearing [*Cal. Rules of Ct., Rule 3.1306(a), (b)*].

[5] Respond to Opposing Party's Declarations, Affidavits, and Memorandum

1. Prepare any reply declarations and any reply memorandum in response to any counterdeclarations and opposing memorandum filed by the opposing party.

2. Serve a conformed copy of each declaration and any reply memorandum on opposing counsel (or on the opposing party if he or she is appearing in pro per), and file the originals, at least five court days before the time appointed for the hearing [*Code Civ. Proc. §§ 1005(a)(13), (b), 1015*; *Cal. Rules of Ct., Rule 3.1300(a)*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to section 1010.6)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 324.91 Opposing Party's Guide

[1] Ascertain Facts

1. Review papers submitted in support of the motion to determine validity of motion. If the court does, in fact, have jurisdiction, counsel should prepare opposition papers.

2. If the objection is valid, ascertain which, if any, courts in California have jurisdiction, and, if more than one, which would be the most convenient.

[2] Make Preliminary Determinations

1. If subject matter jurisdiction is lacking, consider whether to stipulate to dismissal of the action if no California court has subject matter jurisdiction, or to transfer of the case to a California court of appeal or the Supreme Court having jurisdiction [*see Code Civ. Proc. § 396(b)*; for discussion and forms of stipulations, *see* Ch. 533, *Stipulations*].

2. If the action is in a limited jurisdiction court and the lack of jurisdiction results from a claim that exceeds the monetary relief that the lower court can grant, and the client is willing to waive the excess, determine how this should be done. It may be accomplished by:

a. Moving to amend the complaint to expressly remit the excess, and for an order shortening time for service of the motion [*see Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(b)*] so that this motion will be heard at the same time as the motion to transfer or dismiss. For discussion and forms relating to amending complaints, see Ch. 21, *Amended and Supplemental Pleadings* . For discussion and forms relating to shortening time, see Ch. 524, *Shortening and Extension of Time* .

b. Obtaining opposing counsel's stipulation to amendment of the complaint to remit the excess. For discussion and forms relating to amending a complaint or entering into a

stipulation, see Ch. 21, *Amended and Supplemental Pleadings* , and Ch. 533, *Stipulations* , respectively.

3. If the action is in a limited jurisdiction court and the lack of jurisdiction results from a claim that exceeds the monetary relief that the lower court can grant and the client is not willing to waive the excess amount, consider stipulating with opposing counsel that the motion be granted. If stipulating, present to the court with the stipulation, an order of transfer to another California state court or if no California court has jurisdiction, an order of dismissal.

[3] Prepare Opposition Papers

1. Counterdeclarations.

2. Written statement setting forth the nature and extent of any oral evidence proposed to be introduced and a reasonable time estimate for the hearing.

3. Memorandum

For the rules governing memoranda see Ch. 417, *Points and Authorities* . For forms of memoranda opposing a motion to transfer an action from a court lacking to a court having subject matter jurisdiction, see California Points and Authorities, Ch. 133, *Jurisdiction: Subject Matter Jurisdiction* (Matthew Bender).

4. Proof of service.

For forms of proof of service of papers [*Code Civ. Proc. § 1013a*], see Ch. 518, *Service of Summons and Papers* .

5. Proposed order, if desired.

For form of order denying a motion, see Ch. 372, *Motions and Orders* .

[4] Serve and File Papers

1. Serve a conformed copy of each of the above described papers on the other party's attorney, or on the other party if he or she has no attorney [*see Code Civ. Proc. § 1015*], at least 9 court days before the time appointed for the hearing [*see Code Civ. Proc. §§ 418.10(b), 1005(a)(13),(b)*; *Cal. Rules of Ct. Rule 3.1300(a)*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to *section 1010.6*)]. Notwithstanding any other provision of *§ 1005*, all papers opposing a motion and all reply papers shall be served by personal delivery, facsimile transmission, express mail, or other means consistent with sections *§§ 1010*, *1011*, *1012*, and *1013*, and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers, as applicable, are filed. This applies to the service of opposition and reply papers regarding motions for summary judgment or summary adjudication, in addition to the motions listed in *§ 1005(b)* [*Code Civ. Proc. § 1005(c)*].

a. Attach an unsigned copy of the proof of service to the papers to be served or:
(1) If service is to be by mail or overnight service, note the date and place of mailing or deposit with the delivery service on the papers served [*see Code Civ. Proc. § 1013(b),(d)*].

(2) If service is by facsimile transmission, note the date and place of transmission and the facsimile telephone number to which transmitted on the papers served [*see Code Civ. Proc. § 1013(f)*].

b. Have the person who made the service sign the original and conform the remaining copies.

2. Deliver the originals of each of the above described papers to the court clerk's office for filing [*see Cal. Rules of Ct., Rule 3.1302(a)*] at least 9 court days before the time appointed for the hearing [*Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(a)*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to *section 1010.6*)]. The normal practice is to file the original of the proof of service with the originals of the opposition papers, although it may be filed separately. The latest a paper may be filed to be timely is at the close of business of the clerk's office on the day the paper is due [*Cal. Rules of Ct., Rule 3.1300(e)*].

3. If there is a statement regarding oral testimony, file it no later than three days before the hearing. If it is filed less than five court days before the hearing, serve a conformed copy of it on the opposing party, that is, on that party's attorney [*see Code Civ. Proc. § 1015*] in a manner to assure delivery to that person no later than two days before the hearing [*Cal. Rules of Ct., Rule 3.1306(a), (b)*].

[5] Prehearing Procedures

If a countermotion to amend is to be made, present any order shortening time [*see Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(b)*] for service of any countermotion, together with the countermotion and supporting papers.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureDismissalsVoluntary DismissalsStipulations

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§ 324.92 Hearing and Ruling

[1] Attendance at Hearing

Both counsel should attend the hearing, have any witnesses testify, cross-examine witnesses for the other party, and argue the motion.

[2] Motion Granted

If counsel for the moving party has prepared a proposed order granting the motion, and it is in accord with how the judge ruled, present the original of the order to the courtroom clerk for the judge's signature. Otherwise, prepare the order after the hearing, have opposing counsel approve it as to form, and deliver the original to the judge or to the judge's courtroom clerk to deliver the original to the judge for signature. In either case, have the courtroom clerk conform the copies.

[3] Motion Denied

If the motion is denied, the entry of the order in the court's minute order may be all that is required. However, the judge may direct the prevailing party to draft a formal order. If the judge does so, counsel for the opposing party will prepare the order and present it to the judge, or to the judge's courtroom clerk, for signing, and after it is signed have the courtroom clerk conform the copies.

[4] Notice of Ruling

Unless otherwise ordered by the court, or unless waived by all parties in open court and the waiver is entered in the court's minutes, the prevailing party must [*see Code Civ. Proc. § 1019.5(a)*]:

1. Prepare a notice of the court's order and a proof of service; for a form of notice of order, see Ch. 372, *Motions and Orders* ;

2. Serve on opposing counsel; and

3. File the original of the notice and proof of service with the court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedureDismissalsInvoluntary DismissalsMotions

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§ 324.93 Dismissal for Failure to Pay Costs and Fees if Case Ordered Transferred

[1] Payment of Fees

If the court has ordered the case transferred to the proper superior court, the plaintiff must either [*Code Civ. Proc. § 399(A)*]:

1. Pay the fees for transfer within 30 days, or

2. Petition for review of the order by writ of mandate, and

a. If the petition stays the proceeding, pay the costs and fees within 30 days of notice of finality of the order of transfer, or

b. If the petition does not stay the proceeding, pay the costs and fees within 60 days after service of the notice of the order.

NOTE:
Other parties may pay the costs and fees, which will ultimately be recoverable from the plaintiff as costs, or if plaintiff ultimately prevails, as an offset from plaintiff's recovery [*see* *Code Civ. Proc. § 399(A)*].

[2] Motion to Dismiss for Failure to Pay

If the costs and fees of transfer are not timely paid, the defendant may move for an order dismissing the case for nonpayment of costs.

1. Prepare papers.

a. Notice of motion [Form: *see § 324.103*].

b. Supporting declaration [Form: *see § 324.104*].

c. Memorandum

d. Proposed order [Form: *see § 324.105*].

2. Serve and file papers [*see § 324.90[4]*].

3. Hearing and ruling. [*see § 324.92*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsMotions

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28-324 California Forms of Pleading and Practice--Annotated §§ 324.94-324.99

[Reserved]

§§ 324.94[Reserved]

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PART V. FORMS

28-324 California Forms of Pleading and Practice--Annotated § 324.100

§ 324.100 Proceedings to Transfer or Dismiss Appeal or Petition on Ground Court Lacks Subject Matter Jurisdiction [Code Civ. Proc. § 396]--Notice of Motion

[1] FORM Proceedings to Transfer or Dismiss Action, Proceeding, or Case on Ground Court Lacks Subject Matter Jurisdiction [Code Civ. Proc. § 396]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO
vs.	)	_____ [TRANSFER *or* DISMISS]
_____ [*name*],	)	_____ [APPEAL *or* PETITION]
Defendant.	)	FOR LACK OF SUBJECT MATTER JURISDIC-
	)	TION[, SUPPORTING DECLARATION(S) OF
	)	_____ (*name(s)*),] AND SUPPORT-
	)	ING MEMORANDUM
	)	Date: _____
		Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		[Trial Date: _____]

_____

To _____ [*identify party, e.g.*, plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant] will, and hereby does, move for an order _____ [*either, if a California court of appeal or the California Supreme Court has subject matter jurisdiction,* transferring this _____ (appeal *or* petition) from this court to the _____ Court of _____ *or, if there is no California court having subject matter jurisdiction,* dismissing this _____ (appeal *or* petition)]. The motion will be made on the ground that this court lacks jurisdiction of the subject of this _____ [appeal or petition] and that _____ [the _____ Court of _____ has such jurisdiction *or* there is no California court having jurisdiction of the subject matter].

The motion will be based on this notice of motion, on the [declaration(s) of _____ (*name(s)*) and] supporting memorandum served and filed herewith _____ [, and] on the records and file herein[, and on such evidence as may be presented at the hearing of the motion].
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for_____ [*party status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

[*Add supporting declaration*]

SUPPORTING MEMORANDUM

[*Add supporting memorandum*]

[2] Use of Form

The form in [1], *above,* is for use by a party to move for an order transferring the case from that court to the California court of appeal or the California Supreme Court, having subject matter jurisdiction, or, if there is no such court, dismissing the action for lack of jurisdiction. The ground for the motion is that the court in which the action or proceeding is pending lacks jurisdiction of the subject matter [*see Code Civ. Proc. § 396*; *see also* discussion in *§ 324.43*]. The final phrase of the form relating to evidence to be presented at the hearing on the motion should be included if local rule permits evidence at the hearing or if, for some reason, the evidence is unavailable at the time of serving and filing the notice of motion and good cause can be shown for its presentation at the hearing [*see Cal. Rules of Ct., Rule 3.1306(a), (b)*].

For further discussion relating to notices of motion generally, including when appearances may be made by telephone in nonevidentiary law and motion hearings, and for a procedural guide that may be followed in making or opposing a

noticed motion generally, see Ch. 372, *Motions and Orders* .

[3] Motion is General Appearance

The California Supreme Court has indicated that a motion to dismiss for lack of subject matter jurisdiction, even if raised on a motion to quash along with a to personal jurisdiction, constitutes a general appearance [*Greener v. Workers' Comp. Appeals Bd. (1993) 6 Cal. 4th 1028, 1036-1037, 25 Cal. Rptr. 2d 539, 863 P.2d 784]* . The Court did not expressly overrule or even cite earlier Supreme Court cases that allowed a motion to dismiss to be made as a special appearance [*see Boisclair v. Superior Court (1990) 51 Cal. 3d 1140, 1144 n.1, 276 Cal. Rptr. 62, 801 P.2d 305* ; *Goodwine v. Superior Court (1965) 63 Cal. 2d 481, 484-485, 47 Cal. Rptr. 201, 407 P.2d 1]* . Given *Greener*, counsel should not join a motion to dismiss for lack of subject matter jurisdiction with a motion to quash for lack of personal jurisdiction. Under *Greener*, joining the two might result in making a general appearance, which would waive the personal jurisdiction objection [*see California Dental Assn. v. American Dental Assn. (1979)23 Cal. 3d 346, 351-352, 152 Cal. Rptr. 546, 590 P.2d 401]* . For further discussion, see Ch. 323, *Jurisdiction: Personal* .

[4] Noticed Motion

In those cases in which the trial court sua sponte ordered the transfer of an action to another court, the appellate courts have emphasized that a noticed motion is the preferred proceeding. Notice is preferred to assure that litigants will have a full opportunity to resist transfer and to inform the trial court of all the matters it should consider in the sound exercise of its discretion [*see Williams v. Superior Court (1990) 219 Cal. App. 3d 171, 179, 268 Cal. Rptr. 61* ; *Williams v. Superior Court (1989) 216 Cal. App. 3d 378, 386, 264 Cal. Rptr. 677* ; *Campbell v. Superior Court (1989) 213 Cal. App. 3d 147, 154 n.3, 261 Cal. Rptr. 509]* .

[5] Accompanying Papers

Evidence received at a law and motion hearing must be by declaration and affidavit and by request for judicial notice [*see Evid. Code §§ 452-454*] without testimony or cross examination, except as allowed in the court's discretion for good cause shown [*Cal. Rules of Ct., Rule 3.1306(a), (b)* (also setting forth the procedure to follow to request permission to introduce oral evidence); *see also Cal. Rules of Ct., Rule 3.1306(c)* (additional requirements for invoking judicial notice in law and motion proceedings)]. Thus, the evidentiary or probative facts establishing the court's lack of subject matter jurisdiction, if they do not appear from the court's records and file, should be set forth in an affidavit [*see Code Civ. Proc. § 2009* (authorizing use of affidavits on a motion)] or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*], a copy of which must be served and filed with the notice of motion [*Code Civ. Proc. § 1010*; *see also Code Civ. Proc. § 1005(b)*]. For a form of supporting declaration, see *§ 324.101*.

The motion also must be accompanied by a memorandum to be relied on, and the court may construe the absence of the memorandum as an admission that the motion is not meritorious and cause for its denial [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms on memoranda see Ch. 417, *Points and Authorities* .

[6] Copies to Prepare

The notice of motion, and its accompanying papers, should be prepared in an original for filing, one copy for service on the plaintiff or plaintiff's counsel [*see Code Civ. Proc. § 1015*], one office copy, and any additional copies that may be required by the court.

[7] Service and Filing

The notice of motion and its supporting papers must be "served and filed" in the cause [*see, e.g., Code Civ. Proc. §§ 1010, 1013a*; *Cal. Rules of Ct., Rules 3.1103, 3.1103(b), 3.1113(a)*]. That is, the notice of motion filed must be

accompanied by proof of prior service of a copy of the notice of motion and its supporting papers on counsel for the adverse party or on the adverse party if he or she has no attorney [*Cal. Rules of Ct., Rules 1.21(b), 3.1103(b)*; *see also Code Civ. Proc. § 1015*]. If served by mail, facsimile transmission, or overnight delivery, the copies served should either bear a notation of the date and place of mailing, deposit, or transmission, or be accompanied by an unsigned copy of the proof of service, although this requirement is directory and not mandatory [*Code Civ. Proc. § 1013(b), (d), (f), (g)*]. The original of the executed proof of service, under the above-cited rules, must accompany the originals of the papers delivered to the court clerk's office for filing. For a discussion and forms of proof of service by mail, facsimile transmission, or overnight delivery, see Ch. 264, *Fax Filing and Service of Papers* , and Ch. 518, *Service of Summons and Papers* .

Code Civ. Proc. § 396 does not specify when the notice of motion to transfer or dismiss must be served or filed. Consequently, the motion is governed by the provisions of *Code Civ. Proc. § 1005(b)* [*see Code Civ. Proc. § 1005(a)(13)*]. Hence, unless otherwise ordered or specifically provided by law, all moving and supporting papers must be filed and copies served at least 16 court days before the hearing. However, if the notice is served by mail, the required 16-day period of notice before the time appointed for the hearing is increased by five calendar days if the place of mailing and the place of address are within California, 10 calendar days if either the place of mailing or the place of address is outside California but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States [*Code Civ. Proc. § 1005(b)*]. If the notice is served by facsimile transmission, Express Mail, or another method of overnight delivery, the required 16-day period of notice before the time appointed for the hearing is increased by two calendar days [*Code Civ. Proc. § 1005(b)*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to section 1010.6)].

[8] Opposition and Reply Papers

All opposing papers must be filed with the court and a copy served on each party at least 9 court days, and all reply papers at least five court days, before the time appointed for hearing [*Code Civ. Proc. § 1005(b)*].

Notwithstanding any other provision of *§ 1005*, all papers opposing a motion and all reply papers shall be served by personal delivery, facsimile transmission, express mail, or other means consistent with sections *§§ 1010, 1011, 1012*, and *1013*, and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers, as applicable, are filed. This applies to the service of opposition and reply papers regarding motions for summary judgment or summary adjudication, in addition to the motions listed in *§ 1005(b)* [*Code Civ. Proc. § 1005(c)*].

[9] Cross References

For general discussion of notices of motion, procedural guide, and general form of notice of motion, see Ch. 372, *Motions and Orders*

For a discussion of service of papers and a form of proof of service by mail, see Ch. 518, *Service of Summons and Papers*

For memoranda supporting a motion to transfer a case from a court lacking to a court having subject matter jurisdiction, see California Points and Authorities, Ch. 133, *Jurisdiction: Subject Matter Jurisdiction*

Witkin, California Procedure, vol. 2, *Courts*, § 287; *Jurisdiction*, §§ 28, 387-389 (4th ed. 1996)

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28-324 California Forms of Pleading and Practice--Annotated § 324.101

§ 324.101 Declaration [Code Civ. Proc. §§ 2009, 2015.5] in Support of Motion to Transfer or Dismiss Appeal or Petition on Ground Court Lacks Subject Matter Jurisdiction

[1] FORM Declaration [Code Civ. Proc. §§ 2009, 2015.5] in Support of Motion to Transfer or Dismiss Action, Proceeding, or Case on Ground Court Lacks Subject Matter Jurisdiction

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____
vs.	)	[*name*] IN SUPPORT OF MOTION TO
_____ [*name*],	)	_____ TRANSFER
Defendant.	)	_____ *or* DISMISS]
	)	_____ [APPEAL *or* PETITION]
	)	FOR LACK OF SUBJECT MATTER JURISDIC-
	)	TION
	)	Date: _____
		Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		[Trial Date: _____]

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the

courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. This court lacks jurisdiction of the subject of this _____ [appeal *or* petition] for the following reason(s): _____ [*specify, e.g.,* this action involves a claim for damages in excess of the monetary limit of this court *or* this action is to quiet title to land which, as shown by the allegations of the verified complaint on file herein, is situated in the country of Mexico].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form of declaration in [1], *above,* is for use to support a motion to transfer an appeal or petition from a superior court lacking to a court of appeal or the Supreme Court having subject matter jurisdiction, or, if none exists, to dismiss the appeal or petition for lack of subject matter jurisdiction [*see Code Civ. Proc. § 396*; for a form of noticed motion to transfer for lack of subject matter jurisdiction, *see § 324.100*].

If the lack of jurisdiction clearly appears from, for example, a pleading filed in the case, it would appear that no supporting declaration would be necessary. The fact that the court lacks subject matter jurisdiction would be established by the law set forth in the memorandum accompanying the notice of motion, and the memorandum, in such event, should contain a request that the court take judicial notice of the specific pleading in question [*see Evid. Code §§ 452(d), 453*; *see also Cal. Rules of Ct., Rule 3.1306(c)*].

[3] Form and Contents

If the declaration is attached to the notice of motion, the caption to this form should be omitted and the title of the paper should be centered above the body of the form. The supporting declaration would, however, be included in the caption to the notice of motion [for form of notice of motion, *see § 324.100*].

The title of the paper, whether it appears in a caption or is centered above the body of the form, must state the name of the declarant and identify the motion which it supports [*Cal. Rules of Ct., Rule 3.1115(a)*].

[4] Cross References

For a discussion and general forms of declarations supporting motions, see Ch. 372, *Motions and Orders*

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28-324 California Forms of Pleading and Practice--Annotated § 324.102

§ 324.102 Order Granting Motion to Transfer or Dismiss Appeal or Petition on Ground Court Lacks Subject Matter Jurisdiction

[1] FORM Order Granting Motion to Transfer or Dismiss Action, Proceeding, or Case on Ground Court Lacks Subject Matter Jurisdiction

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [*identify party, e.g.,* defendant] for an order _____ [transferring this _____ (appeal *or* petition) to the _____ Court of _____ *or* dismissing the _____ (appeal *or* petition)] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*], and defendant appeared by counsel _____ [*name*].

It appearing to the satisfaction of the court that the determination of this _____ [appeal *or* petition] will necessarily involve the determination of questions not within the jurisdiction of this court,

IT IS ORDERED that the motion be, and it hereby is, granted and that this _____ [appeal *or* petition] _____ [*either be* transferred to the _____ Court of _____, and that

all further proceedings in this (appeal *or* petition) in this court be, and they hereby are, suspended *or* be, and it hereby is, dismissed].

[IT IS FURTHER ORDERED that the _____ (*identify party, e.g.,* plaintiff) pay to the clerk of this court the costs and fees of the transfer, and that the clerk transmit to the clerk of the _____ Court of _____ (*court to which appeal or petition is ordered transferred*) all pleadings and papers herein filed.]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of order in [1], *above,* is for use when the superior court grants a motion to transfer or dismiss an appeal or petition for lack of subject matter jurisdiction [*see Code Civ. Proc. § 396*; for a form of motion, *see § 324.100*].

[3] Notice of Court's Ruling

When a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order shall be given by the prevailing party to all other parties or their attorneys in the manner provided by *Code Civ. Proc. § 1010-1020,* unless notice is waived by all parties in open court and is entered in the minutes [*Code Civ. Proc. § 1019.5(a)*]. For a form of notice of the court's ruling, see Ch. 372, *Motions and Orders* .

[4] Cross References

For a general discussion and forms of orders, see Ch. 372, *Motions and Orders*

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28-324 California Forms of Pleading and Practice--Annotated § 324.103

§ 324.103 Proceedings to Dismiss Appeal or Petition for Failure to Pay Costs and Fees of Transfer [Code Civ. Proc. § 399]--Notice of Motion

[1] FORM Proceedings to Dismiss Action, Proceeding, or Case for Failure to Pay Costs and Fees of Transfer [Code Civ. Proc. § 399]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____ MOTION AND NOTICE OF MOTION
Plaintiff,	)	TO DISMISS FOR FAILURE TO PAY TRANSFER
vs.	)	COSTS AND FEES [SUPPORTING DECLARA-
_____ [*name*],	)	TION OF _____ (*name*),] AND
Defendant.	)	MEMORANDUM
	)	[*Code Civ. Proc. § 399*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		[Trial Date: _____]

_____

To _____ [*identify party, e.g.*, plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____

of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] will, and hereby does, move for an order dismissing this _____ [action *or* proceeding *or* case] pursuant to the provisions of *Section 399 of the Code of Civil Procedure.* The motion will be made on the ground that on _____ [*date*] this court ordered this _____ [appeal *or* petition] transferred to the _____ Court of _____, pursuant to *Section 396 of the Code of Civil Procedure*, on the ground that this court lacks, and the _____ Court of _____ has, subject matter jurisdiction, that _____ [pursuant to the provisions of *Section 399(a), of the Code of Civil Procedure*, _____ (*identify party, e.g.,* plaintiff) was obligated to pay the costs *or* _____ (*identify party, e.g.,* plaintiff) was ordered to pay the costs] of transfer and has failed to do so, and that the time within which the costs and fees may be timely paid under the provisions of *Section 399 of the Code of Civil Procedure* has expired.

The motion will be based on this notice of motion, on the [declaration(s) of _____ (*name(s)*) and the] memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for_____ [*party status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

[*Add supporting declaration*]

SUPPORTING MEMORANDUM

[*Add supporting memorandum*]

[2] Use of Form

The form in [1], *above*, is for use by a party to seek dismissal of an appeal or petition on the ground that the party required by *Code Civ. Proc. § 399(a)*, or by court order, has failed to pay the transfer costs and fees required by *Code Civ. Proc. § 399* when the court, pursuant to *Code Civ. Proc. § 396*, has ordered the matter transferred from itself for lack of subject matter jurisdiction to a court having subject matter jurisdiction.

[3] Accompanying Papers

The motion must be accompanied by a memorandum to be relied on, and the court may construe the absence of the memorandum as an admission that the motion is not meritorious and cause for its denial [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms on points and authorities, see Ch. 417, *Points and Authorities* .

The evidentiary or probative facts establishing the court's lack of subject matter jurisdiction, if they do not appear from the court's records and file, should be set forth in an affidavit [*see Code Civ. Proc. § 2009* (authorizing use of affidavits on a motion)] or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*], a copy of which must be served and filed with the notice of motion [*Code Civ. Proc. § 1010*; *see also Code Civ. Proc. § 1005(b)*]. For a form of supporting declaration, see *§ 324.101*. For additional discussion on evidence received at a law and motion hearing and accompanying papers involving declarations, affidavits, and requests for judicial notice, see *§ 324.101[6]*.

[4] Who Must Pay Fees

When the transfer is sought solely, or is ordered, because the action or proceeding was commenced in a court other than that designated as proper by Tit. 4, Part 2 of the Code Civ. Proc., those costs and fees shall be paid by the plaintiff before the transfer is made, and if the defendant has paid those costs and fees at the time of filing a notice of motion, the same shall be repaid to the defendant, upon the making of the transfer order [*Code Civ. Proc. § 399(a)*]. *Code Civ. Proc. § 399(a)* also discusses when the fees and costs may be paid by another party on the failure of the obligated party to pay them and recovered as an item of costs.

[5] When Motion May Be Made

If the costs and fees of transfer are not paid within the time prescribed by *Code Civ. Proc. § 399*, the court, on the duly noticed motion of any party, may dismiss the action without prejudice to the cause on the condition that no other action on the cause may be commenced in another court prior to satisfaction of the court's order for costs and fees [*Code Civ. Proc. § 399(a)*].

[6] Cross References

For discussion and forms for proceedings to transfer or dismiss an action, proceeding, or case on the groung that the court lacks subject matter jurisdiction, see §§ 324.100-324.102

Action filed in court lacking subject matter jurisdiction as not to be dismissed if there is Witkin, California Procedure, vol. 2, *Courts*, § 375, *Jurisdiction*, § 396 vol. 3, *Actions*, § 853 (4th ed. 1996)

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28-324 California Forms of Pleading and Practice--Annotated § 324.104

§ 324.104 Declaration [Code Civ. Proc. §§ 2009, 2015.5] in Support of Motion to Dismiss Appeal or Petition for Failure to Pay Costs and Fees of Transfer

[1] FORM Declaration [Code Civ. Proc. §§ 2009, 2015.5] in Support of Motion to Dismiss Action, Proceeding, or Case for Failure to Pay Costs and Fees of Transfer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF MOTION TO DISMISS FOR
_____ [*name*],	)	FAILURE TO PAY TRANSFER COSTS AND FEES
Defendant.	)	[*Code Civ. Proc. § 399*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*name of moving party*) *or other statement as appropriate*].

2. _____ [*Specify exact facts supporting dismissal, e.g.,* As shown by the records and file herein, of which this court is requested to take judicial notice: (a) this court, on _____ (*date*), in accordance with the provisions of *Section 396 of the Code of Civil Procedure*, ordered that this _____ (appeal *or* petition) be transferred to the _____ (*specify court*) on the ground that this court lacks jurisdiction of the subject matter and that the _____ (*specify court*) has such jurisdiction; (b) notice of the court's order was served on _____ (plaintiff's attorney of record *or, if none,* plaintiff) on _____ (*date*); (c) _____ (*specify facts of record relating to any appeal or petition for an extraordinary writ to review the order of transfer, e.g.,* plaintiff has not petitioned for a writ of mandate under the provisions of *Section 400 of the Code of Civil Procedure*); (d) plaintiff has failed to pay the costs and fees of transfer; and (e) the _____ (30-day period after service of the notice of the order *or* 30-day period after notice of the finality of the order of transfer *or* 60-day period after service of the notice of order) expired on _____ (*date*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].

_____ [*signature*]

[2] Use of Form

The form of declaration in [1], *above,* is for use to support a motion to dismiss an action, proceeding, or case on the ground that the party required by *Code Civ. Proc. § 399* to pay the costs of transfer has failed to do so. With respect to the manner in which an order of transfer may be reviewed by a higher court, see discussion in *§ 324.46*.

Because the foregoing declaration sets forth no evidentiary facts that do not appear from the court's records and file in the case, of which the court may take judicial notice [*see Evid. Code § 452(d)*], the declaration would appear to be unnecessary, as both the request that the court take judicial notice and the information to be judicially noticed can be contained and identified in the memorandum [*see Evid. Code § 453* (adverse party must be given notice of request, "through pleadings or otherwise" and court must be furnished with sufficient information to enable it to take judicial notice of matter); *cf. Code Civ. Proc. § 430.70* (relating to demurrers and requiring that matter to be judicially noticed be specified in demurrer or in supporting memorandum)]. Counsel in requesting that the court take judicial notice must in addition, however, comply with the requirements of *Cal. Rules of Ct., Rule 3.1306(c)*.

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28-324 California Forms of Pleading and Practice--Annotated § 324.105

§ 324.105 Order Granting Motion to Dismiss Appeal or Petition for Failure to Pay Costs and Fees of Transfer

[1] FORM Order Granting Motion to Dismiss Action, Proceeding, or Case for Failure to Pay Costs and Fees of Transfer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER
_____ [*name*],	)	[*Code Civ. Proc. § 399*]
Defendant.	)	
	)	
	)	

The motion of _____ [*identify party, e.g.,* defendant] for an order dismissing this _____ [appeal *or* petition] on the ground that _____ [*identify party, e.g.,* plaintiff] has failed to pay the costs and fees of transfer of this _____ [appeal *or* petition] to the _____ Court of _____, came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

It appearing from the record herein that this _____ [appeal *or* petition] was ordered transferred as hereinabove set forth on the ground that this court lacks jurisdiction of the subject matter and that the _____ Court of _____ has such jurisdiction, and on proof made to the satisfaction of the court that the _____ [*specify party, e.g.,* plaintiff] has failed to pay the costs and fees of the transfer within the period required by *Section 399 of the Code of Civil Procedure*, or at all, and that the motion ought, therefore,

to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that this action be, and it hereby is, dismissed without prejudice.

IT IS FURTHER ORDERED that no other action on this cause be commenced in another court until this court's order for costs and fees of the transfer is satisfied.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of order in [1], *above*, is for use when the court grants a motion to dismiss for the failure of the party required to pay the costs and fees of transfer to do so [*see Code Civ. Proc. § 399*].

A dismissal ordered by the court must be in the form of a written order signed by the court and filed in the action and when so filed constitutes a judgment and is effective for all purposes [*Code Civ. Proc. § 581d*].

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28-324 California Forms of Pleading and Practice--Annotated § 324.106

§ 324.106 Demurrer [Code Civ. Proc. § 430.30(a)] on Ground of Exclusive Concurrent Jurisdiction

[1] FORM Demurrer [Code Civ. Proc. § 430.30(a)] on Ground of Exclusive Concurrent Jurisdiction

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	DEMURRER OF _____ [*name*] TO
Plaintiff,	)	COMPLAINT
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	[LIMITED CIVIL CASE]

_____

Defendant demurs to the complaint on the following ground:

There is another action pending in which another trial court has exclusive concurrent jurisdiction over the subject matter at issue and all parties. That action is Case No. _____, filed on _____ [*date*], in the _____ [*name of court*] by _____ [*name*], plaintiff, against _____ [*name*], defendant, alleging a cause of action for _____ [*specify*] based on _____ [*describe the transaction*], and seeking the following relief: _____ [*specify*]. Summons was issued in that action and served on _____ [*date*]. [A certified copy of the complaint and a certified copy of the proof of service of summons are attached hereto as Exhibits "1" and "2," respectively, and made a part hereof.]
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Defendant

[2] Use of Form

The form of demurrer in [1], *above*, is for use when it appears on the face of the complaint or from matters of which the court may take judicial notice [*see Code Civ. Proc. § 430.30(a)*; *Evid. Code § 452*] that a case is pending in another trial court that has exclusive concurrent jurisdiction over the same subject matter and parties.

[3] Exclusive Concurrent Jurisdiction

Under the rule of exclusive concurrent jurisdiction, if two trial courts of equal jurisdiction have concurrent jurisdiction over the subject matter and all parties involved in litigation, the first to assume jurisdiction has exclusive and continuing jurisdiction over the subject matter and all parties involved until such time as all necessarily related matters have been resolved [*Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 786-787, 274 Cal. Rptr. 147]* . The rule of concurrent jurisdiction may constitute a ground of abatement of the subsequent action. An order of abatement issues as a matter of right, not as a matter of discretion, when the conditions for its issuance exist [*Plant Insulation Co. v. Fibreboard Corp. (1990) 224 Cal. App. 3d 781, 787, 274 Cal. Rptr. 147]* .

For discussion of exclusive concurrent jurisdiction, see *§ 324.25[2][b]*.

[4] Accompanying Papers

The demurrer must be accompanied by a memorandum to be relied on, and the court may construe the absence of the memorandum as an admission that the special demurrer is not meritorious and cause for its denial and as a waiver of grounds not supported [*Cal. Rules of Ct., Rules 3.1113(a), 3.1320(b)*]. For discussion and forms on memoranda in general, see Ch. 417, *Points and Authorities* . For discussion and forms specific to demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* . For additional discussion on requests for judicial notice, see *§ 324.101[6]*.

[5] Cross References

For alternative forms of demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

For discussion and forms regarding abatement, see Ch. 3, *Abatement of Actions* .

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28-324 California Forms of Pleading and Practice--Annotated §§ 324.107-324.119

[Reserved]

§§ 324.107[Reserved]

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28-324 California Forms of Pleading and Practice--Annotated § 324.120

§ 324.120 Proceedings to Reclassify Case--By Plaintiff, Cross-Complainant, or Petitioner Within Time Allowed for Amending Initial Pleading [Code Civ. Proc. § 403.040(a)]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Reclassify Case--By Plaintiff, Cross-Complainant, or Petitioner Within Time Allowed for Amending Initial Pleading [Code Civ. Proc. § 403.040(a)]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MOTION AND NOTICE OF MOTION TO RE-
vs.	)	CLASSIFY CASE, [SUPPORTING DECLARA-
_____ [*name*],	)	TION(S) OF _____ (*name(s)*),]
Defendant.	)	AND SUPPORTING MEMORANDUM
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [

specify party, e.g., plaintiff] will, and hereby does, move for an order pursuant to *Code of Civil Procedure section 403.040(a)* to reclassify this action as _____ [a limited *or* an unlimited] civil case. The motion will be made on the ground that the caption of the _____ [complaint *or identify* cross complaint *or other initial pleading*] _____ [misstates the jurisdictional classification of this _____ (action *or* proceeding) or mistakenly fails to state that the _____ (action *or* proceeding) is a limited civil case].

The motion will be based on this notice of motion, on the [declaration(s) of _____ (*name(s)*) and] supporting memorandum served and filed herewith _____ [, *or* and] on the records and file herein [, and on such evidence as may be presented at the hearing of the motion].
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for_____ [*party status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*specify, e.g.*, the plaintiff in this action].

2. _____ [*State facts establishing that the action or proceeding is not properly classified in as many paragraphs as necessary*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

SUPPORTING DECLARATION OF _____ [*name*]

[*Add supporting declaration*]

SUPPORTING MEMORANDUM

[*Add supporting memorandum*]

[2] Use of Form

The form in [1], *above*, is for use by a plaintiff, or cross-complainant, or petitioner to move for an order reclassifying a case when the caption of the complaint, cross complaint, or other initial pleading misstated or mistakenly failed to state the jurisdictional classification of the case [*see Code Civ. Proc. § 403.040(a)*; *see also Code Civ. Proc. § 422.30(b)* (caption to state that case is limited civil case)]. This form is for use when the motion is being made within time allowed for amending the initial pleading. For a form of notice of motion for use when the motion is made later in the action or proceeding, see *§ 324.123*.

For discussion of this motion, see *§ 324.64*.

For discussion relating to notices of motion generally, and for a procedural guide that may be followed in making or opposing a noticed motion generally, see Ch. 372, *Motions and Orders* .

[3] Accompanying Papers

The motion must be accompanied by a supporting memorandum and the court may construe the absence of the memorandum as an admission that the motion is not meritorious and cause for its denial [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms on memoranda, see Ch. 417, *Points and Authorities* .

The evidentiary or probative facts establishing the grounds for reclassification, if they do not appear from the court's records and file, should be set forth in an affidavit [*see Code Civ. Proc. § 2009* (authorizing use of affidavits on a motion)] or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*], a copy of which must be served and filed with the notice of motion [*Code Civ. Proc. § 1010*; *see also Code Civ. Proc. § 1005(b)*]. For additional discussion on evidence received at a law and motion hearing and accompanying papers involving declarations, affidavits, and requests for judicial notice, see *§ 324.101[6]*.

[4] Copies to Prepare

The notice of motion, and its accompanying papers, should be prepared in an original for filing, one copy for service on the defendant or defendant's counsel [*see Code Civ. Proc. § 1015*], one office copy, and any additional copies that may be required by the court.

[5] Service and Filing

The notice of motion and its supporting papers must be served and filed in the cause [*see, e.g., Code Civ. Proc. §§ 1010, 1013a*; *Cal. Rules of Ct., Rules 3.1103, 3.1103(b), 3.1113(a)*]. For a discussion and forms of proof of service by mail, facsimile transmission, or overnight delivery, see Ch. 264, *Fax Filing and Service of Papers* , and Ch. 518, *Service of Summons and Papers* .

[6] Length of Notice Required

The moving and supporting papers must be filed and served as provided in *Code Civ. Proc. § 1005* [*Code Civ. Proc. § 1005(a)(13)*]. Thus, unless otherwise ordered or specifically provided by law, all moving and supporting papers must be filed and copies served at least 16 court days before the time appointed for the hearing. If the notice is served by mail, the required 16-day period of notice before the time appointed for the hearing is increased by five calendar days if the place of mailing and the place of address are within California, 10 calendar days if either the place of mailing or the place of address is outside California but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States [*Code Civ. Proc. § 1005(b)*]. If the notice is served by facsimile transmission, express mail, or another method of overnight delivery, the required 16-day period of notice before the time appointed for the hearing is increased by two calendar days [*Code Civ. Proc. § 1005(b)*; *cf. Code Civ. Proc. §*

1010.6(a)(6) (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to *Code Civ. Proc. § 1010.6*); *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to *Code Civ. Proc. § 1010.6*)].

[7] Opposition and Reply Papers

All opposing papers must be filed with the court and a copy served on each party at least 9 court days, and all reply papers at least five court days, before the for hearing [*Code Civ. Proc. § 1005(b)*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to *Code Civ. Proc. § 1010.6*)].

Notwithstanding any other provision of *§ 1005*, all papers opposing a motion and all reply papers shall be served by personal delivery, facsimile transmission, express mail, or other means consistent with sections *§§ 1010*, *1011*, *1012*, and *1013*, and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers, as applicable, are filed. This applies to the service of opposition and reply papers regarding motions for summary judgment or summary adjudication, in addition to the motions listed in *§ 1005(b)* [*Code Civ. Proc. § 1005(c)*].

[8] Cross References

For a related form of an order granting this motion, see *§ 324.122*.

For general discussion of notices of motion, procedural guide, and general form of notice of motion, see Ch. 372, *Motions and Orders*

For a discussion of service of papers and a form of proof of service by mail, see Ch. 518, *Service of Summons and Papers*

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28-324 California Forms of Pleading and Practice--Annotated § 324.121

§ 324.121 Proceedings to Reclassify Case--By Defendant or Cross Defendant Within Time Allowed for Responding to Initial Pleading [Code Civ. Proc. § 403.040(a)]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Reclassify Case--By Defendant or Cross Defendant Within Time Allowed for Responding to Initial Pleading [Code Civ. Proc. § 403.040(a)]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MOTION AND NOTICE OF MOTION TO RE-
vs.	)	CLASSIFY CASE[, SUPPORTING DECLARA-
_____ [*name*],	)	TION(S) OF _____ (*name(s)*),]
Defendant.	)	AND SUPPORTING MEMORANDUM
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____

[*specify party, e.g.,* defendant] will, and hereby does, move for an order pursuant to *Code of Civil Procedure section 403.040(a)* to reclassify this action as _____ [a limited *or* an unlimited] civil case. The motion will be made on the ground that the caption of the _____ [complaint *or identify cross complaint or other initial pleading*] _____ [misstates the jurisdictional classification of this _____ (action *or* proceeding) *or* mistakenly fails to state that the _____ (action *or* proceeding) is a limited civil case].

The motion will be based on this notice of motion, on the [declaration(s) of _____ (*name(s)*) and] supporting memorandum served and filed herewith _____ [, *or* and] on the records and file herein[, and on such evidence as may be presented at the hearing of the motion].
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for_____ [*party status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*specify, e.g.,* the defendant in this action].

2. _____ [*State facts establishing that the action or proceeding is not properly classified in as many paragraphs as necessary*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

SUPPORTING MEMORANDUM

[*Add supporting memorandum*]

[2] Use of Form

The form in [1], *above,* is for use by a defendant or cross defendant to move for an order reclassifying a case when the caption of the complaint, cross complaint, or other initial pleading misstated or mistakenly failed to state the jurisdictional classification of the case [*see Code Civ. Proc. § 403.040(a)*; *see also Code Civ. Proc. § 422.30(b)* (caption to state that case is limited civil case)]. This form is for use when the motion is being made within time allowed for responding to initial pleading. For a form of notice of motion for use when the motion is made later in the action or

proceeding, see *§ 324.123*.

For discussion of this motion, see *§ 324.67*.

For discussion relating to notices of motion generally, and for a procedural guide that may be followed in making or opposing a noticed motion generally, see Ch. 372, *Motions and Orders* .

[3] Motion is General Appearance

A motion to reclassify under *Code Civ. Proc. § 403.040* constitutes an appearance in the action [*Code Civ. Proc. § 1014*].

[4] Accompanying Papers

The motion must be accompanied by a supporting memorandum and the court may construe the absence of the memorandum as an admission that the motion is not meritorious and cause for its denial [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms on memoranda, see Ch. 417, *Points and Authorities* .

The evidentiary or probative facts establishing the grounds for reclassification, if they do not appear from the court's records and file, should be set forth in an affidavit [*see Code Civ. Proc. § 2009* (authorizing use of affidavits on a motion)] or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*], a copy of which must be served and filed with the notice of motion [*Code Civ. Proc. § 1010*; *see also Code Civ. Proc. § 1005(b)*]. For additional discussion on evidence received at a law and motion hearing and accompanying papers involving declarations, affidavits, and requests for judicial notice, see *§ 324.101[6]*.

[5] Copies to Prepare

The notice of motion, and its accompanying papers, should be prepared in an original for filing, one copy for service on the plaintiff or plaintiff's counsel [*see Code Civ. Proc. § 1015*], one office copy, and any additional copies that may be required by the court.

[6] Service and Filing

The notice of motion and its supporting papers must be served and filed in the cause [*see, e.g., Code Civ. Proc. §§ 1010, 1013a*; *Cal. Rules of Ct., Rules 3.1103, 3.1103(b), 3.1113(a)*]. For a discussion and forms of proof of service by mail, facsimile transmission, or overnight delivery, see Ch. 264, *Fax Filing and Service of Papers* , and Ch. 518, *Service of Summons and Papers* .

[7] Length of Notice Required

The moving and supporting papers must be filed and served as provided in *Code Civ. Proc. § 1005* [*Code Civ. Proc. § 1005(a)(13)*].

Thus, unless otherwise ordered or specifically provided by law, all moving and supporting papers must be filed and copies served at least 16 court days before the time appointed for the hearing. If the notice is served by mail, the required 16-day period of notice before the time appointed for the hearing is increased by five calendar days if the place of mailing and the place of address are within California, 10 calendar days if either the place of mailing or the place of address is outside California but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States [*Code Civ. Proc. § 1005(b)*]. If the notice is served by facsimile transmission, express mail, or another method of overnight delivery, the required 16-day period of notice before the time appointed

for the hearing is increa sed by two calendar days [*Code Civ. Proc. § 1005(b)*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to *section 1010.6*); *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to *section 1010.6*)].

[8] Opposition and Reply Papers

All opposing papers must be filed with the court and a copy served on each party at least 9 court days, and all reply papers at least five court days, before the hearing [*Code Civ. Proc. § 1005(b)*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to *section 1010.6*)].

Notwithstanding any other provision of *§ 1005*, all papers opposing a motion and all reply papers shall be served by personal delivery, facsimile transmission, express mail, or other means consistent with sections *§§ 1010*, *1011*, *1012*, and *1013*, and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers, as applicable, are filed. This applies to the service of opposition and reply papers regarding motions for summary judgment or summary adjudication, in addition to the motions listed in *§ 1005(b)* [*Code Civ. Proc. § 1005(c)*].

[9] Cross References

For a related form of order granting this motion, see *§ 324.122*.

For general discussion of notices of motion, procedural guide, and general form of notice of motion, see Ch. 372, *Motions and Orders*

For a discussion of service of papers and a form of proof of service by mail, see Ch. 518, *Service of Summons and Papers*

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28-324 California Forms of Pleading and Practice--Annotated § 324.122

§ 324.122 Order Granting Motion to Reclassify Case When Motion Made Within Time Allowed for Amending or Responding to Initial Pleading

[1] FORM Order Granting Motion to Reclassify Case When Motion Made Within Time Allowed for Amending or Responding to Initial Pleading

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [*identify party, e.g.,* defendant] for an order pursuant to *Code Civ. Proc. § 403.040(a)* reclassifying this _____ [action *or* proceeding] as _____ [a limited *or* an unlimited] civil case came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*], and defendant appeared by counsel _____ [*name*].

It appearing to the satisfaction of the court that the caption of the _____ [complaint *or identify cross complaint or other initial pleading*] mistakenly _____ [stated *or* failed to state] that this _____ [action *or* proceeding *or* case] was a limited civil case,

IT IS ORDERED that the motion be, and it hereby is, granted and that this _____ [action *or* proceeding *or* case] be reclassified as _____ [a limited *or* an unlimited] civil case.

Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of order in [1], *above*, is for use when the court grants a motion by a party to reclassify an action, proceeding, or case for lack of subject matter jurisdiction when the motion is brought within the time to amend or respond to the initial pleading [*see Code Civ. Proc. § 403.040(a)*].

[3] Cost and Fees

If the reclassification is from limited to unlimited civil case, the party who misclassified a case as a limited civil case must pay a reclassification fee equivalent to the higher cost of filing an unlimited civil case. Other fees paid before reclassification are similarly adjusted, and each party is responsible for paying for reclassification of its pleadings [*see Code Civ. Proc. § 403.050(c)*].

If the reclassification is from unlimited to limited civil case, no reclassification fee is required. The parties are not entitled to any refund of higher fees paid while the case was classified as an unlimited civil case [*see Code Civ. Proc. § 403.050(a)*].

For further discussion, including payment of the fees and the effect of failure to pay, see *§ 324.66*.

[4] Notice of Court's Ruling

When a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order must be given by the prevailing party to all other parties or their attorneys in the manner provided by *Code Civ. Proc. §§ 1010-1020*, unless notice is waived by all parties in open court and is entered in the minutes [*Code Civ. Proc. § 1019.5*].

For a form of notice of the court's ruling, see Ch. 372, *Motions and Orders* .

[5] Cross References

For a general discussion and forms of orders, see Ch. 372, *Motions and Orders*

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28-324 California Forms of Pleading and Practice--Annotated § 324.123

§ 324.123 Proceedings to Reclassify Case- By Party After Time to Amend or Respond to Complaint or Other Pleading [Code Civ. Proc. § 403.040(b)]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Reclassify Case- By Party After Time to Amend or Respond to Complaint or Other Pleading [Code Civ. Proc. § 403.040(b)]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MOTION AND NOTICE OF MOTION TO RE-
vs.	)	CLASSIFY CASE [SUPPORTING DECLARA-
_____ [*name*],	)	TION(S) OF _____ (*name(s)*),]
Defendant.	)	AND SUPPORTING MEMORANDUM
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____

[*specify party, e.g.,* defendant] will, and hereby does, move for an order pursuant to *Code of Civil Procedure section 403.040(b)* to reclassify this case as _____ [a limited *or* an unlimited] civil case. The motion will be made on the ground that the caption of the _____ [complaint *or identify* cross complaint *or other initial pleading*] _____ [misstates *or* mistakenly fails to state] the jurisdictional classification of the case and that good cause exists for _____ [*specify moving party, e.g.,* defendant] not having sought reclassification at an earlier time.

The motion will be based on this notice of motion, on the [declaration(s) of _____ (*name(s)*) and] supporting memorandum served and filed herewith _____ [, *or* and] on the records and file herein[, and on such evidence as may be presented at the hearing of the motion].
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for_____ [*party status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*specify, e.g.,* the defendant in this action].

2. _____ [*State facts establishing that the action or proceeding is mistakenly classified, using as many paragraphs as necessary*].

3. _____ [*State facts establishing good cause for not having sought reclassification earlier, using as many paragraphs as necessary*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

SUPPORTING MEMORANDUM

[*Add supporting memorandum*]

[2] Use of Form

The form in [1], *above,* is for use by a party to move for an order reclassifying a case when the caption of the complaint, cross complaint, or other initial pleading misstated or mistakenly failed to state the jurisdictional classification of the case [*see Code Civ. Proc. § 403.040(b)*; *see also Code Civ. Proc. § 422.30(b)* (caption to state that case is limited civil

case)]. This form is for use whenever the misclassification becomes apparent after the time for the moving party to respond to the complaint, cross complaint, or other initial pleading. The moving party must, however, show good cause why a motion to reclassify was not made earlier [*see Code Civ. Proc. § 403.040(b)*]. For a form of notice of motion for use when the motion is by a party within the time to respond to the initial pleading, see *§§ 324.120* and *324.121*.

For discussion relating to notices of motion generally, and for a procedural guide that may be followed in making or opposing a noticed motion generally, see Ch. 372, *Motions and Orders* .

[3] Accompanying Papers

The motion must be accompanied by a supporting memorandum and the court may construe the absence of the memorandum as an admission that the motion is not meritorious and cause for its denial [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms on memorandum, see Ch. 417, *Points and Authorities* .

The evidentiary or probative facts establishing the grounds for reclassification and the reasons for good cause why reclassification was not sought earlier are set forth in an affidavit [*see Code Civ. Proc. § 2009* (authorizing use of affidavits on a motion)] or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*], a copy of which must be served and filed with the notice of motion [*Code Civ. Proc. § 1010*; *see also Code Civ. Proc. § 1005(b)*]. For additional discussion on evidence received at a law and motion hearing and accompanying papers involving declarations, affidavits, and requests for judicial notice, see *§ 324.101[6]*.

[4] Service and Filing

For discussion of service and filing of the motion, including the notice requirements [*Code Civ. Proc. §§ 1005(a)(13), (b)*], *see §§ 324.120[5], 324.121[6]*.

[5] Opposition and Reply Papers

For discussion of opposition and reply papers, including the time requirements [*Code Civ. Proc. §§ 1005(a)(13), (b)*], see *§§ 324.120[7], 324.121[8]*.

[6] Cross References

For a related form of order granting this motion, see *§ 324.124*.

For general discussion of notices of motion, procedural guide, and general form of notice of motion, see Ch. 372, *Motions and Orders*

For a discussion of service of papers and a form of proof of service by mail, see Ch. 518, *Service of Summons and Papers*

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Chapter 324 JURISDICTION: SUBJECT MATTER JURISDICTION
PART V. FORMS

28-324 California Forms of Pleading and Practice--Annotated § 324.124

§ 324.124 Order Granting Motion to Reclassify Case When Motion Made After Time to Amend or Respond to Complaint of Other Pleading

[1] FORM Order Granting Motion to Reclassify Case When Motion Made After Time to Amend or Respond to Complaint of Other Pleading

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

_____

The motion of _____ [*identify party, e.g.,* defendant] for an order pursuant to *Code Civ. Proc. § 403.040(b)* reclassifying this _____ [action *or* proceeding] as _____ [a limited *or* an unlimited] civil case came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*], and defendant appeared by counsel _____ [*name*].

It appearing to the satisfaction of the court that the caption of the _____ [complaint *or identify cross complaint or other initial pleading*] in this _____ [action *or* proceeding *or* case] _____ [is incorrectly classified, and good cause appearing for the moving party not having sought reclassification earlier],

IT IS ORDERED that the motion be, and it hereby is, granted and that this _____ [action *or*

proceeding *or* case] be reclassified as _____ [a limited *or* an unlimited] civil case.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of order in [1], *above*, is for use when the court grants a motion to reclassify an action, proceeding, or case on the motion of a party made after the time to respond to the complaint, cross complaint, or other initial pleading has expired [*see Code Civ. Proc. § 403.040(b)*].

[3] Cost and Fees

For discussion of costs and fees of reclassification, see *§ 324.70*.

[4] Cross References

For a general discussion and forms of orders, see Ch. 372, *Motions and Orders*

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Chapter 325 [RESERVED]

28-325 California Forms of Pleading and Practice--Annotated Chapter 325

[RESERVED]

Chapter 325[RESERVED]

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Chapter 326 JURY INSTRUCTIONS

28-326 California Forms of Pleading and Practice--Annotated 326.syn

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§ 326.syn Synopsis to Chapter 326: JURY INSTRUCTIONS

§ 326.01 Scope of Chapter

§ 326.02 Cross References

§§ 326.03-326.09 [Reserved]

§ 326.10 Governing Law

§ 326.11 Purpose of Jury Instructions

§ 326.12 Judicial Council of California Civil Jury Instructions ("CACI")

§§ 326.13-326.19 [Reserved]

§ 326.20 Court's Discretion to Comment on Evidence

§ 326.21 Court's Own Instructions to Jury

§ 326.22 Timing and Service Requirements for Requesting Jury Instructions

§ 326.23 Drafting Proposed Jury Instructions

[1] Format

[2] Using CACI

[3] Statutory Language

[4] Language From Judicial Opinions

[5] Using Other Sources

[6] Formula Instructions

[a] "Formula Instruction" Defined

[b] Permissible Use

[c] Danger of Incompleteness

[d] Danger of Repetition, Undue Emphasis, or Argumentativeness

[7] Gender Neutral Language

§ 326.24 Right to Proper Jury Instructions

[1] Court Cannot Weigh Evidence

[2] Instructions Based on Different Theories of Law

[3] No Right When Party Refuses or Withdraws Instruction

[4] No Right When Counsel's Conduct Amounts to Waiver

§ 326.25 Effect of Failure to Propose or Request Complete Jury Instructions

§ 326.26 Court's Discretion in Considering Proposed or Requested Jury Instructions

[1] Framing Instructions

[2] Setting Sequence of Instructions

[3] Refusing Instructions

§ 326.27 Court's Disposition of Proposed or Requested Jury Instructions

§ 326.28 Opportunity to Demand Clarification of Jury Instructions

§ 326.29 Instructions Deemed Excepted to Automatically

[1] "Exception" Generally

[2] Certain Jury Instructions

§ 326.30 Instructing the Jury

§ 326.31 Statement of Points of Law

§ 326.32 Retirement of Jury for Deliberations

[1] Documents Jury May Take Into Deliberations

[2] Custody, Privacy, and Secrecy of Jury During Deliberations

[3] Jury's Requests for Further Information

[a] What Jury May Request

[b] Presence of Parties, Counsel, or Judge

[4] Recall of Jury for Further Instructions on Court's Own Motion

§ 326.33 Alleging Prejudice by Motion for New Trial

§§ 326.34-326.39 [Reserved]

§ 326.40 Appeals Based on Erroneous Jury Instructions

[1] Jury Instructions Considered as a Whole on Appeal

[2] Verdict in Accord With Evidence and Law Will Be Upheld

[3] Invited Error

§ 326.41 Designation of Clerk's Transcript on Appeal

§ 326.42 Grounds for Challenges to Instructions

[1] Repetition

[2] Undue Emphasis

[3] Argumentativeness

[4] Irrelevance

[5] Inconsistency

§ 326.43 Requirement of Prejudice

[1] No Reversal Unless Error Is Prejudicial and Results in Miscarriage of Justice

[2] Standard for Determining Prejudicial Error

[a] No Presumption of Inherent Prejudice

[b] Must Be Probable That Error Affected Verdict

[c] Multi-Factor Test

[d] Jury Must Have Been Misled

[3] Error Cured by Other Instructions

§§ 326.44-326.49 [Reserved]

§ 326.50 Related Matthew Bender Publications

§ 326.51 State Constitution

§ 326.52 State Statutes

[1] Proposing, Modifying, Refusing, and Giving Jury Instructions

[2] Retirement of Jury for Deliberations

[3] Errors Relating to Jury Instructions

§ 326.53 California Rules of Court

§ 326.54 Decisions

[1] Court's Own Instructions to Jury

[2] Form of Jury Instructions

[a] Use of Approved Instructions

[b] Formula Instructions

[i] In General

[ii] Danger of Incompleteness

[iii] Danger of Repetition, Undue Emphasis, or Argumentativeness

[c] Use of Judicial Opinions

[d] Use of Statutory Language

[3] Right to Proper Jury Instructions

[4] Court's Discretion in Considering Proposed or Requested Jury Instruction

[a] Framing Instructions

[b] Refusing Instructions

[5] Effect of Failure to Propose or Request Complete Jury Instructions

[6] Opportunity to Demand Clarification of Instructions

[7] Instructions Deemed Automatically Excepted to

[8] Jury's Requests for Further Information

[9] Erroneous Jury Instructions

[a] Argumentativeness

[b] Inconsistency

[c] Irrelevance

[d] Repetition

[e] Undue Emphasis

[10] Prejudicial Instructions

[a] Alleging Prejudice by Motion for New Trial

[b] Standard for Determining Prejudicial Error

[c] Error Cured by Other Instructions

[11] Particular Instructions

[a] Design Defect

[b] Strict Liability

[12] Timeliness of Request for Jury Instruction

§ 326.55 Law Reviews

§ 326.56 Text References

§§ 326.57-326.79 [Reserved]

§ 326.80 Request for Jury Instructions

[1] FORM

[2] Use of Form

[3] Time for Submission and Service of Proposed Instructions

§ 326.81 General Form of Proposed Jury Instruction

[1] FORM

[2] Use of Form

[3] Contents of Instruction

[4] CACI Instructions Strongly Encouraged

§ 326.82 CACI Form of Proposed Jury Instruction

[1] FORM

[2] Use of Form

[3] CACI Instructions Strongly Encouraged

[4] Format of CACI Instructions

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Editorial Consultant n*

FOOTNOTES:
(n55)Footnote *.
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Chapter 326 JURY INSTRUCTIONS
PART I. SCOPE

28-326 California Forms of Pleading and Practice--Annotated § 326.01

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§ 326.01 Scope of Chapter

This chapter discusses and contains forms relating to:

- The purpose of jury instructions [*see § 326.11*].
- Issues related to jury instructions in the trial court, including:
  - The court's comments on evidence and its own instructions to the jury [*see §§ 326.20, 326.21*].
  - Litigants' requests for jury instructions in civil actions, including timing and service requirements, form, right to proper instructions, and failure to propose instructions [*see* §§ 326.22-326.25; for forms, *see* §§ 326.80-326.82].
  - The court's exercise of discretion and grant, refusal, or modification of instructions [*see §§ 326.26, 326.27*].
  - Instructing the jury and retirement for deliberations [*see* §§ 326.30-326.32].
  - Raising instructional error by motion for new trial [*see § 326.33*].
- Issues related to jury instructions on appellate review, including:
  - Grounds for challenging instructions [*see § 326.42*].

- Prejudice requirement [*see § 326.43*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview

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PART I. SCOPE

28-326 California Forms of Pleading and Practice--Annotated § 326.02

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§ 326.02 Cross References

For the official jury instructions for use in California, see Judicial Council of California Civil Jury Instructions ("CACI") (LexisNexis Matthew Bender, Official Publisher).

For a comprehensive source of discussion and forms for specific jury instructions in contract, business, and real property cases, including all CACI instructions, see California Forms Of Jury Instruction(Matthew Bender).

Other topics related to jury instructions are addressed in the following chapters in this publication:

- For discussion and forms for seeking appellate review based on errors in jury instructions, see Ch. 40, *Appeal: An Overview* , et seq.

- For discussion and forms for entering judgments on general and special verdicts, see Ch. 318, *Judgments* .

- For discussion and forms for use in selecting juries and other issues affecting juries generally, see Ch. 322, *Juries and Jury Selection* .

- For discussion and forms relating to verdicts, see Ch. 326A, *Jury Verdicts* .

- For discussion and forms for use in making motions after trial on the basis of prejudicial instructions, see Ch. 371, *Motions After Trial* .

- For discussion relating to jury deliberations and misconduct, see Ch. 551, *Trial* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsJury DeliberationsCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureTrialsJury TrialsVerdictsGeneral Overview

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28-326 California Forms of Pleading and Practice--Annotated §§ 326.03-326.09

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[Reserved]

§§ 326.03[Reserved]

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A. In General

28-326 California Forms of Pleading and Practice--Annotated § 326.10

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§ 326.10 Governing Law

Cal. Const., art. VI, § 10 governs a judge's right to comment on testimony.

Various aspects of jury instructions are addressed in *Code Civ. Proc. §§ 607-619*, which govern the conduct of trials. *Code Civ. Proc. § 607a* sets forth the parties' and court's duties with respect to proposing, evaluating, and approving jury instructions.

Cal. Rules of Ct., Rule 2.1055 [*see § 326.23[1]*], and *Cal. Rules of Ct., Rule 2.1050* [*see § 326.12*], address the format, requirements, and judge's consideration of proposed jury instructions. *Cal. Rules of Ct., Rule 3.1580*, govern requests for special findings by a jury. Local rules of court generally establish when proposed jury instructions must be tendered, when they will be evaluated, and when counsel will be informed which instructions are approved. Therefore, counsel must consult local rules to insure that proposed jury instructions are tendered in a timely manner. However, no local court form or rule for the filing or submission of proposed jury instructions may require that the instructions be submitted in any manner other than as prescribed by this rule [*Cal. Rules of Ct., Rule 2.1055(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewEvidenceProcedural ConsiderationsJudicial Intervention in TrialsComments by JudgesGeneral Overview

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28-326 California Forms of Pleading and Practice--Annotated § 326.11

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§ 326.11 Purpose of Jury Instructions

Jury instructions provide the jury with the law applicable to claims and defenses tendered by the litigants and form part of the record on appeal. For discussion of the right to complete and comprehensive instructions, see *§ 326.24*. For discussion of the creation of a record on appeal, see *§§ 326.40, 326.41*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview

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28-326 California Forms of Pleading and Practice--Annotated § 326.12

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§ 326.12 Judicial Council of California Civil Jury Instructions ("CACI")

In 2003, the California Judicial Council released a comprehensive set of civil jury instructions: the Judicial Council of California Civil Jury Instructions ("CACI"--pronounced "Casey"). LexisNexis Matthew Bender is the Official Publisher of these instructions [*see Cal. Rules of Ct., Rule 2.1050(c)* (Administrative Office of Courts may contract with official publisher)]. CACI covers many areas of law, such as negligence, damages, insurance, employment relations, civil rights, unfair practices, and eminent domain, and are the "official instructions for use" in California [*Cal. Rules of Ct., Rule 2.1050(a)*]. Their use is strongly encouraged [*Cal. Rules of Ct., Rule 2.1050(e)*].

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

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsStandard Instructions

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A. In General

28-326 California Forms of Pleading and Practice--Annotated §§ 326.13-326.19

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[Reserved]

§§ 326.13[Reserved]

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28-326 California Forms of Pleading and Practice--Annotated § 326.20

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§ 326.20 Court's Discretion to Comment on Evidence

A court may comment on the evidence, on the testimony, and on the credibility of any witness when, in the court's opinion, commentary is necessary for the proper determination of a cause [*Cal. Const., art. VI, § 10*]. Pursuant to *Cal. Const., art. VI, § 10*, a trial judge's comments are appropriate and fair if they are attenuated from and do not directly comment on crucial issues before the jury [*see Orient Handel v. United States Fid. & Guar. Co. (1987) 192 Cal. App. 3d 684, 700, 237 Cal. Rptr. 667]* .

A judge's power to comment on the evidence is limited, because a judge may not withdraw material evidence from the jury or distort the testimony. The judge must inform the jurors that they are the exclusive judges of all questions of fact and of the credibility of the witnesses [*Orient Handel v. United States Fid. & Guar. Co. (1987) 192 Cal. App. 3d 684, 699, 700, 237 Cal. Rptr. 667* ; *see Code Civ. Proc. § 608* (discussed at *§ 326.21*)].

ILLUSTRATION:

Comment Beyond Permissible Scope. After closing arguments in a personal injury case, in which plaintiff claimed to have been injured taking a shortcut by stepping over a chain closing off a portion of defendant's place of business, the trial judge commented to the jury that he had never before, in 22 years on the bench, commented on a case, but that he intended to do so in this case because it was so "unusual." The judge then commented, among other things, that "no defect in this premises had anything to do with plaintiff's fall," that any damages should be assessed not on the original injury, but on any possible aggravation when an employee moved plaintiff's arm to test whether it was really hurt, that there was no horrendous pain and suffering in a broken arm that had healed perfectly, and that plaintiff's doctor never said the injury would lead to permanent pain. The judge also told the jury that they could ignore his comments. During deliberations, when the jurors asked to have the judge's comments read to

them, the judge refused and sent back the message that his comments were "[c]ompletely irrelevant to the jury's duties." The jury returned a nine-to-three verdict in favor of defendant.

The court of appeal found that the judge's comments had gone too far. The judge commented on the crucial issue of proximate cause, and his comments conflicted with uncontroverted testimony that plaintiff sustained permanent injury from the fall. The comments taken as a whole were confusing; their cumulative impact may well have swayed the opinion of at least one juror [*Lewis v. Bill Robertson & Sons, Inc. (1984) 162 Cal. App. 3d 650, 655-657, 208 Cal. Rptr. 699]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsJudicial Intervention in TrialsComments by JudgesGeneral Overview

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B. In Trial Court

28-326 California Forms of Pleading and Practice--Annotated § 326.21

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§ 326.21 Court's Own Instructions to Jury

In charging a jury, a court may instruct the jury on all matters of law the court believes necessary for the jury's information in reaching a verdict. If a court comments on the testimony in the case, it must inform the jury that the jury is the exclusive judge of all questions of fact. On request of a party, a court must furnish a statement of the legal authority supporting the charge or sign a statement adopting the law prepared and submitted by counsel [*Code Civ. Proc. § 608*].

It is the duty of a court to protect parties from unjust verdicts arising from:

- Ignorance or misstatement of the rules of law and of evidence.
- Impulse of passion or prejudice.
- Any other violation of a party's lawful rights in the conduct of the trial.

This is done, in part, by instructing the jury in the rules of law to be applied to the evidence presented [*Thomas v. Buttress & McClellan, Inc. (1956) 141 Cal. App. 2d 812, 819-820, 297 P.2d 768]* .

A trial court ordinarily has no duty to instruct the jury in the absence of a party's specific request. However, it does have a duty to instruct on controlling legal principles [*see § 326.25*], to ensure that the jury has a complete understanding of the law applicable to the facts. Failure to do so constitutes reversible error. The parties' submission of faulty or inadequate instructions does not relieve the court of its responsibility [*Paverud v. Niagara Machine & Tool Works (1987) 189 Cal. App. 3d 858, 863, 234 Cal. Rptr. 585]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview

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28-326 California Forms of Pleading and Practice--Annotated § 326.22

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§ 326.22 Timing and Service Requirements for Requesting Jury Instructions

In any case tried before a jury, before the first witness is sworn for trial, counsel must deliver to the trial judge and serve on opposing counsel proposed jury instructions covering the law as disclosed by the pleadings [*Code Civ. Proc. § 607a*; for forms for proposed jury instructions generally, see *§§ 326.81, 326.82*]. For a form request for jury instructions, see *§ 326.80*.

Before the commencement of argument, counsel may deliver to the trial judge and serve on opposing counsel additional proposed jury instructions on questions of law arising during the trial that were developed by the evidence and not disclosed by the pleadings [*Code Civ. Proc. § 607a*].

If during argument issues are raised that are not covered by the instructions given or refused, on the request of counsel the court may give additional jury instructions on those issues [*Code Civ. Proc. § 607a*].

PRACTICE TIP:

Check Local Rules and Custom for Timing and Service Methods. Despite the times for submission of proposed instructions prescribed by *Code. Civ. Proc. § 607a*, the time for submission and the method of service of proposed jury instructions vary from county to county and court to court. Refer to local court rules and to other local practitioners to clarify the preference of the presiding judge in a case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsRequests for Instructions

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28-326 California Forms of Pleading and Practice--Annotated § 326.23

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§ 326.23 Drafting Proposed Jury Instructions

[1] Format

Each proposed instruction must [*Cal. Rules of Ct., Rule 2.1055(c)*]:

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

Each instruction presented, except instructions presented by CACI number reference, must have at the bottom of the page a citation of authorities which supports the instruction. No citation is required for approved instructions [*Cal. Rules of Ct., Rule 2.1055(d)*]. Citing a decision as authority for a requested jury instruction does not preclude a party from arguing on appeal that the trial court erred in giving a different instruction based on the same decision but stating a different proposition of law [*Asgari v. City of Los Angeles (1997) 15 Cal. 4th 744, 759, 63 Cal. Rptr. 2d 842, 937 P.2d 273* ; *see generally § 326.40[3]* (invited error)].

All proposed instructions must be submitted to the court in the form and format specified by *Cal. Rules of Ct., Rules 2.100-2.119* [*Cal. Rules of Ct., Rule 2.1055(b)(1)*]. Each set of proposed jury instructions must have a cover page, containing the caption of the case and stating the name of the party proposing the instructions, and an index listing all

the proposed instructions [*Cal. Rules of Ct., Rule 2.1055(b)(2)*].

In the index, approved jury instructions must be identified by their reference numbers and special jury instructions must be numbered consecutively. The index must contain a checklist that the court can utilize to indicate whether the instruction was [*Cal. Rules of Ct., Rule 2.1055(b)(3)*]:

(1) Given as proposed;

(2) Given as modified;

(3) Refused; or

(4) Withdrawn.

Each set of proposed jury instructions must be bound loosely [*Cal. Rules of Ct., Rule 2.1055(b)(4)*].

The format rules apply to any proposed jury instructions that a party submits to the court, including "approved jury instructions" and "special jury instructions" [*Cal. Rules of Ct., Rule 2.1055(a)(1)*]. This rule defines "approved" instructions as the Judicial Council's Civil Jury Instructions (CACI) and "special" instructions as instructions from other sources, those specially prepared by the party, or CACI that have been substantially modified by the party. The format rules do not apply to the form or format of jury instructions presented to the jury. That is left to the court's discretion [*Cal. Rules of Ct., Rule 2.1055(a)(2)*].

No local court form or rule for the filing or submission of proposed jury instructions may require that the instructions be submitted in any manner other than as prescribed by this rule [*Cal. Rules of Ct., Rule 2.1055(e)*].

For discussion of and a form for the preparation of CACI instructions, see *§§ 326.23[2]* and *326.82*, respectively. For a general form for proposed jury instructions, see *§ 326.81*. For discussion of the various forms in which legal principles can be couched in jury instructions, see *§ 326.23[3]-[5]*.

[2] Using CACI

As noted in *§ 326.12*, in 2003, the California Judicial Council released a comprehensive set of civil jury instructions. The goal of the CACI instructions is to improve the quality of the jury decision-making by providing standardized instructions that accurately state the law in a way that is understandable to the average juror [*Cal. Rules of Ct., Rule 2.1050(a)*].

If the latest edition of CACI contains an instruction applicable to a case, and the trial judge determines that the jury should be instructed on the subject, it is recommended that the judge use the CACI instruction unless the judge finds that a different instruction would more accurately state the law and be understood by jurors. Whenever the latest edition of CACI does not contain an instruction on a subject on which the trial judge determines that the jury should be instructed, or when a CACI instruction cannot be modified to submit the issue properly, the instruction given on that subject should be accurate, brief, understandable, impartial, and free from argument [*Cal. Rules of Ct., Rule 2.1050(e)*].

The Judicial Council intends that CACI be freely available for use and reproduction by parties, attorneys, and the public. However, commercial publishers of CACI must get a license from the Administrative Office of the Courts [*Cal. Rules of Ct., Rule 2.1050(c)*]. The Judicial Council maintains a website that includes the CACI instructions, a user's guide, and frequently asked questions, among other things [*see* www.courtinfo.ca.gov/jury/civiljuryinstructions/].

If the trial court refuses to give an approved instruction containing the only reference to a major theory of the case

because the court believes the instruction is loaded with naked abstractions and not a ready tool to assist a lay jury, the court's omission is prejudicial error if the requested instruction is more accurate and complete than the instructions given by the court [*Godwin v. La Turco (1969) 272 Cal. App. 2d 475, 479, 480, 77 Cal. Rptr. 305]* .

For a CACI form of proposed instructions, see *§ 326.82*. For the official jury instructions, see Judicial Council of California Civil Jury Instructions (CACI) (LexisNexis Matthew Bender, Official Publisher). For a comprehensive source of jury instructions in contract, business, and real property cases, including all CACI instructions as well as instructions that enhance and supplement CACI, see California Forms of Jury Instruction (Matthew Bender).

Preparation of jury instructions using computer document assembly software can save time and increase accuracy. For a software program to prepare the Judicial Council civil jury instructions using HotDocs© document assembly automation, see LexisNexis Automated Jury Instructions. Although the attorney must still exercise careful attention to detail, the LexisNexis Automated Judicial Council of California Civil Jury Instructions program walks the user through questions and decisions that surface, and leads to the creation of better jury instructions. The attorney must review all instructions to make sure that they apply correctly to the particular facts and circumstances of the case for which they are submitted.

[3] Statutory Language

Jury instructions may be given in the language of a statute only if a jury will have no difficulty in understanding the statute without guidance from the court [*Lourence v. West Side Irrigation Dist. (1965) 233 Cal. App. 2d 532, 538, 43 Cal. Rptr. 889* ; *see Conservatorship of Gregory (2000) 80 Cal. App. 4th 514, 520, 95 Cal. Rptr. 2d 336* (proper to instruct jury in applicable statute's language)].

ILLUSTRATION:

Basic Speed Law. It is proper for the court in a personal injury action to give an instruction in the terms of the applicable section of the Vehicle Code setting forth the basic speed law and to inform the jury that a violation of the statute constitutes negligence as a matter of law [*Hardin v. San Jose City Lines, Inc. (1953) 41 Cal. 2d 432, 438, 260 P.2d 63]* .

If a code section is not applicable, it is error to instruct on it [*Shamblin v. Polich (1973) 32 Cal. App. 3d 756, 762, 108 Cal. Rptr. 410]* . Even though an instruction is couched in proper statutory language, it is improper if it is not supported by the evidence. For example, an instruction on negligent failure to have equipment prescribed by a statute from which defendant's type of vehicle is specifically exempted is error. The very giving of an instruction on an inapplicable statute indicates to a jury that the court considers the statute to be relevant [*Davis v. Pine Mountain Lumber Co. (1969) 273 Cal. App. 2d 218, 224-225, 77 Cal. Rptr. 825]* .

For discussion of the proper format for preparing jury instructions, see *§ 326.23[1]*. For a general form of proposed jury instructions, see *§ 326.81*.

[4] Language From Judicial Opinions

If an instruction taken from the language of a legal opinion is substantially correct and, even though erroneous is innocuous to the jury, giving the instruction does not constitute prejudicial error [*Schance v. H. O. Adams Tile Co. (1955) 131 Cal. App. 2d 549, 556, 280 P.2d 851]* . However, the language used by a court in an opinion seeking to apply principles of law to the facts of a given case is not necessarily proper to use in instructing the jury in another case if the same principles are inapplicable or the facts are different. An opinion should always be read in conjunction with the facts of the case in which the opinion is given. Often an opinion may use expressions by way of argument or illustration that are correct in their application to that case, but are inapplicable in other cases. Thus, it is not always proper to give jury instructions on a principle of law couched in language taken from a judicial opinion [*Pearce v.*

Boggs (1893) 99 Cal. 340, 343-344, 33 P. 906 ; *Schance v. H.O. Adams Tile Co. (1955) 131 Cal. App. 2d 549, 555-556, 280 P.2d 851]* . For discussion of the proper format for preparing jury instructions, see *§ 326.23[1]*.

[5] Using Other Sources

There are a wide variety of sources from which parties may draw instructions, so long as the instructions are correct statements of law. These include, in addition to statutes (*see § 326.23[3]*) and judicial opinions (*see § 326.23[4]*), treatises, hornbooks, legal encyclopedias, digests, and form books. Thus, for example, in a proper case, instructions may be based on state or federal regulations [*Conservatorship of Gregory (2000) 80 Cal. App. 4th 514, 523, 95 Cal. Rptr. 2d 336]* .

[6] Formula Instructions

[a] "Formula Instruction" Defined

A formula instruction is one in which the jury is directed to find for a party if it finds certain facts to be true [*see Dodge v. San Diego Electric Ry. Co. (1949) 92 Cal. App. 2d 759, 764, 208 P.2d 37]* .

[b] Permissible Use

Formula instructions are justified only if they contain all of the elements necessary for a party to prevail [*Mazzotta v. Los Angeles Ry. Corp. (1944) 25 Cal. 2d 165, 170, 153 P.2d 338* ; *see Bertero v. Nat'l General Corp. (1974) 13 Cal. 3d 43, 58, 118 Cal. Rptr. 184, 529 P.2d 608* (test for determining whether formula instruction constitutes prejudicial error)]. A formula instruction based on an incorrect or unauthorized premise gives rise to reversible error even if the correct instruction is given in another part of the instructions as a whole [*Hubbard v. Calvin (1978) 83 Cal. App. 3d 529, 534, 147 Cal. Rptr. 905]* .

PRACTICE TIP:

Avoid Formula Instructions When Possible to Avoid Reversal. Although merely giving formula instructions does not mandate reversal, their use is disfavored by reviewing courts [*Bertero v. Nat'l General Corp. (1974) 13 Cal. 3d 43, 58, 118 Cal. Rptr. 184, 529 P.2d 608]* .

For discussion of the proper format for preparing jury instructions, see *§ 326.23[1]*.

[c] Danger of Incompleteness

Formula instructions are often defective in failing to recite all the legal prerequisites for a verdict for a party [*Murrell v. State of California ex rel. Dept. Pub. Wks. (1975) 47 Cal. App. 3d 264, 269, 120 Cal. Rptr. 812]* . The proper test in determining whether a formula instruction constitutes prejudicial error is whether the instruction purports to address all the elements and whether the omitted elements are covered by specific instructions elsewhere [*Bertero v. Nat'l General Corp. (1974) 13 Cal. 3d 43, 58, 118 Cal. Rptr. 184, 529 P.2d 608]* .

Generally, the absence of one of the necessary elements in an instruction cannot be compensated for or cured by the fact that other instructions state in a general way the omitted factors required for a verdict [*see Mazzotta v. Los Angeles Ry. Corp. (1944) 25 Cal. 2d 165, 170, 153 P.2d 338]* . However, this rule is relaxed when the conditions warrant [*Amidon v. Hebert (1949) 93 Cal. App. 2d 225, 228, 208 P.2d 733]* . Thus, the use of a formula instruction that does not include all of the essential factors is not prejudicial error if the instructions, considered together in their entirety, fully and fairly charge the jury with the law applicable in the case [*Mazzotta v. Los Angeles Ry. Corp. (1944) 25 Cal. 2d 165, 170, 153 P.2d 338]* . For example, giving formula instructions is not prejudicial error if [*Amidon v. Hebert (1949) 93 Cal. App. 2d 225, 227, 208 P.2d 733]* :

- The method of giving the instructions indicates that they are not intended to state all of the elements involved in the case.

- The omitted elements are covered by specific instructions given elsewhere.

- The jury is instructed to regard each instruction in light of all the others.

For further discussion of when instructions may be cured by other instructions, see *§ 326.43[3]*. For further discussion of what constitutes prejudicial error, see *§ 326.43[2]*.

[d] Danger of Repetition, Undue Emphasis, or Argumentativeness

Formula instructions often contain repetitious references to elements a jury must find for a particular party. The practice of giving formula instructions has met with disapprobation because these instructions frequently amount to argument rather than a fair discussion of the law [*Cal. Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 Cal. App. 3d 1, 65, 221 Cal. Rptr. 171*]. Formula instructions, like argumentative instructions, are objectionable because they emphasize certain portions of the testimony and may confuse and mislead the jury [*Roy v. Mission Taxi Co. (1950) 101 Cal. App. 2d 438, 446, 225 P.2d 920]* .

ILLUSTRATION:

Singling Out Facts Showing Negligence in Personal Injury Action. It was improper in a personal injury action for the trial court to single out certain testimonial facts and instruct the jury that those facts constituted negligence if a prudent person would not have so conducted himself or herself [*Powell v. Bartmess (1956) 139 Cal. App. 2d 394, 404, 294 P.2d 150]* .

For further discussion of repetition, undue emphasis, and argumentativeness with respect to instructions generally, see *§ 326.42[1]-[3]*, respectively.

[7] Gender Neutral Language

All instructions submitted to the jury must be written in gender-neutral language. If standard jury instructions such as CACI are submitted to the jury, the court, or counsel at the court's request, must recast the instructions as necessary to ensure that gender-neutral language is used in each instruction [*Cal. Rules of Ct., Rule 2.1058(b)*]. All Judicial Council civil jury instructions (CACI) as well as Matthew Bender specific instructions are drafted using gender neutral language [*see* California Forms of Jury Instruction (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsRequests for InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsStandard Instructions

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Chapter 326 JURY INSTRUCTIONS
PART II. LEGAL BACKGROUND
B. In Trial Court

28-326 California Forms of Pleading and Practice--Annotated § 326.24

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§ 326.24 Right to Proper Jury Instructions

[1] Court Cannot Weigh Evidence

Each party is entitled to have the jury instructed on all of the party's theories of the case that are reasonable and supported by the pleadings and evidence or inferences that may be properly drawn from the evidence [*Alcala v. Vazmar Corporation (2008) 167 Cal. App. 4th 747, 754, 84 Cal. Rptr. 3d 402* ; *Orient Handel v. United States Fid. & Guar. Co. (1987) 192 Cal. App. 3d 684, 698, 237 Cal. Rptr. 667]* , regardless of whether the evidence was considered persuasive by the trial court [*Maxwell v. Powers (1994) 22 Cal. App. 4th 1596, 1607, 28 Cal. Rptr. 2d 62* (citing *Fish v. Los Angeles Dodgers Baseball Club (1976) 56 Cal. App. 3d 620, 633, 128 Cal. Rptr. 807*)], and irrespective of the manner in which issues are framed in a complaint or in a pretrial order [*Alvarez v. Felker Mfg. Co. (1964) 230 Cal. App. 2d 987, 998, 41 Cal. Rptr. 514]* , without assuming the existence of disputed facts [*see* *Slovick v. James I. Barnes Constr. Co. (1956) 142 Cal. App. 2d 618, 626, 298 P.2d 923]* .

Although evidence on the proponent's theory may be weak when compared to conflicting evidence, the trial judge may not weigh or appear to weigh the conflicting evidence by refusing the proferred instructions [*Barrett v. Bank of America (1986) 183 Cal. App. 3d 1362, 1369, 229 Cal. Rptr. 16* ; *Byrne v. City & County of San Francisco (1980) 113 Cal. App. 3d 731, 737, 170 Cal. Rptr. 302]* . However, the court need not give instructions on a party's theory of the case unless that theory is supported by substantial evidence [*Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 572, 34 Cal. Rptr. 2d 607, 882 P.2d 298* ; *Morey v. Vannucci (1998) 64 Cal. App. 4th 904, 915, 75 Cal. Rptr. 2d 573]* .

In determining whether a party was entitled to an instruction, the appellate court reviews the evidence most favorable to the contention that the requested instruction is applicable [*Maxwell v. Powers (1994) 22 Cal. App. 4th 1596, 1607, 28 Cal. Rptr. 2d 62* (citing *Christian v. Bolls (1970) 7 Cal. App. 3d 408, 415-416, 86 Cal. Rptr. 545*); *Fish v. Los*

Angeles Dodgers Baseball Club (1976) 56 Cal. App. 3d 620, 634, 128 Cal. Rptr. 807].

[2] Instructions Based on Different Theories of Law

If opposing parties rely on different theories and request conflicting instructions, the court should give instructions on the theories of each party [*Skoglie v. Crumley (1972) 26 Cal. App. 3d 294, 298, 103 Cal. Rptr. 205* ; *see also § 326.24[1]*].

ILLUSTRATION:

Res Ipsa Loquitur Instruction. A conditional res ipsa loquitur instruction is justified if a plaintiff produces evidence sufficient to support findings that the requisite conditions are present. The plaintiff need not demonstrate all of the facts necessary to the res ipsa loquitur inference [*Diamond Springs Lime Co. v. American River Constructors (1971) 16 Cal. App. 3d 581, 601, 94 Cal. Rptr. 200]* .

When evidence is received for a restrictive purpose, the party against whom it is offered is entitled to a limiting instruction showing the specific reason for which the evidence is admitted [Mangrum v. Union Pac. R.R. Co. (1964) 230 Cal. App. 2d 960, 981, 41 Cal. Rptr. 536] .

[3] No Right When Party Refuses or Withdraws Instruction

A trial court's duty to instruct a jury fully does not include an obligation to discuss a subject when the court has effectually offered a party, and the party has refused, an instruction on that subject [*McCloud v. Roy Riegels Chemicals (1971) 20 Cal. App. 3d 928, 935, 97 Cal. Rptr. 910]* . By agreeing to the proposed instructions, a party effectively withdraws other proposed instructions on a subject and waives the right to complain that a proferred instruction was refused [*Sill Properties, Inc. v. CMAG, Inc. (1963) 219 Cal. App. 2d 42, 53, 33 Cal. Rptr. 155]* . Thus, a party who withdrew a proposed instruction or agreed at trial that a proposed instruction be deemed withdrawn cannot contend on appeal that the proposed instruction should have been given [*Swails v. General Electric Co. (1968) 264 Cal. App. 2d 82, 85, 70 Cal. Rptr. 143]* .

However, a party may always challenge an erroneous instruction on appeal even though the party did not request modification of the instruction or that the court give another in its place [*Clawson v. Stockton Golf & Country Club (1963) 220 Cal. App. 2d 886, 899, 34 Cal. Rptr. 184]* . For discussion of the bases for an appeal based on erroneous instructions, see *§ 326.42*.

[4] No Right When Counsel's Conduct Amounts to Waiver

Generally, counsel has the right to have the jury instructed on his or her legal theory of the case. However, this general rule does not apply when counsel's conduct is tantamount to a waiver of the instruction. For example, refusal to modify an instruction on request from the court is an implied waiver of the right to raise the issue on appeal [*see* *Roberts v. City of Los Angeles (1980) 109 Cal. App. 3d 625, 632-633, 167 Cal. Rptr. 320]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsRequests for Instructions

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Chapter 326 JURY INSTRUCTIONS
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28-326 California Forms of Pleading and Practice--Annotated § 326.25

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§ 326.25 Effect of Failure to Propose or Request Complete Jury Instructions

Each party must propose complete and comprehensive jury instructions in accordance with the party's theories. If the parties fail to propose instructions, the court owes no duty to instruct on its own motion [*Switzer v. State of California (1969) 269 Cal. App. 2d 627, 635, 75 Cal. Rptr. 371]* .

A party's failure to propose an instruction waives any objection to a jury instruction that is legally correct, even though it may be too general or incomplete for the state of the evidence [*Suman v. BMW of North America, Inc. (1994) 23 Cal. App. 4th 1, 9, 28 Cal. Rptr. 2d 133]* . Nevertheless, the trial judge is obliged to see that justice is done and to furnish the jurors with some guidance on the controlling legal principles applicable to the case [*Thomas v. Buttress & McClellan, Inc. (1956) 141 Cal. App. 2d 812, 819, 297 P.2d 768]* . For discussion of when a party is deemed to have excepted to jury instructions that have been given, refused, or modified by a court, see *§ 326.29*.

Additionally, a party who fails to request a particular jury instruction cannot raise on appeal the trial court's failure to instruct on that subject [*Orient Handel v. United States Fid. & Guar. Co. (1987) 192 Cal. App. 3d 684, 699, 237 Cal. Rptr. 667* ; *Switzer v. State of California (1969) 269 Cal. App. 2d 627, 636, 75 Cal. Rptr. 371* ; *see Conservatorship of Gregory (2000) 80 Cal. App. 4th 514, 520-521, 95 Cal. Rptr. 2d 336* ; *Kitzig v. Nordquist (2000) 81 Cal. App. 4th 1384, 1398, 97 Cal. Rptr. 2d 762* (failure to propose special verdict to offset noneconomic damages attributable to another person's fault)]. For example, a party in an action based on breach of an oral agreement and fraudulent misrepresentations could not complain on appeal of a failure to instruct on the measure of damages when that party did not propose any instructions concerning the measure to be applied by the jury in assessing damages [*Meyer v. Ford Motor Co. (1969) 275 Cal. App. 2d 90, 108, 79 Cal. Rptr. 816]* . Similarly, a party who submitted no jury instruction could not argue on appeal the trial court's failure to instruct the jury in detailed legal principles, when the court submitted a special verdict and the party made no objection [*Olson v. Arnett (1980) 113 Cal. App. 3d 59, 66, 169 Cal.*

Rptr. 629 ; *see also Conservatorship of Gregory (2000) 80 Cal. App. 4th 514, 520-521, 95 Cal. Rptr. 2d 336* (defendant's failure to specifically request that jury be instructed in accordance with *Welf. & Inst. Code §§ 15610.57* and *15610.63* waived issue on appeal)]. However, a party's failure to propose instructions does not waive the right to argue on appeal that an instruction incorrectly states the law [*see Suman v. BMW of North America, Inc. (1994) 23 Cal. App. 4th 1, 9, 28 Cal. Rptr. 2d 133]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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28-326 California Forms of Pleading and Practice--Annotated § 326.26

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§ 326.26 Court's Discretion in Considering Proposed or Requested Jury Instructions

[1] Framing Instructions

Although it is incumbent on a trial court to instruct on all material issues involved in an action, the court is not required to give every instruction offered by a litigant or to instruct in the language selected by the litigant [*Fleck v. Bollinger Home Corp. (1997) 54 Cal. App. 4th 926, 934, 63 Cal. Rptr. 2d 407* ; *Ray v. Jackson (1963) 219 Cal. App. 2d 445, 455, 33 Cal. Rptr. 339]* . Instructions are sufficient if they fairly and accurately state the necessary legal principles when read as a whole [*Fleck v. Bollinger Home Corp. (1997) 54 Cal. App. 4th 926, 934, 63 Cal. Rptr. 2d 407]* . The court may modify a proffered instruction or give one of its own instead of that proposed by a party, as long as the instruction given states the law correctly [*Byrum v. Brand (1990) 219 Cal. App. 3d 926, 939, 268 Cal. Rptr. 609* ; *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 805, 174 Cal. Rptr. 348* ; *see Ewing v. Gill Industries, Inc. (1992) 3 Cal. App. 4th 601, 610, 4 Cal. Rptr. 2d 640]* .

A trial court acts properly in modifying and condensing an instruction offered by a party if the omitted portion of the requested instruction addresses matters of general information that are not principles of law and are more appropriately the subject of argument [*see Mezerkor v. Texaco, Inc. (1968) 266 Cal. App. 2d 76, 101, 72 Cal. Rptr. 1* (instruction proposed by plaintiff in personal injury action)].

[2] Setting Sequence of Instructions

The sequence in which instructions are given to a jury rests in the sound discretion of the trial court. The trial court does not mislead, misdirect, or confuse a jury if the instructions given are appropriate to the issues and evidence in the case and correctly express the law, and the trial judge makes a conscientious effort to fully instruct the jury on all legal principles and to arrange the instructions in logical order so that the jury might better comprehend them [*Davis v.*

Nelson (1963) 221 Cal. App. 2d 62, 69, 34 Cal. Rptr. 201] .

[3] Refusing Instructions

On request, a party is entitled to correct, nonargumentative instructions on every theory of the case advanced by the party supported by substantial evidence. The court may not force the party to rely on abstract generalities. The court must instruct in specific terms that relate the party's theory to the case [*Daum v. SpineCare Medical Group, Inc. (1997) 52 Cal. App. 4th 1285, 1307, 61 Cal. Rptr. 2d 260* (error in refusing to instruct on negligence per se in medical malpractice action based on failure to obtain informed consent for implantation of device)].

However, a party may not complain on appeal that the court refused the party's requested instruction as long as the court's instruction correctly stated the applicable law, even when the requested instruction stated the principles of law more clearly and definitely than the instructions given by the court [*Eagar v. McDonnell Douglas Corp. (1973) 32 Cal. App. 3d 116, 121, 107 Cal. Rptr. 819]* . The court may refuse instructions on points of law sufficiently covered by other instructions even though the proffered instructions are correctly drawn and applicable to the evidence [*Doupnik v. General Motors Corp. (1990) 225 Cal. App. 3d 849, 864, 275 Cal. Rptr. 715* ; *Mezerkor v. Texaco, Inc. (1968) 266 Cal. App. 2d 76, 100, 72 Cal. Rptr. 1]* .

The trial court must refuse a proposed instruction that is incomplete or misleading. The court is not required to correct, modify, or edit an incomplete proposed instruction [*Orient Handel v. United States Fid. & Guar. Co. (1987) 192 Cal. App. 3d 684, 698, 237 Cal. Rptr. 667* ; *Alvarez v. Felker Mfg. Co. (1964) 230 Cal. App. 2d 987, 1001, 41 Cal. Rptr. 514* ; *see also Conservatorship of Gregory (2000) 80 Cal. App. 4th 514, 522, 95 Cal. Rptr. 2d 336* (court not required to give instructions that are not correct statements of law, or are incomplete or misleading)]. Nor is the trial court compelled to redraft a proposed inaccurate instruction [*Orient Handel v. United States Fid. & Guar. Co. (1987) 192 Cal. App. 3d 684, 698, 699, 237 Cal. Rptr. 667* ; *Barth v. B. F. Goodrich Tire Co. (1968) 265 Cal. App. 2d 228, 243, 71 Cal. Rptr. 306]* .

However, the trial court errs by refusing a proffered instruction because there is conflicting evidence on the issue, *i.e.*, the court may not weigh conflicting evidence by refusing a proffered instruction [*Fish v. Los Angeles Dodgers Baseball Club (1976) 56 Cal. App. 3d 620, 641, 128 Cal. Rptr. 807* ; *McGoldrick v. Porter-Cable Tools (1973) 34 Cal. App. 3d 885, 891, 110 Cal. Rptr. 481* ; *see also John B. Gunn Law Corp. v. Maynard (1987) 189 Cal. App. 3d 1565, 1573, 235 Cal. Rptr. 180* (prejudicial refusal of instruction); *§ 326.24[1]*]. Conversely, the court should refuse instructions on principles of law not applicable to the issues in the case. To do otherwise is likely to confuse and mislead the jury [*Perry v. Schwartz (1963) 219 Cal. App. 2d 825, 829, 33 Cal. Rptr. 511]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJury TrialsJury InstructionsRequests for Instructions

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Chapter 326 JURY INSTRUCTIONS
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28-326 California Forms of Pleading and Practice--Annotated § 326.27

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§ 326.27 Court's Disposition of Proposed or Requested Jury Instructions

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

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

If the latest edition of the Judicial Council of California Civil Jury Instructions (CACI) (LexisNexis Matthew Bender, Official Publisher) contains an instruction applicable to a case and the trial judge determines that the jury should be instructed on the subject, it is recommended that the judge use the CACI instruction unless the judge determines that a different instruction would more accurately state the law and be understood by jurors. Whenever the latest edition of CACI does not contain an instruction on a subject on which the trial judge determines that the jury should be instructed, or when a CACI instruction cannot be modified to submit the issue properly, the instruction given on that subject should be accurate, brief, understandable, impartial, and free from argument [*Cal. Rules of Ct., Rule 2.1050(e)*]. For discussion of the use of CACI, see *§§ 326.23[2], 326.82*.

If a party requests special instructions, the court must do any of the following [*see Code Civ. Proc. § 609*]:

- Give the instructions as requested.

- Refuse to give the instructions as requested.

- Give the instructions with modifications in a manner that makes distinct which instructions were given in whole or in part.

For discussion of the use of non-CACI instructions, see *§ 326.23*; for a general form for proposed jury instructions, see *§ 326.81*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsRequests for InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsStandard Instructions

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28-326 California Forms of Pleading and Practice--Annotated § 326.28

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§ 326.28 Opportunity to Demand Clarification of Jury Instructions

If the trial court gives an instruction that is legally correct, but one of the parties complains that the instruction is too general, lacks clarity, or is incomplete, the complaining party may request additional or qualifying instructions. If the party fails to request additional or qualifying instructions, the party waives that issue on appeal [*Weeks v. Baker & McKenzie (1998) 63 Cal. App. 4th 1128, 1162, 74 Cal. Rptr. 2d 510* ; *see Conservatorship of Gregory (2000) 80 Cal. App. 4th 514, 520, 95 Cal. Rptr. 2d 336* ; *Switzer v. State (1969) 269 Cal. App. 2d 627, 636, 75 Cal. Rptr. 371]* .

ILLUSTRATION:

Instruction Incomplete Compared to Facts in Evidence. In a negligence action, an instruction was not entirely applicable to the facts of the case and the plaintiff did not request amplification of, or proffer an instruction on, when a driver may pass on the right side of the road. The court of appeal found that the plaintiff forfeited the right to complain on appeal of the incompleteness of the instruction given. This was the type of error that a party must have raised in the trial court to preserve it for appeal [*Downing v. Barrett Mobile Home Transport, Inc. (1974) 38 Cal. App. 3d 519, 523, 113 Cal. Rptr. 277]* .

PRACTICE TIP: Request Clarification if Any Doubt as to Jury's Understanding. If you have any doubt whether the jury understood an instruction or whether the jury might misapprehend its meaning, either ask the court to explain the instruction or prepare and proffer an instruction that explains the law clearly [*O'Connor v. United Railroads of San Francisco (1914) 168 Cal. 43, 52, 141 P. 809]* . For discussion of when a party is deemed to have excepted to jury instructions given, refused, or modified, by a court, see *§ 326.29*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsSupplemental Instructions

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28-326 California Forms of Pleading and Practice--Annotated § 326.29

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§ 326.29 Instructions Deemed Excepted to Automatically

[1] "Exception" Generally

An exception is an objection on a matter of law to a decision made, before or after judgment, by a court, tribunal, judge, or other judicial officer in an action or proceeding. An exception must be taken at the time a decision is made [*Code Civ. Proc. § 646*]. Certain actions by the trial court are deemed automatically excepted to [*see Code Civ. Proc. § 647*]. For the exceptions specifically in the context of jury instructions, see *§ 326.29[2]*.

The trial court or the court of appeal may vacate a verdict and modify or vacate any other decision, in whole or in part, and grant a new or further trial on all or part of the issues on application of an aggrieved party for an error in law that occurs at the trial and is excepted to by the party making the application, and that materially affects the substantial rights of the applicant [*Code Civ. Proc. § 657(7)*]. For discussion and forms for use in moving to vacate a verdict and for a new or further trial, see Ch. 371, *Motions After Trial* .

[2] Certain Jury Instructions

The parties are deemed to except to the giving of an instruction, refusal to give an instruction, or modification of an instruction [*Code Civ. Proc. § 647*]. If a party, at the time the ruling on an instruction is sought or made, or within a reasonable time afterwards, makes the party's position known by objection or otherwise, all other orders, rulings, actions, or decisions are deemed to have been excepted to [*Code Civ. Proc. § 647*]. Hence, instructions requested by an adverse party are deemed excepted to by the complaining party under the provisions of *Code Civ. Proc. § 647*, even though the complaining party makes no objection to them [*Pappert v. San Diego Gas & Electric Co. (1982) 137 Cal. App. 3d 205, 212, 186 Cal. Rptr. 847*].

Similarly, a party's failure to request an instruction does not bar the party from asserting on appeal that it was error for the court to give the instruction, because *Code Civ. Proc. § 647* expressly provides that giving an instruction is deemed excepted to [*Griesel v. Dart Industries, Inc. (1979) 23 Cal. 3d 578, 583-584 n.4, 153 Cal. Rptr. 213, 591 P.2d 503]* . At least one court has interpreted *Code Civ. Proc. § 647* to mean that when an instruction contains an incorrect statement of the law, in contrast to an instruction is too general or is incomplete, failure to object or to propose a correct instruction will not bar a party from raising the error on appeal [*U.S. Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal. App. 3d 1431, 1447, 279 Cal. Rptr. 533]* .

For discussion of the effect of a party's failure to propose complete jury instructions, see *§ 326.25*. For discussion of the effect of a party's failure to request additional or qualifying instructions, see *§ 326.28*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsObjections to Instructions

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28-326 California Forms of Pleading and Practice--Annotated § 326.30

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§ 326.30 Instructing the Jury

Immediately after the jury is sworn, the trial judge may, in his or her discretion, "preinstruct" the jury. Preinstructions can relate to the elements of the charges or claims, the jury's duties, the jury's conduct, the order of proceedings, the procedure for submitting written questions, and the legal principles that will govern the proceedings [*Cal. Rules of Ct., Rule 2.1035*].

At the close of evidence or after closing arguments, the court charges the jury with instructions [*Code Civ. Proc. § 607*]. The court instructs on all matters of law necessary for rendering a verdict. If the court restates the testimony of the case, it must inform the jurors that they are the exclusive judges of all questions of fact [*Code Civ. Proc. § 608*].

The court may, at its discretion, give special instructions requested by either party [*Code Civ. Proc. § 609*]. For discussion of special findings and special interrogatories, see Ch. 326A, *Jury Verdicts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview

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28-326 California Forms of Pleading and Practice--Annotated § 326.31

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§ 326.31 Statement of Points of Law

If requested by either party, the court must furnish to either party a statement of the points of law charged to the jury or must sign a statement of points prepared by counsel for either party [*Code Civ. Proc. § 608*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview

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28-326 California Forms of Pleading and Practice--Annotated § 326.32

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§ 326.32 Retirement of Jury for Deliberations

[1] Documents Jury May Take Into Deliberations

When the court submits the case to the jury, the jury then retires for deliberation [*see Code Civ. Proc. § 613* (jury may decide case in court or retire for deliberation); for discussion of requirements when the jury retires, *see § 326.32[2]*]. If the jury retires to deliberate, the court must advise the jury of the availability of a written copy of the jury instructions. The court may at its discretion, or must if the jury so requests, provide the jury with a written copy of the instructions given [*Code Civ. Proc. § 612.5*; *see CACI No. 5000* (Duties of the Judge and Jury)].

The jurors may also take into deliberations all evidence except deposition transcripts and papers the court does not find advisable to take from their possessor. The jurors may also take exhibits the court deems proper and notes of testimony or other proceedings made by themselves during the course of the trial. However, the jury may not retire with the trial notes of a nonjuror [*Code Civ. Proc. § 612*]. Similarly, one juror may not tell other jurors about an experiment conducted with a nonjuror outside the jury room [*Bell v. State of California (1998) 63 Cal. App. 4th 919, 930-934, 74 Cal. Rptr. 2d 541* (discussing propriety of juror experiments in general); *see also CACI No. 100* (instruction to jurors not to conduct experiments)]. For discussion of juror misconduct generally, see Ch. 551, *Trial* .

Jurors may take notes during trial [*see Cal. Rules of Ct., Rule 2.1031*] and these notes can also be taken into the jury room during deliberations [*see generally CACI Nos. 102, 5010*].

[2] Custody, Privacy, and Secrecy of Jury During Deliberations

When the jury retires to deliberate, the jurors are kept together in a convenient place under the charge of a court officer until at least three-fourths of them agree on a verdict or they are discharged by the court. The officer may not allow any

communications to reach the jurors and is prohibited from making any communication himself or herself except on court order and except for asking if three-fourths of the jurors have agreed on a verdict. The officer may not communicate to anyone about the state of the jury's deliberations or the verdict before it is read by the clerk [*see Code Civ. Proc. § 613*].

[3] Jury's Requests for Further Information

[a] What Jury May Request

If there is a disagreement among jurors as to any part of the testimony, or if the jurors wish to be informed of any point of law, they may request that the officer conduct them back into the courtroom [*Code Civ. Proc. § 614*]. The jury may request rereading of original instructions or new instructions [*Bartosh v. Banning (1967) 251 Cal. App. 2d 378, 387, 59 Cal. Rptr. 382]* . The court has discretion not to give new instructions or reread original instructions when the original instructions are full and complete in themselves and readily understandable by a person of common intelligence [*People v. McCleod (1997) 55 Cal. App. 4th 1205, 1219-1220, 64 Cal. Rptr. 2d 545* (construing language in *Penal Code § 1138* substantially similar to *Code Civ. Proc. § 614*)]. If the jury requests that testimony be reread to them, the request must reasonably identify the testimony in question [*see Hutton v. Brookside Hospital (1963) 213 Cal. App. 2d 350, 353, 29 Cal. Rptr. 774, 29 Cal. Rptr. 670]* .

[b] Presence of Parties, Counsel, or Judge

Ordinarily, the court must respond to the jury's request in the presence of, or after notice to, the parties or their counsel [*Code Civ. Proc. § 614*]. However, there may be exceptions to this rule. For example, in one case in which the jury announced that it had already arrived at a verdict and communicated its desire to look at an exhibit, the court's message that there was no need to view the exhibit, made out of presence of counsel, was not expressly prohibited because the court had been informed that the jury had reached a verdict [*Carlson, Collins, Gordon & Bold v. Banducci (1967) 257 Cal. App. 2d 212, 228-230, 64 Cal. Rptr. 915]* . The trial court's communication to a jury outside the presence of counsel requires reversal only if an examination of the entire cause shows that the error resulted in a miscarriage of justice [*Harris v. City of Compton (1985) 172 Cal. App. 3d 1, 11, 217 Cal. Rptr. 884]* .

When the information requested is a reading of testimony previously received in evidence, the judge in his or her discretion need not be present in court during the reading, unless good cause for the judge's presence is shown [*Code Civ. Proc. § 614.5*].

[4] Recall of Jury for Further Instructions on Court's Own Motion

The trial court has the inherent right to recall the jurors for further instructions on its own motion. If the court recalls the jury to read an unintentionally omitted instruction, the court can avoid the danger that the jury might give undue emphasis to the instruction by doing one of the following [*Weirum v. RKO General, Inc. (1975) 15 Cal. 3d 40, 50, 123 Cal. Rptr. 468, 539 P.2d 36]* :

- Admonishing the jury not to attach any particular emphasis to the fact it is reading certain instructions which had been inadvertently omitted in its first reading.

- Rereading all the instructions.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 326.33 Alleging Prejudice by Motion for New Trial

Granting new trial is a proper remedy for the giving of an erroneous jury instruction when the improper instruction materially affected the substantial rights of the aggrieved party [*Maher v. Saad (2000) 82 Cal. App. 4th 1317, 1325, 99 Cal. Rptr. 2d 213]* .

When instructions are erroneous, the question of prejudice and whether erroneous instructions were cured by other instructions is for the discretion of the trial court on a motion for new trial [*Conner v. Southern Pacific Co. (1952) 38 Cal. 2d 633, 642, 241 P.2d 535]* . For discussion of whether instructional error is prejudicial, see *§ 326.43[2]*; for discussion of curing instructional error by other instructions, see *§ 326.43[3]*. For additional discussion and forms for use in moving for a new trial, see Ch. 371, *Motions After Trial*, § 357.60 et seq.

Legal Topics:

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

§§ 326.34[Reserved]

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28-326 California Forms of Pleading and Practice--Annotated § 326.40

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§ 326.40 Appeals Based on Erroneous Jury Instructions

[1] Jury Instructions Considered as a Whole on Appeal

When reviewing the record on appeal, the reviewing court considers the jury instructions in their entirety. When they state the law of a case fairly and clearly, they are not objectionable even though isolated passages of single instructions may be subject to just criticism [*United Pacific Ins. Co. v. Southern Cal. Edison Co. (1985) 163 Cal. App. 3d 700, 712, 209 Cal. Rptr. 819* ; *Eagar v. McDonnell Douglas Corp. (1973) 32 Cal. App. 3d 116, 120, 107 Cal. Rptr. 819]* . Semantic analysis of a single line, sentence, or instruction without regard to the whole charge can only result in misleading distortion [*Hom v. Clark (1963) 221 Cal. App. 2d 622, 643, 35 Cal. Rptr. 11]* .

The reviewing court must scrutinize the law and facts as a whole and review all circumstances of the case, including the evidence and other instructions [*Osborn v. Mission Ready Mix (1990) 224 Cal. App. 3d 104, 122, 273 Cal. Rptr. 457* ; *People v. Coleman (1979) 89 Cal. App. 3d 312, 322-323, 152 Cal. Rptr. 407]* . The appellate court will not reverse because of verbal inaccuracies in an instruction or because an instruction does not contain all of the elements contained in the instructions as a whole [*Mangrum v. Union P. R. Co. (1964) 230 Cal. App. 2d 960, 967, 41 Cal. Rptr. 536*]. The reviewing court must adopt the construction of the instructions that will support rather than defeat the verdict if the instructions are reasonably susceptible to that interpretation [*Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal. App. 3d 455, 463, 214 Cal. Rptr. 276*].

When a new trial was granted on the basis of an erroneous instruction, the order will not be disturbed unless the questioned instruction was absolutely accurate and under no reasonable interpretation could possibly have mislead or confused the jury [*Bell v. Bayerische Motoren Werke Aktiengesellschaft (2010) 181 Cal. App. 4th 1108, 1123-1124, 105 Cal. Rptr. 3d 485* ; *Maher v. Saad (2000) 82 Cal. App. 4th 1317, 1325, 99 Cal. Rptr. 2d 213]* .

[2] Verdict in Accord With Evidence and Law Will Be Upheld

If a verdict is in accord with the evidence and the law, it is not subject to attack even if it is contrary to an erroneous instruction, because the error in the instruction is cured by the verdict [*Boam v. Trident Financial Corp. (1992) 6 Cal. App. 4th 738, 743, 8 Cal. Rptr. 2d 177]* .

[3] Invited Error

When a party requests an instruction and later complains of the instruction on appeal, any error is "invited error." A party challenging a verdict or judgment has the burden of presenting a record on appeal that is sufficiently complete to establish that the claimed errors were not invited by that party. In the absence of that showing, the party cannot complain [*Phillips v. Noble (1958) 50 Cal. 2d 163, 169, 323 P.2d 385* ; *see* *Fortman v. Hemco, Inc. (1989) 211 Cal. App. 3d 241, 255, 259 Cal. Rptr. 311]* .

On appeal, a party cannot legitimately object to instructions when the party tendered instructions on the same principles as those to which the party objects [*Moreno v. Herrera (1968) 260 Cal. App. 2d 418, 426, 67 Cal. Rptr. 151* ; *Davis v. Nelson (1963) 221 Cal. App. 2d 62, 65, 34 Cal. Rptr. 201]* , unless the objecting party's proposed instructions were sufficiently different [*see* *Pappert v. San Diego Gas & Electric Co. (1982) 137 Cal. App. 3d 205, 212, 186 Cal. Rptr. 847* (different test for superseding cause)].

ILLUSTRATION:

Extra-Statutory Language Invited Error. A county's request for a companion instruction containing extra-statutory language later incorporated in the instruction given by the court amounted to invited error. [*Johnston v. County of Yolo (1969) 274 Cal. App. 2d 46, 58, 79 Cal. Rptr. 33]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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28-326 California Forms of Pleading and Practice--Annotated § 326.41

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§ 326.41 Designation of Clerk's Transcript on Appeal

If a party attacks the jury instructions on appeal, the party must designate the clerk's transcript on appeal to include all written instructions given and show at whose request the instructions were given [*Perry v. Schwartz (1963) 219 Cal. App. 2d 825, 828, 33 Cal. Rptr. 511]* . For designation of the clerk's transcript on appeal generally, see Ch. 44, *Appeal: Preparing and Filing the Record* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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28-326 California Forms of Pleading and Practice--Annotated § 326.42

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§ 326.42 Grounds for Challenges to Instructions

[1] Repetition

The trial court need not give more than one instruction on a given principle of law; that is, repetitious instructions are improper [*Crooks v. Pirrone (1964) 228 Cal. App. 2d 549, 554, 39 Cal. Rptr. 622]* . The court may refuse a proposed instruction if the instructions already include the substance of the proposed instruction [*Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 915-916, 114 Cal. Rptr. 622, 523 P.2d 662]* . However, the trial court may give lengthy and somewhat repetitive instructions to the jury if the issues are complicated or confusing to the jury [*see* *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 57-58, 118 Cal. Rptr. 184, 529 P.2d 608* (long, bitterly contested trial of malicious prosecution action); *Sprague v. Equifax, Inc. (1985) 166 Cal. App. 3d 1012, 1046, 213 Cal. Rptr. 69]* .

For discussion of the danger of repetition in formula instructions, see *§ 326.23[6][d]*.

[2] Undue Emphasis

It is error for the trial court to give and proper to refuse to give an instruction that unduly emphasizes issues, theories, or defenses by repetition or by singling them out or making them unduly prominent [*Major v. Western Home Insurance Company (2009) 169 Cal. App. 4th 1197, 1217-1218, 87 Cal. Rptr. 3d 556*]. Further, an instruction should state rules of law generally, rather than elaborate on matters of evidence [*Slayton v. Wright (1969) 271 Cal. App. 2d 219, 238, 76 Cal. Rptr. 494]* . The court's attempt to stress, overemphasize, or unduly make prominent selected portions of evidence violates the rule that instructions should not focus the jury's attention on particular items of evidence. The vice in this kind of instruction is that it puts the court in the position of making an argument to the jury, and misleads the jury into thinking that, because the court has specifically mentioned certain testimonial facts, they are of greater importance or weight or that the court believes them to be true [*Slayton v. Wright (1969) 271 Cal. App. 2d 219, 238, 76 Cal. Rptr.*

494] .

ILLUSTRATION:

Failure to Reread Balancing Instruction. In a wrongful death action, when the jury requested further information, the trial court reread instructions that were repetitious and stressed the duties of a pedestrian (decedent) without stating the reciprocal obligations applicable to a driver (defendant). This amounted to undue emphasis. [*Clark v. State of California (1950) 99 Cal. App. 2d 616, 624, 222 P.2d 300]* .

However, there is no need for a numerical balance between instructions favoring one party over another [*Mason v. Case (1963) 220 Cal. App. 2d 170, 182, 33 Cal. Rptr. 710]* . For example, if cases are consolidated for trial on the motion of a party and that party submits separate instructions pertaining to each of the adversarial parties, the party is not in a position to complain on appeal of the number of instructions on a given issue [*see* *Risley v. Lenwell (1954) 129 Cal. App. 2d 608, 652, 277 P.2d 897* (no overemphasis of issue of damages to prejudice of defendants in personal injury action)].

For discussion of the danger of undue emphasis in formula instructions, see *§ 326.23[6][d]*.

[3] Argumentativeness

An argumentative instruction is one that goes too elaborately into the particular facts on which one of the parties relied. An instruction should state rules of law generally rather than elaborate on specific matters of evidence [*Slayton v. Wright (1969) 271 Cal. App. 2d 219, 238, 76 Cal. Rptr. 494]* . It is not the province of a court to make an argument to a jury.

The court should not give an argumentative instruction even though the argument is a legitimate one [*In re Estate of Clark (1919) 180 Cal. 395, 398-399, 181 P. 639]* . However, instructions that merely state the claims of a party without intimating that the claims have been proven are not objectionable as argumentative, since they do not assume the existence of facts not in evidence or with respect to which there is a conflict of evidence [*Slayton v. Wright (1969) 271 Cal. App. 2d 219, 239, 76 Cal. Rptr. 494]* .

For discussion of the danger of argumentativeness in formula instructions, see *§ 326.23[6][d]*.

[4] Irrelevance

An instruction is erroneous, even though abstractly correct as a statement of law, if it does not concern the issues developed by the evidence or from reasonable inferences drawn from the evidence [*De George v. Crimmins (1967) 254 Cal. App. 2d 544, 547, 62 Cal. Rptr. 394]* .

ILLUSTRATION:

Instruction Must Be Related to Evidence. In an action arising from a collision between a bicycle operated by a mentally retarded adult and a city bus, the trial court gave an instruction on the standard of care for a person with impaired faculties, even though there was no evidence to support the conclusion that impaired mental or physical faculties played any part in causing the collision. The court of appeal found the instruction improper. In the absence of evidence that the bicycle operator's conduct was somehow attributable to or connected with his or her impaired faculties, the instruction was likely to be confusing and therefore should not have been given [*Fox v. City & County of San Francisco (1975) 47 Cal. App. 3d 164, 173, 120 Cal. Rptr. 779]* .

The court is not precluded from calling a jury's attention to matters not in evidence, if counsel has argued that those issues were before the jury for consideration and deliberation [*Tingley v. Times Mirror Co. (1907) 151 Cal. 1, 28, 89 P. 1097]* .

[5] Inconsistency

The trial court can err by giving conflicting instructions that confuse the jury [*see Fitch v. Le Beau (1969) 1 Cal. App. 3d 320, 325, 81 Cal. Rptr. 722* (judgment reversed after trial court gave incompatible instructions on landowner's duty to licensee)]. Because the jury must accept the court's instructions as correct statements of law, the jury is likely to be confused and misled by conflicting statements. Likewise, it is difficult to determine which of several conflicting instructions control a jury's determination [*see Henderson v. Harnischfeger Corp. (1974) 12 Cal. 3d 663, 673, 117 Cal. Rptr. 1, 527 P.2d 353]* .

When two instructions are inconsistent, the more specific charge controls.

ILLUSTRATION:

Contributory Negligence Instruction in Medical Malpractice Action. In a medical malpractice action, the jury was correctly instructed on general negligence [*see BAJI No. 3.00* (now *CACI No. 400*)], but erroneously instructed on the principle of contributory negligence in the context of medical malpractice. The appellate court reversed, because it was more likely that the jury followed the improper instruction [*LeMons v. Regents of University of Cal. (1978) 21 Cal. 3d 869, 878, 148 Cal. Rptr. 355, 582 P.2d 946]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329
Chapter 326 JURY INSTRUCTIONS
PART II. LEGAL BACKGROUND
C. On Appeal

28-326 California Forms of Pleading and Practice--Annotated § 326.43

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§ 326.43 Requirement of Prejudice

[1] No Reversal Unless Error Is Prejudicial and Results in Miscarriage of Justice

Under the California Constitution, a judgment may not be reversed for instructional error in a civil case unless the court, after examining the entire cause, including the evidence, is of the opinion that the error resulted in a miscarriage of justice [*see Cal. Const., art. VI, § 13*; *Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 580, 34 Cal. Rptr. 2d 607, 882 P.2d 298]* .

Reversal is similarly restricted by statute. Under *Code Civ. Proc. § 475*, a reviewing court must disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings that does not affect the substantial rights of the parties. No judgment, decision, or decree is to be reversed or affected by an error, improper ruling, instruction, or defect unless all of the following appear from the record [*Code Civ. Proc. § 475*]:

- The error, ruling, instruction, or defect is prejudicial.
- The complaining or appealing party sustained and suffered substantial injury as a result of the error, ruling, instruction, or defect.
- A different result would have been probable if the error, ruling, instruction or defect did not occur or exist.

There is no presumption that error is prejudicial or that a party was injured if error is shown [*Code Civ. Proc. § 475*].

Thus, failure to properly instruct the jury is not inherently prejudicial and there is no automatic reversal merely because the court failed to instruct the jury properly [*Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 580, 34 Cal. Rptr. 2d 607, 882 P.2d 298* (finding error was harmless); *Logacz v. Limansky (1999) 71 Cal. App. 4th 1149, 1156-1166, 84 Cal. Rptr. 2d 257* (finding error was prejudicial and reversing)]. The reviewing court will not reverse a judgment for misdirection of the jury absent a miscarriage of justice [*Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 580, 34 Cal. Rptr. 2d 607, 882 P.2d 298* ; *Alcala v. Vazmar Corporation (2008) 167 Cal. App. 4th 747, 754, 84 Cal. Rptr. 3d 402* (no error in declining to instruct on negligence per se)].

For discussion of the analysis used to determine whether instructional error warrants reversal, see [2], *below*.

ILLUSTRATION:

Absence of Instruction May Be Prejudicial. In an asbestos exposure case, plaintiff was a smoker and had previously tested positive for tuberculosis. The court refused to give an instruction proffered by defendant requiring the jury to reduce medical-monitoring damages for monitoring already required by plaintiff's preexisting conditions. The appellate court found that the absence of that instruction was prejudicial because defendant was left without an instruction to support its argument that all the monitoring plaintiff needed was already needed for preexisting conditions [*Gutierrez v. Cassiar Mining Corp. (1998) 64 Cal. App. 4th 148, 156-159, 162, 75 Cal. Rptr. 2d 132]* .

[2] Standard for Determining Prejudicial Error

[a] No Presumption of Inherent Prejudice

There is no presumption of inherent prejudice from instructional error in civil cases [*Rutherford v. Owens-Illinois, Inc. (1997) 16 Cal. 4th 953, 983, 67 Cal. Rptr. 2d 16, 941 P.2d 1203* ; *Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 573-580, 34 Cal. Rptr. 2d 607, 882 P.2d 298* ; *see Henderson v. Harnischfeger Corp. (1974) 12 Cal. 3d 663, 674, 117 Cal. Rptr. 1, 527 P.2d 353* ; *Mock v. Michigan Millers Mutual Ins. Co. (1992) 4 Cal. App. 4th 306, 322, 5 Cal. Rptr. 2d 594* (articulating former standard)].

[b] Must Be Probable That Error Affected Verdict

Instructional error in a civil case is prejudicial when it is probable that the error affected the verdict [*Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 580, 34 Cal. Rptr. 2d 607, 882 P.2d 298* ; *Pool v. City of Oakland (1986) 42 Cal. 3d 1051, 1069, 232 Cal. Rptr. 528, 728 P.2d 1163* ; *LeMons v. Regents of University of California (1978) 21 Cal. 3d 869, 875, 148 Cal. Rptr. 355, 582 P.2d 946* ; *Ortega v. Pajaro Valley Unified School Dist. (1998) 64 Cal. App. 4th 1023, 1049-1050, 75 Cal. Rptr. 2d 777* ; *Nat'l Med. Transp. Network v. Deloitte & Touche (1998) 62 Cal. App. 4th 412, 432, 72 Cal. Rptr. 2d 720]* , *i.e.*, it is reasonably probable that, absent the error the jury would have returned a verdict more favorable to the complaining party [*see Fletcher v. Western National Life Ins. Co. (1970) 10 Cal. App. 3d 376, 407, 89 Cal. Rptr. 78* (no reversal; technical omissions in jury instructions)].

PRACTICE TIP:

Party in Whose Favor Verdict Rendered May Not Assert Instructional Error as Grounds for New Trial. In spite of potential prejudice, a party in whose favor a verdict is rendered may not assert instructional error as a ground for a new trial [*see Bristow v. Ferguson (1981) 121 Cal. App. 3d 823, 826-827, 175 Cal. Rptr. 571* (victorious defendants could not assert potentially prejudicial instruction as ground for new trial on their case alone)]. For discussion of motions for new trial generally, see Ch. 371, *Motions After Trial* .

The determination of whether the error affected the verdict depends heavily on the particular nature of the error, including its natural and probable effect on a party's ability to fully present its case to the jury. Actual prejudice must be evaluated in the context of the trial record in the individual case [*Soule v. General Motors Corp. (1994) 8 Cal. 4th*

548, 580, 34 Cal. Rptr. 2d 607, 882 P.2d 298 ; *Ortega v. Pajaro Valley Unified School Dist. (1998) 64 Cal. App. 4th 1023, 1050, 75 Cal. Rptr. 2d 777* ; *Nat. Med.Tran. Network v. Deloitte & Touche (1998) 62 Cal. App. 4th 412, 432, 72 Cal. Rptr. 2d 720]* .

[c] Multi-Factor Test

The multi-factor test to determine whether an erroneous instruction given or the omission or refusal to give an instruction was prejudicial, requires consideration of the following [*Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 570-571, 580, 34 Cal. Rptr. 2d 607, 882 P.2d 298* ; *Pool v. City of Oakland (1986) 42 Cal. 3d 1051, 1069-1070, 232 Cal. Rptr. 528, 728 P.2d 1163* ; *LeMons v. Regents of University of California (1978) 21 Cal. 3d 869, 876, 148 Cal. Rptr. 355, 582 P.2d 946* ; *Ortega v. Pajaro Valley Unified School Dist. (1998) 64 Cal. App. 4th 1023, 1050, 75 Cal. Rptr. 2d 777* ; *Nat. Med. Tran. Network v. Deloitte & Touche (1998) 62 Cal. App. 4th 412, 432, 72 Cal. Rptr. 2d 720]* :

- The degree of conflict in the evidence on critical issues.
- Whether respondent's argument to the jury may have contributed to the instruction's misleading effect.
- Whether the jury requested a rereading of the erroneous instruction or of related evidence.
- The closeness of the jury's verdict.
- The effect of other instructions in remedying the error (*see* [3], *below*).

In deciding whether an omission to instruct was prejudicial, the court must also evaluate the following [*Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 580-581, 34 Cal. Rptr. 2d 607, 882 P.2d 298* ; *Nat. Med. Tran. Network v. Deloitte & Touche (1998) 62 Cal. App. 4th 412, 432, 72 Cal. Rptr. 2d 720* ; *Buzgheia v. Leasco Sierra Grove (1997) 60 Cal. App. 4th 374, 393-394, 70 Cal. Rptr. 2d 427]* :

- The state of the evidence.
- The effect of other instructions.
- The effect of counsel's argument.
- Any indications by the jury itself that it was misled.

[d] Jury Must Have Been Misled

If an instruction as given does not mislead the jury, it is "harmless error," *i.e.*, the error is not so prejudicial as to require a reversal, and the verdict will stand [*Hom v. Clark (1963) 221 Cal. App. 2d 622, 658, 35 Cal. Rptr. 11]* . For discussion of harmless and prejudicial error in general in appellate review, see Ch. 41, *Appeal: Review Standards and Appellate Rules of Law* .

The determination of whether the probable effect of an instruction was to mislead a jury depends on all the circumstances of the case, including the facts in evidence and other instructions given [*see* Mangrum v. Union Pacific R.R. Co. (1964) 230 Cal. App. 2d 960, 966, 41 Cal. Rptr. 536] .

[3] Error Cured by Other Instructions

Errors in instructions may be cured by other instructions [*see Howarth v. Maroney (1964) 228 Cal. App. 2d 116, 123, 39 Cal. Rptr. 260]* .

ILLUSTRATION:

Curing Instruction. After giving an improper instruction on the statute of limitations as a meritorious defense, which intimated that the defense was peculiarly favored over other defenses, the court instructed the jury that the court did not intend its instructions to express any opinions as to the weight of evidence, the credibility of testimony of witnesses, or the establishment of any fact, and that the jury was not to select a single instruction or be influenced by prejudice or emotion in favor of or against any party. This was sufficient to cure the error in the instruction regarding the statute of limitations defense [*Hsu v. Mt. Zion Hospital (1968) 259 Cal. App. 2d 562, 576-577, 66 Cal. Rptr. 659]* .

Similarly, an error in a formula instruction that omits necessary elements can be cured if the omitted elements are covered by other specific instructions and the jury is instructed that [*Amidon v. Hebert (1949) 93 Cal. App. 2d 225, 227, 208 P.2d 733]* :

- The formula instruction was not intended to state all elements involved in case.
- The jury is to regard each instruction in light of all other instructions.

For further discussion of the danger of incompleteness occurring in formula instructions, see *§ 326.23[6][c]*.

The prejudicial effect of a misstatement of the law cannot easily be overcome by another instruction to the contrary [*Henderson v. Harnischfeger Corp. (1974) 12 Cal. 3d 663, 673, 117 Cal. Rptr. 1, 527 P.2d 353]* . The province of jury is invaded when an instruction assumes the existence of a fact not in evidence or with respect to which there is a conflict of evidence. Any error in this respect cannot be cured by other instructions that submit the question of fact to the jury [*Pauly v. King (1955) 44 Cal. 2d 649, 663, 284 P.2d 487]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsPrejudicial ErrorsCivil ProcedureAppealsStandards of ReviewPlain ErrorMiscarriages of JusticeCivil ProcedureAppealsStandards of ReviewReversible Errors

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28-326 California Forms of Pleading and Practice--Annotated §§ 326.44-326.49

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[Reserved]

§§ 326.44[Reserved]

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28-326 California Forms of Pleading and Practice--Annotated § 326.50

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§ 326.50 Related Matthew Bender Publications

For the official jury instructions for use in California, see Judicial Council of California Civil Jury Instructions (CACI) (LexisNexis Matthew Bender, Official Publisher).

For a comprehensive source of discussion and forms for specific jury instructions in contract, business, and real property cases, see California Forms of Jury Instruction (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 326.51 State Constitution

Court's right to comment on evidence, testimony, and credibility to extent necessary for jury's proper determination of cause. *Cal. Const., art. VI, § 10*

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsJudicial Intervention in TrialsComments by JudgesGeneral Overview

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§ 326.52 State Statutes

[1] Proposing, Modifying, Refusing, and Giving Jury Instructions

Counsel may propose jury instructions covering law in pleadings prior to first witness being sworn at trial; additional jury instructions may be proposed before commencement of argument on points of law developed by evidence and, on request, on issues raised in argument. *Code Civ. Proc. § 607a*

Each proposed instruction must be typed on separate sheet of paper. *Code Civ. Proc. § 607a*

Before argument commences, trial court, if requested by counsel, must (1) decide whether to give, refuse, or modify proposed instructions; (2) decide which instructions, if any, to give in addition to those proposed; and (3) advise counsel of all instructions to be given. *Code Civ. Proc. § 607a*

In charging jury, court may state all matters of law it thinks necessary for jury's information in giving verdict; court, if requested, must furnish written statement of points of law contained in charge or sign statement of points of law prepared and submitted by either party. *Code Civ. Proc. § 608*

If either party asks for special instruction, court must either give instruction as requested, refuse to give it, or give instruction with modification in manner which makes distinct what instructions given in whole or part. *Code Civ. Proc. § 609*

"Exception" defined. *Code Civ. Proc. § 646*

Giving instruction, refusing to give instruction, or modifying instruction is deemed excepted to; reasonable time

permitted for party to make known party's position by objection. *Code Civ. Proc. § 647*

If requested, court must instruct jury as to matters judicially noticed. *Evid. Code § 457*

Failure or refusal of court to take judicial notice of matter or to instruct jury with respect to judicially noticed matter does not preclude court from taking judicial notice of matter in subsequent proceedings. *Evid. Code § 458*

[2] Retirement of Jury for Deliberations

Presence of disabled juror's reader or interpreter in jury room; prohibition on interpreter's participation in jury deliberations. *Code Civ. Proc. § 224*

What jury may take into deliberations. *Code Civ. Proc. § 612*

Copy of written jury instructions. *Code Civ. Proc. § 612.5*

Case is decided by jury in court or on retirement for deliberations. *Code Civ. Proc. § 613*

Jurors must be kept together during deliberations without outside communications. *Code Civ. Proc. § 613*

Return of jurors for information or if disagreement; notice to parties. *Code Civ. Proc. § 614*

[3] Errors Relating to Jury Instructions

Conditions required for reversal due to error in instructions; no presumption that error is prejudicial or that injury was done in event of error. *Code Civ. Proc. § 475*

Error in law, when excepted to by aggrieved party and materially affecting party's substantial rights, is ground for vacating verdict and for new or further trial. *Code Civ. Proc. § 657(7)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DeliberationsCivil ProcedureTrialsJury TrialsJury InstructionsRequests for InstructionsCivil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsGeneral OverviewCivil ProcedureAppealsStandards of ReviewReversible Errors

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§ 326.53 California Rules of Court

Proper form for submission of jury instructions. *Cal. Rules of Ct., Rules 2.100-2.119*

Juror note-taking. *Cal. Rules of Ct., Rule 2.1031*

Juror questions. *Cal. Rules of Ct., Rule 2.1033*

Preinstruction immediately after swearing in of jury. *Cal. Rules of Ct., Rule 2.1035*

Assisting jury at impasse. *Cal. Rules Ct., Rule 2.1036*

Judicial Council of California Civil Jury Instructions ("CACI") are "official instructions for use" in California. *Cal. Rules of Ct., Rule 2.1050(a)*

CACI instructions are intended to be freely available for use and reproduction by parties, attorneys, and the public; however, commercial publishers of CACI must get a license from Administrative Office of the Courts. *Cal. Rules of Ct., Rule 2.1050(c)*

CACI instructions are strongly encouraged unless court finds that different instructions would more accurately state the law and be understood by jurors. *Cal. Rules of Ct., Rule 2.1050(e)*

All proposed jury instructions must be submitted to the court in the form and format specified by *Cal. Rules of Ct., Rules 2.100-2.119*; each set of proposed instructions must have a cover page, containing the caption of the case and

stating the name of the party proposing the instructions, and an index listing all the proposed instructions; each proposed instruction must be on a separate page or pages, contain the instruction number and title of the instruction at the top of the first page of the instruction, and be prepared without any blank lines or unused bracketed portions, so that it can be read directly to the jury. *Cal. Rules of Ct., Rule 2.1055*

Procedure for designation of clerk's transcript on appeal. *Cal. Rules of Ct., Rule 8.120*

Procedure for notice to prepare reporter's transcript when instructions form basis of appeal. *Cal. Rules of Ct., Rule 8.130*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsRequests for InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsStandard InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsSupplemental InstructionsCivil ProcedureAppealsRecords on AppealCivil ProcedureAppealsReviewabilityNotice of Appeal

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§ 326.54 Decisions

[1] Court's Own Instructions to Jury

Instruction that encouraged jurors in civil trial to reach verdict, listen with deference to other jurors, distrust their own personal judgment if majority of jurors took opposite views, but also to follow their own personal convictions of truth was proper and not coercive. *Inouye v. Pacific Southwest Airlines (1981) 126 Cal. App. 3d 648, 650, 652, 179 Cal. Rptr. 13*

[2] Form of Jury Instructions

[a] Use of Approved Instructions

Court properly refused to make major changes in approved instructions, particularly when they adequately, if not ideally, stated principles of law applicable to key factual issue presented. *Orient Handel v. United States Fid. & Guar. Co. (1987) 192 Cal. App. 3d 684, 698-699, 237 Cal. Rptr. 667* (definition of fraud)

Court's refusal to give approved instruction containing only reference to major theory of case (in belief approved instruction was loaded with naked abstractions) is prejudicial error if requested approved instruction is more accurate and complete than instructions given by the court. *Godwin v. La Turco (1969) 272 Cal. App. 2d 475, 479, 480, 77 Cal. Rptr. 305*

[b] Formula Instructions

[i] In General

Test for determining whether formula instruction constitutes prejudicial error. *Bertero v. National General Corp. (1974) 13 Cal. 3d 43, 58, 118 Cal. Rptr. 184, 529 P.2d 608*

Formula instructions are justified only if they contain all elements necessary for party to prevail. *Mazzotta v. Los Angeles Ry. Corp. (1944) 25 Cal. 2d 165, 170, 153 P.2d 338*

[ii] Danger of Incompleteness

Absence of necessary elements in formula instruction cannot be compensated for by other instructions stating omitted factors required to sustain verdict. *Mazzotta v. Los Angeles Ry. Corp. (1944) 25 Cal. 2d 165, 170, 153 P.2d 338*

Rule that formula instruction contain all elements necessary for party to prevail may be relaxed if conditions and surrounding circumstances indicate rule should not be applied in original strictness. *Amidon v. Hebert (1949) 93 Cal. App. 2d 225, 227, 208 P.2d 733*

[iii] Danger of Repetition, Undue Emphasis, or Argumentativeness

Formula instructions are objectionable if they emphasize portions of testimony and, coming from court, confuse and mislead jury. *Roy v. Mission Taxi Co. (1950) 101 Cal. App. 2d 438, 446, 225 P.2d 920*

Formula instructions often contain repetitious references that jury must find in favor of party and thus may amount to argument rather than fair discussion of law. *Dodge v. San Diego Electric Ry. Co. (1949) 92 Cal. App. 2d 759, 764, 208 P.2d 37*

[c] Use of Judicial Opinions

Giving jury instructions on principle of law couched in language taken from judicial opinion in case reports is not always proper. *Pearce v. Boggs (1893) 99 Cal. 340, 343-344, 33 P. 906* ; *Schance v. H.O. Adams Tile Co. (1955) 131 Cal. App. 2d 549, 555-556, 280 P.2d 851*

Instruction in language of opinion is not prejudicial error if instruction is mainly correct and, insofar as instruction is improper, it is innocuous for jury making decision. *Schance v. H.O. Adams Tile Co. (1955) 131 Cal. App. 2d 549, 556, 280 P.2d 851*

[d] Use of Statutory Language

Instruction in personal injury action in language of code section setting forth basic speed law and informing jury that violation of statute constitutes negligence was proper. *Hardin v. San Jose City Lines, Inc. (1953) 41 Cal. 2d 432, 438, 260 P.2d 63*

Whether substitution of nonstatutory term in jury instruction misled jury must be determined by reference to general context of instruction, whether words are in effect synonymous, treatment of terms by counsel for both sides, and whether trial court provided statutory definition of term. *Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 887-888, 263 Cal. Rptr. 64*

Instructions are properly denied by trial court when party seeking to submit them does not meet threshold burden of

placing party within fact pattern covered by code section to be used. *Byrne v. City & County of San Francisco (1980) 113 Cal. App. 3d 731, 737, 170 Cal. Rptr. 302*

[3] Right to Proper Jury Instructions

Each party is entitled to have jury instructed on all its theories of case that are reasonable and supported by pleadings and evidence or inferences that may be properly drawn from evidence. *Alcala v. Vazmar Corporation (2008) 167 Cal. App. 4th 747, 754, 84 Cal. Rptr. 3d 402*

When court refuses to instruct on legally correct theory, plaintiff is not required to propose instruction on legally incorrect theory in order to preserve error on appeal. *Ashcraft v. King (1991) 228 Cal. App. 3d 604, 615 n.4, 278 Cal. Rptr. 900*

Litigant in jury trial is entitled to instructions on every theory advanced by litigant that finds support in evidence, even if evidence is slight, inconclusive, or opposed to preponderance of evidence. *Lunghi v. Clark Equipment Co. (1984) 153 Cal. App. 3d 485, 491-493, 200 Cal. Rptr. 387* ; *Byrne v. City & County of San Francisco (1980) 113 Cal. App. 3d 731, 737, 170 Cal. Rptr. 302*

Court has no duty to modify erroneous instructions submitted by counsel, and may properly reject erroneous instructions. *Roberts v. City of Los Angeles (1980) 109 Cal. App. 3d 625, 630, 167 Cal. Rptr. 320*

When evidence is received for restrictive purpose, party against whom evidence is offered is entitled to limiting instruction showing specific reason for which evidence admitted. Mangrum v. Union Pacific R.R. Co. (1964) 230 Cal. App. 2d 960, 981, 41 Cal. Rptr. 536

[4] Court's Discretion in Considering Proposed or Requested Jury Instruction

[a] Framing Instructions

It is proper to use an applicable statute's language in giving jury instructions. *Conservatorship of Gregory (2000) 80 Cal. App. 4th 514, 520, 95 Cal. Rptr. 2d 336*

Instructions are sufficient if they fairly and accurately state necessary legal principles when read as whole; party is not entitled to have substance of instructions given in particular language desired. *Fleck v. Bollinger Home Corp. (1997) 54 Cal. App. 4th 926, 934, 63 Cal. Rptr. 2d 407*

Party does not have right to require particular phraseology of instruction, and court is permitted to modify instruction or give its own instruction in lieu of one offered by party. *Byrum v. Brand (1990) 219 Cal. App. 3d 926, 939, 268 Cal. Rptr. 609* ; *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 805, 174 Cal. Rptr. 348* ; *Eagar v. McDonnell Douglas Corp. (1973) 32 Cal. App. 3d 116, 121, 107 Cal. Rptr. 819*

[b] Refusing Instructions

In action for false arrest and related causes of action, trial court properly refused to give instruction requested by defendants on narcotics asset forfeiture hearing being judicial proceeding, since no evidence was introduced that forfeiture hearing took place. *Asgari v. City of Los Angeles (1997) 15 Cal. 4th 744, 761, 63 Cal. Rptr. 2d 842, 937 P.2d 273*

In determining whether refusal to instruct jury as requested is erroneous, reviewing court is required to examine evidence in light most favorable to appellant. *Townsend v. Turk (1990) 218 Cal. App. 3d 278, 280 n.1, 266 Cal. Rptr. 821*

Court properly refused inaccurate and misleading instruction; in civil action, court has no duty to modify or correct instructions offered by party. *Akers v. Kelley Co. (1985) 173 Cal. App. 3d 633, 652, 219 Cal. Rptr. 513* ; *Wank v. Richman & Garrett (1985) 165 Cal. App. 3d 1103, 1112-1113, 211 Cal. Rptr. 919* (argumentative instruction)

In view of trial court's duty to instruct jury on controlling legal principles and to protect parties from unjust verdicts, refusal to give requested instruction was reversible error when omission misled and confused jury, and when it was reasonably probable that result more favorable to requesting party would have been reached absent court's error. *Blake v. E. Thompson Petroleum Repair Co. (1985) 170 Cal. App. 3d 823, 834, 216 Cal. Rptr. 568*

[5] Effect of Failure to Propose or Request Complete Jury Instructions

Plaintiffs were entitled to object to erroneous jury instructions when they offered modified instruction which was refused but proposed no additional modifications, and their proposed instruction was neither essentially identical to that which was given by court, nor was it inconsistent with their position on appeal. *Pappert v. San Diego Gas & Electric Co. (1982) 137 Cal. App. 3d 205, 212, 186 Cal. Rptr. 847*

[6] Opportunity to Demand Clarification of Instructions

If instruction given by court correctly states law, party must request additional or qualifying instruction when it is claimed instruction is (1) lacking clarity, (2) incomplete, or (3) too general; failure to do so bars review of such error on appeal. *Conservatorship of Gregory (2000) 80 Cal. App. 4th 514, 520, 95 Cal. Rptr. 2d 336*

Party has right to request additional or qualifying instructions when instruction given states correct law but is too general, lacking clarity, or incomplete; failure to do so bars assertion of error on appeal. *Switzer v. State of California (1969) 269 Cal. App. 2d 627, 636, 75 Cal. Rptr. 371*

[7] Instructions Deemed Automatically Excepted to

Jury instruction erroneous on material element of law is deemed excepted to even absent objection. *Manguso v. Oceanside Unified School Dist. (1984) 153 Cal. App. 3d 574, 577, 581-582, 200 Cal. Rptr. 535*

[8] Jury's Requests for Further Information

Defense counsel's signature on court's written response to jury inquiry is apparent approval of response; absence of objection in record and apparent approval of court's response to jury inquiry constitute implied waiver of any claim of error on appeal. *Hurlbut v. Sonora Community Hospital (1989) 207 Cal. App. 3d 388, 404, 254 Cal. Rptr. 840*

[9] Erroneous Jury Instructions

[a] Argumentativeness

Argumentative instruction defined. *Slayton v. Wright (1969) 271 Cal. App. 2d 219, 238, 76 Cal. Rptr. 494*

[b] Inconsistency

Giving conflicting instructions is prejudicial error if jury's decision is based on issue to which instructions were directed because jury could have been misled. *Maupin v. Widling (1987) 192 Cal. App. 3d 568, 577, 237 Cal. Rptr. 521* ; *Hargrave v. Winquist (1982) 134 Cal. App. 3d 916, 923-924, 185 Cal. Rptr. 30*

[c] Irrelevance

Directions to jury to apportion fault among multiple defendants in negligence action was erroneous because defendants' proportionate fault was not at issue, and plaintiff had no legitimate interest in having jury determine defendants' liability for indemnity inter se. *Klemme v. Hoag Memorial Hospital Presbyterian (1980) 103 Cal. App. 3d 640, 644, 163 Cal. Rptr. 109* (error not prejudicial)

Trial court's refusal to instruct jury that contributory negligence is no defense to strict product liability action was correct when no mention had been made of negligence by either side at trial; instruction on contributory negligence would have been confusing to jury. *Foster v. Gillette Co. (1979) 100 Cal. App. 3d 569, 575, 161 Cal. Rptr. 134*

Giving instruction that pertains to issue not before jury or supported by evidence is error. *People v. Coleman (1979) 89 Cal. App. 3d 312, 321, 152 Cal. Rptr. 407* (error not prejudicial)

Irrelevant instruction defined. *De George v. Crimmins (1967) 254 Cal. App. 2d 544, 547, 62 Cal. Rptr. 394*

[d] Repetition

Trial court properly gave lengthy and repetitive charge to jury at conclusion of long, bitterly contested malicious prosecution trial when issues, particularly malice and probable cause, were confusing to jury. *Bertero v. National General Corp. (1974) 13 Cal. 3d 43, 57-58, 118 Cal. Rptr. 184, 529 P.2d 608*

[e] Undue Emphasis

Undue emphasis violates rule that instructions should not focus jury's attention on particular items of evidence. *Slayton v. Wright (1969) 271 Cal. App. 2d 219, 238, 76 Cal. Rptr. 494*

There is no requirement for numerical balance between instructions favoring one party against another. *Mason v. Case (1963) 220 Cal. App. 2d 170, 182, 33 Cal. Rptr. 710*

No overemphasis on instructions on issue of damages in complaining party's submission of separate instructions pertaining to each adversarial party. *Risley v. Lenwell (1954) 129 Cal. App. 2d 608, 652, 277 P.2d 897* (appellants previously submitted separate instructions themselves, undermining their assertion of error)

[10] Prejudicial Instructions

[a] Alleging Prejudice by Motion for New Trial

Question of whether erroneous instructions cured by other instructions is one for discretion of trial court on motion for new trial. *Conner v. Southern Pacific Co. (1952) 38 Cal. 2d 633, 642, 241 P.2d 535*

[b] Standard for Determining Prejudicial Error

In general, error in giving improper instruction is prejudicial and ground for reversal when it appears likely to have mislead jury and therefore become factor in jury's verdict. *Conservatorship of Gregory (2000) 80 Cal. App. 4th 514, 520, 95 Cal. Rptr. 2d 336*

To determine whether instructional error prejudicially affected verdict, instructions must be considered as whole and not by individual paragraphs or sentences. *Abbott v. Taz Express (1998) 67 Cal. App. 4th 853, 858, 79 Cal. Rptr. 2d 360* ; *Conservatorship of McKeown (1994) 25 Cal. App. 4th 502, 507, 30 Cal. Rptr. 2d 542*

Whether opposing counsel's argument to jury magnified effect of instructional error is factor in assessing prejudice. *Sesler v. Ghumman (1990) 219 Cal. App. 3d 218, 226, 268 Cal. Rptr. 70*

When original instructions are inadequate and jury asks questions indicating confusion and need for further explanation, failure to give proper additional instructions is usually reversible error. *Sesler v. Ghumman (1990) 219 Cal. App. 3d 218, 226-227, 268 Cal. Rptr. 70*

Instructional error alone is not sufficient to overturn jury verdict absent showing by appellant that error was prejudicial and resulted in miscarriage of justice; miscarriage of justice is declared only when court, after examination of entire cause including evidence, is of opinion that it is reasonably probable that result more favorable to appealing party would have been reached in absence of error; factors to be considered in determining whether instructional error was prejudicial. *Jones v. Toyota Motor Co. (1988) 198 Cal. App. 3d 364, 371, 243 Cal. Rptr. 611*

No precise formula for determining whether probable effect of instruction was to mislead jury and whether error was so prejudicial as to require reversal; determination is dependent on all circumstances, including evidence and other instructions given. Mangrum v. Union Pacific R.R. Co. (1964) 230 Cal. App. 2d 960, 966, 41 Cal. Rptr. 536

[c] Error Cured by Other Instructions

Prejudicial effect of misstatement of important principle of law is not easily overcome by another contradicting instruction. *Henderson v. Harnischfeger Corp. (1974) 12 Cal. 3d 663, 673, 117 Cal. Rptr. 1, 527 P.2d 353*

Instruction assuming existence of fact not in evidence or with respect to which evidence was in conflict was not cured by other instructions submitting to jury question of whether such fact existed. *Pauly v. King (1955) 44 Cal. 2d 649, 663, 284 P.2d 487*

Instructional error requires reversal where is seems probable the error prejudicially affected verdict; appellant must show reasonable probability of more favorable result absent the error, determination depends on particular nature of error, and its effect on appellant's ability to place full case before jury; actual prejudice must be assessed in context of trial record; five factors to be considered in assessing prejudice; refusal to give requested instruction on concurrent causation found to be prepucial. *Logacz v. Limansky (1999) 71 Cal. App. 4th 1149, 1156-1166, 84 Cal. Rptr. 2d 257*

In usual case, when jury has been correctly instructed on strict products liability and enters special verdict finding no defect in product, trial court's erroneous refusal to instruct on negligence in designing product is not reversible; however, error was reversible when court failed to instruct on duty to warn. *Lunghi v. Clark Equipment Co. (1984) 153 Cal. App. 3d 485, 493-495, 200 Cal. Rptr. 387* (criticized on other grounds in *West v. Johnson & Johnson Products, Inc. (1985) 174 Cal. App. 3d 831, 220 Cal. Rptr. 437*)

[11] Particular Instructions

[a] Design Defect

Instruction on "consumer expectations test," one of two standards set forth in *BAJI No. 9.00.5* (now *CACI Nos. 1203* and *1204* to determine when product design is defective, is applicable to products within common experience of ordinary consumer, and was properly refused when product in issue was specialized heavy machinery. *Lunghi v. Clark Equipment Co. (1984) 153 Cal. App. 3d 485, 495-496, 200 Cal. Rptr. 387* (criticized on other grounds in *West v. Johnson & Johnson Products, Inc. (1985) 174 Cal. App. 3d 831, 220 Cal. Rptr. 437*)

[b] Strict Liability

In strict liability action against supplier of lumber that broke under plaintiff's weight due to internal dry rot, instruction on unavoidably unsafe product defense was improper because there was no evidence at all to support defendant's theory that dry rot is unavoidably unsafe defect in wood; trial court's implicit finding that question of whether dry rot in wood is unavoidable can be decided without benefit of evidence solely on basis of "life experience" was erroneous as matter of law. *Wilkinson v. Bay Shore Lumber Co. (1986) 182 Cal. App. 3d 594, 600-603, 227 Cal. Rptr. 327*

[12] Timeliness of Request for Jury Instruction

Court did not error when it refused to give instruction on ground that it was too late, when it was not exactly correct statement of law and was submitted after initial instructions had been given and after initial oral argument; late instruction would have unduly emphasized its contents. *Webber v. Inland Empire Investments, Inc. (1999) 74 Cal. App. 4th 884, 909, 88 Cal. Rptr. 2d 594*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJury TrialsJury InstructionsObjections to InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsRequests for InstructionsCivil ProcedureTrialsJury TrialsJury InstructionsSupplemental InstructionsCivil ProcedureAppealsStandards of ReviewReversible Errors

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Chapter 326 JURY INSTRUCTIONS
PART III. RESEARCH GUIDE

28-326 California Forms of Pleading and Practice--Annotated § 326.55

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§ 326.55 Law Reviews

Tiersma, *The Rocky Road to Legal Reform: Improving Language of Jury Instructions, 66 Brook. L. Rev. 1081 (2001)*

Brown, *Regulating Decision Effects of Legally Sufficient Jury Instructions, 73 S. Cal. L. Rev. 1105 (2000)*

Thornburg, *The Power and Process: Instructions and the Civil Jury, 66 Fordham L. Rev. 1837 (1998)*

Symposium, *The Sound of the Gavel: Perspectives on Judicial Speech: "What Do We Do Now?": Helping Juries Apply the Instructions, 28 Loy. L.A. L. Rev. 869 (1995)*

Farrell, *Communication in the Courtroom: Jury Instructions, 85 W. Va. L. Rev. 5 (1982)*

Schwarzer, *Communicating With Juries: Problems and Remedies, 69 Cal. L. Rev. 731 (1981)*

Charrow and Charrow, *Making Legal Language Understandable: A Psucholinguistic Study of Jury Instructions, 79 Columbia L. Rev. 1306 (1979)*

Pollock, *How to Persuade the Court to Give Non-BAJI Jury Instructions*, 10 CTLJ 109 (1971)

Symposium, *1959 Institute for California Judges--Panel Discussion Part III: Instructing the Jury, 47 Cal. L. Rev. 888 (1959)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview

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PART III. RESEARCH GUIDE

28-326 California Forms of Pleading and Practice--Annotated § 326.56

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§ 326.56 Text References

Witkin, California Procedure, vol. 7, *Trial*, §§ 268-329 (4th ed.)

BAJI (9th *Ed. 2002*) [California Jury Instructions, Civil]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsStandard Instructions

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28-326 California Forms of Pleading and Practice--Annotated §§ 326.57-326.79

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[Reserved]

§§ 326.57[Reserved]

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PART IV. FORMS

28-326 California Forms of Pleading and Practice--Annotated § 326.80

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§ 326.80 Request for Jury Instructions

[1] FORM Request for Jury Instructions

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	REQUEST FOR JURY INSTRUCTIONS
Defendant.	)	
	)	
	)	

Plaintiff/Defendant _____ [*name*] respectfully requests this court to give the following [numbered CACI] jury instructions as well as any further or additional instructions requested hereafter.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Use of Form

This form is for use in proposing jury instructions and additional jury instructions to be given by a court. It is the first sheet.

Each proposed instruction must [*Code Civ. Proc. § 607a*; *Cal. Rules of Ct., Rule 2.1055(c)*; *see § 326.23[1]*]:

- Be on a separate page or pages;

- Contain the instruction number and title of the instruction at the top of the first page of the instruction; and

- Be prepared without any blank lines or unused bracketed portions, so that it can be read directly to the jury.

Each set of proposed jury instructions must have a cover page, containing the caption of the case and stating the name of the party proposing the instructions, and an index listing all the proposed instructions [*Cal. Rules of Ct., Rule 2.1055(b)(2)*].

In the index, approved jury instructions must be identified by their reference numbers and special jury instructions must be numbered consecutively. The index must contain a checklist that the court can utilize to indicate whether the instruction was [*Cal. Rules of Ct., Rule 2.1055(b)(3)*]:

(1) Given as proposed;

(2) Given as modified;

(3) Refused; or

(4) Withdrawn.

Each set of proposed jury instructions must be bound loosely [*Cal. Rules of Ct., Rule 2.1055(b)(4)*].

For forms of proposed instructions to be inserted in this form, see *§§ 326.81* (general form of proposed instructions) and 326.82 (CACI form of proposed instructions).

[3] Time for Submission and Service of Proposed Instructions

Counsel for the respective parties to an action must deliver to the trial judge and serve on opposing counsel proposed instructions based on the pleadings in the action. Unless otherwise provided by local rule, the proposed instructions must be submitted before the first witness is sworn [*Code Civ. Proc. § 607a*; *see Wilson v. Gilbert (1972) 25 Cal. App. 3d 607, 613, 102 Cal. Rptr. 31* ; *§ 326.22*]. The time for submission and method of service of proposed jury instructions vary from county to county and court to court. Refer to local court rules and the preference of the presiding judge in each case.

Counsel may deliver to the trial judge and serve on opposing counsel additional proposed instruction based on the evidence developed during discovery and not disclosed in the pleadings. The additional proposed instructions must be submitted before the commencement of argument [*Code Civ. Proc. § 607a*]. The trial court may disregard an instruction

submitted later than required by *Code Civ. Proc. § 607a* [*Zanon v. Moher (1955) 136 Cal. App. 2d 348, 354, 288 P.2d 597]* . Refer to local court rules and to the preference of the presiding judge in each case to determine if these rules are altered by local rule or practice.

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28-326 California Forms of Pleading and Practice--Annotated § 326.81

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§ 326.81 General Form of Proposed Jury Instruction

[1] FORM General Form of Proposed Jury Instruction

[PLAINTIFF/DEFENDANT]'S PROPOSED INSTRUCTION
NO. _____

You are instructed that _____ [*text of instruction*].

GRANTED: _____
GIVEN AS MODIFIED: _____
REFUSED: _____
WITHDRAWN: _____

_____ [*signature*]

Judge of the Superior Court

Authorities:
_____
_____
_____

[2] Use of Form

This form of proposed jury instruction is for use in conjunction with the request for jury instructions form at § 326.80[1]. This format for proposed instructions, with each proposed instruction on a separate sheet of paper, must be used to propose each different instruction requested, other than a CACI instruction [*see Code Civ. Proc. § 607a*; *see also* discussion at *§ 326.23[1]*]. See *§ 326.82[1]* for the correct form for proposing CACI instructions.

[3] Contents of Instruction

Each proposed instruction must [*Cal. Rules of Ct., Rule 2.1055(c)*]:

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

Each instruction presented, except instructions presented by CACI number reference, must have at the bottom of the page a citation of authorities which supports the instruction. No citation is required for approved instructions [*Cal. Rules of Ct., Rule 2.1055(d)*].

Each set of proposed jury instructions must have a cover page, containing the caption of the case and stating the name of the party proposing the instructions, and an index listing all the proposed instructions [*Cal. Rules of Ct., Rule 2.1055(b)(2)*].

In the index, approved jury instructions must be identified by their reference numbers and special jury instructions must be numbered consecutively. The index must contain a checklist that the court can utilize to indicate whether the instruction was [*Cal. Rules of Ct., Rule 2.1055(b)(3)*]:

(1) Given as proposed;

(2) Given as modified;

(3) Refused; or

(4) Withdrawn.

Each set of proposed jury instructions must be bound loosely [*Cal. Rules of Ct., Rule 2.1055(b)(4)*].

For each special instruction proposed by either party, the trial court must do any of the following in a manner that makes distinct what instructions were given in whole or in part [*Code Civ. Proc. § 609*]:

- Give the instruction as requested.
- Refuse to give the instruction.
- Give the instruction with modifications.

[4] CACI Instructions Strongly Encouraged

Use of CACI instructions is strongly encouraged unless the court finds that different instructions would more accurately state the law and be understood by the jurors; if there is no CACI instruction on the subject or CACI instructions cannot be modified to submit the issue properly, the court may give an instruction which is accurate, brief, understandable, impartial, and free from argument [*Cal. Rules of Ct., Rule 2.1050(e)*].

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28-326 California Forms of Pleading and Practice--Annotated § 326.82

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§ 326.82 CACI Form of Proposed Jury Instruction

[1] FORM CACI Form of Proposed Jury Instruction

CACI No. _____.

[*EITHER*]

_____ [*Quote text of CACI instruction*]. Exact copy of CACI No. _____.

[*OR*]

_____ [*Quote text of CACI instruction with deletion of optional bracketed material*]. Exact copy of CACI No. _____, except adaptions.

[*OR*]

_____ [*Quote text of CACI instruction that has been modified, with modifications appearing in parenthesis or indicated by other appropriate means*]. CACI No. _____, as modified.

GRANTED: _____
GIVEN AS MODIFIED: _____

REFUSED: _____
WITHDRAWN: _____

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use in conjunction with the form request for jury instructions at *§ 326.80[1]*. This form must be typed on a separate sheet of paper for each proposed instruction requested from the latest edition of CACI [*see Code Civ. Proc. § 607a*].

Some courts provide preprinted forms on which counsel need only check the numbers of the requested instructions; other courts require only that CACI instructions not adapted or modified be listed on a single typewritten page. Determine the local court rules and practice before preparing CACI instructions for submission.

For a form for use in proposing non-CACI instructions, see *§ 326.81[1]*.

[3] CACI Instructions Strongly Encouraged

Use of CACI instructions is strongly encouraged unless the court finds that different instructions would more accurately state the law and be understood by the jurors; if there is no CACI instruction on the subject or CACI instructions cannot be modified to submit the issue properly, the court may give an instruction which is accurate, brief, understandable, impartial, and free from argument [*Cal. Rules of Ct., Rule 2.1050(e)*].

[4] Format of CACI Instructions

Each proposed instruction must [*Cal. Rules of Ct., Rule 2.1055*

- Be on a separate page or pages;

- Contain the instruction number and title of the instruction at the top of the first page of the instruction; and

- Be prepared without any blank lines or unused bracketed portions, so that it can be read directly to the jury.

Each set of proposed jury instructions must have a cover page, containing the caption of the case and stating the name of the party proposing the instructions, and an index listing all the proposed instructions [*Cal. Rules of Ct., Rule 2.1055(b)(2)*.

In the index, approved jury instructions must be identified by their reference numbers. The index must contain a checklist that the court can utilize to indicate whether the instruction was [*Cal. Rules of Ct., Rule 2.1055(b)(3)*]:

(1) Given as proposed;

(2) Given as modified;

(3) Refused; or

(4) Withdrawn.

Each set of proposed jury instructions must be bound loosely [*Cal. Rules of Ct., Rule 2.1055(b)(4)*].

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Chapter 326A JURY VERDICTS

28-326A California Forms of Pleading and Practice--Annotated 326A.syn

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FOOTNOTES:
(n57)Footnote *.
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PART I. SCOPE

28-326A California Forms of Pleading and Practice--Annotated § 326A.01

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§ 326A.01 Scope of Chapter

This chapter discusses jury verdicts [*see § 326A.10* et seq.] and directed verdicts [*see § 326A.30* et seq.]. A Research Guide is also provided for both topics [*see § 326A.50* et seq. and *§ 326A.60* et seq., respectively].

The chapter includes the following forms:

- General verdict [*see § 326A.70*].
- Verdict with separate special finding regarding punitive damages [*see § 326A.71*].
- Notice of motion for directed verdict [*see § 326A.80*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureTrialsJury TrialsVerdictsGeneral Overview

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329

Chapter 326A JURY VERDICTS
PART I. SCOPE

28-326A California Forms of Pleading and Practice--Annotated § 326A.02

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§ 326A.02 Cross References

- For a form relating to special interrogatories in actions on disability insurance policies, see Ch. 308, *Insurance* .

- For discussion and forms relevant to requesting and entering judgment, see Ch. 318, *Judgments* .

- For discussion and forms relating to the right to trial by jury; the opportunities to demand or waive trial by jury; qualifications, voir dire, and challenges to prospective jurors; and conduct of the jury during deliberations, see Ch. 322, *Juries and Jury Selection* .

- For discussion and forms for proper instructions to jurors prior to their deliberations, see Ch. 326, *Jury Instructions* .

- For discussion and forms for use in seeking writs of mandate or prohibition, see Ch. 358, *Mandate and Prohibition* .

- For discussion and forms for use in making motions for new trial or for judgment notwithstanding the verdict, see Ch. 371, *Motions After Trial* .

- For discussion and forms relating to special interrogatories to be submitted to a jury for a special verdict, see Ch. 529, *Statement of Decision* .

- For discussion of juror misconduct as grounds for mistrial, see Ch. 551, *Trial* , and as grounds for motion for new trial, see Ch. 371, *Motions After Trial* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsJury TrialsRight to Jury TrialCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibition

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Chapter 326A JURY VERDICTS
PART I. SCOPE

28-326A California Forms of Pleading and Practice--Annotated §§ 326A.03-326A.09

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[Reserved]

§§ 326A.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Jury Verdicts

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§ 326A.10 Governing Statutes

Jury verdicts are governed by *Code Civ. Proc. §§ 617-619* and *Code Civ. Proc. §§ 624-628*. Judgment notwithstanding the verdict is governed by *Code Civ. Proc. § 629*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureTrialsJury TrialsVerdictsGeneral Overview

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Chapter 326A JURY VERDICTS
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A. Jury Verdicts

28-326A California Forms of Pleading and Practice--Annotated § 326A.11

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§ 326A.11 Definitions

[1] Verdict

Black's Law Dictionary defines a verdict as "the formal and unanimous decision or finding made by a jury upon a matter or question duly submitted to the jurors at trial" Black's Law Dictionary 1559 (6th ed. 1990)]. A verdict also is described in Black's Law Dictionary as "the definitive answer given by a jury to the court concerning the matters of fact committed to the jury for its deliberation and determination" Black's Law Dictionary 1559 (6th ed. 1990)].

A verdict is either general or special [*Code Civ. Proc. § 624*]. For definitions of general and special verdicts, see [2], [3], *below*, respectively.

[2] General Verdict

A general verdict is a verdict pronounced on all or any of the issues generally, either in favor of the plaintiff or defendant [*Code Civ. Proc. § 624*]. A general verdict implies a finding in favor of the prevailing party of every fact essential to support its claim or defense [*Southern Pac. Co. v. Unarco Industries, Inc. (1974) 116 Cal. Rptr. 847]* . For a form of general verdict, see *§ 326A.70*.

If the evidence supports the verdict on any theory of the case, it is assumed the jury so found [*Hazelwood v. Gordon (1967) 253 Cal. App. 2d 178, 180-181, 61 Cal. Rptr. 115*]. This is referred to as the general verdict rule: When multiple alternative or inconsistent counts are alleged, the jury is instructed on multiple counts, and a general verdict is rendered, that verdict will be upheld if there is substantial evidence to support any of the claims [*Henderson v. Harnischfeger Corp. (1974) 12 Cal. 3d 663, 673 , 527 P.2d 353* ; *Crogan v. Metz (1956) 47 Cal. 2d 398, 403, 303 P.2d 1029* ; *Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 617, 124 Cal. Rptr. 143* ; *Codekas v. Dyna-Lift Co. (1975)*

48 Cal. App. 3d 20, 24-25, 121 Cal. Rptr. 121] . This rule applies even if the measure of damages, and thus the amount of the general damage verdict, might differ under the various theories of recovery pleaded in the complaint [*Crogan v. Metz (1956) 47 Cal. 2d 398, 404-405, 303 P.2d 1029* ; *Gilman v. Nemetz (1962) 203 Cal. App. 2d 81, 94, 21 Cal. Rptr. 317]* , unless damages are apportioned in special findings to the various theories of recovery [*see* *Tavaglione v. Billings (1993) 4 Cal. 4th 1150, 1158, 17 Cal. Rptr. 2d 608, 847 P.2d 574* , discussed at *§ 326A.12[3]*].

ILLUSTRATION:

General Verdict Rule. A personal injury action was submitted to the jury on theories of negligence, implied warranty, and misrepresentation. There was substantial evidence to support both the negligence and implied warranty theories, and those two theories were unaffected by reversible error. However, the issue of misrepresentation also was submitted to the jury, with instructions inviting a verdict on it, without any evidence to support it. A general verdict was entered for plaintiff. That verdict should be affirmed on appeal. The general verdict rule states that a general verdict will not be disturbed by an appellate court if any theory is supported by substantial evidence [*Continental Dairy Equipment Co. v. Lawrence (1971) 17 Cal. App. 3d 378, 383, 94 Cal. Rptr. 887]* .

The jury is not required to itemize its verdict or relate the facts it found in arriving at its verdict (except when a special verdict is required; *see* [3], *below*) [*Sill Properties, Inc. v. CMAG, Inc. (1963) 219 Cal. App. 2d 42, 49, 33 Cal. Rptr. 155]* .

For discussion of preparing and submitting verdict forms, see *California Trial Guide § 91.21* (Matthew Bender).

[3] Special Verdict

A special verdict as provided by *Code Civ. Proc. § 624* is one in which the jury finds the facts only, leaving the judgment to the court. A special verdict that calls for conclusions of law, implying the facts on which it is based, is defective [*see* *Simon v. San Paolo United States Holding Co., Inc. (2003) 113 Cal. App. 4th 1137, 1148, 7 Cal. Rptr. 3d 367]* . A special verdict must present conclusions of fact as established by the evidence rather than the evidence used to prove those facts. The conclusions of fact drawn by the jury must be presented in such a manner that nothing remains for the court to do but draw the conclusions of law from them [*Code Civ. Proc. § 624*; *see* *Valentine v. Baxter Healthcare Corp. (1999) 68 Cal. App. 4th 1467, 1487, 81 Cal. Rptr. 2d 252* (special verdict form that asked "Were the Defendants negligent in failing to exercise reasonable care in the design of Plaintiff's breast implants?" did not impermissibly call for evidentiary facts as opposed to ultimate facts)]. For discussion of requesting a special verdict, see *§ 326A.12*. For special verdict forms, see Judicial Council Forms of California Civil Jury Instructions (CACI) (Matthew Bender).

The questions propounded to and answered by the jury constitute the ultimate facts to be found, and together those questions and answers form a special verdict [*Estate of Keithley (1901) 134 Cal. 9, 11, 66 P. 5]* . Thus a special verdict must pass on all the issues by presenting the conclusions of fact bearing on all of them [*In re Sanderson (1887) 74 Cal. 199, 208, 15 P. 753]* .

The jury is not required to itemize its verdict or relate the facts it found in arriving at its verdict, except when a special verdict is required [*Sill Properties, Inc. v. CMAG, Inc. (1963) 219 Cal. App. 2d 42, 49, 33 Cal. Rptr. 155]* .

[4] Special Interrogatories

Although the terms "special verdicts" and "special interrogatories" often are used interchangeably by the courts, and although the procedures for obtaining special verdicts and special interrogatories are similar, special verdicts and special interrogatories are different. A special interrogatory is a question put to the jury to test the validity of a general verdict. A special verdict, on the other hand, is a finding by the jury of the ultimate facts, following which the court renders

judgment [*Burlingame Motor Co. v. Peninsula Activities, Inc. (1971) 15 Cal. App. 3d 656, 661, 93 Cal. Rptr. 376]* . A special finding on an issue incidental to a general verdict is immaterial; it may be ignored [*De Gottardi v. Donati (1909) 155 Cal. 109, 111, 99 P. 492]* .

If a court, on its own motion, instructs a jury on all elements of a cause of action, the court may properly refuse a request for cumbersome special interrogatories addressing the same elements of that cause of action [*see* *Babcock v. Omansky (1973) 31 Cal. App. 3d 625, 630, 107 Cal. Rptr. 512* (partially overruled on other grounds in *Canal-Randolph Anaheim, Inc. v. Wilkoski (1978) 78 Cal. App. 3d 477, 485, 144 Cal. Rptr. 474*) (court instructed on all elements of fraud)].

For a form of verdict with special interrogatories regarding punitive damages, see *§ 326A.71*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts

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§ 326A.12 Requesting Special Findings or Special Verdicts

[1] In General

The court may direct the jury to find a special verdict in writing and to find special verdicts as to all or any of the issues. The court also may instruct the jury to find on particular questions of fact when the jury renders a general verdict [*Code Civ. Proc. § 625*]. For discussions of the distinction between general and special verdicts, and which prevails when there is inconsistency between a general verdict and a special finding, see *§ 326A.11[2], [3],* and *§ 326A.18[5],* respectively.

A special verdict, or finding, is filed with the clerk and entered in the minutes [*Code Civ. Proc. § 625*].

The statutory scheme contemplates a partial special verdict, since the court can direct the jury to find a special verdict "upon all, or any of the issues" [*Code Civ. Proc. § 625*; *see Valentine v. Baxter Healthcare Corp. (1999) 68 Cal. App. 4th 1467, 1477, 81 Cal. Rptr. 2d 252]* . Upon a jury's return of special verdicts on some, but not all, causes of action, the trial court can enter those verdicts in the minutes as the conclusive adjudication of those causes of action, render judgment on the verdicts where appropriate or reserve judgment on those causes of action pending entry of final judgment upon termination of the case, declare a partial mistrial as to the remaining causes of action, and order a limited retrial [*Code Civ. Proc. § 628*; *Valentine v. Baxter Healthcare Corp. (1999) 68 Cal. App. 4th 1467, 1475, 81 Cal. Rptr. 2d 252* (case of first impression)].

Historical disuse of special verdicts has not stemmed from ignorance of their availability but, rather, because trial counsel often shun their use. When a special verdict form is taken into a jury room, it focuses special jury attention on a particular matter. Because that matter may be something trial counsel would prefer to have the jury gloss over, the use

of special verdicts often is avoided [*see McCloud v. Roy Riegels Chems. (1971) 20 Cal. App. 3d 928, 936, 97 Cal. Rptr. 910]* . For the conflicting views of appellate courts on the use of special verdicts, see *All-West Design, Inc. v. Boozer (1986) 183 Cal. App. 3d 1212, 1221, 228 Cal. Rptr. 736* .

For special verdict forms, see Judicial Council Forms of California Civil Jury Instructions (CACI) (Matthew Bender).

[2] Special Verdict Required for Punitive Damages

In all cases in which the issue of punitive damages is presented to the jury, the jury must return a special verdict, separating punitive damages from compensatory damages [*Code Civ. Proc. § 625*]. For a form of verdict with special interrogatories regarding punitive damages, see *§ 326A.71*.

[3] Advisability of Requesting Special Verdicts or Findings

A party has one opportunity to have the jury's findings pinpointed: the request for special verdicts or findings. Well-conceived special verdicts or findings simplify and often eliminate issues on appeal. The responsibility for requesting special verdicts or findings rests on the parties [*see Codekas v. Dyna-Lift Co. (1975) 48 Cal. App. 3d 20, 24-25, 121 Cal. Rptr. 121]* . An appellate court will uphold a general verdict if there is any substantial evidence to support it [*see § 326A.11[2]*]. Accordingly, a party concerned about the sufficiency of the evidence to support a key element of a claim or defense must request a special verdict to isolate this particular issue on appeal [*see McCloud v. Roy Riegels Chems. (1971) 20 Cal. App. 3d 928, 937, 97 Cal. Rptr. 910]* .

When special findings or verdicts are not used, it is assumed that the jury found in accordance with any theory of liability supported by substantial evidence in its general verdict [*see § 326A.11[2]*]. Thus, to attack the sufficiency of evidence to support a general verdict in favor of the plaintiff, a defendant must request special findings or verdicts on the alternate theories [*see Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 617, 124 Cal. Rptr. 143]* . It may be especially helpful to submit special findings apportioning the various elements of damages or specifying the amount of damages attributable to each separate theory of liability [*see Tavaglione v. Billings (1993) 4 Cal. 4th 1150, 1154-1158, 17 Cal. Rptr. 2d 608, 847 P.2d 574* ; *Pressler v. Irvine Drugs, Inc. (1985) 169 Cal. App. 3d 1244, 1249, 215 Cal. Rptr. 807* (approving use of special interrogatories to allocate general verdict damages between medical expenses, lost earnings, and general damages)].

ILLUSTRATION:

Products Liability Theories. A products liability case was submitted to the jury on theories of design defect and failure to warn. With respect to design defect, the jury was instructed on both the consumer expectations and risk-benefit theories. Defendant objected to the instructions on the consumer expectations test, on the grounds the evidence did not warrant it. The jury returned a general verdict for plaintiff. Prior to submission of the case to the jury, defense counsel specifically declined to request a special verdict. The trial court did not commit reversible error in instructing the jury on the consumer expectations theory of design defect. The liability theory of defect by failure to warn was supported by substantial evidence, and thus it was immaterial whether the evidence supported either the giving of instructions on the theory of design defect under consumer expectations or a finding based on it or on the risk-benefit theory [*Bresnahan v. Chrysler Corp. (1998) 65 Cal. App. 4th 1149, 76 Cal. Rptr. 2d 804]* .

[4] Time for and Manner of Requesting Special Verdicts or Findings

A party desiring special findings or special verdicts must present those issues or questions of fact to the judge in writing prior to argument. The issues or questions of fact must be in proper form for submission to the jury, and copies must be served on all other parties [*see Cal. Rules of Ct., Rule 3.1580*]. Counsel should consult local rules to determine whether there are additional or alternative requirements for the submission of requests for special verdicts or findings. For discussion of preparing and submitting special verdict and interrogatory forms, see *California Trial Guide § 91.21*

(Matthew Bender).

A party waives any objection under *Cal. Rules of Ct., Rule 3.1580*, to a belated request for special findings when no objection is placed in the record [*Hurlbut v. Sonora Community Hospital (1989) 207 Cal. App. 3d 388, 403, 254 Cal. Rptr. 840 (decided under former Cal. Rules of Ct., Rule 230)]* . Similarly, a party's failure to object to special verdict forms submitted by an opposing party waives that issue on appeal [*Orient Handel v. United States Fidelity & Guaranty Co. (1987) 192 Cal. App. 3d 684, 700, 237 Cal. Rptr. 667]* .

[5] Court's Discretion in Directing Special Verdicts or Findings

Although it is rare for a trial judge to refuse a proper request by counsel to submit special finding or verdict forms in a proper case [*see McCloud v. Roy Riegels Chems. (1971) 20 Cal. App. 3d 928, 936, 97 Cal. Rptr. 910]* , submission of requests for special findings to the jury lies within the discretion of the trial court [*Hurlbut v. Sonora Community Hospital (1989) 207 Cal. App. 3d 388, 403-404, 254 Cal. Rptr. 840* ; *McCloud v. Roy Riegels Chems. (1971) 20 Cal. App. 3d 928, 936, 97 Cal. Rptr. 910]* . Absent a showing of clear abuse, the trial judge's determination is not subject to reversal on review [*Oakes v. McCarthy Co. (1968) 267 Cal. App. 2d 231, 266, 73 Cal. Rptr. 127]* .

It is not an abuse of discretion for a trial court to refuse special interrogatories based on negligence when the record provided insufficient evidence on the issue of negligence [*Hurlbut v. Sonora Community Hospital (1989) 207 Cal. App. 3d 388, 403-404, 254 Cal. Rptr. 840]* . Similarly, it is not an abuse of discretion for a trial judge to refuse requested special verdicts on separate counts that state alternative theories of recovery presented during trial [*see Ferro v. Citizens Nat'l Trust & Savings Bank (1955) 44 Cal. 2d 401, 414, 282 P.2d 849]* .

A jury is not qualified to make, and should not be expected to make, findings of fact and conclusions of law; nor should a jury be saddled with lengthy and involved interrogatories of a technical legal nature [*Wyler v. Feuer (1978) 85 Cal. App. 3d 392, 405-406, 149 Cal. Rptr. 626]* . In the interest of simplicity, the court should prevent long, argumentative, and possibly unresponsive answers to special findings or verdicts by framing the questions so that the answers may be either "yes" or "no," so long as the jury is not cramped or prevented from giving full expression to the opinion of a majority of its members [*see Law v. Northern Assurance Co. (1913) 165 Cal. 394, 405, 132 P. 590]* .

[6] Situations Commonly Employing Special Verdicts or Findings

Special verdicts and special findings often are used in negligence actions to determine the basis of liability or defense [*see Scott v. Industrial Accident Com. (1956) 46 Cal. 2d 76, 84, 293 P.2d 18* , and [7], *below*]. Special verdicts are necessary to apportion comparative negligence and to assure that a jury follows proper standards [*see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824, 119 Cal. Rptr. 858, 532 P.2d 1226]* , although special verdicts are not required in comparative negligence cases [*see United Farm Workers of America v. Superior Court (1980) 111 Cal. App. 3d 1009, 1015, 169 Cal. Rptr. 94* (*disapproved on other grounds* in *Juarez v. Superior Court (1982) 31 Cal. 3d 759, 768-769, 183 Cal. Rptr. 852, 647 P.2d 128*)]. A special verdict also is necessary when one of the defenses in an action is jurisdictional, such as the allegation of an employment relationship in a personal injury case involving the question of workers' compensation coverage [*Scott v. Industrial Accident Com. (1956) 46 Cal. 2d 76, 84, 293 P.2d 18]* .

Special verdicts and findings also have been approved in actions based on the following:

- Fraud [*see Babcock v. Omansky (1973) 31 Cal. App. 3d 625, 630, 107 Cal. Rptr. 512]* .

- Indemnification [*see Burlingame Motor Co. v. Peninsula Activities, Inc. (1971) 15 Cal. App. 3d 656, 661, 93 Cal. Rptr. 376]* .

- Breach of contract, in which a special verdict may dispose of the necessity for giving the jury

detailed instructions on principles of contract law [*Olson v. Arnett (1980) 113 Cal. App. 3d 59, 66, 67, 169 Cal. Rptr. 629]* .

[7] Sufficiency of Special Verdicts in Negligence Actions

If three-fourths of the jurors agree that a party is negligent and that the negligence is a proximate cause of the other party's injuries, special verdicts apportioning damages are valid if they contain the votes of any of three-fourths of the jurors on any of the issues. To hold otherwise would be to prohibit jurors who dissent on the question of liability from participating in the issues of causation, apportionment, and damages, a result that would deny the parties a jury of all jurors deliberating on all issues [*Juarez v. Superior Court (1982) 31 Cal. 3d 759, 768-769, 183 Cal. Rptr. 852, 647 P.2d 128* (disapproving *Borns v. Butts (1979) 98 Cal. App. 3d 208, 210, 159 Cal. Rptr. 400*); *see Ramona Manor Convalescent Hospital v. Care Enterprises (1986) 177 Cal. App. 3d 1120, 1142, 225 Cal. Rptr. 120* ; *United Farm Workers of America v. Superior Court (1980) 111 Cal. App. 3d 1009, 1014, 1019, 169 Cal. Rptr. 94* ; for discussion of size of jury, number required to render a verdict, and related rule for general verdicts, *see § 326A.14[1]*]. *Juarez* has been given limited retroactive application only to cases in which no retrial has commenced and resulted in judgment. Cases in which the judgment on retrial is reversed also might be entitled to the limited retroactive application of *Juarez* under the same rationale of judicial economy [*Phelps v. Superior Court (1982) 136 Cal. App. 3d 802, 811, 186 Cal. Rptr. 626]* .

Jurors who do not join in a negligence special verdict still may vote on a proximate cause special verdict [*Resch v. Volkswagen of America, Inc. (1984) 36 Cal. 3d 676, 682, 205 Cal. Rptr. 827, 685 P.2d 1178]* . Thus, judgment may be entered on both special verdicts even though the same nine jurors are not in agreement on the questions of negligence and proximate cause [*Resch v. Volkswagen of America, Inc. (1984) 36 Cal. 3d 676, 682, 205 Cal. Rptr. 827, 685 P.2d 1178* (disapproving contrary language in *Collin v. Connecticut Valley Arms, Inc. (1982) 137 Cal. App. 3d 815, 187 Cal. Rptr. 306* , and *United Farm Workers of America v. Superior Court (1980) 111 Cal. App. 3d 1009, 169 Cal. Rptr. 94*)].

In a products liability case alleging design or manufacturing defects, jurors who voted against a special verdict regarding product defect are entitled to vote on a special verdict regarding causation [*Resch v. Volkswagen of America, Inc. (1984) 36 Cal. 3d 676, 682-683, 205 Cal. Rptr. 827, 685 P.2d 1178]* . For further discussion of special verdicts in negligence actions, see Ch. 380, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureRemediesDamagesPunitive Damages

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§ 326A.13 Court Open for Instructions and Reception of Verdict

While the jury is deliberating outside the courtroom, the court may conduct other business. However, the court remains open for every purpose connected with the case submitted to the jury until a verdict is rendered or the jury is discharged [*Code Civ. Proc. § 617*].

If the jury reaches a verdict while the court is in recess, the court may direct that the jury bring in a sealed verdict when the court resumes session [*Code Civ. Proc. § 617*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 326A.14 Reception of Verdict

[1] Number of Jurors to Agree

A verdict in a civil action requires three fourths of the jurors to agree [*Code Civ. Proc. § 618*; *see Cal. Const., art. I, § 16* (allowing three fourths of jury to render verdict in civil action)]. Thus, when polling discloses that more than one quarter of the jurors disagree with a verdict, the trial judge retains control of the proceedings and may order the jury to retire and reconsider the case [*Van Cise v. Lencioni (1951) 106 Cal. App. 2d 341, 347, 235 P.2d 236]* .

The specific number required depends on the size of the jury, which may have a maximum of 12 persons or a lesser number if the parties agree in open court [*see Code Civ. Proc. § 220*, discussed in Ch. 322, *Juries and Jury Selection*].

At least nine of twelve jurors must concur that each element of a negligence cause of action has been proved by a preponderance of the evidence, but, faced with multiple or alternative acts that could support an element of a cause of action, nine jurors need not concur on which act is proved [*Stoner v. Williams (1996) 46 Cal. App. 4th 986, 1002, 54 Cal. Rptr. 2d 243* ; *see also Valentine v. Baxter Healthcare Corp. (1999) 68 Cal. App. 4th 1467, 1486, 81 Cal. Rptr. 2d 252* ; for discussion of related rule for special verdicts, see *§ 326A.12[7]*].

[2] Presentation of Verdict and Discharge of Jury

The verdict must be written, signed by the jury foreperson, and read to the jury by the clerk, and the inquiry made whether it is their verdict. Either party may require the jury to be polled by the court or clerk, asking each juror if it is the juror's verdict. If no disagreement is expressed, the verdict is complete and the jury discharged from the case [*Code Civ. Proc. § 618*]. For further discussion, see *California Trial Guide, Unit 91, Jury Deliberations and Rendition of Verdict, §§ 91.30, 91.31* (Matthew Bender).

[3] Polling

Either party may require that the jury be polled. If a poll is requested, the clerk or court asks each juror if the verdict read back to the jury was his or her verdict. If more than one fourth of the jurors disagree, the jury is sent out again to reconsider the verdict. If no disagreement is shown, the verdict is complete and the jury is discharged from the case [*Code Civ. Proc. § 618*]. A juror's silence at polling, due to the trial court's failure to poll the juror on one of multiple special verdict questions, does not constitute an expressed disagreement with the verdict under *Code Civ. Proc. § 618* [*Keener v. Jeld-Wen, Inc. (2009) 46 Cal. 4th 247, 257-259, 92 Cal. Rptr. 3d 862, 206 P.3d 403]* . Any challenge to the verdict based on the polling must be asserted before the jury is discharged if the purported defect is apparent and could be corrected, or else the challenge is forfeited [*Bell v. Bayerische Motoren Werke Aktiengesellschaft (2010) 181 Cal. App. 4th 1108, 1129-1130, 105 Cal. Rptr. 3d 485]* .

Even when there is ambiguity when the jury is first polled, if at least three fourths of the jurors eventually agree to the verdict, the court may direct that the verdict be recorded [*Silverhart v. Mount Zion Hospital (1971) 20 Cal. App. 3d 1022, 1029, 98 Cal. Rptr. 187]* . For further discussion, see *California Trial Guide, Unit 91, Jury Deliberations and Rendition of Verdict, §§ 91.30, 91.31* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsPolling of JuryCivil ProcedureTrialsJury TrialsVerdictsGeneral Overview

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Chapter 326A JURY VERDICTS
PART II. LEGAL BACKGROUND
A. Jury Verdicts

28-326A California Forms of Pleading and Practice--Annotated § 326A.15

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§ 326A.15 Requirements of Verdict

[1] Amount

If a verdict is found for a plaintiff or cross complainant in an action for recovery of money, the jury also must award a recovery [*Code Civ. Proc. § 626*]. The purpose of this rule is to assure litigants the right to have a jury determine all issues of fact. The rule is applicable only in civil cases in which the issues are presented to the jury in a single trial; it is not applicable if the parties have stipulated to separate trials on the issues of liability and damages [*Little v. Superior Court (1961) 55 Cal. 2d 642, 644-645, 12 Cal. Rptr. 481, 361 P.2d 13]* .

[2] Value of Property

The jury must find the value of property and, if so instructed, the value of specific portions of property, in an action for the recovery of specific personal property when either the property has not been returned to the plaintiff or the plaintiff is entitled to the return of the property. The jury may, at the same time, assess the damages sustained by the prevailing party by reason of the taking or detention of the property [*Code Civ. Proc. § 627*].

[3] When Jury Has Discretion to Award Interest

Interest is awarded to parties entitled to recover damages in a sum certain, or capable of being made certain by calculation, when the right to recover damages vests in that party on a particular day before the verdict is entered [*Civ. Code § 3287(a)*]. In addition, interest may be awarded, in a court's discretion, from a date prior to the entry of judgment when a party is entitled to damages based on a contract action; however, interest may not be awarded in those cases from a date earlier than that on which the action was filed [*Civ. Code § 3287(b)*].

Moreover, a jury in its discretion may award interest in the following circumstances [*Civ. Code § 3288*]:

- In an action for breach of an obligation not arising from contract.
- In every case of oppression, fraud, and malice.

Interest awarded or denied as damage in the discretion of a jury pursuant to *Civ. Code § 3288* is of a different character than interest awarded or denied in the exercise of discretion by a court under *Civ. Code § 3287* [*Esgro Central, Inc. v. General Insurance Co. of America (1971) 20 Cal. App. 3d 1054, 1064, 98 Cal. Rptr. 153]* . Denial of prejudgment interest is proper when the jury has considered that item in computing overall damages [*Esgro Central, Inc. v. General Insurance Co. of America (1971) 20 Cal. App. 3d 1054, 1064, 98 Cal. Rptr. 153* (business interruption insurance)].

Reading *Civ. Code §§ 3287* and *3288* together when fraud is alleged, the allegedly defrauded party may ask for interest from the time of the fraud [*Nathanson v. Murphy (1957) 147 Cal. App. 2d 462, 467, 305 P.2d 710]* .

Legal Topics:

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§ 326A.16 Interpretation of Verdicts

The trial judge interprets a verdict in the context of the pleadings, evidence, and instructions [*Cucamonga County Water Dist. v. Southwest Water Co. (1971) 22 Cal. App. 3d 245, 255, 99 Cal. Rptr. 557* ; *Telles v. Title Insurance & Trust Co. (1969) 3 Cal. App. 3d 179, 185, 83 Cal. Rptr. 444]* . A verdict should be liberally construed to uphold the judgment and to give it the effect intended by the jury, as well as an effect consistent with the law and the evidence [*Maxwell v. Powers (1994) 22 Cal. App. 4th 1596, 1603, 28 Cal. Rptr. 2d 62* ; *All-West Design, Inc. v. Boozer (1986) 183 Cal. App. 3d 1212, 1223, 228 Cal. Rptr. 736* ; *Cucamonga County Water Dist. v. Southwest Water Co. (1971) 22 Cal. App. 3d 245, 255, 99 Cal. Rptr. 557]* .

The affidavits of jurors cannot be used to construe or interpret a verdict [*Telles v. Title Insurance & Trust Co. (1969) 3 Cal. App. 3d 179, 187, 83 Cal. Rptr. 444]* . An appellate court will interpret a verdict only if the trial judge fails to do so or does so erroneously [*Cucamonga County Water Dist. v. Southwest Water Co. (1971) 22 Cal. App. 3d 245, 255, 99 Cal. Rptr. 557* ; *Telles v. Title Insurance & Trust Co. (1969) 3 Cal. App. 3d 179, 185, 83 Cal. Rptr. 444]* .

Legal Topics:

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§ 326A.17 Types of Defective Verdicts

[1] Informal Verdicts

An informal verdict is defective and should be corrected [*see Code Civ. Proc. § 619*; as to correction, see *§ 326A.18[1]*]. The term "informal" as used in *Code Civ. Proc. § 619* means a verdict defective in form because it is not in the usual form or manner and is contrary to custom or prescribed rule [*see Crowe v. Sacks (1955) 44 Cal. 2d 590, 596, 283 P.2d 689]* . For example, a verdict is informal if a jury fails to assess the value of separate interests in property sought to be condemned, as required by statutes in condemnation proceedings [*Reed Orchard Co. v. Superior Court (1912) 19 Cal. App. 648, 663, 128 P. 9]* .

[2] Insufficient Verdicts

An insufficient verdict is defective and should be corrected [*see Code Civ. Proc. § 619*; as to correction, *see § 326A.18[1]*]. The term "insufficient" as used in *Code Civ. Proc. § 619* means a verdict is defective because it is inadequate for some need, purpose, or use [*see Crowe v. Sacks (1955) 44 Cal. 2d 590, 596, 283 P.2d 689]* . A verdict must encompass all the issues submitted to the jury. A verdict that goes beyond the issues of the case is insufficient because it is not in conformity with the instructions [*Maxwell v. Powers (1994) 22 Cal. App. 4th 1596, 1603, 28 Cal. Rptr. 2d 62* ; *Crowe v. Sacks (1955) 44 Cal. 2d 590, 596, 283 P.2d 689]* .

ILLUSTRATION:

Examples of Insufficient Verdicts. A jury instructed and authorized only to determine relative fault, also apportioned damages. The verdict amounted to an insufficient verdict [*Maxwell v. Powers (1994) 22 Cal. App. 4th 1596, 1603, 28 Cal. Rptr. 2d 62]* . In a trial in which there was no issue of liability, and it was clear from the evidence that plaintiff suffered some damage, the jury returned a verdict awarding

"no sum" as damages. That also was an insufficient verdict [*Sherwood v. Rossini (1968) 264 Cal. App. 2d 926, 930, 71 Cal. Rptr. 1]* .

A verdict that is patently contrary to a court's instructions also is insufficient [*Sherwood v. Rossini (1968) 264 Cal. App. 2d 926, 930, 71 Cal. Rptr. 1]* .

[3] Ambiguous Verdicts

Ambiguous verdicts are "informal" or "insufficient" within the meaning of *Code Civ. Proc. § 619* [*see Campbell v. Zokelt (1969) 272 Cal. App. 2d 315, 319, 77 Cal. Rptr. 561* ; as to correction, *see § 326A.18[2]*]. For example, a verdict in a personal injury action is ambiguous when it fails to specify whether it includes or excludes the amount paid to plaintiff as workers' compensation benefits [*Woodcock v. Fontana Scaffolding & Equipment Co. (1968) 69 Cal. 2d 452, 456, 72 Cal. Rptr. 217, 445 P.2d 881]* .

[4] Jury's Failure to Find on All Issues

A verdict is informal or insufficient within the meaning of *Code Civ. Proc. § 619*, and thus defective, when a jury fails to find as to all issues before it [*see Walters v. Marler (1978) 83 Cal. App. 3d 1, 19, 147 Cal. Rptr. 655* (verdict against one of two defendants that is silent as to other defendant is not verdict in favor of latter but merely is failure on part of jury to find on all of issues; verdict on one theory that is silent as to other theories is merely failure to find on other theories); *Fransen v. Washington (1964) 229 Cal. App. 2d 570, 578, 40 Cal. Rptr. 458* ; as to correction, see *§ 326A.18[4]*]. For example, a verdict against one of two defendants that is silent as to the other defendant amounts to a failure by the jury to find on all of the issues presented to it [*Irelan-Yuba Gold Quartz Mining Co. v. Pacific Gas & Electric Co. (1941) 18 Cal. 2d 557, 570, 116 P.2d 611]* . But failure of the court to provide the jury with specific forms of verdict as to each defendant is not fatal as long as clear and specific instructions were given regarding the various findings that could be made, and sufficient information was given to enable the jury to frame its own verdict [*Fransen v. Washington (1964) 229 Cal. App. 2d 570, 579, 40 Cal. Rptr. 458]* .

ILLUSTRATION:

Jury Made Its Findings Clear. In a case with two defendants, forms of verdict that would have exonerated one defendant and found another defendant liable were not submitted to the jury. The jury returned a verdict using forms of verdict that showed its intent to find both defendants liable. The failure to furnish the jury forms of verdict that would have exonerated one defendant and found another defendant liable was not prejudicial error. The verdict was sufficient [*Fransen v. Washington (1964) 229 Cal. App. 2d 570, 579, 40 Cal. Rptr. 458]* .

[5] Inadequate Damages Awarded by Jury

A verdict is defective if the jury awards inadequate damages. Hence, if the jury assesses damages so grossly inadequate as to show that it must have disregarded the evidence and the instructions of the court, it should be returned for further deliberation under proper instructions [*Crowe v. Sacks (1955) 44 Cal. 2d 590, 598, 283 P.2d 689]* .

However, it cannot be presumed on appeal that any element of damage was ignored by the jury merely because the verdict was not for a large sum of money [*Crowe v. Sacks (1955) 44 Cal. 2d 590, 597, 283 P.2d 689]* . Moreover, when the damages awarded are substantial, a verdict for less than the total damages supported by the uncontradicted evidence is not, by itself, a basis for assuming the verdict is defective [*Pfingsten v. Westenhaver (1952) 39 Cal. 2d 12, 25, 244 P.2d 395]* .

A verdict also may be challenged because the jury's apportionment of fault was not supported by the evidence. The verdict is inadequate if the apportionment of fault appears to be the result of passion and prejudice [*see Scott v. County of Los Angeles (1994) 27 Cal. App. 4th 125, 147, 32 Cal. Rptr. 2d 643]* . For a thorough discussion of issues concerning

damages, see Ch. 177, *Damages* .

ILLUSTRATION:

Improper Apportionment of Fault. In a case arising out of allegations of child abuse, social services personnel placed and kept the abused child with a relative despite warnings that child was being mistreated. That relative's intentional, criminal behavior was the immediate cause of the child's injuries. Nevertheless, the jury allocated only 1 percent of fault to the relative who actually injured the child. That allocation rendered the verdict defective because the apportionment was the result of passion and prejudice [*Scott v. County of Los Angeles (1994) 27 Cal. App. 4th 125, 147-148, 32 Cal. Rptr. 2d 643]* .

[6] Inconsistency Between General Verdict and Special Verdicts or Findings

A verdict is defective when a special verdict or finding is inconsistent with a general verdict. This form of defective verdict occurs when the special verdict or finding taken by itself supports a judgment different from the general verdict [*Wyler v. Feuer (1978) 85 Cal. App. 3d 392, 404, 149 Cal. Rptr. 626* ; *see Oxford v. Foster Wheeler LLC (2009) 177 Cal. App. 4th 700, 716-717, 99 Cal. Rptr. 3d 418* (verdicts are inconsistent when beyond possibility of reconciliation under any possible application of evidence and instructions); *Stillwell v. The Salvation Army (2008) 167 Cal. App. 4th 360, 374, 84 Cal. Rptr. 3d 111* (improper for trial court to grant judgment as matter of law consistent with one special verdict but notwithstanding other special verdicts)].

[7] Inconsistent Answers Within Special Verdict

A special verdict is defective under *Code Civ. Proc. § 619* when it is inconsistent in the sense that it contains two or more answers that are inconsistent with each other [*see Mendoza v. Club Car, Inc. (2000) 81 Cal. App. 4th 287, 302-303, 96 Cal. Rptr. 2d 605]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 326A.18 Correction of Defective Verdicts

[1] Informal or Insufficient Verdicts

If the jury's verdict is informal or insufficient, it may be corrected. The court may either advise the jury to correct its verdict or send the jury out again [*Code Civ. Proc. § 619*].

Thus, while a trial court does not have the power to order a jury to deliberate further if it has returned a complete verdict, the court does have the power under *Code Civ. Proc. § 619* to return the jury to the jury room for further deliberation if its verdict is informal or insufficient in not covering the issue submitted [*Sherwood v. Rossini (1968) 264 Cal. App. 2d 926, 929, 71 Cal. Rptr. 1]* . In fact, the court retains control over the proceedings with power to correct informal or insufficient verdicts under *Code Civ. Proc. § 619* until the verdict is recorded and the jury is finally discharged [*Maxwell v. Powers (1994) 22 Cal. App. 4th 1596, 1603, 28 Cal. Rptr. 2d 62* , citing *Phipps v. Superior Court (1939) 32 Cal. App. 2d 371, 374, 89 P.2d 698]* . The judge should exercise caution and restraint when ordering the jury to correct its verdict so that the court does not influence the deliberations of the jury as to matters exclusively within its province [*Fibreboard Paper Products Corp. v. East Bay Union of Machinists (1964) 227 Cal. App. 2d 675, 732-733, 39 Cal. Rptr. 64]* .

[2] Ambiguous Verdicts

If a verdict is ambiguous, the party adversely affected should request clarification. The court then may order the jury to deliberate further to correct the informal or insufficient verdict. If no objection is made before the jury is discharged, the trial judge must interpret the verdict in light of the pleadings, evidence, and instructions [*Woodcock v. Fontana Scaffolding & Equipment Co. (1968) 69 Cal. 2d 452, 456, 72 Cal. Rptr. 217, 445 P.2d 881* ; *Campbell v. Zokelt (1969) 272 Cal. App. 2d 315, 319, 77 Cal. Rptr. 561]* .

If a verdict is hopelessly ambiguous, a reversal is required even though a retrial may be limited only to the issue giving rise to the ambiguity [*see Woodcock v. Fontana Scaffolding & Equipment Co. (1968) 69 Cal. 2d 452, 457, 72 Cal. Rptr. 217, 445 P.2d 881* (erroneous interpretation of damage award as net amount, rather than gross amount, entitles defendant to new trial on issue of damages only); *McCoy v. Gustafson (2009) 180 Cal. App. 4th 56, 6667, 103 Cal. Rptr. 3d 37*].

[3] Inadequate Damages Awarded by Jury

If a jury awards damages so grossly inadequate that it must have disregarded the evidence and instructions, the court should return the jury for deliberation with further instructions. This is particularly true in a trial in which there is no issue of liability and it is absolutely clear from the evidence that plaintiff suffered some damage. When a jury returns a verdict assessing damages at "no sum," the verdict is insufficient because it is contrary to the court's instructions on damages and ignores the evidence presented [*Sherwood v. Rossini (1968) 264 Cal. App. 2d 926, 929-930, 71 Cal. Rptr. 1]* .

If both liability and damages are at issue, a trial court has jurisdiction to return a jury for further deliberations with instructions that the verdict should not be based on a compromise as to liability and damages [*Crowe v. Sacks (1955) 44 Cal. 2d 590, 598, 283 P.2d 689]* . However, if the trial judge believes the damages awarded by a jury are inadequate but the verdict is not defective, the proper procedure is to set aside the verdict on a motion for a new trial [*Jehl v. Southern Pacific Co. (1967) 66 Cal. 2d 821, 827, 59 Cal. Rptr. 276, 427 P.2d 988]* . For discussion and forms for motions for a new trial, see Ch. 371, *Motions After Trial* .

[4] Jury's Failure to Find on Issue or Party

In determining whether the jury failed to find on an issue presented to it, a verdict must be construed with reference to the instructions under which it was rendered [*Irelan-Yuba Gold Quartz Mining Co. v. Pacific Gas & Electric Co. (1941) 18 Cal. 2d 557, 570, 116 P.2d 611]* . The normal proceeding is a formal correction of the verdict under *Code Civ. Proc. § 619* by the jury under the direction of the court. Although explanations by a jury are not binding on the trial judge, informal explanations by jurors can be used to confirm the court's understanding of the verdict in improper form [*Brand v. Norris (1953) 121 Cal. App. 2d 367, 369, 263 P.2d 456]* .

A court acts properly in returning a jury for further deliberation with instructions when the jury presents a verdict form finding for plaintiff that fails to list each of the defendants [*Fibreboard Paper Products Corp. v. East Bay Union of Machinists (1964) 227 Cal. App. 2d 675, 731-732, 39 Cal. Rptr. 64]* .

[5] Inconsistency Between General Verdict and Special Verdicts or Findings

The purpose of the special finding or verdict as provided in *Code Civ. Proc. § 625* primarily is to determine whether a general verdict is consistent with the law [*Wyler v. Feuer (1978) 85 Cal. App. 3d 392, 404, 149 Cal. Rptr. 626* ; *see Bate v. Marsteller (1965) 232 Cal. App. 2d 605, 615, 43 Cal. Rptr. 149]* . When a special finding of fact or special verdict is inconsistent with a general verdict, the inconsistency is resolved in favor of the special finding or verdict, and the court renders judgment accordingly [*see Code Civ. Proc. § 625*; *Tavaglione v. Billings (1993) 4 Cal. 4th 1150, 1156, 17 Cal. Rptr. 2d 608, 847 P.2d 574* ; *see also Hasson v. Ford Motor Co. (1977) 19 Cal. 3d 530, 540-541, 138 Cal. Rptr. 705, 564 P.2d 857* ; *Bate v. Marsteller (1965) 232 Cal. App. 2d 605, 614, 43 Cal. Rptr. 149]* .

In resolving an inconsistency between a general verdict and special verdicts or findings, there is no presumption in favor of answers to special interrogatories, and every reasonable interpretation in favor of the general verdict should be given [*Wyler v. Feuer (1978) 85 Cal. App. 3d 392, 404, 149 Cal. Rptr. 626* ; *see Bate v. Marsteller (1965) 232 Cal. App. 2d 605, 615, 43 Cal. Rptr. 149]* . Thus, a general verdict will stand unless the facts found by the jury in answer to

special interrogatories are so clearly antagonistic to the verdict as to be absolutely irreconcilable so that both the general verdict and special findings or verdicts cannot stand [*Wyler v. Feuer (1978) 85 Cal. App. 3d 392, 404-405, 149 Cal. Rptr. 626* ; *see* *Law v. Northern Assurance Co. (1913) 165 Cal. 394, 406, 132 P. 590* ; *but see* *Stillwell v. The Salvation Army (2008) 167 Cal. App. 4th 360, 375-376, 84 Cal. Rptr. 3d 111* (remedy for inconsistent verdicts is not to grant judgment as matter of law, but to order new trial)].

Special verdicts or findings should be reconciled with general verdicts whenever possible. An irreconcilable inconsistency exists only if the special verdicts or findings are such that, if supported, the general verdict could not stand on any theory under the evidence and instructions [*Wyler v. Feuer (1978) 85 Cal. App. 3d 392, 404-405, 149 Cal. Rptr. 626* ; *Pitcher v. Kniss (1970) 10 Cal. App. 3d 931, 940, 89 Cal. Rptr. 676* (no irreconcilable inconsistency when general verdict was in favor of plaintiff and special verdict found cross-defendants concurrently liable in negligence for plaintiff's injuries)]. If any conclusions could be drawn that would explain the apparent conflict between the general verdict and the special verdict, the jury is deemed to have drawn them [*Oxford v. Foster Wheeler LLC (2009) 177 Cal. App. 4th 700, 716-717, 99 Cal. Rptr. 3d 418* (verdicts are inconsistent when beyond possibility of reconciliation under any possible application of evidence and instructions); *Wyler v. Feuer (1978) 85 Cal. App. 3d 392, 404-405, 149 Cal. Rptr. 626]* .

[6] Inconsistent Answers Within Special Verdict

When the trial court recognizes, before the jury is discharged, that a special verdict has two or more answers that are inconsistent with each other, it may properly advise the jury of the inconsistency and instruct it to deliberate further in an attempt to cure the defective verdict, pursuant to *Code Civ. Proc. § 619*. In fact, the trial court has a duty in such a case to attempt to remedy the situation before the verdict becomes final [*see* *Mendoza v. Club Car, Inc. (2000) 81 Cal. App. 4th 287, 303, 305-306, 96 Cal. Rptr. 2d 605* (affirming action of trial court in advising jury of inconsistency and sending it out again to correct the inconsistency)].

Legal Topics:

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§ 326A.19 Waiver of Defects in Verdict

A waiver of a defect in a verdict occurs if the party has done any of the following [*Mixon v. Riverview Hospital (1967) 254 Cal. App. 2d 364, 376-377, 62 Cal. Rptr. 379]* :

- Given prior approval to the form of the verdict submitted to the jury.
- Failed to object to the form of the verdict as returned by the jury.
- Failed to seek clarification of a verdict returned by a jury.

ILLUSTRATION:

Failure to Object to Blank Verdict Form. A party that failed to object to blank verdict forms submitted to the jury waived the right to complain of the form of the verdict [*Lynch v. Birdwell (1955) 44 Cal. 2d 839, 851, 285 P.2d 919]* .

A waiver also occurs when no objection is made at the time the jury returns its verdict or when the court sends the jury back to insert the amount of the award in the appropriate blank on the form [*Worthington Corp. v. El Chicote Ranch Properties, Ltd. (1967) 255 Cal. App. 2d 316, 320-321, 63 Cal. Rptr. 203]* . However, failure to make the objection before the jury is discharged may not automatically result in a waiver [*Mixon v. Riverview Hospital (1967) 254 Cal. App. 2d 364, 376-377, 62 Cal. Rptr. 379* (question as to meaning of verdicts against several defendants raised in trial court on motion for new trial)].

A party adversely affected by an ambiguous verdict waives the right to complain about the ambiguity only when the

failure to object is the result of a desire to reap a technical advantage or to promote a litigation strategy [*Schiernbeck v. Haight (1992) 7 Cal. App. 4th 869, 879, 9 Cal. Rptr. 2d 716* (quoting *Woodcock v. Fontana Scaffolding & Equipment Co. (1968) 69 Cal. 2d 452, 456, 72 Cal. Rptr. 217, 445 P.2d 881*)].

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§ 326A.20 Entry of Verdict

[1] In General

On receipt of a verdict, an entry is made in the court's minutes specifying all of the following [*Code Civ. Proc. § 628*]:

- The time of the trial.
- The names of the jurors and witnesses.
- The verdict set out at length.

In addition, when a special verdict is found, the minutes must state either the judgment rendered on it or, if the case is to be reserved for further argument or consideration, the order reserving it [*Code Civ. Proc. § 628*].

[2] Writs of Mandate and Prohibition

When a court orders an essential question of fact to be tried before a jury in a proceeding for a writ of mandate or prohibition, the question of fact is distinctly stated in an order for trial and transmitted to the court in which the matter will be heard before the jury. The order for trial may direct the jury to assess any damages sustained by the applicant in the event the jury finds for the applicant. Argument on the writ is then postponed until a verdict is certified back to the court in which the motion for the writ is to be heard [*see Code Civ. Proc. §§ 1090, 1105*].

Within five days after a verdict is rendered, the clerk of the court hearing the essential question of fact must transmit a certified copy of the verdict, attached to the order for trial, to the court in which the writ of mandate or prohibition is

pending if either (1) no notice of motion for new trial is made, or (2) notice of motion for new trial is made and denied. After the clerk's transmission, either party may bring on the argument for the application on reasonable notice to the adverse party [*Code Civ. Proc. §§ 1093, 1105*].

For further discussion, procedural checklists, and forms related to mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329
Chapter 326A JURY VERDICTS
PART II. LEGAL BACKGROUND
A. Jury Verdicts

28-326A California Forms of Pleading and Practice--Annotated § 326A.21

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§ 326A.21 Motion for Judgment Notwithstanding Verdict

The standards governing the trial court's power to grant a motion for judgment notwithstanding the verdict are the same as its power to grant a directed verdict: It cannot weigh the evidence. Unless it can be said that no other reasonable conclusion is deducible from the evidence except that the party moving for judgment notwithstanding the verdict prevail, the motion must be denied [*see Valdez v. J.D. Diffenbaugh Co. (1975) 51 Cal. App. 3d 494, 513, 124 Cal. Rptr. 467]* .

For discussion and forms for use in making a motion for judgment notwithstanding the verdict, see Ch. 371, *Motions After Trial* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts

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28-326A California Forms of Pleading and Practice--Annotated § 326A.22

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§ 326A.22 Entry of Judgment

[1] In General

Judgment must be entered by the clerk, in conformity to the verdict, within 24 hours after the jury's rendition of the verdict. This is done whether or not a motion for judgment notwithstanding the verdict is pending unless the court either [*Code Civ. Proc. § 664*]:

- Orders the case reserved for argument or further consideration; or
- Grants a stay of proceedings.

In no case is a judgment effective for any purpose until it is entered [*Code Civ. Proc. § 664*].

For related discussion and forms concerning the entry of judgments, see Ch. 318, *Judgments* .

[2] Death of Party After Verdict and Before Judgment

The court may render judgment on a case if a party dies after a verdict on any issue of fact [*Code Civ. Proc. § 669*]. When the judgment creditor dies, the judgment may be enforced by his or her executor or administrator or successor in interest [*Code Civ. Proc. § 686.010*]. When the judgment debtor dies, enforcement is governed by the Probate Code [*Code Civ. Proc. § 686.020*; *see Prob. Code §§ 9300-9304*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral Overview

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§ 326A.23 Effect of Verdict

[1] In General

The jury trial guarantee in the California Constitution [*see Cal. Const., art I, § 16*] requires submission of certain issues to a jury. For discussion of the right to a jury trial in civil actions, see Ch. 322, *Juries and Jury Selection* . Once a verdict has been reached, the California Constitution prohibits improper interference with the jury's decision [*Jehl v. Southern Pacific Co. (1967) 66 Cal. 2d 821, 829, 59 Cal. Rptr. 276, 427 P.2d 988]* . It is not a denial of the right to have a jury determination of a question of fact, however, when the court sets aside the verdict and grants the motion for a new trial [*Dorsey v. Barba (1952) 38 Cal. 2d 350, 358, 240 P.2d 604* (disapproved on other grounds in *Jehl v. Southern Pacific Co. (1967) 66 Cal. 2d 821, 828, 59 Cal. Rptr. 276, 427 P.2d 988*)].

In an equity case, the jury's verdict is advisory only, because a jury is not available as a matter of right [*Schlyen v. Schlyen (1954) 43 Cal. 2d 361, 372, 273 P.2d 897* ; *see* Ch. 322, *Juries and Jury Selection*].

[2] Bifurcated Trial

When the decision of a jury is for plaintiff on the issue of liability in a bifurcated trial, the verdict represents a determination on the issue presented and the plaintiff is entitled to proceed with its case against defendant. But when the decision is against plaintiff and for defendant, final judgment is entered and the plaintiff is barred from further proceedings against defendant absent reversal on appeal [*Lauderdale v. U & I Equipment Co. (1969) 271 Cal. App. 2d 140, 142, 76 Cal. Rptr. 483]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsVerdictsGeneral Overview

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28-326A California Forms of Pleading and Practice--Annotated §§ 326A.24-326A.29

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[Reserved]

§§ 326A.24[Reserved]

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28-326A California Forms of Pleading and Practice--Annotated § 326A.30

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§ 326A.30 Governing Statute

The requirements for making a motion for directed verdict and the granting of the motion are addressed in *Code Civ. Proc. § 630*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawDirected Verdicts

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28-326A California Forms of Pleading and Practice--Annotated § 326A.31

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§ 326A.31 When Proper

A motion for directed verdict may be made by either party [*Code Civ. Proc. § 630(a)*; *Hillard v. A. H. Robins Co. (1983) 148 Cal. App. 3d 374, 394, 196 Cal. Rptr. 117* ; *De La Rosa v. City of San Bernardino (1971) 16 Cal. App. 3d 739, 742-743, 94 Cal. Rptr. 175* (motion by defendant); *Rooney v. Mutual Benefit Health & Accident Assn. (1946) 74 Cal. App. 2d 885, 891, 170 P.2d 72* (motion by plaintiff)]. For a form of notice of motion for directed verdict, see *§ 326A.80*.

A motion for directed verdict, like a motion for nonsuit, is in the nature of a demurrer to the evidence [*Hunt v. United Bank & Trust Co. (1930) 210 Cal. 108, 117, 291 P. 184* ; *Howard v. Owens Corning (1999) 72 Cal. App. 4th 621, 629-630, 85 Cal. Rptr. 2d 386* ; *Hillard v. A. H. Robins Co. (1983) 148 Cal. App. 3d 374, 394, 196 Cal. Rptr. 117]* . It can be granted only when, disregarding conflicting evidence and giving to the evidence of the party against whom the verdict is sought all the value to which it is legally entitled, including indulging every legitimate inference that may be drawn from that evidence, there is no evidence of sufficient substantiality to support the claim or defense of the party opposing the motion, or a verdict in favor of that party [*Dailey v. Los Angeles Unified School Dist. (1970) 2 Cal. 3d 741, 745, 87 Cal. Rptr. 376, 470 P.2d 360* ; *Estate of Lances (1932) 216 Cal. 397, 400, 14 P.2d 768* ; *Howard v. Owens Corning (1999) 72 Cal. App. 4th 621, 629-630, 85 Cal. Rptr. 2d 386* ; *Hillard v. A. H. Robins Co. (1983) 148 Cal. App. 3d 374, 395, 196 Cal. Rptr. 117]* . For further discussion of the grounds for directed verdict, see *§ 326A.33*.

The order of the court granting the motion for directed verdict is effective without assent of the jury [*Code Civ. Proc. § 630(e)*].

A judgment notwithstanding the verdict is proper when a motion for directed verdict should have been granted if the motion had been made previously [*Code Civ. Proc. § 629*]. Thus, a directed verdict is proper in situations in which a

judgment notwithstanding the verdict is proper. For discussion and forms for making motions for judgment notwithstanding the verdict, see Ch. 371, *Motions After Trial* .

When a jury has been discharged without rendering a verdict, the court may order judgment to be entered in favor of a party whenever a motion for directed verdict for that party should have been granted had a previous motion been made [*Code Civ. Proc. § 630(f)*; for discussion, *see § 326A.36*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawDirected Verdicts

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§ 326A.32 Timeliness of Motion for Directed Verdict

Unless the court specifies an earlier time for making the motion, after all parties have presented their evidence, any party may, without waiving its right to trial by jury, move for an order directing entry of a verdict in its favor [*Code Civ. Proc. § 630(a)*]. It is within the discretion of the trial court to permit a motion for directed verdict to be made at any time before the case is submitted to the jury [*Gibson v. Southern Pacific Co. (1955) 137 Cal. App. 2d 337, 346, 290 P.2d 347]* .

A motion for directed verdict also may be made after the jury has been discharged without having reached a verdict [*Code Civ. Proc. § 630(f)*, discussed at *§ 326A.36*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawDirected Verdicts

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§ 326A.33 Grounds for Directed Verdict

A directed verdict, like a nonsuit or judgment notwithstanding the verdict, may be granted only when, disregarding conflicting evidence and giving the evidence in favor of the party against whom the verdict is sought all the value to which it is legally entitled, including indulging in every legitimate inference that may be drawn from that evidence, the court determines there is no evidence of sufficient substantiality to support the claim or defense of the party opposing the motion, or a verdict in favor of that party [*Estate of Lances (1932) 216 Cal. 397, 400, 14 P.2d 768* ; *Margolin v. Shemaria (2000) 85 Cal. App. 4th 891, 895, 102 Cal. Rptr. 2d 502* ; *Howard v. Owens Corning (1999) 72 Cal. App. 4th 621, 629-630, 85 Cal. Rptr. 2d 386* ; *Bell v. State of California (1998) 63 Cal. App. 4th 919, 922, 74 Cal. Rptr. 2d 541* ; *Heller v. Pillsbury Madison & Sutro (1996) 50 Cal. App. 4th 1367, 1392-1393, 58 Cal. Rptr. 2d 336* ; *Colbough v. Hartline (1994) 29 Cal. App. 4th 1516, 1521, 35 Cal. Rptr. 2d 213]* . The court may not grant a directed verdict if there is *any* substantial conflict in the evidence. If the party resisting the motion produces sufficient evidence to support a jury verdict in his or her favor, the motion must be denied [*Howard v. Owens Corning (1999) 72 Cal. App. 4th 621, 629-630, 85 Cal. Rptr. 2d 386]* .

Unless it can be said as a matter of law that no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it on appeal, the trial court is not justified in taking the case from the jury [*Short v. Nevada Joint Union High School Dist. (1985) 163 Cal. App. 3d 1087, 1095-1096* ; *Frisk v. Merrihew (1974) 42 Cal. App. 3d 319, 325, 116 Cal. Rptr. 781]* .

The opposing inferences drawn in favor of the party against whom the verdict is sought must be based on evidence, not mere speculation or conjecture [*Atlas Vegetable Exchange, Inc. v. Bank of America (1970) 10 Cal. App. 3d 868, 873, 89 Cal. Rptr. 274]* . In considering a motion for directed verdict, the trial court is not permitted to weigh or consider

conflicting evidence or to judge the credibility of witnesses [*Persons v. Salomon North America, Inc. (1990) 217 Cal. App. 3d 168, 173, 265 Cal. Rptr. 773]* .

ILLUSTRATION:

Inferences in Favor of Party Against Whom Directed Verdict Is Sought. In an action against a bank for having paid checks not properly drawn on plaintiff's account, evidence was introduced from which a jury could have concluded that plaintiff was negligent in failing to compare its returned checks with the invoices on which those checks were issued. Plaintiff sought a directed verdict in its favor. The court properly denied the directed verdict. The evidence supported inferences in favor of the defendant and thus was sufficient to preclude a directed verdict against it [*Atlas Vegetable Exchange, Inc. v. Bank of America (1970) 10 Cal. App. 3d 868, 873, 89 Cal. Rptr. 274]* .

Once granted, a directed verdict must be sustained on appeal if it can be sustained on any theory of law applicable to the case, regardless of the considerations that moved the trial court to its conclusions [*Stilson v. Moulton-Niguel Water Dist. (1971) 21 Cal. App. 3d 928, 933, 98 Cal. Rptr. 914]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 326A.34 Partial Directed Verdict

If it appears that the evidence presented supports the granting of a motion for directed verdict as to some, but not all, of the issues involved in the action, the court must grant the motion as to those issues [*Code Civ. Proc. § 630(b)*; *see Hillard v. A. H. Robins Co. (1983) 148 Cal. App. 3d 374, 396-398, 196 Cal. Rptr. 117* (reversing partial directed verdict on issue of punitive damages)]. The action then proceeds on any remaining issues. In that case, no final judgment is entered prior to the conclusion of the action, but the final judgment, in addition to any matter determined in the trial, must reflect the directed verdict ordered by the court [*Code Civ. Proc. § 630(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 326A.35 Directed Verdict in Favor of One of Multiple Defendants

In actions that arise out of an injury to a person or property, when a motion for directed verdict is granted in favor of one defendant, no other defendant may attempt to attribute fault to or comment on the absence or involvement of that defendant [*Code Civ. Proc. § 630(d)*]. For a discussion of verdicts in negligence actions raising joint and several liability issues, see Ch. 380, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 326A.36 After Jury Has Been Discharged

When a jury for any reason has been discharged without rendering a verdict, the court may order judgment to be entered in favor of a party who would have been entitled to a directed verdict on a previous motion. A court may direct a verdict in favor of a party on its own motion or on motion of the party. A party moving for directed verdict in this situation must give notice of the motion within 10 days after the jury is discharged [*Code Civ. Proc. § 630(f)*]. The power of the court to act under *Code Civ. Proc. § 630(f)* expires 30 days after the day on which the jury was discharged. If the motion is not granted within that time, the motion for judgment is deemed denied without further order of the court [*Code Civ. Proc. § 630(f)*].

A directed verdict may be granted pursuant to *Code Civ. Proc. § 630(f)* even after a previous denial of the same motion by the same party [*Heller v. Pillsbury Madison & Sutro (1996) 50 Cal. App. 4th 1367, 1393-1395, 58 Cal. Rptr. 2d 336]* . Each case must be determined on its own merits; and an order for directed verdict made after denial of a previous motion must be based on the same grounds applicable to an "original" motion for directed verdict: Viewing the evidence and all inferences from it in favor of the party against whom the verdict is sought, there must be insufficient evidence to prove all elements of that party's case [*Heller v. Pillsbury Madison & Sutro (1996) 50 Cal. App. 4th 1367, 1392-1393, 58 Cal. Rptr. 2d 336* ; *cf. Jaehne v. Pacific Tel. & Tel. Co. (1951) 105 Cal. App. 2d 683, 685, 234 P.2d 165* (directed verdict entered after previous denial of motion for same, and after mistrial due to jury deadlock, reversed)].

ILLUSTRATION:

Entering Directed Verdict After Previous Denial. In a suit with many causes of action arising out of plaintiff's discharge from a law firm, after several causes of action were dismissed, defendant law firm moved for a directed verdict. The motion was denied, and the remaining causes of action went to the

jury. The jury deadlocked, and a mistrial was declared. Defendant again moved for directed verdict, and this time it was granted. The directed verdict was properly granted. Plaintiff contended that the directed verdict was improper only with respect to his cause of action for intentional interference with prospective business advantage. After reviewing the evidence and all inferences available from it in the light most favorable to plaintiff, there still was no substantial evidence to support the cause of action for intentional interference with prospective economic advantage [*Heller v. Pillsbury Madison & Sutro (1996) 50 Cal. App. 4th 1367, 1395, 58 Cal. Rptr. 2d 336]* .

Legal Topics:

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§ 326A.37 Effect of Directed Verdict

If a motion for directed verdict is granted, it operates as an adjudication on the merits unless the court specifies otherwise [*Code Civ. Proc. § 630(c)*].

Legal Topics:

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§§ 326A.38[Reserved]

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§ 326A.50 Related Matthew Bender Publications

For discussion of general and special verdicts and special interrogatories and findings, as well as jury deliberations, see California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict* (Matthew Bender).

For discussion of juror misconduct, see *California Trial Guide § 3.32[3][c], [d]*; §§ 91.10-91.13 (Matthew Bender).

For discussion of preparing and submitting verdict forms, see *California Trial Guide § 91.21* (Matthew Bender).

For special verdict forms, see Judicial Council Forms of California Civil Jury Instructions (CACI) (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 326A.51 State Constitution

Three-fourths of jury is required to render verdict in civil cases. *Cal. Const., art. I, § 16*

Legal Topics:

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§ 326A.52 State Statutes

[1] Definitions

Verdict is either general or special. *Code Civ. Proc. § 624*

General verdict is one pronounced on all or any issues generally either in favor of plaintiff or defendant. *Code Civ. Proc. § 624*

Special verdict is one in which jury finds facts only. *Code Civ. Proc. § 624*

[2] Special Verdicts or Findings

Special instructions at court's discretion. *Code Civ. Proc. § 609*

Direction of special verdict in writing on any or all issues or on particular questions of fact with general verdict. *Code Civ. Proc. § 625*

[3] Adjournment or Recess

Court may adjourn during deliberations but must remain open for every purpose with respect to case submitted to jury. *Code Civ. Proc. § 617*

Sealed verdict rendered when verdict reached during court recess or adjournment. *Code Civ. Proc. § 617*

[4] Special Verdict Required for Punitive Damages

When issue of punitive damages is presented to jury, court must direct jury to find special verdict in writing separating punitive from compensatory damages. *Code Civ. Proc. § 625*

[5] Reception of Verdict

Procedure for rendering verdict in open court. *Code Civ. Proc. § 618*

Polling of jury; reconsideration or discharge of jury. *Code Civ. Proc. § 618*

[6] Requirements of Verdict

[a] Amount

Jury is required to find amount in action for recovery of money. *Code Civ. Proc. § 626*

[b] Value of Property

Jury is required to find value of property in action for recovery of property and to assess damages sustained by taking or detention of property. *Code Civ. Proc. § 627*

[c] When Jury Has Discretion to Award Interest

Interest on certain damages or damages capable of being made certain by calculation from date of vesting of right; prejudgment interest in contract action when claim unliquidated at court's discretion. *Civ. Code § 3287*

Interest at jury's discretion when action for breach of noncontractual obligation or when oppression, fraud, or malice. *Civ. Code § 3288*

[7] Correction of Defective Verdicts

[a] Informal or Insufficient Verdict

If verdict is informal or insufficient in not covering issue submitted, verdict may be corrected by jury under advice of court or jury sent out again to reconsider. *Code Civ. Proc. § 619*

[b] Inconsistency Between General Verdict and Special Verdicts or Findings

Inconsistency between general and special verdicts or specific finding of fact is resolved in favor of special finding or verdict. *Code Civ. Proc. § 625*

[8] Entry of Verdict

Minute entry in superior courts; requirements of entry of general and special verdicts. *Code Civ. Proc. § 628*

Transmission of order for jury trial by court in which writ of mandate or prohibition pending. *Code Civ. Proc. § 1090*

Transmission of certified copy of verdict to court in which writ of mandate pending. *Code Civ. Proc. § 1093*

Applicability of mandate provisions to writs of prohibition. *Code Civ. Proc. § 1105*

[9] Entry of Judgment

Judgment effective when entered; entry within 24 hours after jury's rendition of verdict. *Code Civ. Proc. § 664*

Power of court to render judgment when party dies after verdict on any fact issue. *Code Civ. Proc. § 669*

Enforcement of judgment after party dies. *Code Civ. Proc. §§ 686.010, 686.020*; *Prob. Code §§ 9300-9304*

Requirement that costs be included in judgment. *Code Civ. Proc. § 664*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsJury TrialsJury DeliberationsCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial VerdictsCivil ProcedureRemediesDamagesPunitive Damages

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Chapter 326A JURY VERDICTS
PART III. RESEARCH GUIDE
A. Jury Verdicts

28-326A California Forms of Pleading and Practice--Annotated § 326A.53

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§ 326A.53 California Rules of Court

Request for special findings by jury. Cal. Rules of Ct., Rule 3.158

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts

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§ 326A.54 Local Court Rules

Procedures from submission of jury instructions through discharge of jury. Los Angeles Co. Super. Ct. Rules, Rules §§ 8.24-8.57

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§ 326A.55 Decisions

[1] Definitions

[a] General Verdict

General verdict constitutes implied finding in favor of prevailing party of every fact essential to support its action or defense. *Southern Pacific Co. v. Unarco Industries, Inc. (1974) 42 Cal. App. 3d 142, 152, 116 Cal. Rptr. 847*

General verdict creates assumption that jury found on any theory supported by the evidence. *Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 617, 124 Cal. Rptr. 143* (respondeat superior, ratification, and breach of statutory duty); *Codekas v. Dyna-Lift Co. (1975) 48 Cal. App. 3d 20, 24-25, 121 Cal. Rptr. 121* (negligence and intentional tort); *Continental Dairy Equipment Co. v. Lawrence (1971) 17 Cal. App. 3d 378, 383, 94 Cal. Rptr. 887* ; *Hazelwood v. Gordon (1967) 253 Cal. App. 2d 178, 180-181, 61 Cal. Rptr. 115*

[b] Special Verdicts

Special verdict is verdict in which jury finds facts only, leaving judgment to court, and presents conclusions of facts as established by evidence; questions propounded to and answered by jury constitute ultimate facts to be found and forming special verdict. *Estate of Keithley (1901) 134 Cal. 9, 11, 66 P. 5*

Special verdict passes on all issues by presenting conclusions of fact bearing on all of them. *In re Sanderson (1887) 74 Cal. 199, 208, 15 P. 753*

On jury's return of special verdicts on some, but not all, causes of action, trial court can enter those verdicts in minutes as conclusive adjudication of those causes of action, render judgment on verdicts where appropriate or reserve judgment on those causes of action pending entry of final judgment upon termination of case, declare partial mistrial as to remaining causes of action, and order limited retrial. *Valentine v. Baxter Healthcare Corp. (1999) 68 Cal. App. 4th 1467, 1475, 81 Cal. Rptr. 2d 252*

Special verdict form identifying nonparties as "other persons" for purpose of allocating negligence was not confusing or ambiguous. *Bly-Magee v. Budget Rent-A-Car Corp. (1994) 24 Cal. App. 4th 318, 326, 29 Cal. Rptr. 2d 330*

[c] Special Interrogatories

Special finding on issue incidental to general verdict may be ignored if immaterial. *De Gottardi v. Donati (1909) 155 Cal. 109, 111, 99 P. 492*

Special interrogatory is question put to jury to test validity of general verdict; special verdict decides ultimate facts, after which judgment rendered by court. *Burlingame Motor Co. v. Peninsula Activities, Inc. (1971) 15 Cal. App. 3d 656, 661, 93 Cal. Rptr. 376*

[2] Requesting Special Findings or Special Verdicts

[a] Advisability of Requesting Special Verdicts or Findings

Party who attacks sufficiency of general verdict should have requested special verdicts. *Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 617, 124 Cal. Rptr. 143*

Responsibility for requesting special verdicts or findings on party who loses verdict. *Codekas v. Dyna-Lift Co. (1975) 48 Cal. App. 3d 20, 24-25, 121 Cal. Rptr. 121*

Appellate court will not permit tactical choices of trial counsel in failing to request special findings or verdicts to force abstract issues on it for determination on appeal. *McCloud v. Roy Riegels Chems. (1971) 20 Cal. App. 3d 928, 937, 97 Cal. Rptr. 910*

[b] Court's Discretion in Directing Special Verdicts or Findings

Trial court does not abuse its discretion by denying requested instruction that jury state on which of several alternative theories it finds judgment. *Ferro v. Citizens Nat'l Trust & Savings Bank of Los Angeles (1955) 44 Cal. 2d 401, 414, 282 P.2d 849*

Court properly prevented long, argumentative, and possibly unresponsive answers to special findings or verdicts by framing questions so that answers may be either "yes" or "no" so long as jury was not cramped or prevented from giving full expression to opinion of majority of jurors. *Law v. Northern Assurance Co. (1913) 165 Cal. 394, 405, 132 P. 590*

If jury was provided with correct instructions, detailed repetition of instructions in special verdict form was not required. *Neal v. Montgomery Elevator Co. (1992) 7 Cal. App. 4th 1194, 1199, 9 Cal. Rptr. 2d 497*

Code Civ. Proc. §§ 624 and *625* have been streamlined to give trial court carte blanche in furnishing special finding or verdict forms to jury. *McCloud v. Roy Riegels Chems. (1971) 20 Cal. App. 3d 928, 936, 97 Cal. Rptr. 910*

[c] Situations in Which Special Verdicts or Findings Commonly Employed

Utilization of special verdicts or jury interrogatories of invaluable assistance in assuring that jury approaches its task with proper standards when there are issues of comparative negligence. *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824, 119 Cal. Rptr. 858, 532 P.2d 1226*

Special interrogatory is necessary to disclose whether jury's determination turned on failure to establish negligence by plaintiff or on defendant's defenses. *Scott v. Industrial Accident Com. (1956) 46 Cal. 2d 76, 84, 293 P.2d 18*

Special verdicts or findings are commonly used in actions based on fraud. *Babcock v. Omansky (1973) 31 Cal. App. 3d 625, 630, 107 Cal. Rptr. 512*

Special verdicts or findings are commonly used in actions based on indemnification. *Burlingame Motor Co. v. Peninsula Activities, Inc. (1971) 15 Cal. App. 3d 656, 661, 93 Cal. Rptr. 376*

[d] Sufficiency of Special Verdicts in Negligence Actions

Special verdicts are valid in personal injury action even though jurors who dissented from special verdict on existence of manufacturing defect voted on special verdict finding that defect was not substantial factor in causing plaintiff's injuries, and only seven of ten jurors finding that defect was not substantial factor in causing plaintiff's injuries also found manufacturing defect. *Resch v. Volkswagen of America, Inc. (1984) 36 Cal. 3d 676, 678, 205 Cal. Rptr. 827, 685 P.2d 1178* (disapproving contrary language in *Collin v. Connecticut Valley Arms, Inc. (1982) 137 Cal. App. 3d 815, 187 Cal. Rptr. 306* , and *United Farm Workers of America v. Superior Court (1980) 111 Cal. App. 3d 1009, 169 Cal. Rptr. 94*)

All jurors are permitted to participate in each special verdict when case is submitted to jury for special verdicts. *Resch v. Volkswagen of America, Inc. (1984) 36 Cal. 3d 676, 678, 205 Cal. Rptr. 827, 685 P.2d 1178* (disapproving contrary language in *Collin v. Connecticut Valley Arms, Inc. (1982) 137 Cal. App. 3d 815, 187 Cal. Rptr. 306* , and *United Farm Workers of America v. Superior Court (1980) 111 Cal. App. 3d 1009, 169 Cal. Rptr. 94*)

Special verdicts apportioning damages in negligence actions are valid if they command votes of any nine jurors, when nine identical jurors agreed that party is negligent and that negligence is proximate cause of other party's injuries. *Juarez v. Superior Court (1982) 31 Cal. 3d 759, 768, 183 Cal. Rptr. 852, 647 P.2d 128* (retroactive application limited in *Phelps v. Superior Court (1982) 136 Cal. App. 3d 802, 811, 186 Cal. Rptr. 626*)

[3] Reception of Verdict

Juror's silence at polling, due to trial court's failure to poll juror on one of multiple special verdict questions, does not constitute expressed disagreement with verdict under *Code Civ. Proc. § 618*. *Keener v. Jeld-Wen, Inc. (2009) 46 Cal. 4th 247, 257-259, 92 Cal. Rptr. 3d 862, 206 P.3d 403*

No disagreement exists within meaning of *Code Civ. Proc. § 618* when 10 jurors state on polling that verdict returned was their verdict. *Silverhart v. Mount Zion Hospital (1971) 20 Cal. App. 3d 1022, 1029, 98 Cal. Rptr. 187*

[4] Requirements of Verdict

[a] Amount

Applicability of *Code Civ. Proc. § 626* to single trials. *Little v. Superior Court (1961) 55 Cal. 2d 642, 644-645, 12 Cal. Rptr. 481, 361 P.2d 13*

[b] When Jury Has Discretion to Award Interest

Interest awarded or denied as additional damage in discretion of jury is of different character than interest awarded or denied in exercise of discretion imposed on court by statute. *Esgro Central, Inc. v. General Insurance Co. (1971) 20 Cal. App. 3d 1054, 1064, 98 Cal. Rptr. 153*

Discretion of trier of fact to award interest from date of fraud when fraud alleged and *Civ. Code §§ 3287* and *3288* read together. *Nathanson v. Murphy (1957) 147 Cal. App. 2d 462, 467, 305 P.2d 710*

[5] Interpretation of Verdicts

Interpretation of verdict by trial judge in connection with pleadings, evidence, and instructions. *Cucamonga County Water Dist. v. Southwest Water Co. (1971) 22 Cal. App. 3d 245, 255, 99 Cal. Rptr. 557* ; *Telles v. Title Insurance & Trust Co. (1969) 3 Cal. App. 3d 179, 185, 83 Cal. Rptr. 444*

[6] Types of Defective Verdicts

[a] Ambiguous Verdicts

Verdict that fails to specify whether amount awarded as damages in personal injury action represents gross figure from which payment to plaintiff as workers' compensation was not excluded or net figure reflecting exclusion of workers' compensation payments is ambiguous. *Woodcock v. Fontana Scaffolding & Equipment Co. (1968) 69 Cal. 2d 452, 456, 72 Cal. Rptr. 217, 445 P.2d 881*

If jury has been discharged and verdict is hopelessly ambiguous, judgment must be reversed. *McCoy v. Gustafson (2009) 180 Cal. App. 4th 56, 6667, 103 Cal. Rptr. 3d 37*

In breach of contract action with related causes of action based on leasing of skiploader by plaintiff to defendant, which then disappeared, jury's special verdict was hopelessly ambiguous, requiring reversal, in awarding plaintiff damages of $15,500 on breach of contract claims and common count for open book account, but, for purposes of common count for goods and services rendered, valuing skiploader at $30,000, even though neither party objected to verdict before jury was discharged, where two damages awards were internally inconsistent, so that both findings were equally against law. *Zagami, Inc. v. James A. Crone, Inc. (2008) 160 Cal. App. 4th 1083, 1091-1094, 74 Cal. Rptr. 3d 235*

Although special verdict form was ambiguous, form did not fail to dispose of contract cause of action and plaintiff's proposed question regarding negotiation was subsumed in it; had jury found enforceable agreement to negotiate exclusively with plaintiff, it would have properly answered there was in fact enforceable agreement. Further, plaintiff failed to show any abuse was sufficiently grave to amount to manifest miscarriage of justice, where jury found there was no enforceable contract and plaintiff failed to suggest how result would have been different if jury had been asked more specifically whether there was contract to negotiate exclusively and to provide authority for his contentions so that point was waived on appeal. *Simon v. San Paolo United States Holding Co., Inc. (2003) 113 Cal. App. 4th 1137, 1148, 1172, 7 Cal. Rptr. 3d 367*

Ambiguous verdicts are "informal" or "insufficient" within meaning of *Code Civ. Proc. § 619*. *Campbell v. Zokelt*

(1969) 272 Cal. App. 2d 315, 319, 77 Cal. Rptr. 561

[b] Inadequate Damages Awarded by Jury

If jury allows damages so grossly inadequate as to show that it must have disregarded the evidence and instructions of court, court should return it for further deliberation under proper instructions. *Crowe v. Sacks (1955) 44 Cal. 2d 590, 598, 283 P.2d 689*

There is no presumption that jury ignored instruction on damages when verdict is not for large sum of money. *Crowe v. Sacks (1955) 44 Cal. 2d 590, 597, 283 P.2d 689*

Substantial damages in less than total shown by uncontradicted evidence is not basis for assuming verdict was result of surmise and conjecture. *Pfingsten v. Westenhaver (1952) 39 Cal. 2d 12, 25, 244 P.2d 395*

[c] Inconsistency Between General Verdict and Special Findings

Verdicts are inconsistent when beyond possibility of reconciliation under any possible application of evidence and instructions. *Oxford v. Foster Wheeler LLC (2009) 177 Cal. App. 4th 700, 716-717, 99 Cal. Rptr. 3d 418*

Remedy for inconsistent verdicts is not to grant judgment as matter of law, but to order new trial. *Stillwell v. The Salvation Army (2008) 167 Cal. App. 4th 360, 375-376, 84 Cal. Rptr. 3d 111*

In eminent domain proceeding, jury implicitly made inconsistent findings of fact in its special verdict, rendering verdict against the law, where, although in eminent domain proceeding jury may accept evidence of any expert and jury is not bound by valuation opinion of appraiser and may choose figure between experts based on all evidence and cannot render verdict higher or lower than shown by testimony, these rules do not override independent rule that special verdict findings must be internally consistent and logical, and where jury implicitly made inconsistent findings of fact on fair market value of property in before condition when it reached its conclusions as to fair market value of property taken and severance damages to remainder before considering project benefits. *City of San Diego v. D.R. Horton San Diego Holding Co., Inc. (2005) 126 Cal. App. 4th 668, 681-684, 24 Cal. Rptr. 3d 338*

Special verdict or finding is inconsistent with general verdict only if, as matter of law, special verdict or finding taken by itself authorizes judgment different from that permitted by general verdict; every reasonable intendment favoring general verdict must be given. *Wyler v. Feuer (1978) 85 Cal. App. 3d 392, 404, 149 Cal. Rptr. 626; Bate v. Marsteller (1965) 232 Cal. App. 2d 605, 614-615, 43 Cal. Rptr. 149*

[d] Informal Verdict

"Informal" verdict defined. *Crowe v. Sacks (1955) 44 Cal. 2d 590, 596, 283 P.2d 689*

[e] Insufficient Verdicts

"Insufficient" verdict defined. *Crowe v. Sacks (1955) 44 Cal. 2d 590, 596, 283 P.2d 689*

In action for wrongful death, negligence, and battery, special verdict form was fatally defective when it did not require jury to make finding on battery claim, because battery and lack of informed consent were separate claims. Correct way to remedy defective verdict was to grant defendant's motion for JNOV on battery claim, not order new trial. *Saxena v.*

Goffney (2008) 159 Cal. App. 4th 316, 325-330, 71 Cal. Rptr. 3d 469

Verdict patently contrary to court's instructions by not covering or comprehending issues submitted is insufficient. *Sherwood v. Rossini (1968) 264 Cal. App. 2d 926, 930, 71 Cal. Rptr. 1*

[f] Jury's Failure to Find on All Issues or Parties

Jury's silence as to one of two defendants is failure to find on issue presented to it and does not amount to verdict in favor of that defendant; construction of verdict with reference to instructions under which it was rendered. *Irelan-Yuba Gold Mining Co. v. Pacific Gas & Electric Co. (1941) 18 Cal. 2d 557, 570, 116 P.2d 611*

Granting of mistrial was proper when jury was unable to answer all questions on special verdict form submitted to it. *Falls v. Superior Court (1987) 194 Cal. App. 3d 851, 855, 239 Cal. Rptr. 862*

Verdict is defective when jury fails to find as to all issues before it. *Fransen v. Washington (1964) 229 Cal. App. 2d 570, 578, 40 Cal. Rptr. 458*

[7] Correction of Defective Verdicts

[a] Informal or Insufficient Verdict

Court retains control over proceedings with power to procure correction of informal or insufficient verdict under *Code Civ. Proc. § 619* until verdict recorded and jury discharged. *Maxwell v. Powers (1994) 22 Cal. App. 4th 1596, 1603, 28 Cal. Rptr. 2d 62* ; *Fibreboard Paper Products Corp. v. East Bay Union of Machinists (1964) 227 Cal. App. 2d 675, 732-733, 39 Cal. Rptr. 64*

Court's power to return jury for further deliberation if its verdict is informal or insufficient in not covering issues submitted. *Sherwood v. Rossini (1968) 264 Cal. App. 2d 926, 929, 71 Cal. Rptr. 1*

[b] Ambiguous Verdicts

If verdict is ambiguous, party adversely affected must request more formal and certain verdict; if trial judge has any doubts, trial judge may send jury out under proper instructions to correct informal or insufficient verdict; if no objection is made before jury discharged, trial judge must interpret verdict from its language considered in connection with pleadings, evidence, and instructions. *Woodcock v. Fontana Scaffolding & Equipment Co. (1968) 69 Cal. 2d 452, 456, 72 Cal. Rptr. 217, 445 P.2d 881* ; *Campbell v. Zokelt (1969) 272 Cal. App. 2d 315, 319, 77 Cal. Rptr. 561*

If verdict is hopelessly ambiguous, reversal is required even though retrial will be limited to issue giving rise to ambiguity. *Woodcock v. Fontana Scaffolding & Equipment Co. (1968) 69 Cal. 2d 452, 457, 72 Cal. Rptr. 217, 445 P.2d 881*

If jury has been discharged and verdict is hopelessly ambiguous, judgment must be reversed. *McCoy v. Gustafson (2009) 180 Cal. App. 4th 56, 66-67, 103 Cal. Rptr. 3d 37*

[c] Inadequate Damages Awarded by Jury

If trial judge believes damages awarded by jury are inadequate but verdict is not defective, proper procedure is to set aside verdict on motion for new trial. *Jehl v. Southern Pacific Co. (1967) 66 Cal. 2d 821, 827, 59 Cal. Rptr. 276, 427*

P.2d 988

When both liability and damages are at issue, trial court has jurisdiction to return jurors making inadequate damage award for further consideration with instructions that determination should not be based on compromise of liability and damage issues. *Crowe v. Sacks (1955) 44 Cal. 2d 590, 598, 283 P.2d 689*

[d] Jury's Failure to Find on Issue or Party

In determining whether jury failed to find on issue presented to it, verdict is construed with reference to instructions under which it was rendered. *Irelan-Yuba Gold Mining Co. v. Pacific Gas & Electric Co. (1941) 18 Cal. 2d 557, 570, 116 P.2d 611*

Jury foreperson's explanation of why jury failed to render verdict for any party to action accepted by court in construction of verdict as a whole and confirmed court's understanding of verdict in improper form. *Brand v. Norris (1953) 121 Cal. App. 2d 367, 369, 263 P.2d 456*

[e] Inconsistency Between General Verdicts and Special Verdicts or Findings

Verdicts are inconsistent when beyond possibility of reconciliation under any possible application of evidence and instructions. *Oxford v. Foster Wheeler LLC (2009) 177 Cal. App. 4th 700, 716-717, 99 Cal. Rptr. 3d 418*

General verdict stands unless facts found by jury in answer to special interrogatories are clearly antagonistic so as to be absolutely irreconcilable that both general verdict and special findings or verdicts cannot stand. *Law v. Northern Assurance Co. (1913) 165 Cal. 394, 406, 132 P. 590* ; *Wyler v. Feuer (1978) 85 Cal. App. 3d 392, 404, 149 Cal. Rptr. 626*

In action against multiple defendants, in which plaintiff dismissed some defendants as to whom jury had returned inconsistent general and special verdicts, defendants remaining in action waived any objection to judgment on this ground, because verdicts actually entered were no longer inconsistent and remaining defendants failed to make timely objection to plaintiff's motion for dismissal. *Hathaway v. Spiro (1985) 164 Cal. App. 3d 359, 364-367, 210 Cal. Rptr. 421*

"Irreconcilable inconsistency" defined. *Pitcher v. Kniss (1970) 10 Cal. App. 3d 931, 940, 89 Cal. Rptr. 676*

[8] Waiver of Defects in Verdict

Waiver when no objection to blank forms of possible verdicts. *Lynch v. Birdwell (1955) 44 Cal. 2d 839, 851, 285 P.2d 919*

Plaintiff and defendant waived error in form of special verdict by failing to object to it. *Simon v. San Paolo United States Holding Co., Inc. (2003) 113 Cal. App. 4th 1137, 1148, 1171-1172, 7 Cal. Rptr. 3d 367*

Plaintiff waived any inconsistency in verdict by failing to request that verdict be corrected or that jury be returned to deliberate further. *United Farm Workers of America v. Superior Court (1980) 111 Cal. App. 3d 1009, 1021-1022, 169 Cal. Rptr. 94* (disapproved on other grounds in *Resch v. Volkswagen of America, Inc. (1984) 36 Cal. 3d 676, 682, 205 Cal. Rptr. 827, 685 P.2d 1178*)

[9] Motion for Judgment Notwithstanding Verdict

Criteria similar to directed verdict. *Valdez v. J.D. Diffenbaugh Co. (1975) 51 Cal. App. 3d 494, 513, 124 Cal. Rptr. 467*

[10] Effect of Verdict

[a] In General

Prohibition is proper remedy for improper interference with verdict. *Jehl v. Southern Pacific Co. (1967) 66 Cal. 2d 821, 829, 59 Cal. Rptr. 276, 427 P.2d 988*

Right to jury trial is not denied by court's setting aside verdict and granting motion for new trial. *Dorsey v. Barba (1952) 38 Cal. 2d 350, 358, 240 P.2d 604* (disapproved on other grounds in *Jehl v. Southern Pacific Co. (1967) 66 Cal. 2d 821, 828, 59 Cal. Rptr. 276, 427 P.2d 988*)

Jury's verdict is advisory in equity cases and is not available to either party as matter of right. *Schlyen v. Schlyen (1954) 43 Cal. 2d 361, 372, 273 P.2d 897*

Court may accept or reject advisory verdict and must make findings to complete record. *Posey v. Leavitt (1991) 229 Cal. App. 3d 1236, 1244, 280 Cal. Rptr. 568*

[b] Bifurcated Trial

Verdict is determination of issue presented in bifurcated trial; if decision is for defendant on issue of liability, plaintiff is barred from further proceedings. *Lauderdale v. U & I Equipment Co. (1969) 271 Cal. App. 2d 140, 142, 76 Cal. Rptr. 483*

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§ 326A.56 Law Reviews

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§ 326A.57 Text References

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How the Jury Decides (Cal. C.E.B. 1972)

7 Witkin, California Procedure, *Trial*, §§ 330-407, 430-438, 446-456 (4th ed. 1997)

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§ 326A.60 State Statutes

Procedures for moving for directed verdict and effect of directed verdict. *Code Civ. Proc. § 630*

Directed verdict of no fault in action with multiple defendants. *Code Civ. Proc. § 630(d)*

Directed verdict after jury discharged without rendering verdict; denial of motion when judgment not ordered within specified time. *Code Civ. Proc. § 630(f)*

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§ 326A.61 Decisions

[1] Function of Jury in Rendering Directed Verdict

Jury is bound by court's direction of verdict; jurors act ministerially and do not exercise discretion in giving verdict on court's order. *Estate of Sharon (1918) 179 Cal. 447, 460, 177 P. 283*

[2] Grounds for Directed Verdict

In action alleging false arrest and false imprisonment based on plaintiff's conduct in dumping trash on floor during school board meeting held in school's multi-purpose room, as result of which police were called, trial court properly denied plaintiff's motion for directed verdict, where substantial evidence supported jury's finding that plaintiff's conduct was not legitimate element of meeting, but rather significant impairment of it. *McMahon v. Albany Unif. Schl. Dist. (2002) 104 Cal. App. 4th 1275, 1282-1289, 129 Cal. Rptr. 2d 184*

Situations in which directed verdict proper. *Metzenbaum v. R. O. S. Associates (1986) 188 Cal. App. 3d 202, 208, 232 Cal. Rptr. 741* ; *Short v. Nevada Joint Union High School Dist. (1985) 163 Cal. App. 3d 1087, 1095-1096, 210 Cal. Rptr. 297* ; *Frisk v. Merrihew (1974) 42 Cal. App. 3d 319, 325, 116 Cal. Rptr. 781*

Directed verdict for defendant in defamation action was not proper because question of whether utterance was privileged cannot be determined as matter of law. *Frisk v. Merrihew (1974) 42 Cal. App. 3d 319, 325, 116 Cal. Rptr. 781*

Directed verdict must be sustained on any applicable theory of law supporting it. *Stilson v. Moulton-Niguel Water Dist. (1971) 21 Cal. App. 3d 928, 933, 98 Cal. Rptr. 914*

[3] Timeliness of Motion for Directed Verdict

Motion for directed verdict is proper at conclusion of evidence to give opposing party an opportunity to introduce its evidence to overcome grounds of motion; trial court's discretion to permit motion for directed verdict at any time before case submitted to jury. *Gibson v. Southern Pacific Co. (1955) 137 Cal. App. 2d 337, 346, 290 P.2d 347*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawDirected Verdicts

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329
Chapter 326A JURY VERDICTS
PART III. RESEARCH GUIDE
B. Directed Verdicts

28-326A California Forms of Pleading and Practice--Annotated §§ 326A.62-326A.69

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[Reserved]

§§ 326A.62[Reserved]

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Chapter 326A JURY VERDICTS
PART IV. FORMS
A. Jury Verdicts

28-326A California Forms of Pleading and Practice--Annotated § 326A.70

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§ 326A.70 General Verdict

[1] FORM General Verdict

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	GENERAL VERDICT
Defendant(s).	)	
	)	
	)	

_____

We, the jury in the above-entitled action, find for the _____[*status of party, and name, if desired*] and against the _____[*status of party*] [in the sum of $_____ as actual damages].
Dated: _____.

_____
[*signature of foreperson*]

[2] Use of Form

The form in [1], *above*, is a form of general verdict for use in an action for the recovery of money in which there are only two parties [*see Code Civ. Proc. § 624*, discussed at *§ 326A.11[2]*].

The verdict must be signed by the jury foreperson, read to the jury by the court or clerk, and inquiry made whether it is the jury's verdict. Either party may require the jury to be polled [*see Code Civ. Proc. § 618*, discussed at *§ 326A.14[3]*].

In a civil action for the recovery of money, the jury must find the amount of recovery [*see Code Civ. Proc. § 626*, discussed at *§ 326A.15[1]*].

The form is not appropriate for a verdict for the recovery of specific personal property [*see Code Civ. Proc. § 627*, discussed at *§ 326A.15[2]*].

[3] Modification of Form

If there are multiple plaintiffs (or cross complainants), the form in [1], *above*, can be modified by addition of the phrase "for the _____ [*status of party, and name*] and against the _____ [*status of party*] in the sum of $_____ as actual damages" for each plaintiff (or cross complainant) who is awarded damages.

If the action is one in which the jury has discretion to award interest, the form may be modified by the addition of the phrase "together with interest thereon from and after _____ [*date*]" [*see Civ. Code § 3288*, discussed at *§ 326A.15[3]*; *see also Ch. 177, Damages, § 177.140* et seq.].

[4] Cross References

For other forms of general verdict, and a form of general verdict with special interrogatories in a medical malpractice case, see California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict* (Matthew Bender).

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Chapter 326A JURY VERDICTS
PART IV. FORMS
A. Jury Verdicts

28-326A California Forms of Pleading and Practice--Annotated § 326A.71

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§ 326A.71 Verdict with Separate Special Findings Regarding Punitive Damages

[1] FORM Verdict with Separate Special Findings Regarding Punitive Damages

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	VERDICT WITH SPECIAL FINDINGS REGARD-
Defendant(s).	)	ING PUNITIVE DAMAGES
	)	
	)	

_____

We, the jury in the above-entitled action, find for the _____[*status of party, and name, if desired*] and against the _____[*status of party or parties*] [in the sum of $_____ as actual damages].

We further find in answer to the special interrogatories submitted to us as follows:

ISSUE NO. 1: If you found that plaintiff was entitled to recover actual damages from defendant[s, or any of them,], was/were defendant[s, or any of them,] guilty of oppression, fraud, or malice in doing the acts that caused plaintiff's

actual damages?

Answer "yes" or "no."

ANSWER:

_____

[If you have answered Issue No. 1 yes, which defendant or defendants do you find guilty of oppression, fraud, or malice?

Name each such defendant:

_____

_____

_____

_____]

ISSUE NO. 2: If you answered Issue No. 1 yes, what amount of punitive damages, if any, do you assess against _____[each] defendant [named in your answer to Issue No. 1] for the sake of example and by way of punishment?

Name each such defendant:	Amount of Punitive Damages:
_____	_____
_____	_____
_____	_____
_____	_____

Dated: _____.

_____
[*signature of foreperson*]

[2] Use of Form

The form in [1], *above*, is a form of general verdict with special interrogatories for use to assess punitive damages [*see Code Civ. Proc. § 625*, discussed at *§ 326A.11[2]*; *see also § 326A.70[2], [3]*]. The first interrogatory is not necessary; it is enough that the amount of punitive damages be separately stated [*see Clark v. McClurg (1932) 215 Cal. 279, 281, 9 P.2d 505* ; *see also Civ. Code § 3294(b)*; *Weeks v. Baker & McKenzie (1998) 63 Cal. App. 4th 1128, 1154, 74 Cal. Rptr. 2d 510* (employer may be liable for punitive damages for employee's sexual harassment without being guilty of oppression, fraud, or malice)].

The bracketed portions of the first interrogatory are for use only if there are multiple defendants. Similarly, if there is only one defendant, the first column of the answer to the second interrogatory and the last three lines of the second column of that answer should be omitted.

[3] Cross References

For discussion and forms relating to punitive damages generally, see *Ch. 177, Damages, § 177.40* et seq.

For a form of special verdict in a personal injury case, see California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict* (Matthew Bender).

For special verdict forms, see Judicial Council Forms of California Civil Jury Instructions (CACI) (Matthew Bender).

California Forms of Pleading and Practice--Annotated

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Chapter 326A JURY VERDICTS
PART IV. FORMS
A. Jury Verdicts

28-326A California Forms of Pleading and Practice--Annotated §§ 326A.73-326A.79

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[Reserved]

§§ 326A.73[Reserved]

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Chapter 326A JURY VERDICTS
PART IV. FORMS
B. Directed Verdicts

28-326A California Forms of Pleading and Practice--Annotated § 326A.80

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§ 326A.80 Notice of Motion for Directed Verdict

[1] FORM Notice of Motion for Directed Verdict

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR DIR-
Plaintiff,	)	ECTED VERDICT [, SUPPORTING DECLARA-
vs.	)	TION OF _____ (*name*), AND
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Defendant.	)	IES]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.*, plaintiff _____ (*name*)] and to _____[*name*], his/her/its/their attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], California, _____ [*identify party, e.g.,* defendant] _____[*name*] will, and hereby does, move, pursuant to *Section 630 of the Code of Civil Procedure*, for an order directing entry of a verdict for the _____ [*moving party, e.g.,* defendant] and against the _____ [*opposing party, e.g.,* plaintiff] on _____ [all the issues *or* the following issues only: _____ (*describe issues, e.g.,* whether plaintiff is entitled to punitive damages from defendant)]. The motion will be made on the grounds that _____ [*specify legal grounds, e.g.,* disregarding conflicting evidence and giving to _____ (*opposing party's, e.g.,* plaintiff's) evidence all the value to which it is legally entitled, including all reasonable and logical inferences that may be drawn from that evidence, as a matter of law there is no substantial evidence to support a verdict for _____ (*opposing party, e.g.,* plaintiff) on any of the claims asserted herein; and thus, such evidence is wholly insufficient to warrant submission of the case to the jury].

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____[*name(s)*] and the memorandum served and filed herewith, on the records and file herein, [on such portions of the transcript of the trial and such supplemental affidavits or declarations and memoranda of points and authorities as may be filed subsequently herein,] and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form in [1], *above*, is for use to give notice of a motion for directed verdict [*see Code Civ. Proc. § 630*, discussed in *§ 326A.30* et seq., *above*]. The examples in the form assume the motion is being made by the defendant, which is the usual case; but the motion also may be made by a plaintiff [*see De La Rosa v. City of San Bernardino (1971) 16 Cal. App. 3d 739, 742-743, 94 Cal. Rptr. 175* ; *§ 326A.31*].

A directed verdict may be ordered with respect to some or all of the issues [*see Code Civ. Proc. § 630(b)*, for discussion, *see § 326A.35*], or with respect to some or all of the parties [*see Code Civ. Proc. § 630(d)*; for discussion, *see § 326A.36*].

A defendant's motion for directed verdict must be denied if the plaintiff presents any substantial evidence that justifies submission of the case to the jury after resolving all inferences and intendments to be drawn from the evidence in favor of denial of the motion [*Bell v. California (1998) 63 Cal. App. 4th 919, 927, 74 Cal. Rptr. 2d 541* ; for discussion, *see § 326A.33*].

[3] Supporting Memorandum Required

A memorandum must be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[4] Time for Making Motion for Directed Verdict

Generally, a party moves for a directed verdict after all parties have completed the presentation of all their evidence [*Code Civ. Proc. § 630(a)*; for discussion, *see § 326A.32*]. However, the trial court may permit a motion for directed

verdict to be made at any time before the case is submitted to the jury [*Gibson v. Southern Pacific Co. (1955) 137 Cal. App. 2d 337, 346, 290 P.2d 347]* .

A motion for directed verdict also may be made or renewed after a jury has been discharged without having reached a verdict [*see Code Civ. Proc. § 630(f)*; for discussion, *see § 326A.36*].

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CHAPTER 327 JUVENILE COURTS: JURISDICTION AND GENERAL PROCEDURES

28-327 California Forms of Pleading and Practice--Annotated 327.syn

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.syn Synopsis to Chapter 327: JUVENILE COURTS: JURISDICTION AND GENERAL PROCEDURES

§ 327.01 Scope of Chapter

§ 327.02 Cross References

§§ 327.03-327.09 [Reserved]

§ 327.10 Purpose of Juvenile Court System

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[a] In General

[b] Dependent Children

[c] Delinquent Minors

[2] Recognition of Parental Duty to Support Minor Children

§ 327.11 Jurisdiction of Juvenile Court

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[2] Scope of Jurisdiction

[a] In General

[b] Dependency Proceedings

[c] Wardship and Delinquency Proceedings

[3] Dual Jurisdiction Issues

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[b] Procedure for Recommending Single Status

[c] Procedure When Two Counties Are Involved

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[e] Notice and Decision Making

[f] Special Protocols for Dual Status

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[5] Retention of Jurisdiction When Juvenile Permitted to Reside in Another County

[6] Trend Toward Expanding Jurisdiction of Juvenile Court

§ 327.12 Venue for Transfer of Juvenile Court Proceedings

[1] General Rule for Determining Proper Court

[2] Determining Residency of Minor

[3] When Minor Is Detained in County Other Than County of Jurisdiction

[a] Notice to County of Jurisdiction

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[4] Transfer When Minor's County of Residence Changes

§ 327.13 Citation, Subpoena, and Warrant Powers of Juvenile Court

[1] Citation

[2] Subpoena

[3] Warrant for Arrest or Protective Custody

§ 327.14 Enforcement of Orders of Juvenile Court

[1] Incarceration or Other Sanctions

[2] Misdemeanor Punishment for Willful Failure to Appear as Promised

§§ 327.15-327.19 [Reserved]

§ 327.20 Juvenile Court Judges and Referees

[1] Judge

[a] Appointment of Superior Court Judge to Hear Juvenile Court Matters

[b] Authority and Role

[2] Referee

[a] Appointment and Term of Office

[b] Qualifications

[c] Authority and Role

[d] Referee Acting as Temporary Judge

[e] Disqualification

[f] Referee Findings and Orders

[i] When Effective

[ii] Service of Findings and Orders

[g] Rehearing on Orders of Referee

[i] Notice of Right to Rehearing

[ii] Application for Rehearing

[iii] Procedures on Rehearing

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[4] Dependency Training for Judicial Officers

§ 327.21 Other Juvenile Court Personnel

[1] Delinquency Proceedings

[a] Probation Officer

[i] Appointment and Term of Office

[ii] Authority to Employ Other Professionals

[iii] Role in Delinquency Proceedings

[b] Prosecuting Attorney

[2] Dependency Proceedings

[a] Social Worker

[b] Petitioner's Attorney

[c] Court Officer

§ 327.22 Appointment of Private Counsel

[1] In County With Public Defender

[2] Compensation

[3] Duties

§§ 327.23-327.29 [Reserved]

§ 327.30 Filing Papers and Petitions

[1] Filing Fees

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§ 327.31 Conduct of Juvenile Court Proceeding

[1] Expeditious and Nonadversarial Conduct Generally Required

[2] Special or Separate Session Required

[3] Persons Entitled to Be Present

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§ 327.32 Service of Written Findings and Orders

§ 327.33 Court Reporter Transcripts

[1] Required in Proceedings Before Judge

[2] Directive in Proceedings Before Referee

[3] Preparation of Transcript

§ 327.34 Confidentiality of Juvenile Records

[1] Limits on Disclosure

[2] Petition for Disclosure

[a] Preparation and Service of Petition

[b] Review and Determination of Petition

[i] Balancing Test

[ii] Third-Party Petitioners

[iii] Disclosure to Press

[iv] Access Requires Showing of Good Cause and Notice

[v] In Camera Hearing and Balancing Test

[vi] Records Pertaining to Deceased Child

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§ 327.35 Other Determinations of Confidentiality

§§ 327.36-327.39 [Reserved]

§ 327.40 Commitment or Placement of Dependents and Wards

[1] Separate Facilities Required Generally for Dependents and Wards

[2] Preference for Institutions or Family Homes of Same Religious Belief

§ 327.41 Parent Liability for Costs Incurred on Behalf of Minor

§ 327.42 Procedure for Order Requiring Reimbursement for Support

§§ 327.43-327.49 [Reserved]

§ 327.50 Matthew Bender Publications

§ 327.51 Other Text References

§ 327.52 Law Reviews

§§ 327.53-327.59 [Reserved]

§ 327.60 Purpose and Nature of Juvenile Courts

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[2] Decisions

§ 327.61 Jurisdiction and Venue of Juvenile Courts

[1] State Statutes

[2] California Rules of Court

[3] Decisions

[4] Attorney General Opinions

§ 327.62 Powers of Juvenile Courts

[1] State Statutes

[2] California Rules of Court

[3] Decisions

§§ 327.63-327.69 [Reserved]

§ 327.70 Judges and Referees

[1] State Statutes

[2] California Rules of Court

[3] Decisions

[4] Attorney General Opinions

§ 327.71 Probation Officers

[1] State Statutes

[2] Attorney General Opinions

§ 327.72 Child Welfare Workers

[1] State Statutes

[2] Decisions

§ 327.73 Appointed Counsel

[1] State Statutes

[2] Decisions

§ 327.74 Psychotherapeutic Professionals

§ 327.75 Juvenile Court System Commissions and Committees

§§ 327.76-327.79 [Reserved]

§ 327.80 State Statutes

§ 327.81 California Rules of Court

§§ 327.82-327.89 [Reserved]

§ 327.90 State Statutes

§ 327.91 Attorney General Opinions

§§ 327.92-327.149 [Reserved]

§ 327.150 Application to Commence Proceedings by Affidavit and Decision by Social Worker [Welf. & Inst. Code §§ 329, 653, 653.5]--Judicial Council Form JV-210

[1] FORM

[2] Use of Form

[3] Obligations of Social Worker or Probation Officer in Response to Declaration

[4] Situations in Which Minor May Be Both Dependent and Ward

§ 327.151 Application to Review Decision by Social Worker Not to Commence Proceedings [Welf. & Inst. Code §§ 331, 655]--Judicial Council Form JV-215

[1] FORM

[2] Use of Form

[3] Review of Decision Not to Commence Juvenile Court Proceedings

§§ 327.152-327.159 [Reserved]

§ 327.160 Order to Transfer Juvenile Court Proceedings [Welf. & Inst. Code §§ 375, 750; Cal. Rules of Ct., Rule 5.610]--Judicial Council Form JV-550

[1] FORM

[2] Use of Form

[3] Transfer-Out Hearing

[4] Contents of Order

[5] Transport of Child in Custody

[6] Transmittal of Papers

[7] Cross References

§ 327.161 [Reserved]

§ 327.162 Petition for Disclosure of Juvenile Court Records [Welf. & Inst. Code §§ 827, 828; Cal. Rules of Ct., Rules 5.504, 5.552]--Judicial Council Form JV-570

[1] FORM

[2] Use of Form

[3] Service of Petition

[4] Hearing on Petition

[5] Cross References

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FOOTNOTES:

(n61)Footnote *. **Gary C. Seiser** is one of California's leading authorities on juvenile dependency law and practice, and is certified as a Child Welfare Law Specialist by the National Association of Counsel for Children, which is accredited by the State Bar of California, Board of Legal Specialization. He is a supervising deputy with the Juvenile Dependency Division of the San Diego County Office of County Counsel. Mr. Seiser also serves as a consultant on the Judicial Benchguides for dependency hearings published by the California Center for Judicial Education and Research (CJER), and has served as faculty for CJER, the California Judges Association, and the National Council of Juvenile and Family Court Judges. His published works include articles for the American Bar Association Child Law Practice and a chapter in The Handbook of Juvenile Forensic Psychology (2002). Mr. Seiser's writing has been cited by the Ninth Circuit Court of Appeals, the California Supreme Court, and numerous California appellate courts. He was a member of the California Blue Ribbon Commission on Children in Foster Care (2006-2009), and has more than 60 published decisions, including 10 at the California Supreme Court. A former Commissioner of the Riverside County Superior Court assigned to the Juvenile Court and a former prosecutor, Mr. Seiser also served as a member of the SB 1195 Task Force that rewrote much of California's dependency law through Senate Bill 243 [Stats. 1987, ch. 1485]. He is a frequent public speaker throughout California on juvenile dependency law and practice.

(n62)Footnote **. **Hon. Kurt Kumli** is a California Superior Court Judge for the County of Santa Clara and a Commissioner on the State Commission on Juvenile Justice. He was instrumental in creating specialized delinquency courts in Santa Clara County for drug offenders, family violence, and restorative justice. He was the co-creator of the country's first juvenile mental health court and implemented Santa Clara's juvenile deferred entry of judgment (DEJ) process, which now accounts for nearly 30 percent of all first-time court referrals in that county. A nationally recognized expert on juvenile law and policy, Judge Kumli serves on the faculty at the Santa Clara University School of Law and teaches delinquency law and policy classes throughout the United States. The National Institute of Justice chose Judge Kumli as a recipient of a John B. Pickett Fellowship at Harvard's Kennedy School of Government for Senior Executives in State and Local Government Program. Judge Kumli has been a member of the California Judicial Council's Family and Juvenile Law Advisory Committee, and a faculty member and technical advisor for the California District Attorneys Association, where he chaired its Juvenile Justice Committee. He has published numerous articles on gang prosecution, juvenile justice reform, juvenile mental health court, and California's adult court certification (Fitness) process.

(n63)Footnote ***. **Janice M. Brickley** is an attorney in private practice, specializing in juvenile delinquency law. Between 1984 and 1994, she served as an Assistant Public Defender in Alameda County, handling juvenile delinquency matters that included numerous homicides and fitness hearings. Ms. Brickley has taught law school classes on juvenile law and evidence and has lectured across the state on juvenile law issues. She is a member of both the Juvenile Justice Committee of California Attorneys for Criminal Justice and the Juvenile Justice Section of the Alameda County Bar Association.

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CHAPTER 327 JUVENILE COURTS: JURISDICTION AND GENERAL PROCEDURES
PART I. SCOPE

28-327 California Forms of Pleading and Practice--Annotated § 327.01

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.01 Scope of Chapter

This chapter provides an overview of the juvenile court system, including the following:

- The purpose of the juvenile court system.
- Its jurisdiction over persons and types of proceedings.
- The powers and duties of its judges, referees, and other personnel.
- The procedures followed in juvenile court proceedings generally.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureJuvenile OffendersJuvenile ProceedingsGeneral OverviewFamily LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency Proceedings

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CHAPTER 327 JUVENILE COURTS: JURISDICTION AND GENERAL PROCEDURES
PART I. SCOPE

28-327 California Forms of Pleading and Practice--Annotated § 327.02

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.02 Cross References

For a detailed discussion and forms relating specifically to dependency proceedings in juvenile court, see Ch. 328, *Juvenile Courts: Dependency Proceedings* .

A discussion and forms relating specifically to juvenile court proceedings for delinquency or wardship may be found in Ch. 329, *Juvenile Courts: Delinquency Proceedings* .

For a discussion of specific civil actions arising out of children's issues, including suggested forms of pleadings, see the following related chapters:

- Ch. 5, *Abuse of Minors and Elderly* (includes discussion and forms relating to civil actions based on sexual abuse of minors).

- Ch. 12A, *Adoptions: Termination of Parental Rights* (discussion and forms relating to termination of parental rights).

- Ch. 259, *Family Law Enforcement*: *Special Remedies for Support Enforcement* (discussion and forms relating to enforcement of child support orders).

- Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* (discussion and forms relating to appointment of guardians of minors).

- Ch. 293, *Harassment and Domestic Violence* (discussion and forms relating to protective orders against domestic violence, including abuse of minors).

- Ch. 364, *Minors: Claims and Property of Minors* (discussion and forms relating to a compromise of

a minor's claim).

- Ch. 367A, *Minors: Tort Actions* (discussion and forms relating to tort actions by and against minors).

- Ch. 394, *Parent and Child* (additional discussion and forms relating to parental rights and duties; coverage of child custody issues arising outside context of dissolution of marriage proceedings).

- Ch. 412, *Paternity* (discussion and forms relating to establishment of a parent-child relationship).

To review legal and strategic considerations involved in the increasingly broad area of child-related litigation, see Dale, et al., Representing the Child Client (Matthew Bender).

For practical guidance and techniques in representing neglected or abused children, see Peters, Representing Children in Child Protective Proceedings (Matthew Bender 2001).

An analysis of family law issues affecting children, such as the termination of parental rights, enforcement of child support orders, protective orders against domestic violence (including child abuse), parental rights and duties, custody, the establishment of the parent-child relationship, and paternity, can be found in Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2d ed., Chs. 30- 35, 96, 141, and 171 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureJuvenile OffendersJuvenile ProceedingsGeneral OverviewFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency ProceedingsFamily LawGuardiansAppointmentFamily LawParental Duties & RightsDutiesGeneral OverviewFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationGeneral Overview

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329
CHAPTER 327 JUVENILE COURTS: JURISDICTION AND GENERAL PROCEDURES
PART I. SCOPE

28-327 California Forms of Pleading and Practice--Annotated §§ 327.03-327.09

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

[Reserved]

§§ 327.03[Reserved]

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329

CHAPTER 327 JUVENILE COURTS: JURISDICTION AND GENERAL PROCEDURES
PART II. LEGAL BACKGROUND
A. Purpose, Jurisdiction, and Powers of Juvenile Courts

28-327 California Forms of Pleading and Practice--Annotated § 327.10

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.10 Purpose of Juvenile Court System

[1] Protection of Public and Minor

[a] In General

The purpose of the juvenile court system is to provide for the protection and safety of the public and each minor under the jurisdiction of the juvenile court, and to preserve and strengthen the minor's family ties whenever possible [*Welf. & Inst. Code § 202(a)*]. Thus, the juvenile courts and other public agencies charged with enforcing, interpreting, and administering the juvenile court law are required, in all deliberations under the juvenile court law, to consider [*Welf. & Inst. Code § 202(d)*]:

- The safety and protection of the public.
- The importance of redressing injuries to victims.
- The best interests of the minor.

The juvenile court system may seek removal of a minor from the custody of his or her parents only when the minor's welfare or safety and protection of the public cannot be adequately safeguarded without removal. When removal of a minor is determined by the juvenile court to be necessary, reunification of the minor with his or her family is a primary objective. When the minor is removed from his or her own family, it is the purpose of the juvenile court law to secure for the minor custody, care, and discipline as nearly as possible equivalent to that which should have been given by the parents. The requirements of the juvenile court provisions must be liberally construed to carry out these purposes [*Welf. & Inst. Code § 202(a)*].

[b] Dependent Children

The purpose of the juvenile dependency system is to provide the maximum protection to children who have suffered or are at substantial risk of suffering serious abuse or neglect [*Welf. & Inst. Code § 300.2*]. Children under the jurisdiction of the juvenile court who are in need of protective services shall receive care, treatment, and guidance consistent with their best interest and with the best interest of the public [*Welf. & Inst. Code § 202(b)*; see also further discussion in *Ch. 328, Juvenile Courts: Dependency Proceedings, § 328.11* (Goals of Dependency Proceedings)].

[c] Delinquent Minors

Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of public safety and protection, receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances [*Welf. & Inst. Code § 202(b)*].

This guidance may include punishment that is consistent with the rehabilitative objectives of this chapter. The term "punishment" means the imposition of sanctions, but does not include placement in foster care as defined by *Welf. & Inst. Code § 727.3* [*Welf. & Inst. Code §§ 202(b), 202(e)*]. If the minor has been removed from the custody of his or her parents, family preservation and family reunification are appropriate goals for the juvenile court to consider in determining the disposition of a minor under the jurisdiction of the juvenile court as a consequence of delinquent conduct, when those goals are consistent with the minor's best interests and with the best interests of the public [*Welf. & Inst. Code § 202(b)*].

[2] Recognition of Parental Duty to Support Minor Children

Another purpose of the juvenile court system is to reaffirm that the duty of a parent to support and maintain a minor child continues, subject to the financial ability of the parent to pay, during any period the minor may be declared a ward of the court and removed from the custody of the parent [*Welf. & Inst. Code § 202(c)*; *see also* further discussion in *§ 327.41*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency ProceedingsFamily LawParental Duties & RightsDutiesSupport of Children

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CHAPTER 327 JUVENILE COURTS: JURISDICTION AND GENERAL PROCEDURES
PART II. LEGAL BACKGROUND
A. Purpose, Jurisdiction, and Powers of Juvenile Courts

28-327 California Forms of Pleading and Practice--Annotated § 327.11

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§ 327.11 Jurisdiction of Juvenile Court

[1] Jurisdiction Resides in Superior Courts

Each superior court exercises the jurisdiction of the juvenile court law and, while exercising such jurisdiction, is known and referred to as the juvenile court [*Welf. & Inst. Code § 245*].

[2] Scope of Jurisdiction

[a] In General

The juvenile court exercises jurisdiction in the following types of proceedings:

- Dependency proceedings under *Welf. & Inst. Code § 300*.
- Delinquency proceedings under *Welf. & Inst. Code § 601* or *602*.
- Hearings on traffic and other violations by minors enumerated in *Welf. & Inst. Code § 256*.

[b] Dependency Proceedings

In a dependency proceeding, the juvenile court is asked to adjudge a minor to be a dependent of the court on one or more of the grounds specified in *Welf. & Inst. Code § 300*. These grounds encompass various forms of child abuse and neglect. The Legislature's intent in enacting *Welf. & Inst. Code § 300* was to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of these harms [*see Welf. & Inst. Code § 300.2*].

For a complete discussion relating to the grounds for dependency and the procedure in dependency proceedings, see Ch. 328, *Juvenile Courts: Dependency Proceedings* .

[c] Wardship and Delinquency Proceedings

In wardship and delinquency proceedings, the juvenile court is asked to declare a minor to be a ward of the court on any of the following grounds [*see Welf. & Inst. Code §§ 258, 601, 602, 603.5*]:

- The minor is habitually disobedient and uncontrollable.
- The minor violates a curfew ordinance.
- The minor is habitually truant.
- The minor violates any criminal law or ordinance.
- The minor commits a traffic violation or other violations that may be heard by a juvenile hearing officer under *Welf. & Inst. Code § 256*.

For a complete discussion relating to the grounds for wardship and procedure in delinquency proceedings, see Ch. 329, *Juvenile Courts: Delinquency Proceedings* .

[3] Dual Jurisdiction Issues

[a] Single Status Required in Most Counties

It is well established that many children who have been abused or neglected later become involved in the juvenile delinquency and adult criminal justice systems [*see* Wiig, Widom & Tuell, Understanding Child Maltreatment & Delinquency: From Research to Effective Program, Practice, and Systemic Solutions (CWLA 2003)]. Thus, preventing child abuse and neglect is a form of delinquency prevention. So too does good child welfare case management and services in dependency cases serve as a form of delinquency prevention. Far too often, however, dependent children find their way into the delinquency system.

A minor's factual situation that could come within the juvenile court's jurisdiction under more than one of the types of proceedings pursuant to *Welf. & Inst. Code §§ 300, 601* and *602* raises a potential dual jurisdiction issue. These cases often appear in the context of a dependent child who has now committed an act that could bring the child into the delinquency system [*see, e.g., Los Angeles County Dept. of Children & Fam. Services v. Superior Court (2001) 87 Cal. App. 4th 320, 322-323* ; *In re Donald S. (1988) 206 Cal. App. 3d 134, 137-138, 253 Cal. Rptr. 274]* . In other cases, a child is brought to the attention of both the dependency and the delinquency systems at the same time, or a delinquent child being considered for termination of wardship has an abusive or neglectful home situation that might justify dependency proceedings. Regardless of how the situation came to the attention of the authorities, both decisional law [*In re Donald S. (1988) 206 Cal. App. 3d 134, 138-139, 253 Cal. Rptr. 274]* , and statutory provisions [*Welf. & Inst. Code § 241.1*], have made it clear that a minor could not simultaneously be both a dependent and a ward of the juvenile court [*In re Marcus G. (1999) 73 Cal. App. 4th 1008, 1012, 87 Cal. Rptr. 2d 84]* . Effective January 1, 2005, however, some counties may choose to voluntarily develop a protocol for allowing a minor to be designated as both a delinquent and a dependent [*Welf. & Inst. Code § 241.1(e)*]. For counties that have developed such a protocol, see discussion in *§ 327.11[3][f]*. For the majority of counties, however, it is anticipated the mandate for single status will continue.

Even in single status counties, however, nothing precludes the provision of informal services by a social services

agency to a delinquent child and his or her family without a declaration of dependency [*Welf. & Inst. Code § 301*] or the informal supervision by a probation officer of a dependent child without a declaration of wardship [*Welf. & Inst. Code § 654*]. The same may also be true for dependent children who are placed on probation without wardship pursuant to *Welf. & Inst. Code § 725(a)* or granted deferred entry of judgment pursuant to *Welf. & Inst. Code §§ 790-795*. By coupling formal dependency with informal probation or formal probation with informal social services, both agencies are allowed to provide services to the child. While such actions may be at the outer limits of what the Legislature intended in single status cases, there is no prohibition against such practices and thus they are available options in an appropriate case.

PRACTICE TIP:

Transfer from Delinquency to Dependency. Traditionally, delinquency court has been seen as the forum to which dependent children "graduate" after committing certain offenses. This perception is not always correct. *Welf. & Inst. Code § 241.1* applies equally to minors who appear to come within the description of both Section 300 and 602, regardless of the jurisdiction of origin. Consequently, delinquency attorneys should consider utilizing their local protocol to have dependency proceedings initiated in appropriate cases.

[b] Procedure for Recommending Single Status

In order to deal with the situation of a minor who may qualify for adjudication as both a dependent and a ward of the court, each county's probation and child protective services departments are mandated by statute to jointly develop a written protocol to ensure local coordination in the assessment of any such minor and for presenting a recommendation to the juvenile court as to which status is appropriate for the minor [*Welf. & Inst. Code § 241.1*].

Using the protocol, the probation department and the child protective services department must initially determine which status will serve the best interests of the minor and the protection of society. If possible, a determination should be made before a petition is filed concerning the minor [*Cal. Rules of Ct., Rule 5.512(a)(2)*]. In most instances, though, the minor will already be a dependent or a ward and the assessment under *Welf. & Inst. Code § 241.1* will be done after the second petition is filed. The recommendations of both departments will then be presented to the juvenile court with the petition that is filed on behalf of the minor, and the court will determine which status is appropriate for the minor. The juvenile court is to provide notice of the recommendations within five calendar days to any other juvenile court that has jurisdiction over the minor. The notice must include "the name of the judge to whom, or courtroom to which, the recommendations were made [*Welf. & Inst. Code § 241.1(a)*]. One appellate court has determined the assessment and recommendation of the probation and social services departments must accompany the "*later petition*, i.e., the petition that creates the potential for dual jurisdiction" [*In re Marcus G. (1999) 73 Cal. App. 4th 1008, 1013, 87 Cal. Rptr. 2d 84* (emphasis in original)]. Thus, if the child is already a dependent of the court and a petition is filed to declare the child to be a delinquent, the assessment and recommendation under *Welf. & Inst. Code § 241.1(a)* must be presented to the juvenile court hearing the delinquency petition. Under this interpretation, the dependency court in such a case would receive notice of the second proceeding, but it would be the delinquency court that would determine whether the child should be treated as a dependent child or a delinquent minor [*In re Marcus G. (1999) 73 Cal. App. 4th 1008, 1013, 87 Cal. Rptr. 2d 84* ; *see also In re Jaime M. (2001) 87 Cal. App. 4th 320, 325, 104 Cal. Rptr. 2d 425]* . The reverse would naturally be true if the minor was already a ward of the court and the second petition was being filed to make the child a dependent.

PRACTICE TIP:

Communication Between Courts. An approach that has been taken by the juvenile courts in some counties is to have one judicial officer who is experienced in both delinquency and dependency matters designated to determine all potential dual jurisdiction issues. Under this approach the juvenile court receiving the assessment and recommendation of the probation and social services departments has both the delinquency and the dependency files before it, as well as the attorneys from both cases. In this way a

full and complete consideration by an experienced judicial officer can be made as to which status is most appropriate for the minor. If this approach is not utilized, however, "best practice" is to have the delinquency and dependency courts communicate on the issue, much in the way California courts communicate with courts in other states under the Uniform Child Custody Jurisdiction and Enforcement Act [*see Fam. Code §§ 3410, 3424*; *see also In re Joseph D. (1993) 19 Cal. App. 4th 678, 693-694, 23 Cal. Rptr. 2d 574]* . While such communication between courts in potential dual jurisdiction cases is not required, it should be encouraged.

In developing a protocol and in applying it to determine their recommendations to the juvenile court, the departments are required to consider, but are not limited to, the following factors [*Welf. & Inst. Code § 241.1(b)*; *Cal. Rules of Ct., Rule 5.512(d)*]:

- The nature of the minor's referral.
- The age of the minor.
- The history of any physical, sexual, or emotional abuse of the minor.
- The prior record of the minor's parents for child abuse with this or any other minor.
- The prior record of the minor for out-of-control or delinquent behavior.
- The parents' cooperation with the minor's school.
- The minor's functioning at school.
- The nature of the minor's home environment.
- The history of involvement by any agencies or professionals with the minor and his or her family.
- The services or community agencies available to assist the minor and his or her family.
- The statement of any counsel currently representing the minor.
- The statement of any Court Appointed Special Advocate currently appointed for the minor.

The protocol is also required to contain provisions for resolving disagreements between the probation and child protective services departments over the need for dependency or wardship status, and for determining the circumstances under which a new petition should be filed to change a minor's status [*Welf. & Inst. Code § 241.1(b)*].

The rule of court indicates the hearing on the joint assessment report under *Welf. & Inst. Code § 241.1* must be heard prior to the jurisdictional hearing [*Cal. Rules of Ct., Rule 5.512(e)*]. This is not required by the statute, however, and may not be in the best interests of the minor or the protection of the public in all cases. Some practitioners have argued that use of the protocol and assessment process should not be undertaken until after delinquency jurisdictional allegations have been adjudicated. In this way a decision would not be made as to whether a dependent child should be adjudged a delinquent with dependency status being terminated until after it was determined by the court that the jurisdictional allegations under *Welf. & Inst. Code § 602* are true. Since the full nature of the delinquency allegations may not become clear until after they have been litigated and the juvenile court may or may not find those allegations true, there is substantial merit to following such a procedure in an appropriate case. This also ensures that the district attorney is involved in the decision-making process, since it is that public official who is responsible for the bringing of

delinquency actions [*Welf. & Inst. Code § 650(c)*]. Nevertheless, the statutory provisions do not mandate such a procedure and whether it is utilized should be determined by the court itself on a case-by-case basis. If the court finds this procedure is best in an individual case, the requirement of *Cal. Rules of Ct., Rule 5.512(e)* for an earlier determination may be considered inconsistent with the intent of the statute to serve the minor's best interest and the protection of the public, and thus void [*cf. California Court Reporters Assn. v. Judicial Council (1995) 39 Cal. App. 4th 15, 24-26, 46 Cal. Rptr. 2d 44]* . Timely decisions are, however, important [*In re Jaime M. (2001) 87 Cal. App. 4th 320, 326, 104 Cal. Rptr. 2d 425* (after 18 months decision on single status under *Welf. & Inst. Code, § 241.1* still had not been made)].

The length of available confinement time under the minor's delinquency status is not a determinative factor in deciding whether the minor should be treated as a dependent child or a delinquent minor. It is inappropriate for probation or defense counsel to suggest in a potential dual jurisdiction case that a minor's delinquency status be terminated and dependency proceedings initiated solely because the minor's confinement time has run out. A delinquent minor is often better served by probation, even without confinement time, than by social services as part of a dependency proceeding. Admittedly, it may be appropriate in some cases to terminate wardship when a minor has served all allowable time in a secure facility. But other wards may benefit more from the firmer control and closer supervision of a probation officer than from the softer approach of a social worker [*see In re Marcus G. (1999) 73 Cal. App. 4th 1008, 1015, 87 Cal. Rptr. 2d 84* (noting the "firmer control and closer supervision of a probation officer" may be more appropriate than "the social services that could be provided by the welfare department")]. This requires, of course, that probation departments and juvenile courts develop non-secure placement alternatives for such children. Non-secure placement alternatives should be developed in any event. Where a minor's maximum confinement time has been used and there is little or no time left for the minor to be placed in secure facilities, the court, probation, social services, and all parties should look closely at the needs of the minor to ascertain the appropriate status. Shifting the focus to the amount of confinement time remaining improperly shifts it away from the minor.

For further discussion relating to the seeking of dependency proceedings and attempts by minor's counsel to bypass the requirements of *Welf. & Inst. Code §§ 329* and *241.1*, see *Ch. 328, Juvenile Courts: Dependency Proceedings, § 328.45* (Application to Commence Juvenile Court Proceeding).

[c] Procedure When Two Counties Are Involved

If the minor has already been adjudicated a dependent or ward of a juvenile court pursuant to *Welf. & Inst. Code §§ 300, 601*, or *602*, and it is alleged in another county that the minor comes within *Welf. & Inst. Code §§ 300, 601*, or *602*, a similar procedure is to be followed [*Welf. & Inst. Code § 241.1(c)*; *Cal. Rules of Ct., Rule 5.512(c)*]. The county probation or child protective services department in the county that already has jurisdiction and the county probation or child protective services department in the county that is alleging jurisdiction are to initially determine which status will best serve the best interests of the minor and the protection of society. The assessment process is to be done consistent with the requirements of *Welf. & Inst. Code § 241.1(b)* that apply when it is alleged the minor comes within a different status in the same county in which the minor is already a dependent or ward [*Welf. & Inst. Code § 241.1(c)*; *see also* discussion in *§ 327.11[3][a]* (Single Status Required in Most Counties)].

[d] Local Practice

Counties differ markedly in their handling of potential dual jurisdiction cases. Some have not developed a local protocol as required by *Welf. & Inst. Code § 241.1*. Further, in those counties that have such protocols, some courts tend to downplay or disregard the protocol and assessment process and make their own decisions without requiring the assessment or without regard to the recommendations. Such practices obviously are inconsistent with both the letter and intent of the law [*Welf. & Inst. Code § 241.1*].

It is the philosophy of the courts and agencies, however, that may differ more from county to county than the procedure

for handling such cases. Many courts, agencies and practitioners favor dependency proceedings over wardship proceedings, believing that children should be spared the consequences of a declaration of wardship if at all possible and that the services provided both the child and the family in dependency proceedings are greater. There is much to be said for this position. If the juvenile court and probation department fulfill their responsibility to develop appropriate resources for delinquents and their families, however, the accuracy of the latter argument is substantially diminished. Moreover, many minors who would qualify for both dependency and delinquency require placement in a secure facility, which is only available through a declaration of wardship, if both they and the public are to receive needed help and protection. This may be especially true in the case of minors who are fire-setters or sexual offenders. Thus strong arguments can also be made for favoring delinquency over dependency in potential dual jurisdiction cases. Nevertheless, regardless of one's personal or professional philosophy in this area, each case should be determined on its own individual facts and merits so as to ensure both the best interests of the child and the protection of the public are served [*Welf. & Inst. Code §§ 202, 241.1*].

[e] Notice and Decision Making

Notice of the hearing on the joint assessment report and a copy of the report must be provided to the minor, the minor's parent or guardian, all attorneys of record, any Court Appointed Special Advocate, and any other juvenile court having jurisdiction over the minor. In the case of notice to a juvenile court, the notice must be directed to the judicial officer or department that conducts hearings regarding the minor. The notice must be provided at least five calendar days before the hearing on the joint assessment report [*Cal. Rules of Ct., Rule 5.512(f)*]. All parties and their attorneys must be given an opportunity to be heard at the hearing on the joint assessment report [*Cal. Rules of Ct., Rule 5.512(g)*].

A specific decision as to which status is appropriate must be made by the juvenile court. It is not enough that a minor be adjudicated under the second status; the court must make an actual decision as to which status, delinquency or dependency, is appropriate [*Cal. Rules of Ct., Rule 5.512(e)*; *In re Jaime M. (2001) 87 Cal. App. 4th 320, 326, 104 Cal. Rptr. 2d 425]* . The court must also state its reasons for making its decision. The statement of reasons must be made on the record or in a written order [*Cal. Rules of Ct., Rule 5.512(g)*].

It is important that decisions as to which status a minor should be supervised under needs to be made in a timely fashion. Although the statute does not provide a specific time in which the decision must be made, the applicable rule of court indicates the hearing on the joint assessment report must occur "as soon as possible after or concurrent with the detention hearing, but no later than 15 court days after the order of detention and prior to the jurisdictional hearing" [*Cal. Rules of Ct., Rule 5.512(e)*]. In some cases determining which status is best prior to determining if the jurisdictional allegations in the second petition are true will not serve the best interest of the child or the protection of society, since those allegations may not subsequently be found true. If the court finds it appropriate in an individual case to delay the decision on which status is appropriate until it is determined if the allegations in the second petition are true, the requirement of *Cal. Rules of Ct., Rule 5.512(e)* for an earlier determination may be considered inconsistent with the intent of the statute to serve the minor's best interest and the protection of the public, and thus void [*cf. California Court Reporters Assn. v. Judicial Council (1995) 39 Cal. App. 4th 15, 24-26, 46 Cal. Rptr. 2d 44]* . Minors who are caught in between the two systems can suffer by not receiving full services or stability of placement from either. Thus, as with all matters involving minors, timely resolution is important [*In re Jaime M. (2001) 87 Cal. App. 4th 320, 326, 104 Cal. Rptr. 2d 425* (after 18 months decision on single status under *Welf. & Inst. Code, § 241.1* still had not been made)].

[f] Special Protocols for Dual Status

Effective January 1, 2005, counties are authorized to develop protocols that would allow a minor to be designated as a "dual status child, allowing the child to be simultaneously a dependent child and a ward of the court" [*Welf. & Inst. Code § 241.1(e)*]. Some see this as a step forward in policy. Others view it as a step backwards to the time when dual status was allowed prior to the enactment of *Welf. & Inst. Code § 241.1*. The need for dual jurisdiction is questionable if

delinquency courts and probation departments fulfill their responsibility to provide services for minors who are not in locked facilities and their families in much the same way as social services agencies provide services for dependent children and their families. Both dependency and delinquency laws require the court determine whether services could prevent the need for detention and require the court to make a finding that continuance in the home is contrary to the minor's welfare before the child is detained [*Welf. & Inst. Code §§ 319, 636*]. Both require inquiries regarding paternity [*Welf. & Inst. Code §§ 316.2, 726.4*]. Both require case plans to outline services for children likely to enter foster care that includes consideration of family strengths, the needs of both the child and the family, and the identification of services needed to work toward reunification [*Welf. & Inst. Code §§ 636.1, 706.6, 16501.1*]. Both provide for placement with parents, relatives, nonrelative extended family members, and in foster homes [*Welf. & Inst. Code §§ 361.2, 361.3, 362.7, 727*]. At status review hearings both require the court to review the efforts made by the probation department or social services agency to work towards either reunification or an alternative permanent plan, and the progress made by the parents and the child toward alleviating or mitigating the need for foster care placement [*Welf. & Inst. Code §§ 366.21, 366.22, 706.5*]. And both require permanent plans that may include return to parent, adoption, legal guardianship, or another planned permanent living arrangement [*Welf. & Inst. Code §§ 366.21, 366.22, 366.26, 727.3*]. Thus, probation departments can and should be doing everything for wards that are not in locked facilities and their families that social service agencies are doing for dependent children and their families. Further, although children may qualify for both dependency and delinquency, frequently the "firmer control and closer supervision of a probation officer" may be more appropriate than "the social services that could be provided by the welfare department" [*In re Marcus G. (1999) 73 Cal. App. 4th 1008, 1015, 87 Cal. Rptr. 2d 84]* . Thus, if the delinquency system is fulfilling its responsibility to children and families, the need for dual status is open to question. Nevertheless, some counties may choose to develop such protocols [*Welf. & Inst. Code § 241.1(e)*].

The decision to develop a protocol for dual status children is made by the county probation department and children's services agency in consultation with the presiding judge of the juvenile court. It is a discretionary action that must be voluntarily entered into by the probation department and social services agency. The statute does not give the juvenile court the authority to mandate such a protocol if either probation or social services does not desire to create such a protocol [*Welf. & Inst. Code § 241.1(e)*]. The protocol must be signed by the chief probation officer, the director of the county children's services agency, and the presiding judge of the juvenile court prior to implementation of the protocol, and no juvenile court can order a child be simultaneously both a ward and a dependent unless the required protocol has been created and signed by the necessary parties [*Welf. & Inst. Code § 241.1(e)*].

A county dual jurisdiction protocol must include:

- A description of the process to be used in determining whether the child is eligible to receive dual status designation [*Welf. & Inst. Code § 241.1(e)(1)*].

- A description of the procedure to be used by probation and social services in assessing the necessity for dual status and the process for making joint recommendations for the court's consideration, which recommendations shall ensure a seamless transition from one status to another so that services are not disrupted [*Welf. & Inst. Code § 241.1(e)(2)*].

- A provision for ensuring communication between judicial officers when dependency jurisdiction has been suspended, which may be by providing the dependency court with copies of reports filed pursuant to *Welf. & Inst. Code § 727.2* [*Welf. & Inst. Code § 241.1(e)(3)*].

- A plan for the collection of data so the implementation of the protocol can be evaluated pursuant to *Welf. & Inst. Code § 241.2* [*Welf. & Inst. Code § 241.1(e)(4)*].

- Identification of whether the county has chosen to utilize an "on-hold" system of dual jurisdiction in which dependency jurisdiction is suspended while the child is supervised as a ward of the court or a "lead

> court/lead agency" system in which one court and one agency is designated as responsible for case management, conducting statutorily mandated court hearings, and submitting court reports. In either event, it is the intent of the Legislature that judges will not issue conflicting orders and that case management and services shall not be duplicative or simultaneously provided by both agencies [*Welf. & Inst. Code § 241.1(e)(5)*].

When a child is designated as a dual status child and the county has adopted an "on hold" system, dependency jurisdiction shall be suspended while the child is a ward of the court [*Welf. & Inst. Code § 366.5*].

The Judicial Council will be responsible for collecting data and preparing an evaluation of the results of the implementation of dual jurisdiction protocols and must submit a report to the Legislature with its findings and recommendations within two years of the counties first deeming a child to be a dual status child [*Welf. & Inst. Code § 241.2*].

[4] Jurisdiction Over Matters Incidental to Proceedings

A superior court convened as, and exercising the special powers of, a juvenile court is vested with jurisdiction to make only those limited determinations authorized by the legislative grant of those special powers. Notwithstanding the absence of specific authorization to make particular determinations, the juvenile court is vested with the authority to make determinations incidentally necessary to the performance of functions demanded of it by the Legislature pursuant to the juvenile court law or necessary to any ultimate determination with which it is charged [*In re Ashley M. (2003) 114 Cal. App. 4th 1, 6, 7 Cal. Rptr. 3d 237]* . For example, although the juvenile court was not specifically authorized to make determinations relative to the parentage of a minor at the time the Supreme Court considered the issue, the Court determined the juvenile court is vested with jurisdiction to determine parentage issues when that finding is necessary to reach its conclusion as to the imposition of dependency status for a child who needs care and has no parent [*In re R. (1975) 13 Cal. 3d 636, 643-644, 119 Cal. Rptr. 475, 532 P.2d 123* ; *now see Welf. & Inst. Code § 316.2*; *Cal. Rules of Ct., Rule 5.635*]. Other decisions have also recognized the juvenile court's inherent authority to address certain issues necessary to carrying out its mandate [*see, e.g., In re Claudia E. (2008) 163 Cal. App. 4th 627, 637, 77 Cal. Rptr. 3d 722* ("the juvenile court has the inherent power to issue declaratory relief in such proceedings"); *In re Fred J. (1979) 89 Cal. App. 3d 168, 176, 152 Cal. Rptr. 327* ("the juvenile court has inherent power to entertain a prehearing challenge to the petition's sufficiency by a motion akin to a demurrer")].

[5] Retention of Jurisdiction When Juvenile Permitted to Reside in Another County

Any person placed on probation by the juvenile court or adjudged to be a ward or dependent child of the juvenile court may be permitted by order of the court to reside in a county other than the county of his or her legal residence. The court, nevertheless, retains jurisdiction over the minor [*Welf. & Inst. Code §§ 380* (dependents), 755 (delinquents or wards)].

Whenever a ward or dependent of the juvenile court is permitted to reside in a county other than the county of his or her legal residence, the minor may be placed under the supervision of the probation officer of the county of actual residence, with the consent of that probation officer. The ward must comply with the instructions of the probation officer and upon failure to do so must be returned to the county of his or her legal residence for further hearing and orders of the court [*Welf. & Inst. Code §§ 380* (dependents), 755 (delinquents or wards)].

[6] Trend Toward Expanding Jurisdiction of Juvenile Court

While the jurisdiction of the juvenile court has traditionally been limited to dependency, delinquency, status offenders and juvenile traffic matters, some advocates are engaged in a continuing effort to bring all matters relating to children, family and human relations within one court system. In 1988 the California Child Victim Witness Judicial Advisory

Committee recommended the enactment of a Family Relations Code and a Family Relations Division of the superior court [*see* California Child Victim Witness Jud. Adv. Comm., Final Report (Oct. 1988) p. 46]. The problems associated with bringing all matters relating to children, families and human relations into one court are significant.

Initially, efforts to consolidate all family-related matters in one court must confront the physical scattering of the existing courts in different buildings and even in the different parts of the city. The need for new buildings or remodeling to house such combined courts and the logistic and geographic problems such a change would create would be both costly and difficult to resolve. Moreover, the task of learning all of the specialized intricacies of law and human dynamics involved in juvenile dependency, family, and other types of cases related to human relations is difficult enough for attorneys and judicial officers when only one of these areas of law is involved. To expect our judicial officers and attorneys to be able to master them all is, in all likelihood, unrealistic. Nevertheless, although such a specialized division of the court has not yet been created, many areas of family and human relations law have subsequently been consolidated into California's Family Code [*see* Stats. 1992, ch. 162].

To date, efforts to move to the Family Code those portions of the Welfare and Institutions Code which deal with minors have not been successful. Efforts to increase the juvenile court's jurisdiction and its involvement in children's issues, however, have met with more success. For example, the juvenile court is now empowered to make orders regarding visitation between an incarcerated person and a child victim even if that child is not a dependent of the court [*see Penal Code § 1202.05*; *Welf. & Inst. Code § 362.6*]. While many may agree with the juvenile court's involvement in visitation issues for abused children regardless of whether they are dependents of the court, there is greater debate over the wisdom of expanding the court's involvement in cases beyond its traditional jurisdiction under *Welf. & Inst. Code §§ 300, 601,* & *602*.

For further discussion regarding the crisis facing California's dependency courts and the California Court Improvement Project, see Ch. 328, *Juvenile Courts: Dependency Proceedings*, § 328.12A (California Court Improvement Project).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewFamily LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency ProceedingsFamily LawDelinquency & DependencyWards of Court

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CHAPTER 327 JUVENILE COURTS: JURISDICTION AND GENERAL PROCEDURES
PART II. LEGAL BACKGROUND
A. Purpose, Jurisdiction, and Powers of Juvenile Courts

28-327 California Forms of Pleading and Practice--Annotated § 327.12

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.12 Venue for Transfer of Juvenile Court Proceedings

[1] General Rule for Determining Proper Court

The proper juvenile court in which to commence proceedings within its jurisdiction is that in any of the following counties [*Welf. & Inst. Code §§ 327* (dependency proceedings), 651 (delinquency proceedings); *Cal. Rules of Ct., Rule 5.510(a)*; *In re Hadley B. (2007) 148 Cal. App. 4th 1041, 1048, 56 Cal. Rptr. 3d 234]* :

- The county in which a minor resides.
- The county where the minor is found.
- The county in which the acts take place or the circumstances exist that are alleged to bring the minor within the provisions of *Welf. & Inst. Code §§ 300, 601,* or *602*.

[2] Determining Residency of Minor

Unless otherwise specified in the juvenile court law or rules, the residency of a minor for purposes of juvenile proceedings is determined under *Welf. & Inst. Code § 17.1* [*Cal. Rules of Ct., Rule 5.510(b)*]. This section provides that, to the extent not in conflict with federal law, the residence of a minor must be determined by the following rules:

- The residence of the parent with whom a child maintains his or her place of abode, the residence of any individual who has been appointed legal guardian, or the residence of the individual who has been given the care or custody of the child by a court of competent jurisdiction, determines the residence of the child [*Welf. & Inst. Code § 17.1(a)*].
- Whenever it is provided that the residence of a child is determined by the residence of the person

who has custody, custody means the legal right to custody of the child unless that right is held jointly by two or more persons, in which case custody means the physical custody of the child by one of the persons sharing the right to custody [*Welf. & Inst. Code § 17.1(b)*].

- The residence of a foundling is deemed to be that of the county in which the child is found [*Welf. & Inst. Code § 17.1(c)*].

- If the residence of the child is not otherwise determined, the county in which the child is living must be deemed the county of residence, if and when the child has had a physical presence in the county for one year [*Welf. & Inst. Code § 17.1(d)*].

- If the child has been declared permanently free from the custody and control of his or her parents, his or her residence is the county in which the court issuing the order is situated [*Welf. & Inst. Code § 17.1(e)*].

[3] When Minor Is Detained in County Other Than County of Jurisdiction

[a] Notice to County of Jurisdiction

Whenever a minor is taken into temporary custody in any county other than the county in which the minor is alleged to be within the jurisdiction of the juvenile court (the latter of which is referred to as the requesting county), the officer who has taken the minor into temporary custody may notify the law enforcement agency in the requesting county of the fact that the minor is in custody [*Welf. & Inst. Code §§ 324* (dependency proceedings), 641 (delinquency proceedings)].

[b] Transfer to County of Jurisdiction

When a law enforcement officer of the requesting county files a petition with the clerk of the juvenile court of the requesting county to commence proceedings in that court to declare a minor to be a ward or a dependent child of the court, and the officer secures a warrant, he or she may forward the warrant or a telegraphic copy to the officer having temporary custody. The warrant must be forwarded as soon as possible within 48 hours, excluding Sundays and nonjudicial days, from the time that the juvenile was taken into temporary custody. Thereafter, the officer from the requesting county takes custody of the minor within five days and takes the minor before the juvenile court judge who issued the warrant, or before some other juvenile court of the same county without unnecessary delay. If the minor is not brought before a judge of the juvenile court within the period prescribed, he or she must be released from custody [*Welf. & Inst. Code §§ 324* (dependency proceedings), 641 (delinquency proceedings)].

[4] Transfer When Minor's County of Residence Changes

A change in the minor's legal residence to another county after the minor is placed under juvenile court supervision allows the court in which the proceeding is pending to transfer the case to the juvenile court of the other county [*Welf. & Inst. Code §§ 375, 750*; *Cal. Rules of Ct., Rule 5.610(d)*]. The minor's "residence" for this purpose is the residence of the person who has the legal right to custody of the minor pursuant to the prior court order, including (1) a juvenile court order under *Welf. & Inst. Code § 361.2* (authority for juvenile court to make a juvenile court custody order awarding custody to previously noncustodial parent) and (2) an order appointing a guardian of the person of the minor [*Welf. & Inst. Code § 17.1(a)*; *Cal. Rules of Ct., Rule 5.610(a)*]. Merely placing the minor with a foster parent or relative in another county is not sufficient to change the minor's legal residence for purposes of transfer, since the child is only "placed" with that caregiver; the custody and control of the minor remains with the social services agency or probation department and the juvenile court in the original county [*but see In re J. C. (2002) 128 Cal. Rptr. 2d 671* (failing to consider *Welf. & Inst. Code § 17.1* and suggesting *Cal. Rules of Ct., Rule 5.610(a)* made the county of residence the one in which the child was placed in long term foster care, not the one in which the person who had legal custody but for the dependency order resided)]. If, however, the minor's caregiver becomes the minor's legal guardian,

the minor's county of legal residence does change for purposes of transfer if the guardian moves with the minor to another county. This is true even if the parent previously having custody or from whom the minor was originally removed has not changed his or her county of residence [*In re Christopher T. (1998) 60 Cal. App. 4th 1282, 1288-1292, 71 Cal. Rptr. 2d 116* ; California Ctr. for Jud. Educ. and Research, Cal. Judges Benchguides, Benchguide 100: Juvenile Dependency Initial Or Detention Hearing (March 2006) § 100.10, p. 100-112]. If the previously custodial parent had a court order for custody of the minor, placement of the minor with a previously noncustodial parent who resides in or moves to another county does not change the county of residence of the minor for transfer purposes, unless a family court custody order (delinquency) or juvenile court custody order (dependency or delinquency [*Welf. & Inst. Code §§ 302(c), 726.5(a)*]) is made granting that parent legal custody of the minor [*see Cal. Rules of Court, Rule 5.610(a)*; *In re Judson W. (1986) 185 Cal. App. 3d 838, 842-844, 230 Cal. Rptr. 92* (construing *Welf. & Inst. Code § 17.1(a)* [residence of minor is residence of parent "with whom a child maintains his or her place of abode"] as not determinative of issue and holding *Welf. & Inst. Code § 750* and Cal. Rules of Court, former Rule 1381 [*now see Cal. Rules of Court, Rule 5.610*] control)].

Where the minor's county of legal residence has changed before the disposition hearing in a dependency case, the court may transfer the case either before or after the disposition hearing [*Cal. Rules of Ct., Rule 5.610(c)*]. If the minor's county of legal residence changes before the disposition hearing in a delinquency case and the court determines to transfer the case, the court must transfer the case before the disposition hearing [*Cal. Rules of Ct., Rule 5.610(c)*]. In either type of case, the court must not order the transfer unless it first determines the transfer will protect or further the best interests of the child [*Cal. Rules of Ct., Rule 5.610(e)*; *In re J.C. (2002) 128 Cal. Rptr. 2d 671]* .

PRACTICE TIP:

Communication Between Courts Regarding Transfer. Anyone who has worked in the juvenile court system for long has witnessed or experienced the frustration of having a case bounce back and forth between two counties because the parent keeps moving or cannot be found and neither county wants to keep jurisdiction. One approach that should be considered in such cases is to have the two juvenile courts directly communicate on the issue, much in the way California courts communicate with courts in other states under the Uniform Child Custody Jurisdiction and Enforcement Act [*see Fam. Code §§ 3410, 3424*; *see also In re Joseph D. (1993) 19 Cal. App. 4th 678, 693-694, 23 Cal. Rptr. 2d 574]* . While such communication between courts in transfer situations within California is not required, it should be encouraged.

Communication between courts regarding which county is the most appropriate county for a child's case is not always successful. With or without communication, cases sometimes are repeatedly transferred between counties [*In re J.C. (2002) 128 Cal. Rptr. 2d 671* ("The case bounced back and forth between the two counties five times over nine months before appellant initiated this appeal.")]. A juvenile court cannot reject a transfer. If a court or party believes a transfer was incorrect, the remedy is either to appeal the transfer order or to hold a transfer out hearing [*Cal. Rules of Ct., Rule 5.612(a)*; *In re J.C. (2002) 128 Cal. Rptr. 2d 671* (dependency case); *In re Carlos B. (1999) 76 Cal. App. 4th 50, 55, 90 Cal. Rptr. 2d 72* (delinquency case)].

When an appeal is filed to challenge a transfer order, it must be filed in the court making the transfer order [*Cal. Rules of Ct., Rule 5.610(h)*]. This was correctly done in the cases of *In re J.C. (2002) 128 Cal. Rptr. 2d 671* , and *In re Christopher T. (1998) 60 Cal. App. 4th 1282, 71 Cal. Rptr. 2d 116* . If the appeal is filed in the wrong court, the correct procedure is to request the appellate court ask the Supreme Court to transfer the case [*National Kinney v. Workers' Comp. Appeals Bd. (1980) 113 Cal. App. 3d 203, 209, 169 Cal. Rptr. 801]* . A request to transfer the case to the proper appellate court does not have to be granted, however, if transferring the case would delay proceedings to the detriment of the child [*In re Lisa E. (1986) 188 Cal. App. 3d 399, 405, 232 Cal. Rptr. 799]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueIndividual DefendantsCivil ProcedureVenueMotions to TransferGeneral OverviewFamily LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency Proceedings

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CHAPTER 327 JUVENILE COURTS: JURISDICTION AND GENERAL PROCEDURES
PART II. LEGAL BACKGROUND
A. Purpose, Jurisdiction, and Powers of Juvenile Courts

28-327 California Forms of Pleading and Practice--Annotated § 327.13

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§ 327.13 Citation, Subpoena, and Warrant Powers of Juvenile Court

[1] Citation

The juvenile court may issue a citation directing any parent or guardian of the person concerning whom a petition has been filed to appear at the time and place set for any hearing or financial evaluation, and directing any person having custody or control of the minor to bring the minor with him or her. The notice must, in addition, state that a parent or guardian may be required to participate in a counseling program with the minor. Personal service of the citation must be made at least 24 hours before the time stated for such an appearance [*Welf. & Inst. Code §§ 338* (dependency proceedings), 661 (delinquency proceedings)].

In a delinquency proceeding under *Welf. & Inst. Code § 601* (wardship for minors habitually disobedient or truant, discussed in *Ch. 329, Juvenile Courts: Delinquency Proceedings, § 329.20[2], [3]*), the notice must also do the following [*Welf. & Inst. Code § 661*]:

- Inform the parent, guardian, or other person having control or charge of the minor that failure to comply with the compulsory school attendance laws is an infraction that may be charged and prosecuted before the juvenile court judge sitting as a municipal court judge and that the person having control or charge of the minor has the right to a hearing on the infraction before a judge different than the judge who has heard or is to hear the proceeding pursuant to *Welf. & Inst. Code § 601*.

- Explain the provisions of *Code Civ. Proc. § 170.6* (relating to disqualification of judges) [see discussion and forms relating to disqualification generally, Ch. 317, *Judges*].

[2] Subpoena

The court, the clerk of the court, or an attorney pursuant to *Code Civ. Proc. § 1985*, must issue subpoenas requiring

attendance and testimony of witnesses and production of papers at any hearing, upon the request of the probation officer, district attorney, the minor, the minor's parent, guardian, or custodian. The court may also issue such a subpoena on its own motion.

When a person attends a juvenile court hearing as a witness pursuant to a subpoena, the court may, in its discretion, make a minute order directing the county auditor draw his or her warrant upon the county treasurer for witness fees [*Welf. & Inst. Code § 341* (dependency proceedings), *Welf. & Inst. Code § 664* (delinquency proceedings)].

[3] Warrant for Arrest or Protective Custody

In case a citation cannot be served, or the person served fails to obey it, or in any case in which it appears to the court that the citation will probably be ineffective, a warrant for arrest may issue on the order of the court either against the parent, or guardian, or the person having custody of the minor, or with whom the minor is living [*Welf. & Inst. Code § 339* (dependency proceedings); *Welf. & Inst. Code § 662* (delinquency proceedings)].

Whenever a petition has been filed in the juvenile court alleging that the minor falls within the jurisdiction of the court as a dependent child and praying for a hearing, or whenever any subsequent petition has been filed praying for a hearing in the matter of the minor, and it appears to the court that the circumstances of the minor's home environment may endanger the health, person, or welfare of the minor, or whenever a dependent minor has run away from his or her court-ordered placement, a protective custody warrant may be issued immediately for the minor [*Welf. & Inst. Code § 340*; *see also Welf. & Inst. Code § 663* (warrant for arrest of minor in delinquency proceedings); *Fam. Code § 3451* ("warrant to take physical custody of a child" under the Uniform Child Custody Jurisdiction and Enforcement Act)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSubpoenasCriminal Law & ProcedureJuvenile OffendersJuvenile ProceedingsGeneral OverviewCriminal Law & ProcedureArrestsWarrantsFamily LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency Proceedings

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28-327 California Forms of Pleading and Practice--Annotated § 327.14

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§ 327.14 Enforcement of Orders of Juvenile Court

[1] Incarceration or Other Sanctions

Any willful disobedience or interference with a lawful order of the juvenile court or of a judge or referee constitutes a contempt of court [*Welf. & Inst. Code § 213*]. This statute recognizes the juvenile court retains the inherent authority of the court to deal with contempt. As stated by one appellate court, a contempt proceeding "is a special proceeding, criminal in character, governed by the provisions of the Code of Civil Procedure, not by those of the Penal Code; not for the punishment of an offense against the state, but intended to implement the inherent power of the court to conduct the business of the court and enforce the lawful orders of the court" [*Oil Workers Intl. Union v. Superior Court (1951) 103 Cal. App. 2d 512, 570, 230 P.2d 71*]. As in other courts, contempt in the juvenile court is done under *Code of Civ. Proc. § 1218*, and may result in a fine of one thousand dollars, incarceration for up to five days in custody, or both [*Code Civ. Proc. § 1218*]. Contempt proceedings are ancillary proceedings, and thus require a separate stipulation to a referee if he or she is to hear the contempt proceeding. Further, contempt judgments cannot be reviewed by appeal, but may be reviewed by an extraordinary writ [*Code Civ. Proc. § 904.1(a)(1)*].

There are two types of contempt judgments handed down under *Code of Civ. Proc. § 1218*. Criminal contempt is generally used to vindicate the authority or dignity of the court by punishing the past violation of a court order even when that violation arises in a civil proceeding. Civil contempt, however, is forward looking and is used to coerce compliance with a court order. In civil contempt it is sometimes said the person in contempt holds the key to their release by complying with the court order [*In re Nolan W. (2009) 45 Cal. 4th 1217, 1236-1237, 91 Cal. Rptr. 3d 140, 203 P.3d 454]* . This statement, however, is more applicable to orders that can be complied with by a single action. In juvenile proceedings, particularly juvenile dependency proceedings, orders for the protection and welfare of minors are often of a more continuing nature, requiring an ongoing course of conduct rather than a single, specific action [*see, e.g., Welf. & Inst. Code §§ 245.5, 361.5(a), 362(c)*]. In such cases, the line between civil and criminal contempt can become blurred, mandating the court take steps to make a clear record of the reasons for and purpose of any contempt judgment.

Whether the contempt proceeding is criminal or civil in nature, such proceedings are not commonly conducted in juvenile dependency courts. This is especially true following the *Nolan W.* decision, which virtually eliminated any recognition of the juvenile court's statutory and inherent authority to utilize contempt proceedings of either nature to facilitate reunification through compelling parental compliance with court ordered reunification services [*In re Nolan W. (2009) 45 Cal. 4th 1217, 1230-1238, 91 Cal. Rptr. 3d 140, 203 P.3d 454]* . As a result, juvenile dependency courts should tread very lightly in this area and carefully review all relevant case law before utilizing its contempt power.

In delinquency proceedings, however, the juvenile court's ability to utilize its contempt authority is more clear and accepted. If the contempt consists of the refusal of a minor under the age of 16 years to take the oath or to testify, the court must first refer the matter to the juvenile probation officer for a report and recommendation regarding the appropriateness of the imposition of a sanction. The court may, however, impose a sanction for contempt before receipt of the report and recommendation if the court enters a finding, supported by specific facts stated on the record, that the minor would be likely to flee if released before the receipt of the report and recommendation [*see Code Civ. Proc. § 1219.5(a), (c)*].

The juvenile court has inherent power to punish a minor for contempt of court. Thus, for example, if a status offender adjudged a ward of the court under *Welf. & Inst. Code § 601* has violated a court order, the juvenile court may exercise its contempt power to incarcerate the minor, if the following conditions are met [*In re Michael G. (1988) 44 Cal. 3d 283, 297, 243 Cal. Rptr. 224, 747 P.2d 1152]* :

- The juvenile is given sufficient notice to comply with the order and to understand its provisions.
- The violation of court order is egregious.
- The record indicates that less restrictive alternatives were considered and found to be ineffective.
- Special confinement conditions are made to ensure that the minor does not come in contact with those minors who are confined because of their commission of a crime.

In addition to contempt, the juvenile court, including referees, is authorized to impose sanctions pursuant to *Code of Civ. Proc. § 128.7*, to deter or punish frivolous filings [*In re Mark B. (2007) 149 Cal. App. 4th 61, 64-65, 56 Cal. Rptr. 3d 697*].

[2] Misdemeanor Punishment for Willful Failure to Appear as Promised

In each instance in which a provision of the juvenile court law authorizes the execution by any person of a written promise to appear, or to have any other person appear, before the probation officer or before the juvenile court, any willful failure of the promisor to perform as promised constitutes a misdemeanor. The willful failure is punishable as a misdemeanor if, at the time of the execution of the written promise, the promisor is given a copy of the promise on which it is clearly written that failure to appear or to have any other person appear is punishable as a misdemeanor [*Welf. & Inst. Code § 214*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptGeneral OverviewFamily LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency Proceedings

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[Reserved]

§§ 327.15[Reserved]

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28-327 California Forms of Pleading and Practice--Annotated § 327.20

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.20 Juvenile Court Judges and Referees

[1] Judge

[a] Appointment of Superior Court Judge to Hear Juvenile Court Matters

In counties having more than one judge of the superior court, the presiding judge of the court or the senior judge annually designates one or more judges of the superior court to hear all cases falling within the juvenile court provisions. The presiding judge or senior judge may also appoint such additional judges as may be necessary for the prompt disposition of the business before the juvenile court [*Welf. & Inst. Code § 246*]. In all counties where more than one judge is designated as a judge of the juvenile court, the presiding judge must also designate one such judge as presiding judge of the juvenile court [*Welf. & Inst. Code § 246*].

Although *Welf. & Inst. Code § 246* indicates judicial assignments to the juvenile court shall be made annually, where possible judges should be assigned to the juvenile court for a period of three years [*Welf. & Inst. Code § 202*; Cal. Rules of Ct., Stds. Jud. Admin., Juvenile § 5.40(a)].

[b] Authority and Role

The presiding judges of both the superior and juvenile courts are charged with motivating and educating other judges regarding the significance of the juvenile court and are to work to ensure that adequate resources, including sufficient judges, staff and facilities, are provided to the juvenile court to enable it to carry out its functions [Cal. Rules of Ct., Stds. Jud. Admin., Juvenile § 5.40(b)].

The presiding judge of the juvenile court is also given the responsibility of ensuring that both public and private attorneys working in the juvenile court are qualified to work in this specialized area, receive equivalent promotional opportunities and compensation as attorneys working in other areas, and remain working in the court for two to five

years [Cal. Rules of Ct., Appendix, Div. I, § 5.40(c)]. To help accomplish this, the presiding judge of the juvenile court should establish standards of representation, develop orientation and in-service training programs for all the professionals working in the juvenile court, including the judicial officers, and encourage the leaders of public law offices to require their attorneys to meet the same standards as court appointed counsel [*Welf. & Inst. Code § 202*; Cal. Rules of Ct., Stds. Jud. Admin., Juvenile § 5.40(d)].

The work of juvenile court judges is not limited to the courtroom. The unique role of the juvenile court judicial officer requires that, when appropriate, they provide active leadership within the community to develop resources and services for at-risk children and families, including fulfilling a leadership role in programs of inter-agency cooperation for such services and promoting and unifying public and private sector efforts in this area [*Welf. & Inst. Code § 202*; Cal. Rules of Ct., Stds. Jud. Admin., Juvenile § 5.40(e)].

Juvenile court judges must also work closely with school authorities, educate the community regarding the role of the court, guide child protection agencies regarding what constitutes "reasonable efforts" to prevent the removal of or hasten the reunification of a child, and encourage the development of community resources to help homeless, truant, runaway and incorrigible children [*Welf. & Inst. Code § 202*; Cal. Rules of Ct., Stds. Jud. Admin., Juvenile § 5.40(e)]. Thus the role of the juvenile court judge truly is unique as compared with that of judges fulfilling other judicial assignments [*see* Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43(2) Juv. & Fam. Ct. J. 1 (1992)].

[2] Referee

[a] Appointment and Term of Office

Each trial court may establish and may appoint such subordinate judicial officers as are deemed necessary for the performance of subordinate judicial duties authorized by law. The appointment of juvenile court referees was formerly done under Welf. & Inst. Code former § 247, which was repealed effective January 1, 2004, by Stats. 2003, ch. 149, § 88. The appointment of subordinate judicial officers, including juvenile court referees, is now done under *Gov. Code § 71622* [*Gov. Code §§ 71601(i), 71622(a)*]. Persons who were already authorized to serve as subordinate judicial officers under the previous statutory authorization continue to serve under the new statutory provisions [*Gov. Code § 71622(f)*]. The duties and powers of juvenile court referees have not changed [*see, e.g., Welf. & Inst. Code §§ 248, 249, 250*]. Only the appointing statutes have changed as part of legislation addressing court consolidation. The number and type of subordinate judicial officers in a trial court are subject to approval by the Judicial Council and serve at the pleasure of the trial court [*Gov. Code § 71662(a)*]. See also discussion in *§ 327.20[2][c]*.

Some superior courts choose to utilize superior court commissioners in juvenile court rather than juvenile court referees. Commissioners may be assigned to perform the duties of a juvenile court referee. There is, however, no judicial position of a juvenile court commissioner [*In re Brittany K. (2002) 96 Cal. App. 4th 805, 811-812, 117 Cal. Rptr. 2d 813* ; *In re Courtney H. (1995) 38 Cal. App. 4th 1221, 1226, 45 Cal. Rptr. 2d 560* , *citing In re Mark L. (1983) 34 Cal. 3d 171, 176* ; *see also In re Ian J. (1994) 22 Cal. App. 4th 833, 836, 27 Cal. Rptr. 2d 728]* . Unless a commissioner is assigned to perform the duties of a referee, the commissioner is not hearing matters as a referee and can only hear matters if stipulated to as a temporary judge [*In re Courtney H. (1995) 38 Cal. App. 4th 1221, 1224-1226, 45 Cal. Rptr. 2d 560* ; *see also Gov. Code § 71622(d)*, permitting cross-assignment of subordinate judicial officers if the person cross-assigned meets the qualifications established by the Judicial Council for the cross-assigned position]. Such a stipulation can be implied by the conduct of the parties and any objection waived if no timely objection is made [*In re Brittany K. (2002) 96 Cal. App. 4th 805, 811-812, 117 Cal. Rptr. 2d 813]* . See discussion in *§ 327.20[3]*.

[b] Qualifications

The minimum qualifications and training requirements necessary to serve as subordinate judicial officer are determined

by rules established by the Judicial Council [*Gov. Code § 71622(c)*]. Formerly, every referee first appointed on or after January 1, 1977, must have been admitted to practice law in California for a period of not less than five years, or in any other state and California for a combined period of not less than 10 years [Welf. & Inst. Code former § 247]. Under trial court consolidation legislation, persons already serving as referees will continue to do so under the new statutory provisions for appointment [*Gov. Code § 71622(f)*].

[c] Authority and Role

A referee hears such cases as are assigned to him or her by the presiding judge of the juvenile court, with the same powers as a judge of the juvenile court, except that a referee cannot conduct hearings to which state or federal constitutional prohibitions against double jeopardy apply unless the parties stipulate in writing to the referee hearing the matter as a temporary judge [*Welf. & Inst. Code § 248*]. Initial delinquency proceedings, such as detention, fitness, and pretrial hearings, are often held before a referee who hears such cases as are assigned to him or her by the presiding judge. If the referee takes an admission from a minor he or she may also conduct the dispositional hearing. The referee generally has the same powers as a judge of the juvenile court [*Welf. & Inst. Code § 248*; *Cal. Rules of Ct., Rule 5.536(a)*]. See discussion in *§ 327.20[1][b]*.

A referee may hear any dependency hearing as a matter of right. However, a referee does not have authority under *Cal. Const., art. VI, § 22*, to conduct a delinquency jurisdictional hearing to which the state or federal constitutional prohibitions against double jeopardy attach under *Welf. & Inst. Code § 602*, unless the parties confer that judicial power by stipulated agreement [*Welf. & Inst. Code § 248*; *see In re C. (1979) 26 Cal. 3d 49, 57, 160 Cal. Rptr. 704, 603 P.2d 1300* ; *see also Cal. Rules of Ct., Rule 2.831* (procedures for stipulation to temporary judge); discussion in § 327.20[2][d]].

The parties in a delinquency matter must exercise caution, however, because participation in a juvenile matter before a referee without objection to the referee's jurisdiction waives any error from failure to obtain a written stipulation [*see In re Richard S. (1991) 54 Cal. 3d 857, 865-866, 2 Cal. Rptr. 2d 2, 819 P.2d 843* (*Cal. Rules of Ct., Rule 2.831(a)* is directory, not jurisdictional); *In re Julio N. (1992) 3 Cal. App. 4th 1120, 1123, 5 Cal. Rptr. 2d 86* (participation without objection is deemed implied stipulation)]. See discussion in § 327.20[2][d].

[d] Referee Acting as Temporary Judge

The subordinate judicial classifications of referee and temporary judge are distinct, vested with different powers, and subject to different procedural constraints [*In re Brittany K. (2002) 96 Cal. App. 4th 805, 811, 117 Cal. Rptr. 2d 813]* . If a referee is an attorney admitted to practice in California, the parties may stipulate, pursuant to *Cal. Rules of Ct., Rule 2.831*, that the referee act as a temporary judge with the same powers as a judge of the juvenile court [*see In re Richard S. (1991) 54 Cal. 3d 857, 861-867, 2 Cal. Rptr. 2d 2, 819 P.2d 843]* . An official court reporter is then required to be present to take down all proceedings [*Cal. Rules of Ct., Rule 5.536(b)*]. The stipulation must be in writing and submitted for approval to the appropriate court, which must endorse on it the order designating the temporary judge [*Welf. & Inst. Code § 248*; *Cal. Rules of Ct., Rule 2.831(a)*].

A defect in a stipulation under *Cal. Rules of Ct., Rule 2.831*, does not necessarily invalidate the stipulation. That is, compliance with that rule is not a constitutional prerequisite to empowering the temporary judge to act. The rule is directory, not mandatory, to the extent that it imposes requirements beyond the constitution [*In re Richard S. (1991) 54 Cal. 3d 857, 861-867, 2 Cal. Rptr. 2d 2, 819 P.2d 843* , *approving In re P. I. (1989) 207 Cal. App. 3d 316, 254 Cal. Rptr. 774* (delinquency proceeding) and *In re Robert S. (1988) 197 Cal. App. 3d 1260, 243 Cal. Rptr. 459* (dependency proceeding), *and disapproving In re Heather P. (1988) 203 Cal. App. 3d 1214, 250 Cal. Rptr. 468* , and *In re Damian V. (1988) 197 Cal. App. 3d 933, 243 Cal. Rptr. 185* , to the extent they are inconsistent; *see Cal. Const., art. VI, § 21*].

The parties to a stipulation waive any claim of error based on omission of the superior court's signature approving the

referee's appointment. They also waive any error from failure to obtain a written stipulation by participation in a juvenile matter before a referee without objection [*see In re Richard S. (1991) 54 Cal. 3d 857, 861-867, 2 Cal. Rptr. 2d 2, 819 P.2d 843]* or an omission of an express provision applying it to the dispositional hearing [*see In re P. I. (1989) 207 Cal. App. 3d 316, 320-323, 254 Cal. Rptr. 774* (delinquency proceeding)]. In addition, an appellate court has upheld an oral stipulation to a referee acting as a temporary judge [*In re Aontae D. (1994) 25 Cal. App. 4th 167, 171, 30 Cal. Rptr. 2d 176]* .

PRACTICE TIP:

Timely Objection to Referee. If the attorney does not want the referee to hear the jurisdictional hearing in a delinquency matter, he or she must take care to object on the record, otherwise later objections may be waived. Also, the attorney should be aware that when a referee sits as a temporary judge by stipulation of the parties there can be no rehearing of that proceeding.

For discussion of assignment of superior court commissioners, attorneys, or other nonreferees, to act as temporary judges, see § 327.20[3].

[e] Disqualification

Code Civ. Proc. §§ 170 and *170.6* relating to procedures and grounds for the disqualification of judges are applicable to referees of the juvenile court [*Pamela H. v. Superior Court (1977) 68 Cal. App. 3d 916, 918, 137 Cal. Rptr. 612* ; *see Guadalupe A. v. Superior Court (1991) 234 Cal. App. 3d 100, 109, 285 Cal. Rptr. 570* (referee disqualified because of social contact with minor during proceedings)]. If the motion under those sections is granted, the presiding judge of the juvenile court will reassign the matter to another referee or judge [*Cal. Rules of Ct., Rule 5.536(c)*].

For discussion and forms relating to the procedures and grounds for the disqualification of judges and referees generally, see Ch. 317, *Judges* .

[f] Referee Findings and Orders

[i] When Effective

No order of a referee removing a minor from his or her home is effective until expressly approved by a judge of the juvenile court [*Welf. & Inst. Code § 249*; *see Cal. Rules of Ct., Rule 5.540(b)(1)*]. This is not a jurisdictional requirement, however, and does not render the order void if the approval is not obtained. Further, if an order removing a minor from his or her home is made by a referee and no signature approving the order by a judge of the juvenile court is made, that failure is waived if not timely challenged or appealed [*In re Jesse W. (2001) 93 Cal. App. 4th 349, 355-361, 113 Cal. Rptr. 2d 184]* .

In one case, a referee's removal order at the detention hearing was approved by a judge but later findings and orders, including the disposition findings and orders placing the child in out-of-home care, were not. The appellate court found the original removal was done at the detention hearing and that the question at the disposition hearing was whether it would be detrimental to return the child. Based on this appellate finding, the referee's disposition findings and orders did not require approval by a judge to comply with *Welf. & Inst. Code § 249*. The appellate court was not persuaded by the argument that the detention order was only a temporary removal and that removal at disposition mandated a higher burden of proof [*In re I.S. (2002) 103 Cal. App. 4th 1193, 1196-1199, 127 Cal. Rptr. 2d 398]* . This decision is questionable, however. Just as the appellant in that case was incorrect that only the removal at disposition was a removal under *Welf. & Inst. Code § 249*, so too was the appellate court incorrect that at disposition there was no removal. The disposition language of *Welf. & Inst. Code § 361(c)* states that a dependent child may not be "taken from the physical custody" of a parent or guardian the child resided with at the time the petition was initiated unless the juvenile court makes a finding by clear and convincing evidence of one of several possible facts. This disposition language thus speaks of removal being ordered after the declaration of dependency--which can only be made at the

disposition hearing [*Welf. & Inst. Code § 361(c)*]. Although the language of the most commonly used removal subdivision speaks of both the risk to the child if the child were returned home and the lack of reasonable means to protect the child without removing the child from the parents' or guardians' physical custody [*Welf. & Inst. Code § 361(c)(1)*], this provision must be read in context with the main text of *Welf. & Inst. Code § 361(c)* and in a manner that reconciles the two parts of the finding in *Welf. & Inst. Code § 361(c)(1)*. The *I.S.* decision did not do this. The better approach is to recognize that both the temporary removal at the detention hearing and the more complete removal with the higher burden of proof at the disposition hearing are removal orders. Every removal ordered by a referee requires approval by a judge [*Welf. & Inst. Code § 249*].

It is also possible for the judge of the juvenile court or, in counties having more than one judge of the juvenile court, the presiding judge of the juvenile court to establish requirements that any or all orders of referees must be expressly approved by a judge of the juvenile court before becoming effective [*Welf. & Inst. Code § 251*; *see Cal. Rules of Ct., Rule 5.540(b)(2)*]. In courts requiring the approval of a juvenile court judge before a referee's order becomes effective, the order issued by the referee becomes final 10 calendar days after service of a written copy of the referee's findings and orders or 20 judicial days after the hearing at which the findings and orders are made, whichever comes later [*In re Clifford C. (1997) 15 Cal. 4th 1085, 1093, 64 Cal. Rptr. 2d 873, 938 P.2d 932* (harmonizing *Welf. & Inst. Code §§ 250* and *253*)].

In the remaining instances, a referee's order is effective immediately, subject to the right of the minor, parent or guardian to apply for a rehearing within 10 calendar days of the service of a written copy of the referee's findings and order. The finality of the order is also subject to the ability of a juvenile court judge to order a rehearing on his or her own motion with 20 judicial days of hearing at which the referee's order was made, but not more than 10 calendar days after the service of a copy of the written findings and order [*In re Clifford C. (1997) 15 Cal. 4th 1085, 1093, 64 Cal. Rptr. 2d 873, 938 P.2d 932* (harmonizing *Welf. & Inst. Code §§ 250* and *253*)].

When a referee sits as a temporary judge, his or her order becomes final in the same manner as an order made by a judge [*Welf. & Inst. Code § 250*].

For discussion of appeals in dependency proceedings, see *Ch. 328, Juvenile Courts: Dependency Proceedings, § 328.19* and *§ 328.190* et seq. For discussion of appeals in delinquency proceedings, see *Ch. 329, Juvenile Courts: Delinquency Proceedings, § 329.119*.

[ii] Service of Findings and Orders

A referee must furnish a copy of his or her findings and order to the presiding judge of the juvenile court and to the minor if the minor is 14 or more years of age or, if younger, has so requested; he or she must also serve such findings and order on the minor's parent, guardian, and counsel, as well as on counsel for the parent or guardian [*Welf. & Inst. Code § 248*; *Cal. Rules of Ct., Rule 5.538(b)*].

[g] Rehearing on Orders of Referee

[i] Notice of Right to Rehearing

In addition to the service of written findings and orders, the referee must furnish a written explanation of the minor's right to seek review of the order by the juvenile court to the minor if the minor is 14 or more years of age or, if younger, has so requested. Service must be by mail to the last known address and is deemed complete at the time of mailing [*Welf. & Inst. Code § 248*; *Cal. Rules of Ct., Rule 5.538(b)*].

The notice provisions of *Welf. & Inst. Code § 248* are mandatory. Notification of the juvenile's right to request a rehearing safeguards his or her right to a meaningful appeal from the final orders of the juvenile court, particularly

because, in the case of a hearing held without the presence of a court reporter, the right to a rehearing is a matter of right [*In re Drexel F. (1976) 58 Cal. App. 3d 801, 804-805, 130 Cal. Rptr. 253* ; *see In re Gregory M. (1977) 68 Cal. App. 3d 1085, 1092, 137 Cal. Rptr. 756]* .

[ii] Application for Rehearing

At any time prior to the expiration of 10 days after service of a written copy of the order and findings of a referee, a minor or his or her parent or guardian, or the social services agency in case brought under *Welf. & Inst. Code § 300*, may apply to the juvenile court for a rehearing. The application may be directed to all or to any specified part of the order or findings as contained in a statement of the reasons the rehearing is requested [*In re Clifford C. (1997) 15 Cal. 4th 1085, 1093, 64 Cal. Rptr. 2d 873, 938 P.2d 932* ; *Welf. & Inst. Code § 252*].

If all of the proceedings before the referee have been taken down by an official reporter, the judge of the juvenile court may, after reading the transcript of the proceedings, grant or deny the application. If proceedings before the referee have not been taken down, the application must be granted forthwith as of right [*Welf. & Inst. Code § 252*].

If an application for rehearing is not granted, denied, or extended within 20 days following the date of its receipt, it will be deemed granted. However, the court, for good cause, may extend the period beyond 20 days, but not beyond 45 days, following the date of receipt of the application. At that time, the application will be deemed granted unless it is denied within the extended period. All decisions to grant or deny the application or to extend the period must be expressly made in a written minute order. Copies of the order must be provided to the minor or his parent or guardian and to the attorneys of record [*Welf. & Inst. Code § 252*; *see Cal. Rules of Ct., Rule 5.542(a)-(c)*; *see In re Ferdinand R. (1978) 85 Cal. App. 3d 303, 307, 149 Cal. Rptr. 342* (application for rehearing, made before order to which it is directed, has no legal effect)].

A judge of the juvenile court may, on his or her own motion made within 20 court days following a hearing before a referee, order a rehearing of any matter heard by the referee that requires the approval of a juvenile court judge to become effective [*In re Clifford C. (1997) 15 Cal. 4th 1085, 1093, 64 Cal. Rptr. 2d 873, 938 P.2d 932* (harmonizing *Welf. & Inst. Code §§ 250* and *253*)]. For orders that do not require the approval of a judge to become effective, a judge of the juvenile court may order a rehearing on his or her own motion made within 20 judicial days of the referee's order but not more than 10 days after the service of the written copy of the findings and order [*In re Clifford C. (1997) 15 Cal. 4th 1085, 1093, 64 Cal. Rptr. 2d 873, 938 P.2d 932]* .

Upon application for rehearing, the judge must read the entire transcript of the proceeding before the referee and independently weigh and evaluate the evidence. The judge may then either grant the rehearing or adopt the referee's findings and deny the request for rehearing. A judge's signed and dated handwritten note on the order denying a rehearing within the 20 day requirement of *Welf. & Inst. Code § 252* will satisfy the timeliness requirement of that section even if a formal minute order is not prepared within that time [*In re B.A. (2006) 141 Cal. App. 4th 1411, 1414, 1418-1420, 47 Cal. Rptr. 3d 115]* . The standard in reviewing the record on request for rehearing is not abuse of discretion or substantial evidence; rather, the judge must make an independent judgment [*In re M. (1975) 14 Cal. 3d 727, 735-736, 122 Cal. Rptr. 574, 537 P.2d 406* ; *In re Randy R. (1977) 67 Cal. App. 3d 41, 136 Cal. Rptr. 419]* .

The prosecuting attorney may suggest that the court grant a rehearing on its own motion. If a prosecuting attorney does suggest the court order a rehearing, the minor must be given written notice and an opportunity to be heard [*In re V. (1980) 28 Cal. 3d 587, 593-594, 169 Cal. Rptr. 713, 620 P.2d 163]* .

[iii] Procedures on Rehearing

All rehearings of matters heard before a referee must be before a judge of the juvenile court and must be conducted de novo [*Welf. & Inst. Code § 254*; *Cal. Rules of Ct., Rule 5.542(e)*]. A rehearing of a detention hearing must be held

within two court days after the rehearing is granted. A rehearing of other matters heard before a referee must be held within 10 court days after the rehearing is granted [*Cal. Rules of Ct., Rule 5.542(e)*].

Some decisions have suggested the referee's findings and orders become null and void on the granting of a rehearing, but the better rule is that they are entitled to full force and effect until the matter is actually reheard [*Ricardo V. v. Superior Court (2007) 147 Cal. App. 4th 419, 422, 54 Cal. Rptr. 3d 223*].

PRACTICE TIP:

Stipulation to Admission of Transcript of Original Proceeding. The parties may stipulate to having the transcript of the proceeding before the referee admitted as evidence at the rehearing, new evidence may be admitted, or both. Parties will generally stipulate to admission at the rehearing of the transcript of the original proceeding.

In a rehearing from a proceeding before a referee, the juvenile court judge may properly impose a graver or more serious dispositional order than that entered by the referee [*In re Anthony M. (1976) 64 Cal. App. 3d 464, 468-469, 134 Cal. Rptr. 540]* . However, if the juvenile court abandons a referee's findings and recommendations absolving a minor of the charged misconduct necessary to a determination of wardship and embarks on a hearing de novo pursuant to *Welf. & Inst. Code §§ 253* and *254* to redetermine the minor's status as a ward, the minor is exposed to jeopardy a second time contrary to *Fifth Amendment* prohibitions [*Jesse W. v. Superior Court (1979) 26 Cal. 3d 41, 46-48, 160 Cal. Rptr. 700, 603 P.2d 1296]* .

PRACTICE TIP:

Possibility of More Restrictive Order on Rehearing. Caution should be exercised in applying for a rehearing, particularly from a dispositional order. In making the decision the attorney must take into consideration that if a rehearing is granted, the judge could impose a more restrictive dispositional order.

[3] Temporary Judge Other Than a Referee

In some counties, superior court commissioners are assigned to the juvenile court without a designation that they are to perform the duties of a juvenile court referee. Parties appearing before commissioners in these counties must stipulate to the commissioner as a temporary judge in order for the commissioner to hear their juvenile court case [*see In re Courtney H. (1995) 38 Cal. App. 4th 1221, 1224-1226, 45 Cal. Rptr. 2d 560* ; *In re Steven A. (1993) 15 Cal. App. 4th 754]* . Attorneys, in some counties, also hear matters as temporary judges [*see In re Heather P. (1988) 203 Cal. App. 3d 1214, 250 Cal. Rptr. 468]* . A stipulation by a party's attorney can be effective even without the express stipulation of the party [*In re Brittany K. (2002) 96 Cal. App. 4th 805, 813, 117 Cal. Rptr. 2d 813]* . Moreover, a stipulation to an attorney, referee, or commissioner hearing a matter as a temporary judge can be implied by the conduct of the parties and any objection waived if no timely objection is made [*In re Brittany K. (2002) 96 Cal. App. 4th 805, 811-813, 117 Cal. Rptr. 2d 813]* .

One court of appeal has held that parties could stipulate that a commissioner or other attorney may hear a dependency case as a temporary judge until its final determination and further stipulate that the temporary judge may hear any new proceedings but that either party could appear at a new proceeding and, without prejudice, withdraw a stipulation to the continuing authority of the referee. A qualified stipulation of this nature gives the temporary judge irrevocable power to hear the case through the jurisdictional and dispositional hearings. It also allows the temporary judge to conduct any separate hearings that might follow, subject to withdrawal of the stipulation by either party [*see In re Steven A. (1993) 15 Cal. App. 4th 754, 767, 771-772, 19 Cal. Rptr. 2d 576* (reversal of permanency planning order because commissioner refused to recognize parent's withdrawal of stipulation)].

Practitioners should be careful when entering into a stipulation of this kind, at least in dependency proceedings. The decision in *Steven A.* rested in part on the court of appeal's characterization of a hearing under former *Welf. & Inst. Code*

§ 366.25, which was at that time used for permanency planning, as one which the parties may have understood to be a "new" proceeding separate from and merely "ancillary" to the earlier jurisdiction and disposition hearings in which the stipulation was entered [*In re Steven A. (1993) 15 Cal. App. 4th 754, 767-772, 19 Cal. Rptr. 2d 576]* . The legislature, however, has characterized a hearing under *Welf. & Inst. Code § 366.26*, which is the current section for permanency planning, as being part of the "regular review process" [Senate Sel. Comm. on Children & Youth/SB 1195 Task Force Rep. on *Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services* (Jan. 1988) p. 10]. Moreover, the California Supreme Court has concluded that such hearings "cannot properly be understood except in the context of the entire dependency process of which it is a part" [*Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 253, 19 Cal. Rptr. 2d 698, 851 P.2d 1307]* , thus strengthening the argument that all hearings in a dependency case are part of the ongoing process. Because it appears clear that under current law none of the normal hearings conducted throughout the dependency process are "new" or "ancillary" hearings, a stipulation of this type is of questionable value in a dependency case.

[4] Dependency Training for Judicial Officers

Legislation required that on or before July 31, 1997, the Judicial Council develop and implement standards for the education and training of all judicial officers regularly hearing dependency proceedings [*Welf. & Inst. Code § 304.7*]. The training program developed by the Judicial Council is to include a component for the training of newly elected or appointed judges as well as an annual training session [*Welf. & Inst. Code § 304.7(a)*]. All referees and commissioners assigned to hear dependency proceedings are to meet the same minimum standards of training and education [*Welf. & Inst. Code § 304.7*]. The Judicial Council is to submit an annual report to the Legislature detailing the compliance of judicial officers with these standards for training and education [*Welf. & Inst. Code § 304.7(c)*]. While no provision is specifically made for the specialized training of attorneys who sit as temporary judges in dependency proceedings, the juvenile court should obviously only use attorneys for such assignments who meet the requirements of *Welf. & Inst. Code § 317.6(c)* for the education and training of dependency attorneys, thereby accomplishing much the same goal.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersRefereesAppointmentsFamily LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency ProceedingsGovernmentsCourtsJudgesGovernmentsCourtsSpecial Judges

California Forms of Pleading and Practice--Annotated

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329
CHAPTER 327 JUVENILE COURTS: JURISDICTION AND GENERAL PROCEDURES
PART II. LEGAL BACKGROUND
B. Juvenile Court Judges and Other Key Personnel

28-327 California Forms of Pleading and Practice--Annotated § 327.21

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§ 327.21 Other Juvenile Court Personnel

[1] Delinquency Proceedings

[a] Probation Officer

[i] Appointment and Term of Office

Probation officers in any county must be nominated by the juvenile justice commission or regional juvenile justice commission of each county in such a manner as the judge of the juvenile court directs. They are then appointed by the juvenile court judge [*Welf. & Inst. Code § 270*]. Probation officers may be removed at any time by the judge of the juvenile court for good cause; the judge of the juvenile court may in his or her discretion at any time remove any officer with the written approval of a majority of the members of the juvenile justice commission [*Welf. & Inst. Code § 270*]. The foregoing provisions will, however, be superseded by provisions in county charters establishing methods of appointment and tenure of office [*Welf. & Inst. Code § 271*].

[ii] Authority to Employ Other Professionals

The probation officer may, within budgetary limitations established by the board of supervisors, employ such psychiatrists, psychologists, and other clinical experts as are required to assist in determining appropriate treatment of minors within the jurisdiction of the juvenile court and in the implementation of such treatment [*Welf. & Inst. Code § 273*].

[iii] Role in Delinquency Proceedings

The probation officer plays a very significant role in delinquency proceedings. The duties of the probation officer are much broader in juvenile court than in adult court. The probation officer has the initial responsibility of investigating at

intake, and making a determination of whether the minor should be released from custody [*Welf. & Inst. Code § 628*]. In most cases, the probation officer has the authority to decide whether a case will be settled at intake by dismissal or informal probation, or whether a petition will be filed [*Welf. & Inst. Code §§ 652, 654*; see further discussion in *Ch. 329, Juvenile Courts: Delinquency Proceedings, § 329.30* et seq.].

Except when waived by the probation officer, judge, or referee and the minor, the probation officer must be present in court to represent the interests of each person who is the subject of a petition to declare such person to be a ward or dependent child upon all hearings or rehearings of his or her case. In connection with such appearances, the probation officer is required to furnish to the court such information and assistance as the court may require. As such, the probation officer will often provide a written report to the court with information regarding appropriate facts and circumstances and a recommendation at each hearing [*see Welf. & Inst. Code § 280* (court may order and consider reports and recommendations by probation officer); in some cases, including dispositional hearings, probation officer is required by statute to prepare social study of minor, including recommendations for disposition)]. The court may order a probation officer to take charge a minor before and after any delinquency hearing or rehearing [*Welf. & Inst. Code § 280*].

The probation officer is also responsible for supervising minors who are placed on probation, either in the family home, a group home, ranch, or other residential facility [*Welf. & Inst. Code §§ 725(a), 727*]. In addition, the probation department runs and administers juvenile hall and other local detention facilities [*Welf. & Inst. Code § 852*; see further discussion in *Ch. 329, Juvenile Courts: Delinquency Proceedings, §§ 329.55, 329.95*].

PRACTICE TIP:

Importance of Probation Department. Given the importance of the probation officer's role in the juvenile proceeding, an attorney who practices in juvenile court should become familiar with the organization and practices of the counties probation department, as well as becoming familiar with individual probation officers.

[b] Prosecuting Attorney

In proceedings brought under *Welf. & Inst. Code § 602* (wardship for criminal offenses), the prosecuting attorney must appear on behalf of the people of the State of California [*Welf. & Inst. Code § 681(a)*; *Cal. Rules of Ct., Rule 5.530(c)*].

In a juvenile court hearing that is based on a petition alleging jurisdiction under *Welf. & Inst. Code § 601* (wardship for minors habitually disobedient or truant) and in which the minor who is the subject of the hearing is represented by counsel, the prosecuting attorney may, with the consent or at the request of the juvenile court judge or at the request of the probation officer with the consent of the juvenile court judge, appear and participate in the hearing to assist in the ascertaining and presenting of the evidence [*Welf. & Inst. Code § 681(b)*; *Cal. Rules of Ct., Rule 5.530(c)*].

[2] Dependency Proceedings

[a] Social Worker

In most counties, the responsibilities of the probation officer (discussed in § 327.21[1][a]) for dependency cases have been delegated by the county board of supervisors to the social services department pursuant to *Welf. & Inst. Code § 272*. Thus, just as the probation officer serves as the juvenile court's investigatory and supervisorial arm in delinquency proceedings, the social worker serves as an arm of the juvenile court in dependency proceedings [*see In re Malinda S. (1990) 51 Cal. 3d 368, 376-377, 272 Cal. Rptr. 787, 795 P.2d 1244]* . This is also true for an Indian social worker of a tribe which has entered into an agreement with the State Department of Social Services pursuant to *Welf. & Inst. Code § 10553.1* concerning child welfare services or foster care payments [*Welf. & Inst. Code §§ 215, 272(a)(2), 306(a)*]. The social worker's role in dependency proceedings, however, is not limited to that of serving as an arm of the court. The social worker has many roles within the dependency system. As noted by one appellate court, the social worker plays a

" 'hybrid' role in dependency proceedings, exercising both executive and judicial functions" [*In re Ashley M. (2003) 114 Cal. App. 4th 1, 7, 7 Cal. Rptr. 3d 237]* .

For a detailed discussion of the roles of the social worker in dependency proceedings, see *Ch. 328, Juvenile Courts: Dependency Proceedings, § 328.63*.

[b] Petitioner's Attorney

With the transfer in most counties of responsibility for dependency cases from the probation department to the social services department (as discussed in § 327.21[a]) [*Welf. & Inst. Code § 272*], the representation for the petitioner in dependency cases is now routinely handled by the county counsel's office or by counsel contracted for by the county counsel's office. In the City and County of San Francisco the petitioner is represented by the Office of the City Attorney. The prosecuting attorney statutorily may still represent the petitioner [*see Welf. & Inst. Code § 318.5* and discussion in § 327.21[1][b]]. Historically, even when the prosecuting attorney was involved in dependency cases it did not technically represent the petitioner. Instead, it assisted the petitioner and the juvenile court in the presentation of evidence. This was consistent with the prosecuting attorney representing the People of the State of California while also assisting the juvenile court and the county social services agency.

In the few counties where the prosecuting attorney is still involved in dependency cases, his or her involvement is usually as counsel for the child [*Welf. & Inst. Code § 317(c)*]. The fact that a prosecuting attorney represents the child in a dependency proceeding and investigates or files a criminal complaint against a parent or other perpetrator of abuse or neglect that is related to the facts from which the dependency case arises does not in and of itself constitute a conflict of interest [*Welf. & Inst. Code § 317(c)*]. If, however, a prosecuting attorney has appeared in a delinquency proceeding involving the minor, neither that prosecuting attorney nor any attorney from that office may represent the child in any dependency proceeding [*Welf. & Inst. Code § 681.5*].

[c] Court Officer

Many counties use court officers to assist the court in handling its dependency cases. These court officers are social workers employed by the social services agency but assigned to work at the court rather than carrying cases. Court officers may appear in lieu of or in addition to the social worker handling the case. The actual role of the court officer varies greatly from county to county. In some counties, the court officers are carefully selected from amongst the "best and the brightest" of social workers and are given a great deal of authority by the agency to work to resolve cases. Moreover, experienced court officers frequently recognize when social worker's reports are missing information, anticipate the court's need for additional information, and take steps to have that information made available for the court. Some courts also rely heavily on court officers to serve as a liaison between the court and the social services agency. In those counties where the court officer performs these types of functions, the court officer becomes an integral part of the court's team while still being a member of the social services agency. This function is consistent with the social worker's dual role as a party to dependency proceedings and as the court's investigative and supervisorial arm [see discussion of social worker's multiple roles in Ch. 328, *Juvenile Courts: Dependency Proceedings*, § 328.63]. At the very least, court officers normally assist the court in calendar management by keeping track of the attorneys and parties present for waiting cases and calling cases that are ready for hearing. Court officers should communicate with the court to keep the court informed of the status of cases awaiting hearing and may even announce cases and appearances for the record.

PRACTICE TIP:

Court Officers as Sources of Information. Court officers are excellent source of information regarding the policies and practices of both the court and the social services agency. In the counties using them, court officers are able to further assist counsel by advising who is handling various aspects of the case and identifying the persons to contact for assistance with problems or services. Thus, in addition to

helping all attorneys to get their cases in for hearing, court officers are a particularly important source of information for counsel unfamiliar with local dependency practice.

For a thorough discussion of the role and responsibilities of the court officer in juvenile court proceedings, see California Ctr. For Jud. Educ. and Research, California Juvenile Court Deskbook (3d ed. 1989) § 6.7 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureJuvenile OffendersJuvenile ProceedingsGeneral OverviewFamily LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency Proceedings

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PART II. LEGAL BACKGROUND
B. Juvenile Court Judges and Other Key Personnel

28-327 California Forms of Pleading and Practice--Annotated § 327.22

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.22 Appointment of Private Counsel

[1] In County With Public Defender

In proceedings in which it is necessary to appoint counsel for either the minor or the parents who desire but are unable to employ counsel [*Welf. & Inst. Code §§ 317-318* (dependency proceedings), 633-634.6 (delinquency proceedings)], and the proceeding is in a county that has a public defender, the court is authorized to appoint and order compensation for private counsel only after the public defender has refused to represent the individuals involved [*In re J. G. L. (1974) 43 Cal. App. 3d 447, 452-453, 117 Cal. Rptr. 799* ; *but see Welf. & Inst. Code § 317(g)-(h)* (use of public defender for minors and alternate public defender for parents in county of the third class)].

[2] Compensation

In any case in which the court does appoint counsel to represent any person who desires but is unable to employ counsel, counsel will receive a reasonable sum for compensation and for necessary expenses, the amount of which is determined by the court and paid out of the general fund of the county [*Welf. & Inst. Code § 218*].

[3] Duties

Penal Code § 1240.1 imposes special duties on trial counsel representing an indigent defendant in a juvenile court proceeding, including initiating an appeal. For discussion, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 101, *Appeal* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselAppointmentsCriminal Law & ProcedureJuvenile OffendersJuvenile ProceedingsGeneral

OverviewCriminal Law & ProcedureCounselAssignmentFamily LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency Proceedings

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28-327 California Forms of Pleading and Practice--Annotated §§ 327.23-327.29

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

[Reserved]

§§ 327.23[Reserved]

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28-327 California Forms of Pleading and Practice--Annotated § 327.30

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.30 Filing Papers and Petitions

[1] Filing Fees

There is no fee for filing a petition with the juvenile court, nor may any fees be charged by any public officer for his or her services in filing or serving papers or for the performance of any duty, except where the sheriff transports a person to a state institution. If the judge of the juvenile court orders that a ward or dependent child go to a state institution without being accompanied by an officer or that a ward or dependent child be taken to an institution by the probation officer or parole officer or by some other suitable person, all expenses necessarily incurred will be allowed and paid in the same manner and from the same funds as such expenses would be allowed and paid were such transportation effected by the sheriff [*Welf. & Inst. Code § 212*].

[2] Facsimile Filing

Facsimile filing in juvenile court proceedings became a limited option effective January 1, 1999, for those courts permitting it by local rule or other written instruction. Generally, only petitions under *Welf. & Inst. Code §§ 300, 601, 602, 342, 387, 388, 777*, and *778* are eligible for filing by facsimile. Other documents may be filed by facsimile if permitted by local rule or written instruction [*Cal. Rules of Ct., Rule 5.522(c)*].

No one other than the following expressly designated persons and agencies may file permitted documents by facsimile [*Cal. Rules of Ct., Rule 5.522(d)*]:

- Any named party.
- Any attorney of record.
- The county welfare department.

- The probation officer.
- The office of the district attorney.
- The office of the county counsel.
- A Court-Appointed Special Advocate (CASA).

Every "fax" [*Cal. Rules of Ct., Rule 5.522(b)(4)*] filing must be accompanied by a cover sheet, sent first [*Cal. Rules of Ct., Rule 5.522(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency Proceedings

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28-327 California Forms of Pleading and Practice--Annotated § 327.31

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.31 Conduct of Juvenile Court Proceeding

[1] Expeditious and Nonadversarial Conduct Generally Required

The court must control all proceedings with a view to the expeditious and effective ascertainment of the jurisdictional facts and of all information relevant to the present condition and welfare of the minor [*Cal. Rules of Ct., Rule 5.534(a)*; *see also Jeff M. v. Superior Court (1997) 56 Cal. App. 4th 1238, 66 Cal. Rptr. 2d 343]* . Unless there is a contested issue of law or fact, the proceedings must be conducted in a nonadversarial atmosphere [*Welf. & Inst. Code §§ 350(a), 680*; *Cal. Rules of Ct., Rule 5.534(b)*].

[2] Special or Separate Session Required

All juvenile court proceedings must be heard at a special or separate session of the court. No other matter may be heard at that session [*Welf. & Inst. Code §§ 345* (dependency proceedings), 675 (delinquency proceedings); *Cal. Rules of Ct., Rule 5.534(a)*].

[3] Persons Entitled to Be Present

The following persons are entitled to be present at juvenile court proceedings [*Welf. & Inst. Code §§ 280, 332, 347, 349, 353, 656, 656.5, 658, 677, 679, 681, 700*; *Cal. Rules of Ct., Rule 5.534(b)*]:

- The minor.

- All parents, de facto parents, and guardians of the minor, or if no parent or guardian resides within the state, or their place of residence is not known, any adult relative residing within the county or, if none, the adult relative residing nearest to the court.

- Counsel representing the minor or the parent, de facto parent, guardian, or adult relative.

- The probation officer or social worker [see discussion in *§ 327.21[1][a], [2][a]*].

- The prosecuting attorney when required in proceedings under *Welf. & Inst. Code §§ 601, 602* [see discussion in *§ 327.21[1][b]*].

- The petitioner's attorney in proceedings under *Welf. & Inst. Code § 300* [see discussion in *§ 327.21[2][b]*].

- Any court-appointed special advocate.

- A representative of the Indian child's tribe.

- The court clerk.

- The official court reporter.

- At the court's discretion, a bailiff.

- Any other person entitled to notice under *Welf. & Inst. Code §§ 290.1* and *290.2*.

- The victim, in proceedings under *Welf. & Inst. Code § 602* [see discussion in Ch. 329, *Juvenile Courts: Delinquency Proceedings*].

[4] General Rule Excluding Public

Unless requested by the minor and by any parent, guardian, or adult relative present, the public must not be admitted to a juvenile court hearing. The judge or referee may nevertheless admit any person it deems to have a direct and legitimate interest in the particular case or work of the court [*Welf. & Inst. Code §§ 346* (dependency proceedings), 676(a) (delinquency proceedings); *Cal. Rules of Ct., Rule 5.530(e)*; *see, e.g.,* discussion in *§ 327.14[2][a][ii]* (probation officer authorized to employ psychologist or other professional to assist in determining treatment for minor)].

In dependency proceedings, the court may also admit persons the parent or guardian has requested be admitted if the child has also requested the presence of such persons or consents to their presence [*Cal. Rules of Ct., Rule 5.530(e)(1)*].

In delinquency proceedings, the public must be admitted as it would be to trials in criminal court when the minor is charged with specified serious felonies [*Welf. & Inst. Code § 676(a)*; *see also* discussion in *Ch. 329, Juvenile Courts: Delinquency Proceedings, § 329.13*].

[5] Media Access

In deciding whether to allow media access, the primary factor that a trial court must consider is the best interests of the minor. The court must balance those interests against the social values promoted by allowing public or press access to the proceedings. Generally, the court should allow press access unless there is a reasonable likelihood that press access will be harmful to the child's best interest in the case [*San Bernardino County Dep't of Public Soc. Servs. v. Superior Court (1991) 232 Cal. App. 3d 188, 207-208, 283 Cal. Rptr. 332]* .

In applying these principles to the specific facts of the case, the court may consider factors such as the following [*San Bernardino County Dep't of Public Soc. Servs. v. Superior Court (1991) 232 Cal. App. 3d 188, 207-208, 283 Cal. Rptr.*

332] :

- The minor's age.
- The nature of the allegations.
- The extent of any current and expected publicity, and any effect of the publicity on the children and on family reunification.
- The feasibility of permitting press access to part of the proceeding and excluding the press from other portions.

In an attempt to protect the confidentiality of a minor, some juvenile courts order that the media not disclose the name or likeness of the minor. However, the juvenile court may not prohibit the media from disclosing the name and image of the minor when that information has already lawfully been made known to the media prior to the court hearing, unless there is a reasonable likelihood of substantial prejudice to the minor's right to receive a fair or impartial trial [KGTV Channel 10 v. *Superior Court (1994) 26 Cal. App. 4th 1673, 1684, 32 Cal. Rptr. 2d 181]* .

Although the *First Amendment* right of public access does not extend to juvenile delinquency or dependency proceedings, the judge may allow the media to attend if he or she determines that the media have a direct and legitimate interest in the particular case or work of the court [*see San Bernardino County Dep't of Public Soc. Servs. v. Superior Court (1991) 232 Cal. App. 3d 188, 194-196, 283 Cal. Rptr. 332* (dependency proceeding)]. The media has a right to be at any proceeding that the court has otherwise opened to the public [*Welf. & Inst. Code § 676(a)*; see discussion in § 327.31[4]].

Because the court has no power to restrict the right of the press to investigate and publish information that has been lawfully obtained, the judiciary may not prohibit the publication of a juvenile's name and picture that the media obtained lawfully. Nor may the court circumscribe the publication of other information obtained lawfully, the circumstances under which the media may interview the participants in the proceedings, or all press conduct that might interfere with the reunification process of the family. These conditions violate *U.S. Const., amend. I* [*San Bernardino County Dep't of Public Soc. Servs. v. Superior Court (1991) 232 Cal. App. 3d 188, 206-207, 283 Cal. Rptr. 332]* .

The juvenile court may allow media access even if the parties have not so requested. The court may also permit media access over the objection of the parties to the proceeding [*see Welf. & Inst. Code § 346*; *San Bernardino County Dep't of Public Soc. Servs. v. Superior Court (1991) 232 Cal. App. 3d 188, 205 n.10, 283 Cal. Rptr. 332]* . One appellate court has noted that allowing media access in juvenile proceedings promotes the fairness of the proceeding, improves juvenile court practice, and serves to check abuse of judicial and governmental regulation that may interfere with the constitutional right of parents to decide how to raise their children. The court also noted that public access may discourage perjury and encourage witnesses to come forward voluntarily, improving the accuracy of the fact-finding process. Furthermore, the court noted that media access provides an outlet for community reaction and concerns and a means for educating the public about the system [*see San Bernardino County Dep't of Public Soc. Servs. v. Superior Court (1991) 232 Cal. App. 3d 188, 201-203, 283 Cal. Rptr. 332]* . Since this decision, California has amended *Welf. & Inst. Code § 300.2* to clarify that the provisions of the juvenile court law ensuring the confidentiality of juvenile proceedings and records "are intended to protect the privacy rights of the child." Thus, in any decision regarding possible public or media access, the juvenile court must consider the privacy rights of the child.

Professor John E.B. Myers, a leading expert in evidence in child abuse and neglect cases, has stressed the importance of child welfare professionals developing and maintaining good relations with the media. As he noted, "it is a mistake to underestimate the importance of good relations with the media, and through the media, with the public" [Myers, The Backlash: Child Protection Under Fire (Sage 1994) ch. 7, The Literature of the Backlash, p. 102]. He went on to write,

"Confidentiality is important in child protection. Nevertheless, the complex web of confidentiality laws puts a counterproductive gag on CPS. Changes in confidentiality are needed so CPS can defend itself when unfairly attacked. Moreover, changes in confidentiality laws are needed so CPS can showcase its many successes. Finally, changes are needed to remove the incentive to hide mistakes behind the mask of confidentiality" [Myers, The Backlash: Child Protection Under Fire (Sage 1994) ch. 7, The Literature of the Backlash, p. 102]. California is considering such changes. In 1999 hearings were held by the legislature on this important topic. The future of California law on this issue, however, is uncertain. This is an area that should be watched for further developments.

PRACTICE TIP:

Media Access May Be Beneficial. As all who work in the dependency system for any length of time are aware, the system is not without its problems, many of which are caused by a lack of resources and overwhelming caseloads for social workers, attorneys and courts alike. Yet, unlike law enforcement agencies, prosecutors' offices and criminal courts, the juvenile dependency agencies, offices and courts are rarely considered "public safety" by society as a whole or by the powers in government who make budget decisions. To some extent, the same can be even be said regarding the delinquency system. But the juvenile dependency and delinquency systems are vital to the safety of the public and of the public's most vulnerable members; its children. Unless they are recognized as such, it is doubtful that the delinquency and dependency systems will receive the funding and resources they require to adequately address the needs of the children and families they serve. The potential benefits of valid criticism by the media aside, an informed media producing accurate coverage may be a necessary first step in bringing about the recognition that the dependency and delinquency systems are public safety systems. While courts and professionals within these systems are justifiably concerned about media access in light of the diatribes that have resulted from media coverage in the past, not all media access results in caustic or inaccurate coverage. For an excellent example of balanced and sensitive reporting by media representatives, see John Hubner and Jill Wolfson, *Somebody Else's Children: The Courts, The Kids, And The Struggle To Save America's Troubled Families* (Crown 1996). While juvenile courts should be quick to deny access to those media representatives who have an agenda to prove or an obvious bias against the system, they should be willing to seriously consider those requests for access by media representatives who are open to learning and committed to accurate and balanced reporting. The days when the juvenile justice and child protection systems of this state can afford to remain cloaked with a blanket of confidentiality are over. The informed support of the public and of governmental leaders is necessary if these vital public safety systems are to receive the public confidence and resources they require. Opening the doors to the public by allowing access to responsible media representatives may be a necessary first step.

It has also been held that the juvenile court can authorize the release to the media of records from juvenile court files pursuant to *Welf. & Inst. Code § 827* consistent with the child's best interests [*In re Keisha T. (1995) 38 Cal. App. 4th 220, 231-234, 44 Cal. Rptr. 2d 822]* . Before juvenile court records are released to the media an in camera review of those documents must be conducted pursuant to *Cal. Rules of Ct., Rule 5.552(b).* This procedure ensures that the juvenile court properly considers and balances the interests of the child against the need of the requesting party in making any disclosure of records [*In re Keisha T. (1995) 38 Cal. App. 4th 220, 239-241, 44 Cal. Rptr. 2d 822]* . Although the juvenile court can normally issue protective orders in conjunction with any release of records or access [*Cal. Rules of Ct., Rule 5.552(b)*], if information is lawfully released to the media the court cannot restrain the media from publishing that information [*In re Keisha T. (1995) 38 Cal. App. 4th 220, 240, 44 Cal. Rptr. 2d 822 , citing* KGTV Channel 10 v. *Superior Court (1994) 26 Cal. App. 4th 1673, 1682, 32 Cal. Rptr. 2d 181* , and *San Bernardino County Dep't of Public Soc. Servs. v. Superior Court (1991) 232 Cal. App. 3d 188, 206, 283 Cal. Rptr. 332]* .

PRACTICE TIP:

Minor's Right to Confidentiality. Counsel should, when appropriate, argue that media access infringes on the minor's right to confidentiality and privacy [*Welf. & Inst. Code § 300.2*]. Dependency proceedings

often involve very private and personal information regarding minors and their families which if exposed to the public could be detrimental to the welfare of the minor. Wardship proceedings have historically been confidential in order to protect a minor from being labeled as a criminal for life based on something he or she did at a young age, and as contrary to the minor's rehabilitative interest. Such arguments have much validity and carry great weight since the juvenile court must use the best interest of the child as its primary concern in ruling on such issues. Nevertheless, the court may in an appropriate case order access notwithstanding such objections on behalf of the minor [*San Bernardino County Dep't of Public Soc. Servs. v. Superior Court (1991) 232 Cal. App. 3d 188, 193, 199-200, 207-208, 283 Cal. Rptr. 332]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechFree PressPublic AccessCriminal Law & ProcedureJuvenile OffendersJuvenile ProceedingsGeneral OverviewFamily LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency Proceedings

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28-327 California Forms of Pleading and Practice--Annotated § 327.32

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.32 Service of Written Findings and Orders

All written findings and orders of the court must be served by the clerk of the court personally or by first-class mail within three judicial days of their issuance, on the petitioner, the minor or the minor's counsel, the parent or the parent's counsel, and the guardian or the guardian's counsel [*Welf. & Inst. Code § 248.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency Proceedings

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§ 327.33 Court Reporter Transcripts

[1] Required in Proceedings Before Judge

If a juvenile court proceeding is before the judge of the juvenile court, an official court reporter must be present and take down all proceedings [*Welf. & Inst. Code §§ 347* (dependency proceedings), *677* (delinquency proceedings); *Cal. Rules of Ct., Rule 5.532(a)*].

[2] Directive in Proceedings Before Referee

If the hearing is before a referee, and the referee is not acting as a temporary judge (see discussion in *§ 327.20[2]*), a judge may direct an official court reporter to be present and to take down all proceedings [*Welf. & Inst. Code §§ 347, 677*; *Cal. Rules of Ct., Rule 5.532(b)*].

[3] Preparation of Transcript

If directed by the judge or requested by the person on whose behalf the petition was brought, by his or her parent or legal guardian, or by the attorneys of such persons, the court reporter must, within a reasonable time after the hearing as the court may designate, write out the notes or such specific portions as requested in plain and legible longhand or by typewriter or other printing machine and certify the transcript as being correctly reported and transcribed. If directed by the court, the reporter must file the transcript with the clerk of the court [*Welf. & Inst. Code §§ 347, 677*; *Cal. Rules of Ct., Rule 5.532(c)*; *see Davis v. Superior Court (1985) 166 Cal. App. 3d 13, 17, 212 Cal. Rptr. 111* (parent's right to transcript copy as absolute); *but see In re R. (1978) 83 Cal. App. 3d 977, 980-981, 148 Cal. Rptr. 145* (juvenile properly notified of right to review under *Welf. & Inst. Code § 252* within 10 days after service of copy of referee's order and findings, but who fails to request rehearing as waiving right to have transcript on appeal)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersCourt ReportersGeneral OverviewFamily LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency ProceedingsGovernmentsCourtsCourt PersonnelGovernmentsCourtsCourt Records

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28-327 California Forms of Pleading and Practice--Annotated § 327.34

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.34 Confidentiality of Juvenile Records

[1] Limits on Disclosure

The legislature has stated that the provisions of the juvenile court law ensuring the confidentiality of juvenile court proceedings and records "are intended to protect the privacy rights of the child" [*Welf. & Inst. Code § 300.2*]. Nevertheless, discovery of juvenile records and information is often sought by attorneys involved in civil or criminal litigation or by others for a variety of purposes. Such records are not subject to public access or to civil or criminal subpoena, however. Instead, they may only be obtained or inspected by the filing of a petition with the juvenile court pursuant to *Welf. & Inst. Code § 827* and *Cal. Rules of Ct., Rule 5.552* [*see also Welf. & Inst. Code § 828* (records in possession of law enforcement agency)]. For instance, in a case in which a father who had molested his daughter was a school teacher, petitions under *Welf. & Inst. Code § 827* were used to permit disclosure of information regarding the molests to the California Commission on Teacher Credentialing [*see In re R.G. (2000) 79 Cal. App. 4th 1408, 94 Cal. Rptr. 2d 818]* .

Sometimes efforts are made to obtain confidential information contained in juvenile records indirectly, such as by calling individuals as witnesses and seeking the information through testimony. As has been said in other areas of law, a litigant "may not obtain indirectly what is directly" made confidential by statute [*City of San Diego v. Superior Court (1981) 136 Cal. App. 3d 236, 239, 186 Cal. Rptr. 112* ; *see also Fletcher v. Superior Court (2002) 100 Cal. App. 4th 386, 403, 123 Cal. Rptr. 2d 99]* . The statutes for confidentiality of information would serve no purpose if the information "could be obtained by the simple expedient of asking" for the information orally [*City of San Diego v. Superior Court (1981) 136 Cal. App. 3d 236, 239, 186 Cal. Rptr. 112]* . Thus, the requirements of *Welf. & Inst. Code § 827* must be met when the testimony of social workers and others from the dependency system is sought in civil or criminal proceedings.

Not all information within the juvenile dependency and justice systems is covered by *Welf. & Inst. Code § 827,*

however, and thus not all testimony by persons connected to the dependency system is covered. For instance, in one criminal prosecution the defense wanted to present testimony by a child-victim's former foster mother regarding her own observations of the child in foster care and how the child frequently lied and told half-truths while in her care. The trial court held the testimony inadmissible. The Court of Appeal, however, found the former foster mother's testimony would not have come from information in the juvenile court file, but instead were her own "percipient observations." Thus, the testimony was not covered by *Welf. & Inst. Code § 827* [*People v. Espinoza (2002) 95 Cal. App. 4th 1287, 1314-1316, 116 Cal. Rptr. 2d 700]* .

Effective January 1, 2000, *Welf. & Inst. Code § 827(e)* provides that a "juvenile case file" within the protective provisions of that section includes:

- The petition filed in the juvenile court proceeding.
- Reports of the probation officer.
- All other documents filed in the case.
- All other documents made available to the probation officer in making his or her report and thereafter retained by the probation officer.
- All other documents made available to the judge, referee, or other hearing officer and thereafter retained by that judicial officer.

Prior case law has held the records subject to this general protection include [*see* *Lorenza P. v. Superior Court (1988) 197 Cal. App. 3d 607, 610-611, 242 Cal. Rptr. 877* ; *City of San Diego v. Superior Court (1981) 136 Cal. App. 3d 236, 239, 186 Cal. Rptr. 112]* :

- Those documents contained in the juvenile court file.
- Probation and social services records.
- Any reports made available to probation and social services in connection with an investigation in a juvenile case.
- Testimony concerning the content of confidential records.

The protection of juvenile records applies even if proceedings are never initiated in the juvenile court [*see* *In re Elijah S. (2005) 125 Cal. App. 4th 1532, 1548-1551, 24 Cal. Rptr. 3d 16* ; *Lorenza P. v. Superior Court (1988) 197 Cal. App. 3d 607, 610-611, 242 Cal. Rptr. 877* , citing *T.N.G. v. Superior Court (1971) 4 Cal. 3d 767, 780-781, 94 Cal. Rptr. 813, 484 P.2d 981* , and *Wescott v. County of Yuba (1980) 104 Cal. App. 3d 103, 106-109, 163 Cal. Rptr. 385]* . The *Lorenza P.* case suggests the proper procedure for access to juvenile records when juvenile court proceedings were never initiated is to petition the juvenile court, following the procedures set forth in *Evid. Code § 915(b)*, and utilizing the balancing test of *Evid. Code § 1040(b)(2)* [*Lorenza P. v. Superior Court (1988) 197 Cal. App. 3d 607, 611, 242 Cal. Rptr. 877]* . The *Lorenza P.* approach is sound and may be the better view. It is the minority view, however. Other case law supports the use of *Welf. & Inst. Code § 827* for this purpose [*In re Elijah S. (2005) 125 Cal. App. 4th 1532, 1548-1551, 24 Cal. Rptr. 3d 16* ; *Wescott v. County of Yuba (1980) 104 Cal. App. 3d 103, 106, 163 Cal. Rptr. 385* , *citing* *T.N.G. v. Superior Court (1971) 4 Cal. 3d 767, 780-781, 94 Cal. Rptr. 813, 484 P. 2d 981]* . Although *Welf. & Inst. Code § 827* and *Cal. Rules of Ct., Rule 5.552* do not make specific reference to juvenile records if proceedings were never filed in juvenile court, common practice and the majority view is to utilize the procedures in *Welf. & Inst. Code § 827* for the juvenile court's determination of whether to allow access to the records whether juvenile court

proceedings were instituted or not. If, however, juvenile court proceedings were never instituted, the party seeking disclosure of juvenile records bears the burden of showing the child came under the juvenile court's jurisdiction [*In re Elijah S. (2005) 125 Cal. App. 4th 1532, 1544-1545, 24 Cal. Rptr. 3d 16]* . While not likely to occur frequently, in some cases this can turn what should be a straightforward discovery hearing into a contested hearing on the issue of whether the minor came within the juvenile court's jurisdiction. No case law sets forth the burden of proof on the threshold jurisdictional issue in such circumstances [*see In re Elijah S. (2005) 125 Cal. App. 4th 1532, 1545, fn. 10, 24 Cal. Rptr. 3d 16]* . The proper burden of proof should be preponderance of the evidence [*Evid. Code § 115*]. This is consistent with the burden for establishing a child comes within the juvenile court's jurisdiction in dependency cases under *Welf. & Inst. Code § 300* [*Welf. & Inst. Code § 355(a)*; *Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 248, 19 Cal. Rptr. 2d 698, 851 P.2d 1307]* .

Certain court personnel and others are authorized to inspect juvenile records without first filing a petition with the juvenile court and obtaining a court order. These include [*Welf. & Inst. Code § 827(a)(1)*; *Cal. Rules of Ct., Rule 5.552*]:

- Juvenile court personnel.

- The district attorney, a city attorney or city prosecutor who is authorized to prosecute criminal or juvenile cases under state law.

- The minor who is the subject of the juvenile proceedings.

- The minor's parents or guardian.

- The attorneys for the parties, including appellate counsel for the parties in any appellate case relating to the juvenile proceedings.

- Any judicial officers, law enforcement officers, and probation officers involved in the criminal or juvenile proceedings involving the minor.

- The county counsel, city attorney, or other attorney representing the social services agency in a dependency action.

- The superintendent or a designee of the school district where the minor is enrolled or attending school.

- Child protective agencies.

- The State Department of Social Services to carry out its duty to oversee county social services agencies, children in foster care or receiving foster care assistance, and children in out-of-state placements.

- Legal staff or special investigators who are peace officers employed by or serving as an authorized representative of the State Department of Social Services as necessary to inspect, license, and investigate community care facilities.

- Members of children's multidisciplinary teams.

- Persons or agencies providing treatment or supervision of the minor.

- A judge, commissioner, other hearing officer assigned to a family law case that has custody or

visitation issues relating to the minor.

- A family court mediator assigned to and actively involved in the family law case involving the minor.

- An court appointed evaluator or other person conducting a court connected child custody evaluation, investigation, or assessment pursuant to *Fam. Code §§ 3111* or *3118*.

- Counsel appointed for the minor in the family law case. The juvenile court clerk may require counsel to provide a certified copy of the order appointing him or her as counsel for the minor prior to allowing the minor's counsel to inspect the file.

- A court-appointed investigator who is actively participating in a guardianship case involving a minor pursuant to *Prob. Code § 1500 et seq.* and acting within the scope of the investigator's duties in that case.

- A local child support agency for the purpose of establishing paternity and for establishing and enforcing child support orders.

- Juvenile justice commissions [*Welf. & Inst. Code § 827(a)(1)*].

PRACTICE TIP:

Local Rules and Standing Orders for Access and Copies. In some counties the juvenile court has recognized that certain individuals or organizations having a legitimate need for access to juvenile court records on an ongoing basis are not included in the list of persons and agencies authorized access. In such circumstances, some courts have adopted local rules or made standing orders for disclosure. For example, a county grand jury is not an organization authorized by statute to have access to juvenile court information and its subpoena power cannot be used to gain access to such records [*People v. Superior Court (2003) 107 Cal. App. 4th 488, 492-496, 132 Cal. Rptr. 2d 144]* . Rather than require a grand jury to file a petition pursuant to *Welf. & Inst. Code § 827* every time it wants access to juvenile records, some juvenile courts have adopted local rules or issued standing orders pursuant to that section that juvenile court records are to be made available to the county grand jury on request. This not only helps to reduce the court's workload, but may also be beneficial in maintaining positive relations with a grand jury or other agency that has a legitimate reason for seeking access to juvenile court records on an ongoing basis yet does not wish to have to file a petition for disclosure each time it seeks such access. Nevertheless, it is also inconsistent with the case-by-case weighing required by *Welf. & Inst. Code § 827*. Even with appropriate documentation on file with the court to establish the "good cause" for the order, such local rules or orders, while well intentioned, are of questionable validity [*cf. Welf. & Inst. Code § 265* (rules cannot be inconsistent with law)]. The same is true for local rules and orders that allow copies of juvenile court records to be disseminated when the statute itself requires a petition be filed before such release [*In re Gina S. (2005) 133 Cal. App. 4th 1074, 1082-1084, 35 Cal. Rptr. 3d 277* (right to inspect does not include right to copy)]. Thus, while such local rules and orders may be practical, the better approach is to seek legislative change of the statute.

Historically, the right to inspect juvenile records did not automatically mean a right to copies of the records. Prior to January 1, 2008, the language of the statute authorizing juvenile case files to be "inspected" by certain persons did not include that such documents could be "copied" [*In re Gina S. (2005) 133 Cal. App. 4th 1074, 1082-1084, 35 Cal. Rptr. 3d 277* , citing Opinion No. 02-103, 85 Ops. Cal. Atty. Gen. 194 (Sept. 10, 2002)]. Effective January 1, 2008, however, some of the persons entitled to inspect juvenile case files under *Welf. & Inst. Code § 827(a)(1)*, may also receive copies of the documents [*Welf. & Inst. Code § 827(a)(5)*]. These include court personnel, prosecuting attorneys under state law, the minor who is the subject of the proceedings, that minor's parents or guardians, the attorneys for the

parties, judicial officers, probation officers, and law enforcement officers actively participating in proceedings involving the minor, county counsel or other counsel representing the petitioning agency in the dependency action, members of child protective agencies, and the State Department of Social Services [*Welf. & Inst. Code § 827(a)(5)*; *Cal. Rules of Ct., Rule 5.552(b)(1)*]. All other persons listed in *Welf. & Inst. Code § 827(a)(1)* as being entitled to inspect juvenile case still must obtain a court order to receive copies of the documents [*Cal. Rules of Ct., Rule 5.552(b)(2)*]. Regardless, in all cases persons receiving copies of the juvenile case files may not disseminate the documents to any person or agency not authorized to receive documents pursuant to *Welf. & Inst. Code § 827* [*Welf. & Inst. Code § 827(a)(4)*].

Notwithstanding the requirements for confidentiality set forth in *Welf. & Inst. Code § 827(a)*, when a minor has been found by the juvenile court to have committed a felony the court is required within seven days to provide notice of the finding to the superintendent of the school district the minor attends, the sheriff of the county in which the minor resides, and the sheriff of the county where the act was committed [*Welf. & Inst. Code §§ 827(b)(2), 827.7(a)*]. Additionally, where the true finding is that the minor committed a misdemeanor involving "curfew, gambling, alcohol, drugs, tobacco products, carrying of weapons, assault or battery, larceny, vandalism, or graffiti," such notice is required to be sent to the superintendent of the school district the minor attends [*Welf. & Inst. Code § 827(b)(2)*]. All such information is to be kept confidential [*Welf. & Inst. Code §§ 827(b), 827.1*].

In family law proceedings, notwithstanding the requirements of *Welf. & Inst. Code § 827* and *Cal. Rules of Ct., Rule 5.552*, a family court may itself review juvenile records, including reports by social services agencies and law enforcement, as part of its duty pursuant to *Fam. Code § 3011* to require substantial independent corroboration of allegations of abuse by a parent where such allegations have been made in a case in which the family court is called upon to make custody or visitation orders [*Fam. Code § 3011(b)*]. The "best practice" in this regard is for the local juvenile and family courts, in conjunction with law enforcement and social services, to develop a protocol for the sharing of such information and to incorporate the provisions of that protocol in a local rule.

The provisions of *Welf. & Inst. Code § 827* notwithstanding, the county child welfare agency may disclose information from juvenile records to a prospective caregiver if several conditions are met: the agency intends to place the child with the prospective caregiver; the prospective caregiver is willing to become the adoptive parent of the child; and the prospective caregiver has an approved adoption assessment or home study, a foster family home license, certification by a licensed foster family agency, or approval pursuant to *Welf. & Inst. Code §§ 361.2, 361.4* [*Welf. & Inst. Code § 16010(d)(1)*]. The county child welfare agency may also disclose to such a prospective caregiver the placement history and documents that are provided to adoptive parents under *Fam. Code § 8706(a)-(b)* [*Welf. & Inst. Code § 16010(d)(2)*].

[2] Petition for Disclosure

[a] Preparation and Service of Petition

The procedure for petitioning the juvenile court for access to juvenile records is set forth in *Welf. & Inst. Code § 827* and *Cal. Rules of Ct., Rule 5.552*. Judicial Council Form JV-570 must be used for this purpose [*Cal. Rules of Ct., Rule 5.552(c)*; *see § 327.162* for form and discussion]. The petition must identify the specific records sought to be inspected or obtained, based on knowledge, information, and belief that the requested records exist and are relevant to the purpose for which they are sought. In addition, the petition must "describe in detail" the reasons the records are being sought and the relevance to the proceeding or purpose for which they are sought [*Cal. Rules of Ct., Rule 5.552(c)*].

A copy of the petition must be served or attempted to be served either personally or by first class mail on the following individuals, at least five days before the petition is submitted to the juvenile court [*Cal. Rules of Ct., Rule 5.552(d)*; *In re Keisha T. (1995) 38 Cal. App. 4th 220, 235, 44 Cal. Rptr. 2d 822]* :

- County counsel.

- The district attorney.
- The child.
- The attorney of record for the minor if the child is still a ward or dependent of the court.
- The parent or guardian of the child.
- The probation department or social services department as applicable.

If the petition is for the release of juvenile case files in a juvenile dependency case, the due process afforded must include "notice of and an opportunity to file an objection to the release of the record or report to all interested parties" [*Welf. & Inst. Code § 827(a)(3)(B)*].

[b] Review and Determination of Petition

[i] Balancing Test

The juvenile court must review the petition and can grant or deny it summarily, or grant a hearing [*Cal. Rules of Ct., Rule 5.552(e)*]. In determining whether to authorize release of such records, in whole or in part, the court must balance [*Cal. Rules of Ct., Rule 5.552(b)*]:

- The interest of the child and other parties to the juvenile court proceedings.
- The interests of the petitioner who is seeking discovery.
- The interests of the public.

In addition, the juvenile court may only permit disclosure of juvenile records as is necessary, and only if there is a reasonable likelihood that the records will be of substantial relevance to the pending litigation, investigation, or prosecution [*Cal. Rules of Ct., Rule 5.552(b)*].

If the juvenile case file sought pertains to a juvenile dependency matter and is privileged or confidential pursuant to any other state law or federal law or regulation, "the requirements of that state law or federal law or regulation prohibiting or limiting release of the juvenile case file or any portions thereof shall prevail" [*Welf. & Inst. Code § 827(a)(3)(A)*]. In such circumstances, the petition for access still must be filed with the juvenile court, which may only release that portion of the juvenile case file protected by other law if disclosure is not detrimental to the safety, protection, or physical or emotional well being of the "a child who is directly or indirectly connected to the juvenile case that is the subject of the petition" [*Welf. & Inst. Code § 827(a)(3)(A)*]. These requirements, however, are not to be construed to limit the ability of the juvenile court to carry out its responsibilities in juvenile court proceedings [*Welf. & Inst. Code § 827(a)(3)(A)*].

[ii] Third-Party Petitioners

When the petitioner is a third party, such as the media, the juvenile court must be guided by the balancing test in § 327.34[i], but is not bound by it. Although juvenile records are generally confidential, *Welf. & Inst. Code § 827* allows some persons to inspect juvenile records without court order, and for a court to permit inspection by any other person as designated by court order. Thus, the juvenile court has exclusive authority to determine when a release of juvenile records to a third party, such as the media, is appropriate [*In re Keisha T. (1995) 38 Cal. App. 4th 220, 232, 44 Cal.*

Rptr. 2d 822] . Situations in which the latter exercise of authority is appropriate include [*In re Keisha T. (1995) 38 Cal. App. 4th 220, 232-233, 44 Cal. Rptr. 2d 822]* :

- A criminal defendant who needs access to the records to provide a defense, or
- If there are competing interests that require the disclosure of some material in the juvenile records.

There is a conflict between a prosecutor's obligation to disclose exculpatory evidence under federal law [*Brady v. Maryland (1963) 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215]* and the general prohibition against disclosure of juvenile records under *Welf. & Inst. Code § 827*. This conflict has not been addressed by California courts and may not be adequately resolved by a motion for disclosure filed in juvenile court. For a detailed discussion of the *Brady* conflict with *Welf. & Inst. Code § 827*, see *§ 329.15[4]*.

PRACTICE TIP:

The Importance of Record Sealing. Given that juvenile records may be subject to disclosure of information previously thought to be confidential, if the minor is a victim or witness in an adult criminal proceeding, the only way to assure protection of such information may be through record sealing. As a minimum, the court has the discretion to release evidence of moral turpitude conduct for the purpose of impeaching the credibility of the child testifying in criminal proceedings and this evidence may include information otherwise inaccessible under statutes designed to protect confidentiality. Consequently, sealing a child's record may be the only way to protect against disclosure, pursuant to *Welf. & Inst. Code § 827*, and should be pursued whenever allowed by statute. See generally, discussion of record sealing in *§ 329.120*.

[iii] Disclosure to Press

The press may be a party to whom disclosure may be granted, under the court's discretion. Although *Welf. & Inst. Code § 827* contains some anti-dissemination language, the juvenile court may determine, consistent with the best interests of the minors, that records should be released to the press, and in so doing, makes the decision that the public can learn the content of the disclosed records. Nothing in *Welf. & Inst. Code § 827* prohibits the court from making that decision, so long as the court has determined that disclosure is in the best interests of the minor. The juvenile court, then, may find guidance in *Cal. Rules of Ct., Rule 5.552(b)*, described above, but to the extent that this rule limits the discretion of the juvenile court to disclose juvenile records only to those who need them for pending litigation, investigation, or prosecution, regardless of whether disclosure to others is in the best interest of the minor, the rule is restrictive beyond that provided in *Welf. & Inst. Code § 827*, and is to that extent invalid [*In re Keisha T. (1995) 38 Cal. App. 4th 220, 231-235, 44 Cal. Rptr. 2d 822]* .

[iv] Access Requires Showing of Good Cause and Notice

To obtain access to juvenile court records, the petitioner must show good cause, and the minor and other interested parties must be given notice and an opportunity to be heard [*In re Keisha T. (1995) 38 Cal. App. 4th 220, 240, 44 Cal. Rptr. 2d 822* ; *In re R.G. (2000) 79 Cal. App. 4th 1408, 1416, 94 Cal. Rptr. 2d 818* ; *see also Cal. Rules of Ct., Rule 5.552(d)*]. Good cause for disclosure of information contained in juvenile records can be found in a variety of situations. For instance, it is within the court's discretion to permit disclosure of records to a school district regarding a father who had molested his children when that father was a teacher in the school district. In that case, the interest of the public and the school district to protect school children from sexual abuse justified the release of information [*In re R.G. (2000) 79 Cal. App. 4th 1408, 1416-1418, 94 Cal. Rptr. 2d 818]* .

[v] In Camera Hearing and Balancing Test

Any conflict between competing interests can be resolved at an in camera hearing, in which the juvenile court

determines which material, if any, should be disclosed. The court balances the interests of the child, other parties to the court proceedings, the petitioner, and the public in making its decision. A primary concern is the best interests of the child. The juvenile court should make a record of its findings adequate for review of its ruling. If the juvenile court determines that any portion of the records should be disclosed, it should then make appropriate orders specifying the information to be disclosed and the procedure for providing access. The in camera hearing cannot be conducted by a judge pro tem, except on stipulation of the parties [*In re R.G. (2000) 79 Cal. App. 4th 1408, 1417-1418, 94 Cal. Rptr. 2d 818* ; *In re Keisha T. (1995) 38 Cal. App. 4th 220, 240-241, 44 Cal. Rptr. 2d 822* ; *see also Cal. Rules of Ct., Rule 5.552(b)*]. The court's decision to grant or deny a petition for disclosure under *Welf. & Inst. Code § 827* is reviewed under the abuse of discretion standard [*In re R.G. (2000) 79 Cal. App. 4th 1408, 1413, 94 Cal. Rptr. 2d 818* ; *but see Pack v. Kings County Human Services Agency (2001) 89 Cal. App. 4th 821, 838-840, 107 Cal. Rptr. 2d 594* (decision to deny or limit access to records of deceased dependent child reviewed under substantial evidence test)].

PRACTICE TIP:

Request for Review by Judge Temporarily Assigned as Juvenile Court Judge. When disclosure is sought in connection with a pending criminal or civil case, the judicial officer in that case, of course, is not acting as a juvenile court judge and therefore cannot conduct the juvenile court's consideration of the petition for disclosure under *Welf. & Inst. Code § 827* and *Cal. Rules of Ct., Rule 5.552*. Nevertheless, in a complex case, that judge may well be in the best position to determine whether any information in the juvenile court records has sufficient relevance to the pending litigation to merit disclosure. In this event, counsel may wish to consult with the presiding judge of the juvenile court and request that he or she appoint the judge in the pending litigation to sit temporarily as a judge of the juvenile court, for the limited purpose of determining the petition for disclosure of the juvenile court records. Such appointments should, of course, be in writing and made a part of the record.

[vi] Records Pertaining to Deceased Child

Juvenile case files pertaining to a deceased child who was within the juvenile court's jurisdiction pursuant to *Welf. & Inst. Code § 300* "shall be released to the public pursuant to an order by the juvenile court after a petition has been filed and interested parties have been afforded an opportunity to file an objection" [*Welf. & Inst. Code § 827(a)(2)*]. This creates a "veritable presumption in favor of release when the child is deceased" due to "considerations favoring public view, government accountability and reform" [*Pack v. Kings County Human Services Agency (2001) 89 Cal. App. 4th 821, 829, 107 Cal. Rptr. 2d 594]* . Indeed, effective January 1, 2008, the statute includes a statement that this is a presumption in favor of the release of documents when a child is deceased unless a statutory basis for confidentiality is shown to exist [*Welf. & Inst. Code § 827(a)(2)(B)*]. The rules provide that if the request is made by a member of the public the court shall proceed under *Welf. & Inst. Code § 827(a)(1)*, and if the request is made by a member of a county board of supervisors the court shall proceed under *Welf. & Inst. Code § 16502.5* [*Cal. Rules of Ct., Rule 5.553*].

On its face, it appears the provisions of *Welf. & Inst. Code § 827(a)(2)* are limited to deceased children who were dependents of the juvenile court. One case, however, has interpreted it to include any child who came within the juvenile court's jurisdiction pursuant to *Welf. & Inst. Code § 300*, whether dependency proceedings were ever initiated or not [*In re Elijah S. (2005) 125 Cal. App. 4th 1532, 1543-1551, 24 Cal. Rptr. 3d 16]* . If, however, juvenile court proceedings were never instituted, the party seeking disclosure of juvenile records bears the burden of showing the child came under the juvenile court's jurisdiction [*In re Elijah S. (2005) 125 Cal. App. 4th 1532, 1544-1545, 24 Cal. Rptr. 3d 16]* . While not likely to occur frequently, in some cases this can turn what should be a straightforward discovery hearing into a contested hearing on the issue of whether the minor came within the juvenile court's jurisdiction. No case law sets forth the burden of proof on the threshold jurisdictional issue in such circumstances [*see In re Elijah S. (2005) 125 Cal. App. 4th 1532, 1545, fn. 10, 24 Cal. Rptr. 3d 16]* . The proper burden of proof should be preponderance of the evidence [*Evid. Code § 115*]. This is consistent with the burden for establishing a child comes within the juvenile court's jurisdiction in dependency cases under *Welf. & Inst. Code § 300* [*Welf. & Inst. Code § 355(a)*; *Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 248, 19 Cal. Rptr. 2d 698, 851 P.2d 1307]* .

The procedures and time frames for seeking and releasing the records of a deceased child are found in *Welf. & Inst. Code § 827(a)(2)*. Generally, a petition seeking juvenile case files relating to a deceased child must be served not only on the custodian of records, but also on any interested parties, if the petitioner is in possession of their identity and address. On receipt of the petition, the custodian of records must serve a copy of the request on all interested persons not served by the petitioner, if the custodian of records possesses information enabling it to do so [*Welf. & Inst. Code § 827(a)(2)(D)*]. Service by the custodian of records must be done within 10 days. If the custodian of records or any interested party objects to the release of the documents, the party must file and serve an objection on the petitioner within 15 calendar days of the service of the petition [*Welf. & Inst. Code § 827(a)(2)(E)*]. The petitioning party then has 10 calendar days in which to file a reply. The juvenile court must set the matter for hearing no more than 60 calendar days from the date the petition was served on the custodian of records [*Welf. & Inst. Code § 827(a)(2)(F)*]. The petition shall be heard on the basis of the petition, objection, and reply, together with any supporting documents and declarations, and argument. Witnesses will normally not be allowed, but the court may order the appearance of witnesses on its own motion, which may, of course, be at the suggestion of one or more counsel or interested parties. Any decision by the court is reviewable by petition for extraordinary writ filed with the appellate court [*Welf. & Inst. Code § 827(a)(2)(F)*].

If there is information in the file relating to another child or which could identify another child, except information about the deceased child, that information "shall be redacted" prior to release of the file, unless the juvenile court makes an order to the contrary. Further, the juvenile court may limit or prohibit access to the juvenile case file of a deceased dependent child on a showing release of the file or any portion of the file is "detrimental to the safety, protection, or physical, or emotional well-being of another child who is directly or indirectly connected to the juvenile case that is the subject of the petition" [*Welf. & Inst. Code § 827(a)(2)*; *Pack v. Kings County Human Services Agency (2001) 89 Cal. App. 4th 821, 829-830, 107 Cal. Rptr. 2d 594]* . Effective January 1, 2008, it is clear that when considering a request for records concerning a deceased child under these provisions, "no weighing or balancing of the interests of those other than a child is permitted" [*Welf. & Inst. Code § 827(a)(2)(C)*]. The statute imposes an "independent duty" on the juvenile court to seek out the views of interested third parties and to protect the interests of any child "directly or indirectly connected to the case," even if that child is not a dependent of the court [*Pack v. Kings County Human Services Agency (2001) 89 Cal. App. 4th 821, 837, 107 Cal. Rptr. 2d 594]* .

The standard of review on appeal is not clear [*compare In re Elijah S. (2005) 125 Cal. App. 4th 1532, 1541, 24 Cal. Rptr. 3d 16* (standard of review is abuse of discretion) *with Pack v. Kings County Human Services Agency (2001) 89 Cal. App. 4th 821, 838-840, 107 Cal. Rptr. 2d 594* (standard of review is substantial evidence)]. Under either standard, however, the result is likely to be the same.

[vii] Protective Orders

When the juvenile court orders the disclosure of records pursuant to *Welf. & Inst. Code § 827* it should make whatever protective orders are necessary and appropriate [*Cal. Rules of Ct., Rule 5.552(b)* ("The court may issue protective orders to accompany authorized disclosure, discovery, or access.")]. This may even include protective orders to the parent or guardian [*In re Tiffany G. (1994) 29 Cal. App. 4th 443, 450-452, 35 Cal. Rptr. 2d 8* (upholding order of juvenile court to parent of minor not to disclose copies of reports)]. Protective orders will vary and must be decided on a case-by-case basis. Protective orders may include, but are not limited to, requiring the records be limited in use to that purpose the court found constituted good cause for the release of the records, that they not be disclosed to anyone other than the person the court orders disclosure to and that person's counsel, including the investigators and experts used by that counsel, that upon conclusion of the litigation or other purpose for which the records are disclosed, all documents either be returned to the juvenile court or destroyed, and that any court file in the proceedings in which the records are used be sealed [*see Navajo Express v. Superior Court (1986) 186 Cal. App. 3d 981, 986-987, 231 Cal. Rptr. 165]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureJuvenile OffendersJuvenile ProceedingsRecordsFamily LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency Proceedings

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329
CHAPTER 327 JUVENILE COURTS: JURISDICTION AND GENERAL PROCEDURES
PART II. LEGAL BACKGROUND
C. General Juvenile Court Procedures

28-327 California Forms of Pleading and Practice--Annotated § 327.35

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§ 327.35 Other Determinations of Confidentiality

The juvenile court may also be called on to make determinations regarding the confidentiality of other information. In one juvenile dependency case a petition had been filed under *Welf. & Inst. Code § 300* alleging the father had caused the death of another child. That child's death was still being investigated regarding the cause of death and possible criminal charges. The father served subpoenas duces tecum on the local law enforcement and coroner agencies, seeking to discover forensic evidence and investigative reports from the ongoing criminal investigation that was not provided him by social services in the discovery he had been provided in the dependency case [*Michael P. v. Superior Court (2001) 92 Cal. App. 4th 1036, 1040-1041, 113 Cal. Rptr. 2d 11]* . The agencies moved to quash the subpoenas. The juvenile court declined to conduct an in camera review and squashed the subpoenas under the authority of *County of Orange v. Superior Court (2000) 79 Cal. App. 4th 759, 94 Cal. Rptr. 2d 261* [*Michael P. v. Superior Court (2001) 92 Cal. App. 4th 1036, 1041, 113 Cal. Rptr. 2d 11]* . The Court of Appeal held this was error, distinguishing its own decision in the earlier case. It held the juvenile court must conduct an in camera inspection of the information sought to determine whether the conditional privilege of *Evid. Code § 1040* applied. The father's interest in the care and custody of his own child was at risk in the dependency proceedings, making his need for the information great. Despite the ongoing investigation, the juvenile court needed to determine if disclosure of the information was against the public interest and whether the need to prevent disclosure outweighed the necessity for disclosure in the interests of justice. Thus, a balancing of interests needed to be conducted by the juvenile court [*Michael P. v. Superior Court (2001) 92 Cal. App. 4th 1036, 1042-1048, 113 Cal. Rptr. 2d 11]* . The mere fact an investigation was ongoing or the evidence incriminated the father was not enough to prevent disclosure. Instead, the father needed to assert why he needed the information and the government needed to show there was a real possibility that disclosure of the information would allow the father to avoid apprehension or otherwise jeopardize the investigation. The in camera review process would ensure the competing interests were carefully balanced [*Michael P. v. Superior Court (2001) 92 Cal. App. 4th 1036, 1046-1048, 113 Cal. Rptr. 2d 11]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§§ 327.36[Reserved]

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CHAPTER 327 JUVENILE COURTS: JURISDICTION AND GENERAL PROCEDURES
PART II. LEGAL BACKGROUND
D. General Policies Regarding Placement and Support

28-327 California Forms of Pleading and Practice--Annotated § 327.40

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.40 Commitment or Placement of Dependents and Wards

[1] Separate Facilities Required Generally for Dependents and Wards

Minors who are alleged or found to be dependent children of the court pursuant to *Welf. & Inst. Code § 300* must be kept in separated facilities from minors either alleged or adjudged to come within the delinquency provisions of *Welf. & Inst. Code § 601* or *602*, unless the social worker or probation officer has determined that the group home or licensed foster family home meets the specific needs of the minor being placed or detained, and there is a commonality of needs with the other minors in the home [*Welf. & Inst. Code §§ 206, 16514(c)*]. Nevertheless, if necessary, a minor alleged or found to be a dependent child of the court may be housed in an emergency shelter with minors adjudged wards of the court pursuant to *Welf. & Inst. Code § 601*, even without such a determination [*Welf. & Inst. Code § 16514(a)*].

If a minor is alleged to come within *Welf. & Inst. Code § 602*, the minor must not be placed in a facility that houses dependent children. This statutory mandate applies even if the child has already been adjudicated a dependent. By "acting in a criminal manner," a dependent minor "converts" himself or herself into a minor who is alleged to come within *Welf. & Inst. Code § 602* and thus becomes a person the "Legislature deems inappropriate for detention alongside section 300 dependents. A segregated facility must be found for the minor" [*In re Jaime M. (2001) 87 Cal. App. 4th 320, 324, 104 Cal. Rptr. 2d 425]* . This does not require a dependent minor be placed in a secure facility once the allegation is made the minor falls within *Welf. & Inst. Code § 602*. It simply means the minor cannot be housed with other dependents. In an appropriate case, the juvenile court can release the dependent child to social services for a placement separate from other dependents while the determination under *Welf. & Inst. § 241.1* is made regarding the status of the minor [*In re Jaime M. (2001) 87 Cal. App. 4th 320, 324, 104 Cal. Rptr. 2d 425]* .

For a complete discussion of "dual jurisdiction" issues, *see § 327.11[3]*.

[2] Preference for Institutions or Family Homes of Same Religious Belief

All commitments to institutions or for placement in family homes by the juvenile court must be, so far as practicable, either to institutions or for placement in family homes of the same religious belief as that of the person so committed or of his or her parents or to institutions affording opportunity for instruction in that religious belief [*Welf. & Inst. Code § 205*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawDelinquency & DependencyDependency ProceedingsFamily LawDelinquency & DependencyFoster CareFamily LawDelinquency & DependencyWards of Court

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28-327 California Forms of Pleading and Practice--Annotated § 327.41

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§ 327.41 Parent Liability for Costs Incurred on Behalf of Minor

Any person liable for the support of a minor, including the minor's father, mother, or spouse, the minor's estate, and the estate of any person liable for the support of a minor, are liable for the reasonable costs of the support of the minor while the minor is placed or detained in, or committed to, any institution or other place pursuant to *Welf. & Inst. Code § 625* (temporary custody without a warrant) or a juvenile court order [*Welf. & Inst. Code § 903*]. The liability of these persons and estates is joint and several [*Welf. & Inst. Code § 903*; *but see In re Jason V. (1991) 229 Cal. App. 3d 1168, 1170, 280 Cal. Rptr. 562* (legal guardians not liable for child's out-of-home placement costs under *Welf. & Inst. Code § 903*)].

However, a county may not levy charges for the costs of support of a minor detained under *Welf. & Inst. Code § 625*, unless, at the detention hearing, the juvenile court determines that detention of the minor should be continued, the petition for the offense for which the minor is detained is subsequently sustained, or the minor agrees to a program of supervision pursuant to *Welf. & Inst. Code § 654*, which allows programs for care, counseling, and educational services in lieu of filing a petition [*Welf. & Inst. Code § 654*].

For further discussion relating to a parent's liability under *Welf. & Inst. Code § 903*, see Ch. 394, *Parent and Child* ; *see also* Kirkland, Lurvey, Richmond, and Wagner, California Family Law Practice and Procedure, 2d ed., Ch. 30 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureJuvenile OffendersJuvenile ProceedingsGeneral OverviewFamily LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency ProceedingsFamily LawParental Duties & RightsDutiesSupport of Children

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28-327 California Forms of Pleading and Practice--Annotated § 327.42

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.42 Procedure for Order Requiring Reimbursement for Support

In any case in which a child is or has been declared a dependent child or a ward of the court pursuant to *Welf. & Inst. Code § 300*, *601*, or *602*, the juvenile court must order any agency that has expended money or incurred costs on behalf of the child pursuant to a juvenile court order to submit to the district attorney a statement of costs and expenses for the benefit of the child [*Welf. & Inst. Code § 903.4(b)*]. The district attorney may then petition the superior court to issue an order to show cause why an order should not be entered for continuing support and reimbursement of the costs of the support of the minor. The district attorney is not required to petition the court for an order for continuing support and reimbursement if, in the opinion of the district attorney, it would not be appropriate to do so. Any order entered by the court as a result of the order to show cause is enforceable in the same manner as any other support order entered by the courts at the time it becomes due and payable [*Welf. & Inst. Code § 903.4(c)*].

For discussion and forms relating to the enforcement of such support orders, see Ch. 258, *Family Law Enforcement* , and Kirkland, Lurvey, Richmond, and Wagner, California Family Law Practice and Procedure, 2nd ed., Ch. 141 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawDelinquency & DependencyDependency ProceedingsFamily LawDelinquency & DependencyWards of Court

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28-327 California Forms of Pleading and Practice--Annotated §§ 327.43-327.49

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§§ 327.43[Reserved]

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28-327 California Forms of Pleading and Practice--Annotated § 327.50

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.50 Matthew Bender Publications

Detailed treatment of delinquency proceedings in juvenile courts. Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Chs. 120-125 (Matthew Bender)

Practical guidance and techniques in representing neglected or abused children. Peters, Representing Children in Child Protective Proceedings (Matthew Bender 2001)

Discussion and forms relating to enforcement of support orders. Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed. (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureJuvenile OffendersJuvenile ProceedingsGeneral OverviewFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawDelinquency & DependencyDelinquency ProceedingsFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & Neglect

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28-327 California Forms of Pleading and Practice--Annotated § 327.51

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.51 Other Text References

Myers, Evidence in Child Abuse And Neglect Cases (John Wiley 3d ed. 1997)

Myers, The Backlash: Child Protection Under Fire (Sage 1994)

Patton, Legal Ethics in Child Custody and Dependency Proceedings: A Guide for Judges and Lawyers (Cambridge 2006)

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawDelinquency & DependencyDependency ProceedingsFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectLegal EthicsGeneral Overview

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28-327 California Forms of Pleading and Practice--Annotated § 327.52

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§ 327.52 Law Reviews

Arredondo, et al., *Juvenile Mental Health Court: Rationale and Protocols*, 52(4) Juv. & Fam. Ct. J. (Fall 2001)

Boland, *The Los Angeles County Children's Court: A Model Facility for Child Abuse and Neglect Proceedings, 18 Pepperdine L. Rev. 247 (1991)*

Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43(2) Juv. & Fam. Ct. J., 1 (1992)

Edwards, *The Relationship of Family and Juvenile Courts in Child Abuse Cases, 27 Santa Clara L. Rev. 201 (1987)*

Note, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates, 40 Stan. L. Rev. 773 (1988)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureJuvenile OffendersJuvenile ProceedingsGeneral OverviewFamily LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency ProceedingsFamily LawFamily Protection & WelfareChildrenProceedingsPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentChildren

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28-327 California Forms of Pleading and Practice--Annotated §§ 327.53-327.59

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§§ 327.53[Reserved]

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28-327 California Forms of Pleading and Practice--Annotated § 327.60

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.60 Purpose and Nature of Juvenile Courts

[1] State Statutes

Purposes of juvenile court system. *Welf. & Inst. Code § 202*

Characterization of juvenile court proceedings as not criminal in nature. *Welf. & Inst. Code § 203*

Recommendations of probation and welfare departments over whether minor should be declared dependent or ward of court. *Welf. & Inst. Code § 241.1*

Protocol for allowing designation of minor as "dual status," being both a dependent and a ward. *Welf. & Inst. Code §§ 241.1(e), 241.2*

[2] Decisions

Children alleged to fall within the provisions of *Welf. & Inst. Code § 602* are statutorily required to be segregated from children taken into custody under *Welf. & Inst. Code § 300* *Los Angeles County Dep't of Children & Fam. Servs. v. Superior Court (Jaime M.) (2001) 87 Cal. App. 4th 320, 104 Cal. Rptr. 2d 425*

Cal. Const., art. I, § 28(f), providing that prior felony conviction, juvenile or adult, may be used without limitation in any subsequent proceeding for purposes of impeachment or enhancement as not applying if previous offense is juvenile adjudication; juvenile adjudications as not equivalent of criminal convictions. *In re Anthony R. (1984) 154 Cal. App. 3d 772, 776-777, 201 Cal. Rptr. 299* (juvenile proceeding); *see* *People v. West (1984) 154 Cal. App. 3d 100, 106-110,*

201 Cal. Rptr. 63 (adult proceeding)

Juvenile court law as liberally construed to secure for each minor such care and guidance, preferably in his or her own home, as will serve welfare of minor and best interests of state; and when minor is removed from his or her own family, to secure for him or her custody, care, and discipline as nearly as possible equivalent to that which should have been given by parents. *In re Aline D. (1975) 14 Cal. 3d 557, 562, 121 Cal. Rptr. 816, 536 P.2d 65*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency ProceedingsFamily LawDelinquency & DependencyWards of Court

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28-327 California Forms of Pleading and Practice--Annotated § 327.61

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.61 Jurisdiction and Venue of Juvenile Courts

[1] State Statutes

Determining residency of minor. *Welf. & Inst. Code § 17.1*

Superior court jurisdiction over juvenile court proceedings. *Welf. & Inst. Code § 245*

Dependency proceedings. *Welf. & Inst. Code §§ 290.1-399*

Exclusive jurisdiction of juvenile court over custody of minor when he or she has been declared dependent; power of juvenile court to issue protective orders under *Fam. Code § 6218. Welf. & Inst. Code §§ 304, 340.5, 362.4*

Transfer of juveniles between counties. *Welf. & Inst. Code § 324*

Venue provisions. *Welf. & Inst. Code §§ 1, 327, 651*

Termination of juvenile court jurisdiction over dependent child when other actions, such as dissolution, legal separation, nullity, or paternity, are pending; court's power to issue protective orders and orders governing custody and visitation at termination of jurisdiction. *Welf. & Inst. Code § 362.4* Wardship proceedings. *Welf. & Inst. Code §§ 601-800*

[2] California Rules of Court

Proper court; determination of minor's residence. *Cal. Rules of Ct., Rule 5.510*

[3] Decisions

The piecemeal adjudication of dependency jurisdiction undermines the statutory goal of protecting children at risk. The juvenile court should consider all relevant information on jurisdiction, including events that occur outside of the county. *In re Hadley B. (2007) 148 Cal. App. 4th 1041, 1048, 56 Cal. Rptr. 3d 234*

Case cannot be transferred between counties absent determination the transfer is in the child's best interest. *In re J.C. (2002) 104 Cal. App. 4th 984, 128 Cal. Rptr. 2d 671*

Once a case has been lawfully transferred to a county pursuant to *Welf. & Inst. Code § 750*, the juvenile court in that county has jurisdiction over the minor for all purposes and may not transfer the case back to the original court. *In re Brandon H. (2002) 99 Cal. App. 4th 1153, 1156, 121 Cal. Rptr. 2d 530*

Transfer of case to county of residence of minor's legal guardian permitted, despite fact parent with prior custody order had not changed county of residence. *In re Christopher T. (1998) 60 Cal. App. 4th 1282, 1288-1292, 71 Cal. Rptr. 2d 116*

Welf. & Inst. Code § 750 and former Cal. Rules of Ct., Rule 1381 (*now see Cal. Rules of Ct., Rule 5.610*) as both providing that residence of minor is residence of person who has legal custody of minor or who would have legal custody in absence of juvenile court order; trial court as erroneously transferring case from county in which father resided to county in which mother resided, because father still had legal custody, even though minor no longer lived with father and had last lived with mother before running away. *In re Judson W. (1986) 185 Cal. App. 3d 838, 844, 230 Cal. Rptr. 92*

Juvenile court is a superior court that exercises limited jurisdiction arising under juvenile law. *In re Chantal S. (1996) 13 Cal. 4th 196, 200, 51 Cal. Rptr. 2d 866, 913 P.2d 1075*

Superior court convened as and exercising special powers of juvenile court as vested with jurisdiction to make only those limited determinations authorized by legislative grant of those special powers. *In re R. (1975) 13 Cal. 3d 636, 643, 119 Cal. Rptr. 475, 532 P.2d 123*

Notwithstanding absence of specific authorization to make particular determinations, juvenile court as nevertheless vested with authority to make such determinations which are incidentally necessary to performance of those functions demanded of it by Legislature pursuant to juvenile court law. *In re R. (1975) 13 Cal. 3d 636, 643, 119 Cal. Rptr. 475, 532 P.2d 123*

Juvenile court as vested with jurisdiction to determine parentage of minor when finding is necessary to any ultimate determination with which it is charged. *In re R. (1975) 13 Cal. 3d 636, 643, 119 Cal. Rptr. 475, 532 P.2d 123*

While juvenile court, on adequate facts, retains jurisdiction and stays within bounds of its legal power, no other court as having right to interfere with its supervision, for state, of children involved. *In re Syson (1960) 184 Cal. App. 2d 111, 117, 7 Cal. Rptr. 298*

[4] Attorney General Opinions

"Homeless" minors as defined by San Francisco Mayor's Criminal Justice Council who are from different counties and states as subject to continuing jurisdiction of court making initial dependency determination. *69 Ops. Cal. Atty. Gen.*

241, 246 (1986)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureVenueIndividual DefendantsCivil ProcedureVenueMotions to TransferGeneral OverviewFamily LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency Proceedings

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AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.62 Powers of Juvenile Courts

[1] State Statutes

Enforcement of orders of juvenile court. *Welf. & Inst. Code §§ 213, 214*

Authority of probation department to engage in activities designed to prevent juvenile delinquency. *Welf. & Inst. Code § 236*

Citation, subpoena, and warrant powers of juvenile court. *Welf. & Inst. Code §§ 338, 339, 341, 661-663*

[2] California Rules of Court

Citations to appear, warrants for arrest, and subpoenas. *Cal. Rules of Ct., Rule 5.526*

[3] Decisions

The juvenile court has the inherent authority to issue declaratory relief in dependency proceedings. *In re Claudia E. (2008) 163 Cal. App. 4th 627, 637, 77 Cal. Rptr. 3d 722*

Authority of juvenile court, including referees, to impose sanctions pursuant to *Code of Civ. Proc. § 128.7*. *In re Mark B. (2007) 149 Cal. App. 4th 61, 64-65, 56 Cal. Rptr. 3d 697*

The juvenile court is vested with jurisdiction to determine parentage of a minor when that finding is necessary to any ultimate determination with which it is charged. *In re R. (1975) 13 Cal. 3d 636, 643-644, 119 Cal. Rptr. 475, 532 P.2d 123*

The juvenile court has inherent authority to entertain a prehearing challenge to the petition's sufficiency by a motion akin to a demurrer. *In re Fred J. (1979) 89 Cal. App. 3d 168, 176, 152 Cal. Rptr. 327*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSubpoenasCriminal Law & ProcedureJuvenile OffendersJuvenile ProceedingsGeneral OverviewCriminal Law & ProcedureArrestsWarrantsFamily LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency Proceedings

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§§ 327.63[Reserved]

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28-327 California Forms of Pleading and Practice--Annotated § 327.70

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.70 Judges and Referees

[1] State Statutes

Appointment of juvenile court judge. *Welf. & Inst. Code § 246*

Appointment of subordinate judicial officers, including juvenile court referees. *Gov. Code §§ 71601(i), Gov. Code §§ 71622(a)*, Gov. Code §§ 71622(f)

Powers and duties of referees. *Welf. & Inst. Code § 248*

No order of referee removing minor from his or her home as becoming effective until expressly approved by judge of juvenile court. *Welf. & Inst. Code § 249*

Effect and finality of referee's order. *Welf. & Inst. Code § 250*

Judge of juvenile court, or in counties having more than one judge of juvenile court, presiding judge of juvenile court, as authorized to establish requirement that any and all orders of referees must be expressly approved by judge before becoming effective. *Welf. & Inst. Code § 251*

Review of order of referee on rehearing before juvenile court judge. *Welf. & Inst. Code § 252*

Judge of juvenile court as permitted on own motion made within 20 judicial days of hearing before referee to order rehearing of any matter heard before referee. *Welf. & Inst. Code § 253*

Rehearing of matter heard originally by referee before juvenile court judge as conducted de novo. *Welf. & Inst. Code § 254*

Juvenile court judge as empowered at any time to require, and on request of board of supervisors must require, probation officer to examine and report to court on qualifications and management of any society, association, or corporation, other than state institution, that applies for or receives custody of any ward or dependent child of juvenile court; no probation officer as having authority to enter any institution without its consent. *Welf. & Inst. Code § 282*

Training and education for judicial officers hearing dependency proceedings. *Welf. & Inst. Code § 304.7*

[2] California Rules of Court

Appointment and powers of referees. *Cal. Rules of Ct., Rule 5.536(a)*

Referee as temporary judge. *Cal. Rules of Ct., Rule 5.536(b)*

Conduct of proceedings before referee. *Cal. Rules of Ct., Rule 5.538(a)*

Requirement that referee furnish written findings and orders and explanation of right of review. *Cal. Rules of Ct., Rule 5.538(b)*

Effective date and finality of orders of referee. *Cal. Rules of Ct., Rule 5.540*

Application for rehearing. *Cal. Rules of Ct., Rule 5.542(a)*

Rehearing as granted as matter of right when no court reporter was present in proceeding before referee. *Cal. Rules of Ct., Rule 5.542(b)*

Rehearing as either granted or denied by juvenile court judge after reading transcript of proceedings at which court reporter was present. *Cal. Rules of Ct., Rule 5.542(c)*

Rehearing on motion of judge. *Cal. Rules of Ct., Rule 5.542(d)*

Rehearing de novo. *Cal. Rules of Ct., Rule 5.542(e)*

Advice as to rights of appeal from rehearing. *Cal. Rules of Ct., Rule 5.542(e)*

[3] Decisions

When a rehearing of a referee's findings and orders is granted, the better rule is that the referee's findings and orders are entitled to full force and effect until the matter is actually reheard. *Ricardo V. v. Superior Court (2007) 147 Cal. App. 4th 419, 422, 54 Cal. Rptr. 3d 223*

Whenever the approval of a juvenile court judge is required for a referee's order to become effective, the referee's order becomes final 10 calendar days after service of a written copy of the referee's findings and orders or 20 judicial days after the hearing at which the findings and orders are made, whichever comes later. *In re Clifford C. (1997) 15 Cal. 4th 1085, 1093, 64 Cal. Rptr. 2d 873, 938 P.2d 932* (harmonizing *Welf. & Inst. Code §§ 250* and *253*)

Where the order of the referee does not require the approval of a judge to become effective, a judge of the juvenile

court may order a rehearing on his or her own motion made within 20 judicial days of the order but not more than 10 days after the service of the written copy of the findings and orders. *In re Clifford C. (1997) 15 Cal. 4th 1085, 1093, 64 Cal. Rptr. 2d 873, 938 P.2d 932*

Cal. Rules of Ct., former Rule 244, requirement of a written stipulation to a referee sitting as a temporary judge is deemed waived if the parties imply consent by their actions. *In re Richard S. (1991) 54 Cal. 3d 857, 2 Cal. Rptr. 2d 2, 819 P.2d 843*

Transcript of arguments of minor's attorney as integral part of right to be represented by counsel at jurisdictional hearing, so that denial of application for rehearing made without that portion of transcript constitutes reversible error when judge is not informed from any source of counsel's theory of defense. *In re C. (1976) 16 Cal. 3d 493, 497, 128 Cal. Rptr. 172, 546 P.2d 676*

When portion of reported proceedings have not been transcribed when juvenile court denies application for rehearing, court's denial as reversible error. *In re C. (1976) 16 Cal. 3d 493, 497, 128 Cal. Rptr. 172, 546 P.2d 676*

Actual review of action on application for hearing de novo from order by referee within time prescribed by statute as necessary to prevent referee's acts from exceeding constitutional limitations restricting such acts to subordinate judicial duties and to effectuate legislative intent to limit period during which application for rehearing can remain pending and unresolved. *In re M. (1975) 14 Cal. 3d 727, 730, 122 Cal. Rptr. 574, 537 P.2d 406*

Juvenile court judge as required to read transcript of all challenged proceedings and to act on application for rehearing within time limits or rehearing granted as matter of right. *In re M. (1975) 14 Cal. 3d 727, 738-739, 122 Cal. Rptr. 574, 537 P.2d 406*

When transcript of proceedings before referee is available to juvenile court judge, failure to read transcript in ruling on application for rehearing de novo as constituting insufficient judicial review to make referee's order that of judge rather than of referee alone. *In re M. (1975) 14 Cal. 3d 727, 738, 122 Cal. Rptr. 574, 537 P.2d 406*

Juvenile court as required to postpone ruling on rehearing until transcript received or else grant rehearing, if proceedings before referee are recorded but not yet transcribed. *In re Larissa W. (1991) 227 Cal. App. 3d 124, 131, 277 Cal. Rptr. 802*

Oral stipulation to referee as temporary judge was sufficient. *In re Aontae D. (1994) 25 Cal. App. 4th 167, 171-172, 30 Cal. Rptr. 2d 176*

A minor charged with a technical violation of probation (as opposed to a new law violation) may not make a challenge under *CCP 170.6* to the judge who presided over the prior hearing in the matter since the supplemental hearing is a continuation of the prior proceeding. *Antonio G. v. Superior Court (1993) 14 Cal. App. 4th 422, 427-428*

Superior court sitting as juvenile court as properly ordering rehearing on its own motion without first obtaining and reviewing transcript of testimony heard by referee, unless minor requests that court review transcript. *In re Darrell P. (1981) 121 Cal. App. 3d 916, 921-924, 175 Cal. Rptr. 682*

District attorney as properly making informal request for rehearing after referee's decision, when juvenile is given notice of request before court orders rehearing. *In re V. (1980) 28 Cal. 3d 587, 590-593, 169 Cal. Rptr. 713, 620 P.2d 163*

Statutory provision requiring courts to conduct rehearings de novo as construed not to restrict right of judge to grant or deny application for rehearing after reading transcript of proceedings before referee. *In re Anthony H. (1980) 108 Cal.*

App. 3d 494, 500, 166 Cal. Rptr. 607

Juvenile court as required to articulate its reasons for good cause shown in order extending time under *Welf. & Inst. Code § 252*. *In re Freddie R. (1979) 96 Cal. App. 3d 829, 831, 158 Cal. Rptr. 260*

California juvenile court law that allows juvenile full trial before judge as matter of right only when proceedings before referee are not reported and transcribed as not denying juvenile due process and equal protection of law in situations when credibility of witnesses is significant. *In re Jay J. (1977) 66 Cal. App. 3d 631, 633, 136 Cal. Rptr. 125*

In rehearing from proceeding before referee, juvenile court judge as properly imposing more grave or serious dispositional order than that entered by referee. *In re Anthony M. (1976) 64 Cal. App. 3d 464, 469, 134 Cal. Rptr. 540*

Failure of juvenile court referee to give juvenile or his or her attorney or parents written explanation of right to seek review of jurisdictional and dispositional orders of referee as reversible error. *In re Drexel F. (1976) 58 Cal. App. 3d 801, 805, 130 Cal. Rptr. 253*

Even though juvenile court judge ordered transcript of proceedings before referee in order to review disposition within statutory period allowed for order for rehearing, failure of judge to actually order such rehearing within statutory period as depriving juvenile court judge of jurisdiction to order rehearing on his or her own motion and rendering disposition of referee final. *In re W. R. W. (1971) 17 Cal. App. 3d 1029, 1033, 95 Cal. Rptr. 354*

Statutory provision rendering order of referee final after specified number of days after service of copies of order as depriving juvenile court of jurisdiction to order rehearing on its own motion following end of period. *In re Henley (1970) 9 Cal. App. 3d 924, 928, 88 Cal. Rptr. 458*

Statutory limitation providing that application for rehearing by minor or parent not granted within 20 days is deemed denied as construed to mean 20 days from date juvenile court judge receives any available copy of transcript of proceedings before referee. *In re J. R. (1970) 5 Cal. App. 3d 597, 601, 85 Cal. Rptr. 396*

Any order of referee, approved or not by juvenile court judge prior to setting of rehearing, as conditional until time for granting of rehearing has elapsed so that when rehearing is subsequently granted, referee's order becomes nullity and there is no double jeopardy. *In re Dale S. (1970) 10 Cal. App. 3d 952, 957, 89 Cal. Rptr. 499*

Statutory limitation providing that application for rehearing by minor or parent not granted within 20 days is deemed denied as construed to mean 20 days from date juvenile court judge receives any available copy of transcript of proceedings before referee. *In re J. R. (1970) 5 Cal. App. 3d 597, 601, 85 Cal. Rptr. 396*

[4] Attorney General Opinions

Superior court commissioner appointed to act as juvenile court referee as allowed to preside over any hearing assigned by presiding judge of juvenile court and related to juvenile delinquency proceedings (except jurisdictional hearing), in absence of stipulation and subject to hearing de novo by juvenile court judge. *76 Ops. Cal. Atty. Gen. 25, 31 (1993)*

Juvenile traffic hearing officer as not permitted to establish bail schedule and accept forfeiture of bail in lieu of appearance by juvenile. *63 Ops. Cal. Atty. Gen. 232 (1980)*

Legal Topics:

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

Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersRefereesGeneral OverviewCriminal Law & ProcedureJuvenile OffendersJuvenile ProceedingsGeneral OverviewFamily LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency Proceedings

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28-327 California Forms of Pleading and Practice--Annotated § 327.71

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.71 Probation Officers

[1] State Statutes

"Probation officer" or "social worker" as used in juvenile court law may also refer to any social worker of Indian tribe which has entered into an agreement with State Department of Social Services pursuant to *Welf. & Inst. Code § 10553.1* concerning child welfare services or foster care payments when that Indian social worker is supervising dependent children. *Welf. & Inst. Code § 215*

Appointment of probation officers. *Welf. & Inst. Code § 270*

Effect of county charter provisions for method of appointment and tenure of office for probation officers and other juvenile court personnel. *Welf. & Inst. Code § 271*

Bonding requirements for probation officers. *Welf. & Inst. Code § 274*

Designation of probation officer or other county officer to keep suitable books and accounts and give and keep suitable vouchers for purpose of handling reimbursement and other payments provided for by juvenile court law. *Welf. & Inst. Code § 275*

Powers of probation officer to receive, deposit, and disburse money. *Welf. & Inst. Code § 276*

Probation officer as empowered to authorize sale of handiwork made by wards under jurisdiction of probation office. *Welf. & Inst. Code § 277*

Board of supervisors as authorized to delegate powers of probation officer to receive, deposit, and disburse to auditor or other county officer authorized by *Welf. & Inst. Code § 276* and required by *Code Civ. Proc. §§ 1685-1687*. *Welf. & Inst. Code § 278*

Board of supervisors as authorized to impose service charge at uniform rate sufficient to defray costs of services of probation officer or other officer designated to act as trustee. *Welf. & Inst. Code § 279*

Powers and duties of probation officers; preparation of social study. *Welf. & Inst. Code § 280*

Investigation by probation officer involving custody, status, or welfare of minor. *Welf. & Inst. Code § 281*

Every probation officer, assistant probation officer, and deputy probation officer as having the powers and authority conferred by law upon peace officers listed in *Penal Code § 830.5*. *Welf. & Inst. Code § 283*

All probation officers as required to make such special and periodic reports to Department of Youth Authority as authority may require and upon forms furnished by authority. *Welf. & Inst. Code § 284*

All probation officers as required to make periodic reports to Bureau of Criminal Statistics on forms as bureau may require, provided that no names or social security numbers are transmitted regarding *Welf. & Inst. Code §§ 300* and *601* proceedings. *Welf. & Inst. Code § 285*

[2] Attorney General Opinions

County probation officer as under no duty to make child abuse report when he or she knows or reasonably suspects that juvenile suffered nonaccidental physical injury at hands of police in course of arrest, unless probation officer knows or reasonably suspects that force used by police was not reasonably necessary to effect arrest, prevent escape, or overcome juvenile's resistance. *70 Ops. Cal. Atty. Gen. 38 (1987)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureJuvenile OffendersJuvenile ProceedingsGeneral OverviewFamily LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency ProceedingsFamily LawFamily Protection & WelfareChildrenServicesPublic Health & Welfare LawSocial ServicesNative Americans

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28-327 California Forms of Pleading and Practice--Annotated § 327.72

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§ 327.72 Child Welfare Workers

[1] State Statutes

Board of supervisors as authorized to delegate to county welfare department all or part of duties of probation officer. *Welf. & Inst. Code § 272(a)*

Board as delegating to county welfare department probation officer's right of access to state summary criminal history information, when necessary to carry out duties concerning children reasonably believed to be dependents. *Welf. & Inst. Code § 272(b)*.

Social workers as authorized to take child into temporary custody pursuant to *Welf. & Inst. Code § 306*, whether or not county has delegated duties of probation officers to county welfare department. *Welf. & Inst. Code § 272(c)*.

Indian social workers of tribe which has entered into agreement with State Department of Social Services pursuant to *Welf. & Inst. Code § 10553.1* concerning child welfare services or foster care payments as being able to be delegated probation officer's right of access to state summary criminal history information when necessary to carry out duties concerning children reasonably believed to be dependents. *Welf. & Inst. Code §§ 215, 272(a)(2)*

Indian social workers of tribe which has entered into agreement with State Department of Social Services pursuant to *Welf. & Inst. Code § 10553.1* concerning child welfare services or foster care payments as being able to be take child into temporary custody pursuant to *Welf & Inst. Code § 306*, whether or not county has delegated duties of probation officers to county welfare department. *Welf. & Inst. Code § 272(c)*

[2] Decisions

Social worker in dependency proceedings serves a hybrid role, exercising both judicial and executive functions. *In re Ashley M. (2003) 114 Cal. App. 4th 1, 7, 7 Cal. Rptr. 3d 237*

Social worker in dependency proceedings is both a party and more than a party. *San Diego County Dep't of Social Servs. v. Superior Court (1996) 13 Cal. 4th 882, 891, fn. 4, 55 Cal. Rptr. 2d 396, 919 P.2d 1329*

Social worker in dependency proceedings serves as an arm of the court in the writing of reports. *In re Malinda S. (1990) 51 Cal. 3d 368, 376-377, 272 Cal. Rptr. 787, 795 P.2d 1244*

Social worker in dependency proceedings serves as an arm of the court in the supervision of visitation. *In re Danielle W. (1989) 207 Cal. App. 3d 1227, 1235, 255 Cal. Rptr. 344*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawDelinquency & DependencyDependency ProceedingsFamily LawDelinquency & DependencyFoster CareFamily LawFamily Protection & WelfareChildrenServicesPublic Health & Welfare LawSocial ServicesNative Americans

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28-327 California Forms of Pleading and Practice--Annotated § 327.73

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§ 327.73 Appointed Counsel

[1] State Statutes

Compensation for private appointed counsel. *Welf. & Inst. Code § 218*

Appointment of counsel for parents, guardians and children in dependency cases. *Welf. & Inst. Code § 317*

Parties in dependency proceedings who are represented by counsel are entitled to competent counsel. *Welf. & Inst. Code § 317.5*

[2] Decisions

"Necessary expenses" allowed to appointed counsel under *Welf. & Inst. Code § 218* as including reasonable sums for investigative services. *Johnny S. v. Superior Court (1979) 90 Cal. App. 3d 826, 828, 153 Cal. Rptr. 550*

In those counties in which there is public defender, appointment and compensation of private counsel for persons financially unable to employ counsel only after public defender has refused to represent them. *In re J. G. L. (1974) 43 Cal. App. 3d 447, 452-453, 117 Cal. Rptr. 799*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselAppointmentsCriminal Law & ProcedureJuvenile OffendersJuvenile ProceedingsGeneral

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28-327 California Forms of Pleading and Practice--Annotated § 327.74

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§ 327.74 Psychotherapeutic Professionals

Employment by probation officer of such psychiatrists, psychologists, and other clinical experts as are required to assist in determining appropriate treatment of minors within jurisdiction of juvenile court and in implementation of such treatment. *Welf. & Inst. Code § 273*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency Proceedings

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§ 327.75 Juvenile Court System Commissions and Committees

Establishment of county juvenile justice commission. *Welf. & Inst. Code § 225*

Establishment of regional juvenile justice commission. *Welf. & Inst. Code § 226*

Qualifications of county or regional juvenile justice commission members. *Welf. & Inst. Code § 227*

Duties of juvenile justice commission as including inquiry into the administration of juvenile court law in county or region in which commission serves. *Welf. & Inst. Code § 229*

Juvenile justice commission as inquiring into nonconfidential aspects of administration of group homes receiving placements by juvenile court order, and as reporting thereon to State Department of Social Service, presiding judge of juvenile court, and chief probation officer. *Welf. & Inst. Code § 229.5*

Board of supervisors as able by ordinance to provide for establishment support and maintenance of one or more agencies or departments to cooperate with and assist in coordinating on countywide basis work of community agencies engaged in activities designed to prevent juvenile and adult delinquency. *Welf. & Inst. Code § 232*

Establishment of delinquency prevention commission. *Welf. & Inst. Code § 233*

Establishment of delinquency prevention agency or department. *Welf. & Inst. Code § 234*

Establishment of public councils or committees on prevention of juvenile delinquency. *Welf. & Inst. Code § 235*

Establishment of probation commission in counties having population in excess of 6 million in lieu of county juvenile justice commission to function in advisory capacity to probation officer. *Welf. & Inst. Code §§ 240-243*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureJuvenile OffendersJuvenile ProceedingsGeneral OverviewFamily LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency ProceedingsGovernmentsLocal GovernmentsAdministrative Boards

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§§ 327.76[Reserved]

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28-327 California Forms of Pleading and Practice--Annotated § 327.80

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§ 327.80 State Statutes

Prosecuting witness as entitled, for support, to attendance of up to two family members of own choosing at any juvenile court proceeding involving violation of certain offenses. *Penal Code § 868.5(a)*; *Welf. & Inst. Code § 676(a)*

Transmittal by Department of Justice of information relating to arrest or custody of minor. *Welf. & Inst. Code § 204*

Costs and fees for filing and serving papers in juvenile court. *Welf. & Inst. Code § 212*

Participation of prosecuting attorney. *Welf. & Inst. Code §§ 318.5, 681*

Requirement that all juvenile court proceedings be heard at special or separate session of court. *Welf. & Inst. Code §§ 345, 675*

Persons entitled to be present at proceedings. *Welf. & Inst. Code §§ 345, 679*

Exclusion of general public from proceedings. *Welf. & Inst. Code §§ 346, 676*

Role of court reporter in proceedings. *Welf. & Inst. Code §§ 347, 677*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 327.81 California Rules of Court

Applicability of juvenile court rules. *Cal. Rules of Ct., Rule 5.501(a)*

Authority and purpose of rules. *Cal. Rules of Ct., Rule 5.501(b)*

Rules of construction governing rules. *Cal. Rules of Ct., Rule 5.501(c)*

Definitions and construction of terms included in rules. *Cal. Rules of Ct., Rule 5.502*

Contents of notice of hearings. *Cal. Rules of Ct., Rule 5.524*

Persons entitled to notice of hearing. *Cal. Rules of Ct., Rule 5.524(e)*

Service of notice. *Cal. Rules of Ct., Rule 5.524(f)*

Waiver of service. *Cal. Rules of Ct., Rule 5.524(g)*

Service on minor's attorney as constituting service on minor's parent or guardian in proceedings under *Welf. & Inst. Code §§ 601* and *602*. *Cal. Rules of Ct., Rule 5.524(f)*

Notice as permitted to be oral and as required to be oral if parent does not read. *Cal. Rules of Ct., Rule 5.524(h)*

Persons entitled to be present at juvenile court proceedings. *Cal. Rules of Ct., Rule 5.530*

Use of court reporter; cost and preparation of transcripts. *Cal. Rules of Ct., Rule 5.532*

Conduct of proceedings. *Cal. Rules of Ct., Rule 5.534*

Discovery policies and procedures. *Cal. Rules of Ct., Rule 5.546*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§§ 327.82[Reserved]

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§ 327.90 State Statutes

Liability of parent, parent's estate, and minor's estate to county for costs of care of minor in county institution. *Welf. & Inst. Code § 903*

Court-ordered parental reimbursement for support of juveniles in out-of-home placement. *Welf. & Inst. Code § 903.4*

Designation of county officer to make financial evaluations of parental liability for costs. *Welf. & Inst. Code § 903.45*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawDelinquency & DependencyDelinquency ProceedingsFamily LawDelinquency & DependencyDependency ProceedingsFamily LawDelinquency & DependencyFoster CareFamily LawParental Duties & RightsDutiesSupport of Children

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§ 327.91 Attorney General Opinions

Person with felony conviction as disqualified from holding job that requires having custody of ward in institution operated by probation department in general law county pursuant to *Penal Code § 830.5*. *65 Ops. Cal. Atty. Gen. 95 (1982)*

Each California county as required to operate its own juvenile hall, either solely or jointly with another county, but county may not contract with another county for use of its county jail to secure detention of minors; county as not permitted to place minors described in *Welf. & Inst. Code § 602* in out-of-state juvenile halls pending adjudication and disposition hearing in California. 63 Ops. Cal. Atty. Gen. 361 (1980)

Legal Topics:

For related research and practice materials, see the following legal topics:
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28-327 California Forms of Pleading and Practice--Annotated § 327.150

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.150 Application to Commence Proceedings by Affidavit and Decision by Social Worker [Welf. & Inst. Code §§ 329, 653, 653.5]--Judicial Council Form JV-210

[1] FORM Application to Commence Proceedings by Affidavit and Decision by Social Worker [Welf. & Inst. Code §§ 329, 653, 653.5]--Judicial Council Form JV-210

Click here to view image.

[2] Use of Form

This form is the Judicial Council form used to commence juvenile court proceedings generally, including either dependency proceedings discussed in *Ch. 328, Juvenile Courts: Dependency Proceedings, § 328.40* et seq., or delinquency proceedings discussed in *Ch. 329, Juvenile Courts: Delinquency Proceedings, § 329.30* et seq.

Whenever any person applies to the social worker, probation officer, or district attorney to commence proceedings in the juvenile court, the application must be in the form of an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) alleging that there was or is within the county, or residing within the county, a minor within the jurisdiction of the juvenile court to declare such minor a dependent child or ward of the court and setting forth facts in support of such allegations [*Welf. & Inst. Code §§ 329, 653, 653.5*; *Cal. Rules of Ct., Rule 5.520(c)*; *see Welf. & Inst. Code § 601.3* (initiation of wardship proceedings by district attorney for truancy)].

This form is available in an interactive, electronic format in *LexisNexis[(R)] Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Obligations of Social Worker or Probation Officer in Response to Declaration

On receipt of an application for the commencement of juvenile proceedings, the social worker, probation officer, or

district attorney in consultation with the probation officer must immediately make such investigation as is necessary to determine whether proceedings should be instituted [*Welf. & Inst. Code §§ 329, 653*].

In the case of an allegation that the minor falls within the jurisdiction of the juvenile court under *Welf. & Inst. Code § 300* as a dependent child, if the social worker or probation officer does not institute a program of supervision under *Welf. & Inst. Code § 301* and does not file a petition in juvenile court to commence proceedings within three weeks after the application, the social worker or probation officer must endorse the declaration of the applicant with his or her decision not to proceed further and the reasons therefor. The probation officer must also immediately notify the applicant of the action taken or the decision rendered [*Welf. & Inst. Code § 329*; *Cal. Rules of Ct., Rule 5.520(c)*]. The probation officer must retain the declaration and the endorsement thereon for a period of 30 days after notice to the applicant [*Welf. & Inst. Code § 329*]. *See also* discussion in *Ch. 328, Juvenile Courts: Dependency Proceedings, §§ 328.44, 328.45*.

If the probation officer determines that a petition to commence a delinquency proceedings should be filed, to declare the minor a ward under *Welf. & Inst. Code § 602*, he or she must forward the declaration to the prosecuting attorney who must then institute proceedings within his or her discretionary power [*Welf. & Inst. Code §§ 653.1, 653.5*; *Cal. Rules of Ct., Rule 5.520(c)*].

If a statutorily specified serious offense is alleged, the probation officer must take the affidavit (or declaration under *Code Civ. Proc. § 2015.5*) to the prosecuting attorney within 48 hours [*see Welf. & Inst. Code § 653.5(a)*]. In other cases, the probation officer has discretion to forward the affidavit (or declaration), or to instead place the minor on informal supervision [*see Welf. & Inst. Code §§ 654-654.4*]. See generally discussion in *Ch. 328, Juvenile Courts: Dependency Proceedings, § 328.40* et seq.

[4] Situations in Which Minor May Be Both Dependent and Ward

Both statutory and decisional law make it clear a minor cannot be adjudicated both a delinquent and a dependent child of the juvenile court at the same time *Welf. & Inst. Code § 241.1*; *In re Marcus G. (1999) 73 Cal. App. 4th 1008, 1012, 87 Cal. Rptr. 2d 84]* . If it appears that the minor falls within juvenile court jurisdiction as both a dependent child and as a ward of the court, before any petition is filed, the probation department and the welfare department are required to determine initially whether the petition that is filed should allege jurisdiction under *Welf. & Inst. Code § 300* (dependency) or under *Welf. & Inst. Code § 601* or *602* (wardship).

The departments must follow the guidelines of a jointly developed written protocol specifying the various factors to be considered. Recommendations of both departments will be presented to the juvenile court with the petition that is filed on behalf of the minor, and the court will determine which status is appropriate for the minor [*Welf. & Inst. Code § 241.1(a)*; *see In re Marcus G. (1999) 73 Cal. App. 4th 1008, 1012-1015, 87 Cal. Rptr. 2d 84* ; *In re Donald S. (1988) 206 Cal. App. 3d 134, 138, 253 Cal. Rptr. 274* ; *see also* discussion in *§ 327.11[3]*].

Effective January 1, 2005, some counties may choose to develop a protocol that will allow a child to be designated a dual jurisdiction minor [*Welf. & Inst. Code § 241.1(e)*; *see also* discussion in *§ 327.11[3][f]*.

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CHAPTER 327 JUVENILE COURTS: JURISDICTION AND GENERAL PROCEDURES
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28-327 California Forms of Pleading and Practice--Annotated § 327.151

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.151 Application to Review Decision by Social Worker Not to Commence Proceedings [Welf. & Inst. Code §§ 331, 655]--Judicial Council Form JV-215

[1] FORM Application to Review Decision by Social Worker Not to Commence Proceedings [Welf. & Inst. Code §§ 331, 655]--Judicial Council Form JV-215

Click here to view image.

[2] Use of Form

This form is the Judicial Council form used to seek review by the juvenile court of a decision by the social worker, probation officer, or district attorney not to file an application to commence juvenile court proceedings, following the filing of a declaration seeking such application (*see* form and discussion in *§ 327.150*). It may be used either in the context of an application to commence a dependency proceeding discussed in *Ch. 328, Juvenile Courts: Dependency Proceedings, § 328.40 et seq.*, or a delinquency proceedings discussed in *Ch. 329, Juvenile Courts: Delinquency Proceedings, § 329.30* et seq.

This form is available in an interactive, electronic format in *LexisNexis[(R)] Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Review of Decision Not to Commence Juvenile Court Proceedings

If any person has applied to the probation officer or social services department to commence dependency proceedings under *Welf. & Inst. Code § 300*, and the social worker or probation officer fails to file a petition within three weeks after the application, that person may, within one month after making the application, apply to the juvenile court to review the decision of the social services department. The court may then either affirm the decision of the social services department or order the department to commence juvenile court proceedings [*Welf. & Inst. Code § 331*; *see Cal. Rules*

of Ct., Rule 5.520(c)].

If any person has applied to the probation officer or the district attorney, to commence juvenile court delinquency proceedings under *Welf. & Inst. Code § 601* or *602*, and the probation officer or the district attorney fails to file a petition within 21 court days after the application is made, that person may, within 10 court days of receiving notice of the probation officer's or the district attorney's decision not to file a petition, apply to the juvenile court to review the decision of the probation officer or the district attorney. The court may then either affirm the decision or order the probation officer or district attorney to commence juvenile court proceedings [*Welf. & Inst. Code § 655*; *see Cal. Rules of Ct., Rule 5.520(c)*].

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28-327 California Forms of Pleading and Practice--Annotated §§ 327.152-327.159

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

[Reserved]

§§ 327.152[Reserved]

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28-327 California Forms of Pleading and Practice--Annotated § 327.160

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.160 Order to Transfer Juvenile Court Proceedings [Welf. & Inst. Code §§ 375, 750; Cal. Rules of Ct., Rule 5.610]--Judicial Council Form JV-550

[1] FORM Order to Transfer Juvenile Court Proceedings [Welf. & Inst. Code §§ 375, 750; Cal. Rules of Ct., Rule 1425]--Judicial Council Form JV-550

Click here to view image.

[2] Use of Form

This form is the Judicial Council order to transfer juvenile court proceedings to the county of a minor's residence [*see Welf. & Inst. Code §§ 375, 750*; *Cal. Rules of Ct., Rule 5.610*]. The Spanish version of the form is JV-550S.

Use of the form is mandatory [*Cal. Rules of Ct., Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis[(R)] Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Transfer-Out Hearing

If a juvenile court petition is filed in a county other than that of the minor's residence or if the minor changes his or her residence after the petition was filed, the juvenile court may, after making its jurisdictional findings, transfer the case to the county in which the minor actually resides [*see Welf. & Inst. Code §§ 375, 750*; *Cal. Rules of Ct., Rule 5.610(c)*].

The minor's "residence" is the residence of the person who has the legal right to custody of the minor according to prior court order, including (1) a juvenile court order under *Welf. & Inst. Code § 361.2* (authority for juvenile court to make a juvenile court custody order awarding custody to previously noncustodial parent) and (2) an order appointing a guardian of the person of the minor [*Cal. Rules of Ct., Rule 5.610(a)*]. The court may transfer the case either before or after the

disposition hearing in a dependency proceeding [*Cal. Rules of Ct., Rule 5.610(c)*]. In a delinquency proceeding, if the court determines to transfer the case it must do so before the disposition hearing [*Cal. Rules of Ct., Rule 5.610*]. However, the court must not order the transfer in either type of case unless it first determines the transfer will protect or further the best interests of the child [*Cal. Rules of Ct., Rule 5.610(e)*].

[4] Contents of Order

The order of transfer must be entered on the Judicial Council form, which must include all required information and findings [*Cal. Rules of Ct., Rule 5.610(f)*].

[5] Transport of Child in Custody

The court may order the child, while in custody, to be transported to the receiving county. In that event, the child must be delivered to the receiving county within seven court days [*Cal. Rules of Ct., Rule 5.610(h)*].

[6] Transmittal of Papers

Generally, all papers contained in the file must be transferred to the receiving court [*see Welf. & Inst. Code §§ 377, 752*]. If the minor is ordered transported to the receiving county in custody, the clerk of the court of the transferring county must prepare all papers contained in the files so that they may be transported with the minor to the court of the receiving county. If the minor is not ordered to be transported in custody, the clerk of the court of the transferring county must transmit to the clerk of the court of the receiving county within 10 days all papers contained in the files. Certified copies are deemed to be originals [*Cal. Rules of Ct., Rule 5.610(h)*]. The transferring county must keep in its file copies of the transfer order and the court's jurisdictional findings of fact [*see Welf. & Inst. Code § 377*].

[7] Cross References

For further discussion relating to the transfer of juvenile court proceedings, see *§ 327.12[3]*

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28-327 California Forms of Pleading and Practice--Annotated § 327.161

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[Reserved]

§ 327.161[Reserved]

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28-327 California Forms of Pleading and Practice--Annotated § 327.162

AUTHOR: Gary C. Seiser and Hon. Kurt Kumli Editorial Consultants Janice M. Brickley Former Contributor

§ 327.162 Petition for Disclosure of Juvenile Court Records [Welf. & Inst. Code §§ 827, 828; Cal. Rules of Ct., Rules 5.504, 5.552]--Judicial Council Form JV-570

[1] FORM Petition for Disclosure of Juvenile Court Records [Welf. & Inst. Code §§ 827, 828; Cal. Rules of Ct., Rules 1402, 1423]--Judicial Council Form JV-570

Click here to view image.

[2] Use of Form

This Judicial Council form is the petition for disclosure of juvenile court records. This form has been adopted for mandatory use [*Cal. Rules of Ct., Rules 1.31, 5.504(a)*]. It may be produced by a word-processor printer or similar process, or may be produced by the Child Welfare Services Case Management System [*Cal. Rules of Ct., Rule 5.504(b)*].

This form is available in an interactive, electronic format in *LexisNexis[(R)] Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

The form must be filed by any person who desires access to the records but who is not authorized by statute to such access [*Cal. Rules of Ct., Rule 5.552(c)*; *see Welf. & Inst. Code § 827 et seq.*]. The petition must identify the specific records sought to be inspected or obtained, based on knowledge, information, and belief that the requested records exist and are relevant to the purpose for which they are sought. In addition, the petition must "describe in detail" the reasons the records are being sought and the relevance to the proceeding or purpose for which they are sought [*Cal. Rules of Ct., Rule 5.552(c)*]. The sample here does not include the attached pages on which the details supporting the request would be set forth.

Juvenile court records, police reports, and detention records are confidential, and access to them is available only to the

following [*Cal. Rules of Ct., Rule 5.552(b)*]:

- Court personnel [*Welf. & Inst. Code § 827(a)(1)(A)*].

- The district attorney, a city attorney or city prosecutor authorized to prosecute criminal or juvenile cases under state law [*Welf. & Inst. Code § 827(a)(1)(B)*].

- The minor who is the subject of the proceeding [*Welf. & Inst. Code § 827(a)(1)(C)*].

- The minor's parents or guardian [*Welf. & Inst. Code § 827(a)(1)(D)*].

- Attorneys for the foregoing parties in the juvenile court proceeding, including appellate attorneys for appeals of the juvenile court proceedings [*Welf. & Inst. Code § 827(a)(1)(E)*; *Cal. Rules of Ct., Rule 5.552(b)(1)(A*); *see Lorenza P. v. Superior Court (1988) 197 Cal. App. 3d 607, 611, 242 Cal. Rptr. 877]*
.

- Judicial officers, law enforcement officers, and probation officers involved in criminal or juvenile proceedings involving the minor [*Welf. & Inst. Code § 827(a)(1)(E)*].

- The county counsel, city attorney or any other attorney representing the social services agency filing the petition in the dependency action [*Welf. & Inst. Code § 827(a)(1)(F)*].

- The superintendent or a designee of the school district where the minor is enrolled or attending school [*Welf. & Inst. Code § 827(a)(1)(G)*].

- Child protective agencies [*Welf. & Inst. Code § 827(a)(1)(H)*].

- The State Department of Social Services to carry out its duty to oversee county social services agencies, children in foster care or receiving foster care assistance, and children in out-of-state placements [*Welf. & Inst. Code § 827(a)(1)(I)*].

- Legal staff or special investigators who are peace officers employed by or serving as an authorized representative of the State Department of Social Services as necessary to inspect, license, and investigate community care facilities [*Welf. & Inst. Code § 827(a)(1)(J)*].

- Members of children's multidisciplinary teams [*Welf. & Inst. Code §§ 827(a)(1)(K), 830*].

- Persons or agencies providing treatment or supervision of the minor [*Welf. & Inst. Code § 827(a)(1)(K)*].

- A judge, family court mediator, court-appointed evaluator or person conducting a count connected child custody evaluation, investigation, or assessment pursuant to *Fam. Code §§ 3111, 3118*, and counsel appointed for the child in the family law case [*Welf. & Inst. Code § 827(a)(1)(L)*].

- A court-appointed investigator who is actively participating in a guardianship case involving a minor pursuant to *Prob. Code § 1500* and acting within the scope of the investigator's duties in that case [*Welf. & Inst. Code § 827(a)(1)(M)*].

- A local child support agency for the purpose of establishing paternity and establishing and enforcing child support orders [*Welf. & Inst. Code § 827(a)(1)(N)*].

- Juvenile justice commissions [*Welf. & Inst. Code § 827(a)(1)(O)*].

- Other law enforcement agencies and other persons and agencies that have a "legitimate need for the information for purposes of official disposition of a case" [*Welf. & Inst. Code § 828*].

- Board of Prison terms if the records have not been sealed, concern the person before the board, and relate to a case in which the person was found to come under the juvenile court's jurisdiction pursuant as a delinquent [*Welf. & Inst. Code § 829*].

- Any other persons who may be designated by order of the judge of the juvenile court on filing a petition for inspection [*Welf. & Inst. Code § 827(a)(1)(P)*].

- Individuals listed in *Welf. & Inst. Code § 827(a)(1)(A), (B), (C), (D), (E), (F), (H),* and *(I)* may also receive copies of the case file, but the confidentiality requirements of *Welf. & Inst. Code § 827(a)(4)* still apply [*Welf. & Inst. Code § 827(a)(5)*].

Juvenile court records that must be sought through this petition include the following [*Cal. Rules of Ct., Rule 5.552(a)*]:

- All documents filed in a juvenile court case.

- Reports to, and documents made available to, the court by probation officers, social workers of child welfare services programs, and court-appointed special advocates.

- Documents that relate to a child for whom a petition has been filed in juvenile court and that are maintained in the office files of these officers, workers, or advocates.

- Transcripts, records, or reports that relate to matters prepared or released by the court, probation department, or child welfare services program.

- Documents, video or audio tapes, photographs, and exhibits admitted into evidence at juvenile court hearings.

- Documents made available to probation officers, social workers of child welfare service programs and court-appointed special advocates in preparation of reports to the court.

[3] Service of Petition

Before the petition is submitted to the juvenile court, the petitioner must serve or attempt to serve a copy of it personally or by first-class mail using Judicial Council form JV-571, Notice of Request for Disclosure of Juvenile Case File. Service must be made at least five days before filing with the court. A copy of the petition must be served on county counsel, the district attorney, the child, the attorney of record for a child who remains a ward or dependent of the court, the parent or guardian for a child who is under age 18 or was the subject of a dependency petition, and either, or both if applicable, the probation department or child welfare services agency [*Cal. Rules of Ct., Rule 5.552(d)*]. An objection may be filed by any of these persons using Judicial Council form JV-572, Objection to Release of Juvenile Case File.

[4] Hearing on Petition

The court will review the petition and will summarily grant or deny it or will set a hearing. The clerk must give all parties notice of the hearing. At the hearing, if the court determines that the petitioner may be entitled to disclosure of

any information or documents, the court must review the records in camera, with the assumption that all legal claims of privilege are asserted. Thereafter, if the court determines that all or part of the records may be disclosed, the court must make appropriate orders that specify the information to be disclosed and the procedure for providing access to it [*Cal. Rules of Ct., Rule 5.552(e)*].

For further discussion of the hearing procedure, including grounds that must be asserted, notice, and the in camera procedure, see *§ 327.34[2][b]*.

[5] Cross References

For further discussion relating to disclosure of juvenile court records, see § 327.64

For discussion relating to disclosure and sealing of juvenile court records of dependency proceedings, see *Ch. 328, Juvenile Courts: Dependency Proceedings, §§ 328.109[14]*, 328.182

For discussion relating to sealing of juvenile court records of delinquency or wardship proceedings, see *Ch. 329, Juvenile Courts: Delinquency Proceedings, § 329.117*

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS

28-328 California Forms of Pleading and Practice--Annotated 328.syn

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.syn Synopsis to Chapter 328: JUVENILE COURTS: DEPENDENCY PROCEEDINGS

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FOOTNOTES:

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART I. SCOPE

28-328 California Forms of Pleading and Practice--Annotated § 328.01

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§ 328.01 Scope

This chapter discusses issues and includes selected forms relating to juvenile court dependency proceedings, that is, proceedings instituted for the protection of abused, neglected, and abandoned children under *Welf. & Inst. Code § 300*.

It includes:

- An overview of the dependency system, including its general purpose, jurisdiction, and processes [*see § 328.10* et seq.].
- Intake, investigation, and commencement procedures [*see § 328.30* et seq.].
- Initial hearing procedures [*see § 328.40* et seq.].
- Parties, standing and right to counsel [*see § 328.60* et seq.].
- Detailed discussion of subject matter and juvenile court jurisdiction in dependency proceeding [*see § 328.80* et seq.].
- Jurisdiction hearings [*see § 328.100* et seq.].
- Disposition hearings [*see § 328.120* et seq.].
- Supplemental and Subsequent Petitions [*see § 328.140* et seq.].
- Periodic review proceedings [*see § 328.150* et seq.].

- Permanency planning proceedings [*see § 328.170* et seq.].
- Post-permanency planning proceedings [*see § 328.180* et seq.].
- Appeals and review by extraordinary writ [*see § 328.190* et seq.].
- Adoption of dependent children [*see § 328.198*].
- Sealing juvenile court records [*see § 328.199*].

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PART I. SCOPE

28-328 California Forms of Pleading and Practice--Annotated § 328.02

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§ 328.02 Cross References

A discussion of general juvenile court jurisdiction and procedures can be found in Ch. 327, *Juvenile Courts: Jurisdiction and General Procedures* .

For a discussion relating specifically to juvenile court proceedings for delinquency or wardship, refer to Ch. 329, *Juvenile Courts: Delinquency Proceedings*.

To evaluate specific child-related civil actions, and review related pleading forms, see the following chapters:

- Ch. 5, *Abuse of Minors and Elderly* (includes discussion and forms relating to civil actions based on sexual abuse of minors).

- Ch. 12, *Adoptions: Nature and Effect* through Ch. 12E, *Adoptions: Attack on Decree* (discussion and forms relating to termination of parental rights).

- Ch. 258, *Family Law Enforcement: General Enforcement: General Enforcement Principles and Remedies*; Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*; and Ch. 260, *Family Law Enforcement: Foreign Judgments* (discussion and forms relating to the enforcement of child support orders).

- Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* through Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships* (discussion and forms relating to the appointment of guardians of minors).

- Ch. 293, *Harassment and Domestic Violence* (discussion and forms relating to protective orders

against domestic violence, including abuse of minors).

- Ch. 364, *Minors: Claims and Property of Minors*; Ch. 365, *Minors: Contract Actions*; Ch. 366, *Minors: Court Consent for Medical Care or Enlistment*; Ch. 367, *Minors: Disaffirmation of Judgments*; Ch. 367A, *Minors: Tort Actions* (discussion and forms relating to tort and contract actions by and against minors).

- Ch. 394, *Parent and Child* (additional discussion and forms relating to parental rights and duties, together with coverage of child custody issues arising outside the context of dissolution of marriage proceedings).

- Ch. 412, *Paternity* (discussion and forms relating to establishment of a parent-child relationship).

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART I. SCOPE

28-328 California Forms of Pleading and Practice--Annotated § 328.03

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§ 328.03 Terminology: "Probation Officer," "Social Worker," and "Indian Social Worker" Distinguished

Almost all California counties have delegated the duties of the county probation officer concerning dependent children to the county welfare department pursuant to *Welf. & Inst. Code § 272*. This chapter therefore generally uses the term "social worker" rather than "probation officer" and "social services department" rather than "probation department" whenever describing the authority and duties of the county in respect to dependency cases. It should be understood that such usage can refer to either the social worker or the probation officer and either the county social services department or the county probation department [*see Welf. & Inst. Code § 215*]. It can also refer to any social worker of an Indian tribe which has entered into an agreement with the State Department of Social Services pursuant to *Welf. & Inst. Code § 10553.1* concerning child welfare services or foster care payments [*Welf. & Inst. Code §§ 215, 272(a)(2), 306(a)*].

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PART I. SCOPE

28-328 California Forms of Pleading and Practice--Annotated §§ 328.04-328.09

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[Reserved]

§§ 328.04[Reserved]

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
A. Overview of Dependency Proceedings

28-328 California Forms of Pleading and Practice--Annotated § 328.10

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§ 328.10 Governing Law and Nature of Proceedings

[1] Governing Law

State statutes governing dependency proceedings are set out generally in *Welf. & Inst. Code § 300 et seq.*, while state rules of court governing these procedures are set out in *Cal. Rules of Ct., Rule 5.500 et seq.*

Dependency proceedings are special proceedings traditionally viewed as being governed by their own set of rules and statutes [*In re Shelley J. (1998) 68 Cal. App. 4th 322, 328, 79 Cal. Rptr. 2d 922* ; *In re Chantal S. (1996) 13 Cal. 4th 196, 200, 51 Cal. Rptr. 2d 866, 913 P.2d 1075* ; *In re Jennifer R. (1993) 14 Cal. App. 4th 704, 711, 17 Cal. Rptr. 2d 759]* . As such, the traditional view is that neither the Civil Code nor the Code of Civil Procedure apply to dependency proceedings unless expressly applicable [*see, e.g., Welf. & Inst. Code §§ 213* (contempt), 213.5 (restraining orders), 341 (subpoenas), 348 (variance and amendment of pleadings); *Code of Civ. Proc § 917.7* (stay of order for out-of-state placement in dependency cases)].

Several cases have now departed from the traditional view and have held the provisions of the Code of Civil Procedure that apply to special proceedings are applicable to dependency proceedings if they are consistent with the overall goal of the dependency system [*In re David H. (2008) 165 Cal. App. 4th 1626, 1638-1639, 82 Cal. Rptr. 3d 81* ; *In re Claudia E. (2008) 163 Cal. App. 4th 627, 636, 77 Cal. Rptr. 3d 722* ; *In re Mark B. (2007) 149 Cal. App. 4th 61, 78-79, 56 Cal. Rptr. 3d 697]* . There are two fundamental problems with these holdings.

The first is that they fail to recognize the importance that should be given to the fact case law has long held the Civil Code and Code of Civil Procedure do not apply to dependency cases unless made expressly applicable [*see, e.g., In re Shelley J. (1998) 68 Cal. App. 4th 322, 328, 79 Cal. Rptr. 2d 922* (the requirements of the Civil Code and the Code of Civ. Proc. do not apply to dependency proceedings unless otherwise specified); *In re Chantal S. (1996) 13 Cal. 4th*

196, 205-208, 51 Cal. Rptr. 2d 866, 913 P.2d 1075 (legislature knows how to make provisions of other codes applicable to dependency proceedings if it chooses to and failure to do so can infer an intent the other statutory provision was intended not to apply)]. Indeed, while this principle was not the sole basis on which the Supreme Court ruled in *Chantal S.*, it was one of the express legal reasons the Court cited for its ruling that *Fam. Code § 3190* did not apply to juvenile court custody orders [*In re Chantal S. (1996) 13 Cal. 4th 196, 208, 51 Cal. Rptr. 2d 866, 913 P.2d 1075]* . Such long recognized authority should not be abruptly discarded without good reason [*Sara M. v. Superior Court (2005) 36 Cal. 4th 998, 1011-1015, 32 Cal. Rptr. 3d 89, 116 P.3d 550*].

Here there was no such good reason, since none of the cases marking the recent departure on the inapplicability of other codes to dependency proceedings required that departure to reach their holdings on the merits [*In re David H. (2008) 165 Cal. App. 4th 1626, 1640, 82 Cal. Rptr. 3d 81* (*Code of Civ. Proc. § 430.80*, appears in part 2 of that code, which applies to civil actions, not in part 3, which applies to special proceedings); Welf. & Inst. Code expressly incorporates one chapter of part 2 of the Code of Civil Procedure and does not expressly incorporate the section at issue or the chapter in which it appears, thereby supporting the conclusion it does not apply to dependency proceedings); In re Claudia E. (2008) *(2008) 163 Cal. App. 4th 627, 637, 77 Cal. Rptr. 3d 722* ("the juvenile court has the inherent power to issue declaratory relief in such proceedings"); *In re Mark B. (2007) 149 Cal. App. 4th 61, 78, 56 Cal. Rptr. 3d 697* (the statutes in part 1 of the Code of Civ. Proc. "provide for the fundamental empowerment of the courts, including the juvenile court" and thus apply to dependency proceedings).

Second, the *Mark B.* and *Claudia E.* line of cases fails to recognize the Pandora's Box of litigation at both the trial and appellate levels that will occur as parties challenge whether each individual provision of the Code of Civil Procedure that applies to special proceedings is consistent with the overall purpose of the dependency system. As noted by the court in *David H.*, the Fourth District has cited practical reasons for following the *Shelley J.* decision and enforcing forfeiture [*In re David H. (2008) 165 Cal. App. 4th 1626, 1638 , citing In re S. O. (2002) 103 Cal. App. 4th 453, 459-460, 126 Cal. Rptr. 2d 554* ; *In re Jessica C. (2001) 93 Cal. App. 4th 1027, 1038 n.8, 113 Cal. Rptr. 2d 597]* . How many years will it take to resolve the many questions that will need to be litigated to determine which provisions of which codes outside the Welfare & Institutions Code are consistent with the overall purpose of the dependency system and thus applicable to dependency proceedings? How many trial and appellate courts will disagree on these issues? Such needless litigation is itself an unnecessary delay inconsistent with the overall purpose of the dependency statutes.

Thus, the change suggested by recent case law is not the better view. If practical reasons are a basis for appellate decision-making, the better view on this issue is the traditional view that provisions of other codes are not applicable to dependency proceedings unless specifically made applicable. Courts can, of course, look to other codes by analogy for guidance when necessary, and in doing so can recognize the inherent authority of the juvenile court to do that which is necessary to carry out its mandate [*see, e.g.*, In re Claudia E. (2008) *(2008) 163 Cal. App. 4th 627, 637, 77 Cal. Rptr. 3d 722* ("the juvenile court has the inherent power to issue declaratory relief in such proceedings"); *In re Lisa R. (1975) 13 Cal. 3d 636, 643-644, 119 Cal. Rptr. 475, 532 P.2d 123* ("a juvenile court is vested with jurisdiction to determine parentage of a minor when that finding is necessary to any ultimate determination with which it is charged"); *In re Fred J. (1979) 89 Cal. App. 3d 168, 176, 152 Cal. Rptr. 327* ("the juvenile court has inherent power to entertain a prehearing challenge to the petition's sufficiency by a motion akin to a demurrer")]. Nevertheless, practitioners and juvenile courts should be prepared to argue or rule under both alternative approaches until the law in this area settles.

PRACTICE TIP:

Be Aware of Local Rules and Practices. Practitioners should be aware that some juvenile courts have established local rules for dependency proceedings [*see Los Angeles County Dep't of Children & Family Servs. v. Superior Court (1996) 51 Cal. App. 4th 1257, 1267, 59 Cal. Rptr. 2d 613* ; *Code of Civ. Proc. § 575.1*; *Gov. Code §§ 68070, 68071*]. Further, they may also have local practices, policies, or procedures that are not formalized into rules but nonetheless affect the practice of dependency law in a particular county. For instance, many courts have informal non-statutory procedures for the setting of

matters on calendar to address issues such as visitation or services without the necessity of a formal petition pursuant to *Welf. & Inst. Code § 388*. The practitioner should familiarize himself or herself with any local rules and practices.

Dependency proceedings are, when applicable, subject also to the Indian Child Welfare Act (ICWA) [*25 U.S.C. § 1901 et seq.*], the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) [*Fam. Code § 3400 et seq.*], the Interstate Compact On The Placement of Children (ICPC) [*Fam. Code § 7900 et seq.*], the Uniform Parentage Act (UPA) [*Fam. Code § 7600 et seq.*], and other federal and state acts and regulations.

[2] Nature of Dependency Proceedings

For many years, the courts characterized the nature of the dependency system inconsistently. Some viewed it as civil in nature [*see In re Robinson (1970) 8 Cal. App. 3d 783, 786, 87 Cal. Rptr. 678]* . Others viewed it as quasi-criminal in nature [*see Lois R. V. Superior Court (1971) 19 Cal. App. 3d 895, 901, 97 Cal. Rptr. 158]* . In 1990, however, the California Supreme Court described dependency proceedings as civil in nature, designed not to punish the parent but to protect the child [*see In re Malinda S. (1990) 51 Cal. 3d 368, 384, 272 Cal. Rptr. 787, 795 P.2d 1244 , citing In re Mary S. (1986) 186 Cal. App. 3d 414, 418-419, 230 Cal. Rptr. 726* ; *see also In re Kerry O. (1989) 210 Cal. App. 3d 326, 333]* . This does not mean dependency proceedings are civil proceedings. The characterization "civil in nature" is essentially a statement that dependency proceedings are non-criminal proceedings. More accurately, they are unique special proceedings of their own juvenile dependency nature, non-criminal, but also not specifically civil. Regardless, these proceedings are significantly different from ordinary civil actions by reason of the way they affect the fundamental rights of parents and children [*In re Kristin H. (1996) 46 Cal. App. 4th 1635, 1661-1662, 54 Cal. Rptr. 2d 722]* .

[3] Informal and Nonadversary Atmosphere

The law requires dependency proceedings to be conducted in as informal and nonadversary an atmosphere as possible, except where there is a contested issue of law or fact [*Welf. & Inst. Code § 350(a)(1)*]. The goal of conducting dependency proceedings in such a manner is to maximize the cooperation of all persons interested in the child's welfare, including the child, in working with the court in any orders it may make in the case, especially in those orders for the care of the child [*Welf. & Inst. Code § 350(a)(1)*]. Attorneys are still required to represent their clients zealously. But zealous advocacy does not require rudeness or unreasonableness. Further, zealous advocacy in the dependency context includes helping the client to fully understand options, what is realistic, and what is best for the child and family both short term and long term. To this end, mediation programs are encouraged [*Welf. & Inst. Code § 350(a)(2)*]. Thus, while dependency proceedings often become "adversarial in nature" [*In re Kristin H. (1996) 46 Cal. App. 4th 1635, 1662, 54 Cal. Rptr. 2d 722]* , such is neither the goal of, nor the intention for the system. Even when matters go to a contested hearing, everyone benefits from a professional and balanced demeanor by all participants.

PRACTICE TIP:

The Need To Work Together. Although the law is clear that dependency proceedings are to be nonadversary proceedings to the maximum degree possible, the way in which the law is practiced by social services agencies, attorneys and the courts is often much different. In some counties, these various participants merely dislike each other or fail to work well together. In other counties, they appear to be in a constant state of "war." Where such animosities exist everybody suffers, including the children and families the dependency system is designed to serve. While contested hearings are inevitable, they often signify the parties and the court have failed to work together to resolve the matter, consistent with the evidence, in a manner which protects the child while also respecting the needs and desires of the family where appropriate. Resolution rarely requires formal mediation if the participants are reasonable and truly desire to resolve the matter.

The most effective litigants in dependency proceedings, be they on the side of the agency, the child or the parent, are rarely those who consistently draw the hardest line or take the most cases to contested hearings. Instead, they are usually those who work with knowledge, insight, and a spirit of cooperation to achieve realistic and reasonable goals for their clients both inside and outside the courtroom. Litigants who achieve the best result regardless of their role in the proceedings strive to protect the child and to maximize the involvement of the family in decision making and services. Those litigants who focus on problem solving enjoy the greatest likelihood of success and the least degree of hostility. All agencies, attorneys and courts should evaluate their own approach to dependency proceedings in light of these guiding principles.

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
A. Overview of Dependency Proceedings

28-328 California Forms of Pleading and Practice--Annotated § 328.11

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§ 328.11 Goals of Dependency Proceedings

[1] To Protect the Child

The dependency system has traditionally be viewed as having three primary goals for each child made a dependent of the juvenile court: (1) the safety and protection of the child; (2) the preservation of the family, if it can be done safely and in a timely manner; and (3) the timely provision of a stable, permanent home for the child. Underlying these three is the fundamental goal of serving the child's best interests.

The first and foremost goal of the dependency system is to protect children who have been seriously abused, neglected or abandoned or who are at substantial risk of being so abused or neglected [*Welf. & Inst. Code §§ 202, 300.2*]. To this end, the legislature has declared that in providing for a statewide system of child welfare services it believes all children "are entitled to be safe and free from abuse and neglect" [*Welf. & Inst. Code § 16500*; *see also Welf. & Inst. Code § 396* ("children have a right to a normal home life free from abuse")]. Thus, the safety, protection, physical and emotional well-being of dependent children is the primary goal of the dependency system [*see, e.g., Welf. & Inst. Code §§ 202, 300.2, 361(c)(1), 361.2(a), 361.3(a)(8), 366.21(e)*].

[2] To Preserve the Family

Second and equal in importance so long as it can be done safely, is the public commitment to preserve families and safeguard parents' fundamental right to raise their children [*Welf. & Inst. Code §§ 202, 300.2, 361.5(a)*; *see also Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 255, 19 Cal. Rptr. 2d 698, 851 P.2d 1307* ; *In re Marilyn H. (1993) 5 Cal. 4th 295, 308-310, 19 Cal. Rptr. 2d 544, 851 P.2d 826]* . So important is this goal of family maintenance and reunification that the California Supreme Court has noted, "up until the time the section 366.26 hearing is set, the parent's interest in reunification is given precedence over the child's need for stability and permanency" [*In re Marilyn H. (1993) 5 Cal. 4th 295, 310, 19 Cal. Rptr. 2d 544, 851 P.2d 826]* . This is not to say that family preservation

and reunification is not also in the child's interest. Children have a right to and an interest in remaining part of their family of origin, when it can be done safely. Thus, family preservation and reunification can serve both the interest of the parents and the child.

[3] To Provide a Stable, Permanent Home in a Timely Manner

The third goal of the dependency system is to provide a stable, permanent home for the child in a timely manner. Foster care is meant to be temporary care. California has long recognized that children are better served by being reunified with parents or being in an alternative permanent placement such as adoption or guardianship than in foster care [*Welf. & Inst. Code § 396*]. But in the past, it was not until family reunification efforts were unsuccessful that the dependency system shifted its focus from preserving the family to providing the child with a safe and stable permanent home [*Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 254-256, 19 Cal. Rptr. 2d 698, 851 P.2d 1307* ; *Welf. & Inst. Code § 366.26*]. The California Supreme Court had even noted the state legislature's determination to provide stable, permanent homes for dependent children once reunification efforts had been unsuccessful. Indeed, the interest of providing children a permanent home upon the failure of reunification efforts has been viewed by the courts as a compelling one [*In re Marilyn H. (1993) 5 Cal. 4th 295, 307, 19 Cal. Rptr. 2d 544, 851 P.2d 826 , citing In re Heather P. (1989) 209 Cal. App. 3d 886, 892, 257 Cal. Rptr. 545]* . But this form of "sequential planning" often delayed permanency for children, since efforts to find a permanent home usually did not begin until reunification efforts had failed.

With the implementation of concurrent services planning that is now authorized by federal law and mandated by California law, planning for a permanent home for a dependent child does not wait to begin until after reunification efforts are terminated. Instead, when a child is removed from parents and reunification services are ordered, permanency planning services are concurrently implemented. If the family is successful in reuniting, the family home is the permanent home that fulfills this goal. If the family is not successful in reuniting, however, another permanent home will have already been planned for. Thus, the goal of providing dependent children with stable, permanent homes is no longer one that does not come into effect until later in the case. Now it is a goal that is present from the very beginning, concurrent with the goals of protecting the child and preserving the family.

[4] The Best Interest of the Child

Underlying the goals of protecting the child, preserving the family, and providing the child with a permanent home is the fundamental goal of serving the best interest of the child [*Welf. & Inst. Code § 202(a)-(b)*; *In re William B. (2008) 163 Cal. App. 4th 1220, 1227, 78 Cal. Rptr. 3d 91 , citing* Seiser & Kumli, California Juvenile Courts Practice and Procedure § 2.11 (Matthew Bender)]. Thus, when an abused or neglected child is provided with safety and protection, the child's best interest is served. When a dependent child's family is preserved with the child safely remaining a member of that household, the best interest of the child is served. And when a child is provided a stable and permanent home, whether with a parent or some other caretaker, the child's best interest is served.

It has been said that the best interest of the child is an " 'elusive guideline that belies rigid definition' " [*In re Ethan N. (2004) 122 Cal. App. 4th 55, 66, 18 Cal. Rptr. 3d 504 , quoting Adoption of Michelle T. (1975) 44 Cal. App. 3d 699, 704, 117 Cal. Rptr. 856]* . This is no doubt true, since reasonable minds can differ on what is best for a specific child. Nevertheless, the dependency system strives to achieve it. It has been argued, however, that the best interest of the child is difficult, if not impossible to achieve in the adversary atmosphere the dependency system all too often provides [Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 Univ. of Miami L. Rev. 79 (1997)]. It can be difficult. It is not impossible. There are, however, many problems inherent in the vagueness and subjectivity of a best interest of the child standard for decision making [Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*]. Thus, although the best interest of the child is one of the fundamental goals of the dependency system, it is rarely used in the California dependency system as the standard for

decision making [*see, e.g., Welf. & Inst. Code §§ 361.3(a)(1), 362.1(a), 388* (sections where best interest is used as one of the standards or criteria for decision making)]. Instead, recognizing the need for more definitive standards for decision making [Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 623, 639-641 (1976)*], California's dependency statutes usually set forth specific standards for decision making at the various hearings [*see, e.g., Welf. & Inst. Code §§ 319, 361(c), 366.21(e), 366.26(c)(1)* (sections where specific standards for decision making are set forth)]. When such specific standards are followed, the interest of the child is inherently served in the manner the legislature has determined is best [*see, e.g., In re Zeth S. (2003) 31 Cal. 4th 396, 410, 2 Cal. Rptr. 3d 683, 73 P.3d 541* ("The Legislature, however, has determined that what is in the child's best interests is best realized through implementation of the procedures, presumptions, and timelines written into the dependency statutes"); *In re Jessica G. (1997) 58 Cal. App. 4th 1, 8, 67 Cal. Rptr. 2d 811* (best interest is "implied throughout dependency law"); *In re Tabatha G. (1996) 45 Cal. App. 4th 1159, 1165, 53 Cal. Rptr. 2d 93* (best interest is "inherent in the legislative procedure")].

[5] The Future Goal of the Dependency System

Although the statutory scheme has not yet been revised to recognize it, the implementation of concurrent services planning as a mandatory part of California's dependency system was moving this system toward a single goal for dependent children. That one goal was to provide all children who are declared dependents with a safe, stable, permanent home in a timely fashion. This single goal can be seen to incorporate all three of the goals of the system that had been applied sequentially under prior law, as well as the underlying purpose of serving the child's best interest. If the child is safely maintained with or returned to the parent in a timely fashion as a permanent placement, this one goal is accomplished. If the child is safely placed with the previously noncustodial parent in a timely fashion as a permanent placement, this one goal is accomplished. If reunification efforts are denied or terminated and the child receives the safety and stability of an adoptive home or a legal guardianship in a timely fashion as an alternative permanent placement, this one goal is accomplished. For years many within the dependency system have defined "success" as achieving family maintenance or reunification. Adoption or legal guardianship were viewed as signals the system had failed. With the recognition of a single goal for the dependency system, that of providing dependent children with a safe, stable, permanent home in a timely fashion, "success" is redefined and can be achieved in a variety of ways. This change is one that is long overdue, serves the best interest of children and families, and should be the future of California's dependency system.

Nevertheless, several gradual shifts are placing this single future goal in question. First, while it has often been said that the importance of reunification in the dependency system is difficult, if not impossible, to exaggerate [*In re Luke L. (1996) 44 Cal. App. 4th 670, 678, 52 Cal. Rptr. 2d 53]* , the number of reasons for denying services to parents continues to grow. Indeed, over a decade ago one appellate court noted regarding the *Luke L.* statement as to the importance of reunification in the dependency system that "In light of the steady multiplication of the section 361.5, subdivision (b) exceptions, it may be questionable how long this comment will hold up" [*Riverside County Dept. of Public Social Services v. Superior Court (1999) 71 Cal. App. 4th 483, 488, n.9, 83 Cal. Rptr. 2d 777]* . In the decade since that decision the list of reasons to deny reunification services has continued to grow [*42 U.S.C. § 671(a)(15)(D)(i)*; *Welf. & Inst. Code § 361.5(b)(1)-(15), (e)*]. Thus, the emphasis on reunification as a means of accomplishing the single goal of the dependency system is suffering from erosion. Second, the goal of timely permanency decisions is eroding as well. This can be seen clearly in two recent shifts, that of mandating minimum periods of reunification services rather than maximum [*Welf. & Inst. Code §§ 361.5(a)(1), 366.21(e)*], and the provision of services to certain parents for up to 24 months from removal rather than the previous maximum of 18 months [*Welf. & Inst. Code §§ 361.5(a)(4), 366.22(b), 366.25*]. Finally, for many years it has been said the legislature has been clear that when reunification is not possible, adoption is the preferred permanent plan [*see, e.g., In re Dakota H. (2005) 132 Cal. App. 4th 212, 228, 33 Cal. Rptr. 3d 337* ; *In re Tabatha G. (1996) 45 Cal. App. 4th 1159, 1164, 53 Cal.Rptr.2d 93]* . In recent years, however, the number of exceptions to the termination of parental rights has continued to grow [*Welf. & Inst. Code § 366.26(c)(1)(A), (B)(i)-(vi)*]. Thus the idea that adoption is the preferred permanent plan is also eroding. The effect these three policy

shifts on the future of the dependency system and on providing children with a safe, stable, permanent home in a timely fashion remains to be seen. This is an area to be watched for future developments.

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329

CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
A. Overview of Dependency Proceedings

28-328 California Forms of Pleading and Practice--Annotated § 328.12

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§ 328.12 Development of Dependency Proceedings

[1] 1980 Federal Standards: Public Law 96-272

Following several years of hearings, studies and reports, the United States Congress in 1979 proposed a major revision of the federal funding of child welfare services [*see* 1980 U.S. Code Cong. & Admin. News 1448]. Congress recognized that children placed in foster care often suffered what was characterized as "foster care drift." As such, the legislation sought to provide an incentive to the states to modify their existing laws so as "to lessen the emphasis on foster care placement and to encourage greater efforts to find permanent homes for children by making it possible for them to return to their own families or by placing them in adoptive homes" [*see* 1980 U.S. Code Cong. & Admin. News 1448, 1450].

This proposal was enacted as the Adoption Assistance and Child Welfare Act of 1980 and is commonly referred to as Public Law 96-272 [*see 42 U.S.C. § 670 et seq.*; *see also* 1980 U.S. Code Cong. & Admin. News 1448]. To receive federal funding states must enact legislation requiring active efforts to keep children in their own homes if possible, to reunify their families if removal proved necessary, and to select permanent plans in a timely fashion, including adoption, if the families could not be reunified [*see 42 U.S.C. §§ 671(a)(14), 672, 675*; *Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 246, 19 Cal. Rptr. 2d 698, 851 P.2d 1307]* .

[2] 1982 California Compliance: Senate Bill 14

Senate Bill 14 [Stats. 1982, ch. 978] was passed by the California Legislature in 1982 so as to bring California into compliance with Public Law 96-272. It created a more structured framework for the protection of abused, neglected and abandoned children and for services for their families. It mandated a clear and convincing standard for removal of children from their parents [*Welf. & Inst. Code § 361*], provision of reunification services for families where children are removed [*see* former *Welf. & Inst. Code § 361(e)*; *now see Welf. & Inst. Code § 361.5*], and court review hearings

every six months [*Welf. & Inst. Code §§ 364, 366, 366.2*]. If a child was removed from parental custody it placed the burden on the county welfare department to prove at each of the review hearings the necessity for the child continuing to remain out of the home [*Welf. & Inst. Code § 366.2(e)*].

If the child could not be returned through the provision of reunification services within 12 to 18 months of removal, Senate Bill 14 mandated that a permanency planning hearing be held at which the juvenile court would select adoption, guardianship or long-term foster care as a permanent plan for the child [former *Welf. & Inst. Code § 366.25*]. If the plan ordered was adoption, a separate proceeding had to be filed in the superior court pursuant to former *Civ. Code § 232* [*now see Fam. Code § 7800 et seq.*] to implement that plan [*Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 246, 19 Cal. Rptr. 2d 698, 851 P.2d 1307]* .

While the juvenile dependency system established by Senate Bill 14 was a vast improvement, in practice it did not accomplish all that it had been intended to do toward solving the dilemma of foster care drift. Often permanency planning hearings were not held within 18 months of the initial removal of dependent children. Further, once a permanent plan of adoption was selected it sometimes took many months, or even years, before the separate superior court action to terminate parental rights was filed or completed [*Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 246-247, 19 Cal. Rptr. 2d 698, 851 P.2d 1307 , citing In re Micah S. (1988) 198 Cal. App. 3d 557, 564, 243 Cal. Rptr. 756* (conc. opn. of Brauer, J.)].

[3] 1986 California Task Force: SB 1195

The California Legislature recognized that Senate Bill 14 was not always being implemented so as to eliminate foster care drift. Further, other potential problems were brought to its attention. In 1986 the Legislature enacted Senate Bill 1195 [Stats. 1986, ch. 1122]. It directed the Senate Select Committee on Children and Youth to convene a task force to examine the then existing statutes and practices for the protection of children. The task force was to make recommendations on how to bring greater coordination between the child abuse reporting laws, child welfare services and juvenile dependency proceedings. Further, the task force was to make recommendations for any changes it saw necessary to ensure maximum protection for children at risk of abuse, neglect and exploitation [*see* Sen. Sel. Comm. on Children & Youth/SB 1195 Task Force Rep. on *Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services* (Jan. 1988) p. i)].

The SB 1195 Task Force that was subsequently convened was a broad-based group of experts appointed by the Senate Select Committee on Children & Youth [*Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 247, 19 Cal. Rptr. 2d 698, 851 P.2d 1307]* . Its members included representatives from state and county social service agencies, the Attorney General's Office, the American Civil Liberties Union, parents' and children's advocates from both the legal and social policy fields, a law professor, a dependency court judicial officer, and a mental health practitioner [*see* Senate Sel. Comm. on Children & Youth/SB 1195 Task Force Rep. on *Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services* (Jan. 1988)].

The SB 1195 Task Force wrote three bills. The one that is best known and of the greatest importance to dependency practitioners is Senate Bill 243 [Stats. 1987, ch. 1485], which dealt directly with the statutory scheme for dependency cases. The task force also wrote Senate Bill 834 [Stats. 1987, ch. 1310] dealing with statewide training and establishing the Child Welfare Training Advisory Board, and Senate Bill 1219 [Stats. 1987, ch. 1459], which amended California's child abuse reporting laws [*see* Senate Sel. Comm. on Children & Youth/SB 1195 Task Force Rep. on *Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services* (Jan. 1988) pp. 1-2, 12-16].

[4] 1987 California Reform: Senate Bill 243

Senate Bill 243 [Stats. 1987, ch. 1485] was a comprehensive and substantial revision of California's juvenile dependency law. Among the more significant changes was the redefinition of the statutory grounds for jurisdiction

under *Welf. & Inst. Code § 300* to provide more specific language as to what kinds of children are described by that section. It also made significant changes to the appointment of counsel statutes making appointed counsel mandatory for indigent parents if the child is recommended to be or has been placed outside of the home, mandating "vertical representation" by appointed counsel throughout the dependency case, requiring the court to be more involved in the decision to appoint or not appoint counsel for the child, and setting forth specific duties for child's counsel where appointed. Further, it took steps to help focus the court and parties on the need to provide reasonable services to maintain or reunify the family [*see* Senate Sel. Comm. on Children & Youth/SB 1195 Task Force Rep. on *Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services* (Jan. 1988) pp. 3-10].

Senate Bill 243 also substantially changed the procedures for the termination of parental rights for dependent children for whom reunification efforts had failed. It did this by bringing the termination process within the dependency case itself at a hearing pursuant to *Welf. & Inst. Code § 366.26* at which the court would both select and implement a permanent plan for the child. The purpose of this change was to ensure that "minors who are adoptable will no longer have to wait months and often years for the opportunity to be placed with an appropriate family on a permanent basis" [*see Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 247, 19 Cal. Rptr. 2d 698, 851 P.2d 1307* , *citing* Sen. Sel. Comm. on Children & Youth/SB 1195 Task Force Rep. on *Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services* (Jan. 1988) p. 10].

[5] Evolutionary Change

The "broad-based group of experts" which comprised the SB 1195 Task Force [*Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 247, 19 Cal. Rptr. 2d 698, 851 P.2d 1307]* and wrote the comprehensive 1987 reform of the dependency system intended to remain in place to oversee the implementation of its work [Senate Sel. Comm. on Children & Youth/SB 1195 Task Force Rep. on *Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services* (Jan. 1988) pp. 1, 20]. This did not happen, however, and no similar group of experts from all sides of the issues has stepped forward or been appointed to help monitor and guide legislative developments in this area. The absence of such a group has been noticeable in recent years as many pieces of special interest legislation, some arguably lacking in the balance that such a group affords, have been enacted affecting children and their families in the dependency system, sometimes in well meaning but questionable ways. Such change has at times appeared to be brought about more by dissatisfaction with the outcome in a single case than with a demonstrated need within the dependency system. At other times the change has simply evidenced the ever-present swinging of the child protection pendulum and helped to identify where on the arc of that pendulum the prevalent mood of legislators and those seeking legislation is currently located.

Many of these recent changes have yet to be tested in the appellate courts, but no doubt will be in coming years. The need for balance in legislation and appellate decision making in a system as important as the dependency system is obvious, yet not always achieved. What is clear, however, is that each year this area of the law will continue to see a multitude of legislative changes and published appellate decisions. Practitioners and judicial officers who are involved in dependency proceedings at every level must actively seek to remain current in the ever-evolving area of juvenile dependency law and should, where possible and appropriate, help it to achieve and maintain the balance that it will always need.

For a historical perspective on where the dependency system was and where it needed to go see Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L. Rev. 623 (1976)*. This visionary article by Professor Michael S. Wald is easily recognized as a foreteller of what was to come in the form of Public Law 96-272, Senate Bill 14, and Senate Bill 243. This should be no surprise since Professor Wald played a major role in the drafting and development of all three pieces of legislation. Although over two decades old, his 1976 article remains valuable reading for dependency practitioners.

[6] Eliminating Delays and Denials of Placements for Cultural and Racial Reasons

The federal Multiethnic Placement Act of 1994 (MEPA) was enacted as part of the Improving America's Schools Act of 1994 [Public Law 103-382]. The act had several purposes. Recognizing too many children, particularly minorities, were staying in foster care for long periods of time while awaiting adoptive placement, the act sought to decrease the length of time children wait to be adopted. It sought to prevent discrimination in the placement of children based on race, color, or national origin. Finally, it sought to facilitate the identification and recruitment of foster and adoptive parents who can meet the needs of children. The language of that act was a compromise, however, and two years later even stricter language was enacted [Public Law 104-188]. Federal law in this regard is now found in *42 U.S.C. § 671(a)(18)*. The parallel provisions relevant to the care of dependent children in California are found in the California Family Code. No social services agency or other entity which receives any state assistance and is involved in foster care placements may do either of the following [*Fam. Code § 7950(a)(2)*]:

- Deny to any person the opportunity to become a foster or adoptive parent, on the basis of the race, color, or national origin of the person or the child involved [*Fam. Code §§ 7950(a)(2)(A), 8708(a)(1)*].

- Delay or deny the placement of a child in foster care or for adoption on the basis of the race, color, or national origin of the foster or adoptive parent or the child involved [*Fam. Code §§ 7950(a)(2)(B), 8708(a)(2)*].

Nevertheless, although race, color, and national origin cannot be used to deny a person the opportunity to become a foster or adoptive placement, and cannot be used to deny or delay foster or adoptive placement, a child's religious background may be considered in determining an appropriate adoptive placement for a child who has been freed for adoption through either relinquishment or the termination of parental rights [*Fam. Code § 8709(a)*]. None of these provisions of law, however, are not to be construed to affect the application of the Indian Child Welfare Act [*Fam. Code §§ 7950(b), 8708(b), 8709(b)*].

[7] Confidentiality of Addresses as Means of Protection

One recent and valuable development is the recognition that there are situations where it is not appropriate to disclose the actual address of an individual, be that person the child, a parent who is the victim of family violence, or a foster parent. While the juvenile court has always had the inherent authority and discretion to make orders in this regard, the recent changes in the law codify this authority and in some situations extend the responsibility for confidentiality to the social services department. For instance, the law now provides that the location of the specific foster home in which a child has been placed following removal from a parent will in most instances not be disclosed prior to the disposition hearing; by that time, more will be known about the parents and whether disclosure will place the child or foster family in danger [*Welf. & Inst. Code § 308*]. Also, if the social services agency is filing a petition and knows that one of the parents is a victim of domestic violence, the agency is to keep the address of that parent confidential [*Welf. & Inst. Code §§ 302(b), 332(e)*]. Further, the court may keep the child's placement address confidential to protect the safety of the child, specifically including when making visitation orders [*Welf. & Inst. Code § 362.1(a)*]. Protecting individuals by keeping their address and location confidential under appropriate circumstances is a welcome development in the law.

[8] Family Violence

The law's recognition of and response to violence in the family is not a new development in California [*see Welf. & Inst. Code § 18290 et seq.* (The Domestic Violence Centers Act, added by Stats. 1977, ch. 892)]. Nor is it new to dependency cases [*see, e.g., In re Benjamin D. (1991) 227 Cal. App. 3d 1464, 1470, n.5, 278 Cal. Rptr. 468* ; *In re Jon N. (1986) 179 Cal. App. 3d 156, 161, 224 Cal. Rptr. 319]* . In recent years, however, it has finally received the statewide and national attention it has long deserved [*see, e.g.*, National Council of Juv. And Fam. Ct. Judges, Fam. Violence Dept., Effective Intervention In Domestic Violence & Child Maltreatment Cases: Guidelines for Policy and Practice (1999);

Edleson, *Children's Witnessing of Adult Domestic Violence*, 14 J. Interpersonal Violence 839 (1999)]. The result in California has been a variety of statutes addressing the problem in specific legal settings [*see, e.g., Evid. Code § 1370* (hearsay exception for threats of infliction of injury); *Fam. Code §§ 3011(b)* (history of domestic abuse by parent is factor in determining child's best interest), 3020(a) ("domestic violence in a household where a child resides is detrimental to the child"); *Welf. & Inst. Code §§ 302(b), 332(e)* (keeping address of parent who is domestic violence victim confidential), 16507(d) (authorization for social services agency to request Board of Prison Terms inform it when a parent imprisoned for domestic violence is scheduled to be released; applicable in cases in which reunification services are being provided to the other parent)].

The effects of violence in the family on its victims, both young and old, are great. The Legislature has wisely mandated that all attorneys in dependency cases, including attorneys for the social services agency, court-appointed counsel, and counsel who volunteer their services, participate in domestic violence training if available through existing programs at no cost to the county [*Welf. & Inst. Code § 218.5*]. All professionals who work in the dependency system should receive such training. Family violence is an area that will be receiving continued attention in the future and should be watched by all concerned for further developments in both the law and our knowledge of the area.

For further discussion of family violence as dealt with in the dependency system, see *§§ 328.33[14], 328.126[2][b]*.

[9] Concurrent Services Planning and Related Changes

Effective January 1, 1998, concurrent services planning for legal permanence is required for all dependent children in out-of-home placement where reunification services are being provided. Concurrent planning provides for reunification services for the parents and family while simultaneously developing an alternative plan, such as adoption, in case reunification efforts fail [*see* Katz, Spoonemore, & Robinson, *Concurrent Planning: From Permanency Planning to Permanency Action*, Lutheran Social Services of Washington and Idaho, p. 9 (1994)]. This new requirement was brought about in California by the federal Adoption and Safe Families Act of 1997 [Public Law 105-89] and the enactment of Assembly Bill 1544 [Cal. Stats. 1997, ch. 793]. It was further implemented by Assembly Bill 2773 [Cal. Stats. 1998, ch. 1056]. The changes in California law are intended to conform state statutes to the Adoption and Safe Families Act of 1997 [*Welf. & Inst. Code § 16131*]. In actuality, it does more, since under federal law concurrent planning is authorized, but discretionary [*42 U.S.C. § 671(a)(15)(F)*]. Under California law it is mandatory for all dependent children in out of home placement for whom reunification services have been ordered.

Concurrent services planning is only one of many changes being brought to California's dependency system. Some of these are specifically intended to facilitate concurrent services planning and to bring California into compliance with the federal Adoption and Safe Families Act of 1997. Others are simply intended to improve the system and the way it serves children and families, but are consistent with the underlying goal of concurrent services planning, which is providing children with stability and permanence in a timely fashion. Such changes include the fact the 12-month review hearing is no longer a 12-month review hearing. It is now the 12-month "permanency hearing." Further, instead of being held 12 months from the date of the disposition hearing, the 12-month permanency hearing is held 12 months from the date the child entered foster care, which is the date of the jurisdiction finding or 60 days from the date the child was initially removed from the physical custody of the parent or guardian whichever occurred first [*Welf. & Inst. Code §§ 361.49, 361.5(a), 366.21(f)*]. The 18-month review hearing is now the "permanency review hearing." It is still held not more than 18 months after the date the child was originally removed from the physical custody of the parent or guardian, however [*Welf. & Inst. Code § 366.22(a)*].

Although court-mandated open adoptions are prohibited in California, there is now authorization for postadoption contact agreements, which allow adopting parents to enter formal agreements with the child's birth relatives, including the birth parents and even the child's Indian tribe, for postadoption visitation, contact, and sharing of information. These agreements are not part of the actual dependency process, but are available to dependent children at the time they are adopted [*Fam. Code § 8616.5*; *Welf. & Inst. Code § 366.26(a)*]. There is also now authorization for postadoption sibling

visitation if the adoptive parents agree [*Welf. & Inst. Code § 366.29*]. For foster parents who have had the child for an extended period of time or relatives with a significant relationship with the child there is an expedited adoption home study process [*Fam. Code § 8730 et seq.*]. There is also a specialized program for the training of prospective parents for HIV and alcohol and drug exposed infants [*Welf. & Inst. Code § 16135 et seq.*]. For relatives being appointed as guardians there is a kinship guardianship assistance program to help rectify some of the financial inequities that have previously kept some relatives from accepting guardianship or some courts from terminating dependency jurisdiction once relatives were appointed guardians [*Welf. & Inst. Code § 11360 et seq.*]. Thus, there are many changes now being made to the California dependency system. Judicial officers, attorneys, social workers, court-appointed special advocates and others working in and around the dependency system need to take steps to become familiar with these many changes so as to enable them to better fulfill their roles and responsibilities.

For further discussion of concurrent reunification and alternative permanency services, see *§ 328.129[3], [4],* and *[7]*.

For further discussion of postadoption visitation, postadoption contact agreements and postadoptive sibling contact agreements, see *§ 328.198[4] -[6]*.

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§ 328.13 Summary of Initiation of Dependency Proceedings

[1] Removal of Child

Although removal of the child is not a requirement for the initiation of a dependency proceeding, the majority of court cases do involve the removal of a child, at least initially. This is largely because if the child does not have to be removed from the home in order to protect the child, the social services agency will attempt to work with the family informally rather than bringing the matter to court. If a peace officer or social worker has reason to believe that a child is described by *Welf. & Inst. Code § 300* and also has reason to believe that the child is in immediate danger as a result thereof, the child may be taken into temporary custody [*Welf. & Inst. Code §§ 305, 306, 307*]. Removal of the child may be done by a social worker or a probation officer acting alone, but is usually done either by a peace officer or by law enforcement and the social services department working together.

Where the child believed to be described by *Welf. & Inst. Code § 300* is under medical care, release to a parent poses an immediate danger to the child, and the child cannot be immediately moved, the child shall be "deemed" to have been taken into temporary custody for purposes of juvenile court law while the child remains at the office of the doctor or medical facility [*Welf. & Inst. Code §§ 305(b), 309(b)*]. This is commonly called a "hospital hold." Temporary custody and the time for filing a petition with the juvenile court begins when the hospital hold is placed on the child by the law enforcement officer or social worker.

Before removing a child a social worker must consider whether there are services or referrals to public assistance that could be provided to eliminate the need to remove the child. The social worker must also consider whether there is a nonoffending caretaker who could protect the child and whether the alleged perpetrator will voluntarily agree to withdraw from the residence as possible alternatives to removal [*Welf. & Inst. Code § 306*]. If the child is removed the social worker must file a dependency petition in the juvenile court within 48 hours excluding non-judicial days [*Welf. &*

Inst. Code § 313].

[2] Summary of the Initial or Detention Hearing

The initial hearing on a dependency petition is commonly and historically referred to as a "detention hearing" even if one or more of the children involved have not been removed from the home. To avoid confusion, it should only be referred to as a detention hearing, however, if the child has been removed from the custody of the parent or guardian. Otherwise, it should be referred to as the initial hearing. Both, however, are initial hearings. If a child has been removed and a petition filed, the detention hearing must be held by the juvenile court not later than the next judicial day following the filing of that petition [*Welf. & Inst. Code § 315*; *Cal. Rules of Ct., Rule 5.670(b)*]. If the child has not been taken into custody, the clerk of the court must set the matter for an initial hearing within 15 judicial days of the filing of the petition [*Cal. Rules of Ct., Rule 5.670(a)*].

At the initial hearing the court first considers the appointment of counsel. If the parents or guardians desire counsel and cannot afford counsel the court must appoint counsel for them if the child has been removed from the home or the recommendation of the social services department is for such removal. Any appointed counsel is required to represent the parents at the initial hearing and all subsequent proceedings [*Welf. & Inst. Code § 317(b), (d)*].

The court must also appoint counsel for the child unless the court finds the child would not benefit from such appointment [*Welf. & Inst. Code § 317(c)*].

At the initial or detention hearing the court is also required to inquire of the parents present at the hearing and any other appropriate person as to the identity and address of all presumed or alleged parents. The fact that a person who claims to be the parent is at the hearing does not relieve the court of its obligation to make a parentage inquiry [*Welf. & Inst. Code § 316.2(a)*]. Where necessary, the court must take additional steps to ensure each alleged parent is noticed of the proceedings and to determine parentage [*Welf. & Inst. Code § 316.2(b), (d)*].

The social services department bears the burden to make a prima facie showing at the detention hearing that the child comes within *Welf. & Inst. Code § 300*, that continuation of the child in the parent or guardian's home is contrary to the welfare of the child, and that there is a need for detention under one of the criteria set forth in *Welf. & Inst. Code § 319(b)(1)-(4)*. The court may rely upon the reports provided by the social worker, including copies of written police reports, to make its decision [*Cal. Rules of Ct., Rule 5.674(b)*]. The parent has the right to present evidence also and, if the preparers of the reports relied upon by the social services department are not present, the right to a prima facie rehearing [*Welf. & Inst. Code §§ 319, 321*].

In addition to making findings regarding detention of the child, the court must also determine whether reasonable efforts were made to prevent or eliminate the need for removal of the child from his or her home [*Welf. & Inst. Code § 319*; *Cal. Rules of Ct., Rule 5.678(c)*].

If the court detains the child it also must order visitation and services to be provided as soon as possible to reunify the child and his or her family, if appropriate [*Welf. & Inst. Code § 319*]. This is significant since the initial removal of the child marks the beginning of the maximum 18 months of reunification services that a parent may receive in a dependency case [*Welf. & Inst. Code § 366.21(g)(1)*].

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§ 328.14 Summary of the Jurisdiction Hearing

Welf. & Inst. Code § 300 is the basic, jurisdictional section that describes the abused, neglected and abandoned children who fall within the juvenile court's dependency jurisdiction. It provides in pertinent part that any minor who comes within any of the descriptive subdivisions of that section is within the jurisdiction of the juvenile court. The section then goes on to describe in ten different subdivisions the kinds of children who fall within the juvenile court's jurisdiction [*Welf. & Inst. Code § 300(a)-(j)*].

Generally speaking, Section 300 defines jurisdiction in terms of serious harm suffered by a child or the substantial risk of such serious harm to a child. Although the harm or risk of harm to the child still must generally be the result of an act, omission or inability of one of the parents or guardians, the central focus of dependency jurisdiction is now clearly on the child rather than the parent. If the juvenile court finds the dependency petition to be true, it is not sustained against one or the other of the parents. It is simply "sustained" or "found true" [*see Welf. & Inst. Code § 300*; *see also* California Ctr. for Jud. Educ. and Research, Cal. Judges Benchguides, Benchguide 101: Juvenile Dependency Jurisdiction Hearing (Jan. 2009) § 101.5, p. 101-9].

Jurisdictional findings in dependency cases must be made by at least a preponderance of the evidence [*Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 248, 19 Cal. Rptr. 2d 698, 851 P.2d 1307 , citing Welf. & Inst. Code § 355* and Cal. Rules of Ct., former Rule 1450(f)]. The social services department bears the burden of proof at the jurisdictional hearing. It can meet this burden through the submission of a report, usually called a social study, which is received into evidence by the juvenile court. So long as the preparer of the report is available for cross-examination and the parent or guardian has the opportunity to subpoena and cross-examine witnesses whose statements are contained in the report or its attachments this procedure meets the requirements of constitutional due process [*In re Malinda S. (1990) 51 Cal. 3d 368, 382-385, 272 Cal. Rptr. 787, 795 P.2d 1244]* . If any party to a jurisdictional hearing makes a timely objection to specific hearsay statements contained in the report, the petitioner must then satisfy additional statutory requirements

regarding the statements to which an objection was made if those statements are to be the sole basis on which jurisdiction is to be found [*Welf. & Inst. Code § 355*].

At the jurisdiction hearing, as is generally true throughout the dependency case, parents and guardians have the continuing right to counsel, the right to utilize the subpoena power of the court, the right to present evidence, and the right to cross-examine the preparers of any reports submitted by the social services department [*Welf. & Inst. Code §§ 341, 353*]. If the parent or guardian is present at the hearing and not represented by counsel, any objection that could have been made to evidence received by the court will be deemed to have been made unless the court has found that the parent or guardian has knowingly and intelligently waived his or her right to counsel [*Welf. & Inst. Code § 355(a)*]. The parent does not have the right, however, to claim the privilege not to testify against a spouse or the confidential marital communication privilege [*Evid. Code §§ 972, 986*].

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
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28-328 California Forms of Pleading and Practice--Annotated § 328.15

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§ 328.15 Summary of Disposition Hearing

If the juvenile court makes a jurisdictional finding by at least a preponderance of the evidence that a child comes within *Welf. & Inst. Code § 300*, the court then conducts a disposition hearing [*Welf. & Inst. Code § 358*]. The social services department bears the burden of proof at a disposition hearing that it can meet through the submission of a report.

The parents and guardians have the same continuing rights including the right to counsel, the right to utilize the court's subpoena power, and the right to present evidence [*Welf. & Inst. Code §§ 317, 341, 358*].

The first decision the court must make after hearing evidence at the dispositional hearing is whether to:

- Dismiss the case despite the fact that it has jurisdiction [*Cal. Rules of Ct., Rule 5.695(a)(1)*].
- Order informal services without declaring dependency [*Welf. & Inst. Code § 360(b)*].
- Appoint a guardian if all parties are in agreement [*Welf. & Inst. Code § 360(a)*].
- Declare the child to be a dependent child of the juvenile court [*Welf. & Inst. Code § 360(d)*].

If the child is declared to be a dependent child of the juvenile court, the court then considers whether the child may remain with the custodial parent or whether the child must be removed from the parent pursuant to *Welf. & Inst. Code § 361(c)*.

The child must remain with the parent unless the social services department can prove by clear and convincing evidence that even with the provision of services there is no reasonable means by which the child can be protected without

removal from the home. Dispositional findings for removal from a custodial parent must be made by clear and convincing evidence [*Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 248, 19 Cal. Rptr. 2d 698, 851 P.2d 1307* , *citing* Welf. & Inst. Code former § 361(b) (*now see Welf. & Inst. Code § 361(c)*) and Cal. Rules of Ct., former Rule 1456(c) (*now see Cal. Rules of Ct., Rule 5.695)*].

If the child is not removed from the custodial parent the case becomes a "family maintenance" case. In such cases the court must order the parent to participate in child welfare services under a family maintenance plan that may include a parenting course, counseling, attendance at substance abuse meetings or classes, or such other programs as the court determines necessary [*see Welf. & Inst. Code § 362*]. The court may also place limitations on the parents' control over the child to include limitations on medical and educational decisions, visitation with others, or such other limitations as are necessary for the protection of the child [*Welf. & Inst. Code § 361(a)*].

If the child is removed from the custodial parent or legal guardian and a previously noncustodial parent desires custody of the child the court must place the child with that noncustodial parent unless to do so would be detrimental to the child [*Welf. & Inst. Code § 361.2(a)*]. This includes the court's removal of the child from the custody of a legal guardian previously appointed under the Probate Code [*In re Catherine H. (2002) 102 Cal. App. 4th 1284, 1288-1291, 126 Cal. Rptr. 2d 342]* . Only mothers and presumed fathers [*Fam. Code § 7611*] have the right to such placement [*In re Zacharia D. (1993) 6 Cal. 4th 435, 454, 24 Cal. Rptr. 2d 751, 862 P.2d 751]* . The burden of proof for a finding that it would be detrimental to the child to place him or her with the previously noncustodial parent is clear and convincing evidence [*In re Marquis D. (1995) 38 Cal. App. 4th 1813, 1827-1829, 46 Cal. Rptr. 2d 198]* .

A biological father who has not achieved presumed father status but has established paternity may be considered for placement of the child, however, particularly if the biological father has sought at the earliest opportunity to take an active paternal role in the child's life [*see In re Zacharia D. (1993) 6 Cal. 4th 435, 451, 24 Cal. Rptr. 2d 751, 862 P.2d 751* , *discussing Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 4 Cal. Rptr. 2d 615, 823 P.2d 1216]* .

If the child cannot remain or be placed with either parent the juvenile court and the social services department must give full consideration to placing the child in proximity to the parents so as to facilitate visitation and reunification [*Fam. Code § 7950(a)*]. In so doing, they must first consider the home of any relative seeking placement of the child [*Welf. & Inst. Code § 361.3(a)*; *Fam. Code § 7950(a)(1)*]. An adult who is a grandparent, aunt, uncle, or sibling, who seeks placement of the child is given preferential consideration for such placement. Other adult relatives may also be considered, but are not entitled to preferential consideration [*Welf. & Inst. Code § 361.3(c)(2)*]. Preferential consideration does not mean the relative seeking placement will actually have the child placed in their home. It only means the placement shall be the first placement to be considered and investigated [*Welf. & Inst. Code § 361.3(c)(1)*]. Such factors as the wishes of the parent and child, the good moral character of the relative and any adult living in the home of the relative, placement of siblings and half-siblings in the same home, the relative's willingness to protect the child, to facilitate visitation and reunification efforts, the safety of the relative's home, the ability and desire of the relative to provide legal permanence for the child if reunification efforts fail, and the child's best interests are taken into account in making the actual placement decision [*Welf. & Inst. Code § 361.3(a)*]. Since a relative caretaker will be considered for adoption or legal guardianship if reunification efforts fail [*Welf. & Inst. Code § 366.26(c)(4), (k)*], the ability and desire of the relative to provide a safe and stable home for the child on a long-term basis is an important part of any relative placement decision, although it cannot be the sole basis for precluding a preferential relative placement [*Welf. & Inst. Code § 361.3(a)(6), (a)(7)(H)*]. If the court does not place the child with a relative who has been considered for placement under *Welf. & Inst. Code § 361.3* the court must state on the record the reasons for denying placement with the relative [*Welf. & Inst. Code § 361.3(e)*].

If the child is not placed with a relative, consideration should also be given to placing the child with a "nonrelative extended family member" [*Welf. & Inst. Code §§ 309(d), 362.7*]. A "nonrelative extended family member" is defined as an adult caregiver who has an established familial or mentoring relationship with the child that has been verified by the social services agency [Welf. & Inst. Code § 36328.7]. The home of a "nonrelative extended family member" must be

evaluated and approved in the same way that relative homes are evaluated and approved [*Welf. & Inst. Code § 309(d)*].

If placement of the child with a relative is not in the child's best interest or cannot be accomplished the child is usually placed in a foster home. As with relative placements, foster care placements should be selected very carefully; ultimately, the home in which the child is placed may receive preferential consideration for adoption if parental rights are eventually terminated [*Welf. & Inst. Code § 366.26(k)*] or receive legal guardianship if parental rights are not terminated [*Welf. & Inst. Code § 366.26(c)(4)*].

The court must give the parents notice that if they do not reunify with their child within 12 months from the date the child entered foster care for a child three years of age or older at the time of removal, or six months from disposition hearing as set forth in *Welf. & Inst. Code § 361.5(a)* for a child under the age of 3 years at the time of removal or who is a member of a sibling group that was removed at the same time and one of the siblings was under the age of 3 years at the time of initial removal, a permanent plan will be selected that may include terminating their parental rights [*Welf. & Inst. Code § 361.5(a)*].

If the child is removed from the custodial parent and placed with a previously noncustodial parent the court may choose to provide family maintenance services to the parent assuming custody, family reunification services to the parent from whom the child was removed, or both [*see Welf. & Inst. Code § 361.2(b)(3)*].

If the child is removed from the custodial parent or parents and is not placed with a previously noncustodial parent, the juvenile court must consider ordering reunification services. In most cases reunification services must be provided to parents if their child has been removed from their custody [*Welf. & Inst. Code § 361.5(a)*].

Significantly, the child shall be involved in developing the case plan to the extent appropriate due to the child's age and development [*Welf. & Inst. Code § 16501.1(f)(1)*]. Further, in addition to being given a meaningful opportunity to participate in the development of the case plan, the child shall be allowed to state his or her preference for foster care placement. If the child is 12 years of age or older, and in a permanent placement, the child shall also be given the opportunity to review, sign, and have a copy of the case plan [*Welf. & Inst. Code § 16501.1(f)(13)*]. If the case plan's goal is for adoption or placement in another permanent home, a statement of the child's wishes regarding their permanent placement plan and an assessment of those wishes shall also be included [*Welf. & Inst. Code § 16501.1(f)(15)*].

The specific plan and services ordered must be designed to serve the particular needs of the individual family related to the reasons the child came into the system [*Welf. & Inst. Code § 300*], the reasons the child had to be removed from the custodial parent [*Welf. & Inst. Code § 361(c)*], and the reasons for non-placement with the non-custodial parent if that parent is seeking custody [*Welf. & Inst. Code § 361.2(a)*; *In re Terry H. (1994) 27 Cal. App. 4th 1847, 1857, 34 Cal. Rptr. 2d 271]* . These plans must be case limited, case specific, and tailored to the needs of the family; the social services department must make a good faith effort to develop and implement these plans [*see In re Christina L. (1992) 3 Cal. App. 4th 404, 414, 4 Cal. Rptr. 2d 680* ; *see also* California Ctr. for Jud. Educ. and Research, Cal. Judges Benchguides, Benchguide 102: Juvenile Dependency Disposition Hearing (Jan. 2009) §§ 102.64 to 102.66, pp. 102-61 to 102-64]. The specific statutory provisions for the requirements of the child welfare services case plan are found in *Welf. & Inst. Code § 16501.1*.

Reunification services are not required in all cases. Pursuant to *Welf. & Inst. Code § 361.5(b)* reunification services must be denied if the court finds, by clear and convincing evidence, any one of 15 different statutory exceptions to the provision of services [*Welf. & Inst. Code § 361.5(b)(1)-(15)*]. The court may also order that no reunification services be provided to an incarcerated parent or guardian if it finds by clear and convincing evidence that to provide such services would be detrimental to the child [*Welf. & Inst. Code § 361.5(e)(1)*].

If the social services department is recommending that services not be provided under *Welf. & Inst. Code § 361.5(b),*

the parent has a separate right to notice of that recommendation [*Cal. Rules of Ct., Rule 5.686(b)*] and the right to present evidence to show that such services should be provided [*Welf. & Inst. Code § 361.5(c)*; *see Riverside County Dep't of Pub. Soc. Servs. v. Superior Court (1999) 71 Cal. App. 4th 483, 492, 83 Cal. Rptr. 2d 777]* .

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28-328 California Forms of Pleading and Practice--Annotated § 328.16

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§ 328.16 Summary of Review and Permanency Hearings

Cases in which the child is declared a dependent of the juvenile court but is not removed from the custody of the parent or guardian or where the child has been returned to the custody of the parent or guardian as a dependent of the court are called family maintenance cases. Each family maintenance case must be reviewed by the court at least every six months [*Welf. & Inst. Code § 364(a), (d)*]. At least ten calendar days prior to the review hearing the social worker must provide to the court, the parties and their counsel a report that describes the services offered to the family, details the progress the family has made in addressing the conditions that caused the need for juvenile court supervision, and makes a recommendation regarding the need for continued dependency supervision [*Welf. & Inst. Code §§ 364(b), 364.05* (service of report in Los Angeles County); *see also* discussion in *§ 328.150* et seq.].

At the review hearing the court must terminate its jurisdiction unless it determines by a preponderance of the evidence that the conditions still exist within the family that would justify the initial assumption of jurisdiction or that if supervision is withdrawn that such conditions are likely to exist. The social worker bears the burden of proving the existence of such circumstances. If, however, the parent or guardian has failed to participate on a regular basis in any court ordered treatment program, such failure shall constitute prima facie evidence of the need for continued supervision [*Welf. & Inst. Code § 364(c)*].

If the child has been placed with a previously non-custodial parent and had dependency jurisdiction continued, the court shall determine at the in-home review hearing whether continued supervision is still necessary. The court may make juvenile custody orders awarding custody to that parent, make visitation and protective orders, and terminate its jurisdiction if appropriate [*Welf. & Inst. Code § 362.4*].

If the juvenile court does not terminate its jurisdiction at a family maintenance review hearing, it must set the matter for another review hearing to be held not more than six months later. At that future review hearing the court will repeat the

process of review pursuant to *Welf. & Inst. Code § 364(c)* [*Welf. & Inst. Code § 364(d)*]. There is no limit to the length of time during which the court can maintain its jurisdiction other than the child's twenty-first birthday [*see Welf. & Inst. Code § 303*], as long as the social services department can continue to prove the need for continuing supervision pursuant to *Welf. & Inst. Code § 364(c)*.

The juvenile court also must review the case of all children placed in foster or relative care no less frequently than once every six months. At least ten calendar days prior to the review hearing the social worker must file a report that describes the services provided or offered to the family, details the progress the family has made in addressing the conditions that caused the need for out of home placement, addresses the prognosis for possible return of the child to the custody of the parent or guardian, and makes a recommendation regarding the appropriate further disposition of the case. The report must also address the efforts that have been made to achieve legal permanence for the child if reunification efforts fail, including, but not limited to, efforts to maintain relationships between the child and individuals who are important to the child. If the recommendation is that the child not be returned to the parent, the report must specify why the return of the child to the parent would be detrimental [*Welf. & Inst. Code §§ 366.21(c), 366.05* (service of report in Los Angeles County)].

Prior to permanency planning, there is a statutory presumption at each status review and permanency hearing that the child will be returned to the custody of the parent or guardian. If the social services department is recommending that the child not be returned home it bears the burden of proof by a preponderance of the evidence to establish that return of the child to the custody of the parent or guardian will create a substantial risk of detriment to the child's safety, protection, or physical or emotional well-being. Failure of the parent or guardian to regularly participate in any court ordered treatment programs, however, will constitute a prima facie showing that return of the child would be detrimental [*Welf. & Inst. Code §§ 366.21(e), (f), 366.22(a)*, 366.25(a)]. If the child is not returned to the custody of the parent or guardian and reunification services are continued, the court must again advise the parent or guardian of the possibility of permanency planning and that parental rights may be terminated if reunification is not achieved by the date of the next review and permanency hearing [*Welf. & Inst. Code § 366.21(e), (g)(1)*, 366.22(b)].

In addition to making findings and orders regarding whether or not to return the child to the custody of the parent or guardian, the court must also make findings regarding whether reasonable reunification services have been offered or provided to the parents. Unless terminating reunification services and setting a hearing under *Welf. & Inst. Code § 366.26*, the court must also order that such services be initiated or continued. In making that order it can change or modify the terms of the reunification and service plan as appropriate [*Welf. & Inst. Code § 366.21(e), (f)*; *see also* general discussion in *§ 328.151* et seq.]. The court should also review the concurrent permanency planning services that have been provided in the case and make such findings and orders as it deems appropriate.

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§ 328.17 Summary of Supplemental, Subsequent, and Modification Petitions

A subsequent petition pursuant to *Welf. & Inst. Code § 342* is filed by the social services department within an ongoing dependency case when it is alleged that additional grounds for juvenile court jurisdiction exist for a child who has already been declared a dependent child of the court. This petition must state the new grounds under *Welf. & Inst. Code § 300* that are alleged. A subsequent petition is adjudicated following the same procedures and hearing process that is required for an original dependency petition [*Welf. & Inst. Code § 342*].

For detailed discussion of subsequent petitions, see *§ 328.142*.

A supplemental petition pursuant to *Welf. & Inst. Code § 387* is filed by the social services department when there is a request for the court to order a change in placement that removes a dependent child from the custody of a parent, guardian, or relative and seeks to place the child in foster care or in a licensed facility. A common example is a move from court-ordered relative placement to foster care. The petition must state facts sufficient to support the conclusion that the court's previous orders have not been effective in the protection of the child or, in the case of a requested move from a court-ordered relative placement, that the placement with the relative is no longer appropriate in light of the criteria set forth in *Welf. & Inst. Code § 361.3* [*Welf. & Inst. Code § 387(a)-(b)*]. Although the process is a post-dispositional proceeding and there is no new jurisdictional finding required, the hearing on the petition is to follow the general procedures required for a jurisdiction and disposition hearing. In this way the court first determines whether the allegations in the petition are true and then, if true, proceeds to a further dispositional hearing [*see Cal. Rules of Ct., Rule 5.565*].

For detailed discussion of supplemental petitions, see *§ 328.141*.

Throughout the dependency process any interested person, including the social worker, parent, guardian, CASA, or

child, may petition the court for a modification of any of its previous orders based upon a change of circumstances or new evidence that makes a change of orders in the child's best interest [*Welf. & Inst. Code § 388*]. Petitions under this section must be liberally construed in favor of granting a hearing to consider the request [*Cal. Rules of Ct., Rule 5.570*; *In re Marilyn H. (1993) 5 Cal. 4th 295, 309-310, 19 Cal. Rptr. 2d 544, 851 P.2d 826* ; *see also In re Heather P. (1989) 209 Cal. App. 3d 886, 891, 257 Cal. Rptr. 545]* . The burden of proof at a hearing on a supplemental petition under *Welf. & Inst. Code § 388* is on the party who filed the petition [*Cal. Rules of Ct., Rule 5.570*].

For detailed discussion of petitions for modification of orders, see *§ 328.140*.

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§ 328.18 Non-Statutory Hearings

Many courts regularly conduct non-statutory hearings. Such non-statutory hearings may be called visitation hearings, placement hearings, special hearings, 90-day review hearings, or a variety of other names dependent upon the county and the purpose of the hearing. In some instances the use of such hearings may appear to obviate the need for petitions being filed under *Welf. & Inst. Code §§ 342* and *387*, and particularly those under § 388. It shouldn't [*In re Lance V. (2001) 90 Cal. App. 4th 668, 675-677, 108 Cal. Rptr. 2d 847* (change in visitation without filing of a *Welf. & Inst. Code § 388* petition was error)]. Further, as a general rule a non-statutory hearing process should not be used when the type of order sought is specifically covered by express provisions of the statutory scheme, such as the many provisions that deal with placement of the child.

While the court may have the authority to conduct such non-statutory hearings, they are problematic for several reasons. In a time of limited courts and resources, if non-statutory hearings are too readily granted, as is frequently the case, they can contribute greatly to the congestion of calendars the juvenile courts already suffer. Further, to the extent that such hearings reduce the need for attorneys to monitor their cases and bring them back to the court under *Welf. & Inst. Code § 388* if a change of orders is needed, the non-statutory hearings may contribute to a blurring of roles and may slow the development of effective counsel [*Welf. & Inst. Code § 317.5(a)*]. The greatest problem incurred with these non-statutory hearings, however, is the frequent lack of any clear notice requirements and standards for the conduct of the hearing [*In re Lance V. (2001) 90 Cal. App. 4th 668, 676-677, 108 Cal. Rptr. 2d 847]* . Unlike a hearing under *Welf. & Inst. Code §§ 342, 387*, and *388* or a regular review hearing under *Welf. & Inst. Code §§ 364, 366.21*, and *366.22*, local practice often provides little in the way of formalized procedures and standards for such non-statutory hearings. This can make it difficult for the practitioner to know what the issues are, who has the burden of proof, what the burden is, and the like. This also can make it difficult for appellate review should an appeal or writ be taken from an adverse decision. As such, even if calendar congestion was not an issue, the advisability of conducting such non-statutory hearings would be open to substantial question. Nevertheless, practitioners need to be aware that many

juvenile courts conduct such hearings and should take steps to familiarize themselves with local practice in this regard.

PRACTICE TIP:

Requesting Clarification. Since non-statutory hearings generally have no formal guidelines as to the conduct of the proceedings, counsel would be wise at the beginning of such hearings to ask for clarification on the record as to what the issue to be determined at the hearing is, which party bears the burden of proof on that issue, and what the burden is both in regard to the level of proof and what must be proven. If counsel has any objection to the clarification of the issues and burdens as stated by the court, such objection should be made both at this time and at closing argument. In this way counsel will be preserving the issues for any subsequent appellate proceedings as well as ensuring that counsel has an adequate understanding of the proceedings so as to allow the provision of effective assistance of counsel.

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§ 328.19 Summary of Procedure for Determining an Alternative Permanent Plan

If the permanent plan of return to parent cannot be safely accomplished within the statutory time limits, a court may order a hearing pursuant to *Welf. & Inst. Code § 366.26* to select and implement a alternative permanent plan for the child. This hearing is sometimes formally called a "selection and implementation hearing" since it is at this hearing that the court both selects and implements the alternative permanent plan [*see, e.g., Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 247, 249, 19 Cal. Rptr. 2d 698, 851 P.2d 1307]* . More commonly, however, such hearings are simply referred to as ".26" (pronounced "two six") hearings, taking the name from *Welf. & Inst. Code § 366.26* which governs the hearing itself [*see, e.g., Guillermo G. v. Superior Court (1995) 33 Cal. App. 4th 1168, 1173, 39 Cal. Rptr. 2d 748]* . This hearing should not be called a permanency planning hearing, since that name referred to the hearing held under former *Welf. & Inst. Code § 366.25*. Further, it should not be referred to as a permanency hearing, since the permanency hearing is the hearing held 12 months after the date the child entered foster care, the permanency review hearing is the hearing held 18 months after the original removal of the child from the physical custody of the parent or guardian, and the "subsequent permanency review hearing" (commonly called the "24-month hearing") is held 24 months after the date of the original removal [*Welf. & Inst. Code §§ 361.5(a), 366.21(f), 366.22(a),* 366.25(a)].

A juvenile court's order that a hearing under *Welf. & Inst. Code § 366.26* be held to select and implement a permanent plan may be made at the disposition hearing, six-month review hearing, 12-month permanency hearing, 18-month permanency review hearing, or 24-month permanency review hearing. The criteria for setting a selection and implementation hearing depends on the hearing at which the order is sought.

PRACTICE TIP:

Most Likely Time for Order. In previous years these orders were most frequently made at 12-month and 18-month review hearings due to the very restrictive circumstances for ordering such a hearing from the disposition or six-month review hearings. As the number of grounds for the denial of services at

disposition increases, however, this order is now often made at the disposition hearing [*see Welf. & Inst. Code §§ 361.5(b)* and *(e)(1)*]. Moreover, for children who are under the age of 3 at the time of removal, the presumptive time limit for reunification services is now six months from the date of the disposition hearing. This limitation on services may also apply to part or all of a sibling group if one of the group was under the age of 3 years on the date of the initial removal and the children were removed at the same time [*Welf. & Inst. Code § 361.5(a)(3)*]. As such, for those children the setting of a hearing pursuant to *Welf. & Inst. Code § 366.26* is now often done at the six-month review [*see Welf. & Inst. Code §§ 361.5(a)(2), 366.21(e)*].

A hearing under *Welf. & Inst. Code § 366.26* may only be ordered when reunification services have been denied or terminated for all parents or guardians [*see Welf. & Inst. Code § 361.5(b)(2)-(15), (e)(1)*], since permanency planning is done for children, not for adults [*see Welf. & Inst. Code § 361.5(f)*]. However, a court may not order a selection and implementation hearing from the disposition hearing if services are denied under *Welf. & Inst. Code § 361.5(b)(1)* due to the whereabouts of the parent or guardian being unknown.

At the six-month review hearing the court may order a selection and implementation hearing if it finds by clear and convincing evidence that the parent has been convicted of a felony indicating parental unfitness, that the parent has failed to contact and visit the child during the previous six months, that the parent is deceased, or that the child was declared a dependent of the court under *Welf. & Inst. Code § 300(g)* due to the whereabouts of the parent being unknown and the whereabouts of the parent is still unknown [*Welf. & Inst. Code § 366.21(e)*; *Cal. Rules of Ct., Rule 5.710(f)(1)*; *see also In re Monique S. (1993) 21 Cal. App. 4th 677, 682, 25 Cal. Rptr. 2d 863]* . The court may also set the matter for a hearing pursuant to *Welf. & Inst. Code § 366.26* if the child was under three years of age when initially removed from the parent or guardian, or is a member of a sibling group whose members were removed at the same time and one of the children was under the age of 3 years at the time of the initial removal, and the parent or guardian has failed to regularly participate and make "substantive progress" in the court-ordered treatment program [*Welf. & Inst. Code §§ 361.5(a)(2)-(3), 366.21(e)*].

At the permanency hearing held 12 months after the child entered foster care the court must order a selection and implementation hearing if it does not return the child to the custody of a parent or guardian, finds that there is no substantial probability of return to the parent within 18 months of the original removal of the child and finds by clear and convincing evidence reasonable reunification services have been offered or provided to the parent or guardian [*Welf. & Inst. Code § 366.21(g)(3)*]. For purposes of conducting this hearing, the date the child entered foster care is the date of the jurisdiction finding or 60 days from the date of the original removal of the child from the physical custody of the parent or guardian, whichever occurs first [*Welf. & Inst. Code §§ 361.49, 361.5(a), 366.21(e)-(f)*].

At the permanency review hearing held within 18 months of the date the child was originally removed from the physical custody of the parent or guardian the court must order a *Welf. & Inst. Code § 366.26* hearing if it does not order the return of the child to the custody of the parent or guardian [*Welf. & Inst. Code § 366.22(a)*]. The court has discretion, however, to order additional services instead of setting a selection and implementation hearing if it determines that reasonable services have not been provided [*In re Dino E. (1992) 6 Cal. App. 4th 1768, 1779, 8 Cal. Rptr. 2d 416]* . Effective January 1, 2009, in limited circumstances involving a parent in a substance abuse treatment program or a parent recently released from incarceration or institutionalization, the juvenile court may also continue the matter for a 24-month hearing [*Welf. & Inst. Code §§ 366.22(b), 366.25*].

At any of the five points where the court can order a hearing pursuant to *Welf. & Inst. Code § 366.26* the court can instead order that a permanent plan of long-term foster care be implemented if it finds by clear and convincing evidence based upon the evidence already before it that the child is not a proper subject for adoption and that there is no one willing to accept a legal guardianship [*see Welf. & Inst. Code §§ 366.21(g)(2), 366.22(a)*, 366.25(a)(3); *see also* discussion in *§ 328.153[3]*]. The court may not avoid the setting of a hearing under *Welf. & Inst. Code § 366.26*, however, on the grounds that it believes that one of the exceptions to the termination of parental rights found in that

section exist or upon the belief that long-term foster care is in the child's best interest [*see In re John F. (1994) 27 Cal. App. 4th 1365, 1374-1379, 33 Cal. Rptr. 2d 225]* .

For detailed discussion regarding permanency planning procedures, see *§ 328.170* et seq.

A hearing pursuant to *Welf. & Inst. Code § 366.26* must be heard within 120 days of the hearing from which it was set [*Welf. & Inst. Code §§ 361.5(f), 366.21(e), (g)(3)*; 366.22(a)].

The social services department must prepare a full report for the court regarding the child, the relationship of the child to the parent or guardian, and any prospective adoptive parent or legal guardian [*Welf. & Inst. Code §§ 361.5(g), 366.21(i), 366.22(b)*]. The parent or guardian, all counsel of record, and any court appointed special advocate are to receive a copy of the assessment at least 10 calendar days prior to the hearing and the child's custodian and the tribe of any Indian child are to receive a summary of the recommendations [*Cal. Rules of Ct., Rule 5.725(c)*; *cf. Welf. & Inst. Code § 366.21(c)*].

The parent or guardian including any alleged fathers, the child if ten years of age or older, any court-appointed special advocate, and all counsel of record are to be notified of the hearing at least 45 days before it except in those cases where the social services department is recommending termination of parental rights and the whereabouts of the parent are unknown despite a diligent search [*Welf. & Inst. Code § 294*]. If the child has any siblings in the dependency system, or if the court knows or has reason to know the child is an Indian child, additional notice is also required [*Welf. & Inst. Code § 294*]. No notice need be given, however, to a parent or alleged father who has relinquished the child for adoption or to an alleged father who has executed a denial of paternity and waiver of rights form [*Welf. & Inst. Code § 294(b)*]. Further, if the identity of one or both parents is unknown or uncertain, the court may issue an order dispensing with notice under certain circumstances [*Welf. & Inst. Code § 294(g)*].

Prior to the hearing pursuant to *Welf. & Inst. Code § 366.26* the parent or guardian continues to have the right to work on his or her own toward reunification. The parent or guardian also has the right to file a petition pursuant to *Welf. & Inst. Code § 388* to seek a modification of the orders setting the selection and implementation hearing and to vacate that hearing if the parent or guardian can show a change of circumstances or new evidence that would make a change of order in the child's best interest [*Welf. & Inst. Code § 388*; *In re Marilyn H. (1993) 5 Cal. 4th 295, 309-310, 19 Cal. Rptr. 2d 544, 851 P.2d 826* ; *see also* discussion in *§ 328.18* and general discussion in *§ 328.140* et seq.].

The first question of fact for the court to consider at a selection and implementation hearing is whether the child is adoptable. The social services department bears the burden of proving by clear and convincing evidence that if parental rights are terminated it is likely the child will be adopted. In so doing it is not required that the child actually be in an approved adoptive home, but that the social services department proves that the child is likely to be adopted [*In re Amelia S. (1991) 229 Cal. App. 3d 1060, 1065, 280 Cal. Rptr. 503]* .

If the court finds by clear and convincing evidence that it is likely the child would be adopted if parental rights are terminated, and the court does not utilize the relative guardianship cutout found in *Welf. & Inst. Code § 366.26(c)(1)(A)*, it must terminate parental rights unless it is demonstrated that termination of parental rights would be detrimental to the child pursuant to one of the six circumstances in *Welf. & Inst. Code § 366.26(c)(1)(B)*. These circumstances are as follows:

- The parent or guardian has maintained regular visitation and contact with the child and the child would benefit from continuing that relationship [*Welf. & Inst. Code § 366.26(c)(1)(B)(i)*].

- The child is 12 years of age or older and objects to the termination of parental rights [*Welf. & Inst. Code § 366.26(c)(1)(B)(ii)*].

- The child is in a residential treatment facility, adoption is unlikely or undesirable, and continuing parental rights will not prevent finding a permanent placement for the child if the parents cannot resume custody of the child when residential care is no longer necessary [*Welf. & Inst. Code § 366.26(c)(1)(B)(iii)*].

- The child is living with a foster parent or Indian custodian who is unable or unwilling to adopt the child due to exceptional circumstances, but who is willing to accept legal responsibility for the child and is willing and capable of providing the child with a stable and permanent home, and removal of the child from that home would be detrimental to the child's emotional well-being [*Welf. & Inst. Code § 366.26(c)(1)(B)(iv)*]. This exception does not apply, however, to a child who is either under 6 years of age or a member of a sibling group, with a sibling under age 6, which is or should be permanently placed together.

- The termination of parental rights would create substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child and the sibling were raised in the same home, whether they shared significant common experiences or have existing close and strong bonds with each other, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared with the benefit of legal permanence through adoption [*Welf. & Inst. Code § 366.26(c)(1)(B)(v)*].

- The child is an Indian child as defined by the Indian Child Welfare Act and the court determines termination of parental rights would not be in the Indian child's best interest for a reason directly related to that status, including but not limited to: (i) the termination of parental rights would substantially interfere with the child's connection with his or her tribal community, or with the child's tribal membership rights; or (ii) the child's tribe has identified a permanent plan other than adoption, such as guardianship, long-term foster care with a fit and willing relative, or another planned permanent living arrangement [*Welf. & Inst. Code § 366.26(c)(1)(B)(vi)*]. Effective July 1, 2010, this exception will also include the possibility of a tribal adoption without the termination of parental rights.

There is no requirement that the court find termination is in the best interest of the child and no exception to termination of parental rights based upon the child's best interest [*In re Tabatha G. (1996) 45 Cal. App. 4th 1159, 1164-1165, 53 Cal. Rptr. 2d 93* ; *In re Jennifer J. (1992) 8 Cal. App. 4th 1080, 1089-1091, 10 Cal. Rptr. 2d 813]* .

The person seeking to prove that adoption is detrimental to the child pursuant to one of these six circumstances bears the burden of proof [*In re Lorenzo C. (1997) 54 Cal. App. 4th 1330, 1345, 63 Cal. Rptr. 2d 562* ; *In re Cristella C. (1992) 6 Cal. App. 4th 1363, 1373, 8 Cal. Rptr. 2d 342]* . This would include the social services agency if it seeks to have the court order a plan other than adoption for a child who is an adoptable child. The court also shall not terminate parental rights if it finds that at each and every hearing at which the court was required to consider the issue of reasonable services, it found that reasonable reunification efforts were not offered or provided [*Welf. & Inst. Code § 366.26(c)(2)*]. If the court terminates parental rights it maintains jurisdiction and reviews the case every six months until the child is adopted [*Welf. & Inst. Code § 366.3(a)*].

For a complete discussion of the statutory exceptions to the termination of parental rights for an adoptable child, see *§ 328.171[5][a]*.

If the court does not terminate parental rights either because the child is not adoptable or because adoption would be detrimental to the child under one of the six statutory exceptions, the court then must consider the permanent plans of legal guardianship or another planned permanent living arrangement, such as permanent placement with a foster or relative caregiver committed to caring for the child on a permanent basis. Legal guardianship is to be considered before long-term foster care consistent with the best interests of the child and if a suitable guardian can be found [*Welf. & Inst.*

Code § 366.26(c)(4)]. This is consistent with the state's policy that foster care is to be temporary [*Welf. & Inst. Code § 396*] and that children who cannot be reunified should be provided with stable permanent homes [*In re Marilyn H. (1993) 5 Cal. 4th 295, 307, 19 Cal. Rptr. 2d 544, 851 P.2d 826]* .

If the court determines that legal guardianship is appropriate it appoints the guardian and issues letters of guardianship. No separate guardianship proceeding is required [*Welf. & Inst. Code § 366.26(d)*]. The court must also make visitation orders as part of its guardianship orders unless it finds that visitation with the parent would be detrimental to the child [*Welf. & Inst. Code § 366.26(c)(4)(C)*]. Thereafter it will normally terminate dependency jurisdiction and retain jurisdiction over the child as a ward of the guardianship [*Cal. Rules of Ct., Rules 5.735, 5.740*; *see also Welf. & Inst. Code § 366.4*].

If the court does not terminate parental rights or appoint a legal guardian it will order another planned permanent living arrangement, such as permanent placement with a foster or relative caregiver committed to caring for the child on a permanent basis [*Welf. & Inst. Code §§ 366(a)(2), 366.26(c)(4)*]. The parents continue to have a right of visitation unless visitation would be detrimental to the child [*Welf. & Inst. Code § 366.26(c)(4)(C)*].

PRACTICE TIP:

Another Planned Permanent Living Arrangement. California is in a transition from having "long term foster or relative care" as an alternative permanent plan to having the plan be for "another planned permanent living arrangement." This new language is based on a change in the federal law and emphasizes that even for children who can't have adoption or guardianship as alternative plans, another plan that is more stable than long-term foster care is preferred, rather than the "foster care drift" so common with long-term foster care orders. Everyone should be aware of this need to find foster and relative caregivers who will commit to the long-term stability and care of the child even though they are not receiving adoption or legal guardianship.

Review hearings must continue to be heard every six months but may be heard by either the court or by a local review board unless the parents, guardians or the child request review by the court. At the review there is a presumption for continued out of home care unless the parent or guardian prove that further efforts at reunification are in the child's best interest [*Welf. & Inst. Code § 366.3(d)-(e)*].

At any post-permanency planning review conducted by the court where the permanent plan is long-term foster or relative care, and at least every 12 months, the court must review the continuing appropriateness of the permanent plan. The court must consider all permanency planning options for the child including adoption, legal guardianship, and even return to the home of the parent. Only if the court finds by clear and convincing evidence that the child is not a proper subject for adoption and that no one is willing to accept legal guardianship can it order that the child remain in another planned permanent living arrangement, such as permanent placement with a foster or relative caregiver committed to caring for the child on a permanent basis. In all other cases it must order that a hearing be held pursuant to *Welf. & Inst. Code § 366.26* [*Welf. & Inst. Code § 366.3(g)*].

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PART II. LEGAL BACKGROUND
A. Overview of Dependency Proceedings

28-328 California Forms of Pleading and Practice--Annotated § 328.20

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.20 Summary of Appeal of Findings and Order

A parent or guardian normally has the right to appeal a juvenile court's findings and orders from each of the various hearings throughout the dependency process beginning with the disposition hearing [*Welf. & Inst. Code § 395*].

Nevertheless, if the court sets a selection and implementation hearing pursuant to *Welf. & Inst. Code § 366.26* and the parent or guardian desires to challenge the juvenile court's findings upon which that order is based, a petition for extraordinary writ relief must be filed in the court of appeal [*Welf. & Inst. Code § 366.26*(*l*)]. If a timely filed writ petition that is supported by an adequate record is summarily denied or otherwise not decided on the merits, the specific issues raised therein may again be raised on appeal from the *Welf. & Inst. Code § 366.26* hearing. Failure to file such a petition for extraordinary writ, however, precludes challenging the setting of a selection and implementation hearing on appeal from that hearing [*Cal. Rules of Ct., Rules 8.450, 8.452*].

For detailed discussion of appeals and writs, see *§ 328.189* et seq.

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[Reserved]

§§ 328.21[Reserved]

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§ 328.30 Temporary Custody by Peace Officer

[1] Grounds

Any peace officer may, without a warrant, take into temporary custody a child in the following circumstances [*Welf. & Inst. Code § 305*]:

- When the officer has reasonable cause for believing that the child is a person described in *Welf. & Inst. Code § 300* and, in addition, that the child has an immediate need for medical care, or the child is in immediate danger of physical or sexual abuse, or the physical environment or the fact that the child is left unattended poses an immediate threat to the child's health or safety [*Welf. & Inst. Code § 305(a)*]. In cases in which the child is left unattended, the peace officer must first attempt to contact the child's parent or guardian to determine if the parent or guardian is able to assume custody of the child. If the parent or guardian cannot be contacted, the peace officer must notify a social worker in the county welfare department to assume custody of the child [*Welf. & Inst. Code § 305(a)*].

- When the child is in a hospital, and release of the child to a parent poses an immediate danger to the child's health or safety [*Welf. & Inst. Code § 305(b)*].

- When the child is a dependent child of the juvenile court, or concerning whom an order was made under *Welf. & Inst. Code § 319* (detention of child not released from custody), and the officer has reasonable cause for believing that the child violated an order of the juvenile court or left any placement ordered by the juvenile court [*Welf. & Inst. Code § 305(c)*].

- When the child is found in any street or public place suffering from any sickness or injury that

requires care, medical treatment, hospitalization, or other remedial care [*Welf. & Inst. Code § 305(d)*].

Any peace officer may also, without a warrant, take into temporary custody a child who is in a hospital if the release of the child to a prospective adoptive parent poses an immediate danger to the child's health or safety [*Welf. & Inst. Code § 305.6(a)*].

Notwithstanding the provisions of *Welf. & Inst. Code §§ 305*, and *305.6(a)*, a peace officer may not, without a warrant, take a child who is in a hospital into temporary custody if all of the following exist [*Welf. & Inst. Code § 305.6(b)*]:

- The child is a newborn who tested positive for illegal drugs or whose birth mother tested positive for illegal drugs [*Welf. & Inst. Code § 305.6(b)(1)(A)*].

- The child is the subject of a petition for adoption and a "Health Facility Minor Release Report," as prescribed by the California State DSS, has been completed by the hospital, including marking the boxes that apply to an independent or agency adoption, and signed by the placing birth parent or parents and the prospective adoptive parent or parents, prior to the discharge of the birth parent or the child from the hospital. Prior to signing the "Health Facility Minor Release Report" the birth parent or parents must be given and sign a written notice the release report does not constitute a consent to adoption or a relinquishment, and the child may be reclaimed at any time until an adoption placement agreement or relinquishment is signed by the birth parent or parents. The signed notice must be attached to the "Health Facility Minor Release Report [*Welf. & Inst. Code § 305.6(b)(1)(B)*].

- The release of the child to the prospective adoptive parent or parents does not pose an immediate danger to the child [*Welf. & Inst. Code § 305.6(b)(1)(C)*].

- An attorney or adoption agency has provided documentation stating he or she is representing the prospective adoptive parents in the adoption. If the adoption is an independent adoption, documentation must also be provided that shows the prospective adoptive parent or parents have been informed the child may be eligible for benefits under the Adoption Assistance Program (AAP) [*Welf. & Inst. Code § 305.6(b)(1)(D)*].

- A signed copy of the "Health Facility Minor Release Report" with the signed notice to the birth parent or parents and a copy of the petition for adoption is provided to the peace officer or representative of the local child protective services agency who is at the hospital to take the child into temporary custody [*Welf. & Inst. Code § 305.6(b)(1)(E)*]. A copy of an adoption placement agreement signed by the placing birth parent or parents and the prospective adoptive parent or parents may be used in lieu of the "Health Facility Minor Release Report" and notice to the birth parent or parents [*Welf. & Inst. Code § 305.6(b)(4)*].

A newborn child at a hospital who tested positive for illegal drugs or whose birth mother tested positive for illegal drugs may not be taken into temporary custody by a police officer without a warrant--again, despite the provisions of *Welf. & Inst. Code §§ 305* and *305.6(a)*--if all of the following are true:

- The child is the subject of a petition for adoption;

- The prospective adoptive parent or parents have been licensed to act as a foster parent or parents pending finalization of the adoption;

- The release of the child to the prospective adoptive parent or parents does not pose an immediate danger to the child; and

- The prospective adoptive parents or their representative provides a copy of the petition for adoption and of the licensure as a foster parent to the local child protective services agency or to the peace officer (who is at the hospital to take the child) [*Welf. & Inst. Code § 305.6(b)(2)*].

If the petition for adoption has not been filed with the court by the time the child is released to the custody of the prospective adoptive parent or parents, it must be filed within 15 calendar days of the date the birth parent is released from the hospital [*Welf. & Inst. Code § 305.6(b)(3)*].

Nothing in *Welf. & Inst. Code § 305.6* is intended to create a duty requiring law enforcement to investigate the prospective adoptive parent or parents [*Welf. & Inst. Code § 305.6(c)*].

[2] Alternative Courses of Action

A peace officer who takes a child into temporary custody has several alternative courses of action. Under the provisions of *Welf. & Inst. Code § 307*, he or she may:

- Release the child [*Welf. & Inst. Code § 307(a)*].

- Prepare in duplicate a written notice for the parent or parents of the child to appear with the child before the social worker of the county in which the child was taken into custody at a time and place specified in the notice.

- The notice must also contain a concise statement of the reasons the child was taken into custody. The officer must deliver one copy of the notice to the child and a parent, guardian, or responsible relative of the child and may require the child and the parent, guardian, or relative to sign a written promise that he or she appear at the time and place designated in the notice. On execution of the promise to appear, the officer must immediately release the child. The officer must, as soon as practicable, file one copy of the notice with the social worker [*Welf. & Inst. Code § 307(b)*]. See further discussion of requirements regarding notice to parent in [3], *below*.

- The peace officer may take the child without unnecessary delay before the social worker of the county in which the child was taken into custody, or in which the child resides, or in which the acts take place or the circumstances exist that are alleged to bring the child within the provisions of *Welf. & Inst. Code § 300*, and deliver the child into the custody of the social worker [*Welf. & Inst. Code § 307(c)*].

In addition to the alternatives set forth in *Welf. & Inst. Code § 307*, an officer who takes a child into temporary custody may, if he or she deems that it is in the best interests of the child and the public, take the child to a community service program for abused and neglected children [*Welf. & Inst. Code § 307.5*].

In determining which disposition of the child will be made, the officer must give preference to the alternative that least interferes with the parents' or guardians' custody of the child if this alternative is compatible with the safety of the child. The officer must also consider the needs of the child for the least restrictive environment, and the protective needs of the community [*Welf. & Inst. Code § 307(c)*].

[3] Notice to Parents

[a] Regarding Procedural Rights and Custody of Child

A peace officer who takes a child into temporary custody under *Welf. & Inst. Code §§ 305-307* must inform the parent,

guardian, or relative that the child has been taken into custody and that a written statement is available explaining the parent's or guardian's procedural rights and the preliminary stages of the dependency hearing [*see Welf. & Inst. Code § 307.4(a)*].

[b] Regarding Location of Child

A peace officer or social worker who takes a child into custody pursuant to *Welf. & Inst. Code §§ 305-324,* must also take immediate steps to notify the child's parent, guardian, or a responsible relative of the fact that the child has been placed in a facility that the law authorizes for the care of the child and must provide a telephone number to be used to contact the child. If the child has been placed with a licensed foster family, the address of that family shall remain confidential until the disposition hearing, unless the foster parent authorizes the release of the address. If the disposition hearing is delayed beyond the 60-day period from the detention of the child as set forth in *Welf. & Inst. Code § 352(b),* the court may in its discretion order release of the address to the parent, guardian, or responsible relative upon notification to the foster family [*Welf. & Inst. Code § 308(a)*].

[4] Referral to Community Service Agency

When a peace officer takes a child to a community service program pursuant to *Welf. & Inst. Code § 305,* the receiving organization must take immediate steps to notify the child's parent, guardian, or a responsible relative of the place to which the child was taken [*Welf. & Inst. Code § 307.5*]. An agency receiving a child pursuant to *Welf. & Inst. Code § 307.5* must make an immediate investigation to determine what disposition should be made. If the agency does not initiate a service program within 20 days of a referral or 10 days of a delivery of a child, the agency must immediately notify the referring officer in writing [*Welf. & Inst. Code § 328.3*]. When the agency has not initiated a service program for the child within these time periods, the referring agency may, within 10 court days following receipt of the notice from the referral agency, apply to the social worker for a review of that decision [*Welf. & Inst. Code § 331.5*].

[5] Release of Child by Day-Care Facility

If a child day-care facility releases a child to a peace officer pursuant to *Welf. & Inst. Code § 305,* the official in charge of the facility must provide the officer with the address and telephone number of the child's parent or guardian to enable the officer to make the notification required by *Welf. & Inst. Code § 308* [*Health & Safety Code § 1596.876*].

[6] Confinement Limits on Detention in Facility for Dependent Children

Facilities for children alleged or adjudged to come within *Welf. & Inst. Code § 300* (dependency) must be nonsecure. A "nonsecure facility" is one that is not characterized by the use of physically restricting construction, hardware, and procedures. It provides its residents access to the surrounding community with minimal supervision [*Welf. & Inst. Code § 206*].

A "nonsecure facility" may contain a small room for the protection of individual residents from themselves or others. It may also adopt regulations establishing reasonable hours for residents to come and go from the facility. These regulations must be based on a sensible and fair balance between allowing residents free access to the community, and providing the staff with sufficient authority to maintain order, limit unreasonable actions by residents, and insure that children placed in their care do not come and go at all hours of the day and night, or absent themselves at will for days at a time. The staff may control ingress and egress to the extent that a prudent parent would [*Welf. & Inst. Code § 206*; *see Welf. & Inst. Code § 636.2* (operation and maintenance of nonsecure detention facilities); *see also* discussion in *Ch. 327, Juvenile Courts: Jurisdiction and General Procedures, § 327.40*].

No child alleged or adjudged to come within *Welf. & Inst. Code § 300* may be held in temporary custody in any building that contains a jail or lockup for the confinement of adults, unless, while in the building, the child is under continuous supervision and is not permitted to come into or remain in contact with adults in custody in the building.

There must be direct and continuous supervision by a peace officer or other child protective agency worker until temporary custody of the child is assumed pursuant to *Welf. & Inst. Code § 309*. Trained volunteers may assume these supervisory duties for up to three hours under some circumstances [*see Welf. & Inst. Code § 206*].

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28-328 California Forms of Pleading and Practice--Annotated § 328.31

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§ 328.31 Initial Investigation by Social Worker

[1] When Duty to Investigate Arises

On delivery to the social worker of a child who has been taken into temporary custody, the social worker must immediately investigate the circumstances of the child and the facts surrounding his or her being taken into custody [*Welf. & Inst. Code § 309(a)*].

Additionally, if the social worker has cause to believe that there was or is within the county, or residing therein, a person falling within the definition of a dependent child, the social worker must immediately make any investigation as he or she deems necessary to determine if child welfare services should be offered or if proceedings in the juvenile court should be commenced [*Welf. & Inst. Code § 328*]. However, a social worker is not required to undertake an investigation with respect to a child delivered or referred to any agency pursuant to *Welf. & Inst. Code § 307.5* [*Welf. & Inst. Code § 328*; *see* discussion in *§ 328.40[2]*].

The social worker must immediately make such investigation as he or she deems necessary to determine whether proceedings in the juvenile court should be commenced [*Welf. & Inst. Code §§ 328, 329*].

[2] Temporary Custody of Child

[a] Social Worker's Authority

Regardless of whether the county board of supervisors has delegated the duties of the probation officer to the social services department pursuant to *Welf. & Inst. Code § 272(a)*, a social worker may take a child into custody pursuant to *Welf. & Inst. Code § 306* [*Welf. & Inst. Code § 272(c)*]. Pursuant to *Welf. & Inst. Code § 306*, the social worker may:

- Receive and maintain, pending investigation, temporary custody of a child who is described in *Welf. & Inst. Code § 300* (specifying children who may be adjudged dependents of the juvenile court) and who has been delivered by a peace officer [*Welf. & Inst. Code § 306(a)(1)*].

- Take into and maintain temporary custody of, without a warrant, a child who has been declared a dependent child of the juvenile court under *Welf. & Inst. Code § 300*, or who the social worker has reasonable cause to believe is a person described in *Welf. & Inst. Code § 300(b)* (serious physical harm or illness as a result of lack of adequate supervision, protection, or provision) or (g) (lack of care and support), and the social worker has reasonable cause to believe that the child has an immediate need for medical care or is in immediate danger of physical or sexual abuse, or the physical environment poses an immediate threat to the child's health or safety [*Welf. & Inst. Code § 306(a)(2)*].

[b] Factors to be Considered

Before taking a child into custody, a social worker must consider whether there are any reasonable services available to the worker that, if provided to the child's parent, guardian, caretaker, or to the child, would eliminate the need to remove the child from the custody of those persons. The social worker must also consider whether a referral to public assistance under *Welf. & Inst. Code §§ 11200 et seq.* (California Work Opportunity and Responsibility to Kids Act), 14000 et seq. (Basic Health Care), 17000 et seq. (County Aid and Relief to Indigents), and 18900 et seq. (Food Stamps) would eliminate the need to take temporary custody of the child. If those public assistance services are available, they must be utilized. The social worker must also consider whether a "nonoffending" caretaker can provide for and protect the child from abuse and neglect. Finally, the social worker must consider whether the alleged perpetrator voluntarily agrees to leave the residence, does leave the residence, and is likely to remain away from the residence [*Welf. & Inst. Code § 306(b)*]. In this way the law requires the social worker to consider whether there is any way to remove the risk from the child, rather than removing the child from the risk.

[c] Notice to Parents

A social worker who takes a child into temporary custody under *Welf. & Inst. Code § 306* must inform the parent, guardian, or relative that the child has been taken into custody and that a written statement is available explaining the parent's or guardian's procedural rights and the preliminary stages of the dependency investigation and hearing [*see Welf. & Inst. Code § 307.4(a)*].

[d] Placement with Siblings and Half-Siblings

When a child is brought into custody under *Welf. & Inst. Code § 306*, the social worker is to place the child with any other siblings or half-siblings who are also detained, if that is practical and appropriate. If the child is not placed with the other siblings or half-siblings who are also detained, the report prepared pursuant to *Welf. & Inst. Code § 319* is to include a statement of the social worker's continuing efforts to place the siblings together or why such efforts are not appropriate [*Welf. & Inst. Code § 306.5*].

[3] Requirement That Child Over Three Be Interviewed

The social worker must interview any child four years of age or older who is a subject of an investigation, and who is in juvenile hall or another custodial facility, or has been removed to a foster home, to ascertain the child's view of the home environment. If proceedings are commenced, the social worker must include the substance of the interview in any written report submitted at an adjudicatory hearing, or, if no report is then received in evidence, the social worker must include the substance of the interview in the social study required by *Welf. & Inst. Code § 358* [*Welf. & Inst. Code § 328*].

[4] Requirements for Continued Custody

The social worker is required to release the child immediately unless one of the following conditions exist [*Welf. & Inst. Code § 309(a)*]:

- The child has no parent, guardian, or responsible relative; or the child's parent, guardian, or responsible relative is not willing to provide care for the child.

- Continued detention of the child is a matter of immediate and urgent necessity for the protection of the child, and there are no reasonable means by which the child can be protected in his or her home or the home of a responsible relative.

- There is substantial evidence that a parent, guardian, or custodian of the child is likely to flee the jurisdiction of the court.

- The child has left a placement made by the juvenile court.

- The parent or other person having lawful custody of a child that is 72 hours old or younger has voluntarily surrendered the child pursuant to *Health & Safety Code § 1255.7* and has not reclaimed the child within the 14-day period specified in that section.

If the child is not released to his or her parent or guardian, he or she is deemed detained for the purposes of *Welf. & Inst. Code §§ 305-324* [*Welf. & Inst. Code § 309(c)*].

[5] Temporary Custody for Medical Care

In any case in which there is reasonable cause for believing that a child who is under the care of a physician or surgeon or a hospital, clinic, or other medical facility and cannot be immediately moved is a person subject to the jurisdiction of the juvenile court as a dependent child under *Welf. & Inst. Code § 300*, a "hospital hold" may be placed on the child and the child is deemed to have been taken into temporary custody and delivered to the social worker while he or she is at the office of the physician or surgeon or such medical facility [*Welf. & Inst. Code § 309(b)*]. Once a "hospital hold" is placed on the child, the time for the filing of a petition in the juvenile court begins [*Welf. & Inst. Code §§ 309(b), 311(a), 313(a)*]. In this way the parent has a forum in which to challenge the "hospital hold" and detention of the child, just as if the child had actually been removed from the parent and placed in shelter care.

[6] Physical Examination by Medical Specialist

California statutory law provides that when a child is brought into protective custody and allegations of physical or sexual abuse come to the attention of law enforcement or social services, the local law enforcement agency or social services department may consult with a medical practitioner with "specialized training in detecting and treating child abuse injuries and neglect" to determine if it would be appropriate to have a physical examination of the child. If appropriate, the child shall be examined by a medical practitioner with such specialized training. Whenever possible, that examination shall be done within 72 hours of the child being brought into custody or, if the allegations are made when the child is already in protective custody, within 72 hours of the allegations being made. The results of any such physical examination are to be provide to the court and all counsel. The failure to have such an examination is not grounds to deny a dependency petition [*Welf. & Inst. Code § 324.5(a)*].

California statutory law also provides that in cases of known or suspected sexual abuse of children, "the consent of the parents or legal guardian is not required" for examination and treatment of the child [*Penal Code § 13823.11(c)(5)*]. A federal decision, however, provides different guidance. The majority in the Ninth Circuit Court of Appeals case held that absent a "reasonable concern that material physical evidence might dissipate" or that "some urgent medical problem

exists requiring immediate attention, the state is required to notify parents and to obtain judicial approval before children are subjected to investigatory physical examinations" without parental consent [*Wallis v. Spencer (9th Cir. 1999) 202 F.3d 1126, 1141]* . In a footnote, the majority observed on rehearing that there was "no apparent conflict" between its decision and *Welf. & Inst. Code § 324.5* [*Wallis v. Spencer (9th Cir. 1999) 202 F.3d 1126, 1141, fn. 12*]. The decision does not mention or address, however, the provisions of *Penal Code § 13823.11(c)(5)* which specifically provide the consent of the parent is not required. Further, the dissent noted the issue of a city policy regarding medical examinations in the case was never alleged or argued, and there was no evidence addressing it. Thus, the dissent observed the possibility of a city policy regarding medical examinations of children "was invented here; the discussion with respect to it is dicta, as it clearly is not necessary to the decision to reverse; and we have no business inventing an issue *and* a constitutional right or two to resolve it" [*Wallis v. Spencer (9th Cir. 1999) 202 F.3d 1126, 1145-1146* , dis. opn. of Rymer, J, emphasis in original]. Additionally, the *Wallis* decision was not a case where there were any allegations of sexual abuse, making the medical examination particularly inappropriate and distinguishable. A more balanced approach is that found in the case of *Darryl H. v. Coler (7th Cir. Ill. 1986) 801 F. 2d 893* , which the Ninth Circuit distinguished in *Calabretta* [*Calabretta v. Floyd (9th Cir. Cal. 1999) 189 F. 3d 808, 818-819]* . The Seventh Circuit's decision held there was no requirement for a search warrant or probable cause for a strip search of a young child, only reasonable cause [*Darryl H. v. Coler (7th Cir. Ill. 1986) 801 F. 2d 893, 895-896, 899-904]* . Under this approach only reasonable cause would be required before a medical examination for possible evidence of sexual abuse is conducted, something wholly consistent with *Welf. & Inst. Code § 324.5* and *Penal Code § 13823.11(c)(5)*. Nevertheless, the *Wallis* decision is a disturbing one, and one that may be found to be controlling. Pending further clarification of the law, government agencies should seek the advice of counsel and tread carefully in this regard. When in doubt, the better practice will be to adhere to the majority's requirements in *Wallis* while watching the area for further development.

Should the child need additional medical examinations for abuse or neglect at a later point in time, the social services agency shall, whenever possible, request the additional examinations be conducted by the same medical practitioner who performed the earlier examination. Moreover, if the child is referred to a different medical practitioner for ongoing diagnosis and treatment, the social services agency shall ensure the child is treated by a medical practitioner with "specialized training in detecting and treating child abuse injuries and neglect" and that the child's medical records of current and previous incidents of abuse are made available to that practitioner [*Welf. & Inst. Code § 324.5(b)*].

[7] Written Promise to Appear as Condition of Release

As a condition for the release of a child, the social worker may require the child or his or her parent, guardian, or relative, or both, to sign a written promise that either or both of them will appear before the social worker at the juvenile hall or other suitable place designated by the social worker at a specified time [*Welf. & Inst. Code § 310*].

[8] Assessment of Available Relatives and "Nonrelative Extended Family Members"

If the child is not returned to the parent or guardian, the social worker must also initiate an assessment of the suitability of any able and willing relative who is available and requests temporary placement of the child pending the detention hearing. The assessment must include an in-home visit to assess the safety and suitability of the home, as well as a consideration of the results of a criminal records check of the relative and other adults living in the home. The criminal records check may be conducted by an appropriate government agency through the California Law Enforcement Telecommunications System (CLETS) pursuant to *Welf. & Inst. Code § 16504.5*. For purposes of this assessment "relative" is defined as set forth in *Welf. & Inst. Code § 319* [*Welf. & Inst. Code § 309(d)(1)*]. The social worker may also consider temporary placement of the child pending the detention hearing in the home of a "nonrelative extended family member" as defined in *Welf. & Inst. Code § 362.7* [*Welf. & Inst. Code § 309(d)(1)*]. These initial efforts for possible temporary placement of the child should be viewed as a first step in the more complete process for notifying relatives now required by *Welf. & Inst. Code § 309(e)*.

For purposes of temporary placement in the assessed home of a relative or nonrelative extended family member, the standards used to determine the home's suitability for placement shall be the same as those set forth in the regulations for the licensing of foster family homes, except for the criminal records check conducted under *Welf. & Inst. Code § 16504.5* [*Welf. & Inst. Code § 309(d)(1)*].

PRACTICE TIP (PARENT'S P.O.V.):

The Role of Parent's Counsel Regarding Concurrent Planning. It is common for parents to want to keep the existence of dependency proceedings confidential from family members and non-related extended family members. Parents should be counseled early and often about the requirements of *Welf. & Inst. Code § 309(e)*, and the potential benefits of keeping children connected with family and friends. These connections reduce trauma, create placement options, and increase visitation and the potential for continued contact in the event of an adoption. Parent's counsel must also take an active role in making sure relatives and non-related extended family members come forward, cooperate with the agency, and get assessed timely and fairly.

Immediately after temporary placement of a child in the home of a relative or nonrelative extended family member, the county welfare agency must evaluate the home for purposes of AFDC-FC eligibility pursuant to *Welf. & Inst. Code § 11402*. The agency must approve or deny approval of the home. The standards used to evaluate and to grant or deny approval of the home of a relative or "nonrelative extended family member" for temporary placement pending the detention hearing is to be the same as those standards used for the licensing of foster homes regarding the standards of safety and sanitation for the home, supervision of the child, and services provided by the caregiver [Welf. & Code § 309(d)(2)].

To the extent allowed by federal funding laws, if the social worker has not received the Federal Bureau of Investigation's criminal history of the relative or "nonrelative extended family member," but that relative or "nonrelative extended family member" meets all other conditions for approval, the county welfare department may approve the home if the relative or "nonrelative extended family member," and any other adult living in the home, has signed and submitted a statement that he or she has never been convicted of a crime in the United States other than a traffic infraction. If the county welfare department later determines the relative, "nonrelative extended family member," or any other adult living in the home has a criminal record, the approval may be terminated [*Welf. & Inst. Code § 309(d)(3)*].

If the criminal records check indicates the relative, nonrelative extended family member, or other adult living in the home has been convicted of a crime for which the social services agency cannot grant an exemption under *Health & Safety Code § 1522*, the child shall not be placed in the home. If the criminal records check indicates the person has been convicted of a crime for which the social services agency may grant an exemption under *Health & Safety Code § 1522*, the child shall not be placed in the home unless a criminal records exemption has been granted based on "substantial and convincing evidence to support a reasonable belief" the person with the criminal conviction is of such good character as to justify the placement and not present a danger to the child [*Welf. & Inst. Code § 309(d)(4)*].

To avoid having to move the child multiple times, the social worker should be cautious regarding temporary placements with relatives and "nonrelative extended family members" pending the detention hearing if there is any ground for concern the relative or "nonrelative extended family member" will not be approved for ongoing placement. Further, it is important to recognize that the requirements set forth in statute and regulations regarding the standards for approving the homes of relatives, nonrelative extended family members, and foster family homes are not just funding requirements. Instead, they are conditions that have been deemed generally necessary to ensure the safety and well-being of children.

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
B. Intake, Investigation, and Petition Procedures

28-328 California Forms of Pleading and Practice--Annotated § 328.32

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§ 328.32 Search Warrants in Child Welfare Investigations

In August 1999 the Ninth Circuit Court of Appeals handed down its decision in the case of *Calabretta v. Floyd (9th Cir. 1999) 189 F.3d 808* . The *Calabretta* case dealt with the question of whether law enforcement and social services could enter a home without a search warrant to investigate the welfare of a child in the absence of either consent or exigent circumstances. Two issues clearly presented themselves: whether a search warrant was required in such circumstances and, if it was, whether the law on that issue was clearly established such that the county and its officers and workers in the case were properly denied qualified immunity by the trial court. The court ruled against the government on both issues, pointing primarily to dicta in its decision in the case of *White by White v. Pierce County (9th Cir. 1986) 797 F.2d 812* as controlling, holding that a search warrant was required in the absence of consent or exigent circumstances and that no reasonable government official would have believed otherwise [*Calabretta v. Floyd (9th Cir. 1999) 189 F.3d 808, 813-818]* .

The holding in *Calabretta* that the law requiring a search warrant in child welfare investigations to enter a home in the absence of consent or exigent circumstances was clearly established prior to its decision is questionable, if not erroneous. As most practitioners in California's dependency system are well aware, law enforcement officers and social workers in this state have been taught for years that search warrants are not required in child welfare investigations. This is not surprising for a number of reasons. First, California's search warrant statute does not address the issuance of search warrants for child welfare investigations that do not rise to the level of criminal conduct [*Penal Code § 1524*]. Second, California law is clear the exclusionary rule applied to *Fourth Amendment* violations in criminal cases does not apply in dependency cases, since the protection of the child is paramount [*In re Malinda S. (1990) 51 Cal. 3d 368, 384, 272 Cal. Rptr. 787, 795 P.2d 1244 , citing In re Mary S. (1986) 186 Cal. App. 3d 414, 418-419, 230 Cal. Rptr. 726* ; *In re Christopher B. (1978) 82 Cal. App. 3d 608, 615, 147 Cal. Rptr. 390* ; *In re Robert P. (1976) 61 Cal. App. 3d 310, 321, 132 Cal. Rptr. 5]* . Further, for those who may have read *White*, the dicta contained in that case is a generic transitional statement; it appears the question of whether a search warrant was required in child welfare investigations

was not actually considered. Instead, that case was determined on whether the law enforcement officers had probable cause to believe the child had been abused and would be injured or could not be taken into custody if a court order were required, as set forth in the law of the State of Washington at that time; the court finding that if the state law were complied with, constitutional requirements had also been met [*White by White v. Pierce County (9th Cir. 1986) 797 F.2d 812, 815]* . The state statutory scheme in *White* was also very different from that in California, which does not require a prior order of the court for removal [*Welf. & Inst. Code §§ 305, 306*]. Finally, even legal commentators favoring a search warrant requirement for child welfare investigations in the absence of consent or exigent circumstances have noted the law on this issue is unclear, with it being recognized such searches are sometimes considered to be more in the nature of "administrative searches" than criminal investigations. Further, articles on this issue have for the most part not even mentioned the decision in *White* or the dicta contained therein [*see, e.g.,* Note, *Time for Direction: The Need for a Clear, Uniform Rule Regarding Searches During Child Abuse Investigations, 83 Ky. L.J. 529, 542 (1994-1995)*; Hardin, *Legal Barriers In Child Abuse Investigations: State Powers and Individual Rights, 63 Wash. L. Rev. 493, 519*-548 (1988); Note, *Investigating Child Abuse: The Fourth Amendment and Investigatory Home Visits, 89 Columbia L. Rev. 1034, 1034*-1035 (1989)]. It is therefore understandable that law enforcement officers and social workers throughout California have largely been taught in the past that search warrants were not required in child welfare investigations, even in the absence of consent or exigent circumstances. Thus, the denial of qualified immunity to the government defendants in *Calabretta* was questionable, if not erroneous.

Equally troubling is the *Calabretta* decision's failure to consider the child's statutory and constitutional right to be safe. California has very clearly stated that in this state children have a right to be safe in their homes [*Welf. & Inst. Code §§ 396, 16500*]. California courts have also recognized the right of children to be protected from abuse can rise to a constitutional dimension [*see, e.g., In re Jasmon O. (1994) 8 Cal. 4th 398, 419, 33 Cal. Rptr. 2d 85, 878 P.2d 1297* ; *In re Marilyn H. (1993) 5 Cal. 4th 295, 306, 19 Cal. Rptr. 2d 544, 851 P.2d 826]* . But the decision in *Calabretta* does not mention these rights and apparently did not consider the impact they should have on the issue before the court.

California law is now clear that search warrants are required for the entry of a home in child welfare investigations in the absence of consent or exigent circumstances. In most cases either consent is given or exigent circumstances exist, so this new requirement will not be an issue. Counties are scrambling, however, to develop new practices and procedures for search warrants in child welfare investigations for those cases in which a search warrant is required. Numerous issues are arising in this regard, including but not limited to:

- Whether a social worker can draft the warrant and supporting declaration. California law does not require the affidavit supporting a search warrant to have been made by a law enforcement officer; other individuals can be the affiant [*People v. Bell (1996) 45 Cal. App. 4th 1030, 1054-1055, 53 Cal. Rptr. 2d 156]* . Thus, social workers can draft the warrant and be the affiant in support of that warrant.

- Whether probable cause or only reasonable cause is required for the issuance of a child welfare investigation search warrant. California only requires reasonable suspicion for the reporting of suspected child abuse and neglect and reasonable cause for the taking of a child into protective custody [*Penal Code § 11166*; *Welf. & Inst. Code §§ 305, 306*]. Thus, a strong argument can be made that only "reasonable cause" should be required for the issuance of a search warrant in child welfare investigations [*see also* Hardin, *Legal Barriers In Child Abuse Investigations: State Powers and Individual Rights, 63 Wash. L. Rev. 493, 530*-536 (1988) (concluding the standard for entry by social workers should be less than probable cause)]. Nevertheless, the safer approach from a liability viewpoint is to utilize the "probable cause" standard since that standard is known to satisfy constitutional requirements.

- Whether a search warrant can be issued for a child welfare investigation that does not appear to arise to the level of criminal conduct, but for which cause exists to believe the child is described by *Welf. & Inst. Code § 300*. *Penal Code § 1524*, which sets forth the statutory grounds for the issuance of a search warrant, does not provide for the issuance of search warrants in child welfare investigations that do not

rise to the level of criminal conduct. Nevertheless, there are many such investigations and following *Calabretta* search warrants may be required in some of them. California law recognizes the law of this state is not only set forth in statutes, however, it is also set forth in case law [*In re Malinda S. (1990) 51 Cal. 3d 368, 376, 272 Cal. Rptr. 787, 795 P.2d 1244]* . Thus, it appears that in those cases in which the basis for the issuance of a search warrant does not rise to the level of criminal conduct as set forth in *Penal Code § 1524*, but does rise to the level of cause to believe a child comes within the dependency court's jurisdiction and may be in danger, the search warrant should simply issue under the law as set forth in *Calabretta v. Floyd (9th Cir. 1999) 189 F.3d 808* .

- Whether a social worker can serve the search warrant. California law requires that search warrants be served by law enforcement officers [*Penal Code §§ 1528, 1529, 1530*]. Law enforcement officers can use experts and other individuals as necessary and appropriate to assist in the execution of search warrants [*People v. Superior Court (Meyers) (1979) 25 Cal. 3d 67, 70, 74-76, 157 Cal. Rptr. 716, 598 P.2d 877* ; *People v. Superior Court (Moore) (1980) 104 Cal. App. 3d 1001, 1005, 163 Cal. Rptr. 906]* . Thus, while the warrant must be served by a law enforcement officer, social workers can, and in most instances probably should, assist in the execution of the warrant.

Many other issues are also arising, such as the protection of the identity of anonymous informants, including mandatory reporters of child abuse, the use of telephonic search warrants, the requirements for nighttime service, and the possible need for special masters and on-call deputy county counsels. All of these issues are receiving considerable attention at the local and state level as government agencies prepare to respond to the new mandate of *Calabretta*. The need for communication and cooperation between the juvenile and superior courts, social services, law enforcement, prosecutors, and county counsels in the development of effective and legally sufficient programs for search warrants in child welfare investigations is obvious. The need for training is substantial. How this mandate will be implemented in each county remains to be seen.

What is clear, however, is that challenges regarding the need for and sufficiency of search warrants, their issuance and their execution, are not relevant to the dependency case itself, since any evidence of child abuse or neglect is to be admitted regardless [*In re Malinda S. (1990) 51 Cal. 3d 368, 384, 272 Cal. Rptr. 787, 795 P.2d 1244 , citing In re Mary S. (1986) 186 Cal. App. 3d 414, 418-419, 230 Cal. Rptr. 726* ; *In re Christopher B. (1978) 82 Cal. App. 3d 608, 615, 147 Cal. Rptr. 390* ; *In re Robert P. (1976) 61 Cal. App. 3d 310, 321, 132 Cal. Rptr. 5]* . Such challenges are only relevant to questions of civil liability. Thus, it is not anticipated that social workers will include detailed information about the issuance of the search warrant or a copy of the warrant as part of the normal report process within the dependency case itself. Further, unless the search warrant issue attempted to be raised in a dependency case directly affects the credibility of the individuals involved or the reliability of the evidence presented, such challenges should be summarily denied by the juvenile court as irrelevant to the dependency proceedings [*Evid. Code § 350*].

As one would expect, the entire area of search warrants in child welfare investigations should be watched for further developments.

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§ 328.33 Right of Older Children to Communicate With Parents or Guardians and Attorney

Immediately after being taken to a place of confinement pursuant to *Welf. & Inst. Code §§ 305-324* and, except when physically impossible, no later than one hour after he or she has been taken into custody, a child 10 years of age or older shall be advised that he or she has the right to make at least two telephone calls from the place where he or she is being held, one call completed to his or her parent, guardian, or a responsible relative, and one call to an attorney. The calls are at public expense if completed to telephone numbers within the local calling area and must be made in the presence of a public officer or employee. Any public officer or employee who willfully deprives a child taken into custody of his or her right to make the telephone calls is guilty of a misdemeanor [*Welf. & Inst. Code § 308(b)*].

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§ 328.34 Time Limits on Temporary Custody

[1] Requirement to File Petition or Release

Whenever a child is taken into custody by a peace officer or social worker, unless the child willfully misrepresents his or her age as 18 years or more, that child must be released within 48 hours after having been taken into custody, excluding nonjudicial days, unless, within that period of time, a petition to declare him or her a dependent child has been filed [*Welf. & Inst. Code § 313(a)*].

[2] Relief by Writ of Habeas Corpus

The remedy for a failure to file or release within 48 hours is a habeas corpus proceeding directed at the social service agency. The agency is not precluded from filing a petition after the 48-hour period and retaining custody of the child until there is a judicial determination of the appropriateness of detention [*Los Angeles County Dep't of Children & Family Servs. v. Superior Court (1988) 200 Cal. App. 3d 505, 508, 246 Cal. Rptr. 150* ; *see Welf. & Inst. Code § 315*].

[3] Written Explanation of Detention Over Six Hours

Moreover, whenever a child who has been held in custody for more than 6 hours by the social worker is subsequently released and no petition is filed, the social worker is required to prepare a written explanation of the incident. The explanation must be prepared within 72 hours after the child is released from custody and filed in the record of the case. A copy of the written explanation must be sent to the parents, guardians, or other person having care or custody of the child [*Welf. & Inst. Code § 313(b)*].

[4] Effect on Time Limits When Child Misrepresents Own Age

When a child willfully misrepresents himself or herself to be 18 years of age or more when taken into custody by a peace officer or social worker, and this misrepresentation effects a material delay in the investigation that prevents the filing of a petition, the petition or complaint must be filed within 48 hours from the time the child's true age is determined, excluding court judicial days. If a petition of this type is not timely filed, the child must be immediately release from custody [*Welf. & Inst. Code § 314*].

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§ 328.35 Application to Commence Juvenile Court Proceeding

[1] Contents and Forms of Application

In addition to being brought to the attention of the juvenile authorities by a peace officer or social worker, a child may become the subject of juvenile court action through the application of any person to the social worker to commence such proceedings. Whenever any person applies to the social worker to commence proceedings in the juvenile court, the application must be in the form of an affidavit alleging that there was or is within the county, or residing therein, a child who falls within the definition of a dependent child and setting forth facts in support of that allegation [*Welf. & Inst. Code § 329*]. Judicial Council form JV-210 (*Application to Commence Proceedings by Affidavit and Decision by Social Worker*) has been approved for making the application under this section.

[2] Social Worker's Duty to Investigate Application

The social worker must immediately make such investigation as he or she deems necessary to determine whether proceedings in the juvenile court should be commenced [*Welf. & Inst. Code §§ 328, 329*].

[3] Social Worker's Refusal to Take Action

[a] Explanation by Social Worker Required

If the social worker does not take action in the case, either by placing the child under informal supervision or by filing a petition in the juvenile court within three weeks after the application is made, the social worker must endorse on the affidavit of the applicant his or her decision not to proceed further and the reasons for such determination. The social worker must immediately notify the applicant of the action taken or the decision rendered and must retain the affidavit and endorsement for a period of 30 days after such notice to the applicant [*Welf. & Inst. Code § 329*]. Judicial Council

form JV-210 (*Application to Commence Proceedings by Affidavit and Decision by Social Worker*), if used for the making of the application, can be used for to inform the applicant of the "Decision of Social Worker or Social Services Agency."

[b] Review of Social Worker's Refusal

When any person has applied to the social worker, pursuant to *Welf. & Inst. Code § 329*, to commence juvenile court proceedings and the social worker fails to file a petition within three weeks after the application, that person may, within one month of making the application, apply to the juvenile court to review the decision of the social worker. Judicial Council form JV-215 (*Application to Review Decision by Social Worker Not to Commence Proceedings*) is approved for the making of this application. The court may then either affirm the decision of the social worker or order him or her to commence juvenile proceedings [*Welf. & Inst. Code § 331*].

If directed to file a petition, the social worker must carry out his or her duty to the court to further investigate the matter and to submit such reports as the court may direct [*Welf. & Inst. Code § 281*]. The social worker must present a balanced investigation and recitation of the facts in the report. Despite having been directed to file the petition, however, after further investigation the social worker may still conclude in such a report that jurisdiction is not justified or recommend that it not be exercised. Based upon the evidence the juvenile court will thereafter make its own independent determination of whether jurisdiction exists.

PRACTICE TIP:

Attempt to Bypass Requirements Improper. In some counties defense attorneys for delinquent children attempt to bypass the requirements of *Welf. & Inst. Code § 329* (investigation by social worker) and of *Welf. & Inst. Code § 241.1* (joint protocol and assessment procedure for investigation by both probation and social services), and instead go directly to the juvenile court with their request that a dependency petition be filed. Such a request is not a proper *Welf. & Inst. Code § 331* request and should be summarily denied since to consider such a request would deprive the court of the investigation and assessment necessary to wisely make such a decision. A child's attorney would better serve his or her client's needs by ensuring that a full and complete assessment is done to help the court make this important decision.

For a complete discussion of the issue of dual jurisdiction cases in which the child may be considered for both dependency and delinquency status, and the need for a joint assessment, see *Ch. 327, Juvenile Procedures: Jurisdiction and General Procedures, § 327.11[3]*.

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
B. Intake, Investigation, and Petition Procedures

28-328 California Forms of Pleading and Practice--Annotated § 328.36

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.36 Alternative to Filing Petition

[1] Informal Supervision

If the social worker, after investigating a case, concludes that a child is or soon will be within the jurisdiction of the juvenile court, the social worker may, in lieu of filing a dependency petition, and with consent of the child's parent or guardian, undertake a program of supervision in an attempt to adjust the situation that brings the child within, or increases the probability that the child will soon be within, the court's jurisdiction. This program may not exceed six months, and institution of a program does not prevent the social worker from filing a dependency petition at any time within that period [*Welf. & Inst. Code § 301(a)*]. The voluntary supervision program may call for the child to obtain care and treatment for the abuse of or addiction to controlled substances [*Welf. & Inst. Code § 301(b)*]. If the parent of the child that is the subject of the intended informal supervision agreement is a dependent of the juvenile court at the time the social worker seeks to undertake the voluntary supervision agreement, the informal supervision program shall not be undertaken until the minor parent has consulted with his or her dependency attorney [*Welf. & Inst. Code § 301(c)*].

If the objective has not been achieved within six months, the social worker may extend the period of a service plan in six-month increments, if the objectives can be achieved within that time and if the parent or guardian consents [*Welf. & Inst. Code § 16506*].

[2] Required Factors

In determining whether to undertake a program of informal supervision of the child, the social worker must consider the following [*Cal. Rules of Ct., Rule 5.516(b)*]:

- If the alleged condition or conduct is not considered serious, whether the child has had a problem in

the home, school, or community that indicates that some supervision would be desirable.

- Whether the child and the parents seem able to resolve the matter with the assistance of the social worker or social worker and without formal juvenile court action.

- Whether further observation or evaluation by the social worker or social worker is needed before a decision can be reached.

- The attitude of the child and the parent or guardian.

- The age, maturity, and capabilities of the child.

- The prior dependency or delinquency history, if any, of the child.

- The recommendation, if any, of the referring party or agency.

- The attitudes of any affected persons.

- Any other circumstances that indicate that a program of informal supervision would be consistent with the welfare of the child and the protection of the public.

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§ 328.37 Petition for Dependency Filed by Social Worker

[1] When Child Detained

If the social worker determines that the child should be detained in custody, he or she must immediately file a petition to have the child declared a dependent child of the court with the clerk of the juvenile court who must set the matter for hearing on the detention hearing calendar [*Welf. & Inst. Code §§ 311(a), 325*]. The petition may be filed by a facsimile transmission if the local juvenile court has provided for fax filing by local rule or other written instruction [*Cal. Rules of Ct., Rule 5.522*; *see Ch. 327, Juvenile Courts: Jurisdiction and General Procedures, § 327.30[2]*]. The requirements for facsimile filing are set forth in *Cal. Rules of Ct., Rule 5.522*.

[2] When Child Not Detained

Regardless of whether the child is detained in custody, a proceeding in the juvenile court to declare a child a dependent child of the court must be commenced by the social worker who must file a petition with the juvenile court [*Welf. & Inst. Code § 325*]. As with a petition being filed on behalf of a child who has been detained, a petition filed on a child who has not been detained can also be filed by facsimile filing if authorized by the local juvenile court [*Cal. Rules of Ct., Rule 5.522*; *see Ch. 327, Juvenile Courts: Jurisdiction and General Procedures, § 327.30[2]*].

[3] Contents of Petition

A petition to commence proceedings in the juvenile court to declare a child a dependent child of the court must be verified and must contain the following [*Welf. & Inst. Code § 332*]:

- The name of the court to which the petition is addressed.

- The title of the proceeding.

- The code section and subdivisions under which the petition is filed; if it is alleged that the child comes within *Welf. & Inst. Code § 300(e)* (under age five and having suffered severe physical abuse), the petition must contain an allegation pursuant to that section.

- The name, age, and address, if any, of the child on whose behalf the petition is brought.

- The names and residence addresses, if known to petitioner, of both parents and any guardians of the child; if there is no parent or guardian residing within the state, or if his or her place of residence is not known to petitioner, the petition must also contain the name and residence address, if known, of any adult relative residing within the county, or if there is none, the adult relative residing nearest to the court. However, if the social services agency knows that one of the parents is a victim of domestic violence and that the victim-parent is living separately from the "batterer-parent," the address of the victim-parent shall be kept confidential.

- A concise statement of facts, separately stated, to support the conclusion that the child on whose behalf the petition is being brought is a person within the definition of each of the sections and subdivisions under which the proceedings are being instituted [*In re Nicholas B. (2001) 88 Cal. App. 4th 1126, 1134, 106 Cal. Rptr. 2d 465]* .

- The fact that the child on whose behalf the petition is brought is detained in custody or is not detained in custody, and if he or she is detained in custody, the date and precise time the child was taken into custody.

- A notice to the father, mother, spouse, or other person liable for support of the child stating the following:

- *Welf. & Inst. Code § 903* makes that person, the estate of that person, and the estate of the child liable for the cost of the care, support, and maintenance of the child in any county institution or any other place in which the child is placed, detained, or committed pursuant to an order of the juvenile court.

- *Welf. & Inst. Code § 903.1* makes that person, the estate of that person, and the estate of the child liable for the cost to the county of legal services rendered to the child or the parent by a private attorney or a public defender appointed pursuant to the order of the juvenile court.

- *Welf. & Inst. Code § 903.2* makes that person, the estate of that person, and the estate of the child liable for the cost to the county of the probation supervision of the child by the social worker pursuant to the order of the juvenile court.

- The liabilities established by these sections are joint and several.

[4] Use of Judicial Council Forms

The Judicial Council has promulgated forms for use in filing a petition to declare a child a dependent of the juvenile court. The forms are mandatory [*Cal. Rules of Ct., Rule 5.524(c)*].

[5] Verification of Petition

The petition must be verified [*Cal. Rules of Ct., Rule 5.524(b)*]. Any petition filed in juvenile court to commence

proceedings that is not verified may be dismissed without prejudice by the court [*Welf. & Inst. Code § 333*; *Cal. Rules of Ct. Rule 5.524(b)*]. If the petition is filed with the court by a facsimile transmission as provided in *Cal. Rules of Ct., Rule 5.522* the signature produced by fax transmission is considered an original signature [*Cal. Rules of Ct., Rule 5.522*].

[6] Setting the Petition for Hearing

If the child is detained in custody at the time for filing the petition, the hearing must be set within 15 judicial days from the date of the order of the court directing the detention pursuant to *Welf. & Inst. Code § 319* [*Welf. & Inst. Code § 334*]. For a child who has not been taken into custody, the clerk of the juvenile court must by statute set the petition for hearing within 30 days of the filing of the petition [*Welf. & Inst. Code § 334*]. The rules of court, however, provide that for a child who has not been taken into custody, the clerk must set an initial hearing within 15 judicial days of the filing of the petition [*Cal. Rules of Ct., Rule 5.670(a)*].

[7] Variance and Amendment of Pleadings

The rules of the Code of Civil Procedure relating to variance and amendment of pleadings in civil actions apply to petitions and pleadings in the juvenile court to the same extent and with the same effect as if the proceedings were a civil action [*Welf. & Inst. Code § 348*].

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[Reserved]

§ 328.38[Reserved]

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AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.40 Initial or Detention Hearing

[1] Purpose

The first hearing that is held is called an initial hearing, unless the child has been removed from the custody of the parent, in which case it is called a detention hearing. The purpose of the detention hearing is to afford the court an opportunity to make an initial determination regarding the necessity of continued detention of the child. The court is required to order the release of the child from custody unless it finds that a prima facie showing has been made that the child comes within the court's jurisdiction under *Welf. & Inst. Code § 300*, continuation of the child in the home of the parent or guardian is contrary to the welfare of the child, and that continued detention is necessary due to one or more of four grounds [*Welf. & Inst. Code § 319*]. For a discussion of these four grounds, see *§ 328.82[5]*. The purpose of this initial hearing is also to provide notice to the parent or guardian of the allegations and nature of the proceedings, consider the question of the appointment of counsel, and involve the court in the supervision of the case, including the ordering of services. This is true regardless of whether the child has been detained or not.

If a child is detained pending court proceedings, a detention hearing must be held by the next judicial day after the petition is filed [*Welf. & Inst. Code § 315*].

PRACTICE TIP:

Local Terminology. Some juvenile courts mistakenly refer to initial or detention hearings as "arraignment hearings." They are not. Arraignment hearings are conducted in criminal cases, not dependency cases. Nevertheless, it is important to know what the local juvenile court calls its hearings so the practitioner can avoid confusion and looking inexperienced. This is true not only of detention hearings, but all local procedures and terminology.

[2] Time Limits on Detention

A child taken into custody must be released from custody within 48 hours, excluding nonjudicial days, after first being taken into custody by a peace officer or social worker, unless within that time, a petition is filed with the clerk of the juvenile court [*Welf. & Inst. Code § 313(a), Cal. Rules of Ct., Rule 5.670(b)*].

The fact that the child may have been over-detained as a result of a petition not being filed in a timely manner does not, however, deprive the juvenile court of the ability to conduct a detention hearing once the petition is filed [*Los Angeles County Dep't of Children's Servs. v. Superior Court (1988) 200 Cal. App. 3d 505, 508-509, 246 Cal. Rptr. 150]* .

The child, unless sooner released, must also be brought before the juvenile court for a detention hearing as soon as possible, but in any event within 48 hours, excluding noncourt days, after arriving at a facility within the county, in the event of any of the following [*Cal. Rules of Ct., Rule 5.670(e)*]:

- The child was taken into custody in another county and transported in custody to the requesting county under a warrant issued by the juvenile court.

- The child was taken into custody in the county in which a protective custody warrant was issued by the juvenile court.

- The child was ordered transferred in custody by the juvenile court of another county under *Cal. Rules of Ct., Rule 5.610* (transfer-out hearing).

At the hearing, the court must determine whether the child is to be further detained. If the hearing is not begun within that time, the child must be immediately released from custody [*Cal. Rules of Ct., Rule 5.670(e)*].

[3] Service and Notice Requirements

[a] In General

Immediately on filing the petition for a child detained in custody, the social worker must give notice to the mother, the father or fathers, presumed and alleged, any legal guardian of the child, and the child, if the child is 10 years of age or older [*Welf. & Inst. Code § 290.1*; *see Welf. & Inst. Code § 302(b)* (general requirement of notice to both parents of all juvenile court proceedings involving their child)]. If it appears that the parent or guardian does not read English, notice must be given in the language believed to be spoken by the parent or guardian [*Cal. Rules of Ct., Rule 5.667(b)*].

Notice must also be given to any known sibling of the child who is the subject of the dependency petition, if that sibling is either a dependent of the court or is the subject of a dependency proceeding. If the sibling is 10 years of age or older, the notice is to be provided to the sibling, the sibling's caregiver, and the sibling's attorney. If the sibling is under 10 years of age, the notice is to be given to the sibling's caregiver and attorney. Separate notice is not required, however, if the sibling's matter is calendared in the same court on the same day [*Welf. & Inst. Code § 290.1(a)(5)*].

If there is no parent or guardian residing within the state, or if their place of residence is unknown, the social worker must serve and notify an adult relative residing within the county, or if none, the adult relative residing nearest the court [*Welf. & Inst. Code §§ 290.1(a)(6)*]. The social worker must also notify all counsel of record [*Welf. & Inst. Code § 290.1(a)(7)*]. Additionally, the social worker must also give notice to the district attorney, if the district attorney has notified the clerk that he or she wishes to receive such notice, and the probate department of the superior court that appointed the guardian, if the child is the ward of a guardian appointed by a probate court [*Welf. & Inst. Code § 290.1(a)(8)-(9)*]. Finally, if the social worker knows or has reason to know that an Indian child is involved, notice must also be given to the Indian custodian, if any, and the tribe of the child. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, notice shall be given to the Bureau of Indian Affairs (BIA) [*Welf. & Inst.*

Code § 290.1(a)(10)]. Notice to the BIA, if any, shall be by registered mail, return receipt requested [*Welf. & Inst. Code § 290.1(e)*]. No notice is required for a parent whose parental rights have been terminated [*Welf. & Inst. Code § 290.1(b)*].

Notice may be oral or in writing. Notice of the initial petition hearing shall include the date, time, and place of the hearing, the name of the child, and a copy of the petition [*Welf. & Inst. Code § 290.1(d)-(e)*].

The same or similar notice must be given by the clerk of the court [*Welf. & Inst. Code § 290.2*]. If a petition is filed for a child who has not been detained, the notice shall be given at least 10 days prior to the date of the hearing [*Welf. & Inst. Code § 290.2(c)(2)*].

In addition to the general notice provisions in *Welf. & Inst. Code § 290.1* and *290.2*, the court may also issue a citation to the parent or guardian directing that he or she appear or that he or she appear with the child [*Welf. & Inst. Code §§ 296, 338*]. If such a citation cannot be served, or if the person served fails to obey it, or in any case where it appears that the citation will probably be ineffective, the court may issue a warrant of arrest for the parent, guardian or other person having custody of the child [*Welf. & Inst. Code § 339*]. In such circumstances the court may also issue a protective custody warrant for the child [*Welf. & Inst. Code § 340*].

[b] Notice as Jurisdictional Requirement

Parents, guardians, or other person with custody of the child who is the subject of a dependency proceeding have a right to notice of hearings instituted for the purpose of separating children from such individuals. This notice is a jurisdictional requirement [*In re B.G. (1974) 11 Cal. 3d 679, 688-689, 114 Cal. Rptr. 444, 523 P.2d 244 , citing In re Moilanen (1951) 104 Cal. App. 2d 835, 842, 233 P.2d 91* ; *In re Spiers (1936) 15 Cal. App. 2d 487, 491, 59 P.2d 838]* .

The notice statutes merely require a diligent effort to notify the parent. If a parent cannot be located despite reasonable search efforts, due process notice requirements will be deemed to have been met and failure to give actual notice will not render the proceedings invalid [*In re Melinda J. (1991) 234 Cal. App. 3d 1413, 1418-1419, 286 Cal. Rptr. 239]* . If reasonable efforts are not made to locate and notice a parent, a finding of dependency jurisdiction must be reversed [*In re Arlyne A. (2000) 85 Cal. App. 4th 591, 598-600, 102 Cal. Rptr. 2d 109* ("The Department failed to take the simple and most direct step of calling directory assistance to find the parents' number"); *see also David B. v. Superior Court (1994) 21 Cal. App. 4th 1010, 1016, 26 Cal. Rptr. 2d 586* (social services failed to contact the military organization the father was serving in to locate the father; search efforts found "woefully deficient" and the finding of reasonable diligence was "wholly unsupportable")].

[4] Time Limitations on Hearing

[a] In General

If a child is taken into custody under *Welf. & Inst. Code §§ 305-307* and not released to a parent or guardian, the juvenile court must hold a detention hearing to determine whether the child must be further detained. The hearing must be held as soon as possible, but before the expiration of the next court day after a petition to declare the child a dependent child is filed. If the hearing is not begun within this period, the child must be released from custody [*Welf. & Inst. Code § 315*].

[b] Continuance of Hearing

On the motion of the child, parent, or guardian, the court must continue the detention hearing for one court day. This one-day continuance is not discretionary, the request must be granted [*Welf. & Inst. Code § 322*; *Cal. Rules of Ct., Rule 5.550(c), 5.672(a)*]. Unless otherwise ordered by the court, the child must remain in custody pending completion of the

detention hearing or any rehearing [*Cal. Rules of Ct., Rules 5.550(c), 5.672(a)*]. If the court grants the motion to continue the hearing, the court still must make a finding that continuation in the home of the parent or guardian would be contrary to the welfare of the child, or release the child [*Welf. & Inst. Code § 319(c)*]. This is because the "contrary to the welfare" finding must be made at the first court ruling pertaining to removal from the home or the child will not be eligible for title IV-E foster care maintenance payments for the duration of that stay in foster care [*45 C.F.R. 1356.21(c)*]. Thus, even if the court continues the case for just one day or sets the case for rehearing, it still must make the finding that continued custody of the child in the home of the parent's or guardian's is contrary to the child's welfare. The finding may be made without prejudice to any party, however, and may be reevaluated at the time of the continued detention hearing [*Cal. Rules of Ct., Rules 5.550(c), 5.672(a)*]. Where the child is not detained prior to the initial hearing, on motion of the child, parent or guardian the court must continue the initial hearing for one court day and may continue it for "a reasonable period" to allow the moving party time to prepare to address the issue of detention [*Cal. Rules of Ct., Rules 5.550(c), 5.672(a)*].

PRACTICE TIP:

Good Reasons to Ask for One-Day Continuance. The practitioner should note that the court must grant a request by the parent or child for a one day continuance under *Welf. & Inst. Code § 322*. It is not a discretionary decision for the court [*Cal. Rules of Ct., Rules 5.550(c), 5.672(a)*]. Many times attorneys meet their clients only minutes before a scheduled detention hearing. In an appropriate case a one-day continuance may allow counsel to meet further with the parent, guardian, or child and to gather evidence, including the testimony of witnesses, to present at the detention hearing that would not otherwise be available to counsel at the originally scheduled detention hearing. Parents' counsel may wish to do this in an effort to prevent continued detention. The child's counsel may wish to do this to try to ensure either continued detention or release. Both may wish to do this to have time to find an appropriate relative placement for the court to consider. Thus, the one day continuance can be a very helpful request in an appropriate case.

If counsel makes a request for a one-day continuance and agrees with the court making the temporary finding that continued custody in the home of the parent or guardian would be contrary to the child's welfare, counsel should remember to request the court to reevaluate that finding at the continued hearing, if appropriate [*Cal. Rules of Ct., Rules 5.550(c)(2), 5.672(a)*].

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§ 328.41 Explanation, Inquiry, and Action Required by Court

[1] Concerning the Nature of the Proceedings

At the beginning of the detention hearing, the court must inform the child and the parent or guardian, if present, of the contents and meaning of the petition, the reasons why the child was taken into custody, the nature and possible consequences of juvenile court proceedings, and the purpose and scope of the detention hearing [*Welf. & Inst. Code § 316*].

[2] Concerning the Right to Counsel

The court must also inform the parties of the right of each parent or guardian and any child to be represented at every stage of the proceedings by counsel [*Welf. & Inst. Code § 316*]. The court must appoint counsel for the parent, guardian and child where appropriate [*Welf. & Inst. Code § 317*; *see* discussion in *§ 328.60* et seq.].

If the child has arranged for his or her own counsel and any party objects to the selection of counsel by the child in proceedings growing out of his or her status as a dependent child, the counsel selected may not be barred from representing the child without first determining that the child is incapable of choosing or has not chosen competent counsel [*Akkiko M. v. Superior Court (1985) 163 Cal. App. 3d 525, 527, 530-531, 209 Cal. Rptr. 568* (nonprofit law firm specializing in representing children had previously represented the 10-year-old child in conservatorship proceedings and child wanted their representation in dependency proceedings)].

[3] Concerning Parent or Guardian's Permanent Mailing Address

At the first appearance by a parent or guardian, the court must order the parent or guardian to provide a mailing address [*Welf. & Inst. Code § 316.1*]. The court must also advise the parent or guardian that the address provided will be used

by the court, the clerk, and the social services agency to provide notice of hearings and for mailing all documents related to the proceedings. The court must advise the parent or guardian that, unless the parent or guardian, or the attorney of record for the parent or guardian, provides a written notification of a change of address, use of the address first provided will satisfy notice requirements [*Welf. & Inst. Code § 316.1*]. Failure to do this may result in a later reversal for lack of notice if the parent's whereabouts is unknown and reasonable search efforts have not been made [*In re Rashad B. (1999) 76 Cal. App. 4th 442, 448-450, 90 Cal. Rptr. 2d 462]* . As noted by the court in *Rashad B.*, "it is in cases of homeless parents that compliance with section 316.1 is arguably most important" [*In re Rashad B. (1999) 76 Cal. App. 4th 442, 450, 90 Cal. Rptr. 2d 462]* .

[4] Concerning Parentage of the Child

At the detention hearing, or as soon thereafter as reasonably possible, the court must inquire of the parents present and any other appropriate person as to the parentage of the child. The identity and address of all possible parents, presumed and alleged, is to be part of that inquiry. Even the presence at the hearing of a person who claims to be the parent of the child will not relieve the court of its responsibility to make this inquiry [*Welf. & Inst. Code § 316.2(a)*].

For further discussion regarding the parentage inquiry, parentage proceedings, and the rights of parents in dependency cases see *§ 328.60*.

[5] Concerning Child's Health and Education

At the initial hearing the court must direct each parent to provide the social services agency "complete medical, dental, mental health, and educational information, and medical background," of the child, the mother, and the child's biological father if known [*Welf. & Inst. Code § 16010(f)*]. The Judicial Council has created Judicial Council Form JV-225, Health and Education Questionnaire, which is to be used for this purpose. The court must order each parent or guardian present to complete the form or to provide the information necessary for the social worker, court staff, or local child welfare agency to complete the form [*Cal. Rules of Ct., Rule 5.668(c)*]. The court will be required at the disposition hearing to determine whether the child's health and education information has been provided to the social services agency [*Welf. & Inst. Code § 16010(f)*]. As soon as possible, but not more than 30 days following the initial hearing, the child's caregiver is to be provided a copy of the child's health and education summary [*Welf. & Inst. Code § 16010(c)*]. A copy of the completed form is also to be provided to the child's dependency attorney [*Cal. Rules of Ct., Rule 5.668(c)*]. Notwithstanding *Welf. & Inst. Code § 827* or any other provision of law, this information may be provided to prospective caregivers prior to placement of the child if the social services agency intends to place the child with the prospective caregivers, the prospective caregivers are willing to become the adoptive parents of the child, and the prospective caregivers have an approved adoption assessment or home study, a foster family home license, certification by a licensed foster family agency, or approval pursuant to *Welf. & Inst. Code §§ 361.3*, and *361.4* [*Welf. & Inst. Code § 16010(d)*].

The court should also inquire whether there is a need to temporarily limit the right of the parent or guardian to make educational decisions for the child. If there is, and all the requirements of *Welf. & Inst. Code § 319(g)(1)* are met, the court may temporarily limit the parent's or guardian's right to make such decisions and appoint a responsible adult to make educational decisions for the child [*Welf. & Inst. Code § 319(g)(1)*]. If the court cannot identify a responsible adult to make educational decisions for the child and the appointment of a surrogate parent to make such decisions is not warranted under *Educ. Code § 56050(a)*, the court may make educational decisions for the child. If the court makes such decisions, it should do so with the input of any interested person and also issue appropriate orders to ensure efforts are made to identify a responsible adult to make future educational decisions for the child [*Welf. & Inst. Code § 319(g)(2)*]. The temporary limitations, appointments, and orders made pursuant to this section shall expire at the end of the disposition hearing or the dismissal of the dependency petition [*Welf. & Inst. Code § 319(g)(3)*].

[6] Concerning Possible Indian Heritage

Both the juvenile court and the social services agency have an affirmative and continuing duty under California law to inquire whether a child for whom a dependency petition has been filed is or may be an Indian child [*Cal. Rules of Ct., Rule 5.481(a)*]. At the parent's first appearance in juvenile court, the court must inquire regarding any possible Indian heritage and order the parent to complete for ICWA-020, *Parental Notification of Indian Status* [*Cal. Rules of Ct., Rule 5.481(a)(2)*]. The continuing duty to inquire as to whether the child is or may be an Indian child as defined by the ICWA is a state imposed duty, not part of the ICWA itself. For further discussion of the duty of inquiry, *see § 328.125[2]*.

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§ 328.42 Response by Parent or Guardian

[1] Motion of Objection Akin to Demurrer

If the parent or guardian believes that the petition on its face fails to state a cause of action under *Welf. & Inst. Code § 300*, or fails to give adequate notice of the claimed basis for jurisdiction, the parent or guardian may raise a motion "akin to a demurrer" [*In re Fred J. (1979) 89 Cal. App. 3d 168, 176, 152 Cal. Rptr. 327]* . If a motion akin to a demurrer is to be filed, it should be done at the detention hearing prior to entering a plea since the general rule is that once a plea is entered, a demurrer for vagueness or lack of notice will no longer lie unless the court allows the previously entered plea to be withdrawn. This may also be a reason for requesting a one-day continuance of the detention hearing [see discussion in *§ 328.80[4]*].

The purpose of the petition is to give notice to the parties, particularly the parents or guardians, as to what social services believes brings the child within the juvenile court's jurisdiction [*Welf. & Inst. Code § 300*]. Because petitions are generally written by social workers, not lawyers, precision in the actual pleading of the petition is not required or expected [*In re S.O. (2002) 103 Cal. App. 4th 453, 459, 126 Cal. Rptr. 2d 554* ; *In re Jessica C. (2001) 93 Cal. App. 4th 1027, 1038, n.8, 113 Cal. Rptr. 2d 597]* . What is required is notice. The better practice is to read the petition together with the reports filed with it at the initial hearing in a form of notice pleading [*cf. SEC Corp v. Superior Court (1992) 3 Cal. App. 4th 673, 677, 4 Cal. Rptr. 2d 372* ; *Pedro v. County of Humboldt (1933) 217 Cal. 493, 497-498, 19 P.2d 776]* . In some counties this is especially appropriate since reports may include the jurisdictional allegations themselves as well as facts to support them. Thus, when a motion akin to a demurrer is made, the juvenile court should look not only to the petition, but also to the documents filed in support of the petition, to determine if a cause of action is truly stated and the parents are given adequate notice of the allegations made in the case. All parties should be made aware the court will do this, however, so the issue of whether to grant or deny the motion can be adequately argued.

Only rarely should a motion akin to a demurrer be granted without leave to amend. This is for two reasons. The first is that dependency petitions are routinely amended, so it is not unexpected. Sometimes petitions are amended because new information has been gathered during the social worker's ongoing investigation, or new circumstances have developed. Sometimes it is to conform to the proof at trial. Most often petitions are amended as the result of settlement negotiations in which the social services agency agrees to strike or amend by inter-lineation various terms following which the parent or guardian agrees to admit, submit or enter a plea of no contest. Regardless, amending petitions is a common practice. The second and overwhelming reason for allowing petitions to be amended, particularly in a situation involving a motion akin to a demurrer, is the need to view the totality of the circumstances so as to protect the child.

One case has held that a challenge to the sufficiency of a dependency petition can even be made for the first time on appeal if the error asserted is that the petition fails to state a cause of action. Significantly, it held this even though the language of the petition had been amended by agreement of the parties [*In re Alysha S. (1996) 51 Cal. App. 4th 393, 397, 58 Cal. Rptr. 2d 494]* . This is inconsistent with the general rule that one cannot complain on appeal regarding things agreed on in settlement [*see In re Brandon M. (1997) 54 Cal. App. 4th 1387, 1391, 1400-1401, 63 Cal. Rptr. 2d 671]* .

Further, the analysis of the *Alysha S.* decision is incorrect. First, it analyzed the issue by considering the law regarding civil appeals without recognizing that Code of Civ. Pro. 430.80, which it relied on, is not applicable to dependency cases [*see Welf. & Inst. Code § 348*; *see also In re Chantal S. (1996) 13 Cal. 4th 196, 200, 205-206, 51 Cal. Rptr. 2d 866, 913 P.2d 1075* (dependency proceedings are special proceedings with their own set of rules and statutes)]. Instead, on this issue it is the law governing criminal cases that is most analogous [*In re Troy Z. (1992) 3 Cal. 4th 1170, 1180-1182, 13 Cal. Rptr. 2d 724, 840 P.2d 266* (looking to law regarding pleas in criminal cases to analyze effect of plea in dependency case)]. Under criminal law if a demurrer is not made at the trial court level alleging the facts of the accusatory pleading do not constitute a public offense, the failure to make the demurrer is considered a waiver [*Penal Code §§ 1004(4), 1012*]. The same would apply to dependency cases regarding a challenge the petition does not state a cause of action. Moreover, consistent with criminal law, when considering a properly raised demurrer in a dependency case the court should consider not only the petition itself, but also any supporting documents, discovery and evidence provided the parent [*cf. People v. Paul (1978) 78 Cal. App. 3d 32, 42-43, 144 Cal. Rptr. 431]* . The *Alysha S.* court did not consider or utilize either of these applicable doctrines from criminal law.

Even were civil rules to apply, the holding of the *Alysha S.* court that a demurrer for failure to state a cause of action can be raised for the first time on appeal is subject to question. Its reliance on the *Walton* case is of little assistance, since *Walton's* statement of the rule was merely dictum [*see In re Alysha S. (1996) 51 Cal. App 4th 393, 397, 58 Cal. Rptr. 2d 494 , citing Walton v. City of Red Bluff (1991) 2 Cal. App. 4th 117, 130, 3 Cal. Rptr. 2d 275]* . And *Walton's* citation to *Buford* is of little assistance since *Buford* dealt with whether there was a lack of jurisdiction, not a failure to state a cause of action [*see Walton v. City of Red Bluff (1991) 2 Cal. App. 4th 117, 130, 3 Cal. Rptr. 2d 275 , citing Buford v. State of California (1980) 104 Cal. App. 3d 811, 826, 164 Cal. Rptr. 264]* . Finally, although *Walton* correctly cited Witkin's treatise for California Procedure [*see Walton v. City of Red Bluff (1991) 2 Cal. App. 4th 117, 130, 3 Cal. Rptr. 2d 275]* , that portion of Witkin is only part of the story. Although Witkin's California Procedure provides authority for the proposition that a failure to state a cause of action can be raised for the first time on appeal where the defect is of substance [*see* 5 Witkin, Cal. Procedure (4th ed. 1997), *Pleading*, § 911, pp. 370-371], it also notes that defects of form rising to a failure to state a cause of action cannot be raised for the first time on appeal if the matter went to trial and resulted in a judgment after the failure to demur [*see* 5 Witkin, Cal. Procedure (4th ed. 1997), *Pleading*, § 913, pp. 371-372, and cases cited there]. Because this latter situation is the more likely situation in dependency cases, the *Alysha S.* holding is questionable even if civil rules were to apply. Since they do not, *Alysha S.* is simply incorrect.

Many courts have disagreed with the *Alysha S.* holding. The leading case is the *Shelley J.* case in which the court stated, "We agree with county counsel that *Alysha S.* was wrongly decided on that point" [*In re Shelley J. (1998) 68 Cal. App. 4th 322, 328, 79 Cal. Rptr. 2d 922]* . Other courts have agreed with the *Shelley J.* analysis, rejecting the *Alysha S.* holding [*see, e.g., In re S.O. (2002) 103 Cal. App. 4th 453, 459-460, 126 Cal. Rptr. 2d 554* ; *In re James C. (2002)*

104 Cal. App. 4th 470, 481, 128 Cal. Rptr. 2d 270] . One court not only noted the criticism of *Alysha S.* regarding looking to civil rather than criminal law, but added its own additional criticism. This court noted the *Alysha S.* decision also ignored normal principles of harmless error. If there was no prejudice resulting from the way in which the dependency petition was written, it does not matter if the issue was waived or not [*In re Athena P. (2002) 103 Cal. App. 4th 617, 627-628, 127 Cal. Rptr. 2d 46]* . Regardless, the *Shelley J.* and *S.O.* approach has now been updated to take into consideration changes in the law [*In re David H. (2008) 165 Cal. App. 4th 1626, 1637-1640, 82 Cal. Rptr. 3d 81]* . This new analysis is even more compelling than *Shelley J.* and *S.O.* regarding why the Civil Code and the Code of Civil Procedure do not apply in dependency proceedings unless expressly made applicable. Thus, although the *Athena P.* court was correct that the issue will usually be moot by the time the case gets to the appellate court, it remains that the *David H.* decision is both the better and the dominant view on this issue. If the adequacy of the allegations in the dependency petition is not timely raised at the trial court level, claiming the petition does not state a cause of action, the right to raise the issue at the appellate level has been waived [*In re David H. (2008) 165 Cal. App. 4th 1626, 1637-1640, 82 Cal. Rptr. 3d 81]* .

PRACTICE TIP:

Stipulated Cause of Action. It is a common practice for the parties to agree to amend the petition to soften the language and make it more acceptable to the parent. In return, the parent usually admits or submits the matter. Common sense suggests that this should preclude challenging the sufficiency of the petition for the first time on appeal. In light of the *Alysha S.* decision, however, attorneys representing social services agencies and children should be very careful before agreeing to amend the language of a dependency petition. It would be wise to require that as part of any agreement to amend the petition the parties also stipulate on the record that the amended language states a cause of action. This will preclude this issue being raised for the first time on appeal should *Alysha S.* rather than *Shelley J.* be followed in the local appellate district.

If the motion akin to a demurrer is made at the trial court level preserving the issue for appeal, the proper standard of review is not the substantial evidence standard. The challenge is a claim of a failure to state a cause of action. Hence, the appellate court is to construe the pleaded facts in favor of the petition to determine whether the social services agency pleaded sufficient grounds to bring the child within *Welf. & Inst. Code § 300* [*In re Nicholas B. (2001) 88 Cal. App. 4th 1126, 1133, 106 Cal. Rptr. 2d 465]* .

For discussion of why neither the Civil Code nor the Code of Civil Procedure should apply to dependency cases unless expressly made applicable and the controversy now surrounding that traditional view, see *§ 328.10[1]*.

[2] Admission, No Contest Plea, or Submission

At the initial or detention hearing, the parent or guardian may admit the allegations of the petition, plead no contest, or submit the jurisdictional determination to the court based on the information provided to the court, and may waive further jurisdictional hearing [*Cal. Rules of Ct., Rule 5.674(a)*]. When accepting an admission, plea of no contest, or submission, the court must proceed according to *Cal. Rules of Ct., Rules 5.682* and *5.686* (admission, no contest plea, or submission procedures in jurisdiction hearing) [*Cal. Rules of Ct., Rule 5.674(a)*; *see* discussion in *§ 328.105*].

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
C. Initial or Detention Hearing

28-328 California Forms of Pleading and Practice--Annotated § 328.43

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§ 328.43 Conduct of Initial or Detention Hearing

[1] Attention to Rights of Child and Parent or Guardian

At any detention hearing, the child, and each parent or guardian, may assert his or her privilege against self-incrimination, and the right to confront and to cross examine the preparer of any police, probation, or social work report or other document submitted to the court and any person examined by the court. Further, the child, parents, or guardians, and the attorneys for such persons must be permitted to inspect the police, probation officer, or social worker reports, and all other documents that are filed with the court or that were made available to the probation officer or social worker in preparing the report [*Welf. & Inst. Code § 311(b)*].

[2] Examination of Parties and Evidence

Subject to the rights of the child, parent, or guardian to cross examine witnesses and assert the privilege against self-incrimination, the court must examine the parents, guardian, or other person having knowledge relevant to the ground for detention and must hear any relevant evidence the child, parents, or guardian or their counsel desires to present. The court may examine the child in chambers and outside the presence of his or her parents or guardian under circumstances specified in *Welf. & Inst. Code § 350(b)* [*Welf. & Inst. Code § 319*; *Cal. Rules of Ct., Rule 5.674(c)*; see discussion in *§ 328.111*].

[3] Social Worker's Detention Report

At the hearing, the social worker must report to the court on the following [*Welf. & Inst. Code § 319*; *Cal. Rules of Ct., Rule 5.676(b)*]:

- The reasons why the child has been removed from the parent's custody.

- A description of the services that have been provided to the family and whether there are available services or safety plans that would prevent the need for further detention.

- The need, if any, for continued detention.

- If continued detention is recommended, whether there is a parent with whom the child was not residing at the time of detention or a relative who is able and willing to take temporary custody of the child.

The social worker shall provide the parents and guardians or their counsel with a copy of the social worker's report without cost [*Welf. & Inst. Code § 302(b)*].

[4] Evidence Presented at Hearing

At the detention hearing the court must read, consider, and reference any reports submitted by the social worker [*Cal. Rules of Ct., Rule 5.674(b)*]. In making the findings prerequisite to an order of detention at the detention hearing, the court may rely solely on written police, probation, or social worker reports or other documents [*Cal. Rules of Ct., Rule 5.676(b)*]. The parties may also present testimony or introduce such other relevant and admissible evidence as they desire, which evidence must be considered by the court [*Welf. & Inst. Code § 319*; *Cal. Rules of Ct., Rule 5.674(b)-(c)*].

PRACTICE TIP:

Evidence at Detention Hearing. Many practitioners in juvenile court mistakenly believe that they cannot present testimony on the issue of detention except at a prima facie rehearing under *Welf. & Inst. Code § 321*. This is not the case. Testimony is permitted at the initial detention hearing and can be presented by any of the parties. Since it may be persuasive on the issue of detention in a close case, practitioners should consider it where appropriate. Most juvenile courts do not anticipate testimony in detention hearings, however, and therefore cases for this practice should be chosen wisely and the court should be given as much notice as possible.

[5] Grounds for Continued Detention

The court must order the child's release from custody unless a prima facie showing is made that the child comes within *Welf. & Inst. Code § 300* (grounds for dependency), the court finds that continuation of residence in the home would be contrary to the welfare of the child, and any of the following circumstances exist [*Welf. & Inst. Code § 319*; *Cal. Rules of Ct., Rules 5.678(a)*]:

- There is a substantial danger to the physical health of the child or the child is suffering severe emotional damage, and there are no reasonable means by which the child's emotional or physical health can be protected without removing the child from the custody of the parents or guardians.

- The child is already a dependent and has left a placement in which he or she was placed by the juvenile court.

- There is substantial evidence that a parent, guardian, or custodian of the child is likely to flee the jurisdiction of the court.

- The child indicates an unwillingness to return home and has been physically or sexually abused by a person residing in the home.

In determining whether to release or detain the child, the court must consider whether the child can be returned home if the court orders services to be provided [*Cal. Rules of Ct., Rule 5.678(b)*; *see Welf. & Inst. Code § 319*]. Services to be considered for purposes of making this determination include consideration of the option of referral to public assistance services pursuant to *Welf. & Inst. Code §§ 11200 et seq.* (California Work Opportunity and Responsibility to Kids Act), 14000 et seq. (Medi-Cal), 17000 et seq. (County Aid to Indigents) or 18900 et seq. (Food Stamps). If those public assistance services would prevent the need for further detention they are to be used [*Welf. & Inst. Code § 319*].

PRACTICE TIP (PARENT'S P.OV.):

The Forgotten Prong; Reasonable Means to Protect Without Removal. Before the detention hearing, all counsel should actively explore whether there are reasonable means by which the child can safely remain home. Examples could include provision of in-home supportive services, child care, a restraining order against a perpetrator, intensive supervision by the agency, or allowing a parent and child to stay at a safe place.

The finding that continuation in the home of the parent or guardian would be contrary to the welfare of the child must be made at the first court ruling pertaining to removal from the home or the child will not be eligible for title IV-E foster care maintenance payments for the duration of that stay in foster care [*45 C.F.R. 1356.21(c)*].

[6] Order to Release or Detain Child

If the social services agency fails to meet its burden to make a prima facie showing of jurisdiction, the child must be returned to the parent or guardian. The petition is not dismissed, however, since the detention hearing is not a jurisdiction hearing. The fact that the agency fails to meet its burden at a detention hearing held only a few days after it becomes involved in the case does not mean the agency will not be able to prove jurisdictional grounds at a full jurisdiction hearing held weeks later after it has had time to conduct a more complete investigation. As such, unless all parties, including the agency, agree to a dismissal of the matter at the detention hearing, the court lacks the authority to dismiss the petition and a jurisdiction hearing must be set [*Los Angeles County Dept. of Children Family Services v. Superior Court (2008) 162 Cal. App. 4th 1408, 1418, 77 Cal. Rptr. 3d 52* , *citing* Seiser & Kumli, California Juvenile Courts Practice and Procedure, former § 2.83[6] (Matthew Bender); *see also* California Ctr. for Jud. Educ. and Research, Cal. Judges Benchguides, Benchguide 100: Juvenile Dependency Initial or Detention Hearing (Jan. 2009) § 100.36, pp. 100.41 to 100.42]. Further, although theoretically applicable, the legislature did not intend *Welf. & Inst. Code § 390*, the general dismissal section, to allow summary dismissal of the petition at the initial or detention hearing due to the requirement for notice and specific findings [*Los Angeles County Dept. of Children Family Services v. Superior Court (2008) 162 Cal. App. 4th 1408, 14171418, 77 Cal. Rptr. 3d 52]* . Thus, even if the court fails to make a prima facie finding on the petition, it must set the matter for a jurisdiction hearing unless all parties agree to a dismissal.

If the child can be returned to the custody of his or her parent or guardian through the provision of services, the court is required to place the child with his or her parents or guardian and order that the services be provided [*Welf. & Inst. Code § 319*]. If the child cannot be returned to the custody of his or her parent or guardian, the court must determine if there is a relative who is able, willing, and assessed pursuant to *Welf. & Inst. Code § 309(d)(1)* to care for the child [*Welf. & Inst. Code § 319(d)(2)*].

Whenever a court orders a child detained, the court must state the facts on which the decision is based, must specify why the initial removal was necessary, and must order services to be provided as soon as possible to reunify the child and his or her family if appropriate [*Welf. & Inst. Code § 319*].

If the court orders the child detained, it must find that a prima facie showing has been made that the child is a child described by *Welf. & Inst. Code § 300*, continuance in the home of the parent or guardian is contrary to the welfare of the child, and that one or more of the grounds for detention exist [*Welf. & Inst. Code § 319*, *Cal. Rules of Ct., Rule 5.678(a)*]. It must also order temporary care and custody of the child be vested with the county social services agency

pending disposition or further order of the court [*Welf. & Inst. Code § 319(e)*]. These findings and orders are necessary both on the record and in the court's written orders to ensure federal funding.

If the detention hearing is continued pursuant to *Welf. & Inst. Code § 322*, or is continued for any other reason, the court must still find that continuation of residence in the home of the parent or guardian would be contrary to the welfare of the child, or order the child released from custody [*Welf. & Inst. Code § 319(c)*]. This determination must be made at the first court ruling pertaining to removal from the home or the child will not be eligible for title IV-E foster care maintenance payments for the duration of that stay in foster care [*45 C.F.R. 1356.21(c)*]. It may be made on a temporary basis pending the continued detention hearing, however, and reevaluated at that continued hearing [*Cal. Rules of Ct., Rules 5.672(a)*].

In making its findings and orders on the issue of reasonable efforts, the court must read and consider any reports that are submitted by the social services department and any relevant evidence submitted by the other parties or their counsel [*Cal. Rules of Ct., Rules 5.674(b)-(c)*]. The court may not order the child detained unless it finds that there are no reasonable services that would prevent the need for detaining the child or that would allow the child to return to the home safely [*Cal. Rules of Ct., Rule 5.678(c)(2)*].

PRACTICE TIP (PARENT'S P.OV.):

Post Detention Hearing; What Just Happened? The detention hearing represents a time of intense emotion and confusion for parents. After the hearing it is critical that parent's counsel take the time to explain to the client what happened in court, what will happen next, and what they need to do in the interim. If criminal prosecution is a possibility, the client needs to be properly advised of the possible ramifications of making statements [*see § 328.111*]. Whenever possible, clients should also be strongly encouraged to participate in services, especially visitation. Often, information in the detention report reveals potential bypass issues. If so, parents will have a relatively short time to prove, by engaging in services, that they are likely to benefit from these services under *Welf. & Inst. Code § 361.5(c)*.

If the child is not released from custody, the court may order that he or she be placed in the assessed home of a relative, in an emergency shelter or other suitable licensed place or a place exempt from licensure designated by the juvenile court, or in the assessed home of a "nonrelative extended family member" as defined in *Welf. & Inst. Code § 362.7*, for a period not to exceed 15 judicial days [*Welf. & Inst. Code § 319(f)(1)*]. The court must consider the social worker's recommendations for relative placement based on the assessment of the relative's home, including the criminal records check and any prior child abuse allegations prior to ordering the child placed with a relative [*Welf. & Inst. Code §§ 309(d), 319(f)*]. In addition, the social worker must initiate the more complete assessment required by *Welf. & Inst. Code § 361.3* for any relative to be considered for continuing placement of the child [*Welf. & Inst. Code § 319(f)(3)*]. This would include the requirements of *Welf. & Inst. Code § 361.4* regarding criminal records checks for all adults living in the home, known to have a familial or intimate relationship with someone living in the home, and all adults who may have significant contact with the child if placed in that home other than the professionals providing professional services to the child [*Welf. & Inst. Code § 361.4(b)*]. It would also include a Child Abuse Index check on all adults living in the home [*Welf. & Inst. Code § 361.4(c)*].

As used in this context, the term "relative" means an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words "great," "great-great," or "grand." The adult spouse of any of these persons is also considered a relative, even if the marriage has been terminated by dissolution or death [*Welf. & Inst. Code § 319(f)(2)*]. In defining a relative in this way, "affinity" refers to the "connection existing between one spouse or domestic partner and the blood or adoptive relatives of the other spouse" [*Cal. Rules of Ct., 5.502(1)*]. Only the following relatives, however, shall be given preferential treatment for placement of the child: an adult who is the grandparent, aunt, uncle, or sibling of the child [*Welf. & Inst. Code § 319(f)(2)*].

A "nonrelative extended family member" is defined as an adult caregiver who has an established familial or mentoring relationship with the child that has been verified by the social services agency [*Welf. & Inst. Code § 362.7*].

PRACTICE TIP:

Careful Selection and Review of Relative and "Nonrelative Extended Family Member" (NREFM) Placements. The assessment of potential temporary relative and "nonrelative extended family member" placements required by *Welf. & Inst. Code § 309(d)* is far less complete than the assessment required by *Welf. & Inst. Code §§ 361.3* and *361.4* for ongoing placement. Once a child is placed with assessed relative, or even an assessed "nonrelative extended family member," however, there is a natural reluctance to remove the child from that placement except for return to a parent. In light of that natural reluctance and with recognition that concurrent planning considerations for permanent placement of the child with any ongoing caretaker must be considered [*see Welf. & Inst. Code §§ 361.3(a)(7)(G)-(H), 366.26(k)*], social services agencies and courts should not rush into temporary relative or "nonrelative extended family member" placements, but instead should select such placements with great care.

[7] Required Finding of Reasonable Efforts to Avoid Removal

Whether the court decides to release or detain the child, it must determine, on the record, whether reasonable efforts to prevent or eliminate the need for removal were made, and must make one of the following findings [*Cal. Rules of Ct., 5.678(c)*; *see Welf. & Inst. Code § 319*]:

- Reasonable efforts have been made to prevent or eliminate the need for removal.
- Reasonable efforts have not been made to prevent or eliminate the need for removal.

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§ 328.44 Orders Concerning Reunification Services and Visitation

If the court orders the child detained it must order reunification services to begin as soon as possible to reunify the child and his or her family if appropriate [*Welf. & Inst. Code § 319*; *Cal. Rules of Ct., Rule 5.678(c)(3)(C)*].

When services are ordered for a parent or guardian, the parent or guardian must be advised that the acceptance of such services does not constitute an admission of guilt and cannot be used as evidence against them [*Evid. Code § 1228.1(a)*; *Welf. & Inst. Code § 16501.1(f)(12)(B)*]. They must also be advised, however, that their failure to cooperate with such services, except for good cause, can be used later as evidence in a review hearing or a hearing on a petition filed pursuant to *Welf. & Inst. Code § 300, 342, 387,* or *388* [*Evid. Code § 1228.1(b)*; *Welf. & Inst. Code § 16501.1(f)(12)(B)*].

PRACTICE TIP:

Hearing Begins Reunification Period. The detention hearing essentially marks the beginning of the maximum 18-month reunification period that starts at the time the child is originally removed from the physical custody of his or her parent or guardian [*Welf. & Inst. Code §§ 361.5(a), 366.21(g)(1), 366.22(a)*]. As such, it is important that counsel ensure the court makes the necessary order for such services at the detention hearing. Counsel should advise their clients to immediately involve themselves in these services since such involvement can be extremely relevant on the issue of "substantial risk" at both jurisdiction and disposition. Even if the parent is denying wrongdoing, there are many services that can be started that do not require any admission on the part of the parent. Counsel can advise their clients as necessary and appropriate in this regard.

If the child is to be detained, the court must consider the issue of visitation with the parent or guardian, and with any others with whom contact would benefit the child, including siblings, and must make

appropriate orders [*Cal. Rules of Ct., Rule 5.670(g)*].

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§ 328.45 Rehearing of Detention Hearing

[1] When Report Preparers Are Available

If the preparers of all reports or documents relied on by the court in making its detention decision are present in court or are otherwise made available for purposes of confrontation and cross examination at the detention hearing, and if the parent had notice of the detention hearing, there is no right to a detention rehearing under *Welf. & Inst. Code § 321* [*Cal. Rules of Ct., Rule 5.680(c)*]. This is because the parent or guardian has the right to call the preparers of the reports and documents to testify and be cross-examined at the original detention hearing if they are present for that hearing.

[2] When Parent or Guardian Was Not Notified of Hearing

If no parent or guardian of the child was present at the detention hearing and did not have actual notice of the hearing, the parent or guardian may file an affidavit setting forth the facts with the clerk of the juvenile court, and the clerk must immediately set the matter for rehearing within 24 hours, excluding Sundays and nonjudicial days, of the filing of the affidavit. At the rehearing, the court must proceed in the same manner as on the original hearing [*Welf. & Inst. Code § 321*; *Cal. Rules of Ct., Rule 5.680(a)*].

[3] On Request for Further Evidence (Prima Facie Rehearing)

After a decision of detention has been made, the child, the parent or guardian, or the child's attorney may request further evidence of the prima facie case or the ground for detention by invoking the right to confront and to cross examine the preparers of reports or documents relied on by the court in its initial decision. If that request is made, a detention rehearing shall be held within three court days [*Cal. Rules of Ct., Rule 5.680(d)*; *see Welf. & Inst. Code § 321*]. If the preparer of any report or document is not made available for purposes of confrontation and cross examination, the report or document may not be considered by the court in making its detention decision. If a prima facie case is not

established, the child must be released from detention [*Welf. & Inst. Code § 321*; *Cal. Rules of Ct., Rule 5.680(d)*].

In lieu of a requested rehearing, the court may set the jurisdiction hearing to commence within 10 court days of the detention hearing [*Welf. & Inst. Code § 321*; *Cal. Rules of Ct., Rule 5.680(d)*].

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§ 328.46 Meeting Mental Health Needs of Dependent Child

[1] Appointment of Psychotherapist

When a petition is filed in a dependency case, the juvenile court may order the probation officer to obtain the services of any psychiatrists, psychologists, or other clinical experts as may be required to assist in determining the appropriate treatment of the child and as may be required in the conduct or implementation of that treatment. Payment for the services are charged against the county [*Welf. & Inst. Code § 370*].

[2] Specialized Treatment

When the court finds a child to be a person described by *Welf. & Inst. Code § 300*, and believes that the child may need specialized mental health treatment while the child is unable to reside in his or her natural home, the court must notify the director of the county mental health department in the county where the child resides. The county mental health department must perform the duties required under *Welf. & Inst. Code § 5694.7*. This section does not restrict the provision of emergency psychiatric services to those children who are involved in dependency cases and have not yet reached the point of adjudication or disposition, nor does it operate to restrict evaluations at an earlier stage of the proceedings or to restrict orders removing the child from a detention facility for psychiatric treatment [*Welf. & Inst. Code § 319.1*].

[3] Placement in Psychopathic Ward

Whenever the court, before or during a hearing on the petition, is of the opinion that the child is mentally ill or if the court is in doubt concerning the mental health of the child, the court may order the child to be held temporarily in the psychopathic ward of the county hospital or of any hospital that has been approved and/or contracted with by the county department of health, for observation and recommendation concerning the future care, supervision, and treatment of the

child [*Welf. & Inst. Code § 357*; *see Welf. & Inst. Code § 6550 et seq.*].

[4] Orders for Psychotropic Medications

Once a child has been adjudicated a dependent child of the juvenile court and removed from the physical custody of a parent pursuant to *Welf. & Inst. Code § 361*, only a juvenile court judicial officer can make orders regarding the administration of psychotropic medications for that child [*Welf. & Inst. Code § 369.5(a)*; *Cal. Rules of Ct., Rule 5.640*]. If the court finds the parent poses no danger to the child and has the capacity to authorize psychotropic medications, it may make an order delegating its authority in this regard to the parent. Such an order is discretionary and must take into consideration the child's best interests [*Welf. & Inst. Code §§ 202(d), 369.5(a)*].

Social services agencies that complete requests for authorization of psychotropic medication are encouraged to complete the request and submit it to the court within three business days of receipt from the physician of the information needed to fully complete the request [*Welf. & Inst. Code § 369.5(b)*]. Within seven court days of the receipt of a completed request, the juvenile court must either approve or deny the request in writing, or set the matter for a hearing [*Welf. & Inst. Code § 369.5(c)*].

Psychotropic medication or drugs are those medications administered for the purpose of treating psychiatric disorders or illnesses by affecting the central nervous system. Such medications include, but are not limited to, anxiolytic agents, antidepressants, mood stabilizers, antipsychotic medications, anti-Parkinson agents, hypnotics, medications for dementia, and psychostimulants [*Welf. & Inst. Code § 369.5(d)*].

Court authorization for psychotropic medications for a dependent child in out-of-home care must be based on a request from a physician that indicates the reasons for the request, a description of the child's behavior and diagnosis, the anticipated results of the medication, and a description of any side effects of the medication [*Welf. & Inst. Code § 369.5(a)*]. The provisions of *Welf. & Inst. Code § 369.5* are not intended to supersede local court rules regarding a child's right to participate in mental health decisions [*Welf. & Inst. Code § 369.5(e)*]. The Judicial Council has adopted *Cal. Rules of Ct., Rule 5.640*, and Judicial Council Forms JV-220 (Application Regarding Psychotropic Medication), JV-220(A) (Prescribing Physician's Statement--Attachment), JV-221 (Proof of Notice: Application Regarding Psychotropic Medication), JV-222 (Opposition to Application Regarding Psychotropic Medication), and JV-223 (Order Regarding Application for Psychotropic Medication) for implementation of *Welf. & Inst. Code § 369.5*. The forms are mandatory and must be filed with the court. Additional information may be provided to the court through local forms that are consistent with the requirements of *Cal. Rules of Ct., Rule 5.640* [*Cal. Rules of Ct., Rule 5.640(c)(2)*].

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
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C. Initial or Detention Hearing

28-328 California Forms of Pleading and Practice--Annotated § 328.47

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§ 328.47 Restraining Orders

[1] During Dependency Proceedings

After a petition has been filed in the juvenile court to declare a child to be a dependent, and until such time as that petition is dismissed or dependency is ordered terminated, the court may issue ex parte [*see Welf. & Inst. Code § 213.5(a)*], or on notice [*see Welf. & Inst. Code § 213.5(d)*], restraining orders requiring any of the following [*Welf. & Inst. Code § 213.5(a)*; *Cal. Rules of Ct., Rules 5.620(b), 5.630*; *see Code Civ. Proc. § 527* (procedure to obtain restraining orders)]:

- Enjoining any person from molesting, attacking, striking, sexually assaulting, stalking, or battering the child or any other child in the household.

- Excluding any person from the dwelling of the person who has care, custody, and control of the child.

- Enjoining any person from behavior the court determines is necessary to enjoin to effectuate either of the two foregoing orders, including contacting, threatening, or disturbing the peace of the child.

On application completed in the manner provided by *Code of Civ. Proc. § 527*, a juvenile court issuing an restraining order pursuant to this section may simultaneously issue an order enjoining any person from "contacting, threatening, molesting, attacking, striking, sexually assaulting, stalking, battering, or disturbing the peace" of any parent, guardian, or current caregiver of the child. This restraining order may be issued regardless of whether the child currently resides with that parent, legal guardian, or current caregiver [*Welf. & Inst. Code § 213.5(a)*].

The application for a restraining order may be made orally at any hearing of the juvenile court regarding the child or in writing. The juvenile court may also issue restraining orders on its own motion [*Welf. & Inst. Code § 304*]. If made in writing, it shall be made on the Judicial Council forms Juvenile Dependency Petition (JV-100) and Application and Declaration for Restraining Order (JV-245) [*Cal. Rules of Court, Rule 5.630(b)*]. The restraining order must be prepared on Judicial Council form Restraining Order--Juvenile (JV-250) [*Cal. Rules of Ct., Rule 5.630*]. If the juvenile court restraining order is made due to domestic violence, the Judicial Council form used must be approved by the Department of Justice pursuant to *Fam. Code § 6380(i)*, although the failure to use such a form does not make the order unenforceable [*Welf. & Inst. Code § 213.5(i)*].

If a temporary restraining order is made without notice, an order to show cause why the order should not be granted shall be made returnable to the court on the earliest day the business of the court will permit, but not later than 15 days following the issuance of the order, or not later than 20 days from the date of the issuance of the temporary restraining order if good cause is shown [*Welf. & Inst. Code § 213.5(c)*]. The time for service on the person to be restrained of the order to show cause may be shortened on motion of the person seeking the restraining order or on the court's own motion [*Welf. & Inst. Code § 213.5(c)*]. If the temporary restraining order has been dissolved by the court for failure to serve the person to be restrained, the court may on its own motion or on the filing of an affidavit by the person seeking the restraining order, find the person to be restrained could not be served within the required time and reissue the temporary restraining order and order to show cause. The reissued order must state on its face the date of the expiration of the order [*Welf. & Inst. Code § 213.5(c)*].

If the person named in the temporary restraining order or emergency protective order has been personally served with the order and notice of a hearing on the order, and the person does not appear at the hearing either in person or through counsel, the court may issue the order, so long as the terms and conditions are identical to the temporary order, except for the duration of the order. Thereafter, the order may be served on the person by first class mail at the most current address known to the court [*Welf. & Inst. Code § 213.6(a)*]. The Judicial Council forms for temporary restraining orders or emergency protective orders are to include notice of these provisions [*Welf. & Inst. Code § 213.6(b)*].

A residence-exclusion order may be issued "regardless of which party holds legal or equitable title or is the lessee of the residence or dwelling" [*Welf. & Inst. Code § 213.5(e)*]. The court may make a residence-exclusion order only on a showing of all of the following [*Welf. & Inst. Code § 213.5(e)(2)*]:

- Facts sufficient for the juvenile court to determine the person who will remain in the dwelling has a right to possession of the premises under color of law.

- That the excluded person has assaulted or threatens to assault the other person, any person under the care, custody and control of the other person, or any minor child of the parties or of the other person.

- That the other person, any person under the care, custody or control of the other person, or any minor child of the parties or of the other person, would suffer physical or emotional harm if the order were not issued.

Any hearing pursuant to *Welf. & Inst. Code § 213.5* regarding a restraining order may be held simultaneously with any of the regularly scheduled dependency hearings [*Welf. & Inst. Code § 213.5(c)*].

Prior to deciding to issue or deny a restraining order, a search must be conducted as described in *Fam. Code § 6306(a)* [*Welf. & Inst. Code § 213.5(k)(1)*]. The court must consider the results of that search, including any conviction for a violent or serious felony, any misdemeanor conviction involving domestic violence, weapons, or other violence, any outstanding warrant, parole or probation status, any prior restraining order, and any violation of a prior restraining order [*Welf. & Inst. Code § 213.5(k)(2)*]. If the person who is the subject of the search is found to have an outstanding arrest warrant, the court shall order the clerk to immediately notify appropriate law enforcement officials who shall take all

necessary and appropriate actions to execute the outstanding warrants as soon as practicable [*Welf. & Inst. Code § 213.5(k)(3)(A)*]. If the person who is the subject of the search is on probation or parole, the court shall order the clerk of the court to immediately notify the parole or probation officer of any information obtained through the search the court determines appropriate [*Welf. & Inst. Code § 213.5(k)(3)(B)*].

If the juvenile court issues a restraining order pursuant to *Welf. & Inst. Code §§ 213.5, 304, 362.4,* or *726.5*, the court shall also order the party being enjoined from taking any action to obtain the address or location of a protected party or the protected party's caregivers, family members, or guardian [*Welf. & Inst. Code § 213.7(a)*]. The court need not make this order, however, if it finds good cause not to make the order [*Welf. & Inst. Code § 213.7(a)*]. The Judicial Council is to promulgate the forms needed to put this section into effect [*Welf. & Inst. Code § 213.7(b)*].

Any restraining orders issued upon notice and a hearing shall remain in effect for a period not exceeding three years, unless the order is otherwise terminated by the court, extended by mutual consent of all parties, or extended by further order of the court. The date of expiration of the order must be stated on the face of the order [*Welf. & Inst. Code § 213.5(d)*].

Any willful and knowing violation of a restraining order is a misdemeanor punishable under *Penal Code § 273.65* [*Welf. & Inst. Code § 213.5(h)*].

PRACTICE TIP:

Notifying Law Enforcement. Getting the court to issue a restraining order is only the first step in protecting the child and the home where the child is staying. Law enforcement must also be aware of the restraining order so that it can be enforced should that prove to be necessary. Practitioners sometimes forget this second step. *Welf. & Inst. Code § 213.5(g)* mandates the court to "order any designated person or attorney" to mail a copy of the restraining order to each local law enforcement agency that has jurisdiction over the residence of the person who is caring for the child. Law enforcement agencies having jurisdiction over "other locations where the court determines that acts of domestic violence or abuse against the child or children are likely to occur" are also to be noticed pursuant to the court's order. These agencies are not only to be mailed the restraining order. They are also to be mailed copies of any extension, modification, or termination thereof, and any subsequent proof of service. These are to be mailed "by the close of the business day" on which the order is made. The juvenile court and attorneys representing agencies, children, and caretakers should take steps to ensure this requirement is met in every case in which a restraining order is issued.

[2] On Termination of Dependency Jurisdiction

At any time the court terminates its dependency jurisdiction prior to the child reaching 18 years of age, and there is a proceeding pending in the superior court of any county for dissolution of marriage, for nullity of marriage, for legal separation of the child's parents, or for establishment of paternity, or where an order has been made with regard to the custody of the child, the court may issue a restraining or protective order as defined in *Fam. Code § 6218* or provided for in *Welf. & Inst. Code § 213.5* and issue an order determining custody of, or visitation with, the child [*Welf. & Inst. Code § 362.4*]. Such an order may include enjoining certain specific actions [*Fam. Code § 6320* and *Welf. & Inst. Code § 213.5(a)(1)*], excluding a person from a dwelling [*Fam. Code § 6321*; *Welf. & Inst. Code § 213.5(a)(2)*], and enjoining other specified behavior [*Fam. Code § 6322* and *Welf. & Inst. Code § 213.5(a)(3)*], as the court deems necessary [Fam. Code § 6318 and *Welf. & Inst. Code § 362.4*]. The order must be prepared on Judicial Council form Custody Order--Juvenile--Final Judgment (JV-200) [*Cal. Rules of Ct., Rule 5.700(a)(2)*].

[3] To Restrain Threats to a Social Worker

The juvenile court has authority to issue a restraining order to parents of a dependent child restraining them "from

threatening the social worker, or any member of the social worker's family, with physical harm" [*Welf. & Inst. Code § 340.5(a)*]. Such orders may only be issued for "good cause," which means the parent to be the subject of the restraining order must have made at least one threat of physical harm to the social worker or a member of the social worker's family, "with the apparent ability to carry out the threat" [*Welf. & Inst. Code § 340.5(b)*]. The statute is silent as to whether that threat must be express, or may be implied from other nonverbal conduct. The better view, consistent with the underlying purpose of the statute, would be to include nonverbal conduct that communicates a danger of physical harm. Thus, following, stalking, or otherwise watching a social worker may in an appropriate case constitute a threat within the meaning of this statute.

The social worker protected need not be the one actually assigned to the case at the time the order is written. It can include the previous social worker, social work supervisors, visitation supervisors, the department head, and others who provide services directly or indirectly on the case [*In re Matthew F. (2005) 132 Cal. App. 4th 883, 888, 33 Cal. Rptr. 3d 909]* . In this way the social services agency can even reassign the case to defuse a parent's anger toward a particular social worker, yet still protect the social worker by seeking a restraining order under *Welf. & Inst. Code § 340.5*. Thus, the connection between the threat and the statutory language for issuance of a restraining order under this section is a causal, not a temporal one [*In re Matthew F. (2005) 132 Cal. App. 4th 883, 887, 33 Cal. Rptr. 3d 909]* .

Like restraining orders issued under other provisions, a restraining order issued under this section may be issued for up to three years [*In re Matthew F. (2005) 132 Cal. App. 4th 883, 887, 33 Cal. Rptr. 3d 909]* . A parent's violation of a restraining order issued pursuant to this code section is punishable as contempt [*Welf. & Inst. Code § 340.5(c)*; *see Welf. & Inst. Code § 213* (contempt)]. Further, although not yet required under *Welf. & Inst. Code § 213.7*, apparently through a legislative oversight, the juvenile court should also order that any party enjoined under this section be prohibited from taking any action to obtain the address or location of the social worker protected by the order, unless it finds good cause not to make such an order.

PRACTICE TIP:

Additional Orders May Be Required. The powers of the juvenile court to issue restraining orders for the protection of social workers pursuant to *Welf. & Inst. Code § 340.5* is limited. The juvenile court may only issue such orders to the parents of dependent children. Thus, in cases in which the stepparent, the parent's significant other, grandparent, or other adult threatens the social worker, additional restraining orders may need to be sought from the superior court. All participants in the dependency process, including all counsel and the court, should be alert for the possible need to protect social workers and should take whatever steps are appropriate to do so.

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§ 328.48 Order to Appear Before Court or Social Worker

At any hearing or rehearing, the court may order the child or any parent or guardian of the child who is present in court to appear again before the court, social worker, or county financial evaluation officer at a time and place specified in the order [*Welf. & Inst. Code § 323*].

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[Reserved]

§§ 328.49[Reserved]

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28-328 California Forms of Pleading and Practice--Annotated § 328.60

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§ 328.60 Rights of Parents and Guardians

[1] Fundamental Right of Parent

Parenting is a fundamental right that should only be disturbed in extreme cases of persons acting in a way that is incompatible with parenthood [*In re Angelia P. (1981) 28 Cal. 3d 908, 916, 623 P.2d 198 , citing In re Carmaleta B. (1978) 21 Cal. 3d 482, 489, 146 Cal. Rptr. 623, 579 P.2d 514* ; *In re B.G. (1974) 11 Cal. 3d 679, 688-689, 114 Cal. Rptr. 444, 523 P.2d 244]* . Thus, our society has recognized that a parent has an "essential" and "basic" presumptive right to the care, custody, management and companionship of his or her own child [*In re Kieshia E. (1993) 6 Cal. 4th 68, 76, 23 Cal. Rptr. 2d 775, 859 P.2d 1290 , citing Stanley v. Illinois (1972) 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551* ; *Lassiter v. Department of Soc. Servs. (1981) 452 U.S. 18, 27, 101 S. Ct. 2153, 68 L. Ed. 2d 640]* .

[2] "Parent" Defined

[a] In General

For purposes of California dependency law, only mothers and presumed parents are considered parents within the meaning of the statutes. Therefore only mothers and presumed parents are entitled to all the rights afforded to parents in dependency proceedings, including standing, the appointment of counsel, and reunification services [*In re Zacharia D. (1993) 6 Cal. 4th 435, 448, 451, 24 Cal. Rptr. 2d 751, 862 P.2d 751* ; *In re Emily R. (2000) 80 Cal. App. 4th 1344, 1354, 96 Cal. Rptr. 2d 285* ; *In re Sarah C. (1992) 8 Cal. App. 4th 964, 971-972, 11 Cal. Rptr. 2d 414* ; *but see also* discussion in *§ 328.60[3]* and *§ 328.60[4]*].

This used to be relatively straightforward, since only mothers and men presumed to be the natural fathers were entitled to the rights of parents in dependency cases. Now, however, men who are known not to be the biological father can still be the presumed father [*In re Jesusa V. (2004) 32 Cal. 4th 588, 606, 10 Cal. Rptr. 3d 205, 85 P.3d 2* ; *In re Nicholas*

H. (2002) 28 Cal. 4th 56, 58-59, 120 Cal. Rptr. 2d 146, 46 P.3d 932]. The California Supreme Court has also held a woman can be a presumed parent under *Fam. Code § 7611(d)* [*Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 119-120, 33 Cal. Rptr. 3d 46, 117 P.3d 660]* . Further, domestic partners legislation has taken effect, which may apply [*Fam. Code § 297 et seq.*; *see § 328.60[2][b]*]. Thus, the area of parentage in dependency cases is one that is undergoing tremendous upheaval and uncertainty due to courts trying to reconcile dependency law to the many non-traditional family structures children are being raised in, and due to a number of California appellate decisions that have held that presumed parentage is not always rebutted by evidence the presumed parent is not the biological parent. Parentage in dependency cases continues to be an ever more frequently contested issue at both the trial and appellate levels. The National Conference of Commissioners on Uniform Laws has recently approved an expanded and updated Uniform Parentage Act that many states, including California, are now considering. The need for a comprehensive statutory scheme in the area of parentage law that addresses the areas of non-traditional families, surrogate mothers, artificial insemination and assisted reproduction, and many of the other parentage issues facing our courts is great. This is an area to be watched for further developments.

[b] Presumed Parents

A man is presumed to be the biological father of the child if he meets any of the following criteria [*Fam. Code § 7611*]:

- He is the husband of the mother, cohabiting with the mother, and is not impotent or sterile. Under such circumstances the child is "conclusively presumed to be a child of the marriage" [*Fam. Code § 7540*].

- He and the mother have signed a voluntary declaration of paternity pursuant to *Fam. Code § 7574* that was filed with the proper state office on or before December 31, 1996, and that declaration has not been rescinded or set aside [*Fam. Code §§ 7570, 7575, 7576 et seq.*]. The presumption of paternity has also been found to apply to a voluntary declaration filed on or after January 1, 1997 [*In re Liam L. (2000) 84 Cal. App. 4th 739, 743-747, 101 Cal. Rptr. 2d 13]* .

- He and the mother are or have been married to each other and either the child is born during the marriage or the child is born within 300 days after the marriage is terminated or a judgment of separation is entered by a court [*Fam. Code § 7611(a)*].

- He and the mother attempted to marry each other in a marriage carried out in apparent compliance with the law prior to the birth of the child, the attempted marriage is or could be declared invalid, and either: (1) the attempted marriage could only be declared invalid by a court and the child is born during the attempted marriage or within 300 days of the termination of the attempted marriage; or (2) the attempted marriage is invalid without a court order but the child is born within 300 days following the termination of the cohabitation [*Fam. Code § 7611(b)*].

- He and the mother married or attempted to marry each other in a marriage carried out in apparent compliance with the law after the birth of the child, and either: (1) he is named on the child's birth certificate as the child's father with his consent; or (2) he is obligated to support the child under a court order or written voluntary promise of support [*Fam. Code § 7611(c)*].

- He receives the child into his home and openly holds the child out as his natural child [*Fam. Code § 7611(d)*]. If, however, he has acted in a manner inconsistent with the parental role, such as abusing or molesting the child, the presumption may not apply [*In re T.R. (2005) 132 Cal. App. 4th 1202, 1212, 34 Cal. Rptr. 3d 215]* .

- He acknowledges he is the child's father in a declaration under penalty of perjury as specified in

Code of Civ. Proc. § 2015.5 and the child was born and resides in a country with which the United States has an Orderly Departure Program or successor program [*Fam. Code § 7611(e)*].

With regard to same sex couples, either a man or a woman may be considered a presumed parent if a registered domestic partnership is involved [see *§ 328.60[2][e]*].

A woman can be a presumed mother if she receives the child into her home and openly holds the child out as her natural child under *Fam. Code § 7611(d)* [*Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 119-120, 33 Cal. Rptr. 3d 46, 117 P.3d 660]* . It can be assumed that women may also now be recognized as presumed parents in the same ways as men [*Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 119-120, 33 Cal. Rptr. 3d 46, 117 P.3d 660]* .

If a parent is seeking to establish presumed parent status, he or she bears the burden of proof by a preponderance of the evidence [*Glen C. v. Superior Court (2000) 78 Cal. App. 4th 570, 585, 93 Cal. Rptr. 2d 103* ; *In re Spencer W. (1996) 48 Cal. App. 4th 1647, 1652, 56 Cal. Rptr. 2d 524]* .

Many have argued that the social services agency lacks standing to challenge the marital presumptions found in *Fam. Code §§ 7540*, and *7611(a)*, since under the limitations set forth in the Family Code only the mother, the mother's husband, the presumed father, or the child can attack those presumptions [*see Fam. Code §§ 7541, 7630(a)*]. Courts have been very strict in applying these limitations when the issues are raised in family law and paternity cases [*see, e.g., Dawn D. v. Superior Court (1998) 17 Cal. 4th 932, 72 Cal. Rptr. 2d 871, 952 P.2d 1139* ; *Rodney F. v. Karen M. (1998) 61 Cal. App. 4th 233, 71 Cal. Rptr. 2d 399]* .

The better view, however, is that these limitations do not preclude the social services agency from challenging a marital presumption in an appropriate dependency case. The social worker is charged with serving the best interests of the child, and in most cases the care, custody and control of the child is placed with social services [*Welf. & Inst. Code §§ 280, 361.2(e)*]. Since the juvenile court's determination of any paternity issues is done within the dependency action, the social worker should have standing to challenge the marital presumptions [*Fam. Code §§ 7541(b), 7630(a)*]. A strong argument can also be made that the limitations on who can challenge the marital presumptions that are found in the Family Code do not apply to dependency cases since dependency proceedings are special proceedings governed by their own rules and procedures. The restrictions and mandates of other codes do not apply to dependency proceedings unless expressly made applicable [*In re Chantal S. (1996) 13 Cal. 4th 196, 200, 51 Cal. Rptr. 2d 866, 913 P.2d 1075* ; *In re Jennifer R. (1993) 14 Cal. App. 4th 704, 711, 17 Cal. Rptr. 2d 759]* . Thus, the definitions of the Uniform Parentage Act apply to dependency proceedings [*In re Zacharia D. (1993) 6 Cal. 4th 435, 451, 24 Cal. Rptr. 2d 751, 862 P.2d 751]* , but its limitations do not [*cf. In re Chantal S. (1996) 13 Cal. 4th 196, 200, 51 Cal. Rptr. 2d 866, 913 P.2d 1075]* .

Holding the social services agency, which is charged with protecting the child and serving the child's best interest, has standing in an appropriate case to challenge a marital presumption is consistent with the overall purpose and goals of the dependency system. Nevertheless, the prevailing view is that since the social worker is no longer the child's guardian ad litem, the social services agency will not have standing in cases in which the statutes allow challenges to parentage by only the mother, any other presumed parent, or the child. This area of law appears to be one in which future litigation and disagreement is all but ensured. As such, this is an area to watch for further developments.

[c] The Non-Biological Presumed Father

Historically, the presumptions in *Fam. Code § 7611(a)-(e)* meant that a man was presumed to be the natural or biological father. The presumptions have been considered rebuttable presumptions that affect the burden of proof. They may be rebutted only by clear and convincing evidence in an appropriate action [*Fam. Code § 7612(a)*]. Where two or more of the presumptions under *Fam. Code § 7611* arise and conflict with one another, the presumption which on the facts of the particular case is "founded on the weightier considerations of policy and logic controls" [*Fam. Code § 7612(b)*]. If a man was found not to be the biological father of the child, however, this evidence rebutted any

presumption and resulted in the man no longer being considered the presumed father. In such circumstances, the man could still receive de facto parent status and even placement, if appropriate, but he was not considered the father of the child.

Beginning in 2001, however, a series of decisions have been handed down that make biology a far less significant factor. Under this line of cases, presumptions of paternity should only be rebutted "in an appropriate action." But whether the individual case is an appropriate one for allowing a presumption to be rebutted is not dependent on the type of action the issue is raised in, it depends on the facts of the case. For instance, if the man is not the biological father but is the person the child thinks of as his or her father, or if there is no other man identified or stepping forward as the possible father, it may not be an "appropriate action" in which to rebut a presumption of paternity [*see, e.g.,* *In re Jesusa V. (2004) 32 Cal. 4th 588, 606, 10 Cal. Rptr. 3d 205, 85 P.3d 2* ; *In re Nicholas H. (2002) 28 Cal. 4th 56, 120 Cal. Rptr. 2d 146* ; *In re Jerry P. (2002) 95 Cal. App. 4th 793, 116 Cal. Rptr. 2d 123* ; *In re Raphael P. (2002) 97 Cal. App. 4th 716, 118 Cal. Rptr. 2d 610* ; *In re Kiana A. (2001) 93 Cal. App. 4th 1109, 113 Cal. Rptr. 2d 669]* . Actual biological paternity is thus a factor to be considered in deciding whether a presumption of paternity should be rebutted, but it is no longer the determining factor. Instead, there are many factors to consider, including whether someone else is stepping forward to assert a parental relationship, the length of any such adult-child relationship, and the nature of the current adult-child relationship, if any, including whether the child knows the adult is not his or her father. Additionally, if the nonbiological person seeking presumed parent status has acted inconsistent with the parental role, such as abusing or molesting the child, it may be an appropriate action in which to rebut any presumption of paternity [*In re T.R. (2005) 132 Cal. App. 4th 1202, 1212, 34 Cal. Rptr. 3d 215]* . All of these are factors, but none alone are determinative.

A strong argument can be made that these cases are incorrect and the words "in an appropriate action" found in *Fam. Code § 7612(a)* mean the type of action, such as paternity, family support, and dependency, and not the type of case factually. Had the legislature meant "in an appropriate case" it could have said "in an appropriate case." It did not. It said "in an appropriate action" [*Fam. Code § 7612(a)*]. This interpretation would provide the structure and degree of certainty that many feel important both generally and specifically in deciding such issues in the lives of children. Knowing who a child's biological father is can be very important in knowing a child's medical background and the possible problems the child may develop later. Further, as those who deal with adoptions know, many children grow up and want to know who their "real" parents are. Those who adhere to this line of reasoning see the *Nicholas H.* and *Jesusa V.* line of cases as result-driven decisions that may have helped the individual children involved, but that have the potential to harm many other children and to create chaos in the dependency system. Thus, both the analysis and the wisdom of this new line of cases is subject to question. Nevertheless, they are now the law.

A question that has surfaced as a result of the *Jesusa V.* decision is whether the dependency system must recognize a child having three parents. In *Jesusa V.* a majority of the Supreme Court recognized a child can only have one presumed father [*In re Jesusa V. (2004) 32 Cal. 4th 588, 603, 10 Cal. Rptr. 3d 205, 85 P.3d 2]* . Nevertheless, the majority held that recognizing one man as the child's presumed father did not terminate another man's biological relationship with the child [*In re Jesusa V. (2004) 32 Cal. 4th 588, 610, 10 Cal. Rptr. 3d 205, 85 P.3d 2]* . Thus, in *Jesusa V.* the Supreme Court majority necessarily left the child with a mother, a presumed father, and a biological father--three legally recognized parents. If California law only recognizes a child having two parents [*see* *Sharon S. v. Superior Court (2003) 31 Cal. 4th 417, 440, 2 Cal. Rptr. 3d 699, 73 P.3d 554* ; *see also* *Sharon S. v. Superior Court (2003) 31 Cal. 4th 417, 447, 2 Cal. Rptr. 3d 699, 73 P.3d 554* , Baxter, J., conc. & dis. opn.], what is the juvenile court to do with the left over biological father in *Jesusa V.*? Can the court enter a judgement of nonpaternity for a biological parent? Apparently so.

PRACTICE TIP (PARENT'S P.O.V.):

The Significance of Parentage at the Initial Hearing. Often, courts appoint counsel for a parent who is not present because they are incarcerated or out of state. Counsel must always learn their client's position before taking a stand on any issue. However, if the client is present and understands the

> ramifications of a finding of presumed father status, efforts should be made to secure that status as soon as possible. Since only presumed fathers have the right to such things as visitation, services, and placement with their relatives, a finding of presumed father status may be necessary to posture the case favorably for the individual who wants to play a significant role in the case.

What does all this mean in dependency proceedings? Increased litigation, delayed parentage determinations, and ongoing uncertainty in some cases as to whether a person should be considered a presumed parent or not. This is an area of law that will now need years of defining decisions to clear the muddied waters created by these recent decisions. All practitioners should read these cases carefully, raise the issues whenever appropriate, try to minimize the harm to and delay for children, and watch for further developments in the law.

[d] The Non-Biological Presumed Mother

Proceedings regarding adults who are not the child's biological parent, yet in which a presumption of parentage is not rebutted, are not limited to fathers. Cases involving mothers are now also occurring in the *Nicholas H.* aftermath. In one case the appellate court held the principle espoused in *Nicholas H.* that a man does not automatically lose a presumption of paternity based solely on the fact the man is not the child's biological father applies to women. The appellate court did not determine whether the case was an appropriate action in which to allow a presumption of maternity to apply, it merely remanded the matter for a hearing on the matter [*In re Karen C. (2002) 101 Cal. App. 4th 932, 939, 124 Cal. Rptr. 2d 677]* . In another case, though, the appellate court actually found the child's half-sister qualified for presumed mother status and it was not an appropriate action in which to rebut the presumption [*In re Salvador M. (2003) 111 Cal. App. 4th 1353, 1358-1359, 4 Cal. Rptr. 3d 705]* . The California Supreme Court cited both of these case with approval in holding that a woman can be a presumed parent under *Fam. Code § 7611(d)* [*Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 119-120, 33 Cal. Rptr. 3d 46, 117 P.3d 660]* . Thus, non-biological presumed mothers can exist under the law. This is a new area of the law and should be watched for further developments.

[e] Parentage in Same Sex Cases

Pursuant to the California Domestic Partner Rights and Responsibilities Act, two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring and have a common residence can file a "Declaration of Domestic Partnership" with the Secretary of State [*Fam. Code § 297, et seq.*]. The rights and obligations of registered domestic partners with respect to a child of either of them are the same as those of spouses [*Fam. Code § 297.5(d)*]. Consequently, registered domestic partners who have a child born after the effective date of this statute, January 1, 2005 have rights and responsibilities regardless of their biological connection to the child [see *Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 119, 33 Cal. Rptr. 3d 46, 117 P.3d 660* (stating in dicta that since the domestic partnership act became effective in California, a child can have two parents, both of whom are women, irrespective of whether the woman is the biological mother)]. This is why it is wise for any parentage inquiry to include questions regarding the existence of a registered domestic partnership [*Cal. Rules of Ct., Rule 5.635(b)(2), (3)*].

There are several recent cases involving same sex couples who have children together outside the context of an adoption or registered domestic partnership. In August 2005, the California Supreme Court decided three companion cases that addressed parentage involving same sex couples. One of these cases, *Elisa B.*, involved a child support action against a non-biological, same sex partner. In *Elisa B.*, the court held that the presumption that a woman was a presumed parent was *not* rebutted where (1) she actively consented to, and participated in the artificial insemination of her partner with the understanding that she would raise the child as her own with the first parent, (2) she voluntarily accepted the rights and responsibilities of parenthood after the child was born, and (3) there were no competing claims to being the child's second parent [*Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 123-125, 33 Cal. Rptr. 3d 46, 117 P.3d 660* . See also *Charisma R. v. Kristina S. (2009) 175 Cal. App. 4th 361, 379-81, 96 Cal. Rptr. 3d 26* (applying the *Elisa B.* factors and finding the presumption of parenthood was not rebutted even where the biological mother's partner only cohabitated with the child for a short duration)].

In *Kristine H.*, after the couple decided to have a child together, Kristine was inseminated [*Kristine H. v. Lisa R. (2005) 37 Cal. 4th 156, 33 Cal. Rptr. 3d 81, 117 P.3d 690]* . In the eighth month of Kristine's pregnancy, the couple presented a signed stipulation that both women agreed to be the parents and accepted all the rights and responsibilities involved. This stipulation was filed as part of a parentage action in which a judgment was entered recognizing both women as parents. After a separation, Kristine filed a motion to set aside the judgment recognizing parentage, arguing that the judgment was void as the court did not have jurisdiction to determine the custody of an unborn child. The court held that Kristine was estopped from challenging the court judgment as she enjoyed its benefits for over two years [*Kristine H. v. Lisa R. (2005) 37 Cal. 4th 156, 166, 33 Cal. Rptr. 3d 81, 117 P.3d 690]* .

Finally, the third Supreme Court decision involved a maternity claim by a woman who donated her ova to her lesbian partner [K.M. v. E.G. *(2005) 37 Cal. 4th 130, 33 Cal. Rptr. 3d 61, 117 P.3d 673]* . In *K.M.*, at the time of the ova donation, the donor signed a form waiving all rights to claim legal parentage. Some time after the birth of twins, the couple separated and the ova donor, K.M., filed a parentage action. E.G. argued that in donating her ova, K.M. was akin to a sperm donor under *Fam. Code § 7613* and therefore had no parentage rights. The Court disagreed, finding that *Fam. Code § 7613* was not applicable under the facts of this case where K.M. supplied ova to her partner in order to produce children who would be raised in their joint home [K.M. v. E.G. *(2005) 37 Cal. 4th 130, 139, 33 Cal. Rptr. 3d 61, 117 P.3d 673]* . The Court found that K.M. was a parent (together with E.G.), based on her genetic relationship to the twins, and therefore, did not address the issue of whether she was a presumed parent under *Fam. Code § 7611(d)* [K.M. v. E.G. *(2005) 37 Cal. 4th 130, 144, 33 Cal. Rptr. 3d 61, 117 P.3d 673]* . Important to the court's analysis was recognition of the fact that a child could have two mothers. The court indicated that the intentions of the parties would be more important if this were a case in which there was a competing claim of parentage, as opposed to the facts of this case, where K.M. was asserting her *joint* right to parentage [K.M. v. E.G. *(2005) 37 Cal. 4th 130, 142-143, 33 Cal. Rptr. 3d 61, 117 P.3d 673]* .

All three cases reflect recognition of a child's right to preservation of an existing parent-child relationship for emotional and financial support regardless of the sex of the child's parents. While these cases all dealt with lesbian partners, the rationale of these decisions should apply equally to male partners. It would seem, then, that courts are more willing to interpret the definition of "parent" in accordance with the rising numbers of same-sex couples and the needs of the children involved [Roach, *Parent-Child Relationship Trumps Biology: California's Definition of Parent in the Context of Same-Sex Relationships, 43 Cal. W. L. Rev. 235, 265 (2006)*]. The same should apply in dependency cases.

[3] Biological Fathers

[a] In General

A biological father is one whose biological paternity has been established, but who has not achieved presumed father status pursuant to *Fam. Code § 7611* [*In re Zacharia D. (1993) 6 Cal. 4th 435, 449 n.15, 24 Cal. Rptr. 2d 751, 862 P.2d 751 , citing Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 823 n.3, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* , and former *Civ. Code § 7004*]. A legal determination of biological paternity may be accomplished in many ways, including through a voluntary declaration of paternity as described in *Fam. Code § 7574* that is filed with the State Department of Social Services on or after January 1, 1997, and has not been rescinded or set aside [*Fam. Code §§ 7573* (voluntary declaration having same force and effect as judgment of paternity), 7575 (rescission or setting aside of declaration), 7576 (effect of voluntary declaration made on or before December 31, 1996); *but see In re Liam L. (2000) 84 Cal. App. 4th 739, 743-747, 101 Cal. Rptr. 2d 13* (holding voluntary declaration is equivalent to a presumption of paternity)].

The area of the rights of biological fathers in dependency cases is one that is still undergoing development in the law. A recent change in statutory law provides that following a finding of paternity by a juvenile court or of proof of a prior declaration of paternity by a court of competent jurisdiction, the juvenile court may order services for a biological father if the court finds that such services will benefit the child [*Welf. & Inst. Code § 361.5(a)*]. What additional rights

biological fathers may be given in the future by statutory and decisional law is uncertain. Nevertheless, it is clear that the law now recognizes a significant distinction between those biological fathers who have stepped forward at an early stage in their child's life to take an active role as a father [*Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 4 Cal. Rptr. 2d 615, 823 P.2d 1216]* and those biological fathers who have done little or nothing in their child's life [*In re Zacharia D. (1993) 6 Cal. 4th 435, 24 Cal. Rptr. 2d 751, 862 P.2d 751* ; *In re Sarah C. (1992) 8 Cal. App. 4th 964, 11 Cal. Rptr. 2d 414]* .

[b] "*Kelsey*" Fathers

The term "*Kelsey* father" is sometimes given to an unwed biological father who "promptly comes forward and demonstrates a full commitment to his parental responsibilities--emotional, financial, and otherwise," but his attempt to achieve presumed father status under *Fam. Code § 7611(d)* was thwarted by a third party [*Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 849, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* ; *In re Elijah V. (2005) 127 Cal. App. 4th 576, 582, 25 Cal. Rptr. 3d 774]* . Among other things, to demonstrate a full commitment to parental responsibilities an unwed biological father must take prompt legal action to seek custody of the child [*In re Elijah V. (2005) 127 Cal. App. 4th 576, 583, 25 Cal. Rptr. 3d 774]* . If the person seeking *Kelsey S.* status has not made that full commitment to parental responsibilities, the actions of any third party are irrelevant to the determination [*In re Elijah V. (2005) 127 Cal. App. 4th 576, 584, 25 Cal. Rptr. 3d 774]* .

One court, in dicta, has suggested that a *Kelsey S.* father "will be declared the minor's presumed father unless the court finds him unfit" [*In re Ariel H. (1999) 73 Cal. App. 4th 70, 72, 86 Cal. Rptr. 2d 125]* . This is not correct. While the rights of such a father cannot be terminated without a showing of unfitness, he is not equated with a presumed father under the *Kelsey S.* decision [*In re Vincent M. (2008) 161 Cal. App. 4th 943, 947, 955-960, 74 Cal. Rptr. 3d 755* ; *Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 849, 4 Cal. Rptr. 2d 615, 823 P.2d 1216]* . As noted by the *Vincent M.* court in a very well-reasoned opinion, in *Kelsey S.* the California Supreme Court did not "hold under any theory that such a father had presumed father status" [*In re Vincent M. (2008) 161 Cal. App. 4th 943, 957, 74 Cal. Rptr. 3d 755]* . Such a biological father has a right to notice and to consideration for custody and reunification services, but he does not have an absolute right to placement or services under current law in the way that a presumed father would [*see Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 842, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* ; *In re Zacharia D. (1993) 6 Cal. 4th 435, 451-454, 24 Cal. Rptr. 2d 751, 862 P.2d 751* ; *In re Sarah C. (1992) 8 Cal. App. 4th 964, 974-975, 11 Cal. Rptr. 2d 414]* . Nevertheless, the more the *Kelsey* father has been involved in the child's life, the more consideration he should be given by the social services agency, the juvenile court, and the law.

While this area is still under development, it appears that parental rights for a *Kelsey* father can be terminated under *Welf. & Inst. Code § 366.26* with a finding of detriment to the child as to the biological father having been made at some time in the dependency proceeding. Alternatively, the rights of a *Kelsey* father may be terminated by an action under *Fam. Code § 7660 et seq.* [*see* former *Civ. Code § 7017*] with a finding of detriment or unfitness [*see Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 849-850, 4 Cal. Rptr. 2d 615, 823 P.2d 1216]* .

If the man seeking *Kelsey S.* status does not expressly raise that issue at the trial court level, the issue is waived or forfeited for review at the appellate court level, even if other parentage issues have been preserved [*In re Elijah V. (2005) 127 Cal. App. 4th 576, 582, 25 Cal. Rptr. 3d 774]* .

[c] "Mere Biological Fathers"

The term "mere biological father" was used by the court of appeal in the case of *In re Sarah C. (1992) 8 Cal. App. 4th 964, 977, 11 Cal. Rptr. 2d 414* , to describe a "biological father who had done almost nothing to develop a relationship with his daughter either before or during the dependency" and who had only vague plans as to how he would care for his daughter [*see also In re Zacharia D. (1993) 6 Cal. 4th 435, 451, 24 Cal. Rptr. 2d 751, 862 P.2d 751* (referring to such a man as a "strictly biological father")].

Although the interests of a mere biological father are obviously less than those of a *Kelsey* father, it would appear from the cases that a mere biological father has the same right to seek custody and services based upon the child's best interest that a *Kelsey* father has, but that, as with the *Kelsey* father, he has no absolute right to receive them [*see Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 842, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* ; *In re Zacharia D. (1993) 6 Cal. 4th 435, 451-454, 24 Cal. Rptr. 2d 751, 862 P.2d 751* ; *In re Sarah C. (1992) 8 Cal. App. 4th 964, 974-975, 11 Cal. Rptr. 2d 414]* .

In the termination of parental rights area, however, the mere biological father does not fare as well as the *Kelsey* father since it appears clear that his parental rights may be terminated based solely upon the child's best interest and without any requirement for a finding of detriment or unfitness [*see Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 849-850, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* ; *In re Sarah C. (1992) 8 Cal. App. 4th 964, 981, 11 Cal. Rptr. 2d 414]* .

[4] Alleged Fathers

An alleged father is a man who may be the father of a child, but whose biological paternity has not yet been established or who has not, in the alternative, achieved presumed father status [*In re Zacharia D. (1993) 6 Cal. 4th 435, 449 n.15, 24 Cal. Rptr. 2d 751, 862 P.2d 751* , *citing In re Shereece B. (1991) 231 Cal. App. 3d 613, 620-621, 282 Cal. Rptr. 430]* . An alleged father has no rights in a dependency case other than the right to step forward and to seek to establish his paternity of the child pursuant to *In re R. (1975) 13 Cal. 3d 636, 644, 119 Cal. Rptr. 475, 532 P.2d 123* , and *Cal. Rules of Ct., Rule 5.635* [*In re Emily R. (2000) 80 Cal. App. 4th 1344, 1352, 96 Cal. Rptr. 2d 285]* . An alleged father is, however, to be given notice of most hearings throughout the dependency process proceedings [*Welf. & Inst. Code §§ 290.1(a)(2), 290.2(a)(2), 291(a)(2), 294(a)(2), 316.2(b)*]. If he has relinquished the child or signed a denial of paternity and waiver of rights form, no notice need be given to the alleged father of the hearing under *Welf. & Inst. Code § 366.26* [*Welf. & Inst. Code § 294(b)*].

The notice to an alleged father is of the dependency proceedings in general, including notice that the child is the subject of the proceedings and that termination of parental rights and adoption could result. The notice provided to an alleged father does not give the alleged father any rights in the dependency case, nor any ability to contest the agency's recommendations. The general notice to the alleged father merely advises him of the existence of the proceeding so that he can step forward and seek to establish his paternity, should he desire to do so. Only after he establishes paternity and is found to be the child's father does he become a party and have a right to participate in the proceedings [*In re Emily R. (2000) 80 Cal. App. 4th 1344, 1358, 96 Cal. Rptr. 2d 285]* .

In addition, notice to alleged fathers must include a Statement Regarding Paternity, Judicial Council form JV-505. This form must be available in the courtroom [*Welf. & Inst. Code § 316.2, Cal. Rules of Ct., rule 5.635(e)(1), (g)*]. The form provides the alleged father with an opportunity to deny paternity or ask the court to make appropriate paternity determinations. If an alleged father appears in juvenile court and asks the court to make a finding of paternity through this form, "the court shall determine whether or not he is the biological father of the child" and if "that person is the presumed parent of the child, if that finding is requested" [*Cal. Rules of Ct., rule 5.635(h)(1), (2)*]. The court may order genetic testing to aid in this determination [*Cal. Rules of Ct., rule 5.635(e)(2)*]. The procedures set forth in *Welf. & Inst. Code § 316.2(b)* and *Cal. Rules of Ct., rule 5.635* give alleged fathers notice to the dependency proceedings and the avenue to establish his paternity status. Failure to comply with these provisions may result in a due process violation [*see In re Paul H. (2003) 111 Cal. App. 4th 753, 761-762, 5 Cal. Rptr. 3d 1]* . Counsel for all parties should ensure that the JV-505 is provided to all alleged fathers named in a dependency case.

[5] Declarations of Paternity

[a] In General

In 1993, the California Legislature added Chapter 3 to Division 12 of the Family Code, entitled "Establishment of Paternity by Voluntary Declaration" [*Fam. Code §§ 7570-7577*]. The goal of these statutes was to provide a "simple system" for unwed mothers and fathers to establish paternity, resulting in a "a significant increase in paternity establishment, an increase in the number of children who have greater access to child support and other benefits, and a significant decrease in the time and money required to establish paternity due to the removal of the need for a lengthy and expensive court process to determine paternity" [*Fam. Code § 7570(b)*; *In re Liam L. (2004) 84 Cal. App. 4th 739, 743, 101 Cal. Rptr. 2d 13]* . The Legislature also found that "knowing one's father is important to a child's development," and that knowing "family medical history is often necessary for correct medical diagnosis and treatment" [*Fam. Code § 7570(a)*].

Beginning January 1, 1995, prior to an unmarried mother leaving the hospital, hospitals are required to secure a voluntary declaration of paternity from the mother and the man "identified by the natural mother as the natural father" [*Fam. Code § 7571(a)*]. On January 1, 1997, *Health & Safety Code § 102425* required hospitals to include an unwed father's name on a child's birth certificate only if "the father and the mother sign a voluntary declaration of paternity at the hospital before the birth certificate is prepared" [*Health & Safety Code § 102425(a)(4)*]. That code section further allows a birth certificate to be amended after the child's birth only when paternity has been established by court judgment or by the filing of a voluntary declaration of paternity.

[b] Requirements for a Valid Voluntary Declaration of Paternity

Fam. Code § 7574 sets forth the requirements for a valid declaration of paternity. The declaration must be executed on a form created by the Department of Child Support Services. In addition, the form must include a statement by the mother that the man who signed the form is "... the only possible father" of the child, and a statement by the father that "... he is the biological father" of the child [*Fam. Code § 7574(b)(5), (6)*]. Hospital staff are required to witness the parties signing the declaration and shall forward the signed declaration to the Department of Child Support Services within 20 days of the date the declaration was signed [*Fam. Code § 7571(a)*]. In addition, voluntary declarations of paternity shall be made available at prenatal clinics, local child support agency offices, offices of local registrars of births and deaths, courts, and county welfare departments. Staff at all of these locations are required to witness the execution of these forms and file the completed declarations with the Department of Child Support Services within 20 days of the date the declarations were signed [*Fam. Code § 7571(e), (f)*].

Only unwed mothers may sign voluntary declarations of paternity [*Fam. Code §§ 7571(a), 7572(b)*]. he husband of a married mother is presumed to be the father of the child under *Fam. Code § 7611(a)*. If a married mother executes a voluntary declaration of paternity, this may rebut the presumption of paternity found in *Fam. Code § 7611(a)* and violate the husband's due process rights [*Fam. Code § 7612(c)*].

Voluntary declarations of paternity must be filed with the Department of Child Support Services in order to be valid [*Fam. Code §§ 7571, 7573*]. Once a man signs a voluntary declaration of paternity, he may rely on the presumption that the document was properly filed with the Department of Child Support Services [*In re Raphael P. (2002) 97 Cal. App. 4th 716, 738, 118 Cal. Rptr. 2d 610]* .

In addition, voluntary declarations of paternity executed in other states are valid declarations of paternity and must be given the same full faith and credit as voluntary declarations of paternity executed in California consistent with *Fam. Code § 7570 et seq.* [*In re Mary G. (2007) 151 Cal. App. 4th 184, 198, 204-205, 59 Cal. Rptr. 3d 703]* .

The Family Code places no time limits on the execution of voluntary declarations of paternity. Indeed, *Fam. Code section 7571(d)* states that if the declaration is not completed at the hospital at the time of the child's birth, "... it may be completed by the attesting parents, notarized, and mailed to the Department of Child Support Services at any time after the child's birth." *Fam. Code section 7571(f)* allows social workers to act as a witness to the parents' signing the declaration and then requires child welfare department staff to mail the declaration to the Department of Child Support

Services within 20 days of execution. One court has reasoned that it is up to the Legislature to determine if the statute should be amended to include a deadline, but that the "open-ended opportunity" to execute a voluntary declaration of paternity is similarly available to a man who attempts to establish paternity under *Fam. Code section 7611(d)*. "In this respect, the statutory scheme rewards the father who is the first to obtain a judgment establishing his parental rights and responsibilities" [*Kevin Q. v. Lauren W. (2009) 175 Cal. App. 4th 1119, 1133 n.8, 95 Cal. Rptr. 3d 477]* .

PRACTICE TIP (PARENTS COUNSEL P.O.V.):

Use of the Declaration of Paternity to Establish Presumed Father Status. If the mother and the man claiming to be the father sign the declaration of paternity, this is a simple way for a man to obtain presumed father status. Depending on the circumstances of the case, a mother might be highly motivated to sign such a declaration since a presumed father, who is eligible for reunification services, can decrease the chances of adoption in a case or at least delay the setting of a hearing to consider a permanent plan. But both unmarried mothers and the men considering signing such declarations of paternity should be cautioned that their signature is made under penalty of perjury and they should not sign the declaration unless they truly believe the man is the only possible biological father. The man who signs the declaration of paternity must also be advised that doing so will provide him with parental rights as well as obligations such as child support.

[c] Effect of Voluntary Declaration of Paternity

A voluntary declaration of paternity executed on or after January 1, 1997, that has been filed with the Department of Child Support Services "shall establish the paternity of a child and shall have the same force and effect as a judgment for paternity issued by a court of competent jurisdiction." The declaration forms the basis of an order for custody, visitation, and child support [*Fam. Code §§ 7573*, *7576*; *but see Fam. Code § 7577* (if declaration signed by minor parent, paternity not established until 60 days after both parents reach 18 or emancipate, whichever first occurs)]. A voluntary declaration of paternity executed after January 1, 1997, entitles the male signatory to presumed father status in dependency matters [*Fam. Code § 7611*; *In re Liam L. (2000) 84 Cal. App. 4th 739, 743-747, 101 Cal. Rptr. 2d 13]* . Presumptions arising under section 7611 are rebutted "by a judgment establishing paternity of the child by another man" [*Fam. Code § 7612(c)*].

For example, in *Kevin Q. v. Lauren W. (2009) 175 Cal. App. 4th 1119, 95 Cal. Rptr. 3d 477* , a biological father executed a voluntary declaration of paternity but failed to take meaningful steps to develop a father/child relationship with his son. After the child was born, the mother and child moved in with her boyfriend. After the mother and child moved out, the ex-boyfriend petitioned the court to establish a parental relationship with the child under *Fam. Code § 7611(d)*, which the trial court granted. The mother appealed, and the court of appeal reversed, holding that the biological father's properly executed voluntary declaration of paternity--which was never rescinded or set aside--rebutted the presumption under *Fam. Code § 7611(d)*. The court relied on the clear language in the applicable statutes to reverse the lower court's decision. It found that under *Fam. Code § 7573*, a voluntary declaration of paternity carries the same force and effect as a judgment of paternity. In addition, under *Fam. Code § 7612(c)*, a presumption under *Fam. Code § 7611(d)* is rebutted by a judgment of paternity in another man. Finally, the court noted that *Fam. Code § 7612(a)* expressly excludes presumed father status from a voluntary declaration of paternity as a rebuttable presumption. "Until the voluntary declaration of paternity is set aside, it has the 'force and effect' of a judgment (§ 7573). It is not a mere presumption to be weighed against competing section 7611 presumptions under section 7612, subdivision (b)" [*Kevin Q. v. Lauren W. (2009) 175 Cal. App. 4th 1119, 1137-1141, 95 Cal. Rptr. 3d 477]* .

PRACTICE TIP:

Competing Judgments of Paternity. What should the juvenile court do when a valid judgment of paternity exists but the mother and another man subsequently sign and execute a valid declaration of paternity? The result under these circumstances is not clear. *Fam. Code § 7636* says that a judgment or court order that determines the existence or nonexistence of a parent/child relationship "is determinative

for all purposes" except for actions brought under *Penal Code § 270*. However, at least one case holds that a judgment of paternity is not the same as a finding of presumed father status [*In re Margarita D. (1999) 72 Cal. App. 4th 1288, 1296, 85 Cal. Rptr. 2d 713]* . Therefore, an argument could be made that because a valid declaration of paternity carries the same weight as a finding of presumed father status [*see In re Liam L. (2000) 84 Cal. App. 4th 739, 101 Cal. Rptr. 2d 13]* , the declaration of paternity trumps the prior judgment. However, one could also argue that the declaration of paternity was void when signed in light of the prior court judgment. This is an area of law that is quickly changing and should be watched for future developments.

A voluntary declaration of paternity executed on or before December 31, 1996, however, creates a presumption of paternity that can be rebutted in certain circumstances by genetic testing requested by the mother or father that signed the declaration. Testing must be requested within three years from the date of the execution of the voluntary declaration of paternity, consistent with *Fam. Code § 7576*. But even a pre-1997 voluntary declaration of paternity trumps the rebuttable presumptions created by *Fam. Code § 7611* [*Fam. Code § 7576(e)*; *Kevin Q. v. Lauren W. (2009) 175 Cal. App. 4th 1119, 1138, 95 Cal. Rptr. 3d 477]* .

[d] Challenging a Voluntary Declaration of Paternity

[i] Methods of Challenge

A voluntary declaration may be challenged in four ways: (a) either parent may rescind the declaration; (b) genetic testing; (c) under *California Code of Civil Proc. § 473* based on mistake, inadvertence, surprise, or excusable neglect; and (d) the court may sit as a court of equity to determine paternity issues.

[ii] Rescission of a Voluntary Declaration of Paternity

Fam. Code § 7575 allows either the mother or the man who signed a voluntary declaration of paternity to file a rescission form with the Department of Child Support Services within 60 days of executing the declaration, "unless a court order for custody, visitation, or child support has been entered in an action in which the signatory seeking to rescind was a party" [*Fam. Code § 7575(a)*].

[iii] Setting Aside a Voluntary Declaration of Paternity Through Genetic Testing

In addition, genetic testing establishing biological paternity in a man other than the man who signed the voluntary declaration of paternity may provide the basis for a court to set aside the declaration. A motion for genetic testing must be filed within two years from the date of the child's birth and may be filed by the local support agency, the mother, the man who signed the voluntary declaration of paternity, "or in an action to determine the existence of nonexistence of the father and child relationship pursuant to *Fam. Code § 7630* or in any action to establish an order for child custody, visitation, or child support based upon the voluntary declaration of paternity" [*Fam. Code § 7575(b)(1), (3)*; *see also Fam. Code § 7646(a)*]. At least two courts have held this statute does not allow a claimed biological father's request for genetic testing to challenge a voluntary declaration of paternity signed by another man [*In re Christopher M. (2003) 113 Cal. App. 4th 155, 6 Cal. Rptr. 3d 197* ; *In re William K. (2008) 161 Cal. App. 4th 1, 9, 73 Cal. Rptr. 3d 737* (court could order genetic testing, however, at request of claimed biological father in a "proceeding in which paternity is a relevant fact" under *Fam. Code § 7551*)].

But other courts have held that where a *Kelsey S.* father seeks to challenge a voluntary declaration of paternity, his constitutional right to establish his paternity trumps the restrictive language in *Fam. Code § 7575(b)(3)*. In the case of *In re J.L. (2008) 159 Cal. App. 4th 1010, 72 Cal. Rptr. 3d 27* , the unwed mother and Adrian signed a voluntary declaration of paternity at J.L.'s birth. The mother and Adrian subsequently disappeared, and a petition under *Welf. & Inst. Code § 300* was filed on J.L.'s behalf. A man who suspected that he was the biological father of J.L. (Christopher) appeared in the dependency matter and sought genetic testing, which showed that he was the biological father. Unaware

of the prior voluntary declaration of paternity, the juvenile court found Christopher to be J.L.'s presumed father and entered a judgment of paternity accordingly [*In re J.L. (2008) 159 Cal. App. 4th 1010, 1016-1017, 72 Cal. Rptr. 3d 27]* . When the court later discovered that the mother and Adrian executed a voluntary declaration of paternity, it granted Christopher's request to set it aside and placed J.L. with Christopher [*In re J.L. (2008) 159 Cal. App. 4th 1010, 1017, 72 Cal. Rptr. 3d 27]* . Adrian appealed, claiming that Christopher had no standing to challenge his voluntary declaration of paternity, relying on *In re Christopher M. (2003) 113 Cal. App. 4th 155, 6 Cal. Rptr. 3d 197* .

The First District Court of Appeal, Division One disagreed with the *Christopher M.* decision. It held that Christopher had standing to challenge Adrian's declaration of paternity based on the plain language of *Fam. Code § 7575(b)(3)(A)*. That code section allows one of the three listed parties to file a motion to set aside a voluntary declaration of paternity, "... or by a participant in a section 7630 paternity action, or by a participant in 'any action to establish an order for child custody, visitation, or child support based upon the voluntary declaration of paternity' " [*In re J.L. (2008) 159 Cal. App. 4th 1010, 1020-1022, 72 Cal. Rptr. 3d 27]* . The court also found that Christopher qualified as a *Kelsey S.* father and therefore had a constitutional right to challenge Adrian's voluntary declaration of paternity [*In re J.L. (2008) 159 Cal. App. 4th 1010, 1022-1023, 72 Cal. Rptr. 3d 27* ; *see also Gabriel P. v. Suedi D. (2006) 141 Cal. App. 4th 850, 858-861, 46 Cal. Rptr. 3d 437]* .

PRACTICE TIP:

Standing and Notice Issues. Under *Fam. Code § 7575(b)(3)(A)* and *In re J.L. (2008) 159 Cal. App. 4th 1010, 72 Cal. Rptr. 3d 27* , a social services agency would also have standing to challenge a voluntary declaration of paternity in a dependency case that sought to determine the existence or non-existence of the father/child relationship or to secure an order for custody, visitation, or support based upon the voluntary declaration of paternity. Furthermore, in any action to set aside a voluntary declaration of paternity, the moving party must provide notice to the man who signed the voluntary declaration so that he can appear and protect his interest [*County of Los Angeles v. Sheldon P. (2002) 102 Cal. App. 4th 1337, 1344-1345, 126 Cal. Rptr. 2d 350]* .

Genetic testing that conclusively determines the man that signed the voluntary declaration of paternity is not the biological father of the child does not automatically set aside the declaration of paternity. If a court finds that genetic testing establishes that the man that signed the declaration is not the child's biological father, it may set aside the voluntary declaration of paternity unless it determines that it would be in the child's best interest to do so, based on a number of factors, including the age of the child, the length of time the declaration has existed, the "nature, duration, and quality of any relationship" between the man who signed the declaration and the child, and the "benefit or detriment to the child" in establishing biological parentage [*Fam. Code § 7575(b)(1)(A)-(H)*; *see also Fam. Code § 7648*; *In re Jesusa V. (2004) 32 Cal. 4th 588, 605, 85 P.3d 2* ; *and In re William K. (2008) 161 Cal. App. 4th 1, 7, 9, 73 Cal. Rptr. 3d 737* (court did not abuse its discretion when it denied biological father's motion to set aside voluntary declaration of paternity; biological father was registered sex offender who failed to promptly assert parental rights; man who executed voluntary declaration of paternity held child out as his own and intended to marry mother)].

[iv] Setting Aside a Voluntary Declaration of Paternity under Code of Civil Proc. § 473

The Family Code allows a court to set aside a voluntary declaration of paternity under *Code of Civil Proc. § 473* because of mistake, inadvertence, surprise, or excusable neglect. The motion may be filed by either parent and must be filed consistent with the timeframes set forth in *Code of Civil Proc. § 473*. If a court sets aside a voluntary declaration of paternity under that section, the court shall order that the mother, the child, and the alleged father undergo genetic testing, and shall resolve the question of paternity accordingly [*Fam. Code § 7575(c)(1), (5)*].

[v] Courts acting as Courts of Equity in Determining Paternity Issues

Finally, *Family Code § 7575(c)(4)* allows a superior court to act as a court of equity in determining paternity issues.

Indeed, an equitable collateral attack on a voluntary declaration of paternity could be made under the theory of extrinsic fraud [*In re Marriage of Stevenot (1984) 154 Cal. App. 3d 1051, 1068, 202 Cal. Rptr. 116]* .

[6] Parentage Proceedings in Dependency Cases

It has long been recognized that the juvenile court has the inherent jurisdiction to make determinations of parentage where necessary and appropriate in dependency cases [*Cal. Rules of Ct., Rule 5.635*; *In re R. (1975) 13 Cal. 3d 636, 644, 119 Cal. Rptr. 475, 532 P.2d 123]* . Nevertheless, all too often the question of parentage was left until late in the case when permanency planning was being considered--or was not determined at all [*see* Krug, *Who Is My Father? The Case For Early Determination Of Paternity In California Juvenile Dependency Proceedings, 18 Thomas Jefferson L. Rev. 143 (1996)*]. Since 1998, however, the court has the duty to conduct paternity inquiries at the detention hearing or as soon thereafter as practicable. Even the presence at the hearing of a man claiming to be the father of the child does not relieve the court of this responsibility [*Welf. & Inst. Code § 316.2(a)*]. This is a very positive step which should help social workers, attorneys and courts statewide to recognize that parentage is an "up front" issue that must be dealt with at the earliest possible opportunity. This inquiry is more than just as to fathers; it is as to mother's too. Thus, it is now a "parentage inquiry" [*Cal. Rules of Ct., Rule 5.635*].

The inquiry "shall include at least all of the following, as the court deems appropriate [*Welf. & Inst. Code § 316.2(a)(1)-(7)*; *Cal. Rules of Ct., Rule 5.635(b)*]:

- Whether there has been a judgment of parentage from another court.
- Whether the mother was married or had a registered domestic partner at or after the time of conception.
- Whether the mother believed she was married or believed she had a registered domestic partner at or after the time of conception.
- Whether the mother was cohabiting with another adult at the time of conception.
- Whether the mother received support payments or promises of support for the child or for herself during her pregnancy or after the birth of the child.
- Whether a man formally or informally acknowledged paternity, including the execution and filing of a voluntary declaration of paternity under *Family Code Section 7570 et seq.*, and agreed to have his name placed on the child's birth certificate.
- Whether genetic tests have been administered, and, if so, what the results demonstrated.
- Whether the child has been raised jointly with another adult or in any other co-parenting arrangement.

After making these inquiries, the court must note its findings in the minutes of the court, as it must following any proceeding or finding under this section [*Welf. & Inst. Code § 316.2(f)*].

PRACTICE TIP:

Inquiries Must Be Sensitive But Thorough. The questions listed in the statute obviously are just the beginning of a thorough paternity inquiry. Questions regarding the possibility of other sexual partners, including outside a marriage, may at times be necessary. To help ensure truthfulness, it may be necessary to question parties separately. Many courts and parents may find such questions and procedures

> embarrassing. To minimize such embarrassment, some courts have the attorneys conduct the inquiry of their clients in the courtroom. Others have developed local forms to assist in this process. Such forms can be completed by the parent or other interested person with the assistance of counsel or the social worker and then brought into court and acknowledged in a manner similar to that used with waiver of rights forms. Although the responsibility is the court's, all parties should ensure that the inquiry is as complete as necessary regardless of the method used. And while not required by the statute, it is suggested that parents and other interested parties be sworn before such inquiries or should complete any paternity questionnaire under penalty of perjury.

If one or more men are identified as alleged parents as a result of the inquiry, each alleged parent must be noticed that it has been alleged that he or she is or could be the parent of the child, that the child is the subject of dependency proceedings, and that the proceedings could result in the termination of parental rights and adoption. The notice must be sent by certified mail, return receipt requested, to the man's last known address [*Welf. & Inst. Code § 316.2(b)*].

In addition to this duty to conduct a parentage inquiry at the detention hearing, or as soon thereafter as practicable, whenever the issue of the parentage of a child is raised in a dependency proceeding the court must first inquire of the parties if any finding of parentage has been made by another court and, if so, by what court [*Cal. Rules of Ct., Rule 5.635(d)*]. The court must also direct its clerk to prepare and transmit to the local child support agency a request that it inquire as to whether or not parentage has been established through any judgment or superior court order. The local child support agency must respond within 25 judicial days and shall provide certified copies of any such order or judgment [*Cal. Rules of Court, Rule 5.635(d)* (directing that Judicial Council form Parentage Inquiry--Juvenile (JV-500) be used for this purpose)]. The juvenile court must take judicial notice of any such prior determination of parentage [*Cal. Rules of Ct., Rule 5.635(d)*; *Evid. Code § 452(c)-(d)*]. Determinations of parentage in the juvenile court always require the involvement of the local child support agency in the overall process and such agencies should be involved in the planning process for paternity determinations in the juvenile court [*Welf. & Inst. Code § 903.41*].

If the Office of Child Support Enforcement indicates that there has been no prior determination of parentage with regards to the child, the juvenile court may proceed to make its own determination of paternity or nonpaternity [*Cal. Rules of Ct., Rule 5.635(e)*]. Once a dependency petition has been filed, the juvenile court hearing the dependency case has exclusive jurisdiction to hear an action filed under *Fam. Code § 7630* or *7631*. Such exclusive jurisdiction continues until such time as the petition is dismissed, dependency is terminated, parental rights are terminated pursuant to *Welf. & Inst. Code § 366.26*, or proceedings are commenced to free the child pursuant to *Fam. Code § 7800 et seq.* [*Welf. & Inst. Code § 316.2(e)*].

The court may order the child and the alleged parent to submit to genetic tests. It may then proceed pursuant to *Fam. Code § 7550 et seq.* (Uniform Act on Blood Tests to Determine Paternity) [*Cal. Rules of Ct., Rule 5.635(e)(2)*]. One case has held the court is not required to order genetic testing if it finds the test results would not be relevant to the proceedings [*In re Joshua R. (2002) 104 Cal. App. 4th 1020, 1025-1029, 128 Cal. Rptr. 2d 241]* , but courts should be careful before denying parentage testing on relevancy grounds. Even if the alleged parent might not be deserving of services or custody if he or she established paternity, by proving he or she is the child's biological parent his or her relatives qualify for possible relative placement pursuant to *Welf. & Inst. Code § 361.3*.

Generally, however, the juvenile court does not have the authority to order genetic testing in cases where a judgment of paternity exists. Under *Fam. Code § 7636*, a judgment of paternity is "determinative for all purposes" regarding the existence or nonexistence of a father/child relationship. Many courts have held that a valid judgment of paternity is res judicata and bars the use of genetic testing in a later proceeding to overturn a paternity determination [*see, e.g.,* *City and County of San Francisco v. Stanley (1994) 24 Cal. App. 4th 1724, 1729, 30 Cal. Rptr. 2d 106* ; *City and County of San Francisco v. Cartagena (1995) 35 Cal. App. 4th 1061, 1065-1069, 41 Cal. Rptr. 2d 797* ; *In re Margarita D. (1999) 72 Cal. App. 4th 1288, 1296, 85 Cal. Rptr. 2d 713]* . This is true even where the judgment was not based on a genetic test establishing a biological connection [*see, e.g.,* *De Weese v. Unick (1980) 102 Cal. App. 3d 100, 162 Cal.*

Rptr. 259 ; *City and County of San Francisco v. Stanley (1994) 24 Cal. App. 4th 1724, 30 Cal. Rptr. 2d 106* ; *City and County of San Francisco v. Cartagena (1995) 35 Cal. App. 4th 1061, 41 Cal. Rptr. 2d 797* ; *In re Margarita D. (1999) 72 Cal. App. 4th 1288, 85 Cal. Rptr. 2d 713]* . But remember, a judgment of paternity is not the same thing as a finding of presumed father status [*In re Margarita D. (1999) 72 Cal. App. 4th 1288, 1296, 85 Cal. Rptr. 2d 713* ; *see also* discussion in *§ 328.60[5]*].

The limited exception to this general rule exists when a party appeals to the equitable powers of the court and asks to set aside the judgment based on extrinsic fraud, mistake or accident. For a good discussion of what a showing of extrinsic fraud requires, see *City and County of San Francisco v. Cartagena (1995) 35 Cal. App. 4th 1061, 1065-1069, 41 Cal. Rptr. 2d 797* .

In the alternative, the court can make its determination based on the testimony, declarations or statements of the alleged parents. If any alleged father indicates he wishes to be declared the father of the child, the court must advise him of his financial obligation for the support of the child if he is declared the father and that if the child receives welfare benefits, the father may be subject to an action for support payments [*Cal. Rules of Ct., Rule 5.635(e)(3)*]. If the court makes a finding of paternity, it must direct that its clerk prepare and transmit Judicial Council Form Parentage--Finding and Judgment [Juvenile] (JV-501) to the Office of Child Support Enforcement [*Cal. Rules of Ct., Rule 5.635(f)*].

When an alleged or biological parent desires to establish that he or she is the presumed parent of a child, he or she bears the burden of proving by a preponderance of the evidence all elements of the presumption on which he or she relies [*In re Spencer W. (1996) 48 Cal. App. 4th 1647, 1652-1653, 56 Cal. Rptr. 2d 524]* . If this person asserts the applicability of *Fam. Code § 7611(d)* based on receiving the child into his or her own home and holding the child out as his or her natural child, he or she must show more than just "some familial relationship." In *Spencer W.*, for example, it was not enough that the man had lived with the mother and the child in the mother's home where the mother provided all the financial support [*In re Spencer W. (1996) 48 Cal. App. 4th 1647, 1653, 56 Cal. Rptr. 2d 524]* . Nor was it sufficient that the man told some friends and family members that the child was his, because he had failed to take steps to establish paternity by legal action, failed to acknowledge paternity when it would have resulted in reduced AFDC, and failed to take steps to assert his rights when he was denied access to the child by the maternal grandparents [*In re Spencer W. (1996) 48 Cal. App. 4th 1647, 1654, 56 Cal. Rptr. 2d 524]* . It is also not sufficient that a man lived with the mother while she was pregnant, since that does not constitute physically receiving the child into his home within the meaning of the presumption [*In re Tanis H. (1997) 59 Cal. App. 4th 1218, 1229-1230, 69 Cal. Rptr. 2d 380]* .

When a parentage finding is adjudicated by a juvenile court, that judgment is often based on evidence of biological parentage and hence is only an adjudication that the person is the biological parent of the child. In such cases the person who was found by the court to be the child's parent is not a presumed parent and is not entitled to the rights of a presumed parent. Sometimes a "finding" of parentage is a recognition by the court that the person satisfies one of the presumptions found in *Fam. Code § 7611* and not a finding that the man is the child's biological parent. A person may, of course, be both a presumed and biological parent of a child. When the court is entering a judgment of parentage, the court should be clear as to exactly what the court is finding.

PRACTICE TIP:

Don't Be Too Eager to Find Just Anyone the Parent. Just as it is important to not delay the effort to determine the identity of the father, it is also important to not be so eager to find someone to be the parent that parentage is found too quickly and the true parent of the child is overlooked. This sometimes happens when testimony, rather than testing, is used to determine parentage. Testimony is at times sufficient. In other cases testing should be required. If parentage findings in dependency cases are to be meaningful and not subject to later dispute when another possible parent emerges, all parties must ensure that the process used by the court to determine parentage in each case is as thorough as the circumstances of the case dictate, and as accurate as reasonably possible.

Once judgment is entered by the court determining a person to be the biological parent of the child any previous presumption that a different person was the parent is rebutted [*Fam. Code § 7612(c)*]. Thus, a person previously presumed to be the parent loses all rights and standing in a dependency case once another person is found by the court to be the biological parent. The same is true for all other presumed and alleged parents. This judgment cannot be set aside except on a showing of extrinsic fraud [*In re Margarita D. (1999) 72 Cal. App. 4th 1288, 1294-1296, 85 Cal. Rptr. 2d 713]* . It is for this reason that it is important to notice all possible parents for parentage proceedings [*Fam. Code § 7635(b)*]. A man who was formerly thought to be the father of the child, including a man previously presumed to be the father, may still have limited standing, however, if he qualifies for and receives de facto parent status [*In re B.G. (1974) 11 Cal. 3d 679, 692-693, 114 Cal. Rptr. 444, 523 P.2d 244]* .

PRACTICE TIP:

Make Sure the Court Enters a Judgment of Parentage. Many practitioners and courts assume that once genetic testing is done and every knows who is and is not the parent, any previous presumption is rebutted. This is not the case. The court cannot merely acknowledge the genetic testing or make a "finding" of parentage and automatically exclude all other potential or presumed parents. Instead, as set forth in *Fam. Code 7612(c)*, it is a "judgment" establishing the parentage of a child that rebuts the presumption that another person is the parent. Further, while a "finding" of parentage or nonparentage is the functional equivalent of a "judgment" of parentage or nonparentage, courts do not always recognize it as such. Thus, all parties and the court need to ensure the court takes the steps necessary to formalize its determinations as a "judgment" so there will be no question as to who the law recognizes as the child's parent.

Finally, many dependency practitioners erroneously use the term "adjudicated father" or "judicially determined father," but neither term is recognized by statute and neither term adequately explains what the full nature of the man's status. Most practitioners use these terms interchangeably to mean that a court of competent jurisdiction has entered a judgment of paternity for a particular man. But that meaning is not universally accepted. Was he adjudicated to be a biological father, a conclusively presumed father, a rebuttably presumed father, or a father by way of declaration? At the detention hearing, the juvenile court is required to conduct a parentage inquiry that includes a determination as to whether or not a judgment of paternity exists [*Cal. Rules of Ct., Rule 5.635(b)(1)*]. In addition, pursuant to *Welf. & Inst. Code § 903.41*, the juvenile court and family court must exchange information to determine if a judgment of paternity already exists in a particular case. As noted above, a judgment of paternity determining the existence or nonexistence of a parent/child relationship "is determinative for all purposes" but for actions under Pen. al Code § 270 [*Fam. Code § 7636*]. But a man with a judgment of paternity must still establish presumed father status in the juvenile court [*In re Margarita D. (1999) 72 Cal. App. 4th 1288, 1296, 85 Cal. Rptr. 2d 713]* . He must additionally demonstrate that he meets a presumption of paternity to attain full standing and status in the dependency proceeding [*In re Zacharia D. (1993) 6 Cal. 4th 435, 451-452, 24 Cal. Rptr. 2d 751]* . The record must be clear and hence the terms "adjudicated father" and "judicially determined father" should not be used because they are not clear and can lead to confusion.

For a detailed discussion of parentage actions in general, including discussions of paternity presumptions and blood and genetic testing for paternity, see Vitek, et al., Disputed Paternity Proceedings (5th ed. Matthew Bender), and Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2d ed., Ch. 31 (Matthew Bender).

PRACTICE TIP:

Raising a Father's Level of Standing. In any dependency case a man may move along a rising continuum of standing. He may begin as an alleged father and then establish his paternity and become a mere biological father. If he involves himself in his child's life he may then become a *Kelsey* father and if he seeks and receives custody he may become a presumed father. The lack of noticed hearings and express findings on paternity issues is one of the most common failures of the juvenile court. In any case where the paternity or standing of a father is not clear, all parties should take steps to ensure that the juvenile court addresses the issue on its merits through a noticed hearing and the introduction of

evidence. Then, should the father's standing later change as he elevates his relationship to his child, steps should be taken to ensure that the juvenile court conducts a further hearing on the issue and makes an express finding of the elevated status. In this way there will be no question as to the status of the father and he will be sure to receive the rights and standing to which he is entitled.

[7] Under What Circumstances is a Finding of "Unfitness" Required to Terminate Parental Rights?

Parentage has important ramifications early in the case as it will directly impact whether the individual has standing and rights to such things as counsel, notice, placement, reunification services and visitation [*see* discussion § 328.60[1][a]]. However, parentage also has important implications at a later point in the case if the child will be freed for adoption. Where the parent is a mere biological parent, his or her parental rights can be terminated based on a finding that adoption is in the child's best interest [*Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 824-825, 831, 4 Cal. Rptr. 2d 615, 823 P. 2d 1216* ; *In re Jason J. (2009) 175 Cal. App. 4th 922, 937-938, 96 Cal. Rptr. 3d 625]* . If the parent is a biological parent who stepped forward at the earliest time, fully accepted the role and responsibilities of a parent, and qualifies as a *Kelsey S.* father, a finding of detriment or unfitness by clear and convincing evidence would need to be made at some time during the case before parental rights may be terminated [*Adoption of Kelsey S., 1 Cal. 4th 816, 849, 4 Cal. Rptr. 2d 615, 823 P. 2d 1216* ; for further discussion, *see § 2.60[3][b]*]. The same rule applies to presumed parents [*In re. G.S.R. (2008) 141 Cal. App. 4th 845, 848, 46 Cal. Rptr. 3d 434]* .

In most instances, one or more findings of detriment or unfitness will already have been made regarding each parent before the case ever gets to a *Welf. & Inst. Code § 366.26* hearing. This prior finding forms part of the basis for termination of parental rights [*Cynthia D. v. Superior Court (1983) 5 Cal. 4th 242, 253, 19 Cal. Rptr. 2d 698, 851 P.2d 1307]* . But that will not always be the case. Sometimes parents have *not* sought custody of their child during the dependency proceedings, and hence the court has never found that placement with the parent would be detrimental to the child [*see, e.g.,* *Robert L. v. Superior Court (1996) 45 Cal. App. 4th 619, 628, 53 Cal. Rptr. 2d 41* ; *In re Terry H. (1994) 27 Cal. App. 4th 1847, 1857, 34 Cal. Rptr 2d 271]* . An interesting issue is whether, is cases such as these, due process requires a finding of detriment where the non-custodial parent qualifies as a *Kelsey S.* parent or a presumed parent. The answer appears to depend on the particular facts of the case.

In the *Gladys L.* case, the presumed father appeared at the detention hearing, was represented by counsel, and submitted to the court's jurisdiction. He then disappeared for three years. He never requested custody and did not visit the child. He reappeared at the *Welf. & Inst. Code § 366.26* hearing and requested visits. The court found it was not in the child's best interest to have contact with the father and denied the request. It subsequently terminated parental rights. The father appealed, and the Court of Appeal reversed [*In re Gladys L. (2006) 141 Cal. App. 4th 845, 847, 46 Cal. Rptr. 3d 434]* .

In its analysis, the *Gladys L.* court noted the California Supreme Court had found the dependency system met the due process requirements of *Santosky v. Kramer (1982) 455 U.S. 745, 747-48, 758, 760* because by the time of the section 366.26 hearing there had been one or more findings of parental unfitness [*In re Gladys L (2006) 141 Cal. App. 4th 845, 848, 46 Cal. Rptr. 3d 434* , *citing* *Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 254, 246* , *and* *Santosky v. Kramer (1982) 455 U.S. 745, 747-48, 758, 760]* . However, under the facts of the case, there had never been a finding of unfitness as to the non-custodial father. The court in *Gladys L.* reasoned: "Here, the requirements of *Santosky* and the safeguards embedded in the California dependency scheme were ignored. DCFS never alleged that Alex was unfit and the trial court never made that finding. Due process therefore prohibits the termination of Alex's parental rights" [*In re Gladys L (2006) 141 Cal. App. 4th 845, 848, 46 Cal. Rptr. 3d 434]* .

Consequently, according to *Gladys L.*, a court must make a finding of unfitness or detriment before terminating parental rights for a presumed father--even where he is a non-custodial parent and never sought custody or services. However, the analysis of *Gladys L.* is potentially flawed. In reaching its conclusion, the *Gladys L.* court relied on *Santosky* and *Cynthia D.*, two cases which dealt with termination of parental rights of *presumed parents from whom the children had*

been removed, not parents who never had or requested custody [*In re Gladys L. (2006) 141 Cal. App. 4th 845, 848, 46 Cal. Rptr. 3d 434 , citing Santosky v. Kramer (1982) 455 U.S. 745, 751 and Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 245-246]* . Therefore, the holding in *Gladys L.*--that a finding of detriment or unfitness is required in all cases involved presumed or *Kelsey S.* fathers--is based on factually distinguishable cases.

Furthermore, there is a lack of statutory authority to support the *Gladys L.* holding that there must be a detriment or unfitness finding for all presumed or *Kelsey S.* fathers even if they are noncustodial fathers and never requested custody. Dependency can be declared under *Welf. & Inst. Code § 300* without any jurisdictional allegations regarding the noncustodial parent, and without any finding of detriment or unfitness as to the noncustodial parent [*In re Joshua G. (2005) 129 Cal. App. 4th 189, 202, 28 Cal. Rptr. 3d 213]* . Further, at disposition a finding of detriment need only be made when the court removes the child from the *custodial* parent or denies placement with a *noncustodial parent who requests custody* [*Welf. & Inst. Code §§ 361(c), 361.2(a)*]. Likewise, at the out-of-home placement review hearings there is a presumption children are to be returned to their *custodial* parent unless the court finds return would create a substantial risk of detriment to the child [*Welf. & Inst. Code §§ 366.21(e), (f), 366.22(a), 366.25(a)*]. No such finding of detriment is required for a previously noncustodial parent who did not seek custody at the disposition hearing. Nor does the Welf. & Inst. Code explicitly require a finding of detriment or unfitness for a noncustodial parent at the *Welf. & Inst. Code § 366.26* hearing, except for the parent of an Indian child [*Welf. & Inst. Code § 366.26(c)(2)(B)(ii)*].

Recent case law provides further support for the argument that a finding of unfitness is not required for presumed parents or *Kelsey S.* fathers regardless of the circumstances. Two 2009 decisions from the California Supreme Court hold that in the context of termination of parental rights in Probate Court proceedings, due process is satisfied even without a finding of parental unfitness when the court terminates parental rights and determines that adoption is in the child's best interest [*In re Charlotte D. (2009) 45 Cal. 4th 1140, 1147, 90 Cal. Rptr. 3d 724, 202 P.3d 1109* ; *Guardianship of Ann S. (2009) 45 Cal. 4th 1110, 1135, 90 Cal. Rptr. 3d 701, 202 P.3d 1089]* . Although not dependency cases, an argument can be made that the due process analysis in these cases applies equally to dependency matters.

In *Guardianship of Ann S.*, the parents challenged the constitutionality of *Prob. Code § 1516.5*, which authorizes the termination of parental rights when the guardianship has continued for at least two years. In upholding the statute as facially constitutional, the California Supreme Court recognized that children who have spent considerable time in out-of-home care have protected interests in a stable, permanent placement with a committed caregiver, and that these interests need to be balanced with the constitutional rights of parents [*Guardianship of Ann S. (2009) 45 Cal. 4th 1110, 1136, 90 Cal. Rptr. 3d 701, 202 P.3d 1089]* . The Court went on to explain: "A termination proceeding under this statute occurs only when the parent has failed to exercise any custodial responsibility for a two-year period, with the possible exception of visitation. In this context, it would make little sense to require a showing that the parent is currently unfit. As guardianship continues for an extended period, the child develops an interest in a stable, continuing placement, and the guardian acquires a recognized interest in the care and custody of the child. [*Probate Code] Section 1516.5* appropriately requires a court to balance all the familial interests in deciding what is best for the child" [*Guardianship of Ann S. (2009) 45 Cal. 4th 1110, 1118, 90 Cal. Rptr. 3d 701, 202 P.3d 1089]* . This is much like the factual situation in *Gladys L.* where the presumed father had appeared at the detention hearing and then disappeared for three years. When he returned, he requested but was denied visitation [*In re Gladys L. (2006) 141 Cal. App. 4th 845, 847, 46 Cal. Rptr. 3d 434]* .

In the *Charlotte D.* case, the California Supreme Court reiterated that a presumed father's parental rights may be terminated based on a finding of best interest [*In re Charlotte D. (2009) 45 Cal. 4th 1140, 1147, 90 Cal. Rptr. 3d 724, 202 P.3d 1109]* . However, the Court added the caveat that there might be situations where due process does require a finding of parental unfitness [*In re Charlotte D. (2009) 45 Cal. 4th 1140, 1148-49, 90 Cal. Rptr. 3d 724, 202 P.3d 1109]* . The Court observed that one such situation might exist where the parent is a *Kelsey S.* father, who has been involved in the child's life by demonstrating a full commitment to parental responsibilities but voluntarily placed their child in guardianship, and later faces termination of parental rights after two years [*In re Charlotte D. (2009) 45 Cal.*

4th 1140, 1143, 90 Cal. Rptr. 3d 724, 202 P.3d 1109] . Therefore, under the analysis of the *Charlotte D.* case, it is not the mere status as a presumed or *Kelsey S.* father that requires a detriment finding to comply with due process. More importantly, it is the relationship that exists between the man and the child that dictates whether a finding of unfitness or detriment is required before terminating parental rights.

Like *Charlotte D.* and *Guardianship of Ann S.*, *Gladys L.* dealt with a statutory scheme that does not require a finding of detriment or unfitness before parental rights of a noncustodial parent who had not been denied custody by the state can be terminated. Another similarity shared by all three cases is that the appellants failed to demonstrate a full commitment to their parental responsibilities. The *Gladys L.* court did not consider a child's protected liberty interest in permanent placement with a committed caregiver as the Court did in *Guardianship of Ann S.* and *Charlotte D.* Indeed, the *Gladys L.* decision is silent on whether the child was in an adoptive placement and had developed a protected interest in remaining in that placement. The *Gladys L.* court thus omitted an important aspect of the due process analysis.

Given the inconsistency between *Gladys L.* on the one hand and *Charlotte D.* and *Guardianship of Ann S.* on the other, different arguments can be made regarding the extent to which a finding of parental unfitness is constitutionally required.

An argument can be made that under *Charlotte D.* and *Guardianship of Ann S.*, a finding of unfitness is not constitutionally required at the trial court level before the rights of the parent can be terminated where the parent has not demonstrated a full responsibility to the child and the child has developed a protected interest in remaining with the prospective adoptive parents by living in that home for an extended period of time. In such cases, the only required finding should be that adoption is in the best interest of the child. This argument must acknowledge that the Supreme Court has noted differences between termination of parental rights in a probate guardianship versus a dependency case [*Guardianship of Ann S. (2009) 45 Cal. 4th 1110, 1122, 90 Cal. Rptr. 3d 701, 202 P.3d 1089]* . Those differences, however, can be argued to make the *Charlotte D.* and *Guardianship of Ann S.* analyses even more appropriate for application in dependency cases, since the noncustodial parent in a dependency case has normally had the assistance of appointed counsel to seek custody and services, and has had a court overseeing the dependency to facilitate such requests where appropriate.

However, for the previously noncustodial parent who never sought custody, several arguments still can be made in support of the position that a finding of parental unfitness *is* constitutionally required before parental rights can be terminated. Counsel can do this by distinguishing *Charlotte D.* and *Guardianship of Ann S.* on the grounds that *Probate Code § 1516.5*, which was the focus of those cases, required the probate guardianship to be in place for two years before termination of parental rights could be contemplated. The statutory scheme in dependency cases, however, allows for the termination of parental rights to occur much sooner through the denial of reunification services and the setting of a *Welf. & Inst. Code § 366.26* hearing as early as disposition. This shortened time frame is a significant distinction between the dependency and guardianship systems. In addition, *Charlotte D.* and *Guardianship of Ann S.* can be distinguished on the grounds that they addressed voluntary guardianship proceedings and not the involuntary removal of the child by the government in dependency cases, a distinction the Supreme Court pointed out. Further, even when the dependency case has a period of reunification services for the previously custodial parent, in many dependency cases the child has not been in a prospective adoptive home for an extended period at time of the *Welf. & Inst. Code § 366.26* hearing. In such situations, while the previously noncustodial parent may not have demonstrated a clear commitment and connection to the child, the child has also not developed a protected interest in remaining in a particular adoptive home. Thus, it can be argued that even if *Charlotte D.* and *Guardianship of Ann S.* apply in dependency cases, *Gladys L.* should still apply where the child has not yet developed the requisite protected interest in a particular stable home.

PRACTICE TIP:

Pay Attention to Detriment Findings. Regardless of what side of the issue one is on, all practitioners and the juvenile court should pay close attention to detriment findings. Assuming the evidence exists, agency attorneys and children's counsel should be sure to ask for a detriment finding by clear and

> convincing evidence for a noncustodial parent at the earliest opportunity. This should be done even if the noncustodial parent is not seeking custody. If no detriment finding has been made previously, parent's counsel should be sure to indicate at the *Welf. & Inst. Code § 366.26* hearing that parental rights cannot be terminated without a finding of detriment and argue that the evidence does not support such a finding.

Whatever position one takes on this issue, this is an area to be watched for future developments. See *§ 328.171[5][f]* for further discussion of when and how detriment findings can be made and whether the requirement for such a finding can be forfeited.

[8] Right of Incarcerated Parents to Be Present

Parents who are incarcerated in city, county, or state institutions within the State of California have certain rights to be transported and be present for some dependency proceedings [*Penal Code § 2625*]. In any action to adjudicate a child as a dependent of the juvenile court under *Welf. & Inst. Code § 300* or to terminate parental rights under *Welf. & Inst. Code § 366.26* the juvenile court shall order notice of any court proceeding regarding the child to be transmitted to the incarcerated parent [*Penal Code § 2625(b)*]. While notice must be given in any such case as required by *Penal Code § 2625(b)*, the provisions of *Penal Code § 2625* for the temporary removal and production of an incarcerated parent only apply when the incarcerated parent is institutionalized in a California institution, since any other institution, such as a federal or an out-of-state facility, would not be subject to the mandate of *Penal Code § 2625* or the jurisdiction of the California court requesting the prisoner's presence [*In re Maria S. (1998) 60 Cal. App. 4th 1309, 1312-1313, 71 Cal. Rptr. 2d 30* (federal prison); *In re Gary U. (1982) 136 Cal. App. 3d 494, 498-499, 186 Cal. Rptr. 316* (out-of-state prison)].

Upon receipt of a statement from the incarcerated parent or his or her attorney indicating the parent's desire to be present during the court proceedings, the court shall issue an order for the temporary removal of the prisoner from the institution at which he or she is incarcerated and the production of the incarcerated parent before the court [*Penal Code § 2625(b)*]. No proceeding to adjudge a child a dependent of the court and no hearing under *Welf. & Inst. Code § 366.26* to terminate parental rights may be adjudicated without the physical presence of the incarcerated parent or the parent's attorney, unless the court has before it a knowing waiver of the right of physical presence signed by the incarcerated parent, or an affidavit signed by the warden, superintendent, or other designated representative stating that the incarcerated parent has indicated, either by an express statement or by his or her actions, an intent not to appear at the proceeding [*Penal Code § 2625(d)*]. There was a split of authority as to whether *Penal Code § 2625(d)* required the proceeding not proceed, in the absence of a waiver, without the parent's presence *or* the presence of counsel [*In re Axsana S. (2000) 78 Cal. App. 4th 262, 267, 92 Cal. Rptr. 2d 701* ; *In re Rikki D. (1991) 227 Cal. App. 3d 1624, 1629, 278 Cal. Rptr. 565]* or that the proceeding not proceed without the parent's presence *and* the presence of counsel [*In re Alexander B. (2002) 99 Cal. App. 4th 1030, 1036-1037, 121 Cal. Rptr. 2d 512]* . The California Supreme Court has resolved that conflict, determining that in the absence of a waiver the proceeding must not go forward without the incarcerated parent's presence and the presence of counsel in cases involving the assumption of jurisdiction under *Welf. & Inst. Code § 300* or to terminate parental rights [*In re Jesusa V. (2004) 32 Cal. 4th 588, 621-624, 10 Cal. Rptr. 3d 205, 85 P.3d 2]* . Regardless, the authority for the temporary removal and production of an parent incarcerated in a California institution is statutory and thus subject to a simple harmless error analysis should the statute be violated [*In re Jesusa V. (2004) 32 Cal. 4th 588, 624-626, 10 Cal. Rptr. 3d 205, 85 P.3d 2*]. The responsibility for preparing an order to produce the incarcerated parent should not be placed solely on the parent's attorney. In light of the significant interests at stake, the juvenile court should take steps to ensure the production of an incarcerated parent who manifests a desire to attend a jurisdiction hearing or a hearing at which parental rights may be terminated.

For any other hearing in a dependency case other than a hearing to adjudicate the child a dependent or select and implement a permanent plan through the termination of parental rights, the juvenile court may order an incarcerated parent's temporary removal from the institution and production before the juvenile court for the dependency hearing. A copy of the order must be transmitted to the warden, superintendent, or other person in charge of the institution not less

than 15 days before the order is executed [*Penal Code § 2625(e)*]. The provisions of *Penal Code § 2625(d)* do not apply when the dependency hearing is for something other than adjudicating the child a dependent or terminating parental rights. Instead, *Penal Code § 2625(e)* provides the court with the discretionary authority to order the incarcerated parent's presence for the dependency hearing [*In re Barry W. (1993) 21 Cal. App. 4th 358, 368-370, 26 Cal. Rptr. 2d 161* (hearing under *Welf. & Inst. Code § 366.26* for guardianship)].

PRACTICE TIP (PARENT'S P.O.V.):

Producing the Incarcerated Parent for the Hearing. In selecting the next hearing date, counsel for the incarcerated parent should request a date at least three weeks out. This will allow enough time for the immediate preparation of the order to produce [JV-450], its filing, signature by the judicial officer, notification to the prison and transportation of the prisoner. For hearings where the production of the prisoner is in the discretion of the court, counsel should consider filing a motion setting forth why production of the prisoner is necessary to protect his or her rights.

It should be noted, however, that *Penal Code § 2625* deals with the statutory authority to have parents incarcerated in California state or local institutions transported for dependency proceedings. In some cases an argument can be made for a due process right to be transported from California state or local institutions to dependency proceedings, regardless of whether it is for a jurisdiction hearing, a hearing at which parental rights may be terminated, or some other dependency hearing. For instance, in the *Jesusa V.* case, the California Supreme Court dealt with whether an incarcerated presumed, biological father had a right to be present at a parentage hearing at which the juvenile court determined another man who qualified as a presumed, nonbiological father was to be recognized as the child's presumed father. The majority opinion found there was no statutory right to be present for that hearing [*In re Jesusa V. (2004) 32 Cal. 4th 588, 599-601, 10 Cal. Rptr. 3d 205, 85 P.3d 2*]. But although the juvenile court did not take the additional steps at that hearing to enter a judgment of nonpaternity for the incarcerated presumed, biological father, as it should have so the child would have only one legally recognized father, the practical effect of finding the presumed, nonbiological father would be recognized as the child's presumed father was to effectively terminate the incarcerated biological father's rights. Thus, a compelling argument can be made that he did have a statutory right to be present for the parentage hearing under *Penal Code § 2625*. This was the view taken by the dissenting justices. Regardless, incarcerated, presumed, biological father also claimed a due process right to be present. Although the majority found no violation of that due process right, it impliedly recognized that right might exist in different factual setting in which the incarcerated parent was denied an opportunity to present his testimony in some form or to cross-examine witnesses [*In re Jesusa V. (2004) 32 Cal. 4th 588, 601-602, 10 Cal. Rptr. 3d 205, 85 P.3d 2* (plurality opn., Baxter, J.)]. Thus, courts and practitioners should be careful to ensure the due process rights of incarcerated parents are protected.

Notwithstanding any other law, however, in any proceeding in which an incarcerated parent's rights are subject to adjudication, the court may not order the removal and production of an incarcerated parent who has been sentenced to death, regardless of whether that sentence is being appealed [*Penal Code § 2625(g)*].

[9] Legal Guardians

A person who is a child's legal guardian through appointment under *Prob. Code § 1500 et seq.* generally has the same rights as a parent in a dependency proceeding [*In re Merrick V. (2004) 122 Cal. App. 4th 235, 250, 19 Cal. Rptr. 3d 490* ; *In re Carrie W. (2003) 110 Cal. App. 4th 746, 758, 2 Cal. Rptr. 3d 38]* . Thus, unless the guardianship is terminated, the probate guardian is entitled to receive copies of social worker's reports before hearings, have counsel appointed if the guardian is unable to afford counsel, object to evidence at the jurisdiction hearing, and to receive reunification services [*In re Merrick V. (2004) 122 Cal. App. 4th 235, 250, 19 Cal. Rptr. 3d 490 , citing Welf. & Inst. Code §§ 302, 317, 355*, and *361.5*].

Once dependency proceedings have been initiated, however, a motion to terminate a probate guardianship can be filed in the juvenile court pursuant to *Welf. & Inst. Code § 728*. This can be done as early as the detention hearing [*In re*

Merrick V. (2004) 122 Cal. App. 4th 235, 253, 19 Cal. Rptr. 3d 490] . Notice is to be given as set forth in the *Probate Code § 1511* [*Welf. & Inst. Code § 728(a)*]. If the motion to terminate the probate guardianship is granted prior to the court making its orders under *Welf. & Inst. Code § 361(c)*, the guardian will no longer be the guardian and no finding for removal will be necessary. Likewise, if the motion is granted before the court makes its orders under *Welf. & Inst. Code § 361.5(a)* for services, the guardian will no longer be a guardian and will not be entitled to services [*In re Merrick V. (2004) 122 Cal. App. 4th 235, 253, 19 Cal. Rptr. 3d 490]* . A petition under *Welf. & Inst. Code § 388* is not an appropriate vehicle for such a motion, since it can only be filed after the child is declared a dependent, while a motion to terminate a probate guardianship can be filed at any time after dependency proceedings have been initiated [*Welf. & Inst. Code §§ 388, 728*]. It is also not appropriate because in addition to a finding of the child's best interest, the standard for granting a *Welf. & Inst. Code § 388* petition requires a showing of new evidence or a change in circumstance, which is not required in terminating a probate guardianship under *Welf. & Inst. Code § 728* [*In re Angel S. (2007) 156 Cal. App. 4th 1202, 1207-1208, 67 Cal. Rptr. 3d 792]* . The motion to terminate a probate guardianship can, of course, be filed later in the dependency process at well.

The process for bringing about a hearing to terminate a probate guardianship in the juvenile court involves two steps. First, the social worker or other party makes a recommendation to the juvenile court to terminate the probate guardianship. This step can be done by filing a *Welf. & Inst. Code § 388* petition if the child is a dependent, but need not be [*Welf. & Inst. Code § 728(a)*; *Cal. Rules of Court, Rule 5.620(e)*; *In re Angel S. (2007) 156 Cal. App. 4th 1202, 1207, 67 Cal. Rptr. 3d 792]* . Upon receiving the recommendation, the court must order the appropriate agency or counsel to file a motion pursuant to Welf. & Inst. Code § section 728 [*Welf. & Inst. Code § 728(a)*; *Cal. Rules of Court, Rule 5.620(e)*; *In re Angel S. (2007) 156 Cal. App. 4th 1202, 1207, 67 Cal. Rptr. 3d 792]* . This motion is not done pursuant to *Welf. & Inst. Code § 388*. In preparing the motion, the social services agency or counsel will be able to contact the probate department of the appropriate county to determine to whom notice should be given. Once the motion, with proper proofs of service, is before the juvenile court, the juvenile court then conducts a hearing to determine whether to enter an order terminating the probate guardianship. "The two-step process ensures that all interested parties have an opportunity to appear in the juvenile court and be heard on the matter" [*In re Angel S. (2007) 156 Cal. App. 4th 1202, 1207, 67 Cal. Rptr. 3d 792]* .

A person who is a child's legal guardian through appointment by the juvenile court pursuant to *Welf. & Inst. Code § 366.26* may also generally have some of the same rights as a parent in a dependency proceeding. This occurs when a petition under *Welf. & Inst. Code § 300* is filed to initiate dependency proceedings and remove a child from a dependency guardian [*see, e.g.,* *In re Alicia O. (1995) 33 Cal. App. 4th 176, 178, 39 Cal. Rptr. 2d 119]* . This is not the norm, however. Normally, if the social services agency believes a child needs to be removed from a dependency guardian or that the dependency guardianship needs to be modified or terminated, a petition under *Welf. & Inst. Code § 388* is filed [*Welf. & Inst. Code § 366.3(c)*; *Cal. Rules of Ct., Rule 5.740(c)*]. Notice is then provided as appropriate for a modification petition. One court has held that dependency guardians are not entitled to treatment like a parent, reunification services if the matter comes back into the dependency system, or to a finding that reunification services were adequate [*In re Carlos E. (2005) 129 Cal. App. 4th 1408, 1417-1421, 29 Cal. Rptr. 3d 317]* . This is contrary to common practice, and whether other courts will follow the lead of the *Carlos E.* court remains to be seen.

Although the form of the notice or petition and the applicable provisions regarding notice are somewhat different [*In re Merrick V. (2004) 122 Cal. App. 4th 235, 249-254, 19 Cal. Rptr. 3d 490]* , the general steps and standards for terminating a guardianship in the juvenile court are the same for either a probate or a dependency guardianship. Both require notice and an opportunity to be heard, including a right to the appointment of counsel if necessary. The due process requirements are therefore essentially the same for terminating either kind of guardianship in the juvenile court [*In re Alicia O. (1995) 33 Cal. App. 4th 176, 183, fn. 5, 39 Cal. Rptr. 2d 119]* .

If the social services agency is seeking to terminate a guardianship in the juvenile court, it must establish by clear and convincing evidence that termination of the legal guardianship is best for the child [*In re Merrick V. (2004) 122 Cal. App. 4th 235, 254, 19 Cal. Rptr. 3d 490* (terminating probate guardianship); *In re Alicia O. (1995) 33 Cal. App. 4th*

176, 183, 39 Cal. Rptr. 2d 119 (terminating dependency guardianship)]. This is a higher burden than the preponderance of the evidence standard used if a parent is seeking to terminate a probate guardianship in the superior court or a dependency guardianship in the juvenile court [*Guardianship of Simpson (1998) 67 Cal. App. 4th 914, 930-933, 79 Cal. Rptr. 2d 389* (parent seeking to terminate probate guardianship); *In re Michael D. (1996) 51 Cal. App. 4th 1074, 1086-1087, 59 Cal. Rptr. 2d 575* (parent seeking to terminate dependency guardianship)]. This is understandable, since if a parent seeks to set aside a guardianship it is normally so the child may be returned to the parent's custody, while if a social services agency is seeking to terminate a guardianship, placement with someone other than a parent is likely to occur.

In deciding whether terminating either kind of guardianship is best for the child, one of the factors the court should consider is the effect on the child of removing the child from the guardian with whom the child has been living, often for an extended period of time [*cf. Guardianship of Kassandra H. (1998) 64 Cal. App. 4th 1228, 1238-1240, 75 Cal. Rptr. 2d 668]* . This is also consistent with the continuing goal of providing children with stable, permanent placements. In some cases it will be best to terminate the probate guardianship. In others it will be best to maintain the guardianship and offer reunification or family maintenance services.

If the juvenile court terminates a probate guardianship, it must provide notice to the court in which the guardianship was originally established [*Welf. & Inst. Code § 728(a)*].

For a further discussion of terminating a dependency guardianship, see *§ 328.181*.

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PART II. LEGAL BACKGROUND
D. Parties and Participants--Standing, Rights, and Appointment of Counsel and GAL

28-328 California Forms of Pleading and Practice--Annotated § 328.60A

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§ 328.60A Rights of De Facto Parents

[1] "De Facto Parent" Defined

The concept of the de facto parent in dependency proceedings is one that is judicially created and maintained [*In re Leticia S. (2001) 92 Cal. App. 4th 378, 383, fn. 5, 111 Cal. Rptr. 2d 810* ; *In re Brandon M. (1997) 54 Cal. App. 4th 1387, 1393, 63 Cal. Rptr. 2d 671]* . It has been a part of California's dependency law since the 1974 decision of the California Supreme Court in the case of *In re B.G. (1974) 11 Cal. 3d 679, 114 Cal. Rptr. 444, 523 P.2d 244* . But the California Legislature has not recognized the de facto parent as a participant in dependency proceedings. Thus, the practitioner must look not to statutes, but to the rules of court and decisional law for authority and information regarding de facto parent status. A "de facto parent" is defined as a person who is the current or recent caretaker of a child and who has been found by the court to have assumed, on a day-to-day basis, the role of a parent to the child, fulfilling both the child's physical and psychological needs for care and affection and who has assumed that role for a substantial period of time [*Cal. Rules of Ct., Rule 5.502(10)*; *see also In re B.G. (1974) 11 Cal. 3d 679, 692 n.18, 114 Cal. Rptr. 444, 523 P.2d 244]* . This concept has received such recognition in decisional law that it has even been held not to be inconsistent with or preempted by the Indian Child Welfare Act [*In re Brandon M. (1997) 54 Cal. App. 4th 1387, 1396-1400, 63 Cal. Rptr. 2d 671]* .

[2] De Facto Parent Status

[a] Burden of Proof and Standard of Review

The person seeking de facto parent status bears the burden of proving by at least a preponderance of the evidence that they meet the criteria for receiving de facto parent status [*In re Patricia L. (1992) 9 Cal. App. 4th 61, 67, 11 Cal. Rptr. 2d 631* ; *In re Joshuia S. (1988) 205 Cal. App. 3d 119, 125, 252 Cal. Rptr. 106]* . When making a request for de facto parent status, the applicant must submit Judicial Council forms JV-295--De Facto Parent Request and JV-296--De Facto

Parent Statement.

Appellate courts reviewing the grant or denial of de facto parent status "have not, by and large, clearly articulated a standard of appellate review" [*In re Michael R. (1998) 67 Cal. App. 4th 150, 156, 78 Cal. Rptr. 2d 842]* . One court treated the denial of de facto parent status as akin to a demurrer without leave to amend, and essentially reviewed the decision de novo [*In re Hirenia C. (1993) 18 Cal. App. 4th 504, 512, 22 Cal. Rptr. 2d 443]* . Another court disagreed with that approach, noting it gave too little regard for the function of the juvenile court in its ruling on the request for de facto parent status. That court determined the appropriate standard was the abuse of discretion standard of review [*In re Michael R. (1998) 67 Cal. App. 4th 150, 156, 78 Cal. Rptr. 2d 842]* . In so doing, however, the *Michael R.* court noted the decision to grant or deny de facto parent status depended on factual determinations, including the resolution of disputed facts and credibility [*In re Michael R. (1998) 67 Cal. App. 4th 150, 156, 78 Cal. Rptr. 2d 842]* . Such factual determinations are normally reviewed using the substantial evidence standard, not the abuse of discretion standard. The *Michael R.* court noted that other appellate courts have reviewed the evidence to see if it supported the court's order denying de facto parent status, thus utilizing the substantial evidence standard without articulating it [*In re Michael R. (1998) 67 Cal. App. 4th 150, 156, 78 Cal. Rptr. 2d 842 , citing In re Ashley P. (1998) 62 Cal. App. 4th 23, 26-30, 72 Cal. Rptr. 2d 383* , and *In re Vincent C. (1997) 53 Cal. App. 4th 1347, 1356-1359, 62 Cal. Rptr. 2d 224]* . It then muddied the issue, however, by stating "the lower court does not abuse its discretion if substantial evidence supports its determination to grant or deny de facto parent status" [*In re Michael R. (1998) 67 Cal. App. 4th 150, 156, 78 Cal. Rptr. 2d 842]* . Some courts have followed the *Michael R.* approach and utilized the abuse of discretion standard without analysis as to why that standard should be used [*see, e.g.*, *In re Merrick V. (2004) 122 Cal. App. 4th 235, 257, 19 Cal. Rptr. 3d 490* ; *In re Jacob E. (2004) 121 Cal. App. 4th 909, 919, 18 Cal. Rptr. 3d 15* ; *In re Leticia S. (2001) 92 Cal. App. 4th 378, 381, 111 Cal. Rptr. 2d 810]* . The practical difference between the substantial evidence and abuse of discretion standards of review is, of course, not that significant [*In re Jasmine D. (2000) 78 Cal. App. 4th 1339, 1351, 93 Cal. Rptr. 2d 644]* . Nevertheless, the issue bears clarification.

The grant of de facto parent status to a person may or may not serve the child's best interest. That is not the question before the court when it considers an application for de facto parent status, however [*In re Leticia S. (2001) 92 Cal. App. 4th 378, 383, fn. 5, 111 Cal. Rptr. 2d 810]* . The question the court considers is whether the individual facts of the case show the person applying for de facto parent status has assumed the role of a parent and cared for the child, developing a substantial interest in the companionship, care, and management of the child that merits legal recognition. If the person has such an interest, de facto parent status should be granted so the person can participate in the proceedings to assert and protect his or her own interest in the companionship, care, custody and management of the child [*In re B.G. (1974) 11 Cal. 3d 679, 692-693, 114 Cal. Rptr. 444, 523 P.2d 244* ; *In re Kieshia E. (1993) 6 Cal. 4th 68, 75-76, 23 Cal. Rptr. 2d 775, 859 P.2d 1290* ; *In re Leticia S. (2001) 92 Cal. App. 4th 378, 383, fn. 5, 111 Cal. Rptr. 2d 810]* . As the Supreme Court has held, "the key to the privileged status of de facto parenthood is adherence to 'the role of parent,' both physical and psychological" [*In re Kieshia E. (1993) 6 Cal. 4th 68, 78, 23 Cal. Rptr. 2d 775, 859 P.2d 1290]* . Thus, granting or denying an application for de facto parent status is more a factual determination than a discretionary one. As a result, the better approach is to utilize the substantial evidence standard of review, as many courts have done [*see, e.g.*, *In re Ashley P. (1998) 62 Cal. App. 4th 23, 26-30, 72 Cal. Rptr. 2d 383* ; *In re Vincent C. (1997) 53 Cal. App. 4th 1347, 1356-1359, 62 Cal. Rptr. 2d 224* ; *In re Krystle D. (1994) 30 Cal. App. 4th 1778, 1808, 37 Cal. Rptr. 2d 132]* . This approach is also appropriate in reviewing the factual determination that a person applying for de facto parent status has acted inconsistently with the role of a parent by abusing or endangering the child and hence has forfeited the right to receive de facto parent status [*In re Kieshia E. (1993) 6 Cal. 4th 68, 79-80, 23 Cal. Rptr. 2d 775, 859 P.2d 1290]* . Although the result will invariably be the same regardless of which of the two standards is used, the substantial evidence standard of review is the more appropriate standard for the review of the grant or denial of de facto parent status.

[b] Factors Considered

Whether the person seeking de facto parent status is entitled to receive such status "depends strongly on the particular

individual seeking such status and the unique circumstances of the case." Among the various factors that courts have used to determine whether to grant de facto parent status are the following [*In re Patricia L. (1992) 9 Cal. App. 4th 61, 66-67, 11 Cal. Rptr. 2d 631]* :

- The child is "psychologically bonded" to the adult.
- The adult has assumed the role of a parent on a day-to-day basis for a substantial period of time.
- The adult possesses information about the child unique from the other participants in the process.
- The adult has regularly attended juvenile court hearings.
- A future proceeding may result in an order permanently foreclosing any future contact with the adult.

In awarding de facto parent status, there are two general approaches. The traditional approach focuses on the nature of the relationship of the child to the person seeking de facto parent status. Where there currently exists a positive psychological parent-child relationship that has developed in a wholesome and stable environment, de facto parent status is warranted [*see, e.g.,* *In re B.G. (1974) 11 Cal. 3d 679, 692-693, 114 Cal. Rptr. 444, 523 P.2d 244* , *citing* Goldstein, Freud, & Solnit, *Beyond the Best Interests of the Child* (1973) (psychological parent-child relationship), and former *Civ. Code § 4600* (*now see Fam. Code § 3040* (if custody is not awarded a parent it should go to person with whom the child has been living in a wholesome and stable environment); *Guardianship of Phillip B. (1983) 139 Cal. App. 3d 407, 419-423, 188 Cal. Rptr. 781* (psychological parents as having a relationship which has "long been recognized in the fields of law and psychology"); *see also* *In re Patricia L. (1992) 9 Cal. App. 4th 61, 67, 11 Cal. Rptr. 2d 631* (subsequent lack of psychological bond between child and de facto parent justifies termination of that status)]. This view holds that it is the special nature of the positive psychological parent-child relationship which creates the legally recognizable interest of the adult in the child so as to merit an award of de facto parent status. This is the better approach.

Many courts, however, have taken a far more liberal view toward the granting of de facto parent status, believing that the juvenile court can only benefit from all possible information [*see, e.g.,* *In re Rachael C. (1991) 235 Cal. App. 3d 1445, 1452, 1 Cal. Rptr. 2d 473* , *disapproved on other grounds to the extent inconsistent in* *In re Kieshia E. (1993) 6 Cal. 4th 68, 79-80, 23 Cal. Rptr. 2d 775, 859 P.2d 1290* ; *Christina K. v. Superior Court (1986) 184 Cal. App. 3d 1463, 1467-1469, 229 Cal. Rptr. 564]* . This trend has in some cases led to extreme outcomes. In *Kieshia E.*, the appellate court affirmed an award of de facto parent status to a man with whom the child did not want any further contact; although he had helped raise this four-and-a-half-year-old girl, he had molested her and threatened to cut her head off if she told [*In re Kieshia E. (1993) 6 Cal. 4th 68, 72-74, 23 Cal. Rptr. 2d 775, 859 P.2d 1290* (reversing the court of appeal's judgment)]. In *Vanessa P.*, the court held that the mere nomination by a parent of a person for legal guardianship justified the granting of de facto parent status [*In re Vanessa P. (1995) 38 Cal. App. 4th 1763, 1770, 45 Cal. Rptr. 2d 760]* . *Vanessa P.* must be viewed as an anomaly even under the more liberal approach to the granting of such status, since it would allow the awarding of de facto parent status without any showing of a psychological parent-child relationship or finding that the person seeking such status has any information for the court. Nevertheless, the *Vanessa P.* decision and the lower courts' rulings in the *Kieshia E.* case are further evidence of the trend toward liberalizing the granting of de facto parent status.

Decisions following the more liberal approach often overlook or discount the fact that the juvenile court can allow persons with a legitimate interest in a case to be present during hearings [*Welf. & Inst. Code § 346*] and receive information if appropriate [*Welf. & Inst. Code § 827(a)*], that any person can ask the court pursuant to *Welf. & Inst. Code § 388* to modify or vacate any order if they have evidence the court did not have at the time the order was made and the best interests of the child would be served, and that relatives and caretakers of dependent children have the right to make their views known to the juvenile court and to provide the court with information [*Welf. & Inst. Code §*

366.2(d); *Cal. Rules of Ct., Rule 5.534(f)*]. This is not to say that the fact that persons seeking de facto parent status have information should be discounted by the court in its determination of de facto parent status. Where, however, such persons do not have a present and positive psychological parent-child relationship with the child, they should be allowed to present their views and information by means other than the granting of the special standing of de facto parent status with the additional rights that it affords.

Regardless of the approach taken, the law is clear that the decision to award de facto parent status hinges on the person's own interest in and relationship with the child, if any, and not in his or her interest in preserving the child's relationship with the parent [*In re Daniel D. (1994) 24 Cal. App. 4th 1823, 1835-1836, 30 Cal. Rptr. 2d 245* ; *In re Vanessa Z. (1994) 23 Cal. App. 4th 258, 261, 28 Cal. Rptr. 2d 313]* . When ruling on a request for de facto parent status, the court must use Judicial Council form JV-297--De Facto Parent Order.

[c] When the Applicant for De Facto Parent Status Has Abused or Endangered Child

When an individual meets some of the criteria set out in [b], *above*, but has committed a substantial harm to the child, such as sexual or other serious physical abuse that is fundamentally at odds with "the role of parent," the perpetrator's "protectible interest" in dispositional decisions is extinguished and that person is not entitled to receive de facto parent status [*In re Kieshia E. (1993) 6 Cal. 4th 68, 78, 79-80, 23 Cal. Rptr. 2d 775, 859 P.2d 1290* (*disapproving In re Rachael C. (1991) 235 Cal. App. 3d 1445, 1 Cal. Rptr. 2d 473* to the extent inconsistent)]. In *Kieshia E.* the individual seeking de facto parent status had molested the child, which the Supreme Court found was a basis for denying de facto parent status [*In re Kieshia E. (1993) 6 Cal. 4th 68, 71-73, 23 Cal. Rptr. 2d 775, 859 P.2d 1290]* . The *Kieshia E.* holding is not limited to cases of physical or sexual abuse, however [*In re Merrick V. (2004) 122 Cal. App. 4th 235, 257, 19 Cal. Rptr. 3d 490* ; *In re Leticia S. (2001) 92 Cal. App. 4th 378, 382, 111 Cal. Rptr. 2d 810]* . If the person's conduct contributed to grounds for dependency jurisdiction, such as when a man used drugs with the mother and left them out where the child could reach it, that person's conduct falls within the *Kieshia E.* holding and prohibits the individual from receiving the legal status of de facto parent [*In re Leticia S. (2001) 92 Cal. App. 4th 378, 382, 111 Cal. Rptr. 2d 810]* . As another specific example, "Kidnapping the children, keeping them in hiding from the DPSS, and removing them without authority from the juvenile court's jurisdiction, purposely to allow free access by the abusing parent, is tantamount to aiding and encouraging the abuse" and has been held to be sufficient to deny de facto parent status to a grandmother even though she had not personally abused the children [*In re Michael R. (1998) 67 Cal. App. 4th 150, 156-158, 78 Cal. Rptr. 2d 842]* . An individual can also be denied de facto parent status where, despite a loving relationship with the child and a long period of caring for the child, the person neglects parental responsibilities by failing to enroll the child in school, failing to schedule medical and dental appointments, hitting the child with a stick, and allowing the child to witness domestic violence [*In re Jacob E. (2004) 121 Cal. App. 4th 909, 920, 18 Cal. Rptr. 3d 15]* . Thus, if the person's misconduct was a significant factor in causing the child's dependency, that misconduct will generally be considered inconsistent with the role of a parent and grounds for the denial of de facto parent status [*In re Merrick V. (2004) 122 Cal. App. 4th 235, 257, 19 Cal. Rptr. 3d 490* (grandmother's conduct "at least indirectly" caused the children to be at risk, leading to their dependency); *In re Leticia S. (2001) 92 Cal. App. 4th 378, 382-383, 111 Cal. Rptr. 2d 810]* . Care should be taken not to attempt to stretch the *Kieshia E.* decision too far. For example, that an applicant can no longer care for a child or is incapable of caring for the child's special needs, is aggressive and outspoken, and can be difficult for the social worker and the child's school to deal with, and the grant of de facto parent status may prolong the dependency proceedings is not grounds for denying de facto parent status [*In re Vincent C. (1997) 53 Cal. App. 4th 1347, 1356-1359, 62 Cal. Rptr. 2d 224]* .

[d] Terminating De Facto Parent Status

As noted by one court of appeal, "To terminate de facto parent status, the department has the burden of establishing a change of circumstances that no longer support the status, such as when a psychological bond no longer exists between the adult and the child. In this regard, we emphasize that de facto parent status does not terminate by operation of law or by any other automatic mechanism except where the dependency itself is terminated. During the dependency if the

department believes such status is no longer warranted, it must file a noticed motion to that effect allowing the court to hold a hearing. Where there are disputed factual issues, the court should permit the parties to present evidence" [*In re Patricia L. (1992) 9 Cal. App. 4th 61, 67, 11 Cal. Rptr. 2d 631]* . One case has disagreed with the *Patricia L.* decision to the extent it states that de facto parent status terminates when dependency jurisdiction has been terminated. As noted by that court, "Dependency proceedings do not operate as some sort of toggle switch which turns de facto parent status off and on. Whether a person is a de facto parent is a question of fact regarding the fulfillment of a youngster's physical needs and psychological need for affection and care by a nonparent" [*In re Joel H. (1993) 19 Cal. App. 4th 1185, 1196, 23 Cal. Rptr. 2d 878]* . In this regard, *Joel H.* confuses the concept of a "psychological parent" with the legal status afforded in dependency proceedings of "de facto parent." Whether a person is a child's "psychological parent" is a question of fact that exists completely independent of any dependency or other court proceedings. Whether a person is a child's "de facto parent" is a legal determination that has meaning only within the dependency proceeding itself. As such, *Patricia L.* is correct on this issue and de facto parent status terminates if the dependency proceedings are terminated [*see also* *In re Leticia S. (2001) 92 Cal. App. 4th 378, 383, fn. 5, 111 Cal. Rptr. 2d 810]* . When finding there is a change of circumstances that no longer support de facto parent status and ordering the status terminated, the juvenile court must use Judicial Council form JV-298--Order Ending De Facto Parent Status.

[3] Limited Rights of De Facto Parents

The status of de facto parents does not entitle them to the same rights and responsibilities of parents or guardians. A de facto parent is not the same as a parent and the de facto parent is not given all the rights and preferences of a parent or guardian [*In re Kieshia E. (1993) 6 Cal. 4th 68, 77, 23 Cal. Rptr. 2d 775, 859 P.2d 1290]* . Instead, the concept of de facto parent status recognizes "limited rights" for the de facto parent in dependency cases [*In re Leticia S. (2001) 92 Cal. App. 4th 378, 381, 111 Cal. Rptr. 2d 810]* . De facto parents have the right to be present at dependency proceedings, to be represented by counsel, and to present evidence. They do not have the right to reunification services, custody, or visitation [*In re Kieshia E. (1993) 6 Cal. 4th 68, 77, 23 Cal. Rptr. 2d 775, 859 P.2d 1290* ; *In re Jody R. (1990) 218 Cal. App. 3d 1615, 1628, 267 Cal. Rptr. 746* ; *In re Jamie G. (1987) 196 Cal. App. 3d 675, 684, 241 Cal. Rptr. 869*]. Since de facto parents do not have a right to such services, even if they are given services they cannot appeal a juvenile court's findings regarding such services [*Clifford S. v. Superior Court (1995) 38 Cal. App. 4th 747, 752, 45 Cal. Rptr. 2d 333]* .

One case has held that de facto parents are entitled to "the same procedural rights as natural parent[s]," since they are entitled to participate as "parties" [*In re Matthew P. (1999) 71 Cal. App. 4th 841, 850, 84 Cal. Rptr. 2d 269]* . But this statement is misleading. De facto parents are parties and entitled to procedural due process to the extent necessary and appropriate for them to assert they recognizable interest in the child [*see, e.g.,* *In re Cynthia C. (1997) 58 Cal. App. 4th 1479, 1490-1491, 69 Cal. Rptr. 2d 1* ; *In re Jonique W. (1994) 26 Cal. App. 4th 685, 693, 31 Cal. Rptr. 2d 601]* . They are not, however, entitled to the same procedural due process rights as natural parents throughout the entire course of the dependency process. Thus, while the ultimate holding of the *Matthew P.* decision that the de facto parents had a right to a contested hearing on their petition pursuant to *Welf. & Inst. Code § 388* was, under the facts of that case, correct, its determination that de facto parents have the same procedural rights as natural parents was not.

PRACTICE TIP (PARENT'S P.O.V.):

Change of Placement Issues. Often, caretakers seek de facto parent status because of concern that the agency is planning on moving a child from the de facto parent's home. If they are the current caregiver at the time of the termination of parental rights, they will receive preferential consideration for adoption [*Welf. & Inst. Code § 366.26(k)*]. After termination of parental rights, if the caretaker qualifies as a "prospective adoptive parent" [*Welf & Inst. Code § 366.26(n)(1)*] they are entitled to notice of a planned removal, and a hearing regarding whether this removal is in the best interest of the child. The qualifications for these different types of status vary and the terms are not interchangeable. Nevertheless, each may have a significant impact on future placement of the child, and hence parents should carefully consider their relationship with the caregiver in deciding whether to support or oppose a request to

receive de facto parent status, or to remove the child from a de facto parent.

Matthew P. also states in dicta that de facto parent status entitles the holder to a copy of the social worker's report [*In re Matthew P. (1999) 71 Cal. App. 4th 841, 847, 84 Cal. Rptr. 2d 269]* . This too is incorrect. De facto parents are not automatically entitled to copies of social worker's reports or other documents. Instead, to the extent necessary and appropriate, de facto parents receive their discovery through *Welf. & Inst. Code § 827* [*see* California Ctr. for Jud. Educ. and Research, Cal. Judges Benchguides, Benchguide 102: Juvenile Dependency Disposition Hearing (Jan. 2009) §§ 1.2.15, 102.20, pp. 102-23 to 102-24, 102-27 (suggesting discovery to a de facto parent under *Welf. & Inst. Code § 827* be limited to that which is relevant to the issues the de facto parent is involved in); *see also* discussion in *§ 328.109[15]*]. Thus, de facto parents do have a right to discovery, but they do not have an automatic right to receive copies of the social worker's reports. When granting de facto parent status, juvenile courts should also make an order for such continuing discovery pursuant to *Welf. & Inst. Code § 827* as it deems appropriate.

California Forms of Pleading and Practice--Annotated

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329
CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
D. Parties and Participants--Standing, Rights, and Appointment of Counsel and GAL

28-328 California Forms of Pleading and Practice--Annotated § 328.61

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§ 328.61 Appointment of Counsel and Guardian ad Litem

[1] Counsel for Parent or Guardian

The court may appoint counsel when it appears to the court that a parent or guardian of the child desires counsel but is unable to afford one and, for that reason, cannot employ counsel [*Welf. & Inst. Code § 317(a)*].

The court must appoint counsel, unless it finds that the parent or guardian has made a knowing and intelligent waiver of counsel, when it appears to the court that a parent or guardian of the child is unable to afford and for that reason cannot employ counsel, and the child has been placed in out-of-home care, or the petitioning agency is recommending that the child be placed in out-of-home care [*Welf. & Inst. Code § 317(b)*]. Counsel is not to be appointed for a parent or guardian, however, unless that parent or guardian appears and requests such appointment or otherwise communicates to the court such a desire [*In re Ebony W. (1996) 47 Cal. App. 4th 1643, 1646-1648, 55 Cal. Rptr. 2d 337]* .

For a discussion of the role and duties of counsel for parents or guardians, see Rauber, et. al., Representing Parents: The Role And Duties Of Respondent's Counsel, in Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases (Bradford Pub. 2005) ch. 20, pp. 443-492.

For a discussion regarding the right to effective assistance of counsel and the raising of claims of ineffective assistance of counsel, see *§ 328.193*.

[2] Counsel for "De Facto Parent"

De facto parents (discussed in *§ 328.60A*) may be represented by retained counsel in dependency proceedings [*Cal. Rules of Ct., Rule 5.534(e)(2)*]. There is, however, no statutory right to the appointment of counsel for de facto parents in dependency cases. This is not surprising since de facto parent status is a judicially created and maintained concept

that has never been recognized by the Legislature for inclusion in the dependency statutory scheme.

Nevertheless, *Cal. Rules of Ct., Rule 5.534(e)(2)*, allows the juvenile court to appoint counsel for a de facto parent at the court's discretion. Absent statutory authority, however, such appointments must be pro bono appointments unless other arrangements are made [California Ctr. for Jud. Educ. and Research, Cal. Judges Benchguide, Benchguide 102: Juvenile Dependency Disposition Hearing, (Sept. 2007) § 102.15, p. 102-24, *citing J.W. v. Superior Court (1993) 17 Cal. App. 4th 958, 970, 22 Cal. Rptr. 2d 527* , and *Payne v. Superior Court (1976) 17 Cal. 3d 908, 920, 924, 132 Cal. Rptr. 405, 553 P.2d 565* ; *see also In re Joel H. (1993) 19 Cal. App. 4th 1185, 1196, 1199, 23 Cal. Rptr. 2d 878* (de facto parent has no right to court-appointed counsel on appeal)]. Further, it should be noted the rule of court that provides for the discretionary appointment of counsel for de facto parents does so after de facto parent status has been granted. The rule does not provide for the discretionary appointment of counsel by the juvenile court for the bringing of the de facto parent application [*Cal. Rules of Ct., Rule 5.534(e)(2)*].

[3] Guardian ad Litem (GAL) for Parent or Guardian

In some dependency cases the parent or guardian is someone who has a conservator [*In re Lee G. (1991) 1 Cal. App. 4th 17, 21, 1 Cal. Rptr. 2d 375* ; *see Welf. & Inst. Code § 5000 et seq.*; *Prob. Code § 1800 et seq.*]. More frequently, however, the question of whether the parent or guardian is mentally competent enough to participate in the dependency proceedings comes up during the proceedings themselves. In either case the question arises as to what the standard is for the appointment of a guardian ad litem (GAL) for the parent or guardian in dependency proceedings [*see Code Civ. Proc. § 372*].

This question was initially answered in the case of *Christina B.* [*In re Christina B. (1993) 19 Cal. App. 4th 1441, 23 Cal. Rptr. 2d 918]* . In that case the court of appeal held the correct standard is that set forth in *Penal Code § 1367* requiring the person either be unable to understand the nature of the proceedings or to assist counsel in a rational manner in the conduct of a defense [*In re Christina B. (1993) 19 Cal. App. 4th 1441, 1449-1451, 23 Cal. Rptr. 2d 918* (rejecting the proposition that the standard in *Prob. Code § 1801* should apply); *see also In re R.S. (1985) 167 Cal. App. 3d 946, 980, 213 Cal. Rptr. 690* (impliedly applying the standard set forth in the Penal Code)]. More recently, however, the issue was considered by another court. That court agreed that in most dependency cases in which this question is raised the standard in *Penal Code § 1367* will be the appropriate one to consider. But it concluded a guardian ad litem should be appointed for the parent or guardian if the standard in either *Penal Code § 1367* or *Prob. Code § 1801* is met [*In re Sara D. (2001) 87 Cal. App. 4th 661, 667, 104 Cal. Rptr. 2d 909]* . The level of proof required for the appointment of a guardian ad litem is a preponderance of the evidence [*In re Sara D. (2001) 87 Cal. App. 4th 661, 667, 104 Cal. Rptr. 2d 909* ; *In re Christina B. (1993) 19 Cal. App. 4th 1441, 1450, 23 Cal. Rptr. 2d 918]* .

If the parent or guardian consents to the appointment of a GAL there is no due process problem involved in the appointment. If a parent or guardian does not consent to the appointment of a GAL, however, either the court or counsel must explain to the parent or guardian the purpose of a GAL, what authority the GAL will have, and the reason it is believed one should be appointed. The parent or guardian must be granted at least an informal hearing and an opportunity to be heard on the issue [*In re Daniel S. (2004) 115 Cal. App. 4th 903, 912, 9 Cal. Rptr. 3d 646* ; *In re Joann E. (2002) 104 Cal. App. 4th 347, 354-361, 128 Cal. Rptr. 2d 189* ; *In re Jessica G. (2001) 93 Cal. App. 4th 1180, 1187-1188, 113 Cal. Rptr. 2d 714* ; *In re Sara D. (2001) 87 Cal. App. 4th 661, 671-672, 104 Cal. Rptr. 2d 909]* . Application of this procedure is not retroactive, however, and the fact a GAL may have been appointed prior to these procedures being recognized cannot be used to set aside juvenile court findings and orders that are already final [*Contra Costa County Children and Family Services Bureau v. Superior Court (2004) 117 Cal. App. 4th 111, 118-119, 11 Cal. Rptr. 3d 459]* .

At one point there was a conflict of decision as to whether error in the appointment process for a guardian ad litem was structural error requiring automatic reversal or was subject to a harmless error analysis. One line of cases said it was structural error [*see, e.g., In re C. G. (2005) 129 Cal. App. 4th 27, 34, 27 Cal. Rptr. 3d 872]* . The other line applied a

harmless error analysis [*see, e.g.,* *In re Enrique G. (2006) 140 Cal. App. 4th 676, 685-687, 44 Cal. Rptr. 3d 724]* . The California Supreme Court has resolved that controversy finding it is subject to harmless error analysis [*In re James F. (2008) 42 Cal. 4th 901, 905, 918-919, 70 Cal. Rptr. 3d 358, 174 P.3d 180]* . The Supreme Court expressly did not determine exactly what due process required in the appointment process for a guardian ad litem in a dependency case, because the violation had been conceded in that case, but noted "the use of flawed procedures in the appointment of a guardian ad litem for a parent does not inevitably and necessarily render dependency proceedings unfair in any fundamental sense," and held it was trial error subject to harmless error analysis [*In re James F. (2008) 42 Cal. 4th 901, 918-919, 70 Cal. Rptr. 3d 358, 174 P.3d 180]* . The Court disapproved the *C.G.* case to the extent inconsistent [*In re James F. (2008) 42 Cal. 4th 901, 919 n.2, 70 Cal. Rptr. 3d 358, 174 P. 3d 180]* . Under the facts of the *James F.* case, the Court found the parent had suffered no actual prejudice and thus the error was harmless [*In re James F. (2008) 42 Cal. 4th 901, 918-919, 70 Cal. Rptr. 3d 358, 174 P.3d 180]* .

For discussion of harmless error of a federal constitutional dimension, see *§ 328.194[2]*.

For discussion of structural error in dependency cases, see *§ 328.194[3]*.

[4] Guardian ad Litem (GAL) for Minor Parent

Must the juvenile dependency court automatically appoint a guardian ad litem for a parent who is a minor? One case holds it must, even when the minor presumed parent does not appear [*In re D.D. (2006) 144 Cal. App. 4th 646, 648, 50 Cal. Rptr. 3d 578*]. In that case the unmarried minor parent was a presumed father, apparently under *Fam. Code § 7611(d)*, and was listed on the dependency petition as the presumed father. The mother was also a minor. At the detention hearing the court appointed an attorney and a guardian ad litem for the mother, with the GAL being appointed to make legal decisions for her [*In re D.D. (2006) 144 Cal. App. 4th 646, 650, 50 Cal. Rptr. 3d 578*]. The social study for the jurisdictional hearing indicated the minor presumed father received SSI due to being developmentally disabled. Reunification services were ordered for both minor parents [*In re D.D. (2006) 144 Cal. App. 4th 646, 651, 50 Cal. Rptr. 3d 578*]. Although the social worker had telephonic contact with the minor presumed father and had sent a letter and notice to him, he did not appear in the dependency case until the six-month review hearing. At that time an attorney and a guardian ad litem were appointed for him. The juvenile court continued services for the mother, but terminated them for the minor presumed father. He appealed, contending the court erred at the outset of the case by not appointing an attorney and a GAL for him [*In re D.D. (2006) 144 Cal. App. 4th 646, 652, 50 Cal. Rptr. 3d 578*].

The court of appeal in *D.D.* agreed, holding that a guardian ad litem was required under *Code of Civ. Proc. § 372(a)*, as a matter of law [*In re D.D. (2006) 144 Cal. App. 4th 646, 652, 50 Cal. Rptr. 3d 578 , citing Code of Civ. Proc. § 372(a), and* *In re Sara D. (2001) 87 Cal. App. 4th 661, 667, 104 Cal. Rptr. 2d 909*]. The court distinguished the case of *Emily R.*, because in that case the failure to appoint a GAL was not error because the minor who did not appear after notice was only an alleged father, not a presumed father as in *D.D.* [*In re D.D. (2006) 144 Cal. App. 4th 646, 653-654, 50 Cal. Rptr. 3d 578 , citing* *In re Emily R. (2000) 80 Cal. App. 4th 1344, 1347, 1358, 96 Cal. Rptr. 2d 285*]. The court of appeal reversed all findings and orders after the detention hearing, holding that because the presumed father "was a minor and had neither a guardian ad litem nor an attorney to represent him, ... the proceedings were fundamentally unfair" [*In re D.D. (2006) 144 Cal. App. 4th 646, 654, 50 Cal. Rptr. 3d 578*]. One appellate court agreed with the *D.D.* holding [*In re M.F. (2008) 161 Cal. App. 4th 673, 678-679, 74 Cal. Rptr. 3d 383]* .

Most juvenile courts and practitioners disagreed with the *D.D.* decision for a number of reasons. First, dependency proceedings are special proceedings and generally neither the Civil Code nor the Code of Civil Procedure apply to dependency cases unless expressly made applicable [*In re Josiah Z. (2005) 36 Cal. 4th 664, 678-679, 31 Cal. Rptr. 3d 472, 115 P.3d 1133* ; *In re Shelley J. (1998) 68 Cal. App. 4th 322, 328, 79 Cal. Rptr. 2d 922*]. Indeed, the guardian ad litem principles that apply in civil cases "do not automatically extend to the dependency context," which has rules that are "slightly different" for dependency guardians ad litem [*In re Josiah Z. (2005) 36 Cal. 4th 664, 678-679, 31 Cal. Rptr. 3d 472, 115 P.3d 1133*]. Second, automatically appointing a guardian ad litem for a minor parent denies the

minor parent the right to an informal hearing and to object to the appointment of a GAL that is afforded adult parents [*see, e.g.,* *In re Daniel S. (2004) 115 Cal. App. 4th 903, 912, 9 Cal. Rptr. 3d 646* ; *In re Sara D. (2001) 87 Cal. App. 4th 661, 671-672, 104 Cal. Rptr. 2d 909*]. It also gives the minor parent less control of his or her own case than an adult parent would have, which is inconsistent with the trend to afford adolescent children a greater voice in their dependency case [*see, e.g.,* Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century, 6 Nev. L.J. 692 (2006)*; Haralambie, *Humility and Child Autonomy in Child Welfare and Custody Representation of Children, 28 Hamline J. Pub. L. & Pol'y 177, 189 (2006)*]. Further, case law holds that "under California law, minors have the absolute authority to make decisions concerning their parental rights ... without any requirement of approval by the minor's parent, guardian, or the court" [*In re Steven H. (2001) 86 Cal. App. 4th 1023, 1030, 103 Cal. Rptr. 2d 649* ; *see also* *American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 313-314, 66 Cal. Rptr. 2d 210, 940 P.2d 797* (minors have right to obtain abortions without parental consent or court authorization)]. To that end, minor parents have been held to the same standards as adult parents [*In re Ariel H. (1999) 73 Cal. App. 4th 70, 74, 86 Cal. Rptr. 2d 125*]. These points were not considered by the appellate court in *D.D.*, and thus many viewed the decision as incorrect.

Further, the *D.D.* case was distinguishable in two ways. One, in that case the minor presumed parent had neither an attorney nor a GAL in the early stages of the proceeding [*In re D.D. (2006) 144 Cal. App. 4th 646, 654, 50 Cal. Rptr. 3d 578*]. Indeed, this distinction was recognized at least in part by a different panel of the same appellate district that decided the *D.D.* case [*In re A. C. (2008) 166 Cal. App. 4th 146, 157-158, 82 Cal. Rptr. 3d 542]* . And two, in that case the minor presumed parent also had a developmental disability that warranted consideration in the question of appointing a GAL whether the presumed parent was a minor or an adult [*In re D.D. (2006) 144 Cal. App. 4th 646, 655, 50 Cal. Rptr. 3d 578*].

In response to the *D.D.* decision, the legislature has amended *Code Civ. Proc. § 372* and added *Welf. & Inst. Code § 326.7* to override that decision. Thus, although always questionable, the *D.D.* and *M.F.* decisions are no longer controlling on this issue. Now the general rule is that a minor parent may appear without a guardian ad litem in a family, dependency, guardianship or other child custody, visitation, or support proceeding regarding the minor parent's child [*Code Civ. Proc. § 372(c)(1)*]. If the court determines the minor parent is unable to understand the nature of the proceedings or to assist counsel in the preparation of the case, the court shall appoint a guardian ad litem either on its own motion or on the motion of the minor parent or the minor parent's counsel [*Code Civ. Proc. § 372(c)(2)*]. Likewise, the specific rule for dependency proceedings is that appointment of a guardian ad litem is not required for a minor parent of a child who is the subject of a dependency petition unless the court finds the minor parent is unable to understand the nature of the proceedings or to assist counsel in the preparation of the case [*Welf. & Inst. Code § 326.7*]. Nevertheless, two questions remain.

First, must a guardian ad litem be appointed for a minor parent who is not present? In light of the statutory changes [*Code Civ. Proc. § 372(c)*; *Welf. & Inst. Code § 326.7*] and in recognition that failure to appoint a guardian ad litem is not by itself a denial of due process even where one should be appointed [*In re A. C. (2008) 166 Cal. App. 4th 146, 158, 82 Cal. Rptr. 3d 542]* , the answer is no. Nevertheless, the better approach in such cases is to appoint counsel for a minor presumed parent at the outset of the dependency case, regardless of whether the minor presumed parent is present and requests counsel or not. This is contrary to the normal requirement that a parent express the desire for court appointed counsel [*In re Ebony W. (1996) 47 Cal. App. 4th 1643, 1646-1648, 55 Cal. Rptr. 2d 337]* , but in this limited situation the practice is appropriate and avoids due process problems. The appointed attorney can ensure adequate steps are taken to notice the minor parent, and can argue for appropriate findings and orders if the minor parent cannot be found or does not appear, which may include orders for further search efforts, services, visitation, or even a guardian ad litem.

Second, when the minor parent does appear, must the court automatically conduct an inquiry of the minor parent as to the need and desire for a guardian ad litem, in much the way it is done for adult parents for whom the question of a guardian ad litem has been raised [*see, e.g.,* *In re Daniel S. (2004) 115 Cal. App. 4th 903, 912, 9 Cal. Rptr. 3d 646* ; *In re Sara D. (2001) 87 Cal. App. 4th 661, 671-672, 104 Cal. Rptr. 2d 909]* ? No. Nothing in the law requires such an

inquiry. Indeed, the presumption is a guardian ad litem shall not be appointed. Thus, the inquiry need only be made if the issue is raised by the minor parent or the minor parent's counsel, or if the circumstances of the case or the minor parent's participation cause the court to believe an inquiry is appropriate.

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
D. Parties and Participants--Standing, Rights, and Appointment of Counsel and GAL

28-328 California Forms of Pleading and Practice--Annotated § 328.62

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§ 328.62 Rights of Child

[1] Child as Party to Dependency Action

Children have historically been considered as the subject of a dependency proceeding and have been afforded many rights and considerations as a result [*see, e.g., Welf. & Inst. Code §§ 317(c)* (appointment of counsel), former 335(a) (notice if 10 or more years of age), 399 (right to make a statement regarding placement decisions)]. Effective January 1, 1995, however, the child is also now a party to the dependency proceeding [*Welf. & Inst. Code § 317.5(b)*].

[2] Constitutional Right to Safe and Stable Life

The purpose of the dependency process is to protect abused or neglected children and those who are at risk of such abuse and neglect and to provide stable, permanent homes to those children if they cannot be returned to their home within a limited period of time. In this regard it has been recognized that the welfare of a child is a compelling state interest that the state has not only a right, but a duty, to serve and protect [*In re Marilyn H. (1993) 5 Cal. 4th 295, 307, 19 Cal. Rptr. 2d 544, 851 P.2d 826]* . The California Legislature has recognized that the state has an interest in providing stable, permanent homes for dependent children who cannot be returned home. This interest has been found to be compelling [*In re Heather P. (1989) 209 Cal. App. 3d 886, 892, 257 Cal. Rptr. 545]* .

The question arises, however, as to whether this interest in a safe and stable, permanent home is not only a compelling state interest, but also a constitutional right of the child. This question was considered in the case of *In re Arturo A. (1992) 8 Cal. App. 4th 229, 10 Cal. Rptr. 2d 131* . That court noted the case of *Adoption of Kay C. (1991) 228 Cal. App. 3d 741, 749, 278 Cal. Rptr. 907* , which had held that "natural children have a fundamental, independent right in belonging to a family unit" [*In re Arturo A. (1992) 8 Cal. App. 4th 229, 241 n.6, 10 Cal. Rptr. 2d 131]* . It pointed out, however, that while it adopted the idea that a child has a "constitutional right to a reasonably directed early life, unmarred by unnecessary and excessive shifts in custody," it had difficulty finding any specific authority for such a

proposition [*In re Arturo A. (1992) 8 Cal. App. 4th 229, 241 n.6, 10 Cal. Rptr. 2d 131]* .

While recognizing there "can be no question that a some point the child acquires a fundamental right," the *Arturo A.* court determined that "when and in what circumstances the child acquires a constitutional right to a settled life" was an issue it did not need to decide [*In re Arturo A. (1992) 8 Cal. App. 4th 229, 241, 10 Cal. Rptr. 2d 131]* . It noted, however, that it felt in an appropriate case "it will be decided that at some point in the administrative process of terminating parental rights and creating new lives for dependent children, the due process rights of the delinquent parent may be neutralized by the competing liberty interests of the child in finalizing the child's permanent life planning" [*In re Arturo A. (1992) 8 Cal. App. 4th 229, 241-242 n.6, 10 Cal. Rptr. 2d 131]* .

Other courts have also recognized a child's constitutional right to a safe and stable home without actually analyzing where that right comes from. Two California Supreme Court decisions illustrate this. In the case of *In re Marilyn H. (1993) 5 Cal. 4th 295, 306, 19 Cal. Rptr. 2d 544, 851 P.2d 826* , the Supreme Court noted that "natural children have a fundamental independent interest in belonging to a family unit [citation], and they have compelling rights to be protected from abuse and neglect and to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child." The court in *In re Jasmon O. (1994) 8 Cal. 4th 398, 419, 33 Cal. Rptr. 2d 85, 878 P.2d 1297* , observed that "Children, too, have fundamental rights--including the fundamental right to be protected from neglect and to "have a placement that is stable [and] permanent."

Despite these cases, one appellate court has found that while children have an interest in a safe, stable, permanent home, they do not have a constitutional right to one [*In re Vincent M. (2007) 150 Cal. App. 4th 1247, 1265-1266, 59 Cal. Rptr. 3d 321*]. That court, however, appeared to seek authority for the proposition that all dependent children have a constitutional right to a safe, stable, permanent home, rather than seeking a source for such a right when reunification efforts have either been denied or terminated. At that point, particularly when the child has been in a particular home for an extended period of time and has come to view the caregivers as his or her psychological parents, the child's natural interest in a safe, stable, permanent home may transform into a familial or liberty interest right [*In re Arturo A. (1992) 8 Cal. App. 4th 229, 241-242, n.6, 10 Cal. Rptr. 2d 131*]. That transformation as the child's dependency case proceeds along its continuum toward permanency is something the *Vincent M.* case did not consider, and hence does not address.

The better view is that once reunification efforts have been either denied or terminated, a constitutional right to familial association and a liberty interest in a safe, stable, permanent home may develop, particularly when the dependent child has resided in particular home for an extended period of time and has come to view his or her caregivers as psychological parents [*In re Arturo A. (1992) 8 Cal. App. 4th 229, 241-242, fn. 6, 10 Cal. Rptr. 2d 131*]. When that transformation is fully analyzed, it is likely the dependent child's "interest" in a safe, stable, permanent home will be found to have grown into a constitutionally protected "right," since the right of a child to a safe and stable home is clearly part of the basic values implicit in the concept of ordered liberty and of the basic civil rights of individuals [*see City of Carmel-by-the-Sea v. Young (1970) 2 Cal. 3d 259, 266-267, 85 Cal. Rptr. 1, 466 P.2d 225* (listing many of the recognized liberty interests); *In re Roger S. (1977) 19 Cal. 3d 921, 927-928, 141 Cal. Rptr. 298, 569 P.2d 1286* (finding a 14-year-old child has a protected liberty interest in proceedings to involuntarily place the child in a state mental hospital)].

[3] Appointment of Counsel for Child

[a] When Counsel Should Be Appointed

In the past, in any case in which it appeared to the court that the child would benefit from the appointment of counsel the court was required to appoint counsel for the child. That counsel for the child could be a county counsel, district attorney, public defender, or other member of the bar, provided the counsel did not represent another party or county agency whose interests conflicted with those of the child [Welf. & Inst. Code former § 317(c)]. This law recognized that while it was essential that every child have a voice in the dependency proceedings, the child's voice need not always be

that of an attorney. The court had a duty to examine the facts of the case, including the child's desires and situation, to determine if the child would benefit from the appointment of counsel. If no specific benefit was found, appointment of counsel was not necessary [*see* Welf & Inst. Code former § 317(c); *In re Jesse C. (1999) 71 Cal. App. 4th 1481, 1490-1491, 84 Cal. Rptr. 2d 609* ; *cf., In re Juan H. (1992) 11 Cal. App. 4th 169, 173, 13 Cal. Rptr. 2d 716]* . In those cases, the child's interests were served solely by his or her guardian ad litem (GAL) [*see Welf & Inst. Code § 326* (repealed eff. 7/1/01, Stats. 2000, ch. 450, §§ 2, 4)] and Court-Appointed Special Advocate (CASA), if any [*see Welf & Inst. Code § 356.5*].

Effective January 1, 2001, California law changed significantly. Now the court "shall appoint counsel for the child unless the court finds that the child would not benefit from the appointment of counsel." If the court makes a finding the child would not benefit from the appointment of counsel, the court must state on the record the reasons for its finding [*Welf. & Inst. Code § 317(c)* (Stats. 2000, ch. 450, § 1)]. The statute does not say how the court should determine whether the child would benefit from the appointment of counsel [*Welf. & Inst. Code § 317(c)*]. The rule of court on this issue does not help matters.

The rule does not address factors that may impact the determination of whether the child would benefit from the appointment of counsel, such as the nature of the allegations, the child's level of placement, whether the child has siblings in other placements, the complexity of the issues, and whether the matter is hotly contested. Instead, for the court to find the child would not benefit from the appointment of counsel, the rule requires the court to first find the child understands the nature of the proceedings and is able to communicate and advocate effectively with the court, counsel, the social worker, and other parties and professionals involved in the case [*Cal. Rules of Ct., Rule 5.660(b)(1)*]. This is highly relevant to a determination of whether the child can knowingly and intelligently waive counsel, a requirement not imposed by the statute, but is significantly less relevant or even not relevant to a determination of whether the appointment of counsel would or would not benefit the child. Thus, this requirement appears inconsistent with the statute and may be invalid [*Welf. & Inst. Code § 265*].

The rule also requires the court to find the child would not receive "any benefit" from representation by counsel before the court can find the child would not benefit from the appointment of counsel [*Cal. Rules of Ct., Rule 5.660(b)(1)(C)*]. This goes beyond the requirement of the statute; too far beyond. The fact the child may gain some incidental benefit from the representation of counsel does not mean the child would or would not benefit from the appointment of counsel within the meaning of the statute [*see In re Autumn H. (1994) 27 Cal. App. 4th 567, 575, 32 Cal. Rptr. 2d 535* (observation in context of the beneficial relationship exception to adoption that interaction between a child and birth parent will always confer some "incidental benefit," but that this is not enough in terms of that exception)]. If incidental benefit was enough to preclude a finding the child would not benefit from the appointment of counsel, the statute's requirement that the court determine the issue would be meaningless, since the court could always find some incidental or imagined benefit from the appointment of counsel for the child. This portion of the rule may also be invalid as inconsistent with the law [*Welf. & Inst. Code § 265*]. Thus, the rule of court hinders, rather than helps the juvenile court make the determination required by *Welf. & Inst. Code § 317(c).*

Legitimate argument can be made that in many dependency cases the benefit a child receives from the appointment of counsel is not significant, particularly with regard to infants, since in the majority of cases social services agencies do their jobs well and the child's interests are indeed served. This argument may be strengthened if children's counsel in a particular county are often ineffective due to incompetence, high caseloads, or role confusion [*see* Green & Dohrn, *Foreword: Children and the Ethical Practice of Law, 64 Fordham L. Rev. 1281, 1286*-1287 (1996), discussing how the quality of legal representation for children varies widely and is often inadequate]. But to find the child will not gain at least some cognizable benefit from the appointment of counsel will be difficult. Thus, the change in the statute creates a presumption for the appointment of counsel for all children brought into the dependency system that is unlikely to be challenged. Indeed, the California Supreme Court has recognized the law now presumes the child will benefit from the appointment of counsel and hence courts must be "very cautious" in finding there would be no benefit [*In re Celine R. (2003) 31 Cal. 4th 45, 61, fn. 3, 1 Cal. Rptr. 3d 432, 71 P.3d 787]* .

For discussion of court-appointed special advocates (CASA), see *§ 328.64*.

For discussion of the change in the law effective July 1, 2001, regarding the appointment of guardians ad litem for children in dependency proceedings, see *§ 328.66*.

[b] Who Should Be Appointed and the Need for Separate Counsel

[i] Conflict of Interest May Bar Joint Representation

There is substantial controversy both within California and nationwide as to who should be appointed as the attorney for the child in those cases where counsel is appointed and what the role of that attorney should be, and reasonable, experienced, competent minds can differ. In regards to the appointment of counsel, the most controversial question often is whether the attorney for the social services agency may also be the attorney for the child. At a special conference conducted in 1995 at the Fordham University School of Law on the legal representation of children, a consensus was reached by the participants--lawyers "should not jointly represent a child and a government agency in *any* case" [Special Issue: *Ethical Issues in the Legal Representation of Children, 64 Fordham L. Rev. 1295*, 1384 (1996)]. But the lack of participation by agency attorneys in this forum places its conclusions regarding this issue in question [*see* Special Issue: *Ethical Issues in the Legal Representation of Children, 64 Fordham L. Rev. 1395*-1397 (1996) (listing participants)]. Nevertheless, many of the reasons expressed for the belief that a child and a social services agency should not be represented by the same attorney have at least some validity [*see also* Walter, *Averting Revictimization of Children: State Funding Needed for Independent Counsel Representing Children in Juvenile Court, 1 J. Center Children & Cts. 45 (1999)*].

The joint representation issue is far from settled. Both practitioners and policy makers often disagree on this very important yet emotional topic. California, however, has taken a significant step in eliminating this controversy through a statutory amendment. Former *Welf. & Inst. Code § 317(c)* provided that counsel for the child could be a "county counsel, district attorney, public defender, or other member of the bar." The only absolute limitation on the juvenile court's discretion on the appointment of counsel was that appointed counsel for the child could not also represent another party or county agency whose interests conflicted with the child. A court could even adopt a local policy which provided that all or most representation for children in dependency proceedings come from one of the four eligible categories [*Los Angeles County Dep't of Children & Family Servs. v. Superior Court (1996) 51 Cal. App. 4th 1257, 1267, 59 Cal. Rptr. 2d 613]* . Effective January 1, 2001, however, the statute changed.

The statute now provides counsel for the child "may be a district attorney, public defender, or other member of the bar, provided that the counsel does not represent another party or county agency whose interests conflict with the child's" [*Welf. & Inst. Code § 317(c)* (Stats. 2000, ch. 450, § 1)]. County counsels are, of course, members of the bar. Further, while opinions differ widely as to actual percentages, in most dependency cases the interests of the social services agency do not conflict with those of the child. Thus, on its face, the plain language of the statute still provides the juvenile court with discretion in an appropriate case to appoint the same county attorney for the child as for the social services agency. But the Legislature's act of deleting "county counsel" from the list of specifically delineated possible attorneys for the child cannot be seen to be an idle act. Many would argue the intent of the amendment was to eliminate the ability of the juvenile court to appoint county counsel on behalf of the child entirely, and the legislative history may support that argument. But if the Legislature had intended to completely eliminate that possibility it knows how to do that [*In re Chantal S. (1996) 13 Cal. 4th 196, 206-207, 51 Cal. Rptr. 2d 866, 913 P.2d 1075* (if legislature wanted to include a specific term or requirement, it knows how to do that)]. The plain language of the statutory amendment suggests a different interpretation. That interpretation is that while the court may retain discretion to appoint county counsel on behalf of both the child and the social services agency in an appropriate case in which the agency's interests do not conflict with those of the child, that should not be the norm. Instead, in most instances the attorney for the child should not be county counsel, but should instead be the district attorney, public defender, or some member of the bar

other than county counsel. This gives meaning to the Legislature's act of deleting the specification of "county counsel" from the statute. It also gives meaning to the decision of the Legislature to leave in the language the child's counsel may not represent another county agency whose interests conflict with the child's, since such counsel could normally only be county counsel. This interpretation is consistent with the practice in most California counties and with the growing national trend toward the use of separate counsel for children. It also leaves the juvenile court some limited discretion to use county counsel for this purpose in an appropriate case. How counties and courts will interpret and implement the statutory change in the law remains to be seen. Nevertheless, this is a significant step in the representation of children in California dependency cases and should be viewed positively.

Case law indicates that an actual rather than a potential conflict of interest is required before the court must appoint separate counsel [*In re Richard H. (1991) 234 Cal. App. 3d 1351, 1367-1369, 285 Cal. Rptr. 917* (county counsel permitted to represent both the social services department and the child absent actual conflict); *see also In re Candida S. (1992) 7 Cal. App. 4th 1240, 1251-1254, 9 Cal. Rptr. 2d 521* (separate counsel for each child not required absent actual conflict); *Castro v. Los Angeles County Bd. of Supervisors (1991) 232 Cal. App. 3d 1432, 1439-1445, 284 Cal. Rptr. 154* (no conflict of interest between attorneys operating within separate groups in single nonprofit corporation, even though they could represent up to three parties in one dependency proceeding) *but see In re Elizabeth M. (1991) 232 Cal. App. 3d 553, 565-566, 283 Cal. Rptr. 483* (using the fact that there was a potential conflict of interest among the children in the case as the starting point for its discussion)]. While one court characterized these decisions as interpreting former *Welf. & Inst. Code § 317* to "permit" appointment of separate counsel at the trial court level only if an actual conflict existed between the agency and the child [*In re Mary C. (1995) 41 Cal. App. 4th 71, 75, 48 Cal. Rptr. 2d 346]* , a more accurate description would be that these decisions and former *Welf. & Inst. Code § 317* only *required* the appointment of separate counsel for the child where there was an actual conflict of interest. This was not the same as saying the court did not have discretion to appoint separate counsel where it deemed such appointment appropriate either due to a potential conflict of interest or a determination the child's best interest so required [*Los Angeles County Dep't of Children & Family Servs. v. Superior Court (1996) 51 Cal. App. 4th 1257, 1262-1264, 59 Cal. Rptr. 2d 613* (court has discretion to appoint private counsel for child despite absence of conflict); *cf. In re Mary C. (1995) 41 Cal. App. 4th 71, 79, 48 Cal. Rptr. 2d 346* (child entitled to separate counsel on appeal when best interest of the child requires such appointment)]. The amendments to *Welf. & Inst. Code § 317(c)* effective January 1, 2001, make it clear the court not only has discretion to appoint separate counsel for the child, in most cases that is what it should do [*Welf. & Inst. Code § 317(c)* (Stats. 2000, ch. 450, § 1)].

The law is clear that where there is an actual conflict of interest between the child and the agency, the same attorney cannot represent both. The court also has discretion to appoint separate counsel for the child, and will in most cases do so. The legal issue remains, however, whether a potential conflict of interest is sufficient to mandate the appointment of separate counsel. Since 1995 children who are the subject of dependency proceedings are also parties to the action [*Welf. & Inst. Code § 317.5(b)*], a significant change in the law. Some already considered the child a party, but many others correctly recognized the child was the subject of the proceedings and was afforded many special rights and protections while not an actual party to the action. The enactment of *Welf. & Inst. Code § 317.5(b)* made it clear the child is now both the subject of the proceedings and a party to it. The majority of those cases which held there needed to be an actual, rather than just a potential, conflict of interest between the agency and the child before the court was required to appoint separate counsel were decided prior to this change in the law. The impact of this change in the child's status should not be underestimated. The fact the child is now a party to the action triggers the requirements of *Cal. Rules Prof. Conduct, Rule 3-310(C)*. That rule, amended in 1992 to deal with potential conflicts of interest, now provides in pertinent part that: "A member shall not, without the informed written consent of each client: (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict? ... " [*Cal. Rules Prof. Conduct, Rule 3-310(C)*]. A potential conflict of interest has been defined by one court as a "reasonable likelihood an actual conflict will arise" [*Carroll v. Superior Court (2002) 101 Cal. App. 4th 1423, 1430, 124 Cal. Rptr. 2d 891]* . The California Supreme Court has agreed with this interpretation in dependency proceedings [*In re Celine R. (2003) 31 Cal. 4th 45, 58, fn. 3, 1 Cal. Rptr. 3d 432, 71 P.3d 787]* . Obviously, an informed written consent cannot be obtained from a young child [*In re Mary C. (1995) 41 Cal. App. 4th 71, 76, 48 Cal. Rptr. 2d 346]* , and is

unlikely to be obtained from most dependent children or accepted by a juvenile court. Thus, when the court appoints counsel for the child, that counsel must be separate counsel if the court determines based on the facts of the case there is a reasonable likelihood an actual conflict will arise [*Cal. Rules Prof. Conduct, Rule 3-310(C)(1)*; *Carroll v. Superior Court (2002) 101 Cal. App. 4th 1423, 1430, 124 Cal. Rptr. 2d 891* ; *In re Celine R. (2003) 31 Cal. 4th 45, 58, fn. 3, 1 Cal. Rptr. 3d 432, 71 P.3d 787]* .

Nevertheless, under current law and practice in California, it will be the rare case in which the court even considers having counsel for the agency also represent the child. Thus, it is unlikely the court will ever need to consider whether there is a reasonable likelihood of an actual conflict in such representation.

[ii] Conflicts Between Siblings

[A] In General

Courts have not been consistent regarding when to provide different counsel for children within sibling groups. While conflicts do arise between siblings, it is not reasonable to argue there is always the potential for a conflict of interest if each individual child does not have separate and independent counsel. As noted by one respected author, "Representing siblings does not *per se* create a conflict of interest" [Haralambie, *The Child's Attorney: A Guide to Representing Children in Custody, Adoption, and Protection Cases* (ABA 1993) p. 37]. Indeed, it has been noted that in the representation of siblings in dependency cases, "More often than not, the attorney will not encounter an actual conflict of interest during the course of the representation" [Wu, *Conflicts of Interest in the Representation of Children in Dependency Cases, 64 Fordham L. Rev. 1857, 1862 (1996)*].

The "appointment of separate counsel for each sibling at the commencement of the dependency proceeding would in most cases result in an unnecessary duplication of effort and resources" [*Carroll v. Superior Court (2002) 101 Cal. App. 4th 1423, 1429, 124 Cal. Rptr. 2d 891]* . As noted by the California Supreme Court, "If each child had separate counsel, matters could become unwieldy, especially when there are several children; so many attorneys could interfere with the need to resolve dependency questions expeditiously as well as fairly" [*In re Celine R. (2003) 31 Cal. 4th 45, 55, 1 Cal. Rptr. 3d 432, 71 P.3d 787]* . The Supreme Court went on to note that having separate counsel for every child could create scheduling difficulties, drain scarce public resources, and "unnecessarily make siblings feel they are adversaries, which could harm their ability to provide mutual emotional support" [*In re Celine R. (2003) 31 Cal. 4th 45, 56, 1 Cal. Rptr. 3d 432, 71 P.3d 787]* . The Court pointed out that having a single attorney for a sibling group can allow the children to meet with their attorney together rather than separately, which can also be beneficial to the children. "Children's interests are not always adversarial, and they should not always be treated as such" [*In re Celine R. (2003) 31 Cal. 4th 45, 56, 1 Cal. Rptr. 3d 432, 71 P.3d 787]* . Nevertheless, "it is essential for counsel to continually assess conflicts questions" [Patton, Legal Ethics in Child Custody and Dependency Proceedings: A Guide for Judges and Lawyers (Cambridge 2006) p. 7]. When actual conflicts between siblings arise, separate counsel must be appointed for each child unless the conflict can be resolved through other measures [Haralambie, *The Child's Attorney: A Guide to Representing Children in Custody, Adoption, and Protection Cases* (ABA 1993) p. 38].

While conflicts between siblings may arise at any time during the dependency process, it is at the *Welf. & Inst. Code § 366.26* hearing that most sibling conflict issues are being raised. This is especially true where significant age differences exist between the siblings, since "the greater the age gap between the siblings, the higher the risk for a conflict of interest" [Patton, Legal Ethics in Child Custody and Dependency Proceedings: A Guide for Judges and Lawyers (Cambridge 2006) p. 10]. This is because of the substantial interference with a sibling relationship exception to adoption found in *Welf. & Inst. Code § 366.26(c)(1)(B)(v)*. In one case, seven siblings were before the juvenile court for a hearing to select and implement a permanent plan. Social services was recommending the termination of parental rights and adoption for the three youngest children who were not yet in an adoptive home, legal guardianship for three oldest children who were in a home willing to accept legal guardianship, and a continuance to determine the likelihood of adoption of the seventh child if parental rights were terminated. Some of the children had expressed a desire to

maintain sibling relationships. Their counsel asked to be relieved due to the conflicts presented, but the juvenile court denied that request [*Carroll v. Superior Court (2002) 101 Cal. App. 4th 1423, 1425-1427, 124 Cal. Rptr. 2d 891]* . The children's counsel filed a traditional petition for extraordinary writ relief, which the Court of Appeal granted, finding there was an actual conflict of interest that mandated counsel be relieved [*Carroll v. Superior Court (2002) 101 Cal. App. 4th 1423, 1427-1428, 124 Cal. Rptr. 2d 891]* . In reaching this decision, the Court of Appeal took no position as to whether a sibling had standing to seek to prevent the termination of parental rights to other siblings, but recognized counsel needed to be free of conflicting loyalties so the argument for standing could be raised [*Carroll v. Superior Court (2002) 101 Cal. App. 4th 1423, 1428, fn. 5, 124 Cal. Rptr. 2d 891]* . It should be noted the Supreme Court has pointed out that counsel who believe the juvenile court has erred legally in requiring the representation of more than one child should not seek extraordinary writ or appellate relief unless the attorney believes doing so is in the children's best interest. As is clear throughout the dependency process, any delay in dependency proceedings and the finality of decisions can cause harm to children [*In re Celine R. (2003) 31 Cal. 4th 45, 60, 1 Cal. Rptr. 3d 432, 71 P.3d 787]* .

In *Carroll* the court found an actual conflict of interest existed mandating counsel be relieved. Thus, the questions of whether the juvenile court could have or should have relieved *existing* counsel based on a potential conflict of interest between some of the children or based on the children's best interest was not reached [*cf. Los Angeles County Dep't of Children & Family Servs. v. Superior Court (1996) 51 Cal. App. 4th 1257, 1262-1264, 59 Cal. Rptr. 2d 613* ; *In re Mary C. (1995) 41 Cal. App. 4th 71, 79, 48 Cal. Rptr. 2d 346]* . These are questions that will need to be addressed in future decisions on this topic.

The *Carroll* case did address, however, the question of whether *new* counsel could accept representation of a sibling group if there exists a potential conflict of interest. The court recognized that *Cal. Rules Prof. Conduct, Rule 3-310(C)* does not permit counsel to accept new representation of multiple clients when there is a potential conflict of interest without the informed written consent of each client. It noted a "degree of tension" between that prohibition and *Welf. & Inst. Code § 317(c)*, which "seems to contemplate an actual conflict" before separate counsel must be appointed [*Carroll v. Superior Court (2002) 101 Cal. App. 4th 1423, 1429, 124 Cal. Rptr. 2d 891]* . It resolved that conflict by creating a new interpretation of *Cal. Rules Prof. Conduct, Rule 3-310*. It determined that in the dependency context a "potential conflict" means there is "a reasonable likelihood an actual conflict will arise." In this way it sought to "reconcile the importance of independent representation with the practicality of not overburdening the dependency system when unnecessary" [*Carroll v. Superior Court (2002) 101 Cal. App. 4th 1423, 1430, 124 Cal. Rptr. 2d 891]* . How juvenile courts should go about determining whether there is a reasonable likelihood an actual conflict will arise in the future representation of siblings "is not an easy or simple task" [*Carroll v. Superior Court (2002) 101 Cal. App. 4th 1423, 1430, 124 Cal. Rptr. 2d 891]* .

The *Carroll* decision and its new interpretation of "potential conflict" for counsel being appointed in dependency proceedings received quick approval from the California Supreme Court. In the case of *In re Celine R. (2003) 31 Cal. 4th 45, 1 Cal. Rptr. 3d 432, 71 P.3d 787* , the Supreme Court examined the *Carroll* analysis and held "the *Carroll* court appropriately reconciled *section 317* and *rule 3-310*, as well as the sometimes contradictory needs to assure that everyone is properly represented but not to overburden the dependency system or unnecessarily suggest that siblings are adversaries" [*In re Celine R. (2003) 31 Cal. 4th 45, 58, 1 Cal. Rptr. 3d 432, 71 P.3d 787]* . It held the juvenile court may generally appoint a single attorney to represent a sibling group, despite the potential for conflict that exists in all multisibling dependency cases. The juvenile court would only have to appoint separate attorneys at the outset of a case if there is an actual conflict among the siblings or if circumstances specific to the case present a reasonable likelihood an actual conflict will arise later in the case. If such likelihood exists, "the court should appoint separate counsel at the outset rather than await an actual conflict and the possible disruption a later reappointment may cause" [*In re Celine R. (2003) 31 Cal. 4th 45, 58, 1 Cal. Rptr. 3d 432, 71 P.3d 787]* . If a single counsel is appointed for siblings, the juvenile court "will have to relieve counsel from multiple representation if, but only if, an actual conflict arises" [*In re Celine R. (2003) 31 Cal. 4th 45, 58, 1 Cal. Rptr. 3d 432, 71 P.3d 787]* .

[B] Rule for Sibling Conflicts

Effective January 1, 2006, the Rules of Court have incorporated much of what was determined by the courts in the cases of *In re Celine R. (2003) 31 Cal. 4th 45, 1 Cal. Rptr. 3d 432, 71 P.3d 787* , and *Carroll v. Superior Court (2002) 101 Cal. App. 4th 1423, 1430, 124 Cal. Rptr. 2d 891* [*Cal. Rules of Ct., Rule 5.660(c)*]. The rule specifically provides the court may appoint a single attorney to represent a sibling group, but the attorney must decline appointment for one or more of the siblings and the court must appoint separate counsel to represent the sibling or siblings, if at the time of appointment an actual conflict of interest exists among the siblings or circumstances specific to the case indicate a reasonable likelihood an actual conflict will develop [*Cal. Rules of Ct., Rule 5.660(c)(1)*]. Significantly, the rule provides the fact the siblings are different ages, have different parents, there is a theoretical or abstract conflict among the siblings, some of the siblings are more likely to be adopted than others, or that the siblings may have different permanent plans, does not, standing alone, necessarily demonstrate an actual conflict of interest or a reasonable likelihood that an actual conflict will arise [*Cal. Rules of Ct., Rule 5.660(c)(1)(C)*]. The rule also deals with when and how an attorney should withdraw from the representation of a sibling group [*Cal. Rules of Ct., Rule 5.660(c)(2)*]. In all cases involving siblings and sibling representation, the court, the children's attorney or attorneys, and all parties and their counsel should look to the provisions of this rule for guidance in deciding legal representation for the children. [*see also* Patton, Legal Ethics in Child Custody and Dependency Proceedings: A Guide for Judges and Lawyers (Cambridge 2006)].

[iii] Standing to Raise Conflict Issues

The courts have not been consistent regarding who has standing to raise the question of whether children need separate counsel from each other. This issue will occur more frequently as courts and agencies begin to implement the many new provisions regarding sibling togetherness and visitation, and face the increasing potential for conflict between siblings [*see Welf. & Inst. Code §§ 306.5, 361.2(i), 362.1, 388(b)*, 366.26(c)(1)(B)(v), *16002(b)*]. At the trial court level the question of standing is less significant, since the court has the duty to examine whether children need separate counsel regardless of who raises the issue, or even if no one raises the issue [*Welf. & Inst. Code § 317(c)*]. On appeal, however, a person must have standing to raise the question of whether children represented by the same counsel at the trial level should have had separate counsel. As noted in one case on the issue, "Standing to appeal is jurisdictional" [*In re Frank L. (2000) 81 Cal. App. 4th 700, 703, 97 Cal. Rptr. 2d 88]* .

The *Frank L.* decision is instructive, since it does not assume standing exists for a parent to raise this issue on appeal, but instead looks to prior decisions for both the law and distinguishing facts. It notes the interests of siblings or other relatives in their relationship with a child is separate from that of the parent, and thus the parent lacks standing to raise such issues because the parent is not an "aggrieved party" [*In re Frank L. (2000) 81 Cal. App. 4th 700, 703, 97 Cal. Rptr. 2d 88* , *citing In re Devin M. (1997) 58 Cal. App. 4th 1538, 1541, 68 Cal. Rptr. 2d 666* , *In re Nachelle S. (1996) 41 Cal. App. 4th 1557, 1561, 49 Cal. Rptr. 2d 200* , and *In re Gary P. (1995) 40 Cal. App. 4th 875, 877, 46 Cal. Rptr. 2d 929]* . It also distinguishes several of the cases frequently relied on to allow parents to raise issues regarding their children's counsel on appeal [*In re Frank L. (2000) 81 Cal. App. 4th 700, 703, 97 Cal. Rptr. 2d 88* , *distinguishing In re Patricia E. (1985) 174 Cal. App. 3d 1, 219 Cal. Rptr. 783* , *In re Elizabeth M. (1991) 232 Cal. App. 3d 553, 283 Cal. Rptr. 483* , *In re James S. (1991) 227 Cal. App. 3d 930, 278 Cal. Rptr. 295* , and *In re Ann S. (1982) 137 Cal. App. 3d 148, 188 Cal. Rptr. 1]* .

The *Frank L.* court held the mother lacked standing on appeal to assert the issue that Frank's counsel at the trial court level was ineffective due to a conflict between the siblings [*In re Frank L. (2000) 81 Cal. App. 4th 700, 702-704, 97 Cal. Rptr. 2d 88* ; *but see In re Cliffton B. (2000) 81 Cal. App. 4th 415, 427, fn. 6, 96 Cal. Rptr. 2d 778* , *citing In re Elizabeth M. (1991) 232 Cal. App. 3d 553, 565, 283 Cal. Rptr. 483* without analysis for proposition parent has standing to raise this issue]. In this and related areas, the interests of the parent and the dependent child do not always intertwine. Instead, as our law has progressed it has recognized that children have separate rights and interests that may differ from those of the parent, particularly once reunification efforts have been denied or terminated.

For discussion of children's right to a safe, stable, permanent home, see *§ 328.62[2]*.

For discussion of sibling placement and visitation issues, see *§ 328.129[7]*.

For discussion of ineffective assistance of counsel claims, see *§ 328.193*.

[iv] When District Attorney Represents Child

The involvement of district attorneys in dependency cases is not common in California. In other states prosecuting attorneys are often involved in dependency proceedings, "prosecuting" the action on behalf of the state or the social services agency [*see* Scahill, *Prosecuting Attorneys in Dependency Proceedings in Juvenile Court: Defining and Assessing a Critical Role in Child Abuse and Neglect Cases*, *1 J. Center Children & Cts. 73 (1999)*]. In the few California counties in which the district attorney is involved in dependency proceedings, it is usually to represent the child [*Welf. & Inst. Code § 317(c)*]. The fact that the district attorney represents the child in a proceeding pursuant to *Welf. & Inst. Code § 300*, as well as conducts a criminal investigation or files a criminal complaint or information arising from the same or reasonably related set of facts as the proceeding pursuant to *Welf. & Inst. Code § 300*, is not in and of itself a conflict of interest [*Welf. & Inst. Code § 317(c)*].

If criminal charges related to a dependency petition under *Welf. & Inst. Code § 300(a), (b)*, or *(d)*, are pending against the parent, guardian, or person in whose care or custody the child resides, or against a member of the household, for unlawful acts committed against the child, the district attorney must, with the consent or at the request of the juvenile court judge, represent the child in the interest of the state at the juvenile court proceeding, according to the terms and conditions set forth by the judge of the juvenile court [*Welf. & Inst. Code § 681*].

A district attorney who represents a child in a dependency proceeding must not appear on behalf of the state in any juvenile court hearing based on a petition that alleges that the same child is a person within the delinquency statute [*Welf. & Inst. Code § 318*; *see Welf. & Inst. Code § 602* (delinquent children)]. Moreover, the district attorney's records kept in the course of representing the child are confidential. They must be held separately and must not be inspected by members of the district attorney's office not directly involved in representing the child. A district attorney who represents or who has represented a child in a dependency proceeding must not discuss the substance of the case with a district attorney representing the people in a delinquency proceeding for the same child [*Welf. & Inst. Code § 318*].

[c] Rights and Duties of Appointed Counsel for Child

[i] Overview

As stated in one respected treatise, "Lawyers have represented children in child-protective proceedings for almost twenty-five years without a consensus in either the law, the ethical rules, or the scholarly literature about their role for children" [Peters, *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions*, 2d ed. Section 2-3(a) (LexisNexis 2001)]. Nevertheless, in California some things are clear. The counsel for the child is charged in general with the representation of the child's legal interests. To that end, counsel must make such further investigations as he or she deems necessary to ascertain the facts, including the interviewing of witnesses, and he or she must examine and cross examine witnesses in both the adjudicatory and dispositional hearings. Counsel may also introduce and examine his or her own witnesses, make recommendations to the court concerning the child's welfare, and participate further in the proceedings to the degree necessary to adequately represent the child's legal interests. In any case in which the child is four years of age or older, counsel must interview the child to determine the child's wishes and to assess the child's well-being [*Welf. & Inst. Code § 317(e)*; *In re Robert A. (1992) 4 Cal. App. 4th 174, 5 Cal. Rptr. 2d 438]* . A primary responsibility of any counsel appointed to represent a child in dependency proceedings "shall be to advocate for the protection, safety, and physical and emotional well-being of the child" [*Welf. & Inst. Code § 317(c)*].

Counsel for the child "shall not" advocate for return of the child to a parent if, to the best of the attorney's knowledge, "that return conflicts with the protection and safety of the child" [*Welf. & Inst. Code § 317(e)*].

Effective January 1, 1999, *Welf. & Inst. Code § 317(e)* was amended to provide the following clarification: "The attorney representing a child in a dependency proceeding is not required to assume the responsibilities of a social worker and is not expected to provide nonlegal services to the child" [*Welf. & Inst. Code § 317(e)*]. Some may view this as a restriction on the role of the child's attorney. It is not. It has never been the role of the child's attorney to assume the responsibilities of a social worker. Indeed, it is the rare attorney for children who is qualified to do social work. Further, although the nature of representing children virtually ensures the attorney will do some things with his or her client outside the normal realm of legal representation, such as coloring or playing games to build rapport, it has never been the role of the child's attorney to provide nonlegal services to the child. Thus, this clarification in the law merely recognizes that although many children's attorneys have received additional training or experience, counsel for children are rarely experts in the wide variety of social, psychological and developmental issues that concern their child clients or are skilled in the delivery of nonlegal services. Instead, their expertise is in representing a child's legal interests in the proceedings brought in the juvenile court. To that end, counsel for the child should also consult and work with the experts and professionals, including social workers, who are assessing the child's needs and providing services to the child outside of the courtroom. By focusing his or her efforts on the legal representation of the child, the child's attorney is fulfilling the role of counsel the law envisions and the child needs.

For additional discussion on the role and duties of counsel appointed to represent the child in dependency proceedings, see Michael J. Dale, *Representing Children in Dependency Proceedings*, in Dale et al., Representing The Child Client, Ch. 4 (Matthew Bender); Patton, Legal Ethics in Child Custody and Dependency Proceedings: A Guide for Judges and Lawyers (Cambridge 2006) pp. 28-35; Duquette, et. al., Representing Children And Youth, in Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases (Bradford Pub. 2005) ch. 21, pp. 493-544. See also Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (ABA [NACC Revised] 1999).

In representing a child for whom a dependency petition has been filed it is important the attorney have contact with the child and the child's caregivers. As soon as possible after receiving information from the social services agency regarding where the child is placed, the child's counsel must provide the caregiver with the attorney's contact information. If the child is 10 years of age or older, the attorney must also provide the child with his or her contact information. The attorney may also provide a child under the age of 10 years with the attorney's contact information [*Welf. & Inst. Code § 16010.6(b)*; *Cal. Rules of Ct., Rule 5.660(d)(5)*].

[ii] Representing Best Interest Versus Stated Interest

[A] The Best Interest Versus Stated Interest Controversy

Substantial controversy extends beyond the question of who should represent the child to the question of how an attorney should represent the child if he or she is appointed to that role. Regardless of whether the child's appointed counsel is a government or private attorney, the question is whether the attorney should represent the child's best interest, the child's stated interest, or something in between. Alternatively, the question is whether the child's attorney should serve in the traditional role of an attorney, as a guardian ad litem, or as a hybrid of both [*see, e.g.*, Buss, *"You're My What?" The Problem of Children's Misperceptions of Their Lawyers' Roles, 64 Fordham L. Rev. 1699, 1700*-1706 (1996); *see also* Patton, *Searching for the Proper Role of Children's Counsel in California Dependency Cases, 1 J. Center Children & Cts. 21 (1999)*]. Some question whether examining the issue as one of "best interest versus stated interest" continues to be a valid and constructive method of examination [*see* Peters, *Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions* 2d ed. § 2-3(e)(2) (LexisNexis 2001)]. But most still consider the issue in this way.

Philosophically, the national trend appears to be that the attorney for the child should represent the child much as he or she would any other client, and to that end the child's attorney should advocate for the position stated by the child if the child is mature enough to voice one. This view recognizes that lawyers for children are often given too much discretion in determining what is in a child's best interests and that attorneys are not well suited to the role of determining what this is. If children are to have rights, then under this view their right to an attorney should include the right to have that attorney assert their stated position [*see, e.g., Recommendations of the Conference on Ethical Issues in the Legal Representation of Children, 64 Fordham L. Rev. 1301 (1996)*; Elrod, *An Analysis of the Proposed Standards of Practice for Lawyers Representing Children in Abuse and Neglect Cases, 64 Fordham L. Rev. 1999 (1996)*; Haralambie, *Response to the Working Group on Determining the Best Interest of the Child, 64 Fordham L. Rev. 2013 (1996)*].

This is the position taken by the American Bar Association. In its *Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, adopted in February 1996, the ABA defines a child's attorney as "a lawyer who provides legal services for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation to the child as is due an adult client." In commenting on this definition, the ABA states that "These Standards explicitly recognize the child is a separate individual with potentially discrete and independent views. To ensure the child's independent voice is heard, the child's attorney must advocate the child's articulated position" [*Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 Fam. L.Q. 375, 376 (1995); *see also* Elrod, *An Analysis of the Proposed Standards of Practice for Lawyers Representing Children in Abuse and Neglect Cases, 64 Fordham L. Rev. 1999, 2000*-2004 (1996)]. The ABA recognized there may be cases where the attorney for the child believes the stated desire of the child would be "seriously injurious" to the child and provided in its standards that in such circumstances the attorney should ask the court for the appointment of a guardian ad litem. Thereafter the guardian ad litem should advocate for what is best for the child and the attorney should continue to advocate for what the child desires [*Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 Fam. L.Q. 375, 382 (1995)].

The ABA position is consistent with the idea under California law that in a dependency case a child should have someone representing his or her best interest [*Welf. & Inst. Code §§ 280* (social worker required to be present in court to represent the interests of the child), 326.5 (requirement for a guardian ad litem)] and someone representing his or her legal interest [*In re Robert A. (1992) 4 Cal. App. 4th 174, 5 Cal. Rptr. 2d 438* (role of child's attorney)]. But California has also held that a child's attorney is not bound by a child's desires and may advocate for a position different from what the child wants if the attorney determines that it is best for the child to do so [*In re Mary M. (1986) 180 Cal. App. 3d 1058, 1066, 226 Cal. Rptr. 5* ; *In re David C. (1984) 152 Cal. App. 3d 1189, 1207-1208, 200 Cal. Rptr. 115]* . Further, since July 1, 2001, many California counties have started using the child's attorney in the additional and sometimes conflicting role of the child's guardian ad litem [*see Welf. & Inst. Code § 326.5*]. Thus California, like the rest of the nation, has struggled with this issue and is not yet clear regarding the role of the child's attorney.

Recent California legislation attempted to resolve this issue in a manner very different from that adopted by the American Bar Association. Effective January 1, 1997, the child's attorney in a dependency action has as a "primary responsibility" the obligation to "advocate for the protection, safety, and physical and emotional well-being" of the child [*Welf. & Inst. Code § 317(c)*]. While appointed counsel is required to advise the court of the child's wishes, he or she "shall not" advocate for return of the child to the parents if, "to the best of his or her knowledge, that return conflicts with the protection and safety" of the child [*Welf. & Inst. Code § 317(e)*]. Other recent California legislation has made it likely some counties will use the child's attorney to also serve as the child's guardian ad litem [*see Welf. & Inst. Code § 326.5*]. Indeed, the rule of court finally adopted to address this issue indicates the child's attorney "will serve" as the child's guardian ad litem under *Welf. & Inst. Code § 326.5* [*Cal. Rules of Ct., Rule 5.662(c)*]. Clearly placing the attorney for the child in a role that is far more guardian ad litem or hybrid than strictly attorney, California's recent changes are philosophically contrary to a growing national consensus.

Nevertheless, California's hybrid approach has essentially been upheld by one appellate court. In that case the child's

attorney had put her teenaged client on the witness stand and questioned her about her recantation of the molest allegations. In closing argument the attorney informed the court what the child's stated desire was, but also pointed out her duty to argue what was best and that the attorney disagreed with the child's recantation and desire to go home. The appellate court found the attorney was not ineffective because she "performed her duties under *Welf. & Inst. Code, § 317*, zealously and effectively by conducting a factual investigation and advocating a position, supported by the evidence, which served to protect the child's welfare" [*In re Kristen B. (2008) 163 Cal. App. 4th 1535, 1542, 78 Cal. Rptr. 3d 495]* . Nor was the attorney's decision to call the child as a witness and to question her about her recantation a violation of the attorney's duty of loyalty. The child was a willing witness and the child's wishes are always relevant. As such, the court found "the decision to allow Kristen to testify was within the wide range of competent representation and entirely consistent with the duty of minor's counsel to carefully balance the wishes of Kristen--an articulate teenager--with her need for safety" [*In re Kristen B. (2008) 163 Cal. App. 4th 1535, 1542, 78 Cal. Rptr. 3d 495]* .

Many will argue, as the California Legislature and the *Kristen B.* court obviously agreed, that these changes are necessary to ensure the safety and protection of dependent children. Several practical realities lend support for this position. The first is that the juvenile court often does not know whether counsel for the child is actually arguing what the attorney believes is in the child's best interest or what the child has indicated is his or her desire. Thus a court can believe a child's attorney is arguing for the child's best interest when the attorney is actually arguing what the child desires. Moreover, the court may believe that the child's attorney is advising the court of the full circumstances of the case when the attorney is actually editing the facts to serve his or her argument [Larsen, *Does the Child's Lawyer Owe "The Whole Truth" To the Court in Neglect-Abuse Cases?*, 47(2) Juv. & Fam. Ct. J., 49 (1996)]. Also true, the quality of legal representation for children, whether by agency attorneys or separate counsel, varies greatly and in many cases is woefully inadequate [*see* Green & Dohrn, *Foreword: Children and the Ethical Practice of Law, 64 Fordham L. Rev. 1281, 1286*-1287 (1996)]. Finally, the juvenile court's decision-making should be an independent determination based on the facts of the case and statutory and case law requirements, not just a deferral to the position of the child's attorney, social worker or therapist [Haralambie, *Response to the Working Group on Determining the Best Interest of the Child, 64 Fordham L. Rev. 2013, 2017 (1996)*]. Nevertheless, courts tend to give the position argued by the child's attorney great weight, sometimes far more than may be appropriate [*see In re Eric H. (1997) 54 Cal. App. 4th 955, 967, 63 Cal. Rptr. 2d 230* (in light of responsibilities of child's counsel "it is unlikely that additional evidence from a parent is necessary to promote the welfare of the child"); Green & Dohrn, *Foreword: Children and the Ethical Practice of Law, 64 Fordham L. Rev. 1281, 1286 (1996)* ("Thus, children's lawyers have a great capacity to influence judges--for good *or* bad."); Guggenheim, *A Paradigm For Determining the Role of Counsel for Children, 64 Fordham L. Rev. 1399, 1430 (1996)* ("In the real world, judges rely on the advocacy of a child's lawyer.")]. Every one of these arguments supports the new restrictions of *Welf. & Inst. Code § 317* for children's attorneys.

The issue is not one-sided, however. Many rightly contend the requirements of *Welf. & Inst. Code § 317* further blur the boundaries between social workers and attorneys. Others validly argue the new requirements place counsel for the child in an ethical and professional dilemma if the child is mature enough to voice a position, the position voiced is that he or she wishes to go home, and the attorney believes that may not be safe for the child. The new statutory limitations on what the child's attorney can advocate necessarily impact the independence of children's counsel in such situations. California's new restrictions also assume, perhaps incorrectly, that children's attorneys can accurately or even reasonably determine when return to a parent conflicts with the protection and safety of the child [*see Recommendations of the Conference on Ethical Issues in the Legal Representation of Children, 64 Fordham L. Rev. 1301, 1309 (1996)* ("Nothing about legal training or traditional legal roles qualifies lawyers to make decisions on behalf of their clients.")]. Further, the statutory restrictions appear to create at least the potential for conflict between *Welf. & Inst. Code § 317(c), (e)* and such other provisions of law as *Bus. & Prof. Code § 6068(e)* (attorney shall maintain inviolate the confidences of the client), and the requirement that the attorney not assume a position which is inconsistent with the interest of the client [*see, e.g., Zador Corp. v. Kwan (1995) 31 Cal. App. 4th 1285, 1293, 37 Cal. Rptr. 2d 754]* . Finally, at a time when the rights of children are being expanded, it denies the child the right to have his or her desires advocated for by legal counsel.

Answers do not come easily in response to the question of what the specific role of the child's attorney in dependency proceedings should be, and reasonable, experienced, competent minds can differ. California's venture into this area may prove to be a wise one--or it may not. What is clear, however, is that the requirement of *Welf. & Inst. Code § 317* regarding the responsibility of the child's attorney not to advocate for anything which would endanger the child is certain to generate substantial controversy and to be tested at both the trial and appellate court levels. What is also clear is that if California is going to move in this direction changes must also be made in *Bus. & Prof. Code § 6068* and the Rules of Professional Conduct to authorize the representation of children in a manner different from other clients. This area must be watched for future developments.

[B] Guidance for Children's Counsel

There is no one rule or statute that children's counsel can look to for guidance when deciding whether or how to argue for what the attorney believes is in the child's best interest when the child expresses a different stated desire. The following, however, are some general guidelines that should be considered by children's counsel in such situations.

- This is not an easy area for children's attorneys, particularly when the child is an older child. Thus, children's attorneys must approach these cases carefully and creatively, respecting both the child's desires and the child's need for safety [*Welf. & Inst. Code § 317(e)*; Peters, Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions, pp. xx-xxi (LexisNexis, Int'l 3d ed., 2007)].

- Under California's hybrid model of children's representation in dependency cases the duty of loyalty and zealousness the attorney owes the child client is not limited to loyalty to the child's stated interest, even if the child is a teenager, but also includes loyalty to the child's safety and best interest [*In re Kristen B. (2008) 163 Cal. App. 4th 1535, 1542, 78 Cal. Rptr. 3d 495* ; Wu, *Conflicts of Interest in the Representation of Children in Dependency Cases* (1996) *64 Fordham L. Rev. 1857, 1860*-1862 (Attorney-Client Privilege--The Concept of Loyalty)].

- The older a child becomes and the better the child is developmentally able to formulate and express his or her desires, the greater the weight the attorney and guardian ad litem should give the child's stated interest in deciding what is in the child's best interest and whether the requirements of *Welf. & Inst. Code § 317(e)* mandate the attorney and guardian ad litem to take a position different from the child's stated interest in order to advocate for the child's safety [Haralambie, The Child's Attorney: A Guide to Representing Children in Custody, Adoption, and Protection Cases (ABA 1993) pp. 13-14; Ventrell & Duquette (eds.), Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases (NACC 2005), The Child's Wishes Are Always Relevant, § 21A.7, pp. 511-512].

- Consistent with the duty to communicate with the client, the child's counsel should explain to the child before the hearing what position the attorney and guardian ad litem will take, unless the child is not old enough to understand. If that differs from the child's stated interest, the attorney and guardian ad litem should explain, to the extent appropriate based on the age and development of the child, why a different position must also be advocated, including the requirements of *Welf. & Inst. Code § 317(e)*, and the role of the guardian ad litem. To the extent possible, the child should take part in the attorney's and guardian ad litem's decision-making process as to what is best for the child, separate from the child's own stated interest.

- The child's counsel and guardian ad litem must always ensure the court is informed of the child's stated interest [*Welf. & Inst. Code § 317(e)*; Ventrell & Duquette, (eds.), Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases (NACC 2005), The Child's Wishes Are Always Relevant, § 21A.7, pp. 511-512.)

- The child's counsel and guardian ad litem should always be very clear so that the court is well aware when the attorney and guardian ad litem believe there is a conflict between the child's stated interest and what the attorney and guardian ad litem believes is the child's safety and best interest [Larsen, *Does the Child's Lawyer Owe "The Whole Truth" To the Court in Neglect-Abuse Cases?* (1996) 47 Juv. & Fam. Ct. J. 49].

- Make a record of your investigation, your communications with your child client and the reasoning behind your determination that a position different from your client's stated interest was necessary to serve the child's safety and best interest. Should it later be alleged you provided ineffective assistance of counsel or otherwise violated your hybrid role as an attorney and guardian ad litem, that record may be important.

- Remember, each case and child is different, and the range of what competent children's counsel would do in a particular case is very broad. Exactly how to handle an individual case must be decided by the attorney and guardian ad litem only after proper investigation, communication with the client when the child is old enough to understand, consideration of relevant statutes, rules, and case law, and consultation with supervisors or other experts on child representation. There is no one right way to represent children.

[iii] Investigating Other Interests of the Child

In addition to their duties regarding the dependency case, counsel for the child must investigate the interests of the child beyond the scope of the juvenile proceeding and report to the court other interests of the child that may need to be protected by instituting other administrative or judicial proceedings. The court must take whatever appropriate action is necessary to fully protect the child's interests [*Welf. & Inst. Code § 317(e)*]. Some courts have gone so far as to appoint attorneys to pursue other actions on behalf of the child and to appoint guardians ad litem for children in other proceedings. The juvenile court has no jurisdiction to do this, since the juvenile court is a court of limited jurisdiction. The juvenile court also has no authority to pay such attorneys if it does appoint them to pursue matters outside of the dependency proceeding. What it can do is appoint a separate guardian ad litem to seek out counsel willing to take the case on a pro bono or contingency basis. The juvenile court can then arrange for that attorney to represent the child in the other proceedings on a pro bono or contingency fee basis, and recommend or nominate a guardian ad litem to be appointed by the court hearing the other action pursuant to *Code Civ. Proc. § 372(a)*. Regardless of the practice utilized by the juvenile court, however, the court must take action to ensure the child's interests are protected [*Welf. & Inst. Code § 317(e)*].

PRACTICE TIP:

Working With the Local Bar Association. Some juvenile courts have worked with local bar associations to arrange for experienced civil litigators to do pro bono or contingency fee work for dependent children whose interests need protection in or through other proceedings. This is an excellent approach, since many dependency attorneys, including those representing children, are not experienced in civil litigation.

[iv] Concerning the Child's Privileged Communications

Many of the communications dependent children have with professionals involved in the investigation and diagnosis of child abuse, medical, developmental, or psychological evaluation of children, or the children's care, are not privileged communications. Some are, particularly those made during ongoing therapy. There has been much confusion as to the holder of the privilege for children's privileged communication with therapists, doctors, and members of the clergy. Effective January 1, 2001, either the child or the child's attorney may invoke the child's psychotherapist-client privilege,

physician-patient privilege, and clergyman-penitent privilege [*Welf. & Inst. Code § 317(f)*]. The attorney for the child shall be the holder of these privileges if the juvenile court finds the child is not of sufficient age and maturity to make informed decisions regarding such privileged communications. If the court finds the child is of sufficient age and maturity to make such decisions, the child can invoke the privilege and the child's attorney cannot thereafter waive it. If counsel invokes the privilege, however, and the court finds the child is of sufficient age and maturity to make decisions in this regard, the child may thereafter waive the privilege [*Welf. & Inst. Code § 317(f)*].

The statute makes no provision for the child's guardian ad litem to be the holder of the privilege if the child is found by the court to not be of sufficient age and maturity to make decisions in this regard. This is not significant if the child's attorney serves as the child's guardian ad litem. If the child has a different guardian ad litem, however, as should frequently be the case with older children, it creates a situation in which the attorney, not the guardian ad litem, is making best interest determinations on behalf of the child. With young children, attorneys should usually waive privileges, since social workers, juvenile courts, and other professionals will need to know the content and tenor of these communications if children are to be protected and their best interests served. With older children, the issue is far more problematic, since children may be found by the court to be of sufficient age and maturity to make decisions in this area, yet choose to make decisions that do not serve their safety or best interests. How these decisions should be made by counsel and the courts, and what factors should be looked to, are not set forth in the statute. Case law, however, has provided guidance the statute lacks [*In re Mark L. (2001) 94 Cal. App. 4th 573, 114 Cal. Rptr. 2d 499* ; *In re Kristine W. (2001) 94 Cal. App. 4th 521, 114 Cal. Rptr. 2d 369]* .

In the context of juvenile dependency cases, therapy for the child has a "dual purpose." One of those purposes is "treatment of the child to ameliorate the effects of abuse or neglect." The other is "disclosure of information from which reasoned recommendations and decisions regarding the child's welfare can be made" [*In re Mark L. (2001) 94 Cal. App. 4th 573, 584, 114 Cal. Rptr. 2d 499* ; *In re Kristine W. (2001) 94 Cal. App. 4th 521, 527, 114 Cal. Rptr. 2d 369]* . The juvenile court and social services agency require information from children's therapists and doctors if they are to serve the interests of children and families and fulfill their statutory responsibilities to protect children and in most cases to work toward reunification. Most children's attorneys understand this and will work with the court and agency to facilitate that sharing of information. If the child or the child's attorney invoke the privilege, however, there are multiple steps the court may consider to ensure necessary information is provided to the court and the social worker.

- The court may prospectively order the therapist to provide reports on the child's progress and issues needing attention. In this way both the child and the therapist understand information will be provided to the court and thus there is no expectation of privacy or privilege [*In re Eduardo A. (1989) 209 Cal. App. 3d 1038, 1044, 261 Cal. Rptr. 68]* . If this kind of order is made, however, it must be limited to requiring the therapist to reveal only that information that would reasonably assist the juvenile court and social services agency in assessing the child's circumstances and in making orders necessary for the child's best interest. It must also preserve the confidentiality of the details of the child's therapy to the extent reasonably possible [*In re Kristine W. (2001) 94 Cal. App. 4th 521, 528-529, 114 Cal. Rptr. 2d 369]* .

- Retroactively, it can order the child's therapist to provide the information regarding therapy that has already taken place that the court and agency needs to serve the purpose of the therapy, which would include enabling the court and agency to serve the interests of the child and family [*In re Pedro M. (2000) 81 Cal. App. 4th 550, 554, 96 Cal. Rptr. 2d 839* ; *Evid. Code § 1012*]. Again, however, the order must be limited to that information reasonably needed by the court and the agency, and must preserve the confidentiality of the details of the child's therapy to the extent reasonably possible [*In re Mark L. (2001) 94 Cal. App. 4th 573, 584, 114 Cal. Rptr. 2d 499]* .

- Alternatively, the court could order a psychological evaluation by a different psychologist, which would not be privileged and which might provide the court and agency with at least some of the same

information [*Evid. Code §§ 730, 1017*; *In re Mark L. (2001) 94 Cal. App. 4th 573, 584, fn. 8, 114 Cal. Rptr. 2d 499* ; *In re Eduardo A. (1989) 209 Cal. App. 3d 1038, 1044, 261 Cal. Rptr. 68]* .

- If the court finds the child's attorney has a conflict of interest, the court could even appoint a separate guardian ad litem as the holder of the privilege. The separate guardian ad litem might be better able to determine what information should be shared consistent with the child's best interest and need for confidentiality, thereby enabling the guardian ad litem to waive the privilege to the extent appropriate and reasonably necessary.

No one step will be right in every case. But each of these steps should be considered by the juvenile court if the child or the child's attorney asserts the psychotherapist-patient privilege. Where appropriate, the court can order one or more of them.

[v] Serving as the Child's Guardian Ad Litem

Effective July 1, 2001, the Judicial Council was to adopt a rule that would address the appointment of guardians ad litem (GAL) for children brought into the dependency system. The child's attorney may be appointed in this role [*Welf. & Inst. Code § 326.5*]. Particularly with older children, there is potential for conflicts of interest between the role of the child's attorney and the role of the guardian ad litem. Thus, the decision to accept or to make such a dual appointment should be done on a case-by-case basis. California did not accept a case-by-case approach, however. In the rule that was finally adopted effective January 1, 2003, the child's attorney "will serve" as the child's guardian ad litem for purposes of the Child Abuse Prevention and Treatment Act (CAPTA) requirements [*Cal. Rules of Ct., Rule 5.662(c)*]. Nevertheless, children's counsel may have a conflict in also serving as the child's CAPTA guardian ad litem. The rule is silent as to how to address such issues. This is an area that should be watched for further developments.

For discussion of guardians ad litem (GAL) for children, see *§ 328.66*.

[d] Relieving Children's Counsel

Relieving children's counsel, in the absence of a conflict or the substitution of counsel, such that the child is without an attorney is something many find unacceptable. Nevertheless, California law does not require counsel for children if the court finds the child would not benefit from the appointment of counsel [*Welf. & Inst. Code § 317(c)*]. One court found under a previous version of the appointments statute if the court later determines the child no longer receives a benefit from that appointment, such a determination constitutes "good cause" within the meaning of *Welf. & Inst. Code § 317(d)*, giving the court has discretion to relieve counsel [*In re Jesse C. (1999) 71 Cal. App. 4th 1481, 1490-1491, 84 Cal. Rptr. 2d 609]* . Despite recent amendments to *Welf. & Inst. Code § 317(c)*, this interpretation appears to continue to be valid. Obviously, such an action is one that should not be done without consideration of all the facts concerning and interests of the child.

When a child is represented by counsel and requests substitution of his or her court-appointed attorney, it is error for the court to order the child to keep the attorney without inquiring into the causes of the child's dissatisfaction. If the child's complaint appears valid, the court should take corrective action in accordance with law [*see* *In re Ann S. (1982) 137 Cal. App. 3d 148, 150, 188 Cal. Rptr. 1]* .

[e] Appointing Appellate Counsel for Children

Historically, appellate courts have varied greatly in their practices regarding the appointment of counsel for children in dependency appeals. Some have routinely appointed counsel for children in all dependency appeals, which is understandable since the child is a party, the subject of the appeal, and indigent, and because many dependency appeals involve fundamental rights. Children should have a voice in appeals involving their lives. This is "best practice." Many

appellate courts, however, have not routinely appointed counsel for children in dependency appeals, believing that in most appeals the arguments of the parents and the social services agency provide the information and positions needed on most issues. Effective January 1, 2007, *Welf. & Inst. Code § 395* has been amended to help bridge that gap. Now it is clear the court of appeal must appoint counsel for the child if the child is the appellant [*Welf. & Inst. Code § 395(b)(1)*]. The court of appeal must also appoint counsel for the child in a dependency appeal if the court determines, after considering the recommendation of the child's trial counsel or guardian ad litem, that the child would benefit from the appointment of appellate counsel [*Welf. & Inst. Code § 395(b)(1)*]. Petitions for extraordinary writ relief and responses to such petitions normally must be handled by the child's trial counsel, of course [*Rayna R. v. Superior Court (1993) 20 Cal. App. 4th 1398, 1403-1405, 25 Cal. Rptr. 2d 259]* .

The child's trial counsel or guardian ad litem shall make a recommendation to the court of appeal for the appointment of separate counsel for the child if she determines the child's best interest in the appeal cannot be protected without the appointment of separate appellate counsel [*Welf. & Inst. Code § 395(b)(1)*; *Cal. Rules of Ct., Rule 5.661*]. The Judicial Counsel form *Recommendation for Appointment of Appellate Attorney for Child* (JV-810) may be used to make the recommendation [*Cal. Rules of Ct., Rule 5.661(g)*]. The child's trial counsel or guardian ad litem is not limited, however, to making a recommendation for appointed appellate counsel to only those cases in which the child's best interest cannot be protected without the appointment of separate appellate counsel. A recommendation can be made any time it is determined the appointment of counsel for the appeal would be in the child's best interest [*Welf. & Inst. Code § 395(b)(1)*].

A strong argument can, of course, be made that it is in the child's best interest to have separate appellate counsel in all dependency appeals, since this ensures the child a "voice" in the appeal. At the very least, a recommendation for the appointment of separate appellate counsel for the child should be made in all cases in which an older child voices a position different from those of other parties, an actual conflict exists, an apparent conflict exists, or a complex factual situation exists. Cases where siblings, or trial counsel for siblings, have taken different positions should also result in such a recommendation. And, of course, any dependency case in which a new or novel legal issue is involved, or that has been accepted for review by the California Supreme Court, should result in a recommendation for appointed appellate counsel for the child. A further list of factors that may be considered by the child's trial counsel or guardian ad litem in making a recommendation for appellate counsel is set forth in *Cal. Rules of Ct., Rule 5.661(f)*. Notably, that list includes "The existence of any other factors relevant to the child's best interests" [*Cal. Rules of Ct., Rule 5.661(f)(8)*].

When the child's trial counsel or guardian ad litem makes a recommendation for the appointment of separate appellate counsel, she must set forward in the recommendation the reasons why the appointment is in the child's best interest, including the factual basis for the recommendation [*Welf. & Inst. Code § 395(b)(1)*; *Cal. Rules of Ct., Rule 5.661(g)*].

PRACTICE TIP:

When in Doubt, Recommend Separate Appellate Counsel. In those appellate districts that have not routinely appointed separate appellate counsel for children in dependency appeals, the courts will have to adjust to this new practice and may have to develop resources for such appointments. Only regular recommendations for the appointment of such counsel will drive that process. Children's trial counsel and guardians ad litem should look at all cases going up on appeal and consider whether making such a recommendation is appropriate. Where separate appellate counsel has not been appointed for the child at the outset, they should also monitor the progress of the appeals, to the extent reasonably possible, and make such a recommendation if the briefing suggests the positions of the parties are such that appointment of separate appellate counsel is in the child's best interest. When in doubt, the recommendation should be made.

[4] Rights of Children in Foster Care

Effective January 1, 2001, the rights of children in foster care were formally codified. Additional rights have since been

added. These rights are now set forth in *Welf. & Inst. Code § 16001.9*. That statute provides that it is the policy of the State of California that all children in foster care have the following rights [*Welf. & Inst. Code § 16001.9(a)(1)-(22)*]:

- To live in a safe, healthy, and comfortable home in which the child is treated with respect.

- To be free from physical, sexual, emotional, or other abuse, and from corporal punishment.

- To receive adequate and healthy food, adequate clothing, and for children in group home placement, an allowance.

- To receive medical, dental, vision, and mental health services.

- To not have medication or other chemical substances administered to them, unless authorized by a doctor.

- To be able to contact family members, unless prohibited by the court, and to contact social workers, attorneys, foster youth advocates and supporters, court-appointed special advocates, and probation officers.

- To visit and contact brothers and sisters, unless prohibited by the court.

- To contact the State Department of Social Services Community Care Licensing Division or the State Foster Care Ombudsperson regarding violations of rights, to speak with representatives of those offices confidentially, and to be free from threats or punishment for making complaints.

- To make and receive confidential telephone calls and to send and receive unopened mail, unless prohibited by the court.

- To maintain an emancipation bank account and manage the child's personal income, consistent with the child's developmental level and age, unless prohibited by the case plan.

- To not be locked in any room, building, or facility, unless placed in a community treatment facility.

- To attend school and participate in cultural, personal enrichment, and extracurricular activities, consistent with the child's developmental level and age.

- To have social contacts with people outside of the foster care system, such as friends, church members, teachers, and mentors.

- To attend court hearings and speak to the judge.

- To have storage space for the child's private use.

- To review the case plan if the child is over 12 years old, and to receive information about the child's out-of-home placement and case plan, including being told about any changes in the case plan.

- To be free from unreasonable searches of the child's personal belongings.

- To confidentiality of all juvenile court records pertaining to the child, consistent with existing law.

- To have fair and equal access to all available services, placement, care, treatment, and benefits, and to not be subject to harassment or discrimination on the basis of perceived or actual race, ethnic group identification, ancestry, national origin, color, religion, sex, sexual orientation, gender identity, mental or physical disability or HIV status.

- At 16 years of age or older, to have access to existing information regarding educational options available, including, but not limited to, coursework necessary for vocational and postsecondary educational programs, and information about financial aid for postsecondary education.

At least once every six months, the social worker must inform the foster child of these rights. This is to be done in a manner appropriate to the child's developmental level and age, and is to be done at the time of a regularly scheduled contact with the foster child [*Welf. & Inst. Code § 16501.1(f)(4)*]. These rights of foster children do not require any foster care provider to take action that would impair the health and safety of foster children [*Welf. & Inst. Code § 16001.9(b)*].

The rights granted foster children by *Welf. & Inst. Code § 16001.9* do not directly impact the findings the court must make at the hearings it conducts as part of the normal dependency process, and there is no penalty for failing to afford a foster child of each of these rights. Nevertheless, the rights set forth in *Welf. & Inst. Code § 16001.9* are important rights that are consistent with the underlying goal of the dependency system to serve the best interests of dependent children. All parties and the court should make reasonable efforts to ensure these rights are afforded children in foster care. Moreover, although not expressly granted to children in relative care or the care of a "nonrelative extended family member," affording such children these rights whenever possible is logical and consistent with the underlying goal of serving the best interest of dependent children in out-of-home care. Finally, as set forth in the provisions for case plans, everyone should take steps to ensure that "no child leaves foster care without a life-long connection to a committed adult" [*Welf. & Inst. Code § 16500.1(b)(11)*].

PRACTICE TIP:

The Foster Child's Right to Speak to the Judge. The statute grants foster children the right to attend court hearings and to speak to the judge [*Welf. & Inst. Code § 16001.9(a)(17)*]. It does not define, however, the actual process to be followed in allowing the foster child to speak to the judge. Some judicial officers have a practice of meeting in chambers privately with dependent children, particularly dependent children who are teenagers. This practice poses a number of potential problems and should not be encouraged. One danger is that a child might make false allegations against a judicial officer who met with the child privately. Thus, any judicial officer following this practice places his or her career and professional standing at risk. Another danger is that the court might consider the child's unsworn statements in chambers as evidence in making its findings and orders, something the court cannot do. Further, even if the court thereafter advises the parties and their counsel of the general nature of the child's statements, the parties and counsel will not know all that was said. This potentially deprives the social worker of information needed to protect and serve the child and the parents of information needed to protect their own interests, including their right to due process. Thus, even if all parties and counsel agree the court can meet with the child privately, the practice has the potential to do more harm than good. The better way to let the child speak to the judicial officer is to have at least one other person present, and to have the meeting either recorded or reported [*see, e.g., In re Jamie R. (2001) 90 Cal. App. 4th 766, 770-772, 109 Cal. Rptr. 2d 123* (all counsel stipulated trial court could interview children in camera without counsel or parties present; court met with children and used their statements to deny mother's *Welf. & Inst. Code § 388* petition; appellate court was able to review the transcript of the children's testimony to find any error harmless)].

Effective January 1, 2004, state law also provides the state has a duty to care for and protect children placed in foster care, and that public policy provides the state "assumes an obligation of the highest order to ensure the safety of

children in foster care" [*Welf. & Inst. Code § 16000.1(a)(1)*]. This statement of public policy was enacted in response to concerns the case of *County of Los Angeles v. Superior Court (Terrell R.) (2002) 102 Cal. App. 4th 627, 125 Cal. Rptr. 2d 637* was inconsistent in some way with existing law. It was not. It was a reasoned analysis that was consistent with existing law, practical, and reasonable. Some may argue, however, that the new policy statement that the state assumes an obligation of the "highest order" for the safety of foster children establishes a mandatory duty to protect children in foster care from all possible harm. Thus, the statute's provision that nothing in that section is intended to change the balance of liability, or to increase or decrease liability of the state and counties as it existed prior to the *Terrell R.* decision is both questionable and confusing [*Welf. & Inst. Code § 16000.1(a)(3), (b)(1)*]. A specific, mandatory obligation to keep foster children safe from all possible harm did not exist prior to the *Terrell R.* decision, and is not reasonably possible to effect. The statute should not be construed to impose such a duty now. The areas of liabilities and immunities is beyond the scope of this text. Nevertheless, this is an area to watch for further developments.

[5] Children's Right to Be Present at Hearings

Reasonable minds differ on the value to the process and the benefit or harm to the child of having children present at dependency hearings. This is to be expected, since these things may vary greatly from one case, hearing, and child to the next. Thus, local practices have varied tremendously in this regard. Nevertheless, the growing motto of children who have aged out of the dependency system and of the California Youth Connection, a nonprofit advocacy organization of current and former foster youth, is "Nothing about us without us." They understand the need for dependent children to feel empowered and involved in the decisions that affect their lives, and recognize the decision as to whether a child should attend court proceedings is often best left to the child, when the child is old enough to make a reasoned decision on the issue.

PRACTICE TIP:

Keeping Children Involved Is Everyone's Responsibility. While it is rarely necessary or appropriate for dependent children to know all the details of their case and the decisions being made, it is always appropriate for them to feel involved and listened to regarding these decisions. The responsibility is not theirs, and shouldn't be [*In re Leo M. (1993) 19 Cal. App. 4th 1583, 1593, 24 Cal. Rptr. 2d 253]* . Dependent children need to understand the court will ultimately make the decisions. But adults need to ensure dependent children are consulted and involved in the process. This responsibility is not just the social worker's, the children's attorney, or the juvenile court's. It belongs to everyone.

Children who are 10 years of age or older are to be provided notice of their right to attend hearings. If such a child is not present, the court must determine whether the child was advised of his or her right to attend the hearing and ask why the child is not present [*Welf. & Inst. Code § 349*; *Cal. Rules of Ct., Rule 5.532(n)*]. However, at a hearing under *Welf. & Inst. Code § 366.26* a child under the age of 10 years is not required to be present unless the child or the child's counsel so requests, or the court so orders [*Welf. & Inst. Code § 366.26(f)*].

[6] Education for Children in the Dependency System

[a] Education Issues in General

Children obviously need an education, regardless of whether they are in the dependency system. But children who are abused or neglected and separated from their family face unique and considerable disadvantages in their education. Often, removal from the home means the child is no longer able to attend his or her regular school. Placement changes that result in a change in school can be detrimental to the child's education [Espana & Fried, *The Expanding Role of the Juvenile Court in Determining Educational Outcomes for Foster Children, 5 J. Center Children & Cts. 83, 84 (2004)*]. Changing schools can result in courses not being completed or credited. Enrollments at new schools may be denied or delayed without records, and records may not be readily available for transfer. Further, children form attachments with teachers and other children in school. The change in school environment can sever these relationships, creating stress and behavioral problems [California Department of Education (CDE), 2008 Report to the Legislature and the Governor

for the Foster Youth Services, pp. 1-2 (2008)]. None of this serves the best interest of the child or the child's education. These problems are exacerbated by the fact that children in the dependency system often experience multiple placements over the course of their stay in foster care. In many cases this means time spent out of school or transitioning into a new one.

It is little surprise that studies show children in foster care underperform in school [Pecora, et al., Assessing The Effects Of Foster Care: Early Results From The Casey National Alumni Study, p. 26 (Casey Family Programs, 2003)]. According to a 2008 Report to the Legislature and the Governor for the Foster Youth Services Program, "seventy-five percent of foster youth students are working below grade level, eighty-three percent are being held back by the third grade, and forty-six percent become high school drop outs" [California Department of Education (CDE), 2008 Report to the Legislature and the Governor for the Foster Youth Services Program, p. 2 (2008)]. Children exiting foster care also have higher rates of poverty, homelessness, alcohol or other drug issues, and involvement with the adult criminal court system as adults [Dicker & Gerber, *Children Adrift: Addressing the Educational Needs of New York's Foster Children, 69 Albany Law Review 1, 4 (2005)*]. Efforts to address these problems are seen in the legislative mandates regarding a foster child's educational rights.

Under *Welf. & Inst. Code § 317(e)*, attorneys representing children have a duty to investigate issues beyond the scope of the juvenile proceeding, such as educational issues, and report to the court when the child's interests need to be protected by the institution or other administrative or judicial proceedings. The court must take any appropriate action that is necessary to fully protect the interests of the child, including joining in the proceedings any agency the court determines has failed to meet its legal obligation to provide services to the child in question [*Welf. & Inst. Code § 362(a)*]. Clearly, the dependent child has numerous and significant rights and issues related to education. These should be addressed throughout the life of the dependency case. Cooperation of social services agencies, local education agencies, juvenile courts, and other stakeholders is not only important to this effort to promote the well-being of dependent children--it is vital.

PRACTICE TIP:

Questions to Ask. Important questions to ask at all dependency hearings beginning with the initial or detention hearing include, but are not limited to: Is the child in school? What type of school? If the child is enrolled in an alternative school, what is the basis for such a placement? Does the child have appropriate clothing and supplies for school? Is the child enrolled in a non-public school (NPS)? How is the child getting to and from school? How is the child's attendance at school? Is the child able to participate in school-related extracurricular activities? What was the date of the last educational evaluation or assessment? How is the child performing in school? Who holds the child's educational rights? Who is the child's educational advocate? Are there mental, physical, or language issues that impair the child's ability to learn? Does the child have an individualized education program (IEP) or Section 504 Plan? Unless the answers to these questions are known, the child's education needs may not be met.

Two helpful resources regarding educational issues for children in the dependency system are the checklist published by the National Council of Juvenile and Family Court Judges, which lists questions related to educational issues [NCJFCJ, Asking The Right Questions: A Judicial Checklist to Ensure That the Educational Needs of Children and Youth in Foster Care Are Being Addressed (NCJFCJ 2005)] and the California Foster Care Education Law Fact Sheets published by the California Foster Youth Education Task Force [CYETF, California Foster Care Education Law Fact Sheets (CYETF 3d ed. 2008)]. The CYETF fact sheets are available at www.clcla.org/train-educat.htm and cover topics such as Special Education, School Discipline and Non-Public Schools.

For further discussion of educational advocacy on behalf of dependent children, see Espana & Fried, *The Expanding Role of the Juvenile Court in Determining Educational Outcomes for Foster Children, 5 J. Center Children & Cts. 83, 84 (2004)*; McNaught, Educational Advocacy, in Child Welfare Law and Practice: Representing Children, Parents, and

State Agencies in Abuse, Neglect, and Dependency Cases (Bradford Pub. 2005) § 12H, pp. 283-297; NCJFCJ, Asking The Right Questions: A Judicial Checklist to Ensure That the Educational Needs of Children and Youth in Foster Care Are Being Addressed (NCJFCJ 2005).

PRACTICE TIP:

Informative Websites Relating to Educational Issues. Practitioners should be aware that many websites provide excellent information relating to education [*see, e.g.*, Youth Law Center, www.ylc.org (as of Dec. 22, 2008); Children's Law Center of Los Angeles, www.clcla.org (as of Dec. 22, 2008); U.S. Department of Education, Office of Special Education, IDEA (Building the Legacy: IDEA 2004), (as of Dec. 22, 2008); Protection & Advocacy, Inc., Publications for Special Education, www.pai-ca.org/issues/specialeducation-pubs.html (as of Oct. 15, 2009)]. Practitioners should look to these websites for additional information and practical advice on meeting the educational needs of children who are in the juvenile dependency system.

[b] Educational Rights and Limitations

It is important to determine who holds educational rights for the child. Educational rights will ordinarily be held by the parent or legal guardian until an order is made otherwise. The juvenile court must determine who holds educational rights as early as the detention hearing [*Cal. Rules of Ct., Rule 5.651(b)(1)(1)(A)*]. At the detention hearing and until the child is adjudged a dependent, the court may temporarily limit the right of the parent or guardian to make educational decisions if all of the following conditions are found to exist [*Welf. & Inst. Code § 319(g), Cal. Rules of Ct., Rule 5.650*]:

- The parent is unavailable, unable, or unwilling to exercise educational rights.

- The department has made diligent efforts to secure the participation of the parent or guardian regarding educational issues.

- The child's educational needs cannot be met without the temporary appointment of an educational representative.

If the court temporarily limits the rights of the parents or guardians, an educational representative or surrogate parent must be appointed on a temporary basis to make educational decisions. Any ruling limiting educational rights at the detention hearing must be set forth in the order and will expire at the conclusion of the dispositional hearing or if the petition is dismissed or found not true [*Welf. & Inst. Code § 319(g)(3)*].

If a child is declared a dependent, the juvenile court must consider the child's educational needs, regardless of whether the child is removed from the custody of the parent or guardian. The court may limit the educational rights of a parent or guardian at the dispositional hearing or any subsequent hearing if appropriate [*Welf. & Inst. Code §§ 361(a), 366.1(e)*; *Cal. Rules of Ct., Rule 5.650*]. The dispositional report is required to address the inability or unwillingness of the parent or guardian to participate in educational decisions [*Welf. & Inst. Code § 358.1(e)*]. Any supplemental reports must also discuss this issue [*Welf. & Inst. Code § 366.1(e)*; *Cal. Rules of Ct., Rule 5.651(b)(2)(E)*]. The court will consider this information as well as additional information provided by the parties in determining whether education rights should be limited. Parents may object to the limitation of their educational rights. For example, a recent case has upheld limiting the mother's educational rights over her objection where the mother was actively involved in educational issues but disagreed with the decision to send her child to an out-of-state residential program [*In re R.W. (2009) 172 Cal. App. 4th 1268, 1277-78, 91 Cal. Rptr. 3d 785]* . The court focused on the child's special mental health and educational needs, an "urgent need" to meaningfully address those issues in a timely fashion, and the mother's history of poor decision-making regarding her child [*In re R.W., 172 Cal. App. 4th 1268, 1270, 91 Cal. Rptr. 3d 785]* . Significantly, the mother did not submit any additional information as evidence at the hearing to support her position [

In re R.W., 172 Cal. App. 4th 1268, 1276, 1278, 91 Cal. Rptr. 3d 785] . Upon limiting educational rights of a parent or guardian, the court must appoint an educational representative to make educational decisions for the child. An appropriate person for appointment as an educational representative to make educational decisions may be a relative, a court-appointed special advocate (CASA), or a foster parent absent a conflict of interest [*Educ. Code § 56055(c)*]. A county social worker cannot be appointed to make educational decisions. Additionally, individuals with conflicts of interests such as employees of agencies providing education or care for a child are excluded from appointment [*Gov. Code § 7579.5(i)*; *20 U.S.C. § 1415(b)(2)*; *34 C.F.R. § 300.519(d)*]. Consequently, anyone employed by a child's group home is precluded from serving as an educational representative or surrogate parent designated to make educational decisions.

If the court is unable to locate an appropriate person, the court will refer the child with special education needs to the local educational agency for appointment of a surrogate parent [*Welf. & Inst. Code § 361(a)(5)*; *Gov. Code § 7579.5(b)*]. However, the appointment of a surrogate parent is only appropriate when the child is receiving special education services or may be eligible for such services [*Gov. Code § 7579.5(a)(1)(A*); *Cal. Rules of Ct., Rule 5.650(d)*]. If the court determines that appointment of a surrogate parent is necessary, the local educational agency must be provided with a copy of the order (form JV-535) and response form (JV-536, titled Local Educational Agency Response to JV-535--Appointment of Surrogate Parent). The local educational agency then has 30 days to appoint a surrogate parent [*Gov. Code § 7579.5(a), Cal. Rules of Ct., Rule 5.650(d)(3)*]. If there is no responsible adult available, and the child does not qualify for a surrogate parent, the court can make educational decisions for the child with the input of any interested person [*Welf. & Inst. Code §§ 319(g)(2), 361(a)(5)*].

PRACTICE TIP:

Educational Representative Versus Surrogate Parent Versus Responsible Adult. Be sure to use appropriate terminology when referring to orders appointing adults to make educational decisions for children. If the juvenile court makes such an appointment, the court appoints an "educational representative" to make educational decisions [*Cal. Rules of Ct., Rule 5.650*]. If the local education agency makes such an appointment, it appoints a "surrogate parent" [*Gov. Code § 7579.5(a)*]. To further complicate matters, the term formerly used for "educational representative" was "responsible adult." In fact, the code and some practice guides use the term "responsible adult" rather than "educational representative" [*Welf. & Inst. Code §§ 319(g)(2), 361(a)*]. Practitioners should be aware that while both terms refer to the same thing, "educational representative" is now the appropriate terminology.

The parent or guardian's educational rights can be restored when that individual is able to act in the child's best interests regarding educational issues [*Welf. & Inst. Code § 361(a)(3)*]. Restoring the parent or guardian's educational rights can be sought by a petition pursuant to *Welf. & Inst. Code § 388*. Additionally, the responsible adult can be changed until the child turns 18. The Judicial Council has approved a form requesting a hearing regarding a child's education for this purpose, among others (JV-539). Otherwise, the appointment of the adult responsible for making educational decisions stays in place until the child turns 18 years of age, with two exceptions: where the child chooses not to make educational decisions him or herself, or where the court deems the child incompetent.

PRACTICE TIP:

Formulating Position on Limiting Educational Rights. For social workers, county counsel, children's counsel, and the court certain circumstances should trigger the discussion of limiting educational rights: the parent's whereabouts are unknown, the parent is the subject of a no-contact order, or a parent's ability to exercise educational rights is impaired. Sometimes, mental illness or severe substance abuse issues may render a parent unable to assist in educational decision-making. For the parent's counsel, limitation of educational rights can be seen as the erosion of parental rights and should be resisted unless grounds clearly exist. Regardless, there should be aggressive efforts to facilitate the parent's involvement in education-related meetings. Counsel for parents should also ensure their clients continue to receive all notices from the school related to educational issues. This participation is relevant to the issue as to

whether the parent has the ability to care for the child.

Pursuant to *Welf. & Inst. Code § 16500.1(a)*, it is the intent of the legislature to foster the educational progress of children in out-of-home care. Toward this end, the court may make any and all reasonable orders for the care and maintenance of children who are dependents [*Welf. & Inst. Code § 362(a)*]. This includes restricting a dependent child's parent in a family maintenance case from home schooling the child if the court finds that a history of abuse or neglect in the family makes "regular contact with mandated reporters necessary to guarantee the child's safety" in the parent's home [*Jonathan L. v. Superior Court (2008) 165 Cal. App. 4th 1074, 1105, 81 Cal. Rptr. 3d 571]* . The authority of the juvenile court to ensure that a dependent child's educational needs are met has been held to include the ability to order the agency pay for an appointed surrogate parent's travel expenses to visit a child placed out-of-county [*In re Samuel G. (2009) 174 Cal. App. 4th 502, 506, 94 Cal. Rptr. 3d 237]* . In the *Samuel G.* case, a Southern California agency placed the child in a group home in Northern California. The child, with severe educational and behavioral issues, had an individualized education program (IEP) and was assigned an educational representative after his mother's educational rights were suspended. Referencing the juvenile court's authority to appoint an educational representative under *California Rule of Court 5.650*, and the duties of the representative, the appellate court upheld the lower court's order that the agency pay for the educational representative's travel expenses to participate in IEP meetings and review the child's progress [*In re Samuel G., 174 Cal. App. 4th 502, 510-511, 94 Cal. Rptr. 3d 237]* . The *Samuel G.* court reasoned that the trial court acted within its discretion "to ensure continuity ... in the monitoring and advocating for the child's interests in, and rights to, a quality education" [*In re Samuel G., 174 Cal. App. 4th 502, 513, 94 Cal. Rptr. 3d 237]* . Particularly in hard financial times, the issue of who is responsible for education related costs is the subject of much disagreement. This is an area that is continuing to develop.

[c] Transfer and Enrollment (McKinney-Vento, A.B. 490, and California Rules of Court, Rule 5.651)

Recognizing the critical role education plays in a foster child's life, both federal and California law provide significant rights to children who are brought into the dependency system. The McKinney-Vento Homeless Assistance Act of 1986 (*42 U.S.C. § 11431 et seq.*) applies to "homeless children and youths." This definition includes children who are "living in emergency or transitional shelters" or are "awaiting foster care placement" [*42 U.S.C. § 11434a*]. The goal of the Act is to ensure that such children have equal access to the same free, appropriate public education as is provided to other children and youths. Toward this end, McKinney-Vento sets forth several obligations on the part of the local educational agency including:

- Maintaining homeless children in the school they attended prior to becoming homeless (school of origin) to the extent feasible and when it serves the child's best interest to attend the same school until the end of the academic year.

- Immediately enrolling the child at a new school, even where the child lacks the school and medical records necessary for immediate enrollment.

- Requiring the enrolling school to immediately contact the child's prior school to obtain the child's records.

- Providing assistance with immunization issues.

- Providing transportation to and from the school of origin.

The intent of California's statutory provisions is to ensure that all children, including foster children, "have the opportunity to meet the challenging state pupil academic achievement standards to which all pupils are held" [*Welf. & Inst. Code § 16000(b)*]. To this end, the code requires educators, county placing agencies, care providers, attorneys and juvenile courts to work collaboratively to maintain stable school placements, ensure children are placed in the "least

restrictive educational programs," and ensure children have access to academic resources, services, and extracurricular activities that are available to all pupils [*Educ. Code §§ 48850(a), 48853(g)*]. California Assembly Bill 490 (Stats. 2003, ch. 862, eff. Jan. 1, 2004) followed the requirements of its federal counterpart, the McKinney-Vento Act, and expands on McKinney-Vento substantially. Regarding its scope, for example, Assembly Bill 490 applies to any foster child who: (1) has been removed from his or her home pursuant to *section 309 of the Welfare and Institutions Code*; (2) is the subject of a petition filed under *sections 300* or *602 of the Welfare and Institutions Code*; or (3) has been removed from his or her home and is the subject of a petition filed under *section 300* or *602 of the Welfare and Institutions Code* [*Educ. Code § 48853.5(a)*]. When coupled with the broad definition of "homeless children and youths" set forth under the McKinney-Vento Act, it is possible to argue the rights accorded under McKinney-Vento and A.B. 490 cover foster children from the detention hearing through the close of the dependency case. The requirements of Assembly Bill 490 include the following:

- Each local educational agency is required to designate a staff person as the educational liaison for foster children who will ensure and facilitate proper educational placement, enrollment in school, and checkout from school. This educational liaison must also assist foster children in transferring schools, ensuring proper transfer of credits, records and grades [*Educ. Code § 48853.5(b)(1)-(2)*].

- When deciding where to place a child, one of the factors that must be considered is proximity to the child's present school and the impact the placement would have on the child's educational stability [*Welf. & Inst. Code § 16501.1(c)(1), (f)(8)*].

- Foster children shall be allowed to remain in their school of origin for the duration of the academic school year if it is in their best interests to do so [*see Educ. Code § 48853.5(d)(1)*].

- The new school must immediately enroll the foster child even if the foster child lacks immunization records, fees, books, required uniform, academic records, medical records, proof of residency or other necessary documentation [*Educ. Code § 48853.5(d)(4)(B)*].

- The new school must request records from the former school within two business days of the child's request for enrollment and the former school must provide such records within two business days of the request [*Educ. Code § 48853.5(d)(4)(C)*].

- The foster child's grades may not be lowered due to absences from school which are related to changes in placement, court hearings, or other court-related activities [*Educ. Code § 49069.5(g)-(h)*].

- Each public school district and county office of education shall accept and provide credit for all full or partial coursework satisfactorily completed by a student while attending a public school, juvenile court school, or nonpublic, nonsectarian school or agency [*Educ. Code § 48645.5*].

- Foster children are entitled to be placed in the least restrictive educational program and attend a regular comprehensive public school unless the child has an individualized education program (IEP) requiring placement in a nonpublic, nonsectarian school or the person holding educational rights determines that another educational program is best for the child [*Educ. Code § 48853(a)(2)-(3)*].

The term "least restrictive educational program" is an important one. Many group homes have on-site schools that are non-public schools (NPS) [*Educ. Code § 56034*]. These schools tend to have restrictive educational programs since they address the needs of children found eligible for special education who cannot function in a regular public school and are in need of specialized programs and services not available at a regular public school [Espana & Fried, *The Expanding Role of the Juvenile Court in Determining Educational Outcomes for Foster Children, 5 J. Center Children & Cts. 83, 85 (2004)*]. Furthermore, group homes may be motivated to enter a child in their non-public school as it results in

additional funding and resolves the need to transport the child to a public school. A group home cannot require, as a condition of placement, that a child be identified as an individual with exceptional needs, that educational authority over the child be designated to the group home or the NPS, or that the child attend the non-public school the group home owns or operates [*Educ. Code §§ 56366.9, 56155.7, 48854*].

Despite the clear entitlement to be placed in the least restrictive educational program, foster youth are often placed in other more restrictive schools such as continuation high schools, community day schools or independent study. Further, students are sometimes convinced to voluntarily enroll in such programs because they lack sufficient credits and are informed, often incorrectly, that they will graduate sooner or more easily make up credits in such programs. However, other options also exist for foster children. These students should be given meaningful access to appropriate educational programs and all other supplemental services that are funded by money allocated to school districts to address the needs of all academically "at risk" students in the regular school setting.

A key aspect of educational stability is the notion of having a foster child continue to attend his/her "school of origin." There has been much controversy over the preference to keep children in their school of origin primarily because it can impact placement decisions and result in the expense of transporting a child to a school that is not close to the child's placement. *California Rules of Court, Rule 5.651,* which became effective January 1, 2008 requires the Court to determine whether the child is attending his or her school of origin and, if not, whether this is in the child's best interest. The right to attend the school of origin can be waived in consultation with the child, the child's attorney and the individual holding educational rights. In determining whether to waive this right, there should be careful consideration and balancing of which educational setting is best for the child taking into consideration the available placements and the distance the child will have to travel to get to the school of origin.

To ensure school stability, *California Rules of Court, Rule 5.651* gives the social worker a duty to notify the court, the child's attorney, and the educational representative or surrogate parent of any proposed change in placement that will result in the removal from a child's school of origin. That notice must be given within 24 hours, excluding non-judicial days, of the decision to change such a placement [*Cal. Rules of Ct., Rule 5.651(e)(1)(A)*]. The child's attorney is required to discuss the proposed move from the school of origin with the child and the person who holds educational rights. Children's counsel or the educational representative may then request a hearing by filing the JV-539, Request for Hearing Regarding Child's Education form, within two days. The court may also set a hearing on its own motion. If a hearing is requested or set, the child must be allowed to remain in the school of origin until the matter is resolved by the court [*Cal. Rules of Ct., Rule 5.651(e)(3)*].

While under McKinney-Vento children who are "awaiting foster care placement" or "living in emergency or transitional shelters" are entitled to transportation, A.B. 490 does not require that transportation to and from the school of origin be provided. Some argue the cost of transportation is the responsibility of the child welfare agency because when a child is placed in foster care, it is understood the child welfare agency is responsible for ensuring the child receives the care to which she or he is entitled. As discussed previously, the recently decided *Samuel G.* case upheld a juvenile court order that the agency pay for an educational representative's travel expenses "to ensure continuity" in representing the child's educational rights [*In re Samuel G., 174 Cal. App. 4th 502, 513, 94 Cal. Rptr. 3d 237]* . While *Samuel G.* did not address the issue of who is responsible for transportation of a child to and from a school of origin under A.B. 490, it is likely practitioners will use this case to argue by analogy that the agency should also bear this transportation expense.

Others may argue the responsibility for travel expenses falls on the school district, as school districts have the discretion to provide home to school transportation for their students and are allocated money from the state for doing so [*see Educ. Code § 41850 et seq.*]. In any event, *Educ. Code § 48850(a)* requires stakeholders (educators, county planning agencies, care providers, advocates and juvenile courts) to work together to maintain stable school placements. Furthermore, *Educ. Code § 48853.5(d)(6)* encourages the local education agency and the county placing agency to collaborate in obtaining funding "to promote the well-being of foster children through educational stability." This can be interpreted to require these agencies to work together to resolve the issue of the cost of transportation.

PRACTICE TIP:

Obligations of Dependency Practitioners. Educational issues should be addressed at every hearing. Section 24 of the California Standards of Judicial administration requires judges take responsibility with the other juvenile court participants at every stage of the child's case, to ensure that the child's educational needs are met. This includes making certain that educational rights are investigated, reported and monitored and that court reports, case plans, assessments and permanency plans address how educational entitlements are being satisfied [Cal. Stds. Jud. Admin. § 24(h)(1)-(3)]. *California Rules of Court, Rule 5.651* incorporates the educational rights discussed in this section. It also lists the educational elements that social worker reports and court hearings must address. All dependency courts and practitioners should be familiar with these obligations.

In October 2008, President Bush signed the Fostering Connections to Success and Increasing Adoptions Act of 2008 (HR 6893). As noted by the National Center for State Courts' Government Relations Office, this legislation is aimed at improving outcomes for children in foster care and requires states to develop a plan to ensure educational stability for these children [NCSC, *Issue Brief: Fostering Connections to Success and Increasing Adoptions Act*, Vol. 9, No. 3 (NCSC 2008)]. HR 6893 requires each state's plan include the following:

- Assurances that the placement of the foster child takes into account the appropriateness of the current education setting and the proximity to the school where the child was enrolled at the time of placement.

- An assurance that state agencies coordinate with the local educational agencies to ensure that the child remains in the school of origin.

- An assurance that when remaining in the school of origin is *not* in the child's best interests, the child will be immediately enrolled in a new more appropriate school which will be provided with all of the child's educational records.

HR 6893 also allows Title IV-E foster care payments to be used to cover the cost for the child to travel to the school of origin. Hopefully, state guidelines that address the administration of this act will be provided soon. Until then, it remains to be seen what impact the Fostering Connections to Success and Increasing Adoptions Act will have on this controversial issue of paying for such transportation.

California law grants other rights specifically for foster children. These rights include:

- Participation in age-appropriate extracurricular, enrichment, and social activities and Independent Living Skills Programs if eligible [*Welf. & Inst. Code §§ 362.05, 16001.9(a)(13)*; *22* C.C.R. §§ 83072(c)(20), (23), 84072(c)(25), (28), 89372(c)(18)(A), (E)].

- To be provided information about available educational options including vocational and postsecondary schooling if over 16 years of age [*Welf. & Inst. Code § 16001.9(a)(24)*; *22* C.C.R. §§ 83072(c)(29), 84072(c)(34)].

- For children over 16, services necessary to transition "from foster care to independent living" [*Welf. & Inst. Code § 366.3(e)(10)*].

Finally, children who are identified as limited English proficient (LEP) or as an English Language Learner must be given access to appropriate educational programs to address their language needs [*see Educ. Code §§ 305, 310*]. For foster youth who are identified as LEP, it is extremely important to consider their language needs when determining what educational placement is in their best interest pursuant to AB 490. Whenever possible, there should be continuity in the type of language program made available to such youths when changing placements. A child's school records

should indicate whether he or she is LEP; in fact, the newly revised JV-225 form now asks about the languages spoken at home and whether a child has ever been identified as an English Language Learner by a school.

[d] Special Education

[i] In General

According to research, 30 percent to 40 percent of foster children are classified as special education students [Wingerden et al., Improving Special Education for Children with Disabilities in Foster Care (2002) p. 4]. Furthermore, studies show that many foster children in need of these services are unidentified, inappropriately designated as special education, or underserved despite qualifying for special education services [*see* Wingerden et al., Improving Special Education for Children with Disabilities in Foster Care (2002); McNaught, *Education Advocacy in Child Welfare Cases: Key Issues and Role* s, 21 Child Law Practice 129, 138 (2002)]. Special education programs in California are governed by both state and federal laws. The applicable federal laws include the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) and Section 504 of the Rehabilitation Act of 1973. California law, which generally parallels IDEA, is found in *Education Code § 56400 et seq.* Additional guidance can be found in the federal and state regulations [*see* 34 C.F.R. § 300; *5 C.C.R. § 3000 et. seq.*].

[ii] Individuals with Disabilities Education Improvement Act (IDEA)

IDEA addresses the provision of education and related services to children with qualifying disabilities [*20 U.S.C. § 1400 et seq.*]. The purpose of IDEA is to ensure that children with disabilities have access to a free appropriate public education (FAPE) [*20 U.S.C. § 1400(c)*; *34 C.F.R. § 300.1-300.818*]. This means that a disabled child must be provided with free special education and related services which enable a child with a disability to progress in the general curriculum and conform to an Individual Education Program (IEP) from preschool through secondary education [*20 U.S.C. § 1401(8)*]. The education and services need not be the best possible arrangement for the child. Rather, it is sufficient if the student is receiving an "educational benefit" [*Board of Education v. Rowley (1982) 458 U.S. 176, 204-208, 102 S. Ct. 3034, 3050-3052, 73 L. Ed. 2d 690, 711-713*]. Under California law, educational benefit is measured by whether the child is making progress toward achieving the central goals of the IEP [Community Alliance for Special Education and Protection and Advocacy, Inc., Special Education Rights and Responsibilities, ch. 10 (9th ed. 2005)]. Special education is required to be provided in the least restrictive environment. This means that, to the maximum extent possible, special education students must be educated with non-disabled students [*Board of Education v. Rowley (1982) 458 U.S. 176, 202, 102 S. Ct. 3034, 3049, 73 L. Ed. 2d 690, 709*].

Under the IDEA a disability includes "mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), serious emotional disturbance, an orthopedic impairments, autism, traumatic brain injury, other health impairment, or specific learning disability [*20 U.S.C. § 1401(3)(A)(i)*]. Furthermore, as a result of one of these disabilities the student must need special education and related services to benefit from their education [*20 U.S.C. § 1401(3)(A)(ii)*; *34 C.F.R. § 300.8(b)(2)*]. Under California law, children with the disabilities set out above are designated "individuals with exceptional needs" and are eligible for special education if they require instruction and services which cannot be provided by merely modifying the regular school program [*Educ. Code § 56026(a), (b)*].

Children between the ages of 5 and 18 years, inclusive, are eligible for special education services [*Educ. Code § 56026(c)(3)*]. Also eligible are individuals between 19 and 21 who were eligible for such services prior to their 19th birthday, provided they have not graduated from high school with a "regular diploma" and have not completed their prescribed course of study, or if they have not met proficiency standards in basic skills [*Educ. Code §§ 56026(c)(4), 56026.1(b)*; 34 C.F.R. § 300.102(a)(3)(i), (ii)]. Children under 3 years of age are eligible for special education services if they are identified by the local educational agency as requiring special education and services [*Educ. Code § 56026(c)(1)*]. Children between 3 and 5 years of age are eligible if they have one of the conditions set forth above or a

disabling medical condition or congenital syndrome that has a high likelihood of requiring special education and services [*Educ. Code § 56026(c)(2)*].

PRACTICE TIP:

Identifying a Child with Special Education Needs. Certain educational difficulties should trigger further inquiry into this issue. Such triggers may include poor grades, delays in academic achievements or developmental milestones, lack of interest in school, or a refusal to attend school and behavioral problems [McNaught, Educational Advocacy, in Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases (Bradford Pub. 2005) p. 284]. Consequently, it is valuable for practitioners to talk with the child and his/her caretakers, review educational records, communicate with the school, and attend any meetings which address the child's progress. The social worker or attorney can also seek medical, psychological and neuropsychological evaluations. Under the Individuals with Disabilities Education Improvement Act "Child Fund" mandate, states are required to assure that children in need of special education services are located, identified, and referred. While identifying special education students is critical, it is also important to question a child's designation as a special education student when appropriate and make sure the child is not placed in an unnecessarily restrictive educational setting [McNaught, *Education Advocacy in Child Welfare Cases: Key Issues and Roles*, 21 Child Law Practice 129, 138 (2002)]. Inquiry should be made into whether there are any modifications that can be made within the general education classroom which could assist the child with his or her problems such as tutoring or use of a teacher's assistant.

The responsibility for ensuring that a child receives appropriate special education services falls on the local school district. The special education process can be commenced by a written request to the school district special education director, the school principal, and/or the school psychologist for a special education assessment. The request must be made by a "parent" whose educational rights have not been suspended. A "parent" for purposes of special education law is defined as a natural or adoptive parent, a guardian, a person having legal custody of a child, a person acting in the place of a natural or adoptive parent, such as a grandparent, stepparent, or other relative with whom the child lives, an individual who is legally responsible for the child, an adult student who has no conservator, or a surrogate parent [*20 U.S.C. § 1401(19)*; *Educ. Code § 56028(a)(2)*; 34 C.F.R. § 300.30(a)(2)]. Foster parents are also authorized to initiate a referral for special education of their foster child as long as the educational rights of the natural parents have been limited by court order [*Educ. Code § 56028(a)(2), 56029(c)*; 34 C.F.R. § 300.30(a)(2)]. If the dependency court has designated a particular person to make educational decisions, that is the appropriate person to make the request [*34 C.F.R. § 300.30(a)(3)*].

In response to a request, the local educational agency has 15 days, excluding days between regular school sessions or terms or days of school vacation in excess of five school days from the date of receipt of the referral, to provide a written proposed assessment plan [*Educ. Code § 56321(a)*]. The student is to be assessed in all areas related to the suspected disability including, where appropriate, health and development, vision (including low vision), hearing, motor abilities, language function, general ability, academic performance, self-help, orientation and mobility skills, career and vocational abilities and interest, and social and emotional status [*Educ. Code § 56320(f)*]. A "parent" must consent to the proposed assessment.

PRACTICE TIP:

The Student Study Team (SST). Before a student is referred for special education services, the school district must consider and utilize, where appropriate, the resources of the regular education program [*Educ. Code § 56303*]. Often schools will want to refer the child's case to a student study team (SST) for this purpose. However, the student study team process is not a requirement. The student study team may be used by the school district as a stalling tactic to avoid the cost of the special education assessment. If the study team referral is made, it should not in any way delay the assessment and IEP timelines without consent of the person holding education rights [Community Alliance for Special Education and

Protection and Advocacy, Inc., Special Education Rights and Responsibilities, ch. 2 (9th ed. 2005)].

Within 60 calendar days of receipt of the parent's consent, the assessment must be completed and an Individual Education Program (IEP) team meeting held for the purposes of determining if the child qualifies for special education services. The IEP team includes parents, regular and special education teachers, and any individual who performed the assessment or can interpret it. If the child is found to qualify for special education, the IEP the team develops the child's program for the academic year, assessing the child's present level of educational functioning and establishing annual goals and short term objectives. The team also determines what types of services and which educational setting will enable the child to make progress on the identified goals. Also, the IEP must address the extent to which the child can participate in a regular education program. For older children, services designed to transition the child to adulthood are also discussed and made part of the IEP. The IEP must be implemented as soon as possible following the IEP team meeting [*34 C.F.R. §§ 300.323(c)(2), 300.347(a)(6)*; *5 C.C.R. § 3040(a)*]. An IEP must be in effect for each eligible child at the beginning of the school year [*Educ. Code § 56344(c)*; *20 U.S.C. § 1414(d)(2)(A)*; *34 C.F.R. § 300.323(a)*]. An IEP must be conducted at least annually to review the child's progress and the program and can be conducted more often if the child demonstrates a lack of anticipated progress or upon the request of a parent or teacher [*Educ. Code § 56343(b)-(d)*]. Additionally, a student must be reevaluated for special education and related services at least every three years [*20 U.S.C. § 1414(a)(2)(B)(ii)*]. This is called a triennial IEP. Furthermore, this form of reevaluation is necessary if the school district asserts the child no longer needs special education services [*20 U.S.C. § 1414(a)(2)(B)(ii)*].

The special education student must also be provided with all "related services" that are required in order for the child to benefit from special education. "Benefit" from special education has generally been interpreted to mean making meaningful progress toward meeting IEP goals and objectives [*County of San Diego v. California Special Education Hearing Office (9th Cir. 1996) 93 F.3d 1458, 1466-67* ; *Taylor v. Honig (9th Cir. 1990) 910 F.2d 627, 629]* . "Related services," as defined by *34 C.F.R. § 300.34(a)*, means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech language pathology and audiology, psychological services, physical and occupational therapy, orientation and mobility services, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, parent counseling and training and residential placement if necessary for educational purposes [*34 C.F.R. § 300.34(a)*].

PRACTICE TIP:

School Placement Issues. Any deviation from the appropriate placement identified in the IEP must be documented in a review of the IEP by an IEP team within 30 days of the change in placement pursuant to *Educ. Code § 56325*.

Generally, the local school district where either parent or guardian resides is responsible for providing these services [*Educ. Code §§ 48200, 48204*]. However, exceptions exist for children not living with a parent or guardian. For example, there is currently considerable controversy over which agency is required to pay for the costs of a residential treatment center when parental rights are terminated or educational rights are limited. The California Office of Administrative Hearings has rendered several decisions on this subject. These, and other decisions related to special education can be found at www.oah.dgs.ca.gov/default.htm.

Both the child and the local educational agency are entitled to a due process hearing when there is disagreement concerning such issues as eligibility, placement, program needs, or related services. These administrative hearings are held by the Office of Administrative Hearings. The burden of persuasion is on the party seeking relief [*Schaffer v. Weast (2005) 546 U.S. 49, 51, 126 S. Ct. 528, 163 L. Ed. 2d 387, 393]* . As a result of the hearing, the school maybe ordered to provide a particular service or placement, compensatory education, or award reimbursement to a parent who has paid out of pocket for a service that should have been provided by the school. This reimbursement can include the cost of private school tuition [*Forest Grove School District v. T.A. (2009) 557 U.S. --, 129 S. Ct. 2484, 2488, 174 L.*

Ed. 2d 168, 175 (parents can be awarded reimbursement for private school tuition even where the child has never received special education services in public school)]. Parents and school districts can also attempt to settle their disputes through mediation. In addition, parents can file compliance complaints if the school district is not providing a service listed in the IEP or for procedural violations of IDEA.

[iii] Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 is a federal anti-discrimination law [*29 U.S.C. § 794*]. It is not intended to apply solely to education. Rather, Section 504 applies to any program that receives federal funds including preschool, elementary, and secondary schools [*29 U.S.C. § 794(a)*]. Schools receiving federal funds may not discriminate against individuals with disabilities, exclude disabled children from participating in their program, or deny disabled children the benefits of the program [*29 U.S.C. § 794*]. In order for a child to be deemed an "individual with a disability" the child must have a physical or mental impairment that substantially limits one or more major life activities [*29 U.S.C. § 705(20)*]. Major life activities include learning, seeing, hearing, walking, speaking, reading and working.

PRACTICE TIP:

Eligibility Criteria Under IDEA Differ From Section 504. For a child to qualify for special education and related services under the Individuals with Disabilities Education Act (IDEA), the child must have a certain designated disability that causes them to need special education services in order to benefit from their education. Under Section 504, eligibility is not limited to those disabilities defined in IDEA and there is no requirement the child need special education. For example, a child with Attention Deficit Hyperactivity Disorder (ADHD) is entitled to the same education that is available to a child who does not have ADHD under Section 504. However, because ADHD is not one of the disabilities listed under IDEA, a child with ADHD will not automatically qualify for special educations services, although some will if it constitutes an "other health impairment" that adversely impacts his/her educational performance and requires special education. As a result of the less onerous requirements of Section 504, all students who are eligible for IDEA services are eligible under 504. However, the reverse is not always true. This being the case, practitioners should remember that whenever a referral for a special education assessment is made, the request should include an assessment for eligibility under Section 504 as well.

[e] School Discipline

[i] In General

Unfortunately, it is not uncommon for dependent children to have problems in school that lead to suspension or expulsion [Kortenkamp et. al, *The Well-Being of Children Involved With the Child Welfare System: A National Overview*, The Urban Institute No.B-43, p. 2 (2002)]. For these children, a suspension or expulsion can result in further stigmatization, feelings of diminished self-worth, and difficulty keeping up with schoolwork [McNaught, *School Discipline and Children in Foster Care: Advocates' Roles*, 23 Child Law Practice 137, 138 (2004)]. A suspension or expulsion can adversely impact the child's current placement and make it harder to find a permanent placement for the child [Id.]. Suspension is defined as a temporary removal from school, generally not more than five consecutive days or 20 school days total [*Educ. Code §§ 48911(a), 48903(a)*]. An expulsion, on the other hand, results in a child being prohibited from attending *any* school within the district for a minimum of a semester to a year depending on the offense [*Educ. Code § 48916(a)*]. The Education Code sets out the various offenses for which a child can be suspended or recommended for expulsion [*Educ. Code §§ 48900(a)-(q), 48900.2, 48900.3, 48900.4, 48900.7*]. Additionally, certain "zero tolerance" offenses carry a punishment of immediate suspension and a mandatory recommendation for expulsion [*Educ. Code § 48915(c)*]. In order for the act to warrant a possible suspension or expulsion, it must be related to a school activity. This includes acts that occur on school grounds, during travel to and from school, during the lunch period, during a school-sponsored activity or travel to or from such activities [*Educ. Code § 48900(r)*].

In *Goss v. Lopez* the United States Supreme Court held that a child suspended for 10 days or less has a due process right

to oral or written notice of the charges against them, an explanation of the evidence against them and an opportunity to present his or her version of the story [*Goss v. Lopez (1975) 419 U.S. 565, 584, 95 S. Ct. 729* , 42 L. Ed. 3d 725, 740]. Under California law, students who are recommended for suspension for any length of time have these certain due process rights [*Educ. Code § 48911(b)*]. These rights are usually provided by way of an informal conference between the student and the principal that occurs before the possible suspension. In certain "emergency situations" a suspension can occur before this conference [*Educ. Code § 48911(c)*]. A suspension should only be imposed when other means of correction fail [*Educ. Code § 48900(a)-(e)*]. However, certain conduct can result in suspension without the consideration of alternatives [*Educ. Code §§ 48900.5, 48900(a)-(e)*].

The due process rights of a student facing expulsion are set forth in *Education Code section 48918*. These rights include a hearing within 30 school days before the district governing board, an administrative panel, or hearing officer [*Educ. Code § 48918(a)*]. The student is also entitled to written, 10 calendar-day notice of the hearing including a citation to the education code section that the child is alleged to have violated as well as details of the violation, the right to bring a lawyer or other advocate, and the right to present witnesses and other evidence as well as questioning witnesses [*Educ. Code § 48918(b)*].

Before a student can be expelled it must be demonstrated that 1) the student committed an act prohibited by the education code that was related to a school activity, and 2) other means of correction are not feasible or have failed to bring about proper conduct, or that due to the nature of the act, the present of the student causes a continuing danger to the physical safety of the student or others [*Educ. Code § 48915(b)*]. However, the second prong above is not required if the child commits certain "zero tolerance" offenses in connection with a school activity [*Educ. Code § 48916(c)*]. These offenses are:

- Possessing, selling, or furnishing a firearm;
- Brandishing a knife at another;
- Selling a controlled substance;
- Committing or attempting to commit a sexual assault, or committing sexual battery; and
- Possession of an explosive [*Educ. Code § 48915(c)*; CYETF, California Foster Care Education Law Fact Sheets, Fact Sheet Number Seven: School Discipline (CYETF 3d ed. 2008].

If the student is expelled, the district must provide an educational program and recommend a plan for rehabilitation [*Educ. Code §§ 48916.1(a), 48919*]. A student has 30 days to appeal the expulsion [*Educ. Code § 48919*]. If the child is expelled, the governing board will recommend a plan of rehabilitation such as improved academic performance, tutoring, job training, counseling or community service [*Educ. Code § 48916(b)*]. The student can apply for readmission at the end of the expulsion period. The child must be readmitted unless the student has not completed the rehabilitation plan, or the student continues to pose a danger to the campus safety, other students, or district employees [*Educ. Code § 48916(c)*].

PRACTICE TIP (CHILD'S COUNSEL P.O.V.):

The Role of Children's Counsel in School Discipline Issues. Pursuant to *Welfare and Institutions Code section 317(e)*, children's counsel should investigate the interests of the child as it relates to school discipline issues and report to the court. While some offices that represent children have attorneys experienced in school discipline issues, more often this is an area that will require securing an outside attorney experienced in education law. The attorney representing the child in a school discipline matter may seek less stringent sanctions such as detention or community service. Furthermore if the child has a disability, the attorney will most likely review the IEP or Section 504 plan, attend the manifestation

determination meeting and provide input, making sure the special education plan is being followed. Additionally, if the child was not already identified as having a disability, inquiry should be made into whether the school was on notice of a suspected disability. Oftentimes, disciplinary issues and behavior-related disabilities are interrelated.

[ii] School Discipline for Children Eligible for Service Under IDEA

If a child is in special education under IDEA or is suspected of being eligible for such services, certain protections apply. A child can be suspected of being eligible for special education services in one of a few ways. One possibility is that school personnel identify the child as having possible special education issues [*34 C.F.R. § 300.534*]. Additionally, the child is suspected of being eligible for special education services when the parent expresses concern in writing to the school that the child needs special education or requests the school conduct an evaluation *before* the disciplinary action-triggering misbehavior occurs [Community Alliance for Special Education and Protection and Advocacy, Inc., Special Education Rights and Responsibilities, pp. 64-65 (9th ed. 2005)].

A special education student may be suspended for up to 10 days in a school year, just like a non-disabled student. However, when one suspension exceeds 10 consecutive school days, or suspensions on different occasions exceed a total of 10 days, and this creates a pattern, the suspension is deemed a "change in placement" necessitating a special process [*20 U.S.C. § 1415(k)(1)(C)*; *34 C.F.R. § 300.530*]. Likewise, an expulsion is considered to be a "change in placement." If an intended discipline rises to the level of a "change in placement," the school district is required to hold a manifestation-determination meeting [*20 U.S.C. §§ 1415(k)(1)(B), 1415(k)(1)(E)*; *34 C.F.R. § 300.530(e)*]. At this meeting held within 10 days after the decision to discipline the child, and prior to an expulsion proceeding, the IEP team must determine whether the behavior was a manifestation of the child's disability [*20 U.S.C. § 1415(k)(1)(E)(i)*]. This entails determining: 1) whether the behavior was caused by, or had a direct and substantial relationship to the child's disability, and 2) whether the behavior was directly related to the school's failure to implement the IEP [*20 U.S.C. § 1415(k)(1)(E)(i)(I)-(II)*; *34 C.F.R. § 300.530(e)(i)-(ii)*]. If the answer to either question is "yes," the child cannot be expelled or suspended and is returned to his/her school placement unless the parents agree otherwise [*20 U.S.C. 1415(k)(1)(E)(ii)*; *34 C.F.R. § 300.530(f)*]. The IEP team must determine whether to conduct a functional behavioral assessment (FBA) and develop a behavior intervention plan (BIP) to address the conduct [*20 U.S.C. § 1415(k)(1)(F)(i)-(ii)*; *34 C.F.R. § 300.530(f)(1)(i)-(ii)*; *5 C.C.R. § 3052*]. However, return to the previous school placement will not occur if the child committed an offense such as possession of a weapon, possession, use or sale of drugs, or infliction of serious bodily injury [*20 U.S.C. § 1415(k)(1)(G)*; *34 C.F.R. § 300.530(g)*]. Where these offenses have been committed, the disabled student can be placed in an Interim Alternative Educational Setting (IAES) immediately and for up to 45 days [*20 U.S.C. § 1415(k)(1)(G)*; *34 C.F.R. § 300.530(g)*]. Likewise, if the behavior is found not to be related to the disability and not due to the failure to implement the IEP, the child will be placed in an IAES for up to 45 days [*20 U.S.C. § 1415(k)(1)(C), (G)*; *34 C.F.R. §§ 300.530(g), 300.531*]. After the 45 days, the special education student can return to the original placement unless the parent and district agree otherwise. If a special education student is expelled or suspended for more than 10 days, the student is still entitled to receive appropriate special educational services [*20 U.S.C. § 1415(k)(1)(G)*]. These services must enable the student to continue to work towards meeting his or her IEP goals [*20 U.S.C. §§ 1412(a)(1), 1415(k)(1)(D)*; 34 C.F.R. § 530(d)(1)].

[iii] School Discipline for Children under Section 504 of the Rehabilitation Act of 1973

The rules regarding suspension or expulsion of a disabled child under Section 504 are similar to those applicable to the special education student. When a child receiving services under Section 504 is facing a "change in placement" due to expulsion, suspension of more than 10 consecutive days or a series of suspension creating a pattern, the placement team must meet. As with IDEA students, the initial inquiry is whether the misconduct is caused by the disability [McNaught, *School Discipline and Children in Foster Care: Advocates' Roles*, 23 Child Law Practice 137, 146 (2004)]. If so, the team will then consider whether the student's current educational placement is appropriate. If, however, the team finds that the misconduct is *not* caused by the disability, the appropriateness of the current educational placement is not

reviewed and the child can be excluded from school just as a child without disabilities [Community Alliance for Special Education and Protection and Advocacy, Inc., Special Education Rights and Responsibilities, pp. 8-19-8-21 (9th ed. 2005); McNaught, *School Discipline and Children in Foster Care: Advocates' Roles*, 23 Child Law Practice 137, 146 (2004)]. A decision that behavior is not related to the child's disability and any subsequent placement proposal can be challenged by requesting a Section 504 hearing.

[7] Extracurricular, Enrichment, and Social Activities

Children benefit greatly from positive, age-appropriate activities. Dependent children are entitled to participate in such age-appropriate extracurricular, enrichment, and social activities [*Welf. & Inst. Code § 362.05*]. No state or local policy or regulation can prevent or create barriers to dependent children's participation in such activities [*Welf. & Inst. Code § 362.05*]. Caregivers are to use a "reasonable and prudent parent standard," as defined in *Welf. & Inst. Code § 362.04*, in determining whether a child should be permitted to participate in a particular activity, and must take reasonable steps to determine the appropriateness of such activities in terms of the child's age, maturity, and developmental level [*Welf. & Inst. Code § 362.05*].

California Forms of Pleading and Practice--Annotated

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D. Parties and Participants--Standing, Rights, and Appointment of Counsel and GAL

28-328 California Forms of Pleading and Practice--Annotated § 328.63

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§ 328.63 The Social Worker and Social Services Agency

[1] Overview

"County child protective services (CPS) agencies are the most important link in the child protection chain ... Indeed, compared to the day-to-day responsibilities of CPS social workers, the responsibilities of doctors, lawyers, judges, and mental health professionals are child's play" [Myers, The Backlash: Child Protection Under Fire (Sage 1994) Ch. 2, Definition and Origins of the Backlash, pp. 28-29]. To those who work in the juvenile dependency system on a day-to-day basis, the truth of these words by the nation's leading expert on evidence in child abuse and neglect cases, Professor John E.B. Myers, is self-evident. This is not to say that all social workers perform their functions perfectly, although most "perform well under extraordinarily trying circumstances" [Myers, The Backlash: Child Protection Under Fire (Sage 1994) Ch. 2, Definition and Origins of the Backlash, p. 29]. Nor is it to say the other "links" of attorneys, judicial officers, medical and mental health professionals are not also important, as recognized by Professor Myers [Myers, The Backlash: Child Protection Under Fire (Sage 1994) Ch. 2, Definition and Origins of the Backlash, p. 28]. Instead, it is merely to emphasize that the role and responsibilities of the child welfare services (CWS) agency and social worker are the very foundation on which the juvenile dependency system is built.

In most counties, the responsibilities of the probation officer for dependency cases have been delegated by the county board of supervisors to the social services department pursuant to *Welf. & Inst. Code § 272*. The terms "probation officer" and "social worker," as found in juvenile dependency law, are now deemed interchangeable [*In re Ashley M. (2003) 114 Cal. App. 4th 1, 8, 7 Cal. Rptr. 3d 237]* . Thus, just as the probation officer serves as the juvenile court's investigatory and supervisorial arm in delinquency proceedings, the social worker serves as an arm of the juvenile court in dependency proceedings [*In re Valerie A. (2007) 152 Cal. App. 4th 987, 1011, 61 Cal. Rptr. 3d 403* ; *In re Ashley M. (2003) 114 Cal. App. 4th 1, 8, 7 Cal. Rptr. 3d 237* , citing Seiser & Kumli, California Juvenile Courts Practice and Procedure § 2.63[1] (*Matthew Bender); In re Malinda S. (1990) 51 Cal. 3d 368, 376-377, 272 Cal. Rptr. 787, 795*

P.2d 1244] . This is also true for an Indian social worker of a tribe which has entered into an agreement with the State Department of Social Services pursuant to *Welf. and Inst. Code § 10553.1* concerning child welfare services or foster care payments [*Welf. & Inst. Code §§ 215, 272(a)(2), 306(a)*]. The social worker's role in dependency proceedings, however, is not limited to that of serving as an arm of the court. The social worker has many roles within the dependency system; arm of the court, arm of the state, service provider, case manager, and party to the action. In fulfilling these roles, the social worker is "exercising both executive and judicial functions" [*In re Ashley M. (2003) 114 Cal. App. 4th 1, 7, 7 Cal. Rptr. 3d 237]* . These roles are simultaneous, integrated, overlapping, and carried out on an ongoing basis. It is this diversity of roles that has sometimes led to confusion amongst practitioners, courts, and even social services agencies as to the role of the social worker in a particular case or activity.

The social worker has the initial responsibility of investigating abuse and neglect allegations and determining whether a child can remain or be returned to his or her home through the provision of services [*Welf. & Inst. Code §§ 306, 309*]. Further, it is the social worker who is responsible for the decision to file a petition alleging that a child comes within the jurisdiction of the juvenile court due to abuse or neglect [*Welf. & Inst. Code §§ 311, 325*; *see* discussion in *§ 328.40* et seq.]. In carrying out these functions the social worker has been likened to a prosecutor [*Alicia T. v. County of Los Angeles (1990) 222 Cal. App. 3d 869, 880, 271 Cal. Rptr. 513]* and thus is serving as an arm of the state in this regard, fulfilling an executive function [*In re Ashley M. (2003) 114 Cal. App. 4th 1, 7, fn. 3, 7 Cal. Rptr. 3d 237]* . The same is true throughout the dependency process as the social worker exercises his or her independent judgment and discretion to file subsequent, supplemental, and modification petitions under *Welf. & Inst. Code §§ 342, 387,* and *388*, makes recommendations to the court, and carries out a myriad of other responsibilities. Indeed, like a prosecutor in a criminal case, the social worker and social services department bears the burden of proof at most hearings including those for detention, jurisdiction, disposition, review, and permanency planning [*see, e.g., Welf. & Inst. Code §§ 350(c), 366.21(e)-(f), 366.22(a), 366.26(c)(1)*].

Once a dependency petition is filed, the social worker is required to appear in court to represent and serve the interests of the child [*Welf. & Inst. Code §§ 202, 280, 361.2(e)*], and the case comes under the supervision of the juvenile court [*Allen M. v. Superior Court (1992) 6 Cal. App. 4th 1069, 1073-1075, 8 Cal. Rptr. 2d 259]* . The social worker is also required to prepare reports for the many hearings held by the juvenile court for dependent children [*see, e.g., Welf. & Inst. Code §§ 281, 358, 358.1, 365*]. The social worker serves as an impartial arm of the court in preparing these reports [*In re Ashley M. (2003) 114 Cal. App. 4th 1, 8, 7 Cal. Rptr. 3d 237* , citing Seiser & Kumli, California Juvenile Courts Practice and Procedure § 2.63[1] (*Matthew Bender); In re Malinda S. (1990) 51 Cal. 3d 368, 376-377, 272 Cal. Rptr. 787, 795 P.2d 1244]* and in exercising limited discretion in the implementation of the court's visitation orders [*In re Danielle W. (1989) 207 Cal. App. 3d 1227, 1235, 255 Cal. Rptr. 344]* .

PRACTICE TIP (PARENT'S P.O.V.):

Who Has the Burden and What Is That Burden? Attorneys for parents sometimes focus too much on the truth of the allegations and its preponderance of the evidence standard and fail to recognize the heightened standard of proof required at removal. It is critical that at each and every hearing, counsel understand who bears the burden of proof and what that standard is.

In serving as a case manager and service provider the social services department is largely acting as an administrative agency of the state that is subject to the supervision of the California State Department of Social Services [*In re Ashley M. (2003) 114 Cal. App. 4th 1, 7, 7 Cal. Rptr. 3d 237]* . The juvenile court exercises control over those services and the management of the case by its orders for the provision of services and its determinations as to whether reasonable services were offered or provided [*In re Ashley M. (2003) 114 Cal. App. 4th 1, 7, 7 Cal. Rptr. 3d 237]* . Yet in some aspects of those services, such as visitation, the social worker is also serving as the arm of the court [*In re Danielle W. (1989) 207 Cal. App. 3d 1227, 1235, 255 Cal. Rptr. 344]* . It supervises the child, provides or offers services to the family, and assists in carrying out the overall purpose of the Juvenile Court Law. In this way it can be seen that dependency law envisions a cooperative effort between the juvenile court and the county social services department [*In re Ashley M. (2003) 114 Cal. App. 4th 1, 7, 7 Cal. Rptr. 3d 237]* . Thus, if reports by a social worker

are inadequate or biased yet accepted by the juvenile court, or services by the agency are inadequate or inappropriate yet the juvenile court finds reasonable efforts have been made, the responsibility for such deficiencies must be shared by both the social services agency and the juvenile court, not placed solely on the shoulders of the agency. While the two serve as something of a team in this regard, where the social worker serves as an arm of the court the juvenile court itself bears the ultimate responsibility for ensuring the adequacy and appropriateness of the efforts of its investigatory and supervisorial arm.

In addition to serving as an arm of the state and of the juvenile court in dependency proceedings as already described, the social worker and county social services department also performs many other functions as an arm of the state. Although the work of social services in this regard is sometimes related to the dependency process, it is not always subject to the supervision of the juvenile court. For example, most county social services departments serve as agents of the State Department of Social Services in the evaluation and licensing of community care facilities, including foster homes [*Health & Safety Code §§ 1521.5, 1521.6*]. Although dependent children and wards of the court may be placed in these facilities, a county social services department is not subject to the supervision of the juvenile court in carrying out these licensing functions. Instead, it is subject to the supervision of the State Department of Social Services, the Office of Administrative Hearings, and through mandamus by the superior court [*Health & Safety Code § 1550 et seq.*; *Gov. Code § 11500 et seq.*; *Code Civ. Proc. § 1094.5*]. When the social worker and social services agency makes actual placement decisions for dependent children, however, those discretionary decisions are subject to review by the juvenile court for abuse of discretion [*In re Cynthia C. (1997) 58 Cal. App. 4th 1479, 1489-1490, 69 Cal. Rptr. 2d 1* ; *In re Robert A. (1992) 4 Cal. App. 4th 174, 5 Cal. Rptr. 2d 438* (general placement decisions); *Department of Soc. Servs. v. Superior Court (1997) 58 Cal. App. 4th 721, 734, 68 Cal. Rptr. 2d 239* (adoptive placement decisions)].

Finally, the social worker is a party to the dependency proceeding. Unlike the probation officer in criminal and delinquency proceedings, the social services agency actually takes positions and litigates in dependency actions. However, as noted by the Supreme Court in pointing out that in long-term foster care cases the agency can actually conduct the six-month review [*Welf. & Inst. Code § 366.3(d)*], the social worker is both "a party *and sometimes more than a party*" [*San Diego County Dep't of Soc. Servs. v. Superior Court (1996) 13 Cal. 4th 882, 891, fn. 4, 55 Cal. Rptr. 2d 396, 919 P.2d 1329* (emphasis in original)]. This characterization is an extremely accurate one. The social worker has many differing roles and responsibilities within and related to the dependency system. These roles and responsibilities are carried out in a simultaneous, integrated, and ongoing basis. Nevertheless, when possible and appropriate, all parties and courts should take care to ensure they understand which role or responsibility the social worker is fulfilling in a particular activity. This will help to avoid confusion as to that action and how it should be reviewed by the juvenile court, superior court, or administrative agency.

For a discussion of the social worker serving in yet another role as a "court officer" and assisting the court in the courtroom during dependency proceedings, see *Ch. 327, Juvenile Courts: Jurisdiction and General Procedures, § 327.21[2][c]*.

[2] Counsel for the Social Services Agency

When the parent or guardian is represented by counsel, the county counsel or district attorney must, at the request of the juvenile court judge, appear and participate in the hearing to represent the social services department [*Welf. & Inst. Code § 318.5*]. With the transfer in most counties of responsibility for dependency cases from the probation department to the social services agency [*Welf. & Inst. Code § 272*], the representation for the agency in dependency cases is now routinely handled by the county counsel's office or by counsel contracted for by the county counsel's office. In many county counsel offices, dependency representation is a career track and attorneys are hired for and remain in dependency units representing social services in dependency matters at the trial and appellate courts. This is the better practice.

For an excellent discussion of the ethical considerations and role of county counsel in representing social services in

dependency cases, see the chapter by Lead Deputy County Counsel L. Michael Clark of the Office of County Counsel, Santa Clara County, in 2 Cal. Juvenile Dependency Practice (Cont. Ed. Bar 2002) Representing Petitioner, ch. 14, pp. 757-832. See also Standards of Practice for Lawyers Representing Child Welfare Agencies (ABA 2004); Mimi Laver, Agency Attorneys and Caseworkers: Working Well Together, in Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases (Bradford Pub. 2005) § 19B, pp. 431-442; Laver et al., Foundations for Success: Strengthening Your Agency Attorney Office (ABA 1999).

PRACTICE TIP:

Counsel for the Agency Is Not Always Present. Although in most counties the county counsel's office represents the social services agency in dependency cases, do not assume that attorneys from that office will appear to represent the agency at every dependency hearing. In some counties, counsel only appear for the social services agency at contested hearings. As a result, the social worker carrying the case or a court officer may appear as the agency's representative at uncontested hearings. Attorneys unfamiliar with local practice who desire to consult with counsel for social services should take steps to determine whether counsel for the agency can be expected to appear at a particular hearing. When appropriate, counsel for social services should be contacted ahead of time.

[3] Assignment and Removal of Social Workers

The decision as to what social worker to assign to a case is made by the social services agency. The court has no jurisdiction to order that a particular worker handle a particular case [*In re Ashley M. (2003) 114 Cal. App. 4th 1, 9-10, 7 Cal. Rptr. 3d 237* , citing Seiser & Kumli, California Juvenile Courts Practice and Procedure § 2.64[3] (Matthew Bender)]. The juvenile court does have a responsibility to oversee the provision of services provided by the agency in its function as an arm of the court [*In re Robert A. (1992) 4 Cal. App. 4th 174, 5 Cal. Rptr. 2d 438]* . The assignment of individual social workers is not a judicial function, however. Instead, the internal management of the social services agency and the assignment of individual social workers is done as part of the agency's executive function, acting on behalf of the county board of supervisors and subject to the supervision of the State Department of Social Services [*Welf. & Inst. Code §§ 202.5, 306, 10800-10803, 16500, 16501*; *In re Ashley M. (2003) 114 Cal. App. 4th 1, 7-10, 7 Cal. Rptr. 3d 237* ; *cf. In re Walter E. (1992) 13 Cal. App. 4th 125, 136-137, 17 Cal. Rptr. 2d 386]* . For the juvenile court to order the social services agency to assign a particular social worker to a case would be a violation of the separation of powers doctrine [*Cal. Const., art. III, § 3*; *In re Ashley M. (2003) 114 Cal. App. 4th 1, 10, 7 Cal. Rptr. 3d 237]* .

Nevertheless, the juvenile court does have the authority to order a social worker removed from a dependency case under very limited circumstances involving a conflict of interest. Any party to the dependency proceeding may bring a motion to have a social worker removed. Although not specifically enumerated in the statute, it would seem appropriate a juvenile court could also initiate a motion under this statute on its own as part of its general oversight responsibilities. The court must grant the motion if it is proven by a preponderance of the evidence that the social worker has a conflict of interest that would interfere with the worker's ability to objectively carry out his or her duties [*Welf. & Inst. Code § 16513.5*]. A conflict of interest justifying removal may include, but is not limited to, the following circumstances:

- The social worker has had sexual contact with any party to the dependency proceeding [*Welf. & Inst. Code § 16513(a)*].

- The social worker has a relationship with a person who is adopting or attempting to adopt the child who is the subject of the proceedings, and the relationship is of such a nature that the objectivity of the social worker may be compromised due to a conflict of interest or bias [*Welf. & Inst. Code § 16513(b)*].

- The social worker has been convicted of perjury with regard to the dependency case in which the motion to have the worker removed has been made [*Welf. & Inst. Code § 16513.5(c)*].

If the juvenile court had the inherent power to order a social worker removed from a case, these statutory provisions would not have been needed. Thus, the court's authority in this area is very limited. This is understandable, since the assignment of individual social workers is an executive function, not a judicial one. These provisions make clear the court can only order the removal of a social worker from a case when there is a actual conflict of interest, not merely the potential for conflict [*Welf. & Inst. Code § 16513.5*]. Further, it is not enough for a party to allege a personality conflict with the social worker or for a party to claim he or she would prefer a different social worker. Instead, there must be evidence of an actual conflict of interest that would interfere with the social worker's ability to objectively carry out his or her duties [*Welf. & Inst. Code § 16513.5*]. The social services agency must, of course, be afforded due process. It must be given notice of any request to remove a social worker from a case and the opportunity to a meaningful hearing at which the matter can be litigated and determined.

PRACTICE TIP:

Talk to the Agency and County Counsel First. No one likes the thought of a social worker having a conflict of interest in a case, especially one as serious as those described in *Welf. & Inst. Code § 16513.5(a)-(c)*. If a social worker has a conflict that interferes with the worker's ability to objectively carry out his or her duties in conjunction with a dependency case, it is to everyone's benefit for a different worker to be assigned to the case. While a practitioner can bring a motion before the juvenile court in the first instance, it is recommended that the social services agency and county counsel be contacted first. If a conflict of interest is clear, the agency should take steps to rectify the problem without the need for a juvenile court order. In some instances, the agency may even choose to change social workers despite the lack of an actual conflict, if is best for all concerned, especially the child. Handling the matter in this way helps to maintain good working relationships and the nonadversarial atmosphere that is preferred in the dependency system [*Welf. & Inst. Code § 350(a)(1)*]. If the agency fails to view the situation in the same way as the party raising the alleged conflict, a formal motion can then be brought before the juvenile court [*Welf. & Inst. Code § 16513.5*].

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§ 328.64 Court-Appointed Special Advocate (CASA)

Court-Appointed Special Advocate (CASA) programs are now growing in number throughout California and the United States following the guidelines of the National Court-Appointed Special Advocate Association [*see Welf. & Inst. Code §§ 100-109, 356.5*; *Cal. Rules of Ct., Rule 5.655*; *see also* Courter, I Speak For This Child: True Stories of a Child Advocate (Crown 1995)]. A CASA program must adopt and comply with written plan for the program, including, if applicable, articles of incorporation, by-laws, and a board of directors. A CASA program may function under the auspices of a public or private entity, but cannot function under the auspices of a probation department or social services agency [*Cal. Rules of Ct., Rule 5.655(k)(1)*]. If the CASA program is one that functions under the auspices of a public or private agency, its governance plan must specify a clear administrative relationship with the parent organization with delegations of authority and accountability clearly delineated. Such programs must have an active advisory council [*Cal. Rules of Ct., Rule 5.655(k)(1)-(2)*]. Effective July 1, 2004, a CASA program may submit fingerprints and requests for criminal offender record information relating to employees and volunteer candidates to the Department of Justice [*Penal Code § 11105.04*].

A CASA program must develop and adopt a written description of activities that CASA volunteers are prohibited from doing. The prohibited activities must include, but are not limited to, taking a dependent child to the CASA volunteer's home, giving legal advice or therapeutic counseling, giving money or expensive gifts to the child or family, being related to any of the parties in the case or employed in a position or by an agency that might result in a conflict of interest, and any other activities prohibited by the juvenile court [*Cal. Rules of Ct., Rule 5.655(g)*].

A CASA is a volunteer who may be appointed in a *Welf. & Inst. Code § 300* proceeding [*Welf. & Inst. Code §§ 102(b), 356.5*]. A CASA is an officer of the court with all of the relevant rights and responsibilities that pertain to that role [*Welf. & Inst. Code § 103(e)*]. As such, the court may make an order allowing the CASA access to records and the right to interview parties involved in the case [*Welf. & Inst. Code § 103(h)*].

A CASA does not have to be either an attorney or a social worker, but may be anyone who has demonstrated an interest in children and their welfare [*Welf. & Inst. Code § 103(a)*]. Before being sworn in as a CASA, however, the volunteer must complete an extensive training program that includes but is not limited to, the dynamics of child abuse and neglect, dependency court structure and laws, social service systems, child development, interviewing techniques, report writing, roles and responsibilities of a CASA, rules of evidence and discovery procedures, and problems associated with verifying reports [*Welf. & Inst. Code § 102(d)*].

The role of the CASA is (1) to provide independent, factual information to the court regarding the case; (2) to represent the best interests of the child involved and to consider the best interests of the family; and (3) at the request of the court, to monitor cases to which he or she has been appointed to assure that the court's orders have been fulfilled [*Welf. & Inst. Code § 102(c)*]. Thus, the CASAs responsibilities are much the same as those of a guardian ad litem [*Welf. & Inst. Code § 356.5*]. In some counties CASAs are actually appointed to also serve as the child's guardian ad litem, although this is not yet a common practice in California [*see Welf. & Inst. Code § 326.5*]. Reports written by a CASA are to be received and considered by the court in dependency proceedings [*see, e.g., Welf. & Inst. Code §§ 366.21(e)-(f), 366.22(a)*].

The fact the CASA has independent responsibilities to the court and child does not mean the CASA works in a vacuum. CASAs often work very closely with both the child's social worker and the child's attorney. This is as it should be, since all have the goal of serving the child's interests and their responsibilities overlap considerably. CASAs, social workers, and children's attorneys may or may not agree as to what is best for the child and thus may make different recommendations to the court. But their need to work together cooperatively for the child's interest is significant [*see* Piraino, *Lay Representation of Abused and Neglected Children: Variations on Court Appointed Special Advocate Programs and Their Relationship to Quality Advocacy, 1 J. Center Children & Cts. 63 (1999)*].

Although an officer of the court with specific duties and responsibilities, unless the CASA has been appointed as the child's guardian ad litem, a CASA is not a party to the proceeding and as such has no right to set matters for contested hearing or to question witnesses. Regardless of the nonparty status of the CASA, the CASA is allowed to be present during the dependency hearings and most courts will allow the CASA to address the court where appropriate. Further, a CASA may file a petition pursuant to *Welf. & Inst. Code § 388* as a "person having an interest in a child who is a dependent child" and, if a hearing is granted, will have standing as a party at the hearing on the petition.

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§ 328.65 Continued Representation by Appointed Counsel

The counsel appointed by the court must represent the parent, guardian, or child at the detention hearing and at all subsequent proceedings before the juvenile court. Counsel must continue to represent the parent or child unless relieved by the court on the substitution of other counsel or for cause. The representation includes representing the parent or the child in termination proceedings and in those proceedings relating to the institution or setting aside of a legal guardianship [*Welf. & Inst. Code § 317(d)*; *see In re Tanya H. (1993) 17 Cal. App. 4th 825, 828-833, 21 Cal. Rptr. 2d 503* (court's policy of relieving counsel post-permanency planning was error); *see also In re Ronald R. (1995) 37 Cal. App. 4th 1186, 1192-1194, 44 Cal. Rptr. 2d 22* (court relieving counsel for parent who did not appear and with whom counsel had no contact was error)].

While *Welf. & Inst. Code § 317(d)* does not define "for cause" in regards to relieving attorneys in dependency cases, the words of the statute must be construed in context, "keeping in mind the statutory purpose" [*Janet O. v. Superior Court (1996) 42 Cal. App. 4th 1058, 1063, 50 Cal. Rptr. 2d 57]* . The purpose of *Welf. & Inst. Code § 317(a)* is to provide counsel to parents who desire counsel, but cannot afford to hire counsel. Thus, in *Janet O.*, the court of appeal found the parents' extended absence and failure to appear in court and stay in contact with their appointed counsel demonstrated the parents no longer desired representation. As such, the juvenile court did not abuse its discretion in relieving counsel [*Janet O. v. Superior Court (1996) 42 Cal. App. 4th 1058, 1064, 50 Cal. Rptr. 2d 57]* . In a case in which the mother fled the jurisdiction of the court with her dependent child, however, the court of appeal found the relieving of the mother's counsel by the juvenile court was required reversal since the mother had not abandoned her child and the lack of counsel contributed to multiple errors in the dependency proceeding [*Katheryn S. v. Superior Court (2000) 82 Cal. App. 4th 958, 970-975, 98 Cal. Rptr. 2d 741* , *distinguishing Janet O. v. Superior Court (1996) 42 Cal. App. 4th 1058, 50 Cal. Rptr. 2d 57]* . The relieving of counsel for both parents and children is an area of ongoing litigation. As such, practitioners should watch this area for further developments.

For discussion of relieving counsel for children, see *§ 328.62[3][d]*.

For discussion of ineffective assistance of counsel claims, see *§ 328.193*.

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§ 328.66 Guardian Ad Litem for the Child

Prior to July 1, 2001, the social worker served as the child's guardian ad litem (GAL) unless the court appointed a different person to serve as the child's guardian ad litem [Welf. & Inst. Code former § 326 (repealed eff. 7/1/01, *see* Stats. 2000, ch. 450, §§ 2, 4)]. Effective July 1, 2001, the Judicial Council was to adopt a rule of court that complied with the federal Child Abuse Prevention and Treatment Act (CAPTA) for the appointment of a GAL for the child. This appointment must be made in any case "in which a petition is filed based upon neglect or abuse of the child" [*Welf. & Inst. Code § 326.5*]. As with CAPTA, this statutory mandate for the appointment of a GAL is written in permissive language as to who should be appointed. Although persons appointed to be the child's guardian ad litem "may" be attorneys or court-appointed special advocates (CASA), the plain language of the state and federal statutes does not require them to be [*see Welf. & Inst. Code § 326.5*; *42 U.S.C. § 5106a(b)(2)(A)(ix)*]. Nevertheless, it was anticipated most counties would either use attorneys or CASAs for this role, which is consistent with the current interpretation of the federal requirement. The adoption of Cal. Rules of Ct., former Rule 1448(c) effective January 1, 2003, making the child's attorney the child's GAL for purposes of CAPTA, ensures that.

Beginning January 1, 2003, the rules of court have provided that the Child Abuse Prevention and Treatment Act (CAPTA) guardian ad litem for a child subject to a juvenile dependency petition is as defined in the rules of court [Cal. Rules of Ct., former Rule 1401(a)(13) (now see *Cal. Rules of Ct., Rule 5.502(3)*)]. Under Cal. Rules of Ct., Rule 5.622(c) the child's attorney "will serve" as the child's CAPTA guardian ad litem. If an attorney is not appointed for the child, a court-appointed special advocate (CASA) must be appointed to serve as the child's CAPTA GAL [*Cal. Rules of Ct., Rule 5.662(c)*]. These provisions are consistent with the current interpretation of the federal requirements, so long as the court identifies "on the record the person appointed as the child's CAPTA guardian ad litem" [*Cal. Rules of Ct., Rule 5.662(c)*].

The duties of a CAPTA GAL for a child in California dependency proceedings are not clear. This is not surprising since

the role of the guardian ad litem in abuse and neglect cases throughout the United States is largely unclear [Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers, 32 Loy. U. Chi. L.J. 1, 27, fn. 93 (2000)*]. The rule doesn't help this. It provides that when the child's attorney serves as the CAPTA GAL, his or her specific duties and responsibilities are set forth in *Welf. & Inst. Code § 317(e)* and *Cal. Rules of Ct., Rule 5.660* [*Cal. Rules of Ct., Rule 5.662(e)*]. If a CASA is appointed to serve as the CAPTA GAL, his or her specific duties and responsibilities are set forth in *Welf. & Inst. Code § 102(c)* and *Cal. Rules of Ct., Rule 5.655* [*Cal. Rules of Ct., Rule 5.662(f)*]. These provisions essentially equate the role of the child's attorney, the child's CASA, and the child's GAL. The duties and responsibilities of each overlap, but they are not the same [*see, e.g.*, Sagatun & Edwards, Child Abuse and the Legal System (1995) p. 51 ("The role of the GAL is different from that of the attorney.")]. Further, the potential for conflict between the role of the child's attorney and the role of the child's GAL, especially with older children, is very real. In some cases the two roles cannot and should not be filled by the same person [*see, e.g.*, Sagatun & Edwards, Child Abuse and the Legal System (1995) p. 51 ("An attorney and a GAL may take different positions in court when advocating for the same child."); Haralambie, *The Child's Attorney: A Guide to Representing Children in Custody, Adoption, and Protection Cases* (ABA 1993) pp. 33-35 (child's attorney should consider asking for a separate GAL to advocate for the child's best wishes when the attorney thinks those interests conflict with the child's wishes); *see also* Patton, Legal Ethics in Child Custody and Dependency Proceedings: A Guide for Judges and Lawyers (Cambridge 2006) pp. 28-35]. This is an area that should be watched for further developments.

The transition in California to using someone other than the social worker to be the guardian ad litem for the child is likely to be a prolonged one, especially when considered with the provisions of *Welf. & Inst. Code § 317* mandating the appointment of counsel for children and California's hybrid model of representation. Not all California counties have in the past appointed separate counsel for children in all dependency cases. Further, not all counties have CASA programs, and of those that do it is doubtful any have enough CASAs to appoint one for every child brought into the dependency system. Thus, many counties will have to expand their children's representation programs in terms of attorneys, CASAs, or both. Further, there is considerable debate as to whether it is more effective or even appropriate to use lawyers as guardians ad litem, or whether the role of GAL is more appropriately and effectively served by CASAs. Some studies have concluded attorneys are less effective in this role than CASAs [*see* Shepherd & England, *"I Know The Child Is My Client, But Who Am I?", 64 Fordham L. Rev. 1917, 1924*-1932 (discussing studies on the effectiveness of lawyers as GAL's), 1933-1934 (noting the "ongoing debate within the legal profession regarding whether it is appropriate for attorneys to adopt the role of GAL when representing children" and citing articles related to it)]. Certainly the potential for conflict between the role of the child's attorney and the role of the child's GAL exists, especially for older children who are better able to form and communicate their own position as to what they want to happen in the case, which may not be what is best for them. This is further complicated by the substantial confusion and debate that already exists as to exactly what the role of the child's attorney and the role of the GAL should be [*see, e.g.*, Special Issue: *Ethical Issues in the Legal Representation of Children*, 64 Fordham L. Rev., No. 4 (1996), and the many articles on the representation of children contained therein].

Finally, in West Virginia GAL's are expected to participate not only in the proceedings at the trial court level, but also in the appellate courts [*see State ex rel. Jeanette H. v. Pancake (W. Va. 2000) 207 W. Va. 154, 529 S.E.2d 865, 872, fn. 6* , and cases cited there]. Social services agencies in California have always appeared in appellate proceedings regarding dependent children. The California Supreme Court has now ruled the child's GAL at the trial court level continues to be the child's GAL for decisions regarding litigation at the appellate court level [*In re Josiah Z. (2005) 36 Cal. 4th 664, 681, 31 Cal. Rptr. 3d 472, 115 P.3d 1133]* . But most of the district courts of appeal do not appoint counsel for children in dependency appeals unless the child is the appellant. These and many other issues will need to be addressed as California makes this move toward separate GAL's for children in dependency proceedings.

PRACTICE TIP:

Asking for Appointment of Children's Counsel on Appeal. In appellate districts in which the court does not routinely appoint counsel for the child in a dependency appeal, the child's trial counsel might

wish to consider, as the GAL, requesting the appellate court to appoint counsel for the child. While the appellate courts are not required to do so, making the request is an appropriate first step.

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§ 328.67 Caregivers

Foster parents and relative caregivers have always been a good source of information about children in their care and have always played a significant role in the child welfare system. Though not always done, existing law has encouraged a team approach to foster care that allows both the biological family and the foster family to be part of the team [*Welf. & Inst. Code § 16500.1(b)(3)*]. It has also encouraged foster parents to "serve as mentors and role models for biological parents" [*Welf. & Inst. Code § 16500.1(b)(8)*]. Provisions for notice to caregivers for hearings and the ability to provide the court with information has also been included in the law [*see, e.g., Welf. & Inst. Code § 293(f)*]. With the mandate for alternative permanency planning over the twenty years or more, and for concurrent services planning in recent years, the use of caregivers as potential adoptive parents and legal guardians has also been recognized.

Effective January 1, 2004, California has gone even further with its requirements in this area. It has expressly recognized that foster parents "are one of the most important sources of information about the children in their care" [*Welf. & Inst. Code § 16010.4(b)*]. It acknowledges that federal law requires caregivers to receive expanded opportunities for notice, participation in review and permanency hearings, and the right to communicate with the court, and also that state law similarly provides that caregivers may submit their concerns to the court in writing [*Welf. & Inst. Code § 16010.4(b)*]. Still further, California has now expressly found that it is in children's best interest that caregivers be provided information about the children. Such information can be necessary for the caregiver to obtain health and social services for children in their care, enroll those children in school and extracurricular activities, and for the caregiver to provide updated information to social workers and the courts regarding important developments affecting the children in their care [*Welf. & Inst. Code § 16010.4(c)*].

Caregivers require certain basic information about the children in their care including, but not limited to, the name, mailing address, and telephone number of the child's social worker, that social worker's supervisor, and of the child's attorney and any CASA. They should be informed of the specific juvenile court the child's case is being handled in, the

child's juvenile court case number, State DSS identification number, and Medi-Cal or other group insurance plan number. They should also be informed of medications or treatments in effect for the child at the time of placement and any instructions for their use, and the plan outlining the child's needs and services, including visitation with siblings, parents, and other family members. [*Welf. & Inst. Code §§ 16002(f), 16010.4(e), 16010.5, 16501.1(f)(5)*]. Caregivers are to be provided with a "caregiver placement agreement" [*Welf. & Inst. Code § 16503.5*]. Ultimately, the willingness and desire of relative caregivers to provide legal permanency for the child if reunification efforts fail is clearly a factor in considering any relative placement [*Welf. & Inst. Code § 361.3(a)(6)*]. At disposition, if the child is in out-of-home placement, juvenile courts are to be provided with information regarding whether the child's caregivers are willing and desire to provide legal permanency for the child if reunification efforts fail [*Welf. & Inst. Code §§ 358(b), 358.1(i)*].

Caregivers also require occasional babysitting so they can attend medical appointments, go grocery or other shopping, attend meetings, or even have an occasional evening out. Caregivers may arrange for such occasional babysitting, including for supervision of the child in extracurricular, enrichment, and social activities. In selecting appropriate babysitters, caregivers shall use a reasonable and prudent parent standard, which means the "standard characterized by careful and sensible parental decisions that maintain the child's health, safety, and best interest" [*Welf. & Inst. Code § 362.04*].

The move to more fully inform and involve caregivers, and to recognize their significance in the dependency system and their need for occasional short-term babysitting, is an important and positive move in the child welfare system, and should be seen as potentially beneficial for children, families, and the system itself. It may also serve to aide recruiting of caregivers, and improve the respect afforded caregivers in the system, as well as their own self-respect. All participants in the system, especially social workers, social services agencies, and the courts, should move as quickly as reasonably possible to ensure the child welfare system moves in this very positive direction and implements any changes necessary. These changes will not occur overnight, however, and are not without potential problems. Thus, all must be alert to the issues and be open about discussing them in a cooperative manner. This is an area to be watched for further developments.

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[Reserved]

§§ 328.68[Reserved]

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§ 328.80 Scope of Dependency Jurisdiction

The juvenile division of the superior court has jurisdiction over children in dependency proceedings [*see Welf. & Inst. Code §§ 245, 300*; *see* discussion in General Introduction under Jurisdiction of Juvenile Court--Superior Court, *above*]. Once a dependency petition has been filed, and until such time as that petition is dismissed or dependency jurisdiction is terminated, no other division of any superior court may hear proceedings regarding custody of and visitation with the child [*Welf. & Inst. Code § 304*; *see In re William T. (1985) 172 Cal. App. 3d 790, 794-795, 218 Cal. Rptr. 420* (juvenile court jurisdiction is paramount, even if acquired later in time and during pendency of family law proceedings)].

The juvenile court's preemption of superior court jurisdiction over child custody matters is an exception to the general rule that the court that takes jurisdiction first has exclusive jurisdiction [*see In re Travis C. (1991) 233 Cal. App. 3d 492, 499-500, 284 Cal. Rptr. 469* ; *In re William T. (1985) 172 Cal. App. 3d 790, 797-798, 218 Cal. Rptr. 420]* .

All issues regarding the custody of a dependent child must be heard by the juvenile court. In fact, a juvenile court in a dependency proceeding may even reconsider an issue litigated in a prior family law proceeding [*In re Desiree B. (1992) 8 Cal. App. 4th 286, 291, 10 Cal. Rptr. 2d 254* (collateral estoppel does not apply; rejecting court's earlier contrary dicta in *In re Brendan P. (1986) 184 Cal. App. 3d 910, 916-917, 230 Cal. Rptr. 720*); *see In re Travis C. (1991) 233 Cal. App. 3d 492, 501, 284 Cal. Rptr. 469* ; *In re Benjamin D. (1991) 227 Cal. App. 3d 1464, 1471-1472, 278 Cal. Rptr. 468]* .

In deciding issues between parents or between a parent and a guardian regarding custody of the dependent child, the juvenile court may review any record that would be available to the domestic relations division of a superior court hearing such a matter. The juvenile court, on its own motion, may also issue an order directed to either of the parents enjoining any action described in *Fam. Code § 6218* [*Welf. & Inst. Code § 304*; *see Welf. & Inst. Code § 302(c)*].

For discussions relating to child custody proceedings, see California Forms of Pleading and Practice (Matthew Bender) Ch. 220, *Dissolution of Marriage and Related Proceedings* , and Ch. 394, *Parent and Child* ; see also Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure 2d ed., Chs. 30 and 32 (Matthew Bender).

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§ 328.81 Termination of Dependency Jurisdiction

Although the juvenile court may retain jurisdiction over a dependent child until he or she is 21 years old [*Welf. & Inst. Code § 303*], this is rarely done. This is in part due to the extensive efforts to either return the child to the custody of a parent or to implement a permanent plan of adoption or legal guardianship if reunification efforts fail [*In re Holly H. (2002) 104 Cal. App. 4th 1324, 1337, 128 Cal. Rptr. 2d 907* , *citing* Seiser & Kumli, California Juvenile Courts Practice and Procedure § 2.31 (Matthew Bender)]. In most instances, the court will terminate its jurisdiction when the child reaches the age of 18 [*see In re Robert L. (1998) 68 Cal. App. 4th 789, 793-797, 80 Cal. Rptr. 2d 578* (maintaining dependency jurisdiction to assist children with expense of college reversed as abuse of discretion)]. If the child is returned to the custody of a parent before the child reaches the age of majority and dependency jurisdiction is terminated, thereafter the family law division of a superior court may hear any issues regarding custody [*see Welf. & Inst. Code § 304*; *In re Sarah M. (1991) 233 Cal. App. 3d 1486, 285 Cal. Rptr. 374* , *overruled on other grounds*, *In re Chantal S. (1996) 13 Cal. 4th 196, 51 Cal. Rptr. 2d 866, 913 P.2d 1075]* . For discussion of termination of dependency jurisdiction when the child reaches the age of majority, see *§ 328.180[5]*.

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
E. Subject Matter and Dependency Jurisdiction

28-328 California Forms of Pleading and Practice--Annotated § 328.82

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§ 328.82 UCCJEA and Notice Under the Hague Convention

[1] Application of the UCCJEA to Juvenile Dependency Proceedings

California has adopted the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), effective January 1, 2000 [*Fam. Code § 3400 et seq.*]. Previously, California law had been set forth in the Uniform Child Custody Jurisdiction Act (UCCJA), which was repealed and replaced by the UCCJEA. The UCCJEA is the exclusive method for determining subject matter jurisdiction for custody proceedings in California [*Fam. Code § 3421(b)*; *In re C.T. (2002) 100 Cal. App. 4th 101, 106, 121 Cal. Rptr. 2d 897* ; *In re Nada R. (2001) 89 Cal. App. 4th 1166, 1173, 108 Cal. Rptr. 2d 493]* . Its provisions apply to juvenile dependency proceedings [*Fam. Code § 3402(d)*] and to actions to terminate parental rights. Its policies even apply to international custody disputes [*In re Jorge G. (2008) 164 Cal. App. 4th 125, 131-132, 78 Cal. Rptr. 3d 552* ; *In re A.C. (2005) 130 Cal. App. 4th 854, 860, 30 Cal. Rptr. 3d 431* ; *In re Stephanie M. (1994) 7 Cal. 4th 295, 310, 27 Cal. Rptr. 2d 595, 867 P.2d 706* (interpreting prior UCCJA)]. Cases that were decided under the prior UCCJA are "instructive" in deciding cases under the UCCJEA except where the two vary [*In re A.C. (2005) 130 Cal. App. 4th 854, 860, 30 Cal. Rptr. 3d 431]* .

While all states have adopted some form of the UCCJA or UCCJEA, not all states expressly apply the acts to international custody disputes, nor do they apply them in the same way [*see, e.g.*, *Amin v. Bakhaty (La. 2001) 798 So. 2d 75, 83-85* ; *Rashid v. Drumm (Mo. Ct. App. 1992) 824 S.W.2d 497, 500-504]* . California has, however, adopted the provision of the UCCJEA that makes it apply to international custody disputes [*Fam. Code § 3405*]. But if the child custody law of a foreign country violates fundamental principles of human rights, the UCCJEA does not apply [*Fam. Code § 3405(c)*]. Further, the UCCJEA is not reciprocal since foreign countries are not signatories [Rutherford, Removing the Tactical Advantages of International Parental Child Abductions under the 1980 Hague Convention on the Civil Aspects of International Child Abduction (1991) *8 Ariz. J. Int'l & Comp. L. 149, 152* (discussing the UCCJA)]. Unlike with the other states of this nation, the child custody law of other nations may not provide for communication

between courts or countries in child custody cases, particularly where there is no child custody determination or proceeding pending in the other country. Thus, it cannot be assumed a court in another country will communicate with the juvenile court here. Indeed, it may even be expressly forbidden to do so under the laws of that country. Nor can it be assumed the other country has provisions similar to those of California regarding what is a child's "home state." California courts should therefore be careful, creative, and flexible in their approach to cases involving other countries and their application of the UCCJEA.

For detailed discussion of the UCCJEA, *see* Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2d ed., Ch. 32 (Matthew Bender).

[2] Prerequisites for UCCJEA Jurisdiction

The prerequisites of jurisdiction for a court of this state to make an initial determination of child custody under the UCCJEA are found in *Fam. Code § 3421*. That section provides for jurisdiction to make an initial child custody determination under any of the following circumstances:

- This state is the home state of the child at the time the proceedings are commenced [*Fam. Code § 3421(a)(1)*]. Home state is defined as the state in which the child immediately preceding the time involved has lived for at least six consecutive months with the parent or a person acting as a parent. For a child under 6 months of age, it is the state in which the child lived from birth [*Fam. Code § 3402(g)*].

- This state was the home state of the child within six months before the proceedings are commenced and the child is absent from this state because of removal or retention by someone claiming custody of the child or for other reasons, and there is a parent or a person acting as a parent continuing to live in this state [*Fam. Code § 3421(a)(1)*].

- A court of another state does not have jurisdiction under *Fam. Code § 3421(a)(1)* or has declined to exercise jurisdiction on the grounds this state is the more appropriate forum, and the child and at least one parent or a persona acting as a parent have a significant connection with this state other than mere physical presence and there is substantial evidence available in this state concerning the child's care, protection, training, and personal relationships [*Fam. Code § 3421(a)(2)*].

- All courts having jurisdiction under *Fam. Code § 3421(a)(1)-(2)* have declined to exercise jurisdiction on the grounds this state is the more appropriate forum to determine the custody of the child [*Fam. Code § 3421(a)(3)*].

- No other court of any other state would have jurisdiction under any of the criteria for jurisdiction set forth in *Fam. Code § 3421(a)(1)-(3)*.

The physical presence of, or personal jurisdiction over, a child or other party to the action, is neither necessary nor sufficient to make a determination of child custody [*Fam. Code § 3421(c)*]. Moreover, the mere fact the child is in the state because of a need for medical care is not sufficient to invoke the jurisdiction provisions of the UCCJEA or to make California the child's home state under the UCCJEA when the parents reside in another state or country and the only reason the child is in the state is for medical care [*In re A.C. (2005) 130 Cal. App. 4th 854, 861-862, 30 Cal. Rptr. 3d 431]* .

[3] Temporary Emergency Jurisdiction to Issue Custody Orders

A California court has "temporary emergency jurisdiction" to issue custody orders if the child is present in this state and the child has either been abandoned or it is necessary to protect the child in an emergency because the child, a sibling of

the child, or a parent of the child, is subjected to or threatened with mistreatment or abuse [*Fam. Code § 3424(a)*]. Other than protecting the child from immediate harm, the only prerequisite to having emergency jurisdiction under the UCCJEA is the child's presence in this state [*In re Jorge G. (2008) 164 Cal. App. 4th 125, 132, 78 Cal. Rptr. 3d 552* ; *In re Angel L. (2008) 159 Cal. App. 4th 1127, 1138, 72 Cal. Rptr. 3d 88* ; *In re Nada R. (2001) 89 Cal. App. 4th 1166, 1174, 108 Cal. Rptr. 2d 493]* . The mere fact the child is in the state because of a need for medical care is not sufficient to invoke the emergency jurisdiction provision of the UCCJEA [*In re A.C. (2005) 130 Cal. App. 4th 854, 863-864, 30 Cal. Rptr. 3d 431]* .

Where a dependency petition and supporting documents contain allegations of an emergency situation [*see Fam. Code § 3424(a)*] and hence seek to invoke the UCCJEA's emergency jurisdiction, it is appropriate for the juvenile court to issue interim custody orders to protect the child pending a hearing. Thereafter the juvenile court may conduct a full and fair evidentiary hearing to determine whether an emergency actually exists and therefore whether it properly has jurisdiction [*In re C.T. (2002) 100 Cal. App. 4th 101, 107, 121 Cal. Rptr. 2d 897* (construing UCCJEA); *In re Joseph D. (1993) 19 Cal. App. 4th 678, 688-689, 23 Cal. Rptr. 2d 574* (construing provisions of former UCCJA)].

One appellate court has held that unlike under the former UCCJA, the normal jurisdiction hearing held by the juvenile court to determine if the allegations under *Welf. & Inst. Code § 300* are true is not a hearing to determine temporary emergency jurisdiction under the UCCJEA, but rather goes beyond what is needed to determine if a temporary emergency exists for temporary emergency jurisdiction under the UCCJEA [*In re C.T. (2002) 100 Cal. App. 4th 101, 108, 121 Cal. Rptr. 2d 897]* . As that court noted, "the hearing to determine whether an emergency exists under the Act is a procedure separate and distinct from the section 300 jurisdictional hearing" [*In re C.T. (2002) 100 Cal. App. 4th 101, 109, 121 Cal. Rptr. 2d 897]* . While that is true, it does not mean that in an appropriate case the juvenile court cannot combine such hearings to avoid unnecessary delays, the duplication of evidence, and judicial time, just as jurisdiction and disposition hearings are often combined for the purpose of taking evidence. Even in *C.T.* the appellate court recognized that although the finding of jurisdiction under *Welf. & Inst. Code § 300* was not authorized by the UCCJEA until after the court properly determined it had emergency jurisdiction, the true finding under *Welf. & Inst. Code § 300* "necessarily included a finding under the Act that an emergency existed and it was necessary to protect [the child] from actual or threatened mistreatment or abuse" [*In re C.T. (2002) 100 Cal. App. 4th 101, 109, 121 Cal. Rptr. 2d 897]* .

Regardless, the provisions for temporary emergency jurisdiction set forth in *Fam. Code § 3424(a)* are intended by the Legislature to be an expansion of the grounds on which the court may exercise temporary emergency jurisdiction and is intended to include the grounds set forth in Fam. Code former § 3403 as that section read on December 31, 1999, "particularly including cases involving domestic violence" [*Fam. Code § 3424(e)*]. Indeed, it is the intent of the Legislature to "afford all children found in California the protection of California's juvenile court in exigent circumstances" [*In re Angel L. (2008) 159 Cal. App. 4th 1127, 1138, 72 Cal. Rptr. 3d 88]* .

When a court assumes emergency jurisdiction, it must remember that such jurisdiction is of a temporary nature and the court must therefore take steps to determine whether it is the appropriate forum to continue to determine the matter of the child's custody [*In re Joseph D. (1993) 19 Cal. App. 4th 678, 689-694, 23 Cal. Rptr. 2d 574* (construing provisions of former UCCJA)]. This does not mean, however, that emergency jurisdiction cannot continue to exist even after the jurisdiction hearing. If the risk of harm that creates the emergency is ongoing, the court continues to have jurisdiction to prevent that harm [*In re Jorge G. (2008) 164 Cal. App. 4th 125, 132, 78 Cal. Rptr. 3d 552* ; *In re Angel L. (2008) 159 Cal. App. 4th 1127, 1139, 72 Cal. Rptr. 3d 88* ; *In re Nada R. (2001) 89 Cal. App. 4th 1166, 1174-1176, 108 Cal. Rptr. 2d 493]* . When the court makes a finding of dependency jurisdiction and issues an actual custody order after determining an emergency exists, it does not do so under the court's emergency jurisdiction, but rather under *Fam. Code §§ 3421* or *3423*, "which are not emergency jurisdiction provisions" [*In re C.T. (2002) 100 Cal. App. 4th 101, 113, 121 Cal. Rptr. 2d 897]* . Thus, before proceeding to making such a custody determination, the juvenile court must have found a basis for jurisdiction under the UCCJEA other than simply temporary emergency jurisdiction.

When the court becomes aware there is an existing child custody order from another state or nation, it must take immediate steps to determine whether that other state or nation desires to exercise or defer its jurisdiction, and, if the matter is ultimately to be resolved by that other state or nation, what period of time is reasonably necessary for that other state or nation to resume consideration of the custody dispute and to make its own further custody orders. This latter information is necessary so the juvenile court in California can know what expiration date to put on any temporary protective custody order it makes under its emergency jurisdiction [*In re C.T. (2002) 100 Cal. App. 4th 101, 109, 121 Cal. Rptr. 2d 897]* . Communication with a court in another state is mandatory if there is an existing child custody order or a pending proceeding in the other state, otherwise it is discretionary [*Fam. Code §§ 3410(a), 3424(d), 3426(b)*; *In re Angel L. (2008) 159 Cal. App. 4th 1127, 1138-1139, 72 Cal. Rptr. 3d 88]* . Even where discretionary, the better practice is to at least attempt such communication.

The communication between the courts must be made as soon as reasonably possible after learning of an existing proceeding or custody order in another state or nation [*Fam. Code § 3424(d)*; *In re C.T. (2002) 100 Cal. App. 4th 101, 110, 121 Cal. Rptr. 2d 897]* . This does not mean the court must stop the proceeding the instant it learns of the possible applicability of the UCCJEA and immediately telephone the court in the other state or nation. It does mean, however, the court must make that communication "shortly thereafter" [*In re C.T. (2002) 100 Cal. App. 4th 101, 110, n.8, 121 Cal. Rptr. 2d 897]* . While a verbatim recording of the communication is not required, it is necessary that a record be made that can be retrieved in a perceivable form. That can include the notes or transcripts of a court reporter who actually listened to the conference call between the states, a memorandum or electronic record of the communication between the courts, or a memorandum or electronic record made by the court after the communication. Thus, a written memorandum by the court to the file or the verbal recitation of the contents of the communication made by the judicial officer in a hearing at which there is a court reporter is sufficient [*In re C.T. (2002) 100 Cal. App. 4th 101, 110-111, 121 Cal. Rptr. 2d 897]* .

PRACTICE TIP:

Importance of Immediate Communication With Out-of-State Court and the Making of a Record.

In the case of *In re Joseph D. (1993) 19 Cal. App. 4th 678, 693, 23 Cal. Rptr. 2d 574* , the juvenile court made some effort to contact the court in Pennsylvania that had previously made domestic custody orders for the purpose of discussing the matter of which court should exercise jurisdiction. The record was not clear as to exactly what transpired, however, and no direct communication between judicial officers of the two states was ever accomplished. The same lack of clarity in the record existed in the *Nada R.* case in which the appellate court noted the record was "unclear whether the juvenile court attempted to communicate with the Saudi Arabian court at any time before or after the jurisdictional hearing" [*In re Nada R. (2001) 89 Cal. App. 4th 1166, 1176, 108 Cal. Rptr. 2d 493]* . While a verbatim transcript of the communication would best avoid any disputes as to what actually was said between the two courts, a verbatim transcript is not required [*In re C.T. (2002) 100 Cal. App. 4th 101, 112, 121 Cal. Rptr. 2d 897]* . A clear record is needed, however, so all parties and the appellate court, if necessary, can know what communications were made.

Direct, immediate interstate judicial communication and consultation is not discretionary in such circumstances, it is mandatory [*see Fam. Code § 3424(d)*; *In re C.T. (2002) 100 Cal. App. 4th 101, 110-111, 121 Cal. Rptr. 2d 897]* . As such, every participant in the dependency proceedings should encourage the court to communicate and consult interstate and to make the record clear as to exactly what transpired in that communication. Counsel should consider requesting to be present when this communication takes place and that a court reporter also be present. Generally, the court should consider such requests favorably. Where possible, telephonic communication should be followed up by written confirmation so that the record is complete.

When making an order of temporary emergency jurisdiction when there is no child custody determination or pending proceeding in the other state, the court should indicate its order shall become a final determination on a specified date, which should be on or after the date by which California would otherwise become the child's home state [*Fam. Code §*

3424(b)]. If it is not known if there is such a custody determination or pending proceeding in the other state, the court should also consider making such an order, so that if it is learned there is no custody determination or pending proceeding in the other state, or if such a proceeding is not started, the California court's order for temporary emergency jurisdiction will become a final determination [*Fam. Code § 3424(b)*]. This practice is important since it may be difficult to get another state, or especially another country, to communicate with the court or expressly decline jurisdiction [*Fam. Code § 3421(a)(2)-(3)*].

[4] Authority to Decline UCCJEA Jurisdiction

Even when the court's jurisdiction is not based upon an emergency situation but is instead based upon one of the other grounds for continuing UCCJEA jurisdiction, the juvenile court may determine that it is an inconvenient forum for the determination of custody based on the circumstances of the case and the availability of a court in another state that is a more appropriate forum [*Fam. Code § 3427*]. Before making a decision of whether to retain or decline jurisdiction the court should communicate with the court of the other state and exchange information pertinent to the question of the assumption of jurisdiction, the resolution of any emergency, the protection of the child and parties, and the period of duration of any temporary orders [*Fam. Code § 3424(d)*]. The UCCJEA, as with the former UCCJA, contains no provisions for the transfer of jurisdiction between courts in such cases. Instead, one court is to exercise its own jurisdiction granted under its own state laws and the other court is to decline to exercise the jurisdiction granted to it by its state laws or stay its proceedings [*see Fam. Code § 3427(c)*].

[5] Notice Under the Hague Convention

While other countries are not signatories to the UCCJEA and their child custody laws may not be similar to the UCCJEA, notice is separate issue. When one of the parents resides in the other country, notice must be given to that parent under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters [*In re Jorge G. (2008) 164 Cal. App. 4th 125, 134, 78 Cal. Rptr. 3d 552* ; *In re Alyssa F. (2003) 112 Cal. App. 4th 846, 852, 6 Cal. Rptr. 3d 1]* . The Hague Convention generally requires notice through a designated central authority, but Article 10 of the convention permits the sending of judicial documents by other means, including through postal channels, if not objected to by the destination country. The exact requirements and meaning of Article 10 and whether the documents that can be sent by postal means includes notice has been the subject of great dispute both throughout this nation and this state. Many courts that hold notice cannot be sent through the mails cite the case of *Honda Motor Co. v. Superior Court (1992) 10 Cal. App. 4th 1043, 12 Cal. Rptr. 2d 861* , which concluded Article 10 of the Hague Convention did not authorize the sending of notice by postal means. But the same court that handed down the *Honda Motor Co.* decision has looked at the issue more recently, this time considering a U.S. State Department declaration, Special Commission Reports, the understanding of the signatories, and the Handbook on the Convention that were not considered by the court in the *Honda Motor Co.* case. It concluded "the view that article 10(a) allows service of process by mail represents the better position" [*Denlinger v. Chinadotcom Corp. (2003) 110 Cal. App. 4th 1396, 1404, 2 Cal. Rptr. 3d 530]* . It is anticipated the *Denlinger* decision will be followed by other courts in the future due to its more thorough examination of the issue based on additional evidence and authority. Nevertheless, even if service of notice by postal means is authorized by the Hague Convention, notice still must comply with the requirements for the type of notice being given of both California and the destination nation [*In re Jorge G. (2008) 164 Cal. App. 4th 125, 134, 78 Cal. Rptr. 3d 552* ; *In re Alyssa F. (2003) 112 Cal. App. 4th 846, 853-854, 6 Cal. Rptr. 3d 1]* .

The country to which California dependency notice must be sent most often is Mexico. It has generally been assumed that Mexico has not objected to notice by other means, including postal channels, under Article 10 of the convention [*In re Alyssa F. (2003) 112 Cal. App. 4th 846, 854, n.10, 6 Cal. Rptr. 3d 1* , citing the United States State Department website]. But that has recently come into question [OGM, Inc. v. Televisa, S.A. (C.D. Cal., Apr. 15, 2009, No. CV 08-5742- *JFW (JCx)) 2009 U.S. Dist. LEXIS 33409]* . How the typically delayed service through a central authority could possibly work in dependency proceedings in which the child needs timely decision making is subject to serious

question. This is an area to be watched for further developments.

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§ 328.83 Servicemembers' Civil Relief Act

The Servicemembers' Civil Relief Act (SCRA) replaced the Soldiers and Sailors Civil Relief Act. The SCRA essentially acts to strengthen and expedite national defense by providing servicemembers with protection in civil proceedings so the servicemember may devote his or her full energies to national defense [*In re A.R. (2009) 170 Cal. App. 4th 733, 740-741, 88 Cal. Rptr. 3d 448* , *citing* 50 U.S.C. Appen. § 502]. An application to the juvenile court for a stay under the SCRA must include a letter or other form of communication setting forth the manner in which current military duty requirements materially affect the servicemember's ability to appear and the date when he or she will be available to appear. It must also include a letter or other form of communication from the servicemember's commanding officer stating the servicemember's current military duty prevents appearance and that military leave is not authorized for the servicemember at the time of the letter [*50 USCS Appx § 522(b)(2)*]. If the application meets these requirements, a 90-day stay must be granted [*50 USCS Appx § 522(b)(1)*; *In re A.R. (2009) 170 Cal. App. 4th 733, 741-742, 88 Cal. Rptr. 3d 448* ; *George P. v. Superior Court (2005) 127 Cal. App. 4th 216, 224-225, 24 Cal. Rptr. 3d 919]* . Thereafter, additional stays are discretionary.

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§ 328.84 Grounds for Dependency Jurisdiction

[1] Welf. & Inst. Code § 300 in General

Any child may be adjudged to be a dependent of the juvenile court on any of the grounds set forth in *Welf. & Inst. Code § 300(a)-(j)* [*see In re Jonathan B. (1992) 5 Cal. App. 4th 873, 875-876, 7 Cal. Rptr. 2d 277* (dependency adjudication is proper if evidence supports any one of dependency grounds set forth in *Welf. & Inst. Code § 300*)].

A child may be brought within the juvenile court's jurisdiction as a result of the conduct or omission of either or both parents that results in the child being described by *Welf. & Inst. Code § 300*. There is no requirement that there be jurisdictional allegations regarding conduct by both parents [*Welf. & Inst. Code § 302(a)*; *In re John S. (2001) 88 Cal. App. 4th 1140, 1143, 106 Cal. Rptr. 2d 476* ; *In re Alysha S. (1996) 51 Cal. App. 4th 393, 397, 58 Cal. Rptr. 2d 494* ; *In re Jeffrey P. (1990) 218 Cal. App. 3d 1548, 1552-1554, 267 Cal. Rptr. 764]* .

Dependency jurisdiction under *Welf. & Inst. Code § 300* is taken *over* the child, not the parents, based upon the harm or risk of harm to the child [*In re Joshua G. (2005) 129 Cal. App. 4th 189, 202, 28 Cal. Rptr. 3d 213* ; *In re Daniel S. (2004) 115 Cal. App. 4th 903, 916, 9 Cal. Rptr. 3d 646]* . It is for this reason that dependency petitions are not found "true" or "sustained" as to a parent. Instead, they are found true as to the child [California Ctr. for Jud. Educ. and Research, Cal. Judges Benchguides, Benchguide 101: Juvenile Dependency Jurisdiction Hearing (Jan. 2009) §§ 101.5 to 101.6, pp. 101-9 to 101-11]. Thus if the conduct or omission of either parent brings the child within the court's jurisdiction, it is sufficient for a jurisdictional finding [*In re Joshua G. (2005) 129 Cal. App. 4th 189, 202, 28 Cal. Rptr. 3d 213* ; *In re Alysha S. (1996) 51 Cal. App. 4th 393, 397, 58 Cal. Rptr. 2d 494]* .

Jurisdiction *over* the parents deals primarily with notice and an opportunity to be heard [*In re Joshua G. (2005) 129 Cal. App. 4th 189, 202, 28 Cal. Rptr. 3d 213* ; *In re Daniel S. (2004) 115 Cal. App. 4th 903, 916, 9 Cal. Rptr. 3d 646* ;

In re Antonio F. (1978) 78 Cal. App. 3d 440, 447-450, 144 Cal. Rptr. 466 ; *In re B.G. (1974) 11 Cal. 3d 679, 688-689, 114 Cal. Rptr. 444, 523 P.2d 244]* .

The current form of *Welf. & Inst. Code § 300* is largely the result of Senate Bill 243 [Stats. 1987, ch. 1485]. One appellate court viewed the legislative history of Senate Bill 243 as confirming an "unmistakable intention to narrow the grounds on which children may be subjected to juvenile court jurisdiction" [*In re Rocco M. (1991) 1 Cal. App. 4th 814, 823, 2 Cal. Rptr. 2d 429]* . Thus, the court inferred that in the "absence of cogent reasons for a contrary conclusion, facts held insufficient to satisfy the earlier statute will also fail to satisfy the revised statute" [*In re Rocco M. (1991) 1 Cal. App. 4th 814, 823-824, 2 Cal. Rptr. 2d 429]* . It proceeded to follow the principle, as the law had previously held, that "While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances at the time of the hearing subject the minor to the defined risk of harm" [*In re Rocco M. (1991) 1 Cal. App. 4th 814, 824, 2 Cal. Rptr. 2d 429]* . "Thus the past infliction of physical harm by a caretaker, standing alone, does not establish a substantial risk of physical harm; '[t]here must be some reason to believe the acts may continue in the future' " [*In re Rocco M. (1991) 1 Cal. App. 4th 814, 824, 2 Cal. Rptr. 2d 429* , *quoting In re Jennifer P. (1985) 174 Cal. App. 3d 322, 326, 219 Cal. Rptr. 909]* . Numerous cases have perpetuated the *Rocco M.* holdings [*see, e.g.*, *In re Savannah M. (2005) 131 Cal. App. 4th 1387, 1394, 32 Cal. Rptr. 3d 526* ; *In re Nicholas B. (2001) 88 Cal. App. 4th 1126, 1134, 106 Cal. Rptr. 2d 465* ; *In re Brison C. (2000) 81 Cal. App. 4th 1373, 1379, 97 Cal. Rptr. 2d 746]* . But *Rocco M.* was not entirely correct.

The legislature did want to limit the number of children removed from their homes inappropriately. That is not the same, however, as narrowing the grounds for dependency jurisdiction. As evidenced by the report of the committee that drafted Senate Bill 243, the legislature's unmistakable intention was not to narrow the grounds for dependency jurisdiction, but to clarify and specify the grounds for dependency jurisdiction [Senate Sel. Comm. on Children & Youth/SB 1195 Task Force Rep. on Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services (Jan. 1988) pp. 2-5]. Indeed, the report reflects the changes in *Welf. & Inst. Code § 300* were to "clarify areas of uncertainty and enhance the court's ability to protect abused and neglected children" [Senate Sel. Comm. on Children & Youth/SB 1195 Task Force Rep. on Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services (Jan. 1988) p. 2]. The report actually indicated Senate Bill 243 potentially expanded the scope of intervention regarding siblings of children who had been abused [Senate Sel. Comm. on Children & Youth/SB 1195 Task Force Rep. on Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services (Jan. 1988) p. 5]. Significantly, this report documented the intent of the law contained in Senate Bill 243 and has been viewed by the California Supreme Court in that light [*Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 247, 19 Cal. Rptr. 2d 698, 851 P.2d 1307]* . Equally significant, the *Rocco M.* court did not consider this report. Moreover, the *Rocco M.* analysis has been examined and this area of the law clarified in the case of *In re David H. (2008) 165 Cal. App. 4th 1626, 1642-1644, 82 Cal. Rptr. 3d 81* , in a manner consistent with this analysis.

The plain language of *Welf. & Inst. Code § 300* evidences a clear legislative intent that a child can come under the juvenile court's jurisdiction when a child has "suffered" serious harm or when a child is at "substantial risk" of suffering serious harm [*Welf. & Inst. Code § 300(a), (b), (d)*]. The use of the past tense form "suffered" evidences a clear intent that a child can come under the court's dependency jurisdiction based on past infliction of serious harm by a parent or guardian. This is supported by language throughout the task force report addressing the revised grounds for jurisdiction. For instance, in one place the report echoes the language of the statute noting that "Under SB 243, *WIC Section 300(a)* specifies that in order for a court to assume jurisdiction, it must find that a child has been injured by a parent or that the child is at 'substantial risk' of injury, and that the injury was 'serious' or was inflicted in such a manner that might have been serious" [Senate Sel. Comm. on Children & Youth/SB 1195 Task Force Rep. on Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services (Jan. 1988) p. 6]. Thus, while *Rocco M.* is correct that if the jurisdictional allegations are based on risk to the child that risk must be shown to exist as of the date of the jurisdiction hearing. But if the jurisdictional allegations are based on serious harm the child has already suffered, such as serious physical harm or sexual abuse by a parent or guardian, the fact the child has already suffered the harm as a result of a parent's or guardian's act or omission is sufficient to support a true finding [*In re David H. (2008) 165 Cal.*

App. 4th 1626, 1642-1644, 82 Cal. Rptr. 3d 81] . In such circumstances, the question of current risk becomes one relevant to dispositional considerations such as whether dependency needs to be declared or the child needs to be removed from the home.

At the end of *Welf. & Inst. Code § 300* the legislature has included a statement of intent. This includes that it is the intent of the legislature that nothing in *Welf. & Inst. Code § 300* should disrupt the family unnecessarily, intrude into family life inappropriately, prohibit reasonable methods of parental discipline, or prescribe a particular parenting method [*Welf. & Inst. Code § 300*]. The legislature also declared that a physical disability, such as blindness or deafness, is not a bar to raising happy, well-adjusted children. Any finding under this section is to center on whether the parent's disability prevents him or her from exercising appropriate care and control [*Welf. & Inst. Code § 300*]. Further, a child whose parent is a dependent child of the court shall not be considered at risk of abuse or neglect solely because of the age, dependent status, or foster care status of the parent [*Welf. & Inst. Code § 300*].

PRACTICE TIP (PARENT'S P.O.V.):

The Impact of Certain Sustained Allegations at Disposition. In deciding how to resolve jurisdiction issues, parent's counsel must look ahead to disposition. Certain allegations may be grounds for a potential bypass of reunification services [*see Welf. & Inst. Code §§ 361.5(b)(4), (5), (6), (8), (9)*].

[2] Serious Physical Harm by Parent or Guardian [Section 300(a)]

The child has suffered, or there is a substantial risk that he or she will suffer, serious physical harm inflicted nonaccidentally by his or her parent or guardian. In this context "guardian" means the legal guardian of the child [*Welf. & Inst. Code § 300(a)*]. This does not require the parent have intended the child to suffer serious physical harm or to be at substantial risk of such harm, although the evidence may show that. If the Legislature had wanted to require a specific intent on the part of the parent, it could have done so. Instead, it chose the term "nonaccidentally," indicating a volitional act, but without the requirement for a specific intended consequence.

For the purposes of *Welf. & Inst. Code § 300(a)*, a court may find there is a substantial risk of serious future injury based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries on the child or the child's siblings, or a combination of these and other actions by the parent or guardian that indicate the child is at risk of serious physical harm. For the purposes of *Welf. & Inst. Code § 300(a)*, "serious physical harm" does not include reasonable and age-appropriate spanking to the buttocks if there is no evidence of serious physical injury [*Welf. & Inst. Code § 300(a)*; *see In re Tania S. (1992) 5 Cal. App. 4th 728, 735 n.5, 7 Cal. Rptr. 2d 60* (concluding that state's interest in protecting child from serious physical harm justifies removal over objections by parents based on cultural and religious child rearing beliefs)].

[3] Failure to Adequately Supervise, Protect, or Provide for Child [Section 300(b)]

The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness as a result of (a) the failure or inability of his or her parent or guardian to adequately supervise or protect the child; (b) the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left; (c) the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment; or (d) the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse. However, no child will be found to be a dependent of the juvenile court for the foregoing reasons solely because of the lack of an emergency shelter for the family [*Welf. & Inst. Code § 300(b)*]. In evaluating the risk of serious physical harm or illness to the child under this subdivision, it is not sufficient for the court to rely on the child's perception of the risk of such harm or illness. The court must evaluate the actual risk. The fact that the parent and child have major differences in politics, beliefs or activities does not justify an assumption of jurisdiction under this subdivision without "a substantial risk of palpable harm to the child" [*Nahid H. v. Superior Court (1997) 53 Cal. App. 4th 1051, 1070, 62*

Cal. Rptr. 2d 281] .

Substance abuse by parents is frequently part of the jurisdictional allegations in dependency cases. The question of whether a child born with a positive toxicology for alcohol or other dangerous drugs automatically falls within the jurisdiction of the juvenile court has been answered in the affirmative by the appellate courts [*see In re Monique T. (1992) 2 Cal. App. 4th 1372, 1378, 4 Cal. Rptr. 2d 198* ; *In re Troy D. (1989) 215 Cal. App. 3d 889, 897, 263 Cal. Rptr. 869]* . This is especially true when the child is born with a positive toxicology for dangerous drugs and medical treatment is necessary to address the child's withdrawal symptoms [*In re Stephen W. (1990) 221 Cal. App. 3d 629, 638-639, 271 Cal. Rptr. 319]* . Further, courts have recognized that "prenatal use of dangerous drugs by a mother is probative of future child neglect" [*In re Stephen W. (1990) 221 Cal. App. 3d 629, 639, 271 Cal. Rptr. 319]* . The enactment of *Penal Code § 11165.13* providing that a positive toxicology report alone is not enough to form a basis for a suspected child abuse report, however, suggests that a positive toxicology is now just one of the factors to be considered in determining if a newborn child is at risk [*see In re Rocco M. (1991) 1 Cal. App. 4th 814, 825, 2 Cal. Rptr. 2d 429* (dependency adjudication was proper when older child had access to drugs at home and mother's neglect of child and her own substance abuse created environment that encouraged child's drug use)]. The significance of substance abuse in dependency cases should not be understated, however [*see Welf. & Inst. Code § 300.2*]. Moreover, it must be remembered it is the impact of substance abuse on parenting and the danger to the child that is important. As noted by one court, "even legal use of marijuana can be abuse if it presents a risk of harm to minors" [*In re Alexis E. (2009) 171 Cal. App. 4th 438, 452, 90 Cal. Rptr. 3d 44* (medical marijuana case)].

Whenever it is alleged that a child comes within the jurisdiction of the court on the basis of the parent's or guardian's willful failure to provide adequate medical treatment or specific decision to provide spiritual treatment through prayer, the court must give deference to the parent's or guardian's medical treatment, nontreatment, or spiritual treatment through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the church or denomination, and may not assume jurisdiction unless necessary to protect the child from suffering serious physical harm or illness. In making its determination, the court must consider (a) the nature of the treatment or nontreatment proposed by the parent or guardian; (b) the risks to the child posed by the course of treatment or nontreatment proposed by the parent or guardian; (c) the risk, if any, of the course of treatment being proposed by the petitioning agency; and (d) the likely success of the courses of treatment or nontreatment proposed by the parent or guardian and agency. The child that comes within the jurisdiction of the court on the basis of the parent's or guardian's willful failure to provide adequate medical treatment or specific decision to provide spiritual treatment through prayer must continue to be a dependent child pursuant to *Welf. & Inst. Code § 300(b)* only so long as is necessary to protect the child from risk of suffering serious physical harm or illness [*Welf. & Inst. Code § 300(b)*].

[4] Serious Emotional Damage [Section 300(c)]

The child is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal or untoward aggressive behavior toward self or others, as a result of the conduct of the parent or guardian, or who has no parent or guardian capable of providing adequate care [*Welf. & Inst. Code § 300(c)*].

This subdivision authorizes the taking of jurisdiction under three types of circumstances: where the parent's actions are the initial cause of the child's emotional damage, where the parent's actions are the cause of the child continuing to suffer the emotional damage, and when the parent is unable to provide suitable care for the child's emotional suffering because of the lack of insurance or financial resources [California Ctr. for Jud. Educ. and Research, Cal. Judges Benchguides, Benchguide 101: Juvenile Dependency Jurisdiction Hearing (Jan. 2009) § 101.11, p. 101-16; *see also In re Amy M. (1991) 232 Cal. App. 3d 849, 869-870, 283 Cal. Rptr. 788* (mother unable to put her emotionally fragile child's needs above her own); *In re Alexander K. (1993) 14 Cal. App. 4th 549, 559, 18 Cal. Rptr. 2d 22* (parental conduct branch of § 300(c) seeks to protect against abusive, neglectful and/or exploitative conduct toward a child causing severe emotional harm shown by any of the serious symptoms identified in § 300(c); statute not overly vague)].

The fact that a parent and child are estranged does not automatically mean the child would suffer serious emotional damage if returned to or continued in the custody of the parent [*In re Brison C. (2000) 81 Cal. App. 4th 1373, 1379-1383, 97 Cal. Rptr. 2d 746]* . Some evidence, such as an evaluation or testimony by a psychologist or therapist, will usually be needed to justify jurisdiction under this subdivision in such circumstances [*see Nahid H. v. Superior Court (1997) 53 Cal. App. 4th 1051, 1070, 62 Cal. Rptr. 2d 281]* .

No child will be found to be a person described by *Welf. & Inst. Code § 300(c)* if the willful failure of the parent or guardian to provide adequate mental health treatment is based on a sincerely held religious belief and if a less intrusive judicial intervention is available [*Welf. & Inst. Code § 300(c)*].

[5] Sexual Abuse [Section 300(d)]

The child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in *Penal Code § 11165.1*, by his or her parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse [*Welf. & Inst. Code § 300(d)*; *In re Tiffany Y. (1990) 223 Cal. App. 3d 298, 303, 272 Cal. Rptr. 733]* . The identity of the actual perpetrator of the molest is not essential to a finding under this subsection if it can be shown that the child was molested and that the parent was either unable or unwilling to protect the child [*In re Christina T. (1986) 184 Cal. App. 3d 630, 640, 229 Cal. Rptr. 247* ; *see Welf. & Inst. Code § 355.1*]. For purposes of dependency proceedings, a person is a member of a child's household if that person is "continually or frequently found in the same household as the child" [*Cal. Rules of Ct., Rule 5.502(18)*]. This takes into account the nontraditional and quasi-familial living arrangements that occur in many American homes, and recognizes that not all members of the household actually reside within the home. Being a member of a household may be more about the relationship between people than the number of hours actually spent in the house [*cf. People v. Jeffers (1987) 43 Cal. 3d 984, 992, 239 Cal. Rptr. 886, 741 P.2d 1127]* .

Penal Code § 11165.1 defines "sexual abuse" as sexual assault or sexual exploitation as defined by *Penal Code § 11165.1(a)-(c)*. "Sexual assault" is conduct in violation of criminal statutes prohibiting rape, statutory rape, rape in concert, incest, sodomy, lewd or lascivious acts on a child under 14 years of age, oral copulation, penetration of a genital or anal opening by a foreign object, or child molestation [*see Penal Code § 11165.1(a)*; *see also Penal Code §§ 261, 264.1, 285, 286, 288a, 289, 647a*]. *Penal Code § 11165.1* also contains a nonexclusive enumeration by description of further conduct constituting "sexual assault" that should be looked to when the dependency jurisdictional allegations do not fit squarely within one of crimes listed in *Penal Code § 11165.1(a)* [*see Penal Code § 11165.1(b)(1)-(4)*].

"Sexual exploitation" refers to matter depicting children engaged in obscene acts in violation of criminal statutes that prohibit preparing, selling, or distributing obscene matter, and employing children to perform obscene acts [*see Penal Code § 11165.1(c)(1)*; *see also Penal Code §§ 311.2, 311.4(a)*]; knowingly promoting, aiding, assisting, employing, using, persuading, inducing, coercing, permitting, or encouraging a child either to (a) engage in, or assist others to engage in, prostitution or live performance involving obscene sexual conduct, or (b) to either pose or model alone or with others for purposes of preparing a film, photograph, negative, slide, drawing, painting, or other pictorial depiction, involving obscene sexual conduct [*see Penal Code § 11165.1(c)(2)*]; or depicting a child in, or knowingly developing, duplicating, printing, or exchanging any film, photograph, videotape, negative, or slide in which a child is engaged in an act of obscene sexual conduct [*see Penal Code § 11165.1(c)(3)*]. One court has held the reference to "obscene" acts or conduct in *Penal Code § 11165.1* is "surplusage from a bygone era, which we may safely disregard" [*In re Ulysses D. (2004) 121 Cal. App. 4th 1092, 1098, 18 Cal. Rptr. 3d 430]* . It held that photographs of a child engaged in sexual conduct do not have to be obscene to bring the child within the juvenile court's jurisdiction [*In re Ulysses D. (2004) 121 Cal. App. 4th 1092, 1098, 18 Cal. Rptr. 3d 430]* .

Although sexual abuse and sexual exploitation may be the result of conduct accompanied by a specific sexual intent, not all such offenses are specific intent offenses. Moreover, as noted by the legislative report that accompanied the

enactment of the language found in *Welf. & Inst. Code § 300(d)*, "All instances of sexual behavior between an adult and child are covered" [Sen. Sel. Comm. on Children & Youth/SB 1195 Task Force Rep. on *Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services* (Jan. 1988) p. 5]. Further, the intent of the law is to provide the maximum safety and protection for children being abused, neglected, or exploited, or who are at risk of such abuse, neglect, or exploitation [*Welf. & Inst. Code § 300.2*]. Providing maximum protection to the child could also include protection from sexual abuse or risk of sexual abuse that is the result of conduct by a sibling. It more commonly, however, addresses protection from sexual abuse or the risk of sexual abuse by a parent or other adult member of the household. In one case the appellate court upheld the finding that one girl had been molested and her sister was at substantial risk of sexual abuse but, despite acknowledging that such abuse could endanger brothers as well, found the evidence failed to show the girl's two brothers were at substantial risk of sexual abuse [*In re Rubisela E. (2000) 85 Cal. App. 4th 177, 196-199, 101 Cal. Rptr. 2d 760* (addressing allegation under *Welf. & Inst. Code § 300(j)* but analysis of risk the same as under *Welf. & Inst. Code § 300(d)*)]. In other cases, however, the risk to siblings has been found. Each case must be viewed based on the evidence of risk presented.

One appellate court went so far as to find that an 8-year-old boy had been sexually abused within the meaning of *Welf. & Inst. Code § 300(d)* even though he had not been present when his 11-year-old sister was raped by the father, since he had seen his sister beaten by the father and was told by his sister about the rape immediately thereafter. The appellate court found the boy was not only at risk of sexual abuse, but that he had been sexually abused [*In re Karen R. (2001) 95 Cal. App. 4th 84, 89-91, 115 Cal. Rptr. 18]* . While other courts may not go as far as the court in *Karen R.* in finding sexual abuse actually happened, the case demonstrates how broadly the sexual abuse provisions of *Welf. & Inst. Code § 300(d)* will be read by courts to protect children.

[6] Severe Physical Abuse of Young Child [Section 300(e)]

The child is under the age of 5 and has suffered severe physical abuse by a parent, or by any person known by the parent, if the parent knew or reasonably should have known that the person was physically abusing the child. For the purposes of *Welf. & Inst. Code § 300(e)*, "severe physical abuse" means (1) any single act of abuse that causes physical trauma of sufficient severity that, if left untreated, would cause permanent physical disfigurement, permanent physical disability, or death; (2) any single act of sexual abuse that causes significant bleeding, deep bruising, or significant external or internal swelling; or (3) more than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness. "Severe physical abuse" also includes the willful, prolonged failure to provide adequate food [*Welf. & Inst. Code § 300(e)*].

This subdivision does not require that the parent personally inflict the severe physical abuse. It is enough to sustain a petition under *Welf. & Inst. Code § 300(e)* if the parent knew or reasonably should have known the child was being abused [*In re E.H. (2003) 108 Cal. App. 4th 659, 667-670, 133 Cal. Rptr. 2d 740* ; *In re Joshua H. (1993) 13 Cal. App. 4th 1718, 1729, 17 Cal. Rptr. 2d 282]* . Even when there is no identifiable perpetrator, jurisdiction under *Welf. & Inst. Code § 300(e)* may still be found based on circumstantial evidence, such as where a child was in the custody of the parents and there is no claim anyone else abused the child. "Otherwise, a family could stonewall the Department and its social workers concerning the origin of a child's injuries and escape a jurisdictional finding under subsection (e)" [*In re E.H. (2003) 108 Cal. App. 4th 659, 670, 133 Cal. Rptr. 2d 740]* . Further, resort to the presumption found in *Welf. & Inst. Code § 355.1* is not required in such cases [*In re E.H. (2003) 108 Cal. App. 4th 659, 669-670, 133 Cal. Rptr. 2d 740]* . The child may not be removed from the physical custody of his or her parent or guardian on the basis of a finding of severe physical abuse, however, unless the social worker has made an allegation of severe physical abuse pursuant to *Welf. & Inst. Code § 332*, which sets forth the required contents of a juvenile court petition [*Welf. & Inst. Code § 300(e)*].

[7] Causing the Death of Another Child by Neglect or Abuse [Section 300(f)]

The child's parent or guardian has caused the death of another child through neglect or abuse [*Welf. & Inst. Code §*

300(f)]. It should be noted that previously this subdivision had required that the parent or guardian be convicted of causing the death of the other child before the protection of this subdivision applied [*see* Welf. & Inst. Code former § 300(f); *In re Jessica F. (1991) 229 Cal. App. 3d 769, 776-778, 282 Cal. Rptr. 303]* . A conviction is no longer necessary. If there is a conviction, however, it is not required that the conviction be for murder or manslaughter. The court can look behind any lesser conviction to determine whether the facts of the case justify a finding that the parent or guardian caused the death of the other child through abuse or neglect [*In re Jessica F. (1991) 229 Cal. App. 3d 769, 776-778, 282 Cal. Rptr. 303]* . It should be remembered, however, that plea bargains in criminal cases are entered into for a wide variety of reasons, including a recognition that the evidence may not support a conviction for murder or manslaughter. As such, it should not be presumed that a conviction for a lesser offense related to a child's death automatically means the parent or guardian caused the death of the child within the meaning of *Welf. & Inst. Code § 300(f)*. Instead, the particular facts of the individual case should be reviewed carefully to see whether the parent or guardian caused the death of the other child through abuse or neglect as described in this jurisdictional subdivision [California Ctr. for Jud. Educ. and Research, Cal. Judges Benchguides, Benchguide 101: Juvenile Dependency Jurisdiction Hearing (Jan. 2009) § 101.14, p 101-19].

PRACTICE TIP:

A Double-Edged Sword. The change in the law allowing for a child to come under the provisions of *Welf. & Inst. Code § 300(f)* without the necessity of a conviction may create a nightmare for social services agencies and juvenile courts in cases where the criminal matter has yet to proceed to trial. In those cases, defense counsel may attempt to use the dependency proceedings as a discovery vehicle for their criminal case, thereby turning the dependency jurisdiction hearing into a mini-murder trial. Agencies should accordingly exercise caution in utilizing this provision as a basis for jurisdiction. The change in the law, however, does obviate the need for the criminal conviction to be final or for there to have been any criminal proceeding at all before the juvenile court can assume jurisdiction under this subdivision. Further, where the conviction is final, collateral estoppel will still preclude its relitigation in the dependency court. As such, the changes in the law in this subdivision may properly be viewed as a double-edged sword for each side.

[8] Child Left Without Provision for Support or Voluntarily Surrendered [Section 300(g)]

The child has been left without any provision for support; the child's parent has been incarcerated or institutionalized and cannot arrange for the care of the child; or a relative or other adult custodian with whom the child resides or has been left is unwilling or unable to provide care or support for the child, the whereabouts of the parent is unknown, and reasonable efforts to locate the parent have been unsuccessful [*Welf. & Inst. Code § 300(g)*]. An incarcerated or institutionalized parent has no burden to prove the arrangements for care the parent has made are suitable [*In re S.D. (2002) 99 Cal. App. 4th 1068, 1078, 121 Cal. Rptr. 2d 518]* . Instead, the burden is on the social services agency to prove the jurisdictional allegations [*In re Kieshia E. (1993) 6 Cal. 4th 68, 79 n.8, 23 Cal. Rptr. 2d 775, 859 P.2d 1290* ; *In re Amy M. (1991) 232 Cal. App. 3d 849, 859, 283 Cal. Rptr. 788]* .

The statutory language does not expressly require the care the parent arranges for the child ensure the child's safety, protection, or physical or emotional well-being [*Welf. & Inst. Code § 300(g)*]. As such, one case has held the arrangements made by an incarcerated or institutionalized parent do not have to be suitable to defeat dependency jurisdiction under this subdivision [*In re S.D. (2002) 99 Cal. App. 4th 1068, 1079, 121 Cal. Rptr. 2d 518]* . This holding is an anomaly, however, and inconsistent with the overall purpose of the statutory scheme to ensure the safety and well-being of children [*Welf. & Inst. Code § 300.2*].

The better view is set forth in two earlier decisions that held the arrangements made by the incarcerated or institutionalized parent had to be adequate or suitable [*In re Monica C. (1995) 31 Cal. App. 4th 296, 305, 36 Cal. Rptr. 2d 910* (the statute "requires only that an incarcerated parent arrange adequately for the care of the child during the period of his or her incarceration"); *In re Aaron S. (1991) 228 Cal. App. 3d 202, 212, 278 Cal. Rptr. 861* ("the

Legislature did not intend dependencies to be established under this statute where the incarcerated parent is able to make suitable arrangements for his or her children's care"); *see also In re Rocco M. (1991) 1 Cal. App. 4th 814, 824, 2 Cal. Rptr. 2d 429* (regarding *Welf. & Inst. Code § 300(b)*, "the fact that a child has been left with other caretakers will not warrant a finding of dependency if the child receives good care")]. These decisions impliedly construe the statutory language as part of the overall statutory scheme to provide for the safety, protection, physical and emotional well being of children [*Welf. & Inst. Code § 300.2*]. This is how dependency statutes should be construed [*Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 253, 19 Cal. Rptr. 2d 698, 851 P.2d 1307* ; *In re Christina A. (2001) 91 Cal. App. 4th 1153, 1162, 111 Cal. Rptr. 2d 310]* .

Providing care for a child involves more than just providing a roof over the child's head. It can involve a whole host of things, including enrolling the child in preschool, authorizing medical care, and having the right to the return of the child if the child wanders off and gets lost. If an incarcerated parent is not able to arrange care that provides for such things, jurisdiction under *Welf. & Inst. Code § 300(g)* may be appropriate [*In re Athena P. (2002) 103 Cal. App. 4th 617, 629, 127 Cal. Rptr. 2d 46* (distinguishing its facts from those of the *S.D.* case and finding substantial evidence supported the finding of jurisdiction under *Welf. & Inst. Code § 300(g)*); *see also In re Isayah C. (2004) 118 Cal. App. 4th 684, 696, 13 Cal. Rptr. 3d 198* (noting if the incarcerated parent can make "suitable arrangements" for the care of the child there is no basis for jurisdiction)]. For a child, particularly a very young child, care that is inadequate or unsuitable is not care at all. Thus, while the incarcerated or institutionalized parent bears no burden to prove his or her arrangements for the care of the child are suitable, if the social services agency can prove the arrangements are not adequate or suitable, jurisdiction under *Welf. & Inst. Code § 300(g)* can be sustained.

As of January 1, 2001, jurisdiction may now also taken under this subdivision when the parent voluntarily surrenders an infant 72 hours old or younger pursuant to *Health & Safety Code § 1255.7* and the child has not been reclaimed within the 14-day period specified in Health & Safety Code § (e) [*Welf. & Inst. Code § 300(g)*]. Provisions for the surrender of such an infant have been expanded since the original passage of the Safe Haven Law. They now permit the infant to have been surrendered at any "safe surrender site" as defined in *Health & Safety Code § 1255.7(a)(1)*, which includes a location designated by the county board of supervisors, or a location within a private or public hospital designated by the hospital for such surrenders [*Health & Safety Code § 1255.7(a)(1)*]. Any such site must post a sign utilizing the statewide logo for a safe surrender site [*Health & Safety Code § 1255.7(a)(3)*]. A parent or other individual who surrenders an infant 72 hours old or younger under the Safe Haven Law cannot be prosecuted for a violation of *Penal Code §§ 270, 270.5, 271*, or *271a* [*Penal Code § 271.5(a)*].

[9] Child Freed for Adoption or Without Adoption Petition [Section 300(h)]

The child has been freed for adoption from one or both parents for 12 months by either relinquishment or termination of parental rights, or an adoption petition has not been granted [*Welf. & Inst. Code § 300(h)*].

[10] Acts of Cruelty [Section 300(i)]

The child has been subjected to an act or acts of cruelty by the parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the child from an act or acts of cruelty when the parent or guardian knew or reasonably should have known that the child was in danger of being subjected to an act or acts of cruelty [*Welf. & Inst. Code § 300(i)*]. This subdivision does not define cruelty. Many people consider sexual molestation or severe physical abuse of a young child to be cruelty, and they may be in certain instances. But if cruelty was already necessarily included in other subdivisions of *Welf. & Inst. Code § 300*, this separate subdivision would not be required. One approach is to ask whether the cruelty alleged "shocks the conscience." If it does jurisdiction under this subdivision is appropriate regardless of whether the acts or omissions of the parent or member of the household were sexual, physical, or some other form of abuse or neglect.

[11] Abuse or Neglect of Sibling [Section 300(j)]

A petition filed under *Welf. & Inst. Code § 300(j)* is often referred to as a "sibling petition." It applies when the child's sibling has been abused or neglected, as defined in *Welf. & Inst. Code § 300(a), (b), (d), (e),* or *(i),* and there is a substantial risk the child will be abused or neglected, as defined in those subdivisions. Thus, there are two prongs to this jurisdictional subdivision: the child's sibling has been abused or neglected as defined in the applicable subdivisions, and there is a substantial risk that this child will be abused or neglected as defined in the applicable subdivisions [*In re Ricardo L. (2003) 109 Cal. App. 4th 552, 566, 135 Cal. Rptr. 2d 72]* . There is no requirement in the language of the statute that the child's sibling to have been adjudicated as a dependent under *Welf. & Inst. Code § 300(a), (b), (d), (e),* or *(i)*. The first prong of the statute merely requires the child's sibling to have been abused or neglected as defined in the relevant subdivisions of *Welf. & Inst. Code § 300*. If the child's sibling has been so adjudicated, however, the parent is barred from relitigating the prior abuse or neglect of the child's sibling by the collateral estoppel aspect of the doctrine of res judicata [*In re Joshua J. (1995) 39 Cal. App. 4th 984, 992-993, 46 Cal. Rptr. 2d 491]* . It should also be noted there is no requirement in the language of the statute that the child's sibling still be a minor for this subdivision to apply. It is enough that the child's sibling, who may now be an adult, was abused or neglected while a minor as defined in one of the applicable subdivisions, and the current child is at substantial risk of abuse or neglect as defined in those subdivisions [*Welf. & Inst. Code § 300(j)*].

In considering the second prong of the statute, that of substantial risk, the court must consider the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child [*Welf. & Inst. Code § 300(j)*]. This can include consideration of any special circumstance of the already adjudicated prior abuse or neglect of the child's sibling that renders similar abuse or neglect of the present child unlikely to occur [*In re Joshua J. (1995) 39 Cal. App. 4th 984, 994-995, 46 Cal. Rptr. 2d 491]* . Sexual abuse of a sibling can support a finding of jurisdiction under *Welf. & Inst. Code § 300(j),* if substantial risk to the child of the same or similar abuse is shown [*In re Jason L. (1990) 222 Cal. App. 3d 1206, 1215, 272 Cal. Rptr. 316]* . Further, brothers of molested sisters can also be molested within a family [*In re Rubisela E. (2000) 85 Cal. App. 4th 177, 198, 101 Cal. Rptr. 2d 760* , *citing In re Mark C. (1992) 7 Cal. App. 4th 433, 439, 8 Cal. Rptr. 2d 856]* . But it cannot automatically be assumed that because one child is molested or abused, all other children in the home are at the risk of the same or similar abuse. If there is no evidence the other children are at substantial risk, a finding of jurisdiction under *Welf. & Inst. Code § 300(j)* cannot be supported [*In re Rubisela E. (2000) 85 Cal. App. 4th 177, 198, 101 Cal. Rptr. 2d 760* (no showing brothers were at risk despite evidence sister was molested)]. Further, if a petition is filed on a child because the child's sibling has already been adjudicated a dependent under *Welf. & Inst. Code § 300(a), (b), (d), (e),* or *(i),* there still must be evidence introduced of that abuse or neglect and that the child for whom this petition is filed is at substantial risk of the same or similar abuse or neglect. In the absence of such evidence, the fact the siblings are already dependents will not be enough to justify a finding under *Welf. & Inst. Code § 300(j)* [*In re Ricardo L. (2003) 109 Cal. App. 4th 552, 566-569, 135 Cal. Rptr. 2d 72]* .

PRACTICE TIP:

Be Sure All Your Evidence Is Admitted. When cases are filed under *Welf. & Inst. Code § 300(j)* based in part on a previous adjudication of a sibling as a dependent, practitioners often mistakenly believe the evidence from the sibling's dependency file will be considered as part of the record for the new case. That is not true unless steps are taken to make it happen. As the appellate court noted in the *Ricardo L.* case, it appeared the juvenile court relied on evidence that was outside the record and that the appellate court was not privy to. The court noted that if the social services agency wanted evidence from the sibling's case to be considered by the court it should have ensured the court took judicial notice of those documents, or that the court stated on the record it had considered those documents, or that the social services agency attached those documents from the sibling's case to the social worker's report in the current case and incorporated them by reference [*In re Ricardo L. (2003) 109 Cal. App. 4th 552, 569, 135 Cal. Rptr. 2d 72]* . Do not assume that because everyone in the courtroom knows about the sibling's case that the juvenile court can rely on that knowledge without steps being taken to introduce that

information into evidence.

[12] Independence of Each Jurisdictional Allegation

Jurisdictional allegations may be filed under as many subdivisions of *Welf. & Inst. Code § 300* as accurately describe the harm or risk of harm suffered by the child. The allegations under each subdivision alleged, however, must be sufficient to support a jurisdictional finding without regard to the other subdivisions alleged. As stated by the judicial benchguide on the topic, "A simple test to determine this is to ask whether the allegations under one subdivision would be sufficient to support a jurisdictional finding if the allegations under the other subdivisions were found to be untrue" [California Ctr. for Jud. Educ. and Research, Cal. Judges Benchguides, Benchguide 101: Juvenile Dependency Jurisdiction Hearing (Jan. 2009) § 101.7, p. 101-11].

For instance, if the child was brought to the attention of authorities due to sexual molest by the stepfather in the mother's home with the mother failing to protect, and with the father's whereabouts being unknown, an allegation under *Welf. & Inst. Code § 300(d)* could be filed and sustained. This would be true even if the father's whereabouts was known. But an allegation under *Welf. & Inst. Code § 300(g)* alleging the father's whereabouts was unknown could not be sustained under this factual scenario. This is because if the stepfather had not molested the child, there would be no need to assume jurisdiction regardless of the fact that the father's whereabouts was unknown. The allegation under *Welf. & Inst. Code § 300(d)* stands on its own. The allegation under *Welf. & Inst. Code § 300(g)* does not. Thus, under these facts the allegation under *Welf. & Inst. Code § 300(d)* could be properly pled and sustained, but the allegation under *Welf. & Inst. Code § 300(g)* could not.

The filing and sustaining of both such allegations is a common mistake by practitioners and courts who forget or do not understand that jurisdiction is taken over the child, not the parents, and that there is no need to plead jurisdictional facts regarding both parents if the conduct or omissions of one parent bring the child within the court's jurisdiction [*In re Alysha S. (1996) 51 Cal. App. 4th 393, 397, 58 Cal. Rptr. 2d 494* ; *In re Jeffrey P. (1990) 218 Cal. App. 3d 1548, 1552-1554, 267 Cal. Rptr. 764]* . The concern that if no jurisdictional allegation is made about each parent any parent not included in such allegations will be entitled to custody of the child is incorrect. It is true that if the court removes the child from the custodial parent who abused, failed to protect, or neglected the child and the previously noncustodial parent about whom no jurisdictional allegations were pled seeks custody, that parent is entitled to custody of the child. But if such placement would be detrimental to the safety, protection, or physical or emotional well-being of the child, the child will not be placed with that parent [*Welf. & Inst. Code § 361.2(a)*]. Thus, the question of the appropriateness of the home of the other parent, if that parent was not involved in conduct or omission that harmed the child or placed the child at risk of harm, is determined when that parent steps forward and seeks custody, not as part of the jurisdictional allegations or hearing. If, of course, the other parent actually did fail to protect the child from harm, such failure should be part of the primary jurisdictional allegation, not a missing parent count pursuant to *Welf. & Inst. Code § 300(g).*

[13] Protection From Negative Effects of Substance Abuse

While not changing the grounds for jurisdiction under *Welf. & Inst. Code § 300* or existing case law regarding dependency jurisdiction, the legislature has indicated in a statement of legislative purpose that it views the "provision of a home environment free from the negative effects of substance abuse" as a necessary condition for the "safety, protection and physical and emotional well-being" of children [*Welf. & Inst. Code § 300.2*]. This statement by the legislature has a firm basis in fact. Those who work in and around the juvenile dependency system learn very quickly that the majority of cases are impacted in some way by substance abuse. Abuse of substances does not have to rise to the level of addiction to impact a person's parenting or to place a child at risk. Nevertheless, notwithstanding this statement of legislative purpose, a child does not come within the juvenile court's dependency jurisdiction solely as a result of a parent or guardian's substance abuse unless it can be shown that such abuse of substances has impacted the person's ability to care for the child to the degree that the health and safety of the child is placed at risk [*Welf. & Inst. Code § 300(b)*].

The impact of the legislative view expressed in *Welf. & Inst. Code § 300.2*--that a home free from the negative effects of substance abuse is a prerequisite for the safety, protection, and physical and emotional well-being of the child--may have its greatest impact at disposition and review hearings at which the court must decide whether placement with the parent or guardian would put the child at substantial risk. The "safety, protection and physical and emotional well-being" of children is the standard by which decisions regarding placements with parents are made [*see Welf. & Inst. Code §§ 361(c)(1), 366.21(e), (f), 366.22*]. Because the Legislature sees the negative impact of substance abuse as a major factor in determining whether a home poses a risk to the child's safety, protection, and physical and emotional well-being, dependency courts and practitioners must also seriously consider evidence of substance abuse in those placement decisions.

While emphasizing the negative impact of substance abuse by assessing the risk to the child does not change the requirement that the agency must factually show that substance abuse in the home is negatively affecting parenting in addition to placing the child at risk, it does underscore the importance the courts should give this issue in their decisions. It is a significant legislative addition to the statutory scheme, and an area that practitioners should watch for future developments.

For further discussion of the connection between parental substance abuse and dependency, and steps to take to address parental substance abuse in dependency cases, see Milliken & Rippel, *Effective Management of Parental Substance Abuse in Dependency Cases, 5 J. Center Children & Cts. 95 (2004).*

[14] Family Violence as Basis for Jurisdiction

Family violence, which is often called domestic violence, includes physically abusive and violent acts by one family member against another member of the family [Kashani & Allan, The Impact of Family Violence on Children and Adolescents (Sage 1998) pp. 3-4]. The term "family member" includes, of course, stepparents and "significant others" who reside in or are frequently in the home. While family violence is frequently thought of as being violence between adult members of the family, it is not limited to such violence. As noted by one respected author, "Child abuse is a particular type of domestic violence" [Ann M. Haralambie, *Domestic Violence*, in Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases (Bradford Pub. 2005) § 12D.1, p. 257]. Family violence may also include sibling violence and elder abuse [Kashani & Allan, The Impact of Family Violence on Children and Adolescents (Sage 1998) pp. 30-31, 41-44]. When family violence is perpetrated by an adult family member toward a child, the basis for dependency jurisdiction is clear both as to that child and any other children in the home who are at risk of the same violence or who suffer from exposure to that violence [*Welf. & Inst. Code § 300(a)-(c)*]. When family violence is perpetrated by one sibling against another sibling and the parent fails to protect the child victim or allows other children to be exposed to or at risk of that violence, dependency jurisdiction may also be found [*Welf. & Inst. Code § 300(b)-(c)*]. When the family violence is spousal or partner abuse, however, consideration must be given to whether the child has suffered or is at substantial risk of suffering serious physical or emotional harm or illness from exposure to that violence [*Welf. & Inst. Code § 300(a)-(c)*].

In dependency cases, there is no requirement that the abusing parent have been convicted in criminal court of family violence before the juvenile court can act. Indeed, even if criminal charges are dropped, juvenile court protection for the child may be both necessary and best [*In re Sylvia R. (1997) 55 Cal. App. 4th 559, 562-563, 64 Cal. Rptr. 2d 93]* . As noted by one court, "Domestic violence is always a serious concern, and any propensity to it is certainly highly relevant as regards children's welfare" [*Guardianship of Simpson (1998) 67 Cal. App. 4th 914, 939, 79 Cal. Rptr. 2d 389]* . Another court noted, "Both common sense and expert opinion indicate spousal abuse is detrimental to children" [*In re Benjamin D. (1991) 227 Cal. App. 3d 1464, 1470, n.5, 278 Cal. Rptr. 468]* .

Family violence in the form of spousal or partner abuse is often alleged to have brought the child within the juvenile court's jurisdiction under *Welf. & Inst. Code § 300(b)* [*see, e.g., In re Alysha S. (1996) 51 Cal. App. 4th 393, 396, 58*

Cal. Rptr. 2d 494 ; *In re Jennifer R. (1993) 14 Cal. App. 4th 704, 706, 17 Cal. Rptr. 2d 759* ; *In re Basilio T. (1992) 4 Cal. App. 4th 155, 161, 5 Cal. Rptr. 2d 450]* . Which subdivision to file under, however, must be determined on a case-by-case basis. In many instances domestic violence involving one or both of the parents may result in the child having suffered serious physical harm or may place the child at substantial risk of such harm. Under such circumstances, jurisdiction may exist under *Welf. & Inst. Code § 300(a)*. In other instances family violence may actually be the cause of the child suffering or being at substantial risk of suffering serious emotional damage as described in *Welf. & Inst. Code § 300(c)*. Expert evidence may be needed to prove such an allegation, making jurisdiction under *Welf. & Inst. Code § 300(c)* difficult to establish. Nevertheless, in an appropriate case, such a finding may be justified. Thus, practitioners should not assume allegations relating to family violence can only be filed under *Welf. & Inst. Code § 300(b)*. The child exposed to family violence may come within the court's jurisdiction under one or more of a number of different subdivisions of *Welf. & Inst. Code § 300*, dependent on the facts of the individual case [*see, e.g.,* *In re Robert A. (1992) 4 Cal. App. 4th 174, 179, 5 Cal. Rptr. 2d 438]* .

The opinion in *In re Heather A. (1996) 52 Cal. App. 4th 183, 60 Cal. Rptr. 2d 315* , exemplifies the attention that family violence is now receiving, particularly in dependency cases, and how family violence can be a basis for dependency jurisdiction. In that case it was held "domestic violence in the same household where children are living is neglect; it is a failure to protect [children] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it." As such, the evidence of family violence in that case was found to be sufficient to support the jurisdictional finding under *Welf. & Inst. Code § 300(b)* [*In re Heather A. (1996) 52 Cal. App. 4th 183, 194, 60 Cal. Rptr. 2d 315]* . The language of a dependency petition alleging family violence in the form of spousal or partner abuse must allege that the violence was "perceived by or affected the child" or otherwise placed the child at substantial risk of harm [*In re Alysha S. (1996) 51 Cal. App. 4th 393, 398, 58 Cal. Rptr. 2d 494]* . But *Heather A.* makes it clear such allegations can be sustained.

For discussion of family violence as a basis for removal of the child, see *§ 328.126[2][b]*.

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[Reserved]

§§ 328.85[Reserved]

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§ 328.100 Purpose of Hearing

The purpose of the jurisdiction hearing is to determine whether sufficient grounds exist for the court to find that the child falls within the jurisdiction of the juvenile court [*Welf. & Inst. Code § 355*]. For a discussion of the jurisdictional grounds under *Welf. & Inst. Code § 300*, see *§ 328.33*.

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§ 328.101 Time and Notice

[1] Nondetention Cases

If the child is not detained, the clerk must, on the filing of the petition, set the petition to be heard and the hearing must be begun within 30 calendar days from the date the petition is filed [*Welf. & Inst. Code § 334*].

[2] Detention Cases

If the child is detained at the time the petition is filed, the clerk must set the petition to be heard, and the hearing must be begun, within 15 court days from the date of the order of the court directing detention [*Welf. & Inst. Code § 334*; *Cal. Rules of Ct., Rule 5.670(f)*]. If the child is released from detention before the jurisdiction hearing, the court may reset the jurisdiction for hearing within the time limit prescribed for nondetention cases [*Cal. Rules of Ct., Rule 5.670(f)*].

[3] Calendar Preference

If the child is detained in custody, the case must be granted precedence on the calendar of the court for the day on which the case is set for hearing [*Welf. & Inst. Code § 345*].

[4] Notice of Jurisdiction Hearing

After the initial or detention hearing, the clerk of the court must cause notice to be served to the mother, the father or fathers, presumed and alleged, any legal guardian of the child, and the child, if the child is 10 years of age or older [*Welf. & Inst. Code § 291(a)(1)-(4)*]. Notice must also be given to any known sibling of the child who is the subject of the dependency petition, if that sibling is either a dependent of the court or is the subject of a dependency proceeding. If

the sibling is 10 years of age or older, the notice is to be provided to the sibling, the sibling's caregiver, and the sibling's attorney. If the sibling is under 10 years of age, the notice is to be given to the sibling's caregiver and attorney. Separate notice is not required, however, if the sibling's matter is calendared in the same court on the same day [*Welf. & Inst. Code § 291(a)(5)*]. The clerk must also notify all counsel of record, unless counsel was present in court when the jurisdiction hearing was scheduled [*Welf. & Inst. Code § 291(a)(6)*]. If there is no parent or guardian residing within the state, or if their place of residence is unknown, notice must also be given to any adult relative residing within the county, or if none, the adult relative residing nearest the court [*Welf. & Inst. Code § 291(a)(7)*]. Notice must be also given, if the court knows or has reason to know that an Indian child is involved, to the Indian custodian, if any, and the tribe of the child. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, notice shall be given to the Bureau of Indian Affairs (BIA) [*Welf. & Inst. Code § 291(a)(8)*]. No notice is required for a parent whose parental rights have been terminated [*Welf. & Inst. Code § 291(b)*].

The notice must include all of the following [*Welf. & Inst. Code § 291(d)*]:

- The name and address of the person notified.
- The nature of the hearing.
- Each section and subdivision under which the proceeding has been initiated.
- The date, time, and place of the hearing.
- The name of the child on whose behalf the dependency petition has been filed.
- A copy of the petition.
- A statement that:
  - If the person notified fails to appear, the court may proceed in their absence.
  - The child, parent, guardian, Indian custodian, or adult relative to whom notice is required is entitled to have an attorney present at the hearing.
  - If the parent, guardian, Indian custodian, or adult relative desires counsel, but is indigent and cannot afford counsel, that person must promptly notify the clerk of the juvenile court.
  - If an attorney is appointed for the parent, guardian, Indian custodian, or adult relative, the represented person will be liable for all or part of the costs to the extent of his or her ability to pay.
  - The parent, guardian, Indian custodian, or adult relative may be liable for the support costs of the child in out-of-home care.
- In the case of an Indian child, a statement that the parent or Indian custodian and the tribe have a right to intervene at any stage of the proceeding, and that, on request, the parent or Indian custodian and the tribe will be granted up to 20 additional days to prepare for the proceeding.

If the child is detained and the person to be noticed was not present at the initial hearing, notice shall be given by personal service or by certified mail [*Welf. & Inst. Code § 291(e)(1)*]. If the child is detained and the person to be

noticed was present at the initial hearing, notice shall be given by personal service or by first-class mail [*Welf. & Inst. Code § 291(e)(2)*]. If the child is not detained, notice shall be given by personal service or by first-class mail, unless the person to be served resides outside of the county, in which case service shall be by first-class mail [*Welf. & Inst. Code § 291(e)(3)*]. In the case of an Indian child, notice shall be by registered mail, return receipt requested [*Welf. & Inst. Code § 291(e)(4)*]. Notice may be waived by a general appearance, in person or through counsel, or by a signed written waiver filed on or before the date of the scheduled hearing [*Welf. & Inst. Code § 291(f)*; *In re B.G. (1974) 11 Cal. 3d 679, 689, 114 Cal. Rptr. 444, 523 P.2d 244]* .

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§ 328.102 Effect of Failure to Commence Hearing Within Time Limits

At one time, absent a continuance granted under *Welf. & Inst. Code § 352* or a time waiver by the parties, when a jurisdiction hearing was not commenced within the appropriate time limits, the rules of court required the petition be dismissed [*Jeff M. v. Superior Court (1997) 56 Cal. App. 4th 1238, 1243, 66 Cal. Rptr. 2d 343]* . This is no longer the rule, since the failure to timely begin the jurisdiction hearing does not deprive the juvenile court of jurisdiction to hear the matter.

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§ 328.103 When Hearing May Be Continued

[1] In General

On request of the counsel for a parent, guardian, child, or petitioner, the court may continue any dependency hearing beyond the time limit within which the hearing is otherwise required to be held. However, no continuance may be granted if it would be contrary to the interest of the child. In considering the interest of the child, the court is required to give substantial weight to a child's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to the child of prolonged temporary placements [*Welf. & Inst. Code § 352(a)*]. Continuances should not be granted lightly, but instead should be difficult to obtain [*Jeff M. v. Superior Court (1997) 56 Cal. App. 4th 1238, 1242, 66 Cal. Rptr. 2d 343* ; *In re Emily L. (1989) 212 Cal. App. 3d 734, 743, 260 Cal. Rptr. 810]* .

No continuance may be granted if a child has been removed from the custody of parent or guardian and if it would result in the dispositional hearing being completed longer than 60 days after hearing at which the child was ordered removed or detained, unless the court finds that there are exceptional circumstances and enters the facts supporting such a finding on the minutes of the court. Even the fact the parent is incarcerated in another county and cannot exercise his statutory right to be present under *Penal Code § 2625* has been held not to be sufficient to justify a continuance beyond the statutory time restrictions [*In re Axsana S. (2000) 78 Cal. App. 4th 262, 272, 92 Cal. Rptr. 2d 701]* . In no event may the court grant a continuance that would cause the hearing under *Welf. & Inst. Code § 361* to be completed more than six months after the hearing pursuant to *Welf. & Inst. Code § 319* [*Welf. & Inst. Code § 352(b)*; *see Cal. Rules of Ct., Rule 5.550(a)(3)*]. In some instances, in order to ensure a case is completed within the statutory time lines, the court may need to transfer the case to a different judicial officer, substitute counsel, and even conduct a contested hearing on a continuous day-to-day basis until completed [*Renee S. v. Superior Court (1999) 76 Cal. App. 4th 187, 197-198, 90 Cal. Rptr. 2d 134]* .

To obtain a continuance, written notice, with supporting documents, must be filed and served on all parties at least two court days prior to the date set for hearing, unless the court finds good cause for hearing an oral motion [*Welf. & Inst. Code § 352(a)*]. The supporting documents must present specific facts showing that a continuance is necessary [*Welf. & Inst. Code § 352(a)*].

[2] Good Cause Requirement and Duration Limitation

Continuances may be granted only on a showing of good cause, and only for that period of time shown to be necessary by the evidence presented at the hearing on the motion for the continuance [*Welf. & Inst. Code § 352(a)*]. None of the following, in and of themselves, constitute good cause: (1) a stipulation between counsel; (2) the convenience of the parties; (3) a pending criminal prosecution; and (4) a pending family law matter. Nor is court congestion, standing alone, good cause to continue a matter beyond mandatory statutory timeliness. Illness of a judge, counsel or a party, however, does constitute good cause for a continuance [*Jeff M. v. Superior Court (1997) 56 Cal. App. 4th 1238, 1243, fn. 4, 66 Cal. Rptr. 2d 343* ; *see Renee S. v. Superior Court (1999) 76 Cal. App. 4th 187, 197-198, 90 Cal. Rptr. 2d 134]* . The court must state in its order the facts requiring any continuance that is granted [*Cal. Rules of Ct., Rule 5.550(a)(5)*].

PRACTICE TIP:

Tactical Reasons for Requesting or Objecting to a Continuance. Beginning January 1, 2009, there is a distinct tactical advantage for the parent of a child who was under the age of 3 years at the time of initial removal, or of a sibling group with such a child, to continue the disposition hearing as long as reasonably and ethically possible, thereby delaying the six-month review hearing and the presumptive end of court-ordered reunification services [*see Welf. & Inst. Code §§ 361.5(a), 366.21(a)*]. The first step toward achieving that end is for parent's counsel in such cases to delay the jurisdiction hearing as long as reasonably and ethically possible. Counsel for the social services agency and usually children's counsel should be watchful for such continuance requests and object, and the juvenile court should adhere carefully to the requirements of *Welf. & Inst. Code § 352* in considering all requests for a continuance.

[3] When Consent to Continuance Is Implied

In any case in which a parent, guardian, or child is represented by counsel and no objection is made to an order continuing beyond the time limit within which the hearing is otherwise required to be held, the absence of such an objection will be deemed to be a consent to the continuance [*Welf. & Inst. Code § 352(c)*; *In re Richard H. (1991) 234 Cal. App. 3d 1351, 1362, 285 Cal. Rptr. 917* (time limits are not mandatory for jurisdictional purposes and may be waived by failure to object to continuances)].

[4] Continuance for Appointment of Counsel

At the beginning of the jurisdiction hearing, the court must continue the hearing for a period not to exceed seven calendar days as necessary to make an appointment of counsel, to enable counsel to become acquainted with the case, or to determine whether the parent or guardian or adult relative is unable to afford counsel [*Welf. & Inst. Code § 353*; *see In re C.P. (1985) 165 Cal. App. 3d 270, 273, 211 Cal. Rptr. 498* (court had duty under circumstances to continue hearing even if appointed counsel for out-of-state parent did not request continuance)].

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§ 328.104 Commencement of Hearing

[1] Explanation of Petition

At the beginning of the jurisdiction hearing, the petition must be read to those present. On request of any parent, guardian, or adult relative, counsel for the child, or the child, if he or she is present, the court must then explain the meaning and contents of the petition, the nature of the hearing, and its procedures and possible consequences [*Welf. & Inst. Code § 353*].

[2] Explanation of Right to Counsel

The court must next ascertain whether the parent, guardian, or adult relative, and the child are represented by counsel. If not, the court must advise those persons of their right to have counsel of their choice present and, when applicable, of their right to appointed counsel, subject to a claim of reimbursement as provided by law [*Welf. & Inst. Code §§ 349, 353*]. The court must appoint counsel for the parent, guardian and child where appropriate [*Welf. & Inst. Code § 317*; *see* discussion in *§ 328.60* et seq., regarding the appointment of counsel].

[3] Explanation Concerning Parent or Guardian's Mailing Address

If this is the parent or guardian's first appearance, the court must order the parent or guardian to provide a mailing address [*Welf. & Inst. Code § 316.1*]. The court must also advise the parent or guardian that the address provided will be used by the court, the clerk, and the social services agency to provide notice of hearings and for mailing all documents related to the proceedings. The court must advise the parent or guardian that, unless the parent or guardian, or the attorney of record for the parent or guardian, provides a written notification of a change of address, use of the address first provided will satisfy notice requirements [*Welf. & Inst. Code § 316.1*]. The use of form JV-140 (Notification of Mailing Address) to provide the require address information is optional, but preferred [*Cal. Rules of Ct., Rule*

5.534(l)(3)].

[4] Advice by Court of Trial Rights

After explaining the petition and the right to counsel, the court must next advise the parent or guardian of each of their rights during trial, specifically the right to a hearing by the court on the issues raised by the petition, the right to assert the privilege against self-incrimination, the right to confront and to cross examine all witnesses who may be called to testify against the parent or guardian, and the right to use the process of the court to compel the attendance of witnesses on behalf of the parent or guardian [*Cal. Rules of Ct., Rule 5.682(b)*]. The court must also advise the parent or guardian that if the child has been removed and the court finds the child does not come within the juvenile court's jurisdiction, the child must be returned to the parent or guardian within two working days after the court's finding, unless the parent or guardian and the social services agency agree the child will be released at a later date [*Cal. Rules of Ct., Rule 5.682(b)(5)*].

[5] If the Parent or Guardian Fails to Appear

Many juvenile courts have found that the appellate courts do not like it when they use the "D-word," namely "default" [*see, e.g., In re Stacy T. (1997) 52 Cal. App. 4th 1415, 1421-1422* , nn.3 & 4, *61 Cal. Rptr. 2d 319* ; *In re Nemis M. (1996) 50 Cal. App. 4th 1344, 1352, 58 Cal. Rptr. 2d 324* ; *In re Brian W. (1996) 48 Cal. App. 4th 429, 433, fn. 3, 56 Cal. Rptr. 2d 1* ; *In re Dolly D. (1995) 41 Cal. App. 4th 440, 444-446, 48 Cal. Rptr. 2d 691]* . There is no statute or statewide rule of court which allows the juvenile court to enter a default in dependency proceedings. As noted by one court, use of default language is "unfortunate and inaccurate, and probably misleading" [*In re Dolly D. (1995) 41 Cal. App. 4th 440, 444-445, fn. 2, 48 Cal. Rptr. 2d 691]* . As such, juvenile courts are well advised to never use the word "default" in making findings and orders when a parent or guardian fails to appear for any hearing. Instead, courts should simply make a finding that the parent or guardian has been noticed for the proceedings, has failed to appear, that the failure to appear implies the parent has chosen not to attend, and that the court is going to proceed in the absence of the parent or guardian [*In re Christopher A. (1991) 226 Cal. App. 3d 1154, 1162]* .

Where counsel has previously been appointed or retained by the missing parent or guardian, counsel can make a motion for a continuance based on the absence of his or her client [*Welf. & Inst. Code § 352*]. Continuances are discouraged in dependency proceedings, however, and the court must give substantial weight to the child's need for a prompt resolution of the matter [*Welf. & Inst. Code § 352(a)*; *In re Gerald J. (1991) 1 Cal. App. 4th 1180, 1187, 2 Cal. Rptr. 2d 569]* . Moreover, the mere absence of the parent or guardian without more, will not normally constitute the good cause required to justify a continuance [*see, e.g., In re Marriage of Teegarden (1986) 181 Cal. App. 3d 401, 405-407, 226 Cal. Rptr. 417* ; *Young v. Redman (1976) 55 Cal. App. 3d 827, 831, 128 Cal. Rptr. 86]* . This is especially true where the attorney has not had recent contact with the client [*In re Gerald J. (1991) 1 Cal. App. 4th 1180, 1187, 2 Cal. Rptr. 2d 569]* . Where the attorney has had recent contact with the absent parent or guardian, however, and there is at least some reason for the absence, a stronger case can be made for the granting of a continuance request. The same is true where the parent or guardian has not been previously informed of the consequences of failing to appear. In such cases an attorney may also be entitled to cross-examine the social worker on behalf of the missing client [*see In re Stacy T. (1997) 52 Cal. App. 4th 1415, 1424-1425, 61 Cal. Rptr. 2d 319* ; *In re Dolly D. (1995) 41 Cal. App. 4th 440, 444-446, 48 Cal. Rptr. 2d 691* . *See also* the discussion in *§ 328.110[3]* (Admissibility of Social Worker's Report)].

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
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28-328 California Forms of Pleading and Practice--Annotated § 328.105

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§ 328.105 Admission, Plea of No Contest, and Submission

[1] Prerequisites to Acceptance of Admission or Plea of No Contest

After advising the parent or guardian of his or her trial rights, the court must inquire whether he or she intends to admit or deny the allegations of the petition. If the parent or guardian neither admits nor denies the allegations, the court must state for the record that the parent or guardian does not admit the allegations. If the parent or guardian wishes to admit the allegations, the court must first find and state on the record that it is satisfied that the parent or guardian understands the nature of the allegations and the direct consequences of the admission, and understands and waives the trial rights which were previously explained to the parent or guardian. An admission by the parent or guardian must be made personally by the parent or guardian [*Cal. Rules of Ct., Rule 5.682(c)(d)*]. Although not expressly set forth in the rule, these same requirements must be satisfied for the acceptance of a plea of no contest.

[2] Required Findings on Acceptance of Admission, Plea of No Contest, or Submission

On admission, plea of no contest, or submission, the court must find each of the following, and must note the findings in the order of the court [*Cal. Rules of Ct., Rule 5.682(f)*]:

- Notice has been given as required by law.
- The birth date and county of residence of the child.
- The parent or guardian has knowingly and intelligently waived the right to a trial on the issues by the court, the right to assert the privilege against self incrimination, and the right to confront and to cross examine adverse witnesses and to use the process of the court to compel the attendance of witnesses on the parent or guardian's behalf.

- The parent or guardian understands the nature of the conduct alleged in the petition and the possible consequences of an admission, plea of no contest, or submission.

- The admission, plea of no contest, or submission by the parent or guardian is freely and voluntarily made.

- There is a factual basis for the parent or guardian's admission.

- Those allegations of the petition as admitted are true as alleged.

- The child is a person described under one or more specific subdivisions of *Welf. & Inst. Code § 300* (grounds for dependency).

[3] Effect of Admission or Plea of No Contest

A plea of no contest in a dependency proceeding is the "juvenile court equivalent" of a no contest plea in a criminal proceeding [*In re Troy Z. (1992) 3 Cal. 4th 1170, 1181, 13 Cal. Rptr. 2d 724, 840 P.2d 266]* . As such, it "admits all matters essential to the court's jurisdiction over the minor" [*In re Troy Z. (1992) 3 Cal. 4th 1170, 1181, 13 Cal. Rptr. 2d 724, 840 P.2d 266]* . A parent or guardian who admits the allegations or enters a plea of no contest waives his or her right to challenge on appeal the legal applicability of *Welf. & Inst. Code § 300* to his or her conduct [*In re Troy Z. (1992) 3 Cal. 4th 1170, 1181, 13 Cal. Rptr. 2d 724, 840 P.2d 266]* . However, the parent or guardian may challenge on appeal the legality of the admission, if he or she was not fully advised of his or her due process rights or if an express personal waiver was not obtained, and the error was not harmless [*In re Monique T. (1992) 2 Cal. App. 4th 1372, 1375-1378, 4 Cal. Rptr. 2d 198]* .

Unlike a finding of juvenile court jurisdiction following a submission or contested hearing, which a party may later seek to set aside using a *Welf. & Inst. Code § 388* petition based on a change of circumstance or new evidence [*In re Brandon C. (1993) 19 Cal. App. 4th 1168, 1171-1172, 23 Cal. Rptr. 2d 571* (recantation of victim)], a petition under *Welf. & Inst. Code § 388* is not an appropriate vehicle for seeking to set aside an admission or plea of no contest. Instead, a motion to set aside the admission or plea of no contest should be used. The motion must make a showing of circumstances that rendered the plea involuntary or unknowing, as in a criminal case, and not merely attempt to belatedly challenge the sufficiency of the evidence [*cf. Pen. Code § 1018*; *People v. Huricks (1995) 32 Cal. App. 4th 1201, 1207-1212, 38 Cal. Rptr. 2d 592]* .

[4] Alternative to Admission or No Contest Plea: Submitting to Court's Jurisdictional Determination

In lieu of admitting the allegations of the petition, a parent or guardian may elect to submit the jurisdictional determination to the court based on the information provided to the court in the social worker's reports and waive further jurisdictional hearing [*Cal. Rules of Ct., Rule 5.682(e)*].

As with accepting an admission or plea of no contest, discussed in [1], *above*, in accepting a submission, the court must first give the requisite advisements and take a waiver [*Cal. Rules of Ct., Rule 5.682(b), (f)*; *see* discussion in [1], *above*].

A parent or guardian who submits the jurisdictional determination to the court on the reports does not waive his or her right to appeal the jurisdictional finding [*In re Tommy E. (1992) 7 Cal. App. 4th 1234, 1237-1239, 9 Cal. Rptr. 2d 402* (submission to evidence considered by the court isn't submission that the evidence supports a jurisdictional finding); *but see In re Richard K. (1994) 25 Cal. App. 4th 580, 589-590, 30 Cal. Rptr. 2d 575* (distinguishing submitting on the reports from submitting on the recommendation of the social worker)].

PRACTICE TIP:

Jurisdiction as Part of Settlement or Agreement. In many cases the parent submits the matter to the court for a jurisdictional determination only after considerable negotiations have successfully taken place on a wide variety of jurisdictional and dispositional issues. To allow the parent to then appeal the finding of jurisdiction undermines such negotiations and may make agencies and children's counsel reluctant to enter into settlement discussions. Where the parent's action on the question of jurisdiction is the result of an agreement on other issues, counsel for the social services agency and the child should consider requiring the parent to admit, plead no contest, or submit the matter with a waiver of the right to appeal any resultant finding of jurisdiction. A waiver of the right to appeal this issue should be made on the record, and the court should make a finding that the waiver was knowingly and intelligently made. This ensures the negotiated settlement is not later undermined by an appeal.

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§ 328.106 Contested Hearing on Petition

[1] Required When Allegations Are Denied

If the parent or guardian denies the allegations of the petition, a contested hearing must be held to determine whether the allegations in the petition are true [*see Welf. & Inst. Code § 355*].

PRACTICE TIP:

Consult Before Contesting Jurisdictional Issues. Counsel for the parent or guardian should carefully consult with their client before setting a matter for contested jurisdictional hearing. Many times the real issues being contested are dispositional issues, not jurisdictional ones. In such cases it may be more appropriate to submit the jurisdictional determination on the basis of the reports and set the matter thereafter for a contested dispositional hearing.

[2] Burden of Proof

Proof by a preponderance of evidence must be adduced to support a finding that the allegations set forth in the petition are true [*Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 248, 19 Cal. Rptr. 2d 698, 851 P.2d 1307 , citing Welf. & Inst. Code § 355* and Cal. Rules of Ct., former Rule 1450(f)].

[3] Allegations When Child in Custody of Only One Parent

There is no need to have jurisdictional allegations regarding both parents in the dependency petition. Jurisdiction can be established even when the child is in the custody of only one parent when the circumstances justifying the assumption of jurisdiction occurred and even though the other parent is capable of providing appropriate care [*Welf. & Inst. Code § 302(a)*; *In re Jeffrey P. (1990) 218 Cal. App. 3d 1548, 1552-1554, 267 Cal. Rptr. 764]* . As noted by one recent

appellate court, the child falls within the juvenile court's jurisdiction "if the actions of either parent bring her within one of the statutory definitions ... " This is consistent with the overall purpose of dependency proceedings, which is to protect children, not prosecute parents [*In re Alysha S. (1996) 51 Cal. App. 4th 393, 397, 58 Cal. Rptr. 2d 494]* .

Many social services departments, attorneys, and juvenile courts continue to mistakenly believe it necessary to file jurisdictional allegations *against* each parent and speak of taking jurisdiction *over* the parent [*see, e.g.,* *In re Katrina W. (1994) 31 Cal. App. 4th 441, 445-447, 37 Cal. Rptr. 2d 7]* . While jurisdictional allegations should be filed regarding any conduct or omission by either or both parents which bring the child under the jurisdiction of the court pursuant to *Welf. & Inst. Code § 300,* there is no requirement that there be jurisdictional allegations regarding conduct by both parents [*In re Alysha S. (1996) 51 Cal. App. 4th 393, 397, 58 Cal. Rptr. 2d 494* ; *In re Jeffrey P. (1990) 218 Cal. App. 3d 1548, 1552-1554, 267 Cal. Rptr. 764]* . Dependency jurisdiction under *Welf. & Inst. Code § 300* is taken *over* the child, not the parents, based upon the harm or risk of harm to the child. It is for this reason that a dependency petition is not "sustained" or "found true" as to a parent. If the juvenile court finds the child comes within the court's jurisdiction, the petition is simply found true as to the child [California Ctr. for Jud. Educ. and Research, Cal. Judges Benchguides, Benchguide 101: Juvenile Dependency Jurisdiction Hearing (Sept. 2007) § 101.5, p. 101-9].

Jurisdiction *over* the parents deals primarily with notice and an opportunity to be heard [*In re Antonio F. (1978) 78 Cal. App. 3d 440, 447-450, 144 Cal. Rptr. 466* ; *In re B.G. (1974) 11 Cal. 3d 679, 688-689, 114 Cal. Rptr. 444, 523 P.2d 244]* . Both parents, however, have the right to contest jurisdiction. This is true even when one of the parents is not named in the petition as having done anything to contribute to the child coming within the court's jurisdiction [California Ctr. for Jud. Educ. and Research, Cal. Judges Benchguides, Benchguide 101: Juvenile Dependency Jurisdiction Hearing (Jan. 2009) § 101.6, p. 101-10].

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§ 328.107 Findings Required by Court

[1] Findings Required When Petition Is Not True and When Dismissing Petition

After the presentation of evidence by the petitioner and the child is closed, the juvenile court, on motion of the child, parent or guardian, or on its own motion, must order whatever action the law requires if the court, on weighing the evidence presented, finds that the petitioner did not meet his, her, or its burden of proof. The action that may be taken by the court includes dismissal of the petition and release of the child [*Welf. & Inst. Code § 350(c)*]. A trial court's refusal to take the evidence and testimony offered by the child or the child's counsel before granting a sua sponte motion for dismissal of the petition is grounds for reversal [*Guadalupe A. v. Superior Court (1991) 234 Cal. App. 3d 100, 106-107, 285 Cal. Rptr. 570* ; *now see Welf. & Inst. Code § 350(c)* (providing that child may introduce evidence before ruling on the motion)]. More recently, another court followed this same approach, holding the child had a right to an evidentiary hearing before the court dismissed the dependency petition based on alleged relinquishments and potential adoptive placement [*Taylor M. (2003) 106 Cal. App. 4th 97, 105-107, 130 Cal. Rptr. 2d 502 , citing Guadalupe A. v. Superior Court (1991) 234 Cal. App. 3d 100, 104-107, 285 Cal. Rptr. 570* ; *Allen M. v. Superior Court (1992) 6 Cal. App. 4th 1069, 1071-1072, 1074-1075, 8 Cal. Rptr. 2d 259* ; and *Kimberly R. v. Superior Court (2002) 96 Cal. App. 4th 1067, 1077-1078, 117 Cal. Rptr. 2d 670]* . A parent, however, has no right to present evidence in support of the petition prior to such dismissal [*In re Eric H. (1997) 54 Cal. App. 4th 955, 962-969, 63 Cal. Rptr. 2d 230]* . If the motion is not granted, the child, parent, or guardian may offer evidence without first having reserved that right [*Welf. & Inst. Code § 350(c)*].

If, after hearing all of the evidence, the court determines that the allegations of the petition have not been proved by a preponderance of the evidence, it must make certain findings to be noted in the court order. The court must find the following [*Welf. & Inst. Code § 356*]:

- That notice has been given as required by law.
- The birth date and residence of the child.
- That the allegations of the petition are not proved.

The court must then order that the petition be dismissed and that the child be discharged from any detention or restriction, if applicable [*Welf. & Inst. Code § 356*]. In such circumstances, the child should be discharged and returned as quickly as reasonably possible, assuming a decision is not being considered to begin a new detention and file a new dependency petition based on at least some additional evidence or circumstances. Nevertheless, a statute effective January 1, 2004, now provides both that the child shall be returned to the physical custody of the parent or guardian "immediately" after a finding the jurisdictional allegations are not true, but not more than two working days after the date of that finding, unless the parent or guardian and the agency agree to a later date for the child's release [*Welf. & Inst. Code § 361.1(a)*]. This new enactment ensures that bureaucratic delay does not inhibit the timely return of the child without altering any existing remedies a parent or guardian had if the child is not returned immediately following the court's finding that the child is not described by *Welf. & Inst. Code § 300* [*Welf. & Inst. Code § 361.1(a)*].

[2] When Sustaining Petition

If, after hearing the evidence, the court determines by a preponderance of the evidence that the allegations of the petition are true, it must make certain findings to be noted in the minutes of the court [*Welf. & Inst. Code § 356*]:

- Notice has been given as required by law.
- The birth date and county of residence of the child.
- The allegations of the petition are true.
- The child is a person described in *Welf. & Inst. Code § 300* (grounds for dependency), and the specific subdivision of *Welf. & Inst. Code § 300* under which the petition was sustained.

All written findings and orders of the court must be served by the clerk of the court personally or by first-class mail within three judicial days of their issuance on the petitioner, the child or the child's counsel, the parent or the parent's counsel, and the guardian or the guardian's counsel [*Welf. & Inst. Code § 248.5*].

For discussion of the clerk's service of the court's written findings and orders on specified parties, see *Ch. 327, Juvenile Courts: Jurisdiction and General Procedures, § 327.32*.

[3] Specificity Required

The juvenile court law does not require the making of specific findings; a general finding that the allegations of the petition are true is sufficient to show the facts on which the court exercised its jurisdiction to declare the child to be a ward or dependent child of the court. This rule presupposes, however, that the allegations of the petition state appropriate ultimate facts that set forth the specific charge or factual allegations on which an adjudication is sought [*In re J. T. (1974) 40 Cal. App. 3d 633, 640, 115 Cal. Rptr. 553]* . Moreover, although the findings need not be specific, they are required to state ultimate facts and not evidentiary facts or conclusions of law such that, in reviewing the sufficiency of the findings, the same tests are to be applied as those used in determining the sufficiency of an allegation in a pleading [*In re J. T. (1974) 40 Cal. App. 3d 633, 641, 115 Cal. Rptr. 553]* .

[4] No True Finding Until All Parents Addressed

One parent may want to admit the allegations in the petition are true while the other parent wants to set the matter for contest. Or, one parent may show up for a jurisdiction hearing prepared to submit the matter on the reports, but the other parent is absent with good cause for a continuance. Under these and similar scenarios, the court sometimes finds itself faced with the need to address each parent's response to the jurisdictional allegations on different days. The court can do so. What it cannot do is to make a true finding on any of the allegations until all parents have been addressed [*In re Joshua G. (2005) 129 Cal. App. 4th 189, 202, 28 Cal. Rptr. 3d 213]* . This is because jurisdiction is taken over the child, not the parents. Thus, if the first parent chooses to admit the allegations on the earlier date, the court accepts the admission, makes its findings that the parent has knowingly and intelligently waived his or her rights, and then takes the matter of jurisdiction under submission until it deals with the other parent at a later date. It is incorrect for the court to make a jurisdictional finding as to one parent without having dealt with the other, since it does not make a finding "against" a parent; instead, it is to make a finding that the child comes within the court's jurisdiction. This it cannot do until the jurisdiction issue has been addressed as to all parents.

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§ 328.108 Continuance Pending Disposition

If the court finds that the child is a person described in *Welf. & Inst. Code § 300*, it must then proceed to hear evidence on the question of the proper disposition to be made of the child [*Welf. & Inst. Code § 358(a)*]. Prior to hearing evidence as to the appropriate disposition in the case, the court may continue the hearing, on its own motion or on motion of the child, a parent, or guardian. As a general rule, a continuance may not exceed 10 judicial days if the child is detained during the continuance or to a date not later than 30 days after the date of the filing of the petition if the child is not detained. The court may, for good cause, continue the hearing for an additional 15 calendar days, if the child is not detained [*Welf. & Inst. Code § 358(a)(1), (2)*].

If the probation officer has alleged that *Welf. & Inst. Code § 361.5(b)* (reunification services not to be provided under specified circumstances) is applicable, the court is required to continue the proceedings for a period not to exceed 30 days, and the probation officer is required to notify each parent of the content of *Welf. & Inst. Code § 361.5(b)* and inform each parent that, if the court does not order reunification, a permanency planning hearing will be held, and his or her parental rights may be terminated within the time frames specified by the law [*Welf. & Inst. Code § 358(a)(3)*].

PRACTICE TIP:

Tactical Reasons for Requesting or Objecting to a Continuance. Beginning January 1, 2009, there is a distinct tactical advantage for the parent of a child who was under the age of 3 years at the time of initial removal, or of a sibling group with such a child, to continue the disposition hearing as long as reasonably and ethically possible, thereby delaying the six-month review hearing and the presumptive end of court ordered reunification services [*see Welf. & Inst. Code §§ 361.5(a), 366.21(a)*]. Counsel for the social services agency and usually children's counsel should be watchful for such continuance requests and object, and the juvenile court should adhere carefully to the requirements of *Welf. & Inst. Code § 352* in considering a continuance request.

The court in its discretion may make an order to release or detain the child during the period of the continuance [*Welf. & Inst. Code § 358(a)(1)*].

For a discussion of the general requirements for continuances, see *§§ 328.83[5]* and *328.105*.

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§ 328.109 Discovery

[1] Civil Discovery Rules Do Not Apply

Juvenile dependency proceedings are special proceedings which are governed by their own rules and statutes [*In re Chantal S. (1996) 13 Cal. 4th 196, 200, 51 Cal. Rptr. 2d 866, 913 P.2d 1075]* . As such, unless otherwise specified, the requirements that are set forth for civil cases in the Civil Code and the Code of Civil Procedure do not apply [*In re Jennifer R. (1993) 14 Cal. App. 4th 704, 711, 17 Cal. Rptr. 2d 759* , *citing Jones T. v. Superior Court (1989) 215 Cal. App. 3d 240, 245 n.3, 264 Cal. Rptr. 4* , and *In re Angela R. (1989) 212 Cal. App. 3d 257, 273, 260 Cal. Rptr. 612]* . The Legislature knows how to make the provisions of other codes applicable to dependency proceedings [*see, e.g., Welf. & Inst. Code §§ 213.5, 341, 348*]. That it has not done so with the civil discovery rules, indicates the Legislature's intention those rules not apply in dependency proceedings [*In re Chantal S. (1996) 13 Cal. 4th 196, 206-207, 51 Cal. Rptr. 2d 866, 913 P.2d 1075]* .

In light of this, and since the dependency system has its own provisions for discovery [*Cal. Rules of Ct., Rule 5.546*], the rules for civil discovery found in *Code Civ. Proc. § 2016.010 et seq.*, including the provisions for depositions, do not apply to dependency proceedings. This is especially appropriate in light of the very short time frames required for hearings in dependency cases [*see, e.g., Welf. & Inst. Code §§ 334* (jurisdiction hearing to be held within 15 judicial days from the date of the detention order), 352(b) (disposition hearing must be held within 60 days of the detention order)]. The need for timely resolution of dependency matters is both recognized and statutorily mandated, making the general application of civil discovery rules inappropriate [*In re Tabatha G. (1996) 45 Cal. App. 4th 1159, 1166, 53 Cal. Rptr. 2d 93* ; *Joe Z. v. Superior Court (1970) 3 Cal. 3d 797, 801, 91 Cal. Rptr. 594, 478 P.2d 26]* . Thus, even if the court applied the new line of decisions that hold the portions of other codes that apply to special proceedings apply to dependency cases unless inconsistent with the overall purpose of the juvenile court law, the Civil Discovery Act would not apply to dependency cases [*see, e.g., In re David H. (2008) 165 Cal. App. 4th 1626, 1638-1639, 82 Cal.*

Rptr. 3d 81 ; *In re Claudia E. (2008) 163 Cal. App. 4th 627, 636, 77 Cal. Rptr. 3d 722* ; *In re Mark B. (2007) 149 Cal. App. 4th 61, 78-79, 56 Cal. Rptr. 3d 697]* . Instead, discovery in dependency matters rests with the control of the juvenile court as guided by *Cal. Rules of Ct., Rule 5.546* [*In re Tabatha G. (1996) 45 Cal. App. 4th 1159, 1166, 53 Cal. Rptr. 2d 93* ; *In re Jeanette H. (1990) 225 Cal. App. 3d 25, 31, 275 Cal. Rptr. 9]* .

While the court's discretion in discovery matters is not unlimited, it does have the inherent authority to order such discovery necessary for the administration of justice and the orderly ascertainment of the truth [*Clinton K. v. Superior Court (1995) 37 Cal. App. 4th 1244, 1246, 44 Cal. Rptr. 2d 140* , *citing Joe Z. v. Superior Court (1970) 3 Cal. 3d 797, 801-802, 91 Cal. Rptr. 594, 478 P.2d 26* ; *In re Jeanette H. (1990) 225 Cal. App. 3d 25, 33-35, 275 Cal. Rptr. 9]* . Thus, the juvenile court may have some inherent authority to order the taking of depositions if the requirements of due process clearly necessitate such action. Nevertheless, it has no statutory authority to do so except in very limited situations [*see Fam. Code § 3411* (deposition of witness in other state under the Uniform Child Custody Jurisdiction and Enforcement Act)]. Due to the child's need for a timely determination of the matter and the statutory time lines and public policy supporting that need, it will be the rare and exceptional circumstance in which the court will be justified in exercising its very limited discretion to order depositions.

For discussion of why neither the Civil Code nor the Code of Civil Procedure should apply to dependency cases unless expressly made applicable and the controversy now surrounding that traditional view, *see § 328.10[1]*.

[2] Prehearing Discovery Rules to Be Liberally Construed

The California Rules of Court governing prehearing discovery must be liberally construed in favor of maximizing informal disclosures, subject to the right of a party to show privilege or other good cause not to disclose specific material or information [*Cal. Rules of Ct., Rule 5.546(a)*].

[3] Petitioner's Affirmative Duty to Disclose

On filing the petition, the social services department must promptly deliver to, or make accessible for inspection and copying by, the child and the parent or guardian, or their counsel, copies of the police, arrest, and crime reports relating to the pending matter. Privileged information may be omitted if notice of the omission is given simultaneously [*Cal. Rules of Ct., Rule 5.546(b)*].

The social services department also has an affirmative duty to disclose any evidence or information within its possession or control which is favorable to the child, parent, or guardian [*Cal. Rules of Ct., Rule 5.546(c)*].

[4] Social Services Department's Required Disclosures on Request

Except as to matters subject to protective orders (*see* discussion in [7], *below*), the social services department must, on timely request, disclose to the child and parent or guardian, or to their counsel, the following material and information within it's possession or control [*Cal. Rules of Ct., Rule 5.546(d)*]:

- Social services reports prepared in connection with the pending matter relating to the child, parent, or guardian.

- Records of statements, admissions, or conversations by the child, parent, or guardian.

- Records of statements, admissions, or conversations by any alleged coparticipant.

- Names and addresses of any witnesses interviewed by an investigating authority in connection with the pending matter.

- Records of statements or conversations of witnesses or other persons interviewed by an investigating authority in connection with the pending matter.

- Reports or statements of experts made regarding the pending matter, including results of physical or mental examinations and results of scientific tests, experiments, or comparisons.

- Photographs or physical evidence relating to the pending matter.

- Records of prior felony convictions of witnesses that each party intends to call.

[5] Parent's or Guardian's Required Disclosures on Request

Except as to matters subject to protective orders (*see* discussion in [7], *below*), the parent or guardian must, on timely request, disclose to the petitioner relevant material and information within the parent or guardian's possession or control. If the parent or guardian is represented by counsel, a disclosure request must be made through counsel [*Cal. Rules of Ct., Rule 5.546(e)*].

[6] Motion for Prehearing Discovery

On refusal of a party to permit disclosure of information or inspection of materials, the requesting party or counsel may move the court for an order requiring timely disclosure of the information or materials. The motion must specifically and clearly designate the items sought, state the relevancy of the items, and state that a timely request has been made for the items and that the other party has refused to provide them. Each court may by local rule establish the manner and time within which a motion must be made [*Cal. Rules of Ct., Rule 5.546(f)*].

[7] Protective Orders

On a showing of privilege or other good cause, the court may make orders restricting disclosures. All material and information to which a party is entitled must be disclosed in time to permit counsel to make beneficial use of them [*Cal. Rules of Ct., Rule 5.546(g)*].

[8] Partial Disclosure

When some parts of materials are discoverable and other parts are not discoverable, the nondiscoverable material may be excised and need not be disclosed if the requesting party or counsel has been notified that the privileged material has been excised. Material ordered excised must be sealed and preserved in the records of the court for review on appeal [*Cal. Rules of Ct., Rule 5.546(h)*].

[9] Conditions of Discovery

An order of the court granting discovery under the rules may specify the time, place, and manner of making the discovery and inspection, and may prescribe terms and conditions. Discovery must be completed in a timely manner so as to avoid the delay or continuance of a scheduled hearing [*Cal. Rules of Ct., Rule 5.546(i)*].

[10] Sanctions for Failure to Comply With Discovery Order

If at any time during the course of the proceedings it is brought to the attention of the court that a person has failed to comply with the rules of discovery or with an order issued under those rules, the court may order the person to permit the discovery or inspection of materials not previously disclosed, grant a continuance, prohibit a party from introducing in evidence the material not disclosed, dismiss the proceedings, or enter any other order the court deems just under the

circumstances [*Cal. Rules of Ct., Rule 5.546(j)*].

[11] Continuing Duty to Disclose

If, subsequent to compliance with the rules of discovery or with court orders, a party discovers additional material or information that is subject to disclosure, that party must promptly notify the requesting child and parent or guardian, or their counsel, of the existence of the additional material [*Cal. Rules of Ct., Rule 5.546(k)*].

[12] Access to Records

Despite any other law, counsel in a dependency proceeding must be given access to all records relevant to the case that are maintained by state or local public agencies. Counsel must be given access to records maintained by hospitals or by other medical or nonmedical practitioners or by child care custodians, in the manner prescribed by *Evid. Code § 1158*, which authorizes inspection and copying of such records on a patient's written authorization [*Welf. & Inst. Code § 317(f)*]. If the requesting counsel is the child's counsel, all information requested from the social services agency or the child's guardian ad litem must be provided to the attorney for the child within 30 days of the request [*Welf. & Inst. Code § 317(f)*]. However, in most instances access to information in the possession of the social services agency should be made available in considerably less time than 30 days to any authorized counsel who requests it.

[13] Witness Lists

In a dependency proceeding [*Welf. & Inst. Code § 300*], the court may compel the pretrial exchange of witness lists shortly before trial that are usually entitled to limited protection as attorney work product [*In re Jeanette H. (1990) 225 Cal. App. 3d 25, 36-37, 275 Cal. Rptr. 9]* .

[14] Attorney Work Product Doctrine

The attorney work product doctrine codified in *Code of Civ. Proc. § 2018* creates a qualified privilege against discovery of the general work product by an attorney and an absolute privilege for the attorney's impressions, conclusions, opinions, and legal strategies. Where a qualified privilege exists, the court can order discovery of attorney work product if denying discovery will result in unfair prejudice against the party seeking discovery or will result in an injustice [*In re Tabatha G. (1996) 45 Cal. App. 4th 1159, 1167, 53 Cal. Rptr. 2d 93 , citing Code of Civ. Proc. § 2018*]. In *Tabatha G.*, the court of appeal held that the juvenile court properly ordered the discovery of a "bonding study" between the mother and the child which the mother had obtained without the knowledge or permission of the social worker, the child's attorney, or the court. To deny discovery of that study would, the appellate court found, unfairly prejudice both the social services agency and the child's attorney in preparing their case for the hearing under *Welf. & Inst. Code § 366.26*. It also found that denying discovery of the study would create an injustice, since the child would then have to go through the "unnecessary inconvenience and potential trauma" of another bonding study, which would be contrary to the child's best interest [*In re Tabatha G. (1996) 45 Cal. App. 4th 1159, 1167-1168, 53 Cal. Rptr. 2d 93]* .

Although the court of appeal did not decide the issue of whether the bonding study before it legitimately came within the attorney work product doctrine, it questioned whether it would since it was obtained in a manner that was "less than aboveboard" [*In re Tabatha G. (1996) 45 Cal. App. 4th 1159, 1167, 53 Cal. Rptr. 2d 93]* . Attorneys should be careful, and appropriate, in their efforts in this area lest a court determine that those efforts do not fall within the attorney work product doctrine and hence are discoverable without requiring a showing of undue prejudice or injustice.

[15] Discovery Under Welf. & Inst. Code § 827

Cal. Rules of Ct., Rule 5.546 provides for discovery between the social services department and the parent, guardian and child. It does not provide for discovery for such persons as de facto parents, relatives or foster parents who may also at times participate in dependency proceedings [*compare* Cal. Rules of Ct., former Rule 1341(a) (de facto parent

included in former prehearing discovery rule), *with Cal. Rules of Ct., Rule 5.546* (current rule which does not include de facto parents)]. Persons who are involved in dependency proceedings but not entitled to discovery under *Cal. Rules of Ct., Rule 5.546*, can seek discovery under *Welf. & Inst. Code § 827*. This allows the juvenile court the ability to determine what discovery should be provided these participants, while recognizing that in most cases they should not receive all the information that a parent, guardian, or child would receive [*see* California Ctr. for Jud. Educ. and Research, Cal. Judges Benchguides, Benchguide 102: Juvenile Dependency Disposition Hearing (Sept. 2007) §§ 102.15, 102.20, pp. 102-24, 102-27 (suggesting discovery to a de facto parent under *Welf. & Inst. Code § 827* be limited to that which is relevant to the issues in which the de facto parent is involved)].

For a discussion of the discovery process under *Welf. & Inst. Code § 827* see *Ch. 327, Juvenile Courts: Jurisdiction and General Procedures, § 327.34*.

California Forms of Pleading and Practice--Annotated

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
F. Jurisdiction Hearing

28-328 California Forms of Pleading and Practice--Annotated § 328.110

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§ 328.110 Evidentiary and Contested Hearing Issues

[1] In General

The juvenile court judicial officer conducting dependency proceedings is to control the proceedings with the goal of expeditiously and effectively ascertaining the facts. The court is also to control proceedings with a view toward ascertaining all information that is relevant to the "present condition and future welfare" of the child [*Welf. & Inst. Code § 350(a)*].

[2] Standard of Proof

Proof by a preponderance of evidence must be established to support a jurisdictional finding that the child is a person described by *Welf. & Inst. Code § 300* [*Welf. & Inst. Code § 355(a)*]. The preponderance of the evidence standard is the standard of proof for many of the determinations made throughout the dependency system [*see, e.g., Welf. & Inst. Code §§ 366.21(e), (f), 366.22(a)* (burden for establishing detriment to return to a parent or guardian at out-of-home review hearings); *Evid. Code § 115* (standard is preponderance of evidence unless otherwise required by law)]. But certain findings require more. The standard of proof for removal from a parent or for nonplacement with a previously noncustodial parent at disposition is that of clear and convincing evidence [*Welf. & Inst. Code § 361(c)*; *In re Marquis D. (1995) 38 Cal. App. 4th 1813, 1827-1829, 46 Cal. Rptr. 2d 198]* . Clear and convincing evidence is also required for a finding at a selection and implementation hearing that the child is likely to be adopted if parental rights are terminated [*Welf. & Inst. Code § 366.26(c)(1)*]. The only finding in dependency proceedings that is required to be made beyond a reasonable doubt arises when termination of parental rights is sought in an case where the Indian Child Welfare Act applies. In such proceedings, the court must find beyond a reasonable doubt that continued custody of the child is likely to result in serious emotional or physical damage to the child [*25 U.S.C. § 1912(f)*].

[3] Admissibility of Social Worker's Report

Welf. & Inst. Code § 281 authorizes the court to receive and consider the reports and recommendations of the probation officer in determining whether the child is within the jurisdiction of the juvenile court [*see In re Malinda S. (1990) 51 Cal. 3d 368, 376, 272 Cal. Rptr. 787, 795 P.2d 1244* ; *see Welf. & Inst. Code § 355* (admissibility of evidence)]. A social worker's report containing information relevant to the jurisdiction hearing is admissible if, on the request of the parent or guardian, the probation officer or social worker is made available to be cross examined on the contents of the report [*Welf. & Inst. Code § 355(b)*; *In re Malinda S. (1990) 51 Cal. 3d 368, 376, 272 Cal. Rptr. 787, 795 P.2d 1244]* . Where the social worker's report merely incorporates the attached reports of other social workers, the right to cross-examine the preparer of the report has been held to also include cross-examining the social workers who wrote the attached reports [*In re Stacy T. (1997) 52 Cal. App. 4th 1415, 1425, 61 Cal. Rptr. 2d 319* (first worker "was just an envelope with a return address, delivering the reports of others")].

One court of appeal has held that the parent's attorney has a right to cross-examine the preparer of report despite the absence of parent [*In re Dolly D. (1995) 41 Cal. App. 4th 440, 444-446, 48 Cal. Rptr. 2d 691]* . However, in that case the parent had maintained contact with his attorney and claimed that he was not able to take off work to attend the hearing [*In re Dolly D. (1995) 41 Cal. App. 4th 440, 445, 48 Cal. Rptr. 2d 691]* . A similar result was reached where the parent had not been informed of the consequences of failing to appear [*In re Stacy T. (1997) 52 Cal. App. 4th 1415, 1424-1425, 61 Cal. Rptr. 2d 319]* . Whether the same holding would have been reached in these cases had the attorney had little or no contact with the parent is open to substantial question, especially in light of the many recent decisions which indicate that a parent's attorney in a dependency case cannot pursue an action without the parent's authorization [*see, e.g.*, *Guillermo G. v. Superior Court (1995) 33 Cal. App. 4th 1168, 1172-1174, 39 Cal. Rptr. 2d 748* ; *In re Alma B. (1994) 21 Cal. App. 4th 1037, 1043, 26 Cal. Rptr. 2d 592]* . As such, *Dolly D.* and similar decisions should not be viewed as resolving the issue of whether a parent's attorney has the right on the parent's behalf to cross-examine the social worker at a jurisdiction hearing where the parent does not appear and is not in contact with the attorney. Nevertheless, such cases demonstrate the importance of the right of the parent to cross-examine the social worker who prepared the report for the jurisdiction hearing.

Social workers' reports are admissible as evidence not only at the jurisdiction hearing. They are also required and admissible evidence at virtually all dependency hearings, including detention, disposition, review, and hearings pursuant to *Welf. & Inst. Code § 366.26* [*see, e.g., Welf. & Inst. Code §§ 280, 281, 319, 2, 358, 361.5(g), 358.1, 366, 366.1, 366.21(e), 366.22(a), 366.26(b)*]. Although the legislature has placed numerous statutory restrictions on the receipt of the social study at the jurisdiction hearing, particularly regarding the hearsay evidence contained in the report [*Welf. & Inst. Code § 355*], those restrictions do not apply to the admissibility of social workers' reports at other hearings. Rather, at hearings other than the jurisdiction hearing, social workers' reports are admissible subject to the basic fundamental fairness principles of due process regarding notice and opportunity to be heard. Indeed, even the requirement that the agency have the social worker available for cross-examination does not apply at other hearings, although the parent must have the ability to obtain the presence of the worker if desired [*Andrea L. v. Superior Court (1998) 64 Cal. App. 4th 1377, 1387, fn. 3, 75 Cal. Rptr. 2d 851* ; *In re Corey A. (1991) 227 Cal. App. 3d 339, 347-348, 277 Cal. Rptr. 782]* .

For a discussion regarding the admissibility of hearsay statements within a social worker's report at a jurisdiction hearing, the child dependency hearsay exception, and the testimony of children, see discussion in [12]-[14], *below*.

[4] Inapplicability of Exclusionary Rule

The exclusionary rules of criminal law do not apply to dependency proceedings before the juvenile court. This is because the potential harm to the child of not allowing the evidence to be considered by the juvenile court far outweighs to society the benefits of trying to deter, by use of the exclusionary rule, government actions in obtaining evidence illegally [*In re Robert P. (1976) 61 Cal. App. 3d 310, 321, 132 Cal. Rptr. 5]* . As noted by one court of appeal, "Recognizing the special protection afforded children by the law, we will not ignore the reliable evidence here presented

and risk the welfare of the children on the basis the evidence was the result of an unlawful and warrantless search" [*In re Christopher B. (1978) 82 Cal. App. 3d 608, 615, 147 Cal. Rptr. 390]* . For a discussion of search warrants in child welfare investigations see *§ 328.42*.

PRACTICE TIP:

Admissibility as Distinguished From Liability. The fact that evidence of child abuse and neglect is admissible in juvenile dependency proceedings regardless of the way in which it was obtained does not mean that in an egregious case civil liability may not be found in another forum. It simply means the state's need to protect children who have suffered or are at substantial risk of suffering abuse or neglect is such that the evidence will not be excluded from the juvenile dependency proceedings. For a brief, general discussion regarding immunity and liability of social workers and agencies see *§ 328.111[6]*.

[5] Evidence of Detriment as Distinguished From Parental "Unfitness"

The question is often asked as to whether the social services department must prove the parent or guardian is unfit in order to remove the child or terminate parental rights, or whether a finding of detriment to the child is enough. This issue is most frequently raised by parents who are appealing the termination of their parental rights and who argue that California's statutory scheme denies them due process since it does not require a finding of unfitness. As noted by one court of appeal, "The persistence and frequency with which appellate attorneys reproduce the argument, however, appears to be based on the misconception that the words 'parental unfitness' are somehow talismanic in the field of juvenile dependency law. They are not" [*In re Cody W. (1994) 31 Cal. App. 4th 221, 225, 36 Cal. Rptr. 2d 848]* .

There is no question but that unfitness was the standard in California for many years. With the enactment of the Family Law Act in 1969, however, California shifted from an unfitness standard to one of detriment [*In re B.G. (1974) 11 Cal. 3d 679, 694-695, 114 Cal. Rptr. 444, 523 P.2d 244* ; *In re Brittany H. (1988) 198 Cal. App. 3d 533, 552, 243 Cal. Rptr. 763* ; *In re B.J.B. (1986) 185 Cal. App. 3d 1201, 1209, 230 Cal. Rptr. 332]* . The difference between the concept of unfitness and that of detriment to the child can most easily be summed up by saying that unfitness generally implies that a person is unfit to parent any child under any circumstances, while detriment to the child carries the meaning that the person cannot parent that particular child without causing the child to suffer detriment [*In re Cody W. (1994) 31 Cal. App. 4th 221, 225-226, 36 Cal. Rptr. 2d 848]* .

Thus, in California the detriment to the child standard is the functional equivalent of the unfitness standard for the particular child in question [*In re Dakota H. (2005) 132 Cal. App. 4th 212, 224, fn. 3, 33 Cal. Rptr. 3d 337* ; *In re Cody W. (1994) 31 Cal. App. 4th 221, 225-226, 36 Cal. Rptr. 2d 848* ; *Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 253, 256, 19 Cal. Rptr. 2d 698, 851 P.2d 1307* (characterizing without comment the multiple findings of detriment in the dependency statutory scheme as findings of unfitness); *see also In re Jasmon O. (1994) 8 Cal. 4th 398, 423, 33 Cal. Rptr. 2d 85, 878 P.2d 1297* (characterizing the required findings under Civ. Code former § 232(a)(7) as "the equivalent of a finding of unfitness"); and *In re Sarah C. (1992) 8 Cal. App. 4th 964, 979, 11 Cal. Rptr. 2d 414* ("Nowhere in the statutory scheme is the court specifically required to find the parent 'unfit.' ")].

[6] Certain Types of Injuries to Child as Prima Facie Evidence of Jurisdictional Grounds

When the court finds, based on competent professional evidence, that an injury, injuries, or detrimental condition sustained by a child are of such a nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent, the guardian, or other person who has the care or custody of the child, that evidence shall be prima facie evidence that the child is a person described by *Welf. & Inst. Code § 300(a), (b),* or *(d),* which describes children suffering from serious physical harm or abuse caused by their parents or guardians [*Welf. & Inst. Code § 355.1(a)*].

A presumption also arises that a child is a person described by *Welf. & Inst. Code § 300(a), (b), (c),* or *(d),* and is at

substantial risk of abuse or neglect, if the court finds that a parent, guardian, or other person who resides with or has care or custody of the child [*Welf. & Inst. Code § 355.1(d)*]:

- Has been convicted of sexual abuse as defined in *Penal Code § 11165.1*;

- Has been convicted in another state of an act that would constitute an act of sexual abuse under *Penal Code § 11165.1* if committed in this state;

- Has been found in a prior dependency hearing in this state or in a similar proceeding in another state to have committed an act of sexual abuse; or

- Is required to register as a sex offender pursuant to *Penal Code § 290*, as a result of a felony conviction.

This presumption was created because the Legislature found that children are put at risk when they have contact with a parent or caretaker who has committed a sex crime. Thus, the presumption in *Welf. & Inst. Code § 355.1(d)* has been said to call for "the widest application of its terms to individuals having contact with the minor" [*In re John S. (2001) 88 Cal. App. 4th 1140, 1145, 106 Cal. Rptr. 2d 476]* . For that reason, the presumption applies even if the parent who is a registered sex offender is not the custodial parent. This does not preclude, however, the parent being able to present evidence that he or she does not pose a substantial risk to the child of abuse or neglect, thereby rebutting the presumption. The presumption is not conclusive. It only affects the burden of producing evidence [*In re John S. (2001) 88 Cal. App. 4th 1140, 1145-1146, 106 Cal. Rptr. 2d 476]* .

The presumption created under *Welf. & Inst. Code § 355.1(a)* on proof of physical abuse, neglect, or cruel treatment constitutes a presumption affecting the burden of producing evidence [*Welf. & Inst. Code § 355.1(c)*]. Thus, once the petitioner establishes a prima facie case under *Welf. & Inst. Code § 355.1(a)*, the burden shifts to the parent to show that he or she can properly care for the child [*In re Stephen W. (1990) 221 Cal. App. 3d 629, 644, 271 Cal. Rptr. 319]* . The juvenile court judge must then weigh the inferences that arise from the testimony that gives rise to the presumption against those of the contrary evidence and resolve the conflict [*In re Katrina C. (1988) 201 Cal. App. 3d 540, 547, 247 Cal. Rptr. 784* ; *see also* *In re Esmeralda B. (1992) 11 Cal. App. 4th 1036, 1040-1041, 14 Cal. Rptr. 2d 179* (need for competent professional evidence; presumption as only shifting the burden of producing evidence); *In re Monique T. (1992) 2 Cal. App. 4th 1372, 1378-1379, 4 Cal. Rptr. 2d 198* (presumption in case of drug induced medical problems in infant); *In re James B. (1985) 166 Cal. App. 3d 934, 937, 212 Cal. Rptr. 778* (construing former *Welf. & Inst. Code § 355.2*)]. The presumption is rebutted on the introduction of evidence that supports a finding of its nonexistence [*Evid. Code § 604*]. This is not to say, however, that all a parent need do is take the stand and deny the allegations or claim to be a good parent for the presumption to be rebutted. If that were the case, the presumption would be meaningless. Instead, some credible evidence that demonstrates the presumption should not apply under the facts of the individual case must be presented to rebut the presumption. Nevertheless, the evidence the parent must produce need not be overwhelming. Hence, neither social services agencies nor the juvenile court should rely solely on *Welf. & Inst. Code § 355.1* as the basis for jurisdiction if other evidence justifying the assumption of jurisdiction also exists.

[7] Admissibility of Proof of Abuse of Another Child

Proof that either parent, the guardian, or other person who has the care or custody of a child who is the subject of a petition filed under *Welf. & Inst. Code § 300* has physically abused, neglected, or cruelly treated another child must be deemed admissible in evidence [*Welf. & Inst. Code § 355.1(b)*; *In re Dorothy I. (1984) 162 Cal. App. 3d 1154, 1158, 209 Cal. Rptr. 5* (construing former *Welf. & Inst. Code § 355.5*)].

[8] Admissibility of Evidence of Past Events

Although a determination that a child falls within the juvenile court's jurisdiction must be proven to exist as of the date of the jurisdictional hearing [*see In re Melissa H. (1974) 38 Cal. App. 3d 173, 175, 113 Cal. Rptr. 139]* , most of the jurisdictional subsections of *Welf. & Inst. Code § 300* now provide for jurisdiction where the child has either already suffered serious harm or is found to be at substantial risk of serious harm [*see* discussion in *§ 328.33*].

A change in a parent or guardian's current circumstances is not relevant to the jurisdictional question of whether a child has already suffered serious harm, but may be relevant to a jurisdictional determination of the child being at substantial risk, and at disposition [*see* California Ctr. for Jud. Educ. and Research, Cal. Judges Benchguides, Benchguide 101: Juvenile Dependency Jurisdiction Hearing (Jan. 2009) § 101.5, p. 101-9 (Focus of Dependency Petition). As such, past events are properly considered in the jurisdictional determination of present risk to the child [*see In re Dorothy I. (1984) 162 Cal. App. 3d 1154, 1158-1159, 209 Cal. Rptr. 5* ; *In re Melissa H. (1974) 38 Cal. App. 3d 173, 175, 113 Cal. Rptr. 139* ; *see In re Benjamin D. (1991) 227 Cal. App. 3d 1464, 1469-1470, 278 Cal. Rptr. 468]* . A parent's current circumstances will, of course, be relevant at the disposition hearing in deciding whether dependency is needed, whether the child should be removed from the custodial parent or placed with a previously noncustodial parent, and in determining what services should be required as part of the case plan.

[9] Inadmissibility of Testimony in Other Proceedings

Testimony by a parent, guardian, or other person who has the care or custody of the child made the subject of a proceeding under *Welf. & Inst. Code § 300* is not admissible as evidence in any other action or proceeding [*Welf. & Inst. Code § 355.1(f)*; for a discussion of the immunity a parent or guardian has for such testimony, see *§ 328.111*].

[10] Inapplicability of Certain Privileges

The privilege not to testify or to be called as a witness against a spouse or domestic partner and the confidential marital communication privilege are not available to the parent or guardian [*Cal. Rules of Ct., Rule 5.684(e)*].

[11] Objections Presumed on Behalf of Unrepresented Parent, Guardian, or Child

If the parent or guardian is present and not represented by counsel, it is deemed that objections that could have been made to the evidence were made unless the court has found that the parent or guardian has knowingly and intelligently waived counsel [*Welf. & Inst. Code § 355(a)*]. If the child is unrepresented by counsel, any objections to the introduction of evidence are deemed to have been made. No waiver of counsel limitation to this statutory provision applies for unrepresented children [*Welf. & Inst. Code § 355(a)*].

[12] Admissibility at Jurisdiction Hearing of Hearsay Statements in Social Study

[a] Background

For many years California dependency law has held social studies are admissible as evidence to prove the jurisdictional allegations in a juvenile dependency case [*In re Jose M. (1988) 206 Cal. App. 3d 1098, 1104-1105, 254 Cal. Rptr. 364* ; *In re Biggs (1971) 17 Cal. App. 3d 337, 345, 94 Cal. Rptr. 519* ; Cal. Rules of Ct., former Rule 1365(d); *see also In re Halamuda (1948) 85 Cal. App. 2d 219, 222-224, 192 P.2d 781]* .

A minority view developed, however, that held that although the report was admissible as evidence at a jurisdictional hearing, it could not be the sole evidence upon which the juvenile court based its decision [*In re Donald R. (1987) 195 Cal. App. 3d 703, 715, 240 Cal. Rptr. 821]* . This reasoning was based upon the argument that the language of former *Welf. & Inst. Code § 355* that was in effect at that time required the jurisdiction finding to be based upon evidence admissible in the trials of civil cases, which did not include evidence admitted under the social study exception to the hearsay rule [*In re Donald R. (1987) 195 Cal. App. 3d 703, 715, 240 Cal. Rptr. 821]* .

In the case of *In re Malinda S. (1990) 51 Cal. 3d 368, 272 Cal. Rptr. 787, 795 P.2d 1244* , the California Supreme Court settled the matter. In that case the social worker's report which was received into evidence at the jurisdiction trial contained a summary of the jurisdictional facts, a social assessment, an evaluation, a reunification plan and a recommendation. It also had attached to it the reports of a medical doctor and another social worker [*In re Malinda S. (1990) 51 Cal. 3d 368, 373, 272 Cal. Rptr. 787, 795 P.2d 1244]* .

The Supreme Court acknowledged that not all exceptions to the hearsay rule are found within the Evidence Code. The Court found that the Legislature did intend social studies to constitute competent evidence when it enacted *Welf. & Inst. Code § 281* ("The court is authorized to receive and consider the reports and recommendations of the probation officer in determining any such matter."). In so doing it also noted the special role that the social worker has as an arm of the court and that social studies are "prepared by disinterested parties in the regular course of their professional duties" [*In re Malinda S. (1990) 51 Cal. 3d 368, 377-381, 272 Cal. Rptr. 787, 795 P.2d 1244]* . As such, the Supreme Court held that social studies are competent evidence which are made admissible as an exception to the hearsay rule by *Welf. & Inst. Code § 281*, met the standard required by *Welf. & Inst. Code § 355* then in effect, and could be used as the sole support for a jurisdictional determination [*In re Malinda S. (1990) 51 Cal. 3d 368, 382, 385, 272 Cal. Rptr. 787, 795 P.2d 1244* (*disapproving In re Donald R. (1987) 195 Cal. App. 3d 703, 714-716, 240 Cal. Rptr. 821* , to the extent inconsistent with its holding)].

The California Supreme Court also made it clear that allowing the social study in as evidence does not deprive the parent of constitutional due process. Looking to the case of *Long v. Long (1967) 251 Cal. App. 2d 732, 59 Cal. Rptr. 790* for guidance, the Court found that so long as each party receives a copy of the social study, is given an opportunity to cross-examine the preparer of the report, is given the opportunity to subpoena and examine the persons whose statements are contained in the report, and is permitted to introduce evidence by way of rebuttal, no constitutional due process violation exists [*In re Malinda S. (1990) 51 Cal. 3d 368, 382-385, 272 Cal. Rptr. 787, 795 P.2d 1244]* .

[b] Current Law

While the holding of the *Supreme Court in In re Malinda S. (1990) 51 Cal. 3d 368, 272 Cal. Rptr. 787, 795 P.2d 1244* , was in many ways only a ratification of existing law and of what the juvenile courts in most counties had been doing for decades, a move arose amongst parents' advocates to attempt to overturn the decision legislatively. Initial efforts were unsuccessful, but on January 10, 1995, a bill which could be characterized as being part of the backlash movement [*see* Myers, The Backlash: Child Protection Under Fire (1994)], was introduced seeking to overturn the *Malinda S.* decision and the decades of law it upheld. In its initial form, Senate Bill 86 would have provided that the hearsay statements contained in a social study could not be sufficient to sustain a jurisdiction finding unless the statements would be admissible over objection in a civil action, the individuals whose statements were in the report were made available for cross-examination, the parties who appeared in court either in person or through counsel so stipulated, or properly noticed parties failed to appear [*see* Senate Bill No. 86, as introduced Jan. 10, 1995, Leg. Counsel Dig.]. This would have effectively shifted the burden of producing witnesses almost entirely to the social services agency, substantially lengthening trials, increasing expense, and requiring witnesses to appear who otherwise might not have been called by any of the parties.

In its final form, Senate Bill 86 was more moderate and balanced [*see* Stats. 1996, ch. 36; *see also, In re Lucero L. (2000) 22 Cal. 4th 1227, 1252-1253, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* (conc. opn. of Chin, J.), quoting Legis. Analyst, Enrolled Bill Rep., Sen. Bill No. 86 (1995-1996 Reg. Sess.) Apr. 25, 1996, p. 1]. *Welf. & Inst. Code § 355* now clearly states that a social study and the hearsay evidence it contains is admissible at a jurisdiction hearing and constitutes competent evidence on which the juvenile court can base a finding of jurisdiction [*Welf. & Inst. Code § 355(b)*]. As under the *Malinda S.* decision and previous law, the preparer of the report must be made available for cross-examination on the timely request of any of the parties, although the social worker may be on telephone standby if he or she can be present at court within a reasonable amount of time [*Welf. & Inst. Code § 355(b)(2)*]. If any party so requests, the juvenile court can grant a continuance of up to 10 days where the social study is not provided to either the

parties or their attorneys within a reasonable time before the hearing [*Welf. & Inst. Code § 355(b)(3)*].

The big change brought about by Senate Bill 86 dealt with those cases in which a party to the proceedings raises a timely objection to the admission of specific hearsay evidence which is contained in a social study. In such cases the specific hearsay evidence "shall not be sufficient by itself to support a jurisdictional finding or any ultimate fact upon which a jurisdictional finding is based" unless the social services agency establishes that at least one enumerated exception applies [*Welf. & Inst. Code § 355(c)(1)*]. The quantum of evidence needed in addition to the specific hearsay evidence is slight, and may be direct or circumstantial evidence. It is not necessary that the additional evidence establish by itself that the child comes within the court's jurisdiction [*In re B.D. (2007) 156 Cal. App. 4th 975, 984-986, 67 Cal. Rptr. 3d 810]* . An objection is considered timely under this section if it "identifies with reasonable specificity the disputed hearsay evidence" and is made sufficiently prior to a contested jurisdiction hearing as to allow the social services agency enough time to prepare to meet the objection [*Welf. & Inst. Code § 355(c)(2)*]. The exceptions to this provision which the agency must establish are as follows:

- The hearsay evidence would be admissible under any statutory or decisional exception to the hearsay rule in any civil or criminal proceeding [*Welf. & Inst. Code § 355(c)(1)(A)*].

- The person who made the hearsay statement is a child under the age of 12 who is the subject of the jurisdiction hearing. Such statements are inadmissible, however, if the party objecting establishes that the child's statement is unreliable because it was the "product of fraud, deceit, or undue influence" [*Welf. & Inst. Code § 355(c)(1)(B)*; *but see* *In re Lucero L. (2000) 22 Cal. 4th 1227, 1247-1248, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* (plur. opn. of Mosk, J.) (allowing the statements to be admitted as evidence, but requiring a finding of reliability if the child is "disqualified as a witness because of the lack of capacity to distinguish between truth and falsehood at the time of testifying" and the child's hearsay statements are the sole basis for a finding of jurisdiction)].

- The person who made the hearsay statement is a peace officer as defined by *Penal Code § 830 et seq.*, a health practitioner as defined by *Penal Code § 11165.7(a)(21)-(28)*, a social worker licensed under *Bus. & Prof. Code § 4996 et seq.*, or a teacher with a credential under *Educ. Code § 44200 et seq.* Statements are admissible under this provision only to the extent they would otherwise be admissible under *Welf. & Inst. Code § 355*, or if the declarant were actually present and testifying in court [*Welf. & Inst. Code § 355(c)(1)(C)*].

- The person who made the hearsay statement is available for cross-examination. The court may deem such a witness available for cross-examination if that person is on telephone standby and can be present in court within a reasonable time [*Welf. & Inst. Code § 355(c)(1)(D)*].

Many courts and practitioners mistakenly believe that if a timely objection is made to hearsay statements contained in the report and the declarant is not available for the objector to subpoena for cross-examination or is otherwise not available, the hearsay statements must be stricken from the report. This is not the case. Instead, they simply cannot be the sole basis on which a "jurisdictional finding or any ultimate fact upon which a jurisdictional finding is based" unless they fall within one of the statutory exceptions [*Welf. & Inst. Code § 355(c)(1)*; *In re Lucero L. (2000) 22 Cal. 4th 1227, 1247-1248, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* (plur. opn. of Mosk, J.)]. Although *Welf. & Inst. Code § 355(c)* limits the extent to which hearsay evidence in a social study hearsay can be relied on exclusively for a finding of jurisdiction, there is no limitation, except for fraud, deceit, or undue influence for the hearsay statement of the child, on the admission of the hearsay evidence in the social study [*In re B.D. (2007) 156 Cal. App. 4th 975, 983-984, 67 Cal. Rptr. 3d 810* ; *In re Lucero L. (2000) 22 Cal.4th 1227, 1243, 96 Cal. Rptr. 2d 56, 998 P.2d 1019]* . Thus, in most instances the hearsay statements will be admitted despite the objection, but the juvenile court must take the unavailability of the declarant as going to the weight to be given the hearsay statements, particularly if they do not meet the criteria for one of the exceptions [*Welf. & Inst. Code § 355(c)(1)*].

Nothing in these provisions limits in any way the right of a party to subpoena a witness whose statement is contained in a social study or to introduce admissible evidence which goes to the weight to be afforded the hearsay evidence or to the credibility of the person whose hearsay statement was admitted [*Welf. & Inst. Code § 355(d)*].

One significant effect of these recent statutory changes has been in the area of lay witnesses whose hearsay statements are contained in the social study or attached documents. Because the statements of lay witnesses will frequently not be covered by one of the exceptions under *Welf. & Inst. Code § 355(c)(1)(A)-(C)*, the social services agency will often need to make such witnesses available for cross-examination by an objecting party [*Welf. & Inst. Code § 355(c)(1)(D)*] if the statements are to be admitted at a jurisdiction hearing over a timely objection and used as the sole basis for jurisdiction [*Welf. & Inst. Code § 355(c)(1)*]. This significant change benefits those parents who object to the assumption of juvenile court jurisdiction; often, the appearance of the lay witness for testimony is the most difficult to obtain in a dependency case.

PRACTICE TIP:

Using Section 355 to Your Benefit. The holding in *Malinda S.* frequently worked to everyone's benefit. Juvenile courts could maximize the use of precious court time by not requiring them to hear witnesses whose testimony was not controverted. Social services agencies could present their case for jurisdiction in a concise fashion without the added cost and inconvenience of calling unnecessary witnesses. Finally, it allowed counsel for the parents to pick and choose which witnesses to call so as to have the greatest impact on the court from a defense perspective. This latter benefit is all too often forgotten, but remains available to parents under *Welf. & Inst. Code § 355*. The majority of witnesses whose statements are contained in the social study will not help the parent's case if called to testify. Indeed, their testimony may well strengthen the case of the social services department [*see In re Malinda S. (1990) 51 Cal. 3d 368, 385 fn. 20, 272 Cal. Rptr. 787, 795 P.2d 1244]* . Defense attorneys should remember that *Welf. & Inst. Code § 355* is as much a tool for the defense as it is for the social services agency. Counsel should use these tools to their advantage by reviewing the social study carefully in advance, interviewing the witnesses, and then only calling those witnesses whose testimony will actually help the defense, thereby maximizing the impact of the live testimony. Of course, if it is believed that a lay witness is unavailable, defense counsel may be wise to enter a timely objection. Care should be taken in making such a decision, however, since if the social services agency is able to find the witness, the testimony may be damaging to the parents' case. Obviously, this is a tactical decision which must be made by parents' counsel. Parents' counsel must also remember the limitations of *Welf. & Inst. Code § 355* only apply at jurisdiction hearings. Those limitations, including the restrictions on hearsay evidence, do not apply at other dependency hearings. Thus, counsel must prepare for the trial of other hearings differently, including having witnesses subpoenaed if counsel desires to cross-examine them regarding their statements contained in the social worker's reports.

[c] Children's Hearsay Statements in Social Studies

It is both surprising and troubling that there should be any question whether a juvenile court charged with the safety and protection of abused and neglected children can consider as evidence the statements of the very children whose safety and protection it is considering. As noted by Justice Chin in his compelling concurring opinion in *Lucero L.*, "If a parent abuses a particularly young child in private and leaves no physical marks, two common scenarios, the child *cannot be protected* if the trial court does not consider and act on his or her hearsay statements" [*In re Lucero L. (2000) 22 Cal. 4th 1227, 1254, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* (conc. opn. of Chin, J.), emphasis in original]. Thus, to many the question at the jurisdiction hearing should not be the admissibility of children's hearsay statements, but whether those statements are true or not, and what weight should be afforded them. Nevertheless, juvenile courts have frequently spent considerable time at jurisdiction hearings litigating the admissibility of children's statements contained in social studies. The enactment of Senate Bill 86 [Stats. 1996, ch. 36] helps to limit this.

Under previous decisional law, although a child's statements would normally be received in evidence at a jurisdiction hearing pursuant to *In re Malinda S. (1990) 51 Cal. 3d 368, 272 Cal. Rptr. 787, 795 P.2d 1244* , those statements were to be stricken from the social study if an objection was made and the child was found not to have been competent at the time the statement was made [*In re Basilio T. (1992) 4 Cal. App. 4th 155, 166-168, 5 Cal. Rptr. 2d 450]* . Although not directly questioned, the *Basilio T.* holding was clarified and ameliorated in numerous subsequent decisions. If the child was found to lack the ability at trial to distinguish between the truth and a lie and therefore was incompetent to testify at a time after the statement was made, it was held that a non-statutory rebuttable presumption arose that the child was incompetent for the same reason at the time the statement was made as well. The presumption was rebuttable on a showing otherwise [*In re Daniel Z. (1992) 10 Cal. App. 4th 1009, 1017-1021, 13 Cal. Rptr. 2d 139* (case remanded; social services agency has burden of producing evidence to rebut presumption)].

It was also held that if the child was found incompetent to testify solely because the child was intimidated by the questioning, earlier hearsay statements could be admitted [*In re Kailee B. (1993) 18 Cal. App. 4th 719, 726, 22 Cal. Rptr. 2d 485* ; *In re Dirk S. (1993) 14 Cal. App. 4th 1037, 1043, 17 Cal. Rptr. 2d 643]* . Moreover, it was recognized the statement might be admissible under hearsay exceptions other than the social study exception, such as the spontaneous statement exception to the hearsay rule [*see Evid. Code § 1240(b)*], in which case it could support a jurisdictional or dispositional order. To be admissible as such, however, the social study report needed to indicate the statement was made while the child was still in a dominating state of nervous excitement [*In re Daniel Z. (1992) 10 Cal. App. 4th 1009, 1022, 13 Cal. Rptr. 2d 139* ; *see also In re Clara B. (1993) 20 Cal. App. 4th 988, 998, 25 Cal. Rptr. 2d 56]* .

Further, it was held that even though a child does not qualify to testify, the child's hearsay statements could be used not for the truth of the matter asserted that a particular individual harmed the child, but for a nonhearsay purpose such as circumstantial evidence of the child's state of mind [*In re Dorinda A. (1992) 10 Cal. App. 4th 1657, 1662, 13 Cal. Rptr. 2d 653* , *citing In re Cheryl H. (1984) 153 Cal. App. 3d 1098, 1131, 200 Cal. Rptr. 789]* . Finally, even if not admissible at the jurisdiction hearing, a child's hearsay statements contained in the social study could be relevant and admissible at a disposition hearing to show whether the child's best interests were served by contact with the parent [*In re Dorinda A. (1992) 10 Cal. App. 4th 1657, 1663, 13 Cal. Rptr. 2d 653* , *citing In re Cheryl H. (1984) 153 Cal. App. 3d 1098, 1132, 200 Cal. Rptr. 789]* .

Cases such as *Daniel Z.*, *Kailee B.*, *Dirk S.*, and *Dorinda A.*, although less necessary, retain some general continued application to dependency proceedings. Except for children 12 years of age or older and children who are not the subject of the dependency proceedings, however, the requirement of *Basilio T.* for testimonial competence as a prerequisite to the admission at the jurisdiction hearing of children's hearsay statements contained in the social study has been legislatively eliminated with the enactment of Senate Bill 86. When it amended *Welf. & Inst. Code § 355* to specifically address the admissibility of the hearsay statements of children contained in social studies, the legislature did not include a competency requirement. The mandate of *Basilio T.* in this regard is therefore no longer applicable law [*see Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified School Dist. (1978) 21 Cal. 3d 650, 659, 147 Cal. Rptr. 359, 580 P.2d 1155* (legislature is presumed to know existing decisional law regarding statute; when it makes substantial changes in statutory language it is inferred legislature intended to alter the law affected by those changes); *In re Chantal S. (1996) 13 Cal. 4th 196, 206-207, 51 Cal. Rptr. 2d 866, 913 P.2d 1075* (if legislature wanted to include a specific term or requirement, it could have)]. This was the holding of the Supreme Court in the *Lucero L.* decision [*In re Lucero L. (2000) 22 Cal. 4th 1227, 1242-1244, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* (plur. opn. of Mosk, J.)]. Thus, the only ground for not admitting the hearsay statements of a child under the age of 12 years who is the subject of the proceedings is a finding the statements are unreliable due to being the product of fraud, deceit, or undue influence [*Welf. & Inst. Code § 355(c)(1)(B)*]. The lack of testimonial competence is no longer a viable objection in this regard.

In the *Lucero L.* case the Supreme Court found the provisions of *Welf. & Inst. Code § 355* constitutional with regard to the admissibility of children's hearsay statements contained in social studies. This was true even if the child was found

to be testimonially incompetent due to the inability to tell truth from falsity [*In re Lucero L. (2000) 22 Cal. 4th 1227, 1243-1244, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* (plur. opn. of Mosk, J.)]. Nevertheless, the Supreme Court imposed an additional due process requirement in those cases in which the child is testimonially incompetent due to the inability to tell truth from falsity and the child's hearsay statements are the only evidence supporting a finding of jurisdiction. In such cases, although the hearsay statements are admissible under *Welf. & Inst. Code § 355*, the juvenile court cannot rely on those statements as the sole basis for a jurisdictional finding unless the court makes a finding the child's hearsay statements are reliable [*In re Lucero L. (2000) 22 Cal. 4th 1227, 1244-1248, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* (plur. opn. of Mosk, J.)]. There is, however, no requirement for corroboration as currently required under the child dependency hearsay exception of *Cindy L.* [*In re Lucero L. (2000) 22 Cal. 4th 1227, 1248-1249, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* (plur. opn. of Mosk, J.)]. For a detailed discussion of the factors to be considered by the court in making a finding that a child's hearsay statements are reliable, *see § 328.110[13]* (Child Dependency Hearsay Exception).

Two points bear mention here. The first is that it will be the rare case in which the child's hearsay statements of abuse will be the only evidence supporting a finding of jurisdiction. Thus, in most cases, even if the child is testimonially incompetent due to the inability to distinguish truth from falsity, no finding of reliability will be required to allow the admission of the child's hearsay statements contained in the social study to be received in evidence. This was the situation in *Lucero L.* [*In re Lucero L. (2000) 22 Cal. 4th 1227, 1251-1252, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* (conc. opn. of Kennard, J.)].

The second point is that *Lucero L.* was a plurality opinion. As the composition of the Supreme Court changes, the possibility exists that a different decision might someday be reached upholding the constitutionality of *Welf. & Inst. Code § 355* as written, without a reliability finding in the limited circumstances addressed in that decision. In a compelling concurring opinion, Justice Chin wrote that he would uphold the social study exception in this regard as written by the Legislature. He and Justice Baxter, who joined him in his concurrence, felt the child's hearsay statements contained in the social study should be admitted under the statutory exception and the trial court should then consider all of the evidence. The fact the child's hearsay statements of abuse are admitted in evidence does not compel a finding of jurisdiction. The statute merely allows the statements to be sufficient to support a jurisdictional finding if believed. Thus, Justice Chin felt the case came down to a "simple question of whether substantial evidence supports the trial court's jurisdiction finding" [*In re Lucero L. (2000) 22 Cal. 4th 1227, 1253, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* (conc. opn. of Chin, J.)]. In reaching this decision, Justice Chin noted that "Section 355 is a balanced statute, giving the parents substantial rights while allowing children to be protected as fully as possible" [*In re Lucero L. (2000) 22 Cal. 4th 1227, 1254, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* (conc. opn. of Chin, J.)]. He went on to note that "Children able to express themselves but too young to testify are precisely those most in need of the protection that section 355 provides. The *can* express themselves; they *can* tell truthfully what is happening to them; they *can*, in this limited way, try to protect themselves. But then others must listen to what they say" [*In re Lucero L. (2000) 22 Cal. 4th 1227, 1256, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* (conc. opn. of Chin, J.)]. This compelling concurring opinion is not currently the law, but it offers valuable insight that may well point the way to the future.

It should also be noted that under current law, if a child's out-of-court statements are admissible under case law as an exception to the hearsay rule [*see, e.g.,* *In re Cindy L. (1997) 17 Cal. 4th 15, 69 Cal. Rptr. 2d 803, 947 P.2d 1340* ; *In re Carmen O. (1994) 28 Cal. App. 4th 908, 33 Cal. Rptr. 2d 848* (child dependency hearsay exception)], they will be admissible under the new statutory provisions as well [*Welf. & Inst. Code § 355(c)(1)(A)*] because they fall under a decisional exception to the hearsay rule. Further, if they are admissible under some statutory provision as an exception to the hearsay rule [*see, e.g., Evid. Code § 1370* (hearsay exception in physical abuse cases)], they will also still be admissible [*Welf. & Inst. Code § 355(c)(1)(A)*].

For children 12 or over, or children who are not the subject of the proceeding, the hearsay exception contained in *Welf. & Inst. Code § 355(c)(1)(B)* does not apply. Thus, if there is an objection to the hearsay statement of such a child contained in a social study, it may not be used as the sole basis for a jurisdictional finding [*Welf. & Inst. Code § 355(c)(1)*]. Even for the statements of these children, however, it is doubtful the holding in *Basilio T.* remains viable in

light of the California Supreme Court's holding in *Cindy L.* and *Lucero L.* [*In re Cindy L. (1997) 17 Cal. 4th 15, 69 Cal. Rptr. 2d 803, 947 P.2d 1340* ("incompetence to testify should not be a categorical bar to the admission of a child's out-of-court statements"); *In re Lucero L. (2000) 22 Cal. 4th 1227, 1242-1243, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* (plur. opn. of Mosk, J.) ("hearsay statements contained in social studies should be admissible even if they do not meet the requirements of the child dependency exception and even if the minor is incompetent to testify")]. Conversely, there may be statements of children who are under 12 but who are not the subject of the jurisdiction hearing, or who are 12 years of age or older, which may have been admissible within the social study under *Malinda S.* and other case law, that may not be admissible now over objection under *Welf. & Inst. Code § 355(c)(1)(B)*.

[d] Inapplicability of *Crawford v. Washington*

In 2004 the United States Supreme Court handed down a decision that represented a significant change in its position on the *Confrontation Clause* and exceptions to the hearsay rule in criminal proceedings [*Crawford v. Washington (2004) 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177*]. In *Crawford*, the Court decided that hearsay evidence that contains "testimonial" statements is inadmissible in criminal prosecutions unless the hearsay declarant either testifies or the prosecution demonstrates a constitutionally acceptable reason for not producing the declarant as a witness and, more importantly, the defendant had an opportunity to confront and cross-examine the declarant at an earlier proceeding. This overruled the Court's decision in *Ohio v. Roberts (1980) 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597* , that held a criminal defendant's right under the *United States Constitution's Sixth Amendment* to be confronted by the witnesses against him or her did not bar admission, at a criminal trial, of an unavailable witness' statement against the defendant if the statement bore adequate indicia of reliability. This dramatic change in the Supreme Court's approach to the issue has caused a great deal of litigation in criminal proceedings that is likely to continue. What constitutes "testimonial" hearsay in criminal proceedings is one of the biggest issues, since the Court declined to provide a comprehensive definition [*Crawford v. Washington (2004) 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177*]. In dependency cases, however, the primary question is whether the *Crawford* decision has any application at all. It does not [*In re April C. (2005) 131 Cal. App. 4th 599, 610-612, 31 Cal. Rptr. 3d 804* ; Myers, 2 Myers on Evidence in Child, Domestic and Elder Abuse Cases (Aspen 2005) § 7.22[B][2], p. 635].

Although dependency proceedings may at times be adversarial [*In re Kristin H. (1996) 46 Cal. App. 4th 1635, 1662, 54 Cal. Rptr. 2d 722]* , it is neither the goal nor the intention of the dependency system to be an adversarial process [*Welf. & Inst. Code § 350(a)(1)*]. More importantly, dependency proceedings are not criminal prosecutions. Instead, they are special proceedings of a civil nature, designed not to punish the parent but to protect the child [*In re Shelley J. (1998) 68 Cal. App. 4th 322, 328, 79 Cal. Rptr. 2d 922* ; *In re Chantal S. (1996) 13 Cal. 4th 196, 200, 51 Cal. Rptr. 2d 866, 913 P.2d 1075* ; *In re Malinda S. (1990) 51 Cal. 3d 368, 384, 272 Cal. Rptr. 787, 795 P.2d 1244]* . The federal *Sixth Amendment* right to confrontation and its California counterpart apply only in criminal prosecutions. Because dependency proceedings are not criminal proceedings, the express right of confrontation guaranteed by the federal and state constitutions to criminal defendants does not apply [*In re Angel W. (2001) 93 Cal. App. 4th 1074, 1080, 113 Cal. Rptr. 2d 659* ; *In re Amber S. (1993) 15 Cal. App. 4th 1260, 1264, 19 Cal. Rptr. 2d 404]* . As such, the *Crawford* decision does not apply to dependency proceedings [*In re April C. (2005) 131 Cal. App. 4th 599, 610-612, 31 Cal. Rptr. 3d 804* ; *see also In re C.M. (Ill. Ct. App. 2004) 815 N.E.2d 49, 52* (holding *Crawford* does not apply to juvenile dependency case because the *Sixth Amendment* does not apply); *Commonwealth v. Given (Mass. 2004) 441 Mass. 741, 808 N.E.2d 788, 794 n. 9* (holding *Crawford* has no bearing on hearsay evidence at a civil commitment proceeding because the *Sixth Amendment* does not apply); Myers, 2 Myers on Evidence in Child, Domestic and Elder Abuse Cases (Aspen 2005) § 7.22[B][2], p. 635].

This does not mean parents have no right to confront the witnesses against them in dependency proceedings. They do, generally. In dependency proceedings, however, that right is based on principles of due process, not the federal *Sixth Amendment* or its California counterpart. Thus, the parent's right to due process may be satisfied through means other than confrontation [*In re Lucero L. (2000) 22 Cal. 4th 1227, 1242-1249, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* ; *In re Amber S. (1993) 15 Cal. App. 4th 1260, 1264-1267, 19 Cal. Rptr. 2d 404]* .

[13] Child Dependency Hearsay Exception

Many states have a residual or child witness hearsay exception that can be utilized to allow the introduction of a child's out-of-court statement for the truth of the matter asserted when it is shown the child's hearsay statements are reliable [*see* Myers, 2 Myers on Evidence in Child, Domestic and Elder Abuse Cases (Aspen 2005) § 7.16, Residual Exception, pp. 587-618]. The Federal Rules of Evidence contain such a residual hearsay exception as well [*see Fed. R. Evid., Rule 807*]. Until recently, however, California did not have a similar provision. Observing that out-of-court statements of child victims are often reliable yet do not fit within the traditional hearsay exceptions, the Fourth District Court of Appeal, Division One, recognized the "child dependency hearsay exception" in the case of *In re Carmen O. (1994) 28 Cal. App. 4th 908, 33 Cal. Rptr. 2d 848* , providing for the admission of a child's hearsay statements in dependency cases upon a finding of reliability. Having broken new ground in California, the *Carmen O.* decision has been called "the pioneering decision in this area" [*In re Lucero L. (2000) 22 Cal. 4th 1227, 1256, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* (conc. opn. of Chin, J.)]. The California Supreme Court has upheld and modified this judicially created hearsay exception in the case of *In re Cindy L. (1997) 17 Cal. 4th 15, 69 Cal. Rptr. 2d 803, 947 P.2d 1340* . Thus California now has a child dependency hearsay exception.

The child dependency hearsay exception is a limited exception that applies only to juvenile dependency cases. In creating this rule of evidence, the court of appeal was very specific that it was not creating a broad brush residual hearsay rule or a hearsay exception for use in criminal child abuse cases. Instead, it indicated it was merely finding the juvenile court should not be required to "push and twist the facts into old-time hearsay exception rules" when there exists sufficient evidence of the reliability of the child's out-of-court statements [*In re Carmen O. (1994) 28 Cal. App. 4th 908, 922, 33 Cal. Rptr. 2d 848]* . Because it does not apply in criminal proceedings, the holding in *Crawford v. Washington (2004) 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177* , does not apply to the child dependency hearsay exception in dependency proceedings [*In re April C. (2005) 131 Cal. App. 4th 599, 610-612, 31 Cal. Rptr. 3d 804* ; Myers, 2 Myers on Evidence in Child, Domestic and Elder Abuse Cases (Aspen 2005) § 7.22[B][2], p. 635].

The Supreme Court agreed with the appellate court's creation of the exception, finding *Carmen O.* "basically sound" and holding courts have the power to create new exceptions to the hearsay rule where, such as here, there is a substantial need for the exception and the class of hearsay evidence is intrinsically reliable [*In re Cindy L. (1997) 17 Cal. 4th 15, 69 Cal. Rptr. 2d 803, 947 P.2d 1340]* .

In creating the child dependency hearsay exception, the *Carmen O.* court noted a number of factors that indicated the four-year-old child's hearsay statements were reliable [*In re Carmen O. (1994) 28 Cal. App. 4th 908, 921, 33 Cal. Rptr. 2d 848]* . These included factors surrounding the making of the statements such as the spontaneity of the statements, the fact the statements were made several times, that they were consistent in their content, that the child used developmentally appropriate terminology, and the fact the child had no motive to lie since she still loved the perpetrator and played with him despite the abuse [*In re Carmen O. (1994) 28 Cal. App. 4th 908, 921, 33 Cal. Rptr. 2d 848]* . In upholding the exception in *Cindy L.* the Supreme Court also found "the time, content, and circumstances" of the almost-four-year-old girl's statement in that case provided an indicia of reliability. The facts supporting a finding of reliability in that case included such factors surrounding the making of the statement as the spontaneity of the statement, that it was repeated consistently to two social workers and a police investigator, and that there was no motive to lie shown, since the child "loved her father and had no wish to harm him" [*In re Cindy L. (1997) 17 Cal. 4th 15, 69 Cal. Rptr. 2d 803, 947 P.2d 1340]* .

Factors surrounding the making of a child's statements that may support a finding of reliability are not limited to those cited by the *Carmen O.* and *Cindy L.* courts. Indeed, in *Cindy L.* the court noted the "nonexhaustive list of factors" the United States Supreme Court had cited as being relevant to determining the reliability of a child's hearsay statements included spontaneity, consistent repetition, the child's mental state, the child's use of terminology unexpected from a child of that age, and a lack of motive to fabricate [*In re Cindy L. (1997) 17 Cal. 4th 15, 69 Cal. Rptr. 2d 803, 947 P.2d 1340* , citing *Idaho v. Wright (1990) 497 U.S. 805, 821-822, 110 S. Ct. 3139, 111 L. Ed. 2d 638]* . And in *Lucero*

L. the court stated "the factors bearing on a statement's reliability are not limited to those specifically enumerated in *Cindy L.* or *Idaho v. Wright*--any factor bearing on reliability may be considered" [*In re Lucero L. (2000) 22 Cal. 4th 1227, 1250, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* (plur. opn. of Mosk, J.)]. This includes the "child's ability to understand the duty to tell the truth and to distinguish between truth and falsity" [*In re Cindy L. (1997) 17 Cal. 4th 15, 30, 69 Cal. Rptr. 2d 803, 947 P.2d 1340]* .

Common sense suggests that any list of reliability factors would of necessity be "nonexhaustive." Perhaps the most complete listings, however, are found in the highly respected treatises by Professor John E.B. Myers. He lists the following as factors surrounding the making of a child's statements that may impact, positively or negatively, its reliability for admission under such a hearsay exception: prior testimony where the adversary had the opportunity to cross-examine the child; testimonial competence of the child when the statement was made; testimonial competence of the child at the time of the trial; spontaneity of the statement; statement overheard by more than one person; statement elicited by questioning and the types of questions used; taped interviews that allow the court to "evaluate firsthand" the types of questions used; mental health counseling before statement was made; consistency of the statements ("complete consistency" is not required for reliability; consistency about peripheral details is less important); the child's state of mind and emotion when statement was made; play and gestures coinciding with the description of abuse; developmentally unusual sexual knowledge; idiosyncratic detail; age and maturity of the child; developmentally appropriate terminology; statement against interest; motive to fabricate; personal knowledge; level of understanding regarding the event; delayed reporting and possible memory loss; and the child testifying at trial [Myers, 2 Myers on Evidence in Child, Domestic and Elder Abuse Cases (Aspen 2005) § 7.16[B], Factors Surrounding Statement, pp. 590-608 (describing factors and providing extensive case authority)]. He has also noted that in all cases it is helpful to consider the child's statements in terms of the "four hearsay risks" of insincerity, memory loss, ambiguity, and misperception. "When the risks are low; admission is appropriate" [Myers, Evidence In Child Abuse And Neglect Cases (John Wiley. 3d ed. 1997) Vol. 2, Hearsay, § 7.51 Factors Surrounding Statement, p. 350].

Factors that corroborate the child's hearsay statements may also impact the determination of the statement's reliability. Such corroborating evidence cannot be used to determine reliability in federal criminal cases [*Idaho v. Wright (1990) 497 U.S. 805, 819-820, 110 S. Ct. 3139, 111 L. Ed. 2d 638* ; *but see* Myers, 2 Myers on Evidence in Child, Domestic and Elder Abuse Cases (Aspen 2005) § 7.16[A], Analysis of Reliability: *Idaho v. Wright*, pp. 587-589 (criticizing the holding of the majority in this regard)]. In dependency proceedings, however, "corroborative evidence that cannot be considered in criminal litigation should be admissible to assess the reliability of children's hearsay statements offered under residual exceptions" [Myers, Evidence In Child Abuse And Neglect Cases (John Wiley, 3d ed. 1997) Vol. 2, Hearsay, § 7.50, Analysis of Reliability, p. 325-326]. The *Carmen O.* court appears to have done exactly that. There, in addition to listing the evidence surrounding the making of the statement that supported reliability, the court of appeal also noted that independent evidence was consistent with the child's out-of-court statement of molestation [*In re Carmen O. (1994) 28 Cal. App. 4th 908, 921, 33 Cal. Rptr. 2d 848]* . This appears to have been referring to the medical evidence that "indicated consistency with the possibility of hymen injury" [*In re Carmen O. (1994) 28 Cal. App. 4th 908, 912, 33 Cal. Rptr. 2d 848]* , which was corroborative evidence supportive of a finding of reliability. The Supreme Court's plurality decision in *Lucero L.* is also supportive of the view that corroborating factors can be considered in determining the reliability of a child's hearsay statements [*In re Lucero L. (2000) 22 Cal. 4th 1227, 1250, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* (plur. opn. of Mosk, J.) ("any factor bearing on reliability may be considered")]. It should be obvious in analyzing the reliability and admissibility of a child's statements that not all evidence of reliability is corroborative in nature, but all corroborative evidence necessarily impacts reliability.

Just as with the factors surrounding the making of the child's statements, any list of corroborative factors that may impact the reliability or admissibility of the statements is also, of necessity, nonexhaustive. As noted by Professor Myers, "The types of evidence that may corroborate abuse are limitless, and case-by-case analysis is required" [Myers, Evidence In Child Abuse And Neglect Cases (John Wiley, 3d ed. 1997) Vol. 2, Hearsay, § 7.53, Child Hearsay Exception, pp. 361-362]. He lists the following as factors corroborating the child's statement that may "bolster confidence in the reliability of the statement": medical or physical evidence of abuse; changes in behavior;

developmentally unusual sexual knowledge; play and gestures indicative of abuse; corroborative hearsay statements; reliability of person who overheard statement; more than one child with the same story; eyewitness testimony; opportunity of the suspect to commit the act; admission by the suspect; evidence of the suspect's prior uncharged misconduct; character evidence; and expert testimony the child was abused [Myers, 2 Myers on Evidence in Child, Domestic and Elder Abuse Cases (Aspen 2005) § 7.16[C], Factors That Corroborate Hearsay, pp. 609-614 (describing factors and providing extensive case authority)].

PRACTICE TIP:

Study Resources Addressing the Reliability of Children's Statements of Abuse. The reliability of children's statements of abuse has always been a factor in the juvenile court's determination of jurisdictional allegations, since the weight to be afforded such statements is always at issue. Now that reliability findings are needed under the child dependency hearsay exception and, in certain limited circumstances, under the social study exception of *Welf. & Inst. Code § 355*, the need for everyone involved in the dependency process to be familiar with factors impacting the reliability of children's statements is even greater. Professor Myers seminal treatise is an excellent starting place. But there are also many other books and articles that are helpful in understanding the reliability of children's statements [*see, e.g.*, Hewitt, Assessing Allegations of Sexual Abuse in Preschool Children: Understanding Small Voices (Sage, 1999); Poole & Lamb, Investigative Interviews of Children: A Guide For Helping Professionals (American Psychological Association, 1998); Ceci & Bruck, Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony (American Psychological Association, 1995); Perry & Wrightsman, The Child Witness: Legal Issues and Dilemmas (Sage, 1991)]. Care, of course, must be taken to identify the biases of authors and any limitations of their work [*see, e.g.*, Lyon, *The New Wave in Children's Suggestibility Research: A Critique, 84 Cornell L. Rev. 1004 (1999)*]. But these and other resources should be on the reading list of social workers, attorneys, advocates, and judicial officers involved in the determination of the reliability of children's statements.

In addition to upholding the child dependency hearsay exception created by *Carmen O.* the Supreme Court in *Cindy L.* provided both clarification and limitation to the exception. It held that before a child's hearsay statements can be admitted under this exception the other parties to the dependency action must have notice of the intention to introduce the statements and the opportunity to contest it so that due process is provided [*In re Cindy L. (1997) 17 Cal. 4th 15, 29, 69 Cal. Rptr. 2d 803, 947 P.2d 1340]* . It also held there is no requirement the child be found to have been testimonially competent at the time the statement was made for the statement to be admissible under the child dependency hearsay exception. Competency is a factor to be considered in determining reliability, but it is not definitive, nor is it a prerequisite to admissibility under this exception [*In re Cindy L. (1997) 17 Cal. 4th 15, 31-35, 69 Cal. Rptr. 2d 803, 947 P.2d 1340]* . This impliedly disapproves the holding in the case of *In re Nemis M. (1996) 50 Cal. App. 4th 1344, 1353-1354, 58 Cal. Rptr. 2d 324* to the contrary.

The one clear limitation placed on the child dependency hearsay exception by the Supreme Court in *Cindy L.* deals with corroboration. If the child is not available for cross-examination, there must be corroborative evidence in order for the child's out-of-court statements to be admissible under this exception [*In re Cindy L. (1997) 17 Cal. 4th 15, 29-30, 69 Cal. Rptr. 2d 803, 947 P.2d 1340]* . The Supreme Court observed the "predominant view" regarding the admission of child hearsay statements in other jurisdictions is consistent with such a requirement. It also expressed the opinion the factors having bearing on the reliability of a child's hearsay statements are ambiguous and subject to manipulation. Thus, a requirement for corroboration if the child is unavailable for cross-examination "is an additional safeguard against the possibility of fabrication by very young witnesses whose out-of-court statements are insulated from the rigors of cross-examination." Finally, it noted such a requirement would make the rule for the admission of such statements in California the same for criminal and dependency cases [*In re Cindy L. (1997) 17 Cal. 4th 15, 30, 69 Cal. Rptr. 2d 803, 947 P.2d 1340* , citing *Evid. Code § 1360*]. The requirement for corroboration imposed by *Cindy L.* was not one required by due process, however. It was an "extra prudential rule" that reflected "prudence in an area in which the truth of a hearsay statement was particularly open to question" [*In re Lucero L. (2000) 22 Cal. 4th 1227,*

1248-1249, 96 Cal. Rptr. 2d 56, 998 P.2d 1019 (plur. opn. of Mosk, J.)].

That the California Supreme Court would acknowledge its imposition of a corroboration requirement was not required by due process is understandable. The United States Supreme Court has held that full reliance on a child victim's hearsay statements does not violate the *Confrontation Clause of the Sixth Amendment to the United States Constitution* if the statements meet the test of reliability. Consideration of corroborating evidence in that context is not only not required, under federal law it is not permitted [*Idaho v. Wright (1990) 497 U.S. 805, 819, 110 S. Ct. 3139, 111 L. Ed. 2d 638]* . "The standard of evidence cannot be higher under the due process clause in a dependency hearing than under the *confrontation clause* in a criminal trial" [*In re Lucero L. (2000) 22 Cal. 4th 1227, 1249, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* (plur. opn. of Mosk, J.)]. In most jurisdictions where corroboration is statutorily required if the child is not available for cross-examination, however, the hearsay exception utilized is one that covers the admission of such statements in all cases, including criminal cases. In that context a requirement for corroboration is understandable. But to require corroboration in a rule limited to dependency cases virtually ensures that in some rare instances a statement already found to be reliable in a fully contested hearing will nevertheless be held inadmissible under the child dependency hearsay exception due to the lack of corroborative evidence. In such rare instances this may deny the juvenile court the ability to protect the child. As noted by Justice Chin in his insightful concurring opinion in *Lucero L.*, "Government can do few things more harmful than turn a deaf ear to an abused child's plea for help and return that child for more abuse" [*In re Lucero L. (2000) 22 Cal. 4th 1227, 1256, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* (conc. opn. of Chin, J.)]. The wisdom of a corroboration requirement in a hearsay exception designed solely for dependency cases is therefore open to substantial question and may someday be reconsidered by the Supreme Court. It is, however, now California law.

In light of the requirement for corroborative evidence if the child is unavailable for cross-examination, it should be noted that corroborative evidence is rarely direct and definitive, such as that provided by an eyewitness or conclusive medical evidence of abuse. More often "corroborative evidence is circumstantial" [Myers, Evidence In Child Abuse And Neglect Cases (John Wiley, 3d ed. 1997) Vol. 2, Hearsay, § 7.53 Child Hearsay Exception, p. 361]. Moreover, corroborative evidence is not required to be conclusive. It only needs to support a logical and reasonable inference that the abusive act alleged in the child's hearsay statements occurred [*In re Cindy L. (1997) 17 Cal. 4th 15, 35, 69 Cal. Rptr. 2d 803, 947 P.2d 1340]* . As noted by Professor Myers, "Evidence corroborates if it has any tendency to make a proposition more likely" [Myers, Evidence In Child Abuse And Neglect Cases (John Wiley, 3d ed. 1997) Vol. 2, Hearsay, § 7.53 Child Hearsay Exception, p. 361]. As such, the requirement for corroboration "should be applied flexibly so that reliable hearsay is not excluded by a stubborn insistence on corroboration that is impossible to obtain" [Myers, Evidence In Child Abuse And Neglect Cases (John Wiley, 3d ed. 1997) Vol. 2, Hearsay, § 7.53 Child Hearsay Exception, p. 362]. Thus, a court determining whether the corroboration requirement of *Cindy L.* has been met should consider the evidence in light of the many factors that may corroborate the child's hearsay statements of abuse and not rigidly require diagnostic or other direct evidence conclusively proving the abuse [*see* Myers, Evidence In Child Abuse And Neglect Cases (John Wiley, 3d ed. 1997) Vol. 2, Hearsay, § 7.52 Factors Corroborating Statement, pp. 350-354 (describing factors and providing extensive case authority); *see also* *In re Lucero L. (2000) 22 Cal. 4th 1227, 1254, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* (conc. opn. of Chin, J.) (finding corroboration of the child's statements included the evidence of similar molestation of an older half sister, expert testimony regarding the significance of that evidence, and medical evidence of an anal fissure, which was not conclusive, but significant)].

One other possible limitation that some argue the Supreme Court appeared to have placed on the child dependency hearsay exception is that of restricting its use to cases of alleged sexual abuse. Although *Carmen O.* involved sexual abuse, the court of appeal did not limit the exception it created to sexual abuse cases. In *Cindy L.*, however, the Supreme Court described the exception as one allowing the admission of a child's hearsay statements in sexual abuse cases [*In re Cindy L. (1997) 17 Cal. 4th 15, 18, 28, 69 Cal. Rptr. 2d 803, 947 P.2d 1340]* . It does do that. But there are also other circumstances in which a child's hearsay statements may be reliable, not fit a statutory exception to the hearsay rule, and be both appropriate and needed for the dependency litigation, yet not involve sexual abuse. Elsewhere in the *Cindy L.* opinion, the Court stated "the requirement of corroboration will make the rule in this state regarding the admission of

child hearsay statements consistent in both criminal and dependency proceedings" [*In re Cindy L. (1997) 17 Cal. 4th 15, 30, 69 Cal. Rptr. 2d 803, 947 P.2d 1340* , citing *Evid. Code § 1360*]. *Evidence Code section 1360* is not limited to sexual abuse cases, but instead applies when the statement of the child describes "any act of child abuse or neglect performed with or on the child by another" or any such act attempted by another. Thus, if consistency was a goal, the child dependency hearsay exception should not be limited to cases involving sexual abuse. In *Lucero L.* the Supreme Court considered the social study exception to the hearsay rule found in *Welf. & Inst. Code § 355*, not the child dependency hearsay exception. But the Court did summarize its holding in *Cindy L.* and draw on that opinion. In so doing, it did not characterize the hearsay exception it upheld in *Cindy L.* as one limited to sexual abuse cases. It indicated the exception dealt with the admission of children's hearsay statements of abuse at a jurisdiction hearing under *Welf. & Inst. Code § 300* [*In re Lucero L. (2000) 22 Cal. 4th 1227, 1231, 1238, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* (plur. opn. of Mosk, J.)]. Further, the *Basilio T.* case, which essentially started the line of cases leading up to *Carmen O.* and the creation of the child dependency hearsay exception, was a case involving domestic violence, not sexual abuse [*In re Basilio T. (1992) 4 Cal. App. 4th 155, 160, 5 Cal. Rptr. 2d 450* (4-year-old child stated: "My mom and dad fight. I saw blood.")]. Thus, the better view is that *Cindy L.* merely described the exception in terms of sexual abuse because that was the type of case it was considering at the time, and not because it was limiting the exception to any particular form of abuse. Regardless, the Supreme Court's holding in *Cindy L.* that courts can create exceptions to the hearsay rule [*In re Cindy L. (1997) 17 Cal. 4th 15, 27-28, 69 Cal. Rptr. 2d 803, 947 P.2d 1340]* provides the authority in an appropriate case not involving sexual abuse for a court to consider using or expanding the child dependency hearsay exception to allow the admission of a child's hearsay statements based on a finding of reliability and, if necessary, corroboration.

Finally, the interplay between the child dependency hearsay exception created in *Carmen O.* and the social study exception found in *Welf. & Inst. Code § 355* should be mentioned. The Supreme Court in *Cindy L.* indicated it would leave to another day the question of whether the legislative amendments to *Welf. & Inst. Code § 355* obviate the need for the child dependency hearsay exception [*In re Cindy L. (1997) 17 Cal. 4th 15, 28, fn. 6, 69 Cal. Rptr. 2d 803, 947 P.2d 1340]* . In the *Lucero L.* case, the Supreme Court acknowledged it had left this question for another day, but did not expressly answer it [*In re Lucero L. (2000) 22 Cal. 4th 1227, 1242, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* (plur. opn. of Mosk, J.)]. Nevertheless, its plurality decision, while somewhat blurring the distinction between the two, impliedly recognizes they are two separate and independent hearsay exceptions. This is as it should be. There is in the everyday practice of dependency law a need for both exceptions. There are, of course, hearsay statements of children that would be admissible under both exceptions. But there are also statements that would only be admissible under one or the other. For instance, a young child's hearsay statement that is reliable, but not corroborated, would be admissible under the social study exception if included in the report, but not under the child dependency hearsay exception if the child was unavailable for cross-examination. Likewise, if the child was 12 years of age or over, or not the subject of the proceedings, the child's hearsay statements would not be admissible under the social study exception if there were an objection and the child was not available for cross-examination, but might be admissible under the child dependency hearsay exception under the same circumstances if found to be reliable and corroborated. Finally, as was the case in *Carmen O.*, there are times when some of the child's statements are not included in the social worker's reports, but are sought to be introduced through the testimony of witnesses [*In re Carmen O. (1994) 28 Cal. App. 4th 908, 915-916, 33 Cal. Rptr. 2d 848]* . Although the social study exception and due process allow detailed cross-examination of witnesses who heard the child's out-of-court statements, *Welf. & Inst. Code § 355* does not authorize the introduction of the child's hearsay statements through testimony rather than reports. In such instances where the child's statements were not included in the social study, the child dependency hearsay exception can be utilized to admit the statements through the testimony of witnesses. Thus, both exceptions are necessary.

PRACTICE TIP:

Be Careful in Using the Exception. As a relatively new hearsay exception, the child dependency hearsay exception is still in its early stages of case law development. Reliability of the child's hearsay statements should never be presumed. Social services departments and children's counsel should be careful not to abuse this exception and should make sure the cases in which they seek to apply this

> exception actually have sufficient indicators of reliability to justify admission. Parents' counsel should object to the use of this exception without an evidentiary hearing on the reliability of the child's hearsay statements and, if necessary, corroborative evidence. Finally, juvenile courts should state on the record the factors surrounding the making of the statements and corroborating the statements, if any, before making a finding of reliability and admitting a child's out-of-court statements under this hearsay exception.

For further discussion of the inapplicability of the United States Supreme Court's decision in *Crawford v. Washington (2004) 541 U.S. 36* , to hearsay exceptions in dependency cases, see *§ 328.110[12][d]*.

[14] Testimony of a Child

[a] No Corroboration Required

In California there is no requirement that a child's testimony be corroborated before it can be used to support a finding by a trier of fact [*People v. Harlan (1990) 222 Cal. App. 3d 439, 451-454, 271 Cal. Rptr. 653* , *citing Evid. Code §§ 700* (except as provided by statute every person "irrespective of age" is qualified as a witness), 701(a) (only a person incapable of understanding the duty to tell the truth or of expressing his or herself is disqualified to be a witness), 411 (except where required by statute, direct evidence of one witness is sufficient for proof of any fact)]. As noted by the California Supreme Court, "Recent studies have undermined traditional notions regarding the unreliability of child witnesses, their untruthfulness, susceptibility to leading questions, or inability to recall prior events accurately." Thus, "it is now well established that a child's testimony cannot be deemed insubstantial merely because of his or her youth" [*People v. Jones (1990) 51 Cal. 3d 294, 315, 270 Cal. Rptr. 611, 792 P.2d 643* , and cases and articles cited there; *see also People v. Vargas (1988) 206 Cal. App. 3d 831, 852, 253 Cal. Rptr. 894]* . As in criminal proceedings, the age of a child is merely one factor among many which should be considered in evaluating the child's testimony. The court "should not discount or distrust the testimony of a child solely because he or she is a child" [*Penal Code § 1127f* (instruction to jury in criminal cases)]. As with the statements of a child included in a social study, the testimony of a child, if believed, is sufficient to support a court's finding in a dependency case without the need for corroboration.

[b] Testimony by Child Outside the Parents' Presence

The testimony of the child may be taken in chambers and outside the presence of the child's parent or parents. The parent or parents must be represented by counsel, who must be present, and at least one of the following circumstances must exist: (1) testimony in chambers is necessary to insure truthful testimony, (2) the child is likely to be intimidated by a formal courtroom setting, or (3) the child is afraid to testify in front of his or her parents. After testimony in chambers, the parent or parents may elect to have the court reporter read back the testimony, or to have the testimony summarized by their counsel. The foregoing rules apply to guardians of the child as well as to parents [*Welf. & Inst. Code § 350(b)*; *see In re Katrina L. (1988) 200 Cal. App. 3d 1288, 1297, 247 Cal. Rptr. 754* ; *In re Stanley F. (1978) 86 Cal. App. 3d 568, 574-575, 152 Cal. Rptr. 5* ; *see also In re Amy M. (1991) 232 Cal. App. 3d 849, 859, 283 Cal. Rptr. 788* (due process rights were not violated when both procedures were used)].

The parent has the statutory right to the presence of counsel when the child's testimony is taken in chambers. The taking of the testimony out of the presence of the counsel, without a knowing and intelligent waiver, may be error requiring reversal [*In re Laura H. (1992) 8 Cal. App. 4th 1689, 1694-1696, 11 Cal. Rptr. 2d 285* (reversal required under facts of that case)].

[c] Child Not Testifying

Refusal to allow a child to testify at all may violate the parent's due process right, particularly if no other testimony or evidence is admitted as a substitute and the parent has had no access to the child before the hearing. The court in such a situation has no authority to deny the parent the right to call the child as a witness, although the court may protect the

child from trauma by taking the testimony in chambers in the presence of the parent's counsel so as to avoid direct confrontation with the parent [*In re Amy M. (1991) 232 Cal. App. 3d 849, 865-867, 283 Cal. Rptr. 788]* .

The *Amy M.* decision was limited, however, to the facts of that case. The Court of Appeal there noted that no effort had been made in the trial below to have the child found to be psychologically unavailable pursuant to *Evid. Code § 240* as had been done in at least one reported appellate opinion [*In re Amy M. (1991) 232 Cal. App. 3d 849, 866, 283 Cal. Rptr. 788 , citing In re Christina T. (1986) 184 Cal. App. 3d 630, 634, 229 Cal. Rptr. 247]* .

The *Amy M.* decision also noted that there was no substitute for the testimony of the child which would satisfy the requirements of due process under the facts of that case. In this regard it noted that the child's statements were not contained in the social study and that the child had not testified at a prior hearing [*In re Amy M. (1991) 232 Cal. App. 3d 849, 865, 283 Cal. Rptr. 788]* . This type of due process substitution was used in the case of *In re Jennifer J. (1992) 8 Cal. App. 4th 1080, 10 Cal. Rptr. 2d 813* , which found that despite the lack of statutory or case law authority, a court has the power based upon the overriding goal of protecting the child to weigh whether the testimony of the child would materially affect the issues to be resolved against the potential psychological injury to the child which would be caused by testifying [*In re Jennifer J. (1992) 8 Cal. App. 4th 1080, 1089, 10 Cal. Rptr. 2d 813* ("It would be a perversion of the procedure to impose upon it a requirement that the child's testimony always be presented, regardless of the trauma resulting to the child therefrom, and regardless of the necessity of such testimony in the resolution of the issues before the court.")].

[d] Competency and the Requirement of an Oath

All witnesses, regardless of age, are presumed competent and are qualified to be a witness [*Evid. Code § 700*]. Nevertheless, a person is disqualified to testify if the person is incapable of understanding the duty of a witness to tell the truth [*Evid. Code § 701(a)(2)*]. Further, all witnesses are required to take an oath, although the court can allow a child under the age of 10 years to simply make a promise to tell the truth [*Evid. Code § 710*]. Therefore, a child witness still must be sworn in a manner that complies with the statutory requirements [*In re Heather H. (1988) 200 Cal. App. 3d 91, 95-96, 246 Cal. Rptr. 38* ; *see Code Civ. Proc. §§ 2094, 2097* (oath or affirmation of witness)]. This requirement may preclude the court from relying on the testimony of a child who is too young to appreciate the meaning of the oath [*see Evid. Code § 701(a)(2)* (witness who is incapable of understanding duty to tell truth is disqualified); *see also In re Heather H. (1988) 200 Cal. App. 3d 91, 96-97, 246 Cal. Rptr. 38* ; *but see In re Katrina L. (1988) 200 Cal. App. 3d 1288, 1298-1299, 247 Cal. Rptr. 754* (testimony of unsworn four-year-old child found competent, based primarily on trial court's conclusion that child was being truthful)]. However, no constitutional provision is violated if unsworn testimony is received. If the adequacy of the oath taking is not raised in the trial court, the issue is deemed waived on appeal [*In re Katrina L. (1988) 200 Cal. App. 3d 1288, 1299, 247 Cal. Rptr. 754]* . Significantly, the court may reserve any ruling on whether the child is competent until the conclusion of direct examination [*Evid. Code § 701(b)*].

It is important to use questions the child can understand. Many young children cannot define the words "truth" or "lie" and cannot explain the difference between the two. Yet that does not mean they do not understand the difference between the truth and a lie or the importance of telling the truth. Unfortunately, many children are found not competent due to the questions asked, not the child's actual competence or incompetence. The difficulty in determining the competence of a young child is the need for the adult questioning the child to understand the child's developmental stage and how best to communicate with the child. Just as it is developmentally inappropriate to ask a young child to define "truth," it may also be inconclusive to point to a blue jacket and ask the child "If I told you this jacket was yellow, would that be the truth or a lie?" Even if the child knows it would be a lie, the child may be reluctant to tell an adult authority figure the adult is lying. Recent studies suggest that even three-year-old children may be able to demonstrate an adequate knowledge of truth and falsity if tested in an age appropriate manner. To this end, "researchers have developed an oath-taking competency picture task that more sensitively assesses children's understanding of the meaning and morality of lying" [California Ctr. for Jud. Educ. and Research, Cal. Judges Bench Handbook, The Child Victim Witness (September 2002) § 4.6, p. 63]. This method of questioning young children regarding competency was

developed by Professor Thomas D. Lyon, J.D., Ph.D., of the University of Southern California Law School, and Professor Karen J. Saywitz, Ph.D., of the Harbor-UCLA Medical Center. It is sometimes referred to as the "Lyon-Saywitz Oath-Taking Competency Picture Task." The use of the method is strongly encouraged [California Ctr. for Jud. Educ. and Research, Cal. Judges Bench Handbook, The Child Victim Witness (September 2002) § 4.6, pp. 62-63; Myers, Evidence In Child Abuse And Neglect Cases (John Wiley, 3d ed. 1997) Vol. 1, Testimonial Competence, § 3.21, Suggestions for Questions During Competency Examinations, pp. 274-283]. Materials explaining this method of examination can be found at hal-law.usc.edu/users/tlyon/articles/competency.PDF, and in various books and journals [*see, e.g.*, Lyon, *Child Witnesses and the Oath*, in Children's Testimony: A Handbook of Psychological Research and Forensic Practice (Westcott et al., edits., 2002) pp. 244-260; Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. Cal. L. Rev. 1017 (2000); Lyon & Saywitz, *Young Maltreated Children's Competence to Take the Oath*, 3(1) Applied Developmental Science 16 (1999)].

[e] Court's Inherent Authority to Fashion Safeguards

The court has inherent authority to fashion other appropriate reasonable orders concerning the testimony of the child. For example, the court may order that the child's testimony be taken by use of closed-circuit television, to ensure the truthfulness of the child's testimony. The testimony may be taken in chambers, outside the presence of parents, if that would further ensure its truthfulness [*In re Amber S. (1993) 15 Cal. App. 4th 1260, 1264-1267, 19 Cal. Rptr. 2d 404]* .

[f] Child's Preliminary Hearing Testimony

The child's former testimony given at a preliminary examination in a criminal matter in which he or she was the alleged victim of the crime may be admissible in a dependency proceeding despite the hearsay rule. The issues involved must be such that the defendant in the preliminary examination in which the former testimony was given had the right and opportunity to cross-examine the child, with an interest and motive similar to that which the parent or guardian against whom the testimony is offered has at the dependency proceeding [*see Evid. Code § 1293(a)*]. This rule of evidence was applied in the case of *In re Elizabeth T. (1992) 9 Cal. App. 4th 636, 12 Cal. Rptr. 2d 10* in which it was held that there was no requirement for a showing in the dependency case of unavailability of the child before this section could be applied. The Court of Appeal also found that this procedure does not infringe impermissibly on the due process right of confrontation and cross-examination [*In re Elizabeth T. (1992) 9 Cal. App. 4th 636, 640-642, 12 Cal. Rptr. 2d 10]* .

[15] Admissibility of Polygraph Evidence

In noncriminal juvenile matters, such as dependency proceedings, relevant polygraph evidence may be admissible. This is because *Evid. Code § 351.1* that prohibits the admission of polygraph evidence in criminal cases absent a stipulation by all parties does not apply [*In re Kathleen W. (1987) 190 Cal. App. 3d 68, 70-73, 235 Cal. Rptr. 205* (applying the principles set forth in *Witherspoon v. Superior Court (1982) 133 Cal. App. 3d 24, 183 Cal. Rptr. 615*)]. A party seeking to admit polygraph evidence may request an evidentiary hearing pursuant to *Evid. Code § 400 et seq.* to determine if the qualifications of the operator and the mechanics and techniques employed in the test justify admitting the test results into evidence [*see In re Kathleen W. (1987) 190 Cal. App. 3d 68, 70-73, 235 Cal. Rptr. 205]* . The likelihood of a party of being successful in this regard is not great since as noted recently by the California Supreme Court, there is a deep division in the scientific community as to the reliability of polygraph evidence [*People v. Wilkinson (2004) 33 Cal.4th 821, 847, 94 P.3d 551* ; *see also United States v. Scheffer (1998) 523 U.S. 303, 309-311, 118 S. Ct. 1261, 140 L. Ed. 2d 413]* . Thus, it will be difficult, if not impossible to show that polygraph evidence is sufficiently reliable to justify admission. It should also be noted the exclusion of polygraph evidence has been held not to be a denial of due process in criminal cases, in part because the exclusion of polygraph evidence does not "preclude a defendant from mounting a defense. A defendant can still testify; he can still present corroborating witnesses; he can still cross-examine hostile witnesses" [*In re Aoetae D. (1994) 25 Cal. App. 4th 167, 175, 30 Cal. Rptr. 2d 176]* . Thus, in dependency cases it is not likely the exclusion of polygraph evidence will be found to be a denial of due process.

[16] Relationship Study as Not Privileged

Many courts make use of what are commonly referred to as "bonding" studies. These studies could well be termed "relationship" studies to indicate that their scope is far broader than just the existence or non-existence of a bond: it is the general nature, quality and impact on a child's life of the relationship that is of greatest concern to the court and parties. Although usually performed by a psychologist, the studies are rarely within the patient-psychotherapist privilege of *Evid. Code § 1014*. Rather than studying the relationship for the purpose of diagnosis or treatment of a mental or emotional condition, these studies are typically performed for the unprivileged purpose of obtaining evidence of the "existence and nature of a relationship" between the adult and the child for use at trial [*In re Tabatha G. (1996) 45 Cal. App. 4th 1159, 1168, 53 Cal. Rptr. 2d 93 , citing Evid. Code § 1011* and *People v. Cabral (1993) 12 Cal. App. 4th 820, 826-828, 15 Cal. Rptr. 2d 866]* .

[17] Relitigation of Jurisdictional Allegations

True findings as to jurisdictional allegations are appealable from the disposition hearing [*In re Candida S. (1992) 7 Cal. App. 4th 1240, 1249, 9 Cal. Rptr. 2d 521* ; *In re Jennifer V. (1988) 197 Cal. App. 3d 1206, 1209-1210, 243 Cal. Rptr. 441]* . As a result, once the period of time has passed for appealing the jurisdiction and disposition findings and orders, the finding of jurisdiction becomes final and is res judicata for that case [*In re Daniel D. (1994) 24 Cal. App. 4th 1823, 1832-1833, 30 Cal. Rptr. 2d 245* ; *In re Megan B. (1991) 235 Cal. App. 3d 942, 950, 1 Cal. Rptr. 2d 177]* .

Similarly, if jurisdictional allegations have been previously litigated by the parent as to one child, the doctrine of collateral estoppel prevents relitigation of those allegations in a dependency action filed for a sibling where the sibling's case is based on the risk posed to the sibling due to the abuse to the first child. The parent in such a subsequent case can litigate the issue of whether the second child is at risk in light of the abuse to the first child, but cannot relitigate in the subsequent case whether the first child was abused [*In re Joshua J. (1995) 39 Cal. App. 4th 984, 992-994, 46 Cal. Rptr. 2d 491]* . Nevertheless, where a significant new development has occurred, such as the recantation of the testimony by a key witness at the jurisdiction hearing, the court may allow a parent to present such evidence by way of a petition under *Welf. & Inst. Code § 388* and consider whether the previous jurisdictional finding should be modified or set aside as in the child's best interest [*In re Brandon C. (1993) 19 Cal. App. 4th 1168, 1171-1174, 23 Cal. Rptr. 2d 571]* . The Court in *Brandon C.* was careful to point out, however, that recantation of testimony will not always constitute "new evidence" or a "change of circumstance" justifying an evidentiary hearing or a change of previous findings. Each case must be determined by the juvenile court on its own specific facts pursuant to *Welf. & Inst. Code § 388* [*In re Brandon C. (1993) 19 Cal. App. 4th 1168, 1172, 23 Cal. Rptr. 2d 571]* .

The importance of the finality of the jurisdictional findings, a significant legal concept in the abstract, is heightened by its special impact in juvenile proceedings. Constant relitigation of these issues can be very traumatic to the child involved, perhaps damaging to his or her psychological well-being. The court can not control its calendars and limited resources, if it is required to constantly relitigate jurisdiction findings. Following a final jurisdictional finding, all parties can be assured that they understand what the issues are as they proceed through the dependency process, both in regards to reunification services and to litigation at subsequent hearings. Nevertheless, one court of appeal has held that where significant new evidence suggests that the previous jurisdiction findings were in error, parents may relitigate jurisdiction findings at subsequent review hearings as to the issue of whether it would be detrimental to return the child to the parent [*Blanca P. v. Superior Court (1996) 45 Cal. App. 4th 1738, 1754-1760, 53 Cal. Rptr. 2d 687]* .

Notwithstanding the very insightful recognition of the dangers of inaccurate findings of sexual abuse and the need to carefully examine parent's denials to determine if the denials may be justified, the analysis and holding in *Blanca P.* are open to substantial question. The court's belief that a psychological evaluation could "exonerate" a parent of allegations of sexual abuse [*Blanca P. v. Superior Court (1996) 45 Cal. App. 4th 1738, 1754-1760, 53 Cal. Rptr. 2d 687]* is without precedent and incorrect. Psychologists cannot determine the ultimate fact of whether someone did or did not do a particular act. Such determinations are outside the expertise and role of psychologists. Further, although the court looked to the concept of collateral estoppel and cases dealing with its application [*Blanca P. v. Superior Court (1996)*

45 Cal. App. 4th 1738, 1754-1760, 53 Cal. Rptr. 2d 687] , it failed to consider the stricter requirements of res judicata which applied in the case before it. Moreover, in considering the California Supreme Court decision in *Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 19 Cal. Rptr. 2d 698, 851 P.2d 1307* , as to the importance of safeguards for parents in the dependency process, it failed to recognize that the safeguard of a petition under *Welf. & Inst. Code § 388*, which the Supreme Court found so significant in *In re Marilyn H. (1993) 5 Cal. 4th 295, 307-310, 19 Cal. Rptr. 2d 544, 851 P.2d 826* , was the proper vehicle for a parent to raise these issues [*Blanca P. v. Superior Court (1996) 45 Cal. App. 4th 1738, 1741, 1758, fn. 17, 53 Cal. Rptr. 2d 687]* . Instead, the *Blanca P.* court chose to create its own safeguard rather than rely on the one created by the Legislature. Finally, it failed to consider the adverse impact that its ruling will potentially have on both the courts and the children they serve. Frequent relitigation of jurisdictional findings and the uncertainty such relitigation brings can only further clog the courts' already busy calendars and be detrimental to need of children for stability and finality. The *Blanca P.* decision allowing the relitigation of jurisdictional findings at a review hearing must be viewed as an anomaly, inconsistent with established principles of law, other decisional and statutory authority, and the overall needs and purposes of the dependency system. Thus, it should not be followed by juvenile and appellate courts. Even if the holding is deemed valid, however, it will be the rare case which will not be factually distinguishable from the situation presented in *Blanca P*. The better, safer, and more correct practice for parents wishing to relitigate a prior jurisdiction finding based on new evidence is to file a petition pursuant to *Welf. & Inst. Code § 388*.

[18] Failure to Object as Waiver or Forfeiture

The question of whether one has waived or forfeited the right to raise a particular issue on appeal is usually considered in the context of appellate or extraordinary writ proceedings. As such, the topic's inclusion in material designed to address evidentiary and other contested hearing issues would not be anticipated. Nevertheless, waiver and forfeiture have become such frequent issues in dependency appeals and writs that it bears mention here. The general rule is that an issue not raised at the trial court level may not be raised for the first time on appeal or in a writ [*see, e.g.*, *In re Dakota H. (2005) 132 Cal. App. 4th 212, 221-222, 33 Cal. Rptr. 3d 337* (failure to raise claim a further finding of unfitness was required before termination of parental rights); *In re Dakota S. (2000) 85 Cal. App. 4th 494, 501-502, 102 Cal. Rptr. 2d 196* (failure to object to assessment's failure to address the foster parent's eligibility, commitment, and suitability as a prospective guardian as waiver); *In re Brandon M. (1997) 54 Cal. App. 4th 1387, 1400-1401, 63 Cal. Rptr. 2d 671* (failure to raise objection to "trial home visit" as waiver); *In re Christopher B. (1996) 43 Cal. App. 4th 551, 558-559, 51 Cal. Rptr. 2d 43* (failure to raise forum non conveniens objection as waiver); *In re Kevin S. (1996) 41 Cal. App. 4th 882, 885-886, 48 Cal. Rptr. 2d 763* (failure to object to setting *Welf. & Inst. Code § 366.26* hearing despite finding of no reasonable efforts as waiver); *Steve J. v. Superior Court (1995) 35 Cal. App. 4th 798, 810-811, 41 Cal. Rptr. 2d 731* (failure of social services agency to raise issue of father's right to reunification services as waiver); *In re Richard K. (1994) 25 Cal. App. 4th 580, 587-590, 30 Cal. Rptr. 2d 575* (submission on recommendations of social worker as waiving ability to challenge on appeal the sufficiency of the evidence to support the court's order when the court followed the recommendations)].

Nevertheless, there are some limited issues that some courts have found the waiver rule does not apply to. For instance, a parent who submits on the social worker's report at the jurisdiction hearing, making no argument against a finding of jurisdiction, has been held not to have waived the right to raise the sufficiency of the evidence to support the jurisdiction finding on appeal [*In re Tommy E. (1992) 7 Cal. App. 4th 1234, 1236-1239, 9 Cal. Rptr. 2d 402]* . Further, some courts have held that when a parent objects to the termination of parental rights, no specific objection need be made to the social services agency's alleged failure to establish the likelihood of adoption for the parent to raise the issue on appeal [*In re Erik P. (2002) 104 Cal. App. 4th 395, 399, 127 Cal. Rptr. 2d 922* ; *In re Brian P. (2002) 99 Cal. App. 4th 616, 623, 121 Cal. Rptr. 2d 326* ; *but see*, *In re Crystal J. (1993) 12 Cal. App. 4th 407, 411-412, 15 Cal. Rptr. 2d 613]* . These are the exception, however, not the rule. In most instances the waiver or forfeiture rule will apply. Indeed, the Supreme Court has recently emphasized that appellate courts should only exercise their discretion to excuse forfeiture in rare instances, and must exercise special care in doing so in dependency appeals and writs since "considerations such as permanency and stability are of paramount importance" [*In re S.B. (2004) 32 Cal. 4th 1287,*

1293, 13 Cal. Rptr. 3d 786, 90 P. 3d 746] .

Attorneys in dependency proceedings, regardless of the party they represent, must be sure to make and preserve any objections which they or their client have to any of the procedures utilized by the juvenile court, the evidence it receives, or its findings, orders or other rulings. Failure to object may preclude raising the issue on appeal, even if a timely appeal is filed.

[19] Offers of Proof

"An offer of proof is not evidence" [*Mundell v. Department of Alcoholic Beverage Control (1962) 211 Cal. App. 2d 231, 239, 27 Cal. Rptr. 62* ; *see also Firestone Tire and Rubber Company v. County of Monterey (1990) 223 Cal. App. 3d 382, 394-395, 272 Cal. Rptr. 745* ; *Estate of Silver (1949) 92 Cal. App. 2d 173, 176, 206 P. 2d 895]* . Instead, it is an unsworn oral or written statement by counsel of the specific, admissible, relevant evidence he or she seeks to introduce [*People v. Rodrigues (1994) 8 Cal. 4th 1060, 1176, 36 Cal. Rptr. 2d 235, 885 P. 2d 1* , *citing In re Mark C. (1992) 7 Cal. App. 4th 433, 444-445, 8 Cal. Rptr. 2d 856]* . As the California Supreme Court has noted, "It is axiomatic that the unsworn statements of counsel are not evidence" [*In re Zeth S. (2003) 31 Cal. 4th 396, 413, fn. 11, 2 Cal. Rptr. 3d 683, 73 P.3d 541* , *citing In re Heather H. (1988) 200 Cal. App. 3d 91, 95, 246 Cal. Rptr. 38* ; *People v. Lee (1985) 164 Cal. App. 3d 830, 841, 210 Cal. Rptr. 799* ; *People v. Superior Court (Crook) (1978) 83 Cal. App. 3d 335, 341, 147 Cal. Rptr. 856* , and *Rules of Prof. Conduct, Rule 5-200(e)*].

There is some precedent for using non-stipulated offers of proof as evidence in certain family law and child support matters [*County of Alameda v. Moore (1995) 33 Cal. App. 4th 1422, 1427, 40 Cal. Rptr. 2d 18* , *overruled in part by Elkins v. Superior Court (2007) 41 Cal. 4th 1337* ; *In re Marriage of Stevenot (1984) 154 Cal. App. 3d 1051, 1059, fn. 3, 202 Cal. Rptr. 116]* . That authority, however, is mostly dicta and does not address matters involving fundamental rights. Parenting is a fundamental right [*In re Marilyn H. (1993) 5 Cal. 4th 295, 306, 19 Cal. Rptr. 2d 544, 851 P. 2d 826]* . Juvenile courts do, of course, have both the power and the need to control their proceedings and make clear that "time is not an unlimited commodity in today's busy juvenile courts" [*Ingrid E. v. Superior Court (1999) 75 Cal. App. 4th 751, 760, 89 Cal. Rptr. 2d 407]* . In so doing, courts can adopt formal and informal local practices and rules to expedite matters and facilitate court business. Courts also have inherent power to manage cases and ensure expeditious proceedings in juvenile matters [*In re Jeanette H. (1990) 225 Cal. App. 3d 25, 33-35, 275 Cal. Rptr. 9]* .

Local practices and rules must be reasonable, however, and must not be in conflict with the law [*In re Jeanette H. (1990) 225 Cal. App. 3d 25, 33-35, 275 Cal. Rptr. 9]* . Since the law is clear that non-stipulated offers of proof are not evidence, a local practice or rule that purported to make them evidence would be in conflict with existing law and invalid. Further, measures to expedite the hearing process cannot override the requirement of providing litigants due process [*Denny H. v. Superior Court (2005) 131 Cal. App. 4th 1501, 1514, 33 Cal. Rptr. 3d 89* , citing Seiser & Kumli, California Juvenile Courts Practice and Procedure § 2.110[19] (Matthew Bender); *see also Ingrid E. v. Superior Court (1999) 75 Cal. App. 4th 751, 760, 89 Cal. Rptr. 2d 407]* . Many attorneys would be happy to draft the exact words the attorney wants a witness to say, thereby avoiding potential pitfalls and ensuring the answers are clear, concise, and accurate. When hearings are contested, though, the exact words used by a witness on both direct and cross examination and the demeanor of the witness during all of that testimony, are very important factors in the weight to be given the witness' testimony by the trier of fact. Thus, since offers of proof are not evidence unless stipulated to by all parties and accepted by the court, a local practice mandating the use of non-stipulated offers of proof as evidence in dependency cases will not satisfy the due process rights of any party in dependency proceedings, whether parent, child, or social services agency [*Denny H. v. Superior Court (2005) 131 Cal. App. 4th 1501, 1512-1514, 33 Cal. Rptr. 3d 89]* . This is especially true when dealing with such issues as jurisdiction, removal, denial or termination of services, and the termination of parental rights. Of course, if a party knows the court intends to proceed by way of non-stipulated offers of proof and does not object, the party may be deemed to have acquiesced to the process and the issue may be waived or forfeited for appellate review.

Nevertheless, offers of proof do have legitimate uses in the dependency process. To be a valid offer of proof, the offer must identify the specific admissible evidence sought to be elicited or introduced including, as appropriate, the name of the witness and the specific purpose and content of the testimony to be presented or elicited [*People v. Rodrigues (1994) 8 Cal. 4th 1060, 1176, 36 Cal. Rptr. 2d 235, 885 P. 2d 1 , citing In re Mark C. (1992) 7 Cal. App. 4th 433, 444-445, 8 Cal. Rptr. 2d 856* ; *Semsch v. Henry Mayo Newhall Memorial Hospital (1985) 171 Cal. App. 3d 162, 167-168, 216 Cal. Rptr. 913]* . Offers of proof may be used for a variety of purposes, including:

- If stipulated to by all parties and accepted by the court, offers of proof may help avoid the necessity for calling certain witnesses in a contested matter by stipulating to what a person would testify to if called as a witness. This may be especially helpful in avoiding the need to call children as witnesses, or to streamline the presentation of evidence and shorten the time required for contested hearings. Where appropriate, the court and all counsel should be encouraged to use this process.

- Offers of proof may be used to convince the court that sufficient admissible, relevant evidence will be presented to justify a contested hearing. Some cases have held this can be required by the court [*see, e.g., In re Earl L. (2004) 121 Cal. App. 4th 1050, 1053, 18 Cal. Rptr. 3d 74* ; *In re Tamika T. (2002) 97 Cal. App. 4th 1114, 1120-1122, 118 Cal. Rptr. 2d 873* ; *In re Jeanette V. (1998) 68 Cal. App. 4th 811, 817, 80 Cal. Rptr. 2d 534* ; *Maricela C. v. Superior Court (1998) 66 Cal. App. 4th 1138, 1146-1148, 78 Cal. Rptr. 2d 488]* . Other cases have held the court cannot require an offer of proof before setting a contested hearing [*see, e.g., In re Kelly D. (2000) 82 Cal. App. 4th 433, 439, fn. 4, 98 Cal. Rptr. 2d 188* ; *In re James Q. (2000) 81 Cal. App. 4th 255, 266-267, 96 Cal. Rptr. 2d 595* ; *In re Johnny M. (1991) 229 Cal. App. 3d 181, 189-191, 279 Cal. Rptr. 693* ; *see also Ingrid E. v. Superior Court (1999) 75 Cal. App. 4th 751, 759, 89 Cal. Rptr. 2d 407* (noting controversy and finding that even assuming court had some discretion to require offer of proof, it abused its discretion under the facts)]. These two differing approaches have now been clarified. A party cannot be required to make an offer of proof for a contested hearing if what the party wants to contest is a finding or issue on which a different party, such as the social services agency, has the burden of proof. A party can be required to make an offer of proof if the issue is one on which that party has the burden of proof [*In re Thomas R. (2006) 145 Cal. App. 4th 726, 731-732, 51 Cal. Rptr. 3d 864* ; *David B. v. Superior Court (2006) 140 Cal. App. 4th 772, 779, 44 Cal. Rptr. 3d 799*]. Either way, it is good practice to be prepared to make an adequate offer of proof to justify a contested hearing should the court request it.

- Offers of proof can also be used to show the relevance of a question or line of questioning, and may convince the juvenile court to allow a line of questioning or a particular question over a relevance objection.

- Offers of proof can preserve issues for appeal. This is required when the court excludes evidence [*Evid. Code § 354(a)*]. "Failure to make an adequate offer of proof precludes consideration of the alleged error on appeal" [*In re Mark C. (1992) 7 Cal. App. 4th 433, 444, 8 Cal. Rptr. 2d 856*].

An offer of proof is not necessary, however, when it would be futile [*In re Catherine H. (2002) 102 Cal. App. 4th 1284, 1292-1293, 126 Cal. Rptr. 2d 342*].

[20] Disentitlement Doctrine

The disentitlement doctrine holds that a party to an action cannot ask a court for assistance in hearing the party's demands "while he stands in an attitude of contempt to legal orders and processes of the courts of this state" [*In re C.C. (2003) 111 Cal. App. 4th 76, 84, 3 Cal. Rptr. 3d 354 , quoting MacPherson v. MacPherson (1939) 13 Cal. 2d 271, 277, 89 P.2d 382]* . This doctrine has been used in dependency and other child related proceedings. In one dependency case a father absconded with his daughter whom the juvenile court had placed in a foster home, while still

appealing the placement order. The appellate court the father's appeal was barred by the disentitlement doctrine, because his conduct in absconding with the child undermined and frustrated the purpose of the dependency statutes and made it virtually impossible for the court to protect the child at an unknown location. Thus, it dismissed his appeal [*In re Kamelia S. (2000) 82 Cal. App. 4th 1224, 1228-1229, 98 Cal. Rptr. 2d 816]* . In a guardianship case, the disentitlement doctrine precluded grandparents from appealing the denial of their guardianship petition because they had caused the child to be taken to the Bahamas in violation of the court order [*Guardianship of Melissa W. (2002) 96 Cal. App. 4th 1293, 1299, 118 Cal. Rptr. 2d 42]* . In a stepparent adoption case, the disentitlement doctrine precluded the mother from contesting the stepmother's petition to terminate the mother's parental rights because the mother had abducted the child [*Adoption of Jacob C. (1994) 25 Cal. App. 4th 617, 623-624, 30 Cal. Rptr. 2d 591]* . While these three cases all involved the abduction of children, the disentitlement doctrine is not limited in the child protection and custody arena to abduction cases. Instead, it also extends to cases in which the party's conduct frustrates the ability of another party or the court from obtaining information needed to protect the rights of the party or the well-being of the child, even if there has been no formal adjudication of contempt for violation of a court order [*In re C.C. (2003) 111 Cal. App. 4th 76, 85, 3 Cal. Rptr. 3d 354* , *citing T.M.S., Inc. (1999) 71 Cal. App. 4th 377, 379-380, 83 Cal. Rptr. 2d 834* ; *see also Alioto Fish Company, Ltd. v. Alioto (1994) 27 Cal. App. 4th 1669, 1683-1684, 34 Cal. Rptr. 2d 244]* .

In the *C.C.* case, the appellate court held that a parent could be denied reunification services under *Welf. & Inst. Code § 361.5(b)(2)* if the parent refused to comply with a court order for two psychological evaluations to determine if she suffered a mental disability that rendered her incapable of utilizing reunification services. The appellate court found the provisions of *Welf. & Inst. Code § 361.5(b)(2)* implicitly assumed a parent would cooperate with the requirement for the evaluations. If the parent is uncooperative and will not submit to the evaluations, it interferes with the child's rights and with the court's obligation to determine the issues. Thus, if the parent will not submit to the court ordered evaluations, the court has the power under the disentitlement doctrine to deny the parent reunification services [*In re C.C. (2003) 111 Cal. App. 4th 76, 85-86, 3 Cal. Rptr. 3d 354]* . The appellate court also held there was no requirement for the mother to have the specific intent to interfere with the court order. In other words, there was no requirement for a showing of mens rea for the disentitlement doctrine to apply. Although if the trial court found the mother was not capable of submitting to the psychological evaluation, that could be taken into consideration in deciding what consequences to give to the mother's refusal [*In re C.C. (2003) 111 Cal. App. 4th 76, 86-87, 3 Cal. Rptr. 3d 354]* . Nor was it necessary the mother have initiated the proceedings the disentitlement doctrine was applied to [*In re C.C. (2003) 111 Cal. App. 4th 76, 87-89, 3 Cal. Rptr. 3d 354]* . Significantly, the appellate court noted the issue was not solely an appellate issue. Indeed, in that case the issue was whether the juvenile court could utilize the doctrine if it issued the order for the evaluations and the mother refused to comply [*In re C.C. (2003) 111 Cal. App. 4th 76, 88, 91-92, 3 Cal. Rptr. 3d 354]* .

The use of the disentitlement doctrine in dependency cases is relatively new, and it is anticipated additional uses of the doctrine will be attempted and additional case law will result. It is not anticipated the appellate courts will be liberal in their application of this doctrine to dependency cases [*see, e.g.*, *In re Claudia S. (2005) 131 Cal. App. 4th 236, 244, 31 Cal. Rptr. 3d 697]* . This is an area to be watched for further developments.

[21] Social Workers as Experts

Social workers are frequently called upon to formulate opinions on issues that require expertise, including the assessment of risk, likelihood of adoption, parent and child relationships, and permanency plans. Whether a social worker actually qualifies as an expert will depend on whether the social worker meets the qualifications required under *Evid. Code § 720*. As one court has noted, "Social workers are frequently recognized as experts in assessing risk and placement of children and selecting permanent plans for children" [*In re Luke M. (2003) 107 Cal. App. 4th 1412, 1427, 132 Cal. Rptr. 2d 907* ; *see also In re Beatrice M. (1994) 29 Cal. App. 4th 1411, 1421, 35 Cal. Rptr. 2d 162* (juvenile court "properly exercised its discretion in qualifying the social worker as an expert witness")]. In another case, although it does not appear there was a formal qualification of the social worker as an expert, the juvenile court accepted the social worker's opinion over that of the mother's substance abuse program coordinator and case manager.

The appellate court held the juvenile court "was entitled to find the social worker credible and to give greater weight to her assessments and testimony" [*In re Casey D. (1999) 70 Cal. App. 4th 38, 53, 82 Cal. Rptr. 2d 426]* . Many agency social workers have advanced degrees, extensive training, experience, or a combination of all three. Some are licensed clinical social workers. Whether a social worker qualifies to render an expert opinion on a particular issue is determined on a case-by-case basis [*Evid. Code § 720*]. However, even in cases in which the social worker does not qualify to render an expert opinion, the social worker is required to make recommendations and can explain the rationale for the explanation so the court can understand and weigh the appropriateness of the recommendation.

PRACTICE TIP:

Social Workers' Resumes. Some county counsel are now encouraging the agency social workers to keep track of their education, training, and experience and to prepare professional resumes for use in dependency cases, particularly those in which the social worker is going to testify. This is a good practice and should be considered by agency social workers throughout the state.

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
F. Jurisdiction Hearing

28-328 California Forms of Pleading and Practice--Annotated § 328.111

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§ 328.111 Immunities and Protections Against Disclosure

[1] Immunity for Parents and Guardians

Testimony by a person having custody of a child who is the subject of a dependency proceeding is not admissible as evidence in a criminal proceeding [*see Welf. & Inst. Code § 355.1(f)*]. Therefore, it has been held there is no abuse of discretion or violation of a custodian's right against self-incrimination in denying a request for a continuance until after criminal proceedings based on the same alleged conduct have been resolved [*see, e.g., In re Katrina L. (1988) 200 Cal. App. 3d 1288, 1295-1296, 247 Cal. Rptr. 754* ; *see In re Dolly A. (1986) 177 Cal. App. 3d 195, 222 Cal. Rptr. 741*].

Nevertheless, it has been argued that statutes such as *Welf. & Inst. Code § 355.1(f)* do not provide full use and derivative use immunity, and hence are not sufficient to override a parent's or guardian's right against self-incrimination [*cf. Kastigar v. United States (1972) 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212* ; *see also* Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings* (1990) *24 Ga. L. Rev. 473*]. This is the view taken by the Fourth District Court of Appeal, Division Three, in the *Mark A.* and *Brenda M.* cases [*In re Brenda M. (2008) 160 Cal. App. 4th 772, 773-774, 72 Cal. Rptr. 3d 686* ; *In re Mark A. (2007) 156 Cal. App. 4th 1124, 1133-1136, 68 Cal. Rptr. 3d 106]* . But these cases are subject to question.

A strong argument can be made, however, that *Welf. & Inst. Code § 355.1(f)* does provide full use and derivative use immunity for parents, guardians, and other custodial adults in dependency proceedings. If it didn't, it would be completely ineffective, something the legislature can be presumed not to have intended. Thus, because the juvenile court often needs information from the parents, guardians, and other custodial adults in order to protect children and serve their best interests, the better view is that in this very limited and special area of dependency proceedings it can be implied the legislature intended to provide full use and derivative use immunity for them through the provisions of *Welf.*

& Inst. Code § 355.1, even without the involvement of the district attorney. This is different from immunity for witnesses other than parents, guardians, or custodial adults for whom the procedures set forth in *Cal. Rules of Ct., Rule 5.548(d)* must be followed.

It is a common practice for counsel for the social services agency to call one or both of the parents or guardians as witnesses in dependency proceedings [*Evid. Code § 776(a)*]. Children's attorneys and counsel for the other parent may do this also. Although parents and guardians have a right to assert the privilege against self-incrimination [*Cal. Rules of Ct., Rule 5.534(j)(1)(A)*], the immunity the parent and guardian either has or may be granted for any testimony given by them in dependency proceedings [*Welf. & Inst. Code § 355.1(f)*; *Cal. Rules of Ct., Rule 5.548(d)*] means the parent can be ordered by the court to testify even when such testimony is against the parent or guardian's interests [*see In re Amos L. (1981) 124 Cal. App. 3d 1031, 1039, 177 Cal. Rptr. 783* , citing Welf. & Inst. Code former § 355.7]. As such, attorneys for parents and guardians should prepare their clients for the possibility of testimony even if they do not intend to call the parent or guardian to testify in his or her own behalf.

The immunity afforded parents and guardians in dependency cases has generally been viewed as extending beyond courtroom testimony. It includes statements made by a parent or guardian in the course of treatment as part of a court-ordered reunification plan, even if that treatment requires an admission by the parent or guardian [*In re Candida S. (1992) 7 Cal. App. 4th 1240, 1249-1251, 9 Cal. Rptr. 2d 521* ; *In re Lamonica H. (1990) 220 Cal. App. 3d 634, 649-650, 270 Cal. Rptr. 60* ; *In re Jessica B. (1989) 207 Cal. App. 3d 504, 520-521, 254 Cal. Rptr. 883* ; *see also* Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings* (1990) *24 Ga. L. Rev. 473, 511*-523]. Again, without parents and guardians having full use and derivative use for such admissions, court-ordered reunification plans might be ineffective.

[2] Privilege Against Self-Incrimination

If a person is called as a witness and it appears to the court that the testimony or other evidence being sought may tend to incriminate the witness, the court must advise the witness of the privilege against self-incrimination and of the possible consequences of testifying. The court must also inform the witness of the right to representation by counsel and, if indigent, of the right to have the court appoint counsel [*Cal. Rules of Ct., Rule 5.548(a)*].

[3] Authority of Judge to Grant Immunity

If a witness refuses to answer a question or to produce evidence based on a claim of the privilege against self-incrimination, a judge of the juvenile court may grant immunity to the witness after following the requirements of *Cal. Rules of Ct., Rule 5.548(d)* and order the question answered or the evidence produced [*Cal. Rules of Ct., Rule 5.548(b)*].

[4] Request for Immunity in Dependency Proceeding

In dependency proceedings under *Welf. & Inst. Code § 300*, the social services department or the district attorney if involved in the proceedings may make a written request or an oral request on the record that the judge order any witness to answer a question or produce evidence. They may also make the request jointly. If the request is not made jointly, the district attorney must be given the opportunity to show why immunity is not to be granted, and the judge may grant or deny the request as deemed appropriate. If jointly made, the judge must grant the request unless the judge finds that to do so would be clearly contrary to the public interest. The terms of a grant of immunity must be stated in the record. After complying with the order and if, but for *Cal. Rules of Ct., Rule 5.548*, the witness would have been privileged to withhold the answer given or the evidence produced, any answer given, evidence produced, or any information derived therefrom must not be used against the witness in a juvenile court or criminal proceeding [*Cal. Rules of Ct., Rule 5.548(d)*].

[5] No Immunity From Perjury or Contempt

A witness may nevertheless be subject to proceedings under the juvenile court law or to criminal prosecution for perjury, false swearing, or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence in accordance with an order [*Cal. Rules of Ct., Rule 5.548(e)*].

[6] Order for Social Services Agency to File Report With Law Enforcement

Notwithstanding the protections and immunity afforded parents in dependency proceedings, if the juvenile court believes a child has suffered abuse or neglect that rises to a criminal level, the court may direct a representative of the social services agency to take the actions provided for in *Penal Code § 11166(i)* for reporting such information to law enforcement for further investigation [*Welf. & Inst. Code § 355.1(e)*].

[7] Immunity in State Court Civil Proceedings

The issue of immunity and liability for social workers, social services agencies, county counsels, children's attorneys, and others in state court proceedings is one beyond the expertise of most dependency attorneys and the scope of materials on general dependency law. Where such issues arise, it is wise to seek the counsel of a civil litigator experienced in this area and to refer to specific resources and materials addressing liability and immunity issues. This is equally true for government counsel representing social workers and agencies in dependency proceedings. Nevertheless, the following material provides a starting place for considering the question of social worker and agency immunity in state court proceedings.

The courts have held that in conducting an initial investigation and filing of a dependency action a social worker performs the quasi-judicial function of a prosecutor. As such, it has been repeatedly held that a county social worker is absolutely immune in state court proceedings for acts performed during the investigative and prosecutorial phases of the worker's employment [*Gensburg v. Miller (1994) 31 Cal. App. 4th 512, 518, 37 Cal. Rptr. 2d 97* ; *Alicia T. v. County of Los Angeles (1990) 222 Cal. App. 3d 869, 882-883, 271 Cal. Rptr. 513* ; *Jenkins v. County of Orange (1989) 212 Cal. App. 3d 278, 283-284, 260 Cal. Rptr. 645* ; *see Gov. Code §§ 820.2, 821.6*]. One case has held, however, that a social worker is not immune for any "tortious conduct" in the making of an investigation [*see Newton v. County of Napa (1990) 217 Cal. App. 3d 1551, 1560-1562, 266 Cal. Rptr. 682]* . The *Newton* case is an anomaly, however, that is inconsistent with the great weight of state authority in California. As such, it is of questionable value as precedent and should be viewed cautiously, if not disregarded entirely.

The social worker is also entitled to absolute immunity from claims of constitutional rights violations under *42 U.S.C. § 1983* that are brought in state courts [*Gensburg v. Miller (1994) 31 Cal. App. 4th 512, 520-522, 37 Cal. Rptr. 2d 97* ; *Alicia T. v. County of Los Angeles (1990) 222 Cal. App. 3d 869, 878-881, 271 Cal. Rptr. 513* ; *McMartin v. Children's Institute International (1989) 212 Cal. App. 3d 1393, 1404, 261 Cal. Rptr. 437* ; *Jenkins v. County of Orange (1989) 212 Cal. App. 3d 278, 286-288, 260 Cal. Rptr. 645* ; *see 42 U.S.C. § 1983*]. The county that employs the social worker is immune from these claims as well [*Gensburg v. Miller (1994) 31 Cal. App. 4th 512, 525, 37 Cal. Rptr. 2d 97* ; *Alicia T. v. County of Los Angeles (1990) 222 Cal. App. 3d 869, 883, 271 Cal. Rptr. 513* ; *Jenkins v. County of Orange (1989) 212 Cal. App. 3d 278, 284, 288, 260 Cal. Rptr. 645* ; *see also Ronald S. v. County of San Diego (1993) 16 Cal. App. 4th 887, 896-899, 20 Cal. Rptr. 2d 418* (social workers and county immune with regard to pre-adoption screening and processing)].

The absolute immunity that is usually extended to a social worker during the initial stages of a dependency case does not automatically extend to fully protect them during their later ongoing supervision of the case, however. Where a social worker fails during the ongoing handling of a dependency case to discharge a mandatory duty which is designed to prevent injury to a child and by that failure the child is injured, absolute immunity is not afforded the social worker or the county and liability may be found [*Scott v. County of Los Angeles (1994) 27 Cal. App. 4th 125, 139-144, 32 Cal. Rptr. 2d 643]* . Nor is a social worker entitled to quasi-judicial prosecutorial immunity when acting outside his or her

official capacity [*cf. Falls v. Superior Court (1996) 42 Cal. App. 4th 1031, 1044, 49 Cal. Rptr. 2d 908* ("when a quasi-judicial officer acts outside his official capacity he does not enjoy immunity," emphasis in original)].

Regardless of what stage the case is in, however, a social worker or other public employee who is authorized to initiate or conduct investigations of proceedings in this area of the law will not have civil immunity in state court proceedings for any act of perjury, fabrication of evidence, failure to disclose known exculpatory evidence, or obtaining testimony by duress, fraud or undue influence when any of these acts are committed with malice [*Gov. Code § 820.21(a)*]. Within this context, "malice" means that the conduct is intended to cause injury or that it is despicable conduct carried on with a willful and conscious disregard of the rights or safety of others [*Gov. Code § 820.21(b)*]. These provisions of law are now being litigated in courts throughout the state. How strictly or loosely the courts will interpret these provisions has yet to be fully determined. Thus, this is an area that should be looked to for future developments, and further illustrates the need to consult with an experienced civil litigator who is current on developments in this area in any case involving possible liability or immunity.

PRACTICE TIP:

Immunity in Federal Court Lawsuits. Lawsuits against social workers, county social services agencies, and other public employees are not always filed in state courts. Federal actions are also common [*see, e.g., Miller v. Gammie (9th Cir. 2003) 335 F.3d 889* ; *Wallis v. Spencer (9th Cir. 1999) 202 F.3d 1126* ; *Calabretta v. Floyd (9th Cir. 1999) 189 F.3d 808* ; *Coverdell v. Department of Soc. & Health Servs. (9th Cir. 1987) 834 F.2d 758* ; *Meyers v. Contra Costa County Dep't of Soc. Servs. (9th Cir. 1987) 812 F.2d 1154]* . The immunity afforded social workers and their agencies in the lower federal courts is in many ways similar to the immunity afforded social workers in California state court proceedings. But it is not identical. Indeed, qualified immunity rather than absolute immunity is often the norm for social workers and social services agencies in federal proceedings, rather than the exception. Immunity in the federal courts is beyond the scope of this text. Should a question arise concerning the immunity of social workers and agencies in proceedings brought in federal court, the practitioner is well advised to seek guidance from someone experienced in such proceedings and from references that deal with applicable federal law.

For a discussion of search warrants in child welfare investigations and the potential for civil liability in the federal courts if a home is entered by a law enforcement officer or social worker without a search warrant in the absence of consent or exigent circumstances, as set forth in the case of *Calabretta v. Floyd (9th Cir. 1999) 189 F.3d 808* , see *§ 328.42*.

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[Reserved]

§§ 328.112[Reserved]

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§ 328.120 Purpose and Time of Disposition Hearing

If the child is found to be a person described in *Welf. & Inst. Code § 300* (grounds for dependency), a disposition hearing must be held to hear evidence on the question of the proper disposition to be made of the child [*Welf. & Inst. Code § 358(a)*].

Absent exceptional circumstances, the disposition hearing must be held not later than 60 days from the date of initial removal for a child in out-of-home care [*Welf. & Inst. Code § 352(b)*]. For a child who has not been removed from the parent's care, the disposition hearing must be held not later than six months from the initial or detention hearing []*Welf. & Inst. Code § 352(b)*].

PRACTICE TIP:

Tactical Reasons for Requesting or Objecting to a Continuance. Except in cases in which the social services agency is recommending to deny reunification services, traditionally it has usually been in everyone's best interest, including the parents, to hold the disposition hearing in as timely a manner as possible. This required the social services agency to prove the jurisdictional allegations and the need for out of home care by the appropriate standards, rather than prolonged reliance on a detention order based on prima facie evidence, enabled reluctant parents to know what allegations were proven and what issues and services needed to be addressed, and moved the child's case forward toward a safe, stable, permanent home in a timely fashion, especially for a child who was under the age of 3 years at the time of initial removal, or was part of a sibling group with such a child.

Beginning January 1, 2009, however, there is a distinct tactical advantage for the parent of a child who was under the age of 3 years at the time of initial removal, or of a sibling group with such a child, to delay the disposition hearing as long as reasonably and ethically possible, thereby delaying the six-month

review hearing and the presumptive end of court ordered reunification services [*see Welf. & Inst. Code §§ 361.5(a), 366.21(a)*]. In doing so, parents' counsel should ensure the social services agency is providing the reunification services ordered at the detention hearing and that the parent is utilizing those services to the maximum degree possible and appropriate. This will ensure not just six months of reunification services, but significantly more. Counsel for the social services agency and usually children's counsel should be watchful for requests to set the disposition hearing beyond the 60-day time limit, and object. Courts should adhere fully to the requirements of *Welf. & Inst. Code §§ 352*, and *358(a)*, in considering all requests for a continuance of the disposition hearing.

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§ 328.121 Preparation and Contents of Social Study

[1] In General

Prior to every disposition hearing, the social worker must prepare a social study of the child, which must contain all matters relevant to disposition and a recommendation for disposition. If the social worker recommends removing the child from the home, the report must include a discussion of the reasonable efforts made to prevent or eliminate removal and a recommended plan for reuniting the child with the family, including a plan for visitation a plan for achieving legal permanence if reunification efforts fail, and a statement that each parent has been advised of the option to voluntarily relinquish the child if an adoption agency is willing to accept the relinquishment, and the parent's response. If the petitioner alleges that one of the grounds under *Welf. & Inst. Code § 361.5(b)* applies, the social study must state why under that section reunification services should not be provided [*Cal. Rules of Ct., Rule 5.690(a)*; *see In re John B. (1984) 159 Cal. App. 3d 268, 274, 205 Cal. Rptr. 321]* . Furthermore, if the social worker is recommending that the child be removed from the custody of the parent or guardian, the social worker must give primary consideration to recommending that the child be placed with a relative, provided that such placement will be in the child's best interests and will be conducive to reunification of the family [*Welf. & Inst. Code § 281.5*].

If the social worker is recommending that a voluntary legal guardianship be ordered pursuant to *Welf. & Inst. Code § 360(a)*, the social worker must include an assessment as required by that section [*Cal. Rules of Ct., Rule 5.690(a)*; *see* discussion in *§ 328.124[3]*].

The social worker must submit the social study and copies of it to the clerk at least 48 hours before the disposition hearing is set to begin. The clerk must make the copies available to the parties and attorneys. A continuance within statutory time limits must be granted on the request of a party who has not been furnished with a copy of the social study, as required [*Cal. Rules of Ct., Rule 5.690(a)*; *see Welf. & Inst. Code § 352*].

Each social study, or evaluation made by a social worker or child advocate appointed by the court, required to be received in evidence pursuant to *Welf. & Inst. Code § 358* shall include, but is not limited to, a factual discussion of each of the following subjects [*Welf. & Inst. Code § 358.1*; *Cal. Rules of Ct., Rule 5.690(a)*]:

- Whether the social services department has considered child protective services as defined in *Welf. & Inst. Code § 16500 et seq.* as a possible solution to the problems at hand, and has offered such services to qualified parents if appropriate under the circumstances.

- What plan, if any, for return of the child is recommended to the court by the social services department.

- What plan, if any, for achieving legal permanence for the child if reunification efforts fail is recommended to the court by the social services department.

- Whether the best interests of the child will be served by granting reasonable visitation rights with the child to his or her grandparents, in order to maintain and strengthen the child's family relationships [*see Welf. & Inst. Code § 361.2(h)*].

- Whether the child has siblings under the court's jurisdiction and, if so:

  - The nature of the relationships between the child and the siblings.

  - The appropriateness of developing or maintaining the sibling relationships pursuant to *Welf. & Inst. Code § 16002*.

  - If the siblings are not placed together, why the siblings are not placed together and either what efforts are being made to place them together or why such efforts are not appropriate.

  - The frequency and nature of sibling visitation if the siblings are not placed together.

  - The impact of the sibling relationships, if any, on the child's placement and permanency planning.

  - A factual discussion of indicators of the nature of the child's sibling relationships, including, but not limited to, whether the siblings were raised together, have shared significant common experiences or have existing close and strong bonds, whether either sibling expresses a desire to visit or live with his or her sibling, and whether ongoing contact is in the child's best emotional interest.

- If the parent or guardian is unwilling or unable to make educational decisions for his or her child, or if other circumstances exist that compromise the ability of the parent or guardian to make those decisions, a consideration of whether the right of the parent or guardian to make educational decisions for the child should be limited. If the recommendation of the social services agency is for the court to limit that right, whether there is a responsible adult available to make educational decisions for the child pursuant to *Welf. & Inst. Code § 361*.

- Whether the child appears to be a person who is eligible to be considered for further court action to free the child from parental custody and control.

- Whether the parent has been advised of the option of participating in adoption planning for the child and to voluntarily relinquish the child for adoption if an adoption agency is willing to accept the relinquishment.

- The appropriateness of any relative placement pursuant to *Welf. & Inst. Code § 361.3*; however, this consideration may not be cause for continuance of the dispositional hearing.

- Whether the caregiver desires, and is willing, to provide legal permanency for the child if reunification efforts fail.

If the child has been placed in foster care, the case plan recommended in the social study must include a summary of the health and education information or records of the child, including mental health information or records. The summary may be in the form of a "health and education passport" or in some other comparable format. It must include, but is not limited to, all of the information detailed in *Welf. & Inst. Code § 16010(a)*, unless some other provision of law imposes a more stringent information requirement, in which case the more stringent requirement shall apply [*Welf. & Inst. Code § 16010(a)*]. This information must also be included in any report or assessment prepared for the review and permanency planning hearings under *Welf. & Inst. Code §§ 366.21*, *366.22*, and *366.26* [*Welf. & Inst. Code § 16010(b)*].

If the social worker has interviewed a child who is the subject of an investigation as a person believed to be within *Welf. & Inst. Code § 300*, the social worker shall include the substance of the interview in any written report submitted at an adjudicatory hearing, or if no report is then received in evidence, the social worker shall include the substance of the interview in the social study required by *Welf. & Inst. Code § 358* [*see Welf. & Inst. Code §§ 328*, *328.5*; *see also Welf. & Inst. Code § 358.1*].

[2] Child Welfare Services Case Plan

Every case in which the social services agency is providing services to a child or family is to have a child welfare services case plan. This case plan has been found by the Legislature to be the "foundation and central unifying tool in child welfare services" [*Welf. & Inst. Code § 16501.1(a)(1)*]. Use of the plan is designed to ensure that the child receives necessary protection and appropriate case management. It is also to ensure that parents and other caretakers receive services as appropriate. The plan must document the preplacement assessment of the needs of the child and family for services, any preplacement preventive services provided, and the reasonable efforts made to prevent out-of-home placement [*Welf. & Inst. Code § 16501.1(b)*]. Formerly the case plan was to be completed within a maximum of 30 days from the date of the initial removal of the child or of the in-person response required by *Welf. & Inst. Code § 16501(f)*, if the child was not removed from his or her home, by the date of the disposition hearing, whichever occurred first. In order to afford social workers with time to actively engage families, including children, parents, relatives, and other interested persons, and to solicit and integrate input from them in the case plan, the time for the case plan to be completed is to be extended to a maximum of 60 days from the date of the initial removal of the child or of the in-person response required by *Welf. & Inst. Code § 16501(f)*, or the date of the disposition hearing, whichever occurs first [*Welf. & Inst. Code § 16501.1(d)*]. The case plan must be submitted to the juvenile court not later than 60 days from the date of initial removal even if the disposition hearing is continued beyond that date [*Cal. Rules of Ct., Rule 5.690(c)(1)*]. The plan must be updated in conjunction with each review hearing and each hearing pursuant to *Welf. & Inst. Code § 366.26*, but no less frequently than every six months. It must also be updated as the needs of the child and the family for services dictate [*Welf. & Inst. Code § 16501.1(d)*]. The case plan is to be comprehensive enough to meet the requirements of dependency proceedings and is to be included with the social study and review reports prepared by the social worker [*Welf. & Inst. Code § 16501.1(e)*, (f)(14)].

The child welfare services case plan is to be developed in the following manner [*Welf. & Inst. Code § 16501.1(f)*]:

- It must be based on an assessment of the circumstances requiring child welfare services intervention.

- It must identify specific goals and the appropriateness of the services planned to meet those goals.

- It must identify the original allegations of abuse or neglect, the reasons for declaring the child a dependent of the court, and any other precipitating incidents leading to intervention by child welfare services. If the child was removed from a custodial parent and a previously noncustodial parent requested but was denied placement, it should also include the reasons why, if any, the child was not placed with a previously noncustodial parent.

- It must include a description of the schedule of contacts for the social worker with the child and the family or other caretakers. The frequency of these contacts are to be in accordance with State Department of Social Services' regulations.

- If the child is in out-of-home placement, the frequency of contact between the child and the parents or guardians must be specified. The frequency of such contacts must reflect the overall case goals. Information regarding any court-ordered visitation between the child and the parent or guardian, as well as the terms and conditions needed to facilitate that visitation safely, must be provided to the child's caregiver as soon as possible after the court order is made.

- If the child is in out-of-home placement, the case plan must include provisions for the development and maintenance of sibling relationships as set forth in *Welf. & Inst. Code § 16002*. Information regarding any court-ordered visitation between the child and any siblings, as well as the terms and conditions needed to facilitate that visitation safely, must be provided to the child's caregiver as soon as possible after the court order is made. If dependent siblings have different social workers, those workers must communicate with each other and ensure the siblings are informed of significant life events that occur within their extended family.

- If the child is in a nonrelative, out-of-home placement that is either a substantial distance from the home of the parent or is out-of-state, the case plan must specify the reasons why such placement is in the child's best interest.

- If the goal is reunification and out-of-home services are used, the case plan must describe the services to be provided to assist in reunification.

- If reunification services are provided, the case plan must also describe the services to be provided concurrently to achieve legal permanence for the child if reunification efforts fail, and shall consider the importance of developing and maintaining sibling relationships pursuant to *Welf. & Inst. Code § 16002*.

- The parents and legal guardians are to participate in the development of the case plan whenever possible. The parents and legal guardians must have the opportunity to review the plan, sign it whenever possible, and must receive a copy of it. In any agreement for voluntary services or placement, the parents or legal guardians must review and sign the case plan. Parents and legal guardians must be advised that neither their signature on the plan nor their acceptance of services pursuant to the plan will constitute an admission of guilt or be used as evidence against them. They must also be advised, however, that their failure to cooperate, except for good cause, in the provision of such services may be used as evidence in dependency review hearings.

- The child is also to be involved in developing the case plan, as age and developmentally appropriate,

and to express a preference for foster or permanent placement. If the child is 12 years of age or older and in a permanent placement, the child shall also be given the opportunity to review, sign, and have a copy of the case plan.

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§ 328.122 Evidence and Standard of Proof

The court must receive in evidence and consider the social study of the child prepared by the social services agency and any study or evaluation made by a child advocate appointed by the court [*Welf. & Inst. Code § 358(b)*; *see Welf. & Inst. Code § 356.5* (purpose of child advocate)]. While the social worker must be present or available for cross-examination to allow the social study into evidence over objection at a jurisdiction hearing, at other hearings such as the disposition hearing the social study is admissible even in the absence of the preparer. No foundation must be laid for the receipt of the report. To this extent the social study is self-authenticating. To provide due process, however, there must be some vehicle for the objecting parent to get the worker who wrote the report into court for questioning should the parent desire to do so [*In re Corey A. (1991) 227 Cal. App. 3d 339, 347-348, 277 Cal. Rptr. 782]* .

Other relevant and material evidence may be offered by the petitioner, the child, or the parent or guardian, including, but not limited to, the willingness of the caregiver to provide legal permanency for the child if reunification efforts fail, and the court may receive other relevant and material evidence on its own motion [*Welf. & Inst. Code § 358(b)*]. In any judgment and order of disposition, the court must specifically state that the social study and the study or evaluation made by any child advocate appointed by the court have been read and considered by the court in arriving at its judgment and order of disposition. Any social study or report submitted to the court by the social worker must include the individual child's case plan developed under *Welf. & Inst. Code § 16501.1* [*Welf. & Inst. Code § 358(b)*]. If the child is being considered for placement in a foster home, the child has the right to make a brief statement to the court making the placement decision [*Fam. Code § 7952*; *Welf. & Inst. Code § 399*].

The trial court is required to hear evidence only if it is relevant to the issues at the proceeding, and the burden of proof as to the substance, purpose, and relevance of the evidence is on the party who offers it [*Evid. Code §§ 350, 500*]. Thus, if the trial court denies admission of the evidence, the offering party must have made an adequate offer of proof to preserve the issue on appeal [*In re Mark C. (1992) 7 Cal. App. 4th 433, 445, 8 Cal. Rptr. 2d 856]* .

The burden of proof at a disposition hearing is on the social services department. The standard of proof at the dispositional phase of dependency proceedings depends on the nature of the intended dispositional order. If the child is to remain in the custodial home, proof by a preponderance of the evidence is sufficient. However, if the child is to be removed from the physical custody of a parent or guardian under *Welf. & Inst. Code § 361(c)* (discussed in *§ 328.126*), clear and convincing evidence is required. This standard is required even if the child is to be placed with the other parent [*In re Katrina C. (1988) 201 Cal. App. 3d 540, 548-549, 247 Cal. Rptr. 784]* .

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§ 328.123 Alternative Judgments of Court

[1] In General

Following receipt and consideration of evidence concerning proper disposition, the court may do any of the following [*Cal. Rules of Ct., Rule 5.695*; *see Welf. & Inst. Code §§ 360(a), (b), (d), 390*]:

- Dismiss the petition with specific reasons stated in the minutes.

- Place the child under a program of informal supervision by the social services agency [*see Welf. & Inst. Code § 301*] and order that services be provided without declaring the child a dependent.

- Appoint a legal guardian if a guardianship is in the child's best interest, the parent has been advised of the right to reunification services and waived that right, and if all parties, including the child, agree to the guardianship. Normally, this is done without a declaration of dependency, but it may also be done in conjunction with a declaration of dependency [*Welf. & Inst. Code § 360(a)*]. The letters of guardianship issued by the court are not subject to the confidentiality protections set forth in *Welf. & Inst. Code § 827* [*Cal. Rules of Ct., Rule 5.695(b)(2)(E)*]. If the court appoints a guardian and declares dependency, a six-month review hearing must be set [*Cal. Rules of Ct., Rule 5.695(b)(3)*].

- Declare dependency, permit the child to remain at home, and order that services be provided.

- Declare dependency, permit the child to remain at home, limit the control to be exercised by the parent or guardian, and order services to be provided.

- Declare dependency, remove physical custody from the parent or guardian, and do any of the following:

  - Order custody to the noncustodial parent, terminate jurisdiction, and direct that Judicial Council Form Custody Order--Juvenile (JV-200) be prepared and filed [*see* discussion in *§ 328.129[5][a]*; for a sample form and commentary on its use, see *§ 328.361*].

  - Order custody to the noncustodial parent with services to one or both parents.

  - Make a general placement order and consider granting specific visitation rights to the child's grandparents.

For discussion of the clerk's service of the court's written findings and orders on specified parties, see *Ch. 327, Juvenile Courts: Jurisdiction and General Procedures, § 327.32*.

[2] Informal Supervision

In some cases the parties may resolve an in-home case at disposition by recommending an order for informal supervision pursuant to *Welf. & Inst. Code § 301(a)*. The court may also determine on its own or following a request by one of the parties that even though it has jurisdiction, the child is placed in the home, and the family is cooperative and able to work with the social services department in a program of informal services without court supervision that can be successfully completed within 6 to 12 months and which does not place the child at an unacceptable level of risk. In such cases the court may order informal services and supervision by the social services department instead of declaring the child a dependent [*Welf. & Inst. Code § 360(b)*; *see Welf. & Inst. Code § 301*]. An order at disposition for informal supervision is the exception, rather than the rule, and it is the rare case in which this will be appropriate. The court should not make such an order unless it finds the order is appropriate, sufficient to protect the child, and in the child's best interest. All parties, of course, have the right to be heard on this issue before the court makes such an order [*Allen M. v. Superior Court (1992) 6 Cal. App. 4th 1069, 1073-1075, 8 Cal. Rptr. 2d 259]* . The voluntary supervision program may call for the child to obtain care and treatment for the abuse of or addiction to controlled substances [*Welf. & Inst. Code § 301(b)*]. If the parent of the child that is the subject of the intended informal supervision agreement is a dependent of the juvenile, the informal supervision program shall not be undertaken until the minor parent has consulted with his or her dependency attorney [*Welf. & Inst. Code § 301(c)*].

PRACTICE TIP:

Watch for Appropriate Cases for Informal Supervision. Most cases appropriate for informal supervision will have been resolved that way prior to the filing of a dependency petition. Sometimes, however, it takes coming into court to really get a parent's attention and cause the parent to be willing and able to utilize voluntary services while keeping the child safe. All parties, but especially parents' counsel, should be alert for such cases and raise the possibility of an order for informal supervision, if appropriate.

If informal supervision is court ordered pursuant to *Welf. & Inst. Code § 360(b)*, the court "has no authority to take any further role in overseeing the services or the family unless the matter is brought back before the court" through a petition filed by the social worker pursuant to *Welf. & Inst. Code § 360(c)* [California Ctr. for Jud. Educ. and Research, Cal. Judges Benchguides, Benchguide 102: Juvenile Dependency Disposition Hearing (Jan. 2009) § 102.37 (Decision Process--Declaring Dependency), p. 102-39]. The court's lack of authority to take a further role in overseeing the services or the family is understandable, since if the court felt a need to supervise the matter it would have declared dependency.

If the court agrees to or orders a program of informal supervision, it does not dismiss the dependency petition or otherwise set it aside. The true finding of jurisdiction remains. It is only the dispositional alternative of declaring the child a dependent that is not made. This is because if the family is unwilling or unable to cooperate with the services being provided, the social worker may institute proceedings pursuant to *Welf. & Inst. Code § 332* (petition to commence proceedings), alleging that a previous petition has been sustained and that informal supervision was ineffective. After hearing the petition, the court may either dismiss it or order a new disposition hearing to be held [*Welf. & Inst. Code § 360(c)*].

[3] Voluntary Guardianship

If a jurisdiction finding has been made that the child falls within the jurisdiction of the juvenile court pursuant to *Welf. & Inst. Code § 300* and the parent has advised the court that the parent is not interested in family maintenance or family reunification services and instead agrees to a guardianship, the court may order a legal guardianship in addition to or in lieu of a declaration of dependency [*Welf. & Inst. Code § 360(a)*]. The court shall not order such a guardianship at a disposition hearing without having first received an assessment which must include the following [*Welf. & Inst. Code § 360(a)(1)-(6)*; *see also Welf. & Inst. Code §§ 361.5(g), 16010(b)*]:

- Current search efforts for a noncustodial parent and notification of that parent as provided in *Welf. & Inst. Code § 291*.

- A review of the nature and amount of contact between the child and the parents since the filing of the dependency petition.

- An evaluation of the child's medical, developmental, scholastic, mental, and emotional status, including a copy of the child's current health and education summary.

- A preliminary assessment of the commitment and eligibility of the prospective guardian, including a social history, a screening for any criminal records and prior referrals for child abuse or neglect, and addressing the capability of the prospective guardian to meet the child's needs, and the understanding of the prospective guardian of the legal and financial rights and responsibilities of a guardian.

- The relationship of the child to the prospective guardian, including the nature and duration of that relationship, the motivation for seeking a guardianship, and a statement from the child regarding the proposed guardianship, unless the child's age or physical, emotional or other condition prevents a meaningful response in which case the assessment shall include a description of such condition.

- An analysis of the likelihood that the child would be adopted if parental rights were terminated.

One court has held the juvenile court is not restricted in appointing voluntary guardians by the requirements of *Welf. & Inst. Code § 361.4* regarding criminal records exemptions [*In re Summer H. (2006) 139 Cal. App. 4th 1315, 1321, 1334, 43 Cal. Rptr. 3d 682]* . The reasoning of this decision is highly questionable, however. A voluntary guardianship under *Welf. & Inst. Code § 360* is not, at its core, triggered by the parent's consent. It is triggered by the jurisdictional finding and the evidence submitted for the disposition hearing, which may include evidence that reunification services should not be provided, or the proposed concurrent services plan for a prospective adoptive placement. To compare such a situation with a voluntary guardianship under the Probate Code misses the point. Both voluntary guardianships under *Welf. & Inst. Code § 360* and dependency guardianships under *Welf. & Inst. Code § 366.26* are only done after a true finding of dependency jurisdiction. Both involve the court's mandate to ensure not only the child's best interest, but also the child's safety. *Welf. & Inst. Code § 361.4* was enacted to ensure the safety of children who come under the juvenile court's jurisdiction and who are not being placed with their parent. Thus, to suggest the juvenile court is not bound by *Welf. & Inst. Code § 361.4* in making a disposition order for a voluntary guardianship is to place the child at

potential risk. Nevertheless, while it is hoped that most appellate courts will choose not to follow the *Summer H.* decision, even that opinion noted that if the proposed guardian has a prior criminal record, it is likely the guardianship is not in the child's best interests, and the recommendation of the social services agency in that regard is entitled to significant weight [*In re Summer H. (2006) 139 Cal. App. 4th 1315, 1334, 43 Cal. Rptr. 3d 682]* . Thus, even where the *Summer H.* decision is followed, it will be the rare case in which a guardianship at disposition should be ordered for a guardian who does not qualify under *Welf. & Inst. Code § 361.4*.

Before granting the guardianship the court must state on the record that it has read and considered the assessment. It must also advise the parents and the child that no reunification services will be provided if a guardianship is established. If the parties waive the right to such services, agree to the guardianship, and the court determines that legal guardianship with the proposed guardian is in the child's best interest, it may issue letters of guardianship [*Welf. & Inst. Code § 360(a)*].

PRACTICE TIP:

Voluntary Guardianship as the Exception and Not the Rule. Voluntary guardianships pursuant to *Welf. & Inst. Code § 360(a)* may at first glance be very appealing. Such proposals must, however, be closely scrutinized. A voluntary guardianship does not result in family maintenance or reunification services to the family; hence, it denies the child the possibility that he or she might stay or return home through the provision of such services. Further, a voluntary guardianship may bypass the finding the child must be removed from the custody of the parent [*Welf. & Inst. Code § 361(c)*], thereby requiring that issue to be litigated if the voluntary guardianship is subsequently terminated at a time when evidence regarding the parent may not be immediately known. A voluntary guardianship does bypass the holding of a *Welf. & Inst. Code § 366.26* hearing, which would normally occur if reunification efforts were attempted and failed, thereby eliminating the possibility at that time of adoption. As such, any proposal for a voluntary guardianship should be reviewed carefully to determine whether it truly is in the best interests of the child.

[4] Relinquishment

The social worker is to advise the parent of the option of voluntarily relinquishing the child for adoption if an adoption agency is willing to accept the relinquishment. Whether the social worker has done this is to be included in the social study [*Welf. & Inst. Code § 358.1(f)*]. When a parent relinquishes a child who is the subject of a petition for dependency jurisdiction, the agency accepting the relinquishment must give written notice of the relinquishment within five court days to the juvenile court hearing the child's case, the child's attorney, if any, and the attorney for the relinquishing parent [*Fam. Code § 8700(h)*]. The adoption agency has full care, custody and control of a relinquished child [*Fam. Code § 8704(a)*]. Hence, if the child is freed by relinquishment prior to the declaration of dependency, the court may exercise its discretion to simply dismiss the dependency matter [*Cal. Rules of Ct., Rule 5.695(a)(1)*]. In such cases, the agency can bring the matter back under a new petition should adoption not be realized within 12 months [*Welf. & Inst. Code § 300(h)*]. Where appropriate, the court may declare the child a dependent child [*Welf. & Inst. Code § 360(d)*]. A parent may relinquish the child pursuant to *Fam. Code § 8700* even after a declaration of dependency [*Welf. & Inst. Code § 361(b)*]. This does not mean, however, that the parent can do a designated relinquishment to the adoption agency without the juvenile court's permission. A designated relinquishment allows the parent to designate who would adopt the child. Allowing that would be inconsistent with previous findings and orders removing the child from the parent and the court's overall supervision of the care, custody, and control of the child [*cf. Taylor M. (2003) 106 Cal. App. 4th 97, 107-109, 130 Cal. Rptr. 2d 502* ; *Teresa J. v. Superior Court (2002) 102 Cal. App. 4th 366, 368, 370, 125 Cal. Rptr. 2d 506]* . As such, *Welf. & Inst. Code § 361(b)* should be construed within the context of the overall statutory scheme to mean only that a parent can unconditionally relinquish the child to the adoption agency if the agency is willing to accept the relinquishment. If the child is already a dependent at the time of the relinquishment, the normal practice is to maintain the dependency until the child is adopted.

The ability of a parent to relinquish a child for an independent or private adoption following the filing of a dependency petition is not the same as the ability of a parent to relinquish the child for an agency adoption. Once a dependency petition is filed, the parent must seek the juvenile court's authorization before the parent can relinquish the child to a private or independent adoption agency [*Taylor M. (2003) 106 Cal. App. 4th 97, 107-109, 130 Cal. Rptr. 2d 502* ; *Teresa J. v. Superior Court (2002) 102 Cal. App. 4th 366, 368, 370, 125 Cal. Rptr. 2d 506]* .

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
G. Disposition Hearing

28-328 California Forms of Pleading and Practice--Annotated § 328.124

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§ 328.124 Orders After Declaration of Dependency

[1] In General

The court may make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child, including medical treatment, subject to the further order of the court [*Welf. & Inst. Code § 362(a)*]. The court may also direct any and all reasonable orders to the parents or guardians of the child as necessary to carry out the purposes of *Welf. & Inst. Code § 362* [*Welf. & Inst. Code § 362(c)*]. Reasonable orders may also be made directing the parents or guardians of the child to ensure the child's regular school attendance and to make reasonable efforts to obtain the educational services necessary for any specific needs of the child [*Welf. & Inst. Code § 362(d)*].

In all cases in which a child is not placed with a parent, full consideration must be given to placing the child in proximity to the natural parents so as to facilitate visitation and family reunification [*In re Luke L. (1996) 44 Cal. App. 4th 670, 677-680, 52 Cal. Rptr. 2d 53* ; *Fam. Code § 7950(a)*]. When a placement in out-of-home care is being made, it must be made, if possible, in the home of a relative, unless the placement would not be in the child's best interest. The social services agency and the juvenile court must make diligent efforts to locate an appropriate relative. Further, before any child is placed in long-term foster care, each relative whose name has been submitted to the social services agency as a possible caretaker for the child must be evaluated as an appropriate placement resource [*Fam. Code § 7950(a)(1)*].

[2] Orders Relating to Service Providers--Joinder

For the purpose of facilitating coordination and cooperation among government agencies, private service providers, or both, the court may join in the dependency proceedings any agency or private service provider it determines has failed to meet a legal obligation to provide services to the child. Such action may only be done after giving notice to the agency or private service provider and an opportunity to be heard [*Welf. & Inst. Code § 362(a)*]. The court can only join the agency or private service provider in the dependency proceedings if the agency or private service provider is found

to have failed to meet a legal obligation to provide services to the child. The belief the agency or private service provider may at some time in the future fail to meet such a legal obligation is not grounds to join it in the dependency proceedings [*Southard v. Superior Court (2000) 82 Cal. App. 4th 729, 98 Cal. Rptr. 2d 733* ; *Welf. & Inst. Code § 362(a)*].

The court may only order a government agency or private service provider to provide services if it has determined through the administrative process of the agency, which has been joined as a party in the juvenile proceeding, that the child is eligible for the services. The court must not impose duties on the agency or private service provider beyond those mandated by law [*Welf. & Inst. Code § 362(a)*].

"Private service provider" means any agency or individual that receives federal, state, or local government funding or reimbursement for the provision of services directly to foster children [*Welf. & Inst. Code § 362(e)*].

[3] Placement Issues Relating to Race, Color, or National Origin

No social services agency or other entity which receives any state assistance and is involved in foster care placements may do either of the following [*Fam. Code § 7950(a)(2)*]:

- Deny to any person the opportunity to become a foster parent, on the basis of the race, color, or national origin of the foster parent or the child involved [*Fam. Code § 7950(a)(2)(A)*].

- Delay or deny the placement of a child in foster care on the basis of the race, color, or national origin of the foster parent or the child involved [*Fam. Code § 7950(a)(2)(B)*].

However, these provisions of law should not be construed to affect the application of the Indian Child Welfare Act [*Fam. Code § 7950(b)*].

For discussion of sibling placement issues, see *§ 328.129[6]*.

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
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28-328 California Forms of Pleading and Practice--Annotated § 328.125

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§ 328.125 Indian Children

[1] In General

Many Americans, adult and children, have some Native American ancestry. But only a very small percentage of them are members of federally recognized Indian tribes or eligible for membership in such tribes. The Indian Child Welfare Act (ICWA) does not apply to the many children involved in juvenile dependency proceedings who merely have some vague, distant, or possible Indian heritage. Instead, it only applies to children who are Indian children as defined by federal statute in the ICWA [*25 U.S.C. § 1901 et seq.*]. For purposes of the ICWA, an Indian child is defined as an unmarried person under the age of 18 who is either a member of a federally recognized Indian tribe or is the biological child of a member of a federally recognized Indian tribe and is eligible for membership in that tribe [*25 U.S.C. § 1903(4)*]. If the case is an ICWA case, there are numerous additional requirements including special placement preferences and statutorily required findings under the ICWA [*25 U.S.C. § 1901 et seq.*].

The ICWA does allow states to impose higher standards for the handling of cases involving Indian children [*25 U.S.C. § 1921*]. When a state imposes higher standards for the protection of the interests of a parent or Indian custodian of an Indian child, the higher standard or greater protection does not become part of the federal ICWA. Instead, it is strictly state law and is reviewed under state standards, including the standard for harmless error [*In re S.B. (2005) 130 Cal. App. 4th 1148, 1158, 1162, 30 Cal. Rptr. 3d 726]* . California has imposed a number of such higher standards through its rules of court, statutes, and appellate decisions. California has not always been clear, however, in noting which state requirements parallel federal requirements, and which are additional state requirements [*see, e.g.,* *In re Edward H. (2002) 100 Cal. App. 4th 1, 4-6, 122 Cal. Rptr. 2d 242]* . As a result, practitioners and courts have often been confused and have lumped all the requirements under the blanket term of "ICWA." They should not have done so. With the many new California statutory provisions regarding Indian children and possible Indian children that take effect in 2007, it is now especially important to review prior California appellate decisions, current California rules, and federal statutes to

determine if a particular provision is a federal mandate that is also set forth in state law, or only a state provision.

The mandatory federal provisions regarding the ICWA are set forth in federal statutes and regulations [*25 U.S.C. § 1901 et seq.*; *25 C.F.R. § 23.1 et seq.*]. Additional federal guidelines are set forth in the "Guidelines for State Courts" [*Guidelines for State Courts (Nov. 26, 1979) 44 Fed. Reg. 67584]* . By their own terms, these guidelines are "not intended to have binding legislative effect" [*Guidelines for State Courts (Nov. 26, 1979) 44 Fed. Reg. 67584]* . They are not, therefore, federal ICWA requirements. Instead, the guidelines are most appropriately viewed as federal "best practice" [*see In re N.A.H. (S.D. 1988) 418 N.W.2d 310, 311]* . Where the guidelines go beyond the statutory language yet are incorporated into state law, making them mandatory, the state provisions are actually higher state standards of protection and not part of the ICWA [*25 U.S.C. § 1921*; *In re S.B. (2005) 130 Cal. App. 4th 1148, 1158, 30 Cal. Rptr. 3d 726]* .

The purpose of the ICWA is twofold: (1) to protect the best interests of Indian children, and (2) to promote stable and secure Indian tribal entities [*In re Crystal K. (1990) 226 Cal. App. 3d 655, 661, 276 Cal. Rptr. 619 , citing In re Appeal in Pima County Juvenile Action (1981) 130 Ariz. 202, 635 P.2d 187, 188* ; *see 25 U.S.C. § 1902*]. In this regard, ICWA is not only concerned with the interests of Indian children and their families, but also with the interests of the Indian tribe itself. Thus, under ICWA the tribe has rights independent of the rights of the Indian parent and the Indian child [*In re Kahlen W. (1991) 233 Cal. App. 3d 1414, 1425, 285 Cal. Rptr. 507 , citing Mississippi Band of Choctaw Indians v. Holyfield (1989) 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29]* . Both federal and California law recognize the interests of Indian tribes, families, and children [*25 U.S.C. §§ 1901, 1902*; *Welf. & Inst. Code § 224*].

The ICWA is only applicable when the "Indian tribe" is recognized by the United States government [*In re Wanomi P. (1989) 216 Cal. App. 3d 156, 166-167, 264 Cal. Rptr. 623* (ICWA did not apply to Mic Mac tribe of Maine, U.S.A., and Nova Scotia, Canada, since that tribe was not a federally recognized tribe)]. For purposes of the ICWA an "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized by the Secretary of the Interior, including any Alaska Native village as defined in *43 U.S.C. § 1602(c)* [*25 U.S.C. § 1903(8)*].

The ICWA expressly excludes from its definition of a parent an "unwed father where paternity has not been acknowledged or established" [*25 U.S.C. § 1903(9)*]. If the possible Indian heritage is through an alleged father who has neither acknowledged or established his paternity, such an alleged father lacks standing to challenge a lack of notice under the ICWA on appeal [*In re Daniel M. (2003) 110 Cal. App. 4th 703, 707-708, 1 Cal. Rptr. 3d 897]* . In *Daniel M.* the alleged father did not acknowledge his paternity; although he had initially asked for paternity testing, he did not show up for that testing, withdrew his request for testing, and only belatedly requested testing again shortly before the hearing under *Welf. & Inst. Code § 366.26* [*In re Daniel M. (2003) 110 Cal. App. 4th 703, 706-707, 1 Cal. Rptr. 3d 897]* . However, an unwed father who has yet to establish his paternity in court may still invoke the application of the ICWA by openly acknowledging his paternity. Thus, *Daniel M.* should not be taken too far or read to automatically exclude the possible application of the ICWA when the Indian heritage is through an alleged father, especially if that alleged father acknowledges paternity.

The Indian tribe has exclusive authority to determine whether a child is or is not a member of or eligible for membership in the tribe [*Santa Clara Pueblo v. Martinez (1978) 436 U.S. 49, 55-56, 72, n.32, 98 S. Ct. 1670, 56 L. Ed. 2d 106]* . The trial court, however, must make a determination as to whether the child is an Indian child within the meaning of the ICWA [*Matter of Appeal in Maricopa County (1983) 136 Ariz. 528, 532, 667 P.2d 228, 232* ; *Matter of K.A.B.E. (S.D. 1982) 325 N.W.2d 840, 842-843]* . This is an important responsibility in cases in which the evidence is not clear, as is sometimes the case, whether the child is a member of or eligible for membership in a tribe, or whether the child's biological parent is a member of the tribe.

PRACTICE TIP:

ICWA as Federal Law. There are many published California appellate decisions dealing with ICWA in a dependency or other child custody context in addition to those cited here. It should be remembered,

however, that ICWA is a federal law that has been interpreted by many courts throughout the county. A practitioner with an ICWA case should look for and consider the decisions of courts of other states and federal courts in addition to his or her legal research of the United States Code and California cases.

For further discussion of the ICWA, see Hollinger, Adoption Law and Practice, Ch. 15 (Matthew Bender); Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2d ed., Ch. 176 (Matthew Bender).

[2] Required Notice to Tribe and BIA

[a] Federal Law Regarding Notice

A key requirement in child custody cases involving Indian children is actual notice to the federally recognized tribe of the pending action and of its rights under the ICWA, including the right to intervene [*25 U.S.C. § 1912(a)*; *In re Kahlen W. (1991) 233 Cal. App. 3d 1414, 1421, 285 Cal. Rptr. 507]* . Where the social services agency and the court have reason to know the child is an Indian child within the meaning of the ICWA but a specific tribe cannot be identified, the ICWA requires notice to the Secretary of the Interior, Bureau of Indian Affairs (BIA), not to all possible tribes [*25 U.S.C. § 1912(a)*; *In re Edward H. (2002) 100 Cal. App. 4th 1, 5-6, 122 Cal. Rptr. 2d 242* ; *In re Levi U. (2000) 78 Cal. App. 4th 191, 198-199, 92 Cal. Rptr. 2d 648]* . Moreover, notice is required regardless of how late in the proceedings the social services agency and the juvenile court discover reason to know the child is an Indian child as defined by the ICWA. Failure to provide such notice is error that may result in any action taken being invalidated [*25 U.S.C. § 1914*; *In re Kahlen W. (1991) 233 Cal. App. 3d 1414, 1421-1426, 285 Cal. Rptr. 507]* . But substantial compliance coupled with timely, actual notice is usually sufficient [*In the Interest of J.J.G. (Kan. Ct. App. 2004) 83 P.3d 1264, 1267* ; *In the Interest of D.M. (S.D. 2004) 685 N.W.2d 768, 771]* .

Notice under the ICWA is not required merely because the child has some Indian heritage. The clear language of the statute only requires notice under the ICWA if the court "knows or has reason to know that an Indian child is involved" [*25 U.S.C. § 1912(a)*]. A child is an Indian child within the meaning of the ICWA if the child is a member of a recognized tribe or is both eligible for membership and the child of a member of the tribe [*25 U.S.C. § 1903(4)*]. This does not mean there must be proof of enrollment. The lack of enrollment is not determinative, since not all tribes use enrollment as the indicator of membership [*In re Desiree F. (2000) 83 Cal. App. 4th 460, 470-471, 99 Cal. Rptr. 688]* . Further, membership in a tribe need not be certain to require notice. Indeed, when in doubt courts should err on the side of caution and require ICWA notice. But they should not do so based on a mere hint of Indian ancestry. Instead, there must be some evidence to give the court or social services agency reason to know the child is an Indian child as defined by the ICWA [*In re Arianna R.G (Wis. 2003) 657 N.W.2d 363, 370-371* ; *In re A.L. (N.D. 2001) 623 N.W.2d 418, 420-422]* .

The federal guidelines, which are entitled to great weight and help to define best practice in this area, provide further assistance. The guidelines utilize the phrase "reason to believe" rather than "reason to know," but even the guidelines require some substantive information to give the court or social services agency reason to believe or know the child is an Indian child [*25 U.S.C. § 1912(a)*; *Guidelines for State Courts (Nov. 26, 1979) 44 Fed. Reg. 67584* , § B.1; *see also In re Arianna R.G (Wis. 2003) 657 N.W.2d 363, 370, fn. 18*]. The guidelines recommend the court make inquiries to determine if the child "is a member of an Indian tribe or if a parent of the child is a member of an Indian tribe and the child is eligible for membership in an Indian tribe" [*Guidelines for State Courts (Nov. 26, 1979) 44 Fed. Reg. 67584* , § B.5(a), and Commentary]. This inquiry is consistent with the statutory language regarding the definition of an Indian child [*25 U.S.C. § 1903(4)*]. Additionally, the guidelines provide a "list of several circumstances which shall trigger an inquiry by the court and petitioners to determine whether a child is an Indian for purposes of this Act" [*Guidelines for State Courts (Nov. 26, 1979) 44 Fed. Reg. 67584* , § B.1, Commentary; *In Interest of H.D. (Kan. Ct. App. 1986) 729 P.2d 1234, 1236]* . Those circumstances include when the court is informed the child is an Indian child, the social services agency discovers information suggesting the child is an Indian child, the child gives the court reason to believe he or she is an Indian child, the residence or domicile of the child, the biological parents, or the Indian custodian is

known by the court to be or shown to be a predominantly Indian community, or an officer of the court involved in the proceedings has knowledge the child may be an Indian child [*Guidelines for State Courts (Nov. 26, 1979) 44 Fed. Reg. 67584* , § B.1(c)]. Both the guideline and its commentary must be read together to fully understand these circumstances trigger a duty of inquiry, not notice, something not all courts have understood [*see, e.g.,* *Dwayne P. v. Superior Court (2002) 103 Cal. App. 4th 247, 258, 126 Cal. Rptr. 2d 639]* . If those inquiries lead the court or the social services agency to know or have reason to know the child is an Indian child, notice is required [*25 U.S.C. § 1912(a)*].

While some may say a duty should be implied, the ICWA does not expressly impose an affirmative duty for the court to inquire about possible Indian heritage in all cases. Instead, the duty is on the party seeking to have the ICWA apply to show Indian heritage [*In re C.N. (Ill. 2001) 752 N.E.2d 1030, 1044-1045* ; *In the Interest of M.N.W. (Iowa Ct. App. 1998) 577 N.W.2d 874, 876 , citing In re A.G.-G (Colo. App. 1995) 899 P.2d 319, 321* ; *In re A.M. (Neb. 1990) 455 N.W.2d 572, 573* .]. The federal guidelines do, however, list circumstances when the court should conduct an inquiry due to information indicating the child is an Indian child [*Guidelines for State Courts (Nov. 26, 1979) 44 Fed. Reg. 67584* , § B.1, Commentary]. Further, the federal guidelines recommend that state courts "routinely inquire of participants in child custody proceedings whether the child is an Indian" [*Guidelines for State Courts (Nov. 26, 1979) 44 Fed. Reg. 67584* , § B.5, Commentary]. This is federal best practice and strongly recommended, but not a federal mandate. States, however, may impose a higher standard than the ICWA and require inquiry in all cases about possible Native American heritage [*In re Elliott (Mich. Ct. App. 1996) 554 N.W.2d 32, 37-38]* .

The ICWA does not apply to detention hearings, even regarding a child the social services agency and court know or have reason to know is an Indian child. To so require would result in an absurdity, since the need for a detention hearing is based on the need for emergency removal, while ICWA provisions, particularly ICWA notice provisions, obviously require significant additional time [*25 U.S.C. § 1922*; *In re S.B. (2005) 130 Cal. App. 4th 1148, 1162-1163, 30 Cal. Rptr. 3d 726* ; *In re J.A.S. (Minn. Ct. App. 1992) 488 N.W.2d 332, 334-335]* . Nevertheless, where reasonably possible it is "best practice" to contact an Indian child's tribe or tribal social worker for possible placement and services resources even before formal notice is required or given.

The ICWA does not expressly mandate providing the juvenile court with copies of the notices sent, mailing receipts, or responses [*In re Elizabeth W. (2004) 120 Cal. App. 4th 900, 906, 16 Cal. Rptr. 3d 514* ; *In re L.B. (2003) 110 Cal. App. 4th 1420, 1425, n.3, 3 Cal. Rptr. 3d 16]* . Nevertheless, when notice is required the federal guidelines support the best practice of having copies of the actual forms sent to the tribes or BIA, together with any return receipt or other proof of service, filed with the court [*Guidelines for State Courts (Nov. 26, 1979) 44 Fed. Reg. 67584* , § B.5(d)]. Best practice also includes filing any documents received in response to those notices with the juvenile court. This ensures the juvenile court has the evidence necessary to make a determination as to whether the ICWA applies and that the appellate court has an adequate record on which to review that decision.

The ICWA does not create jurisdiction in a court that does not otherwise have it [*Slone v. Inyo County Juvenile Court (1991) 230 Cal. App. 3d 263, 267, 282 Cal. Rptr. 126]* . Further, it does not supplant normal state rules of appellate procedure. Hence, if an ICWA issue is not raised at the trial court level, normal rules of forfeiture apply and the issue cannot be raised for the first time on appeal [*In the Interest of J.D.B. (Iowa 1998) 584 N.W.2d 577, 581* ; *Adoption of T.N.F. (Alaska 1989) 781 P.2d 973, 978-980]* . Nevertheless, when the issue raised is notice under the ICWA, courts are less inclined to apply the principles of waiver or forfeiture [*In re Enrique P. (Neb. Ct. App. 2006) 709 N.W.2d 676, 686]* .

[b] California Law Regarding Notice

The ICWA provides that states can impose higher standards [*25 U.S.C. § 1921*]. Before 2007 California's appellate courts regularly went beyond the clear language of *25 U.S.C. 1912(a)* to require notice under the ICWA in almost any case in which there was possible Indian heritage [*see, e.g.,* *In re Nikki R. (2003) 106 Cal. App. 4th 844, 848, 131 Cal. Rptr. 2d 256* (court needs only a suggestion of Indian ancestry to trigger notice requirements); *In re Marinna J. (2001)*

90 Cal. App. 4th 731, 735-739, 109 Cal. Rptr. 2d 267 (requiring notice based on possible Cherokee heritage); *In re Desiree F. (2000) 83 Cal. App. 4th 460, 469-470, 99 Cal. Rptr. 688* (erroneously placing blame for the child not being enrolled as a member of the tribe on the social services agency's lack of notice, rather than on the family)]. One case went so far as to hold a mere hint of Indian ancestry was enough to trigger the requirement for ICWA notice [*Dwayne P. v. Superior Court (2002) 103 Cal. App. 4th 247, 258, 126 Cal. Rptr. 2d 639]* . These and other similar cases were supported by the rule of court that required notice to at least the Bureau of Indian Affairs (BIA) if the box on the dependency petition is checked saying the child "may be of Indian ancestry" [Cal. Rules of Ct., former Rule 5.664(e)]. Nevertheless, not all California courts required notice based on a mere hint of Indian ancestry [*In re Aaron R. (2005) 130 Cal. App. 4th 697, 707-708, 29 Cal. Rptr. 3d 921* ; *In re O. K. (2003) 106 Cal. App. 4th 152, 155-158, 130 Cal. Rptr. 2d 276]* .

Most practitioners and trial courts believed the cases requiring notice based on a mere hint of Indian ancestry went far beyond the ICWA notice requirements, which only require notice when the court knows or has reason to know the child may be an Indian child as defined by the ICWA [*25 U.S.C. §§ 1903(4), 1912(a)*]. The ICWA was intended to apply only to Indian children as defined by the ICWA, not to all children who have Indian heritage. Even the guideline for inquiry set forth in the "Guidelines for State Courts" listed "the most common circumstances giving rise to a reasonable belief that a child may be an Indian" [*Guidelines for State Courts (Nov. 26, 1979) 44 Fed. Reg. 67584* , § B.1 Commentary]. A requirement for notice based on the mere hint of Indian heritage is not notice based on a reasonable belief the child is or even may be an Indian child. Further, though some courts have suggested otherwise, notice is an onerous requirement [*Dwayne P. v. Superior Court (2002) 103 Cal. App. 4th 247, 254, 126 Cal. Rptr. 2d 639]* . It takes more than a simple preprinted form to satisfy the notice requirements in the opinions of some appellate courts [*see In re C.D. (2003) 110 Cal. App. 4th 214, 225-226, 1 Cal. Rptr. 3d 578]* . Further, perfection is rarely possible to achieve, yet appellate decisions routinely applied almost a "strict liability" standard for clerical and other errors in completing the notice forms. Further, personnel costs go up and are compounded by expenses for certified mail and registered mail. Finally, the cost in terms of delays to children are significant, especially when cases are reversed by appellate courts, directly contrary to the goals of the dependency system to move cases expeditiously and for finality of decisions. Mandating notice based on a mere hint of Indian ancestry, even if a name of a possible tribe is attached to that hint, was costly--in many ways. Nevertheless, some believed the cost to the entire system was worth it if only one additional Indian child was discovered by the California notice requirements found in appellate decisions. Experience indicates that may be all there was since statewide the many appellate reversals on ICWA notice issues have failed to result in more than a few, if any, additional Indian children being identified.

California's history regarding Native Americans does complicate the process of tracing a person's possible Indian ancestry. Much was done to either eliminate California's Native American population through death and destruction, or to force their assimilation into the white culture [*see, e.g.*, Norton, Genocide in Northwestern California: When Our Worlds Cried (Indian Historian Press, 1997); Adams, Education for Extinction: American Indians and the Boarding School Experience 1875-1928 (Univ. Press Kan., 1997)]; Heizer, The Destruction of California Indians (Univ. of Neb. Press, 1993); Rawls, Indians of California: The Changing Image (Univ. of Okla. Press, 1986); Garner, The Broken Ring: The Destruction of the California Indians (Westernlore Press, 1982); Carranco & Beard, Genocide and Vendetta: The Round Valley Wars in Northern California (Univ. of Okla. Press, 1981)]. Efforts in California geared to force Indian assimilation into white culture were not limited to California's Native American population. Indian children from other states were also forced by the federal government to attend boarding school in California, at which Native American languages could not be spoken and Indian culture was suppressed. Further, as late as the second half of the twentieth century, the BIA's Urban Indian Relocation Program was relocating Native Americans from reservations to cities, including relocating Indians from reservations in other states to California cities, including the greater Los Angeles and San Francisco areas. Thus, California's Native American population includes individuals from a great number of tribes, not just those originally found in what is now California. Many of these individuals do not know the details of their own ancestry, only their family legend from comments of relatives. To some, this justifies additional efforts in California to seek out the Indian ancestry of any who express a hint of Native American heritage. To others, it is a sad and shameful commentary on our history, but does not justify creating California mandates beyond those of the

ICWA.

Regardless of one's views, beginning in 2007 California's notice requirements in this area have changed dramatically, rendering most California appellate decisions on the issue subject to reexamination. The California legislature is presumed to know of existing case law and judicially created rules. When it enacts new statutes on the same subject, does not incorporate the same language, and the plain language of the new statutes provides more limited and contrary requirements, a change is indicated. That is what has happened in the area of California's additional notice requirements. Seeking to incorporate much of the ICWA into California law, the plain language of California's statutory requirements as to notice have now moved far closer to those of the ICWA.

One appellate court stated it clearly when it wrote "both the federal regulations and the California Welfare and Institutions Code require more than a bare suggestion that a child might be an Indian child" [*In re Jeremiah G. (2009) 172 Cal. App. 4th 1514, 1520, 92 Cal. Rptr. 3d 203]* . They do. As with the ICWA, California's statutes and rules now only require notice when the court or social services agency knows or has reason to know the child is an Indian child [*Welf. & Inst. Code §§ 224.3(d), 290.1(f), 290.2(e), 291(g), 292(f), 293(g), 294(i), 295(g), 297(d)*; *In re Shane G. (2008) 166 Cal. App. 4th 1532, 1538-1539, 83 Cal. Rptr. 3d 513* (despite information the "great-great-great-grandmother was a Comanche princess," a thorough inquiry was done and ICWA notice was not required because there was no reason to know the child was an Indian child)]. The rule of court now echoes that change [*Cal. Rules of Ct., Rule 5.481(b)(1)*]. The California legislature could have written a statute requiring notice based on a mere hint of Indian ancestry. It did not. Instead, like the federal guidelines, California provides a list of circumstances that "may" provide reason to know a child is an Indian child, and thereafter incorporates the federal guidelines' suggested best practice of those circumstances requiring "further inquiry regarding the possible Indian status of the child" and that such further inquiry be done "as soon as practicable" [*Welf. & Inst. Code § 224.3(b)-(c)*].

The circumstances that "may" provide reason to know the child is an Indian set forth in the statute include, but are not limited to, information suggesting the child is a member of a tribe or eligible for enrollment in a tribe or one or more of the child's biological parents, grandparents, or great-grandparents are or were members of a tribe, the residence or domicile of the child, the child's parents, or Indian custodian is in a predominantly Indian community, or the child or the child's family has received services or benefits from a tribe or services available to Indians from tribes or the federal government, such as Indian Health Services [*Welf. & Inst. Code § 224.3(b)*]. Depending on the facts of the case, these "may" provide reason to know the child is an Indian child, but definitely give rise to the need for further inquiry as to the child's possible Indian status [*Welf. & Inst. Code § 224.3(c)*]. Such inquiry includes interviewing the parents, Indian custodian, and extended family members, and contacting any other person that "reasonably can be expected to have information regarding the child's membership status or eligibility" [*Welf. & Inst. Code § 224.3(c)*]. It even includes, where appropriate, contacting tribes, the BIA, and the State Department of Social Services [*Welf. & Inst. Code § 224.3(c)*].

Ultimately, however, under California's statutes and rules notice is only required when the court or social services agency "knows or has reason to know that an Indian child is involved" [*Welf. & Inst. Code § 224.3(d)*; *Cal. Rules of Ct., Rule 5.481(b)(1)*; *In re Shane G. (2008) 166 Cal. App. 4th 1532, 1538-1539, 83 Cal. Rptr. 3d 513* (despite information the "great-great-great-grandmother was a Comanche princess," a thorough inquiry was done and ICWA notice was not required because there was no reason to know the child was an Indian child)]. This is a significant change in California statutory law and should bring the state back in line with the federal ICWA requirements for when notice is required. Of course, as always, membership in a tribe need not be certain to require notice, especially since only tribes, not state courts, can decide who is a member of the tribe. What is needed is a balanced approach to California's notice requirements. Certainty should not be required, but neither should notice be required based on a mere hint of ancestry or the naming of a tribe without more information. When there is some credible reason to know a child is an Indian child, notice should be required. Further, courts should err on the side of reasonable caution and require ICWA notice if it is a close call.

Unfortunately, not all appellate courts are recognizing this change [*In re Alice M. (2008) 161 Cal. App. 4th 1189, 1198-1200, 74 Cal. Rptr. 3d 863* ; *In re Damian C. (2009) 178 Cal. App. 4th 192, 196-200, 100 Cal. Rptr. 3d 110]* . It is true the legislative history of California's statutory changes does not expressly state that a change in notice requirements was intended, but the legislative history is clear the legislature intended to move California more in line with the ICWA. The plain language of the ICWA has never required notice based on a mere hint of Indian ancestry, and when the federal guidelines are read in conjunction with their commentary and the ICWA it is clear the guidelines do not either. It is only California's appellate case law that has required notice based on a mere hint of ancestry or the mere naming of a tribe without more. With California's statutory and rule changes its appellate courts are now free to take a more balanced approach to notice if they choose to do so. Hopefully they will. But it should be expected that some courts will have difficulty changing their views in this regard. As such, whether the *Alice M.* and *Damien C.* decisions should be viewed as anomalies on the path to new case law regarding California's notice requirements or a true indicator of the future remains to be seen. This is an area to be watched for further development.

California does impose not only an affirmative but also a continuing duty to inquire whether a child for whom a dependency petition has been filed is or may be an Indian child [*Welf. & Inst. Code § 224.3(a)*]. While under this additional state duty the burden is on the court and social services agency, competent children's and parents' counsel should also inquire regarding whether the child is or may be an Indian child, particularly since it is the parents and family members who most often have information regarding possible Indian ancestry. If the parent has such information, it is to be expected the parent will provide that information on the appropriate judicial counsel form and that parent's counsel will bring that information forward in a timely fashion [*In re Levi U. (2000) 78 Cal. App. 4th 191, 198, 92 Cal. Rptr. 2d 648]* . This is especially appropriate because the parent will normally have superior access to information regarding Indian ancestry, and the parent's counsel has a duty to help protect the parent's interest, if any, in his or her rights under the ICWA [*In re Miracle M. (2008) 160 Cal. App. 4th 834, 847, 73 Cal. Rptr. 3d 24* ; *In re S.B. (2005) 130 Cal. App. 4th 1148, 1160, 30 Cal. Rptr. 3d 726]* . If a party knowingly and willfully falsifies or conceals a material fact regarding whether the child is an Indian child, or counsels a party to do so, that person is subject to court sanctions [*Welf. & Inst. Code § 224.2(e)*].

When notice is required, California goes beyond the ICWA in terms of to whom that notice must be sent and what it must include. The ICWA does not require the notice to be sent to all possible tribes if the exact tribe is not known [*25 U.S.C. § 1912(a)*; *In re Edward H. (2002) 100 Cal. App. 4th 1, 5-6, 122 Cal. Rptr. 2d 242* ; *In re Levi U. (2000) 78 Cal. App. 4th 191, 198-199, 92 Cal. Rptr. 2d 648]* . But California requires notice be sent to all tribes of which the child may be a member or eligible in cases where there is reason to know the child is an Indian child [*Welf. & Inst. Code § 224.2(a)(3)*]. The statutory requirements for who notice must be sent to and what that notice must include are set forth in *Welf. & Inst. Code § 224.2(a)*.

California requires that once notice is sent, it be sent for "every hearing thereafter" unless a determination has been made the ICWA does not apply [*Welf. & Inst. Code § 224.2(a)(3)*]. The California requirements for such a determination as set forth in *Welf. & Inst. Code § 224.3(e)*. Absent a determination by the tribe or the BIA that the child is not a member or eligible for membership, California law provides the juvenile court cannot make a determination the ICWA does not apply unless proper and adequate notice was given under *Welf. & Inst. Code § 224.2*, 60 days has elapsed after the tribe or BIA received that notice, and no determinative response has been received [*Welf. & Inst. Code § 224.3(e)*]. This does not mean the court must wait 60 days after notice is received before it can conduct juvenile court proceedings in the matter. Nor does it mean the substantive provisions of the ICWA must be applied, unless the juvenile court has found the ICWA applies, since there can be no violation of the substantive provisions of the ICWA unless and until the child is found to be an Indian child as defined by the ICWA [*In re R.E.K.F. (Iowa 2005) 698 N.W.2d 147, 151]* . *Cal. Rules of Ct., Rule 5.482(c)*, does indicate that if a federally recognized tribe responds indicating the child is eligible for membership if certain steps are taken, the juvenile court must proceed as if the child is an Indian child and that it must direct the appropriate individual or agency to make active efforts to secure tribal membership for the child as set forth in *Cal. Rules of Ct., Rule 5.484(c)*. But these requirements are directory, not mandatory [*In re Melinda J. (1991) 234 Cal. App. 3d 1413, 1419, 286 Cal. Rptr. 239* ; *In re Lamonica H. (1990) 220 Cal. App. 3d 634, 639-645,*

270 Cal. Rptr. 60] . This is understandable, since even with the far more balanced approach found in California statutes beginning in 2007, and an indication the child is eligible for membership, mandating treating the case as if the child is Indian before such a finding is made would still be costly and impractical. Nevertheless, where the indications are the child actually is an Indian child, a juvenile court or social services agency may voluntarily choose to treat the case as if the child is an Indian child. Except for the detention hearing, however, for which notice to a tribe or the BIA may be impractical in light of the exigency and need for a timely hearing, the juvenile court need only wait 10 days after receipt of notice by the parent, Indian custodian, tribe or BIA before conducting proceedings, except that an additional 20 days to prepare shall be granted to the parent, Indian custodian, or tribe on request [*Welf. & Inst. Code § 224.2(d)*].

When notice is given, California case law has required copies of the actual forms sent to the tribes and BIA, the mailing receipt, and any responses be filed with the juvenile court to establish that proper notice was given [*see, e.g., In re Asia L. (2003) 107 Cal. App. 4th 498, 507-508, 132 Cal. Rptr. 2d 733* ; *In re H.A. (2002) 103 Cal. App. 4th 1206, 1214-1215, 128 Cal. Rptr. 2d 12]* . California statutes and the rules of court now also impose that requirement [*Welf. & Inst. Code § 224.2(c)*; *Cal. Rules of Ct., Rule 5.482(a)(2)(B), (b)*]. Thus, this is now both federal best practice and a California mandate.

Some California courts have held that substantial compliance with the notice provisions, coupled with timely, actual notice is sufficient [*see, e.g., In re Jonathon S. (2005) 129 Cal. App. 4th 334, 343, 28 Cal. Rptr. 3d 495* ; *In re Jonathan D. (2001) 92 Cal. App. 4th 105, 110, 111 Cal. Rptr. 2d 628]* . But others have not been as open to this practice [*see, e.g., In re Elizabeth W. (2004) 120 Cal. App. 4th 900, 907, 16 Cal. Rptr. 3d 514* ; *In re Asia L. (2003) 107 Cal. App. 4th 498, 503, 507-509, 132 Cal. Rptr. 2d 733]* . In the future, how California courts will address substantial compliance issues for additional California statutory provisions versus federal ICWA requirements remains to be seen.

PRACTICE TIP:

Importance of Strict Compliance With Notice Requirements. The single most common reason for reversal in dependency cases involving children who may be of Indian heritage is the failure of the social services department and the juvenile court to follow the California requirements for notice to Indian tribes, including the requirements for form and content of that notice. Any time information suggests a child may have Indian ancestry, all participants should take steps to ensure proper and adequate inquiry is made to determine if there is reason to know the child is an Indian child as defined by the ICWA. Notice no longer must be give under California law merely because a parent states that somewhere in the child's bloodline there is someone of Indian heritage, but great care must be taken in this regard to ensure an adequate inquiry is made, proper notice is given when required, any reasonable doubt is resolved on the side of caution by giving notice, and when such notice is required documentation is provided to the court of the notice, receipts, and any responses.

The doctrine of harmless error applies to ICWA inquiry and notice issues, particularly where there is substantial compliance and timely, actual notice, and has been used to uphold dependency cases on appeal in the face of ICWA notice challenges [*see, e.g., In re A.B. (2008) 164 Cal. App. 4th 832, 843, 79 Cal. Rptr. 3d 580* ; *In re Cheyanne F. (2008) 164 Cal. App. 4th 571, 576-579, 79 Cal. Rptr. 3d 189* ; *In re Miracle M. (2008) 160 Cal. App. 4th 834, 847, 73 Cal. Rptr. 3d 24* ; *In re S.B. (2005) 130 Cal. App. 4th 1148, 1162, 30 Cal. Rptr. 3d 726* ; *In re Christopher I. (2003) 106 Cal. App. 4th 533, 563-564, 567, 131 Cal. Rptr. 2d 122* ; *In re Antoinette S. (2002) 104 Cal. App. 4th 1401, 1411, 129 Cal. Rptr. 2d 15]* . In the past, most courts have been reluctant to apply harmless error analysis to an ICWA notice issue. Regardless, it must be remembered the ICWA is a statutory enactment, not a constitutional one. The additional statutory protections regarding notice adopted by California are equally only a statutory provision, not a constitutional one. The California Supreme Court has reminded us of the applicability of the simple harmless error doctrine for statutory errors in other dependency areas, and has noted that appellate courts should remember the delay caused by reversals may harm the child [*In re Zeth S. (2003) 31 Cal. 4th 396, 413 n.10, 2 Cal. Rptr. 3d 683, 73 P.3d 541* ; *In re Celine R. (2003) 31 Cal. 4th 45, 59-61, 1 Cal. Rptr. 3d 432, 71 P.3d 787]* . In light of the 2007 statutory enactments that bring California back closer to the ICWA regarding when notice is required, appellate courts should look more

favorably on the harmless error doctrine in ICWA cases, particularly where there is no likelihood a child is an Indian child as defined by the ICWA or where there has been substantial compliance with notice requirements.

If a dependency case is reversed on appeal due to an ICWA or California notice issue, the appellate court can only reverse the judgment the appeal was taken from, not any earlier findings and orders, since the error is a statutory one, not a jurisdictional error [*Tina L. v. Superior Court (2008) 163 Cal. App. 4th 262, 268, 77 Cal. Rptr. 3d 628* ; *In re Veronica G. (2007) 157 Cal. App. 4th 179, 187, 68 Cal. Rptr. 3d 465* ; *In re Jonathon S. (2005) 129 Cal. App. 4th 334, 340-342, 28 Cal. Rptr. 3d 495* ; *In re Brooke C. (2005) 127 Cal. App. 4th 377, 384-385, 25 Cal. Rptr. 3d 590]* . Remand normally is limited to addressing only the ICWA or California notice issue [*In re Francisco W. (2006) 139 Cal. App. 4th 695, 704-710, 43 Cal. Rptr. 3d 171]* . This practice is consistent with holdings in other states [*In re R.E.K.F. (Iowa 2005) 698 N.W.2d 147, 150-151]* . Further, limited remands continue to be appropriate after the legislature revised and recast the state's ICWA statutes and rules [*Tina L. v. Superior Court (2008) 163 Cal. App. 4th 262, 267-269, 77 Cal. Rptr. 3d 628]* .

The majority of California case law has allowed parents to raise ICWA or California notice issues for the first time on appeal even long after the juvenile court made a determination the ICWA did not apply [*Dwayne P. v. Superior Court (2002) 103 Cal. App. 4th 247, 251, 126 Cal. Rptr. 2d 639* ; *In re Samuel P. (2002) 99 Cal. App. 4th 1259, 1267-1268, 121 Cal. Rptr. 2d 820* ; *In re Marinna J. (2001) 90 Cal. App. 4th 731, 735-739, 109 Cal. Rptr. 2d 267* ; *but see In re Pedro N. (1995) 35 Cal. App. 4th 183, 189-190, 41 Cal. Rptr. 2d 819]* . Nevertheless, even in California this may only be done once. Thereafter, the parent must make his or her objection to the adequacy of the notice or evidence to support the ICWA determination at the trial court level or have forfeited that issue for further appellate review [*In re X.V. (2005) 132 Cal. App. 4th 794, 804-805, 33 Cal. Rptr. 3d 893]* .

How California courts will treat the questions of waiver and forfeiture, and of notice, as they begin to recognize the difference between the ICWA, California's additional state requirements, and the statutes that took effect in 2007 remains to be seen. This entire area is one to be watched for further developments.

[3] Possible Overriding Principles

[a] Existing Indian Family Doctrine

In 1982 the Supreme Court of Kansas handed down a decision that recognized a limitation on the applicability of the ICWA [*Matter of Adoption of Baby Boy L. (1982) 231 Kan. 199, 204-207, 643 P.2d 168]* . The approach that court enunciated has come to be known as the "existing Indian family" doctrine. The essence of the doctrine is that for children who are not domiciled on a reservation, tribal membership or eligibility for such membership is not the sole determining factor for the applicability of the ICWA. Instead, the applicability of the ICWA will depend on whether or not the child is part of an existing Indian family that has maintained the Indian culture or otherwise maintained ties with the Indian community. Having examined the purpose of the ICWA, those courts following this doctrine have reasoned that applying the ICWA to children who have never been part of an Indian family or community is inconsistent with the purpose of the ICWA [*Matter of Adoption of Baby Boy L. (1982) 231 Kan. 199, 204-207, 643 P.2d 168]* . Courts across this nation are divided on this judicially created doctrine. California courts initially rejected the idea that they could create this judicial exception to the ICWA [*In re Junious M. (1983) 144 Cal. App. 3d 786, 796, 193 Cal. Rptr. 40* ; *Adoption of Lindsay C. (1991) 229 Cal. App. 3d 404, 409-415* ; *see also In re Crystal K. (1990) 226 Cal. App. 3d 655, 663, 276 Cal. Rptr. 619* (case sometimes construed as rejecting the existing Indian family doctrine)]. Later California decisions, however, created a clear conflict of law within California on this issue.

Prior judicial interpretations of the existing Indian family doctrine were examined by the court of appeal in *In re Bridget R. (1996) 41 Cal. App. 4th 1483, 1498-1501, 49 Cal. Rptr. 2d 507* . The court also focused on constitutional limitations to the scope of the ICWA, including the child's liberty interest in stability of life and home and the child's equal protection rights [*In re Bridget R. (1966) 41 Cal. App. 4th 1483, 1502-1511, 49 Cal. Rptr. 2d 507]* . It

concluded the "ICWA's purpose is not served by an application of the Act where the child may be of Indian descent, but where neither the child *nor either parent* maintains any significant social, cultural or political relationships with Indian life" [*In re Bridget R. (1996) 41 Cal. App. 4th 1483, 1498-1501, 49 Cal. Rptr. 2d 507* (emphasis in original)]. Another California court of appeal agreed, and went even further by holding the application of the existing Indian family doctrine is not limited to those situations where the child and both parents lack a significant relationship with Indian life, but "is dependent on the unique factors of each situation" [*In re Alexandria Y. (1996) 45 Cal. App. 4th 1483, 1493, 53 Cal. Rptr. 2d 679]* . This opinion suggested that in some cases the ICWA might be found not to apply by virtue of the existing Indian family doctrine notwithstanding the fact that one of the parents, or even the child, had maintained at least some involvement with Indian life. Even those who agree with the existing Indian family doctrine should acknowledge this holding had the potential to be taken too far. Indeed, in the case of *Crystal R. v. Superior Court (1997) 59 Cal. App. 4th 703, 69 Cal. Rptr. 2d 414* , the Court of Appeal considered the approaches of both *Bridget R.* and *Alexandria Y.* and indicated it was "inclined to the view in *Bridget R.*, which we believe is more in keeping with the purposes of the ICWA" [*Crystal R. v. Superior Court (1997) 59 Cal. App. 4th 703, 723, 69 Cal. Rptr. 2d 414]* .

Not all later decisions in California embraced the existing Indian family doctrine, however. In the case of *In re Alicia S. (1998) 65 Cal. App. 4th 79, 76 Cal. Rptr. 2d 121* , that court noted the split of authority on this issue both nationally and in California. It examined the issue itself and rejected the doctrine. In so doing, the court indicated it shared the concern for the dependent child's interest in permanence and stability and acknowledged that in some instances the child's interests outweigh the interests of both the parent and the tribe. Nevertheless, it felt the "good cause" exception that allows the court to not follow the statutory preferences of the ICWA for placement allowed courts to reach essentially the same result as achieved by the application of the existing Indian family doctrine [*In re Alicia S. (1998) 65 Cal. App. 4th 79, 88-89, 76 Cal. Rptr. 2d 121]* . It also found there was no ambiguity in the statutory provisions of the ICWA as to the nature of the relationship that has to exist between the child and the tribe for the ICWA to apply [*In re Alicia S. (1998) 65 Cal. App. 4th 79, 89-90, 76 Cal. Rptr. 2d 121]* . Finally, it expressed its belief the existing Indian family doctrine conflicts with the policy of preserving and protecting the interests of Indian tribes in their children and undermines the ICWA's purpose of establishing "uniform federal standards" for the removal of Indian children from their families [*In re Alicia S. (1998) 65 Cal. App. 4th 79, 90, 76 Cal. Rptr. 2d 121]* . Thus, while acknowledging the many decisions choosing to follow the existing Indian family doctrine, this California court rejected it.

There is much to be said for both positions in this national controversy. Both sides contend their position is consistent with the spirit and intent of the ICWA. It would take an exhaustive study of the full legislative history of the ICWA to know which view is more correct. Even then, it is likely the answer would not be clear. In the final analysis it will probably take a decision by the United States Supreme Court or clarifying federal legislation to put this issue to rest at a national level. The court in *Bridget R.* noted "in passing" that in 1987 Congress failed to approve amendments to the ICWA that purportedly would have precluded application of the existing Indian family doctrine [*In re Bridget R. (1996) 41 Cal. App. 4th 1483, 1501 n.11, 49 Cal. Rptr. 2d 507]* . But to date this controversy has not been resolved at the federal level.

In 1999, however, California enacted legislation for the purpose of eliminating the existing Indian family doctrine in this state. Under this new provision of California law, the juvenile court must apply the ICWA to a dependency case if an Indian tribe determines the child is either a member of the tribe or eligible for membership and a biological child of a member of the tribe [Welf. & Inst. Code former § 360.6(c); *now see Welf. & Inst. Code § 224(c)*]. This does not resolve the controversy as to what the actual intent of the ICWA is in this regard and whether the existing Indian family doctrine should be recognized under federal law. Further, this new provision of California law does not resolve potential constitutional issues. For a comprehensive analysis of the ICWA, see Joan Heifetz Hollinger, *Adoption of Native American Children*, in Hollinger, et al., Adoption Law and Practice, Ch. 15 (Matthew Bender).

[b] Child's Constitutional Rights

Both the ICWA and *Welf. & Inst. Code § 224(c)* are statutory enactments. In recognizing the existing Indian family doctrine in *Bridget R.*, the court found the ICWA to be constitutionally invalid to the extent it impermissibly infringes on a child's constitutionally protected familial rights or right to equal protection [*In re Bridget R. (1996) 41 Cal. App. 4th 1483, 1502-1510, 49 Cal. Rptr. 2d 507]* . This holding was reached, however, in the context of a case in which the children had been with their non-Indian adoptive family since birth and had developed a recognizable liberty interest in the continuity and stability of that home. That situation will not arise in the usual ICWA case in which the ICWA is addressed at the outset of the dependency proceeding within a short time following the removal of the child from parental custody. Nevertheless, the argument for not applying the statutory requirements of the ICWA if it violates the child's constitutional rights is still a valid argument that can be upheld despite the enactment of *Welf. & Inst. Code § 224(c)* [*In re Santos Y. (2001) 92 Cal. App. 4th 1274, 1312-1323, 112 Cal. Rptr. 2d 692* ; *but see In re Vincent M. (2007) 150 Cal. App. 4th 1247, 1265-1266, 59 Cal. Rptr. 3d 321* (holding children have an interest in a permanent home, but not a constitutional right to one)]. While this argument may support application of the existing Indian family doctrine, it is a separate argument better seen as the child's constitutional rights controlling over the enforcement of the statutory requirements of the ICWA. Under this approach the ICWA still applies, it simply is not enforced to the extent inconsistent with the child's constitutional rights. This is an area that should be watched for further development. For a comprehensive analysis of the ICWA, see Joan Heifetz Hollinger, *Adoption of Native American Children*, in Hollinger, et al., Adoption Law and Practice, Ch. 15 (Matthew Bender).

[4] Tribal Jurisdiction, Intervention, and Transfer

[a] In General

[i] Federally Recognized Tribes

Under the ICWA, an Indian tribe has exclusive jurisdiction regarding a child custody proceeding involving an Indian child residing or domiciled on the reservation of that tribe, except where federal law has otherwise vested that jurisdiction in the state [*25 U.S.C. § 1911(a)*]. California is a Public Law 280 state, which gives the state jurisdiction to handle criminal and civil adjudicatory matters that arise on Indian reservations [*18 U.S.C. § 1162*; *25 U.S.C. §§ 1321-1326*; *28 U.S.C. § 1360*]. As a result, federally recognized tribes in California do not have exclusive jurisdiction regarding child custody proceedings for Indian children residing or domiciled on that tribe's reservation. In order to regain that exclusive jurisdiction, the tribe must have "reassumed" jurisdiction over Indian child custody proceedings pursuant to *25 U.S.C. § 1918* [*see also Welf. & Inst. Code § 305.5(a)*]. If, of course, the Indian child is found in California but actually resides or is domiciled on the reservation of an Indian tribe in a non-Public Law 280 state, the provisions of Public Law 280 would not apply.

In child custody proceedings for children who are found to come under ICWA, regardless of whether or not they reside on a reservation, the child's tribe, or any Indian custodian of the child have an absolute right to intervene at any point in the proceedings [*25 U.S.C. 1911(c)*; *Welf. & Inst. Code § 224.4*; *In re Riva M. (1991) 235 Cal. App. 3d 403, 410, 286 Cal. Rptr. 592]* .

A tribe with a tribal court also has a qualified right to have the action transferred to its jurisdiction [*In re M.A. (2006) 137 Cal. App. 4th 567, 569, 571-578, 40 Cal. Rptr. 3d 439]* . Many California tribes do not have formal tribal courts, of course, since in light of Public Law 280 the BIA has declined to fund tribal court development for those tribes that have not petitioned for and been granted the resumption of exclusive jurisdiction for child welfare matters under *25 U.S.C. § 1918* [Cohen's Handbook of Federal Indian Law (Matthew Bender 2005) § 6.04[3][c], p. 561]. Nevertheless, this is starting to change and more California tribes are taking steps to set up formal tribal courts, such as the Hoopa Valley Tribal Court, Karuk Tribal Court, Pit River Tribal Court, and the Intertribal Court System of Southern California. Some even have Court Appointed Special Advocate (CASA) programs, such as the Karuk tribal CASA program and the Pit River tribal CASA program. Numerous other California tribes are receiving help from the federal Tribal Courts

Assistance Program (TCAP), which is a special program through the Bureau of Justice Assistance, United States Department of Justice, designed to help federally recognized tribes to develop, implement, enhance, and continue the operation of tribal and intertribal court systems. Thus, more tribal courts in California can be expected. Further, the ICWA expressly recognizes that "tribal courts" for child welfare matters may include other tribal administrative bodies that are vested by the tribe with authority over child custody proceedings [*25 U.S.C. § 1903(12)*; Cohen's Handbook of Federal Indian Law (Matthew Bender 2005) pp. 266-267]. Thus, a formal tribal court is not required for a federally recognized tribe to exercise jurisdiction over child welfare matters involving Indian children, so long as the tribe has vested some administrative body, such as a tribal council, with authority over child custody proceedings.

Transfer to the tribe can be requested by either parent, the child's Indian custodian, or the tribe. Such transfer shall be granted in the absence of good cause, although the tribe may decline such transfer [*25 U.S.C. § 1911(b)*]. Either parent, however, may veto the transfer of a state court proceeding to the tribe for an Indian child not residing or domiciled on the reservation [*In re Larissa G. (1996) 43 Cal. App. 4th 505, 510-515, 51 Cal. Rptr. 2d 16]* . A parent may not, however, veto tribal intervention or application of ICWA [*In re Larissa G. (1996) 43 Cal. App. 4th 505, 514, 51 Cal. Rptr. 2d 16]* .

[ii] Non-Federally Recognized Tribes

Beginning in 2007, California has enacted a statutory provision that allows the juvenile court to permit non-federally recognized tribes limited participation in the proceedings if the child is either a member of the non-federally recognized tribe or eligible for membership and the biological child of a member [*Welf. & Inst. Code § 306.6(a)*]. This goes beyond the provisions of *Welf. & Inst. Code § 346*, which authorizes the court to admit persons deemed to have a direct or legitimate interest in the particular case or the work of the court. This authorizes the juvenile court to allow the non-federally recognized tribe to actually participate in the proceedings, including being present, addressing the court, requesting and receiving notice of hearings, requesting to examine court documents relating to the proceeding, presenting information to the court that is relevant, submitting written reports and recommendations, and performing such other duties and responsibilities as the court requests or approves [*Welf. & Inst. Code § 306.6(b)*]. This does not make the non-federally recognized tribe a party to the proceedings, nor does it mean the ICWA applies. Instead, it is designed to ensure the juvenile court receives all the information it needs regarding placement options, service availability within the tribal community, and any other unique interests the child or the child's parents may have as an Indian [*Welf. & Inst. Code § 306.6(d)*]. California has more than 40 non-federally recognized tribes, many of which have petitions pending with the BIA to regain federal recognition, and there are more than 200 such tribes throughout the United States. Thus, the opportunity for this new provision to apply is great.

Nevertheless, several points regarding *Welf. & Inst. Code § 306.6* must be remembered. First, it does not apply unless the child is either a member of the non-federally recognized tribe or eligible for membership and the biological child of a member. Second, it does not require notice to a non-federally recognized tribe unless that tribe has sought and received permission to participate in the proceedings, and the court has thereafter ordered the tribe receive notice of hearings. Third, the decision to allow a non-federally recognized tribe to participate in the proceedings, and the level of participation allowed, are discretionary decisions for the court. Before making such decisions, the court should make such inquiries as it deems appropriate to its decision-making. And fourth, the statute does not expressly authorize the court to receive the information or reports submitted by the non-federally recognized tribe into evidence, nor does it expressly authorize the court to allow the non-federally recognized tribe to call or question witnesses. This is understandable since the non-federally recognized tribe is not a party. That no provision is made for the cross-examination of the preparer of any such information, report, or recommendation, further supports this conclusion. All parties, including the parents, child, and social services agency, can, of course, stipulate the court receive any such information or report as evidence, and the court has the discretion to accept the stipulation. Further, the court can make such use of any information, report, or recommendation submitted by the non-federally recognized tribe as appropriate under the law, including directing the social services agency to investigate and report back to the court regarding the non-federally recognized tribe's assertions and recommendations. This is an area to be watched for further

developments.

[b] Effect of Public Law 280

[i] In General

California is a Public Law 83-280 state. That law is commonly called Public Law 280 and gives the state jurisdiction to handle criminal and civil adjudicatory matters that arise on Indian reservations [*18 U.S.C. § 1162*; *25 U.S.C. §§ 1321-1326*; *28 U.S.C. § 1360*]. It has been held not to confer civil regulatory jurisdiction, such as taxation, on state courts for matters arising on Indian reservations [*California v. Cabazon Band of Mission Indians (1987) 480 U.S. 202, 207-208, 107 S. Ct. 1083, 94 L. Ed. 2d 244* ; *Bryan v. Itasca County (1976) 426 U.S. 373, 384-385, 96 S. Ct. 2102, 48 L. Ed. 2d 710]* . It has been argued that Public Law 280 was never intended to cover involuntary child welfare matters [Cohen's Handbook of Federal Indian Law (Matthew Bender 2005) § 6.04[3][d][ii], pp. 570-571]. This argument may be stronger in states that characterize juvenile proceedings as distinct from criminal or civil adjudicatory matters, since only criminal and civil adjudicatory jurisdiction was included in Public Law 280 [Cohen's Handbook of Federal Indian Law (Matthew Bender 2005) p. 546, n. 319]. California dependency proceedings have been characterized as special proceedings in which the provisions of California civil law apply only when expressly made applicable [*In re Shelly J. (1998) 68 Cal. App. 4th 322, 328, 79 Cal. Rptr. 2d 922* ; *In re Chantal S. (1996) 13 Cal. 4th 196, 200, 51 Cal. Rptr. 2d 866, 913 P.2d 1075]* . Nevertheless, they are civil in nature [*Doe v. Mann (9th Cir. 2005) 415 F.3d 1038, 1057 n.27* , *citing In re Malinda S. (1990) 51 Cal. 3d 368, 384, 272 Cal. Rptr. 787, 795 P.2d 1244* , *and* Seiser & Kumli, California Juvenile Courts Practice and Procedure § 2.10[2] (Matthew Bender)]. After extensive analysis, the federal Ninth Circuit Court of Appeals has held that dependency proceedings are civil adjudicatory in nature, not civil regulatory [*Doe v. Mann (9th Cir. 2005) 415 F.3d 1038, 1058-1064]* . This conclusion is understandable, since juvenile dependency proceedings focus on the safety and well-being of children, and can result in the termination of parental rights. Thus, the prevailing and better view in California is that juvenile courts have jurisdiction in dependency cases that involve Indian children domiciled on the reservation of a California tribe unless that tribe has petitioned for and been granted resumption of exclusive jurisdiction of child welfare matters for those children [*25 U.S.C. § 1918*].

The more interesting question is whether federally recognized tribes in Public Law 280 states such as California have concurrent jurisdiction to address child welfare matters involving Indian children, whether residing or domiciled on or off the reservation. The best answer is "Yes." As noted by one respected treatise on federal Indian law, "The nearly unanimous view among tribal courts, state courts and lower federal courts, state attorneys general, the Solicitor's Office for the Department of the Interior, and legal scholars, is that Public Law 280 left the inherent civil and criminal jurisdiction of Indian nations untouched" [Cohen's Handbook of Federal Indian Law (Matthew Bender 2005) § 6.04[3][c], pp. 560-561, footnotes omitted]. That treatise went on to observe that "Public Law 280 did not specifically extinguish any tribal court jurisdiction, and the legislative history reflects no such congressional intent" [Cohen's Handbook of Federal Indian Law (Matthew Bender 2005) § 6.04[3][c], p. 561]. California case law now agrees with this position [*In re M.A. (2006) 137 Cal. App. 4th 567, 574-575, 40 Cal. Rptr. 3d 439]* .

[ii] Indian Children Not Domiciled on the Reservation

By its very terms Public Law 280 does not deal with cases that arise off the reservation. As such, it does not affect a federally recognized tribe's inherent sovereign authority to decide child welfare matters affecting its Indian children when those children are not residing or domiciled on the tribe's reservation. Some precedent exists holding Public Law 280 divests federally recognized tribes in those states of jurisdiction to hear all child welfare matters, but this precedent is older [*see, e.g.,* *In re F.P. (Alaska 1992) 843 P.2d 1214, 1215-1216* ; *Native Village of Nenana v. State Dept. of Health & Soc. Servs. (Alaska 1986) 722 P.2d 219, 221]* . As noted in Cohen's Handbook of Federal Indian Law, "The consensus about concurrent tribal and state jurisdiction under Public Law 280 has developed relatively recently" [Cohen's Handbook of Federal Indian Law (Matthew Bender 2005) § 6.04[3][c], p. 562]. This consensus is consistent

with recognition of tribal sovereignty and self-governance, and is the better view. California case law has now joined this consensus [*In re M.A. (2006) 137 Cal. App. 4th 567, 574-575, 40 Cal. Rptr. 3d 439]* .

Further, even if Public Law 280 is viewed as having totally divested federally recognized tribes in Public Law 280 states from exercising jurisdiction in child welfare matters as of the time it was enacted, the ICWA, which is the later law, expressly provides for the transfer of juvenile dependency matters to the tribal court of a federally recognized tribe notwithstanding the fact the tribe is a Public Law 280 tribe. This express authority is found in *25 U.S.C. § 1911(b)*, which addresses transfer without mention of Public Law 280 restrictions. This is significant since Congress was well aware of Public Law 280's limitation on jurisdiction and addressed it in *25 U.S.C. §§ 1911(a)* and *1918* for child welfare matters. The failure to include such a limitation in *25 U.S.C. § 1911(b)* evidences a different intent. As noted by the Alaska Supreme Court: "The language and structure of section 1911 reflect congressional intent that all tribes, regardless of their P.L. 280 status, be able to accept transfer jurisdiction of ICWA cases from state courts" [*In the Matter of C.R.H. (Alaska 2001) 29 P.3d 849, 852]* . As such, notwithstanding Public Law 280, the better and prevailing view is that ICWA affirms, the right of federally recognized tribes to receive transfers of dependency matters from state courts, thereby exercising concurrent jurisdiction. California case law has now joined this prevailing view [*In re M.A. (2006) 137 Cal. App. 4th 567, 574-575, 40 Cal. Rptr. 3d 439]* . Further, beginning in 2007, California now has a state statutory provision addressing such transfers to tribal courts [*Welf. & Inst. Code § 305.5(b)*].

[iii] Indian Children Residing or Domiciled on the Reservation

The bigger question is whether federally recognized tribes in Public Law 280 states have concurrent jurisdiction in child welfare matters involving Indian children residing on the reservation without having petition for and been granted resumption of jurisdiction under *25 U.S.C. § 1918*. As previously indicated, the better view is that federally recognized tribes retain concurrent jurisdiction notwithstanding Public Law 280, and this would include involving child welfare matters for children residing or domiciled on the reservation [Cohen's Handbook of Federal Indian Law (Matthew Bender 2005) § 6.04[3][c], pp. 560-561, footnotes omitted]. Generally, California has practiced concurrent state and tribal jurisdiction in ICWA matters, including for Indian children residing or domiciled on the reservation [*Doe v. Mann (9th Cir. 2005) 415 F.3d 1038, 1067-1068* , citing Risling, California Judges' Benchguide: The Indian Child Welfare Act (2000)].

Notwithstanding this practice, the Ninth Circuit Court of Appeals interpreted California law to restrict transfers to tribes in California when the tribe has not petitioned for and been granted resumption of jurisdiction under *25 U.S.C. § 1918* [*Doe v. Mann (9th Cir. 2005) 415 F.3d 1038, 1067-1068* , citing *Welf. & Inst. Code § 305.5*, and Cal. Rules of Ct., former Rule 1439(c)(1)]. The language in *Doe v. Mann* to this effect is dicta. Moreover, it is incorrect. Both of those California provisions dealt with the mandate that if the tribe has petitioned for and been granted resumption of "exclusive jurisdiction" over child welfare matters the juvenile court must transfer the case of an Indian child residing or domiciled on the reservation to the tribe [*Welf. & Inst. Code § 305.5*] and dismiss the dependency petition [Cal. Rules of Ct., former Rule 1439(c)(1)]. Neither addressed the question of concurrent jurisdiction and hence neither are authority for the proposition that Public Law 280 tribes lack concurrent jurisdiction for Indian children residing or domiciled on the reservation. Indeed, the fact both provisions speak of California tribes that have reassumed "exclusive jurisdiction" is further indication that California recognizes the tribes already have concurrent jurisdiction, notwithstanding Public Law 280.

Finally, it must be noted that it would be an absurd result to give federally recognized tribes concurrent jurisdiction over their Indian children who reside off the reservation in Public Law 280 states but to deny them concurrent jurisdiction over their Indian children who reside on the reservation. Courts are to avoid interpreting the law in ways that produce such absurd results [*In re Christopher I. (2003) 106 Cal. App. 4th 533, 565, 131 Cal. Rptr. 2d 122* ; *In re Charles T. (2002) 102 Cal. App. 4th 869, 878, 125 Cal. Rptr. 2d 868]* . Thus, the better view is that California's Public Law 280 tribes have concurrent jurisdiction over child welfare matters involving Indian children who reside or are domiciled on the reservation. Further, beginning in 2007, California has a state statutory provision addressing such transfers to tribal

courts [*Welf. & Inst. Code § 305.5(b)*]. Thus, California law is now clear regarding this.

[5] Finding That Continued Custody Is Likely to Cause Serious Damage

[a] The Finding and When It Must Be Made

In cases in which the ICWA applies, the juvenile court cannot order the Indian child placed in foster care unless it finds by clear and convincing evidence that the evidence, including expert testimony, establishes continued custody by the parent or Indian custodian is likely to cause the child serious emotional or physical damage [*25 U.S.C. § 1912(e)*]. This finding must be made at the disposition hearing.

When termination of parental rights is sought, the evidence, including expert testimony, must establish beyond a reasonable doubt that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child [*25 U.S.C. § 1912(f)*]. California case law has held that normally this finding should be made at the hearing at which the *Welf. & Inst. Code § 366.26* hearing is set. If it is, the court does not need to readdress the issue at the selection and implementation hearing, unless the parent presents evidence of changed circumstances or demonstrates the finding is stale due to the *Welf. & Inst. Code § 366.26* hearing being held "substantially longer than the 120-day statutory period" [*In re Matthew Z. (2000) 80 Cal. App. 4th 545, 554-555, 95 Cal. Rptr. 2d 343]* . If it was not made at the earlier hearing and the court intends to terminate parental rights, the finding under *25 U.S.C. § 1912(f)* must be made at the *Welf. & Inst. Code § 366.26* hearing [*In re Matthew Z. (2000) 80 Cal. App. 4th 545, 555, 95 Cal. Rptr. 2d 343]* . In either way, the federal requirement under *25 U.S.C. § 1912* is met.

Beginning in 2007, however, California has added its own statutory requirement for the finding supporting the termination of parental rights to be made "at the hearing terminating parental rights" [*Welf. & Inst. Code § 366.26(c)(2)(B)(ii)*]. Whether California's new statutory provision as to when the finding must be made will be interpreted as inconsistent with the ICWA or merely an additional state requirement remains to be seen. Regardless, it is a state, not a federal requirement [*In re S.B. (2005) 130 Cal. App. 4th 1148, 1158, 1162, 30 Cal. Rptr. 3d 726]* .

[b] Qualified Expert Witness

[i] Federal Law

The express terms of the ICWA do not limit in any way who may be a qualified expert in an ICWA, so long as they are qualified [*25 U.S.C. § 1911(f)*]. Even a social worker handling the case may be the qualified expert witnesses for ICWA purposes under federal law [*In re M.P.M. (Mont. 1999) 976 P.2d 988, 992]* . The federal guidelines do provide, however, a list of qualifications that may provide the background necessary to qualify as an expert in an ICWA case [*Guidelines for State Courts (Nov. 26, 1979) 44 Fed. Reg. 67584* , § D.4(b)]. This background includes: (1) being a member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they relate to family organization and child rearing practices; (2) a "lay expert" having substantial experience in the delivery of child and family services to Native Americans, and extensive knowledge of the social and cultural standards and child rearing practices of the Indian child's tribe; or (3) a professional having substantial education and experience in the area of his or her specialty [*Guidelines for State Courts (Nov. 26, 1979) 44 Fed. Reg. 67584* , § D.4(b)]. A knowledge of tribal culture and child-rearing practices is not always required [*Guidelines for State Courts (Nov. 26, 1979) 44 Fed. Reg. 67584* , § D.4(b)(iii)]. Such knowledge will, however, "frequently be very valuable to the court" [*Guidelines for State Courts (Nov. 26, 1979) 44 Fed. Reg. 67584* , § D.4, Commentary]. Case law agrees that "Special knowledge of Indian life is not necessary where a professional person has substantial education and experience and testifies on matters not implicating cultural bias" [*In re N. L. (Okla. 1988) 754 P.2d 863, 868* ; *see also State ex rel. Juvenile Dep't of Lane County v. Tucker (Ore. Ct. App. 1985) 710 P.2d 793]* .

Nevertheless, in many cases knowledge of tribal culture and child rearing practices will be necessary for the expert to be qualified to testify on the issue of whether continued custody by the parent or Indian custodian is likely to result in

serious emotional or physical damage to the child [*25 U.S.C. § 1912(e)-(f)*]. Further, looking at the legislative history of the ICWA, some courts have held "a social worker must possess expertise beyond that of the normal social worker to satisfy the qualified expert witness requirement of *25 U.S.C. § 1912(f)*" [*In re H.M.O. (Mont. 1998) 962 P.2d 1191, 1197* ; *see also In re Elliott (Mich. Ct. App. 1996) 554 N.W.2d 32, 37* ; *In re N. L. (Okla. 1988) 754 P.2d 863, 868]* . Many agency social workers do possess such beyond the norm knowledge in their area or areas of specialty, including risk assessment, sexual abuse, substance abuse, adoptability, and others. Thus, "In the absence of implication of cultural bias, the expert witness may be a social worker who possesses expertise beyond the normal social worker qualifications" [*In re M.J.J. (Okla. Ct. App. 2003) 69 P.3d 1226, 1228]* . Additionally, some agency social workers are members of federally recognized tribes or have special education, training, or experience in tribal customs and child rearing practices that would qualify them as an expert for ICWA purposes under federal law even if cultural issues are implicated. Whether a particular witness actually qualifies as an expert witness for purposes of the ICWA is a case-by-case determination.

[ii] California Law

Beginning in 2007, California statutory law has been enacted addressing the issue of who is a qualified expert witness under California law for purposes of a case involving an Indian child [*Welf. & Inst. Code § 224.5*]. It indicates a qualified expert witness may include a social worker, sociologist, doctor, psychologist, traditional tribal therapist and healer, tribal historian, tribal spiritual leader, or tribal elder [*Welf. & Inst. Code § 224.5(a)*]. It also provides a list of the characteristics most likely to meet the requirements for a qualified expert witness. This list essentially mirrors the federal guidelines [*compare Guidelines for State Courts (Nov. 26, 1979) 44 Fed. Reg. 67584* , § D.4(b), *with Welf. & Inst. Code § 224.6(c)*]. But California has departed from the ICWA in one major requirement: California now holds a qualified expert witness for a case involving an Indian child may not be an employee of the person or agency recommending foster care placement or termination of parental rights [*Welf. & Inst. Code § 224.6(a)*].

Whether California's statutory restriction against agency employees being qualified expert witnesses will be interpreted as inconsistent with the ICWA or merely an additional state requirement remains to be seen. Regardless, it demonstrates a bias against social services agencies that may in decades past have been warranted, but that is now no longer justified. While exceptions exist, today the significant majority of social workers and social services agencies are supportive of the ICWA and work well with tribes and tribal agencies. The bias against them that is exhibited by the legislation is unfortunate.

Beginning in 2007 California has also imposed a statutory restriction that a declaration or affidavit from the qualified expert witness may only be accepted by the court in lieu of testimony if the parties have so stipulated in writing and the court is satisfied the stipulation is knowing, intelligent, and voluntary [*Welf. & Inst. Code § 224.6(e)*]. In the past, such affidavits were frequently used to avoid prolonging trials with lengthy direct examination, or to avoid formal contested hearings when parents were not present and tribes had not intervened or objected. It is doubtful that parents' attorneys can, and unlikely parents' attorneys will, enter into such stipulations in the absence of their clients, and they may not do so even with their clients present. Thus, the necessity for a written stipulation will mean that full testimony by the qualified expert witness, both direct examination and cross examination, at all stages of the dependency case, will likely be mandated by the state legislation, thereby significantly prolonging hearings, often to the benefit of no one.

How these state imposed restrictions on who may be a qualified expert witness and the use of stipulations will be treated by the courts, including the delays that may occur in trying to find outside experts or providing for full testimony even though parents are not present or objecting, is an area to be watched for further development.

[6] Finding of "Active Efforts"

Before any foster care placement or termination of parental rights for an Indian child, it must be shown that active efforts were made to provide remedial services and rehabilitative programs that were designed to prevent the breakup of

the Indian family and that these efforts were unsuccessful [*25 U.S.C. § 1912(d)*; *Welf. & Inst. Code § 361.7*]. The Indian tribe itself may become involved in the provision of services and supervision of the case, even without transfer of the case to a tribal court. This is especially true where the tribe has entered into an agreement with the State Department of Social Services pursuant to *Welf. & Inst. Code § 10553.1* concerning child welfare services or foster care payments [*Welf. & Inst. Code §§ 215, 272(a)(2), 306(a)*]. There is no requirement in *25 U.S.C. § 1912(d)* that expert evidence be presented to support the active efforts finding [*see In the Interest of S.A.E. (Utah 1996) 912 P.2d 1002, 1004* (qualified expert evidence only required on detriment issue)].

Active efforts under the ICWA and reasonable reunification efforts under California law are "essentially undifferentiable" [*In re Michael G. (1998) 63 Cal. App. 4th 700, 714, 74 Cal. Rptr. 2d 642]* . Under the ICWA, however, the court must also take into account prevailing social and cultural conditions of the child's tribe, including the tribe's way of life. Moreover, active efforts are to involve the available resources of the extended family, individual Indian care givers, Indian social services agencies, and the tribe [*In re Michael G. (1998) 63 Cal. App. 4th 700, 714, 74 Cal. Rptr. 2d 642]* . A reunification plan for an Indian family involved in the Indian way of life would usually include such considerations and resources under state law for reasonable reunification efforts, since those efforts are to be developed on a case by case basis to serve the needs of the family. As such, the addition of a federal "active efforts" requirement should not be a major addition to a case. Nevertheless, the court must make two separate findings; one regarding reasonable efforts under state law and one regarding active efforts under the ICWA [*In re Michael G. (1998) 63 Cal. App. 4th 700, 714, 74 Cal. Rptr. 2d 642]* . If the parent's whereabouts are not known during the dependency, the requirement for active efforts can be met by the agency's efforts to locate the parent. Thus, where a parent is not found until the *Welf. & Inst. Code § 366.26* hearing and the juvenile court does not become aware of the Indian heritage of the child until that time, the termination of parental rights could still be proper without additional services. "The Act requires that active efforts be made to provide services, not that services be provided regardless of when a parent becomes available to receive those services" [*In re William G. (2001) 89 Cal. App. 4th 423, 428, 107 Cal. Rptr. 2d 436]* .

The ICWA is silent as to the standard of proof for the finding of active efforts [*see 25 U.S.C. § 1912(d)*]. Some states have held that the active efforts finding should be made beyond a reasonable doubt before parental rights may be terminated. Most have done so however, without actually analyzing the issue [*see, e.g., People in the Interest of S.R. (S.D. 1982) 323 N.W.2d 885, 887* ; *In the Matter of Kreft (Mich. Ct. App. 1986) 148 Mich. App. 682, 693, 384 N.W.2d 843, 848* ; *In re L.N.W. (Iowa Ct. App. 1990) 457 N.W.2d 17, 19]* , although one out-of-state court did look at the interests being determined before it went on to "recognize" that the beyond a reasonable doubt standard for detriment under *25 U.S.C. § 1912(f)* should also apply to the active efforts requirement under *25 U.S.C. § 1912(d)* [*see In the Matter of the Welfare of M.S.S. (Minn. 1991) 465 N.W.2d 412, 418]* .

The better view, however, is that taken by the courts in such states as Alaska, Maine, Idaho, and now California, which have examined the issue and concluded that Congress did not intend to impose the highest standard of proof for the active efforts finding. Instead the proper standard should be that established by the states for reasonable efforts [*see K.N. v. State (Alaska 1993) 856 P.2d 468, 476* (looking to congressional history and holding that the standard of proof for the active efforts finding is a preponderance of the evidence); *In re Annette P. (Maine 1991) 589 A.2d 924, 928* (looking to the reasoning of *Santosky v. Kramer (1982) 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599* and holding that the standard of proof for the active efforts finding is clear and convincing evidence); *see also In the Interest of S.A.E. (Utah 1996) 912 P.2d 1002, 1004* (holding that the only finding that needs to be made beyond a reasonable doubt is the finding of detriment under *25 U.S.C. § 1912(f)*)]. Applying the state standard for reasonable efforts to the active efforts finding of *25 U.S.C. § 1912(d)* and the higher beyond a reasonable doubt standard to the detriment finding of *25 U.S.C. § 1912(f)* is consistent with the normal rules of statutory construction and still affords significant importance to the requirement to work with the family that is imposed by both state and federal law. Moreover, this approach is consistent with the meaning of the word "satisfy" within the context of *25 U.S.C. § 1912(d)* to the effect that the party seeking to terminate parental rights to an Indian child must "satisfy" the court that active efforts have been made [*Doe v. Roe (In re Baby Boy Doe) (1995) 127 Idaho 452, 902 P.2d 477, 482* (finding that active efforts did not have to be

found beyond a reasonable doubt under the ICWA)].

This later view is the one taken by the court of appeal in the case of *In re Michael G. (1998) 63 Cal. App. 4th 700, 74 Cal. Rptr. 2d 642* . In that case the California court examined the decisions on each side of the issue, the language of the ICWA, and the rules of statutory construction. It noted that in enacting the active efforts requirement, "Congress sought solely to rectify the nonprovision of any services to Indian families. There is no indication it sought to impose a beyond a reasonable doubt standard of proof upon state courts" [*In re Michael G. (1998) 63 Cal. App. 4th 700, 711, 74 Cal. Rptr. 2d 642]* . It found the reasoning of *In the Matter of the Welfare of M.S.S. (Minn. 1991) 465 N.W.2d 412* "unpersuasive" and held the language of the section and its legislative history "convince us Congress had no intention of imposing a reasonable doubt standard of proof regarding the active efforts determination." As such, noting that the state standard for reasonable efforts for the setting of a *Welf. & Inst. Code § 366.26* hearing from a 12-month review is clear and convincing evidence, it held that clear and convincing evidence was needed to prove active efforts in an ICWA case where services are terminated at that hearing [*In re Michael G. (1998) 63 Cal. App. 4th 700, 712, 74 Cal. Rptr. 2d 642]* . Neither the ICWA nor California's statutory requirements for active efforts requires the finding be made by clear and convincing evidence, but that elevated standard is required by *Cal. Rules of Ct., Rule 5.485(a)(1)*. This is the better practice.

It should also be noted that the *Michael G.* case acknowledged the question of when the "active efforts" finding should be made in a case in which the termination of parental rights is to be determined. This is an issue California juvenile courts have struggled with, since the state finding of reasonable efforts is made at a time different from the hearing under *Welf. & Inst. Code § 366.26* at which parental rights are terminated. The court of appeal noted that it should be made before scheduling a hearing under *Welf. & Inst. Code § 366.26*, just as the reasonable efforts finding is made under state law [*In re Michael G. (1998) 63 Cal. App. 4th 700, 713 n.9, 74 Cal. Rptr. 2d 642]* . This ensures the matter can be raised along with any challenge to the reasonable efforts made under state law as part of an extraordinary writ petition. Beginning in 2007, California has added its own statutory requirement to provide that termination of parental rights cannot be ordered for an Indian child if "[a]t the hearing terminating parental rights" the court has found that active efforts were not made as required by *Welf. & Inst. Code § 361.7* [*Welf. & Inst. Code § 366.26(c)(2)(B)(i)*]. This does not mean there is a requirement for a new active efforts finding at the *Welf. & Inst. Code § 366.26* hearing. Rather, the better view is that the court must review its prior findings to ensure findings were made that active efforts had been made and proven unsuccessful. If, of course, no active efforts finding has been made, the court must consider the evidence on the issue and cannot terminate parental rights unless it makes a finding by clear and convincing evidence that active efforts have been made and have proven unsuccessful [*25 U.S.C. § 1912(d)*; *Welf. & Inst. Code §§ 361.7(c), 366.26(c)(2)(B)(i)*; *Cal. Rules of Ct., Rule 5.485(a)(1)*].

[7] Denial of Services in ICWA Cases

In light of the requirement in ICWA cases for "active efforts," it has often been assumed that reunification services cannot be denied in an ICWA case even if services would otherwise be denied under one of the grounds found in *Welf. & Inst. Code § 361.5(b)* or *(e)(1)* [*see* Simmons & Trope, *P.L. 105-89 Adoption and Safe Families Act of 1997: Issues for Tribes and States Serving Indian Children*, National Resource Center for Organizational Improvement (1999) 7-8]. But the law does not require idle acts [*Vigil v. Tansy (10th Cir. 1990) 917 F.2d 1277, 1279* ; *Letitia V. v. Superior Court (2000) 81 Cal. App. 4th 1009, 1016, 97 Cal. Rptr. 2d 303* , citing *Civ. Code § 3532*]. In *Letitia V.* the juvenile court found the ICWA applied, but denied services under Welf. & Inst. Code former § 361.5(b)(10) and (b)(12). Both the mother and the Indian tribe filed petitions for extraordinary writ relief with the appellate court. The Court of Appeal found that where a parent has received substantial but unsuccessful reunification services for one child and the parent has shown no desire to change, duplicating those efforts in a second case involving the same parent but a different child would be an idle act. It also noted the ICWA "says nothing about requiring the state to provide duplicative reunification services" [*Letitia V. v. Superior Court (2000) 81 Cal. App. 4th 1009, 1016, 97 Cal. Rptr. 2d 303]* . The Court of Appeal found the mother was a "chronic abuser of illegal and dangerous drugs." She had received extensive but unsuccessful services in the past to assist her in addressing her longstanding substance abuse problem. As such, it found

the juvenile court could not be faulted under either federal or state law for choosing not to expend resources that "merely duplicate efforts that have already been made" [*Letitia V. v. Superior Court (2000) 81 Cal. App. 4th 1009, 1018, 97 Cal. Rptr. 2d 303]* . Thus, in ICWA cases in which active efforts have already been provided at an earlier time, the parent has not changed, and the services needed now would merely duplicate those earlier efforts, services can be denied under California case law.

Is the denial of services in ICWA cases limited to those in which active efforts have previously been provided? No published California decision has yet to deal with this issue. On one side is the argument the "active efforts" requirement in the ICWA is a specific provision of federal law that overrides the federal Adoption and Safe Families Act provisions and any general state law regarding the denial of reunification services [*compare 25 U.S.C. § 1912(d) with Welf. & Inst. Code § 361.5(b), (e)(1)*; *see also* Cohen's Handbook of Federal Indian Law (Matthew Bender 2005) § 11.08, pp. 855-856; Hazeltine, *Speedy Termination of Alaska Native Parental Rights: The 1998 Changes to Alaska's Child in Need of Aid Statutes and Their Inherent Conflict With the Mandates of the Federal Indian Child Welfare Act* (2002) *19 Alaska L. Rev 57, 68, 79*-80]. On the other side is the argument the provisions for the denial of services found in the federal Adoptions and Safe Families Act of 1997 (ASFA) are the more specific [*42 U.S.C. § 671(a)(15)(D)*]. This argument will contend ASFA came after ICWA and could have made an exception for ICWA cases on this narrow issue, but didn't. Thus, while the ICWA is controlling over general federal and state provisions for abused and neglected children, ASFA is controlling over ICWA on the very narrow issue of the denial of services. This argument would not eliminate the applicability of the ICWA to other issues, such as tribal intervention and placement preferences, but would allow services to be denied in an appropriate ICWA case even if active efforts had not been previously made. Further, regardless of whether ICWA or ASFA controls on this narrow issue, the law does not require idle or futile acts. This is a fundamental principle of both federal and state law [*Vigil v. Tansy (10th Cir. 1990) 917 F.2d 1277, 1279* ; *Weaver v. Ewers (8th Cir. 1912) 195 F. 247, 249* ; *Letitia V. v. Superior Court (2000) 81 Cal. App. 4th 1009, 1016]* . As such, even ICWA's requirement for "active efforts" may not be mandated when reunification efforts would be fruitless.

Beginning in 2007, however, California has enacted a statutory provision that "[n]otwithstanding Section 361.5" a party seeking involuntary foster care placement or termination of parental rights for an Indian child must prove active efforts have been made and proven unsuccessful [*Welf. & Inst. Code § 361.7(a)*]. This new state statutory provision should not be viewed to alter the conclusion of the *Letitia V.* case, since there the appellate court held that active efforts had already been made and the ICWA did not require those efforts to be duplicated when there was no showing the parent that had received those efforts had shown no desire to change [*Letitia V. v. Superior Court (2000) 81 Cal. App. 4th 1009, 1016, 1018, 97 Cal. Rptr. 2d 303]* . But it does indicate that California has come down on the side of those arguing that active efforts must be made in an ICWA case, regardless of other federal and state law allowing the denial of services, when no previous active efforts have been provided. The question remains, however, regardless of ASFA and *Welf. & Inst. Code § 361.5*, whether the making of active efforts is required by the ICWA and *Welf. & Inst. Code § 361.7* when doing so would be absurd and clearly fruitless [*Vigil v. Tansy (10th Cir. 1990) 917 F.2d 1277, 1279* ; *Weaver v. Ewers (8th Cir. 1912) 195 F. 247, 249* ; *Letitia V. v. Superior Court (2000) 81 Cal. App. 4th 1009, 1016]* . How the courts will determine this issue remains to be seen and this area should be watched for further developments.

For detailed discussion of the grounds for denial of services under California law, see *§ 328.129[2][b]*.

[8] Placement Preferences

There are placement preferences established for the Indian child who must be temporarily removed from his or her home or who is to be placed for adoption. They require that preference for foster care placement be given in the following order: to a member of the Indian child's extended family; to a foster home licensed or approved by the Indian child's tribe; to a state or county licensed or certified Indian foster home; or to a children's institution approved by the tribe or operated by an Indian organization and offering a program to meet the Indian child's needs [*25 U.S.C. § 1915(b)*; *Welf. & Inst. Code § 361.31(b)*]. The Indian child must also be placed in the least restrictive setting that most

approximates a family situation, and within reasonable proximity to the Indian child's home, taking into consideration the Indian child's special needs, if any [*Welf. & Inst. Code § 361.31(b)*].

For adoptive placement of an Indian child preference must be given in the following order: to a member of the Indian child's extended family; to other members of the Indian child's tribe; to other Indian families [*25 U.S.C. § 1915(a)*; *Welf. & Inst. Code § 361.31(c)*].

The prevailing social and cultural standards of the Indian child's tribe, or of the Indian community in which the parent or extended family members reside or maintain social and cultural ties, shall be applied in meeting the placement preferences for the Indian child [*Welf. & Inst. Code § 361.31(f)*]. Where appropriate, the preferences of the Indian child or parent shall also be considered [*Welf. & Inst. Code § 361.31(e)*]. An Indian child may only be placed in a non-Indian home if the court finds that a suitable Indian home is not available [*Cal. Rules of Ct., Rule 5.484(b)*; *see also 25 U.S.C. § 1915(e)*, and *Welf. & Inst. Code § 361.31(k)* (requiring court to keep records regarding efforts to comply with placement preferences)] or if the court finds good cause not to follow the normal preference requirements [*25 U.S.C. § 1915(a)*; *Welf. & Inst. Code § 361.31(h)*]. If no preferred placement is available, active efforts must be made to place the Indian child with a family committed to enabling the child to maintain contact with extended family members and to participate in the cultural and ceremonial events of the Indian child's tribe [*Welf. & Inst. Code § 361.31(i)*]. If the child has been in a non-Indian home for an extended period of time and removal from that home for placement in an Indian home would violate the child's constitutional rights, the child's constitutional right may control over the statutory placement preferences found in the ICWA and California statutory law [*In re Bridget R. (1996) 41 Cal. App. 4th 1483, 1502-1510, 49 Cal. Rptr. 2d 507]* . Such circumstances may also justify a finding of good cause not to follow the placement preferences set forth in the ICWA and California statutory law [*In re Alicia S. (1998) 65 Cal. App. 4th 79, 88-89, 76 Cal. Rptr. 2d 121]* .

In determining whether good cause exists to overcome the ICWA placement preferences, the juvenile court is not restricted to consideration of those factors set forth in federal guidelines. Congress intended state courts to have flexibility in this regard [*Fresno County Dept. of Children & Family Services v. Superior Court (2004) 122 Cal. App. 4th 626, 643, 646, 19 Cal. Rptr. 3d 155* (consideration of detriment that would be caused by separating siblings was proper)]. If an Indian child is placed with a non-Indian relative, however, that is a placement with a member of the child's extended family as required by *25 U.S.C. § 1915(b)* and no "good cause" finding need be made [*In re Liliana S. (2004) 115 Cal. App. 4th 585, 590, 10 Cal. Rptr. 3d 553]* . On review of a juvenile court's decision regarding a good cause determination the appellate court uses a substantial evidence standard of review [*Fresno County Dept. of Children & Family Services v. Superior Court (2004) 122 Cal. App. 4th 626, 645, 19 Cal. Rptr. 3d 155]* .

If an Indian tribe has designated a home under the ICWA that would be barred from placement due to the requirements of *Welf. & Inst. Code § 361.4* regarding criminal background checks, the tribe may request a criminal records exemption. That request may be submitted to either the State Department of Social Services or the county social services agency, if the county has a approved procedure for granting such exemptions. Once the tribe has elected to make the request with either the state or county agency, the request for a criminal records exemption may only be made by the agency to which that request was made. Even if the request is made to the State Department of Social Services, however, the county social worker may still evaluate the home for placement and gather information needed to evaluate the request for a criminal records exemption [*Welf. & Inst. Code § 361.4(f)*].

[9] Waiver of Right to Raise ICWA on Appeal

The normal rules of error preservation are not preempted by the ICWA [*In the Interest of J.D.B. (Iowa 1998) 584 N.W.2d 577, 581* ; *Adoption of T.N.F. (Alaska 1989) 781 P.2d 973, 978-980]* . Thus, the waiver rule normally applies in ICWA cases just as in any other case. For instance, at the trial court level, if the parent fails to object to the lack of expert testimony or the use of a clear and convincing evidence standard of proof, rather than a beyond a reasonable doubt standard of proof, as required by *25 U.S.C. § 1912(f)*, the parent has waived the right to challenge the court's

findings in that regard on appeal [*In re Riva M. (1991) 235 Cal. App. 3d 403, 411-412, 286 Cal. Rptr. 592]* . The waiver rule also applies to a tribe that has had proper notice [*In re Liliana S. (2004) 115 Cal. App. 4th 585, 589, 10 Cal. Rptr. 3d 553]* .

There is a split of authority, however, on the question of whether the normal rules of appellate jurisdiction and waiver apply in a case in which the question is whether proper notice was given under the ICWA. The ICWA does not confer jurisdiction to decide an ICWA issue on a state court that would not otherwise have jurisdiction to determine the issue [*Slone v. Inyo County Juvenile Court (1991) 230 Cal. App. 3d 263, 267, 282 Cal. Rptr. 126]* . Since the jurisdiction of appellate courts to determine matters is predicated on a timely notice of appeal, one case has held that if the parent knows of the possibility the ICWA is applicable, but fails to object to a lack of ICWA notice at the trial court level and to raise it in a timely appeal, the parent has waived the right to raise the issue for the first time in a later appeal [*In re Pedro N. (1995) 35 Cal. App. 4th 183, 189-190, 41 Cal. Rptr. 2d 819]* . This is consistent with the normal rules of appellate jurisdiction that require a timely notice of appeal for the Court of Appeal to have jurisdiction to determine the matter [*Adoption of Alexander S. (1988) 44 Cal. 3d 857, 864, 245 Cal. Rptr. 1, 750 P.2d 778]* . Of course, if there is no showing a parent knew of the consequences of the ICWA and knowingly failed to raise the issue, waiver does not apply [*In re Pedro N. (1995) 35 Cal. App. 4th 183, 189-190, 41 Cal. Rptr. 2d 819* ; *In re Kahlen W. (1991) 233 Cal. App. 3d 1414, 1425, 285 Cal. Rptr. 507]* .

California courts have not been quick to follow the *Pedro N.* decision, however. Instead, most have disagreed with it. One court has held that even where the parent knew of the ICWA requirements and failed to raise them in a timely manner, the lack of ICWA notice to the tribe could still be raised by the parent in a later appeal [*In re Marinna J. (2001) 90 Cal. App. 4th 731, 735-739, 109 Cal. Rptr. 2d 267 , disagreeing with In re Pedro N. (1995) 35 Cal. App. 4th 183, 189-190, 41 Cal. Rptr. 2d 819]* . The *Marinna J.* decision fails to consider the lack of appellate court jurisdiction, and instead addresses only the question of waiver. As such, *Marinna J.* should be considered an anomaly. Other courts, however, have been more inclined to follow the *Marinna J.* approach than the *Pedro N.* approach and thus *Marinna J.* is the prevailing view [*see, e.g.*, *Dwayne P. v. Superior Court (2002) 103 Cal. App. 4th 247, 251, 126 Cal. Rptr. 2d 639* ; *In re Samuel P. (2002) 99 Cal. App. 4th 1259, 1267-1268, 121 Cal. Rptr. 2d 820]* .

Notwithstanding the many cases that have held a parent can raise an ICWA notice challenge in a first appeal without having made a timely objection at the trial court level, one case has now held that there is no right to again raise ICWA notice challenges in a second appeal without having objected at the trial court level. The court held "as an apparent matter of first impression that forfeiture principles preclude a second appellate review in such a case, as further delay harms the paramount interests of dependent children in permanence and stability" [*In re X.V. (2005) 132 Cal. App. 4th 794, 798, 33 Cal. Rptr. 3d 893]* . This one case will not stop the plethora of cases in which parents are able to raise ICWA notice issues in a first appeal without having done anything to preserve the issue, thereby giving the parents a free reversal and delaying stability for the child, even when there is no reasonable likelihood the child is an Indian child as defined by the ICWA. Nevertheless, it is a welcome first step in providing some parameters in this very out of control area of the law. Hopefully other courts will follow it.

If a dependency case is reversed on appeal due to an ICWA notice issue, the appellate court can only reverse the judgment the appeal was taken from, not any earlier findings and orders, since the error is a statutory one and is not a jurisdictional error [*In re Jonathon S. (2005) 129 Cal. App. 4th 334, 340-342, 28 Cal. Rptr. 3d 495* ; *In re Brooke C. (2005) 127 Cal. App. 4th 377, 384-385, 25 Cal. Rptr. 3d 590]* . Remand normally is limited to addressing only the ICWA or California notice issue [*In re Francisco W. (2006) 139 Cal. App. 4th 695, 704-710, 43 Cal. Rptr. 3d 171]* . This practice is consistent with holdings in other states [*In re R.E.K.F. (Iowa 2005) 698 N.W.2d 147, 150-151]* .

Regardless of which view is taken on the issue of ICWA noticing, all parties should take steps to ensure compliance with the ICWA is raised in a timely fashion or run the risk the issue may either be waived or be belatedly raised for the first time in a later appeal by an appellate attorney who has found some reference to possible Indian ancestry somewhere in the record on appeal.

[10] Postadoption Contact for Tribes

When it is best for the dependent Indian child being adopted and all parties agree, the court doing the adoption may provide for postadoption contact between the Indian child and the Indian child's tribe [*Fam. Code §§ 8616.5(b)(2), 8620(f)*]. For a discussion of postadoption contact agreements, including agreements involving an Indian child's tribe, see *§ 328.198[7]*.

[11] Tribal Customary Adoptions

A tribal customary adoption is an adoption carried out under the custom, traditions, or law of an Indian child's tribe. For such an adoption, termination of parental rights is not required [*Welf. & Inst. Code § 366.24(a)*]. Effective July 1, 2010, tribal customary adoptions are a potential permanency planning option for dependent Indian children under *Welf. & Inst. Code § 366.26(c)(1)(B)(vi)*. In the case of a tribal customary adoption the provisions of *Welf. & Inst. Code § 366.24* shall apply [*Welf. & Inst. Code § 366.26(c)(1)(C)*]. If the courts finds that termination of parental rights would be detrimental to the Indian child under one of the statutory exceptions, including that found in *Welf. & Inst. Code § 366.26(c)(1)(B)(vi)*, it must state its reasons either in writing or on the record [*Welf. & Inst. Code § 366.26(c)(1)(D)*].

When an assessment is ordered for a *Welf. & Inst. Code § 366.26* hearing it is to address the option of tribal customary adoption for an Indian child [*Welf. & Inst. Code § 366.24(b)*]. In the case of a tribal customary adoption the child's tribe or the tribe's designee shall conduct a trubal customary adoption home study before final approval of the tribal customary adoptive placement [*Welf. & Inst. Code § 366.24(c)(1)*]. The requirements for the home study are set forth in *Welf. & Inst. Code § 366.24(c)*. Significantly, the standard for evaluating the home of a prospective tribal customary adoption parent is "the prevailing social and cultural standard of the child's tribe [*Welf. & Inst. Code § 366.24(c)(1)(B)*]. But a Child Abuse Central Index check must be conducted, state and federal standards for criminal background checks must be adhered to, and a home cannot be approved by the tribe for a tribal customary adoption if the home does not satisfy state and federal standards in this regard [*Welf. & Inst. Code § 366.24(c)(2)-(5)*].

If the Indian child's tribe identifies tribal customary adoption as a potential permanent plan for an Indian child, the juvenile court may continue the hearing for a period not more than 120 days to allow the Indian child's tribe to complete the tribal customary adoption process and file with the court a tribal customary adoption order indicating the tribe has completed the adoption [*Welf. & Inst. Code § 366.24(c)(6)*]. If necessary, the court has discretion to grant a further continuance for a period of no more than 60 days, but if the tribal customary adoption is not completed by that date the juvenile court shall make new findings and orders under *Welf. & Inst. Code § 366.26(b)* for a permanent plan for the child [*Welf. & Inst. Code § 366.24(c)(6)*].

Once the juvenile court affords full faith and credit to the tribal customary adoption order and the tribe's approved tribal customary adoption home study, the child is eligible for tribal customary adoption placement [*Welf. & Inst. Code § 366.24(c)(8)*]. Once prospective tribal customary adoption placement parents have signed the tribal customary adoption placement agreement and the adoption assistance agreement under *Welf. & Inst. Code § 16120(g)*, the prospective adoptive parents may file the petition for adoption in the juvenile court. After a period of supervision, if required, and all other requirements including those relating to the child's medical background have been completed, the court may enter the tribal customary adoption decree that must include, but is not limited to a description of the modification of the legal relationship of the birth parents or Indian custodian, including visitation, if any, and responsibilities of the birth parents, the rights of inheritance of the child, and the child's legal relationship with the tribe [*Welf. & Inst. Code § 366.24(c)(10)*]. Once the juvenile court has afforded full faith and credit to the tribal customary adoption and has issued its final adoption decree, the court shall terminate dependency jurisdiction over the Indian child [*Welf. & Inst. Code § 366.24(c)(14)*].

The Judicial Council is to adopt rules of court and necessary forms for the implementation of tribal customary adoptions for dependent Indian children. It must also study the tribal customary adoption provisions and their affects on children,

birth parents, adoptive parents, Indian custodians, tribes and the court and must submit a report to the Legislature on or before January 1, 2013 [*Welf. & Inst. Code § 366.24(f)*]. Absent further legislative action, the tribal customary adoption provisions shall only remain in effect until January 1, 2014 [*Welf. & Inst. Code § 366.24(g)*].

California Forms of Pleading and Practice--Annotated

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
G. Disposition Hearing

28-328 California Forms of Pleading and Practice--Annotated § 328.126

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§ 328.126 Order Limiting Control or Removing Custody From Parent

[1] Family Maintenance Cases

[a] Limiting Parental Control

The court may limit the control to be exercised over the child by any parent or guardian by setting forth in its order clearly and specifically all such limitations. The limitations must not exceed those necessary to protect the child [*Welf. & Inst. Code § 361(a)*]. Included in the limitations the juvenile court can impose is the limitation of the right of the parent or guardian to make educational decisions for the child [*Welf. & Inst. Code § 361(a)*].

Nothing in these limitations is to prevent a parent from voluntarily relinquishing his or her child, if the adoption agency is willing to accept the relinquishment [*Welf. & Inst. Code § 361(b)*].

For discussion of addressing the educational needs of the child, including limiting the parents' right to make educational decisions and the appointment of a responsible adult to make such decisions, see *§ 328.62[6]*.

[b] Orders to Parents Regarding Services and Counseling

If a child is adjudged a dependent child of the court and the court orders that a parent or guardian will retain custody of the child subject to the supervision of the social worker, the parent or guardian is required to participate in child welfare services or services provided by an appropriate agency designated by the court [*Welf. & Inst. Code § 362(b)*]. The parents or guardian may also be ordered to participate in a counseling or education program or appear before a financial evaluation officer [*Welf. & Inst. Code § 362(c)*]. To implement its power to issue orders to parents and guardians, the juvenile court may issue citations directing parents or guardians to appear at hearings under *Welf. & Inst. Code §§ 200-987* [*Welf. & Inst. Code § 362.3*]. Family maintenance services may be extended in six month increments if it can

be shown that the objectives of the service plan can be achieved within the extended time period [*Welf. & Inst. Code § 16506*]. Such services can be provided in an appropriate case until the child reaches 18 years of age [*Welf. & Inst. Code § 16506(d)*].

[2] Removing Child From Parent's Custody

[a] Grounds for Removal

No dependent child may be taken from the physical custody of his or her parents or guardians with whom the child resides at the time the petition was initiated unless, on the hearing, the juvenile court finds clear and convincing evidence of any of the following [*Welf. & Inst. Code § 361(c)*]:

- There is a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the child, or would be if the child was returned home, and there are not reasonable means by which the child's physical health can be protected without removing the child from the child's parents' or guardians' physical custody. The fact that parents may not understand their teenage child or is angry when they discipline her is not a basis for a finding the child must be removed from the parent's custody [*In re Jasmine G. (2000) 82 Cal. App. 4th 282, 288-293, 98 Cal. Rptr. 2d 93]* . But the fact that a child has been adjudicated a dependent child of the court pursuant to *Welf. & Inst. Code § 300(e)* (under age five and suffered severe physical abuse) is prima facie evidence that the child cannot be safely left in the custody of the parent or guardian with whom the child resided at the time of the injury. As a means of protecting the child without removal, the court must consider the option of removing an "offending" parent or guardian from the home. It must also consider allowing a "nonoffending" parent or guardian to retain custody if that parent or guardian presents a plan demonstrating that the he or she will be able to protect the child in the future and the court finds the plan acceptable for that purpose [*Welf. & Inst. Code § 361(c)(1)*; *In re Isayah C. (2004) 118 Cal. App. 4th 684, 696, 700, 13 Cal. Rptr. 3d 198* (finding the incarcerated parent could make "suitable" arrangements for the care of the child and there was no basis for removing or not placing the child with that parent)].

  PRACTICE TIP:
  "Offending" and "Nonoffending" Terminology. The use of the terms "offending" and "nonoffending" found in *Welf. & Inst. Code § 361(c)(1)* should be used with caution in dependency proceedings. It is often not clear who the "offending" parent is, whether one or both parents are "offending," or whether a parent is a nonoffending parent or a non-protecting parent. The better practice is generally considered to be to refer to parents as "custodial" or "noncustodial" rather than "offending" or "nonoffending" [California Ctr. for Jud. Educ. and Research, Cal. Judges Benchguides, Benchguide 101: Juvenile Dependency Jurisdiction Hearing (Jan. 2009) § 101.6, p. 101-10]. The use of the term "nonoffending" in *Welf. & Inst. Code § 361(c)(1)* should be viewed as placing a requirement on the juvenile court to make a factual determination based on the totality of the circumstances that the person actually is a "nonoffending" parent in the truest sense of the word, so as to ensure the safety of the child.

- The parent or guardian of the child is unwilling to have physical custody of the child, and the parent or guardian has been notified that, if the child remains out of his or her physical custody for the specified statutory period, the child may be declared permanently free from his or her custody and control [*Welf. & Inst. Code § 361(c)(2)*].

- The child is suffering severe emotional damage, as indicated by extreme anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, and there are no reasonable means by

which the child's emotional health may be protected without removing the child from the child's parents' or guardians' physical custody [*Welf. & Inst. Code § 361(c)(3)*].

- The child or a sibling of the child has been sexually abused, or is deemed at substantial risk of such abuse, by a parent, guardian, or member of his or her household, or by another person known to his or her parent and there are no reasonable means by which the child can be protected from further sexual abuse or a substantial risk of sexual abuse without removing the child from his or her parent or guardian, or the child does not wish to return to his or her parent or guardian [*Welf. & Inst. Code § 361(c)(4)*; *see In re Esperanza G. (1985) 173 Cal. App. 3d 358, 360, 218 Cal. Rptr. 827]* .

- The child has been left without any provision for his or her support, or a parent who has been incarcerated or institutionalized cannot arrange for the appropriate care of the child, or a relative or other adult custodian with whom a child has been left by the parent is unable or unwilling to provide care or support for the child and the whereabouts of the parent is unknown and reasonable efforts to locate him or her have been unsuccessful [*Welf. & Inst. Code § 361(c)(5)*; *see also In re Isayah C. (2004) 118 Cal. App. 4th 684, 696, 13 Cal. Rptr. 3d 198]* .

- The child is an Indian child and continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child [*Welf. & Inst. Code § 361(c)(6)*]. Federal law requires this finding be supported by the evidence, including the testimony of a qualified expert witness [*25 U.S.C. § 1912(e)*]. Beginning in 2007, the California statute indicates the finding must be supported by the testimony of the qualified expert witness as described in *Welf. & Inst. Code § 224.6* [*Welf. & Inst. Code § 361(c)(6)*]. This is a significant difference, and is at odds with the greater protection provided the child under the ICWA, which allows the court to consider all the evidence on this issue, not just the testimony of the qualified expert witness [*25 U.S.C. § 1912(e)*]. This is particularly true when considered in light of the totality of federal and state law designed to ensure the safety and protection of the child, including Indian children. It is also inconsistent with the provisions of both federal and state law regarding the similar determination required to be made beyond a reasonable doubt prior to the termination of parental rights to an Indian child, which allow all evidence to be considered [*25 U.S.C. § 1912(f)*; *Welf. & Inst. Code § 366.26(c)(2)(B)(ii)*]. Thus, to this limited extent, the California statutory restriction on the consideration of other evidence on this issue at the disposition hearing should be deemed invalid.

The distinction between a custodial and noncustodial parent can be confusing in some cases. In *Isayah C.* the court did not decide the issue, but appeared to view a parent who had joint legal custody as one from whom custody needed to be removed under *Welf. & Inst. Code § 361(c)*, rather than one for whom placement needed to be decided under *Welf. & Inst. Code § 361.2(a)* [*In re Isayah C. (2004) 118 Cal. App. 4th 684, 695-701, 13 Cal. Rptr. 3d 198]* . This approach is questionable, since *Welf. & Inst. Code § 361(c)* specifically speaks of removal from the physical custody of the parent. The better approach is to apply *Welf. & Inst. Code § 361(c)* in cases in which the parent has joint legal and physical custody of the child, and *Welf. & Inst. Code § 361.2(a)* in cases in which the parent has only joint legal custody of the child and the child is not being removed from the physical custody of that parent. Either way, all parties and the court should take steps to ensure the record is clear as to whether the parent is being viewed as a custodial or noncustodial parent. When in doubt, the juvenile court should consider making alternative findings under both code provisions.

[b] Removal in Family Violence Cases

Children are often removed from their parent's custody in family violence cases under *Welf. & Inst. Code § 361(c)*. In cases in which one parent is solely a victim of the domestic violence and not a participant or perpetrator, removing children from that parent's custody is viewed by some as further victimizing and penalizing that parent. It may also not be best for the children. Finding shelter and services for that parent, keeping that parent's address confidential, and

arranging for visitation with the offending parent to be under controlled circumstances only, may be a way to avoid the necessity of placing children in out of home care [*In re Jon N. (1986) 179 Cal. App. 3d 156, 161, 224 Cal. Rptr. 319]* . The need for family violence agencies, social services agencies, and juvenile courts to work together in trying to protect both adult victims and child victims of family violence is very important [*see* National Council of Juv. And Fam. Ct. Judges, Fam. Violence Dept., Effective Intervention In Domestic Violence & Child Maltreatment Cases: Guidelines for Policy and Practice (1999)]. In many cases, however, the nonoffending parent will not separate from the offending parent or other perpetrator, or cannot be trusted to utilize services, stay separated from the offending person, or ensure the child's safety. In such cases, removal may be the only way to protect the child.

One case that found the evidence of domestic violence sufficient to justify dependency jurisdiction, but not sufficient to justify removal was the case of *In re Basilio T. (1992) 4 Cal. App. 4th 155, 5 Cal. Rptr. 2d 450* . In that case there was an ongoing history of family violence and two recent incidents. Both children reported seeing the fighting between the mother and father. The appellate court upheld the finding of jurisdiction under *Welf. & Inst. Code § 300(b)*, but reversed the removal order. It noted the "skimpy nature" of the information in the social study regarding the history of domestic violence. It also noted that some of the reports of domestic violence made by neighbors that were contained in the social study "were at least double hearsay and contradicted by a live witness, whom the trial court explicitly found credible." Further, the appellate court found it "significant" the incidents had not "directly affected either minor physically." Thus, it found no substantial evidence to support the finding of removal under *Welf. & Inst. Code § 361*, "under the requisite clear and convincing standard" [*In re Basilio T. (1992) 4 Cal. App. 4th 155, 168-169, 171, 5 Cal. Rptr. 2d 450]* .

The risk to children posed by domestic violence is not only physical, however [*see* Edleson, *Children's Witnessing of Adult Domestic Violence*, 14 J. Interpersonal Violence 839 (1999); Kashani & Allan, The Impact of Family Violence on Children and Adolescents (Sage 1998) pp. 33-45]. One case that discussed domestic violence as a basis for removal was the *Heather A.* case. Based on expert evidence regarding "secondary abuse," the court found that if the young girls' exposure to the father's domestic violence had not already "sown the seeds in them for battered women's syndrome," further exposure might do so. Such exposure could result "in substantial danger to their future physical health in that they would submit to being battered themselves." As such, the evidence supported removing the children from the father's custody [*In re Heather A. (1996) 52 Cal. App. 4th 183, 194-196, 60 Cal. Rptr. 2d 315]* . Experts may well question the conclusion that exposing young girls to family violence will necessarily result in them becoming victims as adults. Some may also question whether the juvenile court can or should consider such potential delayed effects years later in determining current risk under *Welf. & Inst. Code § 361(c)*. Nevertheless, there can be no question but that children are affected both directly and indirectly by family violence in the home. The *Heather A.* decision emphasizes that point for all who work in the dependency system.

PRACTICE TIP:

Evidence of Risk to Child in Family Violence Cases. The difference in the two holdings in the *Basilio T.* and *Heather A.* decisions is not due to a difference in the philosophy or viewpoint of the different appellate courts. Instead, it is found in the evidence or lack of evidence that was presented or challenged at the trial court level. In *Basilio T.* the evidence contained in the social worker's report regarding the history of domestic violence was "skimpy," a credible witness contradicted hearsay statements contained in the report, and the focus was on the physical danger to the children, if any [*In re Basilio T. (1992) 4 Cal. App. 4th 155, 170-171, 5 Cal. Rptr. 2d 450]* . In *Heather A.*, however, expert testimony was presented on the issue of risk to the children and much of that focused on psychological risk [*In re Heather A. (1996) 52 Cal. App. 4th 183, 194-196, 60 Cal. Rptr. 2d 315]* . Social workers need to include sufficient detail in their reports regarding any history of family violence and of their risk assessment of the current danger to the child. County counsels need to guide the social worker in this regard, and if necessary should call other experts on the issue of risk. Parents' attorneys and children's attorneys should also consider presenting evidence, including expert testimony, to support their position either for or against a finding of risk.

[c] No Immediate Detention or Trial Placement With Parent

Over the years, many courts have utilized an informal, non-statutory practice of "trial placement" or "detention" with a parent in order to have the information necessary to determine whether placement with the parent would actually work. The rationale was that such a practice would encourage the court, social services, and children's counsel to agree to temporarily putting the child in the parent's home at an earlier point in time than they might otherwise do, since the temporary placement could be terminated without the necessity for a *Welf. & Inst. Code § 387* petition. In return, while the parent gave up the need for a supplemental petition, the parent was able to receive the child into his or her temporary care at an earlier point in time than might otherwise occur. While in most cases such trial placement or detention orders were made after the child had been removed from the home for a substantial period of time, in others the court actually utilized the procedure at disposition hearings, removing the child and then immediately putting the child back on a trial placement or detention. Where such local practices limited such trial placements or detention to cases in which the child had been out of the home for an extended period of time or made such orders effective for only a short period of time, such as 30 to 90 days, before it became an actual placement order, all parties usually benefitted. Nonetheless, this non-statutory practice has been found to be impermissible by the appellate courts as being inconsistent with statutory mandates for either placement or removal of the child and, at least as implemented in some cases, fundamental policies of dependency law [*Savannah B. v. Superior Court (2000) 81 Cal. App. 4th 158, 161-162, 96 Cal. Rptr. 2d 428* (60-day visit with parent immediately following removal order not authorized); *In re Andres G. (1998) 64 Cal. App. 4th 476, 480-481, 75 Cal. Rptr. 2d 285* (detention with parent immediately following removal order not authorized); *In re Damonte A. (1997) 57 Cal. App. 4th 894, 899-900, 67 Cal. Rptr. 2d 369* (trial placement with parent immediately following removal order not authorized)].

Thus, at disposition the juvenile court must either remove the child from the custody of the parent or leave the child with the parent. Where, however, a child has been previously ordered removed from the parent's custody and the court desires to see if return would now be in order, the better procedure would be to authorize an extended visit for a period of 30 to 90 days, with the agency having discretion to terminate the visit should it not go well or the child becomes at risk [*Welf. & Inst. Code § 362.1*]. In such circumstances the court may choose to direct that the visitation order become a placement order if the visit is not terminated within the short period of time designated or direct that the matter be brought back before the court to determine if the visit has gone well enough to justify a placement order.

[3] Subsequent Action Under Welf. & Inst. Code § 300(a), (d), or (e)

In any case in which the court has ordered that a parent or guardian may retain physical custody of a child subject to supervision of a social worker, and the social worker subsequently receives a report of acts or circumstances that indicate that there is reasonable cause to believe that the child is a person described in *Welf. & Inst. Code § 300(a), (d),* or *(e)* (serious physical harm, sexual abuse, or under age five and having suffered severe physical abuse), the social worker must commence proceedings under *Welf. & Inst. Code §§ 200-945*. If, as a result of the proceedings required, the court finds that the child is a person described in *Welf. & Inst. Code § 300(a), (d),* or *(e),* the court must remove the child from the care, custody, and control of the child's parent or guardian and commit him or her to the care, custody, and control of the social worker pursuant to *Welf. & Inst. Code § 361* [*Welf. & Inst. Code § 364(e)*].

[4] Additional Findings

In addition, when a child taken from the custody of his or her parents or guardians has been living in out-of-home placement under *Welf. & Inst. Code § 319* or *16507.4*, the court must, as additional findings, make all the findings required by *Welf. & Inst. Code § 366(a)*, relating to necessity for and appropriateness of current placement, extent of the social services agency's compliance with the case plan, including whether steps have been taken necessary to secure a permanent placement for the child, the need, if applicable, for continued suspension of sibling interaction, the extent of any progress made toward resolving or mitigating the problems which led to foster care placement, and the likely date for the child to be placed in a permanent living situation [*Welf. & Inst. Code § 361(e)*].

[5] Reasonable Efforts Finding

If the child is removed from the custody of the parent, the court must thereafter make a determination as to whether reasonable efforts were made to prevent or eliminate the need for removal of the child from his or her home or, if the child is removed for one of the reasons stated in *Welf. & Inst. Code § 361(c)(5)*, whether it was reasonable under the circumstances not to make any such efforts [*Welf. & Inst. Code § 361(d)*].

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
G. Disposition Hearing

28-328 California Forms of Pleading and Practice--Annotated § 328.127

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§ 328.127 Disposition on Removal of Child From Parental Custody

[1] Placement or Nonplacement With Noncustodial Parent

[a] Juvenile Court Custody Orders

When a court orders removal of a child from parental custody pursuant to *Welf. & Inst. Code § 361(c)*, the court must first determine if there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of *Welf. & Inst. Code § 300* (grounds for dependency), who desires to assume custody of the child. If such a parent requests custody, the court must place the child with that parent unless it finds by clear and convincing evidence that placement with that parent would be detrimental to the child's safety, protection, physical or emotional well-being [*Welf. & Inst. Code § 361.2(a)*; *In re Marquis D. (1995) 38 Cal. App. 4th 1813, 1827-1829, 46 Cal. Rptr. 2d 198]* .

One case has held that if the previously noncustodial parent seeking custody is incarcerated, the court must consider whether that parent can arrange for suitable care while the parent is incarcerated [*In re Isayah C. (2004) 118 Cal. App. 4th 684, 700, 13 Cal. Rptr. 3d 198*]. The *Isayah C.* case was dealing with a muddy factual situation, however, and it was not clear whether the father was a custodial or noncustodial parent. Moreover, apparently no one pointed out that *Welf. & Inst. Code § 361.2(a)* does not contain the language regarding an incarcerated parent being able to arrange suitable care that is found in *Welf. & Inst. Code §§ 300(g)* and *361(c)(5)*. The lack of that language in *Welf. & Inst. Code § 361.2(a)* indicates a different legislative intent for previously noncustodial parents who are incarcerated and seeking custody. For them the focus is on the totality of the evidence relating to detriment to place, not just the incarcerated parent's ability to arrange suitable care. Thus, while the court may consider whether an incarcerated, previously noncustodial parent seeking custody can arrange for suitable care while the parent is incarcerated, that is only one of many factors that may be considered in deciding whether placement with the incarcerated, previously noncustodial parent would be detrimental to the child. Indeed, the *Isayah C.* case acknowledged the question of sibling

relationships was also a factor to consider [*In re Isayah C. (2004) 118 Cal. App. 4th 684, 700, 13 Cal. Rptr. 3d 198* , *concurring with* *In re Luke M. (2003) 107 Cal. App. 4th 1412, 1422-1423, 132 Cal. Rptr. 2d 907*]. Moreover, placement with an incarcerated noncustodial parent who arranges appropriate care for the child is legally a family maintenance placement, which could deny the child the stability of a permanent home since no *Welf. & Inst. Code § 366.26* hearing would take place. Further, the parent could at any time change his or her mind on placement. Yet dependent children have a strong interest in a safe, stable, permanent home. Thus, length of incarceration must also be considered in deciding whether allowing the parent to arrange appropriate care for the child during the parent's incarceration is detrimental to the child due to denying the dependent child permanency and stability.

The evidence the court may consider in determining whether placement with the previously noncustodial parent would be detrimental to the child is not limited to evidence of parental conduct or unfitness. Even when the previously noncustodial parent is a nonoffending parent, it may still be detrimental to place the child with that parent. While a jurisdiction finding is essentially predicated on a finding that parental conduct harmed or places the child at risk, "a detriment finding for purposes of deciding placement with a noncustodial, nonoffending parent need not be" [*In re Luke M. (2003) 107 Cal. App. 4th 1412, 1425, 132 Cal. Rptr. 2d 907]* . Thus, in one case it was held the juvenile court could properly consider the emotional harm the children would suffer if separated from siblings in deciding whether placement with the previously noncustodial parent would be detrimental [*In re Luke M. (2003) 107 Cal. App. 4th 1412, 1420-1427, 132 Cal. Rptr. 2d 907]* .

If the court places the child with a previously noncustodial parent, it may order that the parent become the legal and physical custodian of the child by means of a juvenile court custody order [*Welf. & Inst. Code §§ 361.2(b), 362.4*]. While the statutory provisions indicate that thereafter the court "shall" terminate its jurisdiction [*Welf. & Inst. Code § 361.2(b)(1)*], the rule of court provides authority for the making of such orders without terminating jurisdiction [*Cal. Rules of Ct., Rule 5.700(b)*]. Although this rule allows the juvenile court to effectively change legal custody while maintaining dependency jurisdiction, normally the court terminates its jurisdiction when it makes a juvenile custody order. Juvenile court custody orders may be made at the disposition hearing, any subsequent review hearing, or upon the granting of a petition under *Welf. & Inst. Code § 388* seeking custody and visitation orders [*Cal. Rules of Ct., Rule 5.620(c)*].

In such cases the juvenile court may also provide reasonable visitation by the parent who is now the noncustodial parent. A copy of the juvenile court custody order must be filed in any existing superior court domestic relation, guardianship or paternity proceeding. If there is no such existing proceeding, the order can be used for the opening of a superior court file [*Welf. & Inst. Code §§ 361.2(b)*; *Cal. Rules of Ct., Rule 5.700*]. In so doing, neither the order nor the juvenile court's jurisdiction is transferred to the superior court. Instead, a certified copy of the juvenile court custody order is placed in the file of the superior court which has its own jurisdiction, and the juvenile court's dependency jurisdiction is terminated.

When making a custody order, the juvenile court is not bound by the presumption in the Family Code [*see Fam. Code § 3080*] for joint custody [*In re Chantal S. (1996) 13 Cal. 4th 196, 206, 51 Cal. Rptr. 2d 866, 913 P.2d 1075* ; *In re Jennifer R. (1993) 14 Cal. App. 4th 704, 711-713, 17 Cal. Rptr. 2d 759]* . Nor is the juvenile court bound by the restrictions of *Fam. Code § 3190* in limiting counseling orders to parents to a period of one year. The court may make orders conditioning custody or visitation on a parent's participation in a counseling program without limitation as to the length of such participation so long as the parent is given notice and an opportunity to be heard, including a contested hearing if desired, the court finds the order necessary to protect the child and serve the child's best interest, that determination is based on competent evidence, and the order is narrowly drawn to respect both the parent's rights and the child's needs [*In re Chantal S. (1996) 13 Cal. 4th 196, 210-211, 214-215, 51 Cal. Rptr. 2d 866, 913 P.2d 1075]* .

One court of appeal characterized juvenile court custody orders as similar to pendente lite orders under family law and not equivalent to permanent custody orders. This holding was due in large part to its belief that statutory and decisional law allowed such orders to be subsequently modified by the superior court based solely upon a best interest

determination [*In re John W. (1996) 41 Cal. App. 4th 961, 970-973, 48 Cal. Rptr. 2d 899]* . This characterization was incorrect. Juvenile court custody orders are only made after noticed hearings on the merits at which the parent opposing the making of such orders has the full panoply of rights afforded parents throughout the dependency process, including the right to a contested hearing [*see In re Chantal S. (1996) 13 Cal. 4th 196, 210-211, 51 Cal. Rptr. 2d 866, 913 P.2d 1075* (explaining due process rights of objecting parent)]. As such, they are not properly likened to the temporary orders that family law allows pending litigation [*see Fam. Code §§ 3060-3064*; *In re Marriage of Lewin (1986) 186 Cal. App. 3d 1482, 1487-1488, 231 Cal. Rptr. 433]* , but instead have always been the equivalent of a permanent custody order [*see Speelman v. Superior Court (1983) 152 Cal. App. 3d 124, 129, 199 Cal. Rptr. 784]* .

The suggestion that juvenile court custody orders can be modified by the superior court based on the child's best interest does not change the fact that these orders are the equivalent of permanent family law custody orders. The statutory standard for both temporary and permanent family law custody orders between parents, as well as for the modification of permanent custody orders, is the best interest of the child. Based on principles of res judicata, however, when modifying a permanent custody order a showing of changed circumstances must also be made. This is not a different rule than that of the best interest of the child, but instead is an adjunct to it. The ultimate question remains the best interest of the child [*Burchard v. Garay (1986) 42 Cal. 3d 531, 535, 229 Cal. Rptr. 800, 724 P.2d 486]* . In this regard, requests for changing a permanent custody order under family law in the superior court, including a juvenile court custody order, are similar to requests to change juvenile court orders during an ongoing dependency through petitions under *Welf. & Inst. Code § 388*, for which both new evidence or a change of circumstance, and proof that the change will be in the child's best interest are required [*Welf. & Inst. Code § 388*]. Juvenile court custody orders are made after a hearing on the merits and are intended by both the juvenile court and the parties to remain in effect until circumstances change and the child's best interest requires a different order. They continue unless and until modified by a subsequent order of the superior court [*Welf. & Inst. Code § 361.2(b)(1)*] based on changed circumstances and the child's best interest. Juvenile court custody orders are the equivalent of permanent custody orders under family law.

Since the *John W.* decision, the Legislature has amended *Welf. & Inst. Code § 302* to make clear that any juvenile court custody and visitation order made pursuant to *Welf. & Inst. Code § 362.4* is a final judgment and shall remain in effect after dependency jurisdiction is terminated. Such an order "shall not be modified" in a family law proceeding unless the court finds there has been a significant change of circumstances since the juvenile court made the order, and that modification of the order is in the best interests of the child [*Welf. & Inst. Code § 302(d)*].

In addition to making orders regarding custody and visitation, when the juvenile court makes a custody order it may also issue protective orders directed to either parent as specified in *Fam. Code § 6218* [*Welf. & Inst. Code § 362.4*]. For a discussion of restraining orders made pursuant to *Welf. & Inst. Code § 213.5*, see § 328.87.

PRACTICE TIP:

Don't Say "Exit Order." Some dependency practitioners use the non-statutory term "exit order" to refer to a juvenile court custody order. Supposedly this is because the court makes its custody order and the matter then "exits" the dependency system through the termination of jurisdiction. This term has even found its way into appellate decisions [*see, e.g.,* *In re John W. (1996) 41 Cal. App. 4th 961, 970, fn. 13, 48 Cal. Rptr. 2d 899* ; *In re Katherine M. (1994) 27 Cal. App. 4th 91, 96, 33 Cal. Rptr. 2d 298* ; *In re Jennifer R. (1993) 14 Cal. App. 4th 704, 710, 17 Cal. Rptr. 2d 759]* . The term is inaccurate: the court does not need to terminate its ongoing jurisdiction in order to make a juvenile court custody order [*Cal. Rules of Ct., Rule 5.700(b)*]. Moreover, as a non-statutory term and one not used by family law practitioners, it has the potential of being misunderstood from county to county and from juvenile court to family court. Practitioners and courts are well advised to follow the lead of the California Supreme Court before which the issue was briefed in *In re Chantal S. (1996) 13 Cal. 4th 196, 204, 211, 51 Cal. Rptr. 2d 866, 913 P.2d 1075* , and refer to these orders as "juvenile court custody orders," "juvenile custody orders," or "juvenile custody and visitation orders" [*see also* *In re Sarah M. (1991) 233 Cal. App. 3d 1486, 1503, 285 Cal. Rptr. 374* ("custody and visitation orders pursuant to section 362.4")].

[b] Ongoing Dependency Jurisdiction

[i] Custody With Three-Month Home Visit

The court may choose to order that the parent assuming custody do so subject to the supervision of the juvenile court and require the social worker conduct a home visit within three months. In deciding whether to take this action, the court must consider any concerns raised by the child's current caregiver regarding the parent [*Welf. & Inst. Code § 361.2(b)(2)*]. If the court takes this action, the social worker must conduct the home visit and file a report with the court regarding the results of that visit. The court may then either award the parent custody of the child and terminate dependency jurisdiction, or leave the child placed in the parent's home subject to ongoing juvenile court supervision [*Welf. & Inst. Code § 361.2(b)(2)*]. However, the court is not required to take the action described in this paragraph before taking the action described in *Welf. & Inst. Code § 361(b)(1)* or *(3)* [*Welf. & Inst. Code § 361.2(b)(2)*].

[ii] Custody Subject to Court Supervision

The court may choose to order that the parent assuming custody do so subject to the supervision of the juvenile court. For example, the court may order that reunification services be provided to the parent or guardian from whom the child is being removed, or the court may order that services be provided solely to the parent who is assuming physical custody in order to allow that parent to retain later custody without court supervision, or that services be provided to both parents, in which case the court shall determine, at review hearings held pursuant to *Welf. & Inst. Code § 366* (6-month status review hearings), which parent, if either, shall have legal custody of the child [*Welf. & Inst. Code §§ 361.2(b)(3), 366.21(e)*].

When choosing this option, the court should be very clear as to the nature of the services it is ordering for each parent. Services ordered for the former custodial parent from whom the child was removed may, for example, be intended by the court not to achieve reunification but instead to assist the parent in developing, maintaining or improving that parent's relationship with the child; the court may have no intention of changing its order that the child live with the new custodial parent with whom he or she has now been placed. The court and all parties should be clear so that the parent is not misled [California Ctr. for Jud. Educ. and Research, Cal. Judges Benchguides, Benchguide 102: Juvenile Dependency Disposition Hearing (March 2006) § 102.49, p. 102-36].

[2] Placement With Someone Other Than Parent

When the court orders removal, the court must order the care, custody, control, and conduct of the child to be under the supervision of the social worker who may place the child in any of the following [*Welf. & Inst. Code § 361.2(e)*]:

- The home of a noncustodial parent.
- The approved home of a relative.
- The approved home of a "nonrelative extended family member" as defined in *Welf. & Inst. Code § 362.7*.
- A foster home in which the child has been placed before an interruption in foster care, if that placement is in the best interest of the child and space is available.
- A suitable licensed community care facility.
- With a foster family agency to be placed in a suitable licensed foster family home or certified family home that has been certified by the agency as meeting licensing standards.

- A home or facility in accordance with the federal Indian Child Welfare Act.

Ordering that the child be under the care of the social services agency with the agency having the discretion to place the child is referred to as making a "general placement order." While the pertinent statute indicates that a general placement order is the only type of placement order a court can make when a child is removed from a parent and not placed with a previously noncustodial parent [*Welf. & Inst. Code § 361.2(e)*], case law provides otherwise. Where the social services agency acts as an arm of the court, it is subject to the court's supervision and direction. Where it acts as an arm of the state, it is subject to judicial oversight to ensure it does not abuse its discretion. Thus it has been held that once the court places the custody of the child under the supervision of the agency, the court retains jurisdiction to oversee the agency's choice of placement alternatives even before the agency exercises its discretion to select a placement [*In re Robert A. (1992) 4 Cal. App. 4th 174, 5 Cal. Rptr. 2d 438]* . As stated by the *Robert A.* court, "Although the court does not make a direct placement order itself, it does have the power to instruct the Department to make a particular out-of-home placement of a particular dependent child" [*In re Robert A. (1992) 4 Cal. App. 4th 174, 5 Cal. Rptr. 2d 438]* . To the agency and dependency practitioners, of course, the distinction between a "direct placement order" which the court supposedly cannot make and an order to the agency "to make a particular out-of-home placement" is lost. As such, in most counties juvenile courts either make "general placement orders" subject to the court's review of placement decisions for abuse of discretion or "direct placement orders" which require a court order under *Welf. & Inst. Code §§ 387* or *388* for a later change of placement.

If a social services agency makes a decision to change a child's placement, the agency must notify the child's attorney and provide the attorney information regarding the child's address, telephone number, and caregiver. The statutory requirement for this is declaratory of existing law [*Welf. & Inst. Code § 16010.6(a)*; *see also In re Robert A. (1992) 4 Cal. App. 4th 174, 5 Cal. Rptr. 2d 438]* .

[3] Relative Placement

If the child is removed from the physical custody of his or her parents under *Welf. & Inst. Code § 361(c)* and not placed with a previously custodial parent under *Welf. & Inst. Code § 361.2(a)*, consideration is to be given for placement in the home of a relative during the period of removal [*Welf. & Inst. Code § 361.3*]. Throughout the dependency process, the responsibility for identifying potential relative placements is shared by all participants. Parents can, and in most instances should, voluntarily identify possible relative placements. Regardless, the court is to order the parents to provide the social worker with the names, residences, and other identifying information of "any" maternal or paternal relatives of the child [*Welf. & Inst. Code § 361.3(a)*]. Children too, if old enough to express themselves on the topic, should be asked if there is a relative they might like to be placed with [*Welf. & Inst. Code § 309(e)(3)*]. Children's attorneys and court-appointed special advocates, if any, should make relative placement a priority in their investigations and advocacy for the child, when appropriate [*Welf. & Inst. Code §§ 104* (duties of CASA), 317(e) (responsibilities of child's attorney)]. Relatives may themselves step forward and seek placement of the child [*Welf. & Inst. Code §§ 309* ("If an able and willing relative, as defined in Section 319, ... is available and requests temporary placement"), 361.3(a) ("consideration shall be given to a request by a relative of the child for placement")].

Following the initial removal of the child the social worker is to conduct an investigation to identify and locate grandparents, adult siblings, and other adult relatives as identified in *Welf. & Inst. Code § 319(f)(2)*. That investigation is to be done within 30 days, so it should normally be completed by the disposition hearing [*Welf. & Inst. Code § 309(e)(1)*]. Except when the relative's history of family violence makes notification inappropriate, any located relatives are to be noticed that the child has been removed and an explanation of the various options the relative may have to participate in the care of the child and support of the family [*Welf. & Inst. Code § 309(e)(1)(A)-(B)*]. Thereafter, *Welf. & Inst. Code § 361.3* the social worker must "contact the relatives given preferential consideration for placement to determine if they desire the child to be placed with them." If they do, they are to be assessed as required by that section [*Welf. & Inst. Code § 361.3(a)*; *see also Fam. Code § 7950(a)(1)* (the social worker shall make "diligent efforts" to

locate an appropriate relative for placement)].

Even the court bears responsibility for ensuring relative placements are considered [*Welf. & Inst. Code § 319(d)* ("the court shall determine if there is a relative who is able and willing to care for the child")]. Thus, the responsibility for exploring the possibility of relative placements and the failure, if any, in not considering relative placements is shared by everyone, not just the juvenile court and the social services agency.

In determining whether placement with a particular relative is appropriate, the county social worker and the court must consider, but are not limited to consideration of, the following factors [*Welf. & Inst. Code § 361.3(a)*]:

- The best interests of the child, including any special physical, psychological, educational, medical, or emotional needs of the child.

- The wishes of the parent, relative, and child, if appropriate.

- The provisions of *Fam. Code § 7950 et seq.* regarding placement.

- Placement of siblings and half-siblings in the same home, if found to be in the best interest of each child pursuant to *Welf. & Inst. Code § 16002*.

- The good moral character of the relative and of any other adult who is residing in the home. This consideration shall include whether any individual living in the home has a been responsible for acts of child abuse or neglect or has a history of violent criminal conduct.

- The duration and nature of the child's relationship with the relative and the desire of the relative to care for, and provide legal permanence for, the child if reunification efforts are unsuccessful.

- The ability of the relative to provide a safe, secure and stable environment, exercise proper and effective care and control of the child, provide a home and the necessities of life, protect the child from his or her parents, facilitate court-ordered reunification efforts with the parents, and facilitate visitation with the child's other relatives.

- The ability of the relative to facilitate the implementation of all elements of the case plan and to provide legal permanence for the child if reunification efforts fail. These two considerations, however, shall not be the sole basis on which a decision to preclude preferential placement with a relative is made.

- The ability of the relative to arrange for safe and appropriate child care where necessary.

- The safety of the relative's home. In this regard the social worker must conduct a "direct assessment" of the safety of the relative's home and must document the result of that assessment in the child's case record.

The social worker must also cause the necessary criminal records and Child Abuse Index checks required by *Welf. & Inst. Code §§ 309*, and *361.4* to be conducted and abide by the restrictions of those sections [*Welf. & Inst. Code §§ 361.3(a)(8), 361.4*]. For discussion of these criminal records checks and the circumstances under which the county may issue a criminal records exemption, see *§ 328.41[8]*.

The court is required to order the parents to disclose the names, addresses, and other known identifying information regarding any maternal or paternal relatives of the child. This inquiry does not mean that the child must be placed with any of the relatives identified. The social worker must first contact the relatives to whom preferential consideration is

given to see if they wish to have the child placed with them. Relatives desiring placement of the child must be assessed pursuant to the factors found in *Welf. & Inst. Code § 361.3(a)* and the results documented in the social study prepared pursuant to *Welf. & Inst. Code § 358.1* [*Welf. & Inst. Code § 361.3(a)*]. When more than one appropriate relative requests preferential consideration, each relative must be considered under the factors set forth above [*Welf. & Inst. Code § 361.3(b)*]. The evaluation of a potential relative placement shall not be cause for the continuation of a disposition hearing [*Welf. & Inst. Code § 361.3(a)*].

The definition of relative for purposes of placement of dependent children is very broad. Any adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all adult relatives whose relation to the child is preceded by the words "great," "great-great" or "grand" or the spouse of any such relative is to be considered a relative for purposes of placement. This is even true for spouses of such relatives if the marriage has been terminated by death or dissolution [*Welf. & Inst. Code § 361.3(c)*]. Within this definition of relative, "affinity" refers to the "connection existing between one spouse and the blood or adoptive relatives of the other spouse" [*Cal. Rules of Ct., Rule 5.502(1)*]. Only an adult relative who is a grandparent, aunt, uncle or sibling is to be given preferential consideration, however. In this context, "preferential consideration" only means that the relative asking for placement of the child should be considered and assessed first [*Welf. & Inst. Code § 361.3(c)*]. Relatives of alleged fathers are not considered relatives of the child for purposes of placement until the man has actually been determined to be a biological or presumed father of the child.

Consideration of relative placements may depend on individual circumstances [*see In re Rodger H. (1991) 228 Cal. App. 3d 1174, 1185-1186, 279 Cal. Rptr. 406* (disposition order vacated for investigation of relative placement after court gave unclear instructions and relative failed to contact social worker after jurisdiction hearing)]. The relative preference does not presume or require, however, that a child actually be placed with a relative. Instead, it merely requires that it be considered and that a determination be made as to whether the relative home is appropriate based on a consideration of the suitability of the home and the child's best interest [*In re Stephanie M. (1994) 7 Cal. 4th 295, 320-321, 27 Cal. Rptr. 2d 595, 867 P.2d 706]* .

The process for the granting or denial of criminal records exemptions is an executive function that is not subject to review by the juvenile court, but rather is subject to administrative review [*In re S.W. (2005) 131 Cal. App. 4th 838, 848, 32 Cal. Rptr. 3d 192* ; *In re Hanna S. (2004) 118 Cal. App. 4th 1087, 1091, 13 Cal. Rptr. 3d 338]* . The juvenile court can review, however, the agency's failure to seek an exemption. If an exemption is not granted, the juvenile court cannot override the agency and order the child placed in the home [*In re S.W. (2005) 131 Cal. App. 4th 838, 851-852, 32 Cal. Rptr. 3d 192* ; *In re Hanna S. (2004) 118 Cal. App. 4th 1087, 1092, 13 Cal. Rptr. 3d 338* ; *Los Angeles County Dept. of Children & Fam. Services v. Superior Court (2001) 87 Cal. App. 4th 1161, 1170, 105 Cal. Rptr. 2d 254]* . The juvenile court does, however, have the ability to review the denial of an exemption to determine if the appropriate legal standard was used. If it appears that it was not, and thus it is believed the social services agency abused its discretion in denying the exemption thereby depriving the court of the ability to consider placement with the relative, the court "is limited to directing the agency to consider the request for an exemption under the appropriate legal standard" [*In re Esperanza C. (2008) 165 Cal. App. 4th 1042, 1050, 81 Cal. Rptr. 3d 556]* .

Once the child is placed in the home, however, the fact the relative is no longer approved for placement of the child under the necessary licensing standards or that a criminal records exemption or waiver of child welfare background has not been granted, does not automatically mean the social services agency can remove the child. The juvenile court still has the authority to order the child to remain in a relative placement despite the fact that it is no longer approved. While this may make the placement ineligible for federal funding, once the initial placement has been made juvenile court's have been found to have the authority to order that such placements continue [*In re Miguel E. (2004) 120 Cal. App. 4th 521, 545-546, 15 Cal. Rptr. 3d 530* ; *Los Angeles County Dept. of Children & Fam. Services v. Superior Court (2003) 112 Cal. App. 4th 509, 519-521, 5 Cal. Rptr. 3d 182]* .

There is a natural tendency on the part of workers, attorneys and courts to be reluctant to remove a child from a relative

placement even where such placement is later determined to be marginal or even potentially dangerous. Thus, the original decision to place a dependent child with a relative should be made with great care as it may prove to be a more enduring placement than originally envisioned or than is best for the child. Moreover, although relative placements are preferred if appropriate for the child, it must be remembered that a child's ongoing caretakers will receive preferential consideration for adoption and legal guardianship if reunification efforts fail [*Welf. & Inst. Code § 366.26(c)(4), (k)*]. While the ability to provide legal permanence for a child is not the only reason for making or not making a placement with a particular relative [*Welf. & Inst. Code § 361.3(a)*], courts and agencies should ensure that a child's long-term needs are given serious consideration in any relative placement decision. If the court does not place the child with a relative who has been considered for placement pursuant to *Welf. & Inst. Code § 361.3*, the court must state for the record the reasons placement with that relative was denied [*Welf. & Inst. Code § 361.3(e)*].

Subsequent to the disposition hearing under *Welf. & Inst. Code § 358*, whenever a new placement of the child must be made, consideration for placement must be given to relatives who have not been found to be unsuitable and who will fulfill the child's reunification or permanent plan requirements. In addition to the factors described in *Welf. & Inst. Code § 361.3(a)*, the county social worker must consider whether the relative has established and maintained a relationship with the child [*Welf. & Inst. Code § 361.3(d)*; *see also In re Jessica Z. (1990) 225 Cal. App. 3d 1089, 1099, 275 Cal. Rptr. 323* (when relative requests custody after disposition but before change in placement would damage child, court should order at least an assessment of placement with the relative)].

The Legislature has declared that physical disability, such as blindness or deafness, is no bar to raising children. Thus, a social worker's determination as to a disabled relative's ability to exercise care and control should center on whether the disability prevents the relative from exercising care and control [*Welf. & Inst. Code § 361.3(a)*].

PRACTICE TIP:

Relative Status After Termination of Parental Rights. Different statutes and regulations define "relative" in varying ways. Differing interpretations of those authorities may also cause confusion regarding who is a "relative" in a particular situation. There is ongoing disagreement regarding the status of relatives after parental rights have been terminated. One view is that the termination of the rights of the child's parents also terminates the relative status of the child's birth relatives. Where this view is maintained, relative caretakers who desire to continue caring for the child are required to obtain foster care licensing following the termination of the rights of the child's parents. The better view is that relatives continue to have relative status until such time as an adoption is finalized and the child receives a new birth certificate. This view recognizes that it is the parents' rights that have been terminated, not their bloodline. It is the order of adoption and the naming of the adoptive parents on the child's new birth certificate that result in the child having a new set of relatives. Until that time, although the birth parents have no rights or status, the child's birth relatives continue to be relatives. Since the standards for licensing as a foster parent require more than those for approval as a relative caretaker, this view avoids the difficulties experienced under the previous view where a "former relative" is no long considered a relative yet cannot qualify for a foster care license, resulting in the child needing to be moved. This also appears to be consistent with the growing recognition of the importance of relatives in the lives of children before, during and after dependency proceedings [*see, e.g., Welf. & Inst. Code §§ 16605* (Kinship Support Services Program for before and during dependency), 361.3 (relative placement preference during dependency); *Fam. Code § 8616.5* (availability of postadoption contact agreements to birth relatives; goal is to remove barriers to adoption by relatives)]. Nevertheless, at this time two very different views on this issue exist. Practitioners need to be aware of these two interpretations and take steps to be knowledgeable as to which view is practiced in the county where the case they are handling is located.

[4] Placement with "Nonrelative Extended Family Member"

California formerly had a process for "certifying" the homes of extended family members and friends of the family who had filed an application to be licensed as a foster home, but had not yet been licensed [Welf. & Inst. Code former § 361.2(h)]. This was a way to recognize "kin" as a possible placement. Effective October 10, 2001, California now has a process for approving the home of a "nonrelative extended family member" [*Welf. & Inst. Code § 362.7*]. A "nonrelative extended family member" is defined by the statute as an adult caregiver who already has an "established familial or mentoring relationship with the child." When such an individual is being considered for approval for placement of the child, the social services agency must verify the existence of that relationship through interviews with the parent and child, or with one or more third parties. The parties to help verify the existence of the relationship may include the child's relatives, teachers, medical professionals, clergy, neighbors, and family friends [*Welf. & Inst. Code § 362.7*]. The standards for evaluating, and for approving or denying a "nonrelative extended family member" for placement of the child are to be the same as those for licensing a foster family [*Welf. & Inst. Code § 362.7*]. The criminal records checks required for relative placements also apply to "nonrelative extended family member" placements [*Welf. & Inst. Code §§ 309(d), 361.4*].

PRACTICE TIP:

Placement With Relatives of an Alleged Father. The relatives of a man alleged to be the father of a child are not relatives for purposes of placement unless and until the alleged father establishes paternity. This has often been problematic when the family of the alleged father is known to the child and desires placement, but the alleged father has not yet established paternity. The process for assessing and approving the home of a "nonrelative extended family member" under *Welf. & Inst. Code § 362.7* provides a way to facilitate such placement in an appropriate case even if the alleged father has not established paternity or turns out not to be the father.

[5] Placement Within the County

If the child is taken from the physical custody of the child's parents or guardians and unless the child is placed with relatives, the child must be placed in foster care in the county of residence of the child's parents or guardians in order to facilitate reunification of the family [*Welf. & Inst. Code § 361.2(f)(1)*].

In the event that there are no appropriate placements available in the parents' or guardians' county of residence, a placement may be made in an appropriate place in another county, preferably a county located adjacent to the parents' or guardians' community of residence [*Welf. & Inst. Code § 361.2(f)(2)*].

In making its placement decision, the juvenile court must follow the requirement of *Fam. Code § 7950(a)* to give "full consideration" to placing the child within proximity to the parents so as to facilitate visitation and reunification [*Welf. & Inst. Code § 361.3(a)(3)*; *In re Luke L. (1996) 44 Cal. App. 4th 670, 677-680, 52 Cal. Rptr. 2d 53]* . Thus, in light of the importance of visitation to efforts to reunify the family, placement outside of the county during the period for reunification may constitute an abuse of discretion even where such placement is with a relative [*In re Luke L. (1996) 44 Cal. App. 4th 670, 680-681, 52 Cal. Rptr. 2d 53]* . While the *Luke L.* decision does not hold that a juvenile court can never place a child outside of the county during the reunification period, it makes it clear the court must give great weight to placing the child in proximity to the parent in its balancing of placement considerations during the reunification period. Where a parent is not actively working toward reunification or where placement out-of-county is necessary to ensure the child's safety or well-being, an out-of-county placement may be considered more favorably.

When it has been determined that it is necessary for a child to be placed in a county other than the county of residence of the parents or guardians, the specific reason the out-of-county placement is necessary must be documented in the case plan. If the out-of-county placement is necessary due to the lack of resources in the sending county to meet the specific needs of the child, those specific resource needs shall be documented in the case plan [*Welf. & Inst. Code § 361.2(f)(4)*].

When it has been determined that a child is to be placed out-of-county either in a group home or with a foster family

agency for subsequent placement in a certified foster family home, and the sending county is to maintain responsibility for supervision and visitation of the child, the sending county must develop a plan of supervision and visitation. In addition, the sending county must document information regarding any known or suspected dangerous behavior of the child that indicates the child may pose a safety concern in the receiving county [*Welf. & Inst. Code § 361.2(f)(5)*].

When a child is to be placed out-of-county, and the sending county plans that the receiving county will be responsible for the supervision and visitation of the child, the sending county must develop a formal agreement between the sending and receiving counties, which specifies the supervision and visitation to be provided the child, and which indicates that the receiving county is responsible for providing the supervision and visitation. The formal agreement must be approved and signed by the sending and receiving counties prior to placement of the child in the receiving county [*Welf. & Inst. Code § 361.2(f)(6)*].

[6] Child Under Six Years

The Legislature has indicated its intent that very young children, from birth to 6 years of age, who are removed from their home be placed in family homes, not group care or institutional settings [*see* Stats. 1993, ch. 1088, § 3]. A child under 6 years of age may be placed in a community care facility licensed as a group home for children, or a temporary shelter care facility [*see Health & Safety Code § 1530.8*] only under any of the following circumstances [*Welf. & Inst. Code § 361.2(e)(6)*]:

- When a case plan indicates that placement is to provide specialized treatment to the child, the case plan specifies the need for, nature of, and anticipated duration of this treatment, and the facility meets the applicable regulations and standards [*see Health & Safety Code § 1530.8*; *Welf. & Inst. Code § 11467.1*]. The specialized treatment period must not exceed 120 days, unless additional time is needed pursuant to the case plan as documented by the caseworker, and approved by the caseworker's supervisor [*Welf. & Inst. Code § 361.2(e)(6)(A)*].

- When a case plan indicates that placement is to provide family reunification services, the facility offers reunification services that meet the needs of the child and his or her family, permits parents to have reasonable access to their children 24 hours a day, encourages extensive parental involvement in meeting the daily needs of their children, employs trained staff, and one of the following conditions exists:

  - The parent is also a ward or dependent of the court and resides in the facility.

  - The parent is participating in a treatment program affiliated with the facility, and the child's placement in the facility facilitates reunification services.

  - Placement in the facility is the only alternative that permits the parent to have daily 24-hour access to the child in accordance with the case plan, to participate fully in meeting all of the daily needs of the child, including feeding, and personal hygiene, and to have access to necessary reunification services [*Welf. & Inst. Code § 361.2(e)(6)(B)*].

[7] Placement for Concurrent Permanency Planning

In the past, some counties utilized "fost-adopt" homes for the placement of those potentially adoptable children for whom the likelihood of reunification is only slight. There was no legal impediment to such a practice provided the juvenile court, social services agency and the fost-adopt parents were aware of and followed both the spirit of and requirements for reunification services, and gave the parent a true opportunity at reunification [*see In re Steven A. (1993) 15 Cal. App. 4th 754, 764, 19 Cal. Rptr. 2d 576]* . Foster parents for such fost-adopt programs were usually very

carefully selected to ensure this was accomplished and were only utilized in the small number of cases where reunification seemed unlikely. Nevertheless, there were times and jurisdictions when "fost-adopt" placements were disfavored.

Now that concurrent planning for legal permanence is required for all cases where the child is in out-of-home placement and reunification services are being offered, more placements will be made where the caretakers may be willing to consider adoption or legal guardianship if reunification fail. Such caretakers may be relatives or foster parents [*Welf. & Inst. Code §§ 358.1(b), 361.3(a)(7)(H), 366.21(e), (f), 366.22(a),* 366.25(a)(3), *16501.1(f)(9)*]. This practice, assuming that it is conducted openly and appropriately as is intended with concurrent planning, is entirely consistent with the dual goals of working toward reunification with the parent and providing the child with stability of placement and permanency if reunification cannot be achieved [*Welf. & Inst. Code §§ 361.5(a), 366.26(k)*; *see also* discussion regarding the purpose of dependency proceedings in § 328.11, and concurrent planning in § 328.12[9]]. Without doubt, in some cases fost-adopt or other potential permanency placements, including relatives and nonrelative extended family members, may in fact interfere with reunification efforts. The juvenile court and all parties, including the social services agency and the caretakers, must be very sensitive to the potential for conflicts of interest in such placements and in concurrent planning and must ensure that the nature of the placement and the planning does not defeat the possibility of reunification with the parent [*see, e.g., In re Jasmon O. (1994) 8 Cal. 4th 398, 430-431, 33 Cal. Rptr. 2d 85, 878 P.2d 1297* (fact that early in the case the foster parent came to desire adoption did not interfere with reunification efforts which failed)].

[8] Educational Decisions

If the parent or guardian is unwilling or unable to make educational decisions for his or her child, or if other circumstances exist that compromise the ability of the parent or guardian to make those educational decisions, the social worker is to consider in the social study prepared for the disposition hearing whether the rights of the parent or guardian to make educational decisions should be limited. If the social worker makes that recommendation in the social study, the social worker is to identify whether there is a responsible adult available to make educational decisions for the child [*Welf. & Inst. Code § 358.1(e)*]. The social worker must also address this issue in any supplemental report required for the review of a child in foster or relative care [*Welf. & Inst. Code § 366.1(e)*].

If a child is declared a dependent child, the juvenile court must consider the educational needs of the child, regardless of whether the child is removed from the custody of the parent or guardian or not. If appropriate it may limit the right of the parent or guardian to make educational decisions on behalf of the child [*Welf. & Inst. Code § 361(a)*]. This may be especially appropriate when the child is removed from the custody of the parent or guardian, and this is when the limitation of the right of the parent or guardian to make educational decisions is most commonly seen. Indeed, when the child is placed in foster care and the child's status reviewed, the court must consider whether this action needs to be taken [*Welf. & Inst. Code § 366(a)(1)(C)*].

The issue of the need for a responsible adult for educational decisions is to be considered at disposition, review hearings, and even post-permanency planning review hearings for children in long term foster care [*Welf. & Inst. Code §§ 358.1(e), 366(a)(1)(C), 366.3(e)(5)*]. Any limitation on the right of a parent or guardian to make educational decisions for the child and any order appointing a responsible adult for educational decisions must be specified in the court order [*Cal. Rules of Ct., Rule 5.650(a)*]. If the child is subsequently moved from the home of a relative or foster parent who has been appointed to make educational decisions for the child, a new responsible adult for educational decisions shall be appointed [*Gov. Code § 7579.5(c)*].

Educational advocacy on behalf of dependent children is not limited to the activities of a responsible adult or surrogate parent. Counsel for children, CASAs, social workers, and other child advocates, as well as the juvenile court, must take an active role in educational advocacy for dependent children [*see, e.g.*, Espana & Fried, The Expanding Role of the Juvenile Court in Determining Educational Outcomes for Foster Children, *5 J. Center Children & Cts. 83 (2004)*;

NCJFCJ, Asking The Right Questions: A Judicial Checklist to Ensure That the Educational Needs of Children and Youth in Foster Care Are Being Addressed (NCJFCJ 2005)].

Important questions to ask at all dependency hearings beginning with the initial or detention hearing include, but are not limited to: Is the child in school? What type of school? If the child is enrolled in an alternative school, what is the basis for such a placement? Does the child have appropriate clothing and supplies for school? How is the child getting to and from school? How is the child's attendance at school? Is the child able to participate in school-related extracurricular activities? What was the date of the last educational evaluation or assessment? How is the child performing in school? Who is the child's educational advocate? Are there mental, physical, or language issues that impair the child's ability to learn? Unless the answers to these questions are known, the child's education needs may not be met.

For further discussion of the requirement to address the educational needs of the child, including limiting the parents' right to make educational decisions and the appointment of a responsible adult to make such decisions, see *§ 328.62[6]*.

California Forms of Pleading and Practice--Annotated

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
G. Disposition Hearing

28-328 California Forms of Pleading and Practice--Annotated § 328.128

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§ 328.128 Interstate Compact on the Placement of Children

[1] In General

California has adopted the Interstate Compact on the Placement of Children (ICPC) [*Fam. Code § 7900*]. The purpose of the ICPC is to have the states cooperate with each other in the interstate placement of children to ensure that each child requiring placement receives the maximum opportunity to be placed in a suitable home. It is also the purpose of the ICPC to ensure that the appropriate authorities in a state where a child is to be placed may have a full opportunity to investigate the proposed placement so as to protect the child, so that the authorities of the state placing the child can receive complete information on which to make the placement decision, and to promote appropriate jurisdictional arrangements for the care of children placed in other states [*Fam. Code § 7901* (Article 1)].

The ICPC applies any time a government agency, including the juvenile court, sends or otherwise causes a child to be taken to another state for placement. It sets out conditions for placement of a child in another state [*Fam. Code § 7901* (Article 3)] and imposes penalties for illegal placements [*Fam. Code § 7901* (Article 4)]. It also makes clear that it is the state which sends the child to the other state which retains financial responsibility for the child [*Fam. Code §§ 7901* (Article 5), 7902, 7905]. To implement the purposes and provisions of the ICPC, the Judicial Council adopted *Cal. Rules of Ct., Rule 5.616*.

[2] Visitation Versus Placement

It is considered a placement under the ICPC whenever a court maintaining dependency jurisdiction sends or authorizes a child to be taken to another state without a specific date of return, beyond the ending date of a school vacation period, or with a return date more than 30 days from the start of the visit [*Cal. Rules of Ct., Rule 5.616(b)*]. Thus, any sending or taking of the child to another state under court order for less than those periods is considered a visit and ICPC approval is not required. This is commonly called a "29 day visit." Where done for 29 days or less, such a visit truly is a

visit and should not be held violative of the law. Indeed, it may facilitate the child's relations with extended family members and the information gained thereby may assist the court in making future placement decisions. In many instances, however, courts authorize repeated 29-day visits such that the child remains in the other state for months without ever receiving ICPC approval and potentially without that placement ever being supervised. Moreover, it means the child is in the other state without the California juvenile court ever having received the full and complete information the ICPC process is designed to provide. This can result in the child being in a de facto placement that is not best or even safe for the child. Allowing a child to be in another state for repeated and continuous 29-day visits is a practice that violates the spirit, if not the letter of the ICPC and should not be utilized [*In re Luke L. (1996) 44 Cal. App. 4th 670, 681-682, 52 Cal. Rptr. 2d 53]* .

It should be noted, however, that where the proposed placement is a "priority placement" time limits "may be modified by written agreement between the sending court, the sending agency, and the Compact Administrators of the sending and receiving jurisdictions" [*Cal. Rules of Ct., Rule 5.616(f)(6)*]. This would appear to authorize extended visits prior to formal ICPC approval if these entities enter into a written agreement to allow that in the particular case.

At a minimum, the juvenile court, social services agency, and child's attorney should never allow a child to remain in another state for more than a 29-day visit without an agreement with an appropriate agency in the receiving state for at least minimal courtesy supervision, including regular verification of the child's well-being and the provision of services if necessary.

PRACTICE TIP:

Communicate With the Receiving State. As previously noted, some courts will, on occasion, allow a child to go to another state on a "29 day visit" pending ICPC approval for placement. Practitioners should be aware that states differ as to whether they will do ICPC home studies on homes in their state when the child is already visiting in that home. Some will. Some won't. The same is true with regard to providing courtesy supervision services. Moreover, most, if not all states are unwilling to do an adoptive home study until parental rights are terminated. These potential difficulties point out the need for early and ongoing communication with the social services agency in the receiving state as to what they will and will not do in a given case. All parties should ensure that such communication is taking place and that necessary information is received before important decisions impacting on the child's welfare are made.

[3] Applicability to Out-of-State Placements With Parents

In the past there was substantial controversy and uncertainty as to whether the ICPC applies when the juvenile court sends the child to a parent in another state. Two California decisions [*In re Johnny S. (1995) 40 Cal. App. 4th 969, 974-980, 47 Cal. Rptr. 2d 94* ; *Tara S. v. Superior Court (1993) 13 Cal. App. 4th 1834, 1837-1838, 17 Cal. Rptr. 2d 315]* and one federal decision [*McComb v. Wambaugh (3d Cir. 1991) 934 F.2d 474]* held that use of the ICPC is not required for placement with out-of-state parents. These three holdings were directly at odds with the position taken by the Association of Administrators of the Compact in its regulations and by the vast majority of states [*see* ICPC Regulation III; ICPC Secretariat Opinions 32, 34, 43]. In disagreeing with the ICPC Administrators, these three decisions looked to the language of the ICPC statute for their conclusion the legislature did not intend the ICPC to be mandated for such placements. With broad disagreement on the issue indicating the meaning of the statute's language is not clear, other sources, such as legislative history and the ICPC Administrator's regulations should be looked to in interpreting the ICPC's application to parental placements. In the view of the ICPC Administrators, such sources supported their belief the ICPC does apply to placements with parents. Recent developments, however, appear to have resolved this controversy.

A joint committee composed of representatives from the National Council of Juvenile and Family Court Judges, the National Association of Public Welfare Administrators, and the ICPC Administrators has created a new process for

expedited home studies for priority placements that should resolve much of the dissatisfaction with the slowness of the ICPC process, particularly as to placements with parents [*see* ICPC Regulation No. 7 effective October 1, 1996; *Cal. Rules of Ct., Rule 5.616(f)*]. In a memorandum regarding the work of that committee, it was noted that:

"Parents have constitutionally-guaranteed custodial rights superior to any non-parent. If the court determines that a non-custodial parent is a non-offending parent and an appropriate caretaker, it may restore physical custody of the child to that parent and dismiss its jurisdiction without invoking the Interstate Compact.

"If a court restores legal and physical custody to a previously non-custodial parent but retains jurisdiction to ensure the appropriateness of that parent, ICPC must be invoked. When supervision of the placement in the receiving state indicates that the child is not at risk of abuse or neglect, a receiving state should not withhold its concurrence to dismissal of sending state jurisdiction." [ICPC Administrators' Memorandum to Joint Committee on ICPC Improvement regarding the Joint Committee's Recommendations to Improve the Placement of ICPC Children, p. 11 (May 8, 1996).]

California accepted this new approach through the adoption of Cal. Rules of Ct., former Rule 1428, effective January 1, 1999. The key question to ask now is whether the California juvenile court intends to retain jurisdiction. If the court is sending the child to the parent in another state and maintaining dependency jurisdiction for supervision of that child, the home study process and compliance with ICPC is required since this is now recognized by California as a placement requiring ICPC adherence [*Cal. Rules of Ct., Rule 5.616(b)(1)*]. On the other hand, if the court is sending the child to the parent in another state and terminating jurisdiction, the ICPC need not be invoked [*Cal. Rules of Ct., Rule 5.616(b)(1)*]. Both the ICPC Administrators' memorandum and *Cal. Rules of Ct., Rule 5.616(b)(1)* make possible the placement of a child with a parent in another state and the maintenance of California dependency jurisdiction without ICPC compliance if the purpose of ongoing jurisdiction is solely to provide services to or impose conditions on the parent who remains in California. It will be a rare case, however, in which a court may wish to make such an order and whether such an order would ever be appropriate is subject to question.

Nothwithstanding the actions taken by the ICPC Administrators and California's rules of court, one recent California decision has held the ICPC does not apply to placements with out-of-state parents, even if dependency jurisdiction is being maintained [*In re John M. (2006) 141 Cal. App. 4th 1564, 1573-1575, 47 Cal. Rptr. 3d 281]* . This decision again puts California out of step with the ICPC Administrators and the majority of states that hold the ICPC applies to placements with out-of-state parents when dependency jurisdiction is maintained [*see, e.g. State Dept. of Econ. Sec. v. Leonardo (Ariz. Ct. App. 2001) 22 P.3d 513* ; *K.D.G.L.B.P. v. Hinds County Dept. of Human Svcs. (Miss. 2000) 771 So.2d 907* ; *D.S.S. v. Clay County Dept. of Human Resources (Ala. Civ. App. 1999) 755 So. 2d 584* ; *Dept. of Children and Families v. Benway (Fla. App. 1999) 745 So.2d 437* ; *In re Adoption of Warren (Mass. App. 1998) 693 N.E.2d 1021* ; *State ex rel. Juvenile Dep't of Clackamas County v. Smith (Or. App. 1991) 811 P.2d 145]* . This can make placing children in other states difficult, and make other states reluctant to work with California. While the reasoning of the *John M.* court is subject to question, this is an area in which reasonable minds, and reasonable courts, can and have differed. A revised ICPC, which clarifies its application to placements with parents, has been proposed and Congress has indicated its sense the revised ICPC should be ratified "expeditiously" [Safe and Timely Interstate Placement of Foster Children Act of 2006, Sec. 2 (2006) 109 P.L. 239 (eff. 10/1/06)]. Nevertheless, until the revised ICPC is adopted in California, this is an area to be watched for further developments.

PRACTICE TIP:

ICPC Administrators. For more information on the ICPC, its regulations, and the ICPC Secretariat's Opinions, contact the Association of Administrators of the Interstate Compact on the Placement of Children, 810 First Street, N.E., Suite 500, Washington, D.C. 20002. The national Project Director may be reached at 202-682-0100. In California, the Deputy Compact Administrator may be reached at 916-651-8111.

[4] Priority Placements

A "priority placement" is a placement or request for placement by a court if the court makes a specific finding the proposed placement is with a relative who could receive the child from another relative without ICPC compliance if the child was not under the court's jurisdiction and the court finds the child is under two years of age, in an emergency shelter, or has spent a substantial period of time in the home of the relative proposed for placement [*Cal. Rules of Ct., Rules 5.616(b)(2), 5.616(f)*]. As used in this regard, the word relative means a parent, stepparent, grandparent, adult sibling, adult uncle or aunt, or guardian of the child [*Cal. Rules of Ct., Rule 5.616(f)*]. Priority placement provisions may also apply if the receiving state has been in possession of a "properly completed interstate compact placement request form and supporting documentation" for over 30 business days, but the sending agency has not yet received notice of whether the child may be placed in the receiving state [*Cal. Rules of Ct., Rules 5.616(b)(2), 5.616(f)*]. When the court determines a proposed placement is a priority placement under one or more of these provisions, procedures apply for an increased communication and an expedited home study [*Cal. Rules of Ct., Rule 5.616(f)*]. Judicial Council Forms JV-565 (Findings and Request for Assistance under Interstate Compact on the Placement of Children) and JV-567 (ICPC Priority--Findings and Orders) are to be used for these purposes.

[5] Placement in Out-of-State Group Homes

California has declared that "the health and safety of children in out-of-state group home care pursuant to the Interstate Compact on the Placement of children is a matter of statewide concern" [*Fam. Code § 7912(a)*]. To this end, a dependent child cannot be placed in an out-of-state group home unless the court finds that the out-of-state group home is licensed or certified for the placement of children by an agency of the state in which the child will be placed, the out-of-state group home meets the requirements of *Fam. Code § 7911.1*, and that facilities and programs within California have been determined to be unavailable or inadequate to meet the needs of the child [*Welf. & Inst. Code §§ 361.21(a), 366(d)*]. Nor can a child remain in an out-of-state group home placement unless the group home is in compliance with *Fam. Code § 7911.1* [*Welf. & Inst. Code § 366(d)*]. *Fam. Code § 7911.1* makes it clear that notwithstanding any other provision of law, the California State Department of Social Services will investigate "any threat to the health and safety of children" placed by county social services agencies in an out-of-state group home under the provisions of the ICPC. Out-of-state group homes must also comply with the reporting requirements applicable to California group homes for all children placed in their care, regardless of whether placed by California or not [*Fam. Code § 7911.1(a)*]. Further, out-of-state group homes accepting California children must also meet California licensing standards [*Fam. Code §§ 7911(b), 7911.1(c)*].

To further ensure the appropriateness of placements in out-of-state group homes, each county must obtain an assessment and placement recommendation by a county multidisciplinary team for all children placed in such group homes. That assessment and recommendation is to be completed within six months of the effective date of the enacting legislation, which was August 19, 1998. Moreover, effective March 1, 1999, all counties must obtain such an assessment and recommendation prior to the placement of a child in an out-of-state group home [*Fam. Code § 7911.1(d)*]. For purposes of conducting this assessment and recommendation, a multidisciplinary team "shall consist of participating members from county social services, county mental health, county probation, county superintendents of schools, and other members as determined by the county" [*Fam. Code § 7911.1(f)*].

[6] Review of Out-of-State Placement

When a child has been placed out-of-state the court must review the placement decision at every regularly scheduled review hearing. The court must determine the continuing appropriateness of the out-of-state placement and whether the placement is in the child's best interest [*Welf. & Inst. Code 366(c)*]. The juvenile court must review all out-of-state placements in group homes at least every six months to ensure compliance with the requirements of *Welf. & Inst. Code § 361.21(a)*, which includes meeting the requirements of *Fam. Code § 7911.1* [*Welf. & Inst. Code § 361.21(b)*]. Unless the requirements of *Welf. & Inst. Code § 361.21(a)* and *(b)* are met, a county is not entitled to receive or expend public funds for the placement of a child in an out-of-state group home [*Welf. & Inst. Code § 361.21(c)*].

[7] Automatic Stay of Order Placing Child Out-of-State

Code Civ. Proc. § 917.7 provides that "in the absence of a writ or order of a reviewing court providing otherwise," any order of the juvenile court "allowing, or eliminating restrictions against removal" of a dependent child from the state are stayed by operation of law for a period of seven calendar days from the order of the juvenile court. This provision used to stay such orders for a period of 30 days, which is still the law for out-of-state orders in cases other than juvenile dependency cases, but was changed effective January 1, 2000, for dependent children.

Parties objecting to an order placing a dependent child out-of-state should consider asking the juvenile court to stay its order for a specified period of time so review by a higher court can be sought [*Code Civ. Proc. § 917.7*; *see also In re Elijah S. (2005) 125 Cal. App. 4th 1532, 1541, 24 Cal. Rptr. 3d 16]* . In the absence of a stay by the juvenile court, however, the party objecting has only seven calendar days to seek a stay from the appellate court by way of a petition for writ of supersedeas pending appeal before the automatic stay of this section expires [*see In re Elijah S. (2005) 125 Cal. App. 4th 1532, 1541, 24 Cal. Rptr. 3d 16* (petition for writ of supersedeas granted to stay release of juvenile court documents pending review); *In re Nikki R. (2003) 106 Cal. App. 4th 844, 850, 131 Cal. Rptr. 2d 256* (writ of supersedeas granted to stay change of adoptive placement pending review)]. Such a writ should indicate on its cover that an immediate stay is requested pending the appeal and must be supported by an adequate record, including a copy of the court's minute order, any reports or points and authorities considered by the court in making the order, and either a reporter's transcript or a declaration by counsel as set forth in *Cal. Rules of Court, Rule 8.490* [*Cal. Rules of Ct., Rules 8.116, 8.490*].

The question arises whether a court's authorization of an out of state visit triggers the automatic stay found in *Code Civ. Proc. § 917.7*. The use of the term "removal" suggests something more permanent or lasting than a mere visit of less than 30 days duration at the end of which the child will be returning to this state. Thus, the better and more practical view is that an order allowing a visit to another state for a period less than 30 days does not trigger the automatic stay of *Code Civ. Proc. § 917.7*. If the visit is a prelude to an anticipated placement in the other state, however, and it is not envisioned the child will be returning to California within 30 days, the automatic stay of *Code Civ. Proc. § 917.7* should apply.

If the automatic stay applies, the social services agency, child's attorney, or any other party with standing on this issue may apply by extraordinary writ petition to the Court of Appeal for an order lifting the automatic stay [*Code Civ. Proc. § 917.7*]. In light of the shortened length of the automatic stay in dependency proceedings, such requests for the lifting of the automatic stay are now less likely to be made, but may still be appropriate in certain cases.

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
G. Disposition Hearing

28-328 California Forms of Pleading and Practice--Annotated § 328.129

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§ 328.129 Services on Removal

[1] General Requirements and Limitations

Except as noted below, whenever a child is removed from a parent's or guardian's custody, the juvenile court is required to order the social worker to provide child welfare services to the child and the child's parents or guardians for the purpose of facilitating reunification of the family [*Welf. & Inst. Code § 361.5(a)*; *see In re John B. (1984) 159 Cal. App. 3d 268, 273-274, 205 Cal. Rptr. 321* (court may not circumvent statutory scheme for reunification even though it appears that reunification is doomed to failure)]. Such services are not a constitutional entitlement, but rather are a "benefit" provided by statutory law [*In re Baby Boy H. (1998) 63 Cal. App. 4th 470, 475, 73 Cal. Rptr. 2d 793]* . Further, those services are only a benefit to be ordered for a parent or guardian. The court cannot order other relatives or significant others, such as stepparents or de facto parents, to participate in such services if the child is not placed in their care [*In re Silvia R. (2008) 159 Cal. App. 4th 337, 341-342, 345-351, 71 Cal. Rptr. 3d 496* ; *see also In re Jody R. (1990) 218 Cal. App. 3d 1615, 1628, 267 Cal. Rptr. 746]* . This is so even if the relative or significant other residing with the parent was the abuser. Instead, the court orders the parent or legal guardian to participate in services to make the home safe for the child, and orders the parent or legal guardian to ensure any other person in the home, including relatives or significant others, are safe. This places the burden on the parent or legal guardian to ensure that person either participates in services and becomes safe for the child or leaves the home [*In re Silvia R. (2008) 159 Cal. App. 4th 337, 341-342, 345-351, 71 Cal. Rptr. 3d 496]* . As noted in a respected judicial practice guide, "A parent who resides with the perpetrator of child abuse has the responsibility to ensure that the perpetrator makes the progress necessary to allow the child to be returned to the home. Thus, while the perpetrator, who may be a stepparent, may have no independent right to services, such services may flow through the parent. In such a case the plan might read: 'If the mother continues to reside with the stepfather, she shall ensure that the stepfather participate in and complete a course in appropriate disciplinary techniques and that he demonstrate an ability and willingness to use alternative forms of discipline so as to allow the child to be returned to the home safely' " [California Ctr. for Jud. Educ. and Research, Cal.

Judges Benchguides, Benchguide 102: Juvenile Dependency Disposition Hearing (Jan. 2009) § 102.68, p. 102-65].

Where the child is 3 years of age or older at the time of the initial removal from the physical custody of his or her parent or guardian, court-ordered reunification services shall not exceed 12 months from the date the child entered foster care [*Welf. & Inst. Code §§ 361.49*, 361.5(a)(1)]. For a child under 3 years of age at the time of the initial removal from the physical custody of his or her parent or guardian, court-ordered reunification services shall be for the period beginning with the disposition hearing and ending with the six-month review hearing under *Welf. & Inst. Code § 366.21(e)*, but no longer than 12 months from the date the child entered foster care [*Welf. & Inst. Code § 361.5(a)(1)(B)*]. This limitation on the time for services in the case of a very young child has been upheld as not violating a parent's constitutional substantive due process and equal protection rights [*Daria D. v. Superior Court (1998) 61 Cal. App. 4th 606, 610-613, 71 Cal. Rptr. 2d 668]* . The date the child entered foster care is the date of the jurisdiction finding or 60 days from the date the child was removed from the physical custody of the parent or guardian, whichever occurs first. This is true regardless of the age of the child [*Welf. & Inst. Code § 361.49*].

PRACTICE TIP (PARENT'S P.O.V.):

The Reunification Case Plan. Parents and parent's counsel should be actively involved in the drafting of a client's reunification plan. This means making sure that components are appropriate, available, and no barriers to participation exist. Counsel should also consider recommending particular services that the client will need in order to make return more probable. Finally, it is often said that visitation is the lynchpin of reunification. Visitation is a service. Without frequent visitation, the parent-child bond is diminished or incapable of forming and the parent loses sight of what they are working for. Counsel for parents must take an active role on individual cases and system-wide to ensure visitation is maximized.

The statutory changes effective January 1, 2009, for the period of services for a child under 3 years of age at the time of the initial removal and for bringing motions to terminate court ordered services prior to the normal presumptive period resulted in a major policy change for California. For over two decades it was recognized that under state and federal law reunification services were not ordered for a minimum period of time; they were ordered for a maximum period of time since services were to be time-limited to afford children permanency at the earliest possible stage, if they could not be returned safely [*see, e.g.,* Welf. & Inst. Code former § 361.5(a); *In re Christina A. (2001) 91 Cal. App. 4th 1153, 1159-1164, 111 Cal. Rptr. 2d 310* ; *In re Candace P. (1994) 24 Cal. App. 4th 1128, 1132-1133, 30 Cal. Rptr. 2d 1* ; *In re David H. (1995) 33 Cal. App. 4th 368, 388, 39 Cal. Rptr. 2d 313* , *quoting* Sen. Select Com. on Children & Youth/ Sen. Bill No. 1195 Task Force Rep. on Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services (Jan. 1988) p. 2; *In re Zacharia D. (1993) 6 Cal. 4th 435, 446, 24 Cal. Rptr. 2d 751, 862 P.2d 751]* . The Legislature is presumed to have known that, but the legislative history of the bill rebuts that presumption. Instead, citing dicta from the cases of *Daria D. v. Superior Court (1998) 61 Cal. App. 4th 606, 71 Cal. Rptr. 2d 668* , and *Judith P. v. Superior Court (2002) 102 Cal. App. 4th 535, 126 Cal. Rptr. 2d 14* , the Legislature was led to believe first that there were "varying interpretations of existing law regarding reunification service timelines," second that state and federal law intended services to be provided for a minimum period of time, and third that the cases of *In re Derrick S. (2007) 156 Cal. App. 4th 436, 67 Cal. Rptr. 3d 367* , and *In re Aryanna C. (2005) 132 Cal. App. 4th 1234, 34 Cal. Rptr. 3d 288* , which allowed services to be terminated early in very limited, egregious circumstances, "undermine[d] this intent and due process requirements" [*see* Senate Rules Comm. Analysis, AB 2341 (1997-1998 Reg. Sess.), Aug. 25, 2008, pp. 4-5]. None of those statements were accurate. Nevertheless, knowingly or unknowingly, California has enacted a major policy shift in the area of services to parents. As such, it can be expected to result, at least initially, in substantial litigation at both the trial and appellate levels. The wisdom of this policy shift and how it will be implemented and interpreted are matters to be watched for further developments.

Notwithstanding the above limitations, the court may extend services up to a maximum time period not to exceed 18 months from the date the child was originally removed from the physical custody of the parent or guardian if it can be shown the permanent plan of return to parent with the child being "safely maintained in the home" can be achieved within the extended time period [*Welf. & Inst. Code § 361.5(a)*]. Before it extends the time period for court-ordered

reunification services, the court must find a substantial probability that the child will be returned to the custody of the parent or guardian within the extended period of time, or that reasonable reunification services have not been provided. The court must also state the factual basis for its determination that there is a substantial probability of return within the extended time period [*Welf. & Inst. Code § 361.5(a)*; *see also Welf. & Inst. Code § 366.21(g)(1)* (additional findings necessary to extend reunification period to the maximum of 18 months)]. Physical custody of the child by the parents during the 12-month period does not interrupt the running of the period [*Welf. & Inst. Code § 361.5(a)*].

Effective January 1, 2009, there is a provision that allows the juvenile court to extend services to a date 24 months from the original removal of the child in certain very limited circumstances pertaining to parents in substance abuse programs, and parents recently released from incarceration or institutionalization [*Welf. & Inst. Code §§ 361.5(a)(4), 366.22(b), 366.25*]. Many will question the wisdom of this change, in part because it is likely to require strictly state or county funding, but primarily because it extends the uncertainty of placement and permanency for the child beyond the normal time frames, which may be especially questionable with infants and very young children. Nevertheless, this major shift in policy is now also the law in California. At the 18-month permanency review hearing held under *Welf. & Inst. Code § 366.22*, if the child is not returned to a parent and the juvenile court finds it is in the child's best interest to provide further reunification services to a parent or legal guardian making "significant and consistent" progress in a substance abuse program, or to a parent recently discharged from institutionalization or incarceration and making "significant and consistent" progress in establishing a safe home for the child, the court may continue reunification services to a date not to exceed 24 months from the date of the child's original removal. Continuing the case to the 24-month date does require certain specific findings relating to the substantial probability of return in light of visitation and contact, progress, and a demonstrated capacity to complete their treatment plan and provide for the child's safety, protection, physical and emotional well being, and any special needs. It also requires a finding that it's in the child's best interest, all standards that may be difficult to establish [*Welf. & Inst. Code §§ 361.5(a)(3), 366.22(b)*]. This is an area in which substantial litigation is anticipated at both the trial and appellate levels, and should be watched for further developments.

The court must also make findings under *Welf. & Inst. Code § 366(a)* (necessity and appropriateness of placement, compliance of agency with case plan, need for continued suspension of sibling interaction if applicable, progress towards alleviating or mitigating causes necessitating placement, projection of likely date for return to home, or placement for adoption or guardianship) and of *Welf. & Inst. Code § 358.1(f)* whether parent has been advised of the option to participate in adoption planning, including the option of entering into a postadoption contact agreement, and voluntarily relinquish the child if an adoption agency is willing to accept the relinquishment [*Welf. & Inst. Code § 361.5(a)*].

When counseling or other treatment services are ordered, the parent will be ordered to participate in those services, unless the parent's participation is deemed by the court to be inappropriate or potentially detrimental to the child.

When services are ordered for a parent or guardian, the parent or guardian must be advised that neither their signature on the plan nor the acceptance of services constitutes an admission of guilt and cannot be used as evidence against them [*Evid. Code § 1228.1(a)*; *Welf. & Inst. Code § 16501.1(f)(11)(B)*]. They must also be advised, however, that their failure to cooperate with such services, except for good cause, can be used as evidence at any hearing conducted on a petition filed pursuant to *Welf. & Inst. Code § 300, 342, 387* or *388*, or any review hearing conducted pursuant to *Welf. & Inst. Code § 366.21* or *366.22* [*Evid. Code § 1228.1(b)*; *Welf. & Inst. Code § 16501.1(f)(11)(B)*].

Except in cases in which the court does not order reunification services [*see Welf. & Inst. Code § 361.5(b)*; *see also* discussion under [2], *below*], the court must inform the parent or parents about permanency planning procedures under *Welf. & Inst. Code § 366.26* and must specify that parental rights may be terminated [*Welf. & Inst. Code § 361.5(a)*].

Family reunification services must be provided or arranged for by county welfare department staff in order to reunite the child separated from his or her parent because of abuse, neglect, or exploitation [*see Welf. & Inst. Code § 16507(a)*].

In accordance with *Welf. & Inst. Code § 16507*, family reunification services may not be ordered as part of a child custody or visitation rights proceeding brought under the Family Law Act [*Civ. Code § 4609*]. However, notwithstanding *Welf. & Inst. Code § 16507*, family reunification services may not be provided to a child adjudged a dependent because he or she was freed for adoption from one or both parents for 12 months by either relinquishment or termination of parental rights, and for whom an adoption petition has not been granted [*Welf. & Inst. Code § 300.1*, as amended by Stats. 1987, ch. 1485, § 6; *see Welf. & Inst. Code § 300(h)*].

If a child is removed from the custody of a parent or guardian and placed with another parent, the court may order that reunification services be provided to the parent or guardian from whom the child has been separated [*Welf. & Inst. Code § 361.2(b)(3)*]. Although a reunification plan is not required in such a case, the juvenile court should exercise its discretion as to whether or not one should be ordered [*In re Katrina C. (1988) 201 Cal. App. 3d 540, 550, 247 Cal. Rptr. 784]* .

It should be noted that the court has discretion to grant or deny reunification services to a man who is found by the court to be the biological father of the child or who has been found by another court of competent jurisdiction to be the father of the child, if the court finds that such services will benefit the child. The purpose of reunification is generally only furthered by the provision of services if the biological father has had at least some sort of substantial familial relationship with the child [*Welf. & Inst. Code § 361.5(a)*; *In re Sarah C. (1992) 8 Cal. App. 4th 964, 975-976, 11 Cal. Rptr. 2d 414* ; *see also In re Zacharia D. (1993) 6 Cal. 4th 435, 451, 24 Cal. Rptr. 2d 751, 862 P.2d 751* (biological father who is not presumed father is not "parent" entitled to reunification services or to child custody on removal from a custodial parent, under *Welf. & Inst. Code §§ 361.2* and *361.5*)].

For further discussion of presumed fathers and establishing paternity, see Ch. 412, *Paternity* and Disputed Paternity Proceedings (Matthew Bender) [*see also § 328.60[3]*].

[2] When Reunification Services Are Not to Be Ordered

[a] Federal Law Regarding Not Providing Services

Federal law now provides reunification services "shall not be required" if the court finds [*42 U.S.C. §§ 671(a)(15)(D), 5106a(b)(2)(A)(xii)*]:

- The parent has subjected the child to "aggravated circumstances" as defined in state law. These circumstances may include, but are not limited to, abandonment, torture, chronic abuse, and sexual abuse.

- The parent has committed the murder of another child of the parent.

- The parent has committed the voluntary manslaughter of another child of the parent.

- The parent has aided or abetted, attempted, conspired, or solicited to commit such a murder or voluntary manslaughter.

- The parent has committed a felony assault resulting in serious bodily injury to the child or another child of the parent.

- The parental rights of the parent to another child have been terminated involuntarily.

For discussion regarding not providing services in an Indian Child Welfare Act (ICWA) case, see § 328.32A[7].

For discussion regarding the Americans With Disabilities Act (ADA) in the context of not providing services in a juvenile dependency case, see *§ 328.129[8]*.

[b] California's Statutory Exceptions to Providing Services

California's statutory authority for identifying cases in which reunification services are not to be provided began long before federal law provided for such action. Nevertheless, these provisions of California law identify the "aggravated circumstances" in which California has determined services should not be provided. Thus, they are now authorized not only by state law, but by federal law [*42 U.S.C. § 671(a)(15)(D)(i)*]. The provisions of *Welf. & Inst. Code § 361.5(b), (e)(1),* for the "denial" of services apply to both the custodial parent from whom the child was removed under *Welf. & Inst. Code § 361(c),* and the previously noncustodial parent who has asked for and been denied placement under *Welf. & Inst. Code § 361.2(a)* [*In re Adrianna P. (2008) 166 Cal. App. 4th 44, 53-59, 81 Cal. Rptr. 3d 918]* .

Reunification services are, of course, not to be provided to individuals who are not entitled to such services. When the court removes a child from a legal guardian, reunification services are not to be provided if the court terminates the guardianship. In this circumstance, the former guardian is no longer the legal guardian and thus is not entitled to services [*In re Alicia O. (1995) 33 Cal. App. 4th 176, 181-184, 39 Cal. Rptr. 2d 119]* . The juvenile court has the authority to terminate a guardianship previously established by either a juvenile court or a probate court [*Welf. & Inst. Code § 728*]. A de facto parent is not entitled to reunification services [*Clifford S. v. Superior Court (1995) 38 Cal. App. 4th 747, 752, 45 Cal. Rptr. 2d 333]* . Nor is a stepparent [*In re Jodi B. (1991) 227 Cal. App. 3d 1322, 1325-1329, 278 Cal. Rptr. 242]* . Even a man who has established he is the biological father of the child, but who does not qualify for presumed father status, is not entitled to reunification services, although he may receive services if he proves they will benefit the child [*Welf. & Inst. Code § 361.5(a)*; *In re Zacharia D. (1993) 6 Cal. 4th 435, 451, 24 Cal. Rptr. 2d 751, 862 P.2d 751]* .

Reunification services are not to be provided to a mother, statutorily presumed father, or guardian if the court finds, by clear and convincing evidence, any of the statutory grounds set forth in *Welf. & Inst. Code § 361.5(b)(1)-(15),* and *(e)(1)*.

PRACTICE TIP (PARENT'S P.O.V.):

Defending Against the Bypass Case. Bypass of reunification services is a huge issue for parents. Parent's counsel must be familiar with all the grounds for bypass and the case law interpreting those code sections. The agency or child's counsel must be held to their burden of proving the existence of such grounds by clear and convincing evidence. If that standard is met, in most cases, the court can still order services if it finds by clear and convincing evidence that providing reunification services is in the best interest of the child. Parent's counsel should contemplate requesting a 30-day continuance under *Welf. & Inst. Code § 358(a)(1)* and consider presenting evidence relating to progress in services, the child's positive attachment to the parent, and retaining an independent expert to assess the ability of the parent to benefit from services, all as a way of establishing services to the parent would be best for the child.

[i] Whereabouts Unknown

If the whereabouts of the parent or guardian is unknown, reunification services shall not be provided. A finding pursuant to this provision must be supported by an affidavit or by proof that a reasonably diligent search has failed to locate the parent or guardian. The posting or publication of notices is not required in such a search [*Welf. & Inst. Code § 361.5(b)(1)*]. This is the one basis for denying services in which the juvenile court cannot immediately set a hearing under *Welf. & Inst. Code § 366.26*. Instead, it must set a six-month review hearing.

[ii] Mental Disability

If the parent or guardian is suffering from a mental disability that is described in *Fam. Code § 7820 et seq.* and that

renders him or her incapable of utilizing those services, reunification services shall not be provided [*Welf. & Inst. Code § 361.5(b)(2)*]. In such circumstances, case law has held that evidence from two experts each of which agree the parent suffers from a mental disability that renders him or her incapable of utilizing those services is necessary [*In re Catherine S. (1991) 230 Cal. App. 3d 1253, 1257-1258, 281 Cal. Rptr. 746* ; *In re Rebecca H. (1991) 227 Cal. App. 3d 825, 838-840, 278 Cal. Rptr. 185]* . The majority in one decision held *Fam. Code § 7827(a)* does not require both experts to agree the parent is unlikely to benefit from services in order for it to deny reunification services. Instead, the majority concluded the statute only requires evidence from two experts regarding the parent's mental disability, "from which the court then can make inferences and base it findings" [*Curtis F. v. Superior Court (2000) 80 Cal. App. 4th 470, 474, 95 Cal. Rptr. 2d 232]* . There has always been an argument that *Rebecca H.* was in error when it concluded the requirements of *Welf. & Inst. Code § 361.5(b)(2)* encompassed not only the definition of "mental disability" but also the burden of proof by two experts [*see* *In re Rebecca H. (1991) 227 Cal. App. 3d 825, 838-840, 278 Cal. Rptr. 185]* . But the majority in *Curtis F.* doesn't address that argument. Indeed, it does not even cite *Rebecca H.* [*Curtis F. v. Superior Court (2000) 80 Cal. App. 4th 470, 473-474, 95 Cal. Rptr. 2d 232]* . Thus, its cursory conclusion is subject to substantial question. This is an area that should be watched for further developments.

[iii] Previous Removal

If the child or a sibling of the child had been previously adjudicated a dependent pursuant to any subdivision of *Welf. & Inst. Code § 300* (grounds for dependency) as a result of physical or sexual abuse; following that adjudication, the child who was adjudicated a dependent had been removed from the custody of his or her parent or guardian pursuant to *Welf. & Inst. Code § 361* (grounds for removal); the child who was removed has been returned to the custody of the parent or guardian from whom the child had been taken originally; and the child currently being removed pursuant to *Welf. & Inst. Code § 361* is being removed because of additional physical or sexual abuse, reunification services shall not be provided [*Welf. & Inst. Code § 361.5(b)(3)*].

[iv] Death of Another Child

If the parent or guardian of the child caused the death of another child through abuse or neglect, reunification services shall not be provided [*Welf. & Inst. Code § 361.5(b)(4)*; *In re Ethan N. (2004)122 Cal. App. 4th 55, 66-69, 18 Cal. Rptr. 3d 504* ; *Patricia O. v. Superior Court (1999) 69 Cal. App. 4th 933, 941-942, 81 Cal. Rptr. 2d 662* ; *In re Alexis M. (1997) 54 Cal. App. 4th 848, 850-851, 63 Cal. Rptr. 2d 356* ; *In re Jessica F. (1991) 229 Cal. App. 3d 769, 779, 282 Cal. Rptr. 303]* . As noted by the court of appeal in *Alexis M.*, "given the gravity and nature of the crime involved here--felony child abuse resulting in death of a small infant--the idea of reunification with another infant must be considered as bordering on the frivolous" [*In re Alexis M. (1997) 54 Cal. App. 4th 848, 851, 63 Cal. Rptr. 2d 356]* .

[v] Severe Physical Abuse of Young Child

If the child was brought within the jurisdiction of the court under *Welf. & Inst. Code § 300(e)* (under age five and suffered severe physical abuse) because of the conduct of the parent or guardian, reunification services shall not be provided [*Welf. & Inst. Code § 361.5(b)(5)*; *Raymond C. v. Superior Court (1997) 55 Cal. App. 4th 159, 163, 64 Cal. Rptr. 2d 33]* . "Conduct of the parent" for these purposes refers to abuse personally inflicted on the child by the parent or abuse inflicted on the child by another when the parent knew or reasonably should have known that the other person was physically mistreating the child [*In re Joshua H. (1993) 13 Cal. App. 4th 1718, 1732, 17 Cal. Rptr. 2d 282]* . Further, it is not required that the identity of the perpetrator of the abuse be known, so long as it is shown the abuse was either inflicted by the parent or someone known by the parent [*In re Kenneth M. (2004) 123 Cal. App. 4th 16, 21, 19 Cal. Rptr. 3d 752 , citing* *In re E.H. (2003) 108 Cal. App. 4th 659, 667, 670, 133 Cal. Rptr. 2d 740]* .

[vi] Severe Sexual Abuse or Physical Harm

Reunification services are not to be provided if either the child is a dependent as a result of the determination that the child, a sibling, or a half-sibling suffered severe sexual abuse as defined in *Welf. & Inst. Code § 361.5(b)(6)*, by the

parent or guardian, or the parent or guardian inflicted severe physical harm, as defined in *Welf. & Inst. Code § 361.5(b)(6)*, on the child, sibling, or half-sibling, and the court makes a determination that it would not benefit the child to pursue reunification services with the offending parent [*Welf. & Inst. Code § 361.5(b)(6)*]. The child who has suffered severe physical harm under this section need not be the child for whom services are being denied. It also applies where the sibling suffered that severe physical harm [*Welf. & Inst. Code § 361.5(b)(6)*; *see also Deborah S. v. Superior Court (1996) 43 Cal. App. 4th 741, 748-751, 50 Cal. Rptr. 2d 858* (construing earlier version of the statute)]. Further, it is not necessary the parent being denied services as to his or her child also be the parent or guardian of the sibling or half-sibling who was abused by that parent [*Anthony J. v. Superior Court (2005) 132 Cal. App. 4th 419, 422, 33 Cal. Rptr. 3d 677]* .

One case has held that *Welf. & Inst. Code § 361.5(b)(6)* only "applies to the parent who inflicted severe physical harm to the minor" [*In re Kenneth M. (2004) 123 Cal. App. 4th 16, 21, 19 Cal. Rptr. 3d 752]* . Some may consider that holding dicta, however, since it was not necessary to the ultimate decision upholding the denial of services, and thus is not binding [*Katie V. v. Superior Court (2005) 130 Cal. App. 4th 586, 598, 30 Cal. Rptr. 3d 320]* . Others will note that while the *Kenneth M.* decision limits the application of *Welf. & Inst. Code § 361.5(b)(6)* to a parent who has inflicted the abuse, that does not mean that parent must be the actual perpetrator, only that the parent must be an offending parent as intended by that subdivision. Thus, in the *Amber K.* case a mother who had given implied consent for the abuse was properly denied services despite not being the perpetrator [*Amber K. v. Superior Court (2006) 146 Cal. App. 4th 553, 564, 52 Cal. Rptr. 3d 701*].

The better view is that *Welf. & Inst. Code § 361.5(b)(6)* should apply whenever the severe sexual abuse or physical harm was inflicted by the parent or guardian whether by act or omission. This is consistent with the interpretation of other subdivisions of *Welf. & Inst. Code § 361.5(b)* [*see, e.g., In re E.H. (2003) 108 Cal. App. 4th 659, 667, 670, 133 Cal. Rptr. 2d 740]* . It is also consistent with the legislative preference to not provide services when doing so is fruitless, and with the overall goal of providing timely stability and permanence for the child [*Karen S. v. Superior Court (1999) 69 Cal. App. 4th 1006, 1010, 81 Cal. Rptr. 2d 858* ; *In re Rebecca H. (1991) 227 Cal. App. 3d 825, 837, 278 Cal. Rptr. 185]* . Finally, it is consistent with the language of the subdivision itself, which includes within the definition of severe sexual abuse acts that were done with the actual or implied consent of the parent or guardian, and includes within the definition of severe physical harm injuries that were accomplished through the act or omission of the parent or guardian [*Welf. & Inst. Code § 361.5(b)(6)*].

[vii] No Services in Siblings' Case

If the parent is not receiving court-ordered reunification services for a sibling or a half-sibling pursuant to *Welf. & Inst. Code § 361.5(b)(3), (5)* or *(6)*, reunification services shall not be provided [*Welf. & Inst. Code § 361.5(b)(7)*].

[viii] Child Is the Product of Rape

If the child was conceived by means of the commission of an offense listed in *Penal Code § 288* or *288.5*, or by an act committed outside of the state which would constitute such an offense if committed here and the parent being denied services is the parent who committed the offense or act, reunification services shall not be provided [*Welf. & Inst. Code § 361.5(b)(8)*].

[ix] Abandonment Constituting Serious Danger or Voluntary Surrender of Infant

If the child was brought within the court's jurisdiction under *Welf. & Inst. Code § 300(g)* and the court finds that the abandonment itself constituted a serious danger to the child as defined in *Welf. & Inst. Code § 361.5(b)(9)*, reunification services shall not be provided [*Welf. & Inst. Code § 361.5(b)(9)*].

Reunification services may also be denied under this subsection if the parent or other person having custody of an infant

child 72 hours old or younger voluntarily surrendered the child under *Health & Safety Code § 1255.7* and failed to reclaim the child within the 14-day period set forth in that section [*Welf. & Inst. Code § 361.5(b)(9)*].

[x] Previous Termination of Services

If the court has previously ordered termination of reunification services for any siblings or half-siblings of the child after the sibling or half-sibling was removed from the same parent or guardian described in *Welf. & Inst. Code § 361.5(a)*, and the court finds that this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to the removal of the sibling or half-sibling from that parent or guardian, reunification services shall not be provided [*Welf. & Inst. Code § 361.5(b)(10)*; *Randi R. v. Superior Court (1998) 64 Cal. App. 4th 67, 70-72, 74 Cal. Rptr. 2d 770* (considering previous version of statute); *In re Baby Boy H. (1998) 63 Cal. App. 4th 470, 474-475, 73 Cal. Rptr. 2d 793* (considering previous version of the statute); *see also Marlene M. v. Superior Court (2000) 80 Cal. App. 4th 1139, 1148-1151, 96 Cal. Rptr. 2d 104* (considering previous version of statute); *Riverside County Dep't of Pub. Soc. Servs. v. Superior Court (1999) 71 Cal. App. 4th 483, 486-492, 83 Cal. Rptr. 2d 777* (services may be denied under this subsection even if permanent plan for other child was implemented after current child was detained but prior to disposition; considering previous version of the statute)].

This provision for the denial of reunification services was previously found in Welf. & Inst. Code former § 361.5(b)(10). That subdivision was divided into two parts, subdivision (a) for the denial of services due to the previous termination of reunification services for a sibling, and subdivision (b) for the denial of services due to the previous termination of parental rights to a sibling. The appellate courts were divided as to whether that previous language required a determination the parent had not subsequently made a reasonable effort to treat the problems that led to the previous removal of the sibling [*see Shawn S. v. Superior Court (1998) 67 Cal. App. 4th 1424, 80 Cal. Rptr. 2d 80* (holding proof of the parent's failure to make reasonable efforts was a requirement of both subdivisions); *Marshall M. v. Superior Court (1999) 75 Cal. App. 4th 48, 88 Cal. Rptr. 2d 891* (expressly disagreeing with *Shawn S.* and concluding the finding was required under Welf. & Inst. Code former § 361.5(b)(10)(B), but not under Welf. & Inst. Code former § 361.5(b)(10)(A))]. On August 16, 2001, the California Supreme Court ended the conflict by agreeing with the *Marshall M.* decision [*Renee J. v. Superior Court (2001) 26 Cal. 4th 735, 743-749, 110 Cal. Rptr. 2d 828, 28 P. 3d 876]* . The Supreme Court noted that "If we have failed to discern correctly the Legislature's intent in enacting the statute, that body may clarify the statute accordingly" [*Renee J. v. Superior Court (2001) 26 Cal. 4th 735, 748-749, 110 Cal. Rptr. 2d 828, 28 P. 3d 876]* . Less than two months later, the Legislature did exactly that. Effective October 10, 2001, *Welf. & Inst. Code § 361.5(b)* was amended to create two separate subdivisions for the denial of services in this regard [Stats. 2001, ch. 653, §§ 11.3, 23]. Denial of services based on the previous termination of reunification services for a sibling is now addressed in *Welf. & Inst. Code § 361.5(b)(10)*. Denial of services based on the previous termination of parental rights for a sibling is now addressed in *Welf. & Inst. Code § 361.5(b)(11)*. Both require a finding the parent or guardian has not subsequently made a reasonable effort to treat the problems that led to the removal of the sibling [*Welf. & Inst. Code § 361.5(b)(10)-(11)*].

[xi] Previous Termination of Parental Rights

If the parental rights of the parent or guardian regarding any sibling or half-sibling of the child have been terminated and the court finds that this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to the removal of the sibling or half-sibling from that parent or guardian, reunification services shall not be provided [*Welf. & Inst. Code § 361.5(b)(11)*; *In re Jasmine C. (1999) 70 Cal. App. 4th 71, 76, 82 Cal. Rptr. 2d 493* (considering previous version of statute); *see also Riverside County Dep't of Pub. Soc. Servs. v. Superior Court (1999) 71 Cal. App. 4th 483, 486-492, 83 Cal. Rptr. 2d 777* (services may be denied under this subsection even if permanent plan for other child was implemented after current child was detained but prior to disposition; considering previous version of the statute)]. The provisions of this subdivision apply even if the parent was not the custodial parent of the child for whom parental rights were previously terminated, and even if the parent was only an "alleged father" or a "biological father" to that child [*Francisco G. v. Superior Court (2001) 91 Cal. App. 4th 586, 595-599, 110 Cal. Rptr. 2d 679* (considering

previous version of statute)]. Alleged fathers often deny paternity, sometimes because they truly do not believe they are the fathers, and sometimes because they do not want to be bothered or to be responsible. The *Francisco G.* holding relating to previous termination of the rights of an alleged father applies in cases in which the alleged father asserted paternity in the previous action. Due process issues may exist, however, if the alleged father did not appear or assert paternity in the previous proceedings. This is an area to be watched for further developments.

[xii] Parent Convicted of Violent Felony

If the parent or guardian has been convicted of a violent felony as defined in *Penal Code § 667.5(c)*, reunification services shall not be provided [*Welf. & Inst. Code § 361.5(b)(12)*; *In re James C. (2002) 104 Cal. App. 4th 470, 484-485, 128 Cal. Rptr. 2d 270]* . *Penal Code § 667.5(c)* has many different subsections listing violent felonies. These felonies include murder, attempted murder, voluntary manslaughter, mayhem, rape, forcible sodomy or oral copulation, lewd acts on a child under the age of 14, felonies where great bodily injury was inflicted or a firearm was used, arson, kidnapping, carjacking, continuous sexual abuse of a child, and others. If it is believed the parent or guardian may have been convicted of a violent felony as defined in *Penal Code § 667.5(c)*, the practitioner should look to that section for specific definitions and limitations of the crimes listed.

[xiii] Chronic Substance Abuse

If the parent or guardian of the child has a history of "extensive, abusive, and chronic use of drugs or alcohol" and has either resisted prior court-ordered treatment for the problem during the three-year period immediately prior to the filing of the dependency petition, or has refused or failed to comply with a drug or alcohol treatment program required in a case plan pursuant to *Welf. & Inst. Code § 358.1* on at least two previous occasions where the programs identified were available and accessible, reunification services shall not be provided [*Welf. & Inst. Code § 361.5(b)(13)*]. Providing services to a parent who has an extensive history of substance abuse and has resisted or failed prior court-ordered treatment can be a clear abuse of discretion even where the children love the parent and the court desires to give the parent one more chance [*In re William B. (2008) 163 Cal. App. 4th 1220, 1223, 78 Cal. Rptr. 3d 91]* . Substance abuse is "notoriously difficult for a parent to overcome, even when faced with the loss of her children" [*In re William B. (2008) 163 Cal. App. 4th 1220, 1228, 78 Cal. Rptr. 3d 91 , citing In re Kimberly F. (1997) 56 Cal. App. 4th 519, 531, fn. 9, 65 Cal. Rptr. 2d 495]* . *Welf. & Inst. Code § 361.5(b)(13)* reflects a legislative determination that when the parent is a chronic abuser of drugs or alcohol and has resisted prior substance abuse treatment providing reunification services is generally not in the child's best interest [*In re William B. (2008) 163 Cal. App. 4th 1220, 1228, 78 Cal. Rptr. 3d 91 , citing In re Levi U. (2000) 78 Cal. App. 4th 191, 200, 92 Cal. Rptr. 2d 648]* . Such a parent has a high risk of reabuse that places the parent's interest in reunifying with the child directly at odds with the child's compelling right to a safe, stable, permanent home [*In re William B. (2008) 163 Cal. App. 4th 1220, 1228, 78 Cal. Rptr. 3d 91 , citing In re Baby Boy H. (1998) 63 Cal. App. 4th 470, 478 [73 Cal. Rptr. 2d 793 , and In re Marilyn H. (1993) 5 Cal.4th 295, 306, 19 Cal. Rptr. 2d 544, 851 P.2d 826]* .

The requirement in the first basis for denial of services under this subdivision that the resisted treatment be court-ordered treatment was effective January 1, 2003. Prior to that, it was enough the parent had the necessary history of substance abuse and had resisted treatment during the three years prior to the filing of the petition. Thus, the treatment resisted could have been voluntary treatment [*see, e.g., Karen H. v. Superior Court (2001) 91 Cal. App. 4th 501, 504-505, 110 Cal. Rptr. 2d 665* (mother's resistance to drug treatment that she had entered voluntarily was sufficient)]. Any precedential decision handed down prior to January 1, 2003, must be read carefully to determine whether it would still be a correct interpretation of the law in light of the new amendment.

In one case a parent had attempted rehabilitation on at least four occasions and had previously completed two substance abuse programs. She had relapsed within one year on both occasions. The court of appeal found that although she had technically completed her rehabilitation programs, "her failure to maintain any kind of long-term sobriety must be considered resistance to treatment" and hence upheld the juvenile court's denial of services under this provision [

Randi R. v. Superior Court (1998) 64 Cal. App. 4th 67, 73, 74 Cal. Rptr. 2d 770 (considering previous version of statute); *see also Laura B. v. Superior Court (1998) 68 Cal. App. 4th 776, 80 Cal. Rptr. 2d 472* (considering previous version of statute)]. Further, the definition of resist "encompasses both active and passive behavior. Thus a parent can actively resist treatment for drug or alcohol abuse by refusing to attend a program or by declining to participate once there. The parent also can passively resist by participating in treatment but nonetheless continuing to abuse drugs or alcohol" [*Karen S. v. Superior Court (1999) 69 Cal. App. 4th 1006, 1010, 81 Cal. Rptr. 2d 858* (upholding denial of services due to passive resistance to substance abuse treatment; considering previous version of statute); *see also*; *In re William B. (2008) 163 Cal. App. 4th 1220, 1230, 78 Cal. Rptr. 3d 91* (resumption of substance abuse demonstrated resistance to treatment, not a "simple relapse"); *In re Brian M. (2000) 82 Cal. App. 4th 1398, 1401-1403, 98 Cal. Rptr. 2d 881* (considering previous version of statute); *In re Levi U. (2000) 78 Cal. App. 4th 191, 199-200, 92 Cal. Rptr. 2d 648* (considering previous version of statute)]. The statute does not require that any previous rehabilitation program be completed. It only requires the parent resist treatment during the previous three years [*Karen H. v. Superior Court (2001) 91 Cal. App. 4th 501, 504-505, 110 Cal. Rptr. 2d 665]* .

[xiv] Waiver of Services

If the parent or guardian has been advised of his or her right to reunification services and of the consequences of waiving such services, including the possibility of termination of parental rights and adoption, and the parent or guardian waives such services, reunification services shall not be provided. The parent or guardian must be represented by counsel before making such a waiver and must execute the waiver of services form which the Judicial Council is to adopt. The court must not accept the waiver unless it finds that the parent or guardian has knowingly and intelligently waived the right to services. This finding by the court must be stated on the record [*Welf. & Inst. Code § 361.5(b)(14)*; *Cynthia C. v. Superior Court (1999) 72 Cal. App. 4th 1196, 1200-1201, 85 Cal. Rptr. 2d 669* (juvenile court denial of parent's request to withdraw waiver of services upheld under previous version of statute)].

[xv] Abduction of Child

If the parent or guardian has willfully abducted the child or the child's sibling or half-sibling from his or her placement on one or more occasions and refused to disclose the whereabouts of the abducted child, to return physical custody of the abducted child to the child's placement, or to return physical custody of the abducted child to the social worker, reunification services shall not be provided [*Welf. & Inst. Code § 361.5(15)*].

[xvi] Incarcerated or Institutionalized Parent

If the parent or guardian is incarcerated or institutionalized and the court determines by clear and convincing evidence that providing services would be detrimental to the child, reunification services shall not be provided [*Welf. & Inst. Code § 361.5(e)(1)*]. The mere fact that a parent is incarcerated is not, in and of itself, sufficient grounds to deny reunification services [*In re Brittany S. (1993) 17 Cal. App. 4th 1399, 1402, 22 Cal. Rptr. 2d 50* ("go to prison, lose your child" is not an appropriate legal maxim)]. Nor is the distance of the prison to be the sole factor in denying visitation or services to an incarcerated parent [*In re Jonathan M. (1997) 53 Cal. App. 4th 1234, 1237-1238, 62 Cal. Rptr. 2d 208]* . In some instances, however, mandating services, including visitation, for a child and the incarcerated parent is detrimental to the child [*In re James C. (2002) 104 Cal. App. 4th 470, 485-486, 128 Cal. Rptr. 2d 270]* . This is especially true "where the very reason a parent is in prison in the first place is the death of another child from child abuse, particularly an infant sibling" [*In re Alexis M. (1997) 54 Cal. App. 4th 848, 853, 63 Cal. Rptr. 2d 356]* .

In determining whether providing services to an incarcerated or institutionalized parent would be detrimental to the child, the court must consider the age of the child, the degree of parent-child bonding, the length of the period of incarceration the parent or guardian is serving, the length and nature of the treatment, the nature of the crime or illness, the degree of detriment to the child, if any, if services are not offered, the likelihood of the parent's release from incarceration or institutionalization within the reunification time limits described in *Welf. & Inst. Code § 361.5(a)*, for

children 10 years of age or older, the child's attitude toward implementation of family reunification services, and any other appropriate factors [*Welf. & Inst. Code § 361.5(e)(1)*].

If the parent is serving a prison term for child abuse, a sexual offense against a child, or domestic violence, and the court orders reunification services for the other parent, the social services agency may request the Board of Prison Terms to notify it when the incarcerated parent is scheduled to be released [*Welf. & Inst. Code § 16507(d)*; *see also Penal Code § 3058.65(a)(1)(B)*].

PRACTICE TIP:

Denying Services to Incarcerated Parents. The authority in *Welf. & Inst. Code § 361.5(e)(1)* for the denial of services to an incarcerated parent when providing services is detrimental to the child is one of the most underutilized dependency provisions. While providing services to an incarcerated parent is required in most circumstances, there are many cases in which the provision of such services has little or no likelihood of success and thus only serves to delay stability for the child, particularly if the incarcerated parent is the only parent receiving services. This is especially true when the parent will be incarcerated longer than the maximum time periods for reunification efforts. It is also frequently true when the parent is incarcerated in a facility that has no services sufficient to help the parent work toward reunification and there is no reasonable way to provide services to that parent. Indeed, to attempt services in such circumstances may be setting everyone up for failure, including the parent, agency, and child. Thus, in cases such as these, it may be possible to show that providing services to the incarcerated parent would be detrimental to the child since it would delay permanency with no likelihood of success. Juvenile courts and attorneys for social services agencies and children should carefully consider the question of whether providing services to an incarcerated parent would be detrimental to the child and should utilize this provision to deny services when appropriate.

[xvii] Deciding to Order or Deny Services

In deciding whether to order reunification in any case in which *Welf. & Inst. Code § 361.5* applies, the court must hold a dispositional hearing [*Welf. & Inst. Code § 361.5(c)*]. The social worker is required to prepare a report, which must be considered by the court [*Cal. Rules of Ct., Rule 5.690*]. The report must discuss whether reunification services should be provided [*Welf. & Inst. Code § 361.5(c)*; *Cal. Rules of Ct., Rule 5.690(a)(1)(c)*]. While the social services agency has to investigate the question of services and provide the court with information about the "prognosis for a successful reunification, it is not required to prove the services will be unsuccessful" [*Raymond C. v. Superior Court (1997) 55 Cal. App. 4th 159, 164, 64 Cal. Rptr. 2d 33]* . If the court determines that one of the provisions for the denial of reunification services applies, "the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources" [*In re Baby Boy H. (1998) 63 Cal. App. 4th 470, 478, 73 Cal. Rptr. 2d 793* ; *see also In re William B. (2008) 163 Cal. App. 4th 1220, 1227, 78 Cal. Rptr. 3d 91]* .

If reunification services are not ordered pursuant to *Welf. & Inst. Code § 361.5(b)(1)* because the whereabouts of a parent are unknown, and the whereabouts of the parent become known within six months of the out-of-home placement of the child, the court must order the social worker to provide family reunification services. The time limits specified in *Welf. & Inst. Code § 361.5(a)* are not tolled by the parent's absence, however [*Welf. & Inst. Code § 361.5(d)*].

If it is alleged, pursuant to *Welf. & Inst. Code § 361.5(b)(2)*, that the parent is incapable of utilizing services because of mental disability, the court must order reunification services unless competent evidence from mental health professionals establishes that, even with the provision of services, the parent is unlikely to be capable of adequately caring for the child within the time limits specified in *Welf. & Inst. Code § 361.5(a)* [*Welf. & Inst. Code § 361.5(c)*]. It should be noted *Welf. & Inst. Code § 361.5(c)* previously mandated it be shown the parent was unlikely to be capable of adequately caring for the child "within 12 months." The change effective January 1, 1999, that it be shown the parent is likely to be capable of adequately caring for the child within "the time limits specified in subdivision (a)" evidences the

legislature intended to change the law. When considered as a whole in light of the many recent changes to the law, this change means that for children who were under the age of 3 years at the time of the original removal it need only be shown the parent is unlikely to be capable of adequately caring for the child within six months from the date of the disposition hearing, but no longer than 12 months from the date the child entered foster care [*Welf. & Inst. Code § 361.5(a)(1)(B), (c)*]. For children 3 years of age or older at the time of the original removal, it must be shown the parent is unlikely to be capable of adequately caring for the child within 12 months from the date the child entered foster care [*Welf. & Inst. Code § 361.5(a)(1)(A), (c)*].

If jurisdiction was taken under *Welf. & Inst. Code § 300(e)* due to severe physical abuse of the child under age 5, the provisions of *Welf. & Inst. Code § 361.5(b)(5)* are applicable and the court shall not order reunification services for the parent or guardian whose conduct resulted in such abuse and jurisdiction, unless it finds based on competent evidence that such services are likely to prevent the reabuse or continued neglect of the child or that it will be detrimental to the child not to attempt such reunification because the child is "closely and positively attached to that parent" [*Welf. & Inst. Code § 361.5(c)*]. The social worker is required to investigate the circumstances leading to the removal of the child and advise the court whether there are circumstances that indicate that reunification is likely to be successful or unsuccessful and whether failure to order reunification is likely to be detrimental to the child [*Welf. & Inst. Code § 361.5(c)*]. The ordering of reunification services where *Welf. & Inst. Code § 361.5(b)(5)* is applicable is not discretionary with the court. The court may not order such services unless it makes the requisite finding described above. No standard of proof is set forth in the statute for this finding, however. As such, it is presumed that the finding must be made by a preponderance of the evidence [*Evid. Code § 115*].

The failure of the parent to respond to previous services, the fact that the child was abused while the parent was under the influence of drugs or alcohol, a past history of violent behavior, or testimony by a competent professional that the parent's behavior is unlikely to be changed by services are among the factors indicating that reunification services are unlikely to be successful [*Welf. & Inst. Code § 361.5(c)*]. The fact that a parent or guardian is no longer living with an individual who severely abused the child may be considered in deciding that reunification services are likely to be successful, provided that the court must consider any pattern of behavior on the part of the parent that has exposed the child to repeated abuse [*Welf. & Inst. Code § 361.5(c)*]. Thus, the court must consider a broad spectrum of evidence under *Welf. & Inst. Code § 361.5(b)(5)* in determining the likelihood of success or failure of any reunification services which might be ordered. The likelihood of success of any proposed efforts to reunify is also an important factor for the court's determination whether reunification efforts are in the child's best interest where *Welf. & Inst. Code § 361.5(b)(3), (4), (6), (7), (8), (9), (10), (11), (12), (13), (14),* or *(15)* are applicable.

In considering whether the provision of reunification services would benefit the child in cases where the circumstances of *Welf. & Inst. Code § 361.5(b)(6)* or *(7)* (severe sexual abuse or severe physical harm to the child or the child's sibling or half-sibling; parent not receiving services for sibling or half-sibling pursuant to *Welf. & Inst. Code § 361.5(b)(3), (5),* or *(6)*) apply, the court must consider any information it deems relevant, including the specific act or omission constituting the severe physical harm or sexual abuse inflicted, the circumstances of the infliction of that abuse or harm, the severity of the emotional trauma suffered by the child victim, any history of child abuse by the parent, the likelihood of safely reunifying with no further supervision within 12 months, and the desires of the child regarding reunification with the offending parent or guardian [*Welf. & Inst. Code § 361.5(h)*].

If *Welf. & Inst. Code § 361.5(b)(3), (4), (6), (7), (8), (9), (10), (11), (12), (13), (14),* or *(15)* (discussed *above*) are applicable, the court shall not order reunification services unless it finds by clear and convincing evidence, that reunification is in the best interest of the child [*Welf. & Inst. Code § 361.5(c)*; *see also Riverside County Dep't of Pub. Soc. Servs. v. Superior Court (1999) 71 Cal. App. 4th 483, 492, 83 Cal. Rptr. 2d 777]* . Thus, where these subdivisions are applicable, the provision of reunification services is not discretionary with the court. Instead, the court cannot order such services unless evidence is presented that establishes that it is in the best interest of the child to attempt to work toward reunification and the court so finds by clear and convincing evidence. One court has held that evidence the parent has ameliorated the problems that led to the dependency of siblings cannot alone support a finding that it would

be in the child's best interest to provide services to the parent when *Welf. & Inst. Code § 361.5(b)(4)* applies [*In re Ethan N. (2004)122 Cal. App. 4th 55, 66, 18 Cal. Rptr. 3d 504]* . Instead, the parent must affirmatively show that reunification services are best for the child [*In re Ethan N. (2004)122 Cal. App. 4th 55, 66, 18 Cal. Rptr. 3d 504]* . The juvenile court has broad discretion when determining whether further reunification services would be in the best interests of the child under *Welf. & Inst. Code § 361.5(c)*, and an appellate court will only reverse that finding if there is a clear abuse of discretion [*In re William B. (2008) 163 Cal. App. 4th 1220, 1229, 78 Cal. Rptr. 3d 91 , citing In re Angelique C. (2003) 113 Cal. App. 4th 509, 523, 6 Cal. Rptr. 3d 395]* . But where there is no substantial evidence in the record to support the juvenile court's finding that further services would be in the child's best interests, an order for such services is an abuse of discretion [*In re William B. (2008) 163 Cal. App. 4th 1220, 1229, 78 Cal. Rptr. 3d 91]* . This applies to the social services agency as well. Sometimes, notwithstanding the existence of a statutory presumption against the provision of reunification services as set forth in *Welf. & Inst. Code § 361.5(b)*, the social services agency desires to provide reunification services to the parent or family. That desire alone does not authorize the court to order such services. Instead, if the agency desires to provide services notwithstanding a presumption against such services, the agency must present evidence on which the court can base a finding as required by statute that the provision of services is in the child's best interest or that it would be detrimental to the child not to attempt such services.

PRACTICE TIP:

Revisiting the Issue of Services With a Petition Pursuant to *Welf. & Inst. Code § 388*. If reunification services are denied or later terminated, parents may still pursue services to work towards reunification on their own. If they make substantial progress and there is a change of circumstances that would make the provision of services or even reunification best for the child, the parent may file a petition under *Welf. & Inst. Code § 388* to seek that modification [*In re Marilyn H. (1993) 5 Cal. 4th 295, 309, 19 Cal. Rptr. 2d 544, 851 P.2d 826* ; *In re Eileen A. (2000) 84 Cal. App. 4th 1248, 1260-1261, 101 Cal. Rptr. 2d 548]* . The reverse is also true. If the juvenile court orders reunification services and circumstances change to justify the denial of services under *Welf. & Inst. Code § 361.5(b)* or *(e)(1)*, a petition under *Welf. & Inst. Code § 388* may be used to modify the court's prior order for services and enter a new order denying services in the child's best interest [*Sheila S. v. Superior Court (2000) 84 Cal. App. 4th 872, 877-879, 101 Cal. Rptr. 2d 187]* . All parties on either side of the services issue should be alert for a change in circumstances that makes it best for the child to file a *Welf. & Inst. Code § 388* petition seeking to modify a previous order granting or denying services.

[c] Setting a Selection and Implementation Hearing When Reunification Services Are Not Ordered

If the court, pursuant to *Welf. & Inst. Code § 361.5(b)(2)-(15)* or *Welf. & Inst. Code § 361.5(e)(1)*, does not order reunification services, the disposition hearing is also considered a permanency hearing [*Welf. & Inst. Code § 361.5(f)*]. In this way the court is determining the permanent plan for the child. Rather than returning the child to the parent as a permanent plan, the child will instead receive an alternative permanency plan of adoption, guardianship, or long-term foster or relative care. The court must then direct that a hearing pursuant to *Welf. & Inst. Code § 366.26* be held within 120 days of the disposition and permanency hearing to select and implement the specific alternative permanency plan [*Welf. & Inst. Code § 361.5(f)*]. The court, however, may not schedule a hearing so long as the other parent is being provided reunification services pursuant to *Welf. & Inst. Code § 361.5(a)* [*Welf. & Inst. Code § 361.5(f)*] because permanent plans are ordered as to children, not as to parents. Unless services to all parents whose rights have not otherwise been terminated have either been denied or tried and terminated, the case is not ready for a permanent plan to be selected and implemented for the child [*see Cal. Rules of Ct., Rule 5.725(h)* (purpose of termination of parental rights)].

If the juvenile court orders a selection and implementation hearing following the denial of reunification services, it must orally advise all parties present, and advise by first class mail all parties who are not present, that if the party wishes to preserve any right to review on appeal of the order the court made setting the matter for a hearing under *Welf. & Inst. Code § 366.26*, the person must seek an extraordinary writ by filing a Notice of Intent to File Writ Petition and Request

for Record [*Cal. Rules of Ct., Rule 8.450*; *see Welf. & Inst. Code § 366.26(l)*; *see also* discussion in *§ 328.190* et seq.].

[3] Concurrent Reunification Plans and Services

The reunification plan is part of the overall child welfare services case plan for the child and family [*Welf. & Inst. Code § 16501.1(f)(9)*]. The specific reunification plan and services ordered must be designed to serve the particular needs of the individual family related to the reasons the child came into the system [*Welf. & Inst. Code § 300*], the reasons the child had to be removed from the custodial parent [*Welf. & Inst. Code § 361(c)*], and the reasons for non-placement with the non-custodial parent if that parent is seeking custody [*Welf. & Inst. Code § 361.2(a)*; *In re Terry H. (1994) 27 Cal. App. 4th 1847, 1857, 34 Cal. Rptr. 2d 271]* . The reunification plan may also include requirements to address parental problems that will interfere with the reunification process even though the problems were not themselves sufficient to justify jurisdiction. For instance, the inclusion of a substance abuse component in a reunification plan was not found to be an abuse of discretion where the parent had a substance abuse problem that would interfere with reunification. This was despite the fact that the jurisdictional allegation regarding the parent's substance abuse negatively affecting his ability to parent was found not true [*In re Christopher H. (1996) 50 Cal. App. 4th 1001, 1006-1008, 57 Cal. Rptr. 2d 861]* . A reunification or service plan cannot, however, require a parenting class by a nonoffending parent if there is no evidence either the parent or the child would benefit from the parenting class [*In re Jasmine C. (2003) 106 Cal. App. 4th 177, 178-179, 130 Cal. Rptr. 2d 558]* .

Reunification plans must be case limited, case specific, and tailored to the needs of the family. The social services agency and the juvenile court must make a good faith effort to develop and implement these plans [*see In re Christina L. (1992) 3 Cal. App. 4th 404, 414, 4 Cal. Rptr. 2d 680* ; *In re Misako R. (1991) 2 Cal. App. 4th 538, 545, 3 Cal. Rptr. 2d 217* ; *see also* California Ctr. for Jud. Educ. and Research, Cal. Judges Benchguides, Benchguide 102: Juvenile Dependency Disposition Hearing (Jan. 2009) § 102.64 to 102.65, pp. 102-61 to 102-62].

PRACTICE TIP:

Case Limited and Case Specific. Reunification plans need to be case limited and case specific. A plan is case limited when it only includes those services actually needed for the parent to achieve reunification. For instance, while most parents in dependency cases would benefit from a parenting class, not all need one to achieve reunification. Nor do they all need a psychological evaluation, individual counseling and drug testing, notwithstanding the fact that most might benefit from such requirements. The plan should be limited to what is needed. Where services are required, the plan must also be specific as to both the service and the goals. If a parenting class is needed the plan should specify what type of parenting class is required, what the parent is expected to learn, and how the parent should demonstrate that. Classes for parenting infants have different goals and content than those for parenting teenagers. If therapy is required the reunification plan should specify what type of therapy, what issues are to be addressed, and what progress is to be demonstrated. Case limited and case specific reunification plans are plans for success. They do not require more than the agency can provide or the parent can complete. Nor do they require more than is necessary. What they do require, however, are very specific services with well defined goals to enable the parent to make and demonstrate progress, not just participation. All parties, the agency, and the court should take an active role in ensuring the reunification plan in every case meets these requirements.

For further discussion of concurrent services planning, see *§§ 328.12[9]* and *328.129[7]*.

[4] Reunification Services for Incarcerated or Institutionalized Parents

If the parent or guardian is incarcerated or institutionalized, the court must order reasonable services, unless the court determines, by clear and convincing evidence, those services would be detrimental to the child [*Welf. & Inst. Code § 361.5(e)(1)*; *Mark N. v. Superior Court (1998) 60 Cal. App. 4th 996, 1011, 70 Cal. Rptr. 2d 603]* . In determining what

services to order for a parent who is institutionalized or incarcerated, the court must consider the particular barriers to the parent or guardian accessing court mandated services and the ability of the parent or guardian to maintain contact with his or her child. The court must ensure this information is documented in the child's case plan. Services may include, but are not limited to, all of the following [*Welf. & Inst. Code § 361.5(e)(1)*]:

- Maintaining contact between parent and child through collect phone calls.
- Transportation services, when appropriate.
- Visitation services, when appropriate.
- Reasonable services to extended family members or foster parents providing care for the child if the services are not detrimental to the child.

An incarcerated parent may be required to attend counseling, parenting classes, or vocational training programs as part of the service plan if these programs are available [*Welf. & Inst. Code § 361.5(e)(1)*]. If the other parent assumes custody, reunification services are not required for an incarcerated parent who fails to request them under a specific available program [*In re Jeanette R. (1989) 212 Cal. App. 3d 1338, 1342, 261 Cal. Rptr. 246* ; *see Welf. & Inst. Code § 361.2(a)*].

If the incarcerated parent is a woman seeking to participate in the community treatment program operated by the Department of Corrections [*see Penal Code § 3410 et seq.* (permitting release of mother and child or children to public or private facility in community suitable to needs of mother and child or children)], the court must determine whether the parent's participation in a program is in the child's best interest and whether it is suitable to meet the needs of the parent and child [*Welf. & Inst. Code § 361.5(e)(3)*].

If the court has ordered reunification services for an incarcerated parent, a good faith effort must be made to provide such services [*Robin V. v. Superior Court (1995) 33 Cal. App. 4th 1158, 1164-1167, 39 Cal. Rptr. 2d 743* (finding such efforts had not been made for incarcerated parent)]. The social worker cannot evade the responsibility to provide such services by delegating to the incarcerated parent the responsibility of providing the social worker with a list of services available to the parent in the institution [*In re Monica C. (1995) 31 Cal. App. 4th 296, 306-308, 36 Cal. Rptr. 2d 910]* . Of course, social services agencies are not involved in the operation of prisons, correctional and other custodial institutions, and have no direct say in where a parent is incarcerated or the services available within that institution [*Mark N. v. Superior Court (1998) 60 Cal. App. 4th 996, 1013, 70 Cal. Rptr. 2d 603* , *citing In re Ronell A. (1996) 44 Cal. App. 4th 1352, 1363, 52 Cal. Rptr. 2d 474]* . Nevertheless, the social worker must contact the institution to notify it that the incarcerated parent is in need of services, determine what services might be available, and explore the possibility of whether the institution can make changes to facilitate the provision of such services "consistent with legitimate prison and public safety concerns" [*Mark N. v. Superior Court (1998) 60 Cal. App. 4th 996, 1013, 70 Cal. Rptr. 2d 603]* . Further, if the prison allows visitation and is not excessively distant, the reunification plan and the services provided must include ongoing visitation between the incarcerated parent and the child [*In re Jonathan M. (1997) 53 Cal. App. 4th 1234, 1237-1238, 62 Cal. Rptr. 2d 208* ; *In re Monica C. (1995) 31 Cal. App. 4th 296, 306-307, 36 Cal. Rptr. 2d 910* , *citing In re Brittany S. (1993) 17 Cal. App. 4th 1399, 1406-1407, 22 Cal. Rptr. 2d 50]* . Moreover, the age of the child alone, without some evidence showing how the age of the child makes visitation with an incarcerated parent contrary to the child's best interests, is not sufficient to deny visitation [*In re Dylan T. (1998) 65 Cal. App. 4th 765, 774, 76 Cal. Rptr. 2d 684]* .

Reunification services for an incarcerated or institutionalized parent are subject to the normal time limitations which apply to all parents [*Welf. & Inst. Code § 361.5(e)(1)*; *see Welf. & Inst. Code § 361.5(a)*].

[5] Visitation for Parents

"No visitation order shall jeopardize the safety of the child" [*Welf. & Inst. Code § 362.1(a)(2)*]. Although this mandate is set forth by the legislature in the context of visitation orders with parents, its essence is equally applicable to all visitation orders.

[a] Terms and Conditions of Visitation

To maintain ties between the parent and child, and to provide information relevant to deciding if and when to return a child to the custody of his or her parent or guardian, every order placing a child in foster care and ordering reunification services must provide for visitation between the parent or guardian and the child. Visitation must be as frequent as possible, consistent with the well-being of the child [*Welf. & Inst. Code § 362.1(a)(1)*]. But the court will not issue any visitation order that jeopardizes the safety of the child. And in making visitation orders, the court may keep the child's address confidential to protect the safety of the child. [*Welf. & Inst. Code § 362.1(a)(2)*]. Moreover, if the parent has been convicted of murder in the first degree of the other parent, the court shall only order visitation between the parent and the child "if that order would be consistent with" *Fam. Code § 3030*, which provides that in such circumstances no person so convicted may receive custody of, or unsupervised visitation with the child "unless the court finds that there is no risk to the child's health, safety, and welfare, and states the reasons for its finding in writing or on the record" [*Welf. & Inst. Code § 362.1(a)(2)*; *Fam. Code § 3030(c)*]. If the child has been placed out of state, one court of appeal has noted it could find "no authority for the juvenile court ordering the Department to pay" for the cost of the parent flying monthly to the other state for visitation [*Los Angeles County Dep't of Children & Family Servs. v. Superior Court (1997) 60 Cal. App. 4th 1088, 1093, 70 Cal. Rptr. 2d 658]* .

Visitation for parents can also serve as a means of maintaining a relationship between a parent and child when reunification is not possible or is not accomplished [*In re Nicholas B. (2001) 88 Cal. App. 4th 1126, 1138, 106 Cal. Rptr. 2d 465]* . In this way visitation within the reunification program may provide the basis for an exception to the termination of parental rights if the parent-child relationship maintained is sufficiently beneficial to the child to make termination of rights detrimental under *Welf. & Inst. Code § 366.26(c)(1)(B)(i)*. Thus, visitation may result in the selection of a permanent plan other than adoption, thereby allowing the parent to maintain their parental interests [*cf. In re Monica C. (1995) 31 Cal. App. 4th 296, 306-310, 36 Cal. Rptr. 2d 910]* .

If the juvenile court orders custody to a noncustodial parent, the court may make visitation orders for the other parent [*Cal. Rules of Ct., Rule 5.700(a)*]. The order must be prepared on Judicial Council form of Custody Order--Juvenile Final Judgment (JV-200) [*Cal. Rules of Ct., Rule 5.700(a)(2)*]. If the court is considering making juvenile court custody and visitation orders and terminating its jurisdiction pursuant to *Welf. & Inst. Code § 362.4*, the court should hear evidence on the question of those orders [*In re Michael W. (1997) 54 Cal. App. 4th 190, 194-196* (choosing to follow *Roger S.*, not *Elaine E.); In re Roger S. (1992) 4 Cal. App. 4th 25, 30, 5 Cal. Rptr. 2d 208* (declining to follow *Elaine E.* and holding court should hear evidence on visitation issue where making custody orders); *but see In re Elaine E. (1990) 221 Cal. App. 3d 809, 814, 270 Cal. Rptr. 489* (court did not err by refusing to allow noncustodial parent to present evidence at review hearing in support of request for change in visitation)].

The determination of the right to visitation, the length of visitation, and the frequency of visitation are a part of a judicial function and must be made by the court. The implementation and administration of the court's order, however, may properly be delegated to the Department of Social Services. These ministerial tasks that may be delegated include the time, place, and manner of visitation. The court's order cannot, however, impermissibly delegate to the social worker, children's therapist, or other person unlimited discretion to determine whether visitation is to occur [*In re Donnovan J. (1997) 58 Cal. App. 4th 1474, 1476-1478, 68 Cal. Rptr. 2d 714* (granting therapist sole discretion to determine if visitation should occur was unlawful delegation of authority); *In re Moriah T. (1994) 23 Cal. App. 4th 1367, 1373-1377, 28 Cal. Rptr. 2d 705* (rejecting dictum in *In re Jennifer G. (1990) 221 Cal. App. 3d 752, 755, 756-757, 270 Cal. Rptr. 326* (that court should determine frequency and length of visitation); *see also In re Danielle W. (1989) 207 Cal. App. 3d 1227, 1233-1238, 255 Cal. Rptr. 344* (approving order of visitation "at [Department's]

discretion and the children's discretion")]. Nor can the court allow the child to control whether visitation occurs, although the child's desires may be a dominant factor in a court's determination as to visitation [*In re S.H. (2003) 111 Cal. App. 4th 310, 317-319, 3 Cal. Rptr. 3d 465* ; *In re Nicholas B. (2001) 88 Cal. App. 4th 1126, 1138-1139, 106 Cal. Rptr. 2d 465* ; *In re Julie M. (1999) 69 Cal. App. 4th 41, 51, 81 Cal. Rptr. 2d 354]* .

If the court does not order reunification services, the court may continue to permit the parent to visit the child unless it finds that visitation would be detrimental to the child [*Welf. & Inst. Code § 361.5(f)*].

Juvenile court visitation orders may be changed by an application for modification under *Welf. & Inst. Code § 388* [*see* discussion in *§ 328.140* et seq.].

[b] Denial of Visitation

The juvenile court can deny visitation to a parent if it finds that visitation would be detrimental to the child [*In re Mark L. (2001) 94 Cal. App. 4th 573, 580, 114 Cal. Rptr. 2d 499* ; *In re David D. (1994) 28 Cal. App. 4th 941, 954, 33 Cal. Rptr. 2d 861]* . There is a split of authority, however, as to whether that detriment must be proven by clear and convincing evidence or only by a preponderance of the evidence. The *Dylan T.* and *Manolito L.* decisions best illustrate this split [*In re Dylan T. (1998) 65 Cal. App. 4th 765, 76 Cal. Rptr. 2d 684* ; *In re Manolito L. (2001) 90 Cal. App. 4th 753, 760, 109 Cal. Rptr. 2d 282]* .

In the *Dylan T.* case, the appellate court recognized that visitation might be found detrimental to a child based on a single factor or a combination of factors, although a child's young age alone is not enough. Regardless, the evidence must show by clear and convincing evidence that visitation would be detrimental to the child before a parent can be denied visitation [*In re Dylan T. (1998) 65 Cal. App. 4th 765, 773-774, 76 Cal. Rptr. 2d 684]* . Further support for this conclusion that clear and convincing evidence is the appropriate standard of proof for denying visitation to a parent, is that parenting is a fundamental right [*In re Kieshia E. (1993) 6 Cal. 4th 68, 76, 23 Cal. Rptr. 2d 775, 859 P.2d 1290* ; *In re Jennifer G. (1990) 221 Cal. App. 3d 752, 756-757, 270 Cal. Rptr. 326]* . The Legislature has declared that visitation between dependent siblings can only be denied if it is found to be detrimental by clear and convincing evidence [*Welf. & Inst. Code §§ 362.1(a)(2), 16002(b)*]. Since sibling contact is not, in most instances, a fundamental right, but parenting is, it would be inappropriate to apply a lesser standard of proof for denying a parent visitation.

In the *Manolito L.* decision, however, a different appellate court reached a different conclusion. The court noted the standard for granting a petition under *Welf. & Inst. Code § 388* for a change of placement is only a preponderance of the evidence. The standard of proof for denying visitation under that same section should not be any different [*In re Manolito L. (2001) 90 Cal. App. 4th 753, 760, 109 Cal. Rptr. 2d 282]* . Further, in the absence of a statute specifying the standard of proof, *Evid. Code § 115* dictates the standard of proof is a preponderance of the evidence [*In re Manolito L. (2001) 90 Cal. App. 4th 753, 760-761, 109 Cal. Rptr. 2d 282* , *citing In re Marquis D. (1995) 38 Cal. App. 4th 1813, 1827, 46 Cal. Rptr. 2d 198* , and *In re Cheryl H. (1984) 153 Cal. App. 3d 1098, 1114, 200 Cal. Rptr. 789]* . The appellate court also noted that the Legislature knew how to require clear and convincing evidence when it desired the higher standard to apply. Its failure to require the higher standard of proof in the review hearing statutes indicates it did not intend the higher standard of proof to apply to the denial of visitation after disposition [*In re Manolito L. (2001) 90 Cal. App. 4th 753, 761-762, 109 Cal. Rptr. 2d 282]* . Finally, the court found the requirements of due process do not mandate application of the higher standard of proof [*In re Manolito L. (2001) 90 Cal. App. 4th 753, 762-764, 109 Cal. Rptr. 2d 282]* . Its due process analysis was consistent with that of the Supreme Court in *Cynthia D.* in which it was held parental rights could be constitutionally terminated under *Welf. & Inst. Code § 366.26* despite the fact some of the findings made in dependency proceedings are made by only a preponderance of the evidence [*Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 253-256, 19 Cal. Rptr. 2d 698, 851 P.2d 1307]* .

The *Dylan T.* and *Manolito L.* decisions are not without their flaws, however. In reaching its conclusion for the application of the higher standard of proof, the *Dylan T.* court looked to the standard of proof for denying all services to

an incarcerated parent under *Welf. & Inst. Code § 361.5(e)(1)*, rather than any statute dealing strictly with visitation as an order separate from the grant or denial of reunification services [*In re Dylan T. (1998) 65 Cal. App. 4th 765, 770-771, 773-775, 76 Cal. Rptr. 2d 684]* . In reaching its holding for the lower standard of proof, the *Manolito L.* court overlooked that the standard of proof for removing a child from a parent through the use of a petition under *Welf. & Inst. Code § 388* is clear and convincing evidence, not a preponderance of the evidence [*Cal. Rules of Ct., Rule 5.570(h)(1)*]. Further, although the preponderance of the evidence standard normally applies in the absence of a legislative mandate otherwise, that is not always the case. In the *Marquis D.* decision cited by the *Manolito L.* court, it was held denying placement to a previously non-custodial parent could only be constitutionally done if it was shown to be detrimental to the child by clear and convincing evidence, notwithstanding the absence of a requirement for the higher standard of proof in *Welf. & Inst. Code § 361.2(a)* [*In re Marquis D. (1995) 38 Cal. App. 4th 1813, 1828-1829, 46 Cal. Rptr. 2d 198]* .

Thus, the analysis and holdings of both *Dylan T.* and *Manolito L.* have strengths and weaknesses. One way to reconcile the two decisions would be to recognize the different stages in the proceedings at which the denial of visitation order was made. In *Dylan T.* the appellate court was reviewing an order denying visitation that was made at a disposition hearing [*In re Dylan T. (1998) 65 Cal. App. 4th 765, 767, 76 Cal. Rptr. 2d 684]* . In *Manolito L.* the appellate court was reviewing an order denying a request for visitation raised through a petition under *Welf. & Inst. Code § 388* after disposition [*In re Manolito L. (2001) 90 Cal. App. 4th 753, 755, 759-762, 109 Cal. Rptr. 2d 282]* . Therefore, it could be argued the higher standard of proof should apply at disposition and the lower standard of proof should apply at later proceedings. This would recognize that later in the dependency process a finding for removal of the child from the custodial parent's home and the non-placement of the child in the previously non-custodial parent's home has already been made by clear and convincing evidence [*Welf. & Inst. Code § 361(c)*; *In re Marquis D. (1995) 38 Cal. App. 4th 1813, 1828-1829, 46 Cal. Rptr. 2d 198]* . This oversimplifies the issue, however, and the analysis still contains potential flaws.

The proper standard of proof for denying parents visitation is something about which reasonable minds can and do differ. Even child advocates can justifiably argue on either side of the issue. The better practice may be to provide parents with visitation unless it is shown by clear and convincing evidence the visitation would be detrimental to the child. Lesser evidence of detriment to the child can then provide the basis for restricting the frequency, length, and conditions of visitation, including requiring any visitation be held in a supervised or therapeutic setting. Until either the Supreme Court or the Legislature resolves this issue, however, it is likely trial and appellate courts will disagree on the proper standard of proof for denying parents visitation. This is an area to be watched for further developments.

[c] Standard of Review

The juvenile court is afforded wide discretion in determining the appropriate terms and conditions of visitation between dependent children and their parents [*In re Megan B. (1991) 235 Cal. App. 3d 942, 953, 1 Cal. Rptr. 2d 177]* . Thus, in most cases in which an appellate court is reviewing a juvenile court's visitation order, the proper standard of review is the abuse of discretion standard [*In re Julie M. (1999) 69 Cal. App. 4th 41, 48-51, 81 Cal. Rptr. 2d 354]* .

The standard of review for a juvenile court order that denies a parent visitation, however, has not always been clear. A finding that visitation would be detrimental to the child is a factual finding. Factual findings are normally reviewed using the substantial evidence standard. In the area of the denial of visitation, courts have sometimes mixed the two standards of review, holding that if there is substantial evidence to support the court's order, there was no abuse of discretion. For instance, in the *Daniel C.H.* case, the appellate court held, "substantial evidence supports the trial court's order of no visitation. There was no abuse of discretion" [*In re Daniel C.H. (1990) 220 Cal. App. 3d 814, 839, 269 Cal. Rptr. 624]* . The better approach, however, is to recognize that defining the terms and conditions of visitation is very different from denying visitation. The first is done as part of the juvenile court's broad discretion. The second can only be done if the court finds visitation would be detrimental to the child. Thus, if the juvenile court denies visitation, the appellate court should utilize the substantial evidence standard of review to determine whether substantial evidence

supports the detriment finding [*see, e.g., In re Mark L. (2001) 94 Cal. App. 4th 573, 581, 114 Cal. Rptr. 2d 499* ; *In re Cheryl H. (1984) 153 Cal. App. 3d 1098, 1133, 200 Cal. Rptr. 789]* .

[6] Visitation With Grandparents

When the court has ordered removal of the child from the physical custody of his or her parents pursuant to *Welf. & Inst. Code § 361* (grounds for removal), the court must consider whether or not the family ties and best interests of the child will be served by granting visitation rights with the child to the child's grandparents. The court must clearly specify those rights to the supervising social worker [*Welf. & Inst. Code § 361.2(h)*].

[7] Sibling Placement, Contact, and Visitation

Sibling relationships can be very important to children, particularly when one or more of the children are removed from parental custody. When a child is brought into custody under *Welf. & Inst. Code § 306*, the social worker is to place the child with any other siblings or half-siblings who are also detained, if that is practical and appropriate. If the child is not placed with the other siblings or half-siblings who are also detained, the report prepared pursuant to *Welf. & Inst. Code § 319* is to include a statement of the social worker's continuing efforts to place the siblings together or why such efforts are not appropriate [*Welf. & Inst. Code § 306.5*]. Social services agencies are to make a "diligent effort" to develop and maintain sibling relationships for dependent children. If siblings are not placed together, the social worker must explain why they have not been placed together in the same home and what efforts the worker is making to place the siblings in the same home, or why such efforts are not appropriate [*Welf. & Inst. Code § 16002(b)*]. If siblings cannot be placed together, diligent effort must be made by the agency to provide frequent interaction among siblings until family reunification is achieved [*Welf. & Inst. Code § 16002(b)*]. When the child has been removed from the custody of the parents, the juvenile court must consider whether there are any siblings under the court's jurisdiction, the nature of the relationship between the children, the appropriateness of developing or maintaining the sibling relationships, and the impact of those relationships on the child's placement and planning for legal permanence [*Welf. & Inst. Code § 361.2(i)*]. The court can even consider the emotional harm a child will suffer if separated from siblings in determining whether placing the child with a previously noncustodial parent would be detrimental to the child [*In re Luke M. (2003) 107 Cal. App. 4th 1412, 1419-1427, 132 Cal. Rptr. 2d 907]* .

Sibling visitation is not new in dependency cases. Even before statutes mandated sibling visitation, case law held the requirement for the court to consider the best interests of the child included "an implicit requirement that the court consider whether continuing sibling visitation is in the child's best interest" [*In re Elizabeth M. (1991) 232 Cal. App. 3d 553, 569, 283 Cal. Rptr. 483]* . Dependency statutes now make that requirement explicit. They also require the child's caregiver be provided information regarding any court-ordered sibling visitation, including any terms and conditions for facilitating that visitation safely, as soon as possible after the order for the sibling visitation is made [*Welf. & Inst. Code §§ 362.1(a)(2), 16501.1(f)(8)(B)*]. In any case in which reunification services are ordered, the court must order that sibling visitation take place pursuant to *Welf. & Inst. Code § 16002* unless the court finds by clear and convincing evidence that sibling interaction is detrimental to either child [*Welf. & Inst. Code § 362.1(a)(2)*]. The appropriateness of such a high burden of proof for this determination is subject to substantial question. While sibling contact is often beneficial for children, that is not always the case. Further, it is inconsistent with the goal of the safety, protection, physical and emotional well-being of dependent children to mandate visitation between siblings if the juvenile court finds by a preponderance of the evidence that such visitation is detrimental to either child or not in the best interest of one or both of the children. Thus, although well intended, this provision may violate the rights of children in certain cases. For this reason, while child and family advocates usually support the concept of sibling interaction in most cases, many such advocates question this very high standard. This is an area that should be watched for further developments.

A person who desires to assert a sibling relationship with a child who is either a dependent of the juvenile court or the subject of a dependency petition may petition the court to assert that relationship. The petition is to be filed pursuant to

Welf. & Inst. Code § 388(b) and may seek visitation with the dependent child, placement with or near the dependent child, consideration in developing or implementing a case plan or permanent plan for the dependent child, or any other order that may be in the best interest of the dependent child [*Welf. & Inst. Code § 388(b)*]. The dependent child may also file such a petition and, if necessary for the dependent child's best interests, the court may appoint a guardian ad litem to file the petition for the dependent child [*Welf. & Inst. Code § 388(b)*]. Any such petition must be verified and set forth the following [*Welf. & Inst. Code § 388(b)(1)-(4)*]: through which parent he or she is related to the dependent child, whether the sibling relationship is by blood, adoption, or affinity, what request or order is sought, and why that request or order is in the best interest of the dependent child. This new provision of *Welf. & Inst. Code § 388* does not require there to have been a prior order that is sought to be changed, modified, or set aside [*compare Welf. & Inst. Code § 388(a) with Welf. & Inst. Code § 388(b)*]. This is understandable, since there may have been no prior order recognizing the existence of the sibling relationship and addressing issues of placement, visitation, or plans. For further discussion of petitions under *Welf. & Inst. Code § 388*, see *§ 328.140*.

Sibling relationships must also be considered if reunification services are denied to the parent and, if parental rights are terminated, as part of developing the permanent plan for the child [*Welf. & Inst. Code §§ 361.2(i), 362.1(b), 16002(b)*]. In very limited circumstances, sibling relationships can even influence the selection of a permanent plan for children [*Welf. & Inst. Code § 366.26(c)(1)(E)* (substantial interference with sibling relationship exception to termination of parental rights)]. If a child is part of a sibling group that is placed together and for whom adoption as a sibling group is desired, the child may be difficult to place for adoption, resulting in the permanency planning process being extended while further efforts to locate an adoptive family are made [*Welf. & Inst. Code § 366.26(c)(3)*]. The goal of developing and maintaining sibling relationships and the goal of providing children with safe, stable, permanent homes, with adoption being the preferred permanent plan for children who are not returned to the custody of a parent, are not inconsistent in most cases. The dependency system and its participants must make a sincere effort, when possible and appropriate, to place dependent children in homes that will facilitate ongoing relationships between siblings on a long-term basis. This may mean placement as a sibling group in a home willing to provide legal permanency for all of the children, or providing for contact between siblings in different homes even after permanency plans are selected and implemented [*see, e.g., Welf. & Inst. Code § 366.29* (postadoption sibling contact provisions)]. If a prospective adoptive family intends to adopt a sibling group, the siblings are to be assigned the same social worker unless the social services agency determines that assigning the same social worker to all of the children would not be in the best interest of one or more of the children, or of the operation of the agency [*Welf. & Inst. Code § 16005*]. For a discussion of the "substantial interference with sibling relationship" exception to the termination of parental rights, see *§ 328.171[5][a][v]*.

As used in these sections, "sibling" means a child who is related to another person by blood, adoption, or affinity through a common legal or biological parent [*Welf. & Inst. Code §§ 362.1(c), 16002(f)*]. "Affinity" refers to the "connection existing between one spouse and the blood or adoptive relatives of the other spouse" [*Cal. Rules of Ct., Rule 5.502(1)*].

[8] Other People Important to the Child

Parents, relatives, siblings, and caregivers are not the only people significant to children. Other people may be important to a child as well. This may be especially true for children in the dependency system who may not have regular contact with the family members, including parents and siblings, who were in their lives prior to coming into the dependency system.

Beginning January 1, 2004, a number of statutory provisions have been enacted to address the issue of people who are important to the child other than parents, relatives, and siblings. Initially, the primary focus of these provisions were children who were 10 years of age or older and had been placed in a group home for six months or longer from the date the child entered foster care [Welf. & Inst. Code former §§ 366(a)(1)(B), 366.1(g)]. Now the statutory provisions pertain to all children who are 10 years of age or older and who have been in out of home care for six months or longer from the date the child entered foster care as described by *Welf. & Inst. Code § 361.49* [*Welf. & Inst. Code §§*

366(a)(1)(B), 366.1(g), 366.35]. The new provisions are being phased in gradually [*Welf. & Inst. Code § 366.35*].

Social workers must ask dependent children 10 years of age or older who have been in out of home placement for six months or longer from the date the child entered foster care whether there are people important to the child, other than siblings, consistent with the child's best interest. The social worker may also ask dependency children younger than 10 years old who are in groups home whether there are any people important to the child, other than siblings, consistent with the child's best interest [*Welf. & Inst. Code § 366.1(g)*].

Review reports are to include information regarding efforts to maintain relationships between a child who is 10 years of age or older and has been place in out of home placement for six months or longer from the date the child entered foster care and any individuals important to the child, consistent with the child's best interest [*Welf. & Inst. Code §§ 366.1(g), 366.21(c)*]. At review hearings the court must consider this information and make such orders as are appropriate in this regard, consistent with the child's best interest [*Welf. & Inst. Code § 366(a)(1)(B)*]. If a child is found difficult to place for adoption and the child's hearing under *Welf. & Inst. Code § 366.26* is continued for additional efforts to find an adoptive placement, the agency must ask a child 10 years of age or older who has been in out of home placement for six months or longer from the date the child entered foster care, and may ask a child under 10 years of age, to identify persons who are important to the child. This is to help identify potential adoptive placements [*Welf. & Inst. Code § 366.26(c)(3)*]. Further, for any child given a permanent plan of long-term foster care in out of home placement for six months or longer from the date the child entered foster care who is 10 years of age or older, the court must determine whether the social services agency has made reasonable efforts to maintain relationships between the child and individuals other than the child's siblings who are important to the child, consistent with the best interests of the child, and may make appropriate orders for the maintenance of those relationships [*Welf. & Inst. Code §§ 366.21(g), 366.22(a)*]. For children with a plan of long-term foster care or another planned permanent living arrangement, who are not in relative care or a group home, the social worker and court must also address this issue [*Welf. & Inst. Code § 366.3(e)*]. Finally, when dependent children turn 18 and are to leave the dependency system, the social services agency must provide assistance in maintaining relationships with individuals who are important to the child if the child had been placed in out of home care for six months or longer from the date the child entered foster care, consistent with the child's best interests [*Welf. & Inst. Code § 391(b)(5)*].

It is best practice to determine and consider whether there are individuals who are important to children in the dependency system, regardless of the dependent child's age or placement. All parties and participants, including social workers, court appointed special advocates, and children's counsel, should be encouraged to determine and consider whether such people exist in a dependent child's life and what steps, if any, should be taken to facilitate and maintain such relationships whenever reasonably possible and appropriate, consistent with the child's best interest.

[9] Concurrent Permanency Planning Services

Concurrent services planning in California is defined as:

> The process of immediate, simultaneous and continuous assessment and case plan development that provides a continuum of options to achieve early, family-based permanency for every child removed from his or her family. Concurrent services planning is a court/agency/family collaboration which must include the probability of reunification, availability of extended family resources and identification of a family who will commit to legal permanency for the child [*The Governor's Adoptions Initiative: Progress Report II, Report to the Legislature February 1, 1997 & March 1, 1997*, California Department of Social Services, p. 19 (1997)].

More simply stated, "Concurrent planning provides for reunification services while simultaneously developing an alternative plan, in case it is needed" [Katz, Spoonemore, & Robinson, *Concurrent Planning: From Permanency Planning to Permanency Action*, Lutheran Social Services of Washington and Idaho, p. 9 (1994)]. Thus,

> In concurrent services planning, alternative forms of permanency are identified, and implemented early in the case planning process. The case plan addresses both how reunification can be achieved ... and how legal permanency ... can be achieved if efforts to reunify fail. ... The development of both tracks simultaneously is necessary to achieve the goal of timely, legal permanency [*Concurrent Services Planning: Resource Guide*, California Department of Social Services, p. I-3 (rev. 6/19/98)].

Concurrent services planning "is both a philosophy and a case management method emphasizing candor, goal setting and time limits" in the agency and juvenile court's working with parents and families in the dependency system [Katz, Spoonemore, & Robinson, *Concurrent Planning: From Permanency Planning to Permanency Action*, Lutheran Social Services of Washington and Idaho, p. 9 (1994)]. To effect this, the child welfare services case plan developed for a child and his or her family and the social study must now include such concurrent services planning for permanency where reunification services are being provided [*Welf. & Inst. Code §§ 358.1(b)*; 16501.1(f)(9)]. Thus, in any case where the child is placed outside of the parent's home and reunification services are ordered, there must be two concurrent services "tracks": the concurrent reunification services track and the concurrent permanency planning track. This is a major shift from the "sequential" planning that was done under previous law. Now, instead of waiting until after reunification efforts fail to begin permanency planning efforts, both must considered and worked towards concurrently.

As part of the effort to achieve early stability and permanence for children, the social study must also indicate that the parent has been advised of the option of participating in adoption planning for the child, including the option of entering into a postadoption contact agreement, and relinquishing the child voluntarily if an adoption agency is willing to accept the relinquishment [*Welf. & Inst. Code § 358.1(f)*]. Even after the child is a dependent, the parent has the option of relinquishing the child if the agency is willing to accept the relinquishment [*Welf. & Inst. Code § 361(b)*]. The parent may also waive reunification services [*Welf. & Inst. Code § 361.5(b)(14)*].

Moreover, the law now specifically requires that the disposition social study include information regarding whether the caregiver is willing and desires to provide legal permanency for the child if reunification efforts fail [*Welf. & Inst. Code § 358.1(i)*]. One of the factors to consider in considering potential relative placements is the relative's desire to provide legal permanency for the child if reunification efforts fail [*Welf. & Inst. Code § 361.3(a)(6)*]. The law also provides that the fact a child has been placed in a preadoptive home or with a family that is eligible to adopt the child, that the case plan includes services to achieve legal permanence if reunification fail, or that such services to achieve permanency were provided concurrently with reunification services shall not be deemed, in and of itself, a failure to provide or offer reasonable reunification services to the parent or guardian [*Welf. & Inst. Code §§ 366.21(e), (f), 366.22(a)*]. Such potential permanency placements are not limited to foster homes, but may include relative placements as well [*Welf. & Inst. Code § 361.3(a)(6), (a)(7)(H)*].

Concurrent services planning helps emphasize that the number one permanent plan for children in California is return to parents when it can be done safely [*see Welf. & Inst. Code §§ 361.5(a)* (services can be extended up to 18 months if it can be shown "that the permanent plan for the child is that he or she will be returned and safely maintained in the home within the extended time period"), 366.3(g) (at post permanency planning review for child in another planned permanent living arrangement, such as permanent placement with a foster or relative caregiver committed to caring for the child on a permanent basis "the court shall consider all permanency planning options for the child including whether the child should be returned to the home of the parent")]. Indeed, return to parents is the only permanent plan that accomplishes all three of the goals of the dependency system: protection of the child, preservation of the family, and the provision of a stable, permanent home. Where efforts to reunify fail, however, the child should not have to wait for legal permanence and stability. Thus, concurrent services planning provides an excellent way to work towards both reunification with the parent and legal permanence for the child if reunification fails. Taking concurrent planning objectives into account when making early placement decisions may help to minimize the disruption and trauma children often have to experience when a permanent placement is sought after reunification efforts fail, resulting in the child needing to be moved. Nevertheless, despite the positive benefits of concurrent services planning, all parties and the court must be very sensitive to the potential for conflicts between concurrent reunification efforts and concurrent

permanency planning efforts.

PRACTICE TIP:

Watch For And Openly Discuss Concurrent Services Planning. The federal Adoption and Safe Families Act of 1997 and concurrent services planning are not without their detractors [*see, e.g.*, Brooks, *The Case for Adoption Alternatives*, 39 Fam. Ct. Rev. 43 (2001); Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997, 83 Minn. L. Rev. 637 (1999)*]. Their arguments are better made to the legislature, however, than to the trial court. In the trenches of the juvenile dependency system, social services agencies statewide are working to develop and implement their approaches to concurrent services planning. While the first indication of such planning may be the social study, CASAs, attorneys and judicial officers involved in dependency proceedings should be alert for such concurrent planning to be taking place at all stages of the proceedings. The need for agencies, CASAs, courts, and attorneys to discuss how concurrent planning will take place in their respective counties is great. Moreover, as concurrent planning is implemented and counties see what works and what doesn't work, the need for ongoing discussion regarding and development of this philosophy and practice will continue.

Concurrent permanency planning services will vary from case to case, just as concurrent reunification services do. Parents and family members should be encouraged to be involved in decision making regarding relative placements, potential permanency placements, and the entire reunification and permanency planning process. In an appropriate case, this may result in going directly to a legal guardianship or in the waiver of services and the setting of a hearing pursuant to *Welf. & Inst. Code § 366.26* [*Welf. & Inst. Code §§ 360(a), 361.5(b)(14)*].

In some cases the plan for the child will be to place the child in a permanency planning placement that is prepared to provide legal permanence for this child should reunification efforts fail. For younger children this will probably be a relative or foster home placement willing to consider adoption. For older children this may simply be a home willing to accept legal guardianship. Although not a determinative issue to be considered in the dependency proceeding itself, if the child is placed in a home that is willing to adopt the child if efforts to reunify fail, postadoption contact agreements if parental rights are terminated may also be discussed as part of concurrent permanency planning services [*Welf. & Inst. Code § 366.29*]. In an appropriate case, sibling placement, visitation, and permanency planning may also be discussed as part of concurrent services planning [*see, e.g., Welf. & Inst. Code §§ 306.5, 388(b)*, 366.26(c)(1)(B)(v), *16002*].

It is hoped that in many cases discussions with parents regarding concurrent permanency planning will result in parents being more diligent in their reunification efforts and in the permanent plan of reunification being achieved. It is also hoped that in those cases in which reunification is unlikely, discussions with parents regarding concurrent permanency planning may result in parents participating in permanency planning and voluntarily relinquishing their child for adoption. Where it does not, however, it may still result in a less traumatic transition for the family and the child to an alternative plan of legal permanence for the child, such as adoption or guardianship. Regardless, if implemented correctly, concurrent permanency planning will result in children suffering fewer placements and in their receiving stability and permanence in a more timely fashion.

PRACTICE TIP:

Findings and Orders for Concurrent Permanency Planning. Concurrent permanency planning is required in all cases in which reunification services are ordered. Thus, courts should review the plans for achieving legal permanence if reunification efforts fail that are to be included in each social study and review report. If such information is not contained in the report, the court should find out why and take steps to ensure concurrent permanency planning efforts are made. If included in the report, the court should indicate, just as it does with reunification plans, that it has read and considered the plan for achieving legal permanence if reunification efforts fail, and whether reasonable efforts to develop and

implement an alternative permanency plan for the child have been made. Thereafter, the court should make such other orders as it deems necessary and appropriate to ensure concurrent permanency planning efforts are appropriately made. Agency attorneys, counsel for children, and court-appointed special advocates should bring the need for and appropriateness of such findings and orders to the court's attention should the court not address the issue on its own.

For further discussion of concurrent services planning, see *§§ 328.12[9]* and *328.129[3]*.

[10] Americans With Disabilities Act

Recently a new argument has been heard in dependency cases involving parents with special needs and disabilities. In addition to arguing social services agencies have not complied with state law regarding reasonable efforts for such parents [*In re Victoria M. (1989) 207 Cal. App. 3d 1317, 1327-1330, 255 Cal. Rptr. 498]* , attorneys for parents are also raising the challenge that the agency's failures violate the Americans With Disabilities Act (ADA). Courts in some states have assumed it does [*see, e.g., In re Angel B. (Me. 1995) 659 A.2d 277, 279* ; *Robinson (Wash. 1995) 78 Wn. App. 222, 229-230, 896 P.2d 1298, 1302* ; *In the Interest of C.M. (Iowa 1994) 526 N.W.2d 562, 566* ; *see also Stone v. Daviess County Div. of Children & Family Servs. (Ind. 1995) 656 N.E.2d 824, 830]* .

Congress knows how to make federal law directly applicable to state court proceedings such that it can be raised within those proceedings. Indeed, it did so with the Indian Child Welfare Act [*25 U.S.C. § 1901 et seq.*]. That it did not do so with the ADA suggests a different legislative intent [*Cf. In re Chantal S. (1996) 13 Cal. 4th 196, 206-207, 51 Cal. Rptr. 2d 866, 913 P.2d 1075]* . Thus, the better view is that the ADA creates a separate, private, federal cause of action that can be instituted in federal court separate and apart from any challenge raised under state law in the dependency action. An alleged violation of the ADA regarding services cannot be raised in the state dependency proceeding. This is the position taken in other states in which the issue has been examined [*In re B.S. (Vt. 1997) 166 Vt. 345, 693 A.2d 716, 720-722* ; *In the Interest of Torrance P. (Wis. 1994) 187 Wis. 2d 10, 15-16, 522 N.W.2d 243, 245-246]* . This is also the view that has now been adopted in California [*In re Anthony P. (2000) 84 Cal. App. 4th 1112, 1115-1116, 101 Cal. Rptr. 2d 423* ; *In re Diamond H. (2000) 82 Cal. App. 4th 1127, 98 Cal. Rptr. 2d 715 , disapproved on other grounds to the extent inconsistent, Renee J. v. Superior Court (2001) 26 Cal. 4th 735, 748, n. 6, 110 Cal. Rptr. 2d 828, 28 P.3d 876]* . As noted in *Diamond H.*, "the ADA does not directly apply to juvenile dependency proceedings and cannot be used as a defense in them." Thus, in *Diamond H.* the appellate court held the mother's claimed violation of the ADA could not be used to attack the juvenile court's order denying reunification services under Welf. & Inst. Code former § 361.5(b)(10) [*In re Diamond H. (2000) 82 Cal. App. 4th 1127, 1139, 98 Cal. Rptr. 2d 715 , disapproved on other grounds to the extent inconsistent, Renee J. v. Superior Court (2001) 26 Cal. 4th 735, 748, n. 6, 110 Cal. Rptr. 2d 828, 28 P.3d 876]* .

[11] Visitation for Teen Parent

If the dependent child is a teen parent who has custody of his or her child, and that child is not a dependent of the juvenile court, the court must make orders for visitation among the teen parent, the child's noncustodial parent, and appropriate family members, unless the court finds by clear and convincing evidence that such visitation would be detrimental to the teen parent [*Welf. & Inst. Code § 362.1(a)(3)*]. A shared responsibility plan shall also be developed [*Welf. & Inst. Code § 16501.25*].

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§ 328.130 Selecting Therapist or Evaluator

In many cases the juvenile court will direct that there be therapy or a psychological evaluation, but not make the actual selection of the therapist or evaluator. This has been found to be proper [*In re Walter E. (1992) 13 Cal. App. 4th 125, 135-136, 17 Cal. Rptr. 2d 386* (juvenile court determines need for expert, the selection of whom is delegated to the social services department)]. As the court of appeal in *Walter E.* noted, "The Department ... is clearly the entity best able to perform the task of selecting the particular psychologist to perform a clinical examination" of the child [*In re Walter E. (1992) 13 Cal. App. 4th 125, 137, 17 Cal. Rptr. 2d 386]* . Although the juvenile court does not select the expert, it retains ultimate control over the exercise of this function through its review of the expert's report [*In re Walter E. (1992) 13 Cal. App. 4th 125, 136, 17 Cal. Rptr. 2d 386]* .

Moreover, the juvenile court need not appoint a second expert of the parent's choosing [*In re Walter E. (1992) 13 Cal. App. 4th 125, 137, 17 Cal. Rptr. 2d 386* (parent has no due process right to appointment); *In re Jennifer J. (1992) 8 Cal. App. 4th 1080, 1084, 10 Cal. Rptr. 2d 813]* . Rather, the parent may employ his or her own expert to evaluate the results of tests and data collected by the expert selected by the social services department, if applicable [*In re Walter E. (1992) 13 Cal. App. 4th 125, 138, 17 Cal. Rptr. 2d 386]* .

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§ 328.131 Detention Pending Execution of Disposition Order

Whenever a person has been adjudged a dependent child of the juvenile court and has been committed or otherwise provided for, the court may order the child detained in a sheltered care facility, or otherwise as to the court seems fit, until execution of the order of commitment or of other disposition [*Welf. & Inst. Code § 367(a)*].

In any case in which a child is detained for more than 15 days pending the execution of the order of commitment or of any other disposition, the court will periodically review the case to determine whether the delay is reasonable. Such reviews are held at least every 15 days, commencing from the time the child was initially detained pending the execution of the order of commitment or of any other disposition. During the course of such review, the court will inquire regarding the action taken by the social services department to carry out its order, the reasons for the delay, and the effect of the delay on the child [*Welf. & Inst. Code § 367(b)*].

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§ 328.132 Reduction of Public Assistance

If the parent or person legally responsible for the care of a child declared to be a dependent child of the court on the grounds that the home is an unfit place by reason of neglect, cruelty, depravity, or physical abuse receives public assistance or care, any portion of which is attributable to the child, a copy of the order of the court providing for the removal of the child from the home is furnished to the appropriate social services official, who reduces the public assistance and care furnished the parent or other person by the amount attributable to the child [*Welf. & Inst. Code § 363*].

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§ 328.133 Setting a Six-Month Review

Once the juvenile court has completed making all of its findings and orders regarding the disposition of the case and if those orders include the continuing jurisdiction of the court under a family maintenance, family reunification or permanency planning order, the court shall set the matter for a future six-month review. The six-month review is to be held six months from the date of the disposition hearing, but not more than 12 months from the date the child entered foster care, and must be put on the appearance calendar [*Welf. & Inst. Code §§ 364(a), 366, 366.21(a), (e)*]. The juvenile court must advise all persons present at the disposition hearing of the date of the review hearing, and of their right to be present and represented by counsel [*Welf. & Inst. Code § 366.21(a)*].

For discussion of date for the six-month review hearing in cases in which the child has been removed from the home of the parent or guardian, see *§ 328.152*.

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329
CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
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[Reserved]

§§ 328.134[Reserved]

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329
CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
H. Supplemental and Subsequent Petitions

28-328 California Forms of Pleading and Practice--Annotated § 328.140

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§ 328.140 Petitions for Modification of Orders

[1] Availability

Petitions for modification of orders are brought under *Welf. & Inst. Code § 388*, can be filed by any interested person, and seek to modify a previous order of the juvenile court based upon new evidence or a change of circumstances which require a change in the court's order so as to serve the child's best interest [*Cal. Rules of Ct., Rule 5.570*]. The petition can also be used to address sibling relationship issues [*Welf. & Inst. Code § 388(b)*]. And it must be used if a party desires to terminate court ordered reunification services prior to the regularly scheduled review or permanency hearings for the child [*Welf. & Inst. Code §§ 361.5(a)(1)(C), 388(c)*].

Any order made by the juvenile court in the case of a dependent child subject to its jurisdiction, may at any time be changed, modified, or set aside, as the court deems proper, subject to certain statutory procedural requirements [*Welf. & Inst. Code § 385*]. One exception to this general rule is that once a court has terminated parental rights pursuant to *Welf. & Inst. Code § 366.26* it has no jurisdiction to modify its termination of parental rights order, except in the very limited situation in which the child asks that parental rights be reinstated because the child is no longer likely to be adopted [*Welf. & Inst. Code § 366.26(i)*; *In re Ronald V. (1993) 13 Cal. App. 4th 1803, 1805-1806, 17 Cal. Rptr. 2d 334]* .

Petitions for modification of court orders can be used in a wide variety of situations [*see, e.g., Sheila S. v. Superior Court (2000) 84 Cal. App. 4th 872, 877-879, 101 Cal. Rptr. 2d 187* (to modify previous disposition order for reunification and have services denied under *Welf. & Inst. Code § 361.5(b)(2)*); *In re Michael D. (1997) 51 Cal. App. 4th 1074, 1080, 1086, 59 Cal. Rptr. 2d 575* (to set aside dependency guardianship and return child to mother); *In re Jasmon O. (1994) 8 Cal. 4th 398, 33 Cal. Rptr. 2d 85, 878 P.2d 1297* (to change permanency planning order); *In re Stephanie M. (1994) 7 Cal. 4th 295, 27 Cal. Rptr. 2d 595, 867 P.2d 706* (to seek a change in placement of the child); *In re John F. (1994) 27 Cal. App. 4th 1365, 33 Cal. Rptr. 2d 225* (brought by dependent child to change permanent

plan); *In re Brandon C. (1993) 19 Cal. App. 4th 1168, 23 Cal. Rptr. 2d 571* (to show evidence of recantation of testimony on jurisdictional issue); *In re Hirenia C. (1993) 18 Cal. App. 4th 504, 22 Cal. Rptr. 2d 443* (to seek visitation); *In re Heather P. (1989) 209 Cal. App. 3d 886, 257 Cal. Rptr. 545* (to change orders after permanency planning hearing); *Ansley v. Superior Court (1986) 185 Cal. App. 3d 477, 483-488, 229 Cal. Rptr. 771* (to raise due process challenge based upon lack of notice)]. They may also be used to obtain recognition of a sibling relationship and to address such issues as sibling visitation, placement, and case planning [*Welf. & Inst. Code § 388(b)*].

PRACTICE TIP:

Is a "388" Petition Needed? The question frequently arises as to whether a petition pursuant to *Welf. & Inst. Code § 388* is needed to raise a particular issue at a regularly scheduled review hearing or at some other statutory hearing within the dependency process. A simple test to answer this question is to ask the following: Is the issue sought to be raised one which the court must already consider at the hearing due to the criteria for the hearing which are set forth in statute, decisional law, or rules of court? If the answer is "yes," no petition under *Welf. & Inst. Code § 388* is necessary. If the answer is "no," a petition under *Welf. & Inst. Code § 388* is necessary. An example of this is the issue of whether such a petition is needed at a regularly scheduled post-permanency planning review hearing for a child in long-term foster care in order for the court to consider a request for a change in permanent plan. Since the court must already consider the "continuing appropriateness" of the child's permanent plan at that hearing [*Welf. & Inst. Code § 366.3(e)(2)*], no petition under *Welf. & Inst. Code § 388* is necessary for the court to consider such a request [*In re John F. (1994) 27 Cal. App. 4th 1365, 1375, 33 Cal. Rptr. 2d 225* ; *cf. San Diego County Dep't of Soc. Servs. v. Superior Court (1996) 13 Cal. 4th 882, 887-892, 55 Cal. Rptr. 2d 396, 919 P.2d 1329]* . Should a party seek such a change between review hearings, however, when the matter of the child's permanent plan is not otherwise before the court, a petition under *Welf. & Inst. Code § 388* would be necessary.

The juvenile court, of course, has the inherent jurisdiction to modify any previously made interim order, except for the termination of parental rights, particularly if that order was erroneously or inadvertently made, or to prevent an injustice. Such modification can be made sua sponte, on the court's own motion, without a *Welf. & Inst. Code § 388* petition. Notice and an opportunity to be heard are required [*Welf. & Inst. Code § 385*; *Le Francois v. Goel (2005) 35 Cal. 4th 1094, 1104-1108, 29 Cal. Rptr. 3d 249, 112 P.3d 636]* .

[2] General Requirements

Any parent or other person having an interest in a child who is a dependent child of the juvenile court, including the social worker and the child him or herself, may, on grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child for a hearing to change, modify, or set aside a previously made order of the court or to terminate the jurisdiction of the court [*Welf. & Inst. Code § 388(a)*].

PRACTICE TIP:

Person Filing Petition Need Not Be Party. The language of *Welf. & Inst. Code § 388(a)* allowing a petition for modification to be filed by any person having an interest in the child suggests that the person filing the petition need not be a party to the dependency proceedings so long as a recognizable interest in the child is demonstrated. A nonparty might have to utilize the procedures in *Welf. & Inst. Code § 827* to obtain sufficient information to file the petition and would not be entitled to the appointment of counsel for the bringing of the petition. Nevertheless, this would allow such nonparties as CASAs and relatives to file petitions under *Welf. & Inst. Code § 388(a).*

A petition may also be filed by any person who desires to assert a sibling relationship with a child who is either a dependent of the juvenile court, or the subject of a dependency petition. The petition may seek visitation with the dependent child, placement with or near the dependent child, consideration in developing or implementing a case plan

or permanent plan for the dependent child, or any other order that may be in the best interest of the dependent child [*Welf. & Inst. Code § 388(b)*]. The dependent child may also file such a petition and, if necessary for the dependent child's best interests, the court may appoint a guardian ad litem to file the petition for the dependent child [*Welf. & Inst. Code § 388(b)*]. The primary purpose of this provision as enacted by the Legislature is to facilitate keeping dependent siblings together or in contact with each other while they are in the dependency system. Its applicability to nondependent siblings is limited and questionable, since the juvenile court has no jurisdiction over nondependent siblings.

PRACTICE TIP:

Standing to File Sibling Petition. *Welf. & Inst. Code § 388(b)* starts out with the words "Any person ..." This can be misleading if the entire sentence as to who can file a sibling petition is not read in context. Any person with a legally recognizable interest can file a petition for modification of a prior court order under *Welf. & Inst. Code § 388(a)*. But only persons seeking to file a petition "as a sibling related by blood, adoption, or affinity through a common legal or biological parent" may file a sibling petition under *Welf. & Inst. Code § 388(b)*. Thus, only dependent children, the siblings of dependent children, or those persons having legal custody of the dependent children or their siblings may file petitions under *Welf. & Inst. Code § 388(b)*. A parent whose parental rights have been terminated or who does not have legal custody of any of the children would not have standing to file a sibling petition [*see In re Ronald V. (1993) 13 Cal. App. 4th 1803, 1805-1806, 17 Cal. Rptr. 2d 334* ; *In re Frank L. (2000) 81 Cal. App. 4th 700, 702-704, 97 Cal. Rptr. 2d 88]* . This is an area that should be watched for further developments.

If a party, including the dependent child, desires to terminate court-ordered reunification services prior to the date of the six-month review hearing for a child who was under 3 years of age at initial removal, or part of a sibling group with one such child, or prior to the 12-month permanency hearing for a child who was 3 years of age or older at the time of initial removal, petition under *Welf. & Inst. Code § 388* must be used [*Welf. & Inst. Code § 361.5(a)(1)*]. The petition used for this purpose must allege one of the following two circumstances exist [*Welf. & Inst. Code § 388(c)(1)*]:

- A change of circumstance or new evidence exists that satisfies a condition set forth in *Welf. & Inst. Code § 361.5(b)* or *(e)* exist justifying termination of court-ordered reunification services.

- The action or inaction of the parent or guardian including, but not limited to, the parent or guardian's failure to visit the child, or the failure of the parent or guardian to participate regularly and make substantive progress in a court-ordered treatment plan, creates a substantial likelihood that reunification will not occur.

In determining whether the parent or guardian has failed to visit the child or participate regularly or make progress in the treatment plan, the juvenile court must consider factors including, but not limited to, the parent or guardian's incarceration, institutionalization, or participation in a residential substance abuse treatment program [*Welf. & Inst. Code § 388(c)(2)*]. The juvenile court shall grant the petition and terminate reunification services only if it finds by a preponderance of evidence that reasonable services have been offered or provided, and that by clear and convincing evidence one of the conditions in *Welf. & Inst. Code § 388(c)(1)(A)* or *(B)* exists [*Welf. & Inst. Code § 388(c)(3)*]. Of course, before granting the petition the court must also find the termination of court ordered reunification services prior to the presumptive time is in the child's best interest.

The petition must be in writing [*In re Baby Boy L. (1994) 24 Cal. App. 4th 596, 609, 29 Cal. Rptr. 2d 654]* and on the Judicial Council Form JV-180. The petition must be verified and, if made by a person other than the child, must state the petitioner's relationship to or interest in the child and set forth in concise language any change of circumstance or new evidence that is alleged to require a change in the order or termination of jurisdiction [*Welf. & Inst. Code § 388*]. It is not enough to make general averments relating to new evidence or a change of circumstance without actually stating

in the petition specific allegations describing the evidence which are alleged to constitute the new evidence or change of circumstances required for the granting of a hearing [*In re Anthony W. (2001) 87 Cal. App. 4th 246, 250-251, 104 Cal. Rptr. 2d 422* ; *In re Edward H. (1996) 43 Cal. App. 4th 584, 593, 50 Cal. Rptr. 2d 745]* .

If the petition is brought for the purpose of recognizing a sibling relationship or to address sibling visitation, placement, or case planning issues, the petition must be verified and set forth the following [*Welf. & Inst. Code § 388(b)(1)-(4)*]: through which parent he or she is related to the dependent child, whether the sibling relationship is by blood, adoption, or affinity, what request or order is sought, and why that request or order is in the best interest of the dependent child.

If the petition states a change of circumstance or new evidence, and it appears that the best interest of the child may be promoted by the proposed change of order or termination of jurisdiction, or that clear and convincing evidence supports revocation or termination of court-ordered reunification services, the court must grant a hearing on the petition. If the petition seeks recognition of a sibling relationship, a hearing must be ordered if it appears the best interests of the child may be promoted by recognition of the sibling relationship [*Welf. & Inst. Code § 388(d)*]. A petition for modification must be liberally construed in favor of its sufficiency for the granting of a hearing [*In re Marilyn H. (1993) 5 Cal. 4th 295, 309, 19 Cal. Rptr. 2d 544, 851 P.2d 826* , *citing In re Jeremy W. (1992) 3 Cal. App. 4th 1407, 1413-1414, 5 Cal. Rptr. 2d 148* , and *In re Heather P. (1989) 209 Cal. App. 3d 886, 891, 257 Cal. Rptr. 545]* . It is not necessary that the petitioner show a probability of prevailing on the petition at a full hearing. The petitioner only needs to make a prima facie showing to trigger the requirement of a full hearing [*In re Aljamie D. (2000) 84 Cal. App. 4th 424, 432, 100 Cal. Rptr. 2d 811* ; *In re Hashem H. (1996) 45 Cal. App. 4th 1791, 1798-1799, 53 Cal. Rptr. 2d 294]* .

If the petition fails to state any change of circumstance or new evidence that might require a change of order or termination of jurisdiction, the court may deny the petition without a hearing at which evidence is taken or even ex parte. While many courts are reluctant to deny a petition without a hearing, since the petition is to be liberally construed in favor of granting a hearing, the law is nonetheless clear that a hearing is not required if the petition fails to make a sufficient showing to justify one [*In re Zachary G. (1999) 77 Cal. App. 4th 799, 807-808, 92 Cal. Rptr. 2d 20* ; *In re Jamika W. (1997) 54 Cal. App. 4th 1446, 1450-1451, 63 Cal. Rptr. 2d 513* ; *In re Elizabeth M. (1997) 52 Cal. App. 4th 318, 323, 60 Cal. Rptr. 2d 557* ; *In re Edward H. (1996) 43 Cal. App. 4th 584, 591-593, 50 Cal. Rptr. 2d 745*]. As noted by one court, the petition may not be conclusory. Merely asserting that a parent has participated in and completed programs and visits the child, without mention of dates or names of counselors may not be enough. Successful petitions often include declarations or other attachments that demonstrate the showing the petitioner will make should a hearing be granted on the petition. Without such supporting documents, courts may find the unsubstantiated assertions in the petition to be conclusory and deny a hearing on the petition [*In re Anthony W. (2001) 87 Cal. App. 4th 246, 250-251, 104 Cal. Rptr. 2d 422]* . The basis for any decision denying a hearing on the petition should be set forth clearly in the court's order [*see In re Jeremy W. (1992) 3 Cal. App. 4th 1407, 1413-1414, fn. 11, 5 Cal. Rptr. 2d 148]* .

Petitions filed under *Welf. & Inst. Code § 388* may be filed by facsimile filing if authorized by local rule or written instruction by the juvenile court [*Cal. Rules of Ct., Rule 5.522*]. This authorization is only applicable, however, to parties, attorneys of record, social services, probation, the office of the district attorney, the office of the county counsel, and court-appointed special advocates [*Cal. Rules of Ct., Rule 5.522*; *see § 328.130[2]*].

PRACTICE TIP:

Argument on Whether to Grant a Hearing. Some courts allow argument by the parties before making the judicial decision to grant or deny a hearing on a petition under *Welf. & Inst. Code § 388*. This has the advantage of ensuring the court has all of the arguments in mind to allow for the making of an informed decision and of making a good record of the basis for the court's decision granting or denying a hearing on the petition. Such a practice is not required, however, and can contribute to calendar congestion. Other courts make the decision to grant or deny a hearing ex parte. Where the decision to grant a hearing has been made ex parte, the better practice is to allow the parties the opportunity to argue at the beginning of the hearing for and against the granting of a hearing should they so desire. Practitioners

who believe the petitioner has not made a sufficient showing to justify the granting of a hearing should state that position at the start of any hearing granted ex parte and ask for the opportunity to argue the issue.

If all parties stipulate to the requested modification, the court may order modification without a hearing. If the modification will be contested because the parties do not agree to the requested modification, or if the court desires to receive further evidence on the issue, the court must order that a hearing on the petition for modification be held within 30 calendar days after the petition is filed [*Cal. Rules of Ct., Rule 5.570(d)*; *see Welf. & Inst. Code § 388*].

PRACTICE TIP:

Use of Petition and Attached Documents as Evidence. Some confusion exists among practitioners as to the use of the statements alleged in the petition under *Welf. & Inst. Code § 388* or in declarations and documents attached thereto. Such information is provided to the court for its consideration in granting or denying a hearing on the petition and may be considered by the court for that limited purpose. In this way the statements alleged in the petition or the documents attached thereto are in the nature of offers of proof as to what the petitioner would seek to establish if a hearing were granted. If a hearing is actually granted, however, the rules of evidence are less clear. *Cal. Rules of Ct., Rule 5.570(g)*, provides the court with discretion to allow proof to be made by declaration and other documentary evidence, or by testimony, or both, which suggests the attachments to the petition could be used as evidence. If the petition requests removal from the home of the parent or guardian, or to a more restrictive level of care, or if there is a due process right to confront and cross-examine witnesses, the normal rules for disposition hearings must apply [*Cal. Rules of Ct., Rule 5.570(h)*]. Such due process rights will normally exist if the petition seeks anything significant, is at all complex, or is hotly contested [*see, e.g., Los Angeles County Dep't of Children & Family Servs. v. Superior Court (1998) 63 Cal. App. 4th 1299, 1305-1306, 74 Cal. Rptr. 2d 618* ; *In re Matthew P. (1999) 71 Cal. App. 4th 841, 849-851, 84 Cal. Rptr. 2d 269]* . As such, practitioners would be wise to assume and courts to rule that at the hearing the statements alleged in the petition or the documents attached thereto will be considered inadmissible hearsay unless they fall within an exception to the hearsay rule, such as the social study exception, and an opportunity to cross-examine the witnesses is provided. Nevertheless, in an appropriate case the parties may wish to stipulate to the admissibility of such information as evidence at the hearing on the modification petition if it is uncontroverted, would constitute the testimony of the declarant if called as a witness, or would otherwise speed up the hearing in a way all parties find acceptable.

[3] When Welf. & Inst. Code § 366.26 Hearing Has Been Set

A parent may also file a *Welf. & Inst. Code § 388* petition to seek return of the child or renewed reunification services, based on changed circumstances, after reunification services have been terminated and a hearing under *Welf. & Inst. Code Section 366.26* has been set [*see In re Marilyn H. (1993) 5 Cal. 4th 295, 308-309, 19 Cal. Rptr. 2d 544, 851 P.2d 826]* . Because reunification is not an option that can be considered at the selection and implementation hearing [*see Welf. & Inst. Code § 366.26(b)*; *In re Marilyn H. (1993) 5 Cal. 4th 295, 303-304, 19 Cal. Rptr. 2d 544, 851 P.2d 826]* , the availability of the modification hearing in this circumstance provides a parent with substantive due process, under both the state and federal constitutions, to exercise the parent's interest in having an opportunity to reunify with a child [*In re Marilyn H. (1993) 5 Cal. 4th 295, 309, 19 Cal. Rptr. 2d 544, 851 P.2d 826]* . Juvenile courts sometimes combine the hearing on the modification petition with the selection and implementation hearing in the interest of judicial economy. This is because the evidence that would be presented on the question of return or further services may be substantially the same evidence to be produced on the issue of the beneficial relationship exception under *Welf. & Inst. Code § 366.26*(c)(1)(A). Whether the hearings are combined or heard separately, the court must determine whether to grant the petition for return or further reunification services first, since the granting of the petition would be inconsistent with the holding of a selection and implementation hearing [*In re Marilyn H. (1993) 5 Cal. 4th 295, 308-310, 19 Cal. Rptr. 2d 544, 851 P.2d 826* ; *In re Sean E. (1992) 3 Cal. App. 4th 1594, 1599, 5 Cal. Rptr. 2d 193* ;

In re Jeremy W. (1992) 3 Cal. App. 4th 1407, 1416, fn. 14, 5 Cal. Rptr. 2d 148] . If the court denies the modification petition, it then goes on to make its findings and orders under *Welf. & Inst. Code § 366.26*.

It is also common for parents to file petitions under *Welf. & Inst. Code § 388* seeking placement of the child with a different relative or foster caregiver, or seeking to modify the court's visitation orders with the parent. A petition to modify the out-of-home placement of the child or visitation orders is not necessarily inconsistent with the selection of a permanent plan for the child, even if the recommended plan is adoption. Visitation between a parent and child may be positive and pleasant, yet not enough to make the beneficial relationship exception to the termination of parental rights applicable [*see, e.g.,* *In re Derek W. (1999) 73 Cal. App. 4th 823, 827, 86 Cal. Rptr. 2d 739* ; *In re Beatrice M. (1994) 29 Cal. App. 4th 1411, 1418-1420, 35 Cal. Rptr. 2d 162]* . Further, the specific out-of-home placement of the child may affect which family receives preferential consideration for adoption [*Welf. & Inst. Code § 366.26(k)*]. But in most cases it does not affect the selection of a permanent plan, unless the child is only likely to be adopted or receive a legal guardian if in a particular home. Finally, if parental rights are terminated and the child placed with the agency for adoptive placement, any prior orders for visitation and placement may be moot, since it is the agency that is normally given "exclusive care and control" of the child following the termination of parental rights [*Welf. & Inst. Code § 366.26(j)*; *Los Angeles County Dep't of Children & Family Servs. v. Superior Court (1998) 62 Cal. App. 4th 1, 9-10, 72 Cal. Rptr. 2d 369* ; *Department of Soc. Servs. v. Superior Court (1997) 58 Cal. App. 4th 721, 732-733, 68 Cal. Rptr. 2d 239]* . Thus, when the modification petition does not seek return or resumption of reunification services, but only seeks a change of out-of-home placement or additional visitation, in most instances the court should determine the selection of the permanent plan first, and thereafter consider whether it can or should grant the requested modification of prior court orders. If parental rights are terminated, a parent normally loses any standing he or she might have to seek a change in placement. If the court has deferred consideration of the parent's *Welf. & Inst. Code § 388* petition for a change in placement until after the hearing under *Welf. & Inst. Code § 366.26*, however, it may be appropriate to allow the parent continued standing for the limited purpose of determining the change in placement sought in the parent's petition. This helps ensure the decision to defer consideration of the *Welf. & Inst. Code § 388* petition was not an abuse of discretion or a denial of due process. Nevertheless, in considering the petition for a modification of placement after the termination of parental rights the court must recognize the change in the law regarding placement of a freed child [*In re Harry N. (2001) 93 Cal. App. 4th 1378, 1381-1382, 1397-1399, 114 Cal. Rptr. 2d 46* ; *Los Angeles County Dep't of Children & Family Servs. v. Superior Court (1998) 62 Cal. App. 4th 1, 9-10, 72 Cal. Rptr. 2d 369* ; *Department of Soc. Servs. v. Superior Court (1997) 58 Cal. App. 4th 721, 732-733, 68 Cal. Rptr. 2d 239* ; *but see Welf. & Inst. Code § 366.26(n)*].

For examples of decisions involving the use of a *Welf. & Inst. Code § 388* petition to attempt to vacate a *Welf. & Inst. Code § 366.26* hearing, see *In re Casey D. (1999) 70 Cal. App. 4th 38, 82 Cal. Rptr. 2d 426* ; *In re Sean E. (1992) 3 Cal. App. 4th 1594, 5 Cal. Rptr. 2d 193* , and *In re Jeremy W. (1992) 3 Cal. App. 4th 1407, 5 Cal. Rptr. 2d 148* .

[4] Required Notice

No order changing, modifying, or setting aside a previous order may be made unless prior notice of the petition for the modification has been given to the social worker and to the child's counsel of record or, in the absence of counsel, to the child and his or her parent or guardian [*Welf. & Inst. Code § 386*; *see also Welf. & Inst. Code § 302(b)* (general requirement of notice to both parents of all juvenile court proceedings involving their child)]. The specific requirements for notice of a petition for modification of a prior court order under *Welf. & Inst. Code § 388(a)* or for a sibling petition under *Welf. & Inst. Code § 388(b)* are set forth in *Welf. & Inst. Code § 297(c)*.

[5] Required Showing

The party seeking modification of a prior court order has the burden of showing a change of circumstances or new evidence to warrant modification of the previous order and that the requested change of order is in the child's best interest [*Welf. & Inst. Code § 388*]. Except in situations where the request change of orders will result in removal from

the home of a parent or guardian, the burden of proof is by a preponderance of the evidence. Where, however, the petition seeks removal from the parent, the court must find by clear and convincing evidence that one of the circumstances justifying removal under *Welf. & Inst. Code § 361* exists [*Cal. Rules of Ct., Rule 5.570(f)*]. If the request is for a more restrictive level of placement, the rule of court requires clear and convincing evidence that a change of placement is needed to protect the child's physical or emotional well-being [*Cal. Rules of Ct., Rule 5.570(f)*]. The rule's requirement for clear and convincing evidence when a higher level of care is sought but the removal is not from a parent is incorrect. Clear and convincing evidence is needed to remove from a parent, but it is the best interest of the child by a preponderance of the evidence that governs where the child should be placed once the child is in out-of-home care. This limited portion of the rule should be considered invalid.

It has often been argued that when the modification petition demonstrates an earlier failure to conduct adequate search efforts for a parent or to provide proper notice the petition must be granted [*Ansley v. Superior Court (1986) 185 Cal. App. 3d 477, 481, 487-488, 229 Cal. Rptr. 771]* . This argument either presumes granting the petition in such circumstances will automatically be in the child's best interest or that no showing of best interest is required. Neither is correct. The *Ansley* decision was both distinguished and clarified in the later *Justice P.* decision that made it clear that even when the petition demonstrates a lack of adequate search or notice efforts a showing that granting the petition is in the child's best interest still must be made [*In re Justice P. (2004) 123 Cal. App. 4th 181, 189-192, 19 Cal. Rptr. 3d 801]* .

Where the person filing the petition for modification demonstrates both a change of circumstances and that it would be in the child's best interest to modify the order, it is an abuse of discretion for the court to deny the petition [*In re Kimberly F. (1997) 56 Cal. App. 4th 519, 532-535, 65 Cal. Rptr. 2d 495* (reversing juvenile court's order denying modification petition)]. As one court has noted, however, "A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests" [*In re Casey D. (1999) 70 Cal. App. 4th 38, 47, 82 Cal. Rptr. 2d 426* (trial court found mother's circumstances "were changing, rather than changed" [*70 Cal. App. 4th 38, 49])]* .

One approach to determining whether granting a petition to modify a prior court order as being in the child's best interest is suggested in the *Kimberly F.* case. The approach used there was to consider the seriousness of the problem that originally led to the dependency, the reason, if any, for continuation of the problem, the strength and nature of the relationship between the child and both the parent and the caretaker, the degree to which the continuing problem may be easily resolved, and the degree to which the problem actually has been resolved [*In re Kimberly F. (1997) 56 Cal. App. 4th 519, 532, 65 Cal. Rptr. 2d 495]* . This approach is appropriate in some cases, but is by no means the only way for the court to consider the issues presented in a petition for modification under *Welf. & Inst. Code § 388*.

When a change of placement is sought after the court has terminated reunification services with a child's parents, the focus shifts to the "needs of the child for permanency and stability," and a rebuttable presumption exists that continued foster care is in the best interest of the child [*In re Stephanie M. (1994) 7 Cal. 4th 295, 324-325, 27 Cal. Rptr. 2d 595, 867 P.2d 706* (reversing appellate court decision to remove child from foster care and place her with maternal grandmother)]. In such circumstances, the approach of the court in the case of *In re Kimberly F. (1997) 56 Cal. App. 4th 519, 532, 65 Cal. Rptr. 2d 495* , may not be appropriate since it fails to give full consideration to this shift in focus.

The new provisions of *Welf. & Inst. Code § 388(b)* regarding petitions brought for the recognition of a sibling relationship, or for orders addressing sibling placement, visitation, or case planning, do not require there to have been a prior order that is sought to be changed, modified, or set aside [*compare Welf. & Inst. Code § 388(a) with Welf. & Inst. Code § 388(b)*]. This is because there may have been no prior order recognizing the existence of the sibling relationship and addressing issues of placement, visitation, or plans. The standard for petitions brought under *Welf. & Inst. Code § 388(b)* is the best interests of the child. This is consistent with the traditional petitions brought under *Welf. & Inst. Code § 388(a)* for changing, modifying, or vacating prior orders of the court. This is an area that should be watched for

further development, however. For further discussion of sibling relationship issues, see *§ 328.127*.

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
H. Supplemental and Subsequent Petitions

28-328 California Forms of Pleading and Practice--Annotated § 328.141

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§ 328.141 Supplemental Petitions

[1] In General

Supplemental petitions brought under *Welf. & Inst. Code § 387* seek to modify a previous placement order of the juvenile court by removing the child from the physical custody of a parent, guardian, or relative and placing the child in a foster home or other licensed facility. It is often considered by practitioners to be a petition to move the child to a "higher" or "more restrictive" level of court ordered care based upon the child's needs and the ineffectiveness or inappropriateness of the previous placement order. While this is true in some cases, a petition under *Welf. & Inst. Code § 387* is not the only vehicle to be used in such circumstances. Nor is it required for all moves to higher levels of care. Instead, it is only required where the child is being removed from a court ordered placement with a parent, guardian, or relative, and being placed in a foster home or other facility. A common example of the proper use of a supplemental petition is a family maintenance case in which the court has placed the child with a parent and the agency now believes it necessary to move the child to a foster placement. In such circumstances a supplemental petition is required unless new jurisdictional grounds are being alleged pursuant to *Welf. & Inst. Code §§ 300, 342*.

In most instances, a supplemental petition must allege facts sufficient to show the previous placement order has not been effective in the rehabilitation or protection of the child [*Welf. & Inst. Code § 387(b)*; *In re Javier G. (2006) 137 Cal. App. 4th 453, 459-460, 40 Cal. Rptr. 3d 383]* . A supplemental petition which seeks to move the child from a specific court-ordered relative placement to a more restrictive level of care, however, must show that the relative placement is no longer appropriate in light of the criteria set forth in *Welf. & Inst. Code § 361.3*. Pursuant to *Welf. & Inst. Code § 387*, only a social worker may file a supplemental petition.

Welf. & Inst. Code § 387 mentions removal from or placement with a "friend." This language is held over from the placement orders which the juvenile court could make under juvenile court law prior to the enactment of Senate Bill 14

(Stats. 1982, ch. 978) when the juvenile court had broad discretion and power over who it could place a dependent child with. *Welf. & Inst. Code § 387* has never been brought up to date by the Legislature to mirror the changes in the placement order statutes which no longer provide for such flexibility [*see* Welf. & Inst. Code former § 362 (Stats. 1977, ch. 21); Welf. & Inst. Code former § 362 (Stats. 1982, ch. 978); *now see Welf. & Inst. Code 361.2*]. Unless the friend of the family, including a de facto parent, is licensed as a foster home or is approved as a "nonrelative extended family member," neither the court nor county social services can place the child in that home [*see Welf. & Inst. Code § 361.2(e)*; *Health & Safety Code § 1536.1*]. Nevertheless, the continued inclusion of the term "friend" in *Welf. & Inst. Code § 387*, can be interpreted to mean that the licensed home of a friend is a higher level of care than a relative, but a lower level of care than some other foster home to which the child is a stranger.

A supplemental petition may only be granted after a noticed hearing as set forth in *Welf. & Inst. Code § 297(b)* [*Welf. & Inst. Code §§ 297(b), 387(c)*].

A supplemental petition and a detention hearing is not required, however, when a previously declared dependent child of the court is removed from a foster home and placed in a county receiving home to await further placement [*In re Timothy N. (1975) 48 Cal. App. 3d 862, 870, 121 Cal. Rptr. 880]* . Nor is a supplemental petition required where the child is being moved from one relative or foster care placement to another under a general placement order that has given the social services department the discretion to make the specific out-of-home placement of the child. Such changes of placement do not require a change or modification of a previous court order and thus are left to the agency's discretion under the general placement order, subject to the court's review of that discretion [*see Welf. & Inst. Code § 361.2(e)*; *In re Cynthia C. (1997) 58 Cal. App. 4th 1479, 1489-1490, 69 Cal. Rptr. 2d 1* ; *In re Robert A. (1992) 4 Cal. App. 4th 174, 5 Cal. Rptr. 2d 438]* .

By its very language, a petition under *Welf. & Inst. Code § 387* is also not required to move a child from a foster home to a Foster Family Agency (FFA) home or licensed group home. This is because the petition is only required to change or modify a previous order by removing a child from a "parent, guardian, relative, or friend" and placing the child in a foster home or other facility [*Welf. & Inst. Code § 387*]. If the child is already in a foster home under a court order that does not include placement in a group home and the social services agency desires to move the child to a licensed group home, a petition under *Welf. & Inst. Code § 388* may be used. For these same reasons, a petition under *Welf. & Inst. Code § 387* is not required to move a child from court ordered placement with the parent to a court ordered placement with a relative. Many counties use supplemental petitions for this purpose, which may be the better practice and does provide all parties with notice and the opportunity to be heard. The proper vehicle for moving the child from the parent's custody to placement with a relative, however, is a modification petition under *Welf. & Inst. Code § 388*, utilizing the higher level of clear and convincing evidence and requiring grounds be found to exist for removal under *Welf. & Inst. Code § 361* [*Welf. & Inst. Code § 388*].

For discussion of modifications petitions under *Welf. & Inst. Code § 388*, see *§ 328.140*. For an illustrative form of supplemental petition and commentary on its use, see *§ 328.371*.

[2] Filing and Notice of Hearing

The supplemental petition must be filed by the social worker in the original matter and should contain a concise statement of facts sufficient to support the conclusion that the previous disposition has not been effective in the rehabilitation or protection of the child or that placement with the relative is no longer appropriate [*Welf. & Inst. Code § 387(b)*; *In re Javier G. (2006) 137 Cal. App. 4th 453, 459-460, 40 Cal. Rptr. 3d 383]* . On the filing of a supplemental petition, the clerk of the juvenile court sets the petition for hearing within 30 days and the probation officer causes notice to be served on the required persons in the manner prescribed by *Welf. & Inst. Code §§ 290.1* and *291* [*Welf. & Inst. Code §§ 297(b), 387(c)*].

Petitions filed under *Welf. & Inst. Code § 387* may be filed by facsimile filing if authorized by local rule or written

instruction by the juvenile court [*Cal. Rules of Ct., Rule 5.522*]. This authorization is only applicable, however, to parties, attorneys of record, social services, probation, the office of the district attorney, the office of the county counsel, and court-appointed special advocates [*Cal. Rules of Ct., Rule 5.522(c)*; *see § 328.130[2]*].

[3] Procedures for Conduct of Hearing

An order for the detention of the child pending adjudication of the petition may be made only after a detention hearing has been conducted [*Welf. & Inst. Code § 387(e)*].

The procedures relating to jurisdiction hearings for dependent children apply to the determination of the allegations of a supplemental petition [*Cal. Rules of Ct., Rule 5.565(e)(1)*]. The procedures relating to disposition hearings for such children apply to the determination of further dispositional issues following adjudication of a supplemental petition [*Cal. Rules of Ct., Rule 5.565(e)(2)*]. Nevertheless, hearings on a petition pursuant to *Welf. & Inst. Code § 387* are post-dispositional hearings which do not necessarily involve allegations which would provide an additional basis for jurisdiction. As such, they are not jurisdiction or disposition hearings and should not be referred to as such. Instead, they only follow the procedures for such hearings which allow for the allegations in the petition to be adjudicated first and then, if found true, allow for the court determining what further dispositional orders need to be made.

At the adjudication hearing, the sole issue is whether the allegations in the supplemental petition are true that the previous disposition order has been ineffective in the protection or rehabilitation of the child, or that continued placement with the relative is no longer appropriate in light of the circumstances set forth in *Welf. & Inst. Code § 361.3* [*Welf. & Inst. Code § 387(b)*; *In re Javier G. (2006) 137 Cal. App. 4th 453, 460, 40 Cal. Rptr. 3d 383]* . While most supplemental petitions allege the previous disposition order was not effective in the protection of the child, a supplemental petition can be based solely on the allegation the previous disposition order has not been effective in the rehabilitation of the child [*In re Javier G. (2006) 137 Cal. App. 4th 453, 459-460, 40 Cal. Rptr. 3d 383]* . The supplemental petition need only be found true by a preponderance of the evidence [*Evid. Code § 115*]. It is at the further disposition hearing thereafter that the juvenile court considers whether there is a need to actually remove the child from his or her current level of placement [*In re Javier G. (2006) 137 Cal. App. 4th 453, 460-462, 40 Cal. Rptr. 3d 383]* . If the child is to be removed from a parent or guardian, rather than removal from a relative, the same requirement for clear and convincing evidence justifying such removal under *Welf. & Inst. Code § 361(c)* is required [*In re Paul E. (1995) 39 Cal. App. 4th 996, 1000-1003, 46 Cal. Rptr. 2d 289]* . If the disposition order is for removal from the parent or guardian, the court must make a finding whether reasonable efforts were made to prevent or eliminate the need for removal from the parent or guardian [*In re Javier G. (2006) 137 Cal. App. 4th 453, 463, 40 Cal. Rptr. 3d 383]* . Further, as with jurisdiction and disposition hearing, a finding the allegations in a supplemental petition are true is not an appealable judgment. Instead, an appeal can be taken from the further disposition hearing following the adjudication of the supplemental petition [*In re Javier G. (2005) 130 Cal. App. 4th 1195, 1199, 30 Cal. Rptr. 3d 837]* . For general discussions of the procedures in the jurisdiction and disposition stages of dependency proceedings, see *§ 328.100 et seq. and § 328.120* et seq., respectively.

It should be noted that one court of appeal has held that a child's custodial relative is entitled to contest a supplemental petition filed for the purpose of removing the child, at least in situations in which the conduct of the relative and the removal of the child from the relative's care are at issue [*In re Jonique W. (1994) 26 Cal. App. 4th 685, 691-693, 31 Cal. Rptr. 2d 601* ; *see also In re Antonio G. (2007) 159 Cal. App. 4th 369, 378, 71 Cal. Rptr. 3d 79 , citing In re Jonique W. (1994) 26 Cal. App. 4th 685, 693, 31 Cal. Rptr. 2d 601]* . Its holding in this regard is an anomaly, however, since it would suggest that a relative who had only had the child in his or her custody for a period of months, weeks, or even days would have standing to contest removal of the child. This would grant the relative caretaker far more rights than either the law or common sense would require. The better view is that taken later in the decision to the effect that where the relative caretaker has been granted de facto parent status and a supplemental petition is filed for the removal of the child, the de facto parent has standing to contest the allegations [*In re Jonique W. (1994) 26 Cal. App. 4th 685, 693-697, 31 Cal. Rptr. 2d 601]* . This holding is consistent with existing law regarding de facto parents. Thus, where the

relative caretaker has not been granted the status of a de facto parent due to the positive psychological parent-child bond resulting from the child being in that person's care for an extended period of time, that relative caretaker should only be entitled to notice and an opportunity to address the court, either orally or in writing [*Cal. Rules of Ct., Rules 5.534(f), 5.565*]. If, however, as was the case in *Jonique W.*, the relative applies for and receives de facto parent status, standing to contest the supplemental petition should result from that status as a de facto parent. The same general approach should be used with foster parents as well. If a relative is not the caregiver, but makes a request for placement when a new placement is required [*Welf. & Inst. Code § 361.3*], the relative does not have the right to contest the denial or failure to consider the request for placement unless the relative has been granted de facto parent status, but may have standing to appeal the denial or failure to consider the request for placement [*cf. In re Antonio G. (2007) 159 Cal. App. 4th 369, 371-372, 376-377, 71 Cal. Rptr. 3d 79]* .

If a supplemental petition for removal from a parent is granted, it does not return the case to "square one" for the provision of reunification services [*In re N.M. (2003) 108 Cal. App. 4th 845, 853, 134 Cal. Rptr. 2d 187* ; *Carolyn R. v. Superior Court (1995) 41 Cal. App. 4th 159, 166, 48 Cal. Rptr. 2d 669* ; *In re Steven A. (1993) 15 Cal. App. 4th 754, 765, 19 Cal. Rptr. 2d 576]* . If a dependent child was returned to parental custody at a 12-month review hearing [*see* discussions in *§ 328.150* et seq.], or at a subsequent interim hearing, and a supplemental petition is thereafter sustained and the child removed once again, the court must set a permanency planning hearing pursuant to *Welf. & Inst. Code § 366.26*, unless the court finds that there is a substantial probability of return within the next six months or, if more than 12 months had expired at the time of the prior return, within whatever time remains before the expiration of the maximum 18-month period [*Cal. Rules of Ct., Rule 5.565(f)*]. If the child was returned to the custody of the parent at an earlier point in the reunification process and a supplemental petition for removal is subsequently granted, the court has discretion to order reunification services to resume if the parent has received less than 12 months of services, has not received reasonable services, or there is a substantial probability of return to the parent within 18 months of the date that the child was originally removed from the parent [*Carolyn R. v. Superior Court (1995) 41 Cal. App. 4th 159, 166, 48 Cal. Rptr. 2d 669]* . One court has even held that when a child is removed from the parent's custody at the detention hearing and then returned at the disposition hearing, the entire time of both family maintenance and family reunification services counts toward the 18-month maximum [*In re N.M. (2003) 108 Cal. App. 4th 845, 854-855, 134 Cal. Rptr. 2d 187]* . Thus, close attention must be paid to this to determine whether the court can order additional services following the subsequent removal and, if so, whether the court should order additional services following the subsequent removal.

For examples of cases in which supplemental petitions pursuant to *Welf. & Inst. Code § 387* were used, see *Carolyn R. v. Superior Court (1995) 41 Cal. App. 4th 159, 162, 48 Cal. Rptr. 2d 669* (removal from mother's home); *In re Jonique W. (1994) 26 Cal. App. 4th 685, 31 Cal. Rptr. 2d 601* (removal from grandmother's care); *In re Joel H. (1993) 19 Cal. App. 4th 1185, 23 Cal. Rptr. 2d 878* (removal from relative placement); *In re John V. (1992) 5 Cal. App. 4th 1201, 7 Cal. Rptr. 2d 629* (removal from father's custody).

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§ 328.142 Subsequent Petitions

If a child was found to be a person described by *Welf. & Inst. Code § 300* (grounds for dependency), and the petitioner alleges new facts or circumstances, other than those under which the original petition was sustained, sufficient to state that the child is a person described in *Welf. & Inst. Code § 300*, the petitioner must file a subsequent petition. However, this does not apply if the jurisdiction of the juvenile court has been terminated prior to the new allegations [*Welf. & Inst. Code § 342*]. A subsequent petition may also be filed if the family is unwilling or unable to cooperate with services previously ordered pursuant to *Welf. & Inst. Code § 360(b)* (informal supervision ordered for a period of time consistent with *Welf. & Inst. Code § 301* following a finding of jurisdiction) [*Cal. Rules of Ct., Rule 5.560(b)(3)*].

All procedures and hearings required for an original petition are required for a subsequent petition, including the notice provisions [*Welf. & Inst. Code § 297(a)*]. Also, a subsequent petition must be verified and must contain the information required in an original petition [*Cal. Rules of Ct., Rule 5.565(a)*]. The procedural requirements for a subsequent petition hearing are the same as those discussed for a supplemental petition in Supplemental Petitions, *above* [*see Cal. Rules of Ct., Rule 5.565*] except for the distinction that a hearing on a subsequent petition actually is a hearing on a new jurisdictional allegation. Nevertheless, as with a supplemental petition or a petition for modification of orders, the finding of the petition true does not automatically start the time clock over for the provision of reunification services [*see In re Barbara P. (1994) 30 Cal. App. 4th 926, 933-934, 36 Cal. Rptr. 2d 27* ; *see also In re Steven A. (1993) 15 Cal. App. 4th 754, 765, 19 Cal. Rptr. 2d 576]* .

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[Reserved]

§§ 328.143[Reserved]

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28-328 California Forms of Pleading and Practice--Annotated § 328.150

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§ 328.150 Family Maintenance Review Hearings

[1] In General

Every case in which an order is made placing a child under the supervision of the juvenile court and in which the child is not removed from the physical custody of his or her parent or guardian or in which the child has been returned to the physical custody of his or her parent or guardian with family maintenance services ordered must be continued to a specific future date not to exceed six months after the date of the original dispositional hearing. The continued hearing must be placed on the appearance calendar. The court must advise all persons present of the date of the future hearing, and of their rights to be present and to be represented by counsel [*Welf. & Inst. Code § 364(a)*]. Notice of the hearing is to be provided pursuant to *Welf. & Inst. Code § 292*]. The provisions of *Welf. & Inst. Code § 364* also apply when the juvenile court has removed the child and thereafter returned the child at a six-, 12-, or 18-month hearing under continued court supervision [*Bridget A. v. Superior Court (2007) 148 Cal. App. 4th 285, 313-316, 55 Cal. Rptr. 3d 647*]. It can be presumed they would also apply if the child is returned at the 24-month hearing.

[2] Review Report for Family Maintenance Review Hearing

At least 10 days prior to the hearing, the social worker must file a supplemental report with the court describing the services offered to the family and the progress made by the family in eliminating the conditions or factors requiring court supervision. The social worker must also make a recommendation regarding the necessity of continued supervision. A copy of this report must be furnished to all parties at least 10 days prior to the hearing [*Welf. & Inst. Code § 364(b)*].

In Los Angeles County, a separate statute provides for service of the social worker's report [*Welf. & Inst. Code § 364.05*]. This is in response to the case of *Judith P. v. Superior Court (2002) 102 Cal. App. 4th 535, 126 Cal. Rptr. 2d 14* . In that case, the juvenile court had directed the review report be provided to all parties at least two days before the

review hearing, notwithstanding the statutory provision for providing the report ten days before the hearing. Nevertheless, the report was provided to the parties the morning of the hearing [*Judith P. v. Superior Court (2002) 102 Cal. App. 4th 535, 540, 542, 126 Cal. Rptr. 2d 14]* . At the appellate level, despite the agreement of the social services agency to a reversal, a full opinion was issued; apparently, the appellate court saw a systemic problem of untimely review reports in Los Angeles County [*Judith P. v. Superior Court (2002) 102 Cal. App. 4th 535, 545, fn. 7, 126 Cal. Rptr. 2d 14]* . The *Judith P.* decision held the requirements for providing the court, parents, and counsel with a copy of the review report for an out-of-home review hearing ten days before the hearing were mandatory, not directory, and that prejudice was presumed. It held that in the absence of either a continuance or an express waiver, failure to provide the report ten days before the hearing was reversible per se [*Judith P. v. Superior Court (2002) 102 Cal. App. 4th 535, 547-558, 126 Cal. Rptr. 2d 14]* . Legislation was introduced to clarify the time requirements for providing reports are directory, not mandatory, to provide a way for juvenile courts to be able to find an absence of prejudice to the parties, and to restore a level of balance on the issue so as not to unnecessarily delay proceedings. What became clear, however, was that only Los Angeles County was being affected by the *Judith P.* decision. In other counties it was recognized that while well-intentioned, the decision's legal analysis was flawed and its ultimate holding went far beyond the language of the statutes and legislative intent. Courts in other counties recognized that the statutory language for provision of the reports ten days before the hearing was directory, prejudice should not be presumed, waivers can be express or implied, and courts should balance the totality of the circumstances, including any prejudice, in considering the need for a continuance if review reports were not timely served. Thus, the proposed legislative solution would have helped restore balance in Los Angeles County, but would have imposed restrictions and burdens on other counties that were not required by their courts or the law. Ultimately, the result was a bill that was applicable to Los Angeles County only.

In Los Angeles County, the review report is to be provided to all parties at least 10 calendar days prior to the review hearing. The statute specifically provides that the provision of the report to parties can be accomplished by mailing the report at least 15 calendar days before the hearing if the party's address is in California, or at least 20 calendar days before the hearing if the party's address is outside of California [*Welf. & Inst. Code § 364.05*]. The juvenile court in Los Angeles County shall grant a reasonable continuance for up to 10 calendar days if the report was not provided to the parties at least 10 calendar days prior to the hearing, unless the party or the party's counsel has expressly waived the requirement, or the juvenile court has found the party's ability to proceed at the hearing was not prejudiced by the untimely service of the report [*Welf. & Inst. Code § 364.05*]. In making that determination, the Los Angeles County juvenile court must presume the party was prejudiced by the lack of a timely report and can only find the party was not prejudiced by clear and convincing evidence to the contrary [*Welf. & Inst. Code § 364.05*].

[3] Conduct of the Hearing

Presentation of evidence at the review hearing is limited to the issue of whether conditions for continuing juvenile court jurisdiction and supervision exist [*Welf. & Inst. Code § 364(c)*]. If the court is considering making juvenile court custody and visitation orders and terminating its jurisdiction pursuant to *Welf. & Inst. Code § 362.4*, the court should also hear evidence on the question of those orders [*In re Michael W. (1997) 54 Cal. App. 4th 190, 194-196* (choosing to follow *Roger S.*, not *Elaine E.); In re Roger S. (1992) 4 Cal. App. 4th 25, 30, 5 Cal. Rptr. 2d 208* (declining to follow *Elaine E.* and holding court should hear evidence on visitation issue); *but see In re Elaine E. (1990) 221 Cal. App. 3d 809, 814, 270 Cal. Rptr. 489* (court did not err by refusing to allow noncustodial parent to present evidence in support of request for change in visitation)].

After hearing any evidence presented by the social worker, the parent, the guardian, or the child, the court must determine whether or not continued supervision is necessary. The court must terminate its jurisdiction unless the social services department establishes by a preponderance of evidence that the conditions still exist that would justify initial assumption of jurisdiction under *Welf. & Inst. Code § 300* (grounds for dependency) or that these conditions are likely to exist if supervision is withdrawn. Failure of the parent or guardian to participate regularly in a court-ordered treatment program constitutes prima facie evidence that the conditions that justified initial assumption of jurisdiction

still exist and that continued supervision is necessary [*Welf. & Inst. Code § 364(c)*].

If the court retains jurisdiction, it must continue the matter to a specified date, not more than six months from the time of the hearing, at which point the court must again follow the review hearing procedure specified in *Welf. & Inst. Code § 364(c)* [*Welf. & Inst. Code § 364(d)*].

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§ 328.151 General Requirements for Out-of-Home Review and Permanency Hearings

[1] Notice

Status review and permanency hearings relating to children who have been placed outside of the home of a parent and for whom a permanent plan has not yet been selected are governed by *Welf. & Inst. Code §§ 366.21* and *366.22*.

Notice for the six-month review, 12-month permanency hearing, 18-month permanency review, and the 24-month hearing under *Welf. & Inst. Code §§ 366.21, 366.22* and 366.25 shall be given to the mother, the presumed father or any father receiving services, any legal guardian of the child, and the child, if the child is 10 years of age or older [*Welf. & Inst. Code § 293(a)(1)-(4)*]. Notice must also be given to any known sibling of the child who is the subject of the dependency petition, if that sibling is either a dependent of the court or is the subject of a dependency proceeding. If the sibling is 10 years of age or older, the notice is to be provided to the sibling, the sibling's caregiver, and the sibling's attorney. If the sibling is under 10 years of age, the notice is to be given to the sibling's caregiver and attorney. Separate notice is not required, however, if the sibling's matter is calendared in the same court on the same day [*Welf. & Inst. Code § 293(a)(5)*]. If the child has been removed from the physical custody of the parent or guardian, notice must also be given to the foster parents, relative caregivers, community care facility, or foster family agency having physical custody of the child [*Welf. & Inst. Code § 293(a)(6)*]. The social worker must also notice all counsel of record, unless counsel was present in court when the hearing was scheduled [*Welf. & Inst. Code § 293(a)(7)*]. If the court knows or has reason to know that an Indian child is involved, notice must also be given to the Indian custodian, if any, and the tribe of the child. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, notice shall be given to the Bureau of Indian Affairs (BIA) [*Welf. & Inst. Code § 293(a)(8)*]. No notice is required for a parent whose parental rights have been terminated [*Welf. & Inst. Code § 293(b)*].

In addition to the date, time, and place of the hearing, the notice must include all of the following [*Welf. & Inst. Code §*

293(d)]:

- The nature of the hearing and any change in the custody or status of the child that is recommended by the social services agency.

- The right of the child, parents, and legal guardians, if any, of the right to be present, to be represented by counsel, to request the appointment of counsel, and to present evidence.

- If the parent or guardian fails to appear, the court may proceed in their absence.

- If the parent or guardian fails to appear, the court may proceed in their absence.

- In the case of an Indian child, a statement that the parent or Indian custodian and the tribe have a right to intervene at any stage of the proceeding, and that, on request, the parent or Indian custodian and the tribe will be granted up to 20 additional days to prepare for the proceeding.

- Notice to a foster or relative caregiver, a foster parent who has been approved for adoption, or the State Department of Social Services when it is acting as an adoption agency in a county that does not have its own adoption agency, the notice shall also indicate the person may attend all hearings or may submit information he or she believes relevant to the court in writing.

Notice shall be served not less than 15 days nor more than 30 days before the hearing. In the case of an Indian child in which notice is given to the Bureau of Indian Affairs (BIA), the BIA shall have 15 days after receipt to provide notice to the parent or Indian custodian and the tribe [*Welf. & Inst. Code § 293(c)*].

Service of the notice shall be by first-class mail to the last known address of the person to be notified of the hearing or by personal service on the person. Service may also be by certified mail, return receipt requested, or by any other form of notice that is equivalent to service by first-class mail [*Welf. & Inst. Code § 293(e)(1)*]. In the case of an Indian child, notice must be given by registered mail, return receipt requested [*Welf. & Inst. Code § 293(e)(2)*].

[2] Social Workers' Reports

The social worker must file a report with the court at least 10 calendar days before the out-of-home review or permanency hearing regarding the concurrent services provided or offered to the parent or guardian to enable him or her to assume custody and the efforts made to achieve legal permanence if reunification efforts fail, the progress made, and when relevant, the prognosis for return of the child to the physical custody of his or her parent or guardian [*Welf. & Inst. Code § 366.21(c)*]. The social worker must also make his or her recommendation for further disposition at the hearing. If the recommendation is not to return the child to a parent, the report must specify why the return of the child would be detrimental to the child [*Welf. & Inst. Code § 366.21(c)*].

The social worker must provide the parent or legal guardian, counsel for the child, and any court appointed special advocate with a copy of the supplemental report, including his or her recommendation for disposition, at least 10 calendar days prior to the hearing. Within that period, the social worker must also provide a summary of his or her recommendation for disposition to any foster parents, relative caregivers, community care facility, or foster family agency having the physical custody of the child [*Welf. & Inst. Code § 366.21(c)*].

In Los Angeles County, a separate statute provides for service of the social worker's report [*Welf. & Inst. Code § 366.05*]. This is in response to the case of *Judith P. v. Superior Court (2002) 102 Cal. App. 4th 535, 126 Cal. Rptr. 2d 14* . In that case, the juvenile court had directed the review report be provided to all parties at least two days before the review hearing, notwithstanding the statutory provision for providing the report ten days before the hearing.

Nevertheless, the report was provided to the parties the morning of the hearing [*Judith P. v. Superior Court (2002) 102 Cal. App. 4th 535, 540, 542, 126 Cal. Rptr. 2d 14]* . At the appellate level, the social services agency's agreed with reversal, but a full opinion was ultimately issued apparently due to what the appellate court saw as a systemic problem in that county with the timely provision of review reports [*Judith P. v. Superior Court (2002) 102 Cal. App. 4th 535, 545, fn. 7, 126 Cal. Rptr. 2d 14]* . The *Judith P.* decision held the requirements for providing the court, parents, and counsel with a copy of the review report for an out-of-home review hearing ten days before the hearing were mandatory, not directory, and that prejudice was presumed. It held that in the absence of either a continuance or an express waiver, failure to provide the report ten days before the hearing was reversible per se [*Judith P. v. Superior Court (2002) 102 Cal. App. 4th 535, 547-558, 126 Cal. Rptr. 2d 14]* . Legislation was introduced to clarify the time requirements for providing reports are directory, not mandatory, to provide a way for juvenile courts to be able to find an absence of prejudice to the parties, and to restore a level of balance on the issue so as not to unnecessarily delay proceedings. What became clear, however, was that only Los Angeles County was being affected by the *Judith P.* decision. In other counties it was recognized that while well-intentioned, the decision's legal analysis was flawed and its ultimate holding went far beyond the language of the statutes and legislative intent. Courts in other counties recognized that the statutory language for provision of the reports ten days before the hearing was directory, prejudice should not be presumed, waivers can be express or implied, and courts should balance the totality of the circumstances, including any prejudice, in considering the need for a continuance if review reports were not timely served. Thus, the proposed legislative solution would have helped restore balance in Los Angeles County, but would have imposed restrictions and burdens on other counties that were not required by their courts or the law. Ultimately, the result was a bill that was applicable to Los Angeles County only.

In Los Angeles County, the review report is to be provided to all parties at least 10 calendar days prior to the review hearing. The statute specifically provides that the provision of the report to parties can be accomplished by mailing the report at least 15 calendar days before the hearing if the party's address is in California, or at least 20 calendar days before the hearing if the party's address is outside of California [*Welf. & Inst. Code § 366.05*]. The juvenile court in Los Angeles County shall grant a reasonable continuance for up to 10 calendar days if the report was not provided to the parties at least 10 calendar days prior to the hearing, unless the party or the party's counsel has expressly waived the requirement, or the juvenile court has found the party's ability to proceed at the hearing was not prejudiced by the untimely service of the report [*Welf. & Inst. Code § 366.05*]. In making that determination, the Los Angeles County juvenile court must presume the party was prejudiced by the lack of a timely report and can only find the party was not prejudiced by clear and convincing evidence to the contrary [*Welf. & Inst. Code § 366.05*].

[3] Report by Child's Caregiver

Before any review hearing involving a child in the physical custody of a community care facility or foster family agency that may result in the return of the child to the physical custody of his or her parent or guardian, or in adoption or the creation of a legal guardianship [*see Welf. & Inst. Code § 366.26*], the facility or agency must file with the court a report containing its recommendation for disposition. Before any such hearing involving a child in the physical custody of a foster parent or relative caregiver, the foster parent or relative caregiver may file with the court a report containing his or her recommendation for disposition. The court must consider any such report and recommendation prior to determining any disposition [*Welf. & Inst. Code § 366.21(d)*].

[4] If Child Placed Out-of-State

At any review hearing where the child has been placed out-of-state, the court must address the question of whether the out-of-state placement continues to be the most appropriate placement for the child and in the child's best interest [*Welf. & Inst. Code § 366(c)*]. If the child is in an out-of-state group home it must also conduct the review required by *Welf. & Inst. Code §§ 361.21* and *366(d)* to ensure the out-of-state group home is in compliance with *Fam. Code § 7911.1*.

For further discussion of placements in out-of-state group homes, see *§ 328.128[5]*.

[5] Evaluating "Detriment to Return"

At each out-of-home review or permanency hearing held during the reunification period the court must consider the return of the child to the parent's custody. The child must be returned unless the social services agency proves by at least a preponderance of the evidence that return to the custody of the parent would create a substantial risk of detriment to the child's safety, protection, physical or emotional well-being [*Welf. & Inst. Code §§ 366.21(e)-(f), 366.22(a),* 366.25(a)]. While the parent's or guardian's failure to participate regularly and make substantive progress in a court ordered treatment program is prima facie evidence that return would be detrimental [*Welf. & Inst. Code §§ 366.21(e), (f), 366.22(a),* 366.25(a)], mere participation in services required by a reunification plan does not mean the child should be returned. The question is whether the parent or guardian has made sufficient progress to allow the child to be returned safely [*In re Joseph B. (1996) 42 Cal. App. 4th 890, 899-900, 49 Cal. Rptr. 2d 900]* . Even if the parent has "largely complied" with his or her reunification plan and some evidence justifies return of the child, the court must look to the totality of the facts, including the parent's progress, and may find that return would be detrimental if those facts warrant such a determination [*Constance K. v. Superior Court (1998) 61 Cal. App. 4th 689, 703-711, 71 Cal. Rptr. 2d 780]* .

The court must also consider the effect on the child of return, since the statutes governing out-of-home review and permanency hearings phrase the question of return in terms of the effect on the child, i.e., whether return would be detrimental to the child. One appellate court has held that this allows the juvenile court to consider factors unrelated to the original jurisdictional allegations or reasons for removal in determining detriment to return at the out-of-home review [*In re Joseph B. (1996) 42 Cal. App. 4th 890, 900, 49 Cal. Rptr. 2d 900]* . Another court has interpreted the *Joseph B.* decision so as to limit its holding to "when the risk of detriment at the 18-month review hearing was caused by the parent's actions leading to the out-of-home placement" [*In re Dustin R. (1997) 54 Cal. App. 4th 1131, 1140, 63 Cal. Rptr. 2d 269]* . This does not appear to be an accurate interpretation of the *Joseph B.* decision. Although the *Joseph B.* court did indicate that under the facts of that case the detriment to return was a "manifestation of the original basis for dependency" [*In re Joseph B. (1996) 42 Cal. App. 4th 890, 903, 49 Cal. Rptr. 2d 900]* , that was not the basis of its ruling. Instead, the court in *Joseph B.* was very clear that if return would be detrimental out-of-home placement "must continue regardless of whether that detriment mirrors the harm which had required the child's removal from parental custody" [*In re Joseph B. (1996) 42 Cal. App. 4th 890, 900, 49 Cal. Rptr. 2d 900]* . Thus, there appears to be a conflict of decisional law on this issue. While the *Joseph B.* decision is the better supported and reasoned decision, practitioners need to be aware of the conflict and argue whichever case better supports their position.

If the detriment to the child is not related to the original jurisdictional allegations or basis for removal, note that the question of whether reasonable services have been offered or provided to the parent should include consideration of whether services were offered or provided to address this additional detrimental concern. Where the parent or guardian has made sufficient progress to remedy the original basis of jurisdiction and removal, a finding of a new and unrelated detriment to the child may justify an order for additional services [*cf. In re Daniel G. (1994) 25 Cal. App. 4th 1205, 1209, 31 Cal. Rptr. 2d 75* ; *In re Dino E. (1992) 6 Cal. App. 4th 1768, 1779, 8 Cal. Rptr. 2d 416]* . If the parent or guardian has not resolved the original problem, the addition of another one does not require any extension of time for additional services beyond the normal time limit [*cf. In re Barbara P. (1994) 30 Cal. App. 4th 926, 933-934, 36 Cal. Rptr. 2d 27* ; *In re Steven A. (1993) 15 Cal. App. 4th 754, 765, 19 Cal. Rptr. 2d 576* ; *In re Michael S. (1987) 188 Cal. App. 3d 1448, 1452-1459]* .

[6] Determination of Sibling Issues

At each out-of-home review hearing conducted prior to the completion of the hearing under *Welf. & Inst. Code § 366.26,* the court must also determine whether the child has any siblings under the court's jurisdiction. If siblings exist, the court must determine the nature of the relationship between the child and the siblings, the appropriateness of developing or maintaining the sibling relationship, and the impact of the sibling relationship on the child's placement and planning for legal permanence. It the children are not placed together, it must also determine why they are not

together and what efforts are being made to place them together, or why such efforts are not appropriate. Further, if the siblings are not placed together the court must determine the frequency and nature of sibling visitation. In making these determinations regarding sibling relationships, the court may consider whether the siblings were raised together, have shared significant common experiences, have close and strong bonds, and whether either sibling expresses a desire for placement or visitation with the other sibling. It may also consider whether ongoing contact is in the child's best interests, and any other relevant factors [*Welf. & Inst. Code § 366(a)(1)(C)*].

For discussion of sibling placement and visitation issues, see *§ 328.129[6]*.

[7] If Parent Has Absconded With Child

If a parent has absconded with a child prior to the initial or detention hearing and both the parent and the child are missing, the court cannot go forward with the normal jurisdiction, disposition, and review hearing process. Instead, all it can do is issue a warrant of arrest for the parent [*Welf. & Inst. Code § 339*], a protective custody warrant for the child [*Welf. & Inst. Code § 340*], and wait until at least the child is found [*In re Claudia S. (2005) 131 Cal. App. 4th 236, 245-251, 31 Cal. Rptr. 3d 697]* .

Similarly, if a parent has absconded with a dependent child during the ongoing dependency, the court can neither terminate dependency jurisdiction nor go on with its normal process for permanency planning. Instead, it should issue a warrant of arrest for the parent [*Welf. & Inst. Code § 339*], a protective custody warrant for the child [*Welf. & Inst. Code § 340*], and await their return [*In re Jean B. (2000) 84 Cal. App. 4th 1443, 1446-1447, 101 Cal. Rptr. 2d 522* ; *Katheryn S. v. Superior Court (2000) 82 Cal. App. 4th 958, 969, n. 11, 98 Cal. Rptr. 2d 741]* . This does not mean the matter should be taken off calendar and not brought back into court until the parent or child is found. The court should continue to conduct limited review hearings at which it can review the efforts made to locate the child and parent, and whether any additional information is available.

California Forms of Pleading and Practice--Annotated

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
I. Periodic Review Procedures

28-328 California Forms of Pleading and Practice--Annotated § 328.152

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§ 328.152 Six-Month Out-of-Home Review Hearing

The statute provides that the six-month review hearing is held six months after the date of the disposition hearing [*Welf. & Inst. Code § 366.21(e)*]. In the past some asserted the six-month review hearing for children who were under the age of 3 years at the time of initial removal or that are part of a sibling group that was removed together and one of the siblings was under the age of 3 years at the time of initial removal should be six months from the date the child entered foster care, as defined in *Welf. & Inst. Code § 361.5(a)*, rather than six months from the date of disposition [*compare* Welf. & Inst. Code former § 361.5(a)(2)-(3) *with Welf. & Inst. Code § 366.21(e)*]. Others disagreed, contending the language of *Welf. & Inst. Code § 366.21(e)* was clear the hearing should be held six months from the date of the initial disposition hearing. The rule of court indicated the review should be held no more than six months from the disposition date, but no later than six months after the date the child is determined to have entered foster care [Cal. Rules of Ct., former Rule 5.569(h)]. All three arguments had considerable validity. One appellate court agreed with the Judicial Council's interpretation, recognizing the many amendments that were made in the statutes to bring California into compliance with the federal Adoption and Safe Families Act of 1997. It characterized the California Legislature's failure to amend *Welf. & Inst. Code § 366.21(e)* as an oversight and ruled the proper date for the six-month review hearing is six months from the date the child entered foster care [*In re Christina A. (2001) 91 Cal. App. 4th 1153, 1159-1164, 111 Cal. Rptr. 2d 310]* . It was. Nevertheless, effective January 1, 2009, California has made a major policy shift for court-ordered reunification services, particularly those for a child who was under the age of 3 years at the time of initial removal, or part of a sibling group with such a child. Now the court-ordered reunification services for a child who was under the age of 3 years at the time of initial removal, or part of a sibling group with such a child, extend for six months from the date of disposition, but not more than 12 months from the date the child entered foster care [*Welf. & Inst. Code § 361.5(a)(1)*].

For discussion of California's major policy shift on court ordered services brought about by the enactment of Assembly Bill 2341 [stats. 2008, ch. 457], *see § 328.129[1]*.

[1] Whether Child Should Return to Custody of Parent or Guardian

At the six-month review hearing the court must order the return of the child to his or her parents' or guardians' physical custody unless, by a preponderance of the evidence, it finds that the return of the child would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child [*Welf. & Inst. Code § 366.21(e)*]. Although not expressly stated in the statute, it is clear this finding need only be made as to any parent or guardian receiving reunification services. If the court denied services for one parent pursuant to *Welf. & Inst. Code § 361.5(b)* or *(e)(1)* at disposition, but ordered services for the other parent, it should be presumed the child is not returning to the parent for whom no services were ordered and the only question is whether return to the parent receiving services would create a substantial risk of detriment. If a parent was denied services and wishes to seek return of the child, a *Welf. & Inst. Code § 388* petition must be filed [*Kimberly H. (2000) 83 Cal. App. 4th 67, 71-72, 99 Cal. Rptr. 2d 344]* .

The social services department has the burden of establishing that detriment. The failure of the parent or guardian to participate regularly and make substantive progress in any court-ordered treatment programs will constitute prima facie evidence that return would be detrimental. In making its determination, the court must do the following [*Welf. & Inst. Code § 366.21(e)*]:

- Review and consider the social worker's report and recommendations.

- Review and consider the report and recommendations of any child advocate appointed under *Welf. & Inst. Code § 356.5*.

- Consider the efforts or progress, or both, demonstrated by the parent or guardian and the extent to which he or she cooperated and availed himself or herself of services provided [*see In re Amanda D. (1997) 55 Cal. App. 4th 813, 818-819, 64 Cal. Rptr. 2d 108* (father's involvement in fight while incarcerated resulting in loss of privileges, including programs and visitation, is evidence he did not fully comply with plan)].

- Specify a factual basis for the court's determination that return of the child would or would not be detrimental to the child. The court must do this regardless of whether it returns the child or not.

- Make appropriate findings under *Welf. & Inst. Code § 366(a)* (relating to necessity for and appropriateness of current placement, compliance with case plan, sibling interaction, progress in resolving or mitigating the reasons that necessitated foster care placement, and a projected date for the child receiving a permanent placement either with the parent or an alternative permanent home).

If the court returns the child to the custody of a parent, the court may continue court supervision as a family maintenance case and set the matter for a review hearing under *Welf. & Inst. Code § 364* [*Bridget A. v. Superior Court (2007) 148 Cal. App. 4th 285, 313-316, 55 Cal. Rptr. 3d 647*]. If the child is not returned to the parent or guardian but reunification services are continued, the court must also inform the parent or guardian that, if the child cannot be returned home by the 12-month permanency hearing, a proceeding pursuant to *Welf. & Inst. Code § 366.26* may be instituted. *Welf. & Inst. Code § 366.21* does not apply when, pursuant to *Welf. & Inst. Code § 361.5*, the court at the disposition hearing ordered that reunification services will not be provided [*Welf. & Inst. Code § 366.21(e)*].

For a discussion of determining whether it would be detrimental to return the child, see *§ 328.151[5]*.

[2] Placement With Previously Noncustodial Parent

If the child was placed under court supervision with a previously noncustodial parent pursuant to *Welf. & Inst. Code § 361.2*, with reunification services being provided to the parent from whom the child was removed, the court may be

faced with determining whether return of the child to the previously custodial parent or remaining in the current parental placement is appropriate. Although the statutes are not clear on this issue, it appears appropriate for the court to consider evidence from all parties on this issue, if so requested, and to determine this issue based on the best interests of the child, without the need for a determination of detriment or the filing of a petition pursuant to *Welf. & Inst. Code § 388*. If there is evidence that return to the parent from whom the child was removed would create a substantial risk of detriment to the child, then return would not be in the child's best interest. But if both parents are now appropriate as placements for the child, the court should determine which placement is best. If the court returns the child to the parent from whom the child was removed, a period of family maintenance services and supervision will normally be appropriate. If the court determines that continued custody in the current parental placement continues to be appropriate, the court must determine whether supervision is still necessary. The court may terminate supervision and transfer permanent custody to that parent, as provided for by *Welf. & Inst. Code § 361.2* [*Welf. & Inst. Code § 366.21(e)*; *Cal. Rules of Ct., Rule 5.710(h)* (Final Judgment--Juvenile (JV-200) must be prepared and filed under *Cal. Rules of Ct., Rule 5.700*); for a sample form and commentary on its use, *see § 328.361*].

[3] Concurrent Reunification and Permanency Planning Services

If the child is not returned to his or her parent or parents, the court must determine whether reasonable services have been provided or offered to the parent or parents that were designed to aid the parent or guardian to overcome the problems that led to the initial removal and the continued out-of-home custody of the child [*Welf. & Inst. Code § 366.21(e)*]. The fact that a child has been placed in a preadoptive home or with a family that is eligible to adopt the child, or that the case plan includes concurrent planning for legal permanence, or that services to achieve legal permanence for the child if reunification efforts are unsuccessful have been provided concurrently with services to reunify shall not be deemed, in and of itself, a failure to provide or offer reasonable reunification services to the parent or guardian [*Welf. & Inst. Code § 366.21*(*l*)].

Visitation between a child and a parent is an important component of any reunification plan [*In re Alvin R. (2003) 108 Cal. App. 4th 962, 972, 134 Cal. Rptr. 2d 210* ; *In re Mark L. (2001) 94 Cal. App. 4th 573, 580-581, 114 Cal. Rptr. 2d 499* ; *In re Luke L. (1996) 44 Cal. App. 4th 670, 679, 52 Cal. Rptr. 2d 53]* . Thus the question of whether reasonable visitation has been offered or provided to the parent is one aspect of the reasonable efforts determination. If the child is reluctant to visit and conjoint or family therapy is necessary to address the issue and promote visitation, that therapy may also be critical to reunification, and the failure to take steps to overcome obstacles to providing that therapy may result in a finding that reasonable reunification services have not been provided [*In re Alvin R. (2003) 108 Cal. App. 4th 962, 972-973, 134 Cal. Rptr. 2d 210]* . Further, while the child may be allowed to refuse to attend a particular visit, the child cannot be allowed to have the power to stop all visits [*In re S.H. (2003) 111 Cal. App. 4th 310, 317-319, 3 Cal. Rptr. 3d 465]* . Even if it has been determined visitation would be detrimental to the child, reunification services should not thwart the potential for future contact by giving the child complete control of whether visitation will take place or by denying the court adequate information on which to base its decision regarding such future contact. If it does, the court may be justified in making a finding that reasonable reunification services have not been offered or provided to the parent [*In re Mark L. (2001) 94 Cal. App. 4th 573, 585, 114 Cal. Rptr. 2d 499]* . Such a decision must be made based on the totality of the evidence regarding reunification services, however, and should not be limited solely to the visitation issue.

The court must also determine whether reasonable efforts to provide legal permanence for the child if reunification fails have been made, including efforts for a child who is 10 years of age or older and placed in out of home care to maintain relationships with people who are important to the child, consistent with the child's best interest. The court must make whatever findings and orders are appropriate in this regard [*Welf. & Inst. Code § 366(a)(1)(B)*].

If reunification efforts are not terminated, the court must order those services be initiated or continued, provided that the court may modify the terms and conditions of those services as appropriate. The court should also make whatever orders are necessary and appropriate regarding the provision of concurrent permanency planning services to achieve

legal permanence if reunification efforts fail. The court must then set the matter for a 12-month permanency hearing, to be held no later than 12 months after the date the child entered foster care as described by *Welf. & Inst. Code § 361.49* [*Welf. & Inst. Code § 366.21(e)-(f)*].

For a discussion of concurrent reunification and permanency planning services, see *§ 328.129[1], [3], [4], [5],* and *[6]*.

[4] Termination of Services and Setting of a Selection and Implementation Hearing

There are five circumstances under which the court at a six-month review hearing may terminate reunification efforts and set the matter for a selection and implementation hearing pursuant to *Welf. & Inst. Code § 366.26* to be held within 120 days [*Welf. & Inst. Code § 366.21(e)*]. If the juvenile court orders a selection and implementation hearing following the denial of reunification services under any of these five circumstances, it must orally advise all parties present, and advise by first class mail all parties who are not present, that if the party wishes to preserve any right to review on appeal of the order the court made setting the matter for a hearing under *Welf. & Inst. Code § 366.26*, the person must seek an extraordinary writ by filing a Notice of Intent to File Writ Petition and Request for Record [*Cal. Rules of Ct., Rule 8.450*; *see Welf. & Inst. Code § 366.26(l)*; *see also* discussion in *§ 328.189* et seq.]. The court may, however, terminate services for one parent and continue them for the other [*In re Jesse W. (2007) 157 Cal. App. 4th 49, 64-65, 68 Cal. Rptr. 3d 435]* . In such circumstances, a *Welf. & Inst. Code § 366.26* hearing is not set.

[a] Child Under Three Years of Age at Initial Removal or Member of Sibling Group in Which One Child Was Under Three Years of Age at Initial Removal

"When the child is under the age of three, the maximum period of reunification services is generally six months" [*Sara M. v. Superior Court (2005) 36 Cal. 4th 998, 1009, fn. 4, 32 Cal. Rptr. 3d 89, 116 P.3d 550* , citing *Welf. & Inst. Code § 361.5(a)(2)*]. If the child was under three years of age at the time of the initial removal and the court at the six-month review hearing finds by clear and convincing evidence that the parent has failed to regularly participate and make substantive progress in the court-ordered treatment program, the court may schedule a hearing pursuant to *Welf. & Inst. Code § 366.26*. Such orders may also be made for all or some of the members of a sibling group if the children were removed at the same time and one of the children was under the age of 3 years at the time of the initial removal [*Welf. & Inst. Code §§ 361.5(a)(3), 366.21(e)*]. If, however, the court determines there is a substantial probability of the return of the child to the custody of the parent or guardian within six months or that reasonable services have not been provided, the court shall not schedule a hearing under *Welf. & Inst. Code § 366.26*, but shall instead continue the case for further services [*Welf. & Inst. Code § 366.21(e)*].

One court has held that a *Welf. & Inst. Code § 366.26* hearing may also be set at the six-month review hearing for a child who was under the age of 3 years at the time of initial removal if there is no substantial probability of return by the 18-month permanency review date [*Armando D. v. Superior Court (1999) 71 Cal. App. 4th 1011, 1020-1025, 84 Cal. Rptr. 2d 189]* . That holding was questioned by many as incorrect. Regardless, it was based on language in *Welf. & Inst. Code § 361.5(a)* that has since been amended in a way that makes the analysis and holding of *Armando D.* no longer applicable. As such, the current language of *Welf. & Inst. Code § 366.21(e)* that sets forth under what circumstances the court may terminate services and set a *Welf. & Inst. Code § 366.26* hearing for a child under the age of 3 years at the time of initial removal should be considered dispositive on the issue.

Practitioners should not misread the requirements of *Welf. & Inst. Code §§ 361.5(a)* and *366.21(e)* regarding the termination of services for parents whose child was under the age of 3 years at the time of the initial removal. It is not correct, as some believe, that unless the parents can prove there is a substantial probability of return by the 12-month permanency hearing date services must be terminated. Instead, to terminate services at the six-month review hearing for a child who was under the age of 3 years at the time of the initial removal the social services agency must first prove it has offered or provided reasonable reunification services. It must then prove by clear and convincing evidence the parent has "failed to participate regularly and make substantive progress in a court-ordered treatment plan" [*Welf. &*

Inst. Code § 366.21(e)]. If the agency does not do this, the parent has no obligation to attempt to prove there is a substantial probability of return by the 12-month permanency hearing date in order for services to continue. It is only if the agency meets its burden by clear and convincing evidence to show the parent has failed to participate in the court ordered treatment plan and make substantial progress that the parent, or any other party seeking to extend services, must show by a preponderance of the evidence there is a substantial probability of the return of the child by the 12-month permanency hearing. If the court finds there is such a probability, it must continue the case to the 12-month permanency hearing.

It should also be noted, however, that if the agency proves the parent has not made substantial progress even though participating in services, the requirement for the parent to prove the substantial probability of return applies. At one time *Welf. & Inst. Code § 366.21(e)* provided that if the court found "the parent failed to participate regularly in any court-ordered treatment plan, the court may schedule a hearing pursuant to Section 366.26 within 120 days." Effective January 1, 2000, however, the language "and make substantive progress" was added to replace the words "in any" [*Welf. & Inst. Code § 366.21(e)*, Stats. 1999, ch. 805]. To give meaning to the statutory change, the phrase "participate regularly and make substantive progress" must be read as two related, but independent requirements. If the agency proves by clear and convincing evidence the parent has either failed to participate regularly in the court ordered treatment plan or that the parent has participated but failed to make substantive progress, the court must schedule a *Welf. & Inst. Code § 366.26* hearing unless the parent establishes there is a substantial probability of return by the date of the 12-month permanency hearing [*Welf. & Inst. Code § 366.21(e)*].

One appellate court held that when the juvenile court considers whether the parent has established there is a substantial probability of return within six months, it should consider a full six-month period so long as that does not exceed 18 months from the date of original removal. Under that holding, the date of the 12-month permanency hearing was irrelevant for making the determination of substantial probability of return [*Dawnel D. v. Superior Court (1999) 74 Cal. App. 4th 393, 399, 87 Cal. Rptr. 2d 870*]. The *Dawnel D*. decision was an anomaly, however. While purporting to be consistent with the totality of the statutory scheme, it actually focused on the phrase "within six months," construing it strictly without regard to the full intent of the legislature to comply with federal mandates and move quickly toward timely stability for children [*see In re Christina A. (2001) 91 Cal. App. 4th 1153, 1159-1165, 111 Cal. Rptr. 2d 310*]. A different court disagreed with the *Dawnel D.* analysis, finding it inconsistent with the overall statutory scheme, and holding the juvenile court should only consider whether there is a substantial probability of return by the date of the 12-month permanency hearing [*Jessica A. v. Superior Court (2004) 124 Cal. App. 4th 636, 643-645, 21 Cal. Rptr. 3d 488*].

The California Supreme Court granted review in a third case to settle the conflict of authority. It found the language of the statute was ambiguous and thus looked to the legislative intent and other sources to determine its meaning. The Court noted the statutory scheme established three different review periods with three "corresponding distinct escalating standards for the provision of reunification services to parents of children under the age of 3 [*Tonya M. v. Superior Court (2007) 42 Cal. 4th 836, 69 Cal. Rptr. 3d 96, 172 P.3d 402*]. Significantly, it observed "juvenile courts lack the authority to order services extending beyond the next review hearing" [*Tonya M. v. Superior Court (2007) 42 Cal. 4th 836, 69 Cal. Rptr. 3d 96, 172 P.3d 402*]. It concluded the most logical position, and one supported by the legislative intent and history, and the rule of court was that at the six-month review hearing for a child under 3 years at the time of initial removal, the juvenile court should only consider whether there is a substantial probability of return by the date of the 12-month permanency hearing, regardless of whether that hearing was less than six months away [*Tonya M. v. Superior Court (2007) 42 Cal. 4th 836, 69 Cal. Rptr. 3d 96, 172 P.3d 402*]. Disapproving the holding in *Dawnel D.*, the Supreme Court noted: "In urging the rule we here adopt, one leading treatise on dependency law describes Dawnel D. as 'an anomaly' [citation]. We agree" [*Tonya M. v. Superior Court (2007) 42 Cal. 4th 836, 69 Cal. Rptr. 3d 96, 172 P.3d 402* , *citing* Seiser & Kumli, California Juvenile Courts Practice and Procedure § 2.152[4][a] (Matthew Bender)].

Thus, the statutory language "within six months" presumes the six-month review is held in a timely manner. When it is not, the phrase must be read within the context of the entire statutory scheme. In so doing, the phrase should be

interpreted to mean within six months, but not more than 12 months from the date the child entered foster care [*Welf. & Inst. Code §§ 361.5(a)(1)-(2), 366.21(f)*; *In re Christina A. (2001) 91 Cal. App. 4th 1153, 1159-1165, 111 Cal. Rptr. 2d 310*]. As the Supreme Court noted, "reunification services and timing of review hearings are to be determined relative to the child's initial removal into custody or the jurisdictional or dispositional hearing, not the length of previous services or the dates of previous review hearings" [*Tonya M. v. Superior Court (2007) 42 Cal. 4th 836, 69 Cal. Rptr. 3d 96, 172 P.3d 402*].

Parent advocates should note the *Tonya M.* decision does not inappropriately limit the services the parent might receive, since services actually began at the detention hearing, were more formally ordered at the disposition hearing, and continued throughout any continuances of the six-month review hearing [*Welf. & Inst. Code §§ 319(e), 361.5(a)*]. By the date of the 12-month permanency hearing the parent should have been offered or provided 12 months of reunification services since the date the child entered foster care, and more since removal, regardless of when the six-month review hearing was held. Care should be taken to ensure these provisions are applied correctly.

The significance of presumptively ending reunification services for a parent or guardian of a young child at the six-month review hearing, as distinguished from presumptively ending reunification services at the 12-month permanency hearing for a child who was 3 years of age or older at the time of initial removal, has been greatly reduced with California's major policy shift effective January 1, 2009. As indicated, previously the six-month review hearing was held six months from the date the child entered foster care and the 12-month permanency hearing was held 12 months from the date the child entered foster care [*In re Christina A. (2001) 91 Cal. App. 4th 1153, 1159-1164, 111 Cal. Rptr. 2d 310]* . Thus, the presumptive difference was six months. With the enactment of Assembly Bill 2341 [stats. 2008, ch. 457], setting the presumptive time for services for the young child as six months from disposition, the concept of expedited permanency for children who were under the age of 3 years at the time of initial removal, or for sibling groups with one such child, has been substantially undermined. Unless the disposition hearing is held within 60 days of removal or nearly so, the practical difference between six months from the date of disposition and 12 months from the date the child entered foster care may be little or nothing. This is an area to be watched for further developments.

PRACTICE TIP:

Setting a ".26" Hearing for Sibling Groups. Many believe the area in which the juvenile dependency system most frequently fails children is that of maintaining sibling contact and togetherness. There is a mandate that attempts be made to place siblings together, unless such placement is not in one or more of the children's best interests. There is also a mandate to provide for regular contact between siblings if they cannot be placed together, unless such contact is detrimental [*Welf. & Inst. Code § 16002*]. The decision to terminate services and set a case for a *Welf. & Inst. Code § 366.26* hearing for a sibling group can be a difficult one. Many times the court does not want the children to be on different "tracks" or to receive different plans. But different "tracks" and different plans are not always inappropriate. When making such decisions at a six-month review hearing, the court is to consider a multitude of factors including: whether the children were removed from parental care as a group; the "closeness and str ength of the sibling bond"; the ages of the children; the appropriateness of keeping the children together; the detriment to the child if sibling ties are not maintained; the likelihood of finding an alternative permanent home for all of the siblings; whether the children are currently placed together in a home that is a potential permanent home for the children; the wishes of each child, if able to provide "a meaningful response"; and the best interest of the children [*Welf. & Inst. Code § 366.21(e)*]. It must also be remembered that if not placed together and one or more of the children are adopted, provisions may still be available for post-adoptive sibling contact in appropriate cases [*Welf. & Inst. Code § 366.29*; *see* discussion in *§ 328.198[5]*]. There is no one correct solution for all sibling groups. Each must be looked at individually. Sometimes all of the sibling group should be set for a *Welf. & Inst. Code § 366.26* hearing together; sometimes such a hearing should only be set for part of the group from the six-month review hearing; and sometimes the family should receive additional services for all of the children, if permitted by law. In making its decision, the court must state its factual basis for determining it is best

for some or all of the children to set a hearing pursuant to *Welf. & Inst. Code § 366.26* [*Welf. & Inst. Code § 366.21(e)*]. All parties should ensure the court has all relevant information on this very important issue.

For discussion of California's major policy shift on court-ordered services brought about by the enactment of Assembly Bill 2341 [stats. 2008, ch. 457], see *§ 328.129[1]*.

[b] Parents' Whereabouts Are Still Unknown

If the child was removed initially under *Welf. & Inst. Code § 300(g)* (child left without provision for support; parent incarcerated or institutionalized and cannot arrange for child's care; relative or custodian with whom child resides or has been left is unwilling or unable to provide care or support and whereabouts of parent unknown), and the court finds by clear and convincing evidence that the whereabouts of the parent are still unknown, the court may schedule a hearing pursuant to *Welf. & Inst. Code § 366.26* [*Cal. Rules of Ct., Rule 5.710(f)(1)(A)*]. This form of abandonment recognizes that a parent's initial absence as recognized in *Welf. & Inst. Code § 300(g)* may not actually be due to abandonment, but that if the parent's whereabouts are still unknown six months thereafter, abandonment should be presumed.

[c] Parent Has Failed to Contact and Visit the Child

If the court finds by clear and convincing evidence that the parent has failed to contact and visit the child, the court may schedule a hearing pursuant to *Welf. & Inst. Code § 366.26* [*Sara M. v. Superior Court (2005) 36 Cal. 4th 998, 1017, 32 Cal. Rptr. 3d 89, 116 P.3d 550* ; *In re Monique S. (1993) 21 Cal. App. 4th 677, 682, 25 Cal. Rptr. 2d 863]* . This can be done even if the parent has had some nominal or chance contact with the child during the 6-month period [*In re Tameka M. (1995) 33 Cal. App. 4th 1747, 1753-1754, 40 Cal. Rptr. 2d 64]* . To terminate services due to the parent's failure to contact and visit the child, there is no requirement the original finding of jurisdiction have been under *Welf. & Inst. Code § 300(g)*. Instead, this recognizes that a parent can abandon a child whether that parent's whereabouts is known or unknown. Either way, the effect on the child is the same [*Sara M. v. Superior Court (2005) 36 Cal. 4th 998, 1016, 32 Cal. Rptr. 3d 89, 116 P.3d 550* , citing Seiser & Kumli, California Juvenile Courts Practice and Procedure § 2.152[4][c] (Matthew Bender)]. This is also consistent with the law as it existed before the enactment of *Welf. & Inst. Code § 366.26* for the termination of parental rights of dependent children. At that time a dependent child could be freed if the parent abandoned the child by failing to communicate with the child for six months. This was without regard to the basis for juvenile court jurisdiction, and could even be done without the juvenile court's authorization [*see* former *Civ. Code § 232(a)(1), now see Fam. Code § 7822*; *see also* *In re Jasmon O. (1994) 8 Cal. 4th 398, 411-412, 33 Cal. Rptr. 2d 85, 878 P.2d 1297* , and cases cited therein]. This form of abandonment due to a failure to contact and visit the child was incorporated into the dependency system as a basis for the termination of services and of parental rights through the enactment of Senate Bill 243 [Stats. 1987, ch. 1485].

[d] Parent Convicted of Felony Indicating Parental Unfitness

The court may also schedule a hearing pursuant to *Welf. & Inst. Code § 366.26* within 120 days if it finds by clear and convincing evidence that the parent has been convicted of a felony indicating parental unfitness [*Cal. Rules of Ct., Rule 5.710(f)(1)(C)*]. The language of the statute for the termination of services based on a conviction of a felony indicating parental unfitness is akin to that of *Fam. Code § 7825* for termination of parental rights [*In re Cody W. (1994) 31 Cal. App. 4th 221, 225, fn. 1, 36 Cal. Rptr. 2d 848]* . Thus, in the absence of case law interpreting this provision of *Welf. & Inst. Code § 366.21(e)*, courts and practitioners should look by analogy to case law interpreting *Fam. Code § 7825* and former *Civ. Code § 232(a)(4)*.

In addition to the nature of the felony conviction itself, the trial court "may properly consider past criminal activities in determining whether a natural parent has rendered himself an unfit parent for the future by commission of a felony" [*In re Geoffrey G. (1979) 98 Cal. App. 3d 412, 421, 159 Cal. Rptr. 460* ; *see also* *Adoption of D.S.C. (1979) 93 Cal.*

App. 3d 14, 26-27, 155 Cal. Rptr. 406] . In one case a father was convicted of voluntary manslaughter of the mother. The father had numerous previous arrests and convictions for intoxication, and the trial court could reasonably infer the father would continue his drinking habits and either do physical harm to the child while in a drunken rage or because of such intoxication fail to properly provide for the child. The finding that he had been convicted of a felony indicating parental unfitness was upheld [*In re Geoffrey G. (1979) 98 Cal. App. 3d 412, 416, 420, 159 Cal. Rptr. 460]* . In another case a father was convicted of armed burglary. He had a propensity to violent crime, however, and the facts showed he did not hesitate to involve family members of a tender age in his crime, would turn to crime in the future should he find difficulty in making a living, and might violate parole thereby placing himself at risk of being taken from his family and returned to prison. The finding he had been convicted of a felony indicating parental unfitness was also upheld [*Adoption of D.S.C. (1979) 93 Cal. App. 3d 14, 25, 155 Cal. Rptr. 406]* .

Courts should not assume a felony conviction, even a heinous one, automatically means the parent is unfit to parent, however. Instead, close consideration must be given to the facts of the underlying conviction, any prior criminal history or lack thereof, and all other relevant circumstances [*In re James M. (1976) 65 Cal. App. 3d 254, 259, 266, 135 Cal. Rptr. 222* (denial of termination of parental rights upheld where father convicted of murder of mother by stabbing her 22 times, but evidence supported conclusion the crime was one of passion, not the result of a violent and vicious character, and understandable "within the framework of human folly, weakness and imperfection")].

[e] Parent Is Deceased

The rules of court provide a fifth circumstance in which the court may order a hearing pursuant to *Welf. & Inst. Code § 366.26* at the six-month review hearing: if the parent is deceased [*Cal. Rules of Ct., Rule 5.710(f)(1)(D)*].

[5] Educational Decisions

The need for limiting a parent's right to make educational decisions, to appoint a responsible adult for educational decisions, or for the court to make educational decisions for the child should to be considered at any review hearing, including post-permanency planning review hearings for children in long term foster care [*Welf. & Inst. Code §§ 361(a), 366(a)(1)(C), 366.3(e)(5)*]. Educational advocacy on behalf of dependent children is not limited to the activities of a responsible adult or surrogate parent for the making of educational decisions for the child. Counsel for children, CASAs, social workers, and other child advocates, as well as the juvenile court, must take an active role in educational advocacy for dependent children [*see, e.g.*, Espana & Fried, The Expanding Role of the Juvenile Court in Determining Educational Outcomes for Foster Children, *5 J. Center Children & Cts. 83 (2004)*; NCJFCJ, Asking The Right Questions: A Judicial Checklist to Ensure That the Educational Needs of Children and Youth in Foster Care Are Being Addressed (NCJFCJ 2005)].

For discussion of the requirement to address the educational needs of the child, including limiting the parents' right to make educational decisions and the appointment of a responsible adult to make such decisions, see *§ 328.62[6]*.

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329
CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
I. Periodic Review Procedures

28-328 California Forms of Pleading and Practice--Annotated § 328.153

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§ 328.153 Twelve-Month Permanency Hearing

The 12-month permanency hearing must be held within 12 months of the date the child entered foster care, which is the date of the jurisdiction finding or 60 days from the date the child was originally removed from the physical custody of the parent or guardian whichever occurred earlier [*Welf. & Inst. Code §§ 361.5(a), 366.21(f)*].

In some cases continuances and delays will cause the 12-month permanency hearing under *Welf. & Inst. Code § 366.21(f)* to be completed 18 months or more from the date the child was physically removed from the custody of the parent. When that happens, there is a difference of opinion whether the hearing should be considered a 12-month permanency hearing under *Welf. & Inst. Code § 366.21(f)* or an 18-month permanency review hearing under *Welf. & Inst. Code § 366.22*. One case has commented that an 18-month hearing under *Welf. & Inst. Code § 366.22(a)* can only occur when the matter has been continued at a 12-month hearing under *Welf. & Inst. Code § 366.21(f), (g)(1)*. Thus, if there has been no 12-month hearing and no continuance of the matter to the 18-month date, it is not an 18-month hearing under *Welf. & Inst. Code § 366.22* [*In re Ricky H. (1992) 10 Cal. App. 4th 552, 557, fn. 2, 12 Cal. Rptr. 2d 578]* . This view is consistent with the plain language of the statutes, but fails to construe the statutes "in the context of the entire dependency process of which [they] are a part" [*Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 253, 19 Cal. Rptr. 2d 698, 851 P.2d 1307]* .

The better and more widely followed view recognizes the time frames for reunification services are limited [*Welf. & Inst. Code § 361.5(a)*; *Denny H. v. Superior Court (2005) 131 Cal. App. 4th 1501, 1509, fn. 3, 33 Cal. Rptr. 3d 89* , citing Seiser & Kumli, California Juvenile Courts Practice and Procedure § 2.153 (Matthew Bender)]. The law does not establish a minimum number of months of services for a parent. Instead, the emphasis of the law is on "setting outside limits to the length of time a child may be kept in foster care before a permanent plan is established" [*In re David H. (1995) 33 Cal. App. 4th 368, 388, 39 Cal. Rptr. 2d 313]* . The statutes assume the 12-month permanency hearing will be held in a timely fashion and will conclude prior to the time for the 18-month permanency review hearing. When it does

not, the passage of time will cause the two hearings to merge, with the result that the 12-month permanency hearing will become the 18-month permanency review hearing without the necessity for a second or separate hearing [*see In re Brian R. (1991) 2 Cal. App. 4th 904, 917, 924, 3 Cal. Rptr. 2d 768]* . Under either view, the statutory mandate for limiting reunification services to a maximum of 18 months from the date of the original removal will control over any conflict in the statutes [*Denny H. v. Superior Court (2005) 131 Cal. App. 4th 1501, 1509, fn. 3, 33 Cal. Rptr. 3d 89* , citing Seiser & Kumli, California Juvenile Courts Practice and Procedure § 2.153 (*Matthew Bender); In re David H. (1995) 33 Cal. App. 4th 368, 385-389, 39 Cal. Rptr. 2d 313]* .

For detailed discussion of 18-month permanency review hearings, see *§ 328.154*.

[1] To Determine Whether Child Should Return to Custody of Parent or Guardian

At the 12-month permanency hearing, the juvenile court must order the return of the child to the physical custody of his or her parent or guardian unless, by a preponderance of the evidence, it finds that return of the child would create a substantial risk or detriment to the safety, protection, or physical or emotional well-being of the child. The social services department has the burden of establishing that detriment [*Welf. & Inst. Code § 366.21(f)*]. Although not expressly stated in the statute, it appears clear this finding need only be made as to any parent or guardian receiving reunification services. If the court denied services for one parent pursuant to *Welf. & Inst. Code § 361.5(b)* or *(e)(1)* at disposition or terminated such services for one parent pursuant to *Welf. & Inst. Code § 366.21(e)* at the six-month review, but ordered services for the other parent, it should be presumed the child is not returning to the parent for whom services were denied or terminated and the only question is whether return to the parent receiving services would create a substantial risk of detriment.

The failure of the parent or guardian to participate regularly and make substantive progress in any court-ordered treatment programs constitutes prima facie evidence that return would be detrimental. In making its determination, the court must [*see Welf. & Inst. Code § 366.21(f)*]:

- Review and consider the social worker's report.

- Review and consider the report and recommendation of any child advocate appointed pursuant to *Welf. & Inst. Code § 356.5*.

- Consider the efforts or progress, or both, demonstrated by the parent or guardian and the extent to which he or she cooperated and availed himself or herself of services provided.

- Specify the factual basis for its determination that return of the child would or would not be detrimental to the child. The court must do this regardless of whether it returns the child or not.

- Make a finding under *Welf. & Inst. Code § 366(a)* (relating to necessity for and appropriateness of current placement, compliance with case plan, sibling interaction, progress toward resolving or mitigating the reasons that led to foster care placement, and the likely date by which the child will receive a permanent placement either in the home of the parent or an alternative permanent home).

If the court returns the child to the custody of a parent, the court may continue court supervision as a family maintenance case and set the matter for a review hearing under *Welf. & Inst. Code § 364* [*Bridget A. v. Superior Court (2007) 148 Cal. App. 4th 285, 313-316, 55 Cal. Rptr. 3d 647*].

For a discussion of determining whether it would be detrimental to return the child, see *§ 328.151[5]*.

[2] Placement With Previously Noncustodial Parent

If the child was placed under court supervision with a previously noncustodial parent pursuant to *Welf. & Inst. Code § 361.2*, the court must determine whether supervision is still necessary. The court may continue supervision and services, or make juvenile custody orders granting custody to that parent and either continue supervision and services or terminate dependency jurisdiction [*Cal. Rules of Ct., Rule 5.715(c)(2)* (Custody Order--Juvenile Final Judgment (JV-200) must be prepared and filed under *Cal. Rules of Ct., Rule 5.700*)]. For a discussion of how the court may view placement alternatives when reunification services were ordered for the parent from whom the child was removed and the child was placed with the previously noncustodial parent, both of whom may now desire placement of the child, see *§ 328.152[2]*.

[3] Determining a Permanent Plan for the Child

At the 12-month permanency hearing the court must determine the permanent plan for the child [*Welf. & Inst. Code § 366.21(f)*]. If the child is returned to the custody of a parent or guardian that permanent plan for the child is reunification. If the child is not returned, however, the court must make a determination of whether to continue working toward the permanent plan of reunification or to terminate reunification efforts and select an alternative permanency plan for the child. The social worker must recommend a hearing be held pursuant to *Welf. & Inst. Code § 366.26* if the child is in foster care, or enters foster care, on or after January 1, 1999, and the child has been in foster care for 15 of the most recent 22 months, unless certain circumstances apply [*Welf. & Inst. Code § 16508.1*]. If a child is not returned to the custody of a parent or guardian at the 12-month permanency hearing, the court must do one of the following [*Welf. & Inst. Code § 366.21(g)*]:

- Continue the case for up to six months for a permanency review hearing, provided that the hearing must occur within 18 months of the date of the original removal of the child from the physical custody of the parent or guardian [*Welf. & Inst. Code § 366.21(g)(1)*]. If 18 months has already passed since the date of the child's original removal, this option is not available to the court [*In re David H. (1995) 33 Cal. App. 4th 368, 385-389, 39 Cal. Rptr. 2d 313]* . The court must continue the case only if it finds that there is a substantial probability the permanent plan of having the child returned and safely maintained in the physical custody of his or her parent or guardian will be achieved within that time frame or that the social services agency has not proven by clear and convincing evidence that reasonable services have been provided or offered to the parent or guardian [*Welf. & Inst. Code §§ 361.5(a), 366.21(g)(1)*]. In order to determine there is a substantial probability the child will be returned to the parent or guardian and safely maintained in that home within the extended period of time the court must find all of the following [*Cal. Rules of Court, Rule 5.715(c)(3)*]: (1) the parent or guardian has "consistently and regularly contacted and visited with the child" [*Welf. & Inst. Code § 366.21(g)(1)(A)*]; (2) the parent or guardian has made "significant progress" in working on their plan and resolving the problems that led to the child's removal [*Welf. & Inst. Code § 366.21(g)(1)(B)*]; and (3) the parent or guardian has shown the "capacity and ability" to complete his or her treatment plan objectives and to "provide for the child's safety, protection, physical and emotional well-being, and special needs" [*Welf. & Inst. Code § 366.21(g)(1)(C)*]. Moreover, the court must inform the parent or guardian that, if the child cannot be returned home by the next permanency review hearing, a permanent plan will be developed at that hearing and a hearing pursuant to *Welf. & Inst. Code § 366.26* may be set [*Welf. & Inst. Code § 366.21(g)(1)*].

- Order that a hearing be held within 120 days, pursuant to *Welf. & Inst. Code § 366.26*, if the court finds that there is no substantial probability of return to the parent or guardian within 18 months of the date the child was originally removed from the physical custody of the parent or guardian, and finds by clear and convincing evidence that reasonable services have been offered or provided to the parent or guardian [*Welf. & Inst. Code § 366.21(g)(3)*]. In this case the court is determining the permanent plan of the child to be an alternative plan other than return to parent. The setting of the hearing pursuant to *Welf.*

& Inst. Code § 366.26 is for the purpose of selecting which alternative permanent plan is to be ordered for the child.

- Order that the child remain in long-term foster or relative care, if the court does not continue the matter for further services and finds by clear and convincing evidence, based on the evidence already presented to it, that the child is not a proper subject for adoption and has no one willing to accept legal guardianship [*Welf. & Inst. Code § 366.21(g)(2)*]. In making this determination the court shall consider any recommendation by a licensed adoption agency or the State Department of Social Services when acting as a licensed adoption agency, that "there is a compelling reason for determining that a hearing held pursuant to Section 366.26 is not in the best interest of the child because the child is not a proper subject for adoption and has no one willing to accept legal guardianship" [*Welf. & Inst. Code § 366.21(g)(2)*]. The statute provides that the recommendation of the agency in this regard "shall constitute a compelling reason for the court's determination" [*Welf. & Inst. Code § 366.21(g)(2)*]. This latter provision should not be read to suggest the court must accept the recommendation as conclusive and does not have to consider the factual basis for that recommendation or to make its own determination of whether the child is a proper subject for adoption. To so hold would impermissibly invade and restrict the role and responsibilities of the court. Instead, it should be interpreted to mean that the recommendation of the licensed adoption agency that the child be found to not be a proper subject for adoption is a sufficient basis for the court to make such a finding if the court finds the facts of the case as then presented to it provide clear and convincing evidence to support that recommendation and determination. It must be remembered that it will be the rare case in which the court will have sufficient facts before it to make such a determination at the time of the permanency hearing. In most cases, the more complete assessment required for the *Welf. & Inst. Code § 366.26* hearing will be necessary before the court can factually make such a determination.

PRACTICE TIP:

Not a Proper Subject for Adoption. Prior to January 1, 1996, the criteria for "cutting out" to a permanent plan of long-term foster care required that the court have clear and convincing evidence that the child "is not adoptable" [*see* Welf. & Inst. Code former § 366.21(g)(2)]. This was a very objective standard. The current criteria of "not a proper subject for adoption" is a very subjective standard which is not defined in statute. This is a major departure from the strict requirements of Senate Bill 243 [Stats. 1987, ch. 1485] which limited juvenile court discretion in this regard so as to ensure that children were provided the maximum opportunity for a permanent plan of adoption or guardianship if they cannot be returned home. The additional language effective January 1, 1999, regarding a "compelling reason" as recommended by the adoption agency creates the potential for further undermining the policy of taking all reasonable steps to ensure the most stable and permanent plan for the child through a full assessment at the *Welf. & Inst. Code § 366.26* hearing. Juvenile courts, county counsel, children's counsel, and court-appointed special advocates should be wary of utilizing or agreeing with the use of this "cut out" unless they have a very complete report, similar to an assessment for a selection and implementation hearing, which provides sufficient details on the topic of adoption for the child so as to allow the court to make an informed decision. Even then use of this "cut out" should be the exception, not the rule. Counsel for parents and guardians, however, should attempt to utilize this subjective standard to avoid a selection and implementation hearing thereby limiting the permanency planning possibilities whenever possible. How the appellate courts will interpret the phrase "not a proper subject for adoption" remains to be seen and this area should be watched for further developments.

[4] Concurrent Reunification and Permanency Planning Services

The court must also determine whether reasonable services have been provided or offered to the parent or parents, which were designed to aid the parent or parents to overcome the problems that led to the initial removal and continued

custody of the child [*Welf. & Inst. Code § 366.21(f)*]. The fact that a child has been placed in a preadoptive home or with a family that is eligible to adopt the child, or that the case plan includes concurrent planning for legal permanence, or that services to achieve legal permanence for the child if reunification efforts are unsuccessful have been provided concurrently with services to reunify shall not be deemed, in and of itself, a failure to provide or offer reasonable reunification services to the parent or guardian [*Welf. & Inst. Code § 366.21*(*l*)].

Visitation between a child and a parent is an important component of any reunification plan [*In re Mark L. (2001) 94 Cal. App. 4th 573, 580-581, 114 Cal. Rptr. 2d 499* ; *In re Luke L. (1996) 44 Cal. App. 4th 670, 679, 52 Cal. Rptr. 2d 53]* . Thus the question of whether reasonable visitation has been offered or provided to the parent is one aspect of the reasonable efforts determination. Even if it has been determined visitation would be detrimental to the child, reunification services should not thwart the potential for future contact by giving the child complete control of whether visitation will take place or by denying the court adequate information on which to base its decision regarding such future contact. In one case visitation was found to be detrimental at the six-month review, but the juvenile court prevented the child's therapist from communicating with the social services agency or the court based on the assertion of the psychotherapist-patient privilege. The appellate court upheld the finding that visitation would be detrimental, but found that preventing the therapist from providing circumscribed information to accomplish the information-gathering goal of therapy effectively thwarted the potential for visitation, resulting in a failure to provide reasonable reunification services between the 6-month and 12-month hearings [*In re Mark L. (2001) 94 Cal. App. 4th 573, 585, 114 Cal. Rptr. 2d 499]* . Any determination of this nature should, of course, be based on the totality of the evidence regarding reunification services and normally should not be limited solely to the visitation issue.

The court should also determine whether reasonable efforts to provide legal permanence for the child if reunification fails have been made, including efforts for a child who is 10 years of age or older and placed in out of home care to maintain relationships with people who are important to the child, consistent with the child's best interest. The court must make whatever findings are appropriate in this regard [*Welf. & Inst. Code § 366(a)(1)(B)*].

If a hearing pursuant to *Welf. & Inst. Code § 366.26* is set, the court must terminate reunification services. Visitation must be continued, however, unless the court determines visitation would be detrimental to the child [*Welf. & Inst. Code § 366.21(h)*]. If reunification efforts are not terminated, the court must order those services be initiated or continued, provided that the court may modify the terms and conditions of those services as appropriate. The court should also make whatever orders are necessary and appropriate regarding the provision of concurrent permanency planning services to achieve legal permanence if reunification efforts fail. The court must then set the matter for a 18-month permanency review hearing, to be held no later than 18 months after the date the child was originally removed from the physical custody of the parent or guardian [*Welf. & Inst. Code §§ 366.21(f)-(g), 366.22(a)*].

For a discussion of concurrent reunification and permanency planning services see *§ 328.129[1], [3], [4], [5],* and *[6]*.

[5] Setting a Selection and Implementation Hearing

If the court orders that a *Welf. & Inst. Code § 366.26* hearing must be held, it must also orally advise all parties present, and advise by first class mail all parties who are not present, that if the party wishes to preserve any right to review on appeal of the order the court made setting the matter for a hearing under *Welf. & Inst. Code § 366.26*, the person must seek an extraordinary writ by filing a Notice of Intent to File Writ Petition and Request for Record [*Cal. Rules of Ct., Rule 5.715(d)(3)*; *see Welf. & Inst. Code § 366.26(l)*; *see also* discussion in *§ 328.189* et seq.].

[6] Educational Decisions

The need for limiting a parent's right to make educational decisions, to appoint a responsible adult for educational decisions, or for the court to make educational decisions for the child should to be considered at any review hearing, including post-permanency planning review hearings for children in long term foster care [*Welf. & Inst. Code §§ 361(a)*

, *366(a)(1)(C), 366.3(e)(5)*]. Educational advocacy on behalf of dependent children is not limited to the activities of a responsible adult or surrogate parent for the making of educational decisions for the child. Counsel for children, CASAs, social workers, and other child advocates, as well as the juvenile court, must take an active role in educational advocacy for dependent children [*see, e.g.*, Espana & Fried, The Expanding Role of the Juvenile Court in Determining Educational Outcomes for Foster Children, *5 J. Center Children & Cts. 83 (2004)*; NCJFCJ, Asking The Right Questions: A Judicial Checklist to Ensure That the Educational Needs of Children and Youth in Foster Care Are Being Addressed (NCJFCJ 2005)].

For discussion of the requirement to address the educational needs of the child, including limiting the parents' right to make educational decisions and the appointment of a responsible adult to make such decisions, see *§ 328.62[6]*.

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
I. Periodic Review Procedures

28-328 California Forms of Pleading and Practice--Annotated § 328.154

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§ 328.154 Eighteen-Month Permanency Review Hearing

The 18-month permanency review hearing must be held within 18 months of the original removal of the child from the physical custody of the parent or guardian [*Welf. & Inst. Code §§ 361.5(a)(2), 366.21(g)(1), 366.22(a)*]. Due to the length of time that passed between the original removal and the finding of jurisdiction or 60 days, and due to any continuances of the 12-month permanency hearing, the 18-month permanency review hearing will be held less than six months after the 12-month permanency hearing.

[1] To Determine Whether Child Should Return to Custody of Parent or Guardian

The procedures at the 18-month permanency review hearing are essentially the same as those at the 12-month permanency hearing (discussed in *§ 328.153*) in regards to the determination of whether the child should be returned to the custody of the parent or guardian. Thus, the court must order the child returned to parental custody unless, by a preponderance of the evidence, it finds that return of the child would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. Although not expressly stated in the statute, it appears clear this finding need only be made as to any parent or guardian receiving reunification services. If the court has denied or terminated services for one parent, but ordered services for the other parent, it should be presumed the child is not returning to the parent for whom services were denied or terminated and the only question is whether return to the parent receiving services would create a substantial risk of detriment. The social services department has the burden of establishing the detriment. The failure of the parent or guardian to participate regularly and make substantive progress in any court-ordered treatment programs constitutes prima facie evidence that return would be detrimental [*Welf. & Inst. Code § 366.22(a)*].

In making its determination, the court must review and consider the social worker's report and recommendations, and must review and consider the report and recommendations of any child advocate appointed pursuant to Welf. & Inst.

Code § 356.6 [*Welf. & Inst. Code § 366.22(a)*]. The court must also consider the efforts or progress, or both, demonstrated by the parent or guardian and the extent to which he or she cooperated and availed himself or herself of services provided. The court must specify the factual basis for its conclusion that return would or would not be detrimental regardless of whether it orders the child returned or not [*Welf. & Inst. Code § 366.22(a)*]. If the court returns the child to the custody of a parent, the court may continue court supervision as a family maintenance case and set the matter for a review hearing under *Welf. & Inst. Code § 364* [*Bridget A. v. Superior Court (2007) 148 Cal. App. 4th 285, 313-316, 55 Cal. Rptr. 3d 647*].

Parental rights may not be terminated without holding an 18-month hearing where such a hearing is required [*In re Rubin P. (1991) 2 Cal. App. 4th 306, 310, 3 Cal. Rptr. 2d 301* (failure to allow contested 18-month hearing is grounds for reversal of order terminating parental rights)].

For a discussion of determining whether it would be detrimental to return the child, see *§ 328.151[5]*.

[2] Concurrent Reunification and Permanency Planning Services

[a] Findings and Orders

The court must also determine whether reasonable services have been provided or offered to the parent or parents, which were designed to aid the parent or parents to overcome the problems that led to the initial removal and continued custody of the child [*Welf. & Inst. Code § 366.22(a)*]. The fact that a child has been placed in a preadoptive home or with a family that is eligible to adopt the child, or that the case plan includes concurrent planning for legal permanence, or that services to achieve legal permanence for the child if reunification efforts are unsuccessful have been provided concurrently with services to reunify shall not be deemed, in and of itself, a failure to provide or offer reasonable reunification services to the parent or guardian [*Welf. & Inst. Code § 366.22(a)*].

Visitation between a child and a parent is an important component of any reunification plan [*In re Mark L. (2001) 94 Cal. App. 4th 573, 580-581, 114 Cal. Rptr. 2d 499* ; *In re Luke L. (1996) 44 Cal. App. 4th 670, 679, 52 Cal. Rptr. 2d 53]* . Thus the question of whether reasonable visitation has been offered or provided to the parent is one aspect of the reasonable efforts determination. In one case visitation was found to be detrimental, but the juvenile court prevented the child's therapist from communicating with the social services agency or the court based on the assertion of the psychotherapist-patient privilege. The appellate court upheld the finding that visitation would be detrimental, but found that preventing the therapist from providing circumscribed information to accomplish the information-gathering goal of therapy effectively thwarted the potential for visitation, resulting in a failure to provide reasonable reunification services [*In re Mark L. (2001) 94 Cal. App. 4th 573, 585, 114 Cal. Rptr. 2d 499]* . Any determination of this nature should, of course, be based on the totality of the evidence regarding reunification services and normally should not be limited solely to the visitation issue. The burden of proof for the reasonable services finding at the 18-month permanency review hearing is a preponderance of the evidence [*Katie V. v. Superior Court (2005) 130 Cal. App. 4th 586, 594-598, 30 Cal. Rptr. 3d 320]* . While a finding regarding reasonable services must be made at this hearing, the authority of the juvenile court to set a hearing under *Welf. & Inst. Code § 366.26* does not require the court to have made a finding at the 18-month permanency review hearing that reasonable services were offered or provided [*Denny H. v. Superior Court (2005) 131 Cal. App. 4th 1501, 1511-1512, 33 Cal. Rptr. 3d 89* ; *Mark N. v. Superior Court (1998) 60 Cal. App. 4th 996, 1015-1016, 70 Cal. Rptr. 2d 603]* .

The court should also determine whether reasonable efforts to provide legal permanence for the child if reunification fails have been made, including efforts for a child who is 10 years of age or older and placed in out of home care to maintain relationships with people who are important to the child, consistent with the child's best interest. The court must make whatever findings are appropriate in this regard [*Welf. & Inst. Code § 366(a)(1)(B)*].

[b] Limited Circumstances for Services Beyond 18 Months

While a reasonable efforts finding at the 18-month permanency hearing is not essential to setting a selection and implementation hearing if there has been a previous finding that reasonable services have been provided, the court has discretion to continue the matter beyond the 18-month time frame for the provision of reunification services if it finds that no reasonable services have been provided [*see In re Daniel G. (1994) 25 Cal. App. 4th 1205, 1209, 31 Cal. Rptr. 2d 75* ; *In re Dino E. (1992) 6 Cal. App. 4th 1768, 1779, 8 Cal. Rptr. 2d 416]* . But as one court of appeal noted in a case in which the father made little effort to visit the child and could have raised the question of visitation far sooner, "A noncustodial parent may not refuse to participate in reunification treatment programs until the final reunification review hearing has been set and then demand an extension of the reunification period to complete the required programs" [*Los Angeles County Dep't of Children & Family Servs. v. Superior Court (1997) 60 Cal. App. 4th 1088, 1092-1093, 70 Cal. Rptr. 2d 658]* . "Neither may a parent wait silently by until the final reunification review hearing to seek an extended reunification period based on a perceived inadequacy in the reunification services occurring long before that hearing" [*Los Angeles County Dep't of Children & Family Servs. v. Superior Court (1997) 60 Cal. App. 4th 1088, 1093, 70 Cal. Rptr. 2d 658]* . Further, the mere fact the previous hearings had been continued and delayed for so long the parent did not receive a full period of reunification services is not controlling. The statutes do not provide for a minimum period of reunification services. "To the contrary, the emphasis throughout the statutes is upon setting outside limits to the length of time a child may be kept in foster care before a permanent plan is established" [*In re David H. (1995) 33 Cal. App. 4th 368, 388, 39 Cal. Rptr. 2d 313]* . Thus, if the parents "request or accede in delays" of the dependency adjudication process, they "may not complain if a hearing under section 366.26 is ordered after an abbreviated period of reunification services [*In re David H. (1995) 33 Cal. App. 4th 368, 388, 39 Cal. Rptr. 2d 313]* .

One court of appeal has held that a juvenile court has the discretion to order services beyond the 18-month hearing date where appropriate to help a "special needs" parent work towards reunification [*In re Elizabeth R. (1995) 35 Cal. App. 4th 1774, 1787, 42 Cal. Rptr. 2d 200]* . In that case, the mother was hospitalized throughout much of the reunification period for psychological problems. Although the court criticized the evidence regarding reasonable services, it did not actually determine that the juvenile court's finding of reasonable services at the 18-month hearing was not supported by substantial evidence [*In re Elizabeth R. (1995) 35 Cal. App. 4th 1774, 1789-1792, 42 Cal. Rptr. 2d 200]* . As such, its holding that the juvenile court had discretion to order further services is a marked departure from statutory mandates and previous decisional precedents, including the cases of *In re Daniel G. (1994) 25 Cal. App. 4th 1205, 31 Cal. Rptr. 2d 75* , and *In re Dino E. (1992) 6 Cal. App. 4th 1768, 8 Cal. Rptr. 2d 416* , which it cites as supportive authority [*In re Elizabeth R. (1995) 35 Cal. App. 4th 1774, 1793-1796, 42 Cal. Rptr. 2d 200]* . Nevertheless, although an anomaly, this case stands for the proposition that a special needs parent can receive more than 18 months of services. It should be noted that where cited by other appellate courts, *Elizabeth R.* is usually mentioned only in dicta for the proposition that in "rare" instances a parent or guardian may get more than 18 months of services, with the court then going on to distinguish the facts in the case at hand [*see, e.g.,* *Cresse S. v. Superior Court (1996) 50 Cal. App. 4th 947, 954, 58 Cal. Rptr. 2d 56]* . Another court has noted that in each of the decisions that have upheld or ordered the provision of services beyond the 18-month limit there were "extraordinary circumstances" that favored the extension of services. These circumstances "uniformly involved some external factor which prevented the parent from participating in the case plan" [*Andrea L. v. Superior Court (1998) 64 Cal. App. 4th 1377, 1388, 75 Cal. Rptr. 2d 851]* . Such treatment emphasizes the very limited nature of the *Elizabeth R.* holding.

The better and more frequently utilized approach is that taken in the case of *Los Angeles County Dep't of Children & Family Servs. v. Superior Court (1997) 60 Cal. App. 4th 1088, 70 Cal. Rptr. 2d 658* in which the court of appeal reversed a juvenile court's order extending services beyond the 18 month date. There the court noted the statutory limitation of 18 months for the provision of reunification services and found the court's order for services beyond that date exceeded the juvenile court's jurisdiction [*Los Angeles County Dep't of Children & Family Servs. v. Superior Court (1997) 60 Cal. App. 4th 1088, 1091-1092, 70 Cal. Rptr. 2d 658]* . The court of appeal also found the juvenile court's order to be an abuse of discretion, since the father in that case had made no showing he could complete the programs necessary to achieve reunification within the extended period of time [*Los Angeles County Dep't of Children & Family Servs. v. Superior Court (1997) 60 Cal. App. 4th 1088, 70 Cal. Rptr. 2d 658]* . While the facts of this case did

not involve a parent with special needs and thus is distinguishable from *Elizabeth R.*, the court of appeal's recognition of the limits of the juvenile court's jurisdiction in this regard is significant and should be remembered in all cases in which the juvenile court is asked to extend services beyond the maximum period allowed by law [*Denny H. v. Superior Court (2005) 131 Cal. App. 4th 1501, 1511, 33 Cal. Rptr. 3d 89* ("When extraordinary special needs are not at issue, the approach taken in *Los Angeles County Dept. of Children etc. Services v. Superior Court (1997) 60 Cal. App. 4th 1088 [70 Cal. Rptr. 2d 658]* makes sense")].

It should also be noted that within the cases addressing whether a court can extend services beyond 18 months is the question of the appropriate vehicle for doing so. Most courts have held that *Welf. & Inst. Code § 352*, which allows any dependency hearing to be continued beyond the statutory time limits if the continuance is not contrary to the interests of the child, is the proper vehicle [*see, e.g.,* *Mark N. v. Superior Court (1998) 60 Cal. App. 4th 996, 1016-1017, 70 Cal. Rptr. 2d 603* ; *In re Elizabeth R. (1995) 35 Cal. App. 4th 1774, 1797-1799, 42 Cal. Rptr. 2d 200]* . It is doubtful, however, that *Welf. & Inst. Code § 352* was ever intended to allow hearings to be continued for a period of six months, particularly in light of the mandate to resolve dependency cases in a timely manner. An 18-month review that is continued for six months is no longer an 18-month review. It is a 24-month review, which does not exist in California's dependency statutes [*Denny H. v. Superior Court (2005) 131 Cal. App. 4th 1501, 1511, 33 Cal. Rptr. 3d 89* , citing Seiser & Kumli, California Juvenile Courts Practice and Procedure § 2.154[2][b] (Matthew Bender)]. Thus, the more appropriate use of *Welf. & Inst. Code § 352* is for the normal continuances caused by missing or sick witnesses, calendar conflicts, and the like. A different approach was taken by the court of appeal in the case of *In re Daniel G. (1994) 25 Cal. App. 4th 1205, 31 Cal. Rptr. 2d 75* . Having found that reasonable reunification services had not been offered or provided, the court of appeal determined that under the facts of that case the juvenile court had discretion to continue the matter for services [*In re Daniel G. (1994) 25 Cal. App. 4th 1205, 1211-1215, 31 Cal. Rptr. 2d 75]* . Although a court's discretion in such circumstances must of necessity be very limited, it is probably more consistent with the overall purposes of the dependency system to hold the court has some very limited inherent authority to continue matters beyond the time limits statutorily mandated in cases where the necessary services have not in any way been provided and the needs of the child require such a continuance. Nevertheless, regardless of which approach is utilized, it should be the rare case in which services are ever ordered beyond the statutory time frames.

PRACTICE TIP:

Arguments for and Against Further Services. Counsel for parents and guardians should note that the *Elizabeth R.* decision does not define "special needs" parent. As such, it may be argued that any parent or guardian with serious or "special" problems falls within the parameters of the *Elizabeth R.* case and should be given additional services where necessary and appropriate, regardless of whether they have already received 18 months of services or not. Counsel for the social services agency and most children should argue that *Elizabeth R.* was incorrectly decided, is inconsistent with both statutory and decisional precedents, and thus is not binding on local trial and appellate courts insofar as it purports to grant authority to juvenile courts to order services beyond the 18-month date where reasonable services have already been provided. Courts should be cautious in their use of the *Elizabeth R.* decision in light of its many inconsistencies with established law. Regardless of whether a court chooses to consider *Elizabeth R.* as correct or not, however, it will be the rare case which is not factually distinguishable from the unique situation presented there.

[c] Continuing the Case for a 24-Month Hearing

Effective January 1, 2009, the juvenile court has a new option at the 18-month permanency review hearing. In certain limited circumstances it can continue the matter for up to six months, but not more than 24 months from the date of the initial removal, for a "subsequent permanency review hearing" [*Welf. & Inst. Code § 366.22(b)*]. This major policy shift on court-ordered services was brought about by the enactment of Assembly Bill 2070 [stats. 2008, ch. 482]. If the court finds by clear and convincing evidence the best interests of the child would be served by providing additional reunification services to a parent or guardian who is making "significant and consistent progress" in a substance abuse

treatment program, or who has been recently released from institutionalization or incarceration and is making "significant and consistent progress" in establishing a home that is safe for the child to return to, the court may continue the case for up to six months, but not more than 24 months from the date of the initial removal. The court can only do this, however, if it finds there is a substantial probability the child will be returned to the physical custody of the parent or guardian, and be safely maintained in that home, within the extended period of time. The court can also do this if it finds reasonable services have not been offered or provided to the parent or legal guardian [*Welf. & Inst. Code § 366.22(b)*]. Indeed, for parents or legal guardians who fall under the provisions of this limited subdivision, the court may not order a hearing under *Welf. & Inst. Code § 366.26* unless it finds by clear and convincing evidence that reasonable services have been provided or offered to the parent or legal guardian [*Welf. & Inst. Code § 366.22(b)*].

In order for the court to find a substantial probability the child will be returned to the parent or guardian and maintained safely in that home within the extended period of time, the court must find all of the following [*Welf. & Inst. Code § 366.22(b)(1)-(3)*]:

- The parent or legal guardian had consistently and regularly contacted and visited the child;

- The parent or legal guardian has made "significant and consistent progress" in the previous 18 months in resolving the problems that led to the child's removal from the home; and

- The parent or legal guardian as demonstrated both the capacity and ability to complete the objectives of his or her substance abuse treatment plan, or to complete a treatment plan after discharge from institutionalization or incarceration, and to provide for the safety, protection, physical and emotional well being, and special needs of the child.

It is anticipated that it will be the rare case in which all of the requirements are met for continuing the matter to the 24-month date. Nevertheless, if the court does continue the matter for a 24-month hearing, it must inform the parent or legal guardian that if the child cannot be returned to the home by the date for the 24-month hearing, a hearing under *Welf. & Inst. Code § 366.26* may be set [*Welf. & Inst. Code § 366.22(b)*]. The court's decision continuing the matter to the 24-month date is statutorily determined to be a compelling reason for deciding that setting a hearing under *Welf. & Inst. Code § 366.26* is not in the child's best interest [*Welf. & Inst. Code § 366.22(b)*].

For discussion of California's major policy shift on court ordered services brought about by the enactment of Assembly Bill 2070 [stats. 2008, ch. 482], see *§ 328.129[1]*.

[3] Determining a Permanent Plan for the Child

If the child is returned to the custody of the parent or guardian, the permanent plan of reunification has been achieved. If the child is not returned to a parent or guardian at the 18-month permanency review hearing, the court must develop an alternative permanent plan, except in the very limited circumstances where it sets a 24-month hearing. The social worker must recommend a hearing be held pursuant to *Welf. & Inst. Code § 366.26* if the child is in foster care, or enters foster care, on or after January 1, 1999, and the child has been in foster care for 15 of the most recent 22 months, unless certain circumstances apply [*Welf. & Inst. Code §§ 366.22(b), 16508.1*]. In most cases, the court must order that a selection and implementation hearing pursuant to *Welf. & Inst. Code § 366.26* be held to determine whether adoption, guardianship, or another planned permanent living arrangement, such as permanent placement with a foster or relative caregiver committed to caring for the child on a permanent basis, is the most appropriate alternative permanency plan for the child. The hearing must be held no later than 120 days from the date of the 18-month permanency review hearing. The court must also order termination of reunification services to the parent. However, the court must continue to permit the parent to visit the child unless it finds that visitation would be detrimental to the child [*Welf. & Inst. Code § 366.22(a)*].

However, if the court finds by clear and convincing evidence, based on the evidence already presented to it, that the child is not a proper subject for adoption and has no one willing to accept legal guardianship, the court may order as an alternative permanency plan that the child remain in another planned permanent living arrangement, such as permanent placement with a foster or relative caregiver committed to caring for the child on a permanent basis. The court may not select long-term foster care in order to extend reunification services beyond 18 months or because it does not have an adoptive home whose application has been approved [*In re John F. (1994) 27 Cal. App. 4th 1365, 1377-1379, 33 Cal. Rptr. 2d 225* ; *In re Emily L. (1989) 212 Cal. App. 3d 734, 743, 260 Cal. Rptr. 810* ; *see Welf. & Inst. Code § 366.22(a)*]. In making this determination the court shall consider any recommendation by a licensed adoption agency or the State Department of Social Services when acting as a licensed adoption agency, that "there is a compelling reason, as described in paragraph (2) of subdivision (g) of Section 366.21, for determining that a hearing held under Section 366.26 is not in the best interest of the child because the child is not a proper subject for adoption and has no one willing to accept legal guardianship" [*Welf. & Inst. Code § 366.22(a)*]. For a discussion of "compelling reason" recommendations by licensed adoption agencies, see *§ 328.153[3]*.

If the court sets a selection and implementation hearing, the court must also orally advise all parties present, and advise by first class mail all parties who are not present, that if the party wishes to preserve any right to review on appeal of the order the court made setting the matter for a hearing under *Welf. & Inst. Code § 366.26*, the person must seek an extraordinary writ by filing a Notice of Intent to File Writ Petition and Request for Record [*Cal. Rules of Ct., Rule 8.450*; *see Welf. & Inst. Code § 366.26(l)*; *see also* discussion in *§ 328.189* et seq.].

[4] Educational Decisions

The need for limiting a parent's right to make educational decisions, to appoint a responsible adult for educational decisions, or for the court to make educational decisions for the child should to be considered at any review hearing, including post-permanency planning review hearings for children in long term foster care [*Welf. & Inst. Code §§ 361(a), 366(a)(1)(C), 366.3(e)(5)*]. Educational advocacy on behalf of dependent children is not limited to the activities of a responsible adult or surrogate parent for the making of educational decisions for the child. Counsel for children, CASAs, social workers, and other child advocates, as well as the juvenile court, must take an active role in educational advocacy for dependent children [*see, e.g.*, Espana & Fried, The Expanding Role of the Juvenile Court in Determining Educational Outcomes for Foster Children, *5 J. Center Children & Cts. 83 (2004)*; NCJFCJ, Asking The Right Questions: A Judicial Checklist to Ensure That the Educational Needs of Children and Youth in Foster Care Are Being Addressed (NCJFCJ 2005)].

For discussion of the requirement to address the educational needs of the child, including limiting the parents' right to make educational decisions and the appointment of a responsible adult to make such decisions, see *§ 328.62[6]*.

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§ 328.155 Twenty-Four-Month Subsequent Permanency Review Hearing

The 24-month subsequent permanency review hearing must be held within 24 months of the original removal of the child from the physical custody of the parent or guardian [*Welf. & Inst. Code §§ 361.5(a)(3), 366.22(b), 366.25(a)*].

[1] To Determine Whether Child Should Return to Custody of Parent or Guardian

The procedures at the 24-month subsequent permanency review hearing are essentially the same as those at six-month review hearing, the 12-month permanency hearing, and the 18-month permanency review hearing in regards to the determination of whether the child should be returned to the custody of the parent or guardian. Thus, the court must order the child returned to parental custody unless, by a preponderance of the evidence, it finds that return of the child would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. Although not expressly stated in the statute, it appears clear this finding need only be made as to any parent or guardian receiving reunification services. If the court has denied or terminated services for one parent, but ordered services for the other parent, it should be presumed the child is not returning to the parent for whom services were denied or terminated and the only question is whether return to the parent receiving services would create a substantial risk of detriment. The social services department has the burden of establishing the detriment. The failure of the parent or guardian to participate regularly and make substantive progress in any court-ordered treatment programs constitutes prima facie evidence that return would be detrimental [*Welf. & Inst. Code § 366.25(a)(1)*].

In making its determination, the court must review and consider the social worker's report and recommendations, and must review and consider the report and recommendations of any child advocate appointed pursuant to Welf. & Inst. Code § 356.6 [*Welf. & Inst. Code § 366.25(a)(1)*]. The court must also consider the efforts or progress, or both, demonstrated by the parent or guardian and the extent to which he or she cooperated and availed himself or herself of services provided. The court must specify the factual basis for its conclusion that return would or would not be

detrimental regardless of whether it orders the child returned or not [*Welf. & Inst. Code § 366.25(a)(1)-(2)*]. The court must also make a finding as to whether reasonable reunification services have been offered or provided to the parent [*Welf. & Inst. Code § 366.25(a)(3)*].

For a discussion of determining whether it would be detrimental to return the child, see *§ 328.151[5]*.

[2] Determining a Permanent Plan for the Child

If the child is returned to the custody of the parent or guardian, the permanent plan of reunification has been achieved. If the child is not returned to a parent or guardian at the 24-month subsequent permanency review hearing, the court must develop an alternative permanent plan. The social worker must recommend a hearing be held pursuant to *Welf. & Inst. Code § 366.26* if the child is in foster care, or enters foster care, on or after January 1, 1999, and the child has been in foster care for 15 of the most recent 22 months, unless certain circumstances apply [*Welf. & Inst. Code § 16508.1*]. In most cases, the court must order that a selection and implementation hearing pursuant to *Welf. & Inst. Code § 366.26* be held to determine whether adoption, guardianship, or another planned permanent living arrangement, such as permanent placement with a foster or relative caregiver committed to caring for the child on a permanent basis, is the most appropriate alternative permanency plan for the child. The hearing must be held no later than 120 days from the date of the 24-month permanency review hearing. The court must also order termination of reunification services to the parent. However, the court must continue to permit the parent to visit the child unless it finds that visitation would be detrimental to the child [*Welf. & Inst. Code § 366.25(a)(3)*].

However, if the court finds by clear and convincing evidence, based on the evidence already presented to it, that the child is not a proper subject for adoption and has no one willing to accept legal guardianship, the court may order as an alternative permanency plan that the child remain in another planned permanent living arrangement, such as permanent placement with a foster or relative caregiver committed to caring for the child on a permanent basis. In making this determination the court shall consider any recommendation by a licensed adoption agency or the State Department of Social Services when acting as a licensed adoption agency, that there is a compelling reason for determining that a hearing held under Section 366.26 is not in the best interest of the child because the child is not a proper subject for adoption and has no one willing to accept legal guardianship" [*Welf. & Inst. Code § 366.25(b)(3)*].

If the court sets a selection and implementation hearing, the court must also orally advise all parties present, and advise by first class mail all parties who are not present, that if the party wishes to preserve any right to review on appeal of the order the court made setting the matter for a hearing under *Welf. & Inst. Code § 366.26*, the person must seek an extraordinary writ by filing a Notice of Intent to File Writ Petition and Request for Record [*Cal. Rules of Ct., Rule 8.450*; see *Welf. & Inst. Code § 366.26(l)*; see also discussion in *§ 328.189* et seq.].

[3] Educational Decisions

The need for limiting a parent's right to make educational decisions, to appoint a responsible adult for educational decisions, or for the court to make educational decisions for the child should be considered at any review hearing, including post-permanency planning review hearings for children in long term foster care [*Welf. & Inst. Code §§ 361(a), 366(a)(1)(C), 366.3(e)(5)*]. Educational advocacy on behalf of dependent children is not limited to the activities of a responsible adult or surrogate parent for the making of educational decisions for the child. Counsel for children, CASAs, social workers, and other child advocates, as well as the juvenile court, must take an active role in educational advocacy for dependent children [*see, e.g.*, Espana & Fried, *The Expanding Role of the Juvenile Court in Determining Educational Outcomes for Foster Children, 5 J. Center Children & Cts. 83 (2004)*; NCJFCJ, Asking The Right Questions: A Judicial Checklist to Ensure That the Educational Needs of Children and Youth in Foster Care Are Being Addressed (NCJFCJ 2005)].

For discussion of the requirement to address the educational needs of the child, including limiting the parents' right to

make educational decisions and the appointment of a responsible adult to make such decisions, see *§ 328.62[6]*.

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§ 328.156 Subsequent Periodic Review Reports by Social Worker

The court may require the social worker or any other agency to render periodic reports concerning children committed to its care, custody, and control following a disposition hearing as the court deems necessary or desirable. The court may require that the social worker, or any other public agency organized to provide care for needy or neglected children, perform such visitation and make such periodic reports to the courts concerning children committed under disposition proceedings as the court deems necessary or desirable [*Welf. & Inst. Code § 365*].

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§ 328.157 Issuance of Custody Orders on Termination of Jurisdiction

If the juvenile court terminates dependency jurisdiction prior to the child's 18th birthday and places the child with a parent, it may also make a juvenile court custody order and protective orders [*Welf. & Inst. Code § 362.4* (not applicable where termination of dependency jurisdiction is due to an adoption being finalized)]. For a discussion of juvenile court custody orders, see *§ 328.127[1][a]*. For a discussion of restraining orders, see § 328.87.

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§ 328.158 Post-Permanency Planning Review Hearings

For a discussion of the review process for cases in which a permanent plan has been selected, see *§ 328.180* et seq.

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[Reserved]

§§ 328.159[Reserved]

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28-328 California Forms of Pleading and Practice--Annotated § 328.170

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§ 328.170 Children in Parental Custody

While it could be said that the permanent plan for a child who has not been removed from parental custody is for permanent placement with his or her parent, California's statutory scheme for dependent children generally considers permanency planning as something which is done for children who have been removed from the care of their parent or guardian. Thus, while the number one permanent plan for children who have been removed from parental custody is return to a parent's custody in a safe, stable, permanent home, there are no statutory requirements or provisions for permanent plans for children who have not been removed from parental custody. Instead, continued review hearings are held for these children every six months until the court terminates its dependency jurisdiction [*see Welf. & Inst. Code § 364*]. Nevertheless, the provision of family maintenance services to enable a child to remain safely in the custody of a parent is consistent with the fundamental goals of protecting children, preserving families, and providing stability and permanence for children. Thus, while maintenance in the family home is not a court ordered permanent plan, it is consistent with the concept that reunification is the number one permanent plan for children if it can be done safely.

If the child was removed from a parent's custody and later placed with either the previously noncustodial parent or, following a period of reunification services, with the parent from whom the child was removed, and the court determines parental custody provides the child with a safe, stable, permanent home, the permanent plan of return to parent is achieved.

For discussions relating to review hearings for children not removed from parental custody or for children who have been returned to parental custody with family maintenance services ordered, see *§ 328.150* et seq.

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28-328 California Forms of Pleading and Practice--Annotated § 328.171

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§ 328.171 Selecting and Implementing an Alternative Permanency Plan

[1] Assessment Reports

Whenever the court orders that a selection and implementation hearing be held for a child it must direct the agency supervising the child and the licensed county adoption agency, or the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency, to prepare an assessment that must include the following [*Welf. & Inst. Code §§ 361.5(g), 366.21(i), 366.22(b),* 366.25(b) *16010(b)*]:

- Current search efforts for an absent parent or parents.

- A review of the amount and nature of any contact between the child and his or her parents since the time of placement. This does not require, however, that the assessment include a breakdown of visitation by minutes, hours, or other measure [*In re Lorenzo C. (1997) 54 Cal. App. 4th 1330, 1336-1337, 63 Cal. Rptr. 2d 562]* . Nor does it require that a relationship study be done by a psychologist in order to review the nature of the child's relationship with the parent [*In re Lorenzo C. (1997) 54 Cal. App. 4th 1330, 1338-1341, 63 Cal. Rptr. 2d 562]* .

- A review of the amount and nature of any contact between the child and his or her extended family since the time of placement. The "extended family" of each child is reviewed on a case-by-case basis; the term includes, but is not limited to, the child's siblings, grandparents, aunts, and uncles].

- An evaluation of the child's medical, developmental, scholastic, mental, and emotional status, including a copy of the child's current health and education summary as described in *Welf. & Inst. Code § 16010(a).*

- A preliminary assessment of the eligibility and commitment of any identified prospective guardian or adoptive parent, particularly the caretaker, to include a social history including screening for criminal records and prior referrals for child abuse or neglect, the capability to meet the child's needs, and the understanding of the legal and financial rights and responsibilities of adoption and guardianship. If a proposed guardian is a relative who was assessed for placement of the child before January 1, 1998, the assessment shall also consider all of the factors set forth in *Welf. & Inst. Code § 361.3(a)*. The definition of relative in regards to this assessment is the same as set forth in *Welf. & Inst. Code §§ 319* and *361.3*. Effective July 1, 2010, this assessment must include any prospective tribal customary adoptive parent.

- The relationship of the child to any identified prospective adoptive parent or guardian, the duration and character of the relationship, the motivation for seeking adoption or guardianship, and a statement from the child regarding placement and the adoption or guardianship, unless the age of the child or the child's physical, emotional, or other condition precludes a meaningful response in which case a description of that condition is to be included. Effective July 1, 2010, this assessment must include any prospective tribal customary adoptive parent.

- A description of any efforts made to identify a prospective adoptive parent or legal guardian, including any child specific recruitment or listing on an adoption exchange.

- An analysis of the likelihood the child will be adopted if parental rights are terminated.

Effective July 1, 2010, if the child is an Indian child the report must also include an assessment of the likelihood the child will be adopted through a tribal customary adoption when such an adoption is recommended in consultation with the child's tribe [*Welf. & Inst. Code § 361.5(g)(1)(G)*, eff. July 1, 2010]. If a tribal customary adoption as defined by *Welf. & Inst. Code § 366.24* is recommended, the assessment must include an analysis of whether tribal customary adoption would or would not be detrimental to the Indian child, whether the Indian child can be returned to the home of the Indian parent, and the reasons for each conclusion [*Welf. & Inst. Code § 361.5(g)(1)(G)*, eff. July 1, 2010].

PRACTICE TIP:

Don't Wait Until July 1, 2010 to Assess for Tribal Customary Adoptions. Although the provisions relating to tribal customary adoptions do not take effect until July 1, 2010, the assessment process for such hearings begins 120 days before. Further, requests for continuances of *Welf. & Inst. Code § 366.26* hearings can be anticipated for those that are set within a few weeks or months before July 1, 2010. As such, in cases involving Indian children social services agencies should start consulting with Indian tribes and considering tribal customary adoption recommendations beginning in early 2010.

A relative caregiver's preference for legal guardianship over adoption shall not constitute the sole basis for recommending removal of the child from the relative caregiver for purposes of adoptive placement, if the preference is due to circumstances that do not include an unwillingness to accept legal or financial responsibility for the child [*Welf. & Inst. Code § 361.5(g)(2)(A)*]. Moreover, a relative caregiver is to be given information regarding the alternative permanency options of guardianship and adoption, including the long-term benefits and consequences of each option, prior to establishing legal guardianship or pursuing adoption [*Welf. & Inst. Code § 361.5(g)(2)(B)*].

The assessment must be provided to the parent or guardian and all counsel of record, and filed with the court at least 10 days prior to the selection and implementation hearing. A copy of the assessment should also be provided to any court appointed special advocate. Further, a summary of the recommendations must be provided to the present custodians of the child and the tribe of any Indian child [*Cal. Rules of Ct., Rule 5.725(c)*; *cf. Welf. & Inst. Code § 366.21(c)*].

[2] Notice

If a juvenile court schedules a hearing pursuant to *Welf. & Inst. Code § 366.26*, the social worker must give notice to the following persons [*Welf. & Inst. Code § 294(a)*]:

- The mother of the child.

- Any presumed father or alleged father of the child. Although not specifically required by *Welf. & Inst. Code § 294*, any man who has been found by the court to be the biological father of the child should also be noticed [*see* discussion in *§ 328.60* et seq.].

- The child if he or she is 10 years of age or older.

- Any sibling of the child involved in the dependency process, the sibling's caregiver, and the sibling's attorney, except that separate notice is not required if the sibling's dependency case is scheduled in the same court on the same day.

- The grandparents of the child, if their whereabouts are known and if the parent's whereabouts are not known.

- Any counsel of record.

- If the court knows or has reason to know the child is an Indian child, to the Indian custodian and the child's tribe; if the identity or location of the parent or Indian custodian and the tribe cannot be determined, to the Bureau of Indian Affairs.

- To any unknown parent by publication, if ordered pursuant to *Welf. & Inst. Code § 294(g)(2)*.

- Although not required by *Welf. & Inst. Code § 294*, notice must also be given to any court-appointed child advocate, the child's present caregiver, and any de facto parent [*Cal. Rules of Ct., Rule 5.725(b)*].

If a parent or alleged father has relinquished his or her child for the purpose of adoption and that relinquishment has been accepted and filed as required by *Fam. Code § 8700*, no notice need be given to that parent. Similarly, if the alleged father has signed a denial of paternity and waiver of rights form, no notice need be given. Further, no notice is required to a parent whose parental rights have already been terminated [*Welf. & Inst. Code § 294(b)*].

The notice must advise the person of the date, time and place of the hearing, the right to appear, the parents' right to counsel, the nature of the proceedings, and the recommendation of the social services agency [*Welf. & Inst. Code § 294(e)(1)-(5)*]. It must also include a statement that at the hearing the court is required to select a permanent plan of adoption, legal guardianship, or long-term foster care [*Welf. & Inst. Code § 294(e)(6)*]. In the case of an Indian child, the notice shall contain a statement that the parent or Indian custodian and the tribe have a right to intervene at any point in the proceedings and a right to be granted, on request, up to 20 additional days to prepare for the hearing [*Welf. & Inst. Code § 294(e)(7)*].

Service of the notice must be completed at least 45 days before the date of the *Welf. & Inst. Code § 366.26* hearing, except that service in cases in which publication is ordered must be completed at least 30 days before the date of the hearing. Service is deemed complete at the time of personal service to the person identified for the notice, 10 days after the notice was placed in the mail, or at the expiration of the time prescribed by the order for publication, whichever is applicable [*Welf. & Inst. Code § 294(c)(1)*]. If the child is an Indian child, notice to the Indian custodian and the tribe must be completed at least 10 days prior to the hearing [*Welf. & Inst. Code § 294(c)(2)*]. In the case of an Indian child, if notice is given to the Bureau of Indian Affairs (BIA), the BIA shall have 15 days after receipt of the notice to notify

the parent or Indian custodian and the tribe [*Welf. & Inst. Code § 294(c)(3)*].

Notice of the hearing to the child, if required, and to any counsel of record must be by first-class mail [*Welf. & Inst. Code § 294(h)*].

In the case of an Indian child, notice to the tribe shall be by registered mail, return receipt requested [*Welf. & Inst. Code § 294(i)*].

Notice may be given to a parent by means of any of the following [*Welf. & Inst. Code § 294(f)*]:

- If the parent was present at the hearing at which the court scheduled the *Welf. & Inst. Code § 366.26* hearing, the court shall advise the parent of the date, time, and place of the hearing, their right to counsel, the nature of the proceedings, and that at the hearing the court must select an alternative permanent plan of adoption, legal guardianship, or long-term foster care. The court must then order the parent to appear for the *Welf. & Inst. Code § 366.26* hearing and then direct the parent be notified thereafter by first-class mail to the parent's usual place of residence or business only.

- Certified mail, return receipt requested, if the social services agency receives a return receipt signed by the parent.

- Personal service to the parent named in the notice.

- Delivery to a competent person who is at least 18 years of age, at the parent's usual place of residence or business, and thereafter mailed to the parent named in the notice by first-class mail at the place where the notice was delivered.

- If the place of residence is outside the state, service in the manner prescribed in subparagraph (1), (3), or (4), *above*, or by certified mail, return receipt requested.

- If the recommendation of the petitioner is limited to legal guardianship or long-term foster care, service may be made by first-class mail to the parent's usual place of residence or business.

- If the father or mother of the child, or any person alleged or claiming to be the father or mother, cannot, with reasonable diligence, be served as provided *above*, the social worker must file an affidavit with the court at least 75 days before the date of the stating the name of the parent and describing the efforts that have been made to locate and serve the parent [*Welf. & Inst. Code § 294(f)(7)*].

- If the court determines that there has been due diligence in attempting to locate and serve the parent, and the petitioner limits the recommendation to legal guardianship or long-term foster care, the court must order that notice be given to the grandparents of the child, if there are any and if their residences and relationships to the child are known. Notice to grandparents must be given by first-class mail. No further notice to the parent is required. If the residence of the parent subsequently becomes known, notice must immediately be served on that person pursuant to *Welf. & Inst. Code § 294(f)(2), (3), (4), (5),* or *(6)* [*Welf. & Inst. Code § 294(f)(7)(B)-(C)*].

- If the court determines that there has been due diligence in attempting to locate and serve the parent, and the petitioner does not limit the recommendation to legal guardianship or long-term foster care, the court must order that service to the parent be by certified mail, return receipt requested, to the parent's counsel of record, if any. If the parent does not have counsel of record, the court must order that service be made by publication of a citation requiring the father, mother, or alleged father or mother to appear at

the time and place stated in the citation. The citation must be published in a newspaper designated as most likely to give notice to the parent. Publication must be made once a week for four successive weeks. Regardless of whether notice is to the attorney of record or by publication, notice must also be given to the grandparents of the child by first-class mail [*Welf. & Inst. Code § 294(f)(7)(A)*]. If the residence of the parent becomes known, notice must immediately be served on the parent as set forth in *Welf. & Inst. Code § 294(f)(2), (3), (4), (5),* or *(6)* [*Welf. & Inst. Code § 294(f)(7)(C)*].

In cases in which the parent is missing, notice to the grandparents is more than just an idle act or one done merely for the grandparents' benefit. Grandparent notification "is intended, at least in part, as an attempt to get notice to the missing parent." Consequently, when that required notice is not given, the parent has standing to raise the issue on appeal [*In re Steven H. (2001) 86 Cal. App. 4th 1023, 1032-1033, 103 Cal. Rptr. 2d 649]* .

If the identity of one or both of the parents or alleged parents of the child is unknown or if the name of either or both of the parents or alleged parents is uncertain, that fact must be set forth in the social worker's affidavit. If the court determines there has been due diligence in attempting to identify the unknown parent, the court is unable to identify the "natural or possible natural parent," and no one has appeared claiming to be the "natural parent," the court shall issue an order dispensing with notice [*Welf. & Inst. Code § 294(g)(1)*]. However, if the court finds that notice by publication is likely to lead to actual notice to the unknown parent and the social services agency is recommending termination of parental rights and adoption, the court may order notice by publication. In ordering publication, the court must order the published citation to be directed to either the father or the mother, or both, of the child, and to all persons claiming to be the father or mother of the child, naming and otherwise describing the child [*Welf. & Inst. Code § 294(g)(2)*]. If the court finds there has been due diligence in attempting to identify one or both parents and the social worker is not recommending adoption, no further notice to the unknown parent is required [*Welf. & Inst. Code § 294(g)(3)*].

Service is deemed complete at the time the notice is personally delivered to the party named in the notice, or 10 days after the notice has been placed in the mail, or at the expiration of the time prescribed by the order for publication, as appropriate [*Welf. & Inst. Code § 294(c)(1)*].

Notwithstanding the requirements of *Welf. & Inst. Code § 294(a)*, if counsel of record is present at the hearing when the court sets the selection and implementation hearing, no further notice is required to counsel except as required by *Welf. & Inst. Code § 294(f)(7)(A)* for substitute service for a parent [*Welf. & Inst. Code § 294(j)*].

If the court finds the person entitled to notice has been properly noticed for the *Welf. & Inst. Code § 366.26* hearing and the matter is continued, the full requirements of *Welf. & Inst. Code § 294* for notice are not mandated for each continuance. Instead, so long as the recommendation has not changed, notice may be provided by first class mail to any last known address [*Welf. & Inst. Code § 294(d)*; *In re J.I. (2003) 108 Cal. App. 4th 903, 909-910, 134 Cal. Rptr. 2d 342]* . Previous case law also authorized a written notice from the parent's attorney, or an oral notice if the parent appeared in court [*see In re Phillip F. (2000) 78 Cal. App. 4th 250, 259, 92 Cal. Rptr. 2d 693]* . This should still be sufficient [*see In re J.I. (2003) 108 Cal. App. 4th 903, 909-910, 134 Cal. Rptr. 2d 342]* . If the recommendation has changed, however, notice must be given as set forth in *Welf. & Inst. Code § 294* [*Welf. & Inst. Code § 294(d)*]. If the hearing is continued, the court must state on the record the reasons why good cause exists to continue the hearing [*Welf. & Inst. Code § 294(l)*].

Although detailed here as applicable to dependency proceedings, the provisions of *Welf. & Inst. Code § 294* also apply when a hearing pursuant to *Welf. & Inst. Code § 366.26* is scheduled pursuant to *Welf. & Inst. Code § 727.31* for a child who has been adjudged a ward of the juvenile court [*Welf. & Inst. Code § 294(k)*].

[3] Scope of Hearing Under Welf. & Inst. Code § 366.26

[a] In General

At the selection and implementation hearing, the juvenile court must [*Welf. & Inst. Code § 366.26(b)*]:

- Receive into evidence the social worker's assessment [*see also Welf. & Inst. Code §§ 361.5, 366.21, 366.22*, 366.25].
- Receive into evidence the report of any court-appointed child advocate.
- Indicate that it has read and considered the report(s).
- Receive such other evidence as the parties present.

The court must then do one of the following [*Welf. & Inst. Code § 366.26(b)*]:

- Permanently sever parental rights and order that the child be placed for adoption.
- Without permanently terminating parental rights, identify adoption as the permanent placement goal and order that efforts be made to locate an appropriate adoptive family for the child for an additional period not to exceed 180 days for further efforts to be made to find an adoptive home for the child.
- Without permanently terminating parental rights, appoint a legal guardian for the child and issue letters of guardianship.
- Order that the child be placed in long-term foster care, subject to the regular review of the juvenile court.
- Effective July 1, 2010, without terminating parental rights the court also may order a permanent plan of tribal customary adoption as described in *Welf. & Inst. Code § 366.24* [*Welf. & Inst. Code § 366.26(b)(2)*, eff. July 1, 2010].

Although detailed here as applicable to dependency proceedings, the provisions of *Welf. & Inst. Code § 366.26*, except for *Welf. & Inst. Code § 366.26(j)*, also apply pursuant to *Welf. & Inst. Code § 727.31* for a child who has been adjudged a ward of the juvenile court [*Welf. & Inst. Code § 366.26(m)*].

[b] Return to Parent Is Not an Option

Welf. & Inst. Code § 366.26 does not give the court discretion to consider, as a dispositional option at the hearing, the return of a child to a parent once reunification services have been terminated by court order [*In re Marilyn H. (1993) 5 Cal. 4th 295, 304-305, 19 Cal. Rptr. 2d 544, 851 P.2d 826]* . However, a parent who seeks return of the child or further reunification services because of changed circumstances can petition the court under *Welf. & Inst. Code § 388* for modification of the prior order terminating reunification [*In re Marilyn H. (1993) 5 Cal. 4th 295, 309, 19 Cal. Rptr. 2d 544, 851 P.2d 826]* . The court will first hear and act on the modification petition and then proceed to hearing on the selection and implementation of the alternative permanency plan [*In re Marilyn H. (1993) 5 Cal. 4th 295, 308-309, 19 Cal. Rptr. 2d 544, 851 P.2d 826]* .

Requiring the parent to proceed under *Welf. & Inst. Code § 388* does not deprive the parent of substantive or procedural due process under either the federal or the state constitution [*In re Marilyn H. (1993) 5 Cal. 4th 295, 309, 19 Cal. Rptr. 2d 544, 851 P.2d 826]* . On the contrary, when *Welf. & Inst. Code §§ 366.26* and *388* are viewed together, it is clear that the Legislature has provided the parent with an adequate opportunity to seek further reunification services and has given the juvenile court the chance to consider evidence warranting such services prior to the *Welf. & Inst. Code §*

366.26 hearing without unnecessarily disrupting the focus and efforts of the court to establish permanency for the child [*In re Marilyn H. (1993) 5 Cal. 4th 295, 310, 19 Cal. Rptr. 2d 544, 851 P.2d 826]* . In this way, the dependency statutory scheme as a whole balances both the parent's liberty interest in the care, custody, and companionship of a child and the child's liberty interest in a stable and permanent home [*In re Marilyn H. (1993) 5 Cal. 4th 295, 306-307, 310, 19 Cal. Rptr. 2d 544, 851 P.2d 826]* .

For discussion of *Welf. & Inst. Code § 388* petitions when a *Welf. & Inst. Code § 366.26* hearing has been set, see *§ 328.140[3]*.

[c] Limited Context for Consideration of Changed Circumstances

Changed circumstances also may be considered at the *Welf. & Inst. Code § 366.26* hearing, but only to a limited extent. At the hearing, the question is no longer whether the child should be returned to the parent, an issue already decided in the negative with the permanent plan of return to the parent having been rejected. Instead, the issue is whether the child is adoptable and what the alternative permanency plan should be. Nevertheless, the court may consider evidence of the parent's present circumstances at the time of the hearing, if relevant to resolving whether the child would benefit from continuing the parent-child relationship, which might support a decision pursuant to *Welf. & Inst. Code § 366.26(c)(1)(B)(i)* not to terminate parental rights [*see In re Edward R. (1993) 12 Cal. App. 4th 116, 127, 15 Cal. Rptr. 2d 308* ; *see also In re Autumn H. (1994) 27 Cal. App. 4th 567, 575-576, 32 Cal. Rptr. 2d 535]* .

[4] Appointment of Counsel

Although the parties appearing at a selection and implementation hearing usually have counsel, if a child or parent is not represented the juvenile court must first proceed as follows [*Welf. & Inst. Code § 366.26(f)*]:

- The court must consider whether the interests of the child requires the appointment of counsel. If the court finds that the interests of the child do require this protection, the court must appoint counsel to represent the child, whether or not the child is able to afford counsel. The child must not be present in court unless the child or the child's attorney so requests or the court so orders.

- If a parent appears without counsel and is unable to afford counsel, the court must appoint counsel for the parent, unless this representation is knowingly and intelligently waived. The same counsel may not be appointed to represent both the child and his or her parent. The public defender or private counsel may be appointed as counsel for the parent.

- Private counsel appointed under *Welf. & Inst. Code § 366.26(f)* must receive a reasonable sum for compensation and expenses, and the amount must be determined by the court. The amount must be paid by the real parties in interest, other than the child, in any proportion that the court deems just. However, if the court finds that any of the real parties in interest are unable to afford counsel, the amount must be paid out of the general fund of the county.

The court may continue the proceeding for not more than 30 days as necessary to appoint counsel and to enable counsel to become acquainted with the case [*Welf. & Inst. Code § 366.26(g)*].

[5] Decision Process for the Adoptable Child

[a] Relative Guardianship Cutout

In the past, adoption has been the preferred alternative permanency plan for all dependent children in California who cannot be safely returned to their parents' care. This was because it gave dependent children their best chance at receiving the permanency and stability of a complete commitment from a responsible and loving caregiver [*In re*

Celine R. (2003) 31 Cal. 4th 45, 53, 1 Cal. Rptr. 3d 432, 71 P.3d 787 , quoting In re Jasmine D. (2000) 78 Cal. App. 4th 1339, 1348, 93 Cal. Rptr. 2d 644]. The legislature recognized that although legal guardianship is more stable than foster care and its attendant "foster care drift," it still falls short of the kind of stability and permanency that is best for dependent children [*In re Celine R. (2003) 31 Cal. 4th 45, 53, 1 Cal. Rptr. 3d 432, 71 P.3d 787 , quoting In re Lorenzo C. (1997) 54 Cal. App. 4th 1330, 1344, 63 Cal. Rptr. 2d 562*]. Effective January 1, 2008, however, California has made a major shift in its permanency policy for children. Now if a relative caregiver is unwilling or unable to adopt the child, but is willing and able to provide the child with a stable home through legal guardianship, and removal from the relative's home would be detrimental to the emotional well-being of the child, the court shall not terminate parental rights even though there is clear and convincing evidence the child is likely to be adopted if parental rights are terminated [*Welf. & Inst. Code § 366.26(c)(1)(A)*]. For an Indian child the term "relative" as used in this provision includes "extended family member" as defined by the Indian Child Welfare Act in *25 U.S.C. § 1902(2)* [*Welf. & Inst. Code § 366.26(c)(1)(A)*].

The wisdom of this controversial change in California policy will not be known for many years, but the immediate effect is likely to be an increase in contested hearings and appeals on these issues, a significant decrease in the number of relative adoptions for dependent children, and a gradual increase in the number of failed or troubled dependency guardianships as these children reach adolescence and strain the patience and commitment of their relative guardians. Regardless, while this may be a step backward for California's dependent children in terms of permanency, it brings California more in line with the rest of the nation, which has rarely emphasized relative adoption for dependent children to the degree California has for the last two decades [*see 42 U.S.C. § 675(5)(E)(i)* (termination of parental rights not required if "at the option of the State, the child is being cared for by a relative")].

In apparent anticipation of relative guardianships that may later become troubled, the legislature has added a provision for consideration of reunification services if the child has to be removed from the relative guardian [*Welf. & Inst. Code § 366.3[b*]]. Previously, relative guardians appointed through the dependency process could be provided family maintenance or other voluntary services, but case law held they could not receive reunification services [*In re Jessica C. (2007) 151 Cal. App. 4th 474, 483, 59 Cal. Rptr. 3d 855* ; *In re Carlos E. (2005) 129 Cal. App. 4th 1408, 1420-1421, 29 Cal. Rptr. 3d 317*]. Not all courts, social services agencies, and practitioners agreed with that case law, and reunification services were provided in some cases. Nevertheless, while the new provision does not create a right to reunification services on the part of the guardian, the addition of a provision clearly giving the juvenile court discretion to provide those services is significant.

Under the relative guardian cutout, a mere preference for guardianship by the relative caregiver is not enough to stop the termination of parental rights for an adoptable child. This is consistent with existing case law [*In re Zeth S. (2003) 31 Cal. 4th 396, 410, 2 Cal. Rptr. 3d 683, 73 P.3d 541* ; *In re Rachel M. (2003) 113 Cal. App. 4th 1289, 1298, 7 Cal. Rptr. 3d 153*]. Instead, the relative caregiver must be unwilling or unable to adopt the child due to circumstances that do not include an unwillingness to accept financial or legal responsibility for the child, but be willing and able to provide the child with a stable home through legal guardianship [*Welf. & Inst. Code § 366.26(c)(1)(A)*].

PRACTICE TIP:

Watch for Relatives Being Pressured to Ask for Guardianship. In the past, concern was sometimes voiced that relative caregivers were being pressured by the dependency system and social services agencies to accept adoption or face the possibility of having the child removed [*see In re P.C. (2006) 137 Cal. App. 4th 279, 288, 40 Cal. Rptr. 3d 17* (conc. opn. of McDonald, J.)]. Now the risk is that relative caregivers will be pressured by the parents, parents counsel, or even children's counsel in some cases to say they want guardianship, and are not willing to adopt. As with the other form of pressure, courts should be alert for this. Neither type of pressure is appropriate.

Further, removal from the relative's home must be shown to be detrimental to the emotional well-being of the child [*Welf. & Inst. Code § 366.26(c)(1)(A)*]. Removal from any placement often causes the child's emotional well-being

some short-term trauma. If this short-term trauma was enough to stop the termination of parental rights, it would make the statutory requirement for a showing of detriment unnecessary, since in almost all cases there will be some short-term emotional detriment. Instead, the showing must be of a more substantial and enduring nature. It does not, however, have to rise to the level of a compelling reason outweighing the benefits of adoption and making termination of parental rights detrimental, as it did before this provision was enacted.

The findings that the relative caregiver is unwilling or unable to adopt, is willing and able to provide a stable home through legal guardianship, and that removal from the relative caregiver's home would be detrimental to the child's emotional well-being must be made by a preponderance of the evidence [*Evid. Code § 115*]. In such circumstances, the court shall not terminate parental rights even though there is clear and convincing evidence the child is likely to be adopted if parental rights are terminated [*Welf. & Inst. Code § 366.26(c)(1)(A)*]. This relative cutout is expected to be the subject of frequent litigation at both the trial and appellate levels, and should be watched for future development.

[b] The Likelihood of Adoption

In determining which alternative permanent plan should be ordered for the child, the court must terminate parental rights only if it first determines, by clear and convincing evidence, that it is likely the child will be adopted if parental rights are terminated [*Welf. & Inst. Code § 366.26(c)(1)*; *see Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 249-250, 19 Cal. Rptr. 2d 698, 851 P.2d 1307* ; *In re Amelia S. (1991) 229 Cal. App. 3d 1060, 1065, 280 Cal. Rptr. 503]* . Some attorneys have argued that notwithstanding any evidence of adoptability the court should not make such a finding unless the child is already in an approved adoptive home. In this way, they argue, the court ensures the child does not become a "legal orphan." Some courts have mistakenly accepted this argument and philosophy. The law has never required, however, that the child already be in an adoptive home before the court make a finding by clear and convincing evidence that the child is likely to be adopted if parental rights are terminated.

The legislature has clarified existing law by providing that the fact the child is not yet placed in a preadoptive home or in the home of a relative or foster parent prepared to adopt, "shall not constitute a basis for the court to conclude that it is not likely the child will be adopted" [*Welf. & Inst. Code § 366.26(c)(1)*]. This does not mean the court can take the question of adoptability for granted. Although some may argue that all children are adoptable if enough time and resources are spent seeking an adoptive placement, which may well be true, the reality is that adoptive homes are not always found for children. Thus, while the child need not be in an adoptive placement to support freeing the child, the court must require credible evidence the child is likely to be adopted if parental rights are terminated. This requirement is often met by the opinion of an experienced adoptions worker that an adoptive placement can be found for the child, and an explanation of the reasons for that opinion.

If there are prospective adoptive parents, the parent may introduce or develop through cross-examination evidence of some legal impediment to adoption by those prospective adoptive parents. Where the prospective adoptive parents are the only possibility for adoption, such evidence is relevant to a determination of whether the child is likely to be adopted if parental rights are terminated. However, if the child is generally adoptable the parent is not entitled to ask questions concerning the suitability of the prospective adoptive parents [*In re Carl R. (2005) 128 Cal. App. 4th 1051, 1061, 27 Cal. Rptr. 3d 612* ; *In re Scott M. (1993) 13 Cal. App. 4th 839, 844, 16 Cal. Rptr. 2d 766* (questions irrelevant to issue of whether child is likely to be adopted)]. Further, even when the child will require extensive care for life, it is not an appropriate inquiry to challenge whether particular prospective adoptive parents are suitable based on their specific plans for the special education needs for the child. "Although in order to meet a child's needs, the parents must educate the child (*Ed. Code, § 48200*), there is no authority requiring the court to assess the specifics of how the child will be educated. Because the Agency's obligation is to provide only preliminary information, the court's inquiry should also be preliminary, and need not include an in-depth assessment of specific educational plans" [*In re Carl R. (2005) 128 Cal. App. 4th 1051, 1061, 27 Cal. Rptr. 3d 612]* . Additionally, so long as the assessment provides a synopsis of the child's medical needs and the prospective adoptive parent is fully aware of the child's medical needs and is prepared to meet them, the court is not precluded from finding the child likely to be adopted. As noted by one court,. "Nowhere in

the statutes or case law is certainty of a child's future medical condition required before a court can find adoptability" [*In re Helen W. (2007) 150 Cal. App. 4th 71, 79, 57 Cal. Rptr. 3d 914*]. Nor may the court find a child is not likely to be adopted solely because the child is bonded to foster caregivers the court believes would be too old by the time the child became a teenager to be qualified adoptive parents, when there are other families also available to adopt the child [*In re Josue G. (2003) 106 Cal. App. 4th 725, 733-735, 131 Cal. Rptr. 2d 92* ; *see also In re T.S. (2003) 113 Cal. App. 4th 1323, 1328-1329, 7 Cal. Rptr. 3d 173]* .

If the court finds by clear and convincing evidence that the child is likely to be adopted if parental rights are terminated, the findings pursuant to (1) *Welf. & Inst. Code § 361.5(b), (e)(1)* that reunification services shall not be offered, or (2) pursuant to *Welf. & Inst. Code § 366.21(e)* that (a) the whereabouts of a parent have been unknown for six months or (b) the parent has failed to visit or contact the child for six months or (c) the parent has been convicted of a felony indicating parental unfitness, or (3) pursuant to *Welf. & Inst. Code § 366.21* or *366.22* that a child cannot or should not be returned to his or her parent or guardian within the applicable statutory time period shall then constitute sufficient basis for termination of parental rights, unless the court finds that termination would be detrimental to the child due to the existence of one of six statutory circumstances, or unless the relative guardianship cutout applies [*Welf. & Inst. Code § 366.26(c)(1)*]. The court may not, however, terminate the rights of only one parent, under *Welf. & Inst. Code § 366.26*, unless that parent is the only surviving parent or the rights of the other parent have been terminated under *Fam. Code §§ 200, 7660 et seq., 7800 et seq.*, or *8604-8606*, or the other parent has relinquished custody of the child to the welfare department [*Cal. Rules of Ct., Rule 5.725(a)*]. The court also cannot "stay" the order terminating parental rights [*In re Melvin A. (2000) 82 Cal. App. 4th 1243, 1247-1250, 98 Cal. Rptr. 2d 844]* .

Where clear and convincing evidence establishes that the child is likely to be adopted if parental rights are terminated, the parent or other party, including the agency, seeking to show that termination of parental rights would be detrimental to the child bears the burden of proof for the existence of one of the six statutory circumstances set forth in *Welf. & Inst. Code § 366.26(c)(1)(A)-(E)* [*In re Zachary G. (1999) 77 Cal. App. 4th 799, 809, 92 Cal. Rptr. 2d 20* ; *In re Lorenzo C. (1997) 54 Cal. App. 4th 1330, 1345, 63 Cal. Rptr. 2d 562* ; *In re Cristella C. (1992) 6 Cal. App. 4th 1363, 1373, 8 Cal. Rptr. 2d 342*]. The juvenile court has no sua sponte duty to determine an exception to adoption applies if it is not raised by a party [*In re Rachel M. (2003) 113 Cal. App. 4th 1289, 1295, 7 Cal. Rptr. 3d 153]* . The burden of proof in establishing one of the enumerated circumstances is by a preponderance of the evidence [*Evid. Code § 115*].

[i] Beneficial Relationship Exception

[A] *Autumn H.* Line of Cases

If a parent can prove he or she has maintained regular visitation and contact with the child, and the child would benefit from continuing the relationship to such a degree that terminating parental rights would be detrimental to the child, the court cannot terminate parental rights even though the child is likely to be adopted if parental rights are terminated [*Welf. & Inst. Code § 366.26(c)(1)(B)(i)*]. The standard of review at the appellate court level is the substantial evidence test [*In re Autumn H. (1994) 27 Cal. App. 4th 567, 576-577, 32 Cal. Rptr. 2d 535]* . One court has disagreed with the use of that standard, finding the abuse of discretion standard of review is more appropriate. But that court mischaracterized the determination being made at the *Welf. & Inst. Code § 366.26* hearing as one involving a custody determination [*In re Jasmine D. (2000) 78 Cal. App. 4th 1339, 1351, 93 Cal. Rptr. 2d 644]* . It is not. The court initially must make a finding by clear and convincing evidence the child is likely to be adopted if parental rights are terminated. Second, for the beneficial relationship exception to apply, the court must find termination of parental rights is detrimental to the child because of the beneficial parent-child relationship. Adoptability and detriment findings are more appropriately reviewed utilizing the substantial evidence standard. As recognized by the court in *Jasmine D.*, most courts have "routinely applied the substantial evidence test to the juvenile court's finding under section 366.26, subdivision (c)(1)(A)" [*In re Jasmine D. (2000) 78 Cal. App. 4th 1339, 1351, 93 Cal. Rptr. 2d 644]* . This is the better view.

The beneficial relationship exception has two prongs that must be met. First, the parent must establish that he or she has maintained regular visitation and contact with the child. Second, the parent must establish that the benefit to the child of maintaining the parent-child relationship outweighs the benefit of adoption [*Welf. & Inst. Code § 366.26(c)(1)(B)(i)*]. The first prong is somewhat self-explanatory. The second is not. The seminal case on this second prong of the "beneficial relationship exception" is the case of *In re Autumn H. (1994) 27 Cal. App. 4th 567, 32 Cal. Rptr. 2d 535* .

In *Autumn H.* the court interpreted the beneficial relationship exception to mean "the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." It went on to say, "the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated" [*In re Autumn H. (1994) 27 Cal. App. 4th 567, 575, 32 Cal. Rptr. 2d 535]* . The court explained the beneficial relationship exception has to be examined on a "case-by-case basis," taking into account the many variables that affect a parent/child relationship. These variables may logically include the age of the child, the portion of the child's life spent with the parent, the effect of interaction between parent and child, and the child's needs [*In re Autumn H. (1994) 27 Cal. App. 4th 567, 576, 32 Cal. Rptr. 2d 535]* . The court also noted that interaction between a birth parent and a child "will always confer some incidental benefit to the child." But this was not enough. "The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent" [*In re Autumn H. (1994) 27 Cal. App. 4th 567, 575, 32 Cal. Rptr. 2d 535]* .

Numerous cases have followed the *Autumn H.* standard [*see* *In re Jasmine D. (2000) 78 Cal. App. 4th 1339, 1350, 93 Cal. Rptr. 2d 644* ("a parental relationship is necessary for the exception to apply, not merely a friendly or familiar one"); *In re Zachary G. (1999) 77 Cal. App. 4th 799, 811, 92 Cal. Rptr. 2d 20* ("When the benefits from a stable and permanent home provided by adoption outweigh the benefits from a continued parent/child relationship, the court should order adoption."); *In re Brittany C. (1999) 76 Cal. App. 4th 847, 853, 90 Cal. Rptr. 2d 737* ("To require that the parent need only show some, rather than great, harm at this stage of the proceedings would defeat the purpose of dependency law"); *In re Derek W. (1999) 73 Cal. App. 4th 823, 827, 86 Cal. Rptr. 2d 739* ("While the relationship between [the father] and Derek is pleasant and emotionally significant to Derek, it bears no resemblance to the sort of consistent, daily nurturing that marks a parental relationship"); *In re Casey D. (1999) 70 Cal. App. 4th 38, 51, 82 Cal. Rptr. 2d 426* ("The *Autumn H.* standard reflects the legislative intent that adoption should be ordered unless exceptional circumstances exist"); *In re Amanda D. (1997) 55 Cal. App. 4th 813, 821, 64 Cal. Rptr. 2d 108* ("Beatrice M. and Autumn H. do not enlarge the parent's burden; they simply define it."); *In re Sylvia R. (1997) 55 Cal. App. 4th 559, 563, 64 Cal. Rptr. 2d 93* (mother's relationship with children "was more of a peer than a parent"); *In re Lorenzo C. (1997) 54 Cal. App. 4th 1330, 1341-1342, 63 Cal. Rptr. 2d 562* (balancing process can include balancing child's bond with prospective adoptive parents as compared to bond with father); *In re Elizabeth M. (1997) 52 Cal. App. 4th 318, 324, 60 Cal. Rptr. 2d 557* (at best the mother occupied a "pleasant place" in the child's life); *In re Teneka W. (1995) 37 Cal. App. 4th 721, 728-729, 43 Cal. Rptr. 2d 666* (strength and quality of relationship between children and father who had killed children's mother and had history of violence did not outweigh benefit of adoption); *In re Beatrice M. (1994) 29 Cal. App. 4th 1411, 1418-1420, 35 Cal. Rptr. 2d 162* (frequent and loving contact does not outweigh benefit of adoption when parental role has not been occupied by the parent)].

One case has suggested the Fourth District Court of Appeal, Division One, has "recently characterized the nature of the determination required under section 366.26, [former] subdivision (c)(1)(A) in an even more flexible way" [*In re Jasmine D. (2000) 78 Cal. App. 4th 1339, 1349, 93 Cal. Rptr. 2d 644]* . It did not. What the court in *Jasmine D.* refers to is the case of *Zachary G.*, from which it quotes guidance that each case must be determined on a case-by-case basis, taking into account many variables [*In re Jasmine D. (2000) 78 Cal. App. 4th 1339, 1349-1350, 93 Cal. Rptr. 2d 644* , quoting *In re Zachary G. (1999) 77 Cal. App. 4th 799, 811, 92 Cal. Rptr. 2d 20]* . But the guidance in *Zachary G.* is actually a direct reference and partial quote from *Autumn H.* regarding the need to examine each case on a case-by-case

basis and to take the many variables affecting the child's relationship with the parent into account [*In re Zachary G. (1999) 77 Cal. App. 4th 799, 811, 92 Cal. Rptr. 2d 20* , citing *In re Autumn H. (1994) 27 Cal. App. 4th 567, 576, 32 Cal. Rptr. 2d 535]* . *Zachary G.* does not characterize the beneficial relationship exception in a more flexible way than did *Autumn H.* It merely restated that which *Autumn H.* had already said. The beneficial relationship exception as interpreted in *Autumn H.* was not intended to be a totally rigid exception. It was merely intended to recognize the Legislature's strong preference for adoption if the child cannot be returned to the parent, its desire the standard be high, and the belief that only a strong and positive parent-child relationship from which the child benefits more than the child would benefit from the stability of an adoptive family should be enough to override the preference for adoption. That did not change with *Zachary G.* It was merely restated.

[B] *S.B.* Decision

Many view another case from the Fourth District, Court of Appeal, Division One, as a significant departure from the *Autumn H.* line of cases [*In re S.B. (2008) 164 Cal. App. 4th 289, 79 Cal. Rptr. 3d 449]* . It is, and it is not. In the *S.B.* decision the appellate court overturned a finding that the beneficial parent child relationship exception did not apply. The father had used methamphetamine on and off for 30 years, and had been diagnosed with combat-related posttraumatic stress disorder following his service during the Vietnam War. He suffered recurrent bouts of anger and aggression. His treatment included psychotropic medications, and individual and group therapy. His physical health was also poor, suffering heart and stomach problems and acute degenerative osteoarthritis, which caused severe neck and back pain. Nevertheless, the father had been the child's primary caregiver. The child came into the dependency system at 3 years of age. During her placement with the grandmother, the father had supervised visitation two to three times each week, and the father and child had a consistent and positive relationship. Even during visits, however, the child looked to her grandmother for security, safety, guidance and parenting, not her father. The psychologist who did the relationship study believed the father's relationship with the child vacillated between parental and peer-like, but characterized the relationship as "fairly strong" or "moderate." He opined the detriment a child would suffer if parental rights is terminated is difficult to predict, but that in this case it was his opinion there was potential for the child to suffer harm if she were to lose the parent-child relationship. The social worker opined any harm the child would suffer from termination of parental rights would be outweighed by the benefits of adoption. The juvenile court agreed and terminated parental rights. The father appealed [*In re S.B. (2008) 164 Cal. App. 4th 289, 293-296, 79 Cal. Rptr. 3d 449]* .

The *S.B.* appellate court reversed finding the father had a positive parent-child relationship with his daughter before removal, participated fully in services, and continued his significant relationship with the child during the dependency despite the lack of daily contact. While the child had a parental relationship with her grandmother, the court noted it was self-evident that a child could have a parental relationship with more than one parent, and that here she derived significant benefit from both relationships. Further, the fact any emotional loss might be healed by time and the support of the grandmother did not mean the child would not be greatly harmed by the termination of the father's parental rights [*In re S.B. (2008) 164 Cal. App. 4th 289, 300, 79 Cal. Rptr. 3d 449]* . It noted "Neither section 366.26, subdivision (c)(1)(B)(i), nor *Autumn H.* requires proof that the child has a 'primary attachment' to a parent or that the noncustodial parent has maintained day-to-day contact with the child" [*In re S.B. (2008) 164 Cal. App. 4th 289, 300, 79 Cal. Rptr. 3d 449]* . Further, the court indicated it did not believe a parent should lose his or her parental rights "on the basis of an unenforceable promise of future visitation by the child's prospective adoptive parents" [*In re S.B. (2008) 164 Cal. App. 4th 289, 300, 79 Cal. Rptr. 3d 449]* . It thus reversed the termination of parental rights.

What is unusual about the *S.B.* decision is there was significant evidence on both sides of the issue, which under the substantial evidence standard of review would normally result in the termination of parental rights being affirmed. Yet the appellate court found "the only reasonable inference" was the child "would be greatly harmed by the loss of her significant, positive relationship" with her father and reversed [*In re S.B. (2008) 164 Cal. App. 4th 289, 301, 79 Cal. Rptr. 3d 449]* . Nevertheless, the decision should be viewed less as a departure from the *Autumn H.* line of cases and more the result of a very unique factual situation. Thus, although the individual holdings within the analysis are both

clarifying and significant, the ultimate *S.B.* decision will be factually distinguishable in most cases. Dependency practitioners and courts must be very familiar with both the facts and the analysis of this case and be prepared to address the decision any time the beneficial parent-child relationship exception is raised. How the appellate courts will view this decision remains to be seen, and this is an area that should be watched for further developments.

PRACTICE TIP:

Arguing the *S.B* . Decision. Until further appellate clarification is available, parents' attorneys should argue the *S.B.* decision substantially weakens the standard set by the *Autumn H.* line of cases and results in a far more flexible test for application of the beneficial parent-child relationship exception. Agency attorneys should argue *S.B.* is not a change in the standard, only a clarification of some of the individual points of the analysis, and that it is factually distinguishable from the individual case before the court. Children's counsel should normally agree with the agency approach on the law, but look to the individual circumstances of their client to determine what is best for the child and whether to argue the *S.B.* decision is distinguishable from the case being argued.

[C] Proving the Beneficial Relationship Exception Applies

Many have contended *Autumn H.* set a standard that was difficult, if not impossible, to meet, especially for parents who are not providing daily care for the child. One appellate court has even suggested the beneficial relationship exception to the termination of parental rights "may be the most unsuccessfully litigated issue in the history of law" [*In re Eileen A. (2000) 84 Cal. App. 4th 1248, 1255, n. 5, 101 Cal. Rptr. 2d 548]* . As already shown in the discussion of the *S.B.* decision, the exception can be proven [*In re S.B. (2008) 164 Cal. App. 4th 289, 300-301, 79 Cal. Rptr. 3d 449]* . Further, in *Casey D.* the Fourth District Court of Appeal, Division One, reviewed its decision in *Autumn H.* and found "the *Autumn H.* language, while setting the hurdle high, does not set an impossible standard nor mandate day-to-day contact." It recognized the required "showing will be difficult to make in a situation, such as the one here, where the parents have essentially never had custody of the child nor advanced beyond supervised visitation." But it noted that difficulty is caused by the factual circumstances of the case in which the parents failed to reunify and to establish a parental relationship, rather than just a "caretaker or friendly visitor relationship with the child." It also noted a strong and beneficial relationship might exist such that termination of parental rights would be detrimental to the child despite the absence of day-to-day contact and interaction, "particularly in the case of an older child" [*In re Casey D. (1999) 70 Cal. App. 4th 38, 51, 82 Cal. Rptr. 2d 426*)]. That the burden can be met on appeal has been shown in another decision from the Fourth District Court of Appeal, Division One. In the *Jerome D.* case, the juvenile court found the beneficial relationship exception did not apply and terminated parental rights. At the time of the termination of rights the child was nine years old. He had lived with his mother for the first six-and-one-half years of his life, and had expressed a desire to live with her again. The mother was having unsupervised overnight visits with the child. A psychologist opined the child and mother had a strong and well developed parent-child relationship. Under the facts of that case, the appellate court found there was "insufficient evidence to support the determination that Mother did not meet her burden of showing a beneficial relationship" [*In re Jerome D. (2000) 84 Cal. App. 4th 1200, 1207, 101 Cal. Rptr. 2d 449]* .

Other examples demonstrate the ability of a parent to meet the burden to establish the beneficial relationship exception. In the *Brandon C.* case the juvenile court determined the parent had met the burden of establishing a beneficial relationship that made the termination of parental rights detrimental. The court of appeal upheld that determination [*In re Brandon C. (1999) 71 Cal. App. 4th 1530, 1533-1537, 84 Cal. Rptr. 2d 505]* . In *Brandon C.* the children were being cared for by a grandmother who preferred to adopt, although she intended the children to continue having a relationship with their mother. The mother had visited the children, had a good relationship with them, and testified she had wanted additional visitation, but it had not been afforded her. The social services agency provided little evidence as to the nature of the parental relationship with the children. Under these circumstances, many courts following the *Autumn H.* line of cases would have terminated parental rights. But the juvenile court in *Brandon C.* found the beneficial relationship exception applied, denied the request to terminate parental rights, and ordered a legal guardianship. Citing *Autumn H.* and *Beatrice M.* with apparent approval, the court of appeal applied the substantial evidence rule and upheld

the order for guardianship [*In re Brandon C. (1999) 71 Cal. App. 4th 1530, 1533-1537, 84 Cal. Rptr. 2d 505]* .

One difficulty with the *Brandon C.* decision exists, however. The court stated that the "benefit of continued contact between mother and children must be considered in the context of the very limited visitation mother was permitted to have" [*In re Brandon C. (1999) 71 Cal. App. 4th 1530, 1537-1538, 84 Cal. Rptr. 2d 505]* . This changes the focus of the beneficial relationship determination from the child to the parent and to this limited extent the *Brandon C.* decision must be considered incorrect. Nevertheless, it is a decision that should be looked to by all who oppose the termination of parental rights through the utilization of the beneficial relationship exception found in *Welf. & Inst. Code § 366.26(c)(1)(B)(i)*, because it demonstrates that in an appropriate case, the circumstances set forth in the beneficial relationship exception can be met to avoid the termination of parental rights.

The *Jasmine D.* case is also of assistance in arguing that the beneficial relationship exception should apply to prevent the termination of parental rights. In that case the court dealt with a mother's contention that *Autumn H.* and *Beatrice M.* applied an interpretation of the beneficial relationship exception that was overly broad. The *Jasmine D.* court disagreed [*In re Jasmine D. (2000) 78 Cal. App. 4th 1339, 1347, 93 Cal. Rptr. 2d 644]* . But it did note its belief that a "more flexible" application of *Autumn H.* was "most appropriate." In so doing, it stated that "Parent child relationships do not necessarily conform to a particular pattern. The juvenile court should be concerned not with finding a certain type of parental relationship but with the interests of the particular child or children before it, and whether there is a compelling reason not to terminate parental rights" [*In re Jasmine D. (2000) 78 Cal. App. 4th 1339, 1350, 93 Cal. Rptr. 2d 644]* . The court did go on to express its agreement the relationship must be parental in nature, "not merely a friendly or familiar one" [*In re Jasmine D. (2000) 78 Cal. App. 4th 1339, 1349-1350, 93 Cal. Rptr. 2d 644]* . And obviously only the existence of one of the statutory exceptions to the termination of parental rights can constitute a "compelling reason" not to terminate parental rights [*Welf. & Inst. Code § 366.26(c)(1)(B), (c)(4)*]. But the *Jasmine D.* language is of assistance to those arguing against the termination of parental rights in a particular case.

Finally, the case of *Amber M.* is also of assistance in showing the beneficial parent-child relationship exception to adoption can be established. In that case the trial court found the exception did not apply, but the appellate court found the mother had established the exception applied. There it found a common theme in the evidence from the psychologist who did the relationship study, the therapists, and the CASA was there was a beneficial parent-child relationship that outweighed the benefits of adoption. Only the social worker disagreed. Thus, the appellate court reversed the termination of parental rights [*In re Amber M. (2002) 103 Cal. App. 4th 681, 689-691, 127 Cal. Rptr. 2d 19]* .

The *S.B*, *Amber M.*, *Jerome D.* and *Brandon C.* cases, together with the dicta in *Jasmine D.* serve as a reminder. Although adoption is the preferred permanent plan if a child cannot be returned safely to the care of the parent, there are cases in which adoption is not appropriate due to one of the statutory exceptions that make it detrimental to the child to terminate parental rights. The burden on the parents is, and should be, high. But it should not be impossible to meet. Nor should juvenile courts, social services agencies, or child advocates assume that adoption is always appropriate or that the parents will always fail to meet their burden. Instead, all must approach their assessment of the beneficial relationship exception in a balanced fashion. As stated by the court in *Autumn H.*, every case must be "examined on a case-by-case basis" with the many variables that affect a child's relationship with the parent being taken into consideration [*In re Autumn H. (1994) 27 Cal. App. 4th 567, 576, 32 Cal. Rptr. 2d 535]* . In most cases, adoption is both appropriate and mandated. Sometimes, however, those variables will mean the statutory exception should apply and a plan other than adoption should be selected.

PRACTICE TIP:

Postadoption Contact Agreements Are Not At-Issue in a Selection and Implementation Hearing. Voluntary postadoption contact agreements are "applicable and available" to all dependent children meeting the requirements of *Fam. Code § 8616.5*, if such agreements are voluntarily entered into [*Welf. & Inst. Code § 366.26(a)*]. Practitioners and courts should note, however, that such agreements are considered by the court at the time of the hearing on the petition for adoption. They are not at issue in a

hearing pursuant to *Welf. & Inst. Code § 366.26* [*see In re Kimberly S. (1999) 71 Cal. App. 4th 405, 411-412, 83 Cal. Rptr. 2d 740* ; *In re Zachary D. (1999) 70 Cal. App. 4th 1392, 83 Cal. Rptr. 2d 407]* . Moreover, it would not be wise to consider such agreements as part of the balancing process under *Welf. & Inst. Code § 366.26(c)(1)(B)(i)*, since the parties to a postadoption contact agreement entered into prior to the selection and implementation hearing may change their minds prior to the hearing on the adoption petition, the court hearing the petition for adoption may find that at that later time the agreement is not in the best interest of the child or not voluntarily entered into, or the agreement may never be lived up to or enforced [*see In re David H. (1995) 33 Cal. App. 4th 368, 380-385, 39 Cal. Rptr. 2d 313* (claim, among others, that fraudulent representation adoptive parents would allow postadoption contact induced parents to submit at selection and implementation hearing not grounds to vacate termination of parental rights; there are no guarantees); *Welf. & Inst. Code § 366.26(a)* (such agreements available to all dependent children "if the post adoption contact agreement has been entered into voluntarily"); *Fam. Code § 8616.5(b)* (court hearing adoption must find postadoption contact agreement was voluntarily entered into and in best interests of the child)]. Where parents and children have a beneficial relationship that outweighs the benefits of adoption, California law calls for a permanent plan other than adoption [*Welf. & Inst. Code § 366.26(c)(1)(B)(i)*]. If parents with a beneficial relationship truly want the adoption to take place, they can relinquish the child [*Welf. & Inst. Code § 361(b)*; *Fam. Code § 8700*]. Indeed, as part of the efforts toward concurrent permanency planning, the possibility of a postadoption contact agreement may already have been explored with the birth and adoptive parents. Nevertheless, they are not at issue in the *Welf. & Inst. Code § 366.26* hearing. For discussion of postadoption contact agreements, see *§ 328.198[6]*.

[ii] Child 12 Years or Older Objecting

If it is established that the child is 12 years of age or older and objects to the termination of parental rights, the exception found in *Welf. & Inst. Code § 366.26(c)(1)(B)(ii)* may apply. A finding the child 12 years of age or older objection to the termination of parental rights is a factual finding to be made by the juvenile court and reviewed by the appellate court using the substantial evidence standard. This is not a "child veto" exception, however. If the juvenile court finds the child 12 years of age or older objects to the termination of parental rights, it must consider that objection in light of the totality of the circumstances and determine whether the objection to adoption outweighs the benefits of adoption to such a degree that termination of parental rights would be detrimental to the child [*Welf. & Inst. Code § 366.26(c)(1)(B)*]. This balancing is done in much the same way that it is done under *Welf. & Inst. Code § 366.26(c)(1)(B)(i)* or *Welf. & Inst. Code § 366.26(c)(1)(B)(v)* [*see In re Autumn H. (1994) 27 Cal. App. 4th 567, 575-576, 32 Cal. Rptr. 2d 535* ; *In re L.Y.L. (2002) 101 Cal. App. 4th 942, 952-953, 124 Cal. Rptr. 2d 688]* .

Admittedly, if the child 12 years of age or older clearly objects to termination of parental rights, it will almost always be detrimental to the child to terminate such rights to avoid making the child a legal orphan [*Fam. Code § 8602* (child over 12 years of age must consent to adoption)]. But the child may want to be adopted or willing to be adopted yet have mixed feelings or reservations, sending an unclear or mixed message. This is common, since it is frequently very difficult for children to make such decisions [*In re Leo M. (1993) 19 Cal. App. 4th 1583, 1593, 24 Cal. Rptr. 2d 253]* . In such cases, the juvenile court's weighing of any possible objection voiced by the child against the benefits of adoption may be critical to relieving the child of the emotional burden of agreeing to the termination of parental rights, while still ensuring the child receives the needed stability and permanence of adoption.

The juvenile court's balancing of the child's objection against the benefits of adoption is not inconsistent with the provisions of *Fam. Code § 8602*, which provides "The consent of a child, of over the age of 12 years, is necessary to the child's adoption." A child can consent to adoption and yet have reservations about it. A child can consent to adoption and still have some objections. At the adoption it is the child 12 years of age or older who balances any reservations or objections he or she has and decides whether to consent to the adoption [*Fam. Code § 8602*]. At the *Welf. & Inst. Code § 366.26* hearing it is the juvenile court that does the balancing and decides whether, in light of any objection by the

child, the termination of parental rights would be detrimental to the child.

Should the child change his or her mind after the termination of parental rights and decide not to consent to the adoption, the ability exists to set aside the termination of parental rights if it is best for the child [*Welf. & Inst. Code § 366.26(i)(2)*].

[iii] Child in a Residential Facility

If it is established the child is placed in a residential treatment facility, adoption is unlikely or undesirable, and continuation of parental rights will not prevent finding the child a permanent family placement if the parents cannot resume custody when the residential care is no longer needed, the court cannot terminate parental rights if on balance with the benefits and stability of adoption the court finds that terminating parental rights would be detrimental to the child [*Welf. & Inst. Code § 366.26(c)(1)(B)(iii)*]. If the child is "unlikely" to be adopted, the court will never reach the possibility of this exception applying, since the court could not have found it likely the child would be adopted within a reasonable amount of time as required before even considering the exceptions [*Welf. & Inst. Code § 366.26(c)*]. Further, what the statute means by adoption being "undesirable" is unclear. This exception is the least utilized exception, if indeed it has ever been utilized. Nevertheless, it is one of the potential statutory exceptions to the termination of parental rights [*Welf. & Inst. Code § 366.26(c)(1)(B)(iii)*].

[iv] Limited Exceptional Circumstances Exception

If it is established that the child is living with a foster parent or Indian custodian who is unable or unwilling to adopt the child due to exceptional circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment, and the court finds removal of the child from the physical custody of his or her foster parent or Indian custodian would be detrimental to the emotional well-being of the child, parental rights cannot be terminated if on balance with the benefits and stability of adoption the court finds that terminating parental rights would be detrimental to the child [*Welf. & Inst. Code § 366.*26(c)(1)(B)(iv]. This exception does not apply, however, to a child who is either under 6 years of age or a member of a sibling group, with a sibling under the age of 6, and the sibling group is or should be permanently placed together [*Welf. & Inst. Code § 366.26(c)(1)(B)(v)*].

This exception was seldom used and had little explanatory case law when it included relative caregivers. It is anticipated that it will now be used even more infrequently. Nevertheless, it is clear from prior case law dealing with relatives that the exception found in *Welf. & Inst. Code § 366.26(c)(1)(B)(iv)* does not apply merely because a foster parent or Indian custodian prefers a lesser plan than adoption [*In re Zeth S. (2003) 31 Cal. 4th 396, 410, 2 Cal. Rptr. 3d 683, 73 P.3d 541* ; *In re Rachel M. (2003) 113 Cal. App. 4th 1289, 1298, 7 Cal. Rptr. 3d 153*]. Further, neither guardianship nor some other planned permanent living arrangement, such as long-term foster care, are irrevocable. Thus they fall short of providing the child with the kind stability and permanence the Legislature intended [*In re Celine R. (2003) 31 Cal. 4th 45, 53, 1 Cal. Rptr. 3d 432, 71 P.3d 787 , quoting In re Jasmine D. (2000) 78 Cal. App. 4th 1339, 1348, 93 Cal. Rptr. 2d 644 , and In re Lorenzo C. (1997) 54 Cal. App. 4th 1330, 1344, 63 Cal. Rptr. 2d 562*]. This preference for adoption is especially strong since the implementation of the federal Adoption and Safe Families Act of 1997 [*Welf. & Inst. Code § 16131*]. Thus, it will be the rare case in which this exception to the termination of parental rights and adoption applies.

PRACTICE TIP:

Relative Caregivers Are No Longer Included. For years this exception to the termination of parental rights included relative caregivers and an Indian child's extended family members under Welf. & Inst. Code former § 366.26(c)(1)(D). Effective January 1, 2008, those caregivers are not included in this exception. Instead, a separate relative guardianship cutout has been added as *Welf. & Inst. Code § 366.26(c)(1)(A)*. For an explanation of that relative guardianship cutout see § 2.171[5][a].

[v] Substantial Interference with Sibling Relationship Exception

If it is established that termination of parental rights would be detrimental to the child because it would create substantial interference with a dependent child's sibling relationships and the maintenance of that sibling relationship outweighs the benefits of adoption, parental rights are not to be terminated. In reaching this determination, the court is to take into consideration the nature and extent of the sibling relationship, including but not limited to, whether the children were raised in the same home, whether they shared significant common experiences, whether there is an existing close and strong bond, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared with the benefit of legal permanence and stability through adoption [*Welf. & Inst. Code § 366.26(c)(1)(B)(v)*]. This section was enacted as part of a broader statutory scheme intended to protect and maintain a dependent child's relationships with his or her siblings [*In re Valerie A. (2007) 152 Cal. App. 4th 987, 997-998, 61 Cal. Rptr. 3d 403]* .

This exception effective January 1, 2002, was not made retroactive. It only applies in cases in which termination of parental right is being considered on or after January 1, 2002 [*In re Raymond E. (2002) 97 Cal. App. 4th 613, 616-618, 118 Cal. Rptr. 2d 376* ; *In re Daniel H. (2002) 99 Cal. App. 4th 804, 812, 121 Cal. Rptr. 2d 475]* . The exception is based on the subjective belief of some child advocates that in some cases sibling relationships may be more important to dependent children than the stability of adoption. Numerous statutory provisions already exist to help develop and maintain sibling relationships for dependent children [*see, e.g., Welf. & Inst. Code §§ 306.5, 362.1(a)(2), 388(b), 16002*]. There is also a provision for postadoption sibling contact agreements [*Welf. & Inst. Code § 366.29*]. Thus, the necessity for and wisdom of this new exception that can result in children being denied the stability and love of an adoptive home is questionable. Nevertheless, it is now the law. Whether psychological evidence can establish the necessity for denying the child the stability of adoption in favor of posing fewer restrictions on a sibling relationship will have to be determined on a case-by-case basis. It will be the rare case in which this exception actually applies. Substantial litigation at both the trial and appellate levels is anticipated, however.

PRACTICE TIP:

A Tool for Parents. The "substantial interference with sibling relationship" exception to the termination of parental rights was intended to help children. It holds the potential, however, to be a stronger and more frequently used tool for parents to try to prevent termination of parental rights. Experienced child advocates know the substantial benefits to children brought by the love of an adoptive family and the stability of adoption. Thus, it should be the rare case in which child advocates argue this exception applies. But under this exception parents can argue that parental rights should not be terminated because it will cause substantial interference with a sibling relationship, even though the parent did little to work toward reunification or to maintain a beneficial parent-child relationship. This gives parents a significant new tool to argue against termination of parental rights in an appropriate case.

The substantial interference with a sibling relationship exception to the termination of parental rights creates a "heavy burden for the party opposing adoption" [*In re Daniel H. (2002) 99 Cal. App. 4th 804, 813, 121 Cal. Rptr. 2d 475]* . The exception only applies when the juvenile court determines "there is a 'compelling reason' for concluding that the termination of parental rights would be 'detrimental' to the child due to 'substantial interference' with a sibling relationship" [*In re Daniel H. (2002) 99 Cal. App. 4th 804, 813, 121 Cal. Rptr. 2d 475* ; *see also In re Celine R. (2003) 31 Cal. 4th 45, 61, 1 Cal. Rptr. 3d 432, 71 P.3d 787* , citing *Daniel H.* with approval]. Adoption is still the "norm" and substantial interference with a sibling exception to the termination of parental rights must be considered in view of the preference for adoption when reunification efforts fail [*In re Celine R. (2003) 31 Cal. 4th 45, 53, 1 Cal. Rptr. 3d 432, 71 P.3d 787]* . The party opposing adoption must first show that termination of parental rights would substantially interfere with the sibling relationship" [*In re L.Y.L. (2002) 101 Cal. App. 4th 942, 951-952, 124 Cal. Rptr. 2d 688]* . To do this, the existence of a "significant sibling relationship" must be shown, "the severance of which would be detrimental to the child." As noted by one court, "Many siblings have a relationship with each other, but would not suffer detriment if that relationship ended. If the relationship is not sufficiently significant to cause detriment

on termination, there is no substantial interference with that relationship" [*In re L.Y.L. (2002) 101 Cal. App. 4th 942, 952, 124 Cal. Rptr. 2d 688* ; *see also* *In re Megan S. (2002) 104 Cal. App. 4th 247, 252, 127 Cal. Rptr. 2d 876* (although siblings were bonded, there was no evidence severing the relationship would be detrimental)]. The *L.Y.L.* decision suggested that mere sadness would not be enough to show substantial detriment to the child [*In re L.Y.L. (2002) 101 Cal. App. 4th 942, 952, 124 Cal. Rptr. 2d 688]* . But another court noted that sometimes all a child can express is sadness, yet courts should be open to the possibility that such sadness may be significant to the child and consider any evidence demonstrating whether sadness will result in substantial detriment to the child [*In re Jacob S. (2002) 104 Cal. App. 4th 1011, 1017, 128 Cal. Rptr. 2d 654]* . Indeed, it noted that in some cases sibling relationship studies may be indispensable in determining whether the substantial interference with a sibling relationship exception applies in a given case [*In re Jacob S. (2002) 104 Cal. App. 4th 1011, 1018, 128 Cal. Rptr. 2d 654]* .

If a "sibling relationship exists that is so strong that its severance would cause the child detriment, the court then weighs the benefit to the child of continuing the sibling relationship against the benefit to the child adoption would provide" [*In re L.Y.L. (2002) 101 Cal. App. 4th 942, 952-953, 124 Cal. Rptr. 2d 688* ; *see also* *In re Celine R. (2003) 31 Cal. 4th 45, 61, 1 Cal. Rptr. 3d 432, 71 P.3d 787* , *citing L.Y.L.* with approval]. The language of the substantial interference with a sibling exception to the termination of parental rights is "strikingly similar" to the language of *In re Autumn H. (1994) 27 Cal. App. 4th 567, 575, 32 Cal. Rptr. 2d 535* [*In re L.Y.L. (2002) 101 Cal. App. 4th 942, 951, 124 Cal. Rptr. 2d 688]* . As with the beneficial parent-child exception, the juvenile court "must balance the beneficial interest of the child in maintaining the sibling relationship, which might leave the child in a tenuous guardianship or foster home placement, against the sense of security and belonging adoption and a new home would confer" [*In re L.Y.L. (2002) 101 Cal. App. 4th 942, 951, 124 Cal. Rptr. 2d 688* , *citing* *In re Autumn H. (1994) 27 Cal. App. 4th 567, 575, 32 Cal. Rptr. 2d 535]* . Thus, the burden is a high one. Nevertheless, the requirements for the two exceptions are not identical. Thus, as is clear from the statutory language, regular visitation and contact are required for the beneficial parent-child relationship exception, but not for the substantial interference with a sibling relationship exception [*In re Valerie A. (2007) 152 Cal. App. 4th 987, 1007-1009, 61 Cal. Rptr. 3d 403]*

The enactment of the substantial interference with sibling relationship exception raises a number of questions that are not answered by the statutory language. Many of these have already been answered by the appellate courts.

- Can this exception be raised by the parents at the trial court level? Yes. A determination of any of the five exceptions to the termination of parental rights "directly affects the parent's interest in the relationship with the minor; the parent is an aggrieved party in that determination." Thus, the parent has standing to assert the sibling exception found in *Welf. & Inst. Code § 366.26(c)(1)(B)(v)* [*In re L.Y.L. (2002) 101 Cal. App. 4th 942, 951, 124 Cal. Rptr. 2d 688* ; *see also* *In re Jacob S. (2002) 104 Cal. App. 4th 1011, 1016, 128 Cal. Rptr. 2d 654* ; *In re Erik P. (2002) 104 Cal. App. 4th 395, 402, 127 Cal. Rptr. 2d 922* ; *In re Daniel H. (2002) 99 Cal. App. 4th 804, 811-812, 121 Cal. Rptr. 2d 475]* . The parent also has standing to request a guardian ad litem be appointed for a nondependent sibling adopted by a relative so the nondependent sibling could appear through the guardian ad litem regarding the substantial interference with a sibling relationship exception, although the parent would not have standing to appeal the denial of that request [*In re Valerie A. (2007) 152 Cal. App. 4th 987, 1000, 61 Cal. Rptr. 3d 403]* .

- Can this exception be raised by a sibling at the trial court level? That depends. Even dependent siblings are not parties to another sibling's dependency case, despite the fact each of their cases may be heard at the same time, and non-dependent siblings certainly are not parties. Thus, there is no automatic right for siblings to participate in the hearing at which parental rights may be terminated [*In re Hector A. (2005) 125 Cal. App. 4th 783, 791, 23 Cal. Rptr. 3d 104* , citing Seiser & Kumli, California Juvenile Courts Practice and Procedure § 2.171[5][a] (Matthew Bender)]. To have standing to raise the sibling exception, a sibling must first establish a right to be involved in the *Welf. & Inst. Code § 366.26* hearing at which termination of parental rights is being considered. This is done through a petition under *Welf. & Inst. Code § 388(b)*, which allows a sibling to file a petition seeking recognition of the sibling

relationship and asking for "consideration" as the permanent plan for the dependent child [*Welf. & Inst. Code §§ 388(b), 16002(d)*; *In re Hector A. (2005) 125 Cal. App. 4th 783, 791-793, 23 Cal. Rptr. 3d 104]* . The standard is the best interest of the dependent child for whom adoption is being sought [*Welf. & Inst. Code § 388(d)*]. Thus, for a sibling to have standing to assert the sibling exception should apply to prevent the termination of parental rights of the dependent child whose case is before the court, the sibling must first prove under *Welf. & Inst. Code § 388(b), (d)* that allowing the sibling to litigate the sibling exception is in the best interest of the dependent child that is before the court. This does not mean the petition must allege the sibling exception should apply, since that is to be determined at the *Welf. & Inst. Code § 366.26* hearing itself. Instead, a *Welf. & Inst. Code § 388(b)* petition for sibling standing to litigate the exception need only show there is a sufficiently strong and positive relationship between the siblings that it is in the adoptive child's best interest to grant the sibling standing and to have the juvenile court fully consider the sibling exception under *Welf. & Inst. Code § 366.26(c)(1)(E)* [*In re Hector A. (2005) 125 Cal. App. 4th 783, 793-795, 23 Cal. Rptr. 3d 104]* . If that standing is granted, the sibling then bears the burden of showing the exception should be found to exist.

- Is the right to raise the exception at the appellate level waived if the issue is not raised at the trial court level? Yes [*In re Erik P. (2002) 104 Cal. App. 4th 395, 402-403, 127 Cal. Rptr. 2d 922]* .

- Which child is the focus of the sibling exception? The focus is on the child for whom adoption is being considered. As noted by one appellate court, "the language focuses exclusively on the benefits and burdens to the adoptive child, not the other siblings. The court is specifically directed to consider the best interests of the adoptive child, not the siblings, and must ultimately determine whether adoption would be detrimental to the adoptive child, not the siblings" [*In re Daniel H. (2002) 99 Cal. App. 4th 804, 813, 121 Cal. Rptr. 2d 475]* . The California Supreme Court has agreed, holding "the sibling relationship exception permits the trial court to consider possible detriment to the child being considered for adoption, but not a sibling of that child" [*In re Celine R. (2003) 31 Cal. 4th 45, 54, 1 Cal. Rptr. 3d 432, 71 P.3d 787]* . This does not mean the effect on the sibling who is not being considered for adoption will always be irrelevant. The non-adoptive sibling's views may be relevant as indirect evidence of the effect the adoption might have on the adoptive child, and the non-adoptive sibling's emotional resistance towards the proposed adoption may also be relevant to the interests of the adoptive child. The ultimate question, however, is whether termination of parental rights and adoption would be detrimental to the adoptive child, not the sibling [*In re Celine R. (2003) 31 Cal. 4th 45, 55, 1 Cal. Rptr. 3d 432, 71 P.3d 787]* .

- Can the exception apply when the relationship is with a biological sibling who has already been adopted by a different family? There is a split of authority on this issue. One court has held it cannot [*In re Erik P. (2002) 104 Cal. App. 4th 395, 403, 127 Cal. Rptr. 2d 922]* . In doing so, it recognized that termination of parental rights could not affect the dependent child's relationship with the previously adopted sibling since the biological parent no longer had a legal relationship with the adopted child. Thus, the termination of parental rights could not be detrimental to the dependent child under this exception [*In re Erik P. (2002) 104 Cal. App. 4th 395, 403, 127 Cal. Rptr. 2d 922]* . This is consistent with the fact an adopted child gets a new birth certificate giving the child new parents and relatives, and severing the legal relationship with his or her biological family [*Fam. Code §§ 8512, 8614, 8615, 8616*]. Nevertheless, one court has held the substantial interference with a sibling relationship exception can apply because of the relationship between a dependent child and an already adopted sibling [*In re Valerie A. (2006) 139 Cal. App. 4th 1519, 1523-1524, 43 Cal. Rptr. 3d 734]* . In so doing, it held that none of the authorities it examined indicated a sibling relationship ended at adoption [*In re Valerie A. (2006) 139 Cal. App. 4th 1519, 1523, 43 Cal. Rptr. 3d 734]* . While this may be true emotionally, and efforts are to be made to maintain and facilitate post-adoption sibling contact when appropriate, the legal relationship does change in light of the fact adoption gives the child a different birth certificate, parents,

and family. Further, the *Valerie A.* decision does not even mention that *Erik P.* came to a different conclusion. The better view is that of *Erik P.*, but regardless, it will be the rare case in which a dependent child has a sufficiently significant relationship with a previously adopted sibling for the exception to apply. This is an area to be watched for further developments.

● At what point does a conflict of interest between dependent siblings exist that requires separate counsel to be appointed for the dependent children so that different positions can be advocated? An attorney who represents a sibling group only needs to be relieved and separate counsel appointed if there is an actual conflict of interest [*Carroll v. Superior Court (2002) 101 Cal. App. 4th 1423, 1426-1431, 124 Cal. Rptr. 2d 891* (conflict existed in case of seven dependent siblings in multiple placements with varying degrees of attachment; recommendation was adoption for three of the siblings, legal guardianship for three of the siblings, and a continuance for the seventh for further assessment); *see also In re Celine R. (2003) 31 Cal. 4th 45, 58, 1 Cal. Rptr. 3d 432, 71 P.3d 787* , citing *Carroll* with approval]. This is an area to be watched for further development, however. As noted by the California Supreme Court, now that it is clear the substantial interference with a sibling exception only applies to the adoptive child, it is not clear how likely it is an actual conflict will arise or how the exception as interpreted by the Court will affect determinations of actual conflict [*In re Celine R. (2003) 31 Cal. 4th 45, 58, 1 Cal. Rptr. 3d 432, 71 P.3d 787]* . If an attorney believes the court is erroneously requiring the attorney to represent more than one child, the attorney can consider taking a traditional writ for extraordinary relief, rather than wait to have the issue raised on appeal. The attorney should only do so, however, if the attorney believes it is in his or her clients' best interest, not simply because the attorney believes the court is in error. As is clear throughout the dependency process, delay may cause children harm [*In re Celine R. (2003) 31 Cal. 4th 45, 60, 1 Cal. Rptr. 3d 432, 71 P.3d 787]* . Any error in this regard will be reviewed using the simple harmless error test [*In re Celine R. (2003) 31 Cal. 4th 45, 59, 1 Cal. Rptr. 3d 432, 71 P.3d 787]* . For further discussion of conflict issues regarding children's counsel, see *§ 328.62[3][b]*.

● Does the social services agency have a duty to provide detailed information on any sibling relationships and to establish whether the substantial interference with a sibling relationship applies? No. It is only required to provide a "review" of the amount and nature of any contact the child has had with extended family members, including siblings [*Welf. & Inst. Code §§ 361.5(g)(2), 366.21(i)(2), 366.22(b)(2)*]. It is not required to provide a detailed account of that contact [*see In re Lorenzo C. (1997) 54 Cal. App. 4th 1330, 1336-1338, 63 Cal. Rptr. 2d 562* (social worker's assessment not required to provide detailed account of parent-child contact)]. Nor is it required to establish whether the sibling exception applies, or whether the child would suffer detriment if separated from the sibling, unless it is advocating for the exception to apply [*In re Megan S. (2002) 104 Cal. App. 4th 247, 252, 127 Cal. Rptr. 2d 876]* . The strong preference for a child likely to be adopted is for an alternative permanent plan of adoption [*In re Zachary G. (1999) 77 Cal. App. 4th 799, 809, 92 Cal. Rptr. 2d 20]* . In most cases the sibling exception will not apply. There is no requirement in the statutes for the social services agency to prove the absence of an exception before parental rights can be terminated [*In re Cristella C. (1992) 6 Cal. App. 4th 1363, 1372-1373, 8 Cal. Rptr. 2d 342]* . Unless the social services agency is advocating for the exception to apply, to require it to establish whether the exception applies in each case would require a substantial increase in the assessment requirements and workload for the social worker, something the legislature did not mandate. As an arm of the court, it must objectively provide the court with the information required by the statute. As a party and an arm of the state, however, it must be free to advocate for the position it determines is best for the child. If that is adoption, to require it to establish the application of the exception would be inconsistent with its role. Instead, the burden to prove the sibling exception applies is on whichever party seeks to prevent the termination of parental rights [*In re Zachary G. (1999) 77 Cal. App. 4th 799, 809, 92 Cal. Rptr. 2d 20* ; *In re Lorenzo C. (1997) 54 Cal. App. 4th 1330, 1343-1345, 63 Cal. Rptr. 2d 562]* .

- Does the juvenile court have a sua sponte duty to determine whether the sibling exception applies in a particular case? No. First, to require the juvenile court to determine in every case whether the exception applies would consume a significant amount of judicial time, something the court has all too little of. The legislature did not require that. More importantly, there is a strong preference for an alternative permanent plan of adoption for a child who is likely to be adopted if parental rights are terminated [*In re Zachary G. (1999) 77 Cal. App. 4th 799, 809, 92 Cal. Rptr. 2d 20]* . It will be the rare case in which the sibling exception applies. Unless one of the parties seeks to prevent the termination of parental rights based on the substantial interference with the sibling exception, the court has no duty to determine the application of the exception and the strong preference for adoption should apply.

- Previously it had been clearly established the Legislature had not created a "best interest" exception to the termination of parental rights in dependency cases [*In re Tabatha G. (1996) 45 Cal. App. 4th 1159, 1164-1165, 53 Cal. Rptr. 2d 93]* . Does the requirement the court consider whether "ongoing contact is in the child's best interest" now create a "best interest" exception in cases in which sibling relationships are raised? No. The court's consideration of whether ongoing contact is in the child's best interest is only one of the factors the court is to consider in determining whether termination of parental rights is detrimental to the child under this statutory exception. Thus, the better view is that overall it is a determination of detriment, not best interest. This would be consistent with the language of *Welf. & Inst. Code § 366.26(c)(1)(B)* and the many appellate decisions interpreting the beneficial parent-child relationship exception found in *Welf. & Inst. Code § 366.26(c)(1)(B)(i)*.

- Previously the question of postadoption sibling contact provisions under *Welf. & Inst. Code § 366.29* was not a factor to be considered at a hearing under *Welf. & Inst. Code § 366.26*. Does the enactment of the substantial interference with sibling relationship exception now make such agreements relevant to the termination of parental rights determination? Probably not. As with postadoption contact agreements for other biological family members and the child's tribe, if the ICWA applies, postadoption sibling contact provisions are entered into and made part of the court's order in the adoption process, not the termination of parental rights process [*see Fam. Code § 8616.5*; *In re Kimberly S. (1999) 71 Cal. App. 4th 405, 411-412, 83 Cal. Rptr. 2d 740]* . Even if the parties, including the prospective adoptive parents, are in agreement with a postadoption sibling contact provision at the time of the *Welf. & Inst. Code § 366.26* hearing, one or more of the persons involved may change their mind prior to the adoption being finalized. Thus, there is no guarantee that postadoption sibling contact provisions would actually be made a part of the adoption order [*In re Megan S. (2002) 104 Cal. App. 4th 247, 254, 127 Cal. Rptr. 2d 876]* . This makes the consideration of such provisions at the time of the *Welf. & Inst. Code § 366.26* hearing questionable.

- What is the proper standard of review at the appellate level? Although the juvenile court considers whether ongoing contact with the sibling is in the dependent child's best interest as one of the factors involved in this exception, the exception only applies when the court finds on balance with the benefits of adoption that termination of parental rights would be detrimental to the child because it would cause substantial interference with a sibling relationship that is important to the child. A finding of detriment is reviewed using the substantial evidence standard. Thus, that is the appropriate standard of review [*see, e.g.,* *In re Jacob S. (2002) 104 Cal. App. 4th 1011, 1019, 128 Cal. Rptr. 2d 654* ; *In re Megan S. (2002) 104 Cal. App. 4th 247, 251, 127 Cal. Rptr. 2d 876]* .

For further discussion of sibling relationships, see *§§ 328.129[7]* (sibling placement, contact, and visitation), 328.198[5] (post adoption sibling contact agreements).

[vi] California Exception for Indian Child

Beginning in 2007, there is another potential exception to the termination of parental rights that is applicable only to Indian children in California. It may apply if the court finds the child is an Indian child as defined by the Indian Child Welfare Act and first determines termination of parental rights would not be in the Indian child's best interest for a reason directly related to that status, including but not limited to: (i) the termination of parental rights would substantially interfere with the child's connection with his or her tribal community, or with the child's tribal membership rights; or (ii) Effective July 1, 2010, this exception may also apply to cases in which the child's tribe has recommended a tribal customary adoption [*Welf. & Inst. Code §§ 366.24, 366.26(c)(1)(B)(vi)*, eff. July 1, 2010].

PRACTICE TIP:

Consider the Relative Guardianship Cutout if the Caregiver Is an Extended Family Member Under the ICWA. While this exception may apply when the caregiver is an extended family member under the ICWA, it requires a higher showing than the new relative guardianship cutout found in *Welf. & Inst. Code § 366.26(c)(1)(A)*, which does not require a detriment finding. Thus, for an Indian child both this exception and the relative guardianship cutout should be considered if the child's caregiver is an extended family member under the ICWA. For an explanation of that relative guardianship cutout see *§ 328.171[5][a]*.

As with the substantial interference with a sibling relationship exception that also allows the court to consider the child's best interest as a factor in its decision-making, the initial burden under *Welf. & Inst. Code § 366.26(c)(1)(B)(vi)* is significant. In determining what is best for the Indian child, it is not enough that there may be some interference with the Indian child's connection with his or her tribe or tribal membership rights; it must be a substantial interference [*Welf. & Inst. Code § 366.26(c)(1)(B)(vi)*; *cf. In re L.Y.L. (2002) 101 Cal. App. 4th 942, 951-952, 124 Cal. Rptr. 2d 688* ; *In re Megan S. (2002) 104 Cal. App. 4th 247, 252, 127 Cal. Rptr. 2d 876]* . Nor is it enough the child's tribe has merely identified a permanent plan other than adoption law, since California law requires both a finding of best interests and a finding that termination of parental rights would be detrimental to the Indian child because of this exception [*Welf. & Inst. Code § 366.26(c)(1)(B)*; *cf. In re Laura F. (2000) 83 Cal. App. 4th 583, 593, 99 Cal. Rptr. 2d 859* (court not required to give full faith and credit to tribal resolution against adoption under *25 U.S.C. § 1911(d)*, since it is inconsistent with California law)].

Guardianship and other lesser plans fall short of the kind of permanence the legislature has determined is best for dependent children [*In re Celine R. (2003) 31 Cal. 4th 45, 53, 1 Cal. Rptr. 3d 432, 71 P.3d 787* ; *In re Lorenzo C. (1997) 54 Cal. App. 4th 1330, 1344, 63 Cal. Rptr. 2d 562]* . Many federally recognized tribes have tribal courts and could request transfer of the dependency case, following which the tribal court could select any permanent plan it found appropriate. This exception should not be used as a vehicle to sidestep the tribal responsibilities entailed in requesting the matter be transferred to the tribal court while still receiving the benefit of being able to prevent adoption. Further, even if the child is currently an Indian child as defined by the ICWA, there are no guarantees tribal membership will continue or tribal benefits will actually be received. Federally recognized tribes are sovereign nations and can change their minds about membership and benefits at any time [*Lamere v. Superior Court (2005) 131 Cal. App. 4th 1059, 1063-1064, 31 Cal. Rptr. 3d 880* ; *In re Barbara R. (2006) 137 Cal. App. 4th 941, 954-955, 40 Cal. Rptr. 3d 687]* . The Indian child's need for stability and permanence, however, does not change.

The juvenile court's finding termination of parental rights is not in the best interest of the Indian child pursuant to this subdivision does not end the issue. As with all the exceptions to the termination of parental rights, the juvenile court still must consider that finding in light of the totality of the circumstances and determine whether the finding outweighs the benefits of adoption to such a degree that termination of parental rights would be detrimental to the Indian child [*Welf. & Inst. Code § 366.26(c)(1)(B)(vi)*]. The balancing is done in much the same way that it is done under *Welf. & Inst. Code § 366.26(c)(1)(B)(i)* or *Welf. & Inst. Code § 366.26(c)(1)(B)(v)* [*see In re Autumn H. (1994) 27 Cal. App. 4th 567, 575-576, 32 Cal. Rptr. 2d 535* ; *In re L.Y.L. (2002) 101 Cal. App. 4th 942, 952-953, 124 Cal. Rptr. 2d 688]* . In many instances, if the court finds terminating parental rights will not be in the Indian child's best interest it will also find

that terminating parental rights will be detrimental to the Indian child. But this will not always be the case, since the two terms are not synonymous.

Thus, as with the other similar exceptions, the final question is whether terminating parental rights will be detrimental to the Indian child. The court balances what it found to be in the Indian child's best interest against the benefits of adoption, which is what the legislature has found is best in the absence of detriment due to one of the statutory exceptions. By doing so and following the statutory scheme, the court acts in the child's best interest [*see, e.g.,* *In re Zeth S. (2003) 31 Cal. 4th 396, 410, 2 Cal. Rptr. 3d 683, 73 P.3d 541* ("The Legislature, however, has determined that what is in the child's best interests is best realized through implementation of the procedures, presumptions, and timelines written into the dependency statutes"); *In re Jessica G. (1997) 58 Cal. App. 4th 1, 8, 67 Cal. Rptr. 2d 811* (best interest is "implied throughout dependency law"); *In re Tabatha G. (1996) 45 Cal. App. 4th 1159, 1165, 53 Cal. Rptr. 2d 93* (best interest is "inherent in the legislative procedure")].

The juvenile court's balancing of its best-interest determination against the benefits of adoption is not inconsistent with the child being an Indian child. Adoption is still the "norm," even for Indian children, and the exception under *Welf. & Inst. Code § 366.26(c)(1)(B)(vi)* must be considered in view of the strong preference for adoption when reunification efforts fail [*In re Celine R. (2003) 31 Cal. 4th 45, 53, 1 Cal. Rptr. 3d 432, 71 P.3d 787]* . Further, this exception to the termination of parental rights is not found in the Indian Child Welfare Act. This is solely a California statutory exception that California has chosen to enact, and should not be viewed as if it were part of the ICWA [*25 U.S.C. § 1921*; *In re S.B. (2005) 130 Cal. App. 4th 1148, 1158, 30 Cal. Rptr. 3d 726]* . Instead, it must be recognized the ICWA permits and the Adoption and Safe Families Act [Public Law 105-89] and other federal law strongly favors adoption when reunification efforts fail [*25 U.S.C. § 1912(f)*; *42 U.S.C. § 675(5)(E)*]. Thus, it is appropriate the person or tribe seeking to establish the applicability of this exception bear a heavy burden [*In re Daniel H. (2002) 99 Cal. App. 4th 804, 813, 121 Cal. Rptr. 2d 475]* .

Finally, in some cases, the Indian child's right to association with the prospective adoptive family the child has been placed with and to a safe, stable, permanent home in a timely fashion will rise to a constitutional level. In such cases, the Indian child's constitutional rights may outweigh this California statutory exception to the termination of parental rights [*In re Santos Y. (2001) 92 Cal. App. 4th 1274, 1312-1323, 112 Cal. Rptr. 2d 692* ; *In re Bridget R. (1996) 41 Cal. App. 4th 1483, 1502-1510, 49 Cal. Rptr. 2d 507]* .

This new California statutory exception to the termination of parental rights is an area to be watched for further developments.

[vii] Findings Not Required

The court is not required to make an express finding as to the statutory exceptions to adoption found in *Welf. & Inst. Code § 366.26(c)(1)(B)* unless the court finds that one of the exceptions does apply under the facts of the case to make termination of parental rights detrimental to the child [*see* *In re Jesse B. (1992) 8 Cal. App. 4th 845, 851, 10 Cal. Rptr. 2d 516]* .

If parental rights are terminated, the court is not required to specifically find the parent unfit [*In re Amanda D. (1997) 55 Cal. App. 4th 813, 819, 64 Cal. Rptr. 2d 108* , quoting *In re Brittany M. (1993) 19 Cal. App. 4th 1396, 1403, 24 Cal. Rptr. 2d 57* ; *see* *In re Sarah C. (1992) 8 Cal. App. 4th 964, 979, 11 Cal. Rptr. 2d 414* ; *see also* discussion in [i], *above*], or that termination would be in the best interest of the child [*In re Jennifer J. (1992) 8 Cal. App. 4th 1080, 1089, 10 Cal. Rptr. 2d 813* (holding there is no fifth "best interest" exception to termination of parental rights)].

[b] No "Best Interest" Exception

Despite the clear legislative intent for the original enactment of *Welf. & Inst. Code § 366.26* to create only four statutory

exceptions to the termination of parental rights for a child likely to be adopted [*see* Senate Sel. Comm. on Children & Youth/SB 1195 Task Force Rep. on *Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services* (Jan. 1988) pp. 11-12], some have argued that the language of former *Welf. & Inst. Code § 366.26(c)(4)* to the effect that the court should not terminate parental rights if such termination "is not in the interests" of the child, or if one of the conditions of *Welf. & Inst. Code § 366.26(c)(1)(A)-(D)* exist, created a "best interest" exception to the termination of parental rights. This argument was considered and rejected by the court of appeal in *In re Tabatha G. (1996) 45 Cal. App. 4th 1159, 1164-1165, 53 Cal. Rptr. 2d 93* . Other appellate courts concluded similarly [*see, e.g., In re Jasmine J. (1996) 46 Cal. App. 4th 1802, 1807-1808, 54 Cal. Rptr. 2d 560* ; *In re Jennifer J. (1992) 8 Cal. App. 4th 1080, 1090, 10 Cal. Rptr. 2d 813]* . At least one court, however, disagreed with the *Tabatha G.* decision and held the language of that subdivision did create a "best interest" exception to adoption, although in that case it found that it did not apply [*see In re Jose V. (1996) 50 Cal. App. 4th 1792, 1800-1801, 58 Cal. Rptr. 2d 684]* .

Effective January 1, 1998, the language of *Welf. & Inst. Code § 366.26(c)(4)* was amended to further clarify the Legislature's intent that there is no "best interest" exception. That subdivision now prohibits the termination of parental rights if the court finds that adoption of the child or termination of parental rights is not in the interest of the child because one of the statutory exceptions found in *Welf. & Inst. Code § 366.26(c)(1)* applies [*Welf. & Inst. Code § 366.26(c)(4)* (emphasis added)]. This clarification indicates a clear legislative determination that only where one of the enumerated exceptions to adoption exists or the court has never found reasonable efforts to reunify were offered or provided when required can the court find that termination of parental rights for an adoptable child is detrimental to the child and thus not in the child's best interest. Nevertheless, parents have on occasion continued to raise arguments for additional exceptions to the termination of parental rights. In the case of *In re Jasmine T. (1999) 73 Cal. App. 4th 209, 86 Cal. Rptr. 2d 128* a parent attempted to avoid termination of her rights by contending the fact the potential adoptive placement was a relative made it such that a legal guardianship would fulfill the goal of family preservation. As that court noted, however, placement with a relative "is not tantamount to family preservation" and upheld the termination of parental rights [*In re Jasmine T. (1999) 73 Cal. App. 4th 209, 213-214, 86 Cal. Rptr. 2d 128]* .

[d] Consideration of Child's Wishes

At all termination proceedings, the court must consider the wishes of the child, and must act in the child's best interests [*Welf. & Inst. Code § 366.26(h)*; *In re Diana G. (1992) 10 Cal. App. 4th 1468, 1480, 13 Cal. Rptr. 2d 645* ; *In re Jennifer J. (1992) 8 Cal. App. 4th 1080, 1086 n. 5, 10 Cal. Rptr. 2d 813* ; *In re Jesse B. (1992) 8 Cal. App. 4th 845, 853, 10 Cal. Rptr. 2d 516]* . The juvenile court must consider the child's wishes to the extent ascertainable [*In re Amanda D. (1997) 55 Cal. App. 4th 813, 820, 64 Cal. Rptr. 2d 108* ; *In re Leo M. (1993) 19 Cal. App. 4th 1583, 1591, 24 Cal. Rptr. 2d 253* ; *In re Juan H. (1992) 11 Cal. App. 4th 169, 173, 13 Cal. Rptr. 2d 716]* . The court may receive direct evidence of the child's wishes by direct formal testimony in court, informal direct communication with the court in chambers on or off the record, reports prepared for the hearing, letters, telephone calls to the court, or electronic recordings [*In re Amanda D. (1997) 55 Cal. App. 4th 813, 820, 64 Cal. Rptr. 2d 108* ; *In re Leo M. (1993) 19 Cal. App. 4th 1583, 1591, 24 Cal. Rptr. 2d 253* ; *In re Diana G. (1992) 10 Cal. App. 4th 1468, 1480, 13 Cal. Rptr. 2d 645]* . If the child is too young to understand or even express his or her wishes, the court may determine the child's wishes from his or her behavior while in the presence of the parent [*In re Juan H. (1992) 11 Cal. App. 4th 169, 173, 13 Cal. Rptr. 2d 716]* . The child's presence in court is not required [*In re Diana G. (1992) 10 Cal. App. 4th 1468, 1480, 13 Cal. Rptr. 2d 645]* . Nor is a direct statement required from the child if that is contrary to the child's best interest [*In re Amber M. (2002) 103 Cal. App. 4th 681, 687, 127 Cal. Rptr. 2d 19]* .

Although evidence of the child's wishes is not determinative of what is in the child's best interest, it can be powerful evidence of what is best for the child [*In re Michael D. (1996) 51 Cal. App. 4th 1074, 1087, 59 Cal. Rptr. 2d 575]* . Nevertheless, in honoring the dignity of children and giving them a voice in permanency planning decisions, it must be remembered that in some cases it can be harmful to a child to make direct inquiries or to make the child feel responsible for the ultimate decision. As very eloquently stated by one appellate court, "we must be mindful that we should not carelessly impose upon them decisions which are heavy burdens even for those given the ultimate responsibility to

decide. To ask children with whom they prefer to live or to ascertain what they wish through other evidence is one thing. To ask those children to choose whether they ever see their natural parent again or to give voice to approving that termination is a significantly different prospect. We must have regard for the possible and readily conceivable anguish that such confrontational choices could create in a short lifetime already filled with trauma" [*In re Leo M. (1993) 19 Cal. App. 4th 1583, 1593, 24 Cal. Rptr. 2d 253]* . It is for this reason that in considering a child's expression of preferences, it is not always necessary that the child specifically be made to understand that the proceeding may result in the termination of parental rights [*In re Amanda D. (1997) 55 Cal. App. 4th 813, 820, 64 Cal. Rptr. 2d 108* , *quoting In re Leo M. (1993) 19 Cal. App. 4th 1583, 1593, 24 Cal. Rptr. 2d 253* ; *but see In re Diana G. (1992) 10 Cal. App. 4th 1468, 1480, 13 Cal. Rptr. 2d 645]* .

[e] Constitutionality of Procedures

A decision to terminate parental rights can be made where the finding of adoptability has been made by clear and convincing evidence, even though some of the previous findings of detriment to return and reasonable services have been made by only a preponderance of the evidence [*Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 254, 19 Cal. Rptr. 2d 698, 851 P.2d 1307]* .

The lesser standard of proof is permitted in the context of the entire proceeding because the purpose of the permanency planning hearing is not to accumulate further evidence of parental unfitness and danger to the child, but to begin the task of finding the child a permanent alternative family placement. In effect, by the time the dependency proceedings have reached the permanency planning hearing stage, there have been multiple specific findings of parental detriment or unfitness [*Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 253, 19 Cal. Rptr. 2d 698, 851 P.2d 1307* ; *see, e.g.,* Welf. & Inst. Code former § 361(b) (grounds for initial removal of child from parental custody required to be been established by clear and convincing evidence), *now see Welf. & Inst. Code § 361(c)*; *Welf. & Inst. Code §§ 366.21(e), (f), 366.22(a)* (6-, 12-, and 18-month hearings to review reunification efforts; statutory presumption at each hearing that child should be returned to parental custody); *see also* discussion in *§ 328.110[5]*].

Additionally, when considered in the context of the entire process for terminating parental rights under the dependency statutes, the procedure at the permanency planning hearing for termination of parental rights on a preponderance of the evidence comports with federal constitutional due process requirements. This is because the precise and demanding substantive and procedural requirements that the petitioning agency must have satisfied before proposing termination are carefully calculated to constrain judicial discretion, diminish the risk of erroneous findings of parental inadequacy and detriment to the child, and otherwise protect the legitimate interests of the parents [*Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 256, 19 Cal. Rptr. 2d 698, 851 P.2d 1307]* .

Finally, at a stage in the proceedings as late as the selection and implementation hearing, the evidence of detriment is already so clear and convincing that more cannot be required without prejudice to the interests of the adoptable child, with which the petitioning agency must align itself. Proof of some of the previous findings by a preponderance of the evidence is therefore sufficient in this context [*Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 256, 19 Cal. Rptr. 2d 698, 851 P.2d 1307]* .

[f] Requirement for Previous Findings

[i] Requirement for Previous Reasonable Efforts Finding

The court may not terminate parental rights if at each and every hearing at which the court was required to consider reasonable efforts or services, the court has found that reasonable efforts were not made or that reasonable services were not offered or provided [*Welf. & Inst. Code § 366.26(c)(2)*]. The court is not required to have made a reasonable efforts finding at each of the prior hearings. If at any of the prior hearings a finding that reasonable services had been offered or provided to the parent, the court may terminate parental rights [*Cal. Rules of Ct., Rule 5.725(f)(1)*].

[ii] Requirement for Previous Detriment Finding

In most instances one or more findings of detriment will already have been made regarding each parent before the case ever gets to a *Welf. & Inst. Code § 366.26* hearing, and that prior finding forms part of the basis for the termination of parental rights [*Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 253, 19 Cal. Rptr. 2d 698, 851 P.2d 1307*]. But that will not always be the case. Sometimes parents have not sought custody of their child during the dependency proceedings and hence no detriment finding has ever been made [*cf.* *Robert L. v. Superior Court (1996) 45 Cal. App. 4th 619, 628, 53 Cal. Rptr. 2d 41* ; *In re Terry H. (1994) 27 Cal. App. 4th 1847, 1857, 34 Cal. Rptr. 2d 271*]. If the parent is a mere biological parent, that is not a problem since the rights of a mere biological parent can be terminated based on a finding adoption is in the child's best interest [*Fam. Code § 7664*; *Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 824-825, 831, 4 Cal. Rptr. 2d 615, 823 P.2d 1216*]. If the parent is a biological parent who stepped forward at the earliest time and fully accepted the role and responsibilities of a parent, however, a finding of detriment by clear and convincing evidence must be made at some time during the case before parental rights may be terminated [*Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 849, 4 Cal. Rptr. 2d 615, 823 P.2d 1216]* . Also, if the parent is a presumed parent, a finding of detriment by clear and convincing evidence must be made at some time during the case before parental rights may be terminated [*In re G.S.R. (2008) 159 Cal. App. 4th 1202, 1210-1212, 72 Cal. Rptr. 3d 398* ; *In re Gladys L. (2006) 141 Cal. App. 4th 845, 848, 46 Cal. Rptr. 3d 434]* .

If the parent is a presumed parent, a finding of detriment by clear and convincing evidence must generally be made at some time during the case before parental rights may be terminated [*In re G.S.R. (2008) 159 Cal. App. 4th 1202, 1210-1212, 72 Cal. Rptr. 3d 398* ; *In re Gladys L. (2006) 141 Cal. App. 4th 845, 848, 46 Cal. Rptr. 3d 434]* .

The *Gladys L.* decision indicated that if a finding of detriment for a presumed parent had not been previously made this would require sending the matter back to determine if a jurisdiction finding under *Welf. & Inst. Code § 300* could be made as to that presumed parent [*In re Gladys L. (2006) 141 Cal. App. 4th 845, 849, 46 Cal. Rptr. 3d 434]* . This was incorrect, however [*In re P.A. (2007) 155 Cal. App. 4th 1197, 1212, 66 Cal. Rptr. 3d 783]* . Jurisdiction findings are not made as to parents. They are made as to children, and there is no need for jurisdictional allegations as to both parents [*In re Alysha S. (1996) 51 Cal. App. 4th 393, 397, 58 Cal. Rptr. 2d 494* ; *In re Jeffrey P. (1990) 218 Cal. App. 3d 1548, 1552-1554, 267 Cal. Rptr. 764]* . Instead, what is needed in this situation is for the juvenile court to enter a detriment finding at the *Welf. & Inst. Code § 366.26* hearing for any presumed or *Kelsey S.* parent for whom no prior detriment finding has been made, if evidence exists to support that finding, before it terminates parental rights [*cf.* *In re Matthew Z. (2000) 80 Cal. App. 4th 545, 555, 95 Cal. Rptr. 2d 343 and* *In re Michael G. (1998) 63 Cal. App. 4th 700, 713 n.9, 74 Cal. Rptr. 2d 642* (ICWA findings will normally have been made before the *Welf. & Inst. Code § 366.26* hearing, but if not they must be made at the *Welf. & Inst. Code § 366.26* hearing)]. If a detriment finding is requested to be made at a ".26 hearing," notice and an opportunity to be heard on this issue must be afforded the presumed or *Kelsey S.* parent. In this way the due process rights of all presumed and *Kelsey S.* parents are protected before parental rights are terminated.

Can a presumed or *Kelsey S.* parent be found to have forfeited the right to a detriment finding or can it be implied by the parent's abandonment of the child? The *Gladys L.* court refused to imply such a finding or find a presumed father had forfeited such a right, despite the presumed father's three-year absence after he had noticed the child was in out-of-home care as a dependent [*In re Gladys L. (2006) 141 Cal. App. 4th 845, 849, 46 Cal. Rptr. 3d 434]* . This is somewhat understandable in that case; at the time there was no decisional law dealing with the issue, and the appellate court mistakenly believed a jurisdictional finding was required as to that parent [*In re P.A. (2007) 155 Cal. App. 4th 1197, 1212, 66 Cal. Rptr. 3d 783]* . If an adequate search had been done for the missing presumed parent, however, the juvenile court could have made a detriment finding at the disposition hearing under *Welf. & Inst. Code § 361*, and the functional equivalent of a detriment finding under *Welf. & Inst. Code § 361.5(b)(1)*, due to the presumed father's whereabouts being unknown, as was done in a factually similar case [*In re P.A. (2007) 155 Cal. App. 4th 1197, 1212, 66 Cal. Rptr. 3d 783]* . Thus, the better view is that such a finding can be forfeited or implied if the record indicates adequate search efforts were done for the missing presumed or *Kelsey S.* parent. Juvenile courts must take steps to

ensure adequate search efforts are completed and documented, however, or the appellate court will have no basis on which to base a holding of forfeiture or an implied finding of detriment. Further, all parties and the juvenile court should ensure the issue is addressed if there is a missing presumed or *Kelsey S.* parent, and that parent later appears. This is an area to be watched for further developments.

For a discussion as to whether recent case law from the California Supreme Court renders the *Gladys L.* decision inapposite for a presumed parent who has not stepped forward and assumed a parental role, see *§ 328.60[7]*.

[g] Adoption as Goal for Difficult-to-Place Child

[i] In General

If the court finds (1) that termination of parental rights would not be detrimental to the child under the exceptions found in *Welf. & Inst. Code § 366.26(c)(1)(B), (2)* that the child has a probability for adoption but is difficult to place for adoption, and (3) there are no prospective adoptive homes available to the child, the court may identify adoption as the permanent placement goal and continue the matter for further efforts to locate an adoptive home for the child [*Welf. & Inst. Code § 366.26(c)(3)*].

One appellate court has held the standard of proof for finding a probability of adoption is clear and convincing evidence. That court noted the juvenile court has to find that termination of parental rights would not be detrimental to the child under *Welf. & Inst. Code § 366.26(c)(1)(B)*, and that subdivision requires clear and convincing evidence of the likelihood of adoption. Thus, the court believed it "is reasonably understood" the clear and convincing standard of proof also applies to the finding the child has a probability of adoption [*In re Ramone R. (2005) 132 Cal. App. 4th 1339, 1351, 34 Cal. Rptr. 3d 344]* . This is not correct for two reasons. First, the language of the statute places the finding the child has a probability for adoption after the language that the court must find termination of parental rights would not be detrimental to the child under *Welf. & Inst. Code § 366.26(c)(1)(B)*, not before [*Welf. & Inst. Code § 366.26(c)(3)*]. Thus, the requirements of *Welf. & Inst. Code § 366.26(c)(1)* cannot be said to apply to the finding of a probability for adoption. Second, if the juvenile court found there was clear and convincing evidence the child had a probability for adoption, it is doubtful the court would need to continue the matter, since the same evidence would usually also prove by clear and convincing evidence that it is likely the child would be adopted within a reasonable period of time. A requirement the finding the child has a probability for adoption be made by clear and convincing evidence would limit, if not eliminate, the need for the entire provision, making *Welf. & Inst. Code § 366.26(c)(3)* essentially superfluous, an interpretation courts are to avoid [*In re J. W. (2002) 29 Cal. 4th 200, 210, 126 Cal. Rptr. 2d 897, 57 P.3d 363* ; *In re Tanyann W. (2002) 97 Cal. App. 4th 675, 678, 118 Cal. Rptr. 2d 596]* . Thus, the better view is the finding the child has a probability for adoption need only be shown by a preponderance of the evidence [*Evid. Code § 115*].

A child may only be found to be difficult to place for adoption if there is no prospective adoptive home available because of the child's membership in a sibling group, because of the presence of a diagnosed medical, physical, or mental handicap, or because the child is seven years old or older. Without terminating parental rights, the court may order that efforts be made to locate an appropriate adoptive family for the child for a period not to exceed 180 days. During this period, the public agency responsible for seeking adoptive parents shall conduct a search in the same manner as prescribed for children in *Fam. Code §§ 8708* and *8709*. If the child is 10 years of age or older and has been placed in out of home care for six months or longer from the date the child entered foster care, the agency must also, to the extent possible, ask the child to identify any individuals, other than the child's siblings, who are important to the child. The purpose of this is to help identify potential adoptive parents [*Welf. & Inst. Code § 366.26(c)(3)*]. The agency may also ask any younger child who is a member of the sibling group, as appropriate, regarding individuals important to that child [*Welf. & Inst. Code § 366.26(c)(3)*]. Although the purpose of these efforts is to locate a potential adoptive home, it may also result in a home appropriate for legal guardianship or for another planned permanent living arrangement being found.

The emphasis on concurrent services planning, including concurrent permanency planning, should greatly reduce the need for the use of this option, since by the time of the *Welf. & Inst. Code § 366.26* hearing more children will already be in a home that is willing to keep them on a permanent basis if reunification efforts fail. Indeed, if social services agencies are doing their job effectively, it will be the rare child for whom this option will be needed. Courts, children's counsel, and court-appointed special advocates must take steps to ensure social services agencies are actively seeking permanent homes for children during the reunification period so the delay authorized by this provision of law will not be needed.

At the continued *Welf. & Inst. Code § 366.26* hearing, the court shall proceed to determine the appropriate permanent plan. One appellate court has noted that effective January 1, 2004, the statute provides that only termination of parental rights or legal guardianship are permanency planning options at the continued hearing [*In re Ramone R. (2005) 132 Cal. App. 4th 1339, 1349, 34 Cal. Rptr. 3d 344]* . The court was correct the plain language of the statute was amended in that way [*Welf. & Inst. Code § 366.26(c)(3)*; Stats. 2003, ch. 813, § 7; Stats. 2004, ch. 810, § 5]. Nevertheless, that cannot have been the intent of the Legislature, since at the continued hearing there may be no family willing to adopt or accept legal guardianship. The option of another planned permanent living arrangement (long term foster care) must exist at the continued *Welf. & Inst. Code § 366.26* hearing. Otherwise, if the child was not found likely to be adopted by clear and convincing evidence at the continued hearing and there was no one willing and appropriate to be the child's legal guardian, the child would be left without a permanent plan. While both federal and state legislation has sought to reduce the number of children who are not reunified with a parent or adopted, and to eliminate to the maximum degree possible the number of children placed in long term foster care, the Legislature could not have intended a difficult to place child be left at the continued *Welf. & Inst. Code § 366.26* hearing without a permanent plan. Indeed, interpreting the statute to leave such a child without a permanent plan would be an absurd result, something the courts are to avoid even when the statute appears clear on its face [*In re Christopher I. (2003) 106 Cal. App. 4th 533, 565, 131 Cal. Rptr. 2d 122* ; *In re Charles T. (2002) 102 Cal. App. 4th 869, 878, 125 Cal. Rptr. 2d 868]* .

Thus, the better view is that notwithstanding the language of the statute, at the continued hearing all three permanency planning options are available to the court: adoption, legal guardianship with a nonrelative, and long-term foster care (another planned permanent living arrangement) [*In re Y.R. (2007) 152 Cal. App. 4th 99, 111, 60 Cal. Rptr. 3d 820]* . This is consistent with the goal of the overall statutory scheme to provide children with as much safety, stability, and permanence as possible and appropriate, which is how dependency statutes should be construed [*Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 253, 19 Cal. Rptr. 2d 698, 851 P.2d 1307* ; *In re Christina A. (2001) 91 Cal. App. 4th 1153, 1162, 111 Cal. Rptr. 2d 310]* . Surprisingly, in 2009 the California Supreme Court took the narrow view that at the continued hearing long-term foster care is not available [*In re S.B. (2009) 46 Cal. 4th 529, 535-536, 94 Cal. Rptr. 3d 24, 207 P. 3d 525 , citing In re Gabriel G. (2005) 134 Cal. App. 4th 1428, 1436-1438, 36 Cal. Rptr. 3d 847]* . Fortunately, effective July 1, 2010, the legislature has amended *Welf. & Inst. Code § 366.26(c)(3)*, correcting the legislative oversight and making it clear that all possible permanent plans, including long-term foster care, are available at the continued hearing for the child who is difficult to place for adoption [*Welf. & Inst. Code § 366.26(c)(3)*, eff. July 1, 2010 (Stats. 2009 [AB 1325], ch. 287 § 15)].

[ii] Finality of Findings and Appealability

One court of appeal held a decade ago that the determination under *Welf. & Inst. Code § 366.26(c)(3)* identifying adoption as the goal for a difficult-to-place child is immediately appealable. It made this determination, however, on the erroneous assumption that at the subsequent hearing at which parental rights are terminated the juvenile court would not be dealing with the issue of the child's adoptability [*In re Edward H. (1996) 43 Cal. App. 4th 584, 590-591, 50 Cal. Rptr. 2d 745]* . The *Edward H.* analysis in this regard has been characterized as "flawed," however [*In re Cody C. (2004) 121 Cal. App. 4th 1297, 1301, 17 Cal. Rptr. 3d 928]* . The original determination identifying adoption as a probable permanent plan for the difficult to place child is only an interim finding, however, and should not be immediately appealable. At the original hearing the court does not make a finding by clear and convincing evidence that the child is adoptable as required under *Welf. & Inst. Code § 366.26(c)(1)*, if it continues the matter for a

difficult-to-place child. Instead, it only finds that the child has the probability for adoption [*Welf. & Inst. Code § 366.26(c)(3)*]. Thus, the better view is that no final determination has been made as to whether it is likely the child will be adopted if parental rights are terminated and the issue is not yet ripe for review [*In re Y.R. (2007) 152 Cal App. 4th 99, 108-109, 60 Cal. Rptr. 3d 820* ; *In re Cody C. (2004) 121 Cal. App. 4th 1297, 1301, 17 Cal. Rptr. 3d 928* ; *In re Jacob S. (2002) 104 Cal. App. 4th 1011, 1019, 128 Cal. Rptr. 2d 654]* .

The more difficult question has been whether the determination that termination of parental rights would not be detrimental to the child under one of the statutory exceptions should be immediately appealable.

In *Jacob S.* the Court of Appeal found the issue of adoptability not yet ripe for review, but determined on the merits whether substantial evidence supported the finding the substantial interference with a sibling relationship exception did not apply [*In re Jacob S. (2002) 104 Cal. App. 4th 1011, 1017-1019, 128 Cal. Rptr. 2d 654]* . It appears, however, that the question of whether the finding termination of parental rights would not be detrimental to the child was appealable at that time was not raised, and a decision does not stand for a proposition that was not actually determined in the case [*People v. Harris (1989) 47 Cal. 3d 1047, 1071, 255 Cal. Rptr. 352, 767 P.2d 619]* . The Court in *Edward H.* did state that if the finding no exception to adoption applied was not appealed from the first hearing, it could not be raised in a later appeal if parental rights were terminated [*In re Edward H. (1996) 43 Cal. App. 4th 584, 590-591, 50 Cal. Rptr. 2d 745]* . In light of the erroneous conclusion in *Edward H.* allowing the issue of adoptability to be raised on appeal from a hearing at which adoption was only identified as the permanent placement goal, however, its holding in this regard must be questioned too. Nevertheless, the statutory language supports a conclusion the finding that no exception to adoption applies is a final determination that would be subject to appeal [*Welf. & Inst. Code § 395*]. Under this approach, if a parent or the child wishes to later raise an exception to adoption at the continued hearing, it would have to be done based on a petition pursuant to *Welf. & Inst. Code § 388* if new evidence or a change of circumstances would justify a finding that a different order would be best for the child in regards to one of the statutory exceptions to the termination of parental rights. This approach helps ensure further efforts toward finding an adoptive home aren't made when an exception to adoption applies.

Another approach, however, is to recognize that although the court has made an interim determination that termination of parental rights would not be detrimental, it has not terminated the parents' rights and as such they continue to have the right to visitation, which may affect the parent-child relationship and justify a later finding the beneficial parent child relationship exception should apply [*Welf. & Inst. Code §§ 366.21(h), 366.22(a),* 366.26(c)(1)(B)(i)]. During the continuance, the child may also reach the age of 12 years and be able to raise the exception in *Welf. & Inst. Code § 366.26(c)(1)(B)(ii)*. Sibling visitation may also be continuing, which could affect a determination under *Welf. & Inst. Code § 366.26(c)(1)(B)(v)*. At the continued hearing the juvenile court is required to proceed pursuant to paragraph (1) or (4) of subdivision (b) [*Welf. & Inst. Code § 366.26(c)(3)*]. Those paragraphs specifically deal with implementing a permanent plan, not selecting one. The provisions for the selection of a permanent plan, including a permanent plan of adoption, however, are found in the next subdivision, which only allows termination based upon a finding by clear and convincing evidence the child is likely to be adopted, and that the adoption would not be detrimental pursuant to the statutory exceptions [*Welf. & Inst. Code § 366.26(b), (c)(1)*]. This suggests that at the continued hearing the juvenile court should consider not only the evidence of adoptability, but also evidence on the question of whether one of the statutory exceptions to the termination of parental rights exists. Under this approach, none of the findings at the *Welf. & Inst. Code § 366.26* hearing would be appealable until the continued hearing was held and a permanent plan actually selected. This view has its merits also, but creates the possibility the exceptions to adoption could be fully litigated at both hearings, a result the legislature is unlikely to have intended.

The best approach is a combination of the two. Under this approach the parties could not relitigate the question of whether one of the statutory exceptions to adoption applied at the time of the continued hearing in the absence of a *Welf. & Inst. Code § 388* petition demonstrating prima facie evidence of a change in circumstances or new evidence that would make it in the child's best interest to apply one of the exceptions found in *Welf. & Inst. Code § 366.26(c)(1)(B),* but none of the findings would be appealable until the continued hearing was actually concluded and a permanent plan

selected [*In re Cody C. (2004) 121 Cal. App. 4th 1297, 1301, 17 Cal. Rptr. 3d 928* ("Because the permanency hearing has not been concluded, there is nothing yet to appeal.")]. In this way the appealability of the findings and interim orders made at the initial and continued hearings under *Welf. & Inst. Code § 366.26* would be much like those at jurisdiction and disposition hearings, i.e., not appealable until the completion of the later hearing [*In re Meranda P. (1997) 56 Cal. App. 4th 1143, 1150, 65 Cal. Rptr. 2d 913* ; *In re Sheila B. (1993) 19 Cal. App. 4th 187, 196, 23 Cal. Rptr. 2d 482]* . Requiring the parent, sibling, or other party to file a petition under *Welf. & Inst. Code § 388* if it is alleged a change in circumstances supports a modification of the finding the termination of parental rights would not be detrimental to the child because the exceptions to adoption do not apply is not a denial of due process and does not inappropriately shift the burden to the parent, sibling, or other party, since that finding will already have been fully litigated and the focus has shifted to finding an adoptive home [*see* *In re Marilyn H. (1993) 5 Cal. 4th 295, 307-310, 19 Cal. Rptr. 2d 544, 851 P.2d 826]* . This approach avoids unnecessary relitigation of the exception issue and the need for multiple appeals. It also recognizes that if clear and convincing evidence the child is likely to be adopted is not presented at the continued hearing, the parent or child opposing adoption will have no need on appeal to challenge the sufficiency of the evidence on the exception issue, since adoption will not have been selected as the actual permanent plan. This approach is the better view.

Unfortunately, at this point in time it is not the prevailing view. In 2009 the California Supreme Court reviewed the conflict of decisions on this issue and held the findings under *Welf. & Inst. Code § 366.26(c)(3)*, are immediately appealable [*In re S.B. (2009) 46 Cal. 4th 529, 537, 94 Cal. Rptr. 3d 24, 207 P. 3d 525]* . It disapproved the cases of *In re Y.R. (2007) 152 Cal App. 4th 99, 60 Cal. Rptr. 3d 820* ; *In re Cody C. (2004) 121 Cal. App. 4th 1297, 1301, 17 Cal. Rptr. 3d 928* ; and *In re Jacob S. (2002) 104 Cal. App. 4th 1011, 128 Cal. Rptr. 2d 654* , to the extent they conflict with this conclusion [*In re S.B. (2009) 46 Cal. 4th 529, 537 n.5, 94 Cal. Rptr. 3d 24, 207 P.3d 525]* . How long the *S.B.* decision will remain dispositive of the issue is uncertain, for two reasons. First, it invited legislative action if the Legislature did not want the findings made pursuant to *Welf. & Inst. Code § 366.26(c)(3)*, to be immediately appealable [*In re S.B. (2009) 46 Cal. 4th 529, 537, 94 Cal. Rptr. 3d 24, 207 P.3d 525]* . Second, effective July 1, 2010, the legislature has already amended *Welf. & Inst. Code § 366.26(c)(3)*, correcting the legislative oversight the Supreme Court found significant and making it clear that all possible permanent plans, including long-term foster care, are available at the continued hearing for the child who is difficult to place for adoption [*Welf. & Inst. Code § 366.26(c)(3)*, eff. July 1, 2010 (Stats. 2009 [AB 1325], ch. 287 § 15)]. This is an area to be watched for further developments.

PRACTICE TIP:

Continue the *Welf. & Inst. Code § 366.26* Hearing. In light of the California Supreme Court's decision in the *S.B.* case, practitioners on all sides of the issue may wish to simply utilize *Welf. & Inst. Code § 352* and request a continuance of the *Welf. & Inst. Code § 366.26* hearing for a period of up to 180 days for the social services agency to continue to seek an adoptive placement. This avoids unnecessary appeals for all concerned. Further, unless the parent feels their relationship with the child will be weaker in six months, it avoids the need for parents to file a *Welf. & Inst. Code § 388* petition at the continued hearing if they wish to show an exception to the termination of parental rights applies. To be consistent with the statutory scheme, juvenile courts should be receptive to such motions but only for a period of 180 days. If an adoptive home is not found in that time the court should go forward with the *Welf. & Inst. Code § 366.26* hearing and select a lesser alternative permanent plan.

There may, of course, be other orders made at the initial *Welf. & Inst. Code § 366.26* hearing, such as interim visitation or placement orders. An immediate appeal of these orders may not be concluded by the time of the continued hearing and thus would be ineffective. Such orders are more effectively challenged by traditional writ petition, if the appellate court will determine the petition on its merits. Thus, if an objection to the interim orders is made, the better approach would be to view such orders as able to be raised from any appeal taken from the final orders at the continued *Welf. & Inst. Code § 366.26* hearing, but subject to an immediate writ petition.

[h] Finality of Termination of Parental Rights Order

[i] In General

Any order of the juvenile court permanently terminating parental rights is conclusive and binding on the child, the parent or parents, and all other persons who have been served with citation by publication or otherwise as provided by *Welf. & Inst. Code § 200 et seq.* After making such an order, the court generally has no power to set aside, change, or modify it [*Welf. & Inst. Code § 366.26(i)*; *In re Jerred H. (2004) 121 Cal. App. 4th 793, 796-798, 17 Cal. Rptr. 3d 481* (juvenile court could not grant child's petition to reinstate parental rights or to declare the child's stepfather his presumed father, since the rights of all possible parents were terminated pursuant to *Welf. & Inst. Code § 366.26*); *In re Rachel M. (2003) 113 Cal. App. 4th 1289, 7 Cal. Rptr. 3d 153* (writ of error coram vobis to overturn termination of parental rights order was not proper absent extrinsic fraud); *In re Ronald V. (1993) 13 Cal. App. 4th 1803, 1806, 17 Cal. Rptr. 2d 334* (court has no jurisdiction to modify *Welf. & Inst. Code § 366.26* termination order pursuant to *Welf. & Inst. Code § 388* for change of circumstances, because *Welf. & Inst. Code § 366.26* removes jurisdiction from court to set aside, change, or modify the order); *In re David H. (1995) 33 Cal. App. 4th 368, 380-385, 39 Cal. Rptr. 2d 313* (absent both extrinsic fraud and meritorious defense, juvenile court lacks authority to vacate termination of parental rights)]. However, the parties retain the right to appeal the order or to seek a rehearing if the matter was heard by a referee [*In re Roderick U. (1993) 14 Cal. App. 4th 1543, 1553, 18 Cal. Rptr. 2d 555* ; *Cal. Rules of Ct., Rule 5.725(f)(2)*]. The court must advise all parties of their appeal rights [*see Cal. Rules of Ct., Rule 5.725(i)*; *see also Cal. Rules of Ct., Rule 5.585*].

PRACTICE TIP:

Consider Postadoption Contact Agreement Before Filing Notice of Appeal. After terminating parental rights and advising parties of their appeal rights the court usually makes the following order: "Counsel for the parents is relieved upon the filing of the notice of appeal or the expiration of the appeal period whichever occurs first." If the child is placed with a person who desires to adopt the child, the parent's attorney should discuss the possibility of a postadoption contact agreement [*Fam. Code § 8616.5*] with his or her client before filing a notice of appeal. This issue may have already been raised as part of concurrent permanency planning. In this way, if the birth parent desires to attempt to reach a postadoption contact agreement with the prospective adoptive parents, the birth parent's attorney can assist the birth parent with this effort prior to filing any notice of appeal or the expiration of the appeal period. Care must be taken, however, to ensure the time for filing the notice of appeal is not missed, since the appeal period runs from the date of the termination order. For a discussion of postadoption contact agreements see *§ 328.198[6]*.

[ii] Reinstating Parental Rights

Recognizing there will be situations in which a freed child's circumstances have changed and the child is no longer adoptable, leaving the child a "legal orphan," California has enacted a provision to allow children who have not been adopted after at least three years from the date parental rights were terminated to petition the juvenile court to reinstate parental rights [*Welf. & Inst. Code § 366.26(i)(2)*]. A petition under *Welf. & Inst. Code § 388* shall be used for this purpose [*Welf. & Inst. Code § 366.26(i)(2)*]. If the child and the social services agency stipulate the child is no longer likely to be adopted, the child may file the petition prior to the expiration of the three-year period [*Welf. & Inst. Code § 366.26(i)(2)*]. If a hearing is set on the petition, notice must be given to the child's former parent. The court must grant the petition if it finds by clear and convincing evidence the child is no longer likely to be adopted and the reinstatement of parental rights is in the child's best interest [*Welf. & Inst. Code § 366.26(i)(2)*]. This provision is intended to be retroactive regardless of the date parental rights were terminated [*Welf. & Inst. Code § 366.26(i)(2)*].

The question arises whether the reinstatement of parental rights is an all or nothing issue. In other words, if the court reinstates the parental rights of one former parent, must it automatically reinstate the parental rights of the other former parent? The answer is no. Unlike termination of parental rights under *Welf. & Inst. Code § 366.26(c)*, which requires the parental rights of all parents be terminated to free the child for adoption [*Cal. Rules of Ct., Rule 5.725(a)(2)*], a hearing

under *Welf. & Inst. Code § 366.26(i)(2),* is triggered by the child filing a petition under *Welf. & Inst. Code § 388* and focuses on the freed child's best interest. As such, the court may find it is appropriate to reinstate the parental rights of one former parent, the other former parent, or both former parents, depending on the individual child's circumstances and best interest. Indeed, the child may only be asking for the reinstatement of one former parent's rights, and that may be best for the child, particularly where the other former parent seriously abused the child.

Must notice be given to both former parents regardless of whether the child is asking for reinstatement of both former parents' rights? The answer to that is unclear. An argument can be made that notice is only required to the former parent whose rights the child seeks to have reinstated. But notice must be given in the manner set forth in *Welf. & Inst. Code § 294(f)* for a recommendation of adoption, which implies notice must be given to all former parents whose rights were terminated pursuant to *Welf. & Inst. Code § 366.26(c),* even if the child is only asking parental rights be reinstated as to one former parent [*Welf. & Inst. Code § 366.26(i)(2)*]. In any event, notice to all such former parents may be best practice, since if the child seeks to have one former parent's rights reinstated it may be in the child's best interests to notice both former parents and to provide them the opportunity to express their views.

If the child petitions for reinstatement of one former parent's rights may the court nevertheless reinstate both former parents' rights if the court finds it is in the child's best interest? Again, the answer is unclear. A strong argument can be made that if the child's *Welf. & Inst. Code § 388* petition only seeks reinstatement of one former parent's rights, that is the only issue before the court and the court has no authority to reinstate both former parents' rights. Indeed, the freed child may have a very good reason for only wanting one former parent's rights reinstated, such as where the other former parent seriously abused the child. Nevertheless, the purpose of the enabling legislation was to empower juvenile courts to act in the child's best interest when the freed child's circumstances change such that the child is no longer adoptable, and to avoid leaving the freed child a "legal orphan" when that is not in the child's best interest [Stats. 2005, ch. 634, § 2 (AB 519)]. Once the freed child files the petition, the issue of what is best for the child and whether the child should remain a "legal orphan" is before the court. As such, the better position is that the juvenile court does have the inherent ability to reinstate both former parents' right even if the child only petitions for the rights of one former parent to be reinstated. It will be the rare case, however, in which the juvenile court should do so, since it will rarely be in the child's best interest to reinstate the rights of a former parent the child does not desire to be his or her parent. Regardless, the standing afforded the former parents at the hearing on the child's petition is very limited unless and until the court reinstates parental rights to one or both former parents. Thus, the former parents have no automatic right to the appointment of counsel or to a contested hearing on the question of whether one or both parental rights should be reinstated.

If parental rights are reinstated to one or both former parents, the court must then consider placement and a new permanent plan. This is a post-permanency planning situation and the presumption is still for continued out-of-home care [*Welf. & Inst. Code § 366.3(e)*]. At this point, however, any former parent whose rights have been reinstated will once again have a right to request the appointment of counsel, and the right to seek placement or reunification services under *Welf. & Inst. Code § 366.3(e),* if the parent or parents can prove it is in the child's best interest. If the court reinstates parental rights for one or both former parents of a child who is under the age of 12 years and the new permanent plan is not for reunification with a parent or legal guardian, the court must state the factual basis for its findings that it is in the child's best interest to reinstate parental rights [*Welf. & Inst. Code § 366.26[i][2]*]. Best practice is, of course, for the court to state its factual basis for the reinstatement of parental rights regardless of the age of or new permanent plan for the child.

[i] Visitation and Placement of Freed Child

[i] In General

If the court, by order or judgment declares the child free from the custody and control of both parents, or one parent if the other does not have custody and control, the court must at the same time order the child referred to the State

Department of Social Services or a licensed adoption agency for adoptive placement by the agency. However, no petition for adoption may be granted until the appellate rights of the natural parents have been exhausted. With the consent of the agency, the court may appoint a guardian of the child, who must serve until the child is adopted [*Welf. & Inst. Code § 366.26(j)*].

Once parental rights are terminated and the child referred for adoptive placement, the State Department of Social Services or licensed adoption agency is responsible for the custody and supervision of the child, and is normally entitled to the "exclusive care and control of the child at all times" until a petition for adopted is granted [*Welf. & Inst. Code § 366.26(j)*]. Thus, once parental rights are terminated it is the social services agency that is normally responsible for making placement decisions for the child. The juvenile court can, however, review those decisions for abuse of discretion [*In re Harry N. (2001) 93 Cal. App. 4th 1378, 1381-1382, 1397-1399, 114 Cal. Rptr. 2d 46* ; *Los Angeles County Dep't of Children & Family Servs. v. Superior Court (1998) 62 Cal. App. 4th 1, 9-10, 72 Cal. Rptr. 2d 369* ; *Department of Soc. Servs. v. Superior Court (1997) 58 Cal. App. 4th 721, 732-733, 68 Cal. Rptr. 2d 239]* .

The transition, adoptive placement, and finalization process can be critical to the success of the child's stabilization and well-being in the adoptive home. For this reason, decisions regarding visitation for the child should also be made by the social services agency that is vested with exclusive care and control of the child, with the juvenile court limited to reviewing those decisions for abuse of discretion [*Welf. & Inst. Code § 366.26(j)*]. Because usually the agency has been given exclusive care and control of the child, in most circumstances no petition under *Welf. & Inst. Code § 387* is needed for the agency to move the child from a relative placement to a prospective adoptive home after parental rights have been terminated [*In re A.O. (2004) 120 Cal. App. 4th 1054, 1059-1061, 16 Cal. Rptr. 3d 117]* .

Having given the exclusive care and control of a freed child to the adoption agency, the legislature has recognized that "only in exceptional circumstances" will the juvenile court intervene in placement decisions for a child after parental rights have been terminated [*Welf. & Inst. Code § 366.28(a)*]. When the juvenile court is called upon to review the adoption agency's placement decision, however, delays caused by appeals from the court's decision can delay permanence for the child and thus cause substantial detriment. As a result, the legislature has made such decisions made on or after January 1, 2005, not appealable, but instead has directed a writ procedure be utilized much like that used for challenging the setting of a *Welf. & Inst. Code § 366.26* hearing [*Welf. & Inst. Code § 366.28*; *Cal. Rules of Ct., Rules 8.454, 8.456*]. This process does not affect the right of a parent, guardian, or the child to appeal the orders made at a *Welf. & Inst. Code § 366.26* hearing if those orders are otherwise appealable [*Welf. & Inst. Code § 366.28(c)*].

For discussion of the writ process for review of juvenile court decisions designating specific placement of a dependent child after parental rights have been terminated, see *§ 328.195*.

For discussion of adoptive placement decisions, and postadoption visitation agreements, including postadoptive sibling contact, see *§ 328.198*.

[ii] Court Designated Prospective Adoptive Parents

Effective January 1, 2005, the juvenile court may designate a current caregiver as a prospective adoptive parent, which will then limit the exclusive care and control normally given the social services agency for a freed child, and allow the juvenile court to make best interest determinations regarding placement for the child [*Welf. & Inst. Code § 366.26(n)*]. This is a significant first step by those who oppose the social services agency having exclusive authority for placement decisions subject only to review by the juvenile court for abuse of discretion. The rules of court addressing this process are at *Cal. Rules of Ct., Rules 5.726 et seq.*

For the court to designate a current caregiver as the child's prospective adoptive parent, the child must have lived with the caregiver for at least six months, the caregiver must express a current commitment to adopt the child, and the caregiver must have taken at least one step to facilitate the adoption process [*Welf. & Inst. Code § 366.26(n)(1)*].

Although the statute does not expressly require the court to make a finding the caregiver actually is sincerely committed to adopting the child, a requirement for such a finding should be inferred. It should also be inferred that this status will not be granted if there is a legal impediment to adoption. The decision to designate the current caregiver as a prospective adoptive parent is one committed to the discretion of the court.

Steps to facilitate the adoption process include, but are not limited to [*Welf. & Inst. Code § 366.26(n)(2)*]:

- Applying for an adoption homestudy. This would appear to mean turning in the actual written adoption homestudy application.

- Cooperating with an adoption homestudy. This would appear to mean working with the social worker in a cooperative fashion to facilitate the timely completion of the adoption homestudy after the written application is submitted to the adoption agency.

- Being designated by the court or the licensed adoption agency as the adoptive family. This step will need further clarification.

- Requesting de facto parent status. Because only the court can grant de facto parent status, this would appear to mean the filing of the written application for de facto parent status with the court, regardless of whether that application has yet been granted. If de facto parent status was requested but denied, this step would not apply.

- Signing an adoptive placement agreement. This step is self-explanatory.

- Engaging in discussions regarding a postadoption contact agreement. This step will need further clarification, but the better view is this will require the discussions be relatively recent and be part of the overall permanency planning process, not merely a brief mention of possible postadoption contact and being in agreement with providing that contact.

- Working to overcome any impediments to adoption that have been identified by the adoption agency. Again, this will need further clarification.

If the juvenile court designates the current caregiver as the prospective adoptive parent, before the agency can change the child's placement the agency must give notice to the court, the designated prospective parent, the child's attorney, and the child, if the child is 10 years of age or older [*Welf. & Inst. Code §§ 366.26(n)(3), 16010.6*]. The agency must also notify the current caregiver, "if that caretaker would have met the threshold criteria to be designated as a prospective adoptive parent" pursuant to *Welf. & Inst. Code § 366.26(n)(1)* [*Welf. & Inst. Code § 366.26(n)(3)*]. This latter requirement is unclear and likely to result in extensive litigation. If it means the agency must notice any current caregiver who has had the child for at least six months and made any mention of wanting to adopt the child, the requirement will be onerous and agencies will have err on the side of caution and notice any caregiver who even comes close to qualifying for designating as a prospective adoptive parent. The better and more practical view, however, is that such notice should only be required if the current caregiver has had the child for at least six months, clearly and recently expressed to the social worker a desire to adopt the child, and has clearly taken at least one of the steps listed in *Welf. & Inst. Code § 366.26(n)(2)*.

Following notice, the child, the child's attorney, or the designated prospective adoptive parent has five court days or seven calendar days, whichever is longer, in which to file a petition with the court objecting to the proposal to move the child. In response to such a petition, or on its own motion within the same time, the court may set a hearing regarding the proposal [*Welf. & Inst. Code § 366.26(n)(3)(A)*]. For good cause the court may extend the filing period [*Welf. & Inst. Code § 366.26(n)(3)(A)*]. Further, the current caregiver who would have met the threshold criteria for designation

as a prospective adoptive parent may file a petition objecting to the proposed move and a petition for designation as the prospective adoptive parent [*Welf. & Inst. Code § 366.26(n)(3)(A)*].

The hearing process is one in which the court determines whether the proposed move is in the child's best interest. If the current caregiver has requested designation as a prospective adoptive parent, the court should decide that issue first, since it will affect the standing the caregiver has to object to any move. The fact the caregiver is designated a prospective adoptive parent does not make the caregiver a party to the action or confer standing to object to any other action by the social services agency [*Welf. & Inst. Code § 366.26(n)(3)(B)-(C)*].

If no petition is filed objecting to the move and the court does not set the matter for a hearing on its own motion, the child may be moved without a hearing [*Welf. & Inst. Code § 366.26(n)(3)(D)*].

The child may also be moved without a hearing if the agency determines the child must be removed due to a risk of physical or emotional harm, however, notice must be given as soon thereafter as possible and not longer than two court days after the child is removed [*Welf. & Inst. Code § 366.26(n)(4)*].

While the legislative history suggests these new provisions are not likely to cause extensive litigation, the reality of the dependency system strongly suggests otherwise. This new legislation can be expected to result in an increase in requests for de facto parent status, cases in which notice is an issue, many cases in which courts will be asked to designate current caregivers as prospective adoptive parents, many cases in which courts will have to decide whether to allow a child to be removed from a designated prospective adoptive parent, and many contested hearings and appeals on all of these issues. Numerous published appellate decisions will be needed to provide the guidance the dependency system will need in implementing this new legislation. This is an area to be watched for further developments.

[6] Decision Process for Non-Relative Guardianship or Another Planned Permanent Living Arrangement as the Alternative Permanent Plan

[a] In General

If the court finds it has not been proven the child is likely to be adopted if parental rights are terminated or that one of the conditions in *Welf. & Inst. Code § 366.26(c)(1)(B)* applies, the court must either order that the present caretakers or other appropriate persons become legal guardians of the child or order that the child remain in another planned permanent living arrangement, such as permanent placement with a foster or relative caregiver committed to caring for the child on a permanent basis. Legal guardianship must be considered before another planned permanent living arrangement, if it is in the best interests of the child and if a suitable guardian can be found.

PRACTICE TIP:

Another Planned Permanent Living Arrangement. California statutes still often speak of the third alternative permanent plan for children as long-term foster care [*see Welf. & Inst. Code § 366.26(c)(4)* (long-term foster care); *but see Welf. & Inst. Code § 366(a)(2)* (another planned permanent living arrangement)]. Federal law no longer considers long-term foster care an appropriate permanent plan, since it is not a permanent living situation for a child [Renne, *Reasonable Efforts to Finalize A Permanency Plan for "Another Planned Permanent Living Arrangement"*, 21(3) ABA Child Law Prac. 33 (May 2002)]. Instead, it speaks of "another planned permanent living arrangement," emphasizing the goal of permanency planning when reunification, adoption, or legal guardianship are not appropriate or available should still be to find the child a home committed to permanency [*42 U.S.C. § 675(5)(C)*]. Thus, if a child cannot be returned home and neither adoption nor legal guardianship is available or appropriate under the law, the remaining alternative permanent plan should be for another planned permanent living arrangement with a foster or relative caregiver committed to caring for the child on a permanent basis. While some of California's statutes speak of another planned permanent living

> arrangement, the California dependency system is still becoming familiar with this new language and how to achieve it. One case has held that long-term foster care is still a permanent plan that can be chosen, although it is not preferred and efforts to achieve another planned permanent living arrangement should continue [*In re Stuart S. (2002) 104 Cal. App. 4th 203, 207-209, 127 Cal. Rptr. 2d 856]* . At the least, the phrase "another planned permanent living arrangement" reminds us that all children need stability and permanency, even those in long-term foster care. We should all be working toward that end in cases in which neither return home, nor adoption or legal guardianship are appropriate.

If the child is living with a relative or a foster parent who is willing and capable of providing a stable and permanent environment, but not willing to become a legal guardian, the child must not be removed from the home if the court finds that removal would be seriously detrimental to the emotional well-being of the child because the child has substantial psychological ties to the relative caretaker or foster parents [*Welf & Inst. Code § 366.26(c)(4)(B)*]. When the court has placed a child in another planned permanent living arrangement with a relative pursuant to *Welf. & Inst. Code § 366.26*, the court may authorize the relative to provide the same legal consent for the child's medical, surgical, and dental care, and education as the custodial parent of the child [*Welf. & Inst. Code § 366.27(a)*]. It may also limit the right of the parent or guardian to make educational decisions for the child so the caregiver may exercise the educational consent duties found in *Educ. Code § 56055* [*Welf. & Inst. Code § 366.27(b)*].

[b] Guardianship Pursuant to Welf. & Inst. Code § 366.26

A proceeding for the appointment of a guardian for a child who is a dependent of the juvenile court must be in the juvenile court. Neither a separate guardianship petition nor a separate guardianship hearing is required. Instead, the appointment of a guardian is done at the selection and implementation hearing [*Welf. & Inst. Code § 366.26(d)*]. If the court finds that legal guardianship is the appropriate permanent plan, it must appoint the legal guardian and issue letters of guardianship. The assessment prepared for the selection and implementation hearing must be read and considered by the court prior to the appointment and its consideration noted in the minutes of the court. The person preparing the assessment may be called and examined by any party to the proceeding [*Welf. & Inst. Code § 366.26(d)*].

There was a split of authority on the issue of visitation orders made in conjunction with a legal guardianship pursuant to *Welf. & Inst. Code § 366.26*. In the case of *In re Jasmine P. (2001) 91 Cal. App. 4th 617, 110 Cal. Rptr. 2d 562* , the appellate court held a visitation order was not required when the juvenile court made an order for legal guardianship. The appellate court construed Welf. & Inst. Code former § 366.26(c)(4) narrowly, and held a visitation order was only required when the court ordered long-term foster care, not when the court ordered legal guardianship [*In re Jasmine P. (2001) 91 Cal. App. 4th 617, 621, 110 Cal. Rptr. 2d 562]* . The appellate court in the case of *In re Randalynne G. (2002) 97 Cal. App. 4th 1156, 118 Cal. Rptr. 2d 880* disagreed. It held that a visitation order for parents was required when guardianship was ordered, unless the court found visitation would be detrimental to the child [*In re Randalynne G. (2002) 97 Cal. App. 4th 1156, 1163, fn. 7, 118 Cal. Rptr. 2d 880]* . The *Randalynne G.* holding was the better analysis and more practical approach. Still, there was a conflict of decisions. The requirement for visitation orders in conjunction with guardianship orders was reviewed by the California Supreme Court in the case of *In re S.B. (2004) 32 Cal. 4th 1287, 13 Cal. Rptr. 3d 786, 90 P.3d 746* . By the time the Supreme Court reached its decision, however, the statute had been inadvertently changed through a drafting error and was clear that a visitation order was only mandated when long term foster care was ordered, not when legal guardianship was ordered [*In re S.B. (2004) 32 Cal. 4th 1287, 1295-1296, 13 Cal. Rptr. 3d 786, 90 P.3d 746]* . Effective January 1, 2005, however, the statute was changed once again to rectify the drafting error and clarify that an order for visitation for the parent or guardian must be made whenever the court orders a permanent plan of guardianship or long term foster care unless the court finds by a preponderance of the evidence that visitation would be detrimental to the child's physical or emotional well-being [*Welf. & Inst. Code § 366.26(c)(4)(C)*; *see also* *In re S.B. (2004) 32 Cal. 4th 1287, 1296, fn. 3, 13 Cal. Rptr. 3d 786, 90 P.3d 746]* . Thus, courts must ensure that if a visitation order is requested for a parent in conjunction with a legal guardianship, that an order is made that determines whether there should be such visitation, or whether visitation would be detrimental to the child [*In re M.R. (2005) 132 Cal. App. 4th 269, 273-274, 33 Cal. Rptr. 3d 629]* . The

determination of whether the parents should have visitation or whether such visitation would be detrimental to the child is a decision well suited for judicial determination. If there is no request, the issue is, of course, waived [*In re Dakota S. (2000) 85 Cal. App. 4th 494, 501-502, 102 Cal. Rptr. 2d 196]* .

If a parental visitation order is made in conjunction with an order for legal guardianship, the question then becomes how much discretion may be given to the guardian to control the frequency, time, place, length, and manner of such visitation. Again, on this issue there are differing opinions and authorities. The best view takes into account several factors. First, when a legal guardianship is ordered the case is no longer in reunification and the mandate for frequent parental visitation to facilitate reunification no longer applies [*Welf. & Inst. Code § 362.1*]. Instead, the focus is on achieving and maintaining stability for the child [*In re Marilyn H. (1993) 5 Cal. 4th 295, 309, 19 Cal. Rptr. 2d 544, 851 P.2d 826]* . In this respect, guardians are normally viewed as having a level of control for the child's life and well-being similar to that of a natural parent [*Prob. Code § 2108(a)*]. Second, guardians must have a significant degree of flexibility and authority in their care, custody, and control of the child. While not limited to older children, most guardianships in dependency cases are ordered for children who are at or reaching the age at which school, extracurricular activities, and childhood friends take on great significance and require increased time. Even custodial and noncustodial parents of children who have not been through the dependency system often see their children less during these years of transition from childhood to young adulthood. Children who are the subject of a guardianship are no different, so flexibility is needed. Finally, if the guardian and the parent get along and work well together, it is to everyone's benefit to give them the maximum degree of flexibility to work together in maintaining contact between the parent and child. In such cases, an order for "reasonable visitation as directed by the guardian in the child's best interest" may be sufficient. If the guardian and the parent do not get along, however, some guidelines and specificity as to the minimum visitation to be afforded the parent and the terms and conditions of that visitation are necessary. In those cases, the court may need to make an order such as "unsupervised visitation is to occur at least once per month for a minimum of four hours, with additional contact and visitation, if requested by either the child or the parent, and the time, length, and manner of such visitation and contact being at the discretion of the guardian consistent with the best interest of the child." Until further guidance is received from the appellate courts or the legislature, juvenile courts would be wise to ensure all of the above factors are considered in defining the terms and conditions of a guardianship visitation order, that the record reflects the reasons for the terms and conditions of the order, and that the order is clearly stated in the letters of guardianship.

The guardianship provisions of the Probate Code (*Prob. Code § 1500 et seq.*) do not apply to guardianships established in juvenile court. If no specific provision of the Welfare and Institutions Code or the California Rules of Court is applicable, however, the provisions of the Probate Code governing administration of guardianship and conservatorship estates (*Prob. Code § 2100 et seq.*) govern so far as they are applicable to like situations [*Welf. & Inst. Code § 366.4*; *see Prob. Code § 1517*].

In the case of relatives appointed legal guardians pursuant to *Welf. & Inst. Code § 366.26*, such relatives are to be eligible for aid under the kinship guardianship assistance payment (Kin-GAP) program as provided for in *Welf. & Inst. Code § 11360 et seq.* [*Welf. & Inst. Code §§ 366.21(j), 366.22(c)*]. For purposes of this assistance program, the term "relative" is defined in the same way as set forth in *Welf. & Inst. Code §§ 319, 361.3* [*Welf. & Inst. Code §§ 366.21(k), 366.22(d)*].

[c] Long-Term Foster Care With Foster Family Agency

If the court finds that the child should not be placed for adoption, that legal guardianship will not be established, and that there are no suitable foster parents except exclusive-use homes available to provide the child with a stable and permanent environment, the court may order the care, custody, and control of the child transferred from the county welfare department or probation department to a licensed foster family agency. The court must consider the written recommendation of the county welfare director or chief probation officer regarding the suitability of such a transfer. The transfer will be subject to further court orders [*Welf. & Inst. Code § 366.26(c)(5)*].

The licensed foster family agency must place the child in a suitable licensed or exclusive-use home that has been certified by the agency as meeting licensing standards. The licensed foster family agency must be responsible for supporting the child and for providing appropriate services to the child, including those services ordered by the court. Responsibility for the support of the child will not, in and of itself, create liability on the part of the foster family agency to third persons injured by the child. Those children whose care, custody, and control are transferred to a foster family agency will not be eligible for foster care maintenance payments or child welfare services, except for emergency response services pursuant to *Welf. & Inst. Code § 16504* [*Welf. & Inst. Code § 366.26(c)(5)*].

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J. Permanency Planning Procedures

28-328 California Forms of Pleading and Practice--Annotated § 328.172

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§ 328.172 Retention of Jurisdiction After Permanency Plan

If a juvenile court orders a permanent plan of adoption or legal guardianship pursuant to *Welf. & Inst. Code § 366.26*, the court must retain jurisdiction over the child until the child is adopted or the legal guardianship established [*In re Rosalinda C. (1993) 16 Cal. App. 4th 273, 279, 20 Cal. Rptr. 2d 58* (reversing dismissal of dependency case as premature; juvenile court has continuing responsibility to account for welfare of dependent child until permanent and stable home established)]. The status of the child must be reviewed every six months to ensure that the adoption or guardianship is completed as expeditiously as possible. At the review hearing, the court must consider the report of the petitioner and the report of any court-appointed child advocate. Notice of the hearing must be given as required by *Welf. & Inst. Code § 295*.

Dependency jurisdiction is usually terminated once a guardianship is established by the juvenile court for a dependent child [*Cal. Rules of Ct., Rule 5.735(d)(3)*]. In this way, the court continues to maintain jurisdiction over the guardianship without requiring ongoing review hearings. Instead, the matter only comes back before the court if there is a problem with some aspect of the guardianship orders, someone desires to terminate the guardianship, or if a more permanent plan for the child is sought [*Welf. & Inst. Code § 366.3*].

If guardianship is ordered for an adoptable child for whom parental rights were not terminated because of an exception to the termination of parental rights as set forth in *Welf. & Inst. Code § 366.26(c)(1)(B)(i)* or *(v)*, the juvenile court should consider whether dependency jurisdiction should be maintained despite the appointment of a legal guardian so the court can ensure the child has continued contact with the parent or sibling whose relationship with the child caused the exception to apply. The court must consider the need, if any, for ongoing dependency supervision, as well as the legislative mandate to provide the child with stability and permanence. Whether dependency jurisdiction should be maintained in such circumstances must be determined on a case-by-case basis.

In the past some counties routinely ordered guardianships without dependency jurisdiction being terminated, especially when the guardian was a relative. Thus, counties established practices regarding the termination of dependency jurisdiction following the appointment of a guardian that differed markedly from county to county.

PRACTICE TIP:

Know the Practice of the Court. It is important that all parties to a potential guardianship be aware of the practice of the juvenile court regarding maintaining or terminating dependency jurisdiction after the appointment of a guardian. This may be especially important in cases where dependency jurisdiction may be transferred to another county, since the policy of the receiving county may be different than that of the sending county and may result in dependency jurisdiction being terminated notwithstanding the policy of the original court for the maintenance of dependency jurisdiction. Thus, such information needs to be considered in making the decision for legal guardianship and in making any subsequent decision for transfer of dependency jurisdiction if such jurisdiction was maintained.

Effective January 1, 1999, the statute was changed to provide that if a relative has been appointed as guardian for the child and the child has been in that home for over 12 months, the court must terminate dependency jurisdiction absent a finding of exceptional circumstances [former *Welf. & Inst. Code § 366.3(a)*]. This was designed to help eliminate the many cases in which a relative guardian has been appointed, but dependency was maintained in certain counties. The difficulty had been that once dependency jurisdiction was terminated a relative caretaker who had accepted guardianship had not previously been eligible for the same benefits as an unrelated caretaker who had accepted guardianship. In most counties, relative caretakers were advised of this change in benefits and considered that change in making their decision to be appointed as legal guardians. In a few counties, however, courts developed the practice of continuing dependency jurisdiction notwithstanding the appointment of a relative guardian so as to ensure continued financial benefits for the guardian. This practice contributed to court congestion and negated many of the benefits of legal guardianship. Recognizing these problems, the National Center for State Courts recommended the Judicial Council take steps through its Juvenile Law Subcommittee to identify and where possible correct such financial disincentives to permanency planning [National Ctr. for State Cts., California Court Improvement Project Report (Apr. 1997) pp. 47-49]. Effective January 1, 2000, a kinship guardianship assistance payment (Kin-GAP) program was enacted to help remedy this situation [*Welf. & Inst. Code §§ 366.21(j), 366.22(c), 11360 et seq.*]. Nevertheless, effective January 1, 2001, the statute was again amended. Now the relative guardian may object to the termination of jurisdiction, in which case the court is not required to terminate dependency jurisdiction [*Welf. & Inst. Code § 366.3(a)*]. Maintaining dependency jurisdiction after ordering a legal guardianship defeats much of the purpose of ordering the guardianship in the first place, however. Thus, in most cases, if a guardianship is ordered as the permanent plan for the child, dependency jurisdiction will be terminated. The juvenile court will continued to have jurisdiction over the guardianship if a modification of the guardianship orders becomes necessary [*Welf. & Inst. Code § 366.4*].

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§ 328.173 Permanency Planning for Children Adjudged Dependents Prior to January 1, 1989

When Senate Bill 243 [Stats. 1987, ch. 1485] was enacted it created two separate systems for permanency planning in dependency cases. For those children declared dependents of the juvenile court before January 1, 1989, the prior system remained in effect. This meant the selection of a permanent plan was done under former *Welf. & Inst. Code § 366.25* and that termination of parental rights was done under a separate action filed pursuant to former *Civil Code § 232* (*now see Fam. Code § 7800 et seq.*). For children declared dependents on or after January 1, 1989, permanency planning was accomplished in a new way. Under the procedures set forth in *Welf. & Inst. Code § 366.26* the permanent plan would be both selected and implemented as part of the dependency process. No separate termination of parental rights action was required or permitted for such dependent children. This new system for the termination of parental rights was upheld by the California Supreme Court in the case of *Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 19 Cal. Rptr. 2d 698, 851 P.2d 1307* .

Effective January 1, 1999, former *Welf. & Inst. Code § 366.25* was repealed [Stats. 1998, ch. 1054, sec. 35]. Now permanency planning for all children is done through *Welf. & Inst. Code § 366*.26 [Stats. 1998, ch. 1054, sec. 36]. This is a positive step forward to ease the cumbersome process of permanency planning for those children who were declared dependents prior to January 1, 1989, and are still in the dependency system.

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[Reserved]

§§ 328.174[Reserved]

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§ 328.180 Periodic Review Process

[1] In General

Regardless of whether a child's permanent plan was ordered at a permanency planning hearing pursuant to former *Welf. & Inst. Code § 366.25* or a selection and implementation hearing pursuant to *Welf. & Inst. Code § 366.26*, so long as the child remains a dependent of the juvenile court the child's case shall be reviewed every six months following the procedures set forth in *Welf. & Inst. Code §§ 366.3, 16503* [*Welf. & Inst. Code § 366(b)*].

Unless their parental rights have been permanently terminated, the parent or parents of the child are entitled to receive notice of, and participate in, those hearings. Notice of the hearing must be given as required by *Welf. & Inst. Code § 295* [*Welf. & Inst. Code § 295*].

The need for limiting a parent's right to make educational decisions, to appoint a responsible adult for educational decisions, or for the court to make educational decisions for the child should to be considered at any review hearing, including post-permanency planning review hearings for children in long term foster care [*Welf. & Inst. Code §§ 361(a), 366(a)(1)(C), 366.3(e)(5)*]. Educational advocacy on behalf of dependent children is not limited to the activities of a responsible adult or surrogate parent for the making of educational decisions for the child. Counsel for children, CASAs, social workers, and other child advocates, as well as the juvenile court, must take an active role in educational advocacy for dependent children [*see, e.g.*, Espana & Fried, The Expanding Role of the Juvenile Court in Determining Educational Outcomes for Foster Children, *5 J. Center Children & Cts. 83 (2004)*; NCJFCJ, Asking The Right Questions: A Judicial Checklist to Ensure That the Educational Needs of Children and Youth in Foster Care Are Being Addressed (NCJFCJ 2005)].

Where the child has been placed out-of-state, the court must consider whether the out-of-state placement continues to be

the most appropriate placement for the child and continues to be in the child's best interest [*Welf. & Inst. Code § 366(c)*].

For discussion of the requirement to address the educational needs of the child, including limiting the parents' right to make educational decisions and the appointment of a responsible adult to make such decisions, see *§ 328.62[6]*.

For discussion of placements in out-of-state group homes, see *§ 328.128[5]*.

[2] Review Where Plan Is Adoption or Guardianship

If the permanent plan selected was one of adoption or legal guardianship pursuant to either *Welf. & Inst. Code § 360* or *Welf. & Inst. Code § 366.26*, the juvenile court must retain jurisdiction until the guardianship is established or the adoption is finalized [*Welf. & Inst. Code § 366.3(a)*]. If the court has ordered parental rights terminated and the child placed for adoption, the post-permanency planning review hearings must be held by the court at least every six months. If the court has not ordered parental rights terminated and has not ordered the child placed for adoption, the review may be heard by either the court or an appropriate local agency [*Welf. & Inst. Code § 366.3(d)*]. For the review of a child for whom the court has ordered parental rights terminated and that the child be placed for adoption, the social services agency must prepare a report regarding the child's placement and status. The report must also detail the progress made toward adoption, including whether the child has been placed in an adoptive home, whether adoptive placement papers have been signed, whether the actual adoption order should include postadoptive sibling contact provisions pursuant to *Welf. & Inst. Code § 366.29*, any impediments to adoption, and any recommended orders the court could make that will assist in the child being placed for adoption or adoption being finalized. The court must determine whether reasonable efforts have been made to "make and finalize" a permanent placement for the child. The court must make any appropriate orders to "protect the stability of the child and to facilitate and expedite the permanent placement and adoption of the child" [*Welf. & Inst. Code § 366.3(f)*].

At the review hearings, the court shall review the status of the child to ensure that the adoption or guardianship is completed as expeditiously as possible. When the child is adopted the court shall terminate its jurisdiction over the child. When legal guardianship is granted the court will normally terminate its dependency jurisdiction and retain jurisdiction over the guardianship pursuant to *Welf. & Inst. Code § 366.4*. The court may, however, continue its dependency jurisdiction after the granting of the legal guardianship. If the guardian is a relative who has had the child in his or her care for at least 12 months, however, the court may only continue dependency jurisdiction following appointment of the relative guardian if it finds exceptional circumstances require it to do so or if the relative guardian objects to the termination of dependency jurisdiction [*Welf. & Inst. Code § 366.3(a)*]. For a discussion of the question of terminating or continuing dependency jurisdiction following the appointment of a legal guardian, see *§ 328.172*.

[3] Review Where Plan Is Another Planned Permanent Living Arrangement

If the permanent plan selected was that of another planned permanent living arrangement or long-term foster or relative care, the reviews which are held every six months may be conducted by the court or an appropriate local agency. The court must conduct the review on the request of the child's parents or guardian or of the child and must conduct the review 12 months after the hearing at which the permanent plan of long-term foster or relative care was ordered and every 12 months thereafter [*Welf. & Inst. Code § 366.3(d), (g)*].

Each licensed foster family agency must submit reports for each child in its care, custody, and control to the court concerning the continuing appropriateness and extent of compliance with the child's permanent plan, the extent of compliance with the case plan, and the type and adequacy of services provided to the child. At the review hearing, the court must consider the report of the petitioner and the report of any court-appointed child advocate [*Welf. & Inst. Code § 366.3(e)*].

The reviewing body must inquire about the progress being made to provide a permanent home for the child and must determine the appropriateness of the placement, efforts made to determine and facilitate relationships with individuals important to the child if the child is 10 years of age or older and has been placed in out of home care for six months or longer from the date the child entered foster care, the continuing appropriateness and extent of compliance with the permanent plan for the child, the extent of the social services agency's compliance with the case plan in providing the child with a permanent home the adequacy of services provided to the child, the extent of any progress the parents may have made toward reresolving or mitigating the reasons that necessitated placement of the child in foster care, and the likely date by which the child may be returned to and safely maintained in parental custody, placed for adoption or legal guardianship, or placed in some other permanent living arrangement. The reviewing body must determine whether reasonable efforts have been made to make and finalize a permanent placement for the child. The review must also include a determination of the services needed to assist a child who is 16 years old or older in making the transition from foster care to independent living [*Welf. & Inst. Code §§ 366.3(e), 391*]. Further, it must make determinations regarding sibling relationships [*Welf. & Inst. Code § 366.3(e)(7)*; *see* discussion in *§ 328.129[6]*, regarding sibling placement and visitation issues].

Once the court makes the findings and orders that returning a child to his or her parents would create a substantial risk of detriment to the child, terminating reunification services, and selecting a permanent plan other than return to parent, the court is not required to continue to make such findings at each subsequent review [*In re Heather P. (1989) 209 Cal. App. 3d 886, 890, 257 Cal. Rptr. 545* ; *In re Elizabeth G. (1988) 205 Cal. App. 3d 1327, 1332, 253 Cal. Rptr. 161]* . Instead, it is presumed that continued out-of-home care is in the interests of the child, unless the parent or parents prove, by a preponderance of the evidence, that further efforts at reunification are the best alternative for the child. In those cases, the court may order that further reunification services to return the child to a safe environment be provided to the parent or parents for a period not to exceed six months [*Welf. & Inst. Code § 366.3(e)*; *Nahid H. v. Superior Court (1997) 53 Cal. App. 4th 1051, 1071, 62 Cal. Rptr. 2d 281]* .

In the past, the proper means to challenge an order for out-of-home placement of the child after reunification services have been terminated has been through a petition under *Welf. & Inst. Code § 388*. Thus, where a parent sought return of a child in long-term foster or relative care, the parent would petition the court to modify the order on the ground that there was a change of circumstances or new evidence justifying return and that the change in order is in the child's best interest. If the court determined the best interests of the child might be promoted by the change, it would order a hearing on the matter [*see* *In re Heather P. (1989) 209 Cal. App. 3d 886, 891, 257 Cal. Rptr. 545]* . This is still the procedure that must be followed in most situations. The law now requires, however, that at each review for a child in long-term foster care, the court consider all permanency planning options "including whether the child should be returned to the home of the parent" [*Welf. & Inst. Code § 366.3(g)*]. The court must also determine the likely date by which the child "may be returned to and safely maintained in the home," placed for adoption or legal guardianship, or placed in some other permanent living arraignment [*Welf. & Inst. Code § 366.3(e)*]. These provisions mean that at a post-permanency planning review hearing for a child in long-term foster care the court should consider a parent's argument that further services should be offered or provided or that the child should be returned without the need for a petition under *Welf. & Inst. Code § 388*. It does not mean, however, that the parent is automatically entitled to a contested hearing on the issue. Instead, if the parent makes an offer of proof as to what evidence the parent would present at the contested hearing, the court should consider that offer of proof and exercise its discretion as to whether the offer of proof is sufficient to justify setting a contested hearing on the matter so as to ensure the child's best interests are served [*Maricela C. v. Superior Court (1998) 66 Cal. App. 4th 1138, 1147, 78 Cal. Rptr. 2d 488]* .

[4] Changing the Permanent Plan

If circumstances have changed since the permanent plan was ordered, the court may order a new permanent plan under *Welf. & Inst. Code § 366.26* at any regularly scheduled subsequent review hearing, or any party may seek at any other time a new permanent plan by means of an application for a modification of the court's previous order [*Welf. & Inst. Code § 366.3(c), (g), (h)*; *San Diego County Dep't of Soc. Servs. v. Superior Court (1996) 13 Cal. 4th 882, 887-892,*

55 Cal. Rptr. 2d 396, 919 P.2d 1329 ; *In re John F. (1994) 27 Cal. App. 4th 1365, 1375, 33 Cal. Rptr. 2d 225]* .

The Legislature's intent that children not languish in long-term foster care if the possibility of a more permanent placement exists has now been made very clear through the provisions of *Welf. & Inst. Code § 366.3(d)-(h)*, which require the juvenile court or other reviewing body to consider all permanency planning options, including return to the parent, at each review hearing for children in long-term foster care [*Welf. & Inst. Code § 366.3(g)*]. At such hearings, the court must order a hearing under *Welf. & Inst. Code § 366.26* to consider selecting a more permanent plan unless it is clear there is a compelling reason to determine a hearing under that section is not best for the child because the child is being returned to the home of a parent, or is not a proper subject for adoption and no one is willing to accept legal guardianship of the child. If the court determines it is unlikely the child will be adopted or that one of the conditions set forth in *Welf. & Inst. Code § 366.26(c)(1)(A)-(E)* exists, that determination shall constitute a compelling reason not to set a hearing pursuant to *Welf. & Inst. Code § 366.26* [*Welf. & Inst. Code § 366.3(g)*]. The court should be careful, however, to ensure it has sufficient information on which to base such a determination. Review reports, particularly post-permanency planning review reports, frequently lack sufficient information to allow the court to make such findings. It is for this reason that "cutting out" to another planned permanent living arrangement, such as permanent placement with a foster or relative caregiver committed to caring for the child on a permanent basis at a 12-month permanency hearing or an 18-month permanency review hearing is the exception rather than the rule. Even in a post-permanency planning setting, the court, children's counsel, and any court-appointed special advocate should ensure sufficient information is presented to the court to justify making a finding that there is such a compelling reason not to order a *Welf. & Inst. Code § 366.26* hearing. Only if the court makes that determination may it order the child remain in another planned permanent living arrangement, such as permanent placement with a foster or relative caregiver committed to caring for the child on a permanent basis, without ordering a selection and implementation hearing [*Welf. & Inst. Code § 366.3(g)*].

For discussion of "cutting out" to another planned permanent living arrangement, such as permanent placement with a foster or relative caregiver committed to caring for the child on a permanent basis, at a 12-month permanency hearing, see *§ 328.153[3]*.

The juvenile court also has the authority to consider the appropriateness of changing a permanent plan of guardianship to one of adoption, even where dependency jurisdiction has been terminated with the establishment of a dependency guardianship. Where the social services agency becomes aware of changed circumstances following the establishment of a dependency guardianship which indicate adoption may be an appropriate plan for the child, the agency shall notify the juvenile court of that information. The court may vacate its previous order terminating dependency jurisdiction and set the matter for a selection and implementation hearing at which it will determine whether adoption or continued guardianship is the appropriate permanent plan [*Welf. & Inst. Code § 366.3(c)*; *In re Heraclio A. (1996) 42 Cal. App. 4th 569, 574-576, 49 Cal. Rptr. 2d 713]* .

For a general discussion of applications for modification, see *§ 328.140* et seq.

[5] Terminating Jurisdiction When Child Reaches Age of Majority

The juvenile court may, in an appropriate case, maintain dependency over a child who has reached the age of majority, but not yet reached the age of 21 years [*Welf. & Inst. Code § 303*]. In most instances, however, the court will terminate its jurisdiction when the child reaches the age of 18 [*see, e.g.*, *In re Holly H. (2002) 104 Cal. App. 4th 1324, 1330, 128 Cal. Rptr. 2d 907* , citing Seiser & Kumli, California Juvenile Courts Practice and Procedure § 2.31 (Matthew Bender); *In re Robert L. (1998) 68 Cal. App. 4th 789, 793-797, 80 Cal. Rptr. 2d 578* (maintaining dependency jurisdiction to assist children with expense of college reversed as abuse of discretion)]. If the child has reached the age of majority, the child must be present at any hearing to terminate dependency jurisdiction, unless the child does not wish to attend the hearing or the child is unavailable to attend the hearing and the social services agency has documented efforts to locate the child [*Welf. & Inst Code § 391(a)(1)*]. At the hearing the agency must submit a report verifying the following

information, documents, and services have been provided to the child [*Welf. & Inst. Code § 391(a)(2)*]:

- Written information regarding child's dependency case including the child's Indian heritage or tribal connections, if applicable, the child's family history and placement history, any photographs of the child or his or her family that are in the possession of the social services agency, other than forensic photographs, the whereabouts of any siblings under the court's jurisdiction unless the court determines sibling contact would jeopardize the safety of the sibling, instructions on how to access the child's documents under *Welf. & Inst. Code § 827*, and the date on which dependency jurisdiction is to be terminated.

- The child's social security card, certified birth certificate, health and education summary as described in *Welf. & Inst. Code § 16010(a)*, identification card as described in *Veh. Code § 13000*, death certificate of deceased parent or parents, proof of citizenship or residence, and a letter prepared by the social services agency that includes the child's name and date of birth, the dates during which the child was within the juvenile court's jurisdiction, and a statement that the child was a foster child in compliance with the state and federal financial aid documentation requirements.

- Assistance in obtaining health insurance or completing an application for Medi-Cal, referral transitional housing, if available, or assistance in obtaining other housing, and assistance in finding employment or other financial support.

- Assistance in applying for admission to college or to another education institution, including a vocational training program, and in obtaining financial aid, where appropriate.

- Assistance in maintaining relationships with individuals who are important to the child if the child had been placed in a group home for six months or longer from the date the child entered foster care, based on the child's best interests.

The social services agency must also file Judicial Council form JV-365 (Termination of Dependency Jurisdiction, Child Attaining Age of Majority), which provides check boxes for each of these items. The form must be filed with the juvenile court at least 10 calendar days before the hearing to terminate dependency jurisdiction. Copies of the form must be provided to all counsel of record, the child, the parents or guardians, and any court-appointed special advocate at least 10 calendar days before the hearing [*Cal. Rules of Ct., Rule 5.740(d)*].

The burden of proof is with the agency when it is seeking to terminate dependency jurisdiction for a dependent child who has turned 18 years of age. The agency cannot contend dependency jurisdiction must be terminated unless it is an unusual case. Instead, it must show termination of dependency jurisdiction is in the child's best interest [*In re Tamika C. (2005) 131 Cal. App. 4th 1153, 1160-1161, 32 Cal. Rptr. 3d 597]* .

If a dependent child has turned 18, however, and will not cooperate with the court or social services in facilitating the assistance and information mandated by *Welf. & Inst. Code § 391*, the court can terminate dependency jurisdiction. As noted by one court, when a child turns 18, the youth is no longer a child, but an adult, and the court "may not, and should not, force her to accept its services" [*In re Holly H. (2002) 104 Cal. App. 4th 1324, 1337, 128 Cal. Rptr. 2d 907]* .

If the social services agency has not met the requirements of *Welf. & Inst. Code § 391(b)* and the court finds termination of jurisdiction would be harmful to the best interests of the child, the court may continue dependency jurisdiction. The continuance of dependency jurisdiction for this reason shall only be for that period of time necessary for the agency to meet these requirements. If the social services agency has offered the required services and the child has either refused them or cannot be located despite reasonable efforts by the agency to locate him or her, the court may terminate

jurisdiction. Nothing in *Welf. & Inst. Code § 391* shall be construed to limit the discretion of the juvenile court to maintain dependency jurisdiction for other reasons [*Welf. & Inst. Code § 391(c)*].

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
K. Post-Permanency Planning Procedures

28-328 California Forms of Pleading and Practice--Annotated § 328.181

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§ 328.181 Setting Aside or Modifying Legal Guardianships

Notwithstanding *Prob. Code § 1601*, a petition to terminate a dependency guardianship, to appoint a successor guardian, or to modify or supplement orders relating to a guardianship established by the juvenile court must be filed in the juvenile court that retains jurisdiction over the guardianship or the juvenile court in the county in which the child and guardian reside, whichever is in the child's best interest, unless the guardianship is being terminated because of emancipation or adoption of the child [*see Welf. & Inst. Code § 366.3(b)*]. If dependency was terminated at the time of or subsequent to the appointment of the guardian, and dependency is later declared in another county, proceedings to terminate the guardianship may be held in the juvenile court with current dependency jurisdiction [*Cal. Rules of Ct., Rule 5.740(c)*].

Not less than 15 court days before the date of a hearing to terminate the guardianship, the petitioner must serve notice of the hearing on the social services department, the guardian, the child, if 10 years or older, the parents whose parental rights have not been terminated, the court that established the guardianship, if in another county, and counsel of record for those entitled to notice [*Cal. Rules of Ct., Rule 5.740(c)(2)*]. Before hearing the petition, the court must order the social services agency that has jurisdiction or jointly with the social services agency in the county where the child and guardian currently reside to prepare a report. That report must include an evaluation of whether the child could safely remain in the guardian's home with the provision of services without terminating the guardianship. The report must also identify recommended services and a plan for accomplishing this, if applicable [*Welf. & Inst. Code § 366.3(b)*].

At the hearing on the petition to terminate the guardianship, the court may do one of the following [*Cal. Rules of Ct., Rule 5.740(c)(3)*]:

- Deny the petition.

- Deny the petition and request the social services department to provide services to the guardian and the ward for the purpose of maintaining the guardianship, consistent with *Welf. & Inst. Code § 301* (informal supervision by social worker) [*see* discussion in *§ 328.155*].

- Grant the petition.

The burden of proof for a parent seeking to establish a change of circumstances that make termination of a dependency guardianship and return to the parent in the child's best interest is a preponderance of the evidence [*In re Michael D. (1996) 51 Cal. App. 4th 1074, 1086-1087, 59 Cal. Rptr. 2d 575]* . If the social services agency is seeking to terminate a guardianship in the juvenile court, it must establish by clear and convincing evidence that termination of the legal guardianship is best for the child [*In re Merrick V. (2004) 122 Cal. App. 4th 235, 254, 19 Cal. Rptr. 3d 490* (terminating probate guardianship); *In re Alicia O. (1995) 33 Cal. App. 4th 176, 183, 39 Cal. Rptr. 2d 119* (terminating dependency guardianship)].

If the petition is granted and the court continues or resumes dependency, the court must order that a new plan be developed to provide stability and permanency to the child. The court must conduct a hearing to review the child's status within 60 days. Parents whose parental rights have not been terminated must be notified of the hearing on the new plan [*Cal. Rules of Ct., Rule 5.740(c)(4)*; *see Welf. & Inst. Code § 366.3(b)*]. The court may consider further efforts at reunification only if the parents prove, by a preponderance of the evidence, that reunification is the best alternative for the child [*Welf. & Inst. Code § 366.3(b)*; *Cal. Rules of Ct., Rule 5.740(c)(4)*].

If the court terminates a guardianship established in another county, the clerk of the county of current dependency jurisdiction must transmit a certified copy of the order terminating guardianship within 15 days to the court that established the original guardianship [*Cal. Rules of Ct., Rule 5.740(c)(5)*].

For a discussion of the termination of probate guardianships in the juvenile court, see *§ 328.60[7]*.

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[Reserved]

§§ 328.182[Reserved]

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L. Appeal and Extraordinary Writs

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§ 328.189 Standing

[1] General requirements

As a general rule, a litigant may only assert his or her own constitutional rights or immunities [*McGowan v. Maryland (1961) 366 U.S. 420, 429, 81 S. Ct. 1101, 6 L. Ed. 2d 393]* . To have standing, a person must have rights that suffer injury; the person must be aggrieved [*Clifford S. v. Superior Court (1995) 38 Cal. App. 4th 747, 751, 45 Cal. Rptr. 2d 333]* . To be aggrieved, an appellant must have a legally cognizable interest that is affected injuriously by the juvenile court's decision [*In re Paul W. (2007) 151 Cal. App. 4th 37, 55, 60 Cal. Rptr. 3d 329]* . The objection that a person lacks standing cannot be waived by failure to raise it; lack of standing may be raised at any point in the proceedings [*Pillsbury v. Karmgard (1994) 22 Cal. App. 4th 743, 758, 27 Cal. Rptr. 2d 491]* .

PRACTICE TIP:

Always Look at Standing Issues. Practitioners should always ensure that individuals seeking to participate in appellate matters have standing to do so. The issue of standing is never waived, and it may be an easy way to prevent protracted appellate litigation.

In dependency appeals, the social services agency, the child and the parent or guardian has the right to appeal from any order specified in *Welf. & Inst. Code § 395*, which allows any judgment to be appealed "in the same manner as a final judgment" [*Cal. Rules of Court, Rule 5.585(b)*]. But *Welf. & Inst. Code § 395* does not eliminate the requirement for standing. Although an appeal may be taken from any juvenile court judgment, only "aggrieved" parties have standing to appeal [*Code of Civ. Proc. § 902*]. An appellant's legally cognizable interest must be injuriously affected by the trial court's ruling in an immediate and substantial manner, and not as a nominal or remote consequence [*In re Joshua S. (1986) 186 Cal. App. 3d 147, 150, 230 Cal. Rptr. 437]* . As such, it is not enough that an appellant has a personal interest in the judgment; it must be a legally cognizable interest that is injured to give standing. Nevertheless, standing determinations should be liberally construed and resolved in favor of the right to appeal [*Ajida Technologies, Inc. v.*

Roos Instruments, Inc. (2001) 87 Cal. App. 4th 534, 540, 104 Cal. Rptr. 2d 686] .

The mere fact a parent has a fundamental right to parent his or her child does not automatically confer standing to appeal [*In re Carissa G. (1999) 76 Cal. App. 4th 731, 736-737, 90 Cal. Rptr. 2d 561]* . For instance, a parent has no standing on appeal to seek reversal of the judgment based upon an assertion that the rights of the other parent were violated, unless appellant can also assert that he or she suffered harm [*In re Jenelle C. (1987) 197 Cal. App. 3d 813, 818, 243 Cal. Rptr. 89]* . Likewise, standing to challenge a ruling is not established simply because a parent takes a position on a particular issue that has some affect on the child. Without a showing that a parent's personal rights are affected by a ruling, the parent does not establish standing [*In re D.S. (2007) 156 Cal. App. 4th 671, 674, 67 Cal. Rptr. 3d 450* , *citing In re Frank L. (2000) 81 Cal. App. 4th 700, 703, 97 Cal. Rptr. 2d 88]* .

Generally in dependency cases, a parent's interest is in reunification. The interest of other relatives in their relationship with the child is separate from that of the parent [*In re Devin M. (1997) 58 Cal. App. 4th 1538, 1541, 68 Cal. Rptr. 2d 666]* .

[2] First Party Standing--Do the Rights Interweave?

Many cases that discuss standing hold that when the interests of two parties are intertwined, either party has standing to litigate issues related to each other. This is known as "first party standing" "Where the interests of two parties interweave, either party has standing to litigate issues that have a[n] impact upon the related interests. This is a matter of first party standing" [*In re Caitlin B. (2000) 78 Cal. App. 4th 1190, 1193, 93 Cal. Rptr. 2d 480* , *quoting In re Patricia E. (1985) 174 Cal. App. 3d 1, 6, 219 Cal. Rptr. 783* , *disapproved on other grounds in In re Celine R. (2003) 31 Cal. 4th 45, 60, 71 P. 3d 787]* .

In the *Patricia E.* case, the appellate court held the father had standing to appeal the juvenile court's order appointing the county counsel to represent his daughter, even though it already represented the social services agency. The court found that "Independent representation of the daughter's interests impacts upon the father's interest in the parent-child relationship. Further, the child's welfare and the parent-child relationship were both at issue and intertwined because the father sought to have his child returned to his care [*In re Patricia E. (1985) 174 Cal. App. 3d 1, 5, 219 Cal. Rptr. 783]* . Without the presence of interrelated interests, "a parent is precluded from raising issues on appeal which did not affect his or her own rights" [*In re Jasmine J. (1996) 46 Cal. App. 4th 1802, 1806, 54 Cal. Rptr. 2d 560]* .

Subsequent cases have distinguished the *Patricia E.* decision. In the case of *In re Frank L. (2000) 81 Cal. App. 4th 700, 97 Cal. Rptr. 2d 88* , the court held that a mother lacked standing to appeal one child's placement order despite the fact the mother's position may be intertwined with other siblings in a different placement. The court noted the remaining siblings did not appeal the court's order, and the mother could not do so for them [*In re Frank L. (2000) 81 Cal. App. 4th 700, 703, 97 Cal. Rptr. 2d 88]* . The *Frank L.* court also found that the child was in long-term foster care, and unlike the situation in *Patricia E.*, the parent-child relationship was no longer an issue because placement with the mother was not an option [*In re Frank L. (2000) 81 Cal. App. 4th 700, 704, 97 Cal. Rptr. 2d 88* ; *see also In re Devin M. (1997) 58 Cal. App. 4th 1538, 1541-1542, 68 Cal. Rptr. 2d 666* (mother lacked standing in *Welf. & Inst. Code § 366.26* appeal to argue child's bond with foster parents should not be disrupted; mother's rights not intertwined or implicated where parental rights were terminated and the interest at stake was not reunification)].

Cases where courts have found standing include *In re Elizabeth M. (1997) 52 Cal. App. 4th 318, 60 Cal. Rptr. 2d 557* (mother had standing to appeal *Welf. & Inst. Code § 388* petition seeking placement with her cousin); *In re Paul H. (2003) 111 Cal. App. 4th 753, 5 Cal. Rptr. 3d 1* (alleged father has standing to appeal to raise issues concerning his parental interest in the child), and *In re Esperanza C. (2008) 165 Cal. App. 4th 1042, 81 Cal. Rptr. 3d 556* (child has standing to appeal section 388 decision denying placement with relative because child has a legally cognizable interest in placement with relative).

A good example of the necessary interest to find standing is the case of *In re Silvia R. (2008) 159 Cal. App. 4th 337, 344, 71 Cal. Rptr. 3d 496* , in which the juvenile court ordered a stepfather and adult brother to participate in sexual perpetrator counseling as part of the mother's reunification plan. The mother appealed the orders, and the appellate court found she had standing to raise the issue because her "... immediate and substantial interest is her liberty interest in parenting her daughter, with which the state has now substantially interfered" [*In re Silvia R. (2008) 159 Cal. App. 4th 337, 344, 71 Cal. Rptr. 3d 496]* . Because her ability to reunify with her daughter was directly impacted by the court's orders requiring the non-parties to engage in services, the court allowed her to challenge those orders on appeal. "The manner in which she is ordered to address that problem, and the validity of the orders encompassed within her disposition plan, are issues which Mother necessarily has standing to address" [*In re Silvia R. (2008) 159 Cal. App. 4th 337, 345, 71 Cal. Rptr. 3d 496]* .

However, published dependency decisions are more likely to address situations in which standing was not found to exist [*see, e.g.*, *In re Valerie A. (2007) 152 Cal. App. 4th 987, 1000, 61 Cal. Rptr. 3d 403* (mother lacked standing to appeal the denial of her request for a guardian ad litem for Valerie's sibling); *Amber R. v. Superior Court (2006) 139 Cal. App. 4th 897, 901, 43 Cal. Rptr. 3d 297* (biological mother whose rights were terminated lacking standing to bring *Welf. & Inst. Code § 388* petition requesting to be identified as an important person in the child's life); *In re Neil D. (2007) 155 Cal. App. 4th 219, 224, 65 Cal. Rptr. 3d 771* (children lacked standing to appeal court order requiring mother to participate in residential drug treatment because not aggrieved by court's order); *In re Daniel H. (2002) 99 Cal. App. 4th 804, 809-812, 121 Cal. Rptr. 2d 475* (mother lacked standing to appeal sibling visitation related issues because not aggrieved by court's order); *In re Crystal J. (2001) 92 Cal. App. 4th 186, 190, 111 Cal. Rptr. 2d 646* (dependent child does not have standing to appeal the denial of de facto parent status to her former caregivers); *In re Frank L. (2000) 81 Cal. App. 4th 700, 703-704, 97 Cal. Rptr. 2d 88* (parent may not argue child's counsel was ineffective and child should not be separated from siblings); *In re Devin M. (1997) 58 Cal. App. 4th 1538, 1541-1542, 68 Cal. Rptr. 2d 666* (mother has no standing in *Welf. & Inst. Code § 366.26* appeal to argue that the child's bond with foster parents should not be disrupted); *In re Cliffton B. (2000) 81 Cal. App. 4th 415, 425, 96 Cal. Rptr. 2d 778* (parent has no standing to argue in appeal from the *Welf. & Inst. Code § 366.26* hearing that the child had a right to sibling visitation)].

A good example of an insufficient interest resulting in a denial of standing is the case of *In re D.S. (2007) 156 Cal. App. 4th 671, 67 Cal. Rptr. 3d 450* , in which the mother's *Welf. & Inst. Code § 388* petition requesting visitation and reunification services was denied by the juvenile court. The father did not join in the mother's petition. The court terminated parental rights, and the father appealed, contending the juvenile court erred in denying the mother's modification petition. The appellate court dismissed the father's appeal because he did not have standing. Standing to challenge an adverse ruling is not established merely because a parent takes a position on an issue that affects the child [*In re Frank L. (2000) 81 Cal. App. 4th 700, 703, 97 Cal. Rptr. 2d 88]* . Here, the father lacked standing because he did not show how the denial of the mother's *Welf. & Inst. Code § 388* petition affected his interests when he did not join the mother's petition and made no showing his personal rights were implicated [*In re D.S. (2007) 156 Cal. App. 4th 671, 674, 67 Cal. Rptr. 3d 450]* .

[3] Standing to Appeal the Dismissal of a Dependency Petition

Currently, a conflict exists in case law determining whether a parent is sufficiently aggrieved to have standing to appeal an order dismissing a dependency petition after a contested jurisdictional hearing. In 1990, the appellate court in the case of *In re Tomi C. (1990) 218 Cal. App. 3d 694, 267 Cal. Rptr. 210* held the father lacked standing to appeal the juvenile court's order dismissing the dependency petition. In that case, the social services agency filed a petition claiming the father sexually molested his children. A family law court subsequently placed the children with their mother, and the juvenile court granted the agency's request to dismiss the petition. The father appealed, but the court noted that "[e]ven if father could have successfully defended against the allegations in the petition, he could not thereby regain custody of his children since the custody issue had already been decided in family court" [*In re Tomi C. (1990) 218 Cal. App. 3d 694, 698, 267 Cal. Rptr. 210]* . In addition, the court noted the father could petition the agency to file another petition under *Welf. & Inst. Code § 329*. Therefore, the appellate court concluded the father was not aggrieved

by the court's order dismissing the petition [*In re Tomi C. (1990) 218 Cal. App. 3d 694, 698, 267 Cal. Rptr. 210]* .

But in 1996, a different appellate court held in the case of *In re Lauren P. (1996) 44 Cal. App. 4th 763, 52 Cal. Rptr. 2d 170* that a mother had standing to appeal the juvenile court's order dismissing the petition. In that case, the mother retained custody of her child after a contested jurisdictional hearing where the court dismissed a petition alleging the father sexually abused the child. Relying on a parent's general constitutional interest in the companionship, care, and custody of his or her child, the court there found the mother had "a natural interest in obtaining the state's protection for her daughter against future sexual abuse. Dismissal of the petition injuriously affected this interest" [*In re Lauren P. (1996) 44 Cal. App. 4th 763, 770-771, 52 Cal. Rptr. 2d 170]* .

Three years later, yet another appellate court ruled in a different case that a mother lacked standing to appeal the juvenile court's dismissal of the dependency petition alleging sexual abuse by the father [*In re Carissa G. (1999) 76 Cal. App. 4th 731, 736, 90 Cal. Rptr. 2d 561]* . Relying on the reasoning in *Tomi C.* and rejecting the reasoning of *Lauren P.*, the *Carissa G.* court found the dismissal order did not alter the child's custody status with the mother. In addition, although the *Carissa G.* court acknowledged the mother's fundamental right to parent her child, it further noted the dismissal order "did not impact that right" [*In re Carissa G. (1999) 76 Cal. App. 4th 731, 736, 90 Cal. Rptr. 2d 561]* . "Thus, the mere fact a parent takes a position on a matter at issue in a juvenile dependency case that affects his or her child does not alone constitute a sufficient reason to establish standing to challenge an adverse ruling on it" [*In re Carissa G. (1999) 76 Cal. App. 4th 731, 736-737, 90 Cal. Rptr. 2d 561]* .

Because the *Tomi C.* case involved a father seeking to appeal the dismissal of a dependency petition alleging he molested his children, that decision is significantly different than the *Lauren P.* and *Carissa G.* decisions that addressed whether a mother seeking to protect her children could appeal the dismissal of a dependency petition that had alleged the father molested the children. Strong arguments can be made in support of both the *Lauren P.* and *Carissa G.* decisions, and this is an area to be watched for future developments.

[4] Standing in De facto Parent Cases

Individuals seeking de facto parent status have standing to appeal the court's denial of their motion [*In re Joel H. (1993) 19 Cal. App. 4th 1185, 1195, 23 Cal. Rptr. 2d 878]* . But a de facto parent lacks standing to challenge whether the provision of reunification services offered to him were reasonable since de facto parents are not entitled to those services in the first place [*Clifford S. v. Superior Court (1995) 38 Cal. App. 4th 747, 751-756, 45 Cal. Rptr. 2d 333]* . Indeed, de facto parents have no right to reunification services, custody, or visitation merely because they are de facto parents, and thus normally lack standing to appeal orders relating to those issues [*In re P.L. (2005) 134 Cal. App. 4th 1357, 1361-1362, 37 Cal. Rptr. 3d 6* , *citing In re Kieshia E. (1993) 6 Cal. 4th 68, 82, 23 Cal. Rptr. 2d 775, 859 P.2d 1290* ; *and Clifford S. v. Superior Court (1995) 38 Cal. App. 4th 747, 752, 45 Cal. Rptr. 2d 333]* .

In some cases, however, de facto parents have standing to appeal a court's order removing a dependent child from their home under *Welf. & Inst. Code § 387* [*In re Joel H. (1993) 19 Cal. App. 4th 1185, 1196, 23 Cal. Rptr. 2d 878]* . In the *Joel H.* case the juvenile court had already selected adoption as the permanent plan with the de facto parents identified as willing to adopt the children [*In re Joel H. (1993) 19 Cal. App. 4th 1185, 1189-1190, 23 Cal. Rptr. 2d 878]* . Similarly, in the case of *In re Vincent M. (2008) 161 Cal. App. 4th 943, 952-953, 74 Cal. Rptr. 3d 755* , de facto parents who intended to adopt a child were found to have standing to appeal an order finding a biological father who had not been identified earlier in the case was a presumed father and entitled to services without a showing of best interest. But in a case in which the de facto parent had vacillated regarding adoption and steps had already been taken to transition the child to an different home for adoption, the de facto parent was found to lack standing to appeal [*In re P.L. (2005) 134 Cal. App. 4th 1357, 1361-1362, 37 Cal. Rptr. 3d 6]* . Thus, whether a de facto parent has a legally cognizable interest in continued placement of a child such that the de facto parent has standing to appeal findings and orders impacting that placement will depend on the individual facts of the case. Normally a mere de facto parent will not have standing to appeal an order impacting placement of the child, but where the child has been in the home for an

extended period of time with the intent of the home providing permanency for the child, the de facto parent may have standing to appeal an order impacting that placement.

Courts also limit a parent's ability to raise on appeal the court's denial of a de facto parent motion, reasoning that a parent's interest in a dependency action proceeding is in reunification with the child, while a de facto parent's interest is his or her separate interest in the relationship with the child. A court's denial of a de facto parent motion does not preclude a parent from presenting evidence regarding his or her relationship with the child [*see In re Vanessa Z. (1994) 23 Cal. App. 4th 258, 28 Cal. Rptr. 2d 313* ; *In re Daniel D. (1994) 24 Cal. App. 4th 1823, 30 Cal. Rptr. 2d 245]* . At least one court has extended that reasoning to a child's attempt to appeal the denial of a de facto motion as well, reasoning that the child can still present evidence regarding his or her relationship with the proposed de facto parent and argue that he or she should be placed there [*see In re Crystal J. (2001) 92 Cal. App. 4th 186, 191-192, 111 Cal. Rptr. 2d 646]* .

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
L. Appeal and Extraordinary Writs

28-328 California Forms of Pleading and Practice--Annotated § 328.190

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§ 328.190 Appeal in Dependency Cases

[1] Right of Appeal

Welf. & Inst. Code § 395 provides that a judgment in a proceeding under *Welf. & Inst. Code § 300* may be appealed from in the same way as any final judgment. The judgment the statute is referring to has been held to be the declaration of dependency at the disposition hearing [*In re Meranda P. (1997) 56 Cal. App. 4th 1143, 1150, 65 Cal. Rptr. 2d 913* ; *In re Melvin S. (1976) 59 Cal. App. 3d 898, 900, 130 Cal. Rptr. 844]* . The statute goes on to say that "any subsequent order may be appealed from as from an order after judgment" [*Welf. & Inst. Code § 395*]. Thus, in dependency cases there is no "one final judgment" from which an appeal is taken. Instead, the orders at disposition and "all subsequent orders are directly appealable without limitation" except for those orders setting a hearing under *Welf. & Inst. Code § 366.26* which are reviewed by extraordinary writ [*In re Meranda P. (1997) 56 Cal. App. 4th 1143, 1150, 65 Cal. Rptr. 2d 913* ; *see also In re S.B. (2009) 46 Cal. 4th 529, 532, 94 Cal. Rptr. 3d 24, 207 P. 3d 525]* .

This does not, of course, mean that interim findings and orders are immediately appealable, such as where a contested review hearing is conducted on several dates and the court makes an interim visitation order pending the completion of the contested hearing. In such circumstances, a common sense interpretation of *Welf. & Inst. Code § 395* would suggest that only final orders are directly appealable without limitation and the interim orders could be raised either by way of a traditional writ petition if appropriate or on appeal from the conclusion of the contested hearing. Nevertheless, practitioners and courts should be aware of the Supreme Court's decision in the *S.B.* case that held the findings and orders made under *Welf. & Inst. Code § 366.26(c)(3)* are immediately appealable even though the hearing is not yet completed and is instead continued for up to 180 days for a child who is difficult to place for adoption [*In re S.B. (2009) 46 Cal. 4th 529, 537, 94 Cal. Rptr. 3d 24, 207 P. 3d 525]* . The broad view of *Welf. & Inst. Code § 395* taken by the Supreme Court in the *S.B.* decision may open the floodgates for practitioners to seek appellate review of other interim findings and orders. Appellate courts should be cautious in considering such requests.

As indicated, the first hearing from which an appeal can be taken in a dependency case is the disposition hearing [*In re Meranda P. (1997) 56 Cal. App. 4th 1143, 1150, 65 Cal. Rptr. 2d 913* ; *In re Sheila B. (1993) 19 Cal. App. 4th 187, 196, 23 Cal. Rptr. 2d 482* ; *In re Tracy Z. (1987) 195 Cal. App. 3d 107, 112, 240 Cal. Rptr. 445* ; *In re Melvin S. (1976) 59 Cal. App. 3d 898, 900, 130 Cal. Rptr. 844]* . As a result, a court's finding of jurisdiction cannot be raised in a separate appeal from the jurisdiction hearing, but may be raised on appeal from a disposition hearing [*In re Candida S. (1992) 7 Cal. App. 4th. 1240, 1249, 9 Cal. Rptr. 2d 521* ; *In re Jennifer V. (1988) 197 Cal. App. 3d 1206, 1209-1210, 243 Cal. Rptr. 441]* . The previous findings and orders made at the detention hearing, however, are generally made moot by the jurisdiction and disposition determinations and thus cannot be considered on appeal [*In re Raymond G. (1991) 230 Cal. App. 3d 964, 967, 281 Cal. Rptr. 625]* .

The need to timely file an appeal from a dependency hearing at which the juvenile court makes findings or orders which one disagrees with is important, since once the time for filing an appeal from that hearing has expired those findings and orders are res judicata and cannot be considered on appeal from a subsequent hearing [*In re Meranda P. (1997) 56 Cal. App. 4th 1143, 65 Cal. Rptr. 2d 913* ; *In re Daniel D. (1994) 24 Cal. App. 4th 1823, 1832-1833, 30 Cal. Rptr. 2d 245]* . Where, however, the parent was not provided with notice of the right of appeal or the right to file a petition for writ relief, or otherwise suffered error that fundamentally undermined the statutory scheme, the normal waiver rule upheld in *Meranda P.* may not be followed. Nevertheless, the burden to demonstrate the waiver rule should not apply is high [*In re Janee J. (1999) 74 Cal. App. 4th 198, 87 Cal. Rptr. 2d 634* ; *In re Cathina W. (1998) 68 Cal. App. 4th 716, 722-724, 80 Cal. Rptr. 2d 480]* . Thus, timely appeals are important.

PRACTICE TIP:

Use of Petitions for Extraordinary Writ in Lieu of Appeals. Although the traditional means of seeking review of the various findings and orders of the juvenile court in dependency cases is by appeal, the appeal process is often too slow to provide a plain, speedy, and adequate review. This is especially true when the orders of the court place the child outside of the parent's home, constitute an unauthorized detention order, or deny visitation [*see, e.g.,* *Savannah B. v. Superior Court (2000) 81 Cal. App. 4th 158, 159-160, 96 Cal. Rptr. 2d 428* ; *In re Jonathan M. (1997) 53 Cal. App. 4th 1234, 1238, 62 Cal. Rptr. 2d 208* ; *Zenide v. Superior Court (1994) 22 Cal. App. 4th 1287, 1293, 27 Cal. Rptr. 2d 703]* . This may also be true in the case of lengthy or repeated continuances which take the matter beyond statutory time lines [*Renee S. v. Superior Court (1999) 76 Cal. App. 4th 187, 189, 90 Cal. Rptr. 2d 134* ; *Jeff M. v. Superior Court (1997) 56 Cal. App. 4th 1238, 1239-1240, 66 Cal. Rptr. 2d 343]* . Traditional writs are also appropriate to challenge a discovery order as violating a privilege against disclosure [*In re Jeanette H. (1990) 225 Cal. App. 3d 25, 30, 275 Cal. Rptr. 9]* . Practitioners should give serious consideration in appropriate cases to filing petitions for extraordinary writ relief in lieu of or in addition to a notice of appeal [*In re Matthew P. (1999) 71 Cal. App. 4th 841, 844, 84 Cal. Rptr. 2d 269* ; *In re Pablo D. (1998) 67 Cal. App. 4th 759, 761, 79 Cal. Rptr. 2d 247]* .

For a discussion of traditional writs, see § 2.192, below.

[2] Appeal or Writ Must Be Approved by Party Appealing

In dependency cases it is a frequent occurrence that one or more of the parents involved in the case have at one time appeared and had counsel appointed, but are no longer in touch with their attorney, the social worker or the court. While their attorney in many instances will continue to represent the absent parent's interest in the dependency case to the best of his or her ability, an attorney cannot file an appeal on behalf of the missing parent without some contact with that parent and the parent's approval of the appeal [*In re Sean S. (1996) 46 Cal. App. 4th 350, 352, 53 Cal. Rptr. 2d 766* ; *In re Alma B. (1994) 21 Cal. App. 4th 1037, 1043, 26 Cal. Rptr. 2d 592]* . The same is true with regard to filing a petition for extraordinary writ [*Janice J. v. Superior Court (1997) 55 Cal. App. 4th 690, 691-692, 64 Cal. Rptr. 2d 227* ; *Suzanne J. v. Superior Court (1996) 46 Cal. App. 4th 785, 788, 54 Cal. Rptr. 2d 25* ; *Guillermo G. v. Superior Court*

(1995) 33 Cal. App. 4th 1168, 1172-1174, 39 Cal. Rptr. 2d 748] . Moreover, "a trial attorney has no legal or ethical duty to file a notice of appeal on behalf of a parent who has not consented to its filing" [*In re Sean S. (1996) 46 Cal. App. 4th 350, 353, 53 Cal. Rptr. 2d 766]* . The same is true with regard to extraordinary writ petitions [*Janice J. v. Superior Court (1997) 55 Cal. App. 4th 690, 692, 64 Cal. Rptr. 2d 227* ; *Suzanne J. v. Superior Court (1996) 46 Cal. App. 4th 785, 788, 54 Cal. Rptr. 2d 25]* . Thus, an attorney has neither the duty nor the ability to file a notice of appeal or petition for extraordinary writ in a dependency case without the actual consent of the client.

Nevertheless, a notice of appeal may be signed by either the party or the attorney for the party. If the parent's trial counsel signed the notice of appeal it is presumed he or she has the approval of the parent for the signing of the notice of appeal, absent strong factual evidence to the contrary [*In re Helen W. (2007) 150 Cal. App. 4th 71, 78-79, 57 Cal. Rptr. 3d 914* , *citing Cal. Rules of Ct., Rule 8.400(c)*]. The same is not true, however, with regard to the filing of a notice of intent to file a writ petition challenging the setting of a *Welf. & Inst. Code § 366.26* hearing, since the rule of court requires the notice of intent be signed by the party [*In re Helen W. (2007) 150 Cal. App. 4th 71, 79, n.3, 57 Cal. Rptr. 3d 914* , *citing Cal. Rules of Ct., Rule 8.450(e)(3)*]. This will change effective July 1, 2010, when the rule is revised to allow the notice of intent to be signed by either the party or the attorney of record for the party, so long as the client has authorized the attorney to sign the notice of intent on his or her behalf [*see Cal. Rules of Ct., Rule 8.450(e)(3)*, eff. July 1, 2010].

The exception to the requirement for client authorization is when the appeal is based on the allegation the appellant did not receive proper notice of the trial court proceedings. In such cases, if the record on appeal contains no evidence the appellant was made aware of what transpired at the trial court level within the time limit for the filing of a notice of appeal, there is no requirement the appellant personally authorize the appeal. Instead, in this one instance, the trial attorney can file the notice of appeal on the parent's behalf without the parent's personal authorization [*In re Steven H. (2001) 86 Cal. App. 4th 1023, 1031, 103 Cal. Rptr. 2d 649]* .

PRACTICE TIP:

Be Realistic In Advice to Client. An appeal is not an opportunity to re-litigate the issues you challenged at the trial court level. Under the substantial evidence and abuse of discretion standards of review the appellate court cannot re-weigh the evidence and must view the evidence in the light most favorable to the trial court's judgment. Thus, the standards of review at the appellate level favor affirming whatever action the trial court took. Whether your client is a parent, de facto parent, or social services agency, the client should be advised the odds of winning an appeal are not good. If your client is the child and you are making that decision on behalf of the child, this must be considered also. Appeals should not be filed merely because someone does not like the outcome in the trial court. They should be filed because one of the parties does not like the outcome and believes there is a realistic chance of success at the appellate level despite the uphill battle posed by the standards of appellate review. Don't delay resolution of the issues by giving your client false hope or the idea the appeal will be a second bite of the apple. Be realistic in your advice regarding the likelihood of success on appeal and help your client make a wise decision about whether to file a notice of appeal.

For a discussion regarding the standards of review in appeals and writs, see § 2.190[14].

[3] Stay Pending Appeal

No appealable order or judgment in a dependency case is stayed by the appeal [*Code Civ. Proc. § 917.7*; *Welf. & Inst. Code § 395(a)(1)*].

The juvenile court does have discretion to stay its orders pending an appeal [*Code Civ. Proc. § 917.7*]. It is rare, however, for a juvenile court to stay any of its orders pending appeal since its orders are generally viewed as being necessary for the child's well-being and best interest at the time that they are made.

By statute, however, an order of the juvenile court placing a dependent child out of state or allowing a dependent child to leave the state is stayed for a period of seven days [*Code Civ. Proc. § 917.7*]. Some juvenile courts and practitioners are not aware of this provision. Where appropriate, practitioners should bring it to the court's attention. While this automatic stay is not long enough to take an appeal, it does allow time for the filing of an extraordinary writ petition. Practitioners opposing the child leaving the state should be aware, however, that the statute also provides for the court of appeal to enter an order allowing the child to leave the state before the expiration of the seven days. Thus, it may be a "race to the courthouse."

For a discussion of whether allowing a child to go on an out of state visit triggers the automatic stay of *Code Civ. Proc. § 917.7*, see *§ 328.128[2]*.

For a discussion on whether or not to file a petition for writ of supersedeas in order to seek a stay by the appellate court pending a decision on an appeal, see § 2.192[2].

[4] Time for Filing a Dependency Appeal

The timely filing of a notice of appeal is a jurisdictional requirement [*Mauro B. v. Superior Court (1991) 230 Cal. App. 3d 949, 953, 281 Cal. Rptr. 507]* . As a general rule, an appeal from a juvenile court order must be filed within 60 days after pronouncement of the order in open court [*Cal. Rules of Ct., Rule 8.400(d)(1)*; *In re Alyssa H. (1994) 22 Cal. App. 4th 1249, 1253-1254, 27 Cal. Rptr. 2d 809* ; *In re Markaus V. (1989) 211 Cal. App. 3d 1331, 1337, 260 Cal. Rptr. 126]* . If one party files a timely appeal, the time for any other party to appeal from the same judgment or order of the juvenile court is extended until 20 days after the superior court clerk mails notification of the first appeal [*Cal. Rules of Ct., Rule 8.400(d)(4)*].

One court of appeal has held as an exception to the general rule, that an appeal of a *Welf. & Inst. Code § 362.4* juvenile court custody order made upon the termination of juvenile court jurisdiction must be filed within 60 days after issuance and filing of the *written* order if that occurs after the *oral* pronouncement [*In re Markaus V. (1989) 211 Cal. App. 3d 1331, 1337, 260 Cal. Rptr. 126* (basing its decision on the language of this particular statute, which "plainly envisions that a *written* order be 'issued' ")].

A notice of appeal is to be liberally construed to avoid denying an appeal for a technical defect [*Cal. Rules of Ct., Rule 8.100*]. Nevertheless, the law is clear a notice of appeal must clearly indicate what judgment is being appealed. It does not include other judgments that are directly, separately, and independently appealable, and not identified on the notice of appeal, particularly when those other judgments were on other dates [*Sole Energy Co. v. Petrominerals Corp (2005) 128 Cal. App. 4th 212, 239, 26 Cal. Rptr. 3d 798* ; *DeZerega v. Meggs (2000) 83 Cal. App. 4th 28, 43, 99 Cal. Rptr. 2d 366* ; *In re Marriage of Weiss (1996) 42 Cal. App. 4th 106, 119, 49 Cal. Rptr. 2d 339]* . One court of appeal, however, has held that on appeal from a *Welf. & Inst. Code § 366.26* hearing the court may also consider issues from a separate hearing on a *Welf. & Inst. Code § 388* petition, so long as the judgment on the petition was made within 60 days of the filing of the notice of appeal [*In re Madison W. (2006) 141 Cal. App. 4th 1447, 47 Cal. Rptr. 3d 143]* . The superficial analysis in the *Madison W.* decision, however, is an anomaly. For instance, the case it cites for the rule of liberal construction speaks of liberally construing a notice of appeal when the notice can be reasonably be interpreted as being from a particular judgment, such as when incorrect terminology is used but the meaning is reasonably clear what is being appealed and there is no prejudice, such as where the notice of appeal lists an "order" rather than a "judgment" [*Vibert v. Berger (1966) 64 Cal. 2d 65, 67-68, 410 P.2d 390]* . An appeal from an order terminating parental rights can reasonably be said to include an appeal from the denial of a *Welf. & Inst. Code § 388* petition on that same date, or where the contested hearing was held on multiple dates with the two matters being heard together. But an appeal from an order terminating parental rights on one date cannot reasonably be interpreted as meaning the denial of a *Welf. & Inst. Code § 388* petition on another date, absent those special circumstances, something not apparent in the *Madison W.* decision. To do so would create appellate jurisdiction where none exists, and will promote further

litigation, not avoid it. Further, the *Madison W.* decision fails to even mention the extensive body of law that holds a separate notice of appeal, or a notice of appeal listing multiple judgments, must be filed when there are multiple judgments, including those that are close in time [*Sole Energy Co. v. Petrominerals Corp (2005) 128 Cal. App. 4th 212, 239, 26 Cal. Rptr. 3d 798]* . Finally, *Madison W.* would open a Pandora's Box of attempts to expand the decision to other dependency hearings, findings, and orders. Thus, it is doubtful other appellate courts will follow the *Madison W.* decision. Nevertheless, this is an area to be watched for further developments.

Historically, some parents have sought to file late notices of appeal under the "constructive filing" doctrine, which applies in some criminal cases. There were two difficulties with this argument. First, the constructive filing doctrine only applies in criminal cases in which the person seeking to timely file a notice of appeal is incarcerated or otherwise in custody and has been thwarted in his or her effort to timely file the notice of appeal due to his necessary reliance on prison officials or his reasonable reliance on his attorney [*In re Benoit (1973) 10 Cal. 3d 72, 86, 109 Cal. Rptr. 785, 514 P.2d 97* ("we believe that in the interest of justice the principle should be extended to apply to situations like the instant one where the defendant is incarcerated or otherwise in custody after having been properly notified of his appeal rights by the sentencing judge and has made arrangements with his trial attorney to file a notice of appeal for him."); *People v. Slobodion (1947) 30 Cal. 2d 362, 367, 181 P.2d 868* ("when appellant timely deposited his notice of appeal with the state's employees as required by the state prison rules, such action constituted a constructive filing of the specified notice.")]. Second, numerous cases have held the constructive filing doctrine is not available in appeals from orders terminating parental rights, based on the child's special need for finality in adoption-related proceedings [*see, e.g.,* *In re Alyssa H. (1994) 22 Cal. App. 4th 1249, 1254, 27 Cal. Rptr. 2d 809* ; *In re Issac J. (1992) 4 Cal. App. 4th 525, 530-534, 6 Cal. Rptr. 2d 65* ; *Mauro B. v. Superior Court (1991) 230 Cal. App. 3d 949, 955, 281 Cal. Rptr. 507]* . Indeed, allowing use of the constructive filing doctrine in cases involving the termination of parental rights could delay or cause great confusion over when an adoption could be finalized. Even when termination of parental rights is not involved, the need of children for the timely resolution of their dependency cases and related appeals is a compelling interest. Thus, the prevailing view has been that the constructive filing doctrine does not apply in dependency appeals.

Effective January 1, 2006, however, a limited form of the constructive filing doctrine has been added to the California Rules of Court for dependency appeals. If the superior court receives a late notice of appeal by mail from a custodial institution but the envelope shows the notice was mailed or delivered to custodial officials for mailing within the time for filing a notice of appeal, the notice will be deemed timely [*Cal. Rules of Ct., Rule 8.400(e)*]. In such a case, the clerk must retain the envelope in which the notice was received [*Cal. Rules of Ct., Rule 8.400(e)*]. Significantly, the new rule provision does not provide for application of the constructive filing doctrine when a late notice of appeal for an incarcerated parent is filed by counsel.

The constructive filing doctrine is a very limited exception to the normal rules governing the filing of notices of appeal in criminal and now dependency cases. It is only applicable to incarcerated defendants or parents in cases in which the delay in the filing of the notice of appeal resulted from the conduct or representation of counsel in criminal cases, or prison officials in criminal or dependency cases upon which the prisoner reasonably relied, and is not substantially due to any fault on the part of the prisoner [*In re Ricky H. (1992) 10 Cal. App. 4th 552, 559-560, 12 Cal. Rptr. 2d 578* ; *In re Benoit (1973) 10 Cal. 3d 72, 86, 109 Cal. Rptr. 785, 514 P.2d 97* ; *People v. Slobodion (1947) 30 Cal. 2d 362, 367, 181 P.2d 868]* . Few parents will satisfy all the criteria of the constructive filing doctrine under *Cal. Rules of Ct., Rule 8.400(e)*, including both incarceration and the absence of fault [*see* *In re Ricky H. (1992) 10 Cal. App. 4th 552, 560, 12 Cal. Rptr. 2d 578* ("The constructive filing doctrine is not intended to save an appellant from the natural consequences of his or her own decisions.")]. As such, even with the new rule provision the doctrine of constructive filing is unlikely to be found available in dependency appeals except in rare instances.

[5] Appeal From Orders Made by Referees

Whenever the approval of a juvenile court judge is required for a referee's order to become effective, the referee's order becomes final 10 calendar days after service of a written copy of the referee's findings and orders or 20 judicial days

after the hearing at which the findings and orders are made, whichever comes later [*In re Clifford C. (1997) 15 Cal. 4th 1085, 1093, 64 Cal. Rptr. 2d 873, 938 P.2d 932* (harmonizing *Welf. & Inst. Code §§ 250* and *253*)]. In any other instance, the orders of the referee become immediately effective, subject to the right of the minor, parent or guardian to apply for a rehearing within 10 calendar days of the service of a written copy of the referee's findings and orders. The finality of the orders is also subject to the ability of a juvenile court judge to order a rehearing on his or her own motion with 20 judicial days of hearing at which the referee's orders were made, but not more than 10 calendar days after the service of a copy of the written findings and orders [*In re Clifford C. (1997) 15 Cal. 4th 1085, 1093, 64 Cal. Rptr. 2d 873, 938 P.2d 932* (harmonizing *Welf. & Inst. Code §§ 250* and *253*)]. If a referee sits as a temporary judge, his or her orders become final in the same manner as orders made by a judge [*Welf. & Inst. Code § 250*].

A notice of appeal from a judgment or subsequent order made by a referee not sitting as a temporary judge must be filed within 60 days of the date on which the order of the referee becomes final under *Cal. Rules of Ct., Rule 5.540(c)*, if no such request for rehearing was filed or a rehearing granted [*Cal. Rules of Ct., Rule 8.400(d)(2)*; *In re Miguel E. (2004) 120 Cal. App. 4th 521, 537-538, 15 Cal. Rptr. 3d 530]* . If an application for rehearing of a judgment or order entered by a referee not sitting as a temporary judge was filed and denied, the notice of appeal must be filed within 60 days after the referee's order is served under *Cal. Rules of Ct., Rule 5.538(b)(3)*, or within 30 days after the order denying the application for rehearing, whichever is later [*Cal. Rules of Ct., Rule 8.400(d)(3)*]. If one party files a timely appeal, the time for any other party to appeal from the same judgment or order of the juvenile court is extended until 20 days after the superior court clerk mails notification of the first appeal [*Cal. Rules of Ct., Rule 8.400(d)(4)*]. Effective July 1, 2010, these requirements will be found in *Cal. Rules of Ct., Rule 8.406*.

[6] Indigents

The reviewing court may appoint counsel to represent an indigent child, parent, or guardian appealing from a dependency proceeding [*Cal. Rules of Ct., Rule 5.585(b)*]. Effective January 1, 2007, the appellate court must appoint separate counsel for a child who is an appellant, and may appoint separate counsel for a child in other circumstances [*Welf. & Inst. Code § 395(b)*; *Cal. Rules of Ct., Rule 5.661*]. Effective July 1, 2010, the rule provisions for the appointment of counsel on appeal will be found in *Cal. Rules of Ct., Rule 8.403*. For a discussion of this process and the factors to consider in recommending separate counsel for the child on appeal see *§ 2.62[3][e]*.

An appellant unable to afford counsel must be provided a free copy of the transcript in any appeal. The record on appeal must be prepared and transmitted immediately after filing of the notice of appeal, without advance payment of fees. If the appellant is able to afford counsel, the county may seek reimbursement for the cost of the transcript as though the appellant had been granted permission to proceed in forma pauperis [*Welf. & Inst. Code § 395*].

[7] Precedence of the Appeal

The appeal of any appealable order in a dependency case has precedence over all other cases in the court to which the appeal is taken [*Welf. & Inst. Code § 395*]. Judgments freeing a dependent child from parental custody and control, as well as those denying a recommendation to free the child, are given particular precedence. To enable the child to be available for adoption as quickly as possible and to minimize the anxiety to all [*Code of Civ. Proc. § 45*], the appellate court must require a showing of "exceptional" good cause before granting an extension of time to a court reporter or attorney in a case terminating parental rights [*Cal. Rules of Ct., Rule 8.416(f)*].

The same exceptional cause requirement is applicable to all dependency appeals in Imperial, Orange, and San Diego counties, not just those involving termination of parental rights issues [*Cal. Rules of Ct., Rule 8.416(a)(1)(A)*]. These three counties utilize a "fast-track" procedure for all appeals in dependency cases, not just termination of parental rights appeals [*Cal. Rules of Ct., Rule 8.416(a)(1)(B)*]. Hopefully, this special rule will become a statewide requirement so that all dependency appeals throughout California will receive expedited handling by the appellate courts, regardless of whether the termination of parental rights is involved. A significant step in that direction takes effect July 1, 2010, when

Cal. Rules of Ct., Rule 8.416(a)(1), will make these "fast-track" procedures applicable for dependency appeals in any county where the juvenile court and the applicable appellate court have agreed and adopted a local rule so providing.

[8] *Wende* Briefs Not Permitted

According to prior case law, an indigent appellant whose appointed counsel submitted a brief that raised no specific issues or described the appeal as frivolous was nevertheless entitled to a *Wende* review on appeal from an order in proceedings under *Welf. & Inst. Code § 300* or to terminate parental rights [*In re Brian B. (1983) 141 Cal. App. 3d 397, 398-399, 190 Cal. Rptr. 153* ; *In re Joyleaf W. (1984) 150 Cal. App. 3d 865, 198 Cal. Rptr. 114]* . When applicable, *Wende* requires the appellate court to undertake a review of the entire trial record to determine whether any arguable issues exist [*see People v. Wende (1979) 25 Cal. 3d 436, 441-443, 158 Cal. Rptr. 839, 600 P.2d 1071]* . After numerous more recent appellate decisions held that *Wende* review was not required in dependency writs and appeals, the California Supreme Court settled the matter: *Wende* briefs are not permitted in appeals from dependency and termination of parental rights cases [*In re Sade C. (1996) 13 Cal. 4th 952, 55 Cal. Rptr. 2d 771, 920 P.2d 716]* .

Notwithstanding the holding in *Sade C.*, many appellate attorneys argued that *Sade C.* merely held that *Wende* review was not mandated in dependency and termination of parental rights appeals. They contended *Sade C.* still left the appellate court with discretion to review the record for error where appellate counsel finds no issue. This issue too has been put to rest. The *Sade C.* decision leaves no room for such discretionary review. Where neither appellate counsel nor appellant has made any specific claims of error, the appeal is "implicitly abandoned" and should be dismissed [*In re Sara H. (1997) 52 Cal. App. 4th 198, 200-202, 60 Cal. Rptr. 2d 434* ; *see also Glen C. v. Superior Court (2000) 78 Cal. App. 4th 570, 579-580, 93 Cal. Rptr. 2d 103]* .

There has been a difference of approach by the various appellate districts as to whether an appellant in a dependency case has a right to file a pro per supplemental brief after his or her appellate counsel files a *Sade C.* brief indicating the attorney can find no arguable issue. Some appellate districts automatically extended appellant the right to file a pro per supplemental brief within 30 days, others routinely dismissed the appeal [California Juvenile Dependency Practice (Cal. CEB 2009) No Wende Review Under Sade C., § 10.69, pp. 791-793]. In the Supreme Court's decision in the *Conservatorship of Ben C.* case, however, a footnote suggested the right to file a supplemental brief following a no issues brief might extend beyond the criminal arena [*Conservatorship of Ben C. (2007) 40 Cal. 4th 529, 543, 544 n.6, 53 Cal. Rptr. 3d 856, 150 P.3d 738]* . The Court settled that issue for dependency appeals in the *Phoenix H.* case. It held there is no such right following the filing of a *Sade C.* brief in a dependency case, but that appellate courts have discretion to allow pro per supplemental briefs in such cases if good cause is shown [*In re Phoenix H. (2009) 47 Cal. 4th 835, 102 Cal. Rptr. 3d 481, 220 P.3d 524]* .

Practitioners should remember that duties of zealous advocacy and communication require the appellate attorney to communicate with his or her client, if the client can be located, before filing a *Sade C.* brief to inform the client the attorney is considering filing a *Sade C.* brief and to see if the appellant can help identify an issue the attorney may have missed. At the same time the appellate attorney can ask if the client wants to file a pro per supplemental brief and identify any issue the client wishes to raise. In this way, at the same time the *Sade C.* brief is filed appellate counsel can simultaneously file a request for the filing of a pro per supplemental brief identifying the issue the client intends to raise in that brief, thereby seeking to provide justification for the appellate court to exercise its discretion to allow the supplemental brief. This is an area to be watched for further development as to practices within appellate districts following the *Phoenix H.* decision.

[9] Order Denying or Terminating Services

An order by the juvenile court denying or terminating reunification services and directing that a selection and implementation hearing be held under *Welf. & Inst. Code § 366.26,* is not immediately appealable but review must first be sought by extraordinary writ in order to preserve any right of later appeal if the writ petition is not decided on its

merits [*Welf. & Inst. Code § 366.26(l)*; *Cal. Rules of Ct., Rules 8.450, 8.452*].

The Legislature made this change in 1995 in response to the decision of the *California Supreme Court in In re Matthew C. (1993) 6 Cal. 4th 386, 24 Cal. Rptr. 2d 765, 862 P.2d 765* , which held that the juvenile court's nonappealable order terminating reunification services and setting a "selection and implementation" hearing was reviewable on appeal from the juvenile court's final order terminating parental rights at the *Welf. & Inst. Code § 366.26* hearing. *Matthew C.* overturned what was then established practice in the majority of the state that an order setting a selection and implementation hearing was only reviewable by extraordinary writ petition and was not reviewable in a subsequent appeal [*see, e.g., In re Amanda B. (1992) 3 Cal. App. 4th 935, 4 Cal. Rptr. 2d 922* ; *In re Taya C. (1991) 2 Cal. App. 4th 1, 2 Cal. Rptr. 2d 810* ; *In re Rebecca H. (1991) 227 Cal. App. 3d 825, 278 Cal. Rptr. 185]* .

The statutory change in the law requiring the filing of an extraordinary writ petition to preserve any right of appeal was suggested by the Supreme Court in footnote 13 of its *Matthew C.* decision and is not subject to serious question as to its continued validity [*see In re Matthew C. (1993) 6 Cal. 4th 386, 400 fn. 13, 24 Cal. Rptr. 2d 765, 862 P.2d 765]* .

As currently set forth by both statute and rule, an order of the juvenile court directing that a hearing pursuant to *Welf. & Inst. Code § 366.26* be held is not appealable at anytime unless each of the following applies: (1) an extraordinary writ petition was timely filed; (2) the writ petition substantively addressed the specific issues to be challenged and supported that challenge by an adequate record; and (3) the extraordinary writ petition was summarily denied or otherwise not decided on the merits by the reviewing court. Review on appeal of the order setting a hearing under *Welf. & Inst. Code § 366.26* is limited to issues that were raised in the previous extraordinary writ petition that were supported by an adequate record [*Welf. & Inst. Code § 366.26(l)*; *Cal. Rules of Ct., Rules 8.450, 8.452*].

Case law has carved out an exception to the writ requirement in *Welf. & Inst. Code § 366.26(l)* in cases where ithe juvenile court failed to advise the parent of the writ requirement as required under *Welf. & Inst. Code § 366.26(l)(3)(A)*. For example, the appellate court in the case of *In re Cathina W. (1998) 68 Cal. App. 4th 716, 722, 724, 80 Cal. Rptr. 2d 480* allowed the mother to raise issues regarding the referral to the *Welf. & Inst. Code § 366.26* hearing in an appeal from the order terminating her parental rights because she was not timely or correctly advised of the writ requirement [*see also In re Lauren Z. (2008) 158 Cal. App. 4th 1102, 1110, 70 Cal. Rptr. 3d 583]* . Another court has held that a parent who was not given the writ advisement can appeal from the order terminating services and setting a *Welf. & Inst. Code § 366.26* hearing [*In re Merrick V. (2004) 122 Cal. App. 4th 235, 247-249, 19 Cal. Rptr. 3d 490]* . But the better view is that set forth in the case of *Jennifer T. v. Superior Court (2007) 159 Cal. App. 4th 254, 260, 71 Cal. Rptr. 3d 293* , in which the appellate court found good cause to treat the mother's appeal from the referral order as a petition for writ of mandate, disagreeing with the *Merrick V.* decision and recognizing the right to appeal is statutory and therefore the appellate court could not grant the mother the right to appeal where it was not provided by statute.

PRACTICE TIP:

Advisory on Writ Requirements. Lawyers representing parents should ensure the juvenile court advises their clients of the writ requirement when it terminates services and refers a case to a *Welf. & Inst. Code § 366.26* hearing whether the parent is present in court at the time the orders are made or not [*Welf. & Inst. Code §§ 248.5, 366.26(l)(3)(A)*]. In addition, in cases where the juvenile court fails to advise the parent of this requirement, but where the parent later wants to seek appellate review of the orders, parent's counsel should ensure when the brief is filed that the appellate court is aware the lower court failed to give the appropriate advisement.

If the juvenile court denies or terminates reunification services but does not set a hearing under *Welf. & Inst. Code § 366.26*, the orders may be appealed immediately and the requirement for writ review does not apply [*In re Nada R. (2001) 89 Cal. App. 4th 1166, 1178-1179, 108 Cal. Rptr. 2d 493* ; *Wanda B. v. Superior Court (1996) 41 Cal. App. 4th 1391, 1395, 49 Cal. Rptr. 2d 175]* .

[10] Orders Related to the Referral Order

The manner in which appellate courts will treat orders made at the same time as the order setting the selection and implementation hearing was uncertain under the statutes. Decisional law has clarified this issue, however. Orders that are deemed integrally related to reference orders may also be considered reviewable only by extraordinary writ [*In re Charmice G. (1998) 66 Cal. App. 4th 659, 669-671, 78 Cal. Rptr. 2d 212]* . One court of appeal has also held that where the court denies services to both parents at the disposition hearing and sets the matter for a hearing under *Welf. & Inst. Code § 366.26*, all jurisdiction and disposition issues must be raised in an extraordinary writ petition [*In re Anthony B. (1999) 72 Cal. App. 4th 1017, 1021-1024, 85 Cal. Rptr. 2d 594]* . More recently, however, one court held "All court orders, regardless of their nature, made at a hearing in which a section 366.26 permanency planning hearing is set must be challenged by a petition for extraordinary writ" [*In re Merrick V. (2004) 122 Cal. App. 4th 235, 247, 19 Cal. Rptr. 3d 490]* . This is the better view and the only way to ensure that all issues, including otherwise appealable issues, will be dealt with by the appellate court before the selection and implementation hearing is held and thus should be the law regardless of the hearing from which the selection and implementation hearing is set. This places an added burden on trial counsel to brief some issues, rather than appellate counsel. Nevertheless, it is a judicially economical and time sensitive means of ensuring that the issues are dealt with in a timely and effective manner. This assumes, of course, that the appellate court considers the issues raised in all writ petitions under *Cal. Rules of Ct., Rule 8.452* on the merits. Not all appellate courts have accepted and met that responsibility.

Historically, related nonappealable orders included orders rejecting reunification services [*In re Tammy H. (1992) 11 Cal. App. 4th 48, 51, 14 Cal. Rptr. 2d 16* (claim that court erred in terminating reunification services, based on challenge to sufficiency of reunification plan, not cognizable on appeal from order authorizing termination action); *In re Jennilee T. (1992) 3 Cal. App. 4th 212, 217-218, 4 Cal. Rptr. 2d 101* (order made in conjunction with order to place child for adoption); *In re Catherine S. (1991) 230 Cal. App. 3d 1253, 1256, 281 Cal. Rptr. 746* (order made in conjunction with order setting permanency planning hearing); *In re Rebecca H. (1991) 227 Cal. App. 3d 825, 836-837, 845, 278 Cal. Rptr. 185* (order made in conjunction with order setting permanency planning hearing); *In re Kristin W. (1990) 222 Cal. App. 3d 234, 246, 271 Cal. Rptr. 629* (order implied from order to initiate proceedings to terminate parental rights); *but see In re Violet J. (1990) 225 Cal. App. 3d 600, 605-607, 275 Cal. Rptr. 139* (finding that order to file termination proceedings was not appealable on basis that it impliedly terminated parent's reunification services and, in dicta, observing that separate order expressly terminating reunification services would arguably have been appealable)] and an order limiting the visitation rights of the parents [*In re Steven H. (1992) 6 Cal. App. 4th 1752, 1755-1757, 8 Cal. Rptr. 2d 535* (order made in conjunction with order for permanent placement proceedings)]. Now all court orders made at the hearing in which the *Welf. & Inst. Code § 366.26* hearing is to be set must be raised by petition for extraordinary writ relief [*In re Merrick V. (2004) 122 Cal. App. 4th 235, 247, 19 Cal. Rptr. 3d 490]* .

For a discussion of petitions for extraordinary writ relief, see *§ 328.191*.

[11] Notice to the Parties

When a notice of appeal has been filed in a juvenile dependency case, the clerk of the court shall mail a notice of the filing of the notice of appeal to each party other than the appellant, including the child if the child is 10 years of age or older, all attorneys of record, any de facto parent, any court-appointed special advocate, and to the tribe of an Indian child [*Cal. Rules of Ct., Rule 8.400(h)*]. Effective July 1, 2010, these requirements will be found in *Cal. Rules of Ct., Rule 8.405(b)*.

[12] Confidentiality of Juvenile Dependency Appeal

In juvenile dependency appeals all records, briefs, or other documents that are filed by the parties to the appeal, and all opinions or orders filed by the court, shall protect the anonymity of the parties. The record on appeal, and the briefs may only be inspected by court personnel, the parties, the attorneys for the parties, and such other persons as are designated

by the appellate court. A person or entity that is considering filing an amicus curiae brief may also inspect filed documents. The briefs and other documents filed by the parties in dependency appeals are to protect the anonymity of the parties. Additionally, the court of appeal may limit or even prohibit the admission of the public to hearings regarding the dependency appeal [*Cal. Rules of Ct., Rule 8.400(b)*]. Effective July 1, 2010, these requirements will be found in *Cal. Rules of Ct., Rule 8.401*.

PRACTICE TIP:

Party Names. When writing dependency appeals and writs, it is important to remember the mandate that the anonymity of the parties is to be protected [*see, e.g., T.N.G. v. Superior Court (1971) 4 Cal. 3d 767, 770 n.1, 94 Cal. Rptr. 813, 484 P.2d 981* ("Attorneys have similarly not mentioned a minor's last name in briefs and petitions.")]. As such, the last names of the parties should not be included. Terms such as "appellant" or "petitioner" are sometimes used, but often the best approach is to simply refer to the "mother," "father," or "child." Descriptive identifications such as "the mother" or "the father" are best. One court recently held that in order to protect the privacy of the children involved in dependency and family law cases, it would refer to the parties only by their initials, consistent with an "informal recommendation of the Reporter of Decisions" [*Adoption of O.M. (2008) 169 Cal. App. 4th 672, 675 n.1, 87 Cal. Rptr. 3d 135]* . But this practice made it difficult for practitioners to keep track of appellate cases and created confusion in cases with the same initials. Subsequent to the *O.M.* decision, Presiding Justice Kline of the First District Court of Appeal, Division Two, wrote in the *Edward S.* decision that despite the comment in *O.M.*, the court would refer to the parties by their first name and last initial because that was consistent with the rules of court and because the court believed "... the use of initials only would make it increasingly difficult for legal researchers to keep track of and differentiate between and among the growing number of appellate opinions in delinquency and dependency and family law cases, create confusion, and impair the readability of many such opinions" [*In re Edward S. (2009) 173 Cal. App. 4th 387, 392 n.1, 92 Cal. Rptr. 3d 725]* . For the reasons stated in the *Edward S.* opinion, Justice Klein sets forth the better approach. Indeed, effective July 1, 2010, the rule of court will provide that parties are to be referred to by their first name and last initial. If the first name is unusual, however, or other circumstances would defeat the objective of anonymity if the first name was used, "the parties initials may be used" [*Cal. Rules of Ct., Rule 8.401(a)(2)*, eff. July 1, 2010].

Using the first initial of the last name, such as "Mr. J." or "Ms. C.," is also an acceptable means of identification. While the requirement for anonymity is only mandated for the parties, it is recommended that this practice be used for all nonprofessionals mentioned in documents filed with the appellate court, including relatives ("the grandmother") and foster parents ("the foster mother"). Writing "sanitized" briefs as if they might be used later as writing samples for a job interview or as the basis for a published opinion is an excellent means of ensuring the anonymity of the parties is protected.

[13] Post-Judgment Evidence

The general rule for all appeals is that the correctness of a trial court's judgment will be reviewed as of the time the judgment was made and on a record of that evidence the trial court had before it for its consideration. This general rule applies in dependency appeals as well [*In re Zeth S. (2003) 31 Cal. 4th 396, 405, 2 Cal. Rptr. 3d 683, 73 P.3d 541]* . This is especially true in appeals from the termination of parental rights in which the California Supreme Court has made clear that post-judgment evidence is not to be considered by the appellate court pursuant to *Code of Civ. Proc. § 909* for the reversal of the termination of rights except in a "rare and compelling case" not present or defined in that decision [*In re Zeth S. (2003) 31 Cal. 4th 396, 400, 413-414, 2 Cal. Rptr. 3d 683, 73 P.3d 541 , disapproving to the extent inconsistent, In re Jonathan M. (1997) 53 Cal. App. 4th 1234, 62 Cal. Rptr. 2d 208* ; *In re Eileen A. (2000) 101 Cal. Rptr. 2d 548* ; *In re Jeremy S. (2001) 89 Cal. App. 4th 514, 107 Cal. Rptr. 2d 280* ; and *In re Jayson T. (2002) 97 Cal. App. 4th 75, 118 Cal. Rptr. 2d 228]* . The Supreme Court did note one exception to the general rule regarding post-judgment evidence in termination of parental rights appeals. That exception was found in the *Elise K.* case in

which all parties stipulated that circumstances had changed and the child was no longer adoptable, thereby undermining the foundation for the order terminating parental rights [*In re Zeth S. (2003) 31 Cal. 4th 396, 413, fn. 11, 2 Cal. Rptr. 3d 683, 73 P.3d 541 , citing In re Elise K. (1982) 33 Cal. 3d 138, 187 Cal. Rptr. 483, 654 P.2d 253]* . But it provided no further express guidance regarding the particular circumstances in which post-judgment evidence might be appropriate in a termination of parental rights appeal, or in any other dependency appeal. Some general guidance is found within the decision, however:

- The post-judgment evidence sought to be presented to the appellate court pursuant to *Code Civ. Proc. § 909* should actually be evidence. In *Zeth S.* it was not. It was the unsworn statement of the child's appellate counsel, which the Supreme Court noted was not evidence [*In re Zeth S. (2003) 31 Cal. 4th 396, 403, 414, fn. 11, 2 Cal. Rptr. 3d 683, 73 P.3d 541]* . Unsworn statements of the child's appellate counsel or other individuals are not appropriate for consideration by appellate courts following *Zeth S.* [*In re Merrick V. (2004) 122 Cal. App. 4th 235, 258, fn. 9, 19 Cal. Rptr. 3d 490* ; *In re Rachel M. (2003) 113 Cal. App. 4th 1289, 1294, 7 Cal. Rptr. 3d 153]* .

- The post-judgment evidence should be evidence that would be relevant and admissible at the trial court level. In *Zeth S.* it was not. The Supreme Court noted the grandfather's preference for legal guardianship would not, in likelihood, have been relevant or admissible at the *Welf. & Inst. Code § 366.26* hearing, since the child was adoptable and the grandfather was willing to accept adoption [*In re Zeth S. (2003) 31 Cal. 4th 396, 410, 2 Cal. Rptr. 3d 683, 73 P.3d 541]* .

- The post-judgment evidence should be relevant to the issue or issues raised by the appealing party, and the standards of appellate review. In *Zeth S.* it was not. The mother appealed the termination of parental rights contending she had a beneficial parent-child relationship that made adoption detrimental to the child under *Welf. & Inst. Code § 366.26(c)(1)(A)*. The child did not appeal and the child's trial attorney supported adoption, but the post-judgment evidence was sought to be introduced by the child's appellate attorney to show the termination of parental rights was not best for the child. The Supreme Court noted that allowing such post-judgment evidence in support of reversal would dispense with such basic formalities as the need for a notice of appeal and to first raise issues at the trial court level, and would impose a new standard for reversal based on the child's best interest [*In re Zeth S. (2003) 31 Cal. 4th 396, 412-413, 2 Cal. Rptr. 3d 683, 73 P.3d 541]* .

- The post-judgment evidence should either be agreed to by all parties or not reasonably subject to dispute. In *Zeth S.* it was not. There the unsworn statements of the child's appellate counsel were later refuted and clarified by the grandfather's sworn declaration that was attached to the petition for rehearing [*In re Zeth S. (2003) 31 Cal. 4th 396, 403-404, 2 Cal. Rptr. 3d 683, 73 P.3d 541]* . The only circumstance the Supreme Court expressly approved for the use of post-judgment evidence, however, was that of the *Elise K.* decision in which all parties agreed a change of circumstances existed [*In re Zeth S. (2003) 31 Cal. 4th 396, 413, fn. 11, 2 Cal. Rptr. 3d 683, 73 P.3d 541 , citing In re Elise K. (1982) 33 Cal. 3d 138, 187 Cal. Rptr. 483, 654 P.2d 253]* .

- Finally, the post-judgment evidence normally must be in support of affirming the judgment, not of reversing the judgment. Again, in *Zeth S.* it was not. It was sought to be used to reverse the judgment. The Supreme Court noted the "state's strong interest in the expeditiousness and finality of juvenile dependency proceedings" [*In re Zeth S. (2003) 31 Cal. 4th 396, 412, 2 Cal. Rptr. 3d 683, 73 P.3d 541* ; *see also Alicia B. v. Superior Court (2004) 116 Cal. App. 4th 856, 867, 11 Cal. Rptr. 3d 1]* . It also noted the delay caused by reversing a dependency judgment may be contrary to, rather than in, a child's best interests [*In re Zeth S. (2003) 31 Cal. 4th 396, 413, fn. 10, 2 Cal. Rptr. 3d 683, 73 P.3d 541 , quoting In re Celine R. (2003) 31 Cal. 4th 45, 59, 1 Cal. Rptr. 3d 432, 71 P.3d 787]* .

These guidelines are consistent with existing law regarding the acceptance of post-judgment evidence in appeals under *Code of Civ. Proc. § 909*, and should be considered by any appellate court to which a request to receive post-judgment evidence is made in a dependency appeal.

Given the strong holding in the *Zeth S.* decision, it is anticipated appellate courts will move very carefully in finding that postjudgment evidence should be received in a dependency appeal, particularly one involving termination of parental rights. For example, in the case of *In re Valerie W. (2008) 162 Cal. App. 4th 1, 75 Cal. Rptr. 3d 86* , the court refused to grant the child's counsel's motion to consider postjudgment evidence of facts set forth in counsel's declaration in determining whether substantial evidence supported the trial court's order terminating parental rights. The issues that post-judgment evidence will be most clearly relevant to, and thus most likely to be accepted if all other factors support acceptance, are: mootness, harmless error, and stipulated reversals. Appellate courts have demonstrated a willingness to accept additional evidence in certain limited situations since *Zeth S.* [*In re Karen G. (2004) 121 Cal. App. 4th 1384, 1389-1390, 18 Cal. Rptr. 3d 301* (considering evidence of subsequent events to show appeal was moot); *In re S.M. (2004) 118 Cal. App. 4th 1108, 1117, fn. 5, 13 Cal. Rptr. 3d 606 (ICWA notices)* ; *In re Louis S. (2004) 117 Cal. App. 4th 622* ; *12 Cal. Rptr. 3d 110 (ICWA notices)* ; *Alicia B. v. Superior Court (2004) 116 Cal. App. 4th 856, 865-867, 11 Cal. Rptr. 3d 1 (ICWA notices)]* . This area is an area to be watched for further developments.

[14] Standards of Appellate Review

[a] De Novo Review

Pure questions of law that do not involve the resolution of disputed facts are subject to de novo review. The appellate court decides the matter after its own review of the case, without giving any deference to the trial court's ruling [*Ghirardo v. Antoniolo (1994) 8 Cal. 4th 791, 801, 35 Cal. Rptr. 2d 418* ; *In re Daniel M. (1996) 47 Cal. App. 4th 1151, 1154, 55 Cal. Rptr. 2d 17*].

Courts will review the interpretation of a statute de novo, since it is a question of law [*In re Fernando M. (2006) 138 Cal. App. 4th 529, 535, 41 Cal. Rptr. 3d 511* ; *Robin J. v. Superior Court (2004) 124 Cal. App. 4th 414, 420, 21 Cal. Rptr. 3d 417*].

[b] Substantial Evidence Test

Generally, appellate courts review a trial court's factual findings to determine whether or not they are supported by substantial evidence [*Jennifer A. v. Superior Court (2004) 117 Cal. App. 4th 1322, 1341, 12 Cal. Rptr. 3d 572*]. Many factual findings made throughout the dependency process are subject to the substantial evidence standard of review on appeal. For example, appellate courts will affirm jurisdictional findings if substantial evidence supports them [*see, e.g., In re Heather A. (1996) 52 Cal. App. 4th 183, 193, 60 Cal. Rptr. 2d 315* ; *In re Kristin H. (1996) 46 Cal. App. 4th 1635, 1649, 54 Cal. Rptr. 2d 722* ; *In re S.O. (2002) 103 Cal. App. 4th 453, 461, 126 Cal. Rptr. 2d 554*]. Courts also use the substantial evidence test to review the finding that reasonable reunification services have been offered or provided to the parent [*Angela S. v. Superior Court (1995) 36 Cal. App. 4th 758, 762, 42 Cal. Rptr. 2d 755 , citing James B. v. Superior Court (1995) 35 Cal. App. 4th 1014, 1020, 41 Cal. Rptr. 2d 762*)]. Further, a trial court's determination that it would be detrimental to return a child to parental custody is also reviewed under the substantial evidence test [*In re Shaundra L. (1995) 33 Cal. App. 4th 303, 316, 39 Cal. Rptr. 2d 299*]. Many other findings and orders are also reviewed under the substantial evidence standard [*see, e.g.,* *Cheryl P. v. Superior Court (2006) 139 Cal. App. 4th 87, 96, 42 Cal. Rptr. 3d 504* (ordering denying reunification services reviewed for substantial evidence); *In re Jacob S. (2002) 104 Cal. App. 4th 1011, 1017, 128 Cal. Rptr. 2d 654* (substantial evidence used to review court's finding that sibling bond exception applies to termination of parental rights); *In re Sheila B. (1993) 19 Cal. App. 4th 187, 198-199, 23 Cal. Rptr. 2d 482* (order dismissing dependency petition reviewed for substantial evidence); *In re Erik P. (2002) 104 Cal. App. 4th 395, 399-400, 127 Cal. Rptr. 2d 922* (court reviews finding that child likely to be adopted within reasonable amount of time for substantial evidence); *In re Y.R. (2007) 152 Cal. App. 4th 99, 103, 112,*

60 Cal. Rptr. 3d 820 (adoptability determination reviewed for substantial evidence)].

In reviewing a challenge to the sufficiency of the evidence, the appellate court must view the evidence in the light most favorable to the prevailing party. "We must indulge in all legitimate and reasonable inferences to uphold the verdict. If there is substantial evidence supporting the judgment, our duty ends and the judgment must not be disturbed" [*In re Misako R. (1991) 2 Cal. App. 4th 538, 545, 3 Cal. Rptr. 2d 217*]. Further, when " 'two or more inferences can reasonably be deduced from the facts,' either deduction will be supported by substantial evidence, and 'a reviewing court is without power to substitute its deductions for those of the trial court' " [*In re Misako R. (1991) 2 Cal. App. 4th 538, 545, 3 Cal. Rptr. 2d 217 , quoting In re Eric J. (1979) 25 Cal. 3d 522, 527, 159 Cal. Rptr. 317, 601 P.2d 549* ; *see also In re J. I. (2003) 108 Cal. App. 4th 903, 134 Cal. Rptr. 2d 342* (sufficiency of evidence to establish given fact is question for trial court; if substantial evidence supports its conclusion, determination not open to review)].

On appeal from a juvenile court's factual findings, the appellate court's role is not to reweigh the evidence or to express an independent judgment about the evidence presented [*In re Shelley J. (1998) 68 Cal. App. 4th 322, 329, 79 Cal. Rptr. 2d 922*]. "The ultimate determination is whether a reasonable trier of fact could have found for the respondent based on the whole record" [*Kuhn v. Department of General Services (1994) 22 Cal. App. 4th 1627, 1633, 29 Cal. Rptr. 2d 191*]. As stated by one appellate court: "The Court of Appeal is not a second trier of fact and a writ petition is not a trial brief. We are bound to uphold the challenged order, particularly if supported by findings of fact, if it is supported by substantial evidence. Evidence not favorable to the petitioner cannot be simply ignored as if it does not exist" [*James B. v. Superior Court (1995) 35 Cal. App. 4th 1014, 1021, 41 Cal. Rptr. 2d 762*]. As noted by the appellate court in the *A.A.* decision, "The juvenile court's reasoning is not a matter for our review. [Citation.] It is judicial action not judicial reasoning which is the proper subject of appellate review. [Citation.] [Para.] Further, appellants approach the question of the children's adoptability by picking and choosing evidence from the record in support of their argument. This is not an approach we may follow on review. The purpose of an appellate court asked to assess the sufficiency of the evidence begins and ends with a determination of whether there is any substantial evidence, whether or not contradicted, which will support the conclusion of the trier of fact" [*In re A.A. (2008) 167 Cal. App. 4th 1292, 1313, 84 Cal. Rptr. 3d 841, 858-859]* .

Nevertheless, while the standard is high for reversal of a finding of fact under the substantial evidence standard of review, it does not mean that review of substantial evidence questions will always result in affirmance. As has been repeated by many courts: " '[S]ubstantial evidence is not synonymous with *any* evidence. [Citations.] A decision supported by a mere scintilla of evidence need not be affirmed on appeal. [Citation.]' " [*In re David M. (2005) 134 Cal. App. 4th 822, 828, 36 Cal. Rptr. 3d 411 , quoting In re Savannah M. (2005) 131 Cal. App. 4th 1387, 1393-1394, 32 Cal. Rptr. 3d 526*]. Further, while substantial evidence may be composed of inferences, such inferences must be supported by evidence and be the product of logic and reason. Inferences resulting from mere conjecture or speculation are not sufficient to constitute substantial evidence to support a trial court's factual finding on appeal [*In re David M. (2005) 134 Cal. App. 4th 822, 828, 36 Cal. Rptr. 3d 411* ; *In re Savannah M. (2005) 131 Cal. App. 4th 1387, 1393-1394, 32 Cal. Rptr. 3d 526*]. Instead, the "ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record" [*In re Savannah M. (2005) 131 Cal. App. 4th 1387, 1394, 32 Cal. Rptr. 3d 526 , quoting Roddenberry v. Roddenberry (1996) 44 Cal. App. 4th 634, 652, 51 Cal. Rptr. 2d 907*].

Some appellate courts have said that on review of a finding made by clear and convincing evidence, the court of appeal will employ the substantial evidence test, but will bear in mind the heightened burden of proof [*see, e.g., In re Alvin R. (2003) 108 Cal. App. 4th 962, 971, 134 Cal. Rptr. 2d 210* ; *In re Lukas B. (2000) 79 Cal. App. 4th 1145, 1154, 94 Cal. Rptr. 2d 693* ; *In re Angelia P. (1981) 28 Cal. 3d 908, 924, 623 P. 2d 198*]. Other courts conclude that at the appellate level the clear and convincing evidence standard "disappears" and the substantial evidence test becomes the governing standard of review. This second view recognizes the heightened burden of proof is a standard for decision-making at the trial court level, not a standard of review [*In re Mark L. (2001) 94 Cal. App. 4th 573, 580-581, 114 Cal. Rptr. 2d 499* ; *Sheila S. v. Superior Court (2000) 84 Cal. App. 4th 872, 880-881, 101 Cal. Rptr. 2d 187* ; *Crail v. Blakely (1973) 8 Cal. 3d 744, 750, 505 P. 2d 1027*]. The second view is the better view; requiring different levels of substantial evidence

at the appellate court for the review of findings made by different standards of proof in the trial court would inevitably result in appellate courts reweighing the evidence, something the appellate courts are not to do. Nevertheless, under either method, the result in most cases will be the same.

[c] Abuse of Discretion

Generally, courts review a trial court's discretionary rulings for abuse of discretion. This is an even higher standard of review than the substantial evidence standard. The appropriate test on appeal for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the record, the reviewing court has no authority to substitute its decision for that of the juvenile court [*In re Stephanie M. (1994) 7 Cal. 4th 295, 318-319, 27 Cal. Rptr. 2d 595, 867 P.2d 706*]. Thus, where a trial court has discretionary power to decide an issue, a reviewing court may not disturb the trial court's decision unless the trial court exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [*In re K.D. (2004) 124 Cal. App. 4th 1013, 1018, 21 Cal. Rptr. 3d 711* ; *In re Raymundo B. (1988) 203 Cal. App. 3d 1447, 1456, 250 Cal. Rptr. 812*].

A reviewing court employs the abuse of discretion standard in many instances where the trial court exercises its discretion in determining what is best for the dependent child [*see, e.g.,* *In re Jasmon O. (1994) 8 Cal. 4th 398, 415, 419, 33 Cal. Rptr. 2d 85, 878 P.2d 1297* ; *In re Brittany K. (2005) 127 Cal. App. 4th 1497, 1505, 1507, 26 Cal. Rptr. 3d 487* (court reviews summary denial of *Welf. & Inst. Code § 388* petition under abuse of discretion standard); *In re Jesse C. (1999) 71 Cal. App. 4th 1481, 1487, 84 Cal. Rptr. 2d 609* (appointment of counsel for dependent child reviewed for abuse of discretion); *In re Nada R. (2001) 89 Cal. App. 4th 1166, 1179, 108 Cal. Rptr. 2d 493* (decision whether to offer reunification services to parent losing custody to previously noncustodial parent reviewed for abuse of discretion); *In re Sabrina H. (2007) 149 Cal. App. 4th 1403, 1420-1421, 57 Cal. Rptr. 3d 863* (juvenile court's placement orders reviewed under abuse of discretion standard); *In re Marilyn A. (2007) 148 Cal. App. 4th 285, 300, 55 Cal. Rptr. 3d 647* (court reviews for abuse of discretion trial court's decision to make juvenile court custody order and terminate dependency jurisdiction)].

PRACTICE TIP:

When Standard of Review Is Unclear or in Conflict. It may be unclear in some cases which standard of review applies [*see, e.g.,* *In re Sheila B. (1993) 19 Cal. App. 4th 187, 199, 23 Cal. Rptr. 2d 482* , noting the case of *In re Christina T. (1986) 184 Cal. App. 3d 630, 229 Cal. Rptr. 247* , "articulates all three standards of review--abuse of discretion, sufficiency of the evidence, and error as a matter of law--and uses them interchangeably"; *see also* *In re Robert L. (1993) 21 Cal. App. 4th 1057, 1065-1066, 24 Cal. Rptr. 2d 654]* . Further, in some circumstances there is a split of authority as to which standard applies [*compare* *In re Jasmine D. (2000) 78 Cal. App. 4th 1339, 1351, 93 Cal. Rptr. 2d 644* (abuse of discretion standard applies to determination whether beneficial parent child relationship exception to termination of parental rights applies) *with* *In re Zachary G. (1999) 77 Cal. App. 4th 799, 809, 92 Cal. Rptr. 2d 20* , *and* *In re Derek W. (1999) 73 Cal. App. 4th 823, 827, 86 Cal. Rptr. 2d 739* (exception reviewed for substantial evidence)]. Under either the abuse of discretion or the substantial evidence standards, however, the reviewing court's task is not to reweigh the evidence or to express its independent judgment thereon [*In re Jasmine D. (2000) 78 Cal. App. 4th 1339, 1351, 93 Cal. Rptr. 2d 644]* . Thus, in cases where you are unsure which standard of review applies, or where there is a split of authority as to which standard applies, argue that under either standard your client should prevail, and explain why.

[15] Briefing Guidelines

In general, appellant's opening briefs and any petitions for extraordinary writ relief should contain a concise statement explaining how the lower court erred, the appropriate standard of review that the appellate court should use in reviewing the claim, and an analysis of the appropriate outcome. It is not necessary to raise every possible claim of error on

appeal; the better course is to limit appellate review to those issues that raise a serious question of error.

When the respondent or real party in interest files a responsive brief, it is important to limit arguments to those claims raised in the opening brief or writ petition, and not raise new issues that were not briefed initially by the appellant or petitioner [*see, e.g.,* *In re S.J. (2008) 167 Cal. App. 4th 953, 84 Cal. Rptr. 3d 557* (respondent erred in raising applicability of code section in respondent's brief that did not apply to the case and not initially raised by appellant)].

Parties should also be aware that in the case of *In re R.H. (2009) 170 Cal. App. 4th 678, 88 Cal. Rptr. 3d 650* , the court held that a father in propria persona who filed 13 writs or appeals in his son's dependency matter was a vexatious litigant who was therefore subject to prefiling requirements found in the *Code of Civ. Proc. § 391* before he could file additional appellate briefs. In cases where a party files numerous appeals or writs that are without merit, opposing counsel may be able to have the appellate court declare appellant to be a vexatious litigant, preventing additional frivolous filings.

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
L. Appeal and Extraordinary Writs

28-328 California Forms of Pleading and Practice--Annotated § 328.191

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§ 328.191 Review by Rule 8.452 Extraordinary Writ Petition

[1] In General

[a] Notice of Intent to File Writ Petition

The current rules of court for extraordinary writ petitions challenging the termination of services and setting of a *Welf. & Inst. Code § 366.26* hearing are now *Cal. Rules of Ct., Rules 8.450*, and *8.452*. Originally the rule provisions for these writ petitions were found in Cal. Rules of Ct., former Rule 39.1B. Later they were moved to Cal. Rules of Ct., former Rules 38, and 38.1. As such, many published decisions resulting from these writ petitions have used the older rule numbers and practitioners and courts should be aware of the changes.

A Notice of Intent to File Writ Petition and Request for Record must be filed with the clerk of the court within 7 days of the date of the order setting the selection and implementation hearing or, if the order was made by a referee not sitting as a temporary judge, within 7 days after the order of the referee becomes final. Judicial Council form JV-820 (Notice of Intent to File Writ Petition and Request for Record) may be used for this purpose. Where the party received notice by mail only of the order setting the hearing pursuant to *Welf. & Inst. Code § 366.26*, the period for filing the notice of intent to file a writ and the request for record is 12 days after the date the clerk mailed the notification [*Cal. Rules of Ct., Rule 8.450(e)*]. The notice of intent to file a writ petition must be signed by the party intending to file the writ petition unless, based on a declaration by the attorney of record, the court of appeal finds good cause to waive the party-signature requirement [*Cal. Rules of Ct., Rule 8.450(e)(3)*; *Janice J. v. Superior Court (1997) 55 Cal. App. 4th 690, 691-692, 64 Cal. Rptr. 2d 227* ; *Suzanne J. v. Superior Court (1996) 46 Cal. App. 4th 785, 788, 54 Cal. Rptr. 2d 25* ; *Guillermo G. v. Superior Court (1995) 33 Cal. App. 4th 1168, 1172-1174, 39 Cal. Rptr. 2d 748]* . Where the notice of intent to file a writ petition is filed on behalf of the child, the attorney of record for the child must sign the notice [*Cal. Rules of Ct., Rule 8.450(e)(3)*].

[b] Preparation of the Record

Upon the filing of a Notice of Intent to File Writ Petition and Request for Record, the clerk of the court shall immediately assemble the record, including immediately notifying the court reporter by telephone and in writing to prepare and deliver the reporter's transcript within 12 days. The clerk must prepare the clerk's transcript within 20 days after the notice of intent is filed. The record must include all the minute orders and reports from the juvenile court file, the notice of intent, proof of service, the reporter's transcript from all sessions of the hearing at which the order setting a selection and implementation hearing was made, and any additional documents or evidence which were considered by the court at the hearing [*Cal. Rules of Ct., Rules 8.450(f)-(g), 8.404(a)*]. In those cases where the reviewing court requires additional records or transcripts, the court may grant up to 15 additional days for the preparation and submission of the additional clerk's or reporter's transcripts [*Cal. Rules of Ct., Rule 8.452(f)*; see *Cal. Rules of Ct., Rule 8.452(e)*, eff. July 1, 2010]. Immediately on completion of the record, the clerk shall certify it and deliver it by the most expeditious means to the reviewing court. The clerk shall also transmit copies of the record to the petitioner and parties, or counsel of record, by any method which is as fast as the express mail service of the United States Postal Service. The clerk of the reviewing court is also required upon receipt of the record to notify all parties that the record has been filed and to indicate the date on which the 10-day period for the filing of the writ will expire [*Cal. Rules of Ct., Rules 8.450(h)-(i)*].

[c] Augmentation or Correction of Record by Petitioner

Any request by petitioner for augmentation or correction of the record must be filed within 5 days of receiving the initial record or within 10 days if the record exceeds 600 pages [*Cal. Rules of Ct., Rule 8.452(f)*; see *Cal. Rules of Ct., Rule 8.452(e)*, eff. July 1, 2010].

[d] Petition Requirements

The petition must be served on all parties entitled to receive notice under *Welf. and Inst. Code § 294*, and to any CASA and de facto parent, and filed within 10 days after the filing of the record in the reviewing court [*Cal. Rules of Ct., Rule 8.452(c)-(d)*]. The petition may be filed on Judicial Council form Writ Petition--Juvenile (JV-825) or other petition for extraordinary writ. Those petitions which are filed on the Judicial Council form will be accepted by the reviewing court. All petitions shall be liberally construed in favor of their sufficiency [*Cal. Rules of Ct., Rule 8.452*]. Thus, these writs should not be denied on technical grounds of format [*Cresse S. v. Superior Court (1996) 50 Cal. App. 4th 947, 955, 58 Cal. Rptr. 2d 56]* .

Nevertheless, "litigants must not be misled by the brevity of form No. JV-825." An adequate record and points and authorities are still required [*Rayna R. v. Superior Court (1993) 20 Cal. App. 4th 1398, 1406-1407, 25 Cal. Rptr. 2d 259]* . Indeed, one appellate court has said that "use of the truncated Judicial Council form petition, without more, is the functional equivalent of a request for Wende review" [*Nahid H. v. Superior Court (1997) 53 Cal. App. 4th 1051, 1056, 62 Cal. Rptr. 2d 281]* . The extraordinary writ petition must summarize the factual basis for the petition, although it need not repeat the facts as they appear in the attached or submitted record, provided that references to specific portions of the record and their significance to the issues raised, as well as any disputed aspects of the record, be noted to assist the reviewing court. Points and authorities in support of the petition must be attached [*Cal. Rules of Ct., Rule 8.452(b)*; *see* *Rayna R. v. Superior Court (1993) 20 Cal. App. 4th 1398, 1407, 25 Cal. Rptr. 2d 259* (emphasizing the need for points and authorities)].

The writ petition should be dismissed as abandoned if it does not summarize the facts supporting the petition, refer to specific portions of the record, relate the facts of the case to the error alleged, note any disputed aspects of the record, and have attached a memorandum of points and authorities that is actually particularized to the specific case [*Cheryl S. v. Superior Court (1996) 51 Cal. App. 4th 1000, 1005, 59 Cal. Rptr. 2d 520* ; *Cresse S. v. Superior Court (1996) 50 Cal. App. 4th 947, 955, 58 Cal. Rptr. 2d 56]* . As noted by one appellate court, "counsel are enjoined to function as

professionals, not as mere scriveners" [*Nahid H. v. Superior Court (1997) 53 Cal. App. 4th 1051, 1056, 62 Cal. Rptr. 2d 281]* . The fact that a trial attorney may be paid a flat fee that does not provide extra compensation for such writs does not relieve counsel of the obligation to prepare a sufficient writ [*Cresse S. v. Superior Court (1996) 50 Cal. App. 4th 947, 955, 58 Cal. Rptr. 2d 56]* . Nevertheless, where refusal to consider an inadequate petition would "risk grave injustice" due to the unusual facts of the case, a court may choose not to dismiss an otherwise insufficient petition [*Nahid H. v. Superior Court (1997) 53 Cal. App. 4th 1051, 1055-1056, 62 Cal. Rptr. 2d 281]* .

[e] Augmentation Request and Response

Any request by a responding party for augmentation of the record shall be filed within 5 days of the filing of the writ petition. Any responding brief must be served and filed within 10 days of the filing of the writ petition, or within 15 days after filing if the writ petition was served by mail, or within 10 days of any request by the reviewing court for a response, unless a shorter time is designated by the reviewing court [*Cal. Rules of Ct., Rule 8.452(c), (f)*; see *Cal. Rules of Ct., Rule 8.452(e),* eff. July 1, 2010].

[f] Oral Argument

Oral argument "shall be held" no later than 30 days after the response is filed or due to be filed, unless waived or unless the time period for argument is extended for good cause by the court [*Cal. Rules of Ct., Rule 8.452(h)*; see *Cal. Rules of Ct., Rule 8.452(g),* eff. July 1, 2010].

[g] Decision on the Merits

The purpose of the rules is to encourage and assist appellate courts to determine the writ petitions on their merits and to achieve a meritorious review by the reviewing court of the issues raised in the writ petition within the 120-day period for the holding of the *Welf. & Inst. Code § 366.26* hearing. The rules indicate that absent "exceptional circumstances" the appellate court "must" determine such petitions on the merits by written opinion [*Cal. Rules of Ct., Rule 8.452(i)*; see *Cal. Rules of Ct., Rule 8.452(h),* eff. July 1, 2010]. Unfortunately, not all appellate courts have accepted this responsibility. Where the court does not routinely determine all such writ petitions on the merits, parents clearly suffer since their challenges are not determined until long after the *Welf. & Inst. Code § 366.26* hearing. In dealing with the lives of children and families, such delay is almost inevitably detrimental if the challenge has any merit to it at all. Nevertheless, practitioners need to be familiar with what the practice of the appellate court is in their district or division and act accordingly.

Where courts of appeal do routinely render decisions on the merits in these writs proceedings, they have not been consistent in the past as to the procedures utilized. At least one appellate court issued either an alternative writ or an order to show cause [*see In re Shaundra L. (1995) 33 Cal. App. 4th 303, 314-316, 39 Cal. Rptr. 2d 299]* . Others believed that neither an alternative writ nor an order to show cause were required and instead utilized a procedure of briefing followed by an opportunity for oral argument [*see, e.g., Joyce G. v. Superior Court (1995) 38 Cal. App. 4th 1501, 1506, 1509-1510, 45 Cal. Rptr. 2d 805* ; *Steve J. v. Superior Court (1995) 35 Cal. App. 4th 798, 805-810, 41 Cal. Rptr. 2d 731]* . However, the Judicial Council has since mandated that in all cases where the appellate court intends to issue a decision on the merits, it must issue either an order to show cause or an alternative writ [*Cal. Rules of Ct., Rule 8.452(e)*; see *Cal. Rules of Ct., Rule 8.452(d),* eff. July 1, 2010; *but see Maribel M. v. Superior Court (1998) 61 Cal. App. 4th 1469, 1473-1477, 72 Cal. Rptr. 2d 536* (finding these requirements as previously set forth in Cal. Rules of Ct., former Rule 39.1B to be unconstitutional)].

[h] Notice of Decision

Any notice of decision shall be promptly transmitted by the clerk of the reviewing court to the parties. Where the reviewing court has directed an order to the trial court the clerk of the reviewing court shall also promptly transmit a certified copy of the order to that court. If the writ or order prohibits or stays a proceeding set to occur within seven

days, or in any other urgent situation, the clerk of the reviewing court shall make a reasonable effort to give telephone notice to the clerk of the trial court, in which case the juvenile court clerk must then notify the judicial officer most directly concerned by the order [*Cal. Rules of Ct., Rule 8.452(i)(2)-(3)*; see *Cal. Rules of Ct., Rule 8.452(h)(2)-(3)*, eff. July 1, 2010]. The clerk of the reviewing court is not required to give telephonic notice of the summary denial of a writ, unless a stay had been previously issued and will be dissolved [*Cal. Rules of Ct., Rule 8.452(i)(4)*; *see Cal. Rules of Ct., Rule 8.452(h)(4)*, eff. July 1, 2010].

[2] No Stay of Dependency Proceedings

The rules also provide that no request for a stay of the hearing under *Welf. & Inst. Code § 366.26* shall be granted by the appellate court unless there is an exceptional showing of good cause [*Cal. Rules of Ct., Rule 8.452(g)*; see *Cal. Rules of Ct., Rule 8.452(f)*, eff. July 1, 2010].

[3] Trial Counsel Is Responsible for Writ Petition

Trial counsel is responsible for the filing of the writ petition [*Cal. Rules of Ct., Rules 8.450(c)*; *see Rayna R. v. Superior Court (1993) 20 Cal. App. 4th 1398, 1403-1405, 25 Cal. Rptr. 2d 259]* . Such trial counsel are encouraged to seek assistance from, or consult with, attorneys experienced in writ procedures [*Cal. Rules of Ct., Rules 8.450(c)*]. In the absence of an attorney, the party is responsible for the filing of the writ [*Cal. Rules of Ct., Rules 8.450(c)*].

PRACTICE TIP:

Competent Counsel and Writ Practice. The simultaneous enactment of these writ requirements and the provision of *Welf. & Inst. Code § 317.5(a)* for competent counsel makes it imperative that all attorneys practicing in dependency proceedings, regardless of the party they represent, learn at least the basics of how to draft and respond to extraordinary writ petitions. Under the requirements established by the Judicial Council, competent counsel in dependency proceedings are to be familiar with the procedures for filing petitions for extraordinary writs [*Cal. Rules of Ct., Rule 5.660(d)(1)*]. Local juvenile courts and county bar associations should be encouraged to establish ongoing seminars and training programs to ensure attorneys practicing in juvenile dependency cases achieve this basic level of competency.

[4] Failure to File Writ Precludes Later Appellate Review

The failure to file a petition for extraordinary writ review as specified in the rules precludes that party from obtaining any subsequent review on appeal of the findings and orders setting the *Welf. & Inst. Code § 366.26* hearing [*Welf. & Inst. Code § 366.26(l)*; *but see* discussion in *§ 328.190* regarding limited exceptions]. Nevertheless, a writ petition challenging the termination of services and the setting of a selection and implementation hearing should only be filed where there is merit to the challenge [*Cresse S. v. Superior Court (1996) 50 Cal. App. 4th 947, 956, 58 Cal. Rptr. 2d 56]* .

[5] Time Lines for Writ Are Generally Mandatory

The time lines set forth in *Cal. Rules of Ct., Rules 8.450* and *8.452* for the filing of the Notice of Intent and of the actual writ petition (*see* discussion in [1], *above*) are mandatory absent some showing of good cause [*Jonathan M. v. Superior Court (1995) 39 Cal. App. 4th 1826, 1830-1831, 46 Cal. Rptr. 2d 688* (dismissing writ petition when notice of intent was filed one day late); *Karl S. v. Superior Court (1995) 34 Cal. App. 4th 1397, 1403-1405, 41 Cal. Rptr. 2d 84* (dismissing writ petition when notice of intent was filed two months late)].

[6] Confidentiality of Dependency Writ Proceedings

As with dependency appeals, extraordinary writ proceedings in dependency cases are confidential. The record, petition,

and responses may be inspected only court personnel, the parties, the attorneys for the parties, and such other persons as are designated by the appellate court, including individuals or entities that are considering filing an amicus curiae brief. All records, briefs, or other documents which are filed by the parties, and all opinions or orders filed by the court, must protect the anonymity of the parties. Further, the court of appeal may limit or even prohibit the admission of the public to hearings regarding the dependency writ proceedings [*Cal. Rules of Ct., Rule 8.400(b)*; *see T.N.G. v. Superior Court (1971) 4 Cal. 3d 767, 770, fn. 1, 94 Cal. Rptr. 813, 484 P.2d 981* ("Attorneys have similarly not mentioned a minor's last name in briefs and petitions."). See also discussion in *§ 328.190[12]* (Confidentiality of Juvenile Dependency Appeals)].

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28-328 California Forms of Pleading and Practice--Annotated § 328.192

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§ 328.192 Traditional Writ Petitions

[1] In General

Traditional writs, also called extraordinary writs, are becoming more common in juvenile matters and may be an effective way to obtain more immediate relief from a reviewing court. Proceedings for writ of mandate, prohibition, and certiorari are governed by the *Code of Civ. Proc. §§ 1067-1110(b)*, and *Cal. Rules of Ct., Rule 8.486*. Traditional writs are discretionary writs, however, and appellate courts will entertain these writs and render a decision on the merits only in extraordinary circumstances [*Babb v. Superior Court (1971) 3 Cal. 3d 841, 851, 92 Cal. Rptr. 179, 479 P.2d 379*].

Courts will generally not grant writ relief unless there is no plain, speedy, or adequate remedy in the ordinary course of the law [*Code of Civ. Proc. §§ 1068(a), 1086, 1103(a)*]. If a right to a direct appeal exists, the petitioner must show some special reason why an appeal would be inadequate based on the specific facts of petitioner's case [*Phelan v. Superior Court (1950) 35 Cal. 2d 363, 370, 217 P.2d 951* ; see also *Oceanside Union School Dist. v. Superior Court (1962) 58 Cal. 2d 180, 185, n.4, 373 P.2d 439* ("In most cases ... the parties must be relegated to a review of the order on appeal from the final judgment.")].

PRACTICE TIP:

Monitor Deadline for Filing Notice Of Appeal. Most traditional writ petitions are summarily denied, without reaching the merits, and thus do not preclude the filing of an appeal. A party filing a traditional writ petition should monitor the deadline for filing a notice of appeal so the notice can be filed, if desired, should the appellate court not decide the traditional writ petition before the time to appeal expires, or should the court summarily deny the writ petition during that time.

In order to have standing to seek a writ, a party must be beneficially interested and have some special interest to be served or some particular right to be preserved or protected [*Code of Civ. Proc. §§ 1086, 1103(a)*; *Syngenta Crop*

Protection, Inc. v. Helliker (2006) 138 Cal. App. 4th 1135, 1181, 42 Cal. Rptr. 3d 191] . Writ petitions must be verified [*Cal. Rules of Ct., Rule 8.486(a)(4)*].

In addition, counsel preparing the writ petition is responsible for preparing an "adequate record," including copies of the ruling from which the petitioner seeks review, and all documents and exhibits submitted to the court supporting and opposing the petitioner's position [*Cal. Rules of Ct., Rule 8.486(b)(1)*]. This is an important requirement, which dependency counsel must be sure not to overlook. If an adequate record on which to determine the merits of the writ petition is not filed with the writ petition, it will be summarily denied.

A reporter's transcript of the proceeding in question must also be submitted, and if a transcript is not available, the record must include a declaration by counsel explaining why the transcript is not available and "fairly summarizing the proceedings," or providing the court with an expected date by which the transcript will be submitted to the reviewing court. If counsel proceeds by the latter course, counsel must provide the court with a date upon which the transcript will be submitted that is before any action requested of the reviewing court, aside from a request for a stay [*Cal. Rules of Ct., Rule 8.486(b)(1), (3)*].

Aside from specific statutory time limits that apply to matters outside the dependency context, there is no general statutory time limit on filing traditional writ petitions. Some courts have imposed a judicially created 60-day time limit generally applicable to appeals, but reviewing courts have discretion to hear a traditional writ petition filed beyond this time limit [*People v. Superior Court (Brent) (1992) 2 Cal. App. 4th 675, 682, 3 Cal. Rptr. 2d 375* ; *Jones v. Superior Court (1980) 107 Cal. App. 3d 496, 499, 165 Cal. Rptr. 748*]. If there has been a delay in filing a traditional writ petition, however, counsel should explain the reason for the delay and why the petition should still be heard.

PRACTICE TIP:

Whether to File a Traditional Writ Petition. Writs are rarely granted and are timely to prepare [*In re Sheila B. (1993) 19 Cal. App. 4th 187, 198, 23 Cal. Rptr. 2d 482]* . Counsel should carefully consider the likely outcome of filing a writ petition and should only do so in extraordinary circumstances. Appellate courts are only likely to entertain a traditional writ petition if it involves an issue of great importance or a significant legal issue, and even then it must be shown there is no adequate remedy under the law [*Holtz v. Superior Court (1970) 3 Cal. 3d 296, 301 n.4, 475 P.2d 441* ; *James B. v. Superior Court (1995) 35 Cal. App. 4th 1014, 1021, 41 Cal. Rptr. 2d 762]* . Nevertheless, many believe too few traditional writ petitions are filed in dependency cases, and counsel should be alert to those circumstances in which a timely traditional writ petition may be the only effective means of review by a higher court.

[2] Writ of Supersedeas

A writ of supersedeas is an auxiliary writ that suspends the trial court's authority to compel execution of its appealed judgment or order. Its purpose is to preserve appellate jurisdiction pending review by appeal and a ruling on the merits [*California Code of Civil Procedure § 923*; *Cal. Rules of Ct., Rule 8.112(a)*]. There are two prerequisites to filing a writ of supersedeas: first, a notice of appeal must be filed and included with the writ [*Cal. Rules of Ct., Rule 8.112(a)*]. Second, the petitioner must exhaust trial court remedies [Eisenberg, Horvitz and Weiner, Cal. Prac. Guide: Civil Appeals & Writs (TRG 2006 rev.) § 7:276, 7.278, p. 7-56].

In order to prevail in a writ of supersedeas, the petitioner must show that irreparable harm will occur if the petition to preserve the status quo pending the appeal is not granted [*California Table Grape Commission v. Dispoto (1971) 14 Cal. App. 3d 314, 316, 92 Cal. Rptr. 268*]. In addition, the petitioner must establish that the underlying appeal has merit, although no showing the petitioner will prevail is required, since that is reserved for the appeal itself [*Deepwell Homeowners' Protective Ass'n v. City Council of Palm Springs (1965) 239 Cal. App. 2d 63, 66-67, 48 Cal. Rptr. 321* (petitioner must show "substantial questions" will be raised in the appeal)]. The petitioner may request the reviewing

court to issue an immediate stay pending a ruling on the petition [*Cal. Rules of Ct., Rules 8.112(c), 8.116*].

Writs of supersedeas are especially appropriate in dependency cases where the juvenile court makes an order that places a child at immediate risk, since the child will have already been exposed to the risk of harm while the appeal is pending. These writs have been granted in numerous dependency cases to stay enforcement of the judgment pending the appeal [*see, e.g., In re Elijah S. (2005) 125 Cal. App. 4th 1532, 1541, 24 Cal. Rptr. 3d 16* (release of juvenile court records of deceased child); *In re Emmanuel R. (2001) 94 Cal. App. 4th 452, 455, 114 Cal. Rptr. 2d 320* (Interstate Compact on Placement of Children does not apply to court-ordered visits); *In re Santos Y. (2001) 92 Cal. App. 4th 1274, 1281, 112 Cal. Rptr. 2d 692* (order removing child from foster home and placing child in another state)].

PRACTICE TIP:

Clearly Alert the Court. If you are asking the reviewing court for an immediate stay pending its full review of the writ petition, be clear about the request on the cover of the writ petition. *Cal. Rules of Ct., Rule 8.116* requires the cover "prominently" include the notice "STAY REQUESTED," and other specific information about the proceeding or act sought to be stayed. In addition to putting that information on the cover, be sure to stress in your introduction and your prayer that you are seeking and immediate temporary stay pending full decision on the writ petition.

Finally, the petitioner must include the name of the trial court, the department, and the name and phone number of the trial judge involved in the case. This must either be on the cover or in the beginning of the text [*Cal. Rules of Ct., Rule 8.116(b)*]. If these additional rules are not followed, the reviewing court may decline to consider the request for writ of supersedeas or temporary stay [*Cal. Rules of Ct., Rule 8.116(c)*]. It is also wise to include fax numbers for all parties and the juvenile court on the proof of service so the reviewing court can inform the parties and the court quickly if it issues the stay.

PRACTICE TIP:

Whether to File a Traditional Writ Petition. Writs are rarely granted and are timely to prepare [*In re Sheila B. (1993) 19 Cal. App. 4th 187, 198, 23 Cal. Rptr. 2d 482*]. Counsel should carefully consider the likely outcome of filing a writ petition and should only do so in extraordinary circumstances. Appellate courts are only likely to entertain a traditional writ petition if it involves an issue of great importance or a significant legal issue, and even then it must be shown there is no adequate remedy under the law [*Holtz v. Superior Court (1970) 3 Cal.3d 296, 301, fn. 4, 475 P. 2d 441* ; *James B. v. Superior Court (1995) 35 Cal. App. 4th 1014, 1021, 41 Cal. Rptr. 2d 762*]. Nevertheless, many believe too few traditional writ petitions are filed in dependency cases, and counsel should be alert to those circumstances in which a timely traditional writ petition may be the only effective means of review by a higher court.

[3] Writ of Mandamus

A writ of mandamus, or mandate, is generally used to compel the performance of an act or mandatory duty by the trial court if petitioner has a beneficial interest in compelling that duty and a clear legal right relief to the relief sought. Writs of mandate are governed by the *Code of Civ. Proc. §§ 1085-1097* and *Cal. Rules of Ct., Rule 8.486*. Any court may issue a writ of mandate to any inferior tribunal or to any corporation, board, or person [*Code Civ. Proc. § 1085(a)*.]. As noted *above*, courts will generally not grant a writ of mandate unless there is no plain, speedy, or adequate remedy in the ordinary course of the law [*Code Civ. Proc. § 1086*].

Courts of Appeal may grant a writ of mandate in order to resolve issues of great public importance and where a quick resolution is necessary, issues often common to juvenile dependency matters. For example, in *Jeff M. v. Superior Court (1997) 56 Cal. App. 4th 1238, 1243-1244, 66 Cal. Rptr. 2d 343* , the court noted that "[w]hile each division of the court is vitally important to the litigants and to society, there is no division of greater importance than the juvenile court,

which deals with the sensitive parent-child relationship and the potential of horrendous damage to children." There, after more than one year of continued hearings, the court issued a writ of mandate ordering the juvenile court to conduct a contested jurisdictional and dispositional trial every day until completion [*Jeff M. v. Superior Court (1997) 56 Cal. App. 4th 1238, 1243-1244, 66 Cal. Rptr. 2d 343* ; *see also* *Ingrid E. v. Superior Court (1999) 75 Cal. App. 4th 751, 89 Cal. Rptr. 2d 407* (writ issued where juvenile court abused its discretion when it denied request for contested *Welf. & Inst. Code § 366.22* hearing); *Rosa S. v. Superior Court (2002) 100 Cal. App. 4th 1181, 1187-1188, 122 Cal. Rptr. 2d 866* ("dependency cases are among the most compelling that come before the superior court"; writ issued where juvenile court erroneously denied reunification services to mother entitled to receive them); *Taylor M. v. Superior Court (2003) 106 Cal. App. 4th 97, 107-111, 130 Cal. Rptr. 2d 502* (child entitled to evidentiary hearing before court dismissed petition)].

Courts may also deny petitions for writ of mandate on the merits [*see, e.g.*, *Los Angeles County Department of Children and Family Services v. Superior Court (2003) 112 Cal. App. 4th 509, 513, 5 Cal. Rptr. 3d 182* (DCFS petition for writ of mandate seeking removal from particular placement denied since *Welf. & Inst. Code § 361.4* doesn't apply to existing placements); *Los Angeles County Department of Children and Family Services v. Superior Court (2005) 126 Cal. App. 4th 144, 146-147, 24 Cal. Rptr. 3d 256* (mandamus proper to challenge erroneous placement under *Welf. & Inst. Code § 361.4*, but writ petition denied since issue was moot); *Melinda K. v. Superior Court (2004) 116 Cal. App. 4th 1147, 1150, 11 Cal. Rptr. 3d 129* (parent couldn't appeal reasonable services finding when services were continued, but appeal treated as petition for writ of mandate; writ petition denied where substantial evidence supported finding); *Joe B. v. Superior Court (2002) 99 Cal. App. 4th 23, 120 Cal. Rptr. 2d 722* (parent cannot both appeal and also seek writ relief from order denying reunification services)].

[4] Writ of Prohibition

In general, writs of prohibition are used to restrain or prevent judicial action taken without or in excess of jurisdiction [*Code Civ. Proc. § 1102*]. Like a writ of mandate, courts will entertain writs of prohibition upon the verified petition of a person beneficially interested and where no other plain, speedy, or adequate remedy exists [*Code Civ. Proc. § 1103(a)*].

A court will issue a writ of prohibition when the trial court judge refuses to disqualify himself or herself when required to do so under *Code Civ. Proc. § 170.6* [*Calhoun v. Superior Court (1958) 51 Cal. 2d 257, 262, 331 P.2d 648*], or where the hearing officer questions witnesses called by the parties to the point of establishing the agency's case for it, thereby violating the parent's right to due process [*Lois R. v. Superior Court (1971) 19 Cal. App. 3d 895, 903, 97 Cal. Rptr. 158*].

PRACTICE TIP:

Which Writ Petition to File. Writs of mandate and prohibition are similar in several aspects and are sometimes used interchangeably. Consider asking for both types of relief in your writ petition. This gives the reviewing court more leeway in granting appropriate relief [*Teresa J. v. Superior Court (2002) 102 Cal. App. 4th 366, 125 Cal. Rptr. 2d 506* (petitions for mandate and prohibition filed seeking review of court order invalidating relinquishment; mandate granted;) *In re Carmen M. (2005) 141 Cal. App. 4th 478, 46 Cal. Rptr. 3d 117* (petition for mandate and prohibition filed to set aside court order requiring dependent child to undergo drug testing; mandate denied)].

[5] Writ of Habeas Corpus

Habeas corpus is a process guaranteed by both federal and state Constitutions to obtain prompt judicial release from illegal restraint [*Cal. Const., Art. I, § 11*; U.S. *Const., Art. I,, § 9*]. Use of the writ in California is governed by *Pen. Code § 1473, et seq.*, and *Cal. Rules of Ct., Rules 8.380* and *8.384*. Practitioners unfamiliar with the writ of habeas corpus and its use in the dependency system, particularly regarding claims of ineffective assistance of counsel, should

review the excellent concurring opinion of Justice Bamattre-Manoukian in the case of *In re Paul W. (2007) 151 Cal. App. 4th 37, 60 Cal. Rptr. 3d 329* .

The normal function of the writ is set forth in *Pen. Code § 1473(a)*: "[E]very person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint." As the California Supreme Court stated: "Habeas corpus has become a proper remedy in this state to collaterally attack a judgment of conviction which has been obtained in violation of fundamental constitutional rights. [Citations.] The denial of a fair and impartial trial amounts to a denial of due process of law [citation] and is a miscarriage of justice within the meaning of that phrase as used in *section 4, article VI, of the Constitution* of this state. [Citations.]" [*In re Harris (1993) 5 Cal. 4th 813, 825-826, 855 P.2d 391*].

Habeas corpus will not ordinarily lie as a substitute for an appeal or as a form of second appeal [*In re Harris (1993) 5 Cal. 4th 813, 825, 855 P. 2d 391*]. The general rule is that habeas corpus is reserved as an avenue of relief to those for whom the standard appellate system failed to operate properly. Moreover, in such cases, the habeas corpus petition should normally be filed in conjunction with the direct appeal [*see* *People v. Pope (1979) 23 Cal. 3d 412, 426-427, n.17, 152 Cal. Rptr. 732*]. Habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, a writ of habeas corpus will not lie where the claimed errors could have been, but were not, raised in a timely appeal [*In re Dixon (1953) 41 Cal. 2d 756, 759, 264 P.2d 513*].

" 'Because the rules on habeas corpus petitions evolved in the context of prisoners asserting unlawful confinement or conditions of confinement, they do not fit the dependency context well' " [*In re Paul W. (2007) 151 Cal. App. 4th 37, 53, 60 Cal. Rptr. 3d 329* , *quoting* Abbott, et al, Cal. Juv. Dependency Prac. (Cont. Ed. Bar 2006 supp.) Appeals and Writs, § 10.113, p. 586]. Nonetheless, writs of habeas corpus are used in various types of child custody proceedings. For example, the writ will lie when a person entitled to custody is denied custody [*Adoption of Alexander S. (1988) 44 Cal. 3d 857, 867-868, 750 P.2d 778*]. It is also appropriate to protect a child from imminent danger [*In re Dowell (1935) 4 Cal. App. 2d 688, 41 P.2d 596*]. But courts are split as to whether or not a parent can challenge an order terminating parental rights by way of a writ of habeas corpus [*see* *In re Meranda P. (1997) 56 Cal. App. 4th 1143, 65 Cal. Rptr. 2d 913* (*Welf. & Inst. Code § 366.26(i)* limits review of termination order to direct appeal only); *In re Ronald V. (1993) 13 Cal. App. 4th 1803, 17 Cal. Rptr. 2d 334* ; *but see* *In re Darlice C. (2003) 105 Cal. App. 4th 459, 129 Cal. Rptr. 2d 472* (parent entitled to seek review of termination order by writ of habeas corpus); *In re O.S. (2002) 102 Cal. App. 4th 1402, 126 Cal. Rptr. 2d 571* ; *In re Carrie M. (2001) 90 Cal. App. 4th 530, 108 Cal. Rptr. 2d 856*]. In addition, habeas petitions are proper vehicles to raise claims of ineffective assistance of counsel in dependency cases [*In re Paul W. (2007) 151 Cal. App. 4th 37, 60 Cal. Rptr. 3d 329* ; *In re Darlice C. (2003) 105 Cal. App. 4th 459, 129 Cal. Rptr. 2d 472*]. But the fact that a parent is a party to the dependency proceedings does not mean that parent will have standing as a party in a habeas corpus proceeding for ineffective assistance of counsel as to the other parent [*In re Paul W. (2007) 151 Cal. App. 4th 37, 65, 60 Cal. Rptr. 3d 329*]. For a discussion of ineffective assistance of counsel claims, see *§ 328.193[4]*.

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
L. Appeal and Extraordinary Writs

28-328 California Forms of Pleading and Practice--Annotated § 328.193

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§ 328.193 Claims of Ineffective Assistance of Counsel

[1] Statutory Right

Effective January 1, 1995, all parties in dependency proceedings who are represented by counsel are statutorily entitled to competent counsel [*Welf. & Inst. Code § 317.5*]. This statutory entitlement to competent counsel must be distinguished from the due process right to competent counsel under the federal constitution that has been found by the courts to exist in certain limited circumstances in dependency proceedings [*see In re Arturo A. (1992) 8 Cal. App. 4th 229, 10 Cal. Rptr. 2d 131* ; *In re Emilye A. (1992) 9 Cal. App. 4th 1695, 12 Cal. Rptr. 2d 294* ; discussion in [2], *below*].

In order to help accomplish the goal of competent counsel in dependency cases, the Judicial Council adopted state rules regarding the appointment of competent counsel in dependency proceedings [*Welf. & Inst. Code § 317.6(a)*; *see Cal. Rules of Ct., Rule 5.660*].

The California rule for competency of counsel in dependency proceedings defines "competent counsel" as "an attorney who is a member in good standing of the State Bar of California, who has participated in training in the law of juvenile dependency, and who demonstrates adequate forensic skills, knowledge and comprehension of the statutory scheme, the purposes and goals of dependency proceedings, the specific statutes, rules of court, and cases relevant to such proceedings, and procedures for filing petitions for extraordinary writs" [*Cal. Rules of Ct., Rule 5.660(d)(1)*].

The state rule also requires that attorneys appointed in dependency cases have either completed a minimum of eight hours of training or education in dependency proceedings or have sufficient recent experience in dependency cases in which the attorney has demonstrated competence. In addition to training on the law, training and education for dependency attorneys must include information regarding child development, child abuse and neglect, and services and

efforts designed to achieve family preservation and reunification. Attorneys appointed in dependency cases are to complete a minimum of eight hours of continuing dependency education within every three years [*Cal. Rules of Ct., Rule 5.660(d)(3)*]. Attorneys are also expected to meet regularly with their clients, including child clients, to contact social workers and other professionals associated with the case, to work with other counsel and the court to resolve cases where possible, and to adhere to the mandated time lines established for dependency cases [*Cal. Rules of Ct., Rule 5.660(d)(4)*].

The superior court of each county was to amend its local rules regarding the representation of parties in dependency proceedings on or before January 1, 2002. These local rules are to address time lines and procedures for settlements, mediation, discovery and other issues related to contested hearings. They are also to address procedures for the screening, training and appointment of counsel in dependency cases. Minimum standards of experience, training and education are also to be established by the local rules, as are procedures for reviewing and resolving complaints by parties regarding the performance of attorneys. Additionally, the local rules are to address procedures for informing the court of interests of the child which may require further investigation, intervention or litigation [*Cal. Rules of Ct., Rule 5.660(a)*].

All attorneys in dependency cases, including attorneys for the social services agency, court-appointed counsel, and counsel who volunteer their services, are required by statute to participate in domestic violence training if available through existing programs at no cost to the county [*Welf. & Inst. Code § 218.5*]. While this statutory provision is not directly linked to the requirements for competent counsel, the knowledge and ability of attorneys to recognize and handle family violence issues is important in many dependency cases. Counties should therefore include this training among their requirements for dependency attorneys. In some cases, challenges claiming ineffective assistance of counsel may include the attorney's failure to appropriately handle domestic violence issues within the dependency case.

The statutory right to competent counsel found in *Welf. & Inst. Code § 317.5(a)* is still relatively new and hence does not yet have fully developed case law to interpret it [*In re Kristin H. (1996) 46 Cal. App. 4th 1635, 1660, 54 Cal. Rptr. 2d 722]* . It is clear, however, that claims of a violation of the statutory right to counsel must be timely made [*In re Kristin H. (1996) 46 Cal. App. 4th 1635, 1667, 54 Cal. Rptr. 2d 722* ("untimeliness may in many cases preclude review of claims of ineffective assistance of counsel"), and cases cited there]. Moreover, unlike cases where a violation of the constitutional right to counsel is made and the claimant must first establish that the constitutional right to such counsel exists under the facts of that particular case, an analysis of a statutory right to competent counsel claim, if timely raised, will start instead with the question of whether counsel was ineffective, followed by the question of whether any prejudice has been shown [*In re Kristin H. (1996) 46 Cal. App. 4th 1635, 1667-1672, 54 Cal. Rptr. 2d 722]* . This is because the statutory right to competent representation is already established by the statute itself.

[2] Federal Constitutional Right

[a] Factors to Consider

A federal due process constitutional right to effective counsel only exists in those situations where the right to counsel rises to a constitutional level [*Katheryn S. v. Superior Court (2000) 82 Cal. App. 4th 958, 971-972, 98 Cal. Rptr. 2d 741]* . In analyzing a claim to a federal constitutional right to effective counsel the court should consider [*In re Arturo A. (1992) 8 Cal. App. 4th 229, 238, 10 Cal. Rptr. 2d 131* ; *In re Emilye A. (1992) 9 Cal. App. 4th 1695, 1707, 12 Cal. Rptr. 2d 294]* :

- The nature of the proceedings from which the claim of ineffective counsel is being raised.

- A case-by-case analysis of the facts of the case and the interests involved, including the complexity of the case and the likelihood that counsel might sway the outcome.

- Whether counsel actually was ineffective.
- Whether the person raising the claim has been prejudiced by the ineffective representation.

[b] Nature of the Proceedings

In the case of *In re Arturo A. (1992) 8 Cal. App. 4th 229, 10 Cal. Rptr. 2d 131* , the court of appeal noted that in the cases of children declared dependents of the court prior to January 1, 1989, the parent's right to the appointment of counsel was statutory, not constitutional, since the parent was not threatened with termination of parental rights within the dependency proceedings as a potential outcome [*In re Arturo A. (1992) 8 Cal. App. 4th 229, 238, 10 Cal. Rptr. 2d 131* , *citing In re Ammanda G. (1986) 186 Cal. App. 3d 1075, 1080, 231 Cal. Rptr. 372* , and *In re James S. (1991) 227 Cal. App. 3d 930, 936, 278 Cal. Rptr. 295* ; *but see In re Christina H. (1986) 182 Cal. App. 3d 47, 49, 227 Cal. Rptr. 41]* .

With the enactment of *Welf. & Inst. Code § 366.26*, however, termination of parental rights for dependent children was incorporated into the ongoing dependency review process, thus necessitating a new look at claims of ineffective assistance of counsel.

In the *Arturo A.* case, the court of appeal premised a parent's ability to assert a violation of the due process right to effective assistance of counsel on whether the particular hearing in which counsel was allegedly ineffective had the potential of termination of parental rights [*In re Arturo A. (1992) 8 Cal. App. 4th 229, 239-240, 10 Cal. Rptr. 2d 131]* . The *Arturo A.* court included in the list of hearings that had such "potential" any of the review hearings that resulted in the setting of a selection and implementation hearing pursuant to *Welf. & Inst. Code § 366.26* as well as the selection and implementation hearing itself. It indicated that at any other hearing the right to counsel would only be a statutory right [*In re Arturo A. (1992) 8 Cal. App. 4th 229, 239-240, 10 Cal. Rptr. 2d 131]* . Thus, the first step in claiming a violation of the constitutional right to counsel under *Arturo A.* is to show that the hearing the claim is raised from had the potential for the termination of parental rights. It was only after that initial hurdle was met that the *Arturo A.* court moved to a case-by-case analysis to determine if the constitutional right to effective counsel existed under the facts of that case [*In re Arturo A. (1992) 8 Cal. App. 4th 229, 238-240, 10 Cal. Rptr. 2d 131]* .

[c] Case-by-Case Analysis

Shortly after the *Arturo A.* case was decided, a different appellate court handed down the case of *In re Emilye A. (1992) 9 Cal. App. 4th 1695, 12 Cal. Rptr. 2d 294* , which came to a different conclusion. The *Emilye A.* decision utilized the three-prong test of *Lassiter v. Department of Soc. Servs. (1981) 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640* , to determine if there was a federal due process right to counsel in that case.

Applying that test to the facts of the case before it, the court of appeal held that a father who was alleged to have molested his daughter had a federal due process right to counsel, and, therefore, to the effective assistance of counsel at the jurisdictional hearing, thereby implying that a right to effective assistance of counsel could potentially arise from any dependency hearing [*In re Emilye A. (1992) 9 Cal. App. 4th 1695, 1711, 12 Cal. Rptr. 2d 294]* .

Regardless of whether one follows the approach of *In re Arturo A. (1992) 8 Cal. App. 4th 229, 10 Cal. Rptr. 2d 131* (constitutional right to effective counsel can only arise from a hearing pursuant to *Welf. & Inst. Code § 366.26* or one terminating services and setting a selection and implementation hearing), or *In re Emilye A. (1992) 9 Cal. App. 4th 1695, 12 Cal. Rptr. 2d 294* (constitutional right to effective counsel can potentially arise from any dependency hearing), a constitutional right to effective counsel only arises in dependency proceedings on a case-by-case basis.

Under the *Arturo A.* approach the question of whether the right to counsel rises to a federal constitutional dimension in a particular case "will depend upon the complexity of the issues presented and the likelihood that counsel might sway the

outcome" [*In re Arturo A. (1992) 8 Cal. App. 4th 229, 238, 10 Cal. Rptr. 2d 131* , *citing* *In re Christina P. (1985) 175 Cal. App. 3d 115, 128-129, 220 Cal. Rptr. 525]* .

Under the *Emilye A.* approach, the three-pronged test noted in *Lassiter v. Department of Soc. Servs. (1981) 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640* is used to determine if there is a due process right to counsel in a particular case [*see also* *Mathews v. Eldridge (1976) 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18]* . That three-pronged test requires the court to balance the private interest of the person raising the claim of ineffective assistance of counsel, the government's interests, including its interest in protecting the child, and the risk the procedures will lead to an erroneous decision in the absence of legal representation [*In re Emilye A. (1992) 9 Cal. App. 4th 1695, 1708, 12 Cal. Rptr. 2d 294]* . Noting that there is a presumption that there is no federal constitutional right to counsel in cases where the party is not subject to a loss of personal freedom, the *Emilye A.* court held that a court considering such a claim must balance the three factors and that the "net weight of such factors when so weighed must be sufficient to rebut that presumption and lead to the conclusion that due process requires the appointment of counsel" [*In re Emilye A. (1992) 9 Cal. App. 4th 1695, 1708, 12 Cal. Rptr. 2d 294* , *citing* *Lassiter v. Department of Soc. Servs. (1981) 452 U.S. 18, 27, 31, 101 S. Ct. 2153, 68 L. Ed. 2d 640* ; *see also* *Katheryn S. v. Superior Court (2000) 82 Cal. App. 4th 958, 971-972, 98 Cal. Rptr. 2d 741* , *citing* *In re Meranda P. (1997) 56 Cal. App. 4th 1143, 1153, fn. 6, 65 Cal. Rptr. 2d 913]* . This was the approach used by the court in the *O.S.* case in which it was found an alleged father had a federal constitutional right to counsel. In that case the attorney's failure to contact the alleged father, take steps to seek to establish his paternity, as he desired, or to challenge the lack of notice to the alleged father prevented him from seeking or attaining biological or presumed father status in the dependency case [*In re O.S. (2002) 102 Cal. App. 4th 1402, 1407, 1410-1412, 126 Cal. Rptr. 2d 571]* .

Under either the *Arturo A.* or *Emilye A.* approach it is clear that even when parental rights have been terminated pursuant to *Welf. & Inst. Code § 366.26*, not every case will give rise to a federal constitutional claim of ineffective assistance of counsel. Each case must be examined on its own facts to determine if a due process right to counsel exists [*In re Arturo A. (1992) 8 Cal. App. 4th 229, 238, 10 Cal. Rptr. 2d 131* ; *In re Emilye A. (1992) 9 Cal. App. 4th 1695, 1708, 12 Cal. Rptr. 2d 294* ; *see also* *Lassiter v. Department of Soc. Servs. (1981) 452 U.S. 18, 27, 31, 101 S. Ct. 2153, 68 L. Ed. 2d 640]* .

PRACTICE TIP:

Ineffective Assistance of Counsel Claims. Whenever a claim of ineffective assistance of counsel is raised, the party making the claim should assert that both their statutory right to competent counsel [*Welf. & Inst. Code § 317.5(a)*; *In re Kristin H. (1996) 46 Cal. App. 4th 1635, 54 Cal. Rptr. 2d 722]* , and their federal constitutional right to effective counsel [*In re Arturo A. (1992) 8 Cal. App. 4th 229, 10 Cal. Rptr. 2d 131* ; *In re Emilye A. (1992) 9 Cal. App. 4th 1695, 12 Cal. Rptr. 2d 294]* , have been violated [*see* *In re Meranda P. (1997) 56 Cal. App. 4th 1143, 1150-1151, 65 Cal. Rptr. 2d 913* (mother claiming violation of constitutional and statutory right to effective assistance of counsel)].

[3] Determining Claim Where Right Exists

[a] Determining Whether Counsel Was Ineffective

Where a federal constitutional right to effective assistance of counsel has been established or the claim is raised under the statutory right to competent counsel, the person raising the claim must meet the standards set forth in *People v. Pope (1979) 23 Cal. 3d 412, 152 Cal. Rptr. 732, 590 P.2d 859* and *Strickland v. Washington (1984) 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674* . This involves a two-pronged test. The first prong of this test requires a showing that the attorney's representation fell below an objective standard of reasonableness under prevailing professional norms [*In re Kristin H. (1996) 46 Cal. App. 4th 1635, 1667-1668, 54 Cal. Rptr. 2d 722* ; *In re Emilye A. (1992) 9 Cal. App. 4th 1695, 1711, 12 Cal. Rptr. 2d 294* , *quoting* *Strickland v. Washington (1984) 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674* ; *see also* *In re Christina P. (1985) 175 Cal. App. 3d 115, 129, 220 Cal. Rptr. 525]* .

For instance, given the admissibility of social studies and other materials pursuant to *In re Malinda S. (1990) 51 Cal. 3d 368, 272 Cal. Rptr. 787, 795 P.2d 1244* , reasonably competent counsel need not object to admitting such materials [*In re Christopher A. (1991) 226 Cal. App. 3d 1154, 1162]* . Moreover, it is within the purview of a parent's attorney as diligent trial counsel to control ordinary trial strategy, including whether a particular witness should be called to testify, whether certain evidence should be sought to be introduced, and whether an objection should be made to evidence proffered by opposing counsel [*In re Kerry O. (1989) 210 Cal. App. 3d 326, 333]* . Thus, on the whole, appellate courts should avoid second-guessing an attorney's informed choice among tactical alternatives [*People v. Pope (1979) 23 Cal. 3d 412, 424, 152 Cal. Rptr. 732, 590 P.2d 859]* . There is also no requirement for competent counsel to file a writ petition where the facts of the case are clear that reunification services were adequate [*Glen C. v. Superior Court (2000) 78 Cal. App. 4th 570, 584, 93 Cal. Rptr. 2d 103* (dealing with Cal. Rules of Ct., former Rule 39.1B)]. Thus, the mere fact that a parent's attorney did not file a writ to challenge the setting of a hearing under *Welf. & Inst. Code § 366.26* does not automatically mean counsel was ineffective [*Cresse S. v. Superior Court (1996) 50 Cal. App. 4th 947, 956, 58 Cal. Rptr. 2d 56]* . Further, in one case the child's attorney had put her teenage client on the witness stand and questioned the child about her recantation of the molest allegations. In closing argument the attorney informed the court what the child's stated desire was, but also pointed out her duty to argue what was best and that the attorney disagreed with the child's recantation and desire to go home. The appellate court found the attorney was not ineffective because she "performed her duties under *Welf. & Inst. Code, § 317,* zealously and effectively by conducting a factual investigation and advocating a position, supported by the evidence, which served to protect the child's welfare" [*In re Kristen B. (2008) 163 Cal. App. 4th 1535, 1542, 78 Cal. Rptr. 3d 495]* .

The failure of a parent's attorney to raise a lack of notice issue was found to be ineffective assistance of counsel where a parent was not given notice of what could happen at a selection and implementation hearing, and subsequently failed to appear, resulting in parental rights being terminated [*In re Anna M. (1997) 54 Cal. App. 4th 463, 469, 62 Cal. Rptr. 2d 831]* . In another case counsel for the parent filed a petition for extraordinary writ under Cal. Rules of Ct., former Rule 39.1B (*now see Cal. Rules of Ct., Rule 8.452*), but it was woefully deficient. The court of appeal pointed out that while such a petition should not be filed if there are no meritorious issues, if it is filed counsel must comply with the requirements for an adequate petition, including points and authorities that identify the issues being challenged, point out the factual support in the record, and offers argument and authorities to assist the court in determining the contested issues. Failure to do this may result in sanctions [*Glen C. v. Superior Court (2000) 78 Cal. App. 4th 570, 583-584, 93 Cal. Rptr. 2d 103]* . In a case involving an alleged father, the appellate court found the attorney's failure to contact the alleged father, to take steps to seek to establish his paternity as he desired, and to challenge the lack of notice to the alleged father that had occurred at previous hearings, was ineffective assistance of counsel [*In re O.S. (2002) 102 Cal. App. 4th 1402, 1407, 1410-1412, 126 Cal. Rptr. 2d 571]* .

For discussion of conflict issues regarding the representation of children, see *§ 328.62[3][b][i] -[iii]*.

[b] Prejudice Arising From Ineffective Representation

Where the claimant has established that his or her counsel was ineffective, there still must be a prima facie showing of prejudice arising from that ineffective representation [*In re Eileen A. (2000) 84 Cal. App. 4th 1248, 1258-1260, 101 Cal. Rptr. 2d 548* ; *In re Kristin H. (1996) 46 Cal. App. 4th 1635, 1671-1672, 54 Cal. Rptr. 2d 722* ; *In re Arturo A. (1992) 8 Cal. App. 4th 229, 245, 10 Cal. Rptr. 2d 131]* . This is the second prong of the two-pronged test. The standard is whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome" [*In re Emilye A. (1992) 9 Cal. App. 4th 1695, 1711, 12 Cal. Rptr. 2d 294 , quoting Strickland v. Washington (1984) 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674* ; *see also In re Kristin H. (1996) 46 Cal. App. 4th 1635, 1668, 54 Cal. Rptr. 2d 722 , citing People v. Watson (1956) 46 Cal. 2d 818, 836, 299 P.2d 243]* .

For example, in the case of *In re Emilye A. (1992) 9 Cal. App. 4th 1695, 12 Cal. Rptr. 2d 294* , the attorney's failure to

call the child as a witness did not meet the second prong of *Pope* and *Strickland* since there was no showing that except for counsel's error, the outcome in the case would have been different. There the child's statements in the social study were already admissible under exceptions to the hearsay rule, and even if not admissible, the social worker had testified to those statements and that testimony had not been objected to on appeal. Thus, there was no reasonable probability that the outcome would have been different if counsel had called the child to testify [*In re Emilye A. (1992) 9 Cal. App. 4th 1695, 1712-1715, 12 Cal. Rptr. 2d 294]* .

In another case, however, the court found that the prejudice "virtually leaps from the record." In that case an attorney had failed to raise the issue that the mother had not received notice of what might happen at the hearing under *Welf. & Inst. Code § 366.26*. She had been led to believe that guardianship would be the outcome and was not advised of a change in recommendation. The result of counsel's failure to raise the notice issue was that the juvenile court went forward when the mother did not appear and terminated her parental rights. Had counsel raised the issue, the court would have been required to continue the matter [*In re Anna M. (1997) 54 Cal. App. 4th 463, 468, 62 Cal. Rptr. 2d 831]* . Likewise, in the *Eileen A.* case, the appellate court found the mother's regular visitation, and taking her own steps to participate in counseling, parenting classes, Al-Anon, and to keep the perpetrator of the abuse out of her life made a petition under *Welf. & Inst. Code § 388* a "clear winner." Thus, it found the mother had made a prima facie showing of prejudice based on the failure of her trial counsel to file such a petition to vacate the setting of the *Welf. & Inst. Code § 366.26* hearing [*In re Eileen A. (2000) 84 Cal. App. 4th 1248, 1260-1262, 101 Cal. Rptr. 2d 548]* . Further, in a case involving an alleged father who desired to establish his paternity and had made multiple attempts to contact his counsel, the appellate court found the attorney's failure to contact the alleged father, to take steps to seek to establish his paternity, and to challenge the lack of notice prevented the alleged father from seeking or attaining biological or presumed father status in the dependency case, established the prima facie evidence of prejudice required for a new hearing [*In re O. S. (2002) 102 Cal. App. 4th 1402, 1407, 1409-1412*].

Although the question of whether the claimant has made an adequate showing of prejudice does not have to be considered until after it has been demonstrated his or her counsel was ineffective, an appellate court need not evaluate whether counsel's performance was deficient before it looks at the question of prejudice. If no prejudice is shown, the court may reject a claim of ineffective assistance of counsel without ever having examined the question of whether counsel was actually ineffective or whether a conflict of interest existed for the attorney [*In re Nada R. (2001) 89 Cal. App. 4th 1166, 1180, 108 Cal. Rptr. 2d 493]* .

[4] Manner and Time for Raising Claim of Ineffective Counsel

It is generally recognized that claims of ineffective assistance of counsel are most appropriately raised through the filing of petition for extraordinary writ relief, usually a writ of habeas corpus [*People v. Mendoza Tello (1997) 15 Cal. 4th 264, 267, 62 Cal. Rptr. 2d 437, 933 P.2d 1134* ; *In re Darlice C. (2003) 105 Cal. App. 4th 459, 463, 129 Cal. Rptr. 2d 472]* . Raising the claim as part of an appeal virtually ensures there will not be sufficient information in the record to establish ineffective assistance of counsel. This is because the reasons for the actions and inactions of trial counsel are not normally reflected in the record on appeal. Utilizing writ review as the vehicle for raising the claim of ineffective assistance of counsel allows the record to be supplemented with additional evidence, including declarations from trial counsel, the parent, or other individuals as appropriate [*In re Arturo A. (1992) 8 Cal. App. 4th 229, 243, 10 Cal. Rptr. 2d 131* ; *see also In re Daisy D. (2006) 144 Cal. App. 4th 287, 292-295, 50 Cal. Rptr. 3d 242* (termination of parental rights affirmed where appeal failed to establish ineffective assistance or prejudice)]. Nevertheless, a claim of ineffective assistance of counsel can be raised by way of appeal if " 'there simply could be no satisfactory explanation' for trial counsel's action or inaction" [*In re Eileen A. (2000) 84 Cal. App. 4th 1248, 1254, 101 Cal. Rptr. 2d 548* , *quoting People v. Pope (1979) 23 Cal. 3d 412, 426, 152 Cal. Rptr. 732, 590 P.2d 859* ; *see also In re Darlice C. (2003) 105 Cal. App. 4th 459, 463, 129 Cal. Rptr. 2d 472* ; *In re Dennis H. (2001) 88 Cal. App. 4th 94, 98, fn. 1, 105 Cal. Rptr. 2d 705]* . This will, of course, rarely be the case.

Whether the claim is based on a violation of the statutory or of the constitutional right to effective counsel, an

ineffective counsel claim must be made in a timely manner or it will usually be lost. In one leading case on the issue, the appellate court considered the claim of a mother that her statutory and constitutional right to counsel and to effective counsel were violated at the numerous hearings throughout the dependency process which had preceded the hearing under *Welf. & Inst. Code § 366.26* at which her parental rights were terminated. She had never appealed any of those previous orders, however, and had not filed a petition for extraordinary writ review of the decision setting the selection and implementation hearing [*In re Meranda P. (1997) 56 Cal. App. 4th 1143, 1150-1151, 65 Cal. Rptr. 2d 913]* . The question the court addressed was whether the "waiver rule" precluded the subsequent challenge of the orders made at the previous hearings that were now long since final even though the claim was based on a lack of effective assistance of counsel. In a particularly thorough and well-reasoned decision, the court of appeal analyzed the question an d determined that the waiver rule prevents a challenge of those previous findings and orders on a later appeal from the termination of parental rights. Basing its decision on the many safeguards provided to parents throughout the dependency process, the shift of focus to the needs of the child after the termination of reunification services and parental rights, and the interests of the child and the state in the finality of proceedings [*In re Meranda P. (1997) 56 Cal. App. 4th 1143, 1151-1160, 65 Cal. Rptr. 2d 913]* , the court held that once parental rights are terminated, a parent cannot challenge the findings and orders of the juvenile court at earlier hearings based on a claim of ineffective assistance of counsel.

The holding in *Meranda P.* has been clarified in the case of *In re Janee J. (1999) 74 Cal. App. 4th 198, 87 Cal. Rptr. 2d 634]* . As the *Janee J.* court explained, "this is the crux of *Meranda P.*: the waiver rule will be enforced unless due process forbids it." It went on to note that "in the usual case, application of the waiver rule will note offend due process" [*In re Janee J. (1999) 74 Cal. App. 4th 198, 208, 87 Cal. Rptr. 2d 634]* . With this holding, the decisions in *Meranda P., above*, and *In re Cathina W. (1998) 68 Cal. App. 4th 716, 719-724, 80 Cal. Rptr. 2d 480* , which had allowed a mother to raise issues from earlier hearings following the termination of her parental rights due to the failure to provide her with notice of the right to file a writ petition, and other notice errors, are found to be not in conflict. Nevertheless, rather than reconcile *Meranda P.* in the way the *Janee J.* court did, some courts have simply chosen to question or disagree with the *Meranda P.* analysis [*In re Darlice C. (2003) 105 Cal. App. 4th 459, 464, 129 Cal. Rptr. 2d 472* ("we join several courts that have rejected or questioned *In re Meranda P.'s* analysis")]. Thus, there are a number of decisions and approaches practitioners and courts can look to in this regard.

A claim of ineffective assistance of counsel can still, of course, be raised on an appeal from an order terminating parental rights if the claimed ineffective representation occurred at the hearing at which parental rights were terminated. The same is true for any hearing where an appeal or extraordinary writ petition is timely filed and a claim of ineffective assistance of counsel at that hearing is raised. Moreover, the court in *Meranda P.* expressly did not decide whether it would apply the waiver rule to claims of ineffective assistance of counsel at prior hearings that are raised before parental rights are terminated [*In re Meranda P. (1997) 56 Cal. App. 4th 1143, 1160, 65 Cal. Rptr. 2d 913]* . In one case an appellate court found the failure of trial counsel to file a *Welf. & Inst. Code § 388* petition to vacate the setting of a *Welf. & Inst. Code § 366.26* hearing was so clearly ineffective assistance of counsel and prejudicial to the parent that the court allowed it to be raised in the appeal of the termination of parental rights [*In re Eileen A. (2000) 84 Cal. App. 4th 1248, 1256-1258, 101 Cal. Rptr. 2d 548]* . Whether other appellate courts would go as far as the court did in *Eileen A.* is questionable. Nevertheless, it demonstrates the need for appellate counsel to raise a claim of ineffective assistance of counsel when appropriate, even if uncertain the challenge is timely, since the appellate court may follow the lead of *Eileen A.*, rather than *Meranda P.*

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
L. Appeal and Extraordinary Writs

28-328 California Forms of Pleading and Practice--Annotated § 328.194

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§ 328.194 Harmless Error

[1] When Error Claimed Is Statutory

The traditional standard for answering the question of whether error was harmless in a dependency case is that found in *People v. Watson (1956) 46 Cal. 2d 818, 299 P.2d 243* [*In re Nalani C. (1988) 199 Cal. App. 3d 1017, 1028, 245 Cal. Rptr. 264* ; *In re Justin L. (1987) 188 Cal. App. 3d 1068, 1078, 233 Cal. Rptr. 632]* . That standard is whether it is reasonably probable that a result more favorable to the person appealing would have been reached if the error had not occurred [*People v. Watson (1956) 46 Cal. 2d 818, 836, 299 P.2d 243* ; *see also Cal. Const., art. VI, § 13*]. This is also the standard that is applied to a violation of the statutory right to competent counsel pursuant to *Welf. & Inst. Code § 317.5(a)* [*In re Meranda P. (1997) 56 Cal. App. 4th 1143, 1153, 1165, 65 Cal. Rptr. 2d 913* ; *In re Kristin H. (1996) 46 Cal. App. 4th 1635, 1668, 54 Cal. Rptr. 2d 722* ; *In re Malcolm D. (1996) 42 Cal. App. 4th 904, 914-919, 50 Cal. Rptr. 2d 148* ; *In re Ronald R. (1995) 37 Cal. App. 4th 1186, 1195-1197, 44 Cal. Rptr. 2d 22]* . This includes violations of the statutory right to competent counsel for children, which may arise in a number of contexts including conflicts of interest in the representation of sibling groups [*In re Celine R. (2003) 31 Cal. 4th 45, 59, 1 Cal. Rptr. 3d 432, 71 P.3d 787* (rejecting the conclusion of *In re Patricia E. (1985) 174 Cal. App. 3d 1, 219 Cal. Rptr. 783* that standards from criminal cases should apply, including that errors in the representation of multiple defendants are not subject to harmless error analysis)].

[2] When Error Claimed Is of a Federal Constitutional Dimension

The question arises, however, as to what standard should be applied when the violation that has been shown is of a federal constitutional dimension such as a violation of federal constitutional due process, as distinguished from statutory due process, or that of the federal constitutional right to competent counsel pursuant to either *In re Arturo A. (1992) 8 Cal. App. 4th 229, 10 Cal. Rptr. 2d 131* , or *In re Emilye A. (1992) 9 Cal. App. 4th 1695, 12 Cal. Rptr. 2d 294* . This is to be distinguished from error that may be alleged under the California Constitution, since the California Constitution

mandates the standard "miscarriage of justice" or simple harmless error test in California cases [*In re Celine R. (2003) 31 Cal. 4th 45, 59-60, 1 Cal. Rptr. 3d 432, 71 P.3d 787* , *citing People v. Watson (1956) 46 Cal. 2d 818, 836, 299 P.2d 243]* . Some argue that the appropriate standard for error of a federal constitutional dimension must be that expressed in *Chapman v. California (1967) 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705* , of harmless beyond a reasonable doubt, since the error is one of a constitutional dimension. It has even been argued that denial of a constitutional right to effective assistance of counsel in dependency and termination of parental rights cases should be reversal per se, although a harmless beyond a reasonable doubt standard was considered a "best alternative" [*see* Patton, *Standards of Appellate Review for Denial of Counsel and Ineffective Assistance of Counsel in Child Protection and Parental Severance Cases*, 27 Loyola Chicago L. J. 195 (1996)]. Such extreme standards are neither required nor appropriate in dependency cases even for the denial of a constitutional right. Nevertheless, the other argument occassionally heard, that the *Watson* standard for simple harmless error should apply, places too little weight on the denial of a constitutional right.

Unfortunately, where courts have utilized a standard for error of a constitutional dimension in dependency cases they have generally done so without actually analyzing the issue [*see, e.g., In re Stacy T. (1997) 52 Cal. App. 4th 1415, 1426, 61 Cal. Rptr. 2d 319* ; *see also In re Dolly D. (1995) 41 Cal. App. 4th 440, 446, 48 Cal. Rptr. 2d 691* , *and In re Amy M. (1991) 232 Cal. App. 3d 849, 868, 283 Cal. Rptr. 788* , *both citing without analysis Arizona v. Fulminante (1991) 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302]* . Other courts have simply avoided the question [*see, e.g., In re Laura H. (1992) 8 Cal. App. 4th 1689, 1696, 11 Cal. Rptr. 2d 285* ("We need not resolve this conflict, however, for under either standard [the resolution of present issue remains the same]")].

It must be remembered, however, that the *Chapman* and *Fulminante* decisions were criminal cases in which the standard of proof at trial was that of beyond a reasonable doubt. Such is not the standard of proof in dependency proceedings or termination of parental rights cases even though such cases involve the constitutional right to parent. Instead the standard of proof is in some instances that of clear and convincing evidence [*see In re Angelia P. (1981) 28 Cal. 3d 908, 915-922, 623 P.2d 198* ; *Welf. & Inst. Code § 361(c)*], and in others only a preponderance of the evidence [*see Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 253-256, 19 Cal. Rptr. 2d 698, 851 P.2d 1307* ; *Welf. & Inst. Code § 355*].

The *Chapman* standard of harmless beyond a reasonable doubt is thus inappropriate in dependency cases even for a violation of the constitutional right to effective counsel. This appears to have been recognized by the court of appeal in the well-reasoned *Meranda P.* decision which considered the issue of the timeliness of claims of ineffective assistance of counsel and the principle of waiver [*In re Meranda P. (1997) 56 Cal. App. 4th 1143, 65 Cal. Rptr. 2d 913]* . The court there was critical of the decision in *In re Laura H. (1992) 8 Cal. App. 4th 1689, 11 Cal. Rptr. 2d 285* and set forth in a footnote some of its concerns. In concluding that footnote, the court wrote: "The *Laura H.* court also applied the 'harmless beyond a reasonable doubt' standard of *Chapman v. California (1967) 386 U.S. 18, 87 S. Ct.824, 17 L. Ed. 2d 705* , even though the criminal reasonable doubt standard of persuasion does not apply at any stage of a dependency proceeding" [*In re Meranda P. (1997) 56 Cal. App. 4th 1143, 1157-1158, fn. 9, 65 Cal. Rptr. 2d 913]* . The court in *Denny H.* also noted the beyond a reasonable doubt standard of proof did not apply in dependency cases [*Denny H. v. Superior Court (2005) 131 Cal. App. 4th 1501, 1514, 33 Cal. Rptr. 3d 89]* . The proper standard of persuasion for harmless error regarding constitutional violations in dependency proceedings is not proof beyond a reasonable doubt.

The question remained what the appropriate standard for harmless error in dependency proceedings should be for violations of federal constitutional rights such as the constitutional right to effective assistance of counsel or denial of due process. That question was answered in the *Denny H.* case [*Denny H. v. Superior Court (2005) 131 Cal. App. 4th 1501, 1512-1514, 33 Cal. Rptr. 3d 89]* . Because most violations of federal constitutional rights in dependency cases, including the constitutional right to effective counsel where applicable, arise from a single act or hearing, the appropriate standard for harmless error for violations of federal constitutional rights should be that of clear and convincing evidence [*cf. In re Angelia P. (1981) 28 Cal. 3d 908, 915-922, 623 P.2d 198* ; *but see In re Andrew S.*

(1994) 27 Cal. App. 4th 541, 548-549, 32 Cal. Rptr. 2d 670] . This recognizes both the special nature and purpose of dependency proceedings as well as the importance of the right to parent, and assigns an increased significance to the federal constitutional error established, such as violation of the federal due process constitutional right to counsel [*In re Arturo A. (1992) 8 Cal. App. 4th 229, 10 Cal. Rptr. 2d 131* ; *In re Emilye A. (1992) 9 Cal. App. 4th 1695, 12 Cal. Rptr. 2d 294]* , over that of a statutory error, such as a violation of the statutory right to effective counsel which utilizes the simple harmless error standard [*Welf. & Inst. Code § 317.5(a)*; *In re Celine R. (2003) 31 Cal. 4th 45, 59, 1 Cal. Rptr. 3d 432, 71 P.3d 787* ; *In re Kristin H. (1996) 46 Cal. App. 4th 1635, 1668, 54 Cal. Rptr. 2d 722]* . This was the conclusion reached by the *Denny H.* court [*Denny H. v. Superior Court (2005) 131 Cal. App. 4th 1501, 1514, 33 Cal. Rptr. 3d 89* , citing Seiser & Kumli, California Juvenile Courts Practice and Procedure § 2.194[2] (Matthew Bender)]. The thorough analysis by that court should resolve this issue. Unfortunately, it has not.

One appellate court has expressly disagreed with the *Denny H.* decision in this regard, holding the correct standard for harmless error of a federal constitutional dimension in a dependency proceeding is indeed the *Chapman* standard of harmless beyond a reasonable doubt [*In re Mark A. (2007) 156 Cal. App. 4th 1124, 1145, 68 Cal. Rptr. 3d 106]* . The *Mark A.* Court suggested the *Denny H.* Court had mistakenly merged the burden of persuasion at the trial court with the burden of persuasion at the appellate court [*In re Mark A. (2007) 156 Cal. App. 4th 1124, 1146, 68 Cal. Rptr. 3d 106]* . It had not. Instead, it had impliedly recognized the reasoning used by the United States Supreme Court for the burden of proof at the trial court level for terminating the constitutionally protected right to parent was equally persuasive for the appropriate burden of harmless error at the appellate level in those same proceedings [*Santosky v. Kramer (1982), 455 U.S. 745, 769-770, 102 S. Ct. 1388, 71 L. Ed. 2d 599*].

The Court in *Mark A.* also felt the appellate court could take the burden of persuasion at the trial court level into account when deciding if federal constitutional error was harmless beyond a reasonable doubt [*In re Mark A. (2007) 156 Cal. App. 4th 1124, 1145, 68 Cal. Rptr. 3d 106]* . It could. But using two different standards of proof in the same analysis can be confusing. Indeed, even the *Mark A.* Court recognized such an analysis could yield different results depending on the burden of persuasion at the trial court level [*In re Mark A. (2007) 156 Cal. App. 4th 1124, 1145, 68 Cal. Rptr. 3d 106]* .

Finally, the *Mark A.* Court felt it inappropriate to balance a federal constitutional right against the state created right recognizing the special nature and purpose of dependency proceedings [*In re Mark A. (2007) 156 Cal. App. 4th 1124, 1146, 68 Cal. Rptr. 3d 106]* . The protection of children, preservation of families where appropriate, and the need of children to have safe, stable, permanent homes is not just a state recognized right, however [*see, e.g.,* *Santosky v. Kramer (1982), 455 U.S. 745, 789-790, 102 S. Ct. 1388, 71 L. Ed. 2d 599* (dis. opn. of Rehnquist, J.; "A stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being"].

The California Supreme Court has noted the differences between criminal proceedings and dependency cases and explained its caution against using the criminal structural error doctrine in dependency proceedings to require automatic reversal [*In re James F. (2008) 42 Cal. 4th 901, 915-917, 70 Cal. Rptr. 3d 358, 174 P.3d 180]* . But the harmless beyond a reasonable doubt standard also comes close to automatic reversal [Traynor, The Riddle of Harmless Error (1970) pp. 35, 43]. This is especially inappropriate in dependency cases because such proceedings involve evidence, such as psychological evidence, that is "rarely susceptible to proof beyond a reasonable doubt" [*Santosky v. Kramer (1982), 455 U.S. 745, 768-769, 102 S. Ct. 1388, 71 L. Ed. 2d 599* ; *see also* *In re Jasmon O. (1994) 8 Cal. 4th 398, 430, 33 Cal. Rptr. 2d 85, 878 P.2d 1297* ("Without the testimony of psychologists, in many juvenile dependency and child custody cases superior courts and juvenile courts would have little or no evidence, and would be reduced to arbitrary decisions based upon the emotional response of the court")].

The *Mark A.* court emphasized, "The United States Constitution is the supreme law of the land" [*In re Mark A. (2007) 156 Cal. App. 4th 1124, 1146, 68 Cal. Rptr. 3d 106]* . It is. And it is the United States Supreme Court that is the supreme arbiter of what is required by the United States Constitution. The United States Supreme Court has never required a beyond a reasonable doubt standard at either the trial or appellate levels when dealing with federal

constitutional rights in the context of the fundamental right to parent. Instead, it has applied the "elevated standard" of clear and convincing evidence standard [*Santosky v. Kramer (1982), 455 U.S. 745, 764, 769-770, 102 S. Ct. 1388, 71 L. Ed. 2d 599*]. California should do the same. The many valid reasons for not applying the beyond a reasonable doubt standard in dependency cases at the trial court level apply equally to appellate review. The California Supreme Court has not yet addressed this issue [*In re James F. (2008) 42 Cal. 4th 901, 911 n.1, 70 Cal. Rptr. 3d 358, 174 P.3d 180]* . Interestingly, in the *James F.* case the Court found due process error in the appointment of a guardian ad litem was trial error that was harmless under the facts of that case, but did not indicate which standard of harmless error it was applying [*In re James F. (2008) 42 Cal. 4th 901, 905, 918-919, 70 Cal. Rptr. 3d 358, 174 P.3d 180]* . Subsequent to the *James F.* decision, one appellate court has applied harmless beyond a reasonable doubt, without deciding the issue, because it "provides a more cautious approach in that if the error is harmless beyond a reasonable doubt it will also be harmless by clear and convincing evidence" [*In re Esmeralda S. (2008) 165 Cal. App. 4th 84, 94, 80 Cal. Rptr. 3d 585]* . Until the Supreme Court resolves this issue, practitioners and courts must be aware of the controversy and prepared to address it.

PRACTICE TIP:

Argue Alternative Standards. Until more courts have considered the *Denny H.* decision, parties would be wise to argue alternative standards. Appellants should argue the *Chapman* standard of harmless beyond a reasonable doubt should apply, but even the *Denny H.* standard of harmless by clear and convincing evidence has not been met. Respondents should argue the *Denny H.* standard applies, but even the *Chapman* standard has been met. This is consistent with the holding in *Denny H.* that recognized it was treading on new ground, and held that under either standard the error in that case was harmless [*Denny H. v. Superior Court (2005) 131 Cal. App. 4th 1501, 1515, 33 Cal. Rptr. 3d 89]* .

[3] Structural Error

The concept of structural error originated in the criminal context and involved basic protections without which a criminal trial could not reliably serve its function as a method for the determination of guilt or innocence, and no criminal punishment could be regarded as fundamentally fair [*Arizona v. Fulminante (1991) 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302*]. The U.S. Supreme Court has held structural error " 'necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence' " [*Washington v. Recuenco (2006)548 U.S. 212, 126 S. Ct. 2546, 2551, 165 L. Ed. 2d 466 , quoting Neder v. United States (1999) 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35*]. On the other hand, "trial error" is error that occurs during the presentation of the criminal case. An error that occurs during the criminal trial process itself does not require automatic reversal because a court may quantitatively assess such error in the context of other evidence presented in order to determine whether the error was harmless [*Arizona v. Fulminante (1991) 499 U.S. 279, 307-308, 111 S. Ct. 1246*].

In more than 60 years, however, only in rare criminal cases has the high court held that an error is structural requiring automatic reversal [*Arizona v. Fulminante (1991) 499 U.S. 279, 309-310, 111 S. Ct. 1246, 113 L. Ed. 2d 302* ; *see also Neder v. United States (1999) 527 U.S. 1, 8, 119 S. Ct. 1827*]. More often than not, the U.S. Supreme Court has found federal constitutional error in criminal cases subject to harmless error standards, rather than finding the error to require reversal per se. "[T]he Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless" [*Arizona v. Fulminante (1991) 499 U.S. 279, 306, 312, 111 S. Ct. 1246, 113 L. Ed. 2d 302* (due process violation occurring with use of coerced confession subject to harmless error analysis, not structural error); *see also Chapman v. California (1967) 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705* (error not structural despite privilege against self-incrimination being violated when prosecution commented on defendant's failure to testify in a trial); *Washington v. Recuenco (2006)548 U.S. 212, 126 S. Ct. 2546, 2553, 165 L. Ed. 2d 466* (harmless error applied to *Blakely* violation for failure to submit fact to jury that serves as basis for sentencing enhancement)]. Thus, structural error rarely applies even in criminal cases.

Nonetheless, some courts have applied the theory of structural error to errors of a federal constitutional dimension in

dependency cases [*see, e.g.,* *In re Jasmine G. (2005) 127 Cal. App. 4th 1109, 1115-1116, 26 Cal. Rptr. 3d 394* (agency failed to make any attempt to provide parent notice of *Welf. & Inst. Code § 366.26* hearing); *In re DeJohn B. (2000) 84 Cal. App. 4th 100, 102, 109-110, 100 Cal. Rptr. 2d 649* (failure to make any effort to provide notice of review hearing at which services were terminated and a *Welf. & Inst. Code § 366.26* hearing was set); *In re C.G. (2005) 129 Cal. App. 4th 27, 33-34, 27 Cal. Rptr. 3d 872* (error in appointment process for guardian ad litem); *Judith P. v. Superior Court (2002) 102 Cal. App. 4th 535, 554-557, 126 Cal. Rptr. 2d 14* (requirement for review report to be filed 10 days prior to hearing, *but see Welf. & Inst. Code § 366.05* enacted thereafter)]. Most courts considering a claim of structural error, however, have rejected the application of structural error, holding that a harmless error standard is appropriate [*see, e.g., In re Celine R. (2003) 31 Cal. 4th 45, 58-59, 1 Cal. Rptr. 3d 432, 71 P.3d 787* (appointment of separate children's counsel); *In re Sabrina H. (2007) 149 Cal. App. 4th 1403, 1419-1420* & n.14, *57 Cal. Rptr. 3d 863* (notice)]. To date they have not gone so far as to say structural error does not apply in dependency cases. The California Supreme Court, however, has come close.

In a case dealing with the failure to follow the necessary procedures for the appointment of a guardian ad litem, the California Supreme Court has clearly implied structural error should never apply in dependency cases and has provided a persuasive rationale for that position [*In re James F. (2008) 42 Cal. 4th 901, 70 Cal. Rptr. 3d 358, 174 P.3d 180]* . Without addressing what due process required in the context of appointment of a guardian ad litem, the Court noted that "juvenile dependency proceedings differ from criminal proceedings in ways that affect the determination of whether an error requires automatic reversal of the resulting judgment" [*In re James F. (2008) 42 Cal. 4th 901, 915, 70 Cal. Rptr. 3d 358, 174 P.3d 180]* . It went on to note, "These significant differences between criminal proceedings and dependency proceedings provide reason to question whether the structural error doctrine that has been established for certain errors in criminal proceedings should be imported wholesale, or unthinkingly, into the quite different context of dependency cases" [*In re James F. (2008) 42 Cal. 4th 901, 915-916, 70 Cal. Rptr. 3d 358, 174 P.3d 180]* . The Court also noted the United States Supreme Court has never applied structural error outside of criminal proceedings or that "harmlessness is irrelevant when the right of procedural due process ... has been violated" [*In re James F. (2008) 42 Cal. 4th 901, 917, 70 Cal. Rptr. 3d 358, 174 P.3d 180]* . Significantly, it stated, "We cannot agree with the Court of Appeal majority that prejudice is irrelevant in a dependency proceeding when the welfare of the child is at issue and delay in resolution of the proceeding is inherently prejudicial to the child" [*In re James F. (2008) 42 Cal. 4th 901, 917, 70 Cal. Rptr. 3d 358, 174 P.3d 180]* .

The view clearly implied by the Supreme Court in *James F.* is the better view. Structural error should not apply in dependency proceedings even when dealing with errors of a federal constitutional dimension. Structural error considers only the error and the interest of the parent. It fails to consider the weight of the facts or the interest of the child who is both a party to and the subject of the proceedings [*Welf. & Inst. Code § 317.5(b)*]. An examination of California dependency cases in which appellate courts found structural error before the Supreme Court's *James F.* decision reveals the courts conducted little to no analysis as to whether structural error should apply in dependency cases. Instead, it was simply assumed the concept of structural error could apply in dependency cases, just as it does in criminal cases [*see, e.g.,* *In re C.G. (2005) 129 Cal. App. 4th 27, 34, 27 Cal. Rptr. 3d 872* ; *In re Jasmine G. (2005) 127 Cal. App. 4th 1109, 1118, 26 Cal. Rptr. 3d 394* ; *Judith P. v. Superior Court (2002) 102 Cal. App. 4th 535, 554, 126 Cal. Rptr. 2d 14]* . But the U.S. Supreme Court and the California Supreme Court have been clear that criminal standards do not apply in dependency proceedings, and that due process requirements afforded to parents in dependency court differ from those due criminal defendants [*see, e.g.,* *Lassiter v. Department of Social Servs. (1981) 452 U.S. 18, 32, 101 S. Ct. 2153, 68 L. Ed. 2d 640* ; *Santosky v. Kramer (1982), 455 U.S. 745, 769-770, 102 S. Ct. 1388, 71 L. Ed. 2d 599* ; *Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 256, 19 Cal. Rptr. 2d 698, 851 P.2d 1307* ; *In re Lucero L. (2000) 22 Cal. 4th 1227, 1247-1248, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* ; *In re Malinda S. (1990) 51 Cal. 3d 368, 384, 272 Cal. Rptr. 787, 795 P.2d 1244* (dependency proceedings not criminal in nature; purpose is to protect child, not punish parent)]. These cases support the position that structural error does not apply in dependency cases.

Further, courts have found that children have fundamental interests of their own that may "diverge from the interests of the parent" [*In re Jasmon O. (1994) 8 Cal. 4th 398, 419, 878 P. 2d 1297*]. Indeed, the California Supreme Court has

said that children "have compelling rights to be protected from abuse and neglect and to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child" [*In re Marilyn H. (1993) 5 Cal. 4th 295, 306, 851 P.2d 826*]. Thus, where the rights of children and parents conflict, the legal system traditionally protects the child's interest [*Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 254, 19 Cal. Rptr. 2d 698, 851 P.2d 1307* (where a child has been abused or neglected by a parent, "the child's interest must be given more weight")]. At the very least, the system must provide a level playing field that balances the interests of the child with the interests of the parent. The structural error concept does not do that.

An unlevel playing field, such as that resulting from the reversal per se standard, is not appropriate in a system designed to protect both the child and the family [*Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 255, 19 Cal. Rptr. 2d 698, 851 P.2d 1307*]. This is not to say cases should never be reversed. Sometimes error at the trial court level will constitute reversible error at the appellate court level. But reversal should not be presumed merely because there is a fundamental error, even when it is of a federal constitutional dimension. The more egregious the error the less likely it is the error will be found to be harmless under a harmless error analysis, but it is inappropriate in a dependency case to regard any error as justifying reversal per se, thereby giving no weight whatsoever to the interests of the child.

For a discussion trial error of a federal constitutional dimension in dependency cases, see *§ 328.194[2]*.

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§ 328.195 Review by Writ Petition of Court Orders Designating the Specific Placement of a Freed Child

[1] Notice of Intent to File Writ Petition

The Judicial Council adopted rules that set forth strict time lines for the filing of extraordinary writ petitions that challenge juvenile court orders designating the specific placement of a child for whom parental rights have been terminated [*Cal. Rules of Ct., Rules 8.454, 8.456*]. These rules must be followed in order to preserve any right to appeal. In directing these rules be adopted by the Judicial Council, the legislature recognized the juvenile court intervenes in the specific placement of freed children only in exceptional circumstances. It also recognized, however, that appeals taken from such decisions can delay stability and permanence for the child, which can cause substantial detriment [*Welf. & Inst. Code § 366.28(a)*; *Cal. Rules of Ct., Rule 8.454(b)*].

A Notice of Intent to File Writ Petition and Request for Record must be signed by the party seeking review of the court's decision and filed by the party's counsel, unless the petitioner was not represented by counsel. If the petition is to be filed on behalf of the child, the notice of intent must be signed and filed by the child's attorney. The appellate court can waive the requirement for the party's signature if it finds good cause based on a declaration from counsel of record explaining why the party could not sign the notice of intent [*Cal. Rules of Ct., Rule 8.454(e)(3)*]. Effective July 1, 2010, the notice of intent must be authorized by the party seeking review of the court's decision, but may be signed by either that party or the party's counsel [*Cal. Rules of Ct., Rule 8.454(e)(3)*, eff. July 1, 2010].

When a Notice of Intent to File Writ Petition and Request for Record is filed pursuant to *Cal. Rules of Ct., Rule 8.454*, the superior court clerk must immediately mail a copy of the notice to all counsel of record, all parties, including the child, the present caregiver, any legal guardian, and any person granted de facto parent status and given standing to participate in the juvenile court proceedings, the social worker, any court appointed special advocate, and the tribe of an Indian child, if any [*Cal. Rules of Ct., Rule 8.454(g)(1)*]. The clerk must also promptly send a copy of the notice of

intent and a proof of service list to the reviewing court, which may be done by facsimile or first-class mail [*Cal. Rules of Ct., Rule 8.454(g)(2)*]. The clerk must also immediately notify the court reporter by telephone and in writing to prepare a reporter's transcript within 12 days after the notice of intent was filed, and the clerk must prepare a clerk's transcript within 20 days of the filing of the notice of intent that includes the notice of intent, proof of service, and all items listed in *Cal. Rules of Ct., Rule 8.404(a)* [*Cal. Rules of Ct., Rule 8.454(h)*].

When the transcripts are certified as correct and filed with the reviewing court, the reviewing court's clerk must immediately notify the parties, indicating the date on which the 10-day period for filing the writ petition will expire [*Cal. Rules of Ct., Rule 8.454(j)(2)*].

[2] Rule 8.456 Writ Petition

The writ petition to challenge a juvenile court's order designating a specific placement for a dependent child after termination of parental rights must be filed within 10 days after the record is filed in the reviewing court [*Cal. Rules of Ct., Rule 8.456(c)*]. Trial counsel filing such writ petitions are encouraged to seek assistance from attorneys that are experienced in writ procedure [*Cal. Rules of Ct., Rule 8.454(c)*]. Judicial Council form JV-825 Petition for Extraordinary Writ--Juvenile Dependency may be used for this purpose. As with writ petitions challenging the setting of a hearing under *Welf. & Inst. Code § 366.26*, however, counsel should not be misled by the brevity of the Judicial Council form. Adequate points and authorities and references to the record are necessary [*Rayna R. v. Superior Court (1993) 20 Cal. App. 4th 1398, 1406-1407, 25 Cal. Rptr. 2d 259* ; *Nahid H. v. Superior Court (1997) 53 Cal. App. 4th 1051, 1056, 62 Cal. Rptr. 2d 281]* . Requests by the petitioner to augment or correct the record must be filed within five days of the receipt of the record, unless the record exceeds 600 pages, in which case the petitioner must file any request to augment or correct the record within 10 days of the receipt of the record [*Cal. Rules of Ct., Rule 8.456(f)(2)*; *see Cal. Rules of Ct., Rule 8.456(e)(2)*, eff. July 1, 2010].

Writ petitions filed pursuant to *Cal. Rules of Ct., Rule 8.456* must include the identities of the parties, the date of the juvenile court order designating the specific placement of a child after the termination of parental rights, a summary of the grounds on which the petition is filed, and the relief requested [*Cal. Rules of Ct., Rule 8.456(a)*]. The writ petition must be accompanied by points and authorities that provide a summary of the significant facts contained in the record, set forth each point under a separate heading or subheading summarizing the point, support each point by argument and citation of authority, and support any reference to a matter in the record by a citation to the record, explaining the significance of any cited portion of the recording and noting any disputed aspects of the record [*Cal. Rules of Ct., Rule 8.456(b)*]. If the writ petition seeks a stay of the juvenile court's placement order for a freed child, the petition must demonstrate that implementation of the specific placement order pending the reviewing court's decision is likely to cause detriment to the child is the placement order is ultimately reversed [*Cal. Rules of Ct., Rule 8.456(g)*].

Any response to the writ petition must be served and filed within 10 days of the filing of the writ petition, unless the writ petition was served by mail, in which case the response must be filed within 15 days [*Cal. Rules of Ct., Rule 8.456(c)(2)*]. If the respondent receives a request from the reviewing court for a response, the response must be filed within 10 days, unless the court specifies a shorter time [*Cal. Rules of Ct., Rule 8.456(c)(2)*]. Any request by the responding party to augment or correct the record must be served and filed within five days after the writ petition is filed [*Cal. Rules of Ct., Rule 8.456(f)(2)*; *see Cal. Rules of Ct., Rule 8.456(e)*, eff. July 1, 2010].

The rule states that absent exceptional circumstances, the reviewing court must review the petition and decide it on the merits by a written opinion [*Cal. Rules of Ct., Rule 8.456(i)*; *see Cal. Rules of Ct., Rule 8.456(h)*, eff. July 1, 2010]. If the reviewing court intends to issue a decision on the merits, it must issue an order to show cause or an alternative writ [*Cal. Rules of Ct., Rule 8.456(e)*; *see Cal. Rules of Ct., Rule 8.456(d)*, eff. July 1, 2010]. Oral argument must be heard within 30 days after the response is file or due to be filed, unless the court extends the time for good cause or counsel waives argument. If argument is waived, the matter is deemed submitted not later than 30 days after the response is filed or due to be filed [*Cal. Rules of Ct., Rule 8.456(h)*; *see Cal. Rules of Ct., Rule 8.456(g)*, eff. July 1, 2010].

This writ procedure is a relatively new procedure that was expected to be infrequently used [*Welf. & Inst. Code § 366.28(a)*]. It is anticipated that much of the law regarding the mandatory timelines and procedures for writ review of decision setting hearings under *Welf. & Inst. Code § 366.26* will be held to apply to writ petitions under *Cal. Rules of Ct., Rules 8.454* and *8.456*, where applicable. This is an area to be watched for further development.

While it was anticipated that all decisions affirming or rejecting placement decisions for dependent children who had been freed for adoption would be challenged by way of extraordinary writ petition pursuant to *Welf. & Inst. Code § 366.28*, thereby ensuring all such decisions were reviewed quickly by the appellate courts, that has not proven to be the case in all courts. One appellate court has taken the position that if a *Welf. & Inst. Code § 388* petition for placement of a freed child is denied due to the juvenile court's determination the social services agency did not abuse its discretion in its adoptive placement decision, that judgment is to be reviewed by way of appeal, not by way of petition for writ [*In re Daniel C. (2006) 141 Cal. App. 4th 1438, 1440, 47 Cal. Rptr. 3d 137* ; *In re Shirley K. (2006) 140 Cal. App. 4th 65, 68, 70-71, 43 Cal. Rptr. 3d 897]* . These decisions resulted from a plain reading of *Welf. & Inst. Code § 366.28*, without a close examination of what that statute was trying to accomplish. They create the anomaly that had the *Welf. & Inst. Code § 388* petition been granted, thereby resulting in the juvenile court making a direct order for placement of the freed child, it could only be reviewed by way of writ under *Welf. & Inst. Code § 366.28*, but if it is denied, it can only be reviewed by way of appeal under *Welf. & Inst. Code § 395*. Whether the legislature will act to clarify its intent in this regard, and whether other courts will choose to follow the *Shirley K.* and *Daniel C.* court remains to be seen. This is an area to be watched for further developments.

For discussion of the law regarding the juvenile court's review of the agency's discretionary placement decisions for children who have been freed for adoption, and other adoption related issues, see *§§ 328.171[5][h]*, and *328.198*.

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§ 328.196 Waiver or Forfeiture of Right to Raise Issue on Appeal or by Writ

One very common determination made by appellate courts in dependency proceedings is that the parent, guardian, or other aggrieved person has waived or forfeited the right to raise a particular issue on appeal or in writ proceedings by having failed to object or otherwise raise the issue at the juvenile court level. Generally, an issue not raised at the trial court level may not be raised for the first time on appeal or in a writ [*see, e.g.,* *In re Dakota S. (2000) 85 Cal. App. 4th 494, 501-502, 102 Cal. Rptr. 2d 196* (failure to object to assessment's failure to address the foster parent's eligibility, commitment, and suitability as a prospective guardian as waiver); *In re Amanda D. (1997) 55 Cal. App. 4th 813, 819-820, 64 Cal. Rptr. 2d 108* (failure to object to lack of child's testimony regarding wishes for permanent plan as waiver); *In re Brandon M. (1997) 54 Cal. App. 4th 1387, 1400-1401, 63 Cal. Rptr. 2d 671* (failure to raise objection to "trial home visit" as waiver); *In re Christopher B. (1996) 43 Cal. App. 4th 551, 558-559, 51 Cal. Rptr. 2d 43* (failure to raise forum non conveniens objection as waiver); *In re Kevin S. (1996) 41 Cal. App. 4th 882, 885-886, 48 Cal. Rptr. 2d 763* (failure to object to setting *Welf. & Inst. Code § 366.26* hearing despite finding of no reasonable efforts as waiver); *Steve J. v. Superior Court (1995) 35 Cal. App. 4th 798, 810-811, 41 Cal. Rptr. 2d 731* (failure of social services agency to raise issue of father's right to reunification services as waiver); *In re Richard K. (1994) 25 Cal. App. 4th 580, 587-590, 30 Cal. Rptr. 2d 575* (submission on recommendations of social worker as waiving ability to challenge on appeal the sufficiency of the evidence to support the court's order when the court followed the recommendations)]. While most courts and practitioners use the term "waiver," the California Supreme Court has indicated the correct legal term for the loss of the right to raise a claim based on the failure to timely assert it is "forfeiture" [*In re S.B. (2004) 32 Cal. 4th 1287, 1293, n.2, 13 Cal. Rptr. 3d 786, 90 P.3d 746*].

Nevertheless, there are exceptions to the general waiver or forfeiture rule. For instance, a parent who submits on the social worker's report at the jurisdiction hearing, making no argument against a finding of jurisdiction, has been held not to have waived the right to raise the sufficiency of the evidence to support the jurisdiction finding on appeal [*In re Tommy E. (1992) 7 Cal. App. 4th 1234, 1236-1239, 9 Cal. Rptr. 2d 402*]. Further, some courts have held that when a

parent objects to the termination of parental rights, no specific objection need be made to the social services agency's alleged failure to establish the likelihood of adoption for the parent to raise the issue on appeal [*In re Erik P. (2002) 104 Cal. App. 4th 395, 399, 127 Cal. Rptr. 2d 922* ; *In re Brian P. (2002) 99 Cal. App. 4th 616, 623, 121 Cal. Rptr. 2d 326* ; *but see In re Crystal J. (1993) 12 Cal. App. 4th 407, 411-412, 15 Cal. Rptr. 2d 613*].

It should also be noted that, although not commonly done, appellate courts have discretion to consider forfeited issues in certain circumstances, such as where the issue presented is an important legal issue [*see, e.g., In re Charles T. (2002) 102 Cal. App. 4th 869, 873, 125 Cal. Rptr. 2d 868* ; *Rosa S. v. Superior Court (2002) 100 Cal. App. 4th 1181, 1188, 122 Cal. Rptr. 2d 866* ; *In re C.T. (2002) 100 Cal. App. 4th 101, 110, n.7, 121 Cal. Rptr. 2d 897*]. The Supreme Court has emphasized, however, that appellate courts should only exercise their discretion to excuse forfeiture in rare instances, and must exercise special care in doing so in dependency appeals and writs since "considerations such as permanency and stability are of paramount importance" [*In re S.B. (2004) 32 Cal. 4th 1287, 1293, 13 Cal. Rptr. 3d 786, 90 P.3d 746*].

Finally, it should be noted that many cases have stated that pure issues of law are not subject to the forfeiture rule, particularly where they can be decided on undisputed facts in the record [*see, e.g., Ward v. Taggart (1959) 51 Cal. 2d 736, 742, 336 P.2d 534*]. A more accurate statement would be that pure issues of law are not automatically forfeited, since an appellate court may decline to hear an issue of law raised for the first time on appeal [Eisenberg, et al., Cal. Prac. Guide: Civil Appeals & Writs (TRG 2005) P 8:240.1, p. 8-139; *Hussey-Head v. World Savings & Loan Assn. (2003) 111 Cal. App. 4th 773, 783, n.7, 4 Cal. Rptr. 3d 171*]. Nevertheless, appellate courts have discretion to consider such issues [*see, e.g., In re Lauren R. (2007) 148 Cal. App. 4th 841, 854, 56 Cal. Rptr. 3d 151* ; *People v. Koontz (2002) 27 Cal. 4th 1041, 1075, n.4, 119 Cal. Rptr. 2d 859, 46 P.3d 335* ; *People v. Butler (1980) 105 Cal. App. 3d 585, 588, 164 Cal. Rptr. 475* ; *Panopulos v. Maderis (1956) 47 Cal. 2d 337, 341, 303 P.2d 738*]. It is in the area of pure issues of law that can be decided on the undisputed facts in the record that appellate courts are most likely to consider issues raised for the first time on appeal.

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§ 328.198 Adoption and Related Issues

[1] Adoption in the Juvenile Court

Although many counties conduct adoptions in the juvenile court building, adoptions are traditionally superior court proceedings which are separate and distinct from the limited jurisdiction of the juvenile court [*see Fam. Code § 8500 et seq.*]. In dependency cases, however, the adoptive parent and social services agency may choose to have the adoption done by the juvenile court [*Welf. & Inst. Code § 366.26(e)*]. When an adoption is done in the juvenile court for a dependent child it is given a separate confidential adoption file with an adoption case number which is different from the dependency case number. Judicial Council forms have been developed for such juvenile court adoptions and a rule of court sets forth the procedures to be followed by the juvenile court [*see Cal. Rules of Ct., Rule 5.730*; *see also* Judicial Council forms for Petition for Adoption of Dependent Child (JV-360), Consent and Agreement to Adoption (JV-361), and Order of Adoption (JV-362)]. In conducting an adoption in the juvenile court, the full report required by *Fam. Code § 8715* must be read and considered by the court prior to ordering the adoption. The minutes of the court must reflect that such report was read and considered by the court. The person who prepared the report may be called and examined by any party to the adoption proceeding [*Welf. & Inst. Code § 366.26(e)*].

For a discussion of tribal customary adoptions, which do not require the termination of parental rights, see *§ 328.125[11]*.

[2] Caretaker Preference for Adoption

Notwithstanding any other provision of law, the application of any person who, as a relative caretaker or foster parent, has cared for a dependent child for whom the court has approved a permanent plan for adoption or who has been freed for adoption must be given preference with respect to that child over all other applications for adoptive placement if the agency making the placement determines that the child has substantial emotional ties to the relative caretaker or foster

parent, and removal from the relative caretaker or foster parent would be seriously detrimental to the child's emotional well-being [*Welf. & Inst. Code § 366.26(k)*].

"Preference" means that the application must be processed, and, if satisfactory, the family study must be completed, before the processing of the application of any other person for the adoptive placement of the child [*Welf. & Inst. Code § 366.26(k)*].

[3] Adoptive Placement Decisions

If the juvenile court has terminated parental rights pursuant to *Welf. & Inst. Code § 366.26*, the court must at the same time order the child referred to the State Department of Social Services or a licensed adoption agency for adoptive placement by the agency. The State Department of Social Services or licensed adoption agency is responsible for the custody and supervision of the child, and is entitled to the exclusive care and control of the child at all times until a petition for adopted is granted. With the consent of the agency, however, the court may appoint a guardian of the child, who must serve until the child is adopted [*Welf. & Inst. Code § 366.26(j)*]. Notwithstanding this clear authority setting forth the agency as being responsible for the care of the child pending adoption, some juvenile courts and practitioners have assumed that in a dependency case it is the court itself that makes such placement decisions. Recent cases have clearly held otherwise, except in cases involving court designated prospective adoptive parents under *Welf. & Inst. Code § 366.26(n)*, in which cases the social services agency is responsible for the placement, care, and control of the child, but the court can intercede and make an independent best interest determination regarding placement [*Welf. & Inst. Code § 366.26(n)*].

In the case of *Department of Soc. Servs. v. Superior Court (1997) 58 Cal. App. 4th 721, 68 Cal. Rptr. 2d 239* , the two dependent children who had been freed for adoption had two homes available to them for placement and potential adoption. The agency chose one home. The juvenile court chose the other, substituting its judgment for that of the agency, and directed the agency to place the children there. On appeal the juvenile court's order was reversed. The court of appeal held the legislature has clearly and expressly given the licensed adoption agency "exclusive care and control" of the child after the termination of parental rights [*Department of Soc. Servs. v. Superior Court (1997) 58 Cal. App. 4th 721, 68 Cal. Rptr. 2d 239* , *quoting Welf. & Inst. Code § 366.26(j)* and *Fam. Code § 8704(a)*]. It also held, however, that the discretion of the agency in placing the child pending adoption is subject to review by the juvenile court to determine if the agency has abused its discretion [*Department of Soc. Servs. v. Superior Court (1997) 58 Cal. App. 4th 721, 68 Cal. Rptr. 2d 239]* . In reviewing the agency's placement decision the juvenile court cannot substitute its own judgment for that of the agency. It merely determines whether the agency's placement decision "is patently absurd or unquestionably not in the minor's best interests" and thus an abuse of discretion [*Department of Soc. Servs. v. Superior Court (1997) 58 Cal. App. 4th 721, 734, 68 Cal. Rptr. 2d 239]* . In that case the court of appeal found there was no evidence the agency had abused its discretion and thus reversed the juvenile court's orders [*Department of Soc. Servs. v. Superior Court (1997) 58 Cal. App. 4th 721, 741-743, 68 Cal. Rptr. 2d 239]* .

In the case of *Los Angeles County Dep't of Children & Family Servs. v. Superior Court (1998) 62 Cal. App. 4th 1, 72 Cal. Rptr. 2d 369* , the court of appeal dealt with a similar question. Finding that it was "greatly assisted" by the decision in *Department of Soc. Servs. v. Superior Court (1997) 58 Cal. App. 4th 721, 68 Cal. Rptr. 2d 239* , the court indicated "the issue for us is simply whether given this statutory scheme, the trial court properly rejected Department's request that [the child] be placed with Ms. B. pending adoption." The court of appeal found the juvenile court had not properly rejected the agency's request because the juvenile court had improperly substituted its judgment for that of the agency [*Los Angeles County Dep't of Children & Family Servs. v. Superior Court (1998) 62 Cal. App. 4th 1, 9-10, 72 Cal. Rptr. 2d 369]* .

The case of *In re Harry N. (2001) 93 Cal. App. 4th 1378, 114 Cal. Rptr. 2d 46* , also dealt with this issue. In that case there were two families that wanted to adopt the child. One was the foster family the child had been placed with since he was only a few days old. The other was a relative home in Puerto Rico that had not previously been available due to

a delay in obtaining the necessary home study. After parental rights were terminated the social services agency sought to move the child to the relative home for adoption. The child's counsel and the foster parents opposed the move. Ultimately, the juvenile court sided with the child's counsel and the foster parents. In so doing, however, the juvenile court did not determine whether the agency's decision to move the child for adoption by the relatives had been an abuse of discretion [*In re Harry N. (2001) 93 Cal. App. 4th 1378, 1381-1382, 1398-1399, 114 Cal. Rptr. 2d 46]* . The Court of Appeal noted that "We agree with the line of cases that, absent an abuse of discretion, gives the Department authority for placement at this stage in the proceedings. The Department has been given the resources for investigation and evaluation of the placement decision. The juvenile court's role is to decide if there was an abuse of discretion in the decision" [*In re Harry N. (2001) 93 Cal. App. 4th 1378, 1398, 114 Cal. Rptr. 2d 46]* . In exercising its discretion, the social services agency must process an application by the current caregivers as a prospective adoptive placement, but it is not prevented from considering other applications as well [*In re Harry N. (2001) 93 Cal. App. 4th 1378, 1396-1397, 114 Cal. Rptr. 2d 46]* . Since the juvenile court had made its own decision regarding placement, rather than determining whether the agency had abused its discretion, the matter was reversed and remanded for consideration by the juvenile court of that issue. In so doing, of course, the juvenile court would also of necessity have to consider any further developments in the case that occurred while the appeal was pending [*In re Harry N. (2001) 93 Cal. App. 4th 1378, 1398-1399, 114 Cal. Rptr. 2d 46]* .

Some may view these decisions as restricting the juvenile court's authority. It can also be said, however, that these cases expand the court's authority, since prior to these decisions it was thought by many that the juvenile court had no role in the review of adoptive placements. Instead, such decisions by the agency were only subject to an administrative review process and mandamus [*see Cain v. Adoption Agency (1976) 54 Cal. App. 3d 1127, 126 Cal. Rptr. 836]* . Nevertheless, both statutory and decisional law are now clear that the agency makes the placement decisions pending adoption, but that the juvenile court has the power to review the agency's placement decisions utilizing an abuse of discretion standard.

For discussion of the writ process for review of juvenile court decisions designating specific placement of a dependent child after parental rights have been terminated, see *§ 328.195*.

[4] Same Social Worker for Adoption of Sibling Groups

If a prospective adoptive family intends to adopt a sibling group, the siblings are to be assigned the same social worker unless the social services agency determines that assigning the same social worker to all of the children would not be in the best interest of one or more of the children, or of the operation of the agency [*Welf. & Inst. Code § 16005*].

[5] No Court-Mandated Postadoption Visitation

California follows a general policy of closed adoptions, with clear law that the court cannot order postadoption visitation. Recognizing the need for the adoptive family to solidify their relationships within the family, California allows the adoptive parents the discretion to determine what is in the adopted child's best interest without the interference of the child's biological relatives. This also promotes the public policy of providing children with stable, permanent homes that are free from protracted litigation of custody and visitation [*Huffman v. Grob (1985) 172 Cal. App. 3d 1153, 1157-1158, 218 Cal. Rptr. 659]* . Not even the argument that such visitation would promote the child's best interests is sufficient to allow for an order requiring postadoption visitation [*Marckwardt v. Superior Court (1984) 150 Cal. App. 3d 471, 480, 198 Cal. Rptr. 41]* . Consistent with the law of adoption found in *Fam. Code §§ 8616* and *8617*, following adoption the child and the adoptive parents shall have the legal relationship of parent and child and the birth parents are relieved of any responsibility.

Only one California case has held that a juvenile court can order visitation that would survive an adoption [*see In re Hirenia C. (1993) 18 Cal. App. 4th 504, 517-520, 22 Cal. Rptr. 2d 443]* . Perhaps outraged by the facts before it, the appellate court issued an opinion that is an anomaly. The decisional law it relied on for support of its conclusion the

juvenile court could enter an order for visitation that would survive an adoption does not provide such support. Instead, the cited cases dealt with visitation in a variety of dependency and termination of dependency contexts, none of which included adoption [*see In re Hirenia C. (1993) 18 Cal. App. 4th 504, 518-520, 22 Cal. Rptr. 2d 443* , citing *In re Jennifer R. (1993) 14 Cal. App. 4th 704, 712, 17 Cal. Rptr. 2d 759* ; *In re Roger S. (1992) 4 Cal. App. 4th 25, 30, 5 Cal. Rptr. 2d 208* ; *In re Michelle M. (1992) 8 Cal. App. 4th 326, 328, 10 Cal. Rptr. 2d 64* ; *In re Robin N. (1992) 7 Cal. App. 4th 1140, 1146, 9 Cal. Rptr. 2d 512]* . Nor does *Welf. & Inst. Code § 362.4*, which the *Hirenia C.* court also looked to, provide authority or support for its conclusion. By its very terms, that section authorizes the juvenile court to make custody, visitation and restraining orders when it terminates dependency jurisdiction under a variety of situations, none of which include adoption [*Welf. & Inst. Code § 362.4*]. *Hirenia C.* must therefore be viewed as inconsistent with established decisional and statutory law, and with the public policy of this state for closed adoptions; it should be questioned, not followed. Indeed, in one decision determined well after the *Hirenia C.* case, a court of appeal was asked to be "the first court to change the rule" that California law does not provide for court-ordered open adoptions. Without even citing the *Hirenia C.* decision, that court indicated, "Not now, and maybe not ever" [*In re Sylvia R. (1997) 55 Cal. App. 4th 559, 563, 64 Cal. Rptr. 2d 93* , citing *Huffman v. Grob (1985) 172 Cal. App. 3d 1153, 1158, 218 Cal. Rptr. 659]* .

PRACTICE TIP:

Voluntary Open Adoptions. Although the juvenile court lacks the authority to order an open adoption, nothing prevents the adoptive parents and the biological family from formally or informally agreeing between themselves to some form of open adoption. While such voluntary agreements cannot be entered into by the social services agency and cannot be ratified or enforced by the court except in the very limited circumstances of sibling interaction provisions and postadoption contact agreements described in the next subsections, in cases where there are no animosities between the biological and adoptive families they can provide a very viable way for the families to work together for the good of the child. Voluntary arrangements should not be viewed as contrary to the public policy of this state, since they are entered into voluntarily by the adoptive parents and hence are simply a reasonable exercise of their discretion as the adoptive parents. Only when the court attempts to order an open adoption, or to somehow ratify one, without direct statutory authority, is the public policy of California for closed adoptions violated. Where appropriate, parties and attorneys in a dependency action in which termination of parental rights and adoption is anticipated may wish to explore the possibility of a voluntary open adoption as a means of providing the child with the stability of adoption while still retaining contact with his or her biological family.

[6] Facilitating Postadoptive Sibling Contact

It has always been good social work practice to consider the appropriateness of facilitating postadoptive sibling contact in cases in which the siblings by blood or marriage are not part of the same adoptive family but have an existing relationship. Indeed, in addition to giving social workers and juvenile courts the responsibility of maintaining sibling contact and relationships at all times throughout the dependency process unless it is detrimental to the child to do so [*Welf. & Inst. Code §§ 306.5, 362.1(b), 16002(b)*], California law requires efforts be made to provide for sibling interaction "as part of developing the permanent plan for the child" [*Welf. & Inst. Code § 16002(b)*]. While efforts must be made to keep siblings placed together [*Welf. & Inst. Code § 16002(a)*] or to facilitate sibling contact where appropriate, California's juvenile court law does not require that siblings actually be placed together, kept in contact, or receive the same permanent plan [*In re Gerald J. (1991) 1 Cal. App. 4th 1180, 1187-1188, 2 Cal. Rptr. 2d 569]* . This is understandable, since every case and situation is different and it cannot be presumed that placing siblings together or facilitating contact is best, workable, or even possible. Nevertheless, social workers and adoptive parents have often worked to informally facilitate sibling contact in a postadoptive setting when it is best for the children to do so.

Effective January 1, 1999, statutory authority exists for final adoption orders to include provisions for the adoptive parents to facilitate postadoptive sibling contact, when such provisions are made with the adoptive parents' consent [

Welf. & Inst. Code § 366.29(a)]. To help encourage prospective adoptive parents to agree to such provisions, social services agency are to take several steps, except in those cases in which the court has determined sibling interaction is detrimental to the child. The agency is to include in the training provided to prospective adoptive parents "information about the importance of sibling relationships to the adopted child and counseling on methods for maintaining sibling relationships" [*Welf. & Inst. Code § 16002(e)(1)*]. Prospective adoptive parents are also to be provided information about the child's siblings and half-siblings. The address of the siblings and half-siblings is not to be disclosed, however, unless the court finds good cause to order the release of the address [*Welf. & Inst. Code § 16002(e)(2)*]. Finally, prospective adoptive parents are to be encouraged to make a plan for facilitating postadoptive contact between the child they are adopting and the child's siblings or half-siblings [*Welf. & Inst. Code § 16002(e)(3)*].

The adoption report prepared by the agency regarding the adoption must include information regarding the plan, if any, for postadoptive sibling contact [*Fam. Code § 8715(b)*]. If the court hearing the adoption petition has the agreement of the prospective adoptive parents, it may include in the adoption orders provisions for the agreed on provisions for facilitating postadoptive sibling contact [*Welf. & Inst. Code § 366.29(a)*]. The juvenile court hearing the dependency matter lacks jurisdiction to order such provisions unless the adoption petition has been filed in the juvenile court and the provisions are made in conjunction with the entering of the adoption orders [*Welf. & Inst. Code § 366.26(e), 366.29(a)*]. The continued validity of the adoption is not contingent on the adoptive parents facilitating sibling contact. Moreover, the provisions for contact do not impair the ability of the adoptive parents to change their residence, including moving outside the state [*Welf. & Inst. Code § 366.29(a)*]. Further, once the provisions are made, the adoptive parents can at any time determine sibling contact "poses a threat to the health, safety, or well-being of the adopted child" and terminate the contact. If such a decision is made by the adoptive parents, they must submit to the court within ten days of terminating the contact, written notification of the reasons why continued sibling contact would threaten the health, safety, or well-being of the adopted child [*Welf. & Inst. Code § 366.29(b)*]. Nevertheless, the requirement for the training and encouragement of prospective adoptive parents to facilitate such contact and the authorization for the court hearing the adoption to include such provisions in the adoptive orders are positive steps to help maintain sibling relationships in a postadoptive setting where best for the child.

Once the petition for adoption of a dependent child is granted and the order of adoption issued, the jurisdiction of the juvenile court terminates as to the dependency proceedings. Nevertheless, the court granting the petition of adoption maintains jurisdiction over the child for purposes of enforcing the postadoption sibling contact agreement. The court may only order compliance with the agreement upon a finding that the party seeking enforcement of the agreement participated in good faith in mediation or other appropriate alternative dispute resolution proceedings regarding the postadoption sibling contact agreement prior to filing the request for enforcement, and that enforcement of the agreement is in the best interest of the child [*Welf. & Inst. Code § 366.29(c)*].

[7] Postadoption Contact Agreements

As part of California's effort to provide stability to children through the benefits of adoption and with the recognition that many relative caretakers do not desire to enter into a traditional adoption thereby changing family structure and relationships, effective January 1, 1998, California authorized adopting relative caretakers to enter into adoption agreements with biological parents and other relatives that could be enforced by the courts after the adoption is completed [Fam. Code former §§ 8714.5, 8714.7 (Stats. 1997, ch. 793); *see also In re Kimberly S. (1999) 71 Cal. App. 4th 405, 83 Cal. Rptr. 2d 740* ; *In re Zachary D. (1999) 70 Cal. App. 4th 1392, 83 Cal. Rptr. 2d 407]* . This law was California's initial step into the uncertain waters of court-approved open adoptions. It was limited, however, to adopting relatives. Indeed, its purpose was to "expedite legal permanency for children who cannot return to their parents and to remove barriers to adoption by relatives" [Fam. Code former § 8714.5(a)]. Effective January 1, 2001, this law was changed. While still available when the adopting parents are relatives, the law was expanded to allow any adoptive parent of a dependent child to enter into a "postadoption contact agreement" with the child's birth relatives, including the child's birth parents [Fam. Code §§ former 8714.5, 8714.7 (Stats. 2000, ch. 930)]. As noted in the statement of legislative intent, "*some* adoptive children *may* benefit from either direct or indirect contact with birth relatives,

including the birth parent or parents, after being adopted [Fam. Code § former 8714.7(a), emphasis added (Stats. 2000, ch. 930, § 3)]. Effective January 1, 2004, these provisions were amended and renumbered, making the applicable provision *Fam. Code § 8616.5* (Stats. 2003, ch. 251). At the same time, provisions were enacted to allow postadoption contact agreements with the child's Indian tribe if the case is governed by the ICWA [*Fam. Code § 8620(f)* (Stats. 2003, ch. 469)]. These were added to *Fam. Code § 8616.5* the next year [*Fam. Code § 8616.5(b)(2)* (Stats. 2004, ch. 858)]. Thus, the breadth of potential postadoption contact agreements has greatly expanded from what was originally available.

Postadoption contact agreements are intended to ensure adopted children of an "achievable level of continuing contact" with birth relatives when that contact is beneficial to the child, and when the agreements are voluntarily entered into by the birth relatives and adoptive parents. Thus, these agreements cannot be forced on the adoptive parents or the birth relatives. They must be entered into voluntarily [*Fam. Code § 8616.5(a)*]. Postadoption contact agreements with the child's Indian tribe, when the case is an ICWA case, are also to be entered into and ordered when beneficial to the child [*Fam. Code § 8616.5(f)*].

This law does not provide for court-ordered open adoptions. Instead, it provides that nothing in California's adoption laws "shall be construed to prevent" adoptive parents from entering into an agreement with one or more of the child's birth relatives, including the birth parents, for postadoption privileges where the court finds at the time of the granting of the adoption petition that the agreement is in the child's best interest and voluntarily entered into [*Fam. Code § 8616.5(a)*]. Further, the law is clear that no subsequent failure of any of the parties to the adoption agreement to comply with that agreement or any modification thereof can serve as the basis for an order setting aside a decree of adoption, rescinding a relinquishment, or modifying an order terminating parental rights [*Fam. Code § 8616.5(k)*].

The child who is the subject of the adoption petition is to be considered a party to any adoption agreement. Where the child is 12 years of age or older, the child's written consent to the agreement and any subsequent modifications of the agreement is a "necessary condition" to the granting of the privileges contained in the agreement or modification, unless the court finds the agreement or modification is in the child's best interest. This finding, if made by the court, must be made by at least a preponderance of the evidence. If the child being adopted is a dependent of the juvenile court or a petition under *Welf. & Inst. Code § 300* has been filed regarding the child, the child must be represented by counsel "for purposes of consent to the kinship adoption agreement" [*Fam. Code § 8616.5(d)*].

The allowable provisions of a postadoption contact agreement are very limited. Such an agreement may only include one or more of the following [*Fam. Code § 8616.5(b)(2)(A)-(C)*]:

- provisions for visitation between the child being adopted and other birth relatives, including birth parents, siblings, and the child's Indian tribe if the case is an ICWA case;

- provisions for future contact between birth relatives, including birth parents and siblings, and the child's Indian tribe if the case is an ICWA case, with the child being adopted, the adoptive parents, or both; or

- provisions for the future sharing of information about the child.

No other provisions are authorized. Further, the law is clear that a postadoption contact agreement need not include all of these provisions, nor involve all of the child's relatives or the child's Indian tribe if the case is governed by the ICWA [*Fam. Code § 8616.5(b)*]. And, if the child does not have an existing relationship with the birth relative, the terms of the postadoption agreement "shall be limited to the sharing of information about the child" [*Fam. Code § 8616.5(b)(3)*].

The postadoption contact agreement must include in bold-type warnings that the adoption cannot be set aside due to the failure of any of the parties to follow through with the agreement, the validity of the adoption is not affected by a

disagreement between the parties regarding the agreement, and that the court will not consider a petition to change or enforce a postadoption contact agreement unless the petitioner has in good faith participated in or attempted to participate in some form of mediation or other dispute resolution proceedings to resolve the disagreement [*Fam. Code § 8616.5(e)*].

Where an adoptive parent has entered into a postadoption contact agreement with the birth parent, a copy of that agreement must be attached to the petition for adoption [*Fam. Code § 8714(c)*]. The adoption report prepared by the adoption agency must deal with the question of whether the adoption agreement is in the best interests of the child being adopted, and whether it was entered into voluntarily [*Fam. Code § 8715(c)*]. If, at the time the adoption petition is granted, the court finds the postadoption contact agreement has been entered into voluntarily and is in the child's best interest, the court entering the adoption decree may grant the postadoption privileges contained in the agreement [*Fam. Code § 8714.7(c)*].

Only the court that grants the petition of adoption shall have continuing jurisdiction to enforce the postadoption contact agreement it approved at the time of the adoption. The court must make a finding that the party petitioning for enforcement of the agreement participated, or attempted to participate, in good faith in dispute resolution prior to the filing of the petition for enforcement of the agreement. It must also make a finding that enforcement of the agreement is in the child's best interest. This court may utilize documentary evidence or offers of proof as the basis for its decision regarding enforcement of the agreement. It may not, however, order any further investigation or evaluation by any agency or individual unless it finds by clear and convincing evidence that the further inquiry "will not disturb the stability of the child's home to the detriment of the child" and that the child's best interest may be advanced or protected only by such inquiry. No evidentiary hearing or testimony is required for the court in such enforcement proceedings [*Fam. Code § 8616.5(f)*]. A postadoption contact agreement can be modified or terminated following similar procedures where there is a substantial change of circumstances or where all of the parties, including the child if at the time of the requested modification or termination the child is 12 years of age or older, have signed and filed a modified agreement with the court which granted the adoption petition [*Fam. Code § 8616.5(h)*]. No monetary damages may be awarded as a result of the filing of an action for enforcement of a postadoption contact agreement under this section [*Fam. Code § 8616.5(g)*], although costs and fees of litigation may be awarded in certain circumstances [*Fam. Code § 8616.5(i)*].

PRACTICE TIP:

Postadoption Contact Should be Approached Carefully. Postadoption contact agreements are a valuable tool in helping provide children with the stability of adoption while still maintaining contact with family and tribal members within the terms of the adoption agreement. They will only work, however, where all parties entering into such an agreement do so willingly and with the full intention of working together. Such agreements should not be pushed on any of the parties by social workers, attorneys, or the courts. To the extent that birth parents are urged to relinquish, submit to the termination of parental rights, or forego appeals in favor of a kinship adoption agreement when they do not truly desire to do so and potentially have a viable defense or appeal to the termination of rights, such agreements may later have a detrimental impact on family relationships and the child. Further, to the extent that adopting caretakers are urged to enter into such agreements to get parents to relinquish, submit to the termination of parental rights, or forego appeals when the adoptive parents do not truly desire to enter into such an agreement, such agreements may also later have a detrimental impact on family relationships and the child. Any decision to enter into a postadoption contact agreement should only be made after a full consideration by all of the parties of all of the issues involved. Moreover, any determination by a court that such an agreement is in the child's best interest and was entered into voluntarily should only be made after a full consideration of the totality of the circumstances. Not all postadoption contact will be in the best interest of the child. This is a very new area of the law and postadoption contact agreements should be approached with caution to ensure that all parties, including and especially the child, are truly served by such agreements.

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CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
N. Sealing Juvenile Court Records

28-328 California Forms of Pleading and Practice--Annotated § 328.199

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§ 328.199 Sealing Record

[1] Availability of Procedure

In any case in which a petition has been filed with a juvenile court to commence proceedings to adjudge a person a dependent child of the court, in any case in which a person is cited to appear before a probation officer or is taken before a probation officer by a police officer, or in any case in which a child is taken before any officer of a law enforcement agency, the person or the probation officer or social worker may petition the court for sealing of the records, including records of arrest, relating to the person's case, in the custody of the juvenile court and probation officer and any other agencies, including law enforcement agencies, and public officials as the petitioner alleges to have custody of such records [*Welf. & Inst. Code § 389(a)*].

For a form of application to seal juvenile court records, see *Ch. 329, Juvenile Courts: Delinquency Proceedings § 329.290*.

[2] Time for Filing Petition to Seal Records

Such a petition may be presented five years or more after the jurisdiction of the juvenile court has terminated as to the person or, in a case in which no petition is filed, five years or more after the person was cited to appear before a probation officer or was taken before a probation officer or was taken before any officer of a law enforcement agency or, in any case, at any time after the person has reached the age of 18 years [*Welf. & Inst. Code § 389(a)*].

[3] Determination of Petition to Seal Records

On receipt of a petition to seal records, the court notifies the district attorney of the county and the county probation officer. The district attorney, the county probation officer, and any other person having relevant evidence may testify at

the hearing on the petition. If the court finds that the individual has not been convicted of a felony or of any misdemeanor involving moral turpitude and that rehabilitation has been attained to the satisfaction of the court, it must order sealed all records, papers, and exhibits in the person's case in the custody of the juvenile court, including the juvenile court record, minute book entries, and entries on dockets and other records relating to the case in the custody of such other agencies and officials as are named in the order [*Welf. & Inst. Code § 389(a)*].

[4] Effect of Order Sealing Records

After an order to seal records has been given, the proceedings in the case are deemed never to have occurred and the person may properly reply accordingly to any inquiry about the events [*Welf. & Inst. Code § 389(a)*].

The court sends a copy of the order to each agency and official named in the order directing the agency to seal its records and to destroy them five years thereafter, and each agency and official is then required to seal the records, advise the court of its compliance, and seal the order for sealing of the records [*Welf. & Inst. Code § 389(a)*].

The person who is the subject of the records sealed may thereafter petition the superior court to permit inspection of the records by the persons named in the petition. Otherwise, except as discussed below in actions for defamation, the records may not be opened for inspection [*Welf. & Inst. Code § 389(a)*].

[5] Reopening of Sealed Records

In any action or proceeding based on defamation, a court, on showing of good cause, may order any records sealed to be opened and admitted into evidence. The records must be confidential and must be available for inspection only by the court, jury, parties, counsel for the parties, and any other person who is authorized by the court to inspect them. On the judgment in the action or proceeding becoming final, the court shall order the records resealed [*Welf. & Inst. Code § 389(b)*].

[6] Destruction of Sealed Records

Five years after a juvenile court record has been sealed, the court must order the destruction of the sealed juvenile court record unless for good cause the court determines that the juvenile court record must be retained. Any other agency in possession of sealed records must destroy its records five years after the records were ordered sealed [*Welf. & Inst. Code § 389(c)*].

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Wald and Woolverton, *Risk Assessment: The Emperor's New Clothes?* LXIX Child Welf., No. 6, 483 (1990) *Special Issue: Ethical Issues in the Legal Representation of Children*, 64 Fordham L. Rev. No. 4 (1996) *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded, 83 Calif. L. Rev. 1415 (1995)*

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§ 328.210 Federal Statutes

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§ 328.211 State Statutes

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Arnold-Kennick Juvenile Court Law. *Welf. & Inst. Code § 200*

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§ 328.212 California Rules of Court

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§ 328.213 Decisions

Overview of dependency proceedings. *In re Marilyn H. (1993) 5 Cal. 4th 295, 19 Cal. Rptr. 2d 544, 851 P.2d 826* ; *Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 19 Cal. Rptr. 2d 698, 851 P.2d 1307*

Civil Code and Code of Civil Procedure as not applying to dependency proceedings unless expressly made applicable. *In re Shelley J. (1998) 68 Cal. App. 4th 322, 328, 79 Cal. Rptr. 2d 922* ; *In re Chantal S. (1996) 13 Cal. 4th 196, 200, 51 Cal. Rptr. 2d 866, 913 P.2d 1075* ; *In re Jennifer R. (1993) 14 Cal. App. 4th 704, 711, 17 Cal. Rptr. 2d 759*

Provisions of Civil Code and Code of Civil Procedure that apply to special proceedings do apply to dependency proceedings if they are consistent with the overall goal of the dependency system. *In re David H. (2008) 165 Cal. App. 4th 1626, 1638-1639, 82 Cal. Rptr. 3d 81* ; *In re Claudia E. (2008) 163 Cal. App. 4th 627, 636, 77 Cal. Rptr. 3d 722* ; *In re Mark B. (2007) 149 Cal. App. 4th 61, 78-79, 56 Cal. Rptr. 3d 697*

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"Homeless" children, as defined by San Francisco Mayor's Criminal Justice Council, as falling within provisions of former *Welf. & Inst. Code § 300(a), (b)* (*now see Welf. & Inst. Code § 300(b)*). *69 Ops. Cal. Atty. Gen. 241, 243, 245 (1986)*

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28-328 California Forms of Pleading and Practice--Annotated § 328.220

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§ 328.220 State Statutes

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Initial investigation by social worker. *Welf. & Inst. Code § 328*

Obligations of social worker on application by affidavit to commence dependency proceedings. *Welf. & Inst. Code § 329*

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Review of social worker's decision not to file petition commencing dependency proceedings. *Welf. & Inst. Code § 331*

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§ 206

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[3] Temporary Custody of Child

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Temporary custody of child by peace officer without warrant. *Welf. & Inst. Code § 305*

Temporary custody of child by social worker in county welfare department. *Welf. & Inst. Code § 306*

Temporary custody of child by Indian social worker of tribe that has entered into agreement with State Department of Social Services pursuant to *Welf. & Inst. Code § 10553.1* concerning child welfare services or foster care payments. *Welf. & Inst. Code § 306(a)*

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Requirement that parent, guardian, or relative be informed that child has been taken into custody and that written statement is available explaining parent's or guardian's procedural rights and preliminary stages of dependency investigation and hearing. *Welf. & Inst. Code § 307.4*

Peace officer as authorized to take child in temporary custody to community service program for abused or neglected children. *Welf. & Inst. Code § 307.5*

Notification of parents that child has been taken into temporary custody. *Welf. & Inst. Code § 308(a)*

Right of child ten years of age or older to make completed telephone calls to parent and attorney after being taken into temporary custody. *Welf. & Inst. Code § 308(b)*

Procedure upon delivery of child to social worker. *Welf. & Inst. Code § 309*

Assessment of relatives and nonrelative extended family members for temporary placement of child. *Welf. & Inst. Code § 309(d)*

Written promise to appear as condition for release by social worker. *Welf. & Inst. Code § 310*

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Child of a dependent minor is not at risk solely because of the age, dependent status, or foster care status of the parent. *Welf. & Inst. Code § 300*

Teen Parents in Foster Care Act. *Welf. & Inst. Code §§ 16002.5, 16004.5*

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§ 328.221 California Rules of Court

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§ 328.230 State Statutes

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Right to competent counsel. *Welf. & Inst. Code § 317.5(a)*

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Guardian ad litem for child. *Welf. & Inst. Code § 326.5*

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§ 328.231 California Rules of Court

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Relatives. *Cal. Rules of Ct., Rule 5.502(26)*

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Court-Appointed Special Advocates. *Cal. Rules of Ct., Rule 5.655*

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28-328 California Forms of Pleading and Practice--Annotated § 328.232

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§ 328.232 Decisions

[1] Biological and Presumed Fathers and Mothers

A *Kelsey S.* father is not a presumed father. *In re Vincent M. (2008) 161 Cal. App. 4th 943, 957, 74 Cal. Rptr. 3d 755*

Parent whose parental rights are terminated cannot later become a presumed parent by receiving the child into her home and holding the child out as her own. A request for presumed parent in those circumstances would be an impermissible collateral attack on the termination of parental rights. *In re Cody B. (2007) 153 Cal. App. 4th 1004, 1006-1007, 63 Cal. Rptr. 3d 652*

Biological father who is not presumed father is not "parent" entitled to child custody on removal from custodial parent under *Welf. & Inst. Code § 361.2*. *In re Zacharia D. (1993) 6 Cal. 4th 435, 452-453, 24 Cal. Rptr. 2d 751, 862 P.2d 751*

Declaration of paternity equivalent of presumption of paternity. *In re Liam L. (2000) 84 Cal. App. 4th 739, 743-747, 101 Cal. Rptr. 2d 13*

Presumption that man is father of child is not necessarily rebutted by evidence the man is not the biological father. Court must determine whether it is an appropriate action in which to allow the presumption to be rebutted by evidence of nonpaternity. *In re Jesusa V. (2004) 32 Cal. 4th 588, 10 Cal. Rptr. 3d 205, 85 P. 3d 2* ; *In re Nicholas H. (2002) 28 Cal. 4th 56, 120 Cal. Rptr. 2d 146, 46 P.3d 932*

Paternity statutes applicable to determinations of maternity, and presumption that woman is mother of child is not

necessarily rebutted by evidence the woman is not the biological mother. *In re Salvador M. (2003) 111 Cal. App. 4th 1353, 4 Cal. Rptr. 3d 705* ; *In re Karen C. (2002) 101 Cal. App. 4th 932, 124 Cal. Rptr. 2d 677*

Case law requiring hearing for appointment of guardian ad litem is not retroactive. Contra *Costa County Children and Family Services Bureau v. Superior Court (2004) 117 Cal. App. 4th 111, 118-119, 11 Cal. Rptr. 3d 459*

[2] Guardian Ad Litem

Failure to follow due process procedures for appointment of guardian ad litem for parent in dependency proceedings is not structural error, but is subject to harmless error analysis. *In re James F. (2008) 42 Cal. 4th 901, 905, 70 Cal. Rptr. 3d 358, 174 P. 3d 180*

Appointment of guardian ad litem pursuant to *Code Civ. Proc. §§ 372* and *373* as required for developmentally disabled or mentally ill parent who is incapable of understanding juvenile dependency proceedings involving his or her child. *In re Lisa M. (1986) 177 Cal. App. 3d 915, 918-919, 225 Cal. Rptr. 7*

Standard for appointment of guardian ad litem for parent as that found in *Penal Code § 1367*. *In re Christina B. (1993) 19 Cal. App. 4th 1441, 1449-1451, 23 Cal. Rptr. 2d 918*

Standard for appointment of guardian ad litem for parent will usually be that found in *Penal Code § 1367*, but guardian ad litem for parent should also be appointed if standards of *Probate Code § 1801* is met. *In re Sara D. (2001) 87 Cal. App. 4th 661, 667, 104 Cal. Rptr. 2d 909*

If parent objects to appointment of guardian ad litem for parent, court must conduct a hearing at which parent may be heard before making the appointment. *In re Joann E. (2003) 104 Cal. App. 4th 347, 128 Cal. Rptr. 2d 189* ; *In re Sara D. (2001) 87 Cal. App. 4th 661, 104 Cal. Rptr. 2d 909*

Court must appoint guardian ad litem for child parent. *In re D.D. (2006) 144 Cal. App. 4th 646, 50 Cal. Rptr. 3d 578*

[3] De Facto Parents

Grandmother who had cared for children and amply provided for their needs as being entitled to de facto parent status. *In re Ashley P. (1998) 62 Cal. App. 4th 23, 72 Cal. Rptr. 2d 383*

Nonparent who commits sexual or other serious physical abuse on child in his or her charge as barred from participating in that child's dependency proceeding as a "de facto parent." *In re Kieshia E. (1993) 6 Cal. 4th 68, 78-79, 23 Cal. Rptr. 2d 775, 859 P.2d 1290*

Nonparent whose conduct contributes to grounds for dependency proceeding falls within the *Kieshia E.* prohibition for de facto parent status. *In re Merrick V. (2004) 122 Cal. App. 4th 235, 257, 19 Cal. Rptr. 3d 490* ; *In re Jacob E. (2004) 121 Cal. App. 4th 909, 920, 18 Cal. Rptr. 3d 15* ; *In re Leticia S. (2001) 92 Cal. App. 4th 378, 382, 111 Cal. Rptr. 2d 810*

Conduct of grandparent who took children and kept them in hiding for purpose of allowing abusing parent free access falls within the *Kieshia E.* prohibition for de facto parent status. *In re Michael R. (1998) 67 Cal. App. 4th 150, 156-158, 78 Cal. Rptr. 2d 842*

De facto parent status as not terminating by operation of law or by any other automatic mechanism except when dependency itself if terminated; rather, to terminate status, department must file noticed motion to terminate based on

change of circumstances. *In re Patricia L. (1992) 9 Cal. App. 4th 61, 67, 11 Cal. Rptr. 2d 631*

Juvenile court as properly granting continuing visitation rights to de facto parent. *In re Robin N. (1992) 7 Cal. App. 4th 1140, 1141, 1146-1147, 9 Cal. Rptr. 2d 512*

Juvenile court as lacking legislative authority to order de facto parent to comply involuntarily with reunification or child welfare requirements. *In re Jody R. (1990) 218 Cal. App. 3d 1615, 1628, 267 Cal. Rptr. 746*

De facto parent status as determined at permanency planning hearing by preponderance of evidence because grant of de facto parent status not automatic grant of custody and neither severs parent-child relationship nor affects parents' due process interests in liberty or privacy. *In re Joshuia S. (1988) 205 Cal. App. 3d 119, 122, 125, 252 Cal. Rptr. 106*

De facto parents with no other legal or blood relation to dependent child as not having same right to family reunification services under *Welf. & Inst. Code § 366.2(e)* as parents or guardians; denial of reunification services as not violating de facto parents' due process rights. *In re Jamie G. (1987) 196 Cal. App. 3d 675, 679, 684, 241 Cal. Rptr. 869*

Juvenile court as abusing discretion in summary refusal to permit foster parent to participate in status review hearing, because foster parent may have standing as de facto parent. *Christina K. v. Superior Court (1986) 184 Cal. App. 3d 1463, 1466-1469, 229 Cal. Rptr. 564*

Participation of de facto parents, such as foster parents, as not restricted to limited role of amicus curiae; such persons as permitted to appear as parties to assert and protect their own interests in companionship, care, custody, and management of child. *Katzoff v. Superior Court (1976) 54 Cal. App. 3d 1079, 1084, 127 Cal. Rptr. 178*

[4] Relatives

Participation by grandparent or other close blood relative in permanency planning hearing as permitted under prior dependency laws, although de facto parent status is lacking, if actions in undertaking participation suggest to court that it would profit by hearing his or her views as to child's best interests. *Charles S. v. Superior Court (1985) 168 Cal. App. 3d 151, 156-157, 214 Cal. Rptr. 47*

[5] Guardians

Process for initiating hearing to terminate probate guardianship in the juvenile court involves two steps: a recommendation to the juvenile court to terminate the probate guardianship; and the juvenile court ordering the appropriate agency or counsel to file a motion pursuant to *Welf. & Inst. Code § 728*. *In re Angel S. (2007) 156 Cal. App. 4th 1202, 1207, 67 Cal. Rptr. 3d 792*

[6] Right to Counsel

Indigent parent's due process right to appointment of attorney in proceeding to terminate parental rights as determined on case-by-case basis. *Lassiter v. Department of Social Services (1981) 452 U.S. 18, 31, 101 S. Ct. 2153, 68 L. Ed. 2d 640*

Welf. & Inst. Code § 318 as permitting district attorney to act as prosecutor of parents and as appointed counsel for children without conflict of interest per se. *In re Albert B. (1989) 215 Cal. App. 3d 361, 382-383, 263 Cal. Rptr. 694*

Petitioning county agency as not required to be represented by counsel unless both conditions of *Welf. & Inst. Code § 318.5* are met. *In re Jessica B. (1989) 207 Cal. App. 3d 504, 513, 254 Cal. Rptr. 883*

Parent as having no standing to claim that petitioning agency has been denied effective assistance of counsel. *In re Jessica B. (1989) 207 Cal. App. 3d 504, 512-513, 254 Cal. Rptr. 883*

Counsel for sibling group of dependent children as having conflict due to differing circumstances and possible positions of children facing *Welf. & Inst. Code § 366.26* hearing in light of substantial interference with a sibling relationship exception to the termination of parental rights. *Carroll v. Superior Court (2002) 101 Cal. App. 4th 1423, 124 Cal. Rptr. 2d 891*

Standards for conflict of counsel in the representation of dependent sibling groups. *In re Celine R. (2003) 31 Cal. 4th 45, 1 Cal. Rptr. 3d 432, 71 P.3d 787*

Attorney's failure to contact alleged father, take steps to seek to establish his paternity, as he desired, or to challenge the lack of notice to the alleged father prevented him from seeking or attaining biological or presumed father status in the dependency case and was ineffective assistance of counsel. *In re O.S. (2002) 102 Cal. App. 4th 1402, 1407, 1410-1412, 126 Cal. Rptr. 2d 571*

Child previously represented by counsel of own choice as required to be permitted to continue representation unless court first determines that child is incapable of choosing or has not chosen competent counsel. *Akkiko M. v. Superior Court (1985) 163 Cal. App. 3d 525, 527, 530-531, 209 Cal. Rptr. 568*

In counties in which there is public defender, Welfare and Institutions Code as authorizing appointment and compensation of private counsel for persons financially unable to employ counsel after public defender has refused to represent them in juvenile proceedings. *In re J. G. L. (1974) 43 Cal. App. 3d 447, 452-453, 117 Cal. Rptr. 799*

Appointment of and payment for counsel for indigent appealing decision from juvenile court as authorized. *In re Simeth (1974) 40 Cal. App. 3d 982, 985, 115 Cal. Rptr. 617*

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§ 328.240 State Statutes

Assessment of suitability of relative or nonrelative extended family member for temporary placement. *Welf. & Inst. Code § 309*

Time limitation for detention hearing. *Welf. & Inst. Code § 315*

Initial explanation by court at detention hearing. *Welf. & Inst. Code § 316*

Duty of court to inquire regarding identity and address of all presumed or alleged fathers. *Welf. & Inst. Code § 316.2*

Appointment of counsel. *Welf. & Inst. Code § 317*

Representation of petitioner by county counsel or district attorney. *Welf. & Inst. Code § 318.5*

Criteria for release or detention at detention hearing. *Welf. & Inst. Code § 319*

Request for rehearing of detention proceeding when no parent or guardian is present and no parent or guardian has had actual notice of hearing. *Welf. & Inst. Code § 321*

Request for rehearing for presentation of a prima facie case. *Welf. & Inst. Code § 321*

Motion for continuance. *Welf. & Inst. Code § 322*

Order for child or parent or guardian to appear. *Welf. & Inst. Code § 323*

Transfer of child between counties. *Welf. & Inst. Code § 324*

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28-328 California Forms of Pleading and Practice--Annotated § 328.241

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§ 328.241 California Rules of Court

Inquiry and notice for possible Indian child. *Cal. Rules of Ct., Rule 5.481*

Service of petition and notice of initial or detention hearing. *Cal. Rules of Ct., Rule 5.667*

Language of notice. *Cal. Rules of Ct., Rule 5.667(b)*

Explanation of proceedings at commencement of initial or detention hearing. *Cal. Rules of Ct., Rule 5.668*

Time limits for filing petition and setting initial hearing if child is not in custody. *Cal. Rules of Ct., Rule 5.670(a)*

Time limits for filing petition if child is taken into custody. *Cal. Rules of Ct., Rule 5.670(b)*

Detention of child in medical facility. *Cal. Rules of Ct., Rule 5.670(c)*

Time of detention hearing. *Cal. Rules of Ct., Rule 5.670(d)*

Detention hearings pursuant to warrants issued by juvenile court, transfers between counties, and changes of placement under juvenile court order. *Cal. Rules of Ct., Rule 5.670(e)*

Time limits for setting jurisdiction hearing. *Cal. Rules of Ct., Rule 5.670(f)*

Visitation orders pending jurisdiction hearing. *Cal. Rules of Ct., Rule 5.670(g)*

Continuances. *Cal. Rules of Ct., Rule 5.672*

Conduct of initial or detention hearing. *Cal. Rules of Ct., Rule 5.674*

Admission, no contest, or submission. *Cal. Rules of Ct., Rule 5.674(a)*

General Conduct. *Cal. Rules of Ct., Rule 5.674(b)*

Examination by court and receipt of evidence. *Cal. Rules of Ct., Rule 5.674(c)*

Rights of child, parent, or guardian. *Cal. Rules of Ct., Rule 5.674(d)*

Requirements for detention. *Cal. Rules of Ct., Rule 5.676(a)*

Evidence to be considered by court. *Cal. Rules of Ct., Rule 5.676(b)*

Findings in support of detention. *Cal. Rules of Ct., Rule 5.678(a)*

Factors to be considered as grounds for detention. *Cal. Rules of Ct., Rule 5.678(b)*

Findings by the court regarding reasonable efforts. *Cal. Rules of Ct., Rule 5.678(c)*

Order vesting custody with the social services agency. *Cal. Rules of Ct., Rule 5.678(d)*

Detention alternatives. *Cal. Rules of Ct., Rule 5.678(e)*

Rehearing of detention hearing. *Cal. Rules of Ct., Rule 5.680*

Prima facie hearings for further evidence. *Cal. Rules of Ct., Rule 5.680(d)*

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28-328 California Forms of Pleading and Practice--Annotated § 328.242

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§ 328.242 Decisions

Dependency petition is not to be dismissed merely because court finds a prima facie showing of dependency jurisdiction has not been made. *Los Angeles County Dept. of Children & Family Serv. v. Super. Ct. (2008) 162 Cal. App. 4th 1408, 1418, 77 Cal. Rptr. 3d 52*

Prima facie case for removal must be made by relevant evidence. *In re Raymond G. (1991) 230 Cal. App. 3d 964, 972, 281 Cal. Rptr. 625*

Failure of social services department to file petition in a timely fashion does not require juvenile court to release the child at detention hearing if detention is warranted. *Los Angeles County Dept. of Children's Services v. Superior Court (1988) 200 Cal. App. 3d 505, 509, 246 Cal. Rptr. 150*

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28-328 California Forms of Pleading and Practice--Annotated §§ 328.243-328.249

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[Reserved]

§§ 328.243[Reserved]

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28-328 California Forms of Pleading and Practice--Annotated § 328.250

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§ 328.250 State Statutes

Jurisdiction requirements for the declaration that a child is a dependent child of the court. *Welf. & Inst. Code § 300*

Purpose of dependency proceedings. *Welf. & Inst. Code § 300.2*

Assumption of jurisdiction over child in custody of one or both parents. *Welf. & Inst. Code § 302*

Retention of jurisdiction over dependent children. *Welf. & Inst. Code § 303*

Commencement of proceeding by filing petition. *Welf. & Inst. Code § 325*

Child Abuse Prevention and Treatment Act (CAPTA) guardian ad litem for child. *Welf. & Inst. Code § 326.5*

Venue for dependency proceedings. *Welf. & Inst. Code § 327*

Time limitations for setting of jurisdictional hearing. *Welf. & Inst. Code § 334*

Issuance of citation. *Welf. & Inst. Code § 338*

Issuance of warrant for arrest. *Welf. & Inst. Code § 339*

Issuance of warrant for protective custody of child. *Welf. & Inst. Code § 340*

Issuance of subpoenas. *Welf. & Inst. Code § 341*

Child and any person entitled to notice of hearing as entitled to be present at jurisdictional hearing. *Welf. & Inst. Code § 349*

Judge of juvenile court as controlling all proceedings with a view to ascertaining jurisdictional facts of all information relative to the present condition and future welfare of the child in an informal, nonadversary atmosphere, except when there is a contested issue of fact or law. *Welf. & Inst. Code § 350*

Provisions for continuance. *Welf. & Inst. Code § 352*

Initial explanation by judge as to allegations, nature of hearings, its procedures and possible consequences. *Welf. & Inst. Code § 353*

Provision for ascertaining need for and appointment of counsel. *Welf. & Inst. Code § 353*

Informing dependent child of right to modify order or terminate jurisdiction. *Welf. & Inst. Code § 353.1*

Evidence and proof at jurisdictional proceedings including receipt of social studies. *Welf. & Inst. Code § 355*

Presumptions affecting the burden of producing evidence on the issue of jurisdiction. *Welf. & Inst. Code § 355.1*

Findings and orders as to jurisdictional allegations. *Welf. & Inst. Code § 356*

Jurisdiction to dismiss petition or set aside findings. *Welf. & Inst. Code § 390*

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28-328 California Forms of Pleading and Practice--Annotated § 328.251

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§ 328.251 California Rules of Court

[1] Time Limitations

Time limitations for setting jurisdiction hearing. *Cal. Rules of Ct., Rule 5.670(f)*

[2] No Contest or Submission

Right to plead no contest or submit jurisdictional determination to court and waive further jurisdictional hearing. *Cal. Rules of Ct., Rule 5.682(e)*

[3] Admission of Allegations of Petition

Prerequisites to acceptance of admission of petition. *Cal. Rules of Ct., Rule 5.682(c)*

Requirement that admission be made personally by parent or guardian. *Cal. Rules of Ct., Rule 5.682(d)*

Required findings on acceptance by court of admission, plea of no contest, or submission on reports. *Cal. Rules of Ct., Rule 5.682(f)*

[4] Conduct of Hearing

Explanation of petition at jurisdiction hearing. *Cal. Rules of Ct., Rule 5.682(a)*

Advice by court of trial rights of parent or guardian. *Cal. Rules of Ct., Rule 5.682(b)*

When contested hearing must be held. *Cal. Rules of Ct., Rule 5.684(a)*

[5] Continuance of Hearing

Limitations on continuances. *Cal. Rules of Ct., Rule 5.550(a)*

Continuance pending disposition hearing. *Cal. Rules of Ct., Rule 5.686(a)*

Continuance when nonreunification requested. *Cal. Rules of Ct., Rule 5.686(b)*

[6] Discovery and Evidentiary Rules

Prehearing discovery. *Cal. Rules of Ct., Rule 5.546*

Privilege against self-incrimination. *Cal. Rules of Ct., Rule 5.548(a)*

Authority of judge to grant immunity. *Cal. Rules of Ct., Rule 5.548(b)*

Request for immunity. *Cal. Rules of Ct., Rule 5.548(d)*

No immunity for perjury, false swearing, or contempt in juvenile court proceeding. *Cal. Rules of Ct., Rule 5.548(e)*

Admissibility of evidence. *Cal. Rules of Ct., Rule 5.684(b)*

Admissibility of social worker's report. *Cal. Rules of Ct., Rule 5.684(c)*

Objections to and admissibility of hearsay in social worker's report. *Cal. Rules of Ct., Rule 5.684(d)*

Inapplicable privileges. *Cal. Rules of Ct., Rule 5.684(e)*

[7] Posthearing Findings and Procedures

Court findings when allegations of petition are true. *Cal. Rules of Ct., Rule 5.684(f)*

Disposition if allegations found to be true. *Cal. Rules of Ct., Rule 5.684(g)*

Court findings when allegations of petition are not proved; dismissal. *Cal. Rules of Ct., Rule 5.684(h)*

Release or detention of child during continuance pending disposition hearing. *Cal. Rules of Ct., Rule 5.686(c)*

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28-328 California Forms of Pleading and Practice--Annotated § 328.252

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.252 Decisions

[1] Petition

Once a dependency petition is filed, it may not be voluntarily dismissed by the petitioner should further investigation show a lack of grounds. The petition may be dismissed only by the juvenile court after an evidentiary hearing to determine whether dismissal is in the child's best interest. *Allen M. v. Superior Court (1992) 6 Cal. App. 4th 1069, 1073-1075, 8 Cal. Rptr. 2d 259*

Bare recital of conclusive words of *Welf. & Inst. Code § 300* as insufficient notice of specific facts on which petition is based. *In re Jeremy C. (1980) 109 Cal. App. 3d 384, 397, 167 Cal. Rptr. 283*

To satisfy due process requirements, petition to commence proceedings in juvenile court as required to contain concise statement of facts, separately stated, to support conclusion that child on whose behalf petition is being brought is person within definition of each section and subdivision under which proceedings are being instituted. *In re J. T. (1974) 40 Cal. App. 3d 633, 639, 115 Cal. Rptr. 553*

Motion akin to a demurrer must be made at trial court or it is waived for appeal. *In re S.O. (2002) 103 Cal. App. 4th 453, 459-460, 126 Cal. Rptr. 2d 554* ; *In re James C. (2002) 104 Cal. App. 4th 470, 481, 128 Cal. Rptr. 2d 270* ; *In re Shelley J. (1998) 68 Cal. App. 4th 322, 328, 79 Cal. Rptr. 2d 922* ; *but see In re Alysha S. (1996) 51 Cal. App. 4th 393, 397, 58 Cal. Rptr. 2d 494*

[2] Presumptions

Parent being a registered sex offender presumptive for dependency jurisdiction under *Welf. & Inst. Code § 355.1(d). In re John S. (2001) 88 Cal. App. 4th 1140, 1145, 106 Cal. Rptr. 2d 476*

Filing of dependency petition based on parent's alleged substance abuse as not creating "conclusive presumption of unfitness" when parent is entitled to, and does, present evidence in attempt to demonstrate that he or she can adequately care for child. *In re Stephen W. (1990) 221 Cal. App. 3d 629, 640-641, 271 Cal. Rptr. 319*

Child born under influence of dangerous drugs ingested by mother as born with detrimental condition, thereby creating presumption that child was person described by former *Welf. & Inst. Code § 300(a)* (*now cf. Welf. & Inst. Code § 300(b)*). *In re Troy D. (1989) 215 Cal. App. 3d 889, 897, 263 Cal. Rptr. 869*

[3] Due Process Rights of Parents

At jurisdiction hearing the parent's attorney has right to cross-examine preparer of report despite absence of parent. *In re Dolly D. (1995) 41 Cal. App. 4th 440, 444-446, 48 Cal. Rptr. 2d 691*

A parent who admits the allegations of the petition at the jurisdiction hearing waives any objections based on inadequate notice of the facts at issue. Thus, in one such case a court held that a mother received adequate notice of the grounds for removal of her son, even though "new" facts were alleged at the disposition hearing, because those facts merely explained the ultimate fact alleged in the original petition. *In re Rodger H. (1991) 228 Cal. App. 3d 1174, 1181-1182, 279 Cal. Rptr. 406*

Court as not erring when it considered transcript of child's in camera testimony in prior proceedings on counsels' stipulation without extracting personal waiver of parents' constitutional rights. *In re Kerry O. (1989) 210 Cal. App. 3d 326, 334, 258 Cal. Rptr. 448*

Parent who initially appeared at dependency proceedings with appointed counsel and thereafter was unable to be located as receiving adequate notice of proceedings when, in addition to mailing notice to her last known address, county made "due diligence" efforts, and court authorized her counsel to hire investigator to locate her. *In re Larry P. (1988) 201 Cal. App. 3d 888, 896-897, 247 Cal. Rptr. 472*

Parent's interest in companionship, care, custody, and management of child as compelling and as giving rise to requirement of adequate notice and opportunity to be heard before state may deprive parent of this interest. *In re Larry P. (1988) 201 Cal. App. 3d 888, 893, 247 Cal. Rptr. 472*

Parent as having no express constitutional right to physically confront child during civil dependency hearing; when child testifies outside parent's presence in such hearing, parent's due process right to confrontation as protected by his or her counsel's confrontation of child. *In re Mary S. (1986) 186 Cal. App. 3d 414, 419, 422-423, 230 Cal. Rptr. 726*

Juvenile court as having duty under *Welf. & Inst. Code § 353* to continue jurisdiction hearing to preserve rights to notice and hearing of out-of-state parent who did not appear and who had no contact with appointed counsel, even though appointed counsel did not contest issue of dependency or request continuance. *In re C.P.(1985) 165 Cal. App. 3d 270, 271, 273-274, 211 Cal. Rptr. 498*

Notice of specific facts on which removal of child from parental custody is predicated as fundamental to due process. *In re Jeremy C. (1980) 109 Cal. App. 3d 384, 397, 167 Cal. Rptr. 283*

Right to notice of allegations on which deprivation of custody is predicated and to notice of time and place of hearing

as fundamental to due process; parent as entitled to be apprised of charges to be met in order to prepare case and to be given opportunity to be heard and to cross examine accusers. *In re Neal D. (1972) 23 Cal. App. 3d 1045, 1048, 100 Cal. Rptr. 706*

[4] No Contest Plea or Submission on Reports

Parent who submits on the recommendations in the social worker's report waives the right to challenge on appeal the sufficiency of the evidence to support the findings and orders which the court makes in accordance with those recommendations. *In re Richard K. (1994) 25 Cal. App. 4th 580, 587-590, 30 Cal. Rptr. 2d 575*

Parent or guardian who admits or pleads no contest to allegations in petition as waiving right to challenge on appeal the legal applicability of *Welf. & Inst. Code § 300* to his or her conduct. *In re Troy Z. (1992) 3 Cal. 4th 1170, 1181, 13 Cal. Rptr. 2d 724, 840 P.2d 266*

Parent or guardian who submits jurisdictional determination to court as not waiving right to appeal jurisdictional finding. *In re Tommy E. (1992) 7 Cal. App. 4th 1234, 1237-1239, 9 Cal. Rptr. 2d 402*

[5] Discovery and Evidentiary Issues

[a] Discovery Policies and Procedures

Trial court as not abusing discretion in denying parent's discovery request for matter not available to petitioner in dependency proceeding, especially in view of lack of particularized claim showing how matter was relevant to proceeding. *In re Dolly A. (1986) 177 Cal. App. 3d 195, 204, 222 Cal. Rptr. 741*

[b] Privileges

Court's exclusion of testimony of psychologist who examined child upheld when child's attorney had not been contacted and had not given permission for parents to have child examined. *In re Katrina W. (1994) 31 Cal. App. 4th 441, 447-448, 37 Cal. Rptr. 2d 7*

Parent's access to psychotherapist's records and testimony as denied by analogy to former *Health & Safety Code § 1795.14(a)(2)* (*now see Health & Safety Code § 123115(a)(2)*) if disclosure will harm child's therapeutic relationship or have detrimental effect on child's psychological well-being. *In re Daniel C.H. (1990) 220 Cal. App. 3d 814, 827-828, 269 Cal. Rptr. 624*

Molested child as entitled to assert psychotherapist-patient privilege against parent. *In re Daniel C.H. (1990) 220 Cal. App. 3d 814, 829, 269 Cal. Rptr. 624*

Juvenile court referral for psychiatric counseling after dependency finding as not equivalent of court-ordered examination, and as therefore not excepted by *Evid. Code § 1017(a)* from psychotherapist-patient privilege. *In re Eduardo A. (1989) 209 Cal. App. 3d 1038, 1041, 261 Cal. Rptr. 68*

In dependency proceeding, statements by four-year-old child to psychotherapist as within statutory exception of *Evid. Code § 1027* to psychotherapist-patient privilege when child had been sexually molested by mother's boyfriend and therapist reasonably believed that disclosure was in best interests of child; mother's statements to therapist as also not protected by psychotherapist-patient privilege pursuant to exception contained in *Evid. Code § 1024*, permitting disclosure of otherwise privileged communication to prevent danger to another, when mother defended boyfriend's

conduct and there was basis for concluding that mother's mental or emotional condition endangered child. *In re Courtney S. (1982) 130 Cal. App. 3d 567, 574-575, 181 Cal. Rptr. 843*

Juvenile court may prospectively order the child's therapist to provide reports to the court, but the order must be limited in scope to what is necessary and must preserve the confidentiality of details and statements made by the child in therapy. *In re Kristine W. (2001) 94 Cal. App. 4th 521, 528-529, 114 Cal. Rptr. 2d 369* ; *In re Eduardo A. (1989) 209 Cal. App. 3d 1038, 1044, 261 Cal. Rptr. 68*

Juvenile court may retroactively order child's therapist to reveal information otherwise protected by psychotherapist-patient privilege, but the order must be limited in scope to that which is needed and must preserve the confidentiality of details and statements made by the child in therapy. *In re Mark L. (2001) 94 Cal. App. 4th 573, 584, 114 Cal. Rptr. 2d 499* ; *In re Pedro M. (2000) 81 Cal. App. 4th 550, 554, 96 Cal. Rptr. 2d 839*

[c] Children as Witnesses

Truthful child, who does not understand duty to testify truthfully, as incompetent to testify. *In re Crystal J. (1990) 218 Cal. App. 3d 596, 602, 267 Cal. Rptr. 105*

Improved procedure for determining if child understands difference between truth and a lie, and understands the duty to testify truthfully. Lyon, *Child Witnesses and the Oath*, in Children's Testimony: A Handbook of Psychological Research and Forensic Practice (Westcott et al., edits., 2002) pp. 244-260; Lyon, *Child Witnesses and the Oath: Empirical Evidence*, 73 S. Cal. L. Rev. 1017 (2000); Lyon & Saywitz, *Young Maltreated Children's Competence to Take the Oath*, 3(1) Applied Developmental Science 16 (1999)

[d] Hearsay

[i] Child's Conduct or Statements

Child dependency hearsay exception upheld based on finding of reliability, but if child is unavailable to testify corroboration is required. *In re Cindy L. (1997) 17 Cal. 4th 15, 69 Cal. Rptr. 2d 803, 947 P.2d 1340*

Court is allowed to receive out-of-court statements of a child after finding of reliability under child dependency hearsay exception. *In re Carmen O. (1994) 28 Cal. App. 4th 908, 921, 33 Cal. Rptr. 2d 848*

Two-year-old child's statement regarding sexual assault made more than 10 minutes after assault as spontaneous declaration admissible under *Evid. Code § 1240* in juvenile wardship proceeding and as not violating confrontation right. *In re Damon H. (1985) 165 Cal. App. 3d 471, 475-476, 478, 211 Cal. Rptr. 623*

In juvenile dependency proceeding in which father's sexual molestation of three-year-old daughter was alleged, child's act of recoiling at mention of father viewed by child psychiatrist as nonassertive conduct and not hearsay, and as admissible as some evidence that father was molester, and as circumstantial evidence that child was afraid of father. *In re Cheryl H. (1984) 153 Cal. App. 3d 1098, 1128, 200 Cal. Rptr. 789*

In juvenile dependency proceeding in which father's sexual molestation of three-year-old daughter was alleged, child's out-of-court statement that father was abuser as inadmissible hearsay on issue of whether father actually committed acts but as admissible hearsay on issue of daughter's state of mind and desirability of permitting father continued access to child. *In re Cheryl H. (1984) 153 Cal. App. 3d 1098, 1128, 200 Cal. Rptr. 789*

In juvenile dependency proceeding in which father's sexual molestation of three-year-old daughter was alleged, child's

conduct with anatomically correct dolls during play therapy viewed by child psychiatrist as nonassertive conduct and not hearsay, and as relevant circumstantial evidence tending to prove allegation of molestation and as supplying partial basis for psychiatrist's expert opinion that molestation had occurred. *In re Cheryl H. (1984) 153 Cal. App. 3d 1098, 1126-1127, 200 Cal. Rptr. 789*

Testimony that child complained to witness of parent's sexual conduct with child as admissible under "complaint doctrine" exception to hearsay rule. *In re Marianne R. (1980) 113 Cal. App. 3d 423, 427, 169 Cal. Rptr. 848*

[ii] Third Party's Statements

In juvenile dependency proceeding in which child eventually removed from mother's custody, tape-recorded admission by mother's boyfriend at time of his arrest on child molestation charges as admissible as declaration against penal interest (*see Evid. Code § 1230*) and as relevant to show mother's knowledge of molestation, as well as duration and extent thereof. *In re Courtney S. (1982) 130 Cal. App. 3d 567, 574, 181 Cal. Rptr. 843*

[e] Criminal Proceedings and Related Issues

Immunity provided a parent by *Welf. & Inst. Code § 355.1(f)* is not full use and derivative use immunity, and thus parent cannot be compelled to testify if he or she invokes *Fifth Amendment* privilege to remain silent. *In re Brenda M. (2008) 160 Cal. App. 4th 772, 773-774, 72 Cal. Rptr. 3d 686* ; *In re Mark A. (2007) 156 Cal. App. 4th 1124, 1128-1129, 68 Cal. Rptr. 3d 106*

Collateral estoppel as not applying to bar criminal prosecution for child abuse when juvenile court has already determined in dependency proceedings that child abuse had not been proven; general collateral estoppel policy considerations in *Lucido v. Superior Court (1990) 51 Cal. 3d 335, 272 Cal. Rptr. 767, 795 P.2d 1223* require result different than that reached in earlier case of *Lockwood v. Superior Court (1984) 160 Cal. App. 3d 667, 206 Cal. Rptr. 785* . *People v. Percifull (1992) 9 Cal. App. 4th 1457, 1461-1464, 12 Cal. Rptr. 2d 331*

Evidence of nonfinal criminal conviction may not be used as evidence in dependency proceeding. *In re L. S. (1987) 189 Cal. App. 3d 407, 412-415, 234 Cal. Rptr. 508* , *overruled by Principal Life Ins. Co. v. Peterson (2007) 156 Cal. App. 4th 676*

Parent's testimony at dependency proceedings and statements made during court-ordered therapy are afforded use immunity when the parent is involved simultaneously in criminal child abuse proceedings and dependency proceedings. *In re Jessica B. (1989) 207 Cal. App. 3d 504, 520-521, 254 Cal. Rptr. 883*

Court has authority to order parent to testify in dependency proceedings despite assertion of privilege against self-incrimination due to the use immunity given parents by statute. *In re Amos L. (1981) 124 Cal. App. 3d 1031, 1039, 177 Cal. Rptr 783* , citing Welf. & Inst. Code former § 355.7, *now see Welf. & Inst. Code § 355.1(f)*

Exclusionary rule of criminal law as not applicable to dependency proceedings. *In re Christopher B. (1978) 82 Cal. App. 3d 608, 615, 147 Cal. Rptr. 390*

Exclusionary rules of criminal law as not applicable to dependency cases. *In re Robert P. (1976) 61 Cal. App. 3d 310, 321, 132 Cal. Rptr. 5*

Holding of Crawford v. Washington (2004) 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 , regarding "testimonial" hearsay evidence not being allowed in criminal proceedings as not applicable to dependency proceedings. *In re April C. (2005) 131 Cal. App. 4th 599, 610-612, 31 Cal. Rptr. 3d 804*

[f] Expert Testimony

Expert testimony on child's interaction with anatomically correct dolls as inadmissible when foundation not laid for interpretation as accepted scientific method of detecting sexual abuse. *In re Christie D. (1988) 206 Cal. App. 3d 469, 477-480, 253 Cal. Rptr. 619*

Expert testimony describing "child molest syndrome" as inadmissible under *Kelly-Frye* criteria to prove that child was sexually abused because syndrome is not generally accepted in psychological community or recognized by American Psychological Association; *Kelly-Frye* criteria for admissibility of expert testimony based on new scientific technique as requiring that (1) reliability of method be established, and (2) witness be properly qualified to give opinion on subject. *In re Sara M. (1987) 194 Cal. App. 3d 585, 592-594, 239 Cal. Rptr. 605*

Evidence based on psychological tests, for example, to determine if child has been abused, may be subject to *Kelly-Frye* rule under which evidence based on new scientific method of proof is admissible only on showing that method has been generally accepted as reliable in scientific community in which it was developed. *In re Amber B. (1987) 191 Cal. App. 3d 682, 687-692, 236 Cal. Rptr. 623* ; *In re Christine C. (1987) 191 Cal. App. 3d 676, 679-680, 236 Cal. Rptr. 630*

In juvenile dependency proceeding in which father's sexual molestation of three-year-old daughter was alleged, psychiatrist's opinion testimony that child had suffered sexual abuse as admissible, but opinion testimony that father had committed abuse as inadmissible; conclusion about identity of abuser as not proper subject for expert opinion testimony. *In re Cheryl H. (1984) 153 Cal. App. 3d 1098, 1116, 1121, 200 Cal. Rptr. 789*

[g] Siblings, Evidence Concerning

Child whose sibling was slain by father as properly judged dependent child under *Welf. & Inst. Code § 300(j)*. *In re Steve W. (1990) 217 Cal. App. 3d 10, 24-28, 265 Cal. Rptr. 650*

When child slain by father, removal of sibling from mother's custody as not justified by mother's potential for future reliance on abusive individuals. *In re Steve W. (1990) 217 Cal. App. 3d 10, 21-23, 265 Cal. Rptr. 650*

Evidence of parent's prior sexual abuse of child's sibling as admissible in *Welf. & Inst. Code § 300* disposition proceeding to remove child from home. *In re Dorothy I. (1984) 162 Cal. App. 3d 1154, 1158, 209 Cal. Rptr. 5*

Expert opinion testimony to show present danger to child based on abusive parent's past conduct toward child's sibling as admissible in juvenile dependency hearing. *In re Dorothy I. (1984) 162 Cal. App. 3d 1154, 1158, 209 Cal. Rptr. 5*

Proof of father's sexual abuse of other child as admissible under former *Welf. & Inst. Code § 355.5* in supplemental proceeding on *Welf. & Inst. Code § 387* petition involving his daughter. *In re Marianne R. (1980) 113 Cal. App. 3d 423, 426, 169 Cal. Rptr. 848*

[h] Social Study of Child

A timely objection under *Welf. & Inst. Code § 355* to hearsay statements in the social study does not mean the statements are not received in evidence; it only means the hearsay statements cannot be used as the sole evidence on which a jurisdiction finding is made unless the statements fall within one of the statutory exceptions to hearsay statements in the report, or there is corroborating evidence. *In re B.D. (2007) 156 Cal. App. 4th 975, 984, 67 Cal. Rptr. 3d 810*

Hearsay statements of child who is the subject of the dependency petition and under 12 years of age are admissible as part of social study under *Welf. & Inst. Code § 355* regardless of whether child is competent to testify or not, so long as statements are not the product of fraud, deceit, or undue influence. If hearsay statements of child are the only evidence supporting a finding of jurisdiction, court must make finding statements are reliable. *In re Lucero L. (2000) 22 Cal. 4th 1227, 1244-1248, 96 Cal. Rptr. 2d 56, 998 P.2d 1019* (plur. opn. of Mosk, J.)

Juvenile court as properly relying on social study prepared by social worker to determine whether child is within court's dependency jurisdiction, even if study contains hearsay or multiple hearsay; social studies as both admissible and competent evidence to support finding of dependency jurisdiction and, in fact, may form basis of jurisdictional determination itself. *In re Malinda S. (1990) 51 Cal. 3d 368, 381-385, 272 Cal. Rptr. 787, 795 P. 2d 1244* (disapproving *In re Donald R. (1987) 195 Cal. App. 3d 703, 714-716, 240 Cal. Rptr. 821* , to the extent inconsistent)

At disposition hearing, hearsay evidence contained in social study as required to be considered by trial court in reaching its decision. *In re Tasman B. (1989) 210 Cal. App. 3d 927, 934, 258 Cal. Rptr. 716*

Complete social study report as admissible in making dependency determination, without regard to hearsay exceptions under *Evidence Code. In re Jose M. (1988) 206 Cal. App. 3d 1098, 1104-1105, 254 Cal. Rptr. 364*

Unlike proceedings in which court is asked to determine whether juvenile should be made ward of court on finding that he or she has committed crime, social worker's report as properly reviewed by court during jurisdictional phase of proceedings to determine whether juvenile should be made dependent child of court. *In re Biggs (1971) 17 Cal. App. 3d 337, 344, 94 Cal. Rptr. 519*

Although in proceeding under *Welf. & Inst. Code § 602* review of social report before or during jurisdictional proceedings constitutes error, no similar defect as existing in use of social study report in jurisdictional phase of hearing under former *Welf. & Inst. Code § 600* (*now Welf. & Inst. Code § 300*) because that proceeding is civil in nature and presents no problem of confrontation. *In re Biggs (1971) 17 Cal. App. 3d 337, 344, 94 Cal. Rptr. 519*

[6] Statement of Decision

Code Civ. Proc. § 632, requiring statement of decision on request, as inapplicable to juvenile court proceedings. *In re Ammanda G. (1986) 186 Cal. App. 3d 1075, 1080-1082, 231 Cal. Rptr. 372*

[7] Jurisdictional Findings

Dependency jurisdiction does not require finding that both parents have abused or neglected child, so long as the actions of one parent bring the child within one of the statutory descriptions of *Welf. & Inst. Code § 300*. *In re Alysha S. (1996) 51 Cal. App. 4th 393, 397, 58 Cal. Rptr. 2d 494* , citing *In re Jeffrey P. (1990) 218 Cal. App. 3d 1548, 1553-1554, 267 Cal. Rptr. 764*

Diagnosis of child born under influence of dangerous drugs as creating *Welf. & Inst. Code § 355.1* presumption justifying *Welf. & Inst. Code § 300(a)* dependency jurisdiction. *In re Troy D. (1989) 215 Cal. App. 3d 889, 897, 263 Cal. Rptr. 869*

Allegations of parental substance abuse coupled with allegation of actual injury to minor (minor's withdrawal symptoms at birth) as sufficient to assume dependency jurisdiction under *Welf. & Inst. Code § 300(a)*. *In re Stephen W. (1990) 221 Cal. App. 3d 629, 639, 271 Cal. Rptr. 319*

Dependency jurisdiction over child as properly terminated when dependent child acquired delinquency status. *In re Donald S. (1988) 206 Cal. App. 3d 134, 138, 253 Cal. Rptr. 274*

Adjudication of dependency as not contingent on showing that child will suffer imminent harm without state intervention; state may intervene on child's behalf if there is substantial likelihood that harm may occur, and if reasonable apprehension is accepted basis for exercise of state power. *In re Eric B. (1987) 189 Cal. App. 3d 996, 1003, 235 Cal. Rptr. 22*

Court as permitted to take jurisdiction over child under *Welf. & Inst. Code § 300(a)* and *(d)* even though child was not yet born when jurisdictional allegations on sibling children were made. *In re Michael S. (1981) 127 Cal. App. 3d 348, 357, 359, 179 Cal. Rptr. 546*

"Person" within meaning of *Welf. & Inst. Code § 300* as not including unborn fetus, and court's finding of jurisdiction in dependency proceeding involving pregnant woman and unborn fetus as without statutory authority. *In re Steven S. (1981) 126 Cal. App. 3d 23, 29-30, 178 Cal. Rptr. 525*

[8] Grounds for Jurisdiction

[a] Inadequate Parental Care and Control

Parents failure to recognize danger friend posed to children, but appropriate protective action thereafter, as not sufficient to support finding of jurisdiction. *In re Savannah M. (2005) 131 Cal. App. 4th 1387, 1395-1396, 32 Cal. Rptr. 3d 526*

Parents' "wait and see" attitude toward ineffective herbal treatment of child's burns as indicative of parental incapacity or unwillingness to exercise proper medical care that justified intervention under former *Welf. & Inst. Code § 300(a). In re Petra B. (1989) 216 Cal. App. 3d 1163, 1169-1170, 265 Cal. Rptr. 342*

Proof that mother supported father's behavior of regularly beating children and allowing them to watch regular, severe beatings of sibling, while admonishing them that beatings were commanded by God, as substantial evidence that parents unwilling or unable to exercise proper care or control within meaning of former *Welf. & Inst. Code § 300(a)* (*now see Welf. & Inst. Code § 300(b), (g)*). *In re Edward C. (1981) 126 Cal. App. 3d 193, 200, 202-203, 178 Cal. Rptr. 694*

Capability of parent to exercise proper parental control as largely determined by external standards and likely effect continued misconduct ultimately will have on welfare of child as he or she grows up and realizes significance of such misbehavior rather than immediate effect on child, particularly when child is very young; conduct of parent as determining whether he or she is capable of exercising proper parental control. *In re J. T. (1974) 40 Cal. App. 3d 633, 637, 115 Cal. Rptr. 553*

[b] Malnutrition

Evidence of malnutrition as providing sufficient grounds for juvenile court to declare children dependent children of court. *In re Jeannie Q. (1973) 32 Cal. App. 3d 288, 299, 107 Cal. Rptr. 646*

Actual nutritional deprivation to brothers and sisters as sufficient grounds to declare other children of same family dependent children of court on grounds that such children had no parent capable of exercising proper parental control. *In re Jeannie Q. (1973) 32 Cal. App. 3d 288, 299, 107 Cal. Rptr. 646*

[c] Physical Abuse

Substantial evidence supporting dispositional finding of dependency under *Welf. & Inst. Code § 300* as existing when preponderance of evidence supported finding that child was sexually molested by father. *In re Cheryl H. (1984) 153 Cal. App. 3d 1098, 1132-1133, 200 Cal. Rptr. 789*

Dispositional order removing child from mother's custody as proper when sufficient evidence supported finding that child had been molested by mother's boyfriend and that mother was unlikely to protect child from similar molestation in future, thus establishing that mother's home unfit by reason of neglect, cruelty, depravity, or physical abuse pursuant to former *Welf. & Inst. Code § 300(d)* (*now see Welf. & Inst. Code § 300(a), (d), (i)*). *In re Courtney S. (1982) 130 Cal. App. 3d 567, 576, 181 Cal. Rptr. 843*

[d] Refusal to Provide Medical Care

When risk of death is substantial, state as clearly justified in intervening and ordering conventional medical treatment, even though contrary to religious beliefs of parents. *In re Eric B. (1987) 189 Cal. App. 3d 996, 1003-1008, 235 Cal. Rptr. 22*

[9] Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)

Although California properly invoked temporary emergency jurisdiction, notice was not given in accordance with the Hague Convention, and hence reversal was necessary. *In re Jorge G. (2008) 164 Cal. App. 4th 125, 132, 78 Cal. Rptr. 3d 552*

Where temporary emergency jurisdiction was clearly warranted and the reasons for that emergency jurisdiction had not been remedied, California had jurisdiction. *In re Angel L. (2008) 159 Cal. App. 4th 1127, 1138, 72 Cal. Rptr. 3d 88*

Where mother and the children were residing in California, not visiting, at the time the children came into the system, California was the "home state." *In re S.W. (2007) 148 Cal. App. 4th 1501, 1509-1510, 56 Cal. Rptr. 3d 665*

UCCJA (now UCCJEA) as allowing California juvenile court to exercise emergency jurisdiction over Mexican national who entered U.S. illegally with her mother and to retain that jurisdiction after removing child from parental custody. *In re Stephanie M. (1994) 7 Cal. 4th 295, 324-325, 27 Cal. Rptr. 2d 595, 867 P.2d 706* (reversing appellate court decision removing child from foster care in California and placing her with maternal grandmother in Mexico)

Cases decided under UCCJA are "instructive" in deciding cases under the UCCJEA except where the two vary. *In re A. C. (2005) 130 Cal. App. 4th 854, 860, 30 Cal. Rptr. 3d 431*

Mere fact child is in state because of need for medical care not sufficient to invoke emergency jurisdiction provision of the UCCJEA. *In re A. C. (2005) 130 Cal. App. 4th 854, 863-864, 30 Cal. Rptr. 3d 431*

UCCJEA as authorizing emergency jurisdiction, but requiring communication with other state or country prior to jurisdiction hearing. *In re C.T. (2002) 100 Cal. App. 4th 101, 121 Cal. Rptr. 2d 897*

[10] Indian Child Welfare Act (ICWA)

Despite information the "great-great-great-grandmother was a Comanche princess," a thorough inquiry was done and ICWA notice was not required because there was no reason to know the child was an Indian child. *In re Shane G. (2008) 166 Cal. App. 4th 1532, 1538-1539, 83 Cal. Rptr. 3d 513*

The parent will normally have superior access to information regarding Indian ancestry, and the parent's counsel has a duty to help protect the parent's interest, if any, in his or her rights under the *ICWA. In re Miracle M. (2008) 160 Cal. App. 4th 834, 847, 73 Cal. Rptr. 3d 24* ; *In re S.B. (2005) 130 Cal. App. 4th 1148, 1160, 30 Cal. Rptr. 3d 726*

ICWA notice error is not jurisdictional. *Tina L. v. Superior Court (2008) 163 Cal. App. 4th 262, 268, 77 Cal. Rptr. 3d 628* ; *In re Veronica G. (2007) 157 Cal. App. 4th 179, 187, 68 Cal. Rptr. 3d 465*

Limited remands for ICWA notice errors continue to be appropriate after the legislature revised and recast the state's ICWA statutes and rules. *Tina L. v. Superior Court (2008) 163 Cal. App. 4th 262, 267-269, 77 Cal. Rptr. 3d 628*

Requiring notice under the Indian Child Welfare Act based on mere hint of Indian ancestry. *Dwayne P. v. Superior Court (2002) 103 Cal. App. 4th 247, 258, 126 Cal. Rptr. 2d 639*

Requiring copies of the actual forms sent to the tribes and BIA, the mailing receipt, and any responses be submitted to the court to establish proper notice under the ICWA. *See, e.g.*, *In re Asia L. (2003) 107 Cal. App. 4th 498, 507-508, 132 Cal. Rptr. 2d 733* ; *In re H.A. (2002) 103 Cal. App. 4th 1206, 1214-1215, 128 Cal. Rptr. 2d 12* . *But see*, *In re L.B. (2003) 110 Cal. App. 4th 1420, 3 Cal. Rptr. 3d 16* (noting procedure is best practice but not actually required)

ICWA noticing error does not deprive the juvenile court of jurisdiction. *In re Jonathon S. (2005) 129 Cal. App. 4th 334, 340-342, 28 Cal. Rptr. 3d 495* ; *In re Brooke C. (2005) 127 Cal. App. 4th 377, 384-385, 25 Cal. Rptr. 3d 590*

Rejecting the "existing Indian family doctrine" as inconsistent with the provisions of the *Indian Child Welfare Act. In re Alicia S. (1998) 65 Cal. App. 4th 79, 76 Cal. Rptr. 2d 121*

Upholding the standard of proof for "active efforts" under *25 U.S.C. § 1912(d)* as being clear and convincing evidence. *In re Michael G. (1998) 63 Cal. App. 4th 700, 74 Cal. Rptr. 2d 642*

Applying the "existing Indian family doctrine." *Crystal R. v. Superior Court (1997) 59 Cal. App. 4th 703, 69 Cal. Rptr. 2d 414*

Applying the "existing Indian family doctrine" based on the unique facts of each case. *In re Alexandria Y. (1996) 45 Cal. App. 4th 1483, 53 Cal. Rptr. 2d 679*

Parent has right to veto transfer of an ICWA dependency case to the tribe. *In re Larissa G. (1996) 43 Cal. App. 4th 505, 51 Cal. Rptr. 2d 16*

Applying the "existing Indian family doctrine" where neither the child nor either parent has a significant social, cultural, or political relationship with Indian life. *In re Bridget R. (1996) 41 Cal. App. 4th 1483, 49 Cal. Rptr. 2d 507*

Application of ICWA not permitted when it violates the child's constitutional rights. *In re Santos Y. (2001) 92 Cal. App. 4th 1274, 1312-1323, 112 Cal. Rptr. 2d 692*

Application of ICWA to wide variety of issues in dependency proceedings. *In re Krystle D. (1994) 30 Cal. App. 4th 1778, 37 Cal. Rptr. 2d 132*

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28-328 California Forms of Pleading and Practice--Annotated § 328.253

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.253 Attorney General Opinions

Duty to report child abuse under Child Abuse Reporting Law (former *Penal Code §§ 11165-11174*; *now see Penal Code §§ 11164-11174.1*) as superseding confidentiality provisions of Lanterman-Petris-Short Act (*Welf. & Inst. Code § 5328*). *65 Ops. Cal. Atty. Gen. 345, 359 (1982)*

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§§ 328.254[Reserved]

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§ 328.260 State Statutes

Juvenile's right to address court when foster care disposition is under consideration. *Welf. & Inst. Code § 399*

Purpose of court-appointed child advocate. *Welf. & Inst. Code § 356.5*

Temporary placement of juvenile in psychopathic ward of county hospital. *Welf. & Inst. Code § 357*

Court as required to hear testimony as to disposition of case; continuance after finding to consider social study of social worker and any study or evaluation of court-appointed child advocate. *Welf. & Inst. Code § 358*

Required contents of social study. *Welf. & Inst. Code § 358.1*

Continuance of proceedings for observation and treatment of drug problem. *Welf. & Inst. Code § 359*

Order adjudging child a dependent child of the court. *Welf. & Inst. Code § 360*

Limitations on parental control over children declared dependent children of the court. *Welf. & Inst. Code § 361*

Dispositional alternatives on removal of child from parental custody. *Welf. & Inst. Code § 361.2*

Preferential consideration of child's relative for placement during period of removal from parents. *Welf. & Inst. Code § 361.3*

Reunification services for parents after removal of child from parental custody. *Welf. & Inst. Code § 361.5*

Alternative orders for the care, supervision, custody, conduct, maintenance, and support of dependent children. *Welf. & Inst. Code § 362*

Reduction in public assistance awarded parents in amount attributable to the child after child is declared a dependent child of the court. *Welf. & Inst. Code § 363*

Temporary detention of dependent child pending execution of the order of commitment or other disposition. *Welf. & Inst. Code § 367*

Transportation of child as necessary to parents, relatives, guardian, or person charged with custody living out of state or in a foreign country. *Welf. & Inst. Code § 368*

Provision of medical, surgical, dental, or other remedial care. *Welf. & Inst. Code § 369*

Provision of psychiatric or psychological services. *Welf. & Inst. Code § 370*

Transfer of juvenile cases between counties. *Welf. & Inst. Code §§ 375-380*

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§ 328.261 California Rules of Court

Interstate Compact on the Placement of Children. *Cal. Rules of Ct., Rule 5.616*

Petition by social worker when family is unable or unwilling to cooperate with services provided by social worker. *Cal. Rules of Ct., Rule 5.688(a)*

Order at hearing on petition. *Cal. Rules of Ct., Rule 5.688(b)*

Social study report. *Cal. Rules of Ct., Rule 5.690(a)*

Evidence considered. *Cal. Rules of Ct., Rule 5.690(b)*

Alternative disposition orders. *Cal. Rules of Ct., Rule 5.695(a)*

Appointment of legal guardian. *Cal. Rules of Ct., Rule 5.695(b)*

Limitations on parental control. *Cal. Rules of Ct., Rule 5.695(c)*

Required findings for removal of custody. *Cal. Rules of Ct., Rule 5.695(d)*

Findings relating to reasonable efforts to prevent or eliminate need for removal from custody. *Cal. Rules of Ct., Rule 5.695(e)*

Provision of reunification services. *Cal. Rules of Ct., Rule 5.695(f)*

Information regarding termination of parent-child relationship. *Cal. Rules of Ct., Rule 5.695(g)*

Setting for six-month review. *Cal. Rules of Ct., Rule 5.695(h)*

Fifteen-day reviews. *Cal. Rules of Ct., Rule 5.695(i)*

Limitation on setting hearing under *Welf. & Inst. Code § 366.26. Cal. Rules of Ct., Rule 5.695(j)*

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§ 328.262 Decisions

[1] Standard of Proof

Proof by clear and convincing evidence as proper standard at disposition hearing for detriment finding justifying non-placement with previously non-custodial parent under *Welf. & Inst. Code § 361.2(a)*. *In re Marquis D. (1995) 38 Cal. App. 4th 1813, 1827-1829, 46 Cal. Rptr. 2d 198*

Proof by preponderance of evidence as proper standard of proof at jurisdictional phase of dependency hearing under *Welf. & Inst. Code § 300*; proof by preponderance of evidence as sufficient standard of proof at dispositional phase of dependency hearing, unless court awards custody to nonparent, in which case proof by clear and convincing evidence required. *In re Cheryl H. (1984) 153 Cal. App. 3d 1098, 1113-1114, 200 Cal. Rptr. 789*

When parent may be deprived of custody of child in favor of nonparent, standard of proof at jurisdictional phase of hearing as preponderance of evidence to determine if child subject to juvenile court jurisdiction under *Welf. & Inst. Code § 300*; more stringent standard of clear and convincing evidence as required at dispositional phase of hearing when child may be ordered removed from parental custody. *In re Bernadette C. (1982) 127 Cal. App. 3d 618, 623-625, 179 Cal. Rptr. 688*

If only action of court would be to declare child to be dependent child and to retain custody of child in parents, proper standard of proof for jurisdictional and dispositional purposes under *Welf. & Inst. Code § 300* as preponderance of evidence. *In re Nicole B. (1979) 93 Cal. App. 3d 874, 882, 155 Cal. Rptr. 916* ; *In re Christopher B. (1978) 82 Cal. App. 3d 608, 618, 147 Cal. Rptr. 390* ; *In re D. (1978) 81 Cal. App. 3d 192, 196, 146 Cal. Rptr. 178*

[2] Alternative Dispositions

Juvenile court has the authority to place child in another country in an appropriate case. *In re Sabrina H. (2007) 149 Cal. App. 4th 1403, 1410-1413, 57 Cal. Rptr. 3d 863*

Practice of removing children from parents and then immediately "detaining" with parents as lacking statutory authority and being beyond juvenile court's jurisdiction. *In re Andres G. (1998) 64 Cal. App. 4th 476, 75 Cal. Rptr. 2d 285*

Practice of removing children from parents and then immediately putting child with parents as a temporary placement as lacking statutory authority. *In re Damonte A. (1997) 57 Cal. App. 4th 894, 899-900, 67 Cal. Rptr. 2d 369*

Father's lack of employment and separate residence as insufficient detriment to support denial of child custody request under *Welf. & Inst. Code § 361.2(a)*. *In re Danielle M. (1989) 215 Cal. App. 3d 1267, 1271, 266 Cal. Rptr. 352*

Welf. & Inst. Code § 361.3(a) as envisioning compliance with Interstate Compact on the Placement of Children regarding juvenile court's knowledge of child's placement outside *California. In re Eli F. (1989) 212 Cal. App. 3d 228, 239, 260 Cal. Rptr. 453*

Because object at dispositional hearing is to find temporary placement that will meet child's needs during reunification efforts, any error that may occur by failing to recommend initial placement with relative pursuant to *Welf. & Inst. Code § 281.5* as insignificant if, at subsequent permanency planning hearing, court determines that reunification has failed. *In re Baby Girl D. (1989) 208 Cal. App. 3d 1489, 1493-1494, 257 Cal. Rptr. 1*

Award of custody to social worker for home placement as nonremoval from parental custody not requiring finding of detriment. *In re Nathan W. (1988) 205 Cal. App. 3d 1496, 1500, 253 Cal. Rptr. 312*

Court as not permitted to circumvent statutory scheme for reunification efforts by failing to order reunification plan at disposition hearing or by referring child to permanency planning despite appearance that effort will fail; early planning for alternative permanent placement may only begin if timely return to parental custody proves improbable by time of review of foster placement disposition and of initial permanency planning hearing. *In re John B. (1984) 159 Cal. App. 3d 268, 273-274, 205 Cal. Rptr. 321*

[3] Reunification Plan and Services

The court cannot order other relatives or significant others, such as stepparents or de facto parents, to participate in such services if the child is not placed in their care. *In re Silvia R. (2008) 159 Cal. App. 4th 337, 341-342, 345-351, 71 Cal. Rptr. 3d 496*

Despite the children loving the parent and the court's desire to give the parent one more chance, providing services to a parent who had an extensive history of substance abuse and has resisted or failed prior court-ordered treatment was a clear abuse of discretion. *In re William B. (2008) 163 Cal. App. 4th 1220, 1223, 78 Cal. Rptr. 3d 91*

Reunification services as a benefit, not a constitutional entitlement. *In re Baby Boy H. (1998) 63 Cal. App. 4th 470, 475, 73 Cal. Rptr. 2d 793*

Statutory provisions limiting reunification services to six months in cases in which the child was under the age of 3 years at the time of initial removal as being constitutional. *Daria D. v. Superior Court (1998) 61 Cal. App. 4th 606, 71*

Cal. Rptr. 2d 668

Incarcerated parent must be provided with reasonable reunification services absent clear and convincing evidence the provision of services would be detrimental to the child under *Welf. & Inst. Code § 361.5(e)(1).* *Mark N. v. Superior Court (1998) 60 Cal. App. 4th 996, 1011-1015, 70 Cal. Rptr. 2d 603*

Child welfare services as required in *Welf. & Inst. Code § 361.5(a)* include both reunification and maintenance services. *Carolyn R. v. Superior Court (1995) 41 Cal. App. 4th 159, 165-166, 48 Cal. Rptr. 2d 669* , citing *Welf. & Inst. Code § 16500 et seq.*

Fact that parent suffers from emotional problems does not excuse parent from statutory requirement of participating in reunification plan, as some capacity to achieve reunification goals is presumed. *Angela S. v. Superior Court (1995) 36 Cal. App. 4th 758, 762, 42 Cal. Rptr. 2d 755*

Placement of child in foster home 50-60 miles from home of parent does not constitute denial of reunification services under facts of case. *James B. v. Superior Court (1995) 35 Cal. App. 4th 1014, 1020-1021, 41 Cal. Rptr. 2d 762*

Court as not required by statutory scheme to order reunification services to biological father who is not presumed father. *In re Zacharia D. (1993) 6 Cal. 4th 435, 24 Cal. Rptr. 2d 751, 862 P.2d 751*

Stepparent as not entitled to reunification plan under *Welf. & Inst. Code § 361.5(a)*, because stepparent is not "parent" for dependency purposes. *In re Jodi B. (1991) 227 Cal. App. 3d 1322, 1324, 278 Cal. Rptr. 242*

Parent's remaining out of prison as fundamental first step toward fulfilling reunification plan. *In re Christopher A. (1991) 226 Cal. App. 3d 1154, 1162, 277 Cal. Rptr. 302*

Frequency and length of parental visitation as necessarily determined by court, but time, place, and manner of visitation as permissibly determined by social agency. *In re Jennifer G. (1990) 221 Cal. App. 3d 752, 757, 270 Cal. Rptr. 326*

Juvenile court as permitted by *Welf. & Inst. Code §§ 361.2, 361.5, 362* to order only parents, guardians, relatives, or foster parents of dependent children to participate in reunification or child welfare services. *In re Jody R. (1990) 218 Cal. App. 3d 1615, 1625-1626, 1628, 267 Cal. Rptr. 746*

Juvenile court as without authority to join live-in companion to dependency proceeding in order to compel compliance with reunification plan. *In re Jody R. (1990) 218 Cal. App. 3d 1615, 1625-1628, 267 Cal. Rptr. 746*

Court as not required by statutory scheme to order reunification services for grandparents. *In re Albert B. (1989) 215 Cal. App. 3d 361, 381, 263 Cal. Rptr. 694*

Failure to make express finding on probability of returning children to parents within six months as not requiring reversal of permanency planning order when finding implied from record and omission not prejudicial to parents. *In re Corienna G. (1989) 213 Cal. App. 3d 73, 83-85, 261 Cal. Rptr. 462*

Reunification services specially designed to assist developmentally disabled parent as needed to be reasonable services. *In re Victoria M. (1989) 207 Cal. App. 3d 1317, 1329-1331, 255 Cal. Rptr. 498*

[4] Visitation

Evidence must show by clear and convincing evidence that visitation would be detrimental to the child before a parent

can be denied visitation. [*In re Dylan T. (1998) 65 Cal. App. 4th 765, 773-774, 76 Cal. Rptr. 2d 684*

Standard of proof for denial of visitation to parent is only preponderance of the evidence that visitation would be detrimental to the child. *In re Manolito L. (2001) 90 Cal. App. 4th 753, 760-761, 109 Cal. Rptr. 2d 282*

Young age of child as insufficient grounds to deny visitation to incarcerated parent absent supporting evidence demonstrating how the age of the child makes visitation detrimental under facts of the case. *In re Dylan T. (1998) 65 Cal. App. 4th 765, 773-774, 76 Cal. Rptr. 2d 684*

Parental visitation determined by discretion of social worker and wishes of children as no abuse of judicial discretion. *In re Danielle W. (1989) 207 Cal. App. 3d 1227, 1237, 1238-1239, 255 Cal. Rptr. 344*

Ministerial tasks related to visitation may be delegated to social worker. *In re Moriah T. (1994) 23 Cal. App. 4th 1367, 1373-1377, 28 Cal. Rptr. 2d 705*

Delegating too much authority to social worker is not permitted. *In re Jennifer G. (1990) 221 Cal. App. 3d 752, 755-757, 270 Cal. Rptr. 326*

[5] Denial of Reunification Services

The provisions of *Welf. & Inst. Code § 361.5(b), (e)(1),* for the denial of services apply to both the custodial parent from whom the child was removed under *Welf. & Inst. Code § 361(c),* and the previously noncustodial parent who has asked for and been denied placement under *Welf. & Inst. Code § 361.2(a).* *In re Adrianna P. (2008) 166 Cal. App. 4th 44, 53-59, 81 Cal. Rptr. 3d 918*

Welf. & Inst. Code § 361.5(b)(10) for the denial of reunification services as comporting with requirements of due process and being constitutional. *In re Baby Boy H. (1998) 63 Cal. App. 4th 470, 73 Cal. Rptr. 2d 793* , considering previous version of statute, *now see Welf. & Inst. Code § 361.5(b)(10)-(11)*

Parent's "failure to maintain any kind of long-term sobriety must be considered resistance to treatment" under *Welf. & Inst. Code § 361.5(b)(12)* for denial of services. *Randi R. v. Superior Court (1998) 64 Cal. App. 4th 67, 73, 74 Cal. Rptr. 2d 770* , considering previous version of statute, now see *Welf. & Inst. Code § 361.5(b)(13)*

Once condition described in *Welf. & Inst. Code § 361.5(b)* is proven to apply, general rule favoring reunification services is replaced by legislative assumption that providing such services would be an unwise use of resources. *Raymond C. v. Superior Court (1997) 55 Cal. App. 4th 159, 164, 64 Cal. Rptr. 2d 33*

Welf. & Inst. Code § 361.5(b)(2) as not denying equal protection, because reasonable for state to distinguish between persons who will or will not benefit from reunification services. *In re Christina A. (1989) 213 Cal. App. 3d 1073, 1079-1080, 261 Cal. Rptr. 903*

[6] Liability in Foster Care

Welf. & Inst. Code § 202 as not imposing affirmative or fiduciary duty on county to prevent parental neglect by foster families with whom wards of the court are placed. *Jordy v. County of Humboldt (1992) 11 Cal. App. 4th 735, 744, 14 Cal. Rptr. 2d 553*

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6. Disposition Hearing

28-328 California Forms of Pleading and Practice--Annotated §§ 328.263-328.269

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§§ 328.263[Reserved]

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28-328 California Forms of Pleading and Practice--Annotated § 328.270

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§ 328.270 State Statutes

Institution of subsequent proceedings by social worker against parents of dependent children who are allowed to remain in the custody of the parents. *Welf. & Inst. Code § 364*

Criteria for modification, change, or setting aside of order. *Welf. & Inst. Code § 385*

Restrictions on modification without prior notice. *Welf. & Inst. Code § 386*

Use of supplemental petition to change or modify previous order by removing child from physical custody of parent, guardian, relative, or friend and directing placement in a more restrictive level of care. *Welf. & Inst. Code § 387*

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Application by sibling for court order regarding sibling placement, visitation or permanency planning. *Welf. & Inst. Code § 388(b)*

Application for termination of reunification services prior to prescribed period. *Welf. & Inst. Code § 388(c)*

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28-328 California Forms of Pleading and Practice--Annotated § 328.271

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§ 328.271 California Rules of Court

[1] In General

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[3] Petitions for Modification of Orders

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Conduct of hearing. *Cal. Rules of Ct., Rule 5.570(h)*

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28-328 California Forms of Pleading and Practice--Annotated § 328.272

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§ 328.272 Decisions

A true finding on a supplemental petition removing a dependent child from a relative placement does not necessarily constitute a finding of unsuitability for purposes of consideration for future placement. *In re Antonio G. (2007) 159 Cal. App. 4th 369, 377-378, 71 Cal. Rptr. 3d 79*

When a child has been placed under the agency's care, custody and control with a general placement order pursuant to *Welf. & Inst. Code § 361.2(e)*, no supplemental petition pursuant to *Welf. & Inst. Code § 387* is required to move the child from a relative to a foster home placement. *In re Cynthia C. (1997) 58 Cal. App. 4th 1479, 1489-1490, 69 Cal. Rptr. 2d 1*

When a child is returned to a parent and then subsequently removed through a supplemental petition, the matter does not return to "square one" with regard to services, but the court does have discretion to order additional reunification services under limited circumstances. *Carolyn R. v. Superior Court (1995) 41 Cal. App. 4th 159, 166-167, 48 Cal. Rptr. 2d 669*

When a child is returned to a parent and then subsequently removed through a supplemental petition, the matter does not return to "square one" with regard to the ordering of reunification services. *In re Steven A. (1993) 15 Cal. App. 4th 754, 765, 19 Cal. Rptr. 2d 576*

Hearing on petition for modification of orders under *Welf. & Inst. Code § 388* to be liberally granted. *In re Heather P. (1989) 209 Cal. App. 3d 886, 891, 257 Cal. Rptr. 545*

Supplemental petition and detention hearing as not required when previously declared dependent child of court is removed from foster home and placed in county receiving home to await further placement. *In re Timothy N. (1975) 48 Cal. App. 3d 862, 870, 121 Cal. Rptr. 880*

A parent, who claims lack of due process notice of dependency petition, as permitted to challenge resulting dependency judgment by filing petition pursuant to *Welf. & Inst. Code § 388* in same dependency proceedings. *Ansley v. Superior Court (1986) 185 Cal. App. 3d 477, 483-488, 229 Cal. Rptr. 771*

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28-328 California Forms of Pleading and Practice--Annotated § 328.280

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§ 328.280 State Statutes

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Twenty-four-month subsequent permanency review hearing. *Welf. & Inst. Code § 366.25*

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28-328 California Forms of Pleading and Practice--Annotated § 328.281

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§ 328.281 California Rules of Court

[1] Six-Month Review Hearing

Hearing requirement. *Cal. Rules of Ct., Rule 5.710*

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Court's determinations; burden of proof. *Cal. Rules of Ct., Rule 5.710(e)*

Conduct of hearing. *Cal. Rules of Ct., Rule 5.710(f)*

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Limitation on setting a hearing under *Welf. & Inst. Code § 366.26. Cal. Rules of Ct., Rule 5.710(i)*

[2] Twelve-Month Permanency Hearing

Setting and conduct of hearing. *Cal. Rules of Ct., Rule 5.715*

Limitation on setting hearing under *Welf. & Inst. Code § 366.26*. *Cal. Rules of Ct., Rule 5.715(e)*

[3] Eighteen-Month Permanency Review Hearing

Setting and conduct of hearing. *Cal. Rules of Ct., Rule 5.720*

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§ 328.282 Decisions

At the six-month review hearing, the court may terminate services for one parent and continue them for the other. *In re Jesse W. (2007) 157 Cal. App. 4th 49, 64-65, 68 Cal. Rptr. 3d 435*

At six-month review hearing the court only considers the likelihood of reunification within the period until the 12-month permanency hearing, not whether there is a substantial probability of return within the next full six months. *Tonya M. v. Superior Court (2007) 42 Cal. 4th 836, 840, 69 Cal. Rptr. 3d 96, 172 P. 3d 402*

At 18-month permanency review hearing juvenile court has the option of return to parent with family maintenance services and continued dependency jurisdiction. *Bridget A. v. Superior Court (2007) 148 Cal. App. 4th 285, 295-296, 55 Cal. Rptr. 3d 647*

At six-month review hearing the court has discretion to terminate services to one parent while continuing services to another parent. *In re Jesse W. (2007) 157 Cal. App. 4th 49, 55-56, 68 Cal. Rptr. 3d 435*

The admissibility of social worker's review reports is not conditioned on the availability of the social worker for cross-examination. *Andrea L. v. Superior Court (1998) 64 Cal. App. 4th 1377, 1387 fn. 3, 75 Cal. Rptr. 2d 851*

Juvenile court's refusal to grant a contested review hearing as error, but harmless under facts of the case. *Andrea L. v. Superior Court (1998) 64 Cal. App. 4th 1377, 1387 fn. 3, 75 Cal. Rptr. 2d 851*

Mere participation in services required by reunification plan does not mean that the child should be returned; question

is whether the parent or guardian has made sufficient progress to allow the child to be returned safely. *In re Joseph B. (1996) 42 Cal. App. 4th 890, 899-900, 49 Cal. Rptr. 2d 900*

Juvenile court may consider factors unrelated to the original jurisdictional allegations or reasons for removal in determining detriment to return at an out-of-home review hearing. *In re Joseph B. (1996) 42 Cal. App. 4th 890, 900, 49 Cal. Rptr. 2d 900*

Juvenile court may not consider factors unrelated to the original jurisdictional allegations or reasons for removal in determining detriment to return at an out-of-home review hearing. *In re Dustin R. (1997) 54 Cal. App. 4th 1131, 1140, 63 Cal. Rptr. 2d 269*

Welf. & Inst. Code § 366.21(f), providing that failure of parent or guardian to participate regularly in court-ordered treatment program constitutes prima facie evidence that return would be detrimental, as not constituting conclusive presumption and therefore not unconstitutional. *In re Heather B. (1992) 9 Cal. App. 4th 535, 562, 11 Cal. Rptr. 2d 891*

Trial court as not abusing discretion in continuing dependency jurisdiction over children at six-month review hearing, based on evidence of continued family instability and vulnerability of custodial mother to renewed living arrangement with person who abused children. *In re V. M. (1987) 190 Cal. App. 3d 753, 757, 235 Cal. Rptr. 506*

Court can terminate services at six-month review if parent has failed to contact or visit the child. *In re Monique S. (1993) 21 Cal. App. 4th 677, 682, 25 Cal. Rptr. 2d 863*

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28-328 California Forms of Pleading and Practice--Annotated § 328.290

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§ 328.290 State Statutes

Notice of *Welf. & Inst. Code § 366.26* hearing. *Welf. & Inst. Code § 294*

Hearing to select and implement alternative permanency plan of adoption, guardianship, or another planned permanent living arrangement, such as permanent placement with a foster or relative caregiver committed to caring for the child on a permanent basis. *Welf. & Inst. Code § 366.26*

Relative guardianship cutout. *Welf. & Inst. Code § 366.26(c)(1)(A)*

Exceptions to termination of parental rights for adoptable child. *Welf. & Inst. Code § 366.26(c)(1)(B)(i)-(vi)*

Guardianship for dependent child shall be in juvenile court. *Welf. & Inst. Code § 366.26(d)*

Adoption for dependent children may be in juvenile court. *Welf. & Inst. Code § 366.26(e)*

Limited jurisdiction to reinstate parental rights if child petitions the court showing the child has not been adopted for at least three years and reinstatement of parental rights is in the child's best interest. *Welf. & Inst. Code § 366.26(i)(2)*

Rights of prisoners with respect to proceedings to have their children declared free from parental control and custody. *Penal Code § 2625*

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28-328 California Forms of Pleading and Practice--Annotated § 328.291

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§ 328.291 California Rules of Court

Selection and implementation hearing under *Welf. & Inst. Code § 366.26*; application of rule. *Cal. Rules of Ct., Rule 5.725(a)*

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Presence of Child. *Cal. Rules of Ct., Rule 5.725(d)*

Conduct of selection and implementation hearing. *Cal. Rules of Ct., Rule 5.725(e)*

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Procedures for appointment of legal guardianship. *Cal. Rules of Ct., Rule 5.725(g)*

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Advice of appeal rights. *Cal. Rules of Ct., Rule 5.725(i)*

Adoption may be in juvenile court. *Cal. Rules of Ct., Rule 5.730(a)*

Notice for adoption in juvenile court. *Cal. Rules of Ct., Rule 5.730(b)*

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Consent of adoptive parents and child. *Cal. Rules of Ct., Rule 5.730(f)*

Termination of dependency jurisdiction following adoption. *Cal. Rules of Ct., Rule 5.730(g)*

Juvenile court jurisdiction regarding guardianship. *Cal. Rules of Ct., Rule 5.735(a)*

Guardianship notice and hearing. *Cal. Rules of Ct., Rule 5.735(b)*

Conduct of guardianship hearing. *Cal. Rules of Ct., Rule 5.735(c)*

Required findings and orders in guardianship hearing. *Cal. Rules of Ct., Rule 5.735(d)*

Advice of appeal rights following guardianship hearing. *Cal. Rules of Ct., Rule 5.735(e)*

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§ 328.292 Decisions

[1] Standard of Proof

Application of preponderance of the evidence standard in some of the hearings held prior to the selection and implementation hearing under *Welf. & Inst. Code § 366.26* at which parental rights are terminated as constitutional in context of totality of dependency statutory scheme and when applied following finding of adoptability based on standard of clear and convincing evidence. *Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 256, 19 Cal. Rptr. 2d 698, 851 P.2d 1307*

[2] Assessment Report

Parent's due process rights as not violated by errors or omissions in assessment report (*Welf. & Inst. Code § 366.21(i)*) that was prepared, made available to parent in advance of notice hearing, and addressed principal questions at issue in proceeding; deficiencies in report as affecting only weight of evidence. *In re Crystal J. (1993) 12 Cal. App. 4th 407, 413, 15 Cal. Rptr. 2d 613*

[3] Scope of Hearing

Requiring parent to proceed under *Welf. & Inst. Code § 388* to obtain court consideration of renewed reunification services, because services are not dispositional option at permanency planning hearing, as not depriving parent of due process. *In re Marilyn H. (1993) 5 Cal. 4th 295, 309-310, 19 Cal. Rptr. 2d 544, 851 P.2d 826*

[4] Lack of Jurisdiction to Change Order

Court as having no jurisdiction to modify *Welf. & Inst. Code § 366.26* termination order pursuant to *Welf. & Inst. Code § 388* for change of circumstances, because former *Welf. & Inst. Code § 366.26(h)* (*see now Welf. & Inst. Code § 366.26(i)*) removes jurisdiction from court to set aside, change, or modify the order. *In re Ronald V. (1993) 13 Cal. App. 4th 1803, 1806, 17 Cal. Rptr. 2d 334*

[5] Guardianship

Probate court as lacking jurisdiction to hear petition for guardianship of dependent minor. *In re Walter P. (1991) 228 Cal. App. 3d 113, 120-121, 126, 278 Cal. Rptr. 602*

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§ 328.300 State Statutes

Status of juvenile court orders after termination of jurisdiction. *Welf. & Inst. Code § 362.4*

Court designated "prospective adoptive parents" and process for changing placement. *Welf. & Inst. Code § 366.26(n)*

Post-permanency planning review hearings and changing of permanent plans. *Welf. & Inst. Code § 366.3*

Petition for modification of orders. *Welf. & Inst. Code § 388*

Sealing of juvenile court records. *Welf. & Inst. Code § 389*

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28-328 California Forms of Pleading and Practice--Annotated § 328.301

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§ 328.301 California Rules of Court

Review hearings relating to adoption and guardianship. *Cal. Rules of Ct., Rule 5.740(a)*

Review hearings relating to long-term foster care. *Cal. Rules of Ct., Rule 5.740(b)*

Procedures in hearings on petition to modify or terminate guardianship. *Cal. Rules of Ct., Rule 5.740(c)*

Procedure for termination of jurisdiction due to child reaching majority. *Cal. Rules of Ct., Rule 5.740(d)*

Court designated prospective adoptive parent designation. *Cal. Rules of Ct., Rule 5.726*

Proposed removal from court designated prospective adoptive parent. *Cal. Rules of Ct., Rule 5.727*

Emergency removal from court designated prospective adoptive parent. *Cal. Rules of Ct., Rule 5.728*

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§ 328.302 Decisions

Social services agency as having authority to determine placement of child pending adoption, subject to review by juvenile court for abuse of discretion. *Los Angeles County Dep't of Children etc. Services v. Superior Court (1998) 62 Cal. App. 4th 1, 9-10, 72 Cal. Rptr. 2d 369*

Social services agency as having authority to determine placement of child pending adoption, subject to review by juvenile court for abuse of discretion. *Department of Social Services v. Superior Court (1997) 58 Cal. App. 4th 721, 724-725, 68 Cal. Rptr. 2d 239*

At a regularly scheduled post-permanency planning review hearing, the juvenile court can consider a request for a change in the child's permanent plan without the necessity for a *Welf. & Inst. Code § 388* petition. *San Diego County Dep't of Social Servs. v. Superior Court (1996) 13 Cal. 4th 882, 887-892, 55 Cal. Rptr. 2d 396, 919 P.2d 1329 , disapproving to the extent inconsistent In re Nina P. (1994) 26 Cal. App. 4th 615, 31 Cal. Rptr. 2d 687*

Changing of permanent plan can be considered by juvenile court at any post-permanency planning review hearing or upon application for modification pursuant to *Welf. & Inst. Code § 388*. *In re John F. (1994) 27 Cal. App. 4th 1365, 1375, 33 Cal. Rptr. 2d 225*

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28-328 California Forms of Pleading and Practice--Annotated §§ 328.303-328.309

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

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§§ 328.303[Reserved]

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28-328 California Forms of Pleading and Practice--Annotated § 328.310

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.310 State Statutes

Challenging orders setting a selection and implementation hearing. *Welf. & Inst. Code § 366.26(l)*

Appeals. *Welf. & Inst. Code § 395*

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28-328 California Forms of Pleading and Practice--Annotated § 328.311

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.311 Rules of Court

Juvenile appeals in general. *Cal. Rules of Ct., Rule 8.400*

Limited "prison delivery" version of "constructive filing doctrine" applicable in dependency cases. *Cal. Rules of Ct., Rule 8.400(e)*

Record on appeal. *Cal. Rules of Ct., Rule 8.404*

Augmenting and correcting record on appeal. *Cal. Rules of Ct., Rule 8.408*

Briefs. *Cal. Rules of Ct., Rule 8.412*

Appeals in termination of parental rights cases and in all dependency cases in Orange, Imperial, and San Diego Counties. *Cal. Rules of Ct., Rule 8.416*

Special Rule for writ petition challenging orders setting a hearing under *Welf. & Inst. Code § 366.26*. *Cal. Rules of Ct., Rule 8.452*

Special rule for writ petition challenging juvenile court's orders designating specific placement of dependent child after termination of parental rights. *Cal. Rules of Ct., Rules 8.454, 8.456*

Hearing and decision in the Court of Appeal. Cal. Rules of Ct., Rule 8.470

Hearing and decision in the Supreme Court. Cal. Rules of Ct., Rule 8.472

Procedures and data. Cal. Rules of Ct., Rule 8.474

Orders and judgments appealable. *Cal. Rules of Ct., Rule 5.585(b)*

When order or judgment may be stayed pending appeal. *Cal. Rules of Ct., Rule 5.585(c)*

Advice of appeal rights. *Cal. Rules of Ct., Rules 5.585(d), 5.590*

Advice of need for extraordinary writ to preserve right to appeal orders setting a *Welf. & Inst. Code § 366.26* hearing. *Cal. Rules of Ct., Rule 5.585(e)*

Writ petition after orders setting hearing under *Welf. & Inst. Code § 366.26*. *Cal. Rules of Ct., Rule 5.600*

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28-328 California Forms of Pleading and Practice--Annotated § 328.312

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.312 Decisions

[1] Appealable Orders

First hearing from which an appeal can be taken in a dependency case is the disposition hearing. *In re Meranda P. (1997) 56 Cal. App. 4th 1143, 1150, 65 Cal. Rptr. 2d 913* , citing *In re Eli F. (1989) 212 Cal. App. 3d 228, 233, 260 Cal. Rptr. 453*

An disposition or postdisposition order that is not timely appealed is final and binding and cannot be challenged in an appeal from a later appealable order. *In re Meranda P. (1997) 56 Cal. App. 4th 1143, 1150, 65 Cal. Rptr. 2d 913*

First hearing from which an appeal can be taken in a dependency case is the disposition hearing. *In re Sheila B. (1993) 19 Cal. App. 4th 187, 196, 23 Cal. Rptr. 2d 482* , citing *In re Candida S. (1992) 7 Cal. App. 4th 1240, 1249, 9 Cal. Rptr. 2d 521* , and *In re Megan B. (1991) 235 Cal. App. 3d 942, 950, 1 Cal. Rptr. 2d 177*

Although order of dismissal is not appealable if juvenile court does not enter judgment of dismissal, promotion of judicial economy and substantial justice as requiring court to deem orders of dismissal to include judgment of dismissal. *In re Elaine E. (1990) 221 Cal. App. 3d 809, 813, 270 Cal. Rptr. 489*

Voluntary dismissal of dependency petition without prejudice as nonappealable order absent request for affirmative relief by aggrieved defendant. *In re Tomi C. (1990) 218 Cal. App. 3d 694, 697-698, 267 Cal. Rptr. 210*

Defective appeal from nonappealable permanency planning order as considered petition for writ of mandate to avoid injustice from retroactivity of former *Welf. & Inst. Code § 366.25(j).* *In re Albert B. (1989) 215 Cal. App. 3d 361,*

372-373, 263 Cal. Rptr. 694

Order transferring juvenile court dependency proceeding from one county to another as appealable by parent of dependent child, as well as by either county. *In re Jon N. (1986) 179 Cal. App. 3d 156, 159-160, 224 Cal. Rptr. 319*

Judgment or decree adjudicating child ward or dependent child of juvenile court as appealable as final judgment and any subsequent order as appealable as from order after judgment. *In re Timothy N. (1975) 48 Cal. App. 3d 862, 867, 121 Cal. Rptr. 880*

[2] Filing

Application of criminal "constructive filing" doctrine to appeals of *Civ. Code § 232* judgments terminating parental rights as "clearly impracticable or inappropriate" under former Cal. Rules of Ct., Rule 39(a). *In re A. M. (1989) 216 Cal. App. 3d 319, 321-322, 264 Cal. Rptr. 666* [now see *Cal. Rules of Ct., Rule 8.400(e)*, for limited application]

[3] Consent of the Client

Unlike with writ petitions, either the client or the attorney may file a notice of appeal in a dependency case. Absent evidence to the contrary, it is presumed the attorney is acting with the client's approval and authority. *In re Helen W. (2007) 150 Cal. App. 4th 71, 78-79, 57 Cal. Rptr. 3d 914*

Failure of mother to sign notice of intent to file writ under Cal. Rules of Ct., former Rule 39.1B as grounds for dismissal of the writ absent good cause for the failure to sign the notice. *Lisa S. v. Superior Court (1998) 62 Cal. App. 4th 604, 606-607, 73 Cal. Rptr. 2d 240*

The lack of a client's consent is a "procedural defect fatal to appellate review" of an extraordinary writ petition in a dependency case. *Janice J. v. Superior Court (1997) 55 Cal. App. 4th 690, 691, 64 Cal. Rptr. 2d 227* , citing *Guillermo G. v. Superior Court (1995) 33 Cal. App. 4th 1168, 1174, 39 Cal. Rptr. 2d 748* , and *Suzanne J. v. Superior Court (1996) 46 Cal. App. 4th 785, 788, 54 Cal. Rptr. 2d 25*

An attorney has no professional duty to file an extraordinary writ petition without the client's authorization. *Janice J. v. Superior Court (1997) 55 Cal. App. 4th 690, 692, 64 Cal. Rptr. 2d 227*

A client's actual consent is required before an attorney can file a notice of appeal in a dependency case. *In re Sean S. (1996) 46 Cal. App. 4th 350, 352, 53 Cal. Rptr. 2d 766* , citing *In re Alma B. (1994) 21 Cal. App. 4th 1037, 1043, 26 Cal. Rptr. 2d 592*

An attorney has no ethical or legal duty to file an appeal when the parent has not consented to its filing. *In re Sean S. (1996) 46 Cal. App. 4th 350, 352, 53 Cal. Rptr. 2d 766*

[4] Mootness and Harmless Error

Appellate court may accept evidence of subsequent events to show any error at the trial court level was harmless. *In re B.D. (2008) 159 Cal. App. 4th 1218, 1240, 72 Cal. Rptr. 3d 153*

Former *Civ. Code § 232(a)(6)* order terminating parental rights as mooting dependency appeal when termination proceeding could have been independently initiated and result would have been the same. *In re Jesse C. (1989) 215 Cal. App. 3d 1384, 1388, 263 Cal. Rptr. 811*

Errors in dependency proceedings as mooted by independent findings of sufficiency of evidence at termination hearing. *In re Angela R. (1989) 212 Cal. App. 3d 257, 266-267, 260 Cal. Rptr. 612*

Parent's appeal from dependency orders as not mooted by subsequent order terminating parental rights when dependency appeal raised issue of adequacy of notice to parent, which, if proven, would have rendered termination proceeding infirm. *In re Larry P. (1988) 201 Cal. App. 3d 888, 893, 247 Cal. Rptr. 472*

Appeal arising from dependency proceedings as not mooted by appeal of order terminating parental rights if error in dependency stage "infected" termination outcome or undermined juvenile court's jurisdictional finding. *In re Kristin B. (1986) 187 Cal. App. 3d 596, 605, 232 Cal. Rptr. 36*

[5] Review by Writ of Habeas Corpus

For guidance regarding the procedures used in filing and deciding a petition for writ of habeas corpus in a dependency case, see the concurring opinion of *Associate Justice Bamattre-Manoukian. In re Paul W. (2007) 151 Cal. App. 4th 37, 60 Cal. Rptr. 3d 329*

When child is being unlawfully detained, habeas corpus as proper method by which to secure prompt release. *In re Timothy N. (1975) 48 Cal. App. 3d 862, 871, 121 Cal. Rptr. 880*

[6] Waiver and Forfeiture

While most courts use the term "waiver," the correct term is "forfeiture." *In re S.B. (2004) 32 Cal. 4th 1287, 1293, fn. 2, 13 Cal. Rptr. 3d 786, 90 P. 3d 746*

Failure of aunt to raise forum non conveniens objection in trial court constitutes waiver of right to raise the issue on appeal since forum non conveniens is a nonjurisdictional issue. *In re Christopher B. (1996) 43 Cal. App. 4th 551, 557-559, 51 Cal. Rptr. 2d 43*

Failure of mother to object to the setting of a *Welf. & Inst. Code § 366.26* hearing despite finding by juvenile court that no reasonable efforts had been provided constitutes waiver of right to raise the issue on appeal. *In re Kevin S. (1996) 41 Cal. App. 4th 882, 885-886, 48 Cal. Rptr. 2d 763*

Excuse of waiver or forfeiture should only be done rarely. *In re S.B. (2004) 32 Cal. 4th 1287, 1293, 13 Cal. Rptr. 3d 786, 90 P. 3d 746*

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28-328 California Forms of Pleading and Practice--Annotated §§ 328.313-328.349

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§§ 328.313[Reserved]

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28-328 California Forms of Pleading and Practice--Annotated § 328.350

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.350 Juvenile Dependency Petition (Version Two) [Welf. & Inst. Code § 300 et seq.] With Attachment Alleging Serious Physical Harm [Welf. & Inst. Code § 300(a)]--Judicial Council Forms JV-110 and JV-120

[1] FORM Juvenile Dependency Petition (Version Two) [Welf. & Inst. Code § 300 et seq.] With Attachment Alleging Serious Physical Harm [Welf. & Inst. Code § 300(a)]--Judicial Council Forms JV-110 and JV-120

Click here to view image.

[2] Use of Form

This form is the Judicial Council version two form for use as a petition to declare a child a dependent of the juvenile court [*see Cal. Rules of Ct., Rules 5.524(c)*]. Use of this form is mandatory [*Cal. Rules of Ct., Rule 5.524(c)*].

There are two Judicial Council forms of petitions, Form JV-100 (Version One) and this form, Form JV-110 (Version Two). [*Cal. Rules of Ct., Rule 5.524(c)*].

The form includes an attachment for use if jurisdiction is sought under *Welf. & Inst. Code § 300(a)* because of a risk of serious physical harm to the minor (Judicial Council Form JV-120). There are 10 such Judicial Council forms of attachment pages for use in alleging each statutory ground that brings the child within the jurisdiction of the juvenile court [*see* Forms JV-120-JV-129]. Any of these attachments may be combined if the headings and language in the body of the forms are included as they appear.

A copy of Judicial Council Form JV-140 (Notification of Mailing Address) must be provided to each parent or guardian along with a petition [*Cal. Rules of Ct., Rule 5.534(l)*; *see Welf. & Inst. Code § 316.1* (requiring parents and guardians to provide permanent mailing address to court); *see* form *set out in § 328.352[1]*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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28-328 California Forms of Pleading and Practice--Annotated § 328.351

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.351 Proof of Service of Dependency Petition [Code Civ. Proc. § 1013a; Welf. & Inst. Code § 311]--Judicial Council Form JV-510

[1] FORM Proof of Service of Dependency Petition [Code Civ. Proc. § 1013a; Welf. & Inst. Code § 311]--Judicial Council Form JV-510

Click here to view image.

[2] Use of Form

This is the Judicial Council form used for proof of service of copies of a dependency petition and notice of detention hearing [*see Code Civ. Proc. § 1013a*; *Welf. & Inst. Code § 311(a)*; for an illustrative example of a dependency petition, *see § 328.350[1]*]. Use of the form is optional [*Cal. Rules of Ct., Rules 1.35, 5.504(a)*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

Paragraph 1d should be checked if the petition includes other documents, such as a form of Notification of Mailing Address [*see* form *set out in § 328.352[1]*], the preferred method of notifying the court and the social services agency of the address of the parent or guardian [*see Welf. & Inst. Code § 316.1*; *Cal. Rules of Ct., Rule 5.534(l)(3)*].

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28-328 California Forms of Pleading and Practice--Annotated § 328.352

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.352 Notification of Mailing Address [Welf. & Inst. Code § 316.1]--Judicial Council Form JV-140

[1] FORM Notification of Mailing Address [Welf. & Inst. Code § 316.1]--Judicial Council Form JV-140

Click here to view image.

[2] Use of Form

This is the Judicial Council form of Notification of Mailing Address. At the first appearance of a parent or guardian at a dependency proceeding, the court will order the parent or guardian, or both, to provide a mailing address for notice purposes [*see Welf. & Inst. Code § 316.1(a)*; *Cal. Rules of Ct., Rule 5.534(l)*].

Although use of this form is optional [*see Cal. Rules of Ct., Rules 1.35, 5.504(a)*], it is the preferred method of providing the mailing address [*Cal. Rules of Ct., Rule 5.534(m)(3)*]. The Spanish language version of this form is Judicial Council form JV-140S.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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§§ 328.353[Reserved]

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28-328 California Forms of Pleading and Practice--Annotated § 328.360

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.360 Restraining Orders--Juvenile (CLETS) (Dependency) [Welf. & Inst. Code § 213.5]--Judicial Council Form JV-250

[1] FORM Restraining Orders--Juvenile (CLETS) (Dependency) [Welf. & Inst. Code § 213.5]--Judicial Council Form JV-250

Click here to view image.

[2] Use of Form

This is the Judicial Council form of a restraining order issued in a dependency case [*see Welf. & Inst. Code § 213.5*; *Cal. Rules of Ct., Rule 5.630*]. It is the mandatory Judicial Council form of Restraining Order--Juvenile (JV-250).

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Restraining Orders

[a] Ex Parte Orders

After a dependency petition has been filed and until such time as the petition is dismissed or dependency terminated, the court may issue ex parte the following restraining orders regardless of whether the child lives with the parent, legal guardian, or caregiver [*Welf. & Inst. Code § 213.5(a)*; *Cal. Rules of Ct., Rule 5.630(a)*; *see Code Civ. Proc. § 527* (procedure to obtain restraining orders)]:

- Enjoining any person from molesting, attacking, striking, sexually assaulting, stalking, or battering the child or any other child in the household.

- Excluding any person from the dwelling of the person who has care, custody, and control of the child.

- Enjoining any person from specified behavior, including contacting, threatening, or disturbing the peace of the child, that the court determines is necessary to effectuate either of the foregoing orders.

The court shall also order that any party enjoined pursuant to these provisions be prohibited from taking any action to obtain the address or location of the protected person or that person's family members, caregivers, or guardian, unless the court finds good cause not to make that order [*Welf. & Inst. Code § 213.7(a)*].

If a temporary restraining order is granted without notice, the matter must be made returnable on an order to show cause on the earliest day that the business of the court will permit, but not later than 15 days (or if good causes appears to the court, 20 days) from the date on which the temporary restraining order was granted. The court may, on the motion of the person seeking the restraining order or on its own motion, shorten the time for service of the order to show cause on the person to be restrained. The court may also, on its own motion or the filing of an affidavit by the person seeking the restraining order, find the person to be restrained could not be served within the required time and reissue the order. The reissued order must state on its face the expiration date of the order. Any hearing on a restraining order may be held simultaneously with another regularly scheduled hearing in the dependency proceeding [*Welf. & Inst. Code § 213.5(c)*].

[b] Orders After Notice and Hearing

The juvenile court may issue, on notice and a hearing, any of the orders in *Welf. & Inst. Code § 213.5(a)* [*see* discussion in [a], *above*]. If it does so, it shall also order that any party enjoined pursuant to these provisions be prohibited from taking any action to obtain the address or location of the protected person or that person's family members, caregivers, or guardian, unless the court finds good cause not to make that order [*Welf. & Inst. Code § 213.7(a)*]. A restraining order granted after notice and a hearing remains in effect, at the discretion of the court, for a period not to exceed three years, unless otherwise terminated by the court, extended by mutual consent of all parties to the order, or extended by further order of the court on the motion of any party to the restraining order [*Welf. & Inst. Code § 213.5(d)*].

[c] Expiration Date Must Be Stated on Restraining Order

Any order issued pursuant to *Welf. & Inst. Code § 213.5(a)* (ex parte) or (b) (after notice and hearing) must state on its face the date of expiration of the order [*Welf. & Inst. Code § 213.5(f)*].

[d] Residence Exclusion Order

A residence-exclusion order may be issued "regardless of which party holds legal or equitable title or is the lessee of the residence or dwelling" [*Welf. & Inst. Code § 213.5(e)*]. The court may make a residence-exclusion order only on a showing of all of the following [*Welf. & Inst. Code § 213.5(e)(2)*]:

- Facts sufficient for the juvenile court to determine the person who will remain in the dwelling has a right to possession of the premises under color of law.

- That the excluded person has assaulted or threatens to assault the other person, any person under the care, custody and control of the other person, or any minor child of the parties or of the other person.

- That the other person, any person under the care, custody or control of the other person, or any minor

child of the parties or of the other person, would suffer physical or emotional harm if the order were not issued.

[e] Execution of Restraining Order

The court shall order any designated person or attorney to mail a copy of any restraining order and proof of service, including an extension, modification, or termination of the order, to each local law enforcement agency having jurisdiction over the residence of the person who has the care, custody, and control of the minor and over other locations where the court determines that acts of domestic violence or abuse against the minor are likely to occur. The order must be mailed by the close of the business day on which it was granted. Each appropriate law enforcement agency must make available, through a system for verification, information as to the existence, terms, and current status of any order to any law enforcement officer responding to the scene of reported domestic violence or abuse [*Welf. & Inst. Code § 213.5(g)*].

[4] Restraining Orders in Conjunction With Custody Order

If the juvenile court orders custody to a noncustodial parent and terminates dependency, as discussed in *§ 328.127[1]*, the court may issue orders to either parent as set forth in *Welf. & Inst. Code § 213.5* or enjoining any action specified in *Fam. Code §§ 6320* (enjoining specific acts of abuse), 6321 (excluding a person from a dwelling), and 6322 (enjoining other specified behavior) [*Welf. & Inst. Code § 362.4*; *see Fam. Code § 6218*]. The order must be prepared on Judicial Council form Custody Order--Juvenile (JV-200) [*Cal. Rules of Ct., Rule 5.630(h)(3)*; *see* form *set out in § 328.361*].

[5] Cross References

For discussion and forms relating to ex parte protective orders restraining family violence generally, see Ch. 293, *Harassment and Domestic Violence* .

For discussion, procedural guide, and forms relating to restraining orders generally, see Ch. 303, *Injunctions* .

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28-328 California Forms of Pleading and Practice--Annotated § 328.361

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.361 Custody--Juvenile (Dependency) [Welf. & Inst. Code §§ 304, 361.2, 362.4]--Judicial Council Form JV-200

[1] FORM Custody--Juvenile (Dependency) [Welf. & Inst. Code §§ 304, 361.2, 362.4]--Judicial Council Form JV-200

Click here to view image.

[2] Use of Form

This is the mandatory Judicial Council form of Custody Order. The Spanish language version of the form is Judicial Council form JV-200S. It is used when the juvenile court issues a custody order for a dependent child and terminates its jurisdiction. When the court orders custody to one parent and visitation rights to the other parent [*see Welf. & Inst. Code §§ 361.2, 362.4*; *Cal. Rules of Ct., Rule 5.700(a)*], use also the mandatory Judicial Council form of Visitation Order--Juvenile (JV-205); *see § 328.361A*. If the court orders custody to a parent subject to jurisdiction of the court with services to one or both parents, the court may direct the order be prepared and filed in the same manner as described in *Cal. Rules of Ct., Rule 5.700(a)* [*see Cal. Rules of Ct., Rule 5.700(b)*].

This form must also be used if the court terminates its jurisdiction and there is a pending nullity, dissolution, legal guardianship, or paternity proceeding or a custody order has been entered relating to the family, particularly if custody has been awarded to the noncustodial parent, and the juvenile court on its own motion wishes to enjoin either parent from any action specified in *Fam. Code § 6320* (contacting, molesting, attacking, striking, threatening, sexually assaulting, battering, or disturbing peace) or *Fam. Code § 6321* (excluding party from dwelling on showing of assault or threat of assault) or as set forth in *Welf. & Inst. Code § 213.5* [*see Welf. & Inst. Code § 362.4*; *Cal. Rules of Ct., Rule 5.700(a)*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Filing Order in Existing Proceeding

This custody order must be filed in an existing nullity, dissolution, legal guardianship, or paternity proceeding. If no custody proceeding is filed or pending, the order may be used as the sole basis to open a file [*Welf. & Inst. Code § 362.4*; *Cal. Rules of Ct., Rule 5.700(a)(1)*].

[4] Preparation and Transmittal of Order

The juvenile court may direct the parent, parent's attorney, county counsel, or clerk to [*Welf. & Inst. Code § 362.4*; *Cal. Rules of Ct., Rule 5.700(a)(2)*]:

- Prepare the order for the court's signature.

- Transmit the order within 10 calendar days after the order is signed to the superior court of the county in which a custody proceeding has already been commenced or, if none, to the superior court of the county in which the parent who has been given custody resides.

[5] Filing of Order

On receipt of the juvenile court custody order, the superior court clerk of the receiving county must immediately file the order in the existing proceeding or must immediately open a file, without a filing fee, and assign a case number [*Welf. & Inst. Code § 362.4*; *Cal. Rules of Ct., Rule 5.700*].

[6] Certificate of Mailing

Within 15 court days after receiving the order, the clerk of the receiving court must send by first-class mail an endorsed filed copy of the order showing the case number of the receiving court to (1) the persons whose names and addresses are listed on the order; and (2) the originating juvenile court, with a completed clerk's certificate of mailing, for inclusion in the minor's file [*Cal. Rules of Ct., Rule 5.700(a)(3)*].

[7] Cross References

For discussion and forms relating to ex parte protective orders restraining family violence generally, see Ch. 293, *Harassment and Domestic Violence* .

For discussion, procedural guide, and forms relating to restraining orders generally, see Ch. 303, *Injunctions* .

For additional discussion and forms relating to parental rights and duties and coverage of child custody issues arising outside the context of dissolution of marriage proceedings, see Ch. 394, *Parent and Child* .

For discussion and forms relating to establishment of a parent-child relationship, see Ch. 412, *Paternity* .

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28-328 California Forms of Pleading and Practice--Annotated § 328.361A

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.361A Visitation--Juvenile (Dependency) Attachment [Welf. & Inst. Code §§ 304, 361.2, 362.4]--Judicial Council Form JV-205

[1] FORM Visitation--Juvenile (Dependency) Attachment [Welf. & Inst. Code §§ 304, 361.2, 362.4]--Judicial Council Form JV-205

Click here to view image.

[2] Use of Form

This is the mandatory Judicial Council form for a Visitation Order on the termination of dependency jurisdiction. The Spanish language version of the form is Judicial Council form JV-205S. It is attached to the juvenile court's custody order, Judicial Council form of Custody Order--Juvenile (JV-200) for a dependent minor when the court terminates its jurisdiction, ordering custody to one parent and visitation rights to the other parent [*see Welf. & Inst. Code §§ 361.2, 362.4*; *Cal. Rules of Ct., Rule 5.700(a)*]; *see § 328.361* for Judicial Council form of Custody Order--Juvenile (JV-200). If the court orders custody to a parent subject to jurisdiction of the court with services to one or both parents, the court may direct the order be prepared and filed in the same manner as described in *Cal. Rules of Ct., Rule 5.700(a)* [*see Cal. Rules of Ct., Rule 5.700(b)*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Cross References

For discussion and forms relating to ex parte protective orders restraining family violence generally, see Ch. 293, *Harassment and Domestic Violence* .

For discussion, procedural guide, and forms relating to restraining orders generally, see Ch. 303, *Injunctions* .

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28-328 California Forms of Pleading and Practice--Annotated § 328.362

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.362 Waiver of Reunification Services [Welf. & Inst. Code § 361.5]--Judicial Council Form JV-195

[1] FORM Waiver of Reunification Services [Welf. & Inst. Code § 361.5]--Judicial Council Form JV-195

Click here to view image.

[2] Use of Form

This is the Judicial Council form of a waiver of reunification services [*Welf. & Inst. Code § 361.5*]. The Spanish language version of the form is Judicial Council form JV-195S. In most cases, when a child is removed from the custody of a parent the juvenile court is required to order the social worker to provide child welfare services to the child and the child's mother, statutorily presumed father, or guardians for the purpose of facilitating reunification of the family [*Welf. & Inst. Code § 361.5(a)*; *Cal. Rules of Ct., Rule 5.695(f)(1)*]. The court may order reunification services for a biological father of the child if the provision of such services are in the child's best interest [*Welf. & Inst. Code § 361.5(a)*].

Reunification services are not to be provided, however, if the court finds by clear and convincing evidence that the parent or guardian has been advised of his or her right to reunification services and of the consequences of waiving such services, including the possibility of termination of parental rights and adoption, and the parent or guardian waives such services. The parent or guardian must be represented by counsel before making such a waiver and must execute the waiver of services form which the Judicial Council has adopted. The court must not accept the waiver unless it finds that the parent or guardian has knowingly and intelligently waived the right to services. This finding by the court must be stated on the record [*Welf. & Inst. Code § 361.5(b)(14)*].

Use of the Judicial Council form is required. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or

monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Cross References

For general discussion of services on removal, see *§ 328.129[1]-[9]*.

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28-328 California Forms of Pleading and Practice--Annotated § 328.363

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.363 ICPC Priority--Findings and Orders [Fam. Code § 7900 et seq.; Cal. Rules of Ct., Rule 1428]--Judicial Council Form JV-567

[1] FORM ICPC Priority--Findings and Orders [Fam. Code § 7900 et seq.; Cal. Rules of Ct., Rule 1428]--Judicial Council Form JV-567

Click here to view image.

[2] Use of Form

This is the Judicial Council form for use as the court's findings and orders regarding a priority placement under Regulation 7 of the Interstate Compact on the Placement of Children (ICPC) [*see Fam. Code § 7900 et seq.*; *Cal. Rules of Ct., Rule 5.616*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Cross References

For discussion of the Interstate Compact on the Placement of Children, see *§ 328.128*.

Additional discussions related to the Interstate Compact on the Placement of Children include the following:

- Ch. 12, *Adoptions* (discussion of interstate adoptions includes the application of the Interstate Compact on the Placement of Children).

- Treatment of interstate adoptions. Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Ch. 172, §§ 180-182 (Matthew Bender).

- Full coverage of adoptions, including interstate adoptions. Hollinger et al., Adoption Law and Practice, Ch. 3, Placing Children for Adoption and App. 3-A (Matthew Bender).

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28-328 California Forms of Pleading and Practice--Annotated § 328.364

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.364 Findings and Request for Assistance Under Interstate Compact on the Placement of Children (ICPC) [Fam. Code § 7900 et seq.; Cal. Rules of Ct., Rule 5.616]--Judicial Council Form JV-565

[1] FORM Findings and Request for Assistance Under Interstate Compact on the Placement of Children (ICPC) [Fam. Code § 7900 et seq.; Cal. Rules of Ct., Rule 1428]--Judicial Council Form JV-565

Click here to view image.

[2] Use of Form

This is the Judicial Council form of findings and request for assistance under the Interstate Compact on the Placement of Children (ICPC) [*see Fam. Code § 7900 et seq.*; *Cal. Rules of Ct., Rule 5.616*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Cross References

For discussion of the Interstate Compact on the Placement of Children, see *§ 328.128*.

Additional discussions related to the Interstate Compact on the Placement of Children include the following:

- Ch. 12, *Adoptions* (discussion of interstate adoptions includes the application of the Interstate Compact on the Placement of Children).

- Complete coverage of adoptions. Hollinger et al., Adoption Law and Practice, and especially Ch. 3, Placing Children for Adoption and App. 3-A (Matthew Bender).

- Detailed treatment of interstate adoptions. Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Ch. 172, §§ 180-182 (Matthew Bender).

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28-328 California Forms of Pleading and Practice--Annotated §§ 328.365-328.369

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[Reserved]

§§ 328.365[Reserved]

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28-328 California Forms of Pleading and Practice--Annotated § 328.370

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.370 Petition to Modify Juvenile Court Order [Welf. & Inst. Code § 388; Cal. Rules of Ct., Rules 5.560, 5.570]--Judicial Council Form JV-180

[1] FORM Petition to Modify Juvenile Court Order [Welf. & Inst. Code § 388; Cal. Rules of Ct., Rules 1430, 1432]--Judicial Council Form JV-180

Click here to view image.

[2] Use of Form

This is the Judicial Council form for use as a petition to modify a previous juvenile court dependency order [*Welf. & Inst. Code § 388*; *Cal. Rules of Ct., Rules, 5.560, 5.570*]. It is also used by a sibling to establish a relationship with the dependent child through the juvenile court [*Welf. & Inst. Code § 388(b)*].

Use of the form is mandatory [*Cal. Rules of Ct., Rules 1.31, 5.504(a)*, 5.570(b)]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

A petition for modification hearing must be used whenever there is a change of circumstances or new evidence that may require the court to change, modify, or set aside any order previously made or to terminate the jurisdiction of the court over the minor [*see Welf. & Inst. Code § 388*; *Cal. Rules of Ct., Rule 5.560(d)*].

A petition for modification hearing may be filed by any of the following [*Cal. Rules of Ct., Rule 5.560(e)*; *see Welf. & Inst. Code § 388*]:

- The social worker, regarding a child who is a dependent, if the requested modification is not for a more restrictive level of custody.
- The parent or guardian.
- The child or the attorney for the child.
- Any other person having a legally recognizable interest in a child who is a dependent.

It may also be filed by a sibling to assert a sibling relationship [*Welf. & Inst. Code § 388(b)*].

Further, it must be used if a party is seeking to terminate court ordered reunification services before the normal prescribed time [*Welf. & Inst. Code § 388(c)*].

[3] Contents of Petition

A petition for modification must be liberally construed in favor of its sufficiency. The petition must be verified and contain the following information [*Cal. Rules of Ct., Rule 5.570(a)*]:

- The name of the court to which the petition is addressed.
- The title and action number of the original proceeding.
- The name, age, and address of the child, unless confidential.
- The name and residence address, if known, of the parent or guardian or of an adult relative of the child, if appropriate under the circumstances described in *Cal. Rules of Ct., Rule 5.524* (contents of juvenile court petition).
- The date and general nature of the order sought to be modified.
- A concise statement of any change of circumstance or new evidence that requires changing of the order.
- A concise statement of the proposed change of the order.
- A statement as to the petitioner's relationship to or interest in the minor, if the petition is made by a person other than the minor; and
- A statement whether or not all parties agree to the proposed change.

[4] Authority of Court to Modify Order

Any order made by the court may at any time be changed, modified, or set aside, as the court in its discretion considers proper [*Welf. & Inst. Code § 385*; *Cal. Rules of Ct., Rule 5.560(a)*].

[5] Notice of Petition and Hearing

The clerk must cause notice of the petition hearing to be given to the minor, the parent or guardian, the prosecuting attorney, the probation officer or social worker, counsel of record, present custodian of a dependent minor, the tribe of a

dependent Indian child, and any court-appointed child advocate, as prescribed by *Cal. Rules of Ct., Rule 5.524* (contents of notice of hearing) [*Welf. & Inst. Code §§ 386, 388*; *Cal. Rules of Ct., Rule 5.570(g)*].

[6] Hearing and Disposition on Petition

If all parties stipulate to the requested modification, the court may order modification without a hearing. If it appears to the court that the requested modification will be contested or if the court desires to receive further evidence on the issue, the court must order that a hearing on the petition for modification be held within 30 calendar days after the petition is filed [*Cal. Rules of Ct., Rule 5.570(f)*].

If the petition fails to set forth any change of circumstance or new evidence that might require a change of order or termination of jurisdiction, the court may deny the petition ex parte [*Cal. Rules of Ct., Rule 5.570(d)*].

If the petition sets forth a change of circumstance or new evidence and it appears that the best interest of the minor may be promoted by the proposed change of order or termination of jurisdiction, the court may grant the petition after following the procedures set forth in *Cal. Rules of Ct., Rule 5.570(f)-(g)* [*Welf. & Inst. Code § 388*; *Cal. Rules of Ct., Rule 5.570(e)*].

[7] Cross References

For discussion of petitions to modify an order of the juvenile court, see *§ 328.140*.

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28-328 California Forms of Pleading and Practice--Annotated § 328.371

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.371 Supplemental Petition for More Restrictive Court-Ordered Placement [Welf. & Inst. Code §§ 387, 727.3; Cal. Rules of Ct., Rule 5.565]--Judicial Council Form JV-150

[1] FORM Supplemental Petition for More Restrictive Placement [Welf. & Inst. Code § 387; Cal. Rules of Ct., Rule 1430(c)]--Judicial Council Form JV-150

Click here to view image.

[2] Use of Form

This is the Judicial Council form for use as a supplemental petition for more restrictive court-ordered placement in a dependency matter under *Welf. & Inst. Code § 300* (Form JV-150) [*see Cal. Rules of Ct., Rule 5.560(c)*].

Use of this form is mandatory [*see Cal. Rules of Ct., Rule 5.504*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

A supplemental petition is used to request an order changing or modifying a previous order by removing a minor from the physical custody of a parent, guardian, relative, or friend, and directing placement in a higher level of care such as a foster home [*Welf. & Inst. Code § 387*]. In general, a supplemental petition must be used whenever the social worker for a dependent child of the court seeks a more restrictive level of court-ordered placement [*Cal. Rules of Ct., Rule 5.560(c)*].

[3] Levels of Restrictive Custody

For purposes of the use of supplemental petitions, a more restrictive level of court ordered placement is determined by reference to the following ascending order [*Cal. Rules of Ct., Rule 5.560(c)*; *see Welf. & Inst. Code §§ 387, 777*]:

1. Placement in the home of the person entitled to legal custody.

2. Placement in the home of a noncustodial parent.

3. Placement in the home of a relative or friend (i.e., nonrelative extended family member).

4. Placement in a foster home.

5. Commitment to a private institution.

[4] Contents of Petition

The supplemental petition must be verified and contain the information required to be in an original petition by *Cal. Rules of Ct., Rule 5.524*. It must contain a concise statement of facts sufficient to support the conclusion that the previous disposition has not been effective in the protection of the minor or, where removal from placement with a relative is sought, that placement with the relative is no longer appropriate in light of the criteria in *Welf. & Inst. Code § 361.3* [*Cal. Rules of Ct., Rule 5.565(a)*; *see Welf. & Inst. Code § 387(a)*].

[5] Filing of Petition

The supplemental petition must be filed in the original action by the social worker when the minor has been declared a dependent child [*see Welf. & Inst. Code § 387(a)*; *Cal. Rules of Ct., Rule 5.565(a)*].

[6] Setting and Notice of Hearing on Petition

Immediately on the filing of a supplemental petition, the clerk must set it to be heard, and the hearing must be commenced, within the time limits prescribed for jurisdiction hearings on original petitions. Notice must be served on the persons and in the manner prescribed by *Cal. Rules of Ct., Rule 5.667* (notice of hearing on original petition) [*Welf. & Inst. Code §§ 386, 387(b)*; *Cal. Rules of Ct., Rule 5.565*].

[7] Detention Hearing

No child may be ordered detained pending a hearing on a supplemental petition unless a detention hearing is held [*Welf. & Inst. Code § 387(c)*; *see Cal. Rules of Ct., Rule 5.565(d)*].

[8] Hearing on Supplemental Petition

The procedures relating to jurisdiction hearings apply to the determination of the allegations of the supplemental petition [*Cal. Rules of Ct., Rule 5.565(e)(1)*; *see Cal. Rules of Ct., Rules 5.682*-5.688]. The procedures relating to disposition hearings apply to the determination of disposition [*Cal. Rules of Ct., Rule 5.565(e)(2)*; *see Cal. Rules of Ct., Rules 5.690*-5.705]. At the conclusion of the hearing on the supplemental petition, the court must make findings that:

- The factual allegations of the supplemental petition are, or are not, true [*Cal. Rules of Ct., Rule 5.565(e)(1)(A)*].

- The allegation that the previous disposition has not been effective in the protection or rehabilitation of the child or that placement with the relative is no longer appropriate is, or is not, true [*Cal. Rules of Ct., Rule 5.565(e)(1)(B)*].

[9] Cross References

For discussion of supplemental petitions, see *§ 328.141*.

For discussion of detention hearings, see *§ 328.80* et seq.

For discussion of applicable procedures in jurisdiction and disposition hearings, respectively, see *§ 328.100 et seq. and § 328.120* et seq.

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28-328 California Forms of Pleading and Practice--Annotated §§ 328.372-328.379

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

[Reserved]

§§ 328.372[Reserved]

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28-328 California Forms of Pleading and Practice--Annotated § 328.380

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.380 Notice of Review Hearing [Welf. & Inst. Code §§ 366.2, 366.21, 366.22; Cal. Rules of Ct., Rules 5.710-5.720]--Judicial Council Form JV-280

[1] FORM Notice of Review Hearing [Welf. & Inst. Code §§ 366.2, 366.21, 366.22; Cal. Rules of Ct., Rules 1460-1462]--Judicial Council Form JV-280

Click here to view image.

[2] Use of Form

This is the Judicial Council form of notice of periodic status review hearing [*see Welf. & Inst. Code §§ 366.2, 366.21, 366.22*; *Cal. Rules of Ct., Rules 5.710*-5.720]. The Spanish language version of this form is Judicial Council form JV-280S. These hearings are generally held every six months until dependency jurisdiction is terminated [*see Welf. & Inst. Code § 366(a)*; *Cal. Rules of Ct., Rules 5.710-5.720, 5.740*; *see also Welf. & Inst. Code §§ 366.26* (selection and implementation of an alternative permanent plan for children), 366.3 (post-permanency planning review)].

Use of the form is mandatory [*Cal. Rules of Ct., Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Cross References

For general discussion of periodic review hearings, see *§ 328.17* and *§ 328.150* et seq.

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28-328 California Forms of Pleading and Practice--Annotated §§ 328.381-328.389

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

[Reserved]

§§ 328.381[Reserved]

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28-328 California Forms of Pleading and Practice--Annotated § 328.390

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.390 Notice of Hearing on Selection and Implementation of Permanent Plan [Welf. & Inst. Code §§ 294, 366.26; Cal. Rules of Ct., Rule 5.725]--Judicial Council Form JV-300

[1] FORM Notice of Hearing on Selection and Implementation of Permanent Plan [Welf. & Inst. Code §§ 294, 366.26; Cal. Rules of Ct., Rule 1463]--Judicial Council Form JV-300

Click here to view image.

[2] Use of Form

This is the Judicial Council form of notice of hearing on the selection and implementation of a permanent plan [*Welf. & Inst. Code § 294*; *Cal. Rules of Ct., Rule 5.725(b)*]. The Spanish language version of this form is Judicial Council form JV-300S. At the hearing, the juvenile court may terminate parental rights and place the minor for adoption or may order legal guardianship or another planned permanent living arrangement [*see Welf. & Inst. Code § 366.26(b)*; *Cal. Rules of Ct., Rule 5.725(e)*].

Use of the Judicial Council form is mandatory [*Cal. Rules of Ct., Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Cross References

For discussion of proceedings to select and implement a permanent plan, see *§ 328.170* et seq.

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28-328 California Forms of Pleading and Practice--Annotated § 328.391

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.391 Proof of Service of Notice of Hearing Regarding Permanent Plan [Code Civ. Proc. § 1013a; Welf. & Inst. Code §§ 294, 366.26; Cal. Rules of Ct., Rule 5.725]--Judicial Council Form JV-310

[1] FORM Proof of Service of Notice of Hearing Regarding Permanent Plan [Code Civ. Proc. § 1013a; Welf. & Inst. Code §§ 294, 366.26; Cal. Rules of Ct., Rule 1463]--Judicial Council Form JV-310

Click here to view image.

[2] Use of Form

This is the Judicial Council form of proof of service of notice of a hearing to select and implement a permanent plan [*see Code Civ. Proc. § 1013a*; *see also Welf. & Inst. Code § 294*; *Cal. Rules of Ct., Rule 5.725(b)*]. The Spanish language version of this form is Judicial Council form JV-310S.

Use of the form is optional [*Cal. Rules of Ct., Rule 1.35*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Cross References

For discussion of proceedings to select and implement a permanent plan, see *§ 328.170* et seq.

For the form of notice of hearing to which this form applies, see *§ 328.390[1]*.

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28-328 California Forms of Pleading and Practice--Annotated § 328.392

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.392 Orders Under Sections 366.24, 366.26, 727.3, 727.31 of the Welfare and Institutions Code [Welf. & Inst. Code §§ 366.24, 366.26, 727.3, 727.31; Cal. Rules of Ct., Rule 5.725]--Judicial Council Form JV-320

[1] FORM Orders Under Sections 366.24, 366.26, 727.3, 727.31 of the Welfare and Institutions Code [Welf. & Inst. Code §§ 366.24, 366.26, 727.3, 727.31; Cal. Rules of Ct., Rule 5.725]--Judicial Council Form JV-320

Click here to view image.

[2] Use of Form

This is the Judicial Council form for use as the court's order after a selection and implementation hearing in a dependency matter under *Welf. & Inst. Code § 366.26* (Form JV-320). The Spanish language version of this form is Judicial Council form JV-320S.

Use of this form is mandatory [*Cal. Rules of Ct., Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Cross References

For discussion of proceedings to select and implement a permanent plan, see *§ 328.170* et seq.

For the form of notice of hearing to which this form applies, see *§ 328.390[1]*.

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329
CHAPTER 328 JUVENILE COURTS: DEPENDENCY PROCEEDINGS
PART IV. FORMS
E. Permanent and Post-Permanent Disposition Proceedings

28-328 California Forms of Pleading and Practice--Annotated § 328.393

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.393 Letters of Guardianship (Juvenile) [Welf. & Inst. Code §§ 360, 366.26, 366.4, 728]-Judicial Council Form JV-330

[1] FORM Letters of Guardianship (Juvenile) [Welf. & Inst. Code §§ 360, 366.26, 366.4, 728]-Judicial Council Form JV-330

Click here to view image.

[2] Use of Form

This form is the Judicial Council form of letters of guardianship of the person for use in a guardianship established by the juvenile court, e.g., in a dependency proceeding. The Spanish language version of this form is Judicial Council form JV-325S.

Use of this form is mandatory [*Cal. Rules of Ct., Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

Neither the Welfare and Institutions Code nor the Rules of Court distinguish between a guardianship of the person and a guardianship of the estate with regard to a guardianship established in juvenile court for a dependent child. Nevertheless, this Judicial Council form is only for use as letters of guardianship of the person. Presumably, if the child has property and a guardianship of the estate is required, the Judicial Council form of letters of guardianship of the estate for use in probate guardianships must also be completed and issued. For an example of the latter form, see Ch. 280, *Guardianship and Conservatorship* .

[3] Cross References

For discussion regarding establishment of a guardianship of the person in dependency proceedings, see *§§ 328.171[6]*, *328.172[5]*, *[7]*, and *328.181*.

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28-328 California Forms of Pleading and Practice--Annotated §§ 328.394-328.399

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

[Reserved]

§§ 328.394[Reserved]

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F. Appeals and Extraordinary Writs

28-328 California Forms of Pleading and Practice--Annotated § 328.400

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.400 Notice of Intent to File Writ Petition and Request for Record [Cal. Rules of Ct., Rule 8.450]--Judicial Council Form JV-820

[1] FORM Notice of Intent to File Writ Petition and Request for Record [Cal. Rules of Ct., Rule 38]--Judicial Council Form JV-820

Click here to view image.

[2] Use of Form

This is the Judicial Council form of Notice of Intent to File Writ Petition and Request for Record. It is for use when a party seeks review of an order setting a hearing to select and implement a permanent plan [*see Welf. & Inst. Code § 366.26(l)*; *Cal. Rules of Ct., Rules 8.450*].

This form has been approved for optional use [*Cal. Rules of Ct., Rule 5.600(c)*]. It may be produced by a word-processor printer or similar process, including computer generated forms by the Child Welfare Services Case Management System [*Cal. Rules of Ct., Rule 5.504(b)*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Cross References

For discussion regarding proceedings to obtain review by extraordinary writ and appeal, see *§ 328.190* et seq.

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28-328 California Forms of Pleading and Practice--Annotated § 328.401

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.401 Petition for Extraordinary Writ (Dependency) [Welf. & Inst. Code § 366.26(l); Cal. Rules of Ct., Rule 5.600]--Judicial Council Form JV-825

[1] FORM Petition for Extraordinary Writ (Dependency) [Welf. & Inst. Code § 366.26(l); Cal. Rules of Ct., Rule 1436]--Judicial Council Form JV-825

Click here to view image.

[2] Use of Form

This is the Judicial Council form of Petition for Extraordinary Writ. The Spanish language version of the form is Judicial Council form JV-825S. It is for use when a party seeks review of a nonappealable order, such as an order setting a hearing to select and implement a permanent plan, or when a party seeks review by extraordinary writ of a decision of the juvenile court for which an appeal is an inadequate remedy [*see Welf. & Inst. Code § 366.26(l)*; *Cal. Rules of Ct., Rules 5.595, 5.600*].

This form has been approved for optional use [*Cal. Rules of Ct., Rule 1.35*]. It may be produced by a word-processor printer or similar process, including computer generated forms by the Child Welfare Systems Case Management System [*Cal. Rules of Ct., Rule 5.504(b)*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

Practitioners should not be misled by the brevity of the Judicial Council form. A petition for extraordinary writ still requires an adequate record and points and authorities [*Rayna R. v. Superior Court (1993) 20 Cal. App. 4th 1398, 1406-1407, 25 Cal. Rptr. 2d 259]* . Moreover, the rules of court specifically mandate that references to specific portions of the record and their significance must be noted in the writ, and applicable points and authorities must be attached [

Cal. Rules of Ct., Rules 5.600(j), 8.452(b)].

[3] Cross References

For discussion regarding proceedings to obtain review by extraordinary writ and appeal, see *§ 328.190* et seq.

For discussion and forms relating to proceedings for review by extraordinary writ generally, see Ch. 358, *Mandate and Prohibition* .

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28-328 California Forms of Pleading and Practice--Annotated § 328.402

AUTHOR: Gary C. Seiser Editorial Consultant John P. Passalacqua Contributing Author Jennifer Kaye Williams Contributing Author

§ 328.402 Notice of Appeal [Welf. & Inst. Code §§ 395, 800(a); Cal. Rules of Ct., Rule 8.400(c)]--Judicial Council Form JV-800

[1] FORM Notice of Appeal [Welf. & Inst. Code §§ 395, 800(a); Cal. Rules of Ct., Rule 37]--Judicial Council Form JV-800

Click here to view image.

[2] Use of Form

This is the Judicial Council form of Notice of Appeal for use when a party desires to appeal a decision of the juvenile court in either a dependency or wardship proceeding [*see Welf. & Inst. Code §§ 395, 800(a)*; *Cal. Rules of Ct., Rule 8.400(c)*]. The Spanish language version of the form is Judicial Council form JV-800S.

This form has been approved for optional use [*Cal. Rules of Ct., Rule 1.35*]. It may be produced by a word-processor printer or similar process, including computer generated forms by the Child Welfare Systems Case Management System [*Cal. Rules of Ct., Rule 5.504(b)*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Cross References

For discussion of appeal in dependency and delinquency (wardship) proceedings, respectively, see *§ 328.190 et seq. and Ch. 329, Juvenile Courts: Delinquency Proceedings, § 329.119*.

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329
Chapter 329 JUVENILE COURTS: DELINQUENCY PROCEEDINGS

28-329 California Forms of Pleading and Practice--Annotated 329.syn

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

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FOOTNOTES:

(n72)Footnote *. **Hon. Kurt Kumli** is a California Superior Court Judge for the County of Santa Clara and a former Commissioner on the State Commission on Juvenile Justice. He was instrumental in creating specialized delinquency courts in Santa Clara County for drug offenders, family violence, and restorative justice. He was the co-creator of the country's first juvenile mental health court and implemented Santa Clara's juvenile deferred entry of judgment (DEJ) process, which now accounts for nearly 30 percent of all first-time court referrals in that county. A nationally recognized expert on juvenile law and policy, Judge Kumli serves on the faculty at the Santa Clara University School of Law and teaches delinquency law and policy classes throughout the United States. The National Institute of Justice chose Judge Kumli as a recipient of a John B. Pickett Fellowship at Harvard's Kennedy School of Government for Senior Executives in State and Local Government Program. Judge Kumli has been a member of the California Judicial Council's Family and Juvenile Law Advisory Committee, and a faculty member and technical advisor for the California District Attorneys Association, where he chaired its Juvenile Justice Committee. He has published numerous articles on gang prosecution, juvenile justice reform, juvenile mental health court and California's adult court certification (Fitness) process.

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Chapter 329 JUVENILE COURTS: DELINQUENCY PROCEEDINGS
PART I. SCOPE

28-329 California Forms of Pleading and Practice--Annotated § 329.01

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§ 329.01 Scope of Chapter

This chapter has discussion and forms relating to juvenile court delinquency proceedings; that is, proceedings to adjudge a minor a ward of the court under *Welf. & Inst. Code § 601* or *602*.

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28-329 California Forms of Pleading and Practice--Annotated § 329.02

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.02 Cross References

The analysis and forms relating to general juvenile court jurisdiction and procedures is in Ch. 327, *Juvenile Courts: Jurisdiction and General Procedures*.

A discussion and forms relating specifically to juvenile court dependency proceedings is in Ch. 328, *Juvenile Courts: Dependency Proceedings*.

Coverage of additional topics related to civil actions arising out of children's issues may be found in the following chapters:

- Ch. 367A, *Minors: Tort Actions* (discussion and forms relating to tort actions by and against minors).

- Ch. 394, *Parent and Child* (additional discussion and forms relating to parental rights and duties, together with coverage of child custody issues arising outside the context of dissolution of marriage proceedings).

Family law issues affecting children, such as termination of parental rights, enforcement of child support orders, protective orders against domestic violence (including child abuse) parental rights and duties, custody, the establishment of the parent-child relationship, and paternity, are analyzed in Kirkland, Lurvey, Richmond and Wagner, California Family Law Practice and Procedure, 2d ed. Chs. 30- 35, 96, 141, and 171 (Matthew Bender).

For a review of the legal and strategic considerations involved in a wide variety of child-related issues, see Dale, et al., Representing the Child Client (Matthew Bender).

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28-329 California Forms of Pleading and Practice--Annotated §§ 329.03-329.09

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

[Reserved]

§§ 329.03[Reserved]

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28-329 California Forms of Pleading and Practice--Annotated § 329.10

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§ 329.10 Governing Law

The statutes governing delinquency proceedings under *Welf. & Inst. Code §§ 601* and *602* are contained in *Welf. & Inst. Code §§ 601-800*. The California Rules of Court governing delinquency proceedings are set forth in *Cal. Rules of Ct., Rules 5.500-5.585, 5.590, 5.605-5.616, 5.625-5.652, 5.663, 5.752, 5.830*. Provisions for detaining minors taken into custody under *Welf. & Inst. Code §§ 601* and *602* are set forth in *Welf. & Inst. Code § 206 et seq.*

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28-329 California Forms of Pleading and Practice--Annotated § 329.11

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§ 329.11 Nature of Delinquency Proceeding

[1] Generally Noncriminal Under Welf. & Inst. Code § 203

Historically, a proceeding in the juvenile court has not been deemed a criminal proceeding [*Welf. & Inst. Code § 203*]. Rather than seeking to place the stigma of criminality on the minor, the juvenile court law is said to be liberally construed to secure for each minor such care and guidance as will serve the welfare of the minor and the best interests of the state [*In re Aline D. (1975) 14 Cal. 3d 557, 562*].

[2] Exception When Juvenile Adjudication Is Based on Serious Offense

Despite the language of *Welf. & Inst. Code § 203* that a juvenile court adjudication is not a criminal conviction, a juvenile adjudication, when based on a serious offense, may be treated as the equivalent of a felony conviction in subsequent adult criminal proceedings for purposes of sentence enhancement under the "Three Strikes Law," which was passed by the voters in November, 1994 [*Penal Code § 1170.12(b)(3)* (juvenile adjudication of minor who was 16 years or older at time he or she committed specified felony offenses may constitute prior serious or violent felony conviction for enhanced sentencing in subsequent felony conviction; *see* discussion in *§ 329.60[10][d]*)].

PRACTICE TIP:

Effect of Juvenile Adjudication. The benevolent purpose and construction attributed to juvenile law has been questioned by some courts as affording an opportunity for a procedural lack of due process. Other courts have suggested that such a characterization is a legal fiction inasmuch as it is common knowledge that such an adjudication, when based on a charge of committing an act that amounts to a felony, is a blight on the character of and is a serious impediment to the future of the minor [*In re Mikkelsen (1964) 226 Cal. App. 2d 467, 471, 38 Cal. Rptr. 106]* .

This discussion has recently been limited to an examination of whether the due process safeguards

inherent in a delinquency court trial proceeding are sufficient to impose the same consequences of a criminal conviction once the adjudicated minor becomes an adult. In this context, courts have frequently undertaken an exhaustive retrospective analysis, weighing the original purposes behind delinquency proceedings against theperception that the consequences of those proceedings are increasingly criminal in nature.

In reality, this approach, that often precipitates down to a question of whether minors should be entitled to jury trials when it is alleged that they have committed certain offenses, may be myopic. Since it is the use of the adjudication in an adult proceeding, and not the adjudication itself, that is at the root of the problem, another option is to require proving the offense was a strike--beyond a reasonable doubt to a jury--once it is alleged in an adult proceeding.

For practical purposes, many of these adjudications in juvenile court never become adult "strikes." These offenses also have other consequences relating to their disposition in juvenile court that have nothing to do with the criminal court system, and are entirely within the rehabilitative purposes for which the system was originally created. Consequently, at the time the offenses are adjudicated in juvenile court, the original safeguards and procedures constructed for that process are as appropriate as ever.

The difficulties arise with the subsequent uses, not originally envisioned at the time of the court's creation, in the adult criminal arena. It is further complicated by the fact that countless matters have already been adjudicated in juvenile court, both before and after the current application of the "Three Strikes Law," without the threat or benefit of a jury trial. Those adjudications, for the purposes of the juvenile court are sound in terms of process and constitutional protection. However, when compared with convictions in the criminal justice system, they are significantly different from both constitutional and practical perspectives.

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28-329 California Forms of Pleading and Practice--Annotated § 329.12

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.12 Detention, Jurisdiction, and Disposition Phases

Juvenile delinquency proceedings are divided into three phases: detention, jurisdiction and disposition.

The detention phase occurs only when a probation officer detains a minor. When that happens, a "detention hearing" is held to determine whether or not the juvenile should continue to be detained pending an adjudication on the petition filed on his or her behalf.

If the minor is not detained, the initial phase of the delinquency proceeding is jurisdictional, that is, a "jurisdictional hearing." This hearing addresses the merits of a petition requesting the court to exercise jurisdiction over the minor child as a ward of the court.

In those instances in which the court agrees to exercise jurisdiction over the minor, the final phase is disposition, or the "disposition hearing." At this hearing the juvenile court considers the proper action to be taken in the case.

The split between jurisdiction and disposition is a consequence of the statutory requirement that the court first determine whether the facts of the case would support jurisdiction in declaring wardship and thereafter determine the appropriate disposition [*see In re J. L. P. (1972) 25 Cal. App. 3d 86, 89, 100 Cal. Rptr. 601]* . This bifurcation recognizes that, once the minor has been declared a fit subject for juvenile treatment, the court's task is not punishment but assistance for the juvenile. Thus, the considerations relative to the proper disposition of the minor are different from those that bear upon a determination that a crime has been committed [*In re J. L. P. (1972) 25 Cal. App. 3d 86, 89, 100 Cal. Rptr. 601]* .

Because, however, juvenile court proceedings are designed to produce an informal, nonadversary atmosphere, it is permissible for the court to dispose of the jurisdictional and dispositional phases in a single hearing so long as it complies with the basic requirements of each of those phases [*In re Mikkelsen (1964) 226 Cal. App. 2d 467, 470, 38*

Cal. Rptr. 106] .

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28-329 California Forms of Pleading and Practice--Annotated § 329.13

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.13 Exclusion of Public at Delinquency Proceedings

[1] Public Generally Excluded

In delinquency proceedings, the public is generally excluded from juvenile court hearings unless the minor or any parent or guardian present at a proceeding requests otherwise. However, the court may admit persons that have a direct and legitimate interest in a particular case or the work of the court [*Welf. & Inst. Code § 676(a)*]. Furthermore, members of the public must be admitted on the same basis as they are allowed in criminal proceedings, when certain offenses are charged [*Welf. & Inst. Code § 676(a)*; *see* discussion in [2], *below*].

Notwithstanding the general rule excluding the public from juvenile proceedings, a prosecuting witness may have up to two family members present for support [*Welf. & Inst. Code § 676(a)* (delinquency proceedings); *Cal. Rules of Ct., Rule 5.530*; *see* discussion in [3], *below*].

[2] Exception When Serious Offense Charged

[a] General Rule

The exception to the rule of excluding the public applies generally to situations in which the juvenile is charged with commission of a serious offense. In other words, the public must be admitted as it would be to trials in criminal court if the wardship petition alleges that the juvenile committed any of the following [*Welf. & Inst. Code § 676(a)*]:

- Murder.
- Arson of an inhabited building.
- Robbery while armed with a dangerous or deadly weapon.

- Rape with force or violence or threat of great bodily harm.
- Sodomy by force, violence, duress, menace, or threat of great bodily harm.
- Oral copulation by force, violence, duress, menace, or threat of great bodily harm.
- Any offense specified in *Penal Code § 289(a)* (penetration by foreign object).
- Kidnapping for ransom.
- Kidnapping in violation of *Penal Code § 209(b)*.
- Kidnapping with bodily harm.
- Assault with intent to murder or attempted murder.
- Assault with a firearm or destructive device.
- Assault by any means of force likely to produce great bodily injury.
- Discharge of a firearm into an inhabited or occupied building.
- Any offense described in *Penal Code § 1203.09* (crimes against aged or handicapped).
- Certain weapons offenses committed by a minor 16 years of age or older, as described in *Penal Code §§ 12020* and *12022.5*.
- Residential burglary if the minor is already a ward of the court.
- Any felony offense described in *Penal Code § 136.1* (intimidation of witnesses and victims) or 137 (influencing testimony or information given to law enforcement official).
- Certain controlled-substance offenses as specified in *Health & Safety Code §§ 11351*, *11351.5*, *11352*, *11378*, *11378.5*, *11379*, and *11379.5*.
- Criminal street gang activity that constitutes a felony pursuant to *Penal Code § 186.22*.
- Manslaughter as specified in *Penal Code § 192*, drive-by shooting or discharge of a weapon from or at a motor vehicle as specified in *Penal Code §§ 246*, *247*, and *12034*.
- Any crime committed with an assault weapon, as defined in *Penal Code § 12276*, including possession of an assault weapon as specified in *Penal Code § 12280(b)*.
- Carjacking, while armed with a dangerous or deadly weapon.
- Kidnapping, in violation of *Penal Code § 209.5*.
- Torture, as described in *Penal Code §§ 206*, *206.1*.

- Aggravated mayhem, in violation of *Penal Code § 205*.

[b] Effect of Proposition 21

Effective March 8, 2000, the "Gang Violence and Juvenile Crime Prevention Act of 1998," commonly referred to as Proposition 21, became law. As a result, the law governing access to juvenile hearings has been significantly altered.

Specifically, *Welf. & Inst. Code § 676* has been amended to expand public access to many juvenile court proceedings. The court must now post in a conspicuous place, which is accessible to the public, a written list of each day's hearings that are open to the public. This posting must include the time and location of those hearings [*Welf. & Inst. Code § 676(g)*]. The list of offenses now open to the public includes any offense described in *Penal Code § 12022.53* [*Welf. & Inst. Code § 676(a)(16)*].

The name of a minor found to have committed an offense described in *Welf. & Inst. Code § 676* is not confidential unless the court so orders for good cause. The good cause order is limited to protecting the personal safety of the minor, victim, or member of the public, and must be made in writing of the record [*Welf. & Inst. Code § 676(c)*].

Public disclosure of any record or file concerning a minor who has committed an offense listed in *Welf. & Inst. Code § 676(a)* shall not be prohibited for the benefit of the minor unless the court makes a written finding that the reason for the prohibition is to protect the safety of the minor [*Welf. & Inst. Code § 676(c)*].

[c] Limitations on Exception

[i] Motion by Juvenile Based on Substantial Prejudice

Even when the court has statutory authority to admit the public to a juvenile proceeding, a minor has the right to exclude the public or press from a proceeding, including a competency proceeding, if he or she establishes a reasonable likelihood of substantial prejudice to his or her right to receive a fair and impartial trial [*Cheyenne K. v. Superior Court (1989) 208 Cal. App. 3d 331, 336, 256 Cal. Rptr. 68* ; *Tribune Newspapers West, Inc. v. Superior Court (1985) 172 Cal. App. 3d 443, 451, 218 Cal. Rptr. 505]* .

[ii] Motion by Victim

In some cases, the victim may request that the district attorney move for a closed hearing when the petition alleges offenses that fall under the exception to public exclusion from proceedings [*see* discussion in [a], *above*].

If the petition alleges that the minor is subject to juvenile court wardship jurisdiction under *Welf. & Inst. Code § 602* (criminal behavior) on the grounds that the minor committed (1) rape with force or violence or great bodily harm, (2) sodomy by force, violence, duress, menace, or threat of great bodily harm, (3) oral copulation by force, violence, duress, menace, or threat of great bodily harm, or (4) any offense specified in *Penal Code § 289* (penetration by foreign object), members of the public must be excluded from the hearing either [*Welf. & Inst. Code § 676(b)*]:

- When the district attorney moves to close the hearing at the victim's request (which the district attorney must do if the victim so requests).

- When, at the time of the offense, the victim was under 16 years of age (in this instance the public is excluded during the victim's testimony).

[iii] Motion to Keep Name Confidential When Proceeding Is Open to Public

The name of a minor found to have committed one of the offenses set out in [a], *above*, will not be confidential unless

the court so orders for good cause [*Welf. & Inst. Code §§ 676(c), 1764.1*; *see also Welf. & Inst. Code §§ 1764.2* (release ofinformation to victim or next of kin of victim), 1764.3 (release of information pursuant to *Penal Code §§ 3058.6* and *3058.8* regarding person committed to Youth Authority or committed to Department of Corrections and transferred to Youth Authority, who has been convicted of violent felony listed under *Penal Code § 667.5(c)*)].

The name of the minor found to have committed one of the offenses listed in *Welf. & Inst. Code § 676(a)* shall not be confidential, unless the court, for good cause, so orders. The court shall make a written finding, on the record, explaining why good cause exists to make the name of the minor confidential [*Welf. & Inst. Code § 676(e)*].

[3] When Support Persons May Attend Proceedings

At any juvenile court proceeding for certain specified offenses, a prosecuting witness is entitled, for support, to the attendance at the hearing of up to two family members or support persons of his or her own choosing. The specified offenses include the following [*Penal Code § 868.5(a)*; *Welf. & Inst. Code § 676(a)*]:

- Murder [*Penal Code § 187*].
- Mayhem [*Penal Code § 203*].
- Aggravated mayhem [*Penal Code § 205*].
- Kidnapping [*Penal Code § 207*].
- Robbery [*Penal Code § 211*].
- Carjacking [*Penal Code § 215*].
- Assault with intent to commit mayhem, rape, rape in concert, sodomy, oral copulation, lewd or lascivious act on child, or penetration by foreign object [*Penal Code § 220*].
- Assault [*Penal Code § 240*].
- Battery [*Penal Code § 242*].
- Sexual battery [*Penal Code § 243.4*].
- Assault with a deadly weapon [*Penal Code § 245*].
- Rape [*Penal Code § 261*].
- Spousal rape [*Penal Code § 262*].
- Willful cruelty or unjustifiable punishment on a child rape [*Penal Code § 273a*].
- Corporal punishment or injury [*Penal Code § 273d*].
- Corporal punishment or injury on spouse or cohabitant [*Penal Code § 273.5*].
- Violation of court order relating to child abandonment or neglect [*Penal Code § 273.6*].

- Taking minor from person or public agency [*Penal Code § 277*].
- Incest [*Penal Code § 285*].
- Sodomy [*Penal Code § 286*].
- Lewd or lascivious act on child or dependent adult [*Penal Code § 288*].
- Oral copulation [*Penal Code § 288a*].
- "Resident child molester" [*Penal Code § 288.5*].
- Penetration by foreign object [*Penal Code § 289*].
- Indecent exposure [*Penal Code § 314(1)*].
- Child molestation [*Penal Code § 647.6* (former *Penal Code § 647a*)].

The judge must inform the support person or persons, however, that juvenile court proceedings are confidential and may not be discussed with anyone not in attendance at the proceedings. The judge must also admonish the support person or persons not to prompt, sway, or influence the witness in any way. The court may remove any support person who is prompting, swaying, or influencing the witness [*Penal Code § 868.5(b)*].

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28-329 California Forms of Pleading and Practice--Annotated § 329.14

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.14 Interpreters and Accommodations

[1] Interpreters

Interpreters for a non-English-speaking minor, or a hearing-impaired minor, may be appointed as necessary [*see Evid. Code §§ 750, 751, 754(b)*]. In certain instances, a noncertified interpreter may be appointed if provisionally qualified, and on request by the minor and on a showing of good cause, one who is not provisionally qualified may be appointed to interpret a brief, routine matter [*see Cal. Rules of Ct., Rule 2.893*].

[2] Accommodations

The minor, as well as any lawyer, party, witness, juror, or other individual with an interest in attending the proceeding, and who has a disability, may file an application to request courtroom accommodations for that disability [*see Cal. Rules of Ct., Rule 1.100*].

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AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.15 Access to Delinquency Proceeding Records

[1] In General

The general rule is that a juvenile records case file is confidential and may be inspected only by the following [*Welf. & Inst. Code § 827*]:

- Court personnel.
- The district attorney, a city attorney, or city prosecutor authorized to prosecute criminal or juvenile cases under state law.
- The minor who is the subject of the proceeding.
- The minor's parents or guardians.
- Attorneys for the parties, and judges, referees, other hearing officers, probation officers and law enforcement officers who are actively participating in criminal or juvenile proceedings involving the minor.
- The county counsel, city attorney, or any other attorney representing the petitioning agency in a dependency action.
- The superintendent or designee of the school district where the minor is enrolled or attending school.
- Members of the child protective agencies.

- The State Department of Social Services to carry out its duties to monitor child welfare agencies, children in foster care, and out-of-state placements.

- Authorized representatives of the State Department of Social Services who inspect, license, and investigate community care facilities.

- Members of children's multidisciplinary teams, persons or agencies providing treatment or supervision of the minor.

- A judge assigned to a family law case with custody or visitation issues involving a minor, a family court mediator assigned to the case, and a child custody evaluator appointed by the court.

- Juvenile justice commission members who are conducting a review of a group home pursuant to *Welf. & Inst. Code § 229.5*.

- Persons conducting a court-connected evaluation, investigation, or assessment involving a child custody or visitation matter.

- Any other person who may be designated by court order of the judge of the juvenile court upon filing a petition.

A "juvenile case file" afforded statutory protection from disclosure to the public includes: the petition filed in the juvenile court proceeding, reports of the probation officer and all other documents either filed in the case or made available to, and retained by, the probation officer or judicial officer [*Welf. & Inst. Code Section 827(e)*]. Prior case law has held that records subject to this general protection include: documents contained in the juvenile court file, probation and social service records, investigative reports made available to probation and social services in connection with a juvenile case, and testimony concerning the contents of confidential records [*Lorenza P. v. Superior Court (1988) 197 Cal. App. 3d 607, 610-611, 242 Cal. Rptr. 877* ; *City of San Diego v. Superior Court (1981) 136 Cal. App. 3d 236, 239, 186 Cal. Rptr. 112]* . The protection of juvenile records applies even if proceedings are never initiated in juvenile court [*see Lorenza P. v. Superior Court (1988) 197 Cal. App. 3d 607, 610-611, 242 Cal. Rptr. 877* , citing *T.N.G. v. Superior Court (1971) 4 Cal. 3d 767, 780-781, 94 Cal. Rptr. 813]* .

The guidelines related to the dissemination of juvenile court records are found in *Cal. Rules of Court, Rule 5.552*. With the exception of those persons permitted to inspect juvenile court records without court authorization under *Welf. & Inst. Code §§ 827* and *828*, every person or agency seeking to inspect or obtain juvenile court records must petition the court for authorization using form JV-570 (Petition for Disclosure of Juvenile Court Records). Rule 5.552(d) and (e) describe the notice requirements and procedures that must be followed [*see also R.S. v. Superior Court of Orange County (2009) 172 Cal. App. 4th 1049, 1054, 91 Cal. Rptr. 3d 546]* .

A juvenile court has broad and exclusive authority to determine whether, and to what extent, to grant access to confidential juvenile records [*In re R.G. (2000) 79 Cal. App. 4th 1408, 1413, 94 Cal. Rptr. 2d 818]* . In determining whether to authorize inspection or release of juvenile case files, in whole or in part, the court must balance the interests of the child and the other parties to the juvenile court proceedings, the interests of the petitioner, and the interests of the public [*Cal. Rules of Ct., Rule 5.552(e)(4)*]. If the court grants the petition, the court must find that the need for discovery outweighs the policy considerations favoring confidentiality of juvenile case files. The confidentiality of juvenile case files is intended to protect the privacy rights of the child [*Cal. Rules of Ct., Rule 5.552(e)(5)*]. The court may permit disclosure of juvenile case files only insofar as is necessary, and only if the petitioner shows by a preponderance of the evidence that the records requested are necessary and have substantial relevance to the legitimate need of the petitioner [*Cal. Rules of Ct., Rule 5.552(e)(6)*]. If, after an in-camera review and review of any objections,

the court determines that all or a portion of the juvenile case file may be disclosed, the court must make appropriate orders, specifying the information to be disclosed and the procedure for providing access to it [*Cal. Rules of Ct., Rule 5.552(e)(7)*].

While it is the intent of the Legislature that juvenile court records remain confidential, the policy of confidentiality is not absolute [*In re R.G. (2000) 79 Cal. App. 4th 1408, 1414, 94 Cal. Rptr. 2d 818]* . In fact, it has been noted that the rules related to juvenile case files recognize competing interests, including public interest, may tip the balance in favor of disclosure [*In re Keisha T. (1995) 38 Cal. App. 4th 220, 235, 44 Cal. Rptr. 2d 822]* .

For a detailed discussion regarding juvenile records and disclosure procedures, see *Ch. 327, Juvenile Courts: Jurisdiction and General Procedures, § 327.34*, et seq.

[2] Parties Entitled to Copies of Case File

Welfare and Institutions Code § 827(a)(1) lists the individuals and entities authorized to inspect a juvenile case file. *Welf. & Inst. Code § 827(a)(5)* lists the individuals and entities who may also receive copies of the case file; they include:

- Court personnel.
- The district attorney, a city attorney, or city prosecutor authorized to prosecute criminal or juvenile cases under state law.
- The minor who is the subject of the proceeding.
- The minor's parents or guardians.
- The attorneys for the parties, judges, referees, or other hearing officers, probation officers, and law enforcement officers who are actively participating in criminal or juvenile proceedings involving the minor.
- The county counsel, city attorney, or any other attorney representing the petitioning agency in a dependency action.
- Members of the child protective agencies as defined in *Section 11165.9 of the Penal Code*.
- The State Department of Social Services pursuant to § 827(a)(1)(I).

[3] When Charging Petition Is Sustained

Notwithstanding *Welf. & Inst. Code §§ 827* and *828* (restrictions on inspection of juvenile court documents and disclosure of information relating to taking minors into custody), if a petition is sustained for any offense listed in *Welf. & Inst. Code § 676(a)* (discussed in *§ 329.13[2]*), the charging petition, the minutes of the proceeding, and the orders of adjudication and disposition of the court that are contained in the court file will be available for public inspection [*Welf. & Inst. Code § 676(d)*]. *Welf. & Inst. Code § 676(d)* does not authorize public access to any other documents in the court file [*Welf. & Inst. Code § 676(d)*].

[4] When Harm Outweighs Benefit

The probation officer or any party may petition the juvenile court to prohibit public disclosure of any file or record. The

juvenile court will prohibit the disclosure if it appears that the harm to the minor, victims, witnesses, or public from the public disclosure outweighs the benefit of public knowledge [*Welf. & Inst. Code § 676(e)*]. *Welf. & Inst. Code § 676* may not, however, be applied to limit disclosure of information as otherwise provided for by law [*Welf. & Inst. Code § 676(f)*].

[5] *Brady* Obligations in Juvenile and Criminal Cases

Brady v. Maryland imposes a duty on prosecutors to disclose exculpatory evidence to the defense [*Brady v. Maryland (1963) 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215]* . Exculpatory evidence has been described as evidence that is, favorable to the defendant (harmful to the prosecution's case, or impeaches or intends to impeach the credibility of a prosecution witness), material and in the possession of the prosecution team [*Kyles v. Whitley (1995) 514 U.S. 419, 437-438, 115 S. Ct. 1555, 131 L. Ed. 2d 490]* . Thus described, prosecutors have a duty to learn of evidence favorable to the accused that is within their possession [*In re Brown (1998) 17 Cal. 4th 873, 882, 72 Cal. Rptr. 2d 698]* including criminal history information that is "reasonably accessible" to the prosecution team [*People v. Little (1997) 59 Cal. App. 4th 426, 433-434, 68 Cal. Rptr. 2d 907]* .

Although under the control of the juvenile court, delinquency records are reasonablyaccessible to the prosecution through their own case files and the access granted through *Welf. & Inst. Code § 827* [*see also T.N.G. v. Superior Court (1971) 4 Cal. 3d 767, 780-81, 94 Cal. Rptr. 813]* . Common *Brady* material in juvenile case files may include moral turpitude conduct to impeach the credibility of a witness, or evidence that a witness is on juvenile probation, which could indicate a bias toward the prosecution [*Davis v. Alaska (1974) 415 U.S. 308, 311, 94 S. Ct. 1105, 39 L. Ed. 2d 347]* . While sustained juvenile petitions are not criminal convictions pursuant to *Welf. & Inst. Code § 203*, the underlying juvenile moral turpitude conduct is discoverable [*People v. Santos (1994) 30 Cal. App. 4th 169, 178, 35 Cal. Rptr. 2d 719]* and potentially admissible [*People v. Wheeler (1992) 4 Cal. 4th 284* ; *People v. Lee (1994) 28 Cal. App. 4th 1724, 1739, 34 Cal. Rptr. 2d 723]* .

On the other hand, prosecutors are prohibited from disclosing information in juvenile case files to defense counsel in separate proceedings [*Welf. & Inst. Code § 827(a)(4)*]. More specifically, one who receives access to juvenile court records is prohibited from independently making a decision to disclose such records to others not authorized by statute or court order [*In re Keisha T. (1995) 38 Cal. App. 4th 220, 234, 44 Cal. Rptr. 2d 822]* .

Consequently, a conflict often precipitates when the prosecution's federal Brady obligation to disclose information is met by the *Welf. & Inst. Code § 827* prohibition on disclosure. This conflict has not been addressed by the California courts.

The matter has been addressed in a slightly different context, with the result favoring disclosure. The U.S. Supreme Court has held that a state's policy interest in protecting the confidentiality of a juvenile court record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness [*Davis v. Alaska (1974) 415 U.S. 308, 320, 94 S. Ct. 1105, 39 L. Ed. 2d 347]* . In *Davis*, a crucial identification witness for the prosecution in a burglary case was on juvenile probation at the time of trial. The prosecution moved for a protective order to prevent the defense from making any reference to the witness's juvenile record during cross-examination [*Davis v. Alaska (1974) 415 U.S. 308, 310, 94 S. Ct. 1105, 39 L. Ed. 2d 347]* . The defense wanted to use the fact of the witness's juvenile probation status to show that he "might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation" [*Davis v. Alaska (1974) 415 U.S. 308, 311, 94 S. Ct. 1105, 39 L. Ed. 2d 347]* . The trial court granted the motion for protective order, relying on an Alaska statute that limited the admissibility of juvenile case information in non-juvenile proceedings. The Alaska Supreme Court affirmed the conviction, but the U.S. Supreme Court reversed, holding that the defendant's right of confrontation is paramount to the State's policy of protecting a juvenile offender" [*Davis v. Alaska (1974) 415 U.S. 308, 319, 94 S. Ct. 1105, 39 L. Ed. 2d 347]* . "Whatever temporary embarrassment might result to [the witness] or his family by disclosure of his juvenile record is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a

crucial identification witness" [*Davis v. Alaska (1974) 415 U.S. 308, 319, 94 S. Ct. 1105, 39 L. Ed. 2d 347]* .

In California, *Davis* has been applied to *Welf. & Inst. Code § 827* with a similar result. In *Foster v. Superior Court (1980) 107 Cal. App. 3d 218, 165 Cal. Rptr. 701* , the defendant filed a Section 827 petition to examine the minors' juvenile court records, in part to "impeach their credibility as accusing witnesses at the time of trial" [*Foster v. Superior Court (1980) 107 Cal. App. 3d 218, 165 Cal. Rptr. 701*]. The juvenile court reviewed the minors' juvenile case files in camera and denied the defendant's motion. The defendant then brought a discovery motion seeking the same records, which the court also denied. Defendant filed a petition for writ of mandate challenging the court's discovery rulings. The Court of Appeal noted that although California has a strong public policy "protective of the confidentiality of juvenile court records and proceedings," this policy must give way when it "conflicts with a defendant's constitutional rights of confrontation and cross-examination" [*Foster v. Superior Court (1980) 107 Cal. App. 3d 215, 228-229-107 Cal. App. 3d 218, 228-229, 165 Cal. Rptr. 701]* .

PRACTICE TIP:

Petitions for Disclosure Pursuant to *Welf. & Inst. Code § 827*. *California Rule of Court 5.552* provides a mechanism for the court to authorize disclosure of juvenile case information to parties who are not otherwise entitled to obtain such information under section 827. Under Rule 5.552, "authorization for any other person to inspect, obtain, or copy juvenile court records must be ordered by the juvenile court presiding judge or a judicial officer designated by the juvenile court presiding judge" [*Cal. Rules of Court, Rule 5.552(b)*]. To obtain such authorization, such "other person" must file a petition for disclosure on Judicial Council form JV-570 [*see* form set out in Ch. 327, *Juvenile Courts: Jurisdiction and General Procedures*, § 327.352].

The specific records sought shall be identified based on knowledge, information, and belief that such records exist and are relevant to the purpose for which they are being sought. Petitioner shall describe in detail the reasons the records are being sought and their relevancy to the proceeding or purpose for which petitioner wishes to inspect or obtain the records [*Cal. Rules of Court, Rule 5.552(c)*].

At least five days before the petition is filed, the petitioner must serve the petition on the child, County Counsel, the District Attorney, the child's attorney of record if the child is still a ward or dependent of the court, the child's parent or guardian if the child is under 18, and the probation department or child welfare services program [*Cal. Rules of Court, Rule 5.552(d)*]. Once a petition is filed, the court reviews it and may grant or deny it summarily, or set a hearing. If at the hearing the court determines that there may be information or documents in the records sought to which petitioner may be entitled, review of records shall be in camera and the juvenile court judicial officer shall assume that all legal claims of privilege are asserted. [*Cal. Rules of Court, Rule 5.552(e)*; *see* *Pennsylvania v. Ritchie (1987) 480 U.S. 39, 107 S. Ct. 989, 94 L.Ed.2d 40]* . Upon a showing which specifies the material sought and furnishes a plausible justification for inspection petitioner appears to be entitled to information contained in juvenile court files including, but not necessarily limited to, prior delinquent referral information records and proceedings, this policy must give way when it "conflicts with a defendant's constitutional rights of confrontation and cross-examination" [*Foster v. Superior Court (1980) 107 Cal. App. 3d 218, 230, 165 Cal. Rptr. 701* ; *People v. Santos (1994) 30 Cal. App. 4th 169, 178, 35 Cal. Rptr. 2d 719* ; *In re Ricky B. (1978) 82 Cal. App. 3d 106, 113-114, 146 Cal. Rptr. 828.]* .

PRACTICE TIP:

Complying With *Brady* and Avoiding Reversible Error. The petition procedure outlined in *Cal. Rules of Court, Rule 5.552* provides a means for the prosecution to comply with its *Brady* disclosure obligations. A prosecutor with juvenile *Brady* material has two basic options: to encourage the defense to file a Section 827 petition or to file one on the prosecution's own behalf. The former practice will satisfy *Brady* disclosure obligations if the defense counsel files a petition, and if the juvenile court releases the *Brady* material. Neither outcome is guaranteed. If defense counsel fails to file a petition, trial results may be vulnerable on three grounds: ineffective assistance of counsel, a *Fourteenth Amendment Brady*

violation of due process, and a denial of defendant's constitutional right to confront and cross-examine witnesses under *Davis v. Alaska*. If the defense files a petition and the juvenile court denies it, the ultimate outcome is still vulnerable on the latter two grounds. Therefore, in order to fulfill their ethical duty to disclose exculpatory evidence and avoid reversible error, prosecutors should consider taking the following steps:

1. Determine whether any *Brady* material exists in their juvenile case files.

2. If any juvenile *Brady* material exists, they should inform counsel in writing as soon as possible, suggesting that they file a Section 827 petition with the juvenile court.

3. If the defense files a Section 827 petition, the prosecutor should appear at the hearing to support the defense's request for disclosure of the *Brady* material.

4. If the defense fails to file a Section 827 petition, the prosecutor should file a petition requesting authorization to copy and disseminate the juvenile *Brady* material to the defense.

5. If the juvenile court denies the petition, consider appealing the order (or joining in a defense appeal) [*In re Keisha T. (1995) 38 Cal. App. 4th 220, 229* (order denying Section 827 petition is appealable as a final judgment in a special proceeding on a collateral matter)].

[6] Disclosure by Law Enforcement

Law enforcement may disclose the offense and name of any minor, 14 or older, taken into custody for the commission of a serious felony, as defined by *Penal Code § 1192.7*, upon the request of interested parties following the minor's arrest for that offense [*Welf. & Inst. Code § 827.5(a)*]. Law enforcement may also release information regarding any minor, 14 or older, who was found to have committed a felony enumerated in *Welf. & Inst. Code § 707(b)*, absent a written statement of reasons by the court finding good cause prohibiting release [*Welf. & Inst. Code § 827.2(c)*]. The name, description, and alleged offense of any minor alleged to have committed a violent offense, as defined in *Penal Code § 667.5(c)*, may be released by law enforcement if a warrant for the minor's arrest is outstanding and the release would assist in the apprehension of the minor or the protection of public safety [*Welf. & Inst. Code § 827.6(a)*].

[7] Record Sealing

The court is prohibited from destroying the record of any minor found to have committed an offense enumerated in *Welf. & Inst. Code § 707(b)* when they were 14 or older [*Welf. & Inst. Code § 781(d)*].

[8] Database Information

Any minor found to be a ward as the result of any felony offense must have their complete criminal history reported by the court to the Department of Justice [*Welf. & Inst. Code § 602.5*].

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§ 329.16 Rights of Victim

[1] "Victim" Defined

"Victim," for these purposes and as discussed below, means [*Welf. & Inst. Code § 676.5(c)*]:

- The alleged victim of the offense and one person of his or her choosing or however many more the court may allow under the particular circumstances surrounding the proceeding;

- In the event that the victim is unable to attend the proceeding, two personsdesignated by the victim or however many more the court may allow under the particular circumstances surrounding the proceeding; or

- If the victim is no longer living, two members of the victim's immediate family or however many more the court may allow under the particular circumstances surrounding the proceeding.

[2] General Rule

Notwithstanding any other law, a victim is entitled to be admitted, on the same basis as he or she may be admitted to trials in an adult criminal court, to juvenile court hearings involving any criminal offense. They may also be accompanied by up to two support persons of the victims choosing. The probation officer is required to notify the victim of these rights either in person or by registered mail, return receipt requested, together with a notice explaining all other rights and services available to the victim with respect to the case [*Welf. & Inst. Code § 676.5*].

[3] Additional Access

In cases involving offenses which are subject to a fitness hearing under *Welf. & Inst. Code § 707*, victims have the right

to attend the fitness hearing and to obtain copies of the charging petition along with the minutes and orders of all proceedings contained in the court file [*Welf. & Inst. Code § 656.2*]. It should be noted that, under this section, a victim who obtains the above mentioned information may not disclose or disseminate it beyond their immediate family unless authorized to do so by a juvenile court judge. The judge may suspend or terminate the victim's rights to the information if it is improperly disclosed. If the information is intentionally disseminated in violation of the section, the victim may be subject to a $500 fine.

In addition, victims have the right to submit victim impact statements in all juvenile cases involving any criminal offense and to be advised by the probation officer of all judicial proceedings concerning the case [*Welf. & Inst. Code § 656.2*].

[4] Exclusion

The court may exclude a victim from the proceeding pursuant to *Evid. Code § 777*, when the victim is subpoenaed as a witness, although the order of exclusion must be consistent with the objectives of allowing the victim to be present, whenever possible, at all proceedings, as discussed below [*Welf. & Inst. Code § 676.5(d)*].

Otherwise, the victim may be excluded from a juvenile court hearing only if each of the following criteria is met [*Welf. & Inst. Code § 676.5(b)*]:

- The movant, including the minor defendant, who seeks to exclude the victim from the hearing, demonstrates that there is a substantial probability that overriding interests will be prejudiced by the presence of the victim (unlike *Penal Code § 1102.6*, governing victim presence at adult proceedings, "overriding interests" is not further defined in *Welf. & Inst. Code § 676.5*);

- The court considers reasonable alternatives to exclusion of the victim from the hearing;

- The exclusion of the victim from the hearing, or any limitation on his or her presence at the hearing, is narrowly tailored to serve the overriding interests identified by the movant; and

- Following a hearing at which the victim who is to be excluded from the juvenile hearing is afforded an opportunity to be heard, the court makes specific factual findings that support the exclusion of the victim from, or any limitation on his or her presence at, the juvenile hearing.

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§ 329.17 Parents and Guardians

While there is no authority to support the position that parents or guardians are parties to a delinquency proceeding, as that designation is limited to the petitioner and the child, their presence is certainly integral to a successful intervention by the juvenile court. Much like victims, parents and guardians have statutory rights, and an expanding list of statutory obligations, relative to the juvenile delinquency court process.

To this end, the juvenile court shall use whatever means are appropriate, including issuance of a subpoena, to require the presence of the parent, parents, or guardian of a child at detention, jurisdictional, and dispositional hearings. If the court determines that it would be in the best interests of the child for the parent to not attend the hearings, or it would impose a hardship upon the parent or guardian, attendance is not required [*Welf. & Inst. Code § 664*].

Parents and guardians are responsible for costs incurred when a minor is placed in, detained in, or committed to any institution pursuant to a juvenile court order or as a result of being taken into temporary custody by a peace officer [*Welf. & Inst. Code § 903*]; costs incurred as the result of legal services rendered to a minor by an attorney pursuant to an order of the juvenile court [*Welf. & Inst. Code § 903.1*]; and probation costs [*Welf. & Inst. Code § 903.2*].

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§ 329.18 Court Security

[1] Use of Physical Restraints

In adult criminal proceedings, the use of physical restraints on a defendant is prohibited absent a showing of manifest need for their use. This rule applies to both jury trials and preliminary hearings, although a lesser showing is required for the latter [*People v. Fierro (1991) 1 Cal. 4th 173, 218-220, 3 Cal. Rptr. 2d 426*]. Recent decisions considering the prohibition on unwarranted shackling of juveniles at jurisdictional hearings apply the same standard used for adult defendants in preliminary hearings, specifically that some showing of necessity is required and finding stated on the record [*In re DeShaun M. (2007) 148 Cal. App. 4th 1384, 1387, 56 Cal. Rptr. 3d 627*].

Any decision to shackle a minor who appears in Juvenile Delinquency Court for a court proceeding must be based on the non-conforming conduct and behavior of that individual minor, made on a case-by-case basis, and depends upon the type of proceeding. The court may not adopt a general policy requiring the use of physical restrains based solely on the inadequacy of courtroom facilities or lack of available security personnel [*Tiffany A. v. Superior Court (2007) 150 Cal. App. 4th 1344, 1359, 59 Cal.Rptr. 3d 363*].

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[Reserved]

§ 329.19[Reserved]

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§ 329.20 Jurisdiction in Delinquency Proceedings

[1] General Scope

In delinquency proceedings, the juvenile court has jurisdiction over those minors who come within the provisions of either *Welf. & Inst. Code § 601* or *602*. Those minors commonly referred to as "status offenders" come within the jurisdiction of the juvenile court under *Welf. & Inst. Code § 601* for noncriminal conduct, such as running away, truancy and curfew violations. Minors who have committed criminalviolations come within the jurisdiction of the juvenile court under *Welf. & Inst. Code § 602*.

[2] Status Offenses Under Welf. & Inst. Code § 601(a)

[a] In General

Any person under the age of 18 years who persistently or habitually refuses to obey the reasonable and proper orders or directions of his or her parents, guardian, or custodian, or who is beyond the control of such person, or who is under the age of 18 years when he or she violates any ordinance of any city or county of the state establishing a curfew based solely on age is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court [*Welf. & Inst. Code § 601(a)*].

[b] Curfew Ordinances

As a general rule, a peace officer is entitled to take a minor who is in violation of a local curfew ordinance into "temporary" custody [*In re S. (1977) 19 Cal. 3d 727, 734, fn. 6, 139 Cal. Rptr. 708, 566 P.2d 610]* , but the officer must then either: release the minor; deliver or refer the minor to the proper agency for shelter care, counseling, or diversion; release the minor following the preparation of a notice to appear before a probation officer; or take the minor without unnecessary delay before the county probation officer. In any event, the officer is required to prefer the

alternative which least restricts the minor's freedom of movement, provided that alternative is compatible with the best interest of the minor and the community [*Welf. & Inst. Code §§ 601, 625, 626, 626.5*].

If it is determined that the minor should be brought before the juvenile court, the officer must either release the child after delivery of written notice to appear or take them without unnecessary delay before a county probation officer within 24 hours after taking the minor into custody [*Welf. & Inst. Code § 626.5*].

Where a city or county adopts a curfew resolution pursuant to *Welf. & Inst. Code § 625.5*, the options for law enforcement are more limited. For a first violation, an officer is authorized only to issue a warning citation, a copy of which is forwarded to the minor's parent or guardian. Subsequent violations allow officers to temporarily detain minors before transporting them to their parent or temporary place of residence within the state [*Welf. & Inst. Code § 625.5(c)*].

PRACTICE TIP:

Unreasonable Search and Seizure. In light of the statutory restrictions on law enforcement handling of curfew violations, it should be noted that transporting a minor to a police station and conducting a custodial interrogation solely on the basis of a curfew matter is not authorized and violates the child's constitutional rights [*In re Justin B. (1999) 69 Cal. App. 4th 879, 81 Cal. Rptr. 2d 852]* . However, subsequent cases have held that searches conducted pursuant to placing curfew violators in a secure facility to arrange a parental pickup are constitutional. [*In re Charles C. (1999) 76 Cal. App. 4th 420, 427* ; *In re Ian C. (2001) 87 Cal. App. 4th 856, 104 Cal. Rptr. 2d 854]* .

[3] Status Offenses Under Welf. & Inst. Code § 601(b)

[a] Truancy or School Behavior

A minor comes within the jurisdiction of the juvenile court based on *Welf. & Inst. Code § 601(b)* in any of the following situations:

- He or she has four or more truancies within one school year.

- A school attendance review board or a probation officer determines that the available public and private services are insufficient or inappropriate to correct the habitual truancy of the minor, or to correct the minor's persistent or habitual refusal to obey the reasonable and proper orders or directions of school authorities.

- The minor fails to respond to directives of a school attendance review board or the probation officer or to services provided.

A minor who comes within the jurisdiction of the juvenile court under *Welf. & Inst. Code § 601(b)* may be adjudged a ward of the court. However, no minor adjudged a ward of the court under *Welf. & Inst. Code § 601(b)* may be removed from the custody of the parent or guardian except during school hours [*Welf. & Inst. Code § 601(b)*]. On the other hand, if a minor's parent or guardian fails to obey directives of the school attendance review board, dependency proceedings may be initiated, which may result in removal of the child from the parent or guardian [*see* discussion in [b], *below*].

Suspension or expulsion of a student is based on findings made by the schools, school districts and their governing boards. In making these determinations, the schools are generally not dependent on or bound by a particular finding in a juvenile court proceeding. However, certain enumerated acts may result in suspension, expulsion, or a recommendation for expulsion [*Education Code §§ 48900, 48915, 48915.6, 48918* and *48918.5*].

For a detailed discussion of school discipline, see *§ 329.131*.

PRACTICE TIP:

School Searches. School officials have broad supervisory and disciplinary powers over students in the interests of school safety and the sanctity of the learning environment. A degree of supervision and control that could not be exercised over adults may be exercised over children in a school setting. Consequently, minors may be detained by school officials, even in the absence of reasonable suspicion, so long as the detention is not arbitrary, capricious, or for the purposes of harassment [*In re Randy G. (2001) 26 Cal. 4th 556, 110 Cal. Rptr. 2d 516, 28 P.3d 239]* . Even school resource officers, police officers assigned to a particular school to perform law enforcement duties, are subject to a diminished standard when conducting school searches. Both school administrators and school resource officers need only have reasonable suspicion, as opposed to probable cause, before conducting school searches [*In re William V. (2003) 111 Cal. App. 4th 1464, 4 Cal. Rptr. 3d 695]* .

[b] Failure of Parent or Guardian to Obey Directives of School Attendance Review Board

In the event that a parent, guardian, or person in charge of the minor fails to respond to directives of the school attendance board or to services offered on behalf of the minor, the school attendance review board must direct that the minor be referred to the probation department or the county welfare department under statutory provisions governing proceedings to declare a minor a dependent child of the court (*see generally* discussion in Ch. 328, *Juvenile Courts: Dependency Proceedings*). Further, the school attendance review board may require the school district to file a complaint against the parent, guardian, or other person in charge of the minor [*Welf. & Inst. Code § 601.2*; *see Educ. Code §§ 48291, 48454*].

[4] Criminal Offenses Under Welf. & Inst. Code § 602

Any person who is under the age of 18 years when he or she violates any law of the state or of the United States or any ordinance of any city or county of the state defining crime, other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court [*Welf. & Inst. Code § 602*]. *Welf. & Inst. Code § 602* applies only to minors found to have violated a law [*In re M. (1978) 22 Cal. 3d 419, 422 n.2, 149 Cal. Rptr. 387, 584 P.2d 524]* .

Notwithstanding the fact that a minor's wardship can be established exclusively as the result of a violation of federal law, *Welf. & Inst. Code § 602* is not preempted by the *United States Constitution's Supremacy Clause*, *18 U.S.C. § 3231* (which gives federal courts exclusive jurisdiction over federal criminal offenses), or any other provision of federal law [*In re Jose C. (2009) 45 Cal. 4th 534, 541-555, 87 Cal. Rptr. 3d 674]* .

[5] Vehicle Code Infractions Under Welf. & Inst. Code § 603.5

In counties that have adopted the provisions of *Welf. & Inst. Code § 603.5*, jurisdiction over a minor alleged to have committed only an infraction under the Vehicle Code or a violation of a local ordinance involving driving, parking, or operating a motor vehicle, lies with the municipal court [*Welf. & Inst. Code § 603.5(a)*]. The municipal court may refer to the juvenile court any case involving a minor who has been adjudicated a ward of the juvenile court, or who has other matters pending in the juvenile court [*Welf. & Inst. Code § 603.5(a)*]. An alleged violation of *Veh. Code § 40508(a)* or *(b)* (written promise to appear or promise to pay fine) may be referred to the juvenile court for adjudication [*Welf. & Inst. Code § 603.5(a)*].

Juvenile court law and procedures do not apply to proceedings arising from Vehicle Code infractions in counties that have adopted this section [*Welf. & Inst. Code § 603.5(b)*]. Provisions controlling the confidentiality of hearings and access to records are expressly inapplicable when the juvenile's case is being handled in municipal court [*Welf. & Inst. Code § 603.5(c)*]. As with similarly situated adult traffic matters, minors may now resolve most traffic infractions by a bail forfeiture in lieu of a court appearance [*Welf. & Inst. Code § 603.5(c)*].

[6] Juvenile Fugitives

California juvenile court law does not apply to any person who violates any California law defined as a crime, who is at the time of the violation under the age of 18 years, and who subsequently flees from the state. Such a person may be proceeded against in the manner provided by law relating to the commission of crimes. On the return of the person to the state, however, either by extradition or otherwise, proceedings are commenced in the manner provided for under juvenile court law [*Welf. & Inst. Code § 216(a)*].

California juvenile court law also does not apply to any person who violates a law of another state defined as a crime and is at the time of the violation under 18 years of age, or who subsequently flees into the State of California. That individual may be proceeded against as an adult in the manner provided in *Penal Code §§ 1547-1558* (extradition and rewards for fugitives).

The magistrate must, however, for purposes of detention, place the person in juvenile hall if space is available. If no space is available in juvenile hall, the magistrate may detain such a person in the county jail [*Welf. & Inst. Code § 216(b)*].

For discussion and forms relating to extradition proceedings, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 13 (Matthew Bender).

[7] Multiple Petitions

In larger jurisdictions, with multiple courtrooms designated to handle delinquency matters, it is not unusual to have two or more 602 petitions charging a minor with criminal misconduct filed under the same superior court case number heard in different departments. Filing multiple petitions against a juvenile under a single case number has important practical considerations. It allows the court to keep track of the minor's progress (or lack thereof), to determine whether ordered rehabilitative programs are succeeding or failing and whether new ones should be tried, and to aggregate offenses in order to extend the maximum term of confinement for new offenses. [*In re Michael B. (1980) 28 Cal. 3d 548, 554, 169 Cal. Rptr. 723* ; *In re Ernest R. (1998) 65 Cal. App. 4th 443, 449, 76 Cal. Rptr. 2d 453]* .

Many of these same considerations support the position that minors with multiple petitions should be handled by one department, and preferably one judge. The statutes and cases which compare a juvenile court's responsibility to that of a parent suggest that minors benefit from the consistency and familiarity of a constant parental presence as opposed to a varied and dysfunctional familial hierarchy [*In re Kasaundra D. (2004) 121 Cal. App. 4th 533, 540-541, 16 Cal. Rptr. 3d 920* ; *In re Magnuson (1952) 110 Cal. App. 2d 73, 75* ; *Welf & Inst. Code § 202*]. At a minimum, allowing a second judicial officer to look at the same facts underlying jurisdiction and reach opposite conclusions, and then proceed to disposition on the ground that the first judicial officer "should have more closely considered what it was doing," undermines the integrity of judicial rulings. [*In re Alberto (2002) 102 Cal. App. 4th 421, 428]* . If a party is unhappy with rulings affecting jurisdiction, they should follow the appropriate procedures for appellate review rather than seek a different ruling from another judicial officer [*In re Kasaundra D. (2004) 121 Cal. App. 4th 533, 16 Cal. Rptr. 3d 920]* .

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28-329 California Forms of Pleading and Practice--Annotated § 329.21

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§ 329.21 Retention of Jurisdiction

The juvenile court may retain jurisdiction over any person who is found to be a ward of the court under *Welf. & Inst. Code § 601* or *602* until that child attains the age of 21. Such jurisdiction may be extended to the age of 25 when the minor has beenadjudicated a ward of the court under *Welf. & Inst. Code § 602* by reason of any of the offenses listed in *Welf. & Inst. Code § 707(b), (d)(2),* or *(e)* and was committed to the Department of the Youth Authority or has been confined in a state hospital or other appropriate public or private mental health facility pursuant to *Welf. & Inst. Code § 702.3* [*Welf. & Inst. Code § 607(a), (b),* and *(d)*]. The court may also retain jurisdiction over any person while that person is the subject of an arrest warrant issued pursuant to *Welf. & Inst. Code § 663* [*Welf. & Inst. Code § 607(e)*].

In addition, the court must not discharge any person from its jurisdiction who has been committed to the Department of the Youth Authority so long as the person remains under the jurisdiction of the Department of the Youth Authority, including periods of extended control ordered pursuant to *Welf. & Inst. Code § 1800* [*Welf. & Inst. Code § 607(c)*]. See discussion in *§ 329.95[7][c]*.

While *Welf. & Inst. Code § 607(c)* bars the juvenile court from discharging from its jurisdiction a ward committed to CYA so long as the ward remains under CYA jurisdiction, a modification of that commitment made pursuant to *Welf. & Inst. Code § 778* or § 779 does not cause the court to lose jurisdiction over a minor. *Welf. & Inst. Code § 607(b)* extends jurisdiction over wards until age 25 when they have been committed to CYA for an offense listed in *Welf. & Inst. Code § 707(b),* notwithstanding subsequent orders modifying or vacating their CYA commitment [*In re Antoine D. (2006) 137 Cal. App. 4th 1314, 1320-1324, 40 Cal. Rptr. 3d 885]* .

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28-329 California Forms of Pleading and Practice--Annotated § 329.22

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§ 329.22 Certification of Minor to Juvenile Court From Adult Court

[1] Original Exclusive Jurisdiction of Juvenile Court

No court has jurisdiction to conduct a preliminary examination or to try the case of any person on an accusatory pleading charging such person with the commission of a public offense or crime if the person was under the age of 18 years at the time of the alleged offense, unless either:

- The matter has been submitted to the juvenile court by petition and the juvenile court has made an order directing that such person be prosecuted under the general law [*Welf. & Inst. Code § 603*].

- The matter was filed directly in adult court under *Welf. & Inst. Code § 707.01*.

[2] Certification to Juvenile Court

Whenever a case is brought before any court on an accusatory pleading and it is suggested or it appears to the judge before whom such person is brought that the person charged was, at the date the offense is alleged to have been committed, under the age of 18 years, the judge must immediately suspend all proceedings against that person, examine into his or her age, and if it appears to the satisfaction of the judge that the person was under the age of 18 years, he or she must then certify to the juvenile court of the county all of the following [*Welf. & Inst. Code § 604(a)*]:

- That the person (naming the minor) is charged with a crime, giving a brief description of its nature.

- That the person appears to have been under the age of 18 years at the date the offense is alleged to have been committed, giving date of birth if known.

- That proceedings have been suspended against the person on such charge by reason of his or her age,

with the date of suspension.

The judge then attaches a copy of the accusatory pleading to the certification [*Welf. & Inst. Code § 604(a)*; *see also Welf. & Inst. Code § 608* (test to be used to determine age of individual alleged to be person described in *Welf. & Inst. Code § 601*, *602*, or *604(a)*; *Cal. Rules of Ct., Rule 4.116* (contents of certification order)].

PRACTICE TIP:

Continuing Conduct and Conspiracies Committed Before and After the Age of 18. A hearing pursuant to *Welf. & Inst. Code § 604(a)* is not required when criminal conduct is committed before an individual reaches the age of 18, and continues after they become an adult. When a jury can find that a defendant continues to participate in a criminal conspiracy or criminal conduct after his or her 18th birthday, the trial court may deny a motion to suspend the proceedings and conduct an examination for the purpose of certification to Juvenile Court [*People v. Quiroz (2007) 155 Cal. App. 4th 1420, 1427-143, 66 Cal. Rptr. 3d 767*].

[3] Transmittal of Pleading to Juvenile Court and Petition to Commence Delinquency Proceeding

The certification and accusatory pleading are transmitted to the clerk of the juvenile court, who must then immediately notify the probation officer. The probation officer then files a petition in that court to commence a delinquency proceeding [*Welf. & Inst. Code § 604(c)*].

Unlike most petitions, a petition filed due to a certification discussed in [2], *above*, need not be verified [*Welf. & Inst. Code § 604(c)*].

[4] Suspension of Criminal Proceedings

When a court certifies a case to the juvenile court, jeopardy has not attached by reason of the proceedings prior to certification, but the court may not resume proceedings in the case, nor may a new proceeding under the general law be commenced in any court with respect to the same matter unless the juvenile court has found that the minor is not a fit subject for consideration under the juvenile court law and has ordered that proceedings under the general law resume or be commenced [*Welf. & Inst. Code § 604(b)*].

Once the petition discussed in [3], *above*, has been filed in the juvenile court, the minor who is the subject of that petition thereafter may not be subjected to criminal prosecution based on the facts giving rise to the petition, unless the juvenile court has made this determination and order [*Welf. & Inst. Code § 606*; for discussion of the fitness hearing, *see § 329.60* et seq.].

[5] Suspension of Statute of Limitations

Whenever a petition is filed in a juvenile court alleging that a minor has violated a law or ordinance, and while the case is pending before the juvenile court, the statuteof limitations applicable under the general law to the offense alleged is suspended [*Welf. & Inst. Code § 605*].

[6] Effect of Adult Court Findings

[a] Conviction by Jury

When a minor who claims to have been an adult at the time of an offense is tried by a jury and is found guilty, he or she is not entitled to a new adjudicatory hearing in juvenile court upon certification [*In re Harris (1993) 5 Cal. 4th 813, 835, 21 Cal. Rptr. 2d 373]* . However, an individual convicted in adult court is still entitled to a juvenile court disposition [*Jose D. v. Superior Court (1993) 19 Cal. App. 4th 1098, 1101, 23 Cal. Rptr. 2d 664]* .

[b] Plea Agreement

When a minor who claims to have been an adult at the time of an offense enters into a plea bargain in adult court, he or she waives the right to enforce the terms of the agreement upon certification. Conversely, he or she does not waive the right to withdraw their plea and begin anew if disposition cannot be imposed in accordance with the terms of the prior agreement [*In re Jermaine B. (1999) 69 Cal. App. 4th 634, 642, 81 Cal. Rptr. 2d 734]* .

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§ 329.23 Expanded Jurisdiction of Juvenile Court

Delinquency courts now have the ability to affect the lives of minors that come within their jurisdiction by crossing over into areas previously reserved for dependency and family courts. This authority includes the ability to terminate or modify the guardianship of a child or to appoint a coguardian or successor guardian of a child [*Welf. & Inst. Code § 728*]. When a minor has been adjudged a ward of the court, or the court terminates wardship while the minor is under age 18, the juvenile court may issue protective orders pursuant to *Welf. & Inst. Code § 213.5* or *Fam. Code § 6218*, and may issue orders determining parentage of, custody of, or visitation with, the minor [*Welf. & Inst. Code § 726.5*].

After a petition pursuant to *Welfare and Institutions Code Section 601* or Section 602 has been filed, the court may issue ex parte orders enjoining certain conduct. Included in this section are orders enjoining any person from threatening, assaulting, stalking, or battering the minor; excluding any person from the dwelling of the person having custody of the minor; and enjoining the minor from contacting, threatening, stalking, or disturbing the peace of any person [*Welf. & Inst. Code § 213.5(b)*].

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§ 329.24 Federal Jurisdiction

[1] In General

Federal jurisdiction over minors is generally governed by the Federal Juvenile Justice and Delinquency Prevention Act of 1974 [*18 U.S.C. §§ 5031-5042*]. It applies to minors who come before the federal court for offenses which, if committed by an adult, violate a federal criminal statute. Basic procedural rights of minors who come within federal court jurisdiction are also covered by the Act [*see generally* Dale, et al., Representing the Child Client, P 5.07 *Children Under Federal Jurisdiction* (Matthew Bender).]

Before 1974, juvenile delinquency matters arising under federal law were subject to unlimited federal court jurisdiction, with prosecuting agencies retaining the discretion to surrender jurisdiction of certain juvenile cases to the states. The JJDPA substantially limited federal jurisdiction over juvenile delinquency matters and created a "statutory framework for determining whether accused juveniles should face federal or state prosecution." [*In re Jose C. (2007) 155 Cal. App. 4th 1115, 1122* (cites)].

Generally speaking, prosecution of juveniles in federal court is rare. To prosecute a juvenile in federal court, the government must follow the certification procedures required by statute [*United States v. Doe (1999) 170 F.3d 1162, 1165]* . Specifically, a child alleged to have committed an act of juvenile delinquency, other than a violation of law committed within the special maritime and territorial jurisdiction of the United States for which the maximum authorized term of imprisonment does not exceed six months, shall not be proceeded against in any court of the United States unless the Attorney General, after investigation, certifies to the appropriate district court of the United States the following [*18 U.S.C. § 5032*]:

- The juvenile court or other appropriate court of a State does not have jurisdiction or refuses to assume jurisdiction over a juvenile with respect to alleged acts of delinquency.

- The State does not have available programs and services adequate for the needs of the juvenile.

- The offense charged is a specifically enumerated offense pursuant to this section and that there is a substantial Federal interest in the case or the offense to warrant the exercise of Federal jurisdiction.

All these findings must be established by an investigation by the United States Attorney's Office and certification decisions; once made, they may be subject to review on their merits by federal courts [*United States v. C.G. (1984) 736 F.2d 1474* ; *United States v. Male Juvenile (1994) 844 F. Supp. 280]* .

PRACTICE TIP:

Lack of Rehabilitative Facilities. While Federal law provides for transfer from juvenile to adult court where a minor is not amendable to treatment, the federal system does not have appropriate facilities for children who are not subject to transfer. The lack of rehabilitative facilities appropriate for delinquent offenders should be given consideration both for the purpose of jurisdictional and dispositional representation.

[2] Practice and Procedure

In the event that Federal jurisdiction is exercised, the court procedures are similar to those governing state delinquency proceedings. Specific procedures and rights set forth by the Act include:

- Custody prior to appearance before a magistrate [*18 U.S.C. § 5033*].

- Duties of the juvenile magistrate [*18 U.S.C. § 5034*].

- Detention prior to disposition [*18 U.S.C. § 5035*].

- Speedy trial [*18 U.S.C. § 5036*].

- Dispositional hearing [*18 U.S.C. § 5037*].

- Use of juvenile records [*18 U.S.C. § 5038*].

- Commitment [*18 U.S.C. § 5039*].

- Support [*18 U.S.C. § 5040*].

- Revocation of probation [*18 U.S.C. § 5042*].

Cases are initiated by the filing of an information. Once filed, the minor may waive treatment as a juvenile and accept adjudication as an adult [*18 U.S.C. § 5032*]. The minor is then taken before a magistrate and may not be detained for an unreasonable period of time prior to their appearance [*18 U.S.C. § 5033*].

The juvenile may be detained in a juvenile facility or other suitable place designated by the attorney general but wherever possible, it shall be in a foster home or community based facility located near the juvenile's home community. As with minors who fall under the jurisdiction of the state, juveniles under federal jurisdiction may not be detained in a facility where they have regular contact with incarcerated adults. Further, alleged delinquents must be kept separate from adjudicated delinquents to whatever extent possible. All facilities used to detain minors must have adequate food, sanitation, recreation, education and medical services [*18 U.S.C. § 5035*]. As defined by federal law, juveniles have a

right to a speedy trial [*18 U.S.C. § 5036*; *United States v. Doe (1998) 149 F.3d 945* ; *United States v. Juvenile Male (1996) 74 F.3d 526]* . For purposes of determining when a juvenile's speedy trial rights begin running, the Ninth Circuit has joined the Second, Fifth, and Tenth Circuits in holding that speedy trial time begins running at the commencement of federal detention on the federal delinquency charge, not when the U.S. Attorney certified, or could have certified the case to federal court [*United States v. Doe (9th Cir. 2004) 366 F.3d 1069, 1071-1074]* .

It is well established that juveniles in federal delinquency proceedings do not have the right to a jury trial [*McKeiver v. Pennsylvania (1971) 403 U.S. 528* ; *United States v. Juvenile Male C.L.O. (1996) 77 F.3d 1075]* . Confidentiality of records relating to proceedings, while appearing to be an essential element of the Act, are not subject to mandatory closure but may be closed (sealed) at the discretion of the court [*United States v. Three Juveniles (1995) 61 F.3d 86]* .

Dispositional hearings are separate proceedings preceded by the preparation of a presentence report which is provided to counsel for the minor and the government prior to the hearing [*18 U.S.C. § 5037(a)*]. Dispositional hearings must be held no later than twenty court days after the juvenile delinquency hearing unless the court has ordered further study. Alternatives available to the court include entering an order of restitution, custodial commitments, imposition of probation and suspension of adjudication. The court's sentencing discretion is limited by the purposes of the Federal Juvenile Delinquency Act, which is rehabilitative in nature. [*U.S. v. Juvenile (9th Cir. 2003) 347 F.3d 778, 785-786]* . Further, the disposition imposed should be based upon an assessment of the minor's individual circumstances, rehabilitative needs, and be the least restrictive means to accomplish the minor's rehabilitation, given those needs and the needs of the community. [*U.S. v. Juvenile (9th Cir. 2003) 347 F.3d 778, 787*].

18 U.S.C. § 5037 provides for sentencing options when the minor is under 18, as well as when the minor is between the ages of 18 and 21. However, on its face the statute is not clear whether the sentence should be based upon the juvenile's age at the time of the offense, the time the information was filed, or at the time of disposition. Federal courts have determined that the juvenile's age at the time of sentencing is the operative age, regardless of whether the minor was only 17 at thetime the offense was committed. The two categories ensure a 17-year-old offender is not able to "slip through the cracks" between the juvenile and adult systems by providing a sentence of appropriate length for a minor whose crime was committed just prior to his 18th birthday [*U.S. v. Leon H. (9th Cir. 2004) 365 F.3d 750, 753-754]* .

PRACTICE TIP:

Parental Notification and Involvement. When federal law enforcement officers take a minor into custody for a matter which may be subject to a federal prosecution, they must notify the child's parents of the custody and the child's constitutional rights. This notification must occur prior to the interrogation of the child and an opportunity for the parent to advise and counsel their child cannot unreasonably be refused [*U.S. v. Female Juvenile (Wendy G.) (2001) 255 F.3d 761]* .

[3] Transfer to Adult Court

Federal law provides for a transfer process to adult court which is similar to California's certification system [*18 U.S.C. § 5032*; *see also §§ 329.60 -329.63*]. A motion seeking transfer is filed by the attorney general in district court. The minor must be at least 15 years of age and alleged to have committed an act after their 15th birthday. The alleged act must be a felony involving violence or a specific crime involving controlled substances. A minor alleged to have committed an act that would be a felony involving the use of physical force against another, a substantial risk of physical force against another, or specified offenses involving controlled substances, and who has previously been found guilty of the same kind of qualifying offense, shall be mandatorily transferred to adult court when the offense occurred after the minor's 16th birthday. In *U.S. v. Phillip A.B.L. (9th Cir. 2004) 100 Fed. Appx. 687, 688-689* , the court reaffirmed that the term "found guilty" was intended to include past juvenile delinquency adjudications [*see also U.S. v. David H. (9th Cir 1994) 29 F.3d 489, 493]* .

The Federal Juvenile Justice and Delinquency Prevention Act of 1974 sets forth the factors to be considered in a

determination of the transfer decision. These factors include:

- The age and social background of the minor;
- The nature of the alleged offense;
- The extent and nature of the juvenile's prior delinquency records;
- The juvenile's present intellectual development and psychological maturity;
- The nature of past treatment efforts and the juvenile's response to such efforts; and
- The availability of programs that are designed to treat the juvenile's behavioral problems.

The statute clearly intends a presumption of juvenile treatment, and the government bears the burden of establishing that transfer is warranted [*United States v. A.R. (3rd Cir. 1994) 38 F.3d 699, 706]* . In considering whether transfer is in the interest of justice, the district court is required to make findings with respect to the six factors enumerated in § 5032. The weight to be given each factor is a matter within the discretion of the district court, and the court is not required to specify whether it regards each factor as weighing for or against transfer [*U.S. v. Brandon P. (9th Cir. 2004) 387 F.3d 969, 977]* . Transfer is proper when the risk of harm posed by affording the defendant more lenient treatment within the juvenile justice system outweighs the defendant's chance for rehabilitation [*United States v. Doe (9th Cir. 1996) 94 F.3d 532, 536]* .

Transfer proceedings are not designed to determine whether a juvenile defendant is guilty, but rather are designed to predict the possibility of rehabilitation if the juvenile is found guilty of the crime alleged [*United States v. Alexander (9th Cir. 19820 695 F.2d 398, 401]* . To this end, the district court may assume the juvenile defendant committed the crime with which they are charged, but is not required to do so. If the court does decide to assume guilt, for the purpose of the hearing, it must confine the assumption to the elements of the offense charged [*U.S. v. Juvenile (9th Cir. 2006) 451 F.3d 571, 576-577]* .

[4] Effects of Juvenile Adjudication on Later Sentencing Under Federal Sentencing Guidelines

[a] DJF Parole--Detention or Revocation: As Used in Adult Federal Sentencing

A juvenile ward's commitment to the Division of Juvenile Facilities can have consequences on a future adult sentence in federal court, as can the revocation of a term of DJF parole by the Youthful Offender Parole Board. Under the United States Sentencing Guidelines Manual (U.S.S.G.) parole revocations can add points to a defendant's criminal history for purposes of increasing future sentences (*U.S.S.G. 4A1.2(k)*) and preclude a court from using a "safety valve" departure from the federal mandatory minimum sentence (*U.S.S.G. 5C1.2*). If detention is imposed upon a ward/defendant currently serving a term of parole, at future sentencing proceedings for additional offenses the court must determine if that detention was the result of an adjudication of guilt and thus a prior sentence and imprisonment, a revocation of parole, or merely a detention, i.e., a "modification" of the terms of parole. An adjudication requires proof of guilt beyond a reasonable doubt [*U.S. v. Sanders (9th Cir. 1994) 41 F.3d 480, 486]* . For a revocation, the federal court must consider whether the due process requirements were followed, i.e. formal finding of a violation, chance to present evidence, etc. [*Morrissey v. Brewer (1972) 408 U.S. 471, 479-480]* . When the court determines that a temporary detention was ordered by the parole authority as an alternative consequence for a violation, and the defendant remained under parole supervision, the detention does not constitute either imprisonment or a revocation for purposes of a criminal history point under federal sentencing rules [*U.S. v. Ramirez (9th Cir. 2003) 347 F.3d 792, 805-806]* .

[b] Juvenile Custody Calculated in Defendant's Criminal History

The U.S.S.G provide that a disposition of confinement imposed for an offense committed while the defendant was a juvenile is confinement for purposes of calculating the defendant's criminal history points if the confinement resulting fromthe juvenile disposition extended into the 5-year period preceding the defendant's commission of the instant offense (*U.S.S.G. § 4A1.1(b)*). The term "resulting from" applies to a later revocation of probation and sentence to a State juvenile facility. Therefore, when a minor's confinement results from a DJF commitment following a violation of probation, and that period of confinement runs into the 5-year period immediately preceding commencement of the instant adult offense, the juvenile delinquency adjudication is calculated in the criminal history score [*U.S. v. Mitchell (9th Cir. 2004) 354 F.3d 1013, 1014]* . This includes credit for time spent in presence custody (i.e. detention) [*Jonah R. V. Gilbert Carmona (9th Cir. 2006) 446 F.3d 1000, 1004]* .

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28-329 California Forms of Pleading and Practice--Annotated § 329.25

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§ 329.25 Native American Youth

[1] In General

Jurisdiction over Native American youth involved in delinquent conduct is determined by a number of factors including geographic area, whether all parties are Native Americans, whether parties are tribe members, and the nature of the incident involving contact with the court. Regarding the geographical issues, a determination must be made if the incident occurred on reservation land, as jurisdiction is predicated on the location of the events [*State v. Elmer J.K., III. (Wis. Ct. App. 1999) 591 N.W.2d 176]* .

While states and reservations often have agreements regarding joint use of facilities and police officers, state courts have no jurisdiction over events occurring on reservations [*Morgan v. Colorado River Indian Tribe (1968) 443 P.2d 421]* .

Whether a minor is a Native American is actually a two-tier inquiry relative to a child's status. If the child is a Native American, a determination of his or her tribe must be made. Through the assistance of tribal administrators a child's status can be determined and, ultimately, a determination of the applicability of the Indian Child Welfare Act can be made.

Finally, as is often the case in jurisdictional analysis, consideration is given to the nature and seriousness of the alleged conduct. Tribal courts have limited jurisdiction and the nature of the alleged conduct may determine whether a case proceeds under federal, state or tribal law.

Practitioners representing Native American children should be familiar with several key federal statutes including:

- The Indian Civil Rights Act [*25 U.S.C. §§ 1301-1303*].

- The Indian Child Welfare Act [*25 U.S.C. §§ 1901-1963*].
- The Indian Education Act [*20 U.S.C. § 240*].
- State Jurisdiction over Offenses Committed by or Against Indians in the Indian Country [*18 U.S.C. § 1162*].
- The General Crimes Act [*18 U.S.C. § 1153*].
- The Major Crimes Act [*18 U.S.C. § 1153*].
- The Assimilative Crimes Act [*18 U.S.C. § 13*].
- The Federal Juvenile Delinquency Act [*18 U.S.C. §§ 5031-5042*].

[2] Application of ICWA to Delinquency

Historically, the federal Indian Child Welfare Act (ICWA) applies only in child custody proceedings involving Indian children. For the purposes of ICWA, child custody proceedings include foster care placements (family or institutional), termination of parental rights actions, preadoptive placements, and adoptive placements [*25 U.S.C. § 1903(l)*]. Delinquency-related placements, defined as placements and proceedings based upon an act which would be a crime if committed by an adult, are specifically excluded from ICWA.

Nevertheless, a California Rule of Court requires ICWA notices in all section 601 and 602 hearings "in which the child is at risk of entering foster care or is in foster care" [Cal. Rules of Court, former Rule 1439(b), *now see Cal. Rules of Court, Rule 5.480 et seq.*].

The apparent conflict between this California requirement and the plain language of ICWA was addressed by the court in *In re Enrique O. (2006) 137 Cal. App. 4th 728, 40 Cal. Rptr. 3d 570* . In that case, the court determined that former Rule 1439(b), which has since been reenacted as Rules 5.480-5.487, does not expressly contradict the federal statute by requiring ICWA notices and procedures occur in all out of home placements arising out of acts that would be crimes if committed by an adult. On the other hand, the court expressed no opinion as to when, if ever, a delinquency proceeding could fall within the ambit of ICWA [*In re Enrique O. (2006) 137 Cal. App. 4th 728, 734-735]* .

The reasoning in *Enrique O.*, however, left little doubt that if ICWA could ever apply to a 602 proceeding, it would be under very limited circumstances. Such circumstances might include a delinquency proceeding where the "criminal act" is punishable only by a fine and community service, but the child's circumstances put them at risk of a foster care placement [*In re Enrique O. (2006) 137 Cal. App. 4th 728, 734 fn.3*].

Subsequent to the *Enrique O.* decision, the California Legislature entered the fray with the passage of Senate Bill 678 (Stats. 2006, Ch. 838), an extensive effort to revise, recast, and expand various provisions of state law that determine applicability of ICWA within the state. Although only referenced once in the bill's 92 pages of text, and not at all in the Legislative Counsel's Digest, SB 678 specifically added *Welf. & Inst. Code § 602* matters to the list of proceedings in which ICWA applies [*Welf. & Inst. Code § 224.3(a)*, Stats 2006, Ch. 838]. This single reference, made in a state law that appears to provide a higher standard of protection to the rights of a parent or Indian custodian than federal law and is thus applicable under federal law, pursuant to *25 U.S.C. § 1921*, puts the result reached in *Enrique O.* in question.

At a minimum, it would appear that the focus of the inquiry regarding the applicability of ICWA to 602 proceedings is now based upon a determination of when a child is at risk of entering foster care. This determination is complicated by a

similardetermination, made for the purposes of acquiring federal funding pursuant to Title IVE (of the Social Security Act), that has resulted in a liberal interpretation of the phrase "at risk of entering foster care."

Arguably, the determination of when a child who is the subject of a 602 proceeding is "at risk of entering foster care" should be made in a more conservative manner, federal funding concerns notwithstanding. As noted by the court in *Enrique O.*, the burden and delay caused by the application of ICWA notice requirements to every 602 proceeding where the child is "at risk" of entering foster care cannot be ignored. The resulting uncertainty, and bureaucratic and financial burden, as well as the serious risk of delaying resolution of delinquency matters would rarely, if ever, be of benefit to a child. The consequence of a widespread application of the practice would be labor intensive and low yield, to both the child and the intent of ICWA "to promote the stability and security of Indian tribes and families" (*25 U.S.C. § 1902*) [*In re Enrique O. (2006) 137 Cal. App. 4th 728, 735, 40 Cal. Rptr. 3d 570]* .

It should be noted that ICWA clearly defines foster care as "any action removing an Indian child from its parent or Indian custodian ... or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated" [*25 U.S.C. § 1903(1)(i)*]. This definition contemplates at a minimum a temporary restriction on parental rights based on parental abuse or neglect, while the parent or parents participate in reunification [*In re S.B. (2005) 130 Cal. App. 4th 1148, 1162-1164, 30 Cal. Rptr. 3d 726]* .

PRACTICE TIP:

Parents' Rights or Children's Rights? Title *25 United States Code section 1921* expressly provides: "In any case where State or Federal law applicable to a child custody proceeding under State or Federal law provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child than the rights provided under this subchapter, the State or Federal court shall apply the State or Federal standard." Thus it provides states may pass more stringent laws affecting the rights of Indian children with respect to protecting the rights of a parent or Indian custodian. While *Welf. & Inst. Code § 224.3* expands its reach to delinquency proceedings, it does so only where those proceedings relate to parents of Indian custodians [*In re Alejandro A. (2008) 160 Cal. App. 4th 1343, 74 Cal. Rptr. 3d 44]* .

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§ 329.26 Immigration Issues

[1] In General

Any person who is not a United States citizen may be subject to deportation because of criminal convictions or charges. This definition includes lawful permanent and temporary residents as well as persons illegally in the country [Immigration and Nationality Act of 1952, Section 241; *8 U.S.C. § 1251*]. Notwithstanding this principle, implementation of uniform standards for dealing with undocumented youth in the delinquency system do not seem to exist in California.

While it is illegal for a noncitizen to be in the United States without permission, all individuals are entitled to Due Process protections once they are within the country's borders [*Mathews v. Diaz (1975) 426 U.S. 67, 77*] Applying these protections to juveniles through the landmark decision of *In re Gault* [*In re Gault (1967) 387 U.S. 1, 13, 18 L. Ed. 2d 527]* alien juveniles are entitled to the same treatment as any other youth involved in the delinquency system, whether or not they are legally in this country [*see* Dale, et al., Representing the Child Client, Ch. 5, *Representing Children in Juvenile Justice Proceedings* (Matthew Bender)]. Additionally, a minor's immigration status cannot be used as a legal basis to impose a more restrictive dispositional placement simply because of a nonspecific fear of escape or flight [*In re Jose P. (1980) 101 Cal. App. 3d 52, 161 Cal. Rptr. 400]* . Nonetheless, practitioners should be vigilant of custodial and dispositional bias against undocumented children in the juvenile justice system as their care, custody and treatment often presents difficult problems within the context of traditional systemic solutions and resources.

[2] Special Immigrant Juvenile Status

Special Immigrant Juvenile Status (SIJS) was created by Section 153 of the Immigration Act of 1990. It provides immediate employment authorization and ability to remain in the United States, as well as eventual lawful permanent resident status, for qualified applicants. The statute specifically makes SIJS available to children in all types of juvenile court proceedings, not excluding delinquency [*8 U.S.C. § 1101(a)(27)(J)(i)*].

For a child to qualify for SIJS, the delinquency court must issue an order finding the minor is "eligible for long-term foster care" due to abuse, neglect or abandonment, and that it is in the child's best interest not to be returned to the home country. Federal regulation defines "eligible for long-term care" to mean that family reunification is no longer a viable option, and that the child normally will go on to foster care, adoption or guardianship [*8 C.F.R. § 204.11(a)*].

Certain offenses may cause a child to be inadmissible for SIJS, including sale or possession for sale of controlled substances, prostitution, and specified sex offenses. However, most delinquent conduct, including offenses involving violence and theft, do not cause immigration problems relative to an SIJS application [*see* Immigrant Legal Resource Center, *Immigration Benchbook for Juvenile and Family Courts*, Chs. 2, 5, and 7].

PRACTICE TIP:

Representation of Minors with Immigration Issues. Given the complexity of Immigration Law, as well as the broad range of consequences for and lack of a uniform approach to delinquency matters involving undocumented children, an attorney specializing in these matters should be consulted whenever representation of a child with immigration concerns is undertaken.

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§ 329.27 Dual Status

[1] In General

It is an unfortunate reality that many children who have been abused or neglected later become involved in the juvenile delinquency and adult criminal justice systems. While it is a gross overstatement to suggest that all delinquent children have dependency issues, for those who do appear to fall within the provisions of *Welf. & Inst. Code § 300* and § 602, the fact that a dependent child has committed a delinquent act, or a delinquent ward has been subject to abuse and neglect, should not preclude an appropriate response from either system--or both.

Historically, both decisional law [*In re Donald S. (1988) 206 Cal. App. 3d 134, 138-139, 253 Cal. Rptr. 274]* and statutory authority [*Welf. & Inst. Code § 241.1*] made it clear that a child could not simultaneously be both a dependent and a ward of the juvenile court [*In re Marcus G. (1999) 73 Cal. App. 4th 1008, 1012, 87 Cal. Rptr. 2d 84]* . This prohibition against concurrent jurisdiction, also known as dual status, ended on January 1, 2005, with the creation of *Welf. & Inst. Code § 241.1(e)*, which allows counties to designate a minor as both a delinquent and a dependent. Notwithstanding this significant change in the law, it appears that the majority of counties in the state have chosen to continue to abide by policies and practices of the original single status mandate.

The purpose of *Welf. & Inst. Code § 241.1* is to resolve a scenario where dual jurisdiction may arise from petitions that already have been filed, not to create a dual jurisdiction issue by inviting subsequent petitions. It rests in the discretion of the executive branch employees--social workers, probation officers, and the district attorney--whether to file such petitions, not the juvenile court [*D.M. v. Superior Court of Orange County (2009) 173 Cal. App. 4th 1117, 1127, 93 Cal. Rptr. 3d 418]* .

[2] Procedure for Recommending Single Status

The procedures for addressing the situation where a minor appears to come within the jurisdiction of the dependency

and delinquency courts mandate a "single status" protocol [*Welf. & Inst. Code § 241.1(a)-(d)*] and allow for counties to develop a "dual status" protocol if they choose to do so [*Welf. & Inst. Code § 241.1(e)*]. Under the single status mandate, each county's probation and child protective services departments must jointly develop a written protocol to ensure local coordination in the assessment of any such minor and for presenting a recommendation to the juvenile court as to which status is appropriate for the minor [*Welf. & Inst. Code § 241.1(a)*].

Using the protocol, the probation department and the child protective services department must initially determine which status will serve the best interests of the minor and the protection of society. If possible, a determination should be made before a petition is filed concerning the minor [*Cal. Rules of Ct., Rule 5.512(a)(2)*]. In most instances, though, the minor will already be a dependent or a ward and the assessment under *Welf. & Inst. Code § 241.1* will be done after the second petition is filed. The recommendations of both departments will then be presented to the juvenile court with the petition that is filed on behalf of the minor, and the court will determine which status is appropriate for the minor. The juvenile court is to provide notice of the recommendations within five calendar days to any other juvenile court that has jurisdiction over the minor. The notice must include "the name of the judge to whom, or courtroom to which, the recommendations were made" [*Welf. & Inst. Code § 241.1(a)*]. One appellate court has determined the assessment and recommendation of the probation and social services departments must accompany the "*later petition*, i.e., the petition that creates the potential for dual jurisdiction" [*In re Marcus G. (1999) 73 Cal. App. 4th 1008, 1013, 87 Cal. Rptr. 2d 84* (emphasis in original)]. Thus, if the child is already a dependent of the court and a petition is filed to declare the child to be a delinquent, the assessment and recommendation under *Welf. & Inst. Code § 241.1(a)* must be presented to the juvenile court hearing the delinquency petition. Under this interpretation, the dependency court in such a case would receive notice of the second proceeding, but it would be the delinquency court that would determine whether the child should be treated as a dependent child or a delinquent minor [*In re Marcus G. (1999) 73 Cal. App. 4th 1008, 1013, 87 Cal. Rptr. 2d 84* ; *see also Los Angeles County Dept. of Children & Fam. Services v. Superior Court (2001) 87 Cal. App. 4th 320, 325, 104 Cal. Rptr. 2d 425]* . The reverse would naturally be true if the minor was already a ward of the court and the second petition was being filed to make the child a dependent.

In developing a protocol and in applying it to determine their recommendations to the juvenile court, the departments are required to consider, but are not limited to, the following factors [*Welf. & Inst. Code § 241.1(b)*; *Cal. Rules of Ct., Rule 5.512(d)*]:

- The nature of the minor's referral.
- The age of the minor.
- The history of any physical, sexual, or emotional abuse of the minor.
- The prior record of the minor's parents for child abuse with this or any other minor.
- The prior record of the minor for out-of-control or delinquent behavior.
- The parents' cooperation with the minor's school.
- The minor's functioning at school.
- The nature of the minor's home environment.
- The history of involvement by any agencies or professionals with the minor and his or her family.
- The services or community agencies available to assist the minor and his or her family.

- The statement of any counsel currently representing the minor.
- The statement of any Court Appointed Special Advocate currently appointed for the minor.

The protocol is also required to contain provisions for resolving disagreements between the probation and child protective services departments over the need for dependency or wardship status, and for determining the circumstances under which a new petition should be filed to change a minor's status [*Welf. & Inst. Code § 241.1(b)*].

The rule of court indicates the hearing on the joint assessment report under *Welf. & Inst. Code § 241.1* must be heard prior to the jurisdictional hearing [*Cal. Rules of Ct., Rule 5.512(e)*]. This is not required by the statute, however, and may not be in the best interests of the minor or the protection of the public in all cases. Some practitioners have argued that use of the protocol and assessment process should not be undertaken until after delinquency jurisdictional allegations have been adjudicated. In this way a decision would not be made as to whether a dependent child should be adjudged a delinquent with dependency status being terminated until after it was determined by the court that the jurisdictional allegations under *Welf. & Inst. Code § 602* are true. Since the full nature of the delinquency allegations may not become clear until after they have been litigated and the juvenile court may or may not find those allegations true, there is substantial merit to following such a procedure in an appropriate case. This also ensures that the district attorney is involved in the decision-making process, since it is that public official who is responsible for the bringing of delinquency actions [*Welf. & Inst. Code § 650(c)*]. Nevertheless, the statutory provisions do not mandate such a procedure and whether it is utilized should be determined by the court itself on a case-by-case basis. If the court finds this procedure is best in an individual case, the requirement of *Cal. Rules of Ct., Rule 5.512(e)* for an earlier determination may be considered inconsistent with the intent of the statute to serve the minor's best interest and the protection of the public, and thus void [*cf. California Court Reporters Assn. v. Judicial Council (1995) 39 Cal. App. 4th 15, 2426, 46 Cal. Rptr. 2d 44]* . Timely decisions are, however, important [*Los Angeles County Dept. of Children & Fam. Services v. Superior Court (2001) 87 Cal. App. 4th 320, 326, 104 Cal. Rptr. 2d 425* (after 18 months, decision on single status under *Welf. & Inst. Code, § 241.1* still had not been made)].

[3] Procedure When Two Counties Are Involved

If the minor has already been adjudicated a dependent or ward of a juvenile court pursuant to *Welf. & Inst. Code §§ 300, 601,* or *602,* and it is alleged in another county that the minor comes within *Welf. & Inst. Code §§ 300, 601,* or *602,* a similar procedure is to be followed [*Welf. & Inst. Code § 241.1(c)*; *Cal. Rules of Ct., Rule 5.512(c)*]. The county probation or child protective services department in the county that already has jurisdiction and the county probation or child protective services department in the county that is alleging jurisdiction are to initially determine which status will best serve the best interests of the minor and the protection of society. The assessment process is to be done consistent with the requirements of *Welf. & Inst. Code § 241.1(b)* that apply when it is alleged the minor comes within a different status in the same county in which the minor is already a dependent or ward [*Welf. & Inst. Code § 241.1(c)*; see also discussion in *§ 1.11[3][b],* Single Status Required in Most Counties].

[4] Procedure When Dual Status Is Available

Effective January 1, 2005, counties are authorized to develop protocols that would allow a minor to be designated as a "dual status child, allowing the child to be simultaneously a dependent child and a ward of the court" [*Welf. & Inst. Code § 241.1(e)*]. Some see this as a step forward in policy. Others view it as a step backwards to the time when dual status was allowed prior to the enactment of *Welf. & Inst. Code § 241.1*. The need for dual jurisdiction is questionable if delinquency courts and probation departments fulfill their responsibility to provide services for minors who are not in locked facilities and their families in much the same way as social services agencies provide services for dependent children and their families. Both dependency and delinquency laws require the court to determine whether services could prevent the need for detention and require the court to make a finding that continuance in the home is contrary to the minor's welfare before the child is detained [*Welf. & Inst. Code §§ 319, 636*]. Both require inquiries regarding

paternity [*Welf. & Inst. Code §§ 316.2, 726.4*]. Both require case plans to outline services for children likely to enter foster care that includes consideration of family strengths, the needs of both the child and the family, and the identification of services needed to work toward reunification [*Welf. & Inst. Code §§ 636.1, 706.6, 16501.1*]. Both provide for placement with parents, relatives, nonrelative extended family members, and in foster homes [*Welf. & Inst. Code §§ 361.2, 361.3, 362.7, 727*]. At status review hearings, both require the court to review the efforts made by the probation department or social services agency to work towards either reunification or an alternative permanent plan, and the progress made by the parents and the child toward alleviating or mitigating the need for foster care placement [*Welf. & Inst. Code §§ 366.21, 366.22, 706.5*]. And both require permanent plans that may include return to parent, adoption, legal guardianship, or another planned permanent living arrangement [*Welf. & Inst. Code §§ 366.21, 366.22, 366.26, 727.3*]. Thus, probation departments can and should be doing everything for wards that are not in locked facilities and their families that social service agencies are doing for dependent children and their families. Further, although children may qualify for both dependency and delinquency, frequently the "firmer control and closer supervision of a probation officer" may be more appropriate than "the social services that could be provided by the welfare department" [*In re Marcus G. (1999) 73 Cal. App. 4th 1008, 1015, 87 Cal. Rptr. 2d 84]* . Thus, if the delinquency system is fulfilling its responsibility to children and families, the need for dual status is open to question. Nevertheless, some counties may choose to develop such protocols [*Welf. & Inst. Code § 241.1(e)*].

The decision to develop a protocol for dual status children is made by the county probation department and children's services agency in consultation with the presiding judge of the juvenile court. It is a discretionary action that must be voluntarily entered into by the probation department and social services agency. The statute does not give the juvenile court the authority to mandate such a protocol if either probation or social services does not desire to create such a protocol [*Welf. & Inst. Code § 241.1(e)*]. The protocol must be signed by the chief probation officer, the director of the county children's services agency, and the presiding judge of the juvenile court prior to implementation of the protocol, and no juvenile court can order a child be simultaneously both a ward and a dependent unless the required protocol has been created and signed by the necessary parties [*Welf. & Inst. Code § 241.1(e)*].

A county dual jurisdiction protocol must include:

- A description of the process to be used in determining whether the child is eligible to receive dual status designation [*Welf. & Inst. Code § 241.1(e)(1)*].

- A description of the procedure to be used by probation and social services in assessing the necessity for dual status and the process for making joint recommendations for the court's consideration, which recommendations shall ensure a seamless transition from one status to another so that services are not disrupted [*Welf. & Inst. Code § 241.1(e)(2)*].

- A provision for ensuring communication between judicial officers when dependency jurisdiction has been suspended, which may be by providing the dependency court with copies of reports filed pursuant to *Welf. & Inst. Code § 727.2* [*Welf. & Inst. Code § 241.1(e)(3)*].

- A plan for the collection of data so the implementation of the protocol can be evaluated pursuant to *Welf. & Inst. Code § 241.2* [*Welf. & Inst. Code § 241.1(e)(4)*].

- Identification of whether the county has chosen to utilize an "on-hold" system of dual jurisdiction in which dependency jurisdiction is suspended while the child is supervised as a ward of the court or a "lead court/lead agency" system in which one court and one agency is designated as responsible for case management, conducting statutorily mandated court hearings, and submitting court reports. In either event, it is the intent of the Legislature that judges will not issue conflicting orders and that case management and services shall not be duplicative or simultaneously provided by both agencies [*Welf. & Inst. Code § 241.1(e)(5)*].

When a child is designated as a dual status child and the county has adopted an "on hold" system, dependency jurisdiction shall be suspended while the child is a ward of the court [*Welf. & Inst. Code § 366.5*]. The Judicial Council will be responsible for collecting data and preparing an evaluation of the results of the implementation of dual jurisdiction protocols and must submit a report to the Legislature with its findings and recommendations within two years of the counties first deeming a child to be a dual status child [*Welf. & Inst. Code § 241.2*].

[5] Notice and Decision Making

Notice of the hearing on the joint assessment report and a copy of the report must be provided to the minor, the minor's parent or guardian, all attorneys of record, any Court Appointed Special Advocate, and any other juvenile court having jurisdiction over the minor. In the case of notice to a juvenile court, the notice must be directed to the judicial officer or department that conducts hearings regarding the minor. The notice must be provided at least five calendar days before the hearing on the joint assessment report [*Cal. Rules of Ct., Rule 5.512(f)*]. All parties and their attorneys must be given an opportunity to be heard at the hearing on the joint assessment report [*Cal. Rules of Ct., Rule 5.512(g)*].

A specific decision as to which status is appropriate must be made by the juvenile court. It is not enough that a minor be adjudicated under the second status; the court must make an actual decision as to which status, delinquency or dependency, is appropriate [*Cal. Rules of Ct., Rule 5.512(e)*; *Los Angeles County Dept. of Children & Fam. Services v. Superior Court (2001) 87 Cal. App. 4th 320, 326, 104 Cal. Rptr. 2d 425]* . The court must also state its reasons for making its decision. The statement of reasons must be made on the record or in a written order [*Cal. Rules of Ct., Rule 5.512(g)*].

It is important that decisions as to which status a minor should be supervised under needs to be made in a timely fashion. Although the statute does not provide a specific time in which the decision must be made, the applicable rule of court indicates the hearing on the joint assessment report must occur "as soon as possible after or concurrent with the detention hearing, but no later than 15 court days after the order of detention and prior to the jurisdictional hearing" [*Cal. Rules of Ct., Rule 5.512(e)*]. In some cases determining which status is best prior to determining if the jurisdictional allegations in the second petition are true will not serve the best interest of the child or the protection of society, since those allegations may not subsequently be found true. If the court finds it appropriate in an individual case to delay the decision on which status is appropriate until it is determined if the allegations in the second petition are true, the requirement of *Cal. Rules of Ct., Rule 5.512(e)* for an earlier determination may be considered inconsistent with the intent of the statute to serve the minor's best interest and the protection of the public, and thus void [*cf. California Court Reporters Assn. v. Judicial Council (1995) 39 Cal. App. 4th 15, 2426, 46 Cal. Rptr. 2d 44]* . Minors who are caught in between the two systems can suffer by not receiving full services or stability of placement from either. Thus, as with all matters involving minors, timely resolution is important [*Los Angeles County Dept. of Children & Fam. Services v. Superior Court (2001) 87 Cal. App. 4th 320, 326, 104 Cal. Rptr. 2d 425* (after 18 months, decision on single status under *Welf. & Inst. Code, § 241.1* still had not been made)].

[6] Jurisdiction Over Matters Incidental to Proceedings

A superior court convened as, and exercising the special powers of, a juvenile court is vested with jurisdiction to make only those limited determinations authorized by the legislative grant of those special powers. Notwithstanding the absence of specific authorization to make particular determinations, the juvenile court is vested with the authority to make determinations incidentally necessary to the performance of functions demanded of it by the Legislature pursuant to the juvenile court law or necessary to any ultimate determination with which it is charged [*In re Ashley M. (2003) 114 Cal. App. 4th 1, 6, 7 Cal. Rptr. 3d 237]* . For example, although the juvenile court was not specifically authorized to make determinations relative to the parentage of a minor at the time the Supreme Court considered the issue, the Court determined the juvenile court is vested with jurisdiction to determine parentage issues when that finding is necessary to reach its conclusion as to the imposition of dependency status for a child who needs care and has no parent [*In re R.*

(1975) 13 Cal. 3d 636, 643-644, 119 Cal. Rptr. 475, 532 P.2d 123 ; *now see Welf. & Inst. Code § 316.2*; *Cal. Rules of Ct., Rule 5.635*]. Other decisions have also recognized the juvenile court's inherent authority to address certain issues necessary to carrying out its mandate [*see, e.g., In re Claudia E. (2008) 163 Cal. App. 4th 627, 637, 77 Cal. Rptr. 3d 722* ("the juvenile court has the inherent power to issue declaratory relief in such proceedings"); *In re Fred J. (1979) 89 Cal. App. 3d 168, 176, 152 Cal. Rptr. 327* ("the juvenile court has inherent power to entertain a prehearing challenge to the petition's sufficiency by a motion akin to a demurrer")].

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[Reserved]

§§ 329.28[Reserved]

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28-329 California Forms of Pleading and Practice--Annotated § 329.30

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§ 329.30 Establishment, Purpose, and Policies of Intake Program

The presiding judge of the juvenile court must initiate meetings and cooperate with the probation department, welfare department, prosecuting attorney, law enforcement, and other persons and agencies performing an intake function. Thereby the judge must establish and maintain a fair and efficient intake program, designed to promote both a swift and objective evaluation of the circumstances of any referral and the pursuit of an appropriate course of action [*Cal. Rules of Ct., Rule 5.514(a)*].

A juvenile court intake program must be designed to provide for settlement of the following matters [*Cal. Rules of Ct., Rule 5.514(b)*]:

- Whether the juvenile court has jurisdiction.
- Whether there is sufficient evidence to support the petition.
- Whether a disposition of referral, to a nonjudicial agency or program available in the community, is suitable.

Further, the intake program must be designed to provide the following [*Cal. Rules of Ct., Rule 5.514(b)*]:

- A program of informal supervision of the minor under *Welf. & Inst. Code § 654* (informal supervision for minors in delinquency proceedings).
- Commencement of proceedings in the juvenile court when necessary for the welfare of the minor or the safety and protection of the public.

PRACTICE TIP:

"At-Risk Youth Early Intervention Programs." Such programs are available in some counties, pursuant to *Welf. & Inst. Code § 601.5*, to assess and serve families with children who have behavioral problems that place the child at risk of becoming a ward of the court under *Welf. & Inst. Code § 601* or *602*. Enrollment in such a program, available to minors over ten years of age, may prevent court or probation intervention in favor of this neighborhood-based alternative.

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28-329 California Forms of Pleading and Practice--Annotated § 329.31

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§ 329.31 Commencement of Delinquency Proceedings

[1] Under Welf. & Inst. Code § 601

Juvenile court proceedings to declare a minor a ward of the court under *Welf. and Inst. § 601* are generally commenced by the filing of a petition by the probation officer [*Welf. & Inst. Code § 650(a)*]. However, the probation officer or the district attorney, after consultation with the probation officer, may file a petition to declare a minor to be a ward of the court under *Welf. & Inst. Code § 601.3(e)* [*Welf. & Inst. Code § 650(b)*; *see* discussion in *§ 329.35*].

The parties in § 601 proceedings are the minor and the probation officer [*People v. Superior Court (Tony S.) (1975) 44 Cal. App. 3d 904, 908, 119 Cal. Rptr. 125]* . The probation officer must determine upon investigation whether the minor's best interest would be served if he is declared a ward of the court and must furnish such assistance and information as the court may require in the disposition of the case [*In re Steven C. (1970) 9 Cal. App. 3d 255, 265, 88 Cal. Rptr. 97]* . This includes appearing and participating in the jurisdictional hearing to assist in the ascertaining and presentation of evidence, with the consent or at the request of the juvenile court judge. [*In re Jesse G. (2005) 128 Cal. App. 4th 724, 731, 27 Cal. Rptr. 3d 331]* .

[2] Under Welf. & Inst. Code § 602

Juvenile court proceedings to declare a minor a ward of the court under *Welf. & Inst. Code § 602* are commenced by the filing of a petition by the prosecuting attorney [*Welf. & Inst. Code § 650(c)*].

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28-329 California Forms of Pleading and Practice--Annotated § 329.32

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§ 329.32 Temporary Custody or Detention by Peace Officer

[1] Grounds for Detention Without Warrant

A peace officer may, without a warrant, take into temporary custody a minor who is any one of the following [*Welf. & Inst. Code § 625*]:

- A person under 18 years of age who the officer has reasonable cause to believe is a person described in those statutes giving the juvenile court jurisdiction to declare a minor a ward of the court [*Welf. & Inst. Code § 625(a)*; *see Welf. & Inst. Code §§ 601, 602,* and discussion of grounds for delinquency proceedings in § 329.20].

- A person who is currently a ward of the court, or who is subject to an order of detention pending either a jurisdictional or dispositional hearing,who the officer has reasonable cause to believe has violated that order or escaped from any commitment ordered by the court [*Welf. & Inst. Code § 625(b)*; *see Welf. & Inst. Code §§ 636, 702*; *see also* discussion in [4], *below*].

- A person under 18 years of age who, when found in any street or public place, is suffering from any sickness or injury that requires care, medical treatment, hospitalization, or other remedial care [*Welf. & Inst. Code § 625(c)*].

- A person under 18 years of age who has committed a misdemeanor.

[2] Notice to Parent, Responsible Relative, or Guardian

When an officer takes a minor before a probation officer at a juvenile hall or to any other place of confinement, the officer must take immediate steps to notify the minor's parent, guardian, or a responsible relative that the minor is in

custody and the place where he or she is being held [*Welf. & Inst. Code § 627(a)*].

[3] Minor's Right to Telephone Calls

Immediately after being taken to a place of confinement and, except where physically impossible, no later than one hour after he or she has been taken into custody, the minor must be advised and has the right to make at least two telephone calls from the place where he or she is being held, one call completed to a parent or guardian, a responsible relative, or his or her employer, and another call completed to an attorney [*Welf. & Inst. Code § 627(b)*].

The calls are at public expense, if completed to telephone numbers within the local calling area, and must be made in the presence of a public officer or employee. Any public officer or employee who willfully deprives a minor taken into custody of his or her right to make the telephone calls is guilty of a misdemeanor [*Welf. & Inst. Code § 627(b)*].

[4] When *Miranda* Statement Is Required by Officer

In any case in which a minor is taken into temporary custody on the ground that there is reasonable cause for believing that such minor is a person properly declared a ward of the court or has violated an order of the juvenile court or has escaped from any commitment ordered by the juvenile court, the officer must advise the minor that anything he or she says can be used against him or her and must advise the minor of applicable constitutional rights, including the right to remain silent, the right to have counsel present during any interrogation, and the right to have counsel appointed if the minor is unable to afford counsel [*Welf. & Inst. Code § 625*].

Whether the minor has been released from custody, the duration and degree of restraint, and the objective circumstances of the interrogation are the dispositive issues surrounding the necessity of providing a *Miranda* advisement [*In re Joseph R. (1998) 65 Cal. App. 4th 954, 956-960]* .

[5] Constitutional Scope of Permissible Detention

A detention does not violate *U.S. Const., amend. IV*, if the detaining officer has a reasonable suspicion that the person to be detained has been, is, or is about to be engaged in criminal activity [*In re Frederick B. (1987) 192 Cal. App. 3d 79, 84-85, 237 Cal. Rptr. 338* , *overruled in part on other grounds,* *In re Randy G. 110 Cal. Rptr. 2d 516, 28 P.3d 239 (2001)* (on school grounds, reasonable suspicion need not be shown)].

A police officer may also detain a person who appears to be between the ages of six and eighteen to investigate whether he or she is a truant from full-time compulsory education, when there are specific and articulable facts causing the officer to reasonably suspect that a truancy violation is occurring and that the person to be detained is a truant. This type of detention is permissible only during school hours.

Furthermore, although youthful appearance is a highly relevant and objectively verifiable factor in determining the propriety of a truancy detention, the detention cannot be based on youthful appearance alone [*In re James D. (1987) 43 Cal. 3d 903, 915-917, 239 Cal. Rptr. 663, 741 P.2d 161* ; *see Educ. Code § 48264*].

[6] Chemical Testing, Fingerprinting, and Photographing

A peace officer may request that a minor who has been detained voluntarily submit to chemical testing of the minor's urine, to determine the presence of alcohol or illegal drugs in any of the following circumstances [*Welf. & Inst. Code § 625.1*]:

- When a minor is taken into temporary custody pursuant to *Welf. & Inst. Code § 625(a)* [*see* discussion in [1], *above*].

- When the peace officer has reasonable cause for believing the minor is a person described in *Welf. & Inst. Code § 602* [*see* discussion in [1], *above*].

- When the minor is taken into temporary custody pursuant to *Welf. & Inst. Code § 625(b)* or *(c)* [*see* discussion in [1], *above*].

The peace officer must inform the minor that the testing is voluntary, and must give a specified admonition unless the test is administered in a drunk driving context [*Welf. & Inst. Code §§ 625.1, 625.2*; *see Veh. Code § 23157*].

PRACTICE TIP:

Use of Test Results. The results of the test may be considered by the court in determining its disposition of the minor. However, unless otherwise provided by law, the results may not be the basis of a petition to declare the minor a ward under *Welf. & Inst. Code § 602*, or the basis for such a finding by the court under *Welf. & Inst. Code § 702* [*Welf. & Inst. Code § 625.1*].

Fingerprinting and photographing minors who are taken into temporary custody for the commission of a felony offense is expressly authorized pursuant to *Welf. & Inst. Code § 626*.

[7] Transmittal of Information Relating to Arrest and Detention of Minor

Any information gathered by a law enforcement agency, including the Department of Justice, relating to the taking of a minor into custody may be disclosed to another law enforcement agency, including a school district police or security department, or to any person or agency which has a legitimate need for the information for the purposes of official disposition of a case. When the disposition of a taking into custody is available, it shall be included with any information disclosed [*Welf. & Inst. Code § 828(a)*]. This change in the law, effective January 1, 2004, is a significant departure from the prior statute that had prohibited the Department of Justice from transmitting arrest information to other agencies unless the information included the disposition of the arrest [*Welf. & Inst. Code § 204*, repealed by statute].

[8] Alternatives Available to Detaining Officer

When an officer takes a minor into temporary custody, he or she may proceed according to one of several available alternatives. However, in determining which alternative to choose, the officer must prefer the alternative that least restricts the minor's freedom of movement, provided such alternative is compatible with the best interests of the minor and the community [*Welf. & Inst. Code § 626*]. The detaining officer may choose any one of the following alternatives:

- Release the minor [*Welf. & Inst. Code § 626(a)*].

- Deliver the minor to a community program for abused and neglected children [*Welf. & Inst. Code § 307.5*] or an agency providing shelter, counseling, or diversion services [*Welf. & Inst. Code § 626(b)*].

PRACTICE TIP:

Agency Must Investigate. The agency to which a minor is referred or delivered pursuant to *Welf. & Inst. Code § 626(b)* must immediately make an investigation as that agency deems necessary to determine what disposition of the minor that agency will make, and initiate a service program for the minor when appropriate [*Welf. & Inst. Code § 625.5*].

- Prepare in duplicate a written notice to appear before the probation officer of the county at a time and place specified in the notice [*Welf. & Inst. Code § 626(c)*].

PRACTICE TIP:

Notice Requirements: Contents, Delivery, and Release on Execution of Promise to Appear. The notice issued must contain a concise statement of the reasons such minor was taken into custody. The officer must deliver one copy of the notice to the minor or to a parent, guardian, or responsible relative of such minor and may require the minor or parent, guardian, or relative, or both, to sign a written promise that either or both will appear at the time and place designated in the notice. On the execution of the promise to appear, the officer must immediately release the minor and, as soon as practicable, file one copy of the notice with the probation officer [*Welf. & Inst. Code § 626(c)*].

- Take the minor, without unnecessary delay, before the probation officer of the county in which the person was taken into custody, or in the county in which the minor resides, or in which the acts took place or the circumstances exist that are alleged to bring the minor within the jurisdiction of the court, and deliver the custody of the minor to the probation officer [*Welf. & Inst. Code § 626(d)*].

PRACTICE TIP:

Delivery Requirements: Statement of Probable Cause; Delivery Within 24 Hours in Some Cases. The peace officer must prepare a concise written statement of the probable cause for taking the minor into temporary custody and the reasons the minor was taken into custody, and must provide the statement to the probation officer at the time the minor is delivered to the probation officer. The minor must be delivered to the probation officer within 24 hours if the minor was taken into custody without a warrant on the belief that he or she has committed a misdemeanor [*Welf. & Inst. Code § 626(d)*].

For further discussion on the limitations on temporary custody of a minor, see discussion in *§ 329.34[2]*.

[9] Mandatory Detention

Statutory procedures dictate the manner in which police and probation officers must handle a minor, over the age of 14, who is taken into custody for any offense listed in *Welf. & Inst. Code § 707(b)* or the commission or attempted commissionof a felony involving personal use of a firearm: They are to deliver the minor to the probation officer without unnecessary delay [*Welf. & Inst. Code § 626.6*]. The probation officer shall then retain the minor in custody until the minor is brought before a judicial officer for a detention hearing [*Welf. & Inst. Code § 629.1*]. In such cases there is no discretion to release a minor prior to a detention hearing [*Welf. & Inst. Code § 625.3*].

Further, a minor 14 years of age or older who is taken into custody for the commission or attempted commission of any felony shall not be released from custody until they and/or their parent, guardian or relative have signed a written promise to appear or have been given an order to appear in juvenile court on a date [*Welf. & Inst. Code § 629(b)*].

[10] Restrictions on Detaining Minor in Jail or Lockup

Generally, no court, judge, referee, peace officer, or employee of a detention facility may knowingly detain any minor in a jail or lockup [*Welf. & Inst. Code § 207.1(a)*]. However, there are statutory exceptions to that rule [*see, e.g., Welf. & Inst. Code §§ 207(b), 207.1(d)*; *see* discussion in *§ 329.55*].

[11] Arrest Warrants

Whenever a petition has been filed in juvenile court alleging that a minor comes within the provisions of *Welf. & Inst. Code § 601* or *602* and a hearing is sought, or whenever a subsequent petition has been filed seeking a hearing, a warrant for the minor's arrest may be issued immediately if one of the following conditions are satisfied:

- It appears to the court that the conduct and behavior of the minor may endanger the health, person,

welfare or property of the minor, or others; or that the circumstances of the minor's home environment may endanger their health, person, welfare, or property [*Welf. & Inst. Code § 663(a)(1)*].

- It appears to the court that either personal service upon the minor has been unsuccessful, or the minor's whereabouts are unknown [*Welf. & Inst. Code § 663(a)(2)*].

- It appears to the court that the minor has willfully evaded service of process [*Welf. & Inst. Code § 663(a)(3)*].

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§ 329.33 Investigation by Probation Officer on Application of Citizen or Arrest of Minor

[1] Duty to Investigate

A minor may be referred to a probation officer by application of a citizen or on arrest by a police officer [*see, e.g., Welf. & Inst. Code §§ 628, 653, 653.1, 653.5*].

Whenever the probation officer has cause to believe that there was or is within the county, or residing therein, a person within the provisions of *Welf. & Inst. Code §§ 601* and *602*, the probation officer must immediately make such investigation as is necessary to determine whether proceedings in the juvenile court should be commenced [*Welf. & Inst. Code § 652*].

When an officer delivers a minor to a probation officer after detaining the minor, the probation officer must immediately investigate the circumstances of the minor and the facts surrounding his or her being taken into custody [*Welf. & Inst. Code § 628(a)*].

There is no duty to investigate when a minor is referred to a shelter, to counseling, or to diversion services pursuant to *Welf. & Inst. Code § 626(b)* [*Welf. & Inst. Code § 652*; *see* discussion in *§ 329.32[8]*].

[2] Notice Required on Arrest by Peace Officer

In any case in which a minor is taken before a probation officer by a peace officer and it is alleged that the minor should be declared a ward of the court, the probation officer must immediately advise the minor and the parent or guardian that anything the minor says can be used against him or her and must advise the parent or guardian of the minor's constitutional rights, including the right to remain silent, the right to have counsel present during any interrogation, and the right to have counsel appointed if he or she is unable to afford counsel. If the minor or parent or guardian requests counsel, the probation officer must notify the judge of the juvenile court of the request, and counsel for the minor will

be appointed [*Welf. & Inst. Code § 627.5*].

The United States Supreme Court has noted that it has not yet held *Miranda* applicable to juvenile proceedings [*Fare v. Michael C. (1979) 442 U.S. 707, 717 n.4, 99 S. Ct. 2560, 61 L. Ed. 2d 197* ; *see Miranda v. Arizona (1966) 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694]* . California case law, however, has applied *Miranda* to juveniles so that statements obtained from juveniles in violation of *Miranda* are inadmissible in juvenile court proceedings [*In re P. (1972) 7 Cal. 3d 801, 810, 103 Cal. Rptr. 425, 500 P.2d 1]* .

PRACTICE TIP:

Applicability of *Roderick P.* in Light of Proposition 8. Whether the holding in *Roderick P.* remains good law is questionable since the passage of Proposition 8, *Cal. Const., art. I, § 28(d)* [*see People v. May (1988) 44 Cal. 3d 309, 243 Cal. Rptr. 369, 748 P.2d 307* (Proposition 8 abrogated judicial decisions that required the exclusion of evidence obtained in violation of the state, but not federal, privilege against self-incrimination)]. It is arguable, however, that the application of *Miranda* to juvenile proceedings will remain valid because theprivilege against self-incrimination, on which *Miranda* is based, is an aspect of federal due process that the United States Supreme Court has held must not be denied in juvenile proceedings [*see In re Gault (1967) 387 U.S. 1, 55, 87 S. Ct. 1428, 18 L. Ed. 2d 527]* . This issue is yet to be resolved.

Under the now-questionable California case law, the police do not have a duty to advise a minor of his or her right to see his or her parent before being interrogated [*In re John S. (1988) 199 Cal. App. 3d 441, 446, 245 Cal. Rptr. 17* ; *People v. Maestas (1987) 194 Cal. App. 3d 1499, 1509-1510, 240 Cal. Rptr. 360* ; *but see In re Patrick W. (1980) 104 Cal. App. 3d 615, 617-618, 163 Cal. Rptr. 848* , *cert. denied, 449 U.S. 1096 (1981)]* .

However, when a minor requests contact of any sort with a parent, it will be presumed the minor intended thereby to invoke the privilege against self-incrimination [*People v. Burton (1971) 6 Cal. 3d 375, 381-384, 99 Cal. Rptr. 1, 491 P.2d 793* ; *In re Louis F. (1978) 85 Cal. App. 3d 611, 619, 149 Cal. Rptr. 642]* . It is clear, however, as a matter of federal case law, that the minor's request for his or her probation officer does not invoke the privilege [*Fare v. Michael C. (1979) 442 U.S. 707, 718-723, 99 S. Ct. 2560, 61 L. Ed. 2d 197]* .

[3] Admissibility of Statements to Probation Officer

Statements made by a juvenile to a probation officer in a *Welf. & Inst. Code § 628* interview are not admissible as substantive evidence, or in any subsequent proceeding to determine criminal guilt, whether juvenile or adult. Such use would frustrate the purposes of the statute, the primary purpose of which is not to elicit evidence of guilt but to assist the probation officer in deciding at the outset of the case whether the minor need be further detained pending a court hearing. Such statements may, however, be admitted and considered in hearings on the issues of detention and fitness for juvenile treatment [*In re H. (1979) 24 Cal. 3d 595, 601-602, 156 Cal. Rptr. 344, 596 P.2d 1]* .

A minor's immunity from use at trial of any statements made to a probation officer was not nullified by *Cal. Const., art. I, § 28(d)*, adopted as part of Proposition 8 at the June 1982 election [*Ramona R. v. Superior Court (1985) 37 Cal. 3d 802, 804, 210 Cal. Rptr. 204, 693 P.2d 789* , reaffirmed in *People v. May (1988) 44 Cal. 3d 309, 315-320, 243 Cal. Rptr. 369, 748 P.2d 307]* .

PRACTICE TIP:

Statements to Probation Officer. If the attorney is involved in the case prior to the probation officer interviewing the minor, he or she should keep in mind that the statements given to the probation officer, although not admissible to prove the case-in-chief at the jurisdictional hearing, could possibly be used for impeachment, an issue that has not been addressed by the courts. This should not necessarily prohibit a minor from giving a statement to the probation officer, but it does mean that the attorney should be

familiar with the police reports, and first confer with the minor prior to the probation interview. The attorney's presence during the interview could possibly make the statement admissible at the jurisdictional hearing [*see People v. Alesi (1967) 67 Cal. 2d 856, 861, 64 Cal. Rptr. 104, 434 P.2d 360]*
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§ 329.34 Continued Detention

[1] General Rule

The probation officer must immediately release the minor to the custody of his or her parents, guardian, or a responsible relative unless any one or more of the following conditions exist [*Welf. & Inst. Code § 628(a)*]:

- The minor is in need of proper and effective parental care or control and has no parent, guardian, or responsible relative; or has no parent, guardian, or responsible relative willing to exercise or capable of exercising such care or control; or has no parent, guardian, or responsible relative actually exercising such care or control.

- The minor is destitute or is not provided with the necessities of life or with a home or suitable place of abode.

- The minor is provided with a home that is an unfit place for him or her by reason of neglect, cruelty, depravity, or physical abuse by either of his or her parents, guardian, or other person in whose custody or care he or she is.

- Continued detention of the minor is a matter of immediate and urgent necessity for the protection of the minor or reasonable necessity for the protection of the person or property of another.

- The minor is likely to flee the jurisdiction of the court.

- The minor has violated an order of the juvenile court.

- The minor is physically dangerous to the public because of a mental or physical deficiency, disorder, or abnormality.

For further discussion on limitations on temporary custody, see discussion in [2], *below*.

[2] Time Limits on Temporary Custody

[a] Release Required Unless Petition or Criminal Complaint Filed

A minor taken into custody must be released from custody within 48 hours, excluding nonjudicial days, after first being taken into custody by a peace officeror probation officer, unless within that time either a petition is filed with the clerk of the juvenile court to declare the minor a ward of the court or a criminal complaint is filed against the minor in a court of competent jurisdiction [*Welf. & Inst. Code § 631(a)*; *see Cal. Rules of Ct., Rule 5.752(b)* (child must be released from custody within 48 hours unless petition or notice of probation violation is filed within that time or prior to time child first taken into custody)].

When a minor is taken into custody by a peace officer or probation officer without a warrant on the belief that the minor has committed a misdemeanor that does not involve violence, the threat of violence, or possession or use of a weapon, and if the minor is not currently on probation or parole, except when the minor misrepresents himself or herself as 18 years of age or older, the minor must be released within 48 hours after having been taken into custody, excluding nonjudicial days, unless a petition has been filed to declare the minor to be a ward of the court and the minor has been ordered detained by a judge or referee of the juvenile court pursuant to *Welf. & Inst. Code § 635*. However, if the minor is to be detained for more than 24 hours, the decision to do so must be reviewed in writing and approved by a probation officer who is a supervisor as soon as possible after it is known that the minor will be so detained, unless the person making the initial decision to so detain the minor is a probation officer who is a supervisor [*Welf. & Inst. Code § 631(b)*].

When an emergency condition exists, as described in *Gov. Code § 68115*, the presiding judge may request, and the Chair of the Judicial Council may authorize an extension of time for filing a case by deeming that the date or dates upon which the condition existed are holidays for the purpose of computing time. Included in that list of emergency conditions described is a large influx of criminal cases resulting from a large number of arrests within a short period of time, threatening the orderly operation of a superior court location [*Welf. & Inst. Code § 828(a)*].

[b] Supplemental Petitions

The 48-hour time limit for filing a petition is also applicable to the filing of a notice of probation violation pursuant to *Welf. & Inst. Code § 777* [*Cal. Rules of Court, Rule 5.752(b)*]. Consequently, if a minor is released upon the expiration of the 48-hour deadline, the minor may not be redetained on the filing of a supplemental petition absent a finding of new or previously undiscovered facts that warrant detention [*In re Daniel M. (1996) 47 Cal. App. 4th 1151, 1154-1157, 55 Cal. Rptr. 2d 17]* .

[c] Exception When Minor Misrepresents Age

Notwithstanding the general time limitations for custody, if the minor taken into custody willfully misrepresents his or her age to be 18 years or more and this misrepresentation effects a material delay in investigation that prevents the filing of a petition or of a criminal complaint within 48 hours after having been taken into custody, a petition or complaint must be filed within 48 hours, excluding nonjudicial days, from the time the minor's true age is determined. Whenever a petition or complaint is not filed within that time, the minor must be immediately released from custody [*Welf. & Inst. Code § 631.1*; *see also Cal. Rules of Ct., Rule 5.752(c)*].

[d] Exception When Adult Misrepresents Age

If an adult willfully misrepresents himself or herself to be a minor when taken into custody and this misrepresentation effects a material delay in investigation that prevents the filing of a criminal complaint against him or her in a court of competent jurisdiction within two days, the complaint must be filed within two days of the time the true age of the person is determined, excluding nonjudicial days [*Penal Code § 824*].

[e] Release Requirement After Certification to Juvenile Court

A minor must be released from custody within 48 hours, excluding nonjudicial days, after certification to juvenile court under *Cal. Rules of Ct., Rules 4.116* and *5.516(d)*, unless a petition has been filed [*Cal. Rules of Ct., Rule 5.752(a)*]. For discussion of certification procedure, see the discussion in *§ 329.22*.

In a recent decision interpreting *Welf. & Inst. Code § 654.2(a)*, the 12-month time limit in which a minor may be declared a ward was determined to be directory, not mandatory, and thus did not result in the trial court losing fundamental jurisdiction over a case. Consequently, where a minor was given an extended period of time to pay restitution and complete public service work, at her request, wardship was properly established even though the 12-month period had expired [*In re C.W. (2007) 153 Cal. App. 4th 468*].

[f] Explanation Required for Release After Custody Over 24 Hours Without Petition

Whenever a minor who has been held in custody for more than 24 hours by the probation officer is subsequently released and no petition is filed, the probation officer must prepare a written explanation of why the minor was held in custody for more than 24 hours. The written explanation must be prepared within 72 hours after the minor is released from custody and filed in the record of the case. A copy of the written explanation must be sent to the parents, guardians, or another person having the care or custody of the minor [*Welf. & Inst. Code § 631(c)*].

[3] Home Supervision Alternative

[a] Availability

When the minor meets one or more of the criteria for continued detention under *Welf. & Inst. Code § 628(a)* [*see* discussion in [1], *above*], but the probation officer believes that 24-hour secure detention is not necessary in order to protect the person or property of another or to ensure that the minor does not flee the jurisdiction of the court, the probation officer may release the minor to home supervision under *Welf. & Inst. Code § 628.1*.

If released on home supervision, under this section, the minor and their parent, guardian or responsible relative are required to sign a written promise that they understand the specific conditions of the release [*Welf. & Inst. Code § 628.1*].

[b] Written Promise to Appear as Condition of Release

As a condition for the release of a minor, the probation officer may require suchminor or his or her parent, guardian, or relative, or both, to sign a written promise that either or both of them will appear before the probation officer at the juvenile hall or other suitable place designated by the probation officer at a specified time [*Welf. & Inst. Code § 629*].

[c] When Home Supervision Is Required

Unless the minor is in need of proper and effective parental control, is destitute and is not provided with a suitable home, or is provided with a home which is an unfit place by reason of neglect, cruelty, depravity, or physical abuse, the probation officer must release the minor to the parent, guardian, or responsible relative on home supervision [*Welf. & Inst. Code § 628.1*].

[d] Conditions for Mandatory Home Supervision

When release is mandated under *Welf. & Inst. Code § 628.1*, the probation officer must require the minor to sign a written promise that he or she understands and will observe the specific conditions of home supervision release. Specific conditions for home supervision release may include curfew and school attendance, requirements related to the protection of the minor or the person or property of another, or to the minor's appearances at court hearings. The home supervision program may also include a condition granting the probation officer access to the minor at all times [*see In re Curtis T. (1989) 214 Cal. App. 3d 1391, 1397, 263 Cal. Rptr. 296]* .

[e] Rights of Minor on Home Supervision

A minor on home supervision must be entitled to the same legal protection as a minor in secure detention, including a detention hearing [*Welf. & Inst. Code § 628.1*].

[f] Violation of Condition of Home Supervision

A minor who violates a specific condition of home supervision release that he or she has promised in writing to obey may be taken into custody and placed in secure detention, subject to court review at a detention hearing. If the supervision program included a condition granting the probation officer access to the minor at all times, the minor is deemed to have consented to permitting the officer entry into the minor's home and the minor's bedroom, and any evidence seized by the officer during such an entry is admissible as evidence at the hearing [*In re Curtis T. (1989) 214 Cal. App. 3d 1391, 1396-1397, 263 Cal. Rptr. 296]* .

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Chapter 329 JUVENILE COURTS: DELINQUENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
C. Intake and Investigation

28-329 California Forms of Pleading and Practice--Annotated § 329.35

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§ 329.35 Application to Commence Wardship Proceedings

[1] Contents and Form of Application

An application to the probation officer or the district attorney to commence proceedings in the juvenile court must be in the form of an affidavit alleging that there was or is within the county, or residing therein, a minor falling within the jurisdiction of the court to declare wardship and setting forth facts in support of the allegation [*Welf. & Inst. Code §§ 653, 653.5*; *Cal. Rules of Ct., Rule 5.520(c)*; *see Welf. & Inst. Code § 601.3(e)* (initiation of delinquency proceedings by probate officer or district attorney for truancy); *see also Ch. 328, Juvenile Courts: Dependency Proceedings, § 328.350*].

[2] Duty to Investigate Application

When an application to commence juvenile court proceedings is filed, the probation officer, or the district attorney in consultation with the probation officer, must immediately initiate any investigation that is necessary to determine whether proceedings in the juvenile court should be commenced [*Welf. & Inst. Code §§ 653, 653.5(a), (b)*].

[3] Alternatives Following Investigation

[a] In General

After investigating a case, the probation officer has three options, except as discussed in [c], *below*. Those options are [*Cal. Rules of Ct., Rule 5.514(c)*]:

- Settle the matter at intake.
- Informal supervision.

- Referral to the prosecuting attorney.

PRACTICE TIP:

Avoiding Referral to Prosecuting Attorney. It is at this initial point in the proceedings that the attorney for the minor may have his or her greatest impact on the case. Efforts should be made to avoid a referral to the prosecuting attorney. This may require conferring with the probation officer, and providing him or her with any favorable information about the minor, or his or her parents, as well as any mitigating facts about the case. It will also require counseling the minor and his or her parent or guardian about the appropriate attitude to present to the probation officer, and encouraging them to seek counseling when appropriate.

[b] Settle at Intake

Except for those cases requiring a mandatory referral to the prosecuting attorney [*see Welf. & Inst. § 653.5*, and the discussion under [d], *below*], a probation officer can settle at intake by doing any of the following [*Cal. Rules of Ct., Rule 5.514(c)*]:

- Taking no action.
- Counseling the child and any others involved in the matter.
- Referring the child and any others involved to other agencies and programs in the community.

In determining whether to settle at intake, the probation officer shall consider the following factors [*Cal. Rules of Ct., Rule 5.516(a)*]:

- Whether there is sufficient evidence of a condition or conduct to bring the child within the jurisdiction of the court.
- If the alleged condition or conduct is not considered serious, whether the child has previously presented no significant problems in the home, school, or community.
- Whether the matter appears to have arisen from a temporary problem withinthe family which has been or can be resolved.
- Whether any agency or other resource in the community is better suited to serve the needs of the child, the parent or guardian.
- Whether settling the matter at intake would be consistent with the welfare of the child and the protection of the public based on:
  - The attitudes of the child and the parent or guardian.
  - The age, maturity, and capabilities of the child.
  - The dependency or delinquency history, if any, of the child.
  - The recommendations, if any, of the referring party.

- The attitudes of affected persons.

- Any other relevant circumstances.

[c] Informal Supervision

[i] When Available

The probation officer, the prosecuting attorney, or the court may determine that the minor is a suitable candidate for informal probation [*Welf. & Inst. Code §§ 654, 654.2,* and *654.3*; *Cal. Rules of Ct., Rule 5.514(c)(2)*; *see Mark F. v. Superior Court (1987) 189 Cal. App. 3d 206, 209-210, 234 Cal. Rptr. 388* and *Marvin F. v. Superior Court (1977) 75 Cal. App. 3d 281, 289-290, 142 Cal. Rptr. 78* (both cases applying former Cal. Rules. of Ct., Rule 1307 mandating investigation by probation officer); *cf.* Cal. Rules of Ct., Rule 1404(c) before 1993 amendments operative Jan. 1, 1994) (investigation by probation officer as mandatory); now see *Cal. Rules of Court, Rule 5.514*].

However, not all minors are eligible for informal probation. Except in an unusual case in which the interests of justice would best be served, no minor is eligible for informal supervision if any of the following exist [*Welf. & Inst. Code § 654.3*]:

- A petition alleges that the minor has violated an offense listed in *Welf. & Inst. Code § 707(b)* [*Welf. & Inst. Code § 654.3(a)*].

- A petition alleges that the minor has sold or possessed for sale a controlled substance as defined in Chapter 2 (commencing with *Section 11053) of Division 10 of the Health and Safety Code* [*Welf. & Inst. Code § 654.3(b)*].

- A petition alleges that the minor has violated *Section 11350* or *11377 of the Health and Safety Code* where the violation takes place at a public or private elementary, vocational, junior high school or high school, or a violation of *Section 245.5, 626.9* or *626.10 of the Penal Code* [*Welf. & Inst. Code § 654.3(c)*].

- A petition alleges that the minor has violated *Section 186.22 of the Penal Code* [*Welf. & Inst. Code § 654.3(d)*].

- The minor has previously participated in a program of supervision pursuant to *Welf. & Inst. Code § 654* [*Welf. & Inst. Code § 654.3(e)*].

- The minor has previously been adjudged a ward of the court pursuant to *Welf. & Inst. Code § 602* (commission of crime) [*Welf. & Inst. Code § 654.3(f)*].

- A petition alleges that the minor has committed an offense in which the restitution owed to the victim exceeds $1,000 [*Welf. & Inst. Code § 654.3(g)* ("victim" as defined in former *Welf. & Inst. Code § 729.6(a)(1)*) (*now see Welf. & Inst. Code § 730.6(j)*) and "restitution" as defined in former *Welf. & Inst. Code § 729.6(d)* (*now see Welf. & Inst. Code § 730.6*))].

- The minor is alleged to have committed a felony offense when they were at least 14 years of age [*Welf. & Inst. Code § 654.3(h)*].

[ii] By Probation Officer in Lieu of Filing a Petition

If the probation officer, after investigating an application for a petition, concludes that a minor is or soon will be within the jurisdiction of the juvenile court, the probation officer may, in lieu of filing a wardship petition under *Welf. & Inst. Code § 601* (refusal to obey parents, violation of curfew, truancy) or requesting a prosecuting attorney to file a wardship petition under *Welf. & Inst. Code § 601.3(e)* (initiation of delinquency proceedings by district attorney for truancy) or under *Welf. & Inst. Code § 602* (criminal offenses), and with the consent of the minor's parent or guardian, delineate specific programs of supervision for the minor and attempt to adjust the situation that brings the minor within, or creates the probability that the minor will soon be within, the court's jurisdiction [*Welf. & Inst. Code § 654*].

This program may not exceed six months, and institution of a program does not prevent the probation officer from filing or requesting the prosecuting attorney to file a petition at any time within the six-month period, or for a 90-day period thereafter [*Welf. & Inst. Code § 654*; *Cal. Rules of Ct., Rule 5.514(e)(2)*; *see In re Michael D. (1989) 211 Cal. App. 3d 1280, 1283-1284, 260 Cal. Rptr. 30* (construing six-month limitation period); *see also People ex rel. Kottmeier v. Superior Court (1987) 194 Cal. App. 3d 1536, 1540-1542, 239 Cal. Rptr. 920* (pre-1989 amendment case; petition must be filed within six-month period (now extended by additional 90 days), because period is jurisdictional)].

If the probation officer determines that a minor on informal supervision has not become involved in a specific program within 60 days, the probation officer must immediately file, or request that the prosecuting attorney file, a petition. However, if in the judgment of the probation officer, the interest of the minor and the community can be protected, the probation officer must make a diligent effort to proceed under the program of informal supervision [*Welf. & Inst. Code § 654*; *Cal. Rules of Ct., Rule 5.514(e)(2)*].

The California Rules of Court set forth explicit factors to be considered by the probation officer when considering whether to institute a program of informal supervision and are similar to the factors considered in determining whether to settle at intake as discussed in [b], *above* [*Cal. Rules of Ct., Rules 5.514, 5.516(b)*].

A probation officer's decision not to place a minor on or to recommend that a minor be placed on informal supervision is reviewable by the juvenile court. If the probationofficer has abused his or her discretion in making the decision, such as by refusing to consider informal supervision unless the minor admits guilt, or on the basis of an inability to make restitution, the juvenile court may order the probation department to nevertheless consider informal supervision [*see Paul D. v. Superior Court (1984) 158 Cal. App. 3d 838, 842-843, 205 Cal. Rptr. 77* ; *Charles S. v. Superior Court (1982) 32 Cal. 3d 741, 749-751, 187 Cal. Rptr. 144, 653 P.2d 648]* .

PRACTICE TIP:

Admission to Offense Not Required. Many probation departments require that a minor admit the offenses alleged against them as a prerequisite for inclusion into a program of informal supervision pursuant to *Welf. & Inst. Code § 654*. This practice or policy is improper and subject to a preemptory writ of mandate ordering a trial court to dismiss a petition against a minor and ordering a probation department to admit the minor to a program of informal supervision, under certain circumstances. The factors to be considered in determining a minor's eligibility for informal supervision are contained within *Cal. Rules of Court, Rule 5.516(b)*. Although consideration of the minor's attitude is included in the list of factors [Rule 5.516(b)(4)], each minor who is otherwise eligible for informal supervision is entitled to an individualized assessment of their suitability for the program, in light of all of the relevant factors [*see Kody P. v. Superior Court (2006) 137 Cal. App. 4th 1030, 40 Cal. Rptr. 3d 763]* .

[iii] By Prosecuting Attorney

In the affidavit discussed in [1], *above*, requesting a prosecuting attorney to file a wardship petition, the probation officer may recommend that the minor be placed on informal supervision if the probation officer believes that the minor will benefit from the program [*Welf. & Inst. Code § 654.2(b)*]. Furthermore, the prosecuting attorney may refer a matter back to the probation officer for whatever action the probation officer deems appropriate if it appears to the prosecuting

attorney that the minor may benefit from a program of informal supervision [*Welf. & Inst. Code § 653.5(c)*].

[iv] By the Court Once a Petition Has Been Filed

If the prosecuting attorney files a petition in a *Welf. & Inst. Code § 602* case, the court may, without adjudging the minor a ward of the court and with the consent of the minor and the minor's parents or guardian, continue any hearing on the petition for six months, so that the minor may participate in a program of informal supervision [*Welf. & Inst. Code § 654.2(a)*]. The program of supervision will require the minor's parents or guardian to participate with the minor in counseling or education programs [*Welf. & Inst. Code § 654*]. Fifteen days before the program's conclusion, the probation officer will be required to submit to the court a follow up report of the minor's participation in the program. The minor and the minor's parents or guardian will be required to appear at the conclusion of the six-month period. If the minor successfully completes the program, the petition will be dismissed; if not, proceedings on the petition will proceed. However, if at the end of the six months the probation officer recommends additional time to enable the minor to complete the program, the court may order and additional six months of informal supervision. In this case, the minor and the minor's parents will be ordered to appear at three-month intervals [*Welf. & Inst. Code § 654.2(a)*]. In any event, the court's jurisdiction to resume adjudicatory proceedings in informal cases, pursuant to *Welf. & Inst. Code § 654.2*, terminates no later than the anniversary date of the filing of the petition [*In re Anthony B. (2002) 104 Cal. App. 4th 677, 682-683, 128 Cal. Rptr. 2d 349]* .

Except in an unusual case in which the interests of justice would best be served and the court specifies on the record the reasons for its decision, no minor is eligible for informal supervision in any of the following situations specified in [i], *above* [*Welf. & Inst. Code § 654.3*].

The court may grant informal supervision over the objection of the prosecuting attorney and the probation officer [*Charles S. v. Superior Court (1982) 32 Cal. 3d 741, 749-751, 187 Cal. Rptr. 144, 653 P.2d 648]* .

The court may not make a true finding on the allegations in the petition and subsequently order informal supervision [*In re Omar R. (2003) 105 Cal. App. 4th 1434, 1437-1438, 129 Cal. Rptr. 2d 912]* . The purpose of informal supervision is to avoid the consequences of a sustained petition. To this end, if a minor successfully completes informal supervision, the petition is dismissed. If informal supervision is not satisfactorily completed the remedy is to proceed with a jurisdictional hearing [*In re Adam R. (1997) 57 Cal. App. 4th 348, 67 Cal. Rptr. 2d 76]* . Similarly, no procedure exists to convert a formal probation disposition into an informal supervision agreement after jurisdiction has been established. A motion pursuant to *Welf. & Inst. Code § 654.2* must be made prior to the jurisdictional hearing [*In re Adam D. (1997) 56 Cal. App. 4th 100, 65 Cal. Rptr. 2d 15]* .

PRACTICE TIP:

Formal Recommendation for Informal Supervision. In those cases where the prosecuting attorney has filed a wardship petition on a minor who is generally ineligible for informal supervision [*see Welf. & Inst. Code § 654.3*], there is nothing prohibiting the probation officer or minor's counsel from recommending supervision pursuant to *Welf. & Inst. Code § 654* to the court. Factors that are often considered in granting informal supervision in this context include: the age of the minor, the passage of a significant period of time since the minor was previously place on informal supervision, and the relationship of the minor to the victim to whom restitution is owed (*e.g.*, parent).

It can be argued that by granting informal supervision in this manner, which would involve a court appearance by the minor on the petition filed, the court would impress upon the minor the importance of the term of informal supervision. The court can further emphasize this by setting an ex parte review date with the minor to check on their progress prior to the termination of the informal supervision period.

[v] Supervision of Youthful Intoxicated Driver in Lieu of Petition

If a minor is charged with driving while under the influence of alcohol or drugs, under either *Veh. Code § 23140* or *23152*, the probation officer may, in lieu ofrequesting that the prosecuting attorney file a wardship under *Welf. & Inst. Code § 602* (criminal offenses), delineate a program of supervision for the minor. However, the probation officer must cause the citation for the violation of *Veh. Code § 23140* or *23152* to be heard and disposed of by the judge, referee, or traffic hearing officer pursuant to *Welf. & Inst. Code §§ 257* (conduct of hearing for traffic offenses) and 258 (disposition alternatives after minor found guilty of traffic offense) as a condition of the program of supervision. The probation officer is not prevented from requesting that the prosecuting attorney file a wardship petition against the minor pursuant to *Welf. & Inst. Code § 602*, but should employ the informal supervision procedure if, in the probation officer's judgment, the interest of the minor and the community can be protected by proceeding under informal supervision [*Welf. & Inst. Code § 654.1*].

Any minor who is placed in a program of informal supervision for an offense involving the possession, use, sale, or other furnishing of a controlled substance listed in *Health & Safety Code §§ 11053-11058*, public intoxication [*Penal Code § 647(f)*], or driving while intoxicated [*Veh. Code §§ 23140, 23152*] will be required to participate in and successfully complete an alcohol or drug education program [*Welf. & Inst. Code § 654.4*].

[d] Submission to Prosecuting Attorney in Welf. & Inst. Code § 602 Cases

If the probation officer determines that proceedings should be commenced to declare a person a ward of the juvenile court under *Welf. & Inst. Code § 602* (criminal offense), the probation officer may send the affidavit, discussed in [1], *above*, to the prosecuting attorney. The affidavit must be submitted to the prosecuting attorney within 48 hours if it appears to the probation officer that [*see Welf. & Inst. Code § 653.5(c)*; *Cal. Rules of Ct., Rule 5.514*]:

- A felony referral is being made for a minor who was 14 years of age or older at the date of the offense [*Welf. & Inst. Code § 653.5(c)(3)*].

- A second felony referral is being made for a minor who was under 14 years of age at the date of the offense [*Welf. & Inst. Code § 653.5(c)(2)*].

- The minor has previously been placed in a program of informal probation pursuant to *Welf. & Inst. Code § 654* [*Welf. & Inst. Code § 653.5(c)(7)*; *see* discussion in [ii], *above*].

- The minor has committed an offense in which the restitution owed to the victim exceeds $1,000 [*Welf. & Inst. Code § 653.5(c)(8)* ("victim" as defined in former *Welf. & Inst. Code § 729.6(a)(1)* (*now see Welf. & Inst. Code § 730.6(j)*) and "restitution" as defined in former *Welf. & Inst. Code § 729.6(d)* (*now see Welf. & Inst. Code § 730.6*))].

- The minor is of any age and is being referred to the probation officer for any of certain specified serious criminal offenses [*see Welf. & Inst. Code § 653.5(c)(1), (4), (5), (6)*; *see also Health & Safety Code §§ 11350, 11377*; *Penal Code §§ 136.1, 137, 186.22, 245.5, 288(b), 289, 626.9, 626.10, 1203.09, 12022.5*].

In addition the probation officer must refer any matter to the prosecutor in which it appears that the minor has been referred for any violation of an offense listed in *Welf. & Inst. Code § 707(b), (d)(2)*, or *(e)*, allegedly committed when the minor was 14 years or older [*Welf. & Inst. Code § 653.5(c)(1)*]. *Cal. Rules of Court, Rule 5.516(c)* lists fifteen factors to be considered by the probation officer in determining whether to refer the matter to the prosecuting attorney. These factors include whether the alleged conduct involved physical harm or threat of harm to person or property, whether the child has serious problems in school, at home or in the community, and the attitudes of the child and parent or guardian. If it appears to the prosecuting attorney that (1) the affidavit was not properly referred, (2) the offense for

which the minor was referred should be charged as a misdemeanor, or (3) the minor may benefit from a program of informal supervision, the prosecuting attorney must refer the matter back to the probation officer for whatever action the probation officer may deem appropriate [*Welf. & Inst. Code § 653.5(c)*].

[4] Informal Juvenile and Traffic Court

Offenses specified in *Welf. & Inst. Code § 256* may be heard by juvenile hearing officers (formerly known as traffic hearing officers) in the "Informal Juvenile and Traffic Court." While these hearings may result in the imposition of various orders similar to probation supervision, wardship is not established and the terms and conditions imposed are generally less severe than if the minor is made a ward of the court under *Welf. & Inst. Code § 602* [*Welf. & Inst. Code § 258*].

Violations of *Vehicle Code §§ 23136, 23140, 23152,* and *23153,* which involve driving a vehicle with a blood alcohol level of 0.01 or higher, or driving under the influence of alcohol and/or a drug, are specifically excluded from the jurisdiction of the "Informal Juvenile and Traffic Court."

All other Vehicle Code violations that are not felonies, as well as various other offenses, remain within the informal court's jurisdiction [*Welf. & Inst. Code § 256*].

Decisions on citations for violations not brought on a Section 601 or 602 petition, or heard before a referee pursuant to *Welf. & Inst. Code §§ 247-254,* do not provide a right to appeal. The remedy for hearings in the Informal Juvenile and Traffic Court is a request for rehearing, via a motion to set aside the decision, before a juvenile court judge [*In re K.S. (2003) 112 Cal. App. 4th 118, 121-122, 5 Cal. Rptr. 3d 39]* .

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28-329 California Forms of Pleading and Practice--Annotated § 329.36

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§ 329.36 Decision Not to Commence Proceedings

[1] In General

If the probation officer does not forward an application to the prosecuting attorney within 21 court days the application was filed, the probation officer must endorse on the applicant's affidavit the decision not to proceed further, indicate the reasons for his or her decision, and immediately notify the applicant of the action taken or the decision rendered. The probation officer must retain the affidavit and endorsement for a period of 30 days after such notice to the applicant [*Welf. & Inst. Code § 653.7*].

[2] Review of Decision Not to Commence Proceedings

The probation officer or, in the case of an application based on *Welf. & Inst. Code § 601* (habitual truancy or disobedience), the probation officer or the district attorney, has effectively denied an application to commence juvenile court proceedings when he or she fails to forward the application to the prosecuting attorney within 21 court days after the application is filed [*Welf. & Inst. Code § 655(a), (b)*]. An applicant may, within 10 court days after receiving notice of the probation officer's (or district attorney's) decision not to file a petition [*see Welf. & Inst. Code § 653.7*], apply to the prosecuting attorney to review that decision. The prosecuting attorney may either affirm the decision of the probation officer (or district attorney) or commence juvenile court proceedings [*Welf. & Inst. Code § 655(a), (b)*; *see Welf. & Inst. Code § 601.3(e)* (initiation of delinquency proceedings by district attorney for truancy); *but see Welf. & Inst. Code § 655(c)* (*Welf. & Inst. Code § 655(b)* may not be construed to allow district attorneys to file wardship petition under *Welf. & Inst. Code § 601*, except as specifically allowed by *Welf. & Inst. Code §§ 601.3(e), 653*)].

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§ 329.37 Initiation of Juvenile Court Wardship Proceedings

[1] Filing Petition

If the case is not settled at the intake stage or if a program of informal supervision is not instituted, the probation officer will then initiate formal juvenile court proceedings. A proceeding in the juvenile court to declare a minor a ward of the court under *Welf. & Inst. Code § 601* (minor alleged to be habitually disobedient, truant, or beyond the control of the parent or guardian) is commenced by the filing with the court, by the probation officer, of a petition [*Welf. & Inst. Code § 650(a)*; *Cal. Rules of Ct., Rule 5.520(b)(2)*].

A proceeding in the juvenile court to declare a minor a ward of the court under*Welf. & Inst. Code § 602* (minor alleged to have violated a law or ordinance) is commenced by the filing with the court, by the prosecuting attorney as petitioner, of a petition [*Welf. & Inst. Code § 650(c)*; *Cal. Rules of Ct., Rule 5.520(b)(3)*]. The applicable statute of limitations is that which would apply in an adult case [*see In re Gustavo M. (1989) 214 Cal. App. 3d 1485, 1493, 1495, 263 Cal. Rptr. 328* (*Penal Code § 801*'s three-year statute of limitation applies to juvenile felony cases); *see also Penal Code §§ 799-805.5* (statutes of limitation in adult cases)].

[2] Refiling Petition After Dismissal for Failure to File Within Time Limitations

Despite applicable time limitations, the characterization of juvenile court proceedings as not criminal in nature and conducted for the protection and benefit of the youth in question has led some courts to find that petitions dismissed without a hearing because of a time problem may be properly refiled and new proceedings commenced [*Neil G. v. Superior Court (1973) 30 Cal. App. 3d 572, 576, 106 Cal. Rptr. 505]* .

[3] Form and Contents of Petition

A petition to commence proceedings in the juvenile court to declare a minor a ward of the court must be verified and

contain the following [*Welf. & Inst. Code § 656*; *Cal. Rules of Ct., Rule 5.524(b)*]:

- The name of the court to which the petition is addressed.

- The title of the proceeding.

- The code section or sections, with subdivision or subdivisions, under which the proceedings are instituted and, if the petition is filed under *Welf. & Inst. Code § 602* (criminal violation), the specific code sections alleged to have been violated and, regarding each count, whether it is a misdemeanor or felony [*see Welf. & Inst. Code § 656.1*; *see also* form *set out in Ch. 328, Juvenile Courts: Dependency Proceedings, § 328.352*].

- The name, age, address, if any, of the minor on whose behalf the petition is brought.

- The names and resident addresses, if known to petitioner, of all parents and guardians of such minor. If there is no parent or guardian residing within the state, or if the place of residence is not known to petitioner, the petition must also contain the name and residence address, if known, of any adult relative residing within the county or, if there is none, the adult relative residing nearest to the location of the court.

- A concise statement of facts, separately stated, to support the conclusion that the minor on whose behalf the petition is being brought is the person within the definition of each of the sections and subdivisions under which the proceedings are being instituted.

- The fact that the minor on whose behalf the petition is brought is detained in custody or is not detained in custody, and if he or she is detained in custody, the date and precise time the minor was taken into custody.

- A notice to the father, mother, spouse, or other person liable for support of the minor of the following:

  - *Welf. & Inst. Code § 903* may make that person, the estate of that person, and the estate of the minor liable for the cost of the care, support, and maintenance of the minor in any county institution or any other place in which the minor is placed, detained, or committed pursuant to an order of the juvenile court.

  - *Welf. & Inst. Code § 903.1* may make that person, the estate of that person, and the estate of the minor liable for the cost to the county of legal services rendered to the minor by a private attorney or a public defender appointed pursuant to the order of the juvenile court.

  - *Welf. & Inst. Code § 903.2* may make that person, the estate of that person, and the estate of the minor liable for the cost to the county of the probation supervision of the minor by the probation officer pursuant to the order of the juvenile court.

- The liabilities established by these sections are joint and several.

- In a proceeding alleging that the minor comes within the provisions of *Welf. & Inst. Code § 601*, notice to the parent, guardian, or other person having control or charge of the minor that failure to comply with the compulsory school attendance laws is an infraction, which may be charged and

prosecuted before the juvenile court judge sitting as a municipal court judge. In these cases, the petition must also include:

- Notice that the parent, guardian, or other person having control or charge of the minor has the right to a hearing on the infraction before a judge other than the judge who has heard or is to hear the proceeding pursuant to *Welf. & Inst. Code § 601*.

- The notice must explain the provisions of *Code Civ. Proc. § 170.6* (concerning peremptory challenges of judges).

- If a proceeding is pending against a minor child for a violation of *Penal Code §§ 594.2*, *640.5*, *640.6*, or *640.7* (graffiti), a notice to the minor's parent or legal guardian that, if the minor is found tohave violated either or both of these provisions, any community service that may be required of the minor may be performed in the presence, and under the direct supervision, of the parent or legal guardian pursuant to these provisions, and that, if the minor is personally unable to pay any fine levied for the violation of these provisions, the parent or legal guardian is liable for payment of the fine.

- If applicable, the intent to aggregate other offenses under *Welf. & Inst. Code § 726*.

- A notice to the parent or guardian that if the minor is ordered to make restitution to the victim, or to pay fines or penalty assessments, the parent or guardian may be liable for the payment.

[4] Verification of Petition

Any petition filed in juvenile court to commence proceedings that is not verified may be dismissed without prejudice by the court [*Welf. & Inst. Code § 656.5*; *Cal. Rules of Ct., Rule 5.524(b)*].

[5] Amendment of Petition

The provisions of *Code Civ. Proc. §§ 469-475*, relating to variance and amendment of pleadings in civil actions, apply to petitions and proceedings in the juvenile court to the same extent and with the same effect as if proceedings under juvenile court rules were civil actions [*Welf. & Inst. Code § 678*; *Cal. Rules of Ct., Rule 5.524(d)*]. Specifically, the juvenile court has discretion to permit amendment of a wardship petition to correct or make more specific the factual allegations in support of the offense when the nature of the charge remains unchanged [*In re Man J. (1983) 149 Cal. App. 3d 475, 197 Cal. Rptr. 20]* . This principle has also been applied to the deletion of allegations not supported by evidence adduced at trial [*In re Marcus T. (2001) 89 Cal. App. 4th 468, 107 Cal. Rptr. 2d 451]* .

[6] Setting Petition for Hearing

On the filing of the petition, the clerk of the juvenile court must set the petition for a jurisdiction hearing within 30 days, except that, in the case of a minor detained in custody at the time of the filing of the petition, the petition must be set for hearing within 15 judicial days from the date of the order of the court directing such detention [*Welf. & Inst. Code § 657(a)*; *Cal. Rules of Ct., Rule 5.774(a), (b)*; *see also* the discussion in *§ 329.35*].

[7] Notice Requirements

[a] Persons Entitled to Notice by Clerk of Court

When the petition is filed, the clerk of the juvenile court issues a notice with a copy of the petition attached to it. The

clerk must serve the notice on the minor, if the minor is eight or more years of age, and on each parent, guardian, or adult relative whose residence addresses are set forth in the petition. In addition, the clerk must thereafter, but before the hearing, serve notice on all such persons whose residence addresses become known to the clerk. The clerk must also issue a copy of the petition to the minor's attorney and to the district attorney, if notified that the district attorney wishes to receive such petition, containing the time, date, and place of the hearing [*Welf. & Inst. Code § 658*; *see Cal. Rules of Ct., Rule 5.524(f)*].

[b] Contents of Notice Issued by Clerk

The notice issued by the clerk of the court must contain the following information [*Welf. & Inst. Code § 659*; *Cal. Rules of Ct., Rule 5.524(b)*]:

- The name and address of the person to whom the notice is directed.
- The date, time, and place of the hearing on the petition.
- The name of the minor on whose behalf the petition has been brought.
- Each section and subdivision under which the proceeding has been instituted.
- A statement that:
  - The minor and his or her parent, guardian, or adult relative to whom the notice is required to be given are entitled to have an attorney present at the hearing on the petition.
  - If the parent, guardian, or adult relative is indigent and cannot afford an attorney, and if the minor or the parent, guardian, or adult relative desires to be represented by an attorney, the parent, guardian, or adult relative should promptly notify the clerk of the juvenile court.
  - In the event counsel or legal assistance is furnished by the court, the parent or guardian or adult relative will be liable to the county, to the extent of his, her, or their financial ability, for all or a portion of the cost of the assistance.
- A statement that the parent or parents or responsible relative or guardian may be liable for the costs of support of the minor in a county institution.
- A statement that the parent or guardian of the minor may be liable for the payment of restitution, fines, or penalty assessments that the minor is ordered to pay to the victim.

[c] Time Requirements for Service of Notice

[i] When Minor Is Detained

If the minor is detained, the clerk of the juvenile court must serve the notice anda copy of the petition on all persons required to receive the notice and copy, either personally or by certified mail with return receipt (by first-class mail if all persons entitled to notice were present at detention hearing), as soon as possible after the petition is filed, and at least five calendar days prior to the hearing, unless the hearing is set less than five days from the filing of the petition, in which case the notice and copy must be served at least 24 hours prior to the hearing [*Welf. & Inst. Code § 660(a)*].

[ii] When Minor Is Not Detained

If the minor is not detained, the clerk must serve the notice and a copy of the petition on all persons required to receive them, either personally or by first-class mail, at least 10 days prior to the time set for hearing. If the person resides outside the county, the clerk of the juvenile court must mail the notice and a copy of the petition to the person as soon as possible after the petition is filed, and at least 10 days before the time set for hearing [*Welf. & Inst. Code § 660(c)*].

[d] Failure to Respond to Notice

A nondetained minor who has failed to appear in court in response to a mailed notice of petition may have a warrant issued for their arrest if (1) it appears to the court that personal service has been unsuccessful or the whereabouts of the minor are unknown, and all reasonable efforts to locate and personally serve the minor have failed; or (2) it appears to the court that the minor has willfully evaded service of process [*Welf. & Inst. Code §§ 660, 663*].

[e] Service on Minor's Attorney

Service on the minor's attorney constitutes service on the minor's parent or guardian [*Welf. & Inst. Code § 660(d)*].

[f] Waiver of Notice

Service may be waived by any person by voluntary appearance entered in the minutes of the court or by written waiver of service filed with the clerk of the court at or prior to the hearing [*Welf. & Inst. Code § 660(c)*; *Cal. Rules of Ct., Rule 5.524(g)*].

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§ 329.38 Interim Orders

Once a petition has been filed, the court may issue certain ex parte orders primarily designed to protect the child pending adjudication of the petitioned matter [*Welf. & Inst. Code § 213.5(a), (b)*]. These orders include:

- Enjoining any person from molesting, attacking, threatening, sexually assaulting, stalking, or battering the child who is the subject of the wardship petition, or any other child in the household.

- Excluding any person from the dwelling of the person of the person who has care and custody of the child.

- Enjoining the child from contacting, threatening, stalking or disturbing the peace of any person the court finds to be at risk from the conduct of the child, or with whom association would be detrimental to the child.

When an emergency condition exists, as described in *Gov. Code § 68115*, the presiding judge may request, and the Chair of the Judicial Council may authorize, an extension of time for filing a case by deeming that the date or dates upon which the condition existed are holidays for the purpose of computing time. Included in the list of emergency conditions described is a large influx of criminal cases resulting from a large number of arrests within a short period of time, threatening the orderly operation of a superior court location [*Gov. Code § 68115*].

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[Reserved]

§§ 329.39[Reserved]

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28-329 California Forms of Pleading and Practice--Annotated § 329.50

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§ 329.50 Detention Hearing

[1] Nature and Purpose of Hearing

When a petition is filed to commence delinquency proceedings in the case of a minor who is already temporarily detained, the court must hold a detention hearing to determine whether the minor should continue to be detained pending the jurisdiction hearing on the petition [*Welf. & Inst. Code § 632*].

PRACTICE TIP:

Report by Probation Officer. In most counties, the probation officer will present a report at the detention hearing with information about the minor and the offense, as well as a recommendation regarding detention. Since this report will carry a great deal of weight with the court, and may be the only evidence presented, the attorney should attempt to confer with the probation officer before the report is written, and suggest a plan that would allow the minor to remain out of custody, while protecting the public and the minor. The attorney should also give the probation officer any favorable information regarding the minor of the facts of the offense.

A juvenile detention hearing is not the equivalent of an adult preliminary hearing [*In re Korry K. (1981) 120 Cal. App. 3d 967, 970-971, 175 Cal. Rptr. 91]* .

The minor is entitled to contest the reasons for detention at the hearing, even if the superior court has already found jurisdiction [*In re Talbott (1988) 206 Cal. App. 3d 1290, 1295, 254 Cal. Rptr. 421]* .

[2] Maximum Detention Period

[a] Prior to Filing Petition

Generally, a minor taken into custody by a peace officer or probation officer must be released within 48 hours unless a petition is filed to declare the minor a ward of the court or criminal complaint has been filed [*Welf. & Inst. Code § 631(a)*]. For certain misdemeanors, a minor taken into custody without a warrant must be released within 48 hours unless a petition is filed to declare the minor a ward of the court and a detention hearing held [*Welf. & Inst. Code § 631(b)*]. This time limit includes noncourt hours but excludes nonjudicial days [*In re Tan T. (1997) 55 Cal. App. 4th 1398, 64 Cal. Rptr. 2d 758]* .

[b] Before Detention Hearing Based on Petition

[i] General Rule

If a petition has been filed in juvenile court against the minor in custody alleging that the minor has committed a felony or a misdemeanor involving violence, the threat of violence, or the possession or use of a weapon, or any other offense if the minor is currently on probation or parole, a detention hearing is required to be commenced as soon as possible, but no later than the expiration of the next judicial day after the petition is filed [*Welf. & Inst. Code § 632(a)*; *Cal. Rules of Ct., Rule 5.752(f)*; *see Alfredo A. v. Superior Court (1994) 6 Cal. 4th 1212, 1232, 26 Cal. Rptr. 2d 623, 865 P.2d 56* (upholding *Welf. & Inst. Code § 632(a)* when detention hearing is held within 72 hours of arrest; otherwise, requiring separate, timely judicial determination of probable cause)].

If the minor is not brought before a judge or referee of the juvenile court within the period prescribed, he or she must be released from custody [*Welf. & Inst. Code § 632(c)*]. When an emergency condition exists, as described in *Gov't Code section 68115*, the presiding judge may request, and the Chair of the Judicial Council may authorize, an extension of time by deeming that the date or dates upon which the condition existed are holidays for the purpose of computing time. This section specifically applies to detention hearings [*Gov. Code § 68115(d)*] and includes in the list of emergency conditions described a large influx of criminal cases resulting from a large number of arrests within a short period of time, threatening the orderly operation of a superior court location [*Gov. Code § 68115*].

[ii] Certain Misdemeanors

If the minor is taken into custody without a warrant on the belief that he or she has committed a misdemeanor not involving violence, a threat of violence, or possession or use of weapons, and if the minor is not currently on probation or parole, the minor must be brought before the court for a detention hearing as soon as possible, but in no event beyond 48 hours after being taken into custody or the expiration of the next judicial day, whichever is later [*Welf. & Inst. Code § 632(b)*; *Cal. Rules of Ct., Rule 5.752(e)(2)*]. Additionally, if the child has been taken into custody on a warrant or by the authority of the probation officer, the detention hearing must be commenced as soon as possible, but no later than 48 hours, excluding nonjudicial days, after the minor has been taken into custody [*Cal. Rules of Ct., Rule 5.752(e)(1)*].

If the minor will not be brought before the judge or referee of the juvenile court within 24 hours, the decision not to do so is subject to written review and approval by a probation officer who is a supervisor as soon as possible after it is known that the minor will not be brought before the judge or referee within 24 hours, unless the person making the decision is a probation officer who is a supervisor [*Welf. & Inst. Code § 632(b)*].

If the minor is not brought before a judge or referee of the juvenile court within the period prescribed, he or she must be released from custody [*Welf. & Inst. Code § 632(c)*].

[3] Service and Notice of Filing Prior to Hearing

Immediately on filing the petition, the minor must be served with a copy of the petition and be notified of the time and place of the detention hearing. Counsel of record and each parent or guardian of the minor must also be notified, either orally or in writing, of the time and place of the detention hearing, if the whereabouts of each parent or guardian can be ascertained by due diligence [*Welf. & Inst. Code § 630(a)*; *Cal. Rules of Ct., Rule 5.524(f)*].

[4] Grounds for Continuance

On motion of the minor, parent, or guardian, the court must continue a detention hearing for one judicial day [*Welf. & Inst. Code § 638*; *Cal. Rules of Ct., Rule 5.550(c)(1)*]. On motion of the minor, parent, or guardian, the court may also grant a reasonable continuance to prepare any relevant evidence the moving party desires to present on the issue of detention [*Cal. Rules of Ct., Rule 5.550(c)(1)*]. Unless otherwise ordered by the court, the minor must remain in custody pending completion of the detention hearing [*Cal. Rules of Ct., Rule 5.550(c)(1)*].

[5] Explanation by Court of Proceedings at Commencement of Hearing

At the beginning of the initial hearing, the court must inform the minor and the parent or guardian, if present, of the contents of the petition, the reasons why the minor was taken into custody, the nature and possible consequences of juvenile court proceedings. They must also be informed of the right of the minor and his or her parent or guardian to be represented by counsel at every stage of the proceedings [*Welf. & Inst. Code § 633*; *Cal. Rules of Ct., Rules 5.754(a)* and*5.534(g)*; *see* further discussion in *§ 329.51*].

After explaining the nature of the proceedings and the right to counsel, the court must next inform those present of each of the minor's following rights:

- The right to remain silent, and that anything the minor says may be used against him or her in the pending or any other proceeding.

- The right to confront and to cross-examine the persons who prepared any police reports, probation reports, or other documents submitted by the petition, as well as any witness examined by the court during the detention proceedings.

- The right to use the process of the court to compel the attendance of witnesses on the minor's behalf.

- The right to present to the court whatever relevant evidence the minor, parent, or guardian, or their counsel, desires to present [*Cal. Rules of Ct., Rule 5.534(j)*].

[6] Examination by Court

Subject to the minor's privilege against self-incrimination, the court must examine the minor, parents, guardian, or other person having knowledge relevant to the grounds for detention and must hear any relevant evidence the minor, parents, guardian, or their counsel desires to present [*Welf. & Inst. Code § 635*; *Cal. Rules of Ct., Rule 5.756(b)*].

PRACTICE TIP:

Examination of Minor. Counsel should object to any questions addressed to the minor regarding the facts of the case, since the answers could be used against the minor at a later time.

[7] Rights of Minor During Hearing

At any detention proceeding, the minor has a privilege against self-incrimination. The minor, parent, or guardian and the attorney for those persons must be permitted to inspect any police report, probation reports, and all other documents that are filed with the court or that were made available to the probation officer in preparing the probation report [*Welf. & Inst. Code § 630(b)*; *Cal. Rules of Ct., Rules 5.534(j), 5.756(a)*].

[8] Admission of Allegation

At the detention hearing, or at any time thereafter, a minor who is alleged to come within the jurisdiction of the juvenile

court to declare wardship may, with the consent of counsel, admit in court the allegations of the petition and waive the jurisdictional hearing [*Welf. & Inst. Code § 657(b)*].

If the minor wishes to admit the allegations of the petition or enter a plea of no contest at the detention hearing, the court may accept the admission or plea and proceed according to *Cal. Rules of Ct., Rules 7.754(b), 5.778(c)*. However, before accepting an admission or a no contest plea, the court must establish a knowledgeable waiver of rights in the record of the proceedings [*In re Ronald E. (1977) 19 Cal. 3d 315, 137 Cal. Rptr. 781, 562 P.2d 684]* . For further discussion of admitting allegations and pleading no contest in delinquency proceedings, see *§ 329.73[2]*.

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§ 329.51 Representation by Counsel at Hearing

[1] Advisement of Right by Court

If either the minor or the parent or guardian is unrepresented by counsel, the court must advise them of the right of the minor and the parent or guardian to be represented by counsel at the detention hearing and at every other stage of the proceedings and, when applicable, of the right to appointed counsel, subject to a claim by the county for reimbursement [*Welf. & Inst. Code § 633*; *Cal. Rules of Ct., Rule 5.534(g)*; *see In re Ryan B. (1990) 216 Cal. App. 3d 1519, 1527, 265 Cal. Rptr. 629* (out-of-custody minor must be given notice and be advised of right to counsel before judicial authority may order detention; no statute authorizes detention hearings when juvenile appears out of custody without notice of possibility of detention)].

[2] Appointment of Counsel

[a] In General

If the minor appears at the detention hearing without counsel, the court must appoint counsel to represent the minor whether or not the minor is able to afford counsel, unless there is an intelligent and knowing waiver of the minor's right to counsel by the minor. If the parent or guardian does not furnish counsel, the court must appoint counsel, subject to a claim by the county for reimbursement by the parent or guardian [*Welf. & Inst. Code § 634*; *Cal. Rules of Ct., Rule 5.534(h)(2)(A)*].

The minor will not be permitted to represent himself or herself, however, unless he or she can demonstrate a rational and factual understanding of the proceedings against him or her. In making this determination, the juvenile court may factor in the age of the minor [*In re Shawnn F. (1995) 34 Cal. App. 4th 184, 195-196, 40 Cal. Rptr. 2d 263]* .

[b] When Conflict of Interest Exists Between Minor and Parent or Guardian

In any case in which it appears to the court that there is such a conflict of interest between a parent or guardian and the minor that one attorney could not properly represent both, the court must take appropriate action to eliminate the conflict of interest by appointing counsel in addition to that already employed [*Welf. & Inst. Code § 634*; *Cal. Rules of Ct., Rule 5.534(h)(2)(C)*].

[c] Right to Counsel Offense Specific

Any counsel, on entering an appearance on behalf of a minor, must continue to represent that minor unless relieved by the court on the substitution of other counsel or for cause [*Welf. & Inst. Code § 634.6*]. However, the minor's *Sixth Amendment* right to counsel is "offense specific" and only applies to the offense to which the right has attached. The exception to this rule exists when a charge or offense is "inextricably intertwined" or "closely related" to the matter in which right to counsel has attached [*In re Robert E. (2000) 77 Cal. App. 4th 557, 91 Cal. Rptr. 2d 774]* .

PRACTICE TIP:

***In re Robert E*. and *Welf. & Inst. Code § 634.6*.** Simply because a minor's right to counsel is offense specific, advocacy efforts on behalf of a child should not terminate at the end of a jurisdictional or dispositional hearing. Too often the minor's real need for zealous advocacy begins once the dispositional orders are made but have yet to be implemented. To this end, ensuring that probation order and a dispositional case plan are being implemented in a manner favorable to the interests of the minor reflects the essence of juvenile law and is not inconsistent with the mandates of *Robert E*. Accordingly, counsel should aggressively monitor the minor's past disposition progress and bring to the court's attention any failings inherent in the implementation of the rehabilitative plan.

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§ 329.52 Time Limits for Hearing Upon Detention

[1] Detention for Violation of Home Supervision

If the minor has been released on home supervision by the probation officer under *Welf. & Inst. Code § 628.1* or by the court under *Welf. & Inst. Code § 636*, and thereafter the minor violates a written condition of home supervision that he or she has promised in writing to obey and is taken into custody, the minor must be brought before the court for a detention hearing as soon as possible, but no later then 48 hours, excluding nonjudicial days, after he or she was taken into custody. If the hearing is not commenced within that time, the minor must be released immediately [*Cal. Rules of Ct., Rules 7.752(h)*].

[2] Detention Following Transfer or Pending Change of Placement

A detention hearing is required to be commenced as soon as possible, but no later than 48 hours, excluding nonjudicial days, after the minor first arrives at a detention facility within the county if any of the following occur [*Cal. Rules of Ct., Rule 5.752(g)*]:

- The minor was taken into custody in one county and transported to another.
- The minor was ordered transferred in custody by the juvenile court of another county under *Cal. Rules of Ct., Rule 5.610*.
- The minor is a ward temporarily placed in a secure facility pending a change of placement.

If the hearing is not timely commenced, the minor must be released immediately, except that, if the minor is a ward under *Welf. & Inst. Code § 602* and is awaiting a change of placement, he or she will be placed in a suitable, nonsecure facility [*Cal. Rules of Ct., Rule 5.752(i)*].

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§ 329.53 Grounds for Detention

[1] General Rule

[a] Court Finding Required

No minor may be ordered detained by the court unless certain grounds are found to exist, in which event the court may order that the minor be detained in custody in a suitable place designated by the court, not limited to the juvenile hall, or be placed on home supervision release under *Welf. & Inst. Code §§ 628.1* and *636* [*Welf. & Inst. Code § 635*; *Cal. Rules of Ct., Rule 5.760(c)*; *see also* discussion in *§§ 329.32[8], 329.34[3]*].

The necessary grounds for detention are discussed in [b] through [f], *below* [*Welf. & Inst. Code § 635*; *Cal. Rules of Ct., Rule 5.760(g)-(k)*].

[b] Violation of Court Order

In determining whether to release or detain the minor on the grounds that the minor has violated an order of the court, the court must consider the following factors [*Cal. Rules of Ct., Rule 5.760(g)*]:

- The specificity of the court order allegedly violated.
- The nature and circumstances of the alleged violation of the court order.
- The severity and gravity of the alleged violation of the court order.
- Whether the violation endangers the minor or others.

- The prior history of the minor insofar as it relates to the failure to obey orders or directives of the court or probation officer.

- Whether there are means to assure the minor's presence at any scheduled court appearance without detaining the minor.

- The nature of the underlying conduct or offense being alleged which brings the minor before the juvenile court.

- The likelihood, that if the petition is sustained the minor will be ordered removed from the physical custody of the parent or guardian on completion of the proceedings.

[c] Escape From Commitment

No minor may be detained on the grounds that he or she has escaped from a previous commitment unless the court first finds that [*Cal. Rules of Ct., Rule 5.760(h)*]:

- The minor has been ordered committed by the juvenile court to the Youth Authority or to a county juvenile home, ranch, camp, forestry camp, or juvenile hall; and

- The minor escaped from commitment, including any escape from the custody of any officer or person in whose lawful custody the minor was placed during the commitment.

[d] Likelihood of Flight

In determining whether to release or detain the minor on the grounds that the minor is likely to flee, the court must consider the following factors [*Cal. Rules of Ct., Rule 5.760(i)*]:

- Whether the minor has previously fled the jurisdiction or failed to appear in court.

- Whether there are means to assure the minor's presence at any scheduled court appearance without detaining the minor.

- Whether the minor promises to appear at any scheduled court appearance.

- Whether the minor has a prior history relating to the failure to obey orders or directives of the court or probation officer.

- Whether the minor is a resident within the county.

- Whether the nature and circumstances of the conduct or offense alleged make it appear likely that the minor would flee to avoid the jurisdiction of the court.

- Whether there exists an unstable home or school situation which makes it appear likely that the minor would flee to avoid the jurisdiction of the court.

- Whether the minor, absent a danger to the minor, would probably be released in an adult court on modest bail.

[e] Protection of Minor

In determining whether to release or detain the minor on the grounds that such detention is for the protection of the minor, the court must consider the following factors [*Cal. Rules of Ct., Rule 5.760(j)*]:

- Whether there are means to ensure the minor's care and protection pending any scheduled court appearance.

- Whether the minor is addicted to or is in imminent danger from the use of a controlled substance or intoxicant.

- Whether there exist any other compelling circumstances that make detention reasonably necessary.

[f] Protection of Person or Property of Another

In determining whether to release or detain the minor on the grounds that such detention is of reasonable necessity for the protection of the person or property of another, the court must consider the following factors [*Cal. Rules of Ct., Rule 5.760(k)*]:

- Whether the offense alleged involved physical harm to the person or property of another.

- Whether the minor's prior history involves physical harm or the substantial threat of physical harm to the person or property of another.

- Whether there exist any other compelling circumstances that make detention reasonably necessary.

[2] Probation Officer Requirements

A probation officer who is recommending that a minor be detained must submit documentation to the court that continued placement in the home is contrary to the minor's welfare, that reasonable efforts were made to prevent or eliminate the need for the removal of the minor from the home, and the nature and results of services provided to the minor [*Welf. & Inst. Code § 636*]. In the event that the minor is detained, if the probation officer believes that reasonable efforts by the minor or their parents will enable the minor to return safely to the home, a case plan must focus on efforts for the return of the minor to their home [*Welf. & Inst. Code § 636.1*].

[3] Required Findings

Whenever the court orders the minor detained, on any of the grounds listed in [1][a], *above*, as further discussed in [1][b]-[f], *above*, the court, if appropriate, will make all of the following findings on the record and in the written orders [*Cal. Rules of Ct., Rule 5.760(e)*]:

- Continuance in the home of the parent or legal guardian is contrary to the minor's welfare.

- Temporary placement and care is vested with the probation officer pending disposition or further order of the court.

- Reasonable efforts have been made to prevent removal or the lack of effort was reasonable because of the emergency nature of the removal.

[4] Specialized Mental Health Treatment

When the court finds a minor to be a person described by *Welf. & Inst. Code § 602* and believes that the minor may

need specialized mental health treatment while the minor is unable to reside in his or her natural home, the court must notify the director of the county mental health department in the county where the minor resides. The county mental health department must perform, for all such minors, the duties required under *Welf. & Inst. Code § 5697.5* (procedures to evaluate minor's condition and determine appropriate treatment) [*Welf. & Inst. Code § 635.1*].

Welf. & Inst. Code § 635.1 does not restrict the provisions of emergency psychiatric services to those minors who have not yet reached the point of adjudication or disposition, nor operate to restrict evaluations at an earlier stage of the proceedings or to restrict the use of *Penal Code §§ 4011.6* (commitment of prisoner to mental facility) and 4011.8 (voluntary application for mental health services) [*Welf. & Inst. Code § 635.1*].

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28-329 California Forms of Pleading and Practice--Annotated § 329.54

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§ 329.54 Order to Detain

[1] In General

If after hearing the evidence presented in the detention hearing, the court finds that any of the criteria for detention exist, it may order the juvenile detained in the juvenile hall or other suitable place designated by the juvenile court. Such an order and the findings of fact in support of such an order must be entered in the records of the court [*Welf. & Inst. Code § 636*; *Cal. Rules of Ct., Rule 5.760(e)*].

[2] Order to Reappear

On any hearing or rehearing on the issue of detention, the court may order the minor or any parent or guardian of the minor who is present in court to again appear before the court, the probation officer, or the county financial evaluation officer at a time and place specified in the order [*Welf. & Inst. Code § 639*].

[3] Home Supervision in Lieu of Detention by Court

If after the detention hearing, the court finds that the criteria of *Welf. & Inst. Code § 628.1* (release of minor to home supervision by probation officer) [*see* discussion in *§ 329.34[3]*] are applicable, the court may place the minor on home supervision for a period not to exceed 15 judicial days. The court must enter such an order together with its findings of fact in support of the order in the records of the court. If the court releases the minor on home supervision, the court may continue, modify, or may impose new conditions on a minor released for the first time. If there are new or modified conditions, the minor must be required to sign a written promise to obey the conditions [*Welf. & Inst. Code § 636*].

[4] Request for Prima Facie Hearing

After a decision of detention has been made, the minor or the minor's attorney may request further evidence regarding

the prima facie case or the grounds of detention by invoking the right to confront and to cross examine the preparers of reports or documents relied upon by the court in support of its initial decision. If that request is made, a detention rehearing must be held within three judicial days to consider testimony by those persons. If the detention rehearing cannot be held within three judicial days due to the unavailability of a witness, the court may continue the rehearing for a period not to exceed five judicial days from commencement of the detention hearing. If the preparer of any report or document is not made available for purposes of confrontation and cross-examination by the minor, the report or document must not be considered by the court in making its detention decision. If the prima facie case is not established, the minor must be released from detention [*Welf. & Inst. Code § 637*; *Cal. Rules of Ct., Rule 5.764*].

[5] Rehearing

[a] Prohibited When All Report Preparers Available

If the preparers of all reports or documents relied upon by the court in making its detention decision are present in court or are otherwise available to the minor for purposes of confrontation and cross examination at the detention hearing, there is no right to a detention rehearing [*Cal. Rules of Ct., Rule 5.762(c)*].

[b] After Absence of Parent or Guardian

When a detention hearing is held and no parent or guardian of the minor is present and no parent or guardian has had actual notice of the hearing, a parent or guardian of the minor may file an affidavit setting forth such facts with the clerk of the juvenile court. The clerk will immediately set the matter for rehearing at a time within 24 hours, excluding Sundays and nonjudicial days, from the filing ofthe affidavit. On the rehearing, the court proceeds in the same manner as on the original hearing [*Welf. & Inst. Code § 637*; *Cal. Rules of Ct., Rule 5.762(a)*].

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§ 329.55 Detention Facilities

[1] General Restrictions

Except as discussed in [2] and [3], *below* (minors detained under *Welf. & Inst. Code § 601* or *602*), no court, judge, referee, peace officer, or employee of a detention facility may knowingly detain any minor in a jail or lockup [*Welf. & Inst. Code § 207.1(a)*].

A "jail" is any building that contains a locked facility administered by a law enforcement or governmental agency to detain adults charged with violations of criminal law pending trial or to hold convicted adult criminal offenders sentenced for less than one year. A "lockup" is any locked room or secure enclosure under the control of a sheriff or other peace officer that is primarily for the temporary confinement of arrested adults [*Welf. & Inst. Code § 207.1(i)(1), (2)*].

[2] Minors Detained Pursuant to Welf. & Inst. Code § 601

Except as discussed below, no minor who is taken into custody solely on the ground that he or she is a person described by *Welf. & Inst. Code § 601* (habitually disobedient or truant) or adjudged to be such or made a ward of the juvenile court solely on that ground, can be detained in any jail, lockup, juvenile hall, or other secure facility [*see* discussion in *§ 329.20[2], [3]*].

Generally, a *Welf. & Inst. Code § 601* minor must be detained in a sheltered-care or crisis resolution home as provided for in *Welf. & Inst. Code § 654* (informal supervision), or in a nonsecure facility [*Welf. & Inst. Code § 207(a)*; *see Welf. & Inst. Code § 636.2* (operation and maintenance of nonsecure detention facilities); *see* discussion in *Ch. 327, Juvenile Courts: Jurisdiction and General Procedures, § 327.40* et seq. and in Ch. 328, *Juvenile Courts: Dependency Proceedings*, § 328.45].

For a discussion relating to what constitutes a "nonsecure facility," see *Ch. 328, Juvenile Courts: Dependency Proceedings, § 328.127*. However, a *Welf. & Inst. Code § 601* minor may be held in a secure facility, other than a facility in which adults are held in secure custody, in any of the following circumstances [*Welf. & Inst. Code § 207(b)*]:

- For up to 12 hours after having been taken into custody for the purpose of determining if there are any outstanding wants, warrants, or holds against the minor in cases in which the arresting officer or probation officer has cause to believe that such wants, warrants, or holds exist.

- For up to 24 hours after having been taken into custody, in order to locate the minor's parent or guardian as soon as possible and to arrange the return of the minor to his or her parent or guardian.

- For up to 24 hours after having been taken into custody, in order to locate the minor's parent or guardian as soon as possible and to arrange the return of the minor to his or her parent or guardian, when the parent or guardian is a resident outside the state wherein the minor was taken into custody, except that the period may be extended to no more than 72 hours when the return of the minor cannot reasonably be accomplished within 24 hours due to the distance of the parents or guardian from the county of custody, the difficulty in locating the parents or guardian, or the difficulty in locating resources necessary to provide for the return of the minor.

A "secure facility" is one designed and operated to insure that all entrances and exits are under the exclusive control of the facility's staff, whether or not the person detained has freedom of movement within the perimeters of the facility. It may also be a facility that relies on locked rooms and buildings, fences, or physical restraint in order to control the behavior of its residents [*Welf. & Inst. Code § 206*].

Every county must keep a record of each *Welf. & Inst. Code § 601* minor detained in a secure facility, the place and length of time of such detention, and the reasons why such detention was necessary. Every county must report, on a monthly basis, this information to the Department of the Youth Authority, on forms to be provided by that agency. The Youth Authority must not disclose the name of the detainee, or any personally identifying information contained in reports sent to the Youth Authority under *Welf. & Inst. Code § 207(e)* [*Welf. & Inst. Code § 207(e)*].

[3] Minors Detained Pursuant to Welf. & Inst. Code § 602

A minor 14 years of age or older who is taken into temporary custody by a peace officer on the basis of being a person described by *Welf. & Inst. Code § 602* (minor committing criminal offenses) and who, in the reasonable belief of the peace officer, presents a serious security risk of harm to self or others, may be securely detained in a law enforcement facility that contains a lockup for adults if all of the following conditions are met [*Welf. & Inst. Code § 207.1(d)*; *see* discussion in *§ 329.20[4]*]:

- The minor is held in temporary custody for the purpose of investigating the case, facilitating release of the minor to a parent or guardian, or arranging transfer of the minor to an appropriate juvenile facility.

- The minor is detained in the law enforcement facility for a period that does not exceed six hours, subject to limited extension in the case of inclement weather, acts of God, or natural disasters that result in thetemporary unavailability of transportation [*see Welf. & Inst. Code § 207.1(g)*].

- The minor is informed at the time he or she is securely detained of the purpose of the secure detention, of the length of time the secure detention is expected to last, and of the maximum time of six hours that the secure detention is authorized to last.

- Contact between the minor and adults confined in the facility is restricted in accordance with *Welf. &*

Inst. Code § 208.

- The minor is adequately supervised.

- A log or other written record is maintained by the law enforcement agency showing the offense that is the basis for the secure detention of the minor in the facility, the reasons and circumstances forming the basis for the decision to place the minor in secure detention, and the length of time the minor was securely detained.

Any other *Welf. & Inst. Code § 602* minor taken into temporary custody by a peace officer may be taken to a law enforcement facility that contains a lockup for adults and may be held in temporary custody in the facility for the purposes of investigating the case, facilitating the release of the minor to a parent or guardian, or arranging for the transfer of the minor to an appropriate juvenile facility. However, while in the law enforcement facility, the minor may not be securely detained and must be supervised in a manner that ensures there will be no contact with adults in custody in the facility [*Welf. & Inst. Code § 207.1(d)*].

If the minor is held in temporary, nonsecure custody within the facility, the peace officer must exercise one of the dispositional options authorized by *Welf. & Inst. Code §§ 626* and *626.5* (alternative procedures regarding disposition of minor) without unnecessary delay and, in every case, within six hours [*Welf. & Inst. Code § 207.1(d)*; *see Welf. & Inst. Code §§ 207.1(e)* (requirements for Youth Authority to assist with enforcement), 207.1(f), (h) (conditional exemption from compliance for county that does not have juvenile hall)].

A peace officer or employee of an adult detention facility or jail may escort a minor into the detention facility or jail for the purpose of administering an evaluation, test, or chemical test pursuant to *Veh. Code § 23157* if all of the following conditions are met [*Welf. & Inst. Code § 207.1(j)*]:

- The minor is taken into custody by a peace officer on the basis of being a person described by *Welf. & Inst. Code § 602* and there is no equipment for the administration of the evaluation, test, or chemical test located at a juvenile facility within a reasonable distance of the point where the minor is taken into custody.

- The minor is:

  - Not locked in a cell or room within the adult detention facility or jail.

  - Under the continuous, personal supervision of a peace officer or employee of the detention facility or jail.

  - Not permitted to come in contact or remain in contact with in-custody adults.

- The evaluation, test, or chemical test pursuant to *Veh. Code § 23157* is performed as expeditiously as possible, so that the minor is not unnecessarily delayed within the adult detention facility or jail. On completion of the evaluation, test, or chemical test, the minor is removed from the detention facility or jail as soon as reasonably possible, and is not held in custody in the detention facility or jail for a period in excess of two hours.

[4] Minors Detained on Transfer to Adult Court

Different rules apply to a minor who is alleged to have committed a specified serious criminal offense when he or she is 14 years of age or older, whose case is transferred to a criminal court because he or she is not a fit and proper subject to

be dealt with under the juvenile court law, or who has been charged directly in or transferred to a criminal court [*see Welf. & Inst. Code §§ 707(b), (d)(2), (e), 707.01, 707.1*]. In that case, the minor may be detained in a jail or other secure facility for the confinement of adults if certain specified conditions are met [*see Welf. & Inst. Code § 207.1(b)*; *see also* discussion in *§ 329.63[11][b][iv]*].

[5] Segregation of Minors Detained Under Welf. & Inst. Code § 601 From Minors Detained Under Welf. & Inst. Code § 602

A *Welf. & Inst. Code § 601* (habitually disobedient or truant) minor detained in juvenile hall may not be permitted to come in contact or remain in contact with any person detained on the basis that he or she had been taken into custody on the ground that he or she is a person described in *Welf. & Inst. Code § 602* (criminal offenses) or adjudged to be such or made a ward of the juvenile court on that ground [*Welf. & Inst. Code § 207(c)*]. Minors detained in juvenile hall pursuant to *Welf. & Inst. Code §§ 601* and *602* may be held in the same facility provided they are not permitted to come in contact or remain in contact within that facility [*Welf. & Inst. Code § 207(d)*].

[6] Restrictions on Contact With Adult Prisoners

When any person under 18 years of age is detained in or sentenced to any institution in which adults are confined, it is unlawful to permit such person to come in contact or remain in contact with such adults [*Welf. & Inst. Code§ 208(a)*; *but see Welf. & Inst. Code § 208.5* (minor who turns 18 in custody may remain in contact with other incarcerated minors until age 19)].

Furthermore, no person who is a ward or dependent child of the juvenile court who is detained in or committed to any state hospital or other state facility may be permitted to come in contact or remain in contact with any adult person who has been committed to any state hospital or other state facility as a mentally disordered sex offender under the provisions of *Welf. & Inst. Code §§ 6300-6330* or with any adult person who has been charged in an accusatory pleading with the commission of any sex offense for which registration of the convicted offender is required under *Penal Code § 290* and who has been committed to any state hospital or other state facility pursuant to *Penal Code § 1026* or *1370* [*Welf. & Inst. Code § 208(b)*; *see* discussion in *§ 329.91[2]*].

"Contact" does not include participation in supervised group therapy or other supervised treatment activities, participation in work furlough program, or participation in hospital recreational activities that are directly supervised by employees of the hospital so long as living arrangements are strictly segregated and all precautions are taken to prevent unauthorized associations [*Welf. & Inst. Code § 208(c)*].

[7] Restriction on Commitment to State Prison

No person under the age of 14 may be committed to a state prison or be transferred there from any other institution [*Welf. & Inst. Code § 211(a)*]. While a minor under the age of 16 years who has been convicted in adult court may be sentenced to state prison, he or she may not be housed in any facility under the jurisdiction of the Department of Corrections until he or she attains the age of 16 [*Welf. & Inst. Code § 211(b)*].

[8] Juvenile Hall

[a] Mandate for Establishment

The board of supervisors in every county must provide and maintain, at the expense of the county, in a location approved by the judge of the juvenile court, a suitable house or place for the detention of wards and dependent children of the juvenile court and of persons alleged to come within the jurisdiction of the juvenile court. Such house or place is known as the "juvenile hall" of the county [*Welf. & Inst. Code § 850*].

The juvenile hall must not be in, or connected with, any jail or prison and must not be deemed to be or treated as a penal institution. It must be conducted in all respects as nearly like a home as possible [*Welf. & Inst. Code § 851*].

[b] Standards for Juvenile Halls

The California Youth Authority must adopt minimum standards for the operation and maintenance of juvenile halls for the confinement of minors. Any violation of such standards renders a juvenile hall unsuitable for the confinement of minors [*Welf. & Inst. Code § 210*].

For further discussion relating to the California Youth Authority, see *§ 329.95[6]*.

[c] Inspection of Jail, Juvenile Hall or Lockup

The judge of the juvenile court of a county, or, if there is more than one such judge, any of the judges of the juvenile court, must, at least annually, inspect any jail, juvenile hall, or lockup that, in the preceding calendar year, was used for confinement of any minor for more than 24 hours. The judge must note in the minutes of the court whether the jail, juvenile hall, or lockup is a suitable place for confinement of minors [*Welf. & Inst. Code § 209(a)*]. Pursuant to legislation effective on July 1, 1995, the Board of Corrections must likewise conduct an annual inspection of each jail, juvenile hall, lockup, or special purpose juvenile hall situated in the state that, during the preceding calendar year, was used for confinement of any minor for more than 24 hours pursuant to *Welf. & Inst. Code § 207.1(b)* or *(d)* [*Welf. & Inst. Code § 209(a)*].

If either the judge of the juvenile court or the board, after inspection of a jail, juvenile hall, or lockup, finds that it is not being operated and maintained as a suitable place for the confinement of minors, the juvenile court or the board must give notice of its findings to all persons having authority to confine minors and, commencing 60 days thereafter, the jail, juvenile hall, or lockup may not be used for confinement of minors until such time as the judge or board finds, after reinspection of the institution, that the conditions that rendered the facility unsuitable have been remedied, and such facility is a suitable place for confinement of minors [*Welf. & Inst. Code § 209(a)*].

The Board of Corrections may inspect any law enforcement facility that contains a lockup for adults and that it has reason to believe may not be in compliance with the requirements of *Welf. & Inst. Code § 207.1(d)* or with the certification requirements or standards adopted under *Welf. & Inst. Code § 210.2*. A judge of the juvenile court must conduct an annual inspection, either in person or through a delegated member of the appropriate county or regional juvenile justice commission, of any law enforcement facility that contains a lockup for adults that, in the preceding year, was used for the secure detention of any minor [*Welf. & Inst. Code § 209(b)*].

If either the judge or the board finds after inspection that the facility is not being operated and maintained in conformity with the requirements of *Welf. & Inst. Code § 207.1(d)* or with the certification requirements or standards under *Welf. & Inst. Code § 210.2*, the juvenile court or the board must give notice of its finding to all persons having authority to securely detain minors in the facility. In addition,commencing 60 days after notice of the finding, the facility must not be used for the secure detention of a minor until the judge or the board finds, after reinspection, that the conditions that rendered the facility unsuitable have been remedied, and the facility is a suitable place for the confinement of minors in conformity with all requirements of law. The custodian of each facility that contains a lockup for adults may make any report as may be required by the board or juvenile court to effectuate the above-mentioned purposes [*Welf. & Inst. Code § 209(b)*].

The board must collect annual data on the number, place, and duration of confinements of minors in jails and lockups, as defined in *Welf. & Inst. Code § 207.1(i)*, and must annually publish the information in the form it deems appropriate for the purpose of providing public information on continuing compliance with the requirements of *Welf. & Inst. Code § 207.1* [*Welf. & Inst. Code § 209(c)*].

[d] Availability of Abortion

No condition or restriction on obtaining an abortion by a female detained in any local juvenile facility, pursuant to the Therapeutic Abortion Act [*Health & Safety Code § 123400 et seq.*], other than those contained in that act, may be imposed. Females found to be pregnant and desiring abortions must be permitted to determine their eligibility for an abortion pursuant to law and, if determined to be eligible, must be permitted to obtain an abortion [*Welf. & Inst. Code § 220*].

Any female in the custody of a local juvenile facility must have the right to summon and receive the services of any physician and surgeon of her choice to determine whether she is pregnant. If she is found to be pregnant, she is entitled to a determination of the extent of the medical services needed by her and to the receipt of such services from the physician and surgeon of her choice. Any expenses occasioned by the services of a physician and surgeon whose services are not provided by the facility must be met by the female [*Welf. & Inst. Code § 222*].

[e] Availability of Material for Personal Hygiene, Information Regarding Family Planning, and Birth Control Measures

Any female confined in a state or local juvenile facility must, on her request, be allowed to continue to use materials necessary for personal hygiene with regard to her menstrual cycle, reproductive system, and birth control measures as prescribed by her physician [*Welf. & Inst. Code § 221(a)*].

Any female confined in a state or local juvenile facility must, on her request, be furnished by the confining state or local agency with information and education regarding prescription birth control measures [*Welf. & Inst. Code § 221(b)*].

Family planning services must be offered to each and every woman inmate at least 60 days prior to a scheduled release date. On request, any woman inmate must be furnished by the confining state or local agency with the services of a licensed physician or with services necessary to meet her family planning needs at the time of her release [*Welf. & Inst. Code § 221(c)*].

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[Reserved]

§§ 329.56[Reserved]

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§ 329.60 Process for Transfer

[1] Historical Background

Until January 1, 2000, California had a singular process for transferring juveniles to adult court. This process, often referred to as "judicial waiver," allowed transfer of certain minors after a hearing, by a judge pursuant to *Welf. & Inst. Code § 707 et. seq.* After that date, the "No More Victims' Violence Prevention & School Safety Strategy" (Senate Bill 334) created an automatic transfer mechanism for certain minors charged with specified offenses.

On March 7, 2000, California voters approved Proposition 21, the "Gang Violence and Juvenile Crime Prevention Act of 1998." This initiative significantly broadened the circumstances in which prosecutors are authorized to file charges against minors 14 years of age and older in adult court. While it did not lower the minimum age that children could be tried as adults, that was last done by legislation in 1994, Proposition 21 did confer upon prosecutors the discretion to bring specified charges against certain minors directly in criminal court, without a prior adjudication by the juvenile court that the minor is unfit for a disposition under juvenile court law. These newly conferred powers have since been held to be constitutional with respect to the separation of powers doctrine [*Cal. Const., art. III, section 3*; *Manduley v. Superior (2002) 27 Cal. 4th 537, 117 Cal. Rptr. 2d 168]* .

[2] Proposition 21

There are now three procedures by which a minor may be transferred to adult court. The first procedure appears to require that minors, age 14 and over, be charged in adult court when it is alleged that they have committed certain offenses [*Welf. & Inst. Code § 602(b)*].

The second mechanism authorizes the prosecutor to file directly in adult court when certain offenses and circumstances are alleged [*Welf. & Inst. Code § 707(d)*].

Finally, the traditional "judicial waiver" process has been expanded but remains a viable certification option [*Welf. & Inst. Code § 707(a)-(c)*].

These procedures are commonly referred to as statutory waiver, prosecutorial waiver, and judicial waiver, respectively.

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§ 329.61 Statutory Waiver: Cases That Require Filing in Adult Court

Any minor, age 14 or older, must be filed in a court of criminal jurisdiction when charged with the following offenses:

- First degree murder with special circumstances, when it is alleged that the minor personally killed the victim [*Welf. & Inst. Code § 602(b)(1)*].

- Certain sex offenses where it is alleged that the minor personally committed the offense and One Strike circumstances as enumerated in *Penal Code § 667.61(d)* or *(e)* apply [*Welf. & Inst. Code § 602(b)(2)*].

PRACTICE TIP:

Filing Discretion. While the language of *Welf. & Inst. Code § 602(b)* appears to require filing certain matters in adult court, there is an enormous amount of discretion retained by the prosecutor under this section.

Unless the required circumstances and personal commission/killing allegations are affirmatively pled, this section will not apply.

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§ 329.62 Prosecutorial Waiver: Cases That May Be Filed in Adult Court

There are several different circumstances in which the prosecutor may file a case in either juvenile or adult court. The first includes individuals, age 16 or older, who are charged with an offense listed in *Welf. & Inst. Code § 707(b)* [*Welf. & Inst. Code § 707(d)(1)*]. This offense list now includes all robbery [*Welf. & Inst. Code § 707(b)(3)*] and voluntary manslaughter [*Welf. & Inst. Code § 707(b)(30)*].

The second group of prosecutorial waiver cases is applicable to minors, age 14 or older [*Welf. & Inst. Code § 707(d)(2)*]. Children in this class may be filed directly in adult court if they are charged with one of the following: an offense punishable by death or imprisonment for life if committed by an adult [*Welf. & Inst. Code § 707(d)(2)(A)*]; an offense in which the minor personally used a firearm in the commission or attempted commission of a felony, as described in *Section 12022.5 of the Penal Code* [*Welf. & Inst. Code § 707(d)(2)(B)*]; or an offense listed in *Welf. & Inst. Code § 707(b)* with one or more of the following circumstances:

- The minor has previously been found to be a person described in *Welf. & Inst. Code § 602(b)* [*Welf. & Inst. Code § 707(d)(2)(e)(i)*].

- The offense was "gang related" as defined in *Penal Code § 186.22(f)* [*Welf. & Inst. Code § 707(d)(2)(c)(ii)*].

- The offense was a "hate crime" as described in Penal Code § 426.6 et seq. [*Welf. & Inst. Code § 707(d)(2)(c)(iii)*].

- The victim of the offense was 65 years of age or older, or disabled, and that disability was known or reasonably should have been known to the minor at the time of the offense [*Welf. & Inst. Code § 707(d)(2)(c)(iv)*].

A third category of prosecutorial waiver cases applies to minors, age 16 or older, who have been previously adjudged a ward of the court for a felony offense committed when they were age 14 or older, if the current offense:

- Involves a victim 65 years or older, or disabled, and that disability was known or reasonably should have been known to the minor at the time of the offense [*Welf. & Inst. Code § 707(d)(3)(A)*];

- Is a "hate crime" as described in *Penal Code § 422.6 et seq.* [*Welf. & Inst. Code § 707(d)(3)(B)*]; or

- Is committed for the benefit of, at the direction of, or in association with any criminal street gang as prohibited by *Penal Code § 186.22* [*Welf. & Inst. Code § 707(d)(3)(C)*].

In any case where the prosecutor has filed an accusatory pleading against a minor in a court of criminal jurisdiction, the case proceeds according to the laws applicable to a criminal case. In conjunction with the preliminary hearing, pursuant to *Penal Code § 738*, the magistrate shall make a finding that reasonable cause exists to believe that the minor comes within the appropriate provisions of *Welf. & Inst. Code § 707(d)*. If reasonable cause is not established, the criminal court shall transfer the case to the juvenile court having jurisdiction over the matter offense [*Welf. & Inst. Code § 707(d)(4)*].

When a minor is certified to adult court by prosecutorial waiver, tried by a court of criminal jurisdiction and found guilty by the trier of fact, the judge may commit the minor to the Youth Authority in lieu of a state prison term, subject to the limitations of offense: *Welf. & Inst. Code § 1732.6* [*Welf. & Inst. Code § 707(d)(6)*]. These limitations include prohibitions on CYA commitments when the minor has been convicted of any of the following:

- An offense described in *Penal Code § 667.5(c)* or *1192.7* where the sentence is life, an indeterminate term to life, or a determinate term which when added to the minor's age would exceed 25 years [*Welf. & Inst. Code § 1732.6(a)*].

- An offense described in *Welf. & Inst. Code § 602(b)* [*Welf. & Inst. Code § 1732.6(b)(1)*].

- An offense described by *Welf. & Inst. Code § 707(d)(1)-(3)*, if the enumerated circumstances are found true by the trier of fact [*Welf. & Inst. Code § 1732.6(b)(2)*].

- An offense described in *Welf. & Inst. Code § 1732.6(b)(3)*.

If a minor, directly filed upon in criminal court pursuant to *Welf. & Inst. Code § 707(d)*, is not convicted of the 707(b) offense(s) that were the basis of the prosecutorial waiver, there is no subsequent binding effect keeping the child in adult court on the basis of future delinquency. To the extent that the "once unfit always unfit" application of *Welf. & Inst. Code § 707.01* is relevant to cases directly filed in adult court, it is negated where the offense authorizing the direct filing is not sustained [*People v. Superior Court (Marcelina M.) (2005) 133 Cal. App. 4th 651, 656-657, 34 Cal. Rptr. 3d 940]* .

California Forms of Pleading and Practice--Annotated

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Chapter 329 JUVENILE COURTS: DELINQUENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
E. Transfer to Adult Court

28-329 California Forms of Pleading and Practice--Annotated § 329.63

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§ 329.63 Judicial Waiver

[1] Fitness Hearings

The process of certification via a motion made by the petitioner causing a hearing before the court to occur continues to exist, albeit in a somewhat altered state. The provisions which place the burden of proof on the prosecution to show that a minor, 16 or 17 years of age, is not amenable to the care, treatment and training programs available through the juvenile court remain for children not otherwise described in *Welf. & Inst. Code § 707(a)(1)*.

The presumption that a minor is not amenable to juvenile court programs is applicable to individuals, 14 or older, who are alleged to have committed an offense specified in the expanded list of offenses found in *Welf. & Inst. Code § 707(b)* [*Welf. & Inst. Code § 707(c)*]. In addition, a minor 16 years of age or older is presumed unfit if he or she has committed any felony and has been found to have committed two or more prior felony offenses after he or she had attained the age of 14 years [*Welf. & Inst. Code § 707(a)(2)*].

[2] Request for Hearing

[a] By Prosecuting Attorney

The prosecuting attorney may, prior to the attachment of jeopardy, request a hearing to determine whether the minor is a fit and proper subject to be dealt with under the juvenile court law [*Cal. Rules of Ct., Rule 5.766(a)*; *see In re Anna S. (1979) 99 Cal. App. 3d 869, 871-873, 160 Cal. Rptr. 495* (prosecuting attorney as petitioner entitled to request hearing under *Welf. & Inst. Code § 707*)].

[b] By Minor's Attorney

Generally, a minor does not have a right to initiate a fitness proceeding in order to demand treatment as an adult [*In re*

Anna S. (1979) 99 Cal. App. 3d 869, 872, 160 Cal. Rptr. 495] . However, if a minor reaches the age of 18 after the juvenile court petition is filed, he or she has the right to demand treatment as an adult and receive a trial by jury, and is entitled to waive the benefits of the juvenile court process [*Rucker v. Superior Court (1977) 75 Cal. App. 3d 197, 200-203, 141 Cal. Rptr. 900]* . He or she may do so only by moving for a finding of unfitness for disposition as a juvenile pursuant to *Welf. & Inst. Code §§ 707, 707.01*, or *707.1*, and not by a demand to be tried as an adult [*see In re Rodney F. (1988) 203 Cal. App. 3d 177, 182, 249 Cal. Rptr. 424]* .

A minor who can move for a finding of unfitness because he or she has attained majority age does not have an absolute right to be found unfit. The juvenile court still retains discretion to determine fitness to be tried as a juvenile, under the statutory criteria [*Joey W. v. Superior Court (1992) 7 Cal. App. 4th 1167, 1171-1175, 9 Cal. Rptr. 2d 486]* .

PRACTICE TIP:

Determining When to Move for Finding of Unfitness. There are a limited number of situations where the attorney should consider moving for treatment in adult court for a minor who has turned 18. Those situations include:

- When the evidence against the minor is sufficiently weak that it is unlikely that a jury would convict, whereas a juvenile court might.

- When the sentence in adult court may result in a significantly shorter period of time in custody. This situation may arise when the subject has an extensive juvenile history that would lead to a juvenile court commitment to California Youth Authority, whereas the present offense in adult court would result in a jail commitment, probation or diversion.

[3] Time and Notice of Fitness Hearing

The fitness hearing is required to be held and the court is required to rule on the issue of fitness, before the jurisdiction hearing begins. Absent a continuance, the jurisdiction hearing is required to begin within 30 calendar days from the date the petition is filed if the minor is not detained, and within 15 judicial days from the date of the detention order if the minor is detained, unless the minor is released from detention before the jurisdiction hearing, in which case the jurisdiction hearing may be reset to within 30 calendar days from the date the petition is filed [*Cal. Rules of Ct., Rules 5.766(c), 5.774(a), (b)*].

For discussion of the grounds for and procedure relating to continuances, see the discussion in *§ 329.70[4]*.

Notice of the fitness hearing must be given at least five judicial days before the fitness hearing [*Cal. Rules of Ct., Rule 5.766(b)*].

[4] Representation by Counsel

Unless the court finds the minor has intelligently waived counsel, the minor must be represented by counsel at the fitness hearing [*Welf. & Inst. Code § 700*; *Cal. Rules of Ct., Rule 5.534(g)*].

[5] Probation Officer's Report

[a] Requirement

The probation officer must investigate, and provide a report to the court a report on, the behavioral patterns and social history of the minor that will be considered for unfitness [*Welf. & Inst. Code § 707(a)*; *Cal. Rules of Ct., Rule 5.768(a)*]. A juvenile court has no jurisdiction to find a minor unfit for treatment as a juvenile without first having received and

considered the probation department's social study report [*Raul P. v. Superior Court (1984) 153 Cal. App. 3d 294, 298-299, 200 Cal. Rptr. 360]* .

[b] Contents

The probation officer's report must include information relevant to the determination whether or not the minor would be amenable to the care, treatment, and training program available through the facilities of the juvenile court, including information regarding the criteria for such amenability as listed in *Cal. Rules of Ct., Rules 5.770* and *5.772* [*see* discussion in [10], [11], *below*].

The report may also include information concerning the following [*Welf. & Inst. Code § 707(a)*; *Cal. Rules of Ct., Rule 5.768(a)*]:

- The social, family, and legal history of the minor.
- Any statement the minor chooses to make regarding the alleged offense.
- Any statement by the parent or guardian.
- A "victim impact statement," as described in *Welf. & Inst. Code § 656.2*.
- A written or oral statement by the victim, the victim's parent or guardian if the victim is a minor, or the victim's next of kin if the victim is deceased [*Welf. & Inst. Code § 707(e)*].
- If the minor is or has been under the jurisdiction of the juvenile court, a statement by the probation officer, social worker, or Youth Authority parole agent who has supervised the minor regarding the relative success or failure of any program of rehabilitation.
- Any other information relevant to the determination of fitness.

[c] Distribution of Report

The probation officer's report on the behavioral patterns and social history of the minor must be furnished to the minor, the parent or guardian, and all counsel at least 24 hours prior to commencement of the fitness hearing. A continuance of 24 hours must be granted on request of any party who has not been furnished the probation officer's report in accordance with this time limitation [*Cal. Rules of Ct., Rule 5.768(c)*].

[6] Admissibility of Statements Made to Probation Officer

Statements made by a minor to a probation office in a prefitness hearing investigation are not admissible in subsequent proceedings, at least for the purpose of proving guilt. [*see* *Sheila O. v. Superior Court (1981) 125 Cal. App. 3d 812, 178 Cal. Rptr. 418* ; *In re H. (1979) 24 Cal. 3d 595, 156 Cal. Rptr. 344, 596 P.2d 1]* .

PRACTICE TIP:

Possible Use of Minor's Statements for Impeachment. Whether a minor's statement to the probation officer can be used for impeachment at a later trial has not been decided. Therefore, counsel must make the difficult decision of whether to allow the probation officer to interview the minor regarding the facts of the offense. Factors such as the likelihood of prevailing at the fitness hearing, the extent of mitigation the minor's statement offers, and the extent to which the case has been fully investigated and the minor fully prepared, should all be considered. If the attorney decides against having the minor give a statement regarding the offense, he or she should inform the probation officer that this is the attorney's decision, so

that it will not be held against the minor. The attorney might still allow an interview regarding subjects other than the offense, such as the minor's personal history.

[7] Recommendation by Probation Officer

The probation officer must make a recommendation to the court as to whether the minor is a fit and proper subject to be dealt with under the juvenile court law [*Cal. Rules of Ct., Rule 5.768(b)*].

PRACTICE TIP:

Role of Attorney. Since the probation officer's recommendation will carry a great deal of weight with the court, the attorney for the minor should make every effort to influence the probation officer. The probation officer should be contacted before the report is written, and offered any mitigating evidence, or character references that would benefit the minor.

[8] Relevant Evidence

At the fitness hearing, the court must admit into evidence and consider theprobation officer's report on the behavioral patterns and social history of the minor and any other relevant evidence that the prosecuting attorney or minor may submit as to whether or not the minor is a fit and proper subject to be dealt with under the juvenile court law [*see Welf. & Inst. Code § 707(a)*; *Cal. Rules of Ct., Rule 5.772(c), (d)*].

PRACTICE TIP:

Evidence on Behalf of Minor. Any evidence tending to show the minor's suitability for treatment as a juvenile should be introduced at the hearing. Such evidence might include favorable letters from former teachers, neighbors, relatives, ministers or priests, employers, or any other concerned parties.

If the minor's participation in the alleged crime was minimal or was the result of some mitigating circumstances such as intoxication or duress, counsel should consider presenting evidence of these mitigating circumstances during the hearing unless a premature disclosure of the ultimate defense of the case might be unwise. Evidence tending to prove prior attempts to rehabilitate the minor may come from old probation files and reports, testimony of prior probation officers, juvenile hall or camp counselors. Psychologists or other behavioral experts could testify regarding the minor's amenability to treatment and programs offered by the juvenile court.

[9] Request for a Prima Facie Hearing

In those cases where a minor is presumed or not presumed unfit, the minor can require the prosecution to establish a prima facie case that the acts constitute the offense alleged [Cal. Rules of Ct., Rules 7.772(b), 5.772; *Edsel P. v. Superior Court (1985) 165 Cal. App. 3d 763, 211 Cal. Rptr. 869* ; *People v. Superior Court (Zaharias M.) (1993) 21 Cal. App. 4th 302, 25 Cal. Rptr. 2d 838]* . If a prima facie hearing is requested, the prosecution must produce the preparer of any report submitted to the court to establish that there is a prima facie case that the minor committed the act that gives rise to the presumption of unfitness [*People v. Superior Court (Ronald H.) (1990) 219 Cal. App. 3d 1475*].

The minor is not entitled to present an affirmative defense at a fitness hearing for purposes of showing that he or she did not commit the crime [*In re Shannon B. (1994) 22 Cal. App. 4th 1235, 1246-1248, 27 Cal. Rptr. 2d 800]* The defense can, however, subpoena and call percipient witnesses to defeat the presumption on any of the five criteria of unfitness [*see* discussion in [10][a], *below*].

PRACTICE TIP:

When to Request Prima Facie Hearing. In determining whether to request a prima facie hearing counsel must decide how likely it is that the prosecution will fail to meet it's burden, and must balance any possible advantages he or she may gain from discovery of evidence against the harm that may result

when the court hears more details of the crime and the minor's involvement.

At least one appellate court has interpreted the evidentiary requirements for Prima Facie hearings, also known as *Edsel P.* hearings, in a slightly broader context. In *Marcus W. v. Superior Court (2002) 98 Cal. App. 4th 36, 118 Cal. Rptr. 2d 919* , the court held that when incriminating statements were offered to establish a prima facie case that a minor committed an offense triggering the presumption of unfitness, the minor may move to suppress such statements. Thereafter, the juvenile court must hold a hearing on the suppression motion, including the opportunity of counsel for the minor to confront and cross-examine witnesses on the issue.

[10] Determination of Fitness

[a] Basic Criteria

The basis on which the court must make its determination whether or not the minor is a fit and proper subject to be dealt with under the juvenile court law is whether the minor would be amenable to the care, treatment, and training program available through the juvenile court [*Welf. & Inst. Code § 707(a)-(e)*]. The court must base this determination on an evaluation of the following five basic criteria [*Welf. & Inst. Code § 707(a)-(c)*; *see Cal. Rules of Ct., Rules 5.770(b)(2), 5.772(c)(5)*]:

- The degree of criminal sophistication exhibited by the minor.
- Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction.
- The minor's previous delinquent history.
- Results of previous attempts by the juvenile court to rehabilitate the minor.
- The circumstances and gravity of the offense alleged to have been committed by the minor.

[b] Applicable Standard and Burden of Proof

[i] When Prosecution Has Burden of Showing Unfitness

When the prosecution has the burden of proof to show that a minor is not amenable to the care, treatment and training programs available through the juvenile court (*see § 329.63[1]*), the presumption that the minor is "fit" for the court's jurisdiction may be rebutted based on an evaluation of any one ora combination of the criteria set out in [a], *above* [*Cal. Rules of Ct., Rule 5.770(b)(2)*].

For these purposes, if the court determines that one or more of the five criteria, set out in [a], *above*, apply to the minor, the court may nevertheless find that the minor is amenable to the care, treatment, and training program available through the juvenile court, and may find the child to be a fit and proper subject to be dealt with under juvenile court law [*Cal. Rules of Ct., Rule 5.770(d)*]. In evaluating each criterion, the court may consider extenuating or mitigating circumstances [*Cal. Rules of Ct., Rule 5.770(e)*].

[ii] When Burden Shifts to Defense to Show Fitness

A different standard will be applied, however, and the burden will shift to the defense, if the minor is 14 years of age or older and is charged with the commission of certain serious offenses. Such minors will be presumed unfit for juvenile court treatment when charged with one of the following felony offenses [*Welf. & Inst. Code § 707(b)*; *see In re Sim J. (1995) 38 Cal. App. 4th 94, 96-99, 45 Cal. Rptr. 2d 30* (listed offenses are restricted to felony offenses, and do not include misdemeanors)]:

- Murder.
- Attempted murder.
- Arson of an inhabited building or causing great bodily injury.
- Robbery.
- Rape with force or violence or threat of great bodily harm.
- Sodomy by force, violence, duress, menace, or threat of great bodily harm.
- Lewd or lascivious act as provided in *Penal Code § 288(b)*.
- Oral copulation by force, violence, duress, menace, or threat of great bodily harm.
- Any offense specified in *Penal Code § 289(a)*.
- Kidnapping for ransom, for purpose of robbery or with bodily harm.
- Assault with a firearm or destructive device, or by any means of force likely to produce great bodily injury.
- Discharge of a firearm into an inhabited or occupied building.
- Any offenses described in *Penal Code § 1203.09*.
- Any of the offenses listed in *Penal Code § 12022.5* and § 12022.53.
- Any felony offense in which the minor personally used a weapon as listed in *Penal Code § 12020(a)*.
- Any offense listed in *Penal Code § 136.1* or *137*.
- Manufacturing, compounding, or selling one-half ounce or more of any salt or solution of a controlled substance specified in *Health & Safety Code § 11055(e)*.
- Any violent felony, as defined in *Penal Code § 667.5(c)* which would also constitute a felony violation of *Penal Code § 186.22(b)*.
- Escape, by the use of force or violence, from any county juvenile hall, home, ranch, camp, or forestry camp in violation of *Welf. & Inst. Code § 871(b)*, if great bodily injury is intentionally inflicted on an employee of the juvenile facility during commission of the escape.
- Torture as described in *Penal Code §§ 206* and *206.1*.
- Aggravated mayhem as described in *Penal Code § 205*.
- Carjacking, as described in *Penal Code § 215*, while armed with a dangerous or deadly weapon. (Applies to principals not personally armed [*In re Travis W. (2003) 107 Cal. App. 4th 368, 377]* .)

- Kidnapping, as punishable in *Penal Code § 208(d)* or *209.5*.

- Any offense described in *Penal Code § 12034(c)* or *12308* [*Welf. & Inst. Code § 707(b)*; *see Penal Code §§ 136.1, 137, 186.22(b), 288(b), 289, 667.5, 1203.09, 12022.5, 12308*].

- Voluntary manslaughter.

In addition, a minor 16 years of age or older is presumed unfit if they are alleged to have committed any felony offense and have previously been found to have committed two or more felony offenses after the age of 14 [*Welf. & Inst. Code § 707(a)(2)*].

If a minor is presumed not to be a fit and proper subject to be dealt with under the juvenile court law, the presumption will be overcome if the court concludes, based on evidence, which may be of extenuating or mitigating circumstances, that the minor would be amenable to the care, treatment, and training program available through the facilities of the juvenile court based on an evaluation of the enumerated criteria discussed in [a], *above* [*Cal. Rules of Ct., Rule 5.772(d)(3), (e)*].

To determine that the minor is a fit and proper subject to be dealt with under the juvenile court law, the court must find amenability after considering each of thecriteria, and reciting findings in its order for each criterion, that the minor is fit and proper under each of the criteria [*see Cal. Rules of Ct., Rule 5.772(f)(3)*; *see also People v. Superior Court (Zaharias M.) (1993) 21 Cal. App. 4th 302, 25 Cal. Rptr. 2d 838* ; *People v. Superior Court (Robert L.) (1989) 213 Cal. App. 3d 54, 63, 261 Cal. Rptr. 303* (before statutory presumption of unfitness may be overcome, court must sufficiently detail its reasons for its findings under each enumerated criteria)].

The minor has the burden of rebutting the presumption of unfitness, under each of the five criteria, by a preponderance of the evidence [*Cal. Rules of Ct., Rule 5.772(a)*].

The stricter standard for persons presumed to be unfit for juvenile court treatment does not apply if the minor is alleged only to have attempted to commit one of the offenses listed above [*David P. v. Superior Court (1982) 127 Cal. App. 3d 417, 418-422, 179 Cal. Rptr. 673]* .

PRACTICE TIP:

Rebutting Gravity. Since most, if not all, of the offenses that trigger the presumption of unfitness are extremely serious, a question frequently arises as to how the fifth criterion may be rebutted. To answer this question, *Rene C. v. Superior Court (2006) 138 Cal. App. 4th 1, 41 Cal. Rptr. 3d 71* may be instructive. In this case, a 14-year-old charged with murder, attempted murder, and assault with a firearm was determined to be a fit and proper subject for juvenile court, despite the fact that the charges arose from a gang-related altercation. To reach this conclusion, the court examined evidence, which demonstrated that the minor's participation was less grave or less serious than the crime would lead a court to believe. Such evidence may come from the fact that the individual's culpability arises from his role as an aider and abettor. It may also come from the existence of a developmental disability, mental retardation, or organic brain dysfunction.

[c] Plea to Petition When Fitness Hearing Is Pending

In any case in which a hearing has been noticed to determine the fitness of the minor, the court must postpone the taking of a plea to the petition until the conclusion of the fitness hearing. No plea that may already have been entered may constitute evidence at the hearing [*Welf. & Inst. Code § 707(a), (c)*].

[11] Required Findings

[a] For Fitness

If at the conclusion of a fitness hearing where the minor was presumed "unfit," the court determines that the minor is a fit and proper subject to be dealt with under the juvenile court law, the court must make a finding to that effect, noted in the minutes of the court, and proceed to the jurisdiction hearing in the usual manner [*Cal. Rules of Ct., Rule 5.772(f)(3), (g)(2)*].

If, at the conclusion of a fitness hearing held under *Welf. & Inst. Code § 707(c)* or (a)(2) where the minor was presumed "unfit," the court determines that the minor is a fit and proper subject to be dealt with under juvenile court law, it must make specific findings that, based on the consideration and evaluation of all the criteria discussed in [10][a], *above*, (1) the minor would be amenable to the care, treatment, and training program of the juvenile court for reasons that must be recited in the order, and (2) the minor is a fit and proper subject to be dealt with under the juvenile court law. The recitation of findings must be for each criterion, and find that the minor is fit and proper under each and every one of those criteria. The court must then proceed to the jurisdiction hearing in the usual manner [*Cal. Rules of Ct., Rule 5.772(d)(3), (f)(3), (g)(2)*; *People v. Superior Court (Zaharias M.) (1993) 21 Cal. App. 4th 302, 25 Cal. Rptr. 2d 838]* .

For a discussion of the relationship between a finding of fitness in a juvenile adjudication and the use of that adjudication as a "prior conviction" under the "Three Strikes You're Out" law, see discussion in *§ 329.99*.

[b] For Unfitness

[i] In General

If, at the conclusion of a fitness hearing held where the minor was presumed "fit," the court determines that the minor is unfit, it must make findings, recited in the order (1) as to the minor's age at the time of the alleged offense and (2) that the minor would not be amenable to the care, treatment, and training program of the juvenile court, based on an evaluation of the criteria discussed in [10][a], *above*, which criteria must be specifically recited in the order [*Cal. Rules of Ct., Rule 5.770(b), (c)(2)*].

If the minor is charged with having committed a crime enumerated in *Welf. & Inst. Code § 707(b)*, the court must find and recite in its order that either (1) the minor was 14 years or older at the time of the commission of the offense, and the offense is listed in *Welf. & Inst. Code § 707(b)* or *(2)* the minor was 16 years of age at the time of the commission of the alleged felony offense and that they had committed two or more felony offenses after the age of 14; and, in both cases, that (3) the minor would not be amenable to the care, treatment, and training program available through the juvenile court because of one or a combination of more than one of the criteria discussed in [10][a], *above* [*Cal. Rules of Ct., Rule 5.772(f)(1), (2)*].

[ii] Subsequent Use of Finding of Unfitness

If a minor is found to be unfit for juvenile court treatment but is already a ward of the juvenile court based on a previous adjudication, which did not result in aYouth Authority commitment, the juvenile court jurisdiction may be terminated within the discretion of the juvenile court judge upon a notice hearing [*Welf. & Inst. Code § 707.01(a)(1), (2)*].

If the minor has petitions pending at the time he or she is found unfit for juvenile court treatment they will be transferred to adult court as long as jeopardy has not attached, and the minor was at least 16 years of age at the time of the alleged offense or the alleged offense is one for which the minor could be found unfit [*Welf. & Inst. Code § 707.01(a)(3), (4)*].

If the minor is convicted in criminal court of the violation that resulted in the finding of unfitness, all subsequent

petitions alleging violations of the criminal laws prior to or after the finding of unfitness may be filed in adult court, if the minor was 16 years of age or older at the time of the alleged offense or if the alleged offense is one for which the minor could be found unfit [*Welf. & Inst. Code § 707.01(a)(5)*]. Subsequent criminal charges can be filed directly in adult court even if there was not a conviction of the violation that resulted in the finding of unfitness if the unfitness finding was based solely on either or both the minor's previous delinquent history or a lack of success of previous attempts by the juvenile court to rehabilitate the minor, and the minor was 16 years of age or older at the time of the alleged new violation or the alleged offense is one for which the minor could be found unfit [*Welf. & Inst. Code § 707.01(a)(6)*].

However, when the finding of unfitness assumes the truth of charges that later result in acquittal or dismissal, juvenile court jurisdiction over a subsequent petition or pending cases exists to the same extent that it existed before the finding of unfitness in the preceding case [*Welf. & Inst. Code § 707.01(a)(6)*]. The probation officer is not required to investigate or submit a behavioral study report for any subsequent charges that need not be filed in juvenile court [*Welf. & Inst. Code § 707.01(b)*].

[iii] Procedure After Finding

If the minor is declared not a fit and proper subject under juvenile court law, or is a minor for whom charges in a petition or petitions in juvenile court have been transferred to a court of criminal jurisdiction pursuant to *Welf. & Inst. Code § 707.01*, the district attorney, or other appropriate prosecuting officer, may file an accusatory pleading against the minor in a court of criminal jurisdiction [*Welf. & Inst. Code § 707.1(a)*]. The juvenile court petition shall then be dismissed without prejudice [*Cal. Rules of Ct., Rules 5.770(f)(2), 5.772(g)(1)*]. The case must proceed from that point according to the laws applicable to a criminal case.

If a prosecution has been commenced in another court but has been suspended while juvenile court proceedings are being held, the proceedings on that prosecution must be ordered to resume [*Welf. & Inst. Code § 707.1(a)*]. Due process does not prevent the judge who presided over the fitness hearing from presiding over the adult criminal proceedings, even if the minor divulged information to the judge at the fitness hearing that would not have been admissible at trial [*People v. Bryant (1987) 190 Cal. App. 3d 1569, 1573-1574, 236 Cal. Rptr. 96]* .

[iv] Order of Custody of Minor

The court must make an appropriate order under *Welf. & Inst. Code § 707.1* relating to the custody of the minor pending prosecution. The juvenile court may order that a minor alleged to have committed an offense under *Welf. & Inst. Code § 707(b)* and who has been declared not a fit and proper subject under the juvenile court law be delivered to the custody of the sheriff on a finding that the presence of the minor in the juvenile hall would endanger the safety of the public or be detrimental to the other inmates detained in the juvenile hall.

Other minors declared not fit and proper subjects under juvenile court law, if detained, must remain in the juvenile hall pending final disposition by the criminal court or until they attain the age of 18, whichever occurs first. On attaining the age of 18, such a person who is detained in juvenile hall must be delivered to the custody of the sheriff unless the court finds that it is in the best interests of the person and the public that he or she be retained in juvenile hall. If the person requests a hearing, the transfer will not take place until after the court has made its findings [*Welf. & Inst. Code § 707.1(b)*].

A minor who is under the age of 18 years whose case has been transferred to adult court after a finding of unfitness or who is charged directly in a court of criminal jurisdiction pursuant to *Welf. & Inst. Code § 707.01* may be detained in a jail or other secure facility for the confinement of adults if all of the following conditions are met [*Welf. & Inst. Code §§ 207.1(b), 707.1(b)*]:

- The juvenile court judge or the court of criminal jurisdiction makes its findings on the record and, in addition, finds that the minor poses a danger to the staff, other minors in the juvenile facility, or to the public because of the minor's failure to respond to the disciplinary control of the juvenile facility, or because the nature of the danger posed by the minor cannot safely be managed by the disciplinary procedures of the juvenile facility [*Welf. & Inst. Code §§ 207.6*].

- Contact between the minor and adults in the facility is restricted in accordance with *Welf. & Inst. Code § 208* [*see* discussion in *§ 329.55[6]*].

- The minor is adequately supervised.

[v] Release on Bail or Recognizance

A minor found not a fit and proper subject to be dealt with under the juvenilecourt law must, on the conclusion of the fitness hearing, be entitled to bail consideration on the same circumstances, terms, and conditions as an adult alleged to have committed the same offense [*Welf. & Inst. Code §§ 207.1(c), 707.1(b)(4)*].

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28-329 California Forms of Pleading and Practice--Annotated § 329.64

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§ 329.64 Proceeding in Criminal Court

[1] Grand Jury Indictment Permitted

In cases where the prosecutor is required to file a matter directly in adult court pursuant to *Welf. & Inst. Code § 602(b)*, recent case law has permitted the prosecution to be initiated by grand jury indictment or by way of information following a preliminary hearing. The same appears to be true in cases governed by the prosecutorial waiver provisions of *Welf. & Inst. Code § 707(c)*. The appellate case which previously prohibited the use of indictment in both instances [*People v. Superior Court (Gevorgyan) (2001) 91 Cal. App. 4th 602, 110 Cal. Rptr. 2d 668]* has been disapproved in a recent Supreme Court decision which specifically discussed grand jury indictment in the context of *Welf. & Inst. Code § 602(b)* filings [*Guillory v. Superior Court (2003) 31 Cal. 4th 168, 1 Cal. Rptr. 3d 879]* .

[2] Report to Juvenile Court When No Conviction Results

In any case in which there is no subsequent conviction in the criminal court, the clerk of the criminal court will report that disposition to the juvenile court, to the probation department, to the law enforcement agency that arrested the minor, and to the Department of Justice. Unless the minor has a prior conviction in a criminal court, the clerk of the criminal court delivers to the clerk of the juvenile court all copies of the minor's record and obliterates the minor's name from any index or minute book maintained in the criminal court. The clerk of the juvenile court maintains the minor's criminal court record until such time as the juvenile court may issue an order that it be sealed [*Welf. & Inst. Code § 707.4*; *see* discussion in *§ 329.117*].

[3] Conviction on Nonpredicate Offenses

When a minor has been found not to be a fit and proper subject for juvenile court after a fitness hearing in which he was presumed unfit, he is still subject to the criminal court's jurisdiction even when not convicted of the crime which triggered the statutory presumption [*People v. Self (1998) 63 Cal. App. 4th 58, 61-63, 73 Cal. Rptr. 2d 501]* . This is

specifically applicable to minors' declared unfit after a judicial hearing and is in contrast to minor's against whom charges have been filed directly in adult court.

[4] Commitment to California Youth Authority

If the juvenile is found guilty in an adult court, he or she may be eligible for a California Youth Authority Commitment. However, the court may not commit to the Youth Authority any minor who has been convicted of certain serious or violent felonies and is sentenced to a determinate or indeterminate period of life such that the maximum number of years of potential confinement when added to the minor's age would exceed 25 years [*Welf. & Inst. Code § 1732.6*].

In order to determine eligibility under *Welf. & Inst. Code § 1732.6*, the trial court need not consider only the greatest term that can be imposed rather than the actual term the court intends to impose [*People v. Rangel (1999) 70 Cal. App. 4th 350, 353-356, 82 Cal. Rptr. 2d 589]* .

If the juvenile is eligible for a Youth Authority commitment, the court may, prior to sentence, remand the minor to the custody of the Youth Authority for a period not to exceed 90 days for the purpose of evaluation and report concerning the youth's amenability to training and treatment. A remand to the Youth Authority for an evaluation and report regarding amenability is mandatory prior to imposing a prison sentence for any minor who was under the age of 16 when he or she committed the offense. In all other cases, if after considering the recommendation of the probation department, the adult court decides not to remand for a report and evaluation of the minor's amenability, specific findings must be made [*Welf. & Inst. Code § 707.2*].

Consideration of the Youth Authority amenability report is only one factor that the court is required to consider in making its disposition determination. Although the court is not free to ignore the report, and must give it serious consideration, the court is nevertheless free to reject the recommendation [*People v. Jones (1988) 46 Cal. 3d 585, 601-602, 250 Cal. Rptr. 635, 758 P.2d 1165* (1982 amendment to *Welf. & Inst. Code § 707.2* retained requirement for report, but abrogated rule of *People v. Carl B. (1979) 24 Cal. 3d 212, 217-219, 155 Cal. Rptr. 189, 594 P.2d 14* , that court must give great weight to YA recommendation absent substantial countervailing considerations); *see also People v. Martinez (1987) 191 Cal. App. 3d 1372, 1386-1388, 237 Cal. Rptr. 219* (1982 revision to *Welf. & Inst. Code § 707.2* enlarged trial court's sentencing discretion, as specific reaction to *Carl B.*); *see also People v. Prothro (1989) 215 Cal. App. 3d 166, 171-172, 263 Cal. Rptr. 433* (*Jones* requires only that record reflect that judge is aware of discretion and has rejected disposition on legitimate factors, and does not require judge to state reasons for exercising discretion to decline Youth Authority commitment)].

The other considerations in determining the appropriate disposition are the need to protect society, the interests of justice, the nature and seriousness of the offense, and the minor's needs [*Welf. & Inst. Code § 707.2*]. For example, if the minor entered into a plea bargain contemplating a term that would extend well beyond the time the minor would turn age 25, that factor may outweigh a favorable amenability report and justify a rejection of a Youth Authority recommendation [*People v. Armendariz (1993) 16 Cal. App. 4th 906, 911-912, 20 Cal. Rptr. 2d311]* . If the Youth Authority finds the minor amenable to treatment, the trial court may nevertheless re-refer the minor to the Youth Authority for a second diagnostic report [*People v. Gonzales (1986) 186 Cal. App. 3d 591, 596, 230 Cal. Rptr. 732]* .

[5] Maximum Penalties

A minor who is prosecuted in criminal court is subject to different maximum penalties, depending upon the age at which they committed their offenses. For juveniles under the age of 16 who were 14 or 15 when the crime was committed, a life term without the possibility of parole is not permitted, leaving the maximum possible term as 25 years to life with the possibility of parole. For offenders 16 years of age or older, punishment may be a life term without the possibility of parole. In no case can a minor prosecuted in adult court be sentence to death [*People v. Demirdjian (2006) 144 Cal. App. 4th 10, 50 Cal. Rptr. 3rd 184]* .

[6] Review of Fitness Hearing Determination

[a] Availability

An order that a minor is or is not a fit and proper subject to be dealt with under the juvenile court law is not an appealable order. Appellate review of the order is by extraordinary writ. Any petition for review of a judge's order determining the minor unfit, or denying an application for rehearing of the referee's determination of unfitness, must be filed no later than 20 days after the minor's first arraignment on an accusatory pleading based on the allegations that led to the unfitness determination [*Cal. Rules of Ct., Rules 5.770(i), 5.772(j)*]. When the court must presume that a minor is not fit for treatment as a juvenile and the court, reaching a contrary conclusion, fails to make specific findings that each one of five statutory criteria have been considered, the People may challenge the court's order by a writ of mandate [*People v. Superior Court (James B.) (1981) 122 Cal. App. 3d 263, 265-269, 175 Cal. Rptr. 733]* .

The juvenile court's ultimate finding that a minor is a fit or unfit subject for treatment under juvenile court law is subject to review for error under an abuse of discretion standard [*People v. Superior Court (Jones) (1998) 18 Cal. 4th 667, 680-681]* .

[b] Continuance of Jurisdiction Hearing When Prosecuting Attorney Seeks Review of Fitness Finding

If the prosecuting attorney indicates an intention to seek review of a finding of fitness, the court, on the request of the petitioner, must grant a continuance of the jurisdiction hearing for not less than two judicial days to allow time within which to obtain a stay of further proceedings from the reviewing judge or appellate court [*Cal. Rules of Ct., Rules 5.770(g), 5.772(h)*].

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28-329 California Forms of Pleading and Practice--Annotated § 329.65

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§ 329.65 Role of Judge or Referee in Subsequent Contested Jurisdiction Hearing

Unless the minor objects, a judge or referee who has conducted a fitness hearing may participate in any subsequent contested jurisdiction hearing relating to the same offense [*Cal. Rules of Ct., Rules 5.770(h), 5.772(i)*].

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§ 329.66 Reverse Remand

[1] In General

Minors convicted in adult court after having their cases directly filed there without a fitness hearing are subject to a range of consequences depending upon the crime for which they are convicted. If a minor is convicted of an offense that triggered the direct filing authority of the prosecutor, he or she is subject to the same sentence as an adult convicted of the identical offense [*Penal Code § 1170.17(a)*]. In the event that a minor is not convicted of at least one offense that triggered the direct filing, the possibility of remanding the matter back to juvenile court exists.

If the minor is only convicted of an offense that could not have been initiated in adult court without a fitness hearing, he or she shall receive a disposition pursuant to *Penal Code § 1170.19(b)*, unless the prosecutor brings a motion for a fitness hearing. At that hearing, the minor is presumed fit and the prosecutor has the burden of proof under a standard similar to that set forth under *Welf. Inst. Code § 707(a)*. If the minor is declared unfit, he or she shall be sentenced as an adult pursuant to *Penal Code § 1170.19(a)* [*Penal Code § 1170.17(c)*].

In matters where an issue exists as to whether a minor should be sentenced as a juvenile or adult after a conviction in adult court, the court must receive in evidence, read, and consider a social study pursuant to *Penal Code § 1170.19(a)(4)* only if a juvenile disposition is ordered. If the sentencing court has determined that an adult sentence is appropriate, no such report is required prior to the imposition of that sentence [*People v. Garcia (2004) 118 Cal. App. 4th 987]* .

Where the conviction is for the type of offense which, in combination with the person's age, does not make the minor eligible for transfer to adult court, he or she shall be subject to a disposition in accordance with *Penal Code § 1170.19(b)* [*Penal Code § 1170.17(d)*].

The California Supreme Court has recently held that the requirement of Welf. & Inst. Code § 1170.19(a)(4), that the criminal court must secure the prosecutor's consent before it can order a DJF [CYA] commitment violates the State Constitution's separation of powers doctrine (*Cal. Const., Art. III, § 3*) [*People v. Thomas (2005) 35 Cal. 4th 635, 642, 27 Cal. Rptr. 3d 2]* . This doesnot mean that a postconviction "fitness hearing," pursuant to the reverse remand provisions, is available in every case where a minor has been placed in adult court as a result of *Welf. & Inst. Code § 707(d)*. The authority of the court to commit a minor, convicted in criminal court, to the DJF is still subject to the restrictions of *Welf. & Inst. Code § 1732.6* [*People v. Thomas (2005) 35 Cal. 4th 635, 643, 27 Cal. Rptr. 3d 2; see [2], below]* .

PRACTICE TIP:

Prosecutor's Consent Questioned. The requirement of [*Penal Code section 1170.19(a)(4)*, that a trial court secure a prosecutor's consent to order a juvenile disposition after a criminal trial may violate the state constitution's separation of powers doctrine. As opposed to the authority to directly file cases in adult court, as discussed in Manduley, Section 1170.19 deals with post-charging sentencing decisions. Consequently, an apparent distinction exists between prosecutorial involvement in the reverse remand process and constitutionally sanctioned venue decisions made prior to filing charges. While the separation of powers question relating to Section 1170.19 remains unanswered, a finding that prosecutorial consent is not required would pave the way for post conviction "fitness hearings" in virtually every case where a minor has been placed in adult court as result of *Welf. Inst. Code § 707(d)*.

[2] Adult Sentence

When sentenced as an adult, eligibility for commitment to the California Youth Authority is limited by *Welf. & Inst. Code § 1732.6*. However, if the minor and the prosecutor consent, the court may order a juvenile disposition if it is determined that such an order would serve the best interests of justice, protection of the community, and the person being sentenced [*Penal Code § 1170.19(a)*].

Welf. & Inst. Code § 1732.6(a) restricts the criminal court's discretion to order a DJF commitment for minors convicted of any offense described in *Penal Code § 667.5(c)*. Minors convicted of such offenses cannot be committed to the DJF if they have been "sentenced to incarceration for life, an indeterminate period to life, or a determinate period of years such that the maximum number of years of potential confinement when added to the minor's age would exceed 25 years" [*Welf. & Inst. Code § 1732.6(a)*; *People v. Thomas (2005) 35 Cal. 4th 635, 643]* .

[3] Juvenile Disposition

When a dispositional hearing is mandated the procedures set forth under *Welf. & Inst. Code § 706* are applicable. The conviction results in wardship pursuant to *Welf. & Inst. Code § 602*. Confidentiality, with respect to court records, is afforded the minor as if the matter had been initiated as a delinquency petition. However, if the minor and prosecutor consent, the court may impose an adult sentence if it is determined that such a sentence would serve the best interests of justice, protection of the community, and the person being sentenced [*Penal Code § 1170.19(b)*].

[4] No Direct Refile

Once a petition is filed in juvenile court, a minor shall not thereafter be subject to criminal prosecution based on facts giving rise to the petition unless the juvenile court finds the minor not to be a fit and proper subject, and subsequently orders that criminal proceedings be resumed or instituted against him or her, or orders the petition transferred to adult court [*Welf. & Inst. Code § 606*].

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[Reserved]

§§ 329.67[Reserved]

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§ 329.70 Jurisdiction Hearing

[1] Purpose of Hearing

The purpose of the jurisdiction hearing is to determine whether sufficient evidence exists to declare the minor a ward of the juvenile court [*see Welf. & Inst. Code § 702*].

[2] Waiver of Jurisdiction Hearing

At the detention hearing, or at any time thereafter, a minor may admit in court the allegations of the petition or plead no contest, and thereby waive any further jurisdiction hearing [*Welf. & Inst. Code § 657*; *Cal. Rules of Ct., Rule 5.774(e)*; *see also* discussion in *§ 329.50[8]*].

[3] Time for Hearing

[a] General Rule

If the minor is not detained, the clerk must, on filing of the petition, set the petition to be heard, and the hearing must be commenced, within 30 calendar days from the date the petition was filed. If the minor is detained at the time the petition is filed, the clerk must set the petition to be heard, and the hearing must be commenced, within 15 judicial days from the date of the detention order. If the minor is released from detention prior to the jurisdiction hearing, the court may reset the petition for hearing within the more lax time limitations of nondetention cases. If the minor is not before the court at the time the petition is filed and a warrant has been issued for his or her arrest, the 30-day period is tolled until the minor is brought before the court [*Welf. & Inst. Code § 657*; *Cal. Rules of Ct., Rule 5.774(a), (b)*].

In either case, it is well established that the right to a speedy trial exists injuvenile delinquency proceedings [*In re Chuong D. (2006) 135 Cal. App. 4th 1303, 1309, 38 Cal. Rptr. 3d 351* ; *In re Robert B. (1995) 39 Cal. App. 4th 1816,*

46 Cal. Rptr. 2d 691 ; *Richard N. v. Superior Court (1981) 116 Cal. App. 3d 579, 172 Cal. Rptr. 512]* . For this purpose, a contested jurisdictional hearing is commenced when both the court and the prosecutor are objectively ready to process the case to conclusion and not merely when the first witness is sworn. [*In re Chuong D. (2006) 135 Cal. App. 4th 1303, 1310-1311, 38 Cal. Rptr. 3d 351]* .

When an emergency condition exists, as described in *Gov. Code § 68115*, the presiding judge may request, and the Chair of the Judicial Council may authorize, an extension of time by deeming that the date or dates upon which the condition existed are holidays for the purpose of computing time. This section specifically applies to jurisdiction hearings. [*Gov. Code § 68115*]. Included in the list of emergency conditions described is a large influx of criminal cases resulting from a large number of arrests within a short period of time, threatening the orderly operation of a superior court location [*Gov. Code § 68115*].

PRACTICE TIP:

"Expedited Youth Accountability Programs." Some counties have local programs which will establish expedited time deadlines for law enforcement, probation, the district attorney, and court functions in order to ensure that a case is heard within 60 days after a minor is cited to court. This will not apply to detained minors or those cited to "Informal Juvenile and Traffic Court" [*Welf. & Inst. Code § 660.5*]. Attorneys should be familiar with those counties that have such programs and the applicable time deadlines adopted by each.

[b] Effect of Delay Caused by Minor's Failure to Appear

Any period of delay resulting from the minor's unavailability or failure to appear must be excluded in computing the applicable time limitations [*Cal. Rules of Ct., Rule 5.774(c)*].

[c] Dismissal for Untimely Commencement of Jurisdiction Hearing

If a jurisdiction hearing is not commenced within the applicable time limitations, the court must order the petition dismissed [*Cal. Rules of Ct., Rule 5.774(d)*].

An order dismissing the petition prior to the jurisdiction hearing does not in itself bar the filing of a subsequent petition based on the same allegations as in the original petition. If, however, the petition was dismissed for failure to comply with the time limits discussed in [a], *above*, the minor may not be detained under the subsequent petition [*Cal. Rules of Ct., Rule 5.774(d)*].

[4] Continuance of Hearing

[a] Basis and Procedure

To continue any hearing relating to proceedings pursuant to *Welf. & Inst. Code § 601* or *602* beyond the time limit within that the hearing is otherwise required to be heard, a written notice must be filed and served on all parties to the proceeding at least two court days before the hearing sought to be continued, together with affidavits or declarations detailing specific facts showing good cause for the continuance [*Welf. & Inst. Code § 682(a)*; *Cal. Rules of Ct., Rule 5.776(a)(1)*]. A party may make a motion for a continuance without complying with the requirements of *Welf. & Inst. Code § 682(a)*, but, unless the moving party shows good cause for failure to comply with those requirements, the court will deny the motion [*Welf. & Inst. Code § 682(c)*].

A continuance will be granted only on a showing of good cause and only for that period of time shown to be necessary by the moving party at the hearing on the motion. Neither stipulation nor convenience of the parties is, in and of itself, good cause. [*In re Ernesto H. (2004) 125 Cal. App. 4th 298, 315 n.6, 24 Cal. Rptr. 3d 561, 575]* .

To establish good cause based upon the unavailability of a witness, the party seeking the continuance has the burden of showing that they exercised due diligence to secure the witness's attendance, that the expected testimony is material and not cumulative, that the testimony will be obtained within a reasonable time, and that the facts to which the witness will testify could not otherwise be proven [*In re Chuong D. (2006) 135 Cal. App. 4th 1303, 1312-1313, 38 Cal. Rptr. 3d 351]* .

If a jurisdictional hearing is continued for good cause, over a minor's objection, the statutory time limits specified in *Welf. & Inst. Code § 682(e)* require that the hearing must commence within seven days. Failure to commence the hearing within seven days shall cause the court to release the minor from custody on the offense which is the subject of the jurisdictional hearing [*In re Kerry K. (2006) 139 Cal. App. 4th 1, 5-6, 42 Cal. Rptr. 3d 467]* .

Whenever a continuance is granted, the facts that require the continuance will be entered into the minutes [*Welf. & Inst. Code § 682(b)*; *see Cal. Rules of Ct., Rule 5.776(a)(2)*]. Absent a waiver of time, a minor may not be detained beyond the statutory time limits [*Cal. Rules of Ct., Rule 5.776(a)(1)*]. The court may not order counsel to pay any consequential witness fees or expenses that result from granting the continuance [*In re Sean R. (1989) 214 Cal. App. 3d 662, 666, 262 Cal. Rptr. 884* (*Welf. & Inst. Code § 664* mandates that all witness fees and expenses be borne by county)].

[b] To Prepare for Hearing

At the beginning of the jurisdiction hearing, the court must continue the hearingfor a period not to exceed seven calendar days as necessary (1) to make an appointment of counsel, (2) to enable counsel to become acquainted with the case, or (3) to determine whether the parent or guardian or adult relative is unable to afford counsel [*Welf. & Inst. Code § 700*; *Cal. Rules of Ct., Rule 5.776(b)(2)*].

The court must continue the jurisdiction hearing as necessary to provide reasonable opportunity for the minor and the parent, guardian, or adult relative to prepare for the hearing [*Welf. & Inst. Code § 700*; *Cal. Rules of Ct., Rule 5.776(b)(1)*].

[c] After Unexpected Contest of Petition

If the minor denies the allegations of the petition after having made a statement admitting the allegations of the petition, or after indicating an intention to admit the allegations at the time of the jurisdiction hearing, the court may continue the hearing for a period not to exceed seven calendar days to enable the petitioner to subpoena witnesses to attend the hearing to prove the allegations [*Welf. & Inst. Code § 701*; *Cal. Rules of Ct., Rule 5.776(c)*].

[d] New Evidence

If a continuance is sought in order to file a motion to set aside the jurisdictional finding based upon newly discovered evidence, pursuant to *Welf. & Inst. Code § 778*, the motion may be denied when the allegedly new evidence is not dispositive of the outcome [*People v. Beeler (1995) 9 Cal. 4th 953, 1003, 39 Cal. Rptr. 2d 607]* . This is true even when the evidence would otherwise be admissible in the jurisdictional hearing [*In re Ernesto H. (2004) 125 Cal. App. 4th 298, 316-317, 24 Cal. Rptr. 3d 561]* . The issue of whether allegedly new evidence warrants a continuance is subject to the broad discretion of the court and will only be reversed on appeal when an abuse of that discretion is established [*Id. at p. 316* , citing People v. Beeler].

[e] Pending Completion of Informal Probation

In a case petitioned under *Welf. & Inst. Code § 602*, the court may, with the consent of the child and his or her parent or guardian, continue the jurisdiction hearing for six months and order the child and parent or guardian to participate in a program of supervision and counseling or education under *Welf. & Inst. Code § 654* [*Cal. Rules of Ct., Rule 5.776(d)*]. If the probation officer recommends additional time to enable the minor to complete the program, the court at its

discretion may order an extension, not to exceed twelve months from the date the petition was filed [*Welf. & Inst. Code § 654.2(a)*].

In a 2007 decision interpreting *Welf. & Inst. Code § 654.2(a)*, the 12-month time limit in which a minor may be declared a ward was determined to be directory, not mandatory, and thus did not result in the trial court losing fundamental jurisdiction over a case. Consequently, where a minor was given an extended period of time to pay restitution and complete public service work, at her request, wardship was properly established even though the 12-month period had expired [*In re C.W. (2007) 153 Cal. App. 4th 468, 472, 62 Cal. Rptr. 3d 851*].

[f] Implied Consent to Continuance

If the minor is represented by counsel and no objection is made to an order continuing the jurisdiction hearing beyond the time limit within which the hearing is otherwise required to be commenced, the absence of an objection must be deemed a consent to the continuance [*Welf. & Inst. Code § 682(d)*; *Cal. Rules of Ct., Rule 5.776(a)(3)*].

[g] Co-Minor Cases

The presence of other minors charged with offenses arising out of the same alleged conduct does not have the same impact on a juvenile pending a jurisdictional hearing as an adult facing trial with codefendants. Specifically, the continuance statute applicable to adult matters, *Penal Code § 1050.1*, does not apply to juvenile cases [*A.A. v. Superior Court (2003) 115 Cal. App. 4th 1, 6, 9 Cal. Rptr. 3d 1]* . Even in the event that minors are jointly charged in the same petition, a continuance where "good cause" exists as to one co-minor cannot justify an extension of the statutory right to a jurisdictional hearing as to other minors, beyond seven days [*Welf. & Inst. Code § 700*; *Cal. Rules of Ct., Rule 5.776(b)(2)*; *A.A. v. Superior Court (2003) 115 Cal. App. 4th 1, 6, 9 Cal. Rptr. 3d 1]* .

[5] Commencement of Hearing

[a] Explanation of Petition

At the beginning of the jurisdiction hearing, the petition must be read to those present. The court must then explain the meaning and contents of the petition, the nature of the hearing, and its procedures and possible consequences. The judge must also advise those present that the parent or guardian may be liable for the payment of restitution, fines, or penalty assessment, if the minor is ordered to pay restitution [*Welf. & Inst. Code § 700*].

[b] Explanation of Trial Rights

At the beginning of the jurisdiction hearing, the court must have the petition read to all those present and, on request of the child, parent, guardian, or adult relative, must explain the meaning and contents of the petition and the nature, procedures, and consequences of the hearing [*Cal. Rules of Ct., Rule 5.778(a)*]. After giving the advice required by *Cal. Rules of Ct., Rule 5.534* (right to counsel, hearing rights), the court must inform those present of each of the following minor's rights [*Welf. & Inst. Code §§ 664, 679, 702.5*; *Cal. Rules of Ct., Rule 5.778(b)*]:

- The right to a hearing by the court on the issues raised by the petition.
- The right to remain silent, and that anything the minor says may be used against the minor in the juvenile court proceedings.
- The right to confront and to cross-examine any witness who may be called to testify against the minor.
- The right to use the process of the court to compel the attendance of witnesses on the minor's behalf.

[c] Explanation of Right to Representation by Attorney

After explaining the petition and the nature of the hearing, the court must then ascertain whether the minor and the parent, guardian, or adult relative are represented by counsel. If not, the court must advise the minor and those persons, if present, of their right to have counsel present and, if applicable, of the right to appointed counsel, subject to a claim of reimbursement to the county [*Welf. & Inst. Code § 700*; *Cal. Rules of Ct., Rule 5.534(g)*].

[d] Appointment of Counsel in Cases of Conflict of Interest

In any case in which it appears to the court that there is such a conflict of interest between a parent or guardian and the minor that one attorney could not properly represent both, the court must take appropriate action to eliminate the conflict of interest by appointing additional counsel [*Welf. & Inst. Code § 634*; *Cal. Rules of Ct., Rule 5.534(h)(2)(C)*].

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§ 329.71 Prehearing Discovery

[1] In General

Prehearing discovery in juvenile proceedings is governed by *Cal. Rules of Ct., Rule 5.546*. These provisions must be liberally construed in favor of maximizing informal disclosures, subject to the right of a party to show privilege or other good cause not to disclose specific material or information [*Cal. Rules of Ct., Rule 5.546(a)*]. All material and information to which a party is entitled must be disclosed in time to permit counsel to make beneficial use of them [*Cal. Rules of Ct., Rule 5.546(g)*].

Some aspects of discovery practice in adult criminal cases may be applied to juvenile wardship cases, as the two are often parallel. For example, a minor in a juvenile delinquency proceeding who is seeking discovery of peace officers records is subject to the same rules that apply in an adult criminal proceeding [*San Jose v. Superior Court (1993) 5 Cal. 4th 47, 53-54, 850 P. 2d 621*]. For discussion of discovery in adult criminal cases, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 70 (Matthew Bender).

[2] Petitioner's Duty to Disclose Certain Information

[a] When Petition Is Filed

On filing the petition, the petitioner must promptly deliver to, or make accessible for inspection and copying by, the minor and the parent or guardian, or their counsel, copies of the police, arrest, and crime reports relating to the pending matter. Privileged information may be omitted if notice of the omission is given simultaneously [*Cal. Rules of Ct., Rule 5.546(b)*].

The petitioner must disclose any evidence or information within the petitioner's possession or control favorable to the minor, parent, or guardian [*Cal. Rules of Ct., Rule 5.546(c)*].

[b] On Timely Request

Except as to matters subject to protective orders (*see* discussion in [5][b], *below*), the petitioner must, on timely request, disclose to the minor and parent or guardian, or to their counsel, the following material and information within the petitioner's possession or control [*Cal. Rules of Ct., Rule 5.546(d)*]:

- Probation reports prepared in connection with the pending matter relating to the minor, parent, or guardian.
- Records of statements, admissions, or conversations by the minor, parent, or guardian.
- Records of statements, admissions, or conversations by any alleged coparticipant.
- Names and addresses of any witnesses interviewed by an investigating authority in connection with the pending matter.
- Records of statements or conversations of witnesses or other persons interviewed by an investigating authority in connection with the pending matter.
- Reports or statements of experts made regarding the pending matter, including results of physical or mental examinations and results of scientific tests, experiments, or comparisons.
- Photographs or physical evidence relating to the pending matter.
- Records of prior felony convictions of witnesses that each party intends to call.

[3] Duty of Parent or Guardian to Disclose Relevant Information on Timely Request

Except as to matters subject to protective orders (*see generally* discussion in [5][b], *below*), the parent or guardian must, on timely request, disclose to the petitioner relevant material and information within the parent or guardian's possession or control. If the parent or guardian is represented by counsel, a disclosure request must be made through counsel [*Cal. Rules of Ct., Rule 5.546(e)*].

[4] Continuing Duty to Disclose

If, subsequent to compliance with the rules of discovery or with court orders, a party discovers additional material or information that is subject to disclosure, that party must promptly notify the requesting minor and parent or guardian, or their counsel, of the existence of the additional material [*Cal. Rules of Ct., Rule 5.546(k)*].

[5] Prehearing Discovery Orders

[a] Orders Compelling Disclosure

On refusal of a party to permit disclosure of information or inspection of materials, the requesting party or counsel may move the court for an order requiring timely disclosure of the information or materials. The motion must specifically and clearly designate the items sought, state the relevancy of the items, and state that a timely request has been made for the items and that the other party has refused to provide them. Each court may by local rule establish the manner and time within which a motion must be made [*Cal. Rules of Ct., Rule 5.546(f)*].

The juvenile court has discretion to order discovery prior to a fitness hearing. The burden of justifying discovery, by showing reasonable necessity and that the discovery will not unduly delay or prolong the proceeding, is on the party

seeking disclosure. If the discovery request includes only those items listed in the parallel adult reciprocal discovery statute (*see Penal Code §§ 1054.1* (discovery by the defendant), 1054.3 (discovery by the prosecution)), no additional showing will be required [*Clinton K. v. Superior Court (1995) 37 Cal. App. 4th 1244, 1249-1250, 44 Cal. Rptr. 2d 140]* .

Compelled prehearing disclosure of the minor's witnesses and their statements does not violate either the federal constitutional privilege against self-incrimination [*see U.S. Const., amend. V*] or the federal constitutional right to counsel and concomitant protection of attorney work product [*see U.S. Const., amend. VI*; *Robert S. v. Superior Court (1992) 9 Cal. App. 4th 1417, 1425-1426, 12 Cal. Rptr. 2d 489]* .

[b] Protective Orders

On a showing of privilege or other good cause, the court may make orders restricting disclosures [*Cal. Rules of Ct., Rule 5.546(g)*]. When some parts of materials are discoverable and other parts are not discoverable, the nondiscoverable material may be excised and need not be disclosed if the requesting party or counsel has been notified that the privileged material has been excised. Material ordered excised must be sealed and preserved in the records of the court for review on appeal [*Cal. Rules of Ct., Rule 5.546(h)*].

[c] Conditions of Discovery

An order of the court granting discovery under the rules may specify the time, place, and manner of making the discovery and inspection, and may prescribe terms and conditions. Discovery must be completed in a timely manner so as to avoid the delay or continuance of a scheduled hearing [*Cal. Rules of Ct., Rule 5.546(i)*].

[d] Reciprocal Discovery Orders

Although the reciprocal discovery provisions of *Penal Code § 1054* do not apply to delinquency proceedings under *Welf. & Inst. Code § 602*, the juvenile court has the inherent discretionary authority to make reciprocal discovery orders [*Robert S. v. Superior Court (1992) 9 Cal. App. 4th 1417, 1421-1422, 12 Cal. Rptr. 2d 489* ; *see Joe Z. v. Superior Court (1970) 3 Cal. 3d 797, 801-802, 91 Cal. Rptr. 594, 478 P.2d 26* ; *see also Cal. Const., art. I, § 30(c)*; *Penal Code § 1054 et seq.*].

The state constitutional privilege against self-incrimination [*see Cal. Const., art. I, § 15*] does not limit the court's authority to make such an order [*Robert S. v. Superior Court (1992) 9 Cal. App. 4th 1417, 1422-1424, 12 Cal. Rptr. 2d 489]* . Additionally, the federal constitutional guarantee of substantive due process [*see U.S. Const., amend. XIV, § 1*] does not prevent the making of such an order, as long as the minor is not required to provide discovery to the prosecutor absent reciprocal disclosures [*Robert S. v. Superior Court (1992) 9 Cal. App. 4th 1417, 1425, 12 Cal. Rptr. 2d 489]* .

Issuance of an order consistent with the reciprocal discovery provisions does not conflict with *Cal. Rules of Ct., Rule 5.546*, which sets forth the procedure for discovery in juvenile court proceedings but makes no provision for reciprocal discovery [*Robert S. v. Superior Court (1992) 9 Cal. App. 4th 1417, 1426, 12 Cal. Rptr. 2d 489]* . However, the court must exercise its discretion and make a discovery order as to a minor if sanctions for a failure to comply are to be imposed. [*In re Thomas F. (2003) 113 Cal. App. 4th 1249, 1255, 7 Cal. Rptr. 3d 19]* .

[6] Sanctions on Failure to Comply With Discovery Order

If at any time during the course of the proceedings it is brought to the attention of the court that a person has failed to comply with the rules of discovery or with an order issued under those rules, the court may order the person to permit the discovery or inspection of materials not previously disclosed, grant a continuance, prohibit a party from introducing in evidence the material not disclosed, dismiss the proceedings, or enter any other order the court deems just under the

circumstances [*Cal. Rules of Ct., Rule 5.546(j)*]. However, the sanction of dismissal should be employed only when the prosecutor has engaged in discoverymisconduct that is depriving the minor defendant of a fair trial [*In re Jesus J. (1995) 32 Cal. App. 4th 1057, 1060, 38 Cal. Rptr. 2d 429* (*Cal. Rules of Ct., Rule 5.546*, to extent it allows juvenile court to dismiss solely because of discovery abuses, is inconsistent with legislative intent and is disapproved)].

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Chapter 329 JUVENILE COURTS: DELINQUENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
F. Procedures for Establishing Wardship

28-329 California Forms of Pleading and Practice--Annotated § 329.72

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.72 Motions to Suppress Evidence

The constitutional protection against unreasonable search and seizure applies to juveniles as well as adults [*In re Scott K. (1979) 24 Cal. 3d 395, 155 Cal. Rptr. 671, 595 P.2d 105]* . It also extends to the entire residence in which a minor lives, regardless of household or internal familial rules dividing the space. [*In re Rudy F. (2004) 117 Cal. App. 4th 1124, 1131, 12 Cal. Rptr. 3d 483]* . Any motion to suppress as evidence any tangible or intangible thing obtained as a result of an unlawful search or seizure must be heard prior to the attachment of jeopardy and at least five judicial days after receipt of notice by the people, unless the people are willing to waive a portion of this time. In juvenile court, a motion to suppress is referred to as a "*Welf. & Inst. Code § 700.1* motion."

If the court grants a motion to suppress prior to the attachment of jeopardy over the objection of the people, the court must enter a judgment of dismissal as to all counts of the petition except those counts on which the prosecuting attorney elects to proceed pursuant to *Welf. & Inst. Code § 701* [*see In re Mitchell G. (1990) 226 Cal. App. 3d 66, 72, 276 Cal. Rptr. 245* (jeopardy attached when suppression motion was heard simultaneously with wardship petition, precluding People from appealing dismissal that resulted from grant of motion)]. If, prior to the attachment of jeopardy, opportunity for the motion did not exist or the person alleged to come within the provisions of the juvenile court law was not aware of the grounds for the motion, that person has the right to make the motion during the course of the proceeding under *Welf. & Inst. Code § 701* [*Welf. & Inst. Code § 700.1*].

Prehearing motions must be specific and note the grounds for the motion. They must also be supported by points and authorities [*Cal. Rules of Ct., Rule 5.544*]. Unless otherwise ordered or specifically provided by law, and absent a waiver, a prehearing motion to suppress evidence obtained as a result of an unlawful search or seizure and accompanying points and authorities must be served on the child and opposing counsel and filed with the court at least five judicial days before the date the jurisdiction hearing is set to begin if the minor is detained, and at least 10 judicial days before the jurisdiction hearing date if the minor is not detained [*Cal. Rules of Ct., Rule 5.544*].

PRACTICE TIP:

Suppressing Evidence by Motion. As with all pretrial motions, the attorney for the minor has an obligation to raise a suppression motion when warranted by the facts and the law. If the juvenile court judge asks the attorneys to stipulate to having the suppression motion heard simultaneously with the jurisdictional hearing, it is, in most cases, to the minor's advantage to do so, since double jeopardy will attach preventing the district attorney from appealing should the motion be granted.

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28-329 California Forms of Pleading and Practice--Annotated § 329.73

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§ 329.73 Entering Plea to Allegation

[1] Court Inquiry

After explaining the minor's trial rights and hearing any motions to suppress (*see* discussion in *§§ 329.70[5][b]* and *329.72*), the court must determine whether the minor intends to admit or deny the truth of the allegations of the petition. If the minor neither admits nor denies the truth of the allegations, the court must indicate for the record that the minor does not admit the truth of the allegations [*Cal. Rules of Ct., Rule 5.778(c)*].

[2] Admission of Allegations

[a] Requirement That Minor Admit Personally

An admission by the minor must be made personally by the minor [*Cal. Rules of Ct., Rule 5.778(d)*].

[b] Requirement That Counsel Consent

If the minor is represented by counsel, no admission may be accepted unless counsel consents to the minor's admission of the truth of the allegations of the petition [*Cal. Rules of Ct., Rule 5.778(d)*; *see In re Regina N. (1981) 117 Cal. App. 3d 577, 584-585, 172 Cal. Rptr. 810*].

Although the use of written waiver forms is increasing in delinquency proceedings, it is unclear if such forms, purporting to constitute personal admission of truth to the alleged charge and a waiver of rights, meet the necessary requirements.

[c] Prerequisites to Acceptance

Before accepting an admission by the minor that the allegations of the petition are true, the court must find, and the minutes must reflect, that the minor has made an intelligent and voluntary waiver of his or her *Boykin-Tahl* trial rights based on the minor's understanding of the nature of the allegations, and the direct consequences of a finding that the allegations are true, and that, by admitting the truth of the allegations in the petition, the minor will be waiving those rights [*see Boykin v. Alabama (1969) 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274* ; *In re Tahl (1969) 1 Cal. 3d 122, 81 Cal. Rptr. 577, 460 P.2d 449]* .

Express advisements and waivers of the *Boykin-Tahl* rights are not necessary todemonstrate a voluntary and intelligent admission [*People v. Howard (1992) 1 Cal. 4th 1132, 1178-80, 5 Cal. Rptr. 2d 268, 824 P.2d 1315]* . See discussion in [g], *below*.

[d] Warning When Minor Is on Probation

If the minor is on probation, and a possible consequence of an admission is that probation will be revoked at the dispositional hearing and the minor will be confined for a relatively longer period as a result, the minor must be informed that this is a possible consequence of admission [*In re Gary O. (1978) 84 Cal. App. 3d 38, 41-42, 148 Cal. Rptr. 276]* .

[e] Acceptance of Admission

If the court is satisfied that the admission should be received, the court must then ask whether the minor admits or denies the truth of the allegations in the petition. On admission, the court must make findings as to each of the following, noted in the minutes of the court [*Cal. Rules of Ct., Rules 5.778(f)*]:

- That notice has been given as required by law.
- The birth date and county of residence of the minor.
- That the minor has knowingly and intelligently waived the right to a hearing on the issues by the court, the right to remain silent, and the right to confront and to cross examine adverse witnesses and to use the process of the court to compel the attendance of witnesses on the minor's behalf.
- That the minor understands the nature of the conduct alleged in the petition and the possible consequences of an admission.
- That the admission by the minor is freely and voluntarily made.
- That there is a factual basis for the minor's admission.
- That the allegations of the petition as admitted are true as alleged.
- That the minor is a person described in *Welf. & Inst. Code § 601* (habitually disobedient or truant) or 602 (criminal violations).
- If the petition was filed pursuant to *Welf. & Inst. Code § 602* (criminal violations), the degree of the offense and whether it would be a misdemeanor or felony had it been committed by an adult, although these determinations may be deferred until the disposition hearing.

[f] Pleading No Contest

In lieu of admitting the allegations of the petition, the minor may enter a plea of no contest concerning the truth of the allegations, subject to the approval of the court. For purposes of juvenile court proceedings, the procedure for and legal effect of an entry of no contest is the same as that of an admission [*see Cal. Rules of Ct., Rule 5.778(e), (f)*]. See discussion in [g], *below*.

[g] Effect of Failure to Establish Knowledgeable Waiver of Rights

Failure to establish a knowledgeable waiver of rights before accepting a guilty plea or an admission in a juvenile case in the record of the proceedings will constitute grounds for habeas corpus relief [*In re Ronald E. (1977) 19 Cal. 3d 315, 321, 137 Cal. Rptr. 781, 562 P.2d 684]* . Inasmuch as the *Boykin-Tahl* advisement of rights is applicable to juvenile proceedings in which the juvenile admits an offense involving delinquency and potential detention, failure of the record to reflect that the juvenile understood the nature and elements of the crime charged or the consequence of an admission will constitute error [*In re Ronald E. (1977) 19 Cal. 3d 315, 321, 137 Cal. Rptr. 781, 562 P.2d 684* ; *see Boykin v. Alabama (1969) 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274* ; *In re Tahl (1969) 1 Cal. 3d 122, 81 Cal. Rptr. 577, 460 P.2d 449]* .

[3] Presumption That Minor Under 14 Is Incapable of Committing Crime

[a] Application to Delinquency Proceedings

The presumption that a minor under the age of 14 is incapable of committing a crime, set forth in *Pen. Code § 26*, applies to delinquency proceedings under *Welf. & Inst. § 602* [*In re Manuel L. (1994) 7 Cal. 4th 229, 239, 27 Cal. Rptr. 2d 2, 865 P.2d 718* ; *In re R. (1970) 1 Cal. 3d 855, 862, 83 Cal. Rptr. 671, 464 P.2d 127]* .

This presumption may be defeated by clear and convincing evidence that, at the time the minor committed the charged act, he or she knew of its wrongfulness [*In re Manuel L. (1994) 7 Cal. 4th 229, 239, 27 Cal. Rptr. 2d 2, 865 P.2d 718* ; *In re R. (1970) 1 Cal. 3d 855, 862, 83 Cal. Rptr. 671, 464 P.2d 127* ; *see* discussion in [b], *below*].

[b] Standard of Proof

Although a finding that a minor knew the wrongfulness of the charged act at the time he or she committed it is a prerequisite to a wardship adjudication under *Welf. & Inst. Code § 602*, it is not an element of the charged offense and therefore does not require proof beyond a reasonable doubt under *Welf. & Inst. Code § 701* or *In re Winship (1970) 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368* (holding that due process requires proof beyond a reasonable doubt in juvenile proceedings) [*In re Manuel L. (1994) 7 Cal. 4th 229, 239 n.5, 27 Cal. Rptr. 2d 2, 865 P.2d 718* (disapproving, to the extent inconsistent with this decision, *In re Billie Y. (1990) 220 Cal. App. 3d 127, 130-131, 269 Cal. Rptr. 212* , *In re Francisco N. (1986) 186 Cal. App. 3d 175, 179-180, 230 Cal. Rptr. 475* , *In reRichard T. (1985) 175 Cal. App. 3d 248, 252-253, 220 Cal. Rptr. 573* , and *Shortridge v. Municipal Court (1984) 151 Cal. App. 3d 611, 618, 198 Cal. Rptr. 749* ; *see also In re Clyde H. (1979) 92 Cal. App. 3d 338, 343, 154 Cal. Rptr. 727*)]. Rather, the evidence need only be clear. In making the determination, the juvenile court must consider the minor defendant's age, experience, and understanding [*In re Marven C. (1995) 33 Cal. App. 4th 482, 486-487, 39 Cal. Rptr. 2d 354]* .

A minor's age is a basic and important consideration in making a determination that they had the required capacity necessary to commit a crime [*People v. Lewis (2001) 26 Cal. 4th 334, 378, 110 Cal. Rptr. 2d 272]* . Generally, the older a child gets and the closer they are to the age of 14, the more likely it is that they appreciate the wrongfulness of their acts [*In re James B. (2003) 109 Cal. App. 4th 862, 872-873, 135 Cal. Rptr. 2d 457* ; *In re Paul C. (1990) 221 Cal. App. 3d 43, 52, 270 Cal. Rptr. 369]* .

The more convoluted the mens rea for a particular delinquent act, the more likely the minor did not have the requisite criminal capacity necessary to meet the standard of proof [*In re Michael B. (1983) 149 Cal. App. 3d 1073, 1088, 197*

Cal. Rptr. 379] . However, this does not mean that the child has to understand the intricacies of law involved with a particular offense (*e.g.*, conspiracy) in order to establish knowledge of wrongfulness pursuant to *Pen. Code § 26* [*In re Harold M. (1978) 78 Cal. App. 3d 380, 388, 144 Cal. Rptr. 744]* .

[c] Evidence of Prior Conduct

Knowledge of the wrongfulness of one offense does not necessarily mean that a minor has the requisite knowledge of wrongfulness in regard to the commission of other offenses [*In re C. (1978) 21 Cal. 3d 888, 900, 148 Cal. Rptr 366, 582 P.2d 957]* . Nonetheless, evidence of prior conduct where the knowledge of wrongfulness has been shown may be determinative in proving knowledge in similar subsequent acts [*In re Clyde H. (1979) 92 Cal. App. 3d 338, 344, 154 Cal. Rptr. 727]* . To this end, the court may take judicial notice of previously sustained petitions for similar offenses for the purpose of establishing that a minor knew of the wrongfulness of the acts in presently petitioned matters [*In re Nirran (1989) 207 Cal. App. 3d 1157, 1160, 255 Cal. Rptr. 327* ; *In re Martin L. (1986) 187 Cal. App. 3d 534, 539, 232 Cal. Rptr. 43]* .

PRACTICE TIP:

Testimony of Minor's Parent. The district attorney will often call the minor's parent as a witness to establish that the minor knew the wrongfulness of the charged act, by asking the parents if they taught the minor that it was wrong to commit such an act. Attorney for the minor should warn the parent of this possibility.

[4] Pleading Not Guilty by Reason of Insanity

When a minor denies, by a plea of not guilty by reason of insanity, the allegations of a petition filed pursuant to *Welf. & Inst. Code § 602* (criminal violations), and also joins with that denial a general denial of the conduct alleged in the petition, he or she will be subject to a hearing as if he or she had made no allegation of insanity. If the petition is sustained or if the minor denies the allegations only by reason of insanity, then a hearing must be held on the question of whether the minor was insane at the time the offense was committed [*Welf. & Inst. Code § 702.3(a)*].

[5] Minors Mentally Incompetent To Stand Trial

[a] In General

Counsel cannot effectively represent a defendant who is unable to understand the proceedings or to rationally assist him [*James H. v. Superior Court (1978) 77 Cal. App. 3d 169, 174, 143 Cal. Rptr. 398]* . Due process requires that a competency hearing cannot be deferred and must be held prior to a fitness hearing or jurisdiction hearing [*Tyrone B. v. Superior Court (2008) 164 Cal. App. 4th 227, 78 Cal. Rptr. 3d 569]* . *California Rule of Court 5.645* requires the juvenile court to stay proceedings and conduct a hearing regarding a minor's competency to stand trial if the court finds a reason to doubt that the minor "is capable of understanding the proceedings or of cooperating with the [his] attorney... ." It directs that if the court finds that the child is not capable of understanding the proceedings or of cooperating with the attorney, they may receive a civil commitment under the Lanterman-Petris-Short Act (LPS) by way of either *Welf. & Inst. Code § 6550* or *Penal Code § 4011.6*.

Welf. & Inst. Code § 6550 and Rule 5.645 provide procedures upon a finding that a child is mentally ill, mentally disabled, mentally disordered, or mentally retarded.

A commitment made under *Welf. & Inst. Code § 6551* suspends the jurisdiction of the juvenile court during the time the minor is subject to the jurisdiction of the court in which the LPS petition is filed. Under *Penal Code § 4011.6*, the juvenile court may retain concurrent jurisdiction over the minor during the LPS proceedings [*In re Patrick H. (1997) 54 Cal. App. 4th 1346, 63 Cal. Rptr. 2d 455]* .

PRACTICE TIP:

***Penal Code § 26* v. Competence.** The standard for determining competency is whether the minor has the present ability to consult with his lawyer with a reasonable degree of rational understanding as well as factually understanding the proceedings against him. It is not whether the minor knows right from wrong or knows the wrongfulness of the act charged in the petition [*In re Ricky S. (2008) 166 Cal. App. 4th 232, 82 Cal. Rptr. 3d 432]* .

[b] Mental Incompetence v. Developmental Incompetence

Dusky v. United States (1960) 362 U.S. 402, 80 S. Ct. 788 set the standard for determining competency to stand trial. Under that standard, the inquiry is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him." [*Id. at p. 403*]. Those standards were applied to California delinquency proceedings in *James H. v. Superior Court (1978) 77 Cal. App. 3d 169* ; *143 Cal. Rptr. 398* . Specifically, the court in *James H.* advised that the juvenile court "may borrow from *Penal Code § 1367* and use as a yardstick the definition of incompetency set forth in that section ... [o]r the court may be guidedby the statement of the *United States Supreme Court in Dusky, supra* ..." [*James H., supra, 77 Cal. App. 3d at pp. 176-177*].

Under *Penal Code § 1367*, an adult's incompetence to stand trial arises from a mental disorder or developmental disability that limits his or her ability to understand the nature of the proceedings and to assist counsel [*Penal Code § 1367(a)*]. Recent case law suggests that this is not the sole standard to be applied in delinquency cases and, in fact, *Dusky* requires that the court make an inquiry to determine developmental disability, including a minor's age, to assess cognitive, psychological, social, and moral development [*Timothy J. v. Superior Court and Dante H. v. Superior Court (2007) 150 Cal. App. 4th 847, 58 Cal. Rptr. 3d 746*].

As the court points out in *Timothy J./Dante H.*, this inquiry is distinguishable from proof required pursuant to *Penal Code § 26*, which provides that children under the age of 14 are presumed to be incapable of committing a crime [*see § 329.73[3*]]. The inquiry in rule 5.645 is made prior to trial, as opposed to within the context of a jurisdictional hearing. Further, while some of the same factors may be relevant to both, the purpose and focus of the two inquiries is different as are the time and procedures for determining them [*Timothy J. v. Superior Court (2007) 150 Cal. App. 4th 847, 862, 58 Cal. Rptr. 3d 746*].

What is left unsaid in *Timothy J.* is that the remedies for minors determined to be incapable of committing crime under *Penal Code § 26* and children found to be incompetent under a "traditional" mental disorder/developmental disability analysis are well established and incorporated into most delinquency systems. It is less clear, if the developmental incompetence analysis of *Timothy J.* is widely accepted, what the remedial course of action should be, both at the time the finding is made and when the child becomes "competent" solely as a function of growing older.

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§ 329.74 Evidentiary Standards in Jurisdiction Proceeding

[1] Admission of Evidence and Standard of Proof

The admission and exclusion of evidence at the jurisdiction hearing is determined according to the rules of evidence established by the Evidence Code and by judicial decision. Proof beyond a reasonable doubt supported by evidence legally admissible in the trial of criminal cases must be adduced to support a finding that the minor has violated a law or ordinance. A preponderance of the evidence, legally admissible in the trial of civil cases, must be adduced to support a finding that the minor is within the juvenile court's jurisdiction under *Welf. & Inst. Code § 601* (habitually disobedient or truant) [*Welf. & Inst. Code § 701*; *see Cal. Rules of Ct., Rule 5.780(b)*; *In re Bettye K. (1991) 234 Cal. App. 3d 143, 148, 285 Cal. Rptr. 633]* .

PRACTICE TIP:

The Inapplicability of *Penal Code § 1111*. *Penal Code § 1111*, prohibiting a conviction upon the testimony of an accomplice unless the testimony is corroborated by other evidence tending to connect a defendant with the commission of the offense, does not apply to juvenile court proceedings [*In re P. (1978) 22 Cal. 3d 946, 949, 151 Cal. Rptr. 330*]. However, recent case law has called for this rule to be reassessed in light of changes in juvenile law over the last 30 years that make sustained petitions increasingly similar to criminal convictions [*In re Christopher B. (2007) 156 Cal. App. 4th 1557, 1561, 68 Cal. Rptr. 3d 253*]. Moreover, the very basis for the rule, that uncorroborated testimony of an accomplice is inherently untrustworthy for a myriad of reasons, is arguably more applicable to children. Consequently, with the notable exception of having such evidence weighed by a judge and not a jury, the distinctions cited by the court in *Mitchell P*. seem to be evaporating and the exception to *Penal Code § 1111* may soon be abolished.

[2] Objections to Evidence When Minor Is Unrepresented

If the minor is not represented by counsel at the hearing, objections that could have been made to the evidence are deemed to have been made [*Welf. & Inst. Code § 701*; *Cal. Rules of Ct., Rule 5.780(d)*].

[3] Use of Probation Officer's Report Prohibited

The court must not read or consider any portion of the probation officer's reportprior to or during a contested jurisdiction hearing [*Cal. Rules of Ct., Rule 5.780(c)*; *In re R. (1970) 1 Cal. 3d 855, 860, 83 Cal. Rptr. 671, 464 P.2d 127]* . However, the error is waived unless the minor timely objects in the juvenile court [*In re Christopher S. (1992) 10 Cal. App. 4th 1337, 1344-1345]* .

[4] Proscription Against Multiple Prosecutions

Penal Code § 654 provides, in relevant part: "An acquittal or conviction and sentence under any one [provision of law] bars a prosecution for the same act or omission under any other." While expressly applicable to juvenile proceedings, it should be noted that amended petitions may be filed after jurisdiction, by admission or contested hearing, if the matter has not yet gone to disposition [*In re R.L. (2009) 170 Cal. App. 4th 1339, 88 Cal. Rptr. 3d 854]* .

Similarly, the *Kellett* rule applies in delinquency proceedings. In *Kellett*, the California Supreme Court held that when "the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence" [*Kellett v. Superior Court (1966) 63 Cal. 2d 822, 827, 48 Cal. Rptr. 366]* . However, *Kellett* does not apply when the prosecutor cannot proceed on additional charges earlier because additional facts and police reports have not been discovered at the time of the original jurisdiction and disposition hearing [*In re R.L. (2009) 170 Cal. App. 4th 1339, 1343-1345, 88 Cal. Rptr. 3d 854]* .

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28-329 California Forms of Pleading and Practice--Annotated § 329.75

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§ 329.75 Immunity for Witnesses in Delinquency Proceedings

[1] Privilege Against Self-Incrimination

If a person is called as a witness and it appears to the court that the testimony or other evidence being sought may tend to incriminate the witness, the court must advise the witness of the privilege against self-incrimination and of the possible consequences of testifying [*Cal. Rules of Ct., Rule 5.548(a)*].

[2] Request for Immunity in Proceedings Pursuant to Welf. & Inst. Code § 602

In proceedings under *Welf. & Inst. Code § 602* (wardship for criminal offenses), the prosecuting attorney may make a written request or an oral request on the record that a judge order a witness to answer a question or produce evidence. The judge must then proceed under either *Penal Code § 1324* or *1324.1*, both of which govern the procedures for compelling privileged testimony. After complying with an order to answer a question or produce evidence and if, but for *Penal Code §§ 1324* and *1324.1* or *Cal. Rules of Ct., Rule 5.548*, the witness would have been privileged to withhold the answer given or the evidence produced, the witness may not be subject to proceedings under the juvenile court law, to criminal prosecution, or to a penalty or forfeiture for, or on account of, any fact or act concerning which, in accordance with the order, the witness was required to answer or produce evidence [*Cal. Rules of Ct., Rule 5.548(c)(1)*].

[3] No Immunity From Perjury or Contempt

A witness may nevertheless be subject to proceedings under the juvenile court law or to criminal prosecution for perjury, false swearing, or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence in accordance with an order [*Cal. Rules of Ct., Rule 5.548(e)*].

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28-329 California Forms of Pleading and Practice--Annotated § 329.76

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§ 329.76 Dismissal of Petition After Presentation by Prosecution

After the presentation of evidence on behalf of the petitioner has been closed, the court, on motion of the minor or on its own motion, is required to order the petition dismissed and the minor discharged from any detention or restriction therefore ordered if, on weighing the evidence then before it, it finds that the minor is not a person described by *Welf. & Inst. Code § 601* (habitually disobedient or truant) or 602 (criminal violations) [*Welf. & Inst. Code § 701.1*; *see also Cal. Rules of Ct., Rule 5.534(d)(1)(B)*]. The standard of proof is whether the prosecution has proven each element beyond a reasonable doubt [*In re Andre G. (1989) 210 Cal. App. 3d 62, 65-66, 258 Cal. Rptr. 127]* . If the motion is not granted, the minor may offer evidence without first having reserved the right to do so [*Welf. & Inst. Code § 701.1*]. In fact, even if a minor submits evidence that cures any deficiency in the petitioner's case following an erroneous denial of a motion to dismiss, the right to contest that denial is not waived [*In re Anthony J. (2004) 117 Cal. App. 4th 718, 725, 11 Cal. Rptr. 3d 865]* .

The federal rule that a defendant who by testifying cures a deficiency in the prosecutor's case waives the right to complain about an earlier erroneous denial of a motion to dismiss was recently determined to be inapplicable in California in a delinquency case [*In re Anthony J. (2004) 117 Cal. App. 4th 718, 729-732, 11 Cal. Rptr. 3d 865]* . Noting that the federal rule offended the most basic premises of the criminal justice system, the court found that the rule presented "a Hobson choice: resting and sacrificing the right to present a defense out of fear that his or her testimony may cure defects in the prosecution's case, or putting on such evidence and thereby possibly assisting the prosecution in proving its case." [*Id. at p. 732*].

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28-329 California Forms of Pleading and Practice--Annotated § 329.77

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§ 329.77 Determination That Allegations Are True

[1] Required Findings

If, after hearing the evidence, the court determines that the allegations of the petition are true, it must make findings as to each of the following, noted in the minutes of the court [*Welf. & Inst. Code § 702*; *Cal. Rules of Ct., Rule 5.780(e)*]:

- That notice has been given as required by law.
- The birth date and county of the residence of the minor.
- That the allegations of the petition are true as alleged.
- That the minor is a person described in *Welf. & Inst. Code § 601* (habitually disobedient or truant) or 602 (criminal violations).
- If the minor is found to be a person described in *Welf. & Inst. Code § 602*, the degree of the offense and whether the offense would be a misdemeanor or felony had the offense been committed by an adult. The determinations required for this particular item may be deferred until the disposition hearing.

[2] Finding Regarding Degree of Offense

The language of *Welf. & Inst. Code § 702* is mandatory rather than discretionary. The most recent decision of the California Supreme Court on this pointrequires an express finding as to the degree of the offense on the record [*In re Manzy W. (1997) 14 Cal. 4th 1199, 1204, 60 Cal. Rptr. 2d 889, 930 P.2d 1255]* .

The juvenile court lacks authority to reduce the degree of the offense if the evidence establishes that the minor could

only have committed the higher-degree offense [*In re Andrew I. (1991) 230 Cal. App. 3d 572, 582, 281 Cal. Rptr. 570]* . Furthermore, when the court accepts an admission to the petition as a felony and determines maximum length of confinement as a felony, the appellate court need not automatically remand for a finding on the level of the offense if the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor [*In re Manzy W. (1997) 14 Cal. 4th 1199, 1209, 60 Cal. Rptr. 2d 889, 930 P.2d 1255]* .

The juvenile court may not find that the minor committed an uncharged lesser-related offense, over the minor's objection [*In re Johnny R. (1995) 33 Cal. App. 4th 1579, 1583-1585, 40 Cal. Rptr. 2d 43]* .

[3] Finding When Offense Could Be Treated as Either Misdemeanor or Felony in Criminal Court

The juvenile court must make an express finding of whether the offense committed by a minor was a felony or a misdemeanor if the offense, when committed by an adult, could be treated as either a misdemeanor or a felony [*In re Kenneth H. (1983) 33 Cal. 3d 616, 618-620, 189 Cal. Rptr. 867, 659 P.2d 1156* ; *see Welf. & Inst. Code § 702*; *see also In re Andrew I. (1991) 230 Cal. App. 3d 572, 582, 281 Cal. Rptr. 570* (express finding not required when offense could only be treated as felony)]. However, the trial court need not state its reasons for designating the offense as a felony or as a misdemeanor [*In re Jacob M. (1989) 210 Cal. App. 3d 1178, 1181-1182, 258 Cal. Rptr. 754]* .

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28-329 California Forms of Pleading and Practice--Annotated § 329.78

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§ 329.78 Determination That Allegations Are Not True

If, after hearing the evidence, the court determines that the allegations of the petition are not true, it must make findings as to each of the following, noted in the minutes of the court [*Welf. & Inst. Code § 702*; *Cal. Rules of Ct., Rule 5.780(g)*]:

- That notice has been given as required by law;
- The birth date and county of residence of the minor; and
- That the allegations of the petition have not been proved.

The court must then order that the petition be dismissed and that the minor be discharged from any detention or restriction, if applicable.

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28-329 California Forms of Pleading and Practice--Annotated § 329.79

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§ 329.79 Review of Jurisdiction Order

A juvenile court order issued at the close of a jurisdictional hearing is an intermediate order and therefore is not appealable. The dispositional order is the final step in the proceedings, and thus the jurisdictional order is not reviewable until after disposition [*In re James J. (1986) 187 Cal. App. 3d 1339, 1342-1343, 232 Cal. Rptr. 456* ; *In re Melvin S. (1976) 59 Cal. App. 3d 898, 900-901, 130 Cal. Rptr. 844* ; *but see In re Kelvin M. (1978) 77 Cal. App. 3d 396, 399, 143 Cal. Rptr. 561* ; *In re Wiiliam C. (1977) 70 Cal. App. 3d 570, 574, 138 Cal. Rptr. 843]* .

For discussion of review of delinquency proceedings, see *§ 329.110* et seq.

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§ 329.80 Juvenile Informants

With the exception of purchasing tobacco products as authorized by *Bus. & Prof. Code § 2950*, peace officers are prohibited from using a person under the age of 18 as an informant without court authorization. A "minor informant" is defined as an individual, under 18 years of age, who participates on behalf of a law enforcement agency in a prearranged transaction with direct face-to-face contact with any party, when the minor's participation in the transaction is for the purpose of obtaining or attempting to obtain evidence of illegal activity of a third party and where the minor is participating in the transaction for the purpose of reducing or dismissing a pending juvenile petition against the minor. Before a court can authorize a minor's cooperation it must:

- Find probable cause that the minor committed the offense alleged in the pending petition;
- Advise the minor of the mandatory minimum and maximum sentence for the alleged offense;
- Disclose the benefit the minor may obtain be cooperating; and
- Obtain consent of the minor's parent or guardian, unless they are suspects in the investigation.

The court must also consider the age and maturity of the minor, the gravity of the minor's alleged offense, the safety of the public, and the interests of justice before authorizing the minor's cooperation. Under no circumstances may a peace officer use any person 12 years of age or younger as an informant [*Penal Code § 701.5*].

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28-329 California Forms of Pleading and Practice--Annotated § 329.81

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§ 329.81 Determination of Factual Innocence

A minor is entitled, where appropriate, to obtain a determination of factual innocence in specified cases, excluding infractions. In cases where no accusatory pleading or petition to adjudge the minor a ward of the court has been filed, but the matter has been taken before a probation officer pursuant to *Welf. & Inst. Code § 626*, the minor may request in writing that the law enforcement agency andprobation officer having jurisdiction over the matter destroy their records of the arrest or citation [*Welf. & Inst. Code § 781.5*].

A determination of factual innocence shall not be made unless the law enforcement agency and the probation officer, with the concurrence of the district attorney, determine that no reasonable cause exists to believe that the minor committed the offense, which was the basis for the arrest or citation. Upon a finding of factual innocence, law enforcement and probation records must be sealed for three years and then destroyed. If the request is denied, the minor may petition the juvenile court for such a determination. Notice requirements and evidentiary considerations for these hearings are set forth by statute [*Welf. & Inst. Code § 781.5*].

If an accusatory pleading or petition seeking wardship has been filed but not sustained, the minor may, at any time after dismissal, request in writing that the court make a finding of factual innocence. The court may also make a finding of factual innocence upon the written or oral motion of any party, or on its own motion. The district attorney may request a hearing on the matter if they object to the finding [*Welf. & Inst. Code § 781.5*].

Destruction of records pursuant to this section is prohibited during the pendency of a civil action if:

- the minor, or another person arrested or cited for the same offense, has filed the civil action against the peace officer, law enforcement agency, or probation officer that made the arrest, issued the citation, or commenced the proceedings, *and*

- the agency or officer that is the custodian of records has received a certified copy of the complaint in the civil action [*Welf. & Inst. Code § 781.5*].

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[Reserved]

§§ 329.82[Reserved]

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28-329 California Forms of Pleading and Practice--Annotated § 329.90

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§ 329.90 Disposition Hearing

[1] Purpose

When the jurisdictional phase of the delinquency proceeding is concluded by a finding and order that the minor is found to be a person described in *Welf. & Inst. Code § 601* (habitually disobedient or truant) or § 602 (criminal violations), a disposition hearing must be held to hear evidence on the question of the proper disposition to be made of the minor [*Welf. & Inst. Code § 706*].

[2] Transfer Out

Whenever a petition is filed in the juvenile court of a county other than the residence of the minor, the entire case may be transferred to the juvenile court of the county where the minor or his custodian resides. This also applies to situations where the residence of the person entitled to his custody changes to another county after the petition is filed [*Welf. & Inst. Code § 750*; *Cal. Rules of Ct., Rule 5.610(a), (c)*]. The court shall not transfer the case unless it determines that the transfer will protect or further the child's best interests [*Cal. Rules of Ct., Rule 5.610(e)*]. The transfer may be made only after the original court has made findings of facts upon which it has exercised jurisdiction over the minor. On the receipt and filing of the findings and order of transfer, the receiving juvenile court must take jurisdiction of the case [*Cal. Rules of Ct., Rule 5.610(h)*]. Once a court takes jurisdiction of a transferred matter, it retains jurisdiction for all purposes. There is no statutory provision for a transfer back to the original court or for any kind of joint jurisdiction [*In re Brandon H. (2002) 99 Cal. App. 4th 1153, 1156* ; *121 Cal. Rptr. 2d 530]* .

PRACTICE TIP:

Transfer Out Recommendations. In order to determine whether transferring a minor's case to another county will protect or further the child's best interests, it is imperative that counsel contact the probation officer in the county that is the subject of the recommendation. Without knowing the proposed case plans of the counties in question, or at least becoming familiar with their comparative resources and

philosophy relating to the minor's future supervision, it is virtually impossible to competently advocate for or against a transfer out recommendation. This is especially true if the petitioned offense is particularly serious or the minor is currently a ward in a particular county.

[3] Continuance Prior to Disposition Hearing

Prior to hearing evidence on the proper disposition of the case, the court may continue the proceeding to receive the social study of the probation officer, to refer the minor to a juvenile justice community resource program as defined in *Welf. & Inst. Code §§ 1784-1784.4*, or, on its own motion or on the motion of a parent or guardian, to receive other evidence [*Welf. & Inst. Code § 702*; *Cal. Rules of Ct., Rule 5.785(b)*].

If the minor is detained during the continuance, the continuance may not exceed 10 judicial days. If the minor is not detained, the court may continue the hearing to a date not later than 30 days after the date of filing the petition. In the latter case, the court may, for good cause shown, continue the hearing for an additional 15 days. The court may make an order for detention of the minor or for his or her release from detention, during the period of continuance, as appropriate [*Welf. &Inst. Code § 702*; *Cal. Rules of Ct., Rule 5.782(a), (b)*].

[4] Preparation of Social Study Report

Prior to every disposition hearing, the probation officer must prepare a social study concerning the minor, which must contain those matters relevant to disposition, including any parole status information, and a recommendation for disposition [*Cal. Rules of Ct., Rule 5.785(a)*]. If foster care placement is being considered or has been made, the social study must include appropriate a case plan as described in *Welf. Inst. Code § 706.6* [*Welf. & Inst. Code § 706.5*; *see Welf. & Inst. Code § 358.1(a)*].

The study must also indicate what plan, if any, for the return of the minor is recommended to the court by the county welfare department or probation officer [*Welf. & Inst. Code § 706.5*; *see Welf. & Inst. Code § 358.1(a), (b)*].

Furthermore, in cases in which the minor committed an offense that would have been a felony if committed by an adult, the probation officer must include a statement from the victim of the crime or, if the victim is a minor, a statement from the parent or guardian or, if the victim has died, a statement from the next of kin. All persons from whom a statement is required to be taken have the right to attend the disposition hearing and to express their views concerning the offense and disposition of the case [*Welf. & Inst. Code § 656.2*].

Neither a prior probation report nor a oral report will satisfy the statutory requirement of a new social study report [*In re L.S. (1990) 220 Cal. App. 3d 1100, 269 Cal. Rptr. 700]* . A social study prepared for use in a fitness hearing pursuant to *Welf. & Inst. Code § 707* fails to comply with the requirements of a social study for a dispositional hearing [*see Welf. & Inst. Code § 280*]. A disposition study must include an informed recommendation from among a wide range of possible placement and counseling programs. A fitness study explores only two options, adult criminal prosecution or juvenile court treatment [*In re Devin J. (1984) 155 Cal. App. 3d 1096, 1098-1101, 202 Cal. Rptr. 543]* .

The social study must be furnished to all parties at least 48 hours prior to the commencement of the disposition hearing by depositing copies with the clerk. A continuance of 48 hours must be granted on request of any party who has not been furnished the probation officer's report in accordance with this time limitation [*Cal. Rules of Ct., Rule 5.785(a)(2)*].

PRACTICE TIP:

Shaping the Social Study Report. The attorney for the minor should provide any favorable information regarding the minor to the probation officer to be included in the disposition report. This could include letters of character reference, school records, information regarding counseling, etc. Objections should be made to any improper entries in the probation report, or they will be considered waived.

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§ 329.91 Temporary Placement

[1] CYA Placement for Diagnosis

If the court has determined that a minor has violated a law or ordinance, the court, if it concludes that a disposition of the case in the best interest of the minor, requires such observation and diagnosis as can be made at a diagnostic and treatment center of the Youth Authority, may continue the hearing and order that the minor be placed temporarily in the center for a period not to exceed 90 days.

The director of the Youth Authority then reports the diagnosis and recommendations at the close of that period. However, the Youth Authority is only required to conduct a diagnostic evaluation if the referring county is under contract with them for this purpose and if staff and institutions are available [*Welf. & Inst. Code § 704(c)*].

CYA placement for diagnosis and treatment may also be ordered for a juvenile who has been declared a ward of the court as habitually truant or disobedient if a supplemental petition for commitment of the minor to the Youth Authority is filed and the minor is otherwise eligible for commitment to the Youth Authority [*Welf. & Inst. Code § 704(a)*].

When the minor is returned from the center, the minor must be brought before the court within two judicial days. The matter must then be set for a disposition hearing to be commenced within 10 judicial days [*Cal. Rules of Ct., Rule 5.782(c)*].

[2] Holding in Psychopathic Ward

Whenever the court, before or during the hearing on the petition, is of the opinion that the minor is mentally ill or if the court is in doubt concerning the mental health of any such person, the court may order that person held temporarily in the psychopathic ward of the county hospital or any hospital the services of which have been approved and/or contracted for by the department of health of the county, for observation and recommendation concerning future care,

supervision, and treatment [*Welf. & Inst. Code § 705*].

For further discussion relating to detaining minors in hospitals, see *§ 329.55[6]*.

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§ 329.92 Disposition Hearing Procedures

[1] Right to Judge Who Took Admission

A minor will have a right to have the same judge who took his or her admissionconduct the disposition hearing [*People v. Arbuckle (1978) 22 Cal. 3d 749, 753-754, 150 Cal. Rptr 778, 587 P.2d 220]* only if the record affirmatively demonstrates a basis for the defendant's reasonable expectation that the same judge will retain sentencing discretion [*People v. Horn (1989) 213 Cal. App. 3d 701, 261 Cal. Rptr. 814]* . However, the failure to object to a different judge at disposition will be considered a waiver of the right [*In re James H. (1985) 165 Cal. App. 3d 911, 918-919, 212 Cal. Rptr. 61]* .

[2] Explanation of Proceedings by Court

At the beginning of the disposition hearing, the court must inform the minor and the parent or guardian, if present, of the right to be represented by counsel at the hearing and, if applicable, of the right to appointed counsel. The court must also advise the child, parent, and guardian of their hearing rights [*see Cal. Rules of Ct., Rule 5.534(g), (h)*].

[3] Evidence Relevant to Disposition

[a] In General

After finding that the minor is properly adjudged a ward of the court, the court must hear evidence on the question of the proper disposition to be made of the minor. The court receives in evidence the social study of the minor made by the probation officer and other relevant and material evidence as may be offered. This includes hearsay evidence, which would otherwise be inadmissible in a jurisdiction hearing [*In re Vincent G. (2008) 162 Cal. App. 4th 238, 75 Cal. Rptr. 3d 526]* . The court may receive other relevant and material evidence that may be offered, including a "victim impact statement" submitted pursuant to *Welf. & Inst. Code § 656.2*. Any judgment and order of disposition must state

that the social study made by the probation officer has been read and that the social study and any statement considered by the court [*Welf. & Inst. Code § 706*; *Cal. Rules of Ct., Rule 5.785(b)*]. For further discussion of the social study report, see *§ 329.90[3]*.

Welf. & Inst. Code § 725.5 and other relevant policies of Juvenile Court Law require that the court consider "the broadest range of information" in determining how best to rehabilitate a minor and afford them adequate care [*In re Robert H. (2002) 96 Cal. App. 4th 1317, 1329* ; *117 Cal. Rptr. 2d 899* ; *In re Jimmy P. (1996) 50 Cal. App. 4th 1679, 1684* ; *In re Raymond B. (1981) 121 Cal. App. 3d 785* ; *see also* [d], *below*].

As is the case with all juvenile court proceedings, the court must consider the safety and protection of the public, the importance of redressing injuries to victims, and the best interests of the minor [*Welf. & Inst. Code § 202(d)*].

[b] References to Police Contacts

Unless they are sealed under *Welf. & Inst. Code §§ 389, 781* or *Penal Code § 1203.45*, the court must consider any law enforcement agency reports regarding the taking of the minor into custody on another matter, including disposition of that matter, if available, for the purpose of determining whether adjudication of the commission of crimes as a juvenile warrants a finding that there are circumstances in aggravation under *Penal Code § 1170* or to deny probation [*Welf. & Inst. Code § 828(a)*; *see Cal. Rules of Ct., Rule 5.552(g)* (law enforcement agency may disclose these records to any person or agency with legitimate need for information for purpose of official disposition of a case)]. However, reference to police contacts or arrests that are not supported by factual information has been disapproved [*People v. Chi Ko Wong (1976) 18 Cal. 3d 698, 720-721, 135 Cal. Rptr. 392, 557 P.2d 976* , *People v. Calloway (1994) 37 Cal. App. 3d 905, 908-909, 112 Cal. Rptr. 745]* .

[c] Reference to Illegally Obtained Evidence

Illegally obtained evidence may be considered at a disposition hearing, even if it was suppressed for use at the jurisdictional hearing [*In re Michael V. (1986) 178 Cal. App. 3d 159, 169-170, 223 Cal. Rptr. 503]* .

[d] Reference to Dismissed Allegations

A court may consider the conduct underlying dismissed allegations as a factor in determining an appropriate disposition. This is true even when the allegations were dismissed as part of a plea bargain [*In re Jimmy P. (1996) 50 Cal. App. 4th 1679, 58 Cal. Rptr. 2d 632]* .

Welf. & Inst. Code § 725.5 requires that the court consider in addition to any other relevant and material evidence at disposition "the circumstances and gravity of the offense committed by the minor." This has been interpreted as allowing the court to consider facts and details of all evidence submitted, even if it does not support charges that were actually sustained [*In re Robert H. (2002) 96 Cal. App. 4th 1317, 1329* ; *117 Cal. Rptr. 2d 899* ; *In re Jimmy P. (1996) 50 Cal. App. 4th 1679, 1684]* .

In fact, it is well established that the adult court mandates of *People v. Harvey (1979) 25 Cal. 3d 754, 159 Cal. Rptr. 696* , are not applicable to juvenile court proceedings. This would appear to include the common juvenile court practice of entering into "*Harvey* stipulations" for dismissed counts in order to allow the court to consider the conduct underlying those counts, most often for the purpose of obtaining restitution. Most recently, the court in *Robert H.* noted that *People v. Harvey* has no application in juvenile court proceedings since it would limit the court's consideration of relevant evidence and may result in something less than the full truth regarding conduct relevant to the imposition of an appropriate disposition [*In re Robert H. (2002) 96 Cal. App. 4th 1317, 1329* ; *117 Cal. Rptr. 2d 899]* .

PRACTICE TIP:

Stipulations In Light of the Inapplicability of *Harvey*. Counsel should be aware of the possibility of

the court considering conduct surrounding dismissed charges and protect their clients accordingly. Possible means by which this can be accomplished include entering into factual stipulations with the prosecutor for the purpose of disposition and redacting police and probation reports prior to disposition as part of the plea negotiation process. Failure to do so may result in the minor being "punished" for conduct which may not be true but was not adequately deleted from the record as part of the plea process.

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329
Chapter 329 JUVENILE COURTS: DELINQUENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
G. Disposition of Ward

28-329 California Forms of Pleading and Practice--Annotated § 329.93

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§ 329.93 Judgment of Court

[1] Dispositions Available

Following receipt and consideration of the evidence concerning the proper disposition of the case, the court may make any of the following orders:

- The court may set aside the jurisdictional findings and dismiss the petition if it finds that the interests of justice and the welfare of the minor require a dismissal, or if it finds that the minor is not in need of treatment or rehabilitation. The specific reasons for dismissal must be set forth in an order entered on the minutes [*Welf. & Inst. Code § 702*].

- Without adjudging the minor to be a ward of the court, the court may place the minor on probation, under the supervision of the probation officer, for a period not to exceed six months [*Welf. & Inst. Code § 725(a)*].

- The court may order and adjudge the minor to be a ward of the court [*Welf. & Inst. Code § 725(b)*].

PRACTICE TIP:

Wardship for Offenses Without Confinement Time. Attorneys for all parties should be cognizant of the potential futility that may be encountered by imposing any juvenile court disposition for petitions sustained exclusively for offenses that have a maximum punishment without confinement time. Although these offenses may have an impact on certain privileges and afford an opportunity to impose restrictions on a minor's conduct and behavior, these rules may ultimately be unenforceable. Where a ward cannot be confined at all because the offense which is the exclusive basis for the wardship permits no confinement, there is absolute prohibition against confining the minor for a violation of their probation conditions or for contempt based on such violations [*In re Francisco S. (2000) 85 Cal. App. 4th 946, 102 Cal. Rptr.*

2d 514] .

[2] Deferred Entry of Judgment

[a] In General

[i] Eligibility

Effective March 8, 2000, Article 20.5 (commencing with Section 790) was added to Chapter 1 of Part 1 of Division 2 of the Welfare and Institutions Code. This article creates a Deferred Entry of Judgment (DEJ) program whose primary purpose is to 1) identify nonviolent juvenile offenders who are at risk of escalating their antisocial behavior, yet remain candidates for rehabilitation, and 2) targeting scarce resources toward treating and rehabilitating theses individuals. It also implicitly acknowledges that minors over the age of 14 who have felony petitions sustained against them face severe consequences under the law [*In re Spencer S. (2009) 176 Cal. App. 4th 1315, 98 Cal. Rptr. 3d 477]* . DEJ is applicable to minors appearing before the juvenile court because of the commission of a felony offense when all of the following circumstances apply [*Welf. & Inst. Code § 790(a)*]:

- The minor has not previously been declared to be a ward of the court for the commission of a felony offense.
- The offense charged is not one of the offenses enumerated in *Welf. & Inst. Code § 707(b)*.
- The minor has not previously been committed to the custody of the Youth Authority.
- The minor's record does not indicate that probation has ever been revoked without being completed.
- The minor is at least 14 years of age at the time of the hearing.
- The minor is eligible for probation pursuant to *Penal Code § 1203.06*.

The prosecutor reviews the file to determine whether or not the minor's case is eligible for the program. If the minor is found eligible for DEJ, the prosecutor files a declaration in writing or states for the record the grounds upon which the determination is based. This information is to be made available to the minor and their attorney.

PRACTICE TIP:

Probation Revocation v. Violation. *Welf. & Inst. Code § 790(a)(4)* makes a minor ineligible for DEJ if "probation has ever been revoked without being completed." Recent case law suggests that in order for this section to take effect, the court must expressly revoke probation. This is true notwithstanding the fact that a minor may have sustained a new delinquency petition, or that said petition was based upon facts that clearly violate the terms and conditions of probation, while on probation [*In re T.P. (2009) 178 Cal. App. 4th 1, 4-5, 99 Cal. Rptr. 3d 893]* . In support of the position, the court in *T.P.* relies upon the distinction between probation violation and probation revocation as discussed in *People v. Coleman (1975) 13 Cal. 3d 867, 895 n 22* . Unfortunately, no such distinction exists in juvenile law since *Welf.& Inst. Code § 777(e)*, allowing for probation to be violated without revocation, was deleted with the passage of Proposition 21 on March 8, 2000. Consequently, a minor is not ineligible for DEJ simply because they have committed offenses while on probation, assuming that neither the original nor subsequent offenses would otherwise render them ineligible. Still, it should be noted that facts and circumstances that may not render a minor ineligible may still render them unsuitable for DEJ [*see In re Sergio R. (2003) 106 Cal. App. 4th 597, 607, 131 Cal. Rptr. 2d 160]* .

Upon a finding that the minor is also suitable for deferred entry of judgment and would benefit from education,

treatment, and rehabilitation efforts, the court may grant DEJ. Under this procedure, the court may set the hearing for DEJ at the initial appearance under *Welf. & Inst. Code § 657*. The court shall make findings on the record that a minor is appropriate for DEJ in any case where it is granted [*Welf. & Inst. Code § 790(b)*].

The Deferred Entry of Judgment process does not preclude the imposition of informal probation as set forth in *Welf. & Inst. Code § 654* or § 654.2. To the contrary, informal probation is specifically authorized in "unusual cases where the court determines the interest of justice would best be served" even when the minor appears to be eligible for DEJ [*Welf. & Inst. Code § 654.3(h)*].

PRACTICE TIP:

Legal Mandates Related to DEJ. Recent case law has clearly set forth the importance of adhering to the legal requirements related to DEJ, that it is a mandated process and not an informal program. If a minor is DEJ eligible pursuant to *Welf. & Inst. Code § 790(a)*, the prosecuting attorney must file Judicial Council Form JV-750, Determination of Eligibility, with the petition as well as the declaration required pursuant to *Welf. & Inst. Code § 790(b)*. If a minor is determined to be ineligible for DEJ, the prosecuting attorney must complete Form JV-750 and provide it to the court, the child, and the child's attorney. The trial court then has the ultimate discretion to rule on the suitability of the minor for DEJ. This may be done by either summarily granting DEJ or examining the record, conducting a hearing, and making a final determination regarding education, treatment, and rehabilitation. Failure by the prosecutor or the court to satisfy these statutory requirements constitutes reversible error, even where the offense has been adjudicated through a contested jurisdictional hearing [*In re Luis B. (2006) 142 Cal. App. 4th 1117, 48 Cal. Rptr. 3d 581]* .

[ii] Suitability

If the eligibility standards of *Welf. & Inst. Code § 790(a)* are met, the juvenile court may grant DEJ to an eligible minor, although they are not compelled to do so [*In re Sergio R. (2003) 106 Cal. App. 4th 597, 131 Cal. Rptr. 2d 160]* . Ultimately, a two-pronged analysis of a minor's situation is required in order to find that a DEJ disposition is warranted. First, an inquiry must be made with respect to statutoryeligibility pursuant to *Welf. & Inst. Code § 790(a)*. Secondly, an inquiry must be made with respect to suitability, which requires a finding by the court that the minor will benefit from the "education treatment, and rehabilitation" offered by the program. This suitability analysis should be based upon the factors specified in *Cal. Rules of Court, Rule 5.800(d)(3)* and *Welf. & Inst. Code § 791(b)* [*In re Sergio R. (2003) 106 Cal. App. 4th 597, 607, 131 Cal. Rptr. 2d 160]* . The court is only permitted to deny DEJ for statutorily eligible minors based upon this suitability analysis and is prohibited from doing so for any other reason [*In re Martha C. (2003) 108 Cal. App. 4th 556, 133 Cal. Rptr. 2d 544* ; *see generally* LaRon Hogg-Haught, Deferred Entry of Judgment: An Overlooked and Undervalued Benefit of Proposition 21, *38 U.S.F. L. Rev. 339 (2004)*]. Where a minor declines to admit each allegation in the petition, no duty on behalf of the juvenile court arises to refer the case to the probation department or to summarily grant DEJ [*In re Usef S. (2008) 160 Cal. App. 4th 276, 285, 72 Cal. Rptr. 3d 612]* .

[b] Written Notification to Minor by Prosecutor

The prosecutor must provide written notification to the minor regarding the DEJ program that includes each of the following [*Welf. & Inst. Code § 791(a)*]:

- A description of the procedures for deferred entry of judgment.

- A general explanation of the roles and authorities of the probation department, the prosecutor, the program, and the court in that process.

- A clear statement that, in lieu of jurisdictional and dispositional hearings, the court may grant

deferred entry of judgment with respect to any offense charged in the petition, provided that the minor admits each allegation contained in the petition and waives time for the pronouncement of judgment. Upon successful completion of the terms of probation, as defined in *Welf. & Inst. Code § 794*, the positive recommendation of the probation department, and the motion of the prosecuting attorney, the court shall dismiss the charge or charges against the minor, but no sooner than 12 months and no later than 36 months from the date of the referral to the program.

- A clear statement that upon any failure of the minor to comply with the terms of probation, including the rules of any program the minor is directed to attend, or any circumstances specified in *Welf. & Inst. Code § 793*, the prosecutor or the probation department, or the court on its own, may make a motion to the court for entry of judgment and the court shall render a finding that the minor is a ward of the court pursuant to Section 602 for the offenses specified in the original petition and shall schedule a dispositional hearing.

- An explanation of record retention and disposition resulting from participation in the deferred entry of judgment program and the minor's rights relative to answering questions about their arrest and deferred entry of judgment following successful completion of the program.

- A statement that if the minor fails to comply with the terms of the program and judgment is entered, the offense may serve as a basis for a finding of unfitness pursuant to *Welf. & Inst. Code § 707(d)* if the minor commits two subsequent felony offenses.

[c] Grant of Deferred Entry of Judgment

If the minor is eligible for DEJ, the procedures with respect to agreement between the parties and notice requirements are satisfied, the court may refer the case to the probation department or the court may summarily grant deferred entry of judgment if the minor admits the charges in the petition and waives time for the pronouncement of judgment [*Welf. & Inst. Code § 791(b)*].

When directed by the court, the probation department shall make an investigation into the minor's background for the purpose of determining whether the minor is a person who would benefit by education, treatment or rehabilitation. The probation department must also determine which programs would accept the minor. The department's findings and recommendations are then reported to the court. The final determination regarding education, treatment and rehabilitation of the minor is made by the court [*Welf. & Inst. Code § 791(b)*].

PRACTICE TIP:

Minor Must Admit Allegations "As Charged." A review of recent case law and practices throughout the state reveals a disregard for the requirements outlined in *Welf. & Inst. Code § 791(a)(3)*. Specifically, DEJ requires that the minor admit each allegation in the petition. This provision was included to prevent "plea bargaining" in the DEJ process, which usually represents a child's first contact with the juvenile justice system. Arguably, prosecutors can complicate the process by "overcharging" the 602 petition--a practice often cited for the widespread presence of "plea bargaining" in juvenile delinquency courts. Nonetheless, the requirements of § 791(a)(3) are clear. Therefore, an effective DEJ practice involves a petition, devoid of alternative charges, which accurately reflects the conduct allegedly committed by the minor and acceptance of full responsibility for the behavior, as reflected in an admission to the petition as alleged.

At its essence, DEJ is intended to provide an expedited mechanism for channeling certain first-time offenders away from the full panoply of a contested delinquency proceeding. That goal could not coexist with a minor who insists on exercising every procedural protection offered, and who then on appeal

faults the juvenile court for not intervening and short-circuiting those protections, placing the court in an impossible "heads he wins, tails I lose" situation [*In re Kenneth J. (2008) 158 Cal. App. 4th 973, 980, 70 Cal. Rptr. 3d 352]* .

While this analysis is sound, it underscores an implicit tension between procedural fairness and desirable outcomes that exists with some DEJ cases and in many "collaborative courts" where an admission of culpability is a prerequisite to participation. While admission of culpability, free from the plea bargaining process, is developmentally and systemically appropriate, undue pressure to admit wrongdoing, or unconditionally waive constitutional rights, in order to obtain a favorable disposition that would not be available otherwise, can lead to practices that are unsound both in terms of jurisdiction and disposition.

2009 case law suggests that compromise between procedural fairness and desirable outcomes may be achieved by distinguishing between a minor's right to make a motion to suppress evidence prior to a jurisdictional hearing and the jurisdictional hearing itself. Under this analysis, a minor may file and argue such motions prior to the jurisdictional hearing while reserving the right to admit the petition as alleged and request DEJ if they do not prevail [*In re A.I. (2009) 176 Cal. App. 4th 1426, 1433-1437, 98 Cal. Rptr. 3d 501]* .

[d] Citation to Custodial Parent, Guardian, or Foster Parent

The judge must issue a citation to the custodial parent, guardian, or foster parent ofthe minor to appear at the time and place set for the hearing and directing any person having custody or control of the minor to bring the minor to court as well. The notice must state that the custodian may be required to participate in a counseling or education program with the minor. The provisions of *Code Civ. Proc. § 170.6* must be explained in the citation. Personal service of the citation must be made at least 24 hours before the time stated for the appearance [*Welf. & Inst. Code § 792*].

[e] Program Requirements

When a minor is allowed to participate in a deferred entry of judgment procedure, the court shall impose a requirement subjecting the minor to warrantless searches. The court shall also consider whether to impose random chemical testing and require minors to periodically establish compliance with curfew and school attendance, when appropriate. Orders for restitution and any other authorized term of probation that the court believes would assist in the education, treatment, and rehabilitation of the minor may also be imposed [*Welf. & Inst. Code § 794*].

[f] Program Failure

If it appears to the prosecutor, the court or the probation department that the minor is not performing satisfactory in the assigned program or is not complying with the terms of probation, or that the minor is not benefiting from education, treatment, or rehabilitation, the court shall lift the deferred entry of judgment and schedule a dispositional hearing. The same result is reached if the minor is convicted of or adjudicated for the commission of one felony, or two misdemeanors committed on separate occasions. If, after the grant of deferred entry, the minor is convicted of or adjudicated for commission of one misdemeanor, or multiple misdemeanors committed in a single incident, the court may lift the deferred entry and schedule a dispositional hearing [*Welf. & Inst. Code § 793(a)*].

When the previously deferred judgment is imposed and a dispositional hearing scheduled, the court must report the complete criminal history of the minor to the Department of Justice, pursuant to *Welf. & Inst. Code § 602.5* [*Welf. & Inst. Code § 793(b)*]. Conversely, a minor's admission of the charges contained in the petition does not constitute a finding that a petition has been sustained for any purpose unless judgment is entered [*Welf. & Inst. Code § 791(c)*].

[g] Successful Completion

If the minor performs satisfactorily during the period in which deferred entry of judgment is granted the charges in the petition are dismissed, the arrest upon which the judgment was deferred shall be deemed to have never occurred and the records in the possession of the juvenile court are sealed. The only purpose for which access to the records is granted is for future determination of eligibility for the DEJ program entered [*Welf. & Inst. Code § 793(c)*].

[h] Appeals

An order granting deferred entry of judgment is not subject to appeal. There is no statute which expressly provides for an order granting DEJ and such orders are not "judgments" in either a general or specific sense. Consequently, courts of appeals lack the jurisdiction to entertain appeals based upon issues underlying DEJ orders [*In re Mario C. (2004) 124 Cal. App. 4th 1303, 1307-1309, 21 Cal. Rptr. 3d 891]* .

On the other hand, review by extraordinary writ may be available as an avenue for appellate review when conditions for such relief are present [*Id. at pp. 1311-1312*].

[3] Probation Without Wardship

The juvenile court may place the minor on probation without wardship. If the minor fails to comply with the conditions of probation imposed, the court may order and adjudge the minor to be a ward of the court [*Welf. & Inst. Code § 725(a)*]. Reinstitution of the original wardship proceeding, as opposed to an order changing or modifying a previous order pursuant to [*Welf. & Inst. Code § 777(a)*, is the proper disposition of a case where a minor has failed to comply with orders made under *Welf. & Inst. Code § 725* [*In re Deon W. (1998) 64 Cal. App. 4th 143, 146-147]* . However, if the minor is not eligible for informal supervision under *Welf. & Inst. Code § 654*, the court may not place the minor on probation without wardship [*see Welf. & Inst. Code § 725(a)*; *see also Welf. & Inst. Code § 654.3* and discussion in *§ 329.33*].

When a minor is placed on probation without wardship pursuant to *Welf. & Inst. Code § 725(a)*, he or she cannot be removed from the custody of his or her parent and may not be placed in physical confinement, including juvenile hall. Such actions are limited to minors who are adjudged wards of the court pursuant to *Welf. & Inst. Code § 725(b)* [*In re Trevor W. (2001) 88 Cal. App. 4th 833, 106 Cal. Rptr. 2d 169* ; *see Welf. & Inst. Code § 726*; *see also Welf. & Inst. Code § 730*].

This does not mean that significant consequences cannot be imposed pursuant to § 725(a). The conditions required by *Welf. & Inst. Code § 729.2* must be imposed and other conditions, not related to removal from parental custody or placement in "secure confinement" as defined in *Welf. & Inst. Code § 726(c)*, may be imposed as well. Among these conditions, a period of time on home supervision or "house arrest" and participation in a juvenile work program are permitted [*In re Walter P. (2009) 170 Cal. App. 4th 95, 101-103, 87 Cal. Rptr. 3d 668]* .

PRACTICE TIP:

Request for Probation Without Wardship. Attorney for the minor should remember to ask for informal supervision, supervision without wardship, in appropriate cases at disposition. Such a case may be where the evidence at trial showed the minor to be less culpable than it appeared from earlier reports.

[4] Minor Adjudged Insane

If the court finds that the minor was insane at the time the offense was committed, the court, unless it appears that the minor has fully recovered his or her sanity, must direct that the minor be confined in a state hospital for the care and treatment of the mentally disordered or any other appropriate public or private mental health facility approved by the community program director, or the court may order the minor to undergo outpatient treatment. The court must transmit a copy of its order to the community program director or to his or her designee [*Welf. & Inst. Code § 702.3(b)*; *see Penal Code §§ 1600-1614* (outpatient treatment)].

If the allegations of the petition specifying any felony offense are found to be true, the court must direct that the minor be confined in a state hospital or other public or private mental health facility approved by the community program director for a minimum of 180 days, before such minor may be released on outpatient treatment. Prior to making such order directing that the minor be confined in a state hospital or other facility or ordered to undergo outpatient treatment, the court must order thecommunity program director or his or her designee to evaluate the minor and to submit to the court within 15 judicial days of such order his or her written recommendation as to whether the minor should be required to undergo outpatient treatment or committed to a state hospital or another mental health facility. If, however, it appears to the court that the minor has fully recovered his or her sanity, the minor must be remanded to the custody of the probation department until his or her sanity has been finally determined in the manner prescribed by law. A minor committed to a state hospital or other facility or ordered to undergo outpatient treatment cannot be released from confinement or the required outpatient treatment unless and until the court that committed him or her has found and determined, after notice and hearing, that his or her sanity has been restored [*Welf. & Inst. Code § 702.3(b)*].

When the court, after considering the placement recommendation for the community program director, orders that the minor be confined in a state hospital or other public or private mental health facility, the court is required to provide copies of various documents to the state hospital or other treatment facility where the minor is to be confined. These copies include the commitment order, a computation or statement of the maximum commitment time, a computation or statement of the credit time to be deducted, a state summary criminal history information, any arrest or detention reports, any court ordered psychiatric examination or evaluation reports, and the community program director's placement recommendation report [*Welf. & Inst. Code § 702.3(c)*].

No minor may be committed pursuant to *Welf. & Inst. Code § 702.3* for a period longer than the jurisdictional limits of the juvenile court, unless at the conclusion of the commitment, by reason of a mental disease, defect, or disorder, the minor represents a substantial danger of physical harm to others, in which case the commitment for care and treatment beyond the jurisdictional age may be extended by proceedings in superior court in accordance with and under the circumstances specified in *Penal Code § 1026.5(b)* [*Welf. & Inst. Code § 702.3(e)*].

A commitment pursuant to *Welf. & Inst. Code § 702.3* is based on the wardship petition under *Welf. & Inst. Code § 602* rather than a dependency finding under *Welf. & Inst. Code § 300* [*People v. Superior Court (John D.) (1979) 95 Cal. App. 3d 380, 391, 157 Cal. Rptr. 157* (granting writ of mandate as appropriate remedy)].

[5] Adjudged Wardship Under Welf. & Inst. Code § 601

If a minor is adjudged a ward of the court on a finding of habitual disobedience or truancy as set forth in *Welf. & Inst. Code § 601*, the court may make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the minor, including medical treatment, and including orders to the parents and guardians of the minor to appear before a county financial evaluation officer, subject to the further order of the court [*Welf. & Inst. Code § 727(a), (b)*; *Cal. Rules of Ct., Rule 5.790(f)(1)*].

Pursuant to 1992 legislation, the court's authority has been slightly limited in ordering a government agency to provide services. The court may do so only if it has determined through the administrative process of the agency which has been joined as a party in the juvenile proceeding, that the minor is eligible for the services. The court must not impose duties on the agency beyond those mandated by law [*Welf. & Inst. Code § 727(a)*].

The trial court may place a minor adjudged a ward of the court under *Welf. & Inst. Code § 601* on probation with or without supervision of a probation officer. The court may impose any and all reasonable conditions of behavior that may be appropriate for probation [Welf. & Inst. Code & 727(a); *Cal. Rules of Ct., Rule 5.790(f)(1)*; *see also* discussion in *§ 329.94*].

In all other cases, the court must order the care, custody, control, and conduct of the minor to be under the supervision of the probation officer, who may place the minor in one of the following [*Welf. & Inst. Code § 727(a), (b)*]:

- The home of a relative;
- A suitable licensed community care facility; or
- With a foster family agency to be placed in a suitable licensed foster family home or in a family home that has been certified by the agency as meeting licensing standards.

There is no denial of equal protection in the different treatment of minors under *Welf. & Inst. Code §§ 601, 602*, and *300* (dependent children) [*In re Harm R. (1979) 88 Cal. App. 3d 438, 442-444, 152 Cal. Rptr. 167]* .

If a status offender adjudged a ward of the court under *Welf. & Inst. Code § 601* has violated a court order, the juvenile court may exercise its contempt power to incarcerate the minor, so long as the following conditions are met: (1) the juvenile is given sufficient notice to comply with the order and to understand its provisions; (2) the violation of court order is egregious; (3) the record indicates that less restrictive alternatives were considered and found to be ineffective; and (4) special confinement conditions are made to ensure that the minor does not come in contact with those minors who are confined because of their commission of a crime [*In re Michael G. (1988) 44 Cal. 3d 283, 297, 243 Cal. Rptr. 224, 747 P.2d 1152]* .

[6] Adjudged Wardship Under Welf. & Inst. Code § 602

If the juvenile court adjudges the minor a ward of the court under *Welf. & Inst. Code § 602* (criminal offense), it may:

- Place the minor on probation without supervision of the probation officer [*Welf. & Inst. Code § 727(a)*].
- Place the minor on probation with supervision in the family home [*Welf. & Inst. Code § 730*].
- Place the minor with a relative or in a suitable licensed group or foster home [*Welf. & Inst. Code § 727(a)*].
- Commit the minor to juvenile hall, or a county camp or ranch [*Welf. & Inst. Code § 730(a)*].
- Commit the minor to the California Youth Authority [*Welf. & Inst. Code § 731*].

The court has the discretion to place a minor adjudged a ward under *Welf. & Inst. Code § 602* (criminal offenses) on probation without supervision of a probation officer. However, the minor may not be placed on this type of supervision if the minor has committed any of certain specified serious offenses [*see Welf. & Inst. Code § 727(a)* (those offenses specified in *Penal Code §§ 459, 707(b), (d)(2), (e)* or in *Health and Safety Code § 11350(a)*)].

If the minor has been adjudged a ward of the court for the sale or possession for sale of a controlled substance other than marijuana, for the sale, possession, or knowing transportation of a machine gun, for intentionally converting a firearm into a machine gun, or for knowingly manufacturing a machine gun, the minor may be placed on probation without supervision of the probation officer only if the court has determined that the interests of justice would best be served, and has stated reasons on the record for that determination [*Welf. & Inst. Code § 727(a)*; *see Health & Safety Code §§ 11053-11058* (controlled substances); *Penal Code § 12220* (machine gun)].

PRACTICE TIP:

Specialty or Problem-Solving Courts. Recognizing the limitations of the traditional responses available in delinquency courts, many jurisdictions are exploring the use of specialty or problem-solving courts to address specific needs of children who fall within the jurisdiction of *Welf. & Inst. Code § 602*. While these courts arguably improve the systemic response to particular issues, and the competence of the practitioners involved in their administration, they are most effective when a nexus between the specified problem and the delinquent behavior exists. Additionally, since these courts frequently function with limited resources, they should only be utilized when there is a likelihood that the minor's delinquent behavior will be corrected or reduced through involvement with the court.

While many of these courts, especially those dealing with mental health and substance abuse, focus on non-custodial resources, practitioners should be cautioned against involving their clients in specialty courts only as a way to get them out of custody. Frequently these courts involve requirements and expectations that minors may not be able to fulfill and, in turn, may set them up for failure and greater consequences in the future. Finally, it is important to note that because juveniles and adults are not similarly situated with respect to the purposes of the law, specialty courts available to the two groups will not be identical. Not only does this mean that juvenile specialty courts and programs are often not available in adult forums, it also means that adult programs and opportunities such as those provided by Proposition 36, are not applicable to juvenile proceedings [*In re Jose Z. (2004) 116 Cal. App. 4th 953, 961-963, 10 Cal. Rptr. 3d 842]*
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[7] Mandatory Dispositions

The court must commit any minor adjudicated to be a ward as the result of personal use of a firearm in the commission of a violent felony, as defined in *Penal Code § 667.5(1)*, to placement in a juvenile hall, ranch, camp, or with the Youth Authority [*Welf. & Inst. Code § 602.3(a)*]. A treatment-based alternative placement order on any minor subject to this section may be imposed if the court finds the minor has a mental disorder requiring intensive treatment. Any alternative placement so ordered must be made on the record, in writing, and in accordance with existing statutory authority [*Welf. & Inst. Code § 602.3(b)*].

In addition, for any offense that the prosecutor could have filed directly in adult court, pursuant to *Welf. & Inst. Code § 707(d)* but elects instead to file a petition in juvenile court, if the minor is found to be a person described in *Welf. & Inst. Code § 602(a)* they must receive a dispositional commitment to a secured facility [*Welf. & Inst. Code § 707(d)(5)*].

PRACTICE TIP:

Secure Commitments. While both *Welf. & Inst. Code §§ 707(d)(5)* and *602.3(a)* require placement in juvenile hall, ranch camp, forestry camp, boot camp, secure juvenile homes, or any institution operated by the Youth Authority, neither section specifies a duration. Consequently, minimal terms "credit for time served" or electronic monitoring commitments may fulfill the requirements dictated by these sections.

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§ 329.94 Conditions of Probation

[1] Scope of Court's Discretion

Whether or not the minor is adjudged a ward of the court, the court may set reasonable terms and conditions of probation for the minor [*Welf. & Inst. Code §§ 725, 782*; *Cal. Rules of Ct., Rule 5.790(b)*]. The juvenile court has broad discretion in formulating conditions of probation, and may impose a condition that is reasonable for a juvenile although not reasonable for an adult. The court may impose any reasonable condition that is "fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced" [*Welf. & Inst. Code § 730(b)*; *see In re Antonio C. (2000) 83 Cal. App. 4th 1029, 1033, 100 Cal. Rptr. 2d 218]* . The court may also impose a condition that infringes on constitutional rights, so long as that condition is tailored specifically to meet the needs of the juvenile [*In re Antonio R. (2000) 78 Cal. App. 4th 937, 941, 93 Cal. Rptr. 2d 212* ; *In re Michael D. (1989) 214 Cal. App. 3d 1610, 1616, 264 Cal. Rptr. 476* (approving condition requiring minor to stay out of known gang-gathering areas); *see In re Laylah K. (1991) 229 Cal. App. 3d 1496, 1501-1502, 281 Cal. Rptr. 6* (gang prohibition, curfew, search-and-seizure waiver, and chemical-testing conditions were reasonably tailored to minor's needs)]. The third prong of this analysis has also been defined as requiring or forbidding conduct reasonably related to a minor's rehabilitation [*In re Daniel R. (2006) 144 Cal. App. 4th 1, 50 Cal. Rptr. 3rd 179]* .

PRACTICE TIP:

School Performance. Occasionally, the court may attempt to hold a minor to certain performance standards relating to educational achievement (e.g. maintaining a "B" average). While such conditions may be imposed, they must be supported by reliable evidence that the minor has the intellectual capacity to meet the standard set by the court. Absent such evidence, the appropriate order is to have theminor maintain "satisfactory grades, attendance and citizenship" [*In re Juan G. (2003) 2003 Cal. App. LEXIS 1458]* .

If placed on probation, the court will require, unless inappropriate, that the minor attend school without absence, that the

minor and his or her parents or guardian participate in a counseling or education program, and that the minor be at his or her legal residence between 10:00 p.m. and 6:00 a.m. unless accompanied by his or her parents or legal guardian [*Welf. & Inst. Code §§ 725(a), 729.2*; *see In re Jason J. (1991) 233 Cal. App. 3d 710, 717-718, 284 Cal. Rptr. 673* (court may require joint counseling, but may not order parent to attend AA meetings)]. The court also may impose, if appropriate, requirements for alcohol and drug testing [*Welf. & Inst. Code § 729.3*; *In re Jason J. (1991) 233 Cal. App. 3d 710, 718-719, 284 Cal. Rptr. 673* (*overruled on other grounds* in *People v. Welch (1993) 5 Cal. 4th 228, 237, 19 Cal. Rptr. 2d 520, 851 P.2d 802*)], limitations on persons with whom the minor may associate [*In re Byron B. (2004) 119 Cal. App. 4th 1013, 1015-1018, 14 Cal. Rptr. 3d 805* ; *In re Frank V. (1991) 233 Cal. App. 3d 1232, 1241-1243, 285 Cal. Rptr. 16]* , and curfews on activities after dark [*In re Jason J. (1991) 233 Cal. App. 3d 710, 719, 284 Cal. Rptr. 673]* . Upon review, a condition of probation will not be found invalid unless it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct that is not in itself criminal, and (3) requires or forbids conduct that is not reasonably related to future criminality [*People v. Lent (1975) 15 Cal. 3d 481, 124 Cal. Rptr. 905* ; *In re Kacy S. (1998) 68 Cal. App. 4th 704, 709]* .

PRACTICE TIP:

Mandatory Counseling. Effective January 2, 2002, the court is required to order a minor to attend counseling, at the expense of their parents, when they have been found to have committed a violation of *Penal Code § 241.2* (assault on school or park property) or *Penal Code § 243.2* (battery on school, park or hospital property). While the parents' ability to pay must be taken into consideration by the court, an inability to pay does not relieve the minor of their obligation to attend counseling [*Welf. & Inst. Code § 729.6*].

[2] Timely Objection to Conditions

As a general rule, in order to preserve a challenge against an unreasonable or invalid probation condition, the minor must object to the condition at the time it is imposed or the issue is waived [*In re Josue S. (1999) 72 Cal. App. 4th 168, 84 Cal. Rptr. 2d 796]* . Nonetheless, under peculiar circumstances waiver principles do not preclude appellate review [*In re Khonsavanh S. (1998) 67 Cal. App. 4th 532, 537, 79 Cal. Rptr. 2d 80]* . This is the case in situations where, like involuntary AIDS or HIV testing, imposition of the order is strictly limited by statute [*People v. Guardado (1995) 40 Cal. App. 4th 757, 763, 47 Cal. Rptr. 2d 81]* .

An exception also exists where the issues raised on appeal present "pure questions of law that can be resolved without reference to the particular sentencing record developed in juvenile court" [*People v. Welch (1993) 5 Cal. 4th 228, 235, 19 Cal. Rptr. 2d 520* ; *In re Justin S. (2001) 93 Cal. App. 4th 811, 815* ; *113 Cal. Rptr. 2d 466]* . The California Supreme Court has recently resolved any conflict in this area by declining to apply the doctrine of forfeiture to probation conditions that are vague or overbroad and thus facially unconstitutional [*In re Sheena K. (2007) 40 Cal. 4th 875, 889, 55 Cal. Rptr. 3d 716*]. Nonetheless, the court cautioned that this exception does not apply in every case in which a probation condition is challenged on a constitutional ground.

[3] Conditions Directed at Parents or Guardian of Minor

When a minor has been adjudged a ward of the court, the court finds that notice has been given in accordance with *Welf. & Inst. Code § 661*, and the minor is allowed to remain in the custody of a parent or guardian subject to the supervision of the probation officer, the parent or guardian may be required to participate with the minor in a counseling or education program, including, without limitation, parent education and parenting programs operated by community colleges, school districts, or other appropriate agencies designated by the court [*Welf. & Inst. Code § 727(b)*; *see Cal. Rules of Ct., Rule 5.790(b)(1)(B)*]. The court must consider the educational needs of the child. Any limitations on the right of a parent or guardian to make education decisions for the child must be specified in the court order [*Cal. Rules of Ct. Rule 5.790(f)(5)*]. In any event, the court may order a parent or guardian to ensure that the minor attends school regularly and make reasonable efforts to obtain appropriate educational services for the minor [*Welf. & Inst. Code § 727*

].

[4] Conditions When Minor Is Nonresident

If a nonresident minor is placed on supervised probation or made a ward of the court, the court may send the minor to out-of-state parents, relatives, guardians, or custodians, or may order a foreign minor turned over to authorities in his or her country of origin [*Welf. & Inst. Code § 738*; *see In re Adolfo M. (1990) 225 Cal. App. 3d 1225, 1230-1231, 275 Cal. Rptr. 619* (proper transfer of minor to Mexican authorities); *In re Manuel P. (1989) 215 Cal. App. 3d 48, 61-63, 263 Cal. Rptr. 447 , cert. denied, 498 U.S. 832, 111 S. Ct. 97, 112 L. Ed. 2d 68 (1990)* (*Welf. & Inst. Code § 738* not preempted by federal law)]. The court may not, however, impose as a condition of probation that the minor must live in another country with his parents and not return to this country without the permission of his or her probation officer [*In re Babak S. (1993) 18 Cal. App. 4th 1077, 1084-1085, 22 Cal. Rptr. 2d 893]* . This obviously applies to minors who are United States citizens as well. Probation conditions that require that a minor be banished from his or her country violate the constitutional rights of freedom of travel, assembly, and association [*In re James C. (2008) 165 Cal. App. 4th 1198, 1204, 81 Cal. Rptr. 3d 846]* . However, an order placed upon a minor living with his mother in Mexico that prohibited him from entering the United States except to attend school, work, or visit his father and family, and required notification to his probation officer before entering the country, was determined to be lawful for the child whose sustained petition involved marijuana smuggling [*Alex O. v. Superior Court (2009) 174 Cal. App. 4th 1176, 95 Cal. Rptr. 438]* .

[5] Conditions Related to Psychological and Medical Treatment

Pursuant to an order that a minor participate in psychological counseling or undergo psychiatric treatment, the court may also order that all records relating to that treatment be made available to the court or probation department upon request. As with all juvenile probation orders, these orders must be reasonable and tailored to fit the reformative and rehabilitative needs of the child but they do not necessarily violate either the right to privacy or the psychotherapist-patient privilege [*In re Christopher M. (2005) 127 Cal. App. 4th 684, 693-696, 26 Cal. Rptr. 3d 61]* . Similarly, specific orders that a minor take medications prescribed for conditions related to his or her rehabilitation may be lawful but must be narrowly tailored. While they need not specify particular medication by name, they must refer to a specific diagnosis and prescription related to rehabilitation [*In re Luis F. (2009) 177 Cal. App. 4th 176, 99 Cal. Rptr. 3d 174]* .

As the orders relate to the minor's privacy interest, that interest may be outweighed by the countervailing interests in protecting the public against future conduct and determining whether probation is being complied with and treatment is succeeding [Ibid]. As they relate to the psychotherapist-patient privilege, *Evidence Code § 1012* codifies an express exception to the privilege that permits disclosure of otherwise privileged communications to third parties to whom disclosure is reasonably necessary to accomplish the purpose for which the psychotherapist was consulted [*In re Pedro M. (2000) 81 Cal. App. 4th 550, 554, 96 Cal. Rptr. 2d 839]* .

[6] Conditions Related to Drug Use

When a minor who has unlawfully possessed, used, sold, or otherwise furnished any controlled substance is placed on probation, the probation officer may recommend that the minor be ordered to not use or be under the influence of any controlled substance as a condition of probation, and that the minor submit to drug and substance abuse testing as directed by the probation officer or peace officer [*Welf. & Inst. Code § 729.3*; *see In re Laylah K. (1991) 229 Cal. App. 3d 1496, 1502, 281 Cal. Rptr. 6]* . If the probation officer recommends drug-related conditions on probation, the court is required to impose them, unless the court makes a finding that these conditions would not serve the interests of justice. The minor is required to pay for all or part of the costs of the testing, if he or she has the financial ability to do so [*Welf. & Inst. Code § 729.9*].

If the minor's offense involved the possession, use, or furnishing of a controlled substance, public intoxication, or possession of an alcoholic beverage, the minor must also participate in and successfully complete an alcohol or drug rehabilitation program [*Welf. & Inst. Code §§ 725(a), 729.10*; *see Bus. & Prof. Code § 25662* (possession of alcoholic beverage); *Health & Safety Code §§ 11053-11058* (controlled substances); *Penal Code § 647(f)* (public intoxication)]. If the minor unlawfully possessed, used, sold, or otherwise furnished a controlled substance [*see Health & Safety Code § 11053 et seq.*], imitation controlled substance [*see Health & Safety Code § 109550*], or toluene or a toxic [*see Penal Code § 381*], on school grounds or the grounds of any church, synagogue, playground, public or private youth center, child care facility, or public swimming pool, the court must also order the minor to perform not more than 100 hours of community service as a condition of probation, unless that condition would be inappropriate [*Welf. & Inst. Code § 729.8(a)*; *see also Welf. & Inst. Code §§ 729.8(b)*, 11351.1(e) (definitions of "playground" and "youth center")]. The term "community service" means picking up litter along public streets or highways, cleaning up graffiti on school grounds or public property, or performing services in a drug rehabilitation center [*Welf. & Inst. Code § 729.8(c)*].

[7] Condition Permitting Warrantless Search

The court may impose a condition that the minor be searched without a warrant by a police or probation officer. Under prior case law an officer need not have been aware of the probationary search condition in order to later justify a warrantless search [*In re Tyrell J. (1994) 8 Cal. 4th 68, 81, 32 Cal. Rptr. 2d 33, 876 P.2d 519* , overruled by *In re Jaime P. (2006) 40 Cal. 4th 128, 139, 51 Cal. Rptr. 3d 430, 146 P.3d 965]* . Tyrell J. has since been overruled [*In re Jaime P. (2006) 40 Cal. 4th 128, 139, 51 Cal. Rptr. 3d 430, 146 P.3d 965]* . A probation condition does not justify a warrantless search when the officer is unaware of the search condition and the search is otherwise unlawful [*In re Jaime P. (2006) 40 Cal. 4th 128, 130*].

A police officer's reliance on a minor's statement that he was searchable for weapons entitles the officer to conduct a warrantless search where nothing would suggest that reliance of the statement was unreasonable, even if it is inaccurate [*In re Jeremy G. (1998) 65 Cal. App. 4th 553, 555-556]* .

[8] Conditions on Continued Custody

The court may also order the ward to participate in uncompensated work programs or it may commit the ward to a sheltered care facility or order that the ward and his or her family or guardian participate in a program of professional counseling as arranged and directed by the probation officer as a condition of continued custody [*Welf. & Inst. Code § 731*].

[9] Conditions Related to Home Supervision

As the need for expanded use of non-custodial alternatives increases, discussion of probation conditions related to those alternatives has increased as well. Home supervision, or house arrest, is a permissible sanction [*In re Walter P. (2009) 170 Cal. App. 4th 95, 87 Cal. Rptr. 3d 668]* as is use of electronic monitoring devices, including global positioning system (GPS) devices [*In re R.V. (2009) 171 Cal. App. 4th 239, 89 Cal. Rptr. 3d 702]* . It should be noted that because such conditions do not fall within the definition of "secure confinement" pursuant to *Welf. & Inst. Code § 726(c)*, they neither require wardship nor count as custody credits against a minor's maximum time of confinement [*In re Walter P. (2009) 170 Cal. App. 4th 95, 101-102, 87 Cal. Rptr. 3d 668]* .

[10] Community Service Including Graffiti Cleanup

The juvenile court may order the minor to perform community service, including but not limited to graffiti cleanup, during a time other than the minor's school attendance or employment. In lieu of community service, the court may order the minor to keep a specified property in the community free of graffiti for a period of time. Time requirements for both sanctions increase based on prior sustained petitions for vandalism offenses, and may reach 600 hours of community service or 240 days of property maintenance [*Penal Code §§ 594, 594.1, 594.6, 594.8, 640.5, 640.6*; *Welf.*

& Inst. Code § 729.1]. In addition, when a ward placed under the supervision of the probation officer is required as a condition of probation to participate in community service or graffiti cleanup, the court may impose a condition that if the minor unreasonably fails to attend or unreasonably leaves before completing the assigned daily hour of community service or graffiti cleanup, a law enforcement officer may take the minor into custody in order to return the minor to the site of the community service or graffiti cleanup [*Welf. & Inst. Code § 730(c)*].

If a minor is found to be a person described in Section 602 by reason of the commission of an act prohibited by *Section 594, 594.3, 594.4, 640.5, 640.6*, or *640.7 of the Penal Code*, and the court does not remove the minor from the physical custody of the parent or guardian, the court as a condition of probation shall require the minor to wash, paint, repair, or replace the property defaced, damaged, or destroyed by the minor or otherwise pay restitution to the probation officer of the county for disbursement to the owner or possessor of the property or both. If the court fails to do so, it must make a finding and state on the record its reasons why that condition would be inappropriate [Penal Code § 742.16(a)].

Nothing in Penal Code § 742.16 limits a juvenile court's authority to add terms and conditions for graffiti-related offenses to those specified in that statute. Consequently, a minor may be ordered to pay restitution, which is also mandated by *Welf. & Inst. Code § 730.6*, and perform community service work as conditions of probation for minors who have committed the offenses described above in Penal Code § 742.16 [*Inre G.V. (2008) 167 Cal. App. 4th 1244]* . *See also* discussion in *§ 329.95*.

[11] Impact on Driving Privilege

Individuals found to have committed certain offenses may have their driving privilege suspended, delayed or restricted by the court. The duration and nature of the impact on the minor's driving status depends upon the offense committed. Offenses relating to certain Vehicle Code violations may result in a restriction, suspension or delay of no more than six months [*Veh. Code § 13201*]. For each finding that an individual, between the ages of 13 and 21, has committed a specified drug or alcohol related offense, the court must suspend or delay the driving privilege for one year [*Veh. Code § 13202.5*]. Upon a showing of a critical need to drive, the court may modify this suspension or delay to a license restriction [*Veh. Code § 13202.5(c)(1)*]. A similar mandatory suspension or delay of one year applies to individuals found to have operated a motor vehicle in specified drug related offenses, where the vehicle was involved in, or incidental to the commission of the offense [*Veh. Code § 13202*].

Minors over the age of 13 found to be habitual truants may have a license suspension, delay or restriction of one year [*Veh. Code § 13202.7*].

For each finding of a graffiti offense pursuant to *Penal Code § 594, 594.3* or *594.4*, committed by an individual over 13 years of age, the court must suspend, delay or restrict the driving privilege for one year as well [*Veh. Code § 13202.6*]. A minor participating in a graffiti abatement program may reduce the license suspension period, as discussed in *§ 329.94[10][g][iii]*.

The court may also suspend the driving privilege, for five years, when a minor has committed an offense involving a firearm [*Veh. Code § 13202.4*].

Mandatory revocation by the Department of Motor Vehicles for certain offenses, applicable to minor's and adults, is set forth in *Veh. Code §§ 13350, 13351, 13351.5* and *13352*. A department mandated revocation, specific to minors, is applicable to offenses involving driving under the influence of drugs or alcohol [*Veh. Code § 13352.3*].

A sustained allegation of assault with a deadly weapon [*Penal Code § 245(a)(1)*] will result in the immediate and permanent revocation of the driving privilege when a motor vehicle was found to be the deadly weapon or instrument used to commit the offense. The fact that this consequence extends beyond the jurisdiction of the court does not effect the duration of the sanction [*In re Grayden N. (1997) 55 Cal. App. 4th 598, 64 Cal. Rptr. 2d 277]* .

A court's statutory authority to suspend a minor's driving privilege may be distinguishable from its ability to suspend the privilege as a condition of probation. While a recent appellate decision has held that *Vehicle Code § 13203* explicitly prohibits the suspension of the driving privilege as a condition of probation for a period of time longer than that specified by statute [*In re Colleen S. (2004) 115 Cal. App. 4th 471, 472-475, 10 Cal. Rptr. 3d 9]* there is disagreement on the issue. Other courts have held that the authority to suspend the driving privilege as a condition of probation may extend to the duration of the court's jurisdiction over a minor. This reasoning, notwithstanding statutory authority to the contrary, could support the suspension of a minor's driving privilege until the age of 21 or 25, if the order is specifically tailored to meet the needs of the child. [*In re Tanya B. (1996) 43 Cal. App. 4th 1, 50 Cal. Rptr. 2d 576* questioned on other grounds, *In re Justin S. (2001) 93 Cal. App. 4th 811, 814, 113 Cal. Rptr. 2d 466]* .

[12] Employment Restrictions

No ward of the juvenile court or Department of the Youth Authority shall perform any function that provides access to certain personal information of private individuals if the ward has been adjudicated for the following offenses:

- An offense involving forgery or fraud.
- An offense involving misuse of a computer.
- An offense for which the person is required to register as a sex offender pursuant to *Section 290 of the Penal Code*.
- An offense involving any misuse of the personal or financial information of another person. [*Welf. & Inst. Code § 219.5*].

[13] Firearm Prohibition

Any person who is alleged to have committed any offense enumerated in *Penal Code § 12021(c)(1)*, and is subsequently adjudged a ward of the juvenile court because they committed such an offense, shall not own, or have in his or her possession or under his or her custody or control, any firearm until the age of 30 years [*Penal Code § 12021(e)*]. Notably, the offenses listed in § 12021 include misdemeanor assaults and batteries. Recent case law has determined that all battery offenses, including those committed against specific victims not listed in § 12021(c)(1), trigger operation of this mandatory prohibition [*In re David S. (2005) 133 Cal. App. 4th 1160, 1165-1167, 35 Cal. Rptr. 3d 309]* .

[14] Gang and Weapons Orders

It is well established that the court can make reasonable orders related to associates and implements held by minors. These orders must be narrowly tailored and must be sufficiently precise for the probationer to know what is required of them [*People v. Lopez (1998) 66 Cal. App. 4th 615, 630, 78 Cal. Rptr. 2d 66]* . With respect to associations, the preferred language is to prohibit association "with any person known to you to be on probation, on parole or a member of a criminal street gang" [*In re H.C. (2009) 175 Cal. App. 4th 1067, 1072, 96 Cal. Rptr. 3d 793]* . With respect to orders related to "dangerous or deadly weapon" possession, it has been held to apply to items specifically delineated by statutes and items that can be used to cause injury or death [*In re R.P. (2009) 176 Cal. App. 4th 562, 566-570, 97 Cal. Rptr. 3d 822]* .

[15] Victim Considerations

The court may direct a juvenile offender to complete a victim impact class, participate in victim-offender conferencing subject to the victim's consent, pay restitution to the victim, and make a contribution to the victim restitution fund after

all victim restitution orders and fines have been satisfies [*Welf. & Inst. Code § 202(f)*]. The probation officer shall inform the victim of any victim-offender conferencing program or victim impact class available in the county, and of the victim's right to be informed of the final disposition of the case and their right to restitution [*Welf. & Inst. Code § 742(b)*].

California Forms of Pleading and Practice--Annotated

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PART II. LEGAL BACKGROUND
G. Disposition of Ward

28-329 California Forms of Pleading and Practice--Annotated § 329.95

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§ 329.95 Restitution and Fines

[1] Restitution to Victim

[a] General Rule

A victim of conduct for which a minor is declared a ward under *Welf. & Inst. Code § 602*, who incurs any economic loss as a result of the minor's conduct must receive restitution directly from that minor [*Welf. & Inst. Code § 730.6(a)(1)*]. Judges havebroad discretion in fixing the amount of restitution and may use any rational method for determining the amount, provided that it is reasonably calculated to make the victim whole and is consistent with the purpose of rehabilitation [*In re Dina V. (2007) 151 Cal. App. 4th 486, 489, 59 Cal. Rptr. 3d 862* ; *In re Brittany L. (2002) 99 Cal. App. 4th 1381, 1391-1392, 122 Cal. Rptr. 2d 376*].

The economic loss must be "as a result of the minor's conduct" [*Welf. & Inst. Code § 730.6(a)*], but that conduct need not be the sole cause of the victim's loss [*In re Johnny M. (2002) 100 Cal. App. 4th 1128, 1132, 123 Cal. Rptr. 2d 316]* . Since restitution laws are to be broadly and liberally construed, and are authorized by a dispositional statute passed by the Legislature, there is no right to have the obligation to pay restitution, or its amount determined by a civil jury trial [*In re A.M. (2009) 173 Cal. App. 4th 668, 673-674, 93 Cal. Rptr. 3d 168]* .

The nexus between sustained offense and loss to the victim need not be direct or apparent. Recent case law suggests that an offense as benign as driving without a license, in violation of *Veh. Code § 12500(a)*, may support a restitution order for burial and cremation expenses for a victim struck and killed by a car driven by a minor. In that instance, the police reports indicated that both the driver and pedestrian were responsible for the accident. Still, in making the restitution order, the court determined restitution to be appropriate as the minor's conduct was a substantial factor in causing the accident, notwithstanding the nature of the sustained offense [*In re A.M. (2009) 173 Cal. App. 4th 668, 93 Cal. Rptr. 3d 168]* .

The court may determine the amount of the restitution order at any time during the term of probation if the amount of loss cannot be ascertained at the time of disposition. Restitution orders must identify each victim and the amount of each victim's loss. Such loss must include, where applicable, lost wages consisting of base wages and commission income, as defined in *Welf. & Inst. Code § 730.6* [*Welf. & Inst. Code § 730.6(h)*]. In the event that an order for a specific amount of restitution is not made at the time of disposition, the court has the authority to direct the probation officer to determine the amount of restitution [*In re Karen A. (2004) 115 Cal. App. 4th 504, 510-511, 9 Cal. Rptr. 3d 369]* .

Whether the victim has insurance or has made a claim on an insurance policy as the result of a loss sustained from an act described in a petition is irrelevant to the issues of determining loss and imposing restitution. *Welf. & Inst. Code § 730.6* makes it clear that the only person or entity entitled to lieu or subrogation rights pursuant to a restitution order is the State's Restitution Fund [*see § 329.94[14][a][v]*]. The restitution order does not affect the right of the victim to recovery from the Restitution Fund, except to the extent that restitution is actually collected pursuant to the order. Restitution collected is to be credited to any other judgments for the same losses obtained against the minor arising out of the offense for which the wardship petition was sustained [*Welf. & Inst. Code § 730.6(i)*]. The purpose in requiring a minor to pay victim restitution is both its deterrent as well as its rehabilitative effect [*In re Brittany L. (2002) 99 Cal. App. 4th 1381, 1387* ; *122 Cal. Rptr. 2d 376* ; *People v. Crow (1993) 6 Cal. 4th 952, 957* ; *26 Cal. Rptr. 2d 1]* .

A minor shall have the right to a hearing before a judge to dispute the determination of the amount of restitution. The court may modify the amount on its own motion or on the motion of the district attorney, the victim or victims, or the minor. If a motion is made for modification of a restitution order, the victim must be notified of that motion at least 10 days prior to the hearing on the motion [*Welf. & Inst. Code § 730.6(h)(4)*].

When restitution is ordered to the victim, the Court shall require the minor who is subject to the order to report to the court on his or her compliance at least once a year until the order is fulfilled [*Welf. & Inst. Code § 730.8(a)*]. In the event that the minor is committed to the Youth Authority, that department must monitor the minor's compliance with the victim restitution order [*Welf. & Inst. Code § 730.8(b)*].

PRACTICE TIP:

No Harvey Waiver Required. *People v. Harvey (1979) 25 Cal. 3d 754, 159 Cal. Rptr. 696* held that in the context of adult criminal proceedings a defendant will suffer no adverse sentencing consequence by reason of facts underlying, and solely pertaining to, dismissed counts unless they are transactionally related to admitted charges or there is an agreement to the contrary. These agreements, commonly referred to as "Harvey Stipulations" or "Harvey Waivers," do not apply to juvenile court proceedings. In juvenile court proceedings, dismissed charges or conduct that is not charged may be considered for the purpose of disposition, including restitution orders [*In re T.C. (2009) 173 Cal. App. 4th 837, 93 Cal. Rptr. 3d 447]* . This well-established principle should be taken into consideration before a minor admits a petition pursuant to a jurisdictional hearing. Minor's counsel should address the scope of the child's conduct, and appropriate consequences flowing from that conduct, with the prosecutor and the court before entering any admission in juvenile court. This is an essential practice to avoid orders related to dismissed charges or uncharged conduct for which the minor is not responsible [*see also* discussion in *§ 329.92[3][d]*].

[b] Restitution Hearings

Judges are given virtually unlimited discretion as to the kind of information that can be considered at a restitution hearing. The hearing does not require the formalities of other phases of a criminal prosecution [*People v. Foster (1993) 14 Cal. App. 4th 939, 947* ; *18 Cal. Rptr. 2d 1]* . The court may use any rational method of fixing the amount of restitution, provided it is reasonably calculated to make the victim whole, and is consistent with the purpose of rehabilitation [*In re Brian S. (1982) 130 Cal. App. 3d 523, 531* ; *181 Cal. Rptr. 778]* . There is no requirement that the

court explore all aspects of the claimed losses and defenses to them [*People v. Ortiz (1997) 53 Cal. App. 4th 791, 800* ; *62 Cal. Rptr. 2d 66]* . On the other hand, failure to consider evidence relevant to the extent of loss, or a defense thereto, may be grounds for reversible error on appeal [*In re Brittany L. (2002) 99 Cal. App. 4th 1381* ; *122 Cal. Rptr. 2d 376]* .

[c] "Victim" Defined

"Victim" for restitution purposes includes the immediate surviving family of the actual victim [*Welf. & Inst. Code § 730.6(j)*], and may be made to a corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity when that entity is a "direct victim" of the offense [*Welf. & Inst. Code § 730.6(k)*].

[d] Restitution in Relation to Other Penalties

Restitution to the victim or victims, if any, is to be imposed in addition to any other penalty provided or imposed under the law, including the restitution fine, discussed in [b], *below,* and any fine imposed, discussed in [e], *below* [*Welf. & Inst. Code § 730.6(a)(2)*].

[e] Amount of Restitution

Restitution to the victim or victims will be imposed in the amount of the losses, as determined. The court will order full restitution, unless it finds compelling and extraordinary reasons for not doing so, and states them on the record [*Welf. & Inst. Code § 730.6(a)(2)(B), (h)*]. To the extent possible, the restitution will be of a dollar amount sufficient to fully reimburse the victim or victims for all determined economic losses incurred as the result of the minor's conduct for which the wardship petition was sustained, including all of the following [*Welf. & Inst. Code § 730.6(a)(2)(B), (h)*]:

- Full or partial payment for the value of stolen or damaged property, which is the replacement cost of like property, or the actual cost of repairing the property when repair is possible;

- Medical expenses;

- Wages or profits lost due to injury incurred by the victim, and if the victim is a minor, wages or profits lost by the minor's parent, parents, guardian, or guardians, while caring for the injured minor; and

- Wages or profits lost by the victim, and if the victim is a minor, wages or profits lost by the minor's parent, parents, guardian, or guardians, due to time spent as a witness or in assisting the police or prosecution.

PRACTICE TIP:

Restitution and Medical Expenses. Recent cases have provided instruction as to how courts should determine restitution based upon a victim's medicalexpenses. Specifically, the amount billed by a victim's health care provider may not be an appropriate amount, especially when the provider accepts payment from Medi-Cal for medical services rendered. By law, if such payment is accepted, the medical provider is barred from seeking any unpaid balance from the patient. Consequently, the amount of restitution ordered should reflect the amount of the Medi-Cal payment, not the amount billed by the provider [*In re Anthony M. (2007) 156 Cal. App. 4th 1010, 1018, 67 Cal. Rptr. 3d 734*].

The definition of "economic losses" recoverable in a restitution order has recently been stated to include the value of employee work product lost as a result of the criminal conduct. This includes a calculation of the number of hours worked by salaried employees, and a pro rata share of the benefits to which they are entitled, to remedy the harm caused [*In re Johnny M. (2003) 100 Cal. App. 4th 1128, 1134, 123 Cal. Rptr. 2d 316]* .

Economic losses, pursuant to *Welf. & Inst. Code § 730.6*, is broadly defined and has been interpreted to parallel the adult restitution statute, *Penal Code § 1202.4*. Consequently, the court may order payment for costs incurred to collect restitution for economic losses, including legal fees. This does not extend to legal fees incurred to collect general damages. However, the minor has the burden of proof, to be proved by a preponderance of the evidence, to distinguish between attorney fees to recoup economic losses and those for general damages. If this burden cannot be met, the victim may recover attorney fees and costs expended in collecting restitution even if some portion of those fees and costs were spent in recovering general damages [*In re Imran Q. (2008) 158 Cal. App. 4th 1316, 1321-1322, 71 Cal. Rptr. 3d 121]* .

The restitution order must identify the losses to which it pertains, and is enforceable as a civil judgment [*Welf. & Inst. Code § 730.6(i)*]. The liability of a juvenile offender, pursuant to a restitution order, may continue well into adulthood as civil judgments may be enforced for 10 years [*Code Civ. Proc. § 683.020*] and renewed any time in those 10 years [*Code Civ. Proc. § 683.120*]. The fact that restitution orders may extend well beyond the period of wardship has been acknowledged by the courts and is consistent with *Welf. & Inst. Code § 730.6(i)* [*In re Michael S. (2007) 147 Cal. App. 4th 1443, 1456, 54 Cal. Rptr. 3d 920*].

[f] Restitution and Rehabilitation

The restitution order does not affect the right of the victim to recovery from the Restitution Fund, except to the extent that restitution is actually collected pursuant to the order. Restitution collected is to be credited to any other judgments for the same losses obtained against the minor arising out of the offense for which the wardship petition was sustained [*Welf. & Inst. Code § 730.6(i)*].

Under *Welf. & Inst. Code § 730(b)*, the juvenile court has broad discretionary power to impose terms and conditions of probation to achieve justice and enhance the reformation and rehabilitation of a ward. This includes the ability to order restitution in a manner that will further the legislative objectives of making the victim whole, rehabilitating the offender, and deterring future delinquent behavior [*In re Tommy A. (2005) 131 Cal. App. 4th 1580, 33 Cal. Rptr. 3d 103*]. Thus considered, a restitution order made in a delinquency matter is more than a device through which a victim is compensated for losses sustained as a direct result of a minor's conduct.

That a minor is not personally or immediately responsible for a victim's loss does not render an order of restitution improper. To the contrary, courts have the discretion to order restitution as a condition of probation even when the loss was not necessarily caused by the conduct underlying the sustained charge. Ultimately, the question simply is whether the restitution order is reasonably related to the minor's conduct or to future criminality [*In re I.M. (2005) 125 Cal. App. 4th 1195, 1209, 23 Cal. Rptr. 3d 375]* .

While it is true that requiring a child to pay restitution for losses due to some other person's conduct has questionable rehabilitative value, especially when there are no shared motives or criminal tendencies, a restitution order may be made for an act committed without the same state of mind as that required for the crime that proximately caused the loss [*People v. Carbajal (1995) 10 Cal. 4th 1114, 1126* ; *In re I.M. (2005) 125 Cal. App. 4th 1195, 1210]* . It is enough that a restitution order "would make amends 'to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer.' [citation]" [Ibid].

[2] Restitution Fine

[a] Who Must Pay Additional Fine

In addition to other penalty provided or imposed under the law, including restitution to a victim, discussed in [a], *above*,

and any fine imposed, discussed in [e], *below*, or any other disposition, when a wardship petition (*see Welf. & Inst. Code § 602*) is sustained against a minor, the minor will be ordered to pay a separate and additional restitution fine [*Welf. & Inst. Code § 730.6(a)(2), (b), (c)*].

[b] Amount of Fine

The restitution fine is set at the discretion of the court, and is commensurate with the seriousness of the offense, as follows [*Welf. & Inst. Code § 730.6(b)*]:

- If the wardship petition is sustained for the commission of one or more felony offenses, the restitution fine is to be between $100-$1000 for each dispositional proceeding; and

- If the wardship petition is sustained for the commission of one or more misdemeanor offenses, the restitution fine is not to exceed $100.

PRACTICE TIP:

Offset for Restitution Paid by Minor to Victim. A legislative change to the restitution statutes for minors has yet to be addressed by the courts. Under existing case law, the court must reduce the restitution fine in the amount of the restitution paid to the victim by the minor [*In re Paul R. (1996) 42 Cal. App. 4th 1582, 1590-1591, 50 Cal. Rptr. 2d 421]* . Another court has denied a similar offset in an adult case based on the legislative deletion in the statute for adults of the provision allowing victim restitution "in lieu of" the restitution fine [*People v. Blackburn (1999) 72 Cal. App. 4th 1520, 1534-1535, 86 Cal. Rptr. 2d 134]* . Although the legislature also deletedthe identical language in the statute for minors, no court has addressed the impact on restitution fines for minors.

[c] Ability to Pay and Other Factors Considered by Court

The restitution fine is imposed regardless of the minor's inability to pay [*Welf. & Inst. Code § 730.6(c)*]. However, the court, in setting the amount of the fine, is required to consider any relevant factors, including but not limited to 74 [*Welf. & Inst. Code § 730.6(d)*]:

- The minor's ability to pay, including his or her future earning capacity. In this regard, the minor will bear the burden of demonstrating a lack of his or her ability to pay;

- The seriousness and gravity of the offense and the circumstances of its commission;

- Any economic gain derived by the minor as a result of the offense; and

- The extent to which others suffered losses as a result of the offense, including pecuniary losses to the victim or his or her dependents, as well as intangible losses such as psychological harm caused by the offense.

Express findings of the court as to the above factors, however, are not required [*Welf. & Inst. Code § 730.6(e)*].

[d] No Waiver of Fine Except for Compelling and Extraordinary Reasons

Under no circumstances may the court fail to impose the restitution fine, except in a felony case in which the court finds compelling and extraordinary reasons to waive imposition of the fine [*Welf. & Inst. Code § 730.6(f), (g)*]. When a waiver is granted, the court is required to state on the record all reasons supporting the waiver [*Welf. & Inst. Code § 730.6(g)*].

[e] Administrative Costs of Collecting Fine

The fine is not subject to the penalty assessments of *Penal Code § 1464* [*Welf. & Inst. Code § 730.6(f)*]. However, the board of supervisors of any county may impose a fee, not to exceed ten percent of the amount ordered to be paid, to cover the actual administrative costs of collecting the restitution fine. The fee will be included in the orders of the court [*Welf. & Inst. Code § 730.6(q)*].

[f] Fine Is Deposited in Restitution Fund

The restitution fine is to be deposited in the Restitution Fund [*Welf. & Inst. Code § 730.6(c)*].

[3] Imposition as Condition of Probation

[a] General Rule

When a wardship petition [*see Welf. & Inst. Code § 602*] is sustained against a minor, the court is required to order payment of restitution fines and orders, discussed in [a] and [b], *above,* as a condition of probation [*Welf. & Inst. Code § 730.6(l)*].

When a petition pursuant to *Welf & Inst. Code § 602* is sustained, the court may issue a citation to the minor's parents or guardians ordering them to appear at a hearing to impose a restitution fine [*Welf. & Inst. Code § 729.5(a)*]. The citation shall notify the parents or guardians of their liability for restitution payments if the minor is ordered to pay restitution, and further that their failure to appear at the hearing may result in a holding that the parent or guardian is jointly and severally liable with the minor for restitution within the limits provided for in *Civil Code §§ 1714.1* and *1714.3* [*Welf. & Inst. Code § 729.5(b), (d)*].

Execution of the restitution order, including any balance unpaid at the termination of the court's jurisdiction over a minor, may be issued in the same manner as a judgment in a civil action [*Welf. & Inst. Code § 729.5(e)*]. However, a person held liable under this section may petition the court to modify or vacate the order based upon a showing of change of circumstances [*Welf. & Inst. Code § 729.5(f)*].

Foster parents are specifically excluded from these restitution orders and liability [*Welf. & Inst. Code § 729.5(k)*]. This section does not make an insurer liable for loss caused by the willful acts of an insured or their dependents pursuant to *Section 533 of the Insurance Code* [*Welf. & Inst. Code § 729.5(j)*].

[b] Community Service as Alternative

If the court finds and states on the record extraordinary and compelling reasons why restitution should not be required, the court must order, as a condition of probation, that the minor perform specified community service [*Welf. & Inst. Code § 730.6(n)*]. However, the court may avoid ordering community service as a condition of probation, if it finds and states on the record compelling and extraordinary reasons not to order either the restitution or the community service [*Welf. & Inst. Code § 730.6(o)*].

When a minor is ordered to perform community service as a condition of probation, the court shall require that the minor report to the court on his or her compliance no less than annually until the order is fulfilled [*Welf. & Inst. Code § 730.7(a)*].

[c] Revocation of Probation for Failure to Pay Restitution

Probation may not be revoked for failure of a person to make restitution as discussed in [a] and [b], above, as a condition of probation, unless the court determines that the person has willfully failed to pay or failed to make sufficient

bona fide efforts to legally acquire the resources to pay [*Welf. & Inst. Code § 730.6(m)*].

[4] Priority When Committed to Division of Juvenile Facilities

When a minor is committed to DJF, the court is required to order restitution to be paid to the victim or victims, if any, as discussed in [a], *above* [*Welf. & Inst. Code § 730.6(p)*].

Payment of the restitution to the victim or victims will take priority in time over payment of any other restitution fine, discussed in [b], *above* [*Welf. & Inst. Code § 730.6(p)*].

The Chief Deputy Secretary may deduct up to 50 percent from the wages of theminor, for deposit to be paid directly to the victim or in the Restitution Fund [*Welf. & Inst. Code § 1752.82*]. When the minor is released pursuant to *Welf. & Inst. Code § 1766(a)*, the liberty will be conditioned on the payment in full of the restitution or restitution fine; payment is to be set in installments consistent with the minor's ability to pay [*Welf. & Inst. Code § 1766.1*].

[5] Fine for Criminal Offense

[a] In General

When a wardship petition [*see Welf. & Inst. Code § 602*] is sustained against a minor, the court is required to consider levying a fine against the minor, up to the amount that could be imposed on an adult for the same offense, if the court finds that the minor has the financial ability to pay the fine. *Penal Code § 1464*, requiring penalty assessments, applies to this type of fine [*Welf. & Inst. Code §§ 730.5, 730.6(a)(2)*].

The fine, if imposed, is in addition to any restitution ordered paid by the minor, as discussed in [a]-[d], *above* [*Welf. & Inst. Code § 730.6(a)(2)*].

[b] Fees Not Authorized

Penal Code § 1465.8 provides for the imposition of a court security fee for "every conviction for a criminal offense, including a traffic offense." However, since juvenile court adjudications of wardship are not convictions, the statute is inapplicable to minors. Consequently imposition of the court security fee upon minors is not authorized [*Egar v. Superior Court (2004) 120 Cal. App. 4th 1306, 1307-1309]* .

Health & Safety Code § 11372.5, which requires imposition of a $50 fee for any individual convicted of specified drug offenses, is inapplicable to minors for the same reason [*In re T.P. (2006) 136 Cal. App. 4th 1461, 39 Cal. Rptr. 3d 729]* .

[6] Joint and Several Liability

[a] Rebuttable Presumption of Parent's or Guardian's Liability Subject to Ability to Pay

When a minor is ordered to make restitution to the victim or victims, or to pay fines and penalty assessments, as discussed in [a]-[e], *above*, a parent or guardian who has joint or sole legal and physical custody and control of the minor is rebuttably presumed to be jointly and severally liable with the minor, in accordance with *Civil Code §§ 1714.1* and *1714.3*, for the amount of restitution, fines, and penalty assessments so ordered, up to the limits provided in those sections, subject to the court's consideration of the parent's or guardian's ability to pay [*Welf. & Inst. Code § 730.7(a)*].

Parental liability is based upon the age of the minor at the time of the alleged offense, not on the age at the time of the dispositional hearing or imposition of the restitution order [*In re Jeffrey M. (2006) 141 Cal. App. 4th 1017, 46 Cal. Rptr. 3d 533]* .

[b] Factors Considered in Determining Ability to Pay

In considering the parent's or guardian's ability to pay, the court may consider future earning capacity [*Welf. & Inst. Code § 730.7(a)*].

The parent or guardian has the burden of showing [*Welf. & Inst. Code § 730.7(a)*]:

- The inability to pay; and

- By a preponderance of the evidence, that the parent or guardian was either not given notice of potential liability for payment of restitution, fines, and penalty assessments prior to the petition being sustained by an admission or adjudication, or that he or she was not present during the proceedings in which the petition was sustain either by admission or adjudication and any hearing thereafter related to restitution, fines, or penalty assessments.

[c] Joint and Several Liability of Codefendants

One court has held that if the minor has a codefendant, the juvenile court may order that the two be jointly and severally liable for paying restitution [*In re S.S. (1995) 37 Cal. App. 4th 543, 550-551, 43 Cal. Rptr. 2d 768* ; *cf.* *People v. Campbell (1994) 21 Cal. App. 4th 825, 832-834, 26 Cal. Rptr. 2d 433* (same holding in adult context under former version of *Penal Code § 1203.1*); *People v. Zito (1992) 8 Cal. App. 4th 736, 744, 10 Cal. Rptr. 2d 491* (same holding under former *Gov. Code § 13967*)]. Another court, however, has held that the order may be made only in conjunction with a prison commitment, and not as a condition of probation [*People v. Arnold (1994) 27 Cal. App. 4th 1096, 1098-1100, 33 Cal. Rptr. 2d 35]* .

[7] Parental Liability

[a] In General

Any act of willful misconduct of a minor that results in injury or death to another person or in injury to the property of another must be imputed to the parent or guardian having custody and control of the minor. The joint and several liability may not exceed $25,000 for each tort of the minor [*Civ. Code § 1714.1(a)*]. Unlike restitution orders imposed upon their children, payments accepted by victims from the insurer of a parent or guardian will release the parent of guardian from liability for restitution. This is because the state's interest in the rehabilitation of juvenile offenders is not implicated by a release of vicarious liability against an otherwise innocent parent [*In re Michael S. (2007) 147 Cal. App. 4th 1443, 1451-1453, 54 Cal. Rptr. 3d 920*].

[b] Injury Caused by Discharge of Firearm

Civil liability for death or injury to a person or injury to property caused by the discharge of a firearm by a minor must be imputed to the parent or guardian of the minor in an amount not exceeding $30,000 for one victim or $60,000 for all person's injured as a result of one occurrence [*Civ. Code § 1714.3*].

[c] Graffiti-Related Offenses

In addition to restitution costs, parents and guardians may be ordered by the court to keep damaged property or other specified property free of graffiti for various periods of time when their child has been found to have committed certain graffiti-related offenses [*Penal Code §§ 594, 594.1, 594.6, 594.8, 640.5*, and *640.6*]. Participation in this graffiti abatement program is not required if the court deems such involvement to be detrimental to the minor, or if the parent or guardian is a single parent who mustcare for young children [*Penal Code §§ 594(c)*, 544.1(f), *594.6(b), 594.8(b), 640.5(a)(2), 640.5(b)(2), 640.5(c)(2), 640.6(a)(2), 640.6(b)(2), 640.6(c)(2)*; *Veh. Code §§ 13202.6(a)(2)*; *Welf. & Inst.*

Code § 729.1(a)(2)].

For graffiti offenses that result in a court-imposed suspension or delay in a minor's driving privilege, the period of suspension or delay is to be reduced at a rate of one day for each day of community service performed by the minor and their parent or guardian under this graffiti abatement program [*Veh. Code § 13202.6(a)(2)*; *see also* discussion in *§ 329.94[9]*]. The suspension is to be reduced only when the specified period of participation has been completed [*Veh. Code § 13202.6(a)(2)*].

[d] Appealability

A parent or guardian who is ordered to pay an amount pursuant to a restitution order resulting from a delinquent act committed by their child has a right of appeal from the order making them liable [*In re Michael S. (2007) 147 Cal. App. 4th 1443, 1448-1451, 54 Cal. Rptr. 3d 920*]. This is because judgments made pursuant to *Civil Code § 1714.1*, which is specifically incorporated by *Welf. & Inst. Code § 730.7*, are appealable [*In re Michael S. (2007) 147 Cal. App. 4th 1443, 54 Cal. Rptr. 3d 920*].

California Forms of Pleading and Practice--Annotated

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Chapter 329 JUVENILE COURTS: DELINQUENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
G. Disposition of Ward

28-329 California Forms of Pleading and Practice--Annotated § 329.96

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§ 329.96 Orders Limiting Control of Minor by Parent or Guardian

[1] In General

In all cases in which the minor is adjudged a ward of the court, the court may limit the control to be exercised over the ward by any parent or guardian, including ordering removal of the minor from the family home. The order must clearly and specifically set forth all these limitations [*Welf. & Inst. Code § 726*; *Cal. Rules of Ct., Rule 5.790(b)(2)*].

Specific findings are required for an order removing a minor from the family home [*Welf. & Inst. Code § 726*; *Cal. Rules of Ct., Rule 5.790(d)*]. See discussion in [2], *below*.

[2] Removal From the Family Home

No ward will be taken from the physical custody of a parent or guardian unless, at the hearing, the court finds one of the following [*Welf. & Inst. Code § 726*; *Cal. Rules of Ct., Rule 5.790(d)*]:

- That the parent or guardian is incapable of providing or has failed or neglected to provide proper maintenance, training, and education for the minor.
- That the minor has been tried on probation in such custody and has failed to reform.
- That the welfare of the minor requires that physical custody be taken from the parent or guardian.

The court may adjudge the minor to be a ward of the court, then place the minor in the care, custody, and control of the probation officer for placement in the home with the minor's parents [*see In re Nathan W. (1988) 205 Cal. App. 3d 1496, 1500, 253 Cal. Rptr. 312* (in making placement, juvenile court need not find that continued parental custody would be detrimental to minor)].

[3] Placement in Nonsecure Facility

[a] Placement and Group Homes

[i] In General

A ward under *Welf. & Inst. Code § 602* may be placed in a nonsecure institution of the kind described in *Welf. & Inst. Code § 727* [*see Welf. & Inst. Code §§ 207*, commonly referred to as a placement in a family or group home (institutions described in *Welf. & Inst. Code § 727* as required to be nonsecure), 730(a)]. Nonsecure placements include relatives' homes, licensed community care facilities, foster family homes and the homes of nonrelative extended family members, as described in *Welf. & Inst. Code § 727*]. Because these institutions are not places of "physical confinement" described in *Welf. & Inst. Code § 726*, time spent in a nonsecure institution under *Welf. & Inst. Code § 727* is not to be counted in determining, for the purpose of the limitation in *Welf. & Inst. Code § 726*, how long a minor has been or may be held in physical confinement [*In re Randy J. (1994) 22 Cal. App. 4th 1497, 1506, 28 Cal. Rptr. 2d 152* ; *In re Harm R. (1979) 88 Cal. App. 3d 438, 441-442, 152 Cal. Rptr. 167]* . See discussion in *§ 329.96*.

Any minor adjudged to be a ward of the court on the basis of a delinquency petition who is placed in a "community care facility" shall be placed within their count of residence unless 1) they have identifiable needs requiring specialized care that cannot be provided in a local facility or have needs that dictate physical separation from their family, and 2) the county of residence agrees to pay the placement county the costs of providing services to the minor [*Welf. & Inst. Code § 740(a)*]. Before placement in an out-of-county facility may be made, the placing county must notify the receiving county in writing of any gang affiliations or dangerous behavior by the ward along with a plan for his or her supervision and visitation [*Welf. & Inst. Code § 740(b)*].

PRACTICE TIP:

Out-of-State Placements. In lieu of commitments to the Division of Juvenile Justice, many counties utilize out-of-state facilities that do not have to comply with the restrictions and requirements applicable to group homes in California. While many of these placements may still be available, they must now comply with all of the requirements applicable to group homes licensed in this state [*Welf. & Inst. Code § 727.1(a)*]. Courts must also review each out-of-state placement every six months in order to determine compliance [*Welf. & Inst. Code § 727.1(c)*]. Counties may not receive or expend public funds for the placement of a minor in an out-of-state facility which is not in compliance with the California requirements [*Welf. & Inst. Code § 727.1(d)*]. As a result, fewer of these facilities will be available as Youth Authority alternatives. Additionally, minors previously committed to these facilities may be removed from them if compliance with the state regulations is unsatisfactory. If a minor is removed from the placement, the probation officer must promptly return the minor to the court for a hearing to review the suitability of continued out-of-state placement [*Welf. & Inst. Code § 727.1(b)*].

[ii] Visitation

A minor placed out of the home has a fundamental constitutional right to family visitation. This right, and more specifically delegation of the discretionary authority to determine the frequency and circumstances relating to it, must be determined by the court. The common practice of allowing placement facility personnel to exercise discretion in making decisions regarding family visits has been held to be both an abuse of discretion and a violation of the constitutional separation of powers [*In re James R. (2007) 153 Cal. App. 4th 413, 443, 62 Cal. Rptr. 3d 824*].

The *James R.* decision, which applies standards commonly used in dependency cases to delinquency proceedings, will significantly alter the relationship between thecourt, probation, and out of home placements if adopted across the state. Traditionally, rehabilitative programming, which distinguishes most delinquency placements and dispositions, relies heavily on the discretionary authority exercised by administration and staff. At first blush, it would appear that *James R.* dictates micromanaging rehabilitative programming for all out of home placements, including juvenile hall, ranch, camp

and DJF commitments, on the issue of visitation. Upon closer review, this is not the case. It instead appears that *James R.* stands for the proposition that visitation issues can neither be delegated to the sole discretion of facilities nor be allowed to go unchecked. Given the importance of visitation and reunification, as emphasized in *Welf. & Inst. Code § 202*, it must simply be determined on a case-by-case basis, with findings and determinations made by the court, and not a placement facility.

The court may also order the probation department to financially assist a parent's travel to and from visitation when necessary to promote the goal of returning the minor to parental custody. This does not mean that parents are entitled to transportation costs as a matter of constitutional right. It does, however, mean that the broad statutory powers conferred upon the court to make "any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the minor ..." includes the ability to order the payment of travel costs for a parent, so long as "appropriated funds are reasonably available" [*In re L.M. (2009) 177 Cal. App. 4th 645, 650-651* , 99 Cal. Rptr. 33d 350].

[b] Foster Care

[i] In General

Although infrequently utilized as a dispositional alternative, the court may place a minor in foster care under certain limited circumstances. This placement cannot be made as a "punishment" for the purposes of juvenile court law [*Welf. & Inst. Code § 202*]. Specific detailed procedures must be followed for placement, case planning, review, and termination of parental rights for minors in foster care once they have been declared wards of the court pursuant to *Welf. & Inst. Code §§ 601* or *602* [*Welf. & Inst. Code §§ 726.4*, *727.2*, *727.3*, *727.31*, *727.4*].

Generally, the notice of hearing to terminate parental rights [*Welf. & Inst. Code § 366.23*] and the hearing requirements to terminate parental rights [*Welf. & Inst. Code § 366.26*] are the same for dependent children and minors in foster care who have been declared delinquent wards. However, particular steps must be taken by the probation officer [*Welf. & Inst. Code § 628*] and the court before a ward considered for foster care may be detained pending further hearings [*Welf. & Inst. Code §§ 635, 636*]. Specifically, a probation officer who believes a minor is at risk of entering foster care placement is required to make reasonable efforts to prevent or eliminate the need for the removal of the minor from their home [*Welf. & Inst. Code § 628*].

Upon a finding by the court that continuance in the home is contrary to a minor's welfare, the probation officer shall, within 30 calendar days of removal or by the date of the disposition hearing, whichever occurs first, complete a case plan that identifies the strengths and needs of the minor and his or her family, and the services that will be provided to the minor and his or her family in order to reduce or eliminate the need for foster care [*Welf. & Inst. Code § 636.1*]. If the probation officer believes that foster care placement is the most appropriate disposition, the case plan must include all of the information required by *Welf. & Inst. Code § 706.6*.

The probation officer shall when it is determined to be appropriate, make referrals for services to a minor's family in order to prevent or eliminate the need for removal of a minor from his or her home [*Welf. & Inst. Code § 653.5*]. It is also the duty of the probation officer to determine whether reasonable efforts, as described in *Welf. & Inst. Code § 727.4(d)(5)*, have been made to prevent or eliminate the need for removal of a minor from his or her home [*Welf. & Inst. Code § 652*].

If the court has ordered the care of the minor to be under the supervision of the probation officer for foster-care placement, pursuant to *Welf. & Inst. Code § 727(a)*, the court clerk is to issue and serve notice of any hearing on the petition to any foster parents, preadoptive parents, legal guardians, or relatives caring for the minor [*Welf. & Inst. Code §§ 658, 660*].

When foster-care placement is being considered, the probation officer is required to provide a social study which

includes material described in *Welf. & Inst. Code § 727.4* and comments from appropriate local education agencies. The social study must include a case plan, and information about the continuing necessity for and appropriateness of the placement, the extent of the probation department's compliance with the case plan in making reasonable efforts to safety return the minor home, and the educational services the minor is receiving [*Welf. & Inst. Code § 706.5*]. The case plan must either be attached to the social study or be incorporated as a separate section within the social study. If the minor, parent or legal guardian did not participate in the development of the case plan or sign the plan, there must be an explanation about the failure to participate or sign included in the plan [*Welf. & Inst. Code § 706.6*].

When a court orders a minor to be placed under the supervision of the probation officer for foster care placement, the order of priority for placement is "placement with relatives, tribal members, foster family, group care, and residential treatment pursuant to *Section 7950 of the Family Code*." The placement must be a safe setting that is the least restrictive or most family like, in close proximity to the parent's home, and suited to the minor's special needs and interests [*Welf. & Inst. Code § 727.1*]. Once a minor has been declared a ward of the court and placed in foster care, the procedures for review hearings and reunification are set forth in *Welf. & Inst. Code §§ 727.2, 727.3*.

PRACTICE TIP:

Educational Surrogates. Whenever a social study regarding foster care placement of a juvenile ward is submitted to the court, it must address whether the right of a parent or guardian to make educational decisions for the child should be limited. If so, the study must identify whether there is a responsible adult available to make educational decisions for the minor [*Welf. & Inst. Code § 706.5*]. When the court limits the rights of a parent or guardian to make educational decisions, it must appoint a responsible adult to make those decisions [*Welf. & Inst. Code §§ 726, 727.2*]. Such an appointment is to remain in effect until one of the following occurs: (1) the minor reaches the age of 18 and is competent; (2) another responsible adult is appointed; (3) the right of the parent or guardian to make educational decisions is fully restored; (4) a successor guardian or conservator is appointed; or (5) the minor is place into long-term foster care.

[ii] Psychotropic Medication

Effective in 2008, if a ward of the delinquency court is removed from the physical custody of their parent and placed into foster care, only the juvenile court has the authority to make orders regarding the administration of psychotropic medication to the minor. This authority may be delegated to the parent of the minor if the court finds that the parent poses no danger to the minor and has the capacity to administerpsychotropic medications. The court's authority for these orders must be based upon a request from a physician that includes the reasons for the request, a description of the minor's diagnosis and behavior, the expected results of the medication, and a description of the side effects [*Welf. & Inst. Code § 739.5*].

Section 739.5 is virtually identical to *Welf. & Inst. Code § 369.5*, which deals with the administration of psychotropic medication to dependent children who are removed from the physical custody of their parent(s). The procedures are now uniform, regardless of the status of a minor.

[iii] Termination of Parental Rights

In any case where a minor has been declared a ward of the court and has been in foster care for 15 of the most recent 22 months, the probation department must follow the procedures in *Welf. & Inst. Code § 727.31* to terminate parental rights unless the department has documented in its file that termination is not in the minor's best interest or the minor's family has not been provided with reasonable efforts necessary to achieve reunification [*Welf. & Inst. Code § 727.32*]. When the court orders a hearing to terminate parental rights, the agency supervising the minor must prepare an assessment that includes information about any current search for an absentee parent, the amount and nature of any contact between the minor and his or her family members since out-of-home placement, an evaluation of the minor's medical,

developmental, scholastic, mental, and emotional status, and a preliminary assessment of the eligibility and commitment of any prospective adoptive parent or guardian [*Welf. & Inst. Code § 727.31*].

[4] Placement in Secure Facility

[a] Time Limits

In any case in which the minor is removed from the physical custody of the parent or guardian as a result of an order of wardship under *Welf. & Inst. Code § 602*, the order must specify and note in the minutes the maximum period of confinement under *Welf. & Inst. Code § 726* [*Cal. Rule of Ct., Rule 5.795(b)*]. "Physical confinement" means placement in a juvenile home, ranch, camp, or forestry camp, or in any institution run by the Department of Juvenile Facilities. The court may retain the minor on probationary status for the period in which it retains jurisdiction [*Welf. & Inst. Code § 726*].

Minors who are placed in group or foster homes, or other nonsecure placements are not considered "confined" within the meaning of *Welf. & Inst. Code § 726*, and therefore may remain there beyond the maximum term of confinement, up until the termination of juvenile court jurisdiction [*Welf. & Inst. Code § 726*; *In re Randy J. (1994) 22 Cal. App. 4th 1497, 1506, 28 Cal. Rptr. 2d 152]* .

PRACTICE TIP:

Escape From Group Home Facilities. Privately run group home facilities and institutional placements are not listed within the county facilities from which a minor's escape can result in a violation of *Welf. & Inst. Code § 871*. Minors leaving these facilities may face consequences such as placement or probation failures but should not, without additional conduct, face a new delinquency petition [*In re Jason G. (1996) 46 Cal. App. 4th 1017, 54 Cal. Rptr. 2d 255]* .

[b] Required Review Hearing

The case of a ward removed from custody of a parent and placed in a nonsecure facility pursuant to *Welf. & Inst. Code § 727* must be set for a review hearing within six months after the date of the order removing custody, and within six months after each review so long as the child remains out of the custody of the parent or guardian. There must be a permanency planning hearing within 18 months of the order removing custody and periodically, but no less frequently than every 18 months during the period of placement. The hearings may be nonappearance [*Cal. Rules of Ct., Rule 5.810(a), (b)*].

[5] Commitment to Juvenile Home, Ranch, Camp, Forestry Camp, or Juvenile Hall

The court may commit the minor to a juvenile home, ranch, camp, or forestry camp. If there is no juvenile home, ranch, camp, or forestry camp within the county, the court may commit the minor to the county juvenile hall [*Welf. & Inst. Code §§ 730(a), 881*; *Cal. Rules of Ct., Rule 5.790(f)(4)*]. These facilities are run by the county and vary in the length of their program. *Welfare and Institutions Code § 730* gives courts broad discretion to make orders and conditions relative to dispositions made to these facilities, including the imposition of specific durations and minimum commitments [*In re Ronny P. (2004) 117 Cal. App. 4th 1204, 1207-1208, 12 Cal. Rptr. 3d 675]* . The minor may not be committed to such a facility for longer than the maximum period of confinement [*Welf. & Inst. Code § 727*]. See discussion in *§ 329.96*.

PRACTICE TIP:

Escape from a County Ranch, Camp, or Forestry Camp. While *Welf. & Inst. Code § 871* describes an offense for minors who escape from certain facilities, or while they are being transported to those facilities, it does not apply to minors who escape from off-site work crews, field trips or activities held outside of the enumerated institutions. While such conduct may be subject to a violation of probation

pursuant to *Welf. & Inst. Code § 777*, it cannot be the basis for a 602 petition absent statutory modification [*In re Antonio F. (2002) 98 Cal. App. 4th 1227* ; *120 Cal. Rptr. 2d 325]* .

[6] Division of Juvenile Facilities (Formerly the Department of the Youth Authority)

[a] Background

While many of the laws governing a commitment to the Department of the Youth Authority still exist, as do the institutions themselves, the agency formerly known as CYA is now the Department of Corrections and Rehabilitation's Division of Juvenile Facilities [*Gov. Code §§ 12838-12838.13*]. This change was the first in a series of proposed changes that came about as a result of a state taxpayer lawsuit, Farrell v. Hickman, which identified significant deficiencies throughout the California Youth Authority. These deficiencies subsequently became the subject of extensive legislative and media scrutiny, as well as reports from the Office of the Inspector General, and resulted in a requirement that the Department submit quarterly status reports on Juvenile Justice Reform throughout the 2005-06 fiscal year.

In January 2005, the State and the plaintiffs agreed to a Stipulated Agreement resolving the Farrell lawsuit. This agreement commits the state to reforming California's juvenile system to a rehabilitative model, as required by *Welf. & Inst. Code § 1700*. At that time, the State was given until November 30, 2005, to file in court its remedial plans for this new model.

On September 1, 2005, the California Department of Corrections and Rehabilitation (CDCR) submitted the first of the mandated quarterly status reports. This report addressed the question posed by the Legislature, whether California needed a state level juvenile corrections entity. The question was answered affirmatively, based on input from juvenile justice experts and professionals at the state and local level, that a state level juvenile corrections system is essential to provide effective rehabilitative treatment for the higher risk/higher need youthful offenders in California.

On December 1, 2005, CDCR submitted the second quarterly status report which is far more comprehensive in scope. In this report, the Division of Juvenile Justice (DJJ) outlined a set of core principles for reforming the state system:

- Safe and secure facilities;
- Effective rehabilitative treatment to reduce recidivism;
- Youth prepared for re-entry to the community and provided opportunities to address personal, social, physical, educational, and vocational needs;
- Victims adequately heard, served, and protected by the juvenile justice system;
- A strengthened juvenile justice continuum, through collaboration with stakeholders, communities, and families;
- Evaluation of program quality, outcomes, and effectiveness.

[b] Promised Reform

[i] In General

According to the CDCR Status Report on Juvenile Justice Reform, submitted on December 1, 2005, four primary areas related to system reform have been addressed with significant changes proposed. Generally, they can be identified as "Gap Analysis," a "Remedial Plan" prepared in response to the Farrell v. Hickman lawsuit, a preliminary "Facilities

Master Plan," and Parole Reform.

[ii] Gap Analysis

As the result of a DJJ survey of various probation departments from around the state, over 70 gaps in the statewide juvenile justice continuum were identified. Generally, these gaps exist in six major categories:

- Mental Health: Mental health treatment, facilities, staff, and appropriate jurisdiction comprised the single most critical gap in juvenile justice services.

- Programs: This second largest category of gaps included aftercare, assessment, services for older youth, wraparound, vocational services and probation officers in schools among other programs identified as needing enhancement in the statewide continuum.

- Facilities: The kinds of gaps in this category were juvenile halls, commitment facilities and multipurpose residential placement-like treatment facilities.

- Statewide Consistency: These reflected gaps in the statewide continuum and/or in the ability to develop an actual continuum of coordinated juvenile justice sanctions and services statewide, and were in the areas of assessment, caseload resources, studying alternatives to residential treatment/placement, and gathering strategic information in a deliberate and thoughtful way.

- Staff: Sufficient staff and staff training across the continuum.

- Funding: Absence of stable, ongoing funding for probation.

[iii] Remedial Plan

Pursuant to the Farrell v. Hickman lawsuit, the State was required to file six remedial plans addressing deficiencies at the Youth Authority. These plans address education, health care, disabilities, sex behavior treatment, safety and welfare, and mental health. At this time, CDCR's Division of Juvenile Facilities has agreed to make the following changes to the institution as a result of these plans:

- Elimination of the "general population." Every youthful offender committed to DJF requires and will be provided the opportunity for rehabilitative treatment to reduce his/her risk to re-offend.

- Reduction in the living unit size on core program units in existing facilities to no more than 38 (current facilities have units with over 60-80 youth). New facility design/construction could reduce size to 20-30.

- Reduction in the living unit size on mental health treatment programs to no more than 30, with enhanced staffing and the use of licensed mental health professionals.

- Gender specific services, including the possibility of contracting services outside of the Department's facilities for female offenders committed to DJF.

- Enhanced staffing coverage for custody/behavior management functions to ensure a safe environment and promote a "normative culture" with restorative justice principles.

- Contracts for specific treatment interventions in the short term.

- Development of new treatment-oriented classifications in the long term.

- Several additional residential mental health programs over several years.

- Improved services to youth on suicide watch and those requiring acute care to national standards.

- Re-entry planning incorporated into youthful offenders' individual plans from the time of arrival at DJF.

- Dedicated positions to address the needs of victims and to ensure that victim impact is included in youthful offender programming.

- Intensive and continuous staff training, support and monitoring.

- Recording, tracking and reporting performance and outcome measures using nationally recognized measures.

It is estimated by the State that implementation of this new program model will require phasing in over a four year period. In addition, the department has published specific time lines for certain items, including:

Within the first 18 months:

- Bring in national experts, as described in the stipulated agreement filed November 30, 2005, to assist with continued planning and implementation phases, as well as to develop interim strategies to address some of the most immediate and pressing concerns.

- Develop a contract for a Risk/Needs Assessment tool and processes to identify offender risk, needs and strengths, allowing for safe and appropriate placement into living units as well as individualized treatment plans designed to reduce offenders' risks to re-offend.

- Establish objective criteria to identify and separate the most violently disruptive offenders and develop Behavior Treatment Programs to specifically address their violent behavior.

- Convert the use of N.A. Chaderjian (Chad) to a specialized treatment facility. The long term use of all juvenile facilities will be reconsidered as the Facilities Master Plan is phased in.

- Consider contracting for safe and effective programming for female offenders committed to DJF outside of DJF's facilities.

- Begin phasing in the enhanced treatment model in approximately 25% of the living units every year. All existing living units will be converted to the new model within four fiscal years.

- Eliminate Temporary Detention Units by establishing Conflict Resolution Teams, Behavior Treatment Programs and training staff in additional behavior management techniques.

- Implement changes to the disciplinary system to increase the ability for youthful offenders to earn back disciplinary time with good behavior.

- Begin phasing in Victim Services & Restitution Specialists at each facility to address victims

concerns, ensure victim notification, and incorporate victim input into individual treatment plans.

- Begin phasing in Juvenile Court/County Liaisons to facilitate communication with the courts and counties and improve coordination of services statewide.

- Ensure full implementation of Substance Abuse Treatment Programs on existing units.

- Begin construction and renovation of facilities, as approved and authorized by the Legislature.

Within the next five years:

- Statewide risk/needs criteria will be used to determine appropriate commitments to DJF.

- Youthful offenders will be placed into living units that address their level of risk and treatment needs. Gang affiliation will no longer be the primary placement criteria.

- Treatment interventions specifically designed for DJF's population, e.g., long-term violence reduction programs for young adults will be implemented by dedicated treatment staff or contract providers.

- All staff and youthful offenders will promote and maintain a "normative culture."

- As youthful offenders demonstrate a reduction in risk level, they will be moved to lower risk units.

- Certain living units will be designated as re-entry units for offenders who are preparing to return to their communities.

- Certain living units will be designated for parole violators in order to provide shorter-term programming specifically designed to address the reasons they were returned to custody.

[iv] Facilities Master Plan

In addition to the promised changes to the programming and philosophical orientation of the institution, the state has proposed changes to the actual facilities. These changes would convert the existing structures, most of which are over 40 years old, to "state-of-the-art juvenile corrections facilities." This would include:

- Facilities for 150-350 youthful offenders (current facilities were designed for 400 to over 1,000).

- Living units housing 20-30 youth (current facilities have units with over 60-80 youth).

- Living units with appropriate treatment space so youth can receive adequate treatment, instead of being locked in their rooms.

- Eventually, all of the single room living units across the state will need to be replaced or renovated to provide safer, more effective program alternatives. In the interim, enhanced staff will address existing facility deficiencies.

To this end, DJF has proposed an ongoing schedule to replace or significantly renovate most, if not all, of its eight existing facilities, dependent upon legislative authority.

[v] Parole Reform

The final area addressed in the December 1, 2005 Status Report on Juvenile Justice Reform is parole services. Perhaps the most significant proposal in this area is the decision by the state not to attempt a transfer of parole services to the county level. although this transfer was originally proposed by the Governor's Juvenile Justice Working Group in 2004, the state has decided to retain responsibility for parole and aftercare services, for the time being. Nonetheless, the following changes have been proposed by DJJ for parole and aftercare services:

- The development of an assessment tool to assist in determining appropriate sanctions for parolees who violate parole conditions based upon their risk to public safety.

- The introduction of "Re-entry Specialists" to establish re-entry programs and step-down units at each facility to better prepare youthful offenders prior to release.

- Expanded contract aftercare services.

- Developing a "sanction grid" that includes alternative interventions which appropriately address risks and needs of violation behaviors, focusing on the least restrictive alternatives, public safety and increased parolee success.

[c] Realignment

Realizing the state could not afford to comply with the *Farrell* consent decree, in 2007, policymakers acted to reduce the number of youth offenders housed in state facilities by enacting realignment legislation that shifted responsibility to the counties for all but the most serious youth offenders. The counties have long supervised the vast majority of youth involved in the juvenile justice system, with less than two percent of children coming within the provisions and descriptions of *Welf. & Inst. Code § 602* confined in state facilities. However, under realignment, the state has codified which offenders are even eligible for confinement in facilities. In addition, attempts at funding the creation and expansion of county programs that have assumed responsibility for the shifting youth offender population continue as the result of realignment [Little Hoover Commission, *Juvenile Justice Reform: Realigning Responsibilities* (July 2008)].

In January 2009, the State Commission on Juvenile Justice published a Juvenile Justice Operational Master Plan, which articulated specific recommendations for the implementation of the reforms required by the *Farrell* consent decree and mandated by 2007 realignment legislation.

[d] Terminology and Purpose

All prior references to the Department of the Youth Authority are now references to the Division of Juvenile Facilities within the Department of Corrections and Rehabilitation [*Welf. & Inst. Code §§ 1000, 1703*].

The purpose of the Division of Juvenile Facilities is to protect society from the consequences of criminal activity by providing for the secure custody of wards, and to effectively and efficiently operate and manage facilities housing youthful offenders. The purpose of the Division of Juvenile Programs is to provide to youthful offenders comprehensive training, treatment, and rehabilitative services to youthful offenders and is designed to promote community restoration, accountability to victims, and to produce youth who become law-abiding and productive members of society. The purpose of the Division of Parole Operations is to monitor and supervise the re-entry into society of youthful offenders and to promote the successful reintegration of youthful offends into society, in order to reduce the rate of recidivism, thereby increasing public safety [*Welf. & Inst. Code § 1710*].

[e] In General

[i] Commitments

The court may commit the minor to the Department of the Youth Authority Division of Juvenile Facilities (DJF) [*Welf. & Inst. Code § 731*]. No ward of the juvenile court may be committed to the Youth Authority DJF unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that the ward will benefit by the reformatory educational discipline or other treatment provided by the Youth Authority institution [*Welf. & Inst. Code § 734*].

As part of the ongoing reformation at DJF, minors can no longer be committed to the institution unless they have committed an offense described in *Welf. & Inst. Code § 707(b)* or a sex offense specified in *Penal Code § 290(d)(3)*, which has been renumbered to *Penal Code § 290.008(c)* [*Welf. & Inst. Code § 731*]. Minors who have previously been adjudged wards of the court many not be committed to DJF unless the most recent offense admitted or found true is one enumerated in *Welf. & Inst. Code 707(b)* or *Penal Code § 290.008(c)* [*Welf. & Inst. Code § 733*]. Children under the age of 11 and those with contagious or infectious diseases are also ineligible for DJF commitments [*Welf. & Inst. Code § 733*]. If a minor is ineligible pursuant to § 733, DJF is not required to accept them for commitment [*Welf. & Inst. Code § 736*].

Although well intentioned, and clearly effective in reducing the number of minors committed to DJF, the restrictions of *Welf. & Inst. Code § 733* are occasionally problematic for courts faced with limited dispositional options for minors who have committed a § 707(b) offense for which they were not committed to DJF and subsequently reoffend. As noted in a recent case discussing the dilemma, "It is unlikely that the Legislature intended always to bar DJF commitments for juveniles who commit DJF-eligible offenses, who are given a second chance via probation, and who fail to make good on that second chance. ... [T]he purpose of ... Section 733 was to reduce the cost and increase the effectiveness of juvenile confinement by shifting all but the most serious juvenile offenders to county facilities. [cites] This purpose does not support the view that those who commit the offenses the Legislature deemed serious enough for DJF must not be confined there if they first get probation but then violate its terms" [*In re M.B. (2009) 174 Cal. App. 4th 1472, 1478, 95 Cal. Rptr. 3d 359]* .

Whether or not this interpretation is universally held, it appears that courts continue to struggle with the issue. While it is well established that violations of probation filed pursuant to *Welf. & Inst. Code § 777* are "notices" and not "petitions," *Welf. & Inst. Code § 777(a)(2)* covers all probation violations, including those that are criminal in fact [*In re Eddie M. (2003) 31 Cal. 4th 480, 502, 3 Cal. Rptr. 3d 119]* . Still, conflicts arise when petitions filed pursuant to *Welf. & Inst. Code § 602* appear to "block" or prohibit a DJF commitment where a § 707(b) offense has been previously sustained.

The Court of Appeal has upheld DJF commitments in instances where a "freestanding" notice under § 777 was filed even when a 602 petition was subsequently filed and dismissed prior to disposition pursuant to *Welf. & Inst. Code § 782* in the "interests of justice and the welfare of the minor" [In re J.L. (2008) 168 Cal, App. 4th 43, *85 Cal. Rptr. 3d 35]* . However, a DJF commitment based upon a 777 notice when a 602 petition was filed, sustained, and dismissed after the minor had a negotiated disposition imposed on that petition, was considered an abuse of discretion under § 782 [*V.C. v. Superior Court of Sacramento County (2009) 173 Cal. App. 4th 1455, 93 Cal. Rptr. 3d 851]* . In either case, it appears that where a non-707(b) petition has been sustained and disposition imposed between a sustained 707(b) petition and a 777 notice, a DJF commitment violates the statutory mandates of *Welf. & Inst. Code § 733*.

A variation of these scenarios was recently addressed where a probation violation was not alleged in a freestanding 777 notice but in a pleading titled "JUVENILE WARDSHIP PETITION WELF. & INST. CODE 602/777," in which the probation violation was alleged along with an allegation of a "criminal offense." Although the 602 allegation was later dismissed, the probation violation was still alleged in a "petition" and the nature of the allegation related only to conduct that would have amounted to a crime if committed by an adult. In this situation, the DJF commitment based upon that allegation was upheld on appeal [*In re M.B. (2009) 174 Cal. App. 4th 1472, 95 Cal. Rptr. 3d 359]* .

PRACTICE TIP:

DJF Commitments on Violations of Probation. *Welf. & Inst. Code § 733(c)* prohibits a commitment to DJF where "the most recent offense alleged in any petition and admitted or found to be true by the court is not described in subdivision (b) of Section 707." The plain language of this section does not preclude a commitment for a violation of probation pursuant to *Welf. & Inst. Code § 777(a)(2)* when the most recently sustained offense preceding the violation is one described under § 707(b). This is because violations under § 777(a)(2) are, by definition, for conduct "not amounting to a crime," and, as such do not constitute offenses. Further, they are filed in court by way of notice, as opposed to petition.

From a practical standpoint, this has advantages and disadvantages. Ideally, it allows the juvenile court to place youth in alternative placements, in cases where a DJF commitment is a viable option, without fear that the minor would have to commit another § 707(b) offense if the placement is otherwise unsuccessful. This is consistentwith the purpose and intent of recent efforts to limit DJF commitments and encourage alternative placement.

On the other hand, it seems illogical that a commitment to DJF could be made for conduct not amounting to a crime, and proved with reliable hearsay and by a preponderance of the evidence [*Welf. & Inst. Code § 777(c)*; *In re Eddie M. (2003) 31 Cal. 4th 480, 491, 3 Cal. Rptr. 3d 119]* when it is prohibited for certain felony offenses, including some that would qualify as strikes under the "Three Strikes" law if committed by an adult.

The situation is complicated further if this incongruity is resolved by the use of *Welf. & Inst. Code § 782,* if there are intervening § 602 petitions for non-§ 707(b) offenses, which authorizes the juvenile court to set aside findings and dismiss a petition "if the court finds that the interests of justice and the welfare of the minor require such dismissal." Child advocates will generally take issue with the notion that the welfare of the minor would ever benefit from a DJF commitment. However, as described above, in situations where a minor is not committed to DJF upon the commission of a § 707(b) offense and alternative placement is attempted, perhaps repeatedly, it would seem that those efforts, taken in context, would support the use of § 782 in this fashion both in the interests of justice and for the minor's welfare.

The limitation of DJF commitments to *Welf. & Inst. Code § 707(b)* and *Penal Code § 290.008(c)* offenders also applies to individuals who are found unfit for juvenile court. In order for an unfit minor to be committed to DJF, he or she must be convicted of an offense described in *Welf. & Inst. Code § 707(b)* or *Penal Code § 290.008(c)* [*Welf. & Inst. Code § 1731.5*].

Although the primary purpose of *Welf. & Inst. Code § 707(b)* originally related to the determination of fitness for minors over the age of 16, it is well established that the list of enumerated offenses has multiple purposes. Among those purposes is the designation of certain offenses, committed by minors of any age, a § 707(b) offense pursuant to a commitment to the California Youth Authority DJF. Consequently, repeated challenges to such commitments made by minors under 16 years of age have not been successful on appeal [*In re Veronique P. (2004) 119 Cal. App. 4th 195, 14 Cal. Rptr. 3d 125* ; *In re Tino V, (2002) 101 Cal. App. 4th 510, 124 Cal. Rptr. 2d 312* ; *In re Julian O. (1994) 27 Cal. App. 4th 847, 32 Cal. Rptr. 2d 193]* .

PRACTICE TIP:

Findings re: 707(b) Offenses. While § 707(b) enumerates a list of specific crimes and circumstances that are predicated upon sustained charges, it appears that the facts underlying the offense, as determined by the court, as opposed to the sustained charge, may determine whether or not a 707(b) finding can be made [*In re Gary B. (1998) 61 Cal. App. 4th 844, 846-849, 71 Cal. Rptr. 2d 824]* . In fact, the juvenile court is entitled to base its 707(b) determination on facts presented during the trial or at the disposition hearing as established by a preponderance of the evidence [*In re Emilio C. (2004) 116 Cal. App. 4th*

1058, 11 Cal. Rptr. 3d 85 ; In re Gary B., *above, 61 Cal. App. 4th at p. 850*]. Consequently, serious consideration should be given to the factual basis stipulated to in support of an admission or material received into evidence for the purpose of determining disposition.

[ii] Time of Confinement

The court may not commit a minor to the Youth Authority DJF if sentenced to imprisonment for 90 days or less, or to the payment of a fine, or is subject to imprisonment for more than 90 days for defaulting on paying a fine that has been ordered [*Welf. & Inst. Code § 1731.5*; *see also Welf. & Inst. Code §§ 1732.4, 1735*]. A minor may not be held in physical confinement at DJF for a period of time in excess of the maximum period of imprisonment that could be imposed on an adult convicted of the offense that brought the minor under the jurisdiction of the juvenile court [*Welf. & Inst. Code § 731*; *see Welf. & Inst. Code § 726*; *Cal. Rules of Ct., Rule 5.795(b)*]. For discussion of how the maximum term is calculated, see *§ 329.97*.

Welf. & Inst. Code § 731 was recently amended to further limit the time a minor may be held in physical confinement to a period of time not in excess of "the maximum term of physical confinement set by the court based upon the facts and circumstances of the matter or matters which brought or continued the minor under the jurisdiction of the juvenile court, which may not exceed the maximum period of adult confinement as determined pursuant to this section" [*Welf. & Inst. Code § 731(b)*]. This new language appears to authorize requires the court to set the maximum time of confinement based on the offense and the minor's history, in much the same way that the court in an adult criminal case would weigh aggravating and mitigating factors in selecting the low-, middle-, or high-term of a crime that had a range of possible sentences. This authority, which gives the juvenile court the discretion to set the maximum confinement time at less than the lengthiest term an adult would serve for the same offense, does not allow for the imposition of a term less than the minimum adult term [*In re Joseph M. (2007) 150 Cal. App. 4th 889, 896, 58 Cal. Rptr. 3d 756*]. The court's discretion to set a term of physical confinement to a term less than the maximum imposable term is not limited to the options available under the determinate sentencing law "triad" set by *Penal Code § 1170*. The juvenile court operates under an indeterminate disposition scheme in which the minor's release date and term of confinement are determined by the Board of Parole Hearings, subject to the "ceiling" imposed by the committing court. This means, at a minimum, that the court may impose any maximum time within the range of statutory options available for the offense committed [*In re H.D. (2009) 174 Cal. App. 4th 768, 94 Cal. Rptr. 3d 627* ; *In re R.O. (2009) 176 Cal. App. 4th 1493, 98 Cal. Rptr. 3d 738]* .

The amendment to *Welf. & Inst. Code § 731* requires the court to tailor the commitment term to the facts and circumstances of the case before it. Consequently, there is now less likelihood of arbitrary treatment in DJF cases than there was before the amendment [*In re Sean W. (2005) 127 Cal. App. 4th 1177, 1188, 26 Cal. Rptr. 3d 248]* . Recent decisions, stressing the importance of a committing court's interest in, and particularized knowledge of, the minors receiving a commitment to the Division of Juvenile Facilities require that a specific term be set and that the record reflect that the court has considered facts and circumstances related to the case in setting that term [*In re Jacob J. (2005) 130 Cal. App. 4th 429, 437-438, 30 Cal. Rptr. 3d 255* ; *In re Carlos E. (2005) 127 Cal. App. 4th 1529, 1542-1543, 26 Cal. Rptr. 3d 551]* .

Welf. & Inst. Code § 726(c) and *Cal. Rules of Ct., Rule 5.795(b)* require that the court "specify" the maximum period of confinement. Nothing in either the statute or rule requires that the pronouncement be done orally by the court. Unlike adult criminal sentencing proceedings, an oral pronouncement of the maximum period of confinement accompanied by a statement of reasons is not required. A written statement of the maximum period of confinement, accomplished through the completion of Judicial Council form JV-732 is sufficient. Further, where the record is silent as to whether the court considered the relevant facts and circumstances when setting the minor's confinement period, it is presumed that the court performed its statutory duty and was aware of the discretion provided pursuant to *Welf. & Inst. Code § 731(c)* [*In re Julian R. (2009) 47 Cal. 4th 487, 97 Cal. Rptr. 3d 790]* .

PRACTICE TIP:

***Cunningham* Does Not Apply.** *Cunningham v. California (2007) 549 U.S. 270, 127 S. Ct. 856* , determined that California's determinate sentencing law violates a defendant's right to trial by jury safeguarded by the *Sixth* and *Fourteenth Amendments* insofar as it permits a court to impose an upper term sentence based on facts found by the court and established only by a preponderance of the evidence. While *Welf. & Inst. Code § 731(c)* directs that a minor's theoretical maximum time of confinement cannot exceed an adult's for the same offense, there is nothing in the section that requires the court to follow adult sentencing procedures in imposing a maximum term. To the contrary, adult sentencing law provides for determinate terms for punishment while juvenile law provides for indeterminate terms to rehabilitate. To this end, juvenile "max time" is simply an outside time limit on a DJF commitment and not a specific term of confinement. Thus considered, neither the aggravating/mitigating circumstance scheme nor the restrictions enumerated in *Cunningham*, which are applicable to the sentencing of adult felons, are directly applicable to setting "max time" in juvenile cases [*In re Christian G. (2007) 153 Cal. App. 4th 708, 715, 63 Cal.*].

Recent cases have been even more strident in emphasizing the differences between adult sentencing and juvenile disposition proceedings. Reaffirming the inapplicability of *Cunningham* to delinquency proceedings, the court in *In re Alex U. (2007) 158 Cal. App. 4th 259, 69 Cal. Rptr. 3d 695* , stated, "[T]he commitment of the youth, processed through juvenile court, to the [DJJ] for the maximum period under *Welfare and Institutions Code section 731* is in no way the equivalent of the commitment of the adult to prison for the same crime for the upper term based upon aggravation factors. ... The commission of a crime is the only point in common between a ward committed to the DJJ and an adult sentenced to prison [citations]. Since the statutory scheme and case authority 'not only justify but demand a different treatment approach for youths' [there is] no denial of equal protection" [*In re Alex U. (2007) 158 Cal. App. 4th 259, 266]* .

Any minor adjudged a ward of the court for commission of a sexually violent offense, as defined in *Welf. & Inst. Code § 6600*, must be given sexual offender treatment [*Welf. & Inst. Code § 727.2*]. The Department of the Youth Authority Division of Juvenile Facilities must also ensure that each ward who has not attained a high school diploma or the equivalent be enrolled in an appropriate educational program and develop a high school graduation plan [*Welf. & Inst. Code § 1120.1*].

No ward of the juvenile court who is under age 11 or who is suffering from any contagious, infectious, or other disease that would probably endanger the lives or health of other inmates of any state school may be committed to the Youth Authority DJF [*Welf. & Inst. Code § 733*]. The court also may not commit the person to the Youth Authority DJF if the person has been granted probation, unless the probation is revoked and terminated [*Welf. & Inst. Code § 1731.5(a)(3), (4)*].

When the juvenile court commits a minor with exceptional educational needs to the Youth Authority DJF, the court must not order the minor conveyed to the physical custody of the Youth Authority institution until the minor's individualized education program for his or her special needs has been furnished to the Youth Authority DJF [*Welf. & Inst. § 1742*; *see Educ. Code §§ 56026, 56340 et seq.*]. To facilitate this process, the juvenile court must ensure that the probation officer communicates with appropriate staff at the juvenile court school, county office of education, or special education local planning area [*Welf. & Inst. § 1742*]. Failure of the trial court to make specific findings related to a minor's special education requirements, whether the minor has "exceptional needs," prior to a commitment to CYA is reversible error [*In re Angela M. (2003) 111 Cal. App. 4th 1392, 1397-1399, 4 Cal. Rptr. 3d 809]* .

Under certain circumstances, a minor who is committed to the jurisdiction of the Youth Authority Division of Juvenile Facilities will be required to undergo AIDS testing [*see Welf. & Inst. Code § 1768.9*]. Similarly, a minor committed to the Youth Authority DJF may be required to undergo examination, testing, or treatment for tuberculosis [*Welf. & Inst.*

Code § 1768.10].

The Youth Authority Parole Board has been abolished and replaced by the Youth Authority Board within the Department of the Youth Authority [*Welf. & Inst. Code §§ 1716-1723*]. The Youth Authority Board is responsible for discharges of commitment, orders to parole and conditions thereof, revocation or suspension of parole, and disciplinary appeals [*Welf. & Inst. Code § 1719(a)*]. The Department of the Youth authority is responsible for the return of persons to the court of commitment for redisposition, determination of offense category, setting parole consideration dates, conducting annual reviews, treatment program orders, institution placements, return of nonresident persons to the jurisdiction of the state of legal residence, disciplinary decision making, and extension of Youth Authority commitments pursuant to *Welf. & Inst. Code § 1800* [*Welf. & Inst. Code §§ 1719-1729*]. Institutional misconduct by wards is now addressed by a system of graduated sanctions, as implemented the Department of the Youth Authority, distinguishing between minor, intermediate and serious misconduct. Serious misconduct may delay a ward's parole date by up to 12 months and may be appealed to a panel of at least two Youth Authority Board members [*Welf. & Inst. Code § 1719(d)*].

The Department of the Youth Authority Division of Juvenile Facilities must review the case of each ward within 45 days of the ward's arrival and that review must be in writing [*Welf. & Inst. Code § 1720*]. Within 60 days of the commitment to the Youth Authority institution, an initial parole consideration date must be set and notification of that date is to be given to both the probation department and committing juvenile court [*Welf. & Inst. Code § 1731.8*]. In addition, the Department of the Youth Authority DJF is to provide the court and probation department with a treatment plan for each ward within 60 days of intake [*Welf. & Inst. Code § 1766*].

PRACTICE TIP:

Exclusive Authority Over Rehabilitation. Once a minor is committed to the CYA, regulation and supervision of the ward's rehabilitation is a function solely in the hands of the Youth Authority [*In re E. (1979) 23 Cal.3d 398, 400-401, 154 Cal. Rptr. 204, 592 P.2d 720* ; *In re Allen N. (2000) 84 Cal. App. 4th 513, 515, 100 Cal. Rptr. 2d 902]* . This transfer of authority specifically prohibits the court from imposing probation terms and conditions on such minors once a CYA commitment is made [*In re Allen N. (2000) 84 Cal. App. 4th 513, 515-516, 100 Cal. Rptr. 2d 902]* .

[iii] Mandatory Parole Release

All wards committed to DJF must be placed on supervised parole within the period of 120 to 90 days prior to the date of their release from custody pursuant to discharge, or prior to the completion of their maximum period of confinement imposed pursuant to *Welf. & Inst. Code § 1766.2(a)*]. This "mandatory parole release" does not apply when a petition for extended commitment pursuant to *Welf. & Inst. Code § 1800* has been requested by DJF or the Juvenile Parole Board [*Welf. & Inst. Code § 1766.2(b)*]. If parole is revoked pursuant to § 1766.2(a), any term of reconfinement is subject to the limits of Sections 731, 1769, 1770, or 1771 [*Welf. & Inst. Code § 1766.2(c)*].

[iv] Recall of Commitment

Effective September 1, 2007, the court committing a ward to the Division of Juvenile Facilities may, upon the recommendation of the chief probation officer of the county, recall the commitment if the committing offense is not one listed in *Welf. & Inst. Code § 707(b)* or a sex offense described in *Penal Code § 290.008(c)* [*Welf. & Inst. Code § 731.1*]. Upon recall of the ward, the court shall set and convene a recall disposition hearing for the purpose of ordering an alternative disposition for the ward that is appropriate under all of the circumstances prevailing in the case. The specific details related to notice, timing, and procedure of the recall hearing, as well as transportation, delivery, and housing of the ward pending the hearing are set forth in *Welf. & Inst. Code § 731.1* [*see also In re Carl N. (2008) 160 Cal. App. 4th 423, 436-437, 72 Cal. Rptr. 3d 823]* .

The recall procedure established by *Welf. & Inst. Code § 731.1* is the appropriate mechanism through which minors who have been committed to DJF, for offenses that would now prohibit such a commitment, may be recalled. Minors are not automatically entitled to new disposition hearing and the restrictions on commitments as specified under *Welf. & Inst. Code § 731.1* and § 733 are not retroactive [*In re Brandon G. (2008) 160 Cal. App. 4th 1076, 73 Cal. Rptr. 3d 273* ; *In re Carl N. (2008) 160 Cal. App. 4th 423, 72 Cal. Rptr. 3d 823]* .

PRACTICE TIP:

Probation Supervision of Recall Cases. When a minor is recalled from the Division of Juvenile Facilities pursuant to *Welf. & Inst. Code § 731.1*, a question may arise as to the length of physical confinement time remaining in the case. This is especially important if the committing court established a time of commitment, pursuant to *Welf. & Inst. Code § 731*, which represents a significant reduction from the previously established maximum time of confinement pursuant to *Welf. & Inst. Code § 726*.

While it could be argued that in cases where minors are recalled pursuant to § 731.1 probation is essentially assuming the function previously reserved for DJF parole, in which case the maximum time established by *Welf. & Inst. Code § 731* would correctly represent the remaining confinement time, this position in neither legally sound nor appropriate from a practical standpoint. The recall procedure clearly articulates the need for a new disposition hearing, suggesting that the minor is coming back to court in a position similar to that prior to the DJF commitment, and not as a DJF parolee. Further, a minor recalled from DJF is not paroled from the facility. Finally, restricting the court to disposition options based upon commitment time that assumed placement in DJF would deprive the court of the widest range of appropriate options assisting in the minor's rehabilitation and community safety. Therefore, it would appear that upon the completion of the disposition hearing held pursuant to § 731.1, the court should reestablish the appropriate maximum time of confinement pursuant to *Welf. & Inst. Code § 726*, which may of course take into account the entirety of the minor's conduct and custody credits.

[f] Authority to Stay or Suspend Youth Authority State Commitment

There is a split of authority on whether the juvenile court may impose a "stayed" or "suspended" Youth Authority commitment. Some appellate courts have held or implied that a stayed or suspended sentence is unauthorized in juvenile court [*In re Babak S. (1993) 18 Cal. App. 4th 1077, 1084, 22 Cal. Rptr. 2d 893* ; *In re Ronnie P. (1992) 10 Cal. App. 4th 1079, 1086-1090, 12 Cal. Rptr. 2d 875]* . Other appellate courts have held that the juvenile court may impose a stayed or suspended Youth Authority sentence, as long as it does not determine in advance that if a lesser alternative fails, a Youth Authority commitment will become the optimal disposition. Rather, if a particular disposition fails, the court on a supplemental petition, as discussed in *§ 329.90* et seq., must reassess the dispositional issues in light of then-prevailing circumstances [*In re Domanic B. (1994) 23 Cal. App. 4th 366, 371, 28 Cal. Rptr. 2d 439* ; *In re Kazuo G. (1994) 22 Cal. App. 4th 1, 5, 27 Cal. Rptr. 2d 155]* .

[g] Civil Commitment Under Welf. & Inst. Code § 1800

The juvenile Extended Detention Act (EDA) allows the state to extend the detention of a ward beyond the date the Division of Juvenile Facilities' (formerly the California Youth Authority) jurisdiction would normally expire when the ward is determined, beyond a reasonable doubt, to be physically dangerous to the public because of a mental or physical deficiency, disorder, or abnormality that causes the person to have serious difficulty controlling his or her behavior [*Welf. & Inst. Code § 1801.5*]. To initiate a commitment under the EDA, the Division of Juvenile Facilities (DJF) must request, and the prosecuting attorney *may* file, a petition requesting that the ward's detention be extended [*Welf. & Inst. Code § 1800* (emphasis added)].

The petition must be filed at least 90 days before the time of discharge otherwise required [*Welf. & Inst. Code § 1800*]. If the court determines that the petition, on its face, supports a finding of probable cause that the discharge of the CYA

ward would be physically dangerous to the public because of the ward's mental or physical deficiency, disorder, or abnormality, the court must order that a probable cause hearing be held. The probable cause hearing is an evidentiary hearing that must be held with ten calendar days of the court's probable cause finding, unless the ward waives time [*Welf. & Inst. Code § 1801*]. If the court finds there is not a sufficient probable cause showing, the petition is dismissed and discharge of the ward must occur within the time allowed by statute. Upon a finding of probable cause, the ward has a right to a trial by jury. The standard of proof at trial remains beyond a reasonable doubt [*Welf. & Inst. Code § 1801.5*].

In any case where the Division of Juvenile Facilities has not made a request of the prosecuting attorney for an extension of commitment pursuant to *Welf. & Inst. Code § 1800*, the Youth Authority Board may request the Director of the Youth Authority to review the matter. If the mental health professional designated by the Director to review the case disagrees that the Authority's control over the ward should be extended, the Board may a request may be made of the prosecutor to petition the court for an order directing that the ward remain subject to the control of the Youth Authority institution [*Welf. & Inst. Code § 1800.5*].

Welf. & Inst. Code § 1801.5 unambiguously affords all federal and state constitutional rights to juveniles facing an extended commitment pursuant to § 1800 that apply to adult criminal proceedings [*Joshua D. v. Superior Court (2007) 157 Cal. App. 4th 549, 556, 68 Cal. Rptr. 3d 715]* . Specifically, the right of a defendant not to be called as a witness, and the mandatory jury instruction advising that no adverse inference may be drawn from the exercise of that right, are as applicable to the civil commitments as they are to adult criminal trials. It should be noted that, for all of their similarities, the two jury proceedings are not identical and perceptions as to their differences, particularly related to standard of "dangerousness," may make made § 1800 commitments vulnerable to constitutional challenge on due process grounds [*In re Luis C. (2004) 116 Cal. App. 4th 1397, 1399-1403 , 11 Cal. Rptr. 3d 429]* . Nonetheless, the EDA has repeatedly been found to have a demonstrably civil purpose and that confinement, in furtherance of that purpose, is imposed only for treatment [*In re Brian J. (2007) 150 Cal. App. 4th 97, 135, 58 Cal. Rptr. 3d 246* ; *In re Gary W. (1971) 5 Cal. 3d 296, 301, 96 Cal. Rptr. 1*]. To that end, if a person confined under the EDA does not receive treatment, they may seek relief through habeas corpus procedures [*In re Gary W. (1971) 5 Cal. 3d 296, 303, 96 Cal. Rptr. 1, 486 P.2d 1201*].

The California Supreme Court addressed the extended detention scheme and determined that it was constitutional through an interpretation that requires not only that a person is physically dangerous to the public because of his or her mental deficiency, disorder, or abnormality, but also that the mental deficiency, disorder, or abnormality causes serious difficulty controlling his or her dangerous behavior [*In re Howard N. (2005) 35 Cal. 4th 117, 135, 24 Cal. Rptr. 3d 866]* . The *Howard N.* court further held that these requirements be alleged in the petition for extended commitment, demonstrated at the probable cause hearing, and provided at any ensuing trial [*In re Howard N. (2005) 35 Cal. 4th 117, 135, 24 Cal. Rptr. 3d 866, 106 P.2d 305* ; *In re Michael H. (2005) 128 Cal. App. 4th 1074, 1091, 27 Cal. Rptr. 627*].

The required finding that a ward's mental deficiency, disorder, or abnormality causes him or her to have serious difficulty controlling his or her behavior has since been codified in an amended statutory scheme for extended commitment petitions [*Welf. & Inst. Code §§ 1800, 1800.5, 1801, 1801.5*]. This current version of the EDA, amended in light of *Howard N.*, has been found to be constitutional by the California Supreme Court [*In re Lemanuel C. (2007) 41 Cal. 4th 33, 43-49, 58 Cal. Rptr. 3d 597*]. Moreover, recent appellate court interpretation of the section, implying that the EDA has an added requirement that an individual's difficulty in controlling their dangerous behavior must result in a serious and well-founded risk of reoffense, is incorrect. The "serious and well-founded risk of reoffense" language, which is found in some cases discussing the adult civil commitment statutes for sexually violent predators and reflected in *CALCRIM No. 3454*, is not a required finding for an extended commitment [*In re Lemanuel C. (2007) 41 Cal. 4th 33, 46 , disapproving In re Michael H. (2005) 128 Cal. App. 4th 1074, 27 Cal. Rptr. 3d 627*].

When an extended commitment order resulting from a trial held pursuant to *Welf. & Inst. Code § 1801.5* is reversed on

appeal for failure of proof, retrial is barred by *Welf. & Inst. Code § 1803*. If the principles of double jeopardy were not applicable under these circumstances, the state could theoretically keep a person confined indefinitely without ever proving that the defendant is unable to control their dangerousness [*In re Anthony C. (2006) 138 Cal. App. 4th 1493, 1517, 42 Cal. Rptr. 3d 370]* .

A person committed under *Welf. & Inst. Code § 1800* is not subject to release on parole by the Division of Juvenile Parole (DJP). However, DJP is authorized to conditionally release an individual during the extended commitment period pursuant to *Welf. & Inst. Code § 1766* [*In re Donald Schmidt (2006) 143 Cal. App. 4th 694, 49 Cal. Rptr. 3d 477]* .

[h] Remand by Adult Court for Diagnostic Evaluation

If the minor is eligible for a Youth Authority commitment to the Division of Juvenile Facilities, the court may remand the minor to the custody of the Youth Authority institution for a period of up to 90 days for an evaluation and report concerning his or her amenability to the training and treatment offered by the Youth Authority. If, after considering the recommendation of the probation department, the adult court decides not to remand for a report and evaluation of the minor's amenability to the Youth Authority DJF, specific findings must be made. However, a remand to the Youth Authority institution for an evaluation and report regarding amenability to their treatment and training is mandatory prior to imposing a prison sentence for any minor who was under the age of 16 when he or she committed the offense [*Welf. & Inst. Code § 707.2*].

[i] Transfer to the California Department of Corrections and Rehabilitation

Any person over the age of 18 who is scheduled to be returned, or has been returned, from the California Department of Corrections and Rehabilitation (CDCR) after serving a sentence imposed for committing a felony while in the custody of the Youth Authority Division of Juvenile Facilities may be transferred back to CDCR, if that person consents in writing to the transfer. This applies specifically to those offenders who remain under the jurisdiction of the Youth Authority DJF after they have served a CDCR sentence for offenses committed after their 18th birthday [*Welf. & Inst. Code § 1732.8*].

[7] Commitment to Facility for Emotionally Disturbed

If a minor between the ages of 12 and 18 is determined to be seriously emotionally disturbed, has been adjudged a ward of the court pursuant to *Welf. & Inst. Code § 602*, and has been placed on probation under the supervision of a probation officer, he or she may alternatively be placed in a regional facility for the emotional disturbed [*Welf. & Inst. Code § 5696(a)*; *see Welf. & Inst. Code §§ 5695-5697.5*; *see also Welf. & Inst. Code § 727* (probation)]. To be eligible, the minor should be found to be so seriously emotionally disturbed that he or she is a danger to the community or himself or herself, has severe and frequent symptoms, and has persistent inappropriate behavior [*Welf. & Inst. Code § 5696(b)*].

No minor will be eligible for placement in a regional facility if he or she has aprimary substance abuse problem, a primary developmental disability, requires an acute psychiatric hospital setting, can benefit from or requires a level of treatment or confinement not provided at the facility, suffers from a medical condition requiring ongoing nursing and medical care beyond the level that the program can provide, or is under conservatorship [*Welf. & Inst. Code § 5696.2*]. In any event, no minor may be committed to the facility for more than 18 months [*Welf. & Inst. Code § 5695.2*].

[8] County Jail

There is significant disagreement as to whether a juvenile court may commit a ward to county jail, or house them in county jail pursuant to a juvenile hall commitment. Some jurisdictions have held that such commitments are strictly prohibited as they are not authorized as a dispositional option pursuant to *Welf. & Inst. Code § 202(e)*. This prohibition has been held to be specifically applicable to wards who have reached the age of 18 years prior to the disposition

hearing [*In re Jose H. (2000) 77 Cal. App. 4th 1090, 92 Cal. Rptr. 2d 228* ; *In re Kenny A. (2000) 79 Cal. App. 4th 1, 93 Cal. Rptr. 2d 678]* .

Recent case law has disagreed with this reasoning by finding that *Welf. & Inst. Code § 727* authorizes housing certain wards in juvenile hall and then transferring them to county jail upon the recommendation of the probation officer. Specifically, by authorizing the court to punish a delinquent minor "subject to further order of the court" and to make appropriate orders pursuant to section 727 "for the period permitted by Section 607" (§ 726), i.e., until the ward "attains the age of 21 years" or, in some cases, "until that person attains the age of 25 years if the person was committed to the Department of the Youth Authority" (§ 607, subds. (a) & (b)), the Legislature has expressed an intention to authorize a juvenile court to impose a new order of punishment when a ward who has become an adult violates a condition of probation [*In re Charles G. (2004) 115 Cal. App. 4th 608, 615, 9 Cal. Rptr. 3d 503]* .

While the court in Charles G. was dealing with a 20-year-old ward and, as such, relied upon *Welf. & Inst. Code § 208.5* which specifically mandates the transfer of wards 19 and older to the custody of the sheriff, upon the recommendation of the probation officer, for the remainder of the time they remain in custody, the application of the court's reasoning would seem to apply to 18-year-olds as well [*Id. at pp. 613-614*]. At a minimum, by disagreeing with the Sixth Appellate District decisions in Jose H. and Kenny A., the Third Appellate District has created a bright line division on the issue of housing juvenile wards in county jail once they have attained the age of 19.

At this time, it appears well settled that the statutes do not allow the court to commit an 18-year-old ward directly to county jail. Detention in county jail is appropriate only until disposition, and the ability of the court to order pre-disposition detention in the facility does not expand the range of disposition alternatives set forth in *Welf. & Inst. Code § 202*. However, the proper procedure for detention in county jail must begin with an initial placement in a juvenile facility, after which probation may seek an order to allow for housing in county jail pending disposition [*In re Ramon M. (2009) 178 Cal. App. 4th 665, 101 Cal. Rptr. 3d 158]* .

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Chapter 329 JUVENILE COURTS: DELINQUENCY PROCEEDINGS
PART II. LEGAL BACKGROUND
G. Disposition of Ward

28-329 California Forms of Pleading and Practice--Annotated § 329.97

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§ 329.97 Calculating Maximum Term of Confinement

[1] In General

When the minor is removed from the physical custody of his parent or guardian as the result of an order of wardship made pursuant to *Welf. & Inst. Code § 602* (criminal violations), the disposition order must specify the maximum period of confinement determined in accordance with *Welf. & Inst. Code § 726* [*Cal. Rules of Ct., Rule 5.795(b)*]. "Maximum term of imprisonment" is calculated by using the upper term for both the substantive offense and any enhancement that has been found true [*In re George M. (1993) 14 Cal. App. 4th 376, 381-382, 18 Cal. Rptr. 2d 29]* . *Penal Code § 12022.1*, which increases the period of imprisonment for a felony committed while an adult offender is free on bail or his or her own recognizance (O.R.) applies to extend the maximum period of "physical confinement" of a juvenile ward [*In re Jovan B. (1993) 6 Cal. 4th 801, 25 Cal. Rptr. 2d 428, 863 P.2d 673* ("maximum term of imprisonment" under *Welf. & Inst. Code § 726* incorporates the determinate sentencing law for adult offenders, including *Penal Code § 12022.1*; minor's pretrial "house arrest" release is functional equivalent of O.R. release in adult proceeding)]. Full, consecutive terms also are included in the calculation, if they would be applicable to an adult offense [*In re Prentiss C. (1993) 14 Cal. App. 4th 1484, 1488, 18 Cal. Rptr. 2d 541* (court properly considered full, consecutive terms for sex crimes under *Penal Code § 667.6*, as is done in adult cases)]. *Penal Code § 12022.1*, which increases the period of imprisonment for a felony committed while an adult offender is free on bail or his or her own recognizance (O.R.) may be applied to extend the maximum period of "physical confinement" of a juvenile ward [*In re Jovan B. (1993) 6 Cal. 4th 801, 25 Cal. Rptr. 2d 428, 863 P.2d 673]* .

Welf. & Inst. Code § 726 specifically defines "physical confinement" as excluding time not spent in a secure facility [*In re Lorenzo L. (2008) 163 Cal. App. 4th 1076, 78 Cal. Rptr. 3d 150]* . Consequently, time spent in a nonsecure institution under *Welf. & Inst. Code § 727*, such as a private institutional placement or group home, is not to be counted in determining how long a minor has been or may be held in physical confinement [*In re Randy J. (1994) 22 Cal. App. 4th 1497, 1506, 28 Cal. Rptr. 2d 152* ; *In re Harm R. (1979) 88 Cal. App. 3d 438, 441-442, 152 Cal. Rptr. 167]* .

Similarly, time spent on "house arrest" or electronic monitoring does not entitle a minor to receive custody credits for the purposes of calculating maximum time of confinement [*In re Lorenzo L. (2008) 163 Cal. App. 4th 1076, 78 Cal. Rptr. 3d 150]* .

Because minors and adults are not similarly situated with respect to their interest in liberty, and because minors adjudged wards of the juvenile courts and committed to the Youth Authority and adults convicted in criminal court and sentenced to prison are not confined for the same purposes, *Welf. & Inst. Code § 726* does not deny minors equal protection of the law by providing that the maximum term of confinement for a juvenile is the longest term that could be imposed imposable on an adult for the same offense, without the necessity of finding circumstances in aggravation of the crime justifying imposition of the upper term as is required in adult criminal procedure [*In re J. (1979) 25 Cal. 3d 522, 532-533, 159 Cal. Rptr. 317, 601 P.2d 549]* .

To carry out the mandate of *Welf. & Inst. Code § 726(c)* that a juvenile not be held in physical confinement for a period in excess of the maximum term of imprisonment that could be imposed on an adult convicted of the same offenses, a minor is entitled to pre-commitment credit for time spent in juvenile hall pending resolution of the charges against him or her [*In re J. (1979) 25 Cal. 3d 522, 536, 159 Cal. Rptr. 317, 601 P.2d 549]* .

This time is legally distinguishable from "presentence custody credit time," which adult offenders are entitled to, inasmuch as they are not "sentenced" [*In re Pedro M. (2000) 81 Cal. App. 4th 550, 556, 96 Cal. Rptr. 2d 839]* . For this reason, *Penal Code§ 1237.1* does not apply to juvenile proceedings [*In re Antwon R. (2001) 87 Cal. App. 4th 348, 104 Cal. Rptr. 2d 473]* .

Welf. & Inst. Code § 726 incorporates the limitations of *Penal Code § 1170.1(a)* regarding subordinate terms, but not those of *Penal Code § 1170.1(g)* limiting confinement to a double-base term. Thus, the maximum term for a juvenile may exceed a double-base term [*In re Luis H. (1986) 187 Cal. App. 3d 546, 549-550, 231 Cal. Rptr. 722]* . In order to calculate the maximum term, the court may proceed under a supplemental 602 petition and consider prior offenses to aggregate time under *Welf. & Inst. Code § 726* provided that there is adequate notice of the intention to do so and the minor is given a meaningful opportunity to rebut any derogatory material within his or her prior record [*In re Adrian R. (2000) 85 Cal. App. 4th 448, 454, 102 Cal. Rptr. 2d 173* ; *In re Edwardo L. (1989) 216 Cal. App. 3d 470, 478, 265 Cal. Rptr. 188]* . When aggregating multiple counts and previously sustained petitions, the maximum confinement term is calculated by adding the upper term for the principal offense, plus one third of the middle term for each of the remaining subordinate felonies or misdemeanors [*In re J. (1979) 25 Cal. 3d 522, 535-538, 159 Cal. Rptr. 317, 601 P.2d 549* ; *In re Deborah C. (1981) 30 Cal. 3d 125, 140, 177 Cal. Rptr. 852]* .

When the court elects to aggregate the period of physical confinement on multiple petitions, including previously sustained petitions, it may choose to aggregate time on only some, as opposed to all, of those petitions. This may be an option when a minor has exhausted all of their available confinement time on one or more or the previously sustained petitions [*In re Bryant R., Jr. (2003) 112 Cal. App. 4th 1230, 5 Cal. Rptr. 3d 734]* . However, once the maximum time of confinement has been determined on a particular petition, subsequent redeterminations of time on that petition are prohibited [*In re David H. (2003) 106 Cal. App. 4th 1131, 1135-1137, 131 Cal. Rptr. 2d 330]* .

Although a court must exercise its discretion in confining a juvenile for consecutive terms, it need not state its reasons for exercising that discretion [*In re Jesse F. (1982) 137 Cal. App. 3d 164, 168-170, 186 Cal. Rptr. 841]* .

PRACTICE TIP:

Determination of Maximum Time of Confinement. In the event that a party believes that the previously imposed maximum time of confinement was calculated incorrectly, the appropriate remedy appears to come by way of modification pursuant to *Welf. & Inst. Code § 775* This should be done through a formal notice of an application for modification under this section setting forth the basis for the recalculation.

[2] Distinguishing Welf. & Inst. Code §§ 726(c) and § 731(b)

Welf. & Inst. Code § 726(c) provides that if a minor is removed from the physical custody of his or her parent or guardian as the result of an order of wardship made pursuant to section 602, the order shall specify that the minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult convicted of the offense or offenses which brought or continued the minor under the jurisdiction of the juvenile court. This section deals with the maximum term of confinement generally, and is applicable to placement in a juvenile hall, ranch, camp, forestry camp, or secure juvenile home pursuant to *Welf. & Inst. Code § 730,* or in any institution operated by the Division of Juvenile Facilities. Maximum terms specified under this section do not determine the duration of the commitment as much as they place a limit on their potential duration [*In re Ali A. (2006) 139 Cal. App. 4th 569, 573, 42 Cal. Rptr. 3d 846]* .

Welf. & Inst. Code § 731(b) is applicable only to minors committed to the Division of Juvenile Facilities and vests the juvenile court with discretion to commit a minor to DJF for a term less than the maximum term to which an adult offender could be sentenced, based upon the facts and circumstances of the case [*In re Geneva C. (2006) 141 Cal. App. 4th 754, 46 Cal. Rptr. 3d 264]* .

In the context of calculating maximum time pursuant to *Welf. & Inst. Code § 731(b),* it has been noted that the juvenile court operates under an indeterminate disposition scheme that is not limited to the options available under the adult criminal sentencing triad set forth in *Penal Code § 1170.* Therefore, at least pursuant to DJF commitment, the court may impose any maximum time of confinement within the range of statutory options available for the offense committed [*In re H.D. (2009) 174 Cal. App. 4th 768, 94 Cal. Rptr. 3d 627* ; *In re R.O. (2009) 176 Cal. App. 4th 1493, 98 Cal. Rptr. 3d 738]* .

Neither § 726(c) nor § 731(b) is applicable when a minor is not removed from the physical custody of his or her parents, including instances in which the minor is subject to probation supervision [*In re Ali A. (2006) 139 Cal. App. 4th 569, 573, 42 Cal. Rptr. 3d 846]* . Historically, courts have ignored the fact that there is no authority for setting "max time" in all cases, regardless of the non-custodial nature of the disposition, despite repeated warnings of appellate courts to correct the practice. As a result, a recent published opinion ordered the modification of a dispositional order to strike the max time calculation where the minor was placed home on probation [*In re Matthew A. (2008) 165 Cal. App. 4th 537, 541, 81 Cal. Rptr. 3d 119]* .

[3] No Oral Pronouncement Required

While *California Rule of Court Rule 5.795(b)* requires that the court "specify and note in the minutes the maximum period of confinement under [*Welf. & Inst. Code] section 726,*" it does not require an explicit declaration of that finding. This distinction is not a trivial one. The California Supreme Court has determined that such an oral pronouncement is required when finding an offense to be a felony or misdemeanor, as the language of *Welf. & Inst. Code § 702* and *Rule of Court Rule 5.795(a)* requires that the court "expressly declare on the record that it has made such consideration and must state its determination ..." [*In re Manzy W. (1997) 14 Cal. 4th 1199, 1204, 60 Cal. Rptr. 2d 889]* . Neither *Welf. & Inst. Code § 726* nor Rule 5.795(b) has such a requirement.

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§ 329.98 Detention Prior to Disposition

Whenever a person has been adjudged a ward of the juvenile court, the court may order the ward detained in the detention home or, in the case of a ward of 18 years of age or more, in the county jail or otherwise, as the court deems fit, until the execution of the order of commitment or other disposition [*Welf. & Inst. Code § 737(a)*].

In any case in which a minor is detained for more than 15 days pending the execution of the order of commitment or any other disposition, the court must periodically review the case to determine whether the delay is reasonable. The periodic review must be held every 15 days, commencing from the time the minor was initially detained. During the course of each review, the court will inquire regarding the action taken by the probation department to carry out its order, the reasons for the delay andthe effect of the delay on the minor [*Welf. & Inst. Code § 737(b)*; *Cal. Rules of Ct., Rule 5.790(h)*].

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28-329 California Forms of Pleading and Practice--Annotated § 329.99

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§ 329.99 Determination Regarding Degree of Offense

Unless determined previously, the court is required to find, and note in the minutes, the degree of the offense committed by the child, and whether it would be a felony or a misdemeanor had it been committed by an adult [*Welf. & Inst. Code § 702*; *Cal. Rules of Ct., Rule 5.795(a)*]. The requirement that the court make a finding of the degree of the offense can be satisfied by use of a descriptive label as well as by a numerical degree [*In re Andrew I. (1991) 230 Cal. App. 3d 572, 580-581, 281 Cal. Rptr. 570* (court designated degree of offense with statement that offense was "residential burglary"); *see Cal. Rules of Ct., Rule 5.780(e)(5)*].

The juvenile court is permitted to fix the degree of an offense at the disposition hearing [*Cal. Rules of Ct., Rule 5.780(e)(5)*]. This allows the court to take all the dispositional information into account when setting the degree of the crime and to exercise leniency by declaring the offense to be of the lesser degree, despite the fact that the circumstances of the offense alone might justify sustaining the petition for a higher degree [*In re Dorothy B. (1986) 182 Cal. App. 3d 509, 520-521, 227 Cal. Rptr. 472* (construing former Cal. Rules of Ct., Rule 1355; *now see Cal. Rules of Ct., Rule 5.780*); *see also In re Raymond M. (1991) 228 Cal. App. 3d 1508, 1513, 279 Cal. Rptr. 566* (remand for determination of degree of offense when record did not reflect court's recognition or exercise of its discretion to grant leniency in fixing degree); *but see In re Manzy W. (1997) 14 Cal. 4th 1199, 1209, 60 Cal. Rptr. 2d 889, 930 P.2d 1255* (no need to automatically remand where the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor when the minor admitted the offense as a felony and the court accepted the admission as a felony)]. Nevertheless, the juvenile court lacks authority to reduce the degree when evidence establishes that the offense could only be one of the higher degree [*In re Andrew I. (1991) 230 Cal. App. 3d 572, 582-583, 281 Cal. Rptr. 570]* .

Even a felony offense is reduced to a misdemeanor for all purposes at the time that a minor is honorably discharged from the Youth Authority [*see Penal Code § 17(c)*]. *Penal Code § 667(d)(1)* appears to provide that an adult felony conviction is considered a felony thereafter, for "strike" purposes, despite a subsequent disposition, unless it was

reduced to a misdemeanor at the time of sentencing.

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28-329 California Forms of Pleading and Practice--Annotated § 329.100

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§ 329.100 Effect of Adjudication

[1] In General

Since a juvenile court proceeding is not a criminal proceeding, generally, an order adjudging a minor to be a ward of the court will not be considered a criminal conviction in subsequent adult criminal proceedings [*Welf. & Inst. Code § 203*]. Historically, juvenile adjudications have not been considered convictions for any purpose. For this reason, *Cal. Const., art. I, § 28(f)*, which provides that a prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, may be used without limitation for impeachment or sentence enhancement purposes in any subsequent criminal proceeding, has been construed narrowly to only apply to convictions of juveniles in adult criminal courts after finding that the juvenile was unfit for treatment in juvenile court [*People v. West (1984) 154 Cal. App. 3d 100, 106-110, 201 Cal. Rptr. 63* ; *In re Anthony R. (1984) 154 Cal. App. 3d 772, 774-778, 201 Cal. Rptr. 299]* . However, the voters approval of Proposition 184 in November of 1994 put into effect *Penal Code § 1170.12*, which provides that the juvenile adjudication of a minor who was 16 years or older at the time he or she committed a felony offense listed in *Welf. & Inst. Code § 707(b)* on June 30, 1993, may constitute a prior serious or violent felony conviction for the purpose of enhanced sentencing for a subsequent felony conviction under the "Three Strikes You're Out" legislation [*Penal Code § 1170.12* replaced *Penal Code § 667* (effective March 7, 1994); *see* Ch. 328, *Juvenile Courts: Dependency Proceedings*, §§ 328.116, *328.122*; *see also* Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 91 (Matthew Bender)].

PRACTICE TIP:

Plea Bargains. Since the enactment of the "Three Strikes Law" attorneys must be much more careful in arriving at plea bargains in juvenile court. Admissions to offenses that could later be used as a "strike" should be avoided if at all possible. If the offense is a wobbler, the attorney should request that the court set the level at a misdemeanor at disposition.

[2] Subsequent Use and Disclosure

In addition to the consequences of particular juvenile adjudications under the "three strikes" law, a court must consider a minor's arrest history for the purpose of determining whether prior adjudications warrant a finding that there are circumstances in aggravation pursuant to *Pen. Code § 1170* or to deny probation. However, this information does not apply to juvenile records that have been sealed [*Welf. & Inst. Code § 828(a)*; *see also* discussion in *§ 329.123*]. Also, the name of any minor who is 14 years of age or older may be disclosed to the public once there is a finding that the minor has been declared a ward as the result of a sustained petition for the commission of an offense listed in *Pen. Code § 667.5* or *Pen. Code § 1192.7-1192.7(c)* [*Welf. & Inst. Code § 204.5*].

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28-329 California Forms of Pleading and Practice--Annotated §§ 329.101-329.109

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[Reserved]

§§ 329.101[Reserved]

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28-329 California Forms of Pleading and Practice--Annotated § 329.110

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§ 329.110 Proceedings to Modify or Set Aside Order

[1] Availability

Any order made by the court may at any time be changed, modified, or set aside, as the judge deems just and proper [*Welf. & Inst. Code § 775*].

[2] Application for Modification of Order Under Welf. & Inst. Code § 778

[a] In General

Any parent or other person having an interest in a child who is a ward of the juvenile court or the child himself or herself through a properly appointed guardian may, on ground of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a ward for a hearing to change, modify, or set aside any order of the court previously made or to terminate the jurisdiction of the court. The petition must be verified and, if made by a person other than the child, must state the petitioner's relationship to or interest in the child. The petition must also set forth in concise language any change of circumstance or new evidence that is alleged to require the change of order or termination of jurisdiction [*Welf. & Inst. Code § 778*; *Cal. Rules of Ct., Rules 5.560(d), 5.570(a)*; see also form *set out in Ch. 328, Juvenile Courts: Dependency Proceedings, § 328.370*].

[b] Modification of Prior Placement Orders

A violation of probation, pursuant to *Welf. & Inst. Code § 777* is the exclusive statutory mechanism for a juvenile court to modify a prior placement order by committing a ward of the court to the Division of Juvenile Facilities. Where the previous order removes a minor from the physical custody of the parents, but does not place the child with a guardian, relative, or friend, *Welf. & Inst. Code § 778* can be used to change or modify the order to a more restrictive placement, as long as it is not a commitment to DJF [*In re Brent F. (2005) 130 Cal. App. 4th 1124, 1130 n.3, 30 Cal. Rptr. 3d*

833] .

[3] Notice of Hearing

If it appears that the best interests of the child may be promoted by the proposed change or termination of jurisdiction, the court will order a hearing to be held and will give prior notice to the interested parties [*Welf. & Inst. Code § 778*; *Cal. Rules of Ct., Rule 5.570(c), (d)*].

[4] Motion to Modify or Terminate Jurisdiction of Court Upon Finding of Unfitness

If a minor is found unfit to be dealt with under the juvenile court law in a subsequent proceeding, any parent or other person having an interest in the minor, the probation officer, prosecuting attorney or the minor through a properly appointed guardian may petition the court to terminate or modify the jurisdiction of the court as to any wardship that did not result in a Youth Authority commitment. The petition must be verified and state why jurisdiction shall be terminated or modified. The court shall order that a hearing be held and that notice be given [*Welf. & Inst. Code § 785*].

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28-329 California Forms of Pleading and Practice--Annotated § 329.111

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§ 329.111 Probation Violations

[1] Historical Background

Juvenile probation transgressions have traditionally fallen into two categories: In probation violations pursuant to *Welf. & Inst. Code § 777(e)* and probation failures pursuant to *Welf. & Inst. Code § 777(a)*. The probation violation procedure did not require the filing of a supplemental petition and was proved by a showing that a minor failed one or more conditions of probation. As the result of a violation, the court could impose up to 30 days confinement time which had been previously stayed.

A probation failure pursuant to *Welf. & Inst. Code § 777(a)* required the filing of a supplemental petition with the court and a formal hearing. Hearsay was inadmissible and the standard of proof was beyond a reasonable doubt [*In re Arthur N. (1976) 16 Cal. 3d 226, 127 Cal. Rptr. 641, 545 P.2d 1345]* . To sustain a supplemental petition under this section, the court had to conclude that the previous level of disposition had not been effective in the rehabilitation of the minor. If such finding was made, the court could impose a more restrictive level of placement.

Effective March 8, 2000, there is no distinction between failures and violations of probation, supplemental petitions no longer exist and reliable hearsay evidence is admissible. The burden of proof necessary to make a finding upon the alleged facts is a preponderance of the evidence. The provisions of *Welf. & Inst. Code § 777(b)* and *(e)* have been deleted.

[2] Probation Violations

Notice of a hearing is made by the probation officer if wardship or probation status is the result of a *Welf. & Inst. Code § 601* petition [*Welf. & Inst. Code § 777(a)(1)*] or by the probation officer or prosecutor if wardship or probation status is the result of a *Welf. & Inst. Code § 602* petition [*Welf. & Inst. Code § 777(a)(2)*].

The notice must contain a concise statement of facts sufficient to support the conclusion that an order of the court [*Welf. & Inst. Code § 777(a)(1)* or that a condition of probation [*Welf. & Inst. Code § 777(a)(2)*] had been violated.

Upon filing such notice the matter must be set for a hearing within 30 days, with service to be made by the probation officer in the manner prescribed by *Welf. & Inst. Code §§ 658* and *660* [*Welf. & Inst. Code § 777(b)*].

The facts alleged in the notice are established by a preponderance of the evidence at a hearing to change, modify, or set aside a previous order. Reliable hearsay evidence is admissible at the hearing to the same extent that it is admissible in an adult probation revocation hearing [*Welf. & Inst. Code § 777(c)*]. Testimonial evidence presented through hearsay is only admissible after the court takes into account a number of factors including the unavailability of the declarant under *Evidence Code § 240*, the degree of difficulty or expense in securing the declarant to testify at the hearing, whether there existed any risk of physical or emotional harm to the witness if required to appear, and the significance of the particular evidence to the court's determination [*People v. Arreola (1994) 7 Cal. 4th 1144, 875 P.2d 736]* .

PRACTICE TIP:

Conduct Not Amounting to a Crime. Notwithstanding the language of *Welf. & Inst. Code § 777(a)(2)* that an alleged probation violation describe conduct "not amounting to a crime," violations may describe any misconduct, criminal or noncriminal, so long as it is alleged only as a probation violation and not as a newjuvenile crime [*In re Eddie M. (2003) 31 Cal. 4th 480, 3 Cal. Rptr. 3d 119* ; *In re Emiliano M. (2003) 31 Cal. 4th 510, 3 Cal. Rptr. 3d 140]* . The contrary result, reached in *In re Marcus A. (2001) 91 Cal. App. 4th 423, 109 Cal. Rptr. 2d 919* , has been disapproved [*In re Eddie M. (2003) 31 Cal. 4th 480, 502, 3 Cal. Rptr. 3d 119]* . Consequently, certain conduct which may be subject of a 602 petition may be alleged in a 777 violation, if the prosecutor elects to proceed in that manner. While it may seem advantageous to have a minor subject to a 777 violation, as opposed to a 602 petition, this may not always be the case. Given the reduced burden of proof and more lenient evidentiary requirements which accompany a probation violation hearing, a minor's opportunity to prevail in a contested matter is significantly better when the conduct in question is alleged in a 602 petition. Moreover, the decisions in *Eddie M.* and *Emiliano M.* will have significant impact on individuals over 18 years of age who are still on juvenile probation. Such individuals may now have certain misdemeanor conduct, which would otherwise have little consequence in adult court, alleged in a 777 petition with a far more severe disposition imposed.

If established, a violation of probation may result in the court placing a child in a more restrictive placement [*Welf. & Inst. Code § 777*]. While *Welf. & Inst. Code § 777* does not by itself authorize the imposition of fines, the language of the statute providing for modification of prior orders has been interpreted as authorizing the court to levy additional fines where the original disposition included a fine [*In re Brian K. (2002) 103 Cal. App. 4th 39, 126 Cal. Rptr. 2d 580]* .

PRACTICE TIP:

Admissible Hearsay. Notwithstanding the changes in admissible evidence in post-Proposition 21 *Welf. & Inst. Code § 777* hearings, it appears that most hearsay evidence is still inadmissible in such hearings. Nonetheless, documents such as laboratory reports, invoices, receipts and school attendance records seem to fall within the scope of admissible hearsay while "hearsay which takes the place of live testimony" is inadmissible [*In re Kentron D. (2002) 101 Cal. App. 4th 1381, 1389, 125 Cal. Rptr. 2d 260]* . In addition, the exception for witnesses who are unavailable, at risk of harm, or unable to testify without significant difficulty or expense while not well defined, would appear to apply to witnesses from out of state placements or group homes who would have to be brought in to prove a probation violation at such a facility. In most other cases it appears that "live testimony" is till required for probation violation hearings.

The changes in *Welf. & Inst. Code § 777* created by Proposition 21 eased the admissibility of certain evidence and lessened the burden of proof necessary to establish a violation of probation, and escalate the dispositional consequences, against a minor. The changes effect the conduct of § 777 proceedings commencing after the passage of Proposition 21 and not the proceedings, including the original wardship proceedings, which may have occurred prior to March 8, 2000. Thus considered, the California Supreme Court has rejected claims that the changes violate the Ex Post Facto Clause of the United States and California Constitutions, where wardship is established on a minor before, but a violation of probation occurs after, the passage of Proposition 21 [*John L. v. Superior Court (2004) 33 Cal. 4th 158, 14 Cal. Rptr. 3d 261]* .

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[Reserved]

§§ 329.112[Reserved]

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§ 329.114 Changing Order of Commitment to Division of Juvenile Facilities (DJF)

Effective September 29, 2007, the court is authorized, upon the recommendation of the chief probation officer of the county, to recall the commitment of a ward to the Division of Juvenile Facilities (DJF) if the commitment was not for an offense specified in *Welf. & Inst. Code § 707(b)* or *Penal Code § 290.008(c)*, formerly § 290(d)(3). After recalling the ward, the court must hold a recall disposition hearing and order an alternative disposition for the ward "that is appropriate under all of the circumstances prevailing in the case." When such a hearing is held, the court must provide notice to DJF at least 15 days prior to the hearing and the ward must be delivered to the committing county at least five days before the hearing [*Welf. & Inst. Code § 731.1*].

For all other wards, committing a ward to the DJF may thereafter change, modify, or set aside the order of commitment. Ten days notice of the hearing of the application for such an order must be served by mail on the Director of the DJF. In changing, modifying, or setting aside the order of commitment, the court must give due consideration to the effect thereof upon the discipline and parole system of the DJF or of the correctional school in which the ward may have been placed. However, this does not mean that the court may interfere with the parole and discharge system of the DJF, the management of any school, institution, or facility under the jurisdiction of the DJF, or the system of transfer between institutions and facilities under the jurisdiction of the DJF. On the other hand, the court is specifically authorized to change, modify, or set aside an order of commitment after a notice hearing and upon a showing of good cause that the DJF is unable to, or failing to, provide treatment consistent with *Welf. & Inst. Code § 734* [*Welf. & Inst. Code § 779*].

Moreover, before any inmate of a correctional school may be transferred to a state hospital, the inmate must first be returned to a court of competent jurisdiction and, after hearing, may be committed to a state hospital for the insane [*Welf. & Inst. Code § 779*].

If any person who has been committed to the Department of Juvenile Facilities appears to be an improper person to be received by or retained in any institution or facility under the jurisdiction of the department or to be so incorrigible or so

incapable of reformation under the discipline of any institution or facility under the jurisdiction of the department as to render his or her retention detrimental to the interests of the department, the Parole Board may return that person to the committing court. The return of the minor does not relieve the Department of Juvenile Facitlities of any of its duties of responsibilities under the original commitment; the commitment continues in full force and effect until it is vacated, modified, or set aside by order of the court [*Welf. & Inst. Code § 780*; *see also Welf. & Inst. Code §§ 1737, 1737.1*; *People v. Arnold (1988) 206 Cal. App. 3d 88, 91, 253 Cal. Rptr. 468* (court must state reasonsfor denying probation when resentencing defendant who is rejected by Youth Authority)]. The judge may recall a commitment on the recommendation of the Director, or the Parole Board may order a recall [*People v. Najera (1990) 222 Cal. App. 3d 1507, 1514, 272 Cal. Rptr. 413]* .

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§ 329.115 Gang Registration

Effective March 8, 2000, certain wards have become subject to the provisions of *Penal Code § 186.30* which requires registration with a local law enforcement agency, within 10 days from their release from custody, or arrival in their city and county of residence [*Penal Code § 186.20(a)*] when a petition has been sustained for any of the following offenses:

- *Penal Code Section 186.22(a).*
- Any crime where the enhancement specified in *Penal Code Section 186.22(b)* is found to be true.
- Any crime that the court finds is gang related at the time of sentencing or disposition [*Penal Code § 186.30(b)*].

It is important to note that the registration requirement is based upon the offense that is before the court as opposed to non-offense related factors that may portray the minor as gang involved. For minors that are gang-related but whose offenses do not fall within the description of *Penal Code § 186.30(b)*, as shown by substantial evidence, registration is not appropriate. In those instances, the court may impose gang-related conditions during the minor's probation [*In re Eduardo C. (2001) 90 Cal. App. 4th 937, 108 Cal. Rptr. 2d 924]* . For the purpose of determining whether an offense is "gang-related," the gang must fall within the statutory definition of a criminal street gang as defined by *Penal Code § 186.30(e)* and *(f)*.

While registration based upon a petition sustained for a violation of *Penal Code § 186.22(a)* or a true finding that an offense is enhanced by *Penal Code § 186.22(b)* is mandatory, a finding by the court that an offense is "gang-related" is discretionary. Nevertheless, exercising that discretion in order to compel a minor to register is difficult. As both the required findings that conduct is "gang-related" and that a group is a "criminal street gang" are tantamount to the elements required to enhance a crime pursuant to *Penal Code § 186.22(b)*, it is difficult to distinguish between the

mandatory and discretionary sections of *Penal Code § 186.30* except as they relate to the presence of the gang charges in the petition [*In re Jorge G. (2004) 117 Cal. App. 4th 931, 12 Cal. Rptr. 3d 193]* .

Though the plain language of *Penal Code § 186.22(a), (b)* and *(d)* suggest that it is only applicable to adult proceedings in that the paragraphs speak in terms of convictions or do not refer to juvenile adjudications in any way, it has been held that they are each a creation of Proposition 21 and, as such, intended to apply to adult and juvenile conduct and proceedings [*In re Damien V. (2008) 163 Cal. App. 4th 16, 77 Cal. Rptr. 3d 107* ; *In re Jose P. (2003) 106 Cal. App. 4th 458, 130 Cal. Rptr. 2d 810]* .

PRACTICE TIP:

Proof of a "Criminal Street Gang." In order to prove the criminal street gang component of a gang charge or allegation, three elements must be established beyond a reasonable doubt: (1) that there be an ongoing association involving three or more participants, having a common name or common identifying sign or symbol; (2) that the group has as one of its "primary activities" the commission of one or more specified crimes; and (3) the group's members either separately or as a group have engaged in a pattern of criminal gang activity [*People v. Vy (2004) 122 Cal. App. 4th 1209, 1222, 19 Cal. Rptr. 3d 402*]. This requires evidence that the group's members consistently and repeatedly committed criminal activity listed in the gang statute [*People v. Sengpadychith (2001) 26 Cal. 4th 316, 324, 109 Cal. Rptr. 2d 851*]. In juvenile court proceedings, the aforementioned elements are frequently presented through expert testimony with insufficient foundation as to the underlying criminal activity. To the extent that proof of such activity must be based upon reliable sources, such as court records of convictions, in order to sustain a petition or allegation pursuant to *Penal Code § 186.22*, it is also required before a court may order gang registration under *Jorge G*. [*see also* *In re Alexander L. (2007) 149 Cal. App. 4th 605, 57 Cal. Rptr. 3d 226*].

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§ 329.116 Registration of Sex Offenders

Any person who, on or after January 1, 1986, is discharged or paroled from the Division of Juvenile Facilities, to whose custody he or she was committed after having been adjudicated a ward of the court pursuant to *Welf. & Inst. Code § 602* because of the commission or attempted commission of the following offenses is subject to registration under the procedures set forth in *Penal Code § 290.008*; *see In re Bernardino S. (1992) 4 Cal. App. 4th 613, 620-621, 5 Cal. Rptr. 2d 746* (registration as sex offender is not discretionary probation condition for juveniles or adults, and therefore cannot be required in absence of statutory authority)]:

- Assault with intent to commit rape, sodomy, or oral copulation, or any violation of *Penal Code § 264.1*, *288*, or *289* under *Penal Code § 220*.

- Any offense defined in *Penal Code § 207(b), 208(d), 288, 286(b)(1), 286(c), 286(d), 288.5, 288a(b)(1), 288a(c), 288a(d), 261(a)(2)*, or *289(a)*.

- Any offense under *Penal Code § 264.1* involving rape in concert with force or fear of bodily injury or penetration by any foreign object in concert with force or fear of bodily injury.

Any person who is discharged or paroled from the DJF following his or her commitment to its custody after having been adjudicated a ward of the court pursuant to *Welf. & Inst. Code § 602* because of the commission or attempted commission of the offense set forth in *Penal Code § 647.6*, occurring on or after January 1, 1988, is also subject to the registration procedures of *Penal Code § 290.008* [*Penal Code § 290.008(b)(2)*].

Mandatory registration is tied to the offense for which the minor is adjudicated, not the conduct underlying the charge or characterized in dismissed charges [In re J.P. (2009) 170 Cal. app. 4th 1292, 1299, *89 Cal. Rptr. 3d 17]* . Because discretionary sex offender registration does not apply to juvenile adjudications as it does to adult offenders, an order for

registration based solely upon facts and circumstances of the conduct, as opposed to the offense sustained, is not lawful [*In re Derrick B. (2006) 39 Cal. 4th 535, 537-540, 47 Cal. Rptr. 3d 13]* .

Prior to discharge or parole from DJF, all persons subject to registration must be informed of the duty to register, and DJF officials must transmit the required forms andinformation to the Department of Justice [*Penal Code § 290.017*]. Any person required to register who violates any of the provisions of *Penal Code § 290.008* is guilty of either a felony or a misdemeanor [*Penal Code § 290.018*]; if the person has a prior conviction for failing to register and subsequently and willfully commits that offense, the offense is punishable by 16 months, two years, or three years in state prison [*Penal Code § 290.018*].

PRACTICE TIP:

Registration Limitations. Registration of juveniles as sex offenders is limited to minors committed to the Division of Juvenile Facilities for offenses listed in *Penal Code § 290(d)(3)*, an offense list that excludes all statutory references to terms "conviction" and "sentencing," which are used exclusively for adult offenders [*In re Derrick B. (2006) 39 Cal. 4th 535, 47 Cal. Rptr. 3d 13]* . Other registration requirements, applicable to adult offenders, are not applicable to juveniles without a commitment to DJF. This is the case with narcotic offender registration as described in *Health & Safety Code §§ 11590(a)* and *11594*. Such registration is prohibited for juvenile offenders [*In re Luisa Z. (2000) 78 Cal. App. 4th 978, 93 Cal. Rptr. 2d 231]* .

Moreover, the court has the discretion under *Welf. & Inst. Code § 726(c)* to commit a minor to the DJF solely on the current allegations, instead of aggregating all of the previously sustained petitions against him. The exercise of this discretion may well result in a commitment to the state institution without the sex offender registration requirement, even though the minor may have committed an offense which would otherwise require registration [*In re Alex N. (2005) 132 Cal. App. 4th 18, 22-23, 33 Cal. Rptr. 3d 172]* . This discretion does not allow the court to disregard the minor's most recently sustained petition when deciding upon an appropriate disposition, including the mandatory registration requirements of *Penal Code § 290.008* [*In re G.C. (2007) 157 Cal. App. 4th 405, 411, 68 Cal. Rptr. 3d 523]* .

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28-329 California Forms of Pleading and Practice--Annotated § 329.117

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§ 329.117 Notification to Schools

Juvenile court records are considered confidential, with access generally limited to individuals actively participating in criminal or juvenile proceedings involving the minor [*Welf. & Inst. Code § 827(a)*]. However, written notice that a minor, enrolled in a public school, has committed certain offenses is to be provided by the court to the superintendent of the school district of attendance within seven days of the jurisdictional finding. These offenses include any felony of misdemeanor involving curfew, gambling, alcohol, drugs, tobacco products, carrying of weapons, sex offenses listed in *§ 290 of the Penal Code*, assault or battery, larceny, vandalism, and graffiti [*Welf. & Inst. Code § 827(b)(2)*].

The written notice given to the superintendent is to include only the offense committed and disposition of the case. This information is to be disseminated to the principal at the school attended by the minor, to counselors directly supervising or reporting on the behavior or progress of the minor, and to certain teachers and administrators [*Welf. & Inst. Code § 827(b)(2)*]. All information transmitted as a result of this section shall be destroyed when the minor graduates from high school, is released from juvenile court jurisdiction, or reaches the age of 18, whichever occurs first [*Welf. & Inst. Code § 827(d)*].

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28-329 California Forms of Pleading and Practice--Annotated § 329.118

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§ 329.118 Notification of Law Enforcement

When a minor has been found to have committed a felony pursuant to *Welf. & Inst. Code § 602*, written notice is to be provided within seven days by the court to the sheriff of the county in which the offense was committed and to the sheriff of the county in which the minor resides. This notice is limited to information regarding the felony offense found to have been committed, the case disposition, and subsequent dispositional modifications. A sheriff receiving this notice may disseminate the information to law enforcement personnel upon request when it is relevant to the prevention or control of juvenile crime [*Welf. & Inst. Code § 827.1*].

In the written notice provided in this section, a court may authorize a sheriff who receives information to disclose the information where disclosure is imperative for the protection of the public and the offense is a violent felony as defined in *Penal Code § 667.5(c)* [*Welf. & Inst. Code § 827.7*].

When a minor has been adjudged a ward of the court for felony offense, the juvenile court is required to report the complete criminal history of the minor to the Department of Justice. The information is to be retained and made available in the same manner as information gathered pursuant to *Penal Code §§ 13100-13326* [*Welf. & Inst. Code § 602.5*].

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§ 329.119 Notification to Victims

The Chief Deputy Secretary for Juvenile Justice must release information regarding offenders committed to DJF for offenses listed in *Welf. & Inst. Code § 676(a)* and *Penal Code §§ 273.5*, *288*, and *646.9*, *273.5*, *288*, and *646.9* to victims upon request [*Welf. & Inst. Code § 1764.2*]. The information to be released includes the offender's name, age, offense, confinement location, scheduled release date, parole date, and circumstances of any escape [*Welf. & Inst. Code § 1764*]. For minors committed to DJF for the offenses listed above, the Chief Deputy Secretary must also inform victims of their right to request and receive 30 day advance written notice of parole hearings [*Welf. & Inst. Code §§ 1764.2* and *1767(a)*].

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28-329 California Forms of Pleading and Practice--Annotated § 329.120

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§ 329.120 Sealing Juvenile Court Records

[1] In General

Under certain circumstances, the court may be petitioned to seal the juvenile court record of a minor. Such action may be taken in the following cases [*Welf. & Inst. Code § 781(a)*]:

- In any case in which a petition has been filed with a juvenile court to commence proceedings to adjudge a person a ward of the court.

- In any case in which a person is cited to appear before a probation officer or is taken before a probation officer by a peace officer.

- In any case in which a minor is taken before any officer of a law enforcement agency.

Five years later or at any time after the person reaches the age of 18, the person or the probation officer may petition the court to seal the records, including records of arrest, relating to the person's case, in the custody of the juvenile court and probation officer and any other agencies, including law enforcement agencies and public officials as petitioner alleges to have custody of the records [*Welf. & Inst. Code § 781(a)*]. Determinations under *Welf. & Inst. Code § 781* with respect to former wards of the court must be made by the court in the county in which wardship was last terminated [*Cal. Rules of Ct., Rule 5.830(a)*].

An application for a petition to seal records filed by a former ward of the court must be submitted to the probation department in the county in which wardship was last terminated. If the probation officer determines that the former ward is eligible to petition for sealing, he or she will prepare and file the petition, conduct an investigation pursuant to *Welf. & Inst. Code § 781*, prepare a report for the court, set the matter for hearing, and notify the prosecuting attorney of

the hearing [*Cal. Rules of Ct., Rule 5.830(a)(1), (2)*]. If the applicant is not a former ward, the application may be submitted to the probation department in any county in which there is a juvenile record concerning the petitioner, and the probation officer will follow the same procedures as described above for an application filed by a former ward [*Cal. Rules of Ct., Rule 5.830(b)*].

The court will review the petition and the probation officer's report, and an order will be issued if the court is satisfied that the minor has not been convicted of a felony or of any misdemeanor involving moral turpitude and that rehabilitation has been attained.

The court must also find that there is no civil litigation currently pending that directly relates to or arises from the offense that caused the records to be created. In any case in which a ward of the juvenile court is subject to the registration requirements for certain sex offenders set forth in *Penal Code § 290.008*, the court must also provide in the order that the person is relieved from the registration requirement and for the destruction of all registration information in the custody of the Department of Justice and other agencies and officials [*Welf. & Inst. Code § 781(a)*].

After the order is issued, the person who is the subject of the records sealed may petition the superior court to permit inspection of the records by persons named in the petition, and the superior court may so order. Otherwise, except as provided in *Welf. & Inst. Code § 781(b)* for defamation actions, the records are not open to inspection [*Welf. & Inst. Code § 781(a)*]. The order applies in the county of the court hearing the petition and in all other counties in which there are juvenile records concerning the petitioner [*Cal. Rules of Ct., Rule 5.830(d)*]. These provisions do not apply to Department of Motor Vehicle records of any convictions or offenses under the Vehicle Code [*Welf. & Inst. Code § 781(c)*]. A court must not seal records in any case in which a person was found to have committed an offense listed in *Welf. & Inst. Code § 707(b), (d)*, or *(e)*, until at least three years have elapsed since the commission of that offense [*Welf. & Inst. Code § 781(a)*].

When the person who is the subject of juvenile court records sealed pursuant to *Welf. & Inst. Code § 781(a)* reaches the age of 38, the court must order the destruction of the sealed juvenile court record unless, for good cause, the court determines that the juvenile court record must be retained. Any other agency in possession of sealed records may destroy its records five years after the record was ordered sealed [*Welf. & Inst. Code § 781(d)*].

Records lawfully sealed pursuant to *Welf. & Inst. Code § 781* by a court order, upon a probation officer's recommendation may not be disclosed to a third party unless the "defamation" exception under subdivision (b) or the "insurance eligibility" exception under subdivision (c) applies. This includes prohibiting the release of records to the Board of Parole Hearings for use in proceedings to declare an individual a sexually violent predator under *Welf. & Inst. Code § 6600 et seq.* [*In re James H. (2007) 154 Cal. App. 4th 1078*].

[2] Prohibited for Welf. & Inst. Code § 707(b) Offenses

In any case where a minor has been found to have committed an offense described in *Welf. & Inst. Code § 707(b)* when he or she was 14 years of age or older, the court shall not seal the juvenile record [*Welf. & Inst. Code § 781(a)*]. This prohibition applies to all minors described in *Welf. & Inst. Code section 781(a)*, even if the *Welf. & Inst. Code § 707(b)* offense was sustained prior to the date that the law went into effect [Proposition 21, effective March 8, 2000]. The retroactive application of the statute has been determined not to be in violation of the constitutional prohibition against ex post facto laws because it is not punitive in nature [*People v. Superior Court (Manuel G.) (2002) 104 Cal. App. 4th 915, 927-933, 128 Cal. Rptr. 2d 794]* .

The purpose of this prohibition is to eliminate confidentiality in some juvenile court proceedings in order to hold offenders more accountable for their actions. Consequently, the fact that such an offender may have been rehabilitated at any time after the petition was sustained is of no consequence when considering the prohibition against record sealing [*In re Jeffrey T. (2006) 140 Cal. App. 4th 1015, 1018-1021, 44 Cal. Rptr. 3d 861]* .

In the event that a trial court improperly orders the sealing of a record in violation of *Welf. & Inst. Code § 781(a)* such an order is not appealable under *Welf. & Inst. Code § 800(b)(2)* but may be challenged pursuant to a petition for writ of mandate [*People v. Superior Court (Manuel G.) (2002) 104 Cal. App. 4th 915, 922-926, 128 Cal. Rptr. 2d 794]* .

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AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.121 Dismissal of Petition

A judge of the juvenile court may dismiss the petition or set aside the findings and dismiss the petition at any time before the minor reaches the age of 21. Such action may be taken if the court finds that the interests of justice and the welfare of the minor require the dismissal, or if it finds that the minor is not in need of treatment or rehabilitation. The court has jurisdiction to order the dismissal or setting aside of the findings regardless of whether or not the minor is, at the time of the order, a ward of the court [*Welf. & Inst. Code § 782*].

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AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.122 Appeals

[1] In General

A judgment in a proceeding under *Welf. & Inst. Code § 601* (habitually disobedient or truant) or § 602 (criminal violations) may be appealed from in the same manner as any final judgment, and any subsequent order may be appealed from as from an order after judgment [*Welf. & Inst. Code § 800(a)*; *see Cal. Rules of Ct., Rule 5.585(a)*]. A minor who admits a wardship petition that alleges the commission of a crime may perfect an appeal without first securing a certificate of probable cause [*In re Joseph B. (1983) 34 Cal. 3d 952, 955-960, 196 Cal. Rptr. 348, 671 P.2d 852* ; *see Cal. Rules of Ct., Rule 8.400* (rules on appeal)]. Pending appeal of the order or judgment, the granting or refusal to order release rests in the discretion of the juvenile court. Such an appeal has precedence over all other cases in the court to which the appeal is taken [*Welf. & Inst. Code § 800*; *see In re Mitchell G. (1990) 226 Cal. App. 3d 66, 72, 276 Cal. Rptr. 245* (jeopardy attached when suppression motion was heard simultaneously with wardship petition, precluding People from appealing dismissal that resulted from grant of motion) *and Cal. Rules of Ct., Rule 8.400 et seq.*].

The rules governing appeals from the superior court in criminal cases are applicable in all appeals from the juvenile court [*see Cal. Rules of Ct., Rule 5.585(g)*], except when otherwise expressly provided by *Cal. Rules of Ct., Rule 8.400 et. seq.* or Rule 39.1 (not applicable to wardship appeals), or when the application of a particular rule would be clearly impracticable or inappropriate. However, *Cal. Rules of Ct., Rule 8.400 et seq.*, does not apply to any action or proceeding heard by a traffic hearing officer, or to any rehearing, or to an appeal from a denial of a rehearing following an order by a traffic hearing officer [*Cal. Rules of Ct., Rule 8.400 et seq.*].

In the appeal, the minor may seek review of a ruling on a motion to suppress [*see Welf. & Inst. Code § 700.1*], but may not seek review of a ruling on the voluntariness of a confession [*see Welf. & Inst. Code § 800*; *In re John H. B. (1989) 215 Cal. App. 3d 477, 484, 263 Cal. Rptr. 607]* .

A judgment or subsequent order entered by a referee becomes appealable whenever proceedings pursuant to *Welf. & Inst. Code § 252, 253,* or *254* have become completed or, if such proceedings are not initiated, when the time for initiating the proceedings has expired [*Welf. & Inst. Code § 800(a)*].

The People may appeal any of the following [*Welf. & Inst. Code § 800(b)*]:

- A ruling on a motion to suppress [*see Welf. & Inst. Code § 700.1*], even if the judgment is a dismissal of the petition or any count or counts of the petition, except that the People may not appeal any count that, if the People are successful, will be the basis for further proceedings subjecting any person to double jeopardy. However, a motion under *Welf. & Inst. Code § 775,* or § 778, tantamount to a motion for a new trial, made by a minor is an implicit agreement to readjudication if necessary and, as such, constitutes a waiver of jeopardy [*In re Kenneth S. (2005) 133 Cal. App. 4th 54, 61-63, 34 Cal. Rptr. 3d 430]* .

- An order after a judgment made on a supplemental petition to change or modify a previous order relating to the disposition of a minor or the jurisdiction of the court [*see Welf. & Inst. Code §§ 777, 785*].

- An order modifying the jurisdictional finding by reducing the degree of the offense or modifying the offense to a lesser offense.

- An order or judgment dismissing or otherwise terminating the action before the minor has been placed in jeopardy, or when the minor has waived jeopardy. This includes a demurrer to one of several allegations sustained in a juvenile wardship petition [*In re Rottanak K. (1995) 37 Cal. App. 4th 260, 272, 43 Cal. Rptr. 2d 543]* , and a pretrial order excluding a statement as fruit of the poisonous tree of another statement illegally obtained and resulting in dismissal of the wardship petition [*In re Ricardo C. (1995) 37 Cal. App. 4th 431, 435-437, 43 Cal. Rptr. 2d 585]* .

- The imposition of an unlawful order at a dispositional hearing (*see* discussion in *§ 329.93*), whether or not the court suspends the execution of the disposition.

If the People prosecute an appeal or other review of a decision dismissing or terminating an action before the minor has been placed in jeopardy, it will be binding on the People, and they will be prohibited from refiling the case that was appealed [*Welf. & Inst. Code § 800(b)(4)*].

Welf. & Inst. Code § 800 expressly does not authorize an appeal from an order granting probation. Instead, the People may seek appellate review of any grant of probation, whether or not the court imposes disposition, by means of a petition for writ or mandate or prohibition filed within 60 days after probation is granted. The review of any grant of probation will include review of any order underlying the grant of probation [*Welf. & Inst. Code § 800(c)*].

Neither an order of informal supervision, pursuant to *Welf. & Inst. Code § 654.2,* nor an order placing a minor on deferred entry of judgment, under *Welf. & Inst. Code § 790 et seq.,* are appealable orders. They are not appealable judgments or orders after judgment. Consequently, appellate courts have held that they do not have jurisdiction over either informal supervision [*Ricki J. v. Superior Court (2005) 128 Cal. App. 4th 783, 787-791, 27 Cal. Rptr. 3d 494]* or deferred entry of judgment [*In re Mario C. (2004) 124 Cal. App. 4th 1303, 1307-1309, 21 Cal. Rptr. 3d 891]* . In both cases, review by extraordinary writ may be available if a sufficient basis otherwise exists.

An appellant unable to afford counsel must be provided a free copy of the transcript in any appeal [*Welf. & Inst. Code § 800(d)*]. The record must be prepared and transmitted immediately after filing of the notice of appeal, without advance payment of fees. If the appellant is able to afford counsel, the county may seek reimbursement for the cost of the transcripts under *Gov. Code § 68511.3* as though the appellant had been granted permission to proceed in forma

pauperis [*Welf. & Inst. Code § 800(e)*; *see Cal. Rules of Ct., Rule 5.585(d)(4)*].

All appeals must be initiated by the filing of notice of appeal in conformity with the requirements of *Penal Code § 1240.1* [*Welf. & Inst. Code § 800(f)*]. A notice ofappeal must be filed within 60 days after the making of an appealable order or, if the matter was heard by a referee who was not sitting as a temporary judge, within 60 days after the order becomes final under *Cal. Rules of Ct., Rule 5.540(c)* [*Cal. Rules of Ct., Rule 5.585(f)*; *see also* form set out in Ch. 328, *Juvenile Courts: Dependency Proceedings*, § 328.420].

As amended effective January 1, 1992, *Welf. & Inst. Code § 800* affords no right of appeal to parents in juvenile delinquency matters. Prior to this amendment the statute contained nonrestrictive language that had been interpreted by the appellate courts as giving parents standing to appeal certain judgments and orders. This right to appeal can no longer be judicially implied as the current incarnation of the statute specifically limits this right to minors [*In re Almalik S. (1998) 68 Cal. App. 4th 851, 854, 80 Cal. Rptr. 2d 619]* .

[2] Waiver of Appellate Rights

There are two statutory recognitions that a minor can waive their constitutional right to counsel [*Welf. & Inst. Code §§ 634, 700*] and two rule recognitions that they may waive additional constitutional rights and admit the allegations of a petition [*Cal. Rules of Ct., Rules 5.774(e), 5.778(c)*]. Consequently, the courts have determined that a person, juvenile or adult, deemed intelligent enough to appreciate the consequences of admitting a law violation can also make an intelligent appreciation of the decision to forego review of that admission [*In re Uriah R. (1999) 70 Cal. App. 4th 1152, 1158]* .

If there is no specified disposition at the time the appellate rights are waived, it appears that the right to appeal the disposition is not waived [*In re Uriah R. (1999) 70 Cal. App. 4th 1152, 1159]* .

[3] Right to Appointed Counsel

While juvenile delinquency matters are classified as civil proceedings, a juvenile adjudged a delinquent in California has a state-created right to appeal from that determination [*Welf. & Inst. Code § 800(a)*] and to appointed counsel in connection with that appeal [*Cal. Rules of Ct., Rule 5.585(a)*]. Delinquency proceedings are sufficiently similar in substance and import to criminal prosecutions that minors are entitled to appointed counsel on a first appeal as of right, and effective counsel, pursuant to the *Fourteenth Amendment of the United States Constitution* [*In re Kevin S. (2003) 113 Cal. App. 4th 97]* .

When appointed appellate counsel finds no arguable issues, an indigent appellant is still entitled to a review of the entire record to determine whether the appeal is in fact frivolous [*People v. Wende (1979) 25 Cal. 3d 436, 441-442, 158 Cal. Rptr. 839]* . This process, while specifically inapplicable to dependency proceedings has recently been held to apply to minors relative to delinquency appeals [*In re Kevin S, (2003) 113 Cal. App. 4th 97, 107* , *distinguishing In re Sade C. (1996) 13 Cal. 4th 952, 55 Cal. Rptr. 2d 771]* .

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§ 329.123 Sentencing in Subsequent Adult Felony Conviction

[1] Application of the "Three Strikes" Law

[a] In General

It is well established that 16- and 17-year-olds have criminal sentencing exposure under the "Three Strikes Law" when they commit certain offenses. The requirements for juvenile "strikes" are listed pursuant to *Penal Code § 667(d)(3)* which provides that juvenile adjudications may be used as prior felony convictions if:

> (A) The juvenile was 16 years of age or older at the time he or she committed the prior offense.
>
> (B) The prior offense is listed in *Welf. & Inst. Code § 707(b)* or described in paragraph (1) [California prior serious or violent felony convictions] or (2) [other jurisdiction prior serious or violent felony convictions] as a felony.
>
> (C) The juvenile was found to be a fit and proper subject to be dealt with under the juvenile court law.
>
> (D) The juvenile was adjudged a ward of the juvenile court within the meaning of *Welf. & Inst. Code § 602* because the person committed an offense listed in *Welf. & Inst. Code § 707(b)*.

The Supreme Court has held that an implied finding of fitness is sufficient to satisfy *Penal Code § 667(d)(3)(C)*. Such an implied finding essentially occurs every time the juvenile court retains jurisdiction over a minor [*People v. Davis (1997) 15 Cal. 4th 1096, 64 Cal. Rptr. 2d 879]* .

Unfortunately, the offenses listed in *Welf. & Inst. Code § 707(b)* are not identical to those listed in either *Penal Code § 667.5* as "violent" felonies, or in *Penal Code § 1192.7(c)* as "serious" felonies. As a result, some offenses would seem to

be strikes only if committed by 16- or 17-year-olds--assault by means of force likely to produce great bodily injury, discharge of a firearm into an inhabited building, and escape from a juvenile facility by use of force with great bodily injury inflicted on staff. Conversely, certain crimes which are strikes when committed by adults are not offenses enumerated in *Welf. & Inst. Code § 707(b)*--rape which is not accompanied by force or violence or threat of great bodily harm, kidnapping a child under 14, felonies in which defendant inflicts great bodily injury, and residential burglary.

Subsequent court decisions have clarified this situation. A prior juvenile adjudication for an offense that would qualify as a strike if it were the subject of an adult conviction qualifies as a strike only if, in the prior juvenile proceeding, the minor was adjudged a ward of the court for an offense listed in *Welf. & Inst. Code § 707(b)*, whether or not that offense is the same as the offense currently alleged to be a strike [*People v. Garcia (1999) 21 Cal. 4th 1, 6, 87 Cal. Rptr. 2d 114]* .

In order to prove prior conduct, the sealing of the records of a *Welf. & Inst. Code § 707(b)* offense relating to a juvenile who was age 14 or older at the time of the conduct is now prohibited [*Welf. & Inst. Code § 781(a)*].

PRACTICE TIP:

Proof of Wardship Required. In order to prove that prior juvenile conduct constitutes a strike under the "Three Strikes Law" many prosecutors have established a practice of introducing a certified copy of a delinquency petition and a copy of a minute order showing the court's finding on the relevant offense. Recent case law suggests that this practice is insufficient to support a strike allegation. Specifically, the prosecution must prove that the prior juvenile adjudication resulted in a declaration of wardship--a finding which may not be reflected in the documents submitted in support of the strike allegation.

Nonetheless, the California Supreme Court has held that it is permissible to retry a strike allegation after an appellate court has found the evidence insufficient to support a jury's true finding. Since the enhancement or sentencing penalty is not an offense, the retrial does not constitute a violation of the *Double Jeopardy clause* [*People v. Barragan (2004) 32 Cal. 4th 236, 9 Cal. Rptr. 3d 76]* .

[b] Right to Jury Trial

The issue of whether prior juvenile adjudications may be considered strikes notwithstanding the fact that they do not afford minors the right to a jury trial has been the source of some dispute. The claim that juvenile adjudications cannot be used as a "strike" due to the absence of a jury was originally rejected in *People v. Fowler (1999) 72 Cal. App. 4th 581, 84 Cal. Rptr. 2d 874* , but was subsequently called into question by the *United States v. Tighe (9th Cir. 2001) 266 F.3d 1187* .

In *Tighe*, the court considered whether the defendant's prior juvenile adjudication could qualify as a prior conviction under a federal sentencing statute for repeat offenders which did not provide for the right to have a jury find the prior conviction beyond a reasonable doubt. In declaring the statute unconstitutional, the court held that a prior conviction must be obtained through proceedings that included the right to a jury trial and a beyond-a-reasonable-doubt burden of proof [*U.S. v. Tighe (9th Cir. 2001) 266 F.3d 1187, 1193-1194]* .

The reasoning of *Tighe* was rejected in two subsequent federal cases considering the question [*U.S. v. Smalley (8th Cir. 2002) 294 F.3d 1030* ; *U.S. v. Jones (3d Cir. 2003) 332 F.3d 688]* . The ultimate issue is whether nonjury juvenile adjudications have sufficient procedural safeguards to meet constitutional due process standards to enhance a sentence [*U.S. v. Smalley (8th Cir. 2002) 294 F.3d 1030, 1032]* . Given that juveniles have the right to notice, right to counsel, the right to confront and cross-examine witnesses, the privilege against self-incrimination and require a finding of guilt beyond a reasonable doubt, these safeguards were found to be more than sufficient [*U.S. v. Smalley (8th Cir. 2002) 294 F.3d 1030* ; *U.S. v. Jones (3d Cir. 2003) 332 F.3d 688]* . Consequently, a prior nonjury juvenile adjudication afforded all constitutionally required procedural safeguards can properly be characterized as a prior conviction [*U.S. v.*

Jones (3d Cir. 2003) 332 F.3d 688, 696] .

Subsequent California cases have similarly disagreed with the *Tighe* opinion as it applies to the Three Strikes law [*People v. Bowden (2002) 102 Cal. App. 4th 387, 125 Cal. Rptr. 2d 513* ; *People v. Lee (2003) 111 Cal. App. 4th 1310, 4 Cal. Rptr. 3d 642* ; *People v. Buchanan (2006) 143 Cal. App. 4th 139, 49 Cal. Rptr. 3d 137]* . In addition to agreeing with *Smalley* and *Jones* that juvenile adjudications provide sufficient procedural safeguards to satisfy due process concerns, California's Three Strikes law requires that a prior conviction (including a prior juvenile adjudication) be proved beyond a reasonable doubt, and provides for the right to a jury trial on the question whether a defendant has suffered a prior conviction [*People v. Superior Court (Andrades) (2003) 113 Cal. App. 4th 817, 834, 7 Cal. Rptr. 3d 74* ; *People v. Lee (2003) 111 Cal. App. 4th 1310, 1316, 4 Cal. Rptr. 3d 642]* .

Most recently, the Ninth Circuit Court of Appeals has acknowledged widespread disagreement with the Tighe decision. Although falling short of suggesting that Tighe was incorrectly decided, the court stated that the opinion does not represent clearly established federal law "as determined by the Supreme Court of the United States" (citations). In the face of authority directly contrary to *Tighe*, the California courts' use of juvenile adjudications as sentencing enhancements is neither contrary to, nor an unreasonable application of, Supreme Court precedent [*Boyd v. Newland (2004) 393 F.3d 1008, 1017]* .

The Ninth Circuit Court of Appeals has subsequently acknowledged widespread disagreement with the *Tighe* decision. Although falling short of suggesting that *Tighe* was incorrectly decided, the court stated that the opinion does not represent clearly established federal law "as determined by the Supreme Court of the United States" (citations). In the face of authority directly contrary to *Tighe*, the California courts' use of juvenile adjudications as sentencing enhancements is neither contrary to, nor an unreasonable application of, Supreme Court precedent [*Boyd v. Newland (2004) 393 F.3d 1008, 1017]* .

Consistent with overwhelming case law in support of the practice, as well as widespread use of juvenile adjudications as strikes in criminal courts, the California Supreme Court has held that the Constitution does not preclude use of sentence enhancements against adult felons who had "prior valid, fair, and reliable [juvenile] adjudications[s] ... where the juvenile proceeding included all the constitutional protections applicable to such matters, even though these protections did not include the right to a jury trial" [*People v. Nguyen (2009) 46 Cal. 4th 1007, 1019, 95 Cal. Rptr. 3d 615]* .

Citing *McKeiver v. Pennsylvania (1971) 403 U.S. 528, 91 S. Ct. 1976* , the court in *Nguyen* noted that, "the imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the fact-finding function [cite] ... [and] although the function of the jury is to find facts, that body is not necessarily or even probably better at the job than the conscientious judge" [cite] [*People v. Nguyen (2009) 46 Cal. 4th 1007, 1020, 95 Cal. Rptr. 3d 615]* . Thus framed, the issue of reliability and validity of juvenile strike priors appears settled. Still, practitioners with experience in both juvenile and criminal court cannot help but notice the disparity in issuing and proof standards in the two systems that contribute to the perception that "strikes" are more easily obtained in juvenile court, procedural safeguards notwithstanding.

PRACTICE TIP:

Plea Bargains. Since the enactment of the "Three Strikes Law," attorneys must be careful when negotiating settlements in juvenile court. Admissions to any offense that could later be used as a "strike" should not be made without full consideration of the potential lifetime consequence. This is especially true in light of the fact that it is the sustained offense, as opposed to the facts upon which that offense is based, that determines whether the adjudication may be considered a "strike prior" [*In re Mark Anthony Jensen (2001) 92 Cal. App. 4th 262, 111 Cal. Rptr. 2d 751]* .

[2] Effects of Proposition 21

For the purposes of the Three Strikes Laws, where present offenses are committed after March 7, 2000, the relevant list of *Welf. & Inst. Code § 707(b)* offenses [i.e. those that may be considered as strikes if they are also listed in *Penal Code § 667.5* or *Penal Code § 1192.7(c)*] are those included by Proposition 21, including "simple" robbery and voluntary manslaughter [*People v. Bowden (2002) 102 Cal. App. 4th 387, 125 Cal. Rptr. 2d 513]* . Conversely, if the adult offense occurred prior to March 8, 2000, the applicable *Welf. & Inst. Code § 707(b)* list does not include those offenses added by Proposition 21 [*In re Mark Anthony Jensen (2001) 92 Cal. App. 4th 262, 111 Cal. Rptr. 2d 751]* .

PRACTICE TIP:

Going Behind the Adjudication Prohibited. Prosecutors may not prove juvenile strikes by showing that the conduct behind the sustained charge constituted a strike offense, where the sustained charge was not a *Welf. & Inst. Code Section 707(b)* offense. In order for strike offenses to apply to juvenile conduct, the minor must have been adjudged a ward of the juvenile court within the meaning of *Welf. & Inst. Code Section 602* because of a 707(b) offense. A showing of conduct including elements of such an offense is not adequate [*In re Mark Anthony Jensen (2001) 92 Cal. App. 4th 262, 111 Cal. Rptr. 2d 751]* .

[3] Use to Impose Aggravated Term

Under California's determinate sentencing system, the existence of a single aggravating circumstance is legally sufficient to make a defendant eligible for an upper term of imprisonment. While facts supporting an aggravating circumstance must be established within the *Sixth Amendment* guarantees of notice and a right to a jury trial, a defendant does not have a right to a jury trial for an aggravating circumstance based upon "prior convictions ... [that are] numerous or of increasing seriousness" pursuant to *Cal. Rule of Court 4.421(b)(2)* [*People v. Black (2007) 41 Cal. 4th 799, 813-819* ; *62 Cal. Rptr. 3d 569*].

While many of the issues relating to the applicability of juvenile adjudications to the "Three Strikes Law," and the controversy surrounding the sufficiency of procedural safeguards in juvenile court proceedings, apply to the analysis, a recent appellate court decision found that prior juvenile adjudications are encompassed within the prior conviction exception for imposing an upper term pursuant to Rule 4.421(b)(2) [*People v. Tu (2007) 154 Cal. App. 4th 735*]. Siding with the majority of federal and state cases that have grappled with the issue, the court in *Tu* held that the panoply of rights and protections extended to juveniles in this state infuse sufficient reliability into the juvenile adjudicative process to allow sustained petitions to serve as sentence enhancers despite the absence of the right to a jury trial].

Following the decision in *People v. Nguyen (2009) 46 Cal. 4th 1007, 95 Cal. Rptr. 3d 615* , which held that using prior juvenile adjudications to enhance an adult offender's sentence under the Three Strikes Law was constitutional, appellate courts have found the rationale applicable to use as an aggravating factor under *Cal. Rule of Court, Rule 4.421(b)(2)* [*People v. Quiles (2009) 177 Cal. App. 4th 612, 620-621, 99 Cal. Rptr. 3d 378]* .

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H. Post-Disposition Proceedings

28-329 California Forms of Pleading and Practice--Annotated § 329.124

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§ 329.124 Interstate Compact on Juveniles

In October 2009, the Legislature repealed the existing Interstate Compact for Juveniles (ICJ) and enacted a new ICJ which, unless extended, will sunset on January 1, 2012. A newly created Interstate Commission for Juveniles will develop rules and regulations, which have the force of statutory law, to govern the supervision and return of juvenile offenders between the states. The purpose of the ICJ, as stated in *Welf. & Inst. Code § 1400*, art. I, is to facilitate the joint and cooperative action of member states "to ensure that the adjudicated juveniles and status offenders subject to this compact are provided adequate supervision and services ... and that the public safety interests of the citizens, including the victims of juvenile offenders, in both the sending and receiving states are adequately protected ... ."

The express terms of the former ICJ as previously codified in *Welf. & Inst. Code § 1300* prohibited California authorities from exercising ICJ supervision powers under standards that are different from those they apply to their own delinquent juveniles released on probation. This prohibition has been determined to apply in cases requiring registration, such as sex offender registration, where the requirement could not be imposed on a juvenile adjudicated by a California court under the same facts and circumstances. This means that a minor required to register as a sex offender in another state is neither required to register in California, nor can he have his probation violated for failing to register, if the underlying facts and circumstances behind the out-of-state requirement would not mandate registration under California law. This is true even if the minor agreed to register pursuant to ICJ transfer conditions [*In re Lee Dale Crockett (2008) 159 Cal. App. 4th 751, 761-762, 71 Cal. Rptr. 3d 632]* .

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[Reserved]

§§ 329.125[Reserved]

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28-329 California Forms of Pleading and Practice--Annotated § 329.130

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§ 329.130 Right to an Education

[1] In General

Despite numerous pronouncements recognizing the extreme importance of an education in our society, the United States Supreme Court has concluded that education is not "explicitly or implicitly guaranteed by the Constitution" and there is not a "fundamental right." [*San Antonio School Dist. v. Rodriguez (1973) 411 U.S. 1, 33, 93 S. Ct. 1278*]. Consequently the creation of a right to an education is dependent on state constitutions and statutes. In California, a "system of common schools" providing for free schools to be operated at least six months a year is mandated by the State Constitution [*Cal. Const. Art. 9 § 5*].

In addition to guaranteeing a free public education, California also has a compulsory attendance statute that requires children between the ages of 6 and 18 years, who are not otherwise exempt, be subject to full-time education [*Cal. Ed. Code § 48200*].

The nexus between education and child welfare has gained increased attention in recent years as best practices recognize that juvenile courts must include educational plans in dispositional orders. To this end, to the extent the information is available, the court must consider the following at the initial or detention hearing:

- Who holds the child's educational rights [*Cal. Rules of Ct., Rule 5.651(b)(1)(A)*];

- If the child was enrolled in, and is attending, the child's school of origin as defined in *Ed. Code § 48853.5(e)* [*Cal. Rules of Ct., Rule 5.651(b)(1)(B)*];

- If the child is no longer attending the school of origin whether there is a recommendation that the child's right to attend that school be waived, whether a written explanation of that recommendation was

provided if the child is a foster child, whether the child was not afforded the right to attend the school of origin without a waiver, and whether the child was immediately enrolled in a new school pursuant to *Ed. Code § 48853.5(d)(4)* [*Cal. Rules of Ct., Rule 5.651(b)(1)(C)*];

- Whether the parent's or guardian's educational rights should be temporarily limited [*Cal. Rules of Ct., Rule 5.651(b)(1)(D)*]; and

- Whether, taking into account other statutory considerations, out of home placement is the environment best suited to meet the unique needs of the child and promotes educational stability [*Cal. Rules of Ct., Rule 5.651(b)(1)(E)*].

Additionally, at the disposition hearing and at all subsequent hearings provided for in *Cal. Rules of Court., Rule 5.651(a)*, the court must address and determine the child's general and special education needs, identify a plan for meeting those needs, and provide a clear, written statement using form JV-535, and specifying the person who holds the educational rights for the child [*Cal. Rules of Ct., Rule 5.651(b)(2)*].

[2] Special Education

[a] In General

Special education law involves the interplay of several laws that provide for the protection and rights of children with disabilities in the public school setting. The applicable laws include: (1) the Individuals with Disabilities Education Act (IDEA) [*20 U.S.C. § 1400 et seq.*], which sets forth procedures and programming that states must provide to receive federal funding under the Act; (2) Section 504 of the Rehabilitation Act of 1973 [*29 U.S.C. § 794*], which prohibits recipients of federal funding from discriminating on the basis of disability; (3) the Americans with Disabilities Act [*42 U.S.C. 12101 et seq.*], which prohibits both public and private schools from discriminating on the basis of disability and requiring them to provide reasonable accommodations that do not cause undue hardship; (4) the *Fourteenth Amendment* safeguards of equal protection and due process as enforced through *42 U.S.C. § 1983*; and (5) *California Education Code § 56400 et seq.* [*see generally* Dale et al., *Representing the Child Client*, Ch. 6, Representing Students in School-Related Matters (Matthew Bender)].

The Individuals with Disabilities Education Act (IDEA) was adopted to assure that all children with disabilities have available to them "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, [and] to assure that the rights of children with disabilities and their parents or guardians are protected..." [*20 U.S.C. § 1400(c)*; *34 C.F.R. § 300.1*; *20 U.S.C. § 1401(a)(17)*]. The statute and the regulations implementing them [34 C.F.R. § 300.000-.754] set forth in great detail the substantive and procedural rights of disabled students. The law requires that a child having one or more of the disabilities listed in the IDEA, and needing special education and "related services," be entitled to the rights described. [*see generally* Dale et al., *Representing the Child Client*, Ch. 6, Representing Students in School-Related matters (Matthew Bender)].

The IDEA defines children with disabilities as those "with mental retardation, hearing impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments or specific learning disabilities..." who, by reason thereof, need special education and related services [*20 U.S.C. § 1401(a)(1)(A)(i)-(ii)*; *34 C.F.R. § 300.7(a)(1)*].

[c] State Law

In California, the IDEA and other applicable statutes and regulations are supported by *Education Code § 56400*, which intends to the extent feasible, to do the following:

- Ensure that children and young adults with disabilities are provided a free and appropriate public education [*Ed. Code § 56400(a)*];

- Ensure that children and young adults with disabilities receive the necessary educational support and services they need to complete their education [*Ed. Code § 56400(b)*].

- Offer parents and guardians of children and young adults with disabilities access to accurate information, specialized training, and peer to peer support in their communities [*Ed. Code § 56400(c)*].

- Ensure that parents, guardians, and families of children and young adults with disabilities are full participants in their child's education, school reform, and comprehensive systems change efforts [*Ed. Code § 56400(d)*].

- Build upon existing local and regional service delivery systems to improve, expand, and offer coordinated technical assistance to the network of existing resources [*Ed. Code § 56400(e)*].

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§ 329.131 School Security

[1] Search and Seizure

[a] In General

It is well established that students in public schools have a legitimate expectation of privacy in their persons and in the personal effects they bring to school. However, courts have also stated that this expectation must be balanced against the school's obligation to maintain discipline and to provide a safe environment for students and staff [*New Jersey v. T.L.O. (1985) 469 U.S. 325, 339-341, 105 S. Ct. 733, 83 L. Ed. 2d 720]* . In California, the latter concern is also reflected in *Article I, section 28,subdivision (c) of the California Constitution* which provides that all students and staff of public schools have an inalienable right to attend campuses that are "safe, secure and peaceful."

What has precipitated out of the combination of these interests is a rule whereby school officials may conduct a search of the student's person and personal effects based upon a reasonable suspicion that the search will disclose evidence that the student is violating or has violated the law or a school rule. "Reasonable suspicion" is a lower standard than probable cause. Ultimately, the legality of the search depends simply on the reasonableness, under the circumstances, of the search. [New Jersey v. T.L.O., *above, 469 U.S. at p. 341* ; *see also In re William G. (1985) 40 Cal. 3d 550, 562-565, 221 Cal. Rptr. 118* ; *In re Cody S. (2004) 121 Cal. App. 4th 86, 91-92]* . In the absence of articulable facts supporting a reasonable suspicion that a search will disclose evidence of a law violation or a violation of school rules, a search of a child's belongings at school is unconstitutional. Mere disruptive behavior does not authorize a school official to rummage through his or her students' personal belongings [*In re Lisa G. (2004) 125 Cal. App. 4th 801, 807, 23 Cal. Rptr. 3d 163]* . On the other hand, completely random searches of students who enter school grounds are authorized for the purpose of determining whether a weapon is being brought on campus [*In re Latasha W. (1998) 60 Cal. App. 4th 1524, 1526-1527, 70 Cal. Rptr. 2d 886]* .

[b] Two-Fold Inquiry Determining Reasonableness

In order to determine whether a student search conducted pursuant to New Jersey v. T.L.O. is based upon a reasonable suspicion, the courts have established a two-fold inquiry. The action must be justified at its inception and the search, as actually conducted, must be reasonably related in scope to the circumstance which justified the interference in the first place. The search must not be excessively intrusive in light of the age and sex of the student and the nature of the infraction. [*T.L.O., above, 469 U.S. at 341* ; *In re William V. (2004) 111 Cal. App. 4th 1464, 1469, 4 Cal. Rptr. 3d 695]* . Recent case law suggests that, using this inquiry, the mere fact that a minor had no legitimate business on a school campus creates a reasonable need to determine whether he posed a danger, justifying a patdown search [*People v. Jose Y. (2006) 141 Cal. App. 4th 748, 46 Cal. Rptr. 3d 268]* .

[c] *T.L.O.* Searches

[i] Searches by Teachers and School Officials

The reasonable suspicion standard set forth by the U.S. Supreme Court in New Jersey v. T.L.O. applies to searches of students conducted by teachers and school officials in public schools [*T.L.O., above*, at pp. 333-336]. Both the United States and California Supreme Courts, however, expressly declined to consider whether the standard is applicable to a student search conducted with law enforcement involvement or where a school official acts in cooperation with, or as an agent of, law enforcement [*T.L.O., above, 469 U.S. at p. 341 fn. 7* ; In re William G., *above, 40 Cal. 3d at p. 562, fn. 12*].

Subsequent cases reflect a blurred distinction between law enforcement personnel and traditional school officials. In so doing, while the applicability of *T.L.O.* to searches conducted by police officers remains unresolved, it is clear that the list of employees falling within the definition of a "school officials" has expanded. The California Supreme Court has held that, for the purposes of assessing the validity of a detention under the *Fourth Amendment*, no meaningful distinction can be drawn between non-law enforcement security officers employed by a school district and other school officials [*In re Randy G. (2001) 26 Cal. 4th 556, 568-569* & fn 3, *110 Cal. Rptr. 2d 516]* . Subsequent case law has similarly refused to distinguish between school officials and police officers on assignment to schools as a resource officers for the purpose of analyzing detentions and searches of students at school [*In re William V. (2003) 111 Cal. App. 4th 1464, 1471-1472, 4 Cal. Rptr. 3d 695]* .

[d] Detention

The standard to stop a minor student in order to ask questions or conduct an investigation is different than that required to conduct a search at school. Citing the broad authority of school administrators over student behavior, school safety, and the learning environment, the California Supreme Court has held that school officials may detain minor students on school grounds without reasonable suspicion of criminal activity or violation of a school rule. While stopping a student on school grounds during school hours, calling a student into the corridor to discuss a school-related matter, or summoning a student to the principal's office for such purpose is not a detention within the meaning of the *Fourth Amendment*, the test for actions deemed to be detentions is the same--namely, whether the school officials' conduct was arbitrary, capricious, or undertaken for purposes of harassment [*In re Randy G. (2001) 26 Cal. 4th 556, 559-565, 110 Cal. Rptr. 2d 516]* . [See also *§ 329.32[5]*.]

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§ 329.132 School Discipline

Students in the public school system are subject to an array of disciplinary sanctions. The vast majority involve minor sanctions imposed informally without administrative or judicial review. However, certain types of school discipline, either because of the reason for the discipline or the severity of the punishment, result in the need for legal consultation or representation. This is especially true as school districts have adopted "Zero Tolerance" policies that predetermine sanctions for certain behavior beyond those that are mandated by statute. See generally Dale, et. al., Representing the Child Client, P 10.05, *Particular Types of School Discipline* (Matthew Bender).

The general distinction between suspension and expulsion is one of duration relating to a child's removal from school. Statutorily, suspension is defined as the removal of a pupil from ongoing instruction for adjustment purposes [*Educ. Code § 48925(d)*] and expulsion is the removal of a pupil from (1) the immediate supervision and control, or (2) the general supervision, of school personnel [*Educ. Code § 48925(b)*]. In either case, students subject to removal from school are entitled to certain due process protections including the right to notice and an opportunity to be heard. Although this can be done informally, at a minimum, school officials must inform students of what they are accused of doing and the basis for the accusation as well as giving students the chance to explain their version of what occurred. While these procedures should be employed prior to the imposition of a sanction, they may takeplace after the removal has occurred [*Goss v. Lopez (1975) 419 U.S. 565, 582, 95 S. Ct. 729, 42 L. Ed. 2d 725]* .

In California, the bases upon which discipline may be imposed and which specific local school officials may impose the various forms of suspensions is set out by statute [*Educ. Code § 48900 et. seq.*; *see* table *below*]. Generally, the total number of days for which a pupil may be suspended from school in any year is not to exceed 20 days [*Educ. Code § 48903*]. If the pupil is enrolled in a continuation school or class, they may be suspended for a period not to exceed the remainder of the semester if the acts enumerated in *Educ. Code § 48900* occurred [*Educ. Code § 48912.5*]. When a minor has been expelled from school, the expulsion order is to remain in effect until the governing board orders readmission. For acts other than those described in [*Educ. Code § 48915(c)*] that is not to be later than the last day of

the semester following the semester in which the expulsion occurred, at which time the pupil is to be reviewed for readmission to a school maintained by the district or to the school the pupil last attended. For acts described in *Educ. Code § 48915(c)*, the review for readmission is to be set one year from the date the expulsion occurred [*Educ. Code § 48916*].

For most offenses, the decision to suspend or expel is discretionary, not mandatory, and must be based on a finding of one or both of the following:

- Other means of correction are not feasible or have repeatedly failed to bring about proper conduct [*Educ. Code § 48915(b)(1)*].

- Due to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others [*Educ. Code § 48915(b)(2)*].

The hearing to determine if a student should be suspended or expelled normally should precede any exclusion from school. As a practical matter this is rarely the case. Most students are first suspended on a short-term basis, and while this suspension is in effect a notice is sent by the school scheduling a hearing for a long term suspension [*see* Dale, et. al., Representing the Child Client, P 10.05[2][c], *Particular Types of School Discipline* (Matthew Bender)]. Once a hearing is held, the burden of proof necessary to support the allegations of the school district is a preponderance of evidence [*John A. v. San Bernardino City Unified School District (1983) 33 Cal. 3d 301, 187 Cal. Rptr. 472, 654 P.2d 242]* or substantial evidence [*Educ. Code § 48918(f)*].

While the hearing process is relatively informal, the common tendency is to consider all forms of evidence presented. However, pupils subject to long-term school disciplinary hearings have the right to confront their accusers and cross-examine witnesses [*Educ. Code § 48918(b)*]. Generally, this requires direct testimony on the primary allegations against the student and, in fact, evidence to expel a student may not be based solely upon hearsay [*Educ. Code § 48918(f)*].

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In the event that a pupil is expelled after a hearing an appeal may be filed within thirty days of the board's decision. The county board of education must then hear the appeal in closed session within twenty school days and render a decision within three school days of the hearing [*Educ. Code §§ 48919, 48920*].

Students who have been suspended or dismissed from school for disrupting the orderly operation of the institution may be denied access to the campus or facility for the duration of the suspension or, in the event of an expulsion, for a period not to exceed one year [*Penal Code § 626.2*]. Written notice of the suspension or expulsion, including the condition prohibiting access to the school, must be served by registered or certified mail. If such notice is provided, and a suspended or expelled student violates the condition prohibiting access, they may be charged with a misdemeanor offense pursuant to *Penal Code § 626* [*In re Leon S. (2005) 133 Cal. App. 4th 1556, 1560-1561, 35 Cal. Rptr. 3d 679]* .

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[Reserved]

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§ 329.140 Proposition 63: Mental Health Services Act

[1] Background

Mental illness is extremely common. Almost every family in California is affected, people from every background and any age. In any year, between 5 percent and 7 percent of adults suffer from a serious mental illness, as do a similar percentage of children--between 5 percent and 9 percent. More than two million children, adults and seniors in California are affected by a potentially disabling mental illness every year. People who become disabled by mental illness deserve the same guarantee of care already extended to those who face other kinds of disabilities [Proposition 63, Section 1, (a)].

In a cost-cutting move 30 years ago, California drastically cut back its services in state hospitals for people with severe mental illness. Thousands ended up on the streets homeless and incapable of caring for themselves. Today thousands of suffering people remain on our streets because they are afflicted with untreated severe mental illness. We can and should offer these people the care they need to lead more productive lives [Proposition 63, Section 1, (d)].

Counties are the primary providers of mental health care in California communities for persons who lack private coverage for such care. Both children and adults are eligible to receive such assistance. Counties provide a range of psychiatric counseling, hospitalization, and other treatment services to patients. In addition, some counties arrange other types of assistance such as housing, substance abuse treatment, and employment services to help their clients. A number of counties have established so-called "systems of care" to coordinate the provision of both medical and nonmedical services for persons with mental health problems.

County mental health services are paid for with a mix of state, local, and federal funds. As part of a prior transfer of mental health program responsibilities from the state to counties, some state revenues are automatically set aside for the support of county mental health programs and thus are not provided through the annual state budget act. Other state

support for county mental health programs is provided through the annual state budget act and thus is subject to change by actions of the Legislature and Governor [*See generally* Legislative Analyst's Analysis of Proposition 63].

[2] Funding

Proposition 63 establishes a state personal income tax surcharge of 1 percent on taxpayers with annual taxable incomes of more than $1 million. Funds resulting from the surcharge will be used to expand county mental health programs.

Under this measure, beginning in 2004-2005, the State Controller would transfer specified amounts of state funding on a monthly basis into a new state fund named the Mental Health Services Fund. State revenues designated for this fund are estimated at $275 million in 2004-2005 (partial year), $750 million in 2005-2006, $800 million in 2006-2007, with increasing amounts annually thereafter. It is expected that expenditures by the state and counties for expansion of mental health programs will increase by comparable amounts [Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact].

[3] Programs

Revenues deposited in the Mental Health Services Fund will be used to create new county mental health programs and to expand some existing programs. These funds will not be provided through the annual state budget act and thus amounts will not be subject to change by actions of the Legislature and Governor. Specifically, the funds can be used for the following activities:

- Children's System of Care. Expansion of existing county system of care services for children who lack other public or private health coverage to pay for mental health treatment.

- Adults' System of Care. Expansion of existing county system of care services for adults with serious mental disorders or who are at serious risk of such disorders if they do not receive treatment.

- Prevention and Early Intervention. New county prevention and early intervention programs to get persons showing early signs of a mental illness into treatment quickly before their illness becomes more severe.

- "Wraparound" Services for Families. A new program to provide stateassistance to counties, where feasible, to establish wraparound services, which provide various types of medical and social services for families (for example, family counseling) where the children are at risk of being placed in foster care.

- "Innovation" Programs. New county programs to experiment with ways to improve access to mental health services, including for underserved groups, to improve program quality, or to promote interagency collaboration in the delivery of services to clients.

- Mental Health Workforce: Education and Training. Stipends, loan forgiveness, scholarship programs, and other new efforts to (1) address existing shortages of mental health staffing in county programs and (2) help provide the additional staffing that would be needed to carry out the program expansions proposed in this measure.

- Capital Facilities and Technology. A new program to allocate funding to counties for technology improvements and capital facilities needed to provide mental health services.

The measure specifies the portion of funds to be devoted to particular activities. In 2004-2005, most of the funding will be provided for expanding the mental health care workforce and for capital facility and technology improvements. In

subsequent years, most funding will be used for new prevention and early intervention programs and various expansions of the existing types of services provided by counties directly to mental health clients [*See generally* Legislative Analyst's Analysis of Proposition 63].

[4] Administration

Under the terms of the proposition, each county must draft and submit for state review and approval, a three-year plan for the delivery of mental health services within its jurisdiction. Counties are also required to prepare annual updates and expenditure plans for the provision of mental health services.

The Department of Mental Health, in coordination with certain other state agencies, has the lead state role in implementing most of the programs specified in the measure and allocating the funds through contracts with counties. In addition, a new Mental Health Services Oversight and Accountability commission will review county plans for mental health services and to approve expenditures for certain programs. The existing Mental Health Planning Council continues to review the performance of the adult and children's system of care programs. The Franchise Tax Board is the lead state agency responsible for administration of the tax provisions of this proposition [*See generally* Legislative Analyst's Analysis of Proposition 63].

Proposition 63 contains special provisions that prohibit the state from reducing financial support for mental health programs below the 2003-2004 level and that restrict certain other changes in mental health programs. Such restrictions are meant to prevent the Legislature and Governor from taking certain actions in the future to reduce state expenditures for mental health services. As a result, state spending in the future should be higher than it otherwise would have been.

[5] Effect on Delinquency

State and national studies have indicated that mental health programs similar to some of those expanded by Proposition 63 generate significant savings to state and local governments. Studies of such programs in California to date suggest that much of the savings would probably accrue to local government. Specifically the expansion of county mental health services as proposed in this measure will probably result in savings on state prison and county jail operations, medical care, homeless shelters, and social services programs. To the extent that juveniles are affected by mental health programs to the same, if not greater, extent as adults, a similar impact and savings can be expected on juvenile institutional placements and delinquency reduction [*See generally* Legislative Analyst's Analysis of Proposition 63; David E. Arredondo et. al., *Juvenile Mental Health Court: Rationale and Protocols*, 52 Juv. & Fam. Ct. J. 1, 3 (2001)].

The initiative codifies the importance of these outcomes by emphasizing the improved timely access to services for underserved populations and strategies to reduce suicide, incarceration, school failure, unemployment, prolonged suffering, homelessness, and the removal of children from their homes [*Welf. & Inst. Code § 5840(a), (d)*].

[6] Subsequent Legislation

The California Judicial Council is now required, to the extent resources are available, to provide education on mental health and developmental disability issues affecting juveniles in delinquency proceedings to judicial officers and other public officers involved in the arrest, evaluation, prosecution, defense, disposition, or placement phases of delinquency proceedings [*Gov. Code § 68553.5*].

In addition, the court now has the authority to refer a minor for a mental health evaluation by a licensed mental health professional, either a psychiatrist or psychologist, when it appears that the minor suffers from a serious mental disorder is seriously emotionally disturbed, or has a developmental disability. Procedures for the consideration of a written report, resulting from the evaluation, by a multidisciplinary team and the incorporation of the treatment plan proposed by the team are now available to counties in which the board of supervisors chose to adopt them [*Welf. & Inst. Code §*

710 et seq.]. These provisions are consistent with the Juvenile Mental Health Court models, established in Santa Clara County, and adopted throughout the country, which may be ripe for funding pursuant to Proposition 63 [*See generally* Arredondo et al., Juvenile Mental Health Court: Rationale and Protocols, 52 Juv. & Fam. Ct. J. 1, 3 (2001)].

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J. 2004 Initiatives Affecting Delinquency

28-329 California Forms of Pleading and Practice--Annotated § 329.141

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§ 329.141 Proposition 69: DNA Samples, Collection, and Database

[1] In General

Deoxyribonucleic Acid (DNA) is the genetic material contained in humans that controls the production of substances needed for development and life activities. The genetic information contained in DNA can be used, like a fingerprint, to identify and differentiate between individuals. Historically, DNA evidence has been used toidentify, arrest, convict and exonerate people involved in the criminal justice system [*See generally* Legislative Analyst's Analysis of Proposition 69].

Proposition 69, which was enacted by voter initiative on November 2, 2004, expands the list of individuals required to submit DNA samples. That list now includes juveniles with a sustained petition for a felony offense or a sustained petition involving any sex or arson offense, or attempt to commit any such offense. An admission of a "wobbler" offense charged as a felony is not an "adjudication" of the misdemeanor or felony status of that offense. That determination is to be made by the juvenile court in the course of the proceedings [*In re Nancy C. (2005) 133 Cal. App. 4th 508, 512, 34 Cal. Rptr. 3d 871]* .

The compulsory, nonconsensual gathering of a biological sample for DNA testing, pursuant to *Penal Code § 296*, was recently challenged as a violation of a minor's *Fourth Amendment* interests in *In re Calvin S. (2007) 150 Cal. App. 4th 443, 58 Cal. Rptr. 3d 559* . In considering the minor's interests, the court also considered the juvenile's relationship to the state and the state's public policy favoring confidentiality. Balancing those interests against the limited release of the DNA profiles and the public interest in accurate prosecution of crimes by facilitating the detection, apprehension, and conviction of offenders, the court determined that making juveniles subject to the provisions of *Penal Code § 296* is constitutional and "hardly a public announcement of a juvenile offender's felony conviction." [*In re Calvin S. (2007) 150 Cal. App. 4th 443, 449, 58 Cal. Rptr. 3d 559*].

[2] Collection and Use

Immediately following the sustaining of a petition involving a qualifying offense, state or local law enforcement officials are required to collect, from any juvenile, a sample of inner cheek cells of the mouth, known as a "buccal swab" sample. This sample is in addition to the right thumbprint, and a full palm print impression of each hand, and blood specimens or biological samples required to be taken prior to the passage of proposition 69 [*Penal Code § 296(a)(1), (3)*].

Upon collection, the samples are submitted to the California Department of Justice (DOJ). The DOJ laboratory analyzes the samples and stores the DNA profiles in a statewide database. The profiles are also submitted by DOJ to the Combined DNA Index System, a national repository maintained by the Federal Bureau of Investigation. The information in the DNA databank is compared to evidence collected from crime scenes for possible matches [*Penal Code §§ 295(g), (h), 297*].

If at any stage of court proceedings the prosecuting attorney determines that specimens, samples, and print impressions have not been taken as required, they shall notify the court orally on the record, or in writing, and request that the court order collection of the specimens, samples, and print impressions. However, a failure by the prosecuting attorney, or any other law enforcement agency, to notify the court shall not relieve a minor from the obligation to provide the specimens, samples, and print impressions as required by law [*Penal Code § 296(e)*].

Prior to the final disposition of the case, the court must inquire and verify that the specimens, samples, and print impressions required have been obtained and that this fact is included in the abstract of judgment or dispositional order [*Penal Code § 296(f)*].

[3] Retroactive Application

The list of qualifying offenses that require a minor to submit a DNA sample is retroactive, regardless of when the matter was adjudicated. Consequently, DNA is to be obtained from minors previously adjudicated for qualifying offenses who are presently in custodial facilities and placements, as well as those on probation or parole [*Penal Code § 296.1*].

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28-329 California Forms of Pleading and Practice--Annotated §§ 329.142-329.199

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28-329 California Forms of Pleading and Practice--Annotated § 329.200

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§ 329.200 Matthew Bender Publications

Detailed treatment of delinquency proceedings in juvenile courts. Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Chs. 120- 125 (Matthew Bender)

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28-329 California Forms of Pleading and Practice--Annotated § 329.201

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§ 329.201 Other Text References

Myers, Evidence In Child Abuse And Neglect Cases (2d ed. 1992)

Witkin, Summary of California Law, vol. 10, *Parent and Child,* §§ 449-839 (9th ed. 1989)

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28-329 California Forms of Pleading and Practice--Annotated § 329.202

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§ 329.202 Law Reviews

Hogg Haught, Comment, *Deferred Entry of Judgment: An Overlooked and Undervalued Benefit of Proposition 21 38 U.S.F. L. Rev. 339 (2004)*

Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 (2) Juv. & Fam. Ct. J., 1 (1992)

Cohen, *Reconciling Media Access with Confidentiality for the Individual in Juvenile Court, 20 Santa Clara L. Rev. 405 (1980)*

Comment, *The Right to Treatment for Mentally Ill Juveniles in California, 27 Hastings L.J. 865 (1976)*

Comment, *Probation Departments, 6 Pac. L.J. 343 (1974)*

Note, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates, 40 Stan. L. Rev. 773 (1988)*

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28-329 California Forms of Pleading and Practice--Annotated § 329.203

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§ 329.203 Web Sites

Center for Children and the Courts: http://www.courtinfo.ca.gov/programs/children and the courts

Office of Child Development, Neuropsychiatry and Mental Health;

Office of Juvenile Justice and Delinquency Prevention: http://www.ncjrs.org/ojjhome.htm

The ABA Center on Children and the Law: http://www.abanet.org/child/

The ABA Juvenile Justice Center: http://www.abanet.org/crimjust/juvjus/home.html

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28-329 California Forms of Pleading and Practice--Annotated § 329.210

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.210 State Statutes

Statutes governing delinquency proceedings under *Welf. & Inst. Code §§ 601* and *602*. *Welf. & Inst. Code § 601 et seq.*

Provisions for detaining minors taken into custody under *Welf. & Inst. Code §§ 601* and *602*. *Welf. & Inst. Code § 206 et seq.*

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28-329 California Forms of Pleading and Practice--Annotated § 329.211

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§ 329.211 California Rules of Court

California Rules of Court governing delinquency proceedings generally. Cal. Rules of Ct., Title 5

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28-329 California Forms of Pleading and Practice--Annotated § 329.212

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§ 329.212 Decisions

Rather than seeking to place stigma of criminality on the minor, juvenile court law is to be liberally construed to secure for each minor such care and guidance as will serve the welfare of the minor and the best interests of the state. *In re Aline D. (1975) 14 Cal. 3d 557, 562, 121 Cal. Rptr. 816, 536 P.2d 65*

Bifurcation of jurisdiction and disposition is consequence of statutory requirement that juvenile court first determine whether facts support jurisdiction in declaring wardship, and thereafter determine appropriate disposition. *In re J. L. P. (1972) 25 Cal. App. 3d 86, 89, 100 Cal. Rptr. 601*

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28-329 California Forms of Pleading and Practice--Annotated §§ 329.213-329.219

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28-329 California Forms of Pleading and Practice--Annotated § 329.220

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.220 State Statutes

Capacity to commit crime. *Penal Code § 26*

Jurisdiction of traffic hearing officers. *Welf. & Inst. Code § 256*

Jurisdiction over minors habitually disobedient or truant. *Welf. & Inst. Code § 601*

Failure of person in charge of minor to respond to directives of school attendance review board; disposition of minor. *Welf. & Inst. Code § 601.2*

Juvenile court judge may be assigned to sit as municipal court judge to hear complaint alleging that person having control of the minor has violated *Educ. Code § 48293* (failure to comply with compulsory education laws). *Welf. & Inst. Code § 601.4*

Jurisdiction over minors violating laws defining crime or failing to obey court order. *Welf. & Inst. Code § 602*

Exclusive preliminary jurisdiction of juvenile court against person under 18 years of age. *Welf. & Inst. Code § 603*

Jurisdiction when minor violates vehicle code. *Welf. & Inst. Code § 603.5*

Certification to juvenile court; suspension of proceedings; finding; transmittal of pleadings. *Welf. & Inst. Code § 604*

Statute of limitations. *Welf. & Inst. Code § 605*

Subjecting minor to criminal prosecution. *Welf. & Inst. Code § 606*

Retention of jurisdiction over ward of the court. *Welf. & Inst. Code § 607*

Test to be used to determine age of individual alleged to be person described in *Welf. & Inst. Code § 601*, *602*, or *604(a)*. *Welf. & Inst. Code § 608*

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28-329 California Forms of Pleading and Practice--Annotated § 329.221

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§ 329.221 Decisions

[1] Capacity to Commit Crime

Evidence on the issue of wrongfulness must relate to the specific act committed but may include a general awareness of the difference between right and wrong and circumstantial evidence surrounding a child's behavior. *In re James B. (2003) 109 Cal. App. 4th 862, 873, 135 Cal. Rptr. 2d 457*

Presumption that minor under the age of 14 is incapable of committing crime, set forth in *Penal Code § 26*, as applying to delinquency proceedings; rebuttal of presumption as prerequisite to wardship adjudication under *Welf. & Inst. Code § 602*. *In re Manuel L. (1994) 7 Cal. 4th 229, 236, 27 Cal. Rptr. 2d 2, 865 P.2d 718* ; *In re R. (1970) 1 Cal. 3d 855, 862, 83 Cal. Rptr. 671, 464 P.2d 127*

Presumption that minor under age of 14 is incapable of committing crime (*Penal Code § 26*) as rebutted by clear and convincing evidence that, at the time minor committed the charged act, he or she knew of its wrongfulness. *In re Manuel L. (1994) 7 Cal. 4th 229, 236, 27 Cal. Rptr. 2d 2, 865 P.2d 718*

Finding of capacity as not an element of offense and, therefore, as not requiring proof beyond reasonable doubt under *Welf. & Inst. Code § 701* or *In re Winship (1970) 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368* (due process requires proof beyond a reasonable doubt in juvenile proceedings). *In re Manuel L. (1994) 7 Cal. 4th 229, 235-236, 239 n.5, 27 Cal. Rptr. 2d 2, 865 P.2d 718* (disapproving, to the extent inconsistent with this decision, *In re Billie Y. (1990) 220 Cal. App. 3d 127, 269 Cal. Rptr. 212* ; *In re Francisco N. (1986) 186 Cal. App. 3d 175, 179-180, 230 Cal. Rptr. 475* ; *In re Richard T. (1985) 175 Cal. App. 3d 248, 252-253, 220 Cal. Rptr. 573* ; and *Shortridge v. Municipal Court (1984) 151 Cal. App. 3d 611, 618, 198 Cal. Rptr. 749* ; *see also* *In re Clyde H. (1979) 92 Cal. App. 3d 338, 343, 154 Cal. Rptr. 727*)

Penal Code § 26 presumption as overcome when court had evidence beyond reasonable doubt that minor, who was two months short of his 14th birthday, appreciated wrongfulness of his conduct; fact that *Penal Code § 288(a)* (lewd or lascivious act on child under 14) was enacted to protect children as not precluding prosecution of member of that protected class. *In re Billie Y. (1990) 220 Cal. App. 3d 127, 130-133, 269 Cal. Rptr. 212* . Presumption of *Penal Code § 26* that child under age of 14 is incapable of committing crime as referring to chronological age, not mental age. *In re M. (1978) 22 Cal. 3d 419, 422, 149 Cal. Rptr. 387, 584 P.2d 524*

Although intent of *Penal Code § 26* (presumption that minors are incapable of committing crime in absence of clear proof that at time of act they knew its wrongfulness) does not permit court to infer knowledge from bare commission of act itself, reference as properly permitted to be made to attendant circumstances, including its preparation, particular method of its commission, and its concealment. *In re C. (1978) 21 Cal. 3d 888, 900, 148 Cal. Rptr. 366, 582 P.2d 957*

When only evidence on issue of knowledge of wrongfulness was brief statement of police officer that minor said yes when asked if he knew difference between right and wrong, evidence as insufficient to meet requirements of *Penal Code § 26* demanding more substantial evidence to clearly prove 9-year-old boy harbored necessary capacity to commit serious criminal offense. *In re Michael B. (1975) 44 Cal. App. 3d 443, 446, 118 Cal. Rptr. 685*

[2] Jurisdiction of Juvenile Court

Notwithstanding the fact that a minor's wardship can be established exclusively as the result of a violation of federal law, *Welf. & Inst. Code § 602* is not preempted by the *United States Constitution's Supremacy Clause, 18 U.S.C. § 3231* (which gives federal courts exclusive jurisdiction over federal criminal offenses), or any other provision of federal law. *In re Jose C. (2009) 45 Cal. 4th 534, 541-555, 87 Cal. Rptr. 3d 674*

Penal Code § 654 provides, in relevant part: "An acquittal or conviction and sentence under any one [provision of law] bars a prosecution for the same act or omission under any other." While expressly applicable to juvenile proceedings, it should be noted that amended petitions may be filed after jurisdiction, by admission or contested hearing, if the matter has not yet gone to disposition. *In re R.L. (2009) 170 Cal. App. 4th 1339, 88 Cal. Rptr. 3d 854*

The *Kellett* rule applies in delinquency proceedings. In *Kellett*, the California Supreme Court held that when "the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence" [*Kellett v. Superior Court (1966) 63 Cal. 2d 822, 827, 48 Cal. Rptr. 366]* . However, *Kellett* does not apply when the prosecutor cannot proceed on additional charges earlier because additional facts and police reports have not been discovered at the time of the original jurisdiction and disposition hearing. *In re R.L. (2009) 170 Cal. App. 4th 1339, 1343-1345, 88 Cal. Rptr. 3d 854*

When minor is found unfit on *Welf. & Inst. Code § 707(b)* offense, and offense is dismissed in adult court, juvenile court can reacquire jurisdiction. *In re Richard C. (1994) 24 Cal. App. 4th 966, 971, 29 Cal. Rptr. 2d 506*

When minor is convicted in adult court before it is discovered that he was a minor at the time the offense was committed, the matter must be referred back to juvenile court to determine if the minor is unfit. *Jose D. v. Superior Court (1993) 19 Cal. App. 4th 1098, 1100, 23 Cal. Rptr. 2d 664*

Juvenile and adult court may exercise concurrent jurisdiction over minor over the age of 18. *In re Mikeal D. (1983)*

141 Cal. App. 3d 710, 718, 190 Cal. Rptr. 602

Juvenile courts as exercising exclusive initial jurisdiction over all youths under 18 years of age and, until that court makes certification order, superior court as lacking jurisdiction to make order affecting juvenile, except, perhaps, to suspend criminal proceedings and transfer accused to juvenile court when proceedings have been inadvertently commenced in superior court. *People v. Chi Ko Wong (1976) 18 Cal. 3d 698, 710, 135 Cal. Rptr. 392, 557 P.2d 976*

Welf. & Inst. Code § 607(b) which extends the juvenile court's jurisdiction to age 25 for *Welf. & Inst. Code § 707(b)* offenses applies to minors under the age of 16. *In re Julian O. (1994) 27 Cal. App. 4th 847, 850-851, 32 Cal. Rptr. 2d 193* (modified on other grounds)

Welf. & Inst. Code § 607(b) extends the jurisdiction of the court until the age of 25 where the ward was committed to DJF (formerly CYA) for an offense specified in §§ 707(b), (d)(2), or (e), regardless of a subsequent order to modify or vacate the commitment. *In re Antoine D. (2006) 137 Cal. App. 4th 1314, 1323-1325, 40 Cal. Rptr. 3d 885*

For juvenile wardship jurisdiction purposes, person as attaining age 18 on first minute of day of 18th birthday, and not first second of day preceding 18th birthday. *Johnson v. Superior Court (1989) 208 Cal. App. 3d 1093, 1094-1097, 256 Cal. Rptr. 651*

Welf. & Inst. Code § 679 as requiring only that nothing be done to preclude minor from being present at jurisdiction hearing; minor may knowingly and intelligently waive right to attend and may not complain of situation created by voluntary absence. *In re Sidney M. (1984) 162 Cal. App. 3d 39, 48, 208 Cal. Rptr. 378*

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§§ 329.222[Reserved]

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28-329 California Forms of Pleading and Practice--Annotated § 329.230

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.230 State Statutes

Filing of petition; constitutional guarantees. *Welf. & Inst. Code § 630*

Notice of hearings. *Welf. & Inst. Code § 630.1*

Filing of petition. *Welf. & Inst. Code § 650*

Venue. *Welf. & Inst. Code § 651*

Initial investigation by probation officer. *Welf. & Inst. Code § 652*

Investigation by referral agency. *Welf. & Inst. Code § 652.5*

Application to commence proceedings under *Welf. & Inst. Code § 601*. *Welf. & Inst. Code § 653*

When affidavit may be submitted. *Welf. & Inst. Code § 653.1*

When affidavit may be submitted within 48 hours; prosecutor's discretion to file. *Welf. & Inst. Code § 653.5(c)*

Failure of probation officer to take action within 21 days. *Welf. & Inst. Code § 653.7*

Program of supervision as alternative to filing petition. *Welf. & Inst. Code §§ 654-654.4*

Review of failure of probation officer to file petition. *Welf. & Inst. Code § 655*

Review of referral agency's decision. *Welf. & Inst. Code § 655.5*

Contents of petition. *Welf. & Inst. Code § 656*

Requirement that petition specify whether crime charged is felony or misdemeanor. *Welf. & Inst. Code § 656.1*

Dismissal of unverified petition. *Welf. & Inst. Code § 656.5*

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28-329 California Forms of Pleading and Practice--Annotated § 329.231

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.231 California Rules of Court

Investigation by probation officer to determine whether proceedings in juvenile court should be commenced. *Cal. Rules of Ct., Rule 5.514(c)*

Mandatory referrals to the prosecuting attorney. *Cal. Rules of Ct., Rule 5.514(d)*

Intake; guidelines and factors to consider. *Cal. Rules of Ct., Rules 5.514, 5.516*

Discretionary role of probation officer, county welfare department, or prosecuting attorney in determining whether to file petition. *Cal. Rules of Ct., Rule 5.520*

Form of petition; notice of hearing. *Cal. Rules of Ct., Rule 5.524*

Time limit for filing petition. *Cal. Rules of Ct., Rule 5.752*

Time limitation for filing petition in event minor has misrepresented age. *Cal. Rules of Ct., Rule 5.752(c)*

Filing petition after juvenile has been certified to juvenile court and detained in custody. *Cal. Rules of Ct., Rule 5.752(d)*

Service and notice of petition. *Cal. Rules of Ct., Rule 5.524(f)*

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28-329 California Forms of Pleading and Practice--Annotated § 329.232

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.232 Attorney General Opinions

County probation officer as authorized to file petition in juvenile court under *Educ. Code § 48263*; hearing on petition procedure under *Educ. Code § 48263* as satisfying procedural due process requirements; district attorney as authorized to prosecute criminal complaint under *Educ. Code § 48291*. *64 Ops. Cal. Atty. Gen. 894 (1981)*

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28-329 California Forms of Pleading and Practice--Annotated § 329.233

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§ 329.233 Decisions

Welf. & Inst. Code § 654 requires an individualized assessment of a minor's suitability for informal supervision based upon specified criteria which do not include a categorical exclusion from consideration based upon a refusal to admit an offense. *Kody P. v. Superior Court (2006) 137 Cal. App. 4th 1030, 1033, 40 Cal. Rptr. 3d 763*

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28-329 California Forms of Pleading and Practice--Annotated §§ 329.234-329.239

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§§ 329.234[Reserved]

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28-329 California Forms of Pleading and Practice--Annotated § 329.240

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§ 329.240 State Statutes

[1] Detention Facilities

Secure and nonsecure facilities defined. *Welf. & Inst. Code § 206*

Segregation of minors described in *Welf. & Inst. Code § 300* (dependency) from minors brought into detention under *Welf. & Inst. Code § 601* (wardship for habitual truancy or disobedience) or 602 (wardship for criminal offenses). *Welf. & Inst. Code § 206*

Detention of minors taken into custody for refusal to obey parents, habitual truancy, and similar matters. *Welf. & Inst. Code § 207*

Restrictions on detention in jail or lockup. *Welf. & Inst. Code § 207.1*

Prohibition against detention of juvenile in adult institution, so that juvenile prohibited from coming or remaining in contact with incarcerated adults. *Welf. & Inst. Code § 208*

Restrictions on detention of juvenile in state hospital or other state facility. *Welf. & Inst. Code § 208*

Secure juvenile facilities for juveniles charged with serious and violent crimes; confinement with adults. *Welf. & Inst. Code § 208.1*

Minor attains age 18 prior to or during confinement. *Welf. & Inst. Code § 208.5*

No person under age of 14 years as permitted to be committed to state prison or be transferred there from any other institution. *Welf. & Inst. Code § 211*

Workers' compensation benefits for ward injured while performing rehabilitative work under assignment by order of juvenile court. *Welf. & Inst. Code § 219*

Operation of nonsecure facility by probation officers. *Welf. & Inst. Code § 636.2*

Role of California Youth Authority. *Welf. & Inst. Code §§ 1000-1002*

[2] Conditions of Detention

Annual inspection required of jail, juvenile hall, or lockup used for confinement of any minor for more than 24 hours. *Welf. & Inst. Code § 209*

Department of Youth Authority as required to adopt minimum standards for operation and maintenance of juvenile halls for confinement of minors. *Welf. & Inst. Code § 210*

Availability of abortions. *Welf. & Inst. Code §§ 220-222*

Furnishing material for personal hygiene. *Welf. & Inst. Code § 221*

Establishment of juvenile hall. *Welf. & Inst. Code §§ 850, 851*

Establishment of juvenile homes, ranches, and camps. *Welf. & Inst. Code §§ 881, 882*

[3] Detention Hearing

Detention hearing; release. *Welf. & Inst. Code § 632*

Informing minor as to reasons for custody, nature of proceedings, and right to counsel. *Welf. & Inst. Code § 633*

Appointment of counsel. *Welf. & Inst. Code § 634*

Counsel; appearance on behalf of minor; continuity in representation. *Welf. & Inst. Code § 634.6*

Examination of minor. *Welf. & Inst. Code § 635*

Notification requirements for specialized mental health treatment. *Welf. & Inst. Code § 635.1*

Order detaining minor in juvenile hall. *Welf. & Inst. Code § 636*

Rehearing. *Welf. & Inst. Code § 637*

Motion for continuance. *Welf. & Inst. Code § 638*

Order requiring reappearance of minor, parent, or guardian. *Welf. & Inst. Code § 639*

[4] Temporary Custody

Release of minors from temporary custody; parental liability for support costs following refusal to take minor after release. *Welf. & Inst. Code § 207.2*

Temporary custody by peace officer without warrant. *Welf. & Inst. Code § 625*

Chemical testing of minor taken into temporary custody. *Welf. & Inst. Code §§ 625.1, 625.2*

Detention of minor in violation of curfew ordinance; citation; fee for costs. *Welf. & Inst. Code § 625.5*

Alternative proceedings available to peace officer. *Welf. & Inst. Code § 626*

Notice to parent or guardian; right to make telephone calls. *Welf. & Inst. Code § 627*

Advice as to constitutional rights. *Welf. & Inst. Code § 627.5*

Investigation by probation officer; release of minor. *Welf. & Inst. Code § 628*

Written promise to appear as condition for release. *Welf. & Inst. Code § 629*

Filing of petition; constitutional guarantees. *Welf. & Inst. Code § 630*

Notice of hearings. *Welf. & Inst. Code § 630.1*

Time limitations for release; exceptions; written explanation for custody over 24 hours. *Welf. & Inst. Code § 631*

Misrepresentation of age. *Welf. & Inst. Code § 631.1*

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28-329 California Forms of Pleading and Practice--Annotated § 329.241

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§ 329.241 California Rules of Court

Time of detention hearings. *Cal. Rules of Ct., Rule 5.752(e), (f)*

Time of detention hearing for transfers and changes of placement. *Cal. Rules of Ct., Rule 5.752(g)*

Detention hearing after violation of home supervision program. *Cal. Rules of Ct., Rule 5.752(h)*

Grounds for continuance of detention hearing. *Cal. Rules of Ct., Rule 5.550(c)*

Explanation of proceedings at commencement of hearing. *Cal. Rules of Ct., Rule 5.754(a)*

Advice of hearing rights at commencement of hearing. *Cal. Rules of Ct., Rule 5.534(j)*

Admission of allegations of petition and no contest pleas at detention hearing. *Cal. Rules of Ct., Rule 5.754(b)*

Conduct of detention hearing. *Cal. Rules of Ct., Rule 5.756, 5.760*

Prima facie hearings. *Cal. Rules of Ct., Rule 5.764*

Grounds for detention and factors to consider. *Cal. Rules of Ct., Rule 5.760(g)-(k)*

Rehearings. *Cal. Rules of Ct., Rule 5.762*

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28-329 California Forms of Pleading and Practice--Annotated § 329.242

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§ 329.242 Decisions

[1] Detention Hearing

Welf. & Inst. Code § 632 requires a child to be released from custody if a detention hearing is not held before the end of the day following the filing of a petition. *In re Angel M. (1997) 58 Cal. App. 4th 1498, 1501* ; *68 Cal. Rptr. 2d 825*

Although it appears reasonable not to release a child where there is no parent or guardian present, there is no authority requiring a parent or guardian to be present at a detention hearing; the court does not have discretion to detain a child on this basis if the statutory time requirements have not been met. *In re Angel M. (1997) 58 Cal. App. 4th 1498, 1506* ; *68 Cal. Rptr. 2d 825*

Juvenile detention hearing as not equivalent of adult preliminary hearing; juvenile as not entitled to present evidence of affirmative defense unless evidence bears on question of whether juvenile is danger to community if released pending jurisdiction hearing. *In re Korry K. (1981) 120 Cal. App. 3d 967, 970-971, 175 Cal. Rptr. 91*

Juvenile court must consider the minor's case on its individual merits and cannot detain the minor based solely on a category of crime. *In re William M. (1970) 3 Cal. 3d 16, 29-30, 89 Cal. Rptr. 33, 473 P.2d 737*

Juvenile court may not detain an out-of-custody minor who appears for a pretrial conference without counsel and without having been given notice that he or she might be detained. *In re Ryan B. (1989) 216 Cal. App. 3d 1519, 1527, 265 Cal. Rptr. 629*

At a detention rehearing, only the preparers of the report must be made available to the minor for cross-examination. *In re Luis M. (1986) 180 Cal. App. 3d 1090, 1094, 226 Cal. Rptr. 39*

Minor has right to a detention rehearing where the court must find whether there is a reasonable probability that a crime occurred and that the minor committed it. *In re Dennis H. (1971) 19 Cal. App. 3d 350, 354-355, 96 Cal. Rptr. 791*

[2] Preadjudication Procedures

Due process standards governing preadjudication detention of juvenile delinquent as satisfied when purpose of detention is to protect community and minor from consequences of future offenses, conditions of preadjudication confinement are regulatory and nonpunitive in nature, and applicable procedures properly safeguard minor from erroneous and unnecessary deprivations of liberty. *Schall v. Martin (1984) 467 U.S. 253, 266-272, 274-280, 104 S. Ct. 2403, 81 L. Ed. 2d 207*

Juvenile detainees as constitutionally entitled to judicial probable cause determination within 72 hours of arrest; this due process requirement as met by formal juvenile detention hearing pursuant to *Welf. & Inst. Code § 632(a)* when the hearing is held within 72 hours of arrest; otherwise, Constitution requires separate, timely judicial determination of probable cause for any period of detention beyond 72 hours; 48-hour rule governing pretrial detention of adults as not applying to juvenile detention. *Alfredo A. v. Superior Court (1994) 6 Cal. 4th 1212, 1231-1232, 26 Cal. Rptr. 2d 623, 865 P. 2d 56*

Detention in county jail is appropriate only until disposition and the ability of the court to order pre-dispostion detention in the facility does not expand the range of disposition alternatives set forth in *Welf. & Inst. Code § 202*. The proper procedure for detention in county jail must begin with an initial placement in a juvenile facility, after which probation may seek an order to allow for housing in county jail pending disposition. *In re Ramon M. (2009) 178 Cal. App. 4th 665, 101 Cal. Rptr. 3d 158*

Juveniles as properly detained without right to bail or prehearing release. *Aubry v. Gadbois (1975) 50 Cal. App. 3d 470, 475, 123 Cal. Rptr. 365*

Detention as required to be based on substantial showing of facts establishing grounds required as condition precedent to detention. *In re Macidon (1966) 240 Cal. App. 2d 600, 607, 49 Cal. Rptr. 861*

[3] Temporary Custody & Arrest

Welf. & Inst. Code § 625.1, permitting peace officer, without warrant, to take temporary custody of minor whenever officer has reasonable cause to believe that minor has committed crime in officer's presence as overriding *Welf. & Inst. Code § 625(a)*, allowing peace officer to take minor into temporary custody without warrant when officer only had reasonable cause to believe minor was one who had broken law under *Welf. & Inst. Code § 602*. *In re S. (1977) 19 Cal. 3d 727, 744-745, 139 Cal. Rptr. 708, 566 P.2d 610*

Cite-back procedure, which allows release of juvenile after he or she is instructed to return to police station at later time for continued discussion with officer, as legal. *In re Juan G. (1981) 120 Cal. App. 3d 766, 769-770, 174 Cal. Rptr. 795*

Welf. & Inst. Code § 626 requirement that minor be promptly taken to probation officer after arrest as applicable to arrest for minor offenses under *Welf. & Inst. Code § 625* and as not applicable to arrests pursuant to *Welf. & Inst. Code § 625.1(c)* (commission of felony). *In re Anthony J. (1978) 86 Cal. App. 3d 164, 172-173, 150 Cal. Rptr. 183*

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28-329 California Forms of Pleading and Practice--Annotated § 329.250

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§ 329.250 State Statutes

Statutory waiver. *Welf. & Inst. Code § 602(b)*

Direct file (prosecutorial waiver). *Welf. & Inst. Code § 707(d)*

Reverse Remand. *Penal Code § 1170.17*

Fitness hearing for prosecution as adult. *Welf. & Inst. Code § 707*

Consequences of unfitness finding. *Welf. & Inst. Code § 707.01*

Criminal prosecution. *Welf. & Inst. Code § 707.1*

Remand to Youth Authority before sentence to state prison. *Welf. & Inst. Code § 707.2*

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28-329 California Forms of Pleading and Practice--Annotated § 329.251

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§ 329.251 California Rules of Court

Request for hearing. *Cal. Rules of Ct., Rule 5.766(a)*

Notice and time of hearing. *Cal. Rules of Ct., Rule 5.766(b), (c)*

Report of probation officer. *Cal. Rules of Ct., Rule 5.768*

Conduct of hearing. *Cal. Rules of Ct., Rules 5.772*

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28-329 California Forms of Pleading and Practice--Annotated § 329.252

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§ 329.252 Decisions

[1] Challenging Certification Order

The juvenile court's ultimate finding that a minor is a fit or unfit subject for treatment under juvenile court law is subject to review for error under an abuse of discretion standard. *People v. Superior Court (Jones) (1998) 18 Cal. 4th 667, 680, 76 Cal. Rptr. 2d 641*

The juvenile court's findings of fact are subject to appellate review under a "substantial evidence" standard. *People v. Superior Court (Jones) (1998) 18 Cal. 4th 667, 681-682 ; 76 Cal. Rptr. 2d 641*

Rule regarding manner in which certification order may be challenged as only applying prospectively. *People v. Chi Ko Wong (1976) 18 Cal. 3d 698, 716, 135 Cal. Rptr. 392, 557 P.2d 976*

Penal Code § 995 as not embracing challenge to certification order made by juvenile court in collateral proceedings. *People v. Chi Ko Wong (1976) 18 Cal. 3d 698, 715, 135 Cal. Rptr. 392, 557 P.2d 976*

Certification order as normally challenged only by extraordinary writ in collateral proceedings commenced prior to commencement of trial on charges for which defendant is certified as unfit for treatment within juvenile court facilities. *People v. Chi Ko Wong (1976) 18 Cal. 3d 698, 714, 135 Cal. Rptr. 392, 557 P.2d 976*

Because certification hearing is extrajudicial process with regard to subsequent criminal proceedings, appellate review of criminal proceedings as not properly broadened to include attack on certification order. *People v. Chi Ko Wong (1976) 18 Cal. 3d 698, 710-711, 135 Cal. Rptr. 392, 557 P.2d 976*

[2] Constitutional Considerations

Waiver of juvenile court jurisdiction to adult court as prohibited without providing minor with hearing, access to appointed counsel, discovery of all social records, and specific findings or statement of reasons why juvenile court seeks to relinquish jurisdiction. *Kent v. United States (1966) 383 U.S. 541, 563-564, 86 S. Ct. 1045, 16 L. Ed. 2d 84*

Welf. & Inst. Code § 707, establishing procedure by which juvenile court may certify minor to adult court on finding that minor is unfit for treatment and care under juvenile court law, as not unconstitutionally vague. *Donald L. v. Superior Court (1972) 7 Cal. 3d 592, 601, 102 Cal. Rptr. 850, 498 P.2d 1098* (overruled on another ground in *In re V. (1980) 28 Cal. 3d 587, 596, 169 Cal. Rptr. 713, 620 P.2d 163*)

Presumption of unfitness of 14-year-old pursuant to *Welf. & Inst. Code § 707(e)* as not violative of equal protection or due process. *Hicks v. Superior Court (1995) 36 Cal. App. 4th 1649, 1658-1661, 43 Cal. Rptr. 2d 269*

[3] Considerations for Unfitness Finding

Robbery while armed with dangerous or deadly weapon, for which unfitness is presumed under *Welf. & Inst. Code § 707(b)(3)*, as including vicarious as well as personal arming. *In re Christopher R. (1993) 6 Cal. 4th 86, 92-95, 23 Cal. Rptr. 2d 786, 859 P. 2d 1301*

In certification proceeding, no limitations as imposed on evidence that court may consider other than basic tests of relevancy and materiality to issue of amenability to treatment by juvenile court facilities; requirement that court must read and consider probation officer's report on behavioral patterns as introducing wide assortment of hearsay, opinion evidence, evidence of prior offenses, school reports, and other miscellaneous information. *People v. Chi Ko Wong (1976) 18 Cal. 3d 698, 718, 135 Cal. Rptr. 392, 557 P.2d 976*

Factors that may be considered by juvenile court in certifying minor to adult court as including whether minor would be physical danger to society because of mental or physical deficiency, disorder, or abnormality, estimated time required for rehabilitation, nature of crime allegedly committed, circumstances and details surrounding commission, minor's behavior pattern including past record of delinquency, degree of sophistication especially as it relates to criminal activities, and contradictory opinion testimony. *Jimmy H. v. Superior Court (1970) 3 Cal. 3d 709, 715-716, 91 Cal. Rptr. 600, 478 P.2d 32*

A presumption of unfitness under the circumstances and gravity of the crimes criterion may be rebutted by evidence pertaining to the minor's mental state, or mental retardation that tends to lessen the severity of the behavior even if it does not justify or excuse the offense. *Rene C. v. Superior Court (2006) 138 Cal. App. 4th 1, 12-14, 41 Cal. Rptr. 3d 71*

Welf. & Inst. Code § 707(b)'s listed offenses as restricted to felony offenses and not including misdemeanor offenses. *In re Sim J. (1995) 38 Cal. App. 4th 94, 96-99, 45 Cal. Rptr. 2d 30*

People as not required to negate possibility that treatment through juvenile court system would be possible in hearing to determine fitness under *Welf. & Inst. Code § 707*. *People v. Browning (1975) 45 Cal. App. 3d 125, 139, 119 Cal. Rptr. 420* (overruled on another ground in *People v. Williams (1976) 16 Cal. 3d 663, 669, 128 Cal. Rptr. 888, 547 P.2d 1000*)

Affirmative defense of alibi is not relevant at fitness hearing. *People v. Superior Court (Rodrigo O.) (1994) 22 Cal. App. 4th 1297, 1303, 27 Cal. Rptr. 2d 796*

Presumption of *Welf. & Inst. Code § 707(c)* as inapplicable when minor challenges sufficiency of evidence against him or her, unless prosecution first establishes prima facie case that criminal violation was actually committed. *Edsel P. v. Superior Court (1985) 165 Cal. App. 3d 763, 776-777, 211 Cal. Rptr. 869*

Court as required to presume that juvenile age 16 or older charged with offense listed in *Welf. & Inst. Code § 707(b)* is not fit and proper subject of juvenile court law, unless court finds by preponderance of evidence that minor is fit and proper undereach of five criteria listed in *Welf. & Inst. Code § 707(c).* *People v. Superior Court (Steven S.) (1981) 119 Cal. App. 3d 162, 174-177, 173 Cal. Rptr. 788*

[4] Direct File (Prosecutorial Waiver)

If a minor, directly filed upon in criminal court pursuant to *Penal Code § 707(d),* is not convicted of the § 707(b) offense(s) that were the basis of the prosecutorial waiver, there is no subsequent binding effect keeping the child in adult court on the basis of future delinquency. *People v. Superior Court (Marcelina M.) (2005) 133 Cal. App. 4th 651, 656-657* ; *34 Cal. Rptr. 3d 940*

Welf. & Inst. Code § 602(b) requires that juveniles age 14 or older be prosecuted under the general law when it is alleged that they have committed certain specified offenses. If convicted under the general law, such individuals may be punished by life in prison, with 14- and 15-year-olds eligible for parole. *People v. Demirdjian (2006) 144 Cal. App. 4th 10, 16, 17, 50 Cal. Rptr. 3d 184*

[5] Sentencing Considerations

The Supreme Court has determined that the requirement of *Penal Code § 1170.19(a)(4),* that the criminal court must secure the prosecutor's consent before it can order a Youth Authority (Division of Juvenile Justice) commitment violates the state Constitution's separation of powers doctrine (*Cal. Const., Art. III, § 3*). *People v. Thomas (2005) 35 Cal. 4th 635, 642, 27 Cal. Rptr. 3d 2* .

Welf. & Inst. Code § 1732.6(a) restricts the criminal court's discretion to order a Youth Authority (Division of Juvenile Justice) commitment for minors convicted of any offense described in *Penal Code § 667.5(c)*. Minors convicted of such offenses cannot be committed to the Youth Authority (Division of Juvenile Justice) if they have been "sentenced to incarceration for life, an indeterminate period to life, or a determinate period of years such that the maximum number of years of potential confinement when added to the minor's age would exceed 25 years." *Welf. & Inst. Code § 1732.6(a), People v. Thomas (2005) 35 Cal. 4th 635, 643, 27 Cal. Rptr. 3d 2* .

[6] Statement of Reasons in Support of Findings

Because evidence in support of juvenile court's order of certification to adult court was overwhelming, court's failure to state reasons in support of unfitness finding as harmless error. *People v. Chi Ko Wong (1976) 18 Cal. 3d 698, 723, 135 Cal. Rptr. 392, 557 P.2d 976*

Juvenile court's fear that minor could not be kept within juvenile court's jurisdiction for significantly long period of time because *Welf. & Inst. Code § 1800* allowing continued detention of dangerous persons might be declared unconstitutional as an insufficient basis for certifying minor to superior court. *Jimmy H. v. Superior Court (1970) 3 Cal. 3d 709, 716, 91 Cal. Rptr. 600, 478 P.2d 32*

Where there is a presumption of unfitness the court must recite its findings as to each of the statutory criteria and state

its reasons supported by evidence for finding the minor fit. *People v. Superior Court (Zaharias M.) (1993) 21 Cal. App. 4th 302, 306, 25 Cal. Rptr. 2d 838*

Where there is a presumption of unfitness, the minor has a right to require the prosecution to establish a prima facie case that he or she committed the acts that constitute the offense alleged. *People v. Superior Court (Zaharias M.) (1993) 21 Cal. App. 4th 302, 307-308, 25 Cal. Rptr. 2d 838* .

Juvenile court has no jurisdiction to find minor unfit for treatment as juvenile without first receiving and considering probation department social study report (*Welf. & Inst. Code § 707 (c)*). *Raul P. v. Superior Court (1984) 153 Cal. App. 3d 294, 298-299, 200 Cal. Rptr. 360*

Transfer order to adult court under *Welf. & Inst. Code § 707* as vacated if juvenile court fails to state reasons for transfer with sufficient particularity to permit meaningful review. *Juan T. v. Superior Court (1975) 49 Cal. App. 3d 207, 211, 122 Cal. Rptr. 405*

When referee's comments at time of fitness hearing clearly demonstrate that Youth Authority commitment was excluded from consideration, finding of unfitness as insufficient. *People v. Joe T. (1975) 48 Cal. App. 3d 114, 121, 121 Cal. Rptr. 329* (disapproved on other grounds in *People v. Chi Ko Wong (1976) 18 Cal. 3d 698, 716, 135 Cal. Rptr. 392, 557 P.2d 976*)

Statement of reasons why juvenile court is certifying minor to adult court as not required to be in form of traditional findings of fact, but only in sufficient specificity to permit meaningful review. *People v. Browning (1975) 45 Cal. App. 3d 125, 138, 119 Cal. Rptr. 420* (overruled on another ground in *People v. Williams (1976) 16 Cal. 3d 663, 669, 128 Cal. Rptr. 888, 547 P.2d 1000*)

[7] Subsequent Use of Fitness Finding

Prior finding of unfitness, where the juvenile was acquitted in adult court, did not deprive the juvenile court of jurisdiction to adjudicate subsequent petition. *In re Richard C. (1994) 24 Cal. App. 4th 966, 972, 29 Cal. Rptr. 2d 506*

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28-329 California Forms of Pleading and Practice--Annotated § 329.260

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§ 329.260 State Statutes

Time for hearing. *Welf. & Inst. Code § 657*

Waiver of jurisdictional hearing. *Welf. & Inst. Code § 657*

Notice of hearing. *Welf. & Inst. Code § 658*

Contents of notice of hearing. *Welf. & Inst. Code § 659*

Service of petition. *Welf. & Inst. Code § 660*

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California Forms of Pleading and Practice--Annotated

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Volume 28: Jurisdiction, Inconvenient Forum, and Appearances thru Juvenile Courts: Delinquency Proceedings-Chs. 323-329
Chapter 329 JUVENILE COURTS: DELINQUENCY PROCEEDINGS
PART III. RESEARCH GUIDE
B. Statutes, Decisions, and Other Primary Authority
6. Procedures for Establishing Wardship

28-329 California Forms of Pleading and Practice--Annotated § 329.261

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.261 California Rules of Court

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§ 329.262 Decisions

[1] Admissions of Allegations

Defects in giving admonitions and obtaining waivers on constitutional rights, as required by Boykin-Tahl rule does not result in reversal per se, and admission is valid if, under totality of circumstances, it was voluntary and intelligent. *People v. Howard (1992) 1 Cal. 4th 1132, 1178-1179, 5 Cal. Rptr. 2d 268, 824 P. 2d 1315*

Juvenile's personal admission of truth of penal charge as not properly given by his or her signing of prepared form. *In re Regina N. (1981) 117 Cal. App. 3d 577, 584-585, 172 Cal. Rptr. 810*

Application of *Penal Code § 1203.4* (right of discharged probationer to change plea) to juvenile court proceedings as clearly violative of statute and contrary to legislative intent. *In re S. A. (1970) 6 Cal. App. 3d 241, 245, 85 Cal. Rptr. 775*

[2] Amendment to Petition

Reversal of juvenile court finding of wardship as required when court found that minor committed uncharged lesser-related offense, over minor's objection. *In re Johnny R. (1995) 33 Cal. App. 4th 1579, 1583-1585, 40 Cal. Rptr. 2d 43*

Reversal of finding of wardship under *Welf. & Inst. Code § 602* as required when minor charged with rape and had no notice or warning of being subject to lesser related (but not included) charge of sexual battery, and silence of minor on conviction for sexual battery did not imply consent. *In re Alberto S. (1991) 226 Cal. App. 3d 1459, 1464-1465, 277*

Cal. Rptr. 475

Reversal of finding of wardship under *Welf. & Inst. Code § 602* as required when minor had committed an offense or offenses other than those specifically alleged in petition or necessarily included within an alleged offense, unless minor consents to finding on substituted charge. *In re Robert G. (1982) 31 Cal. 3d 437, 445, 182 Cal. Rptr. 644, 644 P.2d 837*

Reversal of finding as required when trial court allowed amendment of petition, over defendant's objection, to allege assault by means of force likely to produce great bodily injury, an offense not necessarily included within crimes of battery or robbery originally charged in petition. *In re Roy C. (1985) 169 Cal. App. 3d 912, 914-915, 215 Cal. Rptr. 513*

Without appropriate amendment to charging petition or notice to minor, juvenile court as without jurisdiction to find minor guilty of uncharged and unincluded lesser offense in case in which minor remained silent and made no objection to procedure. *In re Carlos S. (1979) 94 Cal. App. 3d 377, 379-380, 156 Cal. Rptr. 442* ; *see In re Tammie J. (1980) 101 Cal. App. 3d 24, 25-26, 161 Cal. Rptr. 286*

[3] Codefendants and Accomplices

Penal Code § 1111, which prohibits the use of uncorroborated accomplice testimony as the sole basis of a criminal conviction, is inapplicable to juvenile adjudications, although the Supreme Court decision in *In re Mitchell P.*, which upholds the prohibition, "warrants reevaluation." *In re Christopher B. (2007) 156 Cal. App. 4th 1557, 1564, 68 Cal. Rptr. 3d 253* .

Neither due process nor equal protection violated by holding *Penal Code § 1111*, which prohibits use of accomplice's uncorroborated testimony as sole basis of conviction, inapplicable to juvenile court proceedings. *In re P. (1978) 22 Cal. 3d 946, 949, 952-953, 151 Cal. Rptr. 330, 587 P.2d 1144* , *cert. denied, 444 U.S. 845, 100 S. Ct. 90, 62 L. Ed. 2d 59* , *reh'g denied, 444 U.S. 946, 100 S. Ct. 308, 62 L. Ed.2d 316*

Aranda/Bruton procedures are not required in juvenile adjudications, since they are tried by a court, not a jury. *In re Jose M. (1994) 21 Cal. App. 4th 1470, 1479, 27 Cal. Rptr. 2d 55*

Neither equal protection nor fundamental fairness as requiring that *Penal Code § 1118* be applicable in juvenile court proceedings.

In re Joseph H. (1979) 98 Cal. App. 3d 627, 632, 159 Cal. Rptr. 681

Juvenile court order sustaining petition brought under *Welf. & Inst. Code § 602* alleging murder as reversed when proof of guilt consisted of prior, unsworn, out-of-court statement given by apparent accomplice under threat of prosecution and incarceration, when narrative was confused and declarant later repudiated statement under oath such that proof is so fraught with uncertainty as to preclude confident determination of guilt beyond reasonable doubt. *In re Eugene M. (1976) 55 Cal. App. 3d 650, 659, 127 Cal. Rptr. 851*

Out-of-court statements made by one defendant that incriminate codefendant as not permitted to be introduced in joint jurisdictional hearing unless inculpatory references to codefendant deleted; if logical deletion impossible, hearings as required to be severed and statement used only against declarant. *In re D. L. (1975) 46 Cal. App. 3d 65, 71, 120 Cal. Rptr. 276*

Rule that accomplice testimony be corroborated, if applied to juvenile proceedings, would tend toward formality and an

adversary atmosphere in juvenile system. *In re R.C. (1974) 39 Cal. App. 3d 887, 896, 114 Cal. Rptr. 735*

California requirement that accomplice testimony is to be corroborated as legislative refinement and not rule included within traditional concepts of due process because it must be required in juvenile cases. *In re R.C. (1974) 39 Cal. App. 3d 887, 893, 114 Cal. Rptr. 735*

[4] Continuances

If a continuance is sought in order to file a motion to set aside the jurisdictional finding based upon newly discovered evidence, pursuant to *Welf. & Inst. Code § 778*, the motion may be denied when the allegedly new evidence is not dispositive of the outcome. *People v. Beeler (1995) 9 Cal. 4th 953, 1003, 39 Cal. Rptr. 2d 607*

Welf. & Inst. Code § 682(e) requires that when a contested jurisdictional hearing is continued for good cause, the hearing must commence within seven days of the day to which it was continued. *In re Kerry K. (2006) 139 Cal. App. 4th 1, 4-7, 42 Cal. Rptr. 3d 467*

A jurisdictional hearing does not "commence," for the purposes of § 682(e), if the prosecutor is not ready to process the case to conclusion when the hearing begins. *In reChuong D. (2006) 135 Cal. App. 4th 1303, 1310-1311, 38 Cal. Rptr. 3d 351*

[5] Discovery

Failure to allege nonrecollection of prior statements and admissions as not precluding discovery of statements and admissions if information sought was alleged to be necessary for preparation of defense, relevant and material to case, solely in control of real parties, and unknown to minor. *Joe Z. v. Superior Court (1970) 3 Cal. 3d 797, 805, 91 Cal. Rptr. 594, 478 P.2d 26*

Statements, admissions, and conversations of former codefendants as discoverable in delinquency proceedings on showing of necessity and inability to obtain information from other sources. *Joe Z. v. Superior Court (1970) 3 Cal. 3d 797, 805, 91 Cal. Rptr. 594, 478 P.2d 26*

Minor's statements, admissions, recorded conversations, and notes and memoranda concerning those conversations as discoverable in delinquency proceedings on showing of good cause. *Joe Z. v. Superior Court (1970) 3 Cal. 3d 797, 804, 91 Cal. Rptr. 594, 478 P.2d 26*

Extensive discovery procedures generally applicable to civil proceedings as not available to minors in juvenile court. *Joe Z. v. Superior Court (1970) 3 Cal. 3d 797, 801, 91 Cal. Rptr. 594, 478 P.2d 26*

Quasi-criminal character of delinquency proceedings as leading court to conclude that juvenile courts should have same degree of discretion as court in ordinary criminal case to permit, on proper showing, discovery between parties. *Joe Z. v. Superior Court (1970) 3 Cal. 3d 797, 801, 91 Cal. Rptr. 594, 478 P.2d 26*

Juvenile court as having discretion to order discovery prior to fitness hearing; burden of justifying discovery, by showing reasonable necessity and that discovery will not unduly delay or prolong proceeding, as being on party seeking disclosure; if discovery request includes only those items listed in parallel adult reciprocal discovery statute, no additional showing as being required. *Clinton K. v. Superior Court (1995) 37 Cal. App. 4th 1244, 1249-1250, 44 Cal. Rptr. 2d 140*

The sanction of dismissal should be employed only when the prosecutor has engaged in discovery misconduct that is

depriving the minor defendant of a fair trial; Cal. Rules of Ct., Rule 1420 (now Rule 5.546), to extent it allows juvenile court to dismiss solely because of discovery abuses, is inconsistent with legislative intent and is disapproved. *In re Jesus J. (1995) 32 Cal. App. 4th 1057, 1060, 38 Cal. Rptr. 2d 429*

Although Proposition 115's reciprocal discovery provisions do not apply to juvenile proceedings, juvenile court has inherent authority to order reciprocal discovery. *Robert S. v. Superior Court (1992) 9 Cal. App. 4th 1417, 1422, 12 Cal. Rptr. 2d 489*

A juvenile court has discretion to order reciprocal discovery consistent with *Penal Code § 1054 et seq.* in a delinquency case. However, the juvenile court must exercise its discretion to order reciprocal discovery by making a discovery order. In the absence of an express order for reciprocal discovery by the juvenile court, the provisions of *Penal Code § 1054* do not automatically apply to a delinquency proceeding. *In re Thomas F. (2003) 113 Cal. App. 4th 1249, 1254-1255, 7 Cal. Rptr. 3d 19*

When it appears from evidence that informer is material witness on issue of guilt or innocence and defendant seeks disclosure of informer's identity, prosecution as required either to disclose identity or incur dismissal of action; defendant seeking disclosure of informer's identity as bearing burden of demonstrating that there is reasonable possibility that anonymous informant whose identity is sought could give evidence on issue of guilt that might result in defendant's exoneration. *In re Tracy J. (1979) 94 Cal. App. 3d 472, 477, 156 Cal. Rptr. 512*

[6] Dismissal of Petition

Juvenile court's failure to state reasons for dismissal under *Welf. & Inst. Code § 782* in the minute order renders order invalid. *In re Juan C (1993) 20 Cal. App. 4th 748, 753, 24 Cal. Rptr 2d 573*

Juvenile court as having sole power to dismiss petition filed pursuant to *Welf. & Inst. Code § 602* and as not bound to accept recommendation of probation officer for dismissal. *Raymond B. v. Superior Court (1980) 102 Cal. App. 3d 372, 378, 162 Cal. Rptr. 506*

[7] Incompetency and Insanity

Due process requires that a competency hearing cannot be deferred until after the court has determined whether a case is to be heard in juvenile or adult court. *Tyrone B. v. Superior Court (2008) 164 Cal. App. 4th 227, 78 Cal. Rptr. 3d 569*

The standard for determining competency is whether the minor has the present ability to consult with his lawyer with a reasonable degree of rational understanding as well as factually understanding the proceedings against him, not whether the minor knows right from wrong or knows the wrongfulness of the act charged in the petition. *In re Ricky S. (2008) 166 Cal. App. 4th 232, 82 Cal. Rptr. 3d 432*

Mental disorder or developmental disability may not be the exclusive basis for incompetency to stand trial cases under *Penal Code § 1367(a)*. The court's inquiry must determine developmental disability, including a minor's age, and assess cognitive, psychological, social, and moral development. Timothy J. v. *Superior Court and Dante H. v. Superior Court (2007) 150 Cal. App. 4th 847, 58 Cal. Rptr. 3d 746* .

Because conviction of accused person while he is legally incompetent violates due process, state in juvenile court proceeding as conceding that protective reach of *Penal Code § 1368*, relating to recess of proceedings to resolve competency issue, extends to *Welf. & Inst. Code § 602* proceedings in juvenile court. *In re M. (1978) 22 Cal. 3d 419, 430 n. 14, 149 Cal. Rptr. 387, 584 P.2d 524*

Insanity as defense in juvenile court proceeding under *Welf. & Inst. Code § 602*. *In re M. (1978) 22 Cal. 3d 419, 423 n.3, 149 Cal. Rptr. 387, 584 P.2d 524*

[8] Interpreter, Right to

Juvenile as entitled to interpreter throughout criminal proceedings; acquiescence by defense counsel as not constituting adequate waiver of right. *In re Dung T. (1984) 160 Cal. App. 3d 697, 707-709, 206 Cal. Rptr. 772*

[9] Jury Trial and Advisory Jury

Consistent with overwhelming case law in support of the practice, as well as widespread use of juvenile adjudications as strikes in criminal courts, the California Supreme Court has held that the Constitution does not preclude use of sentence enhancements against adult felons who had "prior valid, fair, and reliable [juvenile] adjudications[s] ... where the juvenile proceeding included all the constitutional protections applicable to such matters, even though these protections did not include the right to a jury trial." *People v. Nguyen (2009) 46 Cal. 4th 1007, 1019, 95 Cal. Rptr. 3d 615*

Following the decision in *People v. Nguyen (2009) 46 Cal. 4th 1007, 95 Cal. Rptr. 3d 615* , which held that using prior juvenile adjudications to enhance an adult offender's sentence under the Three Strikes Law was constitutional, appellate courts have found the rationale applicable to use as an aggravating factor under *Cal. Rule of Court, Rule 4.421(b)(2)*. *People v. Quiles (2009) 177 Cal. App. 4th 612, 620-621, 99 Cal. Rptr. 3d 378*

The collateral impact of the Three Strikes law does not change the fundamentally different nature of juvenile and adult court proceedings; hence, a juvenile adjudication without a jury trial does not violate a juvenile's due process rights. *In re Myresheia W. (1998) 61 Cal. App. 4th 734, 741* ; *72 Cal. Rptr. 2d 647*

Broad provisions of *Welf. & Inst. Code § 680* as including discretionary power on part of juvenile court to empanel advisory jury to assist in determination of jurisdictional issues when, in exceptional case, benefits to be derived from use of advisory jury far outweigh any benefits of informality and confidentiality. *People v. Superior Court (Carl W.) (1975) 15 Cal. 3d 271, 284-285, 124 Cal. Rptr. 47, 539 P.2d 807*

Considerations properly weighed in determining desirability of empaneling an advisory jury as falling into three categories: (1) nature and relative difficulty of fact finding task in particular case, (2) seriousness of charges from point of view of probable dispositionof minor if they were sustained, and (3) extent to which any salutary effects attendant on informal proceeding remain possible of achievement in circumstances. *People v. Superior Court (Carl W.) (1975) 15 Cal. 3d 271, 284, 124 Cal. Rptr. 47, 539 P.2d 807*

Neither state nor federal Constitution guarantees jury trial in juvenile proceedings. *In re Daedler (1924) 194 Cal. 320, 332, 228 P. 467*

Changing philosophy of juvenile court law dictates that juveniles be granted constitutional right to jury trial, however court of appeal bound by stare decisis to holding of California Supreme Court denying right to jury trial to juveniles. *In re Javier A. (1984) 159 Cal. App.3d 913, 954, 206 Cal. Rptr. 386*

Minor as having no constitutional right to waive right to be treated as juvenile in order to obtain jury trial in criminal court. *In re Anna S. (1979) 99 Cal. App. 3d 869, 871-873, 160 Cal. Rptr. 495*

Neither state nor federal Constitution as guaranteeing jury trial in juvenile proceeding. *In re Anthony J. (1978) 86*

Cal. App. 3d 164, 174, 150 Cal. Rptr. 183

Although due process includes right to trial by jury in state criminal proceedings, equal protection as not requiring that juvenile courts use juries. *In re R.C. (1974) 39 Cal. App. 3d 887, 896, 114 Cal. Rptr. 735*

Juvenile as not entitled to jury trial based on rationale that California Constitution does not require that full panoply of rights accorded adults accused of crimes be extended to juvenile because to do so would introduce strong tone of criminality in juvenile proceedings. *In re Steven C. (1970) 9 Cal. App. 3d 255, 261, 88 Cal. Rptr. 97*

[10] Procedural Format of Juvenile Court Proceedings

In considering whether the shackling of a juvenile at a jurisdictional hearing is warranted, the court should apply the same standard used for adult defendants in preliminary hearings, specifically that some showing of necessity is required and finding stated on the record. *In re DeShaun M. (2007) 148 Cal. App. 4th 1384, 1387, 56 Cal. Rptr. 3d 627* .

The court may not adopt a general policy requiring the use of physical restraints based solely on the inadequacy of courtroom facilities or lack of available security personnel, and the decision to shackle a minor who appears for a delinquency court proceeding must be based on the non-conforming conduct and behavior of that individual minor, made on a case-by-case basis, and depends upon the type of proceeding. *Tiffany A. v. Superior Court (2007) 150 Cal. App. 4th 1344* .

History of Welfare and Institutions Code sections dealing with structure of juvenile court proceedings as clearly indicating that Legislature intended to create bifurcated juvenile court procedure in which court would first determine whether facts of the case would support jurisdiction of court in declaring wardship and thereafter would consider social study report at hearing on appropriate disposition of that ward. *In re J.L.P. (1972) 25 Cal. App. 3d 86, 89, 100 Cal. Rptr. 601*

Theory underlying legislative policy requiring bifurcated procedure is that once minor has been declared fit subject for juvenile treatment, court as existing not for punishment but for assistance of juvenile; thus, considerations relative to proper disposition of minor as different from those that bear on determination that a crime has been committed. *In re J.L.P. (1972) 25 Cal. App. 3d 86, 89, 100 Cal. Rptr. 601*

Juvenile court proceedings as designed to produce informal nonadversary atmosphere such that there appears to be no reason why jurisdictional and dispositional phases cannot be disposed of in single bifurcated hearing provided that there is compliance with basic requirements of those phases. *In re Mikkelsen (1964) 226 Cal. App. 2d 467, 470, 38 Cal. Rptr. 106*

Due process does not require a full evidentiary hearing on dual status determinations pursuant to *Welf. & Inst. Code § 241.1*. *In re Henry S. (2006) 140 Cal. App. 4th 248, 252* , 44 Cal. Rprt. 3d 418

[11] Proceedings Under Welf. & Inst. Code § 601

When juvenile was placed in foster group home on petition sustained pursuant to *Welf. & Inst. Code § 601*, juvenile court as not having jurisdiction to sustain petition under *Welf. & Inst. Code § 602* on ground that minor ran away from placement in absence of specific court order directing minor to remain in placement and obey rules of placement. *In re C. (1975) 45 Cal. App. 3d 761, 765, 119 Cal. Rptr. 735*

When breakdown in parental control is because of failings in parent rather than in minor, *Welf. & Inst. Code § 601* petition as not sustainable; finding as supporting determination that minor is within *Welf. & Inst. Code § 600* (*now Welf.*

& Inst. Code § 300) because *Welf. & Inst. Code § 600* deals with children in need of help, not with delinquent children in need of correction. *In re Henry G. (1972) 28 Cal. App. 3d 276, 284, 104 Cal. Rptr. 585*

Although single instance of conduct as sufficient to make minor subject to jurisdiction of juvenile court when he or she violates law or fails to obey lawful order of court after being found to be person described in *Welf. & Inst. Code § 601*, rule as not necessarily applying to proceedings pursuant to *Welf. & Inst. Code § 601* when standards of conduct not carefully delineated. *In re D.J.B. (1971) 18 Cal. App. 3d 782, 786, 96 Cal. Rptr. 146*

When 14-year-old minor deliberately lied to mother to obtain permission to spend weekend with friends about 40 miles away, but was picked up about 600 miles away in process of crossing foreign border, single act was sufficiently serious to support finding that minor was beyond parental control and subject to juvenile court jurisdiction under *Welf. & Inst. Code § 601*. *In re David S. (1970) 12 Cal. App. 3d 1124, 1128, 91 Cal. Rptr. 261*

Language of *Welf. & Inst. Code § 601* as construed to require repeated refusals on part of minor to obey parents in order to fall within first portion of *Welf. & Inst. Code § 601*, but to require only single act, if sufficiently serious, to indicate that minor was "beyond control." *In re David S. (1970) 12 Cal. App. 3d 1124, 1128, 91 Cal. Rptr. 261*

Phrase in *Welf. & Inst. Code § 601*, "beyond control," as construed basically to mean defying parental authority. *In re David S. (1970) 12 Cal. App. 3d 1124, 1126, 91 Cal. Rptr. 261*

Refusal by dependent child of court to remain in placement as relevant and material evidence in jurisdictional hearing under *Welf. & Inst. Code § 601*, but refusal in single instance to do so as not constituting persistent or habitual refusal to obey reasonable and proper order or directions of custodian. *In re Rita P. (1970) 12 Cal. App. 3d 1057, 1060, 95 Cal. Rptr. 430*

The parties in § 601 proceedings are the minor and the probation officer. *People v. Superior Court (Tony S.) (1975) 44 Cal. App. 3d 904, 908, 119 Cal. Rptr. 125* . The probation officer must determine upon investigation whether the minor's best interest would be served if he is declared a ward of the court and must furnish such assistance and information as the court may require in the disposition of the case. *In re Steven C. (1970) 9 Cal. App. 3d 255, 265, 88 Cal. Rptr. 97* . This includes appearing and participating in the jurisdictional hearing to assist in the ascertaining and presentation of the evidence with the consent or at the request of the juvenile court judge. *In reJesse G. (2005) 128 Cal. App. 4th 724, 731, 27 Cal. Rptr. 3d 331*

[12] Proceedings Under Welf. & Inst. Code § 602

The 12-month time limit specified in *Welf. & Inst. Code § 654.2(a)* is directory not mandatory and, as such, a violation of the statute does not result in the trial court losing fundamental jurisdiction over a case and wardship was properly established even though the 12-month period had expired. *In re C.W. (2007) 153 Cal. App. 4th 468, 474, 62 Cal. Rptr. 3d 851* .

Referee as without authority under *Cal. Const., art. VI, § 22*, to conduct jurisdictional hearing under *Welf. & Inst. Code § 602*, absent stipulation conferring judicial power. *In re C. (1979) 26 Cal. 3d 49, 57, 160 Cal. Rptr. 704, 603 P.2d 1300*

Court as committing reversible error in reviewing social study before determination of issue of jurisdiction of juvenile court. *In re R. (1970) 1 Cal. 3d 855, 859-860, 83 Cal. Rptr. 671, 464 P.2d 127*

Oral stipulation to referee as temporary judge was sufficient. *In re Aontae D. (1994) 25 Cal. App. 4th 167, 172, 30 Cal. Rptr. 2d 176*

Penal Code § 120221(d), which prohibits a person on probation from possessing a firearm, applies to juveniles on probation. *In re Reyes P. (1994) 24 Cal. App. 4th 1468, 1471-1472, 30 Cal. Rptr. 2d 466*

Because *Penal Code § 186.22(a), (b)* and *(d)* are a creation of Proposition 21, they are intended to apply to juvenile conduct and proceedings in spite of the fact they speak in terms of convictions and do not refer to juvenile adjudications. *In re Damien V. (2008) 163 Cal. App. 4th 16, 77 Cal. Rptr. 3d 107*

Court's denial of opportunity for counsel to argue merits of case on conclusion of testimony prior to pronouncement of finding in jurisdictional hearing as reversible error. *In re William G. (1980) 107 Cal. App. 3d 210, 217, 165 Cal. Rptr. 587*

Use of criminal contempt to create *Welf. & Inst. Code § 602* offense when minor violated court order by running away (which is *Welf. & Inst. Code § 601* offense) as improper. *In re Mary D. (1979) 95 Cal. App. 3d 34, 36-38, 156 Cal. Rptr. 829*

Admission of reputation evidence regarding minor's membership in Chinese gang as reversible error when testimony was not based on personal knowledge, was irrelevant to change, constituted hearsay, and constituted prejudice to minor of irreparable nature, particularly when identification testimony of minor was not particularly strong or persuasive. *In re Wing Y. (1977) 67 Cal. App. 3d 69, 79, 136 Cal. Rptr. 390*

Appeal from declaration of wardship under *Welf. & Inst. Code § 602* on grounds that only evidence received was mother's testimony that juvenile confessed to acts alleged should have been excluded on ground of parent-child privilege analogous to attorney-client privilege as resulting in affirmation of trial court's determination that no such privilege existed by statute and could not therefore be considered according to *Evid. Code § 911*. *In re Terry W. (1976) 59 Cal. App. 3d 745, 748, 130 Cal. Rptr. 913*

Federal ICWA statutes permit states to pass more stringent laws affecting the rights of Indian children with respect to protecting the rights of a parent or Indian custodian, and while *Welf. & Inst. Code § 224.3* expands its reach to delinquency proceedings, it does so only where those proceedings relate to parents of Indian custodians and the child is at risk of foster care placement. *In re Alejandro A. (2008) 160 Cal. App. 4th 1343, 74 Cal. Rptr. 3d 44*

[13] Public Trial, Right to

Minor as possessing no constitutional right to public trial in juvenile court proceedings. *In re Jesse McM. (1980) 105 Cal. App. 3d 187, 189, 164 Cal. Rptr. 199*

[14] Refiling of Petition

Juvenile court petitions dismissed without hearing because of time problem as properly refiled and new proceeding commenced thereon. *Neil G. v. Superior Court (1973) 30 Cal. App. 3d 572, 577-578, 106 Cal. Rptr. 505*

Characterization of juvenile court proceedings as not criminal in nature and conducted for protection and benefit of youth in question as leading court to find that failure of deputy district attorney to subpoena witnesses as minor lapse in form that should not preclude refiling of petition dismissed without prejudice due to resulting lapse of time limitation imposed for setting of trial. *Neil G. v. Superior Court (1973) 30 Cal. App. 3d 572, 576, 106 Cal. Rptr. 505*

[15] Deferred Entry of Judgment

DEJ serves to 1) identify nonviolent juvenile offenders who are at risk of escalating their antisocial behavior, yet remain candidates for rehabilitation, and 2) target scarce resources toward treating and rehabilitating theses individuals. It also implicitly acknowledges that minors over the age of 14 who have felony petitions sustained against them face severe consequences under the law. *In re Spencer S. (2009) 176 Cal. App. 4th 1315, 98 Cal. Rptr. 3d 477*

Welf. & Inst. Code § 790(a)(4) makes a minor ineligible for DEJ if "probation has ever been revoked without being completed." Recent case law suggests that in order for this section to take effect, the court must expressly revoke probation. This is true notwithstanding the fact that a minor may have sustained a new delinquency petition, or that said petition was based upon facts that clearly violate the terms and conditions of probation, while on probation. In support of the position, the court in *T.P.* relies upon the distinction between probation violation and probation revocation as discussed in *People v. Coleman (1975) 13 Cal. 3d 867, 895 n 22* . Unfortunately, no such distinction exists in juvenile law since *Welf.& Inst. Code § 777(e)*, allowing for probation to be violated without revocation, was deleted with the passage of Proposition 21 on March 8, 2000. *In re T.P. (2009) 178 Cal. App. 4th 1, 4-5, 99 Cal. Rptr. 3d 893*

The compromise between procedural fairness and desirable outcomes may be achieved by distinguishing between a minor's right to make a motion to suppress evidence prior to a jurisdictional hearing and the jurisdictional hearing itself. Under this analysis, a minor may file and argue such motions prior to the jurisdictional hearing while reserving the right to admit the petition as alleged and request DEJ if they do not prevail. *In re A.I. (2009) 176 Cal. App. 4th 1426, 1433-1437, 98 Cal. Rptr. 3d 501*

Where a minor declines to admit each allegation in the petition, no duty on behalf of the juvenile court arises to refer the case to the probation department or to summarily grant *DEJ. In re Usef S. (2008) 160 Cal. App. 4th 276, 285, 72 Cal. Rptr. 3d 612*

DEJ is intended to provide an "expedited mechanism for channeling certain first-time offenders away from the full panoply of a contested delinquency proceeding" and that goal cannot coexist with a minor who insists on exercising every procedural protection offered. *In re Kenneth J. (2008) 158 Cal. App. 4th 973, 980, 70 Cal. Rptr. 3d 352*

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PART III. RESEARCH GUIDE
B. Statutes, Decisions, and Other Primary Authority
6. Procedures for Establishing Wardship

28-329 California Forms of Pleading and Practice--Annotated §§ 329.263-329.269

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

[Reserved]

§§ 329.263[Reserved]

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28-329 California Forms of Pleading and Practice--Annotated § 329.270

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.270 State Statutes

Evidence on proper disposition. *Welf. & Inst. Code § 706*

Social study requirements when foster care placement is considered or made. *Welf. & Inst. Code § 706.5*

Disposition when case involves controlled substances. *Welf. & Inst. Code § 708*

Judgment. *Welf. & Inst. Code § 725*

Consideration of minor's age, criminal history, and gravity of offense. *Welf. & Inst. Code § 725.5*

Limitations on parental control. *Welf. & Inst. Code § 726*

Orders for care, custody, control of ward. *Welf. & Inst. Code § 727*

Placement of ward in private residential facility or supervised program. *Welf. & Inst. Code § 727.1*

Community service to victims of battery when restitution is inappropriate. *Welf. & Inst. Code § 729*

Repair or restitution for crimes committed against public transit vehicles or occupants. *Welf. & Inst. Code § 729.1*

Attendance of school, counseling, and curfew as conditions of probation of minor not removed from parental custody. *Welf. & Inst. Code § 729.2*

Urine testing as condition of probation of minor not removed from parental custody. *Welf. & Inst. Code § 729.3*

Restitution by personal service. *Welf. & Inst. Code § 729.7*

Community service as condition of probation for possession of controlled substances on school grounds. *Welf. & Inst. Code § 729.8*

Participation in and completion of alcohol or drug education program as required for minor who has committed controlled substance offense, or who is guilty of public intoxication or possession of alcoholic beverage. *Welf. & Inst. Code § 729.10*

Fine up to amount that could be imposed on adult for same offense. *Welf. & Inst. Code § 730.5*

Restitution and restitution fine. *Welf. & Inst. Code § 730.6*

Alternative dispositions available for wards under *Welf. & Inst. Code § 602*. *Welf. & Inst. Code §§ 730, 731*

Public service work. *Welf. & Inst. Code § 731.5*

Determination of suitability of commitment to Youth Authority. *Welf. & Inst. Code § 734*

Continued Detention of Dangerous Persons. *Welf. & Inst. Code §§ 1800, 1800.5, 1801, 1801.5*

Intermediate dispositions. *Welf. & Inst. Code § 737*

Placement in community care. *Welf. & Inst. Code § 740*

Collection and payment of restitution imposed on minor committed to Youth Authority. *Welf. & Inst. Code §§ 1752.82, 1766.1*

Upon attaining the age of 18 a juvenile ward may, upon the recommendation of the probation officer, be delivered to the custody of the sheriff and placed in county jail. *Welf. & Inst. Code § 208.5*

While most of the laws governing a commitment to the Department of the Youth Authority still exist, as do the institutions themselves, the agency formerly known as CYA is now the Department of Corrections and Rehabilitation's Division of Juvenile Justice. *Gov't. Code §§ 12838-12838.13*

Supervised parole from DJF within 120 to 90 days prior to release; "mandatory parole release" does not apply when a petition for extended commitment pursuant to *Welf. & Inst. Code § 1800* has been requested; if parole is revoked, any term of reconfinement is subject to the limits of Sections 731, 1769, 1770, or 1771. *Welf. & Inst. Code § 1766.2*

Placement in "community care facility" shall be within county of residence with specified exceptions. *Welf. & Inst. Code § 740*.

Before placement in an out-of-county facility may be made, placing county must notify the receiving county in writing of any gang affiliations or dangerous behavior by the ward along with a plan for their supervision and visitation. *Welf. & Inst. Code § 740*

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§ 329.271 California Rules of Court

Conduct of hearing. *Cal. Rules of Ct., Rule 5.785*

Judgments and orders of court. *Cal. Rules of Ct., Rule 5.790*

Required determinations. *Cal. Rules of Ct., Rule 5.795*

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28-329 California Forms of Pleading and Practice--Annotated § 329.272

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.272 Decisions

[1] Calculation of Term

There is no statutory authority for setting the maximum time of confinement when a minor is not removed from the physical custody of his or her parent and it is error for a court to specify a term of imprisonment in such cases. *In re Matthew A. (2008) 165 Cal. App. 4th 537, 541, 81 Cal. Rptr. 3d 119*

Section 731(c) gives the juvenile court the discretion to set the maximum confinement time at less than the lengthiest term an adult would serve for the same offense, but it does not allow for the imposition of a term less than the minimum adult term. *In re Joseph M. (2007) 150 Cal. App. 4th 889, 896, 58 Cal. Rptr. 3d 756* .

Juvenile "max time" is an outside time limit on a DJF commitment, not a specific term of confinement. Neither the aggravating/mitigating circumstance scheme nor the restrictions enumerated in *Cunningham*, which are applicable to the sentencing of adult felons, are directly applicable to setting "max time" in juvenile cases. *In re Christian G. (2007) 153 Cal. App. 4th 708, 715, 63 Cal. Rptr. 3d 215* .

Commitment of a minor to DJF for the maximum period under *Welf. & Inst. Code § 731* is not equivalent to an adult's commitment to prison for the upper term based upon aggravating factors because the statutory scheme and cases "not only justify but demand a different treatment approach" for minors and, as such, the requirements of *Cunningham v. California* do not apply to delinquency. *In re Alex U. (2007) 158 Cal. App. 4th 259, 266, 69 Cal. Rptr. 3d 695*

Length of commitment of minor under *18 U.S.C. § 5037(c)(1)(B)*, a federal Juvenile Delinquency Act provision limiting detention to maximum term authorized for adult, as dependent on court's determination of maximum permissible sentence in appropriate range under *U.S. Sentencing Guidelines. United States v. R.L.C. (1992) 503 U.S.*

291, 112 S. Ct. 1329, 117 L. Ed. 2d 559, 565

Penal Code § 12022.1 "free on bail" enhancement is applicable to juvenile on home supervision. *In re Jovan B. (1993) 6 Cal. 4th 801, 25 Cal. Rptr. 2d 428, 863 P.2d 673*

Persons committed to Youth Authority as not entitled to have presentence conduct credits applied against maximum term of commitment. *People v. Austin (1981) 30 Cal. 3d 155, 161-166, 178 Cal. Rptr. 312, 636 P.2d 1* (adults); *In re Ricky H. (1981) 30 Cal. 3d 176, 184-190, 178 Cal. Rptr. 324, 636 P.2d 13* (minors)

Minor as entitled, in accordance with *Welf. & Inst. Code § 726(c)*, to precommitment credit for time spent in juvenile hall pending resolution of charges against him. *In re J. (1979) 25 Cal. 3d 522, 536, 159 Cal. Rptr. 317, 601 P.2d 549*

When the court elects to aggregate the period of physical confinement on multiple petitions, it need not include all of the petitions previously sustained or the time served on those petitions. *In re Bryant R. (2003) 112 Cal. App. 4th 1230, 5 Cal. Rptr. 3d 734*

Welf. & Inst. Code § 731(b) applies only to commitments to CDCR, DJF whereas § 726(c) applies to all commitments where the minor is removed from the physical custody of his or her parent. *In re Ali A. (2006) 139 Cal. App. 4th 569, 572-574, 42 Cal. Rptr. 3d 846*

Once maximum time of confinement has been computed, subsequent redeterminations of time for petitions previously sustained is prohibited. *In re David H. (2003) 106 Cal. App. 4th 1131, 1137, 131 Cal. Rptr. 2d 330*

Welf. & Inst. Code § 607(b) which extends juvenile court jurisdiction to age 25 for 707(b) offenses applies to minors under the age of 16. *In re Julian O. (1994) 27 Cal. App. 4th 847, 850-851, 32 Cal. Rptr. 2d 193*

Time spent on "house arrest" or electronic monitoring does not entitle a minor to receive custody credits for the purposes of calculating maximum time of confinement. *In re Lorenzo L. (2008) 163 Cal. App. 4th 1076, 78 Cal. Rptr. 3d 150*

Minor is not entitled to credit for time spent on home detention or other nonsecure placements. *In re Randy J. (1994) 22 Cal. App. 4th 1497, 28 Cal. Rptr. 2d 152*

"Maximum term of imprisonment" as calculated by using upper term for both substantive offense and enhancement that has been found true. *In re George M. (1993) 14 Cal. App. 4th 376, 381-382, 18 Cal. Rptr. 2d 29*

Penal Code § 654 (barring multiple convictions based on included offenses) as irrelevant to delinquency proceedings, so long as juvenile court's aggregation of offenses does not increase minor's theoretical maximum term of confinement. *In re Robert W. (1991) 228 Cal. App. 3d 32, 34, 279 Cal. Rptr. 625*

Person originally sentenced to state prison after determination that he or she is not amenable to Youth Authority treatment, but subsequently resentenced and committed to Youth Authority, as not being entitled to have maximum Youth Authorityconfinement time reduced by conduct credits earned while in state prison. *People v. Linear (1988) 203 Cal. App. 3d 508, 510, 249 Cal. Rptr. 836*

When aggravating multiple counts and previously sustained petitions, the maximum confinement term is calculated by adding the upper term for the principal offense, plus one-third of the middle term for each of the remaining subordinate felonies or misdemeanors. *Welf. & Inst. Code § 726*; *Pen. Code § 1170.1(a)*. *In re Deborah C. (1981) 30 Cal. 3d 125, 140, 177 Cal. Rptr. 852*

Aggregating current Youth Authority commitment with unrelated previously suspended term as improper unless sufficient advance notice to minor and parents of at least 48 hours is given to allow fair opportunity to defend at dispositional hearing. *In re Jose P. (1980) 101 Cal. App. 3d 52, 60-61, 161 Cal. Rptr. 400*

In light of *Welf. & Inst. Code § 707.2*, providing that prior to sentence court of criminal jurisdiction may remand minor to custody of Youth Authority for purpose of evaluation, trial court as not precluded by fitness hearing in juvenile court before criminal proceedings were begun and pursuant to *Welf. & Inst. Code § 707*, as result of which it was found minor would not be amenable to care, treatment, and training program available through facilities of Youth Authority, from committing minor to Youth Authority where court felt minor could benefit from and was in need of rehabilitation program provided by *Authority. People v. Jiminez (1979) 94 Cal. App. 3d 707, 709-713, 157 Cal. Rptr. 86*

Advancement of parole consideration hearing date to take account of time served prior to commitment as not required by *Penal Code § 2900.5* because date does not establish parole release date, term, or sentence. *In re Davis (1978) 87 Cal. App. 3d 919, 923-924, 151 Cal. Rptr. 29*

A commitment to the Division of Juvenile Facilities, in the Department of Corrections and Rehabilitation's Division of Juvenile Justice, requires that a specific term be set and that the record reflect that the court has considered facts and circumstance related to the case in setting that term. *In re Jacob J. (2005) 130 Cal. App. 4th 429, 437-439, 30 Cal. Rptr. 3d 255* ; *In re Carlos E. (2005) 127 Cal. App. 4th 1529, 1542-1543, 26 Cal. Rptr. 3d 551*

The court has the discretion under *Welf. & Inst. Code § 726(c)* to commit a minor to the Youth Authority (Division of Juvenile Justice) solely on the current allegations, instead of aggregating all of the previously sustained petitions against him. *In re Alex N. (2005) 132 Cal. App. 4th 18, 22-23, 33 Cal. Rptr. 3d 172*

Disregarding a minor's most recently sustained petition when committing a minor to DJF is contradictory to the well-settled laws governing the juvenile court system and would undermine the court's policy of holding minors accountable for their actions. *In re G.C. (2007) 157 Cal. App. 4th 405, 411, 68 Cal. Rptr. 3d 523*

The court's discretion to set a term of physical confinement to a term less than the maximum imposable term is not limited to the options available under the determinate sentencing law "triad" set by *Penal Code § 1170*. The juvenile court operates under an indeterminate disposition scheme in which the minor's release date and term of confinement are determined by the Board of Parole Hearings, subject to the "ceiling" imposed by the committing court. This means, at a minimum, that the court may impose any maximum time within the range of statutory options available for the offense committed. *In re H.D. (2009) 174 Cal. App. 4th 768, 94 Cal. Rptr. 3d 627* ; *In re R.O. (2009) 176 Cal. App. 4th 1493, 98 Cal. Rptr. 3d 738*

Where the record is silent as to whether the court considered the relevant facts and circumstances when setting the minor's confinement period, it is presumed that the court performed its statutory duty and was aware of the discretion provided pursuant to *Welf. & Inst. Code § 731(c)*. *In re Julian R. (2009) 47 Cal. 4th 487, 97 Cal. Rptr. 3d 790*

In the context of calculating maximum time pursuant to § 731(b), it has been noted that the juvenile court operates under an indeterminate disposition scheme that is not limited to the options available under the adult criminal sentencing triad set forth in *Penal Code § 1170*. Therefore, at least pursuant to DJF commitment, the court may impose any maximum time of confinement within the range of statutory options available for the offense committed. *In re H.D. (2009) 174 Cal. App. 4th 768, 94 Cal. Rptr. 3d 627* ; *In re R.O. (2009) 176 Cal. App. 4th 1493, 98 Cal. Rptr. 3d 738*

[2] Division of Juvenile Facilities

"It is unlikely that the Legislature intended always to bar DJF commitments for juveniles who commit DJF-eligible offenses, who are given a second chance via probation, and who fail to make good on that second chance. ... [T]he purpose of ... Section 733 was to reduce the cost and increase the effectiveness of juvenile confinement by shifting all but the most serious juvenile offenders to county facilities. [cites] This purpose does not support the view that those who commit the offenses the Legislature deemed serious enough for DJF must not be confined there if they first get probation but then violate its terms." *In re M.B. (2009) 174 Cal. App. 4th 1472, 1478, 95 Cal. Rptr. 3d 359*

Welf. & Inst. Code § 707.2, requiring adult criminal court to order Youth Authority evaluation and report before sentencing minor, as mandatory even when offense precludes Youth Authority commitment; evaluation as not futile because sentencing court has discretion to strike allegations and can commit youthful offender to Department of Corrections but order him or her housed in Youth Authority facilities. *People v. Marsh (1984) 36 Cal. 3d 134, 140-142, 202 Cal. Rptr. 92, 679 P.2d 1033*

Unavailability of suitable alternatives, standing alone, as not justifying commitment of nondelinquent or marginally delinquent child to institution, such as Youth Authority, primarily designed for incarceration and discipline of serious offenders. *In re Aline D. (1975) 14 Cal. 3d 557, 562, 121 Cal. Rptr. 816, 536 P.2d 65*

Youth Authority as prohibited from rejecting minor on basis of mechanical, categorized policies alone. *Bryan v. Superior Court (1972) 7 Cal. 3d 575, 585, 102 Cal. Rptr. 831, 498 P.2d 1079*

Rule 1494(c) (now Rule 5.795) of the California Rules of Court requires that the juvenile court specify in its order committing a minor to the California Youth Authority whether the minor's offense "is one listed in Section 707(b)" of the Welfare and Institutions Code; a determination of this finding may be reached by consideration of the circumstances of the underlying offense as found in the probation officer's social study and other relevant evidence. *In re Gary B. (1998) 61 Cal. App. 4th 844, 847-851* ; *71 Cal. Rptr. 2d 824*

Juvenile court may impose a stayed or suspended Youth Authority commitment provided the general requirements of *Welf. & Inst. Code § 777* are complied with. *In re Domanic B. (1994) 23 Cal. App. 4th 366, 371, 28 Cal. Rptr. 2d 439*

Juvenile court may impose a stayed or suspended Youth Authority commitment provided it is not an automatic response to the minor's violation of probation, rather an alternative reached after an analysis of dispositional evidence. *In re Kazuo G. (1994) 22 Cal. App. 4th 1, 5*

Cal. Rules of Court, Rule 1493(e) (now Rule 5.790) does not require that the court recommit to Youth Authority, when the minor was a Youth Authority parolee at the time of the offense. *In re Jermaine B. (1994) 21 Cal. App. 4th 1280, 1283-1284, 26 Cal. Rptr. 2d 612*

Juvenile court may not impose a stayed or suspended Youth Authority commitment which is automatically imposed upon a violation of probation. *In re Ronnie P. (1992) 10 Cal. App. 4th 1079, 1087-1090, 12 Cal Rptr. 2d 875*

Because punishment is now considered to be rehabilitative tool for juvenile offenders, mildly delinquent youth as properly sent to Youth Authority if all less restrictive sanctions have proven ineffective. *In re Lorenza M. (1989) 212 Cal. App. 3d 49, 58, 260 Cal. Rptr. 258*

To support commitment of minor to Youth Authority, evidence as required to demonstrate probable benefit to minor from commitment and that court considered and rejected less restrictive alternatives as ineffective or inappropriate; proper showing not made by introduction only of probation officer's report that itself does not establish consideration of less restrictive alternatives. *In re Teofilio A. (1989) 210 Cal. App. 3d 571, 577-579, 258 Cal. Rptr. 540*

Juvenile court as properly committing minor to Youth Authority when minor committed number of serious crimes and

could not be controlled by parent, even though court at same time expressed regret that no alternative long-term local facilities were available; although court had voiced concern that other programs might have been more appropriate, it did not find CYA commitment inappropriate, and had considered all relevant factors, including punishment. *In re Gerardo B. (1989) 207 Cal. App. 3d 1252, 1255-1259, 255 Cal. Rptr. 339*

For commitment to Youth Authority, court to consider (1) probable benefit to minor, (2) whether or not less restrictive alternatives are ineffective or inappropriate, (3) proper punishment for rehabilitative purposes, and (4) appropriateness of restrictive commitment as means of protecting public safety. *In re Michael D. (1987) 188 Cal. App. 3d 1392, 1396, 234 Cal. Rptr. 103*

Even though minor had never been previously declared ward of court and probation officer was recommending commitment to forestry camp, juvenile court as properly committing juvenile to Youth Authority when proper findings are made under *Welf. &Inst. Code § 726*, if it appears to court that such disposition is most likely to effect rehabilitation of juvenile, and if minor is characterized as calculating youth who is leader of delinquent peer group with reputation as drug dealer. *In re Willy L. (1976) 56 Cal. App. 3d 256, 264-266, 128 Cal. Rptr. 592*

Aline D. as interpreted to hold only that before Youth Authority commitment will be upheld on review, it must appear from record that committing court was fully satisfied on probability that ward would benefit from such commitment. *In re Willy L. (1976) 56 Cal. App. 3d 256, 263, 128 Cal. Rptr. 592*

Minors are not automatically entitled to new disposition hearing and the restrictions on commitments as specified under *Welf. & Inst. Code §§ 731.1* and *733* are not retroactive. *In re Brandon G. (2008) 160 Cal. App. 4th 1076, 73 Cal. Rptr. 3d 273* ; *In re Carl N. (2008) 160 Cal. App. 4th 423, 72 Cal. Rptr. 3d 823*

Mandatory registration as a sexual offender is tied to the offense for which the minor is adjudicated, not the conduct underlying the charge or characterized in dismissed charges. *In re J.P. (2009) 170 Cal. App. 4th 1292, 1299, 89 Cal. Rptr. 3d 17*

[3] Continued Detention of Dangerous Persons

The extended detention scheme has repeatedly been found to have a demonstrably civil purpose and confinement, in furtherance of that purpose, is imposed only for treatment. *In re Brian J. (2007) 150 Cal. App. 4th 97, 135, 58 Cal. Rptr. 3d 246* .

The current version of the Extended Detention Act, amended in light of *Howard N.*, is constitutional and the "serious and well-founded risk of reoffense" language is not a required finding for an extended commitment. *In re Lemanuel C. (2007) 41 Cal. 4th 33, 43-49, 58 Cal. Rptr. 3d 597 , disapproving In re Michael H. (2005) 128 Cal. App. 4th 1074, 27 Cal. Rptr. 3d 627* .

Minor as entitled to jury trial in hearing under *Welf. & Inst. Code § 1800* to extend Youth Authority jurisdiction beyond age of 21 on grounds that discharge of person would be physically dangerous to public because of person's mental or physical deficiency, disorder, or abnormality. *In re Gary W. (1971) 5 Cal. 3d 296, 307, 96 Cal. Rptr. 1, 486 P.2d 1201*

Welf. & Inst. Code § 1801.5 affords individuals all constitutional rights given to defendants in criminal trials, including double jeopardy. *In re Anthony C. (2006) 138 Cal. App. 4th 1493, 1517, 42 Cal. Rptr. 3d 370*

Though § 1800 proceedings are civil in nature, § 1801.5 clearly and unambiguously affords "all" constitutional rights to juveniles facing extended commitments that defendants in criminal trials are given, including the right not to testify in

commitment proceedings (the probable cause hearing as well as subsequent trial). *Joshua D. v. Superior Court (2007) 157 Cal. App. 4th 549, 565, 68 Cal. Rptr. 3d 715*

Detention of wards confined pursuant to *Welf. & Inst. Code § 1800* (continued detention of dangerous persons) as authorized only if person is in fact receiving treatment; person not receiving treatment as able to seek release through appropriate habeas corpus procedures. *In re Gary W. (1971) 5 Cal. 3d 296, 303, 96 Cal. Rptr. 1, 486 P.2d 1201*

Youth Authority as under affirmative duty to provide treatment for underlying cause of condition with regard to person committed to Youth Authority pursuant to *Welf. & Inst. Code §§ 1800-1803* (continued detention of dangerous persons); if cause is not physical or mental condition or if condition is not amenable to treatment, Youth Authority as having no authority to extend control pursuant to those sections. *In re Gary W. (1971) 5 Cal. 3d 296, 302, 96 Cal. Rptr. 1, 486 P.2d 1201*

The California Supreme Court addressed the extended detention scheme and determined that it was constitutional through an interpretation that requires not only that a person is physically dangerous to the public because of their mental deficiency, disorder, or abnormality, but also that the mental deficiency, disorder, or abnormality causes serious difficulty controlling their dangerous behavior and must result in a serious and well- founded risk of re-offense. *Welf. & Inst. Code §§ 1800, 1800.5, 1801, 1801.5*; *In re Howard N. (2005) 35 Cal. 4th 117, 135, 24 Cal. Rptr. 3d 866*

[4] Effect of Diagnostic Study

Consideration of Youth Authority amenability report as only one factor that court is required to consider, and although court must give it serious consideration, court is nevertheless free to reject it; 1982 amendment to *Welf. & Inst. Code § 707.2* as retaining requirement for report, but as abrogating rule of *People v. Carl B. (1979) 24 Cal. 3d 212, 217-219, 155 Cal. Rptr. 189, 594 P.2d 14* , that court must give great weight to YA recommendation absent substantial countervailing considerations. *People v. Jones (1988) 46 Cal. 3d 585, 600, 250 Cal. Rptr. 635, 758 P.2d 1165*

Youth Authority's recommendation after diagnostic study as not absolutely binding on sentencing court but as entitled to great weight and ordinarily should be followed in absence of substantial countervailing considerations. *People v. B. (1979) 24 Cal. 3d 212, 214-215, 155 Cal. Rptr. 189, 192, 594 P.2d 14* amendment of *Welf. & Inst. Code § 707.2* as enlarging trial court's sentencing discretion, in specific reaction to *Carl B.*; thus, although trial court is required to consider Youth Authority recommendation that minor be placed in Youth Authority facilities as factor in sentencing, it is only one of several primary considerations in determining appropriate disposition. *People v. Martinez (1987) 191 Cal. App. 3d 1372, 1388, 237 Cal. Rptr. 219* ; *People v. Lesnick (1987) 189 Cal. App. 3d 637, 645, 234 Cal. Rptr. 491*

When Youth Authority finds minor amenable to treatment, trial court as nevertheless permitted to rerefer minor to Youth Authority for second diagnostic evaluation. *People v. Gonzales (1986) 186 Cal. App. 3d 591, 596, 230 Cal. Rptr. 732*

[5] Juveniles Inappropriate for Commitment

List of juveniles inappropriate for commitment to Youth Authority as including: (1) youths who are dependent or primarily placement problems; (2) unsophisticated, mildly delinquent youths for whom commingling with serious delinquents who make up most of Youth Authority population might result in negative learning experience and loss of self-esteem; and (3) mentally retarded or mentally disturbed youths. *In re Aline D. (1975) 14 Cal. 3d 557, 564-565, 121 Cal. Rptr. 816, 536 P.2d 65*

Commitment of juvenile to Youth Authority as inappropriate when juvenile was not sophisticated criminal, juvenile might have been mentally disturbed, and crime committed, auto theft, was not one of more serious type cases that would

justify bypassing less restrictive and less punitive placement. *In re Todd W. (1979) 96 Cal. App. 3d 408, 418-419, 157 Cal. Rptr. 802*

[6] Modification of Order of Commitment

Once having committed juvenile to Youth Authority as pronouncement of sentence, trial court as without jurisdiction to vacate or modify sentence proper on its face. *People v. Getty (1975) 50 Cal. App. 3d 101, 107, 123 Cal. Rptr. 704*

[7] Necessary Findings for Commitment

Juvenile court did not err in failing to make and enter express findings indicating reasons for order of commitment in addition to statement required by *Welf. & Inst. Code § 726*. *In re Kenneth H. (1983) 33 Cal. 3d 616, 620-621, 189 Cal. Rptr. 867, 659 P.2d 1156* ; *In re H. (1978) 21 Cal. 3d 18, 24-25, 145 Cal. Rptr. 357, 577 P.2d 177*

Juvenile court as committing only statutory and not constitutional error when it fails tomake explicit its determination that Youth Authority commitment would "probably benefit" minor; however, substantial evidence in record as required to support this conclusion without committing prejudicial error. *In re Jose R. (1983) 148 Cal. App. 3d 55, 58-61, 195 Cal. Rptr. 633*

[8] Return of Minor by Youth Authority

Recommitment to Youth Authority as proper after rejection by Youth Authority, because rejection was based on misinformation and Youth Authority subsequently agreed to accept minor. *In re Asean D. (1993) 14 Cal. App. 4th 467, 473-474, 17 Cal. Rptr. 2d 572*

When juvenile committed to Youth Authority was returned to juvenile court under *Welf. & Inst. Code § 780*, but juvenile court was prohibited from transferring case to adult court in violation of double jeopardy bar and had no other plausible alternatives, juvenile court as having authority to refuse to vacate, modify, or set aside previous Youth Authority commitment; Youth Authority as required to accept juvenile back in custody. *Breed v. Superior Court (1976) 63 Cal. App. 3d 773, 782, 134 Cal. Rptr. 228*

[9] Rights on Honorable Discharge

Juvenile honorably discharged from control by Youth Authority as having absolute right to release from all penalties and disabilities under *Welf. & Inst. Code §§ 1179* and *1772*; relief as automatic so that juvenile may obtain nunc pro tunc dismissal of charges from committing court. *People v. Navarro (1972) 7 Cal. 3d 248, 280, 102 Cal. Rptr. 137, 497 P.2d 481*

Juvenile honorably discharged from control by Youth Authority except those who during incarceration have been placed in state prison as having absolute right to release from all penalties and disabilities resulting from offense or crime and to petition court to set aside verdict of guilty and dismiss accusation or information; court as required to grant petition regardless of fact that minor after release became involved in criminal activity. *Parks v. Superior Court (1971) 19 Cal. App. 3d 188, 191, 96 Cal. Rptr. 645*

[10] Commitments to Mental Health Facilities

Minor who is ward of court as properly committed to mental health facility only in accordance with

Lanterman-Petris-Short Act (*Welf. & Inst. Code §§ 5000 et seq.*); probation officer as without authority to place minor in such facility as voluntary patient under *Welf. & Inst. Code § 6000*; once minor is court ward, parent as also lacking authority to commit minor under *Welf. & Inst. Code § 6000*; *Welf. & Inst. Code §§ 6550, 6551* as available to court to institute Lanterman-Petris-Short Act procedures when court is in doubt about state of ward's mental health. *In re E. (1975) 15 Cal. 3d 183, 190-191, 123 Cal. Rptr. 103, 538 P.2d 231*

Juvenile court as having no jurisdiction to order involuntary commitment to state mental institution; procedures set forth in *Welf. & Inst. Code § 6551* for evaluation, detention, and commitment of wards suffering from mental health problems and provisions of Lanterman-Petris-Short Act (*Welf. & Inst. Code §§ 5000 et seq.*) as applicable. *In re L. L. (1974) 39 Cal. App. 3d 205, 213-214, 114 Cal. Rptr. 11*

[11] Disposition Hearing

Welf. & Inst. Code § 706 permits the court to receive not only the probation social study but other relevant and material evidence, and that includes hearsay evidence, which would otherwise be inadmissible in a jurisdiction hearing. *In re Vincent G. (2008) 162 Cal. App. 4th 238, 75 Cal. Rptr. 3d 526*

Minors are entitled to notice, a current social study and an opportunity to produce evidence at a dispositional hearing. *In re Deon W. (1998) 64 Cal. App. 4th 143, 147* ; *74 Cal. Rptr. 2d 802*

Juvenile court as properly refusing to permit minor to cross-examine probation officer who prepared social study, pursuant to *Evid. Code § 352*. *In re Romeo C. (1995) 33 Cal. App. 4th 1838, 1843-1845, 40 Cal. Rptr. 2d 85*

Juvenile has a right to make personal statement at disposition hearing and present mitigating information. *In re Shannon B. (1994) 22 Cal. App. 4th 1235, 1246*

Preparation, filing, and consideration of current social study as mandatory before court makes dispositional decision; failure of probation officer to prepare and file, and of trial court to consider, current report as reversible error per se. *In re L.S. (1990) 220 Cal. App. 3d 1100, 1104, 269 Cal. Rptr. 700* ; *but see In re Eugene R. (1980) 107 Cal. App. 3d 605, 614-615, 166 Cal. Rptr. 219* (report mandatory, but error subject to harmless-error analysis under *People v. Watson (1956) 46 Cal. 2d 818, 836, 299 P. 2d 243*)

Juvenile as entitled to have same judge preside at both jurisdictional and dispositional hearings when plea bargain has been made only if record affirmatively demonstrates a basis for the defendant's reasonable expectation. *People v. Horn (1989) 213 Cal. App. 3d 701, 261 Cal. Rptr. 814*

Failure of court to hear evidence at dispositional phase after juvenile had admitted petition as constituting reversible error. *In re J. L. P. (1972) 25 Cal. App. 3d 86, 90, 100 Cal. Rptr. 601*

Welfare and Institutions Code as interpreted to afford minor opportunity to have evidence presented relating to disposition of case so that denial of opportunity is violative of due process and constitutes prejudicial error. *In re Mikkelsen (1964) 226 Cal. App. 2d 467, 471, 38 Cal. Rptr. 106*

Report of probation officer as becoming judicial record when filed with juvenile court; juvenile court as not only having right but duty to consider report in deciding case. *In re Garcia (1962) 201 Cal. App. 2d 662, 665, 20 Cal. Rptr. 313*

[12] Dispositional Alternatives

Probation conditions that require that a minor be banished from his or her country violate the constitutional rights of freedom of travel, assembly, and association. *In re James C. (2008) 165 Cal. App. 4th 1198, 1204, 81 Cal. Rptr. 3d 846*

Generally, a minor must challenge an invalid/unreasonable probation condition at the time it is imposed or the issue is waived. However, the doctrine of forfeiture may not apply to probation conditions that are vague or overbroad and thus facially unconstitutional. *In re Sheena K. (2007) 40 Cal. 4th 875, 889, 55 Cal. Rptr. 3d 716*

A minor placed out of the home has a fundamental constitutional right to family visitation. Delegation of the court's discretionary authority to determine the frequency and circumstances relating to it, to a placement facility, constitutes an abuse of discretion and a violation of the constitutional separation of powers. *In re James R. (2007) 153 Cal. App. 4th 413, 438, 62 Cal. Rptr. 3d 824* .

Nothing in *Welf. & Inst. Code § 742.16* limits a juvenile court's authority to add terms and conditions for graffiti-related offenses to those specified in that statute, including ordering restitution and community service work as conditions of probation. *In re G.V. (2008) 167 Cal. App. 4th 1244, 84 Cal. Rptr. 3d 809*

Condition of probation that the minor live in Iran with his parents for two years and not return without permission of the probation officer. *In re Babak S. (1993) 18 Cal. App. 4th 1077, 1084, 22 Cal. Rptr. 2d 893*

Welf. & Inst. Code § 726 as not denying minor equal protection of law because minors and adults are not similarly situated with respect to interest in liberty and are not confined for same purposes. *In re J. (1979) 25 Cal. 3d 522, 532-533, 159 Cal. Rptr. 317, 601 P.2d 549*

Juvenile court may impose a stayed or suspended Youth Authority commitment provided the general requirements of *Welf. & Inst. Code § 777* are complied with. *In re Domanic B. (1994) 23 Cal. App. 4th 366, 371, 28 Cal. Rptr. 2d 439*

Juvenile Court has the authority to stay or suspend a commitment to a juvenile institution, however it can not be automatically imposed upon a violation of probation. *In re Kazuo G. (1994) 22 Cal. App. 4th 1, 7*

Welf. & Inst. Code § 730.6 authorizes the imposition of two different restitution fines when the minor is made a ward based on a felony; one restitution fine, equal to the amount of penalty assessment, is not subject to the ability to pay, while the other, between $100 and $1,000, is subject to the ability to pay. *In re Steven F. (1994) 21 Cal. App. 4th 1070, 1078-1079, 26 Cal. Rptr. 2d 604*

Juvenile court may not impose a stayed or suspended Youth Authority commitment which is automatically imposed upon a violation of probation. *In re Ronnie P. (1992) 10 Cal. App. 4th 1079, 1087-1090, 12 Cal Rptr. 2d 875*

Condition of probation requiring juvenile to maintain "satisfactory" grades as not unconstitutionally vague if term interpreted to mean maintaining "passing" grades. *In re Angel J. (1992) 9 Cal. App.4th 1096, 1102, 11 Cal. Rptr. 2d 776*

Conditioning probation on minor's maintenance of "satisfactory grades" and citizenship as violative of minor's due process rights, but conditions as unfair under facts of particular case, given minor's limited academic capabilities. *In re Robert M. (1985) 163 Cal. App. 3d 812, 816-817, 209 Cal. Rptr. 657*

Juvenile Court has broader power in formulating conditions of probation than adult court. *In re Todd L. (1980) 113 Cal. App. 3d 14, 19, 169 Cal. Rptr. 625*

Condition of probation authorizing automatic confinement in juvenile hall on reported school absence without medical

excuse as invalid. *In re Gerald B. (1980) 105 Cal. App. 3d 119, 126-127, 164 Cal. Rptr. 193*

Juvenile court as erring in committing minor nonresident alien to maximum term in Youth Authority without first considering less restrictive alternatives when minor's history of juvenile delinquency consisted only of two nonviolent attempted car thefts and there had been no psychological or social evaluation of minor or his family environment. *In re Jose P. (1980) 101 Cal. App. 3d 52, 56-60, 161 Cal. Rptr. 400*

Imposition of fine as not authorized under *Welf. & Inst. Code §§ 730* and *731* for minor adjudged ward pursuant to *Welf. & Inst. Code § 602*. *In re Timothy E. (1979) 99 Cal. App. 3d 349, 354, 160 Cal. Rptr. 256*

Disposition order pursuant to petition brought and sustained under *Welf. & Inst. Code § 602* requiring as condition of probation that minor spend five to 20 days in juvenile hall at discretion of juvenile hall staff as not constituting improper delegation of authority because juvenile hall staff is under management and control of probation officer such that discretion is in effect vested in that individual. *In re Ricardo M. (1975) 52 Cal. App. 3d 744, 752, 125 Cal. Rptr. 291*

Disposition order pursuant to petition brought and sustained under *Welf. & Inst. Code § 602* requiring as condition of probation that minor spend five to 20 days in juvenile hall at discretion of juvenile hall staff as appropriate when order was made in furtherance of purpose of juvenile court law to rehabilitate minor by offering least restrictive alternative, where commitment was reasonable, fitting, and proper to end of reformation and rehabilitation, and supported by appropriate findings that minor had previously failed on probation, and continued uninterrupted physical custody of minor by parents would be detrimental. *In re Ricardo M. (1975) 52 Cal. App. 3d 744, 751, 125 Cal. Rptr. 291*

Dismissal of case as one alternative available to referee at time of original disposition if court supervision is then thought to be unnecessary or harmful despite absence of such alternative in statutory scheme. *In re W. R. W. (1971) 17 Cal. App. 3d 1029, 1037, 95 Cal. Rptr. 354*

In dispositions under petitions brought pursuant to *Welf. & Inst. Code § 602*, removal of minor from parental custody as matter of last resort and should not be ordered unless other means have failed. *In re Donna G. (1970) 6 Cal. App. 3d 890, 894, 86 Cal. Rptr. 421*

A minor not personally or immediately responsible for a victim's loss may still be subject to an order of restitution. *In re I.M. (2005) 125 Cal. App. 4th 1195, 1209, 23 Cal. Rptr. 3d 375* . It is enough that a restitution order "would make amends 'to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer.' [citation]" Ibid.

The court may also order the probation department to financially assist a parent's travel to and from visitation when necessary to promote the goal of returning the minor to parental custody. This does not mean that parents are entitled to transportation costs as a matter of constitutional right. It does, however, mean that the broad statutory powers conferred upon the court to make "any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the minor ..." includes the ability to order the payment of travel costs for a parent, so long as "appropriated funds are reasonably available." *In re L.M. (2009) 177 Cal. App. 4th 645, 650-651* , 99 Cal. Rptr. 33d 350

Since restitution laws are to be broadly and liberally construed, and are authorized by a dispositional statute passed by the Legislature, there is no right to have the obligation to pay restitution, or its amount determined by a civil jury trial. *In re A.M. (2009) 173 Cal. App. 4th 668, 673-674, 93 Cal. Rptr. 3d 168*

The nexus between sustained offense and loss to the victim need not be direct or apparent. Recent case law suggests that an offense as benign as driving without a license, in violation of *Veh. Code § 12500(a)*, may support a restitution order for burial and cremation expenses for a victim struck and killed by a car driven by a minor. In that instance, the police reports indicated that both the driver and pedestrian were responsible for the accident. Still, in making the

restitution order, the court determined restitution to be appropriate as the minor's conduct was a substantial factor in causing the accident, notwithstanding the nature of the sustained offense. *In re A.M. (2009) 173 Cal. App. 4th 668, 93 Cal. Rptr. 3d 168*

"Harvey Stipulations" or "Harvey Waivers" do not apply to juvenile court proceedings. In juvenile court proceedings, dismissed charges or conduct that is not charged may be considered for the purpose of disposition, including restitution orders. *In re T.C. (2009) 173 Cal. App. 4th 837, 93 Cal. Rptr. 3d 447*

Specific orders that a minor take medications prescribed for conditions related to his or her rehabilitation may be lawful but must be narrowly tailored. While they need not specify particular medication by name, they must refer to a specific diagnosis and prescription related to rehabilitation. *In re Luis F. (2009) 177 Cal. App. 4th 176, 99 Cal. Rptr. 3d 174*

Home supervision, or house arrest, is a permissible sanction [*In re Walter P. (2009) 170 Cal. App. 4th 95, 87 Cal. Rptr. 3d 668]* , as is use of electronic monitoring devices, including global positioning system (GPS) devices [*In re R.V. (2009) 171 Cal. App. 4th 239, 89 Cal. Rptr. 3d 702]* . It should be noted that because such conditions do not fall within the definition of "secure confinement" pursuant to *Welf.& Inst. Code § 726(c)*, they neither require wardship nor count as custody credits against a minor's maximum time of confinement. *In re Walter P. (2009) 170 Cal. App. 4th 95, 101-102, 87 Cal. Rptr. 3d 668*

With respect to associations, the preferred language is to prohibit association "with any person known to you to be on probation, on parole or a member of a criminal street gang" [*In re H.C. (2009) 175 Cal. App. 4th 1067, 1072, 96 Cal. Rptr. 3d 793]* . With respect to orders related to "dangerous or deadly weapon" possession, it has been held to apply to items specifically delineated by statutes and items that can be used to cause injury or death. *In re R.P. (2009) 176 Cal. App. 4th 562, 566-570, 97 Cal. Rptr. 3d 822*

The conditions required by *Welf. & Inst. Code § 729.2* must be imposed and other conditions, not related to removal from parental custody or placement in "secure confinement" as defined in *Welf. & Inst. Code § 726(c)*, may be imposed as well. Among these conditions, a period of time on home supervision or "house arrest" and participation in a juvenile work program are permitted. *In re Walter P. (2009) 170 Cal. App. 4th 95, 101-103, 87 Cal. Rptr. 3d 668*

An order placed upon a minor living with his mother in Mexico that prohibited him from entering the United States except to attend school, work, or visit his father and family, and required notification to his probation officer before entering the country, was determined to be lawful for the child whose sustained petition involved marijuana smuggling. *Alex O. v. Superior (2009) 174 Cal. App. 4th 1176, 95 Cal. Rptr. 438*

[13] Parent's Liability for Support of Minor

In determining restitution based upon a victim's medical expenses, when a medical provider accepts a patient's Medi-Cal payment, the provider is barred from recovery for any unpaid balance from the patient. The amount of restitution ordered should reflect the amount of the Medi-Cal payment, not the amount billed by the provider. *In re Anthony M. (2007) 156 Cal. App. 4th 1010, 1018, 67 Cal.Rptr. 3d 734*

Economic losses, pursuant to *Welf. & Inst. Code § 730.6*, are broadly defined and the court may order payment for costs incurred to collect restitution, including legal fees incurred for collection of economic loss. *In re Imran Q. (2007) 158 Cal. App. 4th 1316, 71 Cal. Rptr. 3d 121*

Because the state's interest in the rehabilitation of juvenile offenders is not implicated by a release of vicarious liability against an otherwise non-culpable parent, payments accepted by victims from the insurer of a parent or guardian will release the parent of guardian from liability for restitution. *In re Michael S. (2007) 147 Cal. App. 4th 1443,*

1451-1453, 54 Cal. Rptr. 3d 920

Judges have broad discretion in fixing the amount of restitution and may use any rational method for determining the amount, provided that it is reasonably calculated to make the victim whole and is consistent with the purpose of rehabilitation. *In re Dina V. (2007) 151 Cal. App. 4th 486, 489, 59 Cal. Rptr. 3d 862*

County as entitled to reimbursement from family of minor child declared ward of juvenile court for Aid to Families with Dependent Children--Foster Care (AFDC-FC) grant paid by county to foster care group home to support minor. *County of San Mateo v. Dell J. (1988) 46 Cal. 3d 1236, 1241-1242 n.5, 252 Cal. Rptr. 478, 762 P.2d 1202* (clarifying that concurring opinion in *In re Jerald C. (1984) 36 Cal. 3d 1, 201 Cal. Rptr. 342, 678 P.2d 917* , and not "lead" opinion, was actually majority view in that case)

Parents as not liable for upkeep under *Welf. & Inst. Code § 903* after minor has turned 18 years of age. *In re Jesse V. (1989) 214 Cal. App. 3d 1619, 1622-1623, 263 Cal. Rptr. 369*

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Chapter 329 JUVENILE COURTS: DELINQUENCY PROCEEDINGS
PART III. RESEARCH GUIDE
B. Statutes, Decisions, and Other Primary Authority
7. Disposition of Ward

28-329 California Forms of Pleading and Practice--Annotated § 329.273

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.273 Attorney General Opinions

When youthful offender is convicted of misdemeanor in adult court and is committed to Youth Authority under *Welf. & Inst. Code § 1731.5*, maximum period of physical confinement as not allowed to exceed maximum period to which adult convicted of same offense might be subjected. *67 Ops. Cal. Atty. Gen. 361 (1984)*

Youth Authority as permitted to use probation officer's report to determine if offense for which ward was committed is offense described in *Welf. & Inst. Code § 707(b)* (section governing trying juvenile offender as adult in certain situations). *65 Ops. Cal. Atty. Gen. 359, 363-364 (1982)*

Trial for capital offense of defendant under age of 18 at time crime was committed as not capital case. *64 Ops. Cal. Atty. Gen. 648 (1981)*

Juvenile committed to Youth Authority before court ruling grants juveniles predisposition custody credits as entitled to apply for administrative adjustment of commitment term and possible recomputation of maximum term of commitment. *63 Ops. Cal. Atty. Gen. 736 (1980)*

In committing person to Youth Authority under provisions of *Welf. & Inst. Code § 1731.5*, court as not permitted to order that commitment period run consecutively to prior juvenile court commitment; if Youth Authority ward commits offense while on parole and is sentenced to county jail, Youth Authority as not required to give credit for jail confinement time on revoking ward's parole. *63 Ops. Cal. Atty. Gen. 438 (1980)*

Director of Youth Authority as not permitted to keep person who is subject to provisions of *Penal Code § 290* incarcerated beyond time that Youthful Offender Parole Board has scheduled for his release on parole in order to meet

45-day notice requirement of that section. *63 Ops. Cal. Atty. Gen. 393 (1980)*

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[Reserved]

§§ 329.274[Reserved]

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28-329 California Forms of Pleading and Practice--Annotated § 329.280

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.280 State Statutes

Use of juvenile adjudication as "strike" in subsequent felony conviction sentencing under "Three Strikes You're Out" law. *Penal Code § 667(d)(3)*

Registration requirements for sex offenders on discharge or parole from Youth Authority. *Penal Code § 290(d)*

Procedural requirements for modification of order. *Welf. & Inst. Code § 775*

Notice of application for modification of order. *Welf. & Inst. Code § 776*

Supplemental petition. *Welf. & Inst. Code § 777*

Petition for modification of order. *Welf. & Inst. Code § 778*

Changing Youth Authority commitment. *Welf. & Inst. Code § 779*

Return of minor to committing court. *Welf. & Inst. Code § 780*

Petition to seal records. *Welf. & Inst. Code § 781*

Dismissal of petition. *Welf. & Inst. Code § 782*

Petition for order to terminate or modify jurisdiction of juvenile court. *Welf. & Inst. Code § 785*

Appeals. *Welf. & Inst. Code § 800*

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28-329 California Forms of Pleading and Practice--Annotated § 329.281

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§ 329.281 California Rules of Court

[1] Appeals

Juvenile appeals in general. *Cal. Rules of Ct., Rule 5.585*

Right to appeal. *Cal. Rules of Ct., Rule 5.585(a)*

Stay of execution of order or judgment pending appeal. *Cal. Rules of Ct., Rule 5.585(c)*

[2] Subsequent Petitions and Modifications

Supplemental and subsequent petitions. *Cal. Rules of Ct., Rule 5.560*

Petition for modification hearing. *Cal. Rules of Ct., Rules 5.560(d), 5.570*

Hearings of subsequent and supplemental petitions. *Cal. Rules of Ct., Rule 5.565*

Hearing on violation of probation. *Cal Rules of Ct., Rule 5.580*

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28-329 California Forms of Pleading and Practice--Annotated § 329.282

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.282 Decisions

[1] Appeal

Unavailability of complete transcript on appeal because of inadvertent destruction of reporter's notes on second day of two-day jurisdictional hearing as entitling juvenile to new jurisdictional hearing. *In re B. (1979) 25 Cal. 3d 1, 8, 157 Cal. Rptr. 510, 598 P.2d 480*

Order pursuant to *Welf. & Inst. Code § 707* finding juvenile unfit for treatment through juvenile court facilities as not appealable order, because it is outside express provisions of *Welf. & Inst. Code § 800*, which enumerates what orders, judgments, and decrees of juvenile court are appealable. *People v. Chi Ko Wong (1976) 18 Cal. 3d 698, 709, 135 Cal. Rptr. 392, 557 P.2d 976*

Because standard of proof in juvenile proceedings involving criminal acts is same as standard in adult criminal trials, principles of appellate review in criminal trials as applicable to appellate courts in considering sufficiency of evidence admitted in juvenile proceeding. *In re P. (1972) 7 Cal. 3d 801, 809, 103 Cal. Rptr. 425, 500 P.2d 1*

Minor as entitled to free transcript of proceedings for use on appeal according to statute if he or she is personally unable to afford counsel without regard to parents' financial status. *Dana J. v. Superior Court (1971) 4 Cal. 3d 836, 841, 94 Cal. Rptr. 619, 484 P.2d 595*

No per se reversal requirement when juvenile court fails to require verbatim record of hearing at which minor admits petition. *In re Ian J. (1994) 22 Cal. App. 4th 833, 839, 27 Cal. Rptr. 2d 728*

Dispositional hearing with no court reporter present, resulting in no transcript on appeal, as entitling juvenile to new

dispositional hearing. *In re Ray O. (1979) 97 Cal. App. 3d 136, 138, 158 Cal. Rptr. 550 , overruled on other grounds, People v. Horn (1989) 213 Cal. App. 3d 701, 261 Cal. Rptr. 814*

Equal protection clauses of *Cal. Const., art. I, § 7*, and *U.S. Const., amend. XIV*, as not requiring that minor be afforded same right of appellate review following admission of allegations of wardship petition as is afforded to defendant who pleads guilty to criminal offense. *In re David G. (1979) 93 Cal. App. 3d 247, 252-254, 155 Cal. Rptr. 500*

Timely filing of notice of appeal as jurisdictional; unless notice is actually or constructively filed within relevant period, appellate court as having no jurisdiction todetermine merits of appeal requiring dismissal of appeal. *In re Gary R. (1976) 56 Cal. App. 3d 850, 853, 129 Cal. Rptr. 26*

Welf. & Inst. Code § 677 as requiring presence of official court reporter; failure to provide official court reporter as prejudicial and per se requiring orders to be set aside and new trials ordered in which oral proceedings are recorded by official reporter. *In re David T. (1976) 55 Cal. App. 3d 798, 802, 127 Cal. Rptr. 729*

Appeal from dispositional hearing placing juvenile on probation as not rendered moot by fact that probationary period had been served and judge had dismissed initial criminal allegation, because juvenile court law provides right of appeal in order to afford juvenile opportunity to rid himself or herself of stigma of criminality implied by probation. *In re Dana J. (1972) 26 Cal. App. 3d 768, 771, 103 Cal. Rptr. 21*

Appeal from jurisdictional order in case brought under *Welf. & Inst. Code § 602* as not rendered moot by dismissal of juvenile court after entering final commitment order to county camp. *In re Richard D. (1972) 23 Cal. App. 3d 592, 595, 100 Cal. Rptr. 351*

Appeal under juvenile court law as not limited trial de novo on record, but rather an inquiry on existence of substantial evidence in support of findings. *In re Biggs (1971) 17 Cal. App. 3d 337, 340, 94 Cal. Rptr. 519*

When adjudication of minor under *Welf. & Inst. Code § 601* is not based on commission of crime, termination of wardship as rendering appeal from that adjudication moot. *In re Katherine R. (1970) 6 Cal. App. 3d 354, 357, 86 Cal. Rptr. 281*

In juvenile court proceedings, findings of juvenile court judge as not disturbed on appeal when there is substantial evidence to support them; in reviewing such findings, appellate court as indulging all reasonable inferences in support of findings. *In re Corrigan (1955) 134 Cal. App. 2d 751, 754-755, 286 P.2d 32*

Neither an order of informal supervision, pursuant to *Welf. & Inst. Code § 654.2*, nor an order placing a minor on deferred entry of judgment, under *Welf. & Inst. Code § 790 et seq.*, are appealable orders. *Ricki J. v. Superior Court (2005) 128 Cal. App. 4th 783, 787-791, 27 Cal. Rptr. 3d 494* ; *In re Mario C. (2004) 124 Cal. App. 4th 1303, 1307-1309, 21 Cal. Rptr. 3d 891*

[2] Review by Writ of Habeas Corpus

Habeas corpus as proper remedy when Youth Authority fixes term longer than constitutionally permissible. *In re Edward B. (1979) 94 Cal. App. 3d 362, 366, 156 Cal. Rptr. 405*

Proceedings under writ of habeas corpus as appropriate to contest illegal detention if appeal, even if available, would be inadequate when detention only lasts 15 days. *In re Macidon (1966) 240 Cal. App. 2d 600, 607, 49 Cal. Rptr. 861*

[3] Modification of Orders

Juvenile court has authority under *Welf. & Inst. Code § 385* to change, modify, or set aside its prior orders sua sponte. *Nikolas F. v. Superior Court (2006) 144 Cal. App. 4th 92, 116*

Juvenile court as without authority to vacate proper commitment to Youth Authority unless it appears CYA has failed to comply with law or has abused its discretion in dealing with ward in its custody; *Welf. & Inst. Code § 779* as not authorizing judicial intervention into routine parole function of CYA. *In re E. (1979) 23 Cal. 3d 398, 406, 154 Cal. Rptr. 204, 592 P.2d 720*

Before prior commitment order may be modified, express finding by court as required to be made that previous disposition has not been effective in rehabilitation of minor. *In re Reynaldo R. (1978) 86 Cal. App. 3d 250, 255, 150 Cal. Rptr. 71*

Before previous order can be changed, specific procedure specified in *Welf. & Inst. Code §§ 775-777* as required to be complied with. *In re Reynaldo R. (1978) 86 Cal. App. 3d 250, 254, 150 Cal. Rptr. 71*

Welf. & Inst. Code § 778 can be used to change or modify the order to a more restrictive placement but cannot be used as a vehicle to support a commitment to the *Youth Authority (Division of Juvenile Justice). In re Brent F. (2005) 130 Cal. App. 4th 1124, 1130 fn.3, 30 Cal. Rptr. 3d 833*

[4] Supplemental Petitions

District attorney as properly requesting court to aggregate juvenile's terms of confinement under prior sustained petitions by filing either new petition under *Welf. & Inst. Code § 602* or supplemental petition under *Welf. & Inst. Code § 777*, if district attorney meets special notice provisions of *Welf. & Inst. Code § 777* when *Welf. & Inst. Code § 602* petition is brought to aggregate terms of confinement. *In re Michael B. (1980) 28 Cal. 3d 548, 552-556, 169 Cal. Rptr. 723, 620 P.2d 173*

Standard of proof applicable in proceedings brought on supplemental petition as that of beyond reasonable doubt. *In re Arthur N. (1976) 16 Cal. 3d 226, 240, 127 Cal. Rptr. 641, 545 P.2d 1345*

People as authorized under *Welf. & Inst. Code § 800(b)(4)* to immediately appeal pretrial order excluding statement as fruit of poisonous tree of another statement illegally obtained and resulting in dismissal of wardship petition. *In re Ricardo C. (1995) 37 Cal. App. 4th 431, 435-437, 43 Cal. Rptr. 2d 585*

People as authorized under *Welf. & Inst. Code § 800(b)(4)* to immediately appeal demurrer to one of several allegations sustained in juvenile wardship petition. *In re Rottanak K. (1995) 37 Cal. App. 4th 260, 272, 43 Cal. Rptr. 2d 543*

Juvenile court's finding that allegations in supplemental petition were true was sufficient to satisfy requirement that there be a finding that the previous disposition was not effective, since that was alleged in the petition. *In re Kazuo G. (1994) 22 Cal. App. 4th 1,6, 27 Cal. Rptr. 2d 155*

A minor's unauthorized departure from a transportation officer after two weeks of placement was insufficient to show a complete failure of rehabilitation. *In re Ronnie P. (1992) 10 Cal. App. 4th 1079, 1084-1085, 12 Cal. Rptr. 2d 875*

Although *Welf. & Inst. Code § 777* requires written notice that more restrictive level of placement is being sought, due process requirements as met if minor given actual notice; written notice requirement as protecting minor's constitutional

right to due process regarding notice and opportunity to be heard, thus if actual notice resulted in no prejudice to minor, error as not reversible. *In re Donnell L. (1989) 212 Cal. App. 3d 185, 192, 260 Cal. Rptr. 396*

Supplemental petition under *Welf. & Inst. Code § 777* for placement or commitment of juvenile as not needing either to explicitly state that more restrictive placement is being sought for minor or specify that placement, so long as petition contains sufficient information to give adequate notice that placement might be contemplated. *In re Tyrone O. (1989) 209 Cal. App. 3d 145, 150, 257 Cal. Rptr. 134*

Failure to complete a work program and a theft awareness class did not constitute a complete failure of rehabilitation. *In re Joe A. (1986) 183 Cal. App. 3d 11, 27-28, 227 Cal. Rptr. 831*

A dispositional order that was never effectuated cannot be ineffective. *In re Scott K. (1984) 156 Cal. App. 3d 273, 276-277, 203 Cal. Rptr. 268*

Supplemental petition as required by *Welf. & Inst. Code § 777* when court imposes previously stayed detention hall time on violation of condition of probation. *In re Mark M. (1980) 109 Cal. App. 3d 873, 876-877, 167 Cal. Rptr. 461*

Supplemental petition as not required by *Welf. & Inst. Code § 777* in order to modify order committing minor to boys' ranch for 90 days by providing for commitment to different ranch for indefinite period. *In re Glen J. (1979) 97 Cal. App. 3d 981, 985-986, 159 Cal. Rptr. 148*

No basis as existing to distinguish between original and supplementary proceedings such that when supplemental petition charges acts of misconduct or crimes that may lead to substantially more restrictive punishment or custody, bifurcated hearing procedure established for original proceedings should be utilized and juvenile accorded same constitutional and statutory rights as on original petition. *In re Francis (1974) 42 Cal. App. 3d 892, 898, 117 Cal. Rptr. 277*

Fact that minor was found in intoxicated-like condition standing alone as not determinative because fact that minor may have deviated from paths of rectitude does not exemplify parents' complete failure to achieve rehabilitation or compel conclusion that further efforts will be unavailing; commitment to Youth Authority under *Welf. & Inst. Code § 777* as improper. *In re Donna G. (1970) 6 Cal. App. 3d 890, 894-895, 86 Cal. Rptr. 421*

Proceeding under *Welf. & Inst. Code § 777* as applicable when minor who previously has been made ward of court has been returned to custody of parents as part of rehabilitation program and has failed to achieve rehabilitation under such program. *In re Donna G. (1970) 6 Cal. App. 3d 890, 894, 86 Cal. Rptr. 421*

A minor required to register as a sex offender in another state is neither required to register in California, nor can he have his probation violated for failing to register, if the underlying facts and circumstances behind the out-of-state requirement would not mandate registration under California law, even if the minor agreed to register pursuant to ICJ transfer conditions. *In re Lee Dale Crockett (2008) 159 Cal. App. 4th 751, 761-762, 71 Cal. Rptr. 3d 632*

[5] Subsequent Use in Criminal Court Sentencing

Consistent with overwhelming case law in support of the practice, as well as widespread use of juvenile adjudications as strikes in criminal courts, the California Supreme Court has held that the Constitution does not preclude use of sentence enhancements against adult felons who had "prior valid, fair, and reliable [juvenile] adjudications[s] ... where the juvenile proceeding included all the constitutional protections applicable to such matters, even though these protections did not include the right to a jury trial." *People v. Nguyen (2009) 46 Cal. 4th 1007, 1019, 95 Cal. Rptr. 3d 615*

Following the decision in *People v. Nguyen (2009) 46 Cal. 4th 1007, 95 Cal. Rptr. 3d 615* , which held that using prior juvenile adjudications to enhance an adult offender's sentence under the Three Strikes Law was constitutional, appellate courts have found the rationale applicable to use as an aggravating factor under *California Rule of Court, Rule 4.421(b)(2). People v. Quiles (2009) 177 Cal. App. 4th 612, 620-621, 99 Cal. Rptr. 3d 378*

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28-329 California Forms of Pleading and Practice--Annotated §§ 329.283-329.289

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28-329 California Forms of Pleading and Practice--Annotated § 329.290

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.290 State Statutes

Transmittal of arrest information. *Welf. & Inst. Code § 204*

Disclosure of minor's name. *Welf. & Inst. Code § 204.5*

Special juvenile session. *Welf. & Inst. Code § 675*

Admission of public to hearing. *Welf. & Inst. Code § 676*

Attendance of family members of prosecuting witness as support person or persons in juvenile court proceeding involving violation of specified offenses. *Penal Code § 868.5(a)*; *Welf. & Inst. Code § 676(a)*

Petition to seal records. *Welf. & Inst. Code § 781*

Destruction of records. *Welf. & Inst. Code §§ 826, 826.5*

Notice to minor concerning records. *Welf. & Inst. Code § 826.6*

Limited access to juvenile records. *Welf. & Inst. Code § 827*

Disclosure of information relating to taking minor into custody for committing serious felony. *Welf. & Inst. Code § 827.5*

Disclosure of information relating to taking minor into custody. *Welf. & Inst. Code § 828*

Confidentiality of juvenile criminal records-limited exception. *Welf. & Inst. Code § 828.1*

Exchange of information relating to taking minor into custody if offense against school. *Welf. & Inst. Code § 828.3*

Board of prison terms may review juvenile court records. *Welf. & Inst. Code § 829*

Disclosure of information among child abuse team personnel. *Welf. & Inst. Code § 830*

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28-329 California Forms of Pleading and Practice--Annotated § 329.291

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§ 329.291 California Rules of Court

Sealing records. *Cal. Rules of Ct., Rule 5.830*

Persons present at juvenile court proceedings. *Cal. Rules of Ct., Rule 5.530*

Confidentiality of records. *Cal. Rule of Ct., Rule 5.552*

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28-329 California Forms of Pleading and Practice--Annotated § 329.292

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.292 Decisions

[1] Sealing Records

Records lawfully sealed pursuant to *Welf. & Inst. Code § 781* by a court order, upon a probation officer's recommendation, may not be disclosed to a third party. Limited exceptions to this rule include the "defamation" exception under subdivision (b) or the"insurance eligibility" exception under subdivision (c). *In re James H. (2007) 154 Cal. App. 4th 1078, 1083, 65 Cal.Rptr. 3d 410*

Welf. & Inst. Code § 781 as not permitting sealing of person's record of conviction in adult court during person's minority. *People v. Superior Court (Hershelman) (1979) 99 Cal. App. 3d 865, 867, 160 Cal. Rptr. 494*

Welf. & Inst. Code § 731 prohibits the sealing of any person's records when they have been found by the court to have committed a 707(b) offense after they attained the age of 14 years. *In re Jeffrey T. (2006) 140 Cal. App. 4th 1015, 1019, 44 Cal. Rptr. 3d 861*

[2] Media Access

West Virginia statute making it a crime for news to publish name of juvenile without permission of court violates the *First* and *Fourteenth Amendments of the United States Constitution*. *Smith v. Daily Mail Publishing Co. (1979) 443 U.S. 97, 101-102, 99 S. Ct. 2667, 61 L. Ed. 2d 399*

Juvenile court may not prohibit media from publishing name or likeness of minor charged with murder at detention hearing when minor's name and likeness had already been broadcast prior to the hearing, unless there is a reasonable

likelihood of substantial prejudice to the minor's receiving a fair or impartial trial. KGTV Channel 10 v. *Superior Court (1994) 26 Cal. App. 4th 1673, 1682-1684, 32 Cal. Rptr. 2d 181*

Welf. & Inst. Code § 676(a) providing for open hearings for certain offenses, apples to fitness hearings. *Tribune Newspapers West, Inc. v. Superior Court (1985) 172 Cal. App. 3d 443, 447, 218 Cal. Rptr. 505*

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28-329 California Forms of Pleading and Practice--Annotated § 329.300

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§ 329.300 State Statutes

Motion to suppress evidence. *Welf. & Inst. Code § 700.1*

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28-329 California Forms of Pleading and Practice--Annotated § 329.301

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§ 329.301 Decisions

[1] Counsel, Right to

A minor's right to counsel is "offense specific" and only prohibits government-initiated interrogation concerning the offense to which the right to counsel has attached. *In re Robert E. (2000) 77 Cal. App. 4th 557, 561, 91 Cal. Rptr. 2d 774*

Minor's waiver of appointed counsel to avoid or reduce parental pressure or displeasure as neither intelligent nor voluntary, but as product of coercion or fear; in any case, when, having been advised of rights, minor of nonindigent parents purports to waive appointed counsel, juvenile court should refuse to permit waiver if circumstances indicate extraneous and improper factors substantially influence minor's decisions *In re H. (1970) 2 Cal. 3d 513, 525, 86 Cal. Rptr. 76, 468 P.2d 204*

Juveniles are entitled to appointed counsel on a first appeal as of right and further, to effective counsel. *In re Kevin S. (2003) 113 Cal. App. 4th 97, 6 Cal. Rptr. 3d 178*

Welf. & Inst. Code § 903.1, making parents and other responsible relatives liable to county for costs of legal services rendered in juvenile court proceeding when these persons are able to pay for counsel, as constitutional. *In re H. (1970) 2 Cal. 3d 513, 521, 86 Cal. Rptr. 76, 468 P.2d 204*

Minor as not entitled to self-representation when he demonstrated no comprehension, either rationally or factually, of proceedings against him; self-representation as permitted only on demonstration of rational and factual understanding of the proceedings. *In re Shawnn F. (1995) 34 Cal. App. 4th 184, 195-196, 40 Cal. Rptr. 2d 263*

Requiring minor to reimburse state for costs of legal representation as condition of release as violating juvenile's right to counsel. *In re Elizabeth S. (1982) 138 Cal. App. 3d 450, 451-455, 188 Cal. Rptr. 2*

Constitutional right to effective assistance of counsel as not requiring defense counsel to make all conceivable motions and objections for which there is any colorable basis. *In re Frank G. (1980) 104 Cal. App. 3d 593, 595, 163 Cal. Rptr. 762*

[2] Double Jeopardy

Prosecution of juvenile in superior court after an adjudicatory proceeding in juvenile court as violating *double jeopardy clause of Fifth Amendment*. *Breed v. Jones (1975) 421 U.S. 519, 541, 95 S. Ct. 1779, 44 L. Ed. 2d 346*

Hearing de novo pursuant to *Welf. & Inst. Code §§ 253* and *254* to redetermine wardship as violation of *double jeopardy clause of Fifth Amendment*. *Jesse W. v. Superior Court (1979) 26 Cal. 3d 41, 46-48, 160 Cal. Rptr. 700, 603 P.2d 1296*

Absent evidence of timely prosecutorial knowledge of multiple offenses, person's violation of Vehicle Code resulting in punishment for mere infraction as not raising bar from trying him or her on homicide charges arising out of same prohibited act; rule as applicable to juveniles because petition may be filed based on same acts adjudicated as violations of Vehicle Code. *In re B. (1976) 18 Cal. 3d 687, 690, 135 Cal. Rptr. 82, 557 P.2d 514*

Criminal prosecution of minor after adjudicatory hearing as violative of *double jeopardy clause of the Fifth* and *Fourteenth Amendments of the U.S. Constitution*. *In re Bryan (1976) 16 Cal. 3d 782, 785-787, 129 Cal. Rptr. 293, 548 P.2d 693*

No new jeopardy as attaching when juvenile court, after Youth Authority refuses to accept minor, transfers minor to criminal court. *Bryan v. Superior Court (1972) 7 Cal. 3d 575, 584, 102 Cal. Rptr. 831, 498 P.2d 1079*

Dismissal of juvenile proceedings as constituting acquittal so that jeopardy has attached and further hearing on same act and offense by same minor is barred by constitutional protections against double jeopardy. *Richard M. v. Superior Court (1971) 4 Cal. 3d 370, 378, 93 Cal. Rptr. 752, 482 P.2d 664*

Modification of dispositional order in exercise of juvenile court's continuing jurisdiction over ward as not constituting double jeopardy. *In re Glen J. (1979) 97 Cal. App. 3d 981, 987, 159 Cal. Rptr. 148*

Penal Code § 654 as applying to juvenile proceedings to forbid multiple initiation of petitions for same act or course of conduct. *In re Benny G. (1972) 24 Cal. App. 3d 371, 375, 101 Cal. Rptr. 28*

[3] Due Process

Clear and convincing standard of proof applicable to findings under *Penal Code § 26* (rebuttable presumption that minor under 14 is incapable of committing crime) as meeting requirements of state and federal constitutional due process. *In re Manuel L. (1994) 7 Cal. 4th 229, 237-239, 27 Cal. Rptr. 2d 2, 865 P.2d 718* (disapproving, to the extent inconsistent with this decision, *In re Billie Y. (1990) 220 Cal. App. 3d 127, 131, 269 Cal. Rptr. 212* ; *In re Francisco N. (1986) 186 Cal. App. 3d 175, 179-180, 230 Cal. Rptr. 475* *In re Richard T. (1985) 175 Cal. App. 3d 248, 252-253, 220 Cal. Rptr. 573* ; *Shortridge v. Municipal Court (1984) 151 Cal. App. 3d 611, 617, 198 Cal. Rptr. 749* ; *In re R. (1970) 1 Cal. 3d 855, 862, 83 Cal. Rptr. 671, 464 P.2d 127* ; *In re Clyde H. (1979) 92 Cal. App. 3d 338, 343, 154 Cal. Rptr. 727*)

Juvenile detainees as constitutionally entitled to judicial probable cause determination within 72 hours of arrest; this due process requirement as met by formal juvenile detention hearing pursuant to *Welf. & Inst. Code § 632(a)* when the hearing is held within 72 hours of arrest; otherwise, Constitution requires separate, timely judicial determination of probable cause for any period of detention beyond 72 hours; 48-hour rule governing pretrial detention of adults as not applying to juvenile detention. *Alfredo A. v. Superior Court (1994) 6 Cal. 4th 1212, 1231-1232, 26 Cal. Rptr. 2d 623, 865 P.2d 56*

Purposes and structure of juvenile court system as different from adult criminal justice system, because when due process has been satisfied, reasonable differences in procedure are not unconstitutional. *In re R. C. (1974) 39 Cal. App. 3d 887, 897, 114 Cal. Rptr. 735*

Protections extended to juveniles charged with violating law as matter of due process as including exclusionary rules relating to illegally seized evidence, rules for unconstitutional pretrial identification, explicit waiver of right prior to judicial admission, inadmissibility of statements obtained from juveniles in violation of *Miranda* warnings, and bar on multiple prosecutions. *In re R.C. (1974) 39 Cal. App. 3d 887, 897, 114 Cal. Rptr. 735*

Referee's finding that initial allegation was untrue while simultaneously amending petition to allege violation of curfew as violation of due process because juvenile had insufficient notice of allegations against which to prepare defense. *In re Dana J. (1972) 26 Cal. App. 3d 768, 772, 103 Cal. Rptr. 21*

Juveniles as entitled to fundamental protection of *Bill of Rights* in proceedings that may result in confinement or other sanctions, whether state labels proceedings criminal or civil. *In re Ruth H. (1972) 26 Cal. App. 3d 77, 85, 102 Cal. Rptr. 534*

Referee's assumption of dual obligations of presenting case and judging contested matters of fact and law as violating minor's right to due process of law. *In re Ruth H. (1972) 26 Cal. App. 3d 77, 85, 102 Cal. Rptr. 534*

[4] Equal Protection

Welf. & Inst. Code § 726 as not denying equal protection of law because minors and adults are not similarly situated with respect to interest in liberty and are not confined for same purpose. *In re J. (1979) 25 Cal. 3d 522, 532-533, 159 Cal. Rptr. 317, 601 P. 2d 549*

Neither equal protection nor fundamental fairness as requiring that *Penal Code § 1118* be applicable in juvenile court proceedings. *In re Joseph H. (1979) 98 Cal. App. 3d 627, 632, 159 Cal. Rptr. 681*

Juvenile court's placement of minor on probation under supervision of probation officer as not constituting denial of equal protection although adult who was convicted of same offense could receive no more than $100 fine. *In re Wayne J. (1979) 97 Cal. App. 3d 776, 780-783, 159 Cal. Rptr. 106*

Equal protection clauses of *Cal. Const., art. I, § 7*, and *U.S. Const., amend. XIV*, as not requiring that minor be afforded same right of appellate review following admission of allegations of wardship petition as is afforded to defendant who pleads guilty to criminal offense. *In re David G. (1979) 93 Cal. App. 3d 247, 252-254, 155 Cal. Rptr. 500*

[5] Motion to Suppress

Penal Code § 1538.5, relating to motions to suppress evidence, as not applying to delinquency proceedings pursuant to *Welf. & Inst. Code § 602*; hence, minor who admits allegations of wardship petition as not entitled to obtain appellate

review of denial of motion under *Penal Code § 1538.5* to suppress. *In re David G. (1979) 93 Cal. App. 3d 247, 252, 155 Cal. Rptr. 500*

[6] Searches and Seizures

Evidence seized in violation of the *Fourth Amendment* by a police officer, acting in reasonable reliance on information obtained from a juvenile probation officer that a search condition exists, need not be suppressed if it is determined subsequently that the information was incorrect. *In re Arron C. (1997) 59 Cal. App. 4th 1365, 1370-1373, 69 Cal. Rptr. 2d 852*

Police officer's reliance on a minor's statement that he was on probation with a search condition was reasonable where the minor was 16 years old and did not exhibit signs of immaturity or lack of normal intelligence. *In re Jeremy G. (1998) 65 Cal. App. 4th 553, 556-557, 76 Cal. Rptr. 2d 585*

For the purposes of the *Fourth Amendment*, school resource officers are school officials, not police officers, able to conduct school searches on a "reasonable suspicion" standard. *In re William V. (2003) 111 Cal. App. 4th 1464, 1471, 4 Cal. Rptr. 3d 695*

Random metal detector weapon searches or high school students violate the *Fourth Amendment* ban on unreasonable searches and seizures. *In re Latasha W. (1998) 60 Cal. App. 4th 1524, 1526-1528, 70 Cal. Rptr. 2d 886*

A probation search condition does not justify a warrantless search when the officer is unaware of the search condition and the search is otherwise unlawful [*In re Jaime P. (2006) 40 Cal. 4th 128, 130*].

Proposition 8 (*Cal. Const., art. I, § 28(d)*) as abrogating independent state grounds for excluding evidence seized in violation of state constitutional search and seizure provisions and privilege against self-incrimination; exception for minor's immunity from use at jurisdiction hearing of any statements made at fitness hearing. *People v. May (1988) 44 Cal. 3d 309, 315-320, 243 Cal. Rptr. 369, 748 P.2d 307* ; *In re Lance W. (1985) 37 Cal. 3d 873, 886-889, 210 Cal. Rptr. 631, 694 P.2d 744* ; *see also Ramona R. v. Superior Court (1985) 37 Cal. 3d 802, 804, 808-810, 210 Cal. Rptr. 204, 693 P.2d 789*

Police officer can detain for investigation of truancy as long as it is not a pretext for criminal investigation. *In re James D. (1987) 43 Cal. 3d 903, 917, 239 Cal. Rptr. 663, 741 P.2d 161*

Public school officials need only have an objectively reasonable suspicion that a student is engaging in behavior proscribed by the law or school in order to conduct a search. *In re William G. (1985) 40 Cal. 3d 550, 564, 221 Cal. Rptr. 118, 709 P.2d 1287*

Minor old enough to assert his or her rights as protected against unreasonable searches and seizures under *Cal. Const., art. I, § 13*. *In re Scott K. (1979) 24 Cal. 3d 395, 400-403, 155 Cal. Rptr. 671, 595 P.2d 105* , *cert. denied, (1979) 444 U.S. 973, 100 S. Ct. 468, 62 L. Ed. 2d 388* (holding that consent of parent to search property of minor in which parent has no protectible interest was invalid)

Statements obtained from juveniles in violation of *Miranda* as inadmissible in juvenile proceedings under *Welf. & Inst. Code § 602*. *In re P. (1972) 7 Cal. 3d 801, 810, 103 Cal. Rptr. 425, 500 P.2d 1*

Exclusionary rules relative to introduction of evidence of pretrial identification involving constitutionally defective police lineups and identifications procedures as applicable in juvenile court proceedings. *In re Carl T. (1969) 1 Cal. App. 3d 344, 352-353, 81 Cal. Rptr. 655*

Prohibition against practice of showing suspects singly to persons for purpose of identification as applicable to juvenile proceedings. *In re Carl T. (1969) 1 Cal. App. 3d 344, 352-353, 81 Cal. Rptr. 655*

[7] Self-Incrimination

Constitutional right against self-incrimination as aspect of due process that must be accorded in juvenile proceedings. *In re Gault (1967) 387 U.S. 1, 55, 87 S. Ct. 1428, 18 L. Ed. 2d 527*

A self-incriminating statement of juvenile not in custodial restraint, though placed in handcuffs and previously left sitting in a police car, held to be admissible despite lack of *Miranda* warnings; questioning occurred only after handcuffs removed, restraints were applied briefly, juvenile never told he was under arrest and was informed that he need not answer officer's questions. *In re Joseph R. (1998) 65 Cal. App. 4th 954, 959-961, 76 Cal. Rptr. 2d 887*

Minor is not in "custodial interrogation" for purposes of Miranda warnings when minor was temporarily stopped with a group of youths on investigation of report of youths throwing rocks and asked what was in his pocket. *In re Victor B. (1994) 24 Cal. App. 4th 521, 524, 29 Cal. Rptr. 2d 362*

Voluntariness of a minor's confession is judged by the same standards as an adult's, however the minor's age is one factor that should be considered. *In re Aven S. (1991) 1 Cal. App. 4th 69, 76-77, 1 Cal. Rptr. 2d 655*

A minor's request to see his or her parent is considered an invocation of his or her Miranda rights. *People v. Burton (1971) 6 Cal. 3d 375, 383-384, 99 Cal. Rptr. 1, 491 P.2d 793*

Rule of Boykin v. Alabama (1969) 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 , that before plea of guilty may be accepted defendant must affirmatively waive privilege against compulsory self-incrimination and right to confront accusers, and that such waiver must appear on record, as applicable to juvenile court proceedings when minor liable for substantial term of institutional detention. *In re Michael M. (1970) 11 Cal. App. 3d 741, 744, 96 Cal. Rptr. 887*

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A. Initial Delinquency Proceedings

28-329 California Forms of Pleading and Practice--Annotated § 329.350

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.350 Juvenile Wardship Petition [Welf. & Inst. Code §§ 601, 602] With Attachment Alleging Child Habitually Disobedient [Welf. & Inst. Code § 601(a)]--Judicial Council Forms JV-600 and JV-610

[1] FORM Juvenile Wardship Petition [Welf. & Inst. Code §§ 601, 602] With Attachment Alleging Child Habitually Disobedient [Welf. & Inst. Code § 601(a)]--Judicial Council Forms JV-600 and JV-610

Click here to view image.

[2] Use of Form

This Judicial Council form is used to petition to have a child declared a ward of the court (JV-600) [*see Welf. & Inst. Code §§ 601, 602*; *Cal. Rules of Ct., Rule 5.520*]. It includes one of three existing Judicial Council forms of attachment alleging grounds for jurisdiction in a delinquency proceeding: Child Habitually Disobedient (JV-610) [*see Welf. & Inst. Code § 601(a)*]. The other existing attachments are entitled:

- Child Habitually Truant (JV-611) [*see Welf. & Inst. Code § 601(b)*].
- Violation of Law by Child (JV-620) [*see Welf. & Inst. Code § 602*].

This form is usually filed by the district attorney after a referral from a probation officer, but a complaining party may also apply to commence proceedings if the probation officer does not recommend the filing of a petition [*Welf. & Inst. Code § 653.5, 655*].

Use of this form is mandatory [*Cal. Rules of Ct., Rule 5.504*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge. Note that the attachment forms JV-610, JV-611, JV-620 are not included as they are normally used only by the

district attorney or probation officer.

[3] Form of Petition

The petition must be verified [*Welf. & Inst. Code § 656*; *see Welf. & Inst. Code § 656.5*]. An unverified petition may be dismissed without prejudice [*Cal. Rules of Ct., Rule 5.524(b)*]. The petition must contain the following [*Welf. & Inst. Code § 656*; *Cal. Rules of Ct., Rule 5.524(b)*]:

- The title of the court and the proceedings.
- The relevant code provisions.
- The name, age, and address, if known, of the minor.
- The names and residence addresses, if known, of both parents and any guardian of the minor. If no parent or guardian resides within the state, or the residence address is unknown, the name and address of the adult relative residing nearest to the location of the court must be included.
- A concise statement of the facts concerning the alleged misconduct.
- Whether or not the minor was detained and if so, the precise time the minor was taken into custody.
- Various notices regarding restitution, fines, penalties, community service, etc.

[4] Service of Notice and Petition

The juvenile court clerk must serve notice and a copy of the verified petition on the minor, parent or guardian, any known attorney for the minor, parent, or guardian, and, if requested, the district attorney [*Welf. & Inst. Code § 658*; *Cal. Rules of Ct., Rule5.524(f)*; *see § 329.351* (form of notice of hearing), and Ch. 328, *Juvenile Courts: Dependency Proceedings*, § 328.353 (form of proof of service of juvenile court petition)]. Failure to do so is a jurisdictional error that may be raised on a motion at the hearing or by a petition for habeas corpus [*In re Linda D. (1970) 3 Cal. App. 3d 567, 571, 83 Cal. Rptr. 544]* .

[5] Cross References

For discussion regarding the commencement of delinquency proceedings, see *§ 329.30* et seq.

For a form of notice of hearing, see *§ 329.351*

For form of proof of service of a juvenile court petition, see Ch. 328, *Juvenile Courts: Dependency Proceedings*, § 328.353

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PART IV. FORMS
A. Initial Delinquency Proceedings

28-329 California Forms of Pleading and Practice--Annotated § 329.351

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.351 Notice of Hearing (Wardship) [Welf. & Inst. Code §§ 658, 659; Cal. Rules of Ct., Rule 1406(d)]--Judicial Council Form JV-625

[1] FORM Notice of Hearing (Wardship) [Welf. & Inst. Code §§ 658, 659; Cal. Rules of Ct., Rule 1406(d)]--Judicial Council Form JV-625

Click here to view image.

[2] Use of Form

This Judicial Council form is notice of a hearing on a delinquency or wardship petition (JV-625). The juvenile court clerk must serve this notice with a copy of the verified petition on the minor, parent or guardian, any known attorney for the minor, parent or guardian, and, if requested, the district attorney [*see Welf. & Inst. Code § 658*; *Cal. Rules of Ct., Rule 5.524*].

This form may also be used to serve notice of any of the hearings in a delinquency proceeding, including detention, jurisdiction, disposition, and review hearings. The appropriate hearing must be marked in Paragraph 2 of the form.

Use of this form is mandatory [*Cal. Rules of Ct., Rule 5.504*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Form of Notice

The notice must contain the following [*Welf. & Inst. Code §§ 658, 659*; *Cal. Rules of Ct., Rule 5.524(f)*]:

- The names and addresses of the minor and the person entitled to notice.
- The relevant code provisions.
- The date, time, and place for the hearing.
- A statement that the minor, parent, or guardian is entitled to have an attorney present at the hearing and that, if the party is indigent and desires an attorney, he or she should promptly notify the juvenile court clerk.
- A cautionary statement of the party's potential financial liability for appointed counsel and for costs of support of the minor at a county institution.

[4] Cross References

For further discussion regarding the form of notice, see *§ 329.37[7]*

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28-329 California Forms of Pleading and Practice--Annotated §§ 329.352-329.359

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

[Reserved]

§§ 329.352[Reserved]

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28-329 California Forms of Pleading and Practice--Annotated § 329.360

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.360 Notice of Motion and Motion Before Trial to Suppress Illegally Obtained Evidence, Statement, or Admission

[1] FORM Notice of Motion and Motion Before Trial to Suppress Illegally Obtained Evidence, Statement, or Admission

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
JUVENILE COURT

In the Matter of _____ _____ [*name*], A Minor.	)))))))	NO. _____ NOTICE OF MOTION AND MOTION FOR SUPPRESSION OF EVIDENCE, STATEMENT, OR ADMISSION Date: _____ Time: _____ Location: _____ [Trial Date: _____]

TO: _____[*name*], _____[*specify prosecuting attorney, e.g.*, DISTRICT ATTORNEY OF THE (CITY AND) COUNTY OF _____]

NOTICE IS HEREBY GIVEN that, on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], the minor _____[*name*] will, and hereby does, move for an order suppressing as evidence the following: _____[*describe with particularity the evidence, statement, or admission to be suppressed*]. The motion will be made on the grounds that the _____[evidence *or* statement *or* admission] was illegally obtained because _____[*state basis for assertion that evidence, statement, or admission was illegally obtained*].

The motion will be based on this notice of motion, on the declaration(s) of _____[*name(s)*] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Minor _____ [*name*]

[2] Use of Form

This form may be used in preparation of a motion to suppress illegally obtained evidence, statements, or admissions in delinquency cases. Although juvenile court proceedings are not deemed criminal [*Welf. & Inst. Code § 203*], the procedures used and the grounds on which such motions are brought in practice seem to follow those used in adult criminal proceedings.

[3] Content of Prehearing Motion and Accompanying Papers

All prehearing motions must be specific, note the grounds for the motion, and be supported by points and authorities [*Cal. Rules of Ct., Rule 5.544*]. Unless otherwise ordered or specifically provided by law, and absent a waiver, a prehearing motion to suppress evidence obtained as a result of an unlawful search or seizure and accompanying points and authorities must be served on the child and opposing counsel and filed with the court at least five judicial days before the date the jurisdiction hearing is set to begin [*Cal. Rules of Ct., Rule 5.544(1)*].

[4] Constitutional Protections

The protections extended to juveniles charged with the commission of a crime include, as a matter of constitutional due process, the following [*In re R.C. (1974) 39 Cal. App. 3d 887, 897, 114 Cal. Rptr. 735* ; *In re Ruth H. (1972) 26 Cal. App. 3d 77, 85, 102 Cal. Rptr. 534]* :

- The exclusionary rules relating to illegally seized evidence.
- Rules for unconstitutional pretrial identification.
- The explicit waiver of rights prior to a judicial admission.
- The inadmissibility of statements obtained in violation of the *Miranda* warnings.
- The bar on multiple prosecutions.

Juveniles are entitled to these fundamental protections in proceedings that may result in confinement or other sanctions,

whether the state labels these proceedings "criminal" or "civil" [*In re Ruth H. (1972) 26 Cal. App. 3d 77, 85, 102 Cal. Rptr. 534]* .

However, *Cal. Const., art. I, § 28(d)*, adopted as part of Proposition 8 at the June 1982 election, provides that relevant evidence shall not be excluded in any criminal proceeding, including any trial or hearing of a juvenile for a criminal offense. It abrogates both of the following:

- The "vicarious exclusionary rule" under which a defendant had standing to object to the introduction of evidence seized in violation of the rights of a third person.

- A defendant's right to object to and suppress evidence seized in violation of the California, but not the federal, constitutional search and seizure provision.

- Other evidence obtained in violation of the state, but not federal, privilege against self-incrimination [*People v. May (1988) 44 Cal. 3d 309, 315-320, 243 Cal. Rptr. 369, 748 P.2d 307* ; *In re Lance W. (1985) 37 Cal. 3d 873, 879, 210 Cal. Rptr. 631, 694 P.2d 744]* .

An exception has been carved out for a minor's immunity from use at the jurisdiction hearing of any statements made at a fitness hearing. This exception has not been nullified by *Cal. Const., art. I, § 28(d)*, but is preserved by the exception for statutory privileges contained in that section [*People v. May (1988) 44 Cal. 3d 309, 318-320, 243 Cal. Rptr. 369, 748 P.2d 307* (preserving *Ramona R.* as exception); *see* *Ramona R. v. Superior Court (1985) 37 Cal. 3d 802, 804, 808-810, 210 Cal. Rptr. 204, 693 P.2d 789]* .

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28-329 California Forms of Pleading and Practice--Annotated § 329.361

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.361 Order for Prisoner's Appearance at Hearing Affecting Parental Rights, and Waiver of Appearance [Welf. & Inst. Code § 349; Penal Code § 2625]--Judicial Council Form JV-450

[1] FORM Order for Prisoner's Appearance at Hearing Affecting Parental Rights, and Waiver of Appearance [Welf. & Inst. Code § 349; Penal Code § 2625]--Judicial Council Form JV-450

Click here to view image.

[2] Use of Form

This form is the approved Judicial Council form of Order for Prisoner's Appearance and Waiver of Appearance (JV-450). It may be used when the juvenile court issues an order for the appearance of an incarcerated parent whose parental rights may be affected by a juvenile dependency or wardship proceeding involving the parent's child [*see Welf. & Inst. Code § 349*; *Penal Code § 2625*]. Use of the form is mandatory [*Cal. Rules of Ct., Rule 5.504*], and it may be produced by a word-processor printer or similar process [*Cal. Rules of Ct., Rule 5.504(b), (c)*].

The form may be used to obtain the appearance or waiver of an incarcerated parent at any hearing involving that parent's custody rights with respect to a child who is before the juvenile court. For example, the order may be made with respect to a hearing to declare the child a dependent of the court [*see Welf. & Inst. Code § 300*], to terminate parental rights [*see Fam. Code § 7800 et seq.*; *Welf. & Inst. Code § 366.26*], to appoint a legal guardian [*see Welf. & Inst. Code § 366.26*], or to order the child placed in long-term foster care [*see Welf. & Inst. Code § 366.26*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Right to Appearance or to Waive Appearance

A parent of a minor who is the subject of a custody hearing has a right to be present at that hearing even if the parent is incarcerated at the time [*see Welf. & Inst. Code § 349*; *Penal Code § 2625*]. The juvenile court must direct the transportation of any parent who is incarcerated in a California state or county institution when the dependency hearing pertains to the assumption of dependency jurisdiction or the termination of parental rights. The juvenile court may authorize the transportation of any such incarcerated parent for any other dependency hearing regarding the parent's child [*Penal Code § 2625*; *In re Barry W. (1993) 21 Cal. App. 4th 358, 369-370, 26 Cal. Rptr. 2d 161]* . The incarcerated parent or an authorized person acting on the prisoner's behalf may waive the right to appear by completing the second page of this form [*see Penal Code § 2625*]. If the waiver is provided to the incarcerated parent together with the order, the box indicating that a waiver is attached should be marked.

[4] Cross References

For discussion for notice to parent, guardian, or responsible adult in juvenile court proceedings, see *§ 329.32[2]*

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28-329 California Forms of Pleading and Practice--Annotated § 329.362

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.362 Notice of Motion and Motion to Dismiss Juvenile Court Delinquency Petition

[1] FORM Notice of Motion and Motion to Dismiss Juvenile Court Delinquency Petition

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
JUVENILE COURT DEPARTMENT

	)	
	)	NO. _____
	)	NOTICE OF MOTION AND
	)	MOTION TO DISMISS
In the Matter of _____	)	JUVENILE COURT
_____ [*name*],	)	DELINQUENCY PETITION
A Minor.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Trial Date: _____]
	)	

_____

To _____[*name*], _____[*identify party*, *e.g.*, prosecuting attorney *or* probation officer *or* city attorney]:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____

of] this court, located at _____[*street address*], _____[*city*], counsel for the minor will move for an order dismissing the above-entitled petition. The motion will be made on the grounds that the petition brought under Welfare and Institutions Code Section(s) _____[*specify*] should be dismissed because _____[*specify grounds on which petition should be dismissed*].

The motion will be based on this notice of motion, on the declaration(s) of _____[*name(s)*] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
_____ [*signature*]
By _____ [*typed name*]
Attorney for _____ [*moving party*]

[2] Use of Form

This form of notice of motion and motion is for use in moving to dismiss a juvenile court delinquency petition. The motion may be employed in a variety of instances. For example, the motion is properly made before trial or at the commencement of proceedings where the petition itself fails to allege the necessary grounds for juvenile court jurisdiction [*see In re J. T. (1974) 40 Cal. App. 3d 633, 642, 115 Cal. Rptr. 553]* .

The motion may also be made after the prosecuting attorney or the probation officer has presented the evidence in support of the petition and counsel wishes to argue that the evidence is insufficient to sustain jurisdiction, even in the absence of any defense by the minor. The motion may also be used to seek dismissals required by statute for failure to proceed within the time limitations imposed on juvenile court proceedings.

[3] Authority for Motion

[a] Court's General Power to Control Its Proceedings

No specific statute or rule provides for a motion to dismiss. Such a procedure is, however, a commonly accepted practice, the authorization for which may be found in the court's inherent power to provide for the orderly conduct of proceedings before it, and to control its process and orders to make them conform to law and justice [*Code Civ. Proc. § 128(a)(3), (8)*].

[b] Dismissals After Presentation of Evidence

The juvenile court is specifically authorized to dismiss a petition, if, after hearing the evidence, it finds that the minor is not a person within the jurisdiction of the juvenile court [*see Welf. & Inst. Code § 701.1*]. In effect, the motion presented in this form simply seeks such a determination before all of the evidence is heard by the court.

[c] Dismissals in the Interests of Justice

A judge of the juvenile court in which a petition is filed, at any time before the minor reaches the age of 21 years, may dismiss the petition or may set aside the findings and dismiss the petition if the court finds that the interests of justice and the welfare of the minor require such dismissal, or if it finds that the minor is not in need of treatment or rehabilitation. The court has the jurisdiction to order dismissal regardless of whether the minor is, at the time of the order, a dependent child of the court or a ward of the court [*Welf. & Inst. Code § 782*].

Counsel should be careful to distinguish between a dismissal in the interest of justice and one precipitated due to a lack

or insufficiency of jurisdictional grounds. The former carries with it the connotation that the requisite jurisdictional grounds were present, but for extraneous reasons the petition was dismissed. The latter, however, connotes the absence of jurisdictional grounds and hence a more complete exoneration of the minor.

[4] Notice Requirement

There is no express statutory provision generally requiring that notice of allmotions be given, and it has been left to the courts to determine whether a motion requires written notice to the adverse party where not expressly required by statute [*Arata v. Tellurium G. & S. M. Co. (1884) 65 Cal. 340, 342, 4 P. 195]* . Generally, when the order granting the motion affects the rights of the adverse party, the motion must be made on notice to that party [*McDonald v. Severy (1936) 6 Cal. 2d 629, 631, 59 P.2d 98* ; *Bohn v. Bohn (1913) 164 Cal. 532, 536, 129 P. 981]* .

Insofar as no specific statute or rule governs motions to dismiss in juvenile court, the motion may not technically require such notice. It is prudent practice, however, that whenever possible counsel prepare the noticed motion.

[5] Points and Authorities

No specific statute or rule requires the submission of points and authorities in support of a motion to dismiss juvenile court proceedings. Counsel is well advised, however, to submit such supporting papers in order to bolster the strength of the motion and in recognition that the juvenile court is a department of the superior court which requires the submission of points and authorities in support of all noticed motions [*see Cal. Rules of Ct., Rule 3.1113*].

[6] Cross References

For discussion regarding various grounds for dismissal for a juvenile court delinquency proceeding, see *§§ 329.37[2], 329.52, 329.70[3], 329.76*.

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28-329 California Forms of Pleading and Practice--Annotated §§ 329.363-329.369

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

[Reserved]

§§ 329.363[Reserved]

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C. Fitness Hearing

28-329 California Forms of Pleading and Practice--Annotated § 329.370

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.370 Request for Prima Facie Hearing

[1] FORM Request for Prima Facie Hearing

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
JUVENILE COURT

	)	
	)	NO. _____
	)	NOTICE OF MOTION AND
	)	MOTION FOR *EDSEL P.*
In the Matter of _____	)	PRIMA FACIE HEARING
_____ [*name*],	)	Date: _____
A Minor.	)	Time: _____
	)	Location: _____
	)	[Trial Date: _____]
	)	
_____		

TO: _____[*name*], _____[*specify prosecuting attorney, e.g.*, DISTRICT ATTORNEY OF THE (CITY AND) COUNTY OF _____] AND THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN that, on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], the minor

_____[*name*] will, and hereby does, request that the prosecution be required to present a prima facie showing of the minor's guilt of the charged offense. The motion will be made on the grounds that the minor is entitled to such a showing by law under the circumstances alleged in the petition for wardship.

The motion will be based on this notice of motion, on the declaration(s) of _____[*name(s)*] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such further argument, points and authorities, and evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Minor _____ [*name*]

SUPPORTING DECLARATION OF _____[*name*]

I, _____[*name*], declare:

1. I am the attorney for the minor in the above-entitled action.

2. On or about _____[*date*], the District Attorney filed a petition seeking a fitness hearing in the above-entitled matter to determine whether the minor is a fit and proper subject to be dealt with under the juvenile court laws.

3. The minor is charged with a violation of Penal Code Section _____[*specify code section(s) allegedly violated*], an offense specified in *Welfare & Institutions Code Section [707(b) or (e)*] for which there is a presumption of unfitness.

4. Pursuant to *California Rules of Court, Rule 5.772* and *Edsel P. v. Superior Court (1985) 165 Cal. App. 3d 763, 211 Cal. Rptr. 869* , on request of the minor, the prosecution has the burden of establishing a prima facie showing that the offense alleged is specified in *Welfare and Institutions Code Section [707(b) or 707(e)*] and that the minor committed the crimes charged, prior to a determination of fitness.

5. The minor, through his attorney, hereby requests that the District Attorney be required to present a prima facie showing of the minor's guilt of the charged offense prior to any determination of fitness.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form may be used whenever the prosecution or the court has requested a fitness hearing to determine whether the minor should be remanded to adult court for trial, and where the minor is charged with an offense for which there is a presumption of unfitness under *Welf. & Inst. § 707(a)(2)* or *(c)*.

When the prosecution is relying on a presumption of unfitness established by *Welf. & Inst. Code § 707(a)(2)* the minor

is entitled to a determination that there is a prima facie showing that he or she is guilty of the charged crime which raises the presumption [*Edsel P. v. Superior Court (1985) 165 Cal. App. 3d 763, 211 Cal. Rptr. 869]* . Since the enactment of *Welf. & Inst. Code § 707(c)* creates a similar presumption of unfitness for minors 14 years of age or older charged with 707(b) offenses, the holding of *Edsel P.* is arguably applicable to petitions filed under that section.

Additionally, the California Rules of Court provide that on the minor's motion, the court must determine whether a prima facie showing has been made that the offense alleged is a felony or specified in *Welf. & Inst. Code § 707(b)* [*Cal. Rules of Ct., Rule 5.772(b)*].

A request for a prima facie hearing is not mandatory and must be considered carefully by the attorney for the minor. Although there may be some cases in which the prosecution will have difficulty establishing a prima facie showing, and such a hearing could provide useful discovery for the minor, it will also provide recorded testimony and may in some cases prejudice the juvenile court judge or referee who is making the fitness determination against the minor by emphasizing the facts of the offense.

Although *Edsel P.* seemed to implicate that at a prima facie hearing the minor would be entitled to confront and cross-examine percipient witnesses, the court in *People v. Superior Court (Ronald H.) (1990) 219 Cal. App. 3d 1475, 1477, 269 Cal. Rptr. 4* , has since held that *Edsel P.* only requires the prosecution to call the preparers of the reports presented; i.e., police officers or probation officers. Therefore, counsel for the minor must subpoena any percipient witnesses whose testimony may defeat a prima facie showing or diminish the gravity or seriousness of the offense.

[3] Cross References

For further discussion of prima facie hearings, see *§ 329.60[9]*

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28-329 California Forms of Pleading and Practice--Annotated § 329.371

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.371 Notice of Motion and Motion for Jury Trial

[1] FORM Notice of Motion and Motion for Jury Trial

COURT OF CALIFORNIA,
COUNTY OF _____
JUVENILE COURT

	)	
	)	NO. _____
	)	NOTICE OF MOTION AND
In the Matter of _____	)	MOTION FOR JURY TRIAL
_____ [*name*],	)	Date: _____
A Minor.	)	Time: _____
	)	Location: _____
	)	[Trial Date: _____]
	)	

_____

TO: _____[*name*], _____[*specify prosecuting attorney, e.g.*, DISTRICT ATTORNEY OF THE (CITY AND) COUNTY OF _____] AND THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN that, on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], the minor _____[*name*] will, and hereby does, move for an order granting him/her a trial by jury. The motion

will be made on the grounds that the minor has a right to such trial by jury under the circumstances alleged in his/her petition for wardship.

The motion will be based on this notice of motion, [on the declaration(s) of _____ (*name(s)*)] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such further argument, points and authorities, and evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Minor _____ [*name*]

MEMORANDUM OF POINTS AND AUTHORITIES

THE MINOR IS ENTITLED UNDER THE CALIFORNIA AND UNITED STATES CONSTITUTIONS TO TRIAL BY JURY AS TO HIS OR HER GUILT ON THE CHARGES ALLEGED IN THE PETITION

The right to an impartial jury in all criminal proceedings is guaranteed by the *Sixth Amendment of the United States Constitution* and imposed upon the States by the *Fourteenth Amendment* (*Duncan v. Louisiana (1968) 391 U.S. 145* .) California's constitution similarly guarantees that "[t]rial by jury is an inviolate right and shall be secured to all" (*Cal. Const. art. I, § 16*).

Both the United States Supreme Court and the California Supreme Court have thus far declined to extend the right to jury trial to juvenile proceedings, on the premise that juvenile proceedings are not "criminal prosecutions" resulting in criminal convictions (*McKeiver v. Pennsylvania (1970) 403 U.S. 528* , plurality opinion; *In re Daedler (1924) 194 Cal. 320*).

In November 1994, Proposition 184 was passed by the voters resulting in the enactment of *Penal Code § 1170.12*, which redefines certain juvenile adjudications as "prior felony convictions" for purposes of sentence enhancement. This and other changes in the juvenile law have transformed the juvenile court into a court of "criminal prosecution." As such, the minor is entitled to a jury trial (*see In re Javier A. (1984) 159 Cal. App. 3d 913*).

While it is the voters prerogative to alter the juvenile court law, it remains the responsibility of the courts to assure that those changes are accompanied by the appropriate Constitutional protection. If minors are to suffer all the potentially harmful consequences of adult "convictions" for juvenile court "adjudications," they should be entitled to all the due process protection afforded adults. Trial by jury is the most fundamental due process protection.
Dated: _____

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Minor _____ [*name*]

[2] Use of Form

This form should be used whenever the minor is charged with a potential *Penal Code § 1170.12* offense. See *Penal Code § 1170.12(b)(3)* for the definition of when a juvenile adjudication constitutes a felony "strike" for purposes of the "Three Strikes Law."

[3] Cross References

For discussion of the "Three Strikes You're Out" law with regard to juvenile court delinquency proceedings, see *§ 329.60[10][d]*

For detailed treatment of the "Three Strikes You're Out" law generally, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 91 (Matthew Bender)

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Chapter 329 JUVENILE COURTS: DELINQUENCY PROCEEDINGS
PART IV. FORMS
C. Fitness Hearing

28-329 California Forms of Pleading and Practice--Annotated § 329.372

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.372 Fitness Hearing Order (Wardship) [Welf. & Inst. Code § 707; Cal. Rules of Ct., Rules 1480-1483]--Judicial Council Form JV-710

[1] FORM Fitness Hearing Order (Wardship) [Welf. & Inst. Code § 707; Cal. Rules of Ct., Rules 1480-1483]--Judicial Council Form JV-710

Click here to view image.

[2] Use of Form

This Judicial Council form must be used when a court orders a fitness determination after a hearing on whether a minor is unfit for juvenile court treatment (JV-710) [*see Welf. & Inst. Code § 707*; *Cal. Rules of Ct., Rule 5.766*].

Use of this form is mandatory [*Cal. Rules of Ct., Rule 5.504*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Findings Required in Order

If the court concludes that the minor is unfit for juvenile court treatment, the court's order must make specific findings, as stated in the approved form [*see Welf. & Inst. Code § 707*; *see Cal. Rules of Ct., Rules 5.770(c)(2)* and *5.772(f)(1), (2)*]. The findings will vary depending on whether any designated serious felonies are alleged to have been violated [*see Welf. & Inst. Code § 707(b), (c), (d)(2), (e)*].

If the court concludes that the minor is fit for juvenile court treatment and no serious felonies are alleged [*see Welf. & Inst. Code § 707(a)*], the court need only note its conclusion in its minutes [*Cal. Rules of Ct., Rule 5.768*]. However, the

commission of a serious felony indicates that the juvenile is unfit [*see Welf. & Inst. Code § 707(c)*] and, therefore, the court must make specific findings that indicate its reasons for concluding against this presumption [*Cal. Rules of Ct., Rule 5.772*].

A court's order may be vacated on appeal if it does not state the reasons supporting the decision, unless the court's conclusory statements are also supported by substantial facts in the court record [*see Juan T. v. Superior Court (1975) 49 Cal. App. 3d 207, 211-212, 122 Cal. Rptr. 405]* .

[4] Cross References

For discussion of fitness hearings generally, *see § 329.60* et seq.; see *§ 329.60[11]* for discussion of required findings

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28-329 California Forms of Pleading and Practice--Annotated §§ 329.373-329.379

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

[Reserved]

§§ 329.373[Reserved]

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PART IV. FORMS
D. Proceedings to Modify Prior Orders

28-329 California Forms of Pleading and Practice--Annotated § 329.380

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.380 Petition Attachment to Modify Previous Orders (Wardship) [Welf. & Inst. Code § 778; Cal. Rules of Ct., Rule 1432]--Judicial Council Form JV-740

[1] FORM Petition Attachment to Modify Previous Orders (Wardship) [Welf. & Inst. Code § 778; Cal. Rules of Ct., Rule 1432]--Judicial Council Form JV-740

Click here to view image.

[2] Use of Form

This form is the Judicial Council form for petitioning to modify previous wardship orders on the grounds of changed circumstances (JV-740) [*see Welf. & Inst. Code § 778*; *Cal. Rules of Ct., Rule 5.570*]. The modification petition may be filed by the minor, parent, guardian, or any other interested person [*Welf. & Inst. Code § 778*], such as the minor's attorney [*In re Steven S. (1979) 91 Cal. App. 3d 604, 605, 154 Cal. Rptr. 196]* or probation officer [*see In re Glen J. (1979) 97 Cal. App. 3d 981, 984, 159 Cal. Rptr. 148]* .

Use of this form is mandatory [*Cal. Rules of Ct., Rule 5.504*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Form of Petition

The petition must be verified [*Welf. & Inst. Code § 778*]. If the minor is not the petitioner, the petition must state the petitioner's interest in the issue [*Welf. & Inst. Code § 778*]. It must further allege facts to show a change in circumstances or newly discovered evidence that justifies the proposed modification [*Welf. & Inst. Code § 778*; *Cal. Rules of Ct., Rule 5.570(a)(6)*].

[4] Cross References

For discussion relating to modification of existing juvenile court orders in delinquency proceedings, see *§ 329.110* et seq.

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28-329 California Forms of Pleading and Practice--Annotated §§ 329.381-329.389

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

[Reserved]

§§ 329.381[Reserved]

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E. Post-Disposition Proceedings

28-329 California Forms of Pleading and Practice--Annotated § 329.390

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.390 Affidavit and Petition for Sealing of Juvenile Court Records [Welf. & Inst. Code § 781]

[1] FORM Affidavit and Petition for Sealing of Juvenile Court Records [Welf. & Inst. Code § 781]
IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA
IN SESSION AS A JUVENILE COURT

IN THE MATTER OF: _____	)	NO. _____
_____	)	AFFIDAVIT AND PETITION
(D.O.B.)	)	FOR THE SEALING OF RECORDS
_____	)	
	)	

Petitioner in the above-entitled Court and cause hereby alleges:

That the jurisdiction of this Court over your petitioner terminated on or about the _____ day of _____, and that a period of time in excess of five years has elapsed (or that your petitioner is now at least 18 years of age) since said date of termination of jurisdiction.

Attached hereto is a list of all Juvenile Courts, Probation Departments, and other agencies including law enforcement, and public officials, who may have records of arrests or other information concerning the petitioner's juvenile record.

That, since the termination of said jurisdiction, petitioner has not been convicted of a felony or any misdemeanor involving moral turpitude, and that rehabilitation has been attained.

WHEREFORE, your petitioner prays that this Court conduct a hearing pursuant to *Welfare and Institutions Code Section 781* and thereupon order sealed all records, papers and exhibits in your petitioner's case.

I, under penalty of perjury, declare that I have read this Affidavit and Petition, and that the statements therein are true.

_____
Petitioner

_____
Date
240-404 (Rev. 4-74)

The within petition is hereby set for hearing by the Court on _____[*date*], at _____[*time*].

_____
County Clerk
By _____

[2] Use of Form

This form of affidavit and petition to seal juvenile court records is an illustrative example of one used by the juvenile court of the Superior Court of Alameda County. The format of such forms may vary from county to county; counsel should check with the clerk of the juvenile court to procure the most recent standardized form used in local courts.

Under certain circumstances, the court may be petitioned to seal the juvenile record of a minor who has been involved in any of the following [*Welf. & Inst. Code § 781(a)*]:

- Any case in which a petition has been filed with the juvenile court to commence proceedings to adjudge a person to be a ward of the court.

- Any case in which a person is cited to appear before a probation officer or is taken before a probation officer by a peace officer.

- Any case in which a minor is taken before any officer of a law enforcement agency.

Five years after the jurisdiction of the court has terminated, or in a case in which no petition was filed, five years after the person was cited, or at any time after the person reaches the age of 18, the person or the probation officer may petition the court to seal the records, including records of arrest relating to the person's case, that are in the custody of the juvenile court and probation officer and any other agencies, including law enforcement agencies and public officials, that petitioner alleges to have custody of such records [*Welf. & Inst. Code § 781(a)*].

The record may not be sealed if the minor committed an offense listed in *Welf. & Inst. Code § 707(b)* after they have attained 14 years of age. Determinations under *Welf. & Inst. Code § 781* with respect to former wards of the court must be made by the court in the county in which wardship was last terminated [*Cal. Rules of Ct., Rule 5.830(a)*].

An application for a petition to seal records filed by a former ward of the court must be submitted to the probation

department in the county in which wardship was last terminated. If the probation officer determines that the former ward is eligible to petition for sealing, he or she will prepare and file the petition, conduct an investigation pursuant to *Welf. & Inst. Code § 781*, prepare a report for thecourt, set the matter for hearing, and notify the prosecuting attorney of the hearing [*Cal. Rules of Ct., Rule 5.830(a)*]. If the applicant is not a former ward, the application may be submitted to the probation department in any county in which there is a juvenile record concerning the petitioner, and the probation officer will follow the same procedures as described above for an application filed by a former ward [*Cal. Rules of Ct., Rule 5.830(b)*].

The court will review the petition and the probation officer's report, and an order will be issued if the court is satisfied that the minor has not been convicted of a felony or of any misdemeanor involving moral turpitude and that rehabilitation has been attained [*Welf. & Inst. Code § 781*]. In any case in which a ward of the juvenile court is subject to the registration requirements for certain sex offenders set forth in *Penal Code § 290*, the court must also provide in the order that the person is relieved from the registration requirement and for the destruction of all registration information in the custody of the Department of Justice and other agencies and officials [*Welf. & Inst. Code § 781(a)*].

An order sealing records applies in the county of the court hearing the petition and in all other counties in which there are juvenile records concerning the petitioner [*Cal. Rules of Ct., Rule 5.830(a)(4)*].

[3] Cross References

For discussion regarding sealing of juvenile court records, see *§ 329.117*

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28-329 California Forms of Pleading and Practice--Annotated § 329.391

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.391 Order to Seal Juvenile Court Records [Welf. & Inst. Code §§ 389, 781]--Judicial Council Form JV-590

[1] FORM Order to Seal Juvenile Court Records [Welf. & Inst. Code §§ 389, 781]--Judicial Council Form JV-590

Click here to view image.

[2] Use of Form

This form is the Judicial Council form of an order to seal juvenile court records (JV-590). This form is for use to seal records in a dependency matter [*see Welf. & Inst. Code § 389* (discussed in Ch. 328, *Juvenile Courts: Dependency Proceedings*, § 328.182], or in a delinquency (wardship) matter [*see Welf. & Inst. Code § 781* (discussed in *§ 329.117*)].

An order to seal records applies in the county of the court hearing the petition and in all other counties in which there are juvenile records concerning the petitioner [*Cal. Rules of Ct., Rule 5.830(a)(4)*].

Use of this form is mandatory [*see Cal. Rules of Ct., Rule 5.504*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Cross References

For discussion regarding sealing of juvenile court records, see *§ 329.117*; see also Ch. 328, *Juvenile Courts: Dependency Proceedings*, § 328.182

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28-329 California Forms of Pleading and Practice--Annotated § 329.392

AUTHOR: Hon. Kurt Kumli Editorial ConsultantLaRon Hogg Haught Contributing Author

§ 329.392 Petition to Obtain Report of Law Enforcement Agency/Juvenile [Welf. & Inst. Code § 828; Cal. Rules of Ct., Rule 5.552(g)]--Judicial Council Form JV-575

[1] FORM Petition to Obtain Report of Law Enforcement Agency/Juvenile [Welf. & Inst. Code § 828; Cal. Rules of Ct., Rule 1423(f)]--Judicial Council Form JV-575

Click here to view image.

[2] Use of Form

This form is the Judicial Council petition for obtaining the report of a law enforcement agency regarding the taking of a minor into custody, including the disposition of the matter, when it is available [*Welf. & Inst. Code § 828(a)*; *Cal. Rules of Ct., Rule 5.552(g)*].

This form has been adopted for mandatory use [*see Cal. Rules of Ct., Rule 5.504*], although *Cal. Rules of Ct., Rule 5.552(g)* states that the form is only required to be used by persons seeking to inspect or obtain law enforcement agency reports that are not related to the escape of a minor from a secure detention facility. It may be produced by a word-processor printer or similar process [*Cal. Rules of Ct., Rule 5.504(b), (c)*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

The form must generally be used by any person or entity who is authorized by Welf. Code § 828 to inspect or obtain law enforcement agency reports regarding the taking of a minor into custody [*Cal. Rules of Ct., Rule 5.552(g)*]. Unless they are sealed under *Welf. & Inst. Code §§ 389, 781* or *Penal Code § 1203.45*, a law enforcement agency may disclose these records to another law enforcement agency, including a school district police or security department, or to any person or agency that has a legitimate need for the information for purposes of official disposition of a case [*Welf. &*

Inst. Code § 828(a); *Cal. Rules of Ct., Rule 5.552(g)*]. If the record containing the information has not been sealed, a court is required to consider this information for the purpose of determining whether adjudication of the commission of crimes as a juvenile warrants a finding that there are circumstances in aggravation under *Penal Code § 1170* or to deny probation [*Welf. & Inst. Code § 828(a)*].

In complying with a request for records, the law enforcement agency must include information regarding the disposition of the taking into custody, when it is available [*Welf. & Inst. Code § 828(a)*; *Cal. Rules of Ct., Rule 5.552(g)*]. A law enforcement agency must also disclose the name and description of a minor, without a formal petition, to any person specifically requesting this information when the agency has been notified under *Welf. & Inst. Code § 1155* that the minor has escaped from a secure detention facility [*Welf. & Inst. Code § 828(b)*; *Cal. Rules of Ct., Rule 5.552(g)(1)*]. The agency may release this information without a request if it finds that release of the information is necessary to assist in recapturing the minor or to protect the public from substantial physical harm [*Welf. & Inst. Code § 828(b)*; *Cal. Rules of Ct., Rule 5.552(g)(2)*].

Item number 5 of the petition is used to indicate that the minor in question has consented to the requested disclosure. If that item is checked, the minor's written consent should be attached to the petition.

[3] Cross References

For discussion regarding access to juvenile court records in delinquency proceedings, see *§ 329.14*

For discussion and form regarding access to juvenile court records generally, see *Ch. 327, Juvenile Courts: Jurisdiction and General Procedures, §§ 327.34* and *327.161*

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Chapter 330 LANDLORD AND TENANT: GENERAL INTRODUCTION

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§ 330.syn Synopsis to Chapter 330: LANDLORD AND TENANT: GENERAL INTRODUCTION

§ 330.01 Scope of This Chapter and Subsequent Landlord-Tenant Chapters

§§ 330.02-330.09 [Reserved]

§ 330.10 Governing Law

[1] Landlord/Tenant Relationship, Generally

[2] Proceedings in Unlawful Detainer, Forcible Entry, and Forcible Detainer

§ 330.11 Nature of Unlawful Detainer, Forcible Entry, and Forcible Detainer Proceedings

§ 330.12 Terminology and Classification of Remedies

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PART I. SCOPE

29-330 California Forms of Pleading and Practice--Annotated § 330.01

§ 330.01 Scope of This Chapter and Subsequent Landlord-Tenant Chapters

Chapters 330-335 discuss and contain forms relating to the landlord-tenant relationship.

This chapter is a general introduction to the landlord/tenant relationship. It covers the law governing the relationship, the nature of unlawful detainer, forcible entry, and forcible detainer proceedings, and the termination and classification of remedies.

Chapter 331 is Landlord and Tenant: Creating The Tenancy. The types of tenancies are explained and distinguished from each other. Creation of the landlord relationship, leases, rent, and security deposits are among the topics included in Chapter 331.

Chapter 332 is Landlord and Tenant: The Tenancy. This chapter focuses on landlords' and tenants' rights and duties during a landlord/tenant relationship, including the duty to repair, covenants and conditions, assignments, and subleases. Termination of tenancies, including surrender and abandonment, is also addressed in Chapter 332.

Chapter 333 is Landlord and Tenant: Eviction Actions. This chapter has sections on evicting a tenant, including unlawful detainer actions and postjudgment procedures, defending an eviction action, including permissible affirmative defenses, and forcible entry and forcible detainer actions.

Chapter 334 is Landlord and Tenant: Damages Claims. This chapter focuses on actions in which a landlord sues a tenant for damages, including actions for unpaid rent, and/or actions in which a tenant sues a landlord for damages, including wrongful eviction.

Chapter 335 is Landlord and Tenant: Rent Control.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantDuty to RepairReal Property LawLandlord & TenantLandlord's Remedies &

RightsEviction ActionsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantTenanciesGeneral Overview

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[Reserved]

§§ 330.02[Reserved]

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§ 330.10 Governing Law

[1] Landlord/Tenant Relationship, Generally

All of the Landlord and Tenant chapters in this volume discuss general legal principles and the governing law applicable to different aspects of the landlord/tenant relationship.

Certain fundamental aspects of the legal relationship between a landlord and a tenant are governed by *Civ. Code §§ 1940-1954.1* (regarding leasing land and dwellings). These sections apply to all "persons who hire dwelling units located within this state including tenants, lessees, boarders, lodgers, and others, however denominated" [*Civ. Code § 1940(a)*].

A "dwelling unit" is a structure, or a part of a structure, that is used as a home, residence, or sleeping place by any person or persons maintaining a household [*Civ. Code § 1940(c)*].

Civ. Code §§ 1940-1954.1 do not apply in the case of transient occupancy in hotels, motels, residence clubs, or other facilities, if the occupancy is subject to taxation under *Rev. & Tax. Code § 7280* [*Civ. Code § 1940(b)(1)*].

PRACTICE TIP:

Transient Occupancy. The primary effect of this inapplicability is that these owners are not landlords and need not use the unlawful detainer statutes; that is, they may use self-help to evict occupants. Because *Civ. Code §§ 1940-1954.1* does not apply to these owners, this probably means that their occupants may not use the repair and deduct remedy or the statutory retaliation remedies. *By Myron Moskovitz*

PRACTICE TIP: Self-Help. Landlords should be cautious when using self-help. This remedy should not be construed as being unlimited or uncircumscribed. *By Benjamin Kaplan*

However, no person may require an occupant of a residential hotel as defined by *Health & Safety Code § 50519* to move, or to check out and reregister, before expiration of 30 days' occupancy, if a purpose of such requirement is to have that occupant maintain transient occupancy status pursuant to *Civ. Code § 1940(b)(1)* [*Civ. Code § 1940.1(a)*; *see*

Civ. Code § 1940.1(b) (penalties for violation)].

Civ. Code §§ 1940-1954.1 also do not apply in the case of occupancy at a hotel or motel where the innkeeper retains a right of access to, and control of, the dwelling unit, if the hotel or motel provides or offers all of the following to all of the residents [*Civ. Code § 1940(b)(2)*]:

- Facilities for safeguarding personal property in accordance with *Civ. Code § 1860*;
- Central telephone services subject to tariffs filed with the Public Utilities Commission;
- Maid, mail, and room services;
- Occupancy for periods shorter than seven days; and
- Food service provided by a food establishment [*see Health & Safety Code § 113780* ("food establishment" defined) (repealed July 1, 2007)] located on or adjacent to premises of the hotel or motel and owned or operated by the innkeeper or by a person or entity under a lease or similar relationship with the innkeeper or affiliated with the innkeeper.

PRACTICE TIP:

Short-Term Occupants. Attorneys for owners who rent to short-term occupants should draft occupancy agreements and advise their clients with these cases in mind. Owners will have more power to take immediate action against defaulting occupants if the terms of the agreements have more of the characteristics of *lodging* agreements than of *tenancy* agreements. *By Myron Moskovitz*

[2] Proceedings in Unlawful Detainer, Forcible Entry, and Forcible Detainer

Proceedings in unlawful detainer, forcible entry, and forcible detainer are governed by *Code Civ. Proc. §§ 1159-1179a* [*see Civ. Code § 792*]. These statutes appear in Part Three of the Code of Civil Procedure; however, numerous provisions of Part Two of the Code of Civil Procedure are expressly incorporated into the proceedings by various provisions contained in *Code Civ. Proc. §§ 1159-1179a* [*see § 330.12*]. In addition, several provisions contained in Part Two, by their own terms, apply to specified special proceedings [*see, e.g., Code Civ. Proc. §§ 415.45, 415.47* (relating to service of summons in certain unlawful detainer proceedings)].

The economic litigation procedures for limited civil cases [*Code Civ. Proc. § 90 et seq.*] do not apply to proceedings in unlawful detainer, forcible entry, and forcible detainer [*Code Civ. Proc. § 91(b)*].

Much of the case law discussing unlawful detainer, and thus many of the cases cited in this and the following chapters, are opinions rendered by appellate departments of the superior courts. These opinions, unlike those of the courts of appeal and the Supreme Court, are not subject to the mandatory aspect of the doctrine of stare decisis and, therefore, are not binding on other appellate departments or trial courts [*see Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 455, 20 Cal. Rptr. 321, 369 P.2d 937* (decisions of Supreme Court and courts of appeal are binding on all lower courts); *Worthington v. Unemployment Ins. Appeals Bd. (1976) 64 Cal. App. 3d 384, 389, 134 Cal. Rptr. 507* (appellate department opinions not binding on higher courts and not controlling in appellate department)].

Appellate departments, like any other appellate court, may overrule their prior decisions. Similar decisions from other states, law review articles and other secondary authorities, and appellate department opinions may be cited in any court for their precedential and persuasive value.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsSelf-Help Remedies

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29-330 California Forms of Pleading and Practice--Annotated § 330.11

§ 330.11 Nature of Unlawful Detainer, Forcible Entry, and Forcible Detainer Proceedings

Proceedings in unlawful detainer, forcible entry, and forcible detainer are special summary proceedings, purely statutory in character, designed to provide means by which the possession of premises that are wrongfully withheld may be restored to the persons entitled to possession [*see Green v. Superior Court (1974) 10 Cal. 3d 616, 632, 111 Cal. Rptr. 704, 517 P.2d 1168* ; *Turem v. Texaco, Inc. (1965) 236 Cal. App. 2d 758, 763, 46 Cal. Rptr. 389* ; *Werner v. Sargeant (1953) 121 Cal. App. 2d 833, 837, 264 P.2d 217]* . The object of the statutes is to prevent disturbance of the public peace resulting from forcible recovery of possession by self-help. Therefore, a proceeding in unlawful detainer, forcible entry, or forcible detainer may not be maintained when possession has been returned to the plaintiff before the complaint is filed [*see Markham v. Fralick (1934) 2 Cal. 2d 221, 226, 39 P.2d 804* ; *Childs v. Eltinge (1973) 29 Cal. App. 3d 843, 853, 105 Cal. Rptr. 864]* .

PRACTICE TIP:

Further Object of Unlawful Detainer Statutes. In addition to preventing disturbance of the public peace, the unlawful detainer statutes provide a speedy method of recovery. *By Benjamin Kaplan*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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Chapter 330 LANDLORD AND TENANT: GENERAL INTRODUCTION
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29-330 California Forms of Pleading and Practice--Annotated § 330.12

§ 330.12 Terminology and Classification of Remedies

Unlawful detainer, forcible entry, and forcible detainer, which were created by statute and were entirely unknown at common law, are "special proceedings," not "actions" [*see Code Civ. Proc. §§ 22* ("actions" defined), 23 (every other remedy as a special proceeding); *Tide Water Assoc. Oil Co. v. Superior Court (1955) 43 Cal. 2d 815, 822, 279 P.2d 35, 4 O.&G.R. 588* (special proceeding is a case that was neither an action at law nor a suit in equity under the common law or equity practice)]. Civil actions are governed by Part Two of the Code of Civil Procedure [*Code Civ. Proc. § 307 et seq.*], entitled "Civil Actions." Thus, unlawful detainer, forcible entry, and forcible detainer, which are set out in Part Three of the Code of Civil Procedure, entitled "Special Proceedings," are not civil actions even though they are "civil cases." This distinction is important because the statutes governing civil actions do not apply to special proceedings except to the extent that a specific statute applicable to civil actions (1) expressly states that it applies to special proceedings (or simply "proceedings," as in the term "actions and proceedings") or (2) is incorporated by one or more of the statutes governing the special proceeding.

Some court decisions have been imprecise with regard to which statutes apply. This imprecision has no doubt been generated by (1) the Legislature's indiscriminate use of the word "action" in statutes relating to unlawful detainer, forcible entry, and forcible detainer [*see, e.g., Code Civ. Proc. §§ 415.45(a), 415.47*]; (2) the specific incorporation of various provisions of Part Two of the Code of Civil Procedure in the statutes governing these special proceedings [*see, e.g., Code Civ. Proc. §§ 1167* (service of summons), 1167.3, 1167.5, *1177* (provisions of Part Two generally)]; and (3) the fact that these special proceedings are commenced by the filing of a complaint instead of by petition, which is usually used to commence special proceedings [*Code Civ. Proc. § 1166*; *compare Code Civ. Proc. § 411.10* (commencement of civil actions by complaint) *with, e.g., Code Civ. Proc. §§ 1086* (petition for writ of mandate), *1276* (petition to change name)].

For consistency and precision, in Chapters 331-335 unlawful detainer, forcible entry, and forcible detainer will be referred to as proceedings or special proceedings and not as actions.

Legal Topics:

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

Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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29-331 California Forms of Pleading and Practice--Annotated 331.syn

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[4] Payment of Taxes

[5] Rent

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[b] Rent Defined

[c] Liability for Payment of Rent

[d] When Rent Is Due

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[f] Prepaid Rent

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[6] Security Deposits

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§ 331.12 Leases of Real Property

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§ 331.13 Cotenants

§ 331.14 Title

[1] Property to Which Tenant Is Entitled

[2] Estoppel to Deny Landlord's Title

[a] In General

[b] Exceptions

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[5] Landlord's Right to Inspect Leased Premises

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[a] In General

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29-331 California Forms of Pleading and Practice--Annotated § 331.01

§ 331.01 Scope of Chapter

This chapter covers all of the following:

- The different types of tenancies [*see § 331.10*];
- The rights of tenants [*see § 331.11[3]*];
- Rent [*see § 331.11[5]*];
- Security deposits [*see § 331.11[6]*];
- Leases, including the requirements for a valid lease [*see § 331.12*];
- Cotenants [*see § 331.13*]; and
- Title issues, including options to purcharse [*see § 331.14*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantTenanciesGeneral Overview

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29-331 California Forms of Pleading and Practice--Annotated § 331.02

§ 331.02 Cross References

For discussion and forms regarding the rights and duties of landlords and tenants during a tenancy, including issues surrounding the termination of tenancies, see Ch. 332, *Landlord and Tenant: The Tenancy* .

For discussion and forms regarding eviction actions, including actions for unlawful detainer, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

For discussion and forms regarding suing a landlord or tenant for damages, see Ch. 334, *Landlord and Tenant: Claims for Damages* .

For discussion and forms relating to rent control issues, see Ch. 335, *Landlord and Tenant: Rent Control* .

For discussion and forms regarding mobilehome tenancies, see Ch. 369, *Mobilehomes and Mobilehome Parks* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral Overview

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29-331 California Forms of Pleading and Practice--Annotated §§ 331.03-331.09

[Reserved]

§§ 331.03[Reserved]

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29-331 California Forms of Pleading and Practice--Annotated § 331.10

§ 331.10 Types of Tenancies

[1] The Four Types of Tenancies

Four types of tenancies are generally recognized: tenancy at will, periodic tenancy, tenancy for fixed term, and tenancy at sufferance. These are briefly described in [2]-[5], *below*. For a more detailed discussion of the different types of tenancies, see CALIFORNIA REAL ESTATE LAW & PRACTICE, Ch. 150, *Types of Tenancies* (Matthew Bender).

[2] Tenancy at Will

A tenancy at will is an estate that confers a right to the possession of premises leased for such indefinite period as both parties shall determine [*Covina Manor, Inc. v. Hatch (1955) 133 Cal. App. 2d Supp. 790, 284 P.2d 580]* . One who enters on land by permission of the owner under a void parol contract, under a void lease, or pending negotiations for a written lease is a tenant at will [*Covina Manor, Inc. v. Hatch (1955) 133 Cal. App. 2d Supp. 790, 284 P.2d 580]* .

[3] Periodic Tenancy

A periodic tenancy is a form of a tenancy at will. Periodic tenancies continue for successive periods of time of the same length unless sooner terminated by notice at the end of one such period. A tenancy from year to year is a periodic tenancy. A tenancy created under an invalid lease may be construed as a periodic tenancy with the period determined by the frequency of the payment of rent [*Camp v. Matich (1948) 87 Cal. App. 2d 660, 665, 197 P.2d 345]* .

[4] Tenancy for Fixed Term

A tenancy for a fixed term is the most common type of tenancy, especially in commercial settings. To create an estate for a definite period, the duration must be capable of exact computation when it becomes possessory. The most important difference between a periodic tenancy and a tenancy for a fixed term is that the latter terminates at the end of such term without the notice that is required to terminate a periodic tenancy [*Camp v. Matich (1948) 87 Cal. App. 2d 660, 665, 197 P.2d 345]* .

[5] Tenancy at Sufferance

A tenancy at sufferance arises when a person who lawfully entered the property continues in possession or "holds over" beyond the person's period of rightful possession, without any rightful title and without the landlord's consent [*Gartlan v. C.A. Hooper Co. (1918) 177 Cal. 414, 425-426,170 P. 1115* ; *Hull v. Laugharn (1934) 3 Cal. App. 2d 310, 314, 39 P.2d 478]* . The characteristic that distinguishes a tenancy at sufferance from a tenancy at will is the absence of consent by the landlord. A tenancy at will is always by right and permission of the landlord [*Hull v. Laugharn (1934) 3 Cal. App. 2d 310, 314, 39 P.2d 478* ; *see* [2], *above* (tenancy at will)].

[6] Presumptions Regarding Length of Tenancy

A hiring of real property, other than lodgings and dwelling houses, in places in which there is no custom or usage on the subject, is presumed to be a month-to-month periodic tenancy unless otherwise designated in writing. An exception to this general rule is the case of real property used for agricultural or grazing purposes, in which case a hiring is presumed to be for one year from its commencement unless otherwise expressed in the hiring [*Civ. Code § 1943*].

A hiring of lodgings or a dwelling house for an unspecified term is presumed to have been for such length of time as the parties adopt for the estimation of the rent. Thus, a hiring at a monthly rate of rent is presumed to be for one month. In the absence of any agreement respecting the length of time or the rent, the hiring is presumed to be monthly [*Civ. Code § 1944*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantTenanciesPeriodic TenanciesReal Property LawLandlord & TenantTenanciesTenancies at SufferanceReal Property LawLandlord & TenantTenanciesTenancies at WillReal Property LawLandlord & TenantTenanciesTerm Tenancies

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29-331 California Forms of Pleading and Practice--Annotated § 331.11

§ 331.11 Creation of Landlord/Tenant Relationship

[1] Occupancy With Owner's Consent/Existence of Lease Not Necessary

The occupancy of premises with the consent of the owner creates a landlord-tenant relationship and, in the absence of an understanding to the contrary, implies an agreement on the part of the tenant to pay a reasonable rent for such occupation [*Ross v. Long Beach (1944) 24 Cal. 2d 258, 263, 148 P.2d 649* ; *Meyer v. Parobek (1953) 119 Cal. App. 2d 509, 513, 259 P.2d 948]* .

Tenancies need not necessarily be created by valid leases. One may become a tenant at will, a periodic tenant under an invalid lease, or a periodic tenant without any lease at all by occupying premises with the owner's consent. Such tenancies carry with them the incidental obligation to pay rent [*Ellingson v. Walsh, O'Connor & Barneson (1940) 15 Cal. 2d 673, 675, 104 P.2d 507* ; *Meyer v. Parobek (1953) 119 Cal. App. 2d 509, 512-513, 259 P.2d 948]* .

[2] Landlord's Duty Not to Discriminate

No business establishment of any kind whatsoever may discriminate against, boycott or blacklist, refuse to buy from, contract with, sell to, or trade with any person in California because of the race, creed, religion, color, national origin, sex, disability, or medical condition of the person or of the person's partners, members, stockholders, directors, officers, managers, superintendents, agents, employees, business associates, suppliers, or customers [*Civ. Code § 51.5*]. "Person" includes any person, firm, association, organization, partnership, business trust, corporation, limited liability company, or company [*Civ. Code § 51.5*]. The term "business establishment" is to be given the broadest possible interpretation [*Burks v. Poppy Construction Co. (1962) 57 Cal. 2d 463, 468-469, 20 Cal. Rptr. 609, 370 P.2d 313]* and includes the business of leasing or selling real property [*Lee v. O'Hara (1962) 57 Cal. 2d 476, 478, 20 Cal. Rptr. 617, 370 P.2d 321* ; *Swann v. Burkett (1962) 209 Cal. App. 2d 685, 694, 26 Cal. Rptr. 286]* .

PRACTICE TIP:

"Business Establishments" Applicable to Single-Family Dwellings? One interesting question is whether the Unruh Civil Rights Act applies to the landlord of a single-family dwelling. Although there are no cases specifically on point, the broad interpretations and sweeping applications described *above* and *below*, as well as public policy considerations, would lead one to answer such an inquiry in the

affirmative. *By Myron Moskovitz*

The Unruh Civil Rights Act prohibits all arbitrary discrimination and the list of particular bases for discrimination therein is illustrative, not restrictive [*Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 732, 180 Cal. Rptr. 496, 640 P.2d 115* ; *In re Cox (1970) 3 Cal. 3d 205, 216, 90 Cal. Rptr. 24, 474 P.2d 992]* . It is a violation of the Unruh Act to exclude families with children from ordinary apartment buildings. Such a blanket exclusion is not permissible, even if children cause more problems than adults, because the Unruh Act does not permit a business enterprise to exclude an entire class of individuals on the basis of a generalized prediction that the class as a whole is more likely to commit misconduct than other classes. The landlord's remedy is to exclude the particular persons causing the problem. The blanket exclusion is also unreasonable because nothing in the nature of an ordinary apartment is incompatible with the presence of children. Retirement communities or housing complexes reserved for older persons, however, are a reasonable and permissible means under the Unruh Act of providing specialized facilities for persons who need them [*Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 732, 180 Cal. Rptr. 496, 640 P.2d 115]* .

For a general discussion of the Unruh Civil Rights Act and related provisions as they relate to housing discrimination, see Ch. 117, *Civil Rights: Housing Discrimination* .

[3] Rights of Tenants

[a] Possessory Rights of Tenant for Years or at Will

A tenant at will or for a fixed term, unless he or she is a wrongdoer by holding over, may occupy the buildings, take the annual products of the soil, and work mines and quarries on the property open at the commencement of the tenancy [*Civ. Code § 819*]. However, a tenant has no other rights to the property other than those given to him or her by the agreement or instrument by which the tenancy is acquired, or by *Civ. Code § 819* [*Civ. Code § 820*].

[b] Prohibition Against Modification or Waiver of Specified Rights

Under *Civ. Code § 1953(a)*, any provision of a lease or rental agreement of a dwelling executed on or after January 1, 1976, in which a tenant agrees to modify or waive any of the following rights is void as contrary to public policy:

- Tenant's rights or remedies under *Civ. Code § 1950.5* (payment or deposit to secure rental agreement) or *§ 1954* (landlord's permissible entry of dwelling);
- Tenant's right to assert a cause of action against the landlord that may arise in the future;
- Tenant's right to any notice or hearing required by law;
- Tenant's procedural rights in litigation in any action involving rights and obligations as a tenant; and
- Tenant's right to have the landlord exercise a duty of care to prevent personal injury or personal property damage when that duty is imposed by law.

Any provision in a lease or rental agreement of a dwelling executed on or after January 1, 1976, in which a tenant agrees to modify or waive a statutory right, if the modification or waiver is not void under *Civ. Code §§ 1953(a), 1941.1* (waiver of need for landlord to keep premises habitable or tenant's right to repair premises), or 1954 (restrictions on landlord's permissible entry of dwelling), is void as contrary to public policy unless the lease or rental agreement is presented to the tenant before he or she takes actual possession of the premises. This does not apply to any provisions modifying or waiving a statutory right in agreements renewing leases or rental agreements if the same provision was also contained in the lease or rental agreement that is being renewed [*Civ. Code § 1953(b)*].

[4] Payment of Taxes

For a discussion of who is liable for the payment of taxes, see *§ 332.46*.

[5] Rent

[a] In General

Many landlord-tenant disputes revolve around the issue of rent. It is critical to understand that a carefully drafted lease can help avoid potential disputes.

[b] Rent Defined

Rent is compensation paid for the use of land. It need not be money. Any chattels or products of the soil serve the purpose equally as well [*Atlantic Oil Co. v. Los Angeles County (1968) 69 Cal. 2d 585, 600, 72 Cal. Rptr. 886, 446 P.2d 1006]* .

PRACTICE TIP:

Rent. Rent may also be defined by the lease to contain other payments not usually considered "rent" such as payment for water or utilities. *By Benjamin Kaplan*

[c] Liability for Payment of Rent

A person is obligated to pay rent on the basis of mere occupancy of premises as a tenant, even without an express agreement [*Samuels v. Ottinger (1915) 169 Cal. 209, 211, 146 P. 638]* and irrespective of whether the use thereof was tortious or wrongful [*Meyer v. Parobek (1953) 119 Cal. App. 2d 509, 513, 259 P.2d 948]* . A tenant is liable for rent despite the absence of actual delivery of possession if there was no impediment to the tenant taking possession or if he or she was given a legal right of entry and enjoyment during the term of the leasehold [*Reynolds v. McEwen (1952) 111 Cal. App. 2d 540, 542-543, 244 P.2d 961]* . For example, if the premises have been leased to a tenant, he or she is deemed to have had the right to possession and his or her actual possession thereof is immaterial [*O'Meara v. Hables (1912) 163 Cal. 240, 242-243, 124 P. 1003]* .

[d] When Rent Is Due

If there is no usage or contract to the contrary, rent is payable at the termination of the holding when it does not exceed one year. If the holding is by the day, week, month, quarter, or year, rent is payable at the termination of the respective period, as it successively becomes due [*Civ. Code § 1947*]. However, if the parties orally agree to renew a lease requiring payment in advance, the same terms and conditions are continued in the renewal in spite of the provisions of *Civ. Code § 1947* [*Rosenbaum Estate Co. v. Robert Dollar Co. (1916) 31 Cal. App. 576, 577, 161 P. 10]* .

PRACTICE TIP:

When Rent Is Due. Most leases provide for the payment of rent in advance of the period of the holding. However, absent such a provision in the lease, the payment may be governed by the actual practice of the parties. *By Benjamin Kaplan*

[e] Accrual of Rent

Rent does not accrue from day to day; it accrues on the day it is payable [*Dicker v. West (1958) 164 Cal. App. 2d 55, 58, 330 P.2d 106]* . If rent is payable in advance, the landlord is entitled to the full amount at the beginning of the lease period [*Friedman v. Isenbruck (1952) 111 Cal. App. 2d 326, 335, 244 P.2d 718]* . A landlord's right to recover past due rent accrues from the time of default, and, in the past, the landlord was not entitled to recover for future rent not yet

due under the lease [*Phillips-Hollman, Inc. v. Peerless Stages (1930) 210 Cal. 253, 258-259, 291 P. 178* ; *but now see Civ. Code § 1951.2 et seq.* (landlord may, under certain specified circumstances, recover the equivalent of future rent)].

PRACTICE TIP:

Rent Is Contractual. Rent is contractual and when the contract terminates, the landlord's entitlement to receive rent terminates. *By Benjamin Kaplan*

[f] Prepaid Rent

In the absence of a qualifying provision in the lease, prepaid rent will not be apportioned. That is, if rent is paid in advance, a lawful surrender or termination during the prepaid period does not entitle the lessee to a proportional rebate. This rule applies even if the lease is terminated by destruction of the premises, but is not applicable if the advance deposit required by the lease is not contemplated as prepaid rent but only as a security fund out of which the rent is to be paid as it accrues from day to day [*Dicker v. West (1958) 164 Cal. App. 2d 55, 58, 330 P.2d 106]* .

However, if after prepayment of rent, a lease is terminated because of the landlord's fault, then a constructive eviction takes place and the tenant may recover prepaid rent [*Friedman v. Isenbruck (1952) 111 Cal. App. 2d 326, 335, 244 P.2d 718* ; *see Sierad v. Lilly (1962) 204 Cal. App. 2d 770, 775, 22 Cal. Rptr. 580* (unjust enrichment doctrine); *see also Johnson v. Snyder (1950) 99 Cal. App. 2d 86, 89, 221 P.2d 164]* .

[g] Form of Payment

A landlord or a landlord's agent may not demand or require cash as the exclusive form of payment of rent [*Civ. Code § 1947.3(a)(1)*]. However, there is an exception when the tenant has previously attempted to pay the rent with a check drawn on insufficient funds or has instructed a drawee to stop payment. In such circumstances, the landlord may demand or require cash as the exclusive form of payment for a period not exceeding three months. The landlord must give the tenant a written notice stating that the payment instrument was dishonored and informing the tenant that the tenant must pay in cash for the period determined by the landlord. The landlord must attach a copy of the dishonored instrument to the notice [*Civ. Code § 1947.3(a)(2)*]. The notice must comply with *Civ. Code § 827* if demanding or requiring payment in cash constitutes a change in the terms of the lease [*Civ. Code § 1947.3(a)(2)*].

For purposes of these requirements, the issuance of a money order or a cashier's check is direct evidence only that the instrument was issued [*Civ. Code § 1947.3(b)*]. Waiver of these provisions is contrary to public policy, and void and unenforceable [*Civ. Code § 1947.3(c)*].

[6] Security Deposits

[a] "Security" Defined

Security deposits are not rent (but prepaid rent can be treated as a security deposit). *Civ. Code § 1950.5(b)* provides that security means any payment, fee, deposit, or charge, including, but not limited to, any payment, fee, deposit, or charge, except as provided in *Civ. Code § 1950.6* (application screening fee; *see § 331.11[7]*), that is imposed at the beginning of the tenancy to be used to reimburse the landlord for costs associated with processing a new tenant or that is imposed as an advance payment of rent, used or to be used for any purpose, including, but not limited to, any of the following:

- Compensation to a landlord for a tenant's default in payment of rent;
- Repair of damages to leased premises, exclusive of wear and tear, caused by the tenant or the tenant's guest or licensee;
- Cleaning of leased premises following a tenancy's termination (for tenancies beginning after January

1, 2003, the security may be used to return the unit only to the same level of cleanliness it was in at the tenancy's inception); and

- To remedy future defaults by the tenant in any obligation under the rental agreement to restore, replace, or return personal property or appurtenances, exclusive of ordinary wear and tear, if the security deposit is authorized to be applied in such a fashion by the rental agreement.

PRACTICE TIP:

Interest on Security Deposits in Local Rent Control Jurisdictions. In most local rent control jurisdictions there are ordinancesgoverning security deposits. These ordinances may require payment of interest on the security deposits. *By Benjamin Kaplan*

[b] Amount of Security Deposit

A landlord may not demand or receive rent in excess of an amount equal to (1) two months' rent for unfurnished residential property or (2) three months' rent for furnished residential property [*Civ. Code § 1950.5(c)*]. *Civ. Code § 1950.5* also sets forth in detail rules regarding the return of security deposits. For discussion of the form a security deposit can take (e.g., check, cash, money order), see [d], *below*.

[c] Validity of Security Deposits

Security deposits are governed by *Civ. Code § 1950.5*. Before the enactment of *Civ. Code § 1950.5*, case law governed the validity of security deposits. This law provided that an agreement that contemplates the deposit of a fund as security for performance of a lease is valid and enforceable [*see Ace Realty Co. v. Friedman (1951) 106 Cal. App. 2d 805, 812, 236 P.2d 174]* .

A security fee paid by a tenant to a landlord is an amount intended to offset expenses incurred by the landlord as a result of tenant conduct during the tenancy. A fee imposed at the outset of the tenancy to reimburse the landlord for expenses incurred for such purposes as providing application forms, listing, interviewing, screening the applicant, checking credit references, and for similar purposes is not a security governed by the provisions of *Civ. Code § 1950.5* [*Kraus v. Trinity Management Services (2000) 23 Cal. 4th 116, 141, 96 Cal. Rptr. 2d 485, 999 P.2d 718* ; *Civ. Code § 1950.6*; *see* [7][a], *below* (Landlord's Right to Charge Screening Fee)].

[d] Form of Payment

A landlord or a landlord's agent may not demand or require cash as the exclusive form of a deposit of security [*Civ. Code § 1947.3(a)(1)*]. However, there is an exception when the tenant has attempted to pay with a check drawn on insufficient funds or has instructed a drawee to stop payment. In such circumstances, the landlord may demand or require cash as the exclusive form of payment. The landlord must give the tenant a written notice stating that the payment instrument was dishonored and informing the tenant that the tenant must pay in cash. The landlord must attach a copy of the dishonored instrument to the notice [*Civ. Code § 1947.3(a)(2)*]. For purposes of these requirements, the issuance of a money order or a cashier's check is direct evidence only that the instrument was issued [*Civ. Code § 1947.3(b)*]. Waiver of these provisions is contrary to public policy, and void and unenforceable [*Civ. Code § 1947.3(c)*].

[7] Tenant/Applicant Screening Fees

[a] Landlord's Right to Charge Screening Fee

When a landlord (defined as an owner of residential property [*see Civ. Code § 1950.6(g)*]) or his or her agent receives a request to rent a residential property, the landlord or agent may charge the applicant (and his or her guarantor or cosignor, if any) an "application screening fee" [defined in [b], *below*] to cover the costs of obtaining information about

the applicant [*Civ. Code § 1950.6(a)*; *see Civ. Code § 1950.6(i)* ("applicant" defined)]. The information requested and obtained by the landlord may include, but is not limited to, personal reference checks and consumer credit reports. The landlord may, but is not required to, accept and rely on a consumer credit report presented by an applicant [*Civ. Code § 1950.6(a)*]. In cases where the landlord or his or her agent knows or should have known that no rental unit is available or will be available in a reasonable period of time, the landlord may not charge an application screening fee unless the applicant agrees in writing [*Civ. Code § 1950.6(c)*].

The landlord must provide the applicant, either personally or by mail, with a receipt for the fee paid, and the receipt must itemize the out-of-pocket expenses and time spent by the landlord or his or her agent to obtain and process the information about the applicant [*Civ. Code § 1950.6(d)*]. If the landlord or his or her agent does not perform a personal reference check or does not obtain a consumer credit report, the landlord or his or her agent must return any amount of the screening fee that is not used for the purposes authorized by statute to the applicant [*Civ. Code § 1950.6(e)*]. If an applicant who has paid an application screening fee requests a copy of his or her consumer credit report from the landlord, the landlord or his or her agent must provide a copy of the report to the applicant [*Civ. Code § 1950.6(f)*].

The statutory provisions for an application screening fee do not preempt any provisions or regulations that govern the collection of deposits and fees under federal or state housing assistance programs [*Civ. Code § 1950.6(k)*].

[b] Application Screening Fee Defined

"Application" screening fee means any nonrefundable payment of money charged by a landlord or his or her agent to an applicant, the purpose of which is to purchase a consumer credit report and to validate, review, or otherwise process an application for the rent or lease of residential rental property [*Civ. Code § 1950.6(h)*]. The fee is not an "advance fee" as that term is used in *Bus. & Prof. Code § 10026* (advance fee rental agreements), nor is it a "security" as that term is used in *Civ. Code § 1950.5* (security deposits) [*Civ. Code § 1950.6(j)*].

[c] Amount of Fee

An application screening fee may not exceed the actual out-of-pocket costs of gathering information concerning the applicant, including, but not limited to, the cost of using a tenant screening service or a consumer credit reporting service, and the reasonable value of time spent by the landlord or his or her agent in obtaining information on the applicant. In no case may the fee charged by the landlord or his or her agent be greater than $30.00 per applicant, except that the fee may be adjusted annually to commensurate with an increase in the Consumer Price Index, beginning on January 1, 1998 [*Civ. Code § 1950.6(b)*].

[8] Payment of "Key Money"

A landlord may not require, demand, or cause to make payable the payment of "key money," however denominated, or the landlord's attorney's fees incurred in preparing the lease or rental agreement, as a condition of initiating, continuing, or renewing a commercial lease or nonresidential rental agreement, unless the amount of payment is stated in the written lease or rental agreement [*Civ. Code § 1950.8(a), (b)*]. Any person who violates this prohibition is subject to a civil penalty of three times the amount of actual damages proximately suffered by the person seeking to obtain the lease or rental. In addition, that person is entitled to an award of costs, including reasonable attorneys' fees, incurred in connection with obtaining the civil penalty [*Civ. Code § 1950.8(c)*].

It is not unlawful under *Civ. Code § 1950.8* for a landlord to merely make a demand for "key money." Rather, for liability to attach under the statute a plaintiff must allege that the landlord (1) made a demand for "key money" as a condition of initiating, continuing, or renewing a lease or rental agreement, and (2) failed to state the amount of the demanded payment in the resulting new written lease or rental agreement between the parties [*Edamerica, Inc. v. Superior Court (2003) 114 Cal. App. 4th 819, 828-829, 7 Cal. Rptr. 3d 921]* .

The prohibition against a verbal demand of "key money" does not prohibit the advance payment of rent, if the amount and character of the payment are clearly stated in a written lease or rental agreement [*Civ. Code § 1950.8(d)*]. It also does not prevent any person from charging a reasonable amount incurred in connection with business activities relating to the initiating, continuing, or renewing of a lease or rental agreement for nonresidential real property, such as costs relating to verification of the tenant's creditworthiness or other qualifications, or cleaning fees reasonably incurred in connection with the hiring of the real property [*Civ. Code § 1950.8(e)*]. In addition, the prohibition does not bar a person from increasing a tenant's rent for nonresidential real property to recover building operating costs incurred on the tenant's behalf, if the right to the rent, the method of calculating the increase, and the period of time covered by the increase is stated in the lease or rental agreement [*Civ. Code § 1950.8(f)*].

[9] Landlord's Lien

[a] Lien Applies to Property in Furnished and Unfurnished Apartment Houses and Apartments

Keepers of furnished and unfurnished apartment houses and apartments have a lien on the baggage and other property of value belonging to their tenants and all the property in the possession of such tenants that is in the apartment house or apartment for charges due for accommodation, rent, services, meals, for all monies expended for them at their request, and for the costs of enforcing the lien [*Civ. Code § 1861a*]. For a description of the procedure for enforcing the lien, including sale at public auction, see *Civ. Code § 1861a*.

[b] Exemptions

Any property that is exempt from enforcement of a money judgment is not subject to the lien provided for in *Civ. Code § 1861a* [*Civ. Code § 1861a*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantTenant's Remedies & RightsPossession of PremisesReal Property LawLandlord & TenantTenanciesTenancies at WillReal Property LawLandlord & TenantTenanciesTerm Tenancies

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Volume 29: Landlord and Tenant: General Introduction thru Rent Control-Chs. 330-339
Chapter 331 LANDLORD AND TENANT: CREATING THE TENANCY
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§ 331.12 Leases of Real Property

[1] Defined

A lease of real property is an agreement by which one is granted on stated terms and conditions the right to occupy the property to the exclusion of the grantor [*Bachenheimer v. Palm Springs etc. Corp. (1953) 116 Cal. App. 2d 580, 591, 254 P.2d 153]* .

[2] Leases Are Contractual in Nature

A lease, although primarily a conveyance to the lessee of an interest in real property, is contractual in nature. Two distinct sets of rights and obligations are created; one arises out of the relation of landlord and tenant and is based on privity of estate, whereas the other arises out of the express provisions of the lease and is based on privity of contract [*Medico-Dental Bldg. Co. v. Horton & Converse (1942) 21 Cal. 2d 411, 418, 132 P.2d 457* ; *Samuels v. Ottinger (1915) 169 Cal. 209, 211, 146 P. 638* ; *Flynn v. Mikelian (1962) 208 Cal. App. 2d 305, 310, 25 Cal. Rptr. 138]* .

[3] Requirements of a Lease

[a] Intent of Parties to Create Lease Is Key Element

To create a valid lease there must be a definite agreement as to the extent and boundary of the property leased (such as the street address), a definiteand agreed term, a definite and agreed rent, and a time and manner of payment of rent [*Santa Cruz v. MacGregor (1960) 178 Cal. App. 2d 45, 53, 2 Cal. Rptr. 727]* . A lease must ordinarily be signed by both parties and delivered [*Vavuris v. Pinelli (1957) 147 Cal. App. 2d 390, 393, 305 P.2d 149]* . Although these elements are necessary to a lease's existence, they are not sufficient alone to create a lease unless the parties so intend. The question of intention is to be determined by a construction of the instrument in light of the surrounding circumstances [*Back v. New York Merchandise Co. (1961) 196 Cal. App. 2d 434, 442, 16 Cal. Rptr. 591]* .

PRACTICE TIP:

Oral Agreement Despite Lack of Signature. Even when a lease may be deemed unenforceable due to the lack of a party's signature [*see* [e], *below* for a discussion of the signature requirements], it may still

be evidence of an oral agreement between the parties. *By Benjamin Kaplan*

PRACTICE TIP: No Lease. If a lease is not created, a court might conclude in appropriate circumstances that a license, a security interest, or some other instrument was created. *By Myron Moskovitz*

No particular legal terminology is required in the making of a lease, but it is essential that the instrument show an intention to establish the relationship of landlord and tenant [*Beckett v. City of Paris Dry Goods Co. (1939) 14 Cal. 2d 633, 636, 96 P.2d 122]* . The parties' characterization of an agreement as a lease is not controlling, but it is some evidence that the parties intended to create a lease [*Sherwin v. Bogosian (1931) 112 Cal. App. 359, 364, 296 P. 641]* .

In summary, all that is required is that the agreement show the intention of the named lessor to dispossess himself or herself of, and to grant to the named lessee, the right to enter and possess the designated premises in subordination to the lessor's title for a fixed consideration and period of time [*Timm v. Brown (1947) 78 Cal. App. 2d 609, 616, 178 P.2d 10]* .

One of the distinguishing characteristics of a lease is that the owner of premises must grant the possessor "exclusive" possession and control of the premises, including possession exclusive of the owner for the lease's term. Sporadic use of premises, with shared control by the owner during each use, cannot be deemed "exclusive" of the owner's possession [*Golden West Baseball Co. v. City of Anaheim (1994) 25 Cal. App. 4th 11, 32-33, 31 Cal. Rptr. 2d 378]* . For example, possession and control of stadium premises by the owner of a professional baseball team on approximately 81 dates that vary from year to year cannot be considered "exclusive against all the world including the owner" when the owner operates all concession and parking premises, with shared control by the owner during each use [*Golden West Baseball Co. v. City of Anaheim (1994) 25 Cal. App. 4th 11, 32-33, 31 Cal. Rptr. 2d 378]* .

[b] Description of Premises

A valid lease must contain a description of the premises to be leased [*Beckett v. City of Paris Dry Goods Co. (1939) 14 Cal. 2d 633, 637, 96 P.2d 122]* . If the description is ambiguous as to the description of the premises, a court may consider evidence of the parties' intentions [*Gilman v. Nemetz (1962) 203 Cal. App. 2d 81, 87-88, 21 Cal. Rptr. 317]* .

If a lessee takes possession of property under a lease containing an ambiguous and uncertain description of the property to be occupied and pays the stipulated rent, the lease will be enforced as a lease if the parties act on it as relating to particular premises [*Beckett v. City of Paris Dry Goods Co. (1939) 14 Cal. 2d 633, 637, 96 P.2d 122* ; *Gilman v. Nemetz (1962) 203 Cal. App. 2d 81, 87-88, 21 Cal. Rptr. 317]* . Thus, an indefinite description of the property may be cured by taking possession [*Beckett v. City of Paris Dry Goods Co. (1939) 14 Cal. 2d 633, 637, 96 P.2d 122* ; *Santa Cruz v. MacGregor (1960) 178 Cal. App. 2d 45, 53, 2 Cal. Rptr. 727]* .

[c] Definite Term

A valid lease must have a definite term [*Frey v. Corbin (1948) 84 Cal. App. 2d 536, 539, 191 P.2d 21]* . The lease's term may be month-to-month. The term of a lease is adequately stated if the possession is to commence on the completion of the premises, and any uncertainty as to such a term is removed by the completion of the premises [*Santa Cruz v. MacGregor (1960) 178 Cal. App. 2d 45, 53, 2 Cal. Rptr. 727]* .

[d] Consideration

A valid lease must be based on consideration. A lease that allows one party to withdraw at his or her pleasure is not enforceable because of lack of consideration [*Cox v. Hollywood Film Enterprises, Inc. (1952) 109 Cal. App. 2d 320, 325, 240 P.2d 713]* . However, a lease that can be canceled on only 90 days' notice is supported by consideration [

Associated Oil Co. v. Myers (1933) 217 Cal. 297, 301, 18 P.2d 668] .

In an ordinary lease, there is mutual consideration in that the landlord impliedly warrants quiet enjoyment by the tenant and the tenant promises to pay rent [*Blackman v. Dalton's Auto & Furniture Loans Ltd. (1942) 51 Cal. App. 2d 14, 18, 124 P.2d 123]* . In a requirements lease, if the landlord promises to lease to the tenant all the space he or she needs and the tenant agrees to lease all the space he or she needs from the landlord, the requisite consideration exists [*Fisher v. Parsons (1963) 213 Cal. App. 2d 829, 834-836, 29 Cal. Rptr. 210]* .

[e] Signature and Delivery

A valid lease must ordinarily be signed by both parties and delivered to become operative [*Vavuris v. Pinelli (1957) 147 Cal. App. 2d 390, 393, 305 P.2d 149*], although leases for less than one year, as well as month-to-month agreements, need not be in writing [*see Civ. Code §§ 1622, 1624(a)(3)*]. It is not essential that the lessee sign a lease because delivery to and acceptance of the leased premises is sufficient. The lessee may indicate acceptance by taking possession or by paying rent. On such acceptance, both landlord and tenant become bound under the lease, except that a special covenant, such as one to repair, does not bind the tenant who has not signed [*Walker v. Dorn (1966) 240 Cal. App. 2d 118, 121, 49 Cal. Rptr. 362]* .

Whether an instrument has been delivered is a question of fact, and retention of the lease by the landlord is not conclusive evidence of its nondelivery. If retention is with the tenant's consent, it must be considered delivered if the parties understand it has been executed and is in operation [*Handley v. Guasco (1958) 165 Cal. App. 2d 703, 710, 332 P.2d 354]* .

[f] Foreign Language Translation

Any person engaged in a trade or business who negotiates primarily in Spanish, either orally or in writing, in the course of entering into a lease, sublease, rental contract or agreement, or other term of tenancy contract or agreement, for a period of longer than one month, covering a dwelling, apartment, mobilehome, or other dwelling unit normally occupied as a residence, must, on the request of any party to the contract or agreement and before the execution thereof, deliver an unexecuted Spanish language translation of the contract or agreement. In addition, at the time and place where such a contract or agreement is entered into, a Spanish language notice of the right to such a translation must be provided to the lessee or tenant [*Civ. Code § 1632(a)*]. On a failure to comply with the provisions of *Civ. Code § 1632*, the aggrieved person may rescind the contract or agreement in the manner provided by the Civil Code [*Civ. Code § 1632(g)*]. In this context, the term "contract" or "agreement" does not include matters ordinarily incorporated by reference in the above-described leases, subleases, rental contracts or agreements, or other term of tenancy contracts or agreements, including, but not limited to, rules and regulations governing a tenancy and inventories of furnishings to be provided by the person described in *Civ. Code § 1632(a)* [*Civ. Code § 1632(d)*].

These requirements also apply to persons negotiating primarily in Chinese, Tagalog, Vietnamese, or Korean [*Civ. Code § 1632(b)*]. Those persons must provide copies of the unexecuted contract or agreement and the notice of the statutory requirement in the language in which the contract or agreement was negotiated [*Civ. Code § 1632(b), (d)*].

For a discussion of *Civ. Code § 1632*, see Ch. 127, *Consumer Contracts and Loans* . For a discussion of and forms for use in an action to rescind a contract, see Ch. 490, *Rescission and Restitution* .

[4] Agreement to Execute Lease

If the parties agree in writing on the essential terms of a lease, there is a binding lease even if a formal instrument is to be prepared and signed later [*Gavina v. Smith (1944) 25 Cal. 2d 501, 504, 154 P.2d 681* ; *Cappelmann v. Young (1946) 73 Cal. App. 2d 49, 53, 165 P.2d 950]* .

PRACTICE TIP:

Warning! It is important to be careful in executing documents considered to be an intention to lease later as these documents may be enforceable as a lease if they contain all the essential terms even though it was contemplated that a lease would be executed later. *By Benjamin Kaplan*

However, an agreement to lease in the future will not be construed as a present lease if it can be shown that the parties did not intend such a result [*Potter v. Mercer (1879) 53 Cal. 667, 672-674* ; *overruled by Jordan v. Talbot (1961) 55 Cal. 2d 597*], or if the agreement is too uncertain and incomplete in that it lacks a date for commencement or a specified term [*Martin v. Hall (1933) 219 Cal. 334, 338-339, 26 P.2d 288]* .

Whether an instrument is a present lease or an agreement to execute a lease in the future is largely a question of the intention of the parties [*Levin v. Saroff (1921) 54 Cal. App. 285, 289-290, 201 P. 961* , *disapproved on other grounds, Sterling v. Taylor (2007) 40 Cal. 4th 757, 770, 55 Cal. Rptr. 3d 116, 152 P.3d 420*]. If possession is given under an agreement, this is a circumstance tending to prove that a present lease was intended [*Santa Cruz v. MacGregor (1960) 178 Cal. App. 2d 45, 54, 2 Cal. Rptr. 727]* .

[5] Modification

In all leases of lands or tenements, or of any interest therein, from week-to-week, month-to-month, or other period less than a month, the landlord may change the terms of the lease by giving written notice to the tenant in the manner prescribed by *Code Civ. Proc. § 1162*. With regard to tenancies for less than one month, the changes will take effect on the expiration of a period at least as long as the term of the hiring itself. With regard to tenancies from month-to-month, the changes will take effect at the expiration of not less than 30 days. If such change takes effect within a rental term, the rent accruing from the first day of such term to the date of such change is computed at the rental rate that existed immediately before such change. However, parties may provide by a written agreement that a notice changing the terms of the lease may be given at any time not less than seven days before the expiration of a term, to be effective on the term's expiration [*Civ. Code § 827(a)*].

When served on the tenant, the notice in and of itself operates and is effective to create and establish, as part of the lease, the terms, rents, and conditions specified in the notice, if the tenant continues to hold the premises after the notice takes effect [*Civ. Code § 827(a)*].

A landlord may increase the rent in a lease of a residential dwelling or an interest in a residential dwelling from week-to-week, month-to-month, or other period less than a month, on giving written notice to the tenant by either delivering a copy to the tenant personally or by serving a copy by mail under the procedures prescribed in *Code Civ. Proc. § 1013* [*Civ. Code § 827(b)*]. If the proposed rent increase for that tenant is 10 percent or less of the rental amount charged to that tenant at any time during the 12 months before the effective date of the increase, either in and of itself or when combined with any other rent increases for the 12 months before the effective date of the increase, the notice must be delivered at least 30 days before the effective date of the increase and subject to *Code Civ. Proc. § 1013* if served by mail [*Civ. Code § 827(b)*]. If the increase in rent is greater than 10 percent, the minimum notice period is increased by an additional 30 days. However, this additional 30-day period does not apply to an increase in rent caused by a change in a tenant's income or family composition as determined by a recertification required by statute or regulation [*Civ. Code § 827(b)*]. If a state or federal statute, state or federal regulation, recorded regulatory agreement, or contract provides for a longer period of notice regarding a rent increase than that provided above, the personal service or mailing of the notice must be in accordance with the longer period [*Civ. Code § 827(c)*].

[6] Interpretation

A lease is construed primarily as a contract, and therefore, when doubt arises as to what the rights, duties, and obligations of the parties are under the terms of a lease, the statutory rules for the construction of contracts as embodied

in *Civ. Code §§ 1635-1662* (interpretation of contracts) are applicable [*Wright v. Coberly-West Co. (1967) 250 Cal. App. 2d 31, 35, 58 Cal. Rptr. 213* ; *Northridge Hospital Foundation v. Pic'N' Save No. 9 (1986) 187 Cal. App. 3d 1088, 1095-1098, 232 Cal. Rptr. 329]* .

For example, the contract principle regarding the mutual dependency of covenants is appropriate in dealing with residential leases of urban dwelling units [*Green v. Superior Court (1974) 10 Cal. 3d 616, 624, 111 Cal. Rptr. 704, 517 P.2d 1168]* . A lease should be construed in conformity with the fundamental principle that the intentions of the parties should be given effect as far as possible [Medico-Dental etc. v. *Horton & Converse (1942) 21 Cal. 2d 411, 418-419, 132 P.2d 457]* . Thus, covenants and agreements in a lease should be construed to be dependent on or independent of each other according to the intentions of the parties and the good sense of the case, and technical words should give way to such intentions [*Medico-Dental Bldg. Co. v. Horton & Converse (1942) 21 Cal. 2d 411, 419, 132 P.2d 457* ; *Enos v. Foster (1957) 155 Cal. App. 2d 152, 155, 317 P.2d 670]* . Thus, rent may be in certain circumstances an independent covenant.

Any ambiguity or uncertainty in a lease must be interpreted most strongly against the party who drafted the lease [*Cooper v. Mart Associates(1964) 225 Cal. App. 2d 108, 116, 37 Cal. Rptr. 145]* . For this reason, some leases contain clauses waiving this rule of construction and stating that in the event of a dispute, leases are to be construed and interpreted as if both parties jointly prepared the lease. If the landlord, as drafter of the lease, did not allow any negotiation of the language in the lease, a court would probably not permit such a waiver. The inclusion of a clause that both parties had the opportunity to be represented by counsel and that the lease was a fully negotiated agreement may help support a waiver (or estoppel) argument.

[7] Recording

[a] When Lease Is Void for Failure to Record

A conveyance of real property, or an estate for years in the property, is void as against any subsequent purchaser or mortgagee of the same property, or any part of the property, in good faith and for valuable consideration, whose conveyance is first duly recorded, unless it is duly recorded before the recording of a notice of action [*Civ. Code § 1214*]. The word conveyance, as used in *Civ. Code § 1214*, includes all leases of real property [*Seal of Gold Mining Co. v. Slater (1911) 161 Cal. 621, 630, 120 P. 15]* , other than a lease for a term not exceeding one year [*Civ. Code § 1214*]. Thus, the purpose of recording a lease is to give notice to prospective bona fide purchasers and thus protect the lessee's estate in the leased property from either future encumbrances or sale of the property.

[b] Unrecorded Written Leases

Although void as against a good faith purchaser or mortgagee of the leased property, an unrecorded written lease for a term in excess of one year is valid as between the parties and those having notice of the lease [*Civ. Code § 1217*]. Such a lease is therefore valid as against a purchaser of the property who has notice of it or such notice as should put the purchaser on inquiry, such as an inspection of the subject premises. Possession of the property by a tenant or subtenant is sufficient to put the subsequent purchaser on notice of the tenant's or subtenant's claim to the property, and therefore the subsequent purchaser's rights will be subject to the leasehold rights of the tenant in possession even if the lease is not recorded [*Evans v. Faught (1965) 231 Cal. App. 2d 698, 705, 42 Cal. Rptr. 133]* .

[8] Renewal of Leases

[a] Possession After Expiration of Lease

If a lessee of real property remains in possession of the property after the expiration of the hiring, and the lessor accepts rent from him or her,the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly nor in any case one year [*Civ. Code § 1945*].

PRACTICE TIP:

Implied Renewal of Lease. The rule whereby fixed-term leases automatically turn into month-to-month agreements on the same terms is very useful in applying an *attorney's fee* provision in a lease to what many people often assume has become merely an oral month-to-month agreement. *By Myron Moskovitz*

Notwithstanding any other provision of law, any term of a lease executed after June 30, 1966, for the hiring of residential real property that provides for the automatic renewal or extension of the lease for all or part of the full term of the lease if the lessee remains in possession after the expiration of the lease or fails to give notice of his or her intent not to renew or extend before the expiration of the lease is voidable by the party who did not prepare the lease unless the renewal or extension provision appears in at least eight-point boldface type, if the contract isprinted, in the body of the lease agreement and a recital of the fact that such provision is contained in the body of the agreement appears in at least eight-point boldface type, if the contract is printed, immediately before the place where the lessee executes the agreement. In this case, the presumption in *Civ. Code § 1945* (implied renewal of lease) applies [*Civ. Code § 1945.5*].

[b] Extension Distinguished

A renewal of a lease creates a new and distinct tenancy. An extension of a lease is the stretching or spreading out of a former term [*Burroughs v. Ben's Auto Park, Inc. (1945) 27 Cal. 2d 449, 454, 164 P.2d 897* ; *Smith v. Arthur D. Little, Inc. (1969) 276 Cal. App. 2d 391, 399, 81 Cal. Rptr. 140* ; *see In re Marriage of Joaquin (1987) 193 Cal. App. 3d 1529, 1534, 239 Cal. Rptr. 175]* . However, the distinction between a renewal and an extension of a lease is not always observed. The word "renewal" and the words "to renew" have no definite and fixed legal significance [*Erickson v. Boothe (1947) 79 Cal. App. 2d 266, 273, 179 P.2d 611]* , and courts frequently use the terms "renew" and "extend" interchangeably [*Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 64, 338 P.2d 1005]* .

This confusion also appears in the applicable statutes. Although *Civ. Code §§ 1945* and *1945.5* refer to "renewal," their legal effect is that of an extension. When difficulty occurs in interpreting whether a lease provides for an extension or for a renewal, a court will, if possible, give effect to the intention of the parties. In the absence of an express provision that a new lease was intended to be executed, the presumption is that no new lease was intended and the tenant continues to hold under the original lease. The lease must clearly and positively show that the making of a new lease was intended, and this must appear from the express language of the parties [*see Civ. Code § 1654*; *Erickson v. Boothe (1947) 79 Cal. App. 2d 266, 275, 179 P.2d 611]* .

[c] Effect on Original Lease

The execution of a new (renewal) lease does not operate to interrupt the possession of the lessee under the original lease [*Reynolds v. McEwen (1952) 111 Cal. App. 2d 540, 545, 244 P.2d 961]* . Execution of a new lease by a tenant, as opposed to a renewal lease to commence on termination of the existing lease, operates as an effective surrender of the premises demised in the original lease [*Scott v. Mullins (1962) 211 Cal. App. 2d 51, 55, 27 Cal. Rptr. 269]* .

If a tenant remains in possession under a new (renewal) lease, the tenant must be careful to reserve any rights contained in the former lease, such as the right to remove fixtures, or else such rights will be lost [*see Schlageter Estate Co. v. Koontz (1950) 97 Cal. App. 2d 814, 819, 218 P.2d 814* ; *Woods v. Bank of Haywards (1909) 10 Cal. App. 93, 96, 106 P. 730]* . However, under an extension of the lease, the parties are deemed to have assented to all of the terms of the original lease [*Knox v. Wolfe (1946) 73 Cal. App. 2d 494, 500, 167 P.2d 3]* .

[d] Presumption of Extension

When a tenant under a lease remains in possession of the leased premises with the permission of the lessor from month-to-month after the term expires, a new tenancy is not created but the original tenancy is deemed to have been extended [*Schmitt v. Felix (1958) 157 Cal. App. 2d 642, 646, 321 P.2d 473]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawPriorities & RecordingGeneral Overview

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§ 331.13 Cotenants

Cotenants hold as tenants in common but are jointly and severally liable on covenants to repair and to deliver possession at the end of the term [*Coburn v. Goodall (1887) 72 Cal. 498, 503, 14 P. 190]* .

The possession of one cotenant is possession for all other cotenants [*Barrow v. Simon (1934) 2 Cal. App. 2d 500, 503, 38 P.2d 197]* . A holding over by one tenant in possession where the lease provides that such holding over is to be construed to be a tenancy from month-to-month will bind all cotenants unless the other tenants act to terminate the lease. A cotenant not in possession may give notice of termination of the tenancy and, if the cotenant does so, he or she cannot be held liable for his or her cotenants' holding over. In such a case, the landlord may either accept the cotenant in possession as his or her sole tenant or terminate the tenancy [*Schmitt v. Felix (1958) 157 Cal. App. 2d 642, 646-648, 321 P.2d 473]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawLandlord & TenantTenanciesTenancies at Sufferance

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§ 331.14 Title

[1] Property to Which Tenant Is Entitled

The general rule is that everything that belongs to the demised premises or is used with and appurtenant to it and that is reasonably essential to its enjoyment passes as an incident of the leased premises to the tenants, unless specifically reserved by the lessor [*Owsley v. Hamner (1951) 36 Cal. 2d 710, 717, 227 P.2d 263* ; *Sierad v. Lilly (1962) 204 Cal. App. 2d 770, 774, 22 Cal. Rptr. 580]* . Thus, in the absence of qualifying words, a lease of a part of a building passes with it, as incident thereto, everything necessarily used with or reasonably necessary for the enjoyment of the part demised [*Sierad v. Lilly (1962) 204 Cal. App. 2d 770, 774, 22 Cal. Rptr. 580]* .

A lease of an entire house or building operates as a lease of the land on which the building stands, at least as far as is needed for its support; the same is true of adjacent land belonging to the lessor that is used with the building and is necessary for proper occupation of the leased premises for the purpose for which the lease was intended [*Bachenheimer v. Palm Springs etc. Corp. (1953) 116 Cal. App. 2d 580, 588, 254 P.2d 153]* . The lease of a store passes as an incident or appurtenance thereto everything then in use for the store [*Owsley v. Hamner (1951) 36 Cal. 2d 710, 716, 227 P.2d 263]* .

Although not expressly granted, rights and easements may and do pass to lessees by implication [*Sierad v. Lilly (1962) 204 Cal. App. 2d 770, 774, 22 Cal. Rptr. 580]* . If the express words of the grant are not sufficient, the implication that supplies those words flows either from a reasonable necessity or, considering all the circumstances, from the manifest intention of the parties [*Sierad v. Lilly (1962) 204 Cal. App. 2d 770, 774, 22 Cal. Rptr. 580]* . For easements to be implied, they need not be absolutely necessary or required to make the leased property tenantable. The prevailing test is whether they are reasonably necessary for the beneficial enjoyment of the property leased [*Owsley v. Hamner (1951) 36 Cal. 2d 710, 718, 227 P.2d 263]* . Whether they are is generally a question of fact [*Froomer v. Drollinger (1962) 201 Cal. App. 2d 90, 96-98, 19 Cal. Rptr. 891]* .

[2] Estoppel to Deny Landlord's Title

[a] In General

A lessee or sublessee usually is estopped to deny the title of his or her landlord [*People v. Rice (1960) 185 Cal. App. 2d 207, 211, 8 Cal. Rptr. 76]* . Thus, the issue of the validity of the landlord's title may not be raised as a defense to a suit for either unlawful detainer or for rent [*Staudigl v. Harper (1946) 76 Cal. App. 2d 439, 445-446, 173 P.2d 343* (unlawful detainer action); *Blackman v. Dalton's Auto & Furniture Loans Ltd. (1942) 51 Cal. App. 2d 14, 17, 124 P.2d 123* (rent)], nor can it be raised in an action to cancel a lease [*Ware v. Stafford (1957) 148 Cal. App. 2d 840, 843-844, 307 P.2d 950]* .

[b] Exceptions

There are a number of exceptions to the rule that the tenant is estopped to question his or her landlord's title. If the landlord brings an action against the tenant in which the landlord seeks to quiet his or her title against the tenant rather than merely recover possession from the tenant, the tenant is not estopped and can set up and attempt to establish his or her own superior title [*Dimond Public Utility Dist. v. Shaffer (1960) 185 Cal. App. 2d 482, 486-487, 8 Cal. Rptr. 372]* . A tenant is not estopped to question his or her landlord's title in an action to have the lease rescinded if the tenant was induced to enter into the lease by fraudulent representations of the landlord [*Kearney Inv. Co. v. Golden Gate Ferry Co. (1926) 198 Cal. 560, 563-564, 246 P. 322]* or in an action to recover rent paid to the landlord when the lease was executed under the misapprehension that the landlord owned the leased property [*Stratton v. Hanning (1956) 139 Cal. App. 2d 723, 727, 294 P.2d 66]* .

The tenant is also not estopped to deny the title of his or her landlord and claim title for himself or herself if the tenant was in possession of the property before the lease and was therefore not placed in possession by the landlord [*Strong v. Baldwin (1908) 154 Cal. 150, 161-162, 97 P. 178]* , if he or she is no longer in possession of the property [*Stratton v. Hanning (1956) 139 Cal. App. 2d 723, 727, 294 P.2d 66]* , or if it is clear from the lease that the parties agreed that the tenant could question the landlord's title [*Taylor v. Continental So. Corp. (1951) 104 Cal. App. 2d 425, 432, 233 P.2d 577]* . A tenant can interplead the conflicting claims of his or her landlord and a third party as to rent despite any estoppel to deny the landlord's title [*Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 509, 150 P.2d 463]* .

PRACTICE TIP:

Alleged Successor of Landlord. In addition to the above exceptions, a tenant may always question whether a landlord's alleged *successor* properly took title from the landlord and is thus entitled to make demands on the tenant. *By Myron Moskovitz*

PRACTICE TIP: Gravamen of Action Based on Newly Acquired Title. Another exception to the rule in [a], *above*, exists when the gravamen of the action is based on newly acquired title by foreclosure sale. *By Benjamin Kaplan*

[3] Adverse Possession

It is a general rule that a lessee in possession of real property under a lease may not hold adversely to his or her landlord whileholding under the lease [*Harvey v. Nurick (1968) 268 Cal. App. 2d 213, 215, 74 Cal. Rptr. 94]* . Such possession may not be classified as hostile, and therefore, a requisite element of adverse possession cannot be satisfied.

When a landlord and tenant relationship has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of five years from the termination of the tenancy, or, if there has been no written lease, until the expiration of five years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his or her landlord. These presumptions may not be made after the periods limited above [*Code Civ. Proc. § 326*].

[4] Tenant's Obligation to Notify Landlord of Any Proceeding to Recover Property

Every tenant who receives notice of any proceeding to recover the real property occupied by the tenant, or the

possession of such property, must immediately inform his or her landlord of the proceeding, and also deliver any written notice of the proceeding to the landlord. The tenant is responsible to the landlord for all damages that the landlord may sustain by reason of any omission to inform the landlord of the notice or to deliver a written notice to the landlord [*Civ. Code § 1949*].

[5] Landlord's Right to Inspect Leased Premises

When a lease contains a provision that the tenants will not violate governmental laws and regulations, the landlord has the right to ensure that such violations are not taking place. When a landlord reasonably suspects these violations, he or she has a right to inspect leased premises.

Since contamination that would violate government laws and regulation is usually hidden from view, an expert investigation is required. Good faith and fair dealing with regard to the covenant of lawful activity requires a reasonable means by which the landlord can assure itself that environmental laws are not being violated. Such assurance may be provided by tests and reports initiated by the tenant that objectively provide adequate assurance. If the tenant fails to provide this report, the landlord has the right to come onto leased premises and conduct testing in a reasonable and nonobtrusive manner [*Sachs v. Exxon Co. U.S.A. (1992) 9 Cal. App. 4th 1491, 1498, 12 Cal. Rptr. 2d 237]* .

[6] Options to Purchase

[a] In General

For a general discussion and form surrounding a lessee's option to purchase the premises, see *§ 334.67*.

[b] Option of First Refusal Distinguished

A lease can give a tenant the right of first refusal to extend or renew the lease and this clause is enforceable [*Schwartz v. Shapiro (1964) 229 Cal. App. 2d 238, 255, 40 Cal. Rptr. 189]* . Although a right of first refusal is similar to an option, it differs in that the option creates in the tenant a power to compel the landlord to lease the property on specified terms whether he or she is willing to do so at the time of the exercise of the option or on the commencement of the new lease.

A right of first refusal, on the other hand, does not give the tenant the right to compel an unwilling landlord to lease the property, but merely requires the landlord, when and if he or she decides to lease it, to offer it first to the tenant. The tenant has the right to meet an offer made by a third party, but this right is conditioned on the landlord's continued leasing of the property [*Ablett v. Clauson (1954) 43 Cal. 2d 280, 283-284, 272 P.2d 753]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdverse PossessionGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsPossession of PremisesReal Property LawPurchase & SaleOption ContractsRights of First Refusal

California Forms of Pleading and Practice--Annotated

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Volume 29: Landlord and Tenant: General Introduction thru Rent Control-Chs. 330-339
Chapter 332 LANDLORD AND TENANT: THE TENANCY

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Chapter 332 LANDLORD AND TENANT: THE TENANCY
PART I. SCOPE

29-332 California Forms of Pleading and Practice--Annotated § 332.01

§ 332.01 Scope of Chapter

This chapter discusses and contains forms relating to the tenancy. The chapter discusses rights and duties of landlords and tenants during the tenancy, including the duty to repair or restore premises, covenants and conditions, assignments, subleases, and public housing [*see § 332.10* et seq.], and also discusses the termination of tenancy [*see § 332.20* et seq.].

The chapter includes the following forms:

- A complaint [*see § 332.40*] and allegations [*see §§ 332.41 -332.50*] by a landlord against a tenant for breaches of covenants.

- A complaint [*see § 332.51*] and allegations [*see §§ 332.52 -332.56*] by a tenant against a landlord for breaches of covenants.

- Affirmative defenses to complaints for breaches of covenants [*see §§ 332.57 -332.59*].

- Notices to terminate tenancies [*see §§ 332.70 -332.80*].

- Notices, a demand, and a complaint regarding the disposition of property abandoned by a tenant [*see §§ 332.90 -332.97*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsSubleasesReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview

California Forms of Pleading and Practice--Annotated

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Chapter 332 LANDLORD AND TENANT: THE TENANCY
PART I. SCOPE

29-332 California Forms of Pleading and Practice--Annotated § 332.02

§ 332.02 Cross References

For a form of complaint by a real estate broker for a commission for procuring a lessee, see Ch. 103, *Brokers* .

For a discussion of and forms for use in actions involving discrimination in the rental of housing, see Ch. 117, *Civil Rights: Housing Discrimination* .

For a form of complaint to cancel a lease executed by the husband without joining the wife, see Ch. 122, *Community Property* .

For a discussion and forms involving contracts generally, see Ch. 140, *Contracts* .

For a form of stipulation between an owner-lessor and a tenant as to the division of an award in an eminent domain proceeding, see Ch. 247, *Eminent Domain* .

For a form of petition by a conservator for authority to execute a lease of real property and a form of order authorizing the lease, see *Ch. 290A, Guardianship and Conservatorship: Asset Management and Investment, §§ 290A.82, 290A.83*.

For forms for use in actions involving the lease of mining property, see Ch. 363, *Mining* .

For forms for use in actions involving oil and gas leases, see Ch. 393, *Oil and Gas* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsLeasing & SalesCivil Rights LawContractual Relations & HousingProperty Rights (sec. 1982)General OverviewEnergy & Utilities LawLeases & LicensesGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsReal Property LawBrokersRight to Commissions

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29-332 California Forms of Pleading and Practice--Annotated §§ 332.03-332.09

[Reserved]

§§ 332.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Rights and Duties During the Tenancy

29-332 California Forms of Pleading and Practice--Annotated § 332.10

§ 332.10 Duty to Repair or Restore

[1] Landlord

[a] General Duty

At common law, a landlord had no general obligation to repair or maintain leased premises in the absence of fraud, a covenant to repair, or a statutory duty to repair [*Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 671-672, 75 Cal. Rptr. 889, 451 P.2d 721]* . This rule has been modified, however, with regard to a landlord's liability for personal injuries resulting from an accident on his or her leased premises. A landlord is now under a duty to exercise ordinary care in the management of his or her premises [*Brennan v. Cockrell Investments, Inc. (1973) 35 Cal. App. 3d 796, 799, 802, 111 Cal. Rptr. 122]* .

For discussion of a landlord's covenant to repair, see *§ 332.55*. For a discussion of the respective duties of landlords and tenants under a commercial lease to comply with applicable governmental laws and regulations (including those requiring repairs and improvements to leased property), see [c], *below*.

[b] Statutory Duty

[i] In General

A landlord's common law obligation to repair property has been modified by statute in California with regard to residential property, though it remains unchanged for commercial property. At common law, the tenant took the property for better or for worse and, in the absence of a special, or bargained for, agreement, the tenant could not involve the landlord in any expense for repairs without the landlord's consent [*Van Every v. Ogg (1881) 59 Cal. 563, 565]* .

Under California statute, however, the lessor of a building intended for the occupation of human beings is responsible for ensuring that the building is in a condition fit for residential occupation and for repairing all subsequent dilapidations of the building that render the building untenantable, except such as are mentioned in *Civ. Code § 1929* [

Civ. Code § 1941]. These rights cannot be waived by agreement [*see Green v. Superior Court (1974) 10 Cal. 3d 616, 631, 111 Cal. Rptr. 704, 517 P.2d 1168* ; *see also Civ. Code § 1953*].

[ii] Standards

Under *Civ. Code § 1941.1*, a dwelling will be deemed untenantable for purposes of *Civ. Code § 1941* if it substantially lacks any of the following affirmative standard characteristics:

- Effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors;

- Plumbing or gas facilities that conformed to applicable law in effect at the time of installation, maintained in good working order;

- A water supply approved under applicable law, that is under the control of the tenant, capable of producing hot and cold running water, or a system that is under the control of the landlord, which produces hot and cold running water, furnished to appropriate fixtures, and connected to a sewage disposal system approved under applicable law;

- Heating facilities that conformed with applicable law at the time of installation, maintained in good working order;

- Electrical lighting, with wiring and electrical equipment that conformed with applicable law at the time of installation, maintained in good working order;

- Building, grounds, and appurtenances at the time of the commencement of the lease or rental agreement in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents and vermin, and all areas under control of the landlord kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin;

- An adequate number of appropriate receptacles for garbage and rubbish, in clean condition and good repair at the time of the commencement of the lease or rental agreement, with the landlord providing appropriate serviceable receptacles thereafter, and being responsible for the clean condition and good repair of these receptacles under his or her control; and

- Floors, stairways, and railings maintained in good repair.

- A locking mail receptacle is provided for each residential unit in a residential hotel [*Civ. Code § 1941.1(i)*, effective July 1, 2008; *see Health & Safety Code § 17958.3* (mailbox requirements)].

In addition, a dwelling will be deemed untenantable for purposes of *Civ. Code § 1941* if it is a residential unit that meets the definition of "substandard building" set forth in *Health & Safety Code § 17920.3* or if it contains lead hazards as set forth in *Health & Safety Code § 17920.10* [*Civ. Code § 1941.1*].

A lessor of a building intended for the residential occupation of human beings is responsible for installing at least one usable telephone jack and for placing and maintaining the inside telephone wiring in good working order [*Civ. Code § 1941.4*]. Also, on and after July 1, 1998, a landlord of a building intended for human habitation must install and maintain in operable condition deadbolts on dwelling doors and other locking and security devices on windows and doors [*Civ. Code § 1941.3(a)*].

[iii] Defenses

No duty on the landlord's part to repair a dilapidation arises under *Civ. Code § 1941* or *1942* (duty of lessor to keep building fit for occupancy) if the tenant is in substantial violation of any of the following affirmative obligations, provided the tenant's violation contributes substantially to the dilapidation's existence or interferes substantially with the landlord's obligation under *Civ. Code § 1941* to effect the necessary repairs [*Civ. Code § 1941.2(a)*]:

- To keep that part of the premises that he or she occupies and uses clean and sanitary as the condition of the premises permits;

- To dispose from his or her dwelling unit of all rubbish, garbage, and other waste, in a clean and sanitary manner;

- To properly use and operate all electrical, gas, and plumbing fixtures and keep them as clean and sanitary as their condition permits;

- Not to permit any person on the premises, with his or her permission, to willfully or wantonly destroy, deface, damage, impair, or remove any part of the structure or dwelling unit or the facilities, equipment, or appurtenances thereto, nor himself or herself do any such thing; or

- To occupy the premises as his or her abode, utilizing portions of the premises for living, sleeping, cooking, or dining purposes only which were respectively designed or intended to be used for such occupancies.

The first two bullets above do not apply if the landlord has expressly agreed in writing to perform the act or acts mentioned therein [*Civ. Code § 1941.2(b)*].

[iv] Waiver

Any agreement by a tenant of a dwelling waiving or modifying his or her rights under *Civ. Code § 1941* or *1942* is void as contrary to public policy with regard to any condition that renders the premises untenantable, except that the landlord and the tenant may agree that the tenant will undertake to improve, repair, or maintain all or stipulated portions of the dwelling as part of the consideration for rent [*Civ. Code § 1942.1*]. A tenant is not entitled to recover amounts expended in making repairs when he or she has waived all his or her rights under *Civ. Code § 1942* [*Arnold v. Krigbaum (1915) 169 Cal. 143, 147, 146 P. 423]* .

[v] Arbitration

The landlord and tenant may, if an agreement is in writing, set forth the provisions of *Civ. Code §§ 1941-1942.1*, inclusive, and provide that any controversy relating to a condition of the premises claimed to make them untenantable may by application of either party be submitted to arbitration, in accordance with the provisions of *Code Civ. Proc. §§ 1280-1294.2* (arbitrations), and that the costs of the arbitration will be apportioned by the arbitrator between the parties [*Civ. Code § 1942.1*].

Note that the Sixth District Court of Appeal has held that to be enforceable, an agreement to arbitrate issues concerning the rights and obligations of a landlord and tenant, including tenantability issues, must be contained in a separate agreement and not in the lease itself [*Jaramillo v. JH Real Estate Partners, Inc. (2003) 111 Cal. App. 4th 394, 404, 3 Cal. Rptr. 3d 525]* . The court's reasoning was based on *Civ. Code § 1953(a)(4)*, which precludes a residential lease agreement from including any modification or waiver of a tenant's "procedural rights in litigation in any action involving his rights and obligations as a tenant." Thus, to ensure enforceability, landlords may wish to enter into

separate agreements to arbitrate with their tenants. For arbitration provisions to be included in residential leases, see California Legal Forms, Ch. 34B, *Residential Leases* (Matthew Bender), and Rabkin and Johnson, Current Legal Forms, Ch. 23, *Real Estate Leases* (Matthew Bender).

For discussion and forms for use in nonjudicial arbitration under *Code Civ. Proc. § 1280 et seq.*, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* , and Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* .

[c] Compliance With Laws Regarding Repair

When preventative or reparative actions are required by law, one or more of the parties interested in leased property must be obliged to comply. Since the property owner is initially under the duty to comply with all laws and orders, he or she, as landlord, remains subject to that duty [*Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 672, 75 Cal. Rptr. 889, 451 P.2d 721]* . Although a commercial tenant may be able to assume this duty, a residential tenant may not assume this duty [*see Green v. Superior Court (1974) 10 Cal. 3d 616, 631, 111 Cal. Rptr. 704, 517 P.2d 1168* ; *see also* [b][i], *above*].

[d] Implied Warranty of Habitability

A warranty of habitability is implied by law in residential leases in California [*Green v. Superior Court (1974) 10 Cal. 3d 616, 631, 111 Cal. Rptr. 704, 517 P.2d 1168]* . The Supreme Court has held that the landlord's breach of the implied warranty may constitute a defense to an unlawful detainer action [*Green v. Superior Court (1974) 10 Cal. 3d 616, 619, 111 Cal. Rptr. 704, 517 P.2d 1168]* . Since the Court also stated that the tenant's duty to pay rent is mutually dependent on the landlord's fulfillment of the implied warranty of habitability [*Green v. Superior Court (1974) 10 Cal. 3d 616, 635, 111 Cal. Rptr. 704, 517 P.2d 1168]* , breach of the implied warranty constitutes a valid defense to a landlord's action for rent [*see §§ 332.11[2][a], 333.29[4]*, 333.162, *334.10[3], 334.52, 334.63, 334.83*].

[2] Tenant

[a] Statutory Duty

A residential tenant is under no general obligation to correct defective conditions of leased premises. A commercial tenant is only under such an obligation when necessary to prevent waste or to rectify delapidations caused by his or her own lack of ordinary care [*Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 671, 75 Cal. Rptr. 889, 451 P.2d 721* (dictum)]. A residential tenant only has an obligation to use ordinary care for preserving the premises in safe and good condition [*Civ. Code § 1928*]. Although the tenant must also repair all deteriorations or injuries to the premises caused by the tenant's want of ordinary care [*Civ. Code § 1929*], the tenant has no obligation to repair portions of the premises over which he or she has no control or authority [*Rathbun Co. v. Simmons (1928) 90 Cal. App. 692, 696, 266 P. 369]* .

[b] Compliance With Laws Regarding Repair

There are three ways in which a tenant obligates himself or herself to comply with laws regarding repair of leased premises:

- The creation of the lessor-lessee relationship itself imposes on the lessee a minimal duty of compliance with applicable laws. Such a duty extends only to those required activities that are truly minor in expense and inconvenience, that arise out of the ordinary course of the lessee's use of the premises, and that would in no event impose on the lessee a burden greater than that imposed by the common-law duty to prevent waste [*Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 672, 75 Cal. Rptr. 889, 451 P.2d 721]* .

- A lessee who voluntarily uses leased premises in a manner different from the use before the creation of his or her tenancy, and thereby causes the premises to fall within the scope of existing laws not previously applicable to the premises, must bear the burden of conforming his or her new use to the requirements of the law and of taking all action necessary to rectify any subsequent instances of noncompliance [*Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 672, 75 Cal. Rptr. 889, 451 P.2d 721]* . When a subtenant modifies the premises and puts it to different use, the tenant is liable to the landlord for the cost of code compliance [*Wolfen v. Clinical Data, Inc. (1993) 16 Cal. App. 4th 171, 180-182, 19 Cal. Rptr. 2d 684]* .

- A commercial lessor may transfer his or her obligations regarding repair to his or her lessee by an agreement in which the lessee assumes the duty of compliance with statutes and the risk that the performance of this duty may prove expensive or inconvenient. The general rule is that a lessee's unqualified covenant to comply with applicable laws, standing alone, does not constitute an assumption of the duty to comply with those laws that require curative actions of a "substantial" nature, but the lessor can disclaim any obligation and the lessee can assume all risks [*Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 673-675, 75 Cal. Rptr. 889, 451 P.2d 721]* .

For discussion of a tenant's breach of a covenant to keep and surrender leased premises in good condition, see *§ 332.42*.

[3] Insurance

For a discussion and form regarding who must pay for insurance, see *§ 332.44*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantDuty to RepairReal Property LawLandlord & TenantTenant's Remedies & RightsWarranty of Habitability

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29-332 California Forms of Pleading and Practice--Annotated § 332.11

§ 332.11 Covenants and Conditions

[1] Distinguished

[a] In General

A condition is a qualification annexed to an estate by the grantor, on the happening of which the estate granted is enlarged or defeated. It differs from a covenant in that it is created by the mutual agreement of the parties [*Knight v. Black (1912) 19 Cal. App. 518, 522, 126 P. 512]* ; a covenant is an agreement of the covenantor only [*Knight v. Black (1912) 19 Cal. App. 518, 522, 126 P. 512]* .

PRACTICE TIP:

Covenants v. Conditions. Both covenants and conditions are binding on the landlord and the tenant. Failure of a condition can end a tenancy, while breach of a covenant usually does not end a tenancy. Conditions are binding on successors in interest; covenants are binding on successors in interest only if they run with the land. *By Myron Moskovitz*

Generally, use of such terms as "covenants to" or "agrees to" suggests that the provision is a covenant whereas the use of such terms as "on condition that," "subject to," "in the event that," or "shall" suggests that the provision is a condition. Determination of whether a particular provision constitutes a condition or a covenant depends on consideration of the whole instrument. The words used are not determinative of whether a clause was intended to operate as a condition or a covenant. The construction follows the probable intention of the parties [*Streicher v. Heimburge (1928) 205 Cal. 675, 683-684, 272 P. 290]* , and a restrictive covenant as to property retained by a lessor must be evidenced by a clearly expressed intention [*Stockton Dry Goods Co. v. Girsh (1951) 36 Cal. 2d 677, 680, 227 P.2d 1]* . A covenant that may result in a forfeiture on breach of the covenant will be construed strictly against the person relying on the breach [*Salton Community Services Dist. v. Southard (1967) 256 Cal. App. 2d 526, 535, 64 Cal. Rptr. 246]* .

[b] Covenants Running With the Land

The distinguishing characteristic of a covenant running with the land is that both liability on and enforcement of it pass with the transfer of the estate. It binds not only the original covenantor, but also his heirs, devisees, assignees, and subsequent purchasers. In addition, covenants running with the land are binding on subsequent transferees of the property, even though they do not contractually assume any responsibility for their performance. In other words, if a covenant runs with the land, it is unnecessary to establish liability founded on privity of contract [*Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 65, 338 P.2d 1005]* .

Covenants running with the land, however, bind only those who acquire the whole estate of the covenantor in some part of the property [*Civ. Code § 1465*]; no one, merely by reason of having acquired an estate subject to such a covenant, is liable for a breach of the covenant before he or she acquired the estate or after he or she has parted with it [*Civ. Code § 1466*; *see Farber v. Greenberg (1929) 98 Cal. App. 675, 684-685, 277 P. 534]* . Ordinarily, the covenantee of a covenant running with the land is not entitled to enforce the covenant following the transfer of the benefited property [*Maron v. Howard (1968) 258 Cal. App. 2d 473, 484-485, 66 Cal. Rptr. 70* (dictum) (*questioned on other grounds in Abadjian v. Superior Court (1985) 168 Cal. App. 3d 363, 372, 214 Cal. Rptr. 234*)].

[c] Dependent and Independent Covenants

Covenants in a lease are either independent or dependent. The breach of an independent covenant will not justify the other party's nonperformance of his or her covenants, while the breach of a dependent covenant will permit the other party not to perform on his or her covenants. The remedy for the breach of an independent covenant is damages. The determining factors in characterizing covenants as dependent or independent are the intentions of the parties at the time of execution and the "good sense of the case" [*Medico-Dental Bldg. Co. v. Horton & Converse (1942) 21 Cal. 2d 411, 418-420, 132 P.2d 457]* .

Covenants in leases are independent unless the lease expressly or impliedly makes them conditional [*Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 669, 155 P.2d 24* ; *Goldsmith v. Tub-O-Wash (1962) 199 Cal. App. 2d 132, 138, 18 Cal. Rptr. 446]* . For instance, covenants that run to the entire consideration for a lease are mutual and dependent [*Medico-Dental Bldg. Co. v. Horton & Converse (1942) 21 Cal. 2d 411, 419, 132 P.2d 457]* .

The emerging trend in the law is away from the independent covenants doctrine in residential leases and toward finding covenants to be mutually dependent [*see Green v. Superior Court (1974) 10 Cal. 3d 616, 634-635, 111 Cal. Rptr. 704, 517 P.2d 1168]* . The doctrine, however, remains strong in commercial tenancies [*see Schulman v. Vera (1980) 108 Cal. App. 3d 552, 560-563, 166 Cal. Rptr. 620* ; *see also* Cal. Eviction Defense Manual, 2nd ed., § 19.5].

[d] Effect of Breaching Covenants and Conditions

[i] In General

Although a condition, as distinguished from a covenant, entails the consequences of forfeiture of the estate [*Streicher v. Heimburge (1928) 205 Cal. 675, 684, 272 P. 290* (*questioned on other grounds in Simons v. Young (1979) 93 Cal. App. 3d 170, 187-188, 155 Cal. Rptr. 460*)], the breach of a covenant is merely a ground for the recovery of damages [*Knight v. Black (1912) 19 Cal. App. 518, 522, 126 P. 512]* .

[ii] Breach by Lessee

The breach of a covenant by the lessee gives no right of reentry unless the lease provides that it will result in forfeiture or termination of the lessee's interest [*Exchange Sec. Co. v. Rossini (1919) 44 Cal. App. 583, 585, 186 P. 828]* . A tenant's breach of a lease covenant may nevertheless result in forfeiture, following proper notice, under the unlawful detainer statutes [*see Code Civ. Proc. § 1161*], although the lessor may elect to disregard the breach and continue the lease in effect or rely on the breach and declare a forfeiture [*Salton Community Services Dist. v. Southard (1967) 256 Cal. App. 2d 526, 533, 64 Cal. Rptr. 246]* .

As a general rule, before the lessor can declare a forfeiture of the lease for nonperformance of a covenant, he or she must first, absent a contrary provision in the lease or a waiver of demand by the lessee, demand performance of the covenant. This is true whether the lessor subsequently sues in unlawful detainer or ejectment. However, if the breach is one that cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action [*Salton Community Services Dist. v. Southard (1967) 256 Cal. App. 2d 526, 529, 64 Cal. Rptr. 246]* .

[iii] Breach by Lessor

When a lessor breaches a covenant that is a condition precedent to the lessee's performance, the lessee has a choice of several remedies: he or she may rescind and become absolved from further payment of rentals; he or she may continue under the lease and sue for loss of profits; or, he or she may treat the violation as putting an end to the lease for the purposes of performance and sue for damages. For example, when performance of a covenant by the lessor is essential to the beneficial enjoyment of the property by the lessee, it is a condition precedent to the lessee's performance, and a breach thereof may amount to a constructive eviction [*Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 669-670, 672, 155 P.2d 24]* .

[iv] Waiver of Breach

If a lessor knows of a breach and nonetheless conducts himself or herself in a manner consistent with the continued existence of the lease and inconsistent with its termination by forfeiture, this supports an inference that the lessor has waived the lessee's breach [*Salton Community Services Dist. v. Southard (1967) 256 Cal. App. 2d 526, 533, 64 Cal. Rptr. 246]* . For example, the acceptance of rent by a landlord with full knowledge of all the facts from a tenant, after the breach of a condition of a lease, is generally deemed a waiver of the breach and precludes the landlord from declaring a forfeiture of the lease by reason of the breach [*Kern Sunset OilCo. v. Good Roads Oil Co. (1931) 214 Cal. 435, 440, 6 P.2d 71* ; *see Group Property Inc. v. Bruce (1952) 113 Cal. App. 2d 549, 555, 248 P.2d 761]* . However, waiver of a breach is a matter of intent and, while an intent to waive may be inferred from the acceptance of rent under certain circumstances, this inference may be rebutted if the express agreement between the parties is that rent paid would be accepted without prejudice [*Karbelnig v. Brothwell (1966) 244 Cal. App. 2d 333, 342, 53 Cal. Rptr. 335]* .

[v] Future Breaches

Although the acceptance of rents after a known default is generally a waiver of a past default, whether it is a waiver of a future breach depends on (1) the nature of the duty to be performed and (2) the lease's form and contents [*Extension Oil Co. v. Richfield Oil Corp. (1942) 52 Cal. App. 2d 105, 108, 125 P.2d 895* (oil lease)].

[2] Landlord's Covenants

[a] Implied Warranty of Habitability

A warranty of habitability is implied by law in residential leases in California [*Green v. Superior Court (1974) 10 Cal. 3d 616, 631, 111 Cal. Rptr. 704, 517 P.2d 1168]* . For detailed coverage of this warranty, see *§§ 332.10[1][d], 333.28[4], 334.10[3], 334.61* (sample complaint for breach of implied warranty of habitability), and *334.112* (sample affirmative defense of discharge from payment of rent for breach of implied warranty of habitability).

[b] Delivery of Possession

For a form and discussion relating to the lessor's duty to deliver possession, see *§ 332.52*.

[c] Adequacy for Use

Except as modified by *Civ. Code §§ 1941* and *1941.1* and the implied warranty of habitability in residential leases, there is no implied warranty or covenant that leased premises are fit for the purposes for which they are rented, or for the particular use for which they are intended by the tenant, or that they will continue to be fit for the purposes for which they are leased [*Woolford v. Electric Appliances, Inc. (1938) 24 Cal. App. 2d 385, 387, 75 P.2d 112]* . Although a landlord is ordinarily under no duty to prepare the premises for the use of the tenant [*Strecker v. Barnard (1952) 109 Cal. App. 2d 149, 152, 240 P.2d 345]* , when the lease spells out the purposes for which the property is leased and requires the lessor to build or install equipment for such use, there is an implied covenant that the leased premises will be reasonably adequate for the intended use [*Woolford v. Electric Appliances, Inc. (1938) 24 Cal. App. 2d 385, 389, 75 P.2d 112]* .

[d] Not to Lease to Competing Business

[i] In General

The fact that a lease may specify the purposes or uses that may be made of leased premises does not, in and of itself, give the lessee an exclusive right to so use the premises without competition either from the lessor or from other of the lessor's lessees in the same building or area [*see Stockton Dry Goods Co. v. Girsh (1951) 36 Cal. 2d 677, 681, 227 P.2d 1]* . However, a covenant not to let other premises in the lessor's property or permit their use for certain purposes during the existence of the lease with the covenantee is binding [*Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 669, 155 P.2d 24]* . Such a restrictive covenant must be evidenced by a clearly expressed intention [*Stockton Dry Goods Co. v. Girsh (1951) 36 Cal. 2d 677, 680, 227 P.2d 1]* , but it may be implied when language indicating the restrictive intent is used [*Keating v. Preston (1940) 42 Cal. App. 2d 110, 122, 108 P.2d 479]* .

Such a clause is to be interpreted to give effect to the implied covenant of good faith and fair dealing. For instance, it was appropriate to interpret such a clause to include additions to the shopping center to which the lease related, for to do otherwise would violate the implied covenant [*Edmond's of Fresno v. MacDonald Group, Ltd. (1985) 171 Cal. App. 3d 598, 605-608, 217 Cal. Rptr. 375]* .

[ii] Breach

A breach of a covenant not to permit a similar sales business to be conducted occurs if but one of several classes of articles sold in such business is permitted to be sold by the competitor [*Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 673, 155 P.2d 24]* .

[iii] Rescission After Breach

Although contractual restraints on trade competition are generally invalid under the provisions of *Bus. & Prof. Code § 16600*, that section has not been deemed to avoid express restrictive covenants, which are frequently incorporated in leases, regarding the use of leased premises [*see Stockton Dry Goods Co. v. Girsh (1951) 36 Cal. 2d 677, 680, 227 P.2d 1]* . Such a covenant is therefore binding and a breach of the covenant entitles the lessee to terminate the lease when the breach defeats the entire object of the lessee's entering into the lease and is not corrected by the lessor after notification of the breach by the lessee [*Medico-Dental Bldg. Co. v. Horton & Converse (1942) 21 Cal. 2d 411, 420, 430, 132 P.2d 457]* .

For discussion, a procedural guide, and forms concerning the rescission of contracts, see Ch. 490, *Rescission and Restitution* .

[iv] When Lessor's Successors Are Bound

A covenant by the lessor not to lease other property to a competing business is binding on the lessor's successors if certain requirements are met [*see Civ. Code § 1470*].

However, even when the conditions are not met, the covenant may be enforceable as an equitable servitude if it is in a written lease and the person against whom it is to be enforced had actual notice of the covenant [*Hudson Oil Co. v. Shortstop (1980) 111 Cal. App. 3d 488, 493-496, 168 Cal. Rptr. 801]* .

PRACTICE TIP:

Binding Successors. To bind successors (including mortgagees), parties to valuable leases should have them *recorded* in the recorder's office of the county in which the land is located. *By Myron Moskovitz*

[e] Quiet Enjoyment

[i] In General

Even in the absence of a special covenant of quiet enjoyment, a lease carries with it an implied covenant of quiet enjoyment [*see Civ. Code § 1927*] that is binding on the lessor during the continuation of the term. Whether expressed or implied, this covenant means that a tenant must not be wrongfully evicted or disturbed in his or her possession by the lessor [*Pierce v. Nash (1954) 126 Cal. App. 2d 606, 612, 272 P.2d 938* ; *see Civ. Code § 1927*]. Such covenants for quiet enjoyment run with the land [*Civ. Code § 1463*].

[ii] Constructive Evictions

A constructive eviction is a breach of the covenant of quiet enjoyment [*Clark v. Spiegel (1971) 22 Cal. App. 3d 74, 80, 99 Cal. Rptr. 86* ; *Giraud v. Milovich (1938) 29 Cal. App. 2d 543, 547, 85 P.2d 182]* . A constructive eviction occurs when the landlord's acts or omissions to act, or any disturbance or interference with the tenant's possession by either the landlord or by someone acting under his or her authority, render the premises, or a substantial portion of the premises, unfit for the purposes for which they were leased, or has the effect of depriving the tenant for a substantial period of time of the beneficial enjoyment or use of the premises [*Groh v. Kover's Bull Pen, Inc. (1963) 221 Cal. App. 2d 611, 614, 34 Cal. Rptr. 637* ; *Sierad v. Lilly (1962) 204 Cal. App. 2d 770, 773, 22 Cal. Rptr. 580]* .

For further discussion of constructive evictions, see *§§ 333.28[3][c], 334.61* and *334.62* (sample complaints), and 334.105-334.109 (sample affirmative defenses)].

PRACTICE TIP:

Disturbance Caused by Another Tenant. The landlord also has the duty to ensure quiet enjoyment to a tenant who is being disturbed by another tenant of the same building. *By Benjamin Kaplan*

PRACTICE TIP: Examine Economic Value of Lease Before Terminating. Before claiming constructive eviction and terminating the lease, the tenant should examine the *economic value* of the lease by comparing the required rent to the present market rent for similar premises. If the lease is valuable, the tenant might be better off staying in the place and suing the landlord for damages. *By Myron Moskovitz*

[iii] Property Deemed Essential to Use and Enjoyment

The intention of the parties as to what property was to be occupied as essential to the use and enjoyment of the described premises is to be ascertained from the circumstances at the time the lease is entered into [*Sierad v. Lilly (1962) 204 Cal. App. 2d 770, 773, 22 Cal. Rptr. 580]* .

[iv] Obligation to Vacate

There can be no constructive eviction if the lessee continues in the possession of the premises. Therefore, a lessee

alleging an interference with the implied covenant of quiet enjoyment has an obligation to vacate the premises within a reasonable time [*Clark v. Spiegel (1971) 22 Cal. App. 3d 74, 79-80, 99 Cal. Rptr. 86]* .

[v] Waiver of Right to Abandon

If, in the case of an interference with the tenant's beneficial enjoyment of the premises, the tenant does not surrender the premises within a reasonable time after the date of the interference, he or she is deemed to have waived his or her right to abandon the leased premises. What constitutes a reasonable period of time is a question of fact to be determined by the trier of fact after considering all of the circumstances [*Petroleum Collections Inc. v. Swords (1975) 48 Cal. App. 3d 841, 847-848, 122 Cal. Rptr. 114]* .

A tenant who chooses to abandon leased premises should be confident of being able to establish sufficient facts to constitute constructive eviction or the tenant will be liable for breach of the rental agreement [*Hinson v. Delis (1972) 26 Cal. App. 3d 62, 69, 102 Cal. Rptr. 661* (*overruled on other grounds in Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 55 n.7, 171 Cal. Rptr. 707, 623 P.2d 268*)].

[3] Tenant's Covenants

[a] General Limitations in Commercial Leases on Tenants' Use of Premises

A commercial lease may include a restriction on use of the leased property [*Civ. Code § 1997.210(a)*]. "Lease" means a lease or sublease of real property for other than residential purposes, and includes modifications and other agreements affecting a lease [*Civ. Code § 1997.020(b)*]. "Restriction on use" means a provision in a lease that restricts the use of the leased property by a tenant, whether by limiting use to a specified purpose, mandating use for a specified purpose, limiting or prohibiting a change in use, or otherwise [*Civ. Code § 1997.020(c)*]. A restriction on use that is otherwise illegal, however, is not authorized [*Civ. Code § 1997.030*]. Unless the lease includes a restriction on use, a tenant's rights under a lease include any reasonable use of leased property [*Civ. Code § 1997.210(b)*].

A restriction on use of leased property by a tenant may absolutely prohibit a change in use [*Civ. Code § 1997.230*], or may provide that a change in use is subject to any express standard or condition [*Civ. Code § 1997.240*]. A use restriction may require the landlord's consent for a change in use subject to any express standard or condition for giving or withholding consent, including but not limited to either of the following [*Civ. Code § 1997.250*]:

- The landlord's consent may not be unreasonably withheld; and
- The landlord's consent may be withheld subject to express standards or conditions.

Except as provided in *Civ. Code § 1997.270* [*see* [b], *below*], *Civ. Code § 1997.010 et seq.* applies to leases executed before, on, and after January 1, 1992 [*Civ. Code § 1997.050*]. For purposes of these provisions, "tenant" includes a subtenant or assignee [*Civ. Code § 1997.020(d)*], and "landlord" includes a tenant who is a sublandlord under a sublease [*Civ. Code § 1997.020(a)*]. For a form of allegations to use when a tenant breaches a covenant limiting the purposes for which leased premises may be used, see *§ 332.48*.

[b] When No Standard for Landlord's Consent Is Specified

If a restriction on use of leased property by a tenant requires the landlord's consent for a change in use but provides no standard for giving or withholding consent, the restriction must be construed to include an implied standard that the landlord's consent may not be unreasonably withheld. Whether the landlord's consent has been unreasonably withheld in a particular case is a question of fact on which the tenant has the burden of proof. The tenant may satisfy the burden of proof by showing that, in response to the tenant's written request for a statement of reasons for withholding consent, the landlord has failed, within a reasonable time, to state in writing a reasonable objection to the change in use [*Civ. Code §*

1997.260].

Civ. Code § 1997.260 applies to use restrictions executed on or after January 1, 1992. If a restriction in use executed before January 1, 1992 requires the landlord's consent for a change in use of leased premises by a tenant, but provides no standard for giving or withholding consent, the landlord has sole and absolute discretion to give or withhold consent [*Civ. Code § 1997.270(a)*]. If the terms of a restriction on change in use are fixed by an option or other agreement, the restriction on change in use will be deemed to be executed on the date of execution of the option or other agreement [*Civ. Code § 1997.270(b)*].

[c] Remedies

For the purpose of statutory damages on termination for breach of a lease [*see Civ. Code § 1951.2(a)*], the amount of rental loss that could be or could have been reasonably avoided is computed by taking into account any reasonable use of the leased property. However, if the lease contains a restriction on use that is enforceable, the computation must take into account the restricted use of the property except to the extent that the tenant proves that under all the circumstances enforcement of the restriction would be unreasonable. The circumstances include, but are not limited to, circumstances involving both the leased property and any building or complex in which the property is located [*Civ. Code § 1997.040(a)*].

The statutory remedy of continuation of a lease after breach and abandonment [*see Civ. Code § 1951.4*] is available notwithstanding the presence in the lease of a restriction on use of the leased property. The restriction on use applies if it is enforceable under *Civ. Code § 1997.010 et seq.*, except to the extent that the tenant proves that under all the circumstances enforcement of the restriction would be unreasonable. The circumstances include, but are not limited to, those involving both the leased property and any building or complex in which the property is located [*Civ. Code § 1997.040(b)*].

[d] Implied Covenant to Remain in Business

When the amount of rent is based on a percentage of sales, the tenant reasonably may be said to have covenanted impliedly to use good faith to continue using the premises for the purpose for which the premises were leased [*Lippman v. Sears, Roebuck & Co. (1955) 44 Cal. 2d 136, 142-143, 280 P.2d 775]* . For further discussion of this covenant, see *§ 332.50*.

[e] Use Restrictions in Residential Leases

A residential lease may limit use to residential uses [*Civ. Code § 1930*; *Chandler v. Hart (1911) 161 Cal. 405, 413, 119 P. 516]* . The remedies for breach are damages or rescission [*Civ. Code § 1930*]. For a form of allegations to use when a tenant breaches a covenant limiting the purposes for which leased premises may be used, see *§ 332.48*.

[4] Implied Covenant of Good Faith and Fair Dealing

There is an implied covenant in all leases that neither party will do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. This implied covenant of good faith and fair dealing not only imposes on each contracting party the duty to refrain from anything that would render performance of the contract impossible by any act of his or her own, but also imposes the duty to do everything that the contract presupposes will be done to accomplish its purposes [*McWilliams v. Holton (1967) 248 Cal. App. 2d 447, 451, 56 Cal. Rptr. 574]* .

For instance, it was appropriate to interpret a noncompetition clause in a lease so as to include additions to the shopping center to which it related, for to do otherwise would violate the implied covenant [*Edmond's of Fresno v. MacDonald Group, Ltd. (1985) 171 Cal. App. 3d 598, 605-608, 217 Cal. Rptr. 375]* . Also, it is a breach of the covenant for a

sublessor not to renew a master lease when the sublessor has contracted with the sublessee to renew the sublease on the same terms as the master lease [*Mitchell v. Exhibition Foods, Inc. (1986) 184 Cal. App. 3d 1033, 1043-1044, 229 Cal. Rptr. 535]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantTenant's Remedies & RightsConstructive EvictionReal Property LawLandlord & TenantTenant's Remedies & RightsWarranty of HabitabilityReal Property LawRestrictive CovenantsCovenants Running With Land

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§ 332.12 Assignment

[1] By Lessor

[a] In General

A person to whom any real property is transferred or devised, on which rent has been reserved, or to whom any such rent is transferred, is entitled to the same remedies for recovery of rent, for nonperformance of any of the lease's terms, or for any waste or cause of forfeiture, as his or her grantor or devisor might have had [*Civ. Code § 821*]. A right of reentry, or of repossession for breach of condition subsequent, can be transferred [*Civ. Code § 1046*].

[b] Tenant's Rights Against Assignee of Landlord

Whatever remedies the lessee of any real property may have against his or her immediate lessor for the breach of any agreement in the lease, he or she may have against the lessor's assignees. The lessee's assignees also have such remedies against the lessor and his or her assigns, except on covenants either against encumbrances or relating to the title or possession of the premises [*Civ. Code § 823*].

[2] By Lessee

[a] In General

In the absence of a contractual provision to the contrary, a lessee may assign his or her leasehold interest [*Kassan v. Stout (1973) 9 Cal. 3d 39, 43, 106 Cal. Rptr. 783, 507 P.2d 87]* . For a discussion of the right of an assignee of a general assignment for the benefit of creditors to occupy any business premises held under a lease by the assignor under *Civ. Code § 1954.1*, despite any contrary contractual provisions, see Ch. 307, *Insolvency* .

[b] Requirements

An assignment of a lease must transfer the entire term of the original lessee as to the entire premises or some part of the

premises. The term transferred must be for a period of time at least equal to the remainder of the original lease's term [*Barkhaus v. Producers' Fruit Co. (1923) 192 Cal. 200, 205-206, 219 P. 435* ; *Gilman v. Nemetz (1962) 203 Cal. App. 2d 81, 86, 21 Cal. Rptr. 317]* . If by the terms of the conveyance, whether in the form of a lease or an assignment, new conditions with a right of entry or new causes of forfeiture are created, then the tenant holds by different tenure and a new leasehold interest arises which is not an assignment [*Barkhaus v. Producers' Fruit Co. (1923) 192 Cal. 200, 206, 219 P. 435]* .

PRACTICE TIP:

No Assignment. Depending on the particular facts of a case, if a transfer does not qualify as an assignment it is not clear what the transfer is. Two possibilities that counsel could argue is that the transfer is a sublease or is totally ineffective. *By Myron Moskovitz*

[c] Presumption of Assignment

There is a presumption of an assignment that follows occupancy of the leased premises by one other than the lessee, especially when the occupant pays the rent and cost of maintenance [*Karbelnig v. Brothwell (1966) 244 Cal. App. 2d 333, 341, 53 Cal. Rptr. 335]* .

[d] Restrictions on Transfer

[i] Permitted in Commercial Lease

A commercial lease may include a restriction on transfer of the tenant's interest in the lease [*Civ. Code § 1995.210(a)*; *see Civ. Code § 1995.020(b)* ("lease" means a lease or sublease of real property for other than residential purposes)]. "Restriction on transfer" means a provision in a lease that restricts the right of transfer of the tenant's interest in the lease [*Civ. Code § 1995.020(c)*]. "Transfer" of a tenant's interest means an assignment, sublease, or other voluntary or involuntary transfer or encumbrance of all or part of a tenant's interest in a lease [*Civ. Code § 1995.020(e)*]. "Tenant" includes a subtenant or assignee [*Civ. Code § 1995.020(d)*]. Any ambiguity in a restriction on transfer must be construed in favor of transferability [*Civ. Code § 1995.220*].

A restriction on transfer may absolutely prohibit transfer [*Civ. Code § 1995.230*]. A restriction on transfer may provide that the transfer is subject to any express standard or condition, including but not limited to, a provision that the landlord is entitled to some or all of any consideration the tenant receives from a transferee in excess of the rent under the lease [*Civ. Code § 1995.240*]. A restriction on transfer may require the landlord's consent for transfer subject to any express standard or condition for giving or withholding consent, including but not limited to, the condition that the landlord's consent may not be unreasonably withheld or that the landlord's consent may be withheld subject to express standards or conditions [*Civ. Code § 1995.250*]. "Landlord" includes a tenant who is a sublandlord under a sublease [*Civ. Code § 1995.020(a)*].

[ii] Termination and Recapture Clause

Since restrictions on transfer are lawful and not limited in breadth, a commercial lease may include a termination and recapture clause. This type of clause provides that if the tenant gives notice of intent to assign or sublease, the landlord may terminate the lease and enter into a lease with the proposed sublessee or assignee to recapture an increase in rent [*Carma Developers (Cal.) Inc. v. Marathon Development California, Inc. (1992) 2 Cal. 4th 342, 351-371, 6 Cal. Rptr. 2d 467, 826 P.2d 710]* .

[iii] When No Standard for Landlord's Consent Is Specified

If a restriction on transfer of the tenant's interest in a lease, executed on or after September 23, 1983, requires the landlord's consent for transfer but provides no standard for giving or withholding consent, the restriction on transfer

must be construed to include an implied standard that the landlord's consent may not be unreasonably withheld. Whether the landlord's consent has been unreasonably withheld in a particular case is a question of fact on which the tenant has the burden of proof. The tenant may satisfy the burden of proof by showing that, in response to the tenant's written request for a statement of reasons for withholding consent, the landlord has failed, within a reasonable time, to state in writing a reasonable objection to the transfer [*Civ. Code §§ 1995.260, 1995.270(b)*].

If a restriction on transfer executed before September 23, 1983, requires the landlord's consent for the tenant's transfer but provides no standard for giving or withholding consent, the landlord's consent may be unreasonably withheld [*Civ. Code § 1995.270(b)*].

If the terms of a restriction on transfer are fixed by an option or other agreement, the restriction on transfer is deemed to be executed on the date of execution of the option or other agreement [*Civ. Code § 1995.270(b)*].

This statutory scheme was expressly enacted to overrule the cases of *Kendall v. Ernest Pestana, Inc. (1985) 40 Cal. 3d 488, 220 Cal. Rptr. 818, 709 P.2d 837* and *Cohen v. Ratinoff (1983) 147 Cal. App. 3d 321, 195 Cal. Rptr. 84* , which held that a lessor's consent to an assignment could not be unreasonably withheld. The Legislature stated that those decisions frustrated the expectations of the parties, with the result of impairing commerce and economic development, and that public policy was to enable and facilitate freedom of contract by the parties to commercial real property leases [*Civ. Code § 1995.270(a)*; *see Rancho Santa Paula Mobilehome Park, Ltd. v. Evans (1994) 26 Cal. App. 4th 1139, 1146 n.5, 32 Cal. Rptr. 2d 464]* .

[iv] When Lease Contains No Restriction on Transfer

When there is no restriction on transfer in the lease, a tenant has an unrestricted right of transfer [*Civ. Code § 1995.210(b)*].

[v] Effect of Assignment Without Consent

A restriction as to assignment is a covenant for the lessor's benefit; until he or she elects to take advantage of a breach as authorized by law, the assignment remains a valid and binding conveyance of the leasehold interest as to all other parties. Stated differently, assignments without the lessor's consent are merely voidable, not void [*People v. Klopstock (1944) 24 Cal. 2d 897, 901, 151 P.2d 641* ; *Weisman v. Clark (1965) 232 Cal. App. 2d 764, 767, 43 Cal. Rptr. 108]* . The lessor has the option to terminate the lease [*Civ. Code § 1995.320(b)*], or, ignoring the breach, to treat the lease as if it still existed [*Karbelnig v. Brothwell (1966) 244 Cal. App. 2d 333, 341, 53 Cal. Rptr. 335]* .

If the lessor elects to terminate, he or she must give notice of his or her intention [*Sexton v. Nelson (1964) 228 Cal. App. 2d 248, 258, 39 Cal. Rptr. 407]* , but merely giving notice of the invalidity of an assignment without a notice of termination is insufficient to forfeit a lease [*People v. Klopstock (1944) 24 Cal. 2d 897, 901, 151 P.2d 641* ; *Weisman v. Clark (1965) 232 Cal. App. 2d 764, 767, 43 Cal. Rptr. 108]* .

[vi] Waiver of Breach

A lessor waives a breach of a covenant not to assign if he or she has knowledge of the assignment and nevertheless accepts rent from the assignees month after month [*Miller v. Reidy (1927) 85 Cal. App. 757, 762, 260 P. 358]* . It is not enough that the lessor might have discovered the fact on inquiry [*German-American Sav. Bank v. Gollmer (1909) 155 Cal. 683, 691, 102 P. 932]* . Knowledge of the assignment must be actual and not constructive [*Weisman v. Clark (1965) 232 Cal. App. 2d 764, 769, 43 Cal. Rptr. 108]* . However, when the lessor relies on an express agreement in the lease against waiver of the right to assert a forfeiture and also gives notice that acceptance of the rent was not a consent to the assignment and acts promptly in filing a cause of action seeking a forfeiture of the lease, there is no waiver [*Karbelnig v. Brothwell (1966) 244 Cal. App. 2d 333, 341-342, 53 Cal. Rptr. 335]* . Moreover, the lessor will not be

deemed estopped to declare a forfeiture because of violating a lease provision against assignment without his or her consent if the landlord has been lulled by the lessee's evasion or false statements [*Weisman v. Clark (1965) 232 Cal. App. 2d 764, 769, 43 Cal. Rptr. 108]* .

[vii] Tenant's Remedies

If a restriction on transfer of a tenant's interest in a lease requires the landlord's consent for transfer subject to an express or implied standard that the landlord's consent may not unreasonably be withheld, and the landlord unreasonably withholds consent to a transfer, in addition to any other remedies provided by law for breach of the lease, the tenant has all the remedies provided for breach of contract, including but not limited to, (1) the right to contract damages caused by the landlord's breach or (2) the right to terminate the lease [*Civ. Code § 1995.310*].

[viii] Landlord's Remedies

If a tenant transfers the tenant's interest in a lease in violation of a restriction on transfer of a tenant's interest, in addition to any other remedies provided by law for breach of the lease, the landlord has all the remedies provided for breach of contract, including but not limited to, (1) the right to contract damages caused by the tenant's breach or (2) the right to terminate the lease [*Civ. Code § 1995.320*].

A remedy provided by law for violating the rights of the tenant or the landlord concerning transfer of the tenant's interest, including the remedies provided above, is subject to an express provision in the lease that affects the remedies and subject to any applicable defense, whether legal or equitable, including but not limited to waiver and estoppel [*Civ. Code § 1995.300*].

[ix] Rights Against Assignee

An assignee who receives or makes a transfer in violation of a restriction on transfer of a tenant's interest in a lease is jointly and severally liable with the tenant for contract damages. The provisions for measure of damage to the landlord in *Civ. Code § 1951.2* apply to an assignee [*Civ. Code § 1995.330(a)*].

The landlord's right to terminate a lease for a transfer in violation of a restriction includes the right to terminate a transfer without terminating the lease. If the landlord terminates a transfer without terminating the lease, the assignee or subtenant in possession is guilty of unlawful detainer and the landlord may obtain possession from the assignee or subtenant without terminating the tenant's right of possession. For this purpose, the unlawful detainer procedure may be used with changes necessary to make the procedure applicable [*Civ. Code § 1995.330(b)*].

Eviction of the assignee without terminating the tenant's right of possession would be used when the landlord wants to continue the tenant's liability for rent and seeks to recover rent as it becomes due under *Civ. Code § 1951.4*.

[x] Subsequent Transfer

A restriction on transfer of a tenant's interest in a lease applies to a subsequent transfer by a tenant, an assignee, or a subtenant notwithstanding the landlord's consent to a prior transfer or the landlord's waiver of a standard or condition for a prior transfer [*Civ. Code § 1995.340(a)*]. However, the above provision is not applicable if the lease provides expressly that the restriction on transfer is limited to the original tenant or the landlord states in writing that the consent or waiver applies to a subsequent transfer [*Civ. Code § 1995.340(b)*].

[e] Effect on Lessee-Assignor

By an assignment, the lessee transfers all of his or her title and interest in the leasehold estate and retains no reversionary interest or right of reentry [*Flynn v. Mikelian (1962) 208 Cal. App. 2d 305, 310, 25 Cal. Rptr. 138]* . The

assignor's privity of estate is thereby ended, although ordinarily his or her contractual obligations to the lessor are not released even though the lessor consents to the assignment and the assignee expressly assumes the obligations of the lease [*De Hart v. Allen (1945) 26 Cal. 2d 829, 832, 161 P.2d 453* ; *Flynn v. Mikelian (1962) 208 Cal. App. 2d 305, 310, 25 Cal. Rptr. 138]* .

For example, an obligation to pay rent, without an express agreement, arises from the mere occupancy as tenant of the premises. A lessee who has not agreed to pay rent is, by his or her transfer to an assignee with the landlord's consent, relieved of any further obligation to pay rent. This obligation is thereafter on the assignee who has come into privity of estate with the landlord. But when the lessee has expressly agreed to pay rent, his or her liability under the contract remains, notwithstanding an assignment with the lessor's consent [*Samuels v. Ottinger (1915) 169 Cal. 209, 211, 146 P. 638* ; *but see Meredith v. Dardarian (1978) 83 Cal. App. 3d 248, 252, 147 Cal. Rptr. 761* (questioning decision in *Samuels*)].

Conduct on the assignee's part can result in a surrender or abandonment of the premises. An assignor has no interest in the premises that he or she can exercise in the event of such an abandonment, and he or she cannot prevent the original lessor from terminating the lease [*Flynn v. Mikelian (1962) 208 Cal. App. 2d 305, 311-312, 25 Cal. Rptr. 138]* .

Ordinarily, the lessee-covenantee of a covenant running with the land is not entitled to enforce the covenant following the transfer of the benefited property [*Maron v. Howard (1968) 258 Cal. App. 2d 473, 484-485, 66 Cal. Rptr. 70* (dictum)].

[f] Effect on Assignee

After an assignment, there is privity of estate between the lessor and the assignee [*Flynn v. Mikelian (1962) 208 Cal. App. 2d 305, 310, 25 Cal. Rptr. 138]* . An assignee is therefore liable for all covenants running with the land [*see First Nat'l Bank of Oroville v. Aldridge (1939) 33 Cal. App. 2d 485, 490, 92 P.2d 674]* . But an assignee of a lease who does not assume the obligations is not bound by the contractual obligations of the lease [*Ellingson v. Walsh, O'Connor & Barneson (1940) 15 Cal. 2d 673, 676, 104 P.2d 507]* .

An assignee is not liable for installments of rent that become due before the assignment. However, the assignee is personally liable for rents that accrue while he or she is in possession, even though the month or other period for which the rent is owed began before he or she took possession [*First Nat'l Bank of Oroville v. Aldridge (1939) 33 Cal. App. 2d 485, 491-492, 92 P.2d 674]* .

The assignment of a lease transfers to the assignee the right to enforce every unbroken covenant that the lease contains. The exceptions to this rule are stated in *Civ. Code § 823*, which provides that accrued remedies for already-ripened breaches of covenants either against encumbrances or relating to the title or possession of the premises do not pass to the assignee; instead, they remain with the original lessee. However, neither of these two statutory exceptions has any reference to breaches of the lease that have not occurred nor to remedies that have not arisen before the assignment of the lease [*Standard Livestock Co. v. Pentz (1928) 204 Cal. 618, 629-630, 269 P. 645]* .

[g] Lessor's Remedies Against Lessee's Assignee

Whatever remedies the lessor of any real property has against his or her immediate lessee for the breach of any agreement in the lease or for recovery of possession, he or she also has against the assignees of the lessee; this rule applies to any cause of action accruing while they are such assignees, except when the assignment is made by way of security for a loan, and is not accompanied by possession of the premises [*Civ. Code § 822*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsAssignments

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§ 332.13 Subleases

[1] Distinguished From Assignments

The transfer of all of a lessee's interest in a lease is an assignment, while the transfer of a portion of the lessee's interest is a sublease [*Reed v. South Shore Foods, Inc. (1964) 229 Cal. App. 2d 705, 710, 40 Cal. Rptr. 575]* .

If the transfer is an assignment, the transferee comes into privity of estate with the original lessor and the transferor is not the landlord of his or her transferee. When the transfer is a sublease, the transferor becomes the landlord, the transferee the subtenant, and the latter is not in privity with the head lessor. Sublessees have no right to any option given by the lease, while assignees may enforce such an obligation of the lessor [*Ablett v. Clauson (1954) 43 Cal. 2d 280, 283, 272 P.2d 753]* .

[2] Sublessee's Duties and Rights

It is the duty of a person contracting for a sublease to ascertain the provisions of the original lease. A subtenant is charged with notice of the existence of the original lease and is bound by its terms and conditions [*Pedro v. Potter (1926) 197 Cal. 751, 760, 242 P. 926]* .

The right of a sublessee to possession of the premises as against the original lessor terminates with the lease or term of the original lessee. Since a subtenant holds the premises subject to the performance of the terms and conditions impressed on the estate by the provisions of the original lease, his or her rights are generally held to be terminated when the original lessor declares a forfeiture of the original lessee's term based on the latter's nonperformance of obligations imposed on him or her [*Scott v. Mullins (1962) 211 Cal. App. 2d 51, 55, 27 Cal. Rptr. 269]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsSubleases

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§ 332.14 Publicly-Subsidized Private Housing

[1] In General

A public body does not possess the same freedom of action as a private landlord. It may not discriminate arbitrarily between persons and classes either in leasing its premises or in continuing the occupancy of existing tenants [*Housing Authority of Los Angeles v. Cordova (1955) 279 P.2d 215]* . It is also forbidden from making the privilege of continuance dependent on conditions that would deprive any of its citizens of their constitutional rights [*Housing Authority of Los Angeles v. Cordova (1955) 130 Cal. App. 2d Supp. 883, 279 P.2d 215]* .

A tenant in a federally subsidized housing project may not be evicted without prior notice and proof of good cause [*Appel v. Beyer (1974) 39 Cal. App. 3d Supp. 7, 15, 114 Cal. Rptr. 336]* . However, what constitutes "good cause" for eviction in a given case depends on the facts perceived in relation to the purposes of the relevant housing law and the posture of the affected parties [*Appel v. Beyer (1974) 39 Cal. App. 3d Supp. 7, 19, 114 Cal. Rptr. 336]* .

Similarly, a tenant in a state-subsidized housing project may not be evicted without notice and proof of good cause as defined by the rules and regulations of the California Housing Finance Agency. In addition, a tenant is entitled to request a hearing, held in accordance with procedures established by the agency, at which good cause for eviction must be established by the weight of the evidence [*Health & Safety Code § 51066*].

[2] Transitional Housing Programs: Definitions

Under the Transitional Housing Participant Misconduct Act, operative July 1, 1992, a transitional housing program is defined as any program that is designed to assist homeless persons in obtaining skills necessary for independent living in permanent housing, and that has all of the following components [*Health & Safety Code § 50582(g)*]:

- Comprehensive social service programs that include regular, individualized case management services and that may include alcohol and drug abuse counseling, self-improvement education, employment and training assistance services, and independent living skills development;

- Use of a program unit as a temporary housing unit in a structured living environment, which use is conditioned on compliance with the transitional housing program rules and regulations; and

- A rule or regulation that specifies an occupancy period of not less than 30 days, but not more than 24 months.

Abuse of the transitional housing program is defined as intentionally or recklessly causing or attempting to cause bodily injury, or sexual assault or placing another person in reasonable apprehension of imminent serious bodily injury to himself, herself, or another, if the injured person is another participant, program operator's staff, or a person residing within 100 feet of the program site [*Health & Safety Code § 50582(a)*].

Program misconduct is defined as any intentional violation of the program's rules that [*Health & Safety Code § 50582(d)*]:

- Substantially interferes with the orderly operation of the transitional housing program; and

- Relates to drunkenness on the program site, unlawful use or sale of controlled substances, theft, arson, or destruction of the property of the program operator, persons living within 100 feet of the program site, program employees, or other participants; or

- Relates to violence or threats of violence, and harassment of persons living within 100 feet of the program site, program employees, or of other participants.

[3] Injunction Against Abuse of Program or Program Misconduct

Under the Transitional Housing Participant Misconduct Act, operative July 1, 1992, the operator of a transitional housing program for the benefit of homeless persons may seek, on its own behalf or on behalf of other participants, project employees, or persons residing within 100 feet of the program site, a temporary restraining order and an injunction prohibiting abuse or program misconduct [*Health & Safety Code § 50585(a)*].

The Act specifies procedures for filing a petition for an injunction [*Health & Safety Code § 50585(b)*] and hearing within five days of the filing of the petition [*Health & Safety Code § 50585(c)*]. Any willful disobedience of any temporary restraining order or injunction granted under the Act is a misdemeanor under *Penal Code § 166* [*Health & Safety Code § 50586(b)*].

The Judicial Council is required to promulgate forms and related instructions to implement the procedures required by the Act [*Health & Safety Code § 50588*].

[4] Recovery of Dwelling Unit

The Act specifies procedures for recovering the participant's dwelling unit on issuance of an order excluding the participant from the program site [*Health & Safety Code §§ 50590, 50591*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare LawHousing & Public BuildingsLow Income Housing

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A. Rights and Duties During the Tenancy

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[Reserved]

§§ 332.15[Reserved]

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29-332 California Forms of Pleading and Practice--Annotated § 332.20

§ 332.20 Method of Termination Depends on Type of Tenancy

[1] Tenancy at Will

A tenancy or other estate at will, however created, may be terminated by the landlord giving notice in writing to the tenant, in the manner prescribed by *Code Civ. Proc. § 1162*, to remove from the premises within a period of not less than 30 days, as specified in the notice [*Civ. Code § 789*; *see Civ. Code § 1946*].

[2] Periodic Tenancy

A hiring of real property, for a term not specified by the parties, is deemed to be renewed as stated in *Civ. Code § 1945* at the end of the term implied by law unless one of the parties gives written notice to the other of an intention to terminate the tenancy, before the expiration of the term of the hiring itself, not exceeding 30 days [*Civ. Code § 1946*]. However, notwithstanding *Civ. Code § 1946*, an owner must give notice at least 60 days before the proposed date of termination, unless one of the following circumstances applies, in which case 30 days' notice is required [*Civ. Code § 1946.1(b)-(e)*]:

- The tenant has lived in the dwelling for less than one year; or

- The dwelling or unit is alienable separate from the title to any other dwelling unit; the owner has contracted to sell the dwelling or unit to a bona fide purchaser for value, and has established an escrow with a licensed escrow agent or a licensed real estate broker; the purchaser is a natural person or persons; the notice is given not more than 120 days before escrow is established; notice was not previously given to the tenant pursuant to *Civ. Code § 1946.1*; and the purchaser in good faith intends to reside in the property for at least one full year after the tenancy's termination.

As to a tenancy from month-to-month, either of the parties may terminate by giving at least 30 days' written notice of termination at any time and the rent is due and payable to and including the date of termination.The parties may provide by agreement at the time the tenancy is created that a notice of the intention to terminate the tenancy may be given at any time not less than seven days before the expiration of the term thereof [*Civ. Code § 1946*].

The notice required by *Civ. Code §§ 1946* and *1946.1* is required to be given in the manner prescribed in *Code Civ. Proc. § 1162* or by sending a copy of the notice by certified or registered mail addressed to the other party. *Civ. Code § 1946* also provides that the lessee may give the notice by sending a copy by certified or registered mail addressed to the agent of the lessor to whom the lessee has paid the rent for the month before the date of the notice or by delivering a copy to the agent personally [*Civ. Code § 1946*].

PRACTICE TIP:
Warning! *Civ. Code § 1946* may not be used to change the terms of a tenancy. *By Benjamin Kaplan*

A periodic tenancy is also terminated by the tenant's death [*Miller & Desatnik Management Co. v. Bullock (1990) 221 Cal. App. 3d Supp. 13, 16-18, 270 Cal. Rptr. 600]* .

[3] Tenancy for Fixed Term

A tenancy for a fixed term expires automatically at the end of the lease term [*Ryland v. Appelbaum (1924) 70 Cal. App. 268, 270, 233 P. 356]* . There is no need for the landlord to serve notice on the tenant at the end of the lease term [*Camp v. Matich (1948) 87 Cal. App. 2d 660, 665, 197 P.2d 345]* .

[4] Tenancy by Active Duty Service Members

[a] Special Notice Provisions

In 2002, the state Legislature enacted special protections for officers and enlisted members of the National Guard called or ordered into active state or federal service and reservists of the United States Military Reserve who have been called to full-time active service or duty [Stats. 2000, ch. 60, § 1; *Mil. & Vet. Code § 400 et seq.*]. The legislation establishes special notice provisions for the termination of leases by active service members and reservists. The provisions apply to any lease covering premises occupied for dwelling, professional, business, agricultural, or similar purposes in any case in which the lease was executed by or on the behalf of a person who, after the execution of the lease, entered military service [*Mil. & Vet. Code § 409(a)*]. Any such lease may be terminated by notice in writing delivered to the lessor or to the lessor's agent by the lessee at any time following the date of the beginning of the period of military service [*Mil. & Vet. Code § 409(b)*]. Delivery of this notice may be accomplished by mailing it to the lessor or to the lessor's agent [*Mil. & Vet. Code § 409(b)*].

For a form of a notice terminating a lease by a member of a military service, as well as coverage of the statutory eligibility requirements, see *§ 332.71A*.

[b] Effective Date of Termination

Termination of any lease providing for monthly payment of rent will be effective on the last day of the month following notice and not more than 45 days after notice is provided to the lessor [*Mil. & Vet. Code § 409(b)*]. In the case of all other leases, termination will be effected on the last day of the month following the month in which the notice is delivered or mailed. In that case, any unpaid rent for a period preceding termination will be prorated and any rent paid in advance for a period succeeding termination must be refunded by the lessor [*Mil. & Vet. Code § 409(b)*]. On application by the lessor before the termination period provided for in the notice, a court may modify or restrict any relief granted under the statute [*Mil. & Vet. Code § 409(b)*].

[c] Penal Provisions

Any person who knowingly seizes, holds, or detains the personal effects, clothing, furniture, or other property of any person who has lawfully terminated a lease covered by these provisions, or in any manner interfered with the removal of

property from the premises covered by the lease for the purpose of subjecting or attempting to subject any of the property to a claim for rent accruing after the date of the lease's termination, or attempts to do so, is guilty of a misdemeanor [*Mil. & Vet. Code § 409(c)*].

[d] Dependents of Service Members

Dependents of service members are also entitled to these benefits unless the court finds that the dependents' ability to comply with the terms of the obligation has not been materially impaired by the military service of the person on whom the applicants are dependent [*Mil. & Vet. Code § 414*].

[e] Effective Date of Legislation

These provisions apply to service members on active service or duty since September 11, 2001. However, the protections apply prospectively from June 20, 2002 (date bill was signed into law) [*Mil. & Vet. Code § 420*].

[5] Property in Foreclosure

Notwithstanding the unlawful detainer provisions of *Code Civ. Proc. § 1161a* [*see* Ch. 333, *Landlord and Tenant: Eviction Actions*], a tenant or subtenant in possession of a rental housing unit at the time the property is sold in foreclosure must be given 60 days' written notice to quit pursuant to *Code Civ. Proc. § 1162* [*see § 332.70* (form)] before the tenant or subtenant may be removed from the property through unlawful detainer proceedings [*Code Civ. Proc. § 1161b(a)*]. However, this notice requirement does not apply if any party to the note remains in the property as a tenant, subtenant, or occupant [*Code Civ. Proc. § 1161b(b)*]. Section 1161b is in effect until January 1, 2013 [*Code Civ. Proc. § 1161b(c)*].

In 2009, Congress established a 90-day notice requirement in the Protecting Tenants at Foreclosure Act [P.L. 111-22, S. 896]. This requirement applies to any foreclosure on a federally related mortgage loan or on any dwelling or residential real property after May 20, 2009 [P.L. 111-22, § 702, 123 Stats. 1660-1661; *see also* P.L. 111-22, § 703, 123 Stats. 1661, amending *42 U.S.C. § 1437f(o)(7)* (following foreclosure, successor in interest may terminate Section 8 tenancy on 90 days' notice if owner will occupy property as primary residence)]. The Act provides that any immediate successor in interest in the property pursuant to the foreclosure assumes that interest subject to the rights of any bona fide tenant as of the date of the notice of foreclosure, under any bona fide lease entered into before the notice of foreclosure, to occupy the premises until the end of the remaining term of the lease [P.L. 111-22, § 702(a)(2), 123 Stats. 1661]. However, a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of a 90-day notice to vacate [P.L. 111-22, § 702(a)(2), 123 Stats. 1661].

A lease or tenancy is considered bona fide if (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant; (2) the lease or tenancy was the result of an arms-length transaction; and (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a federal, state, or local subsidy [P.L. 111-22, § 702(b), 123 Stats. 1661]. These provisions are repealed on December 31, 2012 [P.L. 111-22, § 704, 123 Stats. 1662].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantTenanciesPeriodic TenanciesReal Property LawLandlord & TenantTenanciesTenancies at WillReal Property LawLandlord & TenantTenanciesTerm Tenancies

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§ 332.21 Option to Terminate

The lease may include a provision allowing one of the parties to terminate the lease. Usually the option arises on the occurrence of some event, but the option is valid if the lease states that it can be exercised at any time during the lease term after the requisite notice and without cause. The language must be unequivocal because courts prefer to avoid forfeitures [*see McNeece v. Wood (1928) 204 Cal. 280, 284, 267 P. 877* ; *O'Connor v. West Sacramento Co. (1922) 189 Cal. 7, 11-12, 207 P. 527* ; *Wagner v. Shapona (1954) 123 Cal. App. 2d 451, 461, 267 P.2d 378]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsLease Provisions

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29-332 California Forms of Pleading and Practice--Annotated § 332.22

§ 332.22 Death of Nursing or Convalescent Home Inmate

With regard to agreements executed on or after January 1, 1979, for accommodations from month-to-month in a nursing or convalescent home, the agreements terminate on the death of the person (patient) by or for whom it was made. Neither this person's estate nor his or her heirs, legatees, or personal representatives can be liable for any rent due for the accommodations beyond the rent due as of the date of death (because this is the date the agreement terminates); no advance payment of rent, in excess of what is due on that date, may be claimed or retained by the nursing or convalescent home but, rather, must be paid to the heirs, legatees, and/or personal representative of the decedent within two weeks after the date of death. A waiver of these rights on the part of the decedent (patient) is void as contrary to public policy [*Civ. Code § 1934.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing FacilitiesReal Property LawLandlord & TenantTenanciesPeriodic Tenancies

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§ 332.23 Effect of Termination of Tenancy

A tenant's rights in leased property end on the date of the lease's termination [*Hart v. Fuller (1920) 45 Cal. App. 618, 620, 188 P. 611]* . Although a tenant may be liable for rent unpaid at that time, he or she is no longer liable for future rent payments [*Space Properties, Inc. v. Tool Research Co. (1962) 203 Cal. App. 2d 819, 825-826, 22 Cal. Rptr. 166]* . However, if a tenancy is terminated because of the tenant's breach of lease, the tenant may be liable for future rent under *Civ. Code § 1951.2*.

A tenant must surrender the property to the landlord on termination of the tenancy [*Commissioners v. Barnard (1893) 98 Cal. 199, 202, 32 P. 982]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & Terminate

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29-332 California Forms of Pleading and Practice--Annotated § 332.24

§ 332.24 Surrender and Abandonment

[1] Distinguished

A surrender of the premises may be accomplished either by the express agreement of the parties or by operation of law [*Martin v. Cassidy (1957) 149 Cal. App. 2d 106, 111, 307 P.2d 981]* . A true voluntary surrender by consent of the parties requires that the landlord and tenant agree to extinguish all liabilities as between themselves arising out of the tenancy, including any further liability for rent [*Steel v. Thompson (1922) 59 Cal. App. 191, 192, 210 P. 430]* . A surrender by operation of law arises when the parties to the lease commit acts so inconsistent with the existing relation of landlord and tenant as to imply that they have both agreed to a surrender [*Triest & Co. v. Goldstone (1916) 173 Cal. 240, 243, 159 P. 715]* . If an effective surrender has occurred, the tenant has no further liability for rent [*Welcome v. Hess (1891) 90 Cal. 507, 512-513, 27 P. 369]* .

An abandonment takes place when the tenant leaves the premises vacant with the avowed intention not to be bound by the lease [*Kassan v. Stout (1973) 9 Cal. 3d 39, 43, 106 Cal. Rptr. 783, 507 P.2d 87* ; *see Flynn v. Mikelian (1962) 208 Cal. App. 2d 305, 310, 25 Cal. Rptr. 138]* . It is the voluntary giving up of a thing by the tenant because he or she no longer desires to possess it or assert any right or dominion over it and is entirely indifferent as to what may become of it or as to whom may thereafter possess it [*Kassan v. Stout (1973) 9 Cal. 3d 39, 43, 106 Cal. Rptr. 783, 507 P.2d 87]* .

Abandonment is distinguished from surrender by the fact that in a surrender the tenant returns possession of the property to the landlord, either with his or her consent or by operation of law, whereas in an abandonment, there is no return of possession [*see Martin v. Cassidy (1957) 149 Cal. App. 2d 106, 111, 307 P.2d 981]* .

[2] Intent

Abandonment is a question of intention to be determined only on an investigation of all the facts and circumstances [*Boral v. Caldwell (1963) 223 Cal. App. 2d 157, 162, 35 Cal. Rptr. 689]* . To constitute an abandonment, the tenant's acts must clearly indicate a desire to relinquish all rights in and possession of the property [*Martin v. Cassidy (1957) 149 Cal. App. 2d 106, 110, 307 P.2d 981]* . Moreover, the tenant need never have been in actual possession; it is

sufficient that he or she had the unqualified right to possession [*Bernard v. Renard (1917) 175 Cal. 230, 234, 165 P. 694]* .

[3] Common Law Remedies

Leases either executed before July 1, 1971, or whose terms were fixed by an agreement executed before that date, are subject to the common-law remedies relevant to surrender or abandonment by the tenant [*see Civ. Code § 1952.2*].

Under the common law, and in situations involving leases executed after July 1, 1971, in which the landlord has not properly exercised the statutory remedy, a landlord has three remedies on surrender or abandonment of possession by a tenant before the expiration of the lease term.

First, the landlord may consider the lease as still in existence and sue for the unpaid rent either as it becomes due for the unexpired portion of the rental term or for the entire amount at the end of the term [*Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 671* ; *Dorcich v. Time Oil Co. (1951) 103 Cal. App. 2d 677, 683, 230 P.2d 10]* .

As a second alternative, the landlord can treat the lease as terminated and retake possession for his or her own account [*Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 671, 155 P.2d 24* ; *Dorcich v. Time Oil Co. (1951) 103 Cal. App. 2d 677, 683, 230 P.2d 10]* .

As the third alternative, the landlord can retake possession for the tenant's account and relet the premises, holding the tenant liable for the difference between the amount due under the original lease and the amount that the landlord is able to procure in good faith by reletting [*Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 671, 155 P.2d 24* ; *Dorcich v. Time Oil Co. (1951) 103 Cal. App. 2d 677, 683, 230 P.2d 10]* . If the landlord chooses to follow this alternative, it is crucial that he or she notify the tenant of his or her intent before the reletting. Failure to give notice results in a surrender and precludes the landlord from collecting any damages based on reletting at a lower rental [*Ace Realty Co. v. Friedman (1951) 106 Cal. App. 2d 805, 814, 236 P.2d 174]* . However, if there has been an assignment of the lease, the landlord need only notify the original tenant, not the assignee, to hold the original tenant liable for the breach [*De Hart v. Allen (1945) 26 Cal. 2d 829, 832, 161 P.2d 453]* .

When the landlord elects to retake possession for the tenant's account and relet the premises, the right of action for damages still does not accrue until the end of the term [*De Hart v. Allen (1945) 26 Cal. 2d 829, 833, 161 P.2d 453]* , and any action brought before the expiration of the term of the original lease is prematurely brought [*Treff v. Gulko (1932) 214 Cal. 591, 594, 7 P.2d 697* ; *but see B.K.K.Co. v. Schultz (1970) 7 Cal. App. 3d 786, 791, 86 Cal. Rptr. 760]* . If a landlord is unable to relet the premises for any portion of the term, the entire balance of the rent is the measure of damage [*B.K.K. Co. v. Schultz (1970) 7 Cal. App. 3d 786, 791, 86 Cal. Rptr. 760]* .

[4] Statutory Rules

[a] Termination of Lease

In 1970, the Legislature made important changes in the common-law rules applicable to abandonment and termination of leases [*see Civ. Code §§ 1951-1952.6*], the most significant of which is that a lease now terminates automatically on abandonment by the tenant [*see Civ. Code § 1951.2*].

[b] Usual Remedy

Except as provided in *Civ. Code § 1951.4* (rights of tenant under lease), if a tenant of real property breaches the lease and abandons the property before the end of the term or if the right to possession is terminated by the landlord because of a breach of the lease, the lease terminates. On such termination, the landlord may recover from the tenant [*Civ. Code § 1951.2(a)*]:

- The worth at the time of award of the unpaid rent that had been earned at the time of termination;

- The worth at the time of award of the amount by which the unpaid rent, which would have been earned after termination until the time of award, exceeds the amount of such rental loss that the tenant proves could have been reasonably avoided;

- Subject to *Civ. Code § 1951.2(c)*, the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss that the tenant proves could be reasonably avoided; and

- Any other amount necessary to compensate the landlord for all the detriment proximately caused by the tenant's failure to perform his or her obligations under the lease or that, in the ordinary course of things, would be likely to result therefrom.

PRACTICE TIP:

Lease Must So Provide. It has been this practitioner's experience that to recover the above amounts, the lease must specifically provide that these amounts are recoverable (despite the fact that *Civ. Code § 1951.2* does not specifically state this). *By Benjamin Kaplan*

PRACTICE TIP: When Remedy Is Valuable. The "worth at the time of award" remedy is usually valuable only in a falling market, that is, when the current market rental value of the property is less than the rent the tenant agreed to pay. When the market is rising, this remedy usually gives nothing to the landlord. Even here, however, the landlord is still entitled to his or her expenses in reletting the property, including advertising, brokerage fees, renovation costs, and the like, under *Civ. Code § 1951.2(a)(4)*. These might be substantial and worth suing for in themselves. *By Myron Moskovitz*

For purposes of the above provisions, the "time of award" means the time of the judgment for damages, not the time of the prior unlawful detainer judgment restoring possession of the property [*California Safety Center, Inc. v. Jax Car Sales (1985) 164 Cal. App. 3d 992, 996-999, 211 Cal. Rptr. 39]* .

The right to damages under *Civ. Code § 1951.2* does not depend on a termination of possession but depends only on a termination of the right to possession. If the tenant is given a three-day notice to quit but stays in possession thereafter by agreement and then abandons the premises, the landlord is still entitled to damages for the remainder of the lease term [*Walt v. Superior Court (1992) 8 Cal. App. 4th 1667, 1672-1678, 11 Cal. Rptr. 2d 278]* .

The general principles governing mitigation of damages apply in determining what constitutes a rental loss that could reasonably be avoided [Leg. Comm'n Comment to *Civ. Code § 1951.2*]. Therefore, the court will consider whether the landlord acted reasonably to mitigate damages [*see* *Green v. Smith (1968) 261 Cal. App. 2d 392, 396, 67 Cal. Rptr. 796]* . If the landlord did act reasonably, it is irrelevant if alternative measures would have further reduced his or her damages [*Green v. Smith (1968) 261 Cal. App. 2d 392, 398, 67 Cal. Rptr. 796]* . Further, in mitigating damages, a landlord is not required to consider renegotiating another lease with the defaulting tenant even if the tenant offers terms that could result in avoidance of loss [*Zanker Development Co. v. Cogito Systems, Inc. (1989) 215 Cal. App. 3d 1377, 1381-1382, 264 Cal. Rptr. 76]* .

If the premises are leased to a third party after the tenant abandons, the amount by which the rent payable under the new lease exceeds the amount of rental loss for the balance of term under the abandoned lease must be considered in the damage award. If the amount of rent under the new lease exceeds the lost rent under the old lease and other consequential damages, the landlord has not been damaged and may not recover damages. If the rent under the new lease does not exceed the landlord's losses but is greater than the rent under the abandoned lease, the increase must be

offset against the landlord's damages [*Willis v. Soda Shoppes of California Inc. (1982) 134 Cal. App. 3d 899, 902-905, 184 Cal. Rptr. 761]* .

[c] Effect of Agreement

The provisions of *Civ. Code § 1951.2* do not preclude an enforceable agreement between the landlord and the tenant that the tenant will vacate the premises and not be liable for further rent. Nor do the provisions of *Civ. Code § 1951.2* preclude the landlord from intentionally waiving or being estopped from collecting rent after the tenant vacates. *Civ. Code § 1951.2* is only designed to prevent the unintentional waiver of the right to collect future rent by attempts to mitigate damages [*Desert Plaza Partnership v. Waddell (1986) 180 Cal. App. 3d 805, 811-814, 225 Cal. Rptr. 775]* .

[d] Interest

The "worth at the time of award" of the amount referred to in *Civ. Code § 1951.2(a)(1), (2)* is computed by allowing interest at such lawful rate as may be specified in the lease or, if no such rate is specified in the lease, at the legal rate. The "worth at the time of award" of the amount referred to in *Civ. Code § 1951.2(a)(3)* is computed by discounting such amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of award, plus 1 percent [*Civ. Code § 1951.2(b)*].

[e] Prerequisites to Recovering Damages

The landlord may recover damages under *Civ. Code § 1951.2(a)(3)* only under the following conditions [*Civ. Code § 1951.2(c)*]:

- The lease provides that the damages he or she may recover include the worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award, or for any shorter period of time specified in the lease, exceeds the amount of such rental loss for the same period that the tenant proves could be reasonably avoided; or

- The landlord relet the property before the time of award and proves that in reletting the property he or she acted reasonably and in a good-faith effort to mitigate the damages, but the recovery of damages under this is subject to any limitations specified in the lease.

[f] Mitigation as Not Waiving Right to Damages

Efforts by the landlord to mitigate the damages caused by the tenant's breach of the lease do not waive the landlord's right to recover damages under *Civ. Code § 1951.2* [*Civ. Code § 1951.2(d)*].

Following abandonment, the landlord's sale of the property does not constitute breach of the duty to mitigate, provided the trier of fact finds a sale to be a reasonable means to avoid further loss of rental revenue [*Millikan v. American Spectrum Real Estate Services California, Inc. (2004) 117 Cal. App. 4th 1094, 1100, 12 Cal. Rptr. 3d 459]* . The landlord retains the right to claim rental loss accruing after the date of sale, except to the extent the breaching tenant can prove the rental loss was avoidable, together with consequential damages including the landlord's selling expenses [*Millikan v. American Spectrum Real Estate Services California, Inc. (2004) 117 Cal. App. 4th 1094, 1104, 12 Cal. Rptr. 3d 459]* .

A landlord who operated a gas station after it was abandoned by the tenants, and turned a profit, was not precluded from seeking damages under *Civ. Code § 1951.2*. The trial court had entered judgment for the tenants in spite of their breach, finding that the landlord suffered no damages because she and her husband occupied the premises after unsuccessfully attempting to re-lease it, managed to run the business at a profit, and mitigated damages well above the amount of damages owed by the tenants. The court of appeal reversed, holding that the proper measure of mitigation credit was the

property's fair market rental value. It reasoned that a tenant's right not to pay damages for rent that he or she proves could have been earned had the property been re-leased at fair market value does not convert a landowner's ability to successfully run a business into an offset against the tenant's breach [*Lu v. Grewal (2005) 130 Cal. App. 4th 841, 849-850, 30 Cal. Rptr. 3d 623]* .

[g] Indemnification

Nothing in *Civ. Code § 1951.2* affects the landlord's right under a lease of real property to indemnification for liability arising before the lease's termination for personal injuries or property if the lease provides for such indemnification [*Civ. Code § 1951.2(e)*].

[h] Continuation of Lease

Under *Civ. Code § 1951.4*, even though a tenant of real property has breached his or her lease and abandoned the property, the lease continues in effect for so long as the landlord does not terminate the tenant's right to possession, and the landlord may enforce all rights and remedies under the lease, including the right to recover the rent as it becomes due under the lease, if any of the following conditions are satisfied [*Civ. Code § 1951.4(b)*]:

- The lease permits the tenant, or does not prohibit or otherwise restrict the tenant's right, to sublet the property, assign the tenant's interest in the lease, or both.

- The lease permits the tenant to sublet the property, assign the tenant's interest in the lease, or both, subject to express standards or conditions, provided the standards and conditions are reasonable at the time the lease is executed and the landlord does not require compliance with any standard or condition that has become unreasonable at the time the tenant seeks to sublet or assign. For this purpose, an express standard or condition is presumed to be reasonable; this presumption is a presumption affecting the burden of proof.

- The lease permits the tenant to sublet the property, assign the tenant's interest in the lease, or both, with the landlord's consent, and the lease provides that the consent must not be unreasonably withheld or the lease includes a standard implied by law that consent must not be unreasonably withheld.

A landlord may utilize the remedies described above only if the lease so provides. In addition to any other type of provision used in a lease to provide for this remedy, a provision in a lease in substantially the following form is sufficient [*Civ. Code § 1951.4(a)*]:

> The lessor has the remedy described in *Civ. Code § 1951.4* (lessor may continue lease in effect after lessee's breach and abandonment and recover rent as it becomes due, if lessee has right to sublet or assign, subject only to reasonable limitations).

PRACTICE TIP:

Rent as It Becomes Due vs. Worth at Time of Award. This remedy, suing periodically for the rent as it comes due, seems expensive and time-consuming compared to the worth at the time of award remedy. Nevertheless, it might be preferable in situations when it is difficult and expensive to prove the worth at the time of award. In small retail tenancies for relatively short terms, for example, it might cost more in expert witness fees to prove the worth than the recovery would justify. Here, the *Civ. Code § 1951.4* remedy might be preferable. However, this remedy is not available unless the lease provides for it, so if you are representing the landlord, be sure to put it in the lease to keep your client's options open. *By Myron Moskovitz*

For the purposes of *Civ. Code § 1951.4(b)*, the following do not constitute a termination of the tenant's right to

possession [*Civ. Code § 1951.4(c)*]:

- Acts of maintenance or preservation or efforts to relet the property;

- The appointment of a receiver on the landlord's initiative to protect the landlord's interest under the lease; or

- Withholding consent to a subletting or assignment, or terminating a subletting or assignment, if the withholding or termination does not violate the tenant's rights.

[i] Leases Not Covered by Statutory Remedies

The statutory rules concerning abandonment apply to all leases, subleases, or lease agreements except for the following:

- Any lease executed before July 1, 1971 [*Civ. Code § 1952.2(a)*].

- Any lease executed on or after July 1, 1971, if the lease's terms were fixed by a lease, option, or other agreement executed before July 1, 1971 [*Civ. Code § 1952.2(b)*].

- An agreement for the removal of or exploration for natural resources [*Civ. Code § 1952.4*].

- A lease or agreement for lease for real property between a public entity and a nonprofit corporation that issues tax-free bonds for acquisition or improvement of the property, whose title or interest in the property is subject to a reversion or vesting in a public entity, unless the lease specifies that the statute applies [*Civ. Code § 1952.6*].

- A lease or agreement to lease between any public entity and any other public entity, unless the lease or agreement specifically provides to the contrary [*Civ. Code § 1952.6*].

[5] Measure of Future Damages

The parties to any lease entered into before July 1, 1971, could specifically provide that, on a breach by the tenant, the landlord would recover the worth at the time of the termination of the excess, if any, of the amount of rent and charges that was equivalent to rent reserved in the lease for the balance of the lease term or for any shorter period of time over the reasonable rental value of the property.

The landlord's right to collect this type of damages is now cumulative to all other remedies given to him or her by law or by the lease's terms. However, the landlord's election to recover this type of damages precludes him or her from exercising any other remedy for recovering these charges. In addition, the lease may have required that the landlord exercise this remedy within a specified time period [*Civ. Code § 3308*].

[6] Liquidated Damages

Except as provided below, a promise to pay liquidated damages for a breach of a contract is valid unless the promisor (or other person seeking to invalidate the promise) establishes that the promise was unreasonable under the circumstances existing when the contract was made [*Civ. Code § 1671(b)*].

However, a promise by the retail purchaser or renter of personal property or services, primarily for his or her personal, family, or household purposes, to pay liquidated damages for breach of the purchase or rental contract, or a promise by a lessee of real property, for use as his or her dwelling or as a dwelling for persons dependent on him or her for support,

to pay liquidated damages for breach of the lease agreement, is void, except that the parties may agree in the contract or lease agreement on an amount that must be presumed to be the damages arising from a breach, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damages [*Civ. Code § 1671(c), (d)*].

The above does not apply in any case when another statute expressly applicable to the contract prescribes the rules or standard for determining the validity of a liquidated damages provision for the breach of a contract [*Civ. Code § 1671(a)*].

In addition, it is specifically provided that *Civ. Code § 1671* applies to a lease of real property [*Civ. Code § 1951.5*], except a lease executed before July 1, 1971, or a lease executed on or after that date and having terms fixed by a lease, option, or other agreement executed before that date [*Civ. Code § 1952.2*].

A liquidated damages clause will generally be considered unreasonable, and thus unenforceable under *Civ. Code § 1671(b)*, if it bears no reasonable relationship to the range of actual damages that the parties could have anticipated would flow from a breach [*Ridgley v. Topa Thrift & Loan Assn. (1998) 17 Cal. 4th 970, 977, 73 Cal. Rptr. 2d 378, 953 P.2d 484]* . The amount set as liquidated damages must represent the result of a reasonable endeavor by the parties to estimate a fair average compensation for any loss that may be sustained. In the absence of such relationship, a contractual clause purporting to predetermine damages must be construed as a penalty [*Ridgley v. Topa Thrift & Loan Assn. (1998) 17 Cal. 4th 970, 977, 73 Cal. Rptr. 2d 378, 953 P.2d 484]* . A provision in a commercial lease extension increasing the rent but providing that half of the increased rent would be conditionally "deferred" and ultimately forgiven if the tenants complied with all of their obligations under the lease was unenforceable as a penalty. The deferred rent had no reasonable relationship to the amount of actual damages caused by the tenants' breach of their obligation to maintain the premises [*Harbor Island Holdings, LLC v. Kim (2003) 107 Cal. App. 4th 790, 795-800, 132 Cal. Rptr. 2d 406]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawLandlord & TenantLease AgreementsDamagesLiquidated Damages

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Chapter 332 LANDLORD AND TENANT: THE TENANCY
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29-332 California Forms of Pleading and Practice--Annotated § 332.25

§ 332.25 Abandoned Real Property

[1] Notice by Lessor

[a] In General

Real property is deemed abandoned by the lessee, within the meaning of *Civ. Code § 1951.2*, and the lease terminates, if the lessor gives written notice of his or her belief of abandonment, as provided in *Civ. Code § 1951.3*, and the lessee fails to give the lessor written notice, before the date of termination specified in the lessor's notice, stating that he or she does not intend to abandon the real property, and stating an address at which the lessee may be served by certified mail in any action for unlawful detainer of the real property [*Civ. Code § 1951.3(a)*].

Civ. Code § 1951.3 does not preclude the lessor or the lessee from otherwise proving that the real property has been abandoned by the lessee within the meaning of *Civ. Code § 1951.2* [*Civ. Code § 1951.3(f)*], nor does it preclude the lessor from serving a notice requiring the lessee to pay rent or quit as provided in *Code Civ. Proc. § 1161* or *1162* at any time permitted by those sections, nor does it affect the time and manner of giving any other notice required or permitted by law. Moreover, the giving of notice provided by *Civ. Code § 1951.3* does not satisfy the requirements of either *Code Civ. Proc. § 1161* or *1162* [*Civ. Code § 1951.3(g)*].

The lessor may give a notice of belief of abandonment to the lessee in accordance with *Civ. Code § 1951.3*, only when the rent on the property has been due and unpaid for at least 14 consecutive days, and the lessor reasonably believes that the lessee has abandoned the property. The date of the lease's termination is required to be specified in the lessor's notice, and cannot be less than 15 days after the notice is served personally or, if mailed, not less than 18 days after the notice is deposited in the mail [*Civ. Code § 1951.3(b)*].

[b] Service of Notice

The lessor's notice of belief of abandonment is required to be personally delivered to the lessee, or sent by first class mail, postage prepaid, to the lessee at his or her last known address and, if there is reason to believe that the notice sent to that address will not be received by the lessee, also to such other address, if any, known to the lessor where the lessee

may reasonably be expected to receive the notice [*Civ. Code § 1951.3(c)*].

[2] When Property Is Not Abandoned

Real property will not be deemed to be abandoned under *Civ. Code § 1951.3* if the lessee proves any of the following [*Civ. Code § 1951.3(e)*]:

- At the time the notice of belief of abandonment was given, the rent was not due and unpaid for 14 consecutive days;

- At the time the notice of belief of abandonment was given, it was not reasonable for the lessor to believe that the lessee had abandoned the real property. The fact that the lessor knew that the lessee left personal property on the real property does not, of itself, justify a finding that the lessor did not reasonably believe that the lessee had abandoned the real property;

- Before the date specified in the lessor's notice, the lessee gave written notice to the lessor, stating his or her intent not to abandon the real property, and stating an address at which he or she can be served by certified mail in any action for unlawful detainer of the real property; or

- During the period commencing 14 days before the time the notice of belief of abandonment was given, and ending on the date the lease would have terminated in accordance with the notice, the lessee paid to the lessor all or a portion of the rent due and unpaid on the real property.

[3] Reletting of Property

On the initial reletting of the property, the lessor is required to send a written notice to the lessee, stating that the property has been relet, the name and address of the new lessee, and the length of the new lease and the amount of the rent. The notice is required to be delivered to the lessee personally, or be sent by regular mail to the lessee at the address shown on the request, not later than 30 days after the new lessee takes possession of the property. No notice is required if the amount of the rent due and unpaid at the time of termination exceeds the amount of the advance payment [*Civ. Code § 1951.7(c)*].

As used in *Civ. Code § 1951.7*, "advance payment" means monies paid to the lessor of real property as prepayment of rent, or as a deposit to secure faithful performance of the terms of the lease, or another payment that is the substantial equivalent of either of these. A payment that is not in excess of the amount of one month's rent is not an advance payment [*Civ. Code § 1951.7(a)*].

The notice specified by *Civ. Code § 1951.7(c)* is required to be given only if [*Civ. Code § 1951.7(b)*]:

- The lessee has made an advance payment;

- The lease is terminated in accordance with *Civ. Code § 1951.2*; and

- The lessee has made a request, in writing, to the lessor that he or she be given notice under *Civ. Code § 1951.7(c)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property

LawLandlord & TenantLandlord's Remedies & RightsTermination Notice

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29-332 California Forms of Pleading and Practice--Annotated § 332.26

§ 332.26 Abandoned Personal Property

[1] Application of Statutes

An optional procedure for the disposing of personal property that remains on the premises after a tenancy has terminated and the premises have been vacated by the tenant is provided by *Civ. Code § 1980 et seq.* (residential property) and 1993 et seq. (commercial property) [*Civ. Code §§ 1981(a), 1993.02(a)*]. These statutes do not apply when *Civ. Code §§ 1862.5* (property left in licensed hospital), 2080.8 (property left with Regents of University of California or University of California Police Department), 2080.9 (property left with Trustees of California State Universities and Colleges), or 2081-2081.6 (property left with common carrier, commission merchant, innkeeper, or warehouseman) apply. They also do not apply to property that exists for the purposes of providing utility services and is owned by a public utility, whether or not this property is actually in operation to provide the utility services [*Civ. Code §§ 1981(b), 1993.02(b)*]. Nor do these statutes apply to any manufactured home as defined in *Health & Safety Code § 18007*, any mobilehome as defined in *Health & Safety Code § 18008*, or to any commercial modular, as defined in *Health & Safety Code § 18001.8*, including attachments thereto or contents thereof, whether or not the manufactured home, mobilehome, or commercial coach is subject to registration under the Health & Safety Code [*Civ. Code §§ 1981(c), 1993.02(c)*]. Finally, the statutes are not applicable to the disposition of animals that have been abandoned in or around premises that have been vacated on or immediately preceding the termination of a lease or other rental agreement or foreclosure [*see Civ. Code § 1815(d)*] or whose disposition is governed by applicable provisions of the Food and Agricultural Code [*Civ. Code §§ 1981(d), 1993.02(d)*].

Except as provided [*see Civ. Code § 1993.01*], the provisions of this procedure do not apply to commercial property. The term "commercial property" does not include self-storage units [*Civ. Code § 1980.5*].

If the requirements of *Civ. Code § 1980* or *1993 et seq.* are not satisfied, it does not affect the rights and liabilities of the landlord, former tenant, or any other person [*Civ. Code §§ 1981(e), 1993.02(f)*].

[2] Definitions

The following terms are defined for purposes of *Civ. Code §§ 1980 et seq.* and *1993 et seq.* [*Civ. Code §§ 1980, 1993*]:

- "Commercial real property" includes any part, portion, or unit thereof, and any related facilities, space, or services, but does not include self-storage units [see *Civ. Code § 1954.26* (definition of "commercial real property").

- "Landlord" means any operator, keeper, lessor, or sublessor of any furnished or unfurnished premises for hire, or his or her agent or successor in interest.

- "Owner" means any person other than the landlord who has any right, title, or interest in personal property.

- "Premises" includes any common areas associated with the premises.

- "Reasonable belief" means the actual knowledge or belief a prudent person would have without making an investigation (including any investigation of public records). Notwithstanding the foregoing, when the landlord has specific information indicating that such an investigation would be reasonable in relation to the probable value of the personal property involved, "reasonable belief" also includes the actual knowledge or belief a prudent person would have if such an investigation were made.

- "Records" means any material, regardless of the physical form, on which information is recorded or preserved by any means, including in written or spoken words, graphically depicted, printed, or electromagnetically transmitted. "Records" does not include publicly available directories containing information an individual has voluntarily consented to have publicly disseminated or listed, such as name, address, or telephone number.

- For residential property, "tenant" includes any paying guest, lessee, or sublessee of any premises for hire; for commercial property, "tenant" includes any lessee or sublessee of any commercial real property and its premises for hire.

The terms "landlord" and "tenant" are defined broadly, such that the statutes govern personal property left on any rental property, whether furnished or unfurnished, residential or commercial.

[3] Disposing of Lost Property

Personal property that the landlord reasonably believes to have been lost must be disposed of in accordance with *Civ. Code §§ 2080-2080.9* (lost and unclaimed property). The landlord is not liable to the owner of the property if he or she complies with these statutes when disposing of the property [*Civ. Code §§ 1982(a), 1993.01*].

If the appropriate police or sheriff's department refuses to accept property as provided in *Civ. Code §§ 2080-2080.9*, the landlord may dispose of the property in accordance with the abandoned property provisions [*Civ. Code §§ 1982(b), 1993.01*; *see Civ. Code §§ 1980 et seq., 1993 et seq.*].

[4] Notice to Tenant

[a] Requirements

When personal property remains on the premises after a tenancy has terminated and the premises have been vacated by the tenant, the landlord is required to give written notice to the tenant and to any other person the landlord reasonably believes to be the owner of the property [*Civ. Code §§ 1983(a), 1993.03(a)*]. If the property remaining on the premises consists of records [*see Civ. Code §§ 1980(e), 1993(f)*], the tenant is presumed to be the owner of the records [*Civ. Code*

§§ 1983(a), 1993.03(a)].

The notice is required to describe the property in a manner reasonably adequate to permit the owner of the property to identify it. The notice may describe all or a portion of the property, but the limitation of liability provided by *Civ. Code §§ 1989* and *1993.08* [*see* [8], *below*], does not protect the landlord from any liability arising from the disposition of property not described in the notice. However, a trunk, valise, box, or other container that is locked, fastened, or tied in a manner that deters immediate access to its contents may be described as such without describing its contents [*Civ. Code §§ 1983(b), 1993.03(b)*].

The notice is also required to advise the person to be notified that reasonable costs of storage may be charged before the property is returned, where the property may be claimed, and the date before which the claim must be made. The date specified in the notice is required to be a date not less than 15 days after the notice is personally delivered or, if mailed, not less than 18 days after the notice is deposited in the mail [*Civ. Code §§ 1983(b), 1993.03(b)*].

Statutory forms of notice are set forth in *Civ. Code §§ 1984* and *1993.04* [*see § 332.90* (form)].

[b] Service of Notice

The notice is required to be personally delivered to the person to be notified or sent by first class mail, postage prepaid, to the person to be notified at his or her last known address and, if there is reason to believe that the notice sent to that address will not be received by that person, also to such other address, if any, known to the landlord where such person may reasonably be expected to receive the notice. If the notice is sent by mail to the former tenant, one copy is required to be sent to the premises vacated by such tenant [*Civ. Code §§ 1983(c), 1993.03(c)*].

[5] Storage of Abandoned Property

The personal property described in the notice [*see* [4][a], *above*] is required either to be left on the vacated premises or to be stored by the landlord in a place of safekeeping until the landlord either releases the property in accordance with *Civ. Code § 1987* or *1993.01* [*see* [6], *below*], or disposes of the property in accordance with *Civ. Code § 1988* or *1993.07* [*see* [7], *below*]. The landlord is required to exercise reasonable care in storing the property, but he or she is not liable to the tenant or any other owner for any loss not caused by a deliberate or negligent act [*Civ. Code §§ 1986, 1993.06*].

[6] Release of Personal Property

The personal property described in the notice [*see* [4][a], *above*] is required to be released by the landlord to the former tenant, or at the landlord's option, to any person reasonably believed by the landlord to be its owner, if the tenant or other person pays the reasonable cost of storage and takes possession of the property not later than the date specified in the notice for taking possession [*Civ. Code §§ 1987(a), 1993.01*].

[7] Public Sale

[a] Release or Sale

When personal property is not released in accordance with *Civ. Code § 1987(a)* and the notice [*see* [4][a], *above*] stated that the personal property would be sold at a public sale, the landlord must release the personal property to the former tenant if he or she claims it before the time it is sold and pays the reasonable cost of storage, advertising, and sale incurred before the time the property is withdrawn from sale [*Civ. Code §§ 1987(b), 1993.01*].

If the personal property described in the notice is not released in accordance with *Civ. Code § 1987*, it is sold at public sale by competitive bidding. However, if the landlord reasonably believes that the total resale value of the property not

released is less than $300 (for residential property) or the lesser of $750 or $1 per square foot of the premises (for commercial property), he or she may retain the property for his or her own use, or dispose of it in any manner he or she chooses [*Civ. Code §§ 1988(a), 1993.07(a)(2)*]. Nothing in *Civ. Code § 1988* or *1993.07* precludes the landlord or tenant from bidding on the property at the public sale [*Civ. Code §§ 1988(a)*, 1993.07(d)].

[b] Notice of Sale

Notice of the time and place of the public sale is required to be given by publication, under *Gov. Code § 6066*, in a newspaper of general circulation, published in the county where the sale is to be held. The last publication must be not less than five days before the sale is to be held. The notice of the sale cannot be published before the last of the dates specified for taking possession of the property in any notice given in accordance with *Civ. Code § 1983* or *1993.03*. The notice of the sale must describe the property to be sold in a manner reasonably adequate to permit the owner of the property to identify it. The notice may describe all or a portion of the property, but the limitation of liability provided by *Civ. Code § 1989* or *1993.08* [*see* [8], *below*] does not protect the landlord from any liability arising from the disposition of property not described in the notice. However, a trunk, valise, box, or other container that is locked, fastened, or tied in a manner that deters immediate access to its contents may be described as such without describing its contents [*Civ. Code §§ 1988(b), 1993.07(b)*].

[c] Proceeds of Sale

After deducting the costs of storage, advertising, and sale, any balance of the sale proceeds that is not claimed by the former tenant or an owner other than the tenant will be paid into the treasury of the county in which the sale took place not later than 30 days after the date of sale. The former tenant or other owner may claim the balance within one year from the date of payment to the county by making application to the county treasurer or other official designated by the county. If the county pays the balance or any part of the balance to a claimant, neither the county nor any officer or employee of the county is liable to any other claimant as to the amount paid [*Civ. Code §§ 1988(c), 1993.07(c)*].

[8] Nonliability of Landlord

Notwithstanding *Civ. Code §§ 1981(e)* and *1993.02(f)* (when requirements of the personal property provisions are not satisfied, nothing affects the rights and liability of the landlord, former tenant, or any other person), if the landlord releases to the former tenant property that remains on the premises after a tenancy is terminated, the landlord is not liable with regard to that property to any person [*Civ. Code §§ 1989(a), 1993.08(a)*].

When the landlord releases property in accordance with *Civ. Code § 1987* to a person (other than the former tenant) reasonably believed by the landlord to be the owner of the property, the landlord is not liable with regard to that property to the following persons [*Civ. Code §§ 1989(b), 1993.08(b)*]:

- Any person to whom notice was given in accordance with *Civ. Code § 1983* or *1993.03*; or

- Any person to whom notice was not given in accordance with *Civ. Code § 1983* or *1993.03*, unless the person proves that before releasing the property, the landlord believed, or reasonably should have believed, that the person had an interest in the property, and also that the landlord knew, or should have known on reasonable investigation, the person's address.

When property is disposed of in accordance with *Civ. Code § 1988* or *1993.07*, the landlord is not liable with regard to that property to the following persons [*Civ. Code § 1989(c)*]:

- Any person to whom notice was given in accordance with *Civ. Code § 1983* or *1993.03*; or

- Any person to whom notice was not given in accordance with *Civ. Code § 1983* or *1993.03*, unless the person proves that, before disposing of the property, the landlord believed, or reasonably should have believed, that the person had an interest in the property, and also that the landlord knew, or should have known on reasonable investigation, the person's address.

[9] Costs of Storage

Under *Civ. Code § 1990(a)* (applicable to both residential and commercial property), costs of storage that may be required to be paid are assessed in the following manner:

- When a former tenant claims property under *Civ. Code § 1987* (applicable to both residential and commercial property), he or she may be required to pay the reasonable costs of storage for all the personal property remaining on the premises at the termination of the tenancy that are unpaid at the time the claim is made; or

- When an owner other than the former tenant claims property under *Civ. Code § 1987*, he or she may be required to pay the reasonable costs of storage for only the property in which he or she claims an interest.

In determining the costs to be assessed under *Civ. Code § 1990(a)*, the landlord may not charge more than one person for the same costs [*Civ. Code § 1990(b)*].

If the landlord stores the personal property on the premises, the cost of storage is the fair rental value of the space reasonably required for the storage for the term of the storage [*Civ. Code § 1990(c)*].

[10] Return of Property on Tenant's Request

[a] Procedure

A residential landlord must not refuse to surrender to a residential tenant any personal property not owned by the landlord that was left on the premises after the tenant had vacated the premises, and the return of which has been requested by the tenant or by his or her representative. The following must occur to give the tenant the right to the return [*Civ. Code § 1965(a)*]:

- The tenant requests, in writing, within 18 days of vacating the premises, the surrender of the personal property. The request must include a description of the property and specify the tenant's mailing address. A form of request for return is set forth in *§ 332.93*.

- The landlord or agent has control or possession of the tenant's personal property at the time the request is received.

- The tenant on demand of the landlord tenders payment of all reasonable costs associated with the landlord's removal and storage of the personal property. A form of the landlord's demand for costs is set forth in *§ 332.94*.

- The tenant agrees to claim and remove the personal property at a reasonable time mutually agreed on by the landlord and tenant but not later than 72 hours after the tender of costs.

[b] When Request Procedure Not Applicable

The procedure in [a], *above*, is not applicable when the disposition of personal property has been initiated or completed

in accordance with the procedure set forth in *Civ. Code §§ 1980-1991*. It is also not applicable when the occupancy is defined by *Civ. Code § 1940(b)*, which refers to hotel and motel occupants [*Civ. Code § 1965(c)*].

[c] Compliance by Landlord

A landlord who complies with the tenant's request is not liable to any person with regard to that person's personal property that is given to another person. In the event of conflicting demands, the first timely request for surrender of personal property received by the landlord prevails [*Civ. Code § 1965(d)*].

[d] Noncompliance by Landlord

A landlord who retains personal property in violation of *Civ. Code § 1965* is liable to a tenant in a civil action for the following damages [*Civ. Code § 1965(e)(1), (2)*]:

- Actual damages not to exceed the value of the personal property if the property is not surrendered by the later of (1) a reasonable time after the tenant's request, or (2) if costs were demanded and the tenant paid the costs, the time agreed on to claim the property. Three days is presumed to be a reasonable time.

- An amount not to exceed $250 for each bad faith violation of this provision. In determining the amount of the award, the court must consider proof of matters as justice may require.

In addition, the court may award reasonable attorney's fees and costs to the prevailing party [*Civ. Code § 1965(e)(3)*].

This remedy is not exclusive and does not preclude either the landlord or the tenant from pursuing other remedies [*Civ. Code § 1965(f)*].

A form of complaint for these damages is set forth in *§ 332.95*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination Notice

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§ 332.27 Domestic Violence, Sexual Assault, or Stalking

A tenant may notify the landlord that he or she or a household member was a victim of an act that constitutes an act of domestic violence [*Fam. Code § 6211*], sexual assault [*Pen. Code §§ 261, 261.5, 262, 286, 288a, 289*], or stalking [*Civ. Code § 1708.7*], and that the tenant intends to terminate the tenancy [*Civ. Code § 1946.7(a)*]. "Household member" means a member of the tenant's family who lives in the same household as the tenant [*Civ. Code § 1946.7(g)*].

The notice of termination must be in writing, and one of the following documents must be attached to the notice [*Civ. Code § 1946.7(b)*; *see § 332.71* (form of termination notice to landlord)]:

- A copy of a temporary restraining order or emergency protective order issued pursuant to *Fam. Code §§ 6300 et seq., 6400 et seq., Pen. Code § 136.2, Code Civ. Proc. § 527.6,* or *Welf. & Inst. Code § 213.5,* that protects the tenant or household member from further domestic violence, sexual assault, or stalking.

- A copy of a written report by a peace officer employed by a state or local law enforcement agency acting in his or her official capacity, stating that the tenant or household member has filed a report alleging that he or she or the household member is a victim of domestic violence, sexual assault, or stalking.

The notice to terminate the tenancy must be given within 60 days of the date that the attached temporary restraining order or emergency protective order was issued, the peace officer's written report was made, or within the time period for giving notice of termination described in *Civ. Code § 1946* [*Civ. Code § 1946.7(c)*].

A tenant who provides a notice of termination under Section 1946.7 is responsible for payment of rent for 30 days following the giving of the notice, or within the appropriate period as described in Section 1946, and thereafter is released from any rent payment obligation under the rental agreement without penalty [*Civ. Code § 1946.7(d)*]. If, within the 30 days following the giving of the notice the tenant quits the premises and the premises are rented to another party, the rent due on the premises for that 30-day period must be prorated [*Civ. Code § 1946.7(e)*]. Existing law governing security deposits applies [*Civ. Code § 1946.7(d)*, (e); *see Civ. Code § 1950.5*; *see also § 331.11[6]*].

These provisions do not relieve a tenant, other than the tenant who is, or who has a household member who is, a victim of domestic violence, sexual assault, or stalking and members of that tenant's household, from his or her obligations under the rental agreement [*Civ. Code § 1946.7(f)*].

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[Reserved]

§§ 332.28[Reserved]

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§ 332.30 Related Matthew Bender Publications

[1] California Points and Authorities

For memoranda of points and authorities related to forms in this chapter, see California Points and Authorities, Ch. 141, *Landlord and Tenant* (Matthew Bender)

[2] California Legal Forms

For legal forms related to forms in this chapter, see California Legal Forms, Chs. 34B, 34C, 35A, and 35B (Matthew Bender)

[3] California Real Estate

For discussion of the creation of tenancies, see California Real Estate Law & Practice, Chs. 150- 155 (Matthew Bender)

For discussion of legal considerations during the term of tenancies, see California Real Estate Law & Practice, Chs. 170- 174 (Matthew Bender)

For discussion of security deposits and the termination of tenancies, see California Real Estate Law & Practice, Chs. 200- 203 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property

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§ 332.31 State Statutes

[1] Abandonment

Notice of belief of abandonment of leased real property. *Civ. Code § 1951.3*

[2] Adverse Possession

Adverse possession of tenant does not commence until five years from termination of tenancy. *Code Civ. Proc. § 326*

Tenant is not permitted to deny title of his or her landlord. *Evid. Code § 624*

[3] Assignment

Lessor's remedies against lessee's assignee. *Civ. Code § 822*

Tenant's rights against assignee of landlord. *Civ. Code § 823*

Restrictions against assignment, including absolute prohibition, is permissible. *Civ. Code § 1995.210 et seq.*

[4] Attachment

Leasehold estate with unexpired term of less than one year is not subject to attachment when defendant is individual. *Code Civ. Proc. § 487.010(c)(1)*

[5] Attornment

Attornment of tenant is unnecessary for grant of rent. *Civ. Code § 1111*

When attornment is void. *Civ. Code § 1948*

[6] Community Property

Leasing community real property. *Fam. Code § 1102*

[7] Construction of Leases

Uncertain language is construed against party who caused uncertainty to exist. *Civ. Code § 1654*

[8] Decedent's Estate

Notice of petition to lease. *Prob. Code § 1200 et seq.*

Leasing estate of decedent. *Prob. Code § 9940 et seq.*

[9] Duties to Inform or Disclose

Owner of residential dwelling unit who has applied for a demolition permit for that property required to give written notice of that fact to prospective and current tenants. *Civ. Code § 1940.6*

Owner of residential dwelling unit has duty to give prospective tenant written notice of presence of release of illegal controlled substance on or beneath dwelling unit. *Civ. Code § 1940.7*.5 (repealed on January 1, 2006, unless later-enacted statute deletes or extends that date)

Landlord's duty to provide each new tenant of residential dwelling unit with copy of notice provided by registered structural pest control company [*Bus. & Prof. Code § 8538*] if contract for periodic pest control service has been executed. *Civ. Code § 1940.8*

Tenant's duty to inform landlord of notice of proceeding to recover real property occupied by him or her. *Civ. Code § 1949*

Disclosure of name of manager and owner or agent to tenant. *Civ. Code §§ 1961-1962.5*

Lessee's duty to provide owner with written notice of release of hazardous substance on or beneath property; remedies and civil penalty. *Health & Safety Code § 25359.7(b)*

Disclosure by landlords of commercial and industrial units and residential units to give notice to prospective and current tenants concerning presence of toxic mold (applicable after Department of Health Services adopts standards and guidelines). *Health & Safety Code §§ 26141, 26147, 26148*

Tenant of commercial or industrial property has duty to notify landlord of presence of toxic mold or condition of chronic water intrusion or flood. *Health & Safety Code § 26142*

Commercial and industrial landlords' affirmative duty to assess presence of toxic mold or condition of chronic water

intrusion or flood and conduct remedial action. *Health & Safety Code § 26143*

Tenant responsible for maintenance of commercial or industrial property has duty to notify landlord and to correct condition when toxic mold is present. *Health & Safety Code § 26143*

[10] General Provisions

Hiring defined. *Civ. Code § 1925*

Double letting of room is prohibited. *Civ. Code § 1950*

Notice to lessee on reletting of property is required when lessee has made "advance payment." *Civ. Code § 1951.7*

Landlord's entry into dwelling is permitted only in specified cases. *Civ. Code § 1954*

Disposition of personal property remaining on premises at termination of tenancy. *Civ. Code §§ 1980-1991*

[11] Guardians

Leases by guardians. *Prob. Code §§ 2553-2555*

[12] Lodgers

Procedure for terminating hiring of room in owner-occupied dwelling in which single lodger resides. *Civ. Code § 1946.5*

Lodger who remains on premises after termination of hiring under *Civ. Code § 1946.5* in owner-occupied dwelling in which single lodger resides is an infraction, and procedure for removal. *Penal Code § 602.3*

[13] Notice of Termination of Government Assistance

Twelve- and six-month notice to tenant and city or county required to terminate governmental rental assistance and to increase rent. *Gov. Code § 65863.10*; *Health & Safety Code §§ 33334.8, 33760.7, 34312.6, 50744.5, 50962, 52087*

Notice under *Gov. Code § 65863.10* not required before prepayment if specified conditions are contained in regulatory agreement that has been recorded against property. *Gov. Code § 65863.13*

[14] Particular Leases and Tenancies

Agricultural lease is limited to 51 years. *Civ. Code § 717*

Oil and gas lease is not enforceable after 99 years. *Civ. Code § 718f*

Mobilehome park tenancies. *Civ. Code § 798 et seq.*

Mining fixtures. *Pub. Res. Code § 3980*

Renting private building for storage of vehicle. *Veh. Code § 10654*

[15] Penal Provisions

Relation of landlord and tenant is basis for challenging juror. *Code Civ. Proc. § 229(b)*

Renting premises for lottery purposes is misdemeanor. *Penal Code § 326*

Criminal liability of landlord of gaming house. *Penal Code § 331*

Forgery of lease. *Penal Code § 470*

Fixtures are subject to larceny. *Penal Code § 495*

Embezzlement by tenant. *Penal Code §§ 504a, 507*

Trespass by entering and occupying real property without consent of owner or person in lawful possession thereof is misdemeanor. *Penal Code § 602(l)*

Applicability of trespass ordinance or resolution. *Penal Code § 602.2*

Unauthorized entry of dwelling is misdemeanor. *Penal Code § 602.5*

[16] Public Entities and Public Lands

Leases by municipalities. *Civ. Code §§ 718, 719*

Leases of state property. *Gov. Code § 14669 et seq.*

Power of harbor commission, port districts, and river port districts to lease. *Harb. & Nav. Code §§ 6074, 6075, 6270, 6271, 6294, 6860, 6861, 6894*

Leasebacks by public entity. *Pub. Contract Code § 20671 et seq.*

Leases of park and recreational areas. *Pub. Res. Code §§ 5060-5065*

Oil, gas, and mineral leases by public agencies. *Pub. Res. Code §§ 7051-7062*

Lease of lands held for state highway purposes. *Sts. & Hy. Code §§ 104.6-104.15*

Lease of parking places by parking district commission. *Sts. & Hy. Code §§ 35568-35572*

Lease of property by county waterworks district. *Water Code §§ 55371-55376*

[17] Receivers

Receiver has power to receive rents. *Code Civ. Proc. § 568*

[18] Recordation

Conveyance of real property is void against subsequent bona fide purchase or mortgagee unless recorded. *Civ. Code § 1214*

Unrecorded lease is valid between parties and those having notice of lease. *Civ. Code § 1217*

Recordation of oil and gas leases. *Civ. Code § 1219*

Assignment of rents is recordable. *Civ. Code § 2938*

[19] Recreational Vehicles

Recreational Vehicle Occupancy Law. *Civ. Code § 799.20 et seq.*

General provisions and definitions. *Civ. Code §§ 799.20-799.46*

Registration agreement and rules. *Civ. Code §§ 799.43, 799.44*

Removal of recreational vehicles of defaulting occupants. *Civ. Code §§ 799.55-799.59*

Termination of recreational vehicle park tenancies. *Civ. Code §§ 799.65-799.67*

Actions and proceedings. *Civ. Code §§ 799.70, 799.71*

[20] Renewal

Implied renewal of lease. *Civ. Code § 1945*

Requirement for automatic renewal provisions. *Civ. Code § 1945.5*

[21] Rights of Landlord

Rights of grantee or devisee to rent. *Civ. Code § 821*

Right of reentry is transferable. *Civ. Code § 1046*

Lien of keeper of apartment houses and apartments on baggage and all property in possession of tenants. *Civ. Code § 1861*

Right of owner of rental real property to have property manager appear on owner's behalf in small claims action. *Code Civ. Proc. § 116.540(h)*

[22] Rights of Tenant

Possessory rights of tenant for years or at will. *Civ. Code § 819*

Limitation on rights of tenant for years or at will. *Civ. Code § 820*

[23] State Agency as Tenant

Payment of rent by state agencies. *Gov. Code § 927.1*

[24] Telephones

Landlord of residential premises is responsible for installing telephone jack and maintaining inside telephone wiring. *Civ. Code § 1941.4*

[25] Terms of Tenancy

Presumptions of term of tenancy. *Civ. Code §§ 1943, 1944*

Notice of change of terms of month-to-month or week-to-week lease. *Civ. Code § 827*

[26] Transitional Housing

Transitional Housing Participant Misconduct Act provides operators of programs benefiting homeless persons with procedure for evicting participants for abuse and program misconduct. Health & Safety Code § 50584 et seq.

[27] Unlawful Detainer

Unlawful detainer, forcible entry, forcible detainer. *Code Civ. Proc. §§ 1159-1179a*

[28] Waiver of Rights

Lessee's waiver of specified rights in lease or rental agreement of dwelling is void. *Civ. Code § 1953*

[29] Waterbeds

Conditions under which waterbeds must be permitted by landlords. *Civ. Code § 1940.5*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract InterpretationGeneral OverviewContracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawEstatesPresent EstatesMarital EstatesCommunity PropertyReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral Overview

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§ 332.32 Decisions

[1] Agreement to Lease

Intent of parties to create lease and not agreement to lease is established where grantee received right to occupy land to the exclusion of grantor. *Corson v. Brown Motel Investments, Inc. (1978) 87 Cal. App. 3d 422, 426, 151 Cal. Rptr. 385*

[2] Assignment

Assignee's express assumption of obligations under lease does not affect liability of lessee to lessor. *De Hart v. Allen (1945) 26 Cal. 2d 829, 832, 161 P.2d 453*

Assignment terminates privity of estate between lessor and lessee but does not affect contractual obligations. *De Hart v. Allen (1945) 26 Cal. 2d 829, 832, 161 P.2d 453* ; *Flynn v. Mikelian (1962) 208 Cal. App. 2d 305, 310, 25 Cal. Rptr. 138*

Privity of contract between landlord and tenant is not affected by tenant's assignment of lease. *Treff v. Gulko (1932) 214 Cal. 591, 600, 7 P.2d 697*

Assignment of lease is required to transfer entire term of original lessee. *Barkhaus v. Producers' Fruit Co. (1923) 192 Cal. 200, 205-206, 219 P. 435* ; *Gilman v. Nemetz (1962) 203 Cal. App. 2d 81, 86, 21 Cal. Rptr. 317*

Tenant who takes assignment of mortgaged ground lease, expressly assuming its obligations, remains liable to lessor after foreclosure of mortgage. *Vallely Investments, L.P. v. Bancamerica Commercial Corp. (2001) 88 Cal. App. 4th 816, 827, 106 Cal. Rptr. 2d 689*

Landlord's demand for percentage of amount tenant was to receive for covenant not to compete in connection with tenant's sale of business, in consideration for landlord's consent to lease assignment, is not authorized by *Civ. Code §*

1995.240. *Ilkhchooyi v. Best (1995) 37 Cal. App. 4th 395, 407, 411, 45 Cal. Rptr. 2d 766*

Assignee who does not assume lease is only liable for covenants running with land such as rent and arbitration and is only liable for rent while in possession of land. *Kelly v. Tri-Cities Broadcasting, Inc. (1983) 147 Cal. App. 3d 666, 676-679, 195 Cal. Rptr. 303*

Covenantee is not entitled to enforce covenant running with land following transfer of benefited property. *Maron v. Howard (1968) 258 Cal. App. 2d 473, 484-485, 66 Cal. Rptr. 70* (dictum) (questioned on other grounds in *Abadjian v. Superior Court (1985) 168 Cal. App. 3d 363, 372, 214 Cal. Rptr. 234*)

Assignment is presumed following occupancy of leased premises by one other than lessee, especially when occupant pays rent and cost of maintenance. *Karbelnig v. Brothwell (1966) 244 Cal. App. 2d 333, 341, 53 Cal. Rptr. 335*

Assignor is unable to prevent lessor from terminating lease in event of abandonment. *Flynn v. Mikelian (1962) 208 Cal. App. 2d 305, 311-312, 25 Cal. Rptr. 138*

Assignee is liable for rents accruing while assignee is in possession but not for installments that became due before assignment. *First Nat'l Bank of Oroville v. Aldridge (1939) 33 Cal. App. 2d 485, 491-492, 92 P.2d 674*

Lessor's consent to assignment and acceptance of rent from assignee is insufficient to constitute discharge of obligation of original lessee. *Strei v. Brooks (1928) 95 Cal. App. 589, 592, 273 P. 145*

Lease is assignable unless it contains prohibition against assignment. *Morris v. Iden (1913) 23 Cal. App. 388, 395, 138 P. 120*

[3] Cotenants

Holding over by one cotenant binds colessees unless they act to terminate the lease. *Schmitt v. Felix (1958) 157 Cal. App. 2d 642, 646-647, 321 P.2d 473*

Possession of one cotenant is possession for all. *Barrow v. Simon (1934) 2 Cal. App. 2d 500, 503, 38 P.2d 197*

Cotenants are jointly and severally liable on covenants to repair and deliver up possession at end of term. *Coburn v. Goodall (1887) 72 Cal. 498, 503,14 P. 190* (*criticized on other grounds in Chinese Hosp. Foundation Fund v. Patterson (1969) 1 Cal. App. 3d 627, 632, 81 Cal. Rptr. 795*)

[4] Crops

Lessee holds title to crops growing on leased property. *Carey v Glenco Citrus Prod. (1965) 235 Cal. App. 2d 572, 579, 45 Cal. Rptr. 365*

When life tenant-lessor dies before end of term, lessee is entitled to crops as against remainderman. *Moy v. Silveira (1960) 184 Cal. App. 2d 80, 83, 7 Cal. Rptr. 251*

[5] Discrimination

Landlord's refusal to rent to unmarried couples on religious grounds violates state's housing antidiscrimination laws (*Gov. Code § 12955*) and does *not* violate landlord's constitutional rights to free-exercise of religion. *Smith v. Fair*

Employment & Housing Com. (1996) 12 Cal. 4th 1143, 1160, 51 Cal. Rptr. 2d 700, 913 P. 2d 909

Blanket exclusion of all families with minor children from apartment complex is violation of Unruh Civil Rights Act [*Civ. Code § 51*]; however, age qualifications in housing facility reserved for older citizens is permissible under *Act. Marina Point, Ltd. v. Wolfson (1982) 30 Cal. 3d 721, 741-743, 180 Cal. Rptr. 496, 640 P.2d 115*

[6] Easements

Implied easement passes to lessee from reasonable necessity or manifest intention of the parties. *Sierad v. Lilly (1962) 204 Cal. App. 2d 770, 774, 22 Cal. Rptr. 580*

Lease of part of building passes with it everything reasonably necessary to enjoyment of part demised. *Owsley v. Hamner (1951) 36 Cal. 2d 710, 716, 227 P.2d 263* ; *Sierad v. Lilly (1962) 204 Cal. App. 2d 770, 774, 22 Cal. Rptr. 580*

Implied easement in lease is not required to be absolutely necessary to make leased property tenantable. *Owsley v. Hamner (1951) 36 Cal. 2d 710, 718, 227 P.2d 263*

Whether or not easements are reasonably necessary for beneficial enjoyment of leased property is question of fact. *Froomer v. Drollinger (1962) 201 Cal. App. 2d 90, 96-98, 19 Cal. Rptr. 891*

[7] Extension and Renewal

Option to renew is exercised by tenant's remaining in possession of premises in absence of specific provision for exercise in lease. *ADV v. Wikman (1986) 178 Cal. App. 3d 61, 66, 223 Cal. Rptr. 262*

Acceptance of monthly rent check for period extending beyond lease term does not raise presumption that lease term was extended under *Civ. Code § 1945* when rent was accepted before expiration of lease term and exact amount of rent was not known. *The City v. Hart (1985) 175 Cal. App. 3d 92, 94-95, 220 Cal. Rptr. 349*

Provision for renewal of lease at a rent to be agreed on without any standard for determination of rent is unenforceable. *Etco Corp. v. Hauer (1984) 161 Cal. App. 3d 1154, 1159-1162, 208 Cal. Rptr. 118*

Renewal of lease creates new and distinct tenancy. *Burroughs v. Ben's Auto Park, Inc. (1945) 27 Cal. 2d 449, 454, 164 P.2d 897* ; *Smith v. Arthur D. Little, Inc. (1969) 276 Cal. App. 2d 391, 399, 81 Cal. Rptr. 140*

Execution of renewal does not interrupt possession of lessee under original lease. *Reynolds v. McEwen (1952) 111 Cal. App. 2d 540, 545, 244 P.2d 961*

Original tenancy is extended when tenant remains in possession with permission of lessor after term of lease expires. *Schmitt v. Felix (1958) 157 Cal. App. 2d 642, 646, 321 P.2d 473*

Acceptance of new lease by tenant is effective surrender of premises demised in original lease. *Scott v. Mullins (1962) 211 Cal. App. 2d 51, 55, 27 Cal. Rptr. 269*

Distinction between renewal and extension is not always observed. *Erickson v. Boothe (1947) 79 Cal. App. 2d 266, 273, 179 P.2d 611*

[8] Fixtures

Tenant is required to reserve right to remove fixtures if he or she remains in possession under new lease. *Schlageter Estate Co. v. Koontz (1950) 97 Cal. App. 2d 814, 819, 218 P.2d 814* ; *Woods v. Bank of Haywards (1909) 10 Cal. App. 93, 96, 106 P. 730*

Continued occupancy is extension of lease including provision for removal of fixtures. *Knox v. Wolfe (1946) 73 Cal. App. 2d 494, 500, 167 P.2d 3*

[9] Government Housing

Stricter application and investigation process for black person in renting apartment is discrimination in housing prohibited by former Health & Safety Code § 35720(6) [now *Gov. Code § 12955(b)*]. *Stearns v. Fair Employment Practice Com. (1971) 6 Cal. 3d 205, 209-212, 98 Cal. Rptr. 467, 490 P.2d 1155*

Postacquisition tenants in properties acquired by state for public use are not to be considered displaced persons, as defined in *Gov. Code § 7260(c)*, entitled to relocation benefits as provided in *Gov. Code § 7262*, unless they entered their tenancy without knowledge of acquisition by state. *Cavanaugh v. California (1978) 85 Cal. App. 3d 354, 357-358, 149 Cal. Rptr. 453*

State, after acquiring real property that will be demolished, which will result in displacement of tenants occupying it, is not required to maintain buildings in habitable condition pending demolition. *Cavanaugh v. California (1978) 85 Cal. App. 3d 354, 359-360, 149 Cal. Rptr. 453*

Tenants are entitled to prior notice and proof of good cause before eviction from federally subsidized housing. *Appel v. Beyer (1974) 39 Cal. App. 3d Supp. 7, 15, 114 Cal. Rptr. 336*

Public body does not possess same freedom of action as private landlord. *Housing Authority of Los Angeles v. Cordova (1955) 130 Cal. App. 2d Supp. 883, 279 P.2d 215*

"Neighborhood pattern policy" of public housing authority is violation of equal protection. *Banks v. Housing Auth. of City & County of San Francisco (1953) 120 Cal. App. 2d 1, 9-17, 260 P.2d 668*

[10] Interpretation

Rule that every party to a contract has duty to do everything incumbent on him or her to accomplish purpose of contract applies to establish breach of lease when lessee failed to fulfill duties created by agreement collateral to lease. *Corson v. Brown Motel Investments, Inc. (1978) 87 Cal. App. 3d 422, 427-428, 151 Cal. Rptr. 385*

Statutory rules for construction of contracts is applicable to lease. Wright v. Coverly-West Co. (1967) 250 Cal. App. 2d 31, 35, 58 Cal. Rptr. 213 ; *Goodman v. Jonas (1956) 142 Cal. App. 2d 775, 790, 299 P.2d 424*

Application of contract principles is appropriate in dealing with residential leases of urban dwelling units. *Green v. Superior Court (1974) 10 Cal. 3d 616, 624, 111 Cal. Rptr. 704, 517 P.2d 1168*

Contract principles provide rational framework for apportionment of landlord-tenant responsibilities. *Hinson v. Delis (1972) 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661* (*questioned on other grounds in Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 55 n.7, 171 Cal. Rptr. 707, 623 P.2d 268*)

Lease is construed in conformity with principle that intentions of parties should be given effect as far as possible.

Medico-Dental etc. v. *Horton & Converse (1942) 21 Cal. 2d 411, 418-419, 132 P.2d 457*

Covenants and stipulations in lease is construed to be dependent or independent of each other according to intention of parties and good sense of the case. Medico-Dental etc. v. *Horton & Converse (1942) 21 Cal. 2d 411, 419, 132 P.2d 457* ; *Enos v. Foster (1957) 155 Cal. App. 2d 152, 155, 317 P.2d 670*

Lease is construed as a whole. *Hunt v. United Bank & Trust Co. (1930) 210 Cal. 108, 115, 291 P. 184* ; *Knox v. Wolfe (1946) 73 Cal. App. 2d 494, 500, 167 P.2d 3*

Ambiguity or uncertainty in lease is interpreted most strongly against party who caused it. *Cooper v. Mart Associates (1964) 225 Cal. App. 2d 108, 116, 37 Cal. Rptr. 145*

Lease drafted by minors' guardian is construed against those interested in guardianship. *Monteleone v. Andrews (1969) 272 Cal. App. 2d 298, 301, 77 Cal. Rptr. 432*

Lease providing for termination by lessor in his "sole discretion" does not allow arbitrary termination. *Guntert v. City of Stockton (1974) 43 Cal. App. 3d 203, 213, 117 Cal. Rptr. 601*

Term "minimum monthly payments" has no fixed legal significance but is definable only by reference to circumstances in which lease was executed. *Professional Bldg. of Eureka, Inc. v. Anita Frocks, Inc., Number 6 (1960) 178 Cal. App. 2d 276, 278, 2 Cal. Rptr. 914*

Lease of house or building operates as lease of land on which building stands. *Bachenheimer v. Palm Springs etc. Corp (1953) 116 Cal. App. 2d 580, 588, 254 P.2d 153*

[11] Landlord-Tenant Relationship

Portion of *Code Civ. Proc. § 1174* which allowed landlord to apply proceeds from sale of stored property of tenant to satisfy judgment entered in favor of landlord is unconstitutional. *Love v. Keays (1971) 6 Cal. 3d 339, 344, 98 Cal. Rptr. 811, 491 P.2d 395*

Occupancy with consent of owner creates relationship of landlord and tenant. *Ross v. Long Beach (1944) 24 Cal. 2d 258, 263, 148 P.2d 649* ; *Meyer v. Parobek (1953) 119 Cal. App. 2d 509, 513, 259 P.2d 948*

Valid lease is not unnecessary to created tenancy. *Ellingson v. Walsh, O'Connor & Barneson (1940) 15 Cal. 2d 673, 675, 104 P.2d 507*

Obligation to pay rent arises from mere occupancy as tenant of premises even without express agreement. *Samuels v. Ottinger (1915) 169 Cal. 209, 211, 146 P. 638*

Lessees in possession of premises is entitled to payment for damages caused by floodborne logs. *Bess v. Wise (1969) 275 Cal. App. 2d 158, 164, 79 Cal. Rptr. 611*

Tenant and lodger distinguished. *Stowe v. Fritzie Hotels, Inc. (1955) 44 Cal. 2d 416, 421, 282 P.2d 890*

[12] Lease Requirements

[a] In General

Requirements for valid lease. *Santa Cruz v. MacGregor (1960) 178 Cal. App. 2d 45, 53, 2 Cal. Rptr. 727*

Required elements are not sufficient alone to create lease unless parties so intend. *Back v. New York Merchandise Co. (1961) 196 Cal. App. 2d 434, 442, 16 Cal. Rptr. 591*

Parties' characterization of agreement as lease does not control, but is evidence that parties intended that it operate as such. *Sherwin v. Bogosian (1931) 112 Cal. App. 359, 364, 296 P. 641*

Lease is sufficiently certain when tenant goes into possession on certain date, begins paying rent on that date, terms were same as in lease between landlord and previous tenants, and property was described. *Pike v. Hayden (1950) 97 Cal. App. 2d 606, 612, 218 P.2d 578*

Agreement providing for sporadic use of premises, with shared control by owner during each use, is not deemed "exclusive" possession and control of premises necessary to characterize agreement as lease. *Golden West Baseball Co. v. City of Anaheim (1994) 25 Cal. App. 4th 11, 32-33, 31 Cal. Rptr. 2d 378*

Minor, nonessential details in lease are permitted to be left for future agreement; uncertainty of such details does not render contract unenforceable if terms can be settled by reasonable determination; whether contractual detail is essential is matter of degree; essentiality is settled by determining whether indefinite promise is so essential to bargain that inability to enforce that promise strictly according to its terms would make unfair enforcement of remainder of agreement. *Mabee v. Nurseryland Garden Centers, Inc. (1978) 84 Cal. App. 3d 968, 972, 149 Cal. Rptr. 105* (holding in lease of commercial property in shopping center that specification of exact boundaries of leased premises was not necessary to bargain, that exact site location was to be agreed to later, and that if parties could not agree, matter would be settled by court)

[b] Consideration

Lease must be based on consideration. *Cox v. Hollywood Film Enterprises, Inc. (1952) 109 Cal. App. 2d 320, 325, 240 P.2d 713*

Requirements lease has valid consideration. *Fisher v. Parsons (1963) 213 Cal. App. 2d 829, 834-836, 29 Cal. Rptr. 210*

Lease subject to cancellation on 90 days' notice is supported by consideration. *Associated Oil Co. v. Myers (1933) 217 Cal. 297, 301, 18 P.2d 668*

Consideration in ordinary lease is implied warranty of quiet enjoyment by landlord and promise to pay rent by tenant. *Blackman v. Dalton's Auto & Furniture Loans, Ltd. (1942) 51 Cal. App. 2d 14, 18, 124 P.2d 123*

[c] Intention

Intention is required to lease. *Timm v. Brown (1947) 78 Cal. App. 2d 609, 616, 178 P.2d 10*

[d] Parties

Valid lease must set forth parties. *Frey v. Corbin (1948) 84 Cal. App. 2d 536, 539, 191 P.2d 21*

[e] Present Lease

Possession tends to prove agreement is present lease. *Santa Cruz v. MacGregor (1960) 178 Cal. App. 2d 45, 54, 2 Cal. Rptr. 727*

Binding lease exists when parties agree in writing on essential terms of lease although formal instrument is to be prepared and signed later. *Gavina v. Smith (1944) 25 Cal. 2d 501, 504, 154 P.2d 681* ; *Cappelmann v. Young (1946) 73 Cal. App. 2d 49, 53, 165 P.2d 950*

Agreement to lease in future is not present lease if parties did not so intend. *Potter v. Mercer (1879) 53 Cal. 667, 672-674* (*overruled on other grounds in Jordan v. Talbot (1961) 55 Cal. 2d 597, 608, 12 Cal. Rptr. 488, 361 P.2d 20*)

Agreement to lease in future is not present lease if agreement is too uncertain and incomplete. *Martin v. Hall (1933) 219 Cal. 334, 338-339, 26 P.2d 288*

Whether instrument is present lease or agreement to execute lease in future is question of intention of the parties. *Levin v. Saroff (1921) 54 Cal. App. 285, 289-290, 201 P. 961 , disapproved on other grounds, Sterling v. Taylor (2007) 40 Cal. 4th 757, 770, 55 Cal. Rptr. 3d 116, 152 P.3d 420*

[f] Property Description

Indefinite description of property is cured by taking possession and paying stipulated rent. *Beckett v. City of Paris Dry Goods Co., (1939) 14 Cal. 2d 633, 637, 96 P.2d 122* ; *Gilman v. Nemetz (1962) 203 Cal. App. 2d 81, 87-88, 21 Cal. Rptr. 317*

Evidence of parties' intentions is allowed if description of premises is ambiguous. *Gilman v. Nemetz (1962) 203 Cal. App. 2d 81, 87-88, 21 Cal. Rptr. 317*

[g] Signature and Delivery

Lease ordinarily must be signed and delivered. *Vavuris v. Pinelli (1957) 147 Cal. App. 2d 390, 393, 305 P.2d 149*

Lessee is not required to sign lease to be bound by it if he or she indicates his or her acceptance by taking possession or paying rent. *Walker v. Dorn (1966) 240 Cal. App. 2d 118, 121, 49 Cal. Rptr. 362*

Delivery, which is prerequisite to validity of lease, is established by evidence that lessee's attorney received physical delivery of lease and lessee received copy of letter pursuant to which attorney held lease, despite lessor's reservation of right to take lease back if collateral agreement not satisfied. *Corson v. Brown Motel Investments, Inc. (1978) 87 Cal. App. 3d 422, 426, 151 Cal. Rptr. 385*

[13] Low Income Housing

Prospective low income tenants are third-party beneficiaries of regulatory contract between owner/developer and city required by *Health & Safety Code § 52080(b)* (bond financing for construction of rental units, percentage of which are set aside for low income tenants); preliminary injunction is proper to restrain owner from utilizing policy preventing no more than four persons to occupy three-bedroom apartment. *Zakaria v. Lincoln Property Co. (1986) 185 Cal. App. 3d 500, 509-510, 229 Cal. Rptr. 669*

[14] Merger

Doctrine of merger is not applicable when fee and leasehold interest is held by same person to extinguish liens on leasehold interest. *6424 Corp. v. Commercial Exchange Property, Ltd. (1985) 171 Cal. App. 3d 1221, 1223-1224, 217 Cal. Rptr. 803*

[15] Mistake

Parties' mistaken assumptions that business would justify rent reserved in lease is collateral mistake not invalidating agreement. *American Nat'l Ins.Co. v. Continental Parking Corp. (1974) 42 Cal. App. 3d 260, 267, 116 Cal. Rptr. 801*

[16] Nature of Lease

Lease involves two sets of rights and obligations arising out of privity of estate and privity of contract. *Ellingson v. Walsh, O'Connor & Barneson (1940) 15 Cal. 2d 673, 675, 104 P.2d 507* ; *Samuels v. Ottinger (1915) 169 Cal. 209, 211, 146 P. 638*

Lease and license distinguished. *Kaiser Co. v. Reid (1947) 30 Cal. 2d 610, 619, 184 P.2d 879* ; *Nahas v. Local 905, Retail Clerks International Asso. (1956) 144 Cal. App. 2d 808, 821, 301 P.2d 932*

Determination whether agreement is lease, easement, or some other interest in land for purposes of determining rights and duties under agreement, is not essential since contractual relationship between parties must be analyzed based on evidence and findings without regard to its classification under traditional common law concepts. *Golden West Baseball Co. v. City of Anaheim (1994) 25 Cal. App. 4th 11, 33, 36-37, 31 Cal. Rptr. 2d 378*

For purposes of tort liability, no special or unique relationship exists between landlord and tenant in commercial setting that creates fiduciary relationship, since duties toward each other are defined by lease between those parties and ordinary damages for breach of lease are available equally to both. *Girard v. Delta Towers Joint Venture (1993) 20 Cal. App. 4th 1741, 1749-1751, 26 Cal. Rptr. 2d 102*

Lease is primarily conveyance but also contractual in nature. Medico-Dental etc. v. *Horton & Converse (1942) 21 Cal. 2d 411, 418, 132 P.2d 457* ; *Flynn v. Mikelian (1962) 208 Cal. App. 2d 305, 310, 25 Cal. Rptr. 138* ; *Goodman v. Jonas (1956) 142 Cal. App. 2d 775, 790, 299 P.2d 424*

[17] Offer to Lease

Proposed sublessee's financing of special improvements does not constitute acceptance of offer to lease. *San Diego Professional Ass'n v. Herrick (1970) 4 Cal. App. 3d 424, 429-430, 84 Cal. Rptr. 398*

[18] Options to Purchase

Month-to-month tenant is not entitled to specific performance of option to purchase property where option clause had been deleted from lease by written notice properly given pursuant to *Civ. Code § 827*. *Wilcox v. Anderson (1978) 84 Cal. App. 3d 593, 596, 148 Cal. Rptr. 773*

[19] Recordation

When tenant's option to purchase was separate, unrecorded document that was not referred to in recorded lease, tenant's

possession under lease does not give subsequent purchaser constructive notice of option or requiring inquiry of tenant of other rights. *Gates Rubber Co. v. Ulman (1989) 214 Cal. App. 3d 356, 366-370, 262 Cal. Rptr. 630*

Purpose of recording lease. *Domarad v. Fisher & Burke, Inc. (1969) 270 Cal. App. 2d 543, 554, 76 Cal. Rptr. 529*

Conveyance for recordation purposes includes lease for years of real property. *Seal of Gold Mining Co. v. Slater (1911) 161 Cal. 621, 630, 120 P. 15*

[20] Regulatory Compliance by Landlord and Tenant

Under net lease with broad repair clause and general compliance with laws clause, landlord is not entitled to force tenant to make or pay for costs of seismic upgrading undertaken by landlord in absence of existing damage to leased building or any governmental ordinance requiring seismic upgrade to building. *Prudential Ins. Co. of America v. L.A. Mart (9th Cir. 1995) 68 F.3d 370, 371*

Responsibility for complying with governmental laws, regulations, or orders does not necessarily depend on literal terms of lease's compliance with laws clause but rather on terms of lease as a whole and whether governmental order was triggered by lessee's particular use of leased premises. *Brown v. Green (1994) 8 Cal. 4th 812, 824-830, 35 Cal. Rptr. 2d 598, 884 P.2d 55* ; *Hadian v. Schwartz (1994) 8 Cal. 4th 836, 843-845, 35 Cal. Rptr. 2d 589, 884 P.2d 46*

Language of clause requiring tenant to comply with all applicable laws when using toxic substances and to clean up "any such wastes, substances or materials found on or under the property," and circumstances in which lease was made, showed that mere presence of de minimis amounts of certain substances otherwise toxic in larger quantities did not trigger tenant's obligations to clean up property. *SDC/Pullman Partners v. Tolo Inc. (1997) 60 Cal. App. 4th 37, 44-45, 70 Cal. Rptr. 2d 62*

[21] Rule Against Perpetuities

Ten-year lease whose term is to commence on recording of notice of completion of building does not violate rule against perpetuities. *Wong v. Di Grazia (1963) 60 Cal. 2d 525, 541, 35 Cal. Rptr. 241, 386 P.2d 817*

Commercial, nondonative transactions such as options to renew, rights of first refusal, and commercial leases are exempt from provisions of Uniform Statutory Rule Against Perpetuities (*Prob. Code § 21225*), except if involving lease or grant of town or city lot, which is subject to statutory 99-year term limit (*Civ. Code § 718*). *Shaver v. Clanton (1994) 26 Cal. App. 4th 568, 576, 31 Cal. Rptr. 2d 595*

[22] Sublease

Sublessee is bound by terms and conditions of original lease. *Pedro v. Potter (1926) 197 Cal. 751, 760, 242 P. 926*

General rule is that rights of subtenant cannot be affected by voluntary surrender of master lease. *Northridge Hospital Foundation v. Pic'N' Save No. 9, Inc., (1986) 187 Cal. App. 3d 1088, 1094-1095, 232 Cal. Rptr. 329*

Transfer of portion of lessee's interest is a sublease. *Reed v. South Shore Foods, Inc. (1964) 229 Cal. App. 2d 705, 710, 40 Cal. Rptr. 575*

Right of sublessee to possession of premises as against original lessor terminates with the lease or term of original lessee. *Scott v. Mullins (1962) 211 Cal. App. 2d 51, 55, 27 Cal. Rptr. 269*

Subtenant's direct rental payments to owner does not affect status of transfer. *Reed v. South Shore Foods, Inc. (1964) 229 Cal. App. 2d 705, 711, 40 Cal. Rptr. 575*

Sublessees have no right to any option given by original lease but assignees are entitled to enforce obligation to renew. *Ablett v. Clauson (1954) 43 Cal. 2d 280, 283, 272 P.2d 753*

[23] Subordination

Commercial lease was extinguished by trustee sale under deed of trust that was senior to lease by virtue of clause in lease subordinating it to future mortgages; fact that subordination clause encompassed only mortgages and not deeds of trust did not mean lease was not forfeited, because the two instruments are functionally and legally the same. *Aviel v. Ng (2007) 161 Cal. App. 4th 809, 817, 74 Cal. Rptr. 3d 200*

Foreclosure did not terminate subordinated lease that contained an attornment provision under which the tenant agreed to recognize, or attorn to, a new landlord who could be the purchaser in a foreclosure sale or the transferee in a transfer in lieu of foreclosure. *Miscione v. Barton Development Co. (1997) 52 Cal. App. 4th 1320, 1332, 61 Cal. Rptr. 2d 280*

Foreclosure terminates subordinated lease. *Dover Mobile Estates v. Fiber Form Products, Inc. (1990) 220 Cal. App. 3d 1494, 1499-1500, 270 Cal. Rptr. 183*

[24] Tenant's Rights Against Third Parties

Apartment renters properly asserted claim under RICO (*18 U.S.C. § 1961 et seq.*) against neighboring residents based on economic loss in leasehold interests arising from sale of illegal drugs and resultant crime and violence that severely affected neighborhood. *Oscar v. University Students Co-op. Ass'n (9th Cir. 1991) 939 F.2d 808, 812-814*

[25] Termination of Tenancies

Tenant's exercise of option to renew lease, which occurred after fire destroyed premises, did not cut off landlord's rights under provision allowing either party to cancel lease within 30 days of total or partial destruction of premises. *11382 Beach Partnership v. Libaw (1999) 70 Cal. App. 4th 212, 216, 82 Cal. Rptr. 2d 533*

[26] Third Parties

Tenant's possession of property is sufficient to put subsequent purchaser on notice of tenant's claim. *Evans v. Faught (1965) 231 Cal. App. 2d 698, 705, 42 Cal. Rptr. 133*

[27] Title

Lessee is estopped to deny title of his or her landlord. *People v. Rice (1960) 185 Cal. App. 2d 207, 211, 8 Cal. Rptr. 76* ; *First Nat'l Bank of Oroville v. Aldridge (1939) 33 Cal. App. 2d 485, 489, 92 P.2d 674*

Validity of landlord's title is not defense in action to cancel lease. *Ware v. Stafford (1957) 148 Cal. App. 2d 840, 843-844, 307 P.2d 950*

Validity of landlord's title is not defense in suit for unlawful detainer. *Staudigl v. Harper (1946) 76 Cal. App. 2d 439,*

445-446, 173 P.2d 343

Validity of landlord's title is not defense in suit for rent. *Blackman v. Dalton's Auto & Furniture Loans Ltd. (1942) 51 Cal. App. 2d 14, 17, 124 P.2d 123*

Tenant entitled to assert his or her superior title in landlord's quiet title action. *Dimond Public Utility Dist. v. Shaffer (1960) 185 Cal. App. 2d 482, 486-487, 8 Cal. Rptr. 372*

Tenant is not estopped to question landlord's title in action to recover rent paid to landlord when lease was executed under misapprehension that landlord owned the leased property. *Stratton v. Hanning (1956) 139 Cal. App. 2d 723, 727, 294 P.2d 66*

Tenant is not estopped to question landlord's title where it appears from the lease that the parties agreed the tenant could do so. *Taylor v. Continental So. Corp. (1951) 104 Cal. App. 2d 425, 432, 233 P.2d 577*

Tenant is not estopped to question landlord's title in action to have lease rescinded where tenant was induced to enter into lease by fraudulent representations. *Kearney Inv. Co. v. Golden Gate Ferry Co. (1926) 198 Cal. 560, 563-564, 246 P. 322*

Tenant is allowed to interplead conflicting title claims of landlord and third party as to rent. *Hancock Oil Co. v. Hopkins (1944) 24 Cal. 2d 497, 509, 150 P.2d 463*

Tenant is not estopped to question landlord's title when tenant was not placed in possession by the landlord. *Strong v. Baldwin (1908) 154 Cal. 150, 161-162, 97 P. 178*

Lessee is unable to hold adversely to landlord while holding under lease. *Harvey v. Nurick (1968) 268 Cal. App. 2d 213, 215, 74 Cal. Rptr. 94*

Lessee is entitled to recover damages for expenses incurred in defending lessee's possession against assertion of superior title. *Standard Livestock Co. v. Pentz (1928) 204 Cal. 618, 632, 269 P. 645*

[28] Types of Tenancies

One who enters on land by permission of owner under void lease is tenant at will. *Covina Manor, Inc. v. Hatch (1955) 133 Cal. App. 2d Supp. 790, 793 284 P.2d 580*

Tenancy at will is able to become tenancy from month-to-month or periodic tenancy by acceptance of rent. *Redevelopment Agency of City & County of San Francisco v. Superior Court (1970) 13 Cal. App. 3d 561, 570, 91 Cal. Rptr. 886*

Exact duration is necessary to create estate for definite period. *Camp v. Matich (1948) 87 Cal. App. 2d 660, 665, 197 P.2d 345*

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§ 332.33 Attorney General Opinions

Educ. Code § 15705 permits school district to lease property it owns for minimal consideration to contractor for purpose of having contractor construct school facilities on such property. *56 Ops. Cal. Att'y Gen. 571, 579-581 (1973)*

When agreed payment by hospital pharmacy tenant to hospital is unearned because it exceeds true rental value of space and services provided, agreement violates *Bus. & Prof. Code § 650*. *53 Ops. Cal. Att'y Gen. 117, 118-120 (1970)*

Savings and loan association is not authorized to make loan secured by sublease. *42 Ops. Cal. Att'y Gen. 5, 6-7 (1963)*

"Lease" in *Fish & Game Code § 1121* does not include easements, licenses, or permits. *44 Ops. Cal. Att'y Gen. 98, 99 (1964)*

Lease is not within scope of *Civ. Code §§ 2953.1-2953.5* (subordination agreements). *43 Ops. Cal. Att'y Gen. 19, 24 (1964)*

Redevelopment agency is not allowed to service listing of landlord who will not accept members of minority groups as tenants. *34 Ops. Cal. Att'y Gen. 1, 2-4 (1959)*

Licensee holding general on-sale license for sale of alcoholic beverages for a bona fide eating place is not allowed to lease or make concession agreement subletting restaurant operations on premises. *29 Ops. Cal. Att'y Gen. 95, 98-100 (1957)*

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§§ 332.36[Reserved]

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Volume 29: Landlord and Tenant: General Introduction thru Rent Control-Chs. 330-339
Chapter 332 LANDLORD AND TENANT: THE TENANCY
PART IV. FORMS
A. Breaches of Covenants

29-332 California Forms of Pleading and Practice--Annotated § 332.40

§ 332.40 Complaint for Damages for Breach of Covenant--By Landlord Against Tenant--General Form

[1] FORM Complaint for Damages for Breach of Covenant--By Landlord Against Tenant--General Form
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Breach of Covenant)
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges on knowledge as to his/her own acts and on information and belief as to all other matters as follows:

1. Plaintiff is, and at all times material herein has been, an individual [*or allege other capacity of plaintiff*] residing [*and/or duly authorized to conduct business*] in _____ County, State of California.

2. Plaintiff is informed and believes and thereon alleges that defendant is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence of defendant*].

3. Plaintiff is ignorant of the true names of defendants DOES I- _____, inclusive, and has therefore sued them by the above names which are fictitious. Plaintiff will amend this complaint by inserting true names in lieu of the fictitious names, together with apt and proper charging words, when the true names are ascertained. Plaintiff is

informed and believes and thereon alleges that each of the defendants designated in this complaint as DOE is responsible and liable to plaintiff in some manner for the events, happenings, and contentions referred to in this complaint. All references in this complaint to defendants shall be deemed to include all DOE defendants.

4. Plaintiff is informed and believes and thereon alleges that each defendant, including DOES, was and is the agent, employee, servant, subsidiary, partner, member, associate, or representative of each other defendant, including DOES, and all of the things alleged to have been done by the defendants were done in the course and scope of the agency, employment, service, subsidiary relationship, partnership, membership, association, or representative relationship and with the knowledge and consent of their respective principals, employers, masters, parent corporations, partners, members, associates, or representatives.

5. On or about _____ [*date*], plaintiff leased to defendant certain premises known as _____ [*street address and city*], California, under a written lease. [*OPTIONAL:* A true and correct copy of the lease is attached to this complaint as Exhibit A and is incorporated herein by reference.]

6. Plaintiff has duly performed all conditions, covenants, and promises required to be performed by him/her under the lease in accordance with its terms and conditions, except for those acts that have been prevented, delayed, or excused by acts or omissions of defendants.

7. Defendant entered into possession of the premises under the terms and conditions of the lease and continued to occupy them until _____ [*date*].

8. By the lease, defendant covenanted to _____ [*state nature of covenant in general terms*] as more particularly set out in [Paragraph _____ of] the lease.

9. In breach of this covenant, defendant failed and refused to _____ [*repeat statement of covenant in general terms as in Paragraph 8*], as follows: _____ [*specify*].

10. By reason of defendant's breach of the covenant, plaintiff was required to and did expend the sum of $_____ to _____ [*specify*], to plaintiff's damage in such sum.

11. As a proximate result of defendant's breach of contract, as described in Paragraph 9, above, plaintiff has been damaged at least in the amount of $ _____ to _____ [*specify*], together with interest at the legal rate from the date plaintiff expended the sum set forth in Paragraph 10, above, to the date judgment is entered pursuant to this complaint.

12. As a further proximate result of defendant's breach of contract, as described in Paragraph 9, above, and this action to collect monies due, plaintiff has and will incur costs and attorney's fees in an amount to be proven, which costs and attorney's fees are recoverable by plaintiff under Paragraph _____ of the lease.

13. As a further proximate result of defendant's breach of contract, as described in Paragraph 9, above, plaintiff has suffered, and will continue to suffer, additional and consequential damages, to be proven, as a result of (1) broker's and attorney's fees and other expenses incurred in connection with re-leasing, repairing, and refurbishing the subject portion of the subject property in preparation for reletting, and (2) any diminution in the value of the subject property.

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____;

2. For costs of suit incurred;

3. For attorney's fees incurred; and

4. For such other and further relief as the court may deem just and proper and according to equity.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*ADD verification, if desired*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form is a general form of complaint for use in an action by a landlord against a tenant for breach of a covenant in a lease.

PRACTICE TIP:

Including Exhibits With Complaint. There is no requirement that copies of leases or notices to perform covenants be attached to the complaint as exhibits [*see* P 5 of form], so long as the complaint includes allegations of proper service of a proper notice. Some attorneys routinely attach these as exhibits. However, they are exposing themselves to a demurrer or motion to quash if their attached notice is defective on its face or inconsistent with the attached lease. This exposure might not be a bad thing, however; if a notice is defective, the landlord's attorney might as well find out early in the suit, before extensive attorneys' fees are incurred. *By Myron Moskovitz*

[3] Damages in Action Based on Contract

For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by the Civil Code, is the amount that will compensate the party aggrieved for all detrimentproximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom [*Civ. Code § 3300*].

PRACTICE TIP:

Estimating Damages. You might estimate "daily damages" simply by dividing the monthly rent by the number of days in the month. *By Myron Moskovitz*

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*].

If the action is a limited civil case, the caption must state whether the demand exceeds or does not exceed $10,000 and must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Cross References

For forms of allegations relating to specific covenants, see *§§ 332.41 -332.50*.

For a complaint for damages for breach of a covenant by a tenant against a landlord, see *§ 332.51*.

For alternative fictitious name allegations and allegations of capacity and residence, see Ch. 20, *Allegations Commonly Used* .

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions* .

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verifications* .

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29-332 California Forms of Pleading and Practice--Annotated § 332.41

§ 332.41 Allegation--Serving of Notice to Perform Covenant When Notice Required by Lease

[1] FORM Allegation--Serving of Notice to Perform Covenant When Notice Required by Lease

On or about _____ [*date*], plaintiff duly served on defendant a notice in writing to perform the covenant, in accordance with the provision for notice in the lease. [*OPTIONAL:* A true and correct copy of the notice is attached hereto as Exhibit _____ and is incorporated herein by reference.]

[2] Use of Form

This form is for use in a complaint to recover damages for breach of a covenant in a lease when the lease requires notice to put the defendant in default.

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29-332 California Forms of Pleading and Practice--Annotated § 332.42

§ 332.42 Allegation--Tenant's Breach of Covenant to Keep and Surrender Premises in Good Condition

[1] FORM Allegation--Tenant's Breach of Covenant to Keep and Surrender Premises in Good Condition

1. By the lease, defendant covenanted to keep and surrender the leased premises in good condition, as more particularly set out in [Paragraph _____ of] the lease.

2. In breach of this covenant, defendant failed and refused to keep and surrender the leased premises in good condition, as follows: _____[*specify*].

3. By reason of defendant's breach of the covenant, plaintiff was required to, and did, expend the sum of $_____ to put the premises in good condition after they were vacated by defendant, to plaintiff's damage in such sum.

[2] Use of Form

This form is for use in a complaint for damages for breach of a covenant to keep and surrender leased premises in good condition. These allegations may be substituted for Paragraphs 8 to 10 in § 332.40[1].

[3] Tenant's Covenant to Repair or to Deliver Premises in Specified Condition

Most tenant's covenants to repair obligate the tenant to repair all damage occurring during the term of the lease with the exception of ordinary wear and tear. These covenants are reasonably interpreted to avoid placing any unwarranted burden of improvement of the landlord's premises on the tenant. The tenant is not bound to make repairs of a substantial nature, involving the substitution of new structures or parts thereof for old, although the latter are defective and worn out through age [*Lynn v. DePue Warehouse Co. (1962) 198 Cal. App. 2d 742, 746, 17 Cal. Rptr. 841]* . Thus, a tenant is not required to renovate the premises at the expiration of his or her lease [*Kanner v. Globe Bottling Co. (1969) 273 Cal. App. 2d 559, 565, 78 Cal. Rptr. 25]* and is not obligated to restore the premises to his or her landlord in a better condition than they were at the inception of the tenancy [*Kanner v. Globe Bottling Co. (1969) 273 Cal. App. 2d 559, 566, 78 Cal. Rptr. 25]* .

A lease provision that the tenant deliver up possession of the premises at the expiration of the lease in good condition, with ordinary use and wear excepted, contemplates that deterioration will occur by reason of time and use despite ordinary care for its preservation [*Kanner v. Globe Bottling Co. (1969) 273 Cal. App. 2d 559, 565, 78 Cal. Rptr. 25]* . But when a tenant covenants to restore the premises to the condition in which they were before any alterations by the tenant, the tenant has the duty to do that which is necessary to restore the premises to their original condition [*see Worthington v. Kaiser Foundation Health Plan, Inc. (1970) 8 Cal. App. 3d 435, 440, 87 Cal. Rptr. 272]* .

A lease provision and amendment to the lease requiring the tenant of commercial property to maintain and repair the premises, including "make any improvement, correct any condition, or otherwise comply with any written notice" from the city or landlord regarding defects did not require the tenant to replace the roofs on the premises. The tenant's duty of maintenance under the lease and amendment could only be reasonably construed as requiring the tenant to maintain the roofs in their conditions as of the time those written agreements were executed (i.e., in their then-dilapidated conditions). If the parties had intended the tenant to assume the obligation to replace the roofs, it would be reasonable to expect that the lease and/or amendment would expressly state this rather than merely stating that the tenant was required to maintain the roofs and other parts of the premises [*ASP Properties Group, L.P. v. Fard, Inc. (2005) 133 Cal. App. 4th 1257, 1271-1272, 35 Cal. Rptr. 3d 343]* .

[4] Measure of Damages

If an action is brought after expiration of a term for breach of a tenant's covenant to keep the premises in repair or to surrender them in good repair or in a specified condition, the measure of damages is the reasonable cost of putting the demised premises into the required state of repair or the condition contemplated by the covenant [*Iverson v. Spang Industries, Inc. (1975) 45 Cal. App. 3d 303, 308, 119 Cal. Rptr. 399* (involving covenant to restore premises to original condition)]. In addition, a tenant who breaches a covenant to restore the premises to their original condition is liable for damages for the loss of rentals during the period required to restore the premises [*Worthington v. Kaiser Foundation Health Plan, Inc. (1970) 8 Cal. App. 3d 435, 442, 87 Cal. Rptr. 272]* .

When there is a breach of the duty to return the premises in good repair, the landlord may recover the reasonable cost of restoring the premises plus lost rent for the time of making the repairs even if the landlord rerents the premises at a reduced rate to a tenant who makes the repairs [*Polster, Inc. v. Swing (1985) 164 Cal. App. 3d 427, 432-434, 210 Cal. Rptr. 567]* .

[5] Cross References

Witkin, Summary of California Law, vol. 12, *Real Property*, §§ 632, 635-637 (10th ed. 2005)

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29-332 California Forms of Pleading and Practice--Annotated § 332.43

§ 332.43 Allegations--Tenant's Breach of Covenant to Surrender Possession of Premises on Expiration of Term

[1] FORM Allegations--Tenant's Breach of Covenant to Surrender Possession of Premises on Expiration of Term

1. By the lease, defendant covenanted to deliver up possession of the leased premises to plaintiff on expiration of the term of the lease, as more particularly set out in [Paragraph _____ of] the lease.

2. In breach of the covenant, defendant failed and refused to deliver up possession of the leased premises on expiration of the term of the lease on _____ [*date*], and held possession of the premises without plaintiff's consent for an additional period of _____ [*number*] days.

3. By reason of defendant's breach of the covenant, plaintiff was prevented from _____ [*e.g.*, delivering possession of the premises to a new and different tenant in accordance with a lease made of the premises providing for an increased rental in the sum of $ _____ per month], to plaintiff's damage in the sum of $_____.

[2] Use of Form

The form in [1], *above*, is for use in a complaint for damages for breach of a covenant to surrender possession of leased premises on expiration of the term. These allegations may be substituted for Paragraphs 8 to 10 in *§ 332.40[1]*.

[3] Interest Not Allowable

Interest is not allowable on damages for breach of the covenant to surrender premises at the end of the lease's term [*Coburn v. Goodall (1887) 72 Cal. 498, 509, 14 P. 190* (*criticized on other grounds in Chinese Hosp. Foundation Fund v. Patterson (1969) 1 Cal. App. 3d 627, 632, 81 Cal. Rptr. 795*)].

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29-332 California Forms of Pleading and Practice--Annotated § 332.44

§ 332.44 Allegations--Tenant's Breach of Covenant to Insure Against Fire

[1] FORM Allegations--Tenant's Breach of Covenant to Insure Against Fire

1. By the lease, defendant covenanted to keep the leased premises insured at all times against fire, as more particularly set out in [Paragraph _____ of] the lease.

2. In breach of this covenant, defendant failed and refused to provide insurance against fire for the leased premises as follows: _____[*specify*].

3. By reason of defendant's breach of the covenant, plaintiff was required to, and did, provide insurance against fire for the premises and pay the premiums therefor in the sum of $_____, to plaintiff's damage in such sum.

[2] Use of Form

The form in [1], *above*, is for use in a complaint for damages for breach of a tenant's covenant to insure the leased premises against fire. These allegations may be substituted for Paragraphs 8 to 10 in *§ 332.40[1]*.

[3] Covenants to Insure

The failure to maintain insurance as agreed in a lease is a breach of the lease giving rise to a liability measured by the damage suffered from failure to secure indemnity from the promised insurance [*Davidson v. Welch (1969) 270 Cal. App. 2d 220, 236-237, 75 Cal. Rptr. 676]* . But failure to insure the property, even if the lease requires it, is not a breach of the lease when performance is impossible because the insurance company will not issue a policy [*Kaliterna v. Wright (1949) 94 Cal. App. 2d 926, 935, 212 P.2d 32* (*overruled on other grounds in State Farm etc. Ins. Co. v. Superior Court (1956) 47 Cal. 2d 428, 431, 304 P.2d 13*)]. In addition, when there is an agreement for insurance between parties standing in the relationship of lessor and lessee, and the party obligated, in violation of his or her agreement, procures insurance payable to himself or herself alone, the other party for whose benefit the agreement was made has an equitable lien on the proceeds of such insurance [*Davidson v. Welch (1969) 270 Cal. App. 2d 220, 237, 75 Cal. Rptr. 676]* .

[4] Effect of Assignment

A covenant to procure insurance runs with the land, and therefore an assignee of the lease in possession of the premises must pay insurance premiums if this obligation was provided for in the lease [*Bank of America etc. Ass'n. v. Moore (1937) 18 Cal. App. 2d 522, 525, 64 P.2d 460]* .

[5] Effect of Absence of Covenant to Insure

In the absence of special provision in the lease there is no obligation of the tenant to procure insurance for the benefit of his or her landlord insuring against fire or any other risk, and neither the landlord nor the tenant ordinarily has an interest in the proceeds of insurance obtained by the other on his or her own separate insurable interest [*Alexander v. Security-First Nat'l Bank (1936) 7 Cal. 2d 718, 723, 62 P.2d 735]* .

By the same token if the lessee does not agree to obtain insurance or to pay any increase in premiums on policies covering the premises and resulting from the lessee's authorized use of the premises, the lessee does not breach the lease by refusing or failing to do so. This is so notwithstanding the fact that the lease provides that no use is to be made of the premises that would increase the rate of insurance. Such a provision applies only when the lessee makes a different or unauthorized use of the premises, and not when the lessee uses the premises in conformity with the use expressly authorized by the lease itself [*Nieman v. Peterson (1978) 86 Cal. App. 3d Supp. 14, 150 Cal. Rptr. 774]* .

[6] Cross References

Witkin, Summary of California Law, vol. 12, *Real Property*, § 576 (10th ed. 2005)

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29-332 California Forms of Pleading and Practice--Annotated § 332.45

§ 332.45 Allegations--Tenant's Breach of Covenant to Comply With Municipal Health Regulations Relating to Use of Premises

[1] FORM Allegations--Tenant's Breach of Covenant to Comply With Municipal Health Regulations Relating to Use of Premises

1. By the lease, defendant covenanted to comply at his/her own expense with all municipal health regulations and orders relating to use of the leased premises, as more particularly set out in [Paragraph _____ of] the lease.

2. In breach of this covenant, defendant failed and refused to comply with a certain municipal health regulation and order issued thereon relating to use of the premises and requiring certain repairs and alterations to the premises, as follows: _____[*specify*].

3. By reason of defendant's breach of covenant, plaintiff was required to, and did, expend the sum of $_____ for repairs and alterations to the premises in compliance with regulation and order, to plaintiff's damage in that sum.

[2] Use of Form

The form in [1], *above*, is for use in a complaint for damages for a tenant's breach of a covenant to comply with municipal health regulations and orders relating to the use of the leased premises at his or her own expense. The form may be used for commercial leases only. These allegations may be substituted for Paragraphs 8 to 10 in *§ 332.40[1]*.

[3] Tenant's Performance of Covenant

The tenant's performance of a covenant to comply with municipal regulations relating to the use of the premises at the tenant's own expense is not excused because it would add to tenant's expense [*Rose v. Long (1954) 128 Cal. App. 2d 824, 826-827, 275 P.2d 925]* .

[4] Responsibility for Complying With Governmental Laws

The responsibility for complying with governmental laws, regulations, or orders does not necessarily depend on the literal terms of the lease's compliance with laws clause. Rather, this responsibility depends on the lease's terms as a whole and whether the governmental order was triggered by the lessee's particular use of the lease premises [*Brown v. Green (1994) 8 Cal. 4th 812, 824-830, 35 Cal. Rptr. 2d 598, 884 P.2d 55* ; *Hadian v. Schwartz (1994) 8 Cal. 4th 836, 843-845, 35 Cal. Rptr. 2d 589, 884 P.2d 46]* .

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29-332 California Forms of Pleading and Practice--Annotated § 332.46

§ 332.46 Allegations--Tenant's Breach of Covenant to Pay Taxes

[1] FORM Allegations--Tenant's Breach of Covenant to Pay Taxes

1. By the lease, defendant covenanted to pay all taxes levied against the leased premises, as more particularly set out in [Paragraph _____ of] the lease.

2. In breach of this covenant, defendant failed and refused to pay taxes levied against the leased premises in the sum of $ _____, as follows: _____ [*specify*].

3. By reason of defendant's breach of covenant, plaintiff was required to, and did, pay the sum of $_____ in discharge of the taxes [and accrued interest and penalties], to plaintiff's damage in that sum.

[2] Use of Form

The form in [1], *above*, is for use in a complaint for damages for a tenant's breach of a covenant to pay the taxes levied against the leased premises. These allegations may be substituted for Paragraphs 8 to 10 in *§ 332.40[1]*.

[3] Covenant to Pay Taxes

When a covenant has been included in the lease obligating the tenant to pay taxes and assessments, the extent of liability depends on the words of the covenant, the context in which they occur, and the subject matter to which they are applied [*Terminal Inv. Co. v. Pope Estate Co. (1932) 122 Cal. App. 281, 283, 10 P.2d 139]* . This liability is further limited to taxes legally assessed [*Third & Broadway Bldg. Co. v. Southern Cal. Edison Co. (1933) 132 Cal. App. 186, 192, 22 P.2d 574]* . The parties to a lease either may provide that one or the other of them must pay the taxes assessed against the leased premises or may agree to an apportionment of the taxes between them [*Lawrence v. F.W. Woolworth Co. (1965) 63 Cal. 2d 119, 121, 45 Cal. Rptr. 140, 403 P.2d 396]* .

If the covenant provides that the tenant must also pay any increase in taxes on leased lands due to increased assessed

valuation, this clause does not require the tenant also to pay increased taxes occasioned by an increase in the tax rate [*Los Angeles Land & Water Co. v. Consumers Rock & Gravel Co. (1935) 3 Cal. 2d 77, 79, 43 P.2d 281]* . However, a covenant that provides for payment of taxes by the tenant during the lease's term includes taxes that may be enacted after the lease has been entered into, including those taxes created by an ordinance whose enactment comes on the very last day of the lease term [*Dorr v. Marsh (1920) 184 Cal. 588, 589-590, 194 P. 1002* ; *Terminal Inv. Co. v. Pope Estate Co. (1932) 122 Cal. App. 281, 293-295, 10 P.2d 139]* .

[4] Effect of Assignment

Covenants to pay taxes and assessments run with the land [*Civ. Code § 1463*; *Ellis v. Bradbury (1888) 75 Cal. 234, 236, 17 P. 3]* . Consequently, when a tenant assigns his or her interest in the lease to another, the assignee in possession becomes liable for tax payments under the covenant. Should the assignee specifically assume the obligations of the lease, he or she remains liable on the covenant even though he or she may not be in possession [*Bank of America etc. Ass'n. v. Moore (1937) 18 Cal. App. 2d 522, 525, 64 P.2d 460]* .

[5] Payment of Taxes in Absence of Covenant

In the absence of an express agreement with regard to the payment of taxes, the general rule is that the lessor has the obligation to pay all taxes assessed against the leased premises during the lease's term. Excepted from the general rule are taxes on improvements constructed on the leased premises by the lessee when the lessee by the terms of the lease is permitted to remove the improvements either during or at the end of the lease term. In this case, the lessee has the obligation of paying the increase in taxes due to the improvements, and he or she may not avoid such liability by proving that it is unlikely that he or she will remove the improvements [*Lawrence v. F.W. Woolworth Co. (1965) 63 Cal. 2d 119, 121-123, 45 Cal. Rptr. 140, 403 P.2d 396]* .

Also, a lessee may be required to pay real property taxes on the leased premises, or on a portion of the leased premises, under a lease that fails to impose this obligation on him or her in express terms but when the obligation is implicit in a construction of the lease [*Ellis v. Title Ins. & Trust Co. (1964) 227 Cal. App. 2d 204, 206, 38 Cal. Rptr. 605]* .

[6] Improvements and Fixtures

For the purpose of property taxation, the term "real estate" includes improvements, and the definition of improvements includes fixtures [*Rev. & Tax. Code §§ 104, 105*].

The assessor is required to assess taxable property to the persons owning, claiming, possessing, or controlling it on the lien date, but may assess the property on the secured roll to the person owning, claiming, possessing, or controlling it for the ensuing fiscal year [*Rev. & Tax. Code § 405*]. Hence, improvements may properly be assessed to the tenant in possession [*Valley Fair Fashions, Inc. v. Valley Fair (1966) 245 Cal. App. 2d 614, 616, 54 Cal. Rptr. 306]* .

A written statement may be filed attesting to separate ownership whenever improvements are owned by a person other than the owner of the land on which they are located and the assessor is required to assess separate interests in real property to their separate owners if he or she receives such a statement [*Rev. & Tax. Code § 2188.2*]. However, the assessor is not prohibited from separately assessing improvements to the tenant when he or she received no such statement [*Ventura County v. Channel Islands State Bank (1967) 251 Cal. App. 2d 240, 244-251, 59 Cal. Rptr. 404]* , although the ultimate liability for the tax as between the owner and the lessee turns on a construction of the agreements between them [*Valley Fair Fashions, Inc. v. Valley Fair (1966) 245 Cal. App. 2d 614, 617, 54 Cal. Rptr. 306]* .

[7] Cross References

Witkin, Summary of California Law, vol. 12, *Real Property*, §§ 657-659 (10th ed. 2005)

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29-332 California Forms of Pleading and Practice--Annotated § 332.47

§ 332.47 Allegations--Tenant's Breach of Covenant Not to Keep or Use Inflammable Substances on Leased Premises

[1] FORM Allegations--Tenant's Breach of Covenant Not to Keep or Use Inflammable Substances on Leased Premises

1. Under the terms of the lease, defendant agreed that there was not to be kept, used, stored, or sold on the premises any inflammable or combustible substances.

2. On or about _____ [*date*], and prior thereto, defendant violated the lease's terms in that he/she had stored on the premises, contrary to the terms of the lease, great quantities of _____ [*specify*] which substance was readily inflammable. This inflammable and combustible substance, on or about _____ [*date*], caused a fire to start on the premises, which completely destroyed the building on the premises. The reasonable cost of restoring the premises to the condition at the time of the fire was and is the sum of $_____. This sum has not, nor has any part of this sum, been paid.

3. As a result of this fire, plaintiff was further damaged in the loss of the rent for _____ [*number*] months, in the amount of $_____.

4. Plaintiff is informed and believes, and thereon alleges, that defendant knew at the time that he/she brought on the premises the inflammable and combustible substance mentioned above, that the substance was inflammable and combustible, and that the substance might cause fire to the building, and defendant also knew that the lease prohibited the bringing and storing on the premises inflammable and combustible substances, and that, notwithstanding the lease's provisions, the defendant brought the substance on the premises and stored the same thereon. Plaintiff further alleges that the substance, being inflammable and combustible, caused the fire that destroyed the building on the premises.

[2] Use of Form

The form in [1], *above*, is for use in a complaint for damages for breach of a covenant not to keep or use inflammable substances on the leased premises. These allegations may be substituted for Paragraphs 8 to 10 in *§ 332.40[1]*.

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29-332 California Forms of Pleading and Practice--Annotated § 332.48

§ 332.48 Allegations--Tenant's Breach of Covenant Limiting Use

[1] FORM Allegations--Tenant's Breach of Covenant Limiting Use

1. By the lease, defendant covenanted to use the premises for _____ [*specify*] purposes only, and for no other purposes, as more particularly set out in [Paragraph _____ of] the lease.

2. In breach of the covenant, on or about _____[*date*], defendant began to use the premises for _____[*specify*] purposes.

3. As a proximate result of defendant's breach of the covenant, the premises were damaged, requiring repairs in the sum of $_____, which plaintiff performed to his/her damage in that sum.

[2] Use of Form

The form in [1], *above*, is for use in a complaint for damages for a tenant's breach of a covenant limiting the purposes for which leased premises may be used. These allegations may be substituted for Paragraphs 7 to 10 in *§ 332.40[1]*.

As an alternative to seeking damages, the landlord may rescind the lease [*Civ. Code § 1930*; *Keating v. Preston (1940) 42 Cal. App. 2d 110, 115, 108 P.2d 479]* . For a discussion, forms, and procedural guide for use in an action for rescission, see Ch. 490, *Rescission and Restitution* .

[3] Limitations on Use of Premises in Commercial Lease

A commercial lease may include restrictions on the use and change in use of the leased premises [*see Civ. Code § 1997.210 et seq.*].

[4] Limitations on Use of Premises in Residential Lease

A residential lease may also prohibit changes in use [*Civ. Code § 1930*; *Chandler v. Hart (1911) 161 Cal. 405, 413,*

119 P. 516] . A tenant is liable for damages for a change in use in violation of a lease provision [*Civ. Code § 1930*].

A lease that fails to specify the purpose for which the leased premises may be used, implies that it may be used for any appropriate purpose [*Keating v. Preston (1940) 42 Cal. App. 2d 110, 118, 108 P.2d 479]* .

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29-332 California Forms of Pleading and Practice--Annotated § 332.49

§ 332.49 Allegations--Tenant's Breach of Covenant Not to Assign Lease Without Landlord's Consent [Civ. Code § 1995.320(a)]

[1] FORM Allegations--Tenant's Breach of Covenant Not to Assign Lease Without Landlord's Consent [Civ. Code § 1995.320(a)]

1. By the lease, defendant agreed not to assign the lease without plaintiff's [written] consent.

2. On or about _____ [*date*], defendant assigned the lease to _____ [*name of assignee*], who took possession of the premises.

3. Defendant did not seek or obtain the [written] consent of plaintiff for the assignment.

4. By reason of defendant's breach of the covenant, _____[*specify manner and amount in which plaintiff was damaged, e.g.,* the premises were damaged, requiring repairs in the sum of $_____, which plaintiff performed to his/her damage to that sum].

[2] Use of Form

The form in [1], *above*, is for use in a complaint for damages for a tenant's breach of a covenant requiring the landlord's consent for assignment of the lease. These allegations may be substituted for Paragraphs 8 to 10 in *§ 332.40[1]*.

The landlord may also recover contract damages against the assignee for breach of the covenant not to assign without permission [*Civ. Code § 1995.330(a)*].

This form may be adapted to allege a tenant's damages when a landlord unreasonably withholds consent to an assignment [*see Civ. Code § 1995.310*].

[3] Restrictions on Transfers of Commercial Leases

If a commercial tenant transfers his or her interest in a lease in violation of a restriction on transfer of the tenant's interest, in addition to any other remedies provided by law for breach of the lease, the landlord has all the remedies provided for breach of contract, including but not limited to either or both of the following [*Civ. Code § 1995.320*]:

- The right to contract damages caused by the tenant's breach; or
- The right to terminate the lease.

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29-332 California Forms of Pleading and Practice--Annotated § 332.50

§ 332.50 Allegations--Tenant's Breach of Implied Covenant to Remain in Business

[1] FORM Allegations--Tenant's Breach of Implied Covenant to Remain in Business

1. By the lease, defendant agreed to pay a rental of [$ _____(*specify fixed sum*) and] _____ percent of the _____ [*specify, e.g.,* gross receipts *or* profits] from the business that defendant was to conduct on the leased premises.

2. By the lease, defendant impliedly covenanted to remain in business and to operate the business in its usual and customary manner.

3. In breach of the implied covenant, on or about _____[*date*], defendant ceased to do business on the leased premises.

4. As a proximate result of defendant's breach, plaintiff was deprived of rent in the amount of $_____ [*specify amount that plaintiff would have received had defendant operated the business as usual or amount of damages as specified in lease*] to plaintiff's damage in that sum.

[2] Use of Form

The form in [1], *above*, is for use in a complaint for damages for a tenant's breach of an implied covenant to remain in business when the rent is based on a percentage of the income from the business. These allegations may be substituted for Paragraphs 8 to 10 in *§ 332.40[1]*.

This form may be used even if the lease provides for a fixed sum in addition to a percentage of the business income if the fixed sum is not an adequate rental [*Lippman v. Sears, Roebuck & Co. (1955) 44 Cal. 2d 136, 142-146, 280 P.2d 775]* .

[3] Implied Covenant to Remain in Business

Ordinarily, a statement as to the purpose for which premises are leased does not imply a covenant by the lessee that he or she will engage in that use, since the lessee may cease to use the premises for any purpose [*Lippman v. Sears, Roebuck & Co. (1955) 44 Cal. 2d 136, 142, 280 P.2d 775* ; *Charles C. Chapman Building Co. v. California Mart (1969) 2 Cal. App. 3d 846, 855, 82 Cal. Rptr. 830]* . But if the rental for use of a building is based on a percentage of sales, the lessee reasonably may be said to covenant impliedly that he or she will use good faith to insure a continuation of them. Such an implied covenant may be found not to exist, however, if there is a substantial and adequate guaranteed minimum rental [*Lippman v. Sears, Roebuck & Co. (1955) 44 Cal. 2d 136, 143-145, 280 P.2d 775* ; *see College Block v. Atlantic Richfield Co. (1988) 206 Cal. App. 3d 1376, 1380-1384, 254 Cal. Rptr. 179* (covenant to continue to operate in good faith is implied when rent paid is minimum amount plus percentage of sales and minimum rent is not substantial; whether rent is substantial is question of fact based on circumstances at time lease was executed)].

If rent for business property is based on a percentage of gross receipts or profits, the rental arrangement determines whether a covenant to use the premises for the purposes stated will be implied. The rent may be: (1) in a fixed sum which under the circumstances is both adequate and fair plus a percentage of gross receipts or profits; (2) in a fixed sum which under the circumstances is neither adequate nor substantial plus a percentage of gross receipts or profits; or (3) a percentage of gross receipts or profits only. In the case of the first alternative, absent an express covenant by the lessee to use the property for the purposes stated, he or she may cease to use them for any purpose. In the case of the other two alternatives, a covenant to so use the property may be implied [*Lippman v. Sears, Roebuck & Co. (1955) 44 Cal. 2d 136, 142-146, 280 P.2d 775]* .

[4] Damages for Breach

The measure of damages for breach of the covenant to remain in business ordinarily is the amount that the lessor would have received from his or her share of the proceeds of the business had the lessee operated it in its usual and customary manner. But the parties may provide a different measure of damages in the lease such as the average monthly rental paid during the 12 months preceding the breach [*Lippman v. Sears, Roebuck & Co. (1955) 44 Cal. 2d 136, 144-147, 280 P.2d 775]* .

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29-332 California Forms of Pleading and Practice--Annotated § 332.51

§ 332.51 Complaint for Damages for Breach of Covenant--By Tenant Against Landlord--General Form

[1] FORM Complaint for Damages for Breach of Covenant--By Tenant Against Landlord--General Form

[*Caption. See § 332.40[1].*]

Plaintiff alleges on knowledge as to his/her own acts and on information and belief as to all other matters as follows:

1. [*Capacity and residence of plaintiff. See § 332.40[1], P 1.*]

2. [*Capacity and residence of defendant. See § 332.40[1], P 2.*]

3. [*Fictitious name allegation, if appropriate. See § 332.40[1], P 3.*]

4. [*Fictitious name allegation, if appropriate. See § 332.40[1], P 4.*]

5. On or about _____ [*date*], defendant leased to plaintiff certain premises known as _____ [*street address and city*], California, under a written lease. (A true and correct copy of the lease is attached to this complaint as Exhibit A and is incorporated into this complaint by reference.)

6. Plaintiff has duly performed all conditions, covenants, and promises required to be performed by him/her under the lease in accordance with its terms and conditions, except for those acts that have been prevented, delayed, or excused by acts or omissions of defendants.

7. By the lease, defendant covenanted to _____ [*state nature of covenant in general terms*], as more particularly set out in [Paragraph _____ of] the lease.

8. In breach of this covenant, defendant failed and refused to _____ [*repeat statement of covenant in*

general terms as in Paragraph 7], as follows: _____ [*specify*].

9. By reason of defendant's breach of covenant, _____[*specify manner and amount in which plaintiff was damaged, e.g.,* the reasonable rental value of the leased premises was only $_____ per month, which sum is $ _____ per month less than the rental contracted for, and plaintiff has been damaged thereby in the sum of $ _____].

[*Prayer. See § 332.40[1].*]

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 332.40[1].*]

[2] Use of Form

The form in [1], *above*, is a general form of complaint for use in an action by a tenant against a landlord for breach of a covenant in a lease.

For a form of allegation relating to service of a notice to perform a covenant when the notice is required by the lease, see *§ 332.41*.

For forms of allegations relating to specific covenants, see *§§ 332.52 -332.56*.

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29-332 California Forms of Pleading and Practice--Annotated § 332.52

§ 332.52 Allegations--Landlord's Breach of Covenant to Deliver Possession

[1] FORM Allegations--Landlord's Breach of Covenant to Deliver Possession

1. By the lease, defendant covenanted to deliver possession of the leased premises to plaintiff on a certain date, to wit, _____ [*date*], as more particularly set out in [Paragraph _____ of] the lease.

2. In breach of this covenant, defendant failed to deliver possession of the leased premises to plaintiff and plaintiff was required to, and did, lease other premises.

3. At the time of executing the lease, plaintiff paid a rental deposit to defendant in the sum of $_____ and by reason of defendant's breach of the covenant, plaintiff has been damaged in such sum for rental deposit paid and not returned. Plaintiff has also suffered additional damages, the exact amount of which has yet to be ascertained, and plaintiff will amend this complaint, if necessary, to allege the exact amount of damages when the same becomes known.

[2] Use of Form

The form in [1], *above*, is for use in a complaint for damages for a landlord's breach of a covenant to deliver possession of the leased premises on a specified date. These allegations may be substituted for Paragraphs 7 to 9 in *§ 332.51[1]*.

[3] Lessor's Duty to Deliver Possession

The lessor is under a duty to put the lessee in the quiet possession of the leased premises on the date specified. Failure of the lessor within a reasonable time after request to fulfill his or her obligation as to placing and securing the lessee in the possession of the premises will justify the lessee's terminating the lease [*Civ. Code § 1932(1)*]. Actual delivery of the premises, however, is not required. The duty is satisfied if there is no impediment to the lessee's taking possession or if the lessee is given a legal right of entry and enjoyment during the term. The tenant may not relieve himself or herself of the obligation to pay rent under an executed lease for a definite term either by refusing to take possession of the premises or by abandoning the premises after he or she has taken possession [*Reynolds v. McEwen (1952) 111 Cal. App. 2d 540, 542-543, 244 P.2d 961]* .

The landlord is liable for his or her own acts or the acts of those claiming title paramount to the lease that prevent the tenant from taking possession. However, he or she cannot be held liable for acts of third parties such as trespassers [*Playter v. Cunningham (1862) 21 Cal. 229, 233]* . If the landlord remains in possession of all or a portion of the leased premises, he or she loses his or her right to collect rent, in the absence of a special agreement to the contrary [*Bowers v. Cherokee Bob (1873) 45 Cal. 495, 500]* .

[4] Damages

The proper measure of damages for a landlord's failure to deliver possession of the premises leased is the difference between the agreed rent and the rental value of the premises during the term of the lease, not that stated in *Civ. Code § 3306* (measure of damages for breach of contract to convey land). In determining the rental value, the court may consider not only expert testimony but also the agreed rent negotiated by the parties and the rental specified in prior leases of the premises [*Foreman & Clark Corp. v. Fallon (1971) 3 Cal. 3d 875, 884-886, 92 Cal. Rptr. 162, 479 P.2d 362]* .

[5] Cross References

Witkin, Summary of California Law, vol. 12, *Real Property*, § 608 (10th ed. 2005)

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§ 332.53 Allegations--Landlord's Breach of Covenant to Make Alterations

[1] FORM Allegations--Landlord's Breach of Covenant to Make Alterations

1. By the lease, defendant covenanted to make alterations in the leased premises during plaintiff's tenancy so as to render the premises more suitable for plaintiff's use, as more particularly set out in [Paragraph _____ of] the lease.

2. In breach of this covenant, defendant failed and refused to make alterations to the leased premises, as follows: _____ [*specify*].

3. By reason of defendant's breach of the covenant, the reasonable rental value of the leased premises was only $_____ per month, which sum is $_____ per month less than the rental contracted for with the alterations, and plaintiff has been damaged in the sum of $_____.

[2] Use of Form

The form in [1], *above*, is for use in a complaint for damages for a landlord's breach of a covenant to make alterations in the leased premises. These allegations may be substituted for Paragraphs 7-9 in *§ 332.51[1]*.

[3] Time for Complying With Covenant to Make Improvements

If a lessor covenants to make improvements on the premises, but the lease is silent as to the time the improvements will be made, in the absence of any other agreement, the lessor is obliged to perform the stipulated acts within a reasonable time [*Schwarting v. Carpenter (1910) 157 Cal. 432, 433-434, 108 P. 318* (citing *Civ. Code § 1657*)].

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29-332 California Forms of Pleading and Practice--Annotated § 332.54

§ 332.54 Allegations--Landlord's Breach of Covenant to Pay for Improvements Made by Tenant

[1] FORM Allegations--Landlord's Breach of Covenant to Pay for Improvements Made by Tenant

1. By the lease, defendant covenanted to pay plaintiff for improvements made by plaintiff to the leased premises, as more particularly set out in [Paragraph _____of] the lease.

2. In breach of this covenant, defendant failed and refused to pay plaintiff for improvements made by plaintiff to the leased premises, as follows: _____ [*specify improvements and cost or reasonable value as appropriate*].

[2] Use of Form

The form in [1], *above*, is for use in a complaint to recover damages for a landlord's breach of a covenant to pay for improvements made by the tenant. These allegations may be substituted for Paragraphs 7 and 8 in *§ 332.51[1]*.

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29-332 California Forms of Pleading and Practice--Annotated § 332.55

§ 332.55 Allegations--Landlord's Breach of Covenant to Repair

[1] FORM Allegations--Landlord's Breach of Covenant to Repair

1. By the lease, defendant covenanted to maintain the premises in good repair and to make any necessary repairs, as more particularly set out in [Paragraph _____of] the lease.

2. On or about _____ [*date*], plaintiff notified defendant [in writing] that the premises were in need of repair in that _____ [*specify conditions requiring repair about which defendant was notified*].

3. In breach of the covenant, defendant failed and refused to make necessary repairs on the leased premises as follows: _____ [*specify*].

4. By reason of defendant's breach of the covenant, plaintiff was required to and did expend the sum of $_____ for the necessary repairs to the premises, to plaintiff's damage in that sum.

[2] Use of Form

The form in [1], *above*, is for use in a complaint for damages for a landlord's breach of a covenant to repair the demised premises. These allegations may be substituted for Paragraphs 7-9 in § 332.51[1].

[3] Landlord's Covenant to Repair--Notice on Condition Precedent

When a landlord is obligated to make repairs during the term of a commercial lease, actual or constructive notice of the need for repair is necessary to put the landlord in default of his or her obligation, unless he or she agreed to repair without notice, or has actual knowledge or reasonable opportunity to acquire knowledge of the defect [*Morris v. Oney (1963) 217 Cal. App. 2d 864, 869-870, 32 Cal. Rptr. 88]* . That is, unless explicitly excluded in the lease, performance under an express covenant to repair is conditional on notice from the tenant and is an indispensable condition precedent to a landlord's duty to perform under the covenant to repair [*Wal-Noon Corp. v. Hill (1975) 45 Cal. App. 3d 605, 612, 119 Cal. Rptr. 646]* .

PRACTICE TIP:

Landlord's Obligation to Make Repairs Without Notice of Conditions. This should be distinguished from the landlord's obligation to make repairs even without notice of conditions if those conditions render the premises unhabitable. *By Benjamin Kaplan*

PRACTICE TIP: No Notice in Residential Leases. For residential property, the landlord must make necessary repairs even without a notice of repair. *By Myron Moskovitz*

[4] Reentry

If there is no provision to the contrary in the lease, the landlord may reenter the premises to effect necessary repairs. The landlord may not, however, reenter to make major alterations without the tenant's permission [*Dwyer v. Carroll (1890) 86 Cal. 298, 304-305, 24 P. 1015]* .

PRACTICE TIP:

Effect of Breach of the Peace. In addition, the landlord may not effect entry in breach of the peace. *By Benjamin Kaplan*

[5] Damages for Breach

The measure of a tenant's damages for a breach of the landlord's covenant to repair is the difference between the reasonable rental value of the premises as is and as contracted to be [*Collins v. Kobold (1956) 146 Cal. App. 2d 868, 872, 304 P.2d 182* ; *Noble v. Tweedy (1949) 90 Cal. App. 2d 738, 743, 203 P.2d 778]* . A court may award exemplary damages for the discomfort and inconvenience caused by a landlord's failure to replace the windows and doors of a tenant's apartment for a period of two weeks [*Farvour v. Geltis (1949) 91 Cal. App. 2d 603, 605, 205 P.2d 424]* .

[6] Rescission

The breach of a covenant to repair or maintain the premises may give the tenant a right to rescind the lease [*Groh v. Kover's Bull Pen, Inc. (1963) 221 Cal. App. 2d 611, 615, 34 Cal. Rptr. 637]* .

[7] Responsibility for Complying With Governmental Laws

The responsibility for complying with governmental laws, regulations, or orders does not necessarily depend on the literal terms of the lease's compliance with laws clause. Rather, this responsibility depends on the lease's terms as a whole and whether the governmental order was triggered by the lessee's particular use of the lease premises [*Brown v. Green (1994) 8 Cal. 4th 812, 824-830, 35 Cal. Rptr. 2d 598, 884 P.2d 55* ; *Hadian v. Schwartz (1994) 8 Cal. 4th 836, 843-845, 35 Cal. Rptr. 2d 589, 884 P.2d 46]* .

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29-332 California Forms of Pleading and Practice--Annotated § 332.56

§ 332.56 Allegations--Landlord's Breach of Covenant to Extend Term of Lease

[1] FORM Allegations--Landlord's Breach of Covenant to Extend Term of Lease

1. By the lease, defendant covenanted to extend the term of the lease at the election of plaintiff for an additional period of _____ [*number*] years at a rental of $_____, as more particularly set out in [Paragraph _____ of] the lease.

2. In accordance with this covenant and on or about _____[*date*], plaintiff elected to and did extend the term of the lease for such additional period by notice in writing in compliance with the terms of the lease. (A true and correct copy of the lease is attached hereto as Exhibit B and is incorporated herein by reference.)

3. In breach of the covenant, defendant failed and refused to extend the term of the lease and plaintiff was required to and did vacate the premises on expiration of the original term.

4. By reason of defendant's breach of covenant, plaintiff has been deprived of the use and value of the leasehold for such additional term, the reasonable value of which is $_____, to his/her damage in such sum.

[2] Use of Form

The form in [1], *above*, is for use in a complaint for damages for a landlord's breach of a covenant to extend the term of a lease. These allegations may be substituted for Paragraphs 7-9 in § 332.51[1]. It should be noted, that a plaintiff in this type of case may choose to seek declaratory relief (extending the term) rather than damages.

[3] Action for Damages

A plaintiff is entitled to sue for damages for a landlord's breach of the covenant to extend the lease's term [*Stern v. Krasne (1955) 130 Cal. App. 2d 818, 820-821, 280 P.2d 45]* .

[4] Option to Renew

The exercise of an option to renew may be made by giving notice [*Shamp v. White (1895) 106 Cal. 220, 222, 39 P. 537]* . However, formal written exercise of an option to renew is not essential [*Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 67, 338 P.2d 1005]* . If the landlord accepts rental payment, this constitutes an exercise of the option to extend the lease [*Schmitt v. Felix (1958) 157 Cal. App. 2d 642, 645, 321 P.2d 473]* .

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29-332 California Forms of Pleading and Practice--Annotated § 332.57

§ 332.57 Affirmative Defense--Waiver of Breach

[1] FORM Affirmative Defense--Waiver of Breach

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

On _____ [*date*], plaintiff had full knowledge that defendant _____ [*either* had *or* had not] _____ [*specify conduct or failure to act constituting breach*], and waived the breach on the date specified in that the plaintiff _____[*specify conduct constituting waiver*].

[2] Use of Form

The form in [1], *above,* is for use as an affirmative defense to an action for breach of a covenant contained in a lease based on waiver of the breach by the lessor's conduct after the breach with knowledge of it.

PRACTICE TIP:

Include Ultimate Facts. When setting forth affirmative defenses, you should include a provision for specific ultimate facts. Affirmative defenses must generally be plead in the same manner as any cause of action. *By Benjamin Kaplan*

[3] Acceptance of Rent Waives Breach

A landlord who accepts rent after the breach of a condition is deemed to have waived the breach when the landlord acts with full knowledge of the facts [*Kern Sunset Oil Co. v. Good Roads Oil Co. (1931) 214 Cal. 435, 440, 6 P.2d 71]* .

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29-332 California Forms of Pleading and Practice--Annotated § 332.58

§ 332.58 Affirmative Defense--Action for Breach of Covenant to Repair--Destruction of Premises

[1] FORM Affirmative Defense--Action for Breach of Covenant to Repair--Destruction of Premises

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

On _____ [*date*], the leased premises were totally destroyed through no fault of defendant and defendant was and is under no obligation to rebuild the structure.

[2] Use of Form

The form in [1], *above*, is for use as an affirmative defense to an action for breach of a covenant to repair when the premises were totally destroyed.

[3] General Rule When Leased Premises Are Destroyed

As a general rule, in the absence of covenants by the landlord to repair or rebuild, a lease automatically terminates in the event the entire leased premises are destroyed [*Civ. Code § 1933(4)*; *Mattal v. American Trust Co. (1962) 208 Cal. App. 2d 645, 647, 25 Cal. Rptr. 517]* . In addition, a tenant may terminate a lease before the end of the term agreed on when the greater part of the leased premises, or that part which was and which the landlord had reason to believe at the time of the lease was the material inducement to the tenant to enter into the contract, perishes from any other cause than the tenant's want of ordinary care [*Civ. Code § 1932(2)*; *C.M. Staub Shoe Co. v. Byrne (1915) 169 Cal. 122, 126-127, 145 P. 1032]* .

[4] Destruction of Premises as Defense

A general covenant by a tenant to repair or surrender the premises at the end of the term in as good condition as they were at the beginning of the term does not oblige the tenant to rebuild structures that have been completely destroyed [

Realty & Rebuilding Co. v. Rea (1920) 184 Cal. 565, 576, 578, 194 P. 1024 ; *Dicker v. West (1958) 164 Cal. App. 2d 55, 60-61, 330 P.2d 106]* . Similarly, a general covenant by the landlord to repair is not sufficient to prevent the lease's termination, nor does it obligate the landlord to rebuild structures on the complete destruction of the premises [*Mattal v. American Trust Co. (1962) 208 Cal. App. 2d 645, 647-648, 25 Cal. Rptr. 517* (dictum)].

However, a party may not terminate a lease because of the destruction of the subject matter when the party has assumed the risk of such destruction by his or her cotenants to repair since to do so would be to evade one of the essential elements of the risk allocation intended by the parties' agreement. The result is the same when the lessee has assumed the risk involved by his or her cotenants relieving his or her lessor of all duties of repair and maintenance and undertaking for himself or herself the duty to comply with all laws and orders regarding the premises [*Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 678, 75 Cal. Rptr. 889, 451 P.2d 721]* .

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29-332 California Forms of Pleading and Practice--Annotated § 332.59

§ 332.59 Affirmative Defense--Action for Tenant's Breach of Covenant--Illegality of Lease or Covenant

[1] FORM Affirmative Defense--Action for Tenant's Breach of Covenant--Illegality of Lease or Covenant

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

By the terms of the _____ [lease *or* covenant], plaintiff leased the premises to defendant for the purpose of _____ [*specify illegal purpose*]. Plaintiff therefore has no enforceable rights under the _____ [lease *or* covenant].

[2] Use of Form

The form in [1], *above,* is for use as an affirmative defense to an action for a tenant's breach of covenant when the premises were leased for an illegal purpose.

[3] Illegality of Lease

A lease, like any contract, must have a legal object [*see Civ. Code § 1550(3)*] and may be void for illegality [*see Grace v. Croninger (1922) 56 Cal. App. 659, 663-664, 206 P. 130]* . The illegality may result from purposes unlawful in themselves, such as prostitution or gambling, or from lawful purposes carried on in an unlawful manner, such as when a hotel is leased to be used for apartment purposes in violation of both local and state laws [*Shephard v. Lerner (1960) 182 Cal. App. 2d 746, 749, 6 Cal. Rptr. 433]* .

[4] Illegal Purpose of Lease

When use of the premises is limited by the lease to one prohibited by statute or local ordinance, the courts will not enforce it [*Becerra v. Hochberg (1961) 193 Cal. App. 2d 431, 433, 14 Cal. Rptr. 101* ; *Shephard v. Lerner (1960) 182 Cal. App. 2d 746, 749, 6 Cal. Rptr. 433]* . If the use is illegal because it is prohibited by a zoning ordinance, for

example, and the lessor knows of the lessee's contemplated use, the lessee may rescind the contract on the ground of mutual mistake of law [*see Civ. Code § 1689(b)(1), (5)*; *Becerra v. Hochberg (1961) 193 Cal. App. 2d 431, 433, 14 Cal. Rptr. 101* (dictum)], or on the ground of failure of consideration when the illegality of the use results from the lessor's act or omission [*see Civ. Code § 1689(b)(2)*; *Lyke v. Pursley (1959) 171 Cal. App. 2d 417, 422-423, 340 P.2d 709]* .

PRACTICE TIP:

Lessor's Misrepresentation. If the lessor has knowledge of a material fact that before the entering of the lease would render the premises unusable or extremely difficult to use by a prospective lessee, then that failure to disclose would probably be actionable in and of itself as a misrepresentation that the premises were fit for the intended use. *By Benjamin Kaplan*

However, the fact that a lease that contemplates action by governmental authorities before the property may be used for the purpose specified in it is not illegal [*Stockburger v. Dolan (1939) 14 Cal. 2d 313, 316-317, 94 P.2d 33]* .

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PART IV. FORMS
A. Breaches of Covenants

29-332 California Forms of Pleading and Practice--Annotated §§ 332.60-332.69

[Reserved]

§§ 332.60[Reserved]

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PART IV. FORMS
B. Termination of Tenancies

29-332 California Forms of Pleading and Practice--Annotated § 332.70

§ 332.70 Notice to Tenant Terminating Tenancy for Unspecified Term or Month-to-Month Tenancy [Civ. Code §§ 1946, 1946.1]--By Landlord

[1] FORM Notice to Tenant Terminating Tenancy for Unspecified Term or Month-to-Month Tenancy [Civ. Code §§ 1946, 1946.1]--By Landlord

NOTICE OF TERMINATION OF TENANCY

To: _____ [*name of tenant*]
_____ [*street address and unit number, if any*]
_____ [*city*], California

Tenant in Possession--

NOTICE IS HEREBY GIVEN that [*insert, if appropriate*: in accordance with the provisions of Paragraph _____ of the lease dated _____ between us] your tenancy of the premises _____ [described above *or* known as _____ (*street address, unit number, if any, and city*), California] is terminated as of 30 [*or other appropriate number*] days after service of this notice in accordance with the provisions of *California Code of Civil Procedure § 1162*.

[*OPTIONAL*:]

[If you fail to deliver up possession within the _____ (*specify, e.g.*, 30)-day period, legal proceedings will be commenced against you to recover possession and to recover a judgment for (statutory) damages for each day you hold possession beyond the _____ (*specify, e.g.*, 30)-day period.]

[*CONTINUE*:]

You are required to remove from the premises and to deliver up possession of the premises to the undersigned [*or* to _____ (*name*), your lessor (or the authorized agent of the undersigned *or other*)] on or before expiration of the above-mentioned 30-day [*or other appropriate number*] period.

[*OPTIONAL*:]

[_____ Rent in the amount of $_____ is due and payable through the end of the _____ (*specify, e.g.*, 30)-day period.]
Date: _____.

LESSOR

_____ [*signature*]

[*typed name*]

_____ [*address*]

[2] Use of Form

The form in [1], *above*, is a notice for use by a landlord to terminate a tenancy for an unspecified or month-to-month term. At least 30 days' written notice is required if the lease agreement does not provide for shorter notice (not less than seven days before expiration of the term) [*see Civ. Code § 1946*; *see also Renner v. Huntington etc. Oil & Gas Co. (1952) 39 Cal. 2d 93, 102, 244 P.2d 895* (30-day notice to quit required to terminate month-to-month tenancy)].

This form may also may be used to terminate a periodic tenancy for a period shorter than month-to-month, in which case the shorter notice period will be used in the form [*see Civ. Code § 1946*].

Notwithstanding *Civ. Code § 1946*, an owner must give notice at least 60 days (not 30 days) before the proposed date of termination of a periodic tenancy if the tenant has been living in the dwelling for at least one year [*Civ. Code § 1946.1(a)-(c)*]. In any case, a tenant must give notice for a period at least as long as the term of the periodic tenancy before the proposed date of termination [*Civ. Code § 1946.1(b)*; for notice of termination by tenant, *see § 332.71*]. After an owner has given notice pursuant to *Civ. Code § 1946.1*, a tenant may also give notice of his or her intention to terminate the tenancy under that section, provided that the tenant's notice is for a period at least as long as the term of the periodic tenancy and the proposed date of termination occurs before the owner's proposed date of termination [*Civ. Code § 1946.1(e)*]. Notice must be sent by certified or registered mail given in the manner prescribed by *Code Civ. Proc. § 1162* [*Civ. Code § 1946.1(f)*].

The 60-day notice requirement for longer term renters does not apply if (1) the dwelling or unit is alienable separate from the title to any other dwelling unit; (2) the owner has contracted to sell the dwelling unit to a bona fide purchaser for value, and has established an escrow with a licensed escrow agent or a licensed real estate broker; (3) the purchaser is a natural person or persons; (4) the notice is given not more than 120 days before escrow is established; (5) notice was not previously given to the tenant in accordance with *Civ. Code § 1946.1*; and *(6)* the purchaser in good faith intends to reside in the property for at least one full year after the tenancy's termination [*Civ. Code § 1946.1(d)*]. These provisions do not affect the authority of a public entity to regulate or monitor the basis for eviction [*Civ. Code § 1946.1(g)*].

Notwithstanding the unlawful detainer provisions of *Code Civ. Proc. § 1161a* [*see* Ch. 333, *Landlord and Tenant: Eviction Actions*], a tenant or subtenant in possession of a rental housing unit at the time the property is sold in foreclosure must be given 60 days' written notice to quit pursuant to *Code Civ. Proc. § 1162* before the tenant or subtenant may be removed from the property through unlawful detainer proceedings [*Code Civ. Proc. § 1161b(a)*]. However, this notice requirement does not apply if any party to the note remains in the property as a tenant, subtenant, or occupant [*Code Civ. Proc. § 1161b(b)*]. Section 1161b is in effect until January 1, 2013 [*Code Civ. Proc. § 1161b(c)*].

In 2009, Congress established a 90-day notice requirement in the Protecting Tenants at Foreclosure Act [Pub. L. No. 111-22, S. 896]. This requirement applies to any foreclosure on a federally related mortgage loan or on any dwelling or residential real property after May 20, 2009 [Pub. L. No. 111-22, § 702, 123 Stats. 1660-1661; *see also* Pub. L. No. 111-22, § 703, 123 Stats. 1661, amending *42 U.S.C. § 1437f(o)(7)* (following foreclosure, successor in interest may terminate Section 8 tenancy on 90 days' notice if owner will occupy property as primary residence)]. The Act provides that any immediate successor in interest in the property pursuant to the foreclosure assumes that interest subject to the rights of any bona fide tenant as of the date of the notice of foreclosure, under any bona fide lease entered into before the notice of foreclosure, to occupy the premises until the end of the remaining term of the lease [Pub. L. No. 111-22, § 702(a)(2), 123 Stats. 1661]. However, a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of a 90-day notice to vacate [Pub. L. No. 111-22, § 702(a)(2), 123 Stats. 1661]. A lease or tenancy is considered bona fide if (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant; (2) the lease or tenancy was the result of an arms-length transaction; and (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a federal, state, or local subsidy [Pub. L. No. 111-22, § 702(b), 123 Stats. 1661]. These provisions are repealed on December 31, 2012 [Pub. L. No. 111-22, sec. 704, 123 Stats. 1662].

PRACTICE TIP:

Drafting a Notice to Terminate. Counsel may determine that it is beneficial not to specify a specific date regarding when the tenancy is terminated (the *form in § 332.70[1]* states that the tenancy is terminated as of a specific date that is at least 30 days after notice is served). Rather, it may be better to simply state that the lease is terminated "30 days after the date of service on you not counting the date you were served." In addition, the landlord should not state a reason for the termination unless demanded by law because it may be held that you have to prove what you alleged. Lastly, counsel may decide that the notice should specify that the tenant will be liable for costs of suit and, if provided by the lease, attorney's fees. *By Benjamin Kaplan*

[3] When Tenancy Is Terminated

The tenancy is not terminated on the giving of the notice but on expiration of the notice period [*Highland Plastics, Inc. v. Enders (1980) 109 Cal. App. 3d Supp. 1, 7 , 167 Cal. Rptr. 353]* . Thus, the obligation to pay rent continues until expiration of the notice terminating the tenancy [*Wheeler v. Bainbridge (1948) 84 Cal. App. 2d Supp. 849, 851 , 191 P.2d 134]* .

If the tenant holds over after the tenancy is terminated, the tenant is guilty of unlawful detainer [*see Code Civ. Proc. § 1161(1)*].

[4] Notice

[a] When Notice May Be Given

In the case of a month-to-month tenancy, the notice may be given at any time, and rent is due and payable through the date of termination [*see Civ. Code §§ 1946, 1946.1*]. The notice need not be given at the beginning of the month or at

the beginning of the rental period, but may be given at any time during the month. Rent is prorated accordingly [*see* Wheeler v. Bainbridge (1948) *84 Cal. App.2d Supp 849, 191 P.2d 134]* .

[b] Format and Contents of Notice

Although the notice must be in writing [*Civ. Code §§ 1946, 1946.1(a)*], no particular format is prescribed. Consequently, the notice may be in a notice format, as *set forth in § 332.70[1]*, or it may be given in simple letter or other written form.

The notice should, however, describe the property to avoid any claim of insufficiency. The complaint for unlawful detainer, which will follow the notice, is expressly required to describe the premises with reasonable certainty [*Code Civ. Proc. § 1166(a)(3)*; *see Code Civ. Proc. § 455* (made applicable to unlawful detainer proceedings by *Code Civ. Proc. § 1177*), which provides that in an action for recovery of real property, the property must be described in the complaint with such certainty as to enable an officer, on execution, to identify it]. The property is normally described by stating its address or, in the case of a particular unit on property having a single address or within a building on the property, by stating the unit number as well as the address.

Civ. Code §§ 1946 and *1946.1* do not require that the reason for termination be specified. However, if the tenant is apt to claim retaliatory eviction, the reason for termination may be set forth to show that the eviction is not retaliatory. The reason must also be stated if there is local rent control legislation limiting the grounds on which such tenancies may be terminated.

When a landlord receives funding from a government agency, a notice to quit must include a statement of reasons constituting good cause for termination [*Mitchell v. Poole (1988) 203 Cal. App. 3d Supp. 1, 249 Cal. Rptr. 842]* .

The optional statement at the end of the first paragraph that proceedings will be commenced may be included if the landlord anticipates that the tenant may not comply with the notice. The final paragraph should be included when the notice is given at such a time that additional rent will be payable before expiration of the notice period. However, unpaid rent accruing before expiration of the notice period is not recoverable in an unlawful detainer proceeding, although damages for the unlawful detention are recoverable. Rent may be recovered in an unlawful detainer proceeding only when the proceeding arises from the tenant's failure to comply with a notice to pay rent or quit given under *Code Civ. Proc. § 1161(2)*, discussed in *§ 333.10[2]* [*see Saberi v. Bakhtiari (1985) 169 Cal. App. 3d 509, 512-516, 215 Cal. Rptr. 359]* .

There is no express statutory requirement that the notice be signed, but such requirement would appear to be implied by the express requirement of *Civ. Code §§ 1946* and *1946.1* that to terminate the tenancy one of the parties must give written notice to the other of his or her intention to terminate a tenancy. Regardless, the better practice is for the landlord, the landlord's agent to whom the tenant has been paying rent, or the landlord's attorney to sign the notice. If the notice is signed by any person other than the landlord, that person's authority to sign should be set forth in the notice [*see Baugh v. Consumers Associates, Ltd. (1966) 241 Cal. App. 2d 672, 674, 50 Cal. Rptr. 822* (holding insufficient a three-day notice to pay rent or quit which, among other things, was given by one other than the lessor and no assignment of the lease was mentioned)].

[c] Effect on Unlawful Detainer Proceeding of Notice Signed by One Other Than Landlord

If the notice is signed by someone other than the landlord, such as an attorney or agent, the landlord may be required in any subsequent proceeding for unlawful detainer to prove that he or she authorized the attorney or agent to serve the notice [*see Zumwalt v. Hargrave (1945) 71 Cal. App. 2d 415, 419-420, 162 P.2d 957* (attorney); *Earl Orchard Co. v. Fava (1902) 138 Cal. 76, 80, 70 P. 1073* (agent); *see also Wayland v. Latham (1928) 89 Cal. App. 55, 66-67, 264 P. 766* (regarding three-day notice to pay rent or quit required by unlawful detainer statutes, notice is sufficient when

signed by landlord's agent who was known to tenant to be landlord's agent and to whom tenant had been paying rent)]. If the notice is signed by only one of two or more co-lessors, it may be necessary in any subsequent proceeding in unlawful detainer to prove that service of the notice was authorized or ratified by the co-lessors [*see Earl Orchard Co. v. Fava (1902) 138 Cal. 76, 79, 70 P. 1073* (authorization established); *Axis Petroleum Co. v. Taylor (1941) 42 Cal. App. 2d 389, 396, 108 P.2d 978* (neither authorization nor ratification established)].

[d] Service of Notice

The notice must be served on the tenant in the manner prescribed by *Code Civ. Proc. § 1162* [*Civ. Code §§ 1946, 1946.1*; for a discussion of *Code Civ. Proc. § 1162*, see *§ 333.11*]. In the case of terminating a month-to-month tenancy, the notice may also be served by sending a copy by certified or registered mail addressed to the tenant [*Civ. Code §§ 1946, 1946.1(f)*].

Unlike a three-day notice served under *Code Civ. Proc. § 1161*, there is no requirement that the notice be served on subtenants since there is no default the subtenants could cure [*see Four Seas Inv. Corp. v. International Hotel Tenants' Assn. (1978) 81 Cal. App. 3d 604, 611-612, 146 Cal. Rptr. 531]* .

[e] Withdrawal of Notice

Acceptance by the landlord of rent covering any period beyond the notice period may constitute an implied withdrawal of the notice [*see Highland Plastics, Inc. v. Enders (1980) 109 Cal. App. 3d Supp. 1, 167 Cal. Rptr. 353* ; *see also EDC Associates, Ltd. v. Gutierrez (1984) 153 Cal. App. 3d 167, 170-171, 200 Cal. Rptr. 333]* . To avoid this result the landlord, when accepting a tender of rent that extends beyond the notice period, should notify the tenant that no withdrawal of the notice is intended and promptly refund that portion of the rent paid for days beyond the notice period.

[f] Additional Notices

No additional three-day notice is required to maintain a proceeding for unlawful detainer should the tenant fail to vacate the premises as required by the above notice [*see Civ. Code § 791*; *Hennessy v. Gleason (1947) 81 Cal. App. 2d 616, 619, 184 P.2d 913* ; *La Cava v. Breedlove (1946) 77 Cal. App. 2d 129, 132, 174 P.2d 880]* .

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29-332 California Forms of Pleading and Practice--Annotated § 332.71

§ 332.71 Notice to Landlord Terminating Tenancy for Unspecified Term or Month-to-Month Tenancy [Civ. Code §§ 1946, 1946.1]--By Tenant

[1] FORM Notice to Landlord Terminating Tenancy for Unspecified Term or Month-to-Month Tenancy [Civ. Code §§ 1946, 1946.1]--By Tenant

NOTICE OF TERMINATION OF TENANCY

To: _____ [*name of landlord*]

NOTICE IS HEREBY GIVEN that I/we will vacate the premises known as _____ [*describe premises, e.g., street address including apartment number, if any*] on or before _____ [*date at least 30 days after notice is served*], thereby terminating my/our tenancy.

This notice is intended as a _____ [*e.g.,* 30]-day notice terminating my tenancy as required by the provisions of *Civil Code Sections 1946* and *1946.1*.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form is a form of notice for use by a tenant under a tenancy for an unspecified or month-to-month term to terminate the tenancy. *Civ. Code § 1946* provides that at least 30 days' written notice is required unless the lease agreement provides for shorter notice (not less than seven days before expiration of term). However, notwithstanding *Civ. Code § 1946*, a tenant is required to give notice for a period at least as long as the term of the periodic tenancy

before the proposed date of termination [*Civ. Code § 1946.1(b), (e)*].

Notwithstanding the unlawful detainer provisions of *Code Civ. Proc. § 1161a* [*see* Ch. 333, *Landlord and Tenant: Eviction Actions*], a tenant or subtenant in possession of a rental housing unit at the time the property is sold in foreclosure must be given 60 days' written notice to quit pursuant to *Code Civ. Proc. § 1162* before the tenant or subtenant may be removed from the property through unlawful detainer proceedings [*Code Civ. Proc. § 1161b(a)*]. However, this notice requirement does not apply if any party to the note remains in the property as a tenant, subtenant, or occupant [*Code Civ. Proc. § 1161b(b)*]. *Section 1161b* is in effect until January 1, 2013 [*Code Civ. Proc. § 1161b(c)*].

In 2009, Congress established a 90-day notice to vacate requirement in the Protecting Tenants at Foreclosure Act [Pub. L. No. 111-22, S. 896]. This requirement applies to any foreclosure on a federally related mortgage loan or on any dwelling or residential real property after May 20, 2009 [Pub. L. No. 111-22, § 702, 123 Stats. 1660-1661; *see also* Pub. L. No. 111-22, § 703, 123 Stats. 1661, amending *42 U.S.C. § 1437f(o)(7)* (following foreclosure, successor in interest may terminate section 8 tenancy on 90 days' notice if owner will occupy property as primary residence)]. The federal provisions are repealed on December 31, 2012 [Pub. L. No. 111 22, § 704, 123 Stats. 1662].

[3] Service of Notice

The notice must be served on the landlord as follows [*Civ. Code §§ 1946, 1946.1(f)*]:

- In the manner prescribed by *Code Civ. Proc. § 1162* [for a discussion of *Code Civ. Proc. § 1162*, see *§ 333.11*]; or

- By sending a copy by certified or registered mail.

Civ. Code § 1946 specifies that notice may be served by sending a copy by certified or registered mail addressed to the landlord or by sending a copy by certified or registered mail addressed to the lessor's agent to whom the lessee has paid the rent for the month prior to the date of the notice or by delivering a copy to the agent personally.

[4] When Tenant Is Guilty of Unlawful Detainer

A tenant continuing in possession after he or she gives notice terminating the tenancy is guilty of unlawful detainer [*Code Civ. Proc. § 1161(5)*; for discussion, see *§ 333.10[2][c]*].

[5] Cross References

See comments in § 332.70.

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29-332 California Forms of Pleading and Practice--Annotated § 332.71A

§ 332.71A Notice to Lessor Terminating Lease--By Member of Military Service [Mil. & Vet. Code § 409; 50 U.S.C. App. § 535]

[1] FORM Notice to Lessor Terminating Lease--By Member of Military Service [Mil. & Vet. Code § 409; 50 U.S.C. App. § 534]

NOTICE OF TERMINATION OF LEASE

To: _____ [*name of landlord*]

NOTICE IS HEREBY GIVEN that I [*or* we] will vacate the premises known as _____ [*describe premises, e.g., street address including apartment number, if any*] on or before _____ [*give date of termination, e.g., last day of month following notice*], thereby terminating the lease entered into by _____ [*name of tenant*].

The ground for terminating this lease is that the tenant is on active military service within the meaning of _____ [California *or* federal] law and is therefore legally permitted to terminate this lease. This notice is intended as a notice terminating the lease as authorized by _____ [*Military and Veterans Code Section 409 or 50 U.S.C. App. Section 535*].
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form is a notice for the termination of a lease by a member of a military service [*Mil. & Vet. Code § 409*; *50 U.S.C.*

App. § 535]. For discussion of eligibility requirements, see [7], *below*.

[3] State Law Termination Provisions

Under *Mil. & Vet. Code § 409*, any lease covering premises occupied for dwelling, professional, business, agricultural, or similar purposes that was executed by or on the behalf of a person who, after the execution of such lease, entered full-time active duty with the National Guard or United States Military Reserve, may be terminated by notice in writing delivered to the landlord or to the landlord's agent by the tenant at any time following the date of the beginning of the period of military service [*Mil. & Vet. Code § 409(a), (b)*]. These provisions apply to service members on active service or duty since September 11, 2001. However, the protections apply prospectively from June 20, 2002 (date bill was signed into law) [*Mil. & Vet. Code § 409.11*]. Dependents of service members are also entitled to these benefits unless the court finds that the dependents' ability to comply with the terms of the obligation has not been materially impaired by the military service of the person on whom the applicants are dependent [*Mil. & Vet. Code § 409.5*].

[4] Federal Termination Provisions

The Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*] provides for the termination of any lease covering premises occupied or intended to be occupied for residential, professional, business, agricultural, or similar purposes by a servicemember or the servicemember's dependents [*50 U.S.C. App. § 535*]. The lease must have been executed (1) by or on behalf of a person who, after the lease's execution, entered military service, or (2) by a servicemember who thereafter receives military orders for a permanent change of station or to deploy with a military unit for a period of not less than 90 days [*50 U.S.C. App. § 535(b)*]. The lessee may terminate the lease at any time after his or her entry into military service or the date of the tenant's military orders for a permanent change of station or deployment. Any such lease may be terminated by notice in writing delivered to the landlord (or his or her grantee) or to the landlord's (or his or her grantee's) agent by the tenant [*50 U.S.C. App. § 535(a)*].

For purposes of the Act, the term "servicemember" means a member of the armed forces, the commissioned corps of the National Oceanic and Atmospheric Administration, and the commissioned corps of the Public Health Service [*50 U.S.C. App. § 511(1)*; *see 10 U.S.C. § 101(a)(5)*].

[5] Delivery of Notice

The state statute provides that delivery of this notice may be made by mail to the landlord or landlord's agent [*Mil. & Vet. Code § 409(b)*]. The federal statute specifies that delivery may be made by hand, by private business carrier, or by U.S. mail, return receipt requested [*50 U.S.C. App. § 535(c)*].

[6] Effective Date of Termination

Under *Mil. & Vet. Code § 409*, termination of any lease providing for monthly payment of rent will be effective on the last day of the month following notice and not more than 45 days after notice is provided to the lessor [*Mil. & Vet. Code § 409(b)*]. In the case of all other leases, termination will be effected on the last day of the month following the month in which the notice is delivered or mailed. In that case, any unpaid rent for a period preceding termination will be prorated and any rent paid in advance for a period succeeding termination must be refunded by the landlord [*Mil. & Vet. Code § 409(b)*]. On application by the landlord before the termination period provided for in the notice, a court may modify or restrict any relief granted under the statute [*Mil. & Vet. Code § 409(b)*].

Under *50 U.S.C. App. § 535(d)(1)*, termination of a lease providing for monthly payment of rent will be effective 30 days after the first date on which the next rental payment is due and payable after the date when notice is delivered or mailed. In the case of all other leases, termination will be effected on the last day of the month following the month in which the notice is delivered or mailed. In such cases, any unpaid rent for a period preceding termination will be prorated and any rental paid in advance for a period succeeding termination must be refunded by the landlord or his or

her assignee. On application by the landlord to the appropriate court before the termination period provided for in the notice, any relief granted may be subject to such modifications or restrictions as in the opinion of the court justice and equity may in the circumstances require.

[7] Persons Eligible for Benefits

The state law provisions apply to service members on active service or duty since September 11, 2001. The protections apply prospectively from June 20, 2002 (date bill was signed into law) [*Mil. & Vet. Code § 409.11*]. "Service member" means both of the following [*Mil. & Vet. Code § 400(a)*]:

- Officers and enlisted members of the National Guard called or ordered into active state service by the Governor pursuant to the provisions of *Mil. & Vet. Code § 143* or *146* or into active federal service by the President of the United States pursuant to Title 10 or 32 of the United States Code.

- Reservists of the United States Military Reserve who have been called to full-time active duty.

"Military service" means full-time active state service or full-time active federal service, as defined in the first bulleted item, above, or full-time active duty of a reservist, as defined in the second bulleted item, above, for a period in excess of seven days in any 14-day period. For any service member who has been called to active service or duty since September 11, 2001, to engage in homeland defense against terrorism, his or her days of service before June 20, 2002, must be credited toward this seven-day period [*Mil. & Vet. Code § 400(b)*].

The federal provisions apply to all of the following:

- Servicemembers who are members of the Army, Navy, Air Force, Marine Corps, or Coast Guard and on active duty [*50 U.S.C. App. § 511(2)(A)(i)*; *see 10 U.S.C. § 101(d)(1)* ("active duty" defined)].

- National Guard members under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days for purposes of responding to a national emergency declared by the President and supported by federal funds [*50 U.S.C. App. § 511(2)(A)(ii)*].

- Commissioned officers of the Public Health Service or the National Oceanic and Atmospheric Administration who are on active service [*50 U.S.C. App. § 511(2)(B)*].

- U.S. citizens who are serving with the forces of a nation with which the United States is allied in the prosecution of a war or military action [*50 U.S.C. App. § 514*].

- Persons ordered to report for induction or military service [*50 U.S.C. App. § 516*].

The federal provisions also apply during any period in which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause [*50 U.S.C. App. 511(2)(C)*].

Dependents of servicemembers are also entitled to the state and federal benefits unless the court finds that the dependents' ability to comply with the terms of the obligation has not been materially impaired by the military service of the person on whom the applicants are dependent [*Mil. & Vet. Code § 409.5*; *50 U.S.C. App. § 538*].

[8] Jurisdiction

The provisions of the Servicemembers Civil Relief Act apply to the United States, the states and political subdivisions of the states, and all territory subject to the jurisdiction of the United States [*50 U.S.C. App. § 512(a)*]. The provisions

apply to judicial and administrative proceedings commenced in any court or agency in any jurisdiction subject to the Act, with the exception of criminal proceedings [*50 U.S.C. App. § 512(b)*]. Any application under the Act that is required to be made to a court in which no proceeding has already been commenced may be made to any court that would otherwise have jurisdiction over the matter [*50 U.S.C. App. § 512(c)*].

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29-332 California Forms of Pleading and Practice--Annotated § 332.72

§ 332.72 Notice to Tenant Terminating Tenancy at Will [Civ. Code § 789]--By Landlord

[1] FORM Notice to Tenant Terminating Tenancy at Will [Civ. Code § 789]--By Landlord

NOTICE OF TERMINATION OF TENANCY

To: _____ [*name of tenant*]
_____ [*street address and unit number, if any*]
_____ [*city*], California

Tenant in Possession--

NOTICE IS HEREBY GIVEN that you must remove yourself from and deliver possession of the premises _____ [described above *or* known as _____ (*street address, unit number, if any, and city*), California] to _____ [the undersigned *or* _____ (*name*), your landlord *or* _____ (*name*), your landlord's authorized agent] on or before _____ [*date at least 30 days after notice is served on tenant*].

This notice is given in accordance with the provisions of *Civil Code Section 789* and its purpose is to terminate your tenancy of the above-described property.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form is a notice for use by a landlord to terminate a tenancy at will [*see Civ. Code § 789*].

Notwithstanding the unlawful detainer provisions of *Code Civ. Proc. § 1161a* [*see* Ch. 333, *Landlord and Tenant: Eviction Actions*], a tenant or subtenant in possession of a rental housing unit at the time the property is sold in foreclosure must be given 60 days' written notice to quit pursuant to *Code Civ. Proc. § 1162* before the tenant or subtenant may be removed from the property through unlawful detainer proceedings [*Code Civ. Proc. § 1161b(a)*]. However, this notice requirement does not apply if any party to the note remains in the property as a tenant, subtenant, or occupant [*Code Civ. Proc. § 1161b(b)*]. Section1161b is in effect until January 1, 2013 [*Code Civ. Proc. § 1161b(c)*].

In 2009, Congress established a 90-day notice to vacate requirement in the Protecting Tenants at Foreclosure Act [P.L. 111-22, S. 896]. This requirement applies to any foreclosure on a federally related mortgage loan or on any dwelling or residential real property after May 20, 2009 [P.L. 111-22, § 702, 123 Stats. 1660-1661; *see also* P.L. 111-22, § 703, 123 Stats. 1661, amending *42 U.S.C. § 1437f(o)(7)* (following foreclosure, successor in interest may terminate Section 8 tenancy on 90 days' notice if owner will occupy property as primary residence)]. The federal provisions are repealed on December 31, 2012 [P.L. 111 22, § 704, 123 Stats. 1662].

[3] Format of Notice

The notice must be in writing and direct the tenant to remove from the premises within a period of not less than 30 days, to be specified in the notice [*Civ. Code § 789*]. Otherwise, no particular format is prescribed. Consequently, the notice may be in a notice format, as set forth above, or it may be given in simple letter or other written form.

There is no express statutory requirement that the notice be signed, but this requirement might be implied by the express requirement of *Civ. Code § 789* that the notice be given by the landlord in writing. Regardless, the better practice is for the landlord, the landlord's authorized agent, or the landlord's attorney to sign the notice. If the notice is signed by any person other than the landlord, that person's authority to sign should be set forth in the notice [*see Baugh v. Consumers Associates, Ltd. (1966) 241 Cal. App. 2d 672, 674, 50 Cal. Rptr. 822* (holding insufficient a three-day notice to pay rent or quit which, among other things, was given by one other than the landlord and no assignment of the lease was mentioned)].

[4] Service of Notice

The notice may be served on the tenant in the manner prescribed by *Code Civ. Proc. § 1162* [*Civ. Code § 789*; for a discussion of *Code Civ. Proc. § 1162*, see *§ 333.11*].

[5] Three-Day Notice to Quit and 30-Day Notice to Terminate

Civ. Code § 789 provides that a tenancy at will, however created, may be terminated by the landlord's giving the tenant written notice, served as prescribed in *Code Civ. Proc. § 1162*, to remove from the premises within a period of not less than 30 days, to be specified in the notice. *Code Civ. Proc. § 1161* provides in effect that a tenant at will who holds over after termination of the tenancy as prescribed in the Civil Code is guilty of unlawful detainer [*Code Civ. Proc. § 1161(1)*]. Under *Civ. Code § 789* and *Code Civ. Proc. § 1161*, it appears that the only notice required as a condition precedent to a proceeding for unlawful detainer would be the 30-day notice under *Civ. Code § 789* to terminate the tenancy [*see Covina Manor, Inc. v. Hatch (1955) 133 Cal. App. 2d Supp. 790, 284 P.2d 580* (mentioning only above two code sections in discussing termination of tenancy at will)].

However, the California Supreme Court has held that the lessor may not maintain a proceeding in unlawful detainer against a tenant at will without giving *both* the 30 days' notice required by *Civ. Code § 789* and later the three days' notice in writing to surrender possession as required by *Civ. Code § 791*. The Court further held that service of both notices must be averred in the complaint for unlawful detainer [*Martin v. Splivalo (1880) 56 Cal. 128, 129-130* (but

also holding that a lessor may maintain an action for ejectment without the additional three-day notice)]. The provisions of *Code Civ. Proc. § 1161(1)* as they existed when *Martin* was decided in 1880 and as they appear today with regard to tenancies at will have not changed, and *Civ. Code § 789* has not been amended. *Civ. Code § 791* was amended in 1931 to add the provision that the three-days' notice is not required when the hiring of real property is for a term not specified by the parties and when the hiring was terminated under and in accordance with *Civ. Code § 1946* [*see* Historical Note to *Civ. Code § 791* in West's Annotated California Codes]. A court of appeal, distinguishing *Martin* on the ground of the 1931 amendment of *Civ. Code § 791*, has expressly held that no three-days' notice is required in addition to the 30-days' notice terminating a month-to-month tenancy under *Civ. Code § 1946* as a condition precedent to suing for unlawful detainer [*Hennessy v. Gleason (1947) 81 Cal. App. 2d 616, 619-620, 184 P.2d 913* ; *see* *Palmer v. Zeis (1944) 65 Cal. App. 2d Supp. 859, 151 P.2d 323* (reaching same result)].

Although a tenancy at will is a tenancy for an unspecified term and would therefore seem to come within the provisions of *Civ. Code § 1946*, *Civ. Code § 789* expressly covers the manner of terminating tenancies at will, and *Civ. Code § 791* does not make an exception for tenancies terminated under *Civ. Code § 789*. Thus, the rule of *Martin* appears to continue to apply and to require a three-day notice under *Civ. Code § 791* in addition to the 30-day notice under *Civ. Code § 789* as a condition precedent to suing for unlawful detainer. However, one court of appeal, without mentioning *Martin* or any other case, has held that the three-day notice need not be given in addition to the 30-day notice [*Alves v. Rodrigues (1948) 84 Cal. App. 2d 333, 337, 190 P.2d 649* (unlawful detainer proceeding involving tenancy at will resulting from the tenant's holding over after expiration of an oral lease for one year; landlord had given both notices, but court said that the subsequent three-day notice was unnecessary); *see* *Rishwain v. Smith (1947) 77 Cal. App. 2d 524, 526, 175 P.2d 555* (only 30-day notice given before suing in unlawful detainer; court did not discuss issue of whether three-day notice was required)].

Although service of the additional three-day notice would seem superfluous, it is suggested that, because of the apparent conflict between *Martin* (a Supreme Court case) and *Alves* (a court of appeal case), a landlord intending to sue a tenant at will for unlawful detainer if possession is not surrendered should follow the procedure set out in *Martin* until such time as the Supreme Court overrules *Martin* or otherwise holds that the three-day notice is not required.

PRACTICE TIP:

Take the More Conservative Approach. Because of the strict construction of statutes and laws against the landlord plaintiff in unlawful detainer actions, it is best to take the more conservative approach, and give the additional notice, particularly when it does not involve the passage of too much additional time.
By Benjamin Kaplan

[6] Examples of Tenancies Constituting Tenancy at Will

A person who enters on land with the owner's permission under a void parol contract, or under a void lease, or pending the unexecuted negotiations for a written lease, is considered a tenancy at will [*Carteri v. Roberts (1903) 140 Cal. 164, 167, 73 P. 818* ; *Covina Manor, Inc. v. Hatch (1955) 133 Cal. App. 2d Supp. 790, 284 P.2d 580]* .

A contract for the sale of real property that provides that the purchaser should give the seller free and full use of the premises from the time title passes until the last day specified in a 90-day written notice to move given by the purchaser should be construed as a tenancy at will terminable on condition subsequent, that is, the purchaser's giving the seller 90-day written notice to move [*First & C Corp. v. Wencke (1967) 253 Cal. App. 2d 719, 722-723, 61 Cal. Rptr. 531]* .

The purchaser of land under an executory or void land sales contract constitutes a tenant at will [*Turney v. Collins (1941) 48 Cal. App. 2d 381, 391, 119 P.2d 954]* . This case also held that notice to a tenant at will to vacate the premises forthwith is ineffective and cancels itself out when, on one hand, the notice purported to demand possession and, on other hand, the notice demanded a specific sum if defendant continued in possession [*Turney v. Collins (1941) 48 Cal. App. 2d 381, 392, 119 P.2d 954]* .

The payment and acceptance of periodic rent converts a tenancy at will into a periodic tenancy [*Tracy v. Donovan (1918) 37 Cal. App. 350, 351-352, 174 P. 113]* .

The permissive occupation of realty when no rent is reserved or paid and no time is agreed on to limit the occupation constitutes a tenancy at will [*Covina Manor, Inc. v. Hatch (1955) 133 Cal. App. 2d Supp. 790, 284 P.2d 580]* .

[7] Cross References

See comments in *§ 332.70*.

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29-332 California Forms of Pleading and Practice--Annotated § 332.73

§ 332.73 Notice to Lessee Terminating Lease in Accordance With Option Retained Under Written Lease--By Lessor

[1] FORM Notice to Lessee Terminating Lease in Accordance With Option Retained Under Written Lease--By Lessor

NOTICE OF TERMINATION OF TENANCY

To: _____ [*name of lessee*]
_____ [*street address and unit number, if any*]
_____ [*city*], California
Tenant in Possession--

NOTICE IS HEREBY GIVEN that [_____ (*specify condition, if any, triggering the earlier termination of the lease, e.g.*, the premises _____ (described above *or* known as _____(*street address, unit number, if any, and city*), California) were sold on _____ (*date*), and, therefore)], pursuant to the election reserved to the [undersigned] Lessor _____ [*name*] by Paragraph _____ of the lease dated _____, under which you hold possession of the _____ [premises *or* above-described premises *or* the premises known as _____ (*street address, unit number, if any, and city*), California], the Lessor has elected to and hereby does terminate the lease as of _____ [_____ (*date*) *or* _____ days after service on you of this notice]. Consequently, you must deliver up possession of the premises to _____ [the undersigned *or* _____ (*name*), your lessor *or* _____(*name*), your Lessor's authorized agent] on or before _____ [that date *or* expiration of the _____-day period].

[Rent in the amount of $_____ is due and payable through the date your tenancy is terminated by this notice.]
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is for use by a lessor to terminate a lease in accordance with the provisions for termination set forth in the lease. The notice is designed for use when a written lease for a fixed term reserves a right in the lessor to prematurely terminate the lease either on the happening of a specified condition, for example, on the sale of the property, or on the giving of a specified number of days' notice to the lessee.

The final paragraph may be included if the notice is given at such a time that additional rent will be payable before expiration of the notice period.

[3] Three-Day Notice

It is not clear from the cases whether an additional three-day notice to quit is required to render the tenant guilty of unlawful detainer for holding over. In *Samuels v. Singer (1934) 1 Cal. App. 2d 545, 549-550, 36 P.2d 1098* , itwas held under *Civ. Code §§ 791, 793* that such a notice is required, but that no additional notice is required to maintain an action for ejectment [*see also Chinese Hosp. Foundation Fund v. Patterson (1969) 1 Cal. App. 3d 627, 631-633, 81 Cal. Rptr. 795* (treating unlawful detainer proceeding as action for ejectment and holding lessor was able to maintain action in ejectment without terminating lease when so provided in lease)]. For a form of the three-day notice to quit that may be used, see *§ 332.76*. For a discussion and forms for use in actions for ejectment, see Ch. 241, *Ejectment* .

On the other hand, it has been held that no additional three-day notice is required to maintain a proceeding in unlawful detainer if the lease is terminated in accordance with a lease provision that the lessee will quit the premises on the lessor's giving a notice of termination as provided in the lease [*Buhman v. Nickels & Brown Bros. (1905) 1 Cal. App. 266, 269, 82 P. 85]* , or if the notice of termination under the lease's terms was for a breach of covenant that could not be undone [*Hignell v. Gebala (1949) 90 Cal. App. 2d 61, 67-68, 202 P.2d 378]* .

[4] Cross-References

See comments in *§ 332.70*.

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29-332 California Forms of Pleading and Practice--Annotated § 332.74

§ 332.74 Three-Day Notice to Tenant to Pay Rent or Surrender Possession of Premises [Code Civ. Proc. §§ 1161(2), 1161.1]--By Landlord

[1] FORM Three-Day Notice to Tenant to Pay Rent or Surrender Possession of Premises [Code Civ. Proc. §§ 1161(2), 1161.1]--By Landlord

NOTICE TO PAY RENT OR SURRENDER POSSESSION OF THE PREMISES

To: _____ [*name of tenant*]
_____ [*street address and unit number, if any*]
_____ [*city*], California
Tenant in Possession--

NOTICE IS HEREBY GIVEN that, within three days after service on you of this notice, you must pay the undersigned in full the rent now due and unpaid on the premises _____ [described above *or* known as _____ (*street address, unit number, if any, and city*), California], in

[*EITHER, if total amount due is known*]

the _____ [amount *or* total sum] of $_____, being the rent that became due on _____ [*date*] for the period from _____ to _____ [*dates*] [in the amount of $_____, and the rent that became due on _____[*date*] for the period from _____ to _____ [*dates*] in the amount of $ _____],

[*OR, if estimating rent due on commercial property*]

the amount of $_____, which is a reasonable estimate of the rent due as of _____ [*date*], as authorized by *Code of Civil Procedure Section 1161.1(a),*

[*CONTINUE*]

or alternatively to surrender possession of the premises to _____ [the undersigned *or* _____ (*name*), your _____ (lessor *or* landlord) *or* _____ (*name*), your (lessor's *or* landlord's) authorized agent]. If you fail to pay the rent or to surrender possession within the three-day period, legal proceedings will be commenced against you to recover possession and to recover a judgment for _____ the rent and damages for your unlawful detention of the premises.

THE PAYMENT MUST BE MADE TO _____ (*name of person to whom payment must be made*) at _____ (*street address, city and state, and telephone number*) [*OPTIONAL*] and may be made in person on _____ (*days and hours that person will be available to receive payment*) or deposited into account number _____ at _____ (*name and address of financial institution located within five miles of rental property*) [*OPTIONAL*] or paid by electronic fund transfer.

[FURTHER NOTICE IS GIVEN that _____ (the undersigned *or* your _____ (lessor *or* landlord) elects to declare forfeited the _____ (lease *or* rental agreement) under which you hold possession of the premises if you _____ (fail to pay the above-stated rent due within the three-day period *or* fail to surrender possession of the premises within the three-day period).]
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is for use by a landlord or lessor when the tenant or lessee has defaulted in the payment of rent. This form is used to demand payment of the rent due and to inform the tenant or lessee that if the amount demanded is not paid, possession of the premises will be surrendered [*see Code Civ. Proc. § 1161(2)*].

The purpose of the notice is to give the tenant or subtenant in possession an opportunity to pay the rent and thereby retain possession of the premises [*Fifth & Broadway Partnership v. Kimny, Inc. (1980) 102 Cal. App. 3d 195, 202, 162 Cal. Rptr. 271]* .

The last paragraph of the form should be included if the lessor elects to declare the lease forfeited if payment is not made within the three-day period [*see Code Civ. Proc. § 1174(a)*] or possession is not surrendered. If payment is made, the declaration of forfeiture is nullified and the lease remains in effect [*see Code Civ. Proc. §§ 1161(3), 1161.5*].

PRACTICE TIP:

Use Caution When Drafting Three-Day Notices. Drafting and serving three-day notices must be done very carefully. The amount of rent claimed may not be overstated, and other breaches must be accurately and completely stated. Notice problems lead to loss of unlawful detainer actions--and to loss of clients.

In addition, counsel should make sure that the amount of rent demanded in any subsequent complaint is the same as that demanded in the three-day notice. *By Myron Moskovitz*

[3] Format and Contents of Notice

The notice must be in writing [*Code Civ. Proc. § 1161(2)*]. Otherwise, no particular format is prescribed. Consequently, the notice may be in a notice format, as set forth above, or it may be given in simple letter or other written form.

The notice must demand payment of the rent due or, in the alternative, possession of the property [*Code Civ. Proc. § 1161(2)*]. It must also state no more than the exact amount of rent due [*see Code Civ. Proc. § 1161(2)*; *Werner v. Sargeant (1953) 121 Cal. App. 2d 833, 837, 264 P.2d 217]* . It may also include a demand for interest on the unpaid rent if interest is provided for in the lease [*Canal-Randolph Anaheim, Inc. v. Wilkoski (1978) 78 Cal. App. 3d 477, 492, 144 Cal. Rptr. 474]* .

PRACTICE TIP:

Including Interest in Notice. However, unless the amount of interest is sizable, and probably only if it is designated as additional rent, it is not good practice to include these amounts in the notice. If the tenant pays the rent demanded in the three-day period, the landlord can thereafter send another notice demanding the interest. *By Benjamin Kaplan*

A notice to pay rent or quit that overstates the rent due is ineffective and will not support an unlawful detainer proceeding [*Nourafchan v. Miner (1985) 169 Cal. App. 3d 746, 753, 215 Cal. Rptr. 450* ; *Ernst Enterprises, Inc. v. Sun Valley Gasoline, Inc. (1983) 139 Cal. App. 3d 355, 359, 188 Cal. Rptr. 641]* . *A fortiori*, a notice that fails to state any amount of rent due and is attached to the complaint for unlawful detainer, will not sustain a judgment for unlawful detainer [*Baugh v. Consumers Associates, Ltd. (1966) 241 Cal. App. 2d 672, 674-675, 50 Cal. Rptr. 822* (notice was also defective in that it was given by one other than lessor and no assignment of lease was stated)]. But a notice demanding payment of rent due on a specified date in an amount that is calculable from information known to the lessee and wrongfully withheld from the lessor satisfies the requirement of *Code Civ. Proc. § 1161(2)* that the notice state the amount of rent due [*Valov v. Tank (1985) 168 Cal. App. 3d 867, 871-874, 214 Cal. Rptr. 546* (lease of farmland provided rent was to be 20 percent of gross crop and required lessee to provide lessor with figures necessary to calculate amount and lessee failed to do so)].

A three-day notice must be served within one year after the rent "becomes due" [*Code Civ. Proc. § 1161(2)*]. However, a notice demanding payment of rents due within one year is not automatically invalidated because the notice also demands rent due more than a year before the notice [*Levitz Furniture Co. v. Wingtip Communications, Inc. (2001) 86 Cal. App. 4th 1035, 1041, 103 Cal. Rptr. 2d 656]* .

Code Civ. Proc. § 1161(2) also requires that the notice set forth the name, telephone number, and address of the person to whom the rent payment is to be made. If the payment may be made personally, the notice must state the usual days and hours that person will be available to receive the payment or the number of an account and the name and street address of a financial institution into which the rental payment may be made (provided that the institution is located within five miles of the rental property). If the address for payment does not allow for personal delivery, it will be conclusively presumed that on the mailing of any rent or notice to the owner by the tenant to the name and address provided, the notice or rent is deemed received by the owner on the date posted, if the tenant can show proof of mailing to the name and address provided by the owner. If an electronic funds transfer procedure has been previously established, the notice must state that payment may be made pursuant to that procedure.

Code Civ. Proc. § 1161(2) does not expressly require that the notice be signed, but the better practice is to sign it. Nevertheless, it has been held that an undated, unsigned notice was sufficient when [*Cavanaugh v. High (1960) 182 Cal. App. 2d 714, 721, 6 Cal. Rptr. 525]* :

- The notice was personally served by the landlord on the tenant;

- Service of the notice on a specified date in person was alleged in the complaint and admitted in the answer; and

- The parties' joint pretrial statement so stated.

This case also held that any defect in the notice was rendered inconsequential by defendant's continuous insistence that there was no lease and that notice to pay or quit would not lie [*Cavanaugh v. High (1960) 182 Cal. App. 2d 714, 721, 6 Cal. Rptr. 525]* .

[4] Use of Estimates for Commercial Property

There are special rules allowing the use of estimates of rent due in three-day notices for commercial property [*see Code Civ. Proc. § 1161.1(a)*]. They are applicable when the exact amount of rent due cannot be calculated because, for instance, it depends on sales information that the tenant has not given to the landlord. The term "commercial property" means all real property in California except mobilehomes [*see Civ. Code § 798.3* ("mobilehome" defined)], recreational vehicles [*see Civ. Code § 799.29* ("recreational vehicle" defined)], or dwelling units subject to *Civ. Code § 1940 et seq.* [*Code Civ. Proc. § 1161.1(d)*].

For commercial property, if the amount stated in the three-day notice is clearly identified by the notice as an estimate and the amount claimed is not in fact correct, but it is determined at the trial or by other judicial determination that rent was owing and the amount claimed in the notice was reasonable, the tenant will be subject to a judgment for possession and the actual amount of rent and other sums found to be due [*Code Civ. Proc. § 1161.1(a)*].

However, if on receiving a notice claiming an estimated amount, the tenant tenders to the landlord within the time required by the notice for payment an amount that the tenant reasonably estimates to be due, and it is determined at trial that the amount of rent due was the amount tendered by the tenant or a lesser amount, the tenant is deemed the prevailing party for all purposes. If the court determines that the amount tendered by the tenant was less than the amount due, but was reasonably estimated nevertheless, the tenant will retain the right to possession if, within five days of the effective date of the judgment, he or she pays the landlord the amount previously tendered if it was not previously accepted, the difference between the amount tendered and the amount determined by the court to be due, and any other sums as ordered by the court [*Code Civ. Proc. § 1161.1(a)*].

Code Civ. Proc. § 1161.1(a) uses conditional phraseology when speaking of a tender by the tenant. Accordingly, although a tenant may act to protect his or her right to possession by tendering a reasonable estimate of the rent due, the failure to do so does not relieve the landlord of complying with the obligations to provide a notice that reasonably estimates the amounts owed [*WDT-Winchester v. Nilsson (1994) 27 Cal. App. 4th 516, 533-534, 32 Cal. Rptr. 2d 511]* .

There is a presumption affecting the burden of proof that the amount of rent claimed or tendered is reasonably estimated if, in relation to the amount determined to be due at the trial or by other judicial determination of that issue, the amount claimed or tendered was no more than 20 percent more or less than the amount determined to be due. However, if the rent due is contingent on information primarily within the knowledge of one party to the lease and that information has not been furnished to, or has not accurately been furnished to the other party, the court must consider that fact in determining the reasonableness of the amount of rent claimed or tendered [*Code Civ. Proc. § 1161.1(e)*]. In addition, even after a judicial finding that the estimated amount exceeds the 20 percent margin, an estimate may nevertheless be deemed a reasonable estimate for purposes of the statute, depending on the facts of the case [*WDT-Winchester v. Nilsson (1994) 27 Cal. App. 4th 516, 531, 32 Cal. Rptr. 2d 511]* .

In addition, in an unlawful detainer action, the landlord's failure to request the trial court to adjudicate the issue of the reasonablness of the amount of rent demanded (under *Code Civ. Proc. § 1161.1*) precluded the landlord from having

that issue determined on appeal [*Cinnamon Square Shopping Center v. Meadowlark Enterprises (1994) 24 Cal. App. 4th 1837, 1844, 30 Cal. Rptr. 2d 697]* .

[5] Service of Notice

The notice must be served on the tenant and any subtenant in actual occupation of the premises [*Code Civ. Proc. § 1161(2)*]. Failure to serve the three-day notice on persons recognized as tenants in possession precludes judgment against them in an unlawful detainer proceeding [*Kwok v. Bergren (1982) 130 Cal. App. 3d 596, 600, 181 Cal. Rptr. 795]* .

PRACTICE TIP:

Prejudgment Claim of Right to Possession. It should be noted that the prejudgment claim of right to possession statutes may effect this requirement, although the statutes are not clear on this point [*see Code Civ. Proc. §§ 415.46, 1174.3*]. *By Benjamin Kaplan*

The notice may be served at any time within one year after the rent became due [*Code Civ. Proc. § 1161(2)*; *see Fifth & Broadway Partnership v. Kimny, Inc. (1980) 102 Cal. App. 3d 195, 202, 162 Cal. Rptr. 271]* . A landlord who waits over one year to sue for unpaid rent is relegated to an ordinary breach of contract action, which results only in a money judgment without restitution of the demised property [*Cal-American Income Property Fund IV v. Ho (1984) 161 Cal. App. 3d 583, 585, 207 Cal. Rptr. 532]* .

The notice must be served in the manner prescribed by *Code Civ. Proc. § 1162* [*Code Civ. Proc. § 1162*; for a discussion of *Code Civ. Proc. § 1162, see § 333.11*]. When service of the notice is made by posting and mailing, the tenant has three days from receiving the notice in the mail to pay rent [*Davidson v. Quinn (1982) 138 Cal. App. 3d Supp. 9, 11-14 , 188 Cal. Rptr. 421]* , although this rule may not be determinative as one cannot generally tell when the notice was *received*.

[6] Recovery of Pretermination Rent

Pretermination rent is recoverable in an unlawful detainer proceeding when the proceeding is based only on the failure to comply with a three-day notice to pay rent or quit [*Saberi v. Bakhtiari (1985) 169 Cal. App. 3d 509, 512-516, 215 Cal. Rptr. 359]* .

[7] Cross References

See *comments in § 332.70*.

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29-332 California Forms of Pleading and Practice--Annotated § 332.75

§ 332.75 Three-Day Notice to Tenant to Perform Covenant or Surrender Possession [Code Civ. Proc. § 1161(3)]--By Landlord

[1] FORM Three-Day Notice to Tenant to Perform Covenant or Surrender Possession [Code Civ. Proc. § 1161(3)]--By Landlord

NOTICE TO PERFORM COVENANT OR SURRENDER
POSSESSION OF THE PREMISES

To: _____ [*name of tenant*]
_____ [*street address and unit number, if any*]
_____ [*city*], California
Tenant in Possession--

NOTICE IS HEREBY GIVEN that you are in breach of the _____ [lease *or* rental agreement] under which you hold possession of the premises _____ [described above *or* known as _____ (*street address, unit number, if any, and city*), California], in that _____ [*specify, e.g.,* you have failed to pay the real estate taxes assessed against the _____(leased *or* rented) premises, as required by _____ (*specify lease or rental agreement provision*)].

WITHIN THREE DAYS after service on you of this notice, you must, as required by the terms of your lease, _____ [*specify covenant to be performed, e.g.,* pay the real estate taxes] or surrender possession of the premises to _____ [the undersigned or _____ (*name*), your _____ (lessor *or* landlord) or _____(*name*), your _____ (lessor's *or* landlord's) authorized agent]. If you fail to _____ [*specify, e.g.,* pay the real estate taxes] or alternatively to surrender possession within the three-day period, legal proceedings will be commenced against you to recover possession and to recover damages for your unlawful detention of the premises.

[FURTHER NOTICE IS GIVEN that _____ (the undersigned *or* your _____ (lessor *or* landlord) elects to declare forfeited the _____ (lease *or* rental agreement) under which you hold possession of the premises if you fail to _____ (*specify, e.g.,* pay the above stated real estate taxes) within the three-day period or fail to surrender possession of the premises.]
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is for use by a landlord or lessor when the tenant or lessee has breached a covenant or condition of the lease that the lessee can still perform. The purpose of the notice is to demand performance of the condition or covenant or, in the alternative, the surrender of the premises [*see Code Civ. Proc. § 1161(3)*]. For a form of notice for use when the covenant that has been breached can no longer be performed, and the breach is therefore incurable, see *§ 332.76*.

[3] Overlap Between Code Civ. Proc. § 1161(3) and (4)

Code Civ. Proc. § 1161(3) and *(4)* may both apply when the breach consists of assigning, subletting, or waste. *Code Civ. Proc. § 1161(3)* requires the three-day notice to be in the alternative (to perform or to quit) if the covenant can yet be performed. *Code Civ. Proc. § 1161(4)*, on the other hand, simply provides that the breach terminates the lease and the landlord is, on service of a three days' notice to quit, entitled to possession without regard to whether the covenant can yet be performed. Apparently, the landlord may proceed under either or both of these provisions to the extent that each provision applies. For example, not every breach of a lease provision regarding repairs will constitute waste.

[4] Format and Contents of Notice

The notice must be in writing [*Code Civ. Proc. § 1161(3)*]. Otherwise, no particular format is prescribed. Consequently, the notice may be in a notice format, as set forth above, or it may be given in simple letter or other written form.

If the covenant or condition can yet be performed, the notice must demand its performance or, in the alternative, possession of the property [*Code Civ. Proc. § 1161(3)*].

The last paragraph of the form should be included if the lessor elects to declare the lease forfeited if the covenant or condition is not performed within the three-day period. If the covenant or condition is performed, the declaration of forfeiture is nullified and the lease remains in effect [*see Code Civ. Proc. §§ 1161(3), 1161.5*].

Code Civ. Proc. § 1161(3) does not expressly require that the notice be signed, but the better practice is to sign it.

[5] Service of Notice

The notice must be served on the tenant and any subtenant in actual occupation of the premises [*Code Civ. Proc. § 1161(3). Code Civ. Proc. § 1161(3)*, however, unlike *Code Civ. Proc. § 1161(2)*], imposes no time limit on when the notice must be served. Consequently, the ordinary statute of limitation applies [*Cal-American Income Property Fund IV v. Ho (1984) 161 Cal. App. 3d 583, 585, 207 Cal. Rptr. 532]* .

The notice must be served in the manner prescribed by *Code Civ. Proc. § 1162* [for a discussion of *Code Civ. Proc. § 1162, see § 333.11*].

[6] Damages Recoverable

Unpaid rent accruing before expiration of the notice period may be recovered in an unlawful detainer proceeding only when the proceeding arises from the tenant's failure to comply with a three-day notice under *Code Civ. Proc. § 1161(2)* to pay rent or quit [*see Saberi v. Bakhtiari (1985) 169 Cal. App. 3d 509, 512-516, 215 Cal. Rptr. 359]* . Other unpaid money obligations required as part of the lessee's consideration for the lease, such as the lessee's covenant to pay real estate taxes or a proportionate share of the cost of maintaining common areas that are treated differently than rent in the lease, however, may be recovered as damages under *Code Civ. Proc. § 1174(b)* in an unlawful detainer based on a three-day notice under *Code Civ. Proc. § 1161(3)* to perform the covenant or quit the premises [*see Cal-American Income Property Fund IV v. Ho (1984) 161 Cal. App. 3d 583, 585-586, 207 Cal. Rptr. 532]* .

[7] Forfeitures

A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created [*Civ. Code § 1442*]. However, forfeitures for the breach of a covenant or condition in a lease are not favored by the courts and are enforced only when it is shown that the clear and manifest intention of the parties was to provide for forfeiture in the event of a breach [*McNeece v. Wood (1928) 204 Cal. 280, 284, 267 P. 877]* .

[8] Cross References

See *comments in § 332.70*.

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29-332 California Forms of Pleading and Practice--Annotated § 332.76

§ 332.76 Three-Day Notice to Tenant to Quit--For Incurable Breach of Covenant [Code Civ. Proc. § 1161(3)], or Assigning or Subletting Contrary to Lease Provision [Code Civ. Proc. § 1161(3), (4)], or Committing Waste Contrary to Lease Provision [Code Civ. Proc. § 1161(4)], or Maintaining or Committing or Permitting Maintenance or Commission of Nuisance [Code Civ. Proc. § 1161(4)], or Using Premises for Unlawful Purpose [Code Civ. Proc. § 1161(4)]--By Landlord

[1] FORM Three-Day Notice to Tenant to Quit--For Incurable Breach of Covenant [Code Civ. Proc. § 1161(3)], or Assigning or Subletting Contrary to Lease Provision [Code Civ. Proc. § 1161(3), (4)], or Committing Waste Contrary to Lease Provision [Code Civ. Proc. § 1161(4)], or Maintaining or Committing or Permitting Maintenance or Commission of Nuisance [Code Civ. Proc. § 1161(4)], or Using Premises for Unlawful Purpose [Code Civ. Proc. § 1161(4)]--By Landlord

NOTICE TO QUIT

To: _____ [*name of tenant*]
_____ [*street address and unit number, if any*]
_____ [*city*], California
Tenant in Possession--

NOTICE IS HEREBY GIVEN that, within three days after service on you of this notice, you must quit and surrender possession of the premises _____ [described above *or* known as _____(*street address, unit number, if any, and city*), California] to _____ [the undersigned *or* (*name*), your _____ (landlord *or* lessor) or _____ (*name*), your _____ (landlord's *or* lessor's) authorized agent]. If you fail to vacate and surrender possession of the premises within the three-day period, legal proceedings will be commenced against you to recover possession and to recover a judgment for damages for your unlawful detention of the premises.

[Your tenancy is being terminated for the reason(s) that _____ (*specify, e.g.*, you have, in violation of

your covenant not to do so, sublet [a portion of] the demised premises to one _____ [*name*])].

[FURTHER NOTICE IS GIVEN that, because _____(*specify, e.g.,* you have breached a covenant of the lease and the breach is incurable), _____ (the undersigned *or* your _____ [lessor *or* landlord]) has elected to declare forfeited the _____ (lease *or* rental agreement) under which you hold possession of the premises.]
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is for use by a landlord or lessor to demand surrender of the possession of real property when the tenant or lessee:

- Has breached a covenant or condition of the lease and the breach is incurable [*see Code Civ. Proc. § 1161(3)*];

- Has assigned the lease or committed waste on the demised premises, contrary to the lease's conditions or covenants [*see Code Civ. Proc. § 1161(3), (4)*];

- Is maintaining, committing, or permitting the maintenance or commission of a nuisance on the demised premises [*see Code Civ. Proc. § 1161(4)*];

- Is using the demised premises for an unlawful purpose [*see Code Civ. Proc. § 1161(4)*]; or

- Has committed an act of domestic violence, sexual assault, or stalking against another tenant or subtenant who is no longer residing at the premises [*see Code Civ. Proc. § 1161(4)* (repealed effective 1/1/12)].

With appropriate modifications, this form may also be used as a three-day notice to quit when a right to reenter under the lease has accrued [*see Civ. Code § 791*].

[3] Format and Contents of Notice

The notice must be in writing [*Code Civ. Proc. § 1161(3)*]. Otherwise, no particular format is prescribed. Consequently, the notice may be in a notice format, as set forth above, or it maybe given in simple letter or other form.

If the covenant or condition can yet be performed, the notice must demand its performance or, in the alternative, possession of the property [*Code Civ. Proc. § 1161(3)*; *see § 332.75*].

When a broken covenant is not capable of performance, an alternative form of notice to the tenant to perform the covenant or surrender possession is not required. However, written demand to surrender possession within three days is required as a condition precedent to a proceeding for unlawful detainer [*Schnittger v. Rose (1903) 139 Cal. 656, 660-663, 73 P. 449* ; *Salton Community Services Dist. v. Southard (1967) 256 Cal. App. 2d 526, 529, 64 Cal. Rptr. 246* ; *Zucco v. Farullo (1918) 37 Cal. App. 562, 567, 174 P. 929]* .

The last paragraph of the form should be included if the lessor elects to declare the lease or rental agreement forfeited [

see Code Civ. Proc. § 1174(a)].

Code Civ. Proc. § 1161(3), (4) do not expressly require that the notice be signed, but the better practice is to sign it.

[4] Service of Notice

If the notice is given under *Code Civ. Proc. § 1161(3)*, it must be served on the tenant and any subtenant in actual occupation of the premises [*Code Civ. Proc. § 1161(3)*]. If the notice is given under *Code Civ. Proc. § 1161(4)*, it must be served on the person or persons in possession of the premises [*Code Civ. Proc. § 1161(4)*].

The notice must be served in the manner prescribed by *Code Civ. Proc. § 1162* [for a discussion of *Code Civ. Proc. § 1162, see § 333.11*].

[5] Waste

When a tenant has committed waste, a notice to quit is not required to demand performance of the covenants against committing waste because *Code Civ. Proc. § 1161(4)* provides that a tenant committing waste on the demised premises contrary to conditions and covenants of lease thereby terminates the lease [*Zucco v. Farullo (1918) 37 Cal. App. 562, 567-568, 174 P. 929]* .

[6] Cross References

See comments in *§ 332.70*.

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29-332 California Forms of Pleading and Practice--Annotated § 332.77

§ 332.77 Three-Day Notice to Quit--To Judgment Debtor [Code Civ. Proc. § 1161a(b)(1)], Mortgagor [Code Civ. Proc. § 1161a(b)(2)], Trustor [Code Civ. Proc. § 1161a(b)(3)], Seller [Code Civ. Proc. § 1161a(b)(4)], Person Whose Property Was Sold Under Default Provisions of Conditional Sale Contract or Security Agreement [Code Civ. Proc. § 1161a(b)(5)], or to Person Who Claims Under Any of the Above, Who Continues in Possession After Sale--By Purchaser

[1] FORM Three-Day Notice to Quit--To Judgment Debtor [Code Civ. Proc. § 1161a(b)(1)], Mortgagor [Code Civ. Proc. § 1161a(b)(2)], Trustor [Code Civ. Proc. § 1161a(b)(3)], Seller [Code Civ. Proc. § 1161a(b)(4)], Person Whose Property Was Sold Under Default Provisions of Conditional Sale Contract or Security Agreement [Code Civ. Proc. § 1161a(b)(5)], or to Person Who Claims Under Any of the Above, Who Continues in Possession After Sale--By Purchaser

NOTICE TO QUIT

To: _____ [*name of tenant*]
_____ [*street address and unit number, if any*]
_____ [*city*], California
Tenant in Possession--

NOTICE IS HEREBY GIVEN that _____ [the undersigned *or* _____ (*name*)] has purchased the _____ [property known as _____ (*street address, unit number, if any, and city*), California *or* _____ (manufactured home *or* mobilehome) _____(*describe*)] _____ [from *or* at an execution sale against *or* at a mortgage foreclosure sale against *or* at a trust deed foreclosure sale against *or* at a sale in accordance with *Health & Safety Code § 18037.5* under the default provisions of a _____ (conditional sale contract *or* security agreement) executed by *or*] _____ [you *or* _____ (*name*), the person under whom you claim] and the title has been duly perfected.

NOTICE IS FURTHER GIVEN that, within three days after service on you of this notice, you must deliver up possession of the property to _____ [the undersigned *or* to _____ (*name*), the _____ (purchaser of the property *or* the authorized agent of the purchaser of the property)]. If you fail to deliver up possession within the three-day period, legal proceedings will be commenced against you to recover possession and a judgment for damages for your unlawful detention of the property.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is for use by the purchaser of property at one of the described sales to demand surrender of possession from a former owner who is holding over after the sale or from an occupant claiming a right to possession under a former owner [*see Code Civ. Proc. § 1161a(b)*]. By appropriately changing the notice period, the above notice may also be used when the property consists of a rental housing unit rented or leased by a tenant or subtenant on a week-to-week, month-to-month, or other interval or for a fixed period of time. In such case, however, the period of notice must be equal to the term of the hiring itself, but not exceeding 30 days [*Code Civ. Proc. § 1161a(c)*; *see § 333.10[10]*].

PRACTICE TIP:
Rent Control Ordinances. WARNING! A tenant in possession may be protected from eviction by local rent control ordinances. *By Benjamin Kaplan*

[3] Format and Contents of Notice

The notice must be in writing [*Code Civ. Proc. § 1161a(b)*]. Otherwise, no particular format is prescribed. Consequently, the notice may be in a notice format, as set forth above, or it may be given in simple letter or other written form.

If the property is subject to local legislation limiting the grounds on which tenancies may be terminated, the notice should include a statement showing that the eviction is authorized under that legislation [*see Gross v. Superior Court (1985) 171 Cal. App. 3d 265, 271, 217 Cal. Rptr. 284* (holding *Code Civ. Proc. § 1161a* does not preempt local rent stabilization ordinance limiting grounds for eviction)].

Code Civ. Proc. § 1161a(b) does not expressly require that the notice be signed, but the better practice is to sign it.

[4] Service of Notice

The notice must be served on the person holding over and continuing in possession of the property and on any subtenant in actual occupation of the premises [*Code Civ. Proc. § 1161a(b)*]. The notice is required to be served in the manner prescribed by *Code Civ. Proc. § 1162* [for a discussion of *Code Civ. Proc. § 1162, see § 333.11*].

[5] Holding Over After Notice to Quit: Code Civ. Proc. § 1161a(b), (c)

The following are all subject to an eviction by a proceeding in unlawful detainer [*Code Civ. Proc. § 1161a(b)(1)-(4)*]:

- A judgment debtor or person claiming under a judgment debtor who holds over and continues in possession of the property after an execution sale and the service of a three-day notice to quit;

- A mortgagor, or person claiming under a mortgagor, who holds over and continues in possession of the property after a foreclosure sale and the service of a three-day notice to quit;

- A trustor, or person claiming under a trustor, who holds over and continues in possession of the property after a sale of the property under a power of sale contained in a trust deed and the service of a three-day notice to quit;

- A seller, or person claiming under a seller, who holds over and continues in possession of the property after the sale and the service of a three-day notice to quit; and

In addition, the owner of a mobilehome or person claiming under the owner after a sale in accordance with Health & Safety Code § 18037.5under the default provisions of a conditional sale contract or security agreement and the service of a three-day notice to quit is subject to an eviction by a proceeding in unlawful detainer [*Code Civ. Proc. § 1161a(b)(5)*].

Notwithstanding the above, a tenant or subtenant in possession of a rental housing unit, as defined in *Code Civ. Proc. § 1161a(d)*, which has been sold by reason of causes enumerated in *Code Civ. Proc. § 1161a(b)*, who rents or leases a unit on a periodic basis or for a fixed period of time is required to be given a notice to quit under *Code Civ. Proc. § 1162* at least as long as the term of the hiring itself but not exceeding 30 days before the tenant or subtenant may be removed therefrom by a proceeding in unlawful detainer [*Code Civ. Proc. § 1161a(c)*].

[6] Cross References

For discussion and forms for use in enforcing a money judgment by writ of execution levied on and sale of real property, see Ch. 254, *Executions and Enforcement of Judgments* , and Ch. 294, *Homesteads* .

For discussion and forms for use in securing issuance of a writ of sale, see Ch. 254, *Executions and Enforcement of Judgments* .

For discussion and forms for use in judicially foreclosing a mortgage or trust deed and for use in nonjudicial foreclosure by private sale, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

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29-332 California Forms of Pleading and Practice--Annotated § 332.78

§ 332.78 Notice to Tenant of Intention Not to Renew or Intention to Terminate Tenancy in Mobilehome Park [Civ. Code §§ 798.55-798.57]--By Management

[1] FORM Notice to Tenant of Intention Not to Renew or Intention to Terminate Tenancy in Mobilehome Park [Civ. Code §§ 798.55-798.57]--By Management

NOTICE OF INTENTION _____ [NOT TO RENEW *or* TO TERMINATE] TENANCY

To: _____ [*name of homeowner*]:

NOTICE IS HEREBY GIVEN that your tenancy [of space number _____] in _____ [*name of mobilehome park*], located at _____ [*street address and city*], _____ County, California, _____ [will not be renewed *or* is hereby terminated] for the reason(s) that _____ [*set forth specific facts to permit determination of date, place, witnesses, and circumstances concerning reasons*].

NOTICE IS FURTHER GIVEN, that you must sell or remove your mobilehome from the park on or before _____ [*date not less than 60 days after date notice will be received*]. If you fail to do so, legal proceedings will be commenced against you to recover possession of the space you occupy in the mobilehome park and to recover a judgment for damages for each day you continue to occupy the space beyond the 60-day period.

[Rent in the amount of $_____ is due and payable through the end of the 60-day period.]

This notice is given in compliance with *California Civil Code §§ 798.55-798.57*.
Dated: _____.

_____ [*signature*]

[Owner *or authorized agent or representative*]

[2] Use of Form

The form in [1], *above*, is for use by the management of a mobilehome park to notify a homeowner of management's intention not to renew a tenancy or to terminate a tenancy in a mobilehome park [*see Civ. Code § 798.55(b)*]. With appropriate modifications, it may also be used by a homeowner to give management the required 60-day notice before vacating his or her tenancy [*see Civ. Code § 798.59*].

[3] 60-Day Notice of Intention Not to Renew or to Terminate Tenancy

[a] Statutory Requirement

The management of a mobilehome park may not terminate or refuse to renew a tenancy, except for a reason specified in *Civ. Code §§ 798.55*- 798.61 and on notice to the homeowner to remove the mobilehome from the park within a period of not less than 60 days [*Civ. Code § 798.55(b)*; for further discussion of tenancies in mobilehome parks, see *§ 333.12[7]*].

[b] Format and Contents of Notice

The notice must be in writing and must direct the homeowner to sell or remove the mobilehome from the park, at the homeowner's election, within a period of not less than 60 days, which period must be specified in the notice [*Civ. Code § 798.55(b)*].

The notice of termination must set forth the reason relied on by management for the termination with specific facts to permit determination of the date, place, witnesses, and circumstances concerning the reason. Neither a reference to *Civ. Code § 798.56* nor to one of its subdivisions nor a recital of the language of *Civ. Code §§ 798.55-798.61* will constitute compliance with this requirement [*Civ. Code § 798.57*].

Permissible reasons for terminating a tenancy are listed in *Civ. Code § 798.56*.

Civ. Code § 798.55(b) does not expressly require that the notice be signed, but the better practice is to sign it.

[4] Service of Notice

The 60-day notice must be given to the homeowner in the manner prescribed by *Code Civ. Proc. § 1162* [*Civ. Code § 798.55(b)*; for a discussion of *Code Civ. Proc. § 1162*, see *§ 333.11*].

A copy of the 60-day notice must also be sent to the legal owner, as defined in *Health & Safety Code § 18005.8*, to each junior lienholder, as defined in *Health & Safety Code § 18005.3*, and to the registered owner of the mobilehome, if other than the homeowner, by United States mail within 10 days after notice to the homeowner. The copy may be sent by regular mail or by certified or registered mail with return receipt requested. If the homeowner has not paid the rent due within three days after notice to the homeowner and the first notice was not sent by certified or registered mail with return receipt requested, a copy of the notice must again be sent to the legal owner, to the junior lienholder, and to the registered owner, by certified or registered mail with return receipt requested within 10 days after notice to the homeowner. Copies of the notice must be addressed to the legal owner, to each junior lienholder, and to the registered owner at their addresses, as set forth in the registration card specified in *Health & Safety Code § 18091.5* [*Civ. Code § 798.55(b)*].

[5] Three-Day Notice to Pay Rent or Utility or Incidental Charges or to Vacate

When the reason for termination is nonpayment of rent, utility charges, or reasonable incidental service charges, the amount due must have been unpaid for at least five days from its due date, and the homeowner must be given a three-day written notice after that five-day period to pay the amount due or to vacate the tenancy [*see § 332.74* for a form that may be adapted for this use]. The five-day period does not include the date payment is due [*Civ. Code § 798.56(e)(1)*].

The three-day notice must be given in the manner prescribed by *Code Civ. Proc. § 1162* and may be given at the same time as the 60 days' notice required for termination of the tenancy [*Civ. Code § 798.56(e)(1)*; *see Palmer v. Agee (1978) 87 Cal. App. 3d 377, 384-386, 150 Cal. Rptr. 841* (involving predecessor statute, court held that 60-day notice provision is to exclusively apply to proceedings for termination of mobilehome tenancies for nonpayment of rent and that summary proceedings of unlawful detainer are not applicable for terminating mobilehome tenancies)]. A copy of the notice must also be sent to the persons or entities described in *Civ. Code § 798.55(b)* within 10 days after notice is delivered to the homeowner [*Civ. Code § 798.56(e)(1)*].

The three-day notice must contain the following statement printed in at least 12-point boldface type at the top of the notice, with the appropriate number written in the blank [*Civ. Code § 798.56(e)(1)*]:

> **Warning:**
> **This notice is the (insert number) three-day notice for nonpayment of rent, utility charges, or other reasonable incidental services that has been served upon you in the last 12 months. Pursuant to *Civil Code Section 798.56(e)(5)*, if you have been given a three-day notice to either pay rent, utility charges, or other reasonable incidental services or to vacate your tenancy on three or more occasions within a 12-month period, management is not required to give you a further three-day period to pay rent or vacate the tenancy before your tenancy can be terminated.**

The homeowner remains liable for all payments due until the time the tenancy is vacated. Payment by either the homeowner within the three-day period or on behalf of the homeowner by the legal owner, a junior lienholder, or the registered owner if other than the homeowner before expiration of 30 calendar days following the mailing to them of the 60-day notice required by *Civ. Code § 798.55(b)* cures the default with regard to the payment [*Civ. Code § 798.56(e)(2), (6)*]. But a cure in this manner of a default of rent, utility charges, or reasonable incidental service charges by the legal owner, a junior lienholder, or theregistered owner, if other than the homeowner, may not be exercised more than twice during a 12-month period [*Civ. Code § 798.56(e)(6)(B)*]. If the homeowner has been given a three-day notice to pay the amount due or to vacate the tenancy on three or more occasions during the preceding 12-month period, and each notice included the warning statement set forth above [*see Civ. Code § 798.56(e)(1)*], no written three-day notice is required in the case of a subsequent nonpayment of rent, utility charges, or reasonable incidental service charges [*Civ. Code § 798.56(e)(5)*]. However, in that situation, the homeowner must still be given a 60-day notice to remove the mobilehome, with copies given to the legal owner, any junior lienholder, and the registered owner [*Civ. Code § 798.56(e)(5)*]. Under certain conditions, the default may then be cured by the legal owner, a junior lienholder, or the registered owner [*see Civ. Code § 798.56(e)(6)*].

[6] Additional Notices When Termination Is for Change of Use of Park

When the reason for terminating the tenancy is a change of the use of the park or any part of it, additional pretermination notices must be given in accordance with *Civ. Code § 798.56(g)*.

[7] Termination to Make Site Available to Mobilehome Purchaser Prohibited

A tenancy is not permitted to be terminated for the purpose of making a homeowner's site available for a person who purchased or proposes to purchase, or rents or proposes to rent, a mobilehome from the mobilehome park owner or the owner's agent [*Civ. Code § 798.58*].

[8] Unlawful Detainer, Forcible Entry, and Forcible Detainer

Except as otherwise provided in *Civ. Code §§ 798.55-798.61*, the provisions of these sections do not affect any rights or proceedings set forth in *Code Civ. Proc. § 1159 et seq.* (unlawful detainer, forcible entry, and forcible detainer) [*Civ. Code § 798.60*].

[9] Cross References

For a discussion of laws governing mobilehomes and mobilehome parks and for forms for use in enforcing rights under those laws, see Ch. 369, *Mobilehomes and Mobilehome Parks* .

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29-332 California Forms of Pleading and Practice--Annotated § 332.79

§ 332.79 30-Day Notice to Tenant Terminating Tenancy in Recreational Vehicle Park [Civ. Code § 799.66]--By Management

[1] FORM 30-Day Notice to Tenant Terminating Tenancy in Recreational Vehicle Park [Civ. Code § 799.66]--By Management

NOTICE OF TERMINATION OF TENANCY

To: _____ [*name of tenant*]

NOTICE IS HEREBY GIVEN that your tenancy of _____ [*identify site, e.g.,* Space No. 69] in _____ [*name of recreational vehicle park*], located at _____ [*street address and city*], is terminated effective _____ [*date at least 30 days after notice is served*] without the right of renewal and that you must remove your recreational vehicle from the park on or before that date. If you fail to do so, legal proceedings will be commenced against you to recover possession of the space you occupy and to recover a judgment for damages for each day you continue to occupy the space beyond the 30-day period.

[_____ (Prorated rent *or* Rent) in the amount of $_____ is due and payable through the end of the _____ (*specify period, e.g.,* 30-day) period.]

This notice is given in compliance with *Civil Code Section 799.66*.
Dated: _____.

_____ [*signature*]

[Owner *or* Manager]

[2] Use of Form

The form in [1], *above*, is for use by the management of a recreational vehicle park [*see Civ. Code § 799.30*] ("recreational vehicle park" defined) to give notice of terminating a tenancy in the park [*Civ. Code § 799.66*]. The form should be used when management wants to terminate or refuse to renew a "tenant's" [*see* [3], *below*, for definition of "tenant"] occupancy for a reason other than nonpayment of rent [*Civ. Code § 799.66*; termination of a tenancy for nonpayment of rent or other charges is covered under *Civ. Code § 799.65*]. The notice need not state the cause for termination, but must provide at least 30 days' notice of termination [*Civ. Code § 799.66*].

For a form of 72-hour notice to a "defaulting occupant" [*see Civ. Code §§ 799.22, 799.55-799.59*] to remove his or her recreational vehicle from a recreational vehicle park, see *§ 332.80*.

[3] Definition of Tenant

"Tenant" is defined as the owner or operator of a recreational vehicle who has been an occupant in a recreational vehicle park for 30 or more consecutive days [*Civ. Code § 799.32*].

[4] Format and Contents of Notice

The notice must be in writing [*Civ. Code § 799.66*]. Otherwise, no particular format is prescribed. Consequently, the notice may be in a notice format, as set forth above, or it may be given in simple letter or other written form.

Civ. Code § 799.66 provides that the owner or manager of a recreational vehicle park may give the notice, but it does not expressly require that the notice be signed. Nevertheless, the better practice would be for the owner or manager to sign the notice.

[5] Service of Notice

The form in [1], *above*, must be served on the tenant in the manner prescribed by *Code Civ. Proc. § 1162* [*Civ. Code § 799.66*; for a discussion of *Code Civ. Proc. § 1162, see § 333.11*].

[6] Unlawful Detainer

Except as provided in *Civ. Code §§ 799.65-799.67*, a tenant who fails to comply with the notice to leave may be evicted as provided in *Code Civ. Proc. § 1159 et seq.*, relating to unlawful detainer, forcible entry, and forcible detainer [*Civ. Code § 799.67*].

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29-332 California Forms of Pleading and Practice--Annotated § 332.80

§ 332.80 72-Hour Notice to Occupant to Remove Recreational Vehicle of Defaulting Occupant From Recreational Vehicle Park [Civ. Code § 799.57]--By Management

[1] FORM 72-Hour Notice to Occupant to Remove Recreational Vehicle of Defaulting Occupant From Recreational Vehicle Park [Civ. Code § 799.57]--By Management

NOTICE TO REMOVE RECREATIONAL VEHICLE

To: _____ [*name of occupant*]

NOTICE IS HEREBY GIVEN that you must remove the recreational vehicle you occupy from _____ [*name of recreational vehicle park*], located at _____ [*street address and city*] within 72 hours after receiving this notice. If you fail to do so, the owner or manager of the recreational park has authority under *Civil Code Section 799.58* to have the recreational vehicle removed from the lot to the nearest secured storage facility.

This notice is given in accordance with the provisions of *Civil Code Section 799.57*.
Dated: _____.

_____ [*signature*]

_____ [Owner *or* Manager]

[2] Use of Form

The form in [1], *above*, is for use by an owner or manager of a recreational vehicle park to notify a "defaulting occupant" [*see* [3], *below*] to remove his or her recreational vehicle from the premises within 72 hours after receiving the notice [*see Civ. Code § 799.57*].

The notice is a prerequisite to the right of the park's owner or manager to have the defaulting occupant's recreational vehicle removed from the lot that is the subject of the registration agreement between the park and the occupant [*Civ. Code § 799.55*]. The rules governing notice to the city police or county sheriff, the removal of the occupants from the vehicle, the care required in removing the vehicle, and the lien of the park's owner or manager on the vehicle and its contents for proper charges due from a defaulting occupant are set forth in *Civ. Code §§ 799.58* and *799.59*.

A 72-hour notice is not required to evict a guest if specified conditions are met, including (1) at the time the guest was provided accommodations by the park management, he or she was provided with, and signed, a written notice that the park management would need the lot to accommodate an arriving person with a contractual right thereto, and that if the guest failed to fully depart at the agreed-on time, the park management may take possession of the guest's property left in the site, including any recreational vehicle, and make the lot available to new guests; (2) there are no other substantially similar campsites, camping cabins, lots, or rental units available for the arriving person; and (3) at the time that the park management actually undertakes to evict the guest, the park management offers another campsite, camping cabin, lot, or rental unit to the guest, if one is available [*Civ. Code § 1866(b)(1)*; *see Civ. Code § 1866(c)* (park management may enter lot to take possession of property and have vehicle towed)].

[3] "Defaulting Occupant" Defined

A "defaulting occupant" is the owner or operator of a recreational vehicle who has been an occupant in a recreational vehicle park for fewer than 30 days and who fails to pay for his or her occupancy in the park or who fails to comply with the park's reasonable written rules and regulations given to the occupant on registration [*Civ. Code §§ 799.22, 799.28*].

[4] Format and Contents of Notice

The notice must be in writing [*Civ. Code §§ 799.55-799.57*]. Otherwise, no particular format is prescribed. Consequently, the notice may be in a notice format, as set forth above, or it may be given in simple letter or other written form.

The notice is required to state that if the defaulting occupant does not remove the recreational vehicle from the park within 72 hours after receiving the notice, the owner or manager of the park has authority under *Civ. Code. § 799.58* to have the recreational vehicle removed from the lot to the nearest storage facility [*Civ. Code § 799.57*].

There is no express requirement in the statutes that the notice be signed. Nevertheless, the better practice would be for the owner or manager to sign the notice.

[5] Service of Notice

The 72-hour notice must be served by the owner or manager of the park [*Civ. Code § 799.55*]. The notice is served by delivering a copy to the defaulting occupant personally [*Civ. Code § 799.56*]. The management must also serve the notice on the police or sheriff [*Civ. Code § 799.56(c)*].

[6] Curing Default by Payment

Civ. Code § 799.55 provides that a defaulting occupant may correct his or her payment deficiency during normal business hours within the 72-hour period. As pointed out in [4], *above*, *Civ. Code § 799.57* provides that the notice to a defaulting occupant must state that the owner or manager of the park may remove the vehicle if the owner does not remove it, but does not provide for curing the default. Thus, it is not clear whether payment under *Civ. Code § 799.55* will cure the default and thus eliminate the grounds for vehicle removal, or whether the recreational vehicle park owner or manager is entitled to have the vehicle removed even if the payment is made. Consequently, as part of the Notice of Removal, the owner or manager of a recreational vehicle park may wish to include an additional sentence providing that

removal will occur unless the payment deficiency, the amount of which should be set forth in the notice, is cured within 72 hours during normal business hours.

[7] Incapacitated Occupants or Vehicles

Delivery of the notice as set forth in [5], *above*, to a defaulting occupant who is incapable because of a physical incapacity of removing the vehicle from the park is not sufficient. For those occupants and defaulting occupants whose vehicles are not motorized or cannot be moved by the occupant's vehicle, the default must be cured within 72 hours, but the date to quit must be no less than seven days after service of the notice [*Civ. Code § 799.56(b)*].

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[Reserved]

§§ 332.81[Reserved]

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29-332 California Forms of Pleading and Practice--Annotated § 332.90

§ 332.90 Notice to Former Tenant of Right to Reclaim Abandoned Personal Property [Civ. Code §§ 1983, 1984, 1993.03, 1993.04]

[1] FORM Notice to Former Tenant of Right to Reclaim Abandoned Personal Property [Civ. Code §§ 1983, 1984, 1993.03, 1993.04]

To _____ [*name and address of former tenant*]:

When you vacated the premises at _____ [*address of premises, including room or apartment number, if any*], the following personal property remained: _____ [*description of personal property*]. Unless you pay the reasonable cost of storage for all of the above-described property, and take possession of the property which you claim, not later than _____ [*date not less than 15 days after notice is personally delivered or, if mailed, not less than 18 days after notice is deposited in mail*], this property may be disposed of in accordance with Civil Code Section _____ [1988 *or* 1993.07].

[*EITHER*]

If you fail to reclaim the property, it will be sold at a public sale after notice of the sale has been given by publication. You have the right to bid on the property at this sale. After the property is sold and the cost of storage, advertising, and sale is deducted, the remaining money will be paid over to the county. You may claim the remaining money at any time within one year after the county receives the money.

[*OR*]

Because you were a commercial tenant and this property is believed to be worth less than the lesser of SEVEN HUNDRED FIFTY DOLLARS ($750), or one dollar ($1) per square foot of the premises you occupied, it may be kept, sold, or destroyed without further notice if you fail to reclaim it within the time indicated above.

Dated: _____.

_____ [*landlord's signature*]

_____ [*landlord's typed or printed name*]

_____ [*telephone number*]

_____ [*address*]

[2] Use of Form

This form is taken from *Civ. Code §§ 1984* (residential property) and 1983.04 (commercial property). It is to be given to the former tenant of premises when personal property remains after a tenancy has terminated and the premises have been vacated by the tenant [*Civ. Code §§ 1983(a), 1993.03(a)*]. This notice, along with the procedures provided in *Civ. Code §§ 1980 et seq.* (residential property) and 1993 et seq. (commercial property) for disposition of personal property remaining on premises at the termination of a tenancy, provide an optional procedure [*Civ. Code §§ 1981(a), 1993.02(a)*]. The rights and liabilities of the landlord, former tenant, or any other person are not affected if the requirements of *Civ. Code §§ 1980 et seq.* or *1993 et seq.* are not satisfied [*Civ. Code §§ 1981(e), 1993.02(f)*].

For a form of a notice to be sent to a person other than a former tenant concerning the right to reclaim abandoned personal property [*Civ. Code §§ 1985, 1993.05*], *see § 332.91*.

[3] Contents of Notice

The notice must describe the property in a manner reasonably adequate to permit the property's owner to identify it. The notice may describe all or a portion of the property, but the limitation of liability provided by *Civ. Code §§ 1989* and *1993.08* does not protect the landlord from any liability arising from the disposition of property not described in the notice. However, a trunk, valise, box, or other container that is locked, fastened, or tied in a manner that deters immediate access to its contents may be described as such without describing its contents [*Civ. Code §§ 1983(b), 1993.03(b)*].

The notice must also advise the person to be notified that reasonable costs of storage may be charged before the property is returned, where the property may be claimed, and the date before which the claim must be made [*Civ. Code §§ 1983(b), 1993.03(b)*].

Moreover, the date specified in the notice must be a date not less than 15 days after the notice is personally delivered or, ir mailed, not less than 18 days after the notice is deposited in the mail [*Civ. Code §§ 1983(b), 1993.03(b)*].

[4] Service of Notice

The notice must be personally delivered to the person to be notified or sent by first-class mail, postage prepaid to the person to be notified at his or her last known address. If there is reason to believe that the notice sent to that address will not be received by that person, the notice must also be personally delivered or sent to the other address, if any, known to the landlord where the person may reasonably be expected to receive the notice. If the notice is sent by mail to the former tenant, on copy must be sent to the premises vacated by the tenant [*Civ. Code §§ 1983(c), 1993.03(c)*].

[5] Lost Property

Personal property the landlord reasonably believes to have been lost must be disposed of in accordance with *Civ. Code § 2080 et seq.* The landlord is not liable to the owner of the property if he or she complies with *Civ. Code § 2080 et seq.*

[*Civ. Code §§ 1982(a), 1993.01* (section 1982 applicable to commercial property)]. If the appropriate police or sheriff's department refuses to accept the lost property, the landlord may dispose of the property in accordance with the abandoned property provisions [*Civ. Code § 1982(b)*]. The abandoned property provisions [*Civ. Code § 1980 et seq.*] do not apply when *Civ. Code § 2081 et seq.* (stored unclaimed goods left with a common carrier) applies [*Civ. Code § 1981(b)*].

[6] Combined Notification

When a notice of belief of abandonment is given to a lessee in accordance with *Civ. Code § 1951.3* [*see § 332.96*], the notice to the former tenant of the right to reclaim abandoned property under *Civ. Code § 1983* or *1993.03* may be given at the same time, even though the tenancy is not terminated until the end of the period specified in the notice of belief of abandonment. If the notices are so given, they may, but need not, be combined in one notice that contains all the information required by both [*Civ. Code §§ 1991, 1993.09*].

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29-332 California Forms of Pleading and Practice--Annotated § 332.91

§ 332.91 Notice to Person Other Than Tenant of Right to Reclaim Abandoned Personal Property [Civ. Code §§ 1983, 1985, 1993.05]

[1] FORM Notice to Person Other Than Tenant of Right to Reclaim Abandoned Personal Property [Civ. Code §§ 1983, 1985, 1993.05]

To _____ [*name and address of person reasonably believed to be owner*]:

When _____ [*name of former tenant*] vacated the premises at _____ [*address of premises, including room and apartment number, if any*], the following personal property remained _____ [*description of personal property*]. If you own any of this property, you may claim it at _____ [*address where property may be claimed*]. Unless you pay the reasonable cost of storage and take possession of the property to which you are entitled not later than _____ [*date not less than 15 days after notice is personally delivered or, if mailed, not less than 18 days after notice is deposited in mail*], this property may be disposed of in accordance with Civil Code Section _____ [1988 *or* 1993.07].
Dated: _____.

_____ [*landlord's signature*]

_____ [*landlord's typed or printed name*]

_____ [*telephone number*]

_____ [*address*]

[2] Use of Form

This form is taken from *Civ. Code § 1985* (residental property) and 1993.05 (commercial property). It is to be given to a person, other than the former tenant, whom the landlord reasonably believes to be the owner of personal property remaining on the premises after a tenancy has terminated and the premises have been vacated by the tenant.

For a discussion of the notice's contents and service of the notice [*see Civ. Code §§ 1983, 1993.03*], see *§ 332.90[3], [4]*.

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29-332 California Forms of Pleading and Practice--Annotated § 332.92

§ 332.92 Notice of Public Auction of Personal Property Remaining on Vacated Premises of Former Tenant [Civ. Code §§ 1988, 1993.07]

[1] FORM Notice of Public Auction of Personal Property Remaining on Vacated Premises of Former Tenant [Civ. Code §§ 1988, 1993.07]

Notice is hereby given that on _____ [*date*], at _____ _____ [*time*], at _____ [*street*] in _____ [*city*], _____ [*county*], the undersigned will sell at public auction the personal property left by _____ [*name of tenant*].

This property consists of _____ [*description of personal property, including trunk, valise, box, or other container that is locked, fastened, or tied in manner deterring access to its contents, but not contents thereof*].

This auction will be made in accordance with the provisions of Civil Code Section _____ [1988 *or* 1993.07].
Dated: _____.

_____ [*name of landlord*]

_____ [*address of landlord*]

[2] Use of Form

The form in [1], *above*, is for use by a landlord preceding a public auction of personal property left by a tenant. The notice must be published once a week for two successive weeks, or by two publications in a newspaper published once a week or more often, with at least five days intervening between the respective publication dates, not counting such publication dates [*Gov. Code § 6066*]. The publication must be a newspaper of general circulation published in a county in which the sale is to be held, the last publication being not less than five days before the sale is to held. The notice of the sale must not be published before the last of the dates specified for taking possession of the property in any notice

required by *Civ. Code §§ 1983* (notice to residential tenant and any other person landlord reasonably believes to be owner of the property) and 1993.03 (notice to commercial tenant and any other personal landlord reasonably believes to be owner of the property) [*Civ. Code §§ 1988, 1993.07*; for discussion of *Civ. Code §§ 1983* and *1993.03, see § 332.90*].

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29-332 California Forms of Pleading and Practice--Annotated § 332.93

§ 332.93 Request for Surrender of Personal Property by Former Tenant [Civ. Code § 1965(a)]

[1] FORM Request for Surrender of Personal Property by Former Tenant [Civ. Code § 1965(a)]

To _____ [*name of former landlord*]:

I request that you surrender to me the following personal property left on the premises at _____ [*address of premises*]:

_____ [*description of personal property*].

My name and address are _____ [*name and address of former tenant*].
Dated: _____.

_____ [*signature of former*

tenant]

[2] Use of Form

The form in [1], *above*, is a request by a former tenant for the return of personal property left on a residential premises. The request must be in writing and describe the personal property held by the landlord. It must also specify the tenant's mailing address and be delivered to the landlord within 18 days of the vacation of the premises [*Civ. Code § 1965(a)*].

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29-332 California Forms of Pleading and Practice--Annotated § 332.94

§ 332.94 Landlord's Demand for Reasonable Costs of Removal and Storage [Civ. Code § 1965(a)]

[1] FORM Landlord's Demand for Reasonable Costs of Removal and Storage [Civ. Code § 1965(a)]

To _____ [*name of former tenant*]:

As a condition to the return of your personal property, I demand that you pay my reasonable costs associated with my removal and storage of the personal property. The reasonable costs are as follows:

_____ [*Item of cost*] $ _____ [*cost*]

[*CONTINUE as necessary*]

Dated: _____.

_____ [*signature of former landlord*]

[2] Use of Form

The form in [1], *above*, is a demand by a former landlord to require the payment of reasonable costs of removal and storage before a former tenant's personal property must be returned [*Civ. Code § 1965(a)(3)*]. The demand must be in writing and must itemize all charges, specifying the nature and amount of each item of cost [*Civ. Code § 1965(a)(3)*].

[3] Service of Demand

The form must be mailed to the tenant at the address provided in the tenant's request [*see § 332.93*] or must be personally presented to the tenant or authorized representative within five days of the actual receipt of the tenant's request, unless the property is returned first [*Civ. Code § 1965(a)(3)*].

[4] Definition of Reasonable Costs

"Reasonable costs associated with the landlord's removal and storage of the personal property" include but are not limited to each of the following [*Civ. Code § 1965(b)*]:

- Reasonable costs actually incurred, or the reasonable value of labor actually provided, or both, in removing the personal property from its original location to the place of storage, including disassembly and transportation.

- Reasonable storage costs actually incurred, which must not exceed the fair rental value of the space reasonably required for the storage of the personal property.

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29-332 California Forms of Pleading and Practice--Annotated § 332.95

§ 332.95 Complaint by Former Tenant Against Landlord--For Compensatory and Statutory Damages for Failure to Return Personal Property After Request [Civ. Code § 1965]

[1] FORM Complaint by Former Tenant Against Landlord--For Compensatory and Statutory Damages for Failure to Return Personal Property After Request [Civ. Code § 1965]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	[Amount demanded _____ (exceeds
through _____,]	)	*or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. Until _____ [*date*], plaintiff resided at _____ [*street address*] in accordance with a written agreement between plaintiff, as tenant, and defendant _____ [*name*], as landlord.

2. [*Fictitious name allegation, if appropriate. See § 332.40[1], P 3.*]

3. On or about _____ [*date*], plaintiff vacated defendant landlord's premises and left on the premises the following personal property: _____ [*describe property*].

4. On _____ [*date*], plaintiff delivered a request for return of the above-described property to defendant landlord. A copy of the request is attached to this complaint as Exhibit A.

[*ADD if plaintiff tendered costs of removal and storage*]

5. Defendant landlord demanded that plaintiff pay the reasonable costs of removal and storage, and plaintiff tendered the reasonable costs to defendant landlord.

[*CONTINUE*]

6. Defendant landlord and plaintiff agreed to the return of the real property at a reasonable time [that was less than 72 hours after tender of the reasonable costs].

7. At the agreed time, defendant landlord refused to return the above-described personal property and continues to refuse to return the property.

8. As a direct and proximate result of defendant's actions, plaintiff has suffered and is suffering general damages in the amount of $_____.

9. Plaintiff is entitled to statutory damages under *Civil Code Section 1965(e)(2)* for each bad faith violation of *Civil Code Section 1965*.

WHEREFORE, Plaintiff prays for judgment as follows:

1. For general damages in the amount of $_____.

2. For statutory damages in the amount of $_____.

3. For reasonable attorney's fees as provided for in *Civil Code Section 1965(e)(3)*.

4. For costs of suit.

5. For such other and further relief as the court may deem proper.

_____ [*date*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

[*Verification, if desired. See § 332.40[1].*]

[2] Use of Form

This form is for use in an action by a former tenant against a landlord who has refused to return personal property after a proper request under *Civ. Code § 1965* [*see § 332.93* for a form of a tenant's request for the return of personal property]. It seeks actual damages, statutory damages, and reasonable attorney's fees and costs [*Civ. Code § 1965(e)*]. The court may award an amount not to exceed $250 for each bad faith violation of *Civ. Code § 1965*, and must consider proof of matters as justice may require in awarding these amounts [*Civ. Code § 1965(e)(2)*]. This remedy is not exclusive and does not preclude the tenant from pursuing any other remedy provided by law [*Civ. Code § 1965(f)*].

For further discussion of a former tenant's action against a landlord based on *Civ. Code § 1965*, see *§ 332.26[10][d]*.

[3] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*].

If the action is a limited civil case, the caption must state whether the demand exceeds or does not exceed $10,000 and must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; Cal. Rules of Ct., Rule 2111(9), (10)].

[4] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and for fictitious name allegations, see Ch. 20, *Allegations Commonly Used* .

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints* .

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages* .

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter* .

For alternative forms of prayers, see Ch. 420, *Prayers* .

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers* .

For forms of allegations showing proper venue, see Ch. 571, *Venue* .

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29-332 California Forms of Pleading and Practice--Annotated § 332.96

§ 332.96 Notice by Landlord to Lessee of Belief of Abandonment of Real Property [Civ. Code § 1951.3]

[1] FORM Notice by Landlord to Lessee of Belief of Abandonment of Real Property [Civ. Code § 1951.3]

To _____ [*name and address of lessee-tenant*]:

This notice is given in accordance with *Civil Code Section 1951.3* concerning the real property leased by you at _____ [*state location of the property by address or other sufficient description*]. The rent on this property has been due and unpaid for 14 consecutive days and the _____ [lessor *or* landlord] believes that you have abandoned the property.

The real property will be deemed abandoned within the meaning of *Civil Code Section 1951.2* and your lease will terminate on _____ [*insert a date not less than 15 days after this notice is served personally or, if mailed, not less than 18 days after this notice is deposited in the mail*] unless before such date the undersigned receives at the address indicated below a written notice from you stating both of the following:

(1) Your intent not to abandon the real property; and

(2) An address at which you may be served by certified mail in any action for unlawful detainer of the real property.

You are required to pay the rent due and unpaid on this real property as required by the lease, and your failure to do so can lead to a court proceeding against you.
Dated: _____.

_____ [*lessor-landlord's signature*]

_____ [*lessor-landlord's typed or*

printed name]

_____ [*address to which lessee-*

tenant is to send notice]

[2] Use of Form

The form in [1], *above*, is taken from *Civ. Code § 1951.3(d)*. It is for use by a landlord to give notice to a tenant of a belief that the tenant's leased real property has been abandoned. If the lessee fails to give the lessor written notice [*see § 332.97*], before the date of termination specified in the landlord's notice, stating that he or she does not intend to abandon the real property and stating an address at which the lessee may be served by certified mail in any action for unlawful detainer of the real property, the real property is deemed abandoned by the tenant, within the meaning of *Civ. Code § 1951.2* (termination of lease; lessor's recovery from lessee), and the lease terminates [*Civ. Code § 1951.3*].

PRACTICE TIP:

Effect of Failure to Provide Required Notice. If the landlord fails to send the statutory notice of belief of abandonment, and retakes possession anyway under the belief that the tenant has abandoned, the landlord is taking a chance: if wrong about abandonment, the landlord is committing a trespass and probably a forcible entry and detainer, and is liable for all consequent damages. The notice of belief of abandonment protects the landlord if he or she is "wrong but reasonable." *By Myron Moskovitz*

[3] Available Alternatives for Landlord

Nothing in *Civ. Code § 1951.3* precludes the landlord from otherwise proving that the real property has been abandoned by the tenant within the meaning of *Civ. Code § 1951.2* (termination of lease; landlord's recovery from tenant) [*Civ. Code § 1951.3(f)*].

Nothing in *Civ. Code § 1951.3* precludes the landlord from seeking a notice requiring the tenant to pay rent or quit as provided in *Code Civ. Proc. §§ 1161* (unlawful detainer; notice to quit) and 1162 (service of notice to quit) at any time permitted by those sections, or affects the time and manner of giving any other notice required by law. The giving of notice of belief of abandonment does not satisfy the requirements of *Code Civ. Proc. §§ 1161* and *1162* [*Civ. Code § 1951.3(g)*].

[4] Combined Notification

When a notice of belief of abandonment is given to a lessee under *Civ. Code § 1951.3*, the notice to the former tenant of the right to reclaim abandoned property in accordance with *Civ. Code § 1983* [*see § 332.91*] may, but need not, be given at the same time, even though the tenancy is not terminated until the end of the period specified in the notice of belief of abandonment. If the notices are so given, they may, but need not, be combined in one notice that contains all the information required by *Civ. Code §§ 1951.3* and *1983* [*Civ. Code § 1991*].

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29-332 California Forms of Pleading and Practice--Annotated § 332.97

§ 332.97 Notice by Tenant to Landlord of Intent Not to Abandon Real Property [Civ. Code § 1951.3]

[1] FORM Notice by Tenant to Landlord of Intent Not to Abandon Real Property [Civ. Code § 1951.3]

To _____ [*name and address of landlord as provided in landlord's notice of belief of abandonment*]:

This is to inform you that I have no intention to abandon the real property leased by me, at _____ [*state location of the property by address or other sufficient description*].

I may be reached at _____ [*state tenant's address*] for service by certified mail in any action for unlawful detainer of the real property.
Dated: _____ [*any date before date of termination specified in the landlord's notice of belief of abandonment*].

_____ [*tenant's signature*]

_____ [*tenant's typed or printed name*]

[2] Use of Form

The form in [1], *above*, is for use by a tenant to notify his or her landlord of an intent not to abandon real property.

[3] Address for Unlawful Detainer Summons

When a tenant has given a landlord written notice of the tenant's intent not to abandon leased real property, the summons in an action for unlawful detainer of the real property may be served on the tenant by certified mail, postage prepaid, addressed to the tenant at the address stated in the tenant's notice of intent not to abandon. The summons must be deposited in the mail within 60 days after the tenant's notice of intent not to abandon is received by the landlord. Service in this manner is deemed completed on the tenth day after such mailing [*Code Civ. Proc. § 415.47(a)*].

[4] Effect of Failure to Include Address

When the tenant has given the landlord written notice of the tenant's intent not to abandon leased real property, but has failed to include in the notice an address at which the tenant may be served by certified mail in any action for unlawful detainer of the real property, the summons in the action may be served on the tenant by certified mail, postage prepaid, addressed to the tenant at (1) the same address or addresses to which the landlord's notice of belief of abandonment was addressed if that notice was given by mail, or (2) the address of the real property if the landlord's notice of belief of abandonment was personally served on the tenant. In either case, the summons must be deposited in the mail within 60 days after the tenant's notice of intent not to abandon is received by the landlord. Service in this manner is deemed completed on the tenth day after mailing [*Code Civ. Proc. § 415.47(b)*].

The methods of service for a summons in an action for unlawful detainer provided above are alternative methods and do not preclude service in any other manner authorized by *Code Civ. Proc. §§ 413.10-417.40* [*Code Civ. Proc. § 415.47(c)*].

California Forms of Pleading and Practice--Annotated

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Volume 29: Landlord and Tenant: General Introduction thru Rent Control-Chs. 330-339
Chapter 333 LANDLORD AND TENANT: EVICTION ACTIONS

29-333 California Forms of Pleading and Practice--Annotated 333.syn

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§ 333.80 Complaint for Unlawful Detainer by Lessor, Sublessor, Landlord, Former Employer, Principal, or Licensor, or Purchaser of Property at Sale [Code Civ. Proc. §§ 1161, 1161a(b), 1166, 1177; Cal. Rules of Ct., Rule 1.45(a)]--Judicial Council Form UD-100

[1] FORM

[2] Use of Form

[3] Verification Required

[4] Complaint by Employer, Principal, Licensor, Purchaser After Sale, or Mobilehome or Recreational Vehicle Park Management

[5] Complaint Against Assignee

[6] Contents of Complaint

[7] Filling Out Form

[a] Block Heading: Identification of Attorney and Title of Court

[b] Block Heading: Title of Case

[c] Block Heading: Case Number

[d] Block Heading: COMPLAINT--Unlawful Detainer*

[e] Block Heading: Jurisdiction

[f] Paragraph 1. (Name of Parties)

[g] Paragraph 2. (Plaintiff's Capacity)

[h] Paragraph 3. (Description of Property and Venue)

[i] Paragraph 4. (Interest in Premises)

[j] Paragraph 6.a. (Rental Agreement)

[k] Paragraph 6.b. (Written or Oral Agreement and Initial Landlord's Identity)

[l] Paragraph 6.c. (Status of Defendants Not Parties to Rental Agreement)

[m] Paragraph 6.d. (Modification or Amendment of Rental Agreement)

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[y] Paragraphs 13., 17.d. (Attorney's Fees)

[z] Paragraph 14. (Rent or Eviction Control Ordinance)

[aa] Paragraph 15. (Additional Allegations)

[bb] Paragraph 16. (Remission of Demand in Excess of Jurisdictional Limit)

[cc] Paragraph 17.a. (Prayer for Possession)

[dd] Paragraph 17.b. (Prayer for Costs)

[ee] Paragraph 17.c. (Prayer for Past Due Rent)

[ff] Paragraph 17.d. (Prayer for Reasonable Attorney's Fees)

[gg] Paragraph 17.e. (Prayer for Forfeiture of Agreement)

[hh] Paragraph 17.f. (Prayer for Damages for Holding Over)

[ii] Paragraph 17.g. (Statutory Damages)

[jj] Paragraph 17.h. (Prayer for Other Relief)

[kk] Paragraph 18. (Number of Pages to Complaint)

[ll] Paragraph 19. (Unlawful Detainer Assistants)

[mm] Signature

[nn] Verification

[8] Summons

§ 333.81 Complaint for Unlawful Detainer by Employer Against Resident Employee Continuing in Possession After Termination of Employment [Code Civ. Proc. §§ 1161(1), 1166, 1177]

[1] FORM

[2] Use of Form

[3] Verification Required

[4] Allegations

[5] Jurisdiction

[6] Cross References

§ 333.82 Complaint for Unlawful Detainer by Licensor Against Licensee Continuing in Possession After Termination of License [Code Civ. Proc. §§ 1161(1), 1166, 1177]

[1] FORM

[2] Use of Form

[3] Verification Required

[4] Allegations

[5] License and Lease Distinguished

§ 333.83 Complaint for Unlawful Detainer by Landlord Against Tenant at Will Holding Over After Expiration of Notice to Quit [Civ. Code § 789; Code Civ. Proc. §§ 1161(1), 1166, 1177]

[1] FORM

[2] Use of Form

[3] Verification Required

[4] Allegations

[5] Three-Day Notice

§ 333.84 Complaint for Unlawful Detainer by Lessor or Landlord Against Lessee or Tenant Holding Over After Terminating Tenancy by Written Notice Under Civ. Code § 1946 or by Written Offer and Acceptance [Civ. Code § 1946; Code Civ. Proc. §§ 1161(5), 1166, 1177]

[1] FORM

[2] Use of Form

[3] Verification Required

[4] Allegations

[5] Holding Over As Unlawful Detainer

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[1] FORM

[2] Use of Form

[3] Verification Required

[4] Allegations

[5] Purchaser's Interest in Property

§ 333.86 Complaint for Unlawful Detainer by Purchaser Against Occupant Holding Over After Foreclosure Sale on Judicial Foreclosure of Mortgage, Perfection of Purchaser's Title, and Service of Three-Day Notice to Quit [Code Civ. Proc. §§ 1161a(b)(2), 1166, 1177]

[1] FORM

[2] Use of Form

[3] Verification Required

[4] Allegations

§ 333.87 Complaint for Unlawful Detainer by Purchaser Against Occupant Holding Over After Nonjudicial Sale Under Power of Sale in Trust Deed, Perfection of Purchaser's Title, and Service of Three-Day Notice to Quit [Code Civ. Proc. §§ 1161a(b)(3), 1166, 1177]

[1] FORM

[2] Use of Form

[3] Verification Required

[4] Allegations

§ 333.88 Complaint for Unlawful Detainer by Purchaser Against Occupant Holding Over After Sale of Real Property, Perfection of Purchaser's Title, and Service of Three-Day Notice to Quit [Code Civ. Proc. §§ 1161a(b)(4), 1166, 1177]

[1] FORM

[2] Use of Form

[3] Verification Required

[4] Allegations

§§ 333.89-333.99 [Reserved]

§ 333.100 Summons in Unlawful Detainer Proceeding [Code Civ. Proc. § 1167]--Judicial Council Form SUM-130

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[2] Use of Form

[3] Contents of Summons

[4] Summons Procedure

§ 333.101 Application for Order That Summons Be Served by Posting Premises and Mailing in Unlawful Detainer Proceeding [Code Civ. Proc. §§ 415.45(a), 1167]

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[2] Use of Form

[3] Proof of Service

§ 333.102 Order That Summons Be Served by Posting Premises and Mailing in Unlawful Detainer Proceeding [Code Civ. Proc. § 415.45(b)]

[1] FORM

[2] Use of Form

§ 333.103 Notice of Motion for Immediate Issuance of Writ of Possession [Code Civ. Proc. § 1166a]

[1] FORM

[2] Use of Form

[3] Contents of Notice

[4] Undertaking

§ 333.104 Order Granting Motion for Immediate Possession [Code Civ. Proc. § 1166a]

[1] FORM

[2] Use of Form

[3] Enforcement Writ

[4] Cross References

§ 333.105 Prejudgment Claim of Right to Possession [Code Civ. Proc. § 415.46(f)]--Judicial Council Form CP-10.5

[1] FORM

[2] Use of Form

[3] Filing Claim

[4] Effect of Filing Claim

§ 333.106 Request/Counter-Request to Set Case for Trial--Unlawful Detainer--Judicial Council Form UD-150

[1] FORM

[2] Use of Form

[3] Proof of Service by Mail

§§ 333.107-333.109 [Reserved]

§ 333.110 Answer to Complaint for Unlawful Detainer by Lessee or Tenant [Code Civ. Proc. §§ 1170, 1177; Cal. Rules of Ct., Rule 1.45(a)]--Judicial Council Form UD-105

[1] FORM

[2] Use of Form

[3] Verification Required

[4] Time to Answer

[5] Filling Out Form

[a] Block Heading: Identification of Attorney and Title of Court

[b] Block Heading: Title of Case

[c] Block Heading: Case Number

[d] Paragraph 1. (Defendant's Name)

[e] Paragraph 2. (Admissions and Denials)

[f] Paragraph 3. (Affirmative Defenses)

[g] Paragraph 4.a. (Premises Vacated)

[h] Paragraph 4.b. (Excessive Fair Rental Value)

[i] Paragraph 4.c. (Other Statements)

[j] Paragraph 5.c. (Prayer--Attorney's Fees)

[k] Paragraph 5.d. (Prayer--Order to Make Repairs)

[l] Paragraph 5.e. (Other Relief)

[m] Paragraph 6. (Number of Pages)

[n] Paragraph 7. (Unlawful Detainer Assistants)

[o] Signature

[p] Verification

[q] Recovery for "Rent Skimming"

§ 333.111 Notice of Motion For Stay of Proceedings Until Military Service Is Completed

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[2] Use of Form

[3] Supporting Papers

[4] Notice

[5] Jurisdiction

§§ 333.112-333.119 [Reserved]

§ 333.120 Interrogatories for Unlawful Detainer Proceeding by Landlord [Code Civ. Proc. §§ 1161, 2030.010]--Judicial Council Form DISC-003/UD-106

[1] FORM

[2] Use of Form

[3] Filling in Form

[a] Block Heading: Identification of Attorney and Title of Court

[b] Block Heading: Title of Case

[c] Block Heading: Unlawful Detainer Assistants

[d] Block Heading: Asking and Answering Parties

[e] Block Heading: Case Number

[f] Choice of Interrogatories

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[5] Special Instructions for Answering (Responding) Party

[6] Cross References

§§ 333.121-333.129 [Reserved]

§ 333.130 Judgment in Unlawful Detainer Proceeding [Code Civ. Proc. § 1174(a), (b)]--Judicial Council Form UD-110

[1] FORM

[2] Use of Form

[3] Contents of Judgment

[4] Cross References

§ 333.131 Conditional Judgment in Unlawful Detainer Action--Attachment--Plaintiff Breached Covenant to Provide Habitable Premises [Code Civ. Proc. § 1174.2]--Judicial Council Form UD-110S

[1] FORM

[2] Use of Form

§ 333.131A Declaration for Default Judgment by Court in Unlawful Detainer Proceeding [Code Civ. Proc. § 585(d)]--Judicial Council Form UD-116

[1] FORM

[2] Use of Form

[3] Exhibits

[4] Cross References

§ 333.131B Stipulation for Entry of Judgment in Unlawful Detainer Action--Judicial Council Form UD-115

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[2] Use of Form

§ 333.132 Petition for Relief From Judgment Declaring Lease or Rental Agreement Forfeited [Code Civ. Proc. § 1179]

[1] FORM

[2] Use of Form

[3] Verification Required

[4] Procedure

[5] Cross References

§ 333.133 Notice of Application for Relief and Hearing for Relief From Judgment Declaring Lease or Rental Agreement Forfeited [Code Civ. Proc. § 1179]

[1] FORM

[2] Use of Form

[3] Service of Notice and Plaintiff's Right to Contest Application

[4] Manner of Service

§ 333.134 Order Granting Relief From Judgment Declaring Lease or Rental Agreement Forfeited [Code Civ. Proc. § 1179]

[1] FORM

[2] Use of Form

[3] Factors in Granting Application

§ 333.135 Claim of Right to Possession [Code Civ. Proc. § 1174.3(h)]--Judicial Council Form CP-10

[1] FORM

[2] Use of Form

[3] Service and Presentation of Form

§§ 333.136-333.139 [Reserved]

§ 333.140 Complaint for Forcible Entry and Detainer or Forcible Detainer [Code Civ. Proc. §§ 1159, 1160, 1166, 1177]

[1] FORM

[2] Use of Form

[3] Verification Required

[4] Jurisdiction

[5] Allegations

[6] Treble and Statutory Damages

[7] Cross References

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Volume 29: Landlord and Tenant: General Introduction thru Rent Control-Chs. 330-339
Chapter 333 LANDLORD AND TENANT: EVICTION ACTIONS
PART I. SCOPE

29-333 California Forms of Pleading and Practice--Annotated § 333.01

§ 333.01 Scope of Chapter

This chapter discusses and contains forms relating to eviction actions. The chapter discusses prosecuting unlawful detainer proceedings and postjudgment proceedings [*see § 333.10* et seq.], defending an eviction action [*see § 333.20* et seq.], and forcible entry and forcible detainer actions [*see § 333.40* et seq.]. Procedural guides for both plaintiffs and defendants are provided [*see § 333.70* et seq.].

The chapter includes the following forms:

- Complaints for unlawful detainer, including a filled in Judicial Council Form Complaint [*see § 333.80* et seq.].

- The Judicial Council Form Summons [*see § 333.100*], an application and order that the summons be served by posting and mailing [*see §§ 333.101, 333.102*], a notice and order for immediate possession of the property [*see §§ 333.103, 333.104*], the Judicial Council Form prejudgment claim of right to possession [*see § 333.105*], and the Judicial Council Form for Request/Counter-Request to Set Case for Trial in an unlawful detainer action [§ 333.106].

- A filled in Judicial Council Form Answer to Complaint for Unlawful Detainer [*see § 333.110*].

- A filled in Judicial Council Form Interrogatories specifically for use in unlawful detainer actions [*see § 333.120*].

- Judgments for unlawful detainer actions [*see §§ 333.130, 333.131*], a petition for relief from a judgment declaring the lease forfeited and a notice of application and order granting relief from a judgment declaring the lease forfeited [*see §§ 333.132 -333.134*], and a claim of right to possession [*see § 333.135*].

- A complaint for forcible entry and detainer or forcible detainer [*see § 333.140*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

California Forms of Pleading and Practice--Annotated

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PART I. SCOPE

29-333 California Forms of Pleading and Practice--Annotated § 333.02

§ 333.02 Cross References

For a form of complaint by a real estate broker for a commission for procuring a lessee, see Ch. 103, *Brokers* .

For a discussion of and forms for use in actions involving discrimination in the rental of housing, see Ch. 117, *Civil Rights: Housing Discrimination* .

For a form of complaint to cancel a lease executed by the husband without joining the wife, see Ch. 122, *Community Property* .

For discussion and forms involving contracts generally, see Ch. 140, *Contracts* .

For discussion and forms for use in actions for ejectment, see Ch. 241, *Ejectment* .

For a form of stipulation between an owner-lessor and a tenant as to the division of an award in an eminent domain proceeding, see Ch. 247, *Eminent Domain* .

For a form of petition by a conservator for authority to execute a lease of real property and a form of order authorizing the lease, see *Ch. 290A, Guardianship and Conservatorship: Asset Management and Investment, §§ 290A.82, 290A.83*.

For a discussion of the right of an assignee of a general assignment for the benefit of creditors to occupy business premises held under a lease by the assignor despite certain termination provisions in the lease, see Ch. 307, *Insolvency* .

For a form of complaint against a lessee for breach of lease agreement to furnish water to the lessor from the leased premises, see Ch. 315, *Irrigation* .

For discussion regarding the relationship of landlord and tenant in general, see Ch. 330, *Landlord and Tenant: General Introduction* .

For discussion relating to the creation of a tenancy, see Ch. 331, *Landlord and Tenant: Creating the Tenancy* .

For discussion and forms relating to the tenancy in general, see Ch. 332, *Landlord and Tenant: The Tenancy* .

For discussion and forms relating to general claims for damages between landlord and tenant, see Ch. 334, *Landlord and Tenant: Claims for Damages* .

For discussion and forms relating to rent control, see Ch. 335, *Landlord and Tenant: Rent Control* .

For forms for use in actions involving the lease of mining property, see Ch. 363, *Mining* .

For forms for use in actions involving oil and gas leases, see Ch. 393, *Oil and Gas* .

For discussion and forms for use in actions for trespass, see Ch. 550, *Trespass* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsLeasing & SalesEnergy & Utilities LawLeases & LicensesGeneral OverviewEnergy & Utilities LawMining IndustryMineral LeasesGeneral OverviewReal Property LawBrokersRight to CommissionsReal Property LawEminent Domain ProceedingsProcedureReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawLandlord & TenantTenanciesGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsEjectment

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29-333 California Forms of Pleading and Practice--Annotated §§ 333.03-333.09

[Reserved]

§§ 333.03[Reserved]

California Forms of Pleading and Practice--Annotated

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Chapter 333 LANDLORD AND TENANT: EVICTION ACTIONS
PART II. LEGAL BACKGROUND
A. Evicting a Tenant

29-333 California Forms of Pleading and Practice--Annotated § 333.10

§ 333.10 Acts Constituting Unlawful Detainer

[1] General Provisions and Definitions

The acts constituting unlawful detainer are set forth in *Code Civ. Proc. §§ 1161* (holding over after termination of tenancy) and *1161a* (holding over after sale).

The word "tenant," as used in this chapter, means a tenant of real property for a term less than life and includes the executor or administrator of his or her estate [*see Code Civ. Proc. § 1161*, 1st paragraph; *see also Telegraph Avenue Corp. v. Raentsch (1928) 205 Cal. 93, 96-97, 269 P. 1109* (99-year tenancy held to be a term less than life)]. Excluded are persons whose occupancy is described in *Civ. Code § 1940(b)* (transient occupancy in hotel, motel, residence club, or other facility, or occupancy at hotel or motel where innkeeper retains right of access and control and provides specified services) [*Code Civ. Proc. § 1161*, last paragraph].

As used in this chapter, the word "landlord" includes the landlord's successor in estate if any [*see Code Civ. Proc. § 1161(1), (2), (4), (5)*].

PRACTICE TIP:

Do Not Use Self-Help to Evict. A landlord should not use self-help to evict *any* tenant, even a lowly tenant at sufferance. Even though such a tenant is entitled to no *notice* of eviction, he or she may be evicted only by the sheriff after judgment in an unlawful detainer or ejectment action. Improper use of self-help can lead to a large judgment against the landlord in a "wrongful eviction" action. *By Myron Moskovitz*

[2] Holding Over by Tenant

[a] After Expiration of Term

Except in the case of an agricultural lease discussed below, a tenant who, in person or by subtenant, continues in possession of the property, or any part of it, after expiration of the term for which it was let, provided the expiration is

of a nondefault nature however brought about, without the landlord's permission, is guilty of unlawful detainer [*Code Civ. Proc. § 1161(1)*]. No notice by the landlord to vacate is required as a condition to suing for unlawful detainer [*Earl Orchard Co. v. Fava (1902) 138 Cal. 76, 78-79, 70 P. 1073* ; *Castle Park No. 5 v. Katherine (1979) 91 Cal. App. 3d Supp. 6, 154 Cal. Rptr. 498]* . The above applies when the person to be removed became the occupant of the premises as a servant, employee, agent, or licensee and the relation of master and servant, employer and employee, principal and agent, or licensor and licensee has been lawfully terminated or the time fixed for the occupancy by the agreement between the parties has expired [*Code Civ. Proc. § 1161(1)*].

In the case of a tenancy on agricultural lands, if the tenant holds over and retains possession for more than 60 days after expiration of the term without any demand for possession or notice to quit by the landlord, the tenant is deemed to be holding by permission and is entitled to hold under the terms of the lease for another full year. The holding over for the 60-day period is construed as a consent by the tenant to hold for another year and the tenant will not be guilty of an unlawful detainer during that year [*Code Civ. Proc. § 1161(2)*; *see Nye v. Dotta (1952) 112 Cal. App. 2d 129, 132, 245 P.2d 529* (notice by landlord served after expiration of 60-day period as ineffective to cancel lease retroactively as of end of term specified)].

[b] Effect of Rent Control Ordinances Requiring Good Cause to Evict

For a discussion of local rent control ordinances, see *§ 335.12*.

[c] After Notice Terminating Tenancy or Agreement to Surrender

Code Civ. Proc. § 1161(1) is not to be construed so as to prevent the removal of the occupant in any other lawful manner, but in the case of a tenancy at will, the tenancy must first be terminated by notice as prescribed in the Civil Code [*Code Civ. Proc. § 1161(1)*]. A tenancy at will is terminated under the Civil Code by the landlord's giving the tenant a 30-day notice to quit the premises [*Civ. Code § 789*; *see § 332.70* (form of 30-day notice)]. A tenancy for an unspecified term or from month-to-month is also terminated by the giving of a 30-day notice unless a shorter term of notice (not less than seven days before expiration of the term) was agreed on by the parties at the time the tenancy was created [*Civ. Code § 1946*; *see §§ 332.70* and *332.71* (forms of notices)]. Other periodic tenancies are terminated by written notice given as long before the expiration of the notice as the term of hiring, not exceeding 30 days [*Civ. Code § 1946*]. A tenant who holds over after expiration of the notice period is guilty of unlawful detainer [*Code Civ. Proc. § 1161(1)*; *see Civ. Code § 790*].

A tenant who gives the landlord written notice as provided in *Civ. Code § 1946* of his or her intention to terminate the tenancy, or makes a written offer to surrender that is accepted by the landlord in writing and fails to deliver up possession at the time specified in the written notice without the landlord's permission is also guilty of unlawful detainer [*Code Civ. Proc. § 1161(5)*].

PRACTICE TIP:

Applicability in Rent Controlled Jurisdictions. It should be noted that the rule set out in *Code Civ. Proc. § 1161(5)* may not be valid in rent controlled jurisdictions. *By Benjamin Kaplan*

[d] After Default in Payment of Rent and Notice

A tenant is guilty of unlawful detainer when he or she, in person or by subtenant, continues in possession without the landlord's permission after default in the payment of rent and three days' written notice, stating the amount due and requiring its payment or possession of the property, has been served on the tenant and on any subtenant in actual occupation of the premises [*Code Civ. Proc. § 1161(2)*; *see § 332.74* (form of three-day notice); *Sun Terrace Manor v. Municipal Court (1973) 33 Cal. App. 3d 739, 742, 108 Cal. Rptr. 307* (involving proceeding by corporate cooperative against shareholder-tenant); *see also § 333.11[5]*].

PRACTICE TIP:

Serving Three-Day Notice to Terminate Residential Tenancy. Before serving a three-day notice to terminate a residential tenancy, be sure to check to see if there is a local rent control ordinance in the jurisdiction in which the property is located. Such an ordinance might well impose "good cause" or other restrictions on when the notice may be served. In addition, you should not confuse the rules for serving *notice* with the rules for service of *process*. *By Myron Moskovitz*

With regard to commercial real property, there are special provisions applicable to using estimates of the rent due in the three-day notice [*see Code Civ. Proc. § 1161.1*]. When the amount stated in the notice provided to the tenant under *Code Civ. Proc. § 1161(2)* is clearly identified by the notice as an estimate, the landlord may receive a judgment for possession and the actual amount due, even if the estimate is incorrect, provided the estimate was reasonable [*Code Civ. Proc. § 1161.1(a)*].

[e] After Breach of Covenant Other Than to Pay Rent and Notice

A tenant is guilty of unlawful detainer when he or she, in person or by subtenant, continues in possession after (1) a neglect or failure to perform any conditions or covenants of the lease or agreement under which the property is held, other than the one for the payment of rent, but including any covenant not to assign or sublet, and (2) three days' written notice requiring performance of the conditions or covenants or the possession of the property has been served on the tenant and on any subtenant in actual possession of the premises [*Code Civ. Proc. § 1161(3)*; *see § 332.76*; *Sun Terrace Manor v. Municipal Court (1973) 33 Cal. App. 3d 739, 742, 108 Cal. Rptr. 307* (involving proceeding by corporate cooperative against shareholder-tenant); *see also* [8], *below*, and *§ 333.11[5]*].

If the conditions and covenants violated by the lessee cannot be performed afterward, then no notice need be given demanding their performance [*Code Civ. Proc. § 1161(3)*]. However, the three-day notice demanding possession of the property must still be given [*Schnittger v. Rose (1903) 139 Cal. 656, 660-663, 73 P. 449* ; *see § 332.76*].

[3] Effect of Lease Provision on Period of Notice

The parties may provide in the lease a longer notice for termination than the three-day period required by *Code Civ. Proc. § 1161* (discussed under [2][c], [d], *above*) [*see Devonshire v. Langstaff (1935) 10 Cal. App. 2d 369, 371-372, 51 P.2d 902* ; *see also Fifth & Broadway Partnership v. Kimny, Inc. (1980) 102 Cal. App. 3d 195, 200-201, 162 Cal. Rptr. 271* (holding, however, that 90-day notice provision of lease did not apply because it was not mandatory and lease authorized unlawful detainer proceeding in accordance with statute as alternative)].

However, the jurisdictional notice is that prescribed by the statute, and is sufficient if any longer notice required by the lease is substantially complied with [*Schulman v. Vera (1980) 108 Cal. App. 3d 552, 564, 166 Cal. Rptr. 620* (statutory three-day notice given but contractually required five-day notice substantially complied with)].

A provision in a commercial lease requiring a shorter notice period than that required by statute does not violate public policy merely because it provides for notice different from and superseding that provided by statute [*see Hignell v. Gebala (1949) 90 Cal. App. 2d 61, 67, 202 P.2d 378]* , but *Civ. Code § 1953* precludes lease provisions that purport to modify a residential tenant's rights regarding receipt of notices. However, if the tenancy is one from month-to-month, the parties may not agree to terminate on less than seven days' notice [*Civ. Code § 1946*]. Such lease provisions for shorter notice are valid and binding on the parties [*see Devonshire v. Langstaff (1935) 10 Cal. App. 2d 369, 372, 51 P.2d 902]* , as are provisions that provide for longer notice than that required by statute [*Watkins v. McCartney (1922) 57 Cal. App. 643, 644-645, 207 P. 909]* .

[4] Forfeiture of Lease at End of Notice Period

The object to be attained by a notice under *Code Civ. Proc. § 1161(2)* or *(3)* (discussed under [2][c], [d], *above*) is a forfeiture of the lease [*Downing v. Cutting Packing Co. (1920) 183 Cal. 91, 95, 190 P. 455]* . Hence, on the proper service of a notice to pay rent or quit or to perform a condition or covenant or quit and stating an election to declare the lease forfeited, the tenancy is forfeited as of the end of the notice period if the tenant fails to pay the rent or perform the condition or covenant [*see Downing v. Cutting Packing Co. (1920) 183 Cal. 91, 95-96, 190 P. 455* ; *Lehr v. Crosby (1981) 123 Cal. App. 3d Supp. 1, 8, 177 Cal. Rptr. 96* (both involving notice to pay rent or quit)]. For a discussion of when the court must in its judgment declare a forfeiture of the lease, see *§ 333.13[13][d]*. For forms and discussions of a petition, notice of application, and order granting relief from a judgment of forfeiture, see *§§ 333.132*, *333.133*, and *333.134*.

[5] Curing Default

In the event of an unlawful detainer under either *Code Civ. Proc. § 1161(2)* or *(3)* (discussed under [2][c], [d], *above*), the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may, within three days after service of the notice, perform the lease's conditions or covenants or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture [*Code Civ. Proc. § 1161(3)*; *see Downing v. Cutting Packing Co. (1920) 183 Cal. 91, 95-96, 190 P. 455* ; *Highland Plastics, Inc. v. Enders (1980) 109 Cal. App. 3d Supp. 1, 167 Cal. Rptr. 353* ; *see also Reed v. South Shore Foods, Inc. (1964) 229 Cal. App. 2d 705, 713, 40 Cal. Rptr. 575* (tender of rent one day after expiration of three-day period prescribed in notice as ineffective to cure default); *but see Glendale Fed. Bank v. Hadden (1999) 73 Cal. App. 4th 1150, 1156, 87 Cal. Rptr. 2d 102* (unlawful detainer action terminated interest of bank that was beneficiary of deed of trust in leasehold and had failed to obtain an agreement from the property owner permitting it to cure tenant's default)]. If this is done, any declaration of forfeiture stated in the notice to the tenant required by *Code Civ. Proc. § 1161* is nullified and the lease or rental agreement remains in effect [*Code Civ. Proc. § 1161.5*].

With regard to commercial real property, if the notice provided to the tenant by the landlord pursuant to *Code Civ. Proc. § 1161(2)* (discussed under [2][c], *above*) claims an amount identified by the notice as an estimate, and the tenant tenders to the landlord within the time required by the notice for payment an amount that the tenant reasonably estimates to be due, the court may allow the tenant to retain the right to possession [*see Code Civ. Proc. § 1161.1(a)*].

[6] Waiver of Default and Estoppel

As a general rule, the acceptance of rent by the lessor or landlord from the lessee or tenant after the breach of a condition or covenant with full knowledge of all the facts is a waiver of the breach and precludes the lessor or landlord from declaring a forfeiture of the lease by reason of the breach [*Kern Sunset Oil Co. v. Good Roads Oil Co. (1931) 214 Cal. 435, 440, 6 P.2d 71* ; *see EDC Associates, Ltd. v. Gutierrez (1984) 153 Cal. App. 3d 167, 170, 200 Cal. Rptr. 333]* . The general rule does not apply, however, if the lease provides otherwise [*see Salton Community Services Dist. v. Southard (1967) 256 Cal. App. 2d 526, 530, 64 Cal. Rptr. 246]* .

Whether there has been a waiver is a question of intent. But to overcome the presumption of waiver that tender and acceptance of the rent creates, either some positive evidence of rejection of the rent on the landlord's part or a specific reservation of rights in the lease is required [*EDC Associates, Ltd. v. Gutierrez (1984) 153 Cal. App. 3d 167, 170, 200 Cal. Rptr. 333]* .

Although acceptance of money by the landlord during the notice period may be shown in an unlawful detainer proceeding based on a 30-day notice terminating a month-to month-tenancy [*see Civ. Code § 1946*] as tending to show a waiver of forfeiture, this evidence bears only on rent paid for the period following termination of the tenancy and not to rents accrued before termination [*Castle Park No. 5 v. Katherine (1979) 91 Cal. App. 3d Supp. 6, 154 Cal. Rptr. 498]* . In such a case it has been said that tender of the rent and its acceptance by the landlord within the notice period probably results in an implied withdrawal of the landlord's notice to terminate a periodic tenancy provided the rent

accepted is sufficient to cover a period beyond the 30-day period, but that the mere tender of the rent does not result in a waiver. For there to be a waiver, the landlord must accept the rent and the rent accepted must be an amount sufficient to cover the rent period beyond the period specified in the termination notice [*Highland Plastics, Inc. v. Enders (1980) 109 Cal. App. 3d Supp. 1, 167 Cal. Rptr. 353]* .

If the breach is waived by the lessor or the landlord after service of the notice required by *Code Civ. Proc. § 1161*, any election stated in the notice to declare the lease or rental agreement forfeited is nullified and the lease or rental agreement remains in effect [*Code Civ. Proc. § 1161.5*].

Apart from waiver, a lessor may be estopped to rely on a particular breach of covenant as a ground for forfeiture of the lease when the lessor, by conduct after the lease's execution, led the lessee to believe that strict compliance with the covenant would not be required and the lessee acted accordingly to his or her detriment [*Salton Community Services Dist. v. Southard (1967) 256 Cal. App. 2d 526, 531, 64 Cal. Rptr. 246]* .

[7] Commercial Real Property

If the landlord accepts a partial payment of rent, including any payment under *Code Civ. Proc. § 1161.1(a)* [*see § 333.13[13][e][iii]*], after serving notice under *Code Civ. Proc. § 1161*, the landlord, without any further notice to the tenant, may commence and pursue an action under *Code Civ. Proc. § 1159 et seq.* to recover the difference between the amount demanded in the notice and the payment actually received [*Code Civ. Proc. § 1161.1(b)*].

Acceptance by the landlord of partial payment of rent after filing a complaint under *Code Civ. Proc. § 1166* is evidence only of that payment, without waiver of any rights or defenses of any of the parties. The landlord is entitled to amend the complaint to reflect the partial payment without creating a necessity for the filing of an additional answer or other responsive pleading by the tenant, and without prior leave of court, and such an amendment may not delay the matter from proceeding. The landlord must, however, provide actual notice to the tenant that acceptance of the partial rent payment does not constitute a waiver of any rights, including any right the landlord may have to recover possession of the property [*Code Civ. Proc. § 1161.1(c)*].

[8] Assigning, Subletting, Waste, Nuisance, or Unlawful Use

If a tenant or subtenant or the executor or administrator of the estate assigns, sublets, or commits waste on the demised premises contrary to the lease's conditions or covenants, or maintains, commits, or permits the maintenance or commission of a nuisance on the demised premises, or uses the premises for an unlawful purpose, he or she risks receipt of a three-day notice. If the three-day notice expires without performance, the lease is terminated. The landlord or the landlord's successor in estate, if any, must, on service of three days' notice to quit on the personor persons in possession, be entitled to restitution of possession of the demised premises under the provisions of *Code Civ. Proc. §§ 1159-1179a* [*Code Civ. Proc. § 1161(4)*; *see § 332.26*; *see also Thrifty Oil Co. v. Batarse (1985) 174 Cal. App. 3d 770, 772-776, 220 Cal. Rptr. 285* (holding unlawful detainer judgment was properly entered on showing that sublessee had sublet property without seeking sublessor's consent as required by sublease); *Roth v. Morton's Chefs Services, Inc. (1985) 173 Cal. App. 3d 380, 387-388, 218 Cal. Rptr. 684* (consent to sublease 50 percent of leased premises as not supporting sublease of 100 percent of premises)]. Any holding over beyond the three-day period would constitute an unlawful detainer [*see Code Civ. Proc. § 1161*, first paragraph].

Code Civ. Proc. § 1161(4), among other things, codifies the common law rule that a tenant must use leased property in such a way as to avoid waste. Waste can be proved only by acts that injuriously affect the market value of the property and show that the market value is substantially or permanently diminished or depreciated [*Smith v. Cap Concrete, Inc. (1982) 133 Cal. App. 3d 769, 776-777, 184 Cal. Rptr. 308]* . A similar showing is required to sustain a proceeding in unlawful detainer based specifically on allegations of waste [*Freeze v. Brinson (1991) 5 Cal. Rptr. 2d 227* ; *cf. Rowe v. Wells Fargo Realty Services, Inc. (1985) 166 Cal. App. 3d 310, 319-320, 212 Cal. Rptr. 374* (allegations, including

damage to thermostat and installation of lights without express authorization, held not to constitute waste)]. If the lease or rental agreement does not contain a covenant against waste, a three-day notice to quit the premises is not authorized under *Code Civ. Proc. § 1161(3)* or *(4)*. The landlord's only remedy in this case would appear to be an action for damages [*see Code Civ. Proc. § 732*].

The provisions of *Code Civ. Proc. § 1161(4)* also extend to a tenant who maintains, commits, or permits the maintenance or commission of a nuisance on leased premises. For purposes of the statute, a person who commits an offense relating to controlled substances, unlawful weapons or ammunition or uses the premises to further the purposes of that offense is deemed to have committed a nuisance on the premises [*Code Civ. Proc. § 1161(4)*; *see Civ. Code § 3485* (until January 1, 2014, unlawful detainer action may be brought by city prosecutor or city attorney in cities of Los Angeles, Long Beach, San Diego, Oakland, and Sacramento to abate nuisance caused by illegal conduct involving an unlawful weapons or ammunition purpose on real property); *Civ. Code § 3486* (until January 1, 2014, city prosecutor or city attorney in cities of Los Angeles, Long Beach, Palmdale, San Diego, Oakland and Sacramento may file action for unlawful detainer against any person in violation of nuisance or illegal purpose provisions of *Code Civ. Proc. § 1161(4)* with regard to a controlled substance; after that date, the authorization will apply only to the City of Los Angeles and only if the city has previously filed specified reports)].

Also for purposes of the statute, if a person commits an act of domestic violence [*see Fam. Code § 6211* (definition), sexual assault [*see Pen. Code §§ 261, 261.5, 262, 286, 288a, 289* (definitions)], or stalking [*see Civ. Code § 1708.7* (definition)] against another tenant or subtenant on the premises, there is a rebuttable presumption affecting the burden of proof that the person has committed a nuisance upon the premises. However, the presumption does not apply if the victim of the act of domestic violence, sexual assault, or stalking, or a household member of the victim, other than the perpetrator, has not vacated the premises [*Code Civ. Proc. § 1161(4)* (to be repealed on January 1, 2012)]. These provisions may not be construed to supersede the provisions of the Violence Against Women and Department of Justice Reauthorization Act of 2005 [P.L.109-162, sec. 606, amending *42 U.S.C. § 1437f*] that allow a tenant who engages in criminal acts of physical violence against cotenants to be removed from the lease [*Code Civ. Proc. § 1161(4)* (to be repealed on January 1, 2012)].

To justify termination of a lease because of the use of the premises for an unlawful purpose under *Code Civ. Proc. § 1161(4)*, the unlawful purpose must relate to the functional use of the property itself and not to just any violation of law. This is also true of a covenant in the lease prohibiting use of the premises in violation of the law. Such a covenant serves to protect thelessor's interest in the demised premises by limiting the functional use of the property and ensures that the lessee will harm neither the physical attributes nor the reputation of the property and will utilize the demised premises in a manner conducive to the lessor's interest so as to secure the continued payment of the rental obligations [*Rowe v. Wells Fargo Realty Services, Inc. (1985) 166 Cal. App. 3d 310, 319-320, 212 Cal. Rptr. 374* (holding resetting of temperature controls in violation of federal Department of Energy regulation did not constitute unlawful use that would terminate lease)].

[9] Holding Over by Subtenant, or by Tenant's Servant, Employee, Agent, or Licensee

A tenant may take proceedings, similar to those prescribed in *Code Civ. Proc. §§ 1159-1179a*, to obtain possession of the premises let to a subtenant or held by a servant, employee, agent, or licensee, in case of an unlawful detention of the premises underlet to or held by him or her [*Code Civ. Proc. § 1161(3)*]. Thus, the summary processes of unlawful detainer are available to a sublessor [*Reed v. South Shore Foods, Inc. (1964) 229 Cal. App. 2d 705, 711, 40 Cal. Rptr. 575]* .

[10] Holding Over After Sale

A person who holds over after sale and continues in possession of a manufactured home (as defined in *Health & Safety Code § 18007* [*Code Civ. Proc. § 1161a(a)(1)*]), a mobilehome (as defined in *Health & Safety Code § 18008* [*Code Civ.*

Proc. § 1161a(a)(2)]), or real property after he or she and any subtenant in actual possession of the premises have been served as provided in *Code Civ. Proc. § 1162* [*see § 333.11*] with a three-day notice to quit the property as prescribed in *Code Civ. Proc. § 1161a(b)* or, in the case of a rental housing unit, the notice prescribed by *Code Civ. Proc. § 1161a(c)*, discussed *below*, may be removed as prescribed in *Code Civ. Proc. §§ 1159-1179a* in the following cases [*Code Civ. Proc. § 1161a(b)*]:

- *Sale under writ of execution*. When the property has been sold under a writ of execution against the person, or a person under whom the person claims, and the title under the sale has been duly perfected [*see § 333.85*].

- *Sale under writ of sale after foreclosure or power of sale*. When the property has been sold under a writ of sale, on the foreclosure of a mortgage, or under an express power of sale contained in a mortgage, executed by the person or a person under whom the person claims, and the title under the foreclosure has been duly perfected [*see § 333.86*].

- *Sale under power of sale in trust deed*. When the property has been sold in accordance with Civ. Code § 2924under a power of sale contained in a trust deed executed by the person, or a person under whom the person claims, and the title under the sale has been duly perfected [*see § 333.87*].

- *Sale by person to be evicted*. When the property has been sold by the person, or a person under whom the personclaims, and the title under the sale has been duly perfected [*see § 333.88*].

- *Sale under conditional sale contract or security agreement*. When the property has been sold in accordance with *Health & Safety Code § 18037.5* (relating to mobilehomes) under the default provisions of a conditional sale contract or security agreement executed by the person, or a person under whom the person claims, and the title under the sale has been duly perfected.

For discussion of these types of sales, see Ch. 254, *Executions and Enforcement of Judgments* , Ch. 294, *Homesteads* , and Ch. 555, *Trust Deeds and Real Property Mortgages* .

A tenant or subtenant in possession of a rental housing unit (that is, any structure or part of a structure rented or offered for rent for residential occupancy in California [*Code Civ. Proc. § 1161a(d)*]) that has been sold by reason of any of the causes enumerated in *Code Civ. Proc. § 1161a(b)* (set forth *above*) who rents or leases the rental housing unit either on a periodic basis from week-to-week, month-to-month, or other interval, or for a fixed period of time, must be given written notice to quit in accordance with *Code Civ. Proc. § 1162* [*see § 333.11*], at least as long as the term of hiring itself, but not exceeding 30 days, before the tenant or subtenant may be removed from the unit as prescribed in *Code Civ. Proc. §§ 1159-1179a* [*Code Civ. Proc. § 1161a(c)*].

The above provisions do not affect the rights of a tenant or subtenant in possession of a rental housing unit under a fixed term lease when the rental housing unit has been sold by the owner and the title under the sale has been duly perfected [*Code Civ. Proc. § 1161a(b)(2)*].

In the case of a sale under a writ of sale after foreclosure or under a power of sale in a trust deed, a tenant may be able to recover actual and exemplary damages incurred due to the loss of the tenancy if the private or judicial foreclosure was the result of "rent skimming" by the landlord. "Rent skimming" is the use of revenue received from the rental of a parcel of residential real property, at any time during the first year period after acquiring that property, without first applying the revenue or an equivalent amount to the payments due on all mortgages and trust deeds encumbering that property [*Civ. Code § 890(a)*]. A tenant of residential real property may bring an action against a person who has engaged in rent skimming with regard to that property for the recovery of actual damages, including any security deposit as defined under *Civ. Code § 1950.5*, and moving expenses if theproperty is sold at a foreclosure sale and the tenant was required

to move. If the tenant prevails in the action, he or she is entitled to recover reasonable attorney's fees and costs. The court may also award exemplary damages, and the court must award exemplary damages of at least three times the amount of actual damages, if the defendant has engaged in multiple acts of rent skimming, or if the payments due under any trust deed or mortgage were two or more months delinquent at the time the tenant rented the premises [*Civ. Code § 891(d)*; for discussion of security deposits under *Civ. Code § 1950.5, see § 331.11[6]*]. For further discussion and a form of complaint for damages for rent skimming, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleasesReal Property LawLandlord & TenantTenanciesTenancies at SufferanceReal Property LawTortsWasteGeneral Overview

California Forms of Pleading and Practice--Annotated

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Chapter 333 LANDLORD AND TENANT: EVICTION ACTIONS
PART II. LEGAL BACKGROUND
A. Evicting a Tenant

29-333 California Forms of Pleading and Practice--Annotated § 333.11

§ 333.11 Service of Notices

[1] Notices Required by Code Civ. Proc. § 1161 or 1161a

The notices terminating tenancies that are required by *Code Civ. Proc. §§ 1161* and *1161a* [*see § 333.11*] may be served as follows [*Code Civ. Proc. § 1162*; *see Chinese Hosp. Foundation Fund v. Patterson (1969) 1 Cal. App. 3d 627, 632, 81 Cal. Rptr. 795]* :

- By delivering a copy to the tenant personally (personal service);

- If the tenant is absent from his or her place of residence and usual place of business, by leaving a copy with some person of suitable age and discretion at either place and sending a copy through the mail addressed to the tenant at the tenant's place of residence (a combination of substituted service and mail service); or

- If the place of residence and business cannot be ascertained, or a person of suitable age or discretion cannot be found there, then by affixing a copy in a conspicuous place on the property, delivering a copy to a person residing there if this person can be found, and sending a copy through the mail addressed to the tenant at the place where the property is situated (a combination of service by posting, substituted service, and mail service).

If the tenant is absent from the residence and place of business, the post and mail service may be used without prior attempts at personal service [*Hozz v. Lewis (1989) 215 Cal. App. 3d 314, 317, 263 Cal. Rptr. 577]* .

Service on a subtenant may be made in the same manner [*Code Civ. Proc. § 1162*].

Code Civ. Proc. § 1162 does not require a showing of reasonable diligence in attempting personal service under *Code Civ. Proc. § 1162(1)* before utilizing the combined forms of service under *Code Civ. Proc. § 1162(2)* and *(3)*, as is required by *Code Civ. Proc. § 415.20(b)* for the service of a summons by a combination of substituted abode service

and mail service [*Nourafchan v. Miner (1985) 169 Cal. App. 3d 746, 750-751, 215 Cal. Rptr. 450* ; *Highland Plastics, Inc. v. Enders (1980) 109 Cal. App. 3d Supp. 1, 6, 167 Cal. Rptr. 353]* . However, if the tenant cannot be located for personal service, *Code Civ. Proc. § 1162(3)* requires the person making the post and mail form of service to first determine either that the tenant's place of residence and business cannot be ascertained or that a person of suitable age or discretion cannot be found there [*Highland Plastics, Inc. v. Enders (1980) 109 Cal. App. 3d Supp. 1, 167 Cal. Rptr. 353]* .

Code Civ. Proc. § 1162(2) provides for service of the notice in the same manner as *Code Civ. Proc. § 1011*, relating to service of papers in civil actions and proceedings. This service is legally equivalent to personal service [*Davidson v. Quinn (1982) 138 Cal. App. 3d Supp. 9, 188 Cal. Rptr. 421]* . However, unlike *Code Civ. Proc. § 415.20(b)* (relating to service of summons and authorizing substituted service on person at least 18 years of age), *Code Civ. Proc. § 1162(2)* does not specify a minimum age of the person on the premises with whom the notice may be left. Rather, it specifies only that the person be of suitable age and discretion. The determination in any given case as to whether the person to whom the notice was given was of a "suitable age" is a matter within the trial court's discretion [*Lehr v. Crosby (1981) 123 Cal. App. 3d Supp. 1, 177 Cal. Rptr. 96]* .

Under *Code Civ. Proc. § 1162(3)*, posting alone of the notice is insufficient [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 609, 12 Cal. Rptr. 488, 361 P.2d 20* ; *see Greene v. Lindsey (1982) 456 U.S. 444, 450-453, 102 S. Ct. 1874, 72 L. Ed. 2d 249]* . Mail service is also required. The service is complete when the notice is posted and a copy is deposited in the mail addressed to the tenant at the address where the premises are located [*Highland Plastics, Inc. v. Enders (1980) 109 Cal. App. 3d Supp. 1, 167 Cal. Rptr. 353]* .

It is not clear whether the tenant's time to comply with a notice served under *Code Civ. Proc. § 1162(2)* or *(3)* is extended under the provisions of *Code Civ. Proc. § 1013*, relating to service by mail [*cf. Code Civ. Proc. § 415.20* (service of summons; expressly providing that service is deemed complete 10 days after mailing)]. In one case [*Walters v. Meyers (1990) 226 Cal. App. 3d Supp. 15, 277 Cal. Rptr. 316]* , the appellate department of thesuperior court held that *Code Civ. Proc. § 1013* applies only to notices in pending civil actions, unless the language of the statute requiring the notice provides otherwise. The court held that *Code Civ. Proc. § 1013* does not apply to three-day notices, noting that there is no language in the unlawful detainer statutes extending the time. The court also held that notice is effective on the day it is posted and mailed and not when it is received, stating that a contrary interpretation would render the various statutory methods of service meaningless. Similarly, in *Highland Plastics, Inc. v. Enders (1980) 109 Cal. App. 3d Supp. 1, 167 Cal. Rptr. 353* , which involved service of a 30-day notice under *Civ. Code § 1946*, the appellate department held a tenant's time to comply was not extended, reasoning that *Code Civ. Proc. § 1013* applies only to papers served after the filing of a complaint in a civil action and not to service of precomplaint papers. On the other hand, in *Davidson v. Quinn (1982) 138 Cal. App. 3d Supp. 9, 188 Cal. Rptr. 421* (default in payment of rent), the appellate department held that *Code Civ. Proc. § 1161(3)* (notices to pay rent or quit and to perform a condition or covenant of the lease or quit) requires three days' actual notice when termination results from the tenant's default in the payment of rent, that the three-day period does not begin to run until the notice is actually served on the tenant, and that the tenant thus has three full days in which to cure the default and prevent forfeiture.

In 1995, the legislature amended *Code Civ. Proc. § 1013* to provide that its provisions for extending time when service is by mail apply absent a specific exception provided for by that code section or by another statute or rule of court [*Code Civ. Proc. § 1013(a)*].

[2] Notice Terminating Tenancy for Unspecified Term or Periodic Tenancy

Service of a notice terminating a tenancy for an unspecified term or a periodic tenancy must be given in the manner prescribed by *Code Civ. Proc. § 1162* [*see* [1], *above*], or by sending a copy by certified or registered mail addressed to the other party [*Civ. Code § 1946*].

In addition, the lessee may give notice by sending a copy by certified or registered mail addressed to the lessor's agent to whom the lessee has paid the rent for the month before the date of the notice or by delivering a copy to the agent personally [*Civ. Code § 1946*].

[3] Notice Required to Exercise Right of Reentry

Whenever the right of reentry is given to a lessor in any lease or otherwise, the reentry may be made at any time after the right has accrued on three days' notice as provided in *Code Civ. Proc. §§ 1161* and *1162* [*Civ. Code § 791*]. The three days' notice is not required, however, when thehiring of the real property is for a term not specified by the parties and was terminated in accordance with the provisions of *Civ. Code § 1946* [*Civ. Code § 791*; *see Jordan v. Talbot (1961) 55 Cal. 2d 597, 608, 12 Cal. Rptr. 488, 361 P.2d 20]* . Moreover, an action for the possession of real property (for example, an action for ejectment) leased with a right of reentry may be maintained at any time after the right to reenter has accrued without the notice prescribed in *Civ. Code § 791* [*Civ. Code § 793*].

[4] Service on Cotenants

Proper service on one of two or more cotenants named in a written lease constitutes service on the other cotenants [*University of So. Cal. v. Weiss (1962) 208 Cal. App. 2d 759, 769-770, 25 Cal. Rptr. 475]* .

[5] Service on Subtenants

Code Civ. Proc. § 1161(2) and *(3)*, relating to the tenant's default in the payment of rent and the tenant's neglect or failure to perform other covenants or conditions of the lease or rental agreement, respectively, require that the three-days' notice be served on any subtenant in actual occupation of the premises as well as on the tenant [*see § 333.10[2][c], [d]*]. However, to maintain an unlawful detainer proceeding against the tenant, the subtenant need not be served if the premises are occupied by both the tenant and the subtenant [*Chinese Hosp. Foundation Fund v. Patterson (1969) 1 Cal. App. 3d 627, 632, 81 Cal. Rptr. 795]* . But, if the landlord wants to evict both the tenant and the subtenant, the subtenant must be served with a separate notice that complies with the requirements of *Code Civ. Proc. § 1161*. Service of a copy of the notice directed to and served on the tenant alone is not sufficient [*Briggs v. Electronic Memories & Magnetics Corp. (1975) 53 Cal. App. 3d 900, 904-905, 126 Cal. Rptr. 34]* .

Service on the subtenant may be made in the same manner as on the tenant [*Code Civ. Proc. § 1162(3)*].

The purpose of the requirement that the subtenant as well as the tenant be served with a notice is to provide the subtenant with the opportunity to cure the tenant's default and thus remain in possession of the premises [*Four Seas Inv. Corp. v. International Hotel Tenants' Assn. (1978) 81 Cal. App. 3d 604, 611, 146 Cal. Rptr. 531]* . Thus, there is no statutory requirement that the subtenant be served with the notice if the tenancy is terminated by a notice given in accordance with *Civ. Code § 1946* (termination of tenancy for unspecified term or periodic tenancy by notice)or under *Code Civ. Proc. § 1161(1)* (termination of tenancy by expiration of term) or under *Code Civ. Proc. § 1161(4)* (termination of lease by assigning, subletting, or committing waste on demised premises contrary to conditions or covenants of lease, or maintaining or permitting maintenance of nuisance on demised premises, or using demised premises for unlawful purpose and service of three-day notice to quit on persons in possession), because there is no default to be cured [*see Four Seas Inv. Corp. v. International Hotel Tenants' Assn. (1978) 81 Cal. App. 3d 604, 611, 146 Cal. Rptr. 531]* . By the same reasoning, when the tenancy is terminated under *Code Civ. Proc. § 1161(3)* because of an incurable breach, it would appear that service on the subtenant is not required.

[6] Computing Time

The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded [*Code Civ. Proc. § 12*]. Holidays include Saturdays, Sundays, and the days listed in *Gov. Code § 6700* [*Code Civ. Proc. § 10, 12a, 135*]. Thus, compliance with a three-day

notice to quit, for example, served on a Monday is timely if the premises are vacated by the end of the following Thursday since, in computing time, Monday is excluded and Thursday is included. If Thursday falls on a holiday, then compliance is timely if the premises are vacated by the end of Friday.

When the last day of a three-day notice to pay rent falls on a legal holiday, the time to pay rent is extended through the first full day thereafter that is not a legal holiday [*see Code Civ. Proc. §§ 12, 12a*; *Lamanna v. Vognar (1993) 17 Cal. App. 4th Supp. 4*]. Therefore, an unlawful detainer complaint filed on the first full day after the holiday is premature because the defendant is not guilty of unlawful detainer on the day the complaint is filed [*Lamanna v. Vognar (1993) 17 Cal. App. 4th Supp. 4*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination Notice

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29-333 California Forms of Pleading and Practice--Annotated § 333.12

§ 333.12 Unlawful Detainer Proceedings

[1] Governing Law

Unlawful detainer is governed generally by *Code Civ. Proc. §§ 1161-1179a*, which incorporate many of the provisions of Part Two of the Code of Civil Procedure, relating to civil actions. Other statutes specifically relating to unlawful detainer proceedings include *Civ. Code § 1942.3* (presumption of breach of habitabilityin unlawful detainer proceeding), *Civ. Code § 1952* (effect of unlawful detainer proceeding on actions under *Civ. Code §§ 1951-1951.8*, relating to tenant's abandonment of leased property), *Civ. Code § 1952.3* (effect on unlawful detainer proceeding of surrender of possession of property before trial or judgment if there is no trial), and *Code Civ. Proc. §§ 415.45* and *415.47* (relating to service of summons by posting or mail, respectively, in certain unlawful detainer proceedings). *Health & Safety Code §§ 17031.5*, *17031.6*, and *17031.7* govern the termination or modification of tenancies in employee housing, proceedings in unlawful detainer involving these tenancies, and prohibitions against retaliatory employment action.

[2] Nature and Purpose

[a] In General

Unlawful detainer is a statutory proceeding governed solely by the statutes creating it and is not based on contract [*see Fish Construction Co. v. Moselle Coach Works, Inc. (1983) 148 Cal. App. 3d 654, 658, 196 Cal. Rptr. 174* ; *Fifth & Broadway Partnership v. Kimny, Inc. (1980) 102 Cal. App. 3d 195, 200, 162 Cal. Rptr. 271]* . The statutes are procedural and provide a summary procedure for regaining possession of real property once the consensual basis for the tenant's occupancy is at an end [*see Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 149, 130 Cal. Rptr. 465, 550 P.2d 1001* ; *De La Vara v. Municipal Court (1979) 98 Cal. App. 3d 638, 640, 159 Cal. Rptr. 648]* . The statutory rights and remedies are given in lieu of the landlord's common law rights and remedies, which had included the right to enter and expel the tenant by force [*Childs v. Eltinge (1973) 29 Cal. App. 3d 843, 853, 105 Cal. Rptr. 864* ; *see Deal v. Municipal Court (1984) 157 Cal. App. 3d 991, 995, 204 Cal. Rptr. 79* ; *Schulman v. Vera (1980) 108 Cal. App. 3d 552, 562, 166 Cal. Rptr. 620]* . The statutory remedy is intended to be a relatively simple and speedy remedy that obviates any need for self-help by landlords [*Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 151, 130 Cal. Rptr. 465,*

550 P.2d 1001] . Thus, the primary purpose of an unlawful detainer proceeding is to obtain possession of real property in the cases specified by statute [*Gray v. Whitmore (1971) 17 Cal. App. 3d 1, 17-19, 94 Cal. Rptr. 904]* . The recovery of damages and rent by the landlord from a defaulting tenant is merely incidental to the proceeding to recover possession [*Briggs v. Electronic Memories & Magnetics Corp. (1975) 53 Cal. App. 3d 900, 906, 126 Cal. Rptr. 34* ; *see Code Civ. Proc. § 1174(b)* and discussion under *§ 333.13[13][e]*].

[b] Strict Compliance With Statutory Procedure Required

The summary nature of unlawful detainer proceedings mandate strict compliance with the governing statutory provisions [*De La Vara v. Municipal Court (1979) 98 Cal. App. 3d 638, 640, 159 Cal. Rptr. 648* ; *see Cal-American Income Property Fund IV v. Ho (1984) 161 Cal. App. 3d 583, 585, 207 Cal. Rptr. 532* (unlawful detainer is highly summary in nature and code requirements must be followed strictly); *Schulman v. Vera (1980) 108 Cal. App. 3d 552, 563-564, 166 Cal. Rptr. 620* (unlawful detainer is a statutory remedy and statutory requirements must be strictly complied with)]. Thus, a person seeking to avail himself or herself of the unlawful detainer statute [*Code Civ. Proc. § 1161*; *see § 333.10*], must bring himself or herself clearly within the terms of the relationship between himself or herself and the occupier of the property that is described in the statute [*Goetze v. Hanks (1968) 261 Cal. App. 2d 615, 616, 68 Cal. Rptr. 150* ; *Marvell v. Marina Pizzeria (1984) 155 Cal. App. 3d Supp. 1, 7, 202 Cal. Rptr. 818]* . In addition, the statutes permitting incidental relief, such as damages, are strictly construed [*Highland Plastics, Inc. v. Enders (1980) 109 Cal. App. 3d Supp. 1*]. Relief not authorized by the statutes may not be granted [*Castle Park No. 5 v. Katherine (1979) 91 Cal. App. 3d Supp. 6*].

[3] Unlawful Detainer Assistants

[a] Unlawful Detainer Assistants Act: Legislative Findings and Declarations

The Unlawful Detainer Assistants Act [*Bus. & Prof. Code §§ 6400-6415*] governs individuals and organizations who provide assistance and advice in unlawful detainer proceedings. The regulations are deemed necessary to protect tenants, landlords, and legitimate tenants' rights organizations from certain individuals and organizations who, although purporting to assist clients in unlawful detainer proceedings, file fraudulent and frivolous claims in connection with these proceedings [*see* 1993 Stats., ch. 1011, § 1 (legislative findings and declarations)].

[b] Unlawful Detainer Assistant Defined

An "unlawful detainer assistant" is any individual who for compensation renders assistance or advice in the prosecution or defense of an unlawful detainer claim or action, including any bankruptcy petition that may affect the unlawful detainer claim or action [*Bus. & Prof. Code § 6400(a)*].

[c] Registration Requirements

An unlawful detainer assistant must register with the county clerk in the county where the unlawful detainer assistant has his or her principal place of business (primary registration) and in any other county in which he or she performs acts for which registration is required (secondary registration) [*Bus. & Prof. Code § 6402*; *see Bus. & Prof. Code § 6403* (required contents of application for registration)]. However, the registration requirement does not apply, among others, to any of the following [*Bus. & Prof. Code § 6401*]:

- Any government employee acting in the course of his or her employment;
- A member of the bar or his or her employees or agents;
- An independent contractor while acting on behalf of a bar member; and

- Any employee of a nonprofit, tax exempt corporation who either assists clients free of charge or is supervised by a member of the State Bar of California who has malpractice insurance.

[d] Bond or Cash Deposit and Contract Requirements

On primary registration, the unlawful detainer assistant must post a bond or cash in the amount of $25,000 [*Bus. & Prof. Code § 6405(a), (e)*]. In the case of a secondary registration, the unlawful detainer assistant is only required to include a certified copy of the bond or cash deposit posted in the county in which the assistant filed the primary registration [*Bus. & Prof. Code § 6405(a)*]. In addition, before performing any services, every unlawful detainer assistant must provide his or her client with a written contract [*Bus. & Prof. Code § 6410(a)*]. The contract provisions between a client and an unlawful detainer assistant are prescribed by statute [*see Bus. & Prof. Code § 6410(b)*]. Failure to comply with the statutory requirements makes the contract voidable at the client's option [*Bus. & Prof. Code § 6410(d)*].

The bond or cash deposit is available for recovery of damages awarded a property owner or manager, tenant, or other person in an action or proceeding for injuries caused by the acts of the unlawful detainer assistant in the performance of duties as an unlawful detainer assistant [*Bus. & Prof. Code § 6412(a)*]. If there is a recovery against the bond or cash deposit, the unlawful detainer assistant must file a new bond or deposit an additional amount of cash within 30 days [*Bus. & Prof. Code § 6412(b)*].

[e] Judicial Council Forms

The Judicial Council Forms of Complaint [*see § 333.80*], Summons [*see § 333.100*], Request/Counter-Request to Set Case for Trial [*see § 333.106*], Answer [*see § 333.110*], and Interrogatories [*see § 333.120*] in unlawful detainer actions all request the preparing party to set forth both of the following:

- Whether an unlawful detainer assistant, for compensation, gave advise or assistance with the forms; and

- If so, the assistant's name, address, telephone number, county of registration, registration number, and the date the assistant's registration expires.

[4] Presumptions as to Term of Lease or Rental Agreement

A hiring of real property, other than lodgings and dwelling-houses, in places where there is no custom or usage on the subject, is presumed to be a month-to-month tenancy unless otherwise designated in writing. In the case of real property used for agricultural or grazing purposes, however, a hiring is presumed to be for one year from its commencement unless otherwise expressed in the hiring [*Civ. Code § 1943*]. A hiring of lodgings or a dwelling-house for an unspecified term is presumed to have been for such length of time as the parties adopt for the rent's estimation. Thus, a hiring at a monthly rate of rent is presumed to be for one month. In the absence of any agreement regarding the length of time or the rent, the hiring is presumed to be monthly [*Civ. Code § 1944*]. Implied renewal of a lease or rental agreement is covered by *Civ. Code §§ 1945* and *1946* and automatic renewal of leases is covered by *Civ. Code § 1945.5*.

[5] Termination of Lease or Rental Agreement

A lease or rental agreement of real property for a fixed term is normally terminated by expiration of the term for which the property is leased or rented. A tenancy for an unspecified term or a periodic tenancy, such as a tenancy from month-to-month, is terminated by an appropriate notice from the landlord to the tenant or from the tenant to the landlord [*see Civ. Code § 1946*; *Highland Plastics, Inc. v. Enders (1980) 109 Cal. App. 3d Supp. 1, 6, 167 Cal. Rptr. 353]* . A tenancy may be prematurely terminated for nonpayment of rent or other breach of covenant or condition by the giving of a three-day notice [*see Code Civ. Proc. § 1161(2)-(4)*; *see also § 333.10*]. The landlord and tenant may, however, in their lease, provide for a longer period of notice [*Fifth & Broadway Partnership v. Kimny, Inc. (1980) 102 Cal. App.*

3d 195, 200, 162 Cal. Rptr. 271] . The tenancy is not terminated on the giving of the notice, but, rather, on expiration of the notice period, and no cause of action for eviction exists until after the tenancy is terminated [*Highland Plastics, Inc. v. Enders (1980) 109 Cal. App. 3d Supp. 1, 167 Cal. Rptr. 353]* .

A tenancy may also be terminated (1) by the tenant because of the landlord's breach of the covenant to repair dilapidations rendering the premises untenantable [*see Civ. Code § 1942(a)*]; and (2) by the landlord as a result of the tenant's abandonment of the leased premises [*see Civ. Code §§ 1951.2, 1951.3*].

[6] Restrictions on Acts of Landlord of Residential Property

Landlords may not willfully do any of the following with the intent to terminate the occupancy under any lease or other tenancy or estate at will, however created, of property used by a tenant for his or her residence:

- Cause, directly or indirectly, the interruption or termination of any utility service, including without limitation, water, heat, light, electricity, gas, phone, elevator, or refrigeration, whether or not the utility service is under the landlord's control [*Civ. Code § 789.3(a)*];

- Prevent the tenant from gaining reasonable access to the property by changing the locks or using a bootlock or by any other similar method or device [*Civ. Code § 789.3(b)(1)*];

- Remove outside doors or windows [*Civ. Code § 789.3(b)(2)*]; or

- Remove the tenant's personal property, furnishings, or any other items from the premises without the tenant's prior written consent, except when done in accordance with the procedure set forth in *Civ. Code §§ 1980-1991* [*Civ. Code § 789.3(b)(3)*; *see § 333.14[8]*].

Civ. Code § 789.3(b) is not to be construed to prevent the lawful eviction of a tenant by appropriate legal authorities, nor does it apply to occupancies defined by *Civ. Code § 1940(b)* (transient occupancy in hotel, motel, residence club, or other facility, or occupancy at hotel or motel where innkeeper retains right of access and control and provides specified services) [*Civ. Code § 789.3(b)*].

A landlord who violates *Civ. Code § 789.3* is liable to the tenant as provided in *Civ. Code § 789.3(c)* and *(d)*.

PRACTICE TIP:

Overlap Between *Civ. Code § 789.3* and Forcible Entry and Detainer. There is substantial overlap between the forcible entry and detainer provisions [*see* Part C, *below*] and *Civ. Code § 789.3*. Keep in mind that while the forcible entry and detainer provisions do not provide for *attorney's fees* for the prevailing party, *Civ. Code § 789.3* does [*see Civ. Code § 789.3(d)*]. *By Myron Moskovitz*

[7] Tenancies in Mobilehome Parks

[a] Governing Law

Tenancies in mobilehome parks are governed by the Mobilehome Residency Law [*Civ. Code § 798 et seq.*], which is discussed at length in Ch. 369, *Mobilehomes and Mobilehome Parks* .

The manner in which tenancies may be terminated under the Mobilehome Residency Law are set forth in *Civ. Code §§ 798.55-798.61*. However, except as otherwise provided, these statutes do not affect any rights or proceedings set forth in *Code Civ. Proc. § 1159 et seq.* (unlawful detainer, forcible entry, and forcible detainer provisions) [*Civ. Code § 798.60*; *see Palmer v. Agee (1978) 87 Cal. App. 3d 377, 384-385, 150 Cal. Rptr. 841* (involving predecessor statutes)].

[b] Notice Required to Terminate Mobilehome Park Tenancy

The management (that is, the park owner or the owner's agent or representative) may terminate or refuse to renew a tenancy for one or more of the reasons specified in *Civ. Code § 798.56* [*see* [c], *below*] on giving the homeowner written notice to remove the mobilehome from the park within a period of not less than 60 days. The notice must be given in the manner prescribed by *Code Civ. Proc. § 1162* (*see § 333.11*) [*Civ. Code § 798.55(b)*; *see § 332.78* (form for notifying tenant of intention not to renew or to terminate tenancy in mobilehome park)].

A homeowner must give the management written notice of not less than 60 days before vacating his or her tenancy [*Civ. Code § 798.59*].

[c] Grounds for Termination by Management

Tenancy in a mobilehome park may be terminated by management for the following reasons [*Civ. Code § 798.56*]:

- Failure to comply with a local ordinance, state law, or regulation relating to mobilehomes within a reasonable time after receiving a notice of noncompliance from the appropriate governmental agency.

- Conduct on the park premises constituting a substantial annoyance to other homeowners or residents.

- Failure to comply with a reasonable park rule or regulation as set forth in the rental agreement or any amendment to it within seven days after written notice of the alleged violation. However, no written notice is required if a homeowner has been given a written notice of an alleged violation of the same rule or regulation on three or more occasions within a 12-month period.

- Nonpayment of rent, utility charges, or reasonable incidental service charges, provided the homeowner is given a three-day written notice to pay the amount due or vacate the tenancy [*see § 332.78*].

- Condemnation of the mobilehome park.

- Change of use (defined in *Civ. Code § 798.10*) of the mobilehome park or any portion of it, provided specified notice requirements are met.

- The homeowner or resident has been convicted of prostitution, an assault with a firearm on another person or on a peace officer or firefighter engaged in the performance of his or her duties [*Pen. Code §§ 243(d), 245(a)(2), (b)*], lewd or lascivious acts involving children [*Pen. Code § 288*], arson [*Pen. Code § 451*], or a felony controlled-substance offense, if the act resulting in the conviction was committed anywhere on the premises of the mobilehome park including, but not limited to, within the homeowner's mobilehome. The tenancy may not be terminated, however, if the person convicted of the offense has permanently vacated, and does not subsequently reoccupy, the mobilehome.

However, no tenancy in a mobilehome park may be terminated for the purpose of making a homeowner's site available for a person who purchased or proposes to purchase, or rents or proposes to rent, a mobilehome from the mobilehome park owner or the park owner's agent [*Civ. Code § 798.58*].

[d] Attorney's Fees and Costs

In any action arising out of the provisions of the Mobilehome Residency Law, the prevailing party is entitled to reasonable attorney's fees and costs [*Civ. Code § 798.85*; *see Palmer v. Agee (1978) 87 Cal. App. 3d 377, 386-388,*

150 Cal. Rptr. 841 (affirming portion of unlawful detainer judgment granting defendant's judgment on the pleadings and reversing portion denying defendant's attorney's fees)].

[8] Tenancies in Recreational Vehicle Parks

[a] Governing Law and Definitions

Tenancies in recreational vehicle parks are governed by the Recreational Vehicle Park Occupancy Law, which is set forth at *Civ. Code § 799.20 et seq.* "Recreational vehicle park" is defined as any area or tract of land, or a separate designated section within a mobilehome park, where two or more lots are rented, leased, held out for rent or lease, or were formerly held out for rent or lease and later converted to a subdivision, cooperative, condominium or other form of resident ownership, to accommodate owners or users of recreational vehicles, camping cabins, or tents [*Civ. Code § 799.30*; *Health & Safety Code § 18862.39*; *see Health & Safety Code §§ 18010* ("recreational vehicle" defined), *18862.5* ("camping cabin" defined)]. "Tenant" is defined as an owner or operator of a recreational vehicle who has been an occupant in a recreational vehicle park for more than 30 consecutive days [*Civ. Code § 799.32*]. "Resident" is defined as a tenant who has occupied a lot in a park for nine months or more [*Civ. Code § 799.31*].

[b] Notice Required to Terminate Recreational Vehicle Park Tenancy

If a person has occupied a lot for more than 30 days but less than nine months [*see Civ. Code §§ 799.31, 799.32*], the tenancy may be terminated for failure to pay rent or service charges if the rent has been unpaid for five days and a three-day notice to vacate or pay rent has been given thereafter. The three-day notice must be served in the same manner as an unlawful detainer three-day notice [*Civ. Code § 799.65*; *see § 333.11*]. Management may terminate the tenancy for any other reason on 30 days' notice [*Civ. Code § 799.66*].

If a person has occupied a lot for more than nine months [*see Civ. Code § 799.31*], management may terminate a tenancy only for specified causes and on 60 days' written notice. The 60-day notice must be served in the same manner as an unlawful detainer three-day notice [*Civ. Code § 799.70*; *see § 333.11*].

Evictions of tenants are subject to the requirements of *Code Civ. Proc. § 1159 et seq.* (unlawful detainer, forcible entry, and forcible detainer provisions) [Civ. Code §§ 799.69, *799.71*].

Removal of recreational vehicles of defaulting occupants on 72-hour notice is governed by *Civ. Code §§ 799.55-799.59* [*see § 332.80*].

[c] Attorney's Fees and Costs

In any action arising out of the provisions of the Recreational Vehicle Park Occupancy Law, the prevailing party is entitled to reasonable attorney's fees and costs [*Civ. Code § 799.78*].

[9] Tenancies in Floating Home Marinas

Lease of rental space for a boat in a marina is subject to unlawful detainer because the space is real property [*Smith v. Municipal Court (1988) 202 Cal. App. 3d 685, 688-689, 245 Cal. Rptr. 300]* . However, there are special limitations on unlawful detainer actions, including a requirement of cause for eviction, that apply to floating home marinas [*see Civ. Code § 800.70 et seq.*]. The rules and limitations applicable to floating home marinas are similar to those applicable to mobilehome parks, which are discussed in [7], *above*.

[10] Order for Payment of Rent by Gasoline Dealer Into Court

In any unlawful detainer proceeding brought by a petroleum distributor against the gasoline dealer, the court may, at the

time either party requests it, require the tenant to make rental payments into the court, for the landlord, at the contract rate, pending the case's resolution [*Code Civ. Proc. § 1174(a)*]. For discussion of the regulation of the nonrenewal or termination of petroleum distributors and other franchises, see Ch. 515, *Securities and Franchise Regulation* .

[11] Parties to Proceeding; Effect of Nonjoinder

No person other than the tenant and any subtenant in the actual occupation of the premises when the complaint is filed need be made defendants, and no proceeding may abate, nor may plaintiff be nonsuited, for the nonjoinder of any person who might have been named as a defendant [*Code Civ. Proc. § 1164*]. However, a judgment may be rendered only against parties who were served with process or appeared in the proceeding [*Code Civ. Proc. § 1164*]. Thus, a judgment may not be entered against one not a party to the proceeding, although one not named as a party in the original complaint may be made a party by amendment of the complaint in accordance with *Code Civ. Proc. § 473* [*see Code Civ. Proc. § 1177*; *Fifth & Broadway Partnership v. Kimny, Inc. (1980) 102 Cal. App. 3d 195, 199, 162 Cal. Rptr. 271]* . Consequently, if the landlord wants to evict all persons on the premises, he or she should join as defendants all adults on the premises, either by their true names or by fictitious names [*see Arrieta v. Mahon (1982) 31 Cal. 3d 381, 393, 182 Cal. Rptr. 770, 644 P.2d 1249* ; *see also Code Civ. Proc. § 474*; § 333.80]. If a defendant became a subtenant of the premises after the notice provided by *Code Civ. Proc. § 1161(2)* (notice to pay rent or quit) was served on the tenant, the fact that the notice was not served on each subtenant constitutes no defense to the proceeding [*Code Civ. Proc. § 1164*].

Except as provided in *Code Civ. Proc. § 1164*, the provisions of Part Two of the Code of Civil Procedure relating to parties to civil actions [*Code Civ. Proc. §§ 367-389.5*] apply to proceedings in unlawful detainer [*Code Civ. Proc. § 1165*].

[12] Protection for Servicemembers and Dependents

Under the Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*], a servicemember or dependents of the servicemember may not be evicted from any premises occupied or intended to be occupied primarily as a residence and for which the agreed rental is not more than $2,400 per month (subject to adjustment for inflation), without leave of court [*50 U.S.C. App. § 531(a)*; *see 50 U.S.C. App. §§ 511* (definitions), *514, 516, 538* (additional persons protected)]. The court may stay the proceedings for up to 90 days, unless the court determines that justice and equity require a longer or shorter period of time, or adjust the obligations under the lease to preserve the interests of all parties [*50 U.S.C. App. § 531(b)*]. Any person knowingly taking part in any eviction or distress other than as provided in *50 U.S.C. App. § 531(a)*, or who so attempts, is guilty of a misdemeanor and subject to imprisonment not to exceed one year and/or a fine [*50 U.S.C. App. § 531(c)(1)*].

In addition, state legislation offers temporary protection from the enforcement of civil liabilities for officers and enlisted members of the National Guard called or ordered into active state or federal service and reservists of the United States Military Reserve who have been on full-time active service or duty since September 11, 2001 [*see* 2002 Stats., ch. 60, § 1; *Mil. & Vet. Code § 400 et seq.*]. If premises are occupied primarily for dwelling purposes by the spouse, children, or other dependents of a service member called to active service or duty, no eviction or distress can be made until 30 days after the service member is released from active service or duty, except on leave of court granted on application therefor or granted in an action or proceeding affecting the right of possession [*Mil. & Vet. Code § 406(a)*; *see Mil. & Vet. Code § 400(a)* ("service member" defined), (b) ("military service" defined)]. Any person who knowingly takes part in any eviction or distress other than as permitted by *Mil. & Vet. Code § 406(a)*, or who attempts to do so, is guilty of a misdemeanor [*Mil. & Vet. Code § 406(c)*].

The court, on its own motion or on application, may stay the proceedings for the period specified in *Mil. & Vet. Code § 406(a)* [*Mil. & Vet. Code § 406(b)*]. Rather than granting a complete stay, the court may require the tenant to make regular partial payments during the service member's period of military service, or the court may make any other order

that it finds to be just [*Mil. & Vet. Code § 406(b)*]. The court may deny the stay if it finds that the ability of the tenant to pay the agreed rent is not materially affected by the military service [*Mil. & Vet. Code § 406(b)*].

These protections apply to service members on active service or duty since September 11, 2001. However, the protections apply prospectively from June 20, 2002 (date bill was signed into law) [*Mil. & Vet. Code § 409.11*]. Dependents of service members are also entitled to these benefits unless the court finds that the dependents' ability to comply with the terms of the obligation has not been materially impaired by the military service of the person on whom the applicants are dependent [*Mil. & Vet. Code § 409.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawLandlord & TenantTenanciesGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 29: Landlord and Tenant: General Introduction thru Rent Control-Chs. 330-339
Chapter 333 LANDLORD AND TENANT: EVICTION ACTIONS
PART II. LEGAL BACKGROUND
A. Evicting a Tenant

29-333 California Forms of Pleading and Practice--Annotated § 333.13

§ 333.13 Unlawful Detainer Litigation

[1] Venue

Subject to the power of a court to transfer actions and proceedings, the county in which the real property that is the subject of the action, or some part of it, is situated, is the proper county for the trial of an action for the recovery of real property [*Code Civ. Proc. § 392(a)(1)*]. With regard to subvenue, the proper court location for trial of a proceeding for an unlawful detainer is the location where the court tries that type of proceeding that is nearest or most accessible to where the real property that is the subject of the action, or some part of it, is situated [*Code Civ. Proc. § 392(b)*]. Otherwise, any location of the superior court designated as the proper court under *Code Civ. Proc. § 392(a)* is a proper court location for the trial. The court may specify by local rule the nearest or most accessible court location where the court tries that type of case [*Code Civ. Proc. § 392(b)*].

The primary purpose of a proceeding in unlawful detainer (or forcible entry or forcible detainer) is to recover possession of real property [*see Code Civ. Proc. § 1174(a)*; *Gray v. Whitmore (1971) 17 Cal. App. 3d 1, 17-18, 94 Cal. Rptr. 904]* . Hence, venue for these proceedings is governed by Code *Civ. Proc. § 392* [*see Childs v. Eltinge (1973) 29 Cal. App. 3d 843, 851, 105 Cal. Rptr. 864* (unlawful detainer); *see also Code Civ. Proc. § 1177* (application of Part Two of Code of Civil Procedure, *Code Civ. Proc. §§ 307-1062.20*, to these proceedings)]. For further discussion of venue of civil actions, see Ch. 571, *Venue* .

[2] Jurisdiction

An unlawful detainer (or forcible entry or forcible detainer) proceeding for which the whole amount of damages claimed is $25,000 or less, is a limited civil case [*Code Civ. Proc. § 86(a)(4)*]. Limited civil cases are within the jurisdiction of the superior court [*Cal. Const., art. VI, § 10*; *see Code Civ. Proc. §§ 85, 86*].

A plaintiff completing the Judicial Council's Unlawful Detainer Complaint form [*see § 333.80[1]*] must set forth information regarding the court's "Jurisdiction." The plaintiff must check one (or more) of the appropriate boxes, that is, that the action is:

- A "Limited Civil Case" in which the amount demanded either does not exceed $10,000 or exceeds $10,000 but does not exceed $25,000;

- An "Unlimited Civil Case" (amount demanded exceeds $25,000); and/or

- An action "reclassified" from (1) unlawful detainer to general unlimited civil (possession not in issue); (2) unlawful detainer to general limited civil (possession not in issue); (3) limited to unlimited; and/or (4) unlimited to limited [*see* [3][c], *below* (reclassification)].

[3] The Complaint

[a] Verification, Contents, and Attachments

[i] Complaint Must Be Verified and Must Properly Describe Premises

A complaint for unlawful detainer [*see §§ 333.80 -333.88* for sample complaints] must be verified and include the typed or printed name of the verifying person. The complaint must set forth the facts on which the plaintiff seeks to recover [*Code Civ. Proc. § 1166(a)(1), (2)*; *Delta Imports, Inc. v. Municipal Court (1983) 146 Cal. App. 3d 1033, 1036, 194 Cal. Rptr. 685]* . It must also describe the premises with reasonable certainty [*Code Civ. Proc. § 1166(a)(3)*]. That is, the property must be described in the complaint with such certainty as to enable an officer, on executing a judgment, to identify it [*Code Civ. Proc. §§ 455, 1177*]. Thus, it has been held that a piece of real property known by some name may be sufficiently described by use of the name [*Hildreth v. White (1885) 66 Cal. 549, 550, 6 P. 454* (action for ejectment)]. In unlawful detainer proceedings in which there are no title problems and only the right to possession is involved, it is customary to describe the premises by street address, apartment number, if any, city, county, and zip code [*see, e.g.*, Judicial Council Form of Complaint for unlawful detainer cases, as set forth in *§ 333.80[1]*, Paragraph 3].

[ii] Tenant's Unlawful Possession Must Be Plead

Because a proceeding in unlawful detainer involves a forfeiture of the tenant's right to possession, one of the matters that must be pled and proved is that the tenant remains in unlawful possession of the premises. If the tenant has surrendered possession of the premises to the landlord before the complaint's filing, the landlord's remedy is not a proceeding for unlawful detainer but, rather, an action for damages and rent [*Briggs v. Electronic Memories & Magnetics Corp. (1975) 53 Cal. App. 3d 900, 906, 126 Cal. Rptr. 34* ; *see also § 333.30*].

[iii] Alleging Facts Surrounding Notice to Quit

When a written notice to quit the premises, or to pay rent or quit, or to perform a covenant or quit, is a condition precedent to maintaining a proceeding for unlawful detainer, the giving of the notice must be alleged in the complaint [*see Delta Imports, Inc. v. Municipal Court (1983) 146 Cal. App. 3d 1033, 1036, 194 Cal. Rptr. 685* ; *Samuels v. Singer (1934) 1 Cal. App. 2d 545, 549, 36 P.2d 1098]* . Although the notice may be alleged either verbatim or according to its legal effect [*Zucco v. Farullo (1918) 37 Cal. App. 562, 568, 174 P. 929]* , a complaint that merely alleges that the defendant was given notice is insufficient. The complaint must allege that the notice was written, that it specified the breach or default on which the termination was based, that it unequivocally demanded possession within three days, or if the condition or covenant allegedly violated was capable of being performed, that the notice gave the tenant the alternative of performing the covenant or condition or of quitting possession [*Delta Imports, Inc. v. Municipal Court (1983) 146 Cal. App. 3d 1033, 1036-1037, 194 Cal. Rptr. 685]* . The complaint must also allege that the notice expired without the tenant performing the covenant or vacating the premises. This requirement can be met by attaching a copy of the notice to the complaint and incorporating it into the complaint by reference [*see Wilson v. Sadleir (1915) 26 Cal. App. 357, 359, 146 P. 1061]* .

[iv] Allegations of Fraud, Force, or Violence

The complaint may set forth any circumstances of fraud, force, or violence that may have accompanied the alleged unlawful detainer (or forcible entry or forcible detainer) and claim damages for them [*Code Civ. Proc. § 1166(b)*].

[v] Alleging Method Used to Serve Defendant with Notice of Termination

The complaint must state specifically the method used to serve the defendant with the notice or notices of termination on which the complaint is based. This requirement may be satisfied by using and completing all items relating to service of the notice or notices in an appropriate Judicial Council form complaint, or by attaching a proof of service of the notice or notices of termination served on the defendant [*Code Civ. Proc. § 1166(a)(5)*].

[vi] Attachments

In addition to the allegations noted in [i]-[v], *above*, in an action regarding residential real property, the plaintiff must attach to the complaint both of the following:

- A copy of the notice or notices of termination served on the defendant on which the complaint is based [*Code Civ. Proc. § 1166(c)(1)(A)*]; and

- A copy of any written lease or rental agreement regarding the premises. In addition, any addenda or attachments to the lease or written agreement that form the basis of the complaint must also be attached [*Code Civ. Proc. § 1166(c)(1)(B)*]. However, the documents required by *Code Civ. Proc. § 1166(c)(1)(B)* are not required to be attached if the complaint alleges (1) that the lease or rental agreement is oral; (2) that a written lease or rental agreement regarding the premises is not in the possession of the landlord or any agent or employee of the landlord; or (3) an action based solely on *Code Civ. Proc. § 1161(2)* (that is, when tenant continues in possession without landlord's permission after default in payment of rent and service of three-day notice to pay rent or quit) [*Code Civ. Proc. § 1166(c)(1)(B)*].

If the plaintiff fails to attach the documents required by *Code Civ. Proc. § 1166(c)*, the court must grant leave to amend the complaint for a five-day period in order to include the required attachments [*Code Civ. Proc. § 1166(c)(2)*].

[b] Proceeding Filed in Proper Court

The complaint must state facts showing that the proceeding has been commenced in the proper superior court for trial and is a proceeding for unlawful detainer. These facts may be set forth in a separate affidavit (or declaration under *Code Civ. Proc. § 2015.5*) filed with the complaint and served with the summons [*Code Civ. Proc. § 396a(a)*]. If this is not done, the proceeding must be dismissed without prejudice, unless the court, on such terms as may be just, permits the affidavit (or declaration) to be filed after the filing of the complaint and a copy served on the defendant. If this is done, the defendant's time to answer or plead dates from the service [*Code Civ. Proc. § 396a(a)*].

If it appears that the court is not the proper court or court location for trial, the court must, on its own motion or on the motion of the defendant, order the proceeding transferred to the proper court unless the defendant is represented by counsel and consents in writing, or in open court, to the keeping of the proceeding in the court in which it was commenced [*Code Civ. Proc. § 396a(b)*]. If transfer is ordered and the summons was served before the filing of the proceeding in the transferee court, the time for any defendant so served who has not appeared to answer dates from service on the defendant of written notice of the filing in the transferee court [*Code Civ. Proc. § 396a(c)*].

[c] Reclassification

[i] Reclassification of Initial Pleading

If the caption of the complaint or cross-complaint filed in the superior court mistakenly fails to state that the proceeding is a limited civil case, the defendant (or the cross-defendant, as the case may be) may file a motion for reclassification within the time allowed to respond to the initial pleading [*see § 333.13[3][d]*]. A motion for reclassification does not extend the defendant's time to answer or otherwise respond to the complaint [*Code Civ. Proc. § 403.040(a)*]. For thorough discussion of reclassification and related forms, see Ch. 324, *Jurisdiction: Subject Matter* .

The court, on its own motion, may also reclassify a case at any time [*Code Civ. Proc. § 403.040(a)*]. However, the court is not required to reclassify a proceeding because the judgment to be rendered, as determined at the trial or hearing, is one that might have been rendered in a limited civil case [*Code Civ. Proc. § 403.040(c)*]. Furthermore, in any case when the misclassification is due solely to an excess in the amount of the demand, the excess may be remitted and the proceeding may continue as a limited civil case [*Code Civ. Proc. § 403.040(d)*].

If a defendant or cross-defendant files a motion for reclassification after the time allowed to respond to the complaint, cross-complaint, or other initial pleading, the court must grant the motion if both of the following conditions are satisfied [*Code Civ. Proc. § 403.040(b)*]:

- The caption of the initial pleading misstates the jurisdictional classification of the proceeding, or mistakenly fails to state that the proceeding is a limited civil case [*Code Civ. Proc. § 403.040(b)(1)*]; and

- The moving party shows good cause for not seeking reclassification earlier [*Code Civ. Proc. § 403.040(b)(2)*].

[ii] Reclassification of Amended Pleading

If a plaintiff (or a cross-complainant as the case may be) files an amended complaint or other amended initial pleading that changes the jurisdictional classification from that previously stated in the caption, and simultaneously pays the reclassification fees as provided in *Code Civ. Proc. § 403.060(a)* and *Gov. Code § 70619* [*see § 333.13[3][c][iv]*], the clerk must promptly reclassify the case [*Code Civ. Proc. § 403.020(a)*]. An amendment to an initial pleading is treated in the same manner as an amended initial pleading [*Code Civ. Proc. § 403.020(b)*].

[iii] Reclassification by Cross-Complaint

If a cross-complainant in a limited civil case files a cross-complaint that causes the proceeding to exceed the maximum amount in controversy for a limited civil case, or otherwise fails to satisfy the requirements for a limited civil case as prescribed by *Code Civ. Proc. § 85*, the caption of the cross-complaint must state that the proceeding is a limited civil case to be reclassified by cross-complaint, or words to that effect. The cross-complainant must pay the reclassification fees as provided in *Code Civ. Proc. § 403.060(a)* and *Gov. Code § 70619* [*see § 333.13[3][c][iv]*], and the clerk must promptly reclassify the case [*Code Civ. Proc. § 403.030*].

[iv] Determination of Reclassification Fees

The fee for reclassification of a case from a limited civil case to an unlimited civil case is $140 [*Code Civ. Proc. § 403.060(a)*; *Gov. Code § 70619*]. This reclassification fee is in addition to any other fee due for that appearance or filing in a limited civil case. No additional amounts may be charged for appearance or filing fees paid before reclassification. After reclassification, the fees ordinarily charged in an unlimited case must be charged [*Code Civ. Proc. § 403.060(a)*]. If a reclassification fee is required and is not paid at the time an amended complaint or other initial pleading, cross-complaint, or stipulation for reclassification is filed under *Code Civ. Proc. § 403.020*, *403.030*, or *403.050*, the clerk may not reclassify the case [*Code Civ. Proc. § 403.060(b)*].

No fee may be charged for reclassification of a case from an unlimited civil case to a limited civil case. The fees

ordinarily required for filing or appearing in a limited civil case must be charged at the time of filing a pleading that reclassifies the case. Parties are not entitled to a refund of the difference between any fees previously paid for appearance or filing in an unlimited civil case and the fees due in a limited civil case. After reclassification, the fees ordinarily charged in a limited civil case will be charged [*Code Civ. Proc. § 403.060(c)*].

[v] Nonpayment of Reclassification Fees

If the fees have not been paid as provided in *Code Civ. Proc. § 403.060* [*see* [iv], *above*] within five days after service of notice of the order for reclassification, any party interested in the case, regardless of whether that party is named in the complaint, may pay the fees, and the clerk must promptly reclassify the case [*Code Civ. Proc. § 403.040(d)*].

The cause of action must not be further prosecuted until the reclassification fees are paid. If the fees are not paid within 30 days after service of notice of an order for reclassification, the court, on its own motion or on the motion of any party, may dismiss the proceeding without prejudice on the condition that no other action on the cause may be commenced in another court before the reclassification fees are paid [*Code Civ. Proc. § 403.040(d)*].

[vi] Effect of Reclassification Order

A proceeding that is reclassified is deemed to have been commenced at the time the complaint was initially filed, not at the time of reclassification [*Code Civ. Proc. § 403.070(a)*].

The court has the same authority over the reclassified proceeding as if the proceeding had been originally commenced as reclassified. The court may allow or require whatever amendment of the pleadings, filing and service of amended, additional, or supplemental pleadings, or giving of notice, or other appropriate action, as may be necessary for the proper presentation and determination of the proceeding as reclassified [*Code Civ. Proc. § 403.070(b)*].

[vii] Appeal of Order to Grant or Deny Motion to Reclassify Proceeding

When an order is made by the superior court granting or denying a motion to reclassify a proceeding under *Code Civ. Proc. § 403.040* [*see § 333.13[3][c][i]*], the party aggrieved by the order may, within 20 days after service of a written notice of the order, petition the court of appeal for the district in which the court granting or denying the motion is situated for a writ of mandate requiring proper classification of the proceeding under *Code Civ. Proc. § 403.040* [*Code Civ. Proc. § 403.080*]. The superior court may, for good cause, and before the expiration of the initial 20-day period, extend the time for one additional period not to exceed 10 days. The petitioner must file a copy of the petition in the superior court immediately after the petition is filed in the court of appeal. The court of appeal may stay all proceedings in the case, pending judgment on the petition becoming final. The clerk of the court of appeal must file with the clerk of the superior court a copy of any final order or final judgment immediately after the order or judgment becomes final [*Code Civ. Proc. § 403.080*].

[d] Summons

On the complaint's filing, a summons must be issued [*Code Civ. Proc. § 1166(d)*]. The summons must be in the form specified in *Code Civ. Proc. § 412.20* (contents of summons in civil action), except that the defendant's time to respond to the complaint is five days (rather than 30 days), including Saturdays and Sundays but excluding all other judicial holidays, after the defendant has been served with the summons. If the last day for filing the response falls on a Saturday or Sunday, the response period is extended to and includes the next court day [*Code Civ. Proc. § 1167*; *see § 333.100* (Judicial Council form of summons for mandatory use in unlawful detainer proceedings)]. In all other regards, the summons is issued, served, and returned in the same manner as a summons in a civil action [*Code Civ. Proc. § 1167*; for full discussion, see Ch. 518, *Service of Summons and Papers*].

The requirement of *Code Civ. Proc. § 1167* that the defendant answer or otherwise plead to the complaint within five

days after the summons is served does not violate the due process or *equal protection clauses* of the federal or state constitutions (*U.S. Const., amend. XIV*; *Cal. Const., art. I, § 7*) [*Deal v. Municipal Court (1984) 157 Cal. App. 3d 991, 994, 998, 204 Cal. Rptr. 79]* .

However, because *Code Civ. Proc. § 1167* provides a response time of only five days, as contrasted to the 30 days normally allowed a defendant in a civil action [*see Code Civ. Proc. § 412.20(a)(3)*], service of a five days' summons on a complaint that fails to state a cause of action for unlawful detainer (or forcible entry or forcible detainer) is defective in illegally purporting to shorten the defendant's time to plead and hence does not give the court jurisdiction over the defendant [*see Greene v. Municipal Court (1975) 51 Cal. App. 3d 446, 451-452, 124 Cal. Rptr. 139* (unlawful detainer)]. Service of the summons in such a case would be subject to a motion to quash [*see § 333.20*].

[e] Access to Court Records

The clerk may allow access to records in any unlawful detainer action filed as a limited civil case, including the court file, index, and register of actions, only as follows [*Code Civ. Proc. § 1161.2(a)*]:

- To a party to the action, including a party's attorney;

- To any person who provides the clerk with the names of at least one plaintiff and one defendant and the address of the premises, including the apartment or unit number, if any;

- To a resident of the premises who provides the clerk with the name of one of the parties or the case number and shows proof of residency;

- To any person by order of the court, which may be granted ex parte, on a showing of good cause [*see Code Civ. Proc. § 1161.2(b)* (good cause includes, but is not limited to, gathering newsworthy facts)]; and

- To any other person 60 days after the complaint has been filed. However, if a defendant prevails in the action within 60 days of the filing of the complaint, the clerk may only allow access to the persons listed in the items above.

On the filing of a case so restricted, the clerk of the court must mail notice to each defendant named in the complaint at the address in the complaint. The contents of the notice are prescribed by statute. The notice does not constitute service of the summons and complaint [*Code Civ. Proc. § 1161.2(c)*].

The purpose of these restrictions is to prevent unscrupulous eviction defense services from searching court records and contacting defendants in newly filed unlawful detainer actions to offer fraudulent and erroneous advice regarding the attempted eviction [Stats. 1991, ch. 1007, § 1]. However, the fact the statute is directed at organizations that represent tenants does not mean it is inapplicable to organizations that represent landlords. Thus, a tenant screening company may not obtain a blanket order under *Code Civ. Proc. § 1161.2* allowing it access to all unlawful detainer filings [*U.D. Registry, Inc. v. Municipal Court (1996) 50 Cal. App. 4th 671, 675, 57 Cal. Rptr. 2d 788]* .

The restrictions do not apply to a case that seeks to terminate a mobilehome park tenancy if the statement of the proceeding's character in the caption of the complaint clearly indicates that the complaint seeks termination of a mobilehome park tenancy [*Code Civ. Proc. § 1161.2(e)*].

[4] Prejudgment Claim of Right to Possession

[a] Availability

In addition to serving the summons and complaint on a tenant or a subtenant, if any, a landlord may have a form of prejudgment claim of right to possession served on other adult occupants who are not named in the complaint [*see Code Civ. Proc. § 415.46(a), (b)*]. Service of the form cuts off the right of unnamed occupants to raise a postjudgment challenge in the unlawful detainer action; an occupant who is served with a summons, complaint, and prejudgment claim of right to possession has only a 10-day period after service in which to file his or her prejudgment claim and be added as a defendant in the action [*see Code Civ. Proc. § 1174.25(a), (b)*; *see also § 333.13[4][c]*]. After that period, the occupant may not object to enforcement of a resulting judgment for possession of the premises by any postjudgment proceeding [*see Code Civ. Proc. §§ 415.46(e), 715.020(d)*; *see also § 333.13[4][b][ii]*].

Although all occupants are not named as defendants, the judgment and the writ of possession will apply to all tenants, subtenants, if any, named claimants, if any, and any other occupants of the premises, and the levying officer will be empowered to remove the unnamed occupants from the property [*see Code Civ. Proc. §§ 715.010(b)(7)* (contents of writ), *715.020(c), (d)* (removal by levying officer)]. For discussion and forms relating to a writ of possession of real property generally, see Ch. 254, *Executions and Enforcement of Judgments* .

If the landlord does not have the unnamed occupants served with the form of prejudgment claim of right to possession, *Code Civ. Proc. § 1174.3* provides a postjudgment procedure by which an occupant not named in the judgment may stop his or her eviction by filing or presenting the levying officer with a claim of right to possession [*see Code Civ. Proc. § 1174.3(b), (c)*; *see also § 333.14[4][b]*].

[b] Service

[i] Requirements of Code Civ. Proc. § 415.46

Code Civ. Proc. § 415.46(a) authorizes service of the form of prejudgment claim of right to possession on "any person who appears to be or who may claim to have occupied the premises at the time of the filing of the action." This language makes it somewhat unclear whether service is authorized on all current occupants, on all persons who may have been occupants when the action was filed, or both. Read together with *Code Civ. Proc. § 415.46(c)* (discussed *below*), which directs the process server to serve any other identifiable adult occupants, whether present or absent, as well as all unidentified occupants who may claim to occupy the premises at the time the action was filed, it appears that *Code Civ. Proc. § 415.46(a)* is intended to authorize service on any person who appears to be occupying the premises or who may claim to have occupied the premises at the time of the filing of the action.

Service of the prejudgment claim of right to possession must be effected by a marshal, sheriff, or registered process server [*Code Civ. Proc. § 415.46(b)*]. Service must be made at the same time that service is made on the tenant or subtenant [*Code Civ. Proc. § 415.46(a)*].

When serving the summons and complaint on a tenant and subtenant, if any, the marshal, sheriff, or registered process server must make a reasonably diligent effort to ascertain whether there are other adult occupants of the premises who are not named in the summons and complaint by inquiring of the person or persons who are being personally served, or any other person of suitable age who appears to reside on the premises, whether there are other occupants of the premises [*Code Civ. Proc. § 415.46(c)*]. If the identity of such an occupant is disclosed to the officer or process server and the occupant is present at the premises, the officer or process server must serve that occupant with a copy of the prejudgment claim of right to possession attached to the summons and complaint. If personal service cannot be made on that occupant at that time, service may be effected by leaving a copy of a prejudgment claim of right to possession attached to a copy of the summons and complaint addressed to that occupant with a person of suitable age and discretion at the premises, affixing the same so that it is not readily removable in a conspicuous place on the premises in a manner most likely to give actual notice to that occupant, and sending a copy of the same addressed to that occupant by registered mail [*Code Civ. Proc. § 415.46(c)*]. The form prescribed is set forth in *Code Civ. Proc. § 415.46(f)* and is

reproduced in § 333.136.

In addition to the service on an identified occupant, or if no occupant is disclosed to the officer or process server, or if substituted service in accordance with *Code Civ. Proc. § 415.45* is made on the tenant and subtenant, the officer or process server must serve a prejudgment claim of right to possession for all other persons who may claim to occupy the premises at the time of the filing of the action by leaving and affixing a copy of a prejudgment claim of right to possession attached to a copy of the summons and complaint at the premises in the same manner as set forth above, and sending the same addressed to "all occupants in care of the named tenant" by first-class mail [*Code Civ. Proc. § 415.46(c)*].

The person serving process must also state the date of service on the form of prejudgment claim of right to possession. The absence of the date of service on the form, however, does not invalidate the claim [*Code Civ. Proc. § 415.46(c)*; for discussion of the time for filing the claim, *see § 333.13[4][c]*].

Proof of service must be filed with the court and must include a statement that service was made in accordance with *Code Civ. Proc. § 415.46*. Service on occupants does not alter or affect service on the tenant or subtenant [*Code Civ. Proc. § 415.46(d)*].

[ii] Effect of Service

If an owner or his or her agent has directed and obtained service of a prejudgment claim of right to possession in accordance with *Code Civ. Proc. § 415.46*, no occupant of the premises, whether or not named in the judgment for possession, may object to the enforcement of the judgment under the provisions of *Code Civ. Proc. § 1174.3* in any post judgment proceeding (discussed at *§ 333.14[4][b]*) [*Code Civ. Proc. §§ 415.46(e), 715.020(d)*].

[c] Filing of Claim by Occupant

[i] Requirements of Code Civ. Proc. § 1174.25

Any occupant who is served with a prejudgment claim of right to possession may file a claim with the court within 10 days of the date of service of the prejudgment claim to right of possession as shown on the return of service. The 10-day period includes Saturday and Sunday, but excludes all other judicial holidays. If the last day for filing the claim falls on a Saturday or Sunday, the filing period is extended up to and including the next court day [*Code Civ. Proc. § 1174.25(a)*].

Filing the prejudgment claim to right of possession constitutes a general appearance for which a fee is collected [*Code Civ. Proc. § 1174.25(a)*; *see Gov. Code § 70614*].

For a form of prejudgment claim of right to possession, see *§ 333.105*.

[ii] Effect of Filing Claim

At the time of filing, the claimant will be added as a defendant in the unlawful detainer action. The clerk must notify the plaintiff that the claimant has been added as a defendant by mailing a copy of the claim filed with the court to the plaintiff with a notation so indicating [*Code Civ. Proc. § 1174.25(b)*]. The claimant must answer or otherwise respond to the summons and complaint within five days, including Saturdays and Sundays but excluding all other judicial holidays, after filing the prejudgment claim of possession. Thereafter, the name of the claimant must be added to any pleading, filing, or form filed in the unlawful detainer action [*Code Civ. Proc. § 1174.25(b)*].

PRACTICE TIP:

Examine Court Records. It is wise to examine the court file shortly after the 10 day period as clerks

often do not fulfill their function. *By Benjamin Kaplan*

[5] Immediate Possession

[a] Motion Required for Immediate Possession

On filing the complaint, the plaintiff may, on motion, have immediate possession of the property or premises by a writ of possession issued by the court and directed to the sheriff of the county, or to the constable or marshal, for execution when it appears to the satisfaction of the court, after a hearing on the motion, from the verified complaint and from any affidavits (or declarations under *Code Civ. Proc. § 2015.5*) filed or oral testimony given by or on behalf of the parties, that the defendant [*Code Civ. Proc. § 1166a(a)*; *see §§ 333.101, 333.102* (forms and discussion of application and order that summons be served by posting premises)]:

- Resides out of state;
- Has departed from the state;
- Cannot, after due diligence, be found within the state; or
- Has concealed himself or herself to avoid service of the summons.

[b] Requirement to File Undertaking

The plaintiff must file an undertaking in such sum as must be fixed and determined by the judge, to the effect that, if the plaintiff fails to recover judgment against the defendant for the possession of the premises or if the suit is dismissed, the plaintiff will pay the defendant such damages, not to exceed the amount fixed in the undertaking, as may be sustained by the defendant by reason of the dispossession under the writ of possession [*Code Civ. Proc. § 1166a(c)*].

[c] Order for Immediate Possession

If, at the hearing on the motion, the court finds in favor of the plaintiff and against the defendant, an order must be entered for the immediate possession of the premises [*Code Civ. Proc. § 1166a(d)*]. The order may be enforced as provided in *Code Civ. Proc. § 712.010 et seq.* (relating to enforcing nonmoney judgments) [*Code Civ. Proc. § 1166a(e)*; for discussion, a procedural checklist, and forms, *see* Ch. 254, *Executions and Enforcement of Judgments*]. For purposes of *Code Civ. Proc. § 1166a*, references in *Code Civ. Proc. § 712.010 et seq.* and in *Code Civ. Proc. § 1174(e)-(m)* [*see § 333.14[8]*] to the "judgment debtor" will be deemed references to the defendant, to the "judgment creditor" will be deemed references to the plaintiff, and to the "judgment of possession or sale of property" will be deemed references to an order for the immediate possession of the premises [*Code Civ. Proc. § 1166a(f)*].

[d] Purpose of Code Civ. Proc. § 1166a

The purpose of *Code Civ. Proc. § 1166a*, authorizing the writ of possession in an unlawful detainer proceeding, is to afford the lessor immediate possession of the premises unlawfully detained. The possession so given vests full and complete control of the premises in the lessor; the lessee is thereby evicted and his or her liability for rent under the lease is terminated from that date forward if the action thereafter results in a termination of the lease without any resumption of possession by the lessee [*Garfinkle v. Montgomery (1952) 113 Cal. App. 2d 149, 155, 248 P.2d 52]* .

[6] Provisional Remedies

[a] Attachment

The provisional remedy of attachment [*Code Civ. Proc. § 481.010 et seq.*] is available in an unlawful detainer proceeding [*see Code Civ. Proc. § 1177*]. The amount that may be secured by an attachment is set forth in *Code Civ. Proc. § 483.020*. However, an attachment may not be issued on a claim against a defendant who is a natural person if the claim is based on the sale or lease of property and the property sold or leased was used by the defendant primarily for personal, family, or household purposes [*see Code Civ. Proc. § 483.010(c)*]. For a discussion and forms relating to attachment, see Ch. 62, *Attachment* .

[b] Receivership

In superior court a receiver may be appointed by the court in which an action or proceeding is pending, or by a judge thereof, in "an action of unlawful detainer" [*Code Civ. Proc. § 564(b)(7)*]. The court may also appoint a receiver in accordance with *Code Civ. Proc. § 564* in limited civil cases [*Code Civ. Proc. § 86(a)(8)*]. For discussion, procedural guides, and forms relating to receivers, see Ch. 486, *Receivers* .

[7] Joinder With Other Claims

Generally, an unlawful detainer proceeding may not be tried with other causes, except perhaps by mutual consent of the parties because, otherwise, the purpose of the summary procedure, to afford an expeditious and adequate remedy for obtaining possession of premises wrongfully withheld by tenants, would be entirely frustrated [*Childs v. Eltinge (1973) 29 Cal. App. 3d 843, 852-853, 105 Cal. Rptr. 864]* .

[8] Discovery

Discovery is permitted in all unlawful detainer actions and might be especially worthwhile in a commercial case, depending on the amount at stake in the litigation. Counsel representing plaintiffs in residential unlawful detainer proceedings should be sure to note whether the defendant has raised as an affirmative defense a breach of the landlord's obligations under *Civ. Code § 1941* or of any warranty of habitability. If so, discovery should be conducted so as to avoid any surprises at trial [*see Code Civ. Proc. § 1174.2*]. Note that *Code Civ. Proc. § 1170.5*, which requires trials of unlawful detainer actions within 20 days of the action being at issue, usually requires a party seeking extensive discovery to obtain an extension of the trial date.

PRACTICE TIP:

Conducting Discovery in Unlawful Detainer Actions. Generally, carefully drafted requests for admission and interrogatories should be sufficient discovery in most uncomplicated residential unlawful detainer actions. In addition, the quick service of a set of form interrogatories is often productive when done early in an action. *By Myron Moskovitz and Benjamin Kaplan*

Notice of a motion for summary judgment must be given in compliance with *Code Civ. Proc. §§ 1013* and *1170.8* [*Cal. Rules of Ct., Rule 3.1351(a)* (effective 1/1/09)]. Any opposition to the motion and any reply to an opposition may be made orally at the time of hearing or in writing [*Cal. Rules of Ct., Rule 3.1351(b)* (effective 1/1/09)]. If a party seeks to have a written opposition considered before the hearing, the written opposition must be served and filed on or before the court day before the hearing. Service must be by personal delivery, facsimile transmission, express mail, or other means consistent with *Code Civ. Proc. §§ 1010, 1011, 1012,* and *1013*, and reasonably calculated to ensure delivery to the other party or parties no later than the close of business on the court day before the hearing. The court, in its discretion, may consider written opposition filed later [*Cal. Rules of Ct., Rule 3.1351(c)* (effective 1/1/09)].

[9] Motion for Summary Judgment

A motion for summary judgment may be made at any time after the answer is filed; five days' notice is required. Summary judgment must be granted and denied on the same basis as a motion under *Code Civ. Proc. § 437c* [*Code Civ. Proc. § 1170.7*; *see Code Civ. Proc. § 1177* (application of provisions of Part Two of Code of Civil Procedure, which

includes *Code Civ. Proc. § 437c*, to unlawful detainer proceedings)]. Notice of a discovery motion must be given in compliance with *Code Civ. Proc. §§ 1013* and *1170.7* [*Cal. Rules of Ct., Rule 3.1347(a)* (effective 1/1/09)]. Any opposition to the motion and any reply to an opposition may be made orally at the time of hearing or in writing [*Cal. Rules of Ct., Rule 3.1347(b)* (effective 1/1/09)]. If a party seeks to have a written opposition considered before the hearing, the written opposition must be served and filed on or before the court day before the hearing. Service must be by personal delivery, facsimile transmission, express mail, or other means consistent with *Code Civ. Proc. §§ 1010, 1011, 1012,* and *1013,* and reasonably calculated to ensure delivery to the other party or parties no later than the close of business on the court day before the hearing. The court, in its discretion, may consider written opposition filed later [*Cal. Rules of Ct., Rule 3.1347(c)* (effective 1/1/09)]. For discussion, a procedural checklist, and forms for use in moving for summary judgment that may be adapted for use in an unlawful detainer proceeding, see Ch. 537, *Summary Judgment* .

[10] Right to Jury Trial

Whenever an issue of fact is presented by the pleadings in an unlawful detainer (or forcible entry or forcible detainer) proceeding, it must be tried by a jury, unless the right to a jury trial is waived as in other cases [*Code Civ. Proc. § 1171*; *see Department of Transportation v. Kerrigan (1984) 153 Cal. App. 3d Supp. 41, 200 Cal. Rptr. 865* (defenses of breach of warranty of habitability and retaliatory eviction as legal defenses to which right to trial by jury applies)]. The jury must be formed in the same manner as other trial juries in the court in which the proceeding is pending [*Code Civ. Proc. § 1171*].

In unlawful detainer proceedings, the jury fees must be deposited five days before the date set for trial [*Code Civ. Proc. § 631(b)*].

For a general discussion of a jury's formation, the right to and waiver of jury trial, and forms for demanding or waiving trial by jury, see Ch. 322, *Juries and Jury Selection* .

[11] Calendar Precedence

Code Civ. Proc. § 1170.5(a) requires trials of unlawful detainer actions to be held within 20 days of cases being at issue. The court in which a proceeding for unlawful detainer is pending must give the proceeding precedence over all other civil actions, except actions to which special precedence is given by law, in setting it for hearing or trial, and hearing it, to the end that all such proceedings must be quickly heard and determined [*Code Civ. Proc. § 1179a*; *see Fish Construction Co. v. Moselle Coach Works, Inc. (1983) 148 Cal. App. 3d 654, 658, 196 Cal. Rptr. 174]* . Nothing in *Code Civ. Proc. § 1170.5*, relating to time for trial and continuances [*see* [12], *below*] is to be construed to abrogate or interfere with the precedence given by *Penal Code § 1050* to the trial of criminal cases over the trial of civil matters [*Code Civ. Proc. § 1170.5(i)*]. For further discussion and forms for use in establishing the precedence of a case, see Ch. 425, *Pretrial Proceedings* .

[12] Trial

[a] Notice of Trial

Before trial may be had of an issue of fact in the absence of the adverse party, proof must be made to the satisfaction of the court that the adverse party had five days' notice of trial in an unlawful detainer proceeding [*Code Civ. Proc. §§ 594(a), 1177*]. For a discussion of the notice of trial requirement and a form of notice of trial, see Ch. 551, *Trial* .

After the case is at issue and when the case has been set for trial, a copy of the notice of trial must be served on the adverse party at least 10 days before the date set for trial [*see Code Civ. Proc. § 594(b)*]. Either party may serve the required notice of trial on the other party [*see Code Civ. Proc. § 594*; for further discussion and a form of notice, *see* Ch. 551, *Trial*].

PRACTICE TIP:

Waiver of Notice of Trial. Any waiver of notice of trial should be placed in evidential form. *By Benjamin Kaplan*

[b] Period for Trial

If the defendant appears in an unlawful detainer proceeding under *Code Civ. Proc. § 1170* (appearance by answer or demurrer), trial of the proceeding must be held not later than the 20th day following the date the request to set the time of trial is made, unless time is extended by the court on the agreement of all parties [*Code Civ. Proc. § 1170.5(a), (b)*; *see* [c] and [d], *below*]. However, if the proceeding is to evict an employee from employee housing accommodations and the answer contains specified allegations, the trial must be set not earlier than 30 days from the date the answer is filed [*see Health & Safety Code § 17031.6(b)*]. For procedures and forms for use in having a case set for trial, see Ch. 425, *Pretrial Proceedings* .

[c] Extension of Period for Trial

The court may extend the period for trial on the agreement of all of the parties, but no other extension may be granted unless the court on its own motion or the motion of a party holds a hearing and renders a decision as specified in *Code Civ. Proc. § 1170.5(c)* [*Code Civ. Proc. § 1170.5(b)*].

[d] Procedure if Trial Is Not Held Within Time Specified

If trial is not held within the time specified in *Code Civ. Proc. § 1170.5*, the court on its own motion or the motion of a party, on finding that there is a reasonable probability that the plaintiff will prevail in the proceeding, must determine the amount of damages, if any, to be suffered by the plaintiff by reason of the extension, and must issue an order requiring the defendant to pay that amount into court as the rent would have otherwise become due and payable or into an escrow designated by the court for so long as the defendant remains in possession pending the termination of the proceeding [*Code Civ. Proc. § 1170.5(b), (c)*; *see Medford v. Superior Court (1983) 140 Cal. App. 3d 236, 241, 189 Cal. Rptr. 227* (statute does not authorize trial court to require deposit of past rent or damages as condition of granting continuance)]. When payments into court or the escrow designated by the court are made in accordance with *Code Civ. Proc. § 1170.5*, the court may order that the payments be invested in an insured interest-bearing account [*Code Civ. Proc. § 1170.5(g)*]. Any cost for administering the escrow account is recoverable by the prevailing party as part of recoverable costs [*Code Civ. Proc. § 1170.5(e)*].

The determination of the amount of the payment must be based on the plaintiff's verified statement of the contract rent for rental payment, and verified objection to it filed by the defendant, and the oral or demonstrative evidence presented at the hearing. The court's determination of the amount of damages must include consideration of any evidence, presented by the parties, embracing the issue of diminution of value or of any setoff permitted by law [*Code Civ. Proc. § 1170.5(c)*]. If the defendant fails to make a payment ordered by the court, trial of the proceeding must be held within 15 days of the date payment was due [*Code Civ. Proc. § 1170.5(d)*].

After trial, the court must determine the distribution of the payment made into court or the escrow designated by the court [*Code Civ. Proc. § 1170.5(f)*]. If the payments have been invested in an insured, interest-bearing account, interest on the account must be allocated to the parties in the same proportions as the original funds are allocated [*Code Civ. Proc. § 1170.5(g)*].

[e] Amendment of Complaint on Trial

When it appears from evidence introduced at trial that the defendant has been guilty of an unlawful detainer other than that charged in the complaint, the judge must order that the complaint be amended to conform to proof. The amendment must be made without any imposition of terms [*Code Civ. Proc. § 1173*]. Under *Code Civ. Proc. § 1173* and *Code Civ.*

Proc. §§ 469 and *470*, which permit amendment of pleadings to conform to proof, and *Code Civ. Proc. § 473*, first paragraph, which permits correction of mistakes in pleadings, pleadings in unlawful detainer may be amended to conform to proof and mistakes may be corrected before or after judgment [*Babcock v. Antis (1979) 94 Cal. App. 3d 823, 830, 156 Cal. Rptr. 673* (holding that a mere demand for daily damages or for other generalized damages in unenumerated amounts, which could be interpreted as potentially escalating the amount of the demand above the municipal court's jurisdiction, is correctable by amendment to conform to proof); *see Code Civ. Proc. § 1177* generally incorporating into unlawful detainer proceedings the provisions of Part Two of the Code of Civil Procedure, which include Code Civ. Proc. §§ 467, *470*, and *473*].

PRACTICE TIP:

Amending Complaint. However, counsel should keep in mind that there is no possibility of amending a complaint to introduce a notice first served after the complaint has been filed. *By Benjamin Kaplan*

No continuance will be permitted on account of the amendment unless the defendant, by affidavit (or declaration under *Code Civ. Proc. § 2015.5*) filed, shows to the satisfaction of the court good cause for the continuance [*Code Civ. Proc. § 1173*].

[13] Judgment

[a] Entry

Judgment must be entered on the trial [*Code Civ. Proc. § 1170.5(a)*]. If required by the court, the judgment must be prepared [*see Code Civ. Proc.§§ 1170.5(a), 1174, 1174.2*; *see also §§ 333.130* (Judicial Council form of judgment), *333.131* (Judicial Council attachment to judgment when tenant's defense that plaintiff breached covenant to provide habitable premises is sustained), *333.131B* (Judicial Council stipulated judgment form)].

PRACTICE TIP:

Preparation of Judgment. In superior court actions and proceedings, the judgment is normally prepared by the prevailing party. *By Myron Moskovitz*

For further discussion of judgments, see Ch. 318, *Judgments* .

[b] Against Guilty Parties; Effect on Nonparties

When it appears that any of the parties served with process or appearing in the proceeding are guilty of the offense charged, judgment must be rendered against that party [*Code Civ. Proc. § 1164*]. Conversely, a judgment may not be entered against one not a party to or appearing in the proceeding [*Fifth & Broadway Partnership v. Kimny, Inc. (1980) 102 Cal. App. 3d 195, 199, 162 Cal. Rptr. 271* ; for the postjudgment procedure for securing an order evicting a tenant who was not named, *see § 333.14[4]*]. However, all persons who entered the premises under the tenant after the suit was commenced are bound by the judgment the same as if they had been made parties to the proceeding [*Code Civ. Proc. § 1164*].

[c] For Possession of Premises

If the jury's verdict or the court's findings are for the plaintiff, judgment must be entered for possession of the premises [*Code Civ. Proc. § 1174(a)*]. However, in an unlawful detainer proceeding by a petroleum distributor against a gasoline dealer, possession must not be restored to the petroleum distributor, except as provided in *Code Civ. Proc. § 1166a* [*see* [5], *above*], unless the court determines that the petroleum distributor had good cause under *Bus. & Prof. Code § 20999.1* (setting forth grounds) to terminate, cancel, or refuse to renew the gasoline dealer's franchise [*Code Civ. Proc. § 1174(a)*; *see E. S. Bills, Inc. v. Tzucanow (1985) 38 Cal. 3d 824, 826-827, 215 Cal. Rptr. 278, 700 P.2d 1280]* . Good cause to terminate a lease under *Bus. & Prof. Code § 20999.1* is a question of fact and must be tried on its merits [

Ernst Enterprises, Inc., v. Sun Valley Gasoline, Inc. (1983) 139 Cal. App. 3d 355, 358-359, 188 Cal. Rptr. 641] . For a discussion of the termination or nonrenewal of petroleum products franchises, see Ch. 515, *Securities and Franchise Regulation* .

[d] Forfeiting Lease

If the proceeding is for an unlawful detainer after the tenant's neglect or failure to perform the conditions or covenants of the lease or agreement under which the property is held, or after default in the payment of rent, the judgment for plaintiff must also declare the lease or agreement forfeited if the notice required by *Code Civ. Proc. § 1161* [*see § 333.10[2][d], [e]*; *see also §§ 332.74 -332.76*] states the landlord's election to declare the forfeiture [*Code Civ. Proc. § 1174(a)*; *see Saberi v. Bakhtiari (1985) 169 Cal. App. 3d 509, 515, 215 Cal. Rptr. 359* ; *see also § 333.10[4]*]. However, if the notice does not so state, the lease or agreement will not be forfeited [*Code Civ. Proc. § 1174(a)*; *see § 333.10[5]*].

A judgment declaring the lease or agreement forfeited does not relieve the lessee from liability under *Civ. Code § 1951.2* (damages resulting from termination of lease because of lessee's breach of lease and abandonment of property) [*Code Civ. Proc. § 1174.5*].

[e] For Damages and Rent

[i] Assessment

The jury or court, as the case may be, must (1) assess the damages suffered by the plaintiff by the unlawful detainer, and (2) if the unlawful detainer be "after default" in the payment of rent, find the amount of any rent due [*Code Civ. Proc. § 1174(b)*; *see Saberi v. Bakhtiari (1985) 169 Cal. App. 3d 509, 515, 215 Cal. Rptr. 359* (holding that "after" in term "after default," means "based on")].

For the method of determining the *tenant's* damages for the landlord's breach of the warranty of habitability of a residence, see *§ 333.28[4][d]*.

[ii] "Rent Found Due" and "Damages" Defined

Rent found due is the amount of rent due and unpaid under the lease or tenancy before expiration of the three-day notice demanding payment of unpaid rent or possession. Damages include the reasonable rental value of the property for the period that the tenant continues in possession after termination of the period prescribed in the notice [*see Markham v. Fralick (1934) 2 Cal. 2d 221, 226, 39 P.2d 804* ; *Medford v. Superior Court (1983) 140 Cal. App. 3d 236, 238 n.1, 189 Cal. Rptr. 227* ; *see also Roberts v. Redlich (1952) 111 Cal. App. 2d 566, 569, 244 P.2d 933]* .

Damages are calculated according to the reasonable value of the use of the premises during the time of the unlawful detainer [*Glouberman v. Coffey (1955) 138 Cal. App. 2d Supp. 906, 907 , 292 P.2d 681]* . The amount agreed on between the parties as rent is evidence of the rental value of the property. However, since the proceeding is not an action on a contract but, rather, one for the recovery of possession and, incidentally, for the damages occasioned by the unlawful detainer, the rental value may be greater or less than the rent provided for in the lease or rental agreement [*see Harris v. Bissell (1921) 54 Cal. App. 307, 312-313, 202 P. 453* ; *Lehr v. Crosby (1981) 123 Cal. App. 3d Supp. 1, 8-9, 177 Cal. Rptr. 96]* . However, any amount of daily rental for continued unlawful occupancy by the defendant *after* judgment is not properly included in the judgment [*Pfitzer v. Candeias (1921) 53 Cal. App. 737, 741, 200 P. 839* ; *Lehr v. Crosby (1981) 123 Cal. App. 3d Supp. 1, 177 Cal. Rptr. 96]* .

Because the amount recoverable is damages, it is not limited by local rent control regulations controlling the amount of rent payable [*Adler v. Elphick (1986) 184 Cal. App. 3d 642, 649-650, 229 Cal. Rptr. 254]* .

Damages may also include those resulting from any circumstances of fraud, force, or violence that may have accompanied the alleged unlawful detainer [*Code Civ. Proc. § 1166(b)*].

[iii] When Three-Day Notice Estimated Rent Due for Commercial Real Property

With regard to commercial real property, if the amount stated in the notice provided to the tenant under *Code Civ. Proc. § 1161(2)* [*see § 333.10[2][d]*] is clearly identified by the notice as an estimate and the amount claimed is not in fact correct, but it is determined at the trial or by other judicial determination that rent was owing and the amount claimed in the notice was reasonably estimated, the tenant will be subject to a judgment for possession and the actual amount of rent and other sums found to be due [*Code Civ. Proc. § 1161.1(a)*].

If on receiving a notice claiming an estimated amount, however, the tenant tenders to the landlord within the time required by the notice for payment an amount that the tenant reasonably estimates to be due, and it is determined at trial that the amount of rent due was the amount tendered by the tenant or a lesser amount, the tenant is deemed the prevailing party for all purposes. If the court determines that the amount tendered by the tenant was less than the amount due, but was reasonably estimated nevertheless, the tenant will retain the right to possession if, within five days of the effective date of the judgment, he or she pays the landlord the amount previously tendered if it was not previously accepted, the difference between the amount tendered and the amount determined by the court to be due, and any other sums as ordered by the court [*Code Civ. Proc. § 1161.1(a)*].

There is a presumption affecting the burden of proof that the amount of rent claimed or tendered is reasonably estimated if, in relation to the amount determined to be due at the trial or by other judicial determination of that issue, the amount claimed or tendered was no more than 20 percent more or less than the amount determined to be due. However, if the rent due is contingent on information primarily within the knowledge of one party to the lease and that information has not been furnished to, or has not accurately been furnished to the other party, the court will consider that fact in determining the reasonableness of the amount of rent claimed or tendered [*Code Civ. Proc. § 1161.1(e)*].

The term "commercial real property" means all real property in California except mobilehomes [*see Civ. Code § 798.3* ("mobilehome" defined)], recreational vehicles [*see Civ. Code § 799.24* ("recreational vehicle" defined)], or dwelling units subject to *Civ. Code § 1940 et seq.* [*Code Civ. Proc. § 1161.1(d)*].

[iv] When Unpaid Rent May Not Be Recovered in Unlawful Detainer Proceeding

Pretermination rent (that is, rent accruing before termination of the period specified in the notice to quit) may be recovered in an unlawful detainer proceeding only when the landlord's right to possession is founded on the tenant's failure to pay rent following service of a three-day notice to pay rent or quit the premises under *Code Civ. Proc. § 1161(2)* (*discussed under § 333.10[2][d]*) [*Saberi v. Bakhtiari (1985) 169 Cal. App. 3d 509, 513, 215 Cal. Rptr. 359]* . Pretermination rent may not be recovered in an unlawful detainer proceeding based on a 30-day notice to quit under *Civ. Code § 1946* or on a notice to quit based on the violation of a covenant in the lease other than for the payment of rent [*see Saberi v. Bakhtiari (1985) 169 Cal. App. 3d 509, 512-516, 215 Cal. Rptr. 359* ; *Harris v. Bissell (1921) 54 Cal. App. 307, 313-314, 202 P. 453* ; *Castle Park No. 5 v. Katherine (1979) 91 Cal. App. 3d Supp. 6, 154 Cal. Rptr. 498]* .

However, if the unlawful detainer consists of a tenant's holding over after expiration of a three-day notice under *Code Civ. Proc. § 1161(3)* to perform covenants to pay certain costs and expenses for maintaining the property, which were treated differently than rent in the lease, or to quit the premises, the amounts required to be paid are not rent within the meaning of the unlawful detainer statutes and may be recovered in the unlawful detainer proceeding [*see Cal-American Income Property Fund IV v. Ho (1984) 161 Cal. App. 3d 583, 585-586, 207 Cal. Rptr. 532* (unpaid taxes assessed against demised premises and proportionate share of costs of maintaining common areas)].

[f] Prejudgment Interest

Plaintiff is entitled to prejudgment interest on the past due rent that is certain and fixed in amount at the legal rate from the date each installment became due [*Sullivan v. Wellborn (1948) 32 Cal. 2d 214, 220, 195 P.2d 787* ; *see Code Civ. Proc. § 1174(c)*; *see also Civ. Code §§ 3287, 3302*].

Prejudgment interest is not normally recoverable on an award based on the reasonable rental value of the property [*Stockton Morris Plan Co. v. Carpenter (1936) 18 Cal. App. 2d 205, 213-214, 63 P.2d 859]* . For when interest may be recovered in an action or proceeding, see generally *Civ. Code §§ 3287-3289.5*.

[g] Statutory Damages

If malice is shown, the plaintiff may be awarded statutory damages of up to $600, in addition to actual damages, including rent found due. The trier of fact is required to determine whether actual damages, statutory damages, or both must be awarded, and judgment must be entered accordingly [*Code Civ. Proc. § 1174(b)*].

Under the law in effect before January 1, 1994, treble damages for malice were properly awarded if malice was pleaded and proved, but it must have also been established that defendant (1) willfully, deliberately, intentionally, and obstinately withheld possession of the property (2) with knowledge that the lease has terminated and (3) against the landlord's will [*Sasson v. Katash (1983) 146 Cal. App. 3d 119, 126, 194 Cal. Rptr. 46* (affirming judgment awarding plaintiff $26,333.36 damages and $40,166.64 punitive damages for a total of $66,500); *Fifth & Broadway Partnership v. Kimny, Inc. (1980) 102 Cal. App. 3d 195, 204-205, 162 Cal. Rptr. 271* (affirming judgment awarding plaintiff treble damages)].

[h] Interest on Judgment

A plaintiff who obtains a judgment in his or her favor is entitled to interest on the verdict or decision of the court from the time it is rendered or made [*see Code Civ. Proc. § 1177*; *Cal. Rules of Ct., Rule 3.1802*; *see also* Ch. 318, *Judgments*].

[i] When Unpaid Rent Can Be Recovered in Unlawful Detainer Proceedings

Any judgment for damages and the rent found due under *Code Civ. Proc. § 1174* is a mere incident to the main object of the proceeding, which is the recovery of possession of the premises [*Gray v. Whitmore (1971) 17 Cal. App. 3d 1, 18, 27, 94 Cal. Rptr. 904]* . Hence, notwithstanding use of the word "shall" in *Code Civ. Proc. § 1174(b)*, stating that the jury or court "shall" assess the damages [*see § 333.13[13][e][i]*], it has been held that the lessor is not required to litigate the issue of rental damages in the unlawful detainer proceeding, as that could delay and frustrate the primary purpose of that proceeding, which is to obtain speedy possession of the property, but may seek its recovery in a separate civil action [*Northrop Corp. v. Chaparral Energy, Inc. (1985) 168 Cal. App. 3d 725, 729-730, 214 Cal. Rptr. 173* (at time judgment for possession of property was entered in unlawful detainer proceeding, civil action was pending between parties involving issues of rent and damages for lessee's failure to surrender possession of industrial property after notice of termination of lease)].

In addition, *Civ. Code § 1952(b)* provides that unless the lessor amends the complaint as provided in *Code Civ. Proc. § 1952.3(a)(1)* [*see § 333.30*], to state a claim for damages not recoverable in the unlawful detainer proceeding, the bringing of such a proceeding does not affect the lessor's right to bring a separate action for relief under *Civ. Code § 1951.2* (damages recoverable on termination of lease because of lessee's abandonment of property), *Civ. Code § 1951.5* (contract provisions for liquidated damages), and *Civ. Code § 1951.8* (lessor's right to any appropriate equitable relief) [*see Northrop Corp. v. Chaparral Energy, Inc. (1985) 168 Cal. App. 3d 725, 729, 214 Cal. Rptr. 173]* . However, no damages may be recovered in the subsequent action for any detriment for which a claim for damages was made and

determined on the merits in the unlawful detainer proceeding [*Civ. Code § 1952(b)*].

[j] Attorney's Fees

Claims for entitlement to attorney's fees can both impede and accelerate settlements. Attorney's fees are only recoverable if authorized by statute or contract. If a lease calls for the prevailing party to recover attorney's fees and costs incurred, this claim should be included in the memorandum of costs filed by the prevailing party following judgment. The prevailing party is either defined in a written agreement signed by the parties or determined by the trier of fact.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionAmount in ControversyCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsLimited JurisdictionCivil ProcedureVenueIndividual DefendantsCivil ProceduresPleading & PracticePleadingsComplaintsRequirementsReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawLandlord & TenantTenant's Remedies & RightsPossession of Premises

California Forms of Pleading and Practice--Annotated

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Chapter 333 LANDLORD AND TENANT: EVICTION ACTIONS
PART II. LEGAL BACKGROUND
A. Evicting a Tenant

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§ 333.14 Postjudgment Proceedings

[1] New Trial

[a] Governing Law

The provisions of Part Two of the Code of Civil Procedure relating to new trials in civil actions, except insofar as they are inconsistent with the provisions of *Code Civ. Proc. §§ 1159-1179a* or with rules adopted by the Judicial Council, apply to proceedings for unlawful detainer (and forcible entry and forcible detainer) [*Code Civ. Proc. § 1178*].

The provisions governing new trials in Part Two are *Code Civ. Proc. §§ 655-663.2*. For a discussion of these provisions, a procedural checklist, and forms for use in moving the court for an order granting a new trial or vacating the judgment and entering another and different judgment, see Ch. 371, *Motions After Trial* .

[b] Hardship Cases and Applications to Relieve Tenants Against Forfeiture of Lease or Rental Agreement

In cases of hardship, the court may relieve a tenant against a forfeiture of a lease or rental agreement, whether written or oral and whether or not the tenancy has terminated, and restore the tenant to his or her former estate [*Code Civ. Proc. § 1179*; *see Childs v. Eltinge (1973) 29 Cal. App. 3d 843, 852 n.8, 105 Cal. Rptr. 864]* . The court has the discretion to relieve any person against forfeiture on its own motion [*Code Civ. Proc. § 1179*].

An application for relief against forfeiture may be made at any time before restoration of the premises to the landlord [*Code Civ. Proc. § 1179*]. The application may be made by a tenant or subtenant, or a mortgagee of the term, or any person interested in the term's continuance. The application must be made by petition, setting forth the facts on which the relief is sought, and must be verified by the applicant. Notice of the application, with a copy of the petition, must be served at least five days before the hearing on the plaintiff in the judgment, who may appear and contest the application [*Code Civ. Proc. § 1179*]. Alternatively, a person appearing without an attorney may make the application orally, if the plaintiff either is present and has an opportunity to contest the application, or has been given ex parte notice of the hearing and the purpose of the oral application. In no case may the application or motion be granted except on condition that full payment of rent due, or full performance of conditions or covenants stipulated, so far as practicable, be made [

Code Civ. Proc. § 1179; *see Hignell v. Gebala (1949) 90 Cal. App. 2d 61, 70-71, 202 P.2d 378]* .

[c] Writ of Execution to Enforce Judgment

If the judgment after trial is for plaintiff, a writ "of execution" [sic, writ of possession; *see Code Civ. Proc. §§ 712.010-712.070, 715.010-715.040, 1174(d)*] must be issued immediately by the court on plaintiff's request [*Code Civ. Proc. § 1170.5(a)*]. However, if (1) the proceeding is for an unlawful detainer after default in the payment of rent, (2) the lease or agreement under which the rent is payable has not by its terms expired, and (3) the notice required by *Code Civ. Proc. § 1161* has not stated the landlord's election to declare a forfeiture, the court may, and if the lease or agreement is in writing, is for a term of more than one year and does not contain a forfeiture clause, must order that a writ will not be issued to enforce the judgment until the expiration of five days after the entry of judgment [*Code Civ. Proc. § 1174(c)*]. The orders referred to in *Code Civ. Proc. § 1174(c)* need not be stated in the judgment, however, because the statute merely regulates the time that execution on the judgment may issue and does not affect the contents of the judgment [*Bloomquist v. Haley (1928) 204 Cal. 251, 253, 268 P. 367]* .

Within the five-day period, the tenant, or any subtenant, or any mortgagee of the term, or any other party interested in its continuance, may pay into the court for the landlord (1) the amount found due as rent, with interest; (2) the amount of the damages found by the jury or court for the unlawful detainer; and (3) the costs of the proceedings, and thereon the judgment must be satisfied and the tenant restored to the tenant's estate. If payment is not made within five days, the judgment may be enforced for its full amount and for the possession of the premises [*Code Civ. Proc. § 1174(c)*].

Subject to the above provisions, the judgment for possession may be enforced as provided in *Code Civ. Proc. §§ 712.010-717.010* (relating to enforcing nonmoney judgments) [*Code Civ. Proc. § 1174(d)*].

[d] Balancing of Equities Required

The mere fact that a hardship exists, however [*see* [b], *above*], will not automatically be a basis on which to set aside the forfeiture, since hardship will exist in almost all cases if relief is not granted. Rather, the test in applying the statute involves a balancing of the equities. In balancing the equities, the court should take into consideration the circumstances of the case, any hardship to the lessee from the forfeiture, any hardship to the lessor from relieving the lessee from the forfeiture, and the willful or other character of the breach causing the forfeiture, and then use its best discretion in determining whether relief will be granted [*Thrifty Oil Co. v. Batarse (1985) 174 Cal. App. 3d 770, 777-778, 220 Cal. Rptr. 285* (enumerating factors to be considered by trial court when forfeiture results from lessee's having sublet commercial premises without having sought lessor's consent as required by lease)].

[2] Appeals

[a] Governing Law

The provisions of Part Two of the Code of Civil Procedure relating to appeals [*Code Civ. Proc. §§ 901-936.1*], except insofar as they are inconsistent with the provisions of *Code Civ. Proc. §§ 1159-1179a* or with rules adopted by the Judicial Council, apply to proceedings for unlawful detainer (and forcible entry and forcible detainer) [*Code Civ. Proc. § 1178*]. Because *Code Civ. Proc. §§ 901-936.1* would apply without *Code Civ. Proc. § 1178* by virtue of *Code Civ. Proc. § 901* which expressly makes those provisions applicable to both civil actions and proceedings, it appears that the purpose of *Code Civ. Proc. § 1178* is to limit the applicability of *Code Civ. Proc. §§ 901-936.1* to the extent of any inconsistency that may exist between those statutes and the statutes or Judicial Council rules governing unlawful detainer (and forcible entry and forcible detainer) actions.

[b] Stay of Judgment

An appeal by the defendant does not automatically stay proceedings on the judgment. To secure a stay, the appellant

must first direct a petition for a stay of the judgment pending appeal to the trial judge who is required to grant it if he or she finds that the moving party will suffer extreme hardship in the absence of a stay and that the nonmoving party will not be irreparably injured by its issuance. If the trial court denies a stay, the defendant may forthwith petition the appropriate appeals court for an extraordinary writ [*Code Civ. Proc. § 1176(a)*; *see Mehr v. Superior Court (1983) 139 Cal. App. 3d 1044, 1048-1050, 189 Cal. Rptr. 138* (decided before 1985 amendment of *Code Civ. Proc. § 1176*, which apparently codified holding of that case)].

If the trial or appellate court stays enforcement of the judgment, the court may impose whatever conditions it deems just. But in any case, as a condition of issuing the stay of enforcement, the court is required to order the payment of the reasonable monthly rental value to the court monthly in advance as rent would otherwise become due. "Reasonable rental value" means the contract rent unless the rental value has been modified by the trial court in which case the modified rental value is used [*Code Civ. Proc. § 1176(a)*].

For discussion and forms for use in taking an appeal from a superior court judgment, see Ch. 40, *Appeal: An Overview* , et seq. For discussion and forms for use in taking an appeal from a judgment in a limited civil case, see Ch. 345A, *Limited Civil Cases* .

[c] Effect on New Cause of Action

A new cause of action on the same agreement for the rental of real property is not barred because of an appeal by any party [*Code Civ. Proc. § 1176(b)*].

[3] When Judgments Are Enforceable

Except when the proceeding is for an unlawful detainer after default in the payment of rent and the conditions set forth in *Code Civ. Proc. § 1174(c)* are met, the judgment may be enforced immediately [*Code Civ. Proc. § 1174(c)*], provided (1) the judgment has not been stayed by the filing of an appeal [*see Code Civ. Proc. § 1176(a)*; *see also* [2][b], *above*]; (2) the tenant has not been granted relief from the judgment declaring the lease or rental agreement forfeited [*see Code Civ. Proc. § 1179*; *see also Bedi v. McMullan (1984) 160 Cal. App. 3d 272, 276-277, 206 Cal. Rptr. 578]* ; and (3) the judgment has not been vacated on an appropriate motion [*see, e.g., Stegge v. Wilkerson (1961) 189 Cal. App. 2d 1, 5, 10 Cal. Rptr. 867* (judgment, when vacated, cannot be effective for any purpose); *see also Bedi v. McMullan (1984) 160 Cal. App. 3d 272, 275, 206 Cal. Rptr. 578* (default judgment that has been set aside will not support writ of execution)].

[4] Writ of Possession

[a] Issuance and Contents

A judgment for possession of real property may be enforced by a writ of possession of real property issued under *Code Civ. Proc. § 712.010* [*Code Civ. Proc. §§ 681.010(c), 715.010, 1174(d)*]. The application must include a declaration under penalty of perjury stating the daily rental value of the property as of the date that the complaint was filed [*Code Civ. Proc. § 712.010*]. The application must also indicate that the writ applies to all tenants, subtenants, if any, named claimants, if any, and any other occupants of the premises [*Code Civ. Proc. § 715.010(a)*]. The court clerk can issue writs of possession in default cases.

The writ must require the levying officer to whom it is directed to enforce the judgment [*Code Civ. Proc. § 712.020*]. It must include the general information set forth in *Code Civ. Proc. § 712.020*. It must also contain all of the following information [*Code Civ. Proc. § 715.010(b)*]:

- A description of the real property;

- A statement that, if the real property is not vacated within five days from the date a copy of the writ is served on the occupant or, if the copy of the writ is posted, within five days from the date a copy of the writ is served on the judgment debtor, the levying officer will remove the occupants from the real property and place the judgment creditor in possession;

- A statement that any personal property, except a mobilehome, remaining on the real property after the judgment creditor has been placed in possession will be sold or otherwise disposed of in accordance with *Code Civ. Proc. § 1174* unless the judgment debtor or other owner pays the judgment creditor the reasonable cost of storage and takes possession of the personal property not later than 15 days after the time the judgment creditor takes possession of the real property;

- The date the complaint that resulted in the judgment of possession was filed;

- The date or dates on which the court will hear objections to enforcing the judgment of possession that are filed in accordance with *Code Civ. Proc. § 1174.3* [*see § 333.14[4][b]*], unless a summons, complaint, and form of prejudgment claim of right to possession were served on the occupants in accordance with *Code Civ. Proc. § 415.46* [*see § 333.13[4][a]*];

- The daily rental value of the property as of the day the complaint for unlawful detainer was filed, unless a summons, complaint, and form of prejudgment claim of right to possession were served on the occupants in accordance with *Code Civ. Proc. § 415.46* [*see § 333.13[4][a]*]; and

- A statement that the writ applies to all tenants, subtenants, if any, named claimants, if any, and any other occupants of the premises, if a summons, complaint, and form of prejudgment claim of right to possession were served on the occupants in accordance with *Code Civ. Proc. § 415.46* [*see § 333.13[4][a]*].

At the time the writ of possession is served or posted, the levying officer must also serve or post a copy of the form for a claim of right to possession [*see § 333.14[4][b]*], unless a summons, complaint, and form of prejudgment claim of right to possession were served on the occupants in accordance with *Code Civ. Proc. § 415.46* (*see § 333.13[4][a]*) [*Code Civ. Proc. § 715.010(c)*].

The disposition of personal property remaining on the premises after the judgment creditor is placed in possession in accordance with a writ of possession is governed by *Code Civ. Proc. § 1174(e)-(m)* [*see § 333.14[8]*]. For this purpose, references in *Code Civ. Proc. § 1174(e)-(m)* to the "landlord" must be deemed to be references to the judgment creditor and references to the "tenant" must be deemed to be references to the judgment debtor or other occupant [*Code Civ. Proc. § 715.030*].

For discussion, a procedural checklist, and forms for use in enforcing a writ of possession generally, see Ch. 254, *Executions and Enforcement of Judgments* .

[b] Unnamed Occupant's Claim of Right to Possession

[i] Filing Claim of Right

Unless a prejudgment claim of right to possession has been served on occupants in accordance with *Code Civ. Proc. § 415.46* [*see § 333.13[4][a]*], any occupant not named in the judgment for possession who occupied the premises on the date the action was filed may object to enforcement of the judgment against that occupant by filing a claim of right to possession as prescribed by *Code Civ. Proc. § 1174.3*. An occupant or tenant who is named in the action as a defendant is not required to file a claim of right to possession to protect his or her right to possession of the premises [*Code Civ.*

Proc. § 1174.3(a)]. The form prescribed is set forth in *Code Civ. Proc. § 1174.3(h)*. For a reproduction of that form, see *§ 333.135*.

When a person is made a defendant but is not named in the judgment for possession, he or she must file a claim of right of possession to stop an eviction by the sheriff; a writ of mandate to force the sheriff to restore possession is not a proper remedy [*Cardenas v. Noren (1991) 235 Cal. App. 3d 1344, 1347-1350, 1 Cal. Rptr. 2d 367]* .

The filing constitutes a general appearance requiring the payment of a fee as provided in *Gov. Code § 70614* (relating to filing fees for limited civil cases), although *Gov. Code § 68630 et seq.* relating to fee waivers applies [*Code Civ. Proc. § 1174.3(a)* (section failed to take into account 2009 repeal of § 68511.3; replaced by § 68630 et seq.)]. For forms for use in applying for fee waivers, see Ch. 174, *Costs and Attorney's Fees* .

The claim may be filed at any time after the writ of possession is served or posted, up to and including the time at which the levying officer returns to effect the eviction of those named in the judgment [*Code Civ. Proc. § 1174.3(a)*].

The court issuing the writ of possession must set a date or dates when it will hold a hearing to determine the validity of objections to enforcing the judgment. The objection to the eviction may be made by delivering the claim of right to possession to the levying officer at the office of the levying officer or at the premises at the time of eviction [*Code Civ. Proc. § 1174.3(b)*].

If the claim of right to possession is completed and presented to the sheriff, marshal, or other levying officer, and if the levying officer does not have a document specifying that a prejudgment claim of right to possession was served, the officer must forthwith [*Code Civ. Proc. § 1174.3(b)*]:

- Stop the eviction of the occupants at the premises;

- Provide a receipt or copy of the completed claim of right of possession to the claimant indicating the date and time the completed form was received; and

- Deliver the original completed claim of right to possession to the court issuing the writ of possession of real property.

[ii] Procedure for Presenting Claim

A claim of right to possession is effected by either of the following methods [*Code Civ. Proc. § 1174.3(c)*]:

- Presenting in person with identification to the sheriff, marshal, or other levying officer a completed form, and delivering to the court within two court days after its presentation an amount equal to 15 days' rent together with the appropriate fee or form for proceeding in forma pauperis. On receiving a claim of right to possession, the sheriff, marshal, or other levying officer must indicate on the claim form the date and time of its receipt and deliver the original to the issuing court and a receipt or copy of the claim to the claimant and notify the plaintiff of that fact. Immediately on receiving the 15 days' rent and the fee or form, the court must file the claim of right to possession and serve an endorsed copy with the notice of the hearing date on the plaintiff and the claimant by first-class mail. The court issuing the writ must set and hold a hearing on the claim not less than five nor more than 15 days after the claim is filed.

- Presenting in person with identification to the sheriff, marshal, or other levying officer a completed form, and delivering to the court within two court days after its presentation the appropriate fee or application for fee waiver without delivering the 15 days' rent. In this case, the court must immediately set a hearing on the claim to be held on the fifth day after the filing is completed. The court must notify

> the claimant of the hearing date at the time the claimant completes the filing and must notify the plaintiff of the hearing date by first-class mail. On receiving a claim of right to possession, the sheriff, marshal, or other levying officer must indicate on the claim form the date and time of its receipt and deliver the original to the issuing court and a receipt or copy of the claim to the claimant and notify the plaintiff of that fact.

If a claim is made without delivery to the court of the appropriate filing fee or a fee-waiver application, the claim must immediately be deemed denied and the court must so order. On denial, the court must immediately deliver an endorsed copy of the order to the levying officer and must serve an endorsed copy of the order on the plaintiff and claimant by first-class mail [*Code Civ. Proc. § 1174.3(f)*].

[iii] Hearing on Claim

At the hearing, the court must determine whether there is a valid claim of possession by the claimant who filed the claim, and the court must consider all evidence produced at the hearing, including, but not limited to, the information in the claim. The court may determine the claim to be valid or invalid based on the evidence presented. The court must determine the claim to be invalid if the court determines that the claimant is an invitee, licensee, guest, or trespasser. If the court determines the claim is invalid, the court must order the return to the claimant of the amount of 15 days' rent, less a pro rata amount for each day that enforcement of the judgment was delayed by reason of making the claim of right to possession, which pro rata amount is paid to the landlord. If the court determines that the claim is valid, the 15 days' rent must be returned immediately to the claimant [*Code Civ. Proc. § 1174.3(d)*].

[iv] Procedure if Claim Is Ruled Valid

If, on hearing, the court determines that the claim is valid, then the court must order further proceedings as follows [*Code Civ. Proc. § 1174.3(e)*]:

- If the unlawful detainer is based on a curable breach and the claimant was not previously served with a proper notice, if any notice is required, then the required notice may at the plaintiff's discretion be served on the claimant at the hearing or after the hearing. If the claimant does not cure the breach within the required time, then a supplemental complaint may be filed and served on the claimant as defendant if the plaintiff proceeds against the claimant in the same action. For this purpose only, service of the required notice and of the supplemental complaint may be made by first-class mail addressed to the claimant at the subject premises, or service may be made on his or her attorney of record. In either case, *Code Civ. Proc. § 1013*, regarding extension of time limits, will otherwise apply. Further proceedings on the merits of the claimant's continued right to possession after service of the summons and supplemental complaint will be conducted as in other unlawful detainer proceedings.

- In all other cases, the court must deem the unlawful detainer summons and complaint to be amended on their faces to include the claimant as defendant. Service of the summons and complaint, as thus amended, may, at the plaintiff's discretion, be made at the hearing or after the hearing, and the claimant thus named and served as a defendant in the proceeding must answer or otherwise respond within five days thereafter.

[v] Procedure if Claim Is Denied or Ruled Invalid

If the claim of right to possession is denied under *Code Civ. Proc. § 1174.3(f)* (failure to pay fee or file forms for proceeding in forma pauperis in a timely manner), or if the claimant fails to appear at the hearing, or if the court determines at the hearing that there are no valid claims, or if the claimant does not prevail at a trial on the merits of the unlawful detainer action, the court must order the levying officer to proceed with enforcing the original writ of

possession as deemed amended to include the claimant, which must be effected within a reasonable time, not to exceed five days. On receiving the court's order, the levying officer may enforce the writ of possession as against any occupant or occupants [*Code Civ. Proc. § 1174.3(g)*].

[5] Writ of Execution

A writ of possession may be enforced as a writ of execution to satisfy any money judgment included in the judgment for possession. If amounts due under the judgment are not satisfied in accordance with the writ of possession, the judgment creditor may use a writ of execution [*see Code Civ. Proc. § 699.010*] to satisfy any money judgment included in the judgment after the writ of possession has been returned or 180 days after its issuance, whichever is earlier [*Code Civ. Proc. §§ 712.040, 1174(d)*].

For discussion, a procedural checklist, and forms for use in enforcing a money judgment, see Ch. 254, *Executions and Enforcement of Judgments* .

[6] Receivership

In any case, a superior court may, after judgment, appoint a receiver to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in accordance with *Code Civ. Proc. § 680.010 et seq.*, relating to enforcement of judgments [*Code Civ. Proc. § 564(b)(4)*]. A receiver may also be appointed after the sale of real property in accordance with a decree of foreclosure, during the redemption period, to collect, expend, and disburse rents as directed by the court or as otherwise provided by law [*Code Civ. Proc. § 564(b)(4)*]. The court may also appoint a receiver in accordance with *Code Civ. Proc. § 564* in limited civil cases [*Code Civ. Proc. § 86(a)(8)*]. Thus, any trial court may appoint a receiver under *Code Civ. Proc. §§ 708.610-708.630* to enforce a judgment for possession of real property [*see Code Civ. Proc. § 712.060*].

[7] Res Judicata Effect of Judgment

Because an unlawful detainer proceeding is summary in character and only claims bearing directly on the right of immediate possession are ordinarily adjudicated, a judgment in an unlawful detainer proceeding usually has very limited res judicata effect and will not normally prevent one who is dispossessed from bringing a subsequent action to resolve questions of title or to adjudicate other legal and equitable claims between the parties [*Vella v. Hudgins (1977) 20 Cal. 3d 251, 255, 142 Cal. Rptr. 414, 572 P.2d 28* ; *Pelletier v. Alameda Yacht Harbor (1986) 188 Cal. App. 3d 1551, 1557, 230 Cal. Rptr. 253]* . However, an unlawful detainer judgment will bar any subsequent actions in whole or in part as to any issues necessarily determined in the unlawful detainer proceeding. Moreover, the full and fair litigation of an affirmative defense, even one not ordinarily cognizable in unlawful detainer if it is raised without objection and if a fair opportunity to litigate it is provided, will result in a judgment conclusive on issues material to that defense [*Vella v. Hudgins (1977) 20 Cal. 3d 251, 256-257, 142 Cal. Rptr. 414, 572 P.2d 28]* .

For a full discussion of res judicata and its application, see Ch. 491, *Res Judicata* .

[8] Disposition of Personal Property Left on Premises

[a] Terminology

For the purposes of *Code Civ. Proc. § 1174(e), (f), (h), (k),* and *(l)* [*see* [b], [c], *below*], the terms "owner," "premises," and "reasonable belief' " have the same meaning as provided in *Civ. Code § 1980* [*Code Civ. Proc. § 1174(m)*].

[b] Lost Property

Personal property remaining on the premises that the landlord reasonably believes to have been lost must be disposed of

in accordance with *Civ. Code § 2080 et seq.* (lost money and goods). The landlord is not liable to the owner of any property disposed of in this manner. If the appropriate police or sheriff's department [*see Civ. Code § 2080.1*] refuses to accept the property, it is deemed not to have been lost [*Code Civ. Proc. § 1174(e)*].

[c] Other Property Not Belonging to Tenant

[i] Notice and Storage

The landlord is required to give notice under *Civ. Code § 1983* to any person (other than the tenant) reasonably believed by the landlord to be the owner of personal property remaining on the premises, unless the procedure for surrender of property under *Civ. Code § 1965* has been initiated or completed [*Code Civ. Proc. § 1174(f)*]. The landlord must store the property in a place of safekeeping until it is either released in accordance with *Code Civ. Proc. § 1174(h)* or disposed of in accordance with *Code Civ. Proc. § 1174(i)* [*Code Civ. Proc. § 1174(g)*; *see* [ii], *below*].

[ii] Release or Disposal of Property

The landlord is required to release personal property in accordance with *Civ. Code § 1965*, or to release it to the tenant or, at the landlord's option, to a person reasonably believed by the landlord to be its owner if the tenant or other person (1) pays the costs of storage as provided in *Civ. Code § 1990* (reasonable costs of storage or fair rental value of space reasonably required for storage of property on premises) and (2) claims the property not later than (a) the date specified in the writ of possession before which the tenant must make his or her claim (not later than 15 days after the landlord takes possession of real property) [*see Code Civ. Proc. § 715.010(b)(3)*], or (b) the date specified in the notice before which a person other than the tenant must make his or her claim (date not less than 15 days after personal service or 18 days after first-class mail service; *see Civ. Code § 1983(b)*) [*Code Civ. Proc. § 1174(h)*].

With regard to the storage costs claimed, it has been suggested as follows: (1) a tenant who is overcharged for storage by mistake, fraud, duress, or oppression may recover against a landlord under the common count of money had and received; and (2) on a demand for the property based on a tender of the reasonable charges for storage, a tenant may bring an action against the landlord who refused to surrender possession of the property either in claim and delivery for the recovery of the property itself, with damages for its wrongful detention, or for damages for the wrongful conversion of the property [*Gray v. Whitmore (1971) 17 Cal. App. 3d 1, 25, 94 Cal. Rptr. 904]* . For discussion and forms of complaints for money had and received and to recover possession of personal property, see Ch. 121, *Common Counts* , and Ch. 119, *Claim and Delivery* , respectively. For discussion, a procedural checklist, and forms of complaints for conversion, see Ch. 150, *Conversion* .

Personal property not released in accordance with *Code Civ. Proc. § 1174(h)* must be disposed of in accordance with *Civ. Code § 1988* (sale of abandoned property or other disposal if value is less than $300) [*Code Civ. Proc. § 1174(i)*].

Code Civ. Proc. § 1174(h) and *(i)* do not offend the due process or *equal protection clauses* of the *U.S. Const., amend. XIV* [*Gray v. Whitmore (1971) 17 Cal. App. 3d 1, 22, 27-28, 94 Cal. Rptr. 904 , approved in Love v. Keays (1971) 6 Cal. 3d 339, 344-345, 98 Cal. Rptr. 811, 491 P.2d 395* (also holding other subsequently deleted parts of *Code Civ. Proc. § 1174* to be unconstitutional)].

[iii] Nonliability of Landlord

If the landlord releases personal property to the tenant in accordance with *Code Civ. Proc. § 1174(h)* [*see* [ii], *above*], the landlord is not liable with regard to that property to any person [*Code Civ. Proc. § 1174(j)*]. If the landlord releases the property to a person other than the tenant under *Code Civ. Proc. § 1174(h)* or the property is disposed of in accordance with *Code Civ. Proc. § 1174(i)* [*see* [ii], *above*], the landlord is not liable with regard to that property to (1) the tenant or to any person to whom notice was given in accordance with *Code Civ. Proc. § 1174(f)* [*see* [i], *above*]; or (2) any other person, unless the other person proves that before releasing or disposing of the property the landlord

believed or reasonably should have believed that the other person had an interest in the property and also that the landlord knew or should have known on reasonable investigation the address of the other person [*Code Civ. Proc. § 1174(k)*, (*l*)].

[9] Duty to Inspect on Entry of Judgment of Possession

A landlord may not ignore a defaulting tenant's possible neglect of property. Thus, a duty to inspect attaches upon entry of the judgment of possession in an unlawful detainer action and includes reasonable periodic inspections thereafter [*Stone v. Center Trust Retail Properties, Inc. (2008) 163 Cal. App. 4th 608, 613, 77 Cal. Rptr. 3d 556*]. On entry of judgment, a holdover tenant's incentive to maintain a property dissipates because continued maintenance likely benefits only the landlord. To protect the public, the incentive to maintain the property must not be an orphan abandoned by a tenant and ignored by a shortly reoccupying landlord. Entry of judgment provides a workable bright line for the parties to know where responsibility lies, and aligns that responsibility with the parties' reordered incentives [*Stone v. Center Trust Retail Properties, Inc. (2008) 163 Cal. App. 4th 608, 613, 77 Cal. Rptr. 3d 556*]. In *Stone v. Center Trust Retail Properties, Inc.*, the court held that a landlord who obtained a judgment of possession in unlawful detainer proceedings against a restaurant but allowed the restaurant to continue operating, at which time a customer was injured, could be liable for the customer's injuries. The landlord had a duty to inspect the premises on entry of judgment and at reasonable intervals thereafter [*Stone v. Center Trust Retail Properties, Inc. (2008) 163 Cal. App. 4th 608, 614-615, 77 Cal. Rptr. 3d 556*].

[10] Postjudgment Proceedings: Cross References

For discussion and forms for use to move for a new trial [*see Code Civ. Proc. §§ 655-663.2, 1178*], see Ch. 371, *Motions After Trial* . For discussion of appellate procedures and forms for use on appeal [*see Code Civ. Proc. §§ 901-936.1, 1176, 1178*], see Ch. 40, *Appeal* , and Ch. 345A, *Limited Civil Cases* . For discussion and forms for use by a plaintiff to secure repossession of the premises in accordance with the judgment rendered and to recover any damages awarded, see Ch. 254, *Executions and Enforcement of Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureAppealsReviewabilityGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsGeneral Overview

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[Reserved]

§§ 333.15[Reserved]

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29-333 California Forms of Pleading and Practice--Annotated § 333.20

§ 333.20 Motion to Quash Service of Summons

[1] When Authorized

A defendant, on or before the last day of his or her time to plead or within a further time as the court may for good cause allow, may serve and file a notice of motion (1) to quash service of summons on the ground the court lacks jurisdiction over the person of the defendant and/or (2) to stay or dismiss the action on the ground of inconvenient forum [*Code Civ. Proc. §§ 418.10(a), 1177*]. Contrary to *Code Civ. Proc. § 418.10(b)*, the time for making the motion in an unlawful detainer, forcible entry, or forcible detainer proceeding must be not less than three days or more than seven days after the filing of the notice [*Code Civ. Proc. § 1167.4(a)*]. The service and filing of the notice of motion extends the defendant's time to plead to the complaint until five days after he or she is served with a written notice of entry of an order denying the motion. The court may extend this time for an additional period not exceeding 15 days on good cause shown [*Code Civ. Proc. § 1167.4(b)*]. Notice of a motion to quash service of summons on the ground of lack of jurisdiction or to stay or dismiss the action on the ground of inconvenient forum must be given in compliance with *Code Civ. Proc. §§ 1013* and *1167.4* [*Cal. Rules of Ct., Rule 3.1327(a)* (effective 1/1/09)]. Any opposition to the motion and any reply to an opposition may be made orally at the time of hearing or in writing [*Cal. Rules of Ct., Rule 3.1327(b)* (effective 1/1/09)]. If a party wants to have a written opposition considered before the hearing, it must be filed and served on or before the court day before the hearing. Service must be by personal delivery, facsimile transmission, express mail, or other means consistent with *Code Civ. Proc. §§ 1010, 1011, 1012*, and *1013*, and reasonably calculated to ensure delivery to the other party or parties no later than the close of business on the court day before the hearing. The court, in its discretion, may consider written opposition filed later [*Cal. Rules of Ct., Rule 3.1327(c)* (effective 1/1/09)].

PRACTICE TIP:

Using *Code Civ. Proc. § 1167.4*. This is a very tricky statute that is easy to mess up. Keep in mind that if you mail, you add five days on. Thus, if you give seven days' notice and mail then it is 12 days and outside the statute. If you give three days' notice and mail then it is eight days and outside the statute. This practitioner cannot see how you can meet the statutory deadlines and still come within the statute unless you personally serve. *By Benjamin Kaplan*

Failure to make a motion to quash service of summons under *Code Civ. Proc. § 418.10* at the time of filing a demurrer or motion to strike constitutes a waiver of the issues of lack of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in prosecution [*Code Civ. Proc. § 418.10(e)(3)*].

[2] Failure of Complaint to State Cause of Action

A motion to quash service of the summons is the proper method for determining whether the court has acquired personal jurisdiction over the defendant through service of the five-day unlawful detainer summons. If the underlying complaint fails to state a cause of action for unlawful detainer, then use of the five-day summons is improper, the court does not acquire jurisdiction over the person of the defendant by its service, and the defendant is entitled to an order quashing service as a matter of law. If the court erroneously refuses to quash service, the defendant is entitled to a writ of mandate under *Code Civ. Proc. § 418.10(c)* to compel it to do so [*Delta Imports, Inc. v. Municipal Court (1983) 146 Cal. App. 3d 1033, 1035, 194 Cal. Rptr. 685* (complaint failed to state cause of action for unlawful detainer in that it failed to allege service of proper notice terminating tenancy)].

For a discussion of the procedure and forms for use in moving to quash service of summons, see Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances*. For a discussion and forms for use in petitioning for a writ of mandate to compel the trial court to enter an order quashing service of the summons under *Code Civ. Proc. § 418.10(c)* generally, see Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances*, and Ch. 358, *Mandate and Prohibition* .

PRACTICE TIP:

Petitioning Procedure. This petitioning procedure can sometimes be susceptible to misuse or abuse when the petitioning defendant files the petition but does not set it for hearing. *By Benjamin Kaplan*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsFailures to State ClaimsCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsGeneral Overview

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§ 333.21 Time to Answer, Amend Answer, and Extensions

Unless otherwise ordered by the court for good cause shown, the time allowed the defendant to answer the complaint, answer the complaint if amended, or amend the answer under *Code Civ. Proc. § 586(a)(2), (3), (5), (6),* or *(7)* may not exceed five days [*Code Civ. Proc. § 1167.3*].

Unless otherwise ordered by the court for good cause shown, no extension of time allowed for the causes specified in *Code Civ. Proc. § 1054* (relating to, among other things, acts to be done relating to pleadings) may exceed 10 days without the adverse party's consent [*Code Civ. Proc. § 1167.5*]. The application for the extension may be made ex parte and need not be in written form. However, the applicant must advise the court in writing as to the nature of the case and whether any extensions have been previously granted by order of court or stipulation of counsel [*Deal v. Municipal Court (1984) 157 Cal. App. 3d 991, 997 n.6, 204 Cal. Rptr. 79* , *citing* former Cal. Rules of Ct., Rules 235(b) (*see now Cal Rules Ct., Rule 2.20(b)*]. For further discussion, a procedural checklist, and forms for use in securing an extension of time under *Code Civ. Proc. § 1054*, see Ch. 524, *Shortening and Extension of Time* .

The five-day period of *Code Civ. Proc. § 1167.3* and the 10-day period of extension authorized by *Code Civ. Proc. § 1167.5* are directions to the court rather than absolute limitations on its authority. Thus, the short time limitation (five days) provided in *Code Civ. Proc. § 1167* [*see § 333.13[3][d]*] may, on a proper showing, be extended to such time as may be just under the circumstances [*Deal v. Municipal Court (1984) 157 Cal. App. 3d 991, 997-998, 204 Cal. Rptr. 79]* .

In addition to the above statutes, *Code Civ. Proc. § 473* affords relief from the statutory time limitations within which to plead [*Deal v. Municipal Court (1984) 157 Cal. App. 3d 991, 998 n.10, 204 Cal. Rptr. 79* ; *see Code Civ. Proc. § 1177* (application of Part Two of the Code of Civil Procedure to unlawful detainer proceedings)].

The defendant may answer the complaint at the same time he or she moves to quash service of summons under *Code Civ. Proc. § 418.10* [*Code Civ. Proc. § 418.10(e)*; *see § 333.20*]. The filing of an answer at the same time as a motion to quash service of summons does not constitute an appearance unless the court denies the motion to quash, in which case the defendant is not deemed to have generally appeared until entry of the order denying the motion [*Code Civ. Proc. §*

418.10(e)(1)]. If the motion to quash service of summons is denied and the defendant petitions for a writ of mandate [*Code Civ. Proc. § 418.10(c)*; *see § 333.20[2]*], the defendant will not be deemed to have generally appeared until the proceedings on the writ petition have finally concluded [*Code Civ. Proc. § 418.10(e)(2)*].

For the extension of time to plead resulting from defendant's filing a notice of motion to quash service of the summons, see *§ 333.20*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProceduresPleading & PracticePleadingsAnswersCivil ProceduresPleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProceduresPleading & PracticePleadingsTime LimitationsExtensions

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§ 333.22 Defaults

[1] Default Judgments

If at the time appointed any defendant served with a summons does not appear and defend, the clerk, or judge if there is no clerk, must, on the written application of the plaintiff and proof of service of the summons and complaint, enter the default of any defendant so served. If requested by the plaintiff, the clerk or judge must also immediately enter judgment for restitution of the premises and issue a writ of execution. The application for a default judgment and the default judgment must include a place to indicate that the judgment includes tenants, subtenants, if any, named claimants, if any, and any other occupants of the premises. Thereafter, the plaintiff may apply to the court for any other relief demanded in the complaint, including costs, against the defendant, or defendants, or against one or more of them [*Code Civ. Proc. § 1169*]. For the procedure for having defaults and default judgments entered and forms of default judgments generally, see Ch. 205, *Defaults and Default Judgments* . *See also §§ 205.90* (mandatory Judicial Council form for request for entry of judgment), *333.130* (Judicial Council form of unlawful detainer judgment that may be used as default judgment), and *333.131A* (Judicical Council form of declaration for default judgment by court).

[2] Relief From Default

Code Civ. Proc. § 1179 authorizes a court to relieve a tenant from forfeiture after judgment and restore him or her to the formerly held estate, in cases of hardship. The court has the discretion to relieve any person against forfeiture on its own motion [*Code Civ. Proc. § 1179*]. In addition, an application for relief against forfeiture may be made at any time before restoration of the premises to the landlord [*Code Civ. Proc. § 1179*]. The application may be made by a tenant or subtenant, or a mortgagee of the term, or any person interested in the term's continuance. The application must be made by petition, setting forth the facts on which the relief is sought, and be verified by the applicant. Notice of the application, with a copy of the petition, must be served at least five days before the hearing on the plaintiff in the judgment, who may appear and contest the application [*Code Civ. Proc. § 1179*]. Alternatively, a person appearing without an attorney may make the application orally, if the plaintiff either is present and has an opportunity to contest the application, or has been given ex parte notice of the hearing and the purpose of the oral application. The application or motion may be granted only on condition that full payment of rent due, or full performance of conditions or covenants stipulated, so far as practicable, is made [*Code Civ. Proc. § 1179*].

The matter of granting or denying the application lies within the sound discretion of the trial court [*Superior Motels, Inc. v. Rinn Motor Hotels, Inc. (1987) 195 Cal. App. 3d 1032, 1064, 241 Cal. Rptr. 487]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsGeneral Overview

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§ 333.23 Defendant's Pleadings

On or before the day fixed for his or her appearance [*see §§ 333.13[3][d], 333.21*], the defendant may appear and answer or demur [*Code Civ. Proc. § 1170*]. *Code Civ. Proc. § 1170* limits the defendant to filing an answer or demurrer or both; a cross complaint is normally not permitted [*Schubert v. Lowe (1924) 193 Cal. 291, 295, 223 P. 550* ; *see § 333.26*]. Except as otherwise provided in *Code Civ. Proc. §§ 1159-1179a*, the general provisions governing answers [*see Code Civ. Proc. §§ 430.10-430.30, 430.80, 431.10-431.70*] and demurrers [*see Code Civ. Proc. §§ 430.10-430.80*] in civil actions apply in unlawful detainer proceedings [*see Code Civ. Proc. § 1177*].

For the Judicial Council approved form of answer for use in an unlawful detainer proceeding, see *§ 333.110*. For a discussion, procedural guide, and forms of demurrer that may be adapted for use in an unlawful detainer proceeding, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsAnswersReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsGeneral Overview

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29-333 California Forms of Pleading and Practice--Annotated § 333.24

§ 333.24 Demurrers

[1] Effect of General Demurrer to Complaint

A general demurrer to a complaint under *Code Civ. Proc. § 430.10(e)*, that is, that the complaint fails to state a cause of action, will be denied even if the complaint fails to state a cause of action for unlawful detainer as long as it states some other cause of action. However, if the complaint does not state facts sufficient to constitute a cause for relief in unlawful detainer, then issuance of the five-day summons is improper and the court does not acquire personal jurisdiction over the defendant by reason of its proper service [*see Code Civ. Proc. § 410.50(a)*]. The defendant may file a demurrer at the same time he or she moves to quash service of summons under *Code Civ. Proc. § 418.10* [*Code Civ. Proc. § 418.10(e)*]. The filing of a demurrer at the same time as a motion to quash service of summons does not constitute an appearance unless the court denies the motion to quash, in which case the defendant is not deemed to have generally appeared until entry of the order denying the motion [*Code Civ. Proc. § 418.10(e)(1)*]. If the motion to quash service of summons is denied and the defendant petitions for a writ of mandate [*Code Civ. Proc. § 418.10(c)*; *see § 333.20[2]*], the defendant will not be deemed to have generally appeared until the proceedings on the writ petition have finally concluded [*Code Civ. Proc. § 418.10(e)(2)*].

Failure to make a motion to quash service of summons under *Code Civ. Proc. § 418.10* at the time of filing a demurrer constitutes a waiver of the issues of lack of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in prosecution [*Code Civ. Proc. § 418.10(e)(3)*].

For a discussion of in personam jurisdiction, see Ch. 323, *Jurisdiction: Personal* .

[2] Objection to Improper Matter in Complaint

When an otherwise sufficient complaint for unlawful detainer seeks relief beyond that authorized under *Code Civ. Proc. §§ 1159-1179a* or contains other improper matter, the proper method for objecting to it is by a motion to strike the improper matter [*see Code Civ. Proc. §§ 436(a), 1177*], or by alleging the impropriety of the matter as a defense in the answer to the complaint [*see Code Civ. Proc. §§ 431.30(b)(2), 1177*], and not by a motion to quash service of the summons [*see Saberi v. Bakhtiari (1985) 169 Cal. App. 3d 509, 517, 215 Cal. Rptr. 359* (involving improper request

for pretermination rent, in which court distinguished *Greene v. Municipal Court (1975) 51 Cal. App. 3d 446* , and, in effect, disapproved the contrary statement in *Castle Park No. 5 v. Katherine (1979) 91 Cal. App. 3d Supp. 6* , which cited *Greene*); for when pretermination rent may be recovered in an unlawful detainer proceeding, *see § 333.13[13][e][iv]* and *[i]*].

For discussion and forms for use in moving for an order striking improper matter from a complaint, see Ch. 375, *Motions to Strike: Pleadings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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29-333 California Forms of Pleading and Practice--Annotated § 333.25

§ 333.25 Motion to Strike

Defendant's counsel should review the complaint and all attachments carefully to determine whether any improper allegations or material can be the subject of a motion to strike [*see Code Civ. Proc. §§ 435-437* (requirements applicable to motions to strike)]. For discussion and sample motions to strike, see Ch. 375, *Motions to Strike: Pleadings* .

The defendant may file a motion to strike at the same time he or she moves to quash service of summons under *Code Civ. Proc. § 418.10* [*Code Civ. Proc. § 418.10(e)*; *see § 333.20*]. The filing of a motion to strike at the same time as a motion to quash service of summons does not constitute an appearance unless the court denies the motion to quash, in which case the defendant is not deemed to have generally appeared until entry of the order denying the motion [*Code Civ. Proc. § 418.10(e)(1)*]. If the motion to quash service of summons is denied and the defendant petitions for a writ of mandate [*Code Civ. Proc. § 418.10(c)*; *see § 333.20[2]*], the defendant will not be deemed to have generally appeared until the proceedings on the writ petition have finally concluded [*Code Civ. Proc. § 418.10(e)(2)*].

Failure to make a motion to quash service of summons under *Code Civ. Proc. § 418.10* at the time of filing a motion to strike constitutes a waiver of the issues of lack of personal jurisdiction, inadequacy of process, inadequacy of service of process, inconvenient forum, and delay in prosecution [*Code Civ. Proc. § 418.10(e)(3)*].

Claims in a cross-complaint filed in an unlawful detainer proceeding may be subject to a special motion to strike pursuant to the anti-SLAPP statute [*Code Civ. Proc. § 425.16*; *Feldman v. 1100 Park Lane Associates (2008) 160 Cal. App. 4th 1467, 1486-1487, 74 Cal. Rptr. 3d 1* ; *see* Ch. 376, *Motions to Strike: Anti -SLAPP*]. Thus, where the plaintiff landlord filed a special motion to strike the defendant subtenants' cross-complaint for damages after dismissal of an unlawful detainer proceeding, the court of appeal held that to the extent the subtenants' claims were based on (1) the unlawful detainer proceeding; (2) the filing of a three-day notice to quit; and (3) on allegedly threatening statements made by an agent of the landlord, they came within the scope of the anti-SLAPP statute as actions taken in anticipation or furtherance of litigation [*Feldman v. 1100 Park Lane Associates (2008) 160 Cal. App. 4th 1467, 1486-1488, 74 Cal. Rptr. 3d 1*]. Furthermore, with the exception of a claim for negligent misrepresentation, all of the subtenants' claims, including a claim for breach of contract, were barred by the litigation privilege set forth in *Civ. Code § 47* [

Feldman v. 1100 Park Lane Associates (2008) 160 Cal. App. 4th 1467, 1491-1493, 74 Cal. Rptr. 3d 1].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsGeneral Overview

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29-333 California Forms of Pleading and Practice--Annotated § 333.26

§ 333.26 Cross Complaints Generally Not Allowed

Because the primary purpose of a proceeding for unlawful detainer is to obtain the possession of real property in the cases specified by statute, cross complaints are generally not allowed as they could frustrate that purpose by injecting extrinsic issues into the case [*Union Oil Co. v. Chandler (1970) 4 Cal. App. 3d 716, 721, 84 Cal. Rptr. 756* ; *see Knowles v. Robinson (1963) 60 Cal. 2d 620, 625, 36 Cal. Rptr. 33, 387 P.2d 833* ; *Deal v. Municipal Court (1984) 157 Cal. App. 3d 991, 995, 204 Cal. Rptr. 79]* . As a result, issues extrinsic to the possessory right are generally excluded even though they arise out of the proceeding's subject matter [*E. S. Bills, Inc. v. Tzucanow (1985) 38 Cal. 3d 824, 830, 215 Cal. Rptr. 278, 700 P.2d 1280]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsCross-ComplaintsReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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29-333 California Forms of Pleading and Practice--Annotated § 333.27

§ 333.27 Denials in the Answer

Defendants' counsel should review the complaint carefully and ensure that all material allegations that are reasonably believed to be untrue are specifically denied. Note that the answer must be verified. For a discussion of denials and sample general denials, see Ch. 26, *Answers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsGeneral Overview

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29-333 California Forms of Pleading and Practice--Annotated § 333.28

§ 333.28 Permissible Affirmative Defenses

[1] In General

Affirmative defenses are permitted if they would, if successful, preclude removal of the tenant from the premises [*Vella v. Hudgins (1977) 20 Cal. 3d 251, 255, 142 Cal. Rptr. 414, 572 P.2d 28]* . Thus, affirmative defenses, whether legal or equitable, which raises considerations that either (1) negate the facts or conditions on which the right to terminate the tenancy depends or (2) show that to enforce the eviction would violate the federal or state constitutions or other public policy may be pleaded and litigated [*see Green v. Superior Court (1974) 10 Cal. 3d 616, 633-634 n.19, 111 Cal. Rptr. 704, 517 P.2d 1168]* .

In causes where the legality of the reason for an eviction may be in issue, the court, in deciding whether to permit affirmative defenses, may balance the interest in preserving the summary nature of the unlawful detainer proceeding against the public policies furthered by protecting the defendant from eviction under the alleged defenses [*Mobil Oil Corp. v. Handley (1978) 76 Cal. App. 3d 956, 963, 143 Cal. Rptr. 321]* .

[2] Ownership Issues

[a] Between Landlord and Tenant

The broad question of title may not normally be raised and litigated by either cross complaint or affirmative defense in an unlawful detainer proceeding [*Abstract Investment Co. v. Hutchinson (1962) 204 Cal. App. 2d 242, 248-249, 22 Cal. Rptr. 309]* . This result derives from the rule that a tenant in possession is normally estopped from denying the landlord's title as it existed at the outset of the relationship [*see, e.g., People v. Rice (1960) 185 Cal. App. 2d 207, 211, 8 Cal. Rptr. 76* ; *Staudigl v. Harper (1946) 76 Cal. App. 2d 439, 446, 173 P.2d 343]* .

However, title may be litigated when the plaintiff has put title in issue by having, for example, filed a prior action against the lessees for declaratory relief and for a judgment quieting title to the property as against the lessees that is still pending [*Greenhut v. Wooden (1982) 129 Cal. App. 3d 64, 68-69, 180 Cal. Rptr. 786]* .

[b] Between Purchaser of Property and Person Holding Over

A qualified exception to the rule that title may not be tried in an unlawful detainer proceeding is contained in *Code Civ. Proc. § 1161a,* which extends the summary eviction remedy beyond the conventional landlord-tenant relationship to include certain purchasers of property and provides for a narrow and sharply focused examination of title. For example, *Code Civ. Proc. § 1161a(b)(3)* authorizes an unlawful detainer proceeding against a person who continues in possession of real property after the property has been sold under a power of sale contained in a trust deed executed by the person or a person under whom the person claims, the title under the sale has been duly perfected, and a proper notice to quit has been served. Thus, one who has purchased property at a trustee's sale and seeks to evict the occupant in possession must, to establish that he or she is a proper plaintiff, show that he or she acquired the property at a regularly conducted sale and thereafter "duly perfected" the title. To this limited extent, title may be litigated in the unlawful detainer proceeding [*see Vella v. Hudgins (1977) 20 Cal. 3d 251, 255, 142 Cal. Rptr. 414, 572 P.2d 28* ; *California Livestock Production Credit Assn. v. Sutfin (1985) 165 Cal. App. 3d 136, 140 n.2, 211 Cal. Rptr. 152]* . But regardless of whether the issue is litigated, the unlawful detainer judgment will normally bar any subsequent actions founded on allegations of irregularity in the trustee's sale under the doctrine of res judicata [*see Vella v. Hudgins (1977) 20 Cal. 3d 251, 255, 142 Cal. Rptr. 414, 572 P.2d 28* ; *see also § 333.14[7]*].

Code Civ. Proc. § 1161a does not, however, require a defendant to litigate a complex fraud claim involving activities not directly related to the technical regularity of the trustee's sale within the statutory time constraints of an unlawful detainer proceeding. Hence, a subsequent civil action between the parties on the fraud issue may be maintained and is not barred by the prior judgment in the unlawful detainer proceeding [*Vella v. Hudgins (1977) 20 Cal. 3d 251, 258, 142 Cal. Rptr. 414, 572 P.2d 28* ; *see Mehr v. Superior Court (1983) 139 Cal. App. 3d 1044, 1049-1050, 189 Cal. Rptr. 138]* .

Notwithstanding the limited qualified exception discussed above, a homeowner may not be evicted, consistent with due process guaranties, without being permitted to raise affirmative defenses which, if proved, would maintain the homeowner's possession and ownership. Accordingly, in an unlawful detainer proceeding brought in a municipal court by a corporation after it had acquired title to the homeowners' property through a fraudulent and deceptive loan transaction after the homeowners had defaulted on a prior loan, the appellate court held that the homeowners were entitled to assert their affirmative defenses of fraud and related causes, in which case, title to the property was inevitably in issue [*Asuncion v. Superior Court (1980) 108 Cal. App. 3d 141, 146, 166 Cal. Rptr. 306* (holding that because title was inevitably in issue and value of property exceeded municipal court's jurisdictional maximum, jurisdiction was in superior court)]. In such a case, if the homeowner has separately filed an action based on the fraud and that action is pending, the superior court may stay the eviction proceeding until trial of the fraud action under the authority of *Code Civ. Proc. § 526* (made applicable to unlawful detainer proceedings by *Code Civ. Proc. § 1177*) which permits a preliminary injunction to preserve the status quo on such grounds as irreparable injury, multiplicity of judicial proceedings, or unconscionable relative hardship [*Asuncion v. Superior Court (1980) 108 Cal. App. 3d 141, 146, 166 Cal. Rptr. 306]* .

[3] Equitable Defenses

[a] In General

An affirmative defense raising equitable considerations that negate the facts or conditions on which the right to terminate the tenancy depends may be pleaded and litigated [*Union Oil Co. v. Chandler (1970) 4 Cal. App. 3d 716, 722, 725, 84 Cal. Rptr. 756]* . Equitable defenses that have been permitted include the following:

- Equitable estoppel [*see Union Oil Co. v. Chandler (1970) 4 Cal. App. 3d 716, 720, 727-729, 84 Cal. Rptr. 756* (defense properly raised but not established); *see also Roth v. Morton's Chefs Services, Inc. (1985) 173 Cal. App. 3d 380, 387-388, 218 Cal. Rptr. 684* (substantial compliance; but holding

fraud vitiates any colorable claim to substantial compliance)];

- Equitable defense that tenancy was not a month-to-month tenancy as alleged by plaintiff, but that occupation was under a partially executed oral agreement to execute a lease [*see Schubert v. Lowe (1924) 193 Cal. 291, 295-296, 223 P. 550]* ; and

- Equitable defense of offer of other security of greater value in lieu of that required by lease that had become impossible to give [*see Knight v. Black (1912) 19 Cal. App. 518, 525-526, 126 P. 512]* .

One court has stated that the equitable defense of laches is not available in an action at law and that unlawful detainer is a legal action and therefore laches is not a bar to unlawful detainer [*Northridge Hospital Foundation v. Pic'N' Save No. 9 (1986) 187 Cal. App. 3d 1088, 1101, 232 Cal. Rptr. 329]* . The court's underlying reasoning in *Northridge* appears, however, to be faulty. The court relied on Witkin, Cal. Procedure, vol. 2, *Actions*, § 78, p. 951 (2d ed. 1970), in support of its statement, yet the cited text concerns actions to quiet title and does not mention unlawful detainer. In fact, a proceeding in unlawful detainer is neither an action at law nor an action in equity; it is a statutory special proceeding unknown to the common law [*see* Witkin, Cal. Procedure, vol. 3, *Actions*, §§ 12, 13 (3d ed. 1985)]. The court's conclusion that laches is not available in an unlawful detainer proceeding thus appears not to be supported by valid authority.

[b] Condemnation

The taking of premises by the government for public use may be provided for in the lease. If there is a lease provision, it will control in the event of condemnation. If there is no such provision, the lease will be terminated by a taking of the entire premises and the tenant will have no further liability for rent [*Texas Co. v. County of Los Angeles (1959) 52 Cal. 2d 55, 62, 338 P.2d 440]* . If there is only a partial taking, the tenant will remain liable for the entire rent absent a contrary lease provision [*Carlstrom v. Lyon Van & Storage Co. (1957) 152 Cal. App. 2d 625, 632, 313 P.2d 645]* .

[c] Constructive Eviction

A tenant is entitled to the quiet possession of the leased premises during the term of the lease against all persons, including the landlord [*Civ. Code § 1927*]. If the landlord has breached the covenant of quiet enjoyment, the tenant is justified in refusing to pay rent. Constructive eviction is a breach of this covenant. Therefore, the tenant can use the landlord's constructive eviction as an affirmative defense to defeat a claim for rent. However, there is a clear obligation on a tenant alleging a breach of quiet enjoyment to vacate the premises within a reasonable time [*Clark v. Spiegel (1971) 22 Cal. App. 3d 74, 79-80, 99 Cal. Rptr. 86]* .

For a more detailed discussion of the covenant of quiet enjoyment and constructive eviction, see Ch. 332, *Landlord and Tenant: The Tenancy* .

[d] Actual Partial Eviction

An actual partial eviction is only available as a defense if the unlawful detainer complaint is based on nonpayment of rent. In addition, actual partial eviction is a defense to the entire obligation to pay rent only if the eviction is from a substantial portion of the premises. In determining whether the eviction is substantial, the court should consider the extent of the interference with the tenant's use and enjoyment of the property, particularly when the partial eviction was not in bad faith. The court may, however, reduce the amount of rent due based on the partial eviction even if the eviction is not a defense to the entire rent obligation [*Dussin Investment Co. v. Bloxham (1979) 96 Cal. App. 3d 308, 314-317, 157 Cal. Rptr. 646]* .

PRACTICE TIP:

Using Defense. There must be some material reduction in the portion of the premises that really impacts

on its use. *By Benjamin Kaplan*

[e] Destruction of Premises

There are two statutory provisions that control whether there is a termination of the lease following destruction of the leased premises, unless there are lease provisions to the contrary.

Civ. Code § 1933(4) provides that the hiring of a thing terminates by destruction of the thing hired. Thus, if the premises are completely destroyed, the lease may terminate automatically and with it the obligation to pay rent.

Civ. Code § 1932(2) applies when there has been a partial destruction of the premises and if the lease contains no contrary provisions. It provides that the tenant may terminate the hiring of the leased premises before the end of the term agreed on if the greater part of the leased premises or the part that was the material inducement to enter into the lease is destroyed, other than as a result of the tenant's negligence [*Civ. Code § 1932(2)*]. The tenant must specifically elect to terminate the lease [*see Civ. Code § 1932(2)*]. However, if the lease contains a covenant on the part of the landlord to rebuild the premises, then the lease does not terminate [*Mattal v. American Trust Co. (1962) 208 Cal. App. 2d 645, 647-648, 25 Cal. Rptr. 517]* . In addition, if the tenant is obligated to make all repairs during the lease term and the property is destroyed as a result of the tenant's failure to make these repairs, the tenant's obligations under the lease do not terminate on the destruction of the premises [*Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 678, 75 Cal. Rptr. 889, 451 P.2d 721]* . However, a general covenant to repair is not sufficient to prevent the lease's termination on destruction of the demised premises [*Realty & Rebuilding Co. v. Rea (1920) 184 Cal. 565, 574-578, 194 P. 1024]* .

[f] Frustration

The doctrine of commercial frustration applies when the expected value of performance to the party seeking to be excused has been destroyed by a chance event that supervenes to cause an actual, but not literal, failure of consideration [*Lloyd v. Murphy (1944) 25 Cal. 2d 48, 53, 153 P.2d 47]* . A lessee may seek to apply this doctrine to avoid liability for rent, but it is applied only in extreme cases [*see Fey v. Rossi Improvement Co. (1914) 23 Cal. App. 766, 767-768, 139 P. 908]* .

For a further discussion of this defense, see the comments and references in *§ 334.116*.

[g] Illegality

If a lease is knowingly made by both parties for the use of premises in violation of local ordinances and state housing statutes, it is a contract for an illegal purpose and no enforceable duties or rights arise under it [*Shephard v. Lerner (1960) 182 Cal. App. 2d 746, 748-751, 6 Cal. Rptr. 433* ; *Cf. Espinoza v. Calva (2008) 169 Cal. App. 4th 1393, 1400, 87 Cal. Rptr. 3d 492* (trial court erred in awarding judgment for landlord for past-due rent when premises lacked certificate of occupancy); *Gruzen v. Henry (1978) 84 Cal. App. 3d 515, 517-519, 148 Cal. Rptr. 573* (landlord's failure to comply with ordinance rendered money judgment for rent improper, even though landlord was entitled to order of eviction)].

[4] Breach of Implied Warranty of Habitability

[a] Nature of Warranty

There is in California a common-law implied warranty of habitability in residential leases under which a landlord covenants that premises leased for living quarters will be maintained in a habitable state for the duration of the lease, and a waiver of that warranty by any provision in the lease or rental agreement is generally prohibited by public policy [*Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 52-53, 171 Cal. Rptr. 707, 623 P.2d 268* ; *see Green v. Superior Court*

(1974) 10 Cal. 3d 616, 629, 111 Cal. Rptr. 704, 517 P.2d 1168] . This warranty does not require that a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that bare living requirements must be maintained. In most cases, substantial compliance with those applicable building and housing code standards that materially affect health and safety suffice to meet the landlord's obligations under the warranty [*Green v. Superior Court (1974) 10 Cal. 3d 616, 637, 111 Cal. Rptr. 704, 517 P.2d 1168]* .

The California Supreme Court has held that the landlord's breach of the implied warranty may constitute a defense to an unlawful detainer action [*Green v. Superior Court (1974) 10 Cal. 3d 616, 619, 111 Cal. Rptr. 704, 517 P.2d 1168]* . This defense is only available if the unlawful detainer action is based on nonpayment of rent. Because the Court also stated that the tenant's duty to pay rent is mutually dependent on the landlord's fulfillment of his or her implied warranty of habitability [*Green v. Superior Court (1974) 10 Cal. 3d 616, 635, 111 Cal. Rptr. 704, 517 P.2d 1168]* , it seems certain that the breach of the implied warranty would constitute a valid defense to a landlord's action for rent.

To constitute a breach of the warranty, it is not required either that the defective condition be unknown to the tenant at the time of taking occupancy or that the landlord be given a reasonable time to repair the defect. The warranty is breached whenever the landlord has notice of alleged uninhabitable conditions not caused by the tenants themselves [*Knight v. Hallsthammar (1981) 171 Cal. Rptr. 707* (disapproving to extent they are inconsistent with above rule, *Quevedo v. Braga (1977) 72 Cal. App. 3d Supp. 1* and *Hinson v. Delis (1972) 26 Cal. App. 3d 62, 102 Cal. Rptr. 661*)]. The fact that the tenant continues to live in the uninhabitable premises after learning of the defects does not constitute a waiver of the landlord's breach of warranty [*Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 51, 59, 171 Cal. Rptr. 707, 623 P.2d 268]* .

The purpose behind adopting the implied warranty of habitability of residences was to force the rehabilitation of substantially defective slum dwellings so that the poor may live decently [*Cazares v. Ortiz (1980) 109 Cal. App. 3d Supp. 23, 168 Cal. Rptr. 108]* . However, the warranty is not limited to slums; it applies to all residential leases, at least in urban areas [*see* *Schulman v. Vera (1980) 108 Cal. App. 3d 552, 560-561 n.2, 166 Cal. Rptr. 620]* .

[b] Related Statutory Provisions

The declaration of an implied warranty of habitability and of a public policy that generally prohibits waiver of that warranty is consistent with California's statutory pattern of landlord-tenant relations [*Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 53, 171 Cal. Rptr. 707 623 P.2d 268]* . The statutory pattern is covered in *Civ. Code §§ 1925-1954.1*. Thus, under *Civ. Code § 1929* the lessee or renter of premises must repair all deteriorations occasioned by his or her want of ordinary care. With this exception, and except as provided in *Civ. Code § 1941.2*, as described below, the lessor of a building intended for human occupancy must, in the absence of an agreement to the contrary, put it in a condition fit for human occupation and repair all subsequent dilapidations that render it uninhabitable [*Civ. Code § 1941*; for conditions that render a dwelling untenantable or uninhabitable, *see Civ. Code § 1941.1* and *Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 58-59* nn. 9, 10, *171 Cal. Rptr. 707, 623 P.2d 268]* . The tenant has the right, subject to specified conditions and procedural prerequisites, to make repairs and deduct the cost from rent payments needed to cure conditions that the landlord should have corrected, which is a remedy explicitly stated to be independent of any other available remedy [*see Civ. Code § 1942*; *Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 53, 59, 171 Cal. Rptr. 707, 623 P.2d 268* ; *Green v. Superior Court (1974) 10 Cal. 3d 616, 629-631, 111 Cal. Rptr. 704, 517 P.2d 1168]* .

However, no duty on the part of the landlord to repair a dilapidation arises under *Civ. Code § 1941* or *1942* if the tenant is in substantial violation of specified affirmative obligations and the violation contributes substantially to the existence of the dilapidation or interferes substantially with the landlord's obligation under *Civ. Code § 1941* to effect the necessary repairs [*Civ. Code § 1941.2(a)*].

Any agreement by the tenant of a dwelling waiving or modifying the tenant's rights under *Civ. Code § 1941* or *1942* is void as contrary to public policy with regard to any condition that renders the premises untenantable. However, the

landlord and tenant may agree that the tenant must undertake to improve, repair, or maintain all or stipulated portions of the dwelling as part of the consideration for rental [*Civ. Code § 1942.1*; *see Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 54, 171 Cal. Rptr. 707, 623 P.2d 268]* . If the agreement is in writing, the landlord and tenant may also set forth the provisions of *Civ. Code §§ 1941-1942.1*, inclusive, and provide that any controversy relating to a condition of the premises claimed to make them untenantable may by application of either party be submitted to arbitration in accordance with *Code Civ. Proc. § 1280 et seq.* and the costs of the arbitration will be apportioned by the arbitrator between the parties [*Civ. Code § 1942.1*].

Note that the Sixth District Court of Appeal has held that to be enforceable, an agreement to arbitrate issues concerning the rights and obligations of a landlord and tenant, including tenantability issues, must be contained in a separate agreement and not in the lease itself [*Jaramillo v. JH Real Estate Partners, Inc. (2003) 111 Cal. App. 4th 394, 404, 3 Cal. Rptr. 3d 525]* . The court's reasoning was based on *Civ. Code § 1953(a)(4)*, which precludes a residential lease agreement from including any modification or waiver of a tenant's "procedural rights in litigation in any action involving his rights and obligations as a tenant." Thus, to ensure enforceability, landlords may wish to enter into separate agreements to arbitrate with their tenants. For discussion and forms for use in nonjudicial arbitration under *Code Civ. Proc. § 1280 et seq.*, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* , and Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* .

A landlord may not issue a three-day notice to quit based on nonpayment of rent [*Code Civ. Proc. § 1161(2)*] if the dwelling (1) is declared substandard as set forth in *Health & Safety Code § 17920.3* because conditions listed in that section exist to an extent that endangers the life, limb, health, property, safety, or welfare of the public or the occupants of the dwelling; (2) contains lead hazards as specified in *Health & Safety Code § 17920.10*; or *(3)* substantially lacks any of certain affirmative standard characteristics [*Civ. Code § 1941.1*], and other specified conditions are met [*Civ. Code § 1942.4*]. A landlord who violates *Civ. Code § 1942.4* is liable to the tenant for actual damages and special damages of not less than $100 and not more than $5,000 [*Civ. Code § 1942.4(b)*]. For further discussion of *Civ. Code § 1942.4* and a complaint by a tenant against a landlord for damages and a repair order for an untenantable dwelling, see *§ 334.60*.

A landlord who institutes an unlawful detainer proceeding based on a tenant's nonpayment of rent and who is liable for violation of *Civ. Code § 1942.4* will be liable to the tenant for reasonable attorneys' fees and costs of the suit [*Code Civ. Proc. § 1174.21*].

PRACTICE TIP:

Suing for Breach of Implied Warranty. When suing for breach of the implied warranty of habitability, it might be best to include causes of action for *both* the common law and statutory remedies, as each is slightly different. Attorney's fees, for example, are allowed under the statutory scheme [*see Civ. Code § 1942.4(b)*], but are allowed under common law only if a lease provision for attorney's fees is deemed applicable [*see Fairchild v. Park (2001) 90 Cal. App. 4th 919, 925, 109 Cal. Rptr. 2d 442* (tenants who prevailed in action for breach of implied warranty of habitability entitled to award of attorneys' fees based on attorneys' fees provision in their written lease)]. *By Myron Moskovitz*

On and after July 1, 1998, the landlord of a building intended for human habitation must install deadbolt locks on entry doors for dwelling units and locking devices on windows. The deadbolts and locks must meet specific statutory requirements [*Civ. Code § 1941.3(a)*]. A tenant must notify the landlord of any locking device that becomes inoperable. The landlord must correct the violation within a reasonable time after receiving a notice of deficiency or after having actual notice of a deficiency [*Civ. Code § 1941.3(b)*]. A tenant's remedies for a landlord's violation of the statutory provisions for deadbolts and locks include those provided by *Civ. Code §§ 1942*, *1942.4*, and *1942.5*, an action for breach of contract, and an action for injunctive relief under *Code Civ. Proc. § 526* [*Civ. Code § 1941.3(c)*]. Also, in an unlawful detainer action involving a default in the payment of rent, a tenant may raise the violation as an affirmative defense [*Civ. Code § 1941.3(c)*; *see § 333.110[5][f]*].

All new and replacement water heaters, and all existing residential water heaters, must be braced, anchored, or strapped to resist falling or horizontal displacement due to earthquake motion [*Health & Safety Code § 19211(a)*]. An owner of residential rental property may not evict any person on the basis that the eviction is required in order to comply with this requirement [*Health & Safety Code § 19211(c)*]. Any building or portion of a building, including any dwelling unit, guestroom, or suite of rooms or the premises on which it is located that is in violation of this requirement is deemed to be a nuisance [*Health & Safety Code § 19211(d)*]. The owner or the owner's agent has the right to correct any violation [*Health & Safety Code § 19211(d)*].

[c] Manner of Raising Issue of Breach

[i] Residential Lease

The landlord's breach of the warranty of habitability may be raised as a defense in an unlawful detainer proceeding arising from the tenant's nonpayment of rent under a residential lease or rental agreement [*Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 52, 171 Cal. Rptr. 707, 623 P.2d 268* ; *Green v. Superior Court (1974) 10 Cal. 3d 616, 619, 620, 631-637, 111 Cal. Rptr. 704, 517 P.2d 1168]* . The defense is based on the fact that the tenant's duty to pay rent is mutually dependent on the landlord's fulfillment of his or her implied warranty of habitability and, hence, the landlord's breach of the warranty may be directly relevant to the issue of possession. If the tenant can prove the landlord's breach, the tenant may demonstrate that the nonpayment of rent was justified and that no rent is in fact due and owing to the landlord. Under these circumstances, the landlord would not be entitled to possession of the premises [*Green v. Superior Court (1974) 10 Cal. 3d 616, 635, 111 Cal. Rptr. 704, 517 P.2d 1168]* . Moreover, a tenant may defend an unlawful detainer proceeding against a current owner, at least with regard to rent currently being claimed due, despite the fact that the uninhabitable conditions first existed under a former owner [*Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 57, 171 Cal. Rptr. 707, 623 P.2d 268]* .

The procedure for raising the defense of breach of the implied warranty of habitability is as follows [*see Lee v. Vignoli (1979) 160 Cal. Rptr. 79* ; *see also Code Civ. Proc. § 1161(2)*]:

- The tenant notifies the landlord of the defects;
- The landlord fails to remedy the defects within a reasonable time and the tenant stops paying rent;
- The landlord serves on the tenant a three-day notice to pay the rent or quit the premises;
- On the tenant's failure to quit the premises, the landlord sues to evict the tenant for nonpayment of the withheld rent; and
- The tenant serves and files an answer in which the facts constituting the breach of the implied warranty are alleged.

Breach of the warranty is a legal defense as to which the parties would appear to be entitled to a jury trial [*see Department of Transportation v. Kerrigan (1984) 153 Cal. App. 3d Supp. 41, 200 Cal. Rptr. 865]* . Whether the premises were uninhabitable is a question of fact for the trier of fact [*Lehr v. Crosby (1981) 123 Cal. App. 3d Supp. 1, 6, 177 Cal. Rptr. 96* ; *see Hall v. Municipal Court (1974) 10 Cal. 3d 641, 643-644, 111 Cal. Rptr. 721, 517 P.2d 1185]* .

The issue of breach of the implied warranty of habitability may also be raised by the tenant in an independent action against the landlord for rent abatement or damages [*see Civ. Code § 1942.4*; *Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 913-932, 162 Cal. Rptr. 194* ; *Quevedo v. Braga (1977) 72 Cal. App. 3d Supp. 1, 140 Cal. Rptr. 143* ; for

discussion and forms, see Ch. 334, *Landlord and Tenant: Claims for Damages*].

[ii] Commercial Lease

The covenant of habitability is implied only in residential leases or rental agreements and not in commercial leases. Hence, the defense that the landlord has breached the covenant is not available to a tenant in an unlawful detainer proceeding arising out of a commercial lease [*Schulman v. Vera (1980) 108 Cal. App. 3d 552, 560, 166 Cal. Rptr. 620* ; *see Fish Construction Co. v. Moselle Coach Works, Inc. (1983) 148 Cal. App. 3d 654, 658, 196 Cal. Rptr. 174]* . If the lease contains a covenant by the landlord to repair, the common law rule that the duty to repair and the duty to pay rent are independent covenants prevails [*see Green v. Superior Court (1974) 10 Cal. 3d 616, 622-623, 111 Cal. Rptr. 704, 517 P.2d 1168]* . Thus, a commercial tenant may not remain in possession of the premises without paying rent and then set up the claim for damages for the landlord's breach of the covenant to repair as a defense in an unlawful detainer proceeding. Rather, the remedies available to a tenant under a commercial lease would be to quit the premises and sue for damages if the breach constitutes a constructive eviction. If the tenant elects to remain in possession with or without having the necessary repairs made, or if the conditions resulting from the breach do not amount to a constructive eviction, the tenant may institute an action for damages for breach of covenant [*Schulman v. Vera (1980) 108 Cal. App. 3d 552, 558, 166 Cal. Rptr. 620]* .

PRACTICE TIP:

Dependant Covenant. Despite the *Schulman* case, the landlord's duty to repair (in a lease provision) and the tenant's duty to pay rent might, in some circumstances, be considered dependant covenants [*see* Moskovitz, et al., California Eviction Defense Manual, § 19.5 (CEB 2nd ed.)]. *By Myron Moskovitz*

For a discussion and forms for use by a tenant in suing a landlord for damages for breach of covenant, see Ch. 334, *Landlord and Tenant: Claims for Damages* .

[d] Computing Tenant's Damages

If the tenant proves the defense of breach of the implied warranty of habitability at trial, the trier of fact must determine a reasonable rent for the period of the breach [*see Lee v. Vignoli (1979) 98 Cal. App. 3d Supp. 24, 160 Cal. Rptr. 79]* .

PRACTICE TIP:

Calculating Rent. Reasonable rent can be calculated by subtracting the tenant's damages from the contract rent. *By Myron Moskovitz*

The court may, during the pendency of the proceeding and at the request of either party, require the tenant to make the rental payments at the contract rate into court as they become due for as long as the tenant remains in possession. At the trial, the court can then determine how the rent paid into court should be distributed [*Green v. Superior Court (1974) 10 Cal. 3d 616, 637, 111 Cal. Rptr. 704, 517 P.2d 1168]* .

Although it has been said that five different methods have been suggested for computing the tenant's damages, it has been held that an appropriate method is as follows [*see Cazares v. Ortiz (1980) 109 Cal. App. 3d Supp. 23, 168 Cal. Rptr. 108]* :

- Recognize the agreed contract rent as proper for the premises as impliedly warranted;
- Reduce the agreed rent by the percentage reduction of habitability;
- Multiply the difference by the number of months of occupancy.

If the trial court determines that the landlord's breach of warranty is total and that the tenant owes no rent whatsoever,

the court should enter judgment for the tenant in the unlawful detainer proceeding. If the court determines, however, that the damages from the breach of warranty justify only a partial reduction in rent, the tenant may maintain possession of the premises by paying that portion of the back rent that is owing as directed by the court. If the tenant fails to pay this sum, the landlord is entitled to a judgment for possession. Also, if the trial court finds that the landlord has not breached the warranty of habitability it should immediately enter judgment in the landlord's favor [*Green v. Superior Court (1974) 10 Cal. 3d 616, 639, 111 Cal. Rptr. 704, 517 P.2d 1168]* .

The above rules have been partially codified. In an unlawful detainer proceeding involving residential premises after default in payment of rent in which the tenant has raised as an affirmative defense a breach of the landlord's obligations under *Civ. Code § 1941* or of any warranty of habitability, the court must determine whether a substantial breach of these obligations has occurred [*Code Civ. Proc. § 1174.2(a)*]. The term "substantial breach," as used in *Code Civ. Proc. § 1174.2*, means the failure of the landlord to comply with applicable building and housing code standards that materially affect health and safety [*Code Civ. Proc. § 1174.2(c)*].

If the court finds that a substantial breach has occurred, the court [*Code Civ. Proc. § 1174.2(a)*]:

- Must determine the reasonable rental value of the premises in its untenantable state to the date of trial;

- Must deny possession to the landlord and adjudge the tenant to be the prevailing party, conditioned on the tenant's payment of the rent that has accrued to the date of the trial as adjusted by the court within a reasonable period of time not exceeding five days from the date of the court's determination or, if service of the court's determination is made by mail, within the extended period of time set forth in *Code Civ. Proc. § 1013*;

- May order the landlord to make repairs and correct the conditions that constitute a breach of the landlord's obligations;

- Must order that the monthly rent be limited to the reasonable rental value of the premises as determined above until repairs are completed; and

- Except as otherwise provided in *Code Civ. Proc. § 1174.2(b)*, must award the tenant costs and attorneys' fees if authorized by any statute or the contract of the parties.

If the tenant fails to pay all rent accrued to the date of trial as determined in the judgment and within the period prescribed by the court, the court must award possession of the premises to the landlord. The tenant must, however, retain any rights conferred by *Code Civ. Proc. § 1174* (relating to the judgment, forfeiture of the lease, assessing damages, execution, and disposal of the tenant's personal property left on the premises) [*Code Civ. Proc. § 1174.2(a)*].

If the court determines that there has been no substantial breach by the landlord of *Civ. Code § 1941* or of any warranty of habitability or if the tenant fails to pay all rent accrued to the date of trial, as required by the court under *Code Civ. Proc. § 1174.2(a)*, then judgment must be entered in the landlord's favor, and the landlord must be the prevailing party for the purposes of awarding costs or attorneys' fees under any statute or the contract of the parties [*Code Civ. Proc. § 1174.2(b)*].

This provision is not intended to deny the tenant the right to a trial by jury [*Code Civ. Proc. § 1174.2(d)*].

[e] When Breach Is Presumed

In any unlawful detainer proceeding by the landlord to recover possession from a tenant, a rebuttable presumption

affecting the burden of producing evidence that the landlord has breached the habitability requirements in *Civ. Code § 1941* [*see* [b], *above*] is created with regard to rental agreements or leases entered into or renewed on or after January 1, 1986 [*Civ. Code § 1942.3(c)*] if all of the following conditions exist [*Civ. Code § 1942.3(a)*]:

- The dwelling (1) substantially lacks any of the affirmative standard characteristics listed in *Civ. Code § 1941.1* (conditions rendering dwelling untenantable), (2) is declared substandard pursuant to *Health & Safety Code § 17920.3*, or *(3)* contains lead hazards as defined in *Health & Safety Code § 17920.10*;

- A public officer or employee who is responsible for enforcing any housing law has notified the landlord, or the landlord's agent, in a written notice issued after inspecting the premises that informs the landlord of his or her obligation to abate the nuisance or repair the substandard or unsafe conditions;

- The conditions have existed and have not been abated 60 days beyond the date of issuance of the notice specified above, and the delay is without good cause; and

- The conditions were not caused by an act or omission of the tenant in violation of *Civ. Code § 1929* or *1941.2* [*see § 333.28[4][b]*].

The presumption does not arise unless all of the above conditions are proven. However, a failure to establish the presumption does not otherwise affect the tenant's right to raise and pursue any defense based on the landlord's breach of the implied warranty of habitability [*Civ. Code § 1942.3(b)*].

For a discussion of rebuttable presumptions affecting the burden of producing evidence, see Ch. 551, *Trial* .

For the remedies available to the tenant when the landlord demands or collects rent when the rental dwelling meets the definition of "substandard building" set forth in *Health & Safety Code § 17920.3*, contains lead hazards as specified in *Health & Safety Code § 17920.10*, or substantially lacks any of certain affirmative standard characteristics [*Civ. Code § 1941.1*], and other specified conditions are met, see *Civ. Code § 1942.4*.

[5] Retaliatory Eviction

[a] Sources and Basis of Doctrine

The ability of a tenant to raise the defense of retaliatory eviction was first recognized in *Schweiger v. Superior Court (1970) 3 Cal. 3d 507, 517, 90 Cal. Rptr. 729, 476 P.2d 97* . At about the same time, the Legislature added *Civ. Code § 1942.5*. That section involves different courses of action the lessee may follow when the lessor retaliates against the lessee because of the exercise by the lessee of his or her statutory rights or because of a complaint to an appropriate governmental agency as to a dwelling's tenantability [*see Civ. Code § 1942.5*]. For further discussion of this defense, see the comments and references in *§§ 334.64* and 334.119.

The doctrine of retaliatory eviction stems from two parallel and independent sources that, to a large extent, overlap each other. The first is the common-law doctrine developed by the courts and the second is the statutory scheme set forth in *Civ. Code § 1942.5* and other statutes [*Barela v. Superior Court (1981) 30 Cal. 3d 244, 250-251, 178 Cal. Rptr. 618, 636 P.2d 582* ; *see Western Land Office, Inc. v. Cervantes (1985) 175 Cal. App. 3d 724, 731-740, 220 Cal. Rptr. 784* ; *see also Civ. Code § 1942.5(h)* (legislative cognizance of common-law doctrine)].

The retaliatory eviction doctrine is founded on the premise that a landlord may normally evict a tenant for any reason or for no reason at all, but a landlord may not evict for an improper reason [*Barela v. Superior Court (1981) 30 Cal. 3d 244, 249, 178 Cal. Rptr. 618, 636 P.2d 582]* .

The defense of retaliatory eviction is a legal defense as to which the parties are entitled to a jury trial [*Department of Transportation v. Kerrigan (1984) 200 Cal. Rptr. 865]* .

[b] Common-Law Doctrine

Retaliatory eviction occurs when a landlord exercises his or her legal right to terminate a residential tenancy in an authorized manner but with a motive of retaliating against a tenant who has exercised a legal right [*Four Seas Inv. Corp. v. International Hotel Tenants' Assn. (1978) 81 Cal. App. 3d 604, 610, 146 Cal. Rptr. 531]* . Retaliatory eviction, based on the tenant's exercise of a statutory right, may be plead as an affirmative defense in an unlawful detainer proceeding to recover possession of residential property [*Vargas v. Municipal Court (1978) 22 Cal. 3d 902, 913-916, 150 Cal. Rptr. 918, 587 P.2d 714* (termination of employment and eviction from home in retaliation for tenants' exercise of statutorily protected rights under *S. P. Growers Asso. v. Rodriguez (1976) 17 Cal. 3d 719, 724, 131 Cal. Rptr. 761, 552 P.2d 721* (eviction of nonunion workers from company-owned housing in retaliation for their filing federal lawsuit charging violations of federal Farm Labor Contractor Registration Act); *Schweiger v. Superior Court of Alameda County (1970) 3 Cal. 3d 507, 517, 90 Cal. Rptr. 729, 476 P.2d 97* (retaliatory eviction based on exercise of statutory right to repair dilapidations and deduct cost from rent after notice to landlord)]. The defense is permitted whenever, on balance, the public policies furthered by protecting a tenant from eviction outweigh the state's interest in ensuring that unlawful detainer proceedings are truly summary [*see E. S. Bills, Inc. v. Tzucanow (1985) 38 Cal. 3d 824, 830, 215 Cal. Rptr. 278, 700 P.2d 1280* ; *Barela v. Superior Court (1981) 30 Cal. 3d 244, 250, 178 Cal. Rptr. 618, 636 P.2d 582]* .

The doctrine has been extended to allow an independent action by the tenant against the landlord for both actual and punitive damages for retaliatory eviction [*see Civ. Code § 1942.5(f), (g)*; *Aweeka v. Bonds (1971) 20 Cal. App. 3d 278, 281, 97 Cal. Rptr. 650* ; *see also Western Land Office,Inc. v. Cervantes (1985) 175 Cal. App. 3d 724, 736-737, 220 Cal. Rptr. 784]* . For further discussion and forms for use by a lessee in suing a lessor for damages for retaliatory eviction, see Ch. 334, *Landlord and Tenant: Claims for Damages* .

[c] Statutory Scheme

If the lessee is not in default in the payment of rent, the lessor may not, in retaliation against a lessee because of the lessee's exercise of rights under *Civ. Code §§ 1940-1954.1*, relating to the leasing of land and dwellings, or complaint to an appropriate agency as to the tenantability of a dwelling [*Civ. Code § 1942.5(a)*; *see Barela v. Superior Court (1981) 30 Cal. 3d 244, 250-252, 178 Cal. Rptr. 618, 636 P.2d 582* ; *see also Hernandez v. Stabach (1983) 145 Cal. App. 3d 309, 312-317, 193 Cal. Rptr. 350* (class action by tenants of uninhabitable apartments for injunctive relief in which appellate court affirmed orders granting preliminary injunction enjoining landlord from evicting or threatening to evict tenants without prior showing of good cause being made to superior court)]:

- Recover possession of the dwelling in any action or proceeding;
- Cause the lessee to quit involuntarily;
- Increase the rent; or
- Decrease any services within 180 days after the latest of certain specified dates.

For a discussion of the history of *Civ. Code § 1942.5*, see *Western Land Office, Inc. v. Cervantes (1985) 175 Cal. App. 3d 724, 732-734, 737-740, 220 Cal. Rptr. 784* .

In addition, it is unlawful for a lessor to increase rent, decrease services, cause a lessee to quit involuntarily, bring an action to recover possession, or threaten to do any of these acts for the purpose of retaliating against the lessee because

the lessee has lawfully organized or participated in a lessees' association or an organization advocating lessees' rights or has lawfully and peaceably exercised any rights under the law [*Civ. Code § 1942.5(c)*; *see EDC Associates, Ltd. v. Gutierrez (1984) 153 Cal. App. 3d 167, 172-178, 200 Cal. Rptr. 333* (separate opinion of Justice Andreen)]. This provision is broad enough to cover an eviction in retaliation for the renter's complaint to the police that the landlord has committed a crime [*Barela v. Superior Court (1981) 30 Cal. 3d 244, 251-252, 178 Cal. Rptr. 618, 636 P.2d 582]* .

A lessor may, however, recover possession of a dwelling and do any of the other acts described in *Civ. Code § 1942.5(a)* or *(c), above*, if the notice of termination, rent increase, or other act, and any pleading or statement of issues in an arbitration states the ground on which the lessor in good faith seeks to recover possession, increase rent, or do any of the other acts described in *Civ. Code § 1942.5(a)* or *(c)*. If the statement is controverted, the lessor has the burden of establishing its truth at the trial or other hearing [*Civ. Code § 1942.5(e)*]. For the liability of the lessor to the lessee for violating the provisions of *Civ. Code § 1942.5*, which remedies are in addition to any other remedies provided by statutory or case law [*Civ. Code § 1942.5(h)*], see *Civ. Code § 1942.5(f)* and *(g)*.

The operator of certain employee housing is prohibited from terminating or modifying a tenancy in retaliation for the tenant's exercise of specified rights, and the tenant may raise the defense of retaliation or retaliatory eviction in any action for possession, including an unlawful detainer proceeding [*see Health & Safety Code §§ 17031.5, 17031.6*]. In addition, persons operating certain employee community housing are prohibited from taking retaliatory employment action [*see Health & Safety Code § 17031.7*].

[d] Applicability to Commercial Leases

Although the cases and statutes set forth in [a]-[c], *above*, concern residential leases, the defense of retaliatory eviction is available in an unlawful detainer proceeding involving a commercial lease when to disallow the defense would frustrate the purpose of statutory law [*see Mobil Oil Corp. v. Handley (1978) 76 Cal. App. 3d 956, 965-967, 143 Cal. Rptr. 321* (stating defense of retaliatory eviction of franchised petroleum lessee based on lessee's exercise of rights under California and federal law could properly be raised, but holding under facts of case that trial court properly struck defense, leaving tenant to an action at law)].

By virtue of *Code Civ. Proc. § 1174(a)*, the defense of retaliatory eviction may be raised in an unlawful detainer proceeding by a petroleum distributor against a gasoline dealer when the defense goes to the issue of the distributor's good faith in terminating or refusing to renew the dealer's franchise [*E. S. Bills, Inc. v. Tzucanow (1985) 38 Cal. 3d 824, 826-827, 831-834, 215 Cal. Rptr. 278, 700 P.2d 1280]* .

[e] Burden of Proof

The existence or nonexistence of a landlord's retaliatory motive is ordinarily a question of fact to be resolved by the trier of fact [*Western Land Office, Inc. v. Cervantes (1985) 175 Cal. App. 3d 724, 731, 220 Cal. Rptr. 784]* . However, the issue cannot be submitted to the jury unless substantial evidence appears in the record in support of it [*Four Seas Inv. Corp. v. International Hotel Tenants' Assn. (1978) 81 Cal. App. 3d 604, 610, 146 Cal. Rptr. 531]* . Thus, when the affirmative defense of retaliatory eviction is asserted under either the common law doctrine or under *Civ. Code § 1942.5* [*see* [c], *above*], the burden of proving retaliatory motive by a preponderance of the evidence is on the tenant under the provisions of *Evid. Code §§ 500* and *520* [*see Schweiger v. Superior Court (1970) 3 Cal. 3d 507, 517, 90 Cal. Rptr. 729, 476 P.2d 97* (common law defense); *Western Land Office, Inc. v. Cervantes (1985) 175 Cal. App. 3d 724, 726, 735, 739, 740-742, 220 Cal. Rptr. 784* (statutory defense); *see also Civ. Code § 1942.5(c)*]. Conversely, a landlord who takes action for a valid reason not listed in the unlawful detainer statutes must give notice to the tenant of the ground on which he or she proceeds and, if the tenant controverts that ground, the landlord has the burden of proving its existence by a preponderance of the evidence [*Western Land Office, Inc. v. Cervantes (1985) 175 Cal. App. 3d 724, 726, 740-742, 220 Cal. Rptr. 784* ; *see Civ. Code § 1942.5(e)*].

[f] Eviction in Violation of Constitutional Right

Judicial eviction of a tenant because of race violates the tenant's rights guaranteed by the *U.S. Const., amend. XIV*, and by *Cal. Const., art. I, § 7(a)*. Hence, eviction based on racial discrimination may also be asserted as an affirmative defense in an unlawful detainer proceeding to recover possession of residential property [*Abstract Investment Co. v. Hutchinson (1962) 204 Cal. App. 2d 242, 244-245, 255, 22 Cal. Rptr. 309]* .

[g] Defense Based on Municipal Rent Control Legislation

Municipal ordinances eliminating particular grounds for eviction for the purpose of enforcing municipal rent control legislation are a limitation on the landlord's property rights under the police power [*see Cal. Const., art. XI, § 7*], giving rise to a substantive ground of defense in unlawful detainer proceedings [*Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 149, 130 Cal. Rptr. 465, 550 P.2d 1001* ; *Gross v. Superior Court (1985) 171 Cal. App. 3d 265, 271-272, 217 Cal. Rptr. 284]* . Hence, a defense based on municipal rent control legislation may be plead if applicable [*see Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 149, 130 Cal. Rptr. 465, 550 P.2d 1001* (although holding rent control legislation in issue unconstitutional because of specified defects, Court said that *Code Civ. Proc. §§ 1159-1179a* and *Civ. Code §§ 1951-1952.6* do not preclude a defense based on municipal rent control legislation enacted under the police power imposing rent ceilings and limiting the grounds for eviction for the purpose of enforcing those rent ceilings); *Nourafchan v. Miner (1985) 169 Cal. App. 3d 746, 751-752, 215 Cal. Rptr. 450* ; *see also Fisher v. City of Berkeley (1984) 37 Cal. 3d 644, 655-656, 209 Cal. Rptr. 682, 693 P.2d 261* (explaining *Birkenfeld* and holding particular rent control ordinance before it did not violate Sherman Antitrust Act, *15 U.S.C. §§ 1, 2*)].

PRACTICE TIP:

Pleading Affirmative Defense Under Rent Control Ordinances. An affirmative defense under municipal rent control ordinances need only be plead if the plaintiff has not plead applicability and compliance with the ordinances. If the plaintiff has plead applicability and compliance, the denial by answer puts the matter in issue without any affirmative defense having to be plead. *By Benjamin Kaplan*

The rule described above applies not only to unlawful detainer proceedings brought by a landlord against a tenant but to unlawful detainer proceedings brought by the purchaser at a foreclosure sale against tenants occupying the premises under a lease or rental agreement as well [*Gross v. Superior Court (1985) 171 Cal. App. 3d 265, 271, 217 Cal. Rptr. 284]* .

When a landlord charges and a tenant pays rent in excess of the maximum rent allowable under a rent control ordinance, the tenant has an affirmative defense to an unlawful detainer action based on the claim that the rent has already been paid. There is no statute of limitations as to how far back the excess rent may be applied [*Minelian v. Manzella (1989) 215 Cal. App. 3d 457, 466-468, 263 Cal. Rptr. 597]* .

When a local rent control ordinance requires payment of relocation assistance as a condition to evictions based on certain bases, failure to pay the assistance is a defense to an unlawful detainer action [*Salazar v. Maradeaga (1992) 12 Cal. Rptr. 2d 676]* .

For the manner of pleading an ordinance, see *Code Civ. Proc. § 459*, which is made applicable to unlawful detainer proceedings by *Code Civ. Proc. § 1177*. For further discussion of legislation and local ordinances governing rent control, see Ch. 335, *Landlord and Tenant: Rent Control* .

[h] Lessee's Period of Protection

If a lessor retaliates against a lessee because of the exercise by the lessee of his or her rights under *Civ. Code §§ 1940-1954.1* (leasing land and dwellings) or because of the lessee's complaint to an appropriate agency as to

tenantability of a dwelling, and if the dwelling's lessee is not in default as to the payment of rent, the lessor may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services within 180 days [*Civ. Code § 1942.5(a)*].

- After the date on which the lessee, in good faith, has given notice in accordance with *Civ. Code § 1942* (tenant's right to repair or vacate), or has made an oral complaint to the lessor regarding tenantability; or

- After the date on which the lessee, in good faith, has filed a written complaint, or an oral complaint that is registered or otherwise recorded in writing, with an appropriate agency, of which the lessor has notice, for the purpose of obtaining correction of a condition relating to tenantability; or

- After the date of an inspection or issuance of a citation, resulting from a complaint described above, of which the lessor did not have notice; or

- After the filing of appropriate documents commencing a judicial or arbitration proceeding involving the issue of tenantability; or

- After entry of judgment or the signing of an arbitration award, if any, when in the judicial proceeding or arbitration the issue of tenantability is determined adversely to the landlord.

In each instance, the 180-day period runs from the latest applicable date referred to above [*Civ. Code § 1942.5(a)*].

A tenant may not invoke the provisions of *Civ. Code § 1942.5(a)* more than once in any 12-month period [*Civ. Code § 1942.5(b)*]. This limitation period applies only to retaliation defenses raised under the statute, not those raised under common law.

[i] Acts Relating to Lessees' Rights

It is unlawful for a landlord to increase rent, decrease services, cause a tenant to quit involuntarily, bring an action to recover possession, or threaten to do any of these acts, for the purpose of retaliating against the tenant because he or she has lawfully organized or participated in a tenants' association or an organization advocating tenants rights or has lawfully and peaceably exercised any rights under the law. In any action brought under *Civ. Code § 1942.5(c)*, the tenant has the burden of producing evidence that the landlord's conduct was retaliatory [*Civ. Code § 1942.5(c)*].

[j] Lessor's Rights

Nothing in *Civ. Code § 1942.5* limits in any way the exercise by the landlord of his or her rights under any lease or agreement or any law pertaining to the hiring of property or his or her right to do any of the acts described in *Civ. Code § 1942.5(a)-(c)* for any lawful cause. Any waiver by a tenant of his or her rights under *Civ. Code § 1942.5* is void as contrary to public policy [*Civ. Code § 1942.5(d)*].

[k] When Lessor May Recover Possession

Notwithstanding *Civ. Code § 1942.5(a)-(d)*, a landlord may recover possession of a dwelling and do any of the other acts described in *Civ. Code § 1942.5(a)* within the period or periods prescribed therein, or within *Civ. Code § 1942.5(c)*, if the notice of termination, rent increase, or other act, and any pleading or statement of issues in an arbitration, if any, states the ground on which the landlord, in good faith, seeks to recover possession, increase rent, or do any of the other acts described in *Civ. Code § 1942.5(a)* or *(c)*. If the statement is controverted, the landlord must establish its truth at the trial or other hearing [*Civ. Code § 1942.5(e)*].

[l] Damages

Any landlord or agent of a landlord who violates *Civ. Code § 1942.5* is liable to the tenant in a civil action for the actual damages sustained by the tenant and for punitive damages in an amount not less than $100 or more than $2,000 for each retaliatory act when the landlord or agent has been guilty of fraud, oppression, or malice with regard to each act [*Civ. Code § 1942.5(f)*].

[m] Attorney's Fees

In any action brought for damages for retaliatory eviction, the court must award reasonable attorney's fees to the prevailing party if either party requests attorney's fees on the initiation of the action [*Civ. Code § 1942.5(g)*].

[n] Remedies Not Exclusive

The remedies provided by *Civ. Code § 1942.5* are in addition to any other remedies provided by statutory or decisional law [*Civ. Code § 1942.5(h)*]. Therefore, there is also a common law defense of retaliatory eviction, which is parallel to and independent from the statutory right provided by *Civ. Code § 1942.5* [*Barela v. Superior Court (1981) 30 Cal. 3d 244, 250-251, 178 Cal. Rptr. 618, 636 P.2d 582]* . The common law defense of retaliatory eviction existed even before the 1970 enactment of *Civ. Code § 1942.5*, stating that the statutory retaliatory eviction remedies were in addition to other remedies [*Glaser v. Meyers (1982) 137 Cal. App. 3d 770, 775-777, 187 Cal. Rptr. 242]* .

[o] Retaliatory Eviction by Employee Housing Operator

[i] Protected Acts

No person operating employee housing may terminate or modify a tenancy by increasing rent, decreasing services, threatening to bring or bringing an action to evict, refusing to renew a tenancy, or in any other way intimidating, threatening, restraining, coercing, blacklisting, or discharging an employee or tenant because of the tenant's exercise of any of the following acts [*Health & Safety Code § 17031.5(a)*]:

- Complaining in good faith, orally or in writing, to the operator, landlord, or employer about tenantability or about any right provided by *Health & Safety Code § 17000 et seq.* (Employee Housing Act);

- Exercising any legal right with regard to the housing provided by the Employee Housing Act;

- Complaining in good faith, orally or in writing, to any applicable enforcement agency about tenantability or any right provided by the Employee Housing Act;

- Bringing an action to enforce any rights provided for by the Employee Housing Act or by *Civ. Code § 1940 et seq.* (leasing land and dwellings); or

- Bringing an action under *Civ. Code § 1942.5* (damages for retaliatory eviction).

[ii] Retaliation Defense

The tenant has a defense of retaliation in any action for possession if the employer or landlord violates *Health & Safety Code § 17031.5*. If the employer or landlord acts to modify or terminate a tenancy within six months after the employee or tenant has exercised any of the acts enumerated in *Health & Safety Code § 17031.5(a)*, there is a rebuttable presumption affecting the burden of proof that the employer's or landlord's action was retaliatory [*Health & Safety Code § 17031.5(b)*].

No tenant has a defense of retaliation in an action for possession when tenantability is an issue of fact and the untenantable condition was caused by the deliberate or negligent act or omission of the tenant, a member of his or her family, or other persons on the premises with his or her consent [*Health & Safety Code § 17031.5(c)*].

[6] Statute of Frauds

[a] Agreement for Period Greater Than One Year

An agreement for the leasing for a longer period than one year of real property is invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his or her agent [*Civ. Code § 1624(a)(3)*]. This agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged [*Civ. Code § 1624(a)(3)*; *see Code Civ. Proc. § 1971*]. An oral one-year lease is not within the statute of frauds [*see Civ. Code § 1624(a)(3)*].

For a form of affirmative defense based on the statute of frauds, see Ch. 140, *Contracts* .

PRACTICE TIP:

Expiration of Fixed Term Leases. If a landlord is relying on the expiration of a fixed term lease, and the lease is invalid under the statute of frauds, then the tenancy was in fact at will or month-to-month and could be terminated only by a 30-day notice. *By Myron Moskovitz*

PRACTICE TIP: Exceptions to Statute of Frauds. There are exceptions to the statute of frauds that should also be explored because they may apply in the landlord/tenant context if the relationship has been in existence for some time [*see, e.g.,* [d], *below* (regarding part performance)]. *By Benjamin Kaplan*

Since a sublease is merely a lease between a present tenant and a third party, it too must conform to the statute of frauds. Further, an assignment of a lease must also meet the statute requirements [*Maron v. Howard (1968) 258 Cal. App. 2d 473, 485, 66 Cal. Rptr. 70]* . In addition, an agreement to surrender a lease for more than one year must be in writing [*Strei v. Brooks (1928) 95 Cal. App. 589, 591-592, 273 P. 145]* .

[b] Requirements

To satisfy the statute of frauds, the lease must contain three essentials [*Enlow v. Irwin (1926) 80 Cal. App. 98, 101, 251 P. 658]* :

- An adequate description of the property to be leased;
- A definite term; and
- A definite rent and the time and manner of its payment.

[c] Extrinsic Evidence

A lessee may not add to the terms of a lease by use of an estoppel based on representations of the lessor made before its execution [*Salton Community Services Dist. v. Southard (1967) 256 Cal. App. 2d 526, 531, 64 Cal. Rptr. 246]* . However, if a lease is ambiguous, extrinsic evidence is admissible to assist the court in interpreting it [*Norlen Investment Co. v. Minskoff (1967) 251 Cal. App. 2d 534, 536, 59 Cal. Rptr. 484]* .

[d] Part Performance

Part performance of an oral lease for more than one year by taking possession of the premises may take the situation out of the operation of the statute of frauds [*Schubert v. Lowe (1924) 193 Cal. 291, 295-296, 223 P. 550]* . The payment of money, however, is not sufficient part performance [*Psihozios v. Humberg (1947) 80 Cal. App. 2d 215, 217-218, 181 P.2d 699]* .

[e] Oral Renewals

An oral agreement for a one-year lease to be annually renewed for one-year terms at the tenant's desire violates the statute of frauds. As to those periods already executed, though, the statute has no application. However, if the entire agreement were considered as a unit, part performance would take the situation out of the statute of frauds [*Aaker v. Smith (1948) 87 Cal. App. 2d 36, 43, 196 P.2d 150]* .

[f] Requirements Lease

An oral lease to provide for a tenant's requirements for office space does not violate the statute of frauds because its performance might be completed within a year [*Fisher v. Parsons (1963) 213 Cal. App. 2d 829, 836-837, 29 Cal. Rptr. 210]* .

[7] Statute of Limitations

A lease executed before July 1, 1971, or one in which the terms of the lease were fixed before that date, is not governed by *Civ. Code §§ 1951-1952* [*Civ. Code § 1952.2*]. The period of limitation for commencing an action based on these leases, if there was an oral contract, is two years from the date the cause of action arose [*Code Civ. Proc. § 339(1)*; *Tillson v. Peters (1940) 41 Cal. App. 2d 671, 679, 107 P.2d 434]* . The period for commencing an action based on these leases, if there was a written contract, is four years [*Code Civ. Proc. § 337(1)*].

If a landlord is seeking relief under *Civ. Code § 1951.2* (regarding what lessor may recover from lessee on the lease's termination) based on an oral lease, the action must be brought within two years of the breach and abandonment of the property, or within two years after the termination of the right of the tenant to possession of the property, whichever is the earlier time [*Code Civ. Proc. § 339.5*]. If the landlord is seeking relief under *Civ. Code § 1951.2* based on a written lease, the action must be brought within four years of the breach and abandonment of the property, or within four years of the termination of the tenant's right to possession, whichever is the earlier time [*Code Civ. Proc. § 337.2*].

For forms of affirmative defenses and demurrers based on the fact that the action is barred by a statute of limitations, see Ch. 345, *Limitation of Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewContracts LawStatutes of FraudsRequirementsGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsTermination & Retaliatory EvictionReal Property LawLandlord & TenantTenant's Remedies & RightsWarranty of Habitability

California Forms of Pleading and Practice--Annotated

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Chapter 333 LANDLORD AND TENANT: EVICTION ACTIONS
PART II. LEGAL BACKGROUND
B. Defending an Eviction Action

29-333 California Forms of Pleading and Practice--Annotated § 333.29

§ 333.29 Time Limits for Discovery

[1] Short Time Limits May Apply

There are special, shorter time limits for certain methods of discovery in unlawful detainer actions [*see, e.g.,* [2], *below,* regarding depositions]. A discovery motion may be made at any time on giving five days' notice [*Code Civ. Proc. § 1170.8*]. For a detailed discussion of discovery methods, see Ch. 190, *Depositions and Discovery* .

[2] Deposition

In unlawful detainer actions, an oral deposition must be scheduled for a date at least five days after service of the deposition notice, but not later than five days before trial [*Code Civ. Proc. § 2025.270(b)*].

[3] Interrogatories

A plaintiff in an unlawful detainer proceeding may propound interrogatories to a party without leave of court at any time that is five days after service of the summons or appearance by that party, whichever occurs first [*Code Civ. Proc. § 2030.020(c)*]. The party to whom any interrogatories are propounded has five days from the date of service to respond, unless on motion of the propounding party the court has shortened the time for response [*Code Civ. Proc. § 2030.260(b)*].

[4] Demand for Inspection of Documents

A plaintiff may make a demand for inspection copying, testing, or sampling without leave of court at any time that is within five days after service of the summons on or appearance by the party to whom the demand is directed, whichever occurs first [*Code Civ. Proc. § 2031.020(c)*]. Demands for inspection copying, testing, or sampling must specify a reasonable time that is at least five days after service of the demand, and must permit the party to whom the demand is directed to have at least five days after service to respond, unless on motion of the party making the demand the court has shortened the time for response [*Code Civ. Proc. §§ 2031.030(c)(2), 2031.260(b)*].

Either party may make a supplemental demand to inspect, copy, test, or sample any later acquired or discovered documents, tangible things, land or other property, or electronically stored information in the custody, or control of the party on whom the demand is made twice before the initial setting of a trial date, and (subject to the time limits on discovery proceedings and motions provided in *Code Civ. Proc. § 2024.010 et seq.*), once after the initial setting of a trial date [*Code Civ. Proc. § 2031.050(a), (b)*]. On motion, for good cause shown, the court may grant leave to a party to make an additional number of supplemental demands for inspection copying, testing, or sampling [*Code Civ. Proc. § 2031.050(c)*].

[5] Request for Admission

A plaintiff may make requests for admission by a party without leave of court at any time that is five days after service of the summons or appearance by that party, whichever occurs first [*Code Civ. Proc. § 2033.020(c)*]. The party to whom any requests are directed has five days from the date of service to respond, unless on motion of the requesting party the court has shortened the time for response [*Code Civ. Proc. § 2033.250(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsAdmissionsGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsRequests for Production & InspectionReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsGeneral Overview

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29-333 California Forms of Pleading and Practice--Annotated § 333.30

§ 333.30 Effect of Surrender of Possession Before Trial or Judgment if There Is No Trial

[1] On Nature of Action

Except as provided in *Civ. Code § 1952.3(b)* [*see* [3], *below*] and *Civ. Code § 1952.3(c)* [*see below*], if possession of the property is no longer in issue in an unlawful detainer proceeding because possession has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action [*Civ. Code § 1952.3(a)*; *see Green v. Superior Court (1974) 10 Cal. 3d 616, 633 n.18, 111 Cal. Rptr. 704, 517 P.2d 1168* (recognizing same rule before its codification in *Civ. Code § 1952.3*)]. The purpose of *Civ. Code § 1952.3* is to accord a tenant, who has relinquished possession of the contested premises at any time before trial, time to prepare for trial and perhaps raise certain defenses not available in unlawful detainer actions. Once possession has been delivered to the landlord, the need for a summary proceeding no longer exists [*Fish Construction Co. v. Moselle Coach Works, Inc. (1983) 148 Cal. App. 3d 654, 659, 196 Cal. Rptr. 174]* .

The above rule does not apply, however, if the defendant's default has been entered on the unlawful detainer complaint and has not been opened by an amendment of the complaint [*see* [2], *below*] or otherwise set aside. In this event the case must proceed as an unlawful detainer proceeding [*Civ. Code § 1952.3(c)*].

[2] On Relief Available to Plaintiff

When an unlawful detainer proceeding becomes an ordinary civil action under *Civ. Code § 1952.3(a)*, the lessor may obtain any relief to which he or she is entitled, including, when applicable, relief authorized by *Civ. Code § 1951.2* (what lessor may recover on automatic termination of lease because of lessee's breach of lease and abandonment of property or termination of lease by lessor because of lessee's breach). However, if the lessor seeks to recover damages described in *Civ. Code § 1951.2(a)(3)* (amount by which unpaid rent for balance of term exceeds amount of rental loss that lessee proves could be reasonably avoided) or any other damages not recoverable in the unlawful detainer proceeding, the lessor must *first amend* the complaint in accordance with *Code Civ. Proc. § 472* or *473* so that possession of the property is no longer in issue and to state a claim for such damages. The lessor must serve a copy of the amended complaint on the defendant in the same manner as a copy of a summons and original complaint are served [*Civ. Code § 1952.3(a)(1)*].

For discussion and forms for use in amending a complaint, see Ch. 21, *Amended and Supplemental Pleadings* . For the manner in which thesummons and complaint are served, see *Code Civ. Proc. §§ 413.10-417.40* and Ch. 518, *Service of Summons and Papers*.

[3] On Defenses and Cross Claims Available to Defendant

When an unlawful detainer proceeding becomes an ordinary civil action under *Civ. Code § 1952.3(a)*, the defendant may, by appropriate pleadings or amendments to pleadings, seek any affirmative relief, and assert all defenses, to which he or she is entitled, whether or not the lessor has amended the complaint [*Civ. Code § 1952.3(a)(2)*]. The court may not require the defendant to deposit into court back rent and accrued damages alleged to be due the landlord as a condition to filing a cross complaint or as a condition to continuing the trial date to allow time for filing and responding to the cross complaint [*Medford v. Superior Court (1983) 140 Cal. App. 3d 236, 239-240, 189 Cal. Rptr. 227* (at p. 239 n.4, pointing out without deciding that *Civ. Code § 1952.3* could be interpreted to mean that defendant may file a cross complaint as a matter of right without seeking leave of court to do so)]. However, *Code Civ. Proc. § 426.30(a)* (relating to compulsory cross complaints) does not apply unless, after delivering possession of the property to the lessor, the defendant (1) files a cross complaint or (2) files an answer or an amended answer in response to an amended complaint filed under *Civ. Code § 1952.3(a)(1)* [*Civ. Code § 1952.3(a)(2)*].

The defendant's time to respond to a complaint for unlawful detainer is not affected by the delivery of possession of the property to the lessor. However, if the complaint is amended as provided in *Civ. Code § 1952.3(a)(1)*, the defendant has the same time to respond to the amended complaint as in an ordinary civil action, that is, 30 days [*Civ. Code § 1952.3(b)*; *Code Civ. Proc. § 471.5(a)*].

For a discussion of cross complaints, including compulsory cross complaints, forms of cross complaints, and forms for use to secure leave of court to file a cross complaint, see Ch. 123, *Complaints and Cross Complaints* .

[4] On Right to Continuance

When possession is no longer an issue because possession has been delivered to the lessor within the period prescribed by *Civ. Code § 1952.3*, and the proceeding is thereby converted to an ordinary civil action, the defendant is entitled, on proper motion, to have the matter continued or placed off calendar to enable him or her to prepare pleadings seeking relief or asserting affirmative defenses not cognizable in an unlawful detainer proceeding and to gather evidence to establish those defenses or the right to such relief. A contrary rule would defeat the statutory policy [*see Code Civ. Proc. § 1179a*] that only those proceedings in which possession remains an issue are entitled to calendar preference as unlawful detainer proceedings and that, once possession has ceased to be an issue, the matter must proceed as an ordinary civil action [*Fish Construction Co. v. Moselle Coach Works, Inc. (1983) 148 Cal. App. 3d 654, 659-660, 196 Cal. Rptr. 174]* .

Nothing in *Civ. Code § 1952.3* affects the pleadings that may be filed, relief that may be sought, or defenses that may be asserted in an unlawful detainer proceeding that has not become an ordinary civil action by reason of the delivery of possession of the property to the lessor before trial or, if there is no trial, before judgment is entered [*Civ. Code § 1952.3(d)*].

For a discussion, procedural checklist, and forms for use in moving for a continuance, see Ch. 136, *Continuances* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersContinuancesReal Property LawLandlord & TenantLandlord's Remedies &

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[Reserved]

§§ 333.31[Reserved]

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§ 333.40 Governing Law

Forcible entry and forcible detainer are defined in *Code Civ. Proc. §§ 1159* and *1160*, respectively. The showing required to be made at trial is set forth in *Code Civ. Proc. § 1172*. Otherwise, the proceedings are governed generally by the same statutes governing proceedings in unlawful detainer, that is, by *Code Civ. Proc. §§ 1159-1179a*.

Penal Code § 418 defines the criminal offenses of forcible entry and forcible detainer and makes them misdemeanors.

PRACTICE TIP:

Forcible Detainer as Crime. As forcible detainer is a crime, tenants who are forcibly removed by their landlords might regain possession most quickly and cheaply by a call to the local police department, rather than by filing suit. *By Myron Moskovitz*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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29-333 California Forms of Pleading and Practice--Annotated § 333.41

§ 333.41 Nature and Purpose of Proceedings

Judicial proceedings for forcible entry and forcible detainer are summary proceedings to recover possession of premises forcibly or unlawfully detained [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 604, 12 Cal. Rptr. 488, 361 P.2d 20]* . The intent of the statutes is to prevent bloodshed, violence, and breaches of the peace likely to result from wrongful entries into the possession of others [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 607, 12 Cal. Rptr. 488, 361 P.2d 20]* . More precisely stated, the legislative intent was to establish a summary procedure for the restitution of real property and thereby promote the settlement of disputes over possession by legal means rather than by self-help. An additional indication of the policy against self-help is found in *Penal Code § 418*, which makes it a misdemeanor for any person to use any force or violence in entering on or detaining any lands or other possessions of another [*Daluiso v. Boone (1969) 71 Cal. 2d 484, 498-499, 78 Cal. Rptr. 707, 455 P.2d 811]* . Thus, the purpose of the statutes was to secure a judicial adjustment of differences concerning the right to possession of property and thereby prevent the parties themselves from redressing or attempting to redress their own wrongs that is likely to lead to serious wrongs against the public or society [*Daluiso v. Boone (1969) 71 Cal. 2d 484, 495, 78 Cal. Rptr. 707, 455 P.2d 811* ; *Rosano v. Superior Court (1983) 147 Cal. App. 3d 92, 96, 194 Cal. Rptr. 749]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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29-333 California Forms of Pleading and Practice--Annotated § 333.42

§ 333.42 Forcible Entry: Definitions

Every person is guilty of forcible entry if he or she [*Code Civ. Proc. § 1159*]:

- Breaks open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror enters on or into any real property [*Code Civ. Proc. § 1159(1)*]; or

- After entering peaceably on real property, turns out by force, threats, or menacing conduct, the party in possession [*Code Civ. Proc. § 1159(2)*; *see Bedi v. McMullan (1984) 160 Cal. App. 3d 272, 275, 206 Cal. Rptr. 578* ; *Civic Western Corp. v. Zila Industries, Inc. (1977) 66 Cal. App. 3d 1, 17, 135 Cal. Rptr. 915]* .

"Every person," as used in *Code Civ. Proc. § 1159*, includes the owner or a person with a superior right to possession, as well as strangers to the title [*see Jordan v. Talbot (1961) 55 Cal. 2d 597, 603, 12 Cal. Rptr. 488, 361 P.2d 20]* . "House," as used in *Code Civ. Proc. § 1159(1)*, is not limited to homes, but includes commercial buildings as well [*Karp v. Margolis (1958) 159 Cal. App. 2d 69, 73, 323 P.2d 557]* . "Party in possession," as used in *Code Civ. Proc. § 1159(2)*, means any person who hires real property and includes a boarder or lodger, but does not include those persons whose occupancy is described in *Civ. Code § 1940(b)* (transient occupancy in hotel, motel, residence club, or other facility, or occupancy at hotel or motel where innkeeper retains right of access and control and provides specified services) [*Code Civ. Proc. § 1159(2)*].

A person who obtains possession of property by a forcible entry does not have the right to retain it [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 608, 12 Cal. Rptr. 488, 361 P.2d 20]* . In addition, no notice or demand for surrender of the premises is necessary to maintain a proceeding for forcible entry [*Rutledge v. Barger (1927) 82 Cal. App. 356, 359, 255 P. 537]* .

Legal Topics:

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

Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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§ 333.43 Forcible Detainer: Definitions

Every person is guilty of a forcible detainer if he or she [*Code Civ. Proc. § 1160*]:

- By force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether it was acquired peaceably or otherwise [*Code Civ. Proc. § 1160(1)*; *see Bedi v. McMullan (1984) 160 Cal. App. 3d 272, 275, 206 Cal. Rptr. 578]* ; or

- In the nighttime, or during the absence of the land's occupant, unlawfully enters on the real property and, after demand made for its surrender, for the period of five days refuses to surrender it to the former occupant [*Code Civ. Proc. § 1160(2)*; *see Jordan v. Talbot (1961) 55 Cal. 2d 597, 608, 12 Cal. Rptr. 488, 361 P.2d 20]* .

"Occupant," within the meaning of *Code Civ. Proc. § 1160(2)*, is one who, within five days preceding the unlawful entry, was in the peaceable and undisturbed possession of the property [*Code Civ. Proc. § 1160(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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§ 333.44 Additional Statutory Causes for Relief

In addition to the four distinct causes for relief provided by *Code Civ. Proc. §§ 1159* and *1160*, a plaintiff may allege in the complaint any circumstances of fraud, force, or violence that may have accompanied the forcible entry or detainer and claim damages for them [*Code Civ. Proc. § 1166(b)*]. Consequently, as an adjunct to any of the standard causes for relief, there is a fifth cause for relief, to wit, damages for fraud accompanying any forcible entry or forcible detainer [*Valencia v. Couch (1867) 32 Cal. 339, 342-343]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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29-333 California Forms of Pleading and Practice--Annotated § 333.45

§ 333.45 Common Law Tort Actions

[1] Damages For Forcible Entry

Apart from any remedy available in a summary proceeding of forcible entry and detainer, but in furtherance of the policy against self-help, a person in peaceable possession of real property may recover in an action in tort all damages for injuries to his or her person or goods that are the natural and proximate result of a forcible entry by another, irrespective of whether the entering party has title or the right to possession [*Daluiso v. Boone (1969) 71 Cal. 2d 484, 486, 499, 78 Cal. Rptr. 707, 455 P.2d 811* (at page 500 overruling *Walker v. Chanslor (1908) 153 Cal. 118, 94 P. 606* , and *Canavan v. Gray (1883) 64 Cal. 5, 27 P. 788*)]. If the occupant's possession was lawful but only damages for a wrongful eviction are sought, the occupant may sue for damages for wrongful eviction notwithstanding that restitution of the premises is not sought under the forcible entry statutes [*Allen v. McMillion (1978) 82 Cal. App. 3d 211, 219 n.6, 147 Cal. Rptr. 77]* .

For discussion and forms of complaints and affirmative defenses that may be adapted for use in suing the intruder in tort, see Ch. 58, *Assault and Battery* , Ch. 362, *Mental Suffering* , and Ch. 550, *Trespass* .

[2] Actions For Trespass

A person in peaceful though wrongful possession of real property may sue in tort for nonstatutory forcible entry and interference with that possession even in the absence of an injury to his or her person or goods [*Allen v. McMillion (1978) 82 Cal. App. 3d 211, 214, 147 Cal. Rptr. 77]* . Although the cause of action is for nonstatutory forcible entry, it has been held that there is no great harm in calling the cause of action an action for trespass so long as it is borne in mind that the cause of action is not for infringement of ownership rights or for injury to real property, but for the forcible, that is, wrongful, interference with peaceable possession [*Allen v. McMillion (1978) 82 Cal. App. 3d 211, 218, 147 Cal. Rptr. 77]* . On proof of the elements of a trespass, that is, a nonstatutory action for forcible entry, the plaintiff in the absence of any injury to his or her person or goods is entitled to an award of at least nominal damages, just as would be true if the intruder was a third party rather than the property's owner. However, unlike the ordinary case when the trespasser is a stranger, the plaintiff by declining to seek restitution of the premises under the forcible entry statutes acquiesces in the continued possession of the property by the forcibly intruding owner. In other words, what is

being remedied in the tort action is the manner of dispossession (self-help) rather than the fact of it [*Allen v. McMillion (1978) 82 Cal. App. 3d 211, 219, 147 Cal. Rptr. 77]* .

It should also be noted that any person who enters residential real property on the invitation of an occupant, during reasonable hours or because of emergency circumstances, for the purpose of providing information regarding tenants' rights or to participate in a tenants' association will not be liable in any criminal or civil action for trespass [*Civ. Code § 1942.6*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawTortsTrespass to Real PropertyTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsGeneral OverviewTortsPremises Liability & PropertyTrespassElements

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§ 333.46 Complaint

The complaint for forcible entry or forcible detainer must (1) be verified and include the typed or printed name of the person verifying the complaint; (2) set forth the facts on which the plaintiff seeks to recover; and (3) describe the premises with reasonable certainty [*Code Civ. Proc. § 1166(a)*]. The complaint may set forth any circumstances of fraud, force, or violence that may have accompanied the alleged forcible entry or forcible detainer, and claim damages for them [*Code Civ. Proc. § 1166(b)*].

For a sample complaint for forcible entry (and detainer or forcible detainer), see *§ 333.140*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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§ 333.47 Elements of Forcible Entry

[1] Plaintiff's Actual, Peaceable Possession

To state a cause of action, or cause for relief, for forcible entry, plaintiff must allege that he or she was in the actual, peaceable possession of the property at the time of the entry complained of [*Knowles v. The Crocker Estate Co. (1899) 125 Cal. 264, 265, 57 P. 998* ; *see Code Civ. Proc. § 1172* (discussed at *§ 333.50*)]. Both words, "actual" and "peaceable," are important. It is not sufficient to allege that plaintiff was entitled to possession or that he or she had constructive possession; it must be alleged that he or she was in actual possession of the premises at the time of the defendant's entry [*Knowles v. The Crocker Estate Co. (1899) 125 Cal. 264, 265, 57 P. 998]* . Actual possession, however, need not consist of actual physical presence on the land, but may exist when one not in actual possession has whatever exclusive power and dominion over it as its circumstances will reasonably permit [*Conroy v. Duane (1873) 45 Cal. 597, 603-605]* . Further, plaintiff's possession must be peaceable and not one maintained against the defendant by force [*Bowers v. Cherokee Bob (1873) 45 Cal. 495, 503-504]* . When, if ever, the possession of a person who enters by force becomes a peaceable possession so as to enable that person to sue for forcible entry is a question of fact to be determined from each case's circumstances [*Bowers v. Cherokee Bob (1873) 45 Cal. 495, 504]* . The plaintiff may be any "party in possession," that is, any person who hires real property, including a boarder or lodger, but not including those persons whose occupancy is described in *Civ. Code § 1940(b)* (transient occupancy in hotel, motel, residence club, or other facility, or occupancy at hotel or motel where innkeeper retains right of access and control and provides specified services) [*Code Civ. Proc. § 1159(2)*].

[2] Forcible Entry by Defendant

[a] Code Civ. Proc. § 1159(1)

To state a cause of action, or cause for relief, for forcible entry under *Code Civ. Proc. § 1159(1)*, plaintiff must allege that defendant is guilty of a forcible entry because defendant entered the premises by breaking open doors, windows, or other parts of the building or, by any kind of violence or circumstance of terror [*Code Civ. Proc. § 1159(1)*]. Angry words and threats of force may be sufficient to constitute acts of forcible entry under *Code Civ. Proc. § 1159(1)*, and the breaking of locks is of itself evidence of force [*Calidino H. Co. v. Bank of America, etc. (1939) 31 Cal. App. 2d 295,*

310, 87 P.2d 923] . However, neither violence nor physical damage is required to constitute a forcible entry under *Code Civ. Proc. § 1159(1)*; what is required is that there be an unauthorized entry against the occupant's consent, in which event force may be implied [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 605-607, 12 Cal. Rptr. 488, 361 P.2d 20]* . For example, an entry made by unlocking a door without the possessor's consent constitutes a forcible entry [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 605, 12 Cal. Rptr. 488, 361 P.2d 20* ; *Karp v. Margolis (1959) 159 Cal. App. 2d 69, 71, 73, 323 P.2d 557* ; *Winchester v. Becker (1906) 4 Cal. App. 382, 384, 88 P. 296]* .

[b] Code Civ. Proc. § 1159(2)

To state a cause of action, or cause for relief, for forcible entry under *Code Civ. Proc. § 1159(2)*, plaintiff must allege that defendant is guilty of a forcible entry because after entering the premises peaceably he or she expelled the plaintiff from the premises by force, threats, or menacing conduct [*Code Civ. Proc. § 1159(2)*]. Under *Code Civ. Proc. § 1159(2)*, a forcible entry is completed if, after a peaceable entry, the occupant is excluded from possession by force or threats of violence [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 607-608, 12 Cal. Rptr. 488, 361 P.2d 20* (*overruling Potter v. Mercer (1879) 53 Cal. 667, 674* , and *disapproving Baxley v. Western Loan & Bldg. Co. (1933) 135 Cal. App. 426, 429, 27 P.2d 387*)]. Thus, it has been held that a landlord is guilty of forcible entry under *Code Civ. Proc. § 1159(2)* by peaceably entering the tenant's apartment in the tenant's temporary absence and removing the tenant's furniture without his or her consent, rendering the apartment unsuitable for residence and thereby forcing the tenant to seek shelter elsewhere, and by a subsequent show of force that caused the tenant to refrain from reentering the premises [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 607, 12 Cal. Rptr. 488, 361 P.2d 20]* .

[3] Defendant's Continuing Possession

To state a cause of action, or cause for relief, for forcible entry, plaintiff must allege that defendant continues to detain possession of the premises from plaintiff [*Davies v. Stark (1914) 25 Cal. App. 519, 521, 144 P. 315]* . The whole purpose of the forcible entry statutes is to provide a summary means of restoring possession to the person entitled to it, and *Code Civ. Proc. § 1174(a)* requires the court, when it or the jury finds in plaintiff's favor, to enter a judgment for possession of the premises. A judgment for possession would, of course, be useless if defendant no longer detained possession of the premises from plaintiff, and this judgment would not serve the purpose of the forcible entry statutes [*Bell v. Haun (1908) 9 Cal. App. 41, 44, 97 P. 1126]* . Therefore, a complaint that alleges a forcible entry but not a detention of the property by defendant does not state a cause of action for forcible entry [*Davies v. Stark (1914) 25 Cal. App. 519, 521-522, 144 P. 315* ; *Bell v. Haun (1908) 9 Cal. App. 41, 44, 97 P. 1126]* .

[4] Damage Caused by Entry and Detention

If damages are sought, plaintiff must allege that he or she has been damaged in a certain amount by the defendant's forcible entry and wrongful detention of the premises [*Karp v. Margolis (1958) 159 Cal. App. 2d 69, 74-75, 323 P.2d 557]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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§ 333.48 Elements of Forcible Detainer

[1] Plaintiff's Occupancy or Right to Possession and Defendant's Forcible Detention of Property

To state a cause of action, or cause for relief, for forcible detainer, plaintiff must allege the following:

- In a proceeding under *Code Civ. Proc. § 1160(1)*, plaintiff was entitled to the possession of the property at the time of the forcible detainer [*see Code Civ. Proc. § 1172* (discussed under *§ 333.50*); *see also San Francisco etc. Soc. v. Leonard (1911) 17 Cal. App. 254, 269, 119 P. 405* (action by employer for forcible detainer against employee who peacefully entered but forcibly detained property after employment's termination)]. Plaintiff must also show that the defendant, by force, or by menaces and threats of violence, unlawfully holds and keeps possession of the property, whether possession was acquired peaceably or otherwise [*Code Civ. Proc. § 1160(1)*; *see Moldovan v. Fischer (1957) 149 Cal. App. 2d 600, 606, 308 P.2d 844]* .

- In a proceeding under *Code Civ. Proc. § 1160(2)*, plaintiff was the property's "occupant" and that the defendant, in the nighttime or during the occupant's absence, unlawfully entered on the property and refused to surrender possession to the occupant for a period of five days after a demand for possession was made [*Code Civ. Proc. § 1160(2)*; *see Moldovan v. Fischer (1957) 149 Cal. App. 2d 600, 607, 308 P.2d 844]* .

The term "occupant" is defined as one who within five days preceding the unlawful entry, was in the peaceable and undisturbed possession of the property [*Code Civ. Proc. § 1160(2)*]. Possession of the premises by a person's agent or servants is sufficient to constitute the person as an occupant within the meaning of *Code Civ. Proc. § 1160(2)* [*Moldovan v. Fischer (1957) 149 Cal. App. 2d 600, 607, 308 P.2d 844]* . An "unlawful entry" as provided in *Code Civ. Proc. § 1160(2)* means simply an entry made without the occupant's consent [*Dutcher v. Sanders (1912) 20 Cal. App. 549, 552, 129 P. 809]* . Thus, under *Code Civ. Proc. § 1160(2)*, the complaint must allege plaintiff's peaceable possession, defendant's unlawful entry, and defendant's forcible detention [*White v. Pfieffer (1913) 165 Cal. 740, 742, 134 P. 321]* .

[2] Defendant's Continuing Detention of Property

To state a cause of action for forcible detainer, plaintiff must allege that defendant continues to detain possession of the premises from plaintiff. The purpose of the forcible detainer statutes is to provide a summary means of restoring possession to the person entitled to it, and *Code Civ. Proc. § 1174(a)* requires the court, when it or the jury finds in plaintiff's favor, to enter a judgment for possession of the premises [*see San Francisco etc. Soc. v. Leonard (1911) 17 Cal. App. 254, 267, 119 P. 405]* .

[3] Damage Caused by Detainer of Property

If damages are sought, the plaintiff must allege that he or she has been damaged in a certain amount by the defendant's forcible detainer of the premises [*see San Francisco etc. Soc. v. Leonard (1911) 17 Cal. App. 254, 267-268, 119 P. 405]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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29-333 California Forms of Pleading and Practice--Annotated § 333.49

§ 333.49 Summons

On the filing of a complaint, a summons must be issued [*Code Civ. Proc. § 1166(d)*]. The Judicial Council has not approved a form of summons for use in proceedings for forcible entry or forcible detainer and the general form of summons for use in civil actions would be inappropriate. Consequently, counsel will either have to (1) draft his or her own summons, in which event the provisions of *Code Civ. Proc. §§ 412.20* and *1167* must be complied with, or (2) adapt the Judicial Council approved form of summons for unlawful detainer [*see § 333.100*]; this may be done by typing above the words "UNLAWFUL DETAINER" in the last box of the block heading one of the following: "FORCIBLE ENTRY AND DETAINER" or "FORCIBLE DETAINER," checking the "5 Day Response Time" box, and crossing out the words "UNLAWFUL DETAINER."

Notice of a motion to quash service of summons on the ground of lack of jurisdiction or to stay or dismiss the action on the ground of inconvenient forum must be given in compliance with *Code Civ. Proc. §§ 1013* and *1167.4* [*Cal. Rules of Ct., Rule 3.1327(a)* (effective 1/1/09)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessSummonsContent & FormCivil ProcedurePleading & PracticeService of ProcessSummonsIssuanceReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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29-333 California Forms of Pleading and Practice--Annotated § 333.50

§ 333.50 Showing Required of Plaintiff at Trial

On the trial of a proceeding for forcible entry or forcible detainer, the plaintiff must show, in addition to the forcible entry or forcible detainer complained of, only that he or she was peaceably in the actual possession of the property at the time of the forcible entry or was entitled to possession at the time of the forcible detainer [*Code Civ. Proc. § 1172*; *see Jordan v. Talbot (1961) 55 Cal. 2d 597, 603, 12 Cal. Rptr. 488, 361 P.2d 20* ; Calidino H. Co. v. Bank of America, etc. *(1939) 31 Cal. App. 2d 295, 307, 87 P.2d 923]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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29-333 California Forms of Pleading and Practice--Annotated § 333.51

§ 333.51 Defenses

[1] In General

The defendant may show in defense that defendant or his or her ancestors or those whose interest in the premises defendant claims, have been in the quiet possession of the property for the space of one whole year together next before the commencement of the proceeding and that his or her interest in the property is not then ended or determined. This showing is a bar to the proceedings [*Code Civ. Proc. § 1172*; *see Karp v. Margolis (1958) 159 Cal. App. 2d 69, 74, 323 P.2d 557* (pointing out that title is not to be confused with possession)].

A necessary element of a cause of action for forcible detainer is that the entry was unlawful with regard to the relation between the defendant and the plaintiff. Thus, defendant may show, in defense, for example, that the entry was with plaintiff's consent [*see Carteri v. Roberts (1903) 140 Cal. 164, 166-167, 73 P. 818* (entry under verbal executory agreement for one year written lease to begin at some future time; although parol agreement was unenforceable (*see Civ. Code § 1624(a)*), permissive entry under it created tenancy at will that could be terminated only by 30 days' notice under *Civ. Code § 789*); *see also Tracy v. Donovan (1918) 37 Cal. App. 350, 351, 174 P. 113* ; *Roberts v. Casey (1939) 36 Cal. App. 2d Supp. 767, 93 P.2d 654]* .

[2] Effect of Defendant's Ownership or Right of Possession

The inquiry in forcible entry and detainer cases is confined to the actual peaceable possession of the plaintiff and the unlawful or forcible ouster or detention by the defendant, or in the case of a forcible detainer the plaintiff's right to possession [*see Code Civ. Proc. § 1172*], the object being to prevent the disturbance of the public peace by the forcible assertion of a private right. Questions as to the defendant's title or right of possession cannot arise [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 604, 12 Cal. Rptr. 488, 361 P.2d 20]* . Thus, the fact the defendant may have title or the right to possession of the land is no defense under the forcible entry and forcible detainer statutes (*Code Civ. Proc. §§ 1159, 1160*), since, by their own terms, these statutes apply to "every person" [*see Daluiso v. Boone (1969) 71 Cal. 2d 484, 495-496, 78 Cal. Rptr. 707, 455 P.2d 811* ; *Jordan v. Talbot (1961) 55 Cal. 2d 597, 603-604, 12 Cal. Rptr. 488, 361 P.2d 20* ; *Allen v. McMillion (1978) 82 Cal. App. 3d 211, 218-219, 147 Cal. Rptr. 77* ; *Rutledge v. Barger (1927) 82 Cal. App. 356, 359-360, 255 P. 537]* . This is true even if the defendant's entry was under a right of reentry given by the

lease. A fortiori, a lease provision expressly permitting a forcible entry by the landlord to recover possession would be void as contrary to public policy [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 604-605, 12 Cal. Rptr. 488, 361 P.2d 20]* . The plaintiff's interest in peaceable though wrongful possession is secured against forcible intrusion by conferring on plaintiff the right to restitution of the premises, the primary remedy, and incidentally to an award of damages proximately caused by the forcible entry [*see Allen v McMillion (1978) 82 Cal. App. 3d 211, 219, 147 Cal. Rptr. 77* ; *see also Code Civ. Proc. § 1174(b)*].

Thus, once a forcible entry, for example, on plaintiff's actual possession is proven, plaintiff is entitled to restitution, though the fee simple title and present right of possession are shown to be in the defendant [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 604, 12 Cal. Rptr. 488, 361 P.2d 20]* .

Evidence of the defendant's title and ownership of the premises is admissible in evidence in a proceeding for forcible entry and detainer, however, not to disprove the plaintiff's right to a judgment, but as evidence bearing on the question of how much damages the plaintiff suffered as the natural and proximate cause of the forcible entry and the forcible detainer [*Karp v. Margolis (1958) 159 Cal. App. 2d 69, 75, 323 P.2d 557]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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§ 333.52 Judgment

[1] Possession, Actual Damages, and Statutory Damages

If at trial, the jury's verdict or court's findings are in the plaintiff's favor and against the defendant, judgment must be entered for the possession of the premises [*Code Civ. Proc. § 1174(a)*]. The jury or the court, if the proceeding was tried without a jury, must also assess the damages occasioned to the plaintiff by any forcible entry or forcible detainer alleged and proved. If the defendant is found guilty and malice is shown, the plaintiff may be awarded statutory damages of up to $600, in addition to actual damages, including rent found due. The trier of fact must determine whether actual damages, statutory damages, or both, must be awarded, and judgment must be entered accordingly [*Code Civ. Proc. § 1174(b)*; *see San Francisco etc. Soc. v. Leonard (1911) 17 Cal. App. 254, 269-272, 119 P. 405]* .

For the manners of enforcing the judgment, see *§ 333.14[3]*.

[2] Treble Damages

If a person recovers damages for a forcible or unlawful entry in or on, or detention of any building or any cultivated real property, judgment may be entered for three times the amount of which the actual damages are assessed [*Code Civ. Proc. § 735*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerTortsDamagesCompensatory DamagesProperty DamageGeneral OverviewTortsDamagesPunitive DamagesAward CalculationsGeneral Overview

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[Reserved]

§§ 333.53[Reserved]

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29-333 California Forms of Pleading and Practice--Annotated § 333.60

§ 333.60 Related Matthew Bender Publications

[1] California Points and Authorities

For memorandum of points and authorities relating to general landlord-tenant matters, such as memorandum supporting and opposing a landlord's claim for damages, see California Points and Authorities, Ch. 141, *Landlord and Tenant* (Matthew Bender)

For memorandum of points and authorities relating to a landlord's liability for injuries resulting from defects in the premises, see California Points and Authorities, Ch. 178, *Premises Liability* (Matthew Bender)

For memoranda of points and authorities supporting and opposing demurrers to complaints for unlawful detainer, see California Points and Authorities, Ch. 236, *Unlawful Detainer* (Matthew Bender)

[2] California Jury Instructions

For jury instructions for use in proceedings for unlawful detainer, see California Forms of Jury Instruction, Ch. 73A, *Matthew Bender Unlawful Detainer Instructions* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligenceGeneral Overview

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29-333 California Forms of Pleading and Practice--Annotated § 333.61

§ 333.61 State Statutes

[1] Acts Constituting Unlawful Detainer

Requiring occupant to move out or check out and reregister before expiration of 30 days' occupancy to avoid application of unlawful detainer law as illegal. *Civ. Code § 1940.1*

When tenant, subtenant, servant, employee, agent, or licensee is guilty of unlawful detainer. *Code Civ. Proc. § 1161*

Holding over after sale of manufactured home, mobilehome, or real property under writ of execution, foreclosure of mortgage or trust deed, by seller, or under default provisions of conditional sale contract or security agreement as unlawful detainer. *Code Civ. Proc. § 1161a*

[2] Rules of Practice

Applicability of provisions of Part Two of Code of Civil Procedure, governing civil actions, to proceedings in unlawful detainer, forcible entry, and forcible detainer. *Code Civ. Proc. §§ 1177, 1178*

[3] Construction of Leases

Uncertain language as construed against party who caused uncertainty to exist. *Civ. Code § 1654*

[4] Termination

Termination of lease by landlord for tenant's use of property contrary to agreement. *Civ. Code §§ 1930, 1931*

Termination of lease by landlord for tenant's failure to make required repairs within reasonable time after request. *Civ. Code § 1931*

Lease terminates when entire leased premises are destroyed. *Civ. Code § 1933(4)*

Termination of hiring before end of term when greater part of thing hired or that part which was the material inducement to the hirer to enter into the contract perishes. *Civ. Code § 1932(2)*

[5] Forfeiture of Lease

Conditions nullifying lessor's declaration of forfeiture of lease. *Code Civ. Proc. § 1161.5*

Forfeiture does not release lessee from liability under *Civ. Code § 1951.2*, relating to tenant's abandonment of property or lessor's termination of lease because of tenant's breach of lease. *Code Civ. Proc. § 1174.5*

Relief from lease's forfeiture. *Code Civ. Proc. § 1179*

[6] Parties

Who may be parties to unlawful detainer proceeding. *Code Civ. Proc. §§ 1164, 1165*

[7] Arbitration

Nothing in *Code Civ. Proc. § 1298* (governing arbitration provisions in real estate contracts) is to be construed to diminish authority of court with regard to real property transactions involving court supervision or jurisdiction, including, but not limited to, unlawful detainer. *Code Civ. Proc. § 1298(d)*

[8] Appearances

Right of owner of rental real property to have property manager appear on owner's behalf in small claims action. *Code Civ. Proc. § 116.540(h)*

Time to appear by answer or demurrer. *Code Civ. Proc. § 1170*

[9] Notice of Trial

Extensions of time provided by *Code Civ. Proc. § 1013(a)*, relating to mail service, is inapplicable to notice of trial requirements for unlawful detainer proceedings. *Code Civ. Proc. § 594(b)*

[10] Notices of Right to Reentry or Terminating Tenancy

Notice required before reentry may be made in accordance with right of reentry given in lease or otherwise. *Civ. Code §§ 791, 793*

Notice required to terminate tenancy in mobilehome park. *Civ. Code §§ 798.55(b), 798.56(d)*

Notice required to terminate tenancy in recreational vehicle park. *Civ. Code §§ 799.65, 799.70*

Notice required to terminate tenancy for unspecified term or periodic tenancy. *Civ. Code § 1946*

Notices required to be given by landlord to tenant or subtenant to render tenant or subtenant guilty of unlawful detainer. *Code Civ. Proc. § 1161(2)-(5)*

Notice required to be given to person who holds over or subtenant is condition precedent to suing for unlawful detainer of manufactured home, mobilehome, or real property held over after sale of property. *Code Civ. Proc. § 1161a(b), (c)*

Service of notices. *Civ. Code §§ 791, 1946*; *Code Civ. Proc. § 1162*

[11] Summons

Service of summons by posting in certain unlawful detainer proceedings, and proof of service. *Code Civ. Proc. §§ 415.45, 417.10(e), 417.20(e)*

Service of summons by certified mail in unlawful detainer proceeding following landlord's notice of belief of abandonment and tenant's notice of intent not to abandon property. *Code Civ. Proc. § 415.47*

On filing of unlawful detainer complaint, summons must be issued thereon. *Code Civ. Proc. § 1166(d)*

Form, issuance, service, and return of summons generally in unlawful detainer proceeding. *Code Civ. Proc. § 1167*; *see Code Civ. Proc. §§ 412.10-417.40*

Motion to quash service of summons for lack of personal jurisdiction or for inconvenient forum. *Code Civ. Proc. § 1167.4*; *see Code Civ. Proc. §§ 418.10(a), 1177*

[12] Possession

Prejudgment claim to right of possession. *Code Civ. Proc. § 415.46*

When plaintiff may have immediate possession of property on filing complaint. *Code Civ. Proc. § 1166a*

Filing of prejudgment claim of right to possession. *Code Civ. Proc. § 1174.25*

Fee for service of prejudgment claim of right of possession. *Gov. Code § 26721.1*

[13] Pleadings

Contents and verification of complaint for unlawful detainer; attachments to complaint. *Code Civ. Proc. § 1166*

Time to answer complaint. *Code Civ. Proc. § 1167.3*

Amendment of complaint to conform to proof. *Code Civ. Proc. § 1173*

[14] Summary Judgment

Motion for summary judgment. *Code Civ. Proc. § 1170.7*

[15] Trial

Time for trial after request to set. *Code Civ. Proc. § 1170.5*

Right to and waiver of jury trial. *Code Civ. Proc. §§ 631(d), 1171*

[16] Extensions of Time

Motion to quash service of summons under *Code Civ. Proc. § 418.10(a)* extends defendant's time to plead. *Code Civ. Proc. § 1167.4*

Extension of time under *Code Civ. Proc. § 1054* is limited to 10 days without consent of adverse party. *Code Civ. Proc. § 1167.5*

[17] Default

Default and judgment. *Code Civ. Proc. § 1169*

[18] Judgment

Interest on amount certain from date plaintiff's right to recover became vested. *Civ. Code § 3287*

Writ of possession issued under judgment for possession in unlawful detainer action is entitled to enforcement without delay notwithstanding filing of bankruptcy proceeding by defendant. *Code Civ. Proc. § 715.050*

Treble damages for forcible or unlawful entry. *Code Civ. Proc. § 735*

Judgment restoring possession of premises, assessing damages, and forfeiting lease, and disposition of personal property left on premises. *Code Civ. Proc. § 1174*

Statutory damages of up to $600 for malice in unlawful detainer actions. *Code Civ. Proc. § 1174(b)*

[19] Attachment

When attachment may or may not be issued. *Code Civ. Proc. § 483.010*

Amount that may be secured by writ of attachment in unlawful detainer proceeding. *Code Civ. Proc. § 483.020*

[20] Costs

Supplemental cost bill in unlawful detainer proceeding. *Code Civ. Proc. § 1034.5*

[21] Appeal

Appeal and stay of judgment. *Code Civ. Proc. § 1176(a)*

Appeal does not bar new action on same agreement for rent. *Code Civ. Proc. § 1176(b)*

[22] Attorney's Fees

Prevailing party in any action under Mobilehome Residency Law (*Civ. Code § 798 et seq.*) is entitled to recovery of reasonable attorney's fees and costs. *Civ. Code § 798.85*

Prevailing party in any action arising out of provisions of Recreational Vehicle Park Occupancy Law (*Civ. Code § 799.20 et seq.*) is entitled to recovery of reasonable attorney's fees and costs. *Civ. Code § 799.78*

Prevailing party is entitled to recovery of attorney's fees in action on contract providing that fees and costs incurred to enforce contract must be awarded either to one of parties or to prevailing party. *Civ. Code § 1717(a)*

Prevailing party is entitled to recovery of attorney's fees in action for damages for retaliatory eviction. *Civ. Code § 1942.5(g)*

[23] Employee Housing

Prohibition against retaliatory termination or modification of tenancy by person operating employee housing; tenants' rights. *Health & Safety Code § 17031.5*

Unlawful detainer proceeding against tenant of employee housing. *Health & Safety Code § 17031.6*

Prohibition against retaliatory employment action by operators of specified employee community housing. *Health & Safety Code § 17031.7*

[24] Mobilehomes

Mobilehome Residency Law. *Civ. Code § 798 et seq.*

[25] Recreational Vehicles

Recreational Vehicle Park Occupancy Law. *Civ. Code § 799.20 et seq.*

[26] Receivers

Appointment of receiver in superior court proceeding for unlawful detainer. *Code Civ. Proc. § 564(b)(7)*

Appointment of receiver in limited civil cases for unlawful detainer. *Code Civ. Proc. § 86(a)(4), (8)*

[27] Covenants

Persons bound by covenant running with the land. *Civ. Code § 1465*

No liability for breach of covenant occurring before acquisition of the property. *Civ. Code § 1466*

Person acquiring estate is not liable for breach of covenant occurring before acquisition. *Civ. Code § 1466*

[28] Landlord's Duties

Owner of residential dwelling unit who has applied for demolition permit for that property is required to give written notice of that fact to prospective and current tenants. *Civ. Code § 1940.6*

Landlords of residential property are required to disclose knowledge of former federal or state ordnance locations in neighborhood. *Civ. Code § 1940.7*

Owner of residential dwelling unit has duty to give prospective tenant written notice of presence of release of illegal controlled substance on or beneath dwelling unit. *Civ. Code § 1940.7*.5 (repealed on January 1, 2006, unless later-enacted statute deletes or extends that date)

Landlord is required to disclose to tenant that gas or electric service provided through tenant's meter serves area outside tenant's dwelling area. *Civ. Code § 1940.9*

Landlord's duty to put building in condition fit for occupation. *Civ. Code § 1941*

Characteristics necessary for tenantable building. *Civ. Code § 1941.1*

Landlord's duty to install and maintain deadbolts and locking devices on doors and windows of buildings intended for human habitation. *Civ. Code § 1941.3*

Tenant's right to repair and deduct from rent. *Civ. Code § 1942*

Waiver of rights. *Civ. Code § 1942.1*

[29] Quiet Enjoyment

Quiet possession implied in agreement to let. *Civ. Code § 1927*

Covenants for quiet enjoyment run with the land. *Civ. Code § 1463*

[30] Warranties

Determinations of court on affirmative defense of breach of landlord's obligations under *Civ. Code § 1941* (requiring landlord to keep residential building in condition fit for human occupation) or of any warranty of habitability. *Code Civ. Proc. § 1174.2*

[31] Forcible Entry and Detainer

[a] Definitions

"Forcible entry" defined. *Code Civ. Proc. § 1159*

"Forcible detainer" defined. *Code Civ. Proc. § 1160*

[b] Practice Rules

Applicability of provisions of Part Two of Code of Civil Procedure to proceedings for forcible entry and forcible detainer. *Code Civ. Proc. §§ 1177, 1178*

[c] Complaint

Complaint for forcible entry and forcible detainer. *Code Civ. Proc. § 1166*

Amendment of complaint at trial. *Code Civ. Proc. § 1173*

[d] Parties

Provisions of Part Two of Code of Civil Procedure, relating to parties to civil actions, are applicable to proceedings for forcible entry or forcible detainer. *Code Civ. Proc. § 1165*

[e] Damages

Damages recoverable in forcible entry and forcible detainer proceedings. *Code Civ. Proc. §§ 735, 1174(b)*

[f] Summons

Issuance. *Code Civ. Proc. § 1166*

Form and content. *Code Civ. Proc. § 1167*

Motion to quash service of summons. *Code Civ. Proc. § 1167.4*

[g] Extensions of Time

On motion to quash service of summons. *Code Civ. Proc. § 1167.4(b)*

Extensions under *Code Civ. Proc. § 1054. Code Civ. Proc. § 1167.5*

[h] Summary Judgment

Motion for. *Code Civ. Proc. § 1170.7*

[i] Trial

Time for. *Code Civ. Proc. § 1170.5*

Calendar preference. *Code Civ. Proc. § 1179a*

[j] New Trials

Applicability to forcible entry and forcible detainer proceedings of provisions of Part Two of Code of Civil Procedure relating to new trials. *Code Civ. Proc. § 1178*

[k] Jury Trial

Right to jury trial and formation of jury. *Code Civ. Proc. § 1171*

[l] Appearance by Defendant

Time to answer complaint or amend answer. *Code Civ. Proc. § 1167.3*

Defendant's time to appear by answer or demurrer. *Code Civ. Proc. § 1170*

[m] Evidence

Showing required of plaintiff; what defendant may show. *Code Civ. Proc. § 1172*

[n] Judgment

Default and default judgment. *Code Civ. Proc. § 1169*

Judgment. *Code Civ. Proc. § 1174(a), (b)*

Enforcement of judgment. *Code Civ. Proc. § 1174(d)*

[o] Appeal

Appeal from judgment and stay of enforcement. *Code Civ. Proc. § 1176(a)*

Applicability to forcible entry and forcible detainer proceedings of provisions of Part Two of Code of Civil Procedure relating to appeals. *Code Civ. Proc. § 1178*

[p] Crimes

Forcible entry on or detaining any lands or possessions of another, except in cases and in manner allowed by law, as misdemeanor. *Penal Code § 418*

Reentry on lands by one who has been removed in accordance with legal process or court order as misdemeanor. *Penal Code § 419*

Lodger who remains on premises after termination under *Civ. Code § 1946.5* of hiring in owner-occupied dwelling in which single lodger resides as infraction, and procedure for removal. *Penal Code § 602.3*

Removal of lodger by owner under *Penal Code § 602.3(a)* from dwelling unit in owner-occupied dwelling in which single lodger resides as not a forcible entry under *Code Civ. Proc. § 1159* and as no basis for civil liability under that

statute. *Penal Code § 602.3(b)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral OverviewReal Property LawLandlord & TenantDuty to RepairReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantTenant's Remedies & RightsWarranty of Habitability

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§ 333.62 Decisions

[1] Purpose and Nature of Unlawful Detainer

Unlawful detainer statutes as procedural in nature, providing adequate, expeditious, and summary procedure for regaining possession of real property once consensual basis for tenant's occupancy is at an end. *Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 149, 130 Cal. Rptr. 465, 550 P.2d 1001* ; *Gross v. Superior Court (1985) 171 Cal. App. 3d 265, 270, 217 Cal. Rptr. 284* ; *De La Vara v. Municipal Court (1979) 98 Cal. App. 3d 638, 640, 159 Cal. Rptr. 648* ; *Childs v. Eltinge (1973) 29 Cal. App. 3d 843, 853, 105 Cal. Rptr. 864*

Purpose of unlawful detainer proceeding as being to restore to landlord possession of property when tenant fails to pay rent. *Fifth & Broadway Partnership v. Kimny, Inc. (1980) 102 Cal. App. 3d 195, 203, 162 Cal. Rptr. 271*

Primary purpose of unlawful detainer proceeding as being to obtain possession of real property in cases specified by statute. *Gray v. Whitmore (1971) 17 Cal. App. 3d 1, 17-18, 94 Cal. Rptr. 904*

Proceedings in unlawful detainer as wholly created and strictly controlled by statute; mode and measure of plaintiff's recovery as limited by those statutes (*Code Civ. Proc. §§ 1161-1179a*), which prevail over inconsistent general principles of law and procedure because of special function of unlawful detainer proceedings to restore immediate possession of real property. *Balassy v. Superior Court (1986) 181 Cal. App. 3d 1148, 1151, 226 Cal. Rptr. 817*

[2] Unlawful Detainer After Sale of Property

Purchaser of property at trustee's sale on foreclosure of trust deed who seeks to evict occupant in possession as required in unlawful detainer proceeding to show that he or she acquired property at regularly conducted sale and thereafter "duly perfected" title. *Vella v. Hudgins (1977) 20 Cal. 3d 251, 255,142 Cal. Rptr. 414, 572 P.2d 28* ; *California Livestock Production Credit Assn. v. Sutfin (1985) 165 Cal. App. 3d 136, 140 n.2, 211 Cal. Rptr. 152*

In unlawful detainer proceeding brought by purchaser of property sold under power of sale in trust deed, defendant

trustor's attacks on plaintiff's title, other than by attempting to show plaintiff's noncompliance with procedure for trustee sale set forth in *Civ. Code § 2924*, as not constituting valid defenses to proceeding and therefore as not raising any triable issue of fact; defendant's assertion of noncompliance with *Civ. Code § 2924* as not raising triable issue because defendant made no showing that it had offered to do equity by tendering full amount of debt for which property was given as security. *MCA, Inc. v. Universal Diversified Enterprises Corp. (1972) 27 Cal. App. 3d 170, 176-177, 103 Cal. Rptr. 522*

[3] Availability of Remedy

Proceeding in unlawful detainer as available only when relation of landlord and tenant exists; that is, remedy is limited to cases in which tenant is estopped to deny landlord's title; hence, vendee in possession of land under contract of sale who has defaulted in installment payment of purchase price as not becoming tenant at will subject to removal by suit in unlawful detainer. *Francis v. West Virginia Oil Co. (1917) 174 Cal. 168, 169-171, 162 P. 394*

Remedy of unlawful detainer as not available to husband to oust his former mistress from house purchased with community property assets when husband had orally agreed to allow mistress to live in house rent free for as long as she wished and some nine years later served her with written notice changing terms of her "tenancy" to provide for rent of $1,000 per month, because mistress had never consented to landlord-tenant relationship and therefore was not a tenant in possession; husband's remedy as being action to quiet title or proceeding for forcible detainer. *Harper v. Raya (1984) 154 Cal. App. 3d 908, 910-913, 201 Cal. Rptr. 563*

Statutory situations (*Code Civ. Proc. §§ 1161, 1161a*) in which remedy of unlawful detainer is available as exclusive. *Greene v. Municipal Court (1975) 51 Cal. App. 3d 446, 450, 124 Cal. Rptr. 139*

Vendee in possession of land under contract of sale who has defaulted in payment of installment of purchase price is not subject to removal by summary method of unlawful deta iner. *Greene v. Municipal Court (1975) 51 Cal. App. 3d 446, 451, 124 Cal. Rptr. 139* ; *Goetze v. Hanks (1968) 261 Cal. App. 2d 615, 616-617, 68 Cal. Rptr. 150*

Relationship between corporate cooperative and shareholder-tenant is that of landlord and tenant; hence, remedy of unlawful detainer proceeding is available to cooperative against tenant who detains premises after tenant's membership and tenancy rights are terminated in accordance with cooperative's bylaws. *Sun Terrace Manor v. Municipal Court (1973) 33 Cal. App. 3d 739, 742-744, 108 Cal. Rptr. 307*

Purchaser of leasehold interest who is allowed possession before escrow closes per escrow agreement is not a tenant and unlawful detainer is unavailable to seller to regain possession if escrow does not close. *Marvell v. Marina Pizzeria (1984) 155 Cal. App. 3d Supp. 1, 202 Cal. Rptr. 818*

[4] Constitutionality of Proceeding

Oregon unlawful detainer statute requiring trial within six days after service of complaint and limiting triable issues is not violative of due process or equal protection provisions of U.S. Constitution. *Lindsey v. Normet (1972) 405 U.S. 56, 66-70, 92 S. Ct. 862, 31 L. Ed. 2d 36*

Civ. Code § 1785.13(a)(3), restricting credit reporting agencies from reporting specified information about unlawful detainer defendants, is unconstitutional. *U.D. Registry, Inc. v. State of California (1995) 34 Cal. App. 4th 107, 116, 40 Cal. Rptr. 2d 228* .

Hearing required by due process clause of *U.S. Const., Amend. XIV*, and former *Cal. Const, Art I, § 13* (now *Cal. Const., Art I, § 7(a)*), is subject to waiver; valid waiver in trust deed precludes defendant in unlawful detainer

proceeding from challenging constitutionality of procedure of trustee's sale. *MCA, Inc. v. Universal Diversified Enterprises Corp. (1972) 27 Cal. App. 3d 170, 174-175, 103 Cal. Rptr. 522*

[5] Notices Terminating Tenancy

Three-day notice demanding payment of more than one year's rent is insufficient to support unlawful detainer action since it did not correctly state amount that is due and it was not served within one year after rent became due, both required under *Code Civ. Proc. § 1161(2).* *Bevill v. Zoura (1994) 27 Cal. App. 4th 694, 697-698, 32 Cal. Rptr. 2d 635*

Under *Code Civ. Proc. § 1161.1(a)*, tenant is not commanded to make tender of amount reasonably estimated to be due and failure to do so does not relieve landlord of complying with obligation to provide notice that reasonably estimates amount owed. *WDT-Winchester v. Nilsson (1994) 27 Cal. App. 4th 516, 533-534, 32 Cal. Rptr. 2d 511*

Finding that landlord's demand for estimated rent exceeds 20 percent margin set by *Code Civ. Proc. § 1161.1(e)* does not necessarily preclude estimate being deemed reasonable for purposes of statute, depending on facts of case. *WDT-Winchester v. Nilsson (1994) 27 Cal. App. 4th 516, 531, 32 Cal. Rptr. 2d 511*

Landlord's failure to serve three-day notice to pay rent or quit on subtenants, as well as on tenant, is waiver of right to have premises restored in absolutely vacant and tenantless condition by tenant who surrenders possession within three-day period. *Markham v. Fralick (1934) 2 Cal. 2d 221, 224, 39 P.2d 804*

Notice to pay rent or quit under *Code Civ. Proc. § 1161(2)* that overstates rent due is ineffective and does not support proceeding for unlawful detainer. *Nourafchan v. Miner (1985) 169 Cal. App. 3d 746, 753, 215 Cal. Rptr. 450* ; *Ernst Enterprises, Inc. v. Sun Valley Gasoline, Inc. (1983) 139 Cal. App. 3d 355, 359, 188 Cal. Rptr. 641*

Lessee waives any defect in service of three-day notice to pay rent or quit possession of farmland by admitting in answer to complaint in unlawful detainer proceeding that he received relevant notice and it was shown that landlord repeatedly attempted personal service on lessee at his residence to no avail, due to lessee's successful efforts to avoid process server, and notice was posted on lessee's residence and copy was mailed to him. *Valov v. Tank (1985) 168 Cal. App. 3d 867, 874-876, 214 Cal. Rptr. 546*

*Code Civ. Proc. § 1161*does not require that lessor serve subtenants as well as tenant with notice to pay rent or quit to maintain proceeding in unlawful detainer against tenant when leased premises are occupied by both tenant and certain subtenants. *Chinese Hosp. Foundation Fund v. Patterson (1969) 1 Cal. App. 3d 627, 632, 81 Cal. Rptr. 795*

Three day period of three-day notice to pay rent or perform covenant or quit premises does not commence to run until notice is actually served on tenant. *Davidson v. Quinn (1982) 138 Cal. App. 3d Supp. 9, 188 Cal. Rptr. 421*

Code Civ. Proc. § 594(b), relating to notice of trial and providing that time extension provisions of *Code Civ. Proc. § 1013(a)*, relating to service by mail, must not serve to extend notice of trial requirements for unlawful detainer proceedings, is direct expression of legislative intent to preserve summary characteristics of unlawful detainer proceedings after complaint has been filed and implies clear legislative intent to exclude notice requirements for terminations of tenancies from time extension provisions of *Code Civ. Proc. § 1013(a)*, relating to service by mail. *Highland Plastics, Inc. v. Enders (1980) 109 Cal. App. 3d Supp. 1, 167 Cal. Rptr. 353*

Tenancy is not terminated on giving of notice but on expiration of notice period, and no cause of action for unlawful detainer exists until tenancy has been terminated. *Highland Plastics, Inc. v. Enders (1980) 167 Cal. Rptr. 353*

Manners of serving notices terminating tenancy. *Highland Plastics, Inc. v. Enders (1980) 167 Cal. Rptr. 353*

[6] Forfeiture of Lease

Forfeiture of lease for appointment of receiver for sublessor when sublessee had continued to pay rent is proper when landlord lost security from appointment. *Superior Motels, Inc. v. Rinn Motor Hotels, Inc. (1987) 195 Cal. App. 3d 1032, 1062-1066, 241 Cal. Rptr. 487*

Right of lessor to declare forfeiture of lease arising from breach of covenant by lessee is waived when lessor, with knowledge of breach, accepts rent specified in lease. *EDC Associates, Ltd. v. Gutierrez (1984) 153 Cal. App. 3d 167, 170, 200 Cal. Rptr. 333* ; *Highland Plastics, Inc. v. Enders (1980) 167 Cal. Rptr. 353*

[7] Effect of Surrender of Possession

Landlord's conversion of unlawful detainer action to ordinary civil action for failure to pay rent is proper if landlord gives up claims for possession and defendant given all rights he or she would have in ordinary civil action. *Lynch & Freytag v. Cooper (1990) 218 Cal. App. 3d 603, 608-610, 267 Cal. Rptr. 189*

When tenant voluntarily surrenders possession of property before trial, right to possession is no longer in issue and proceeding has become ordinary civil action for damages in which rationale underlying rule prohibiting affirmative defenses and cross complaints evaporates. *See Green v. Superior Court (1974) 10 Cal. 3d 616, 633 n.18, 111 Cal. Rptr. 704, 517 P.2d 1168* ; *Knowles v. Robinson (1963) 60 Cal. 2d 620, 625, 36 Cal. Rptr. 33, 387 P.2d 833* ; *Medford v. Superior Court (1983) 140 Cal. App. 3d 236, 240, 189 Cal. Rptr. 227* ; *Mihans v. Municipal Court (1970) 7 Cal. App. 3d 479, 486, 87 Cal. Rptr. 17* ; *Union Oil Co. v. Chandler (1970) 4 Cal. App. 3d 716, 722, 84 Cal. Rptr. 756*

Proceeding in unlawful detainer does not exist when possession of premises is surrendered before complaint is filed. *Markham v. Fralick (1934) 2 Cal. 2d 221, 224, 39 P.2d 804*

Defendant's delivery one day before trial of keys to plaintiff's attorney with letter advising plaintiff that defendants no longer claimed possession of commercial premises is sufficient to establish relinquishment of possession and to allow defendant additional time within which to gather evidence needed to support defense that leased premises were not maintained in safe and secure manner and pleaded denial that plaintiff had performed all covenants of lease agreement. *Fish Construction Co. v. Moselle Coach Works, Inc. (1983) 148 Cal. App. 3d 654, 657-659, 196 Cal. Rptr. 174*

Although not allowed to file cross complaint in unlawful detainer proceeding while remaining in possession of premises, tenant, after moving out, is entitled to do so under *Civ. Code § 1952.3*, filing of which is governed by *Code Civ. Proc. § 428.50*. *Medford v. Superior Court (1983) 140 Cal. App. 3d 236, 239, 189 Cal. Rptr. 227* (noting without deciding that *Civ. Code § 1952.3* could be interpreted to mean that defendant might file cross complaint as matter of right without first obtaining leave of court)

Neither *Code Civ. Proc. § 1024* (postponements conditioned on payment of costs) nor *Code Civ. Proc. § 1170.5* (postponements conditioned on payment into court of accruing rent) authorize trial court to require tenant in unlawful detainer proceeding who has quit premises to deposit into court past rent and damages as condition for granting leave to file cross complaint because of delays that naturally flow from opening case to cross complaint. *Medford v. Superior Court (1983) 140 Cal. App. 3d 236, 240-242, 189 Cal. Rptr. 227*

Demurrer to cross complaint for unlawful detainer is properly sustained without leave to amend when record before appellate court establishes that at time demurrer was before trial court occupant had left premises in dispute and, therefore, no possessory action could be maintained. *Civic Western Corp. v. Zila Industries, Inc. (1977) 66 Cal. App.*

3d 1, 19, 135 Cal. Rptr. 915

If tenant voluntarily surrenders possession of property before issues of fact in unlawful detainer proceeding are finally joined, right to possession is no longer in issue and proceeding becomes ordinary civil action for damages. *Union Oil Co. v. Chandler (1970) 4 Cal. App. 3d 716, 722, 84 Cal. Rptr. 756* ; *see Knowles v. Robinson (1963) 60 Cal. 2d 620, 625, 36 Cal. Rptr. 33, 387 P.2d 833* ; *Mihans v. Municipal Court (1970) 7 Cal. App. 3d 479, 486, 87 Cal. Rptr. 17*

Although defendant in unlawful detainer proceeding is limited to filing answer or demurrer (*Code Civ. Proc. § 1170*) to preserve summary character of proceedings from issues irrelevant to right of immediate possession and court has jurisdiction to strike cross complaint filed in such proceeding, cross complaints are permitted when defendant surrenders possession before trial. *Erbe Corp. v. W & B Realty Co. (1967) 255 Cal. App. 2d 773, 778, 63 Cal. Rptr. 462*

[8] Complaint

Plaintiff is not required in complaint to plead that it had served notice on all subtenants and joined them as parties when it did not appear that subtenants were in default. *Telegraph Avenue Corp. v. Raentsch (1928) 205 Cal. 93, 98, 269 P. 1109*

Tenant screening company could not obtain blanket order under *Code Civ. Proc. § 1161.2* allowing it access to all unlawful detainer filings in municipal court, even though statute is directed at organizations that represent tenants and company represented landlords. *U.D. Registry, Inc. v. Municipal Court (1996) 50 Cal. App. 4th 671, 675, 57 Cal. Rptr. 2d 788*

Complaint in unlawful detainer is required to set forth facts on which plaintiff seeks to recover and, if plaintiff claims defendant breached covenants in lease, compliance with notice requirements of *Code Civ. Proc. § 1161(3)*. *Delta Imports, Inc. v. Municipal Court (1983) 146 Cal. App. 3d 1033, 1036, 194 Cal. Rptr. 685*

Statutory requirements of complaint for unlawful detainer is set forth in *Code Civ. Proc. § 1166*. *De La Vara v. Municipal Court (1979) 98 Cal. App. 3d 638, 640-642, 159 Cal. Rptr. 648*

When averments of complaint are sufficient to state cause of action in ejectment and prays for relief that can be granted in such action, trial court is entitled to grant plaintiff relief in ejectment, although facts pleaded might also show cause of action for unlawful detainer or even to quiet title. *Chinese Hosp. Foundation Fund v. Patterson (1969) 1 Cal. App. 3d 627, 632, 81 Cal. Rptr. 795*

[9] Jurisdiction

Unless tenant has been properly served, court lacks jurisdiction in unlawful detainer action to evict. *Marquez-Luque v. Marquez (1987) 192 Cal. App. 3d 1513, 1518-1519, 238 Cal. Rptr. 172*

Jurisdiction of unlawful detainer proceeding is in superior court when title to property worth more than jurisdictional maximum of municipal court is inevitably in issue. *Asuncion v. Superior Court (1980) 108 Cal. App. 3d 141, 142, 146, 166 Cal. Rptr. 306*

Trial court does not acquire jurisdiction over person of defendant served with summons issued under *Code Civ. Proc. § 1167*, which limits time to file responsive pleading to five days, when complaint fails to state facts sufficient to constitute cause of action for unlawful detainer, forcible detainer, or forcible entry. *Greene v. Municipal Court (1975) 51 Cal. App. 3d 446, 451-452, 124 Cal. Rptr. 139*

Pending action for declaratory relief brought by lessees in another county presenting same underlying issue is to correct amount of rent due, but not encompassing issue of lessors' rights to regain possession and terminate lease, does not invoke rule of exclusive concurrent jurisdiction, so as to divest court in county in which real property is situated from jurisdiction over unlawful detainer proceeding. *Childs v. Eltinge (1973) 29 Cal. App. 3d 843, 848-856, 105 Cal. Rptr. 864*

[10] Parties

Legislature is empowered to authorize maintenance of unlawful detainer proceeding by or against executor or administrator of deceased person. *Stockton Morris Plan Co. v. Carpenter (1936) 18 Cal. App. 2d 205, 209, 63 P.2d 859*

[11] Sublessees

Later termination of lease by tenant and landlord does not affect unlawful detainer proceeding against subtenant, which cause of action arose when rent was not paid after service of three-day notice to pay rent or quit. *Fifth & Broadway Partnership v. Kimny, Inc. (1980) 102 Cal. App. 3d 195, 200-203, 162 Cal. Rptr. 271*

Sublessee is bound by terms and conditions of original lease and its rights are dependent on and subject to sublessor's rights. *Fifth & Broadway Partnership v. Kimny, Inc. (1980) 102 Cal. App. 3d 195, 201, 162 Cal. Rptr. 271*

[12] Motion to Quash

Manner of attacking complaint that fails to state facts sufficient to constitute cause of action for unlawful detainer is by motion to quash and not by general demurrer. *Delta Imports, Inc. v. Municipal Court (1983) 146 Cal. App. 3d 1033, 1035-1036, 194 Cal. Rptr. 685*

[13] Trial

Defendant in unlawful detainer action is entitled to jury trial because action for unlawful detainer is one at law. *Marquez-Luque v. Marquez (1987) 192 Cal. App. 3d 1513, 1519, 238 Cal. Rptr. 172*

Right to jury trial in civil cases is guaranteed by *Cal. Const., Art I, § 16*, and specifically granted in unlawful detainer proceedings by *Code Civ. Proc. § 1171*. *Department of Transportation v. Kerrigan (1984) 200 Cal. Rptr. 865*

Tenant is entitled to jury trial on issue of retaliatory eviction in unlawful detainer proceeding. *Department of Transportation v. Kerrigan (1984) 153 Cal. App. 3d Supp. 41, 200 Cal. Rptr. 865*

[14] Jury Instructions

When appropriate under facts of given case, residential tenants defending against unlawful detainer proceedings on ground landlord breached implied warranty of habitability, are entitled to jury instructions based on relevant standards set forth in *Civ. Code § 1941.1* (conditions under which premises are deemed to be untenantable), regardless of whether "repair and deduct" remedy of *Civ. Code § 1942* has been used. *Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 58-59, 171 Cal. Rptr. 707, 623 P.2d 268*

[15] Res Judicata

Trial court's determination in unlawful detainer proceeding involving farm workers and their employer, although binding within context of unlawful detainer proceeding, has no res judicata or collateral estoppel effect in any related unfair labor practice proceeding before Agricultural Labor Relations Board and initiated in accordance with Agricultural Labor Relations Act (*Lab. Code §§ 1140-1166.3*). *Vargas v. Municipal Court (1978) 22 Cal. 3d 902, 916, 150 Cal. Rptr. 918, 587 P.2d 714*

[16] Judgments

Unlawful detainer judgments based on signed stipulations for judgment on documents resembling official court forms, printed in English, of Spanish speaking tenants who did not read English in which tenants purported to agree to onerous terms in landlord's favor are consideration for stay as denying tenants their due process rights and are void on their face. *Little v. Sanchez (1985) 166 Cal. App. 3d 501, 504-506, 213 Cal. Rptr. 297*

In unlawful detainer proceeding, fact that landlord's notice demanded accrued rent in amount of $600 and judgment awarded only $582 (a difference of $18) does not warrant reversal; though there was no reporter's transcript and hence trial court's reasons for reducing amount were unknown, such error contained in judgment correct in its result is trifling. *Gruzen v. Henry (1978) 84 Cal. App. 3d 515, 519* and n.2, *148 Cal. Rptr. 573*

[17] Damages

Net profits earned by tenant is not proper measure of damages for landlord in unlawful detainer action; reasonable rental value is proper measure of damages. *Superior Motels, Inc. v. Rinn Motor Hotels, Inc. (1987) 195 Cal. App. 3d 1032, 1069-1072, 241 Cal. Rptr. 487*

Lessor is not required to seek rental damages in unlawful detainer proceeding, determination of which could delay and frustrate primary purpose of proceeding to obtain speedy possession of property, but is permitted to seek such damages in separate civil action. *Northrop Corp. v. Chaparral Energy, Inc. (1985) 168 Cal. App. 3d 725, 729-730, 214 Cal. Rptr. 173*

Treble damages is properly awarded against defendant in unlawful detainer proceeding if malice is pleaded and proved; requirement that it be established that defendant willfully, deliberately, intentionally, and obstinately withheld possession with knowledge that lease had terminated and against will of landlord. *Sasson v. Katash (1983) 146 Cal. App. 3d 119, 126, 194 Cal. Rptr. 46* (construing prior law); *Fifth & Broadway Partnership v. Kimny, Inc. (1980) 102 Cal. App. 3d 195, 204, 162 Cal. Rptr. 271* (construing prior law)

Proper measure of damages in unlawful detainer proceeding brought under *Code Civ. Proc. § 1161a(b)(3)* (detention after sale of property under power of sale in trust deed) is detriment to owner because of unlawful detention of property; detriment is measurable in amount of reasonable rental value that plaintiff might have realized had plaintiff not been denied possession unlawfully; hence, trial court did not err in having considered, in part, rents received by defendant during period of unlawful detention in fixing plaintiff's damages for unlawful detention of real property purchased at nonjudicial sale under trust deed. *MCA, Inc. v. Universal Diversified Enterprises Corp. (1972) 27 Cal. App. 3d 170, 179, 103 Cal. Rptr. 522*

Rule in California is well established that lessee of real property who willfully, deliberately, intentionally, and obstinately withholds possession of property, with knowledge of termination of lease and against landlord's will is liable for treble damages. *Erbe Corp. v. W & B Realty Co. (1967) 255 Cal. App. 2d 773, 780, 63 Cal. Rptr. 462*

[18] Injunctive Relief

Preliminary injunction enjoining landlord from suing tenants in unlawful detainer without prior court order is proper in class action by tenants against landlord for injunctive relief when it was shown that landlord had engaged in unlawful business practice of retaliatory eviction against tenants who had exercised lawful rights. *Hernandez v. Stabach (1983) 145 Cal. App. 3d 309, 312-315, 193 Cal. Rptr. 350*

[19] Rent

Court does not have jurisdiction to make post-judgment award of rent after unlawful detainer judgment in favor of tenant. *Hudec v. Robertson (1989) 210 Cal. App. 3d 1156, 1163-1167, 258 Cal. Rptr. 868*

Code Civ. Proc. § 1174 controls trial court's jurisdiction to enter judgment for possession in unlawful detainer proceedings and to award collateral rents and damages; language of section makes clear that court has no jurisdiction to condition entry of judgment for possession in defendant's favor on defendant's immediate payment of pendente lite rents when plaintiff does not prevail on foundational issue of unlawful detainer and right to possession. *Balassy v. Superior Court (1986) 181 Cal. App. 3d 1148, 1152, 226 Cal. Rptr. 817*

Primary purpose of unlawful detainer proceeding is being to enable landlord to recover possession of property; recovery of rent is mere incident to main object; when main object of proceeding fails, incidents fall with it; hence, landlord who fails to show that defendant unlawfully detained property is not entitled in unlawful detainer proceeding to recover arrears of rent due. *Markham v. Fralick (1934) 2 Cal. 2d 221, 226-227, 39 P.2d 804*

Covenants in lease requiring tenant to pay real estate taxes assessed against demised property and proportionate share of cost of maintaining common areas of shopping center in which demised property was located, when rent was treated separately in lease, is not rent and consequently not subject to *Code Civ. Proc. § 1161(2)*, requiring that notice to pay rent or quit be served within one year after rent becomes due, but subject to *Code Civ. Proc. § 1161(3)*, which imposes no time limitation on when notice must be served, thus leaving ordinary statute of limitations to apply. *Cal-American Income Property Fund IV v. Ho (1984) 161 Cal. App. 3d 583, 585, 207 Cal. Rptr. 532*

Landlord in unlawful detainer proceeding is entitled to eviction judgment but not to award of past due rent when it is shown that landlord failed to secure certificate of occupancy as required by city ordinance that expressly imposed only criminal sanction for its violation but purpose of which was to insure that property meets health and safety requirements of city code. *Gruzen v. Henry (1978) 84 Cal. App. 3d 515, 517-519, 148 Cal. Rptr. 573*

Tenant does not have right to prevent lessor from employing summary remedies to which he or she is entitled under unlawful detainer statutes by refusing to pay disputed rent and instead filing and serving action for declaratory relief. *Childs v. Eltinge (1973) 29 Cal. App. 3d 843, 854, 105 Cal. Rptr. 864*

If amount of rent is in dispute, lessee is permitted to pay rent under protest and institute action for declaratory relief in which, if he or she prevails, it could be declared that lessee was entitled to reimbursement or credit against rent due thereafter during lease's term. *Childs v. Eltinge (1973) 29 Cal. App. 3d 843, 853-854, 105 Cal. Rptr. 864*

If lessor enters into and assumes full control of premises during pendency of unlawful detainer proceeding and it cannot be said that this assumption of control is for lessee's account under appropriate provisions of lease or circumstances justifying such declaration, entry constitutes eviction and lessee's liability for rent is terminated. *Garfinkle v. Montgomery (1952) 113 Cal. App. 2d 149, 153, 248 P.2d 52*

Landlord's acceptance of HUD housing assistance payments made on behalf of tenant after tenant's breach does not waive landlord's right to terminate lease, at least where those payments did not constitute rent under terms of lease. *Savett v. Davis (1994) 29 Cal. App. 4th Supp. 13, 20, 34 Cal. Rptr. 2d 550*

In unlawful detainer proceeding for unpaid rent brought after three-day notice to pay rent or quit had been served, trial court has committed reversible error in awarding landlord back rent after landlord had waived all back rent in open court. *Lee v. Vignoli (1979) 98 Cal. App. 3d Supp. 24, 160 Cal. Rptr. 79*

[20] Appeal

Appeal by landlord from judgment for tenant in unlawful detainer action based on trial court's determination that landlord's notice to pay rent was deficient is not moot even though tenant had relinquished possession of premises. *Cinnamon Square Shopping Center v. Meadowlark Enterprises (1994) 24 Cal. App. 4th 1837, 1843, 30 Cal. Rptr. 2d 697*

In unlawful detainer action, landlord's failure to raise and its failure to request trial court to adjudicate issue of reasonableness of amount of rent demanded (under *Code Civ. Proc. § 1161.1*) precludes landlord from having that issued determined on appeal. *Cinnamon Square Shopping Center v. Meadowlark Enterprises (1994) 24 Cal. App. 4th 1837, 1844, 30 Cal. Rptr. 2d 697*

Appeal from judgment awarded to plaintiff in unlawful detainer proceeding, for restitution and possession of property, is not rendered moot by defendant's relinquishment of possession of property pending appeal when defendant was compelled to give up property under judgment; fact that defendant may have given up possession before formal eviction under writ of execution does not make appeal moot, because effective relief was available to defendant if he prevailed on appeal; on reversal of judgment, appellate court is empowered to restore defendant to possession of property. *Old National Financial Services, Inc. v. Seibert (1987) 194 Cal. App. 3d 460, 467-468, 239 Cal. Rptr. 728*

Tenant's payment in unlawful detainer proceeding of pendente lite rentals to avoid forfeiture of right to possession does not effect waiver of tenant's entitlement to appeal that portion of judgment and does not render issue moot. *Balassy v. Superior Court (1986) 181 Cal. App. 3d 1148, 1150 n.2, 226 Cal. Rptr. 817*

Defendant's vacation of premises in accordance with judgment of possession for plaintiff and failure to request stay of execution pending appeal or protective order does not deprive defendant of right to determination on appeal that judgment of possession was erroneous after implied finding made in defendant's favor on affirmative defense. *Lee v. Vignoli (1979) 98 Cal. App. 3d Supp. 24, 160 Cal. Rptr. 79*

Tenant in possession appealing from adverse unlawful detainer judgment is entitled to stay only if trial court exercises its discretion to grant one; *Code Civ. Proc. § 1176* is discretionary stay-of-judgment statute that clearly promotes valid state objective. *Goldie's Bookstore v. Super. Ct. of State of Cal. (9th Cir. [Cal.] 1984) 739 F.2d 466, 470-471*

[21] Arbitration

When (1) license agreement provided for arbitration and related lease did not, (2) franchisee and franchisor were parties to pending class action regarding license agreement, and (3) grounds for franchisor's termination of lease were alleged breaches of same provisions of license agreement that were subject of class action, arbitration of unlawful detainer action had to be compelled but stayed until resolution of class action to avoid conflicting rulings [*see Code Civ. Proc. § 1281.2(c)*]; although action for right of possession is normally subject to priority, breach of lease and breach of licensing agreement were inextricably intertwined. *Pioneer Take Out Corp. v. Bhavsar (1989) 209 Cal. App. 3d 1353, 1357-1358, 257 Cal. Rptr. 749*

[22] Attorney's Fees

Unlawful detainer action that was based on violation of lease provisions and was voluntarily dismissed by landlord was action on the contract and therefore attorneys' fees award to tenant was barred by *Civ. Code § 1717(b)(2)*. *Mitchell Land and Improvement Co. v. Ristorante Ferrantelli Inc. (2007) 158 Cal. App. 4th 479, 490, 70 Cal. Rptr. 3d 9*

Subtenant entitled to attorneys' fees under sublease provision after landlords dismissed unlawful detainer action alleging that tenant was unlawfully in possession of premises; unlawful detainer claim sounded in tort, and therefore recovery of fees was not barred by *Civ. Code § 1717(b)(2)*. *Drybread v. Chipain Chiropractic Corp. (2007) 151 Cal. App. 4th 1063, 1077, 60 Cal. Rptr. 3d 580*

Right to recover attorney's fees in unlawful detainer proceeding extends to attorney's fees incurred on appeal. *Richard v. Degen & Brody, Inc. (1960) 181 Cal. App. 2d 289, 300, 5 Cal. Rptr. 263*

[23] Franchises

Jurisdiction of court in unlawful detainer proceeding against franchised lessee is broad enough to encompass issues arising out of provisions of franchise contract as well as lease to extent that these provisions affect right to possession of premises. *Mobil Oil Corp. v. Handley (1978) 76 Cal. App. 3d 956, 962-963, 143 Cal. Rptr. 321*

In unlawful detainer proceeding against franchised lessee, court, in deciding whether to permit affirmative defenses, is permitted to balance interest in preserving summary nature of unlawful detainer proceeding against public policies furthered by protecting defendant from eviction under alleged defenses; if statutes controlling franchise arrangement prevent its termination, then purpose of those statutes would be totally frustrated if eviction from premises in unlawful detainer proceeding without consideration of those statutes were permitted; but if defendant has adequate remedy at law and/or trial of alleged defenses would be lengthy and difficult, this balance may be resolved by refusing to hear affirmative defenses. *Mobil Oil Corp. v. Handley (1978) 76 Cal. App. 3d 956, 963, 143 Cal. Rptr. 321*

[24] Mobilehome Park Tenants

In unlawful detainer proceeding against mobilehome park tenants, 60-day notice of former *Civ. Code § 789.5* (*now see Civ. Code § 798.55*) rather than three-day notice of *Code Civ. Proc. § 1161* is required, and attorney's fees are awardable to successful tenant under former *Civ. Code § 789.12* (*now see Civ. Code § 798.85*). *Palmer v. Agee (1978) 87 Cal. App. 3d 377, 385-386, 387-388, 150 Cal. Rptr. 841*

[25] Petroleum Dealers

In unlawful detainer proceeding against petroleum dealer based on failure to make required petroleum purchases, dealer is entitled to introduce all relevant evidence to establish that prices charged were unfair. *E. S. Bills, Inc. v. Tzucanow (1985) 38 Cal. 3d 824, 832-834, 215 Cal. Rptr. 278, 700 P.2d 1280*

[26] Receivership

Appointment on lessor's application of receiver who takes possession of property and collects rents from subtenants during pendency of unlawful detainer proceeding constitutes eviction of tenant relieving tenant from payment of rent during receiver's occupancy. *Telegraph Avenue Corp. v. Raentsch (1928) 205 Cal. 93, 99-101, 269 P. 1109*

[27] Affirmative Defenses and Cross Complaints Generally

Unlawful detainer is summary proceeding in which only issues directly relevant to ultimate question of possession may be raised in defense; counterclaims, cross complaints, and affirmative defenses are generally not considered. *Barela v. Superior Court (1981) 30 Cal. 3d 244, 249, 178 Cal. Rptr. 618, 636 P.2d 582* ; *S. P. Growers Asso. v. Rodriguez (1976) 17 Cal. 3d 719, 723-724, 131 Cal. Rptr. 761, 552 P.2d 721*

Rule is firmly established in California that neither cross complaint nor counterclaim may be properly filed in suit for unlawful detention of property, even though alleged cause therein contained grows out of subject matter involved in original suit; exceptions. *Knowles v. Robinson (1963) 60 Cal. 2d 620, 625-626, 36 Cal. Rptr. 33, 387 P.2d 833*

Unlawful detainer statute is not unconstitutional in depriving lessee of equal protection of the laws in denying right to setoff, counterclaim, or cross complain. *Telegraph Avenue Corp. v. Raentsch (1928) 205 Cal. 93, 97-98, 269 P. 1109*

Affirmative defenses are not assertable in unlawful detainer proceeding unless directly relevant to right of possession. *Fish Construction Co. v. Moselle Coach Works, Inc. (1983) 148 Cal. App. 3d 654, 658, 196 Cal. Rptr. 174*

Affirmative defenses and cross complaints are generally not allowed in unlawful detainer proceeding as they could frustrate summary remedy provided by statute by injecting into proceeding issues extrinsic to that right. *Union Oil Co. v. Chandler (1970) 4 Cal. App. 3d 716, 721, 84 Cal. Rptr. 756* ; *see Deal v. Municipal Court (1984) 157 Cal. App. 3d 991, 995, 204 Cal. Rptr. 79* ; *Mihans v. Municipal Court (1970) 7 Cal. App. 3d 479, 486, 87 Cal. Rptr. 17*

Breach of covenant to repair in commercial lease is no defense to unlawful detainer proceeding for failure to pay rent; tenant is required to bring separate action for damages. *Schulman v. Vera (1980) 108 Cal. App. 3d 552, 560-563, 166 Cal. Rptr. 620*

Homeowners are not permitted to be evicted, consistent with due process guarantees, without being permitted to raise affirmative defenses that if proved would maintain their possession and ownership. *Asuncion v. Superior Court (1980) 108 Cal. App. 3d 141, 146, 166 Cal. Rptr. 306*

Generally, neither cross complaint nor affirmative defense is admissible in unlawful detainer proceeding; two exceptions are (1) when tenant has voluntarily surrendered possession before issues of fact are finally joined; and (2) when court is permitted to inquire into equitable considerations. *Union Oil Co. v. Chandler (1970) 4 Cal. App. 3d 716, 721-722, 84 Cal. Rptr. 756* ; *see Deal v. Municipal Court (1984) 157 Cal. App. 3d 991, 995, 204 Cal. Rptr. 79* ; *Mihans v. Municipal Court (1970) 7 Cal. App. 3d 479, 486, 87 Cal. Rptr. 17*

Defendants are not prejudiced by trial court's order in unlawful detainer proceeding striking their cross complaint when in both their pretrial statement of issues and written notice of surrender of possession they steadfastly maintained their legal right to possession; unlawful detainer proceeding is appropriate means to test any question of immediate possession to real property, whether defendant is in actual physical possession or merely claims legal right to immediate possession. *Erbe Corp. v. W & B Realty Co. (1967) 255 Cal. App. 2d 773, 778-779, 63 Cal. Rptr. 462*

[28] Racial Discrimination

Racial discrimination is permissible affirmative defense in unlawful detainer proceeding to recover possession of residential property. *Abstract Investment Co. v. Hutchinson (1962) 204 Cal. App. 2d 242, 244-245, 255, 22 Cal. Rptr. 309* (judicial eviction based on racial discrimination as violation of rights guaranteed by federal and state constitutions)

[29] Rent Control Ordinances

Code Civ. Proc. §§ 1159-1179a and *Civ. Code § 1951-1952.6* does not preclude defense based on municipal rent control legislation enacted in accordance with police power imposing rent ceilings and limiting grounds for eviction for purpose of enforcing those rent ceilings. *Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 149, 130 Cal. Rptr. 465, 550 P.2d 1001* ; *Gross v. Superior Court (1985) 171 Cal. App. 3d 265, 270-271, 217 Cal. Rptr. 284* ; *Nourafchan v. Miner (1985) 169 Cal. App. 3d 746, 751-752, 215 Cal. Rptr. 450*

Municipal court commits reversible error in determining that plaintiff apartment house owner in unlawful detainer proceedings against tenants preparatory to converting apartment house to condominiums had either complied with or was not subject to city's rent control law, which required obtaining permit from city's rent control board to remove apartment building from rental housing market before evicting tenants, when city rent control board had in effect ruled to the contrary in previously denying owner's petition for declaration that it had vested right to proceed with conversion; in permitting owner in unlawful detainer proceedings to collaterally attack order of board, a quasi-judicial administrative body whose decisions are not subject to collateral attack, municipal court has acted in excess of its jurisdiction; owner's remedy is to challenge board's order by administrative mandate, a proceeding over which municipal court has no jurisdiction. *Hazon-Iny Development, Inc. v. Unkefer (1980) 172 Cal. Rptr. 191*

[30] Retaliatory Eviction

Two parallel and independent sources for doctrine of retaliatory eviction exist in California: common law doctrine developed by courts and statutory scheme set forth in *Civ. Code § 1942.5* and other statutes. *Barela v. Superior Court (1981) 30 Cal. 3d 244, 250, 251, 178 Cal. Rptr. 618, 636 P.2d 582* ; *see Western Land Office, Inc. v. Cervantes (1985) 175 Cal. App. 3d 724, 731-740, 220 Cal. Rptr. 784*

Retaliatory eviction arising from tenant's having complained to police that landlord had committed crime (molesting tenant's nine-year-old daughter) is proper defense in unlawful detainer proceeding. *Barela v. Superior Court (1981) 30 Cal. 3d 244, 249-254, 178 Cal. Rptr. 618, 636 P.2d 582*

Retaliatory eviction, based on tenant's exercise of statutory right, is permissible affirmative defense in unlawful detainer proceeding to recover possession of residential property. *Vargas v. Municipal Court (1978) 22 Cal. 3d 902, 913-916, 150 Cal. Rptr. 918, 587 P.2d 714* ; *Schweiger v. Superior Court (1970) 3 Cal. 3d 507, 517, 90 Cal. Rptr. 729, 476 P.2d 97*

Under *Evid. Code §§ 500* and *520*, burden of proving retaliatory motive by preponderance of evidence is on tenant. *See Schweiger v. Superior Court (1970) 3 Cal. 3d 507, 517, 90 Cal. Rptr. 729, 476 P.2d 97* (common law defense); *Western Land Office, Inc. v. Cervantes (1985) 175 Cal. App. 3d 724, 726, 735, 739-742, 220 Cal. Rptr. 784* (statutory defense, further holding that *Civ. Code § 1942.5* creates no rebuttable presumption in tenant's favor)

Tenant is not required to show financial condition of landlord before punitive damages may be imposed under *Civ. Code § 1942.5* for retaliatory eviction and punitive damages are available in these circumstances even though tenant did not move. *Rich v. Schwab (1998) 63 Cal. App. 4th 803, 815-817, 75 Cal. Rptr. 2d 170*

Statutory prohibition of retaliatory eviction (*Civ. Code § 1942.5*) provides protection to mobilehome park residents and is not preempted by Mobilehome Residency Law (*Civ. Code § 798 et seq.*). *Rich v. Schwab (1998) 63 Cal. App. 4th 803, 812, 74 Cal. Rptr. 2d 355*

Defense of retaliatory eviction is unavailable in unlawful detainer proceeding after valid foreclosure sale under deed of trust and lawful perfection of purchaser's title. *California Livestock Production Credit Assn. v. Sutfin (1985) 165 Cal. App. 3d 136, 142, 211 Cal. Rptr. 152*

Retaliatory eviction is legal and not equitable defense. *Department of Transportation v. Kerrigan (1984) 153 Cal. App. 3d Supp. 41, 200 Cal. Rptr. 865*

[31] Warranty of Habitability

Warranty of habitability is implied by law in residential lease; breach of warranty is permissible defense in unlawful detainer proceeding. *Green v. Superior Court (1974) 10 Cal. 3d 616, 631-634, 111 Cal. Rptr. 704, 517 P.2d 1168* ; *see Hall v. Municipal Court (1974) 10 Cal. 3d 641, 643-644, 111 Cal. Rptr. 721, 517 P.2d 1185* (dicta)

Collateral estoppel is not applicable to tenant's action for damages for breach of warranty of habitability filed after stipulated judgment in unlawful detainer action in which tenant raised issue of breach of warranty of habitability as affirmative defense. *Landeros v. Pankey (1995) 39 Cal. App. 4th 1167, 1174, 46 Cal. Rptr. 2d 165*

In unlawful detainer proceeding when court finds breach of implied warranty of habitability that requires reduction in rent, judgment giving landlord possession is improper unless tenant is given opportunity to pay reducedrent and retain possession. *Lee v. Vignoli (1979) 160 Cal. Rptr. 79*

Damages for breach of implied warranty of habitability are determined by reducing agreed rent by percentage of reduction of habitability found by trier of fact. *Cazares v. Ortiz (1980) 109 Cal. App. 3d Supp. 23, 168 Cal. Rptr. 108*

Although breach by landlord of implied warranty of habitability may be raised as defense in unlawful detainer proceeding, landlord is not required to plead performance of warranty in complaint to state cause of action. *De La Vara v. Municipal Court (1979) 98 Cal. App. 3d 638, 640-642, 159 Cal. Rptr. 648*

[32] Forcible Entry

Defendant landlord commits forcible entry in violation of *Code Civ. Proc. § 1159* by unlocking plaintiff's apartment in her temporary absence without her consent and entering with storage company employees to remove her furniture, even though there was no physical damage to premises or actual violence. *Jordan v. Talbot (1961) 55 Cal. 2d 597, 605, 12 Cal. Rptr. 488, 361 P.2d 20*

[33] Forcible Detainer

Person, who by fraudulent pretense that she desired to make temporary inspection of house, took actual possession and permanent occupancy of premises without consent of party entitled to possession, is guilty of unlawful entry under *Code Civ. Proc. § 1160(2). White v. Pfieffer (1913) 165 Cal. 740, 742, 134 P. 321*

Husband's remedy to oust his former mistress from house purchased with community property assets where husband had orally agreed to allow his mistress to live in house rent free for as long as she wished and some nine years later served her with written notice changing terms of her "tenancy" to provide for rent of $1,000 per month, was either an action to quiet title or a proceeding for forcible detainer, and not unlawful detainer because mistress had never consented to landlord-tenant relationship and therefore was not a tenant in possession. *Harper v. Raya (1984) 154 Cal. App. 3d 908, 913, 201 Cal. Rptr. 563*

Employee who holds property by force and threats of violence after termination of employment is not guilty of forcible entry but is guilty of forcible detainer. *San Francisco etc. Soc. v. Leonard (1911) 17 Cal. App. 254, 261-264, 269, 119 P. 405*

[34] Damages for Forcible Entry and Forcible Detainer

Damages for forcible entry do not encompass lost profits for period after plaintiff lost legal right to possession of premises such as after expiration of period specified in legal notice to terminate. *Rosano v. Superior Court (1983) 147 Cal. App. 3d 92, 95-96, 194 Cal. Rptr. 749*

[35] Forcible Entry and Forcible Detainer Under Writ of Execution

Landlord who evicted tenant in reliance on properly issued court order that was subsequently determined to have been erroneously issued had proceeded in accordance with orderly judicial processes rather than forcible self-help and therefore was not liable for forcible entry and detainer. *Glass v. Najafi (2000) 78 Cal. App. 4th 45, 51, 92 Cal. Rptr. 2d 606*

Landlord who evicts tenant under invalid writ of execution and unenforceable judgment is liable for forcible entry and detainer. *Bedi v. McMullan (1984) 160 Cal. App. 3d 272, 274-275, 206 Cal. Rptr. 578*

Landlord who evicts tenant under valid writ of execution issued under enforceable judgment is not liable for forcible entry and detainer. *See Hamilton v. Waters (1949) 93 Cal. App. 2d 866, 867, 210 P.2d 67* ; *Bedi v. McMullan (1984) 160 Cal. App. 3d 272, 275, 206 Cal. Rptr. 578*

[36] Forcible Entry and Forcible Detainer Under Void Statute

State officials are liable for forcible entry and detainer when they evict tenant under color of void statute. *McCauley v. Weller (1859) 12 Cal. 500, 528* ; *see Bedi v. McMullan (1984) 160 Cal. App. 3d 272, 275, 206 Cal. Rptr. 578*

[37] Tort Actions for Forcible Entry and Detainer

Right of person in peaceable possession of real property to recover, in action sounding in tort, damages for injuries to his or her person and goods caused by forcible entry of one who is or claims to be lawful owner or possessor of land. *Daluiso v. Boone (1969) 71 Cal. 2d 484, 486, 78 Cal. Rptr. 707, 455 P.2d 811*

Right to recover in tort for nonstatutory forcible entry even in absence of injury to person or property when plaintiff was in peaceful though wrongful possession of real property. *Allen v. McMillion (1978) 82 Cal. App. 3d 211, 214-220, 147 Cal. Rptr. 77*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticePleadingsComplaintsRequirementsCivil ProceduresAppealsReviewabilityGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawLandlord & TenantLandlord's Remedies & RightsTermination NoticeReal Property LawLandlord & TenantTenant's Remedies & RightsTermination & Retaliatory EvictionReal Property LawLandlord & TenantTenant's Remedies & RightsWarranty of Habitability

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§ 333.63 Law Reviews

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Note, *Unlawful Detainer: Synopsis of California Law and Constitutional Considerations, 44 S. Cal. L. Rev. 768 (1971)*

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For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsSummary EvictionReal Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsWarranty of Habitability

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§ 333.64 Text References

California Residential Landlord-Tenant Practice (Cal. CEB 1986), ch. 6, *Terminating the Tenancy*; ch. 7, *Unlawful Detainer Actions*; ch. 8, *Mobilehome Tenancies*

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52A C.J.S., *Landlord and Tenant*, §§ 752-792

36A C.J.S., *Forcible Entry and Detainer*, §§ 1-122

Legal Topics:

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[Reserved]

§§ 333.65[Reserved]

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§ 333.70 Plaintiff's Procedural Guide

[1] Facts to Be Ascertained

NOTE:
The following is illustrative only of procedures commonly followed in an unlawful detainer proceeding. Not all the matters mentioned here may be required in a particular case, and any given case may require proceedings not mentioned here.

☐ Obtain facts relating to the client.

☐ Client's name, address, and phone number.

☐ Client's capacity, such as an individual, corporation, partnership, unincorporated association, or a public agency.

☐ If the client is other than an individual, authority of the person consulting counsel to employ counsel on behalf of the entity he or she represents and whether the client is in compliance with the appropriate statutes and regulations governing domestic or foreign corporations, partnerships, or unincorporated associations.

☐ If the client is doing business under a fictitious business name, obtain facts whether he, she, or it has complied with the fictitious business name statutes. For further discussion of obtaining these facts, see Ch. 2, *Procedural Guide for Civil Actions* .

PRACTICE TIP:
Obtain Documents/Use Care Before Filing Complaint. Remember, there is no

substitute for obtaining the original and/or up to date documents that contain the information. Reliance on a client's memory, recollection, or knowledge is a dangerous practice. Since you will probably be put to the test regarding proof in any case, you might as well make sure that you can prove your case before you file it. Keep in mind that every dollar of your client's money that you spend before commencing the action (before service of the notice) will probably save your client money after the action is intitiated. Somehow there is a drive to "get on with it" and it is ignored that 90 percent of the mistakes made in unlawful detainer actions are made before the complaint is filed. *By Benjamin Kaplan*

☐ Obtain facts relating to legal relief sought or potential cause of action.

☐ Obtain the specific facts of which the client complains, that is, what the potential defendant(s) did or failed to do, or the legal relief sought.

PRACTICE TIP:

Obtain Complete History. The ideal situation is for your client to provide you with a complete history of the matter on which you indicate to your client that you will rely. Otherwise it is important that you prepare a statement of facts that your client subscribes to before initiating the action. Make sure you see all the original records of a client and be prepared to review them. You will often find that your client has made one or more mistakes in record keeping that will impact significantly on demands that you would have otherwise and erroneously made. *By Benjamin Kaplan*

☐ If the client's complaint is directed to an act or omission of the tenant or tenants of the property, that is, to a breach of a covenant or the nonperformance of a condition, obtain a description of the act or omission, its extent and effect on the premises, and any reasons given for it to the client by the potential defendant(s).

PRACTICE TIP:

Obtain All Documents. Again, always insist on obtaining all correspondence and notes. *By Benjamin Kaplan*

☐ Ascertain from the client any steps taken to secure relief without legal advice [*see § 333.12[6]*].

PRACTICE TIP:

Know Relationship Between Parties. It is important that you know the psychological and personal dimensions of the relationship. Often times clients are either embarrassed or do not see the importance of this background information, but it is critical to your assessing what legal moves will best achieve your objectives. *By Benjamin Kaplan*

☐ Obtain any facts that would tend to show that any circumstances of fraud, force, or violence accompanied the acts of the defendant(s) or that the act or omission to act of the defendant(s) was effected with malice. If the defendant(s) are found guilty of unlawful detainer, damages may be claimed for any circumstances of fraud, force, or violence that may have accompanied the unlawful detainer [*see Code Civ. Proc. § 1166(b)*; *§ 333.13[13][e], [g]*]. If malice is shown, plaintiff may be awarded statutory damages of up to $600 [*see Code Civ. Proc. § 1174(b)*].

PRACTICE TIP:

Statutory Damages. As a matter of practice and practicality, it is best not to go after the $600. *By Benjamin Kaplan*

☐ Obtain facts relating to each potential defendant.

PRACTICE TIP:

Obtain Information on All Persons Claiming Right to Possession. It is critically important that the names and descriptions of all those claiming a right to possession of the subject premises be obtained. Although the service of a prejudgment claim of right to possession will smoke out the unnamed claimants, you will still be faced with the problem of what you should do if you have not previously served them with a cure notice when the clerk adds them as a defendant. A major effort should be made to identify and serve all persons who might claim an interest with the appropriate notice. *By Benjamin Kaplan*

☐ The name and phone number of each person or entity who is in possession of, or lives on, the property and his or her address if other than the property in question [*see § 333.12[11]*]. No person other than the tenant of the premises and subtenant, if there is one, in the actual occupation of the premises when the complaint is filed need be made parties defendant in an unlawful detainer proceeding [*Code Civ. Proc. § 1164*].

PRACTICE TIP:

Be All Inclusive. Be very careful in applying narrow meanings to these statutes. It is best to be all inclusive and identify and serve all those who appear to be claiming an interest even if the claim or possession is "constructive" in nature. *By Benjamin Kaplan*

☐ Capacity of each potential defendant, such as an individual (including whether the individual is an adult or a minor), a corporation, or an unincorporated association.

☐ If the premises are occupied chiefly for dwelling purposes and the agreed rental does not exceed $1,200 per month, whether any tenant in occupation of the premises is the spouse or child or dependent of a person in the U.S. military service [*see § 333.12[12]*].

☐ Description of each potential defendant's employment or professional status, if an individual, and his or her business address and phone number if other than the premises in question.

☐ Obtain facts relating to the tenancy.

☐ The term of the tenancy, that is, whether it is from month-to-month or some other period, or for a fixed term.

☐ Whether the tenancy is under a rental agreement or a lease.

☐ Whether the rental agreement or lease was oral or written.

☐ If oral, between whom was the rental agreement or lease made.

☐ If oral, the agreement with regard to rent, and how, when, and where rent was or is to be paid. In the absence of an agreement or usage to the contrary, rent is normally payable at the termination of the holding if it does not exceed one year [*see Civ. Code § 1947*].

☐ If oral, the terms of the agreement or lease.

☐ If oral, when the term of the tenancy began.

☐ If oral and for a fixed term, when is, or was, it scheduled to terminate.

☐ If oral, any agreement between the parties as to any notice required to terminate the tenancy.

☐ If oral, any option given to the tenant to renew the term of the tenancy under the terms of the rental agreement or lease.

☐ If oral, any agreements with regard to who was responsible for maintaining and repairing the interior and exterior of the premises.

☐ Whether oral or written, the date and specifics of any later changes made to the agreement or lease. If the rental agreement or lease is in writing, its terms, conditions, and covenants, as well as what persons executed it, when the term began and terminated, whether there were any options in it, any notice required by the parties to terminate it, and any provisions relating to the maintenance and repair of the premises will be discovered from the writing itself.

☐ Obtain facts relating to the property.

☐ The street address, city, and county where the property in question is situated and the nature of the property, such as commercial property (describing the commercial activity being carried on), or residential property, such as a house, flat, or unit in an apartment house or condominium.

PRACTICE TIP:

Inquiries Regarding the Property. Get the grant deed and check the title. Obtain all building department records. Check to see who the assessor has as the owner. *By Benjamin Kaplan*

☐ The client's interest in the property in question, for example, the sole owner of the property, a co-owner, or the owner of a life estate or an estate for years. If the client's interest in the property is a terminable estate, when it is scheduled to terminate.

☐ The condition of the property and of any heating, cooling, electrical, water, plumbing, or drainage systems connected to or installed in the premises (1) at the time the tenancy began; (2) in the interim; and

(3) at present.

☐ Any maintenance or repairs performed on the property by the client during the tenancy's term.

☐ Any maintenance or repairs performed on the property by a potential defendant during the tenancy's term.

☐ Any maintenance and repair that now need to be done.

☐ The names, approximate ages, and occupations of any subtenants in actual occupation of the property.

[2] Documents to Be Obtained

PRACTICE TIP:

Be All Inclusive. Everything, including the original escrow file, should be obtained. Be sure to obtain any insurance policy and cover sheet covering the property and ascertain whether there is liability insurance coverage for wrongful eviction or any interference with possessory interests. *By Benjamin Kaplan*

☐ Obtain any written lease or rental agreement between the client and each potential defendant.

☐ Obtain any written professional, business, credit, or personal references supplied by the tenant in the negotiations leading up to the lease or rental agreement with the client.

☐ Obtain any written responses from the tenant's references to the client's inquiries concerning the tenant before the lease or rental agreement was executed.

☐ If a potential defendant is a corporation, obtain a statement of its corporate status, as well as the names of its directors and managing officers and the name of its agent for service of process. This information may be secured from the Secretary of State's office in Sacramento [*see Corp. Code §§ 110* (filing of instruments by Secretary of State), 209, 1502-1505 (domestic corporations), 2101-2107 (foreign corporations qualified to do business in California); for further discussion, see Ch. 160, *Corporations: Capacity*].

☐ If a potential defendant is a partnership or other unincorporated association, a statement of the names of its partners or officers, and of its agent for service of process, if any. If the potential defendant is a partnership, the above information may be available at the office of the county recorder [*see Corp. Code § 16303(d)* (Uniform Partnership Act of 1994 provision); *see also Corp. Code § 15502(1)(b)* (Uniform Partnership Act provision, applicable to limited partnerships that existed on July 1, 1984, and elected not to be governed by California Revised Limited Partnership Act) (repealed January 1, 2010); *Corp. Code §§ 15902.01(e), 15912.06* (applicable to limited partnerships formed on or after January 1, 2008, limited partnerships formed before that date that elect to be subject to Limited Partnership Act of 2008 [*Corp. Code § 15900 et seq.*], and all limited partnerships after that date)]. If a potential defendant

is an unincorporated association, including a partnership [*see Corp. Code §§ 18030, 18035*], the information may be available from the Secretary of State's office in Sacramento [*see Corp. Code § 18200 et seq.*].

☐ Any written communications between the plaintiff and a potential defendant regarding the dispute in issue.

[3] Preliminary Determinations

☐ Determine what legal relief client is seeking with regard to the property [*see §§ 333.10, 333.12[5]*].

☐ Determine whether a demand for possession or notice to quit the premises must be served on the tenant to terminate the tenancy and, if so, whether it has been served [*see §§ 332.70 -332.73*]. If the tenancy is at will, or of agricultural lands, or from month-to-month, or if the rental agreement or lease provides for a specific period of notice to terminate, a written notice terminating the tenancy, in the absence of any breach by the tenant, will normally be required [*see Civ. Code §§ 789, 1946, 1946.1*; *Code Civ. Proc. § 1161(1), (2)*].

PRACTICE TIP:
Notice to Quit. Be very careful about proceeding on a client's generated notice. You are not off the hook because the client's other attorney prepared it. You must not proceed unless you are assured of reasonable success and if the notice is not defective. *By Benjamin Kaplan*

☐ Determine whether the potential defendant(s) breached any covenants or conditions of the rental agreement or lease with plaintiff.

☐ If it is determined that defendant(s) breached any covenants or conditions, determine whether the plaintiff may elect to declarethe agreement or lease forfeited as a result of it [*see §§ 333.10[4] -[6], 333.13[13][d]*].

☐ Determine whether, in the case of a breach of a covenant or condition by the tenant, a notice to cure the breach or, if the breach is incurable, a demand for possession or to quit the premises is required as a condition to suing for unlawful detainer [*see § 333.10*].

☐ Determine whether the wrongful act or omission of the defendant(s) is sufficient to give rise to a proceeding for unlawful detainer if the premises are not surrendered after the proper notice is given [*see § 333.10*].

☐ If the tenant, or any tenant, is the spouse, child, or dependent of a person serving in the U.S. military, National Guard, or military reserve, determine the applicability, if any, of the limitations on eviction contained in the federal Servicemembers Civil Relief Act and under state law [*see § 333.12[12]*].

☐ Determine whether the provisional remedy of attachment is available under the facts and whether it

should be utilized [*see § 333.13[6][a]*].

☐ Determine whether the provisional remedy of receivership is available under the facts and whether it should be utilized [*see § 333.13[6][b]*].

PRACTICE TIP:

Receiverships. Receiverships are very expensive. They should be used sparingly and when significant sums of money are involved. If not used sparingly, all you will be doing is supporting the receiver and his or her attorney. *By Benjamin Kaplan*

☐ Determine the county in which the unlawful detainer proceeding should be tried. The county in which the real property or some part of it is situated is the proper county for the trial of a proceeding for the recovery of real property [*Code Civ. Proc. § 392(a)(1), (b)*]. For further discussion, see Ch. 571, *Venue* .

☐ Determine which court in the county has subject matter jurisdiction of the proceeding [*see §§ 333.13[2], 333.71[2]*].

☐ Determine what remedy would best satisfy the client's interests.

NOTE:

Although this guide assumes that a proceeding for unlawful detainer is the appropriate remedy, counsel should be aware that there are, normally, two remedies available to a landlord to recover possession of real property. The remedies are (1) a special proceeding in unlawful detainer (or forcible detainer) and (2) a civil action for ejectment. For further discussion and forms relating to ejectment, see Ch. 241, *Ejectment* . A civil action for breach of contract is an alternative remedy available to the landlord when recovery of possession of the premises is not desired following a tenant's breach of a covenant or condition of the lease or rental agreement. This remedy is also available to a tenant when it is the landlord who breaches a covenant or condition of the lease or rental agreement. For further discussion and forms relating to breach of contract claims, see Ch. 334, *Landlord and Tenant: Claims for Damages* .

[4] Notices

NOTE:

The following number of copies should be made for notices in addition to the original: (1) one copy for each tenant [*see Code Civ. Proc. § 1161*, last paragraph] or person holding over and continuing in possession after sale [*see Code Civ. Proc. § 1161a*]; (2) in the case of a breach of covenant or nonperformance of a condition or holding over and continuing in possession after sale, one copy for each subtenant in actual occupation of the premises [*see Code Civ. Proc. §§ 1161(2), (3), 1161a(b), (c)*] or, when the breach or misuse of the premises results in the lease's termination, one copy for each person in possession [*see Code Civ. Proc. § 1161(4)*]; (3) a copy for the client if desired; (4) one or more office copies; and (5) any additional copies as may be desired. For the manners in which notices may be served, see *Code Civ. Proc. § 1162*.

☐ Draft the appropriate notice [*see Code Civ. Proc. §§ 1161, 1161a*; *see also §§ 332.70 -332.80*].

☐ Serve a copy of the notice on each tenant or person holding over or continuing in possession after sale and on each subtenant in actual occupation of the premises [*see Code Civ. Proc. §§ 1161(2), (3), 1161a(b), (c)*] or person in possession [*see Code Civ. Proc. § 1161(4)*].

[5] Drafting Court Papers

☐ Pleadings and papers filed by the plaintiff should, except as otherwise noted below, be prepared in the following number of copies: an original for filing with the court; any additional copies required by the court; a copy for each defendant; a copy for the plaintiff, if desired; an office copy; and additional copies as may be desired.

☐ Draft the complaint for unlawful detainer [*see §§ 333.13[3], 333.80 -333.88*].

☐ Fill in a Judicial Council form of Summons for Unlawful Detainer [*see § 333.100*] for each defendant to be served; prepare original for filing, a copy for service on the defendant(s), and an office copy [*see Code Civ. Proc. § 1167*].

☐ If the summons is to be served by posting [*see Code Civ. Proc. § 415.45*], draft the application for an order for service of summons by posting, the supporting affidavit (or declaration under penalty of perjury under *Code Civ. Proc. § 2015.5*), and the order; prepare original for filing, a copy for the plaintiff if desired, an office copy, and any additional copies as may be desired [*see §§ 333.101, 333.102*].

☐ If possession is to be sought on the complaint's filing, draft a notice of motion for immediate possession of the premises, the supporting affidavits or declarations, and the order for immediate possession [*see §§ 333.103, 333.104*].

☐ If it is determined that a writ of attachment is proper [*see Code Civ. Proc. §§ 481.010-493.060*] and should be secured, draft the application for a right to attach order and a writ of attachment with a supporting declaration. For discussion and forms, see Ch. 62, *Attachment* .

☐ If it is determined that a receiver should be appointed to take possession of the property [*see Code Civ. Proc. §§ 564-570*; *Cal. Rules of Ct., Rules 3.1175-3.1177*], draft the declaration and ex parte application for appointment of a receiver and the order to show cause why the appointment should not be confirmed, or a notice of motion for the appointment of a receiver and supporting papers. For discussion, a procedural guide, and forms, see Ch. 486, *Receivers* .

☐ Draft any interrogatories to be served on a defendant [*see § 333.120*; *see also* Ch. 190, *Depositions and Discovery*].

[6] Filing

☐ Present the original of the complaint (and any copies that may be required by the court) to the court clerk for filing. In addition, present all copies to be conformed and returned, and have the clerk issue a summons for each defendant and have the copies conformed [*see § 333.13[3][d]*]. For the manner in

which a summons is issued in a civil action, see Ch. 518, *Service of Summons and Papers* .

[7] Service of Papers and Proof of Service

☐ Serve a copy of the complaint and of the summons on each defendant named in the complaint. The summons must be served and returned in the same manner as a summons in a civil action [*Code Civ. Proc. § 1167*; *see § 333.13[3][d]*]. For the manner in which a summons is served and returned in a civil action, see Ch. 518, *Service of Summons and Papers* .

☐ Draft the proof of service of the summons and complaint or the proof of posting summons [*see §§ 333.100*, *333.101*] or use the Judicial Council separate form of proof of service, and present it to the court clerk for filing. For discussion, a procedural guide, and forms, including the Judicial Council separate form of proof of service, see Ch. 518, *Service of Summons and Papers* .

PRACTICE TIP:
Use Judicial Council Form. Courts require use of the Judicial Council Proof of Service Form (POS-010). *By Benjamin Kaplan*

[8] Procedure on Default

☐ If the defendant fails to appear and defend within the time specified in the summons, prepare an application for entry of default; prepare an original for filing, a copy to be mailed to the defendant, a copy for the plaintiff if desired, and an office copy; mail a copy to the defendant, present the original to the court clerk for filing, and have the copies conformed.

PRACTICE TIP:
Local Rules and Practices. Check local rules as well as "unwritten rules" in notice form that the clerk has in its office by way of a checklist. *By Benjamin Kaplan*

☐ On plaintiff's written application and proof of service of the summons and complaint, the clerk will enter the defendant's default, and if requested by plaintiff, immediately enter a judgment for restitution of the premises and issue a writ of possession [*Code Civ. Proc. § 1169*]. For a discussion of default and forms for use in requesting the entry of default and default judgment, see Ch. 205, *Defaults and Default Judgments* . For a discussion of enforcing judgments and a form of writ of possession, see Ch. 254, *Executions and Enforcement of Judgments* .

☐ If judgment is to be entered by the court and the court so permits, prepare a declaration of facts to be submitted in lieu of personal testimony [*Code Civ. Proc. § 585(d)*]. *See § 333.131A* (Judicial Council declaration form).

[9] Response to Pleading and Motions Filed by Defendant(s)

☐ Prepare any opposition to any motions by a defendant and the proof(s) of service, serve a copy of each paper on the defendant's counsel or, if none, one copy on the defendant [*see Code Civ. Proc.§§ 1015*, *1177*], and present the originals, together with the proof of service, to the court clerk for filing.

PRACTICE TIP:
Local Rules. Check local rules for required extra copy to Law and Motion Department.

By Benjamin Kaplan

☐ Examine the answer and determine whether there is any ground for demurring to it under *Code Civ. Proc. § 430.20* [*see Code Civ. Proc. § 1177*], and if there is, prepare the demurrer and notice of hearing. For discussion, procedure, and forms of demurrers to an answer and notice of hearing, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

☐ Determine whether there is any defense to the proceeding. If there is no defense, and this can be shown by any of the papers specified in *Code Civ. Proc. § 437c(b)*, counsel may wish to move for summary judgment. If so, prepare a notice of motion for summary judgment, one or more supporting affidavits, and a memorandum of points and authorities, and secure a hearing date from the court clerk. A motion for summary judgment may be made at any time after the answer is filed on giving five days' notice personally served and must be granted or denied on the same basis as a motion under *Code Civ. Proc. § 437c* [*Code Civ. Proc. § 1170.7*]. For discussion, procedures, and forms, see Ch. 537, *Summary Judgment* .

☐ Prepare the proof of service for each paper to be served on the attorney for the defendant(s) or, if none, on the defendant(s) [*see Code Civ. Proc. § 1015*; *see also Code Civ. Proc. § 1013a* for form and content of proof of service by mail]. If service is made by mail, the copy of the paper served must either bear a notation of the date and place of mailing or be accompanied by an unsigned copy of the proof of service [*see Code Civ. Proc. §§ 1013(b), 1177*].

☐ Determine whether there may be any fact issues for which a right to trial by jury will be appropriate and, if so, whether to demand a jury trial [*see Code Civ. Proc. § 1171*; *see also § 333.13[10]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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PART IV. PROCEDURAL CHECKLIST

29-333 California Forms of Pleading and Practice--Annotated § 333.71

§ 333.71 Defendant's Procedural Guide

[1] Facts to Be Ascertained

☐ Regarding the complaint, ascertain from defendant(s) which of the facts alleged in the complaint are true, which are false, and which defendant(s) is (or are) unable to answer because he, she, or they lack sufficient information to reply.

☐ Regarding the summons, ascertain from defendant(s) the manner in which the summons was served on the (or each) defendant, and the time and place where service was made.

☐ Regarding defenses, ascertain from the defendant(s) any facts that may support the pleading of one or more affirmative defenses [*see Civ. Code § 1941*; *Code Civ. Proc. § 1174.2*; *see also § 333.28*].

[2] Preliminary Determinations

☐ Determine whether the notice or notices, required to be given as a condition precedent to the complaint's filing, was or were given.

☐ Determine whether the summons served is in proper form and was served in accordance with statutory requirements. If the form or service is defective, determine whether facts exist that would support a motion to quash the service of summons for lack of personal jurisdiction [*see § 333.20*].

☐ Determine whether the complaint states facts sufficient to constitute a cause for relief.

NOTE:
The objection that the complaint fails to state facts sufficient to constitute a cause for

relief [*Code Civ. Proc. § 430.10(e)*] is not waived by failure to raise it by demurrer or answer [*Code Civ. Proc. § 430.80(a)*].

☐ Determine whether any other objections to the complaint exist that may be raised by demurrer or answer. Grounds other than lack of subject matter jurisdiction and failure to state a cause for relief are set forth in *Code Civ. Proc. § 430.10(b)-(d), (f)-(h)*.

☐ Determine whether any affirmative defenses exist that may be plead that would defeat plaintiff's cause for relief [*see § 333.28*].

☐ Determine whether the complaint lacks merit and, if so, whether to move for summary judgment. A motion for summary judgment may be made at any time after the answer is filed on giving five days' notice and must be granted or denied on the same basis as a motion under *Code Civ. Proc. § 437c* [*Code Civ. Proc. § 1170.7*].

☐ If there are fact issues to be tried, determine whether there is a right to trial by jury on any of them and, if there are, whether todemand a jury trial [*see Code Civ. Proc. § 1171*; *see also § 333.13[10]*].

☐ If it appears that plaintiff might prevail in the unlawful detainer proceeding, determine whether the possession of the property should be surrendered to plaintiff. For the effect on the proceeding of the property's surrender, see *§ 333.30*.

[3] Drafting Papers

NOTE:
The following number of copies should be prepared for pleadings and papers filed by the defendant: an original for filing with the court; any additional copies required by the court; a copy for the plaintiff's attorney or, if none, one copy for the plaintiff; one copy for the defendant, if desired; one office copy; and any additional copies as may be desired.

☐ Draft any notice of motion to quash service of summons if the court lacks personal jurisdiction over the defendant. For procedures and forms, see Ch. 323, *Jurisdiction: Personal* .

☐ Draft any demurrer to the complaint and notice of hearing, the answer, or all three. The time allowed the defendant(s) to demur to or answer the complaint is five days [*see Code Civ. Proc. §§ 1167, 1167.3, 1170*]. For the Judicial Council approved form of answer to a complaint for unlawful detainer, see *§ 333.110*.

☐ Draft any opposition to any motion for immediate possession of the premises [*see Code Civ. Proc. § 1166a(b)*].

☐ Draft any opposition to any application for a writ of attachment. For procedures and forms, see Ch. 62, *Attachment* .

☐ Draft any opposition to any noticed motion for appointment of a receiver or order to show cause why the appointment of a receiver should not be confirmed. For discussion and a procedural guide, see Ch. 486, *Receivers* .

☐ Draft any notice of motion for summary judgment, together with its supporting papers [*see Code Civ. Proc. § 1170.7*]. For discussion, a procedural guide, and forms, see Ch. 537, *Summary Judgment* .

☐ Prepare responses to any interrogatories; note that originals of responses must be served on the propounding party within five days from the date of service of the interrogatories, unless on motion of the propounding party the court has shortened the time for response [*see Code Civ. Proc. § 2030.260(b)*].

☐ Prepare the proof of service for each paper to be served [*see Code Civ. Proc. § 1013a* for form and content of proof of service by mail]. If service is made by mail, the copy of the paper served must either bear a notation of the date and place of mailing or be accompanied by an unsigned copy of the proof of service [*see Code Civ. Proc. §§ 1013(b), 1177*].

[4] Service and Filing

☐ Serve a copy of each pleading, notice of motion with its supporting papers, and opposition on the plaintiff's attorney, if any, and, if none, a copy of each on the plaintiff in person or by mail [*see Code Civ. Proc. §§ 465, 1011-1013, 1015, 1177*].

☐ If a notice of motion to quash service of summons for lack of personal jurisdiction over the defendant is to be filed, serve only a copy of the notice of motion and its supporting papers on the plaintiff and nothing else. The service of an answer, demurrer, or other paper constitutes a general appearance [*see Code Civ. Proc. § 1014*], which is equivalent to the service of summons on the party [*see Code Civ. Proc. § 410.50(a)*].

PRACTICE TIP:
Serving Papers. Although not determinative, all papers served in the above manner should bear the words "Special Appearance" next to the client's name. *By Benjamin Kaplan*

☐ Prepare the proof of service [*see Code Civ. Proc. § 1013a* for proof of service by mail] if not already done [*see* Paragraph, *above*], and have it signed by the person who made service. For discussion, a procedural guide, and forms, see Ch. 518, *Service of Summons and Papers* .

☐ Deliver the original of each paper served to the court clerk for filing.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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29-333 California Forms of Pleading and Practice--Annotated § 333.72

§ 333.72 Notice of Trial

☐ To set a case for trial, an at-issue memo (or a memo to set) must be filed. Counsel should check the court's local rules to determine how to have a case placed on the civil active list.

☐ When the case has been set for trial, serve a copy of the notice of trial on the adverse party at least 10 days before the date set for trial [*see Code Civ. Proc. § 594(b)*]. Either party may serve the required notice of trial on the other party [*see Code Civ. Proc. § 594*]. For further discussion and a form of notice, see Ch. 551, *Trial* .

NOTE:
If the defendant appears in the unlawful detainer proceeding by demurrer or answer, trial must be held not later than the 20th day following the date that the request to set the time of trial is made, unless time is extended by the court on the agreement of all parties [*Code Civ. Proc. § 1170.5(a), (b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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29-333 California Forms of Pleading and Practice--Annotated § 333.73

§ 333.73 Judgment

☐ If required by the court, prepare the judgment [*see Code Civ. Proc. §§ 1170.5(a), 1174, 1174.2*; *see also §§ 333.130* (Judicial Council form of unlawful detainer judgment), *333.131* (attachment to judgment when tenant's defense that plaintiff breached covenant to provide habitable premises is sustained), *333.131B* (stipulation for entry of judgment)]. For discussion of judgments, see Ch. 318, *Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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29-333 California Forms of Pleading and Practice--Annotated § 333.74

§ 333.74 Relief From Forfeiture

[1] Facts to Be Ascertained

☐ Obtain any facts establishing that the forfeiture will result in hardship to the defendant(s) that outweighs any hardship to the plaintiff in denying forfeiture [*see Code Civ. Proc. § 1179*; *see also § 333.132*].

[2] Drafting Papers

☐ Draft the petition for relief from forfeiture [*see § 333.132*] in an original for filing, two copies for plaintiff's attorney (one copy for the attorney and a courtesy copy for the client) or, if none, one copy for the plaintiff, a copy for defendant, if desired, an office copy, and any additional copies as may be desired.

☐ Draft the notice of the application in the same number of copies and for the same distribution as the petition [*see § 333.133*].

☐ Draft the order granting the petition in the same number of copies and for the same distribution as the petition [*see § 333.134*].

[3] Service, Filing, and Hearing

☐ Serve two copies of the notice of application, together with two copies of the petition on the plaintiff's attorney (one copy of each for the attorney and a courtesy copy of each for the client) or, if none, one copy of each on the plaintiff [*see Code Civ. Proc. §§ 1015, 1177*].

☐ Attend the hearing. If the petition is granted, present to the courtroom clerk the order granting the

petition to be given to the judge for signing and have the clerk conform the copies.

☐ Unless notice of the court's order was waived by all parties in open court and entered in the minutes, prepare a notice of the court's order [*see Code Civ. Proc. §§ 1019.5(a), 1177*] in an original for filing, two copies for service on plaintiff's attorney, if any, or, if none, one copy for service on the plaintiff, a copy for the defendant, if desired, an office copy, and any additional copies as may be desired.

☐ Serve two copies (one copy for the attorney and a courtesy copy for the client) of the notice of order on the plaintiff's attorney or, if none, one copy on the plaintiff [*see Code Civ. Proc. §§ 1015, 1177*], prepare a proof of service, and present the original of the notice together with the original of the proof of service to the court clerk for filing. Some attorneys prefer to attach a conformed copy of the court's order to the copy of the notice of order that is served.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesForfeituresGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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29-333 California Forms of Pleading and Practice--Annotated §§ 333.75-333.79

[Reserved]

§§ 333.75[Reserved]

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PART V. FORMS
A. Evicting Tenant

29-333 California Forms of Pleading and Practice--Annotated § 333.80

§ 333.80 Complaint for Unlawful Detainer by Lessor, Sublessor, Landlord, Former Employer, Principal, or Licensor, or Purchaser of Property at Sale [Code Civ. Proc. §§ 1161, 1161a(b), 1166, 1177; Cal. Rules of Ct., Rule 1.45(a)]--Judicial Council Form UD-100

[1] FORM Complaint for Unlawful Detainer by Lessor, Sublessor, Landlord, Former Employer, Principal, or Licensor, or Purchaser of Property at Sale [Code Civ. Proc. §§ 1161, 1161a(b), 1166, 1177; Cal. Rules of Ct., Rule 1.45(a)]--Judicial Council Form UD-100

Click here to view image.

Exhibit 2

NOTICE TO PAY RENT OR QUIT TO:

ALICE DALY
222 Sunset Court, No. 101
Paradise City, California 94000
--Tenant in Possession--

NOTICE IS HEREBY GIVEN that, within three days after service on you of this notice, you must pay the undersigned in full the rent now due and unpaid on the above-described apartment in the amount of $540.00, being the rent that became due on September 1, 2004, for the period from September 1, 2004 through September 30, 2004, or deliver up possession of the apartment to the undersigned. If you fail to pay the rent or to deliver up possession within the three-day period, legal proceedings will be commenced against you to recover possession and to recover rent and damages for your unlawful detention of the apartment.
Dated: September 27, 2004

/s/

_____

John Parker

[2] Use of Form

This form is an illustrative filled-in reproduction of the Judicial Council approved form of complaint (Judicial Council Form No. UD-100) for use in a proceeding for unlawful detainer [*see Code Civ. Proc. §§ 425.12, 1166*]. Use of the Judicial Council form is optional [*see Code Civ. Proc. § 425.12*]. Nevertheless, it appears to be widely used in courts throughout California, particularly in general run-of-the-mill landlord-tenant cases involving residences or residential units and simple commercial leases, and should probably be used if feasible.

A "CIVIL CASE COVER SHEET" must accompany the complaint unless the complaint is filed in small claims court [*see Cal. Rule of Court, Rule 3.220*]. For coverage of complaints generally, see Ch. 123, *Complaints and Cross Complaints* .

In actions regarding residential property, the plaintiff must attach to the complaint (1) a copy of the notice or notices of termination served on the defendant on which the complaint is based; and (2) a copy of any written lease or rental agreement regarding the premises, and any addenda or attachments to the lease or written agreement that form the basis of the complaint [*Code Civ. Proc. § 1166(c)(1)*]. These documents are not required to be attached if the complaint alleges that (1) the lease or rental agreement is oral; (2) a written lease or rental agreement regarding the premises is not in the possession of the landlord or any agent or employee of the landlord; or (3) the action is based solely on nonpayment of rent pursuantto *Code Civ. Proc. § 1161(2)* [*Code Civ. Proc. § 1166(c)(1)(B)*]. If the plaintiff fails to attach the required documents, the court must grant leave to amend the complaint for a five-day period in order to include the required attachments [*Code Civ. Proc. § 1166(c)(2)*].

The acts constituting unlawful detainer generally are set forth in *Code Civ. Proc. §§ 1161* and *1161a* [*see § 333.10*]. A tenant may also sue for unlawful detainer to obtain possession of premises let to a subtenant or held by a servant, employee, agent, or licensee in the event he or she unlawfully detains the premises underlet to or held by him or her [*Code Civ. Proc. § 1161(3)*]. Some unlawful detainer cases involve situations to which this form does not easily lend itself [*see, e.g., § 333.80[4]*]. In these cases, counsel may wish to draft his or her own complaint [*see, e.g.,* complaints in §§ 332.40-332.51, 333.81-333.88, 334.61-334.64].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

For the Judicial Council form of answer to the above complaint, see *§ 333.110*.

[3] Verification Required

The complaint must be verified and include the typed or printed name of the verifying person [*Code Civ. Proc. § 1166(a)(1)*]. For a further discussion of verification, see *§ 333.80[7][nn]*.

[4] Complaint by Employer, Principal, Licensor, Purchaser After Sale, or Mobilehome or Recreational Vehicle Park Management

This form is the only complaint for unlawful detainer approved by the Judicial Council and seems to work fairly well in cases involving leases or rental agreements. But unlawful detainer proceedings may also be brought against the following: (1) a person who became the occupant of the premises as a servant, employee, agent, or licensee and holds

over after termination of the master/servant, employer/employee, principal/agent, or licensor/licensee relationship [*see Code Civ. Proc. § 1161(1)*; *see also § 333.10[2][a]*]; and (2) a person who continues in possession of the property after it has been sold [*see Code Civ. Proc. § 1161a(b)*; *see also § 333.10[10]*]. Moreover, the property held over after sale may not be real property at all, but may be a manufactured home or a mobilehome [*see Code Civ. Proc. § 1161a(a), (b)*]. In addition, an unlawful detainer proceeding may be available to a mobilehome or recreational vehicle park owner to evict a park tenant who holds over after termination of thetenancy [*see Civ. Code §§ 798.60, 799.45(c)*; *see also § 333.12[7]* and *[8]* and *§§ 332.78 -332.80* (sample notices to terminate these tenancies)].

Paragraph 6. of the above complaint alleges the existence of the relationship between the parties that creates a duty on the defendant's part to the plaintiff with regard to the property. However, the statements in this paragraph assume the existence of a rental agreement between the plaintiff and defendant and that the unlawful detainer is of real property. The form does not expressly provide for any of the alternative relationships described above and hence does not easily lend itself to use in such cases. Nevertheless, it would appear that the form could be used by crossing out Paragraph 6. in its entirety and then either substituting an "Attachment 6." alleging the existence of one of the alternative relationships or by checking the box in Paragraph 15. and attaching an "Attachment 15." containing the allegations necessary to establish one of the alternative relationships. But since use of the form is optional, it might be simpler for the attorney in such a case to draft his or her own complaint [*see §§ 333.81 -333.88*].

[5] Complaint Against Assignee

A landlord's right to terminate a lease for a transfer in violation of a lease restriction on transfer includes the right to terminate a transfer without terminating the lease. If the landlord terminates a transfer without terminating the lease, the assignee or subtenant in possession is guilty of unlawful detainer and the landlord may obtain possession from the assignee or subtenant without terminating the tenant's right of possession. For this purpose, the unlawful detainer procedure may be used with changes necessary to make the procedure applicable [*Civ. Code § 1995.330(b)*]. The above form may be modified by crossing out Paragraph 6. in its entirety and either substituting an "Attachment 6." alleging possession by the assignee in violation of the lease, or checking the box in Paragraph 15. and attaching an "Attachment 15." containing the allegations of possession by an assignee in violation of the lease. All other appropriate boxes should be checked, and the complaint should not demand the lease's forfeiture.

[6] Contents of Complaint

The contents of a complaint for unlawful detainer are prescribed generally by *Code Civ. Proc. § 396a* [*see § 333.13[3][b]*] and *Code Civ. Proc. § 1166* [*see § 333.13[3][a]*]. Although *Code Civ. Proc. § 396a* appears in Part Two of the Code of Civil Procedure, it applies by its own terms to both actions and proceedings, and is also made applicable to unlawful detainer proceedings by *Code Civ. Proc. § 1177*. The format of the caption is governed by *Code Civ. Proc. §§ 422.30* and *422.40*, both of which apply to unlawful detainer proceedings by virtue of the general incorporating language of *Code Civ. Proc. § 1177*.

[7] Filling Out Form

[a] Block Heading: Identification of Attorney and Title of Court

In the first box of the block heading insert the name, State Bar number, address, and phone number of the attorney for the plaintiff. If the plaintiff is appearing without an attorney, insert just the party's name, address, and phone number. Next, insert the plaintiff's name or, if the plaintiff is representing himself or herself, "In propria persona" or "In person" to the right of "ATTORNEY FOR (*Name*)."

PRACTICE TIP:

Attorney's Name and State Bar Number. Courts require the lead attorney, usually the attorney signing the pleading, to state his or her name above the firm name, if any, followed by the attorney's state bar

number. Thus, it is common practice to simply include this information on all pleadings. *By Benjamin Kaplan*

In the next box, insert the county in which the Superior court is situated, the court's post office address, if any, and its street address [*see Code Civ. Proc. § 422.30(a)*].

For a discussion of the subject matter jurisdiction of trial courts in proceedings in unlawful detainer, see *§ 333.13[2]*.

[b] Block Heading: Title of Case

Insert the title of the case beneath the title of the court. The title of the case must include the names of all the parties [*see Code Civ. Proc. §§ 422.30(a)(2), 422.40, 1177*; *Cal. Rules of Ct., Rule 2.111(4)*]. Thus, the plaintiff's name and the name of the defendant must be inserted. If there are more than one plaintiff or one defendant, all of their names must be set forth. If the space is insufficient, either a cover sheet or an attachment may be used for this purpose. The parties' names then also need to be set forth in Paragraph 1 of the complaint [*see § 333.80[7][f]*].

No person other than the tenant of the premises, and the subtenant, if there is one, in actual occupation of the premises when the complaint is filed need be made defendants in the proceeding [*Code Civ. Proc. § 1164*; *see Richard v. Degen & Brody, Inc. (1960) 181 Cal. App. 2d 289, 301, 5 Cal. Rptr. 263* (liability of sublessee for damages)]. *Code Civ. Proc. § 1164* further provides that no proceeding will abate, nor must the plaintiff be nonsuited, for the nonjoinder of any person who might have been made a party defendant, but when it appears that any of the parties served with process, or appearing in the proceeding, are guilty of the offense charged, judgment must be rendered against him or her.

PRACTICE TIP:

Code Civ. Proc. § 1164. This statute contains obvious problems if one considers that there must be a prior notice served before an unlawful detainer action arises. Thus, in a situation where a notice must be served, the statute would not operate as it says it would. *By Benjamin Kaplan*

Thus, the intent of *Code Civ. Proc. § 1164* is to permit unlawful detainer proceedings to go forward in the absence of individuals who, but for the rule, might be considered indispensable parties. The section does not suggest that the rights of those who are not joined may be determined in their absence. Consequently, for the judgment to be binding on all persons who claim a right to possession of the premises, the complaint for unlawful detainer should include as defendants the names of all adults who are on the premises [*Arrieta v. Mahon (1982) 31 Cal. 3d 381, 391-392, 182 Cal. Rptr. 770, 644 P.2d 1249]* .

If there are other potential defendants of whom plaintiff is ignorant, check the box immediately preceding "DOES 1 TO _____" and insert on the blank line the total number of "DOE" defendants who are to be included in the proceeding [*see Code Civ. Proc. §§ 474, 1177*]. These defendants might include persons on the premises whose names are unknown or unknown persons, such as cotenants, subtenants, occupants, or assignees, who claim a right to possession.

PRACTICE TIP:

Prejudgment Claim of Right to Possession. In this situation, the prejudgment claim of right to possession must be used as well [*see § 333.105* (Prejudgment Claim of Right to Possession)]. *By Benjamin Kaplan*

Although all persons who enter the premises under the tenant after the suit's commencement are bound by the judgment the same as if they had been made parties to the proceeding [*Code Civ. Proc. § 1164*], this does not apply to any person claiming a right to possession of the premises before the unlawful detainer proceeding is filed [*see Arrieta v. Mahon (1982) 31 Cal. 3d 381, 392, 182 Cal. Rptr. 770, 644 P.2d 1249]* .

Paragraph 5. of the above complaint satisfies the requirement of *Code Civ. Proc. § 474* (made applicable to proceedings in unlawful detainer by *Code Civ. Proc. § 1177*) that the plaintiff state in the complaint that he or she is ignorant of the defendant's true name when the defendant is fictitiously named. When the name of a fictitiously named defendant is discovered, the complaint must be amended accordingly [*Code Civ. Proc. §§ 474, 1177*]. For discussion and forms for use in amending a complaint, see Ch. 21, *Amended and Supplemental Pleadings* .

To toll the running of any statute of limitations against fictitiously named defendants, the complaint must state a cause of action against them [*Williams v. Goodman (1963) 214 Cal. App. 2d 856, 861, 29 Cal. Rptr. 877]* . This requirement is met if the charging allegations uses the word "defendants" (as appears in the above complaint, for example, in Paragraphs 3., 7.b.(2), and 12.) as this word includes the fictitiously named defendants [*see Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 600, 15 Cal. Rptr. 817, 364 P.2d 681]* .

If no additional doe defendants are to be joined, do not check the box immediately preceding "DOES 1 TO _____" and type N/A (not applicable) on the blank space to the right of "DOES 1 TO."

[c] Block Heading: Case Number

The court clerk will insert the case number when the complaint is presented for filing, and copies should be conformed at that time.

[d] Block Heading: COMPLAINT--Unlawful Detainer*

As indicated by the asterisk (*) following "Unlawful Detainer" in the block heading, the form should not be used for complaints alleging evictions after the sale of property [*see Code Civ. Proc. § 1161a*]. For sample complaints alleging evictions after sale, see *§§ 333.85 -333.88*.

In this block heading the plaintiff must indicate whether the filing is an initial "Complaint" or an "Amended Complaint." If an Amended Complaint is being filed, the number of the amended complaint (*e.g.*, First, Second, etc.) must be included.

[e] Block Heading: Jurisdiction

The January 1, 2005, Judicial Council form includes a block heading requiring the plaintiff to set forth the jurisdiction of the case. In limited civil cases the caption must state whether the demand exceeds or does not exceed $10,000. When a limited civil case is brought in the superior court, the caption must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

In the block heading the plaintiff must check one (or more) of the following boxes:

- That the action is a "Limited Civil Case" in which the amount demanded either does not exceed $10,000 or exceeds $10,000 but does not exceed $25,000;

- That the action is an "Unlimited Civil Case" in which the amount demanded exceeds $25,000; and/or

- That the action is "reclassified" from (1) unlawful detainer to general unlimited civil (possession not in issue); (2) unlawful detainer togeneral limited civil (possession not in issue); (3) limited to unlimited; or (4) unlimited to limited.

[f] Paragraph 1. (Name of Parties)

In Paragraph 1., set forth the names of all the plaintiffs and defendants. These names should match the names set forth

in the "Title of Case" block heading [*see* [b], *above*].

[g] Paragraph 2. (Plaintiff's Capacity)

The plaintiff's capacity (adult individual, public agency, partnership, corporation, or other) to maintain a proceeding for unlawful detainer is indicated by checking the appropriate box in Paragraph 2.a. The box labeled "other" may be checked to include an executor or administrator, a trustee of an express trust [*see Code Civ. Proc. §§ 369, 1177*], a guardian or conservator of an estate or a minor appearing by a guardian ad litem [*see Code Civ. Proc. §§ 372, 1177*], or an unincorporated association other than a partnership [*see Code Civ. Proc. §§ 388(a), 1177*].

PRACTICE TIP:
Supporting Documents. Be sure to see the underlying supporting documents before filing the action.
By Benjamin Kaplan

For a discussion and forms relating to allegations of capacity, see Ch. 20, *Allegations Commonly Used* .

If the plaintiff made the rental agreement with the defendant under a fictitious business name (as defined in *Bus. & Prof. Code § 17900*), then the plaintiff's capacity must be indicated in Paragraph 2.a., the box in Paragraph 2.b. checked, and the fictitious business name set forth in the blank space at the end of Paragraph 2.b. Compliance with the requirements of the fictitious business name statutes [*Bus. & Prof. Code §§ 17910-17917*] is necessary to maintain an "action" on an agreement made under a fictitious business name [*Bus. & Prof. Code § 17918*]. The allegation in Paragraph 2.b. that the requirements have been complied with avoids a demurrer under *Code Civ. Proc. § 430.10(b)* on the ground of lack of capacity to sue [*see Pleaters & Stitchers Asso. v. Davis (1934) 140 Cal. App. 403, 406, 35 P.2d 401* ; *see also Code Civ. Proc. §§ 1170, 1177* and Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*]. For further discussion and forms relating to compliance with the fictitious business name statutes, see Ch. 20, *Allegations Commonly Used* .

[h] Paragraph 3. (Description of Property and Venue)

In Paragraph 3., insert the street address, apartment number, if any, city, zip code, and county of the unlawfully detained property. Thisinformation satisfies the requirement of *Code Civ. Proc. § 1166(a)(3)* that the complaint describe the premises with reasonable certainty and the requirement of *Briggs v. Electronic Memories & Magnetics Corp. (1975) 53 Cal. App. 3d 900, 906, 126 Cal. Rptr. 34* that a complaint in unlawful detainer include an allegation that the tenant remains in possession of the premises.

The information required by Paragraph 3. (address of premises) also lays the venue of the proceeding, that is, the county in which the proceeding is required to be tried. By virtue of *Code Civ. Proc. § 1177*, venue in unlawful detainer proceedings is governed by *Code Civ. Proc. § 392*, that is, by the situs of the property [*Childs v. Eltinge (1973) 29 Cal. App. 3d 843, 851, 105 Cal. Rptr. 864* ; *see § 333.13[1]*].

[i] Paragraph 4. (Interest in Premises)

Indicate the plaintiff's interest in the premises in Paragraph 4. The first box is checked if the plaintiff is the owner of the property. The term "owner" apparently includes the holder of a fee simple absolute estate or a defeasible fee estate, and multiple owners of a fee estate, such as joint tenants, tenants in common, or holders of a community or partnership interest. If the plaintiff is not this type of owner, the second box, labeled "other," should be checked and the plaintiff's interest specified, as, for example, a holder of a life estate or a tenancy estate such as a tenancy for years or a periodic tenancy [*see Civ. Code § 1946*; *Code Civ. Proc. § 1161(3)*].

A person who does not have any interest in or title to the real property may not recover possession of it in an unlawful detainer proceeding [*see Costa v. Neves (1938) 12 Cal. 2d 121, 126, 82 P.2d 600]* .

[j] Paragraph 6.a. (Rental Agreement)

In Paragraph 6.a. insert the date the rental agreement was entered into and the name of the defendant who rented the premises from the plaintiff. In Paragraph 6.a.(1) indicate the type of tenancy agreed on between the parties by either checking the box labeled "month-to-month tenancy" or the box labeled "other tenancy" and specifying the type, as, for example, a periodic tenancy shorter than month-to-month, a year-to-year tenancy, a tenancy for a term of years subject to a condition subsequent, or a tenancy for a fixed term. In Paragraph 6.a.(2) insert the amount of rent agreed on in the blank space provided. An attachment to Paragraph 6.a. is apparently needed if the rental agreement does not provide for a fixed-sum rent, as, for example, when the rent is a percentage of gross profits or a combination of a fixed sum plus a percentage of gross profits. Further, in Paragraph 6.a.(2) indicate the frequency of payment by checking the box labeled "monthly" or the box labeled "other" and specifying the frequency, such as weekly, quarterly, or yearly. Lastly, in Paragraph 6.a.(3), indicate the day the defendant agreed to pay the rent by checking the box labeled"first of the month" or the box labeled "other day" and specify the day, as, for example, fifteenth of the month, or in the case of a tenancy for other than month-to-month, first of the week, first day of each quarter, or first of the year.

The information sought in Paragraph 6.a., along with that provided in the other allegations of the form, satisfies the requirement that the plaintiff set forth the facts on which he or she seeks to recover possession [*see Code Civ. Proc. § 1166(a)(2)*; *see also § 333.13[3][a]*]. Additionally, this information satisfies the requirement that the plaintiff plead the fact that a landlord-tenant relationship exists between the parties [*see Fredericksen v. McCosker (1956) 143 Cal. App. 2d 114, 116, 299 P.2d 908]* .

For using this form in situations involving a hold-over possession by, for example, an employee, agent, or licensee [*Code Civ. Proc. § 1161(1)*], or after a sale of the property [*Code Civ. Proc. § 1161a*], see [4], *above*.

[k] Paragraph 6.b. (Written or Oral Agreement and Initial Landlord's Identity)

In Paragraph 6.b., check the appropriate box in the first line to indicate whether the rental agreement was written or oral. This allegation avoids an objection by demurrer or answer on the ground that it cannot be ascertained from the complaint whether the contract was written, oral, or implied by conduct [*see Code Civ. Proc. § 430.10(g)*, which is made applicable to unlawful detainer proceedings by *Code Civ. Proc. §§ 1170* and *1177*]. For agreements that must be in writing to satisfy the statute of frauds, see *Civ. Code §§ 1091* and *1624* and Ch. 530, *Statute of Frauds* .

In addition, indicate in Paragraph 6.b.(1), (2), (3), or (4) who made the rental agreement with defendant. For example, check the box labeled "(1) plaintiff" if the plaintiff, as an individual, corporation, or partnership, entered into the agreement with the defendant. Check the box labeled "(2) plaintiff's agent" if, for example, the plaintiff's authorized agent or attorney-in-fact entered into the agreement [*see Civ. Code §§ 2295, 2400*; *Prob. Code § 4000 et seq.*]. Check the box labeled "(3) plaintiff's predecessor in interest" if, for example, the plaintiff is the transferee or devisee of the reve rsionary interest from the previous landlord [*see Civ. Code § 821*]. Check the box labeled "(4) other" to indicate any other person who entered into the rental agreement with the defendant, such as plaintiff's former guardian or conservator [*see Prob. Code §§ 2550, 2553-2555*], plaintiff's spouse when the lease was of community property for a period of one year or less [*see Fam. Code § 1102*], or plaintiff's former cotenant, whose interest in the property the plaintiff has now obtained. Normally, if a rental agreement is made by a spouse on behalf of both spouses or a cotenant on behalf of all cotenants, both spouses or all cotenants would be named as plaintiffs in the unlawful detainer proceeding [*see Code Civ. Proc. §§ 367, 378, 389, 1165*].

[l] Paragraph 6.c. (Status of Defendants Not Parties to Rental Agreement)

Check the box following c. in Paragraph 6. if the unlawful detainer proceeding is brought against multiple defendants, but only one, or some but not all, of the defendants are named in Paragraph 6.a. as a party or parties to the rental agreement. Indicate the unnamed defendants' status, thus establishing their legal relationship with the defendants named

in Paragraph 6.a. and their duties to the plaintiff, by checking the box labeled "(1) subtenants," the box labeled "(2) assignees," or the box labeled "(3) other" and specifying such other status, as, for example, a licensee, easement holder, partner, or person otherwise occupying the premises.

[m] Paragraph 6.d. (Modification or Amendment of Rental Agreement)

If the rental agreement was modified after the date it was entered into by the parties as indicated in Paragraph 6.a., then check the box in Paragraph 6. following d. and specify how the agreement was later changed, for example, by a rent increase in accordance with a notice served on the tenant by the landlord [*see Civ. Code § 827*] or, on the dissolution of the marriage of a couple who signed the agreement together as landlords, by the removal of one of their names from the agreement if the other former spouse has assumed complete ownership of the property.

[n] Paragraphs 6.e. and 6.f. (Attachment of Written Agreement)

Check the box following Paragraph 6.e. and attach the required documents as "Exhibit 1" if the action concerns residential property, and the circumstances set forth in Paragraph 6.f. do not apply. This paragraph satisfies the statutory requirement that a copy of any written lease or rental agreement regarding residential premises, as well as any addenda or attachments to the lease or written agreement that form the basis of the complaint, be attached to the complaint [*Code Civ. Proc. § 1166(c)(1)(B)*]. A copy of a written agreement is not required for residential property if the agreement was oral [*Code Civ. Proc. § 1166(c)(1)(B)(i)*]. If the plaintiff fails to attach the documents required by *Code Civ. Proc. § 1166(c)*, the court must grant leave to amend the complaint for a five-day period in order to include the required attachments [*Code Civ. Proc. § 1166(c)(2)*].

Check the box preceding Paragraph 6.f. if the action concerns residential property, there is a written agreement, and a copy of the written agreement is not attached. Check box (1) if the plaintiff does not have a copy of the written agreement, and check box (2) if the action is solely for nonpayment of rent [*see Code Civ. Proc. § 1161(2)*]. The box preceding Paragraph 6.f. need not be checked if the agreement was oral.

There is no requirement that the agreement be attached to the complaint when the case concerns a commercial lease, and attaching it generally isnot necessary to avoid a demurrer. With respect to commercial leases, the complaint should simply allege the existence of a written agreement.

PRACTICE TIP:

Beware of Demurrer. When the lease is attached to the complaint, the landlord/plaintiff needs to be careful when drafting his/her allegations. The tenant may be able to demur and argue that there is some inconsistency between the agreement and an allegation in the complaint. *By Myron Moskovitz.*

[o] Paragraph 7. (When Notice Is Condition Precedent to Unlawful Detainer)

Check the box following Paragraph 7. if some form of notice was served on the defendant by the plaintiff under *Code Civ. Proc. §§ 1161* or *1161a* or under some other statute [*see §§ 332.70 -332.80* (sample notices)]. When this notice is required, the fact of its service on the defendant must be alleged in the complaint [*see Code Civ. Proc. § 1166(a)(5)*; *Delta Imports, Inc. v. Municipal Court (1983) 146 Cal. App. 3d 1033, 1036, 194 Cal. Rptr. 685* ; *Samuels v. Singer (1934) 1 Cal. App. 2d 545, 549, 36 P.2d 1098]* . This box is apparently not checked when written notice by the plaintiff is not a prerequisite to an unlawful detainer proceeding, as, for example, when a tenant continues in possession after expiration of a fixed term, or when a servant, employee, agent, or licensee continues in possession after termination or expiration of his or her service, employment, agency, or license [*see Code Civ. Proc. § 1161(1)*; *see also § 333.10[2][a], [c]*].

[p] Paragraph 7.a. (Person and Type of Notice Served)

If the box for Paragraph 7. is checked, then indicate in the space provided in a. the name of the defendant on whom the notice was served.

Next, check the applicable box in Paragraph 7.a.(1)-(6) that correctly describes the type of notice served. If the defendant was served notice in accordance with *Code Civ. Proc. § 1161(2)* to pay past due rent or quit the premises, check the box after (1) labeled "3-day notice to pay rent or quit" [*see §§ 332.74* (sample notice), *333.10[2][d]*]. If the defendant was served a 30-day or 60-day notice to terminate a periodic tenancy [*Civ. Code § 1946*] or a tenancy at will [*Civ. Code § 789*], check the box after (2) labeled "30-day notice to quit" or the box after (3) labeled "60-day notice to quit" [*see §§ 332.70, 332.71, 332.72* (sample notices), *333.10[2][c], 333.11[3]*]. If the defendant was served notice in accordance with *Code Civ. Proc. § 1161(3)* to correct a curable breach of covenant or condition or quit the premises, check the box after (4) labeled "3-day notice to perform covenants or quit" [*see §§ 332.75* (sample notice), *333.10[2][e]*]. If thedefendant was served notice in accordance with *Code Civ. Proc. § 1161(3)* to quit the premises because of a noncurable breach of covenant, or in accordance with *Code Civ. Proc. § 1161(4)*, check the box after (5) labeled "3-day notice to quit" [*see §§ 332.76* (sample notice), *333.10[2][e], [8]*]. This box should also be checked if the notice was served in accordance with *Civ. Code § 791* after the landlord's right of reentry had accrued [*see § 333.11[3]*]. Check the box after (6) labeled "other" and specify the type of notice served if the notice was for a period other than one specified, such as a notice of fewer than 30 days to terminate a month-to-month tenancy based on the agreement of the parties or to terminate a periodic tenancy for some period shorter than month-to-month [*see Civ. Code § 1946*]. This box after 7.a.(6) should also be checked and the type of notice served specified if the notice was served under a lease provision requiring some other period of notice [*see § 332.73* (sample notice)].

Paragraph 7. does not cover the situation when the unlawful detainer resulted from the tenant's failure to deliver up possession after expiration of the period specified in the tenant's notice terminating a periodic tenancy [*see Civ. Code § 1946*] or the tenant's written offer of surrender that was accepted in writing by the landlord [*see Code Civ. Proc. § 1161(5)*]. In this case, to completely set forth the facts on which plaintiff seeks to recover [*see Code Civ. Proc. § 1166(a)(2)*], plaintiff could include allegations of such service in an attachment under Paragraph 15. or draft his or her own complaint [*see § 333.84*].

Indicate in Paragraph 7.b.(1) the date on which the period stated in the notice described in Paragraph 7.a. expired. The statement following Paragraph 7.b.(2) provides that the defendant failed to comply with the requirements of the notice by the date specified in the notice.

[q] Paragraphs 7.d., 17.e. (Election to Declare Forfeiture)

The plaintiff, as landlord, may state in the notice required by *Code Civ. Proc. § 1161* his or her election to declare a forfeiture of the lease or rental agreement following the tenant's neglect or failure to perform the conditions or covenants of the lease or agreement or default in the payment of rent [*see Code Civ. Proc. § 1174(a)*]. If the notice includes this election, check the box in Paragraph 7.d. To request the forfeiture of the agreement in the prayer, check the box in Paragraph 17.e. If the court finds in the plaintiff's favor, then the judgment must declare the forfeiture of the lease or agreement [*see Code Civ. Proc. § 1174(a); see also § 333.10[4]*].

PRACTICE TIP:

Forfeiture. A 30-day notice terminating a tenancy without cause may not contain a forfeiture demand or notice. *By Benjamin Kaplan*

[r] Paragraph 7.e. (Attachment of Copy of Notice)

The notice may be alleged either verbatim or according to its legal effect [*Zucco v. Farullo (1918) 37 Cal. App. 562, 568, 174 P. 929]* , or it may be alleged as is done in the above form, by attaching a copy of it as an exhibit to the complaint [*see Wilson v. Sadleir (1915) 26 Cal. App. 357, 359, 146 P. 1061]* . If a copy is attached, check the box in

Paragraph 7. following e. and label the attachment "Exhibit 2." Box 7.e. must be checked and a copy of the notice attached if the action concerns residential property [*Code Civ. Proc. § 1166(c)(1)(A)*]. The exhibit may be fastened to a page of the size required for the complaint and attached. When prepared by a machine copying process, the exhibit must be equal to typewritten material in legibility and permanency of image [*see Cal. Rules of Ct., Rule 2.104*].

[s] Paragraph 7.f. (Different Service on One or More Defendants)

If one or more of the defendants was served with a different notice, on a different date, or in a different manner (from the options set forth in Paragraph 7.a. or from another of the defendants), check the box after Paragraph 7.f. and state this fact in an "Attachment 8.c." If Paragraph 7.f. is checked, Paragraph 8.c. must also be checked with the accompanying "Attachment 8.c." that specifies the facts surrounding the different service (such as type of notice served, when notice period expired, and manner of service) for each defendant [*see* Paragraphs 7.a. through e. and 8.].

[t] Paragraph 8. (Method Used to Serve Notice)

If a notice was served on the defendant by the plaintiff, check the box for Paragraph 8.a. and indicate the method of service used by checking the appropriate box in Paragraph 8.a.(1)-(5) [*see § 333.11*].

If a copy of the notice was personally delivered to the defendant under *Code Civ. Proc. § 1162(1)*, check the first box under 8.a.(1) and indicate the date of service. If service was made by leaving a copy of the notice at the defendant's place of residence or usual place of business and by mailing a copy to his or her place of residence under *Code Civ. Proc. § 1162(2)*, check the second box under 8.a.(2) and insert the name or description of the person of suitable age and discretion at either place with whom the notice was left, the date on which it was left at either place, the place at which it was left, and the date a copy was mailed to the defendant's residence, in the spaces provided. If a copy of the notice was posted on the premises occupied by the defendant under *Code Civ. Proc. § 1162(3)*, check the third box under 8.a.(3) and insert the date of posting, whether or not a copy was left with a person on the premises, the date a copy was mailed to the defendant at the place where the property is situated, and the reason this posting method had to be used. If a notice to terminate a tenancy for an unspecified term was sent by certified or registered mail by the plaintiff to the defendant in accordance with *Civ. Code § 1946*, thencheck the fourth box under 8.a.(4) and indicate the date the notice was mailed.

If the tenancy was terminated by defendant's notice of termination to the plaintiff under *Civ. Code § 1946* or by the tenant's written offer to surrender possession that was accepted by the plaintiff in writing, plaintiff may either modify Paragraph 8.a. to so allege, or include an allegation to that effect in an attachment to Paragraph 15., or counsel may draft his or her own complaint [*see § 333.84*].

If one defendant was served on behalf of two or more defendants and the defendants signed a joint written rental agreement, check the box after Paragraph 8.b. and insert the name of the defendant served in the space provided.

If the notice was served on defendants other than those alleged in Paragraph 7.a., check the box for Paragraph 8.c. and prepare "Attachment 8.c." that includes information about this service. For example, the information could describe service on subtenants in actual possession of the premises, who are required to be served notice under *Code Civ. Proc. § 1161(2), (3),* and *(4).*

The plaintiff is required to allege only the ultimate fact that the notice was served on the defendant [*Zucco v. Farullo (1918) 37 Cal. App. 562, 568, 174 P. 929]* , but the burden of proving service still rests on the plaintiff [*Lamey v. Masciotra (1969) 273 Cal. App. 2d 709, 713, 78 Cal. Rptr. 344]* . Paragraph 8. appears to provide more information than the ultimate fact of service, but further proof may be required if the defendant denies the fact or method of service. Under Paragraph 8.d, proof of service of the notice may be attached and labeled as "Exhibit 3" [*see Code Civ. Proc. § 1166(a)(5)* (requirement that complaint must state specifically method used to serve defendant with notice of

termination may be satisfied by using and completing all items relating to service of notice in appropriate Judicial Council form complaint, or by attaching proof of service of notice)].

[u] Paragraph 9. (Demand for Possession)

This box should be checked in lieu of Paragraphs 7. and 8. when the unlawful detainer consists of the defendant's holding over after expiration of a fixed-term lease. In this case, the plaintiff is not required to serve any notice to quit on the defendant [*see Code Civ. Proc. § 1161(1)*; *see also § 333.10[2][a]*].

[v] Paragraphs 10., 17.c. (Amount of Rent Due)

Paragraph 10. should be checked and the amount of rent due stated when the three-day notice to pay rent or quit the premises was served. When the unlawful detainer charged is after default in the payment in rent [*Code Civ. Proc. § 1166(a)(4)*], the complaint must state the amount of the rent [*Code Civ. Proc. § 1161(2)*].

PRACTICE TIP:
Amount of Rent. Make sure the amount of rent alleged due is the same as that demanded in the three-day notice. *By Myron Moskovitz*

If the amount of rent due and unpaid under the lease or tenancy before the expiration of the three-day notice is alleged in Paragraph 10., also check the box after c. in the prayer in Paragraph 17. and insert the amount of the past-due rent.

It should be noted that pretermination rent (rent accruing before expiration of the period specified in the notice to quit) is recoverable in an unlawful detainer proceeding only when the unlawful detainer consists of a holding over without payment after service of a three-day notice to pay rent or quit [*see Saberi v. Bakhtiari (1985) 169 Cal. App. 3d 509, 512-516, 215 Cal. Rptr. 359* ; *see also § 333.13[13][e][iv]*]. In any other situation, the box for Paragraph 10. should not be checked and plaintiff's remedy to recover the rent would be by an independent action.

[w] Paragraphs 11., 17.f. (Fair Rental Value Damages)

The jury or the court must assess the damages occasioned to the plaintiff by any unlawful detainer alleged in the complaint and proved on trial [*Code Civ. Proc. § 1174(b)*; *see § 333.13[13][e][i], [ii]*]. If the plaintiff seeks damages, check the box in Paragraph 11. and indicate the fair daily rental value of the premises. Additionally, check the box after f. in the prayer in Paragraph 17. and insert the date in which the damages began accruing. The daily rent is usually calculated by dividing the agreed on rent by the number of days in the month.

[x] Paragraphs 12., 17.g. (Statutory Damages)

If the defendant is found guilty of unlawful detainer, and malice is shown, the plaintiff is entitled to statutory damages of up to $600.00, in addition to actual damages, including rent found due [*Code Civ. Proc. § 1174(b)*; *see § 333.13[13][g]*]. Under these circumstances, check the box after Paragraph 12. and include in an "Attachment 12" the facts supporting the claim for statutory damages. In addition, check the box after g. in the prayer in Paragraph 17. that requests statutory damages.

[y] Paragraphs 13., 17.d. (Attorney's Fees)

The box for Paragraph 13. should be checked if the plaintiff seeks to obtain attorney's fees under a written agreement, such as a lease or rental agreement [*see Civ. Code § 1717*; *Code Civ. Proc. §§ 1021, 1177*; *Richard v. Degen & Brody, Inc. (1960) 181 Cal. App. 2d 289, 299-300, 5 Cal. Rptr. 263* (*overruled on other grounds, Kendall v. Ernest Pestana, Inc. (1985) 40 Cal. 3d 488, 496-498, 220 Cal. Rptr. 818, 709 P.2d 837*)]. A provision in a written agreement that provides for reasonable attorney fees is limited to reasonable compensation for legal services that are reasonably

necessary under the circumstances of a case [*Cirimele v. Shinazy (1955) 134 Cal. App. 2d 50, 52, 285 P.2d 311]* . To request attorney's fees in the prayer, check the box after d. in Paragraph 17.

For further discussion of attorney's fees, see Ch. 174, *Costs and Attorney's Fees* .

[z] Paragraph 14. (Rent or Eviction Control Ordinance)

Check the box for Paragraph 14. if the defendant's tenancy is subject to a local rent control or eviction control ordinance, and specify the city or county that enacted the ordinance, the ordinance's title, and the date of its passage [*see Code Civ. Proc. §§ 459, 1177*; *see also § 333.28[5][g]*].

PRACTICE TIP:

Check Local Rent Control Ordinances. Be sure to check applicable ordinances to determine whether certain *special language* is required to be included in the complaint (as well as the notice to quit, such as a statement that the tenant has a right to seek and obtain advice from the rent board). Most rent control ordinances require allegations of *good cause* to evict. This is also required in public housing and in most government-subsidized housing. *By Myron Moskovitz*

[aa] Paragraph 15. (Additional Allegations)

If additional allegations are required, check the box in Paragraph 15. and include the allegations in "Attachment 15." to the complaint. For example, additional allegations may be necessary if this form is used in situations not involving a rental agreement, such as when there is a holding over by a servant, employee, agent, or licensee [*see Code Civ. Proc. § 1161(1)*], or by a person who holds over after the property has been sold and the purchaser's title perfected [*see Code Civ. Proc. § 1161a(b)*; *see also* [4], *above*]. An attachment may also be required to allege that the notice of termination was given by the defendant-tenant to the plaintiff-landlord or that the unlawful detainer consists of the holding over by the tenant after the tenant made a written offer to surrender the premises which was accepted in writing by the landlord [*see Civ. Code § 1946*; *Code Civ. Proc. § 1161(5)*; *see also* [p] (Person and Type of Notice Served), *above*] and to allege the method the notice was served in such cases [*see* [t] (Method Used to Serve Notice), *above*].

Attachment 15. may also be used to set forth any circumstances of fraud, force, or violence that may have accompanied the alleged unlawful detainer [*see Code Civ. Proc. § 1166(b)*; *see also § 333.13[3][a][iv]*].

[bb] Paragraph 16. (Remission of Demand in Excess of Jurisdictional Limit)

Formerly, the municipal court (or the superior court in a county in which there was no municipal court) had jurisdiction over unlawful detainer proceedings when the whole amount of damages claimed was $25,000 or less [*see* former *Code Civ. Proc. §§ 85.1, 86(a)(4)* (jurisdiction in limited civil cases)]. Paragraph 16. states that the plaintiff accepts the court's jurisdictional limit, if any. The primary purpose of this statement was to assure that any recovery in a proceeding pending in a municipal court would be within the subject matter jurisdiction of that court and that the case would not be transferred to the superior court under former *Code Civ. Proc. § 396* if the demand in the complaint had a potential of exceeding the monetary jurisdiction of the municipal court or in the event that it developed at trial that plaintiff was entitled to a judgment in excess of that jurisdiction. By accepting the excess amount, plaintiff in effect waived any claim to that amount. Note, however, that there are no longer any municipal courts in California.

[cc] Paragraph 17.a. (Prayer for Possession)

The prayer includes a request, in Paragraph 17.a., for possession of the premises. This is the primary object of an unlawful detainer proceeding and, hence, inclusion of the request is not made optional.

[dd] Paragraph 17.b. (Prayer for Costs)

The prayer includes a request, in Paragraph 17.b., for costs incurred during the proceeding. Costs are available to the prevailing party under *Code Civ. Proc. §§ 1032* and *1033*. These provisions are made applicable to unlawful detainer proceedings by *Code Civ. Proc. § 1177*. In addition, costs of an unlawful detainer proceeding are expressly provided for when the proceeding involves a default in the payment of rent, the rental agreement has not expired, and the notice to pay rent did not state an election to declare a forfeiture of the agreement [*see Code Civ. Proc. § 1174(c)*]. For further discussion of costs, see Ch. 174, *Costs and Attorney's Fees* .

[ee] Paragraph 17.c. (Prayer for Past Due Rent)

If the proceeding is for unlawful detainer after service of a three-day notice to pay rent or quit and failure to pay, check this box and insert the amount of past-due rent [*see* [v] (Amount of Rent Due), *above*].

[ff] Paragraph 17.d. (Prayer for Reasonable Attorney's Fees)

If the lease or rental agreement or a particular statute governing the proceeding [*see, e.g., Civ. Code § 798.85* (any action arising out of provisions of Mobilehome Residency Law)] authorizes recovery of attorney's fees, check this box [*see* [y] (Attorney's Fees), *above*].

[gg] Paragraph 17.e. (Prayer for Forfeiture of Agreement)

If, in his or her notice to the defendant to quit the premises, the plaintiff has stated an election to declare the lease forfeited, check this box [*see* [q] (Election to Declare Forfeiture), *above*].

[hh] Paragraph 17.f. (Prayer for Damages for Holding Over)

If damages for holding over after expiration of the notice to quit are sought, check this box and insert the date the damages began accruing [*see* [w] (Fair Rental Value Damages), *above*].

[ii] Paragraph 17.g. (Statutory Damages)

If statutory damages are sought [*see Code Civ. Proc. § 1174(b)*], check this box and make sure the complaint includes an "Attachment 12" that sets forth the facts alleging the grounds for these damages [*see* [x] (Statutory Damages), *above*].

[jj] Paragraph 17.h. (Prayer for Other Relief)

Insert in the space provided any other relief to which plaintiff is entitled. The following are examples:

- If the proceeding is based on an unlawful detainer arising from the failure to pay past due rent or quit [*see Code Civ. Proc. § 1161(2)*], prejudgment interest on the amount of the past due rent may be requested in the complaint [*see § 333.13[13][f]*]. To request interest, check the box after h. in Paragraph 17. and specify interest on past due rent. If prejudgment interest is not requested in the complaint or otherwise called to the attention of the trial court, the trial court's failure to allow it cannot be raised for the first time on appeal [*Garfinkle v. Montgomery (1952) 113 Cal. App. 2d 149, 159, 248 P.2d 52]* .

- If plaintiff has sustained any damages by reason of any circumstances of fraud, force, or violence that accompanied the alleged unlawful detainer [*see Code Civ. Proc. § 1166(b)*], specify the amount of damages and the cause (fraud, force, or violence). If these damages are claimed, allegations establishing the fraud, force, or violence should be set forth in an Attachment 15 [*see* [aa] (Additional Allegations), *above*].

[kk] Paragraph 18. (Number of Pages to Complaint)

When the complaint is complete, count the number of pages, including attachments and exhibits, check the box after Paragraph 18., and specify the complaint's total number of pages.

[ll] Paragraph 19. (Unlawful Detainer Assistants)

This Judicial Council Form includes information on unlawful detainer assistants [*see Bus. & Prof. Code §§ 6400-6415*]. This portion of the form must be completed in all cases. If plaintiff did not receive advise or assistance, for compensation, from an unlawful detainer assistant in completing the form complaint, check the "did not" box in Paragraph 19. No other information is required. However, if the plaintiff received any help, advise, or assistance, for a fee, from an unlawful detainer assistance, check the "did" box and complete the information regarding the unlawful detainer assistant in Paragraph 19.a.-f. For a discussion of unlawful detainer assistants, see *§ 333.12[3]*.

[mm] Signature

The complaint must be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, it must be signed by the party. The signer's address and telephone number, if any, must appear in the complaint. An unsigned complaint must be stricken unless the signature's omission is corrected promptly after being called to the attention of the attorney or party [*Code Civ. Proc. § 128.7(a)*]. By presenting a complaint, pleading, or similar paper to the court, whether by signing, filing, submitting, or later advocating, an attorney or unrepresented party is deemed to have made certain certifications regarding the legitimacy of the complaint, pleading, or other paper and is subject to sanctions for violations [*see Code Civ. Proc. § 128.7(b)* (sanctions for frivolous tactics; for discussion, see Ch. 510, *Sanctions*)].

[nn] Verification

The complaint must be verified and include the typed or printed name of the verifying person [*Code Civ. Proc. § 1166(a)(1)*]. When the complaint is verified by the attorney or by any other person except one of the parties, that person must set forth in the affidavit (or, as in the above complaint form, declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) the reasons why it is not made by one of the parties [*Code Civ. Proc. §§ 446, 1177*]. For forms of verification for use by an attorney, or by a corporation or partnership which may be attached to the above complaint when appropriate, see Ch. 572, *Verification* .

[8] Summons

On filing the complaint, a summons must be issued [*Code Civ. Proc. § 1166(d)*]. For discussion and the Judicial Council approved form of summons, see *§ 333.100*.

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Volume 29: Landlord and Tenant: General Introduction thru Rent Control-Chs. 330-339
Chapter 333 LANDLORD AND TENANT: EVICTION ACTIONS
PART V. FORMS
A. Evicting Tenant

29-333 California Forms of Pleading and Practice--Annotated § 333.81

§ 333.81 Complaint for Unlawful Detainer by Employer Against Resident Employee Continuing in Possession After Termination of Employment [Code Civ. Proc. §§ 1161(1), 1166, 1177]

[1] FORM Complaint for Unlawful Detainer by Employer Against Resident Employee Continuing in Possession After Termination of Employment [Code Civ. Proc. §§ 1161(1), 1166, 1177]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR UNLAWFUL DETAINER
_____ [*name*], [and DOES I	)	[Amount demanded _____ (exceeds
through _____,]	)	*or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. Plaintiff is and at all times mentioned in this complaint was _____ [*specify capacity if other than a natural person, e.g.,* a corporation organized and existing under the laws of California, and] the _____ [*e.g.,* owner] of the _____ [*describe property, e.g.,* apartment building located at _____ (*street address and city*), _____ County, California].

[2. The true names and capacities of Defendants DOE I through DOE _____ are unknown to plaintiff, who therefore sues these defendants by such fictitious names and will amend this complaint to allege their true names and capacities

when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants claims a right under the named defendant to possession of the premises against plaintiff.]

3. On or about _____ [*date*], plaintiff and defendant entered into _____ [an oral *or* a written] agreement by the terms of which plaintiff employed defendant as _____ [*specify, e.g.,* the manager of the apartment building].

4. By the terms of the agreement, plaintiff agreed to furnish to defendant, as partial compensation for his/her services as _____ [*e.g.,* the manager of the apartment building], during the continuation of his/her employment, the use and occupancy of _____ [*describe, e.g.,* Apartment No. _____ (referred to below as "the premises") in the apartment building], and defendant agreed to deliver up possession of the premises _____ [forthwith *or specify period*] on the voluntary or involuntary termination of his/her employment.

5. In accordance with the agreement, defendant, on or about _____ [*date*], entered into occupancy of the premises and continues to occupy them.

6. On _____ [*date*], _____ [plaintiff duly terminated defendant's employment *or* defendant terminated his/her employment] as _____ [*e.g.,* manager of the apartment building] and plaintiff thereon became entitled to _____ [immediate possession of the premises *or* possession of the premises on _____ (*date of last day of any period specified in employment agreement*)].

7. _____ [On terminating defendant's employment *or* At the time defendant terminated his/her employment], plaintiff requested that defendant deliver up possession of the premises _____ [forthwith *or* on or before _____ (*date*)] to _____ [plaintiff or _____ (*name*), plaintiff's authorized agent].

8. Defendant failed and refused to deliver up possession of the premises _____ [forthwith *or* on or before _____ (*period specified in agreement*)] or since, but, rather, continues in possession without plaintiff's permission or consent and contrary to the terms of the employment agreement.

[9. Defendant's withholding of possession of the premises by defendant from plaintiff has been willful, deliberate, intentional, and obstinate, and done by defendant with knowledge that his/her right to possession has terminated and that the withholding is against plaintiff's will, in that _____ (*specify*).]

10. The reasonable rental value of the premises is $_____ per day, and the damages to plaintiff proximately caused by defendant's unlawful detention have accrued at that rate since _____ [*date on or before which possession was to have been surrendered in accordance with the employment agreement*] and will continue to accrue at that rate so long as defendant remains in possession of the premises.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For possession of the premises;

2. For damages for the unlawful detention of the premises at the rate of $_____ per day from _____ [*first day of holdover*] until entry of judgment[, and for statutory damages in the amount of $600];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled proceeding. I have read the above complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
Dated: _____.

_____ [*signature*]
_____ [*type or printed name*]

[2] Use of Form

This form is for use by an employer against a former employee to recover possession of a residence or residential property and to recover damages for the unlawful detention of the property after termination of the employment and, if malice is shown, statutory damages [*see Code Civ. Proc. §§ 1161(1), 1174(a), (b)*]. The complaint may also set forth any circumstances of fraud, force, or violence that accompanied the unlawful detainer and claim damages for them [*Code Civ. Proc. § 1166(b)*].

With appropriate modifications, this complaint may also be used when the housing was furnished by a principal to his or her agent and the agent held over after the agency terminated [*see Code Civ. Proc. § 1161(1)*].

For discussion of the relief available in an unlawful detainer proceeding, see *§ 333.13[13]*.

[3] Verification Required

The above complaint must be verified and include the typed or printed name of the verifying person [*Code Civ. Proc. § 1166(a)(1)*; *see Code Civ. Proc. §§ 446, 1177*].

[4] Allegations

This form alleges:

- Plaintiff's capacity if other than a natural person, his or her ownership of the property in question, and a description of the property (Paragraph 1) [*see Code Civ. Proc. § 1166(a)*].

- The venue of the proceeding (Paragraph 1) [*see Code Civ. Proc. §§ 392(a)(1), (b), 1177*; *see also § 333.13[1]*].

- The existence of any fictitiously named defendants (Paragraph 2) [*see Code Civ. Proc. §§ 474, 1177*

].

- The creation of an employer/employee relationship between the parties (Paragraph 3) [*see Code Civ. Proc. §§ 1161(1), 1166*].

- The terms of the employment agreement requiring the employer to furnish the employee with housing and requiring the employee to deliver up possession of the housing to the employer on termination, or within a specified period after termination, of the employment (Paragraph 4) [*see Code Civ. Proc. §§ 1161(1), 1166*].

- Defendant's entry into possession of the premises under the employment agreement (Paragraph 5) [*see Code Civ. Proc. §§ 1161(1), 1166*].

- Termination of the employment and plaintiff's right to possession of the premises (Paragraph 6) [*see Code Civ. Proc. §§ 1161(1), 1166*].

- Plaintiff's request that defendant deliver up possession of the premises in accordance with the terms of the employment agreement (Paragraph 7) [*see Code Civ. Proc. §§ 1161(1), 1166*].

- Defendant's unlawful detention of the premises (Paragraph 8) [*see Code Civ. Proc. §§ 1161(1), 1166*].

- Defendant's current possession of the premises (Paragraph 8) [*see Briggs v. Electronic Memories & Magnetics Corp. (1975) 53 Cal. App. 3d 900, 906, 126 Cal. Rptr. 34]* .

- Defendant's malice in withholding possession, to be alleged if plaintiff is seeking statutory damages (Paragraph 9) [*see Code Civ. Proc. § 1174(b)*].

- The rental value of the property; that is, plaintiff's damages resulting from the unlawful detention (Paragraph 10) [*see Code Civ. Proc. § 1174(b)*].

For further discussion of the required contents of the complaint, see *§ 333.13[3][a]*.

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*].

If the action is a limited civil case, the caption must state whether the demand exceeds or does not exceed $10,000 and must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[6] Cross References

For the Judicial Council Form and further discussion of a complaint for unlawful detainer, see *§ 333.80*.

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Chapter 333 LANDLORD AND TENANT: EVICTION ACTIONS
PART V. FORMS
A. Evicting Tenant

29-333 California Forms of Pleading and Practice--Annotated § 333.82

§ 333.82 Complaint for Unlawful Detainer by Licensor Against Licensee Continuing in Possession After Termination of License [Code Civ. Proc. §§ 1161(1), 1166, 1177]

[1] FORM Complaint for Unlawful Detainer by Licensor Against Licensee Continuing in Possession After Termination of License [Code Civ. Proc. §§ 1161(1), 1166, 1177]

[*Caption. See § 333.81[1].*]

Plaintiff alleges:

1. Plaintiff is and at all times mentioned in this complaint was _____ [*specify capacity if other than a natural person, e.g.,* a corporation organized and existing under the laws of California, and] the _____ [*e.g.,* owner] of the _____ [premises known as _____ (*street address and city*), _____ County, California *or* following described property: _____] (referred to below as "the premises").

[2. _____ (*Specify defendant's capacity, if other than a natural person, e.g.,* Defendant _____ [*name*] is and at all times mentioned in this complaint was a corporation organized [and existing] under the laws of California).]

[3. *Fictitious name allegation. See § 333.81[1], P 2.*]

4. On or about _____ [*date*], _____ [*specify nature and purpose of license, e.g.,* plaintiff gave defendant a license to use the premises for the storage of lumber and other materials to be used by defendant in erecting a building for one _____ (*name*) on adjoining real property], until such time as plaintiff should elect to terminate the license.

5. In accordance with the license, defendant on or about _____ [*date*], commenced

_____ [*specify, e.g.*, storing lumber on the premises] and continued thereafter to do so.

6. On _____ [*date*], plaintiff notified defendant of plaintiff's election to terminate the license _____ [forthwith *or* on _____ (*date*)] and thereby became entitled to _____ [immediate possession of the premises *or* possession of the premises on _____ (*date*)]. Plaintiff at that time asked defendant to deliver up possession of the premises _____ [forthwith *or* on or before _____ (*date*)] to _____ [plaintiff *or* _____ (*name*), plaintiff's authorized agent].

7. Defendant failed and refused to deliver up possession of the premises as requested, but, rather, continues in possession without plaintiff's permission or consent.

[8. Defendant's continued possession of the premises has been willful, deliberate, intentional, and obstinate and done by defendant with knowledge that his/her right to possession and use of the premises has been lawfully terminated and that his/her continued possession and use of the premises is against plaintiff's will, in that _____ (*specify*).]

9. The reasonable rental value of the premises is $_____ per day, and the damages to plaintiff proximately caused by defendant's unlawful detention have accrued at that rate since _____ [*date on or before which possession was to have been surrendered under the license agreement*] and will continue to accrue at that rate so long as defendant continues to occupy the premises.

[*Prayer, date, signature block, and verification. See § 333.81[1]*.]

[2] Use of Form

The form in [1], *above*, is for use by a licensor of real property to recover possession of the property from a licensee and to recover damages for the licensee's unlawful detention of the property after termination of the license and statutory damages if malice is shown [*see Code Civ. Proc. §§ 1161(1), 1174(a), (b)*]. The complaint may also set forth any circumstances of fraud, force, or violence that accompanied the unlawful detainer and claim damages for them [*Code Civ. Proc. § 1166(b)*].

[3] Verification Required

The above complaint must be verified and include the typed or printed name of the verifying person [*Code Civ. Proc. § 1166(a)(1)*; *see Code Civ. Proc. §§ 446, 1177*].

[4] Allegations

The form in [1], *above*, alleges:

- Plaintiff's capacity if other than a natural person, his or her ownership of the property in question, and a description of the property (Paragraph 1) [*see Code Civ. Proc. § 1166(a)*].

- The venue of the proceeding (Paragraph 1) [*see Code Civ. Proc. §§ 392(a)(1), (b), 1177*; *see also § 333.13[1]*].

- The defendant's capacity if other than a natural person (Paragraph 2).

- The existence of any fictitiously named defendants (Paragraph 3) [*see Code Civ. Proc. §§ 474, 1177*

].

- The license agreement between the parties (Paragraph 4) [*see Code Civ. Proc. §§ 1161(1), 1166*].

- Defendant's commencement of using the premises under the license (Paragraph 5) [*see Code Civ. Proc. §§ 1161(1), 1166*].

- Termination of the license (Paragraph 6) [*see Code Civ. Proc. §§ 1161(1), 1166*].

- Plaintiff's request that defendant deliver up possession of the premises (Paragraph 6) [*see Code Civ. Proc. §§ 1161(1), 1166*].

- Defendant's unlawful detention of the premises (Paragraph 7) [*see Code Civ. Proc. §§ 1161(1), 1166*].

- Defendant's current possession of the premises (Paragraph 7); [*see Briggs v. Electronic Memories & Magnetics Corp. (1975) 53 Cal. App. 3d 900, 906, 126 Cal. Rptr. 34]* .

- Defendant's malice in withholding possession, to be alleged if plaintiff is seeking statutory damages (Paragraph 8) [*see Code Civ. Proc. § 1174(b)*].

- Plaintiff's damages resulting from the unlawful detention measured by the rental value of the property (Paragraph 9) [*see Code Civ. Proc. § 1174(b)*].

[5] License and Lease Distinguished

A license, as opposed to a lease, is the authority to do a particular act or series of acts on land of another without possessing an estate in the land. The test to determine whether an agreement for use of real estate is a license or lease is whether the contract gives exclusive possession of premises against all the world, including the owner, in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license [*Shaw v. Caldwell (1911) 16 Cal. App. 1, 7, 115 P. 941* ; *see San Juan G. Co. v. San Juan R. etc. Assn. (1939) 34 Cal. App. 2d 159, 169-170, 93 P.2d 582]* .

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29-333 California Forms of Pleading and Practice--Annotated § 333.83

§ 333.83 Complaint for Unlawful Detainer by Landlord Against Tenant at Will Holding Over After Expiration of Notice to Quit [Civ. Code § 789; Code Civ. Proc. §§ 1161(1), 1166, 1177]

[1] FORM Complaint for Unlawful Detainer by Landlord Against Tenant at Will Holding Over After Expiration of Notice to Quit [Civ. Code § 789; Code Civ. Proc. §§ 1161(1), 1166, 1177]

[*Caption. See § 333.81[1].*]

Plaintiff alleges:

1. [*Plaintiff's capacity if other than a natural person and status as a landlord of described property. See § 333.81[1], P 1.*]

[2. *Defendant's capacity if other than a natural person. See § 333.81[1], P 1.*]

[3. *Fictitious name allegation. See § 333.81[1], P 2.*]

[*ALLEGE, in successively numbered paragraphs, facts creating tenancy at will, for example:*]

4. On or about _____ [*date*], plaintiff and defendant entered into an oral agreement by the terms of which defendant agreed to purchase the premises from plaintiff for $_____ and to pay this amount in full to plaintiff within _____ days after the date the Title Company informed defendant in writing that it was ready, willing, and able to issue its standard form title insurance policy insuring good and marketable title to the premises.

5. On or about _____ [*date*], under the oral agreement and in anticipation of the purchase of the property, defendant entered into possession of the premises and has continued to occupy them.

6. On or about _____ [*date*], the Title Company notified defendant in writing that it was ready, willing, and able to issue its standard title insurance policy, but defendant failed and refused to pay plaintiff the $_____ or any part of it within _____ days thereafter or at all, and the oral agreement has never been consummated.

[*CONTINUE*]

7. On _____ [*date*], plaintiff [caused to be] served on defendant a written notice terminating defendant's tenancy and demanding that defendant remove himself/herself from the premises on or before _____ [*date not less than 30 days after service of notice*]. A copy of the notice is attached to this complaint as Exhibit A and made a part of this complaint.

8. Defendant failed to vacate the premises on or before _____ [*date specified above*].

9. On _____ [*date following expiration of notice period*], plaintiff further [caused to be] served on defendant a three-day written notice demanding possession of the premises before expiration of the three-day period. A copy of the notice is attached to this complaint as Exhibit B and made a part of this complaint.

10. The three-day period expired on _____ [*date*], and ever since that date plaintiff has been entitled to immediate possession of the premises.

11. Defendant failed and refused to deliver up possession of the premises before expiration of the three-day period or since, and continues in possession without plaintiff's permission or consent.

[12. Defendant's withholding of possession of the premises from plaintiff has been willful, deliberate, intentional, and obstinate and done by defendant with knowledge that his/her tenancy has been terminated and that the withholding is against plaintiff's will, in that _____ (*specify*).]

13. The reasonable rental value of the premises is $_____ per day, and the damages to plaintiff proximately caused by defendant's unlawful detention have accrued at that rate since _____ [*date three-day period expired*] and will continue to accrue at that rate so long as defendant remains in possession of the premises.

[*Prayer, date, signature block, and verification. See § 333.81[1]*.]

[2] Use of Form

The form in [1], *above*, is for use by a landlord to recover possession of real property from a tenant at will, and to recover damages for the holding over after expiration of the notice to quit and statutory damages if malice is shown [*see Code Civ. Proc. §§ 1161(1), 1174(a), (b)*]. The complaint may also state any circumstances of fraud, force, or violence that accompanied the unlawful detainer and claim damages for them [*Code Civ. Proc. § 1166*].

[3] Verification Required

The complaint must be verified and include the typed or printed name of the verifying person [*Code Civ. Proc. § 1166(a)(1)*; *see Code Civ. Proc. §§ 446, 1177*].

[4] Allegations

The above complaint alleges:

- The creation of the tenancy at will (Paragraphs 4-6) [*see Code Civ. Proc. § 1166*].

- Defendant's entry into possession of the premises (Paragraph 5) [*see Code Civ. Proc. §§ 1161(1), 1166*].

- Service on defendant of a not less than 30-day notice terminating the tenancy (Paragraph 7) [*see Civ. Code § 789*; *Code Civ. Proc. § 1161(1)*].

- Defendant's failure to surrender possession (Paragraph 8) [*see Code Civ. Proc. §§ 1161(1), 1166*].

- Service on defendant of a three-day notice to quit (Paragraph 9) [*see Civ. Code § 791*].

- Expiration of the three-day period and plaintiff's right to possession (Paragraph 10) [*see Code Civ. Proc. § 1166*].

- Defendant's unlawful detention of the premises (Paragraph 11) [*see Code Civ. Proc. §§ 1161(1), 1166*].

- Defendant's current possession of the premises (Paragraph 11) [*see Briggs v. Electronic Memories & Magnetics Corp. (1975) 53 Cal. App. 3d 900, 906, 126 Cal. Rptr. 34]* .

- Defendant's malice in withholding possession, to be alleged if plaintiff is seeking statutory damages (Paragraph 12) [*see Code Civ. Proc. § 1174(b)*].

- The rental value of the property; that is, plaintiff's damages resulting from the unlawful detention (Paragraph 13) [*see Code Civ. Proc. § 1174(b)*].

For discussion of the required contents of the complaint, see *§ 333.13[3][a]*.

[5] Three-Day Notice

Paragraph 9 of the above complaint alleges the service of a three-day notice to quit under *Civ. Code § 791* in addition to the not less than 30-day notice required by *Civ. Code § 789*. Although it is not entirely clear whether the three-day notice is required, it is unlikely that a court would require service of a three-day notice after a 30-day notice. If the three-day notice to quit is not required, damages would begin to accrue from the date the not less than 30-day notice to remove from the premises expired.

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Chapter 333 LANDLORD AND TENANT: EVICTION ACTIONS
PART V. FORMS
A. Evicting Tenant

29-333 California Forms of Pleading and Practice--Annotated § 333.84

§ 333.84 Complaint for Unlawful Detainer by Lessor or Landlord Against Lessee or Tenant Holding Over After Terminating Tenancy by Written Notice Under Civ. Code § 1946 or by Written Offer and Acceptance [Civ. Code § 1946; Code Civ. Proc. §§ 1161(5), 1166, 1177]

[1] FORM Complaint for Unlawful Detainer by Lessor or Landlord Against Lessee or Tenant Holding Over After Terminating Tenancy by Written Notice Under Civ. Code § 1946 or by Written Offer and Acceptance [Civ. Code § 1946; Code Civ. Proc. §§ 1161(5), 1166, 1177]

[*Caption. See § 333.81[1].*]

Plaintiff alleges:

1. [*Plaintiff's capacity if other than a natural person and interest in described property. See § 333.82[1], P 1.*]

[2. *Defendant's capacity if other than a natural person. See § 333.82[1], P 2.*]

[3. *Fictitious name allegation. See § 333.81[1], P 2.*]

4. On or about _____ [*date*], plaintiff and defendant entered into _____ [a written *or* an oral] _____ [lease *or* rental agreement] by the terms of which plaintiff _____ [leased *or* rented] the premises to defendant _____ [*specify term or period, e.g.,* on a month-to-month basis] at an agreed rental of $_____ per _____ [month *or specify other period*], commencing on _____ [*date*]. [A copy of the _____ (lease *or* rental agreement) is attached to this complaint as Exhibit A and made a part of this complaint.]

5. On or about _____ [the above date *or another date as applicable*], defendant entered into possession of the premises in accordance with the _____ [lease *or* rental agreement] and has been in possession since.

[*EITHER*]

6. On _____ [*date*], defendant served on plaintiff a written notice terminating his/her tenancy on _____ [*date at least 30 days later*]. A copy of the notice is attached to this complaint as Exhibit [B] and made a part of this complaint.

[*OR*]

6. On _____ [*date*], defendant made a written offer to surrender the premises to plaintiff on [or before] _____ [*date*]. Plaintiff accepted the offer in writing and delivered the written acceptance to defendant on _____ [*date*]. A copy of the written offer to surrender and written acceptance are attached to this complaint as Exhibits [C] and [D], respectively.

[*CONTINUE*]

7. Defendant failed to deliver up possession of the premises on or before the date specified, but, rather, continues in possession without plaintiff's permission or consent and contrary to the terms of the written _____ [notice *or* offer and acceptance].

[8. Defendant's withholding of possession of the premises from plaintiff has been willful, deliberate, intentional, and obstinate, and done by defendant with knowledge that his/her tenancy and right to possession have terminated and that the withholding is against plaintiff's will, in that _____ (*specify*).]

9. The reasonable rental value of the premises is $_____ per day, and the damages to plaintiff proximately caused by defendant's unlawful detention have accrued at that rate since _____ [*date tenancy terminated under written notice of termination or written offer to surrender and acceptance*] and will continue to accrue at that rate so long as defendant remains in possession of the premises.

[*Prayer, date, signature block, and verification. See § 333.81[1].*]

[2] Use of Form

The form in [1], *above*, is for use by a lessor or landlord to recover possession of leased or rented premises from the lessee or tenant who has held over after the tenancy was terminated by either the lessee's or tenant's written notice given in accordance with *Civ. Code § 1946* [*see § 332.71*] or the date specified by the lessee or tenant in his or her written offer to surrender possession of the premises, which was accepted in writing by the lessor or landlord, and to recover damages for the holding over and if malice is shown, statutory damages [*see Code Civ. Proc. §§ 1161(5), 1174(a), (b)*].

If rent control applies, good cause must likely be alleged to terminate a month-to-month tenancy.

The complaint may also set forth any circumstances of fraud, force, or violence that accompanied the unlawful detainer and claim damages for them [*Code Civ. Proc. § 1166*].

[3] Verification Required

The above complaint must be verified and include the typed or printed name of the verifying person [*Code Civ. Proc. § 1166(a)(1)*; *see Code Civ. Proc. §§ 446, 1177*].

[4] Allegations

The above complaint alleges:

- The execution of the lease or rental agreement (Paragraph 4) [*see Code Civ. Proc. §§ 1161(5), 1166*].

- The rent agreed on (Paragraph 4) [*see Cal. Const., Art VI, § 10*; *Code Civ. Proc. § 86(a)(4)*].

- Defendant's entry into possession of the premises under the lease or rental agreement (Paragraph 5) [*see Code Civ. Proc. §§ 1161(5), 1166*].

- Termination of the tenancy by the lessee or tenant by notice or agreement to surrender (alternative Paragraphs 6) [*see Civ. Code § 1946*; *Code Civ. Proc. §§ 1161(5), 1166*].

- Defendant's failure to deliver up possession on the date specified (Paragraph 7) [*see Code Civ. Proc. §§ 1161(5), 1166*].

- Defendant's unlawful detention of the premises (Paragraph 7) [*see Code Civ. Proc. §§ 1161(5), 1166*].

- Defendant's current possession of the premises (Paragraph 7) [*see Briggs v. Electronic Memories & Magnetics Corp. (1975) 53 Cal. App. 3d 900, 906, 126 Cal. Rptr. 34]* .

- Defendant's malice in withholding possession, to be alleged if plaintiff is seeking statutory damages (Paragraph 8) [*see Code Civ. Proc. § 1174(b)*].

- The rental value of the property; that is, plaintiff's damages resulting from the unlawful detention (Paragraph 9) [*see Code Civ. Proc. § 1174(b)*].

[5] Holding Over As Unlawful Detainer

A tenant who holds over after given a notice of termination or after making a written offer to surrender that was accepted in writing by the landlord is guilty of unlawful detainer [*Code Civ. Proc. § 1161(5)*].

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Chapter 333 LANDLORD AND TENANT: EVICTION ACTIONS
PART V. FORMS
A. Evicting Tenant

29-333 California Forms of Pleading and Practice--Annotated § 333.85

§ 333.85 Complaint for Unlawful Detainer by Purchaser Against Occupant Holding Over After Execution Sale, Perfection of Purchaser's Title, and Service of Three-Day Notice to Quit [Code Civ. Proc. §§ 1161a(b)(1), 1166, 1177]

[1] FORM Complaint for Unlawful Detainer by Purchaser Against Occupant Holding Over After Execution Sale, Perfection of Purchaser's Title, and Service of Three-Day Notice to Quit [Code Civ. Proc. §§ 1161a(b)(1), 1166, 1177]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR UNLAWFUL DETAINER
_____ [*name*], [and DOES I	)	[Amount demanded _____ (exceeds
through _____,]	)	*or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

[1. _____ (*Plaintiff's capacity if other than a natural person, e.g.,* Plaintiff is and at all times mentioned in this complaint was a corporation organized and existing under the laws of California).]

[2. _____ (*Defendant's capacity if other than a natural person, e.g.,* Defendant is, and at all times mentioned in this complaint was, a corporation organized [and existing] under the laws of California).]

[3. *Fictitious name allegation. See § 333.81[1], P 2.*]

4. By virtue of a deed, executed by _____ [*name*], the _____ [*levying officer, e.g.,* Sheriff of _____ County, California,] and delivered to plaintiff at an auction sale held in accordance with a writ of execution as alleged in this complaint, plaintiff is the owner, and entitled to possession, of the _____ [real property known as _____ (*street address and city*), _____ County, California *or* following described real property: _____], (referred to in this complaint as "the property").

[*ALLEGE, in successively numbered paragraphs, facts leading up to sale of the property, for example:*]

5. On _____ [*date*], a judgment (referred to below as "the judgment") was duly entered in the _____ [*specify, e.g.,* Judgment Book], Volume No. _____, at page _____, of the _____ [above-entitled court *or* the _____ Court of _____] in action number _____, entitled _____ vs. _____ (referred to below as "the action"), in the plaintiff's favor _____ [herein *or* in that action] against _____ [the defendant herein *or* _____ (*name*), who is the person under whom the defendant herein claims], (referred to below as "the judgment debtor").

6. On _____ [*date*], the clerk of the _____ [above-entitled court *or* _____ Court of _____] issued a writ of execution for the collection of the judgment directed to the Sheriff, or to any Marshal or Constable, of _____ County, California.

7. On _____ [*date*], the _____ [*levying officer, e.g.,* Sheriff] of _____ County duly and properly levied the writ of execution on all the judgment debtor's right, title, interest, and claim in or to the property.

8. At the time the writ was levied and the property sold, as alleged in this complaint, the judgment debtor was _____ [*specify interest owned, e.g.,* the sole owner of record of a fee simple estate in the property].

9. Thereafter, the _____ [*e.g.,* Sheriff] gave notice in the manner and form required by *Code of Civil Procedure Sections 701.540-701.547* that the judgment debtor's _____ [*specify interest, e.g.,* fee simple estate] would be sold on execution at public auction on _____ [*date*], at _____ [*time*] at _____ [*street address and city*], California.

[*CONTINUE*]

10. At the time and place specified, the _____ [*e.g.,* Sheriff] conducted the auction and duly sold the judgment debtor's _____ [*interest owned, e.g.,* fee simple estate] to plaintiff, who was the highest bidder.

11. In accordance with the sale, the _____ [*e.g.,* Sheriff] executed and delivered to plaintiff a deed of sale in accordance with *Code of Civil Procedure Sections 701.660* and *701.670* and caused a duplicate to be recorded on _____ [*date*] in Book _____ at page _____ of the official records in the office of the County Recorder of _____ County, California. A copy of the deed of sale is attached to this complaint as Exhibit A and made a part of this complaint.

12. At the time of the sale, the defendant, who is not a tenant of the prior owner and therefore not entitled to a 30-day

notice, was in possession of the property and remained in possession after the sale.

13. On _____ [*date*], plaintiff [caused to be] served on the defendant in this action a written notice stating that plaintiff had purchased the property and that his/her title had been duly perfected and demanding that defendant quit the premises within three days after service of the notice. A copy of the notice is attached to this complaint as Exhibit B and made a part of this complaint.

14. The three day period expired on _____ [*date*], and since that date plaintiff has been and is entitled to immediate possession of the premises.

15. Defendant failed and refused to deliver up possession within the three-day period or since and continues in possession of the premises without plaintiff's permission or consent.

[16. Defendant's withholding of possession of the premises from plaintiff has been willful, deliberate, intentional, and obstinate and done by defendant with knowledge that his/her right to possession has been lawfully terminated and that the withholding of possession is against plaintiff's will, in that _____ (*specify*).]

17. The reasonable rental value of the premises is $_____ per day, and the damages to plaintiff proximately caused by defendant's unlawful detention have accrued at that rate since _____ [*date after which three-day notice expired*], and will continue to accrue at that rate so long as defendant remains in possession of the premises.

[*Prayer, date, signature block, and verification. See § 333.81[1]*.]

[2] Use of Form

The form in [1], *above*, is for use by the purchaser of real property at an execution sale to recover possession of the property from the judgment debtor, or from a person claiming a right to possession under the judgment debtor, who failed to quit the premises after service of a three-day notice to quit [*see § 332.77*] and to recover damages for the holding over and statutory damages if malice is shown [*see Code Civ. Proc. §§ 1161a(b)(1), 1174(a), (b)*; *see also § 333.10[10]*]. This form may also be used when the property involved is a rental housing unit (as defined in *Code Civ. Proc. § 1161a(d)*) in the possession of a tenant or subtenant on a periodic basis from week-to-week, month-to-month, or other interval, or for a fixed period of time and the appropriate notice has been served [*see Code Civ. Proc. § 1161a(c)*]. In such event, the reference to "three days" or "three-day" in paragraphs 13-15 should be changed to reflect the longer notice period required.

The complaint may also set forth any circumstances of fraud, force, or violence that accompanied the unlawful detainer and claim damages for them [*Code Civ. Proc. § 1166(b)*].

For discussion of when title may be in issue in the proceeding, see *§ 333.28[2][b]*. For discussion of the relief available in an unlawful detainer proceeding, see *§ 333.13[13]*.

[3] Verification Required

The above complaint must be verified and include the typed or printed name of the verifying person [*Code Civ. Proc. § 1166(a)(1)*; *see Code Civ. Proc. §§ 446, 1177*].

[4] Allegations

The above complaint alleges:

- Plaintiff's capacity if other than that of a natural person (Paragraph 1) [*see Code Civ. Proc. § 1166*].

- The defendant's capacity if other than a natural person (Paragraph 2).

- The existence of any fictitiously named defendants (Paragraph 3) [*see Code Civ. Proc. §§ 474, 1177*].

- Plaintiff's ownership of the property and right to possession (Paragraph 4) [*see Code Civ. Proc. §§ 1161a(b)(1), 1166*].

- The venue of the proceeding (Paragraph 4) [*see Code Civ. Proc. §§ 392(a)(1), (b), 1177*; *see also § 333.13[1]*].

- The proceedings leading up to the sale of the property to plaintiff at the execution sale (Paragraphs 5-9) [*see Code Civ. Proc. §§ 1161a(b)(1), 1166*].

- Plaintiff's purchase of the property and the perfection of plaintiff's title (Paragraphs 10, 11) [*see Code Civ. Proc. §§ 1161a(b)(1), 1166*].

- Defendant's possession of the property at the time of sale and retention of possession thereafter (Paragraph 12) [*see Code Civ. Proc. §§ 1161a(b)(1), 1166*].

- The service of a three-day notice to quit (Paragraph 13) [*see Code Civ. Proc. §§ 1161a(b), 1166*].

- Expiration of the three-day period and plaintiff's right to immediate possession (Paragraph 14) [*see Code Civ. Proc. §§ 1161a(b), 1166*].

- Defendant's unlawful detention of the premises (Paragraph 15) [*see Code Civ. Proc. §§ 1161a(b), 1166*].

- Defendant's current possession of the premises (Paragraph 15) [*see Briggs v. Electronic Memories & Magnetics Corp. (1975) 53 Cal. App. 3d 900, 906, 126 Cal. Rptr. 34]* .

- Defendant's malice in withholding possession (Paragraph 16) [*see Code Civ. Proc. § 1174(b)*].

- The rental value of the property; that is, plaintiff's damages resulting from the unlawful detention (Paragraph 17) [*see Code Civ. Proc. § 1174(b)*].

[5] Purchaser's Interest in Property

The purchaser of property at an execution sale acquires any interest of the judgment debtor in the property sold (1) that is held on the effective date of the lien under which the property is sold or (2) that is acquired between the effective date and the date of sale [*Code Civ. Proc. § 701.640*].

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A. Evicting Tenant

29-333 California Forms of Pleading and Practice--Annotated § 333.86

§ 333.86 Complaint for Unlawful Detainer by Purchaser Against Occupant Holding Over After Foreclosure Sale on Judicial Foreclosure of Mortgage, Perfection of Purchaser's Title, and Service of Three-Day Notice to Quit [Code Civ. Proc. §§ 1161a(b)(2), 1166, 1177]

[1] FORM Complaint for Unlawful Detainer by Purchaser Against Occupant Holding Over After Foreclosure Sale on Judicial Foreclosure of Mortgage, Perfection of Purchaser's Title, and Service of Three-Day Notice to Quit [Code Civ. Proc. §§ 1161a(b)(2), 1166, 1177]

[*Caption and introduction. See § 333.85[1].*]

[1. *Plaintiff's capacity if other than a natural person. See § 333.85[1], P 1.*]

[2. *Defendant's capacity if other than a natural person. See § 333.85[1], P 2.*]

[3. *Fictitious name allegation. See § 333.81[1], P 2.*]

4. By virtue of a deed, executed by _____ [*name*], the _____ [*levying officer, e.g.,* Sheriff of _____ County, California,] and delivered to plaintiff at an auction sale held in accordance with a writ of sale as alleged below, plaintiff is the owner, and entitled to possession, of the _____ [real property known as _____ (*street address and city*), _____ County, California *or* following described real property: _____] (referred to below as "the property").

[*ALLEGE, in successively numbered paragraphs, facts leading up to sale of the property, for example:*]

5. On _____ [*date*], a judgment (referred to below as "the judgment") was duly entered in the _____ [*specify, e.g.,* Judgment Book], Volume No. _____, at page _____, of the _____ [above-entitled court *or* the _____ Court of _____] in action

number _____, entitled _____ vs. _____ (referred to below as "the action"), in favor of the plaintiff _____ [herein *or* in that action] against _____ [the defendant herein *or* _____ (*name*), who is the person under whom the defendant herein claims], (referred to below as "the mortgagor"). The judgment decreed that the mortgage be foreclosed and that the mortgaged property be sold [subject to the mortgagor's right of redemption].

6. On _____ [*date*], the clerk of the _____ [above-entitled court *or* _____ Court of _____] issued a writ of sale under *Code of Civil Procedure Section 712.010* [, subject to the mortgagor's right of redemption, as provided in *Code of Civil Procedure Sections 729.010-729.090*,] directed to the Sheriff, or to any Marshal or Constable, of _____ County, California.

7. On _____ [*date*], the _____ [*levying officer, e.g.,* Sheriff of _____ County] duly and properly levied the writ of sale on all the mortgagor's right, title, interest, and claim to or in the property.

8. At the time the writ was levied and the property sold, as alleged below, the mortgagor was _____ [*specify interest owned, e.g.,* the sole owner of record of a fee simple estate in the property].

9. Thereafter, the _____ [*e.g.,* Sheriff] gave notice in the manner and form required by *Code of Civil Procedure Sections 701.540-701.547* [and *Code of Civil Procedure Section 729.010(b)*] that the mortgagor's _____ [*specify interest, e.g.,* fee simple estate] in the property would be sold [, subject to the right of redemption,] at public auction on _____ [*date*], at _____ _____.M. at _____ [*street address and city*], California.

[*CONTINUE*]

10. At the time and place specified, the _____ [*e.g.,* Sheriff] conducted the auction and duly sold the mortgagor's _____ [*e.g.,* fee simple estate] [, subject to the right of redemption,] to plaintiff who was the highest bidder.

[*EITHER, if property was not sold subject to redemption*]

11. In accordance with the sale, the _____ [*e.g.,* Sheriff] executed and delivered to plaintiff a deed of sale in accordance with *Code of Civil Procedure Sections 701.660* and *701.670* and caused a duplicate to be recorded on _____ [*date*], in Book _____ at page _____ of the official records in the office of the County Recorder of _____ County, California. A copy of the deed of sale is attached to this complaint as Exhibit A and made a part of this complaint.

[*OR, if property was sold subject to redemption*]

11. In accordance with the sale, the _____ [*e.g.,* Sheriff] executed and delivered to plaintiff a certificate of sale in accordance with *Code of Civil Procedure Section 729.040* and caused a duplicate to be recorded on _____ [*date*] in Book _____ at page _____ of the official records in the office of the County Recorder of _____ County, California. A copy of the certificate of sale is attached to this complaint as Exhibit A and made a part of this complaint.

12. No redemption of the property from plaintiff as purchaser at the sale was made or attempted during the period of redemption.

13. On _____ [*date following expiration of redemption period*], the _____ [*e.g.*, Sheriff] executed and delivered to plaintiff a deed of sale that was recorded on _____ [*date*], in Book _____ at page _____ of the official records in the office of the County Recorder of _____ County, California. A copy of the deed of sale is attached to this complaint as Exhibit B and made a part of this complaint.

[*CONTINUE*]

14. At the time the deed of sale was delivered to plaintiff, defendant, who is not a tenant of the prior owner and therefore not entitled to a 30 day notice, was in possession of the property and remained in possession thereafter.

15. On _____ [*date*], plaintiff [caused to be] served on the defendant in this action a written notice stating that plaintiff had purchased the property and that his/her title had been duly perfected and demanding that defendant quit the premises within three days after service of the notice. A copy of the notice is attached to this complaint as Exhibit [C] and made a part of this complaint.

16. [*Allegation regarding the expiration of the three-day period and plaintiff's right to possession. See § 333.85[1], P 14.*]

17. [*Allegation regarding defendant's continuing possession of the premises without plaintiff's consent. See § 333.85[1], P 15.*]

18. [*Allegation regarding defendant's malicious withholding of possession. See § 333.85[1], P 16.*]

19. [*Allegation regarding reasonable rental value. See § 333.85[1], P 17.*]

[*Prayer, date, signature block, and verification. See § 333.81[1].*]

[2] Use of Form

The form in [1], *above*, is for use by the purchaser of real property at a foreclosure sale to recover possession of the property from the mortgagor, or from a person claiming a right to possession under the mortgagor, who failed to quit the premises after service of a three-day notice to quit [*see § 332.77*] and to recover damages for the holding over and if malice is shown, statutory damages [*see Code Civ. Proc. §§ 1161a(b)(2), 1174(a), (b)*; *see also § 333.10[10]*].

With appropriate modifications, the form may also be used (1) when the property was purchased at a sale following the judicial foreclosure of a deed of trust, and (2) when the property involved is a rental housing unit (as defined in *Code Civ. Proc. § 1161a(d)*) in the possession of a tenant or subtenant on a periodic basis from week-to-week, month-to-month, or other interval, or for a fixed period of time and the appropriate notice has been served [*see Code Civ. Proc. § 1161a(c)*]. In the latter event, the reference to "three days" or "three-day" in paragraphs 15-17 should be changed to reflect the longer notice period required.

The complaint may also set forth any circumstances of fraud, force, or violence that accompanied the unlawful detainer and claim damages for them [*Code Civ. Proc. § 1166(b)*].

For discussion of when title may be in issue in the proceeding, see *§ 333.28[2][b]*. For discussion of the relief available

in an unlawful detainer proceeding, see *§ 333.13[13]*.

[3] Verification Required

The above complaint must be verified and include the typed or printed name of the verifying person [*Code Civ. Proc. § 1166(a)(1)*; *see Code Civ. Proc. §§ 446, 1177*].

[4] Allegations

The above complaint alleges:

- Plaintiff's ownership of the property and right to possession (Paragraph 4) [*see Code Civ. Proc. § 1166*].

- The venue of the proceeding (Paragraph 4) [*see Code Civ. Proc. §§ 392(a)(1), (b), 1177*; *see also § 333.13[1]*].

- The proceedings leading up to the sale of the property to plaintiff at the foreclosure sale (Paragraphs 5-9) [*see Code Civ. Proc. §§ 1161a(b)(2), 1166*].

- Plaintiff's purchase of the property (Paragraph 10) [*see Code Civ. Proc. §§ 1161a(b)(2), 1166*].

- The perfection of plaintiff's title (alternative Paragraph 11 and Paragraphs 11-13) [*see Code Civ. Proc. §§ 1161a(b)(2), 1166*].

- Defendant's possession of the premises at the time the deed of sale was executed and his or her retention of possession thereafter (Paragraph 14) [*see Code Civ. Proc. § 1166*].

- The service of a three-day notice to quit (Paragraph 15) [*see Code Civ. Proc. §§ 1161a(b), 1166*].

- Expiration of the three-day period and plaintiff's right to immediate possession (Paragraph 16) [*see Code Civ. Proc. §§ 1161a(b), 1166*].

- Defendant's unlawful detention of the premises (Paragraph 17) [*see Code Civ. Proc. §§ 1161a(b), 1166*].

- Defendant's current possession of the premises (Paragraph 17) [*see Briggs v. Electronic Memories & Magnetics Corp. (1975) 53 Cal. App. 3d 900, 906, 126 Cal. Rptr. 34]* .

- Defendant's malice in withholding possession, to be alleged if plaintiff is seeking statutory damages (Paragraph 18) [*see Code Civ. Proc. § 1174(b)*].

- The rental value of the property; that is, plaintiff's damages resulting from the unlawful detention (Paragraph 19) [*see Code Civ. Proc. § 1174(b)*].

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29-333 California Forms of Pleading and Practice--Annotated § 333.87

§ 333.87 Complaint for Unlawful Detainer by Purchaser Against Occupant Holding Over After Nonjudicial Sale Under Power of Sale in Trust Deed, Perfection of Purchaser's Title, and Service of Three-Day Notice to Quit [Code Civ. Proc. §§ 1161a(b)(3), 1166, 1177]

[1] FORM Complaint for Unlawful Detainer by Purchaser Against Occupant Holding Over After Nonjudicial Sale Under Power of Sale in Trust Deed, Perfection of Purchaser's Title, and Service of Three-Day Notice to Quit [Code Civ. Proc. §§ 1161a(b)(3), 1166, 1177]

[*Caption and introduction. See § 333.85[1]*.]

[1. *Plaintiff's capacity if other than a natural person. See § 333.85[1], P 1*.]

[2. *Defendant's capacity if other than a natural person. See § 333.85[1], P 2*.]

[3. *Fictitious name allegation. See § 333.81[1], P 2*.]

4. By virtue of a trustee's deed, executed by _____ [*name*], as the trustee named in a deed of trust (referred to below as "the trustee"), and delivered to plaintiff as alleged below, plaintiff is the owner, and entitled to possession, of the _____ [real property known as _____ (*street address and city*), _____ County, California *or* following described real property: _____], (referred to below as "the property").

5. The deed of trust was executed by _____ [the defendant *or* _____ (*name*), the person under whom the defendant claims,], as trustor (referred to below as "the trustor"), and recorded on _____ [*date*], in Book _____ at page _____ of the official records in the office of the County Recorder of _____County, California. By this deed of trust, the trustor conveyed the property to the trustee to secure payment of the trustor's promissory note dated _____, in the principal amount of $_____ payable to _____ [*name*] (referred to below as "the beneficiary") or order.

A copy of the trust deed is attached to this complaint as Exhibit A and made a part of this complaint.

6. The trustor defaulted in the payment of the promissory note and, thereafter, on _____ [*date*], at the request of the beneficiary, the trustee, in accordance with *Civil Code Section 2924*, caused to be recorded in the official records in the office of the County Recorder of _____ County, California, a notice of default and breach of conditions of the trust deed and its election to sell the property under the power of sale contained in the trust deed to satisfy the obligation secured by the trust deed. The notice of default contained the statement specified in *Civil Code Section 2924c(b)(1)*.

7. On _____ [*date*], more than three months after the notice of default was recorded, the trustee, as required by *Civil Code Section 2924*, gave notice in the manner and form required by *Civil Code Section 2924f* that the property would be sold at public auction on _____ [*date*], at _____ _____.M., at _____ [*street address and city*], _____ County, California, to satisfy the obligation secured by the trust deed, and caused the notice of sale to be recorded in the office of the County Recorder of _____ County, California.

8. The trustor failed to cure the default, and at the time and place noticed for sale, _____ [the trustee *or* _____ (*name*), the attorney for the trustee] duly sold the property to plaintiff, who was the highest bidder, and, at that time, executed and delivered to plaintiff a deed for the property, which was thereafter recorded on _____ [*date*], in Book _____ at page _____ of the official records in the office of the County Recorder of _____ County, California. [The deed contains the recital of compliance with law as set forth in *Civil Code Section 2924*.] A copy of the trustee's deed is attached to this complaint as Exhibit B and made a part of this complaint.

9. At the time of the sale, the defendant, who is not a tenant of the prior owner and therefore not entitled to a 30-day notice, was in possession of the property and he/she has remained in possession after the sale.

10. On _____ [*date*], plaintiff [caused to be] served on defendant a written notice stating that plaintiff had purchased the property and that his/her title had been duly perfected and demanding that defendant quit the premises within three days after service of the notice. A copy of the notice is attached to this complaint as Exhibit C and made a part of this complaint.

11. [*Allegation regarding expiration of three-day period and plaintiff's right to possession. See § 333.85[1], P 14.*]

12. [*Allegation regarding defendant's continuing possession of the premises without plaintiff's consent. See § 333.85[1], P 15.*]

[13. *Allegation regarding defendant's malicious withholding of possession. See § 333.85[1], P 16.*]

14. [*Allegation regarding reasonable rental value. See § 333.85[1], P 17.*]

[*Prayer, date, signature block, and verification. See § 333.81[1].*]

[2] Use of Form

The form in [1], *above*, is for use by the purchaser of real property at a nonjudicial trustee's sale under a power of sale contained in a deed of trust to recover possession of the property from the trustor, or from a person claiming a right to possession under the trustor, who failed to quit the premises after service of a three-day notice to quit and to recover damages for the holding over and if malice is shown, statutory damages [*see Code Civ. Proc. §§ 1161a(b)(3), 1174(a),*

(b); *see also § 333.10[10]*]. With appropriate modifications, this form may also be used (1) when the nonjudicial sale was under an express power of sale contained in a mortgage, rather than a trust deed [*see Civ. Code § 2924*; *Code Civ. Proc.§ 1161a(b)(2)*]; and (2) when the property involved is a rental housing unit (as defined in *Code Civ. Proc. § 1161a(d)*) in the possession of a tenant or subtenant on a periodic basis from week-to-week, month-to-month, or other interval, or for a fixed period of time and the appropriate notice has been served [*see Code Civ. Proc. § 1161a(c)*]. In the latter event, the reference to "three days" and "three-day" in Paragraphs 10-12 should be changed to reflect the longer notice period required.

The complaint may also set forth any circumstances of fraud, force, or violence that accompanied the unlawful detainer and claim damages for them [*Code Civ. Proc. § 1166(b)*].

For discussion of when title may be in issue in the proceeding, see *§ 333.28[2][b]*. For discussion of the relief available in an unlawful detainer proceeding, see *§ 333.13[13]*.

[3] Verification Required

The above complaint must be verified and include the typed or printed name of the verifying person [*Code Civ. Proc. § 1166(a)(1)*; *see Code Civ. Proc. §§ 446, 1177*].

[4] Allegations

The above complaint alleges:

- Plaintiff's ownership of the property and right to possession (Paragraph 4) [*see Code Civ. Proc. § 1166*].

- The venue of the proceeding (Paragraph 4) [*see Code Civ. Proc. §§ 392(a)(1), (b), 1177*; *see also § 333.13[1]*].

- The proceedings leading up to the sale of the property to plaintiff at the nonjudicial foreclosure sale (Paragraphs 5-7) [*see Code Civ. Proc. §§ 1161a(b)(3), 1166*].

- The sale of the property to plaintiff and the perfection of plaintiff's title (Paragraph 8) [*see Code Civ. Proc. §§ 1161a(b)(3), 1166*].

- The defendant's possession of the property at the time of the sale and his or her retention of possession thereafter (Paragraph 9) [*see Code Civ. Proc. §§ 1161a(b)(3), 1166*].

- The service of a three-day notice to quit (Paragraph 10) [*see Code Civ. Proc. §§ 1161a(b), 1166*].

- Expiration of the three-day period and plaintiff's right to immediate possession (Paragraph 11) [*see Code Civ. Proc. §§ 1161a(b), 1166*].

- Defendant's unlawful detention of the premises (Paragraph 12) [*see Code Civ. Proc. §§ 1161a(b), 1166*].

- Defendant's current possession of the premises (Paragraph 12) [*see Briggs v. Electronic Memories & Magnetics Corp. (1975) 53 Cal. App. 3d 900, 906, 126 Cal. Rptr. 34]* .

- Defendant's malice in withholding possession, to be alleged if plaintiff is seeking statutory damages

(Paragraph 13) [*see Code Civ. Proc. § 1174(b)*].

- The rental value of the property; that is, plaintiff's damages resulting from the unlawful detention (Paragraph 14) [*see Code Civ. Proc. § 1174(b)*].

The optional bracketed statement at the end of Paragraph 8, relating to the recital in the trustee's deed, should be included if it applies. A recital in a deed executed under the power of sale of compliance with all requirements of law regarding the mailing of copies of notices or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof constitutes prima facie evidence of compliance with those requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrances for value and without notice [*Civ. Code § 2924*].

For the required contents of the complaint, see *§ 333.13[3][a]*.

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29-333 California Forms of Pleading and Practice--Annotated § 333.88

§ 333.88 Complaint for Unlawful Detainer by Purchaser Against Occupant Holding Over After Sale of Real Property, Perfection of Purchaser's Title, and Service of Three-Day Notice to Quit [Code Civ. Proc. §§ 1161a(b)(4), 1166, 1177]

[1] FORM Complaint for Unlawful Detainer by Purchaser Against Occupant Holding Over After Sale of Real Property, Perfection of Purchaser's Title, and Service of Three-Day Notice to Quit [Code Civ. Proc. §§ 1161a(b)(4), 1166, 1177]

[*Caption and introduction. See § 333.85[1].*]

[1. *Plaintiff's capacity if other than a natural person. See § 333.85[1], P 1.*]

[2. *Defendant's capacity if other than a natural person. See § 333.85[1], P 2.*]

[3. *Fictitious name allegation. See § 333.81[1], P 2.*]

4. On or about _____ [*date*], _____ [defendant *or* _____ (*name*), the person under whom the defendant claims] (referred to below as "the seller") was _____ [*specify ownership interest, e.g.,* the sole owner of a fee simple estate] in the _____ [real property known as _____ (*street address and city*), _____ County, California *or* following described real property: _____] (referred to below as "the property"). On that date, plaintiff and the seller entered into a written agreement by the terms of which the seller agreed to sell and plaintiff agreed to purchase the property for the sum of $ _____. [A copy of the agreement is attached to this complaint as Exhibit A and made a part of this complaint.]

5. The sale was handled through an escrow that closed on or about _____ [*date*], at which time the purchase price deposited by plaintiff was paid to the seller and the property was conveyed to plaintiff by a grant deed executed by the seller and delivered to the plaintiff. The deed was duly recorded on _____ [*date*], in

Book _____ at page _____ of the official records in the office of the County Recorder of _____ County, California. A copy of the deed is attached to this complaint as Exhibit [B] and made a part of this complaint.

6. At the time the escrow closed, defendant, who is not a tenant of the prior owner and therefore not entitled to a 30-day notice, was in possession of the property and he/she has remained in possession thereafter.

7. On _____ [*date*], plaintiff [caused to be] served on defendant a written notice [stating that plaintiff had purchased the property and that his/her title had been duly perfected] and demanding that defendant quit the premises within three days after service of the notice. A copy of the notice is attached to this complaint as Exhibit [C] and made a part of this complaint.

8. [*Allegation regarding expiration of three-day period and plaintiff's right to possession. See § 333.85[1], P 14.*]

9. [*Allegation regarding defendant's continuing possession of the premises without plaintiff's consent. See § 333.85[1], P 15.*]

[10. *Allegation regarding defendant's malicious withholding of possession. See § 333.85[1], P 16.*]

11. [*Allegation regarding reasonable rental value. See § 333.85[1], P 17.*]

[*Prayer, date, signature block, and verification. See § 333.81[1].*]

[2] Use of Form

The form in [1], *above*, is for use by the purchaser of real property to recover possession of the property from the seller, or from a person claiming a right to possession under the seller, who failed to quit the premises after service of a three-day notice to quit [*see § 332.77*] and to recover damages for the holding over and statutory damages if malice is shown [*see Code Civ. Proc. §§ 1161a(b)(4), 1174(a), (b)*; *see also § 333.10[10]*]. With appropriate modifications, this form may also be used when the property involved is a rental housing unit (as defined in *Code Civ. Proc. § 1161a(d)*) in the possession of a tenant or subtenant on a periodic basis from week-to-week, month-to-month, or other interval, or for a fixed period of time and the appropriate notice has been served [*see Code Civ. Proc. § 1161a(c)*]. In such event, the reference to "three days" and "three-day" in paragraphs 7-9 should be changed to reflect the longer notice period required.

The complaint may also set forth any circumstances of fraud, force, or violence that accompanied the unlawful detainer and claim damages for them [*Code Civ. Proc. § 1166(b)*].

For discussion of when title may be in issue in the proceeding, see *§ 333.28[2][b]*. For discussion of the relief available in an unlawful detainer proceeding, see *§ 333.13[13]*.

[3] Verification Required

The above complaint must be verified and include the typed or printed name of the verifying person [*Code Civ. Proc. § 1166(a)(1)*; *see Code Civ. Proc. §§ 446, 1177*].

[4] Allegations

The above complaint alleges:

- Plaintiff's purchase of the property from the owner (Paragraph 4) [*see Code Civ. Proc. § 1166*].

- The venue of the proceeding (Paragraph 4) [*see Code Civ. Proc. §§ 392(a)(1), (b), 1177*; *see also § 333.13[1]*].

- The perfection of plaintiff's title (Paragraph 5) [*see Code Civ. Proc. § 1166*].

- The defendant's possession of the property at the time of the sale and his or her retention of possession thereafter (Paragraph 6) [*see Code Civ. Proc. §§ 1161a(b)(4), 1166*].

- The service of a three-day notice to quit (Paragraph 7) [*see Code Civ. Proc. §§ 1161a(b), 1166*].

- Expiration of the three-day period and plaintiff's right to immediate possession (Paragraph 8) [*see Code Civ. Proc. §§ 1161a(b), 1166*].

- Defendant's unlawful detention of the premises (Paragraph 9) [*see Code Civ. Proc. §§ 1161a(b)(4), 1166*].

- Defendant's current possession of the premises (Paragraph 9) [*see Briggs v. Electronic Memories & Magnetics Corp. (1975) 53 Cal. App. 3d 900, 906, 126 Cal. Rptr. 34]* .

- Defendant's malice in withholding possession, to be alleged if plaintiff is seeking statutory damages (Paragraph 10) [*see Code Civ. Proc. § 1174(b)*].

- The rental value of the property; that is, plaintiff's damages resulting from the unlawful detention (Paragraph 11) [*see Code Civ. Proc. § 1174(b)*].

For discussion of the required contents of the complaint, see *§ 333.13[3][a]*.

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[Reserved]

§§ 333.89[Reserved]

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29-333 California Forms of Pleading and Practice--Annotated § 333.100

§ 333.100 Summons in Unlawful Detainer Proceeding [Code Civ. Proc. § 1167]--Judicial Council Form SUM-130

[1] FORM Summons in Unlawful Detainer Proceeding [Code Civ. Proc. § 1167]--Judicial Council Form SUM-130

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustratively filled-in copy of the Judicial Council approved form of summons for mandatory use in unlawful detainer proceedings [*see Gov. Code § 68511*; Judicial Council Form SUM-130; *see also § 333.13[3][d]*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

For the standard proof of service of summons form (Judicial Council Form POS-010), see *Ch. 518, Service of Summons and Papers, § 518.72*.

[3] Contents of Summons

The manner in which the blanks are to be filled in and boxes checked are self-explanatory. For a discussion of the summons, the manners of serving it, and proof of service, as well as forms of ex parte applications for an order that the summons be served by publication and forms of orders granting the application that may be adapted for use in an unlawful detainer proceeding, see Ch. 518, *Service of Summons and Papers* . For a form of ex parte application for service of the summons by posting and an order granting the motion, see *§§ 333.101* and *333.102*.

The Judicial Council Form Summons for use in unlawful detainer actions, like the Judicial Council Form Complaint [*see § 333.80*], Answer [*see § 333.110*], and Interrogatories [*see § 333.120*], requests information on unlawful detainer assistants [*see Bus. & Prof. Code §§ 6400-6416*]. This portion of the Summons must be completed in all cases. Thus, if the plaintiff did not receive advise or assistance, for compensation, from an unlawful detainer assistant in completing

the form Summons, check the "did not" box. No other information is required. However, if the plaintiff received *any* help or advice from an unlawful detainer assistant, check the "did" box in Paragraph 3 of the form and then complete the information regarding the unlawful detainer assistant in Paragraph 6 of the form. For a discussion of unlawful detainer assistants, see *§ 333.12[3]*.

[4] Summons Procedure

The issuance, service, and return of a summons in a civil action is governed by *Code Civ. Proc. §§ 412.10-417.40*. A summons in a unlawful detainer action is required to be in the form specified in *Code Civ. Proc. § 412.20*, except that the defendant's time to respond to the complaint is five days (including Saturdays and Sundays but excluding all other judicial holidays) after the summons is served on him or her. If the last day for filing the response falls on a Saturday or Sunday, the response period is extended to and includes the next court day. In all other regards, the summons is required to be issued, served, and returned in the same manner as a summons in a civil action [*Code Civ. Proc. § 1167*].

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29-333 California Forms of Pleading and Practice--Annotated § 333.101

§ 333.101 Application for Order That Summons Be Served by Posting Premises and Mailing in Unlawful Detainer Proceeding [Code Civ. Proc. §§ 415.45(a), 1167]

[1] FORM Application for Order That Summons Be Served by Posting Premises and Mailing in Unlawful Detainer Proceeding [Code Civ. Proc. §§ 415.45(a), 1167]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	EX PARTE APPLICATION
Plaintiff,	)	FOR ORDER THAT
vs.	)	SUMMONS BE SERVED BY
_____ [*name*], [and DOES I	)	POSTING PREMISES AND
through _____,]	)	MAILING AND
Defendant(s).	)	SUPPORTING
	)	DECLARATION OF _____
	)	[*name*]
	)	

_____

Application is hereby made for an order directing that the summons in this proceeding be served by posting a copy of it on the unlawfully detained premises _____ [*specify manner of posting, e.g.,* by securely affixing it to the front door of the building], which is the manner most likely to give actual notice of this proceeding to the defendant in this action, and that the court direct that a copy of the summons and of the complaint be forthwith sent by certified mail to the defendant at his/her last known address. This application is made on the ground that defendant cannot with reasonable diligence be served in any manner specified in *Code of Civil Procedure Sections 415.10-415.50*, other than by publication. In support of this application, the undersigned declares:

1. I am the attorney of record for plaintiff in this proceeding.

2. The property unlawfully detained is _____ [known as _____ (*street address and city*), _____ County, California *or* described as follows: _____] (referred to below as "the property").

[*EITHER*]

3. As appears from the verified complaint in this action, a cause of action for unlawful detainer of the property exists against defendant based on _____ [*specify, e.g.,* defendant's failure to pay rent or quit the premises after service on him/her of a three-day notice to pay rent or quit].

[*OR*]

3. As appears from the verified complaint in this action, defendant _____ [*name*] is a _____ [necessary *or* proper] party to this proceeding in that _____ [*specify, e.g.,* he/she partially occupies the property as the licensee of defendant _____ (*name of tenant*)].

[*OR*]

3. As appears from the verified complaint in this action, defendant _____ [has *or* claims to have] an interest in the property in that _____ [*specify, e.g.,* he/she claims a possessory right to the premises by virtue of a written assignment purportedly executed by defendant _____ (*name of tenant*)].

[*OR*]

3. As appears from the verified complaint in this action, the relief demanded in the complaint herein consists _____ [wholly *or* in part] in excluding defendant from any interest in the property.

[*CONTINUE*]

4. I have made the following efforts to learn defendant's whereabouts: _____ [*state in detail acts done and date and result of each such act; these acts should include ascertaining identity and address of defendant's relatives, friends, last known employer, last known landlord, and other persons likely to know defendant's whereabouts, checking with these persons, examining the latest city directory, phone directory, tax rolls, and voters register, and any attempts made by the declarant to serve the defendant or to have the defendant served*].

[5. As shown by the _____ (affidavit *or* declaration *or* certificate) of _____ (*name*), a _____ (registered process server *or describe other person*), which is attached to this application as Exhibit A and made a part of this application, attempts to serve defendant with process in this proceeding were made at the places, on the dates, and at the times indicated, and were unsuccessful.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

The combined form of ex parte application and supporting declaration in [1], *above*, is for use by the plaintiff in an unlawful detainer proceeding to apply for a court order that the summons be served by posting a copy of it on the unlawfully detained premises and mailing a copy of it and a copy of the complaint to the defendant at his or her last known address [*Code Civ. Proc. § 415.45*].

[3] Proof of Service

The manner of proof of service of a summons on a person in California by posting a copy on the premises in accordance with *Code Civ. Proc. § 415.45* is provided by *Code Civ. Proc. § 417.10(e)*. The manner of proof of service of a summons on person outside California by posting a copy on the premises in accordance with *Code Civ. Proc. § 415.45* is provided by *Code Civ. Proc. § 417.20(e)*.

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29-333 California Forms of Pleading and Practice--Annotated § 333.102

§ 333.102 Order That Summons Be Served by Posting Premises and Mailing in Unlawful Detainer Proceeding [Code Civ. Proc. § 415.45(b)]

[1] FORM Order That Summons Be Served by Posting Premises and Mailing in Unlawful Detainer Proceeding [Code Civ. Proc. § 415.45(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], [and DOES I	)	ORDER
through _____,]	)	
Defendant(s).	)	
	)	

_____

On reading and filing the application of _____ [*name*] on behalf of plaintiff in this action and it appearing to the court's satisfaction that the defendant cannot with reasonable diligence be served in any other manner specified in *Code of Civil Procedure Sections 415.10-415.50*, other than by publication, and it further appearing that _____ [a cause of action exists against defendant *or* defendant is a _____ (necessary *or* proper) party to this proceeding *or* defendant has or claims to have an interest in the real property alleged to be unlawfully detained *or* the relief demanded in this proceeding consists _____ (wholly *or* in part) in excluding defendant from any interest in the real property alleged to be unlawfully detained],

IT IS ORDERED that the summons in this proceeding be served by posting a copy of it on _____ [*describe, e.g.,* the premises known as _____ (*street address and city*), _____ County, California,] _____ [*specify manner of posting*], which is the manner most likely to give actual

notice of this proceeding to the defendant in this action, and that a copy of the summons and of the complaint be forthwith mailed by certified mail to the defendant at _____ [*specify*], which is his/her last known address.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is an order for use when the court grants the application for an order directing service of summons by posting the premises [*Code Civ. Proc. § 415.45(b)*]. For a form and discussion of an application for an order that a summons be served by posting the premises, see *§ 333.101*.

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29-333 California Forms of Pleading and Practice--Annotated § 333.103

§ 333.103 Notice of Motion for Immediate Issuance of Writ of Possession [Code Civ. Proc. § 1166a]

[1] FORM Notice of Motion for Immediate Issuance of Writ of Possession [Code Civ. Proc. § 1166a]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION FOR IMMEDIATE POS-
vs.	)	SESSION
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Trial Date: _____]

To defendant _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* plaintiff] will move for a writ of possession granting plaintiff immediate possession of the following described property: _____ [*describe manufactured home, mobilehome, or real property*]. The motion will be made on the ground that defendant _____ [resides out of California *or* has departed from California *or* cannot, after due diligence, be found within California *or* has concealed himself/herself to avoid the service of summons in this proceeding]. The writ will apply to all tenants, subtenants, if any, named claimants, if any,

and any other occupants of the premises.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed with this notice of motion, on the records and file in this action, and on such evidence as may be presented at the hearing of the motion.

NOTICE IS FURTHER GIVEN THAT, PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 1166a, YOU MAY FILE AFFIDAVITS ON YOUR OWN BEHALF WITH THE COURT AND MAY APPEAR AND PRESENT TESTIMONY ON YOUR OWN BEHALF. HOWEVER, IF YOU FAIL TO APPEAR, THE PLAINTIFF WILL APPLY TO THE COURT FOR A WRIT OF POSSESSION OF THE _____ [MANUFACTURED HOME *or* MOBILEHOME *or* REAL PROPERTY].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

This form is a notice of motion for use to obtain an order for immediate possession of the premises and issuance of a writ of possession before trial in an unlawful detainer proceeding. The writ may be issued when it appears to the court's satisfaction, after a hearing on the motion, from the verified complaint, and from any affidavits (or declarations under *Code Civ. Proc. § 2015.5*) filed or oral testimony given by or on behalf of the parties, that the defendant resides out of the state, has departed from the state, cannot, after due diligence be found within the state, or has concealed himself or herself to avoid service of summons [*Code Civ. Proc. § 1166a(a)*].

A supporting memorandum is required to be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113*; *see Code Civ. Proc. §§ 1005(b), 1010*; for discussion and forms, see Ch. 417, *Points and Authorities*]. For a form of order granting the motion, see *§ 333.104*.

Written notice of the hearing on the motion must be served on the defendant by the plaintiff in accordance with *Code Civ. Proc. § 1011* [*Code Civ. Proc. § 1166a(b)*].

[3] Contents of Notice

The notice must give the defendant information as specified in *Code Civ. Proc. § 1166a(b)* (set forth in the last paragraph of this form) [*see Code Civ. Proc. § 1166a(b)*]. The motion must indicate that the writ applies to all tenants, subtenants, if any, named claimants, if any, and any other occupants of the premises [*Code Civ. Proc. § 1166a(a)*].

For discussion of the contents and requirements of noticed motions, a procedural guide, and forms of noticed motions and supporting papers, see Ch. 372, *Motions and Orders* .

[4] Undertaking

The plaintiff is required to file an undertaking in such sum as will be fixed and determined by the judge, to the effect, that if the plaintiff fails to recover judgment against the defendant for possession of the premises or if the suit is dismissed, the plaintiff will pay the defendant such damages, not to exceed the amount fixed in the undertaking, as may be sustained by the defendant by reason of the dispossession under the writ of possession [*Code Civ. Proc. § 1166a(c)*]. For discussion and forms for use in filing an undertaking, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

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29-333 California Forms of Pleading and Practice--Annotated § 333.104

§ 333.104 Order Granting Motion for Immediate Possession [Code Civ. Proc. § 1166a]

[1] FORM Order Granting Motion for Immediate Possession [Code Civ. Proc. § 1166a]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

_____

Plaintiff's motion for immediate possession of the property described below came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant _____ [did not appear *or specify appearance made*].

On proof made to the court's satisfaction that the defendant _____ [resides out of California *or* has departed from California *or*, after due diligence, cannot be found within California *or* has concealed himself/herself to avoid service of summons in this proceeding], and that the motion ought to be granted, and plaintiff having filed in this action an undertaking with good and sufficient sureties who jointly and severally bind themselves to defendant for the statutory obligations of *Code of Civil Procedure Section 1166a* in an amount heretofore fixed by this court, to wit, the sum of $_____.

IT IS ORDERED that the motion be, and it hereby is, granted, that plaintiff is entitled to immediate possession, and that a writ of possession issue directed to the Sheriff of this county, [or to any Marshal of this Judicial District,] directing

him/her to put plaintiff into possession of the following described property: _____ [*describe manufactured home, mobilehome, or real property*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is an order for use when the motion for immediate possession of the property is granted. If the court's findings at the hearing on the motion are in plaintiff's favor and against the defendant, an order must be entered for the immediate possession of the premises [*Code Civ. Proc. § 1166a(d)*]. The order may be enforced as provided in *Code Civ. Proc. §§ 712.010-717.030*, relating to enforcement of nonmoney judgments in civil actions [*Code Civ. Proc. § 1166a(e)*]. For the purposes of *Code Civ. Proc. § 1166a*, references in *Code Civ. Proc. §§ 712.010-717.030 (1)* to the "judgment debtor" must be deemed references to the defendant, (2) to the "judgment creditor" must be deemed references to the plaintiff, and (3) to the "judgment of possession of the property" must be deemed references to an order for immediate possession of the premises [*Code Civ. Proc. § 1166a(f)*].

For discussion and a form of notice of motion for immediate issuance of a writ of possession, see *§ 333.103*.

[3] Enforcement Writ

Except with regard to enforcing a judgment for money, a writ of possession issued in accordance with a judgment for possession in an unlawful detainer action must be enforced without delay, notwithstanding receipt of notice that the defendant has filed a bankruptcy proceeding. However, an exception to this rule exists for writs of possession issued for possession of a mobilehome, manufactured home, or real property in a mobilehome park or manufactured housing community [*Code Civ. Proc. § 715.050*].

[4] Cross References

For discussion and requirements of orders, see Ch. 372, *Motions and Orders* .

For discussion and a form of writ of possession, see Ch. 254, *Executions and Enforcement of Judgments* .

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29-333 California Forms of Pleading and Practice--Annotated § 333.105

§ 333.105 Prejudgment Claim of Right to Possession [Code Civ. Proc. § 415.46(f)]--Judicial Council Form CP-10.5

[1] FORM Prejudgment Claim of Right to Possession [Code Civ. Proc. § 415.46(f)]--Judicial Council Form CP-10.5

Click here to view image.

[2] Use of Form

The form in [1], *above*, which is set out in *Code Civ. Proc. § 415.46(f)*, is for use by an occupant who is not named in the unlawful detainer complaint but who claims a right to possession of the premises that are the subject of the unlawful detainer action. The occupant receives the form when it is served by the marshal, sheriff, or registered process server, together with a copy of the summons and complaint, on all the adult occupants of the premises at the same time that the summons and complaint are served on the named defendants [*see Code Civ. Proc. § 415.46(a)*; *§ 333.13[4][a]*; *see also Gov. Code § 26721.1* (fee for filing)].

If the form was not served on the occupant, the occupant is not required to file a prejudgment claim and instead may file a postjudgment claim of right to possession after service or posting of the writ of possession, up to and including the time when the levying officer returns to evict the occupant [*Code Civ. Proc. § 1174.3(a)*]. For discussion of postjudgment claim of right to possession, see *§ 333.14[4][b][i]*.

PRACTICE TIP:

Using Prejudgment Claim. This form is one that should almost always be used unless there is a good articulable reason not to use it. In this practitioner's opinion, the standard of practice in the future will be that it will be presumptively utilized in the absence of good cause. *By Benjamin Kaplan*

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Filing Claim

Any occupant of the premises who is served with a prejudgment claim of right to possession may file the claim with the court within 10 days of the date of service as shown on the return of service. The filing period includes Saturday and Sunday but excludes all other judicial holidays. If the last day for filing the claim falls on a Saturday or Sunday, the filing period is extended to and includes the next court date. Filing the claim constitutes a general appearance [*Code Civ. Proc. § 1174.25(a)*].

[4] Effect of Filing Claim

At the time of filing, the claimant will be added as a defendant in the unlawful detainer action, and the clerk will notify the plaintiff that the claimant has been added as a defendant by mailing a copy of the claim to the plaintiff. The claimant must answer or otherwise respond to the summons and complaint within five days, including Saturdays and Sundays but excluding all other judicial holidays, after filing the prejudgment claim of possession. Thereafter, the claimant's name must be added to any pleading, filing, or form filed in the unlawful detainer action [*Code Civ. Proc. § 1174.25(b)*].

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29-333 California Forms of Pleading and Practice--Annotated § 333.106

§ 333.106 Request/Counter-Request to Set Case for Trial--Unlawful Detainer--Judicial Council Form UD-150

[1] FORM Request/Counter-Request to Set Case for Trial--Unlawful Detainer--Judicial Council Form UD-150

Click here to view image.

[2] Use of Form

This form is a request/counter-request to set an unlawful detainer case for trial. It is adopted for mandatory use. If the defendant appears and files an answer or demur to the complaint, the unlawful detainer case must be set for trial on a date not later than 20 days after the first request to set the case for trial is made [*Code Civ. Proc. § 1170.5(a)*]. If possession of the premises are in issue, Paragraph 2.a. of the form must be checked. It provides that the case is entitled to legal preference under *Code Civ. Proc. § 1179a*. Note that the court may extend the period for trial on the agreement of all of the parties [*Code Civ. Proc. § 1170.5(b)*; *see also Code Civ. Proc. § 1170.5(c)* (if trial is not held within time specified in *Code Civ. Proc. § 1170.5*, court, on finding that there is reasonable probability that plaintiff will prevail in the action, must (1) determine amount of damages, if any, to be suffered by plaintiff by reason of extension; and (2) issue order requiring defendant to pay that amount into court as rent would have otherwise become due and payable or into escrow designated by court for so long as defendant remains in possession pending action's termination)].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Proof of Service by Mail

The second page of Form UD-150 sets forth a "Proof of Service by Mail." An unsigned copy of the Proof of Service by Mail should be completed and served with Form UD-150. After service by mail, the person who mailed Form UD-150 will need to complete the Proof of Service by Mail. Once the Proof of Service by Mail has been completed, it should be given to the clerk for filing.

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[Reserved]

§§ 333.107[Reserved]

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29-333 California Forms of Pleading and Practice--Annotated § 333.110

§ 333.110 Answer to Complaint for Unlawful Detainer by Lessee or Tenant [Code Civ. Proc. §§ 1170, 1177; Cal. Rules of Ct., Rule 1.45(a)]--Judicial Council Form UD-105

[1] FORM Answer to Complaint for Unlawful Detainer by Lessee or Tenant [Code Civ. Proc. §§ 1170, 1177; Cal. Rules of Ct., Rule 1.45(a)]--Judicial Council Form UD-105

Click here to view image.

SHORT TITLE: Parker v. Daly ..... Case Number: C123456

Attachment 3j to Answer to Complaint for Unlawful Detainer

Affirmative Defense 3.b.:

On July 1, 1996, the electric heater in the bedroom of the apartment failed. In addition, the window in the living room of the apartment had been broken since June 15, 1996, resulting in rain damage to the carpet and to defendant's furniture. Defendant phoned plaintiff on July 1 and July 8, 1996, requesting that necessary repairs be made. When plaintiff failed to make the repairs, defendant sent a written notice to plaintiff on July 16, 1996, informing plaintiff that if the necessary repairs were not made within 30 days, defendant would make the repairs herself and deduct the costs from the September rental payment. When the plaintiff did not respond, defendant hired a contractor and an electrician on August 20, 1996, to make the necessary repairs. Their bills for repair totaled $300.00, which defendant paid.

Affirmative Defense 3.c.:

On September 1, 1996, defendant tendered to plaintiff $240.00, together with the bills for $300.00, marked as paid, as payment for the rent due on that date. Plaintiff refused to accept this payment and demanded $540.00 as the rent payment.

Defendant deposited the $240.00 in a bank account (number 0978456-1) opened in plaintiff's name at the Bank of Paradise, and sent a notice of the deposit along with the bank book of the account to plaintiff on September 4, 1996. Defendant will continue to deposit monthly rental payments in this account in plaintiff's name as the payments become due unless otherwise instructed by the court.

Affirmative Defense 3.e.:

In retaliation for defendant's actions, described above, plaintiff served a three-day notice to pay rent or quit on defendant on September 27, 1996, and instituted this proceeding on October 1, 1996.

[2] Use of Form

This form is an illustrative filled-in reproduction of the Judicial Council approved form for use by a defendant in a proceeding for unlawful detainer [*see Code Civ. Proc. §§ 425.12, 1166*; Judicial Council Form UD-105]. If the landlord does not use a Judicial Council form complaint, the tenant should not use a Judicial Council form answer. If the defendant appears by filing an answer, trial of the unlawful detainer case must be held not later than the 20th day following the date that the request to set the time of trial is made [*Code Civ. Proc. § 1170.5(a)*; *see § 333.106* (Judicial Council form of Request/Counter-Request to Set Case For Trial)].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

Use of the Judicial Council form is optional [*see Code Civ. Proc. § 425.12*]. Nevertheless, it should be used whenever the Judicial Council approved form of complaint for unlawful detainer is used [*see § 333.80*].

For a discussion of the format and contents of answers drafted by counsel, which may be adapted for use in answering a counsel-drafted complaint for unlawful detainer, see Ch. 26, *Answers* .

[3] Verification Required

The answer must be verified [*see Code Civ. Proc. §§ 446, 1166(a)(1), 1177*].

[4] Time to Answer

The defendant has five days, including Saturdays and Sundays but excluding all other judicial holidays, to answer or otherwise respond to a complaint or amended complaint for unlawful detainer. If the last day for filing the response falls on a Saturday or Sunday, the response period is extended to and includes the next court day [*see Code Civ. Proc. §§ 1167, 1167.3*]. However, the court may order a different time limit for answering the complaint if good cause is shown [*Code Civ. Proc. §§ 1167.3, 1167.5*; *see § 333.21*]. That is, on or before the day fixed for his or her appearance, the defendant may appear and answer or demur [*Code Civ. Proc. § 1170*; *see § 333.23*]. For forms of demurrers that may be adapted for use in an unlawful detainer proceeding, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* . For discussion of when a motion to quash service of summons should be made in lieu of filing a general demurrer to the complaint and the effect of a general demurrer, see *§§ 333.20, 333.24[1]*.

[5] Filling Out Form

[a] Block Heading: Identification of Attorney and Title of Court

In the first box of the block heading insert the name, address, and phone number of the attorney for the defendant or of the defendant if he or she is appearing in person. Insert the defendant's name or, if the defendant is representing himself

or herself, "In propria persona" or "In person" to the right of "Attorney For (*Name*)." In the next box, insert the title and address of the court as in the complaint [*see § 333.80*].

[b] Block Heading: Title of Case

Type the names of the parties in the blocks provided. In an answer it is sufficient to state the name of the first party on each side with an appropriate indication of any other parties, such as "et al." [*see Code Civ. Proc. §§ 422.40, 1177*; *see also* Ch. 108, *Captions and Introductions*].

[c] Block Heading: Case Number

Insert the case number in the appropriate box in the caption as it appears in the complaint served on the defendant.

[d] Paragraph 1. (Defendant's Name)

Insert in Paragraph 1. the name of each defendant who joins in the answer to the complaint.

[e] Paragraph 2. (Admissions and Denials)

Code Civ. Proc. § 431.30, concerning the form and content of answers in civil actions, applies to answers in unlawful detainer proceedings [*see Code Civ. Proc. § 1177*].

Check the box after a. in Paragraph 2. if the defendant generally denies each statement of the complaint and the demand in the complaint does not exceed $1,000 [*see Code Civ. Proc. §§ 431.40(a), 1177*]. Apart from the general denial in this form of answer, the Judicial Council has adopted a general form of general denial the use of which is made mandatory by *Cal. Rules of Ct., Rule 1.31* [*see Code Civ. Proc. § 431.40(c)*; Judicial Council Form PLD-050]. It is uncertain whether, in an unlawful detainer proceeding brought on a Judicial Council complaint form, the answering attorney who intends to file a general denial would use the mandatory general denial form, or the form presented here, which is a specific form designed for use to answer the Judicial Council form of complaint for unlawful detainer [*cf.* Judicial Council Form PLD-050 (general form) *with* Judicial Council Form UD-105 (unlawful detainer form)]. Consequently, before preparing this form of answer to deny generally the contents of the complaint, counsel should check local court practice to determine whether the court will require use of the general form of general denial.

This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

If the box following a. is not checked, check the box following b. in Paragraph 2., in which event the defendant's denials of allegations in thecomplaint must be made positively, that is, specifically, or according to information and belief [*see Code Civ. Proc. §§ 431.30(d), (f), 1177*]. Positive denials may be stated in Paragraph 2.b.(1) by referring to specific paragraphs or parts of the complaint [*Code Civ. Proc. §§ 431.30(f), 1177*]. Check the box at the end of Paragraph 2.b.(1) if the specific denials are continued on an attachment.

Indicate in Paragraph 2.b.(2) which allegations in the complaint defendant specifically denies on the ground that he or she has no information or belief on the subject sufficient to enable him or her to answer [*see Code Civ. Proc. §§ 431.30(e), (f), 1177*; *see* Ch. 26, *Answers* , for examples of specific denials on information and belief]. Check the box at the end of Paragraph 2.b.(2) if the denials based on the lack of information or belief are continued on an attachment.

[f] Paragraph 3. (Affirmative Defenses)

Paragraph 3. contains statements of new matters constituting defenses, or affirmative defenses [*see Code Civ. Proc. §§*

431.30(b)(2), 1177]. Check the appropriate box to assert any of the following affirmative defenses:

- The plaintiff breached the implied warranty of habitability [Paragraph 3.a.; *see § 333.28[4]*]. This defense should not be alleged unless the complaint is based on non-payment of rent.

- The defendant exercised his or her right to repair and deduct [Paragraph 3.b.; *see Civ. Code § 1942*]. The repair and deduct defense should not be alleged unless the complaint is based on non-payment of rent.

- The plaintiff refused to accept the defendant's offer to pay rent [Paragraph 3.c.; *see, e.g., Strom v. Union Oil Co. (1948) 88 Cal. App. 2d 78, 83-84, 198 P.2d 347* ; *see also § 333.10[5]*].

- The plaintiff has waived, changed, or canceled the notice to quit [Paragraph 3.d.; *see, e.g., Lee v. Vignoli (1979) 98 Cal. App. 3d Supp. 24, 29-30 , 160 Cal. Rptr. 79* (if landlord waives back rent after serving "pay rent or quit" notice, then 30-day notice under *Civ. Code § 1946* is required to terminate month-to-month tenancy)].

- The plaintiff served the notice to quit or filed the complaint to retaliate against the defendant [Paragraph 3.e.; *see § 333.28[5]*].

- The plaintiff is arbitrarily discriminating against the defendant in violation of the Constitutions or laws of the United States or the State of California [Paragraph 3.f.; *see Gov. Code § 12955*; *see also § 333.28[5][f]*].

- The plaintiff's demand for possession violates the local rent control or eviction control ordinance [Paragraph 3.g.; *see § 333.28[5][g]*; *see also* Ch. 335, *Landlord and Tenant: Rent Control*].

- The plaintiff accepted the rent from the defendant to cover a period of time after the date the notice to quit expired [Paragraph 3.h.; *see § 333.10[6]*].

Check the box in Paragraph 3.i. if the defendant intends to assert any other affirmative defenses. Generally, a tenant may interpose any defense that directly relates to the issue of possession and which, if established, would result in the tenant's retention of the premises [*see Green v. Superior Court (1974) 10 Cal. 3d 616, 633 n.19, 111 Cal. Rptr. 704, 517 P.2d 1168]* . For example, the defendant may assert as an affirmative defense that the plaintiff fraudulently acquired title to the premises from the defendant [*see Asuncion v. Superior Court (1980) 108 Cal. App. 3d 141, 146-147, 166 Cal. Rptr. 306]* , that the plaintiff's notice to quit or the manner of its service was defective [*see Code Civ. Proc. §§ 1161, 1162*], or that the plaintiff had failed to secure a certificate of occupancy as required by a local ordinance [*see Gruzen v. Henry (1978) 84 Cal. App. 3d 515, 517-519, 148 Cal. Rptr. 573* (defense as going to issue of rent due); *see also § 333.28*].

Under Paragraph 3.j. briefly state the facts relating to any affirmative defense asserted in Paragraphs 3.a.-3.h. or 3.i. Identify each item separately by identifying the appropriate paragraph number. Check the appropriate box in Paragraph 3.j.(1) or (2) if the space in the form is not sufficient to set forth the facts supporting the affirmative defenses alleged and the statements are either fully set forth in the attachment or are continued on an attachment.

The fact pattern set out as an example in Attachment 3.j. of this form describes a situation where the defendant made repairs and deducted the costs of the repairs in conformance with the requirements of *Civ. Code § 1942*. Standard characteristics necessary for a dwelling to be deemed tenantable are described in *Civ. Code § 1941.1*. Depositing the rental payment in a bank account in the landlord's name and notifying the landlord of the deposit is a due offer of payment that keeps the tender alive and extinguishes the obligation to pay rent [*see Civ. Code § 1500*; *Webb v. Jones*

(1927) 88 Cal. App. 20, 29, 263 P. 538] .

[g] Paragraph 4.a. (Premises Vacated)

Check the box following a. in Paragraph 4. if the defendant has vacated the premises, and state the date on which the premises were vacated. If possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action in which the defendant may, by appropriate pleadings or amendments to pleadings, seek any affirmative relief, and assert all defenses, to which he or she is entitled [*Civ. Code § 1952.3(a)(2)*; *see § 333.30*]. If a tenant vacates the premises and surrenders possession to the landlord before the complaint's being filed, then no action for unlawful detainer will lie even though the premises were not surrendered during the notice period [*Briggs v. Electronic Memories & Magnetics Corp. (1975) 53 Cal. App. 3d 900, 906, 126 Cal. Rptr. 34]* .

[h] Paragraph 4.b. (Excessive Fair Rental Value)

Check the box following b. in Paragraph 4. if the defendant claims that the fair rental value of the premises claimed in Paragraph 10. of the complaint is excessive, and explain the basis of this assertion. The explanation should show that the fair rental value alleged in the complaint is greater than the reasonable value of the use of the premises during the time of the alleged unlawful detainer [*see Glouberman v. Coffey (1955) 292 P.2d 681]* .

[i] Paragraph 4.c. (Other Statements)

Check the box following c. in Paragraph 4. if the defendant desires to allege, for example, other facts about the particular lease or rental agreement involved, other circumstances surrounding the alleged unlawful detainer, or information about any alleged holding over after a sale under an execution, mortgage, or trust deed.

[j] Paragraph 5.c. (Prayer--Attorney's Fees)

Check the box following c. in the prayer set out in Paragraph 5. if the defendant seeks to recover reasonable attorney's fees. Generally, attorney's fees are only available if provided for in the lease or rental agreement [*see Civ. Code § 1717*; *Code Civ. Proc. §§ 1021, 1177*; *see also § 333.80[7][w]*]. However, attorney's fees may be available by statute in particular cases [*see, e.g., Civ. Code § 798.85* (attorney's fees provided in action involving mobilehome tenancy)].

[k] Paragraph 5.d. (Prayer--Order to Make Repairs)

Check the box following d. in Paragraph 5. if the defendant is seeking an order to (1) make the plaintiff repair and correct any conditions that constitute a breach of the implied warranty of habitability and (2) reduce the monthly rent to a reasonable amount until the conditions are corrected. For a discussion of the breach of the warranty of habitability, see *§ 333.28[4]*.

[l] Paragraph 5.e. (Other Relief)

Check the box following e. in Paragraph 5. if the defendant requests any other relief in the answer. Different forms of relief, which the defendant may obtain by answer, may have been provided for in the lease or rental agreement. The defendant may also request here an allocation of any security deposit against any amount of rent found due if a credit was claimed in the Answer.

[m] Paragraph 6. (Number of Pages)

Check the box following Paragraph 6. to indicate the number of pages attached to the Answer and specify the number of pages attached.

[n] Paragraph 7. (Unlawful Detainer Assistants)

This Judicial Council Form Answer, like the Judicial Council Form Complaint [*see § 333.80*], Summons [*see § 333.100*], and Request/Counter-Request to Set Case for Trial [*see § 333.106*], requests information on unlawful detainer assistants [*see Bus. & Prof. Code §§ 6400-6415*]. If the defendant did not receive advise or assistance, for compensation, from an unlawful detainer assistant in completing the form Answer, check the "did not" box in Paragraph 7. No other information is required. However, if the defendant received any help, advise, or assistance, for a fee, from an unlawful detainer assistance, check the "did" box and complete the information regarding the unlawful detainer assistant in Paragraph 7.a.-f. For a discussion of unlawful detainer assistants, see *§ 333.12[3]*.

[o] Signature

The answer must be signed by the defendant or his or her attorney [*see Code Civ. Proc. §§ 446, 1166, 1177*; *see also Code Civ. Proc. § 128.7*]. There is a line for the signature near the bottom of page 2, above the verification. Each defendant for whom the answer is filed must be named in Item 1 of the Judicial Council Form Answer (Defendant's name) *and* must sign the answer unless his or her attorney signs.

[p] Verification

The answer must be verified [*see Code Civ. Proc. §§ 446, 1166(a)(1), 1177*]. When the answer is verified by an attorney or any other person except one of the parties, that person must set forth in the affidavit (or declaration under *Code Civ. Proc. § 2015.5*) the reasons why it is not made by one of the parties [*Code Civ. Proc. §§ 446, 1177*]. For forms of verification for use by an attorney or by a corporation or partnership which may be attached to the above complaint when appropriate, see Ch. 572, *Verification* .

[q] Recovery for "Rent Skimming"

An alternative form of relief, in the form of a cross complaint or separate action for damages under *Civ. Code § 891(d)*, may be available to a residential tenant holding over after a private or judicial foreclosure sale, when the foreclosure sale resulted from "rent skimming," that is, a landlord's use of rental revenue, at any time during the first year period after acquiring the rental property, without first applying the revenue or an equivalent amount to the payments due on all mortgages and trust deeds encumbering that property [*Civ. Code § 890(a)*].

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29-333 California Forms of Pleading and Practice--Annotated § 333.111

§ 333.111 Notice of Motion For Stay of Proceedings Until Military Service Is Completed

[1] FORM Notice of Motion For Stay of Proceedings Until Military Service Is Completed

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	No. _____
_____ [*name*]	)	NOTICE OF MOTION FOR ORDER
Plaintiff	)	STAYING PROCEEDINGS
vs.	)	Date: _____
_____ [*name*]	)	Time: _____
Defendant	)	Dept.: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

To _____ [*identify party, e.g.*, plaintiff] _____ [*name*], and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify moving party, e.g.*, defendant] will move for an order staying the proceedings herein until _____ [*identify party, e.g.*, defendant's] tour of military [duty *or* service] is completed. The motion will be made on the ground that defendant is on full-time active [duty *or* service] with the [_____

specify, e.g., United States Army *or* National Guard] and no eviction may be made until 30 days after that full-time active military [duty *or* service] has ended.

The motion will be based on this notice of motion, the declaration of _____ [*name*], and the supporting memorandum served and filed with this notice, on the records and file of this case, and on any evidence that may be presented at the hearing of the motion.
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
..... [*party's status, e.g.,* Defendant]

[2] Use of Form

This form is a notice of motion for use by a party who seeks to obtain a stay of unlawful detainer proceedings while the party is on active full timeduty or service with one of the branches of the United States armed forces, the National Guard, or the United States Military Reserve. Under the federal Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*], the spouse, children, or other dependents of a person in military service may not be evicted from any premises occupied or intended to be occupied primarily as a residence and for which the agreed rental is not more than $2,400 per month (subject to adjustment for inflation), without leave of court [*50 U.S.C. App. § 531(a)*; *see 50 U.S.C. App. §§ 511* (definitions), *514, 516, 538* (additional persons protected)]. The court may stay the proceedings for up to 90 days, unless the court determines that justice and equity require a longer or shorter period of time, or adjust the obligations under the lease to preserve the interests of all parties [*50 U.S.C. App. § 531(b)*].

Under similar state law provisions [*see Mil. & Vet. Code § 400 et seq.*], the spouse, children, or other dependents of members of the National Guard called or ordered into active state or federal service and reservists of the United States Military Reserve who have been called to full-time active service or duty since September 11, 2001, may not be evicted until 30 days after the service member is released from active service or duty, except on leave of court granted on application therefor or granted in an action or proceeding affecting the right of possession [*Mil. & Vet. Code § 406(a)*; *see Mil. & Vet. Code § 400(a)* ("service member" defined), (b) ("military service" defined)].

For discussion of the Servicemembers Civil Relief Act and the state law provisions applicable to National Guard and Military Reserve members, see *§ 333.12[12]*. For discussion of law and motion practice in general, see Ch. 372, *Motions and Orders* .

[3] Supporting Papers

A supporting memorandum is required to be served and filed with the notice of motion [*see Cal. Rules of Ct., Rule 3.1113*]; for discussion and general forms, see Ch. 417, *Points and Authorities* . A supporting affidavit (or declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) should also accompany the notice of motion.

[4] Notice

This motion should be made in the manner provided by law for civil actions in general [*Code Civ. Proc. § 1010*]. For discussion of law and motion practice in general, see Ch. 372, *Motions and Orders* .

[5] Jurisdiction

The provisions of the federal Servicemembers Relief Act apply to judicial and administrative proceedings commenced

in any state court or agency, with the exception of criminal proceedings [*50 U.S.C. App. § 512(b)*]. Anyapplication under the Act that is required to be made to a court in which no proceeding has already been commenced may be made to any court that would otherwise have jurisdiction over the matter [*50 U.S.C. App. § 512(c)*].

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[Reserved]

§§ 333.112[Reserved]

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D. Interrogatories

29-333 California Forms of Pleading and Practice--Annotated § 333.120

§ 333.120 Interrogatories for Unlawful Detainer Proceeding by Landlord [Code Civ. Proc. §§ 1161, 2030.010]--Judicial Council Form DISC-003/UD-106

[1] FORM Interrogatories for Unlawful Detainer Proceeding by Landlord [Code Civ. Proc. §§ 1161, 2030.010]--Judicial Council Form DISC-003/UD-106

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of the Judicial Council approved form interrogatories [Judicial Council Form UD-106] for use in proceedings for unlawful detainer adopted under *Code Civ. Proc. § 2033.710* (legislative directive that Judicial Council create form interrogatories) and is for use by either the plaintiff or the defendant to request that the opposing party respond to (answer) the interrogatories checked. The form has been illustratively filled in for a defendant who has made the denials and affirmative defense allegations as illustrated in *§ 333.110*. Use of the form is optional and does not restrict the right of a party to propound additional interrogatories [*Code Civ. Proc. § 2033.740*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

The Judicial Council form interrogatories do not change existing law relating to interrogatories, nor do they affect a responding (answering) party's right to assert privileges [*see Code Civ. Proc. § 2017.010*] or objections [*see Code Civ. Proc. § 2030.240*; *see also* § 1(b) of this form].

For a detailed discussion of interrogatories, as well as discovery proceedings generally, and forms for use in such proceedings, see Ch. 190, *Depositions and Discovery* .

[3] Filling in Form

[a] Block Heading: Identification of Attorney and Title of Court

In the first box of the block heading insert the name, address, telephone number, and State Bar number of the attorney for the propounding (asking) party. If the propounding party is representing himself or herself, insert only the party's name, address, and telephone number. Next, insert the party's name or, if the party is representing himself or herself, "In propria persona" or "In person" to the right of "Attorney For (*Name*)." In the next box, insert the county where the action has been filed.

[b] Block Heading: Title of Case

Fill in the short title of the case. The short title normally consists of the last name of the first plaintiff and the last name of the first defendant, separated by the abbreviation "v."

[c] Block Heading: Unlawful Detainer Assistants

This Judicial Council Form, like the Judicial Council Form Complaint [*see § 333.80*] and Answer [*see § 333.110*], requests information onunlawful detainer assistants [*see Bus. & Prof. Code §§ 6400-6415*]. If the propounding (asking) party received advise or assistance, for compensation, from an unlawful detainer assistant in completing the Form Interrogatories, check the "did" box and complete the information regarding the unlawful detainer assistant. If the propounding party did not receive any assistance from an unlawful detainer assistant, check the "did not" box and no other information is required. For a discussion of unlawful detainer assistants, see *§ 333.12[3]*.

[d] Block Heading: Asking and Answering Parties

In the bottom block, type in the name of the asking party, the name of the answering party, and the set number of the interrogatories [*see Code Civ. Proc. § 2030.060*; *see also Cal. Rules of Ct., Rule 3.1000*].

[e] Block Heading: Case Number

Insert the case number in the appropriate box in the caption as it appears in the complaint and answer.

[f] Choice of Interrogatories

The text of the interrogatories appears on the form. Each interrogatory is preceded by a blank square box and a number. Counsel should determine which of the interrogatories he or she wishes to ask (propound) and check the box before the appropriate number on the form. The individual interrogatories are grouped according to particular allegations, denials, or affirmative defenses made by the parties in the complaint and answer [*see §§ 333.80* and *333.110*]. Counsel may use these groupings to aid in choosing interrogatories that address the particular allegations and denials made by the parties in the case.

A party may propound any number of official form interrogatories, plus an additional 35 specially prepared interrogatories if desired [*Code Civ. Proc. § 2030.030(a)*]. If a party wishes to propound more than 35 specially prepared interrogatories, a declaration for additional discovery must be attached to each set of those interrogatories [*Code Civ. Proc. § 2030.040*].

[4] Time to Answer

There is a special time limit for answering interrogatories in unlawful detainer actions. The party to whom the interrogatories are propounded has five days from the date of service to respond, unless on motion of the propounding party the court has shortened the time for response [*Code Civ. Proc. § 2030.260*].

[5] Special Instructions for Answering (Responding) Party

In answering the interrogatories, the answering (responding) party is not limited to his or her own personal knowledge, but must furnish all information available to him or her or anyone acting on his or her behalf [*see Code Civ. Proc. § 2030.220*; *see also* § 3(c), (d) of this form].

Whenever an interrogatory may be answered by referring to a writing, the writing may be attached as an exhibit to the response and referred to in the response. If the writing has more than one page, the answer should refer to the page and section where the answer can be found [*see* § 3(e) of this form].

Whenever the address and phone number for the same person are requested in more than one interrogatory, the answering (responding) party need only furnish them in answering the first interrogatory asking for that information [*see* § 3(f) of this form]. Answers to the interrogatories must be signed under oath [*Code Civ. Proc. § 2030.250*].

[6] Cross References

For discussion, a procedural checklist, and related forms, see Ch. 190, *Depositions and Discovery* .

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[Reserved]

§§ 333.121[Reserved]

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29-333 California Forms of Pleading and Practice--Annotated § 333.130

§ 333.130 Judgment in Unlawful Detainer Proceeding [Code Civ. Proc. § 1174(a), (b)]--Judicial Council Form UD-110

[1] FORM Judgment in Unlawful Detainer Proceeding [Code Civ. Proc. § 1174(a), (b)]--Judicial Council Form UD-110

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of the Judicial Council form of judgment for use in an unlawful detainer proceeding [Judicial Council Form UD-110]. The form may be used for a default judgment [*Code Civ. Proc. § 1169*; *see § 333.22[1]*] or for a judgment following trial by a court sitting without a jury [*Code Civ. Proc. § 1174(a), (b)*]. It may be used when judgment is granted for either the plaintiff or the defendant.

For a discussion of the judgment's enforceability, see *§ 333.14[3]*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Contents of Judgment

Paragraph 1 of this form should be checked when the form is used for a default judgment in favor of plaintiff. For a declaration by plaintiff in support of a default judgment, see *§ 333.131A*. Paragraph 2 should be checked if the form is being used for a judgment after trial by the court sitting without a jury. The following paragraphs must be completed in either case:

- Paragraph 3 (parties);

- Paragraph 4 (party entitled to possession);

- Paragraph 5 (judgment applies to all occupants of the premises) [*see Code Civ. Proc. §§ 715.010, 1169, 1174.3*; *see also §§ 333.12[11], 333.14[4]*]; and

- Paragraph 6 (amount and terms of judgment) [for discussion of holdover damages and rent, interest, statutory damages, and attorneys' fees, see *§ 333.13[13][e] -[j]*].

Paragraph 7 must be checked if the judgment is conditional based on the plaintiff's breach of the agreement to provide habitable premises. For the Judicial Council form to attach when the judgment is conditional, see *§ 333.131[1]*.

[4] Cross References

For discussion of damages generally, prejudgment interest on damages, and statutory damages in an unlawful detainer action, see *§ 333.13[13][e] -[g]*.

For discussion of default and default judgments and forms of default judgments generally, see Ch. 205, *Defaults and Default Judgments* .

For the mandatory Judicial Council form to be used in requesting entry of judgment, see *Ch. 205, Defaults and Default Judgments, § 205.90*.

For discussion of the procedure for obtaining and entering judgments, amendment, correction, and modification of judgments, enforcement of judgments, and satisfaction of judgments and related forms, see Ch. 318, *Judgments* .

For procedure and forms for use in requesting a statement of decision, see Ch. 529, *Statement of Decision* .

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29-333 California Forms of Pleading and Practice--Annotated § 333.131

§ 333.131 Conditional Judgment in Unlawful Detainer Action--Attachment--Plaintiff Breached Covenant to Provide Habitable Premises [Code Civ. Proc. § 1174.2]--Judicial Council Form UD-110S

[1] FORM Conditional Judgment in Unlawful Detainer Action--Attachment--Plaintiff Breached Covenant to Provide Habitable Premises [Code Civ. Proc. § 1174.2]--Judicial Council Form UD-110S

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of the Judicial Council form to be used as an attachment to a judgment in an unlawful detainer proceeding when the tenant's defense that the plaintiff breached the covenant to provide habitable premises is sustained [Judicial Council Form UD-110S]. The form includes a chart for calculating the amount of reduced rent due (Paragraph 7a) and a method for calculating holdover damages (Paragraph 7f). The form provides for continuing jurisdiction over the case until repairs are made (Paragraph 7d(2)).

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

For the Judicial Council form of judgment, see *§ 333.130[1]*. For a discussion of the warranty of habitability, see *§ 333.28[4]*.

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29-333 California Forms of Pleading and Practice--Annotated § 333.131A

§ 333.131A Declaration for Default Judgment by Court in Unlawful Detainer Proceeding [Code Civ. Proc. § 585(d)]--Judicial Council Form UD-116

[1] FORM Declaration for Default Judgment by Court in Unlawful Detainer Proceeding [Code Civ. Proc. § 585(d)]--Judicial Council Form UD-116

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of the Judicial Council form setting forth a declaration for use by a plaintiff after the clerk has entered a default in an unlawful detainer action [Judicial Council Form UD-116]. When the defendant has defaulted in unlawful detainer proceedings, the court may permit the use of affidavits in lieu of personal testimony as to all or any part of the proof required or permitted to be offered, received, or heard [*Code Civ. Proc. § 585(d)*]. The form constitutes a checklist of what should be included to prove the case.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Exhibits

See the summary of exhibits (Paragraphs 16 through 23 of form) for items that may be attached and submitted with the declaration if not attached to the original complaint [*see § 333.80[1]* (complaint for unlawful detainer)] or, when appropriate, to the application for immediate writ of possession [*see § 333.104* (notice of motion for immediate possession)]. For example, the original or copy of the three-day, 30-day, or 60-day notice to quit and the original or copy of proof of service of the notice to quit must be attached to the declaration if not attached to the original complaint [*see* Paragraphs 6a, 6d, and 8b of form].

[4] Cross References

For the mandatory Judicial Council form to be used in requesting entry of judgment, see *Ch. 205, Defaults and Default Judgments, § 205.90*.

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29-333 California Forms of Pleading and Practice--Annotated § 333.131B

§ 333.131B Stipulation for Entry of Judgment in Unlawful Detainer Action--Judicial Council Form UD-115

[1] FORM Stipulation for Entry of Judgment in Unlawful Detainer Action--Judicial Council Form UD-115

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of the Judicial Council form for a stipulation for entry of judgment in an unlawful detainer action [Judicial Council Form UD-115]. The form includes an optional agreement for installment payments (Paragraph 5).

If the parties to pending litigation stipulate in writing or orally before the court for settlement of the case, or a part of the case, the court, on motion, may enter judgment in accordance with the terms of the settlement [*Code Civ. Proc. § 664.6*]. For forms of stipulation to settlement, notice of motion, and an order to enter judgment in accordance with the stipulation, see *Ch. 318, Judgments, § 318.10* et seq. For discussion of *Code Civ. Proc. § 664.6* motions, see *Ch. 520, Settlement and Release, § 520.10* et seq.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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29-333 California Forms of Pleading and Practice--Annotated § 333.132

§ 333.132 Petition for Relief From Judgment Declaring Lease or Rental Agreement Forfeited [Code Civ. Proc. § 1179]

[1] FORM Petition for Relief From Judgment Declaring Lease or Rental Agreement Forfeited [Code Civ. Proc. § 1179]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR RELIEF FROM JUDGMENT DE-
Defendant.	)	CLARING LEASE FORFEITED
	)	
	)	

Petitioner hereby applies for relief against the forfeiture of the lease declared in the judgment entered in this proceeding and in support thereof alleges:

1. Petitioner is the _____ [defendant in this action *or* subtenant of the defendant in this action *or* mortgagee of the term of the defendant in this action *or specify other person interested in the term's continuance*].

2. On _____ [*date*], a judgment was rendered in this proceeding in favor of plaintiff _____ [*name*] against _____ [petitioner *or* defendant _____ (*name*)] and duly entered in _____ [*specify, e.g.,* Volume _____, page

_____, of the Judgment Book] of this court. The judgment ordered that plaintiff have and recover from defendant possession of the premises described in the complaint[, recover unpaid rent due in the total sum of $_____, together with interest on each unpaid installment at the rate of ten percent per annum from the date each installment became due,] and declared the lease under which the _____ [petitioner *or* defendant] held tenancy of the property forfeited.

3. The forfeiture was declared for the reason that defendant had _____ [*specify, e.g.,* breached its covenant to pay increases in the base rent specified in the lease resulting from subsequent periodic appraisals of the property's value exclusive of the improvements as alleged below].

4. Unless relief from forfeiture is granted, petitioner will suffer [enormous] hardship in that _____ [*specify in detail facts showing hardship, e.g.,* as the result of a bona fide dispute between the parties, the judicial resolution of which is now pending in the _____ Court of _____, and petitioner's honest mistake of law as to its right to withhold payment of the additional disputed rent, petitioner will have lost its entire investment of $1,800,000, which will redound to the immediate benefit of the plaintiff in this action, and, without the future receipt of rent from its sublessees, petitioner will be compelled to default on its obligations to pay the additional $800,000 contracted for, all as shown by the following facts:

[*Set forth, in successively lettered subparagraphs, the facts giving rise to the hardship, for example:*]

a. The lease in this action is a ground lease by the terms of which plaintiff leased the property to petitioner for a term of 60 years, commencing on _____ [*date*], and terminating on _____ [*date*], at the base annual rental of $15,000, which rent was to remain firm for the first five years of the lease;

b. The purpose of the lease was to allow petitioner to construct a shopping center on the property and sublease the various units constructed;

c. During the first five years of the lease, petitioner had the shopping center constructed at a cost in excess of $1,800,000 and has entered into contracts for further improvements on the property obligating petitioner to pay an additional sum of approximately $800,000;

d. On or about _____ [*date*], during the lease's third year, petitioner commenced entering into subleases with retail stores and establishments for the rental of the various stores and units constructed;

e. Under the lease's terms, the base annual rental that petitioner was required to pay plaintiff was subject to adjustment, at plaintiff's option, at the end of each five-year period based on any increase in the appraised value of the real property exclusive of the improvements;

f. Paragraph _____ of the lease prescribed the procedure for ascertaining the appraised value, in substance as follows: plaintiff in this action was first to obtain an appraisal and submit it to petitioner; if petitioner disagreed with the appraisal it was to appoint an appraiser; if the two appraisers were unable to agree, they were to select a third appraiser, and the three were to fix the appraised value, the majority prevailing;

g. At the end of the first five-year period, plaintiff and petitioner undertook actions in purported compliance with the lease provisions for appraisal, which resulted in a majority appraisal of $_____, which would have required petitioner to pay plaintiff an annual rent of $16,000 in addition to the prescribed basic ground rent of $15,000 per year;

h. Petitioner disputed the propriety and validity of the appraisal and procedures employed by the parties and initiated a

declaratory relief action to declare the appraisal invalid, to declare the standards to govern reconsideration of rent increases by the parties under the lease, to appoint a neutral appraiser, and to make a new appraisal in accordance with the lease and standards declared by the court; plaintiff filed an answer to the complaint in which it admitted the existence of a dispute between the parties, denied the substance of the petitioner's allegations of impropriety and invalidity of the appraisal, asserted the validity of that appraisal, and prayed for a declaration in accordance with its claims and contentions;

i. Petitioner at all times continued paying the basic ground rent due under the lease but in the mistaken but honest belief that it was not legally required to do so long as the declaratory relief action was pending did not pay the additional rent based on the subsequent appraisal;

j. Plaintiff in this action subsequently served on petitioner a three-day notice to pay the additional rent or quit the premises in which plaintiff stated his/her election to declare the lease's forfeiture and, on petitioner's failure to do either, filed this proceeding for unlawful detainer;

k. Petitioner's special demurrer to the complaint on the ground of another action pending was overruled, and judgment was rendered as alleged above.

[*CONTINUE*]

5. Petitioner is ready, willing, and able to _____ [*specify, e.g.,* pay in full all rent due under the lease and to perform in full all conditions and covenants of the lease [, including the covenant to _____ (*specify, e.g.,* pay the increased rent based on the appraisal as determined by a majority of the appraisers, together with interest thereon as ordered by the court), which defendant was found to have breached].

WHEREFORE, petitioner prays for an order relieving _____ [it *or* defendant] against the lease's forfeiture and restoring it to its former estate in the premises.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for [Defendant and] Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

This form is a form of petition for use by a tenant, subtenant, mortgagee of the term, or any other person interested in

the term's continuance to secure relief from a judgment declaring the lease or rental agreement forfeited [*see Code Civ. Proc. § 1179*]. The fact situation illustrated in this form is adapted from the case of *Childs v. Eltinge (1973) 29 Cal. App. 3d 843, 845-854, 105 Cal. Rptr. 864* .

[3] Verification Required

The above petition must be signed and verified [*Code Civ. Proc. §§ 446, 1177, 1179, 2015.5*; *see Code Civ. Proc. § 128.7*].

[4] Procedure

In cases of hardship, the court may relieve a tenant against a forfeiture of a lease or rental agreement, whether written or oral and whether or not the tenancy has terminated, and restore the tenant to his or her former estate [*Code Civ. Proc. § 1179*]. The court has the discretion to relieve any person against forfeiture on its own motion [*Code Civ. Proc. § 1179*]. An application for relief against forfeiture may be made at any time before restoration of the premises to the landlord [*Code Civ. Proc. § 1179*]. The application may be made by a tenant or subtenant, or a mortgagee of the term, or any person interested in the term's continuance. The application must be made by petition, setting forth the facts on which the relief is sought, and be verified by the applicant. Notice of the application, with a copy of the petition, must be served at least five days before the hearing on the plaintiff in the judgment, who may appear and contest the application [*Code Civ. Proc. § 1179*]. Alternatively, a person appearing without an attorney may make the application orally, if the plaintiff either is present and has an opportunity to contest the application, or has been given ex parte notice of the hearing and the purpose of the oral application. In no case may the application or motion be granted except on condition that full payment of rent due, or full performance of conditions or covenants stipulated, so far as practicable, be made [*Code Civ. Proc. § 1179*].

The application for an order under *Code Civ. Proc. § 1179* is statutorily defined as a motion [*Code Civ. Proc. § 1003*; *see Code Civ. Proc. § 1177*].

The statute does not specify whether the petition should be filed in the main clerk's office or with the courtroom clerk of the judge who rendered the judgment, the procedure for securing a hearing date, or where the petition will be heard. Consequently, counsel should check local court rules and practice to determine the procedure to be followed for filing the petition, securing a hearing date, and having the matter heard.

[5] Cross References

For distinction between written motions and noticed motions, see Ch. 372, *Motions and Orders* .

For memoranda of points and authorities supporting and opposing an application for relief from forfeiture, see California Points and Authorities, Ch. 236, *Unlawful Detainer* (Matthew Bender).

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29-333 California Forms of Pleading and Practice--Annotated § 333.133

§ 333.133 Notice of Application for Relief and Hearing for Relief From Judgment Declaring Lease or Rental Agreement Forfeited [Code Civ. Proc. § 1179]

[1] FORM Notice of Application for Relief and Hearing for Relief From Judgment Declaring Lease or Rental Agreement Forfeited [Code Civ. Proc. § 1179]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF APPLICATION AND HEARING ON
_____ [*name*],	)	PETITION FOR RELIEF FROM JUDGMENT DE-
Defendant.	)	CLARING LEASE FORFEITED
	)	Date: _____
	)	Time: _____
		Location: _____

To: _____ [*name*], plaintiff, and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that _____ [*identify petitioner, e.g.,* defendant] has by application and petition, a copy of which is attached to this notice and served with this notice, moved the court for an order granting relief from that portion of the judgment declaring the lease forfeited on the ground that the lease's forfeiture will cause the _____ [*e.g.,* defendant] hardship.

NOTICE IS FURTHER GIVEN that the petition has been scheduled for hearing on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] the court, located at _____ [*street address*], _____ [*city*], and that under the provisions of *Code of Civil Procedure Section 1179* you may appear and contest the application.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for [Defendant and] Petitioner

[2] Use of Form

The form in [1], *above*, is a form of notice for use by the party applying for relief from a judgment in an unlawful detainer proceeding declaring the lease or rental agreement forfeited to notify the plaintiff of the filing of the application and petition (that is, of the written motion) and of the date the motion will be heard [*see Code Civ. Proc. § 1179*]. For a form and discussion of an order granting relief for a judgment declaring a lease or rental agreement forfeited, see *§ 333.134*.

[3] Service of Notice and Plaintiff's Right to Contest Application

Notice of the application for relief, with a copy of the petition [*see §§ 333.132* and *333.133*], must be served on the plaintiff who may appear and contest the application [*Code Civ. Proc. § 1179*].

[4] Manner of Service

The manners in which the notice may be served are set forth in *Code Civ. Proc. §§ 1010-1020*, which are made applicable to proceedings in unlawful detainer by *Code Civ. Proc. § 1177*, and discussed in Ch. 518, *Service of Summons and Papers* .

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Chapter 333 LANDLORD AND TENANT: EVICTION ACTIONS
PART V. FORMS
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29-333 California Forms of Pleading and Practice--Annotated § 333.134

§ 333.134 Order Granting Relief From Judgment Declaring Lease or Rental Agreement Forfeited [Code Civ. Proc. § 1179]

[1] FORM Order Granting Relief From Judgment Declaring Lease or Rental Agreement Forfeited [Code Civ. Proc. § 1179]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The application of _____ [*identify petitioner, e.g.,* defendant] for an order relieving _____ [him/her *or* the defendant] against the lease's forfeiture as declared by this court's judgment came on regularly for hearing on _____ [*date*]. [Defendant and] [P]etitioner appeared by his/her attorney _____ [*name*] and plaintiff appeared by his/her attorney _____ [*name*]. The court considered the petition and heard and considered the evidence adduced at the hearing and the argument of counsel, and the matter was submitted for decision. On proof made to the satisfaction of the court that forfeiture of the lease will result in hardship to the _____ [defendant *or* petitioner] within the meaning of *Code of Civil Procedure Section 1179*, and that the application and petition ought to be granted,

IT IS ORDERED that the application be and is granted, that the defendant is relieved from that portion of the judgment declaring the lease forfeited, and that defendant is restored to his/her former estate on performance by

_____ [defendant *or* petitioner] within _____ days from the date hereof of the following terms and conditions:

[*EITHER*]

1. The payment to plaintiff in full of the rent due under the lease, to wit, the sum of $_____ [with interest thereon at the rate of 10 percent per annum from _____ (*date*), to the date of payment].

[*OR*]

1. Full performance of the following _____ [condition(s) *or* covenant(s)]: _____ [*specify*].

[*CONTINUE*]

2. _____ [*Set forth such other terms and conditions as the court may direct*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is a form of order for use when the application for relief from that portion of the judgment declaring the lease or rental agreement forfeited is granted [*see Code Civ. Proc. § 1179*]. The order granting relief from forfeiture is required to be conditioned on full payment of rent due or full performance of conditions or covenants stipulated, so far as the same is practicable [*Code Civ. Proc. § 1179*].

[3] Factors in Granting Application

The granting or denying of an application for relief from forfeiture of a lease under *Code Civ. Proc. § 1179* rests in the trial court's discretion [*Hignell v. Gebala (1949) 90 Cal. App. 2d 61, 70, 202 P.2d 378* ; *Olympic Auditorium, Inc. v. Superior Court (1927) 81 Cal. App. 283, 285, 253 P. 944* ; *Matthews v. Digges (1920) 45 Cal. App. 561, 566, 188 P. 283]* . The finding of hardship alone is an insufficient ground to grant relief from a lease's forfeiture under *Code Civ. Proc. § 1179*; rather, the court is required to balance the equities between parties [*Olympic Auditorium, Inc. v. Superior Court (1927) 81 Cal. App. 283, 285-286, 253 P. 944]* . Under *Code Civ. Proc. § 1179*, the court, in balancing equities, should take into consideration the circumstances of the case, any hardship to the lessee from forfeiture, any hardship to the lessor from relieving the lessee from forfeiture, and the willful or other character of the lessee's breach and then use its best discretion in determining whether to grant relief [*Thrifty Oil Co. v. Batarse (1985) 174 Cal. App. 3d 770, 777-778, 220 Cal. Rptr. 285* ; *Hignell v. Gebala (1949) 90 Cal. App. 2d 61, 70-71, 202 P.2d 378]* .

An order granting relief from forfeiture is permitted to impose such conditions as the court deems equitable in addition to those specified in *Code Civ. Proc. § 1179* [*Olympic Auditorium, Inc. v. Superior Court (1927) 81 Cal. App. 283, 287, 253 P. 944]* .

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§ 333.135 Claim of Right to Possession [Code Civ. Proc. § 1174.3(h)]--Judicial Council Form CP-10

[1] FORM § 333.135.1 Claim of Right to Possession [Code Civ. Proc. § 1174.3(h)]--Judicial Council Form CP-10

Click here to view image.

[2] Use of Form

The form in [1], *above*, is prescribed by statute for use for a claim of right to possession [*Code Civ. Proc. § 1174.3(h)*]. It is reproduced for illustrative purposes only. The claim of right to possession is for use by an occupant of a premises who is not named in the judgment for possession if he or she occupied the premises on the date the unlawful detainer action was filed but was not served with a form of prejudgment claim of right to possession in accordance with *Code Civ. Proc. § 415.46* [*Code Civ. Proc. § 1174.3(a)*; for discussion of prejudgment claim of right to possession, see *§§ 333.13[4]* and *333.105*]. Filing this form initiates a procedure by which the occupant may object to being evicted [*see Code Civ. Proc. § 1174.3(b)*]. For discussion of the procedure and fees involved, see *§ 333.14[4][b]*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Service and Presentation of Form

The form is actually served or posted by the levying officer at the premises at the time the writ of possession is served [*see Code Civ. Proc. § 715.010(c)*]. It must then be filled out by any affected occupant and presented to the levying officer at the office of the levying officer or at the premises at the time of the eviction [*Code Civ. Proc. § 1174.3(b)*]. Presentation stops the eviction until a hearing on the claim [*Code Civ. Proc. § 1174.3(b)*].

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[Reserved]

§§ 333.136[Reserved]

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PART V. FORMS
F. Forcible Entry and Forcible Detainer

29-333 California Forms of Pleading and Practice--Annotated § 333.140

§ 333.140 Complaint for Forcible Entry and Detainer or Forcible Detainer [Code Civ. Proc. §§ 1159, 1160, 1166, 1177]

[1] FORM Complaint for Forcible Entry and Detainer or Forcible Detainer [Code Civ. Proc. §§ 1159, 1160, 1166, 1177]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR FORCIBLE
_____ [*name*], [and DOES I	)	_____ [ENTRY AND DETAINER
through _____,]	)	*or* DETAINER]
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

Plaintiff alleges:

[1. *Fictitious name allegation. See § 333.81[1], P 3.*]

[2. _____ (*Specify plaintiff's capacity, if other than a natural person, e.g.,* Plaintiff is and at all times mentioned in this complaint was a corporation organized and existing under the laws of California).]

[*EITHER (Forcible Entry)*]

3. Plaintiff [is, and at all times mentioned in this complaint was, the _____ (owner *or* lessee *or specify other interest*) and] on _____ [*date of forcible entry*], was in the actual and peaceable possession [through its _____ (*e.g.*, agents and employees)] of the premises _____ [known as _____ (*street address, unit number, if any, and city*) *or* described as _____ (*legal description*)], _____ County, California (referred to below as "the premises").

[*OR (Forcible Detainer)*]

3. _____ [Plaintiff is, and at all times mentioned in this complaint was, the _____ (owner *or* lessee *or specify other interest*) and entitled to *or* On _____ (*date of or within five days preceding unlawful entry*), plaintiff was in the peaceable and undisturbed] possession of the real property _____ [known as _____ (*street address, unit number, if any, and city*) *or* described as _____ (*legal description*)], _____ County, California (referred to below as "the premises").

[*CONTINUE*]

4. The premises consist of _____ [*describe nature of property, as a residential or commercial unit in a building, a house or commercial building, or other, and nature of any business conducted on the premises by plaintiff*].

[*EITHER (Forcible Entry and Ouster*)]

5. On _____ [*date of forcible entry and ouster*], defendant(s) [, and each of them,] without plaintiff's permission or consent forcibly entered and took possession of the premises by _____ [*specify acts or circumstances by which entry and dispossession of plaintiff were effected, for example,* breaking down the entrance door and physically forcing his/her/their entry into the premises and then physically and with threats of violent physical harm pushing plaintiff off the premises].

6. Defendant(s) [, and each of them,] has since _____ [*date of forcible entry or ouster*], detained possession of the premises from plaintiff by _____ [*specify, e.g.,* changing the locks on all the doors, barring the windows, and stationing a guard at the entrance to prevent plaintiff's reentry], and continues to detain the premises from plaintiff.

[*OR (Peaceable Entry and Forcible Ouster)*]

5. On _____ [*date of peaceable entry and ouster*], defendant(s) [, and each of them,] _____ [*specify manner of entry and ouster, for example,* secured entry to the premises by representing to plaintiff that he/she/they wanted to check the plumbing for leaks. Once inside, he/she/they grabbed plaintiff and physically threw him/her off the premises and told him/her not to return].

6. Defendant(s) [, and each of them,] has since _____ [*date of ouster*], detained possession of the premises from plaintiff by _____ [*specify, e.g.,* changing the locks on all the doors, barring the windows, and stationing a guard at the entrance to prevent plaintiff's reentry], and continues to detain the premises from

plaintiff.

[*OR (Forcible Detainer by Force or Menaces and Threats of Violence)*]

5. _____ [*Specify manner, peaceable or otherwise, in which defendant(s) secured possession of the premises*].

6. Since _____ [*date of unlawful entry or date plaintiff became entitled to possession*], defendant(s) [, and each of them,] has continued to hold and keep possession of the premises by _____ [force *or* menaces and threats of violence] as follows: _____ [*specify*].

[*OR (Forcible Detainer by Taking Possession in Nighttime or During Plaintiff's Absence)*]

5. On _____ [*date*], _____ [in the nighttime *or* during plaintiff's absence from the premises], defendant(s) [, and each of them,] unlawfully entered the premises without plaintiff's permission or consent and took possession of them.

6. On _____ [*date*], plaintiff demanded of defendant[s, and each of them] in writing that he/she/they surrender possession of the premises to plaintiff, but defendant [s, and each of them,] failed to surrender the premises then, within five days thereafter, or at all, and continue in possession of them.

[*CONTINUE*]

7. _____ [Defendant's *or* Defendants'] [entry on and] detention of the premises has been willful, intentional, deliberate and obstinate in that _____ [*specify*].

8. The reasonable value of the use and occupancy of the premises is the sum of $_____ per day, and damages to plaintiff caused by the acts of defendant(s) as alleged above have accrued at that rate since _____ [*date of entry*], and will continue to accrue at that rate so long as defendant(s) detain possession of the premises from plaintiff.

[9. *Allege in this and subsequent paragraphs any additional detriment or injury and damages sustained by plaintiff.*]

WHEREFORE, plaintiff prays judgment against defendant(s) [and each of them] as follows:

1. For restitution of possession of the premises;

2. For damages at the rate of $_____ per day from _____ [*date of entry*] for each day defendant(s) [, or any of them,] continues in possession of the premises;

[*PRAY for any additional damages sought in complaint, for example:*]

3. For general damages [in the sum of $_____];

4. For _____ [*specify special damages, for example*, medical and related expenses] _____ [in the sum of $_____ *or* according to proof];

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification. See § 333.81[1].*]

[2] Use of Form

The form in [1], *above*, is a complaint for use by a plaintiff to sue for forcible entry and detainer or forcible detainer [*see Code Civ. Proc. §§ 1159, 1160, 1166, 1172, 1174(a), (b)*; *see also §§ 333.46 -333.48*]. The complaint may also set forth and claim for damages for any circumstances of fraud, force, or violence that accompanied the forcible entry or forcible detainer [*Code Civ. Proc. § 1166(b)*].

[3] Verification Required

The complaint must be verified and include the typed or printed name of the verifying person [*Code Civ. Proc. § 1166(a)(1)*; *see Code Civ. Proc. §§ 446, 1177*].

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*].

If the action is a limited civil case, the caption must state whether the demand exceeds or does not exceed $10,000 and must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[5] Allegations

The above complaint alleges:

- The existence of any fictitiously named defendants (Paragraph 1) [*see Code Civ. Proc. §§ 474, 1177*].

- Plaintiff's capacity if other than a natural person (Paragraph 2) [*see Code Civ. Proc. §§ 1165, 1166*].

- Plaintiff's interest in and actual and peaceable possession of the premises [*Code Civ. Proc. §§ 1159, 1172*], or right to possession of the premises [*Code Civ. Proc. §§ 1160(1), 1172*], or peaceable and undisturbed possession of the premises [*Code Civ. Proc. § 1160(2)*], and a description of the premises (alternative Paragraphs 3) [*see Code Civ. Proc. §§ 1166, 1172*].

- The venue of the proceeding (alternative Paragraphs 3) [*see Code Civ. Proc. §§ 392, 1177*; *see also §*

333.13[1]].

- The nature of the property, which, together with Paragraph 8, relate to any damages sustained by plaintiff (Paragraph 4) [*see Code Civ. Proc. § 1166*].

- Defendant's forcible or unlawful entry into and detainer or forcible detainer of the property and continuing detention of the property (alternative Paragraphs 5 and 6) [*see Code Civ. Proc. §§ 1159, 1160, 1166*].

- Defendant's malicious withholding of possession (Paragraph 7) [*see Code Civ. Proc. §§ 735, 1166*].

- The rental value of the property, that is, plaintiff's damages proximately resulting from the forcible entry and detainer or forcible detainer (Paragraph 8) [*see Code Civ. Proc. §§ 1166, 1174(b)*].

- Any other damages sustained by plaintiff (Paragraph 9). These damages may include, for example, general and special damages for personal injuries sustained as a result of the forcible entry or detainer, conversion of personal property or impairment to or loss of use of personal property, any circumstances of fraud accompanying the forcible entry, and in the case of commercial property, loss of profits [*see Code Civ. Proc. §§ 1166, 1174(b)*; *see also § 333.13[13]*].

[6] Treble and Statutory Damages

Damages for forcible or unlawful entry in or on, or detention of any building or cultivated real property, may be trebled [*Code Civ. Proc. § 735*] if the evidence shows that the defendant acted with malice or acted wantonly or oppressively [*San Francisco etc. Soc. v. Leonard (1911) 17 Cal. App. 254, 269-270, 119 P. 405]* . Alternatively, statutory damages of up to $600 may also be awarded if malice is shown [*Code Civ. Proc. § 1174(b)*].

[7] Cross References

For forms of allegations of personal injuries and damages that may, if appropriate, be incorporated in the above complaint, see Ch. 58, *Assault and Battery* , Ch. 362, *Mental Suffering and Emotional Distress* , and Ch. 380, *Negligence* .

For forms of allegations of conversion of personal property and damages that may, if appropriate, be included in the above complaint, see Ch. 150, *Conversion* .

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Volume 29: Landlord and Tenant: General Introduction thru Rent Control-Chs. 330-339
Chapter 334 LANDLORD AND TENANT: CLAIMS FOR DAMAGES

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§ 334.syn Synopsis to Chapter 334: LANDLORD AND TENANT: CLAIMS FOR DAMAGES

§ 334.01 Scope of Chapter

§ 334.02 Cross References

§§ 334.03-334.09 [Reserved]

§ 334.10 Defective Condition of Premises

[1] General Duty of Landlord

[2] Duty to Inspect Premises for Defects

[3] Action on Implied Warranty of Habitability

[4] Landlord's Obligation to Install Locking Mechanisms

[5] Duty to Inspect on Entry of Judgment of Possession

§ 334.11 Strict Liability

[1] For Latent Defects in Leased Premises

[2] Landlord Who Leases Furnishings

§ 334.12 Exculpatory Provisions Invalid

§ 334.13 Landlord's Duty to Protect Tenants From Criminal Conduct by Third Parties

§ 334.14 Wrongful Eviction

§ 334.15 Intentional Infliction of Mental Distress

§ 334.16 Conversion

[1] In General

[2] Damages

[3] No Demand Required

[4] Trespass Distinguished

§ 334.17 Willful Action by Landlord

[1] Termination of Utility Service

[2] Nonpayment of Utilities

[3] Menacing Acts

§ 334.18 Statutory Action for Unlawful Rent Skimming

§ 334.19 Failure to Disclose Application for Permit to Demolish Premises

[1] Written Notice to Tenants

[2] Tenant Action and Remedies

§§ 334.20-334.29 [Reserved]

§ 334.30 Suing a Tenant for Damages

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§ 334.40 Related Matthew Bender Publications

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[1] Prohibitions Against Interrupting or Terminating Utility Services

[2] Rights of Owners

[3] Rent Skimming

[4] Fixtures

[5] Statute of Frauds

[6] Unlawful Contracts

[7] Liquidated Damages

[8] Obligations Imposed by Law

[9] Hiring in General

[10] Leasing Land and Dwellings

[11] Personal Property

[12] Assignments

[13] Damages

[14] Equitable Relief

[15] Nuisance

[16] Statute of Limitations

[17] Venue

[18] Demurrers

§ 334.42 Decisions

[1] Duty of Landlord to Repair Defective Condition

[2] Factors in Landlord's Liability

[3] RICO

[4] Negligence

[5] General Common Law Rule of Nonliability

[6] Specific Exceptions to Common Law Rule of Nonliability

[a] Defective Condition of Premises at Time of Lease

[b] Latent Defects

[c] Duty to Repair

[d] Covenant to Repair

[e] Negligent Repair

[f] Failure to Provide Adequate Security

[g] Violation of Statutory Duty

[h] Injury in Common Area

[i] Lease for Purpose of Admitting Public

[7] Breach of Warranty of Habitability

[8] Nuisance

[9] Acts Constituting Actual Evictions

[10] Wrongful Eviction Generally

[11] Actual Eviction by One With Paramount Title as Wrongful

[12] Retaliatory Eviction

[13] Damages for Wrongful Eviction

[a] General Damages

[b] Special Damages

[c] Exemplary or Punitive Damages

[14] Fixtures

[15] Good Faith Removal of Fixtures

[16] Option to Purchase

[17] Option to Extend or Renew

[18] Return of Security Deposit

[19] Return of Advance Rent

[20] Complaint for Rent

[21] Accounting

[22] Attorney's Fees

[23] Rent as Crops

[24] Rent for Occupation Without Lease

[25] Rent for Holding Over on Written Lease, No Express Provision

[26] Rent for Holding Over on Written Lease, Express Provision

[27] Assignment

[28] Waste

[29] Subrogation by Insurer

[30] Effect of Statutory Remedies on Common Law Remedies

[31] Jury Instructions

[32] Conspiracy

[33] Conversion

[34] Dangerous Animal

[35] Mental Distress

[36] Strict Liability

[37] Complaint for Rent Uncertain

[38] Surrender

[39] Acts Constituting Constructive Evictions

[40] Acts Not Constituting Constructive Evictions

[41] Failure to Place Tenant in Possession

[42] Breach of Covenant

[43] Destruction of Premises

[44] Condemnation of Premises

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§ 334.50 Complaint by Tenant Against Landlord for Damages for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 3333]

[1] FORM

[2] Use of Form

[3] Jurisdiction

[4] Allegations

[5] Specification of Damages

[6] Common Law Rules Superseded

[7] Cross References

§ 334.51 Allegations of Landlord's Negligence for Failure to Disclose Latent Defects

[1] FORM

[2] Use of Form

[3] Examples

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[1] FORM

[2] Use of Form

§ 334.53 Allegation of Landlord's Negligent Failure to Perform Covenant to Repair

[1] FORM

[2] Use of Form

[3] Notice Requirements

§ 334.54 Allegation of Landlord's Negligent Repair

[1] FORM

[2] Use of Form

§ 334.55 Allegation of Landlord's Violation of Statutory Duty

[1] FORM

[2] Use of Form

[3] Statutory Duty to Repair

[a] In General

[b] Not Delegable

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[1] FORM

[2] Use of Form

§ 334.57 Allegations of Landlord's Negligence for Failure to Provide Adequate Security Against Criminal Activities

[1] FORM

[2] Use of Form

[3] Landlord's Duty to Protect Tenant Against Criminal Conduct

§ 334.58 Complaint by Tenant Against Landlord for Compensatory and Punitive Damages for Interruption and Termination of Utility Service, for Damages for Tortious Interference With Beneficial Contractual Relations, and for Temporary Restraining Order and Preliminary Injunction to Prevent Continuing Violation of Civ. Code § 789.3 [Civ. Code §§ 789.3, 3333]

[1] FORM

[2] Use of Form

[3] Verification

[4] Certification re Notice

[5] Injunctive Relief

[6] Punitive Damages

[7] Cross References

§ 334.59 Complaint by Tenant Against Landlord for Compensatory and Punitive Damages for Interference With Tenant's Use of Premises and for Temporary Restraining Order and Preliminary Injunction to Prevent Continuing Violation of Civ. Code § 789.3(b) [Civ. Code § 789.3(b)]

[1] FORM

[2] Use of Form

[3] Amount of Punitive Damages Must Not Be Stated

§ 334.60 Complaint by Tenant Against Landlord for Untenantable Dwelling for Damages and for Repair Order

[Civ. Code §§ 1941.1, 1942.4, 3300]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Landlord's Duty to Maintain Tenantability of Dwelling

[5] Availability of Statutory Remedy

[6] Damages Recoverable

[7] Order to Abate and Repair

[8] Attorney's Fees

§ 334.60A Complaint by Tenant Against Landlord Demanding or Collecting Rent for Untenantable Dwelling for Damages and for Lead Hazard Abatement Order [Civ. Code §§ 1941.1, 1942.4, 3300]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Landlord's Duty to Maintain Tenantability of Dwelling

[5] Availability of Statutory Remedy

[6] Damages Recoverable

[7] Order to Abate and Repair

[8] Attorneys' Fees

§ 334.61 Complaint for Actual and Punitive Damages by Tenant Against Landlord for Breach of Implied Warranty of Habitability; Negligent Maintenance of Premises; Maintenance of Nuisance; Intentional Infliction of Emotional Distress; and Constructive Eviction [Civ. Code §§ 1714(a), 1941, 3294, 3300, 3333, 3479; Code Civ. Proc. § 731]

[1] FORM

[2] Use of Form

[3] Essential Allegations

[a] Complaint for Damages--Generally

[b] Complaint for Damages--Nuisance

[c] Complaint for Damages--Intentional Infliction of Emotional Distress

[4] Statutory Duties

[5] Theories of Liability

[a] Breach of Contract

[b] Tortious Breach

[c] Negligence

[d] Nuisance

[e] Intentional Infliction of Emotional Distress

[f] Negligent Infliction of Emotional Distress

[g] Constructive Eviction

[h] Other Torts

§ 334.62 Complaint by Tenant Against Landlord for Actual and Punitive Damages for Wrongful Eviction [Civ. Code §§ 3294, 3300, 3333]

[1] FORM

[2] Use of Form

[3] Wrongful Eviction

[4] Acts Constituting Actual Evictions

[5] Acts Constituting Constructive Evictions

[6] Acts Not Constituting Constructive Evictions

[7] General Damages

[8] Agricultural Land

[9] Special Damages

[10] Punitive Damages

§ 334.63 Allegation of Wrongful Eviction of Tenant by Landlord; Actual Eviction by One With Paramount Title

[1] FORM

[2] Use of Form

[3] Attorney's Fees

[4] Cross References

§ 334.64 Complaint by Lessee for Damages for Lessor's Retaliatory Action Against Lessee of Dwelling [Civ. Code § 1942.5(f)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Remedies as Cumulative

[5] Burden of Proof

[6] Eviction for Reporting Criminal Activities Prohibited

[7] Alleging Attorney's Fees

[8] Preliminary Injunction

§ 334.65 Complaint to Enforce Tenant's Right to Remove Fixtures Installed in Good Faith Under Mistaken Belief of Rights [Civ. Code §§ 1013, 1013.5]

[1] FORM

[2] Use of Form

[3] Damages for Tenant's Good-Faith Mistake in Installing Fixtures

[4] Other Damages and Remedies

[5] Requirements of Action

[6] When Damages Uncertain

[7] Consent of Lienholders

§ 334.66 Interlocutory Judgment in Action to Enforce Tenant's Right to Remove Fixtures on Payment of Damages [Civ. Code § 1013.5(c)]

[1] FORM

[2] Use of Form

§ 334.67 Complaint for Specific Performance by Tenant Against Landlord to Compel Conveyance of Leased Premises in Accordance With Option to Purchase in Lease [Civ. Code §§ 3384, 3387]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Option to Purchase

[5] Effect of Assignment

[6] Cross References

§ 334.68 Complaint for Specific Performance by Tenant Against Landlord to Compel Extension of Term Under Option to Extend in Lease [Civ. Code § 3384]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Option to Extend or Renew

[5] Exercise of the Option

[6] Effect of Exercise

[7] Enforcement of Option by Successors in Interest

§ 334.69 Complaint for Return of Security Deposit for Expiration of Term Without Default [Civ. Code §§ 1950.5, 1950.7]

[1] FORM

[2] Use of Form

[3] Nonresidential Property

[a] Governing Law

[b] Landlord's Rights

[4] Residential Property

[a] Governing Law

[b] Maximum Security Deposit

[c] Landlord's Rights

[5] Termination of Landlord's Interest

[6] Rights and Liabilities of Successor in Interest in Residential Property

[7] Proof of Existence of Security Deposit

[8] Penalty for Bad-Faith Retention

[9] Nonrefundable Deposits

[10] Waiver of Tenant's Rights

[11] Jurisdiction of Small Claims Court and of Superior Court

§ 334.70 Affirmative Defense of Payment Made to Secure Execution of Rental Agreement [Civ. Code § 1950.7(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 334.71 Complaint for Return of Advance Rent for Termination of Lease by Fault of Landlord [Civ. Code § 3300]

[1] FORM

[2] Use of Form

§ 334.72 Complaint by Residential Tenant Against Landlord for Retroactive Rent Abatement Based on Breach of Warranty of Habitability

[1] FORM

[2] Use of Form

§ 334.73 Complaint by Tenants Against Public Housing Authority for Injunctive and Declaratory Relief to Restrain Housing Authority From Raising Rent [Civ. Code § 3422; Code Civ. Proc. §§ 526, 1060]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§§ 334.74-334.79 [Reserved]

§ 334.80 Complaint for Rent Under Oral Lease [Civ. Code § 3302]

[1] FORM

[2] Use of Form

[3] Jurisdiction

[4] Interest

[5] Verification

[6] Cross References

§ 334.81 Complaint for Rent and Attorney's Fees Under Written Lease [Civ. Code § 3302]

[1] FORM

[2] Use of Form

[3] Attorney's Fees

§ 334.82 Complaint for Accounting, Rent, and Attorney's Fees Under Written Lease; Rent as Percentage of Profits [Civ. Code § 3302]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Interest

[5] Cross References

§ 334.83 Complaint for Accounting, Rent, and Attorney's Fees Under Written Lease; Diversion of Business to Other Location to Avoid Percentage Rent [Civ. Code § 3302]

[1] FORM

[2] Use of Form

§ 334.84 Complaint for Rent Payable in Share of Crop and Attorney's Fees Under Written Lease [Civ. Code § 3300]

[1] FORM

[2] Use of Form

§ 334.85 Complaint for Value of Use and Occupancy of Real Property Without Lease

[1] FORM

[2] Use of Form

[3] Rent for Occupation Without Lease

§ 334.86 Complaint for Rent for Holding Over by Lessee of Written Lease on Expiration of Term With No Express Provision in Lease [Civ. Code § 3302]

[1] FORM

[2] Use of Form

[3] Implied Renewal of Lease

[4] Extension Versus Renewal

[5] Cross References

§ 334.87 Complaint for Rent for Holding Over by Lessee of Written Lease on Expiration of Term; Express Provision in Lease [Civ. Code §§ 1945.5, 3302]

[1] FORM

[2] Use of Form

[3] Requirements for Automatic Extension of Residential Lease

[4] Cross References

§ 334.88 Complaint for Rent and Attorney's Fees Under Written Lease by Assignee of Rents [Civ. Code §§ 821, 3302]

[1] FORM

[2] Use of Form

[3] Remedies of Assignee of Rents

[4] Cross References

§ 334.89 Complaint for Rent Under Written Lease by Grantee of Landlord [Civ. Code § 3302]

[1] FORM

[2] Use of Form

[3] Remedies of Grantee of Property

[4] Cross References

§ 334.90 Complaint Against Assignee of Tenant for Rent and Attorney's Fees Under Written Lease [Civ. Code §§ 822, 3302]

[1] FORM

[2] Use of Form

[3] Remedies of Lessor Against Lessee's Assignee

§ 334.91 Complaint for Rent After Automatic Termination of Lease by Lessee's Breach and Abandonment of Property [Civ. Code §§ 3300, 3302, 1951.2]

[1] FORM

[2] Use of Form

[3] Jurisdiction

[4] Allegations

[5] Damages

[6] Abandonment

[7] Cross References

§ 334.92 Complaint for Rent When Lease Is Continued Under Its Terms After Lessee's Breach and Abandonment of Property [Civ. Code §§ 1951.2, 1951.4, 3300, 3302]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Acts Not Constituting Termination of Lessee's Right to Possession

[5] Cross References

§ 334.93 Complaint by Landlord Against Tenant for Waste, Treble Damages, and for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 732]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction and Venue

[6] Definition of Waste

[7] Remedies for Waste

[8] Measure of Damages

[9] Treble Damages

[10] Alterations by Tenant

[11] Cross References

§ 334.94 Complaint for Declaratory Relief by Landlord Against Tenant for Declaration of Rights as to Removability of Improvement Affixed to Leased Premises [Civ. Code §§ 1013, 1019; Code Civ. Proc. § 1060]

[1] FORM

[2] Use of Form

[3] Declaratory Relief

[4] Fixtures

[5] Property Character

[6] Tests for Determining Fixture

[7] Taxes

[8] Express Agreements Regarding Fixtures

[a] In General

[b] Effect of Extension or Renewal of Lease

[9] Trade Fixtures

[a] Statutory Rule

[b] Removal

[c] Time for Removal

[10] Wrongful Removal of Fixtures

[a] Treated as Personalty

[b] Damages

[11] Other Tenant's Remedies for Detention of Fixtures

[12] Third-Party Interests in Fixtures

[13] Cross References

§ 334.95 Complaint in Subrogation by Insurer as Subrogee of Its Insured for Damages Against Insured's Tenant to Recover Amount Paid to Insured for Fire Damages Caused by Tenant's Negligence [Civ. Code § 3333; Ins. Code § 2071]

[1] FORM

[2] Use of Form

[3] Allegations

[a] Generally

[b] Allegation of Subrogation and Underlying Action

§§ 334.96-334.99 [Reserved]

§ 334.100 Demurrer to Complaint to Recover Rent; Bar of Statute of Limitations [Code Civ. Proc. §§ 337(1), 337.2, 339(1), 339.5]

[1] FORM

[2] Use of Form

[3] Jurisdiction

[4] Statute of Limitations for Leases Executed After July 1, 1971

[5] Statute of Limitations for Leases Executed Before July 1, 1971

[6] Cross References

§ 334.101 Demurrer to Complaint to Recover Rent Under Oral Lease for Uncertainty

[1] FORM

[2] Use of Form

§ 334.102 Demurrer to Complaint to Recover Rent; Invalid Liquidated Damages Provision [Civ. Code § 1671]

[1] FORM

[2] Use of Form

§ 334.103 Affirmative Defense; Discharge From Payment of Rent for Surrender of Premises by Tenant and Retaking by Landlord for Own Account Under Pre-July 1, 1971, Lease

[1] FORM

[2] Use of Form

§ 334.104 Affirmative Defense; Discharge From Payment of Rent for Surrender of Premises by Tenant and Reletting by Landlord at Same Rental Under Post-July 1, 1971, Lease [Civ. Code § 1951.2]

[1] FORM

[2] Use of Form

§ 334.105 Affirmative Defense of Constructive Eviction by Landlord and Vacation of Premises by Tenant for Failure to Repair Dwelling Within Reasonable Time After Notice [Civ. Code §§ 1941, 1942]

[1] FORM

[2] Use of Form

[3] No Rent Obligation After Constructive Eviction

[4] Waiver of Right to Abandon

§ 334.106 Affirmative Defense of Constructive Eviction by Landlord and Vacation of Premises by Tenant for Failure of Landlord to Repair Rendering Business Premises Unfit for Purpose for Which Leased

[1] FORM

[2] Use of Form

§ 334.107 Affirmative Defense of Constructive Eviction by Landlord and Vacation of Premises by Tenant for Alterations Unreasonably Interfering With Quiet Enjoyment of Premises [Civ. Code § 1927]

[1] FORM

[2] Use of Form

§ 334.108 Affirmative Defense of Constructive Eviction by Landlord and Vacation of Premises by Tenant for Failure to Furnish Heat [Civ. Code § 1927]

[1] FORM

[2] Use of Form

§ 334.109 Affirmative Defense of Constructive Eviction by Landlord and Vacation of Premises by Tenant for Harassment Interfering With Enjoyment of Premises [Civ. Code § 1927]

[1] FORM

[2] Use of Form

§ 334.110 Affirmative Defense of Discharge From Payment of Rent for Landlord's Failure to Place Tenant in

Possession

[1] FORM

[2] Use of Form

§ 334.111 Affirmative Defense of Discharge From Payment of Rent for Landlord's Breach of Dependent Covenant

[1] FORM

[2] Use of Form

§ 334.112 Affirmative Defense of Discharge From Payment of Rent for Breach of Warranty of Habitability

[1] FORM

[2] Use of Form

[3] Warranty of Habitability

[4] Standards of Tenantability

[5] Reasonable Time to Repair Not Required

[6] Notice of Breach Required

[7] Materiality of Breach

[8] Rent Obligations

[9] Tenant's Lack of Knowledge of Condition Not Prerequisite

[10] Change of Ownership Irrelevant

[11] Payment of Rent Into Court

[12] Waiver Prohibited

§ 334.113 Affirmative Defense of Discharge From Payment of Rent for Destruction of Premises [Civ. Code §§ 1932(2), 1933(4)]

[1] FORM

[2] Use of Form

[3] Effect of Covenant to Repair

§ 334.114 Affirmative Defense of Discharge From Payment of Rent for Condemnation of Premises

[1] FORM

[2] Use of Form

[3] Cross References

§ 334.115 Affirmative Defense of Discharge From Payment of Rent for Illegality

[1] FORM

[2] Use of Form

§ 334.116 Affirmative Defense of Discharge From Payment of Rent for Frustration of Purpose of Lease

[1] FORM

[2] Use of Form

[3] Frustration as Defense to Action for Rent

[4] When Lease Does Not Terminate

§ 334.117 Affirmative Defense of Discharge From Payment of Rent for Tenant's Right to Repair and Deduct [Civ. Code § 1942]

[1] FORM

[2] Use of Form

[3] Repair and Deduct Remedy

[4] Exercise of Remedy

§ 334.118 Affirmative Defense of Discharge From Payment of Rent for Tenant's Payment of Utilities [Civ. Code § 1942.2]

[1] FORM

[2] Use of Form

[3] Remedy for Nonpayment of Utilities

§ 334.119 Affirmative Defense of Discharge From Payment of Rent for Landlord's Retaliatory Motive [Civ. Code § 1942.5]

[1] FORM

[2] Use of Form

[3] Retaliatory Eviction as Defense

[a] Statutory Authority

[b] Case Authority

[4] Retaliatory Eviction as a Cause of Action

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Volume 29: Landlord and Tenant: General Introduction thru Rent Control-Chs. 330-339
Chapter 334 LANDLORD AND TENANT: CLAIMS FOR DAMAGES
PART I. SCOPE

29-334 California Forms of Pleading and Practice--Annotated § 334.01

§ 334.01 Scope of Chapter

This chapter discusses actions that a tenant may bring against a landlord for damages [*see § 334.10* et seq.], as well as actions by landlords seeking to collect unpaid rent or damages [*see § 334.80* et seq.], and tenants' defenses to actions for unpaid rent [*see § 334.100* et seq.].

The chapter includes the following forms:

- Complaints by a tenant against a landlord for damages, specific performance, and related actions [*see §§ 334.50 -334.73*], including complaints for personal injuries based on negligence [*see § 334.50*], breach of the implied warranty of habitability [*see § 334.61*], wrongful and retaliatory evictions [*see §§ 334.62 -334.64*], and the return of a security deposit [*see § 334.69*].

- Complaints by a landlord against a tenant for damages or unpaid rent [*see §§ 334.80 -334.95*].

- Demurrers and affirmative defenses regarding a tenant's defense to a landlord's action for rent [*see §§ 334.100*-334.119].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawLandlord & TenantTenant's Remedies & RightsRemediesGeneral OverviewTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligenceGeneral Overview

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29-334 California Forms of Pleading and Practice--Annotated § 334.02

§ 334.02 Cross References

For discussion and forms for use in tort actions that may be relevant to a particular landlord-tenant situation, see the following chapters:

- Ch. 150, *Conversion* .
- Ch. 362, *Mental Suffering and Emotional Distress* .
- Ch. 380, *Negligence* .
- Ch. 421, *Premises Liability* .
- Ch. 460, *Products Liability* .
- Ch. 550, *Trespass* .

For a form of complaint for use in an action for conspiracy to harass a tenant, see Ch. 126, *Conspiracy* .

For forms of complaint for conversion against a bailee's landlord and against a tenant for removal of fixtures, see Ch. 150, *Conversion* .

For forms of complaint by a tenant for damages resulting from fire, see Ch. 267, *Fires* .

For forms of complaint for wrongful death against a landlord for negligence in the maintenance or use of gas or electrical appliances or wiring, see Ch. 277, *Gas and Electricity* .

For a form of complaint for a declaration that a lessee is required by agreement to indemnify a lessor for injuries sustained by a third party due to a defective sidewalk, see Ch. 300, *Indemnity and Contribution* .

For a form of complaint for damages for abuse of process in wrongfully evicting a lessee from premises in an unlawful detainer action, see Ch. 357, *Malicious Prosecution and Abuse of Process* .

For a form of complaint for subrogation by an insurer against the insured's tenant to recover payment to the insured for fire damages caused by a tenant's negligence, see Ch. 536, *Subrogation* .

For a form of complaint against an amusement park owner and concessionaire for personal injuries sustained by a patron of the concessionaire from a defective amusement park device, see Ch. 547, *Theaters, Shows, and Amusement Places* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsConversionGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityGeneral OverviewTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligenceGeneral OverviewTortsPremises Liability & PropertyTrespassGeneral OverviewTortsProcedureMultiple DefendantsIndemnityGeneral Overview

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29-334 California Forms of Pleading and Practice--Annotated §§ 334.03-334.09

[Reserved]

§§ 334.03[Reserved]

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Chapter 334 LANDLORD AND TENANT: CLAIMS FOR DAMAGES
PART II. LEGAL BACKGROUND
A. Suing a Landlord for Damages

29-334 California Forms of Pleading and Practice--Annotated § 334.10

§ 334.10 Defective Condition of Premises

[1] General Duty of Landlord

Civ. Code § 1714(a) provides that everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury on himself or herself.

In *Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* , the California Supreme Court departed from the traditional rules governing the liability of the owners and occupiers of land. It held that *Civ. Code § 1714(a)*, rather than plaintiff's status as a trespasser, licensee, or invitee, controlled the liability of tenants for injuries to their social guests, even though this status could have some bearing on the question of liability [*Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561]* . The Court stated that, in the absence of a statutory provision declaring an exception to the fundamental principles enunciated by *Civ. Code § 1714*, no such exception should be made unless clearly supported by public policy [*Rowland v. Christian (1968) 69 Cal. 2d 108, 112, 70 Cal. Rptr. 97, 443 P.2d 561]* . It decided that no public policy required that an exception be carved out of the statute for tenants in possession when they were sued by their guests [*see Rowland v. Christian (1968) 69 Cal. 2d 108, 112-120, 70 Cal. Rptr. 97, 443 P.2d 561]* .

The California Supreme Court has subsequently held that the rule of *Rowland v. Christian* applies to the landlord's liability to the tenant and that the landlord owes a tenant a duty of reasonable care in providing and maintaining the rented premises in a safe condition [*Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 467, 213 Cal. Rptr. 213, 698 P.2d 116* , overruled on other grounds, *Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1188-1189, 43 Cal. Rptr. 2d 836, 899 P.2d 905* ; *see § 334.11[1]*]. In *Becker*, the Court stated that any departure from the fundamental principles of liability under *Civ. Code § 1714(a)* involves the balancing of a number of considerations, as set forth in *Rowland*. These include: the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and

prevalence of insurance for the risk involved [*Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 467, 213 Cal. Rptr. 213, 698 P.2d 116* , overruled on other grounds, *Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1188-1189, 43 Cal. Rptr. 2d 836, 899 P.2d 905]* . This holding appears to remain intact despite the California Supreme Court's subsequent decision overruling *Becker* in the area imposing strict products liability on a landlord for injuries resulting from a defect in the leased premises [*see Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1188-1189, 43 Cal. Rptr. 2d 836, 899 P.2d 905* , discussed in *§ 334.11[1]*].

Courts have therefore held that a landlord, in caring for his or her property, must act toward his or her tenant as a reasonable person under all of the circumstances, including the likelihood of injury, the probable seriousness of injury, the burden of reducing or avoiding the risk, and his or her degree of control over the risk-creating defect [*Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 468, 213 Cal. Rptr. 213, 698 P.2d 116* , overruled on other grounds, *Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1188-1189, 43 Cal. Rptr. 2d 836, 899 P.2d 905* ; *Portillo v. Aiassa (1994) 27 Cal. App. 4th 1128, 1135, 32 Cal. Rptr. 2d 755* ; *Golden v. Conway (1976) 55 Cal. App. 3d 948, 955, 128 Cal. Rptr. 69* ; *Brennan v. Cockrell Investments, Inc. (1973) 35 Cal. App. 3d 796, 800-801, 111 Cal. Rptr. 122* ; *see Alcaraz v. Vece (1997) 14 Cal. 4th 1149, 1158-1159, 60 Cal. Rptr. 2d 448, 929 P.2d 1239]* . The landlord's duty is determined by these general factors; the former common law rule, under which a landlord was under no duty to maintain the leased premises free from defects except in certain exceptional circumstances [*see Burks v. Blackman (1959) 52 Cal. 2d 715, 718, 344 P.2d 301]* , has apparently been abrogated by the Supreme Court's decision in *Becker*.

For further discussion of the liability of a property owner for injuries caused by defective conditions in the property, see Ch. 421, *Premises Liability* . For further discussion of a landlord's liability for negligent failure to maintain the rented premises in safe condition, see Levy, Golden, and Sacks, California Torts, ch. 16, *Landlord-Tenant Tort Liabilities* (Matthew Bender).

[2] Duty to Inspect Premises for Defects

In applying the general considerations discussed in [1], *above*, courts have found that landlords have owed specific duties to their tenants in various factual situations. For example, in *Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 213 Cal. Rptr. 213, 698 P.2d 116* , the California Supreme Court held that a landlord may be reasonably expected, in the exercise of ordinary care, to inspect the rented premises to determine whether or not they are safe [*Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 468, 213 Cal. Rptr. 213, 698 P.2d 116 , overruled on other grounds*, *Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1188-1189, 43 Cal. Rptr. 2d 836, 899 P.2d 905* ; *see § 334.11[1]*]. The Court therefore reversed a summary judgment entered in the landlord's favor in a case in which the tenant was injured by the shattering of a glass shower door that was not tempered. The Court held that the landlord had a duty to inspect for dangerous conditions in the exercise of due care, and that lack of awareness of the dangerous condition does not necessarily preclude liability [*Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 468-469, 213 Cal. Rptr. 213, 698 P.2d 116 , overruled on other grounds*, *Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1188-1189, 43 Cal. Rptr. 2d 836, 899 P.2d 905* ; *see § 334.11[1]*]. However, the Court noted that the duty to inspect should charge the landlord only with those matters that would have been disclosed by a reasonable inspection, and that whether or not a reasonable inspection would have disclosed a particular danger is an issue of fact [*Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 469, 213 Cal. Rptr. 213, 698 P.2d 116 , overruled on other grounds*, *Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1188-1189, 43 Cal. Rptr. 2d 836, 899 P.2d 905* ; *see § 334.11[1]*].

In another case, the court held that a landlord was liable to a deliveryman who was attacked by a guard dog kept on the premises by the landlord's commercial tenant [*Portillo v. Aiassa (1994) 27 Cal. App. 4th 1128, 1132, 32 Cal. Rptr. 2d 755]* . Before renewing the tenant's lease nearly a year before the attack on plaintiff, defendant had not conducted an inspection of the premises, but knew that the tenant was keeping the dog at the store. A sign in the store warned of a guard dog on the premises and a copy of a newspaper article about the dog's recent attack on a robber and its "rotten disposition" was posted near the door of the store [*Portillo v. Aiassa (1994) 27 Cal. App. 4th 1128, 1132, 32 Cal. Rptr. 2d 755]* . The court held that a landlord owes a duty of care to third parties injured by a dangerous condition,

including a tenant's dog, whether or not the landlord has actual knowledge that the dog was dangerous, if the landlord would have discovered the existence of the dangerous condition by exercise of reasonable care [*Portillo v. Aiassa (1994) 27 Cal. App. 4th 1128, 1134, 32 Cal. Rptr. 2d 755]* . The court noted that defendant would have learned about the dog's dangerous propensities merely by asking about the dog's history and training, why the sign had been posted, or whether the newspaper article was accurate [*Portillo v. Aiassa (1994) 27 Cal. App. 4th 1128, 1135, 32 Cal. Rptr. 2d 755]* . The court also distinguished the case from earlier cases finding that a landlord had no duty to inspect rented premises for the purpose of discovering the existence of a tenant's dangerous dog and would not be liable to third parties injured by the dog unless the landlord had previous knowledge of the dog's vicious nature [*see, e.g.,* *Lundy v. California Realty (1985) 170 Cal. App. 3d 813, 821, 216 Cal. Rptr. 575* ; *Uccello v. Laudenslayer (1975) 44 Cal. App. 3d 504, 514, 118 Cal. Rptr. 741]* , because those cases involved family pets kept in single-family residences. The risk of injury from a guard dog in a store open to the public is far greater; moreover, although they may be necessary in some neighborhoods, guard dogs, unlike family pets, cannot be classified as "an important part of our way of life" [*Portillo v. Aiassa (1994) 27 Cal. App. 4th 1128, 1137-1138, 32 Cal. Rptr. 2d 755]* . Finally, the court rejected defendant's argument that imposition of a duty to inspect premises for dangerous animals would make a landlord strictly liable. The court notedthat there are numerous scenarios in which a landlord exercising reasonable care to inspect would not necessarily discover the animal's presence (for example, if the tenant concealed the animal) and therefore would not be held liable for injuries caused by the animals [*Portillo v. Aiassa (1994) 27 Cal. App. 4th 1128, 1138, 32 Cal. Rptr. 2d 755]* .

[3] Action on Implied Warranty of Habitability

The California Supreme Court has established an implied warranty of habitability in residential leases [*see* *Green v. Superior Court (1974) 10 Cal. 3d 616, 623-631, 111 Cal. Rptr. 704, 517 P.2d 1168]* . The warranty was established as a defense in an unlawful detainer action. Thereafter, a superior court appellate department held that a cause of action for damages could be stated in contract for the reduced value of the premises arising from breach of the warranty [*Quevedo v. Braga (1977) 140 Cal. Rptr. 143* ; *see* *Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 916-917, 162 Cal. Rptr. 194* (recognized this cause of action)]. The next step was the recognition by a court of appeal that a tenant could state causes of action in tort for damages for breach of the implied warranty of habitability if the breach caused plaintiff discomfort and annoyance, damage to personal property, and emotional distress [*Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 913-926, 162 Cal. Rptr. 194]* . It therefore appears that a tenant can state a cause of action against a landlord for breach of the implied warranty of habitability causing personal injuries to the tenant.

[4] Landlord's Obligation to Install Locking Mechanisms

On and after July 1, 1988, a landlord of a building intended for human habitation must, among other security measures, install and maintain in operable condition deadbolt locks on doors of dwellings and locking devices on windows [*Civ. Code § 1941.3(a)*]. The tenant is responsible for notifying the landlord of any deadbolt or other locking devices that become inoperable, and the landlord must correct the deficiency within a reasonable time [*Civ. Code § 1941.3(b)*]. By the statute's express terms, a landlord's violation of the statutory duties does not broaden, limit, or otherwise affect the duty of care owed by a landlord in accordance with existing law, including any duty that may exist under *Civ. Code § 1714*, discussed in [1], *above* [*Civ. Code § 1941.3(d)*].

[5] Duty to Inspect on Entry of Judgment of Possession

A landlord may not ignore a defaulting tenant's possible neglect of property. Thus, a duty to inspect attaches upon entry of the judgment of possession in an unlawful detainer action and includes reasonable periodic inspections thereafter [*Stone v. Center Trust Retail Properties, Inc. (2008) 163 Cal. App. 4th 608, 613, 77 Cal. Rptr. 3d 556*]. On entry of judgment, a holdover tenant's incentive to maintain a property dissipates because continued maintenance likely benefits only the landlord. To protect the public, the incentive to maintain the property must not be an orphan abandoned by a tenant and ignored by a shortly reoccupying landlord. Entry of judgment provides a workable bright line for the parties

to know where responsibility lies, and aligns that responsibility with the parties' reordered incentives [*Stone v. Center Trust Retail Properties, Inc. (2008) 163 Cal. App. 4th 608, 613, 77 Cal. Rptr. 3d 556*]. In *Stone v. Center Trust Retail Properties, Inc.*, the court held that a landlord who obtained a judgment of possession in unlawful detainer proceedings against a restaurant but allowed the restaurant to continue operating, at which time a customer was injured, could be liable for the customer's injuries. The landlord had a duty to inspect the premises on entry of judgment and at reasonable intervals thereafter [*Stone v. Center Trust Retail Properties, Inc. (2008) 163 Cal. App. 4th 608, 614-615, 77 Cal. Rptr. 3d 556*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantTenant's Remedies & RightsWarranty of HabitabilityTortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsDuty to InspectTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligenceDuty to InspectTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligenceSafety Requirements

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§ 334.11 Strict Liability

[1] For Latent Defects in Leased Premises

Before 1995 a landlord engaged in the business of leasing dwellings was strictly liable in tort for injuries resulting from a latent defect in the premises if the defect existed at the time the premises were let to the tenant [*Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 464, 213 Cal. Rptr. 213, 698 P.2d 116* (tenant injured by shattering of shower door made of untempered glass)]. The Court in *Becker* held that because landlords are an integral part of the enterprise of producing and marketing rental housing, the cost of injuries resulting from latent defects must be borne by them rather than by the injured persons who are powerless to protect themselves [*see Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 466-467, 213 Cal. Rptr. 213, 698 P.2d 116]* .

However, the California Supreme Court subsequently overruled its decision in *Becker* imposing strict products liability on landlords for injuries to their tenants caused by a defect in the leased premises [*Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1188-1189, 43 Cal. Rptr. 2d 836, 899 P.2d 905]* . In *Peterson*, the Court found that the *Becker* decision constituted an unwarranted extension of the products liability doctrine and that landlords, simply by leasing residential dwellings, should not be included within the class of persons who properly may be held strictly liable under this doctrine [*Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1190, 43 Cal. Rptr. 2d 836, 899 P.2d 905]* . The Court recognized that the *Becker* decision, judicially engrafting products liability principles onto the law governing landlord liability and holding landlords strictly liable for injuries caused by defects in leased premises, represented a minority view that was not gaining acceptance [*Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1193-1195, 43 Cal. Rptr. 2d 836, 899 P.2d 905]* . In addition, the Court found that to impose liability on landlords without fault was not in accordance with accepted principles and that its reasoning imposing strict liability was flawed in several respects [*see Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1197-1200, 43 Cal. Rptr. 2d 836, 899 P.2d 905]* . The decision in *Peterson* applies retroactively [*McCarthy v. Martinson (1996) 51 Cal. App. 4th 632, 634, 59 Cal. Rptr. 2d 149]* .

It should be noted, however, that the Court in *Peterson* specifically did *not* absolve landlords of all potential responsibility for injuries, and that landlords may still be held liable under general tort principles for injuries resulting

from defects in their premises if they have breached the applicable standard of care [*Peterson v. Superior Court (1995) 10 Cal. 4th 1185,1210, 43 Cal. Rptr. 2d 836, 899 P.2d 905]* . In addition, a tenant may still pursue a cause of action for strict products liability against the manufacturer, distributor, or retailer of a defective product that causes injury [*Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1210, 43 Cal. Rptr. 2d 836, 899 P.2d 905]* .

In addition to the Supreme Court's decision in *Peterson*, a court of appeal has held that the doctrine of strict liability does not apply to landlords of commercial or industrial property. The policy placing the burden on residential landlords of maintaining safe premises is not applicable to commercial or industrial landlords [*Muro v. Superior Court (1986) 184 Cal. App. 3d 1089, 1096-1097, 229 Cal. Rptr. 383]* . *Muro* relied on the fact that *Becker*, discussed *above*, phrased its holding to apply to landlords "engaged in the business of leasing dwellings" [*see also Golden v. Conway (1976) 55 Cal. App. 3d 948, 961-962, 128 Cal. Rptr. 69* (rule applied to landlord "engaged in the business of leasing apartments and appurtenant commercial premises"); *Fakhoury v. Magner (1972) 25 Cal. App. 3d 58, 64, 101 Cal. Rptr. 473* (rule applied to landlord who furnished at least five apartments; court noted that strict products liability doctrine does not apply to casual or isolated transactions)].

For further discussion of the liability of a property owner for injuries caused by defective conditions in the property, see Ch. 421, *Premises Liability* .

[2] Landlord Who Leases Furnishings

Except as otherwise agreed by the lessor and the lessee in lease agreements for a term of more than 20 days, personal property let to a renter must be put into a condition fit for its intended purpose or use [*Civ. Code § 1955*]. Relying in part on this provision, a court of appeal has held that a landlord is strictly liable for injuries to a tenant resulting from the tenant's proper use of a defective furnishing within a furnished apartment [*Fakhoury v. Magner (1972) 25 Cal. App. 3d 58, 62-64, 101 Cal. Rptr. 473]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsStrict Liability

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§ 334.12 Exculpatory Provisions Invalid

All contracts that have for their object, directly or indirectly, the exemption of anyone from responsibility for his or her own fraud, willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law [*Civ. Code § 1668*]. Thus, an exculpatory clause in a lease whereby the tenant waives all claims against the lessor from any causes is invalid under *Civ. Code § 1668* [*Halliday v. Greene (1966) 244 Cal. App. 2d 482, 487-488, 53 Cal. Rptr. 267* ; *see* *Henrioulle v. Marin Ventures, Inc. (1978) 20 Cal. 3d 512, 518-519, 143 Cal. Rptr. 247, 573 P.2d 465* (holding exculpatory clause in residential lease executed before 1976 to be invalid under *Civ. Code § 1668*)]. In addition, any provision of a lease or rental agreement of a dwelling executed on or after January 1, 1976, by which the lessee agrees to modify or waive his or her right to have the landlord exercise a duty of care to prevent personal injury or personal property damage where that duty is imposed by law, is void as contrary to public policy [*Civ. Code § 1953(a)(5), (c)*].

For an exculpatory clause to be construed as precluding liability for "active" or "affirmative" negligence, there must be express and unequivocal language in the agreement precluding such liability. A clause that seeks to limit liability generally without mentioning negligence will be construed to shield a party only for passive negligence, not for active negligence [*Burnett v. Chimney Sweep, L.L.C. (2004) 123 Cal. App. 4th 1057, 1066, 20 Cal. Rptr. 3d 562]* . Thus, an exculpatory clause in a commercial lease that shielded the landlord from liability for property damage or personal injury, but did not mention negligence, was construed to shield the landlord only from passive negligence [*Burnett v. Chimney Sweep, L.L.C. (2004) 123 Cal. App. 4th 1057, 1066-1067, 20 Cal. Rptr. 3d 562]* . In that case, the landlord was actively negligent in refusing to remediate problems caused by excessive moisture and mold infestation on the leased premises [*Burnett v. Chimney Sweep, L.L.C. (2004) 123 Cal. App. 4th 1057, 1067-1068, 20 Cal. Rptr. 3d 562]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsExculpatory Clauses

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§ 334.13 Landlord's Duty to Protect Tenants From Criminal Conduct by Third Parties

Landlords owe a duty to their tenants to protect them from reasonably foreseeable risks, including the risk of criminal conduct by third parties [*see, e.g., Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal. 4th 666, 675, 25 Cal. Rptr. 2d 137, 863 P.2d 207* ; *Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 499-503, 229 Cal. Rptr. 456, 723 P.2d 573]* . If the risk is not reasonably foreseeable, there is no duty and no liability. For example, defendants who rented a house to their son were not liable for the injuries suffered by a visitor to the house, whom the son accidentally shot while the son was under the influence of alcohol. Although defendants knew their son had a drinking problem and kept firearms in the house, plaintiff's injury was not reasonably foreseeable because there was no evidence that the son had ever harmed anyone due to either his drinking problem or his possession of firearms and no evidence that the son handled firearms unsafely while drunk [*Sturgeon v. Curnutt (1994) 29 Cal. App. 4th 301, 307, 34 Cal. Rptr. 2d 498]* . Although the combination of drinking and firearms raises the logical possibility of harm to visitors, the court found that nothing put defendants on notice that visitors to the premises were in danger, and therefore they had no duty of care to protect plaintiff from injury [*Sturgeon v. Curnutt (1994) 29 Cal. App. 4th 301, 308, 34 Cal. Rptr. 2d 498]* .

The duty to protect tenants from the risk of criminal conduct by third parties is a duty to safeguard the tenants' personal safety [*see, e.g., Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 499-503, 229 Cal. Rptr. 456, 723 P.2d 573* (tenant of condominium unit assaulted and raped)], not the safety of their property. A commercial landlord owes no duty to safeguard the property of its tenants from even reasonably foreseeable criminal activity by third parties, because tenants are in the best position to take steps to protect their own property, insurance is available to tenants to cover this risk, and holding landlords liable would place an onerous financial burden on landlords (which would eventually be passed on to their tenants) [*Rotman v. Maclin Markets, Inc. (1994) 24 Cal. App. 4th 1709, 1715, 30 Cal. Rptr. 2d 130* (owner of outdoor market not liable for theft of jewelry from tenant's stand); *Royal Neckwear Co. v. Century City, Inc. (1988) 205 Cal. App. 3d 1146, 1149-1151, 252 Cal. Rptr. 810* (owner of mall not liable for burglaries of tenant's store)].

Landlords, including mobilehome park owners, ordinarily have no duty to reject prospective tenants they believe, or have reason to believe, are gang members. To recognize such a duty would tend to encourage arbitrary housing discrimination and would place landlords in the untenable situation of facing potential liability whichever choice they

make about a prospective tenant. A residential tenant's behavior and known criminal associations may, in some circumstances, create such a high level of foreseeable danger to others that the landlord is obliged to take measures to remove the tenant from the premises or bear a portion of the legal responsibility for injuries the tenant subsequently causes. However, in an action against a mobilehome park by a resident who was shot during an altercation by gang members living across the street, the facts known to park management did not make a violent gang confrontation so extraordinarily foreseeable as to justify imposition of a duty to undertake eviction proceedings [*Castaneda v. Olsher (2007) 41 Cal. 4th 1205, 1216-1218, 63 Cal. Rptr. 3d 99, 162 P.3d 610]* .

For further discussion of a property owner's duty to control the conduct of third persons, see Ch. 421, *Premises Liability* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligenceCriminal Acts

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§ 334.14 Wrongful Eviction

A tenant who is wrongfully evicted by a landlord may recover damages for the eviction, regardless of whether the eviction is actual or constructive [*Pierce v. Nash (1954) 126 Cal. App. 2d 606, 612-615, 272 P.2d 938* (constructive eviction); *Saferian v. Baer (1930) 105 Cal. App. 238, 243, 287 P. 142* (actual eviction)].

PRACTICE TIP:

Wrongful Evictions in Cities With Rent Control Ordinances. The most common type of wrongful eviction suit is in cities with rent control ordinances with vacancy decontrol when the landlord has given a notice of termination that contains allegedly false grounds (such as the landlord's intent to move into the unit himself or herself) and the tenant vacated and the landlord rented the premises. *By Myron Moskovitz*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsGeneral OverviewReal Property LawLandlord & TenantRent RegulationRent Control StatutesTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsInterference With Property Rights

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§ 334.15 Intentional Infliction of Mental Distress

One suffering mental anguish and pain or physical injury as a proximate result of a wrongful eviction may waive the breach of contract and sue in tort [*Richardson v. Pridmore (1950) 97 Cal. App. 2d 124, 129, 217 P.2d 113]* , including an action for intentional infliction of mental distress [*see Emden v. Vitz (1948) 88 Cal. App. 2d 313, 318-319, 198 P.2d 696]* . A tenant can also recover damages from a landlord for intentional infliction of mental distress caused by the landlord's retaliatory eviction [*Aweeka v. Bonds (1971) 20 Cal. App. 3d 278, 281-282, 97 Cal. Rptr. 650]* .

For discussion and forms related to this tort, see Ch. 362, *Mental Suffering and Emotional Distress* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsIntentional Infliction of Emotional Distress

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29-334 California Forms of Pleading and Practice--Annotated § 334.16

§ 334.16 Conversion

[1] In General

Conversion is the unwarranted interference by a defendant with the plaintiff's property from which injury results [*Eichhorn v. De La Cantera (1953) 117 Cal. App. 2d 50, 58, 255 P.2d 70]* . A landlord's taking possession of and using the personal property belonging to a tenant constitutes conversion. It is not necessary that the tenant be the owner of the property. It is sufficient if the tenant had actual possession at the time of the landlord's act [*Igauye v. Howard (1952) 114 Cal. App. 2d 122, 126-127, 249 P.2d 558]* .

Refusal of one in possession of real property to permit the owner of chattels left on the property to remove his or her goods from the premises may be a conversion. If the owner of the real estate appropriated the goods to his or her own use in defiance of the plaintiff's rights, it is a conversion. However, the mere failure to deliver the goods is not such a serious interference with the owner's dominion as to require the owner to pay the full value of the goods. The removal of another's property from the premises and storage of the property is not a conversion [*Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 550-551, 176 P.2d 1]* .

It is essential that the plaintiff plead and prove defendant's intention to convert the personal property and exercise ownership over it or an intention to prevent the owner from taking possession of his or her property [*Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 550, 176 P.2d 1]* . The fact that a tenant is in arrears in the payment of rent does not justify the landlord's exercise of dominion over the tenant's personal property [*Haydell v. Silva (1962) 201 Cal. App. 2d 20, 24-25, 19 Cal. Rptr. 705]* .

For further discussion as well as forms related to conversion, see Ch. 150, *Conversion* .

[2] Damages

Damages for converting personal property are presumed to be [*Civ. Code § 3336*]:

- The value of the property at the time of the conversion, with the interest from that time, or an amount

sufficient to indemnify the party injured for the loss that is the natural, reasonable, and proximate result of the wrongful act complained of, and that a proper degree of prudence on his or her part would not have averted; and

- A fair compensation for the time and money properly expended in pursuit of the property.

[3] No Demand Required

When a landlord wrongfully reenters, no demand by the tenant is necessary as a prerequisite to the accrual of a cause of action for damages for conversion of personal property [*Haydell v. Silva (1962) 201 Cal. App. 2d 20, 24, 19 Cal. Rptr. 705]* .

[4] Trespass Distinguished

If there is no substantial interference with possession or the right to use personal property, the tenant has a cause of action only for trespass and may recover only the actual damages due to injury to the personal property or loss of the property's use, rather than the full value of the chattels, which could be recovered for conversion [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 610, 12 Cal. Rptr. 488, 361 P.2d 20]* .

For discussion and forms related to trespass, see Ch. 550, *Trespass* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsConversionElementsTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsInterference With Property RightsTortsPremises Liability & PropertyTrespassElements

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§ 334.17 Willful Action by Landlord

[1] Termination of Utility Service

A landlord is prohibited from willfully causing, directly or indirectly, with the intent to terminate the occupancy under a lease or other tenancy or estate at will, however created, of property used by a tenant as his or her residence, the interruption or termination of any utility service furnished the tenant whether or not the utility service is under the landlord's control [*Civ. Code § 789.3(a)*]. This prohibition against terminating utility service is applicable to a temporary or occasional residence as well as to a permanent residence [*Otanez v. Blue Skies Mobile Home Park (1991) 1 Cal. App. 4th 1521, 1525, 3 Cal. Rptr. 2d 210]* . The services include, but are not limited to, water, heat, light, electricity, gas, telephone, elevator, or refrigeration [*Civ. Code § 789.3(a)*]. In addition, a landlord is prohibited from willfully [*Civ. Code § 789.3(b)*]:

- Preventing the tenant from gaining reasonable access to the property by changing the locks or using a bootlock or by any other similar method or device;

- Removing outside doors or windows; or

- Removing from the premises the tenant's personal property, the furnishings, or any other items without the prior written consent of the tenant except when done in accordance with the procedure set forth in *Civ. Code §§ 1980-1991* (disposition of personal property remaining on premises at termination of tenancy).

Civ. Code § 789.3(b) does not prevent the lawful eviction of a tenant by appropriate legal authorities, nor does it apply to occupancies defined by *Civ. Code § 1940(b)* (exceptions to term "persons who hire") [*Civ. Code § 789.3(b)*].

Any landlord who violates *Civ. Code § 789.3* is liable to the tenant in a civil action for all of the following [*Civ. Code § 789.3(c)*]:

- The tenant's actual damages; and

- An amount not to exceed $100 for each day or part of a day the landlord remains in violation of *Civ. Code § 789.3*. However, in no event may less than $250 be awarded for each separate cause of action. In determining the amount of this award, the court must consider proof of such matters as justice may require. Subsequent or repeated violations, which are not committed contemporaneously with the initial violation, are treated as separate causes of action and are subject to a separate award of damages.

Tenant, as used in Code Civ. Proc. § 789.3, means all the occupants of a rental unit. Therefore, the penalties are effectively $100 per rental unit [*Kinney v. Vaccari (1980) 27 Cal. 3d 348, 357-358, 165 Cal. Rptr. 787, 612 P.2d 877]* .

In any action under *Civ. Code § 789.3(c)*, the court awards reasonable attorney's fees to the prevailing party. Additionally, in any such action the tenant may seek appropriate injunctive relief to prevent continuing or further violation of the provisions of *Civ. Code § 789.3* during the pendency of the action. The remedy provided by *Civ. Code § 789.3* is not exclusive and does not preclude the tenant from pursuing any other remedy that he or she may have under any other provision of law [*Civ. Code § 789.3(d)*].

The reference in *Civ. Code § 789.3(a)* to "willful" interruption or termination of utility service means intentional interruption or termination of service. The landlord's knowledge or ignorance of the statute would be immaterial [*Hale v. Morgan (1978) 22 Cal. 3d 388, 395-397, 149 Cal. Rptr. 375, 584 P.2d 512* (no violation of constitutional equal-protection guaranty)].

In applying the penalty provision in *Civ. Code § 789.3(c)*, a court may not do the following [*Hale v. Morgan (1978) 22 Cal. 3d 388, 397-407, 149 Cal. Rptr. 375, 584 P.2d 512* (reversing and remanding for reassessment of penalty); *see Kinney v. Vaccari (1980) 27 Cal. 3d 348, 352-356, 165 Cal. Rptr. 787, 612 P.2d 877* (penalties of $100 per day per rental unit for 60 days for total of $36,000 is not disproportionate when landlord's actions were willful and egregious and tenants were reasonable in remaining in premises without utilities for 60 days)]:

- Cumulate by counting any day when the tenant was not actually "deprived" of utility service, such as any day when the tenant could have restored service on his or her own initiative by some reasonable means (if possible) or any day when the tenant was not actually occupying the premises; and

- Apply the penalty provision so that the total penalty is disproportionate in the circumstances.

[2] Nonpayment of Utilities

A tenant who has made a payment to a utility pursuant to *Pub. Util. Code § 777, 777.1, 10009, 10009.1, 12822, 12822.1, 16481*, or *16481.1* may deduct the payment from rent as provided in each section [*Civ. Code § 1942.2*]. In general, these Public Utility Code sections provide that when a landlord is the utility customer for individually metered service and the account is in arrears, the utility will give notice directly to the affected occupant in English and specified languages [*see Civ. Code § 1932*], with the opportunity to become the account customer, bringing the account up to date, before individual utility service is terminated [*see, e.g., Pub. Util. Code § 777*].

For a form of affirmative defense, see *§ 334.118*.

[3] Menacing Acts

A tenant is entitled to a civil penalty of up to $2,000 for each act of a landlord made for the purpose of influencing the tenant to vacate a dwelling, if the act constitutes [*Civ. Code § 1940.2(a), (b)*]:

- Theft or extortion [*see Pen. Code §§ 484(a), 518*].

- The use or threatened use of force, threats, or menacing conduct that constitutes a course of conduct that interferes with the tenant's right to quiet enjoyment of the premises and would create an apprehension of harm in a reasonable person. The tenant is not required to be actually or constructively evicted to obtain relief [*Civ. Code § 1940.2(a)(3)*].

- A significant and intentional violation of the statutory requirements governing the landlord's entry into the premises [*see Civ. Code § 1954*].

The action may be brought in small claims court [*Civ. Code § 1940.2(b)*].

However, the following do not constitute violations of these provisions [*Civ. Code § 1940.2(c)*]:

- An oral or written warning notice, given in good faith, regarding conduct by a tenant, occupant, or guest that violates, may violate, or has violated the applicable rental agreement, rules, regulations, lease, or laws.

- An oral or written explanation of the rental agreement, rules, regulations, lease, or laws given in the normal course of business.

These provisions do not enlarge or diminish a landlord's right to terminate a tenancy pursuant to existing state or local law, nor do they enlarge or diminish any ability of local government to regulate or enforce a prohibition against a landlord's harassment of a tenant [*Civ. Code § 1940.2(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsInterference With Property Rights

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§ 334.18 Statutory Action for Unlawful Rent Skimming

Civ. Code § 890 et seq. establishes civil and criminal liability for "rent skimming," which is essentially a landlord's use of rental revenue from residential property during the first year period after acquiring that property without first applying the revenue or an equivalent amount to payments due on all encumbrances on that property [*see Civ. Code § 890(a)(1)*]. "Rent skimming" also includes receiving revenue from renting residential property by a person, who without the consent of the owner or owner's agent, asserts possession or ownership of the property through false claim of title, trespass, or any other unauthorized means [*see Civ. Code § 890(a)(2)*; *see also Penal Code § 602.9* (misdemeanor)].

A tenant of residential real property may bring an action against a person who has engaged in rent skimming with regard to that property for the recovery of actual damages and attorney's fees and costs. The court may also award exemplary damages and must award at least three times the amount of actual damages under specified circumstances [*Civ. Code § 891(d)*]. For further discussion and forms relating to this type of action, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantRent RegulationGeneral Overview

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§ 334.19 Failure to Disclose Application for Permit to Demolish Premises

[1] Written Notice to Tenants

The owner of a residential dwelling unit or the owner's agent who applies to any public agency for a permit to demolish the unit must give written notice of that fact to a prospective tenant before the occurrence of any of the following actions by the owner or the owner's agent [*Civ. Code § 1940.6(a)(1)*]:

- Entering into a rental agreement with a prospective tenant.
- Requiring or accepting payment from the prospective tenant for an application screening fee.
- Requiring or accepting any other fees from a prospective tenant.
- Requiring or accepting any writings that would initiate a tenancy.

The owner or owner's agent must also give written notice to current tenants before applying to the public agency for the permit to demolish the residential dwelling unit. This requirement includes tenants who have entered into a rental agreement but not yet taken possession of the dwelling unit [*Civ. Code § 1940.6(a)(2)*]. The notice must include the earliest possible approximate date on which the owner expects the demolition to occur and the approximate date on which the owner will terminate the tenancy. The demolition may not occur before the earliest possible approximate date noticed [*Civ. Code § 1940.6(b)*].

[2] Tenant Action and Remedies

A tenant may bring an action if the landlord fails to comply with the notice requirements or demolition takes place before the earliest date in the notice [*Civ. Code § 1940.6(c)*]. The court may order remedies including the actual damages suffered, moving expenses, and a civil penalty of up to $2,500 to be paid by the landlord to the tenant [*Civ. Code § 1940.6(c)*]. The prevailing party is entitled to reasonable attorney's fees [*Civ. Code § 1940.6(c)(3)*]. These remedies are cumulative to other remedies available under law [*Civ. Code § 1940.6(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantTenant's Remedies & RightsRemediesGeneral OverviewTortsPremises Liability & PropertyLessees & LessorsGeneral Overview

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PART II. LEGAL BACKGROUND
A. Suing a Landlord for Damages

29-334 California Forms of Pleading and Practice--Annotated §§ 334.20-334.29

[Reserved]

§§ 334.20[Reserved]

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PART II. LEGAL BACKGROUND
B. Suing a Tenant for Damages

29-334 California Forms of Pleading and Practice--Annotated § 334.30

§ 334.30 Suing a Tenant for Damages

A landlord or a landlord's successor in interest may have claims against a tenant or a tenant's successor in interest for not only delinquent rent payments, but also to prevent waste, to determine the right to improvements and fixtures, and for injunctive relief.

For forms and discussions of specific types of actions against a tenant, see *§§ 334.80 -334.95*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsRent Recovery

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PART II. LEGAL BACKGROUND
B. Suing a Tenant for Damages

29-334 California Forms of Pleading and Practice--Annotated §§ 334.31-334.39

[Reserved]

§§ 334.31[Reserved]

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29-334 California Forms of Pleading and Practice--Annotated § 334.40

§ 334.40 Related Matthew Bender Publications

Johnson & Moskovitz, California Real Estate Law & Practice, Ch. 170, *The Premises: Duties and Liabilities* , Ch. 212, *Forcible Entry, Forcible Detainer, and Other Torts* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerTortsPremises Liability & PropertyGeneral Overview

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29-334 California Forms of Pleading and Practice--Annotated § 334.41

§ 334.41 State Statutes

[1] Prohibitions Against Interrupting or Terminating Utility Services

Landlord is prohibited from interrupting or terminating tenant's utility service. *Civ. Code § 789.3(a)*

Landlord is prohibited from terminating tenant's occupancy by interfering with access to premises, with doors or windows, or with tenant's property. *Civ. Code § 789.3(b)*

[2] Rights of Owners

Assignee or grantee of rents is entitled to same remedies for recovery of rent as assignor or grantor might have had. *Civ. Code § 821*

Remedies of lessor against lessee's assignee. *Civ. Code § 822*

Right of owner of rental real property to have property manager appear on owner's behalf in small claims action. *Code Civ. Proc. § 116.540(h)*

[3] Rent Skimming

Action for damages by tenant and other affected persons against purchaser-landlord for unlawful use of rental revenue during first year after acquisition of residential rental property without first applying revenue or equivalent amount to pay off encumbrances. *Civ. Code §§ 890-894*

[4] Fixtures

Generally. *Civ. Code § 1013*

Good-faith removal of fixtures. *Civ. Code § 1013.5*

Trade fixtures as removable. *Civ. Code § 1019*

[5] Statute of Frauds

Lease for longer than one year is required to be written. *Civ. Code § 1624(a)(3)*

[6] Unlawful Contracts

Contracts exempting landlord from liability for fraud, willful injury, or violation of law are against public policy. *Civ. Code § 1668*

[7] Liquidated Damages

Requirements for valid liquidated damages provision. *Civ. Code § 1671*

[8] Obligations Imposed by Law

Every person is bound without contract to abstain from injuring person or property of another, or infringing on any of his or her rights. *Civ. Code § 1708*

Neither owner, owner's agent, nor transferee's agent is required to disclose to transferee, purchaser, lessee, or renter that prior occupant died, if death occurred more than three years before offer to buy or lease, nor that prior occupant had, or died of, AIDS. *Civ. Code § 1710.2*

Liability for negligent acts. *Civ. Code § 1714(a)*

[9] Hiring in General

Implied covenant of quiet enjoyment and possession. *Civ. Code § 1927*

Duty of lessee to use ordinary care. *Civ. Code § 1928*

Tenant's duty to repair deteriorations or injuries to premises caused by his or her want of ordinary care. *Civ. Code § 1929*

Termination of hiring before end of term when greater part of thing hired or that part that was the material inducement to the hirer to enter into the contract perishes. *Civ. Code § 1932(2)*

Lease terminates when entire leased premises are destroyed. *Civ. Code § 1933(4)*

[10] Leasing Land and Dwellings

Landlord's duty to put premises intended for human occupation into condition fit for such occupation and repair all

subsequent dilapidations, other than those mentioned in *Civ. Code § 1929*, that render it untenantable. *Civ. Code § 1941*

Dwelling that meets the definition of "substandard building" set forth in *Health & Safety Code § 17920.3*, contains lead hazards as specified in *Health & Safety Code § 17920.10*, or is substantially lacking specified affirmative standard characteristics is deemed to be untenantable. *Civ. Code § 1941.1*

When violation by tenant of specified affirmative obligations prevents landlord's duty to repair from arising. *Civ. Code § 1941.2*

Landlord's duty to install and maintain deadbolt and other locking devices on buildings intended for human habitation. *Civ. Code § 1941.3*

Repair and deduct remedy. *Civ. Code § 1942*

Liability to tenant of landlord who demands or collects rent when specified conditions exist. *Civ. Code § 1942.4*

Prohibited retaliatory actions by lessor against lessee. *Civ. Code § 1942.5*

Implied renewal of lease on holding over. *Civ. Code § 1945*

Requirements for automatic extension or renewal provision in residential lease. *Civ. Code § 1945.5*

Deposit to secure residential rental agreement. *Civ. Code § 1950.5*

Deposit to secure nonresidential rental agreement. *Civ. Code § 1950.7*

Unlawful to demand payment of money or attorneys' fees as condition of initiating, continuing, or renewing nonresidential lease or rental agreement unless amount of payment is stated in lease or rental agreement. *Civ. Code § 1950.8*

Termination of lease and rent and damages recoverable on lessee's breach of lease and abandonment of property before expiration of lease term. *Civ. Code § 1951.2*

Property is deemed abandoned following lessor's notice of belief of abandonment and subsequent failure to receive from lessee notice of intent not to abandon. *Civ. Code § 1951.3*

Lessor's rights and remedies when lease continues in effect following lessee's breach of lease and abandonment. *Civ. Code § 1951.4*

Civ. Code § 1671, relating to liquidated damages, applies to lease of real property. *Civ. Code § 1951.5*

Inapplicability of *Civ. Code §§ 1951-1952* to leases executed before July 1, 1971, or to leases executed on or after that date if terms of lease were fixed by lease, option, or other agreement executed before July 1, 1971. *Civ. Code § 1952.2*

Rights and remedies under *Civ. Code § 1950.5* are nonwaivable. *Civ. Code § 1953(a), (c)*

Agreement in lease executed after January 1, 1976 modifying or waiving tenant's right to have landlord exercise duty of care to prevent personal injury or personal property damage imposed by law is void. *Civ. Code § 1953(a)(5)*

[11] Personal Property

Personal property let to renter is required to be fit for intended use. *Civ. Code § 1955*

[12] Assignments

Restrictions against assignment, including absolute prohibition, are permissible. *Civ. Code § 1995.210 et seq.*

[13] Damages

Interest on damages. *Civ. Code § 3287*

Exemplary, or punitive, damages. *Civ. Code § 3294*

Measure of damages for breach of contract. *Civ. Code § 3300*

Damages for breach of obligation to pay money. *Civ. Code § 3302*

Damages for injury proximately caused by negligence. *Civ. Code § 3333*

Damages for conversion. *Civ. Code § 3336*

Treble damages for cutting timber. *Civ. Code § 3346*; *Code Civ. Proc. § 733*

Treble damages for waste are permissible. *Code Civ. Proc. § 732*

Damages after execution sale. *Code Civ. Proc. § 746*

[14] Equitable Relief

Specific performance of obligations. *Civ. Code §§ 3384-3395*

Right to injunction for waste. *Civ. Code § 3422*

[15] Nuisance

Acts constituting nuisance. *Civ. Code § 3479*

Judicial remedy for nuisance. *Code Civ. Proc. § 731*

[16] Statute of Limitations

Statute of limitations on written contract. *Code Civ. Proc. § 337(1)*

Statute of limitations on written lease under *Civ. Code § 1951.2*. *Code Civ. Proc. § 337.2*

Statute of limitations on actions for damage to real property is three years. *Code Civ. Proc. § 338(b)*

Statute of limitations on oral contract. *Code Civ. Proc. § 339(1)*

Statute of limitations on oral lease under *Civ. Code § 1951.2*. *Code Civ. Proc. § 339.5*

[17] Venue

Venue for action for damage to real property is county where property is situated. *Code Civ. Proc. § 392(a)(1)*

[18] Demurrers

Demurrer for uncertainty. *Code Civ. Proc. § 430.10(f)*

Complaint is subject to demurrer for failure to state whether contract is written or oral or implied in conduct. *Code Civ. Proc. § 430.10(g)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsInterference With Property RightsTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligenceGeneral Overview

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29-334 California Forms of Pleading and Practice--Annotated § 334.42

§ 334.42 Decisions

[1] Duty of Landlord to Repair Defective Condition

Landlord is potentially liable for tenant's injury caused by shattered shower door if landlord breached duty to inspect premises and discover defect (fact that glass in door was untempered) that would have been disclosed to reasonable inspection. *Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 467-469, 213 Cal. Rptr. 213, 698 P.2d 116* (*overruled on other grounds in Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1188-1189, 43 Cal. Rptr. 2d 836, 899 P.2d 905*)

Civ. Code § 1714, rather than plaintiff's status as trespasser, licensee, or invitee, determines liability of tenants for injuries to their social guests even though this status may have some bearing on liability. *Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561*

Commercial landlord's failure to show that it conducted reasonable inspection of tenant's premises (produce stand) precludes award of summary judgment in customer's slip-and-fall action against landlord for premises liability. *Lopez v. Superior Court (1996) 45 Cal. App. 4th 705, 717, 52 Cal. Rptr. 2d 821*

Common-law rules regarding liability of landlord for accident on his or her leased premises are superseded by *Civ. Code § 1714*. *Brennan v. Cockrell Investments, Inc. (1973) 35 Cal. App. 3d 796, 800, 111 Cal. Rptr. 122*

No exception to *Civ. Code § 1714* made unless clearly supported by public policy. *Rowland v. Christian (1968) 69 Cal. 2d 108, 112, 70 Cal. Rptr. 97, 443 P.2d 561, 32 A.L.R.3d 496*

No public policy requires an exception to *Civ. Code § 1714* for landlords not in possession when sued by their tenants. *Brennan v. Cockrell Inv., Inc. (1973) 35 Cal. App. 3d 796, 800, 111 Cal. Rptr. 122*

[2] Factors in Landlord's Liability

Landlord may be liable for injuries to tenant from dangerous condition on property landlord controls but does not own or possess. *Alcaraz v. Vece (1997) 14 Cal. 4th 1149, 1161-1162, 60 Cal. Rptr. 2d 448, 929 P.2d 1239*

Factors in landlord's liability to tenant. *Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 467-468, 213 Cal. Rptr. 213, 698 P.2d 116* (*overruled on other grounds in Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1188-1189, 43 Cal. Rptr. 2d 836, 899 P.2d 905*); *Brennan v. Cockrell Inv., Inc. (1973) 35 Cal. App. 3d 796, 800-801, 111 Cal. Rptr. 122*

[3] RICO

Cause of action stated against lenders who controlled landlords under Racketeer Influenced and Corrupt Organizations Act (RICO) [*18 U.S.C. § 1961 et seq.*] for maintaining slum premises with owners without funds to maintain premises and maximizing lender's profits at expense of tenant's rights to habitable building; complaint stated RICO cause of action based on enterprise between various defendants and racketeering activity from mail fraud in mailing documents involved in various real estate transactions and that racketeering activity caused damage to tenants from deprivation of habitable building and payment of excess rent. *People v. Highland Fed. Savings & Loan (1993) 14 Cal. App. 4th 1692, 1713-1717, 19 Cal. Rptr. 2d 555*

[4] Negligence

Civ. Code § 1714(a) establishes fundamental principle of negligence liability; this fundamental principle is applicable to landlord's liability to tenant; landlord owes tenant duty of reasonable care in maintaining rented premises in safe condition. *Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 467, 213 Cal. Rptr. 213, 698 P.2d 116* (overruled on other grounds in *Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1188-1189, 43 Cal. Rptr. 2d 836, 899 P.2d 905*)

Landlord owed no duty to assure that tenant's children did not fall out of ordinary second story window when undisputed facts showed that predominant cause of accident was parental negligence. *Pineda v. Ennabe (1998) 61 Cal. App. 4th 1403, 1408-1409, 72 Cal. Rptr. 2d 206*

[5] General Common Law Rule of Nonliability

General rule at common law of nonliability of landlord for injuries to tenants. *Burks v. Blackman (1959) 52 Cal. 2d 715, 718, 344 P.2d 301*

[6] Specific Exceptions to Common Law Rule of Nonliability

[a] Defective Condition of Premises at Time of Lease

General rule of nonliability is not applicable when nuisance existed on property at time lease was made or renewed. *Burroughs v. Ben's Auto Park, Inc. (1945) 27 Cal. 2d 449, 453-455, 164 P.2d 897* ; *Dennis v. Orange (1930) 110 Cal. App. 16, 23-24, 293 P. 865*

[b] Latent Defects

Landlord is liable for personal injuries resulting from landlord's fraud or concealment in allowing tenant to occupy premises without knowledge of defect. *Daley v. Quick (1893) 99 Cal. 179, 182-183, 33 P. 859*

Failure to warn tenant of uninsulated live electric wires is basis for landlord's liability. *Stanley v. Lander (1934) 3*

Cal. App. 2d 284, 288-289, 39 P.2d 225

Failure to disclose latent defect in wooden railing known to landlord is basis for landlord's liability. *Hassell v. Denning (1927) 84 Cal. App. 479, 482-483, 258 P. 426*

[c] Duty to Repair

General rule of nonliability is not applicable when landlord, through fraud or concealment, allowed tenant to occupy premises known to landlord and unknown to tenant to be defective. *Burks v. Blackman (1959) 52 Cal. 2d 715, 718, 344 P.2d 301* ; *Shotwell v. Bloom (1943) 60 Cal. App. 2d 303, 309-310, 140 P.2d 728*

[d] Covenant to Repair

General rule of nonliability is not applicable when landlord covenanted to keep premises in repair. *Mariotti v. Berns (1952) 114 Cal. App. 2d 666, 669-670, 251 P.2d 72*

Covenant to maintain premises obligates landlord to repair in reasonable time after notice from the tenant. *McNally v. Ward (1961) 192 Cal. App. 2d 871, 884, 14 Cal. Rptr. 260*

Actual or constructive notice of need for repair is necessary to put landlord in default on obligation to repair unless he or she agreed to repair without notice or has knowledge or reasonable opportunity to know of defect. *Morris v. Oney (1963) 217 Cal. App. 2d 864, 869, 32 Cal. Rptr. 88*

[e] Negligent Repair

General rule of nonliability is not applicable when landlord had voluntarily undertaken to repair premises but had done so in a negligent manner. *Minoletti v. Sabini (1972) 27 Cal. App. 3d 321, 324, 103 Cal. Rptr. 528*

Voluntary undertaking to repair that which was negligently performed is basis for landlord's liability. *Janofsky v. Garland (1949) 42 Cal. App. 2d 655, 657, 109 P.2d 750*

Acts of repair are not required to be of major nature. *Black v. Partridge (1953) 115 Cal. App. 2d 639, 645-647, 252 P.2d 760*

[f] Failure to Provide Adequate Security

Summary judgment for landlords was improper in action by tenant who was assaulted on premises by another tenant; assault was foreseeable because assaulting tenant had engaged in prior incidents of assault and battery against plaintiff, and it was triable question whether landlords could have prevented injuries by undertaking security measures or by evicting assaulting tenant. *Madhani v. Cooper (2003) 106 Cal. App. 4th 412, 416-418, 130 Cal. Rptr. 2d 778*

Landlord does not have duty to other tenants to investigate background of tenant who was exhibiting unusual behavior absent any concrete indication of dangerous propensity. *Davis v. Gomez (1989) 207 Cal. App. 3d 1401, 1406, 255 Cal. Rptr. 743*

Summary judgment for landlord is proper in action alleging that landlord owed duty to investigate whether tenant who possessed firearm and displayed bizarre behavior posed serious threat to tenants because plaintiffs failed to establish

what action landlord could have taken, even with reasonable investigation. *Davis v. Gomez (1989) 207 Cal. App. 3d 1401, 1406, 255 Cal. Rptr. 743*

Commercial landlord owes no duty to safeguard shopping center tenant's property (as opposed to person) from reasonably foreseeable criminal activity by third parties. *Rotman v. Maclin Markets, Inc. (1994) 24 Cal. App. 4th 1709, 1715, 30 Cal. Rptr. 2d 130* ; *Royal Neckwear Co. v. Century City, Inc. (1988) 205 Cal. App. 3d 1146, 1151-1152, 252 Cal. Rptr. 810*

Landlord is not liable for destruction of automobile in premises parking lot by third party despite landlord's knowledge of previous vandalism when landlord had not represented lot as secure and there was no allegation of failure to maintain defective security devices. *Jubert v. Shalom Realty (1982) 135 Cal. App. 3d Supp. 1, 4-6 , 185 Cal. Rptr. 641*

Landlord does not owe duty of care to prevent third party criminal activity when not aware of prior criminal acts and when he or she allegedly provided insufficient locks and lighting. *Riley v. Marcus (1981) 125 Cal. App. 3d 103, 109-110, 177 Cal. Rptr. 827*

Cause of action is stated against landlord for tenant's rape by third party when landlord had notice of prior criminal activity in lobby, broken lock, and lack of lighting in lobby where attack occurred. *Kwaitkowski v. Superior Trading Co. (1981) 123 Cal. App. 3d 324, 327-333, 176 Cal. Rptr. 494*

Cause of action for negligence is not stated against landlord when complaint merely alleged landlord's knowledge of crime in general area, failure to replace lightbulb outside plaintiff's apartment, and assault on plaintiff in her apartment; landlord is not required to take precautions against attacks by third persons that he has no reason to anticipate. *Hollywood Blvd. Venture v. Superior Court (1981) 116 Cal. App. 3d 901, 903-906, 172 Cal. Rptr. 528*

Cause of action is stated against landlord when complaint alleged landlord's knowledge of rapes in apartment complex, awareness that rapes might continue, possession of drawing of suspect, failure to warn plaintiff, failure to take reasonable precautions to protect tenants, and plaintiff's rape in apartment by person resembling drawing. *O'Hara v. Western Seven Trees Corp. (1977) 75 Cal. App. 3d 798, 802-804, 142 Cal. Rptr. 487*

Cause of action is not stated against landlord when complaint alleged plaintiff guest was injured by gunshots from third parties who were not tenants and when landlord had no reason to anticipate this conduct. *Totten v. More Oakland Residential Housing, Inc. (1976) 63 Cal. App. 3d 538, 541-545, 134 Cal. Rptr. 29*

[g] Violation of Statutory Duty

General rule of nonliability is not applicable when safety law violated. *Grant v. Hipsher (1967) 257 Cal. App. 2d 375, 382-383, 64 Cal. Rptr. 892* ; *Ewing v. Balan (1959) 168 Cal. App. 2d 619, 623, 336 P.2d 561*

When there are no specific covenants concerning repairs, repair statute is construed to imply that landlord is entitled to notice of need to repair and to reasonable time in which to make repairs. *Morris v. Oney (1963) 217 Cal. App. 2d 864, 869, 32 Cal. Rptr. 88*

Repair regulations are capable of imposing duty to inspect on landlord. *McNally v. Ward (1961) 192 Cal. App. 2d 871, 875, 14 Cal. Rptr. 260*

Landlord is not capable of delegating duty to comply with safety ordinances and statutes. *Finnegan v. Royal Realty Co. (1950) 35 Cal. 2d 409, 432, 218 P.2d 17*

Landlord is required to comply with safety regulations when he or she leases building knowing it is to be used for purpose that would require structural changes to meet these regulations. *Longway v. McCall (1960) 181 Cal. App. 2d 723, 729, 5 Cal. Rptr. 818*

Landlord is obligated to third person when building is leased for purpose that will require structural changes. *Finnegan v. Royal Realty Co. (1950) 35 Cal. 2d 409, 423, 218 P.2d 17*

Owner is required to terminate tenancy or compel tenant to comply with safety regulation when tenant makes structural change in violation of such regulation. *Grant v. Hipsher (1967) 257 Cal. App. 2d 375, 381, 64 Cal. Rptr. 892* ; *Longway v. McCall (1960) 181 Cal. App. 2d 723, 729, 5 Cal. Rptr. 818*

Breach of statutory duty to repair contained in *Civ. Code § 1941* does not give rise to liability for injuries caused by such failure. *Carty v. Blauth (1915) 169 Cal. 713, 716, 147 P. 949* ; *Gustin v. Williams (1967) 255 Cal. App. 2d Supp. 929, 62 Cal. Rptr. 838*

[h] Injury in Common Area

General rule of nonliability is not applicable when injuries occur in common areas. *Sockett v. Gottlieb (1960) 187 Cal. App. 2d 760, 766, 9 Cal. Rptr. 831*

[i] Lease for Purpose of Admitting Public

General rule of nonliability is not applicable when property is leased for purpose involving public's admission. *Hayes v. Richfield Oil Corp. (1952) 38 Cal. 2d 375, 380, 240 P.2d 580* ; *Ramirez v. Redevelopment Agency (1970) 4 Cal. App. 3d 397, 400, 84 Cal. Rptr. 356*

[7] Breach of Warranty of Habitability

Warranty of habitability is implied by law in residential leases in California. *Green v. Superior Court (1974) 10 Cal. 3d 616, 637*

Residential tenant is not to be deemed to have exempted landlord from implied warranty of habitability by continuing to live in uninhabitable premises, and breach of warranty does not depend on tenant's lack of knowledge of conditions that make premises uninhabitable. *Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 59, 171 Cal. Rptr. 707, 623 P.2d 268*

Fact that tenant was or was not aware of specific defects is not determinative of landlord's duty to maintain premises that are habitable; reasons that imply existence of warranty of habitability (inequality of bargaining power, shortage of housing, and impracticability of imposing on tenants duty of inspection) is compelling conclusion that tenant's lack of knowledge of defects is not a prerequisite to landlord's breach of warranty. *Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 54, 171 Cal. Rptr. 707, 623 P.2d 268*

When court finds breach of implied warranty of habitability that requires reduction in rent, judgment giving landlord possession is improper unless tenant is first given opportunity to pay reduced rent and retain possession. *Lee v. Vignoli (1979) 98 Cal. App. 3d Supp. 24, 160 Cal. Rptr. 79*

[8] Nuisance

Occupant of land, regardless of whether he or she has sustained physical injury, as entitled to recover damages for discomfort and annoyance of himself or herself and members of his or her family and for mental suffering occasioned by fear for safety of himself or herself or members of his or her family when discomfort or suffering has been proximately caused by nuisance. *Acadia, California, Ltd. v. Herbert (1960) 54 Cal. 2d 328, 337, 5 Cal. Rptr. 686, 353 P.2d 294* ; *Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 920, 162 Cal. Rptr. 194*

Minor resident of apartment complex adequately pleaded causes of action for public nuisance against owners and operators of the apartment complex, based on exposure to secondhand cigarette smoke from smokers in public areas of the complex. *Birke v. Oakwood Worldwide (2009) 169 Cal. App. 4th 1540, 1552-1553, 87 Cal. Rptr. 3d 602*

[9] Acts Constituting Actual Evictions

Landlord's retaking possession of premises and excluding tenant from premises constitutes actual eviction. *Landon v. Hill (1934) 136 Cal. App. 560, 562-566, 29 P.2d 281*

Landlord's breaking into premises, throwing out tenant's personal property, and refusing to allow tenant back on premises constitutes actual eviction. *Saferian v. Baer (1930) 105 Cal. App. 238, 241-243, 287 P. 142*

[10] Wrongful Eviction Generally

Cause of action for wrongful eviction is properly based on landlord's violation of rent control ordinance. *Castillo v. Friedman (1987) 197 Cal. App. 3d Supp. 6, 243 Cal. Rptr. 206*

Tenant is capable of recovering damages for constructive eviction. *Pierce v. Nash (1954) 126 Cal. App. 2d 606, 612-615, 272 P.2d 938*

Tenant is capable of recovering damages for actual eviction. *Saferian v. Baer (1930) 105 Cal. App. 238, 243, 287 P. 142*

Eviction is possibly unlawful even though not accompanied with threats, violence, or abusive language. *Richardson v. Pridmore (1950) 97 Cal. App. 2d 124, 130, 217 P.2d 113*

Tenant is not required to show that landlord acted with bad faith. *Pierce v. Nash (1954) 126 Cal. App. 2d 606, 612, 272 P.2d 938*

Action for wrongful eviction is contractual in nature. *Richardson v. Pridmore (1950) 97 Cal. App. 2d 124, 129, 217 P.2d 113*

Person suffering mental anguish and pain or physical injury is proximate result of eviction as capable of waiving wrongful eviction action and suing in tort. *Richardson v. Pridmore (1950) 97 Cal. App. 2d 124, 129, 217 P.2d 113* (mental anguish)

[11] Actual Eviction by One With Paramount Title as Wrongful

Civ. Code § 1927 contains lessor's agreement to ensure lessee quiet possession of premises during term of hiring against all persons lawfully claiming premises. *Standard Livestock Co. v. Pentz (1928) 204 Cal. 618, 638, 269 P. 645*

[12] Retaliatory Eviction

In unlawful detainer action when defense of retaliatory eviction under *Civ. Code § 1942.5* is raised, tenant has overall burden of proving landlord's retaliatory motive by preponderance of evidence; if landlord takes action for valid reason not listed in unlawful detainer statutes, landlord has duty to give notice of ground and, if tenant controverts ground, landlord has burden of proof of its existence by preponderance of evidence. *Western Land Office, Inc. v. Cervantes (1985) 175 Cal. App. 3d 724, 731-742, 220 Cal. Rptr. 784*

Common-law protection from retaliatory eviction is not subject to time limitations imposed on statutory protection from retaliatory eviction by *Civ. Code § 1942.5*. *Glaser v. Meyers (1982) 137 Cal. App. 3d 770, 775-777, 187 Cal. Rptr. 242*

Exercise of rights under law includes reporting of criminal activities to authorities, and eviction for reporting constitutes retaliatory eviction within meaning of *Civ. Code § 1942.5(c)*. *Barela v. Superior Court (1981) 30 Cal. 3d 244, 248-254, 178 Cal. Rptr. 618, 636 P.2d 582*

Retaliatory eviction defense is available when tenant has only orally complained to landlord and has not repaired and deducted or complained to governmental authorities. *Kemp v. Schultz (1981) 121 Cal. App. 3d Supp. 13, 16-18, 174 Cal. Rptr. 837*

Affirmative cause of action for retaliatory eviction is possible. *Aweeka v. Bonds (1971) 20 Cal. App. 3d 278, 281, 97 Cal. Rptr. 650*

[13] Damages for Wrongful Eviction

[a] General Damages

Measure of damages when tenant wrongfully evicted from agricultural land. *Wells v. B.F. Porter Estate (1928) 205 Cal. 776, 780, 272 P. 1039*

Amount of damages in wrongful eviction action is governed by *Civ. Code § 3300*. *Standard Livestock Co. v. Pentz (1928) 204 Cal. 618, 642-643, 269 P. 645*

Measure of damages under *Civ. Code § 3300*, as general rule, is value of term, less rent reserved; if wrongfully evicted tenant elects to sue in tort, general damages [*see Civ. Code § 3333*] for mental anguish and pain or physical injury are recoverable. *Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 926, 162 Cal. Rptr. 194*

Amount of recovery in wrongful eviction action. *Landon v. Hill (1934) 136 Cal. App. 560, 566, 29 P.2d 281*

[b] Special Damages

Damages recoverable for wrongful eviction, actual or constructive, includes whatever amounts are necessary to compensate tenant for detriment proximately caused by eviction or likely to result from it, including expenses of removal. *Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 926, 162 Cal. Rptr. 194*

Tenant is capable of recovering special damages naturally and proximately resulting from wrongful eviction. *Landon v. Hill (1934) 136 Cal. App. 560, 566, 29 P.2d 281*

[c] Exemplary or Punitive Damages

Exemplary, or punitive, damages are recoverable in tort action [*see Civ. Code § 3294(a)*] for wrongful eviction when landlord's conduct justifies award. *Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 926, 162 Cal. Rptr. 194*

[14] Fixtures

Landlord's interest in fixture derived from interest as owner of real property is not governed by Commercial Code but by law of real property and fixtures. *Goldie v. Bauchet Properties (1975) 15 Cal. 3d 307, 318, 124 Cal. Rptr. 161, 540 P.2d 1*

Fixture defined. *R. Barcroft & Sons Co. v. Cullen (1933) 217 Cal. 708, 711, 20 P.2d 665*

Factors in determining whether article is fixture. *Rinaldi v. Goller (1957) 48 Cal. 2d 276, 279, 309 P.2d 451* ; *Allstate Ins. Co. v. County of Los Angeles (1984) 161 Cal. App. 3d 877, 885-886, 207 Cal. Rptr. 888* ; *Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 132, 95 Cal. Rptr. 728*

Where county refused to allow tenant to remove fixtures on termination of lease for boating marina, inverse condemnation was not appropriate theory of recovery because wrong was nothing more than a breach of the lease, in-place value was not an appropriate measure of damages because lease had ended, and landlord was not liable for damages because removal of improvements was barred by Coastal Commission regulation. *County of Ventura v. Channel Islands Marina, Inc. (2008) 159 Cal. App. 4th 615, 625, 629-630, 71 Cal. Rptr. 3d 762*

In resolving whether article is fixture or personalty, elements of tripartite test does not play equal parts since element of intent is regarded as crucial and overriding factor, with other two criteria considered only as subsidiary ingredients relevant to determination of intent. *Allstate Ins. Co. v. County of Los Angeles (1984) 161 Cal. App. 3d 877, 886, 207 Cal. Rptr. 888*

Landlord is bound by agreement that tenant may remove fixtures. *Clark v. Talmadge (1937) 23 Cal. App. 2d 703, 706-707, 74 P.2d 825* ; *Earle v. Kelly (1913) 21 Cal. App. 480, 483, 132 P. 262*

Special agreement between landlord and tenant regarding fixtures supersedes general rules. *Bridges v. Cal-Pacific Leasing Co. (1971) 16 Cal. App. 3d 118, 128, 93 Cal. Rptr. 796*

Tenant has right to remove trade fixture even though he or she is dispossessed. *Bright v. Gineste (1955) 133 Cal. App. 2d 725, 732, 284 P.2d 839*

[15] Good Faith Removal of Fixtures

Civ. Code § 1013.5 is applicable only if article was affixed in good faith and under mistaken belief of a right to affix; absence of either factor defeats action under that statute. *Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 135-136, 95 Cal. Rptr. 728*

[16] Option to Purchase

Option to purchase in lease is required to contain all essential terms to be subject to specific performance. *Bonk v. Boyajian (1954) 128 Cal. App. 2d 153, 156, 274 P.2d 948*

[17] Option to Extend or Renew

When right to renew was conditional on meeting other offer for property, tenant is required to meet all conditions of offer, including purchase of adjacent property and construction of building. *Ellis v. Chevron, U.S.A., Inc. (1988) 201 Cal. App. 3d 132, 136-138, 246 Cal. Rptr. 863*

Tenant is held to exact compliance with terms of option to extend or renew lease. *Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 67-68, 338 P.2d 1005*

Essential elements are required to be specified in option to renew or extend lease. *Ablett v. Clauson (1954) 43 Cal. 2d 280, 284-286, 272 P.2d 753*

Exercise of option in absence of express provision. *Los Angeles County v. Kling (1972) 22 Cal. App. 3d 916, 922, 99 Cal. Rptr. 642*

Option is not effectively exercised if tenant varies option's terms. *Carney v. Heisch (1924) 67 Cal. App. 465, 467, 227 P. 780*

[18] Return of Security Deposit

Landlord violated *Civ. Code § 1950.7* by retaining security deposit to cover damages for future rent owed under lease for commercial property; *Civ. Code § 1950.7* allows security deposit to be applied only against unpaid rent that has accrued as of date called for in statute for return of deposit. *250 L.L.C. v. PhotoPoint Corp. (2005) 131 Cal. App. 4th 703, 716, 32 Cal. Rptr. 3d 296*

Parties to commercial lease may waive *Civ. Code § 1950.7* to provide that security deposit may be held and applied against future rent damages. *250 L.L.C. v. PhotoPoint Corp. (2005) 131 Cal. App. 4th 703, 719, 32 Cal. Rptr. 3d 296*

Trial court's holding landlord in contempt for failure to return security deposits is error absent substantial evidence of landlord's ability to pay or comply. *In re Cassil (1995) 37 Cal. App. 4th 1081, 1087, 44 Cal. Rptr. 2d 267*

Landlord is not required to pay interest on security deposit because there is no statutory requirement to do so. *Korens v. R. W. Zukin Corp. (1989) 212 Cal. App. 3d 1054, 1058-1060, 261 Cal. Rptr. 137*

Tenant is entitled to refund of security deposit after deduction of rentals due landlord. *Ace Realty Co. v. Friedman (1951) 106 Cal. App. 2d 805, 813, 236 P.2d 174*

Landlord is not entitled to retain security deposit after wrongfully evicting tenant or otherwise terminating tenancy prematurely. *Graham v. Wood (1935) 8 Cal. App. 2d 451, 455-457, 48 P.2d 124* ; *Walter H. Sullivan, Inc. v. Johnson (1931) 116 Cal. App. 591, 594, 3 P.2d 72*

"Nonrefundable" cleaning fee held subject to recovery by tenant. *Bauman v. Islay Investments (1973) 30 Cal. App. 3d 752, 755-759, 106 Cal. Rptr. 889*

[19] Return of Advance Rent

When lease is terminated because of landlord's fault, tenant is entitled to recover prepaid rent. *Friedman v. Isenbruck (1952) 111 Cal. App. 2d 326, 335, 244 P.2d 718*

Advance rent is recoverable on eviction under unjust enrichment doctrine. *Johnson v. Snyder (1950) 99 Cal. App. 2d 86, 89, 221 P.2d 164*

[20] Complaint for Rent

Allegation that lessee had possession of premises is unnecessary. *O'Meara v. Hables (1912) 163 Cal. 240, 242-243, 124 P. 1003*

Sufficiency of allegations in action for rent. *Pringle v. Fassler (1917) 176 Cal. 264, 265, 168 P. 114*

If lessee has right to possession, actual possession is immaterial. *Rapid Transit Co. v. Santa Clara Valley Land Co. (1924) 70 Cal. App. 390, 392, 233 P. 389*

[21] Accounting

Necessity of demand for accounting. *Wooster v. Nevills (1887) 73 Cal. 58, 60, 14 P. 390*

Interest in action for accounting. *Schmidt v. Waterford Winery, Ltd. (1960) 177 Cal. App. 2d 28, 34-35, 1 Cal. Rptr. 874*

[22] Attorney's Fees

Recovery of attorney's fees is dependent on specific provision in lease. *Bank of America etc. Ass'n. v. Moore (1937) 18 Cal. App. 2d 522, 529-530, 64 P.2d 460*

[23] Rent as Crops

Products of the soil are rent. Atlantic Oil Co. v. Los Angeles County (1968) 69 Ca1. 2d 585, 600, *72 Cal. Rptr. 886, 446 P.2d 1006*

Rent payable in crops is not due until crops are harvested or until reasonable time after maturity. *Silveira v. Ohm (1949) 33 Cal. 2d 272, 275, 201 P.2d 387*

[24] Rent for Occupation Without Lease

Rent defined. *Atlantic Oil Co. v. Los Angeles County (1968) 69 Cal. 2d 585, 600, 72 Cal. Rptr. 886, 446 P.2d 1006*

Occupancy with owner's consent implies agreement to pay reasonable rent. *Ross v. Long Beach (1944) 24 Cal. 2d 258, 263, 148 P.2d 649* ; *Meyer v. Parobek (1953) 119 Cal. App. 2d 509, 513, 259 P.2d 948*

Obligation to pay reasonable rental arises from mere occupancy without express agreement. *Southern Pacific Co. v. Swanson (1925) 73 Cal. App. 229, 234, 238 P. 736*

[25] Rent for Holding Over on Written Lease, No Express Provision

Continued occupancy of premises after expiration of lease term is extension of lease. *Woods v. Bank of Haywards (1909) 10 Cal. App. 93, 96, 106 P. 730*

Renewal and extension distinguished. *Burroughs v. Ben's Auto Park, Inc. (1945) 27 Cal. 2d 449, 454, 164 P.2d 897* ; *Smith v. Arthur D. Little, Inc. (1969) 276 Cal. App. 2d 391, 399, 81 Cal. Rptr. 140*

[26] Rent for Holding Over on Written Lease, Express Provision

Holding over is a continuation under written lease containing provision as to holding over. *Knox v. Wolfe (1946) 73 Cal. App. 2d 494, 501-502, 167 P.2d 3*

[27] Assignment

Assignment and subletting distinguished. *Barkhaus v. Producers' Fruit Co. (1923) 192 Cal. 200, 205-206, 219 P. 435* ; *Reed v. South Shore Foods, Inc. (1964) 229 Cal. App. 2d 705, 710, 40 Cal. Rptr. 575*

Assignee is liable for rents that become due at time that he is in possession although period for which rent is owed began before he took possession. *First Nat'l Bank of Oroville v. Aldridge (1939) 33 Cal. App. 2d 485, 491-492, 92 P.2d 674*

Assignment of rents is valid even though for purposes of security. *Silverstein v. Oakland Title Ins. & Guar. Co. (1932) 122 Cal. App. 73, 78, 9 P.2d 846*

[28] Waste

Waste defined. *Southern Pac. Land Co. v. Kiggins (1930) 110 Cal. App. 56, 60-61, 293 P. 708*

Unauthorized alternations by tenant are able to amount to waste. *Briggs v. Sherman (1924) 65 Cal. App. 249, 252, 223 P. 581*

Injunction to restrain tenant's waste. *Taft v. Washington (1915) 29 Cal. App. 197, 198, 154 P. 1073*

Tenant's commission of waste is ground for action for damages by landlord. *Richards v. Silveria (1929) 97 Cal. App. 166, 168, 275 P. 478*

Granting of treble damages under *Code Civ. Proc. § 732* rests with court's discretion; these damages are granted only when waste committed willfully and wantonly or maliciously. *Isom v. Rex Crude Oil Co. (1903) 140 Cal. 678, 679-680, 74 P. 294* (action by lessor against assignee of lease procured by fraud from lessee); *see* *Kanner v. Globe Bottling Co. (1969) 273 Cal. App. 2d 559, 566, 568, 78 Cal. Rptr. 25*

[29] Subrogation by Insurer

Equitable contribution and not equitable subrogation governs rights of insurers relating to fire loss while policies of both lessee and prospective buyer of lessee's business under letter of intent are in effect. *California Food Service Corp. v. Great American Ins. Co. (1982) 130 Cal. App. 3d 892, 895-902, 182 Cal. Rptr. 67*

Insurer who has indemnified insured for property loss is subrogated to insured's right against any person wrongfully

causing loss whether insured's cause of action is in tort or contract. *Royal Indem. Co. v. Security Truck Lines (1963) 212 Cal. App. 2d 61, 65, 27 Cal. Rptr. 858*

[30] Effect of Statutory Remedies on Common Law Remedies

Civ. Code § 1941, imposing duty on landlord to maintain residential buildings in tenantable condition, and *Civ. Code § 1942*, authorizing tenant, subject to limitations, to repair defective condition when landlord fails to do so and deduct amount of repair from rent, is not intended to curtail common law remedies. *Green v. Superior Court (1974) 10 Cal. 3d 616, 630, 111 Cal. Rptr. 704, 517 P.2d 1168* ; *Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 915, 162 Cal. Rptr. 194*

[31] Jury Instructions

Jury instructions in action for breach of implied warranty of habitability and nuisance. *Smith v. David (1981) 120 Cal. App. 3d 101, 108-114, 176 Cal. Rptr. 112*

[32] Conspiracy

Cause of action for conspiracy to induce breach of lease. *McWilliams v. Holton (1967) 248 Cal. App. 2d 447, 452-453, 56 Cal. Rptr. 574*

[33] Conversion

Conversion defined. *Eichhorn v. De La Cantera (1953) 117 Cal. App. 2d 50, 58, 255 P.2d 70*

Landlord's taking possession and use of tenant's personal property constitutes conversion. *Igauye v. Howard (1952) 114 Cal. App. 2d 122, 126-127, 249 P.2d 558*

Removal and storage of property does not constitute conversion. *Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 551, 176 P.2d 1*

Demand by tenant is unnecessary to accrual of cause of action for conversion of personal property. *Haydell v. Silva (1962) 201 Cal. App. 2d 20, 24, 19 Cal. Rptr. 705*

Action for conversion is not proper when there is no substantial interference with possession or use of property. *Jordan v. Talbot (1961) 55 Cal. 2d 597, 610, 12 Cal. Rptr. 488, 361 P.2d 20*

[34] Dangerous Animal

Landlord has no statutory duty under *Civ. Code § 1714(a)* to warn prospective tenant of presence of vicious dog in neighborhood, that is, dog kept by strangers to landlord on premises over which landlord had no control, and has no common law duty to warn of dog, even if there was special relationship between landlord and tenant. *Wylie v. Gresch (1987) 191 Cal. App. 3d 412, 414, 420, 424, 236 Cal. Rptr. 552*

Landlord is liable for damages from attack by vicious dog kept by tenant when landlord has actual knowledge of dangerous animal's presence and when landlord has right to remove the animal by retaking possession of premises. *Uccello v. Laudenslayer (1975) 44 Cal. App. 3d 504, 507, 118 Cal. Rptr. 741*

[35] Mental Distress

Tenant improperly awarded damages for negligent infliction of emotional distress based on economic injury derived solely from landlords' failure to perform obligations under lease. *Butler-Rupp v. Lourdeaux (2005) 134 Cal. App. 4th 1220, 1229*

Tenant's cause of action for intentional infliction of emotional distress against landlord is permitted when landlord's acts were extreme and outrageous, and resulted in severe emotional distress. *Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 922, 162 Cal. Rptr. 194*

Tenant is allowed to recover for mental distress caused by retaliatory eviction. *Aweeka v. Bonds (1971) 20 Cal. App. 3d 278, 281-282, 97 Cal. Rptr. 650*

Tenant is allowed to recover for mental distress caused by tortious eviction. *Emden v. Vitz (1948) 88 Cal. App. 2d 313, 318-319, 198 P.2d 696*

Person suffering mental anguish and pain is capable of waiving breach of contract action for willful eviction and suing in tort. *Richardson v. Pridmore (1950) 97 Cal. App. 2d 124, 129, 217 P.2d 113*

[36] Strict Liability

Landlord is not strictly liable on products liability theory for injuries to their tenants and guests caused by a defect in the premises. *Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1188-1189, 43 Cal. Rptr. 2d 836, 899 P.2d 905* (*overruling Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 213 Cal. Rptr. 213, 698 P.2d 116*)

Decision in Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 43 Cal. Rptr. 2d 836, 899 P.2d 905 , overruling Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 213 Cal. Rptr. 213, 698 P.2d 116 to extent *Becker* held landlords could be held strictly liable for injuries caused by latent defects, operates retroactively. *McCarthy v. Martinson (1997) 51 Cal. App. 4th 632, 634, 59 Cal. Rptr. 2d 149*

Landlord is strictly liable for injuries as lessor of furniture when he or she rents furnished apartments. *Fakhoury v. Magner (1972) 25 Cal. App. 3d 58, 63, 101 Cal. Rptr. 473*

[37] Complaint for Rent Uncertain

Complaint that fails to allege periods when rent was due is subject to demurrer for uncertainty. *Tillson v. Peters (1940) 41 Cal. App. 2d 671, 674, 107 P.2d 434*

[38] Surrender

Surrender by tenant and retaking by landlord for his or her own account. *Dorcich v. Time Oil Co. (1951) 103 Cal. App. 2d 677, 683, 230 P.2d 10*

Surrender by operation of law occurs by commission of acts inconsistent with relation of landlord and tenant. *Triest & Co. v. Goldstone (1916) 173 Cal. 240, 243, 159 P. 715*

Landlord who relets property for benefit of tenant is required to give lessee information that landlord is accepting

possession for tenant's benefit and not in landlord's own right. *Ace Realty Co. v. Friedman (1951) 106 Cal. App. 2d 805, 814, 236 P.2d 174*

Surrender relieves tenant from liability for rent. *Welcome v. Hess (1891) 90 Cal. 507, 512-513, 27 P. 369*

[39] Acts Constituting Constructive Evictions

Any interference by landlord depriving tenant of beneficial enjoyment of premises constitutes constructive eviction if tenant so elects and surrenders possession. *Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 670, 155 P.2d 24*

Constructive eviction occurs when acts or omissions of landlord, or any disturbance or interference with tenant's possession by landlord, renders premises, or substantial portion of premises, unfit for purposes for which they were leased, or has effect of depriving tenant for substantial period of time of beneficial enjoyment or use of premises; abandonment of premises within reasonable time after landlord's wrongful act is essential to enable tenant to claim constructive eviction. *Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 925-926, 162 Cal. Rptr. 194*

Alterations preventing full use of business premises for purpose for which leased constitutes constructive eviction. *Pierce v. Nash (1954) 126 Cal. App. 2d 606, 612-613, 272 P.2d 938*

Failure to repair plumbing systems under landlord's control which leaked and contaminated premises leased for restaurant business constitutes constructive eviction. *Butt v. Bertola (1952) 110 Cal. App. 2d 128, 130-131, 242 P.2d 32*

Harassment of tenant constitutes constructive eviction. *Aaker v. Smith (1948) 87 Cal. App. 2d 36, 43-46, 196 P.2d 150* ; *Tooke v. Allen (1948) 85 Cal. App. 2d 230, 234-235, 192 P.2d 804* ; *Sanders v. Allen (1948) 83 Cal. App. 2d 362, 366-367, 188 P.2d 760*

[40] Acts Not Constituting Constructive Evictions

Constructive eviction is not committed when landlord makes good faith resort to legal process. *Asell v. Rodrigues (1973) 32 Cal. App. 3d 817, 824, 108 Cal. Rptr. 566* (dictum)

Constructive eviction is not committed when acts of landlord or agents are no more serious than trespass. *North Pac. S.S. Co. v. Terminal Inv. Co. (1919) 43 Cal. App. 182, 189, 185 P. 205*

[41] Failure to Place Tenant in Possession

Tenant is not liable for rent when landlord fails to deliver the premises or the right to possession at the agreed time. *Dengler v. Michelssen (1888) 76 Cal. 125, 127, 18 P. 138*

[42] Breach of Covenant

Covenants not to rent to competing businesses are dependent and breach relieves tenant of liability for rent. *Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 669-670, 155 P.2d 24* ; Medico-Dental etc. v. *Horton & Converse (1942) 21 Cal. 2d 411, 418-420, 132 P.2d 457*

[43] Destruction of Premises

General covenant to repair does not prevent lease's termination when premises are destroyed. *Realty & Rebuilding Co. v. Rea (1920) 184 Cal. 565, 574-578, 194 P. 1024*

[44] Condemnation of Premises

Condemnation of entire premises relieves tenant of further liability for rent. *Texas Co. v. County of Los Angeles (1959) 52 Cal. 2d 55, 62, 338 P.2d 440*

[45] Lease for Illegal Purposes

County's prohibition by lease amendment against sale of guns at gun shows authorized on county fairgrounds constitutes infringement of commercial free speech under *First Amendment*, where sale of guns is lawful and not otherwise prohibited by federal, state, or county law. *Nordyke v. Santa Clara County (9th Cir. 1997) 110 F.3d 707, 710-711*

No enforceable rights arises under lease for illegal purpose. *Shephard v. Lerner (1960) 182 Cal. App. 2d 746, 748-751, 6 Cal. Rptr. 433*

[46] Frustration of Purpose

Doctrine of commercial frustration defined. *Lloyd v. Murphy (1944) 25 Cal. 2d 48, 53, 153 P.2d 47*

Anchor tenant's closing not shown by shopping center owner to constitute tortious interference with owner's efforts to sell center. *Westside Center Associates v. Safeway Stores 23, Inc. (1996) 42 Cal. App. 4th 507, 528*

Purpose frustrated is required to be within contemplation of both parties to lease. *Brown v. Oshiro (1945) 68 Cal. App. 2d 393, 396-397, 156 P.2d 976*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFixtures & ImprovementsTenant & Trade FixturesReal Property LawLandlord & TenantDuty to RepairReal Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawLandlord & TenantTenant's Remedies & RightsTermination & Retaliatory EvictionReal Property LawLandlord & TenantTenant's Remedies & RightsWarranty of HabitabilityReal Property LawTortsWasteElementsTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligenceDuty to RepairGeneral OverviewTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligenceSafety RequirementsTortsPremises Liability & PropertyLessees & LessorsNuisance

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§ 334.43 Law Reviews

Comment, *Asbestos in the Work Place: What "Every" Employee Should Know, 31 Santa Clara L. Rev. 423 (1991)*

Comment, *Landlord Premises Liability: Establishing Rational Boundaries, 26 Santa Clara L. Rev. 719 (1986)*

Note, *The Landlord as a Retailer? Strict Products Liability and the Landlord-Tenant Relationship in California: Becker v. IRM Corporation, 21 Cal. W.L. Rev. 524 (1985)*

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Note, *Uniform Commercial Code Section 9-313: Time for Adoption in California, 27 Hastings L.J. 235 (1975)*

Comment, *Green v. Superior Court: A New Remedy for the California Tenant, 5 Golden Gate U.L. Rev. 145 (1974)*

Note, *Fakhoury v. Magner: From Caveat Emptor to Caveat Lessor--Strict Liability and the Landlord, 9 Calif. West L. Rev. 547 (1973)*

Note, *Retaliatory Eviction in California: The Legislature Slams the Door and Boards Up the Windows, 46 So. Cal. L.*

Rev. 118 (1972)

Note, *Retaliatory Eviction as a Defense to Unlawful Detainer--Alternative Approaches? 22 Hastings L.J. 1365 (1971)*

Comment, *A Landlord's Duty to Protect His Tenants from the Criminal Acts of Third Persons, 5 U.S.F. L. Rev. 378 (1971)*

Comment, *Landlord's Liability for Criminal Acts Committed Against His Tenants, 7 Calif. West L. Rev. 197 (1970)*

Note, *Products Liability at the Threshold of the Landlord-Lessor, 21 Hastings L.J. 458 (1970)*

Note, *Torts--Landlord and Tenant--Liability of Landlord for Negligence of an Independent Contractor, 19 So. Cal. L. Rev. 141 (1945)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantTenant's Remedies & RightsTermination & Retaliatory EvictionReal Property LawLandlord & TenantTenant's Remedies & RightsWarranty of HabitabilityTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsGeneral OverviewTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligenceCriminal ActsTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsStrict Liability

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§ 334.44 Text References

Witkin, Summary of California Law, vol. 12, *Real Property*, §§ 393-402 (10th ed. 2005)

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PART IV. FORMS
A. Suing a Landlord for Damages and Related Actions

29-334 California Forms of Pleading and Practice--Annotated § 334.50

§ 334.50 Complaint by Tenant Against Landlord for Damages for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 3333]

[1] FORM Complaint by Tenant Against Landlord for Damages for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 3333]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Negligence)
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant(s) _____ [*name(s)*] _____ [is *or* are], and at all times mentioned in this complaint _____ [was *or* were] _____ [a resident *or* residents] of _____ County, California.

2. [Plaintiff is ignorant of the true names and capacities of defendants sued in this complaint as DOES I through _____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon

alleges that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences alleged in this complaint, and plaintiff's injuries as herein alleged were proximately caused by defendants' negligence)].

3. At all times mentioned in this complaint defendant[s, and each of them,] owned, operated, maintained, and controlled that certain apartment building at _____ [*street*], in _____ [*city*], County of _____, California.

4. At all times mentioned in this complaint plaintiff was a paying tenant of defendant(s) in an apartment of such building designated as _____ [*number*].

5. Defendant(s) failed to exercise ordinary care in the management of the above-mentioned apartment building by _____ [*specify negligent act(s)*].

6. As a proximate result of the negligence of defendant[s, and each of them], plaintiff was seriously injured in his/her health, strength, and activity, sustaining injury to his/her body, and shock and injury to his/her nervous system and person, and among others, sustained the following personal injuries: _____ [*describe*], all of which injuries have caused and continue to cause plaintiff great mental, physical, and nervous pain and suffering.

7. Plaintiff is informed and believes and thereon alleges that the injuries will result in some permanent disability to plaintiff and plaintiff has been damaged thereby [in the sum of $_____].

8. As a further proximate result of the negligence of defendant[s, and each of them], plaintiff was required to and did employ physicians and surgeons to examine, treat, and care for him/her, and did incur [and will continue to incur] medical and incidental expenses. The exact amount of these expenses is unknown to plaintiff at this time.

9. At the time of the events described in this complaint plaintiff was gainfully employed as _____ [*description*]. As a further proximate result of the negligence of defendant[s, and each of them], as alleged in this complaint, plaintiff was prevented from attending to his/her usual occupation for the period of _____ [*specify*], all to his/her loss of earnings and has been damaged [in the sum of approximately $_____].

[10. By reason of the negligence of defendant(s, and each of them), plaintiff will in the future be prevented from attending to his/her usual occupation for an undetermined period of time, all to his/her damage in a sum unknown to him/her at this time.]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For general damages [in the sum of $_____].

2. For all medical and incidental expenses according to proof.

3. For loss of earnings [in the sum of $_____].

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form is a complaint for use by a tenant to recover general damages, medical expenses, and loss of earnings for personal injuries resulting from a landlord's negligent maintenance of an apartment building [*see Civ. Code § 1714* (liability for negligence); *see also Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561* (*Civ. Code § 1714*, rather than plaintiff's status as trespasser, licensee, or invitee, determines liability of tenants for injuries of their social guests even though this status may have some bearing on liability)].

[3] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*].

If the action is a limited civil case, the caption must state whether the demand exceeds or does not exceed $10,000 and must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[4] Allegations

The complaint alleges the landlord-tenant relationship (Paragraphs 3 and 4), defendant's negligence (Paragraph 5), and damages (Paragraphs 6-10).

[5] Specification of Damages

In an action brought to recover damages for personal injury or wrongful death, the complaint or cross-complaint may not state the amount of damages demanded [*Code Civ. Proc. § 425.10(b)*]. However, in a limited civil case the complaint must comply with *Gov. Code § 70613* (first page of first paper filed must state whether amount demanded exceeds or does not exceed $10,000) [*Code Civ. Proc. § 425.10(b)*]. The measure of damages for injuries caused by negligence are set forth in *Civ. Code § 3333*.

For forms and procedures for use in requesting notice of the specific amount sought, see Ch. 177, *Damages* .

[6] Common Law Rules Superseded

The common law rules regarding a landlord's liability for an accident occurring on his or her leased premises are

superseded by *Civ. Code § 1714* [*Brennan v. Cockrell Investments, Inc. (1973) 35 Cal. App. 3d 796, 800, 111 Cal. Rptr. 122]* .

[7] Cross References

See generally Ch. 177, *Damages* , Ch. 380, *Negligence* , and Ch. 421, *Premises Liability* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.51

§ 334.51 Allegations of Landlord's Negligence for Failure to Disclose Latent Defects

[1] FORM Allegations of Landlord's Negligence for Failure to Disclose Latent Defects

1. At all times mentioned in this complaint, the apartment included _____ [*specify, e.g.,* an outside rear stairway enclosed by an outer wooden safety railing] for use by the apartment's tenants, including plaintiff, for the purpose of _____ [*specify, e.g.,* ingress to and egress from the rear of the apartment].

2. On or about _____ [*date*], plaintiff was using the _____ [*e.g.,* stairway] for its intended purpose and while so doing _____ [*specify occurrence resulting in injury, e.g.,* the railing suddenly and without warning collapsed and gave way], thereby causing plaintiff to suffer the injury and damage herein mentioned.

3. At the time of leasing the apartment to plaintiff and at all subsequent times herein mentioned, the _____ [*specify*] was dangerous and unsafe for use for its intended purpose by tenants, including plaintiff, because of its faulty construction, insecurity, and latent defectiveness; at all of such times defendant[s, and each of them,] had actual knowledge of its dangerous and unsafe condition.

4. At all times mentioned in this complaint, plaintiff was unaware that the _____ [*specify*] was dangerous and unsafe for use; the dangerous and unsafe condition was not apparent to nor discoverable by plaintiff through the exercise of ordinary care on his/her part.

5. Defendant(s) carelessly and negligently failed to give plaintiff any notice of the dangerous and unsafe conditions of the _____ [*specify*] at the time of leasing the apartment to plaintiff, at any time thereafter or at all, and the negligence of defendant(s) proximately caused the injuries and damages to plaintiff described below.

[2] Use of Form

This form contains allegations of a landlord's negligence in failing to disclose the existence of a defective condition when the landlord had knowledge of the condition and it was not apparent to the tenant [*see Civ. Code §§ 1714, 3333*].

These allegations may be used in place of Paragraph 5 in *§ 334.50[1]*.

[3] Examples

A landlord is liable for the failure to warn his or her tenant of uninsulated wires [*Stanley v. Lander (1934) 3 Cal. App. 2d 284, 288-289, 39 P.2d 225]* . In addition, the failure to disclose latent defects in a wooden railing known to the landlord is also a basis for the landlord's liability [*Hassell v. Denning (1927) 84 Cal. App. 479, 482-483, 258 P.426]* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.52

§ 334.52 Allegation of Negligent Retention of Portion of Premises Under Landlord's Control for Common Use

[1] FORM Allegation of Negligent Retention of Portion of Premises Under Landlord's Control for Common Use

1. At all times mentioned in this complaint, defendants owned, provided, maintained, operated, and controlled the _____ [*specify area, e.g.*, front entrance] of the apartment building for the common use, convenience, and protection of the building's tenants, including plaintiff.

2. On or about _____ [*date*], plaintiff was _____ [*specify activity being performed, e.g.*, walking] _____ [*specify area, e.g.*, in the front entrance] of the building.

3. At that time and place defendants, and each of them, carelessly and negligently owned, operated, maintained, and controlled _____ [*specify area*] so that this area was dangerous and unsafe for use by tenants, including plaintiff, thereby proximately causing plaintiff to sustain the injuries and damages as mentioned below.

[2] Use of Form

The form in [1], *above*, contains allegations of a landlord's negligence in maintaining some portion of the premises that were provided for the common use of tenants and were thereby under the landlord's control. The landlord has a duty to exercise reasonable care in maintaining and repairing that part of the building over which he or she retains control and which is used in common by tenants and others who enter the premises [*Burks v. Blackman (1959) 52 Cal. 2d 715, 718, 344 P.2d 301* ; *Harris v. Joffe (1946) 28 Cal. 2d 418, 423, 170 P.2d 454* ; *Sockett v. Gottlieb (1960) 187 Cal. App. 2d 760, 766, 9 Cal. Rptr. 831]* . These allegations may be used in place of Paragraph 5 in *§ 334.50[1]*.

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29-334 California Forms of Pleading and Practice--Annotated § 334.53

§ 334.53 Allegation of Landlord's Negligent Failure to Perform Covenant to Repair

[1] FORM Allegation of Landlord's Negligent Failure to Perform Covenant to Repair

1. At all times mentioned in this complaint, defendant(s) owned, operated, maintained, and controlled an office building located at _____ [*street*], in the City of _____, County of _____, California.

2. On or about _____ [*date*], defendant(s) leased to plaintiff certain office space in this building, under a written lease, a copy of which is attached to this complaint as Exhibit A and made a part of this complaint.

3. By the lease, defendant[s, and each of them,] covenanted to maintain the leased premises in good repair and tenantable condition during the lease's continuance, as more particularly set out in Paragraph _____ of the lease.

4. At all times mentioned in this complaint, plaintiff was a paying tenant of defendant(s) as to the office space under the lease.

5. On or about _____ [*date*], plaintiff was _____ [*specify activity being performed*] when _____ [*specify occurrence resulting in injury*].

6. At that time and place defendant[s, and each of them,] carelessly and negligently owned, operated, and maintained the office space in a condition of disrepair and carelessly and negligently failed to maintain the office space in good repair and tenantable condition in that _____ [*specify dangerous condition*]. This office space was dangerous and unsafe for use by plaintiff, thereby proximately causing plaintiff to sustain the injuries and damages mentioned below.

7. [For a reasonable time before the occurrence of the accident to plaintiff, defendant(s) had _____ (*either* actual knowledge *or* notice) of the dangerous and unsafe condition of the office space.]

[2] Use of Form

The form in [1], *above*, contains allegations of a landlord's negligence in failing to make repairs when there was an express covenant to repair [*Mariotti v. Berns (1952) 114 Cal. App. 2d 666, 669-670, 251 P.2d 72* (landlord liable when he or she covenanted to keep premises in repair)]. These allegations may be used in place of Paragraph 5 of *§ 334.50[1]*.

[3] Notice Requirements

The covenant to maintain premises obligates the landlord to repair the premises in a reasonable time after notice from the tenant [*McNally v. Ward (1961) 192 Cal. App. 2d 871, 884, 14 Cal. Rptr. 260]* . Actual or constructive notice of the need for repairs is necessary to put the landlord in default on his or her obligation to repair unless the landlord has agreed to repair without notice or has knowledge or a reasonable opportunity to know of the defect [*see Morris v. Oney (1963) 217 Cal. App. 2d 864, 869, 32 Cal. Rptr. 88]* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.54

§ 334.54 Allegation of Landlord's Negligent Repair

[1] FORM Allegation of Landlord's Negligent Repair

1. On or about _____ [*date*], defendant(s) undertook to repair a certain _____ [*specify, e.g.*, area of cracked plaster in the ceiling of the bedroom occupied by plaintiff] in plaintiff's apartment; defendant(s) did repair the condition by _____ [*specify actions taken, e.g.*, removing the plaster from the ceiling and replastering the area] so that it was caused to appear effectively repaired and safe and plaintiff relied thereon.

2. In fact, notwithstanding its appearance as effectively repaired and safe, defendant(s) so carelessly and negligently repaired this condition that on or about _____ [*date*], while plaintiff was _____ [*specify activity being performed, e.g.*, sleeping in his bed located underneath the replastered area], _____ [*specify occurrence resulting in injury, e.g.*, a portion of the replastered area was proximately caused to suddenly loosen and fall on plaintiff], causing injuries and damages to plaintiff as mentioned below.

[2] Use of Form

The form in [1], *above*, contains allegations of a landlord's negligence in making repairs that give the appearance of safety, even though the repairs were made voluntarily [*see Minoletti v. Sabini (1972) 27 Cal. App. 3d 321, 324, 103 Cal. Rptr. 528* ; *Janofsky v. Garland (1949) 42 Cal. App. 2d 655, 657, 109 P.2d 750]* . These allegations may be used in place of Paragraph 5 in *§ 334.50[1]*.

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29-334 California Forms of Pleading and Practice--Annotated § 334.55

§ 334.55 Allegation of Landlord's Violation of Statutory Duty

[1] FORM Allegation of Landlord's Violation of Statutory Duty

1. At all times mentioned in this complaint, defendant(s) owned, provided, maintained, operated, and controlled a certain _____ [*specify, e.g.*, gas heater] installed in the building for the use of tenants therein, including plaintiff.

2. At all times mentioned in this complaint, the provisions of _____ [*specify applicable statutory provision, e.g., Health and Safety Code Section 16905*] imposed a statutory duty on defendant[s, and each of them,] to _____ [*specify duty, e.g.*, maintain the gas heater in good repair].

3. On or about _____ [*date*], plaintiff was using the above-mentioned _____ [*specify, e.g.*, gas heater] for its intended purpose.

4. At that time and place defendant[s, and each of them,] carelessly and negligently owned, provided, maintained, operated, and controlled this _____ [*specify, e.g.*, gas heater] so that it was dangerous and unsafe for use by tenants, including plaintiff, and carelessly and negligently failed to maintain the _____ [*specify*] in good repair, and as a proximate result _____ [*describe occurrence resulting in injury, e.g.*, the gas heater exploded without warning], thereby causing plaintiff injuries and damages as mentioned below.

[2] Use of Form

The form in [1], *above*, contains allegations of a landlord's liability for personal injuries suffered by a tenant based on the landlord's violation of a statutory duty. These allegations may be used in place of Paragraph 5 of *§ 334.50[1]*.

[3] Statutory Duty to Repair

[a] In General

Statutes and health and safety regulations may impose on the landlord a duty to repair or maintain the premises and make him or her liable to the tenant for personal injuries caused by the failure to repair [*Ewing v. Balan (1959) 168 Cal. App. 2d 619, 623, 336 P.2d 561]* . These regulations may also impose on the landlord a duty to inspect the premises to discover defective conditions, especially with regard to the exterior of the premises [*McNally v. Ward (1961) 192 Cal. App. 2d 871, 875, 14 Cal. Rptr. 260]* . However, employment safety laws contained in *Lab. Code §§ 6300-9061* and safety orders promulgated under these provisions are no longer applicable and may not be considered or admitted into evidence in an action for personal injuries or death other than as between an employee and his or her own employer [*Lab. Code § 6304.5*; *Spencer v. G.A. MacDonald Constr. Co. (1976) 63 Cal. App. 3d 836, 845-861, 134 Cal. Rptr. 78* (upholding constitutionality of statute, approved in *Griesel v. Dart Industries, Inc. (1979) 23 Cal. 3d 578, 153 Cal. Rptr. 213, 591 P.2d 503*)].

[b] Not Delegable

A landlord's duty to comply with safety ordinances and statutes is mandatory and cannot be delegated to the tenant, nor to any other entity or person [*Finnegan v. Royal Realty Co. (1950) 35 Cal. 2d 409, 432, 218 P.2d 17]* .

[c] *Statutory Presumption of Negligence*

The failure of a person to exercise due care is presumed if [*Evid. Code § 669(a)*]:

- He or she violated a statute, ordinance, or regulation of a public entity;
- The violation proximately caused death or injury to person or property;
- The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
- The person suffering the death or the injury to his or her person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

This presumption may be rebutted by proof that the person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances who desired to comply with the law [*Evid. Code § 669(b)(1)*]. When a tenant makes a structural change that is in violation of safety regulations and the owner has knowledge of the change, the law imposes a duty on the owner to terminate the tenancy or compel the tenant to comply with the regulations [*Grant v. Hipsher (1967) 257 Cal. App. 2d 375, 381, 64 Cal. Rptr. 892* ; *Longway v. McCall (1960) 181 Cal. App. 2d 723, 729, 5 Cal. Rptr. 818]* .

[4] Structural Changes

When an owner leases a building knowing it is to be used for a purpose that would require structural changes to comply with safety regulations, the duty to comply with those regulations is on the owner [*Longway v. McCall (1960) 181 Cal. App. 2d 723, 729, 5 Cal. Rptr. 818]* . In this case, the owner's obligation as to third persons is not one of contract with the lessee, but rather one imposed under the law, a violation of which constitutes negligence [*Finnegan v. Royal Realty Co. (1950) 35 Cal. 2d 409, 423, 218 P.2d 17]* .

[5] Civ. Code § 1941

A landlord's breach of the statutory duty to repair contained in *Civ. Code § 1941* [*see § 332.10[1][b]* for a discussion of the statute] does not give rise to liability for injuries caused by such failure [*Carty v. Blauth (1915) 169 Cal. 713, 716, 147 P. 949* ; *Gustin v. Williams (1967) 62 Cal. Rptr. 838]* . However, if the tenant proves that the landlord violated *Civ. Code § 1941* and that the violation proximately caused injury to the tenant's person or property, a rebuttable

presumption of negligence on the part of the landlord arises [*Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 924, 162 Cal. Rptr. 194* (stating that holding of *Gustin v. Williams (1967) 62 Cal. Rptr. 838* concerning interpretation of statutes and common law must be deemed overruled by rationale of *Green v. Superior Court (1974) 10 Cal. 3d 616, 111 Cal. Rptr. 704, 517 P.2d 1168* and *Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561*); *see Evid. Code § 669*].

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29-334 California Forms of Pleading and Practice--Annotated § 334.56

§ 334.56 Allegations of Landlord's Negligence in Suit by Third Party; Lease for Purpose of Admission of Public

[1] FORM Allegations of Landlord's Negligence in Suit by Third Party; Lease for Purpose of Admission of Public

1. At all times mentioned in this complaint, defendant(s) owned, operated, maintained, and controlled that certain building located at _____ [*street address*], _____ [*city*], _____ County, California.

2. On or about _____ [*date*], defendant(s) leased to _____ [*name of lessee*] certain space in this building for the purpose of _____ [*specify purpose involving admission of public, e.g.,* exhibiting art works] under a written lease, a copy of which is attached to this complaint as Exhibit A and made a part of this complaint.

3. On or about _____ [*date*], plaintiff was _____ [*specify activity being performed, e.g.,* viewing an exhibition of art works] at the leased premises when _____ [*specify occurrence resulting in injury*].

4. At the time the lease was executed, defendant[s, and each of them,] carelessly and negligently owned, operated, and maintained the leased premises in a condition of disrepair in that _____ [*specify dangerous condition*]. At that time, the premises were dangerous and unsafe for use by the public, including plaintiff, thereby proximately causing plaintiff to sustain the injuries and damages as mentioned below.

5. At the time of the lease's execution, an inspection would have revealed the existence of the dangerous condition.

[2] Use of Form

The form in [1], *above,* contains allegations of a landlord's negligence in failing to repair a dangerous condition on premises leased for the public's admission. The lessor of property for a purpose involving the public's admission has a duty to inspect and repair the property before possession is transferred [*Ramirez v. Redevelopment Agency (1970) 4 Cal. App. 3d 397, 400, 84 Cal. Rptr. 356* ; *Hayes v. Richfield Oil Corp. (1952) 38 Cal. 2d 375, 380, 240 P.2d 580]* .

These allegations may be used in place of Paragraph 5 of *§ 334.50[1]*.

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29-334 California Forms of Pleading and Practice--Annotated § 334.57

§ 334.57 Allegations of Landlord's Negligence for Failure to Provide Adequate Security Against Criminal Activities

[1] FORM Allegations of Landlord's Negligence for Failure to Provide Adequate Security Against Criminal Activities

1. Before _____ [*date*], defendant(s) had been notified and [was *or* were] aware that _____ [*set forth criminal activity taking place on premises, e.g.*,several women tenants had been sexually assaulted on the premises by a person who had broken into their apartments using similar methods each time].

2. Before _____ [*date*], defendant(s) failed to take adequate security precautions to protect tenants from the above-described criminal activity in that he/she/they failed _____ [*describe precautions that should have been taken, e.g.*, to install sufficient locks, to provide adequate lighting, and to hire a full-time security guard].

3. Although defendant(s) [was *or* were] aware of the above-described criminal activity, he/she/they failed to warn tenants of the criminal activity or of the precautions that should be taken to avoid this criminal activity.

4. Defendant(s) [was *or* were] aware that _____ [*specify criminal activity taking place on premises, e.g.*, the rapes] were likely to continue because _____ [*set forth reasons, e.g.*, no one suspected of committing the rapes had been arrested and incarcerated].

5. On _____ [*date*], plaintiff _____ [*describe criminal activity that damaged plaintiff, e.g.*, was sexually assaulted on the premises by a man who entered her apartment and assaulted her in a similar manner to the prior assaults alleged above].

[2] Use of Form

The form in [1], *above*, contains allegations of a landlord's negligence in failing to provide adequate security precautions against and failure to warn tenants of criminal activity that had taken place on the premises. These

allegations may be used in place of Paragraph 5 of *§ 334.50[1]*.

[3] Landlord's Duty to Protect Tenant Against Criminal Conduct

A landlord has the duty to exercise reasonable care to warn tenants and protect them with adequate security against foreseeable criminal conduct by third parties [*O'Hara v. Western Seven Trees Corp. (1977) 75 Cal. App. 3d 798, 803-804, 142 Cal. Rptr. 487]* . Landlords owe a duty to their tenants to protect them from reasonably foreseeable risks, including the risk of criminal conduct by third parties [*see, e.g.,* *Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal. 4th 666, 675, 25 Cal. Rptr. 2d 137, 863 P.2d 207]* . However, a commercial landlord does not have a duty to safeguard its tenant's *property* from reasonably foreseeable criminal activity by third parties [*Royal Neckwear Co. v. Century City, Inc. (1988) 205 Cal. App. 3d 1146, 1151-1152, 252 Cal. Rptr. 810]* . In addition, a landlord does not have a duty to other tenants to investigate the background of a tenant who was exhibiting unusual behavior absent any concrete indication of a dangerous propensity [*Davis v. Gomez (1989) 207 Cal. App. 3d 1401, 1406, 255 Cal. Rptr. 743]* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.58

§ 334.58 Complaint by Tenant Against Landlord for Compensatory and Punitive Damages for Interruption and Termination of Utility Service, for Damages for Tortious Interference With Beneficial Contractual Relations, and for Temporary Restraining Order and Preliminary Injunction to Prevent Continuing Violation of Civ. Code § 789.3 [Civ. Code §§ 789.3, 3333]

[1] FORM Complaint by Tenant Against Landlord for Compensatory and Punitive Damages for Interruption and Termination of Utility Service, for Damages for Tortious Interference With Beneficial Contractual Relations, and for Temporary Restraining Order and Preliminary Injunction to Prevent Continuing Violation of Civ. Code § 789.3 [Civ. Code §§ 789.3, 3333]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	COMPLAINT FOR TEMPORARY RESTRAINING
Defendant(s).	)	ORDER, PRELIMINARY INJUNCTION, AND
	)	DAMAGES
	)	

FIRST CAUSE OF ACTION

Plaintiff alleges:

1. At all times mentioned in this complaint, plaintiff resided at _____ [*street address and city*],

California, in accordance with a written agreement between plaintiff, as tenant, and defendant, _____ [*name*], as landlord.

2. Before _____ [*date*], plaintiff resided at _____ [*street address and city*], with his/her eight minor children, ages 17, 14, 12, 10, 7, 6, 4, and 6 months.

3. [*Fictitious name allegation, if appropriate. See § 334.50[1], P 2*].

4. On or about _____ [*date*], defendant landlord, _____ [*name*], with the intent to terminate plaintiff's occupancy of the premises, did willfully and maliciously, directly and indirectly, cause the termination and interruption of plaintiff's _____ [*e.g.*, natural gas] utility service.

5. Plaintiff was without _____ [this *or* these] service(s) for a period of _____ [*e.g.*, three days].

6. As a direct and proximate result of defendant's actions plaintiff has suffered and is suffering general damages in the amount of $_____.

7. Plaintiff is entitled to statutory punitive damages under *Civil Code Section 789.3(c)* in the amount of $100 for each day or part of a day that defendant remains in violation of *Civil Code Section 789.3(a)* and in no event is plaintiff entitled to less than $250 for each cause of action.

8. Plaintiff is entitled to receive from defendant _____ [*name*] punitive damages in the amount of $_____.

SECOND CAUSE OF ACTION

Plaintiff alleges:

9. Plaintiff hereby incorporates Paragraphs 1, 2, and 3 of his/her First Cause of Action.

10. The written tenancy agreement mentioned above created a periodic estate in plaintiff's favor in _____ [*street address and city*], California.

11. On or about _____ [*date*], defendant landlord, _____ [*name*], willfully and maliciously trespassed on plaintiff's estate for the purpose of terminating plaintiff's _____ [*e.g.*, electric] utilities.

12. As a direct and proximate result thereof, plaintiff has suffered general damages in the amount of $_____.

THIRD CAUSE OF ACTION

Plaintiff alleges:

13. Plaintiff hereby incorporates Paragraphs 1, 2, and 3 of his/her First Cause of Action.

14. On or about _____ [*date*], defendant landlord, _____ [*name*], with intent to

terminate plaintiff's occupancy of the premises, did willfully and maliciously, directly and indirectly, cause the termination and interruption of plaintiff's _____ [*e.g.*, electrical] utility service.

15. Plaintiff's _____ [*e.g.*, electrical] utility service was restored by defendant landlord, _____ [*name*], on or about _____ [*date*], following a demand letter from plaintiff's attorney.

16. Plaintiff was without _____ [*e.g.*, electrical] utility service from _____ [*date*], to and including _____ [*date*], or a total of _____ [*e.g.*, 15] days or fraction thereof.

17. As a further direct and proximate result of defendant's actions, plaintiff has _____ [*specify loss, e.g.*, lost his/her perishable food stock that was kept in the electric refrigerator, all to his/her special damage in the amount of $_____].

18. As a direct and proximate result of defendant's actions, plaintiff has suffered and is suffering damages in the amount of $_____

19. Plaintiff is entitled to statutory punitive damages under *Civil Code Section 789.3(c)* in the amount of $100 for each day or part of the day that defendant remains in violation of *Civil Code Section 789.3(a)* and in no event is plaintiff entitled to less than $250 for each cause of action.

20. Plaintiff is entitled to receive from defendant landlord, _____ [*name*], punitive damages in the amount of $_____.

FOURTH CAUSE OF ACTION

Plaintiff alleges:

21. Plaintiff hereby incorporates Paragraphs 1, 2, and 3 of his/her First Cause of Action.

22. On or about _____ [*date*], plaintiff contacted _____ [*name of utility, e.g.*, Pacific Gas and Electric Company] and restored his/her _____ [*e.g.*, natural gas] utility service [in the name that he/she previously had used for utility services, to wit, _____ (*name*)].

23. On or about _____ [*date*], defendant landlord, _____ [*name*], in violation of *Penal Code Section 593c*, which declares it a felony to willfully and maliciously shut off, remove, obstruct, injure, or in any way interfere with any valve installed on, connected to, or operated in connection with any main or pipeline created, operated, or maintained by proper authority for the purposes of transporting, conveying, or distributing _____ [*e.g.*, gas] for light, heat, power, or any other purpose, terminated his/her _____ [*e.g.*, natural gas] utility.

24. When defendant landlord, _____ [*name*], terminated plaintiff's _____ [*e.g.*, gas] service, he/she thereby interfered with a contractual relationship between plaintiff and the _____ [*name of utility, e.g.*, Pacific Gas and Electric Company].

25. The above contractual right was a valuable one and defendant's intentional interference with it has caused plaintiff serious injury, all to his/her damage in the amount of $_____.

FIFTH CAUSE OF ACTION

Plaintiff alleges:

26. Plaintiff hereby incorporates Paragraphs 1, 2, and 3 of his/her First Cause of Action; Paragraphs 14, 15, and 16 of his/her Third Cause of Action; and Paragraphs 22, 23, and 24 of his/her Fourth Cause of Action.

27. Plaintiff is entitled to appropriate injunctive relief during the pendency of this action under *Civil Code Section 789.3(c)* and without this injunctive relief will suffer irreparable injury in that _____ [*specify particular facts that will constitute great and irreparable injury, e.g.*, plaintiff will be without lights and without means to prepare food and plaintiff's food will spoil because the refrigerator will not work]. Plaintiff has no plain, speedy, and adequate remedy at law because _____ [*specify facts in addition to those previously alleged that tend to show the inadequacy of any legal remedy that plaintiff might pursue, e.g.*, it will be impossible for plaintiff to determine the precise amount of damage that he/she will suffer if defendant's conduct is not restrained].

WHEREFORE, plaintiff prays for judgment as follows:

1. For an order requiring defendant to show cause, if any he/she has, why he/she should not be enjoined as hereinafter set forth, during the pendency of this action;

2. For a temporary restraining order and preliminary injunction enjoining defendant and his/her agents, servants, and employees, and all persons acting under, in concert with, or for defendant from interrupting or terminating plaintiff's utility services during the pendency of this action.

3. For general damages on the First Cause of Action in the amount of $_____.

4. For punitive damages on the First Cause of Action.

5. For general damages on the Second Cause of Action in the amount of $_____.

6. For special damages on the Third Cause of Action in the amount of $_____.

7. For general damages on the Third Cause of Action in the amount of $_____.

8. For punitive damages on the Third Cause of Action.

9. For general damages on the Fourth Cause of Action in the amount of $_____.

10. For reasonable attorney's fees as provided for in *Civil Code Section 789.3(d)*.

11. For costs of suit.

12. For such other and further relief as the court may deem just and proper and according to equity.

_____[*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.50[1].*]

CERTIFICATION RE NOTICE

I hereby certify that _____ [*either* on _____ (*date*), I informed defendant of what time and where the foregoing application for a temporary restraining order would be made *or* in good faith I attempted to inform defendant of what time and where the foregoing application for a temporary restraining order would be made, by _____ (*specify efforts*), but I was unable to do so *or* notice to defendant of the foregoing application for a temporary restraining order should not be required for the reason that _____ (*specify*)].

I declare under penalty of perjury that the foregoing is true and correct and that this certificate was executed on _____ [*date*], at _____ [*city*], California.

_____ [*signature*]
[Attorney for] Plaintiff

[2] Use of Form

This form is for use in an action by a tenant against a landlord when the landlord has interrupted and terminated the tenant's utility services. It includes causes of action based on *Civ. Code § 789.3*, trespass, and tortious interference with a contractual relationship. The form also includes a cause of action for injunctive relief. It is based on the complaint filed in *Elliott v. Kennon*, Sacramento Superior Court No. 229383, furnished through the courtesy of Attorney Robert E. Leidigh.

In preparing the above complaint, if a preliminary injunction is sought, counsel should either file affidavits (or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*]) in support of the allegations in the complaint or take care to plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan G. Co. v. San Juan R. etc. Assn. (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* . If no affidavits (or declarations) are prepared, the complaint would have to be verified [*see Code Civ. Proc. § 527*].

PRACTICE TIP:
Notice of Lis Pendens. When appropriate, a notice of lis pendens might be filed with this complaint to bind subsequent purchasers and mortgagees to the terms of the injunction. *By Myron Moskovitz*

[3] Verification

Verification of the complaint [*see* Code Civ. Proc. § 466] is required if plaintiff is seeking a temporary restraining order and/or preliminary injunction on a complaint alone without the use of affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) [*Code Civ. Proc. § 527(a)*]. Otherwise, verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified)]. If plaintiff does verify the complaint, however, the defendant must file a verified answer in a superior court action [*Code Civ. Proc. §§ 92(b), 446(a)*] and is precluded from making a general denial in superior court [*Code Civ. Proc. § 431.30(d)*]. For further discussion of how verifying a complaint affects the answer, see Ch. 26, *Answers* .

[4] Certification re Notice

When a temporary restraining order is sought without formal notice, the applicant or the applicant's attorney is required to certify to the court under oath that [*Code Civ. Proc. § 527(c)(2)*]:

- Within a reasonable time before the application he or she informed the opposing party (or his or her attorney, if any) at what time and where the application would be made;

- He or she in good faith attempted to inform the opposing party (or attorney) but was unable to do so, specifying the efforts made to do so; or

- For reasons specified, he or she should not be required to inform the opposing party (or attorney).

[5] Injunctive Relief

Under *Civ. Code § 789.3(c)*, a tenant may seek appropriate injunctive relief to prevent continuing or further violations of the provisions of *Civ. Code § 789.3* during the pendency of the action. It is unclear whether this statutory authority for injunctive relief lessens the plaintiff's pleading burden so that plaintiff need not plead irreparable injury and no adequate remedy at law. It is also unclear whether a permanent injunction may be obtained since the statute uses the words "during the pendency of the action." The above complaint does not seek permanent injunctive relief. It does include allegations of irreparable injury and no adequate remedy at law.

[6] Punitive Damages

In applying the penalty provision in *Civ. Code § 789.3(c)*, a court may not cumulate by counting any day when the tenant was not actually "deprived" of utility service, such as when the tenant could have restored service on his or her own initiative by some reasonable means (if possible) or any day when the tenant was not actually occupying the premises. In addition, a court also may not apply the penalty provision so that the total penalty is disproportionate in the circumstances [*Hale v. Morgan (1978) 22 Cal. 3d 388, 397-407, 149 Cal. Rptr. 375, 584 P.2d 512* (reversing and remanding for reassessment of constitutionally excessive penalty); *see* *Kinney v. Vaccari (1980) 27 Cal. 3d 348, 352-357, 165 Cal. Rptr. 787, 612 P.2d 877* (penalties of $6,000 for termination of each of six tenants' services for 60 days totaling $36,000 as not unconstitutionally excessive when utilities were shut off with no provocation, tenants tendered rent in sufficient amount to pay utility bill, gas was cut off in winter depriving tenants of heat, and tenants were not unreasonable in remaining in occupancy and trying to have utilities restored)].

Civ. Code § 3295(e) prohibits a claim for punitive damages from stating an amount.

[7] Cross References

For additional forms and procedure for use in obtaining injunctive relief, see Ch. 303, *Injunctions* .

California Forms of Pleading and Practice--Annotated

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Volume 29: Landlord and Tenant: General Introduction thru Rent Control-Chs. 330-339
Chapter 334 LANDLORD AND TENANT: CLAIMS FOR DAMAGES
PART IV. FORMS
A. Suing a Landlord for Damages and Related Actions

29-334 California Forms of Pleading and Practice--Annotated § 334.59

§ 334.59 Complaint by Tenant Against Landlord for Compensatory and Punitive Damages for Interference With Tenant's Use of Premises and for Temporary Restraining Order and Preliminary Injunction to Prevent Continuing Violation of Civ. Code § 789.3(b) [Civ. Code § 789.3(b)]

[1] FORM Complaint by Tenant Against Landlord for Compensatory and Punitive Damages for Interference With Tenant's Use of Premises and for Temporary Restraining Order and Preliminary Injunction to Prevent Continuing Violation of Civ. Code § 789.3(b) [Civ. Code § 789.3(b)]

[*Caption. See § 334.58.*]

FIRST CAUSE OF ACTION

Plaintiff alleges:

1. [*Capacity and residence. See § 334.58[1], P 1.*]

2. [*Plaintiff's former residence. See § 334.58[1], P 2.*]

3. [*Fictitious name allegation, if appropriate. See § 334.50[1], P 2.*]

4. On or about _____ [*date*], defendant landlord, _____ [*name*], with the intent to terminate plaintiff's occupancy of the premises, did willfully and maliciously, directly and indirectly, _____ [*specify action proscribed by Civ. Code § 789.3(b), e.g.,* prevent plaintiff from gaining reasonable access to the premises by changing the locks on all the doors without giving plaintiff keys for the new locks].

5. [*Specify length of time during which interference with occupancy of premises continued, e.g.,* Plaintiff was prevented

reasonable access to the premises for a period of seven days.]

6. As a direct and proximate result of defendant's actions, plaintiff has suffered and is suffering general damages in the amount of $_____.

7. Plaintiff is entitled to statutory punitive damages under *Civil Code Section 789.3(c)* in the amount of $100 for each day or part of a day that defendant remains in violation of *Civil Code Section 789.3(b)* and in no event is plaintiff entitled to less than $250 for each cause of action.

8. Plaintiff is entitled to receive from defendant _____ [*name*] punitive damages.

SECOND CAUSE OF ACTION

Plaintiff alleges:

9. Plaintiff hereby incorporates Paragraphs 1, 2, and 3 of his/her First Cause of Action.

10. The written tenancy agreement mentioned above created a periodic estate in plaintiff's favor in _____ [*street address and city*], California.

11. On or about _____ [*date*], defendant landlord, _____ [*name*], willfully and maliciously trespassed on plaintiff's estate for the purpose of _____ [*specify, e.g.*, changing the locks on all the doors and windows to the premises].

12. As a direct and proximate result thereof, plaintiff has suffered general damages in the amount of $_____.

THIRD CAUSE OF ACTION

Plaintiff alleges:

13. Plaintiff hereby incorporates Paragraphs 1, 2, and 3 of his/her First Cause of Action.

14. On or about _____ [*date*], defendant landlord, _____ [*name*], with the intent to terminate plaintiff's occupancy of the premises, did willfully and maliciously, directly and indirectly, _____ [*specify action proscribed by Civ. Code § 789.3(b), e.g.*, prevent plaintiff from gaining reasonable access to the premises by changing the locks on all the doors and windows without giving plaintiff keys for the new locks].

[15. *If the landlord ceased interfering with plaintiff's use and occupancy of the premises, specify when this occurred, e.g.*, Plaintiff received keys for the new locks from defendant landlord, _____ (*name*), on or about _____ (*date*), following a demand letter from plaintiff's attorney.]

[16. *Specify length of time during which interference with occupancy continued, e.g.*, Plaintiff was prevented reasonable access to the premises from _____ (*date*), to and including _____ (*date*), or a total of _____ (*e.g.*, seven) days or fraction thereof.]

17. As a further direct and proximate result of defendant's actions, plaintiff _____ [*specify loss or*

damages, e.g., was forced to pay fines for _____ (*e.g., 20*) library books which were overdue since he/she could not gain access to them to return them on the due date, all to his/her special damage in the amount of $_____].

18. As a direct and proximate result of defendant's actions, plaintiff has suffered and is suffering damages in the amount of $_____.

19. Plaintiff is entitled to statutory punitive damages under *Civil Code Section 789.3(c)* in the amount of $100 for each day or part of a day that defendant remains in violation of *Civil Code Section 789.3(b)* and in no event is plaintiff entitled to less than $250 for each cause of action.

20. Plaintiff is entitled to receive from defendant landlord, _____ [*name*], punitive damages.

FOURTH CAUSE OF ACTION

Plaintiff alleges:

21. Plaintiff hereby incorporates Paragraphs 1, 2, and 3 of his/her First Cause of Action; and Paragraphs 14, 15, 16, and 17 of his/her Third Cause of Action.

22. Plaintiff is entitled to appropriate injunctive relief during the pendency of this action under *Civil Code Section 789.3(c)* and without this injunctive relief will suffer irreparable injury in that _____ [*specify particular facts that will constitute great and irreparable injury, e.g.*, plaintiff will continue to be without a home and without access to his/her, personal possessions and will be forced to stay in a motel and buy new personal possessions such as clothes and cooking utensils]. Plaintiff has no plain, speedy, and adequate remedy at law because _____ [*specify facts in addition to those previously alleged that tend to show the inadequacy of any legal remedy that plaintiff might pursue, e.g.*, it will be impossible for plaintiff to determine the precise amount of damage that he/she will suffer if defendant's conduct is not restrained].

WHEREFORE, Plaintiff prays for judgment as follows:

1. For an order requiring defendant to show cause, if any he/she has, why he/she should not be enjoined as hereinafter set forth, during the pendency of this action;

2. For a temporary restraining order and preliminary injunction enjoining defendant and his/her agents, servants, and employees, and all persons acting under, in concert with, or for defendant from _____ [*specify, e.g.*, interfering with plaintiff's reasonable access to the premises by changing the locks].

3. For general damages on the First Cause of Action in the amount of $_____.

4. For punitive damages on the First Cause of Action.

5. For general damages on the Second Cause of Action in the amount of $_____.

6. For punitive damages on the Second Cause of Action.

7. For general damages on the Third Cause of Action in the amount of $_____.

8. For punitive damages on the Third Cause of Action.

9. For reasonable attorney's fees as provided in *Civil Code Section 789.3(d)*.

10. For costs of suit.

11. For such other and further relief as the court may deem just and proper and according to equity.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.50[1].*]

[*Certification of Notice. See § 334.58[1].*]

[2] Use of Form

The form in [1], *above*, is for use in an action by a tenant against a landlord when the landlord has willfully (1) prevented the tenant from gaining reasonable access to the property by changing the locks or using a bootlock or by any other similar method or device; (2) removed outside doors or windows; or (3) removed from the premises the tenant's personal property, the furnishings, or any other items without the tenant's prior written consent, except when done in accordance with the procedure set forth in *Civ. Code §§ 1980-1991* (disposition of personal property remaining on premises at termination of tenancy) [*see Civ. Code § 789.3(b)*]. This complaint includes causes of action based on *Civ. Code § 789.3(b)*, *Civ. Code § 789.3(d)* (injunctive relief), and trespass.

In preparing the above complaint, if a preliminary injunction is sought, counsel should either file affidavits (or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*]) in support of the allegations in the complaint or take care to plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan G. Co. v. San Juan R. etc. Assn. (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* . If no affidavits (or declarations) are prepared, the complaint would have to be verified [*see Code Civ. Proc. § 527*].

[3] Amount of Punitive Damages Must Not Be Stated

Civ. Code § 3295(e) prohibits a claim for punitive damages from stating an amount.

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Volume 29: Landlord and Tenant: General Introduction thru Rent Control-Chs. 330-339
Chapter 334 LANDLORD AND TENANT: CLAIMS FOR DAMAGES
PART IV. FORMS
A. Suing a Landlord for Damages and Related Actions

29-334 California Forms of Pleading and Practice--Annotated § 334.60

§ 334.60 Complaint by Tenant Against Landlord for Untenantable Dwelling for Damages and for Repair Order [Civ. Code §§ 1941.1, 1942.4, 3300]

[1] FORM Complaint by Tenant Against Landlord for Untenantable Dwelling for Damages and for Repair Order [Civ. Code §§ 1941.1, 1942.4, 3300]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AND REPAIR OR-
_____ [*name*], [and DOES I	)	DER
through _____,]	)	(Maintaining Dwelling in Untenantable Condition)
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. At all times mentioned in this complaint, defendant was the _____ [*specify, e.g.,* owner] of a residential rental unit consisting of _____ [*describe, e.g.,* a house] (referred to below as "the dwelling") situated at _____ [*street address and city*], California.

[2. *Fictitious name allegation, if appropriate. See § 334.50[1], P 2.*]

3. Under *Civil Code Section 1941*, defendant was required to put the dwelling in a condition fit for human occupation

before renting it and to repair all subsequent dilapidations, other than those caused by the tenant's want of ordinary care, that rendered the dwelling untenantable, including _____ [*specify one or more characteristics listed in Civ. Code § 1941.1, e.g.,* effective waterproofing and weather protection of the roof and exterior walls].

4. On or about _____ [*date*], plaintiff and defendant entered into _____ [a written *or* an oral] _____ [lease *or* rental agreement] by the terms of which defendant rented the dwelling to plaintiff _____ [*describe nature of tenancy, e.g.,* on a month-to-month basis] at the agreed rental of $_____ per _____ [*e.g.,* month], payable _____ [*e.g.,* monthly in advance on the _____ day of each and every month], commencing on _____ [*date*], _____ [on which date plaintiff entered into possession of the dwelling *or* and plaintiff entered into possession of the dwelling on _____ (*date*)]. [A copy of the rental agreement is attached to this complaint as Exhibit A and made a part of this complaint.]

5. _____ [At the time plaintiff entered into possession of the dwelling *or* From on or about _____ (*date*)] and since, the dwelling has been and is untenantable for the reason that it substantially lacked and continues to lack _____ [*specify, e.g.,* effective waterproofing and weather protection]. The _____ [*specify, e.g.,* lack of effective waterproofing and weather protection] was/were in no way caused by any act or omission of plaintiff in violation of *Civil Code Section 1929* or *1941.2*.

6. _____ [*Specify circumstances under which plaintiff discovered conditions rendering dwelling untenantable, e.g.,* Plaintiff discovered the above conditions on or about _____ (*date*), which was the first day of plaintiff's tenancy during which it rained, when rainwater leaked through a number of places in the roof and walls into the interior of the dwelling].

7. On or about _____ [*date*], plaintiff notified the defendant _____ [orally *or* in writing] of the _____ [*specify, e.g.,* leaking roof and exterior walls] and requested that he/she repair _____ [it *or* them], but defendant failed to do so.

8. On or about _____ [*date*], _____ [*identify public officer or employee responsible for enforcing housing law*], after inspecting the dwelling, served a written notice informing defendant of his/her obligation _____ [*specify, e.g.,* to repair the roof and exterior walls]. [A copy of the notice is attached to this complaint as Exhibit B and made a part of this complaint.]

9. Defendant failed _____ [*specify, e.g.,* to repair the roof and exterior walls] within 35 days after the notice specified in Paragraph 8 was served or at all.

[*EITHER*]

10. At all times mentioned in this complaint, defendant _____ [demanded and plaintiff paid *or* collected from plaintiff] the rent as it became due under the terms of the rental agreement as specified in Paragraph 4.

[*OR*]

10. On or about _____ [*date*], defendant issued a notice of rent increase to plaintiff [a copy of which is attached to this complaint as Exhibit C and made a part of this complaint].

[*OR*]

10. On or about _____[*date*] defendant issued plaintiff a three-day notice to quit for nonpayment of rent pursuant to *Code of Civil Procedure Section 1161(2)* [a copy of which is attached to this complaint as Exhibit C and made a part of this complaint].

[*CONTINUE*]

11. As a proximate result of the lack of _____ [*specify, e.g.,* effective waterproofing and weather protection of the roof and exterior walls] and defendant's failure and refusal to _____ [*specify, e.g.,* repair them], _____ [*specify conditions caused by defect, e.g.,* rainwater leaked and continues to leak in substantial quantities into the interior of the dwelling on each day that it rains], thereby rendering the dwelling untenantable.

12. The _____ [*specify, e.g.,* leaking roof and exterior walls] constituted and continue to constitute a nuisance within the meaning of *Civil Code Section 3480* in that _____ [*specify, e.g.,* they created and continue to create a health hazard to plaintiff and interfered and continue to interfere with plaintiff's comfortable enjoyment of the dwelling (and of plaintiff's personal property within the dwelling)].

13. As a proximate result of the dwelling's untenantability and of the nuisance as alleged in this complaint, plaintiff suffered discomfort and annoyance, all to his/her general damage in the sum of $_____ for each day of occupancy of the premises.

14. _____ [*Allege in this and subsequently numbered paragraphs any special damage sustained by plaintiff, e.g.,* As a further proximate result of the dwelling's untenantability and of the _____ (*specify, e.g.,* leaking roof and walls), as herein alleged, _____ (*specify, e.g.,* plaintiff's furniture and furnishings were damaged) in the sum of $_____].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages in the sum of $_____ per day for each day from and after _____ [*date*].

2. For special damages for _____ [*specify, e.g.,* injury to personal property] in the sum of $_____.

3. For an order that defendant repair _____ [*specify, e.g.,* the roof and exterior walls].

4. For attorney fees in prosecuting this action in an amount to be fixed by the court.

5. For costs of suit herein incurred.

6. For such other and further relief as the court may deem just and proper and according to equity.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.50[1]* .]

[2] Use of Form

The form in [1], *above*, is for use by a tenant to sue a landlord under *Civ. Code § 1942.4* to recover damages sustained as a proximate result of the untenantability of a rental dwelling when the landlord has demanded or collected rent, issued a notice of rent increase, or issued a three-day notice to quit for nonpayment of rent. The complaint also seeks an order that the landlord repair the untenantable conditions [*Civ. Code § 1942.4(c)*]. The remedy authorized by *Civ. Code § 1942.4* may be utilized in addition to any other remedy provided by *Civ. Code § 1940 et seq.*, by the rental agreement or lease, by any other applicable statutory provision, or by the common law [*Civ. Code § 1942.4(f)*]. However, the tenant is under no obligation to undertake any other remedy before exercising his or her rights under *Civ. Code § 1942.4* [*Civ. Code § 1942.4(d)*]. If applicable, this form should be joined with causes of action for breach of the implied warranty of habitability and nuisance [*see § 334.61*].

For a listing of the affirmative standard characteristics enumerated in *Civ. Code § 1941.1*, see *§ 332.10[1][b][ii]*.

For a form of complaint for use to sue in tort for damages for breach of the implied warranty of habitability, see *§ 334.61*. For a form of complaint for use to recover excessive rent paid during the period that the premises were uninhabitable, see *§ 334.72*.

[3] Allegations

A complaint for damages for breach of the duty to maintain a residential unit in tenantable condition must allege all of the following [*Civ. Code §§ 3281, 3282, 3300, 3333*]:

- A duty on the landlord's part to the tenant;
- A breach of that duty;
- Detriment to the tenant;
- Proximate causation; and
- Damages.

In addition, a complaint for damages under *Civ. Code § 1942.4* must allege the existence of the conditions set forth in *Civ. Code § 1942.4(a)* that give rise to the cause of action.

The form in [1], *above*, alleges:

- Defendant's ownership of or other interest in residential rental property (Paragraph 1).
- Fictitiously named defendants, if any (Paragraph 2) [*see Code Civ. Proc. § 474*].
- The landlord's statutory duty to maintain in a tenantable condition residential premises that he or she rents to another (Paragraph 3) [*Civ. Code § 1941*].
- The execution of a lease or rental agreement between the plaintiff as tenant and the defendant as landlord, giving rise to the landlord's statutory duty to maintain the premises in a tenantable condition

(Paragraph 4) [*see Civ. Code §§ 1941, 1942.4(a), 3300*].

- Defendant's breach of duty, that is, the conditions rendering the premises untenantable (Paragraph 5) [*see Civ. Code §§ 1941.1, 1942.4(a)(1)*].

- The conditions rendering the premises untenantable were not caused by any act or omission of the tenant in violation of *Civ. Code § 1929* or *1941.2* (Paragraph 5) [*see Civ. Code § 1942.4(a)(4)*].

- Plaintiff's discovery of the conditions rendering the premises untenantable (Paragraph 6).

- Plaintiff's notice to the defendant of the dwelling's untenantability (Paragraph 7).

- Notice to the defendant by a public officer or employee of the untenantable condition of the premises and of the defendant's duty to abate the nuisance or repair the condition (Paragraph 8) [*see Civ. Code § 1942.4(a)(2)*].

- Defendant's further breach of duty by failing to repair the condition within 35 days after service of notice (Paragraph 9) [*see Civ. Code § 1942.4(a)(3)*].

- Defendant's demand or collection of rent and plaintiff's payment during the period in which all of the conditions listed in *Civ. Code § 1942.4(a)(1)-(4)* existed or, if applicable, defendant's issuance of a notice of rent increase or a three-day notice to quit for nonpayment of rent (Paragraph 10) [*see Civ. Code § 1942(a)*].

- The detriment sustained by plaintiff as a result of the untenantability of the premises (Paragraphs 11, 13, 14) [*see Civ. Code §§ 1942.4(a), 3282, 3300*].

- The characterization of the conditions rendering the premises untenantable as a nuisance (Paragraph 12) [*see Civ. Code §§ 3333, 3479*; *Code Civ. Proc. § 731*].

- Proximate causation (Paragraphs 11, 13, 14) [*see Civ. Code §§ 3300, 3333*].

- Damages (Paragraphs 13, 14) [*see Civ. Code §§ 1942.4(b)(1), 3281, 3300, 3333*].

[4] Landlord's Duty to Maintain Tenantability of Dwelling

The landlord of a building intended for human occupancy must, in the absence of an agreement to the contrary, put it into a condition fit for human occupation and repair all subsequent dilapidations that render it untenantable, except those mentioned in *Civ. Code § 1929* [*Civ. Code § 1941*; *see § 332.10[1][b][ii]*]. *Civ. Code § 1929* requires that the hirer of a thing repair all deteriorations to it caused by his or her want of ordinary care.

The landlord is under no duty to repair a dilapidation if the tenant is in substantial violation of any of the affirmative obligations set forth in *Civ. Code § 1941.2* [discussed in *§ 332.10[1][b][iii]*] and the violation contributed substantially to the existence of the dilapidation or interfered substantially with the landlord's obligation under *Civ. Code § 1941* to effect the necessary repairs [*Civ. Code § 1941.2(a)*].

[5] Availability of Statutory Remedy

The remedy provided by *Civ. Code § 1942.4* is available when all of the following conditions exist [*Civ. Code § 1942.4(a)*]:

- The rental dwelling (1) is declared substandard as set forth in *Health & Safety Code § 17920.3* because conditions listed in that section exist to an extent that endangers the life, limb, health, property, safety, or welfare of the public or the occupants of the dwelling, (2) contains lead hazards as set forth in *Health & Safety Code § 17920.10*, or *(3)* substantially lacks affirmative standard characteristics set forth in *Civ. Code § 1941.1* [*see Ch. 332, Landlord and Tenant: The Tenancy, § 332.10[1][b][ii]*].

- A public officer or employee who is responsible for the enforcement of any housing law has notified the landlord, or the landlord's agent, in a written notice served after inspection of the premises that informs the landlord of his or her obligations to abate the nuisance or repair the substandard conditions. Service of notice is deemed complete on deposit in the U.S. Mail [*Civ. Code § 1942.4(a)(2), (3)*].

- The conditions have existed and have not been abated 35 days beyond the date the notice specified in *Civ. Code § 1942.4(a)(2)* was served, and the delay is without good cause.

- The conditions were not caused by an act or omission of the tenant or lessee in violation of *Civ. Code § 1929* or *Civ. Code § 1941.2* [*see § 332.10[1][b][iii]*].

[6] Damages Recoverable

Civ. Code § 1942.4(a) provides that a landlord may not demand or collect rent, issue a notice of rent increase, or issue a three-day notice to pay rent or quit pursuant to *Code Civ. Proc. § 1161(2)* [*see § 333.10[2]*] when the statutory conditions set forth in [5], *above*, exist. A landlord who violates *Civ. Code § 1942.4(a)* is liable to the tenant for (1) the "actual damages" sustained by the tenant, and (2) "special damages" of not less than $100 and not more than $5,000 [*Civ. Code § 1942.4(b)*]. "Actual damages" as used in *Civ. Code § 1942.4(b)(1)* includes damages for emotional distress [*McNairy v. C.K. Realty (2007) 150 Cal. App. 4th 1500, 1506, 59 Cal. Rptr. 3d 429]* .

However, the language of *Civ. Code § 1942.4(b)* is ambiguous because the term "actual damages" includes "special damages" [*see Colvig v. RKO General, Inc. (1965) 232 Cal. App. 2d 56, 68-69, 42 Cal. Rptr. 473* (actual damages consist of general and special damages); for further discussion of the nature of damages, see Ch. 177, *Damages*]. If "actual damages" is correctly used in *Civ. Code § 1942.4(b)*, then the Legislature may have intended "special damages" to mean "punitive damages," which are not "actual damages" [*see Civ. Code § 3294* (defining punitive damages); *cf. Civ. Code 1942.5(f)*, relating to retaliatory eviction in which the Legislature has expressly authorized recovery of "actual damages" and "punitive damages"]. If "special damages" is correctly used, then the Legislature may have intended "actual damages" to mean "general damages," although this seems unlikely because it would impose a limit on recovery of part of the actual damages.

[7] Order to Abate and Repair

Any court that awards damages for untenantable conditions may also order the landlord to abate any nuisance at the rental dwelling and to repair any substandard conditions of the dwelling, which significantly or materially affect the health or safety of the occupants of the rental dwelling and are uncorrected. If the court orders repairs or corrections, the court's jurisdiction continues over the matter for the purposes of ensuring compliance [*Civ. Code § 1942.4(c)*].

[8] Attorney's Fees

In addition to the recovery of allowable costs of suit [*see Code Civ. Proc. §§ 1031, 1032*; *see also* Ch. 174, *Costs and Attorney's Fees*], the prevailing party is entitled to recover reasonable attorney's fees in an amount fixed by the court [*Civ. Code § 1942.4(b)*].

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Volume 29: Landlord and Tenant: General Introduction thru Rent Control-Chs. 330-339
Chapter 334 LANDLORD AND TENANT: CLAIMS FOR DAMAGES
PART IV. FORMS
A. Suing a Landlord for Damages and Related Actions

29-334 California Forms of Pleading and Practice--Annotated § 334.60A

§ 334.60A Complaint by Tenant Against Landlord Demanding or Collecting Rent for Untenantable Dwelling for Damages and for Lead Hazard Abatement Order [Civ. Code §§ 1941.1, 1942.4, 3300]

[1] FORM Complaint by Tenant Against Landlord Demanding or Collecting Rent for Untenantable Dwelling for Damages and for Lead Hazard Abatement Order [Civ. Code §§ 1941.1, 1942.4, 3300]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DAMAGES
Plaintiff,	)	AND REPAIR ORDER
vs.	)	(Maintaining Dwelling in
_____ [*name*],	)	Untenantable Condition Due to Lead Hazards)
[and DOES I through _____	)	
_____,]	)	[Amount demanded _____ (exceeds
Defendant	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. At all times mentioned in this complaint, defendant was the _____ [*specify, e.g.*, owner] of a residential rental unit consisting of _____ [*describe, e.g.*, a house] (referred to below as "the dwelling") situated at _____ [*street address and city*], California.

[2. *Fictitious name allegation, if appropriate. See § 334.50[1], P 2.*]

3. Under *Civil Code Section 1941*, defendant was required to put the dwelling in a condition fit for human occupation before renting it and to repair all subsequent dilapidations, other than those caused by the tenant's want of ordinary care, that rendered the dwelling untenantable, including abatement of lead hazards.

4. On or about _____ [*date*], plaintiff and defendant entered into _____ [a written *or* an oral] _____ [lease *or* rental agreement] by the terms of which defendant rented the dwelling to plaintiff _____ [*describe nature of tenancy, e.g.*, on a month-to-month basis] at the agreed rental of $_____ per _____ [*e.g.*, month], payable _____ [*e.g.*, monthly in advance on the _____ day of each and every month], commencing on _____ [*date*], _____ [on which date plaintiff entered into possession of the dwelling *or* and plaintiff entered into possession of the dwelling on _____ (*date*)]. [A copy of the rental agreement is attached to this complaint as Exhibit A and made a part of this complaint.]

5. [At the time plaintiff entered into possession of the dwelling and since, the dwelling has been and is untenantable for the reason that it substantially contains and continues to contain _____ [*specify lead hazards, e.g.*, deteriorating lead-based paint]. The _____ [*specify, e.g.*, deteriorating lead-based paint] was/were in no way caused by any act or omission of plaintiff in violation of *Civil Code Section 1929* or *1941.2*.

6. _____ [*Specify circumstances under which plaintiff discovered conditions rendering dwelling untenantable, e.g.*, Plaintiff discovered the above conditions on or about _____ (*date*), which was the first day of plaintiff's tenancy, when plaintiff discovered _____ (*specify quantity, e.g.*, more than two square feet of) peeling lead-based paint in the _____ (*specify location, e.g.*, kitchen)].

7. On or about _____ [*date*], plaintiff notified the defendant _____ [orally *or* in writing] of the _____ [*specify, e.g.*, deteriorating lead-based paint] and requested that he/she repair _____ [it *or* them], but defendant failed to do so.

8. On or about _____ [*date*], _____ [*identify public officer or employee responsible for enforcing housing law*], after inspecting the dwelling, issued a written notice informing defendant of his/her obligation _____ [*specify, e.g.*, to abate lead hazards]. [A copy of the notice is attached to this complaint as Exhibit B and made a part of this complaint.]

9. Defendant failed _____ [*specify, e.g.*, to abate the lead-based paint hazard] within 35 days after the notice specified in Paragraph 8 was served or at all.

10. At all times mentioned in this complaint, defendant _____ [demanded and plaintiff paid *or* collected from plaintiff] the rent as it became due under the terms of the rental agreement as specified in Paragraph 4.

11. As a proximate result of the _____ [*specify, e.g.*, deteriorating lead-based paint] and defendant's failure and refusal to _____ [*specify, e.g.*, abate the lead hazards], the dwelling has been rendered untenantable.

12. The _____ [*specify, e.g.*, deteriorating lead-based paint] constituted and continues to constitute a nuisance within the meaning of *Civil Code Section 3480* in that _____ [*specify, e.g.*, it created and continues to create a health hazard to plaintiff and interfered and continues to interfere with plaintiff's comfortable enjoyment of the dwelling and of plaintiff's personal property within the dwelling].

13. As a proximate result of the dwelling's untenantability and of the nuisance as alleged in this complaint, plaintiff suffered discomfort and annoyance, all to his/her general damage in the sum of $_____ for each day of occupancy of the premises.

14. _____ [*Allege in this and subsequently numbered paragraphs any special damage sustained by plaintiff*, e.g., As a further proximate result of the dwelling's untenantability and of the _____ (*specify, e.g.*, deteriorating lead-based paint), as herein alleged, _____ (*specify, e.g.*, plaintiff's furniture and furnishings were damaged) in the sum of $_____].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages in the sum of $_____ per day for each day from and after _____ [*date*].

2. For special damages for _____ [*specify, e.g.*, injury to personal property] in the sum of $_____.

3. For an order that defendant abate _____ [*specify, e.g.*, the lead hazards from deteriorating paint in the kitchen].

4. For attorneys' fees in prosecuting this action in an amount to be fixed by the court.

5. For costs of suit herein incurred.

6. For such other and further relief as the court may deem just and proper and according to equity.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.50[1]* .]

[2] Use of Form

The form in [1], *above*, is for use by a tenant to sue a landlord under *Civ. Code § 1942.4* to recover damages sustained as a proximate result of the untenantability of a rental dwelling when the rental agreement or lease under which the tenant holds possession was entered into or renewed on or after January 1, 1986 [*Civ. Code § 1942.4(f)*]. The complaint also seeks an order that the landlord abate the untenantable conditions [*Civ. Code § 1942.4(c)*]. The remedy authorized by *Civ. Code § 1942.4* may be utilized in addition to any other remedy provided by *Civ. Code § 1940 et seq.*, by the rental agreement or lease, by any other applicable statutory provision, or by the common law [*Civ. Code § 1942.4(f)*]. However, the tenant is under no obligation to undertake any other remedy before exercising his or her rights under *Civ. Code § 1942.4* [*Civ. Code § 1942.4(d)*]. If applicable, this form should be joined with causes of action including breach of the implied warranty of habitability and nuisance [*see § 334.61*].

[3] Allegations

For discussion of the allegations required in a complaint for damages for breach of the duty to maintain a residential unit in tenantable condition, see *§ 334.60[3]*.

In addition, a complaint alleging breach of the landlord's duty based on the presence of lead hazards must allege an aggregate affected area of the dwelling equal to or in excess of two square feet in any one interior room or space, 20

square feet on exterior surfaces, or 10 percent of the surface area on an interior or exterior type of component with a small surface area, such as window sills, baseboards, and trim (Paragraph 6) [*see Health & Safety Code § 17920.10(c)* (standards in effect until applicable regulations are adopted by Department of Health Services)].

[4] Landlord's Duty to Maintain Tenantability of Dwelling

For discussion of a landlord's duty to maintain the tenantability of a dwelling, see *§ 334.60[4]*.

[5] Availability of Statutory Remedy

For discussion of the availability of statutory remedies, see *§ 334.60[5]*.

[6] Damages Recoverable

For discussion of recoverable damages, see *§ 334.60[6]*.

[7] Order to Abate and Repair

Any court that awards damages for untenantable conditions may also order the landlord to abate any nuisance at the rental dwelling and to repair any substandard conditions of the dwelling, which significantly or materially affect the health or safety of the occupants of the rental dwelling and are uncorrected. If the court orders repairs or corrections, the court's jurisdiction continues over the matter for the purposes of ensuring compliance [*Civ. Code § 1942.4(c)*].

[8] Attorneys' Fees

In addition to the recovery of allowable costs of suit [*see Code Civ. Proc. §§ 1031, 1032*; *see also* Ch. 174, *Costs and Attorney's Fees*], the prevailing party is entitled to recover reasonable attorneys' fees in an amount fixed by the court [*Civ. Code § 1942.4(b)*].

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Volume 29: Landlord and Tenant: General Introduction thru Rent Control-Chs. 330-339
Chapter 334 LANDLORD AND TENANT: CLAIMS FOR DAMAGES
PART IV. FORMS
A. Suing a Landlord for Damages and Related Actions

29-334 California Forms of Pleading and Practice--Annotated § 334.61

§ 334.61 Complaint for Actual and Punitive Damages by Tenant Against Landlord for Breach of Implied Warranty of Habitability; Negligent Maintenance of Premises; Maintenance of Nuisance; Intentional Infliction of Emotional Distress; and Constructive Eviction [Civ. Code §§ 1714(a), 1941, 3294, 3300, 3333, 3479; Code Civ. Proc. § 731]

[1] FORM Complaint for Actual and Punitive Damages by Tenant Against Landlord for Breach of Implied Warranty of Habitability; Negligent Maintenance of Premises; Maintenance of Nuisance; Intentional Infliction of Emotional Distress; and Constructive Eviction [Civ. Code §§ 1714(a), 1941, 3294, 3300, 3333, 3479; Code Civ. Proc. § 731]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Breach of Implied Warranty of Habitability; Negli-
through _____,]	)	gence; Nuisance; Intentional Infliction of Emotional
Defendant(s).	)	Distress; and Constructive Eviction)
	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Breach of Implied Warranty of Habitability)

1. At all times mentioned in this complaint, defendant was the _____ [*specify, e.g.,* owner] of _____ [*describe residential rental unit, e.g.,* a house] (referred to below as "the premises") situated at _____ [*street address and city*], California.

[2. *Fictitious name allegation, if appropriate. See § 334.50[1], P 2.*]

3. On or about _____ [*date*], plaintiff and defendant entered into _____ [a written *or* an oral] agreement by the terms of which defendant rented the premises to plaintiff _____ [*describe nature of tenancy, e.g.,* on a month-to-month basis] at the agreed rental of $_____ per _____ [*e.g.,* month], payable _____ [*specify, e.g.,* in advance on the _____ day of each and every month], commencing on _____ [*date*], and impliedly warranted that the premises were habitable. [A copy of the rental agreement is attached to this complaint as Exhibit A and made a part of this complaint.]

4. In accordance with the rental agreement, plaintiff entered into possession of the premises on _____ [*date*], and continued to occupy them until _____ [*date*], on which date plaintiff vacated the premises.

5. At the time he/she rented the premises to plaintiff, the premises were unfit for human occupation in that _____ [*specify, e.g.,* they substantially failed to comply with those applicable building and housing code standards that materially affect the tenant's health and safety].

6. Specifically, at the time plaintiff took possession, the premises were uninhabitable and unfit for human occupation in that, among other things, _____ [*specify, e.g.,* the plumbing was inadequate, the roof leaked when it rained, the floor beneath the carpet was deteriorated and rotting, and the premises were infected with roaches]. None of these conditions was known to plaintiff at the time plaintiff moved into the premises.

7. From _____ [the date plaintiff moved into the premises *or* on or about _____ (*date*)], plaintiff became increasingly aware of the numerous defective and dangerous conditions listed above, and others, including, but not limited to, the following: _____ [*specify, e.g.,* leaking of sewage from the bathroom plumbing; defective and dangerous electrical wiring; structural weaknesses in the walls; and falling ceiling].

8. Commencing on or about _____ [*date*], and continuing through _____ [*date*], plaintiff repeatedly notified defendant, _____ [*specify manner of notice, e.g.,* both orally and in writing], of the defective and dangerous conditions described in this complaint and requested that defendant have them repaired, but defendant _____ [failed and refused to repair them, or any of them, or to have them or any of them repaired, within a reasonable time or at all *or specify which repairs were made and which were not made*].

9. Plaintiff paid defendant rent in the amount of _____ [*specify, e.g.,* $_____ per month for each month or portion thereof that he/she occupied the premises, for a total sum of $_____].

10. The _____ [premises as they existed in their defective and dangerous condition had no rental value whatsoever *or* reasonable rental value of the premises as they actually existed in their defective and dangerous condition was no more than $_____ per month *or* use of the premises was reduced _____ percent as a result of their defective and dangerous condition].

11. As a proximate result of defendant's breach of his/her implied warranty of habitability and his/her failure to repair

the defective and dangerous conditions or to have them repaired within a reasonable time or at all, plaintiff sustained general damages in the amount of $_____ [*difference between actual rent paid and reasonable rental value or difference between actual rent paid and rental value based on reduced use of premises*] per _____ [*e.g.,* month], for a total sum of $_____.

12. As a further proximate result of defendant's breach of his/her implied warranty of habitability and his/her failure to repair the defective and dangerous conditions or to have them repaired within a reasonable time or at all, plaintiff suffered property damage and economic loss including, but not limited to, _____ [*specify special damage sustained, e.g.,* water damage to furniture, rugs, mattress, and curtains], all to his/her further damage in the sum of $_____. As a further proximate result of defendant's maintenance of the nuisance, plaintiff suffered discomfort and annoyance, all to his/her general damage in the _____ [sum of $_____ *or* amount of $_____ per day for each day that he/she occupied the premises].

SECOND CAUSE OF ACTION
(Negligent Maintenance of Premises)

13. Plaintiff hereby incorporates Paragraphs 1-4, inclusive, of the First Cause of Action.

[14. Under the provisions of *Civil Code Section 1941*, defendant was required to put the premises in a condition fit for human occupation before renting them and to repair all subsequent dilapidations, other than those caused by the tenant's want of ordinary care, that rendered the premises untenantable.]

15. At the time he/she rented the premises to plaintiff, defendant so negligently owned, maintained, and repaired the premises as to cause them to be unfit for human occupation in that _____ [*specify, e.g.,* the premises substantially failed to comply with those applicable building and housing code standards that materially affect the health and safety of the tenant].

16. Specifically, as a proximate result of defendant's negligence as alleged above, the premises, at the time plaintiff took possession, were uninhabitable and unfit for human occupation in that, among other things, _____ [*specify, e.g.,* the plumbing was inadequate, the roof leaked when it rained, the floor beneath the carpet was deteriorated and rotting, and the premises were infected with roaches]. None of these conditions was known to plaintiff at the time plaintiff moved into the premises.

17. From _____ [the date plaintiff moved into the premises *or* on or about _____ (*date*)], plaintiff became increasingly aware of the numerous defective and dangerous conditions listed above, and others, including, but not limited to, the following: _____ [*specify, e.g.,* leaking of sewage from the bathroom plumbing; defective and dangerous electrical wiring; structural weaknesses in the walls; and falling ceiling].

18. Commencing on or about _____ [*date*], and continuing through _____ [*date*], plaintiff repeatedly notified defendant _____ [*specify manner of notice, e.g.,* both orally and in writing] of the defective and dangerous conditions described in this complaint and requested that defendant have them repaired, but defendant _____ [failed and refused to repair them, or any of them, or to have them or any of them repaired, within a reasonable time or at all *or specify which repairs were made and which were not made*].

19. As a proximate result of defendant's negligence and his/her failure to repair the defective and dangerous conditions or to have them repaired within a reasonable time or at all, as alleged above, plaintiff suffered serious emotional and physical distress, all to his/her general damage [in the sum of $_____].

[20. As a further proximate result of defendant's negligence and his/her failure to repair the defective and dangerous conditions or to have them repaired within a reasonable time or at all, and the serious emotional and physical distress caused plaintiff as a proximate result thereof, all as alleged above, plaintiff was required to and did incur medical and related expenses, all to his/her further damage (in the sum of $_____).]

21. As a further proximate result of defendant's negligence and his/her failure to repair the defective and dangerous conditions or to have them repaired within a reasonable time or at all, as alleged above, plaintiff suffered property damage and economic loss including, but not limited to, _____ [*specify special damage, e.g.,* water damage to furniture, rugs, mattress, and curtains], all to his/her further damage in the sum of $_____.

22. _____ [*Continue, listing in this and subsequently numbered paragraphs any additional special damage to plaintiff's person or property sustained as a proximate result of the defective and dangerous conditions and, unless the special damages relate to personal injuries and the action is in superior court, the amount of the special damages claimed*].

23. Defendant's failure to put the premises into a condition fit for human occupation at the time of renting them to plaintiff and his/her failure to repair the defective and dangerous conditions or to have them repaired within a reasonable time after plaintiff notified him/her of them or at all, as alleged above, were oppressive and malicious within the meaning of *Civil Code Section 3294* in that they subjected plaintiff to cruel and unjust hardship in willful and conscious disregard of plaintiff's rights and safety, thereby entitling plaintiff to an award of punitive damages.

THIRD CAUSE OF ACTION
(Maintenance of Nuisance)

24. Plaintiff hereby incorporates Paragraphs 1-7, inclusive, of the First Cause of Action.

25. The defective and dangerous conditions of the premises as alleged in this complaint constituted a nuisance within the meaning of *Civil Code Section 3479* and *Code of Civil Procedure Section 731* in that they deprived plaintiff of the safe, healthy, and comfortable use of the premises.

26. Plaintiff hereby incorporates Paragraph 8 of the First Cause of Action.

27. As a proximate result of defendant's maintenance of the nuisance, plaintiff suffered discomfort and annoyance, all to his/her general damage in the _____ [sum of $_____ *or* amount of $_____per day for each day that he/she occupied the premises].

28. As a further proximate result of defendant's maintenance of the nuisance, plaintiff suffered property damage and economic loss including, but not limited to, _____ [*specify special damage, e.g.,* water damage to furniture, rugs, mattress, and curtains], all to his/her further damage in the sum of $_____.

29. _____ [*Continue, listing in this and subsequently numbered paragraphs any additional special damage to plaintiff's property sustained as a proximate result of the nuisance and the amount of the special damages claimed*].

30. In maintaining the nuisance, defendant acted with full knowledge of the consequences thereof and of the damage being caused to plaintiff. Despite this knowledge, defendant failed to abate the nuisance by repairing the defective and dangerous conditions of the premises or causing them to be repaired. His/Her failure to act was both oppressive and malicious within the meaning of *Civil Code Section 3294* in that it subjected plaintiff to cruel and unjust hardship in willful and conscious disregard of plaintiff's rights and safety, thereby entitling plaintiff to an award of punitive

damages. Defendant's failure to put the premises into a condition fit for human occupation at the time of renting them to plaintiff and his/her failure to repair the defective and dangerous conditions or to have them repaired within a reasonable time after plaintiff notified him/her of them or at all, as alleged above, were oppressive and malicious within the meaning of *Civil Code Section 3294* in that they subjected plaintiff to cruel and unjust hardship in willful and conscious disregard of plaintiff's rights and safety, thereby entitling plaintiff to an award of punitive damages.

FOURTH CAUSE OF ACTION
(Intentional Infliction of Emotional Distress)

31. Plaintiff hereby incorporates Paragraphs 1-8, inclusive, of the First Cause of Action.

32. Defendant's failure to put the premises into a condition fit for human occupation before renting them to plaintiff and his/her repeated failure to repair the defects or to have them repaired when requested by plaintiff to do so or at all, as alleged in this complaint, were knowing, intentional, and willful and done with a reckless disregard of the probability of causing plaintiff emotional distress.

33. As a proximate result of defendant's conduct, as alleged in this complaint, plaintiff suffered extreme mental anguish and emotional [and physical] distress, all to his/her general damage [in the sum of $_____].

[34. As a further proximate result of defendant's conduct and plaintiff's extreme emotional distress, as alleged in this complaint, plaintiff was required to and did incur medical and related expenses, all to his/her further damage (in the sum of $_____).]

35. In failing to correct the defects within a reasonable time or at all despite plaintiff's numerous requests that he/she/they do so as alleged in this complaint, defendant's conduct was malicious and oppressive, in that it was conduct carried on by the defendant in willful and conscious disregard of plaintiff's rights and subjected plaintiff to cruel and unjust hardship. Plaintiff is therefore entitled to recover punitive damages.

FIFTH CAUSE OF ACTION
(Constructive Eviction)

36. Plaintiff hereby incorporates Paragraphs 1-8, inclusive, of the First Cause of Action.

37. On or about _____ [*date*], the Health Department of the County of _____, served on defendant a notice to vacate and demolish the premises and listed the following violations (among others): _____ [*specify, e.g.,* heavy cockroach infestation; broken interior walls; broken deteriorated flooring on front porch; falling ceiling; deteriorated, overfused electrical wiring; lack of proper plumbing connection to the sewage system in the bathroom; sewage under the bathroom floor; leaking roof; and fire hazard]. OPTIONAL: A copy of the notice is attached to this complaint as Exhibit B and made a part of this complaint.

38. As a proximate result of defendant's failure to maintain the premises in a condition fit for human occupation and in accordance with the above notice, plaintiff was required to vacate the premises and did so on _____ [*date*].

39. As a proximate result of defendant's conduct, as alleged in this complaint, plaintiff suffered mental anguish and pain [and physical injury], all to his/her general damage [in the sum of $_____].

[40. As a further proximate result of defendant's conduct and plaintiff's mental anguish and pain (and physical injury),

as alleged in this complaint, plaintiff was required to and did incur medical and related expenses, all to his/her further damage (in the sum of $_____).]

41. As a further proximate result of defendant's conduct as alleged in this complaint, plaintiff was required to and did incur moving expenses in the sum of $_____, to his/her special damage in that sum.

42. _____ [*Allege in this and subsequently numbered paragraphs any additional special damage and amounts necessary to compensate plaintiff for all detriment proximately caused by eviction or likely to result from it*].

43. Defendant's failure to maintain the premises in a condition fit for human occupation was oppressive and malicious within the meaning of *Civil Code Section 3294* in that it subjected plaintiff to cruel and unjust hardship in willful and conscious disregard of plaintiff's rights and safety, thereby entitling plaintiff to an award of punitive damages.

WHEREFORE, plaintiff prays judgment against defendant as follows:

On the FIRST CAUSE OF ACTION:

1. For general damages in the sum of $_____;

2. For damage to personal property and economic loss in the sum of $_____;

On the SECOND CAUSE OF ACTION:

3. For general damages _____ [in the sum of $_____ *or* according to proof];

[4. For medical and related expenses _____ (in the sum of $_____ *or* according to proof);]

5. For damage to personal property and economic loss in the sum of $_____;

6. For punitive damages in an amount necessary to punish defendants];

On the THIRD CAUSE OF ACTION:

7. For general damages in the amount of $_____ per day for each day that plaintiff occupied the premises;

8. For damage to personal property and economic loss in the sum of $_____;

9. For punitive damages in an amount necessary to punish defendants;

On the FOURTH CAUSE OF ACTION:

10. For general damages _____ [in the sum of $_____ *or* according to proof];

[11. For medical and related expenses _____ (in the sum of $_____ *or* according to proof);]

12. For punitive damages [in an amount necessary to punish defendants];

On the FIFTH CAUSE OF ACTION:

13. For general damages for mental anguish and pain [and physical injury] _____ [in the sum of $_____ *or* according to proof];

[14. For medical and related expenses _____ (in the sum of $_____ *or* according to proof);]

15. For moving expenses in the sum of $_____;

16. For punitive damages in an amount necessary to punish defendants;

On ALL CAUSES OF ACTION:

17. For costs of suit herein incurred; and

18. For such other and further relief as the court may deem just and proper and according to equity.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.50[1].*]

[2] Use of Form

The form in [1], *above*, is for use by a former residential tenant to sue his or her former landlord for damages arising out of the uninhabitability of the premises. The complaint alleges a cause of action in contract (damages for breach of the implied warranty of habitability) and alternatively in tort for damages on alternative theories of liability. This complaint is adapted from the facts set forth in *Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 162 Cal. Rptr. 194* .

For additional discussions of the implied warranty of habitability, see *§§ 332.10[1][d], 332.11[2][a], 333.28[4], 333.131*, and *334.10[3]*.

PRACTICE TIP:

Alleging Breach of Implied Warranty of Habitability. Generally, one should not allege breach of the implied warranty of habitability unless the complaint is based on nonpayment of rent, or, perhaps, some other breach of the lease or rental agreement. When the landlord breaches the warranty, the tenant's duty to perform abates. But when the landlord is basing the eviction on expiration of a fixed-term tenancy or a 30-day notice terminating a month-to-month tenancy, he or she is not claiming any breach of covenant by the tenant, so a breach of the implied warranty is no defense (retaliatory eviction, however, might still be a defense in this situation). *By Myron Moskovitz*

PRACTICE TIP: Allegation That Damage Has Excused Plaintiff's Failure to Pay Rent. It may be beneficial to include an allegation that the conditions alleged to have caused the breach [*see, e.g.,* P 12 of first cause of action] have excused the plaintiff's failure to pay rent. Such an allegation may itself act as a deterrant to the defendant from commencing an unlawful detainer action or may at least constitute a colorable basis for an attempt to enjoin or stay the unlawful detainer action itself. *By Benjamin Kaplan*

[3] Essential Allegations

[a] Complaint for Damages--Generally

A complaint for damages must allege the following [*see Civ. Code §§ 3281, 3282*]:

- The existence of a duty owed to the plaintiff by the defendant;
- The defendant's breach of the duty;
- The detriment sustained by the plaintiff as a result of the defendant's breach, that is, the loss or harm suffered by the plaintiff in person or property;
- Proximate causation; and
- Plaintiff's damages, that is, the measure of plaintiff's loss or harm in terms of money [*see Civ. Code §§ 3281, 3300* (breach of contract), *3333* (tort)].

Duty in the above complaint is established by alleging the relationship of the parties as landlord and tenant, which brings into play the duties imposed on the landlord or tenant by statutory and case law. Breach of duty is shown by alleging the defendant's acts or failure to act that were in violation of law, or of a standard imposed by law [*see, e.g., Civ. Code § 1714(a)* (negligence)]. Detriment is shown by alleging the harm or loss plaintiff suffered as a result of the defendant's acts or failure to act. Proximate causation may be alleged generally (for example, by stating that defendant's acts or failure to act proximately caused the detriment to plaintiff described in the complaint or, as in the above form, that as a proximate result of defendant's acts or failure to act plaintiff sustained specified detriment). Damages are shown by alleging the dollar amount of the harm or loss, or if the dollar amount may not be pleaded, by adding to a description of the detriment the statement "all to plaintiff's damage" [*see Code Civ. Proc. § 425.10(b)* (allegation of damages prohibited in specified superior court actions)].

[b] Complaint for Damages--Nuisance

A complaint for damages for a nuisance must allege the five elements set forth in [a], *above*. It must also allege the existence of a nuisance; that is, anything that is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or obtrusive to the free use of property so as to interfere with the comfortable enjoyment of life or property [*Civ. Code § 3479*]. The maintenance of the nuisance constitutes the breach of duty. Detriment is alleged by stating that plaintiff's property has been injuriously affected or plaintiff's enjoyment of property has been lessened by the nuisance [*see Code Civ. Proc. § 731*; *Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 919, 162 Cal. Rptr. 194* ; *see also Smith v. David (1981) 120 Cal. App. 3d 101, 112-114, 176 Cal. Rptr. 112]* .

[c] Complaint for Damages--Intentional Infliction of Emotional Distress

A complaint for damages for intentional infliction of mental, or emotional, distress must also allege the five elements set forth in [a], *above*. In addition to duty (relationship of parties, as landlord and tenant), breach of duty (outrageous conduct by the defendant), detriment to the plaintiff (severe emotional distress), proximate causation, and damages, the complaint must allege that defendant intended to cause plaintiff emotional distress or acted in reckless disregard of the probability of causing plaintiff emotional distress [*Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 921, 162 Cal. Rptr. 194]* .

[4] Statutory Duties

In determining the landlord's liability for breach of the implied warranty of habitability, the following statutory duties should be considered:

- Every person is bound without contract to abstain from injuring the person or property of another or infringing on any of his or her rights [*Civ. Code § 1708*]. In a landlord-tenant relationship, the duty imposed by *Civ. Code § 1708* is independent of the rental agreement and attaches over and above its terms. Thus, tenants may treat an injury to their tenancy (such as the uninhabitability of the premises) as a tort or as a breach of contract at their election [*Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 919, 162 Cal. Rptr. 194]* .

- Parties to a landlord-tenant relationship owe a standard of reasonable care under the ordinary rules of negligence [*Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 917, 162 Cal. Rptr. 194* ; *see Civ. Code § 1714(a)*]. Damages for a breach of this duty are covered by *Civ. Code § 3333*.

- The hirer of a thing (which term includes the tenant of real property) must repair all deteriorations or injuries to it occasioned by his or her want of ordinary care [*Civ. Code § 1929*].

- The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations that render it untenantable, except as provided in *Civ. Code § 1929* [*Civ. Code § 1941*; for a listing of the characteristics that will render a dwelling untenantable under *Civ. Code §§ 1941* and *1941.1, see § 332.10[1][b][ii]*].

PRACTICE TIP:
Landlord's Responsibility. The landlord is responsible for conditions of uninhabitability even without actual knowledge of the conditions. *By Benjamin Kaplan*

- The affirmative obligations of the tenant, the substantial violation of any one of which will prevent the landlord's duty to repair under *Civ. Code § 1941* or *Civ. Code § 1942* (tenant's limited right to repair and deduct cost from rent) from arising, provided the violation contributes substantially to the dilapidation's existence or interferes with the landlord's obligation under *Civ. Code § 1941* to repair it, are listed in *Civ. Code § 1941.2* [*see § 332.10[1][b][iii]*].

[5] Theories of Liability

[a] Breach of Contract

A breach of the implied warranty of habitability will support an independent action against the landlord for damages for breach of contract [*see Civ. Code § 3300*] to recover retroactive rent abatement for the alleged overpayment of rent resulting from the uninhabitability of the premises [*see Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 916, 162 Cal. Rptr. 194* ; *Quevedo v. Braga (1977) 140 Cal. Rptr. 143* , overruled on other grounds, *Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 55, 171 Cal. Rptr. 707, 623 P.2d 268* ; *see* Paragraphs 1-12 of the above complaint]. However, neither damages for discomfort or annoyance nor punitive damages are recoverable in such an action [*see Quevedo v. Braga (1977) 140 Cal. Rptr. 143* , overruled on other grounds, *Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 55, 171 Cal. Rptr. 707, 623 P.2d 268* ; *Civ. Code § 3294(a)*].

Several methods for computing the tenant's damages (the amount of rent abatement) have been suggested. The first is to measure the tenant's damages by the difference between the fair rental value of the premises if they had been as warranted and the fair rental value of the premises as they were during the occupancy by the tenant in the unsafe or unsanitary condition [*Green v. Superior Court (1974) 10 Cal. 3d 616, 638, 111 Cal. Rptr. 704, 517 P.2d 1168* ; *see*

alternative allegations in Paragraphs 10 and 11 of the above complaint]. Another method of computation, which appears to be the one most commonly utilized, is to measure the tenant's damages by the reduction of the use of the premises. Under this approach, the tenant's rental obligation is reduced by a percentage corresponding to the relative reduction of use of the rented premises caused by the landlord's breach [*see Smith v. David (1981) 120 Cal. App. 3d 101, 113, 176 Cal. Rptr. 112]* . In using this approach, the court must first recognize the agreed contract rent as proper for the premises as impliedly warranted; it must then reduce the agreed rent by the percentage reduction of habitability; and finally, to determine the amount of damages, it must multiply the difference by the number of months of occupancy [*see Cazares v. Ortiz (1980) 168 Cal. Rptr. 108* ; *see also* alternative allegations in Paragraphs 10 and 11 of the above complaint].

The tenant's lack of knowledge of the defects rendering the premises uninhabitable is not a prerequisite to the landlord's breach of the warranty, and the fact the tenant continues to live in the premises after learning of the defects does not constitute a waiver of the breach [*Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 51-54, 171 Cal. Rptr. 707, 623 P.2d 268]* . Nor does the fact that the plaintiff remained in the premises with knowledge of the uninhabitable conditions mean the premises were habitable [*Smith v. David (1981) 120 Cal. App. 3d 101, 110, 176 Cal. Rptr. 112]* .

[b] Tortious Breach

A breach of the implied warranty of habitability may be tortious [*Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 916, 162 Cal. Rptr. 194* ; *Quevedo v. Braga (1977) 140 Cal. Rptr. 143* , overruled on other grounds, *Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 55, 171 Cal. Rptr. 707, 623 P.2d 268]* . If it is, the tenant may state a cause of action in tort against the landlord for damages resulting from the breach [*Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 918-919, 162 Cal. Rptr. 194]* . In that case, the tort measure of damages [*Civ. Code § 3333*] will apply, and the tenant may recover punitive damages if malice, oppression, or fraud is shown by clear and convincing evidence [*see Civ. Code § 3294(a)*].

PRACTICE TIP:

Additional Damages. The tenant may also be able to recover damages for discomfort and annoyance.
By Myron Moskovitz

[c] Negligence

A landlord is liable for any injury to a tenant proximately caused by the landlord's failure to exercise ordinary care or skill in the management of his or her property [*see Civ. Code §§ 1714(a), 3333*]; hence, a tenant may state a cause of action in tort for negligence for damages resulting from the landlord's breach of his or her implied warranty of habitability [*Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 916-919, 162 Cal. Rptr. 194* ; *see* Paragraphs 13-23 of the above complaint]. For a discussion of negligence and general forms of complaints for use in suing for damages for negligence, and affirmative defenses, see Ch. 380, *Negligence* .

If the tenant proves that the landlord violated *Civ. Code § 1941* or any applicable building and housing code standards designed to protect the health and safety of tenants, and that the violation proximately caused plaintiff's injuries, a rebuttable presumption of negligence on the landlord's part may arise under *Evid. Code § 669(a)* [*Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 924, 162 Cal. Rptr. 194* ; for discussion of this presumption, *see* Ch. 380, *Negligence*]. The presumption under *Evid. Code § 669(a)* may be rebutted by proof that the person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law [*Evid. Code § 669(b)(1)*; *Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 924-925, 162 Cal. Rptr. 194]* . The landlord also has available the affirmative defenses of the tenant's negligence and assumption of the risk which, if properly pleaded and proved, could negate liability [*Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 925, 162 Cal. Rptr. 194]* .

PRACTICE TIP:

Tendering Negligence Allegations to Insurance Carrier. Counsel should realize that allegations of negligence provide the defendant with the opportunity to make a tender to his or her insurance carrier for a defense/indemnity. This is a two edged sword. On the positive side, it provides a pot of gold for any settlement. In addition, the insurance carrier wants to make sure that the situation is cleaned up, particularly if they are still on the current policy. On the negative side, it permits the landlord to skate without the pressure of sizable attorney's fees. *By Benjamin Kaplan*

[d] Nuisance

The statutory definition of nuisance in *Civ. Code § 3479* is broad enough to encompass almost any conceivable type of interference with the enjoyment or use of land or property, and may include the maintenance of rented residential premises in an untenantable condition [*Stoiber v. Honeychuck (1980) 162 Cal. Rptr. 194* ; *see* Paragraphs 24-30 of the above complaint]. An action to enjoin or abate a private nuisance and recover damages may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance [*Code Civ. Proc. § 731*; *see Civ. Code §§ 3481* (private defined), *3501-3503* (relief available against private nuisance)]. In the case of a substandard residential building that constitutes a public nuisance, a private citizen, such as a tenant, may have a right of action based on the nuisance if he or she shows special injury different in kind from that suffered by the general public [*Smith v. David (1981) 120 Cal. App. 3d 101, 113-114, 176 Cal. Rptr. 112]* .

A nuisance may be either a negligent or an intentional tort. If intentional, exemplary damages are recoverable [*Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 920, 162 Cal. Rptr. 194]* . For a discussion of nuisances generally, a procedural guide, and forms of complaints and affirmative defenses for use in nuisance actions, see Ch. 391, *Nuisance* .

[e] Intentional Infliction of Emotional Distress

Liability for intentional infliction of emotional, or mental, distress is imposed for conduct exceeding all bounds usually tolerated by a decent society, of a nature that is especially calculated to cause, and does cause, mental distress. Behavior may be considered outrageous if a defendant:

- Abuses a relation or position that gives him or her power to damage the plaintiff's interest;
- Knows the plaintiff is susceptible to injuries through mental distress; or
- Acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress.

A remedy for breach of the implied warranty of habitability does not preclude a tenant from suing his or her landlord for intentional infliction of mental distress if the landlord's acts are extreme and outrageous and result in severe mental distress [*Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 921-922, 162 Cal. Rptr. 194* ; *see* Paragraphs 31-35 of the above complaint].

For further discussion and general forms of complaints for damages for intentional infliction of emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress* .

[f] Negligent Infliction of Emotional Distress

Negligent infliction of emotional distress is compensable without physical injury in cases involving the tortious interference with property rights. Thus, if, in the factual situation illustrated in the above form, the landlord's failure to repair the premises constituted a tort grounded on negligence, the tenant is entitled to prove his or her damages for emotional distress in that cause of action because the failure to repair not only caused water damage to the tenant's

furnishings, but must also be deemed to constitute an injury to his or her tenancy interest [*Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 922-923, 162 Cal. Rptr. 194]* . Hence any mental distress resulting from defendant's negligence in maintaining the premises in an uninhabitable condition would be alleged in the Second Cause of Action in the above form [*see* Paragraphs 19 and 20] as a form of detriment [*see Civ. Code § 3282*] sustained by plaintiff as a proximate result of defendant's negligence, and not set out as a separate cause of action.

[g] Constructive Eviction

A constructive eviction occurs when the acts or omissions of a landlord, or any disturbance or interference with the tenant's possession by the landlord, renders the premises, or a substantial portion of the premises, unfit for the purposes for which they were leased, or has the effect of depriving the tenant for a substantial period of time of the beneficial enjoyment or use of the premises. Abandonment of the premises within a reasonable time after the landlord's wrongful act is essential to enable the tenant to claim a constructive eviction. Failure to repair and keep the premises in a condition suitable for the purposes for which they were leased has been held to constitute eviction [*Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 925-926, 162 Cal. Rptr. 194* (pointing out that plaintiff had alleged that she was forced to abandon the premises after the county health department ordered that the premises be vacated and destroyed and whether she abandoned within a reasonable time would constitute a jury question); *see* Paragraphs 36-43 of above complaint].

The damages recoverable for wrongful eviction, actual or constructive, include whatever amounts are necessary to compensate the tenant for the detriment proximately caused by the eviction or likely to result from it. The measure of damages, as a general rule, is the value of the term, less the rent reserved. In addition to the general damages representing the value of the tenant's unexpired term, recovery may be had for expenses of removal. Moreover, if the tenant wrongfully evicted elects to sue in tort, damages may be awarded for mental anguish and pain or physical injury. Punitive damages may also be recovered when the landlord's conduct justifies the award [*Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 926, 162 Cal. Rptr. 194* ; *see* Paragraphs 39 and 40 of above complaint]. Punitive damages are recoverable when malice, oppression, or fraud is shown by clear and convincing evidence [*Civ. Code § 3294(a)*].

[h] Other Torts

Other potential theories of liability in tort would include both intentional and negligent misrepresentation if the defendant knew but concealed the existence of the conditions rendering the premises unfit for human occupation at the time the premises were rented or otherwise misrepresented them. For a general discussion of misrepresentation and forms of complaints for use in these actions, see Ch. 269, *Fraud and Deceit* .

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Volume 29: Landlord and Tenant: General Introduction thru Rent Control-Chs. 330-339
Chapter 334 LANDLORD AND TENANT: CLAIMS FOR DAMAGES
PART IV. FORMS
A. Suing a Landlord for Damages and Related Actions

29-334 California Forms of Pleading and Practice--Annotated § 334.62

§ 334.62 Complaint by Tenant Against Landlord for Actual and Punitive Damages for Wrongful Eviction [Civ. Code §§ 3294, 3300, 3333]

[1] FORM Complaint by Tenant Against Landlord for Actual and Punitive Damages for Wrongful Eviction [Civ. Code §§ 3294, 3300, 3333]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Wrongful Eviction)
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 334.50[1], P 1.*]

[2. *Fictitious name allegation, if appropriate. See § 334.50[1], P 2.*]

3. On or about _____ [*date*], defendant leased to plaintiff certain premises known as _____ [*street address and city*], California, under a written lease. [*OPTIONAL:* A true and correct copy of the lease is attached to this complaint as Exhibit A and is incorporated into this complaint by reference.]

4. Plaintiff has duly performed all conditions, covenants, and promises required to be performed by him/her under the lease in accordance with its terms and conditions, except for those acts that have been prevented, delayed, or excused by acts or omissions of defendant.

[*EITHER*]

5. On or about _____ [*date*], defendant wrongfully evicted plaintiff from the premises by _____ [*specify nature of act(s) constituting actual eviction*].

[*OR*]

5. On or about _____ [*date*], defendant interfered with plaintiff's right to quiet enjoyment of the premises by _____ [*specify nature of act(s) constituting constructive eviction*]. As a result of defendant's interference, plaintiff vacated the premises on _____ [*date*].

[*EITHER, if action is for breach of contract*]

6. The total amount of rent payable under the terms of the lease from _____ [*date of eviction*], to _____ [*date lease terminates*], is the sum of $_____. The rental value of the lease for the same period is $_____ [*greater amount*].

7. As a proximate result of defendant's _____ [actual *or* constructive] eviction of plaintiff from the premises, plaintiff sustained general damages in the sum of $_____ [*difference between rent reserved and fair rental value of premises*].

[*OR, if plaintiff sues in tort*]

6. As a proximate result of defendant's _____ [actual *or* constructive] eviction of plaintiff from the premises, plaintiff suffered mental anguish and pain [and physical injury], all to his/her general damage [in the sum of $_____].

[7. As a further proximate result of defendant's conduct and plaintiff's mental anguish and pain (and physical injury), as alleged in this complaint, plaintiff was required to and did incur medical and related expenses, all to his/her special damage (in the sum of $_____).]

[*CONTINUE*]

8. As a further proximate result of defendant's conduct as alleged in this compliant, plaintiff was required to and did incur moving expenses in the sum of $_____.

9. _____ [*Allege in this and subsequently numbered paragraphs any additional special damage and amounts necessary to compensate plaintiff for all detriment proximately caused by eviction or likely to result from it*].

[*ADD, if action is in tort*]

10. Defendant's _____ [actual *or* constructive] eviction of plaintiff from the premises was oppressive and malicious within the meaning of *Civil Code Section 3294* in that it subjected plaintiff to cruel and unjust hardship in willful and conscious disregard of plaintiff's rights and safety of the plaintiff, thereby entitling plaintiff to an award of punitive damages.

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages in the sum of $_____;

[2. For medical and related expenses _____ (in the sum of $_____ *or* according to proof);]

3. For moving expenses in the sum of $_____;

4. For _____ [*state here and in subsequently numbered paragraphs, any additional special damages sought*];

[5. For punitive damages in an amount necessary to punish defendants;]

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired, See § 334.50[1].*]

[2] Use of Form

The form in [1], *above*, may be used when a tenant has been either actually or constructively evicted from the premises by the landlord. For alternative allegations that may be used in lieu of Paragraph 5 and the first alternative Paragraphs 6 and 7, see *§ 334.63[1]*.

[3] Wrongful Eviction

A tenant who is wrongfully evicted by his or her landlord may recover damages for the eviction, regardless of whether the eviction is actual or constructive [*Pierce v. Nash (1954) 126 Cal. App. 2d 606, 612-615, 272 P.2d 938* (constructive eviction); *Saferian v. Baer (1930) 105 Cal. App. 238, 243, 287 P. 142* (actual eviction)]. An eviction may be unlawful even though not accompanied with threats, violence, or abusive language [*Richardson v. Pridmore (1950) 97 Cal. App. 2d 124, 130, 217 P.2d 113]* .

PRACTICE TIP:

Local Eviction Controls. Local eviction controls may provide a different definition of wrongful eviction for violation of the ordinance encompassing acts of a relatively low level of conduct, such as a wrongful oral demand for possession. *By Benjamin Kaplan*

Moreover, the tenant does not need to show that the landlord acted with bad faith [*Pierce v. Nash (1954) 126 Cal. App. 2d 606, 612, 272 P.2d 938]* .

The willful eviction of a tenant constitutes a breach of contract, and thus an action for wrongful eviction is contractual in nature [*Richardson v. Pridmore (1950) 97 Cal. App. 2d 124, 129, 217 P.2d 113* ; *see* *Nathan v. Locke (1930) 108 Cal. App. 158, 161-162, 287 P. 550]* .

PRACTICE TIP:

Attorney's Fees. Therefore, if the lease has an attorney's fees provision, the prayer should include a request for attorney's fees. *By Myron Moskovitz*

However, one suffering mental anguish and pain or physical injury as a proximate result of an eviction may waive the breach of contract action and sue in tort [*Richardson v. Pridmore (1950) 97 Cal. App. 2d 124, 129, 217 P.2d 113* (mental anguish); *see* *Goldman v. House (1949) 93 Cal. App.2d 572, 576, 209 P.2d 639* (personal injuries); *Emden v. Vitz (1948) 88 Cal. App. 2d 313, 316-319, 198 P.2d 696* (mental suffering)].

[4] Acts Constituting Actual Evictions

A tenant who has been actually evicted from his or her premises may sue for the wrongful eviction. Acts that constitute actual evictions include:

- The landlord's retaking possession of the premises and excluding the tenant from the premises [*Landon v. Hill (1934) 136 Cal. App. 560, 562-566, 29 P.2d 281]* ; and

- The landlord's breaking into the premises, throwing out the tenant's personal property, and refusing to allow the tenant back on the premises [*Saferian v. Baer (1930) 105 Cal. App. 238, 241-243, 287 P. 142]* .

If there was no actual eviction, but the landlord trespassed, the tenant may wish to sue the landlord for the trespass [*see* Ch. 550, *Trespass*]. The tenant under these circumstances may also want to consider an action for forcible entry and forcible detainer under *Code Civ. Proc. §§ 1159, 1160*.

[5] Acts Constituting Constructive Evictions

Any interference by the landlord by which the tenant is deprived of the beneficial enjoyment of the premises amounts to a constructive eviction if the tenant so elects and surrenders possession [*Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 670, 155 P.2d 24]* . Thus, a constructive eviction occurs when the acts or omissions of a landlord, or any disturbance or interference with the tenant's possession by the landlord, renders the premises, or a substantial portion of the premises, unfit for the purposes for which they were leased, or has the effect of depriving the tenant for a substantial period of time of the beneficial enjoyment or use of the premises. Abandonment of the premises within a reasonable time after the landlord's wrongful act of is essential to enable the tenant to claim a constructive eviction [*Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 925-926, 162 Cal. Rptr. 194]* .

The following are examples of when a landlord commits a constructive eviction:

- Serving a notice to quit the premises with malice and without probable cause to believe that the tenant breached the lease when the landlord does not physically interfere with the tenant's possession [*Asell v. Rodrigues (1973) 32 Cal. App. 3d 817, 823-825, 108 Cal. Rptr. 566]* ;

- Permitting the premises to become infested with vermin [*Buckner v. Azulai (1967) 59 Cal. Rptr. 806]* ;

- Failing to repair residential premises and keep them in a condition suitable for the purposes for which they were leased [*Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 926, 162 Cal. Rptr. 194* (adding that whether premises were abandoned within a reasonable time would be a jury question)];

- Failing to make necessary repairs in accordance with the terms of the lease or other agreement [*Groh v. Kover's Bull Pen, Inc. (1963) 221 Cal. App. 2d 611, 613-615, 34 Cal. Rptr. 637]* ;

- Installing supports that interfere with the intended use of the premises [*Pierce v. Nash (1954) 126 Cal. App. 2d 606, 612-617, 272 P.2d 938]* ;

- Failing to provide free water, storage space, and adequate ingress and egress over the lessor's property, all in violation of the parties' intentions [*Sierad v. Lilly (1962) 204 Cal. App. 2d 770, 773-775, 22 Cal. Rptr. 580]* ;

- Continuing a program of harassment against the tenant designed to injure the tenant's business and the quiet enjoyment thereof [*Aaker v. Smith (1948) 87 Cal. App. 2d 36, 43-46, 196 P.2d 150]* ;

- Terrorizing the tenant [*Sanders v. Allen (1948) 83 Cal. App. 2d 362, 366-367, 188 P.2d 760]* ;

- Breaching a restrictive covenant prohibiting a competing business on the premises [*Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 669-671, 155 P.2d 24]* ;

- Breaching an agreement to furnish heat [*Veysey v. Moriyama (1921) 184 Cal. 802, 805-806, 195 P. 662, 20 A.L.R. 1363* (dictum)]; and

- Cutting off water and boarding up windows necessary for light and air [*Clark v. Koesheyan (1915) 26 Cal. App. 305, 307-308, 146 P. 904]* .

[6] Acts Not Constituting Constructive Evictions

There is no constructive eviction when the landlord makes a good-faith resort to legal process [*Asell v. Rodrigues (1973) 32 Cal. App. 3d 817, 824, 108 Cal. Rptr. 566* (dictum)], when the acts of the landlord or his or her agent are no more serious than a trespass [*North Pac. S.S. Co. v. Terminal Inv. Co. (1919) 43 Cal. App. 182, 189, 185 P. 205]* , or when the landlord only interferes with a portion of the property that is merely a convenience, such as a back door or parking lot [*see* *Corwin v. Hamilton (1957) 154 Cal. App. 2d 829, 832-833, 317 P.2d 139]* .

[7] General Damages

An eviction entitles a tenant to recover any damages he or she may have sustained [*Saferian v. Baer (1930) 105 Cal. App. 238, 244-245, 287 P. 142]* . The amount of recovery is governed by *Civ. Code § 3300* [*Standard Livestock Co. v. Pentz (1928) 204 Cal. 618, 642-643, 269 P. 645]* . *Civ. Code § 3300* provides that the measure of damages for the breach of an obligation that arises from a contract is the amount that will compensate the party aggrieved for all the detriment proximately caused thereby or that, in the ordinary course of things, would be likely to result therefrom. Thus, a tenant who has been wrongfully evicted can recover general damages, which are measured by the difference between the actual fair market value of the unexpired term at the time of the eviction and the rent reserved; stated differently, the measure of damages is the difference between the present rental value and the agreed rent [*Landon v. Hill (1934) 136 Cal. App. 560, 566, 29 P.2d 281]* . If the wrongfully evicted tenant elects to sue in tort, general damages may be

awarded for mental anguish and pain or physical injury [*Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 926, 162 Cal. Rptr. 194]* .

[8] Agricultural Land

When a tenant has been wrongfully evicted from agricultural land, the measure of damages is the value of the crop that might be grown on the leased premises during the lease's term, less the cost of raising and harvesting it [*Wells v. B.F. Porter Estate (1928) 205 Cal. 776, 780, 272 P. 1039]* .

[9] Special Damages

The tenant's recovery in a wrongful eviction action is not limited, however, to the value of his or her leasehold interest. Independently of the general damages ordinarily recoverable, the tenant may recover special damages naturally and proximately resulting from the eviction [*Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 926, 162 Cal. Rptr. 194* ; *Landon v. Hill (1934) 136 Cal. App. 560, 566, 29 P.2d 281]* . These include necessary moving expenses [*Beckett v. City of Paris Dry Goods Co. (1939) 14 Cal. 2d 633, 638, 96 P.2d 122* ; *Klein v. Lewis (1919) 41 Cal. App. 463, 467, 182 P. 789]* ; loss of good will [*Schuler v. Bordelon (1947) 78 Cal. App. 2d 581, 586, 177 P.2d 959* ; *Landon v. Hill (1934) 136 Cal. App. 560, 566, 569, 29 P.2d 281]* ; any sum advanced for future rent [*Sierad v. Lilly (1962) 204 Cal. App. 2d 770, 775, 22 Cal. Rptr. 580* ; *Johnson v. Snyder (1950) 99 Cal. App. 2d 86, 89, 221 P.2d 164]* ; the cost of removing the tenant's fixtures [*Johnson v. Snyder (1950) 99 Cal. App. 2d 86, 90, 221 P.2d 164]* , or, if the improvements are permanent ones, which the tenant has no right to remove, the reasonable value of the improvements for the remaining term of the lease [*Asell v. Rodrigues (1973) 32 Cal. App. 3d 817, 826, 108 Cal. Rptr. 566]* ; the loss of prospective profits for the balance of the lease [*Pierce v. Nash (1954) 126 Cal. App. 2d 606, 622, 272 P.2d 938* ; *Aaker v. Smith (1948) 87 Cal. App. 2d 36, 47, 196 P.2d 150]* if the business is an established one [*Landon v. Hill (1934) 136 Cal. App. 560, 567, 29 P.2d 281]* ; and, when pleaded specially, loss of earnings attributable to the landlord's actions [*Tooke v. Allen (1948) 85 Cal. App. 2d 230, 237-238 192 P.2d 804]* . The tenant may not, however, recover both future loss of profits and the difference between present value and agreed value, because the loss of profits already includes consideration of the rent paid [*Landon v. Hill (1934) 136 Cal. App. 560, 566-567, 29 P.2d 281]* .

[10] Punitive Damages

If the tenant sues in tort and the landlord has been guilty of fraud, oppression, or malice, exemplary, or punitive, damages may also be recovered [*see Civ. Code § 3294(a)*; *Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 926, 162 Cal. Rptr. 194* ; *Beckett v. City of Paris Dry Goods Co. (1939) 14 Cal. 2d 633, 639, 96 P.2d 122* ; *Tooke v. Allen (1948) 85 Cal. App. 2d 230, 239, 192 P.2d 804]* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.63

§ 334.63 Allegation of Wrongful Eviction of Tenant by Landlord; Actual Eviction by One With Paramount Title

[1] FORM Allegation of Wrongful Eviction of Tenant by Landlord; Actual Eviction by One With Paramount Title

1. By the lease, defendant _____ [*either* impliedly *or* expressly] covenanted that plaintiff should have quiet enjoyment and possession of the leased premises during the lease's term.

2. In breach of this covenant and on or about _____ [*date*], one _____ [*name*], who at all times mentioned in this complaint was, and still is, owner of the leased premises under a title paramount to that of defendant, entered on the premises and evicted plaintiff from the premises by due process of law, and ever since has kept plaintiff out of possession of the premises.

3. _____ [*Allege general damage, e.g.,* At the time of the eviction alleged in this complaint, the rental value of the property was $_____ per _____ (*e.g.,* month), for a total rental value of $_____ for the balance of the lease's term, whereas the rent reserved under the lease's term was $_____ per _____ (*e.g.,* month) for a total reserved rent of $_____ for the balance of the lease's term. As a proximate result of defendant's breach of covenant and plaintiff's eviction from the premises, as alleged in this complaint, plaintiff has sustained general damages in the amount of $_____ (*rental value for balance of term less amount of rent reserved*)].

4. As a further proximate result of defendant's breach of covenant and plaintiff's eviction, as alleged in this complaint, plaintiff _____ [*allege any special loss or harm suffered in person or property, e.g.,* was required to and did employ and pay the firm of _____ (*name*) the sum of $_____ to move plaintiff's merchandise, equipment, supplies, furnishings and furniture, and other personal property from the premises to _____ (*new address*)], to plaintiff's further damage in that sum.

5. _____ [*Continue, alleging in this and subsequent numbered paragraphs any additional special damage suffered in person or property and the amount of special damages sustained*].

[2] Use of Form

The form in [1], *above*, are allegations for use in a complaint for damages for a landlord's breach of the covenant of quiet enjoyment when the tenant is evicted by a person with paramount title. The implied covenant of quiet enjoyment and possession has been held to contain the lessor's agreement in a lease to insure the lessee quiet possession of premises during the lease's term against all persons lawfully claiming the premises [*Standard Livestock Co. v. Pentz (1928) 204 Cal. 618, 638, 269 P. 645* ; *see Civ. Code § 1927*]. The above allegations may be substituted for Paragraph 5 and the first alternative Paragraphs 6 and 7 in § 334.62[1].

[3] Attorney's Fees

A tenant may be able to recover the attorney's fees incurred in defending his or her possession against a person claiming a paramount title when the tenant notified the landlord of the action and requested that the landlord defend against it [*see Standard Livestock Co. v. Pentz (1928) 204 Cal. 618, 631-633, 269 P. 645* ; *Levitzky v. Canning (1867) 33 Cal. 299, 308]* . A tenant may not, however, recover attorney's fees when the action against which the tenant must defend was brought by the lessor rather than a third person claiming paramount title, except to the extent the recovery is authorized by the lease's terms [*Stockton Theatres, Inc. v. Palermo (1954) 124 Cal. App. 2d 353, 354-368, 268 P.2d 799* ; *see Civ. Code § 1717*].

[4] Cross References

For a discussion of the kinds of damages and sample allegations, see Ch. 177, *Damages* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.64

§ 334.64 Complaint by Lessee for Damages for Lessor's Retaliatory Action Against Lessee of Dwelling [Civ. Code § 1942.5(f)]

[1] FORM Complaint by Lessee for Damages for Lessor's Retaliatory Action Against Lessee of Dwelling [Civ. Code § 1942.5(f)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Retaliatory Eviction)
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant(s) _____ [is *or* are], and at all times mentioned in this complaint _____ [was *or* were], the _____ [*specify, e.g.*, owner(s)] of the dwelling _____ [known as _____ (*unit number, if any, and street address and city*) *or* described as follows: _____ (*legal description*)] (referred to below as "the premises").

[2. *Fictitious name allegation, if appropriate. See § 334.50[1], P 2.*]

[3. (Plaintiff is informed and believes and thereon alleges that) [A]t all times mentioned in this complaint defendant _____ (*name*) was the agent of the defendant _____ (*name*), and (in doing the things alleged in this complaint) was acting within the course and scope of such agency and with the permission and consent of his/her codefendant.]

4. On or about _____ [*date*], plaintiff and defendant(s) entered into _____ [a written *or* an oral] rental agreement by the terms of which defendant(s) rented the premises to defendant _____ [*specify term, e.g.,* on a month-to-month tenancy] at the agreed rental of $_____ per _____ [*e.g.,* month], payable _____ [*e.g.,* monthly in advance on the _____ day of each and every month], commencing on _____ [*date*]. [A copy of the rental agreement is attached to this complaint as Exhibit A and made a part of this complaint.]

5. Under the rental agreement, plaintiff entered into possession of the premises on or about _____ [*date*], and _____ [has continued in possession since *or* continued in possession until _____ [*date*], on which date plaintiff vacated the premises in accordance with a notice to quit served on the plaintiff by defendant(s), as alleged below].

6. Plaintiff _____ [is not *or* was not] [during the period of his/her tenancy] in default as to the payment of rent.

7. On or about _____ [*date*], plaintiff _____ [*specify right exercised or complaint made, e.g.,* made _____ (an oral *or* a written) complaint to the defendant(s) of dilapidations rendering the premises untenantable which defendant(s) _____ (was *or* were) bound to repair and requested that he/she/they repair them or have them repaired].

8. Thereafter, on or about _____ [*date within 180 days after date plaintiff exercised right or made complaint*], defendant(s) _____ [*specify retaliatory action, e.g.,* served plaintiff with a 30-day notice to quit the premises]. [Plaintiff is informed and believes and thereon alleges that] [T]he _____ [*e.g.,* service of the notice to quit] was in retaliation for plaintiff's having _____ [*specify, e.g.,* complained about the untenantability of the premises and requested that defendant(s) take corrective action].

[*SPECIFY in following paragraphs detriment sustained by plaintiff*]

9. Plaintiff was unable to find other suitable living quarters within the 30-day period, and not until _____ [*date*]. As a proximate result of the retaliatory action of the defendant(s), as alleged in this complaint, plaintiff was required to take up residence in a hotel for a period of _____ days at a cost of $_____ per day, for a total cost of $_____. The difference between the rent that would have been paid for the premises and the amount paid for the hotel room is $_____, and plaintiff has been damaged in that amount.

10. As a further proximate result of retaliatory action of the defendant(s), as alleged in this complaint, plaintiff was required to store his/her personal property for a period of _____ days at a total cost of $_____, and has been further damaged in that sum.

11. As a further proximate result of retaliatory action of the defendant(s), as alleged in this complaint, plaintiff was required to and did incur moving expenses in the sum of $_____, to his/her further damage in that sum.

[*CONTINUE*]

12. The retaliatory action of the defendant(s), as alleged in this complaint, was oppressive and malicious within the meaning of *Civil Code Section 3294* in that it was despicable conduct that subjected plaintiff to cruel and unjust hardship in willful and conscious disregard of plaintiff's rights and safety, thereby entitling plaintiff to an award of punitive damages.

[*ADD, if action is for retaliatory eviction*]

[13. *Civil Code Section 1942.5(g)* provides that in any action brought for damages for retaliatory eviction, the court must award reasonable attorney fees to the prevailing party. The sum of $_____ is a reasonable attorney's fee to allow plaintiff for the commencement and prosecution of this action.]

[*CONTINUE*]

WHEREFORE, plaintiff prays judgment against defendant(s, and each of them,) as follows:

[*LIST the damages alleged in the complaint, e.g.*]

1. For the sum of $_____ for hotel expenses incurred in excess of rent that would have been paid to defendant(s);

2. For the sum of $_____ for costs incurred in the storage of personal property for a period of _____ days;

3. For the sum of $_____ for moving expenses incurred;

[*CONTINUE*]

4. For punitive damages in an amount necessary to punish defendants;

[5. For a reasonable attorney's fee in the sum of $_____;]

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.50[1].*]

[2] Use of Form

The form in [1], *above*, is for use by a residential tenant against a landlord to recover damages for specified prohibited action taken by the landlord against the tenant in retaliation for the tenant's exercise of his or her rights under law or because of the tenant's complaint as to the dwelling's tenantability [*see Civ. Code § 1942.5(a)*]. The tenant may not invoke the provisions of *Civ. Code § 1942.5(a)* more than once in any 12-month period [*Civ. Code § 1942.5(b)*].

[3] Allegations

The above complaint alleges:

- Defendant's or defendants' ownership of the dwelling (Paragraph 1) [*see Civ. Code § 1942.5(a)*];
- Execution of the rental agreement creating the landlord-tenant, or lessor-lessee, relationship (Paragraph 4);
- Plaintiff tenant's possession of the premises (Paragraph 5);
- Plaintiff's nondefault in the payment of rent (Paragraph 6) [*see Civ. Code § 1942.5(a)*];
- Plaintiff's exercise of a legal right or the making of a complaint (Paragraph 7) [*see Civ. Code § 1942.5(a)*];
- Defendant's or defendants' retaliatory response (Paragraph 8) [*see Civ. Code § 1942.5(a)*];
- Plaintiff's detriment proximately resulting from the retaliatory act or acts (Paragraphs 9-11) [*see Civ. Code §§ 1942.5(f), 3282*];
- Defendant's or defendants' malicious and oppressive motive in taking retaliatory action (Paragraph 12) [*see Civ. Code §§ 1942.5(f)(2), 3294*]; and
- If the action is for damages for retaliatory eviction, the reasonable amount of the attorney's fee incurred (Paragraph 13) [*see Civ. Code § 1942.5(g)*; *see also* [7], *below*].

[4] Remedies as Cumulative

The remedies provided by *Civ. Code § 1942.5* are in addition to any other remedies provided by statutory or case law [*Civ. Code § 1942.5(h)*].

[5] Burden of Proof

The burden of producing evidence that the lessor's conduct was, in fact, retaliatory is on the lessee [*Civ. Code § 1942.5(c)*].

[6] Eviction for Reporting Criminal Activities Prohibited

The exercise of rights under the law includes the reporting of criminal activities to authorities. Thus, a landlord who evicts a tenant because the tenant reported criminal activities is guilty of retaliatory eviction [*Barela v. Superior Court (1981) 30 Cal. 3d 244, 248-254, 178 Cal. Rptr. 618, 636 P.2d 582]* .

[7] Alleging Attorney's Fees

In any action brought for damages for retaliatory eviction, the court awards reasonable attorney's fees to the prevailing party if either party requests attorney's fees on the initiation of the action [*Civ. Code § 1942.5(g)*]. It is not clear what the Legislature intended by the term "request," but its purpose may be to require the plaintiff or defendant to give notice that he or she is seeking to recover attorney's fees without being required to plead and prove them in the action. Thus, it may be sufficient to include the request for attorney's fees in the complaint's prayer (as provided in the above complaint), with or without alleging them in the body of the complaint, or answer (if the defendant should so desire), and the court would then award the fees as it would the costs of the action to the prevailing party, who would include these fees in his or her memorandum of costs [*see generally* Ch. 174, *Costs and Attorney's Fees*].

[8] Preliminary Injunction

A preliminary injunction may be sought to halt a retaliatory eviction [*Aweeka v. Bonds (1971) 20 Cal. App. 3d 278, 282, 97 Cal. Rptr. 650]* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.65

§ 334.65 Complaint to Enforce Tenant's Right to Remove Fixtures Installed in Good Faith Under Mistaken Belief of Rights [Civ. Code §§ 1013, 1013.5]

[1] FORM Complaint to Enforce Tenant's Right to Remove Fixtures Installed in Good Faith Under Mistaken Belief of Rights [Civ. Code §§ 1013, 1013.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR REMOVAL OF FIXTURES IN-
_____ [*name(s)*],	)	STALLED IN GOOD FAITH UNDER MISTAKEN
Defendant(s).	)	BELIEF OF RIGHTS
	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. At all times mentioned in this complaint, defendant was and now is the owner of certain premises known as _____ [*street address and city*], California, and more particularly described as follows: _____ [*legal description*].

2. On or about _____ [*date*], defendant leased to plaintiff the above mentioned premises [*or specify portions thereof*] for use as a dwelling under _____ [*either* a lease in writing, a copy of which is

attached to this complaint as Exhibit A and made a part of this complaint *or* an oral lease].

3. During plaintiff's tenancy of the premises, plaintiff affixed certain improvements owned by plaintiff to the leased premises as follows, acting in good faith and in the erroneous belief that he/she had a right in law and in fact to do so: _____ [*specify improvements and manner of affixing them to premises*].

4. Plaintiff's tenancy of the leased premises _____ [*either* expired *or* will expire] on _____ [*date*].

5. Defendant refuses to permit plaintiff to remove the improvements [although plaintiff has offered and still offers to pay defendant the total estimated damages proximately resulting from the affixing and removal of the improvements or to repair the same].

6. Plaintiff elects to exercise his/her rights to remove the improvements under the provisions of *Civil Code Sections 1013* and *1013.5*.

7. Removal of the improvements can be effected within a period of _____ [*specify number of hours or days*] and can be accomplished feasibly by _____ [*physical method of detaching from premises*]. The estimated total damages to the premises proximately resulting from the affixing and removal of these improvements is a sum not exceeding $_____.

8. Plaintiff offers to pay into court the above stated sum of estimated damages, or such other sum as found by the court, as a condition precedent to entry of an interlocutory judgment authorizing the removal of the improvements.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. Adjudging the right of plaintiff to remove the improvements and compelling defendant to permit plaintiff to enter on the premises for the purpose.

2. Determining and ordering plaintiff to pay defendant the amount of damages proximately resulting from the affixing and removal of such improvements.

3. For such other and further relief as the court deems proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.50[1].*]

[2] Use of Form

The form in [1], *above*, is for use to enforce a tenant's right to remove fixtures he or she installed in good faith under a mistaken belief of his or her rights to remove them.

Any encumbrancers of record as well as the owner of the premises are required to be named as defendants [*Civ. Code § 1013.5(b)*]. When there are encumbrancers of record, a paragraph should be added to the above form identifying them and their interests and estimating their damages, if any.

In any action brought to enforce the right of removal as provided for in *Civ. Code § 1013.5*, a notice of the pendency of the action must be recorded before trial [*Civ. Code § 1013.5*]. For a form of notice of a pending action, see Ch. 348, *Lis Pendens* .

PRACTICE TIP:

Removing Fixtures. Rather than leave it to the courts to decide what is a reasonable time to remove a fixture, both parties will gain greater certainty and minimize the need for litigation if they specify in the lease how much time the tenant is allowed to remove fixtures. *By Myron Moskovitz*

[3] Damages for Tenant's Good-Faith Mistake in Installing Fixtures

When any person, acting in good faith and erroneously believing because of a mistake either of law or fact that he or she has a right to do so, affixes improvements to the land of another, this person, or his or her successor in interest, has the right to remove the improvements on payment to the land's owner, and any other person having any interest therein who acquired the interest for value after the commencement of the work of improvement and in reliance thereon, of all the damages proximately resulting from the affixing and removal of the improvements [*Civ. Code § 1013.5(a)*].

This statute is applicable only if the article was affixed in good faith and under a mistaken belief of a right to affix. If either factor is not present, then the measure of damages is not that found in *Civ. Code § 1013.5*. Rather, the measure of damages would be the value of the fixture in place as part of the realty, and not what it would sell for on the open market [*see Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 135-136, 95 Cal. Rptr. 728* ; *see also § 334.94[10][b]*].

[4] Other Damages and Remedies

If the property is returned to the owner of the premises after the complaint is filed and he or she would not have used it while it was severed, the proper measure of damages is the injury to the property plus the expenses of reinstalling it [*Givens v. Markall (1942) 51 Cal. App. 2d 374, 381, 124 P.2d 839]* . Even if the tenant establishes his or her right to the fixtures, the tenant may still be liable for damages to the premises caused by the fixture's removal [*Goldberg v. Stanton (1927) 84 Cal. App. 665, 668-669, 258 P. 417]* . The landlord also can obtain an injunction to prevent the tenant from removing fixtures that belong to the landlord [*see Gordon v. Cohn (1934) 220 Cal. 193, 30 P.2d 19]* .

[5] Requirements of Action

In any action brought to enforce this right, the owner of the land and encumbrancers of record must be named as defendants, a notice of pendency of action must be recorded before trial, and the owner of the land may recover his or her costs of suit and a reasonable attorney's fee fixed by the court [*Civ. Code § 1013.5(b)*].

[6] When Damages Uncertain

If it appears to the court that the total amount of damages cannot readily be ascertained before the removal of the improvements, or that it is otherwise in the interest of justice, the court may order an interlocutory judgment authorizing the removal of the improvements on condition precedent that the plaintiff pay into court the estimated total damages, as found by the court or as stipulated [*Civ. Code § 1013.5(c)*].

[7] Consent of Lienholders

If the court finds that the holder of any lien on the property acquired the lien in good faith and for value after the commencement of the work of improvement and in reliance thereon, or that as a result of the making or affixing of the improvements there is any lien against the property under *Cal. Const., Art XIV, § 3* (mechanic's liens), judgment authorizing removal, final or interlocutory, is not given unless the holder of each such lien has consented to the

improvement's removal. This consent is required to be in writing and filed with the court [*Civ. Code § 1013.5(d)*].

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29-334 California Forms of Pleading and Practice--Annotated § 334.66

§ 334.66 Interlocutory Judgment in Action to Enforce Tenant's Right to Remove Fixtures on Payment of Damages [Civ. Code § 1013.5(c)]

[1] FORM Interlocutory Judgment in Action to Enforce Tenant's Right to Remove Fixtures on Payment of Damages [Civ. Code § 1013.5(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	INTERLOCUTORY JUDGMENT
Defendant(s).	)	
	)	
	)	

This action to enforce a right to remove improvements affixed to the land of another on payment of damages came on regularly for trial [*or* partial trial] this date before the court, sitting without a jury. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

Evidence, both oral and documentary, was introduced and the cause was argued and submitted for decision. The court having heretofore made and caused to be filed its written findings of fact and conclusions of law [*or* written findings of fact and conclusions of law having been waived],

IT IS ORDERED AND ADJUDGED as an interlocutory judgment as follows:

1. On payment by plaintiff _____ [*name*] into court of the sum of $_____ as estimated total damages sustained by defendant _____ [*name*] proximately resulting from the affixing and removal of the improvements hereinafter described from the real property of defendant hereinafter described, plaintiff have the right to remove the improvements and to enter on the premises of defendant for this purpose.

2. Defendant have and recover from plaintiff on account of costs and attorney's fees, the sum of $_____ costs and the sum of $_____attorney's fees.

3. This cause is continued for further hearing until _____, at which time it is anticipated removal of the improvements will have been accomplished and, at which time, the actual total damages, together with additional costs and attorney's fees due, if any, will be ascertained.

4. The improvements so authorized to be removed are described as follows: _____ [*description*].

5. The real property so involved is described as follows: _____[*common and legal description*].
Dated: _____.

_____ [*signature*]
Judge of the_____ Court

[2] Use of Form

The form in [1], *above*, is for use as an interlocutory judgment in an action to enforce a tenant's right to remove fixtures on payment of damages when the total amount of damages cannot readily be ascertained before the removal of the fixtures [*see Civ. Code § 1013.5(c)*].

For additional forms of judgments, see Ch. 318, *Judgments* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.67

§ 334.67 Complaint for Specific Performance by Tenant Against Landlord to Compel Conveyance of Leased Premises in Accordance With Option to Purchase in Lease [Civ. Code §§ 3384, 3387]

[1] FORM Complaint for Specific Performance by Tenant Against Landlord to Compel Conveyance of Leased Premises in Accordance With Option to Purchase in Lease [Civ. Code §§ 3384, 3387]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR SPECIFIC PERFORMANCE
_____ [*name(s)*],	)	(To Compel Conveyance of Land)
Defendant(s).	)	
	)	
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 334.50[1], P 1.*]

2. [*Fictitious name allegation, if appropriate. See § 334.50[1], P 2.*]

3. On or about _____ [*date*], defendant _____ [*name*] leased to plaintiff under a lease in writing, with option to purchase, certain premises known as _____ [*street address and city*], California, [*and more particularly described as follows*: _____ (*legal description*)]. A copy of the

lease is attached to this complaint as Exhibit A and made a part of this complaint.

4. The lease included, as part of the consideration for it, an option to purchase the leased premises _____ [*either* as more particularly set out in Paragraph _____ of the lease *or* as follows: _____ (*set out provision for option*)].

5. In accordance with the provisions of the lease and option to purchase and on or about _____ [*date*], plaintiff exercised his/her option to purchase the leased premises, as follows: _____ [*manner of exercising option satisfying requirements*].

6. At all times mentioned in this complaint, defendant has failed and refused and continues to fail and refuse to comply with the provisions of the lease and option to purchase as to conveying the above-mentioned premises, and has failed and refused and continues to fail and refuse to convey the leased premises to plaintiff.

7. At all times at and since the exercise by plaintiff of the option to purchase the leased premises, plaintiff has been and now is ready, able, and willing to purchase the leased premises in accordance with the terms and conditions of the option to purchase.

8. Plaintiff has duly performed all of the conditions of the lease and option to purchase to be performed on his/her part, and he/she is entitled to specific performance by defendant conveying the leased premises to plaintiff.

9. The consideration provided for in the option to purchase is adequate in that _____ [*specify*]. The option to purchase is just and reasonable in that _____ [*specify*]. Plaintiff has no adequate remedy at law, and unless defendant is compelled to specifically perform, plaintiff will suffer irreparable injury.

WHEREFORE, plaintiff prays for judgment as follows:

1. Compelling defendant to specifically perform the lease and option to purchase by conveying the leased premises to plaintiff in accordance with the terms and conditions of purchase set forth in the lease and option to purchase.

2. Adjudging title to the property vested in plaintiff in fee simple [subject to existing encumbrances].

3. For costs of suit herein incurred.

4. For such other and further relief as the court deems just and proper and according to equity.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.50[1].*]

[2] Use of Form

The form in [1], *above*, is for use by a tenant who seeks to compel a landlord to convey the leased premises in accordance with an option to purchase contained in the lease.

[3] Allegations

The complaint alleges the property's location (Paragraph 3) [*see Code Civ. Proc. § 392(a)(1)*], the inclusion of an option to purchase in the lease and the provisions of the option (Paragraph 4), plaintiff's exercise of the option (Paragraph 5), plaintiff's full and fair performance of all the conditions precedent on his or her part to the obligation (Paragraph 8) [*see Civ. Code § 3392*], the defendant's refusal to perform (Paragraph 6), that the consideration is adequate [*Civ. Code § 3391(1)*], the option agreement is just and reasonable as to the defendant [*Civ. Code § 3391(2)*], and that plaintiff has no adequate remedy in the ordinary course of law (Paragraph 9) [*see Civ. Code § 3387*]. A lis pendens should be filed with this complaint.

[4] Option to Purchase

When the lessee exercises an option to purchase contained in a lease, this action extinguishes the lease and terminates the relation of landlord and tenant. The lessee is no longer in possession as a tenant but as a vendee, and the lessor is not entitled to rent after the option is exercised, unless there is an express stipulation in the lease providing for additional rent [*Sacks v. Hayes (1956) 304 P.2d 281]* .

However, unless the lease provides otherwise, a tenant is not relieved of the duty to pay rent merely by notifying the landlord of his or her intention to exercise a right to purchase. The tenant remains a tenant and not a vendee in possession until the purchase price is paid or tendered and a binding contract of sale comes into existence [*Maron v. Howard (1968) 258 Cal. App. 2d 473, 489, 66 Cal. Rptr. 70]* .

All defaults by the lessee in performing the lease do not necessarily terminate or prevent the exercise of an option to purchase nor do they, of themselves, work a forfeiture. The lessor may not ordinarily declare a forfeiture after a lessee has tendered the purchase price; and when the lessor does not in the original instance make an objection to the form of tender, he or she is deemed to have waived any technical objections [*Crowell v. Braly (1959) 169 Cal. App. 2d 352, 354-355, 337 P.2d 211]* .

[5] Effect of Assignment

An agreement in a lease that gives the lessee the right to purchase the demised premises is a covenant that runs with the land and, in the absence of express restrictions, an assignment of the lease also includes an assignment of the right to purchase [*Maron v. Howard (1968) 258 Cal. App. 2d 473, 484, 66 Cal. Rptr. 70* (dictum)]. Covenants to give the tenant the first right to purchase the property also run with the land [*Laffan v. Naglee (1858) 9 Cal. 662, 676-678]* .

[6] Cross References

For alternative forms of complaints and allegations for use in actions for specific performance, see Ch. 528, *Specific Performance* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.68

§ 334.68 Complaint for Specific Performance by Tenant Against Landlord to Compel Extension of Term Under Option to Extend in Lease [Civ. Code § 3384]

[1] FORM Complaint for Specific Performance by Tenant Against Landlord to Compel Extension of Term Under Option to Extend in Lease [Civ. Code § 3384]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR SPECIFIC PERFORMANCE
_____ [*name(s)*],	)	(To Compel Transfer of Interest in Land)
Defendant(s).	)	
	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 334.50[1], P 1.*]

2. [*Fictitious name allegation, if appropriate. See § 334.50[1], P 2.*]

3. On or about _____ [*date*], defendant _____ [*name*] leased to plaintiff under a lease in writing, with option to extend, certain premises known as _____ [*street address and city*], California [, and more particularly described as follows: _____ (*legal description*)]. A copy of the lease is attached to this complaint as Exhibit A and made a part of this complaint.

4. The lease included, as part of the consideration therefor, an option to extend the lease's term _____ [*either* as more particularly set out in Paragraph _____ of the lease *or* as follows: _____ (*set out provision for extending term of lease*)].

5. In accordance with the provisions of the lease and option to purchase and on or about _____ [*date*], plaintiff exercised his/her option to extend the lease's term, as follows: _____ [*manner of exercising option satisfying requirements*].

6. At all times mentioned in this complaint, defendant has failed and refused and continues to fail and refuse to comply with the provisions of the lease and option to extend the term of the lease as provided in the lease and has failed and refused to extend the term.

7. At all times at and since the exercise by plaintiff of the option to extend the lease's term, plaintiff has been and now is ready, able, and willing to comply with all the terms and conditions of the option to extend the term.

8. Plaintiff has duly performed all of the conditions of the lease and option to extend the term to be performed on his/her part, and he/she is entitled to specific performance by defendant extending the lease's term in plaintiff's favor.

9. The consideration provided for in the option to extend the term is adequate in that _____ [*specify*]. The option to extend the term is just and reasonable in that _____ [*specify*]. Plaintiff has no adequate remedy at law, and unless defendant is compelled to specifically perform, plaintiff will suffer irreparable injury.

WHEREFORE, plaintiff prays for judgment as follows:

1. Compelling defendant to specifically perform the lease and option to extend the term by extending the lease's term in plaintiff's favor in accordance with the terms and conditions as set forth in the option.

2. For costs of suit herein incurred.

3. For such other and further relief as the court deems just and proper and according to equity.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.50[1].*]

[2] Use of Form

The form in [1], *above*, is for use by a tenant who seeks to compel a landlord to extend the term of a lease under an option to extend contained in the lease.

[3] Allegations

The complaint alleges the property's location (Paragraph 3) [*see Code Civ. Proc. § 392(a)(1)*], the inclusion of an option to extend the term in the lease and the provisions of the option (Paragraph 4), plaintiff's exercise of the option (Paragraph 5), and his or her full and fair performance of all the conditions precedent on his or her part to the obligation (Paragraph 8) [*see Civ. Code § 3392*; *Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 67-68, 338 P.2d 1005]* , the

defendant's refusal to perform (Paragraph 6), that the consideration is adequate [*Civ. Code § 3391(1)*], the option agreement is just and reasonable as to the defendant [*Civ. Code § 3391(2)*], and plaintiff has no adequate remedy in the ordinary course of law (Paragraph 9) [*see Civ. Code § 3387*].

[4] Option to Extend or Renew

An option to extend or renew a lease is merely an offer by which the lessor binds himself or herself in advance to make a contract if the lessee accepts on the terms and within the time designated. Since the lessor is bound while the lessee is free to accept or not as he or she chooses, courts are strict in holding the lessee-optionee to exact compliance with the option's terms [*Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 67-68, 338 P.2d 1005]* .

A renewal contemplates the giving of a new lease and the execution of a new instrument by the lessor. If a new lease's execution is not intended by the parties, the option to renew is construed as a continuation of the tenancy under the old lease [*Smith v. Arthur D. Little, Inc. (1969) 276 Cal. App. 2d 391, 401, 81 Cal. Rptr. 140]* . Ordinarily, a standard renewal clause in a lease will be construed to give the tenant the option to renew the lease for one additional term and will not be construed as permitting successive renewal rights [*Penilla v. Gerstenkorn (1927) 86 Cal. App. 668, 670, 261 P. 488]* .

To create an enforceable contract right, an option to renew or extend a lease must provide a sufficient standard for enforcing the option without requiring the courts to write a new contract for the parties. It is not necessary for the parties to specify all of the lease's terms; some of the terms may be left to future agreement. However, if an essential element is reserved for the future agreement of both parties, the promise will not give rise to a legal obligation until the future agreement [*Ablett v. Clauson (1954) 43 Cal. 2d 280, 284-286, 272 P.2d 753]* .

When the only provision not fixed by an option clause to lease for an additional term is the amount of rent, a court can set the amount and the exercise of the option is valid [*Streicher v. Heimburge (1928) 205 Cal. 675, 680-685, 272 P. 290]* . However, when the only provision fixed by such an option clause is the duration, and all of the other provisions are left to future agreement, the option's terms are too uncertain to make it enforceable as a contract right [*Ablett v. Clauson (1954) 43 Cal. 2d 280, 286, 272 P.2d 753]* .

A construction given to an exercise of an option to extend or renew a lease by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the court [*Smith v. Arthur D. Little, Inc. (1969) 276 Cal. App. 2d 391, 400, 81 Cal. Rptr. 140]* .

[5] Exercise of the Option

In the absence of an express provision requiring it, a formal written exercise of the option is not essential; and the lease need not contain any provision regarding the manner and time in which the option is to be exercised. If these provisions are absent, the tenant may exercise the option before the original term's expiration by an act or course of conduct indicating to the lessor his or her election to renew [*Los Angeles County v. Kling (1972) 22 Cal. App. 3d 916, 922, 99 Cal. Rptr. 642* ; *Cicinelli v. Iwasaki(1959) 170 Cal. App. 2d 58, 67-68, 338 P.2d 1005]* . Payment by the tenant of the rental provided in the lease and its acceptance by the landlord constitutes an exercise of the option [*Schmitt v. Felix (1958) 157 Cal. App. 2d 642, 645, 321 P.2d 473]* . However, if the option provision gives the lessor the right to demand an increase in the rental, to effectively exercise his or her option to extend, the lessee must indicate his or her willingness to pay the increased rental [*Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 67-68, 338 P.2d 1005]* .

A tenant normally exercises an option to renew or extend a lease by giving the landlord appropriate notice of his or her intention to do so. Ordinarily, an actual notice is required only in the case of an option to renew since in the case of an option to extend, the tenant's remaining in possession will constitute sufficient notice of his or her decision if no specific

form of notice is required by the lease [*Shamp v. White (1895) 106 Cal. 220, 222, 39 P. 537]* . If the tenant uses an express notice indicating his or her intention to exercise an option to renew or extend the lease, the renewal must be on the precise terms permitted in the lease. If the tenant varies the terms of the option by indicating that he or she will renew for a different period or on different terms than are contained in the lease, the notice will be ineffective [*Carney v. Heisch (1924) 67 Cal. App. 465, 467, 227 P. 780]* .

[6] Effect of Exercise

When the lessee has exercised an option to renew a lease, his or her right to possession of the premises for the additional term cannot be defeated by the landlord's actions. The lessee is entitled to specific performance of the covenant to renew. A sublessee stands in exactly the same position and becomes vested with a right to possession of the premises for the additional term when the renewal or extension options of both lease and sublease have been exercised [*Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 65, 338 P.2d 1005]* .

[7] Enforcement of Option by Successors in Interest

A provision in a lease giving the lessee the option to extend or renew the lease creates only a contractual right. It does not transfer any interest in the land until the option is exercised. However, when the option is exercised the covenant to renew ceases to be merely personal and runs with the land. Thus, the legal successors of the lessee, as well as of the lessor, are entitled to the benefits and are burdened with the duties and obligations that the covenant conferred and imposed on the original parties [*Cicinelli v. Iwasaki (1959) 170 Cal. App. 2d 58, 64-65, 338 P.2d 1005]* . Consequently, sublessees have no right to any option given by the lease, but assignees may enforce an obligation of the lessor to a further term [*Ablett v. Clauson (1954) 43 Cal. 2d 280, 283, 272 P.2d 753]* .

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§ 334.69 Complaint for Return of Security Deposit for Expiration of Term Without Default [Civ. Code §§ 1950.5, 1950.7]

[1] FORM Complaint for Return of Security Deposit for Expiration of Term Without Default [Civ. Code §§ 1950.5, 1950.7]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RETURN OF SECURITY DE-
_____ [*name(s)*],	)	POSIT
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 334.50[1], P 1.*]

2. [*Fictitious name allegation, if appropriate. See § 334.50[1], P 2.*]

3. On or about _____ [*date*], defendant [_____ (*name*)] leased to plaintiff certain premises known as _____ [*street address and city*], California, under a written lease, a copy of which is attached to this complaint as Exhibit A and made a part of this complaint. [*If residential property, add:* The premises were intended to be used, and were used, by plaintiff as plaintiff's dwelling.]

4. The lease provided for plaintiff to deposit with defendant the sum of $_____ as security for plaintiff's performance of all lease conditions, which deposit pursuant to Civil Code Section _____ [*1950.5 or 1950.7*] was to be returned to plaintiff on the term's expiration without default [as more particularly set forth in the lease].

5. In accordance with the above, on or about _____ [*date*] plaintiff deposited the sum of $_____ with defendant as security.

6. The lease's term expired on _____ [*date*].

7. Plaintiff has duly performed all of the conditions of the lease to be performed on plaintiff's part and is entitled to return of the sum deposited with defendant as security.

8. Defendant has failed and refused, and continues to fail and refuse, to return to plaintiff the sum deposited as security, to plaintiff's damage in the sum of $_____ [*amount of deposit*].

9. Defendant's retention of plaintiff's security deposit is in bad faith and without cause and subjects defendant to a penalty in addition to actual damages under Civil Code Section _____ [*1950.5 or 1950.7*].

WHEREFORE, plaintiff prays judgment a follows:

1. For compensatory damages in the sum of $_____;

2. For interest thereon [*if judgment will be entered after January 1, 1987, add* at the rate of two percent per month] from and after _____ [*date two weeks after termination of tenancy*];

[3. For the maximum statutory penalty in addition to actual damages;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem just and proper and according to equity.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.50[1].*]

[2] Use of Form

The form in [1], *above*, is for use by a tenant in an action to recover money deposited as security for performance of a lease or rental agreement.

[3] Nonresidential Property

[a] Governing Law

Security deposits regarding nonresidential property (property not used as the tenant's dwelling) are governed by *Civ.*

Code § 1950.7. These deposits include any payment or deposit of money the primary function of which is to secure the performance of a rental agreement or any part of such an agreement other than a payment or deposit (including an advance payment of rent) made to secure the execution of a rental agreement [*Civ. Code § 1950.7(a)*].

[b] Landlord's Rights

The landlord holds any such payment or deposit for the tenant who is party to the agreement. The tenant's claim to the deposit is prior to the claim of any creditor of the landlord except a trustee in bankruptcy [*Civ. Code § 1950.7(b)*].

The landlord may claim of this deposit only the amounts as are reasonably necessary to remedy tenant defaults in the payment of rent, to repair damages to the premises caused by the tenant, or to clean the premises on the tenancy's termination, if the deposit was made for any or all of those specific purposes. When the landlord's claim on the payment or deposit is only for defaults in the payment of rent, and the security deposit equals no more than one month's rent plus a deposit amount clearly described as the payment of the last month's rent, any remaining portion of the payment or deposit must be returned to the tenant at a time mutually agreed on by landlord and tenant, but in no event later than 30 days from the date the landlord receives possession of the premises [*Civ. Code § 1950.7(c)(1)*]. If the landlord's claim on the payment or deposit is only for defaults in the payment of rent and the security deposit exceeds the amount of one month's rent plus a deposit amount clearly described as the payment of the last month's rent, any remaining portion of the payment or deposit in excess of an amount equal to one month's rent must be returned to the tenant no later than two weeks after the date the landlord receives possession of the premises, with the remainder to be returned or accounted for within 30 days from the date the landlord receives possession of the premises [*Civ. Code § 1950.7(c)(2)*]. When the landlord's claim on the payment or deposit includes amounts reasonably necessary to repair damages to the premises caused by the tenant or to clean the premises, any remaining portion of the payment or deposit must be returned to the tenant at a time as may be mutually agreed on by the landlord and tenant, but in no event later than 30 days from the date the landlord receives possession of the premises [*Civ. Code § 1950.7(c)(3)*].

[4] Residential Property

[a] Governing Law

Security deposits regarding residential property (property used as the tenant's dwelling) are governed by the provisions of *Civ. Code § 1950.5* [*Civ. Code § 1950.5(a)*].

[b] Maximum Security Deposit

A landlord may not demand or receive security, however denominated, in an amount or value in excess of an amount equal to two months rent, in the case of unfurnished residential property, or three months rent, in the case of furnished residential property, in addition to any rent for the first month paid on or before initial occupancy [*Civ. Code § 1950.5(c)*]. "Security" means any payment, fee, deposit, or charge, including, but not limited to, any payment, fee, deposit, or charge that is imposed at the beginning of the tenancy to be used to reimburse the landlord for costs associated with processing a new tenant, or that is imposed as an advance payment of rent, used or to be used for any purpose, including, but not limited to, compensation of the landlord for the tenant's default in the payment of rent, repair of damages to the premises exclusive of ordinary wear and tear caused by the tenant, and cleaning of the premises on the tenancy's termination [*Civ. Code § 1950.5(b)*]. A security deposit can also secure the remedy of future defaults by the tenant in any obligation under the rental agreement to restore, replace, or return personal property or appurtenances, exclusive of ordinary wear and tear, if the security deposit is authorized to be applied thereto by the rental agreement [*Civ. Code § 1950.5(b)*]. "Security" does not include application screening fees [*Civ. Code § 1950.5(b)*; *see Civ. Code § 1950.6* (application screening fees)].

It had been thought that a literal reading of this definition would include a legitimate advance payment of rent as a security. However, this construction has been held to be unreasonable. A security is defined by the statute but does not

include "legitimate rent." The term "legitimate rent" is used to distinguish payments that a landlord calls rent but which are really security. To make the distinction, the court must look at a payment called rent by the landlord to determine whether it is usual or customary that the type of payment is rent rather than security. The court can consider the historical practices of the landlord in making the determination. Thus, the fact that the landlord changed the name of a payment from security deposit to rent is a factor indicating that the payment is really a security deposit [*Granberry v. Islay Invs. (1984) 161 Cal. App. 3d 382, 388-391, 207 Cal. Rptr. 652]* .

The above limitation on the amount of the deposit does not prohibit an advance payment of not less than six months rent when the lease's term is six months or longer. Neither does it preclude the landlord and tenant from entering into a mutual agreement for the landlord, at the tenant's request and for a specified fee or charge, to make structural, decorative, furnishing, or other similar alterations, other than cleaning or repair work for which the landlord may make a claim on the deposit of the previous tenant [*Civ. Code § 1950.5(c)*].

[c] Landlord's Rights

The landlord holds any security deposit for the tenant who is a party to the lease or rental agreement. The tenant's claim to it is prior to the claim of any creditor of the landlord [*Civ. Code § 1950.5(d)*].

The landlord may claim from the security deposit only the amounts as are reasonably necessary for the purposes specified in *Civ. Code § 1950.5(b)* [*see* [b], *above*]. The landlord may not assert a claim against the tenant or the security for damages to the premises or any defective conditions that preexisted the tenancy, for ordinary wear and tear or the effects thereof, whether the wear and tear preexisted the tenancy or occurred during the tenancy, or for the cumulative effects of ordinary wear and tear occurring during any one or more tenancies [*Civ. Code § 1950.5(e)*]. This provision is declaratory of existing law [*Civ. Code § 1950.5(p)*].

Within a reasonable time after notification of either party's intention to terminate the tenancy, or before the end of the lease term, the landlord must notify the tenant in writing of his or her option to request an initial inspection and of his or her right to be present at the inspection. The purpose of the initial inspection is to allow the tenant an opportunity to remedy identified deficiencies in order to avoid deductions from the security. If the tenant chooses not to request an initial inspection, the landlord's duties with regard to an initial inspection are discharged [*Civ. Code § 1950.5(f)(1)*]. Based on the initial inspection, the landlord must give the tenant an itemized statement specifying repairs or cleaning that are proposed to be the basis of any deductions from the security. This statement must include the text of *Civ. Code § 1950.5(b)(1)-(4)* [*Civ. Code § 1950.5(f)(2)*]. The tenant must be given the opportunity during the period following the initial inspection until termination of the tenancy to remedy identified deficiencies, in a manner consistent with the rights and obligations of the parties under the rental agreement, in order to avoid deductions from the security [*Civ. Code § 1950.5(f)(3)*].

Requirements pertaining to the initial inspection do not apply when the tenancy is terminated after the tenant defaults in payment of rent, breaches a covenant other than the payment of rent, or commits waste [*Civ. Code § 1950.5(f)(1)*; *see Code Civ. Proc. § 1161(2)-(4)*].

Within a specified period after the tenant vacates the premises, the landlord must provide an itemized statement indicating the disposition of the security, as well as copies of documents showing charges incurred and deducted by the landlord to repair and clean the premises, and must return any remaining security to the tenant [*Civ. Code § 1950.5(g)*].

A landlord who has failed in good faith to take advantage of the summary nonjudicial deduct-and-retain procedure allowed under *Civ. Code§ 1950.5(f)* may nevertheless recover damages for unpaid rent, repairs, and cleaning (permitted under *Civ. Code § 1950.5(e)*) in a subsequent judicial proceeding. To recover these damages, the landlord must prove by a preponderance of the evidence that he or she has suffered the damages and that the amount claimed is reasonable, as provided in *Civ. Code § 1950.5(l)* [*Granberry v. Islay Investments (1995) 9 Cal. 4th 738, 749-750, 38 Cal. Rptr.*

2d 650, 889 P. 2d 970] .

A landlord is not required to pay interest on a security deposit because no statutory requirement requires the landlord to do so [*Korens v. R. W. Zukin Corp. (1989) 212 Cal. App. 3d 1054, 1058-1060, 261 Cal. Rptr. 137]* .

[5] Termination of Landlord's Interest

Whether or not the property is residential, on termination of the landlord's interest in the unit (property) in question, whether by sale, assignment, death, appointment of a receiver, or otherwise, the landlord or his or her agent is required, within a reasonable time, to do either of the following, whereupon the landlord will be relieved of any further liability regarding the security deposit:

- In the case of residential property, transfer the portion of the security remaining after any lawful deductions made under *Civ. Code § 1950.5(e)* [*see* [4][c], *above*] to the landlord's successor in interest. The landlord must thereafter notify the tenant by personal delivery or by first-class mail, postage prepaid, of the transfer, of any claims made against the security, of the amount of the security deposited, and of the names of the successors in interest, their address, and their telephone number [*Civ. Code § 1950.5(h)(1)*]. In the case of nonresidential property, transfer the portion of the payment or deposit remaining after any lawful deductions made under *Civ. Code § 1950.7(c)* [*see* [3][b], *above*] to the landlord's successor in interest, and thereafter notify the tenant by personal delivery or certified mail of the transfer, of any claims made against the payment or deposit, and of the transferee's name and address [*Civ. Code § 1950.7(d)(1)*]. In either case, if the notice to the tenant is made by personal delivery, the tenant must acknowledge receipt of the notice and sign his or her name on the landlord's copy of the notice [*Civ. Code §§ 1950.5(h)(1), 1950.7(d)(1)*]; or

- Return the portion of the security deposit remaining after any lawful deductions, and, if residential property is involved, furnish the tenant with an itemized written statement of the basis for, and the amount of, the security received and the disposition of the security [*Civ. Code §§ 1950.5(h)(2), 1950.7(d)(2)*].

On receiving any portion of the security deposit, the transferee has all of the rights and obligations of the landlord with regard to the deposit [*Civ. Code §§ 1950.5(k), 1950.7(e)*].

[6] Rights and Liabilities of Successor in Interest in Residential Property

Before the voluntary transfer of a landlord's interest in a residential dwelling unit subject to *Civ. Code § 1950.5*, the landlord must deliver to the landlord's successor in interest a written statement indicating the security remaining after any lawful deductions are made, an itemization of any lawful deductions from any security received, and his or her election. This provision does not affect the validity of title to the real property transferred in violation of its provisions [*Civ. Code § 1950.5(i)*].

If the requirements of *Civ. Code § 1950.5(h)* [*see* [5], *above*] are not complied with, the landlord's successors in interest are jointly and severally liable with the landlord for repaying the security or that portion of the security that the tenant is entitled to. A landlord's successor in interest may not require the tenant to post any security to replace that amount not transferred to the tenant or successors in interest unless and until the successor in interest first makes restitution of the initial security or provides the tenant with an accounting. The above provision does not preclude a successor in interest from recovering from the tenant compensatory damages that are in excess of the security received from the landlord that was previously paid by the tenant to the landlord. Despite the preceding provisions, if on inquiry and reasonable investigation, a landlord's successor in interest has a good faith belief that the lawfully remaining security deposit is transferred to him or her or returned to the tenant, the successor in interest is not liable for damages or for any security

not transferred [*Civ. Code § 1950.5(i), (j)*].

[7] Proof of Existence of Security Deposit

Proof of the existence of and the amount of a security deposit may be established by any credible evidence, including, but not limited to, a canceled check, a receipt, a lease indicating the requirement of a deposit as well as the amount, prior consistent statements or actions of the landlord or tenant, or a statement under penalty of perjury that satisfies the credibility requirements of *Evid. Code § 780* [*Civ. Code § 1950.5(o)*].

[8] Penalty for Bad-Faith Retention

A bad-faith claim or retention by the landlord (or a transferee or successor in interest) of any portion of the security deposit, if the property is residential, may subject the landlord to a statutory penalty of up to twice the amount of the security, or if the property is not residential, to a penalty of not more than $200 in addition to actual damages [*Civ. Code §§ 1950.5(l), 1950.7(f)*].

If the property is residential, the court may award damages for bad faith whenever the facts warrant this award, regardless of whether the injured party has specifically requested relief. The landlord or successor in interest has the burden of proof as to the reasonableness of amounts claimed or as to the authority to demand additional deposits [*Civ. Code § 1950.5(l)*].

[9] Nonrefundable Deposits

No lease or rental agreement for residential property may contain any provision characterizing any security deposit as "nonrefundable" [*Civ. Code § 1950.5(m)*].

[10] Waiver of Tenant's Rights

Under *Civ. Code § 1953(a), (c),* any provision in a lease or rental agreement for a dwelling (residential property) executed on or after January 1, 1976, by which the tenant agrees to modify or waive remedies under *Civ. Code § 1950.5* is void as contrary to public policy.

[11] Jurisdiction of Small Claims Court and of Superior Court

An action under *Civ. Code § 1950.5* may be maintained in small claims court if the total claim (actual damages plus penalty) is within the jurisdictional amount of that court [*Civ. Code § 1950.5(n)*; *see Code Civ. Proc. §§ 116.220, 116.221* (jurisdiction of small claims court)]. Generally, the small claims court has jurisdiction in cases where the amount of the demand does not exceed $5,000 [*Code Civ. Proc. § 116.220(a)(1)*; *see also Code Civ. Proc. § 116.221* (in actions brought in small claims court by natural persons, jurisdictional limit is $7,500)].

The superior court otherwise has jurisdiction [*see Cal. Const., art. VI, § 10*]. If the action is a limited civil case [*see Code Civ. Proc. §§ 85, 86(a)(1)* (amount in controversy, exclusive of interest, is $25,000 or less)], the caption must state whether the demand exceeds or does not exceed $10,000 and must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

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§ 334.70 Affirmative Defense of Payment Made to Secure Execution of Rental Agreement [Civ. Code § 1950.7(a)]

[1] FORM Affirmative Defense of Payment Made to Secure Execution of Rental Agreement [Civ. Code § 1950.7(a)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the payment made by plaintiff on or about _____ [*date*], was made to secure the rental agreement's execution and was not made to secure performance of the rental agreement.

[2] Use of Form

This form is for use by a landlord who is sued for recovering an alleged security deposit when the money in question was paid to secure execution of a rental agreement for nonresidential property [*see Civ. Code § 1950.7(a)*].

[3] Cross References

For a form and discussion of a complaint for return of a security deposit for expiration of a term without default, see *§ 334.69*.

For a memorandum supporting a motion for summary judgment based on the affirmative defense that a payment, allegedly a security deposit, was made to secure execution of a rental agreement, see California Points and Authorities, Ch. 141, *Landlord and Tenant* (Matthew Bender).

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29-334 California Forms of Pleading and Practice--Annotated § 334.71

§ 334.71 Complaint for Return of Advance Rent for Termination of Lease by Fault of Landlord [Civ. Code § 3300]

[1] FORM Complaint for Return of Advance Rent for Termination of Lease by Fault of Landlord [Civ. Code § 3300]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR ADVANCE RENT
_____ [*name(s)*],	)	[Amount demanded _____ (exceeds
Defendant(s).	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 334.50[1], P 1.*]

2. [*Fictitious name allegation, if appropriate. See § 334.50[1], P 2.*]

3. [*Lessee of premises. See § 334.60[1], P 3.*]

4. The lease provided for payment by plaintiff of the sum of $_____ as advance rent for a

_____ [*number*]-year period, which period began on _____ [*date*], and, pursuant thereto, on or about _____ [*date*] plaintiff paid the sum of $_____ to defendant.

5. On _____ [*date*], defendant terminated the lease by _____ [*specify landlord's acts of wrongfully terminating lease*].

6. Defendant has failed and refused, and continues to fail and refuse, to return to plaintiff the sum of $_____ paid as advance rent or any part thereof.

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____.

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem just and proper and according to equity.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.50[1].*]

[2] Use of Form

The form in [1], *above*, is for use in an action to recover rent paid in advance when the lease is terminated because of the landlord's fault [*Friedman v. Isenbruck (1952) 111 Cal. App. 2d 326, 335, 244 P.2d 718* ; *see Johnson v. Snyder (1950) 99 Cal. App. 2d 86, 89, 221 P.2d 164* (holding that advance rent is recoverable on eviction by landlord under doctrine of unjust enrichment)].

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29-334 California Forms of Pleading and Practice--Annotated § 334.72

§ 334.72 Complaint by Residential Tenant Against Landlord for Retroactive Rent Abatement Based on Breach of Warranty of Habitability

[1] FORM Complaint by Residential Tenant Against Landlord for Retroactive Rent Abatement Based on Breach of Warranty of Habitability

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name(s)*],	)	
Plaintiff(s),	)	NO. _____
vs.	)	COMPLAINT FOR RETROACTIVE RENT
_____ [*name(s)*],	)	ABATEMENT
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiffs allege:

1. _____ [*Identify plaintiffs, e.g.*, Plaintiffs _____ (*names*) are a married couple residing (with their two young children) in _____, California. At all times mentioned in this complaint plaintiffs' total income from all sources was $_____ per month].

2. _____ [*Identify and give capacity of landlord, e.g.*, Defendant, _____ (*name*), is a domestic corporation and has its principal place of business in _____ County, California. This defendant owns, operates, and manages _____ (*number*) apartment houses in the

_____ (*city and county*) area, including a _____ (*number*)-unit apartment house located at _____ (*address*), California].

3. [*If there are other defendants whose names and capacities are unknown, include fictitious name allegation, e.g.*, Plaintiffs are ignorant of the true names and capacities of defendants sued in this complaint as DOES I through _____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiffs will amend this complaint to allege their true names and capacities when ascertained. (Plaintiffs are informed and believe and thereon allege that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged and that the damages alleged in this complaint were proximately caused by each of these defendants.)]

4. [*If there are multiple defendants and any of them are sued as principals on the basis of vicarious liability, include agency allegation, e.g.*, At all times mentioned in this complaint, defendant(s) _____ (*name(s)*) _____ (*either* was *or* were) the agent(s) and employee(s) of defendant(s) _____(*name(s)*), and in doing the things alleged below, acted within the scope of the agency.]

5. On or about _____ [*date*] defendant _____ [*name of landlord*] (referred to below as "Landlord") leased to plaintiffs by _____ [*either* an oral *or* a written] lease agreement, apartment _____ [*number*], located at _____ [*address*], California on a _____ [*term of lease, e.g.*, month-to-month basis] for rent of $_____ per month. This lease was for residential use. In so leasing the premises to plaintiffs, Landlord impliedly warranted that the premises were habitable and fit for residential use. [A copy of the written lease is attached to this complaint as Exhibit A and made a part of this complaint.]

6. Plaintiffs took possession of the premises on or about _____ [*date*] and faithfully and promptly paid their rent and performed all other obligations imposed on them by the above mentioned lease agreement [, except _____ (*specify any nonpayment of rent*) which was excused by Landlord's breach of the warranty of habitability alleged below].

7. At the time the lease agreement was entered into, and throughout the time plaintiffs occupied the apartment, Landlord knowingly caused and permitted the following hazardous and unhealthy conditions, among others, to exist within and about the apartment: _____ [*specify*].

8. Landlord, at all times mentioned in this complaint, knew that the above conditions existed in violation of numerous provisions of state and local housing codes including but not limited to the provisions of _____ [*specify code sections violated*].

9. Despite this knowledge and despite plaintiffs' repeated requests that the conditions be remedied and repaired, Landlord failed and refused to do so, all in violation of *Civil Code Sections 1941* and *1941.1*.

10. Because of the above stated conditions, the premises leased by plaintiffs were unsafe, unhealthy, and substantially uninhabitable. In causing and permitting and in failing and refusing to repair the above stated conditions, Landlord breached the warranty of habitability. By virtue of this breach of warranty and as a result of the uninhabitable condition of the premises, the fair rental value of the premises at all times mentioned in this complaint was $_____ per month.

11. [On and after _____ (*date*), plaintiffs refused to pay any further rent until the above stated conditions were remedied and repaired.] Because of the continued existence of these conditions, plaintiffs were unable to remain in the premises and were forced to vacate and did vacate the premises on or about _____ [*date*], restoring possession of the premises to Landlord.

12. During the occupancy, plaintiffs paid a total rent in the sum of $_____ whereas the total fair rental value of the premises during this period was no more than $_____, and therefore, plaintiffs have been damaged in the sum of $_____.

WHEREFORE, plaintiffs pray judgment as follows:

1. For damages in the sum of $_____.

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem just and proper and according to equity.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiffs

[*Verification, if desired. See § 334.50[1].*]

[2] Use of Form

The form in [1], *above*, is adapted from the one filed in Holloway v. Oak Valley Properties, Superior Court for Alameda County, No. H-30375-4, supplied through the courtesy of the Legal Aid Society of Alameda County. It should be used in an action by a tenant against his or her landlord to recover the difference between the rent paid and the fair rental value of premises leased for residential purposes, when the landlord breaches the warranty of habitability. Although there is as yet no appellate court authority for an action for retroactive abatement of rent, such an action would appear to follow from the implied warranty of habitability in residential leases that has been recognized by the California Supreme Court [*see Green v. Superior Court (1974) 10 Cal. 3d 616, 629, 111 Cal. Rptr. 704, 517 P.2d 1168* ; *see also Civ. Code § 1941*].

A complaint for declaratory relief may also be used by a tenant to obtain a judicial declaration of his or her duty to pay rent when a landlord breaches the warranty of habitability [*see Hinson v. Delis (1972) 26 Cal. App. 3d 62, 71, 102 Cal. Rptr. 661]* . For forms for use in a declaratory relief action, see Ch. 182, *Declaratory Relief* .

PRACTICE TIP:

Warning! Rent withholding is the most exposed position a tenant can place himself or herself in. It will usually invite the service of an unlawful detainer action with all the attendant consequences of such an action. This course of action should only be counseled in the most extreme circumstances and with due consideration and disclosure of all the possible consequences. *By Benjamin Kaplan*

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29-334 California Forms of Pleading and Practice--Annotated § 334.73

§ 334.73 Complaint by Tenants Against Public Housing Authority for Injunctive and Declaratory Relief to Restrain Housing Authority From Raising Rent [Civ. Code § 3422; Code Civ. Proc. §§ 526, 1060]

[1] FORM Complaint by Tenants Against Public Housing Authority for Injunctive and Declaratory Relief to Restrain Housing Authority From Raising Rent [Civ. Code § 3422; Code Civ. Proc. §§ 526, 1060]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*names*],	)	
Plaintiffs,	)	
vs.	)	NO. _____
_____ [*name of housing authority*], a Public Corporation,	)	COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF
Defendant.	)	
	)	

_____

Plaintiffs allege:

FIRST CAUSE OF ACTION
(Injunctive Relief)

1. Plaintiffs, _____ [*name*] and _____ [*name*] are tenants of a temporary housing project in the City of _____, _____ County, California, which is owned by the City of _____ and operated by defendant.

2. Plaintiff, _____ [*name*], is a tenant of _____, a temporary housing project located outside of the city limits of _____, _____ County, State of California, which is owned and operated by defendant.

3. Defendant, a public corporation, was created under and is bound by *Health and Safety Code Sections 34200-35745*, inclusive.

4. Defendant through its agents on or about _____ [*date*], informed plaintiffs, and all those similarly situated, that effective _____ [*date*], the monthly rentals on all the apartments in the projects operated by defendant would be increased by _____ [*e.g.*, 10 percent].

5. On _____ [*date*], at the next regularly scheduled monthly meeting of defendant corporation, plaintiffs, their agents, others similarly situated, representatives of the _____ [*e.g.*, Valley Communities Economic Opportunities Organization], and members of the general community sought to elicit from defendant, inter alia, its general policy, its specific policy regarding low income housing, its authority to operate at a profit, its authority to make a voluntary payment in excess of _____ [*e.g.*, $10,000] to _____ County per year, and the specific data on which it based the need for a _____ [*e.g.*, 10 percent] rent increase.

6. Defendant refused to disclose the information sought whereupon plaintiffs, their agents, others similarly situated, representatives of the _____ [*e.g.*, Valley Communities Economic Opportunities Organization], and members of the general community joined in requesting defendant corporation to postpone the rent increase until _____ [*date*], to allow them an opportunity to obtain this information. Defendant refused and continues to refuse the request.

7. On the same evening, _____ [*date*], at a regularly scheduled weekly meeting of the City Council of _____, that Council [unanimously] adopted a resolution requesting defendant corporation to postpone the rent increase until _____ [*date*], to allow it to review the policy, facts, and law on which defendant relies. Defendant refused and continues to refuse the request.

8. On _____ [*date*], at a regularly scheduled weekly meeting of the City Council of _____, Council members directly sought to obtain the specific data on which defendant based its need for a _____ [*e.g.*, 10 percent] rent increase from a member of defendant corporation, Commissioner _____ [*name*]. Commissioner _____ [*name*] refused to supply the information.

9. Defendant continues to refuse to make the information available and has publicly manifested its intent to effect the _____ [*e.g.*, 10 percent] rental increase.

10. Defendant has for many years operated its projects at a profit in violation of *Health and Safety Code Section 34321*.

11. Defendant's budget for fiscal year _____ includes a profit in violation of *Health and Safety Code Section 34321*.

12. Defendant's threatened conduct, unless and until the same is forthwith enjoined and restrained by order of this court, will cause great and irreparable injury to plaintiffs in that plaintiffs are of low income families, have no cash reserves, and the _____ [*e.g.*, 10 percent] increase will seriously reduce their ability to provide necessities for themselves and their families.

13. Plaintiffs have no adequate remedy at law for their injuries in that costly litigation will be essential to determine

their rights and liabilities, this litigation will not provide a speedy remedy, and any amounts they may recover, though substantial to them, will not practically justify the expense of the litigation.

14. Plaintiffs will be subjected to a multiplicity of judicial proceedings to establish their rights and liabilities.

SECOND CAUSE OF ACTION
(Declaratory Relief)

Plaintiffs allege:

15. Plaintiffs incorporate Paragraphs 1-14, inclusive, of their First Cause of Action as if the same were herein set out in full.

16. *Health and Safety Code Section 34321* declares it is the policy of the state that no housing authority shall construct or operate any housing project for profit or as a source of revenue to the city or the county.

17. Defendant has for many years operated its projects at a profit and its budget for fiscal year _____ includes a proposed profit.

18. An actual controversy has arisen and now exists between plaintiffs and defendant in that plaintiffs contend that defendant is prohibited by the above-mentioned statute from consciously operating its projects at a profit whereas defendant disputes this contention and contends that it may operate the projects at a profit.

19. Plaintiffs ask the court to make a declaration as to the validity of defendant operating and continuing to operate these projects at a profit. The declaration is necessary and appropriate at this time so that plaintiffs may ascertain their rights and duties in the premises.

WHEREFORE, plaintiffs pray for a judgment as follows:

1. For a preliminary injunction enjoining and restraining defendant, its agents, servants, employees, and all persons acting under it from increasing the rents from the level of _____ [*date*], until further order of this court.

2. For a declaration by the court that defendant may not operate projects at a profit under the above mentioned statute or any other statutes.

3. For costs of suit.

4. For such other and further relief as the court deems just and proper and according to equity.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.50[1].*]

[2] Use of Form

The form in [1], *above*, is based on the complaint filed in *Tyree v. Housing Authority of Pleasanton (1970) 7 Cal. App. 3d 130, 86 Cal. Rptr. 461* . It is for use to secure a permanent injunction restraining a public housing authority from raising the rent and to obtain a declaration that the housing authority may not operate its projects at a profit.

PRACTICE TIP:

Seek Administrative Relief First. There may already exist administrative proceedings or remedies that might serve to accomplish the same results as this complaint seeks to obtain. Although these procedures probably do not have to be exhausted first before obtaining legal relief, all possible administrative remedies should be explored before filing a lawsuit. *By Benjamin Kaplan*

[3] Allegations

The first cause of action alleges the status of the plaintiffs (Paragraphs 1, 2) and the defendant (Paragraph 3), the notice of rent increase (Paragraph 4) and the housing authority's refusal to disclose the information on which the rent increase was based or to postpone the rent increase (Paragraphs 5-9), violation of *Health & Safety Code § 34321* (Paragraph 11), the threat of irreparable injury to plaintiffs (Paragraph 12), that pecuniary compensation will not afford the plaintiffs adequate relief (Paragraph 13) [*Civ. Code § 3422(1)*;], and that the plaintiffs would be subjected to a multiplicity of judicial proceedings (Paragraph 14) [*Civ. Code § 3422(3)*;].

The second cause of action alleges defendant's violation of *Health & Safety Code § 34321* (Paragraphs 16, 17) and facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties (Paragraph 18) [*Code Civ. Proc. § 1060*].

[4] Cross References

For alternate complaints and allegations concerning declaratory relief, see Ch. 182, *Declaratory Relief* .

For alternate complaints, allegations, orders, and defenses concerning injunctive relief, see Ch. 303, *Injunctions* .

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[Reserved]

§§ 334.74[Reserved]

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29-334 California Forms of Pleading and Practice--Annotated § 334.80

§ 334.80 Complaint for Rent Under Oral Lease [Civ. Code § 3302]

[1] FORM Complaint for Rent Under Oral Lease [Civ. Code § 3302]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RENT
_____ [*name(s)*],	)	[Amount demanded _____ (exceeds
Defendants(s).	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Defendant is, and at all times mentioned in this complaint was, a resident of _____ County, California [*or allege other capacity and residence of defendant*].

2. [Plaintiff is ignorant of the true names and capacities of defendants sued in this complaint as DOES I-_____, inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

3. On or about _____ [*date*], plaintiff leased to defendant certain premises at _____ [*street address, city*], California under an oral lease on a _____ [*length of term, e.g.*, month-to-month] tenancy at a _____ [*length of rent period, e.g.*, monthly] rental of $_____ payable

_____ [*specify, e.g.*, on the first day of each month in advance].

4. Plaintiff has duly performed all of the conditions of the lease to be performed on his/her part.

5. Defendant entered into possession of the premises and occupied the premises until _____ [*date*].

6. Rent has accrued and is unpaid under the lease for the following months: _____ [*specify months and year, and total rent accrued*].

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum or $_____.

2. For interest on the sum of $_____ from and after _____ [*date*] at the rate of _____ percent per year.

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem just and proper and according to equity.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of complaint is for use to recover rent due under an oral lease. The complaint alleges that the lease is oral [*Code Civ. Proc. § 430.10(g)* (complaint is subject to demurrer for failure to state whether contract is written or oral)] and sets out its relevant terms (Paragraph 3), that the plaintiff has performed the conditions on his or her part (Paragraph 4), and that rent is unpaid (Paragraph 6).

The terms of an oral lease that should be alleged in an action for rent are the precise term or tenancy, the amount of rent installments, and when the rent is payable.

A lease for longer than one year must be in writing [*Civ. Code § 1624(a)(3)*].

An allegation of possession by the defendant (Paragraph 5) is not necessary [*O'Meara v. Hables (1912) 163 Cal. 240, 242-243, 124 P. 1003]* , but it is customary. If the defendant did not enter into possession, the complaint should allege that the premises were available to him or her and he or she had the right to possession [*Rapid Transit Co. v. Santa Clara Valley Land Co. (1924) 70 Cal. App. 390, 392, 233 P. 389]* .

[3] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*].

If the action is a limited civil case [*see Code Civ. Proc. §§ 85, 86(a)(1)* (amount in controversy, exclusive of interest, is $25,000 or less)], the caption must state whether the demand exceeds or does not exceed $10,000 and must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[4] Interest

Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him or her on a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt [*Civ. Code § 3287(a)*].

[5] Verification

Although verification of this complaint is not required, verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in limited civil cases, and will preclude a general denial even in limited civil cases when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

PRACTICE TIP:

Verification. There is only limited usefulness obtained by way of a verified answer. Having your client sign a verification exposes him or her to cross-examination on the complaint whereas otherwise no examination would be permitted at deposition and/or at trial on proper objection and instruction. *By Benjamin Kaplan*

[6] Cross References

For alternative fictitious name allegations and allegations of capacity and residence, see Ch. 20, *Allegations Commonly Used* .

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions* .

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively.

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29-334 California Forms of Pleading and Practice--Annotated § 334.81

§ 334.81 Complaint for Rent and Attorney's Fees Under Written Lease [Civ. Code § 3302]

[1] FORM Complaint for Rent and Attorney's Fees Under Written Lease [Civ. Code § 3302]

[*Caption. See § 334.80[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 334.80[1], P 1.*]

2. [*Fictitious name allegation, if appropriate. See § 334.80[1], P 2.*]

3. On or about _____ [*date*], plaintiff leased to defendant certain premises known as _____ [*street address, city*], California, under a written lease, a copy of which is attached to this complaint as Exhibit A and made a part of this complaint.

4. [*Performance of conditions. See § 334.80[1], P 4.*]

5. [*Defendant's possession of premises. See § 334.80[1], P 5.*]

6. By the lease's terms, defendant was required to pay to plaintiff for the rent of the premises the sum of $_____, payable as more particularly set out in the lease.

7. Defendant has paid the sum of $_____ under the lease and there is now due, owing, and unpaid for rental under the lease the sum of $_____.

8. The lease provides for the payment by defendant to plaintiff of an attorney's fee in any action brought to enforce payment of rent due or to become due, as more particularly set out in the lease. The sum of $_____ is

a reasonable attorney's fee to allow plaintiff for commencing and prosecuting this action.

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____.

2. For interest on the sum of $_____ from and after _____ [*date*] at the rate of _____ percent per year.

3. For reasonable attorney's fees in the sum of $_____.

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem just and proper and according to equity.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.80[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use to recover rent and attorney's fees under a written lease.

Attaching a copy of the lease to the complaint makes it unnecessary to expressly allege the lease's specific terms. If a copy is not attached, its pertinent provisions should be quoted in appropriate allegations or accurately summarized.

For a discussion of the sufficiency of allegations in an action for rent, see *Pringle v. Fassler (1917) 176 Cal. 264, 265, 168 P.114* .

[3] Attorney's Fees

The recovery of attorney's fees in an action for rent is dependent on a specific provision for attorney's fees in the lease [*Bank of America etc. Ass'n. v. Moore (1937) 18 Cal. App. 2d 522, 529-530, 64 P.2d 460]* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.82

§ 334.82 Complaint for Accounting, Rent, and Attorney's Fees Under Written Lease; Rent as Percentage of Profits [Civ. Code § 3302]

[1] FORM Complaint for Accounting, Rent, and Attorney's Fees Under Written Lease; Rent as Percentage of Profits [Civ. Code § 3302]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR ACCOUNTING AND RENT
_____ [*name(s)*],	)	[Amount demanded _____ (exceeds
Defendant(s).	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 334.80[1], P 1.*]

2. [*Fictitious name allegation, if appropriate. See § 334.80[1], P 2.*]

3. On or about _____ [*date*], plaintiff leased to defendant, for operation by defendant of a _____ [*specify business*], certain premises known as _____ [*street address, city*], California, under a written lease, a copy of which is attached to this complaint as Exhibit A and made a part of this

complaint.

4. [*Performance of conditions. See § 334.80[1], P 4.*]

5. Defendant entered into possession of the premises and _____ [*either* occupied them until _____ (*date*) *or* continues to occupy them].

[*EITHER*]

6. The lease provides for payment by defendant to plaintiff of a percentage rent in a sum equal to _____ percent of _____ [*either* net profits *or* gross sales] from the business, computed and payable as more particularly set out in the lease.

[*OR*]

6. The lease provides for payment by defendant to plaintiff of a fixed minimum rent of $_____ per month, plus percentage rent in a sum equal to _____ percent of net profits from the business, computed and payable as more particularly set out in the lease.

[*EITHER*]

7. Defendant has paid percentage rent for the leased premises for the period from _____ [*date*], to and including _____ [*date*], as follows, claiming such payments were the sums due by reason of the _____ [*either* net profits *or* gross sales] from the business: _____ [*specify*].

[*OR*]

7. Defendant has paid the fixed minimum rental of $_____ per month only for the period from _____ [*date*], to and including _____ [*date*], and has paid no percentage rent for such period, claiming that none was due by reason of lack of requisite _____ [*either* net profits *or* gross sales] from the business.

[*CONTINUE*]

8. The lease provides for the right of inspection by plaintiff, on demand, of the business records of defendant on which the _____ [*either* net profits *or* gross sales] are claimed to be computed, as more particularly set out in the lease. Plaintiff has duly demanded that he/she be permitted to exercise his/her right of inspection or that defendant give an accounting, but defendant has failed and refused, and continues to fail and refuse, to permit plaintiff to inspect the business records or to give an accounting.

9. [Plaintiff is informed and believes and on such information and belief alleges that] _____ [*either* [T]he net profits *or* [G]ross sales] from defendant's business were in excess of an average sum of $_____ per month for the period, and that percentage rent for the period is due and payable in an average sum of not less than $_____ per month, the exact amount of which should be determined by an accounting.

10. The lease provides for the payment by defendant to plaintiff of an attorney's fee in any action brought to enforce payment of rent due or to become due. The sum of $_____ is a reasonable attorney's fee to allow plaintiff for the commencement and prosecution of this action.

WHEREFORE, plaintiff prays judgment as follows:

1. For an accounting by defendant for _____ [*either* net profits *or* gross sales] from the business.

2. For the amount found to be due from defendant to plaintiff as a result of the accounting and interest on that amount from and after _____ [*date*], at the rate of _____ percent per year.

3. For reasonable attorney's fees in the sum of $_____.

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem just and proper and according to equity.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.80[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use to obtain an accounting of rent due under a written lease providing that the rent is based on a percentage of the net profits of a business or a minimum rent plus a percentage of the profits. It also asks for the rent found to be due under such an accounting and for attorney's fees as provided in the lease.

With minor adaptations, this form may be used in any case where the rent is to be calculated on a formula basis and the information necessary to calculate the amount is within the defendant's knowledge.

[3] Allegations

The complaint alleges the relationship of lessor and lessee (Paragraph 3), plaintiff's performance of conditions on his or her part (Paragraph 4), defendant's possession of the premises (Paragraph 5), that there is an unknown amount of rent due to plaintiff from defendant that cannot be determined without an accounting (Paragraphs 6-9), and that a demand for an accounting has been made by plaintiff and refused by defendant (Paragraph 8) [*see Wooster v. Nevills (1887) 73 Cal. 58, 60, 14 P. 390]* . It also alleges that plaintiff should be allowed reasonable attorney's fees under the terms of the lease (Paragraph 10).

[4] Interest

The general rule is that when an accounting is required to arrive at a sum justly due, interest is not allowed before the date of judgment [*Schmidt v. Waterford Winery, Ltd. (1960) 177 Cal. App. 2d 28, 34-35, 1 Cal. Rptr. 874]* . However, the *Schmidt* case indicated that an exception to the general rule may exist when the amount due is a liquidated amount that could be ascertained before judgment from the face of a contract or by reference to well-established value plus computation.

[5] Cross References

For forms and further discussion of a complaint for rent and attorney's fees, see *§§ 334.80* and *334.81*.

For a complete discussion of and other forms for use in an action for accounting, see Ch. 7, *Accounting, Action for* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.83

§ 334.83 Complaint for Accounting, Rent, and Attorney's Fees Under Written Lease; Diversion of Business to Other Location to Avoid Percentage Rent [Civ. Code § 3302]

[1] FORM Complaint for Accounting, Rent, and Attorney's Fees Under Written Lease; Diversion of Business to Other Location to Avoid Percentage Rent [Civ. Code § 3302]

[*Caption. See § 334.82[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 334.80[1], P 1.*]

2. [*Fictitious name allegation, if appropriate. See § 334.80[1], P 2.*]

3. [*Lease of premises. See § 334.82[1], P 3.*]

4. [*Performance of conditions. See § 334.80[1], P 4.*]

5. [*Defendant's possession of premises. See § 334.82[1], P 5.*]

6. The lease provides for payment by defendant to plaintiff of a fixed minimum rent of $_____ per month, plus a percentage rent equal to _____ percent of gross sales of merchandise, computed and payable as more particularly set out in the lease.

7. Defendant has paid the fixed minimum rent, plus a percentage rent averaging $_____ per month for the period from _____ [*date*] to and including _____ [*date*].

8. On or about _____ [*date*], defendant established a business location at _____ [

street address], in _____ [*city*], California, and diverted the _____ [*e.g.*, major] portion of his/her business from the leased premises to the new location, and ever since has continued to do so.

9. Ever since establishing the new location and diverting business from the leased premises to it, defendant has not paid any percentage rent for the leased premises, claiming that none was due by reason of limited gross sales of merchandise at the leased premises. Defendant has paid the fixed minimum monthly rental of $_____ only for the period from _____ [*date*] to and including _____ [*date*].

10. Plaintiff is informed and believes and on such information and belief alleges that the amount of gross sales at the new location of defendant and the amount of gross sales at the leased premises since the diversion of business, when combined, have been and continue to be approximately the same as the gross sales at the leased premises before the diversion of business.

11. The diversion of business by defendant from the leased premises to such new location was and is contrary to the lease's provisions, and was willfully done by him/her with the intent of depriving plaintiff of the percentage rental payable during the remainder of the lease term.

12. By reason of this diversion of business, plaintiff has been, and continues to be, deprived of the percentage rental provided for by the lease in an amount that should be determined by an accounting.

13. [*Attorney's fees. See § 334.82[1], P 10.*]

WHEREFORE, plaintiff prays judgment as follows:

1. For an accounting by defendant of the gross sales at the new location as well as at the leased premises.

2. For the amount of percentage rent found to be due by such an accounting.

3. For reasonable attorney's fees in the sum of $_____.

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.80[1].*]

[2] Use of Form

The form in [1], *above*, is adapted from the complaint in Professional Bldg. of Eureka, Inc. v. Anita Frocks, Inc., No. 6 *(1960) 178 Cal. App. 2d 276, 2 Cal. Rptr. 914* . The complaint is for use in an action for an accounting, rent, and attorney's fees under a written lease, when the defendant has been diverting gross sales from the leased premises to another location and thus avoiding payment of a percentage of the gross sales as part of the rent. Even if there is not an explicit provision barring this diversion, it might arguably be barred by the implied covenant of good faith and fair dealing [*see Carter v. Adler (1955) 138 Cal. App 2d 63, 72-73, 291 P.2d 111* (dictum)].

For forms and further discussion of an action to recover rent, see *§§ 334.80 -334.82*.

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29-334 California Forms of Pleading and Practice--Annotated § 334.84

§ 334.84 Complaint for Rent Payable in Share of Crop and Attorney's Fees Under Written Lease [Civ. Code § 3300]

[1] FORM Complaint for Rent Payable in Share of Crop and Attorney's Fees Under Written Lease [Civ. Code § 3300]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*of other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RENT
_____ [*name(s)*],	)	[Amount demanded _____ (exceeds
Defendant(s).	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 334.80[1], P 1.*]

2. [*Fictitious name allegation, if appropriate. See § 334.80[1], P 2.*]

3. On or about _____ [*date*], plaintiff leased to defendant for the raising by defendant of _____ [*specify crop*] certain ranch lands known as _____ [*common description*] under a written lease, a copy of which is attached to this complaint as Exhibit A and made a part of this complaint.

4. [*Performance of conditions. See § 334.80[1], P 4.*]

5. Defendant entered into possession of the ranch lands and _____ [*either* occupied them until _____ (*date*) *or* continues to occupy them].

6. By the terms of the lease, defendant was required to pay to plaintiff as rental for the lands a _____ [*specify percentage*] share of all crops raised and harvested thereon, payable as more particularly set out in the lease.

7. In or about the month of _____ [*date*], defendant harvested a crop of _____ [*specify*] raised by him/her on the lands under lease, which crop amounted to _____ [*specify amount, e.g.*, 500 bushels] having a reasonable market value of $_____.

8. Defendant has paid _____ [*specify portion*] only of the _____ [*specify percentage*] share of the crop payable as rent to plaintiff and there is now due, owing, and unpaid for rent under the lease a remaining portion of _____ [*specify percentage*], having a reasonable market value of $_____.

9. [*Attorney's fees. See § 334.82[1], P 10.*]

WHEREFORE, plaintiff prays judgment as follows:

1. For the remainder of the _____ [*specify percentage*] share of the crop in the amount of $_____ or its reasonable market value in the sum of $_____.

2. For reasonable attorney's fees in the sum of $_____.

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.80[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action for rent payable in a percentage share of a crop grown on the leased premises and for attorney's fees [*see Atlantic Oil Co. v. County of Los Angeles (1968) 72 Cal. Rptr. 886* (holding that products of the soil constitute rent)].

Rent that is payable in crops is not due until the crops are harvested or until a reasonable time after maturity [*Silveira v. Ohm (1949) 33 Cal. 2d 272, 275, 201 P.2d 387]* .

For forms and discussions of actions for rent under an oral or written lease, see *§§ 334.80* and *334.81*.

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29-334 California Forms of Pleading and Practice--Annotated § 334.85

§ 334.85 Complaint for Value of Use and Occupancy of Real Property Without Lease

[1] FORM Complaint for Value of Use and Occupancy of Real Property Without Lease

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR VALUE AND USE OF REAL
_____ [*name(s)*],	)	PROPERTY
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 334.80[1], P 1.*]

2. [*Fictitious name allegation, if appropriate. See Form 334.80[1], P 2.*]

3. On or about _____ [*date*], plaintiff permitted defendant to occupy as his/her tenant certain premises known as _____ [*street address, city*], California.

4. Defendant occupied these premises as tenant for a period from _____ [*date*] to and including _____ [*date*].

5. There was no agreed on rent. The reasonable value of the occupation of the premises by defendant for the period was the sum of $_____ per month, a total of $_____ for the period.

6. No part of this sum has been paid and the whole thereof is due, owing, and unpaid from defendant to plaintiff.

WHEREFORE, plaintiff prays judgment as follows:

1. For the value of the use and occupation of plaintiff's premises in the sum of $_____.

2. For costs of suit herein incurred.

3. For such other and further relief as the court deems just and proper and according to equity.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.80[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action to recover the value of the use and occupation of real property with the owner's consent when there is no lease.

[3] Rent for Occupation Without Lease

Usually the occupancy of premises by a person with the owner's consent creates the relation of landlord and tenant, and in the absence of an understanding to the contrary, implies an agreement on the tenant's part to pay a reasonable rent for the occupation [*Ross v. Long Beach (1944) 24 Cal. 2d 258, 263, 148 P.2d 649* ; *Meyer v. Parobek (1953) 119 Cal. App. 2d 509, 513, 259 P.2d 948]* .

If the occupancy is without the owner's consent, such as when a former tenant holds over after the end of a term against the owner's wishes, an action in unlawful detainer may be appropriate [*see* Ch. 333, *Landlord and Tenant: Eviction Actions*].

For a form of complaint and discussion of an action for rent under an oral lease, see *§ 334.80*.

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29-334 California Forms of Pleading and Practice--Annotated § 334.86

§ 334.86 Complaint for Rent for Holding Over by Lessee of Written Lease on Expiration of Term With No Express Provision in Lease [Civ. Code § 3302]

[1] FORM Complaint for Rent for Holding Over by Lessee of Written Lease on Expiration of Term With No Express Provision in Lease [Civ. Code § 3302]

[*Caption. See § 334.80[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 334.80[1].*]

2. [*Fictitious name allegation, if appropriate. See § 334.80[1], P 2.*]

3. [*Lease of premises. See § 334.81[1], P 3.*]

4. This lease was for a term of _____ [*number*] year(s) which term expired on _____ [*date*].

5. On expiration of the lease's term, defendant remained and continued in possession of the leased premises until _____ [*date*], thereby extending his/her original tenancy for such additional period on a month-to-month basis and on the same terms and conditions as provided in the lease.

6. The rent payable by defendant during the extended tenancy was _____ [*either* continued at the same rate as provided in the lease *or* fixed by plaintiff and defendant at the rate of $_____ per month], payable _____ [*specify time of payment, e.g.*, on the first day of each month in advance].

7. [*Performance of conditions. See § 334.80[1], P 4.*]

8. Defendant has not paid the following rental installments payable for the extended tenancy and the same are now due, owing, and unpaid: _____ [*specify periods and amounts, and total*].

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____.

2. For interest on the sum of $_____ from and after _____ [*date*] at the rate of _____percent per year.

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem just and proper and according to equity.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.80[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action to recover rent when the lessee under a written lease holds over after expiration of the term with the owner's consent and the lease contained no express provision on holding over.

PRACTICE TIP:
Attorney's Fees. If the lease had an attorney's fee provision, that also carries over, and plaintiff should therefore seek attorney's fees. *By Myron Moskovitz*

[3] Implied Renewal of Lease

If a lessee of real property remains in possession of the property after the expiration of the hiring, and the lessor accepts rent from him or her, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding one month when the rent is payable monthly nor in any case one year [*Civ. Code § 1945*].

[4] Extension Versus Renewal

Although *Civ. Code § 1945* speaks of a "renewed" hiring, a holding over such as described is an extension [*see Woods v. Bank of Haywards (1909) 10 Cal. App. 93, 96, 106 P. 730]* . A lease's renewal creates a new and distinct tenancy whereas an extension is the stretching or spreading out of a former term [*Burroughs v. Ben's Auto Park, Inc. (1945) 27 Cal. 2d 449, 454, 164 P.2d 897* ; *Smith v. Arthur D. Little, Inc. (1969) 276 Cal. App. 2d 391, 399, 81 Cal. Rptr. 140]* .

[5] Cross References

For a form of complaint and discussion of an action for rent on an oral lease, see *§ 334.80*.

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29-334 California Forms of Pleading and Practice--Annotated § 334.87

§ 334.87 Complaint for Rent for Holding Over by Lessee of Written Lease on Expiration of Term; Express Provision in Lease [Civ. Code §§ 1945.5, 3302]

[1] FORM Complaint for Rent for Holding Over by Lessee of Written Lease on Expiration of Term; Express Provision in Lease [Civ. Code §§ 1945.5, 3302]

[*Caption. See § 334.80[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 334.80[1], P 1.*]

2. [*Fictitious name allegation, if appropriate. See § 334.80[1], P 2.*]

3. [*Lease of premises. See § 334.81[1], P 3.*]

4. [*Expiration of term. See § 334.86[1], P 4.*]

5. The lease provided that on holding possession of the leased premises after the term's expiration, defendant would become a tenant from month-to-month with all of the terms and conditions of the lease remaining in effect.

6. On expiration of the lease's term, defendant remained and continued in possession of the leased premises until _____ [*date*], thereby extending his/her original tenancy for such additional period.

7. Plaintiff has duly performed all of the conditions of the lease and extended tenancy to be performed on his/her part.

8. By the terms of the lease, defendant was required to pay to plaintiff for the rent of the premises during the extended tenancy the sum of $_____ per month, payable as more particularly set out in the lease.

9. [*Rent due. See § 334.86[1], P 8.*]

10. [*Attorney's fees. See § 334.82[1], P 10.*]

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____.

2. For interest on the sum of $_____ from and after _____ [*date*] at the rate of _____percent per year.

3. For reasonable attorney's fees in the sum of $_____.

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.80[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action for rent when a lessee holds over after the expiration of the term of a written lease and an express provision in the lease governs the extension.

[3] Requirements for Automatic Extension of Residential Lease

Any term of a lease executed after June 30, 1966 for the hiring of residential real property which provides for the automatic renewal or extension of the lease for all or part of the full term of the lease if the lessee remains in possession after the expiration of the lease or fails to give notice of his or her intent not to renew or extend before the expiration of the lease is voidable by the party who did not prepare the lease unless the renewal or extension provision appears in at least eight-point boldface type, if the contract is printed, in the body of the lease agreement, and a recital of the fact that such provision is contained in the body of the agreement appears in at least eight-point boldface type, if the contract is printed, immediately before the place where the lessee executes the agreement. In this case the presumption in *Civ. Code § 1945* (implied renewal of hiring) applies [*Civ. Code § 1945.5*].

[4] Cross References

For forms of complaints and discussion of an action for rent on an oral or written lease, see *§§ 334.80* and *334.81*.

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29-334 California Forms of Pleading and Practice--Annotated § 334.88

§ 334.88 Complaint for Rent and Attorney's Fees Under Written Lease by Assignee of Rents [Civ. Code §§ 821, 3302]

[1] FORM Complaint for Rent and Attorney's Fees Under Written Lease by Assignee of Rents [Civ. Code §§ 821, 3302]

[*Caption. See § 334.80[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 334.80[1], P 1.*]

2. [*Fictitious name allegation, if appropriate. See § 334.80[1], P 2.*]

3. On or about _____ [*date*], _____ [*lessor's original name*] leased to defendant certain premises known as _____ [*street address, city*], California, under a written lease, a copy of which is attached to this complaint as Exhibit A and made a part of this complaint.

4. [*Defendant's possession of premises. See § 334.82[1], P 5.*]

5. Defendant entered into possession of the premises and _____ [*either* occupied the same until _____ (*date*) *or* continues to occupy the same].

6. By the terms of the lease, defendant was required to pay to _____ [*name*], as lessor, or to his/her assignee, for the rent of the premises, the sum of $_____ per month, payable as more particularly set out in the lease.

7. On or about _____ [*date*], the lessor duly assigned to plaintiff by written assignment all of his/her

right to the money then due and thereafter to become due from defendant under the lease.

8. On or about _____ [*date*], plaintiff gave defendant due notice in writing of these assignment of rents, and notified defendant to pay all rentals to plaintiff as provided by the assignment. A copy of the notice is attached to this complaint as Exhibit B and made a part of this complaint.

9. Defendant has not paid the following installments of rental under the lease, and the same are due, owing, and unpaid from defendant to plaintiff: _____ [*specify*].

10. The lease provides for the payment by defendant to plaintiff, as assignee of the lessor, of an attorney's fee in any action brought to enforce payment of rent due or to become due, as more particularly set out in the lease. The sum of $_____ is a reasonable attorney's fee to allow plaintiff for commencing and prosecuting this action.

[*Prayer. See § 334.87[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.80[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action for rent and attorney's fees by an assignee of rents under a written lease.

[3] Remedies of Assignee of Rents

A person to whom any rent on real property has been transferred or devised is entitled to the same remedies for recovery of rent, for nonperformance of any of the lease's terms, or for any waste or cause of forfeiture, as his or her grantor or devisor might have had [*Civ. Code § 821*].

[4] Cross References

For forms of complaints and discussions of an action for rent on an oral or written lease, see *§§ 334.80* and *334.81*.

For a complete discussion of and forms for use in an action involving assignments, see Ch. 60, *Assignments* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.89

§ 334.89 Complaint for Rent Under Written Lease by Grantee of Landlord [Civ. Code § 3302]

[1] FORM Complaint for Rent Under Written Lease by Grantee of Landlord [Civ. Code § 3302]

[*Caption. See § 334.80[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 334.80[1], P 1.*]

2. [*Fictitious name allegation, if appropriate. See § 334.80[1], P 2.*]

3. [*Lease of premises. See § 334.88[1], P 3.*]

4. During the term of the lease and on or about _____ [*date*], _____ [*name of lessor*] conveyed all of his/her right, title, and interest in the premises to plaintiff.

5. Defendant entered into possession of the premises under plaintiff's predecessor in interest and _____ [*either* continued in possession under plaintiff until _____ (*date*) *or* continues in possession].

6. *Performance of conditions. See § 334.80[1], P 4.*]

7. By the terms of the lease, defendant was required to pay to _____ [*name*], as lessor, or to his/her grantee, as rent for the premises the sum of $_____ per month, payable as more particularly set out in the lease.

8. On or about _____ [*date*], plaintiff gave defendant due notice in writing of the conveyance of the

premises, and notified defendant to pay all rentals to plaintiff thereafter. A copy of the notice is attached to this complaint as Exhibit B and made a part of this complaint.

9. Defendant has not paid the following installments of rent under the lease, and the same are due, owing, and unpaid from defendant to plaintiff: _____ [*specify*].

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____.

2. or interest on the sum of $_____ from and after _____ [*date*] at the rate of _____percent per year.

3. For costs of suit and attorney's fees herein incurred.

4. For such other and further relief as the court may deem just and proper and according to equity.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.80[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action for rent under a written lease by a grantee of the original landlord.

[3] Remedies of Grantee of Property

A person to whom any real property is transferred or devised, on which rent has been reserved, is entitled to the same remedies for recovery of rent, for nonperformance of any of the terms of the lease, or for any waste or cause of forfeiture, as his or her grantor or devisor might have had [*Civ. Code § 821*].

[4] Cross References

For a general form of complaint and discussion of an action for rent, see *§ 334.80*.

For a form of complaint and discussion of an action for rent by an assignee of rents, see *§ 334.88*.

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29-334 California Forms of Pleading and Practice--Annotated § 334.90

§ 334.90 Complaint Against Assignee of Tenant for Rent and Attorney's Fees Under Written Lease [Civ. Code §§ 822, 3302]

[1] FORM Complaint Against Assignee of Tenant for Rent and Attorney's Fees Under Written Lease [Civ. Code §§ 822, 3302]

[*Caption. See § 334.80[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 334.80[1], P 1.*]

2. [*Fictitious name allegation, if appropriate. See § 334.80[1], P 2.*]

3. On or about _____ [*date*], plaintiff as lessor leased to _____ [*name*] as lessee certain premises known as _____ [*street address, city*], California, under a written lease, a copy of which is attached to this complaint as Exhibit A and made a part of this complaint.

4. Thereafter, on or about _____ [*date*], the lessee duly assigned the lease and all of his/her estate under the lease to defendant with the consent of plaintiff [in writing].

5. [*Performance of conditions. See § 334.80[1], P 4.*]

6. [*Defendant's possession of premises. See § 334.82[1], P 5.*]

7. By the terms of the lease, defendant as assignee of the lessee was required to pay to plaintiff for the rent of the premises the sum of $_____, payable as more particularly set out in the lease.

8. [*Rent due. See § 334.81[1], P 7.*]

9. [*Attorney's fees. See § 334.81[1], P 8.*]

[*Prayer. See § 334.87[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.80[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action for rent and attorney's fees under a written lease against the lessee's assignee.

[3] Remedies of Lessor Against Lessee's Assignee

Whatever remedies the lessor of any real property has against his or her immediate lessee for the breach of any agreement in the lease, or for recovery of the possession, he or she has against the assignees of the lessee, for any cause of action accruing while they are such assignees, except when the assignment is made by way of security for a loan, and is not accompanied by possession of the premises [*Civ. Code § 822*].

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Chapter 334 LANDLORD AND TENANT: CLAIMS FOR DAMAGES
PART IV. FORMS
B. Suing a Tenant for Damages and Related Actions

29-334 California Forms of Pleading and Practice--Annotated § 334.91

§ 334.91 Complaint for Rent After Automatic Termination of Lease by Lessee's Breach and Abandonment of Property [Civ. Code §§ 3300, 3302, 1951.2]

[1] FORM Complaint for Rent After Automatic Termination of Lease by Lessee's Breach and Abandonment of Property [Civ. Code §§ 3300, 3302, 1951.2]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RENT AND OTHER DAM-
_____ [*name(s)*],	)	AGES
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff is, and at all times mentioned in this complaint was, the _____ [*specify, e.g.,* owner] of the premises _____ [known as _____ (*street address and city*) *or* described as follows: _____ (*legal description*)] (referred to below as "the premises").

2. Defendant is, and at all times mentioned in this complaint was, a _____ [*specify residence of defendant if a natural person or capacity and principal place of business of defendant if other than a natural person, e.g.,* resident of *or* corporation organized (and existing) under the laws of California, with its principal place of business

in] _____ [*city*], _____ County, California.

3. On or about _____ [*date*], plaintiff and defendant entered into _____ [a written *or* an oral] lease by the terms of which plaintiff leased the premises to defendant for a term of _____ [*specify, e.g.,* one year] at the agreed rental of $_____ per _____ [*e.g.,* month], payable _____ [*e.g.,* monthly in advance on the _____ day of each and every month], commencing on _____ [*date*], and terminating on _____ [*date*]. [A copy of the rental agreement is attached to this complaint as Exhibit A and incorporated into this complaint by reference.]

4. In accordance with the lease agreement, defendant, on or about _____ [*date*], entered into possession of the premises and paid plaintiff rent as it fell due through _____ [*date*], but, in breach of the lease, defendant failed to pay either in whole or in part the rent that became due on _____ [*date*], or the rent that became due on any subsequent date.

[*EITHER, if defendant abandoned premises*]

5. On or about _____ [*date*], defendant vacated and abandoned the premises and the lease was thereby terminated on that date.

[*OR, if plaintiff gave notice of belief of abandonment*]

5. On or about _____ [*date*], plaintiff, in accordance with *Civil Code Section 1951.3(c)* and *(d)*, _____ [personally delivered *or* sent by postage prepaid first-class mail] to defendant a written notice of plaintiff's belief that defendant had abandoned the premises and stating that the lease would terminate on _____ [*date*], unless plaintiff received from the defendant before that date a written notice of defendant's intent not to abandon the premises. A copy of the notice is attached to this complaint as Exhibit B and made a part of this complaint.

6. Plaintiff did not, within the time specified in plaintiff's written notice to defendant (Exhibit B) or at any other time, receive from the defendant, or from anyone acting on the defendant's behalf, or from anyone at all, any written notice of an intent of the defendant not to abandon the premises, and, therefore, under *Civil Code Section 1951.3(a)*, the premises are deemed abandoned by the defendant.

[*CONTINUE*]

[7. Paragraph _____ of the lease (Exhibit A) provides that in the event the lessee abandons the premises before the lease term expires, the damages the lessor may recover include the worth at the time of the award of the amount by which the unpaid rent _____ (for the balance of the term after the time of the award *or specify any shorter period set forth in lease*) exceeds the amount of the rental loss for the same period that the lessee proves could be reasonably avoided, and that the worth at the time of the award is to be computed by discounting the amount at the discount rate of the Federal Reserve Bank of San Francisco at the time of the award plus one percent.]

[8. On _____ (*date*), plaintiff, in a good-faith effort to mitigate the damages, by _____ (a written *or* an oral) _____ (lease *or* rental agreement) relet the property to _____ (*name*) at a _____ (*specify, e.g.,* monthly) rental of $_____ (*amount less than monthly rental reserved in lease with defendant*) for a term commencing on _____ (*date*), and terminating on _____ (*date*). (A copy of the _____ (lease *or* rental

agreement) is attached to this complaint as Exhibit C and made a part of this complaint.)]

9. On the date the lease was terminated as alleged above, rent was due, owing, and unpaid in the sum of $_____, which became due on _____ [*date*]. As a proximate result of defendant's failure to pay this rent or any part of it on the date it was due, or since, plaintiff has been damaged in the sum of $_____ [*amount of rent due*], together with interest on that sum at the _____ [legal rate *or* rate of _____ percent per annum as provided in the lease] from the date payment was due.

10. As a further proximate result of defendant's breach of the lease and abandonment of the premises, and the consequent termination of the lease, as alleged in this complaint, plaintiff has been further damaged in the sum of $_____ [*amount of rent*] per _____ [*e.g.*, month] from _____ [*date first rent payment became due after termination of lease*], until the date judgment is entered in this case together with interest on each payment at the _____ [legal rate *or* rate of _____ percent per annum as provided in the lease] from the date it became due[, less the sums received by plaintiff during this period as rent from the reletting of the premises].

[11. As a further proximate result of defendant's breach of the lease and abandonment of the premises, and the consequent termination of the lease, as alleged in this complaint, plaintiff has been further damaged in the sum of $_____ per _____ (*e.g.*, month) _____ (for the balance of the term after the time of the award in this action *or specify any shorter period set forth in lease*) (, less the sums that will be received by plaintiff during that period as rent from the reletting of the premises).]

12. As a further proximate result of defendant's breach of the lease and abandonment of the premises as alleged in this complaint, plaintiff _____ [*specify any special detriment sustained and the amount of damages claimed, e.g.*, to mitigate the damages, incurred and paid advertising and other expenses in the sum of $_____ in reletting the property and has sustained damages in that sum].

13. _____ [*Allege in this and subsequently numbered paragraphs any other detriment proximately caused by the lessee's failure to perform his or her obligations under the lease, or which in the ordinary course of things would be likely to result therefrom, and the amount of damages claimed*].

14. [*Attorney fees. See § 334.82[1], P 10.*]

WHEREFORE, plaintiff prays judgment as follows:

1. For the rent due, owing, and unpaid at the time the lease was terminated in the sum of $_____, together with interest thereon at the _____ [legal rate *or* rate of _____ percent per annum as provided in the lease];

2. For the worth at the time of the award in this action of unpaid rent that would have been paid under the terms of the lease from the date the lease was terminated until the date of the award in this action [, less the amount of rent received by plaintiff during that period from the reletting of the premises], together with interest on each payment at the _____ [legal rate *or* rate of _____ percent per annum as provided in the lease] from the date it became due;

[3. For the worth at the time of the award in this action of the amount of the unpaid rent that would have accrued _____ (for the balance of the term of the lease after the time of the award in this action *or specify any shorter period set forth in lease*) (, less the rent received by plaintiff during that period from the reletting of the premises,) discounted at the discount rate of the Federal Reserve Bank of San Francisco at the time of the award plus one percent;]

[4. For expenses incurred and paid in reletting the premises in the sum of $_____;]

[5. For _____ (*specify any other special detriment alleged in the complaint and amount of damages sought*);]

[6. For reasonable attorney's fees in the sum of $_____;]

7. For costs of suit herein incurred; and

8. For such other and further relief as the court may deem just and proper and according to equity.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.80[1].*]

[2] Use of Form

This form of complaint is for use by a landlord to recover unpaid rent and other damages proximately resulting from the premature termination of the lease as a result of the tenant's breach of the lease and abandonment of the leased property [*see Civ. Code § 1951.2(a)*]. For a form of notice of belief of abandonment (mentioned in the alternative Paragraph 5), see *§ 332.96*.

[3] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*].

If the action is a limited civil case, the caption must state whether the demand exceeds or does not exceed $10,000 and must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[4] Allegations

A complaint for damages for breach of a lease agreement must allege the following [*see Civ. Code § 3300*]:

- Duty;
- Breach of duty;
- Proximate cause;
- Detriment; and
- Damages.

Duty is established by alleging the lease's execution between the owner (or other person having a right to let the premises) and the renter and the relevant terms of the lease (Paragraphs 1, 3). Breach of duty is established by pleading the defendant's breach of a covenant or condition of the lease (Paragraph 4). Proximate cause may be alleged generally, by stating that the breach proximately caused specified detriment or that as a proximate result of the breach plaintiff sustained specified detriment, which is the loss or harm suffered in person or property (Paragraphs 9-13) [*see* Civ. Code §§ 1952.1(a)(1)-(4) (measure of damages for abandonment of lease), 3281 (detriment is compensable in damages), 3282 (defining detriment)]. In addition to the above elements, a complaint based on the lessee's breach of the lease and abandonment of the property must also allege the lessee's abandonment of the premises, which automatically terminates the lease (Paragraph 5 or alternative Paragraphs 5, 6) [*see Civ. Code § 1951.2(a)*].

The above complaint also includes an allegation of the capacity of a defendant that is not a natural person, and the city and county of the defendant entity's principal place of business or of a defendant natural person's residence (Paragraph 1). The latter allegations establish venue or subvenue, although facts establishing venue or subvenue are not normally required to be alleged. For a discussion of venue, see Ch. 571, *Venue* . For forms of allegations of plaintiff's capacity that should be used if plaintiff is other than a natural person or is a natural person suing in a representative capacity, see Ch. 20, *Allegations Commonly Used* .

[5] Damages

The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation with interest on that amount (Paragraphs 9, 10) [*Civ. Code § 3302*; *see Civ. Code § 1951.2(b)* (recovery of interest on rent accruing before judgment in action for damages based on breach of a lease and abandonment expressly authorized)].

Specifically, plaintiff may recover damages for the unpaid rent that had been earned at the time of termination (Paragraph 9) [*Civ. Code § 1951.2(a)(1)*]. Plaintiff may also recover the amount that would have been earned between the time of termination and the time of the judgment to the extent it exceeds the amount the lessee proves could have been reasonably avoided (Paragraph 10) [*Civ. Code § 1951.2(a)(2)*].

To recover damages based on loss of rent between the time of the judgment and the end of the term, or any shorter period specified in the lease, plaintiff must either allege that the lease included a provision as alleged in Paragraph 7 of the above form or that plaintiff reasonably and in good faith relet the premises after the abandonment for an amount less than the rental under the abandoned lease. If Paragraph 7 or Paragraph 8 is included, Paragraph 11, which calculates the damages due under either of those paragraphs, should also be included [*see Civ. Code § 1951.2(a)(3), (c), (d)*].

Any additional consequential damages that are clearly ascertainable in both their nature and origin may also be sought if the specific damage or detriment sustained, together with the amount of damages sought, are alleged in the body of the complaint (Paragraphs 12, 13) [*see Civ. Code §§ 3300, 3301*].

[6] Abandonment

Property is deemed abandoned following the lessor's notice of belief of abandonment and his or her subsequent failure to receive from the lessee a notice of intention not to abandon [*see Civ. Code § 1951.3*].

[7] Cross References

For forms and further discussion of actions for rent and abandonment, see *§§ 332.96*, *332.97*, and *334.80 -334.82*.

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29-334 California Forms of Pleading and Practice--Annotated § 334.92

§ 334.92 Complaint for Rent When Lease Is Continued Under Its Terms After Lessee's Breach and Abandonment of Property [Civ. Code §§ 1951.2, 1951.4, 3300, 3302]

[1] FORM Complaint for Rent When Lease Is Continued Under Its Terms After Lessee's Breach and Abandonment of Property [Civ. Code §§ 1951.2, 1951.4, 3300, 3302]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RENT
_____ [*name(s)*],	)	[Amount demanded _____ (exceeds
Defendant(s).	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 334.91[1], P 2.*]

2. [*Execution and term of lease, and provisions relating to rent. See § 334.91[1], P 3.*]

3. [*Defendant's entry into possession and breach of the lease by failure to pay rent when due. See § 334.91[1], P 4.*]

4. [*Defendant's abandonment of the premises. See § 334.91[1], first or second P 5 and P 6.*]

5. The lease (Exhibit A) provides that, even though the lessee breaches the lease and abandons the property, the lease will continue in effect for so long as the lessor does not terminate the lessee's right to possession and that the lessor may enforce all his/her rights and remedies under the lease, including the right to recover the rent as it becomes due under the lease, and further _____ [*if lease is silent on transfer of lessee's interest:* does not prohibit or otherwise restrict the right of the lessee _____ (to sublet the property *or* to assign his/her interest in the lease *or* to sublet the property or assign his/her interest in the lease) *or describe provision on transfer of lessee's interest:* provides that the lessee may _____ (sublet the property *or* assign his/her interest in the lease *or* sublet the property or assign his/her interest in the lease)] [*continue if transfer of lessee's interest is subject to standards or conditions or requires landlord's consent:* _____ (, subject to standards or conditions that were reasonable when the lease was executed, and the lessor is not requiring compliance with any standard or condition that has become unreasonable *or* with the consent of the lessor, which must not unreasonably be withheld)].

6. Plaintiff has not terminated defendant's right to possession of the premises under the lease.

7. Defendant has failed and refused to pay the rent that became due under the terms of the lease on _____ [*date*], for the period from _____, to _____ [*dates*], in the amount of $_____, as a proximate result of which plaintiff has been damaged in that sum together with interest thereon at the _____ [legal rate *or* the rate of _____ percent per annum as provided in the lease].

8. [*Attorney fees. See § 334.82[1], P 10.*]

WHEREFORE, plaintiff prays judgment as follows:

1. For rent in the sum of $_____, with interest thereon from _____ [*date rent became due*];

2. For reasonable attorney fees in the sum of $_____;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem just and proper and according to equity.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.80[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use to bring an action to recover rent when the lessee breaches the lease and abandons the property before the end of the lease term [*see Civ. Code §§ 1951.2, 1951.3*], but the lease, including the lessor's right to recover rent, continues in effect under *Civ. Code § 1951.4* [*see § 332.24[4][h]*].

[3] Allegations

The complaint alleges the following:

- The lease provision that continues the lease in effect in the event of the lessee's breach of the lease and abandonment of the premises so long as the lessor does not terminate the lessee's right to possession (Paragraph 5) [*see Civ. Code § 1951.4(a), (b)*].

- That the lease either does not contain any prohibition on transfer or assignment of the lessee's interest or that it permits the lessee to sublet or assign the property or both (Paragraph 5) [*Civ. Code § 1951.4(b)(1)-(3)*; *see Civ. Code § 1951.4(b)(3)* (requirement that landlord's consent may not be unreasonably withheld may be provided in lease or implied by law)].

- That the plaintiff has not terminated the defendant's right to possession (Paragraph 6) [*Civ. Code § 1951.4(b)*].

- That rent has become due under the terms of the lease that, to plaintiff's damage, defendant has failed and refused to pay (Paragraph 7) [*Civ. Code § 1951.4(b)*].

[4] Acts Not Constituting Termination of Lessee's Right to Possession

None of the following constitute a termination of the lessee's right to possession for the purposes of *Civ. Code § 1951.4(b)* [*Civ. Code § 1951.4(c)*]:

- Acts of maintenance or preservation or efforts to relet the property;

- The appointment of a receiver on the lessor's initiative to protect the lessor's interest under the lease; or

- Withholding consent to a subletting or assignment, or terminating a subletting or assignment, if the withholding or termination does not violate the lessee's rights.

[5] Cross References

For a form of complaint and discussion of an action for rent after the termination of a lease by the lessee's breach and abandonment, see *§ 334.91*.

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29-334 California Forms of Pleading and Practice--Annotated § 334.93

§ 334.93 Complaint by Landlord Against Tenant for Waste, Treble Damages, and for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 732]

[1] FORM Complaint by Landlord Against Tenant for Waste, Treble Damages, and for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 732]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AND FOR IN-
_____ [*name*],	)	JUNCTIVE RELIEF
Defendant.	)	(Waste)
	)	
	)	

_____

Plaintiff alleges:

1. At all times mentioned in this complaint, plaintiff was and now is the owner of certain premises known as _____ [*street address and city*], California, more particularly described as follows: _____ [*legal description*].

2. On or about _____ [*date*], plaintiff leased to defendant _____ [*name*] the above premises for use as _____ [*specify, e.g.,* a dwelling] _____ [*either* under a lease in writing, a copy of which is attached to this complaint as Exhibit A and made a part of this complaint *or* under an oral lease].

3. Under the terms of the lease, on _____ [*date*], the defendant entered into possession of the premises and has remained in possession ever since.

4. Commencing on or about _____ [*date*], and since that time, defendant has caused injury to the premises by committing waste thereon by _____ [*specify defendant's acts or omissions constituting waste*].

5. Before the commencement of defendant's conduct, the above-described premises had a reasonable market value of $_____; presently, its reasonable market value is $_____.

6. Each act and omission of defendant as alleged above was done intentionally and over plaintiff's objection. Defendant willfully and maliciously engaged in this conduct with the full knowledge that it would result in substantial damage to the premises and plaintiff's interest in the premises. Therefore, plaintiff is entitled to recover treble damages from defendant.

7. Plaintiff's property will be further wasted, resulting in a multiplicity of judicial proceedings, unless defendant's conduct is forthwith and henceforth enjoined.

WHEREFORE, plaintiff prays judgment as follows:

1. For actual damages in the sum of $_____, to be trebled in accordance with *Code of Civil Procedure Section 732* for total damages in the sum of $_____.

2. For a temporary restraining order, preliminary injunction, and permanent injunction compelling the defendant to refrain from _____ [*specify acts or omissions constituting waste*].

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.80[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a landlord against a tenant for damages and a permanent injunction when the tenant has caused and is continuing to cause waste to the leased premises. The commission of waste by a tenant contrary to the conditions or covenants of his or her lease is a basis for bringing an unlawful detainer action [*see Code Civ. Proc. § 1161(4)*].

[3] Allegations

The complaint alleges the creation of the tenancy by lease (Paragraph 2) and the defendant's possession under the lease (Paragraph 3), the acts of defendant that constitute waste (Paragraph 4), the amount of depreciation of the market value of the property (Paragraph 5) [*see Sallee v. Daneri (1942) 49 Cal. App. 2d 324, 327, 121 P.2d 781]* , the fact that

defendant acted willfully and maliciously which thus entitles plaintiff to treble damages (Paragraph 6) [*Code Civ. Proc. § 732*; *see Isom v. Rex Crude Oil Co. (1903) 140 Cal. 678, 680, 74 P. 294]* , and the fact that defendant will continue to commit waste unless enjoined (Paragraph 7) [*see Civ. Code § 3422*].

[4] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union(1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . Verification of the complaint requires the defendant to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446*] and precludes a general denial in superior court and some limited civil cases [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

Since the action for damages for waste is combined with a request for a permanent injunction, jurisdiction lies exclusively in the superior court, even if a preliminary injunction or temporary restraining order is also sought [*Code Civ. Proc. § 86(a)(8)*]. An action seeking permanent injunctive relief is in the jurisdiction of the superior court and is not a limited civil action [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*]. If, however, plaintiff decides to seek injunctive relief in the form of a preliminary injunction or temporary restraining order only, then the case is a limited civil action if the amount in controversy, exclusive of interest, is $25,000 or less [*Code Civ. Proc. § 86(a)(1), (8)*].

The venue for an action for damage to real property is the county where the property is situated [*Code Civ. Proc. § 392(a)(1)*].

[6] Definition of Waste

Waste has been defined judicially as an unlawful act or omission of duty on the tenant's part that results in permanent injury to the leased premises [*Southern Pacific Land Co. v. Kiggins (1930) 110 Cal. App. 56, 60-61, 293 P. 708]* . By statute, the hirer of a thing must use ordinary care for its preservation in safety and in good condition [*Civ. Code § 1928*] and he or she must repair all deteriorations or injuries thereto occasioned by his or her want of ordinary care [*Civ. Code § 1929*].

[7] Remedies for Waste

The commission of waste by a tenant may be ground for an action for damages by the landlord [*Richards v. Silveria (1929) 97 Cal. App. 166, 168, 275 P. 478]* . Also, an injunction may be obtained to restrain a tenant from practices that amount to waste [*Taft v. Washington (1915) 29 Cal. App. 197, 198, 154 P. 1073]* . When a tenant commits waste on the demised premises contrary to the condition or covenants of his or her lease, he or she terminates the lease, and the landlord, on service of three days' notice to quit, is entitled to restitution of possession of the premises [*Code Civ. Proc. § 1161(4)*].

If the waste consists of using the premises for purposes other than those for which it was let, the lease may be rescinded by the landlord [*Isom v. Rex Crude Oil Co. (1905) 147 Cal. 659, 661-662, 82 P. 317]* .

When real property has been sold in accordance with a levy, the purchaser of the property, or any person who has succeeded to the purchaser's interest, may recover damages from the person causing the injury for injury to the property after levy and before possession is delivered to the purchaser or the person who has succeeded to the purchaser's interest

[*Code Civ. Proc. § 746*].

[8] Measure of Damages

Ordinarily, the amount of damages recovered for a tenant's waste is the pecuniary measure of the diminution of the estate [*Southern Pacific Land Co. v. Kiggins (1930) 110 Cal. App. 56, 61, 293 P. 708]* or the value of dilapidations amounting to more than ordinary wear and use [*Kanner v. Globe Bottling Co. (1969) 273 Cal. App. 2d 559, 566, 568, 78 Cal. Rptr. 25]* .

The statute of limitations on actions for damage to real property is three years [*Code Civ. Proc. § 338(b)*].

[9] Treble Damages

If a guardian, conservator, tenant for life or years, joint tenant, or tenant in common of real property, commits waste on the property, any person aggrieved by the waste may bring an action against him or her therefor, in which action there may be judgment for treble damages [*Code Civ. Proc. § 732*]. These damages are not mandatory in character and contemplate a showing of willfulness or maliciousness. Whether the damages should be trebled is left to the court's discretion [*Kanner v. Globe Bottling Co. (1969) 273 Cal. App. 2d 559, 568, 78 Cal. Rptr. 25]* . Treble damages are also specifically provided by statute for the cutting of timber [*Civ. Code § 3346*; *Code Civ. Proc. § 733*].

[10] Alterations by Tenant

The right of a tenant to make any alterations to leased premises depends on the specific terms of the lease agreement. A tenant may not make material alterations to the leased premises without the landlord's prior consent, absent an express provision in the lease permitting or requiring such alterations. Unauthorized alterations may constitute waste, even if they enhance the property's value, because the policy is that the demised property ought to be returned on termination of the leasehold in the same condition as when leased. A tenant may, however, still make minor alterations to leased premises without violating a lease specifically prohibiting alterations by the tenant [*Briggs v. Sherman (1924) 65 Cal. App. 249, 252, 223 P. 581]* . Whether an alteration is material or minor is a question of fact to be determined by looking to the lease as a whole and any specific provisions regarding alterations [*Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 674, 75 Cal. Rptr. 889, 451 P.2d 721]* .

[11] Cross References

For forms for use in actions for injunctive relief, see Ch. 303, *Injunctions* .

California Forms of Pleading and Practice--Annotated

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Volume 29: Landlord and Tenant: General Introduction thru Rent Control-Chs. 330-339
Chapter 334 LANDLORD AND TENANT: CLAIMS FOR DAMAGES
PART IV. FORMS
B. Suing a Tenant for Damages and Related Actions

29-334 California Forms of Pleading and Practice--Annotated § 334.94

§ 334.94 Complaint for Declaratory Relief by Landlord Against Tenant for Declaration of Rights as to Removability of Improvement Affixed to Leased Premises [Civ. Code §§ 1013, 1019; Code Civ. Proc. § 1060]

[1] FORM Complaint for Declaratory Relief by Landlord Against Tenant for Declaration of Rights as to Removability of Improvement Affixed to Leased Premises [Civ. Code §§ 1013, 1019; Code Civ. Proc. § 1060]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	COMPLAINT FOR DECLARATORY RELIEF
Defendant(s).	)	
	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 334.80[1], P 1.*]

2. [*Fictitious name allegation, if appropriate. See § 334.80[1], P 2.*]

3. On or about _____ [*date*], plaintiff leased to defendant under a lease in writing, for operation by defendant of a business of _____ [*specify*], certain premises known as _____ [*street address and city*], California, and more particularly described as follows: _____ [*legal description*]. A copy of the lease is attached to this complaint as Exhibit A and made a part of this complaint.

4. [The lease contained provisions relating to the making of and right to remove alterations, repairs, additions, and improvements to the leased premises by defendant, (as more particularly set out in Paragraph _____ of the lease *or* as follows: _____).]

5. During the term of the lease defendant affixed a certain article to the leased premises as follows: _____ [*specify, showing nature of article and manner of annexation*].

[*EITHER*]

6. The lease's term _____ [*either* will expire *or* expired] on _____ [*date*].

[*OR*]

6. Defendant's tenancy of the leased premises has been terminated, effective _____ [*date*] by reason of the following facts: _____ [*specify, e.g.*, defendant abandoned the premises on or about _____ (*date*), which was before the end of the term].

[*CONTINUE*]

7. An actual controversy has arisen and now exists between plaintiff and defendant relating to their respective legal rights and duties as to the article so affixed to the leased premises by defendant. More particularly, the controversy raises the following opposing contentions:

A. Plaintiff contends:

[*SET OUT contentions in as many subparagraphs as needed, e.g.:*]

(1) By reason of the manner in which the article was affixed to the premises, it became and is an integral part of the premises.

(2) The article cannot be removed without injury to the premises.

(3) Title to the article vested in plaintiff under the provisions of the lease set forth above.

(4) Even if the article were impliedly intended to be removable, defendant's default and plaintiff's reentry for breach of condition forfeited any claim defendant might have asserted as to right of removal.

(5) The affixing of the article to the leased premises by defendant was part of the consideration for the lease, and removal would deprive plaintiff of a part of the consideration.

[*CONTINUE*]

B. Defendant contends:

[*SET OUT contentions in as many subparagraphs as needed, e.g.:*]

(1) Defendant affixed the article to the leased premises for the purposes of trade, and as such it has remained a trade fixture removable by defendant during the term's continuance, which has not expired.

(2) The article has not been affixed to the premises in any manner whereby it has become an integral part of the premises.

(3) Removal of the article can be effected without injury to the premises.

(4) The parties intended that the article be removable, and affixing it to the premises permanently was not a part of the lease's consideration.

(5) Defendant retained a right under the lease provisions set forth above to remove such article, and that this is a presently subsisting right.]

[*CONTINUE*]

8. Plaintiff desires a declaration of his/her rights and duties, and particularly a declaration as to whether the article is an integral part of the premises or otherwise nonremovable, or whether it is a removable trade fixture.

WHEREFORE, plaintiff prays judgment as follows:

1. For a determination and declaration that the article specified above is an integral part of the real property or is otherwise nonremovable and belongs as such to plaintiff.

2. For costs of suit herein incurred.

3. For such other further relief as the court deems proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.80[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a landlord who seeks a judicial declaration that a certain improvement affixed to the leased premises is a fixture and cannot be removed by the tenant. The complaint alleges the lease of the premises (Paragraph 3), the affixing of the article (Paragraph 5), and facts showing the existence of an actual controversy relating to the legal rights and duties of the respective parties under the lease (Paragraphs 7, 8) [*see Code Civ. Proc. § 1060*].

Although this form is designed for a landlord, it may be modified for use by a plaintiff tenant.

When a landlord sues seeking declaratory relief, the action may be combined with a cause of action to quiet title [*see, e.g., Rinaldi v. Goller (1957) 48 Cal. 2d 276, 309 P.2d 451* ; *see also* Ch. 482, *Quieting Title*].

[3] Declaratory Relief

Any person interested under a written instrument, excluding a will or a trust, or under a contract, or who desires a declaration of his or her rights or duties with regard to another, or in regard to, in, over, or on property, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action or cross-complaint in the superior court for a declaration of his or her rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract [*Code Civ. Proc. § 1060*; *see Code Civ. Proc. § 86(a)(7)(A)* (actions for declaratory relief in limited civil cases available only by means of a cross-complaint); *see also Code Civ. Proc. §§ 85, 86, 86.1* (limited civil case is one in which amount in controversy, exclusive of interest, is $25,000 or less)]. He or she may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of these rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and the declaration has the force of a final judgment. The declaration may be had before there has been any breach of the obligation in regard to which the declaration is sought [*Code Civ. Proc. § 1060*].

[4] Fixtures

Fixtures are those things that are so attached to realty as to be considered in law a part of the realty [*R. Barcroft & Sons Co. v. Cullen (1933) 217 Cal. 708, 711, 20 P.2d 665]* . When a person affixes his or her property to the land of another, without an agreement permitting him or her to remove it, the thing affixed, except as otherwise provided in *Civ. Code §§ 1013-1019* (trade fixtures), belongs to the owner of the land, unless he or she chooses to require the former to remove it or the former elects to exercise the right of removal provided for in *Civ. Code § 1013.5* (good-faith mistake in affixing property) [*Civ. Code § 1013*]. Fixtures may not be removed by a tenant at the expiration or termination of the tenant's term [*Clark v. Talmadge (1937) 23 Cal. App. 2d 703, 706, 74 P.2d 825]* . However, the parties may expressly agree that the tenant may remove the improvements and the lessor is bound thereby [*Clark v. Talmadge (1937) 23 Cal. App. 2d 703, 706-707, 74 P.2d 825* ; *Earle v. Kelly (1913) 21 Cal. App. 480, 483, 132 P. 262]* . A special agreement between landlord and tenant regarding fixtures supersedes the general rules of law regulating their mutual relations and obligations [*Bridges v. Cal-Pacific Leasing Co. (1971) 16 Cal. App. 3d 118, 128, 93 Cal. Rptr. 796]* .

[5] Property Character

Fixtures installed by a tenant are considered real property and become the landlord's property on termination of the tenancy except when there is an agreement permitting their removal or when they are affixed for the purpose of trade and the removal can be effected without injury to the premises [*Beverly Hills v. Albright (1960) 184 Cal. App. 2d 562, 568, 7 Cal. Rptr. 706]* . When an owner and tenant agree that improvements on the land are the tenant's property, these improvements, even if buildings or homes, lose their nature as real property and become the tenant's personal property [*People ex rel. Thain v. Palo Alto (1969) 273 Cal. App. 2d 400, 402, 78 Cal. Rptr. 240]* .

[6] Tests for Determining Fixture

There are three main factors in determining whether an article is a fixture: physical annexation, adaptation to use with real property, and intention to annex to realty. Of these, intention is the most significant but the others are also relevant [*Rinaldi v. Goller (1957) 48 Cal. 2d 276, 279, 309 P.2d 451* ; *Allstate Ins. Co. v. County of Los Angeles (1984) 161 Cal.App. 3d 877, 885-886, 207 Cal. Rptr. 888* ; *Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 132, 95 Cal. Rptr. 728]* . The widely accepted view is that the united application of all three tests is required, but even this will not suffice in all situations. There are other factors, including the relationship of the claiming parties, the relative difficulty of removal, the nature of the article annexed, and whether the fact of annexation is open and apparent [*Cornell v. Sennes (1971) 18*

Cal. App. 3d 126, 132, 95 Cal. Rptr. 728] . In any given case, whether or not an article annexed to real property is a fixture is a question of fact to be determined on the evidence [*Banks v. Clintworth (1962) 201 Cal. App. 2d 789, 793, 20 Cal. Rptr. 431]* .

A thing is deemed to be affixed to land when it is [*Civ. Code § 660*]:

- Attached to it by roots, as in the case of trees, vines, or shrubs;
- Imbedded in it, as in the case of walls;
- Permanently resting on it, as in the case of buildings; or
- Permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws.

However, for the purposes of sale, emblements, industrial growing crops, and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale, are treated as goods and are governed by the provisions of the Civil Code regulating the sales of goods [*Civ. Code § 660*].

A building does not have to be physically anchored to the land to be affixed. Attachment by force of gravity is sufficient [*Rinaldi v. Goller (1957) 48 Cal. 2d 276, 279-280, 309 P.2d 451]* . However, annexation by weight and gravity is not necessarily sufficient to indicate an intention to affix the article. It must also appear from the nature of the article that it would naturally and necessarily be annexed to and become a permanent and integral part of the realty, or in other words that the article would become essential to the ordinary and convenient use of the realty [*M.P. Moller, Inc. v. Wilson (1936) 8 Cal. 2d 31, 38, 63 P.2d 818]* . Nor is the fact that the article is fastened to the realty by bolts or nails necessarily determinative that the article has become a fixture [*Kruse Metals Mfg. Co. v. Utility Trailer Mfg. Co. (1962) 206 Cal. App. 2d 176, 180, 23 Cal. Rptr. 514]* .

To make an article a permanent accession to the land, its annexation need not be perpetual. It is sufficient if the article appears to be intended to remain where fastened until worn out, unless the purpose to which the realty is devoted has been accomplished or until the article is superseded by another article more suitable for the purpose [*Collins Elec. Co. v. Shasta County (1972) 24 Cal. App. 3d 864, 868, 101 Cal. Rptr. 285* ; *Ventura County v. Channel Islands State Bank (1967) 251 Cal. App. 2d 240, 248, 59 Cal. Rptr. 404]* .

Portions of equipment not attached to the realty but that are used with and essential to other portions attached to the realty constitute a unit and are constructively annexed [*Pajaro Valley Bank v. Santa Cruz County (1962) 207 Cal. App. 2d 621, 627, 24 Cal. Rptr. 639]* .

[7] Taxes

The tenant is liable for a tax increase caused by the improvements he or she erected when the improvements are removable by the tenant during the lease's term even though it is unlikely that he or she will remove the improvements [*Lawrence v. F.W. Woolworth Co. (1965) 63 Cal. 2d 119, 122-123, 45 Cal. Rptr. 140, 403 P.2d 396]* .

[8] Express Agreements Regarding Fixtures

[a] In General

When there is an express agreement giving the lessee the right to remove improvements, this right applies even when the lease is ended before its expiration date because of a failure to pay rent [*Clark v. Talmadge (1937) 23 Cal. App. 2d*

703, 707, 74 P.2d 825] .

[b] Effect of Extension or Renewal of Lease

When a lease provides that the tenant may remove the fixtures that he or she installs and the tenant remains in possession with the lessor's permission from month-to-month after the lease expires, the continued occupancy is regarded as an extension of the lease and the parties are deemed to have assented to the original lease's terms, including the right to remove the fixtures [*Knox v. Wolfe (1946) 73 Cal. App. 2d 494, 500, 167 P.2d 3]* . However, if a tenant remains in possession under a new lease, he or she should be careful to reserve the right to remove fixtures or else the right will be lost [*see Schlageter Estate Co. v. Koontz (1950) 97 Cal. App. 2d 814, 819, 218 P.2d 814]* .

[9] Trade Fixtures

[a] Statutory Rule

A tenant may remove from the demised premises, any time during the continuance of his or her term, anything affixed to these premises for purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises [*Civ. Code § 1019*].

A trade fixture is merely a particular type of fixture for which the law makes a special provision permitting its removal under certain circumstances by a lessee from the lessor's real property to which it has been annexed [*Trabue Pittman Corp. v. Los Angeles County (1946) 29 Cal. 2d 385, 393, 175 P.2d 512]* . Even if the tenant is dispossessed, he or she has a right under the statute to remove the fixtures [*Bright v. Gineste (1955) 133 Cal. App. 2d 725, 732, 284 P.2d 839* (dictum)], but the statutory provision does not apply when it is superseded by express provisions in the lease [*see Renner v. Huntington etc. Oil & Gas Co. (1952) 39 Cal. 2d 93, 103, 244 P.2d 895]* .

Although the term "trade fixture" is usually applied to tools, implements, and other items more readily movable than a building, it also includes a structure erected by the tenant on the demised premises for purposes of trade, and the tenant may exercise his or her right of removal at his or her will at any time before the end of the term [*Roberts v. Mills (1922) 56 Cal. App. 556, 560, 205 P. 872]* .

[b] Removal

If trade fixtures are not removed during the term of the tenancy or within a reasonable time thereafter, they remain part of the realty [*Trabue Pittman Corp. v. Los Angeles County (1946) 29 Cal. 2d 385, 394, 175 P.2d 512]* . A mortgagee from a tenant has no greater right to remove trade fixtures from the premises after the tenant has surrendered possession to the landlord than the tenant would have [*Rinaldi v. Goller (1957) 48 Cal. 2d 276, 281, 309 P.2d 451]* .

A lessor and lessee may covenant away any rights that they might otherwise have under the trade fixture rule [*Wilmerton v. Morton (1946) 74 Cal. App. 2d 891, 894, 169 P.2d 992]* . Furthermore, the trade fixture provision of *Civ. Code § 1019*, permitting the tenant to remove trade fixtures during the lease's term, is not applicable when the lease is terminated because of a broken covenant and the right of reentry has attached and been exercised [*Rinaldi v. Goller (1957) 48 Cal. 2d 276, 282-283, 309 P.2d 451]* .

[c] Time for Removal

In the absence of an express agreement in the lease, improvements are required to be removed during the continuance of the term as a condition to the right of removal [*Rinaldi v. Goller (1957) 48 Cal. 2d 276, 282*].

A tenant who has an express agreement permitting him or her to remove fixtures has a larger right as to the time within

which they must be removed than is the case when no such agreement exists, and he or she may remove them within a reasonable time after the expiration of his or her term [*Weisberg v. Loughridge (1967) 253 Cal. App. 2d 416, 432, 61 Cal. Rptr. 563]* .

[10] Wrongful Removal of Fixtures

[a] Treated as Personalty

If a fixture is wrongfully severed, the owner of the property can at his or her option treat the severed property as personalty and recover it by an action in replevin [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 606, 328 P.2d 953]* or recover damages for its conversion [*see Sill Properties, Inc. v. CMAG, Inc. (1963) 219 Cal. App. 2d 42, 33 Cal. Rptr. 155* ; *see also* Ch. 150, *Conversion*].

[b] Damages

The general rule is that the measure of damages for the wrongful removal of a fixture is the value of the fixture in place as part of the realty, and not what it would sell for on the open market removed from the building [*Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 135, 95 Cal. Rptr. 728* ; *Wilmerton v. Morton (1946) 74 Cal. App. 2d 891, 897, 169 P.2d 992]* . However, this general rule is modified by the enactment of *Civ. Code § 1013.5* (good-faith mistake) [*Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 135, 95 Cal. Rptr. 728* ; for a form of complaint to enforce a tenant's right to remove fixtures installed in good faith and discussion of the good faith mistake rule, *see § 334.65*].

[11] Other Tenant's Remedies for Detention of Fixtures

A tenant who has been denied the right to remove fixtures can either bring an action to obtain possession of the fixtures and for damages for their retention by the landlord [*see Knox v. Wolfe (1946) 73 Cal. App. 2d 494, 167 P.2d 3]* , or bring an action to quiet title to the fixtures [*Lyons v. Emery (1945) 72 Cal. App. 2d 275, 164 P.2d 272* ; *see generally* Ch. 482, *Quieting Title*]. If the fixtures have been wrongfully detained by the landlord, the tenant may recover the fixtures, their reasonable rental value for the period the landlord detained them, and punitive damages if they were detained by oppression, intimidation, and malice [*Knox v. Wolfe (1946) 73 Cal. App. 2d 494, 503-504, 167 P.2d 3]* . If a tenant obtains a judgment quieting title to fixtures, the degree may stipulate that he or she must remove them within a certain period of time [*Lyons v. Emery (1945) 72 Cal. App. 2d 275, 277, 164 P.2d 272]* .

When a lessee constructs permanent improvements that he or she has no right to remove, and he or she is wrongfully evicted before the end of the term, the measure of damages is the reasonable value of the improvements for the remaining term [*Asell v. Rodrigues (1973) 32 Cal. App. 3d 817, 826, 108 Cal. Rptr. 566]* .

[12] Third-Party Interests in Fixtures

Agreements between a lessor and lessee as to the character of property are binding between the parties and against third persons having actual or constructive notice thereof [*Bridges v. Cal-Pacific Leasing Co. (1971) 16 Cal. App. 3d 118, 129, 93 Cal. Rptr. 796]* .

A provision in a lease providing that a tenant may remove improvements is not effective against those not bound by the agreement such as innocent third persons [*Trabue Pittman Corp. v. Los Angeles County (1946) 29 Cal. 2d 385, 397, 175 P.2d 512* ; *Ventura County v. Channel Islands State Bank (1967) 251 Cal. App. 2d 240, 249, 59 Cal. Rptr. 404]* . It appears that the landlord will only prevail if the third party obtains his or her interest with actual or constructive knowledge of the prior rights of the landlord in the property at issue [*see Bridges v. Cal-Pacific Leasing Co. (1971) 16 Cal. App. 3d 118, 130, 93 Cal. Rptr. 796]* .

A lessor gains no interest in fixtures that are installed by the lessee but owned by a third party [*EAC Credit Corp. v.*

Bass (1971) 21 Cal. App. 3d 645, 651, 98 Cal. Rptr. 681] . Thus, when a lessor seeks to recover property purchased by his or her lessee under a conditional sales contract, the lessor must stand in the shoes of the lessee, and he or she cannot prevail against the conditional vendor unless the lessee could have done so [*EAC Credit Corp. v. Bass (1971) 21 Cal. App. 3d 645, 653, 98 Cal. Rptr. 681]* .

[13] Cross References

For additional forms for use in actions for declaratory relief, see Ch. 182, *Declaratory Relief* .

See generally Ch. 150, *Conversion* , and Ch. 482, *Quieting Title* .

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§ 334.95 Complaint in Subrogation by Insurer as Subrogee of Its Insured for Damages Against Insured's Tenant to Recover Amount Paid to Insured for Fire Damages Caused by Tenant's Negligence [Civ. Code § 3333; Ins. Code § 2071]

[1] FORM Complaint in Subrogation by Insurer as Subrogee of Its Insured for Damages Against Insured's Tenant to Recover Amount Paid to Insured for Fire Damages Caused by Tenant's Negligence [Civ. Code § 3333; Ins. Code § 2071]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*], a	)	
_____ [*e.g.*,	)	NO. _____
California Corporation],	)	COMPLAINT IN SUBROGATION
Plaintiff,	)	(Negligence)
vs.	)	[Amount demanded _____ (exceeds
_____ [*name*],	)	*or* does not exceed) $10,000]
Defendant.	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Plaintiff is, and at all times mentioned in this complaint was, _____ [*allege capacity and authority as insurer, e.g.*, a corporation organized and existing under the laws of _____ (*state or foreign country*) and authorized to transact, and transacting, business in California as a fire insurer *or other allegation of capacity and authority as appropriate*].

2. _____ [*Name*], Referred to below as "the insured," is, and at all times mentioned in this complaint was [_____ (*specify capacity, if other than a natural person, e.g.,* : a corporation organized and existing under the laws of California) and] the owner of _____ [*describe, e.g.,* a certain _____ (*e.g.,* apartment *or* commercial) building], referred to below as "the premises," located at _____ [*street address and city*], California.

3. At all times mentioned in this complaint, the insured was insured by plaintiff against damage to or destruction of the premises by fire under a policy of fire insurance, number _____, referred to below as "the policy." [A copy of the policy is attached to this complaint as Exhibit A and made a part of this complaint].

[4. _____ (*Specify defendant's capacity, if other than a natural person, and defendant's business if relevant, e.g.,* Defendant is, and at all times mentioned in this complaint was, a corporation organized and existing under the laws of _____ (*state or foreign country*) and engaged in business as a painting contractor).]

5. From on or about _____ [*date*], through _____ [*date*], defendant was in possession of and occupied _____ [*e.g.,* an apartment in *or* the whole of] the premises as a lessee under a[n] _____ [oral *or* written] lease between the insured and the defendant.

6. _____ [*Allege facts showing defendant's duty to use due care either under the rental agreement or by operation of law, e.g.,* The lease specifically prohibited the keeping, using, or storing of any flammable liquids on the premises *or* In connection with its business, defendant was required to keep, use, and store flammable liquids on the premises].

7. Defendant _____ [, in breach of the lease, *or* so negligently] kept, used, and stored flammable liquids on the premises that as a proximate result thereof a fire erupted on or about _____ [*date*], _____ [damaging *or* destroying] the premises.

8. As a proximate result of defendant's _____ [breach of the lease *or* negligence], the fire, and the consequent _____ [damage to *or* destruction of] the premises, as alleged above, plaintiff's insured was _____ [required to expend the sum of $_____ to have the premises repaired *or if premises were totally destroyed* damaged in the sum of $_____].

[9. As a further proximate result of defendant's _____ (breach of the lease *or* negligence), the fire, and the consequent damage to the premises, the premises were untenantable from the date of the fire though _____ [*date*], which was the period reasonably required to repair the damage and restore the premises to a tenantable condition, all to the insured's further damage in the sum of $_____.]

10. On or about _____ [*date*], plaintiff, under the terms of the policy, paid the insured the [total] sum of $_____ and thereby became subrogated to all of the rights, and entitled to enforce all the remedies, of the insured against the defendant. Before the commencement of this action, the insured assigned to plaintiff in writing all of its rights against defendant.

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____ paid by plaintiff to the insured and for interest thereon at the legal rate from and after _____ [*date of payment*];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 334.80[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a fire insurer as the subrogee of its insured (landlord), the subrogor, to recover from the tenant (obligor) the amount plaintiff paid its insured for a fire loss proximately caused by the tenant's breach of covenant or negligence [*see Ins. Code § 2071*]. If there was no insurance, the form may be adapted for use by the landlord against the tenant based on negligence and breach of contract, and if the tenant was obligated under the lease to procure fire insurance, it could be adapted to include allegations for breach of contract based on the lessee's breach of its covenant to procure fire insurance covering the premises.

If, however, under the terms of the lease or rental agreement, the landlord was required to procure insurance for the mutual benefit of both the landlord and the tenant, the landlord would have no action against the tenant to recover for the fire loss and, the landlord's fire insurer would have no right of subrogation [*see Gordon v. J.C. Penney Co. (1970) 7 Cal. App. 3d 280, 283-285, 86 Cal. Rptr. 604]* .

[3] Allegations

[a] Generally

The above complaint alleges the following:

- The plaintiff's legal capacity and authority to engage in the insurance business as a particular class of insurer (Paragraph 1).
- The identity of the subrogor (Paragraph 2).
- The existence of insurance covering the loss (Paragraph 3).
- Defendant's capacity, if other than a natural person, and defendant's business if relevant (Paragraph 4).
- Defendant's possession of the premises under a rental agreement or lease (Paragraph 5).
- The venue of the action (Paragraphs 2, 7) [*see Code Civ. Proc. §§ 392(a)(1), 395(a), 395.2, 395.5; see also* Ch. 571, *Venue*].
- The defendant's duty to the subrogor, that is, the relationship between the parties giving rise to defendant's duty to exercise due care (Paragraphs 5, 6) [*see Civ. Code § 1714(a)*].
- The defendant's breach of that duty (Paragraph 7) [*see Civ. Code §§ 3300, 3333*].
- Proximate causation and detriment (Paragraphs 7-9) [*see Civ. Code §§ 3282, 3300, 3333*].

- Damages, that is, the measure of the subrogor's loss in terms of money (Paragraphs 8, 9) [*see Civ. Code §§ 3281, 3300, 3333*].

- Plaintiff's payment of the loss (Paragraph 10).

[b] Allegation of Subrogation and Underlying Action

A complaint in subrogation must allege not only the relationship between the subrogee and subrogor that obligated the subrogee to make the payment that it made, but must also allege all the elements of the subrogor's cause of action against the obligor [*see, e.g., Campan v. Molle (1899) 124 Cal. 415, 416-417, 57 P. 208* ; *Iusi v. City Title Ins. Co. (1963) 213 Cal. App. 2d 582, 586, 28 Cal. Rptr. 893]* . It must also allege payment by the subrogee [*see Iusi v. City Title Ins. Co. (1963) 213 Cal. App. 2d 582, 587, 28 Cal. Rptr. 893]* .

If the obligor is not liable to the subrogor, the subrogee cannot recover. For example, if it is found in the case of an alleged liability based on negligence that the subrogor's loss or harm was not caused by defendant's negligence, the subrogee cannot prevail [*see Breese v. Price (1981) 29 Cal. 3d 923, 930, 176 Cal. Rptr. 791, 633 P.2d 987* ; *Mendenhall v. Curtis (1980) 102 Cal. App. 3d 786, 792, 162 Cal. Rptr. 569]* .

For further discussion and additional forms of complaints and defenses for use in subrogated actions, see Ch. 536, *Subrogation* .

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[Reserved]

§§ 334.96[Reserved]

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C. Tenant's Defenses to Recovery of Rent

29-334 California Forms of Pleading and Practice--Annotated § 334.100

§ 334.100 Demurrer to Complaint to Recover Rent; Bar of Statute of Limitations [Code Civ. Proc. §§ 337(1), 337.2, 339(1), 339.5]

[1] FORM Demurrer to Complaint to Recover Rent; Bar of Statute of Limitations [Code Civ. Proc. §§ 337(1), 337.2, 339(1), 339.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	DEMURRER
_____ [*name*],	)	[Amount demanded _____ (exceeds
Defendant.	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Defendant _____ [*name*] demurs to the complaint in this action on the ground that the complaint does not state facts sufficient to constitute a cause of action in that it appears on the face of the complaint that the alleged cause of action is barred by the provisions of _____ [*specify code section, e.g., Section 337(1), or* Section 337.2, *or Section 339(1), or Section 339.5*] of the Code of Civil Procedure.

[*A prayer to a demurrer is unnecessary, but may be added as follows:*]

WHEREFORE, defendant prays that this demurrer be sustained [without leave to amend], that plaintiff take nothing by his/her _____ [*e.g.*, complaint], that defendant have judgment for his/her costs, and for all other proper relief.

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant

[2] Use of Form

This form is for use in objecting, by demurrer, to a complaint for rent on the ground that the pleading does not state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*] because the action is barred by the statute of limitations [*see Code Civ. Proc. §§ 337(1), 337.2, 339(1), 339.5*]. The defect must appear on the face of the complaint or the ground for objection should be taken by answer rather than by demurrer [*see Code Civ. Proc. § 430.30(a), (b)*].

A party filing a demurrer is required to serve and file a supporting memorandum in support of each ground of the demurrer [Cal. *Rules of Ct., Rule 3.1113(a)*; for discussion and forms, see Ch. 417, *Points and Authorities*] and a notice of hearing [*Cal. Rules of Ct., Rule 3.1320*].

[3] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*].

If the action is a limited civil case, the caption must state whether the demand exceeds or does not exceed $10,000 and must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[4] Statute of Limitations for Leases Executed After July 1, 1971

If a landlord is seeking relief under *Civ. Code § 1951.2* based on an oral lease, the action must be brought within two years of the breach and abandonment of the property, or within two years after the termination of the right of the tenant to possession of the property, whichever is the earlier time [*Code Civ. Proc. § 339.5*]. If the landlord is seeking relief under *Civ. Code § 1951.2* based on a written lease, the action must be brought within four years of the breach and abandonment of the property, or within four years of the termination of the tenant's right to possession, whichever is the earlier time [*Code Civ. Proc. § 337.2*].

[5] Statute of Limitations for Leases Executed Before July 1, 1971

A lease executed before July 1, 1971, or one in which the terms of the lease were fixed before that date, is not governed by *Civ. Code § 1951.2* [*Civ. Code § 1952.2*]. The period of limitation for commencing an action based on these leases when there was an oral contract is two years from the date the cause of action arose [*Code Civ. Proc. § 339(1)*; *Tillson v. Peters (1940) 41 Cal. App. 2d 671, 679, 107 P.2d 434]* . The period for commencing an action based on these leases when there was a written contract is four years [*Code Civ. Proc. § 337(1)*].

[6] Cross References

For other forms relating to demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.101

§ 334.101 Demurrer to Complaint to Recover Rent Under Oral Lease for Uncertainty

[1] FORM Demurrer to Complaint to Recover Rent Under Oral Lease for Uncertainty

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	DEMURRER
_____ [*name*],	)	[Amount demanded _____ (exceeds
Defendant.	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Defendant demurs to the complaint in this action on the ground that the complaint is uncertain in that it is not alleged in the complaint nor can it be ascertained from the complaint whether the rental was due monthly, annually, or at the termination of the full period of _____ years for which the premises were leased.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant

[2] Use of Form

The form in [1], *above*, is for use in objecting, by demurrer, to a complaint for rent on the ground that the pleading is

uncertain [*Code Civ. Proc. § 430.10(f)*] in that it does not specify when the rent was due [*Tillson v. Peters (1940) 41 Cal. App. 2d 671, 674, 107 P.2d 434]* .

Special demurrers are not allowed in limited civil cases [*see Code Civ. Proc. §§ 91(a), 92(c)*; *Buss v. J. O. Martin Co., Inc. (1966) 241 Cal. App. 2d 123, 133, 50 Cal. Rptr. 206* (demurrer under *Code Civ. Proc. § 430.10(f)* as special demurrer)].

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29-334 California Forms of Pleading and Practice--Annotated § 334.102

§ 334.102 Demurrer to Complaint to Recover Rent; Invalid Liquidated Damages Provision [Civ. Code § 1671]

[1] FORM Demurrer to Complaint to Recover Rent; Invalid Liquidated Damages Provision [Civ. Code § 1671]

[*Caption. See § 334.100[1].*]

Defendant _____ [*name*] demurs to the complaint in this action on the ground that the complaint does not state facts sufficient to constitute a cause of action in that it appears on the face of the complaint that the action is one to enforce an invalid anticipatory damages provision.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant

[2] Use of Form

The form in [1], *above*, is for use in objecting, by demurrer, to a complaint for rent on the ground that the pleading does not state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*] because the action is one to enforce an invalid anticipatory damages provision [*see Civ. Code § 1671*].

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29-334 California Forms of Pleading and Practice--Annotated § 334.103

§ 334.103 Affirmative Defense; Discharge From Payment of Rent for Surrender of Premises by Tenant and Retaking by Landlord for Own Account Under Pre-July 1, 1971, Lease

[1] FORM Affirmative Defense; Discharge From Payment of Rent for Surrender of Premises by Tenant and Retaking by Landlord for Own Account Under Pre-July 1, 1971, Lease

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that on or about _____ [*date*], defendant surrendered possession of the leased premises to plaintiff.

Thereupon plaintiff retook possession of the premises for his/her own account and treated the lease as terminated.

Defendant was thereby discharged from any further payment of rent for the premises as sued for in this action.

[2] Use of Form

The form of affirmative defense in [1], *above*, may be used to assert nonliability for rent under a lease executed before July 1, 1971 when the tenant has surrendered the leased premises and the landlord has retaken possession for his or her own account [*see Dorcich v. Time Oil Co. (1951) 103 Cal. App. 2d 677, 683, 230 P.2d 10]* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.104

§ 334.104 Affirmative Defense; Discharge From Payment of Rent for Surrender of Premises by Tenant and Reletting by Landlord at Same Rental Under Post-July 1, 1971, Lease [Civ. Code § 1951.2]

[1] FORM Affirmative Defense; Discharge From Payment of Rent for Surrender of Premises by Tenant and Reletting by Landlord at Same Rental Under Post-July 1, 1971, Lease [Civ. Code § 1951.2]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that on or about _____ [*date*], defendant abandoned the leased premises.

At that time defendant owed no rent for the period before abandonment.

Plaintiff immediately relet the premises at the same rent as that which defendant had agreed to pay.

Defendant was thereby discharged from liability for rent for the balance of his/her term.

[2] Use of Form

The form of affirmative defense in [1], *above*, may be used to assert nonliability for rent under a lease executed on or after July 1, 1971 when the tenant abandons the premises, does not owe any rent for the period before abandonment, and the landlord immediately relets the premises at the same rent [*see Civ. Code § 1951.2*].

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29-334 California Forms of Pleading and Practice--Annotated § 334.105

§ 334.105 Affirmative Defense of Constructive Eviction by Landlord and Vacation of Premises by Tenant for Failure to Repair Dwelling Within Reasonable Time After Notice [Civ. Code §§ 1941, 1942]

[1] FORM Affirmative Defense of Constructive Eviction by Landlord and Vacation of Premises by Tenant for Failure to Repair Dwelling Within Reasonable Time After Notice [Civ. Code §§ 1941, 1942]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that he/she leased the premises for occupancy as a dwelling.

During defendant's occupancy of the leased premises, dilapidations of the premises, which rendered the premises untenantable and which plaintiff had the duty to repair, occurred as follows: _____ [*specify*].

On or about _____ [*date*], defendant gave plaintiff notice [in writing] of the dilapidations as provided by *Civil Code Section 1942*.

Within a reasonable time after this notice, plaintiff failed and neglected to repair the dilapidations and defendant vacated the premises on or about _____ [*date*].

Defendant was thereby discharged from any further payment of rent for the premises as sued for in this action.

[2] Use of Form

The form of affirmative defense in [1], *above*, may be used to assert nonliability for rent when the tenant is constructively evicted by the landlord's failure to repair a leased dwelling within a reasonable time after notice of the dilapidations [*see Civ. Code §§ 1941, 1942*].

For further discussion of constructive evictions, see *§ 332.11[2][f]* and *§ 334.61[5][g]*.

[3] No Rent Obligation After Constructive Eviction

Any interference by the landlord by which the tenant is deprived of the beneficial enjoyment of the premises amounts to a constructive eviction if the tenant so elects and surrenders possession, and the tenant is not liable for rentals for the portion of the term following his or her constructive eviction [*Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 670, 155 P.2d 24* ; *see Clark v. Spiegel (1971) 99 Cal. Rptr. 86* (to avoid further liability for rent, tenant must vacate after constructive eviction)], and he or she is entitled to the return of prepaid rent [*Sierad v. Lilly (1962) 204 Cal. App. 2d 770, 775, 22 Cal. Rptr. 580]* .

[4] Waiver of Right to Abandon

If, in the case of an interference with the tenant's beneficial enjoyment of the premises, the tenant does not surrender the premises within a reasonable time after the date of the interference, he or she is deemed to have waived his or her right to abandon. What constitutes a reasonable period of time is a question of fact to be determined by the trier of fact after considering all of the circumstances [*Petroleum Collections Inc. v. Swords (1975) 48 Cal. App. 3d 841, 847-848, 122 Cal. Rptr. 114]* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.106

§ 334.106 Affirmative Defense of Constructive Eviction by Landlord and Vacation of Premises by Tenant for Failure of Landlord to Repair Rendering Business Premises Unfit for Purpose for Which Leased

[1] FORM Affirmative Defense of Constructive Eviction by Landlord and Vacation of Premises by Tenant for Failure of Landlord to Repair Rendering Business Premises Unfit for Purpose for Which Leased

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that he/she leased the premises for the purpose of conducting a business of _____ [*type of business*] on the premises.

During defendant's occupancy of the leased premises for this purpose, plaintiff failed to repair facilities under his/her control and which he/she had a duty to repair under the terms of the lease, and this failure to repair rendered the leased premises wholly unfit for the purpose for which leased, as follows: _____ [*specify*].

By reason of the above, defendant vacated the premises on or about _____ [*date*].

Defendant was thereby discharged from any further payment of rent for the premises as sued for in this action.

[2] Use of Form

The form of affirmative defense in [1], *above*, may be used to assert nonliability for rent when the tenant is constructively evicted by the landlord's failure to make repairs that results in rendering the leased premises unfit for the purpose for which leased [*see Butt v. Bertola (1952) 110 Cal. App. 2d 128, 130-131, 242 P.2d 32]* . Notice may be required by the lease; if so, an allegation of notice to the landlord should be added.

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29-334 California Forms of Pleading and Practice--Annotated § 334.107

§ 334.107 Affirmative Defense of Constructive Eviction by Landlord and Vacation of Premises by Tenant for Alterations Unreasonably Interfering With Quiet Enjoyment of Premises [Civ. Code § 1927]

[1] FORM Affirmative Defense of Constructive Eviction by Landlord and Vacation of Premises by Tenant for Alterations Unreasonably Interfering With Quiet Enjoyment of Premises [Civ. Code § 1927]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that he/she leased the premises _____ [*either* for occupancy as a dwelling *or* for the purpose of conducting a business of _____ (*specify*) on the premises].

During defendant's occupancy of the leased premises, plaintiff undertook extensive and unwarranted alterations of the leased premises that unreasonably interfered with defendant's quiet enjoyment and possession of the premises and rendered them wholly unsuitable for occupancy, as follows: _____ [*specify*].

By reason of the above, defendant vacated the premises on or about _____ [*date*].

Defendant was thereby discharged from any further payment of rent for the premises as sued for in this action.

[2] Use of Form

The form of affirmative defense in [1], *above*, may be used to assert nonliability for rent when the tenant is constructively evicted by the landlord's alterations of the leased premises which unreasonably interfere with the tenant's quiet enjoyment [*see Civ. Code § 1927*; *see Pierce v. Nash (1954) 126 Cal. App. 2d 606, 612-613, 272 P.2d 938]* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.108

§ 334.108 Affirmative Defense of Constructive Eviction by Landlord and Vacation of Premises by Tenant for Failure to Furnish Heat [Civ. Code § 1927]

[1] FORM Affirmative Defense of Constructive Eviction by Landlord and Vacation of Premises by Tenant for Failure to Furnish Heat [Civ. Code § 1927]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that he/she leased the premises for occupancy as a dwelling and the lease provided that plaintiff would furnish heat for the leased premises as follows: _____ [*set out pertinent provision*].

Plaintiff failed and refused to furnish sufficient heat for the premises, as required by the lease, and the premises were thereby rendered wholly unsuitable for occupancy, as follows: _____ [*specify*].

By reason of the above, defendant vacated the premises on or about _____ [*date*].

Defendant was thereby discharged from any further payment of rent for the premises as sued for in this action.

[2] Use of Form

The form of affirmative defense in [1], *above*, may be used to assert nonliability for rent when the tenant is constructively evicted by the landlord's failure to furnish heat as provided for in the lease [*see Civ. Code § 1927*].

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29-334 California Forms of Pleading and Practice--Annotated § 334.109

§ 334.109 Affirmative Defense of Constructive Eviction by Landlord and Vacation of Premises by Tenant for Harassment Interfering With Enjoyment of Premises [Civ. Code § 1927]

[1] FORM Affirmative Defense of Constructive Eviction by Landlord and Vacation of Premises by Tenant for Harassment Interfering With Enjoyment of Premises [Civ. Code § 1927]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that he/she leased the premises _____ [*either* for occupancy as a dwelling *or* for the purpose of conducting a business of _____ (*specify*) on the premises].

During defendant's occupancy of the leased premises, plaintiff undertook to harass defendant persistently and this harassment interfered with defendant's quiet enjoyment and possession of the premises so as to render them wholly unsuitable for occupancy, as follows: _____ [*specify*].

By reason of the above, defendant vacated the premises on or about _____ [*date*].

Defendant was thereby discharged from any further payment of rent for the premises as sued for in this action.

[2] Use of Form

The form of affirmative defense in [1], *above*, may be used to assert nonliability for rent when the tenant is constructively evicted by the landlord's acts of harassment [*see Aaker v. Smith (1948) 87 Cal. App. 2d 36, 43-46, 196 P.2d 150* ; *Tooke v. Allen (1948) 85 Cal. App. 2d 230, 234-235, 192 P.2d 804* ; *Sanders v. Allen (1948) 83 Cal. App. 2d 362, 366-367, 188 P.2d 760]* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.110

§ 334.110 Affirmative Defense of Discharge From Payment of Rent for Landlord's Failure to Place Tenant in Possession

[1] FORM Affirmative Defense of Discharge From Payment of Rent for Landlord's Failure to Place Tenant in Possession

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the term of the lease executed between plaintiff and defendant was to begin on _____ [*date*] in accordance with the terms of the lease.

On _____ [*date*], plaintiff remained in possession of the leased premises and failed and refused to deliver the premises or the right of possession to the premises to defendant under the terms of the lease.

Defendant was thereby discharged from any payment of rent for the premises as sued for in this action.

[2] Use of Form

The form of affirmative defense in [1], *above*, may be used to assert nonliability for rent when the landlord fails to deliver possession of the leased premises or the right of possession to the premises on the date the lease's term was to begin [*see Dengler v. Michelssen (1888) 76 Cal. 125, 127, 18 P. 138]* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.111

§ 334.111 Affirmative Defense of Discharge From Payment of Rent for Landlord's Breach of Dependent Covenant

[1] FORM Affirmative Defense of Discharge From Payment of Rent for Landlord's Breach of Dependent Covenant

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that under the terms of the lease, plaintiff covenanted _____ [*specify dependent covenant, e.g.,* not to rent any adjoining stores to any competing business].

On or about _____ [*date*], plaintiff _____ [*specify acts constituting breach, e.g.,* leased the premises at _____ (*street address, city*), California, adjoining defendant's store to _____ (*name*) for the purpose of conducting a business of _____ (*specify*). This business is in direct competition with defendant's business], in breach of the terms and covenants of the lease.

Plaintiff's covenant and defendant's covenant are interdependent, and plaintiff's breach of his/her covenant undermined defendant's ability to perform his/her covenant.

Defendant vacated the leased premises on _____ [*date*].

[2] Use of Form

The form of affirmative defense in [1], *above*, may be used to assert nonliability for rent when the landlord has breached a covenant on which the covenant to pay rent was dependent [*see Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 669-670, 155 P.2d 24* ; *Medico-Dental etc. Co. v. Horton & Converse (1942) 21 Cal. 2d 411, 418-420, 132 P.2d 457]* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.112

§ 334.112 Affirmative Defense of Discharge From Payment of Rent for Breach of Warranty of Habitability

[1] FORM Affirmative Defense of Discharge From Payment of Rent for Breach of Warranty of Habitability

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that on _____ [*date*], defendant gave notice to plaintiff that _____ [*specify defects in defendant's dwelling constituting breach of warranty of habitability*] and asked that plaintiff repair these conditions.

On _____ [*date*], plaintiff had failed and refused to repair the defects about which he/she had been notified.

Defendant is discharged from the payment of rent in excess of $_____ per month as sued for in this action due to plaintiff's breach of the implied warranty of habitability.

[2] Use of Form

The form of affirmative defense in [1], *above*, may be used to assert nonliability for rent when the landlord's failure to repair defects in a dwelling after notice constitutes a breach of the implied warranty of habitability.

[3] Warranty of Habitability

A warranty of habitability is implied by law in residential leases in California. Under the implied warranty of habitability, a residential landlord covenants that premises he or she leases for living quarters will be maintained in a habitable state for the duration of the lease. This warranty does not require that a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that "bare living requirements" must be maintained. In most cases, substantial compliance with those applicable building and housing code standards that materially affect health and safety will suffice to meet the landlord's obligations under the common law implied warranty of habitability [*Green v. Superior Court (1974) 10 Cal. 3d 616, 631, 637, 111 Cal. Rptr. 704, 517 P.2d 1168]* .

[4] Standards of Tenantability

The standards of tenantability set out in *Civ. Code § 1941.1*, though not strictly applicable in this context of their own force, provide some helpful guidance in determining whether a landlord has satisfied the common law warranty of habitability [*Green v. Superior Court (1974) 10 Cal. 3d 616, 637 n. 23, 111 Cal. Rptr. 704, 517 P.2d 1168]* .

The tenant is entitled to a jury instruction based on the relevant standards of *Civ. Code § 1941.1* [*Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 57-58, 171 Cal. Rptr. 707, 623 P.2d 268]* . An instruction that fails to substantially comply with these standards would constitute a breach [*Smith v. David (1981) 120 Cal. App. 3d 101, 109, 176 Cal. Rptr. 112]* .

For a discussion of *Civ. Code § 1941.1*, see *§ 332.10[1][b][ii]*.

[5] Reasonable Time to Repair Not Required

When a landlord has notice of alleged uninhabitable conditions not caused by the tenants, a landlord's breach of the implied warranty of habitability exists whether or not he or she has had a reasonable time to repair [*Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 54-55, 171 Cal. Rptr. 707, 623 P.2d 268]* .

[6] Notice of Breach Required

The tenant must give notice of alleged defects to the landlord and allow a reasonable time for repairs to be made [*Hinson v. Delis (1972) 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661]* .

[7] Materiality of Breach

In considering the materiality of an alleged breach, both the seriousness of the claimed defect and the length of time for which it persists are relevant factors. Minor housing code violations standing alone that do not affect habitability must be considered de minimis and will not entitle the tenant to a reduction in rent. Likewise, the violation must be relevant and affect the tenant's apartment or the common areas that he or she uses. Moreover, the contract principle that no one may benefit from his or her own wrong will permit the landlord to defend against damage caused by the tenant's wrongful action [*Hinson v. Delis (1972) 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661]* .

[8] Rent Obligations

The tenant's duty to pay rent is mutually dependent on the landlord's fulfillment of his of her implied warranty of habitability [*Green v. Superior Court (1974) 10 Cal. 3d 616, 635, 111 Cal. Rptr. 704, 517 P.2d 1168]* . The tenant is not absolved from all liability for rent, but remains liable for the reasonable rental value of the premises, as determined by the trial court, for such time as the premises were in violation of the housing codes [*Hinson v. Delis (1972) 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661]* .

A suggested measure of damages for breach of the implied warranty of habitability is the difference between the fair rental value of the premises if they had been as warranted and the fair rental value of the premises as they were during occupancy by the tenant in the unsafe or unsanitary condition. Trial courts must use all available facts to approximate the fair and reasonable damages under all of the circumstances [*Green v. Superior Court (1974) 10 Cal. 3d 616, 638, 639, 111 Cal. Rptr. 704, 517 P.2d 1168]* .

[9] Tenant's Lack of Knowledge of Condition Not Prerequisite

The fact that the tenant had knowledge of the defect at the time he or she occupied the premises does not preclude reliance on breach of the implied warranty of habitability based on the defects of which the tenant had knowledge [

Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 54, 171 Cal. Rptr. 707, 623 P.2d 268] and an instruction stating that plaintiffs continued living in the house did not mean that the premises were habitable [*Smith v. David (1981) 120 Cal. App. 3d 101, 110, 176 Cal. Rptr. 112]* .

[10] Change of Ownership Irrelevant

A defense based on the breach of the implied warranty of habitability exists despite the fact that the breach occurred before the present landlord's acquisition of the premises and continued after the change of ownership [*Knight v. Hallsthammar (1981) 29 Cal. 3d 46, 55-57, 171 Cal. Rptr. 707, 623 P.2d 268]* .

[11] Payment of Rent Into Court

If the tenant claims that all or a part of the rent is not due because of defects in the premises, the trial court may, during the pendency of the action and at the request of either party, require the tenant to make the rental payments at the contract rate into court as they become due for as long as the tenant remains in possession. At the trial of the action the court can then determine how the rent paid into court should be distributed [*Hinson v. Delis (1972) 26 Cal. App. 3d 62, 71, 102 Cal. Rptr. 661]* .

[12] Waiver Prohibited

Public policy requires that landlords generally not be permitted to use their superior bargaining power to negate the warranty of habitability rule [*Green v. Superior Court (1974) 10 Cal. 3d 616, 625 n. 9, 111 Cal. Rptr. 704, 517 P.2d 1168]* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.113

§ 334.113 Affirmative Defense of Discharge From Payment of Rent for Destruction of Premises [Civ. Code §§ 1932(2), 1933(4)]

[1] FORM Affirmative Defense of Discharge From Payment of Rent for Destruction of Premises [Civ. Code §§ 1932(2), 1933(4)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the leased premises were destroyed on or about _____ [*date*], through no fault of defendant, by _____ [*specify how destroyed*]. He/She was thereby discharged from any further payment of rent for the premises as sued for in this action.

[2] Use of Form

The form of affirmative defense in [1], *above*, may be used to assert nonliability for rent when the leased premises have been destroyed through no fault of the tenant and the tenant has not covenanted to rebuild [*see Civ. Code § 1933(4)*].

[3] Effect of Covenant to Repair

A general covenant to repair does not prevent a lease's termination when the premises are destroyed [*Realty & Rebuilding Co. v. Rea (1920) 184 Cal. 565, 574-578, 194 P. 1024]* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.114

§ 334.114 Affirmative Defense of Discharge From Payment of Rent for Condemnation of Premises

[1] FORM Affirmative Defense of Discharge From Payment of Rent for Condemnation of Premises

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the entire leased premises were condemned on _____ [*date*], by _____ [*name of public entity*]. Defendant was thereby discharged from any further payment of rent for the premises as sued for in this action.

[2] Use of Form

The form of affirmative defense in [1], *above*, may be used to assert nonliability for rent when the entire leased premises have been condemned [*see Texas Co. v. County of Los Angeles (1959) 52 Cal. 2d 55, 62, 338 P.2d 440]* .

[3] Cross References

For memorandum of points and authorities supporting and opposing a motion for summary judgment based on the affirmative defense of condemnation of the leased premises, see 10 California Points and Authorities, *Landlord and Tenant* (Matthew Bender).

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29-334 California Forms of Pleading and Practice--Annotated § 334.115

§ 334.115 Affirmative Defense of Discharge From Payment of Rent for Illegality

[1] FORM Affirmative Defense of Discharge From Payment of Rent for Illegality

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff leased the premises to defendant for the purpose of _____ [*specify illegal purpose*]. Plaintiff therefore has no enforceable rights under the lease.

[2] Use of Form

The form of affirmative defense in [1], *above*, may be used to assert nonliability for rent when the premises were leased for an illegal purpose and thus did not give rise to any enforceable rights [*see Shephard v. Lerner (1960) 182 Cal. App. 2d 746, 748-751, 6 Cal. Rptr. 433]* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.116

§ 334.116 Affirmative Defense of Discharge From Payment of Rent for Frustration of Purpose of Lease

[1] FORM Affirmative Defense of Discharge From Payment of Rent for Frustration of Purpose of Lease

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that at the time of the execution of the lease, plaintiff and defendant contemplated that the leased premises would be used for the purpose of _____ [*specify*].

On or about _____ [*date*], the city of _____ passed an ordinance requiring that _____ [*specify ordinance provisions that destroyed the expected value of the leased premises for the purpose intended*].

Defendant vacated the premises on _____ [*date*].

Defendant was thereby discharged from any further payment of rent for the premises as sued for in this action.

[2] Use of Form

The form of affirmative defense in [1], *above*, may be used to assert nonliability for rent when the purpose for which the premises were leased has been frustrated by an ordinance destroying the expected value of the leased premises for that purpose. The defense should allege that the tenant vacated the premises because to continue in possession would indicate that the premises had at least some value to the tenant.

[3] Frustration as Defense to Action for Rent

The doctrine of commercial frustration applies when the expected value of performance to the party seeking to be excused has been destroyed by a chance event that supervenes to cause an actual, but not literal, failure of consideration [*Lloyd v. Murphy (1944) 25 Cal. 2d 48, 53, 153 P.2d 47]* . A lessee may seek to apply this doctrine to avoid liability for rent, but it is applied only in extreme cases [*see Fey v. Rossi Improvement Co. (1914) 23 Cal. App. 766, 767-768,*

139 P. 908] . The purpose supposedly frustrated must have been within the contemplation of both parties to the transaction. It is not sufficient that one of the parties hoped to use the premises in a specific way not mentioned in the lease [*Brown v. Oshiro (1945) 68 Cal. App. 2d 393, 396-397, 156 P.2d 976]* .

[4] When Lease Does Not Terminate

The lease does not terminate and the frustration of purpose doctrine is not applicable when:

- The event was within the reasonable anticipation of the parties at the time of the drafting of the lease [*Mitchell v. Ceazan Tires, Ltd. (1944) 25 Cal. 2d 45, 47, 153 P.2d 53]* ;

- The lease does not specifically limit the use to which the premises may be put to a use prohibited by a supervening statute [*Grace v. Croninger (1936) 12 Cal. App. 2d 603, 605-607, 55 P.2d 940]* ;

- A governmental regulation does not entirely prohibit the business to be carried on in the leased premises but only limits or restricts it and thereby makes it less profitable and more difficult to continue [*Lloyd v. Murphy (1944) 25 Cal. 2d 48, 56, 153 P.2d 47]* ; or

- The tenant has voluntarily assumed the duty of compliance with governmental regulations and is later unable to comply with them [*Glenn R. Sewell Sheet Metal, Inc. v. Loverde (1969) 70 Cal. 2d 666, 675-678, 75 Cal. Rptr. 889, 451 P.2d 721]* .

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29-334 California Forms of Pleading and Practice--Annotated § 334.117

§ 334.117 Affirmative Defense of Discharge From Payment of Rent for Tenant's Right to Repair and Deduct [Civ. Code § 1942]

[1] FORM Affirmative Defense of Discharge From Payment of Rent for Tenant's Right to Repair and Deduct [Civ. Code § 1942]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that on or about _____ [*date*], defendant gave notice to plaintiff that _____ [*specify dilapidations that landlord had duty to repair*].

Plaintiff failed and refused to correct the above conditions. Defendant repaired the conditions on _____ [*date*] at an expenditure of $_____ [*sum not exceeding one month's rent*].

Defendant was thereby entitled to deduct this amount from his/her rent and he/she is not liable to plaintiff for the amount as sued for in this action as rent.

Defendant had not previously exercised this remedy more than twice within the 12 months preceding _____ [*date*].

[2] Use of Form

The form of affirmative defense in [1], *above*, may be used to assert nonliability for rent when the amount claimed is the amount deducted by the tenant for the cost of repairs that he or she made after the landlord failed to make, despite an obligation to do so and after notice.

[3] Repair and Deduct Remedy

Before defendant may make any repairs and deduct the cost from the rent, the lessee must give notice to the lessor of dilapidations that ought to be repaired, and if the lessor neglects to make these repairs within a reasonable time, the

lessee may repair the dilapidations and deduct the costs from the rent if they do not exceed one month's rent of the premises [*Civ. Code § 1942(a)*]. If a lessee acts to repair and deduct the costs of the repairs after the 30th day following notice to the lessor, the lessee is presumed to have acted after a reasonable time [*Civ. Code § 1942(b)*].

PRACTICE TIP:

Using Repair and Deduct Remedy. Since repair and deduct is a limited remedy, the strategy should be to utilize it to correct some fundamental condition truly effecting the habitability of the premises. *By Benjamin Kaplan*

[4] Exercise of Remedy

If the lease or hiring of a dwelling has been renewed by agreement or is presumed to have been renewed under *Civ. Code § 1945* on or after January 1, 1980, the remedy of repairing and deducting is available twice in a 12-month period [*Civ. Code § 1942(a)*]. For any leases entered into and not renewed or presumed to have been renewed before January 1, 1980, the remedy is available only once in a 12-month period [*see* former *Civ. Code § 1942(a)*].

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29-334 California Forms of Pleading and Practice--Annotated § 334.118

§ 334.118 Affirmative Defense of Discharge From Payment of Rent for Tenant's Payment of Utilities [Civ. Code § 1942.2]

[1] FORM

AS A [_____(*if more than one, specify number, e.g.*, FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____(*specify, e.g.*, SECOND) CAUSE OF ACTION], defendant alleges that on [_____ *date*], defendant paid for [_____ *specify utility*] to [_____ *name of utility*] on plaintiff's behalf at an expenditure of $_____

Defendant was thereby entitled to deduct this amount from his/her rent, per *Civil Code Section 1942.2*, and he/she is not liable to plaintiff for the amount as sued for in this action as rent.

[2] Use of Form

This form of affirmative defense may be used to assert nonliability for rent when the amount claimed is the amount deducted by the tenant for the cost of utilities that he or she paid but which were the landlord's responsibility to pay.

[3] Remedy for Nonpayment of Utilities

A tenant who has made a payment to a utility pursuant to *Pub. Util. Code § 777*, *777.1*, *10009*, *10009.1*, *12822*, *12822.1*, *16481*, or *16481.1* may deduct the payment from rent as provided in each of these Public Utility Code sections [*Civ. Code § 1942.2*].

In general, these Public Utility Code sections provide that when a landlord is the utility customer for individually metered service and the account is in arrears, the utility will give notice directly to the affected occupant in English and specified languages [*see Civ. Code § 1932*], with the opportunity to become the account customer, bringing the account up to date, before individual utility service is terminated [*see, e.g., Pub. Util. Code § 777*]. The practitioner should consult the particular code section to determine specific requirements.

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29-334 California Forms of Pleading and Practice--Annotated § 334.119

§ 334.119 Affirmative Defense of Discharge From Payment of Rent for Landlord's Retaliatory Motive [Civ. Code § 1942.5]

[1] FORM Affirmative Defense of Discharge From Payment of Rent for Landlord's Retaliatory Motive [Civ. Code § 1942.5]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that on or about _____ [*date*], defendant _____ [*either* gave notice to plaintiff to repair in accordance with *Civil Code Section 1942 or* filed a written complaint with an appropriate governmental agency to obtain correction of a condition relating to tenantability of his/her leased dwelling].

On _____ [*date*], plaintiff gave defendant notice that effective _____ [*date*], defendant's rent would be increased to $_____ per month.

In so raising defendant's rent, plaintiff was retaliating against defendant because of the act(s) mentioned above.

Plaintiff _____ [*either* has paid *or* has offered to pay] the original rental of $_____ per month.

Plaintiff is not liable for any rent in excess of the original rental amount.

Defendant has not invoked the provisions of *Civil Code Section 1942.5* in the 12 months preceding this action.

[2] Use of Form

This form of affirmative defense may be used to assert nonliability for rent that is the result of a landlord's retaliation against a tenant who exercised his or her rights under *Civ. Code § 1942* or because of his or her complaint to an appropriate governmental agency as to the dwelling's tenantability.

PRACTICE TIP:

Protection Afforded by *Civ. Code § 1942.5*. As *Civ. Code § 1942.5* protects the tenant's exercise of any rights granted by the Chapter in which that section is located, and that includes *Civ. Code § 1942* (which requires the tenant to notify the landlord of defects on the premises before invoking the repair-and-deduct remedy), *§ 1942.5* appears to protect the tenant from retaliation for complaining to the landlord about the defects. *By Myron Moskovitz*

[3] Retaliatory Eviction as Defense

[a] Statutory Authority

Under the provisions of *Civ. Code § 1942.5*, if the lessor retaliates against the lessee because of the exercise by the lessee of his or her statutory rights set forth in *Civ. Code §§ 1940-1954* or because of his or her complaint to an appropriate agency as to a dwelling's tenantability, and if the dwelling's lessee is not in default as to the payment of rent, the lessor may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services within 180 days after [*Civ. Code § 1942.5(a)*]:

- The date on which the lessee, in good faith, gave notice of dilapidations under *Civ. Code § 1942* or made an oral complaint to the lessor regarding tenantability;

- The date on which the lessee, in good faith, filed a written complaint or an oral complaint that is registered or otherwise recorded in writing with an appropriate agency, of which the lessor has notice, for the purpose of obtaining correction of a condition relating to tenancy;

- The date of an inspection or issuance of a citation resulting from a complaint described above, of which the lessor did not have notice;

- The filing of appropriate documents commencing a judicial or arbitration proceeding involving the issue of tenantability; or

- The entry of judgment or the signing of an arbitration award, if any, when in the judicial proceeding or arbitration the issue of tenantability is determined adversely to the lessor.

The 180-day period runs from the latest applicable date [*Civ. Code § 1942.5(a)*]. The above provisions can be invoked only once in any 12-month period [*Civ. Code § 1942.5(b)*].

It is also unlawful for a lessor to increase rent, decrease services, cause a lessee to quit involuntarily, bring an action to recover possession, or threaten to do any of these acts for the purpose of retaliating against the lessee because he or she has lawfully organized or participated in a lessees' association or an organization advocating lessees' rights or has lawfully or peacefully exercised any rights under the law. In an action brought by or against the lessee under the rights set out above, the lessee has the burden of producing evidence that the lessor's conduct was in fact retaliatory [*Civ. Code § 1942.5(c)*]. Because reporting a crime to authorities is lawfully exercising legal rights, a lessee cannot be evicted in retaliation for reporting a crime, especially when the crime was committed by the landlord [*Barela v. Superior Court (1981) 30 Cal. 3d 244, 248-254, 178 Cal. Rptr. 618, 636 P.2d 582]* .

A lessor may recover possession of a dwelling, increase the rent, or decrease the services within the periods described above if the notice of termination, rent increase, or other act, and any pleading or statement of issues in an arbitration states the ground on which the lessor, in good faith, seeks to do any of the acts. If the statement is controverted, the lessor must establish its truth at the trial or other hearing [*Civ. Code § 1942.5(e)*].

[b] Case Authority

There is also a common-law defense of retaliatory eviction. *Civ. Code § 1942.5(h)* explicitly states that the remedies provided by *Civ. Code § 1942.5* are in addition to any other remedies provided by statutory or decisional law, and the California Supreme Court has recognized that this provision means that the common-law defense of retaliatory eviction is parallel to and independent of the statutory defense [*Barela v. Superior Court (1981) 30 Cal. 3d 244, 250-251, 178 Cal. Rptr. 618, 636 P.2d 582]* . The common law defense first arose before the enactment of *Civ. Code § 1942.5* in terms of a defense to an eviction in retaliation for a tenant's exercising statutory rights [*Schweiger v. Superior Court (1971) 3 Cal. 3d 507, 517-518, 90 Cal. Rptr. 729, 476 P.2d 97* ; *see* *Vargas v. Municipal Court (1978) 22 Cal. 3d 902, 914-915, 150 Cal. Rptr. 918, 587 P.2d 714* (exercise of labor law rights)].

The California Supreme Court later expanded the defense to all situations when, on balance, the public policies furthered by protecting the tenant from eviction outweigh the state's interest in ensuring that unlawful detainer proceedings are truly summary. The expansion came in a case in which the defense allowed an eviction in retaliation for filing a federal lawsuit charging violations of federal farm labor law [*S. P. Growers Asso. v. Rodriguez (1976) 17 Cal. 3d 719, 728-729, 131 Cal. Rptr. 761, 552 P.2d 721]* .

The defense of retaliatory eviction is available to a commercial tenant such as when it is alleged that the motive for the eviction is the tenant's truthful testimony against the landlord in an action brought by a third party [*Custom Parking, Inc. v. Superior Court (1982) 138 Cal. App. 3d 90, 100-101, 187 Cal. Rptr. 674]* .

The existence of this parallel and independent basis for the defense is important when the lessor's acts are not within the provisions of *Civ. Code § 1942.5* or when the limitations set forth in *Civ. Code § 1942.5* preclude its use.

[4] Retaliatory Eviction as a Cause of Action

A lessee may bring an action for damages against a lessor or his or her agent for violating *Civ. Code § 1942.5*. For a form and allegations for use in this type of action, see *§ 334.64*.

A preliminary injunction may also be sought to halt a retaliatory eviction [*Aweeka v. Bonds (1971) 20 Cal. App. 3d 278, 282, 97 Cal. Rptr. 650]* .

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§ 335.syn Synopsis to Chapter 335: LANDLORD AND TENANT: RENT CONTROL

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§ 335.02 Cross References

§§ 335.03-335.09 [Reserved]

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[2] Right to Establish Initial and Subsequent Rental Rates for Designated Dwelling or Unit

[3] Right to Establish Initial Rental Rates for Designated Dwelling or Unit

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[b] Accommodations Offered for Rent Within Five Years After Withdrawal

[c] Accommodations Offered for Rent Within Two Years After Withdrawal

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§ 335.18 Mobilehomes

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[3] Jurisdiction

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§ 335.41 Complaint for Damages for Failure to Refund Excess Rent Charged [Civ. Code § 1947.11]

[1] FORM

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[5] Cross References

§ 335.43 Affirmative Defense Action Against Landlord Based on Tenant's Eviction From Rental Unit; Landlord Withdrawing Units From Rental Market [Gov. Code § 7060]

[1] FORM

[2] Use of Form

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PART I. SCOPE

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§ 335.01 Scope of Chapter

This chapter discusses and contains forms relating to rent control. The chapter focuses on state law that preempts or relates to local residential and commercial rent control ordinances and includes coverage of all of the following:

- The nature and validity of residential rent control ordinances and their primary components [*see §§ 335.10 -335.12*];
- A residential property owner's right under state law to establish initial and/or subsequent rental rates [*see § 335.13*];
- State law requirements for establishing and certifying rent levels [*see § 335.14*];
- General remedies under state law [*see § 335.15*];
- Prohibitions against compelling a landlord to remain in business ("Ellis Act" prohibitions) [*see § 335.16*]; and
- Commercial rent control [*see § 335.17*].

In addition, the chapter includes the following forms:

- A complaint for an action by a tenant against a landlord for eviction based on a fraudulent intent to occupy [*see § 335.40*].
- A complaint for an action by a tenant against a landlord for failure to refund excess rent charged [*see § 335.41*].
- Affirmative defenses to an action against a landlord [*see §§ 335.42, 335.43*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantRent RegulationGeneral Overview

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29-335 California Forms of Pleading and Practice--Annotated § 335.02

§ 335.02 Cross References

For detailed coverage and forms relating to all aspects of landlord-tenant law, such as the creation of the landlord-tenant relationship, the rights and duties of parties during a tenancy, eviction actions, and actions to recover damages, see Chs. 330- 334.

For discussion and forms related to mobilehomes and mobilehome rental agreements, see Ch. 369, *Mobilehomes and Mobilehome Parks* .

For discussion and forms relating to intentional or negligent misrepresentations of fact, see Ch. 269, *Fraud and Deceit* .

For further discussion and forms relating to pleading affirmative defenses and answers generally, see Ch. 26, *Answers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticePleadingsAnswersReal Property LawLandlord & TenantGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral Overview

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[Reserved]

§§ 335.03[Reserved]

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29-335 California Forms of Pleading and Practice--Annotated § 335.10

§ 335.10 Governing Statutes

Rent control in California is determined by local option--some cities and counties have enacted residential rent control ordinances, although most have not. For those that have chosen to enact such ordinances, the California Legislature has imposed certain restrictions on local jurisdictions' authority to limit landlords' abilities to raise rents and evict when they like.

Limitations on penalties against persons who are in substantial compliance with rent control ordinances are governed by *Civ. Code § 1947.7*. The establishment and certification of permissible rent levels for registered units is generally governed by *Civ. Code § 1947.8*. The Costa-Hawkins Rental Housing Act [*Civ. Code §§ 1954.50-1954.535*], effective January 1, 1996, grants residential property owners the right to establish the initial rental rate and, in some cases, all subsequent rental rates for designated dwellings or units. Regulation of evictions based on the intended reoccupation by the owner or owner's relatives, and penalties for violation, are governed by *Civ. Code § 1947.10*. Refunds of excess rent and penalties for failure to refund excesses or intentionally charging above rent ceilings are governed by *Civ. Code § 1947.11*. Cost of professional services, such as attorneys' fees, incurred by owners of residential units subject to rent control provisions are set forth in *Civ. Code § 1947.15*; however, *Civ. Code § 1947.15* is not operative unless the Costa-Hawkins Rental Housing Act [*Civ. Code § 1954.50 et seq.*] is repealed [*Civ. Code § 1947.15(k)*]. Prohibitions against commercial rent control are contained in *Civ. Code §§ 1954.25-1954.31*. A landlord's right to go out of business despite rent control ordinances is established in the "Ellis Act," *Gov. Code § 7060 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantRent RegulationMethodsReal Property LawLandlord & TenantRent RegulationRent Control Statutes

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29-335 California Forms of Pleading and Practice--Annotated § 335.11

§ 335.11 Rent Control Provisions

[1] Nature

Residential rent control regulation in California is for the most part within the jurisdiction of local governments, particularly municipalities [*see Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 159-160, 130 Cal. Rptr. 465, 550 P.2d 1001]* . Many California cities have enacted residential rent control ordinances, and these regulations vary widely in scope and content.

PRACTICE TIP:

Consult Local Ordinances and Regulations. Before advising a client with regard to any residential rent control issue, counsel should obtain a copy of the applicable local ordinance. As these laws are amended frequently, counsel should confirm that he or she has obtained the current version of any local ordinance. In addition, some rent control boards have enacted regulations that interpret those ordinances. Be sure to consult those regulations too. *By Myron Moskovitz and Publisher's Editorial Staff.*

In several areas, state law preempts local regulations. For discussion of state laws preempting or supplementing local ordinances, see *§§ 335.14 -335.17*. For example, the Legislature has declared that state law totally occupies the area of commercial rent control, and that local commercial rent control is prohibited in California [*Civ. Code §§ 1954.25, 1954.27(a)*; *see § 335.17*]. Therefore, before advising a client with regard to a rent control matter, counsel should determine if state law applies.

Although there is no federal rent control law, federal law preempts local and state regulation in matters relating to Native American reservations [*Zachary v. Wilk (1985) 173 Cal. App. 3d 754, 761-762, 219 Cal. Rptr. 122]* and certain federally assisted rental buildings [*see* 24 C.F.R. Part 246].

PRACTICE TIP:

Consult Rules and Regulations. Often provisions related to both substantive and procedural matters (for example, the required contents of notices or the procedures related to notices) are contained in Rules and Regulations which are not part of the local ordinances themselves. An attorney should carefully review such Rules and Regulations to insure that strict compliance is obtained. Moreover, even if an

attorney should determine that certain requirements are preempted by state law (such as a provision requiring the notice to be filed within a specified time after service or that there is no specified penalty for the failure to file), a conservative approach should be taken and compliance be made so as to obviate a tenant's resort to any defense to the action. *By Benjamin Kaplan.*

[2] Validity

[a] Rent Control as Valid Exercise of Police Power

Rent control regulations are constitutional as a valid exercise of a local entity's police power. Rents may be controlled by a local government even in the absence of an emergency, provided that the regulation is reasonably related to a legitimate governmental purpose such as correction of a housing shortage [*Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 158-160, 130 Cal. Rptr. 465, 550 P.2d 1001]* . Rent control laws may properly be passed by initiative, and state legislation is not required to authorize a local government to enact rent control regulations [*Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 140, 130 Cal. Rptr. 465, 550 P.2d 1001]* .

[b] When Rent Control Ordinances Are Unconstitutional

A rent control ordinance is unconstitutional if the procedures for rent adjustment are so cumbersome and unrelated to the law's stated purpose as to deprive a landlord of due process of law [*Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 173, 130 Cal. Rptr. 465, 550 P.2d 1001]* , or if the law itself has a confiscatory effect on landlords [*Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 165, 130 Cal. Rptr. 465, 550 P.2d 1001* ; *Fisher v. City of Berkeley (1984) 37 Cal. 3d 644, 679, 209 Cal. Rptr. 682, 693 P.2d 261* , *aff'd, 475 U.S. 260, 106 S. Ct. 1045, 89 L. Ed. 2d 206]* .

Confiscatory regulations include (1) ordinances that lower rents below the level required for the measure's stated purpose, and (2) ordinances that do not provide a landlord with a fair return on his or her investment [*Fisher v. City of Berkeley (1984) 37 Cal. 3d 644, 686, 209 Cal. Rptr. 682, 693 P.2d 261* , *aff'd, 475 U.S. 260, 106 S. Ct. 1045, 89 L. Ed. 2d 206]* . A "fair return on investment" is not, however, necessarily synonymous with a "fair return on value" of the property [*Fisher v. City of Berkeley (1984) 37 Cal. 3d 644, 679-686, 209 Cal. Rptr. 682, 693 P.2d 261* , *aff'd, 475 U.S. 260, 106 S. Ct. 1045, 89 L. Ed. 2d 206]* . Further, a local agency may consider financial hardship to the tenant when determining rent increases without depriving a landlord of a fair return on his or her investment [*Pennell v. City of San Jose (1988) 485 U.S. 1, 108 S. Ct. 849, 99 L. Ed. 2d 1]* .

Civ. Code § 1947.15 provides that, to ensure that owners of residential units subject to rent control ordinances are not precluded or discouraged from obtaining a fair return on their properties because of professional expenses they must incur in the course of administrative proceedings to obtain the rent increases necessary to provide a fair return, the rent control provisions must provide that these professional expenses may be included in any calculation of net operating income and operating expenses used to determine a fair return to the property owner [*see Civ. Code § 1947.15*; *see also § 335.12[3][c]*]. However, those professional fees must be included in the fair return calculation only if the rent control ordinance does not include vacancy decontrol [*Civ. Code § 1947.15(b)*]. In light of the requirement in the Costa-Hawkins Rental Housing Act [*Civ. Code § 1954.50 et seq.*] that all cities provide for vacancy decontrol, the Legislature amended *Civ. Code § 1947.15* to provide that it is not operative unless the Costa-Hawkins Rental Housing Act is repealed [*Civ. Code § 1947.15(k)*].

[c] When Rent Control Regulations Are Constitutional

Rent control regulations have survived a series of constitutional challenges, based on the following:

- Impairment of contract [*see Interstate Marina Development Co. v. County of Los Angeles (1984) 155 Cal. App. 3d 435, 445-449, 202 Cal. Rptr. 377]* ;

- Improper delegation of legislative power [*Carson Mobilehome Park Owners' Ass'n v. City of Carson (1983) 35 Cal. 3d 184, 190-191, 197 Cal. Rptr. 284, 672 P.2d 1297]* ; and

- Improper delegation of judicial power [*McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 375, 261 Cal. Rptr. 318, 777 P.2d 91* ; *Sterling v. Santa Monica Rent Control Bd. (1985) 168 Cal. App. 3d 176, 186, 214 Cal. Rptr. 71]* .

Imposition of treble damages by a rent control agency is unconstitutional as a violation of the judicial powers clause of the California Constitution [*McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 378-379, 261 Cal. Rptr. 318, 777 P.2d 91]* . However, treble damages in cases of wrongful eviction as promulgated by a local ordinance are enforceable if part of the judicial function [*see* *Kelly v. Yee (1989) 213 Cal. App. 3d 336, 340-342, 261 Cal. Rptr. 568]* .

[d] When Rent Control Regulations Effect a "Taking"

[i] *Kavanau v. Santa Monica Rent Control Board*

A rent control regulation may effect a taking, even though it leaves the property owner some economically beneficial use of the property [*Kavanau v. Santa Monica Rent Control Bd. (1997) 16 Cal. 4th 761, 774, 66 Cal. Rptr. 2d 672, 941 P.2d 851]* . The California Supreme Court has suggested that the analysis used under the due process clause, which focuses on the regulation's impact and investors' ability to earn a fair return, applies to determine whether a price control regulation such as rent control effects a taking [*Kavanau v. Santa Monica Rent Control Bd. (1997) 16 Cal. 4th 761, 773-776, 66 Cal. Rptr. 2d 672, 941 P.2d 851* (enumerating factors for court to consider in determining whether regulation that does not deprive the property owner of all economic use of the property effects a taking); *Santa Monica Beach, Ltd. v. Superior Court (1999) 19 Cal. 4th 952, 971, 81 Cal. Rptr. 2d 93, 968 P.2d 993]* .

In *Kavanau v. Santa Monica Rent Control Bd.*, the Supreme Court concluded that a landlord's allegations that rent control denied him a fair return on his investment were not sufficient to establish a taking [*Kavanau v. Santa Monica Rent Control Bd. (1997) 16 Cal. 4th 761, 777, 66 Cal. Rptr. 2d 672, 941 P.2d 851]* . In that case, the court of appeal had held that a 12 percent limit on rent increases deprived plaintiff landlord of a fair return and thus violated his right to due process. Before the case went to the California Supreme Court, plaintiff dropped the due process cause of action. Thus, the only claim before the Supreme Court was for inverse condemnation. The Supreme Court stated that plaintiff essentially argued that because he lost rental income as a direct result of defendant's unconstitutional application of the 12 percent limit, he had suffered a taking requiring just compensation. Thus, the Court stated that plaintiff was asking it to consider whether a rent regulation that violates a particular property owner's right to due process by depriving him or her of a fair return also necessarily constitutes a taking. However, the Court declined to reach that issue, holding instead that when a due process violation is the sole basis of an asserted taking, a remedy for the due process violation, if available and adequate, is a valuable benefit that satisfies the *takings clause*. It held that an adjustment of the plaintiff's future rents that took into consideration past confiscatory rents would provide an adequate remedy in that case [*Kavanau v. Santa Monica Rent Control Bd. (1997) 16 Cal. 4th 761, 777-782, 66 Cal. Rptr. 2d 672, 941 P.2d 851]* .

The Ninth Circuit has held that California's creation and implementation of the *Kavanau* process for adjustment of future rents that takes into consideration past confiscatory rents provides an adequate procedure for seeking just compensation, and that the property owner cannot claim a violation of the *Just Compensation Clause* until it has used the procedure and been denied just compensation [*Equity Lifestyle Properties Inc. v. County of San Luis Obispo (9th Cir. 2008) 548 F.3d 1184, 1190-1191*].

[ii] *Santa Monica Beach, Ltd. v. Superior Court*

In *Santa Monica Beach, Ltd. v. Superior Court* [*Santa Monica Beach, Ltd. v. Superior Court (1999) 19 Cal. 4th 952, 81 Cal. Rptr. 2d 93, 968 P.2d 993]* , the California Supreme Court did not decide whether the standard of review for takings claims based on rent control legislation is identical to the rational relationship test employed in other price control schemes. The Court concluded that it was at least clear that the heightened intermediate scrutiny standard articulated by the United States Supreme Court for regulatory takings claims [*see* *Nollan v. California Coastal Comm'n (1987) 483 U.S. 825, 836-837, 107 S. Ct. 3141, 97 L. Ed. 2d 677* (regulation of property effects a taking if it does not substantially advance legitimate state interests); *Dolan v. City of Tigard (1994) 512 U.S. 374, 391, 114 S. Ct. 2309, 129 L. Ed. 2d 304]* is inapplicable to takings claims based on the general application of rent control laws to an individual landlord [*Santa Monica Beach, Ltd. v. Superior Court (1999) 19 Cal. 4th 952, 967, 81 Cal. Rptr. 2d 93, 968 P.2d 993]* . It stated that the standard of review for generally applicable rent control legislation must be at least as deferential as for generally applicable zoning legislation and other legislative land use controls, which means that a party challenging rent control on takings grounds must show that it is an "arbitrary regulation of property rights" [*Santa Monica Beach, Ltd. v. Superior Court (1999) 19 Cal. 4th 952, 967, 81 Cal. Rptr. 2d 93, 968 P.2d 993]* .

The Supreme Court concluded that even if the more stringent "substantial interest" test of *Nollan* and *Dolan* were applicable, the landlord in *Santa Monica Beach, Ltd.* failed to establish a taking claim. Even though the landlord alleged that the ordinance failed to advance its stated goals of providing affordable housing for the poor, the elderly, and young families, the landlord did not allege that the rent control ordinance failed to advance the purpose of preventing unreasonable and excessive rent increases, and therefore did not adequately allege that the ordinance failed to advance some legitimate state purpose [*Santa Monica Beach, Ltd. v. Superior Court (1999) 19 Cal. 4th 952, 971, 81 Cal. Rptr. 2d 93, 968 P.2d 993]* .

[iii] *Galland v. City of Clovis*

In *Galland v. City of Clovis* [*Galland v. City of Clovis (2001) 24 Cal. 4th 1003, 103 Cal. Rptr. 2d 711, 16 P.3d 130]* , the California Supreme Court addressed the question left open in *Kavanau*, discussed in [i], *above*: whether a future rent adjustment also forecloses a suit for damages for violation of a right to constitutional due process under *42 U.S.C. § 1983* [*Galland v. City of Clovis (2001) 24 Cal. 4th 1003, 1008, 103 Cal. Rptr. 2d 711, 16 P.3d 130]* . The Court concluded that it does. It held that to recover § 1983 damages for allegedly confiscatory rent regulation, landlords must show that a confiscatory rent ceiling or other rent regulation was imposed and that relief via a writ of mandate and a *Kavanau* adjustment is inadequate [*Galland v. City of Clovis (2001) 24 Cal. 4th 1003, 1025, 103 Cal. Rptr. 2d 711, 16 P.3d 130]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsOrdinances & RegulationsGovernmentsLocal GovernmentsPolice PowerReal Property LawEminent Domain ProceedingsConstitutional Limits & RightsTakingsReal Property LawLandlord & TenantRent RegulationRent Control Statutes

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§ 335.12 Local Rent Control Ordinances

[1] Exemptions

Most local rent control ordinances specifically exempt certain rental property from regulation in addition to that property being exempted as a matter of state or federal law preemption. For discussion of state and federal law preemption generally, see *§ 335.11[1]*. For discussion of specific areas of state law preemption, see *§§ 335.14 -335.16*.

Commonly exempted properties include the following:

- Small, owner-occupied buildings;
- Buildings with fewer than a specified number of units;
- Newly constructed units or buildings;
- Hotel and boarding house rooms rented to transient tenants;
- Luxury units (generally defined with regard to unit size or rent);
- Substantially renovated units;
- Government owned or subsidized units;
- Care facilities (for example, hospitals and nursing homes); and
- Units maintained by nonprofit institutions (for example, school dormitories and religious residential units).

Exemption of specified types of rental units does not constitute a denial of equal protection under either the United

States or California Constitutions [*Kalaydjian v. City of Los Angeles (1983) 149 Cal. App. 3d 690, 694, 197 Cal. Rptr. 149* ; *Cotati Alliance for Better Housing v. City of Cotati (1983) 148 Cal. App. 3d 280, 291-293, 195 Cal. Rptr. 825]* .

A landlord and tenant may not by mutual agreement exempt rented property from rent control [*Gombiner v. Swartz (2008) 167 Cal. App. 4th 1365, 1372, 85 Cal. Rptr. 3d 83*]. Thus, a landlord and tenant could not settle a dispute by modifying the lease to exempt the property from the effect of the Los Angeles Rent Stabilization Ordinance ("RSO"). The RSO prohibits any person from accepting or retaining rent that exceeds the rent set under the RSO's provisions [L.A. Mun. Code, §§ 151.04, 151.10(A)]. It followed that the landlord could not, even with the tenant's acquiescence or by mutual agreement, circumvent that which the law prohibited. An agreement that violates the law is void and unenforceable [*Civ. Code §§ 1598, 1599*], and a law established for a public reason cannot be contravened by a private agreement [*Civ. Code § 3513*; *Gombiner v. Swartz (2008) 167 Cal. App. 4th 1365, 1372, 85 Cal. Rptr. 3d 83*].

PRACTICE TIP:

Ascertain Exemptions That May Be Available. Exemption provisions vary widely among municipalities, and, before advising a client, counsel should ascertain which exemptions are available. Additionally, counsel should determine whether the applicable ordinance requires a landlord to obtain approval of the rent control board as a precondition to exemption. *By Publisher's Editorial Staff.*

[2] Registration

Many rent control ordinances require a landlord to register his or her units and pay a registration fee. Additionally, a landlord may be required to provide the rent control agency with information relating to the units, including rental rates. A landlord's failure to comply with registration requirements may preclude him or her from receiving rent adjustments or evicting tenants. Subsequent compliance may or may not entitle a landlord to general rent adjustments lost by prior nonregistration, even when the noncompliance was on the part of a predecessor landlord [*see* *Searle v. City of Berkeley Rent Stabilization Bd. (1988) 197 Cal. App. 3d 1251, 1255-1259, 243 Cal. Rptr. 449* (rent control provision precluding landlords and their successors from recapturing, on later registration, annual rent increases lost by prior nonregistration as neither confiscatory nor a violation of constitutional due process principles)].

[3] Determination of Rent

[a] Base Rent

Most rent control ordinances regulate rents based on rent levels in effect at a specified base date. The base date may be a date before adoption of the rent control ordinance, to avoid incorporating last-minute increases made by landlords in anticipation of price controls [*see* *Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 166, 130 Cal. Rptr. 465, 550 P.2d 1001* (selection of base date before adoption of rent control initiative appropriate and reasonable)]. Rent increases are implemented through general adjustments, individual adjustments, or a combination of both. For discussion of both types of adjustments, see [b] and [c], *below*.

[b] General Adjustments

Rent control ordinances provide for general adjustments by which rent increases are implemented, some with and some without the requirement of rent control agency approval. General adjustments may take effect annually, periodically, or after a unit is vacated. The adjustment may be in an amount specified by the ordinance itself, an amount tied to the Consumer Price Index, or an amount determined by the rent control agency. Although a general adjustment provision is not necessarily constitutionally required [*Carson Mobilehome Park Owners' Ass'n v. City of Carson (1983) 35 Cal. 3d 184, 194, 197 Cal. Rptr. 284, 672 P.2d 1297]* , a rent control ordinance that allows increases only through a cumbersome individual adjustment procedure may be unconstitutional [*see* *Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 173, 130 Cal. Rptr. 465, 550 P.2d 1001]* .

[c] Individual Adjustments; Costs of Professional Services

To ensure that landlords will receive a fair return on their investment, rent control ordinances provide for increases in addition to the general adjustment. These increases may be determined based on a "fair value formula," or based on consideration by the rent control board of specified factors relating to a landlord's costs and income. Additionally, individual increases may be authorized for capital improvements, rehabilitation work, increased utilities costs, and a variety of other reasons. The substantive and procedural requirements of individual adjustment provisions vary widely from jurisdiction to jurisdiction.

Civ. Code § 1947.15 provides that any city, county, or city and county that administers an ordinance or regulation (1) controlling or establising the price at which all or any portion of residential rental units may be offered for rent or (2) controlling the rent adjustment, must permit reasonable expenses, fees, and other costs for professional services to be included in any calculation of net operating income and expenses used to determine a fair return to the property owner. However, professional fees must be included in the fair return calculation only if the rent control ordinance does not include vacancy decontrol [*Civ. Code § 1947.15(b)*; *see Civ. Code § 1947.15(i)* ("vacancy decontrol" defined)]. In light of the requirement in the Costa-Hawkins Rental Housing Act [*Civ. Code § 1954.50 et seq.*] that all cities provide for vacancy decontrol [*see* [4], *below*], the Legislature amended *Civ. Code § 1947.15* to provide that it is not operative unless the Costa-Hawkins Rental Housing Act is repealed [*Civ. Code § 1947.15(k)*].

[4] Vacancy Decontrol

All California rent control ordinances must provide for vacancy decontrol, which removes restrictions from units when they become vacant [*see Civ. Code § 1954.50 et seq.* (Costa-Hawkins Rental Housing Act); *§ 335.13*]. On rerental, the units may become subject to rent control again, but rent may be adjusted only from the new base rent. In some municipalities, units vacated under certain circumstances are permanently decontrolled. Generally, vacancy decontrol provisions apply only to voluntary vacancies, or involuntary vacancies based on specified grounds. Additionally, vacancy decontrol may be conditioned on notice to the rent control board and submission of documentation.

A landlord who suffers an informally created tenancy to coexist along with the formally created tenancy may be estopped to claim that the premises became vacant when the formal tenancy ended, if the informal tenancy continued. For example, a lessor permitted the lessee's housemate to occupy a leased house along with the lessee. The housemate had no formal agreement with the lessor, but occasionally paid the rent called for in the lease, which the lessor accepted. When the lessee terminated the lease, the housemate continued to occupy the house, and the lessor made a formal lease agreement with the housemate, at a higher rent. However, it was held that the rent increase was not lawful under the local vacancy decontrol provision because there had been no vacancy. Under the local provision, a tenancy was not required to be formalized by an express agreement, and under state law a tenancy can be created informally by mutual consent and the landlord's acceptance of rent from the tenant [*Getz v. City of West Hollywood (1991) 233 Cal. App. 3d 625, 628-630, 284 Cal. Rptr. 631]* .

PRACTICE TIP:

Increasing Rents Under Vacancy Decontrol. Many local jurisdictions provide for a procedure by which a landlord can obtain the right to increase rents pursuant to vacancy decontrol with regard to "informally created tenancies." This procedure may be utilized without prejudice to any right a landlord may have to assert a provision in a written lease providing for there to be no assignment or subletting. Attorneys should consult not only the local ordinance, but the Rules and Regulations as there are usually limitations on the right to exercise such a right which runs for a specified time from the discovery of the "informally created tenancy." The San Francisco Rent Board Rules and Regulations, Section 6.14, is an example of such a provision. *By Benjamin Kaplan.*

[5] Eviction Control

Most rent control ordinances regulate the grounds on which a landlord may evict a tenant. Eviction control provisions are valid and not preempted by state law, except to the extent that they conflict with the summary nature of state eviction procedures [*Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 151-153, 130 Cal. Rptr. 465, 550 P.2d 1001]* . Additionally, local eviction control provisions are preempted by state law to the extent that they attempt to limit a landlord's right to evict tenants in conjunction with withdrawing the property from the rental market [*Javidzad v. City of Santa Monica (1988) 204 Cal. App. 3d 524, 526-527, 251 Cal. Rptr. 350* (superseded by *Gov. Code § 7060.7, subd. (b)*)]. In 1999 the Legislature made it clear that local governments have authority to regulate, 1) the demolition of rental property, and 2) the conversion of non-residential use [*Lincoln Place Tenants Assn. v. City of Los Angeles (2007) 155 Cal. App. 4th 425, 443* ; for additional discussion of the Ellis Act (*Gov. Code § 7060 et seq.*), which grants landlords the absolute right to go out of business, see *§ 335.16*].

Common permissible grounds for eviction include the following:

- The failure to pay rent [*see Code Civ. Proc. § 1161(2)* (eviction after service of three-day notice for nonpayment of rent)];
- A tenant's breach and/or failure to cure a breach of a rental covenant;
- Conduct of a tenant constituting a nuisance or causing damage;
- Unlawful use of the rental premises;
- A tenant's refusal to execute an extension or renewal of a lease on terms similar to the expiring agreement;
- Owner or family member occupancy of a unit [*see Civ. Code § 1947.10* (requires an owner or family member to occupy the unit for a minimum of six continuous months); *see also § 335.15[3]*];
- A tenant's refusal to allow the landlord access to the unit;
- An unauthorized sublet; and
- Substantial renovation of the premises.

Some rent control ordinances also authorize defenses to an eviction action by a landlord. Counsel should consider the availability of all these defenses when representing either a landlord or a tenant in an eviction proceeding.

PRACTICE TIP:

"Just Cause" Eviction Requirement. Under state law, a landlord may terminate a month-to-month tenancy for no reason or almost any reason simply by giving the tenant 30-days written notice. But rent control ordinances requiring "just cause" to evict do not permit this, and these ordinances have been held valid and not preempted by state law. Similarly, state law does not require a landlord to renew a lease, and a landlord may evict a tenant who refuses to leave at the end of a lease. But here again, local rent control laws requiring just cause to evict prevent such an eviction. *By Myron Moskovitz.*

PRACTICE TIP:

Effect of a Tenant's Notice to Terminate. There is a "trap" inherent in most ordinances which relates to the ordinance's failure to provide for a landlord's right to evict if the tenant should provide to the landlord a 30-day notice to terminate a month-to-month tenancy. Although state law provides that a

tenant may withdraw such notice within the 30-day period, there is no provision in most ordinances that provides a specified (permissible) grounds for eviction if the tenant gives notice and the 30-day period runs before the tenant decides to remain. A landlord must be acutely aware of this "trap" as the landlord may otherwise be caught in a situation wherein the landlord has rented the premises to a new tenant premised on the former tenant honoring its notice and moving. Some commentators have argued that this constitutes "detrimental reliance" by the landlord on the tenant's notice, and will estop the tenant from contesting an eviction action. However, the non-waiver provisions of most ordinances will probably protect such a tenant from this position.

There are various ways in which a landlord may choose to deal with this type of situation, such as writing a letter to a tenant who gives a notice informing the tenant that the landlord is going to rent the unit premised on the tenant's notice. However, this is not in any way a solution to the problem. It would be wise to have some exculpatory provision in any new written rental agreement with the "new" tenant that provides for the eventuality that the current tenant does not honor its own notice. The better practice is simply to wait until the tenant has vacated before re-letting to a "new" tenant. *By Benjamin Kaplan.*

[6] Remedies for Violation

Rent control ordinances typically subject noncompliant landlords to criminal and civil liability. All local penalties, however, are subject to a statutory "substantial compliance" defense [*Civ. Code § 1947.7*; *see § 335.15[1]*]. Additionally, the California Supreme Court has held that a rent control agency may not properly assess treble damages when adjudicating a tenant's claim for excess rent, as imposition of these damages by a rent control agency is a violation of the judicial powers clause set forth in *Cal. Const., art. VI, § 1* [*McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 378-379, 261 Cal. Rptr. 318, 777 P.2d 91]* . Similarly, it is a violation of the judicial powers clause for a rent control agency to issue an order authorizing a tenant to withhold rent as a means of recovering excess rent previously charged if the agency does not allow the landlord an opportunity to first obtain judicial review of the order [*McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 376-377, 261 Cal. Rptr. 318, 777 P.2d 91* ; *Sylve v. Riley (1993) 15 Cal. App. 4th 23, 26-27, 18 Cal. Rptr. 2d 608* ; *Floystrup v. City of Berkeley Rent Stabilization Bd. (1990) 219 Cal. App. 3d 1309, 1314-1316, 268 Cal. Rptr. 898]* . An order authorizing withholding of rent is not unconstitutional if the landlord has an opportunity to challenge it in court, as when the agency stays enforcement of the order for a period of time sufficient to allow the landlord to seek a stay from the courts under *Code Civ. Proc. § 1094.5(g)* [*McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 376-377, 261 Cal. Rptr. 318, 777 P.2d 91* ; for discussion and forms relating to petitions for mandate to review administrative decisions, see Ch. 474, *Availability of Judical Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions*].

PRACTICE TIP:

Mandamus Proceedings. Functionally, practically, most landlords are not going to be in the financial position, nor will they have the economic incentive, to challenge a local Board's ruling by a mandamus proceeding absent involvement of a large number of units, similarly situated. *By Benjamin Kaplan.*

When the rent control ordinance requires trebling of damages for an unlawful eviction, the ordinance imposes a penalty, and the limitations period is thus the one-year limitation period for actions for penalties [*Menefee v. Ostawari (1991) 228 Cal. App. 3d 239, 243-245, 278 Cal. Rptr. 805* ; *see Code Civ. Proc. § 340(a)*].

When there is an eviction on the basis a relative will take possession, the plaintiff claims the relative did not take possession, and the defendant relies on the statute of limitations, there is a triable issue of fact as to when the appearance of vacancy constitutes inquiry notice of lack of intent to have the relative take possession [*Sylve v. Riley (1993) 15 Cal. App. 4th 23, 26-27, 18 Cal. Rptr. 2d 608]* .

Santa Monica's "tenant harassment" ordinance authorizes civil and criminal penalties against a landlord who

maliciously serves a notice of eviction or brings any action to recover possession of a rental unit without a reasonable factual or legal basis [Santa Monica Mun. Code § 4.56.020(i)(1)]. In *Action Apartment Assn., Inc. v. City of Santa Monica*, the Supreme Court held that parts of the ordinance were preempted by the litigation privilege set forth in *Civ. Code § 47(b)* [*Action Apartment Assn., Inc. v. City of Santa Monica (2007) 41 Cal. 4th 1232, 1243-1250, 63 Cal. Rptr. 3d 398, 163 P.3d 89]* . The litigation privilege conflicted with and thus preempted entirely the provision regarding the filing of an action to recover possession of a rental unit [*Action Apartment Assn., Inc. v. City of Santa Monica (2007) 41 Cal. 4th 1232, 1243-1250, 63 Cal. Rptr. 3d 398, 163 P.3d 89]* . However, the privilege preempted only partially the provision concerning service of a notice of eviction. A prelitigation communication is privileged only when it relates to litigation that is contemplated in good faith and under serious consideration, which is an issue of fact. Because a factual inquiry is required in order to determine whether a particular eviction notice is privileged, it was impossible to conclude that the litigation privilege would bar every action arising under the provision of the section authorizing suits based on unfounded notices of eviction [*Action Apartment Assn., Inc. v. City of Santa Monica (2007) 41 Cal. 4th 1232, 1251-1252, 63 Cal. Rptr. 3d 398, 163 P.3d 89]* .

The Santa Monica rent control law provides that any landlord who "demands, accepts, receives, or retains any payment of rent in excess of the maximum lawful rent, in violation of" various city ordinances, rules, or regulations pertaining to rent control, "shall be liable in a civil action to the tenant from whom such payments are demanded" [Santa Monica Charter Amend. § 1809]. The tenant is entitled to actual damages based on the amount of the improper demand or receipt of excess rent, attorney's fees and costs, and a civil penalty of treble damages if the landlord acted willfully or with oppression, fraud, or malice. In *Bisno v. Douglas Emmett Realty Fund 1988 (2009) 174 Cal. App. 4th 1534, 95 Cal. Rptr. 3d 492* , the landlord asserted that it was entitled to increase the rent to market rate because the tenant's ex-wife, who was not on the lease, was residing in the unit. The named tenant disputed the increase. The landlord filed an unlawful detainer action, which was ultimately dismissed. The court of appeal held that the *Civ. Code § 47(b)* litigation privilege barred the named tenant's wrongful eviction action based on the unlawful detainer action, but remanded for retrial the tenant's Charter Amend. § 1809 cause of action based on the landlord's 60-day notice of a demand for a rent increase, which was made under the Costa Hawkins Rental Housing Act [*Bisno v. Douglas Emmett Realty Fund 1988 (2009) 174 Cal. App. 4th 1534, 1553, 95 Cal. Rptr. 3d 492* ; *see Civ. Code § 1954.50 et seq.*].

Although the landlord in *Bisno* contended the rent increase notice came within the scope of the privilege because it qualified as a communication made in anticipation of litigation, the court stated that the notice of rent increase was far more attenuated from the ultimate unlawful detainer action than was the wrongful detainer three-day notice to quit, which did come within the privilege [*Bisno v. Douglas Emmett Realty Fund 1988 (2009) 174 Cal. App. 4th 1534, 1553, 95 Cal. Rptr. 3d 492*]. First, the 60-day notice requirement applies whenever a landlord demands a rent increase such as that sought by the landlord in *Bisno*, regardless of the reason, unless a different notification period is required by statute. Because Costa Hawkins does not provide a notice period, the 60-day notice was required [*Civ. Code § 827(a), (b)(3), (c)*; *Bisno v. Douglas Emmett Realty Fund 1988 (2009) 174 Cal. App. 4th 1534, 1553, 95 Cal. Rptr. 3d 492*]. Second, although the rent increase was sought pursuant to a statute, at heart Costa Hawkins allows landlords to avoid local rent control ordinances and impose whatever rent they think the market will bear either at the start of a new tenancy or when an existing tenant sublets his or her unit. The court reasoned that the essence of such an arrangement is by far more contractual than statutory, as exemplified by Costa Hawkins's express preference for any contractually agreed rental rate in the event of a sublease [*Bisno v. Douglas Emmett Realty Fund 1988 (2009) 174 Cal. App. 4th 1534, 1553, 95 Cal. Rptr. 3d 492* ; *Civ. Code § 1954.53(d)(1)*]. The court observed that theoretically, any demand for increased rent could be viewed as a step toward litigation because it is possible a tenant might refuse to comply, leading the landlord to sue. The court concluded that to apply the litigation privilege to such demands without regard to the factual setting would stretch the privilege to its breaking point. Because the central issue in *Bisno* was factual, namely, whether litigation was contemplated in good faith and under serious consideration at the time the rent increase notice was sent, and had never been litigated, it had to be litigated on remand [*Bisno v. Douglas Emmett Realty Fund 1988 (2009) 174 Cal. App. 4th 1534, 1554, 95 Cal. Rptr. 3d 492*].

PRACTICE TIP:

Availability of Civil Lawsuit. A landlord who serves an eviction notice stating a false ground for "good cause" (e.g., a false statement that the landlord intends to occupy the premises) is vulnerable not just to civil penalties imposed by the local rent control board (and possibly criminal penalties), but also to a separate civil lawsuit by the affected tenant. Judgments and settlements in such cases have run into six figures. *By Myron Moskovitz.*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsOrdinances & RegulationsReal Property LawLandlord & TenantRent RegulationExemptionsReal Property LawLandlord & TenantRent RegulationRent Control Statutes

California Forms of Pleading and Practice--Annotated

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PART II. LEGAL BACKGROUND

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§ 335.13 Residential Property Owner's Right Under State Law to Establish Initial and/or Subsequent Rental Rates

[1] General Applicability and Exclusions

The Costa-Hawkins Rental Housing Act [*Civ. Code §§ 1954.50-1954.535*] allows an owner of residential real property to establish the initial rental rate and, in some cases, all subsequent rental rates for designated dwellings or units [*Civ. Code §§ 1954.52, 1954.53*]. For purposes of the Act, "residential real property" is any dwelling or unit that is intended for human habitation [*Civ. Code § 1954.51(e)*]. "Owner" includes any person, acting as principal or through an agent, having the right to offer residential real property for rent, including the owner's predecessor in interest. The term does not include the owner or operator of a mobilehome park, or the owner of a mobilehome or his or her agent [*Civ. Code § 1954.51(b)*].

Statutory provisions of the Act permitting an owner to establish the initial and/or subsequent rental rates, discussed in [2] and [3], *below*, do not apply to any dwelling or unit when the following conditions are met [*Civ. Code §§ 1954.52(d), 1954.53(f)*]:

- The dwelling or unit has been cited in an inspection report by the appropriate governmental agency as containing serious health, safety, fire, or building code violations, as defined by *Health & Safety Code § 17920.3*, excluding any violation caused by a disaster [*Civ. Code § 1954.53(f)(1)*];

- The citation was issued at least 60-days before the date of the vacancy [*Civ. Code § 1954.53(f)(2)*]; and

- The cited violation had not been abated when the prior tenant vacated and had remained unabated for 60-days or longer. However, the 60-day time period may be extended by the appropriate governmental agency that issued the citation [*Civ. Code § 1954.53(f)(3)*].

Also, nothing in the provisions may be construed to affect any authority of a public entity that may otherwise exist to regulate or monitor the basis or grounds for a tenant's eviction [*Civ. Code §§ 1954.52(c), 1954.53(e)*]. However, these

provisions do not preserve an oversight role for the local agency when owners implement rent increases pursuant to the Costa-Hawkins Act. Thus, local rent control regulations that imposed criteria not found in the Act for determining whether a vacancy was "voluntary" for purposes of a rent increase, gave the rent board the power to challenge an owner's vacancy rent increase "if a question of fact arises" regarding the correct rent, and placed the burden on the owner to prove that the vacancy was a qualifying vacancy, were held preempted by the Act [*Cabina v. Santa Monica Rent Control Bd. (2000) 80 Cal. App. 4th 853, 863-864, 95 Cal. Rptr. 2d 676]* .

[2] Right to Establish Initial and Subsequent Rental Rates for Designated Dwelling or Unit

Notwithstanding any other provision of law, but subject to the exceptions described in [1], *above*, and *below*, an owner of residential real property may establish the initial and all subsequent rental rates for a dwelling or unit that satisfies any of the following [*Civ. Code § 1954.52(a)*]:

- Has a certificate of occupancy issued after February 1, 1995;

- Has already been exempt from the residential rental control ordinance of a public entity on or before February 1, 1995, under a local exemption for newly constructed units; or

- Is alienable separate from the title to any other dwelling unit or is a specified subdivided interest in a subdivision [*see Bus. & Prof. Code § 11004.5(b), (d), (e)* (permitted subdivided interests)], except that any unit or dwelling is excluded if the previous tenancy was terminated by the owner by notice in accordance with *Civ. Code § 1946.1* or was terminated on a change in the terms of the tenancy noticed in accordance with *Civ. Code § 827*. A condominium dwelling or unit that has not been sold separately by the subdivider to a bona fide purchaser for value is also excluded. The initial rent amount of such a unit is the lawful rent in effect on May 7, 2001, unless the rent amount is governed by a different provision of the Act. This exclusion does not apply if the unit meets the first two criteria set forth above or all the condominiums except one have been sold separately by the subdivider to bona fide purchasers for value and the subdivider has occupied the remaining unsold dwelling or unit as his or her principal residence for at least one year after the subdivision occurred [*Civ. Code § 1954.52(a)(3)(B)(ii)*].

PRACTICE TIP:

"Separately Alienable." "Separately alienable" will relate usually to a single family dwelling, a condominium, or a co-operative apartment. Be aware that local jurisdictions have implemented interpretations that if there are two separately standing dwelling units on one parcel, because each is not "separately alienable," this provision of Costa-Hawkins for exemption from rent control does not apply. *By Benjamin Kaplan.*

For a dwelling or unit described above whose initial or subsequent rental rates are controlled by an ordinance or charter provision in effect on January 1, 1995, the following apply [*Civ. Code § 1954.52(a)*]:

- An owner of real property may establish the initial and all subsequent rental rates for all existing and new tenancies in effect on or after January 1, 1999, if the tenancy in effect on or after January 1, 1999, was created between January 1, 1996, and December 31, 1998.

- Beginning on January 1, 1999, an owner of real property may establish the initial and all subsequent rental rates for all new tenancies if the previous tenancy was in effect on December 31, 1995.

- The initial rental rate for a dwelling or unit whose initial rental rate is controlled by an ordinance or charter provision in effect on January 1, 1995 may not, until January 1, 1999, exceed the amount calculated under *Civ. Code § 1954.53(c)* (described in [3], *below*). An owner of residential real property

may until January 1, 1999, establish the initial rental rate for a dwelling or unit only where the tenant has voluntarily vacated, abandoned, or been evicted in accordance with *Code Civ. Proc. § 1161(2)* (unlawful detainer action for nonpayment of rent).

However, it should be noted that none of the provisions discussed above apply if the owner has otherwise agreed by contract with a public entity in consideration for certain direct financial contribution or other forms of assistance from the public entity [*see Civ. Code § 1954.52(b)*].

[3] Right to Establish Initial Rental Rates for Designated Dwelling or Unit

Notwithstanding any other provision of law, but subject to exceptions noted in [1], *above*, and *below*, an owner of residential real property may establish the initial rental rate for a dwelling or unit, *except* when any of the following applies [*Civ. Code § 1954.53(a)*]:

- The previous tenancy was terminated by the owner by notice in accordance with *Civ. Code § 1946.1* or was terminated on a change in the terms of the tenancy noticed under *Civ. Code § 827* (except a change permitted by law in the amount of rent or fees). The owner's termination or nonrenewal of a contract or recorded agreement with a governmental agency that provides for a rent limitation to a qualified tenant, is a change in the terms of the tenancy under *Civ. Code § 827*.

- The owner has otherwise agreed by contract with a public entity in consideration for certain direct financial contribution or other form of assistance [*see Civ. Code § 1954.52(b)*].

- For a dwelling or unit whose initial rental rate is controlled by an ordinance or charter provision in effect on January 1, 1995, the initial rental rate to be established by the owner may not, until January 1, 1999, exceed the amount prescribed by statute, and discussed *below*.

The above-listed provisions apply to, and include, renewal of the initial hiring by the same tenant, lessee, authorized subtenant, or authorized sublessee for the entire period of his or her occupancy at the rental rate established for the initial hiring [*Civ. Code § 1954.53(b)*].

The rental rate of a dwelling or unit whose initial rental rate is controlled by ordinance or charter provision in effect on January 1, 1995, must, until January 1, 1999, be established in accordance with the following formula. When the previous tenant has voluntarily vacated, abandoned, or been evicted in accordance with *Code Civ. Proc. § 1161(2)* (nonpayment of rent), an owner may, no more than twice, establish the initial rental rate for a dwelling or unit in an amount that is no greater than 15 percent more than the rental rate in effect for the immediately preceding tenancy or in an amount that is 70 percent of the prevailing market rent [*Civ. Code § 1954.51(c)* ("prevailing market rent" defined)] for comparable units, whichever amount is greater. The initial rental rate established is not to be deemed to substitute for or replace increases in rental rates otherwise authorized pursuant to law [*Civ. Code § 1954.53(c)*].

In a jurisdiction that controls by ordinance or charter provision the rental rate for a dwelling or unit, an owner who terminates or fails to renew a contract or recorded agreement with a governmental agency that provides for a rent limitation to a qualified tenant may not set an initial rent for three years following the date of termination or nonrenewal. For any new tenancy established during the three-year period, the rental rate for that vacated dwelling or unit must be the same rate as the rent under the terminated or nonrenewed contract or recorded agreement, plus any increases authorized after the termination or nonrenewal of the contract or recorded agreement [*Civ. Code § 1954.53(a)(1)(A)*]. However, this provision does not apply to any new tenancy of 12 months or more duration established after January 1, 2000, in accordance with the owner's contract or recorded agreement with a governmental agency that provides for a rent limitation to a qualified tenant unless the prior vacancy in that dwelling or unit was based on a nonrenewed or canceled contract or recorded agreement with a governmental agency that provides for a rent

limitation to a qualified tenant [*Civ. Code § 1954.53(a)(1)(B)*].

Furthermore, when an owner terminates or fails to renew a contract or recorded agreement with a governmental agency that provides for rent limitations to a qualified tenant, the tenant or tenants who were the beneficiaries of the contract or recorded agreement must be given at least 90 days' written notice of the effective date of the termination and are not obligated to pay more than the tenant's portion of the rent, as calculated under the contract or recorded agreement to be terminated, for 90 days following receipt of the notice of termination or nonrenewal of the contract [*Civ. Code § 1954.535*; *see Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2006) 136 Cal. App. 4th 119, 132, 38 Cal. Rptr. 3d 575* (ordinance prohibiting landlords terminating Section 8 housing contract with city housing authority from charging tenant more than tenant's portion of rent under former contract without any time limit is preempted by *Civ. Code § 1954.535*)]. This requirement applies whether or not the premises are located in a rent controlled jurisdiction [*Wasatch Property Management v. Degrate (2005) 35 Cal. 4th 1111, 1121, 29 Cal. Rptr. 3d 262, 112 P.3d 647]* .

A provision of the San Francisco rent control ordinance purporting to limit the amount of rent a landlord could charge for a replacement unit following an owner move-in eviction directly contradicted the provision that "notwithstanding any other provision of law, an owner of residential real property may establish the initial rental rate for a dwelling or unit" [*Civ. Code § 1954.53(a)*] and therefore was preempted by the Act [*Bullard v. San Francisco Rent Stabilization Board (2003) 106 Cal. App. 4th 488, 492-493, 130 Cal. Rptr. 2d 819]* . The rent restriction did not qualify as a regulation of the "grounds for eviction" under *Civ. Code § 1954.53(e)*. The ground for eviction was that the landlords sought to recover possession of a unit for use as their principal residence. The requirement that owners offer another unit at a regulated rent was a condition imposed by the rent control ordinance on the owners' recovery of possession, but it could not be deemed in any ordinary sense of the term a "ground" for the eviction [*Bullard v. San Francisco Rent Stabilization Board (2003) 106 Cal. App. 4th 488, 492, 130 Cal. Rptr. 2d 819]* .

PRACTICE TIP:

Examine All Notices. An attorney should examine all previous notices to (even) prior tenants to determine whether a previous tenancy was terminated by a 30-day notice (even for "good or permissible grounds under a Rent Control Ordinance"), or was based on some change in the terms of the tenancy which then resulted in eviction. Thus, by one example only, if a prior tenancy was terminated by an owner move in eviction based on a 30-day notice, and then re-rented, the provisions of Costa-Hawkins relating to rent increases would not apply. To provide another example, there was a practice formerly engaged wherein the landlord would change a provision establishing "no pets" in the building and then evict a tenant based on the tenant having a pet. Such an eviction would also serve to remove the property from the provisions of Costa-Hawkins. Many local jurisdictions have parallel ordinances which provide, for example, for the return of the unit to the original rental amount if a landlord fails to comply fully with the owner move in provisions. *By Benjamin Kaplan.*

[4] Effect of Statute on Subletting and Assignments

Nothing in *Civ. Code § 1954.53(a)-(c)*, summarized in [3], *above*, or any other provision of law, precludes the express establishment in a lease or rental agreement of the rental rates to be applicable in the event the rental unit is sublet. Similarly, nothing in the statute is to be construed to impair the obligations of contracts entered into before January 1, 1996 [*Civ. Code § 1954.53(d)(1)*].

When the original occupant or occupants who took possession of the dwelling or unit under the rental agreement with the owner no longer permanently resides there, an owner may increase the rent by any amount allowed by *Civ. Code § 1954.53* [*see* [3], *above*] to a lawful sublessee or assignee who did not reside at the dwelling or unit before January 1, 1996 [*Civ. Code § 1954.53(d)(2)*]. An exception to this rule exists for partial changes in occupancy of a dwelling or unit when one or more of the occupants of the premises, under an agreement with the owner, remains an occupant in lawful

possession of the dwelling or unit, or when a lawful sublessee or assignee who resided at the dwelling or unit before January 1, 1966, remains in possession of the dwelling or unit [*Civ. Code § 1954.53(d)(3)*].

The provisions of *Civ. Code § 1954.53* do not enlarge or diminish an owner's right to withhold consent to a sublease or assignment [*Civ. Code § 1954.53(d)(3)*]. Further, acceptance of rent by the owner does not operate as a waiver or otherwise prevent enforcement of a covenant prohibiting sublease or assignment or as a waiver of an owner's rights to establish the initial rental rate unless the owner has received written notice from the tenant that is party to the agreement and thereafter accepted rent [*Civ. Code § 1954.53(d)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsSubleasesReal Property LawLandlord & TenantRent RegulationRent Control Statutes

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§ 335.14 State Law Requirements for Establishment and Certification of Rent Levels

[1] Statutory Requirement to Provide for Permissible Rent Levels

In accordance with state statute, an ordinance or charter that establishes residential rent control and requires registration of rents must also provide for establishment and certification by the local agency of permissible rent levels for the registered rental units, and any changes to those levels [*Civ. Code § 1947.8(a)*].

If the rent control ordinance, charter, or regulation was in effect on January 1, 1987, it must have provided for establishment and certification of permissible rent levels by January 1, 1988, including completion of all appeals and administrative proceedings connected with establishment of those levels. After July 1, 1990, a local agency may not maintain any action to recover excess rent against a property owner who has registered his or her unit with the local agency within the time limits set forth in *Civ. Code § 1947.8* if the initial certification of permissible rent levels affecting that particular property has not been completed, unless the delay is willfully and intentionally caused by the property owner or is a result of court proceedings or further administrative proceedings ordered by a court [*Civ. Code § 1947.8(b)*].

If the rent control ordinance, charter, or regulation was or is adopted on or after January 1, 1987, it must provide for the establishment and certification of permissible rent levels within one year after its adoption, including completion of all appeals and administrative proceedings connected with establishment of those levels [*Civ. Code § 1947.8(b)*].

PRACTICE TIP:

Have Existing Rents Certified. If your client is considering buying a building in a city that controls rents, he or she faces the danger that the existing rents might be illegal (e.g., because some prior owner raised rents by an amount higher than allowed by the ordinance), and this illegal base rent might prevent the new owner from taking advantage of any new rent increases. To avoid this problem, the attorney should require the old owner to have the existing rents *certified* as proper by the rent board. *By Myron Moskovitz.*

[2] Requirement to Provide Parties With Certification

On the request of a landlord or a tenant, the local rent control agency must provide the landlord and the tenant with a certificate or other documentation reflecting the rental unit's permissible rent levels. A landlord may also request a certificate of permissible rent levels for rental units that have a base rent established, but which are vacant and not exempt from registration under *Civ. Code § 1947.8*. A landlord or tenant may appeal the determination of the permissible rent levels reflected in the certificate. The levels reflected in the certificate or other documentation are, in the absence of intentional misrepresentation or fraud, binding and conclusive on the local agency unless determination of the levels is being appealed [*Civ. Code § 1947.8(b)*].

After permissible rent levels have been established and certified under *Civ. Code § 1947.8(b)*, as described above, the local agency must, on the request of the landlord or the tenant, provide the landlord and the tenant with a certificate of the permissible rent levels of the rental unit. The certificate must be issued within five business days from the date of request. The permissible rent levels reflected in the certificate are, in the absence of intentional misrepresentation or fraud, binding and conclusive on the local agency unless the determination of the permissible rent levels is being appealed [*Civ. Code § 1947.8(c)*].

[3] Appeal of Determination of Permissible Rent Levels

The landlord or the tenant may appeal the determination of the permissible rent levels reflected in the certificate. Any appeal of a determination of permissible rent levels as reflected in the certificate, other than an appeal of the original determination under *Civ. Code § 1947.8(b)*, must be filed with the local agency within 15 days from issuance of the certificate. The local agency must provide the landlord and the tenant with written notice of its decision within 60 days after the appeal has been filed [*Civ. Code § 1947.8(c)*].

[4] Fees

A local rent control agency is permitted to charge the person to whom a certificate is issued a fee in an amount necessary to cover the reasonable costs incurred by the agency in issuing the certificate [*Civ. Code § 1947.8(d)*].

[5] Other Issues Applicable to Establishment of Permissible Rent Levels

The absence of a certification of permissible rent levels does not impair, restrict, abridge, or otherwise interfere with a judicial or administrative hearing, or with any matter in connection with a conveyance of an interest in property [*Civ. Code § 1947.8(e)*]. The record of permissible rent levels is a public record for purposes of the California Public Records Act (*Gov. Code § 6250 et seq.*) [*Civ. Code § 1947.8(f)*; for discussion of that Act, see Ch. 470C, *Public Records Act*].

Civil Code § 1947.8 may not be construed to grant a public entity any power that it does not possess independent of the statute to control or establish a system of rent control, nor may it be construed to diminish any such power that that entity may possess, except as specifically provided in the statute [*Civ. Code § 1947.8(i)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantRent RegulationRent Control Statutes

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§ 335.15 General Remedies Under State Law

[1] "Substantial Compliance" Requirement

[a] Overview

The Legislature has declared that, because the operation of local rent stabilization programs can be complex and disputes arise frequently with regard to standards of compliance, it is the Legislature's intent to limit imposition of penalties and sanctions against an owner of residential rental units if that person has attempted in good faith to fully comply with the regulatory processes [*Civ. Code § 1947.7(a)*]. Therefore, an owner of a residential rental unit who is in substantial compliance with a residential rent control ordinance or charter that requires registration of rents may not be assessed a penalty or any other sanction for noncompliance with the ordinance, charter, or regulation. The exclusive remedies that may be imposed against an owner who is in substantial compliance are restitution to the tenant or recovery of the registration or filing fees due to the local agency [*Civ. Code § 1947.7(b)*].

PRACTICE TIP:
Limits on Remedies. Although the remedies are included in local ordinances, state law puts limits on them. *By Myron Moskovitz.*

For purposes of *Civ. Code § 1947.7*, the term "substantial compliance" means that the owner of a residential rental unit has made a good-faith attempt to comply with the ordinance, charter, or regulation that is sufficient to reasonably carry out the intent and purpose of the rent control provision, but is not in full compliance, and has, after receiving notice of a deficiency from the local rent control agency, cured the defect in a timely manner, as reasonably determined by the local agency [*Civ. Code § 1947.7(b)*]. A landlord who fails to register his or her units with the correct base rent, charges rent increases in excess of the permissible percentage increase, and fails to comply for over one year with the rent control agency's order to reregister the units with the correct base rent is not in substantial compliance with the local ordinance in accordance with *Civ. Code § 1947.7(b)* [*Minelian v. Manzella (1989) 215 Cal. App. 3d 457, 462-463, 263 Cal. Rptr. 597]* .

For purposes of the provisions of *Civ. Code § 1947.7*, an owner is deemed in compliance with a rent control ordinance, charter, or regulation if he or she is in substantial compliance with the applicable local rental registration requirements

and applicable local and state housing code provisions, has paid all fees and penalties owed to the local agency that have not otherwise been barred by the applicable statute of limitations, and has satisfied all claims for refunds of rental overcharges brought by tenants or by the local rent control board on behalf of tenants of the affected unit [*Civ. Code § 1947.7(e)*].

Civ. Code § 1947.7 does not prohibit the award of sanctions or penalties under the state Unfair Business Practices Law [*Bus. & Prof. Code § 17200 et seq.*] when the local agency (1) does not require registration of rents, and (2) has not adopted and followed an administrative procedure for the determination of substantial compliance under *Civ. Code § 1947.7(b)* [*People v. Beaumont Investment Ltd. (2003) 111 Cal. App. 4th 102, 124-126, 3 Cal. Rptr. 3d 429* (sanctions against mobilehome park owners for forcing tenants to accept long-term leases to avoid rent control; court assumed for purposes of discussion that *Civ. Code § 1947.7* applies to mobilehome park rent schemes)].

For a form of affirmative defense for use by a landlord to allege substantial compliance, see *§ 335.42*.

PRACTICE TIP:

Availability of "Wrongful Eviction" Defense. *Civ. Code § 1947.7* does not provide the landlord with an affirmative defense in a "wrongful eviction" action brought by a tenant. It is hypothetically possible under the statutory schema that such a defense might be available under the definition of "substantial compliance" if (1) a landlord serves an eviction notice that fails to comply with the ordinance, (2) the tenant then files a report of "wrongful eviction," (3) the local agency then sends a notice of deficiency, and (4) the landlord then cures the defect in a timely manner. However, such a situation would be relatively early on in the process so as to make the circumstances, however unlikely to happen, be of minimal import. *By Benjamin Kaplan.*

[b] Restoration of Annual Rent Adjustments

If (1) the owner of any residential unit that has been registered and for which a base rent has been listed, (2) the owner of any residential unit who can show, by a preponderance of the evidence, a good-faith attempt to comply with the registration requirements with respect to that unit, or (3) the owner of any residential unit that was exempt from registration requirements in a previous version of the rent control ordinance has subsequently been found not to be in compliance with the ordinance, charter, or regulation, all annual rent adjustments that may have been denied during the period of the owner's noncompliance must be restored prospectively once the owner is in compliance with the ordinance, charter, or regulation [*Civ. Code § 1947.7(c)*].

[c] Powers of Public Entities

The statute may not be construed to grant to a public entity any power that it does not possess independent of the provision to control or establish a system of control on residential rents, nor may it be construed to diminish any power to do so that that public entity may possess, except as specifically provided in the statute [*Civ. Code § 1947.7(f)*; *see Richman v. Santa Monica Rent Control Bd. (1992) 7 Cal. App. 4th 1457, 9 Cal. Rptr. 2d 690* (under this provision, board continues to have pre-enactment authority to determine whether amenities such as parking spaces are included in base rent for dwelling unit)].

[d] Confidential Nature of Tenant Information

In rent control jurisdictions that require the periodic registration of rents and, for purposes of complying with *Civ. Code § 1954.53(e)* (authority of local jurisdiction to regulate evictions), the local agency requires an owner to provide the name of a present or former tenant, the tenant's name and any additional information provided concerning the tenant is confidential and must be treated as confidential information within the meaning of the Information Practices Act of 1977. The local agency may request but may not compel an owner to provide any information regarding a tenant other than the tenant's name [*Civ. Code § 1947.7(g)*].

[2] Intentional Violation of Rent Provisions

In any city, county, or city and county that administers a system of residential rent control and requires registration of rents, after establishment of a certified rent level, any owner who charges a tenant rent in excess of the certified lawful rent ceiling must refund the excess rent to the tenant on demand. If the owner refuses to refund the excess rent and a court determines that he or she willfully or intentionally charged the tenant rent in excess of the certified lawful rent ceiling, the court will award the tenant a judgment for the excess amount of rent and may treble that amount. The prevailing party will be awarded attorney's fees and court costs [*Civ. Code § 1947.11(a)*].

The remedy provided by *Civ. Code § 1947.11* may not be construed to prohibit any other available remedies [*Civ. Code § 1947.11(b)*]. Additionally, the statute may not be construed to extend the time within which actions are required to be brought beyond the otherwise applicable limitations set forth in the Code of Civil Procedure [*Civ. Code § 1947.11(c)*].

For a form of complaint for damages for failure to refund excess rent charged, see *§ 335.41*.

PRACTICE TIP:

Intentional vs. Innocent Increase. It does not matter whether an illegal rent increase is intentional or innocent. Both intentional and innocent increases will give rise to a lawsuit against the landlord to recover the illegal increase. However, only an intentional increase will warrant treble damages. *By Myron Moskovitz.*

[3] Eviction for Owner Occupation

After July 1, 1990, in any city, county, or city and county that administers a system of residential rent control and requires registration of rents, any owner who evicts a tenant based on the owner's or the owner's immediate relative's intention to occupy the tenant's unit is required to maintain residence in the unit for at least six continuous months [*Civ. Code § 1947.10(a)*].

If a court determines that the eviction was based on fraud by the owner or the owner's immediate relative to not fulfill this six-month requirement, it may order the owner to pay treble the cost of relocating the tenant from his or her existing unit back into the previous unit, and may order the owner to pay treble the amount of any increase in rent that the tenant has paid. If the tenant decides not to relocate back into the previous unit, the court may order the owner to pay treble the amount of one month's rent paid by the tenant for the unit from which he or she was evicted, and treble the amount of any costs incurred in relocating to a different unit. The prevailing party will be awarded attorney's fees and court costs [*Civ. Code § 1947.10(a)*]. The remedy provided by *Civ. Code § 1947.10* may not be construed to prohibit any other available remedies [*Civ. Code § 1947.10(b)*].

In addition to the statutory authority for a cause of action based on eviction for fraudulent owner occupation, one court has held that a private cause of action for damages exists for a tenant who is damaged when he or she is evicted by his or her landlord based on occupancy of the unit by the landlord's relative if the relative never resides on the premises. The fraudulent eviction is a violation of the "good faith" standard contained in most local rent control ordinances [*Castillo v. Friedman (1987) 243 Cal. Rptr. 206* (decided before enactment of *Civ. Code § 1947.10*)].

For a form of complaint for damages for eviction based on a fraudulent intent to occupy, see *§ 335.40*.

PRACTICE TIP:

Availability of Damages. As a practical matter, local rent ordinances usually have more stringent requirements and far greater exposure to damages than is provided in *Civ. Code § 1947.10*. In a rent/eviction control jurisdiction, an attorney should always read the ordinance and the Rules and Regulations before proceeding with the filing of a "wrongful eviction" action. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantRent RegulationRent Control Statutes

California Forms of Pleading and Practice--Annotated

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Volume 29: Landlord and Tenant: General Introduction thru Rent Control-Chs. 330-339
Chapter 335 LANDLORD AND TENANT: RENT CONTROL
PART II. LEGAL BACKGROUND

29-335 California Forms of Pleading and Practice--Annotated § 335.16

§ 335.16 Prohibition Against Compelling Landlord to Remain in Business

[1] Ellis Act Prohibitions and Definitions

The Ellis Act [*Gov. Code § 7060 et seq.*] prohibits a public entity from compelling the owner of any residential real property to offer, or continue to offer, accommodations in the property for rent or lease, whether by statute, ordinance, regulation, or administrative action implementing any statute, ordinance, or regulation [*Gov. Code § 7060(a)*]. The prohibition does not, however, extend to local ordinances restricting withdrawal of less than all of an owner's accommodations from the rental market [*Gov. Code § 7060.7(d)*; *see* [2], *below*].

The term "public entity" includes the state, county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state [*Gov. Code § 811.2*]. The term "accommodations" means the residential rental units in any detached physical structure containing four or more residential rental units, and with regard to a detached physical structure containing three or fewer residential rental units, the residential rental units in that structure and in any other structure located on the same parcel of land, including any detached physical structure containing four or more residential rental units [*Gov. Code § 7060(b)*]. "Accommodations" does not include condominiums because they are not detached physical structures [*Valnes v. Santa MonicaRent Control Bd. (1990) 221 Cal. App. 3d 1116, 1120-1122, 270 Cal. Rptr. 636]* .

The Ellis Act is applicable to residential hotels, and the owner of a residential hotel has the right to go out of the residential hotel business [*Bullock v. City and County of San Francisco (1990) 221 Cal. App. 3d 1072, 1095-1099, 271 Cal. Rptr. 44]* . However, in 2003 the Legislature amended the Ellis Act to exempt guestrooms or efficiency units within a residential hotel located in a city and county or in a city with a population of over 1,000,000, if the hotel has a permit of occupancy issued prior to January 1, 1990, and did not deliver a notice of intent to withdraw the accommodations from rent or lease [*see Gov. Code § 7060.4(a)*; *see also* [4][i], *below*] before January 1, 2004 [*Gov. Code § 7060(a)*].

For a form of affirmative defense for use by a landlord to allege the withdrawal of units from the rental market, see *§ 335.43*.

PRACTICE TIP:

Ellis Act Evictions. Ellis Act evictions are very complicated. A wrong move can expose the owner to substantial liability to cities and to evicted tenants. Owners should be strongly advised not to try this without a lawyer's assistance. *By Myron Moskovitz.*

[2] Legislative Intent

In enacting the Ellis Act, the Legislature intended to supersede prior case authority that upheld local regulations restricting or eliminating a landlord's ability to withdraw his or her property from the rental market [*see Gov. Code § 7060.7*; *see also Nash v. City of Santa Monica (1984) 37 Cal. 3d 97, 207 Cal. Rptr. 285, 688 P.2d 894* (opinion decided before and superseded by enactment of Ellis Act)]. The provisions of the Ellis Act, however, are not intended to do any of the following:

- Interfere with local governmental authority over land use, including regulation of the conversion of existing housing to condominiums or other subdivided interests or to other nonresidential use following its withdrawal from rent or lease under the Ellis Act [*Gov. Code § 7060.7(a)*];

- Preempt local or municipal environmental or land use regulations, procedures, or controls that govern the demolition and redevelopment of residential property [*Gov. Code § 7060.7(b)*];

- Override procedural protections designed to prevent abuse of the right to evict tenants [*Gov. Code § 7060.7(c)*];

- Permit an owner to withdraw from rent or lease less than all of the accommodations, as defined by *Gov. Code § 7060(b)(1)* or *(2)* [*Gov. Code § 7060.7(d)*];

- Grant to a public entity any power that it does not possess independent of the Ellis Act to control or establish a system of control on the price at which accommodations may be offered for rent or lease, or to diminish any such power that that public entity may possess, except as specifically provided by *Gov. Code § 7060 et seq.* [*Gov. Code § 7060.7(e)*]; or

- Alter in any way either *Gov. Code § 65863.7*, relating to withdrawal from rent or lease accommodations that comprise a mobilehome park, or *Civ. Code § 798.56(g)*, relating to a change of use of a mobilehome park [*Gov. Code § 7060.7(f)*].

Amendments to *Gov. Code § 7060.7* in the year 2000, providing that the Act is "not otherwise intended to ... (a) Interfere with local governmental authority over land use, including regulation of the conversion of existing housing to condominiums or other subdivided interests or to other nonresidential use following its withdrawal from rent or lease under [the Act][, or] (b) Preempt local or municipal environmental or land use regulations, procedures, or controls that govern the demolition and redevelopment of residential property," did not authorize the City of San Francisco to require a residential hotel owner to comply with the city's Hotel Conversion and Demolition Ordinance permit and one-to-one replacement requirements in order to withdraw the units from the market [*Reidy v. City and County of San Francisco (2004) 123 Cal. App. 4th 580, 590-591, 593, 19 Cal. Rptr. 3d 894]* . Nothing in the amendments altered the expressly stated, fundamental purpose of the Ellis Act: to allow owners of residential rental property to go out of the rental business without restriction by the local government, nor did the amendments manifest an intent to upend uniform judicial construction holding that a local government cannot condition an owner's right to go out of business on compliance with requirements that do not appear in the Act. Rather, the amendments' specific reference to local regulations that govern "demolition and redevelopment" [*Gov. Code § 7060.7(b)*] clarifies the Act by incorporating the body of judicial construction that uniformly holds that the Act does not restrict local governments from exercising their police powers to regulate the use of the landlord's property as to such matters as zoning, demolition, and development after it is taken off the rental market, so long as those regulations do not otherwise prevent a residential landlord from

going out of the rental business [*Reidy v. City and County of San Francisco (2004) 123 Cal. App. 4th 580, 592, 19 Cal. Rptr. 3d 894]* .

PRACTICE TIP:

"Land Use" Issues. Since the Ellis Act does not preclude a local jurisdiction from regulating land use, an attorney needs to carefully discuss and consider with the client who wants to "Ellis" his or her property, the problems that may be encountered with a local jurisdiction when application is made by permit to change the use of the property. For example, there may be a discretionary review process that a landlord must follow in respect to reducing a building from a permitted use of six units to a permitted use as a single family residence. It would be wise under such circumstances for the attorney and client to both consult with an attorney who specializes in "land use" law and regulation before proceeding under the Ellis Act. *By Benjamin Kaplan.*

[3] Scope of Prohibition

The statutory prohibition does not do any of the following:

- Prevent a public entity from enforcing any contract or agreement by which an owner of residential real property has agreed to offer the accommodations for rent or lease in consideration for a direct financial contribution (including contributions specified in *Gov. Code § 65916*, relating to direct financial contributions to housing developments through participation in costs, and any form of interest rate subsidy or tax abatement provided to facilitate the acquisition or development of real property), or with regard to written contracts or agreements entered into before July 1, 1986, for any consideration. Such a contract or agreement is not enforceable against a person who acquires title to the accommodations as a bona fide purchaser for value (or successors in interest thereof) unless the purchaser, at the time of acquiring title to the accommodations, had actual knowledge of the contract or agreement or a written memorandum of the contract or agreement specifically describing its terms and the affected real property and identifying the owner of the property was recorded with the county recorder before July 1, 1986, or not less than 30 days before transfer of title to the property to the purchaser. The county recorder will index the memorandum in the grantor-grantee index [*Gov. Code § 7060.1(a)*].

- Diminish or enhance, except as specifically provided in *Gov. Code § 7060.2*, relating to rerenting withdrawn property, any power of a public entity to grant or deny any entitlement to the use of real property, including, but not limited to, planning, zoning, and subdivision map approvals [*Gov. Code § 7060.1(b)*].

- Diminish or enhance the power of a public entity to mitigate any adverse impact on persons displaced by reason of the withdrawal from rent or lease of any accommodations [*Gov. Code § 7060.1(c)*].

- Supersede provisions for relocation assistance (*Gov. Code § 7260 et seq.*), fair housing (*Gov. Code § 12900 et seq.*), enforcement of unfair competition (*Bus. & Prof. Code § 17200 et seq.*), personal rights (*Civ. Code § 43 et seq.*), hiring (*Civ. Code § 1925 et seq.*), unlawful detainer (*Code Civ. Proc. § 1159 et seq.*), and community development and housing (*Health & Safety Code § 33000 et seq.*) [*Gov. Code § 7060.1(d)*].

- Relieve any party to a lease or rental agreement of the duty to perform any obligation under that lease or rental agreement [*Gov. Code § 7060.1(e)*].

[4] Permissible Local Regulation

[a] Certain Restrictions Are Permitted

If a public entity, by valid exercise of its police power, has in effect any control or system of control on the price at which accommodations may be offered for rent or lease, that entity may provide by statute or ordinance, or by regulation as specified in *Gov. Code § 7060.5*, that any accommodations that have been offered for rent or lease and that were subject to that control or system of control at the time the accommodations were withdrawn from rent or lease are subject to certain restrictive provisions [*Gov. Code § 7060.2*]. These permissible local restrictions are discussed in [b]-[h], *below*. For discussion of the requirements of *Gov. Code § 7060.5* relating to the procedure for adopting local regulations, see [j], *below*.

[b] Accommodations Offered for Rent Within Five Years After Withdrawal

If the accommodations are offered again for rent or lease for residential purposes within five years after withdrawal, local regulation may require the accommodations to be offered and rented or leased at the lawful rent in effect at the time the notice of intent to withdraw the accommodations was filed with the public entity, plus any annual adjustments available under the local rent control [*Gov. Code § 7060.2(a)(2)*]. This requirement applies to all tenancies commenced during either of the following time periods [*Gov. Code § 7060.2(a)(2)*]:

- Within the five-year time period after any notice of intent to withdraw the accommodations was filed with the public entity, whether or not the notice was rescinded or the withdrawal was completed pursuant to the notice of intent.

- The five-year period after the accommodations were withdrawn.

These provisions prevail over any conflicting provision of law authorizing the landlord to establish the rental rate on the initial hiring of the accommodations [*Gov. Code § 7060.2(a)(3)*].

[c] Accommodations Offered for Rent Within Two Years After Withdrawal

[i] Actual and Exemplary Damages

If the accommodations are offered again for rent or lease within two years of the date the accommodations were withdrawn, local regulation may hold the owner of the accommodations liable for actual and exemplary damages to any tenant or lessee who was displaced from the property. Any action by a tenant or lessee under such a local regulation must be brought within three years of the withdrawal of the accommodations from rent or lease, but a tenant is not precluded from pursuing any alternative remedy available under the law [*Gov. Code § 7060.2(b)(1)*].

A public entity that has enacted any of the provisions set forth above may institute a civil proceeding for exemplary damages for displacement of tenants or lessees against any owner who has again offered accommodations for rent or lease within two years of withdrawal. Any action by a public entity for such damages must be brought within three years of the withdrawal of the accommodations from rent or lease [*Gov. Code § 7060.2(b)(2)*].

[ii] Reinstatement of Lease or Rental Agreement

Local regulation may require an owner who offers accommodations again for rent or lease within two years of withdrawal to offer the unit for rent or lease first to the tenant or lessee displaced from that unit by the withdrawal if the tenant has advised the owner in writing within 30 days of the displacement of his or her desire to consider an offer to renew the tenancy and has furnished the owner with an address to which that offer is to be directed. The regulation must provide that the tenant, lessee, or former tenant or lessee may advise the owner of a change of address to which an offer

is to be directed at any time during the period of eligibility [*Gov. Code § 7060.2(b)(3)*].

If the tenant or lessee advises the owner of a desire to consider an offer to renew the tenancy, the owner must offer to reinstate a rental agreement or lease on terms permitted by law. The offer must be deposited in the United States mail, by registered or certified mail with postage prepaid, addressed to the displaced tenant or lessee at the address furnished to the owner as provided above, and must describe the terms of the offer. The regulation must give the displaced tenant or lessee 30 days from the deposit of the offer in the mail to accept the offer by personal delivery of the acceptance or by deposit of the acceptance in the United States mail by registered or certified mail with postage prepaid [*Gov. Code § 7060.2(b)(3)*].

[d] Accommodations Offered for Rent Within 10 Years After Withdrawal

A public entity may require that an owner who offers accommodations again for rent or lease within a period of up to 10 years from the date on which they were withdrawn first offer the unit to the tenant or lessee displaced from that unit by the withdrawal, if that tenant or lessee requests the offer in writing within 30 days after the owner has notified the public entity of an intention to offer the accommodations again for residential rent or lease pursuant to a requirement adopted by the public entity under *Gov. Code § 7060.4(c)*. An owner of accommodations who fails to comply with this requirement may be liable to any displaced tenant or lessee for punitive damages in an amount up to the contract rent for six months [*Gov. Code § 7060.2(b)(3)*].

[e] Accommodations Demolished

Local regulation may provide that, if accommodations are demolished and new accommodations are constructed on the same property and offered for rent or lease within five years of the date the accommodations were withdrawn from rent or lease, the newly constructed accommodations are subject to any system of control on the price at which they would be offered on the basis of a fair and reasonable return on the newly constructed accommodations, notwithstanding any exemption from the system of controls for newly constructed accommodations [*Gov. Code § 7060.2(d)*].

A city ordinance promulgated pursuant to *Gov. Code § 7060.2(d)* was not preempted or repealed by the Costa-Hawkins Rental Housing Act, Civ. Code § 1954.42(a) ("notwithstanding any other provision of law, an owner of residential real property may establish the initial and all subsequent rental rates for a dwelling or a unit about which any of the following is true: [P] (1) It has a certificate of occupancy issued after February 1, 1995") [*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2009) 173 Cal. App. 4th 13, 30, 92 Cal. Rptr. 3d 441]* . Costa-Hawkins specifically provides that it does not "affect the authority of a public entity that may otherwise exist to regulate or monitor the basis for eviction" [*Civ. Code § 1954.52(c)*]. Section 7060.2(d) essentially allows local entities to enact ordinances that discourage landlords from evicting tenants under the false pretense that they are going out of business pursuant to the Ellis Act. Thus, by its terms, Costa-Hawkins did not override *Gov. Code § 7060.2(d)*, or "affect" the city's authority to enact the ordinance at issue [*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2009) 173 Cal. App. 4th 13, 2627, 92 Cal. Rptr. 3d 441]* . The two statutes could be harmonized by construing section 7060.2(d) as an exception to section 1954.52(d) [*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2009) 173 Cal. App. 4th 13, 25, 92 Cal. Rptr. 3d 441]* .

[f] Applicability

Gov. Code § 7060.2 was amended by the Legislature in 2002 to extend from two to five years the period in which the original rent will apply to properties that are withdrawn and then reoffered for rent or lease [2002 Stats., ch. 301 (SB 1403)]. The amendments to *Gov. Code § 7060.2* adopted in SB 1403 apply to all new tenancies created after December 31, 2002. If a new tenancy was lawfully created before January 1, 2003, after a lawful withdrawal of the unit, the amendments do not apply to new tenancies created after that date [*Gov. Code § 7060.2(e)*].

[g] Purchase of Property and Occupation by Tenants in Common

Purchase of property by tenants in common and occupation of the units by the tenants is legal; it is not going out of the landlord business and then resuming it because the tenant-in-common relationship is not a landlord-tenant relationship [*Santa Monica Rent Control Bd. v. Bluvshtein (1991) 230 Cal. App. 3d 308, 315-317, 281 Cal. Rptr. 298]* .

[h] Successors in Interest

If the regulations enacted by a public entity under *Gov. Code § 7060.2* apply constraints to a successor in interest of an owner who has withdrawn accommodations from rent or lease, the public entity must record a notice with the county recorder that specifically describes (1) the real property where the accommodations are located, (2) the dates applicable to the constraints, and (3) the name of the owner of record of the real property. The notice will be indexed in the grantor-grantee index [*Gov. Code § 7060.3*].

A person who acquires title to the real property after the date on which the accommodations thereon have been withdrawn from rent or lease, as a bona fide purchaser for value, is not a successor in interest for these purposes if the notice was not recorded with the county recorder at least one day before the transfer of title [*Gov. Code § 7060.3*].

[i] Notice of Intention to Withdraw

[i] Notice to Public Entity

Any public entity that, by a valid exercise of its police power, has in effect any control or system of control on the price at which accommodations are offered for rent or lease may require by statute, ordinance, or regulation as specified by *Gov. Code § 7060.5* that the owner notify the entity of an intention to withdraw those accommodations from rent or lease and may require that the notice contain statements, under penalty of perjury, providing information on the number of accommodations, the address or location of those accommodations, the name or names of the tenants or lessees of the accommodations, and the rent applicable to each residential unit [*Gov. Code § 7060.4(a)*]. For discussion of the requirements of *Gov. Code § 7060.5*, relating to the procedure for adopting local regulations, see [j], *below*.

Information regarding the name or names of the tenants, the rent applicable to any residential rental unit, or the total number of accommodations is confidential information and must be treated as confidential information by any public entity for purposes of the Information Practices Act of 1977 (*Civ. Code § 1798 et seq.*). A public entity is considered an "agency" for purposes of that act [*Gov. Code § 7060.4(a)*; *see Civ. Code § 1798.3(b)* ("agency" defined); for discussion of the Information Practices Act, see *Ch. 429, Privacy, § 429.60* et seq.].

PRACTICE TIP:

Availability of Protections. Note that these state statutes are not "self-executing." All they do is allow cities with rent control to enact ordinances or regulations that give certain protections to tenants faced with Ellis Act evictions. If cities fail to take advantage of these opportunities, tenants will not have these protections. *By Myron Moskovitz.*

[ii] Recording Memorandum of Notice

The statute, ordinance, or regulation may also require that the owner record with the county recorder a memorandum summarizing the provisions, other than the confidential provisions, of the notice in a form that must be prescribed by the statute, ordinance, or regulation, and require a certification with that notice that actions have been initiated as required by law to terminate any existing tenancies. In that situation, the date on which the accommodations are withdrawn from rent or lease is 120 days from the delivery in person or by first-class mail of that notice to the public entity [*Gov. Code § 7060.2(b)(3)*].

However, if the tenant or lessee is at least 62 years of age or disabled, and has lived in his or her accommodations for at

least one year before the date of the owner's delivery to the public entity of the notice of intent to withdraw, then the date of withdrawal of the accommodations of that tenant or lessee is extended to one year after delivery of such notice to the public entity, provided that the tenant or lessee gives written notice of his or her entitlement to an extension to the owner within 60 days of the date of the owner's delivery of the notice of intent to withdraw. In that situation, the following provisions apply [*Gov. Code § 7060.4(b)*]:

- The tenancy is continued on the same terms and conditions as existed on the date of the owner's delivery of the notice of intent to withdraw, subject to any adjustments otherwise available under the system of control [*Gov. Code § 7060.4(b)(1)*];

- No party will be relieved of the duty to perform any obligation under the lease or rental agreement [*Gov. Code § 7060.4(b)(2)*];

- The owner may elect to extend the date of withdrawal on any other accommodations up to one year after date of delivery of the notice of intent to withdraw, subject to the provisions of *Gov. Code § 7060.4(b)(1)* and *(b)(2)* [*Gov. Code § 7060.4(b)(3)*];

- Within 30 days of the notification by the tenant or lessee to the owner of his or her entitlement to an extension, the owner must give written notice to the public entity of the claim that the tenant or lessee is entitled to stay in their accommodations for one year after date of delivery to the public entity of the notice of intent to withdraw [*Gov. Code § 7060.4(b)(4)*]; and

- Within 90 days of the date of delivery to the public entity of the notice of intent to withdraw, the owner must give written notice to the public entity and the affected tenant or lessee of the owner's election to extend the date of withdrawal and the new date of withdrawal under *Gov. Code § 7060.4(b)(3)* [*Gov. Code § 7060.4(b)(5)*].

[iii] Notice to Displaced Tenant

The statute, ordinance, or regulation may also require the owner to notify any tenant or lessee displaced under these provisions that the public entity has been notified as described above, that the notice to the public entity specified the name and the amount of rent paid by the tenant or lessee as an occupant of the accommodations, and the amount of rent the owner specified in the notice to the public entity, together with a notice to the tenant or lessee of his or her rights under *Gov. Code § 7060.2(b)(3)* [*Gov. Code § 7060.4(c)*; *see* [c][ii], *above*, for discussion of the rights of a tenant or lessee under *Gov. Code § 7060.2(b)(3)*].

Furthermore, a notice to a displaced tenant or lessee must include the following [*Gov. Code § 7060.4(c)(5)*]:

- If the tenant or lessee is at least 62 years of age or disabled, and has lived in his or her accommodations for at least one year before the date of delivery to the public entity of the notice of intent to withdraw, a statement that the tenancy will be extended to one year after delivery of the notice of intent to withdraw, provided that the tenant or lessee gives written notice of his or her entitlement to the owner within 60 days of the date of delivery to the public entity of the notice of intent to withdraw [*Gov. Code § 7060.4(c)(5)(A)*];

- A statement that the extended tenancy will continue on the same terms and conditions as existed on the date of delivery to the public entity of the notice of intent to withdraw, subject to any adjustments otherwise available under the system of control [*Gov. Code § 7060.4(c)(5)(B)*]; and

- A statement that no party will be relieved of the duty to perform any obligation under the lease or

rental agreement during the extended tenancy [*Gov. Code § 7060.4(c)(5)(C)*].

The statute, ordinance, or regulation may require the owner to notify the public entity in writing of an intention to again offer the accommodations for rent or lease [*Gov. Code § 7060.4(d)*].

[j] Procedure for Enacting Regulations

The regulations authorized by *Gov. Code §§ 7060.2* and *7060.4*, relating to accommodations offered for rent after withdrawal and notice of an intention to withdraw accommodations, may be enacted by a public entity after public notice and hearing by a public body of the public entity if the members of the body have been elected by the voters of the public entity. The regulation is subject to referendum in the manner prescribed by law for ordinances of the legislative body of the public entity, except that the decision to repeal the regulation or to submit it to the voters must be made by the public body that adopted the regulation, and the regulation must become effective on adoption by the public body of the public entity and remain in effect until a majority of the voters voting on the issue vote against the regulation, notwithstanding *Elec. Code §§ 9235, 9237*, and *9241*, relating to referendum procedure, or any other law [*Gov. Code § 7060.5*].

[5] Unlawful Detainer Proceedings

If an owner seeks by an unlawful detainer proceeding to displace a tenant or lessee from accommodations withdrawn from rent or lease under *Gov. Code § 7060 et seq.*, the tenant or lessee may appear and answer or demur in accordance with *Code Civ. Proc. § 1170*, and may assert by way of defense that the owner has not complied with the applicable provisions of *Gov. Code § 7060 et seq.*, or with the statutes, ordinances, or regulations of public entities adopted to implement that chapter [*Gov. Code § 7060.6*].

For detailed coverage of unlawful detainer proceedings generally, including numerous forms of complaint, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

PRACTICE TIP:

Affirmative Defenses Generally Not Available. It is doubtful that affirmative defenses of "discrimination" and "retaliation" can succeed with regard to Ellis Act evictions. The California Supreme Court has held that when a landlord has complied with the Ellis Act procedures for withdrawing rental property from the market and has instituted an action for unlawful detainer, and the tenant asserts the statutory defense of retaliatory eviction, the landlord may overcome the defense by demonstrating a bona fide intent to withdraw the property from the market [*Drouet v. Superior Court (2003) 31 Cal. 4th 583, 600, 3 Cal. Rptr. 3d 205, 73 P.3d 1185]* . If the tenant controverts the landlord's bona fide intent to withdraw the property, the landlord then has the burden to establish its truth at the hearing by a preponderance of the evidence [*Drouet v. Superior Court (2003) 31 Cal. 4th 583, 600, 3 Cal. Rptr. 3d 205, 73 P.3d 1185]* .

Nevertheless, landlords often create their own problems with respect to "Ellising" a building, such as permitting an employee to live in a unit of a building as part of that employees compensation, thus not taking all the units out of rental housing use. It is therefore essential to "clear the decks" before proceeding with the Ellis procedures, which will also include reading any and all local enactments regarding such evictions and/or displacements. *By Benjamin Kaplan.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawLandlord & TenantRental Property ManagementReal Property LawLandlord & TenantRent

RegulationRent Control Statutes

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§ 335.17 Commercial Rent Control

[1] Definitions

The term "commercial rental control" includes any action of a public entity taken by statute, charter, ordinance, resolution, administrative regulation, or any other governmental enactment, to establish, continue, implement, or enforce any control or system of controls on the price at which, or the term for which, commercial real property may be offered for rent or control or system of controls that would select, mandate, dictate, or otherwise designate a specific tenant or specific person or entity with whom the owner must negotiate on the formation, extension, or renewal of a tenancy; or any other enactment that has such a purpose [*Civ. Code § 1954.26(f)*].

The term "price" includes any charge or fee, however denominated, for the hiring of commercial real property, and includes security deposits [*Civ. Code § 1954.26(b)*; *see Civ. Code § 1950.7*]. The term "tenant" includes subtenants and sublessees, as well as lessees [*Civ. Code § 1954.26(g)*].

[2] Prohibition Against Local Controls

The Legislature has declared that the price charged for real property is a matter of statewide concern because the economic impact of commercial rent control extends beyond the local boundaries within which the controls are imposed [*Civ. Code § 1954.25*]. Therefore, the Legislature has enacted a uniform system with regard to commercial rents, applicable to every local jurisdiction in the state, and no public entity may enact any measure constituting commercial rent control or enforce any commercial rental control, whether enacted before, on, or after January 1, 1988 [*Civ. Code §§ 1954.25, 1954.27(a)*].

PRACTICE TIP:

Statewide System Not a System of Rent Control. Although California has undoubtedly preempted commercial rent control, the statewide system cannot by any reasonable stretch of the imagination be deemed a system of rent control for commercial property. *By Benjamin Kaplan.*

[3] Limitations on Prohibition

[a] No Grant of Additional Powers to Public Entities

The prohibition against commercial rent control does not augment or diminish the authority of a public entity except as expressly provided in the commercial rental control provisions [*Civ. Code § 1954.30*].

[b] Prohibition Does Not Effect Contracts, Leases, Rights, and Obligations

The prohibition on commercial rent control may not be construed to do any of the following:

- Relieve any party to a commercial lease or rental agreement of the duty to perform any obligation of the agreement [*Civ. Code § 1954.27(b)(1)*];

- Preclude express establishment in a commercial lease or rental agreement of the price at which real property may be offered to a subtenant or sublessee [*Civ. Code § 1954.27(b)(2)*];

- Impair any obligation of any contract entered into before January 1, 1988 [*Civ. Code § 1954.27(b)(3)*];

- Affect any provision of, or requirement for mitigation of damages under *Civ. Code §§ 1951-1952.6* [*Civ. Code § 1954.27(b)(4)*];

- Limit any adjustment of price required or permitted by law because of constructive eviction [*Civ. Code § 1954.27(b)(5)*];

- Enlarge or diminish in any way any power that a public entity may have with regard to regulation of rental rates or the ownership, conveyance, or use of any property specified in *Civ. Code § 1954.26(d)(1)-(3)*, relating to property not within the definition of "commercial real property" [*Civ. Code § 1954.27(b)(6)*; *see* [4], *below*];

- Relieve any party of any requirement or mandate to arbitrate, or deprive any party of any right to arbitrate or compel arbitration, which mandate or right exists under *Code Civ. Proc. §§ 1141.10 et seq., 1280 et seq. , 1823 et seq.*, or any other provision of state law [*Civ. Code § 1954.27(b)(7)*; *see generally* Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* , et seq., and Ch. 36, *Judicial Arbitration*];

- Affect in any way, or preclude the inclusion of, any provision in a lease creating any lawful option, right of first refusal, or any covenant to renew or extend the lease or sell the real property or any interest in the property [*Civ. Code § 1954.27(b)(8)*]; and

- Relieve any person of any duty or deprive any person of any right or cause of action that may exist under *Civ. Code §§ 51, 53*, or *782*, relating to civil rights [*Civ. Code § 1954.27(b)(9)*].

[c] Prohibition Does Not Effect Other Laws and Public Contracts

The prohibition against commercial rent control does not limit or affect public entities' authority under the Eminent Domain Law (*Code Civ. Proc. § 1230.010 et seq.*), the Airport Approaches Zoning Law (*Gov. Code § 50485 et seq.*), the Subdivision Map Act (*Gov. Code § 66410 et seq.*), or *Pub. Res. Code § 5020 et seq.*, relating to historical resources [*Civ. Code § 1954.28(a), (c), (e), (f)*; *see also* [5][a], *below* (authority of public entities)]. Similarly, the power of local entities to abate nuisances is neither limited nor affected by the commercial rent control prohibition [*Civ. Code § 1954.28(b)*]. Further, the prohibition may not affect or limit any contract or agreement entered into by a public entity

relating to the transfer, lease, or license of commercial real property owned or leased by that public entity, except any requirement enacted under *Civ. Code § 1954.31*, relating to local ordinances establishing notice requirements for termination of commercial real property leases on expiration of their term [*Civ. Code § 1954.28(g)*].

The commercial rent control prohibition also does not limit or affect (1) any contract or agreement by which an owner agrees with a public entity to offer any real property for rent at a stipulated or maximum price or under a specified formula for ascertaining a stipulated or maximum price, in consideration for a direct financial contribution; (2) any written contract between a redevelopment agency and an owner or developer of commercial real property within a redevelopment project area; (3) or any written development agreement entered into under *Gov. Code § 65864 et seq.* Any contract described above is not enforceable against an owner who became an owner without actual knowledge of the contract or agreement, more than 30 days before the recording with the county recorder of a written memorandum of the contract or agreement specifically describing its terms and identifying the real property and the owner. The county recorder will index these memoranda in the grantor-grantee index [*Civ. Code § 1954.28(d)*].

[d] Certain Powers of Public Entity Are Not Affected by Prohibition

Nothing in the commercial rent control prohibition may, with regard to a public entity, grant, enlarge, or diminish any power that the entity may possess under *Gov. Code § 65000 et seq.*, relating to planning and land use, with regard to charter cities, planning or zoning powers granted under *Cal. Const., art. XI, § 5*, or any power that it may possess to mitigate the impact caused by the construction, reconstruction, demolition, or alteration of the size of any commercial real property, unless the actions are taken for the clear or systematic purpose of circumventing the ban on commercial rent control [*Civ. Code § 1954.29(a)*]. Similarly, the prohibition may not, with regard to a public entity, grant, repeal, enlarge, or diminish any authority to require a business license, whether for regulation or revenue [*Civ. Code § 1954.29(b)*].

[4] Property Not Subject to Prohibition

Certain property is specifically excluded from the definition of "commercial real property," and is not subject to the prohibition on commercial rent control. The prohibition does not apply to the following [*Civ. Code § 1954.26(d)*]:

- Dwellings or dwelling units subject to the provisions of *Civ. Code § 1940*, relating to leases of land and dwellings;

- Any accommodation in a residential hotel as defined in *Health & Safety Code § 50519*, or comparable accommodations that are specifically regulated by a public entity in structures in which 20 percent or more of the accommodations are occupied by persons as their primary residence;

- Any hotel unit located in a structure with 20 or more units or in which 20 percent or more of the accommodations were occupied as of August 5, 1987, by persons as their primary residence if, in either circumstance, the unit was subject to rental controls on August 5, 1987, provided that any control exercised thereafter is in accordance with the system of controls in effect on that date; or

- Any space or dwelling unit in any mobilehome park as defined in *Health & Safety Code § 18214*.

[5] Local Notice Requirements on Expiration of Term

[a] Authority of Public Entity

Notwithstanding the prohibition on commercial rent control, a public entity may enact a statute, charter, charter amendment, or ordinance establishing a requirement for notice relating to the termination of a lease of commercial real property due to the expiration of its term [*Civ. Code § 1954.31*]. The provisions of the enactment may not, however,

apply to any lease or rental agreement that is not in writing, that constitutes a tenancy at will, that is for a term of less than one year or for an unspecified term, or that is a month-to-month tenancy or a tenancy at sufferance, or to any lease, the term of which expires within 270 days after the effective date of the enactment [*Civ. Code § 1954.31(d)*].

[b] Mandatory Provisions

The local enactment must contain provisions dealing with any or all of the following:

- Delivery of a negotiation notice by a tenant [*Civ. Code § 1954.31(a)(1)*]. The term "negotiation notice" means a written notice by a tenant in privity of estate and contract with the owner, stating either that the tenant offers to extend or renew the lease on the terms set forth in the notice, or that the tenant solicits an offer for the extension or renewal of the lease from the owner [*Civ. Code § 1954.26(j)*].

- A requirement for an owner to deliver an impasse notice at any time after delivery of the negotiation notice [*Civ. Code § 1954.31(a)(2)*]. The term "impasse notice" means a written notice that states either that the owner has not received from the tenant an offer of any terms for an extension or renewal of the lease that are acceptable to the owner or an acceptance by the tenant of any offer of terms by the owner, and that an impasse with regard to any agreement on a lease extension or renewal has been reached; or that the owner is not willing to extend or renew the lease [*Civ. Code § 1954.26(i)*]. Although the local enactment may contain a requirement for an owner to deliver an impasse notice at any time after delivery of the negotiation notice, the requirement will be inapplicable unless the tenant has been required to deliver a negotiation notice not less than 270 days before the expiration of the lease and has done so [*Civ. Code § 1954.31(a)(2)(A)*]. The mandate for delivery of an impasse notice must not occur earlier than 180 days before expiration of the lease, and no impasse notice is required if the parties have executed a renewal or extension of the lease [*Civ. Code § 1954.31(a)(2)(B), (C)*]. Furthermore, provision must be made in the enactment that the notice must include, in a form of type that will distinguish it from the body of the text of the balance of the notice, a disclosure reading either "The giving of this notice does not necessarily preclude further dialogue or negotiation on an extension or renewal of the lease if the parties choose to negotiate, but the delivery of this notice discharges all obligations of _____ (the owner) under the provisions of _____ (the enactment) and *Section 1954.31 of the Civil Code*"; or "By giving this notice _____ (the owner) declares that he or she does not intend to negotiate further on any extension or renewal of the lease" [*Civ. Code § 1954.31(a)(2)(D)*].

- Establish that a bad-faith failure to comply with the enactment is subject to a remedy for actual damages [*Civ. Code § 1954.31(a)(3)*].

- Any remedy under the enactment or *Civ. Code § 1954.31* is available only by an action brought by the owner or the tenant [*Civ. Code § 1954.31(a)(4)*].

The enactment must also contain, or will be deemed to contain, the following provisions:

- A tenant may not exercise any right under the enactment or *Civ. Code § 1954.25 et seq.*, unless the tenant has performed the terms of the lease in such manner as would entitle the tenant to exercise any option he or she might possess under the lease [*Civ. Code § 1954.31(b)(1)*].

- No right or cause of action accruing to a tenant under the enactment or *Civ. Code § 1954.25 et seq.* may be assigned other than to a person who is a lawful assignee of the lease, is in lawful possession of the premises under the lease, and is in compliance with *Civ. Code § 1954.31(b)(1)* [*Civ. Code § 1954.31(b)(2)*].

- Nothing in the enactment or *Civ. Code § 1954.25 et seq.* creates or imposes, nor may be construed to create or impose, a duty to extend or renew, or to negotiate on an extension or renewal, of any lease; nor does the delivery or receipt of any notice provided for by the enactment or *Civ. Code § 1954.25 et seq.* constitute a waiver of any rights to continued performance under the covenants under the lease or to actions for possession [*Civ. Code § 1954.31(b)(3)*].

- The delivery of any notice under the enactment or *Civ. Code § 1954.25 et seq.* creates a rebuttable presumption affecting the burden of proof that the notice has been properly given [*Civ. Code § 1954.31(b)(4)*].

PRACTICE TIP:

Notice Requirements of *Civ. Code § 1954.31*. The notice requirements of *Civ. Code § 1954.31* are not "eviction notice requirements" nor literally "termination notice requirements." Rather, the notice requirements create a schema for the prior negotiation of possible extensions by a commercial tenant which are keyed on the commercial tenant providing a "negotiation notice" at least 270 days before the lease's termination date, and then only if enacted by the local jurisdiction. If the statute achieves anything, it is to provide the tenant with a "wake-up" call that his or her tenancy is at an end. The landlord, however, may be required to respond by way of an impasse notice to the tenant within a specified time period, not earlier than 180 days before the end of the lease, or else the landlord may be exposed to unspecified damages. However, the provisions of *Civ. Code § 1954.31(c)* [*see* [c], *below*] do not interfere, in any way, with the landlord's right to evict (1) after the end of the fixed term tenancy or (2) for a breach of the lease before the end of the fixed term. *By Benjamin Kaplan.*

[c] Limitations on Scope of Local Regulation

No local enactment may provide or be deemed to provide for any of the following [*Civ. Code § 1954.31(c)*]:

- Any extension of a lease's term without the mutual, written consent of the owner and the tenant;

- Any requirement on either party to offer to extend or renew or to negotiate an extension or renewal of the lease;

- A bar to any action brought to recover possession whether by ejectment, unlawful detainer, or other lawful means; or

- Any remedy under the enactment or *Civ. Code § 1954.25 et seq.*, other than that which may be provided under *Civ. Code § 1954.31(a)(3)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantRent RegulationGeneral Overview

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§ 335.18 Mobilehomes

Mobilehome parks are regulated by the Mobilehome Residency Law [*Civ. Code § 798 et seq.*]. Newly constructed mobilehome spaces initially held out for rent after January 1, 1990, are exempt from any ordinance, rule, regulation, or initiative measure adopted by any city, county, or city and county that establishes a maximum amount that a landlord may charge a tenant for rent [*Civ. Code 798.45*; *see Civ. Code § 798.7* ("new construction" defined)]. Local rent control ordinances regulating mobilehome spaces held out for rent before January 1, 1990, are valid, as the Legislature has not shown an intent to occupy the entire field of mobilehome regulation [*Palos Verdes Shores Mobile Estates, Ltd. v. City of Los Angeles (1983) 142 Cal. App. 3d 362, 374, 190 Cal. Rptr. 866]* . These mobilehomes, however, are subject to *Civ. Code § 798.17*, which provides that certain rental agreements are exempt from any ordinance, rule regulation, or initiative measure adopted by any local governmental agency that establishes a maximum amount that a landlord may charge for rent [*Civ. Code § 798.17(a)*].

For further discussion of mobilehomes and mobilehome rental agreements, see Ch. 369, *Mobilehomes and Mobilehome Parks* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral Overview

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[Reserved]

§§ 335.19[Reserved]

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§ 335.30 Other Matthew Bender Publications

For discussion of the legal aspects of rent generally, including a discussion of rent control, see California Real Estate Law and Practice, Ch. 171, *Rent and Rent Control* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantRent RegulationGeneral Overview

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§ 335.31 State Statutes

[1] Establishment of Rent Levels

Rent control ordinances that require registration of units required to provide for establishment and certification of permissible rent levels for registered units. *Civ. Code § 1947.8*

Local agency may not maintain action to recover excess rent against owner who has properly registered unit if initial certification of permissible rent level not completed. *Civ. Code § 1947.8(b)*

Owner or tenant of rental unit may appeal determination of permissible rent level for unit. *Civ. Code § 1947.8(b)*

Under certain circumstances, owner who terminates contract with governmental agency that provides for rent limitation is restricted from increasing rent for new tenancy for three years. *Civ. Code § 1954.53*

[2] Excess Rent Charged

Owner required to refund excess rents intentionally charged; treble damages available for violation. *Civ. Code § 1947.11*

[3] Commercial Rent Control

Generally. *Civ. Code §§ 1954.25-1954.31*

Legislative intent. *Civ. Code § 1954.25*

Prohibition against local controls. *Civ. Code §§ 1954.25, 1954.27(a)*

Definitions. *Civ. Code § 1954.26*

Property not subject to prohibition. *Civ. Code § 1954.26(d)*

Limitations on prohibition. *Civ. Code §§ 1954.27(b), 1954.28, 1954.29*

Effect of law on powers of local public entities. *Civ. Code § 1954.30*

Local regulation permitted requiring notice of termination of lease on expiration of term. *Civ. Code § 1954.31*

Mandatory contents of local regulation requiring notice of termination of lease on expiration of term. *Civ. Code § 1954.31*

[4] Mobilehomes

Mobilehome Residency Law. *Civ. Code § 798 et seq.*

Newly constructed mobilehome spaces exempt from local rent control regulations. *Civ. Code §§ 798.7, 798.45*

Specific mobilehome rental agreements exempt from local rent control regulations. *Civ. Code § 798.17*

[5] Eviction for Owner Occupation

When tenant evicted for occupancy of owner or owner's relative, that person required to reside in premises for six continuous months; treble damages available for fraudulent violation. *Civ. Code § 1947.10*

[6] Substantial Compliance by Landlord

No penalty permitted against landlord in substantial compliance with rent control ordinance other than restitution to tenant and recovery of registration and filing fees due to local rent control agency. *Civ. Code § 1947.7(b)*

[7] Landlord's Right to Go Out of Business

Ellis Act. *Gov. Code §§ 7060-7060.7*

Public agency prohibited from compelling landlord to remain in business. *Gov. Code § 7060(a)*

Scope of prohibition on local regulation. *Gov. Code §§ 7060.1, 7060.7*

Permissible local regulation. *Gov. Code §§ 7060.2-7060.4*

Successors in interest. *Gov. Code § 7060.3*

Procedure for local regulation. *Gov. Code § 7060.5*

Unlawful detainer proceedings. *Gov. Code § 7060.6*

Legislative intent. *Gov. Code § 7060.7*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsOrdinances & RegulationsReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawLandlord & TenantRent RegulationRent Control StatutesReal Property LawMobilehomes & Mobilehome ParksGeneral Overview

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§ 335.32 Decisions

[1] Constitutionality of Rent Control Laws

Rent control ordinance allowing consideration of tenant hardship in determining allowable rent increases is not facially invalid under due process and *equal protection clauses* of *U.S. Const., amend. XIV*. *Pennell v. City of San Jose (1988) 485 U.S. 1, 11-15, 108 S. Ct. 849, 99 L. Ed. 2d 1*

Rent control ordinance setting maximum rent increases is not facially inconsistent with federal antitrust provisions under *Sherman Act. Fisher v. City of Berkeley (1986) 475 U.S. 260, 264-270, 106 S. Ct. 1045, 89 L. Ed. 2d 206*

Mobilehome park's rent control takings claim was not ripe because it failed to pursue "Kavanau adjustment" of prospective rents that would compensate for past losses and failed to show that "Kavanau adjustment" was inadequate remedy. *Carson Harbor Village, Ltd. v. City of Carson (9th Cir. 2004) 353 F.3d 824, 830* ; *see* *Kavanau v. Santa Monica Rent Control Bd. (1997) 16 Cal. 4th 761, 767, 66 Cal. Rptr. 2d 672, 941 P.2d 851*

Mobilehome park owner's allegation that city rent control ordinance allowed tenants to capture "premium" on sales price of mobilehomes alleged as-applied regulatory takings claim, but claim was not ripe because owner failed to show that "Kavanau adjustment" was inadequate remedy. *Hacienda Valley Mobile Estates v. City of Morgan Hill (9th Cir. 2003) 353 F.3d 651, 661* ; *see* *Kavanau v. Santa Monica Rent Control Bd. (1997) 16 Cal. 4th 761, 767, 66 Cal. Rptr. 2d 672, 941 P.2d 851*

Reduction of base rent allowed under city rent control ordinance at mobilehome park following termination of park's adult-only policy violates park owner's rights under *United States v. City of Hayward (9th Cir. 1994) 36 F.3d 832, 835*

Property owner's facial taking challenge to local mobilehome park rent control ordinance is ripe for judicial review even though property owner did not first seek remedies in state court since at time alleged taking occurred California did not recognize actions for inverse condemnation based on regulatory takings. *Levald, Inc. v. City of Palm Desert (9th Cir. 1993) 998 F.2d 680, 686*

District court's dismissal of substantive due process claim challenging city's mobilehome park rent control and vacancy control ordinance as taking without just compensation was proper; however, court abused its discretion by failing to explain its reasons for denying leave to amend a complaint (when no reasons were apparent from record). *Levald, Inc. v. City of Palm Desert (9th Cir. 1993) 998 F.2d 680, 692*

Federal court claim that rent control ordinance was taking was not ripe for adjudication when state remedies had not been pursued. *Schnuck v. City of Santa Monica (9th Cir. 1991) 935 F.2d 171*

In actions alleging confiscatory rent regulation, availability of future rent adjustment forecloses suit for damages for violation of right to constitutional due process under *42 U.S.C. § 1983*. *Galland v. City of Clovis (2001) 24 Cal. 4th 1003, 1008, 103 Cal. Rptr. 2d 711, 16 P.3d 130*

Rent board proceedings effect substantive due process violation only when board's actions amount to a "deliberate flouting of the law." *Galland v. City of Clovis (2001) 24 Cal. 4th 1003, 1035-1036, 103 Cal. Rptr. 2d 711, 16 P.3d 130*

No showing that rent control ordinance failed to advance a "substantial governmental interest" and therefore effected a taking when landlord alleged that ordinance failed to advance its stated goals of providing affordable housing for poor, elderly, and young families, but did not allege that rent control ordinance failed to advance legitimate purpose of preventing unreasonable and excessive rent increases. *Santa Monica Beach, Ltd. v. Superior Court (1999) 19 Cal. 4th 952, 971, 81 Cal. Rptr. 2d 93, 968 P.2d 993*

Rent control regulation may effect an unconstitutional taking, even though it leaves property owner some economically beneficial use of the property; however, when a due process violation is sole basis of asserted taking, remedy for due process violation, if available and adequate, is a valuable benefit that satisfies *takings clause*. *Kavanau v. Santa Monica Rent Control Bd. (1997) 16 Cal. 4th 761, 773-776, 66 Cal. Rptr. 2d 672, 941 P.2d 851*

Imposition of treble damages by rent control agency is unconstitutional. *McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 378-379, 261 Cal. Rptr. 318, 777 P.2d 91*

Rent control legislation is not improper delegation of judicial power. *McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 375, 261 Cal. Rptr. 318, 777 P.2d 91* ; *Baskin v. City of Berkeley Rent Stabilization Bd. (1988) 206 Cal. App. 3d 708, 715, 253 Cal. Rptr. 791*

Rent control ordinance based on fair return on investment is constitutional. *Fisher v. City of Berkeley (1984) 37 Cal. 3d 644, 679-686, 209 Cal. Rptr. 682, 693 P.2d 261 , aff'd, 475 U.S. 260, 106 S. Ct. 1045, 89 L. Ed. 2d 206*

Rent control ordinance is not improper delegation of legislative power. *Carson Mobilehome Park Owners' Ass'n v. City of Carson (1983) 35 Cal. 3d 184, 190, 197 Cal. Rptr. 284, 672 P.2d 1297*

Rent control ordinance that provided just, fair, and reasonable standard and included 12 relevant factors is constitutional even though it did not contain formula for determining reasonable return. *Carson Mobilehome Park Owners' Ass'n v. City of Carson (1983) 35 Cal. 3d 184, 189-191, 197 Cal. Rptr. 284, 672 P.2d 1297*

Rent control regulation is constitutional as valid exercise of local entity's police power. *Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 173, 130 Cal. Rptr. 465, 550 P.2d 1001*

Rent control regulation may properly be enacted by initiative. *Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 159-160, 130 Cal. Rptr. 465, 550 P.2d 1001*

Rent control ordinance is unconstitutional if procedure for rent adjustment is so cumbersome and unrelated to purpose of law as to constitute denial of due process. *Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 173, 130 Cal. Rptr. 465, 550 P.2d 1001*

San Francisco rent ordinance requiring landlords to pay tenants interest on security deposits at rate of five percent did not effect a taking. *Small Prop. Owners of San Francisco v. City & County of San Francisco (2006) 141 Cal. App. 4th 1388, 1409, 47 Cal. Rptr. 3d 121*

Property owner prevented from charging increased rent by rent control ordinance subsequently determined to be unconstitutional not entitled to recover lost rental income, either from tenants or from city that imposed rent limits, if ordinance did not deny owner a fair return on its investment. *Hillsboro Properties v. City of Rohnert Park (2006) 138 Cal. App. 4th 379, 393-394, 41 Cal. Rptr. 3d 441*

"Fair return on investment" does not require separate rent increase for each capital improvement; due process only requires fair return on investment as a whole. *Morgan v. City of Chino (2004) 115 Cal. App. 4th 1192, 1198-1199, 9 Cal. Rptr. 3d 784*

Rent control board did not usurp judicial functions in determining whether mobilehome leases were exempt from regulation and issuing decisions imposing penalties for excess rent charges, because such actions were reasonably necessary to accomplish board's legitimate regulatory functions. *Village Trailer Park v. Santa Monica Rent Control Bd. (2002) 101 Cal. App. 4th 1133, 1143, 124 Cal. Rptr. 2d 857*

Requirement in city's rent control ordinance that landlords place residential tenants' security deposits in interest-bearing accounts at federally insured financial institutions and pay tenants 3 percent interest per year gave rise to regulatory takings claim. *Action Apartment Assn. v. Santa Monica Rent Control Bd. (2001) 94 Cal. App. 4th 587, 593, 114 Cal. Rptr. 2d 412*

Mobilehome rent control ordinance imposing vacancy controls did not effect regulatory taking; city could reasonably have concluded that limiting park owners' ability to raise the rent on sale or transfer of mobilehomes would accomplish the legitimate goal of protecting current mobilehome owners' equity in their homes and protecting prospective mobilehome owners fromexcessive rents. *Montclair Parkowners Assn. v. City of Montclair (1999) 76 Cal. App. 4th 784, 795, 90 Cal. Rptr. 2d 598*

County ordinance and agreement entered into by county and mobilehome park owners imposing 15-year moratorium on enactment of rent control legislation affecting mobilehome parks was unconstitutional limitation on power of future county boards of supervisors to make and enforce ordinances pursuant to their police power. *County Mobilehome Positive Action Com., Inc. v. County of San Diego (1998) 62 Cal. App. 4th 727, 740-741, 73 Cal. Rptr. 2d 409*

Trial court was correct in staying enforcement of rent control provision that prohibited any landlord who purchased rental property after effective date of rent control ordinance from seeking adjustment in base rents since ordinance was too broad and could have unconstitutional results in particular cases. *Apartment Assn. of Greater L.A. v. Santa Monica Rent Control Bd. (1994) 24 Cal. App. 4th 1730, 1738-1739, 30 Cal. Rptr. 2d 228*

Raising registration fee by $48 and not allowing it to be passed on to tenant does not deprive landlord of fair return on investment when there was no showing that base rent or allowed increases were minimum required to be constitutional. *West Hollywood Concerned Citizens v. City of West Hollywood (1991) 232 Cal. App. 3d 486, 497-499, 283 Cal. Rptr. 470*

Rent control ordinance authorizing civil action and mandating imposition of treble damages by trial court is not punitive or violative of due process. *Kelly v. Yee (1989) 213 Cal. App. 3d 336, 341-342, 261 Cal. Rptr. 568*

Rent control provision precluding landlords and successors in interest from recapturing, on later registration, annual rent increases lost by prior nonregistration is neither confiscatory nor a violation of constitutional due process principles. *Searle v. City of Berkeley Rent Stabilization Bd. (1988) 197 Cal. App. 3d 1251, 1255-1259, 243 Cal. Rptr. 449*

Rent control ordinance requiring landlord to paint every four years or have rent decreased is constitutional. *Berman v. City of West Hollywood Rent Stabilization Dept. (1988) 197 Cal. App. 3d 837, 840-841, 243 Cal. Rptr. 144*

Guarantee of fair return on value is not required for validity of rent control law, nor must law guarantee owner's anticipated appreciation. *Baker v. City of Santa Monica (1986) 181 Cal. App. 3d 972, 979-982, 226 Cal. Rptr. 755*

Ordinance allowing rent control board to decrease rents when landlord's maintenance expenses decrease and to base decision partially on violations of housing and health ordinances is valid. *Sterling v. Santa Monica Rent Control Bd. (1985) 168 Cal. App. 3d 176, 183-185, 214 Cal. Rptr. 71*

Rent control ordinance is not unconstitutional impairment of contract. *Interstate Marina Development Co. v. County of Los Angeles (1984) 155 Cal. App. 3d 435, 448, 202 Cal. Rptr. 377*

Provision of rent control ordinance exempting certain units from regulation is not denial of equal protection under California or federal constitutions. *Kalaydjian v. City of Los Angeles (1983) 149 Cal. App. 3d 690, 694, 197 Cal. Rptr. 149*

Rent control ordinance based on "return on investment" rather than "return on current value" is constitutional. *Cotati Alliance for Better Housing v. City of Cotati (1983) 148 Cal. App. 3d 280, 286-291, 195 Cal. Rptr. 825*

[2] Application of Rent Control Laws

Under San Francisco Residential Rent Stabilization and Arbitration Ordinance, successor landlord was liable for refunding overpayment of rent charged by predecessor to tenant. *Baychester Shopping Center, Inc. v. San Francisco Residential Rent Stabilization and Arbitration Board (2008) 165 Cal. App. 4th 1000, 1005, 81 Cal. Rptr. 3d 341*

Although lease expressly prohibited subletting, roommate came within definition of "tenant" in Berkeley Rent Control Ordinance; landlord was unable to evict roommate after named tenant surrendered possession since landlord had no grounds for eviction of roommate under *Ordinance. DeZerega v. Meggs (2000) 83 Cal. App. 4th 28, 38-39, 99 Cal. Rptr. 2d 366*

Costa-Hawkins Rental Housing Act [*Civ. Code § 1954.50 et seq.*] occupies entire field of vacancy decontrol, and therefore local regulations imposing criteria not found in Act for determining whether vacancy was "voluntary" for purposes of rent increase, giving rent board power to challenge owner's vacancy rent increase "if a question of fact arises" regarding correct rent, and placing burden on owner to prove that vacancy was qualifying vacancy, were preempted by Act. *Cabinda LLC v. Santa Monica Rent Control Bd. (2000) 80 Cal. App. 4th 853, 863-864, 95 Cal. Rptr. 2d 676*

Mobilehome rent control ordinance applied to tenancies of nine months or longer at recreational vehicle park. *Griffith v. County of Santa Cruz (2000) 79 Cal. App. 4th 1318, 1322, 94 Cal. Rptr. 2d 801*

Amendment by city council of rent control ordinance adopted by voter initiative is invalid. *Mobilepark West Homeowners Assn. v. Escondido Mobilepark West (1995) 35 Cal. App. 4th 32, 43, 41 Cal. Rptr. 2d 393*

Rent control ordinance is applicable to purchaser at trust deed sale; eviction of tenant of former owner precluded without basis under rent control ordinance. *Gross v. Superior Court (1985) 171 Cal. App. 3d 265, 270-273, 217 Cal. Rptr. 284*

Employee residing on and holding over tenancy on premises was licensee, not tenant, and not entitled to protection of rent control ordinance. *Chan v. Antepenko (1988) 203 Cal. App. 3d Supp. 21, 250 Cal. Rptr. 851*

Provisions in rent control ordinance are applicable to person who acquired premises by foreclosure. *People v. Little (1983) 143 Cal. App. 3d Supp. 14, 19-21 , 192 Cal. Rptr. 619*

[3] Adjustments

Alternative formula presented by mobilehome park owner on application for special adjustment under mobilehome park rent control ordinance did not serve to rebut evidentiary presumption in ordinance that consumer price index and net operating income adjustments would provide fair return. *TG Oceanside, L.P. v. City of Oceanside (2007) 156 Cal. App. 4th 1355, 1381-1382, 68 Cal. Rptr. 3d 320*

Rent control board required to use gross profits maintenance analysis or similar methodology giving due consideration to debt service costs in calculating fair return for mobilehome park owner. Carson Gardens, L.L.C. v. City of Carson *Mobilehome Park Rental Review Board (2006) 135 Cal. App. 4th 856, 866, 37 Cal. Rptr. 3d 768*

When applying maintenance of net operating income (MNOI) standard in determining rent increase for mobilehome park, rent board is not required as matter of law to account for inflation by indexing base year NOI by 100 percent or more of increase in consumer price index. *H.N. & Frances Berger Foundation v. City of Escondido (2005) 127 Cal. App. 4th 1, 14-15, 25 Cal. Rptr. 3d 19*

Santa Monica Rent Control Board not authorized by city rent control ordinance to file petitions to reduce rents based on impacts of construction on behalf of individual tenants who had not come forward on their own initiative but was authorized to order rent reductions for tenants who petitioned for reductions. *Ocean Park Assocs. v. Santa Monica Rent Control Bd. (2004) 114 Cal. App. 4th 1050, 1064-1065, 1069, 8 Cal. Rptr. 3d 421*

Low base rents at mobilehome parks did not provide fair rate of return due to "unique or extraordinary circumstances," based on fact that previousowner of parks owned properties free and clear, paid pre-Proposition 13 taxes, and had not raised rents since 1985 because he did not want any "government involvement." *Concord Communities, L.P. v. City of Concord (2001) 91 Cal. App. 4th 1407, 1417-1418, 111 Cal. Rptr. 2d 511*

Interference with housing services resulting from reasonably necessary repair and maintenance to rental units, without a substantial impact on the right to occupy the premises as a residence, does not represent a decrease in services justifying a corresponding reduction in rent. *Golden Gateway Center v. San Francisco Residential Rent Stabilization & Arbitration Bd. (1999) 73 Cal. App. 4th 1204, 1212, 87 Cal. Rptr. 2d 332*

City's Mobilehome Rental Review Board decision that authorized only limited increase in rent for owners' mobilehome parks reversed and remanded to Board for reconsideration when Board, in determining owners' claim for increased rents, committed serious error by failing to account for interest payments on encumbering loans in determining income (or loss) resulting from operation of parks. *Yee v. Mobilehome Park Rental Review Bd. (1993) 17 Cal. App. 4th 1097, 1100, 23 Cal. Rptr. 2d 1*

Rent control board does not abuse discretion in using prior rent roll to compute gross income for purposes of

determining allowable rent increase based on increased financing costs. *Cole v. City of Oakland Residential Rent Arbitration Bd. (1991) 3 Cal. App. 4th 693, 697-699, 4 Cal. Rptr. 2d 593*

Local rent control ordinance that included "security deposits" in its definition of rent and limited rent increases is not preempted by either *Civ. Code § 1950.5* (regulating security deposits) or by *Civ. Code § 827* (permitting landlord to change terms of month-to-month tenancy on 30 days' notice). *People v. Tannenbaum (1994) 29 Cal. Rptr. 2d 534*

[4] Exhaustion of Administrative Remedies

Challenge to rent control ordinance is precluded by failure to exhaust administrative remedies by application to rent control board for individual adjustment. *Amberhill Properties v. City of Berkeley (9th Cir. 1987) 814 F.2d 1340, 1341*

[5] Actions

Local rent board regulation granting tenant displaced by disaster right to reoccupy same unit following unit's repair is valid and does not exceed scope of underlying rent control ordinance. *Aguirre v. Lee (1993) 20 Cal. App. 4th 1646, 1653, 25 Cal. Rptr. 2d 367*

Action to recover excess rent under rent control ordinance is subject to three-year limitations period of *Code Civ. Proc. § 338(a), not* one-year period of *Code Civ. Proc. § 340(a)*. *Mitchell v. Leslie (1995) 39 Cal. App. 4th Supp. 7, 46 Cal. Rptr. 2d 419*

Private cause of action for damages is available for tenant damaged by landlord's violation of good faith standard contained in local ordinance; landlord evicted plaintiff based on occupancy of the unit by landlord's mother and landlord's mother never resided on the premises. *Castillo v. Friedman (1987) 243 Cal. Rptr. 206* (decided before enactment of *Civ. Code § 1947.10*)

[6] Evidence

Rent Control Board's determination as to threshold of "significantly below fair market rates" could only have been premised on personal experience and knowledge of real estate, and therefore board was not qualified to dispute experts' opinion that base rents at mobilehome park were significantly below market value. *Concord Communities, L.P. v. City of Concord (2001) 91 Cal. App. 4th 1407, 1416, 111 Cal. Rptr. 2d 511*

Issue of fair return on investment under rent control ordinance is matter of expert opinion. *Whispering Pines Mobile Home Park, Ltd. v. Scotts Valley (1986) 180 Cal. App. 3d 152, 159-161, 225 Cal. Rptr. 364*

[7] Damages

Imposition of treble damages by rent control agency is unconstitutional. *McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 378-379, 261 Cal. Rptr. 318, 777 P.2d 91*

Rent control ordinance authorizing civil action for treble damages mandates imposition of treble damages by trial court; provision not punitive or violative of due process. *Kelly v. Yee (1989) 213 Cal. App. 3d 336, 341-342, 261 Cal. Rptr. 568*

[8] Review

Court reviewing rent control agency decision under mandamus procedure (*Code Civ. Proc. § 1094.5*) must be provided with complete administrative record, including evidence; requirement applies whether court exercises independent judgment or determines whether agency's findings supported by evidence. *Buckhart v. San Francisco Residential Rent etc., Bd. (1988) 197 Cal. App. 3d 1032, 1036, 243 Cal. Rptr. 298*

Administrative decision allowing rent increase does not involve fundamental vested right when denial of increase would not put landlord out of business or result in rents so low so as to be confiscatory; proper standard of review is substantial evidence rather than independent judgment test. *San Marcos Mobilehome Park Owners' Assn. v. City of San Marcos (1987) 192 Cal. App. 3d 1492, 1499-1504, 238 Cal. Rptr. 290*

[9] Exemptions From Rent Control Laws

Provision of rent control ordinance exempting certain units from regulation is not denial of equal protection under California or federal constitutions. *Kalaydjian v. City of Los Angeles (1983) 149 Cal. App. 3d 690, 694, 197 Cal. Rptr. 149*

In unlawful detainer action, trial court's finding that downstairs area of landlord's single family residence constituted "dwelling" for purposes of local municipal code was proper; however, premises were exempt under local rent control ordinance which excepted rental units in single family dwellings. *Gabor v. Cox (1994) 31 Cal. Rptr. 2d 925*

[10] Substantial Compliance

Landlord who fails to register units with correct base rent, charges rent increases in excess of permissible percentage increase, and fails to comply for over one year with rent control agency's order to reregister units with the correct base rent is not in substantial compliance with local rent control ordinance under *Civ. Code § 1947.7(b)*. *Minelian v. Manzella (1989) 215 Cal. App. 3d 457, 462-463, 263 Cal. Rptr. 597*

[11] Withdrawal of Property From Rental Market

San Francisco ordinance requiring landlords to provide relocation assistance when removing property from rental market and not limiting such assistance to lower income tenants does not violate Ellis Act. *Pieri v. City & County of San Francisco (2006) 137 Cal. App. 4th 886, 892-893, 40 Cal. Rptr. 3d 629*

San Francisco code section requiring landlords seeking eviction under Ellis Act to notify tenants as to amount of relocation assistance payment landlord believed to be due created substantive defense not contemplated by Ellis Act and therefore was preempted. *Johnson v. City & County of San Francisco (2006) 137 Cal. App. 4th 7, 18, 40 Cal. Rptr. 3d 8*

Ellis Act (*Gov. Code § 7060 et seq.*) preempted local ordinance that conditioned issuance of demolition permits for buildings with two or more residential rental units on city's approval of plans to construct a condominium, stock cooperative, or community apartment project and also provided that demolition permit could be withheld unless owner waived the right to construct such a project for a period of 10 years from the date of demolition. *Los Angeles Lincoln Place Investors, Ltd. v. City of Los Angeles (1997) 54 Cal. App. 4th 53, 64, 62 Cal. Rptr. 2d 600*

Local ordinance requiring six months notice and payment of relocation assistance as condition of going out of business is preempted by state law, which preempts local substantive controls over landlord's right to go out of business. *Channing Properties v. City of Berkeley (1993) 11 Cal. App. 4th 88, 14 Cal. Rptr. 2d 32*

Municipal ordinance that required one-to-one replacement of residential units as condition of going out of business of residential renting is preempted by state law allowing landlords to go out of business. *Bullock v. City and County of San Francisco (1990) 221 Cal. App. 3d 1072, 1099-1101, 271 Cal. Rptr. 44*

Local ordinance requiring rent board permit to demolish building conflicts with state law granting landlords absolute right to go out of business. *Javidzad v. City of Santa Monica (1988) 204 Cal. App. 3d 524, 527-529, 251 Cal. Rptr. 350* (superseded by *Gov. Code, § 7060.7, subd. (b)*)

Local ordinance requiring landlord to obtain permit to evict tenants and go out of business is preempted by state law allowing landlords to go out of business. *City of Santa Monica v. Yarmark (1988) 203 Cal. App. 3d 153, 163-165, 249 Cal. Rptr. 732*

[12] Indian Reservations

Federal law preempts local rent control ordinance for property located on Indian reservations. *Zachary v. Wilk (1985) 173 Cal. App. 3d 754, 761-762, 219 Cal. Rptr. 122*

[13] Eviction Control

Proceeding under San Francisco rent ordinance rather than declaratory relief action was proper method for determining tenant's "protected" status under ordinance. *DeLaura v. Beckett (2006) 137 Cal. App. 4th 542, 547, 40 Cal. Rptr. 3d 253*

San Francisco Rent Control Ordinance provision barring eviction under certain conditions when tenant sublets, even if lease precluded a sublet, was proper exercise of Rent Board's authority and was not unconstitutional impairment of contract. *Danekas v. San Francisco Residential Rent Stabilization and Arbitration Board (2001) 95 Cal. App. 4th 638, 647, 650, 115 Cal. Rptr. 2d 694*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsOrdinances & RegulationsReal Property LawLandlord & TenantRent RegulationExemptionsReal Property LawLandlord & TenantRent RegulationRent Control StatutesReal Property LawMobilehomes & Mobilehome ParksGeneral Overview

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§ 335.33 Law Reviews

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Comment, *Rent Control: A Practical Guide for Tenant Organizations, 15 San Diego L. Rev. 1185 (1978)*

Baar, *Rent Control in the 1970's: The Case of the New Jersey Tenants' Movement, 28 Hastings L.J. 631 (1977)*

Baar and Keating, *The Last Stand of Economic Substantive Due Process--The Housing Emergency Requirement for Rent Control, 7 Urb. Law 447 (1975)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsSummary EvictionReal Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawLandlord & TenantRent RegulationFederal PreemptionReal Property LawLandlord & TenantRent RegulationRent Control StatutesReal Property LawMobilehomes & Mobilehome ParksGeneral Overview

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§ 335.34 Text References

California Residential Landlord-Tenant Practice, ch. 9, *Rent Control* (Cal. C.E.B. 1986)

Witkin, Summary of California Law, vol. 12, *Real Property*, §§ 572-586, 588-606, 770 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§§ 335.35[Reserved]

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PART IV. FORMS

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§ 335.40 Complaint for Damages for Eviction Based on Fraudulent Intent to Occupy [Civ. Code § 1947.10]

[1] FORM Complaint for Damages for Eviction Based on Fraudulent Intent to Occupy [Civ. Code § 1947.10]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Eviction Based on Fraudulent Intent to Occupy)
through _____,]	)	[Amount demanded _____ (exceeds
Defendant(s).	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff _____ [*name*] (hereinafter referred to as "Plaintiff"), a natural person, is, and at all times herein mentioned was, a resident of _____ County, California.

2. Defendant(s) _____ [*name*] (hereinafter referred to as "Defendant(s)"), is/are, and at all times mentioned in this complaint was/were, the owner(s) of the dwelling located at _____ [*unit number, if any, street address, city*], _____ County, California (referred to below as "the premises").

[3. Plaintiff is ignorant of the true names and capacities of defendants sued in this complaint as DOES I through _____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences alleged in this complaint, and plaintiff's injuries as herein alleged were proximately caused by defendants' negligence).]

[4. (Plaintiff is informed and believes and thereon alleges that) (A)t all times mentioned in this complaint, each defendant was the agent of the other(s), was acting within the course and scope of this agency, and all acts alleged to have been committed by any one of them was committed on behalf of every other defendant.]

5. On or about _____ [*date*], plaintiff and defendant(s) entered into _____ [a written *or* an oral] agreement by the terms of which defendant(s) rented the premises to plaintiff _____ [*describe nature of tenancy, e.g.,* on a month-to-month basis] at the agreed rental of $_____ per _____ [*specify, e.g.,* month] payable _____ [*specify, e.g.,* in advance on the first day of each month], commencing on _____ [*date*]. [A copy of the rental agreement is attached to this complaint as Exhibit A and made a part of this complaint.]

6. In accordance with the rental agreement, plaintiff entered into possession of the premises on _____ [*date*] and continued in possession until _____ [*date*], on which date plaintiff vacated the premises in accordance with _____ [*specify, eviction procedure, e.g.,* a notice to quit served on plaintiff by defendant(s)], as alleged below.

7. OPTIONAL: Plaintiff has duly performed all of the conditions of the rental agreement to be performed on his/her part.

8. On or about _____ [*date*], defendant(s) _____ [*specify eviction procedure, e.g.,* served plaintiff with a 30-day notice to quit the premises]. [Defendant also served plaintiff with _____ (*specify additional forms, if any, served on plaintiff as required by local rent control ordinance, title of local ordinance, and passage date, e.g.,* a rent stabilization ordinance declaration as required by the Rent Stabilization Ordinance of the City of Paradise, effective April 21, 1995, operative May 1, 1995).]

9. Defendant(s) represented [in the _____ (*specify, e.g.,* rent stabilization ordinance declaration)] that the grounds for plaintiff's eviction were that defendant sought possession of the premises for _____ [his/her] use and occupancy *or* use and occupancy by _____ (*specify member of defendant's immediate family, e.g.,* defendant's mother _____ [*name*]) under _____ [*specify rent control ordinance provision authorizing eviction based on owner occupancy, title, and passage date of ordinance*].

10. Defendant's representations were false, and _____ [defendant *or* _____ (*name of member of defendant's immediate family*)] has not resided on the premises for six continuous months, as required by *Civil Code Section 1947.10*.

[*EITHER*]

11. Plaintiff is informed and believes and thereon alleges that, when defendant(s) made the representations alleged in this complaint, he/she/they knew them to be false and that these representations were made by defendant(s) with no intention of fulfilling the six-month requirement of *Civil Code Section 1947.10* and with the intent to defraud plaintiff and induce him/her to quit the premises.

[*OR*]

11. Plaintiff is informed and believes and thereon alleges that, when defendant(s) made the representations alleged in this complaint, he/she/they had no reasonable grounds for believing that the representations were true, and that these representations were made by defendant(s) with the intent to induce plaintiff to quit the premises.

[*CONTINUE*]

12. As a proximate result of the eviction, plaintiff was forced to take up residence at _____ [*specify plaintiff's residence(s) since eviction*], for a period of _____ [*specify time period e.g.,* two months], at a cost of $_____ per _____ [*specify, e.g.,* month], for a total cost of $_____. The difference between the rent that would have been paid for the premises and the amount paid by plaintiff since the eviction is $_____, and plaintiff has been damaged in that amount.

13. As a further proximate result of the eviction, plaintiff incurred the following costs:

[*SPECIFY costs incurred by plaintiff in relocating*]

a. Moving costs: $_____

b. Storage costs: $_____

c. Utility charges: $_____

d. Other _____: $_____

TOTAL COSTS: $_____

[14. Plaintiff has incurred and will incur attorney's fees in prosecuting this action.]

WHEREFORE, plaintiff prays judgment as follows:

[*EITHER, if plaintiff desires to relocate on the premises*]

1. That defendant(s) be compelled to allow plaintiff to relocate on the premises as a tenant on the same terms as were in effect before plaintiff's eviction;

2. For damages in the sum of $_____, which is three times the amount of rent expenses incurred in excess of rent that would have been paid to defendant(s);

3. For a sum amounting to three times the cost to plaintiff of relocating on the premises;

[*OR, if plaintiff does not desire to relocate on the premises*]

1. For damages in the sum of $_____, which is three times the amount of one month's rent paid by plaintiff for the premises;

2. For damages in the sum of $_____, which is three times the amount of costs incurred by plaintiff in relocating to a different residence;

[*CONTINUE*]

[3/4. For attorney's fees in the sum of $_____;]

4/5. For costs of suit herein incurred; and

5/6. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a residential tenant in a city, county, or city and county with a system of rent control against an owner when the tenant has been evicted from a rental unit based on reoccupation of the unit by the owner or a member of the owner's immediate family, neither the owner nor the family member has maintained residence in the unit for six continuous months, and the eviction was based on fraud by the owner or the family member not to fulfill the six-month requirement [*Civ. Code § 1947.10(a)*].

In pleading a local ordinance, such as a rent control ordinance, counsel must refer to the ordinance by its title and date of passage [*Code Civ. Proc. § 459*].

The remedies provided by *Civ. Code § 1947.10* do not prohibit any other remedies available to a party affected by the statute [*Civ. Code § 1947.10(b)*].

PRACTICE TIP:

Use of This Form. The attorney should note that the complaint in [1], *above*, does not provide for causes of action based on a local rent control ordinance. As a practical matter, local ordinances usually

have more stringent requirements and far greater exposure to damages than is provided in *Civ. Code § 1947.10*. In a rent/eviction control jurisdiction, an attorney should always read the ordinance and the rules and regulations before proceeding with the filing of a "wrongful eviction" action. *By Benjamin Kaplan.*

[3] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*].

If the action is a limited civil case, the caption must state whether the demand exceeds or does not exceed $10,000 and must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[4] Allegations

The above complaint alleges the following:

- Plaintiff's name, capacity, and residence (Paragraph 1).

- Defendant's ownership of the rental unit (Paragraph 2) [*see Civ. Code § 1947.10(a)*].

- An optional allegation as to fictitiously named defendant(s) (optional Paragraph 3) [*see Code Civ. Proc. § 474*].

- An optional allegation for use when agents are being sued (optional Paragraph 4) [*see* Ch. 427, *Principal and Agent*].

- The rental agreement creating the landlord-tenant or lessor-lessee relationship (Paragraph 5) [*see Civ. Code § 1947.10(a)*].

- Plaintiff tenant's possession of the premises (Paragraph 6).

- Performance by plaintiff of all conditions to be performed on his or her part (Optional Paragraph 7) [*see Code Civ. Proc. § 457*].

- The date of defendant's eviction of plaintiff (Paragraph 8) [*see Civ. Code § 1947.10(a)*].

- The eviction procedure employed by defendant, including any and all forms served by defendant on plaintiff (Paragraph 8) [*see Civ. Code § 1947.10(a)*].

- Defendant's representation to plaintiff that the eviction was based on occupancy of the rental unit by defendant or a member of his or her immediate family (Paragraph 9) [*see Civ. Code § 1947.10(a)*].

- The rent control ordinance provision authorizing eviction based on owner occupation, and the title and passage date of the rent control ordinance (Paragraph 9) [*see Code Civ. Proc. 459*].

- That defendant's representation was false and that neither defendant nor his or her family member has maintained residence in the unit for six continuous months (Paragraph 10) [*see Civ. Code §*

1947.10(a)].

- Allegations of fraud for use in the alternative depending on whether defendant's representations constituted intentional or negligent misrepresentation (alternate Paragraphs 11) [*see Civ. Code §§ 1710, 1947.10(a)*].

- Plaintiff's detriment proximately resulting from the eviction relating to the amount of rent paid since the eviction in excess of the amount that plaintiff would have paid defendant as rent (Paragraph 12) [*see Civ. Code § 1947.10(a)*].

PRACTICE TIP:
Seek Future Rent? Plaintiff may also consider seeking the difference in rent for the future time plaintiff expected to live in the old apartment. However, this claim may subject plaintiff to an argument that such damages are speculative. *By Myron Moskovitz.*

- Plaintiff's detriment proximately resulting from the eviction relating to the costs incurred by plaintiff in relocating to a different unit (Paragraph 12) [*see Civ. Code § 1947.10(a)*].

- An optional allegation as to attorney's fees incurred (optional Paragraph 13) [*see Civ. Code § 1947.10(a)*].

[5] Damages

If the court determines that the plaintiff's eviction was based on fraud by the defendant or the defendant's immediate relative to not fulfill the six-month residency requirement of *Civ. Code § 1947.10*, it may order the defendant to pay treble the cost of relocating the plaintiff from his or her existing unit back into the previous unit and may order the defendant to pay treble the amount of any increase in rent that the plaintiff has paid. If the plaintiff decides not to relocate back into the previous unit, the court may order the defendant to pay treble the amount of one month's rent paid by the plaintiff for the unit from which he or she was evicted and treble the amount of any costs incurred in relocating to a different unit. The prevailing party will also be awarded attorney's fees and court costs [*Civ. Code § 1947.10(a)*].

[6] Cross References

For discussion and forms relating to intentional or negligent misrepresentations of fact, see Ch. 269, *Fraud and Deceit* .

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29-335 California Forms of Pleading and Practice--Annotated § 335.41

§ 335.41 Complaint for Damages for Failure to Refund Excess Rent Charged [Civ. Code § 1947.11]

[1] FORM Complaint for Damages for Failure to Refund Excess Rent Charged [Civ. Code § 1947.11]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Failure to Refund Excess Rent Charged)
through _____,]	)	[Amount demanded _____ (exceeds
Defendant(s).	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Plaintiffs name, capacity, and residence. See § 335.40[1], P 1.*]

2. [*Defendant's ownership of rental property. See § 335.40[1], P 2.*]

3. [*Fictitious name allegation, if appropriate. See § 335.40[1], P 3.*]

4. [*Agency allegation, if appropriate. See § 335.40[1], P 4.*]

5. On _____ [*date*], _____ [*specify local rent control agency*] established and certified the permissible rent level for the premises at $_____ per _____ [*specify, e.g.,* month] under _____ [*specify provision of local rent control ordinance authorizing establishment and certification of permissible rent levels, title of local ordinance, and passage date*]. [A copy of the certificate of the permissible rent level for the premises is attached to this complaint as Exhibit A and made a part of this complaint.]

6. On or about _____ [*date*], plaintiff and defendant(s) entered into _____ [a written *or* an oral] agreement by the terms of which defendant(s) rented the premises to plaintiff _____ [*describe nature of tenancy, e.g.,* on a month-to-month basis] at the agreed rental of $_____ [*specify amount in excess of permissible rent level for premises*] per _____ [*specify, e.g.,* month] payable _____ [*specify, e.g.,* in advance on the first day of each month], commencing on _____ [*date*]. [A copy of the rental agreement is attached to this complaint as Exhibit B and made a part of this complaint.]

7. In accordance with the rental agreement, plaintiff entered into possession of the premises on _____ [*date*].

8. Defendant(s) willfully and intentionally charged plaintiff a rent in excess of the certified permissible rent level for the premises. [Plaintiff was unaware until _____ (*date*) that the rent charged by defendant(s) was in excess of the permissible rent level for the premises.]

9. From _____ [*specify date of first excessive rent payment*] until _____ [*specify date of last excessive rent payment*], plaintiff paid rent to defendant at the rate of $_____ [*specify amount in excess of permissible rent level for premises*] per _____ [*specify, e.g.,* month]. Plaintiff has paid defendant a total amount of $_____ in excess of the permissible rent level for the premises.

10. On or about _____ [*date*], plaintiff demanded [in writing] that defendant(s) refund the excess rent he/she/it has charged plaintiff for the premises. [A copy of plaintiff's demand letter is attached to this complaint as Exhibit C and made a part of this complaint.]

11. Defendant(s) has/have refused and continue(s) to refuse to refund the excess rent charged plaintiff for the premises.

[12. Plaintiff has incurred and will incur attorney's fees in prosecuting this action.]

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____, which is three times the amount of excess rent paid by plaintiff to defendant;

[2. For attorney's fees in the sum of $_____;]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

Dated _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name* name]

Attorney for Plaintiff

[*Verification, if desired. See § 335.40[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a residential tenant in a city, county, or city and county with a system of rent control against an owner who has willfully or intentionally charged the tenant rent in excess of the established, certified, lawful rent ceiling for the rental unit, and has refused the tenant's demand to refund the excess rent [*Civ. Code § 1947.11(a)*]. In pleading a local ordinance, such as a rent control ordinance, counsel must refer to the ordinance by its title and date of passage [*Code Civ. Proc. § 459*].

The remedies provided by *Civ. Code § 1947.11* do not prohibit any other remedies available to a party affected by the statute [*Civ. Code § 1947.11(b)*].

[3] Statute of Limitations

Civ. Code § 1947.11 does not extend the time within which an action is required to be brought beyond the otherwise applicable limitations set forth in the Code of Civil Procedure [*Civ. Code § 1947.11(c)*].

[4] Allegations

The above complaint alleges:

- The plaintiff's name, capacity, and residence (Paragraph 1).
- Defendant's ownership of the rental unit (Paragraph 2) [*see Civ. Code § 1947.11(a)*].
- An optional allegation as to fictitiously named defendant(s) (Optional Paragraph 3) [*see Code Civ. Proc. § 474*].
- An optional allegation for use when agents are being sued (Optional Paragraph 4) [*see* Ch. 427, *Principal and Agent*].
- The establishment and certification of a permissible rent level for the premises by the local rent control agency under a local rent control ordinance (Paragraph 5) [*see Civ. Code § 1947.11(a)*].
- The title and passage date of the local rent control ordinance (Paragraph 5) [*see Code Civ. Proc. § 459*].
- The rental agreement creating the landlord-tenant or lessor-lessee relationship and requiring payment of excessive rent (Paragraph 6) [*see Civ. Code § 1947.11(a)*].
- Plaintiff tenant's possession of the premises (Paragraph 7).
- That defendant willfully and intentionally charged plaintiff excessive rent (Paragraph 8) [*see Civ.*

Code § 1947.11(a)].

- An optional allegation for use when plaintiff was unaware that the rent charged was excessive (Paragraph 8).

- The total amount of rent paid by plaintiff to defendant in excess of the certified permissible rent level for the premises (Paragraph 9) [*see Civ. Code § 1947.11(a)*].

- Plaintiff's demand that defendant refund the excess rent paid (Paragraph 10) [*see Civ. Code § 1947.11(a)*].

- Defendant's refusal to refund the excess rent (Paragraph 11) [*see Civ. Code § 1947.11(a)*].

- An optional allegation as to attorney's fees incurred (optional Paragraph 12) [*see Civ. Code § 1947.11(a)*].

PRACTICE TIP:

Attorney's Fees. If plaintiff is seeking attorney's fees, he or she should state whether a lease provision or a statute is the basis for the claim. Note that *Civ. Code § 1947.11(a)* provides that "[t]he prevailing party shall be awarded attorney's fees and court costs." *By Myron Moskovitz and Benjamin Kaplan.*

[5] Damages

If the court determines that the defendant willfully or intentionally charged the plaintiff rent in excess of the certified rent ceiling, the court will award the plaintiff a judgment for the excess amount of rent, and may treble that amount. The prevailing party will be awarded attorney's fees and court costs [*Civ. Code § 1947.11(a)*].

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29-335 California Forms of Pleading and Practice--Annotated § 335.42

§ 335.42 Affirmative Defense in Action Against Landlord Based on Noncompliance With Local Rent Control Ordinance; Landlord in Substantial Compliance [Civ. Code § 1947.7(b)]

[1] FORM Affirmative Defense in Action Against Landlord Based on Noncompliance With Local Rent Control Ordinance; Landlord in Substantial Compliance [Civ. Code § 1947.7(b)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that he/she has made a good-faith attempt to comply with _____ [*specify title and passage date of local rent control ordinance*], sufficient to carry out the intent and purpose of the ordinance, because _____ [*set forth facts showing defendant's good-faith attempt to comply with local ordinance*].

After receiving notice from _____ [*local rent control agency*] that he/she/it was not in compliance with local law, defendant cured the defect by _____ [*set forth facts showing how defendant cured defect*].

Defendant acted to cure the defect in a timely manner, because _____ [*set forth facts showing that defendant cured defect in a timely manner as reasonably determined by local rent control agency*].

Defendant is in substantial compliance with _____ [*specify title and passage date of local rent control ordinance*], as defined by *Civil Code Section 1947.7(b)*, and therefore may not be assessed a penalty or any other sanction for noncompliance other than _____ [restitution to _____ (*name of tenant*) *or* recovery of _____ (registration *or* filing) fees due to _____ (*local rent control agency*)].

[2] Use of Form

The form of affirmative defense in [1], *above*, may be used in an answer to an action against a landlord for noncompliance with a local rent control ordinance when the landlord is in "substantial compliance" with the ordinance and the plaintiff seeks to assess a penalty or sanction against the landlord [*see Civ. Code § 1947.7(b)*].

In pleading a local ordinance, such as a rent control ordinance, counsel must refer to the ordinance by its title and date of passage [*Code Civ. Proc. § 459*].

PRACTICE TIP:

Rule Applicable Only to Penalties. Please note that this allegation is a defense only to the claim for a penalty. Thus, it is not applicable for use as a defense to the claim for the overcharge itself. *By Myron Moskovitz.*

PRACTICE TIP:

Availability of "Wrongful Eviction" Defense. Civ. Code § 1947.7 does not provide the landlord with an affirmative defense in a "wrongful eviction" action brought by a tenant. It is hypothetically possible under the statutory schema that such a defense might be available under the definition of "substantial compliance" if (1) a landlord serves an eviction notice that fails to comply with the ordinance, (2) the tenant then files a report of "wrongful eviction," (3) the local agency then sends a notice of deficiency, and (4) the landlord then cures the defect in a timely manner. However, such a situation would be relatively early on in the process so as to make the circumstances, however unlikely to happen, be of minimal import. *By Benjamin Kaplan.*

[3] Allegations

The above form of affirmative defense alleges:

- The defendant landlord's good faith attempt to comply with the ordinance (Paragraph 1) [*see Civ. Code § 1947.7(b)*].

- That defendant cured the deficiency after receiving notice of the deficiency from the local rent control agency (Paragraph 2) [*see Civ. Code § 1947.7(b)*].

- That defendant cured the deficiency in a timely manner as reasonably determined by the local rent control agency (Paragraph 3) [*see Civ. Code § 1947.7(b)*].

- That defendant is in substantial compliance with the ordinance in accordance with *Civ. Code § 1947.7(b)* and may not be assessed a penalty or any other sanction for noncompliance (Paragraph 4) [*see Civ. Code § 1947.7(b)*].

[4] Substantial Compliance

A landlord who fails to register units with the correct rent base, charges rent increases in excess of permissible percentage increases, and fails to comply for over one year with the rent control agency's order to reregister units with the correct base rent is not in substantial compliance with the rent control ordinance under *Civ. Code § 1947.7(b)* [*Minelian v. Manzella (1989) 215 Cal. App. 3d 457, 462-463, 263 Cal. Rptr. 597]* .

[5] Cross References

For further discussion and forms relating to pleading affirmative defenses and answers generally, see Ch. 26, *Answers* .

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29-335 California Forms of Pleading and Practice--Annotated § 335.43

§ 335.43 Affirmative Defense Action Against Landlord Based on Tenant's Eviction From Rental Unit; Landlord Withdrawing Units From Rental Market [Gov. Code § 7060]

[1] FORM Affirmative Defense Action Against Landlord Based on Tenant's Eviction From Rental Unit; Landlord Withdrawing Units From Rental Market [Gov. Code § 7060]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that he/she evicted plaintiff from the premises because defendant is withdrawing all the accommodations located at _____ [*specify address*] from the rental market.

Defendant further alleges that he/she has withdrawn the accommodations located at _____ [*specify address*] in good faith and with bona fide intent.

Defendant has an absolute right under *Government Code Section 7060* to go out of business as a landlord and may not be compelled to continue to offer plaintiff's unit for rent or lease.

[2] Use of Form

The form of affirmative defense in [1], *above*, may be used in an action against a landlord based on a tenant's eviction from a rental unit, when the eviction is incident to the landlord's withdrawal of the accommodations from the rental market [*see Gov. Code § 7060*].

The defense is only available if the landlord is withdrawing all the accommodations from the rental market [*Gov. Code § 7060.7(d)*; *see also Gov. Code § 7060(b)* ("accommodations" defined)].

PRACTICE TIP:

Use of this Form. The attorney should note that if, for example, a tenant moved pursuant to an Ellis Act eviction and is alleging that the landlord did not take all the units out of the rental housing market, then no affirmative defense would appear to be necessary. In this case, a denial (Answer) would raise the issue of compliance. However, a tenant might bring a lawsuit based on "retaliation" or "discrimination,"

and thus the affirmative defense in [1], *above*, might apply. *By Benjamin Kaplan.*

[3] Allegations

The above form of affirmative defense alleges (1) that plaintiff was evicted because defendant is withdrawing all the accommodations from the rental market (Paragraph 1) [*see Gov. Code § 7060(a)*]; (2) that the landlord acted in good faith and with bona fide intent in withdrawing the property from the rental market, which overcomes allegations of retaliatory eviction (Paragraph 2) [*see Drouet v. Superior Court (2003) 31 Cal. 4th 583, 600, 3 Cal. Rptr. 3d 205, 73 P.3d 1185]* ; and (3) that defendant has an absolute right to withdraw the accommodations from the rental market and may not be compelled to offer the plaintiff's unit for rent or lease (Paragraph 3) [*see Gov. Code § 7060(a)*].

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
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[7] Determination of Public Official/Public Figure Question

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[12] Interpretation of Defamatory Language

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[i] All Circumstances Considered

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[e] Language Reserved for Jury Interpretation

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[c] Imputing Breach of Confidence

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[15] Language Slanderous Per Se

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[d] Good Reputation Not Required

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[h] Plaintiff's Burden of Proof of Falsity

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[v] Specificity Required

[o] Presumption of Innocence Created

[p] Privilege as Question of Law if Facts Undisputed

[q] Privilege Greater When Reasonable

[r] Qualified Privilege

[s] Specific Communications Covered

[t] Specific Evidence of Malice

[i] Exaggeration

[ii] Ill Will

[iii] Lying

[iv] Recklessness

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[i] In General

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[9] Similarity to Malicious Prosecution

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[11] Survival of Action

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[a] Disparaging

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[2] Use of Form

[3] Allegations

[4] Specification of Damages

[5] Verification

[6] Venue

[7] Pleading of Exact Language

[8] Colloquium

[9] Falsity

[10] Actual Malice

[11] Good Reputation

[12] Innuendo When Language Ambiguous

[13] Inducement When Language Ambiguous

[14] Publication

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[18] Cross References

[19] Forms of Discovery

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[a] Broad Definition of Libel

[b] Colloquium

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[2] Use of Form

[3] Decisions

[4] Text References

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[1] FORM

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[4] Decisions

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[1] FORM

[2] Use of Form

[3] Decisions

[a] In General

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[4] Text References

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[1] FORM

[2] Use of Form

[3] Decisions

[4] Text References

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[1] FORM

[2] Use of Form

[3] Decisions

[4] Text References

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[1] FORM

[2] Use of Form

[3] Decisions

[4] Text References

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[1] FORM

[2] Use of Form

[3] Decisions

[4] Text References

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[1] FORM

[2] Use of Form

[3] Decisions

[4] Text References

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Falsity

[5] Actual Malice

[6] State Statutes

[7] Cross References

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[1] FORM

[2] Use of Form

[3] Falsity

[4] Actual Malice

[5] State Statutes

[6] Decisions

[7] Cross References

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[1] FORM

[2] Use of Form

[3] Constitutional Limitations

[4] State Statutes

[5] Decisions

[6] Text References

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Falsity

[5] Actual Malice

[6] State Statutes

[7] Decisions

[8] Text References

[9] Cross References

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[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Falsity

[5] Actual Malice

[6] Decisions

[7] Text References

[8] Law Reviews

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[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Specification of Damages

[5] Pleading of Exact Language

[6] Slander Per Se

[7] General, Special, and Punitive Damages

[8] Falsity

[9] State Statutes

[10] Decisions

[11] Text References

[12] Cross References

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[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Text References

[6] Cross References

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[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

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[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Text References

[6] Cross References

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[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Text References

[6] Cross References

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[1] FORM

[2] Use of Form

[3] Specification of Damages

[4] State Statutes

[5] Decisions

[6] Text References

[7] Cross References

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[1] FORM

[2] Use of Form

[3] Constitutional Limitation on Damages

[4] State Statutes

[5] Decisions

[6] Cross References

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[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Decisions

[6] Cross References

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[2] Use of Form

[3] State Statutes

[4] Decisions

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[1] FORM

[2] State Statutes

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[1] FORM

[2] Use of Form

[3] Cross References

[4] California Points and Authorities

[5] State Statutes

[6] Decisions

[7] Text References

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[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] State Statutes

[5] Decisions

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

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[1] FORM

[2] Use of Form

[3] Decisions

[4] Text References

[5] Cross References

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[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] State Statutes

[5] Decisions

[6] Law Reviews

[7] Cross References

§ 340.266 Demurrer--Failure of Public Figure Suing for Defamation to Allege Malice

[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

§ 340.267 Affirmative Defense--Defendant Did Not Publish [or Broadcast] Statement About Public Figure With Malice

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] Law Reviews

[5] Cross References

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[1] FORM

[2] Use of Form

[3] Decisions

§ 340.269 General Demurrer--Failure of Private Individual to Allege Negligence

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] Decisions

[5] Cross References

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[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] Decisions

[5] Cross References

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[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] State Statutes

[5] Decisions

[6] Text References

§ 340.272 Affirmative Defense--Failure of Plaintiff Suing Publisher [or Broadcaster] to Notify Defendant With Sufficient Specificity What Statements Were Allegedly Defamatory [Civ. Code § 48a(1)]

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] State Statutes

[5] Decisions

[6] Text References

[7] Cross References

§ 340.273 Affirmative Defense--Failure of Plaintiff Suing Publisher [or Broadcaster] to Notify Defendant of Allegedly Defamatory Statements Within Statutory Period [Civ. Code § 48a(1)]

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] State Statutes

[5] Cross References

§ 340.274 Affirmative Defense--Failure of Plaintiff Suing Broadcaster to Serve Demand on Owner Rather Than Originator of Allegedly Defamatory Statements [Civ. Code § 48a(1)]

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] State Statutes

[5] Decisions

[6] Text References

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[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

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[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] State Statutes

[5] Decisions

[6] Cross References

§ 340.277 Order [Code Civ. Proc. § 1003] Granting Defendant's Motion for Summary Adjudication of Claim for Punitive Damages

[1] FORM

[2] Use of Form

[3] Cross References

§ 340.278 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Nonliability of Radio [or Television] Broadcaster Who Has Exercised Due Care to Prevent Defamatory Statement [Civ. Code § 48.5]

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] State Statutes

[5] Text References

[6] Cross References

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[1] FORM

[2] Use of Form

[3] Burden of Pleading and Proving Falsity

[4] Risk in Pleading Truth

[5] California Points and Authorities

[6] State Statutes

[7] Decisions

[a] Absolute Defense

[b] Burden of Proof of Falsity

[c] Falsity Inferred

[d] Liability for Part of Publication

[e] Risk in Pleading Truth

[f] Subjective Belief Immaterial

[g] Substantial Truth Sufficient

[8] Text References

[9] Cross References

§ 340.280 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Mitigation

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Text References

§ 340.281 General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Presence of Privilege Disclosed on Face of Plaintiff's Complaint

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] Decisions

§ 340.282 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Privilege Publication by Executive Officer [Civ. Code § 47(a)]

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] State Statutes

[5] Decisions

[6] Text References

§ 340.283 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Privilege Publication Made in Connection With Legislative Proceeding [Civ. Code § 47(b)]

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] State Statutes

[5] Decisions

[a] Absolute Privilege

[b] Coverage

[c] No Relevancy Requirement

[d] Pleading

[e] Policy

[f] Public Included

[6] Text References

[7] Cross References

§ 340.284 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Privilege Publication Made in Connection With Judicial Proceeding [Civ. Code § 47(b)]

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] State Statutes

[5] Decisions

[a] Extent of Privilege

[b] No Relevancy Requirement

[c] Perjury Protected

[d] Persons Covered

[e] Policy

[f] Publications Covered

[6] Text References

[7] Cross References

§ 340.285 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Privilege Publication Made in Connection With Administrative Proceeding [Civ. Code § 47(b)]

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] State Statutes

[5] Decisions

[a] In General

[b] Determinative Factors

[c] Policy

[6] Text References

[7] Cross References

§ 340.286 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Privilege--Fair and True Report in Public Journal [Civ. Code § 47(d)]

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] State Statutes

[5] Decisions

[a] Communications Protected

[b] Substantial Accuracy

[6] Text References

[7] Cross References

§ 340.287 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Privilege--Fair and True Report of Public Meeting or of Matter for Public Benefit [Civ. Code § 47(e)]

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] State Statutes

[5] Decisions

[6] Text References

[7] Cross References

§ 340.288 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Privilege--Publication Made Without Malice [Civ. Code § 47(c)]

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] State Statutes

[5] Decisions

[a] Definitions of Malice

[b] Inferrence of Malice

[c] Presumption of Innocence

[d] Specific Evidence of Malice

[e] Specific Communications Covered

[f] Fair Comment

[6] Law Reviews

[13] Text References

[14] Cross References

§ 340.289 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Consent

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] Decisions

[5] Text References

[6] Cross References

§ 340.290 General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Bar of Statute of Limitations [Code Civ. Proc. § 340(c)]

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] State Statutes

[5] Decisions

[6] Text References

§ 340.291 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Bar of Statute of Limitations [Code Civ. Proc. § 340(c)]

[1] FORM

[2] Use of Form

[3] Text References

[4] Cross References

§ 340.292 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Publication Did Not Convey a Defamatory Meaning

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] Decisions

[5] Text References

[6] Cross References

§ 340.293 General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Failure of Plaintiff Suing Public Employee to Allege Filing of Claim With Public Entity [Gov. Code §§ 905, 911.2, 950.2]

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] State Statutes

[5] Decisions

[6] Cross References

§ 340.294 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Public Employee Immune for Statement Made Within Scope of Authority [Gov. Code § 820.2]

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] State Statutes

[5] Decisions

[6] Cross References

§ 340.295 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Public Entity Immune for Discretionary Statement of Public Employee

[1] FORM

[2] Use of Form

[3] California Points and Authorities

[4] State Statutes

[5] Decisions

[6] Cross References

§ 340.296 Notice of Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--General Form

[1] FORM

[2] Use of Form

[3] Cross References

[4] California Points and Authorities

[5] State Statutes

[6] Decisions

[7] Text References

§ 340.297 Order Granting Defendant's Motion for Summary Judgment

[1] FORM

[2] Use of Form

[3] Cross References

§§ 340.298-340.309 [Reserved]

§ 340.310 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for Slander of Title and to Cancel Instrument Constituting Cloud on Title to Real Property [Civ. Code § 3412]--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Quiet Title Action Distinguished

[5] Cross References

[6] State Statutes

§ 340.311 Complaint for Compensatory [Civ. Code § 3333] and Exemplary [Civ. Code § 3294] Damages for Slander of Title--Spoken Words

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 340.312 Affirmative Defense--Justification

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Text References

§ 340.313 Affirmative Defense--Absolute Privilege for Judicial Proceedings [Civ. Code § 47(b)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Text References

§ 340.314 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Conditional Privilege of Rival Claimant to Real Property [Civ. Code § 47(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Text References

§ 340.315 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Statute of Limitations [Code Civ. Proc. § 338(g)]

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

[5] Decisions

§ 340.316 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Acted in Good Faith

[1] FORM

[2] Use of Form

[3] Decisions

§ 340.317 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Failed to Publish Allegedly Disparaging Material

[1] FORM

[2] Use of Form

[3] Decisions

§ 340.318 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for Trade Libel

[1] FORM

[2] Use of Form

[3] Allegations

[4] "Special Damage": Pleading and Proof

[5] Verification

[6] Defamation Action Distinguished

[7] Decisions

[8] Text References

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30-340 California Forms of Pleading and Practice--Annotated § 340.01

§ 340.01 Scope of Chapter

This chapter discusses the right of a person to protect one's personal reputation from defamatory statements. The forms include complaints for libel [*see §§ 340.220 -340.236*] and slander [*see §§ 340.237 -340.244*]. Also included is a form for presenting a claim to a public entity [*see § 340.245*] and allegations of the presentation of a claim to a public entity and its rejection [*see § 340.246*]. For forms for use in actions involving torts that protect interests that are similar to the interests discussed in this part, see Ch. 269, *Fraud and Deceit* , Ch. 357, *Malicious Prosecution and Abuse of Process* , Ch. 362, *Mental Suffering and Emotional Distress* , and Ch. 429, *Privacy* .

This chapter discusses the various defenses which may be asserted against a complaint for libel or slander. Included are forms for defenses based on a failure to plead special damages sufficiently [*see §§ 340.260 -340.262*], on constitutional privilege [*see §§ 340.264 -340.270*], on the retraction statute [*see §§ 340.271 -340.277*], on the statutory immunity afforded broadcasters [*see § 340.278*], on justification by truth [*see § 340.279*], on mitigation [*see § 340.280*], on absolute privilege [*see §§ 340.281 -340.287*], on qualified privilege [*see §§ 340.281* and *340.288*], on consent [*see § 340.289*], and on the statute of limitations [*see §§ 340.290* and *340.291*]. Also included are forms based on failure to convey a defamatory meaning [*see § 340.292*], on failure to file a claim with public entity [*see § 340.293*], on the immunity afforded a public employee [*see § 340.294*], and on immunity afforded a public entity [*see § 340.295*]. In addition, a general form for notice of motion for summary judgment on the basis of an affirmative defense [*see § 340.296*] and an order granting that motion [*see § 340.297*] are included.

This chapter discusses and provides forms for use in slander of title and trade libel actions. The following forms are included in this part:

- Complaints for use in slander of title actions [*see §§ 340.310* and *340.311*],
- Defenses to slander of title actions [*see §§ 340.312 -340.317*], and
- A complaint for trade libel [*see § 340.318*].

For discussion and forms for use in actions which may be related to slander of title actions, see Ch. 11, *Adjoining*

Landowners , Ch. 357, *Malicious Prosecution and Abuse of Process* , and Ch. 482, *Quieting Title* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationGeneral OverviewTortsBusiness TortsSlander of TitleGeneral OverviewTortsBusiness TortsTrade LibelGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesStatutes of Limitations

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30-340 California Forms of Pleading and Practice--Annotated § 340.02

§ 340.02 Cross References

For alternative fictitious name allegations and allegations of capacity and residence, see Ch. 20, *Allegations Commonly Used* .

For a complaint by an unincorporated association against a corporate publisher for libel, see Ch. 61, *Associations and Clubs* .

For alternative forms of captions and introduction, see Ch. 108, *Captions and Introductions* .

For allegations of damages for use in defamations actions, see Ch. 177, *Damages* .

For forms for use in actions involving fraud and deceit, see Ch. 269, *Fraud and Deceit* .

For forms for use in actions involving malicious prosecution, see Ch. 357, *Malicious Prosecution and Abuse of Process* .

For forms for use in actions involving mental suffering and emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress* .

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification* .

For forms for use in actions for invasion of privacy, see Ch. 429, *Privacy* .

For a complaint for slander against a radio station for impugning the ethics of an attorney, see Ch. 484, *Radio and Television* .

For forms for use in actions involving trademarks and trade names, see Ch. 549, *Trademarks and Trade Names* .

For forms for use in actions involving unfair competition, see Ch. 565, *Unfair Competition* .

For alternative forms of demurrer and notice of hearing, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

For additional forms and a procedural guide to making a motion to strike, see Ch. 375, *Motions to Strike: Pleadings* , and Ch. 376, *Motions to Strike: Anti-SLAPP* .

For general forms for alleging statute of limitations as defense, see Ch. 345, *Limitation of Actions* .

For additional forms and a procedural guide for use in making motions generally, see Ch. 372, *Motions and Orders* .

For forms for filing a claim with a public entity when either a public employer or a public employee is being sued, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

For discussion of motions for summary judgment and forms for notice of motion, declarations, and orders, see Ch. 537, *Summary Judgment* .

For forms for use in actions to cancel instruments which constitute clouds on title to real property, see Ch. 107, *Cancellation of Instruments* .

For general discussion, forms, and a procedural checklist for use in actions for injunctive relief, see Ch. 303, *Injunctions* .

For general forms for alleging defenses based on fact statute of limitations has run, see Ch. 345, *Limitation of Actions* .

For forms for use in actions involving the infringement of literary property and copyrights, see Ch. 349, *Literary Property and Copyright* .

For general discussion, forms, and a procedural guide for use in actions to quiet title to real property, see Ch. 482, *Quieting Title* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationProcedure

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[Reserved]

§§ 340.03[Reserved]

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30-340 California Forms of Pleading and Practice--Annotated § 340.10

§ 340.10 Governing Statutes

The right to protection from defamatory publications and defenses to such charges are set forth in *Civ. Code §§ 43-48a*. Pleadings in defamation actions are governed by *Code Civ. Proc. §§ 460, 461*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.11

§ 340.11 Libel Defined

Libel includes those defamatory statements that are more permanent in form than the defamatory matter conveyed by words. In California, a libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye that exposes any person to hatred, contempt, ridicule, or obloquy or that causes him or her to be shunned or avoided or that has a tendency to injure the person in his or her occupation [*Civ. Code § 45*].

Legal Topics:

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

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30-340 California Forms of Pleading and Practice--Annotated § 340.12

§ 340.12 Libel on Its Face

[1] Defamation Without Explanation

A libel on its face, or libel per se, is a libel that is defamatory of the plaintiff without the necessity of explanatory matter such as an inducement, an innuendo, or any other extrinsic fact [*Civ. Code § 45a*; *Barnes-Hind, Inc. v. Superior Court (1986) 181 Cal. App. 3d 377, 381, 385, 226 Cal. Rptr. 354]* .

Language may be libelous on its face even though it may also be susceptible of an innocent interpretation. The test is whether a defamatory meaning appears from the language itself without the necessity of explanation or the pleading of extrinsic facts. If it does, whether the charge be directly made or merely implied, the publication--without averment, colloquium, or innuendo--will, in itself, constitute a libel [*MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 549, 343 P.2d 36]* .

Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he or she has suffered special damage as a proximate result thereof [*Civ. Code § 45a*].

[2] Trade Libel Distinguished

The distinction between libel and trade libel is that the former concerns the person or reputation of the plaintiff and the latter relates to his or her goods [*Polygram Records, Inc. v. Superior Court (1985) 170 Cal. App. 3d 543, 547-550, 555, 216 Cal. Rptr. 252* ; *Shores v. Chip Steak Co. (1955) 130 Cal. App. 2d 627, 630, 279 P.2d 595* ; *see Barnes-Hind, Inc. v. Superior Court (1986) 181 Cal. App. 3d 377, 381, 385, 226 Cal. Rptr. 354* (suggesting that statement disparaging product may constitute libel as well as trade libel)].

[3] Libelous Comments

Comments, opinions, and criticisms may be defamatory even though they are based on true or privileged statements of fact. The publisher is liable unless the comments themselves are privileged [*Maidman v. Jewish Publ'ns, Inc. (1960) 54 Cal. 2d 643, 649, 7 Cal. Rptr. 617, 355 P.2d 265]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesSpecial DamagesTortsBusiness TortsTrade LibelElementsTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefamation Per SeTortsIntentional TortsDefamationDefensesFair Comment & OpinionTortsIntentional TortsDefamationDefensesPrivilegesGeneral Overview

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§ 340.13 Slander

[1] Defined

Slander includes those defamatory statements that are less permanent and more transitory in nature. Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means that (1) charges any person with crime, or with having been indicted, convicted, or punished for crime; (2) imputes in him or her the present existence of an infectious, contagious, or loathsome disease; (3) tends directly to injure him or her in respect to his or her office, profession, trade or business, either by imputing to him or her general disqualification in those respects that the office or other occupation peculiarly requires, or by imputing something with reference to his or her office, profession, trade, or business that has a natural tendency to lessen its profits; (4) imputes to him or her impotence or a want of chastity; or (5) that, by natural consequence, causes actual damage [*Civ. Code § 46*].

The mere fact that oral defamation is subsequently quoted or printed in a newspaper does not make it libel. The original oral statement is still slander [*Mercado v. Hoefler (1961) 190 Cal. App. 2d 12, 18, 11 Cal. Rptr. 787]* .

[2] Slander Per Se

Statements can be slanderous per se even though they do not appear to be defamatory on their face and in innuendo and inducement are required to make the words actionable [*Jarman v. Rea (1902) 137 Cal. 339, 345-346, 70 P. 216* ; *White v. Valenta (1965) 234 Cal. App. 2d 243, 251-254, 44 Cal. Rptr. 241]* . Thus, if words can be shown to have carried a meaning that made them slanderous within any of the first four categories of *Civ. Code § 46*, damages are presumed, and there is no need to plead and prove special damages to sustain a cause of action [*see Jarman v. Rea (1902) 137 Cal. 339, 345, 70 P. 216* ; *White v. Valenta (1965) 234 Cal. App. 2d 243, 252, 44 Cal. Rptr. 241]* . This principle contrasts sharply with the requirement that, for words not libelous on their face to be actionable, special damages must be pleaded and proved [*see Civ. Code § 45a*].

Legal Topics:

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

TortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefamation Per SeTortsIntentional TortsDefamationRemediesGeneral Overview

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30-340 California Forms of Pleading and Practice--Annotated § 340.14

§ 340.14 Effect of Technology on Traditional Libel-Slander Dichotomy

California courts have held that broadcast defamation must be treated as slander [*Polygram Records v. Superior Court (1985) 170 Cal. App. 3d 543, 551-552 n.9, 216 Cal. Rptr. 252* ; *Arno v. Stewart (1966) 245 Cal. App. 2d 955, 961, 54 Cal. Rptr. 392* ; *see Civ. Code §§ 46* (slander), *48a* (slander by radio broadcast requires special damages)]. However, one court of appeal recognized this requirement, but noted in dictum that *Restatement (Second) of Torts § 568A* persuasively contends that broadcast defamation should be treated as libel. The court also noted that statements in videotape form could arguably be deemed communication by any mechanical means and, therefore, slander under *Civ. Code § 46*, or be deemed a publication by fixed representation to the eye and, therefore, libel under *Civ. Code § 45*. Thus, the court opined that modern technology in the form of audio recording, cable television, and videotape has rendered the traditional libel-slander dichotomy increasingly obsolete [*Polygram Records v. Superior Court (1985) 170 Cal. App. 3d 543, 551-552 n.9, 216 Cal. Rptr. 252]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawRelated Legal IssuesLibelTortsIntentional TortsDefamationGeneral Overview

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30-340 California Forms of Pleading and Practice--Annotated § 340.15

§ 340.15 Inaccurate Quotations

The United States Supreme Court, in an action brought by a public figure for the purposes of the constitutional requirement of actual malice, has discussed the application of general defamation principles to the claim that plaintiff was defamed by a magazine story that attributed quotations to him inaccurately [*Masson v. New Yorker Magazine, Inc. (1991) 501 U.S. 496, 511-512, 111 S. Ct. 2419, 115 L. Ed. 2d 447]* . The primary issue in the case was whether or not the charges constituted actual malice [*see § 340.18[2][a]*].

In general, quotation marks around a passage indicate to the reader that it reproduces the speaker's words verbatim; they inform the reader that he or she is reading the statement of the speaker, not a paraphrase or other indirect interpretation by an author. By providing this information, quotations add authority to the statement and credibility to the author's work. Quotations allow the reader to form his or her own conclusions, and to assess the conclusions of the author, instead of relying entirely on the author's characterization of the subject [*Masson v. New Yorker Magazine, Inc. (1991) 501 U.S. 496, 511, 111 S. Ct. 2419, 115 L. Ed. 2d 447]* .

A fabricated quotation may injure reputation in at least two ways, giving rise to a claim of defamation. First, the quotation might attribute an untrue factual assertion to the speaker, for example, a fabricated quotation of a public official admitting he or she had been convicted of a serious crime when in fact he or she had not. Second, regardless of the truth or falsity of the factual matter asserted within the quoted statement, the attribution may result in injury to reputation because the manner of expression or even the fact that the statement was made indicates a negative personal trait or an attitude the speaker does not hold, for example, a fabricated assertion of grandiosity or arrogance. In that situation, one need not determine whether the assertion is true in order to determine whether the report that the plaintiff made the assertion might have injured his or her reputation [*Masson v. New Yorker Magazine, Inc. (1991) 501 U.S. 496, 511-512, 111 S. Ct. 2419, 115 L. Ed. 2d 447* (plaintiff, a psychoanalyst, quoted as asserting himself to be "the greatest analyst who ever lived")]. The Court further stated that a self-condemnatory quotation may carry more force than criticism by another, in that it would constitute an admission against the speaker's interest [*Masson v. New Yorker Magazine, Inc. (1991) 501 U.S. 496, 512, 111 S. Ct. 2419, 115 L. Ed. 2d 447]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationPublic Figures

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30-340 California Forms of Pleading and Practice--Annotated § 340.16

§ 340.16 Opinions

[1] Milkovich Rule

The United States Supreme Court has held that no separate constitutional privilege for opinion is required to ensure the freedom of expression guaranteed by *U.S. Const. amend. I*. Rather, the Court held that *First Amendment* freedom of expression is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between "opinion" and "fact." Those existing doctrines that the court set out that protect free expression are as follows [*Milkovich v. Lorain Journal Co. (1990) 497 U.S. 1, 18-21, 110 S. Ct. 2695, 111 L. Ed. 2d 1]* :

- A statement on matters of public concern must be provable as false before there can be liability under state defamation law when a media defendant is involved [*see Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 776-778, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* ;

- Statements that cannot reasonably be interpreted as stating actual facts and that are obviously rhetorical hyperbole are protected [*see Hustler Magazine, Inc. v. Falwell (1988) 485 U.S. 46, 50, 108 S. Ct. 876, 99 L. Ed. 2d 41* ; *Letter Carriers v. Austin (1974) 418 U.S. 264, 284-286, 94 S. Ct. 2770, 41 L. Ed. 2d 745* ; *Greenbelt Coop. Publ'g Ass'n v. Bresler (1970) 398 U.S. 6, 13-14, 90 S. Ct. 1537, 26 L. Ed. 2d 6]* ;

- If a statement of opinion concerning a public official or public figure reasonably implies false and defamatory facts, the plaintiff must show that the statements were made with knowledge of their falsity or with reckless disregard of the truth [*see Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 336-337, 94 S. Ct. 2997, 41 L. Ed. 2d 789* ; *Curtis Publ'g Co. v. Butts (1967) 388 U.S. 130, 153-154, 87 S. Ct. 1975, 18 L. Ed. 2d 1094* ; *New York Times Co. v. Sullivan (1964) 376 U.S. 254, 279-280, 84 S. Ct. 710, 11 L. Ed. 2d 686]* ; and

- Enhanced appellate review, in which the appellate court has an obligation to make an independent examination of the whole record, provides assurance that these determinations will be made in a manner

that does not constitute a forbidden intrusion on the field of free expression [*see* *Bose Corp. v. Consumers Union of U.S., Inc. (1984) 466 U.S. 485, 499, 104 S. Ct. 1949, 80 L. Ed. 2d 502]* .

Thus, the factfinder must conclude, based on the facts presented, and under the constitutional guarantees listed above, whether the statements in question are of a defamatory nature [*Milkovich v. Lorain Journal Co. (1990) 497 U.S. 1, 21, 110 S. Ct. 2695, 111 L. Ed. 2d 1]* .

Although *Milkovich* involved a media defendant, its standards have been applied without regard to the defendant's status [*see* *Kahn v. Bower (1991) 232 Cal. App. 3d 1599, 1607 n.3, 284 Cal. Rptr. 244* ; *but see* *Savage v. Pacific Gas & Elec. Co. (1993) 21 Cal. App. 4th 434, 445, 26 Cal. Rptr. 2d 305* (no *First Amendment* issue was raised by "matter of purely private concern communicated between private individuals")].

[2] Application of Rule by California Courts

One California court of appeal stated that the dispositive question after *Milkovich* is whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion [*Moyer v. Amador Valley Joint Union High Sch. Dist. (1990) 225 Cal. App. 3d 720, 724, 275 Cal. Rptr. 494]* . To that end, courts have examined the "totality of circumstances," by reviewing the meaning of the language in context, and its susceptibility to being proved true or false [*see, e.g.,* *Savage v. Pacific Gas & Elec. Co. (1993) 21 Cal. App. 4th 434, 445, 26 Cal. Rptr. 2d 305* (holding statement, that plaintiff had conflict of interest, was not defamatory as matter of law because statement did not imply objective fact that could be proved true or false); *Jensen v. Hewlett-Packard Co. (1993) 14 Cal. App. 4th 958, 970-971, 18 Cal. Rptr. 2d 83* (language of employee evaluation examined within context in which it was published and held to be an expression of management's opinion of employee's work habits, interpersonal skills, and level of effort); *Kahn v. Bower (1991) 232 Cal. App. 3d 1599, 1608, 284 Cal. Rptr. 244* ; *Moyer v. Amador Valley J. Union High Sch. Dist. (1990) 225 Cal. App. 3d 720, 725, 275 Cal. Rptr. 494]* .

California cases decided since *Milkovich* have embraced its redefinition of the opinion issue under *U.S. Const. amend. I* [*see, e.g.,* *Edwards v. Hall (1991) 234 Cal. App. 3d 886, 901-907, 285 Cal. Rptr. 810* ; *Moyer v. Amador Valley Joint Union High Sch. Dist. (1990) 225 Cal. App. 3d 720, 723-725, 275 Cal. Rptr. 494]* . Thus far, courts have rejected the argument that *Cal. Const. art. I, § 2(a)* (providing that every person may freely speak, write, and publish sentiments on all subjects, being responsible for abuse of right) provides broader protection for statements of opinion than *U.S. Const. amend. I* [*see, e.g.,* *Edwards v. Hall (1991) 234 Cal. App. 3d 886, 285 Cal. Rptr. 810* ; *Weller v. American Broad. Cos., Inc. (1991) 232 Cal. App. 3d 991, 1006, 283 Cal. Rptr. 644]* .

One case also rejected the assertion that *Baker v. Los Angeles Herald Examiner (1986) 42 Cal. 3d 254, 228 Cal. Rptr. 206, 721 P.2d 87* , which set forth California law prior to *Milkovich*, compelled a contrary finding, holding rather that *Baker* neither discussed nor rested on the California Constitution [*Edwards v. Hall (1991) 234 Cal. App. 3d 886, 905, 285 Cal. Rptr. 810]* . Under *Baker*, the opinion issue was characterized as a determination whether a statement is either opinion and not defamatory, or fact and potentially defamatory [*Baker v. Los Angeles Herald Examiner (1986) 42 Cal. 3d 254, 259-262, 228 Cal. Rptr. 206, 721 P.2d 87]* .

Baker also held that a statement in the form of an opinion may be actionable if the publisher implies that it is based on undisclosed defamatory facts [*Baker v. Los Angeles Herald Examiner (1986) 42 Cal. 3d 254, 266-267, 228 Cal. Rptr. 206, 721 P.2d 87* ; *Okun v. Superior Court (1981) 29 Cal. 3d 442, 451-452, 175 Cal. Rptr. 157, 629 P.2d 1369* ; *see also Restatement (Second) of Torts § 566, comment b*]. However, a publisher is not liable for defamation if the publisher gives an opinion and fully discloses all of the facts on which the opinion is based, without implying the existence of any other facts, so long as those underlying disclosed facts are provably true [*Franklin v. Dynamic Details, Inc. (2004) 116 Cal. App. 4th 375, 384-390, 10 Cal. Rptr. 3d 429* (defendant not liable for libel or trade libel for e-mail statements implying that plaintiff was dishonest in his business dealings, because defendant provided description in e-mails about specific true aspects of plaintiff's Internet web site that supported defendant's opinion)].

California has traditionally applied a "totality-of-circumstances" test to determine whether a potentially defamatory statement of fact (either express or implied) was made. Under this test, the court determines the meaning of the statement according to its natural and popular construction, and considers the total context in which a statement was made [*Baker v. Los Angeles Herald Examiner (1986) 42 Cal. 3d 254, 260-261, 228 Cal. Rptr. 206, 721 P.2d 87]* . The crucial determination whether the statement was fact or opinion was held to be a question of law for the court [*Greenbelt Coop. Publ'g Ass'n v. Bresler (1970) 398 U.S. 6, 13-15, 90 S. Ct. 1537, 26 L. Ed. 2d 6* ; *Moyer v. Amador Valley Joint Union High Sch. Dist. (1990) 225 Cal. App. 3d 720, 724, 275 Cal. Rptr. 494* ; *Jensen v. Hewlett-Packard Co. (1993) 14 Cal. App. 4th 958, 971, 18 Cal. Rptr. 2d 83]* . Although counsel should be aware of the differences between former law and the standards of *Milkovich*, until the contours of opinion law have been more solidly established in California, it is likely that in most cases, the same result will be reached regardless of which standard is applied [*see, e.g.,* *Edwards v. Hall (1991) 234 Cal. App. 3d 886, 907, 285 Cal. Rptr. 810* (stating that same result would be reached under either *Milkovich* rule or state totality-of-circumstances test)].

It also appears that *Milkovich* has not affected constitutional protection of statements that are clearly satirical, hyperbolic, imaginative, or rhetorical [*see, e.g.,* *Winter v. DC Comics (2002) 99 Cal. App. 4th 458, 467-469, 121 Cal. Rptr. 2d 431* ; *James v. San Jose Mercury News, Inc. (1993) 17 Cal. App. 4th 1, 13, 20 Cal. Rptr. 2d 890* ; *Weller v. American Broad. Cos., Inc. (1991) 232 Cal. App. 3d 991, 1001 n.7, 283 Cal. Rptr. 644* ; *Moyer v. Amador Valley Joint Union High Sch. Dist. (1990) 225 Cal. App. 3d 720, 723-724, 275 Cal. Rptr. 494]* . Moreover, a statement of opinion relating to matters of public concern that does not contain a provably false factual connotation receives full constitutional protection [*Milkovich v. Lorain Journal Co. (1990) 497 U.S. 1, 19-20, 110 S. Ct. 2695, 111 L. Ed. 2d 1* ; *James v. San Jose Mercury News, Inc. (1993) 17 Cal. App. 4th 1, 13, 20 Cal. Rptr. 2d 890* ; *Weller v. American Broad. Cos., Inc. (1991) 232 Cal. App. 3d 991, 1000, 283 Cal. Rptr. 644]* .

Statements made by church leaders when terminating the employment of other church leaders may be protected by a *First Amendment*-based "ministerial exception," if evaluating the truth or falsity of those statements would necessarily require an inquiry into the truth or falsity of the doctrinal beliefs of the church [*see, e.g.,* *Gunn v. Mariners Church, Inc. (2008) 167 Cal. App. 4th 206, 216, 84 Cal. Rptr. 3d 1* (worship director could not sue former church employer for post-termination statements to congregation that plaintiff had been "caught in a sin," had admitted to "moral and sexual actions that are sin," had suffered "breakdown in character," and was "broken man.")].

Legal Topics:

For related research and practice materials, see the following legal topics:
Computer & Internet LawCensorshipFirst Amendment ProtectionsComputer & Internet LawPrivacy & SecurityState RegulationConstitutional LawBill of RightsFundamental FreedomsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of FreedomTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesExaggerations & Imaginative CommentaryTortsIntentional TortsDefamationDefensesFair Comment & OpinionTrademark LawLikelihood of ConfusionNoncompeting ProductsParodies & Satires

California Forms of Pleading and Practice--Annotated

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§ 340.17 Pleading Requirements

[1] Publication

An action for defamation must allege that the defamatory matter was published, or communicated, to some third person [*see Draper v. Hellman Commercial Trust & Sav. Bank (1928) 203 Cal. 26, 39, 263 P. 240* (libel); *Cunningham v. Simpson (1969) 1 Cal. 3d 301, 307, 81 Cal. Rptr. 855, 461 P.2d 39* (slander)]. There is no requirement that the statement be disseminated widely; a slanderous statement heard by one person is no less a slander than that heard by a multitude [*Cunningham v. Simpson (1969) 1 Cal. 3d 301, 307, 81 Cal. Rptr. 855, 461 P.2d 39]* .

A defendant does not necessarily "publish" defamatory material by faxing a letter to a number supplied by the plaintiff, even if that fax is read by a third party. In one case, for example, an attorney sent a letter to defendant on her law office letterhead, which contained an office fax number. Defendant responded by sending to that fax number a letter addressed to the attorney that made allegedly defamatory accusations. This letter was received and read by the attorney's daughter, who worked in the law office. The court of appeal held that this fax did not constitute publication to a third person, as the attorney invited correspondence to her to be sent to that fax number and had the burden to protect her own confidentiality under those circumstances [*Martinelli v. International House USA (2008) 161 Cal. App. 4th 1332, 1338, 75 Cal. Rptr. 3d 186*].

[2] Colloquium

The fact that a person is not named in a defamatory statement does not preclude words clearly conveying a meaning within one of the statutory classifications of libel and slander from being actionable per se [*Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 829, 136 P.2d 297]* . However, in such a case, the plaintiff must sustain the burden of pleading and proof, by way of a colloquium, that the defamatory meaning attached to him [*Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 741, 20 Cal. Rptr. 405]* . But it is sufficient to state, generally, that the defamatory matter out of which the cause of action arose was published or spoken of and concerning the plaintiff [*Code Civ. Proc. § 460*; *Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 829, 136 P.2d 297* ; *Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 741, 20 Cal. Rptr. 405]* . It is not necessary for the plaintiff to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose [

Code Civ. Proc. § 460].

If the defendant controverts the allegation, however, the plaintiff then must establish at trial that it was so published or spoken [*Code Civ. Proc. § 460*]. When the person defamed is not mentioned by name, it is sufficient if the publication points to the plaintiff by description or circumstance tending to identify him or her and the jury can infer that the defamatory statement applies to the plaintiff [*Di Giorgio Fruit Corp. v. AFL-CIO (1963) 215 Cal. App. 2d 560, 569-570, 30 Cal. Rptr. 350]* . However, if a defamatory statement identifies the plaintiff only through reasonable, though not necessary, implication, the plaintiff bears the burden of presenting evidence that some person actually made the implied connection identifying the plaintiff [*SDV/ACCI, Inc. v. AT&T Corp. (9th Cir. 2008) 522 F.3d 955, 960*].

Language cannot have the quality of a libel unless there is a certainty as to the individuals accused. There must be a personal application of the publication to the plaintiff. When the language refers to a large group of people, a plaintiff cannot by use of a colloquium make the publication specifically refer to him [*Los Angeles Fire & Police Protective League v. Rodgers (1970) 7 Cal. App. 3d 419, 425, 86 Cal. Rptr. 623* (more than 5,000 persons); *Smith v. Harnish (1959) 167 Cal. App. 2d 115, 118, 333 P.2d 815* (indeterminate group of fictitious persons who might at some unstated future time "unscrupulously" defame others in a legislative proceeding); *Noral v. Hearst Publications, Inc. (1940) 40 Cal. App. 2d 348, 350, 104 P.2d 860* (accusation against "officials of the Worker's Alliance" when that category included more than 162 officials)]. If no single member of a group could have stated a cause of action, then neither can all of them together [*Mullins v. Brando (1970) 13 Cal. App. 3d 409, 422-423, 91 Cal. Rptr. 796]* .

[3] Innuendo When Language Ambiguous

The purpose of an innuendo is to declare what the words meant to those to whom they were published. When the words themselves, under any circumstances, would convey to those who read or hear them a defamatory meaning, there is no occasion for the pleading of an innuendo. Conversely, if the words under no circumstances could convey a defamatory meaning, then no innuendo can make them defamatory. An innuendo is necessary when the words used are susceptible of either a defamatory or an innocent interpretation [*Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 828, 136 P.2d 297* ; *Bates v. Campbell (1931) 213 Cal. 438, 443, 2 P.2d 383]* .

A plaintiff may not, however, plead extrinsic facts to enlarge or change the plain and ordinary meaning of the language used in the publication which is reasonably susceptible of only an innocent interpretation and thereby state a cause of action for libel. The innuendo may only interpret its meaning but cannot introduce one other or broader than the language naturally bears; it cannot add to or enlarge or change the sense of the published words [*Emde v. San Joaquin County Cent. Labor Council (1943) 23 Cal. 2d 146, 159-160, 143 P.2d 20* ; *Corman v. Blanchard (1962) 211 Cal. App. 2d 126, 138, 27 Cal. Rptr. 327]* .

[4] Inducement

An inducement sets forth the extrinsic facts and circumstances that, coupled with the language uttered, make it actionable when standing alone the language used would appear not to affect the plaintiff injuriously [*Grand v. Dreyfus (1898) 122 Cal. 58, 62, 54 P. 389* (slander)]. Stated another way, an inducement indicates that the words were understood in a defamatory sense and shows the situation or opinion of the readers was such that they derived a defamatory meaning from them [*Peabody v. Barham (1942) 52 Cal. App. 2d 581, 585, 126 P.2d 668 , overruled on other grounds, MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36* (libel)].

[5] Identification of Plaintiff With Fictional Character

A work of fiction may libel an actual nonfictional person if a reasonable person would understand that the fictional character portrayed was in fact the plaintiff [*Bindrim v. Mitchell (1979) 92 Cal. App. 3d 61, 78, 155 Cal. Rptr. 29]* . A cause of action for defamation is not established merely because someone believes the fictional character refers to the

plaintiff; the belief must be reasonable [*Aguilar v. Universal City Studios, Inc. (1985) 174 Cal. App. 3d 384, 391, 219 Cal. Rptr. 891]* . Moreover, mere similarity or even identity of names is insufficient to establish that a work of fiction is about a real person [*Aguilar v. Universal City Studios, Inc. (1985) 174 Cal. App. 3d 384, 388, 219 Cal. Rptr. 891]* .

[6] Falsity

Under the common law, a defendant is not liable for defamation if he or she proves the truth of the defamatory statement [*see Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal. 2d 224, 233, 11 Cal. Rptr. 97, 359 P.2d 465* ; *see also Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 776, 106 S. Ct. 1558, 89 L. Ed. 2d 783* (holding that, at least in some cases, plaintiff must prove falsity of allegedly defamatory statement)].

However, recent decisions of the United States Supreme Court have interpreted *U.S. Const. amend. I*, as requiring that the burden be shifted, at least in certain cases, to the plaintiff to plead and prove falsity. Thus, if a plaintiff is a public figure, or if the plaintiff is a private figure who is suing a newspaper or other media defendant for publishing speech of a public concern, that plaintiff bears the burden of proving the falsity of the defamatory statement before recovering damages [*Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 768-769, 776-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783* (private figure plaintiff); *Garrison v. Louisiana (1964) 379 U.S. 64, 74, 85 S. Ct. 209, 13 L. Ed. 2d 125* (public official plaintiff)].

For discussion of other constitutional requirements in defamation actions, see *§ 340.18*.

[7] Statutory Malice: Exemplary Damages After Demand for Retraction Under Civ. Code § 48a

A statutorily defined "actual malice," not to be confused with the constitutionally required "actual malice" [*see § 340.18[2][a]*], is required to be pleaded and proved by a plaintiff seeking exemplary damages in an action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, when plaintiff has demanded a retraction and the defendant has failed to publish or broadcast the retraction under the circumstances described in *Civ. Code § 48a(1)-(3)* [*see Civ. Code § 48a(1)-(3), (4)(c)*]. Specifically, statutory actual malice is the state of mind arising from hatred or ill will toward the plaintiff, except that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast does not constitute actual malice [*Civ. Code § 48a(4)(d)*].

The above-described malice requirement applies only to those retraction situations described in *Civ. Code § 48a(1)-(3)* [*see Manguso v. Oceanside Unified Sch. Dist. (1984) 153 Cal. App. 3d 574, 581, 200 Cal. Rptr. 535* (*Civ. Code § 48a* as special statutory protection given to newspapers); *Burnett v. National Enquirer, Inc. (1983) 144 Cal. App. 3d 991, 1000-1004, 193 Cal. Rptr. 206* (applicability of *Civ. Code § 48a*)].

It appears that both constitutional "actual malice" and statutory "actual malice" are required to support an award of punitive damages in an action covered by the retraction statute [*see McCoy v. Hearst Corp. (1986) 42 Cal. 3d 835, 872, 231 Cal. Rptr. 518, 727 P.2d 711]* .

[8] Special Damages

Unless a communication is defamatory on its face, an averment of special damages is required [*Civ. Code § 45a*; *Gautier v. General Tel. Co. (1965) 234 Cal. App. 2d 302, 309, 44 Cal. Rptr. 404]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsGeneral OverviewCivil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsSpecial DamagesCivil

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§ 340.18 Constitutional Limitations on Recovery

[1] In General

Decisions of the United States Supreme Court have placed wide constitutional limitations on plaintiffs in defamation actions. These limitations vary depending on whether the plaintiff is a private person, as opposed to a public official or public figure. The limitations provided by *U.S. Const. amend. I,* do not apply in all cases, however [*see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 105 S. Ct. 2939, 86 L. Ed. 2d 593, 603-604* (no constitutional protections apply to statements about private plaintiffs if the statement does not relate to a matter of public concern)]. Although the Supreme Court has stated that it is an open question whether or not the protection of *U.S. Const. amend. I* extends to cases involving nonmedia defendants [*see Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 779 n.4, 106 S. Ct. 1558, 89 L. Ed. 2d 783* ; *Hutchinson v. Proxmire (1979) 443 U.S. 111, 133, 99 S. Ct. 2675*], the Court has also indicated that nonmedia defendants are treated in the same manner as media defendants under *U.S. Const. amend. I* [*see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 773, 105 S. Ct. 2939, 86 L. Ed. 2d 593* (White, J., concurring); *see also Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 770-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783* (as with public figure plaintiff, private figure suing media defendant for speech of public concern required to prove falsity)]. One California court of appeal has adopted this view by expressly holding that the constitutional privilege to publish without actual malice applies equally to nonmedia defamers [*Miller v. Nestande (1987) 192 Cal. App. 3d 191, 200, 237 Cal. Rptr. 359]* .

[2] Public Officials

[a] Actual Malice Requirement

In *New York Times Co. v. Sullivan (1964) 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686* , the Supreme Court reversed a judgment against four individuals and the corporation that publishes the New York Times newspaper. The judgment had been rendered under an Alabama law by which a political advertisement that had appeared in the New York Times was deemed libelous per se because the defense of truth could not be established. The Court considered the case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on

government and public officials [*New York Times Co. v. Sullivan (1964) 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686]* . To foster this commitment to public debate, the Court announced a constitutional privilege available to all defendants sued by public officials for defamation: a public official may not recover damages for a defamatory falsehood relating to his or her official conduct unless he or she proves that the statement was made with "actual malice"--that is, with knowledge that it was false or with reckless disregard of whether or not it was true [*New York Times Co. v. Sullivan (1964) 376 U.S. 254, 279-280, 84 S. Ct. 710, 11 L. Ed. 2d 686]* . The proof presented by a public official must be of convincing clarity in order to demonstrate constitutional malice and overcome the privilege [*New York Times Co. v. Sullivan (1964) 376 U.S. 254, 286-288, 84 S. Ct. 710, 11 L. Ed. 2d 686]* . In evaluating claims by public officials that a defendant recklessly disregarded the truth of a publication, there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his or her publication [*St. Amant v. Thompson (1968) 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262]* .

In *Masson v. New Yorker Magazine, Inc. (1991) 501 U.S. 496, 111 S. Ct. 2419, 115 L. Ed. 2d 447* , the Supreme Court discussed the actual malice requirement in the context of a claim that plaintiff (a public figure) was defamed when a magazine article attributed to him, within quotation marks, words he had not said. The general defamation principles applicable to such a claim are discussed in *§ 340.15*.

Whether a fabricated quotation can be the basis for a finding of actual malice rests on the requisite knowledge of falsity or reckless disregard as to truth or falsity, which in turn depends on the concept of falsity in this context. Although any alteration of a verbatim quotation is false, not every alteration constitutes the falsity required to prove actual malice [*Masson v. New Yorker Magazine, Inc. (1991) 501 U.S. 496, 513-515, 111 S. Ct. 2419, 115 L. Ed. 2d 447]* .

The Court declined to create a discrete rule applicable to inaccurate quotations, as it had similarly declined to do with respect to opinions, holding instead that the essential principles of defamation law suffice to delineate liability in this area [*Masson v. New Yorker Magazine, Inc. (1991) 501 U.S. 496, 516, 111 S. Ct. 2419, 115 L. Ed. 2d 447* ; *see Milkovich v. Lorain Journal Co. (1990) 497 U.S. 1, 19-20, 110 S. Ct. 2695, 111 L. Ed. 2d 1* (discussed in *§ 340.16*)].

Minor changes to correct grammar or syntax ("technical falsity") do not amount to falsity for purposes of proving actual malice [*Masson v. New Yorker Magazine, Inc. (1991) 501 U.S. 496, 514, 111 S. Ct. 2419, 115 L. Ed. 2d 447]* . Moreover, an alteration that goes beyond a technical correction of this type does not by itself prove falsity within the meaning of the definition of actual malice, because alteration of a speaker's words that effects no material change in meaning (including any meaning conveyed by the manner or fact of expression) imparts no injury to the speaker that is compensable as a defamation [*Masson v. New Yorker Magazine, Inc. (1991) 501 U.S. 496, 514-515, 111 S. Ct. 2419, 115 L. Ed. 2d 447]* . A deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity of a statement attributed to a public figure unless the alteration results in a material change in the meaning conveyed by the statement. If the alteration of a plaintiff's words gave a different meaning to the statements actually made, bearing on their defamatory character, then the device of quotations might well be critical in establishing that the words are actionable [*Masson v. New Yorker Magazine, Inc. (1991) 501 U.S. 496, 517, 111 S. Ct. 2419, 115 L. Ed. 2d 447]* .

On remand to the Ninth Circuit, the court in *Masson v. New Yorker Magazine, Inc. (9th Cir. 1992) 960 F.2d 896* held that a trier of fact could conclude that, under the standard set forth in *Harte-Hanks Commc'ns v. Connaughton (1989) 491 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562* , the publisher acted with malice in publishing the allegedly inaccurate quotations because it had a high degree of awareness of probable falsity, or it had reason to doubt the veracity of the author of the story or the accuracy of the facts and quotations in the story and it failed to take reasonable steps to dispel those doubts [*Masson v. New Yorker Magazine, Inc. (9th Cir. 1992) 960 F.2d 896, 900* ; *see also Khawar v. Globe Int'l, Inc. (1998) 19 Cal. 4th 254, 276-279, 79 Cal. Rptr. 2d 178, 965 P.2d 696* (actual malice found when tabloid published photograph and statements identifying plaintiff as real assassin of Robert Kennedy, since newspaper had obvious reasons to doubt accuracy of information but made no attempt to verify); *but see Rosenaur v. Scherer (2001) 88 Cal. App. 4th 260, 275-276, 105 Cal. Rptr. 2d 674* (right to rely on information provided in public documents absent reason to doubt accuracy of information)].

The court distinguished publishers that do nothing to investigate the accuracy of a story and those that do not investigate the accuracy of a story even when they have obvious reasons to doubt the accuracy of a story. The court stated that once doubt exists, the publisher must act reasonably in dispelling it. Thus, when the publisher undertakes to investigate the accuracy of a story and learns facts casting doubt on the information contained in the story, it may not ignore those doubts, even though it had no duty to conduct the investigation in the first place [*Masson v. New Yorker Magazine, Inc. (9th Cir. 1992) 960 F.2d 896, 901]* .

In reaching its decision, the court rejected the incremental harm doctrine, stating that it is not an element of California libel law. In the libel context, the incremental harm doctrine proposes to measure harm inflicted by the challenged statements beyond the harm imposed by the rest of the publication. The doctrine provides that if the measured harm is determined to be nominal or nonexistent, then the statements are not actionable [*Masson v. New Yorker Magazine, Inc. (9th Cir. 1992) 960 F.2d 896, 898-899]* .

When actual malice is the pivotal issue in a defamation case, summary judgment in favor of a publisher of the defamatory statement is generally the favored remedy if the opponent fails to present clear and convincing evidence of actual malice [*cf. Antonovich v. Superior Court (1991) 234 Cal. App. 3d 1041, 1047, 285 Cal. Rptr. 863* (plaintiff's showing of actual malice was sufficient to defeat defendant's prima facie showing of good faith belief in statement's truth)].

[b] Public Officials Covered

The United States Supreme Court has not specifically defined who is a "public official." However, the issue was addressed in three opinions in *Rosenblatt v. Baer (1966) 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597* . In the lead opinion, Justice Brennan stated that the public-official designation applies, at the very least, to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs [*Rosenblatt v. Baer (1966) 383 U.S. 75, 85, 86 S. Ct. 669, 15 L. Ed. 2d 597]* . The Brennan opinion suggests that all who are employed by the government are not necessarily public officials for the purposes of defamation law if the position held is not one of power and importance. Writing separately, Justices Douglas and Black advocated a broad scope that would encompass anyone who might be perceived to be in the public domain [*Rosenblatt v. Baer (1966) 383 U.S. 75, 88-91, 94-96, 86 S. Ct. 669, 15 L. Ed. 2d 597* ; *see Mosesian v. McClatchy Newspapers (1988) 205 Cal. App. 3d 597, 604-608, 252 Cal. Rptr. 586* (discussing and analyzing various opinions in *Rosenblatt*)].

In the view of at least one California court, the Brennan opinion is both dicta and lacking a majority on the issue of the scope of the public-official designation, and is therefore not binding precedent [*see Mosesian v. McClatchy Newspapers (1988) 205 Cal. App. 3d 597, 607, 252 Cal. Rptr. 586]* . Nevertheless, this court adopted the limitations implicit in the Brennan opinion. Under this view, a public official is someone in the government's employ who: (1) has or appears to have substantial responsibility for or control over the conduct of governmental affairs; (2) usually enjoys significantly greater access to the mass media and therefore, has a more realistic opportunity to contradict false statements than has a private individual; (3) holds a position in government that has such apparent importance that the public has an independent interest in the person's qualifications and performance beyond the general public interest in the qualifications and performance of all government employees; and (4) holds a position that invites public scrutiny and discussion of the person holding it entirely apart from the scrutiny and discussion occasioned by the particular controversy [*Mosesian v. McClatchy Newspapers (1988) 205 Cal. App. 3d 597, 608-609, 252 Cal. Rptr. 586]* .

In an earlier case, the court of appeal held that a former superintendent of a junior college who sues for defamation must meet the *New York Times* test [*McCunn v. California Teachers Ass'n (1970) 3 Cal. App. 3d 956, 962-964, 83 Cal. Rptr. 846]* . In addition, in a subsequent case, the court of appeal held that the superintendent of a charter school district was a public official for these purposes, because charter schools receive public funding and are considered part of the

state's public school system [*Ghafur v. Bernstein (2005) 131 Cal. App. 4th 1230, 1238-1240, 32 Cal. Rptr. 3d 626]* .

The concept that a public school teacher is a public official, adopted in certain other states, was expressly rejected in *Franklin v. Benevolent & Protective Order of Elks (1979) 97 Cal. App. 3d 915, 924-925, 159 Cal. Rptr. 131* . The governance or control which a public classroom teacher might exercise over the conduct of government is too remote and philosophical in the court's view, to justify exposing teachers to a qualifiedly privileged assault on reputation. The court concluded that an appropriate balancing of freedom of expression against sanctity of reputation does not require, and an appropriate regard for the role of the classroom teacher in present society should not permit, extension of the public official concept to include a school teacher.

The holder of a state-issued license to conduct horse racing events is not a public official. Such a person is not a governmental employee, and the state regulation of private enterprise through licensing requirements does not make the job a governmental function [*Mosesian v. McClatchy Newspapers (1988) 205 Cal. App. 3d 597, 608-611, 252 Cal. Rptr. 586* (analogizing that the governmental licensing of attorneys does not make the practice of law a governmental function)].

A deputy public defender is not a public official because he or she does not have "substantial responsibility for or control over the conduct of governmental affairs." The control that a deputy public defender may exercise over the management of a particular case must invariably be controlled in turn by considerations of the best interests of the individual client, tempered only by professional constraints applicable to all attorneys and not by any generalized public interest beyond concern that indigent defendants should be competently and professionally represented [*James v. San Jose Mercury News, Inc. (1993) 17 Cal. App. 4th 1, 11, 20 Cal. Rptr. 2d 890]* . In so holding, the court of appeal rejected the holding in *Tague v. Citizens for Law & Order, Inc. (1977) 142 Cal. Rptr. 689* , in which the appellate department of the superior court had held that an assistant public defender is a public official.

[c] Publications Covered

The privilege delineated in the *New York Times* case applies to books as well as to the news media--newspapers, magazines, radio, and television [*Church of Scientology of Cal. v. Dell Publ'g Co., Inc. (N.D. Cal. 1973) 362 F. Supp. 767, 769]* . In addition, dicta from a recent Supreme Court decision suggests that the constitutional privileges derived from the *First Amendment* apply to nonmedia as well as media defendants [*see* *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 773, 105 S. Ct. 2939, 86 L. Ed. 2d 593* (four members of dissent per Brennan, J., and White, J., concurring)]. One California court of appeal has adopted this position by expressly holding that the constitutional privilege to publish without actual malice applies equally to media and nonmedia defendants [*Miller v. Nestande (1987) 192 Cal. App. 3d 191, 200, 237 Cal. Rptr. 359]* .

[d] Political Candidates Covered in California

Whatever rights of free speech the Constitution guarantees to the public with respect to criticism of incumbent public officials must also be granted to the latter and their supporters in an election campaign when their speech is addressed to the qualifications of their opponents [*Noonan v. Rousselot (1966) 239 Cal. App. 2d 447, 452, 48 Cal. Rptr. 817]* .

[3] Public Figures

[a] Definition

The Supreme Court effectively extended the *New York Times* privilege to defendants who are sued for defamation by "public figures" in the companion cases of *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker* [*Curtis Publ'g Co. v. Butts (1967) 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094]* . Although a majority of the Court could not agree on an opinion, the Court concluded that constitutional protection should be afforded for criticism of nonpublic officials who are nevertheless intimately involved in the resolution of important public questions or who, by reason of

their fame, shape events in areas of concern to society at large [*Curtis Publ'g Co. v. Butts (1967) 388 U.S. 130, 164, 87 S. Ct. 1975, 18 L. Ed. 2d 1094]* .

The definition of a public figure requires that the plaintiff assume special prominence in the resolution of public questions by voluntarily and actively seeking, in connection with any given matter of public interest, to influence the resolution of the issues involved [*Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 352, 94 S. Ct. 2997, 41 L. Ed. 2d 789* ; *Reader's Digest Assn. v. Superior Court (1984) 37 Cal. 3d 244, 254, 208 Cal. Rptr. 137, 690 P.2d 610]* . Only in this manner does an individual relinquish an interest in the protection of his or her personal name [*Franklin v. Benevolent & Protective Order of Elks (1979) 97 Cal. App. 3d 915, 929, 931, 159 Cal. Rptr. 131* (high school teacher using book in classroom who did not (1) anticipate controversy, (2) engage in activities connected with controversy beyond those required by school district regulations, (3) respond to media inquiries, or (4) call press conferences or take case to public in attempt to influence resolution of issues, as not assuming special prominence beyond that thrust on her)].

If a person is neither a public personality, nor thrusts himself or herself into the vortex of a particular public issue or engages the public's attention in an attempt to influence its outcome, the person is not a public figure [*Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 352, 94 S. Ct. 2997, 41 L. Ed. 2d 789]* . For example, the wife of a scion of a wealthy industrial family was held not to be a public figure because she did not assume any role of special prominence in the affairs of society, did not thrust herself to the forefront of any particular public controversy in order to influence resolution of any issues involved, and even though she resorted to a state court in filing for separate maintenance, did not freely choose to publicize issues as to the propriety of her married life [*Time, Inc. v. Firestone (1976) 424 U.S. 448, 453, 454, 96 S. Ct. 958, 47 L. Ed. 2d 154, 162-163]* .

In determining whether or not a plaintiff is a public figure, courts should look for evidence of affirmative actions by which the purported public figure has thrust himself or herself into the forefront of a particular controvery. The determination is often a close question that can only be resolved by considering the totality of the circumstances comprising each individual controversy, and as such, the mere involvement of a person in a matter which the media deems to be of interest to the public does not, in and of itself, require that such a person become a public figure for the purpose of a subsequent libel action [*Reader's Digest Assn. v. Superior Court (1984) 37 Cal. 3d 244, 254-255, 208 Cal. Rptr. 137, 690 P.2d 610* (drug rehabilitation organization and its founder were public figures because of their myriad attempts to thrust their case and organization in general into public eye)].

[b] "All Purpose" or "Limited Purpose" Public Figures

A defendant's claim that the plaintiff is a "public figure" can be grounded on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he or she becomes a public figure for all purposes and in all contexts. This type of public figure is known as an "all purpose" public figure [*see* *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789, 812* ; *Reader's Digest Assn. v. Superior Court (1984) 37 Cal. 3d 244, 253, 208 Cal. Rptr. 137, 690 P.2d 610]* . Examples of persons who have been held to be all-purpose public figures include a nationally well-known attorney [*Belli v. Curtis Publ'g Co. (1972) 25 Cal. App. 3d 384, 388, 102 Cal. Rptr. 122]* and a famous television personality [*Montandon v. Triangle Publ'ns, Inc. (1975) 45 Cal. App. 3d 938, 946, 120 Cal. Rptr. 186]* .

Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his or her life. It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation [*Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789, 812]* . For example, a prominent local lawyer and businessman who obtained a horse racing license for a newly established racing meet, and intended to seek renewal of the license for the following year, was held to be a limited purpose public figure with respect to a defamation action brought against a local

newspaper that revealed criminal elements in his background, because the licensing was the subject of much public controversy, and the plaintiff's personal qualifications were pertinent to his fitness for holding the license [*Mosesian v. McClatchy Newspapers (1991) 285 Cal. Rptr. 430]* .

More commonly, an individual voluntarily injects himself or herself, or is drawn, into a particular public controversy and thereby becomes a public figure for a limited range of issues [*see Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789, 812]* . This type of public figure is known as a "limited purpose" public figure, and unlike the all-purpose public figure, loses certain protection for his or her reputation only to the extent that the allegedly defamatory communication relates to his or her role in a public controversy [*Reader's Digest Assn. v. Superior Court (1984) 37 Cal. 3d 244, 254, 208 Cal. Rptr. 137, 690 P.2d 610]* . For example, a nationally known drug rehabilitation organization and its founder have been held to be limited purpose public figures for the purposes of general controversy surrounding the effectiveness of the organization's rehabilitation program [*Reader's Digest Assn. v. Superior Court (1984) 37 Cal. 3d 244, 254, 208 Cal. Rptr. 137, 690 P.2d 610]* . To be considered a public figure even for limited purposes, the person must have either voluntarily engaged the public's attention in an attempt to influence the outcome of a public controversy, or must have acquired such public prominence in relation to the controversy as to permit media access sufficient to effectively counter media-published defamatory statements [*Khawar v. Globe Int'l, Inc. (1998) 19 Cal. 4th 254, 265, 79 Cal. Rptr. 2d 178, 965 P.2d 696]* .

[4] Private Plaintiffs

[a] Application of Actual Malice Requirement

In *Rosenbloom v. Metromedia, Inc.* [*Rosenbloom v. Metromedia, Inc. (1971) 403 U.S. 29, 91 S. Ct. 1811, 29 L. Ed. 2d 296]* , a magazine distributor sued a radio station for allegedly defamatory newscasts. A plurality of the Supreme Court concluded that all discussion and communication involving matters of public or general concern should be protected by the *New York Times* privilege [*Rosenbloom v. Metromedia, Inc. (1971) 403 U.S. 29, 44, 91 S. Ct. 1811, 29 L. Ed. 2d 296]* . This extension of the privilege was retracted by the Court in *Gertz v. Robert Welch, Inc. Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 346-347, 94 S. Ct. 2997, 41 L. Ed. 2d 789]* . In place of *Rosenbloom*, the *Gertz* majority stated the following three constitutional principles applicable when a private individual sues a publisher or broadcaster for a statement which is defamatory on its face:

- Fault: A plaintiff must show that the publisher or broadcaster was at fault for publishing the statement. However, so long as the States do not impose liability without fault, they may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual [*Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 347, 94 S. Ct. 2997, 41 L. Ed. 2d 789]* . The Court suggested that a negligence standard of fault would be appropriate [*see Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 350, 94 S. Ct. 2997, 41 L. Ed. 2d 789* ; *see also Widener v. Pacific Gas & Elec. Co. (1977) 75 Cal. App. 3d 415, 433, 142 Cal. Rptr. 304* (suggesting in dicta that standard in California is one of negligence)].

- No Presumed Damages: When a defamation action is within the ambit of a *First Amendment* privilege, the federal constitution precludes a presumption of damages unless actual malice, as defined by the *Supreme Court in New York Times Co. v. Sullivan (1964) 376 U.S. 254, 279-280, 84 S. Ct. 710, 11 L. Ed. 2d 686* , is shown. In the absence of such malice, a private individual may recover only for "actual injury." Actual injury includes impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering, as well as out-of-pocket losses. Awards for actual injury must be supported by competent evidence, although compensation for actual damages such as loss of reputation and mental suffering may be awarded without proof that assigns an actual dollar value [*Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 349-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789]* .

- Punitive Damages: Like general damages, before the plaintiff can recover punitive damages from a publisher or broadcaster, he or she must show that the defendant acted intentionally or recklessly [*see Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 349-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789]* .

[b] Limitation to Matters of Public Concern

The rules of *Gertz* do not apply in all cases brought by private individuals [*cf. Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 776-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783* (private figure suing media defendant for speech of public concern required to prove falsity)]. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 759-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593* , the United States Supreme Court limited *Gertz* by holding that it does not apply to cases in which the allegedly defamatory statement does not relate to a matter of public concern.

In *Dun & Bradstreet*, the Court held that a commercial credit report did not involve a matter of public concern [*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 761-763, 105 S. Ct. 2939, 86 L. Ed. 2d 593]* . In so holding, the Court emphasized that the type of commercial credit reporting in issue did not involve any strong interest in the free flow of commercial information nor did it require special protection to ensure that debate on public issues would be robust, uninhibited, and wide-open. The Court considered the following factors relevant in reaching its finding: (1) the statement was solely in the interest of the publisher and its specific business audience, (2) it was made available to only five subscribers who had agreed not to disseminate the report further, and (3) it was made for profit [*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 761-763, 105 S. Ct. 2939, 86 L. Ed. 2d 593]* .

A California court has held that a deputy public defender's performance, and administration of the criminal laws in general and laws relating to child molestation in particular, were matters of legitimate public interest and concern. Therefore, the qualified constitutional protections applicable to publications by media defendants about private plaintiffs on matters of public interest or public concern applied to a deputy public defender's libel action against a newspaper based on a column that named him in the context of a discussion of asserted violations of law by defense attorneys in criminal cases involving child victims [*James v. San Jose Mercury News, Inc. (1993) 17 Cal. App. 4th 1, 4, 11, 20 Cal. Rptr. 2d 890]* .

[c] No Neutral Reportage Privilege Recognized

Some jurisdictions other than California have recognized a "neutral reportage" privilege protecting the accurate and disinterested reporting of charges brought against a public figure by a responsible, prominent organization, even when the original charges are defamatory [*see Khawar v. Globe Int'l, Inc. (1998) 19 Cal. 4th 254, 268-269, 79 Cal. Rptr. 2d 178, 965 P.2d 696* (describing Second Circuit articulation of privilege)]. Without deciding whether the privilege may ever be constitutionally required, the California Supreme Court has specifically rejected the existence of the privilege for the republication of defamatory reports concerning private figures [*Khawar v. Globe Int'l, Inc. (1998) 19 Cal. 4th 254, 273, 79 Cal. Rptr. 2d 178, 965 P.2d 696]* . The Supreme Court concluded that the reporting of false and defamatory accusations about a private person will rarely provide valuable information in the resolution of a matter of public concern, while such reporting can have a devastating effect on the reputation of the accused individual. Further, a private person, by virtue of his or her status as a private person, has not voluntarily elected to encounter an increased risk of defamation by entering a public debate and may lack sufficient media access to counter the accusations [*Khawar v. Globe Int'l, Inc. (1998) 19 Cal. 4th 254, 272-273, 79 Cal. Rptr. 2d 178, 965 P.2d 696]* .

Neither the California Supreme Court nor any other California court has specifically ruled on whether the privilege may exist when the plaintiff is a public figure or public official [*see Khawar v. Globe Int'l, Inc. (1998) 19 Cal. 4th 254, 269* & n.2, 271, 273, *79 Cal. Rptr. 2d 178, 965 P.2d 696]* .

[5] Exercise of Religious Belief

When a defamation action involves members of a religious organization, it may pit two societal interests--the protection of an individual's reputation, and the free exercise of religion--against each other. Accommodation of these competing interests requires that, for a plaintiff to recover damages for defamatory remarks made during the course of a doctrinal explanation by a duly authorized minister, the plaintiff must show by clear and convincing evidence that the defamation was made with constitutional malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not. Whether the plaintiff is a public figure, or whether the publication is in a newspaper, is irrelevant [*McNair v. Worldwide Church of God (1987) 197 Cal. App. 3d 363, 377, 242 Cal. Rptr. 823]* . Thus, when remarks about a plaintiff's conduct as a wife and as a member of the church were made while the speaker was explaining the church's newly developed and widely misunderstood doctrine on divorce and remarriage, first at a conference, and then in a report, the plaintiff's inability to establish the requisite malice was fatal to her defamation action [*McNair v. Worldwide Church of God (1987) 197 Cal. App. 3d 363, 377-378, 242 Cal. Rptr. 823* ; *see also* Ch. 110, *Churches and Religious Organizations*].

[6] De Novo Review

If a plaintiff has prevailed at trial in a defamation action in which plaintiff was required to prove constitutional "actual malice," the defendant may obtain a de novo review by an appellate court on the issue of actual malice [*McCoy v. Hearst Corp. (1986) 42 Cal. 3d 835, 842, 231 Cal. Rptr. 518, 727 P.2d 711* ; *see Harte-Hanks, Inc. v. Connaughton (1989) 491 U.S. 657, 689-693, 109 S. Ct. 2678, 105 L. Ed. 2d 562* (affirming jury verdict and circuit court of appeal affirmation after conducting extensive review of evidence relating to actual malice)]. The appellate court is required to conduct an independent review of all of the evidence presented on the issue of actual malice. Normal principles of substantial evidence review do not apply. The court may not restrict itself to evidence favorable to the judgment. In addition, the court is not required to consider the evidence in the light most favorable to the verdict and may substitute its own inferences on the issue of actual malice for those drawn by the trier of fact [*McCoy v. Hearst Corp. (1986) 42 Cal. 3d 835, 845-847, 231 Cal. Rptr. 518, 727 P.2d 711* (reversing judgment of trial court after conducting extensive review of evidence relating to actual malice); *see Harte-Hanks, Inc. v. Connaughton (1989) 491 U.S. 657, 689-693, 109 S. Ct. 2678, 105 L. Ed. 2d 562* (affirming jury verdict and court of appeal affirmation after conducting extensive review of evidence relating to actual malice)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesPunitive DamagesCommunications LawRelated Legal IssuesDefamationConstitutional LawBill of RightsFundamental FreedomsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationPublic FiguresConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationPublic QuestionsConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechFree PressGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of FreedomCriminal Law & ProcedureAccusatory InstrumentsGeneral OverviewCriminal Law & ProcedureAppealsStandards of ReviewDe Novo ReviewGeneral OverviewCriminal Law & ProcedureAppealsStandards of ReviewSubstantial EvidenceGeneral OverviewEducation LawAdministration & OperationCharter SchoolsEducation LawCivil LiabilityGeneral OverviewEducation LawFaculty & StaffGeneral OverviewEducation LawFaculty & StaffFreedom of SpeechGeneral OverviewEducation LawFaculty & StaffFreedom of SpeechClassroom SpeechEducation LawFaculty & StaffQualificationsCertification & LicensureGeneral OverviewEducation LawReligion in SchoolsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofClear & Convincing ProofGovernmentsState & Territorial GovernmentsGaming & LotteriesGovernmentsState & Territorial GovernmentsLicensesTortsDamagesGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsDamagesCompensatory DamagesPain &

SufferingEmotional & Mental DistressEvidenceTortsDamagesPunitive DamagesAward CalculationsGeneral OverviewTortsDamagesPunitive DamagesConduct Supporting AwardsTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefamation Per SeTortsIntentional TortsDefamationDefensesFair Comment & OpinionTortsIntentional TortsDefamationDefensesPrivilegesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesConstitutional PrivilegesTortsIntentional TortsDefamationDefensesTruthTortsIntentional TortsDefamationElementsLibelTortsIntentional TortsDefamationProcedureTortsIntentional TortsDefamationRemediesGeneral OverviewTrade Secrets LawCivil ActionsEvidenceTrade Secrets LawCivil ActionsRemediesDamagesGeneral Overview

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§ 340.19 Interpretation of Defamatory Language

[1] In General

The court must determine as a matter of law whether the publication is libelous on its face [*MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 546, 343 P.2d 36* ; *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 288-289, 112 Cal. Rptr. 609]* . When allegedly defamatory material is unambiguous and in the court's opinion could not reasonably be understood as nondefamatory, the issue of libel should not be submitted to the jury [*Polygram Records v. Superior Court (1985) 170 Cal. App. 3d 543, 551, 216 Cal. Rptr. 252* ; *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 288-289, 112 Cal. Rptr. 609* ; *Patton v. Royal Indus., Inc. (1968) 263 Cal. App. 2d 760, 765, 70 Cal. Rptr. 44]* .

[2] Language Not Defamatory

If material published is not fairly susceptible of a defamatory meaning, it is proper to dismiss the action [*Mellen v. Times-Mirror Co. (1914) 140 P. 277* ; *Polygram Records v. Superior Court (1985) 170 Cal. App. 3d 543, 551, 216 Cal. Rptr. 252* ; *Arno v. Stewart (1966) 245 Cal. App. 2d 955, 959-960, 54 Cal. Rptr. 392]* . For example, when there can be only one reasonable interpretation of a cartoon and that interpretation is nonlibelous, a court is required to rule as a matter of law that the material is not defamatory, and it may not submit the issue to a jury [*Yorty v. Chandler (1970) 13 Cal. App. 3d 467, 475, 91 Cal. Rptr. 709]* .

[3] Jury Question

It is error for a court to rule as a matter of law that a publication cannot be defamatory on its face when, by any reasonable interpretation, the language is susceptible of a defamatory meaning [*Mellen v. Times-Mirror Co. (1914) 167 Cal. 587, 593, 140 P. 277* ; *Cameron v. Wernick (1967) 251 Cal. App. 2d 890, 893, 60 Cal. Rptr. 102]* . If it is determined that the publication is susceptible of a defamatory meaning and also of an innocent and nondefamatory meaning, it is for the jury to determine which meaning would be given to it by the average reader [*MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 546, 343 P.2d 36* ; *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 288-289, 112 Cal. Rptr. 609]* . Even when the covert meaning ascribed to the words is improbable, the question

of whether the words are defamatory or innocent should be left to the jury for determination under proper instructions [*Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 743, 20 Cal. Rptr. 405* ; *Gallagher v. Chavalas (1941) 48 Cal. App. 2d 52, 58, 119 P.2d 408]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 340.20 Who Can and Cannot Sue

[1] Corporations

Words spoken or written of a stockholder or officer give no right of action to the corporation unless they have been spoken or written in direct relation to the trade or business of the corporation [*Washburn v. Wright (1968) 261 Cal. App. 2d 789, 793, 68 Cal. Rptr. 224* ; *see also Triton Ins. Underwriters Inc. v. National Chiropractic Ins. Co. (1965) 232 Cal. App. 2d 829, 832, 43 Cal. Rptr. 504]* .

[2] Multiple Plaintiffs and Class Actions

When two or more persons are affected by the same defamatory matter, the defamation is deemed several as to each of them, and each may therefore sue for it independently of the other [*Writers Guild of Am., W., Inc. v. Superior Court (1969) 273 Cal. App. 2d 841, 847, 78 Cal. Rptr. 520]* .

However, it has been held that a fire and police protective league of more than 5,000 members was not "similarly situated" and did not share a community of interest in alleged defamatory statements accusing three of its police officers of brutality. Thus, the league did not have standing to maintain a class action on behalf of all of its members for damages for alleged defamation of such members [*Los Angeles Fire & Police Protective League v. Rodgers (1970) 7 Cal. App. 3d 419, 423-425, 86 Cal. Rptr. 623]* .

[3] Municipal Corporations

A municipality may not, consistent with the free speech provision of the California Constitution, bring a libel action against an individual [*Albany v. Meyer (1929) 99 Cal. App. 651, 654-655, 279 P. 213* (citizen published circular charging city with bankruptcy in course of opposition to city's proposal to issue bonds to build new school)].

[4] Partners

When a defamation directed against a partnership is of such a nature as to affect the partners personally, each partner

may, in a separate suit, recover whatever damages he or she has personally sustained [*Lewis v. Hayes (1918) 177 Cal. 587, 589, 171 P. 293]* .

[5] Unincorporated Associations

The rule generally accepted is tht an unincorportated association has a cause of action for defamation in those circumstances in which a corporation has such a cause of action [*Washburn v. Wright (1968) 261 Cal. App. 2d 789, 793, 68 Cal. Rptr. 224]* . Thus, for example, a labor union can sue for libel of the union as an entity [*Daniels v. Sanitarium Ass'n, Inc. (1963) 59 Cal. 2d 602, 609, 30 Cal. Rptr. 828, 381 P.2d 652]* , the trustees of a nonprofit trust which depended for its support on voluntary contributions can sue for libel of the association as an entity [*Washburn v. Wright (1968) 261 Cal. App. 2d 789, 73, 68 Cal. Rptr. 224]* , and an association of police officers can sue for the libel of the association as an entity [*Mullins v. Brando (1970) 13 Cal. App. 3d 409, 422, 91 Cal. Rptr. 796* (dictum)].

[6] Peace Officers

Notwithstanding the privileges set forth in *Civ. Code § 47* [*see generally § 340.57* et seq.], *Civ. Code § 47.5* provides that a peace officer may bring an action for defamation against an individual who has filed a complaint with that officer's employing agency alleging misconduct, criminal conduct, or incompetence, if that complaint is false, the complaint was made with knowledge that it was false, and it was made with spite, hatred, or ill will. Knowledge that the complaint was false may be proved by a showing that the complainant had no reasonable grounds to believe the statement was true and that the complainant exhibited a reckless disregard for ascertaining the truth [*Civ. Code § 47.5*].

One the California court of appeal opinion has held that this statute is unconstitutional as an impermissible content-based restriction on speech, because it selectively targets only speech that is critical of police officers without a compelling government interest for doing so [*Walker v. Kiousis (2001) 93 Cal. App. 4th 1432, 1457, 114 Cal. Rptr. 2d 69]* . However, based on a subsequent California Supreme Court opinion [*People v. Stanistreet (2002) 29 Cal. 4th 497, 127 Cal. Rptr. 2d 633, 58 P.3d 465*)], the court of appeal has since held that the statute is constitutional, primarily because there is no realistic possibility that the statute actually results in the official suppression of ideas [*Loshonkohl v. Kinder (2003) 109 Cal. App. 4th 510, 516-518, 135 Cal. Rptr. 2d 114* (upholding constitutionality of *Civ. Code § 47.5*].

[7] Person Charged With Child Abuse

No person charged by indictment, information, or other accusatory pleading with child abuse, as set forth in *Penal Code § 1165* [*Civ. Code § 48.7(f)*; *see Penal Code §§ 11165-11165.10*, superseding former *Penal Code § 11165*, to which *Civ. Code § 48.7(f)* refers], may, while the charge is pending before a trial court, bring a civil action for libel or for slander against the minor, the parent or guardian of the minor, or any witness, based on any statements made which are reasonably believed to be in furtherance of the criminal prosecution. Any applicable statute of limitations on the civil action is tolled during the period that the criminal charge is pending before the court [*Civ. Code § 48.7(a)*]. The charge is not pending within the meaning of *Civ. Code § 48.7* after dismissal or pronouncement of judgment or during an appeal from the judgment [*Civ. Code § 48.7(a)*]. The purpose of the statute is to protect victims of child abuse, their parents or guardians, and witnesses to the acts of abuse from harassment by civil lawsuits for defamation while criminal proceedings are still pending [*Satz v. Superior Court (1990) 225 Cal. App. 3d 1525, 1531, 275 Cal. Rptr. 710]* . It does not, therefore, apply to a newsperson who broadcasts events of a child-abuse trial. Consequently, the limitation period in an action against a newsperson is not tolled during the period of time that the criminal charges are pending [*Satz v. Superior Court (1990) 225 Cal. App. 3d 1525, 1532-1533, 275 Cal. Rptr. 710* (newsperson is not "witness" within meaning of statute)].

If a complaint is filed while the criminal charge is pending, no responsive pleading need be filed until 30 days after the end of the period set forth in *Civ. Code § 48.7(a)* [*Civ. Code § 48.7(b)*]. Moreover, the complaint is required to state that

it is not barred by *Civ. Code § 48.7(a)*, and a failure to do so is a ground for demurrer [*Civ. Code § 48.7(c)*]. If the demurrer is sustained, the prevailing party must be awarded attorney's fees and costs [*Civ. Code § 48.7(d)*].

If the prosecutor is informed by a minor, parent, guardian, or witness that a complaint has been filed that may be subject to *Civ. Code § 48.7*, the prosecutor is required to provide the person with a copy of *Civ. Code § 48.7* [*Civ. Code § 48.7(e)*].

If an action is brought after the conclusion of any criminal proceeding against a child for allegedly making a false accusation of abuse, the child may assert the absolute privileges of *Civ. Code § 47(b)* whenever applicable [*Smith v. M.D. (2003) 105 Cal. App. 4th 1169, 1184-1190, 130 Cal. Rptr. 2d 315]* (child's statements to parents, grandparent, and police were absolutely privileged under *Civ. Code § 47(b)*); *see also Chabak v. Monroy (2007) 154 Cal. App. 4th 1502, 1515-1519, 65 Cal. Rptr. 3d 641* (*Penal Code § 11172* does not supersede litigation privilege when alleged victim of child abuse makes report of abuse to police, parents, or paralegal); *see generally §§ 340.60 -340.61*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityStandingBankruptcy LawCase AdministrationExaminers, Officers & TrusteesDuties & FunctionsGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesGeneral OverviewBusiness & Corporate LawUnincorporated AssociationsCivil ProcedureClass ActionsClass MembersGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsStandingCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsDomestic OffensesChildrenGeneral OverviewCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsDomestic OffensesChildrenElementsCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesAbuse of Public OfficeIllegal Political ActivityPenaltiesCriminal Law & ProcedureAccusatory InstrumentsGeneral OverviewCriminal Law & ProcedureTrialsExamination of WitnessesChild WitnessesEducation LawCivil LiabilityDefamationFamily LawFamily Protection & WelfareGeneral OverviewFamily LawFamily Protection & WelfareChildrenGeneral OverviewFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectFamily LawGuardiansGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsLocal GovernmentsFinanceGovernmentsLocal GovernmentsPolice PowerTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesFair Comment & Opinion

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§ 340.21 Persons Liable

[1] In General

In the absence of privilege, anyone who actively participates in the publication of a false and libelous statement is liable for special, general, and even punitive damages [*Di Giorgio Corp. v. Valley Labor Citizen (1968) 260 Cal. App. 2d 268, 273, 67 Cal. Rptr. 82]* .

[2] Author

The general rule is that the author of defamatory statements is not liable for a republication thereof where he or she neither authorized nor intended such republication to be made. However, the original author may be liable if such republication was reasonably foreseeable [*Mitchell v. Superior Court (1984) 37 Cal. 3d 268, 281, 208 Cal. Rptr. 152, 690 P.2d 625* ; *Neary v. Regents of Univ. of Cal. (1986) 185 Cal. App. 3d 1136, 1147, 230 Cal. Rptr. 281* (adequate facts supported finding that defendants could foresee republication); *Di Giorgio Corp. v. Valley Labor Citizen (1968) 260 Cal. App. 2d 268, 273, 67 Cal. Rptr. 82* ; *Curley v. Vick (1963) 211 Cal. App. 2d 670, 673, 27 Cal. Rptr. 501]* . Thus, the repetition of slander may be shown since it bears on the extent of liability [*Mercado v. Hoefler (1961) 190 Cal. App. 2d 12, 18, 11 Cal. Rptr. 787* (original slander repeated in newspaper)].

Although the originator of the defamatory statement is not ordinarily liable for damages resulting from the voluntary disclosure by the defamed person of the contents of a libelous communication to others, the originator of the defamatory statement may be held liable for such damages if he or she communicated the defamatory statement under circumstances which made it reasonably foreseeable that the defamed person would be under a strong compulsion to republish the statement to others [*see* *McKinney v. Santa Clara County (1980) 110 Cal. App. 3d 787, 795-798, 168 Cal. Rptr. 89* (defendant's false statement of reasons for plaintiff's dismissal was voluntarily disclosed by plaintiff to prospective employers)]. However, imposing liability on the original publisher for forced republication by the defamed person requires an actual republication of the defamatory comments. Mere foreseeability that the defamed person might have to repeat the defamatory comments at some point in the future is an insufficient basis for imposing liability [*Dible v. Haight Ashbury Free Clinics, Inc. (2009) 170 Cal. App. 4th 843, 855, 88 Cal. Rptr. 3d 464*].

An author of a nonlibelous statement cannot be held liable for its being changed into a libelous statement and so published unless he or she authorized, consented to, or participated in the publication of the article as changed. The mere fact that an author knew that changes might be made in the wording of an article submitted does not justify a claim that he or she must know that the publisher might turn the article into a libelous one. An author has the right to assume that no such change will be made [*Montandon v. Cox Broad. Corp. (1975) 45 Cal. App. 3d 932, 937, 120 Cal. Rptr. 196]* .

[3] Distributor

A vendor or distributor of publications is not liable for disseminating the defamatory publication of another, absent a showing of malice or scienter in the sense that the distributor knew of the libelous nature of the material, or should have known in light of knowledge of facts giving rise to a duty to investigate. This limitation on liability is in effect constitutional, due to the *First Amendment* protection afforded to sellers and distributors of books or other publications [*Osmond v. EWAP Inc. (1984) 153 Cal. App. 3d 842, 852-854, 200 Cal. Rptr. 674* (action against adult bookstore operator for display and sale of film copies with libelous label)].

[4] Principal of Agent

A principal is subject to liability from defamatory statements made by an agent acting within the scope of his or her authority [*Di Giorgio Fruit Corp. v. AFL-CIO (1963) 215 Cal. App. 2d 560, 576, 30 Cal. Rptr. 350* ; *Mercado v. Hoefler (1961) 190 Cal. App. 2d 12, 18, 11 Cal. Rptr. 787* ; *Swift & Co. v. Gray (9th Cir. 1939) 101 F.2d 976, 981* (slanderous statement by employee of corporation)]. However, an employer cannot be held vicariously liable for the defamatory statements of an employee if the employee has obtained a judgment in his or her favor on the merits of the defamation claim [*Shaw v. Hughes Aircraft Co. (2000) 83 Cal. App. 4th 1336, 1347, 100 Cal. Rptr. 2d 446]* .

[5] Radio and Television Broadcasters

The owner of a radio or television station or his or her agent is not liable for damages resulting from a defamatory statement made by someone other than the owner or agent if the owner or agent exercised due care to prevent the utterance of the statement [*Civ. Code § 48.5*; *see* *Correia v. Santos (1961) 191 Cal. App. 2d 844, 856, 13 Cal. Rptr. 132]* .

[6] Electoral Candidate, State Ballot Measure Proponent, and Campaign Committee Sponsor

A candidate or state measure proponent is liable for any slander or libel committed by a committee that is controlled by that candidate or state measure proponent as defined by *Gov. Code § 82016* if the candidate or state measure proponent willfully and knowingly directs or permits the libel or slander [*Elec. Code § 20501(a)*]. A person who is a sponsor of a sponsored committee, as defined by *Gov. Code § 82048.7*, is liable for any slander or libel committed by the sponsored committee if the sponsor willfully and knowingly directs or permits the libel or slander [*Elec. Code § 20501(b)*]. In any action for libel or slander brought by a candidate, the willingness or unwillingness of the defendant to retract or correct a communication made in the course of a campaign, and his or her action in doing so, is admissible in evidence in the exemplary damages phase of a bifurcated trial [*Elec. Code § 20502(a)*]. The remedy provided by *Elec. Code § 20502* is in addition to any other remedy provided by law [*Elec. Code § 20502(b)*].

"Campaign advertising or communication" is any communication authorized by (1) a candidate or a candidate's controlled committee [*see Gov. Code § 82016* ("controlled committee" defined)], (2) a committee making independent expenditures [*see Gov. Code § 82031* ("independent expenditure" defined)], or (3) a committee formed primarily to support or oppose a ballot measure [*see Gov. Code § 82047.5* ("primarily formed committee" defined)], for the purpose of advocating the election or defeat of a qualified candidate or ballot measure through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general, public, political advertising [*Elec. Code § 304*]. For further definition and discussion of candidates, committees, and ballot measure

proponents, see Ch. 242, *Election Campaigns* , and Ch. 302, *Inititative, Referendum, and Recall* .

The provisions of *Civ. Code § 43 et seq.*, relating to libel and slander, are fully applicable to any campaign advertising or communication [*Elec. Code § 20500*]; in addition, the legislation enacting the former versions of this provision stated that they were declaratory of existing law [*see* Stats. 1987, ch. 778, § 3]. Therefore, if plaintiff is an incumbent candidate for political office suing his or her opponent for damages arising out of libelous campaign advertising or communication, and the advertising or communication relates to matters of public concern, even though it does not relate to plaintiff incumbent's conduct while in office, then defendant is not liable unless plaintiff proves the advertising or communication to be false or reckless when made (i.e., made with actual malice), even though defendant is a nonmedia defendant [*see Miller v. Nestande (1987) 192 Cal. App. 3d 191, 198-201, 237 Cal. Rptr. 359]* . It appears likely that plaintiff would have to prove actual malice in such a case even if he or she were not an incumbent candidate, because the requirement of a showing of actual malice is necessary to protect a free flow of information regarding qualifications of persons applying for, as well as already holding, public office [*see Miller v. Nestande (1987) 192 Cal. App. 3d 191, 201, 237 Cal. Rptr. 359]* .

[7] Repeaters of Defamatory Language

Every repetition of a defamation is a separate publication and gives rise to a new cause of action [*Neal v. Gatlin (1973) 35 Cal. App. 3d 871, 877 n.4, 111 Cal. Rptr. 117* ; *Di Giorgio Corp. v. Valley Labor Citizen (1968) 260 Cal. App. 2d 268, 273, 67 Cal. Rptr. 82]* even though the repeater states the source [*Di Giorgio Corp. v. Valley Labor Citizen (1968) 260 Cal. App. 2d 268, 273, 67 Cal. Rptr. 82]* .

The Communications Decency Act of 1996 provides a federal statutory immunity from common law liability for defamation for Internet publications that originate from a different party. Specifically, that act provides that no provider or user of an interactive computer service may be treated as the publisher or speaker of any information provided by another information content provider [*47 U.S.C.S. § 230(c)(1)*; *see also 47 U.S.C.S. § 230(f)(2), (3)* ("interactive computer service" and "information content provider" defined)]. Liability may not be imposed under state or local law if inconsistent with this federal protection [*47 U.S.C.S. § 230(e)(3)*], effectively overriding common law liability for republication in this context. This immunity is discussed in greater detail in § 340.75.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesUnlawful Acts of AgentsIntentional & Willful InjuriesBusiness & Corporate LawAgency RelationshipsTypesEmployee & EmployerBusiness & Corporate LawDistributorships & FranchisesGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesCauses of ActionAgency RelationshipsBusiness & Corporate LawDistributorships & FranchisesRemediesGeneral OverviewCivil ProcedureRemediesDamagesPunitive DamagesCommunications LawBroadcastingPolitical BroadcastingCommunications LawFederal ActsCommunications Decency ActCommunications LawRelated Legal IssuesDefamationComputer & Internet LawCensorshipCommunications Decency ActComputer & Internet LawCensorshipObscenity & Indecent SpeechComputer & Internet LawCivil ActionsDefamationConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationGeneral OverviewEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral OverviewTortsDamagesPunitive DamagesAward CalculationsGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationRemediesDamagesTortsIntentional TortsDefamationRemediesRetractionsTortsVicarious LiabilityAgentsGeneral Overview

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§ 340.22 General Damages

General damages for defamation actions generally are not specially defined in the Civil Code [*but see generally Civ. Code § 3333* (damages for proximately caused detriment)]. However, the Code does define general damages sought by a plaintiff in an action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, when plaintiff has demanded a retraction and the defendant has failed to publish or broadcast the retraction under the circumstances described in *Civ. Code § 48a(1)-(3)* [*see Civ. Code § 48a(1)-(3), (4)(a)*]. In this latter situation, general damages are defined as those damages for loss of reputation, shame, mortification, and hurt feelings [*Civ. Code § 48a(4)(a)*].

Under common law principles, in an action for damages based on language defamatory per se, damage to the plaintiff's reputation is conclusively presumed; he or she need not introduce any evidence of actual damages in order to obtain or sustain an award of damages [*Contento v. Mitchell (1972) 28 Cal. App. 3d 356, 358, 104 Cal. Rptr. 591* (slander); *Di Giorgio Fruit Corp. v. AFL-CIO (1963) 215 Cal. App. 2d 560, 577, 30 Cal. Rptr. 350* (libel)] and evidence tending to show lack of injury to reputation is inadmissible [*Schomberg v. Walker (1901) 132 Cal. 224, 230, 64 P. 290* (libel); *Clay v. Lagiss (1956) 143 Cal. App. 2d 441, 448, 299 P.2d 1025* (slander)]. Hence, general damages are presumed as a matter of law in a case of slander per se [*Douglas v. Janis (1974) 43 Cal. App. 3d 931, 940, 118 Cal. Rptr. 280* ; *Clay v. Lagiss (1956) 143 Cal. App. 2d 441, 448, 299 P.2d 1025]* . If the slanderous language was not slanderous per se and the action must be brought under *Civ. Code § 46(5)*, after plaintiff proves actual damages as required by *Civ. Code § 46(5)*, the jury then may consider plaintiff's loss of reputation, shame, and hurt feelings in awarding general damages [*Cunningham v. Simpson (1969) 1 Cal. 3d 301, 309, 81 Cal. Rptr. 855, 461 P.2d 39]* . However, in suits brought by private plaintiffs within the coverage of the *First Amendment*, in the absence of proof of "actual malice," general damages may not be presumed and are limited to "actual injury" [*see Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 349-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789* ; *see also § 340.18[4][a]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewCommunications LawRelated Legal IssuesLibelConstitutional

LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefamation Per SeTortsIntentional TortsDefamationProcedureTortsIntentional TortsDefamationRemediesGeneral OverviewTortsIntentional TortsDefamationRemediesRetractions

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§ 340.23 Nominal Damages

If plaintiff suffers no actual damage, it is correct to award nominal damages when the statements constituted libel per se [*Triton Ins. Underwriters, Inc. v. National Chiropractic Ins. Co. (1965) 43 Cal. Rptr. 504]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationDefamation Per SeTortsIntentional TortsDefamationRemediesGeneral OverviewTortsIntentional TortsDefamationRemediesDamages

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§ 340.24 Special Damages

Special damages are all damages that the plaintiff alleges and proves that he or she has suffered in respect to his or her property, business, trade, profession, or occupation, including such amount of money as the plaintiff alleges and proves that he or she has expended as a result of the alleged libel, and no other [*see Civ. Code §§ 45a, 48a(4)(b)*]. When the alleged libel is not actionable per se, an allegation of special damages is an essential element of the cause of action [*Civ. Code § 45a*; *Smith v. Los Angeles Bookbinders Union (1955) 133 Cal. App. 2d 486, 494-495, 284 P.2d 194 , overruled on other grounds, MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36]* .

Under California law, a loss of clients following defamation is evidence of recoverable special damages [*see MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 548, 343 P. 2d 36* ; *see also O'Hara v. Storer Communications, Inc. (1991) 231 Cal. App. 3d 1101, 1112, 282 Cal. Rptr. 712]* . One court of appeal has expanded the scope of special damages regarding business loss, holding that "special damages" include loss of income from the inability to work as a result of illness, depression, or emotional distress caused by defamation, based on a potential employer's conclusion that the defamation rendered plaintiff unable to perform the ordinary duties of his or her profession [*O'Hara v. Storer Communications, Inc. (1991) 231 Cal. App. 3d 1101, 1113-1115, 282 Cal. Rptr. 712* (plaintiff was limited to special damages under *Civ. Code § 48a* because no demand for retraction was made)]. Under such a theory, a plaintiff may produce evidence that a prospective employer failed to hire plaintiff after noticing indications of plaintiff's impaired mental condition caused by the defamation [*O'Hara v. Storer Communications, Inc. (1991) 231 Cal. App. 3d 1101, 1113-1115, 282 Cal. Rptr. 712]* . That court stated that its rule does not violate the general law of defamation that does not permit a plaintiff's emotional injury to support a claim of special damages [*O'Hara v. Storer Communications, Inc. (1991) 231 Cal. App. 3d 1101, 1114-1115, 282 Cal. Rptr. 712]* . However, it could be argued that under Restatement (Second) of Torts § 575 comments b and c, the inability to work caused by emotional distress supports a claim for general damages only, because special damages are limited to economic harm directly caused by loss of reputation (for example, if a potential employer failed to hire plaintiff because of the taint on his or her reputation), rather than by emotional harm [*see O'Hara v. Storer Communications, Inc. (1991) 231 Cal. App. 3d 1101, 1121-1123, 282 Cal. Rptr. 712* (Amos, J., dissenting); *see also § 340.22*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsGeneral OverviewCivil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsSpecial DamagesCivil ProcedureRemediesDamagesSpecial DamagesTortsDamagesGeneral OverviewTortsDamagesCompensatory DamagesGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressAward CalculationsTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefamation Per SeTortsIntentional TortsDefamationElementsLibelTortsIntentional TortsDefamationRemediesGeneral Overview

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§ 340.25 Punitive Damages

[1] When Available

Like general damages, punitive damages for defamation actions generally are not specially defined in the Civil Code [*but see generally* Civ. Code § 3294]. However, the Code does define those exemplary damages sought by a plaintiff in an action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, when plaintiff has demanded a retraction and the defendant has failed to publish or broadcast the retraction under the circumstances described in *Civ. Code § 48a(1)-(3)* [*see Civ. Code § 48a(1)-(3), (4)(c), (d)*]. In this latter situation, exemplary damages are defined as those that may, in the discretion of the court or jury, be recovered in addition to general and special damages for the sake of example and by way of punishing a defendant who has made the publication or broadcast with statutorily defined "actual malice" [*see § 340.17[7]*] (not to be confused with constitutionally required "actual malice") [*Civ. Code § 48a(4)(c)*; *see Civ. Code § 48a(4)(d)* ("actual malice" defined); *see also § 340.18[2][a]*].

A plaintiff is never entitled as a matter of right to punitive damages [*Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791, 800-801, 197 P.2d 713* ; *Shumate v. Johnson Publ'g Co. (1956) 139 Cal. App. 2d 121, 135, 293 P.2d 531]* . For punitive damages to be recovered, there must be proof of the presence of malice in fact; that is, the motive and willingness to vex, harass, annoy, or injure [*Davis v. Hearst (1911) 160 Cal. 143, 162, 116 P. 530* ; *Gautier v. General Tel. Co. (1965) 234 Cal. App. 2d 302, 310, 44 Cal. Rptr. 404]* .

Malice in fact is never presumed [*Davis v. Hearst (1911) 160 Cal. 143, 179, 116 P. 530* ; *Nova v. Flaherty (1956) 145 Cal. App. 2d 761, 764, 303 P.2d 382]* . However, the trier of fact may infer malice in fact from the tenor of the publication of a libel that is actionable per se [*Shumate v. Johnson Publ'g Co. (1956) 139 Cal. App. 2d 121, 136, 293 P.2d 531]* . But malice may not be implied on the part of a defendant from any failure on his or her part to prove truth or the privilege of fair comment [*Nova v. Flaherty (1956) 145 Cal. App. 2d 761, 764, 303 P.2d 382]* .

In certain defamation suits, punitive damages may not be assessed in the absence of proof of constitutionally required "actual malice" as discussed in *§ 340.18[2][a]*. Specifically, the *First Amendment* requires that a public figure plaintiff, or a private figure plaintiff who brings a defamation action against a media defendant for publishing speech involving a

matter of public concern, may not recover presumed or punitive damages when that plaintiff has failed to show that the defendant published the speech with knowledge of its falsity or with reckless disregard for the truth [*Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 349, 94 S. Ct. 2997, 41 L. Ed. 2d 789* ; *see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 759-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593]* . Thus, in such cases, it appears that the plaintiff must satisfy both the federal standard and the state standard before punitive damages may be recovered [*see Kapellas v. Kofman (1969) 1 Cal. 3d 20, 28 n.6, 81 Cal. Rptr. 360, 459 P.2d 912]* .

For discussion of punitive damages generally, including continuing developments regarding the constitutional attack on punitive damages per se, see Ch. 177, *Damages* .

[2] No Vicarious Liability

Punitive damages are awarded to punish the defendant for his or her own wrongdoing and not for the wrongful action of someone else, not even his or her own agent or employee [*Davis v. Hearst (1911) 160 Cal. 143, 170, 116 P. 530* ; *Di Giorgio Corp. v. Valley Labor Citizen (1968) 260 Cal. App. 2d 268, 277, 67 Cal. Rptr. 82* ; *see also Civ. Code § 3294(b)*].

Therefore, to recover punitive damages against multiple defendants the plaintiff must prove malice on the part of each defendant. If two persons are sued the motive of one is not allowed to aggravate the damages against the other [*Davis v. Hearst (1911) 160 Cal. 143, 165, 116 P. 530* ; *Di Giorgio Corp. v. Valley Labor Citizen (1968) 260 Cal. App. 2d 268, 277, 67 Cal. Rptr. 82]* .

[3] Jury Discretion

The granting or withholding of the award of punitive damages is wholly within the control of the jury [*Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791, 801, 197 P.2d 713]* .

Moreover, juries have a wider discretion in awarding punitive damages than they have in the matter of compensatory damages [*Di Giorgio Fruit Corp. v. AFL-CIO (1963) 215 Cal. App. 2d 560, 581, 30 Cal. Rptr. 350]* .

[4] Appellate Review

An appellate court will declare an amount of punitive damages excessive only if, after reviewing the entire record, the award is so grossly excessive as to indicate passion or prejudice on the part of the jury [*Cunningham v. Simpson (1969) 1 Cal. 3d 301, 308-309, 81 Cal. Rptr. 855, 461 P.2d 39* ; *Roemer v. Retail Credit Co. (1975) 44 Cal. App. 3d 926, 937, 119 Cal. Rptr. 82]* . The amount of damages must be so grossly excessive that it can be reasonably imputed solely to the jury's passion or prejudice before the jury's determination is reversed on appeal [*Douglas v. Janis (1974) 43 Cal. App. 3d 931, 940, 118 Cal. Rptr. 280]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesPunitive DamagesCommunications LawBroadcastingGeneral OverviewCommunications LawRelated Legal IssuesLibelConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationPublic FiguresTortsDamagesGeneral OverviewTortsDamagesPunitive DamagesGeneral OverviewTortsDamagesPunitive DamagesAward CalculationsGeneral OverviewTortsDamagesPunitive DamagesAward CalculationsAppellate & Posttrial ReviewTortsDamagesPunitive DamagesAward CalculationsConstitutional RequirementsTortsDamagesPunitive DamagesConduct Supporting AwardsTortsIntentional TortsDefamationGeneral OverviewTortsIntentional

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§ 340.26 Continuous Publications

[1] Ex Parte Application for Shortened Time to Respond

In any action for libel or slander, for good cause shown on ex parte written application, the court may order that the time to respond to the complaint is 20 days after the service of summons on the defendant. The application must be supported by an affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) stating facts showing, among other things, that the alleged defamatory matter has been continuously published and that there is a reasonable likelihood that the publication will continue. The order must direct the clerk to endorse the summons to show that the time to respond has been shortened pursuant to *Code Civ. Proc. § 460.5*. A copy of the application, affidavit, and order must be served with the summons [*Code Civ. Proc. § 460.5(a)*].

[2] Time to Respond to Complaint or Amend Answer Under Code Civ. Proc. § 586

In any action under *Code Civ. Proc. § 460.5(a)*, unless otherwise ordered by the court for good cause shown, the time allowed the defendant to respond to the complaint or amend the answer under *Code Civ. Proc. § 586* is not to exceed 10 days [*Code Civ. Proc. § 460.5(b)*]. *Code Civ. Proc. § 460.5(b)* appears to refer to the provisions of *Code Civ. Proc. § 586(a)(1)-(5)* specifying the time for the defendant to respond to an amended complaint or to any other complaint when a defendant's demurrer has been overruled or motion to strike has been in whole or in part denied or when a demurrer to the answer has been sustained.

[3] Precedence Over Other Civil Actions

The court must give any such action precedence over all other civil actions, except actions to which special precedence is given by law, in the matter of the setting the case for hearing or trial, and in hearing the case, to the end that all such actions shall be quickly heard and determined. Except for good cause shown, the court must not grant a continuance in excess of 10 days without the consent of the adverse party [*Code Civ. Proc. § 460.5(c)*].

[4] Definition

For purposes of *Code Civ. Proc. § 460.5*, "continously published" means three or more publications within 15 days [*Code Civ. Proc. § 460.5(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessProofGeneral Overview

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§ 340.27 Campaign Libel or Slander

In an action by a candidate or former candidate for elective public office against a holder of an elective public office or an opposing candidate for libel or slander that is alleged to have occurred during the course of the campaign, the time allowed the defendant to respond to the complaint is shortened to 20 days [*Code Civ. Proc. § 460.7(a)*]. Furthermore, unless otherwise ordered for good cause shown, the time allowed the defendant to respond to the complaint or to amend an answer under *Code Civ. Proc. § 586* may not exceed 10 days [*Code Civ. Proc. § 460.7(b)*]. Such actions for campaign libel or slander are given precedence over other civil actions in the same manner as actions involving continuing publications under *Code Civ. Proc. § 460.5* [*see Code Civ. Proc. § 460.7(c)*, discussed in *§ 340.26[3]*].

Legal Topics:

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

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§ 340.28 Uniform Single Publication Act

Civ. Code §§ 3425.1-3425.5 contain the provisions of the Uniform Single Publication Act [*Civ. Code § 3425.1*]. The act must be interpreted as to effectuate its purpose to make uniform the law of those states or jurisdictions which enact it [*Civ. Code § 3425.2*]. No person can have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded on any single publication or exhibition or utterance, such as any one issue of a newspaper, book, magazine, any one presentation to an audience, any one broadcast over radio or television, or any one exhibition of a motion picture. Recovery in any action will include all damages for any such tort suffered by the plaintiff in all jurisdictions [*Civ. Code § 3425.3*; *see Strick v. Superior Court (1983) 143 Cal. App. 3d 916, 922-923, 192 Cal. Rptr. 314* (related cause of action for fraud and deceit held time-barred by single publication rule)]. A judgment in any jurisdiction for or against the plaintiff on the substantive merits of any action for damages founded on a single publication or exhibition or utterance as described in Section 3425.3 will bar any other action for damages by the same plaintiff against the same defendant founded on the same publication or exhibition or utterance [*Civ. Code § 3425.4*].

In the case of a single, integrated publication, the cause of action based upon objectionable matter appearing in the publication accrues upon the first general distribution of the publication to the public [*Belli v. Roberts Bros. Furs (1966) 240 Cal. App. 2d 284, 289, 49 Cal. Rptr. 625* ; *see also Strick v. Superior Court (1983) 143 Cal. App. 3d 916, 922, 192 Cal. Rptr. 314]* .

The act does not apply to separate aggregate publications on different occasions. In such cases, the publication reaches a new group and the repetition justifies a new cause of action. For example, the republication of a hardcover book in a paperback form is a new issue of that book giving rise to a new cause of action [*Kanarek v. Bugliosi (1980) 108 Cal. App. 3d 327, 332-333, 166 Cal. Rptr. 526* ; *see Schneider v. United Airlines, Inc. (1989) 208 Cal. App. 3d 71, 76, 256 Cal. Rptr. 71]* .

The single publication rule applies not only to books and newspapers that are published with general circulation, but also to publications that are given only limited circulation and are not generally distributed to the public [*Hebrew Academy of San Francisco v. Goldman (2007) 42 Cal. 4th 883, 890, 70 Cal. Rptr. 3d 178, 173 P.3d 1004*]. In one case,

for example, the Supreme Court held that the single publication rule applied to an oral history transcript originally contained in restricted access at a research library of the University of California, even though no more than 10 copies of the transcript were known to exist and none were available to the public without restrictions [*Hebrew Academy of San Francisco v. Goldman (2007) 42 Cal. 4th 883, 892-893, 70 Cal. Rptr. 3d 178, 173 P.3d 1004*].

The single publication rule applies to the publication of allegedly defamatory material on an Internet web site [*Traditional Cat Assn., Inc. v. Gilbreath (2004) 118 Cal. App. 4th 392, 404, 13 Cal. Rptr. 3d 353]* . In one case, for example, the defendant established that the plaintiff's action for defamation was untimely because the action was filed more than a year after the last update to allegedly defamatory material published on the defendant's web site [*Traditional Cat Assn., Inc. v. Gilbreath (2004) 118 Cal. App. 4th 392, 404-405, 13 Cal. Rptr. 3d 353]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Computer & Internet LawCivil ActionsGeneral OverviewComputer & Internet LawCivil ActionsDefamationComputer & Internet LawCivil ActionsStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 340.29 Necessity of Filing

A claim must be presented in actions for money or damages against local public entities [*Gov. Code § 905*]; a claim for death, or for injury to persons or personal property or growing crops, must be presented not later than six months after the accrual of the cause of action or one year for any other cause of action [*Gov. Code § 911.2*].

Except when a plaintiff pleads and proves that he or she did not know or have reason to know he or she had to file a claim, a cause of action against a public employee or former public employee for injury resulting from an act or omission in the scope of his or her employment as a public employee is barred if an action against the employing public entity is barred even though the public entity is immune from liability [*Gov. Code § 950.2*].

Because of these provisions, a former public employee must file a claim with the public entity as a prerequisite to suing another public employee for allegedly defamatory remarks [*Neal v. Gatlin (1973) 35 Cal. App. 3d 871, 875-877, 111 Cal. Rptr. 117* (former college teacher suing former colleagues for allegedly defamatory letters commenting on his teaching ability); *Hopper v. Allen (1968) 266 Cal. App. 2d 797, 799, 72 Cal. Rptr. 435* (former police officer suing city police chief for allegedly defamatory statements); *see also Tietz v. Los Angeles Unified Sch. Dist. (1965) 238 Cal. App. 2d 905, 909-910, 48 Cal. Rptr. 245* (teacher suing school district for mental distress)]. Private individuals who sue governmental employees also must file claims with the appropriate governmental entity as a prerequisite to a defamation suit [*Miller v. Hoagland (1966) 247 Cal. App. 2d 57, 61-62, 55 Cal. Rptr. 311* (private individual suing city attorney for allegedly fraudulent letter); *Burgdorf v. Funder (1966) 246 Cal. App. 2d 443, 448, 54 Cal. Rptr. 805* (private individual suing chief of state Division of Tax Collection for allegedly libelous letter)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsClaims By & AgainstGovernmentsLocal GovernmentsPolice PowerWorkers' Compensation & SSDIAdministrative ProceedingsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsGeneral OverviewWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityGeneral Overview

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§ 340.30 Statute of Limitations

[1] In General

The statute of limitations for libel and slander actions is one year [*Code Civ. Proc. § 340*; *Hopper v. Allen (1968) 266 Cal. App. 2d 797, 801-803, 72 Cal. Rptr. 435* ; *Rutherford v. Johnson (1967) 250 Cal. App. 2d 316, 318, 58 Cal. Rptr. 546]* . A libel uttered but once is not a continuous thing. The libel occurs on publication, and the statute of limitations begins to run at that time [*Campbell v. Jewish Comm. for Pers. Serv. (1954) 125 Cal. App. 2d 771, 774, 271 P.2d 185]* . The time of publication is the date of first general distribution of a publication to the public and not the date placed on the cover of a publication [*see Strick v. Superior Court (1983) 143 Cal. App. 3d 916, 922, 192 Cal. Rptr. 314* ; *McGuiness v. Motor Trend Magazine (1982) 129 Cal. App. 3d 59, 61-63, 180 Cal. Rptr. 784]* . A subsequent republication of the same defamatory statement does start the statute of limitations running again from the time of the subsequent publication [*see Schneider v. United Airlines, Inc. (1989) 208 Cal. App. 3d 71, 77, 256 Cal. Rptr. 71* (originator of defamation is liable even for subsequent publication for which he or she is not responsible, if republication was reasonably foreseeable)].

[2] Rule of Discovery

The "rule of discovery" may be applied to certain defamation actions. Under this rule, the cause of action does not accrue, for the purpose of determining limitation under *Code Civ. Proc. § 340*, until the plaintiff discovers, or with reasonable diligence should discover, all of the facts constituting the cause of action. However, this rule does not apply unless the defamation is committed in an inherently secretive manner [*Shively v. Bozanich (2003) 31 Cal. 4th 1230, 1248-1250, 7 Cal. Rptr. 3d 576, 80 P.3d 676* ; *McGuiness v. Motor Trend Magazine (1982) 129 Cal. App. 3d 59, 63, 180 Cal. Rptr. 784]* . For example, the running of the statute of limitations is not delayed until plaintiff discovers the alleged libel if such libel is contained in a publication such as a book, newspaper, or magazine that is widely available to the public, including plaintiff [*Shively v. Bozanich (2003) 31 Cal. 4th 1230, 1250-1251, 7 Cal. Rptr. 3d 576, 80 P.3d 676* ; *see also Long v. Walt Disney Co. (2004) 116 Cal. App. 4th 868, 875, 10 Cal. Rptr. 3d 836* (discovery rule inapplicable to action based on material broadcast on national network television weekly for more than one year) *McGuiness v. Motor Trend Magazine (1982) 129 Cal. App. 3d 59, 63, 180 Cal. Rptr. 784]* .

The discovery rule is inapplicable to such publication even if the publication, though published and technically available to the public, is not widely disseminated or mass-marketed. In one case, for example, the discovery rule did not apply to an oral history transcript originally contained in restricted access at a research library of the University of California, even though no more than 10 copies of the transcript were known to exist and none were available to the public without restrictions, little or no publicity had been given to the transcript that would bring it to plaintiff's attention, and there was no reason for the plaintiff to have or seek knowledge of the allegedly defamatory statements contained within. In that case, the Supreme Court stressed that the plaintiffs had access to the document from the time that it was published [*Hebrew Academy of San Francisco v. Goldman (2007) 42 Cal. 4th 883, 894-895, 70 Cal. Rptr. 3d 178, 173 P.3d 1004*].

Once defamatory material is published in a book that is available to the general public, the equitable grounds for applying the discovery rule to toll the running of the statute of limitations disappear, not only for any cause of action based on that publication, but also for any cause of action based on earlier publications that were inherently secret or confidential at the time but are revealed in the published book [*Shively v. Bozanich (2003) 31 Cal. 4th 1230, 1253, 7 Cal. Rptr. 3d 576, 80 P.3d 676]* . In this situation, the limitations period begins to run on all causes of action contained in or revealed by the book when the book is distributed to the general public, regardless of when the plaintiff learned of the defamatory material [*Shively v. Bozanich (2003) 31 Cal. 4th 1230, 1247-1251, 7 Cal. Rptr. 3d 576, 80 P.3d 676]* .

A plaintiff's knowledge of a defamatory publication does not start the running of the statute of limitations for the purposes of later republications of the same defamatory material. In such a case, the statute of limitations on the later cause of action does not run from the time of the accrual of the first cause of action, but rather from the time of the second publication [*Schneider v. United Airlines, Inc. (1989) 208 Cal. App. 3d 71, 77, 256 Cal. Rptr. 71]* .

[3] Equitable Estoppel

The authors of an allegedly defamatory writing who conceal their identities may be equitably estopped from pleading the statute of limitations in a libel action if the libeled individual neither knew, nor through the exercise of reasonable diligence should have discovered, the identity of the authors [*Bernson v. Browning-Ferris Indus. (1994) 7 Cal. 4th 926, 928, 936, 30 Cal. Rptr. 2d 440, 873 P.2d 613* (disapproving contrary language of *Staples v. Zoph (1935) 9 Cal. App. 2d 369, 49 P.2d 1131*)].

The requirement that the plaintiff exercise reasonable diligence permits tolling of the statute of limitations only until the plaintiff knows, or through the exercise of reasonable diligence should have discovered, the defendant's identity. Lack of knowledge alone is not sufficient to stay the statute; a plaintiff may not disregard reasonably available avenues of inquiry that, if vigorously pursued, might yield the desired information [*Bernson v. Browning-Ferris Indus. (1994) 7 Cal. 4th 926, 936, 30 Cal. Rptr. 2d 440, 873 P.2d 613]* . One factor that must be considered pertinent to the diligence inquiry is whether a timely Doe complaint [*see Code Civ. Proc. § 474*] would, as a practical matter, have facilitated the discovery of the defendant's identity within the three-year period for service of process under *Code Civ. Proc. § 583.210* [*Bernson v. Browning-Ferris Indus. (1994) 7 Cal. 4th 926, 936-937, 30 Cal. Rptr. 2d 440, 873 P.2d 613]* . If the identity of at least one defendant is known, the plaintiff must avail himself or herself of the opportunity to file a timely complaint naming Doe defendants and take discovery [*Bernson v. Browning-Ferris Indus. (1994) 7 Cal. 4th 926, 937, 30 Cal. Rptr. 2d 440, 873 P.2d 613]* . However, if the facts are such that even discovery cannot pierce a defendant's intentional efforts to conceal his or her identity, the plaintiff will not be penalized [*Bernson v. Browning-Ferris Indus. (1994) 7 Cal. 4th 926, 937, 30 Cal. Rptr. 2d 440, 873 P.2d 613]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of

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§ 340.31 Choice of Law

Under California conflicts law, the tort of libel occurs at the place of publication of the libelous statement [*see Moore v. Greene (9th Cir. 1970) 431 F.2d 584, 591* ; *Gallegos v. Union-Tribune Publ'g Co. (1961) 195 Cal. App. 2d 791, 797, 16 Cal. Rptr. 185]* . However, the Ninth Circuit Court of Appeals has applied California substantive law of libel to an allegedly libelous letter published outside the state. Reasoning that the purpose of libel is to protect the interest of a victim's reputation and that California was the state which was most interested in the protection of its residents' reputation, the court applied California substantive law to a letter published in Texas which allegedly libeled a California resident [*Moore v. Greene (9th Cir. 1970) 431 F.2d 584, 591-592]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationGeneral OverviewTortsProcedureConflicts of LawsPlace of Injury

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§ 340.32 Undertaking Not Required

Former *Code Civ. Proc. § 830* required the plaintiff in a defamation action to file a written undertaking in the amount of $500 before a summons could be issued by the clerk; if such an undertaking were not filed, the court had to dismiss the action. This requirement was held to be an unconstitutional deprivation of property on the rationale that since the $500 undertaking was a mandatory and unequivocal requirement, the statute failed to provide for a meaningful hearing prior to the deprivation of property and thus violated plaintiff's right to due process as guaranteed by the California and United States Constitutions [*Allen v. Jordanos' Inc. (1975) 52 Cal. App. 3d 160, 164, 125 Cal. Rptr. 31]* .

A plaintiff who recovers judgment in an action for libel or slander must be allowed as costs $100 to cover counsel fees in addition to other costs. If the action is dismissed or the defendant recovers judgment, the defendant must be allowed $100 to cover counsel fees in addition to other costs, and judgment must be entered accordingly [*Code Civ. Proc. § 1037*].

Legal Topics:

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

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§ 340.33 Prior Restraint

The United States Supreme Court has held that "prior restraints on speech and publication are the most serious and least tolerable infringement on *First Amendment* rights" [*Neb Press Ass'n v. Stuart (1976) 427 U.S. 539, 559, 96 S. Ct. 2791, 49 L. Ed. 2d 683]* . There is a "heavy presumption" against the constitutional validity of any prior restraint, and the party seeking to restrain expression has a "heavy burden of showing justification for the imposition of such a restraint" [*Org. for a Better Austin v. Keefe (1971) 402 U.S. 415, 419, 91 S. Ct. 1575, 29 L. Ed. 2d 1]* .

The United States Supreme Court has not specifically addressed the propriety of enjoining defamatory speech. It has, however, strongly intimated in dictum that such statements are no more susceptible to prior restraint than other forms of speech [*see* *Org. for a Better Austin v. Keefe (1971) 402 U.S. 415, 418, 91 S. Ct. 1575, 29 L. Ed. 2d 1]* .

Because *First Amendment* guarantees of speech are within the liberty safeguarded by the *due process clause of the Fourteenth Amendment* from invasion by state action [*Neb Press Ass'n v. Stuart (1976) 427 U.S. 539, 556, 96 S. Ct. 2791, 49 L. Ed. 2d 683]* , states are not free to adopt a standard lower than that mandated by the U.S. Constitution and California's standard is fully consistent with the federal standard. For example, the California Supreme Court struck down a temporary restraining order enjoining a candidate for political office from publishing allegedly libelous statements about his opponent. In doing so, the Court held that "the truth or falsity of a statement on a public issue is irrelevant to the question of whether it should be repressed in advance of publication" [*Wilson v. Superior Court (1975) 13 Cal. 3d 652, 658, 119 Cal. Rptr. 468, 532 P.2d 116]* .

There are no California decisions upholding prior restraint of alleged defamation. To the contrary, in dictum the California Supreme Court has repeatedly interpreted the state Constitution to proscribe injunctive relief for threatened defamation [*see, e.g.,* *Rosicrucian Fellowship v. Rosicrucian Fellowship Non-Sectarian Church (1952) 39 Cal. 2d 121, 145, 245 P.2d 481* ; *Northwestern Pac. R.R. Co. v. Lumber & Sawmill Worker's Union (1948) 31 Cal. 2d 441, 448, 189 P.2d 277* ; *see also* *Bright v. L.A. Unified Sch. Dist. (1976) 18 Cal. 3d 450, 464, 134 Cal. Rptr. 639, 556 P.2d 1090* ; *Evans v. Evans (2008) 162 Cal. App. 4th 1157, 1169, 76 Cal. Rptr. 3d 859]* .

However, a narrowly drawn injunction issued after a trial at which defendant's particular speech has been adjudicated to

be defamatory may properly enjoin the defendant from repeating the defamation and is not considered a prior restraint [*Balboa Island Village Inn, Inc. v. Lemen (2007) 40 Cal. 4th 1141, 1155-1156, 57 Cal. Rptr. 3d 320, 156 P.3d 339]* . If a statement that was once false becomes true at a later time, the defendant may move the court to modify or dissolve the injunction [*Balboa Island Village Inn, Inc. v. Lemen (2007) 40 Cal. 4th 1141, 1161, 57 Cal. Rptr. 3d 320, 156 P.3d 339]* . An otherwise permissible injunction may not prevent a defendant from presenting grievances to government officials with relevant enforcement responsibilities [*Balboa Island Village Inn, Inc. v. Lemen (2007) 40 Cal. 4th 1141, 1160-1161, 57 Cal. Rptr. 3d 320, 156 P.3d 339* ; *see also Evans v. Evans (2008) 162 Cal. App. 4th 1157, 1172-1173, 76 Cal. Rptr. 3d 859* (pretrial order preventing defendant from communicating with sheriff's department about defendant's ex-husband, who was officer within department, was overbroad, despite exception allowing defendant to call 911 to report criminal conduct)].

Legal Topics:

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

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[Reserved]

§§ 340.34[Reserved]

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30-340 California Forms of Pleading and Practice--Annotated § 340.50

§ 340.50 Failure to Plead Special Damages

If a publication is not libelous on its face or slanderous per se, the plaintiff must allege that he has suffered special damages as a result of the publication [*Civ. Code § 45a* (libel); *Civ. Code § 46(5)* (slander)]. Special damages must be alleged with particularity [*Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 791-792, 228 P.2d 6* ; *Smith v. Los Angeles Bookbinders Union (1955) 133 Cal. App. 2d 486, 494, 284 P.2d 194]* in order to protect the defendant from surprise [*Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 792, 228 P.2d 6]* . Thus, a general allegation of the loss of prospective employment, sale, or profit is not a sufficient allegation of special damages [*Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 792, 228 P.2d 6* (dictum); *Smith v. Los Angeles Bookbinders Union (1955) 133 Cal. App. 2d 486, 494-495, 284 P.2d 194* (general allegation of injury to business of $100,000 as not sufficient)]. To the contrary, an allegation of special damages is sufficiently specific where it alleges that plaintiff suffered the loss of employment with a specific employer, for a specific period of time, and in a specific amount of money [*Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 792, 228 P.2d 6]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsGeneral OverviewCivil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsSpecial DamagesCivil ProcedureRemediesDamagesSpecial DamagesTortsIntentional TortsDefamationDefamation Per SeTortsIntentional TortsDefamationRemediesGeneral Overview

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§ 340.51 Constitutional Defenses

Defendants who are sued for defamation by public officials and public figures, as well as defendants who are sued by private individuals forallegedly defamatory statements relating to matters of public concern, may raise constitutional defenses to such actions [*see New York Times Co. v. Sullivan (1964) 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686* ; *Curtis Publ'g Co. v. Butts (1967) 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094* ; *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789* ; *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 757-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593]* . For discussion of the constitutional limitations on the recovery of damages in defamation actions, see *§ 340.18[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationPublic FiguresTortsIntentional TortsDefamationDefensesPrivilegesConstitutional Privileges

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§ 340.52 Special Motion to Strike Cause of Action Based on Exercise of Constitutional Rights (Anti-SLAPP Statute)

To protect the public interest that encourages continued participation in matters of public significance, and to protect this participation from being chilled through abuse of the judicial process [*see Code Civ. Proc. § 425.16(a)*], the California legislature enacted *Code Civ. Proc. § 425.16*, which provides a special motion to strike so-called SLAPP (Strategic Litigation Against Public Participation) suits. If the requirements of the statute are otherwise met, a defendant may use this special motion to strike in a defamation action [*see, e.g., Lafayette Morehouse, Inc. v. Chronicle Publ'g Co. (1995) 37 Cal. App. 4th 855, 862-863, 44 Cal. Rptr. 2d 46]* .

A motion to strike a cause of action may be brought under *Code Civ. Proc. § 425.16* if the defendant's underlying conduct was in furtherance of the defendant's right of petition or free speech under the United States or California Constitutions in connection with a public issue [*Code Civ. Proc. § 425.16(b)(1)*]. Specifically, a motion to strike may be made if any of the following actions by the defendant form the basis for the complaint [*Code Civ. Proc. § 425.16(e)*]:

- Any written or oral statement made before a legislative, executive, or judicial proceeding, or any other proceeding authorized by law.

- Any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.

- Any written or oral statement or writing made in a place open to the public or in a public forum in connection with an issue of public interest.

- Any other conduct in furtherance of the exercise of the constitutional right of petition or free speech in connection with a public issue or an issue of public interest.

Unlike cases falling under the last two paragraphs listed above, a defendant moving to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official

proceeding need not separately demonstrate that the statement concerned an issue of public interest [*Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal. 4th 1106, 1123, 81 Cal. Rptr. 2d 471, 969 P.2d 564]* .

However, there are other considerations that may affect the success of a motion to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a judicial body. For example, the requirements for applying a motion to strike under these provisions may, in some circumstances, be the same as the requirements for applying the litigation privilege of *Civ. Code § 47(b)* [*see A.F. Brown Elec. Contractor, Inc. v. Rhino Elec. Supply, Inc. (2006) 137 Cal. App. 4th 1118, 1125-1126, 41 Cal. Rptr. 3d 1]* . For example, because the litigation privilege does not extend to pre-litigation communications made when no lawsuit was seriously being considered, a motion to strike is properly denied if it is based on the same conduct [*Haneline Pacific Properties, LLC v. May (2008) 167 Cal. App. 4th 311, 319-320, 83 Cal. Rptr. 3d 919* ; *A.F. Brown Elec. Contractor, Inc. v. Rhino Elec. Supply, Inc. (2006) 137 Cal. App. 4th 1118, 1128, 41 Cal. Rptr. 3d 1]* . Conversely, if the suit is based on statements that would be privileged under *Civ. Code § 47(b)* because made in anticipation of litigation contemplated in good faith and under serious consideration, the suit may be subject to a motion to strike. This is the case even if suit is filed several months after the statements were made and the statements were made to nonparties to the lawsuit, so long as the statements have the requisite connection to the impending lawsuit [*Neville v. Chudacoff (2008) 160 Cal. App. 4th 1255, 1266-1270, 73 Cal. Rptr. 3d 383;* see also *Rohde v. Wolf (2007) 154 Cal. App. 4th 28, 38, 64 Cal. Rptr. 3d 348*].

The California Supreme Court has cautioned, however, that because the litigation privilege is designed to protect access to the courts, while the anti-SLAPP statute is designed to prevent abuse of the judicial process, not all conduct protected by the litigation privilege will automatically be protected under the anti-SLAPP statute [*see Flatley v. Mauro (2006) 39 Cal. 4th 299, 322-324, 46 Cal. Rptr. 3d 606, 139 P.3d 2]* . For example, even assuming that the litigation privilege might apply to pre-litigation conduct that is illegal, the Supreme Court has held that a defendant may not successfully pursue a motion to strike under the anti-SLAPP statute if the underlying conduct taken by the defendant was illegal as a matter of law, because illegal conduct is not constitutionally protected [*Flatley v. Mauro (2006) 39 Cal. 4th 299, 317, 46 Cal. Rptr. 3d 606, 139 P.3d 2* (attorney's threats to publicly accuse plaintiff of rape constituted criminal extortion as matter of law); *see also Paul for Council v. Hanyecz (2001) 85 Cal. App. 4th 1356, 1366, 102 Cal. Rptr. 2d 864* (defendant admitted underlying conduct was illegal laundering of campaign contributions)]. Therefore, if the defendant concedes, or the evidence conclusively establishes, that the allegedly protected speech or petitioning activity was illegal, the defendant may not use the anti-SLAPP statute to strike the complaint [*Flatley v. Mauro (2006) 39 Cal. 4th 299, 320, 46 Cal. Rptr. 3d 606, 139 P.3d 2]* . However, if there is a factual dispute as to the legality of the defendant's underlying conduct, the plaintiff, if necessary to demonstrate a probability of success on the merits as discussed below, bears the burden of proving the illegality of the defendant's underlying conduct [*Paul for Council v. Hanyecz (2001) 85 Cal. App. 4th 1356, 1367, 102 Cal. Rptr. 2d 864]* .

A motion to strike may be filed within 60 days after the filing of the complaint, or at any later time at the court's discretion on terms the court deems proper [*Code Civ. Proc. § 425.16(f)*]. The moving defendant bears the initial burden of showing that the cause of action arose from protected activity [*Shekhter v. Financial Indem. Co. (2001) 89 Cal. App. 4th 141, 150-151, 106 Cal. Rptr. 2d 843]* . However, a defendant moving to strike does not bear the burden of actually proving that the plaintiff intended to chill the defendant's exercise of *First Amendment* rights [*Equilon Enters. v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 58, 124 Cal. Rptr. 2d 507, 52 P.3d 685]* , nor need the defendant show that the targeted action has or will have an actual chilling effect [*City of Cotati v. Cashman (2002) 29 Cal. 4th 69, 75-76, 124 Cal. Rptr. 2d 519, 52 P.3d 695] , review granted, depublished, Cashman v. City of Cotati, 415 F.3d 1027* . It is sufficient that the defendant establish that the challenged lawsuit arose from an act by the defendant in furtherance of the right of petition or free speech [*Equilon Enters v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 58, 124 Cal. Rptr. 2d 507, 52 P.3d 685 , reh'g granted, depublished, Cashman v. City of Cotati, 415 F.3d 1027*].

In response, the plaintiff has the burden of establishing, with admissible evidence, that there is a probability that the plaintiff will prevail on the claim [*see Code Civ. Proc. § 425.16(b)*]. In making its determination, the court considers the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based [*Code Civ.*

Proc. § 425.16(b)(2)]. The court cannot weigh the credibility or comparative strength of competing evidence, although the court must grant a defendant's motion to strike if the defendant's supporting evidence defeats the plaintiff's claim as a matter of law [*Tuchscher Dev. Enters., Inc. v. San Diego Unified Port Dist. (2003) 106 Cal. App. 4th 1219, 1235, 132 Cal. Rptr. 2d 57]* .

While the court does not generally weigh the strength of competing evidence, a public figure plaintiff attempting to defeat a motion to strike a defamation action must show a probability of demonstrating actual malice by clear and convincing evidence, and neither the trial court nor a reviewing court is required to consider the evidence of actual malice in the light most favorable to the plaintiff or draw all permissible inferences in favor of plaintiff [*Christian Research Inst. v. Alnor (2007) 148 Cal. App. 4th 71, 86, 55 Cal. Rptr. 3d 600* (reviewing court concluded that plaintiff failed to offer clear and convincing evidence that defendant published false account of mail fraud investigation against plaintiff with actual malice)]. In addition, while the stay on discovery that generally accompanies the filing of a motion to strike may be lifted by the trial court on noticed motion with a showing of good cause [*Code Civ. Proc. § 425.16(g)*], a plaintiff who must demonstrate actual malice to prevail on a defamation claim does not have good cause to seek discovery on the issue of malice without first making a prima facie demonstration that the allegedly defamatory statements are provably false factual assertions [*Paterno v. Superior Court (2008) 163 Cal. App. 4th 1342, 1349, 78 Cal. Rptr. 3d 244*]. If a plaintiff has not alleged actual malice in the complaint, but the proof presented during the hearing on the motion to strike supports a finding that defendant acted with actual malice, the plaintiff should be granted leave to amend the complaint to add allegations in conformity with that proof [*Nguyen-Lam v. Cao (2009) 171 Cal. App. 4th 858, 871-873, 90 Cal. Rptr. 3d 205*].

An order granting or denying a motion to strike is appealable under *Code Civ. Proc. § 904.1* [*Code Civ. Proc. §§ 425.16(i), 904.1(a)(13)*]. If the trial court denies a special motion to strike, a perfected appeal automatically stays the trial court proceedings [*Varian Med. Sys., Inc. v. Delfino (2005) 35 Cal. 4th 180, 195, 25 Cal. Rptr. 3d 298, 106 P.3d 958]* . However, trial court proceedings may continue on causes of action not affected by the motion to strike [*Varian Med. Sys., Inc. v. Delfino (2005) 35 Cal. 4th 180, 195 n.8, 25 Cal. Rptr. 3d 298, 106 P.3d 958]* .

With exceptions for prevailing defendants in actions brought under certain provisions governing wrongful conduct by public employees and public agencies in withholding public documents or violating open meetings laws, in any action subject to *Code Civ. Proc. § 425.16(b)*, a prevailing defendant on a special motion to strike is entitled to recover his or her attorney's fees and costs [*see Code Civ. Proc. § 425.16(c)*(1); *see* Code Civ. Proc. § 415.16(c)(2)--exceptions described].

For further discussion of the special motion to strike and a form, see Ch. 375, *Motions to Strike: Anti-SLAPP* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechAdvocacy of Illegal ActionConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechForumsConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of FreedomConstitutional LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsTime, Place & MannerCriminal Law & ProcedureAppealsStandards of ReviewSubstantial EvidenceGeneral OverviewTortsIntentional TortsDefamationProcedure

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§ 340.53 Statutory Protection Afforded Newspapers and Broadcasters

[1] Scope of Protection

Newspaper publishers as well as radio and television broadcasters are afforded broad statutory protection in California under the provisions of *Civ. Code § 48a*, the retraction statute. As discussed in *§ 340.18[4]*, protection has been increased by the Supreme Court decision in *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789* .

[2] Provisions of Retraction Statute

In any action for damages for the publication of a libel in a newspaper or of a slander by a radio or television [*see Civ. Code § 48.5(4)*] broadcast, a plaintiff can recover no more than special damages unless a correction is demanded and is not published or broadcast as the section further provides. The plaintiff must serve on the publisher at the place of publication, or on the broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. The notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous [*Civ. Code § 48a(1)*].

If a correction is demanded within the 20-day period and is not published or broadcast in substantially as conspicuous a manner in the newspaper or on the broadcasting station as were the statements claimed to be libelous, in a regular issue thereof published or broadcast within three weeks after the service, plaintiff, if he or she pleads and proves the notice, demand, and failure to correct and if the cause of action is maintained, may recover general, special, and exemplary damages. However, the plaintiff may recover no exemplary damages unless the plaintiff proves that the defendant made the publication or broadcast with actual malice as defined by the statute, and then only in the discretion of the court of jury, and actual malice may not be inferred or presumed from the publication or broadcast [*Civ. Code § 48a(2)*].

A correction must be published or broadcast in substantially as conspicuous a manner in the newspaper or on the broadcasting station as the statement claimed in the complaint to be libelous, prior to receipt of a demand for it, and it must be of the same force and effect as though the correction had been published or broadcast within three weeks after a demand for it [*Civ. Code § 48a(3)*].

[3] Purpose of Retraction Statute

The purpose of the retraction statute is to encourage the free and rapid dissemination of news [*Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 115, 77 Cal. Rptr. 243, 453 P.2d 747* ; *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 791, 228 P.2d 6]* .

[4] Adequacy of Demand for Retraction

The crucial issue in evaluating the adequacy of the notice that a broadcaster receives from a demand for a retraction under *Civ. Code § 48a* turns on whether the publisher should reasonably have comprehended which statements plaintiff protested and wished corrected [*Kapellas v. Kofman (1969) 1 Cal. 3d 20, 31-32, 81 Cal. Rptr. 360, 459 P.2d 912* ; *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 554, 343 P.2d 36]* .

A demand for retraction is only effective as to the plaintiffs listed or so described in the demand such that the defendant fairly knows who is objecting to the challenged publication. Thus, merely stating that a business entity is seeking a retraction does not preserve the rights of that entity's parent corporation to seek general or punitive damages, even if the business entity listed in the demand is a wholly owned subsidiary of the parent corporation and this fact of ownership is common knowledge [*Anschutz Entertainment Group, Inc. v. Snepp (2009) 171 Cal. App. 4th 598, 642-643, 90 Cal. Rptr. 3d 133*].

[5] Service on Publisher or Broadcaster

Although the word "publication" in the first sentence of *Civ. Code § 48a(1)* is used in its legal sense to mean the communication of any defamation, the second sentence provides that the demand for correction must be served on the "publisher" or "broadcaster" and clearly refers to the owner or operator of the newspaper or radio or television station rather than the originator of the defamatory statements [*Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 113-114, 77 Cal. Rptr. 243, 453 P.2d 747* ; *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 791, 228 P.2d 6]* . At least in the case of newspapers, however, the California Supreme Court has construed this service requirement to be satisfied when the demand is (1) served on the publisher, (2) served on a person designated by the publisher to receive such demands, or (3) served on someone employed at the newspaper other than the publisher or the publisher's designee if the publisher acquires actual knowledge of the demand within the 20-day period set forth in *Civ. Code § 48a(1)* [*Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652, 658, 14 Cal. Rptr. 2d 839, 842 P.2d 138* (impliedly overruling *Farr v. Bramblett (1955) 132 Cal. App. 2d 36, 44, 281 P.2d 372* , which was itself overruled on other grounds in *Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 114 n.4, 77 Cal. Rptr. 243, 453 P.2d 747*)]. Conversely, a plaintiff is not required to serve a demand on the author of an article if the plaintiff has served a demand on the publisher [*Larrick v. Gilloon (1959) 176 Cal. App. 2d 408, 420, 1 Cal. Rptr. 360 , overruled on other grounds, Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 114 n.4, 77 Cal. Rptr. 243, 453 P.2d 747]* .

When the demand for correction and the notice of statements deemed defamatory are served by mail, neither *Civ. Code § 48a(1)* nor *Code Civ. Proc. § 1020* (any notice required by law may be given by registered mail) requires that they be sent by registered mail [*Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652* (expressly disapproving any suggestion to the contrary in *San Leandro Collection Serv. v. Dunbar (1968) 259 Cal. App. 2d Supp. 933)*].

[6] Sufficiency of Retraction

As noted in *§ 340.53[2],* to provide a sufficient retraction to gain immunity from liability for general or punitive damages under *Civ. Code § 48a*, the retraction must appear in substantially as conspicuous a manner in the newspaper as were the allegedly libelous statements [*Civ. Code § 48a(3)*]. The question of the sufficiency of a retraction is peculiarly a question of fact for the jury [*Twin Coast Newspapers, Inc. v. Superior Court (1989) 208 Cal. App. 3d 656, 660-662, 256 Cal. Rptr. 310]* . Thus, the issue of whether a newspaper article retracting the allegedly libelous

statement was as conspicuous as the allegedly libelous article is a question of fact for the jury [*Twin Coast Newspapers, Inc. v. Superior Court (1989) 208 Cal. App. 3d 656, 660-662, 256 Cal. Rptr. 310]* . However, a court may instruct a jury that the undisputed facts compel the conclusion that the retraction was adequate as a matter of law [*Twin Coast Newspapers, Inc. v. Superior Court (1989) 208 Cal. App. 3d 656, 662, 256 Cal. Rptr. 310]* .

[7] Participants Covered

The purpose of *Civ. Code § 48a* could be circumvented if the section were limited to newspaper publishers and radio and television broadcasters, and therefore the section protects those who participate in the publication or broadcast, including reporters, columnists, authors, critics, and editors. Otherwise, the section would protect not those engaged in the rapid dissemination of news but merely those who owned or operated the facilities for such dissemination; it would protect, not a special form of news reporting, but a special form of investment [*Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 114-115, 77 Cal. Rptr. 243, 453 P.2d 747* ; *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 791, 228 P.2d 6]* .

[8] Nonparticipants Not Protected

The language of *Civ. Code § 48a* indicates that it does not apply to third parties who are not participants in the publishing or broadcasting enterprise [*Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 113-114, 77 Cal. Rptr. 243, 453 P.2d 747* ; *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 791, 228 P.2d 6]* . Thus, either an intruder on a television program [*White v. Valenta (1965) 234 Cal. App. 2d 243, 249-250, 44 Cal. Rptr. 241]* or an ordinary slanderer whose remarks subsequently find their way into a newspaper [*Mercado v. Hoefler (1961) 190 Cal. App. 2d 12, 18-19, 11 Cal. Rptr. 787]* is not protected. The author of a letter to the editor is also a nonparticipant in the business of publishing, and is not protected by the provisions of *Civ. Code 48a* [*Denney v. Lawrence (1994) 22 Cal. App. 4th 927, 936-940, 27 Cal. Rptr. 2d 556]* .

[9] Magazines Not Covered

Civ. Code § 48a applies only to a publication in a newspaper or by radio and does not apply to magazines [*Alioto v. Cowles Communications, Inc. (9th Cir. 1975) 519 F.2d 777, 778-779* ; *Montandon v. Triangle Publ'ns, Inc. (1975) 45 Cal. App. 3d 938, 949-953, 120 Cal. Rptr. 186* ; *see Burnett v. National Enquirer, Inc. (1983) 144 Cal. App. 3d 991, 1000-1001, 193 Cal. Rptr 206]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureRemediesDamagesPunitive DamagesCommunications LawBroadcastingGeneral OverviewCommunications LawRelated Legal IssuesDefamationCommunications LawRelated Legal IssuesLibelTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationProcedureTortsIntentional TortsDefamationRemediesDamagesTortsIntentional TortsDefamationRemediesRetractions

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§ 340.54 Due Care by Radio and Television Broadcasters

Civ. Code § 48.5 provides for the nonliability of the owner, licensee, or operator of a broadcasting station or network in an action for defamation by radio. It provides, in substance, that the owner of a radio station, or the owner's agent, is not liable for damages resulting from a defamatory statement made as a part of a broadcast over that station which was made by someone other than the owner or agent if the owner or agent exercised due care to prevent the utterance of such a statement. At the most, *Civ. Code § 48.5* confers a defense upon the owner and agent under the noted circumstances and does not raise a cause of action against them in favor of the person defamed [*Correia v. Santos (1961) 191 Cal. App. 2d 844, 856, 13 Cal. Rptr. 132]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawRelated Legal IssuesDefamation

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§ 340.55 Justification by Truth

[1] Allegations in Answer

In any action for libel or slander, the defendant may, in the defendant's answer, allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages [*Code Civ. Proc. § 461*].

[2] Complete Defense

Truth is a complete defense against civil liability for defamation regardless of the bad faith or malicious purpose of the publisher of the material [*Davis v. Hearst (1911) 160 Cal. 143, 195, 116 P. 530* ; *Swaffield v. Universal Ecsco Corp. (1969) 271 Cal. App. 2d 147, 164, 76 Cal. Rptr. 680]* .

[3] Substantial Truth Sufficient

It is generally agreed that it is not necessary to prove the literal truth of an allegedly libelous accusation in every detail, so long as the imputation is substantially true and therefore justifies the "gist" or "sting" of the remark [*Emde v. San Joaquin County Cent. Labor Council (1943) 23 Cal. 2d 146, 160, 143 P.2d 20* ; *Southwell v. Mallery, Stern & Warford (1987) 194 Cal. App. 3d 140, 145, 239 Cal. Rptr. 371* ; *Handelsman v. San Francisco Chronicle (1970) 11 Cal. App. 3d 381, 387, 90 Cal. Rptr. 188]* . Immaterial variances and defects of proof upon minor matters are to be disregarded if the substance of the charge is justified [*Stoneking v. Briggs (1967) 254 Cal. App. 2d 563, 573, 62 Cal. Rptr. 249]* . Thus, for example, a statement made in the present tense, such as a statement that a person "is" a criminal, may be found to be substantially true if it refers technically to a state of affairs that was true in the past [*Hughes v. Hughes (2004) 122 Cal. App. 4th 931, 937-939, 19 Cal. Rptr. 3d 247* (statement "our dad's a pimp" was substantially true because supported by evidence that person had engaged in pimping activities in past)].

A media defendant is not liable for publishing a factual account that provides only one perspective on a story, but fails to include additional facts that might give the reader or listener a different impression of the events discussed [*Paterno v. Superior Court (2008) 163 Cal. App. 4th 1342, 1352, 78 Cal. Rptr. 3d 244*].

[4] Adding Emphasis to Truthful Statement Not Defamatory

The mere addition of simple emphasis to an otherwise completely accurate and truthful factual statement is not, in and of itself, defamatory [*Smith v. Maldonado (1999) 72 Cal. App. 4th 637, 652, 85 Cal. Rptr. 2d 397]* . Therefore, in one case, the re-publication and dissemination of a truthful and accurate newspaper article was not defamatory because the article was unedited and unchanged except for the highlighting of one paragraph that identified the plaintiffs as having been the clients of an attorney who had been the subject of a criminal sting operation [*Smith v. Maldonado (1999) 72 Cal. App. 4th 637, 653, 85 Cal. Rptr. 2d 397]* . A truthful statement of fact may be transformed into potentially defamatory material only if it is substantively changed by editing or rearranging the words, removing language from or adding language to the original statement, or repeating or reproducing the statement in a different surrounding context in such a way as to render the statement reasonably susceptible of a different meaning or interpretation [*Smith v. Maldonado (1999) 72 Cal. App. 4th 637, 652, 85 Cal. Rptr. 2d 397]* .

[5] Subjective Belief of Truth Immaterial

It is immaterial whether the publisher believed the statements were true at the time they were made, so long as they in fact were true [*Emde v. San Joaquin County Cent. Labor Council (1943) 23 Cal. 2d 146, 160, 143 P.2d 20]* .

[6] Burden of Proof of Falsity

The United States Supreme Court has held that, at least when the plaintiff is either a public figure or a private figure who is suing a newspaper or other media defendant for publishing speech of a public concern, *U.S. Const. amend. I*, requires that the plaintiff bear the burden of proving the falsity of the defamatory statement before recovering damages [*Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 776-779, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* . However, the Court has continued to leave open the question of what standards would apply if a private plaintiff sues a nonmedia defendant [*see, e.g.,* *Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 779 n.4, 106 S. Ct. 1558, 89 L. Ed. 2d 783* ; *see also* *Hutchinson v. Proxmire (1979) 443 U.S. 111, 133 n.16, 99 S. Ct. 2675, 61 L. Ed. 2d 411* (open question whether protection of *U.S. Const. amend. I*, extends to cases involving nonmedia defendants)].

Although the United States Supreme Court has not ruled on the issue, the California court of appeal has held that a private-figure plaintiff also bears the burden of proving the falsity of allegedly defamatory statements in an action against nonmedia defendants, if the statements concern a matter of public interest [*Integrated Healthcare Holdings, Inc. v. Fitzgibbons (2006) 140 Cal. App. 4th 515, 529, 44 Cal. Rptr. 3d 517* ; *Nizam-Aldine v. City of Oakland (1996) 47 Cal. App. 4th 364, 372-375, 54 Cal. Rptr. 2d 781]* .

Under the common law, a plaintiff is not otherwise required to allege that the statements are false, and an omission of an allegation of falsity in thecomplaint may not be grounds for a demurrer [*see* *Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal. 2d 224, 233, 11 Cal. Rptr. 97, 359 P.2d 465* ; *see also* *Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 776, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* . Therefore, although it is currently unclear whether or not a private plaintiff who sues a nonmedia defendant is required to plead and prove falsity, it appears that at least under *Lipman*, and until the United States Supreme Court rules otherwise, the burden remains on the defendant rather than on the plaintiff. However, the better practice is for a plaintiff to allege falsity in a complaint, and a defendant might have a valid argument against a plaintiff who fails to do so.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationPublic FiguresCriminal Law & ProcedureCriminal

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§ 340.56 Mitigation

In any action for libel or slander, the defendant may in his or her answer allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages. Whether he or she proves the justification or not, he or she may give in evidence the mitigating circumstances [*Code Civ. Proc. § 461*].

The "mitigating circumstances" that *Code Civ. Proc. § 461* allows the defendant to prove are those that tend to show that the defendant, in speaking the slanderous words, acted in good faith, with honesty of purpose, and not maliciously. The fact that the person to whom the slander may have been uttered was not influenced thereby or had subsequently regained his or her confidence in the plaintiff would not be such a "mitigating circumstance" [*Clay v. Lagiss (1956) 143 Cal. App. 2d 441, 448, 299 P.2d 1025* ; *Shumate v. Johnson Publ'g Co. (1956) 139 Cal. App. 2d 121, 135, 293 P.2d 531]* .

Legal Topics:

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§ 340.57 Privilege

A defendant who has published a defamatory statement about a plaintiff may avoid liability if the publication was privileged. When the privilege relied on is of the type referred to as an "absolute" privilege, the defendant avoids liability even when the publication was made with malice. A "qualified" or "conditional" privilege, on the other hand, does not protect a defendant who had acted maliciously [*Saroyan v. Burkett (1962) 57 Cal. 2d 706, 708, 21 Cal. Rptr. 557, 371 P.2d 293]* .

If the privilege is absolute, it is unaffected by the presence of malice. Regardless of the specific type of absolute privilege (discussed under subsequent headings), the absolute immunity attaches if all of the following conditions have been met [*Tiedemann v. Superior Court (1978) 83 Cal. App. 3d 918, 924, 148 Cal. Rptr. 242* ; *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 824, 825, 106 Cal. Rptr. 718]* :

- The publication was made in a judicial (or quasi-judicial) proceeding;
- The publication had some connection or logical relation to the action;
- The publication was made to achieve the objectives of the litigation; and
- The publication involved litigants or other participants authorized by law.

Generally speaking, the only privileges applicable to defamation actions are those enumerated in *Civ. Code § 47* [*Neary v. Regents of Univ. of Cal. (1986) 185 Cal. App. 3d 1136, 1144, 230 Cal. Rptr. 281]* .

The defense of privilege to a charge of defamation is an affirmative one that must be specifically pleaded unless it appears on the face of the complaint [*Locke v. Mitchell (1936) 7 Cal. 2d 599, 602, 61 P.2d 922* ; *Peoples v. Tautfest (1969) 274 Cal. App. 2d 630, 635, 79 Cal. Rptr. 478* ; *Everett v. California Teachers Ass'n (1962) 208 Cal. App. 2d 291, 293, 25 Cal. Rptr. 120]* . If the existence of the privilege is disclosed on the face of the complaint, the privilege is available as a matter of defense on demurrer [*Locke v. Mitchell (1936) 7 Cal. 2d 599, 602, 61 P.2d 922* ; *Whelan v.*

Wolford (1958) 164 Cal. App. 2d 689, 693, 331 P.2d 86] .

When the facts and circumstances under which a defamatory publication was made are undisputed, the question of privilege is a matter of law that may be resolved in a summary judgment proceeding [*Costa v. Superior Court (1984) 157 Cal. App. 3d 673, 678, 204 Cal. Rptr. 1]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationDefensesPrivilegesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesStatutory Privileges

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§ 340.58 Absolute Privilege for Executive Officers

A privileged publication is one made in the proper discharge of an official duty [*Civ. Code § 47(a)*]. The privilege is absolute and exists for state officials corresponding in rank to federal cabinet members to publish false and defamatory matter of another in the exercise of an executive function if the matter has some relation to the executive proceeding in which the officer is acting [*Saroyan v. Burkett (1962) 57 Cal. 2d 706, 710, 21 Cal. Rptr. 557, 371 P.2d 293]* . Some California courts of appeal have held that the absolute privilege conveyed by *Civ. Code § 47(a)* extends only to state executives who correspond in rank to federal cabinet officers; it does not extend to state officials of lesser rank [*see Frisk v. Merrihew (1974) 42 Cal. App. 3d 319, 323, 116 Cal. Rptr. 781* ; *White v. California (1971) 17 Cal. App. 3d 621, 626-628, 95 Cal. Rptr. 175]* . Other court of appeal opinions have held, however, that the absolute privilege of *Civ. Code § 47(a)* extends to lower level state or local officials so long as the publication was made while the official was exercising his or her policymaking function and was acting within the scope of his or her official duties [*Morrow v. Los Angeles Unified School Dist. (2007) 149 Cal. App. 4th 1424, 1440-1441, 57 Cal. Rptr. 3d 885* (statements made by school superintendent to newspaper reporter concerning district's decision to replace principal in response to school violence were privileged); *Neary v. Regents of Univ. of Cal. (1986) 185 Cal. App. 3d 1136, 1141, 230 Cal. Rptr. 281* (vice-chancellor at state university)].

The state Attorney General was protected by the privilege when he released a report at a press conference that named persons suspected of involvement in organized crime in the state [*Kilgore v. Younger (1982) 30 Cal. 3d 770, 779, 180 Cal. Rptr. 657, 640 P.2d 793]* . The Supreme Court found that the Attorney General was discharging an official duty at the press conference, and that regardless of the propriety of the discharge, failure to apply the absolute privilege would cause a chilling effect on the energetic performance of the public's business [*Kilgore v. Younger (1982) 30 Cal. 3d 770, 782, 180 Cal. Rptr. 657, 640 P.2d 793* ; *see also Maranatha Corrections, LLC v. Department of Corrections & Rehabilitation (2008) 158 Cal. App. 4th 1075, 1088-1091, 70 Cal. Rptr. 3d 614* (privilege applied when director of State Department of Corrections & Rehabilitation released letter to public explaining that public contract with plaintiff was terminated due to perceived misappropriation of funds owed to state); *Tutor-Saliba Corp. v. Herrera (2006) 136 Cal. App. 4th 604, 615, 39 Cal. Rptr. 3d 21* (city attorney's speech discussing merits of pending litigation was protected)].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesGovernment PrivilegesGeneral OverviewEvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeGeneral OverviewGovernmentsFederal GovernmentEmployees & OfficialsTortsIntentional TortsDefamationDefensesPrivilegesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesStatutory Privileges

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§ 340.59 Absolute Privilege for Legislative Proceedings

[1] In General

A privileged publication or broadcast is one made in any legislative proceeding authorized by law [*Civ. Code § 47(b)*]. The privilege is absolute since absolute immunity attaches to statements made before a legislative body. The existence of malice on the part of the declarant will not defeat the privilege if it is shown that the statement that is alleged to be defamatory bears some connection to the work of the legislative body [*Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 285, 112 Cal. Rptr. 609]* . The general immunity afforded legislators extends to all that is spoken or done in the course of legislative proceedings [*Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 288, 112 Cal. Rptr. 609]* . However, although the application of the privilege requires the demonstration of some connection with the proceedings, there is no requirement of relevancy, materiality, or pertinency (in their technical sense) [*Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 285, 112 Cal. Rptr. 609* ; *see Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 90, 53 Cal. Rptr. 706]* .

[2] Public Included in Privilege

The immunity afforded to legislators attaches to interested members of the public who wish to address themselves to matters pending before a legislative body [*Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 288, 112 Cal. Rptr. 609* ; *Pettitt v. Levy (1972) 28 Cal. App. 3d 484, 488, 104 Cal. Rptr. 650* ; *see Whelan v. Wolford (1958) 164 Cal. App. 2d 689, 694, 331 P.2d 86]* . The privilege also extends to statements made by members of the public during preliminary conversations while marshalling evidence and preparing to address a legislative body, so long as the statements are relevant to the legislative proceedings and are directed toward the achievement of the objects of the proceedings [*Cayley v. Nunn (1987) 190 Cal. App. 3d 300, 304, 235 Cal. Rptr. 385]* .

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30-340 California Forms of Pleading and Practice--Annotated § 340.60

§ 340.60 Absolute Privilege for Judicial Proceedings

[1] Availability

A publication or broadcast made in any judicial proceeding authorized by law is privileged [*Civ. Code § 47(b)*]. The privilege granted by *Civ. Code § 47(b)* is an absolute one because it protects publications made with actual malice or with the intent to do harm [*Albertson v. Raboff (1956) 46 Cal. 2d 375, 379, 295 P.2d 405* ; *Bradley v. Hartford Acc. & Indem. Co. (1973) 30 Cal. App. 3d 818, 824, 106 Cal. Rptr. 718* , *disapproved on other grounds,* *Silberg v. Anderson (1990) 50 Cal. 3d 205, 218-219, 266 Cal. Rptr. 638, 786 P.2d 365]* .

The California Supreme Court has held that there is no requirement that the communication be "in the interest of justice" to be absolutely privileged [*Silberg v. Anderson (1990) 50 Cal. 3d 205, 212, 266 Cal. Rptr. 638, 786 P.2d 365* (disapproving to extent inconsistent cases holding that statements not made in interest of justice are not privileged, including *Fuhrman v. California Satellite Sys. (1986) 179 Cal. App. 3d 408, 421, 231 Cal. Rptr. 113* , and *Kinnamon v. Staitman & Snyder (1977) 66 Cal. App. 3d 893, 896-897, 136 Cal. Rptr. 321*); *see* *Rubin v. Green (1993) 4 Cal. 4th 1187, 1194, 17 Cal. Rptr. 2d 828, 847 P. 2d 1044* (citing *Silberg v. Anderson* for proposition that malicious prosecution actions are only exception to applicability of *Civ. Code § 47(b)*)]. Therefore, communications that are made in connection with and logically related to litigation do not fall outside the judicial privilege merely because they are, or are alleged to be, fraudulent, perjurious, unethical, or even illegal [*Jacob B. v. County of Shasta (2007) 40 Cal. 4th 948, 957-959, 56 Cal. Rptr. 3d 477, 154 P.3d 1003* ; *Kashian v. Harriman (2002) 98 Cal. App. 4th 892, 920, 120 Cal. Rptr. 2d 576]* .

Although the litigation privilege may be applied in a breach of contract action, application in those cases depends on the facts of the case and whether application would further the policies underlying the privilege [*Feldman v. 1100 Park Lane Associates (2008) 160 Cal. App. 4th 1467, 1497-1498, 74 Cal. Rptr. 3d 1* ; *Wentland v. Wass (2005) 126 Cal. App. 4th 1484, 1492, 25 Cal. Rptr. 3d 109]* . For example, the court of appeal rejected application of the privilege in a case seeking liquidated damages following a breach of a contract in which the defendants had agreed not to make public comments accusing the plaintiff of wrongdoing in connection with his role as managing partner of a business venture. Although the statements breaching this contractual agreement were made in connection with litigation, the court noted

that the defendants had contractually agreed not to make such public statements, and in doing so had waived the protection of the litigation privilege [*Wentland v. Wass (2005) 126 Cal. App. 4th 1484, 1494, 25 Cal. Rptr. 3d 109]* . Moreover, the court concluded that the policies underlying the privilege--including promoting access to the courts, truthful testimony, and zealous advocacy, as well as encouraging finality and avoiding litigation--would not be furthered by applying the privilege to a breach of contract case in which the speaker had violated an agreement not to speak [*Wentland v. Wass (2005) 126 Cal. App. 4th 1484, 1494, 25 Cal. Rptr. 3d 109]* .

The judicial privilege may not apply when another statute specifically prohibits the conduct alleged to be protected by the privilege, at least when applying the privilege would defeat the purposes of the other statute [*compare Cabral v. Martins (2009) 177 Cal. App. 4th 471, 488-489, 99 Cal. Rptr. 3d 394* (application of litigation privilege to attorneys' conduct in representing clients in probate proceedings would not defeat purposes of child support evasion statutes, *Civ. Code §§ 1714.4, 1714.41*), *with Komarova v. National Credit Acceptance, Inc. (2009) 175 Cal. App. 4th 324, 339-340, 95 Cal. Rptr. 3d 880* (litigation privilege did not apply to conduct in violation of Rosenthal Fair Debt Collection Practices Act, *Civ. Code § 1788 et seq.*)].

The absolute judicial privilege applies to allegedly actionable conduct that occurs in connection with judicial proceedings in Mexico [*Beroiz v. Wahl (2000) 84 Cal. App. 4th 485, 493-494, 100 Cal. Rptr. 2d 905]* .

[2] Privilege Applicable to Statements Made in Arbitration Proceedings

"Judicial proceeding" has been held to include arbitration, whether judicial arbitration [*see Code Civ. Proc. § 1141.10 et seq.*] or arbitration pursuant to private contractual agreement [*see Code Civ. Proc. § 1280 et seq.*], so that statements of a witness at an arbitration hearing are protected by the privilege [*Moore v. Conliffe (1994) 7 Cal. 4th 634, 647-648, 29 Cal. Rptr. 2d 152, 871 P.2d 204]* . In reaching this conclusion, the California Supreme Court noted that it had no occasion to address the question whether the litigation privilege also applied to statements involving "alternative dispute resolution" proceedings other than those involving arbitration [*Moore v. Conliffe (1994) 7 Cal. 4th 634, 651 n.8, 29 Cal. Rptr. 2d 152, 871 P.2d 204]* .

While statements of a witness at an arbitration proceeding are generally protected, the litigation privilege does not protect an expert witness from a suit brought by the party who hired that expert witness even if based on testimony provided in conjunction with an arbitration proceeding [*Lambert v. Carneghi (2008) 158 Cal. App. 4th 1120, 1125-1126, 70 Cal. Rptr. 3d 626*].

[3] Privilege Applies to Communication, Not to Conduct

The California Supreme Court has held that the privilege of former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] precludes recovery for tortiously inflicted injury resulting from publications or broadcasts made during the course of judicial and quasi-judicial proceedings, but does not bar recovery for injuries from tortious conduct, regardless of the purpose for which the conduct is undertaken [*Kimmel v. Goland (1990) 51 Cal. 3d 202, 205, 271 Cal. Rptr. 191, 793 P.2d 524]* . In that case, plaintiffs tape-recorded telephone conversations with defendants without defendants' knowledge, in violation of *Penal Code § 632* (which prohibits tape recording of telephone conversation without consent of all parties), and turned the tapes over to their attorney, who transcribed them in preparation for the filing of a civil complaint based on allegations supported by defendants' statements made during the recorded conversations. The Supreme Court held that former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] does not provide immunity for either plaintiffs or their attorney with regard to the defendants' cross complaint against those parties, alleging violation of *Penal Code § 632*, because the cross complaint alleged injury from the illegal taping of the conversations, not from any "publication" or "broadcast" of the information contained in those conversations [*Kimmel v. Goland (1990) 51 Cal. 3d 202, 209-214, 271 Cal. Rptr. 191, 793 P.2d 524]* . For discussion and forms regarding *Penal Code § 630 et seq.*, see Ch. 429, *Privacy* .

[4] Publications Covered

The privilege is not limited to the pleadings, to the oral or written evidence, or to publications in open court or in briefs or in affidavits if the publication is made to achieve the objects of the litigation [*Albertson v. Raboff (1956) 46 Cal. 2d 375* , 381, *295 P.2d 405* ; *Rader v. Thrasher (1972) 22 Cal. App. 3d 883, 887, 99 Cal. Rptr. 670]* . The privilege extends to:

- Statements made in affidavits [*Bernstein v. Alameda-Contra Costa Med. Ass'n (1956) 139 Cal. App. 2d 241, 246, 293 P.2d 862]* .

- Questions and answers at a deposition [*Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 85, 93, 53 Cal. Rptr. 706]* .

- Statements made by a judge at a settlement conference [*Soliz v. Williams (1999) 74 Cal. App. 4th 577, 588-589, 88 Cal. Rptr. 2d 184* (immunity applied even to statements made in hallway outside courtroom)].

- Interviews between a prospective witness and an attorney [*Ascherman v. Natanson (1972) 23 Cal. App. 3d 861, 865, 100 Cal. Rptr. 656]* .

A condominium association's publication of assessment liens is covered by the privilege, even though the liens may be enforced either judicially or by private sale [*Wilton v. Mountain Wood Homeowners Assn., Inc. (1993) 18 Cal. App. 4th 565, 568-570, 22 Cal. Rptr. 2d 471]* .

[5] Persons Covered

Persons who qualify for the absolute privilege afforded by former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] include:

- Judges and other officers [*Soliz v. Williams (1999) 74 Cal. App. 4th 577, 585, 88 Cal. Rptr. 2d 184* ; *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 824, 106 Cal. Rptr. 718* , *disapproved on other grounds,* *Silberg v. Anderson (1990) 50 Cal. 3d 205, 218-219, 266 Cal. Rptr. 638, 786 P.2d 365]* .

- Attorneys [*Friedman v. Knecht (1967) 248 Cal. App. 2d 455, 460, 56 Cal. Rptr. 540]* .

- Parties [*Albertson v. Raboff (1956) 46 Cal. 2d 375, 378-379, 295 P.2d 405]* .

- Witnesses and prospective witnesses [*Ascherman v. Natanson (1972) 23 Cal. App. 3d 861, 865, 100 Cal. Rptr. 656* ; *but see* *Lambert v. Carneghi (2008) 158 Cal. App. 4th 1120, 1142-1144, 70 Cal. Rptr. 3d 626* (litigation privilege does not protect expert witness from suit brought by party who hired witness, even if suit is based on witness's testimony)].

- A county bar association and its officers and the State Bar and its investigative employees [*Lebbos v. State Bar (1985) 165 Cal. App. 3d 656, 669, 211 Cal. Rptr. 847]* .

- Jurors [*Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 825, 106 Cal. Rptr. 718* , *disapproved on other grounds,* *Silberg v. Anderson (1990) 50 Cal. 3d 205, 218-219, 266 Cal. Rptr. 638, 786 P.2d 365]* .

There is no broad exception to the litigation privilege available to a plaintiff merely because he or she did not participate in the underlying judicial proceedings [*Action Apartment Assn., Inc. v. City of Santa Monica (2007) 41 Cal. 4th 1232, 1247-1248, 63 Cal. Rptr. 3d 398, 163 P.3d 89* ; *Komarova v. National Credit Acceptance, Inc. (2009) 175 Cal. App. 4th 324, 341, 95 Cal. Rptr. 3d 880*]. Conversely, defendants who were neither participants nor litigants in the underlying judicial proceedings are never protected from liability by the judicial privilege of *Civ. Code § 47(b)* [*Wise v. Thrifty Payless, Inc. (2000) 83 Cal. App. 4th 1296, 1304, 100 Cal. Rptr. 2d 437]* . For example, in a case involving the dissemination of private information, the plaintiff's estranged husband may have been protected from liability by his use of private information about the plaintiff during their marriage dissolution proceedings, but a pharmacy that was not a participant in those proceedings could not use the husband's judicial privilege as a shield from liability for the pharmacy's own tortious conduct in initially revealing the private information to the plaintiff's estranged husband [*Wise v. Thrifty Payless, Inc. (2000) 83 Cal. App. 4th 1296, 1303-1305, 100 Cal. Rptr. 2d 437]* .

[6] False Evidence

The privilege is accorded even if the testimony of a witness is allegedly perjured and malicious [*Kachig v. Boothe (1971) 22 Cal. App. 3d 626, 641, 99 Cal. Rptr. 393]* . Inasmuch as there is no exception to the privilege when the testimony is perjured, no exception applies to the preparation and presentation of false documentary evidence [*Kachig v. Boothe (1971) 22 Cal. App. 3d 626, 641, 99 Cal. Rptr. 393* ; *Agostini v. Strycula (1965) 231 Cal. App. 2d 804, 808, 42 Cal. Rptr. 314]* .

[7] Some Relation or Relevance to Action Required

An absolute privilege attaches only to a publication that has some connection or logical relation to the judicial proceeding, is permitted by law, and is made to achieve the objects of the litigation [*Silberg v. Anderson (1990) 50 Cal. 3d 205, 212, 266 Cal. Rptr. 638, 786 P.2d 365]* . This logical relation must bear a functional connection to the litigation, so that the communicative act must be a necessary or useful step in the litigation process; it is not sufficient that the communication's content is related to that of the litigation [*Rothman v. Jackson (1996) 49 Cal. App. 4th 1134, 1145-1146, 57 Cal. Rptr. 2d 284]* . For example, a psychologist retained by the parties to a child-custody proceeding for the purpose of making nonbinding recommendations to the court based on professional evaluations is absolutely privileged to make communications that are legitimately connected with that function [*Obos v. Scripps Psychological Assocs., Inc. (1997) 59 Cal. App. 4th 103, 107, 69 Cal. Rptr. 2d 30* (communication by court-ordered psychologist to children's attorney and therapist, regarding allegation that mother's boyfriend had been dishonorably discharged from military and fired from his job for dishonesty, furthered goal of ascertaining which custodial arrangement was in children's best interest, thus was logically connected to case); *Gootee v. Lightner (1990) 224 Cal. App. 3d 587, 591-596, 274 Cal. Rptr. 697* (affirming summary judgment for defendant in action for professional negligence based on alleged negligent and intentional conduct); *Howard v. Drapkin (1990) 222 Cal. App. 3d 843, 860-864 , 271 Cal. Rptr. 893* (dismissing action against psychologist based on alleged bias toward other party and abusive conduct toward plaintiff)].

In addition, communications by attorneys with residents in a mobilehome park concerning park conditions, and the possibility of the attorneys being retained to prosecute an action against the park owner for failure to maintain the park, had "some relation" to an anticipated lawsuit, and thus, were privileged even if the attorneys' conduct constituted wrongful solicitation [*Rubin v. Green (1993) 4 Cal. 4th 1187, 1194-1196, 17 Cal. Rptr. 2d 828, 847 P. 2d 1044]* . However, relevancy or materiality in a strict evidentiary sense is not required [*Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 824, 106 Cal. Rptr. 718 , disapproved on other grounds, Silberg v. Anderson (1990) 50 Cal. 3d 205, 218-219, 266 Cal. Rptr. 638, 786 P.2d 365]* . The privilege is denied to any participant in legal proceedings only if the matter is so palpably irrelevant to the subject matter of the controversy that no resonable person can doubt its irrelevancy and impropriety [*Loomis v. Superior Court (1987) 195 Cal. App. 3d 1026, 1030, 241 Cal. Rptr. 236* (absolute privilege held to apply to filing of public records of State Bar disciplinary proceeding in support of motion to strike another motion that was allegedly filed by suspended attorney during period of suspension)].

If the allegedly defamatory statements meet the requirements for application of the judicial privilege, including the requirements of relevancy and pertinency, the fact that the person allegedly defamed was not a party to the underlying proceeding does not defeat application of the privilege [*Obos v. Scripps Psychological Assocs., Inc. (1997) 59 Cal. App. 4th 103, 106-109, 69 Cal. Rptr. 2d 30]* . Therefore, for example, the privilege applied in a case in which an innocent party not connected to a bankruptcy proceeding was erroneously identified as the debtor in the caption of a notice of motion to sell personal property, which was filed in the course of the bankruptcy proceeding. The court of appeal concluded that the fact that the misidentified plaintiff was not actually involved with the bankruptcy did not change the fact that the contextual document in which the allegedly defamatory mistake occurred--the notice of motion--was filed to further the objects of the bankruptcy litigation [*Sacramento Brewing Co. v. Desmond, Miller & Desmond (1999) 75 Cal. App. 4th 1082, 1090, 89 Cal. Rptr. 2d 760]* .

Civ. Code § 47(b) does not protect the republication of otherwise privileged material, on a nonprivileged occasion, to persons to whom the privilege does not apply. For example, the statute was held not to protect statements made by a forensic psychotherapist to the media, regarding his professional impressions of a person examined in conjunction with a judicial proceeding, when the information disclosed was not otherwise accessible to the public [*Susan A. v. County of Sonoma (1991) 2 Cal. App. 4th 88, 95-96, 3 Cal. Rptr. 2d 27]* . One court has held that the privilege does not even protect communication of statements that would otherwise be available to the public, holding that the privilege does not preclude liability for defamation based on facsimile transmission of a copy of a complaint to a newspaper that is neither a party to nor a participant in the litigation [*Shahvar v. Superior Court (1994) 25 Cal. App. 4th 653, 659, 663, 30 Cal. Rptr. 2d 597]* . However, the holding in *Shahvar* has been abrogated by the 1996 amendment to *Civ. Code § 47(d)* [*see* Stats. 1996, ch. 1055, § 1].

In addition, the absolute judicial immunity of *Civil Code Section 47(b)* does not immunize a judge from liability for false, defamatory statements that are made to the press about a pending lawsuit and that make the plaintiff appear to be a liar, because such statements to the press are not a normal judicial function [*Soliz v. Williams (1999) 74 Cal. App. 4th 577, 595, 88 Cal. Rptr. 2d 184]* .

In contrast, a six-year-old child's statements reporting alleged sexual abuse to her parents and grandmother were absolutely protected. These statements were considered to be made in anticipation of criminal proceedings, and because the child was so young, the adults were considered to be participants in any subsequent litigation [*Smith v. M.D. (2003) 105 Cal. App. 4th 1169, 1189-1190, 130 Cal. Rptr. 2d 315]* .

[8] Statements Made Before and After Judicial Proceedings

A communication is privileged if made in, or in anticipation of, litigation by litigants or authorized participants [*Rothman v. Jackson (1996) 49 Cal. App. 4th 1134, 1145, 57 Cal. Rptr. 2d 284* (citing *Moore v. Conliffe (1994) 7 Cal. 4th 634, 641, 29 Cal. Rptr. 2d 152*)]. However, one court of appeal has held that the privilege of *Civ. Code § 47(b)(2)* does not generally extend to statements made after a judicial proceeding, unless the statements relate to an additional proceeding, such as a proceeding on a motion for a new trial [*Laffer v. Levinson, Miller, Jacobs & Phillips (1995) 34 Cal. App. 4th 117, 123, 40 Cal. Rptr. 2d 233]* . Thus, statements made by an attorney to a third party that involved merely a threat of possible future litigation were not subject to an absolute privilege merely because they had some relation to a past proceeding that had been resolved [*Laffer v. Levinson, Miller, Jacobs & Phillips (1995) 34 Cal. App. 4th 117, 123-124, 40 Cal. Rptr. 2d 233* (factual questions existed regarding applicability of qualified privilege)].

A pre-litigation statement is protected by the litigation privilege of *Civ. Code § 47(b)* if the statement is made in connection with proposed litigation that is contemplated in good faith and under serious consideration [*Aronson v. Kinsella (1997) 58 Cal. App. 4th 254, 262, 68 Cal. Rptr. 2d 305* ; *see also Edwards v. Centex Real Estate Corp. (1997) 53 Cal. App. 4th 15, 33, 61 Cal. Rptr. 2d 518]* . The privilege for pre-litigation statements is an absolute privilege and is not conditioned on an imminency requirement. As long as the statements are made in serious and good faith

consideration of the litigation, the contemplated litigation need not be imminent [*Aronson v. Kinsella (1997) 58 Cal. App. 4th 254, 266-267, 68 Cal. Rptr. 2d 305* ; *see also* *Edwards v. Centex Real Estate Corp. (1997) 53 Cal. App. 4th 15, 35, 61 Cal. Rptr. 2d 518]* . If pre-litigation demand letters are sent to a large number of potential defendants, a plaintiff need not actually file suit against every defendant to be entitled to the protection of the judicial privilege as to all of the demand letters [*Blanchard v. DIRECTV, Inc. (2004) 123 Cal. App. 4th 903, 920, 20 Cal. Rptr. 3d 385]* .

The privilege will not protect pre-litigation communications that are not reasonably relevant to anticipated litigation, especially if the particular communications are defamatory comments about an individual. In one case, for example, the privilege did not protect erroneous statements in a demand letter about a person's criminal record, because the comments were not reasonably relevant to the subject of the demand letter, which involved civil charges of unfair competition leveled at the person's current employer [*Nguyen v. Proton Tech. Corp. (1999) 69 Cal. App. 4th 140, 150-152, 81 Cal. Rptr. 2d 392]* .

The litigation privilege does not automatically apply as a matter of law to a retraction published by a newspaper in response to a demand made pursuant to *Civ. Code § 48a*, which is discussed in *§ 340.53*. Before the privilege may even arguably attach to such a retraction, the newspaper printing the retraction must establish that either it or the party demanding the retraction seriously and in good faith proposed imminent access to the courts as a means of resolving their dispute [*Eisenberg v. Alameda Newspapers, Inc. (1999) 74 Cal. App. 4th 1359, 1381, 88 Cal. Rptr. 2d 802* (newspaper failed to show that litigation was imminent)].

[9] Liberal Application

In applying the general rule of immunity of judicial officers in the conduct of judicial business, of which the privilege in defamation actions is but a special application, the California courts favor a liberal construction of the scope of jurisdiction and relevancy [*Lewis v. Linn (1962) 209 Cal. App. 2d 394, 399, 26 Cal. Rptr. 6]* . Under *Civ. Code § 47(b)*, doubts are to be resolved in favor of relevancy and pertinency [*Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 93, 53 Cal. Rptr. 706]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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B. Defenses To Defamation Actions

30-340 California Forms of Pleading and Practice--Annotated § 340.61

§ 340.61 Absolute Privilege for Other Official Proceedings

[1] Availability

A publication or broadcast made in any official proceeding authorized by law is privileged [*Civ. Code § 47(b)*]. The phrase "in any other official proceeding authorized by law" contained in *Civ. Code § 47(b)* encompasses those proceedings that resemble judicial and legislative proceedings, such as transactions of administrative boards and quasi-judicial and quasi-legislative proceedings. The general rule is now well established that the absolute privilege is applicable not only to judicial but also to quasi-judicial proceedings [*see Silberg v. Anderson (1990) 50 Cal. 3d 205, 212, 266 Cal. Rptr. 638, 786 P.2d 365]* ; thus, defamatory statements made in both judicial and quasi-judicial proceedings having some relation to the proceeding are absolutely privileged [*Harris v. King (1998) 60 Cal. App. 4th 1185, 1188, 70 Cal. Rptr. 2d 790* (medical report prepared by physician and submitted to State Compensation Insurance Fund was communication made in connection with quasi-judicial proceeding and absolutely privileged under *Civ. Code § 47(b)*); *King v. Borges (1972) 28 Cal. App. 3d 27, 32, 104 Cal. Rptr. 414* ; *Ascherman v. Natanson (1972) 23 Cal. App. 3d 861, 865, 100 Cal. Rptr. 656]* .

The words "official proceeding" in this portion of *Civ. Code § 47(b)* do not encompass nongovernmental proceedings [*Hackethal v. Weissbein (1979) 24 Cal. 3d 55, 60, 154 Cal. Rptr. 423, 592 P.2d 1175* (decided under former *Civ. Code § 47(2)*)]. However, after the Court's decision in *Hackethal*, the legislature amended *Civ. Code § 47(b)* by adding protection of publications or broadcasts made in the initiation or course of any other proceeding authorized by law and reviewable by mandate pursuant to *Code Civ. Proc. §§ 1084-1097* [*see Civ. Code § 47(b)*]. This privilege is discussed in *§ 340.62*.

In addition to any other immunity that may exist, any testimony provided by a pupil as a witness in an expulsion hearing is specifically protected by *Civ. Code § 47(b)* [*Educ. Code § 48918.6*].

[2] Determinative Factors

The primary factors that determine the nature of quasi-judicial proceedings under *Civ. Code § 47(b)* are (1) whether the administrative body is vested with discretion based on investigation and consideration of evidentiary facts; (2) whether

it is entitled to hold hearings and decide the issue by the application of rules of law to the ascertained facts; and, more importantly, (3) whether its power affects the personal or property rights of private persons [*Ascherman v. Natanson (1972) 23 Cal. App. 3d 861, 866, 100 Cal. Rptr. 656* (decided under former *Civ. Code § 47(2)*)].

[3] Communications to Agencies Protected

A communication to an official administrative agency, which communication is designed to prompt action by that agency, is as much a part of the "official proceeding" as a communication made after the proceedings have commenced. Thus, it is protected by the absolute privilege of *Civ. Code § 47(b)* [*Martin v. Kearney (1975) 51 Cal. App. 3d 309, 311, 124 Cal. Rptr. 281* ; *King v. Borges (1972) 28 Cal. App. 3d 27, 34, 104 Cal. Rptr. 414]* . Moreover, because a complaint constitutes part of the official proceedings, it is not necessary that the official body take any particular action on the complaint for the complaint itself to be protected [*Lee v. Fick (2005) 135 Cal. App. 4th 89, 97, 37 Cal. Rptr. 3d 375* (written complaints from parents to school board about coach's conduct were protected, even though no formal hearings were ever requested or held)].

For example, the absolute privilege applies to a letter written to the state Division of Real Estate [*King v. Borges (1972) 28 Cal. App. 3d 27, 34, 104 Cal. Rptr. 414]* as well as to letters sent to a public school teacher's superiors that were designed to prompt official action with respect to the teacher's conduct [*Martin v. Kearney (1975) 51 Cal. App. 3d 309, 311, 124 Cal. Rptr. 281]* , and communications to the Committee of Teacher Credentials regarding accusations of unprofessional conduct against a high school teacher [*Picton v. Anderson Union High Sch. Dist. (1996) 50 Cal. App. 4th 726, 737, 57 Cal. Rptr. 2d 829]* .

Similarly, statements made in the course of an investigative audit by the State Auditor under the Reporting of Improper Governmental Activities Act (*Gov. Code § 8547 et seq.*) are absolutely privileged under *Civ. Code § 47(b)* [*Braun v. Bureau of State Audits (1998) 67 Cal. App. 4th 1382, 1388-1389, 79 Cal. Rptr. 2d 791]* .

[4] Communications to Police Protected

Unless the elements of malicious prosecution can be proven, statements made to the police regarding potential criminal activity are protected from civil liability by an absolute privilege under *Civ. Code § 47(b)* [*Hagberg v. California Fed. Bank (2004) 32 Cal. 4th 350, 355, 7 Cal. Rptr. 3d 803, 81 P.3d 244* ; *Kashian v. Harriman (2002) 98 Cal. App. 4th 892, 926-927, 120 Cal. Rptr. 2d 576]* . Applying the absolute privilege to such statements, which are generally made in preparation for or intended to prompt investigation that could result in an official proceeding, serves the important public interest of securing open channels of communication between citizens and law enforcement personnel [*Hagberg v. California Fed. Bank (2004) 32 Cal. 4th 350, 368, 372, 7 Cal. Rptr. 3d 803, 81 P.3d 244]* . However, the privilege does not apply to the act of making a citizen's arrest, which is affirmative conduct that constitutes more than the communicative act of reporting potential criminal activity to the police [*Kesmodel v. Rand (2004) 119 Cal. App. 4th 1128, 1136-1137, 15 Cal. Rptr. 3d 118]* .

In order to protect the privilege as applied to statements made to the police, the privilege applies to a claim that the party who made the report to the police conducted a negligent investigation prior to making the report [*Devis v. Bank of Am. (1998) 65 Cal. App. 4th 1002, 1008-1009, 77 Cal. Rptr. 2d 238]* . A report made to the police is privileged even when the report may be incidentally heard by third parties [*Devis v. Bank of Am. (1998) 65 Cal. App. 4th 1002, 1011-1012, 77 Cal. Rptr. 2d 238]* .

Because the right to compel the attendance at trial of witnesses on behalf of a criminal defendant is a constitutionally protected right, conduct undertaken to compel a witness to attend and testify is protected under the litigation privilege [*Kemps v. Beshwate (2009) 180 Cal. App. 4th 1012, 1018-1019, 103 Cal. Rptr. 3d 480]* .

Cases applying the absolute privilege to police reports extend the privilege only to police reports that trigger adequate

procedural safeguards. Therefore, if there is evidence on summary judgment that a particular report of potential criminal activity in a foreign country has triggered an investigation lacking adequate procedural safeguards, there may be a triable issue of fact as to whether the police report is subject to the absolute privilege, rather than the qualified privilege [*Beroiz v. Wahl (2000) 84 Cal. App. 4th 485, 496, 100 Cal. Rptr. 2d 905]* .

Although *Gov. Code § 1031.1* provides a qualified immunity for information provided by employers to law enforcement agencies conducting background checks on applicants, that statute also contains a savings clause that preserves any other existing common law and statutory privileges and immunities [*see Gov. Code § 1031.1(b)*]. Prior to the enactment of *Gov. Code § 1031.1*, case law had held that *Civ. Code § 47(b)* provides an absolute immunity to employers responding to background check requests from law enforcement agencies [*see O'Shea v. General Tel. Co. (1987) 193 Cal. App. 3d 1040, 1048, 238 Cal. Rptr. 715]* . Therefore, that absolute immunity remains available in addition to the statutory qualified immunity of *Gov. Code § 1031.1* [*Bardin v. Lockheed Aeronautical Sys. Co. (1999) 70 Cal. App. 4th 494, 504, 82 Cal. Rptr. 2d 726]* .

[5] Limit on Privilege

The privilege is not applicable, however, to defamatory statements that were not made in an official proceeding to achieve the object of the particular proceeding [*Frisk v. Merrihew (1974) 42 Cal. App. 3d 319, 324, 116 Cal. Rptr. 781]* . Nor does the privilege extend to communications between private parties who are not acting in an official or quasi-judicial capacity, even if the communication is required by law [*Slaughter v. Friedman (1982) 32 Cal. 3d 149, 155-156, 185 Cal. Rptr. 244, 649 P.2d 886* ; *Prevost v. First W. Bank (1987) 193 Cal. App. 3d 1492, 1498-1499, 239 Cal. Rptr. 161]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsEnforcementGeneral OverviewEducation LawStudentsDisciplinary ProceedingsWitnessesInternational Trade LawImports & ExportsGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesGeneral OverviewTortsIntentional TortsMalicious ProsecutionElementsGeneral OverviewTortsPublic Entity LiabilityImmunityQualified Immunity

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§ 340.62 Absolute Privilege for Proceedings Reviewable by Mandate

A publication or broadcast made in the initiation or course of a proceeding that is not a legislative, judicial, or other official proceeding, but is a proceeding authorized by law and is reviewable pursuant to *Code Civ. Proc. §§ 1084-1097* (mandate), is privileged [*see Civ. Code § 47(b)*]. This provision was added to *Civ. Code § 47(b)* subsequent to the Supreme Court's decision that a hearing before the judicial commission of a private medical society was not an official proceeding within the scope of the absolute privilege of *Civ. Code § 47(b)* [*see* Stats. 1979, ch. 184; *Hackethal v. Weissbein (1979) 24 Cal. 3d 55, 58-61, 154 Cal. Rptr. 423, 592 P.2d 1175* (decided under former *Civ. Code § 47(2)*)].

Because mandate may be used to compel a private medical association to restore a physician to membership [*see Bernstein v. Alameda-Contra Costa Med. Ass'n (1956) 139 Cal. App. 2d 241, 254, 293 P.2d 862]* , it appears that statements made during hearings, such as the ones in *Hackethal*, which resulted in the physician's expulsion from the county medical society, would be absolutely privileged under the 1979 amendment to *Civ. Code § 47*. A letter regarding a physician's qualifications sent to the Board of Medical Quality Assurance by the appointee of a hospital review committee was absolutely privileged under *Civ. Code § 47(b)* since the purpose of the letter was to prompt board action and was thus part of an official proceeding [*Long v. Pinto (1981) 126 Cal. App. 3d 946, 948, 179 Cal. Rptr. 182* (decided under former *Civ. Code § 47(2)*); *see Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 941-942, 242 Cal. Rptr. 259]* . A copy of the letter sent by the appointee to the board of directors of another private hospital where the plaintiff was on staff was also absolutely privileged because the holding in *Hackethal* should not be applied retroactively and becaue the amendment to former *Civ. Code § 47(2)*] *now see Civ. Code § 47(b)*] applies to proceedings of a private hospital regarding the fitness of a staff doctor since such proceedings are reviewable by a writ of mandate [*Long v. Pinto (1981) 126 Cal. App. 3d 946, 948-950, 179 Cal. Rptr. 182]* . For discussions of what proceedings are reviewable by mandate, see Ch. 358, *Mandate and Prohibition* , and Ch. 474, *Availability of Judicial Review of Agency Decisions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityGeneral OverviewCivil ProcedureRemediesWritsCommon Law

WritsMandamusGovernmentsLegislationEffect & OperationRetrospective OperationHealthcare LawActions Against FacilitiesGeneral OverviewHealthcare LawBusiness Administration & OrganizationPeer ReviewGeneral Overview

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30-340 California Forms of Pleading and Practice--Annotated § 340.63

§ 340.63 Exceptions to Absolute Privilege for Legislative, Judicial, Official, and Mandate Proceedings

[1] Allegation or Averment in Marital Dissolution or Legal Separation Action

Civ. Code § 47(b) expressly excepts from its privilege for publications or broadcasts made in any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to *Code Civ. Proc. § 1084 et seq.*, an allegation or averment contained in any pleading or affidavit filed in an action for marital dissolution or legal separation made of or concerning a person by or against whom no affirmative relief is prayed in the action is not a privileged publication or broadcast as to the person making the allegation or averment within the meaning of *Civ. Code § 47* unless the pleading is verified or affidavit sworn to, and is made without malice, by one having reasonable and probable cause for believing the truth of the allegation or averment and unless the allegation or averment is material and relevant to the issues in the action [*Civ. Code § 47(b)(1)*].

[2] Intentional Spoliation of Evidence

Civ. Code § 47(b) expressly excepts from its privilege for publications or broadcasts made in any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to *Code Civ. Proc. § 1084 et seq.*, any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast that is privileged pursuant to *Civ. Code § 47*. Physical evidence is defined as evidence specified in *Evid. Code § 250* or evidence that is property of any type specified in *Code Civ. Proc. § 2031.010 et seq.* [*Civ. Code § 47(b)(2)*].

[3] Concealment of Existence of Insurance

Civ. Code § 47(b) does not make privileged any communication made in a judicial proceeding knowingly concealing the existence of an insurance policy or policies [*Civ. Code § 47(b)(3)*]. However, this exception does not apply to statements that conceal only the terms of a policy that is known to exist, including statements that misrepresent the

amount of the policy coverage [*Home Ins. Co. v. Zurich Ins. Co. (2002) 96 Cal. App. 4th 17, 24-25, 116 Cal. Rptr. 2d 583]* .

[4] Recorded Lis Pendens

Civ. Code § 47(b) expressly provides that a recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction that affects the title or right of possession or real property, as authorized or required by law [*Civ. Code § 47(b)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-340 California Forms of Pleading and Practice--Annotated § 340.64

§ 340.64 Absolute Privilege of Report in Public Journal

[1] Availability

A privileged publication or broadcast is one made by a fair and true report in, or a communication to, a public journal of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof, or (5) of a verified charge of complaint made by any person to a public official, on which complaint a warrant has been issued [*Civ. Code § 47(d)(1)*]. Nothing in *Civ. Code § 47(d)(1)* makes privileged any report to a public journal that violates *Rules Prof. Conduct, Rule 5-120*, breaches a court order, or violates any requirement of confidentiality imposed by law [*Civ. Code § 47(d)(2)*]. It is an absolute privilege [*see Howard v. Oakland Tribune (1988) 199 Cal. App. 3d 1124, 1128, 245 Cal. Rptr. 449* (neither malice nor abuse of personal privilege will defeat privilege); *Handelsman v. San Francisco Chronicle (1970) 11 Cal. App. 3d 381, 386, 90 Cal. Rptr. 188]* .

The well-recognized rule is that the alleged defamatory matter must only be substantially in accord with the report in order to be entitled to the privilege of *Civ. Code § 47(d)* [*Colt v. Freedom Communications, Inc. (2003) 109 Cal. App. 4th 1551, 1558-1560, 1 Cal. Rptr. 3d 245* ; *Handelsman v. San Francisco Chronicle (1970) 11 Cal. App. 3d 381, 386, 90 Cal. Rptr. 188* ; *Hayward v. Watsonville Register-Pajaronian & Sun (1968) 265 Cal. App. 2d 255, 262, 71 Cal. Rptr. 295]* . In determining whether the report was fair and true, the article must be regarded from the standpoint of persons whose function is to give the public a fair report of what has taken place, such as reporters, and not from the standpoint of attorneys [*Handelsman v. San Francisco Chronicle (1970) 11 Cal. App. 3d 381, 387, 90 Cal. Rptr. 188]* .

The privilege of *Civ. Code § 47(d)* is not lost on the ground that the proceeding being reported about is confidential. In addition, the fact that a proceeding is closed to the public does not prevent it from being a "public official proceeding" for purposes of *Civ. Code § 47(d)* [*Braun v. Chronicle Publ'g Co. (1997) 52 Cal. App. 4th 1036, 1050-1051, 61 Cal. Rptr. 2d 58* (confidential investigative audit of hospital training program director by State Auditor)].

[2] Communications Protected by Privilege

A truthful report that a charge has been made in a complaint filed in an action is clearly within the protection afforded

by *Civ. Code § 47(d)(1)* because the filing of a pleading is a public and official act in the course of judicial proceedings [*Kurata v. Los Angeles News Publ'g Co. (1935) 4 Cal. App. 2d 224, 227, 40 P.2d 520* ; *see also Dorsey v. National Enquirer, Inc. (9th Cir. 1992) 973 F.2d 1431, 1436-1437* (statement in article that mother was "100% convinced" that Arnold Dorsey (a.k.a. Engelbert Humperdink) had AIDS virus was fair and true account of court documents in which allegation was qualified "upon information and belief")]. Oral statements of district attorneys, sheriffs, and police officers come under the qualified privilege of *Civ. Code § 47(d)(1)* as do the crime reports of a police department and FBI identification records that are part of such reports and on which a criminal complaint is filed and a warrant of arrest is issued [*Hayward v. Watsonville Register-Pajaronian & Sun (1968) 265 Cal. App. 2d 255, 260, 71 Cal. Rptr. 295]* . A report of a state administrative agency investigation into the expenditure of public funds is also within the privilege [*see Howard v. Oakland Tribune (1988) 199 Cal. App. 3d 1124, 1128, 245 Cal. Rptr. 449]* . In addition, a true report of a congressional investigation into allegations of corruption in governmental anti-racketeering activity is within the privilege [*Crane v. Arizona Republic (9th Cir. 1992) 972 F.2d 1511, 1525-1526* (nothing in language of former *Civ. Code § 47(4)* (*now see Civ. Code § 47(d)(1)*) precludes coverage of committee investigations not open to public)].

Also, although a false charge that a person is a correspondent in a divorce action is libelous per se, the publication of a truthful report that such a charge has been made during the trial of an action is clearly within the protection afforded by *Civ. Code § 47(d)(1)* [*see Mortensen v. Los Angeles Examiner (1931) 112 Cal. App. 194, 207, 296 P. 927]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureAccusatory InstrumentsWarrantsGeneral OverviewEvidencePrivilegesJournalist's PrivilegeGeneral OverviewEvidencePrivilegesJournalist's PrivilegeElementsEvidencePrivilegesJournalist's PrivilegeScopeHealthcare LawBusiness Administration & OrganizationGeneral OverviewTortsIntentional TortsDefamationDefamation Per SeTortsIntentional TortsDefamationDefensesPrivilegesStatutory Privileges

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§ 340.65 Absolute Privilege for Report of Public Meeting

A privileged publication or broadcast is one made by a fair and true report of (1) the proceedings of a public meeting, if the meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit [*Civ. Code § 47(e)*]. The privilege encompassed within *Civ. Code § 47(e)* is an absolute privilege, and therefore malice is not properly an issue when publications are claimed to be privileged under it [*Williams v. Daily Review, Inc. (1965) 236 Cal. App. 2d 405, 418, 419, 46 Cal. Rptr. 135]* .

Under *Civ. Code § 47(e)*, a publication is privileged if it is a fair and true report of the proceedings of a public meeting lawfully convened for a lawful purpose and open to the public or, alternatively, if it is a fair and true report of the proceedings of a public meeting that is not lawfully convened for a lawful purpose or not open to the public, provided that the publication is for the public benefit [*Williams v. Daily Review, Inc. (1965) 236 Cal. App. 2d 405, 418, 46 Cal. Rptr. 135]* .

The absolute privilege under *Civ. Code § 47(e)* applies to media defendants who summarized a report on organized crime, containing the plaintiff's name, that had been adopted by the state Attorney General and released by the Attorney General at a press conference [*Kilgore v. Younger (1982) 30 Cal. 3d 770, 776-778, 180 Cal. Rptr. 657, 640 P.2d 793]* . The Supreme Court found that the media articles were merely giving further publicity to information about the plaintiff that was already public, were fair and true because they captured the substance of the Attorney General's release, and carefully stated the alleged nature of the report [*Kilgore v. Younger (1982) 30 Cal. 3d 770, 776-778, 180 Cal. Rptr. 657, 640 P.2d 793]* .

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§ 340.66 Qualified Privilege for Publication Made in the Common Interest

[1] Availability

The common interest privilege consists of a privileged publication or broadcast made in a communication, without malice, to a person interested in that communication. by: (1) one who is also interested; (2) one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent; or (3) one who is requested by the person interested to give the information [*Civ. Code § 47(c)*]. The qualified privilege conveyed by *Civ. Code § 47(c)* for persons interested in a communication provides only a conditional privilege, one that is defeated if the jury finds that the utterance was actuated by malice [*Cunningham v. Simpson (1969) 1 Cal. 3d 301, 307-308, 81 Cal. Rptr. 855, 461 P.2d 39]* .

[2] Application to Statements Concerning Job Performance

The common interest privilege clearly protects statements made by current or former employers concerning the job performance of former or current employees [*see, e.g., King v. United Parcel Service, Inc. (2007) 152 Cal. App. 4th 426, 440-442, 60 Cal. Rptr. 3d 359* (supervisor's statements to employees that plaintiff was fired for falsifying timecard were privileged)]. The qualified privilege for communications to interested persons based on a request applies to and includes a communication concerning the job performance or qualifications of an applicant for employment, based on credible evidence, made without malice, by a current or former employer of the applicant to, and on request of, one whom the employer reasonably believes is a prospective employer of the applicant. A current or former employer, or the employer's agent, is authorized to answer whether or not the employer would rehire a current or former employee. These provisions do not apply to a communication concerning the speech or activities of an applicant for employment, if the speech or activities are constitutionally protected or otherwise protected by *Code Civ. Proc. § 527.3* (concerning labor disputes) or any other provision of law [*Civ. Code § 47(c)*].

Consistent with the established rule that malice is not established by a showing of mere negligence [*§ 340.66[4]*], the statutory language requiring that the communication of an employer be "based on credible evidence" does not mean that the qualified privilege is lost because of negligence such as an oversight or unintentional error. However, this language can defeat the privilege if the communication is made up of mere rumors or unfounded gossip [*Noel v. River Hills*

Wilsons, Inc. (2003) 113 Cal. App. 4th 1363, 1375, 7 Cal. Rptr. 3d 216 (former employer's negligence in providing inaccurate information to plaintiff's prospective employer did not defeat privilege, because former employer believed inquiry concerned different employee)].

[3] Interested Defined

The word "interested," as used in *Civ. Code § 47(c)*, refers to a direct and immediate concern with the publication. The conditional privilege of *Civ. Code § 47(c)* thus does not apply to publication by a magazine or newspaper merely because it relates to a matter that may have general public interest [*Brown v. Kelly Broad. Co. (1989) 48 Cal. 3d 711, 719, 738, 257 Cal. Rptr. 708, 771 P.2d 406* ; *Rancho La Costa, Inc. v. Superior Court (1980) 106 Cal. App. 3d 646, 664-668, 165 Cal. Rptr. 347]* . Thus, the only privilege that exists to protect the media by requiring proof of malice, rather than ordinary negligence, is for the publication of items of public interest concerning public officials, candidates for public office, and public figures [*Brown v. Kelly Broad. Co. (1989) 48 Cal. 3d 711, 719, 734, 738, 257 Cal. Rptr. 708, 771 P.2d 406]* . With regard to defamatory statements by the news media concerning private figures, the privilege under *Civ. Code § 47(c)* does not apply [*Brown v. Kelly Broad. Co. (1989) 48 Cal. 3d 711, 719, 738, 257 Cal. Rptr. 708, 771 P.2d 406]* .

[4] Definition of Malice

Actual malice is the state of mind arising from hatred or ill will toward the plaintiff, provided that such a state of mind occasioned by a good faith belief on the part of the defendant in the truth of the libelous publication or broadcast at the time it is published or broadcast does not constitute actual malice [*Civ. Code § 48a(4)(d)*].

The California courts have elaborated on the statutory definition of actual malice in a number of ways. It has been defined as "a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy, or injure another person" [*Davis v. Hearst (1911) 160 Cal. 143, 160, 164* . 530; *see, e.g.,* *Hailstone v. Martinez (2008) 169 Cal. App. 4th 728, 740-741, 87 Cal. Rptr. 3d 347* ; *Dietrich v. Litton Indus., Inc. (1970) 12 Cal. App. 3d 704, 714, 90 Cal. Rptr. 856* ; *see* *Cunningham v. Simpson (1969) 1 Cal. 3d 301, 308, 81 Cal. Rptr. 855, 461 P.2d 39]* ; as "personal hatred or ill will towards the plaintiff, or wanton disregard of the civil obligations of the defendants toward the plaintiff" [*Frommoethelydo v. Fire Ins. Exch. (1986) 42 Cal. 3d 208, 217, 228 Cal. Rptr. 160, 721 P.2d 41* ; *Hearne v. De Young (1901) 132 Cal. 357, 361-362, 64 P. 576* ; *White v. State of California (1971) 17 Cal. App. 3d 621, 628-629, 95 Cal. Rptr. 175]* and "a desire or disposition to injure another founded upon spite or ill will" [*Siemon v. Finkle (1923) 190 Cal. 611, 618, 213 P. 954* ; *White v. State of California (1971) 17 Cal. App. 3d 621, 628-629, 95 Cal. Rptr. 175]* . Because actual malice is a function of the state of mind of the communicator, it is not established by a showing of mere negligence, such as an oversight or unintentional error [*Noel v. River Hills Wilsons, Inc. (2003) 113 Cal. App. 4th 1363, 1370-1371, 7 Cal. Rptr. 3d 216]* .

One court has held that the statutory definition of "actual malice" set forth in *Civ. Code § 48a(4)(d)* refers only to that degree of misconduct that must be shown to recover exemplary damages under *Civ. Code § 48a(2), (4)(c)* and has no application to the "malice" that must be shown to defeat the qualified privilege of former *Civ. Code § 47(3)* [*now see Civ. Code § 47(c)*]. Thus, to recover punitive damages, a plaintiff must prove both hatred or ill will and a lack of good faith belief in the truth of the defamatory publication under *Civ. Code § 48a(4)(d)*. However, a plaintiff may defeat the qualified privilege of *Civ. Code § 47(c)* by showing hatred, ill will, or other improper motive, or by showing a lack of reasonable grounds for believing that the false statements were true [*Manguso v. Oceanside Unified Sch. Dist. (1984) 153 Cal. App. 3d 574, 580-581, 200 Cal. Rptr. 535]* .

[5] Presumption of Innocence Created

The qualified privilege conferred by *Civ. Code § 47(c)* creates a presumption that the communication is made innocently and without malice [*Smith v. Hatch (1969) 271 Cal. App. 2d 39, 47, 76 Cal. Rptr. 350* ; *Lesperance v.*

North American Aviation, Inc. (1963) 217 Cal. App. 2d 336, 341, 31 Cal. Rptr. 873] .

[6] Legal Inference of Malice Prohibited

In the case of privilege outlined by *Civ. Code § 47(c)*, malice may not be inferred from the communication [*Civ. Code § 48*; *Emde v. San Joaquin County Cent. Labor Council (1943) 23 Cal. 2d 146, 161, 143 P.2d 20]* . Thus, whereas, in the case of a false and unprivileged publication that is libelous per se, malice is implied and the lack of it is a matter of defense that need not be pleaded, this is not true of a qualified privilege because expressly so prohibited by *Civ. Code § 48*. Hence, if the complaint discloses a case of qualified privilege, no malice is presumed, and, in order to state a cause of action, the pleading must contain affirmative allegations of malice in fact [*Locke v. Mitchell (1936) 7 Cal. 2d 599, 602, 61 P.2d 922]* .

However, in determining whether a defendant may take advantage of the privilege granted in *Civ. Code § 47(c)*, malice may be inferred if the defendant does not have reasonable or probable cause to believe the defendant's statement to be true [*Stationers Corp. v. Dun & Bradstreet, Inc. (1965) 62 Cal. 2d 412, 418, 42 Cal. Rptr. 449, 398 P.2d 785* ; *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 552, 343 P.2d 36* ; *Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791, 797-800, 197 P.2d 713]* .

[7] Privilege as Question of Law If Facts Undisputed

If the facts and circumstances under which a defamatory publication is made are not disputed, the question of privilege is one of law [*Kramer v. Ferguson (1964) 230 Cal. App. 2d 237, 245, 41 Cal. Rptr. 61]* . Therefore, if the issue of mutual interest appears without conflict, a defendant in an action for defamation is entitled to an instruction that, as a matter of law, the statement was qualifiedly privileged [*Gantry Constr. Co. v. American Pipe & Constr. Co. (1975) 49 Cal. App. 3d 186, 197, 122 Cal. Rptr. 834]* .

[8] Pleading and Proving Malice

Ordinarily, privilege must be specially pleaded by the defendant, and the burden of proving it is on him or her [*see Gantry Constr. Co. v. American Pipe & Constr. Co. (1975) 49 Cal. App. 3d 186, 198 n.10, 122 Cal. Rptr. 834]* . However, if the complaint alleges facts that show that the statement was prima facie entitled to the qualified privilege, then plaintiff must allege and prove the presence of malice [*Gantry Constr. Co. v. American Pipe & Constr. Co. (1975) 49 Cal. App. 3d 186, 198, 122 Cal. Rptr. 834]* .

Thus, to defeat the qualified privilege disclosed by the complaint and existing by virtue of *Civ. Code § 47(c)*, the pleadings must contain affirmative allegations of malice in fact, and malice must exist as a fact in order to destroy the privilege [*Locke v. Mitchell (1936) 7 Cal. 2d 599, 602, 61 P.2d 922* ; *White v. State of California (1971) 17 Cal. App. 3d 621, 629, 95 Cal. Rptr. 175* ; *see also Lundquist v. Reusser (1994) 7 Cal. 4th 1193, 1208-1210, 31 Cal. Rptr. 2d 776, 875 P.2d 1279* (noting pleading requirements, and holding that plaintiff has burden of proving malice once defendant establishes that statement was made on privileged occasion)].

The pleading of malice must set forth specific facts that indicate the existence of personal malice [*Maidman v. Jewish Publ'ns, Inc. (1960) 54 Cal. 2d 643, 653, 7 Cal. Rptr. 617, 355 P.2d 265* ; *Locke v. Mitchell (1936) 7 Cal. 2d 599, 603-604, 61 P.2d 922* ; *Noonan v. Rousselot (1966) 239 Cal. App. 2d 447, 453, 48 Cal. Rptr. 817]* . The rule of specificity serves a salutary purpose since it makes it impossible for a plaintiff who is faced with a qualified privilege to force the case to issue by the naked allegation that defendant acted "maliciously" [*Noonan v. Rousselot (1966) 239 Cal. App. 2d 447, 453, 48 Cal. Rptr. 817]* .

Pleading only that a statement was "maliciously published" is an insufficient allegation of actual malice if the complaint discloses the existence of a qualified privilege under *Civ. Code § 47(c)* [*Locke v. Mitchell (1936) 7 Cal. 2d 599, 603,*

61 P.2d 922 ; *Boyich v. Howell (1963) 221 Cal. App. 2d 801, 803, 34 Cal. Rptr. 794]* . However, pleading that defendants published an article with knowledge of its falsity or without an honest belief in its truth or without reasonable grounds for believing it to be true is sufficient to raise the issue of qualified privilege [*MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 551-552, 343 P.2d 36* ; *Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 831, 136 P.2d 297* ; *Noonan v. Rousselot (1966) 239 Cal. App. 2d 447, 453, 48 Cal. Rptr. 817* ; *Boyich v. Howell (1963) 221 Cal. App. 2d 801, 803, 34 Cal. Rptr. 794]* .

The common-interest privilege of *Civ. Code § 47(c)* is determined under a two-step analysis. Once the defendant has established that the statement at issue was made on a privileged occasion, the plaintiff has the burden of establishing that the statement was made with malice [*Lundquist v. Reusser (1994) 7 Cal. 4th 1193, 1208, 31 Cal. Rptr. 2d 776, 875 P.2d 1279]* .

[9] Effect of Failure to Award Punitive Damages

The mere failure to award punitive damages does not necessarily negate the existence of malice that destroys the conditional privilege available under *Civ. Code § 47(c)* [*Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791, 800-801, 197 P.2d 713* ; *Stoneking v. Briggs (1967) 254 Cal. App. 2d 563, 571, 62 Cal. Rptr. 249]* .

[10] When Privilege Is Lost

The conditional privilege given to communications between interested persons by *Civ. Code § 47(c)* extends to false statements of fact, although the occasion may be abused and the protection of the privilege lost by the publisher's lack of belief, or of reasonable grounds for belief, in the truth of the defamatory matter; by excessive publication; by a publication of defamatory matter for an improper purpose; or if the defamation goes beyond the group interest [*Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791, 797, 197 P.2d 713* ; *Emde v. San Joaquin County Cent. Labor Council (1948) 23 Cal. 2d 146, 154-155, 143 P.2d 20]* .

The privilege is lost if the publication is motivated by hatred or ill will toward the plaintiff or by any cause other than the desire to protect the interest for the protection of which the privilege is given [*Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791, 797, 197 P.2d 713]* .

The privilege is also lost if defendant publishes the article with knowledge of its falsity [*MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 552,343 P.2d 36* ; *Roemer v. Retail Credit Co. (1970) 3 Cal. App. 3d 368, 371, 83 Cal. Rptr. 540]* .

Thus, the deliberate publication of known false and defamatory statements cannot be excused on the claim they were made in good faith and from innocent motives. Such abuse of the privilege conferred by *Civ. Code § 47(c)* destroys it [*Patton v. Royal Indus., Inc. (1968) 263 Cal. App. 2d 760, 766, 70 Cal. Rptr. 44* ; *Russell v. Geis (1967) 251 Cal. App. 2d 560, 566, 59 Cal. Rptr. 569]* .

[11] When Privilege Is Not Lost

Even if the publisher has no belief in the truth of the injurious statement, the publication will be protected under certain circumstances. Notwithstanding the lack of belief in the truth of the statement or the knowing falsity of the statement, the publisher may be protected by the qualified privilege under *Civ. Code § 47(c)* if the defamatory matter is stated as a rumor or suspicion by a third party and not as a fact and the relation of the parties and the importance of the interests affected balanced with the harm likely to be done by the publication make the publication reasonable [*Stockton Newspapers, Inc. v. Superior Court (1988) 206 Cal. App. 3d 966, 980-981, 254 Cal. Rptr. 389* (newspaper's publication of account of misconduct by police officer was reasonable even absent belief in truth of allegations because of public's interest in learning of accusations of official misconduct)]. In such a case, if a fair report is published, the publisher is

under no duty to resolve conflicting claims of what happened [*Stockton Newspapers, Inc. v. Superior Court (1988) 206 Cal. App. 3d 966, 970-971, 254 Cal. Rptr. 389]* .

In addition, failure to investigate the truth of the statement or negligence in the investigation of it does not constitute actual malice and cannot without more override the privilege [*see Stockton Newspapers, Inc. v. Superior Court (1988) 206 Cal. App. 3d 966, 983-984, 254 Cal. Rptr. 389]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPersonal InjuriesMaritime Tort ActionsNegligenceBurdens of ProofCivil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDamagesPunitive DamagesLabor & Employment LawEmployment RelationshipsAt-Will EmploymentEmployeesTortsDamagesPunitive DamagesAward CalculationsStatutory RequirementsTortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefamation Per SeTortsIntentional TortsDefamationDefensesPrivilegesQualified PrivilegesTortsIntentional TortsDefamationDefensesPrivilegesStatutory PrivilegesTortsIntentional TortsDefamationProcedureTortsIntentional TortsDefamationRemediesDamages

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§ 340.67 Right of Fair Comment

The common law right of fair comment allows a person to make a fair comment on matters of public interest [*see Maidman v. Jewish Publ'ns, Inc. (1960) 54 Cal. 2d 643, 651-652, 7 Cal. Rptr. 617, 355 P.2d 265 , overruled on other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406* ; *Williams v. Daily Review, Inc. (1965) 236 Cal. App. 2d 405, 416, 46 Cal. Rptr. 135 , overruled on other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406* ; *see also Brown v. Kelly Broad. Co. (1989) 48 Cal. 3d 711, 732 n.18, 257 Cal. Rptr. 708, 771 P.2d 406* (dictum that fair comment defense has mistakenly been included with common interest privilege embodied in former *Civ. Code § 47(3)* (*now see Civ. Code § 47(c)*) by such cases as *Maidman* and *Williams*)]. However, the protection that the law affords to those who would comment or criticize extends only to comment that is fair, not in the sense that it must be reasonable or moderate, but in the sense that it must be published, in part at least, for the bona fide purpose of giving the public the benefit of comment that it is entitled to have rather than for any ulterior motive of causing harm to the plaintiff [*Maidman v. Jewish Publ'ns, Inc. (1960) 54 Cal. 2d 643, 652, 7 Cal. Rptr. 617, 355 P.2d 265 , overruled on other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406]* .

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§ 340.68 Consent Available as Defense

As a general rule, the consent of a person to the publication of defamatory matter concerning him or her is a complete defense to his or her action for defamation [*Kelly v. William Morrow & Co. (1986) 186 Cal. App. 3d 1625, 1632, 231 Cal. Rptr. 497* ; *Restatement (Second) of Torts § 583*]. The defense does not apply when the plaintiff merely requests that the defendant repeat a defamatory statement that already had been made in the presence of third parties [*Puchan v. Godeau (1914) 167 Cal. 692, 694, 140 P. 952* ; *Moranville v. Aletto (1957) 153 Cal. App. 2d 667, 671, 315 P.2d 91]* . In contrast, if a statement made privately to the plaintiff is published solely through the actions and effort of the plaintiff or if the plaintiff demands publication of material that turns out to be defamatory, the plaintiff's consent confers an absolute privilege on the defendant's publication [*Royer v. Steinberg (1979) 90 Cal. App. 3d 490, 498-499, 153 Cal. Rptr. 499]* . An exception occurs when the defendant who privately makes a defamatory statement could have reasonably foreseen that the plaintiff would be under a strong compulsion to disclose its contents to a third party, such as a prospective employer who will inquire why plaintiff was fired from his or her previous job; in such a case, plaintiff's publication of the statement is no consent to defamation [*McKinney v. County of Santa Clara (1980) 110 Cal. App. 3d 787, 796-798, 168 Cal. Rptr. 89]* . In any case, if the plaintiff's consent to publication is ambiguous or qualified, the extent of the privilege conferred is a question of fact and must be determined by the language or acts with which the consent was given in light of the surrounding circumstances [*Kelly v. William Morrow & Co. (1986) 186 Cal. App. 3d 1625, 1633, 1635, 231 Cal. Rptr. 497]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesAbsolute Privileges

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§ 340.69 When No Defamatory Meaning Conveyed

A defendant's words are not defamatory unless they are understood in a defamatory sense. Thus, it is always open to the defendant to show that the words were not understood at all, that they were taken entirely in jest, or that some meaning other than the obvious one was attached by all who heard or read them [*Polygram Records v. Superior Court (1985) 170 Cal. App. 3d 543, 555, 216 Cal. Rptr. 252* ; *Arno v. Stewart (1966) 245 Cal. App. 2d 955, 962-963, 54 Cal. Rptr. 392]* . But the jocular intent of the publisher will not relieve him or her from liability if it is reasonable to not understand the utterance as a joke [*Polygram Records v. Superior Court (1985) 170 Cal. App. 3d 543, 555, 216 Cal. Rptr. 252* ; *Arno v. Stewart (1966) 245 Cal. App. 2d 955, 964, 54 Cal. Rptr. 392]* .

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§ 340.70 Governmental Immunity

[1] Public Employees

Public employees are not personally liable for their discretionary acts that are within the scope of their authority [*Gov. Code § 820.2*]. For example, a public employee is cloaked with immunity if sued for defamation when he or she answers a claim for the refund of gasoline taxes alleged to be excessive [*Burgdorf v. Funder (1966) 246 Cal. App. 2d 443, 448-449, 54 Cal. Rptr. 805]* .

Public employees have no immunity and thus are personally liable for their torts in two situations. First, they are liable when their discretionary acts are beyond the scope of their official powers and are tortious [*see Gov. Code § 820.2*]. Second, they are liable for tortious acts if they are acting in a ministerial capacity, even though the act falls within the scope of their authority [*see Johnson v. State of California (1968) 69 Cal. 2d 782, 793-798, 73 Cal. Rptr. 240, 447 P.2d 352]* .

[2] Public Entities

A public entity would be vicariously liable for the defamatory statement of one of its employees only if the statement were made within the scope of the employee's employment and were a ministerial, as opposed to a discretionary, act [*see Gov. Code § 815.2*; *see also Johnson v. State of California (1968) 69 Cal. 2d 782, 793-798, 73 Cal. Rptr. 240, 447 P.2d 352]* . It is, however, difficult to conceive of a situation in which a public employee would make a defamatory statement in a ministerial capacity, and there appear to be no reported cases in which a public entity has been held liable for the ministerial statement of a public employee that has defamed someone.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityImmunitySovereign ImmunityTortsPublic Entity LiabilityLiabilityGeneral OverviewTortsVicarious LiabilityEmployersActivities & ConditionsGeneral Overview

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§ 340.71 Professional Immunity

Some types of professional societies, various committees that monitor the quality of professional services, and the members of these societies and committees are immune from monetary liability and damages for any act performed within the function of a committee formed to maintain the professional standards of a society or to review the quality of services rendered by or to an individual if the act was taken without malice, after a reasonable effort to obtain the facts of the matter and in the reasonable belief that the action was warranted [*Civ. Code § 43.7(a), (b)*]. For a discussion of this immunity as it relates to physicians, see Ch. 414, *Physicians and Other Medical Personnel*. For a discussion of this immunity as it relates to a professional society, see Ch. 61, *Associations and Clubs* .

Similarly, qualified immunity is available to physicians and surgeons, podiatrists, chiropractors, and attorneys who are members of an underwriting committee whose purpose is the writing of professional liability insurance [*Civ. Code § 43.7(d)*]. This qualified immunity is available to attorneys only until January 1, 1990, unless the legislature extends or deletes that date [*see Civ. Code § 43.7(d), (e)*]. Persons providing information to professional licensing boards or review committees are also immune from liability and damages if the communication is intended to aid in the evaluation of a practitioner of the healing or veterinary arts [*Civ. Code § 43.8*; *see Hassan v. Mercy Am. River Hosp. (2003) 31 Cal. 4th 709, 718, 720, 3 Cal. Rptr. 3d 623, 74 P.3d 726* (immunity of *Civ. Code § 43.8* is qualified rather than absolute, but may attach to entities as well as to natural persons; *see also Civ. Code § 43.8* (as amended eff. July 6, 2007)]. Neither of the immunities afforded by *Civ. Code § 43.7* or *Civ. Code § 43.8* affect the availability of any absolute privilege under *Civ. Code § 47* [*Civ. Code § 43.8*]. For a discussion of the immunities afforded in the mental health field, see Ch. 304; *Insane and Other Incompetent Persons* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersGeneral OverviewHealthcare LawActions Against Healthcare WorkersSurgeonsInsurance LawMalpractice InsurancePhysicians

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§ 340.72 Attorney's Fees as Recoverable in Action Involving Peace Officer

In any action for damages arising out of the performance of a peace officer's duties brought against a peace officer, as defined in *Penal Code §§ 830-832.8*, or against a public entity employing a peace officer, including an action for libel or slander brought pursuant to *Civ. Code § 45* or *46*, the court may, in its discretion, award reasonable attorney's fees to the defendant or defendants as part of the costs on a finding by the court that the action was not filed or maintained in good faith and with reasonable cause [*Code Civ. Proc. § 1021.7*; *see Planned Protective Servs., Inc. v. Gorton (1988) 200 Cal. App. 3d 1, 15, 245 Cal. Rptr. 790]* . The statute also applies reciprocally to allow for an award of attorney's fees to a private citizen who must defend against baseless complaints for libel or slander stemming from a complaint by that private citizen about the manner in which a peace officer has performed his or her duties [*Martin v. Szeto (2004) 32 Cal. 4th 445, 451* & n.7, *9 Cal. Rptr. 3d 687, 84 P.3d 374]* .

Despite an apparent ambiguity in its wording, the California Supreme Court has made clear that *Code Civ. Proc. § 1021.7* does not permit the recovery of attorney's fees by defendants in a defamation case, unless the case concerns the conduct of a peace officer [*Martin v. Szeto (2004) 32 Cal. 4th 445, 452, 9 Cal. Rptr. 3d 687, 84 P.3d 374]* . The Supreme Court analyzed the legislative history of the statute and concluded that the legislature clearly intended to limit the attorney's fees provision to only those actions in which a peace officer or that officer's employer is a party, and only if the action arises out of the performance of the officer's duties [*Martin v. Szeto (2004) 32 Cal. 4th 445, 448-452, 9 Cal. Rptr. 3d 687, 84 P.3d 374]* .

Counsel for the defendant should include in the prayer to the answer a request for these fees. For a discussion of the procedures necessary for recovering these attorney's fees, see Ch. 174, *Costs and Attorney's Fees* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsTortsIntentional TortsDefamationRemediesDamages

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§ 340.73 Immunity for Persons Reporting Child Abuse

[1] Persons Required to Report

Any person who is required by *Penal Code § 11166* (persons required to report child abuse or neglect) to report, and who does report, a known or suspected instance of child abuse or neglect is immune from civil or criminal liability for any report required or authorized by *Penal Code §§ 11165-11174.1* (reporting and investigation of child abuse or neglect) [*Penal Code § 11172(a)*; *see Penal Code § 11166(a)-(d), (i)*]. This immunity applies even if the person reporting acquired the knowledge or reasonable suspicion of child abuse or neglect outside of his or her professional capacity or outside the scope of employment [*Penal Code § 11172(a)*]. Any of these persons who, at the request of a designated agency, provides the agency with access to the victim of a known or suspected instance of child abuse or neglect is also immune from civil or criminal liability as a result of providing that access [*Penal Code § 11172(b)*]. The immunity afforded by *Penal Code § 11172* is absolute [*Ferraro v. Chadwick (1990) 221 Cal. App. 3d 86, 95, 270 Cal. Rptr. 379* ; *Storch v. Silverman (1986) 186 Cal. App. 3d 671, 675, 231 Cal. Rptr. 27]* . It extends not only to the reporting of suspected child abuse or neglect, but also to the provision of services giving rise to the obligation to report, such as the collection of data or the observation, examination, or treatment of the suspected victim or perpetrator of child abuse, performed in a professional capacity or within the scope of employment [*Krikorian v. Barry (1987) 196 Cal. App. 3d 1211, 1223, 242 Cal. Rptr. 312]* . It extends to communications made to law-enforcement and judicial-system officers in investigations that arise from the original reports made [*Ferraro v. Chadwick (1990) 221 Cal. App. 3d 86, 92-95, 270 Cal. Rptr. 379]* .

This immunity does not protect family counselors and foster parents from liability that is based not on their *report* of child abuse or neglect, but on their post-report *activities* such as searching for corroboration or attempting to pressure a witness to obtain a conviction [*James W. v. Superior Court (1993) 17 Cal. App. 4th 246, 256-257, 21 Cal. Rptr. 2d 169]* .

Any person who is required by *Penal Code §§ 11165-11174.1* to report a known or suspected instance of child abuse or neglect, or any person taking photographs at his or her direction, is immune from civil or criminal liability for taking photographs or causing photographs to be taken of a suspected victim of child abuse without parental consent, or for

disseminating the photographs with the required reports. Any other use of photographs so taken, however, does not immunize the person from civil or criminal liability [*Penal Code § 11172(a)*].

Despite these immunities, any person who is required by *Penal Code §§ 11165-11174.1* to report a known or suspected instance of child abuse or neglect, and who is a defendant in an action based on a report of child abuse or neglect required or authorized by *Penal Code §§ 11165-11174.1*, may be entitled to an award of limited attorney's fees from the State Board of Control. However, the claim for an award may only be presented to the Board, and will only be allowed by the Board, if the court dismisses the action on the defendant's demurrer or motion for summary judgment, or if the defendant prevails in the action [*Penal Code § 11172(c)*].

Attorney's fees are not available if a public entity has provided for the defense of the action under *Gov. Code § 995* (defense by public entity of action or proceeding against entity's employee) [*Penal Code § 11172(c)*].

The reports of a designated agency submitted to the Department of Justice are not subject to any immunity under *Penal Code § 11172* [*Penal Code § 11169*].

For a discussion of the persons required to report suspected child abuse or neglect, see Ch. 429, *Privacy* .

[2] Persons Authorized to Report

Any person, other than those required to report known or suspected instances of child abuse or neglect under *Penal Code § 11166*, who reports a known or suspected instance of child abuse or neglect is immune from civil or criminal liability as a result of any report authorized by *Penal Code §§ 11165-11174.1* [*Penal Code § 11172(a)*]. The person loses this immunity, however, and becomes liable for any damages caused if it can be proven that a false report was made and the person knew the report was false or was made with reckless disregard of the report's truth or falsity [*Penal Code § 11172(a)*]. The person may also lose immunity by failing to follow the statutory procedures for reporting suspected child abuse or neglect [*see Searcy v. Auerbach (9th Cir. 1992) 980 F.2d 609, 610-611* (clinical psychologist, who gave written opinion of child abuse to father, lacked immunity under *Penal Code §§ 11164-11174.3* because he failed to report suspected instance of child abuse to authorized agencies or individuals)].

However, these provisions apply only to third persons who report the abuse of a child. They do not apply to a child reporting his or her own alleged abuse, who may instead assert the absolute privileges of *Civ. Code § 47(b)* if they are applicable [*Smith v. M.D. (2003) 105 Cal. App. 4th 1169, 1184-1190, 130 Cal. Rptr. 2d 315* (child's statements to parents, grandparent, and police were absolutely privileged under *Civ. Code § 47(b)*); *see generally §§ 340.60, 340.61*].

The liability imposed under *Penal Code § 11172(a)* for knowingly making a false report of child abuse creates an exception to the privileges provided by *Civ. Code § 47(b)* [*Begier v. Strom (1996) 46 Cal. App. 4th 877, 884-885, 54 Cal. Rptr. 2d 158* ; *see also Siam v. Kizilbash (2005) 130 Cal. App. 4th 1563, 1577, 31 Cal. Rptr. 3d 368* (*Begier* holding still valid after Supreme Court's analysis in *Hagberg v. California Fed. Bank (2004) 32 Cal. 4th 350, 7 Cal. Rptr. 3d 803, 81 P.3d 244*)]. The privileges of *Civ. Code § 47(b)* are described in *§ 340.60*. In addition, voluntary reporters may be liable for making false reports to parties who are required to report suspected abuse [*Siam v. Kizilbash (2005) 130 Cal. App. 4th 1563, 1578, 31 Cal. Rptr. 3d 368]* .

These provisions apply only to reports made by third parties, however, and do not apply to a report of child abuse made by the alleged victim of the abuse [*Chabak v. Monroy (2007) 154 Cal. App. 4th 1502, 1515-1519, 65 Cal. Rptr. 3d 641]* . Thus, an alleged victim of child abuse cannot be held liable under these provisions for making a report of the abuse to police, and the litigation privilege of *Civ. Code § 47(b)* otherwise immunizes the alleged victim from liability for making statements about the alleged abuse to parents or others in anticipation of litigation [*Chabak v. Monroy (2007) 154 Cal. App. 4th 1502, 1519, 65 Cal. Rptr. 3d 641]* .

For a discussion of when a person charged with child abuse may commence an action for defamation arising out of any alleged instance of child abuse, see *§ 340.20[7]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsDomestic OffensesChildrenGeneral OverviewCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsDomestic OffensesChildrenElementsCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsDomestic OffensesChildrenReporting RequirementsEvidencePrivilegesJournalist's PrivilegeExceptionsFamily LawDelinquency & DependencyFoster CareFamily LawFamily Protection & WelfareGeneral OverviewFamily LawFamily Protection & WelfareChildrenGeneral OverviewFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectFamily LawParental Duties & RightsConsentGeneral Overview

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§ 340.74 Immunity for Health Practitioners Reporting Injuries Related to Criminal Conduct

A health practitioner who is required by *Penal Code §§ 11160, 11162.5*, or *11166* to report injuries related to criminal conduct, and who does report a known or reasonably suspected instance of injury related to criminal conduct, is immune from civil or criminal liability for any report required or authorized by *Penal Code §§ 11160-11163.2* [*see Penal Code § 11161.9(a)*; *see also Penal Code § 11162.7* (reporting requirements do not apply if report is required pursuant to Child Abuse and Neglect Reporting Act or Elder Abuse and Dependent Adult Civil Protection Act)]. A health practitioner who, pursuant to a request from an adult protective services agency or a local law enforcement agency, provides the requesting agency with access to the victim of a known or suspected instance of abuse or neglect is also immune from civil or criminal liability as a result of providing that access [*Penal Code § 11161.9(c)*].

Any person required or authorized to report pursuant to *Penal Code §§ 11160-11163.2*, or designated by a person required or authorized to report a suspected instance of abuse or neglect, who takes photographs of a suspected victim is immune from civil or criminal liability for taking the photographs, causing the photographs to be taken, or disseminating the photographs to local law enforcement with the reports. However, any other use of photographs so taken does not immunize the person from civil or criminal liability [*Penal Code § 11161.9(b)(1)*].

In addition to these immunities, any person who is required by *Penal Code §§ 11160-11163.2* to report a known or reasonably suspected instance of injury related to criminal conduct, and who is a defendant in an action based on such report, may be entitled to an award of limited attorney's fees from the Victim Compensation and Government Claims Board [*Penal Code § 11163(a), (b)(1)*]. However, the claim for an award may only be presented to the Board, and will only be allowed by the Board if the court dismisses the action on the defendant's demurrer or motion for summary judgment, or if the defendant prevails in the action [*Penal Code § 11163(b)(1), (2)*]. Attorney's fees are not available if a public entity has provided for the defense of the action under *Gov. Code § 995* (defense by public entity of action or proceeding against entity's employee) [*Penal Code § 11163(b)(3)*].

In any court proceeding or administrative hearing, neither the physician-patient privilege nor the psychotherapist privilege applies to the information required to be reported pursuant to *Penal Code §§ 11160-11163.2* [*Penal Code § 11163.2(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsDomestic OffensesChildrenReporting RequirementsEvidencePrivilegesDoctor-Patient PrivilegeGeneral OverviewEvidencePrivilegesDoctor-Patient PrivilegeElementsEvidencePrivilegesDoctor-Patient PrivilegeExceptionsEvidencePrivilegesPsychotherapist-Patient PrivilegeGeneral OverviewEvidencePrivilegesPsychotherapist-Patient PrivilegeElementsEvidencePrivilegesPsychotherapist-Patient PrivilegeScopeFamily LawFamily Protection & WelfareGeneral OverviewFamily LawFamily Protection & WelfareChildrenGeneral OverviewFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareDependent & Disabled AdultsGeneral OverviewFamily LawFamily Protection & WelfareDependent & Disabled AdultsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareElderly PersonsGeneral OverviewFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectHealthcare LawBusiness Administration & OrganizationGeneral Overview

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30-340 California Forms of Pleading and Practice--Annotated § 340.75

§ 340.75 Federal Immunity for Internet Republication of Defamatory Material Originating From Another Source

The Federal Communications Decency Act of 1996 provides a statutory immunity from common law liability for defamation for Internet publications that originate from a different party. Specifically, that act provides that no provider or user of an interactive computer service may be treated as the publisher or speaker of any information provided by another information content provider [*47 U.S.C.S. § 230(c)(1); see also 47 U.S.C.S. § 230(f)(2), (3)* ("interactive computer service" and "information content provider" defined)], and liability may not be imposed under state or local law if inconsistent with this federal protection [*47 U.S.C.S. § 230(e)(3)*]. This immunity effectively overrides common law liability for republication in this context [*see § 340.21[7]*]. This broad immunity from common law liability even applies to republications made with notice of the potential defamatory nature of the content [*Barrett v. Rosenthal (2006) 40 Cal. 4th 33, 43-49, 51 Cal. Rptr. 3d 55, 146 P.3d 510* (immunity applied even if republisher could be considered "distributor," rather than "publisher," under common law distinction); *see § 340.21[3]*].

While the Communications Decency Act does not define the term "user," the California Supreme Court has concluded that the term extends to all individuals who use an interactive computer service, regardless of whether the "use" at is sue consists of merely receiving defamatory information, or screening and removing defamatory publication from an Internet site, or some other use of the interactive computer service [*Barrett v. Rosenthal (2006) 40 Cal. 4th 33, 58-60, 51 Cal. Rptr. 3d 55, 146 P.3d 510* (rejecting application of distinction between "active" and "passive" use)].

However, the Supreme Court cautioned that, at some point, active involvement in the creation of a defamatory Internet posting may expose a defendant to liability as the originator of the defamatory content, while also noting that other courts have required conduct that goes beyond the traditional editorial role of a publisher in order to overcome the immunity provided by the Act [*Barrettv. Rosenthal (2006) 40 Cal. 4th 33, 60 n.19, 51 Cal. Rptr. 3d 55, 146 P.3d 510]* . The court of appeal held in one case that the recipient of an allegedly defamatory e-mail could not be held liable for forwarding the e-mail on to others merely because he added prefatory remarks to the forwarded message that essentially stated that the truth would come out in the end. The court concluded that this comment made no material contribution to the alleged defamation contained in the message being forwarded [*Phan v. Pham (2010) 182 Cal. App. 4th 323, 328, 105 Cal. Rptr. 3d 791]* .

In a case involving illegal discrimination rather than defamation, the Ninth Circuit Court of Appeals held that the operators of a website designed to match people looking to rent out spare rooms with people looking to rent such rooms were not immune under the Communications Decency Act for requiring users to answer certain profile questions, concerning such things as sex and sexual orientation and whether he or she would rent to someone with a particular gender or orientation, as a prerequisite to using the service. Such questions could constitute illegal discrimination if asked by an actual real estate broker, and by asking the questions and recording the answers for use by the service, the website operators were doing more than merely publishing content created solely by others [*Fair Housing Coun., San Fernando v. Roommates.com (9th Cir. 2008) 521 F.3d 1157, 1164-1167*].

The "provider" of an interactive computer service is also defined broadly under the Act. For example, the court of appeal has held that an employer that provides its employees with Internet access through the company's internal computer system is a "provider" [*Delfino v. Agilent Technologies, Inc. (2006) 145 Cal. App. 4th 790, 806, 52 Cal. Rptr. 3d 376]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawInternet ServicesComputer & Internet LawCensorshipCommunications Decency ActComputer & Internet LawCensorshipObscenity & Indecent SpeechComputer & Internet LawCivil ActionsDefamationComputer & Internet LawInternet BusinessInternet & Online ServicesGeneral OverviewComputer & Internet LawInternet BusinessInternet & Online ServicesTypesGovernmentsCourtsCommon LawTortsIntentional TortsDefamationGeneral Overview

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30-340 California Forms of Pleading and Practice--Annotated § 340.76

§ 340.76 Opposition to Identification of Anonymous Internet Writer

The right to publish anonymously is a freedom of speech generally protected by the *First Amendment* [*McIntyre v. Ohio Elections Comm'n (1995) 514 U.S. 334, 341-342, 115 S. Ct. 1511, 131 L. Ed. 2d 426*], although constitutional protection is not afforded to anonymous speech that is defamatory [*Chaplinsky v. New Hampshire (1942) 315 U.S. 568, 571-572, 62 S. Ct. 766, 86 L. Ed. 1031*]. Anonymous speech published on the Internet is afforded the same constitutional protection, but persons targeted by such speech may seek identification of the speaker from the website host or Internet service provider when the speech is allegedly defamatory. However, no national consensus has yet emerged on precisely how to balance the right of anonymous free speech with the need of a defamed person to obtain the identity of the speaker [*see* *Krinsky v. Doe 6 (2008) 159 Cal. App. 4th 1154, 1167-1170, 72 Cal. Rptr. 3d 231* (reviewing various approaches that courts nationwide have taken)].

Squarely faced with the issue in *Krinsky v. Doe 6*, the court of appeal concluded that if a defendant has been notified that a plaintiff seeks his or her identity and defendant seeks to quash a subpoena issued to the site host or service provider, the plaintiff must make a prima facie showing of the elements of libel in order to defeat the motion to quash. If the plaintiff succeeds in providing evidence that a libelous statement has been made, the court concluded that no further balancing of interests is necessary to overcome the defendant's constitutional right to speak anonymously [*Krinsky v. Doe 6 (2008) 159 Cal. App. 4th 1154, 1172, 72 Cal. Rptr. 3d 231* (plaintiff failed to present prima facie case under Florida law)].

The court in *Krinsky* noted that a requirement that the plaintiff attempt to notify the defendant when his or her identity is sought would not be unduly burdensome, and also that Internet service providers and message board hosts often provide notice to parties when their identity is sought. The court did not actually impose a notice requirement, however, because in the case before it, the defendant had already been notified and thus the issue was moot [*see* *Krinsky v. Doe 6 (2008) 159 Cal. App. 4th 1154, 1171, 72 Cal. Rptr. 3d 231*].

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[Reserved]

§§ 340.77[Reserved]

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30-340 California Forms of Pleading and Practice--Annotated § 340.90

§ 340.90 Definition of Slander of Title

[1] In General

A tort action for slander of title may be brought against one who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels, or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby. The person is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused [*Gudger v. Manton (1943) 21 Cal. 2d 537, 541, 134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405* ; *Frank Pisano & Assocs. v. Taggart (1972) 29 Cal. App. 3d 1, 24, 105 Cal. Rptr. 414]* .

While the definition of slander of title includes personal property as well as real property, there is only one reported case in California involving personal property [*see Chrysler Credit Corp. v. Ostly (1974) 42 Cal. App. 3d 663, 117 Cal. Rptr. 167]* .

Slander of title is an invasion of the interest in the vendibility of property [*Phillips v. Glazer (1949) 94 Cal. App. 2d 673, 677, 211 P.2d 37]* or in the immediate salability of property [*Smith v. Stuthman (1947) 79 Cal. App. 2d 708, 709, 181 P.2d 123]* .

[2] Not Applicable to Adverse Possessor

A person whose title to property depends on adverse possession cannot state a cause of action for slander of title against a person who raises or relies on the record title. The adverse possessors must establish their title by a quiet title action before they have a marketable title and as a condition precedent to any action for slander of title [*Howard v. Schaniel (1980) 113 Cal. App. 3d 256, 262-266, 169 Cal. Rptr. 678]* .

[3] Defamation Distinguished

The gravamen of an action for disparagement of title is different from that of an action for personal defamation [

Albertson v. Raboff (1956) 46 Cal. 2d 375, 378, 295 P.2d 405] . An action for disparagement of title alleviates injury to real property [*Coley v. Hecker (1928) 206 Cal. 22, 27, 272 P. 1045]* , whereas an action for defamation alleviates injury to a person's reputation or character [*see Civ. Code §§ 45, 46*].

[4] Written and Spoken Words Included

The term "slander of title" includes both spoken and written means by which the right of property may be invaded, and a right of action exists irrespective of the means by which the title is traduced. This is so because a property right had been invaded--an injury to real property has been sustained [*Coley v. Hecker (1928) 206 Cal. 22, 27, 272 P. 1045]* . Therefore, the phrase "slander of title" is merely a figure of speech in which the title is personified. Thus, where the facts involve a written document which causes damage, the term is an anomaly because no spoken words have been uttered [*Coley v. Hecker (1928) 206 Cal. 22, 27, 272 P. 1045]* .

[5] Complete Denial of Title Unnecessary

To be disparaging, a statement need not be a complete denial of title in others, but may be any unfounded claim of an interest in the property which throws doubt upon its ownership [*Gudger v. Manton (1943) 21 Cal. 2d 537, 542-543, 134 P.2d 217* , *disapproved on other grounds,* *Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405* ; *Phillips v. Glazer (1949) 94 Cal. App. 2d 673, 677, 211 P.2d 37]* .

The matter need not create a legal "cloud" on the property owner's title to constitute disparagement [*Seeley v. Seymour (1987) 190 Cal. App. 3d 844, 857, 237 Cal. Rptr. 282]* . If the matter is reasonably understood to cast doubt upon the existence or extent of another's interest in land, it is disparaging to the latter's title where it is so understood by the recipient [*Hill v. Allan (1968) 259 Cal. App. 2d 470, 489, 66 Cal. Rptr. 676]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdverse PossessionClaims By & Against Governmental EntitiesReal Property LawTitle QualityAdverse Claim ActionsGeneral OverviewTortsBusiness TortsSlander of TitleGeneral OverviewTortsBusiness TortsSlander of TitleElementsTortsBusiness TortsTrade LibelGeneral OverviewTortsIntentional TortsDefamationGeneral Overview

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§ 340.91 Types of Documents Found Disparaging

[1] In General

Various types of documents have been found disparaging of a person's title or interest in real property, including:

- A lien [*Gudger v. Manton (1943) 21 Cal. 2d 537, 542-543, 134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405]* ;

- An abstract of judgment after an undertaking staying execution pending appeal had been filed [*Coley v. Hecker (1928) 206 Cal. 22, 28-29, 272 P.1045]* ;

- An executed deed by a person who had no interest in the property [*Fearon v. Fodera (1915) 169 Cal. 370, 380, 148 P. 200]* ;

- A forged deed of trust [*Forte v. Nolfi (1972) 25 Cal. App. 3d 656, 686, 102 Cal. Rptr. 455]* ;

- A master plan for a residential development [*Glass v. Gulf Oil Corp. (1970) 12 Cal. App. 3d 412, 424-425, 96 Cal. Rptr. 902]* ;

- The recording of notices of location of mining claims where plaintiff was holder of leasehold interest [*Davis v. Wood (1943) 61 Cal. App. 2d 788, 793-799, 143 P.2d 740]* ; and

- An assignment of royalties under a mining lease [*Ezmirlian v. Otto (1934) 139 Cal. App. 486, 493, 34 P.2d 774]* .

Other instances of disparaging documents include the recording of fraudulent grant deeds [*Castaic Clay Mfg. Co. v. Dedes (1987) 195 Cal. App. 3d 444, 447, 450, 240 Cal. Rptr. 652]* and the recording of a memorandum of agreement purporting to memorialize a lease agreement, which had not been signed by the owner [*Seeley v. Seymour (1987) 190*

Cal. App. 3d 844, 856-859, 237 Cal. Rptr. 282] .

It has also been held that posting a sign next to the plaintiff's property which states that anyone purchasing the property would also be "buying a law suit" is disparaging [*Phillips v. Glazer (1949) 94 Cal. App. 2d 673, 677-678, 211 P.2d 37]* .

[2] Certificate of Acknowledgment Not Disparaging

A certificate of acknowledgment bears no relation to legal interests in property, but serves only to lend to the document to which it is affixed the aura of authenticity. As such, a false certificate of acknowledgment, by itself, could impart no disparaging imputation or innuendo against the plaintiff's interests [*Kirsch v. Barnes (N.D. Cal. 1957) 153 F. Supp. 260, 264* , *aff'd, (9th Cir. Cal 1959) 263 F.2d 692]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsLease AgreementsGeneral OverviewEnergy & Utilities LawGrants & ReservationsAssignments & SubleasesEnergy & Utilities LawMining IndustryMineral LeasesGeneral OverviewEnergy & Utilities LawMining IndustryMineral LeasesRecordationTortsBusiness TortsTrade LibelGeneral Overview

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§ 340.92 Requirement of Publication

Publication of the untrue and disparaging matter is an element of the cause of action. Therefore, a complaint that fails to allege that the defendant ever made a title report to anyone; that documents which were "prepared" were not also completed or executed; or that the defendant never recorded or otherwise published any information to anyone about the title is properly subject to a demurrer [*Southcott v. Pioneer Title Co. (1962) 203 Cal. App. 2d 673, 676-677, 21 Cal. Rptr. 917]* .

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§ 340.93 Description of Property

It is necessary for the complaint to set forth and describe the property respecting which the defamatory statements were made as well as to aver title to the property [*Burkett v. Griffith (1891) 90 Cal. 532, 541, 27 P. 527 , disapproved on other grounds, Gudger v. Manton (1943) 21 Cal. 2d 537, 544, 134 P.2d 217]* . However, in an action involving slander of title the property involved need not be described in the complaint with the same degree of particularity as is necessary in an action to quiet title [*Davis v. Wood (1943) 61 Cal. App. 2d 788, 793, 143 P.2d 740]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsTortsBusiness TortsSlander of TitleGeneral OverviewTortsBusiness TortsSlander of TitleElements

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30-340 California Forms of Pleading and Practice--Annotated § 340.94

§ 340.94 Malice

To commit the tort of slander of title it is not necessary to prove that defendant acted with actual malice or ill will toward plaintiff [*Phillips v. Glazer (1949) 94 Cal. App. 2d 673, 677, 211 P.2d 37* ; *see Gudger v. Manton (1943) 21 Cal. 2d 537, 543-544, 134 P.2d 217* , *disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 379, 295 P.2d 405]* . Implied malice from knowledge of the falsity of the publication is all that is required [*Albertson v. Raboff (1956) 46 Cal. 2d 375, 383, 295 P.2d 405]* .

In a slander of title action when the evidence showed that a buyer recorded a document that contained false accusations against the seller while the buyer was in default under the contract of sale, malice could be implied because accusations made without foundation are indicative of malice [*Contra Costa County Title Co. v. Waloff (1960) 184 Cal. App. 2d 59, 66-67, 7 Cal. Rptr. 358]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsSlander of TitleGeneral OverviewTortsBusiness TortsSlander of TitleElements

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§ 340.95 Falsity

Falsity is an essential element in a cause of action for slander of title [*Gudger v. Manton (1943) 21 Cal. 2d 537, 541-542, 134 P.2d 217* (disapproved on another point in *Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405*); *Burkett v. Griffith (1891) 90 Cal. 532, 537, 27 P. 527* , *disapproved on other grounds, Gudger v. Manton (1943) 21 Cal. 2d 537, 544, 134 P.2d 217]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsSlander of TitleGeneral OverviewTortsBusiness TortsSlander of TitleElements

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30-340 California Forms of Pleading and Practice--Annotated § 340.96

§ 340.96 Privilege

[1] Plaintiff's Burden to Prove Lack of Privilege

To state a cause of action for slander of title, there must be a lack of privilege [*Gudger v. Manton (1943) 21 Cal. 2d 537, 544, 134 P.2d 217* , *disapproved on other grounds,* *Albertson v. Raboff (1956) 46 Cal. 2d 375, 295 P.2d 405]* . Although the gravamen of an action for disparagement of title is different from that of an action for personal defamation, substantially the same privileges are recognized in relation to both torts in the absence of statute. Questions of privilege relating to both torts are now resolved in the light of *Civ. Code § 47* [*Albertson v. Raboff (1956) 46 Cal. 2d 375, 378-379, 295 P.2d 405* ; *Hill v. Allan (1968) 259 Cal App2d 470, 490, 66 Cal. Rptr. 676* ; *see § 340.50* et seq.].

There is some uncertainty regarding the burden of proof on the issue of lack of privilege. Some cases hold that the burden of proof of the lack of privilege is on the plaintiff [*Hill v. Allan (1968) 259 Cal. App. 2d 470, 489, 66 Cal. Rptr. 676* ; *Spencer v. Harmon Enters., Inc. (1965) 234 Cal. App. 2d 614, 622, 44 Cal. Rptr. 683]* . Other cases hold that the burden is normally on the defendant [*Palmer v. Zaklama (2003) 109 Cal. App. 4th 1367, 1380-1381, 1 Cal. Rptr. 3d 116* ; *see* *Stevens v. Snow (1923) 191 Cal. 58, 64-65, 214 P. 968* (case involving defamation as opposed to slander of title)]. A recent case suggests that the existence of a privilege is normally an affirmative defense on which defendant has the burden of proof, but when the existence of the privilege appears on the face of plaintiff's complaint, the plaintiff has the burden of proof [*Smith v. Commonwealth Land Title Ins. Co. (1986) 177 Cal. App. 3d 625, 630-631, 223 Cal. Rptr. 339]* .

[2] Absolute Privilege

[a] Judicial Proceedings

The absolute privilege granted under *Civ. Code § 47(b)(2)* applies to any publication that is required or permitted [*see, e.g., Code Civ. Proc. § 405.20*] by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is invoked. Thus, it is not limited to the pleadings, the oral or written evidence, to publication in open court or in briefs or affidavits. If the

publication has a reasonable relation to the action and is permitted by law, the absolute privilege attaches [*Albertson v. Raboff (1956) 46 Cal. 2d 375, 380-381, 295 P.2d 405* ; *Wilton v. Mountain Wood Homeowners Assn., Inc. (1993) 18 Cal. App. 4th 565, 569, 22 Cal. Rptr. 2d 471* ; *Frank Pisano & Assocs. v. Taggart (1972) 29 Cal. App. 3d 1, 24-25, 105 Cal. Rptr. 414]* . However, under *Civ. Code § 47(b)(4)*, "[a] recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law" [*see also Palmer v. Zaklama (2003) 109 Cal. App. 4th 1367, 1378-1381*].

Courts have used an "interest of justice" test, that is whether the extrajudicial communication was intended to further the litigation and to promote justice, to determine whether a communication is privileged under *Civ. Code § 47(b)(2)* [*Earp v. Nobmann (1981) 122 Cal. App. 3d 270, 282-285, 175 Cal. Rptr. 767* , *overruled, Silberg v. Anderson (1990) 50 Cal. 3d 205, 219, 266 Cal. Rptr. 638, 786 P.2d 365*)]. However, that test was rejected by the California Supreme Court [*Silberg v. Anderson (1990) 50Cal. 3d 205, 219* , *266 Cal. Rptr. 638, 786 P.2d 365]* . In *Silberg v. Anderson*, the court stated that "[t]he principal purpose of [former *Civ. Code] § 47(2)* [*now see Civ. Code § 47(b)(2)*] is to afford litigants and witnesses the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions" [*Silberg v. Anderson (1990) 50 Cal. 3d 205, 213, 266 Cal. Rptr. 638, 786 P.2d 365]* .

[b] Absolutely Privileged Documents

The absolute privilege of *Civ. Code § 47(b)(2)* attaches to the recordation of a notice of lis pendens if it identifies an action previously filed with a court of competent jurisdiction that affects the title or right of possession of real property, as authorized or required by law [*Civ. Code § 47(b)(4)*]. Such a publication is permitted by law and, like other documents that may be filed in an action, it has a reasonable relation thereto; it is immaterial that it is recorded with the county recorder instead of being filed with the county clerk [*Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405* ; *Earp v. Nobmann (1981) 122 Cal. App. 3d 270, 281-282, 175 Cal. Rptr. 767]* . The enactment of statutory procedures for expunging a lis pendens (*Code Civ. Proc. § 405.30 et seq.*) was not intended to abolish the absolute privilege for recording a lis pendens [*Earp v. Nobmann (1981) 122 Cal. App. 3d 270, 282, 175 Cal. Rptr. 767]* .

Similarly, the filing of a claim of mechanic's lien and a judicial proceeding to enforce it is privileged within the meaning of *Civ. Code § 47(b)(2)* [*Frank Pisano & Assocs. v. Taggart (1972) 29 Cal. App. 3d 1, 25, 105 Cal. Rptr. 414]* .

The publication of an assessment lien by a condominium owners' association is also absolutely privileged under the judicial proceedings privilege of *Civ. Code § 47(b)*, regardless of whether the lien is enforced by judicial foreclosure or by private sale [*Wilton v. Mountain Wood Homeowners Assn., Inc. (1993) 18 Cal. App. 4th 565, 568-570, 22 Cal. Rptr. 2d 471]* .

The absolute privilege under *Civ. Code § 47(b)* applies to quasi-judicial as well as judicial proceedings. Thus, for example, it bars a slander of title action based on a cease and desist order issued in proceedings before the California Coastal Commission [*see Ojavan Investors, Inc. v. California Coastal Comm'n (1994) 26 Cal. App. 4th 516, 528-529, 32 Cal. Rptr. 2d 103]* .

[3] Conditional Privilege of Rival Claimant

[a] In General

The courts have long recognized that a rival claimant of property is conditionally privileged to disparage or is justified in disparaging another's interest in the property by an honest and good-faith assertion of an inconsistent legally protected interest in himself [*Gudger v. Manton (1943)21 Cal. 2d 537, 545, 134 P.2d 217* , *disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405* ; *Hill v. Allan (1968) 259 Cal. App. 2d 470, 490, 66 Cal. Rptr. 676]* .

[a] Absence of Malice Essential

The conditional privilege of a rival claimant or interested party is always available whenever the statements are made without malice [*Hill v. Allan (1968) 259 Cal. App. 2d 470, 490, 66 Cal. Rptr. 676]* . However, the existence of actual malice will defeat the assertion of the qualified privilege [*Gudger v. Manton (1943) 21 Cal. 2d 537, 543, 134 P.2d 217* , *disapproved on other grounds,* *Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405* ; *Earp v. Nobmann (1981) 122 Cal. App. 3d 270, 285, 175 Cal. Rptr. 767]* . Malice will not be inferred from the mere fact of communication [*Hill v. Allan (1968) 259 Cal. App. 2d 470, 490, 66 Cal. Rptr. 676* ; *see Civ. Code § 48*]. Malice exists when the person making the statement acts out of hatred or ill will, has no reasonable grounds for believing the statement to be true, or makes the statement for any reason other than to protect the interest for the protection of which the privilege is given [*Earp v. Nobmann (1981) 122 Cal. App. 3d 270, 285, 175 Cal. Rptr. 767]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsSlander of TitleDefensesTortsBusiness TortsSlander of TitleElements

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§ 340.97 Damages

[1] Essential Element of Cause of Action

The allegation and proof of damages as the direct and natural result of the disparaging statement are essential to maintaining a cause of action for slander of title [*Burkett v. Griffith (1891) 90 Cal. 532, 537, 27 P. 527* , *disapproved on other grounds, Gudger v. Manton (1943) 21 Cal. 2d 537, 544, 134 P.2d 217]* .

[2] Loss of Sale to Particular Purchaser Unnecessary

A property owner may recover for the impairment of the vendibility of his or her property without showing that the loss was caused by prevention of a particular sale. The usual manner in which a third person's reliance upon disparaging matter causes pecuniary loss is by preventing a sale to a particular purchaser. However, the disparaging matter may, if widely disseminated, cause pecuniary loss by depriving its possessor of a market in which, but for the disparagement, the possessor's land or other thing might with reasonable certainty have found a purchaser [*Glass v. Gulf Oil Corp. (1970) 12 Cal. App. 3d 412, 424, 96 Cal. Rptr. 902]* .

[3] Elements of Damages

[a] In General

The pecuniary loss for which a publisher of disparaging matter is liable results from the impairment of the vendibility of the thing in question caused by the publication of the disparaging matter and the expense of litigation reasonably necessary to remove the doubt cast by the disparagement of the property [*Frank Pisano & Assocs. v. Taggart (1972) 29 Cal. App. 3d 1, 25, 105 Cal. Rptr. 414* ; *Castaic Clay Mfg. Co. v. Dedes (1987) 195 Cal. App. 3d 444, 447-448, 240 Cal. Rptr. 652* ; *Davis v. Wood (1943) 61 Cal. App. 2d 788, 797-798, 143 P.2d 740]* . However, if the period of time during which plaintiff's title was disparaged is based on both the recordation of a lis pendens which was absolutely privileged and a later letter claiming an interest in the property, which was not privileged, damages cannot be awarded for the period of disparagement caused by the privileged lis pendens [*Earp v. Nobmann (1981) 122 Cal. App. 3d 270, 287, 175 Cal. Rptr. 767]* .

[b] Attorney's Fees

A plaintiff in a slander of title action can recover attorney's fees incurred in clearing title to the property because the tort required plaintiff to bring the proceedings to protect his or her interests [*Glass v. Gulf Oil Corp. (1970) 12 Cal. App. 3d 412, 437-439, 96 Cal. Rptr. 902]* . Plaintiff cannot recover attorney's fees incurred in prosecuting the slander of title action; however, if a slander of title cause of action is combined with a quiet title cause of action, the attorney's fees incurred in bringing the quiet title cause of action can be recovered [*Contra Costa County Title Co. v. Waloff (1960) 184 Cal. App. 2d 59, 67-68, 7 Cal. Rptr. 358]* . Since attorney's fees under these circumstances are special damages, they should be pleaded in the complaint [*Spencer v. Harmon Enters., Inc. (1965) 234 Cal. App. 2d 614, 621, 44 Cal. Rptr. 683]* .

[c] Inconvenience and Time to Remove Cloud

In an action for disparagement of title, damages may be awarded for the inconvenience and time suffered by the plaintiff in the re moval of a recorded cloud on the plaintiff's title [*Forte v. Nolfi (1972) 25 Cal. App. 3d 656, 685, 102 Cal. Rptr. 455* ; *Wright v. Rogers (1959) 172 Cal. App. 2d 349, 366-367, 342 P.2d 447]* . And where there is no express testimony of the amount of damage as a result of plaintiff's time and inconvenience, a trial judge can call on his or her general knowledge of the amount [*Forte v. Nolfi (1972) 25 Cal. App. 3d 656, 686, 102 Cal. Rptr. 455* ; *Wright v. Rogers (1959) 172 Cal. App. 2d 349, 367, 342 P.2d 447]* .

[d] Loss of Use of Proceeds Not Recoverable

The damages that may be awarded in an action for disparagement of title do not include the loss of use of the money which would have been received if a prospective sale had been consummated [*Earp v. Nobmann (1981) 122 Cal. App. 3d 270, 287, 175 Cal. Rptr. 767]* .

[4] Causal Connection Required

The plaintiff must show that the damages sustained were the "direct and natural" result of the disparaging remark [*Burkett v. Griffith (1891) 90 Cal. 532, 537, 27 P. 527* , *disapproved on other grounds, Gudger v. Manton (1943) 21 Cal. 2d 537, 544, 134 P.2d 217]* .

[5] Measure of Damages

The proper measure of damages in slander of title actions is the amount which will compensate the plaintiff for all the damage proximately caused by the disparagement [*Gudger v. Manton (1943) 21 Cal. 2d 537, 555, 134 P.2d 217* , *disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405* ; *see Civ. Code § 3333*].

[6] Punitive Damages Permitted

In a slander of title action where fraud is involved, the award of punitive damages is expressly authorized by *Civ. Code § 3294* [*Spencer v. Harmon Enters., Inc. (1965) 234 Cal. App. 2d 614, 626, 44 Cal. Rptr. 683* ; *see also TXO Prod. v. Alliance Res. (1993) 509 U.S. 443, 452-466, 113 S. Ct. 2711, 125 L. Ed. 2d 366* (upholding $10 million punitive damage award from state-court jury based on $19,000 compensatory damage award for common law slander of title claim); *Castaic Clay Mfg. Co. v. Dedes (1987) 195 Cal. App. 3d 444, 450, 240 Cal. Rptr. 652* (recording of fraudulent grant deeds)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsSlander of TitleRemedies

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§ 340.98 Venue

Actions for injuries to real property are local actions and must be brought in the county in which the property is situated [*see Code Civ. Proc. § 392(a)*]. The term "injuries to real property" as used in *Code Civ. Proc. § 392* is not, however, limited to physical injury to or interference with the land. It includes actions for slander of title, and thus an action for slander of title must be brought in the county in which the property involved lies [*see Coley v. Hecker (1928) 206 Cal. 22, 27-28, 272 P. 1045* ; *Wick v. Mattison (1962) 207 Cal. App. 2d 608, 609, 24 Cal. Rptr. 677]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 340.99 Survival of Action

A cause of action for slander of title survives the death of its owner [*Smith v. Stuthman (1947) 79 Cal. App. 2d 708, 709, 181 P.2d 123* ; *see Code Civ. Proc. § 377.20*; *Prob. Code §§ 7000, 7001*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsSlander of TitleGeneral Overview

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§ 340.100 Liability of Principal

A principal is liable for the acts of the principal's agent in an action for slander of title when the agent is acting within the scope of the agent's authority; further, the agent's knowledge is imputed to the principal [*Gudger v. Manton (1943) 21 Cal. 2d 537, 549, 134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405]* .

Legal Topics:

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

[1] Truth

Truth is a defense to an action for slander of title [*see Gudger v. Manton (1943) 21 Cal. 2d 537, 543, 134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405]* because truth is not considered to disparage a person's title [*Kirsch v. Barnes (N.D. Cal. 1957) 153 F. Supp. 260, 264 , aff'd, (9th Cir. 1959) 263 F.2d 692]* .

[2] Failure to Act Maliciously

When defendants do not act maliciously, are acting under the advice of counsel, and believe that their recording of a deed is proper, they have a defense to a slander of title action [*Cavin Mem'l Corp. v. Requa (1970) 5 Cal. App. 3d 345, 361, 85 Cal. Rptr. 107]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsSlander of TitleGeneral OverviewTortsBusiness TortsSlander of TitleDefensesTortsIntentional TortsDefamationDefensesTruth

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§ 340.102 Statute of Limitations

The statute of limitations for a cause of action for slander of title is three years [*Code Civ. Proc. § 338(g)*]. The cause of action does not begin to run until the plaintiff could reasonably be expected to discover the existence of the cause of action [*Stalberg v. Western Title Ins. Co. (1991) 230 Cal. App. 3d 1223, 1230, 282 Cal. Rptr. 43* ; *Arthur v. Davis (1981) 126 Cal. App. 3d 684, 690-692, 178 Cal. Rptr. 920]* .

For example, discovery of a wild deed gives rise to a duty of inquiry and could commence the running of the statute [*Stalberg v. Western Title Ins. Co. (1991) 230 Cal. App. 3d 1223, 1230, 282 Cal. Rptr. 43]* . Similarly, if an attorney, in the course of quieting title to an easement, discovers wild deeds and the fact that defendant authorized their recording, that knowledge is imputed to the clients to commence the running of the limitation period [*Stalberg v. Western Title Ins. Co. (1991) 230 Cal. App. 3d 1223, 1231, 282 Cal. Rptr. 43]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsBusiness TortsSlander of TitleDefensesTortsIntentional TortsDefamationDefensesStatutes of Limitations

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§ 340.103 Trade Libel

[1] Definition

Trade libel is an intentional disparagement of the quality of property which results in pecuniary damage to plaintiff [*Leonardini v. Shell Oil Co. (1989) 216 Cal. App. 3d 547, 572, 264 Cal. Rptr. 883* (intention is to cause financial harm to business); *Polygram Records v. Superior Court (1985)170 Cal. App. 3d 543, 548, 216 Cal. Rptr. 252* ; *Erlich v. Etner (1964) 224 Cal. App. 2d 69, 73, 36 Cal. Rptr. 256]* . Thus, an ac tion for trade libel lies where statements about the goods of a competito r go no further than to criticize those goods and where the criticism is based upon or appeals to a personal taste or preference of the buyer and does not impugn the honesty or integrity of the merchant in the sale of the goods [*Rosenberg v. J.C. Penney Co. (1939) 30 Cal. App. 2d 609, 621, 86 P.2d 696]* . Trade libel need not be in writing [*Polygram Records v. Superior Court (1985) 170 Cal. App. 3d 543, 548, 216 Cal. Rptr. 252]* .

To constitute trade libel, a statement must be false, but need not be malicious except in the sense that it is not privileged [*Leonardini v. Shell Oil Co. (1989) 216 Cal. App. 3d 547, 572, 264 Cal. Rptr. 883]* .

[2] Defamation Distiguished

[a] Trade Libel Not Actionable Defamation

Trade libel and defamation protect different interests. The action for defamation is to protect the personal reputation of the injured party. The action for trade libel is to protect the economic interests of the injured party against pecuniary loss [*Leonardini v. Shell Oil Co. (1989) 216 Cal. App. 3d 547, 573, 264 Cal. Rptr. 883* ; *Polygram Records (1985) 170 Cal. App. 3d 543, 548, 216 Cal. Rptr. 252]* .

Further, the common law imposes more stringent requirements on the plaintiff seeking to recover for trade libel in three respects. First, a defamatory statement is presumed to be false, with truth a matter to be proved by the defendant. In an action for trade libel, the plaintiff must plead and prove that the statement is false. Second, a defendant in a defamation action is held to strict liability insofar as falsity of the statement is concerned. In an action for trade libel, the defendant is subject to liability only if he or she knew of the falsity or acted with reckless disregard concerning it, or if he or she

acted with ill will or intended to interfere in the economic interests of the plaintiff in an unprivileged fashion. Finally, in defamation, a plaintiff is required under the common law to prove special damages in only a limited number of situations. In trade libel, pecuniary loss to the plaintiff must always be proved [*Polygram Records (1985) 170 Cal. App. 3d 543, 549, 216 Cal. Rptr. 252* , quoting from Rest. 2d Torts, § 623A, comment g].

Thus, trade libel is not true libel and is not actionable as defamation. Although, under *Civ. Code §§ 44-46*, defamation is also effected by libelous or slanderous statements that tend to injure a person in his or her occupation, office, profession, trade or business, the statements concerned cast aspersions on a plaintiff directly or by imputation fairly implied. The statutes are not concerned with statements that do not call into question the plaintiff's honesty, integrity, or competence, or reasonably imply any reprehensible personable characteristic [*Polygram Records (1985) 170 Cal.App. 3d 543, 549-550, 216 Cal. Rptr. 252]* . For a detailed discussion of defamation generally, see *§ 340.10* et seq.

Another important difference between trade libel and defamation is that, because of the economic interest involved in trade libel, the disparagement of quality may be enjoined in a proper case, whereas personal defamation can not be enjoined [*Leonardini v. Shell Oil Co. (1989) 216 Cal. App. 3d 547, 574-575, 264 Cal. Rptr. 883* (no injunction available; distinguishing *Black & Yates v. Mahogany Asso. (3rd Cir. 1942) 129 F.2d 227* , and *Martin v. Reynolds Metals Co. (D. Or. 1963) 224 F. Supp. 978* , as involving purely private concerns)].

[b] Trade Libel May Be Actionable Libel Per Se

An action for libel per se may be brought if statements about the goods of a competitor include libelous words concerning the seller that impute to him fraud, dishonesty, or questionable business methods in connection with the sale. By so implying business dishonesty, an action for libel per se under *Civ. Code §§ 45, 45a* lies in which no special damages need to be alleged or proved [*Erlich v. Etner (1964) 224 Cal. App. 2d 69, 73, 36 Cal. Rptr. 256* ; *Rosenberg v. J.C. Penney Co. (1939) 30 Cal. App. 2d 609, 621, 86 P.2d 696* ; *see Barnes-Hind, Inc. v. Superior Court (1986) 181 Cal. App. 3d 377, 381, 385, 226 Cal. Rptr. 354* (corporation may sue for damage to business reputation)].

[3] Statute of Limitations

There has been some question whether the one-year statute of limitations under *Code Civ. Proc. § 340(c)* (libel and slander) or the two-year statute of limitations under *Code Civ. Proc. § 339(1)* (contract, obligation or liability not founded on an instrument in writing) applies to actions for trade libel. However, one court of appeal has held that, because trade libel is not directed at the plaintiff's personal reputation, but rather at the goods he or she sells or the character of his or her business, actions for trade libel are governed by *Code Civ. Proc. § 339(1)* [*Guess, Inc. v. Superior Court (1985) 176 Cal. App. 3d 473, 475, 477-479, 222 Cal. Rptr. 79]* .

[4] Constitutional Limitations

Constitutional limitations on liability based on the *First Amendment* rights of freedom of the press and free speech, which were formulated in defamation actions, apply to all cases based on an injurious falsehood, including trade libel [*see Blatty v. New York Times Co. (1986) 42 Cal. 3d 1033, 1042, 232 Cal. Rptr. 542, 728 P.2d 1177* ; *Leonardini v. Shell Oil Co. (1989) 216 Cal. App. 3d 547, 576, 264 Cal. Rptr. 883* (attempt to influence government action as indisputably protected by *First Amendment*)]. The primary constitutional protections involve a requisite showing of the defendant's state of mind regarding the truth or falsity of the alleged injurious falsehood.

For example, in cases in which the plaintiff is a public figure, an action for trade libel must be supported by a showing of "actual malice" on the part of the defendant [*see Blatty v. New York Times Co. (1986) 42 Cal. 3d 1033, 1043, 232 Cal. Rptr. 542, 728 P.2d 1177* (citing federal authority)]. "Actual malice" in this context means that the defendant published the disparaging statement with knowledge of its falsity or with reckless disregard for its truth or falsity [*see New York Times Co. v. Sullivan (1964) 376 U.S. 254, 279-280, 285-286, 84 S. Ct. 710, 11 L. Ed. 2d 686]* . This actual

malice standard is a subjective one and it also applies when the statements involve a matter of public concern, even though the plaintiff may not have been a public figure [*Melaleuca, Inc. v. Clark (1998) 66 Cal. App. 4th 1344, 1363-1365, 78 Cal. Rptr. 2d 627]* . For a complete discussion of the constitutional privileges arising under the *First Amendment*, see *§ 340.18[1]*.

In addition, at least when the defendant is a member of the media, the *First Amendment* requires that the injurious falsehood must be "of and concerning" the plaintiff or his or her property; that is, it must specifically refer to plaintiff or his or her property or must refer to them by reasonable implication. Thus, when a plaintiff brought several causes of action, including an action for trade libel, alleging that the New York Times erroneously failed to include his book in its list of top bestsellers, the complaint failed to state a cause of action because the best seller list did not refer to plaintiff or his novel, even by implication [*Blatty v. New York Times Co. (1986) 42 Cal. 3d 1033, 1042, 1046, 232 Cal. Rptr. 542, 728 P.2d 1177]* .

Frequently, a cause of action for trade libel is combined with a cause of action for intentional interference with prospective economic advantage [*see, e.g.,* *Hofmann Co. v. E. I. DuPont de Nemours & Co. (1988) 202 Cal. App. 3d 390, 394, 248 Cal. Rptr. 384]* . The constitutional concerns raised in *Blatty* may also affect the action for intentional interference with prospective economic advantage. However, when the speech alleged to have caused the injury was made in the course of a discussion of governmental affairs, the manner in which government is operated or should be operated, or another matter relating to political processes, the speech is deserving of the highest protection, and the speaker's opinions, even if falsely and insincerely held, are constitutionally protected [*Hofmann Co. v. E. I. DuPont de Nemours & Co. (1988) 202 Cal. App. 3d 390, 407-408, 248 Cal. Rptr. 384]* .

Legal Topics:

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

§§ 340.104[Reserved]

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§ 340.120 California Points and Authorities

For memoranda of points and authorities for use in actions for defamation, see California Points and Authorities, Ch. 142, *Libel and Slander* (*Defamation*) (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 340.121 Forms of Discovery

For forms of discovery for use in actions involving libel and slander, see Bender's Forms of Discovery, Ch. 63, *Defamation, Libel and Slander* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 340.122 Federal Constitution

Prohibition against enactment of any law abridging freedom of speech or of the press. *U.S. Const. amends. I, XIV*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 340.123 State Constitution

Every citizen as permitted to freely speak, write, and publish his or her sentiments on all subjects, and being responsible for abuse of that right; and prohibition against enactment of any law to restrain or abridge liberty of speech or of the press. *Cal. Const. art I, § 9*

Criminal libel; venue. *Cal. Const. art I, § 9*

Legal Topics:

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§ 340.124 State Statutes

[1] Arrest Records of Minors

Use in defamation action or proceeding of prior arrest record of minor ordered sealed. *Penal Code § 851.7(f)*

[2] General Provisions

Libel defined. *Civ. Code § 45*

Libel on its face defined; pleading and proving special damage as necessary where defamatory language not libelous on its face. *Civ. Code § 45a*

Slander defined. *Civ. Code § 46*

Privileged publications. *Civ. Code § 47*

Peace officer's action against person who has filed complaint. *Civ. Code § 47.5*

Inference of malice exception. *Civ. Code § 48*

Demand for retraction by newspaper or radio broadcaster; damages recoverable in civil action brought after failure to retract. *Civ. Code § 48a*

Liability of radio station or network. *Civ. Code § 48.5*

Limitations on and requirements of complaint based on libel or slander arising out of criminal prosecution for child abuse. *Civ. Code § 48.7*

Organization that sponsors or conducts anonymous witness program as granted immunity from civil action for damages under specified conditions. *Civ. Code § 48.9*

[3] Pleading

[a] Extrinsic Facts

Pleading of extrinsic facts in colloquium as unnecessary in complaint for defamation. *Code Civ. Proc. § 460*

[b] Continuous Publications

Shortening of time to answer defamation action when alleged defamatory matter "continuously published"; continuances; and precedence of such action over other civil actions. *Code Civ. Proc. § 460.5*

[c] Defamation During Political Campaign

Shortening of time to respond in action by political candidate for elective office against opponent or incumbent for defamatory statement made during campaign; precedence of action. *Code Civ. Proc. § 460.7*

[4] Penal Provisions

General verdict in criminal libel trial. *Penal Code § 1150*

Misdemeanor penality for defamation of insurance company. *Ins. Code § 44*

[5] Political Campaigns

Liability of candidate or state measure proponent for slander or libel. *Elec. Code §§ 20500, 20501*

[6] Report of Student Misconduct

Standard of proof for defamation liability for reporting threats in school. *Civ. Code § 48.8*

Liability of prinicipal or designee for false and reckless report to parents of student's alcohol or drug abuse. *Educ. Code § 44049*

Principal, designee, or other person authorized by *Educ. Code § 48900 et seq.* (suspension or expulsion) to notify law enforcement authorities of known or suspected violation of *Penal Code § 245* (assault with deadly weapon) or act described in *Educ. Code § 48900(c), (d)* (possession, use, or sale of drugs or alcohol) as immune from liability for results of report, unless report is knowingly false or made with reckless disregard for its truth or falsity. *Educ. Code § 48902(d)*

[7] Statute of Limitations

Statute of limitations on action for libel or slander arising out of criminal prosecution for child abuse as tolled while

criminal prosecution is pending. *Civ. Code § 48.7(a)*

One year as statute of limitations for libel and slander. *Code Civ. Proc. § 340(c)*

Legal Topics:

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California Forms of Pleading and Practice--Annotated

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 340 LIBEL AND SLANDER
PART III. RESEARCH GUIDE
A. Defamation: Libel And Slander Complaints

30-340 California Forms of Pleading and Practice--Annotated § 340.125

§ 340.125 Decisions

[1] Assignment of Defamation Action Prohibited

Defamation as personal tort and as not capable of being assigned. *Los Angeles Fire & Police Protective League v. Rodgers (1970) 7 Cal. App. 3d 419, 425, 86 Cal. Rptr. 623*

[2] Conspiracy to Defame

[a] Evidence of Repetition

Evidence of repetition of slander as not any evidence that there was express or implied agreement for repetition. *Schessler v. Keck (1956) 138 Cal. App. 2d 663, 669, 292 P.2d 314*

[b] Necessity of Actionable Wrong

Complaint for civil conspiracy as failing to state cause of action when defendants' statements of opinion do not constitute actionable wrong. *Okun v. Superior Court (1981) 29 Cal. 3d 442, 454, 175 Cal. Rptr. 157, 629 P.2d 1369*

[c] Pleading

Pleading of conspiracy to defame as not requiring explicit details of manner in which defendant conspired to publish alleged defamatory matter. *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 825, 106 Cal. Rptr. 718 , overruled on other grounds, Silberg v. Anderson (1990) 50 Cal. 3d 205, 266 Cal. Rptr. 638, 786 P.2d 365* ; *Schessler v. Keck (1954) 125 Cal. App. 2d 827, 835-836, 271 P.2d 588*

[d] Statute of Limitations

Action for civil conspiracy to defame as potentially barred by *Uniform Single Publication Act. Belli v. Roberts Bros. Furs (1966) 240 Cal. App. 2d 284, 287, 49 Cal. Rptr. 625*

Statute of limitations for conspiracy as beginning to run until last overt act done in pursuance of conspiracy. *Schessler v. Keck (1954) 125 Cal. App. 2d 827, 833, 271 P.2d 588*

[3] Choice of Law Determination

Conflicts of law rule in California as stating that libel occurs at place of publication of libelous statement. *Moore v. Greene (9th Cir. 1970) 431 F.2d 584, 591* ; *Gallegos v. Union-Tribune Publ'g Co. (1961) 195 Cal. App. 2d 791, 797, 16 Cal. Rptr. 185*

Interest analysis as indicating court should apply law of forum rather than law of place of publication in appropriate circumstances. *Moore v. Greene (9th Cir. 1970) 431 F.2d 584, 591-592*

[4] Constitutional Limitations on Recovery

[a] Malice

[i] Clear and Convincing Evidence

Public figure plaintiff must prove actual malice with "convincing clarity" (clear and convincing evidence). *New York Times Co. v. Sullivan (1964) 376 U.S. 254, 285-286, 84 S. Ct. 710, 11 L. Ed. 2d 686* ; *McCoy v. Hearst Corp. (1986) 42 Cal. 3d 835, 860, 231 Cal. Rptr. 518, 727 P.2d 711* ; *Gomes v. Fried (1982) 136 Cal. App. 3d 924, 934, 186 Cal. Rptr. 605* ; *see also Anderson v. Liberty Lobby, Inc. (1986) 477 U.S. 242, 244, 254, 106 S. Ct. 2505, 91 L. Ed. 2d 202* (clear and convincing standard must be considered by federal court when ruling on motion for summary judgment under *Fed. R. Civ. P., Rule 56*)

Actual malice is defined as either knowledge that defamatory material was false or reckless disregard of whether it was false or not. *New York Times Co. v. Sullivan (1964) 376 U.S. 254, 279-280, 84 S. Ct. 710, 11 L. Ed. 2d 686*

Malice could be found when preparer of financial report knew that report was biased and client wanted report to overstate negative financial aspects of company in order to depress stock price. *Overstock.com, Inc. v. Gradient Analytics, Inc. (2007) 151 Cal. App. 4th 688, 710-711, 61 Cal. Rptr. 3d 29*

Use of phrase "convicted perpetrator of domestic abuse" by defendant, who was not lawyer and thought phrase was accurate, was meant to refer to family court's finding that plaintiff had committed domestic violence against her, not to criminal conviction, and use of phrase did not prove actual malice. *Annette F. v. Sharon S. (2004) 119 Cal. App. 4th 1146, 1167-1170, 15 Cal. Rptr. 3d 100*

Finding of actual malice was precluded because, in addition to professing good-faith belief in truth of statements made, defendant had evidence that source of information contained in statements was reliable and other evidence or circumstances provided reasons for believing information to be true. *Jackson v. Paramount Pictures Corp. (1998) 68 Cal. App. 4th 10, 34*

In action for slander, based on critical remarks made by defendant to newspaper employees regarding coverage of campaign in which defendant was involved, summary judgment for defendant was properly granted, on ground that plaintiff failed to introduce evidence of actual malice. *Live Oak Publ'g Co. v. Cohagan (1991) 234 Cal. App. 3d 1277,*

1287-1293, 286 Cal. Rptr. 198

In action by plaintiff, member of city council, against newspaper based on series of articles depicting plaintiff as dishonest politician, evidence showing some factual errors and reporter's predisposed bias against plaintiff did not establish clear and convincing proof of either deliberate falsification or reckless publication, despite publisher's awareness of probable falsity; defendant's motion for judgment notwithstanding verdict was properly granted on ground that actual malice was not proved. *Fletcher v. San Jose Mercury News (1989) 216 Cal. App. 3d 172, 183-190, 264 Cal. Rptr. 699*

Defendants' subjective belief in truth of allegations, rather than subjective intent toward plaintiff, is proper inquiry of court in determination of actual malice; existence of defamatory inference, which could be drawn by reasonable reader of brochure, was not sufficient to show that defendant acted with actual malice because brochure's quotations from court documents, although extracted out of context, were accurate and unambiguous. *Planned Protective Servs., Inc. v. Gorton (1988) 200 Cal. App. 3d 1, 9-11, 245 Cal. Rptr. 790*

Burden of proving actual malice as on party alleging defamatory statement; malice must be proven by clear and convincing evidence. *Gomes v. Fried (1982) 136 Cal. App. 3d 924, 934, 186 Cal. Rptr. 605*

[ii] Subjective Awareness Test of Recklessness

Public official suing for defamation as required to show that defendant was subjectively aware of possible doubts regarding truth of defamatory publication. *St. Amant v. Thompson (1968) 390 U.S. 727, 731, 88 S. Ct. 1323, 20 L. Ed. 2d 262*

Publication of literally untrue statement, without holding statement out as true, is potentially sufficient to show lack of subjective knowledge or recklessness concerning falsification of statement of fact required by *New York Times* test. *Dworkin v. Hustler Magazine, Inc. (9th Cir. 1989) 867 F.2d 1188, 1194-1195* (statement of outrageous parody or caricature intended as statement of opinion was not published with malice)

Focus of actual malice, with regard to public official's recovery under *New York Times* rule, is defendant's state of mind toward allegedly libelous material published. *McCoy v. Hearst Corp. (1986) 42 Cal. 3d 835, 847, 231 Cal. Rptr. 518, 727 P.2d 711*

[iii] Public Officials Covered

Term "public official" as used in *New York Times* test as applying at least to public employees with substantial responsibility. *Rosenblatt v. Baer (1966) 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597*

Deputy public defender not public official for purposes of application of constitutional limitations on defamation suits. *James v. San Jose Mercury News, Inc. (1993) 17 Cal. App. 4th 1, 11, 20 Cal. Rptr. 2d 890* ; *cf. Tague v. Citizens for Law & Order, Inc. (1977) 142 Cal. Rptr. 689*

Superior court judge is public official for purposes of application of constitutional limitations on defamation suits. *Aisenson v. American Broad. Co. (1990) 220 Cal. App. 3d 146, 154, 269 Cal. Rptr. 379*

Police officer as public official. *Gomes v. Fried (1982) 136 Cal. App. 3d 924, 932-934, 186 Cal. Rptr. 605*

Attorney who was city attorney for Redevelopment Agency as public official for purpose of *New York Times* rule. *Weingarten v. Block (1980) 102 Cal. App. 3d 129, 139, 140, 162 Cal. Rptr. 701*

Former school superintendent as public official and thus required to meet *New York Times* test. *McCunn v. California Teachers Ass'n (1970) 3 Cal. App. 3d 956, 962-964, 83 Cal. Rptr. 846*

[iv] Publications Covered

New York Times test as applicable to books as well as news media. *Church of Scientology of Cal. v. Dell Publ'g Co., Inc. (N.D. Cal. 1973) 362 F. Supp. 767, 769*

Constitutional privilege to publish without actual malice is applicable to nonmedia defendants. *Miller v. Nestande (1987) 192 Cal. App. 3d 191, 200, 237 Cal. Rptr. 359*

Incumbent candidate for public office must prove actual malice, even though defendants were not members of media and alleged defamatory statements were unrelated to official conduct, in action against opponent and several former prisoners of war for dissemination of pamphlet accusing incumbent of cooperating with enemy while POW during Vietnam war. *Miller v. Nestande (1987) 192 Cal. App. 3d 191, 200-202, 237 Cal. Rptr. 359*

[b] Public Figures

[i] Constitutional Requirements

Public figure plaintiff is required by *U.S. Const. amend. I*, to show falsity of defamatory statement to prevail in defamation suit. *Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 775, 106 S. Ct. 1558, 89 L. Ed. 2d 783* (dictum)

[ii] Delineating Who Are Public Figures

Person who engages in criminal conduct as not automatically becoming public figure for purposes of comment on limited range of issues relating to person's conviction for crime. *Wolston v. Reader's Digest Ass'n, Inc. (1979) 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450, 461*

Person who pleaded guilty to contempt charge for failure to respond to grand jury subpoena directing him to appear to testify in investigation of espionage activity as not public figure for purposes of constitutional privilege. *Wolston v. Reader's Digest Ass'n, Inc. (1979) 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450, 457, 460-461*

Scientist who received federal funds for research projects, whose response to receiving award for wasteful spending from United States Senator was reported by news media but whose published writings reached small number of professionals, and who did not thrust himself or his views into public controversy to influence others as not public figure for purposes of constitutional privilege. *Hutchinson v. Proxmire (1979) 443 U.S. 111, 99 S. Ct. 2675, 61 L. Ed. 2d 411, 431*

Wife of scion of wealthy industrial family who sought separate maintenance from husband as not public figure for purposes of constitutional privilege. *Time, Inc. v. Firestone (1976) 424 U.S. 448, 456, 96 S. Ct. 958, 47 L. Ed. 2d 154*

Public figure as determined either on basis of general fame or on basis of involvement in a particular controversy. *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 351, 94 S. Ct. 2997, 41 L. Ed. 2d 789*

College football head coach was limited purpose public figure in dispute stemming from statements dealing exclusively

with his performance as coach. *McGarry v. University of San Diego (2007) 154 Cal. App. 4th 97, 115, 64 Cal. Rptr. 3d 467*

Catholic priest, who was not particularly well-known because of religious, civic, or political activities and had not sought or received notoriety or public attention by reason of his position or achievements, was not public figure for purposes of defamation claim he brought against person who made statement to press implying that priest, who had been helping to take care of elderly woman, was really trying to influence her to become beneficiary of her estate. *Gallagher v. Connell (2004) 123 Cal. App. 4th 1260, 1271-1274, 20 Cal. Rptr. 3d 673*

Plaintiff became limited purpose public figure by purposefully drawing public and media attention to her relationship with another woman in order to promote gay marriage and second-parent adoptions, and that status extended to subject matter of very public legal dispute between plaintiff and her partner over adoption rights to their children. *Annette F. v. Sharon S. (2004) 119 Cal. App. 4th 1146, 1164-1165, 15 Cal. Rptr. 3d 100*

Journalist who was photographed near Robert Kennedy moments before his assassination was not public figure in relation to tabloid newspaper's article reporting book's false accusation that journalist assassinated Kennedy, because journalist was never suspect in government's investigation, journalist's views on assassination were never publicized, and journalist never sought to influence public discussion about assassination. *Khawar v. Globe Int'l, Inc. (1998) 19 Cal. 4th 254, 264-267, 79 Cal. Rptr. 2d 178, 965 P.2d 696*

Two corporations that ran closeout sale for well known landmark department store as not public figures in that merely doing business with parties to public controversy or selling goods to public does not cause elevation to public figure status. *Vegod Corp. v. American Broad. Co., Inc. (1979) 25 Cal. 3d 763, 769, 770, 160 Cal. Rptr. 97, 603 P.2d 14*

Plastic surgeon who put himself into public debate over merits of plastic surgery by appearing on local television shows, writing numerous articles in medical journals and beauty magazines advocating surgery, testifying as expert witness on subject, and advertising his services in local media, was limited purpose public figure for purposes of defamation claims made against former patient. *Gilbert v. Sykes (2007) 147 Cal. App. 4th 13, 25-26, 53 Cal. Rptr. 3d 752*

Candidate for public office as "public figure" for purposes of constitutional privilege. *Planned Protective Servs., Inc. v. Gorton (1988) 200 Cal. App. 3d 1, 9, 245 Cal. Rptr. 790*

Community leaders of organization opposing San Fernando Valley as site of Olympics as public figures who have thrust themselves to forefront of public controversy to influence resolution of issues, and as required to meet higher standard for recovery than private individuals. *Lewis v. Ueberroth (1983) 147 Cal. App. 3d 442, 446, 195 Cal. Rptr. 150*

In action for defamation based on article accusing plaintiffs of being mobsters, gangsters, members of organized crime, and owners of resort that was organized crime headquarters, plaintiffs as not public figures merely because resort had access to media for costly advertising campaign, since such access and advertising is not thrusting oneself into vortex of controversy in attempt to influence resolution of issues involved. *Rancho La Costa, Inc. v. Superior Court (1980) 106 Cal. App. 3d 646, 653-661, 165 Cal. Rptr. 347*

City attorney who thrust himself to forefront of public controversy, who actively and voluntarily continued representation of Redevelopment Agency as its chief local counsel, and who earned substantial amounts from public expenditures as public figure. *Weingarten v. Block (1980) 102 Cal. App. 3d 129, 142, 143, 162 Cal. Rptr. 701*

Well-known TV personality was public figure. *Montandon v. Triangle Publ'ns, Inc. (1975) 45 Cal. App. 3d 938, 946, 120 Cal. Rptr. 186*

Well-known national attorney was public figure. *Belli v. Curtis Publ'g Co. (1972) 25 Cal. App. 3d 384, 388, 102 Cal. Rptr. 122*

[c] Suits Brought by Private Individuals Suing Media Defendants

[i] In General

States as prohibited from imposing liability without fault on a media defendant sued by a private individual. *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 347, 94 S. Ct. 2997, 41 L. Ed. 2d 789*

Private individual suing media defendant as required to prove "actual injury" unless the *New York Times* test is met. *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 349-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789*

Private individual suing media defendant as required to meet *New York Times* test before recovering either presumed or punitive damages. *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 349-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789*

Media defendant is not entitled to "neutral reportage" privilege for republishing defamatory accusations about private person who does not qualify as public figure or official. *Khawar v. Globe Int'l, Inc. (1998) 19 Cal. 4th 254, 268-273, 79 Cal. Rptr. 2d 178, 965 P.2d 696*

[ii] Limitation to Matters of Public Concern

Private figure suing newspaper or other media defendant for publishing speech of public concern is required by *U.S. Const. amend. I* to bear burden of proving falsity of defamatory statement before recovering damages. *Philadelphia Newspapers v. Hepps (1986) 475 U.S. 767, 768-769, 775-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783*

Constitutional limitations enunciated in *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 349-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789* , as not applying in suits by private plaintiffs in which the allegedly defamatory statements do not involve matters of public concern. *Dun & Bradstreet v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 759-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593*

Deputy public defender's performance, and administration of criminal laws in general and laws relating to child molestation in particular, as matters of legitimate public interest and concern. *James v. San Jose Mercury News, Inc. (1993) 17 Cal. App. 4th 1, 4, 11, 20 Cal. Rptr. 2d 890*

[d] Jurisdiction

Nonresident editor of publication and nonresident author as not enjoying *First Amendment* preference on issue of in personam jurisdiction in action based on publication of allegedly libelous material. *Jones v. Calder (1982) 138 Cal. App. 3d 128, 132, 187 Cal. Rptr. 825*

[5] Damages

[a] Appellate Review

Appellate court as not declaring award of punitive damages excessive unless it is so grossly excessive as to indicate passion or prejudice on part of jury. *Cunningham v. Simpson (1969) 1 Cal. 3d 301, 308-309, 81 Cal. Rptr. 855, 461*

P.2d 39 ; *Roemer v. Retail Credit Co. (1975) 44 Cal. App. 3d 926, 937, 119 Cal. Rptr. 82*

Award of punitive damages of $25,000 as not justified when defendant accused plaintiff of having "hot title" to car. *Cunningham v. Simpson (1969) 1 Cal. 3d 301, 309-310, 81 Cal. Rptr. 855, 461 P.2d 39*

Award of damages approved by trial court as not disturbed on appeal unless it appears jury influenced by passion or prejudice. *Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791, 801, 197 P.2d 713*

Court as warranted in ordering new trial when excessive damages appear to have been awarded as result of passion or prejudice. *Rudolph v. Gorman (1959) 169 Cal. App. 2d 666, 669, 338 P.2d 218*

[b] General Damages

After proving actual damage in action for slander under *Civ. Code § 46(5)*, plaintiff as entitled to have jury consider loss of reputation, shame, and hurt feelings in awarding general damages. *Cunningham v. Simpson (1969) 1 Cal. 3d 301, 309, 81 Cal. Rptr. 855, 461 P.2d 39*

When remark slanderous per se, evidence tending to show lack of injury to plaintiff's reputation as not admissible. *Schomberg v. Walker (1901) 132 Cal. 224, 230, 64 P. 290* ; *Clay v. Lagiss (1956) 143 Cal. App. 2d 441, 448, 299 P.2d 1025*

General damages presumed as matter of law in case of slander per se. *Douglas v. Janis (1974) 43 Cal. App. 3d 931, 940, 118 Cal. Rptr. 280* ; *Clay v. Lagiss (1956) 143 Cal. App. 2d 441, 448, 299 P.2d 1025*

Award of nominal damages as correct when plaintiff suffers no actual damage when statements are libelous per se. *Triton Ins. Underwriters Inc. v. National Chiropractic Ins. Co. (1965) 232 Cal. App. 2d 829, 833, 43 Cal. Rptr. 504*

Fact at least one patient stopped going to plaintiff physician because of defamatory newspaper article as capable of sustaining award of general damages. *Hanley v. Lund (1963) 218 Cal. App. 2d 633, 645, 32 Cal. Rptr. 733 , disapproved on other grounds, Adams v. Murakami (1991) 54 Cal. 3d 105, 115-116, 284 Cal. Rptr. 318, 813 P.2d 1348*

Plaintiff as entitled to damages for mental worry, distress, grief, and mortification in addition to general damages. *Moranville v. Aletto (1957) 153 Cal. App. 2d 667, 672, 315 P.2d 91* ; *Clay v. Lagiss (1956) 143 Cal. App. 2d 441, 449, 299 P.2d 1025*

[c] Punitive Damages

[i] Entitlement

Actual malice required for punitive damages award under *Civ. Code § 48a* as distinct from actual malice required to maintain libel action under *New York Times* rule; defendant's attitude towards plaintiff, rather than towards the material published, as focus of actual malice under *Civ. Code § 48a*. *McCoy v. Hearst Corp. (1986) 42 Cal. 3d 835, 872-873, 231 Cal. Rptr. 518, 727 P.2d 711*

Plaintiff as never entitled as matter of right to exemplary damages. *Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791, 800-801, 197 P.2d 713* ; *Shumate v. Johnson Publ'g Co. (1956) 139 Cal. App. 2d 121, 135, 293 P.2d 531*

In action by private figure against newsletter addressing general topic of sexual assault and harassment, newsletter as

constituting matter of public concern, and plaintiff as therefore required to prove at least negligence to recover any damages and required to prove malice under *New York Times v. Sullivan* to recover presumed or punitive damages. *Carney v. Santa Cruz Women Against Rape (1990) 221 Cal. App. 3d 1009, 1019, 271 Cal. Rptr. 30*

Punitive damages as proper in libel action when preponderance of evidence supports finding that defendant acted with intent to vex, injure, or annoy, or with conscious disregard of plaintiff's rights. *Burnett v. National Enquirer, Inc. (1983) 144 Cal. App. 3d 991, 1009, 1009 n.9, 193 Cal. Rptr. 206*

[ii] Implied or Express Malice

Malice as capable of being either implied or express. *Shumate v. Johnson Publ'g Co. (1956) 139 Cal. App. 2d 121, 135, 293 P.2d 531* ; *Freeman v. Mills (1950) 97 Cal. App. 2d 161, 168-169, 217 P.2d 687*

[iii] Inference of Malice

Trier of fact as capable of inferring malice from tenor of publication actionable per se. *Shumate v. Johnson Publ'g Co. (1956) 139 Cal. App. 2d 121, 136, 293 P.2d 531*

[iv] Jury Discretion

Juries as having exclusive power to grant or withhold award of punitive damages. *Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791, 801, 197 P.2d 713*

Juries as having wider discretion in awarding punitive damages than in awarding compensatory damages. *Di Giorgio Fruit Corp. v. AFL-CIO (1963) 215 Cal. App. 2d 560, 581, 30 Cal. Rptr. 350*

[v] Malice Never Presumed

Malice in fact as never presumed and as required to be proved. *Davis v. Hearst (1911) 160 Cal. 143, 179, 116 P. 530* ; *Nova v. Flaherty (1956) 145 Cal. App. 2d 761, 764, 303 P.2d 382*

[vi] Media Defendants

Private individual suing media defendant as capable of recovering punitive damages only if *New York Times* test of knowledge or recklessness met. *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 349-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789*

[vii] No Inference From Failure of Defense

Malice as not inferred from defendant's failure to prove truth or fair comment privilege. *Nova v. Flaherty (1956) 145 Cal. App. 2d 761, 764, 303 P.2d 382*

[viii] No Vicarious Liability

Punitive damages as awarded to punish defendant for his or her own wrong and not for wrong of even own agent or employee. *Davis v. Hearst (1911) 160 Cal. 143, 170, 116 P. 530* ; *Di Giorgio Corp. v. Valley Labor Citizen (1968)*

260 Cal. App. 2d 268, 277, 67 Cal. Rptr. 82

Plaintiff as required to prove malice on part of each defendant in order to recover punitive damages against multiple defendants. *Davis v. Hearst (1911) 160 Cal. 143, 165, 116 P. 530* ; *Di Giorgio Corp. v. Valley Labor Citizen (1968) 260 Cal. App. 2d 268, 277-278, 67 Cal. Rptr. 82*

[ix] Nominal Damages Not Required

Award of nominal damages as not required to support award of punitive damages. *Contento v. Mitchell (1972) 28 Cal. App. 3d 356, 358, 104 Cal. Rptr. 591*

[x] Proof of Malice Required

Plaintiff as required to prove malice before recovering punitive damages. *Davis v. Hearst (1911) 160 Cal. 143, 162, 116 P. 530* ; *Gautier v. General Tel. Co. (1965) 234 Cal. App. 2d 302, 310, 44 Cal. Rptr. 404*

Malice required to recover punitive damages for libel under *Civ. Code § 48a* as being "actual malice" defined by *Civ. Code § 48a(4)(d)*, which requires proof of both hatred or ill will and lack of good faith belief in truth of defamation when published. *Manguso v. Oceanside Unified Sch. Dist. (1984) 153 Cal. App. 3d 574, 577, 581, 200 Cal. Rptr. 535*

[xi] Public Figures

Plaintiff suing public figure in California as capable of recovering punitive damages; *Civ. Code § 3294* as constitutional in this respect. *Maheu v. Hughes Tool Co. (1977) 569 F.2d 459, 478-480*

[xii] Purpose of Punitive Damages

Punitive damages as required to punish defendant for own wrong and not wrong of someone else, even the defendant's own agent or employee. *Davis v. Hearst (1911) 160 Cal. 143, 170, 116 P. 530* ; *Di Giorgio Corp. v. Valley Labor Citizen (1968) 260 Cal. App. 2d 268, 277, 67 Cal. Rptr. 82*

[d] Special Damages

Special damages as essential element of cause of action if defamation not libelous on its face. *Gomes v. Fried (1982) 136 Cal. App. 3d 924, 939, 186 Cal. Rptr. 605*

Special damage as essential allegation where defamation not libelous on its face. *Smith v. Los Angeles Bookbinders Union (1955) 133 Cal. App. 2d 486, 494-495, 284 P.2d 194 , overruled on other grounds, MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36*

Special damages as required to be alleged with specificity. *Smith v. Los Angeles Bookbinders Union (1955) 133 Cal. App. 2d 486, 494, 284 P.2d 194 .*

[6] Definitions

[a] Libel

Comments, opinions, and criticisms as capable of carrying defamatory meaning even though based on true or privileged statements of fact. *Maidman v. Jewish Publ'ns, Inc. (1960) 54 Cal. 2d 643, 649, 7 Cal. Rptr. 617, 355 P.2d 265*

Language as capable of being deemed libelous on its face even though it may carry possible innocent interpretation. *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 549, 343 P.2d 36*

False statement of fact as essential element of libel; question of law as to whether statement is one of fact or opinion. *Botos v. Los Angeles County Bar Assn. (1984) 151 Cal. App. 3d 1083, 1088, 199 Cal. Rptr. 236*

Statement of opinion as outside meaning of libel, whereas statement of fact or statement meant to convince audience it is factual as possibly libelous on its face. *Tschirky v. Superior Court (1981) 124 Cal. App. 3d 534, 539, 177 Cal. Rptr. 357*

Libel distinguished from trade libel. *Shores v. Chip Steak Co. (1955) 130 Cal. App. 2d 627, 630, 279 P.2d 595*

[b] Importance of Distinction Between Libel and Slander

Importance of distinction between libel and slander as involving requirement of proving special damages when statement slanderous as opposed to libelous. *Correia v. Santos (1961) 191 Cal. App. 2d 844, 852, 13 Cal. Rptr. 132*

[c] Privacy Distinguished

Defamation and privacy distinguished. *Kelly v. Johnson Publ'g Co. (1958) 160 Cal. App. 2d 718, 721, 325 P.2d 659*

[d] Slander

Defamation by radio or television broadcast as slander in *California. Arno v. Stewart (1966) 245 Cal. App. 2d 955, 961, 54 Cal. Rptr. 392*

Fact oral slander later quoted in newspaper as not making the defamatory statement libel. *Mercado v. Hoefler (1961) 190 Cal. App. 2d 12, 18, 11 Cal. Rptr. 787*

[e] Slander Per Se

Statements made defamatory through pleading innuendo and inducement as slanderous per se if within *Civ. Code § 46(1)-(4)*; pleading and proof of special damages not necessary. *Jarman v. Rea (1902) 137 Cal. 339, 345-346, 70 P. 216* ; *White v. Valenta (1965) 234 Cal. App. 2d 243, 251-254, 44 Cal. Rptr. 241*

[7] Determination of Public Official/Public Figure Question

Trial court determination of public official/public figure issue prior to jury trial in defamation action was not abuse of discretion, because this procedure is consistent with that followed for determination of privilege, and becausee *Evid. Code § 320* permits discretion in order of proof unless otherwise provided by law. *Weingarten v. Block (1980) 102 Cal. App. 3d 129, 134, 135, 162 Cal. Rptr. 701*

[8] Editorial Process

If member of press is alleged to have circulated damaging falsehoods and is sued for injury to plaintiff's reputation, plaintiff is not barred from inquiring into editorial processes of those responsible for publication by *U.S. Const. amends. I, XIV.* *Herbert v. Lando (1979) 441 U.S. 153, 155, 169-170, 99 S. Ct. 1635, 60 L. Ed. 2d 115*

[9] Elements of Action

Jury is required to determine if ordinary reader would have understood allegedly libelous article that was ambiguous as factual assertion charging plaintiff, member of city council, with crime or whether statements were generally understood as opinion respecting plaintiff's public conduct in regard to matter in issue; however, if allegedly defamatory statement unambiguously constitutes either fact or opinion, question is one of law. *Good Government Group, Inc. v. Superior Court of Los Angeles County (1978) 22 Cal. 3d 672, 680, 682, 150 Cal. Rptr. 258, 586 P.2d 572* ; *see* *Fuhrman v. Risner (1979) 92 Cal. App. 3d 725, 731-732, 155 Cal. Rptr. 122*

[10] Indemnity of Corporate Officer

Corporate officer as entitled to indemnity for making defamatory statements with respect to corporate business under equitable circumstances. *Brokate v. Hehr Mfg. Co. (1966) 243 Cal. App. 2d 133, 139, 52 Cal. Rptr. 672*

[11] Insurance Policies

[a] Applicability of Collateral Estoppel

Principal of collateral estoppel as applicable to case where plaintiff operator of broadcasting station had been held liable for defamatory statement which he refused to retract after proper demand by defamed person; plaintiff operator as estopped from recovering under insurance policy which required compliance with demand. *Mulrooney v. Employers Reinsurance Corp. (1969) 1 Cal. App. 3d 942, 944-946, 81 Cal. Rptr. 907*

[b] Coverage

Insurance policy covering plaintiff psychiatrist as applicable to allegedly slanderous statements made when rendering professional service in discussion availability of psychiatric hospital facilities. *Geddes v. Tri-State Ins. Co. (1968) 264 Cal. App. 2d 181, 183-185, 70 Cal. Rptr. 183*

[12] Interpretation of Defamatory Language

[a] Construction of Language

[i] All Circumstances Considered

Determining whether language is defamatory as requiring examination of all circumstances attending publication. *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 546, 343 P.2d 36* ; *Arno v. Stewart (1966) 245 Cal. App. 2d 955, 961-962, 54 Cal. Rptr. 392*

In applying "totality of circumstances" test, editorial context is powerful element in construing as opinion what might otherwise be considered fact; "spicy prose" used in book to describe opponents in earlier litigation and to provide

author's opinion of merits of that litigation, taken in context, was opinion and could not support action for defamation by attorney. *Ferlauto v. Hamsher (1999) 74 Cal. App. 4th 1394, 1401-1405, 88 Cal. Rptr. 2d 843*

[ii] Entirety of Language Considered

Determining whether language is libelous as including examination of expressions used as well as whole scope and apparent object of writer. *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 546, 343 P.2d 36*

Determining whether language is libelous as requiring examination of entirety of language. *Stevens v. Storke (1923) 191 Cal. 329, 334, 216 P. 371* ; *Handelsman v. San Francisco Chronicle (1970) 11 Cal. App. 3d 381, 388, 90 Cal. Rptr. 188*

[iii] Effect on Average Reader

Determining whether language defamatory as requiring examination of effect of language on mind of average reader. *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 547, 343 P.2d 36* ; *Mullins v. Brando (1970) 13 Cal. App. 3d 409, 415, 91 Cal. Rptr. 796*

[iv] Natural Meaning of Words

Determining whether language is defamatory as requiring examination in light of natural and popular construction. *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 546-547, 343 P.2d 36*

Court as no more free to infer defamation from what is neither said nor reasonably implied than it would be to infer an innocent meaning from what is not negated by publication. *Mullins v. Thieriot (1971) 19 Cal. App. 3d 302, 305, 97 Cal. Rptr. 27*

Determining whether language is defamatory as requiring examination in light of what persons of ordinary intelligence would understand. *Williams v. Daily Review, Inc. (1965) 236 Cal. App. 2d 405, 414-415, 46 Cal. Rptr. 135 , overruled on other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406* ; *Megarry v. Norton (1955) 137 Cal. App. 2d 581, 583, 290 P.2d 571*

[v] Single Readership Mentality Hypothesized

Law as hypothesizing single readership mentality where two meanings are possible. *Williams v. Daily Review, Inc. (1965) 236 Cal. App. 2d 405, 410-411, 46 Cal. Rptr. 135 , overruled on other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406*

[b] Implying Unstated Facts

Letter stating opinion and using terms "mysteriously" and "amazingly" as not implying allegation of undisclosed defamatory facts that would be actionable. *Okun v. Superior Court (1981) 29 Cal. 3d 442, 452, 175 Cal. Rptr. 157, 629 P.2d 1369*

[c] Language Defamatory on Its Face

Material unambiguous and defamatory on its face as properly withheld from jury and refusal to permit publisher to show understood in innocent sense as correct. *Maher v. Devlin (1928) 203 Cal. 270, 278-281, 263 P. 812* ; *Arno v. Stewart (1966) 245 Cal. App. 2d 955, 960, 54 Cal. Rptr. 392*

Accusations that physician was untrained and lacked proper credentials were actionable factual assertions. *Del Junco v. Hufnagel (2007) 150 Cal. App. 4th 789, 798-799, 60 Cal. Rptr. 3d 22*

Statements in letter that attorney had acted unconscionably and in violation of ethical duties as lawyer were actionable, because they were not mere hyperbole, epithet, or subjective expressions of disapproval. *Ruiz v. Harbor View Community Assn. (2005) 134 Cal. App. 4th 1456, 1472, 37 Cal. Rptr. 3d 133*

Unambiguous language not reasonably capable of being understood as non-defamatory as not proper to submit to jury. *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 288-289, 112 Cal. Rptr. 609* ; *Patton v. Royal Indus., Inc. (1968) 263 Cal. App. 2d 760, 765, 70 Cal. Rptr. 44* .

[d] Language Not Defamatory

Dismissal of action where language not fairly susceptible of defamatory meaning as properly dismissed. *Mellen v. Times-Mirror Co. (1914) 167 Cal. 587, 593, 140 P. 277* ; *Arno v. Stewart (1966) 245 Cal. App. 2d 955, 960, 54 Cal. Rptr. 392*

Caption "Manhunt at the Border" run during television news report not susceptible to being interpreted to mean manhunt by police when reporters suggested only that police were "investigating" and search was being made by alleged victim. *Balzaga v. Fox News Network, LLC (2009) 173 Cal. App. 4th 1325, 1340-1341, 93 Cal. Rptr. 3d 782*

Attorney's newspaper advertisement stating that persons who had built wood deck after certain date with galvanized screws manufactured by certain manufacturers "may have certain legal rights and be entitled to monetary compensation" and should call the attorney "to investigate whether you have a potential claim" was not actionable defamation; advertisement did not claim that screws were defective, suggesting at most that some screws may have been unsuitable for use in building wood decks, that possibility of legal claim existed, but that further investigation would be needed to determine if claim exists for potential plaintiffs. *Simpson Strong-Tie Co. Inc. v. Gore (2008) 162 Cal. App. 4th 737, 760-763, 76 Cal. Rptr. 3d 292*

Plaintiffs failed to show that statements describing one as "deadbeat dad who owed thousands to wife and children," and other as "bankrupt, drunk, and chewin' tobaccy," were not substantially true. *Vogel v. Felice (2005) 127 Cal. App. 4th 1006, 1021-1023, 26 Cal. Rptr. 3d 350*

Use of words "thief" and "liar" during chance confrontation with political foe was constitutionally protected hyperbole. *Rosenaur v. Scherer (2001) 88 Cal. App. 4th 260, 280, 105 Cal. Rptr. 2d 674*

Challenged statement in broadcast interview that hotel had fired union employees illegally could not reasonably be construed as slanderous if considered in context of entire news story; allegedly slanderous statement within news broadcast must be considered in light of entire broadcast. *Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees (1999) 69 Cal. App. 4th 1057, 1065-1066, 82 Cal. Rptr. 2d 10*

Rhetorical hyperbole is not actionable; statements such as "when the legal community turns on kids, it doubles their trauma" and that school law specialist "get[s] hassled all the time by attorneys wanting school records without going through the proper motions," in column naming deputy public defender in context of discussion of asserted violations of law by defense attorneys in criminal cases involving child victims, were rhetorical hyperbole in that the statements

contained too many generalizations, elastic terms, and elements of subjectivity to be susceptible of proof or disproof. *James v. San Jose Mercury News, Inc. (1993) 17 Cal. App. 4th 1, 14-15, 20 Cal. Rptr. 2d 890*

Hyperbole is not actionable; media's use of term "bad guy," in broadcasting results of opinion poll of criminal law judges, was at most rhetorical hyperbole and therefore not actionable. *Aisenson v. American Broad. Co. (1990) 220 Cal. App. 3d 146, 157, 269 Cal. Rptr. 379*

Where only one reasonable interpretation of cartoon exists and it is non-libelous, court as required by law to rule material not defamatory. *Yorty v. Chandler (1970) 13 Cal. App. 3d 467, 475, 91 Cal. Rptr. 709*

[e] Language Reserved for Jury Interpretation

Reasonable juror could conclude that statements of county supervisor, impugning company's actions and motives when raising rents at mobilehome parks, were provably false factual assertions, and thus trial court erred in granting county's motion to strike. *Manufactured Home Communities v. County San Diego (9th Cir. 2008) 544 F. 3d 959, 963-964*

Jury as required to decide if publication defamatory if publication susceptible of either defamatory or nondefamatory meaning. *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 546, 343 P.2d 36* ; *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 288-289, 112 Cal. Rptr. 609*

Court as not permitted to rule publication not defamatory on its face if reasonable interpretation indicates susceptibility of defamatory meaning. *Mellen v. Times-Mirror Co. (1914) 167 Cal. 587, 593, 140 P. 277* ; *Cameron v. Wernick (1967) 251 Cal. App. 2d 890, 893, 60 Cal. Rptr. 102*

Question for jury consideration even if covert meaning ascribed to words is improbable. *Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 743, 20 Cal. Rptr. 405* ; *Gallagher v. Chavalas (1941) 48 Cal. App. 2d 52, 58, 119 P.2d 408*

[f] Liability for Insinuations

False inferences or implications raised by arrangement and phrasing of apparently non-libelous statements as potentially injurious as explicit epithets. Kapellas v. *Kofman (1969) 1 Cal. 3d 20, 33, 81 Cal. Rptr. 360, 459 P.2d 912*

Defendant as liable for insinuations as well as for explicit statements. *Maidman v. Jewish Publ'ns, Inc. (1960) 54 Cal. 2d 643, 651, 7 Cal. Rptr. 617 , 355 P.2d 265 , overruled on other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406* ; *Mullins v. Brando (1970) 13 Cal. App. 3d 409, 415, 91 Cal. Rptr. 796*

[g] Meaning as One Understood by Recipient

Meaning of libel as meaning which recipient of publication reasonably understands, whether correctly or mistakenly. *Washburn v. Wright (1968) 261 Cal. App. 2d 789, 799, 68 Cal. Rptr. 224*

[h] Publication Need Not Be Vituperous

Language as not required to be vituperous before it becomes libelous. *Maidman v. Jewish Publ'ns, Inc. (1960) 54 Cal. 2d 643, 650, 7 Cal. Rptr. 617, 355 P.2d 265 , overruled on other grounds, Brown v. Kelly Broadcasting Co.*

(1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406

[i] Question of Law

Question of whether language is libelous on its face as question of law for court. *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 546, 343 P.2d 36* ; *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 288-289, 112 Cal. Rptr. 609*

Question of whether or not language is reasonably suceptible of defamatory meaning as question of law. *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 546, 343 P.2d 36* ; *Arno v. Stewart (1966) 245 Cal. App. 2d 955, 959, 54 Cal. Rptr. 392*

Question whether article susceptible of being understood as charging that plaintiff was Communist sympathizer or fellow traveler as question for court. *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 546, 343 P.2d 36*

Whether statement constitutes expression of opinion or fact as question of law to be decided by court. *Dong v. Board of Trustees (1987) 191 Cal. App. 3d 1572, 1584, 236 Cal. Rptr. 912*

[j] Test for Libel on Its Face

Text for libel on its face as whether publication will constitute libel without averment, colloquium, or innuendo. *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 549, 343 P.2d 36*

[k] Test Not Quantitative

Test of libel as not quantitative; single sentence as capable of providing foundation for libel action. *Washburn v. Wright (1968) 261 Cal. App. 2d 789, 795, 68 Cal. Rptr. 224*

[13] Jurisdiction Over Nonresident Defendant

Trial court properly granted Hong Kong defendants' motion to quash service of summons for lack of personal jurisdiction in action against religious organization and several individuals for allegedly libelous magazine editorial and misleading conduct in soliciting donations, because undisputed declarations showed that defendants' only contacts with California were that 600 out of 8,500 copies per month of magazine were sent to California readers and that allegedly misleading receipts for contributions were sent to California contributors; trial court was entitled to accept defendants' declaration that no information for magazine article was gathered in California and that defendants' only contact with California was while visiting relatives more than one year prior to publication of article. *Evangelize China Fellowship, Inc. v. Evangelize China Fellowship (1983) 146 Cal. App. 3d 440, 444, 448-449, 194 Cal. Rptr. 240*

[14] Language Libelous on Its Face

[a] In General

Definition of libel as very broad in California. *Maidman v. Jewish Publications, Inc. (1960) 54 Cal. 2d 643, 649, 7 Cal. Rptr. 617, 355 P.2d 265* ; *Bates v. Campbell (1931) 213 Cal. 438, 441, 2 P.2d 383*

In libel per se (*Civ. Code § 45a*), defendant is liable for what is insinuated as well as for what is stated explicitly; that

defamatory charge or insinuation also leaves room for innocent interpretation does not establish that defamatory meaning does not appear from language itself. *O'Connor v. McGraw-Hill, Inc. (1984) 159 Cal. App. 3d 478, 485, 206 Cal. Rptr. 33*

[b] Imputation of Crime

Defamation action in which defendant, state official, distributed flyer with plaintiff's photograph on it describing him as active shoplifter as imputing criminal behavior generally actionable as defamatory per se in state court actions; action brought in federal court under *42 U.S.C. § 1983* as dismissed in this situation because plaintiff's interest in his reputation as neither "liberty" nor "property" guaranteed against state deprivation without due process of law. *Paul v. Davis (1976) 424 U.S. 693, 699, 96 S. Ct. 1155, 47 L. Ed. 2d 405*

Imputing crime to a person as libel per se. *Draper v. Hellman Commercial Trust & Sav. Bank (1928) 203 Cal. 26, 34, 263 P. 240* (fraudulent appropriation of funds); *Boyich v. Howell (1963) 221 Cal. App. 2d 801, 802, 34 Cal. Rptr. 794* (stuffing ballot box in union election); *Morris v. National Fed'n of Blind (1961) 192 Cal. App. 2d 162, 164, 13 Cal. Rptr. 336* (calling person "racketeer")

[c] Imputing Breach of Confidence

Falsely charging person with violation of confidence reposed in him or her as libelous on its face, and article stating that father of famous celebrity revealed son's love secrets to weekly newspaper as libelous on its face. *Selleck v. Globe Int'l, Inc. (1985) 166 Cal. App. 3d 1123, 1132, 212 Cal. Rptr. 838*

[d] Imputing Communism

Publication as libelous per se that labels plaintiff as Communist or as communist sympathizer. *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36* ; *Farr v. Bramblett (1955) 132 Cal. App. 2d 36, 48, 281 P.2d 372* , *overruled on other grounds,* *Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 77 Cal. Rptr. 243, 453 P.2d 747*

[e] Imputing Dishonesty

Publication is libelous per se if person falsely accused of being untruthful. *Axelbank v. Rony (9th Cir. 1960) 277 F.2d 314, 318*

Publication as libelous per se if members of city council imputed to be dishonest and corrupt. *Kramer v. Ferguson (1964) 230 Cal. App. 2d 237, 242, 41 Cal. Rptr. 61*

[f] Imputing Immoral Conduct

Publication as libelous per se if plaintiff understood to be guilty of improper and immoral conduct. *Ervin v. Record Publ'g Co. (1908) 154 Cal. 79, 82, 97 P. 21*

[g] Injuring Reputation or Occupation

[i] In General

Publication as libelous per se if allegation is inconsistent with due fulfillment of what person has undertaken. *Maidman v. Jewish Publ'ns, Inc. (1960) 54 Cal. 2d 643, 650, 7 Cal. Rptr. 617, 355 P.2d 265 , overruled on other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406*

Publication as capable of being libelous per se regardless of whether it reflects on office held for profit or not. *Correia v. Santos (1961) 191 Cal. App. 2d 844, 855, 13 Cal. Rptr. 132*

[ii] Specific Occupations

Publication was libelous per se because it stated that well-known player had "doghouse status.' *Cepeda v. Cowles Magazines & Broad., Inc. (9th Cir. 1964) 328 F.2d 869, 870-871*

Publication was libelous per se because oral surgeon's patients told that surgeon charged excessive fees and performed unnecessary work. *Slaughter v. Friedman (1982) 32 Cal. 3d 149, 153-154, 185 Cal. Rptr. 244, 649 P.2d 886*

Publication libelous per se if union exposed to public hatred and harm to its business reputation. *Daniels v. Sanitarium Ass'n, Inc. (1963) 59 Cal. 2d 602, 603, 30 Cal. Rptr. 828, 381 P.2d 652*

Publication as libelous per se if it accused attorney of deliberately misleading court. *Maidman v. Jewish Publ'ns, Inc. (1960) 54 Cal. 2d 643, 651, 7 Cal. Rptr. 617, 355 P.2d 265*

Publication as libelous per se if it charged overseas diplomat with flagrant espionage activity. *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 790, 228 P.2d 6*

Publication as libelous per se where agent in a fiduciary relation charged with flagrantly violating trust and confidence of her principal. *Bates v. Campbell (1931) 213 Cal. 438, 445, 2 P.2d 383*

Letter by educator decribing how certain personal ailments and emotional difficulties had interfered with teacher's work was deemed to directly impute teacher's lack of qualification for permanent employment and was therefore libelous per se. *Manguso v. Oceanside Unified Sch. Dist. (1984) 153 Cal. App. 3d 574, 579-580, 583, 200 Cal. Rptr. 535*

Publication as libelous per se if plaintiff called "not a competent engineer" and "traitor to the company." *Rodriguez v. North Am. Aviation, Inc. (1967) 252 Cal. App. 2d 889, 894, 61 Cal. Rptr. 579*

Publication as libelous per se if businessman alleged to be interested in "fast buck." *Cameron v. Wernick (1967) 251 Cal. App. 2d 890, 894-895, 60 Cal. Rptr. 102*

Publication as libelous per se if plaintiff accused of "milking" bankrupt estate. *Fairfield v. Hagan (1967) 248 Cal. App. 2d 194, 201, 56 Cal. Rptr. 402*

Publication as libelous per se if insinuations alleged that plaintiffs were incompetent street pavers. *Williams v. Daily Review, Inc. (1965) 236 Cal. App. 2d 405, 411, 46 Cal. Rptr. 135 , overruled on other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406*

Publication as libelous per se if teacher or writer said to have narcissistic sexual deviation. *Menefee v. Codman (1957) 155 Cal. App. 2d 396, 402, 317 P.2d 1032 , overruled on other grounds, MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 343 P.2d 36*

[h] Political Cartoons

Political cartoon as libelous per se if it falsely presents plaintiff in defamatory light. *Yorty v. Chandler (1970) 13 Cal. App. 3d 467, 472, 91 Cal. Rptr. 709*

[i] Ridicule

Publication as libelous per se where sign directed to plaintiffs said "Nuts to You--You Old Witch" since it exposed plaintiffs to contempt and ridicule. *Megarry v. Norton (1955) 137 Cal. App. 2d 581, 582-583, 290 P.2d 571*

[15] Language Slanderous Per Se

[a] Imputing Crime

Publication as slanderous per se which states person has a "hot title" to a car. *Cunningham v. Simpson (1969) 1 Cal. 3d 301, 306, 81 Cal. Rptr. 855, 461 P.2d 39*

Publication that stated that person falsified invoices as slanderous per se in that it charged person with crime of forgery. *Kelly v. General Tel. Co. (1982) 136 Cal. App. 3d 278, 285, 186 Cal. Rptr. 184*

Publication as slanderous per se which charges person with theft. *Douglas v. Janis (1974) 43 Cal. App. 3d 931, 939-940, 118 Cal. Rptr. 280* ; *Moranville v. Aletto (1957) 153 Cal. App. 2d 667, 672, 315 P.2d 91*

Publication as slanderous per se which reasonably imputes commission of a murder to a person. *Mullins v. Brando (1970) 13 Cal. App. 3d 409, 414, 91 Cal. Rptr. 796*

[b] Imputing Disease

Publication as slanderous per se which states that person has syphilis. *Schessler v. Keck (1954) 125 Cal. App. 2d 827, 832, 271 P.2d 588*

[c] Imputing Lack of Chastity

Stating that plaintiff had been in house of prostitution, had been afflicted with venereal disease, had conceived an illegitimate child, and had offered herself to a young man as imputing lack of chastity and actionable per se. *Preston v. Frey (1891) 91 Cal. 107, 109, 27 P. 533*

Stating that plaintiff was cohabitating with man as his mistress, that plaintiff was being kept for immoral purposes, and that plaintiff was being used as a mistress as imputing lack of chastity and actionable per se. *Hitchcock v. Caruthers (1890) 82 Cal. 523, 526, 23 P. 48*

Stating that plaintiff was "bitch" did not impute unchastity. *Martin v. Sutter (1922) 60 Cal. App. 8, 12, 212 P. 60*

[d] Injuring Reputation or Occupation

Publication as slanderous per se that accuses automobile dealer of having "hot title" to car. *Cunningham v. Simpson*

(1969) 1 Cal. 3d 301, 306, 81 Cal. Rptr. 855, 461 P.2d 39

Publication as slanderous per se under *Civ. Code § 46(3)* that on its face has natural tendency to injure person's general or occupational reputation. *Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 827, 136 P.2d 297 , overruled on other grounds, MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 343 P.2d 36*

Publication as slanderous per se that accuses plaintiff principal as being "weak spot" in school system. *Oberkotter v. Woolman (1921) 187 Cal. 500, 504, 202 P. 669*

Publication as slanderous per se that calls jeweler "crook" and says he "got away" with ring since it reflects on his integrity. *Williams v. Seiglitz (1921) 186 Cal. 767, 772, 200 P. 635*

Publication as slanderous per se that alleges that master mariner was in habit of getting drunk. *Swan v. Thompson (1899) 124 Cal. 193, 199, 56 P. 878*

Statements that plaintiff, while employed by defendant's company, demanded finder's fee to which he was not entitled and that other employees would not work for plaintiff if he remained, were not slander per se as statements did not necessarily reflect negatively on plaintiff. *The Nethercutt Collection v. Regalia (2009) 172 Cal. App. 4th 361, 369-370, 90 Cal. Rptr. 3d 882*

Publication as slanderous per se that calls car dealer a "son of a bitch." *White v. Valenta (1965) 234 Cal. App. 2d 243, 257, 44 Cal. Rptr. 241*

Publication as slanderous per se that accuses a doctor of malpractice. *Hanley v. Lund (1963) 218 Cal. App. 2d 633, 644, 32 Cal. Rptr. 733 , disapproved on other grounds, Adams v. Murakami (1991) 54 Cal. 3d 105, 115-116, 284 Cal. Rptr. 318, 813 P.2d 1348*

Publication as slanderous per se that accuses plaintiff principal of permitting "petting" and "embracing" in school building. *Larive v. Willitt (1957) 154 Cal. App. 2d 140, 142, 315 P.2d 732*

[16] Language Not Defamatory

[a] Dead Persons

Publication not defamatory if it defames dead person unless it also defames those still living. *Kelly v. Johnson Publ'g Co. (1958) 160 Cal. App. 2d 718, 725, 325 P.2d 659*

Person who publishes defamatory concerning deceased person as not liable either to estate of person or to descendants or relatives. *Kelly v. Johnson Publ'g Co. (1958) 160 Cal. App. 2d 718, 725, 325 P.2d 659*

[b] Legal Behavior

Publication as not defamatory that accuses one of legal behavior. *Smith v. Los Angeles Bookbinders Union (1955) 133 Cal. App. 2d 486, 493, 284 P.2d 194 , overruled on other grounds, MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36*

[c] Public Officials Criticized

Newspaper editorial containing subjective, critical description of plaintiff's conduct of judicial office was absolutely privileged under *U.S. Const. amends. I, XIV,* and under *Cal. Const. art. I, § 9.* *Grillo v. Smith (1983) 144 Cal. App. 3d 868, 872, 193 Cal. Rptr. 414*

Publication as not defamatory that merely expresses an opinion or severely criticizes public official. *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 290, 112 Cal. Rptr. 609* ; *Yorty v. Chandler (1970) 13 Cal. App. 3d 467, 472-473, 91 Cal. Rptr. 709*

Publication as often not defamatory that merely causes public official plaintiff to take umbrage at tone and level of criticism directed at him. *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 291, 112 Cal. Rptr. 609* ; *Yorty v. Chandler (1970) 13 Cal. App. 3d 467, 473, 91 Cal. Rptr. 709*

Temperament and qualifications of candidate for public office as mere matters of opinion of which electors are only judges. *Miller v. Bakersfield News-Bulletin, Inc. (1975) 44 Cal. App. 3d 899, 903, 119 Cal. Rptr. 92*

Publication as often not defamatory in political context which might otherwise be actionable. *Corman v. Blanchard (1962) 211 Cal. App. 2d 126, 136-137, 27 Cal. Rptr. 327*

[d] Specific Language

Publication that alleged that attorney insisted on payment of fee before settling civil suit as not defamatory. *Gang v. Hughes (C.D. Cal. 1953) 111 F. Supp. 27, 29*

Publication not defamatory that states in connection with labor dispute that an employer is "unfair" and that his labor policy is "destructive." *Emde v. San Joaquin County Cent. Labor Council (1943) 23 Cal. 2d 146, 158-159, 143 P.2d 20*

Publication not defamatory that states merely that a company has decided to dismiss an employee. *Maynard v. Fireman's Fund Ins. Co. (1873) 47 Cal. 207, 208*

Publication of opinion by local bar association that candidate for judicial office was "not qualified" was not libelous as matter of law. *Botos v. Los Angeles County Bar Assn. (1984) 151 Cal. App. 3d 1083, 1090, 199 Cal. Rptr. 236*

Publication not defamatory that ascribes membership in John Birch Society or states person is an "extremist" in California in 1964. *Washburn v. Wright (1968) 261 Cal. App. 2d 789, 799, 68 Cal. Rptr. 224*

Publication not defamatory that calls conductor an "iron-clad singing member of the Mafia" where understood as a practical joke. *Arno v. Stewart (1966) 245 Cal. App. 2d 955, 965, 54 Cal. Rptr. 392*

Publication not defamatory that alleges plaintiffs failed to pay their debts in certain circumstances. *Gautier v. General Tel. Co. (1965) 234 Cal. App. 2d 302, 309, 44 Cal. Rptr. 404*

Publication not defamatory that states that young man has kissed a willing and pretty girl. *Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 744, 20 Cal. Rptr. 405*

Publication not defamatory that states that person resembled *Narcissus. Menefee v. Codman (1957) 155 Cal. App. 2d 396, 402, 317 P.2d 1032 , overruled on other grounds,* *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 343 P.2d 36*

[e] Unpleasant Language

Publication as not defamatory that is merely unpleasant and annoys or irks plaintiff. *Gang v. Hughes (C.D. Cal. 1953) 111 F. Supp. 27, 29*

[17] Necessity of Filing Claim With Public Entity

Former public employee as required to file claim with public entity as prerequisite for defamation action. *Neal v. Gatlin (1973) 35 Cal. App. 3d 871, 875-877, 111 Cal. Rptr. 117* (college teacher); *Hopper v. Allen (1968) 266 Cal. App. 2d 797, 799, 72 Cal. Rptr. 435* (police officer)

Private individual suing public employee as required to file claim with public entity as prerequisite for defamation action. *Miller v. Hoagland (1966) 247 Cal. App. 2d 57, 61-62, 55 Cal. Rptr. 311* ; *Burgdorf v. Funder (1966) 246 Cal. App. 2d 443, 448, 54 Cal. Rptr. 805* .

[18] Opinion

[a] No Separate Constitutional Privilege

U.S. Const. amend. I, as not requiring separate constitutional privilege for opinion; *First Amendment* freedom of expression as adequately secured by existing constitutional doctrine without creation of artificial dichotomy between "opinion" and "fact"; factfinder as required to conclude, based on facts presented and under established constitutional guarantees, whether statements in question are of defamatory nature. *Milkovich v. Lorain Journal Co. (1990) 497 U.S. 1, 18-19, 110 S. Ct. 2695, 111 L. Ed. 2d 1*

Defendant's use of colorful language to describe unpleasant working conditions with plaintiff, including that work experience was "horrible" and that plaintiff "slaved" for plaintiff, was nonactionable opinion. *Nygard, Inc. v. Uusi-Kerttula (2008) 159 Cal. App. 4th 1027, 1052-1053, 72 Cal. Rptr. 3d 210*

Statements in financial report suggesting accounting improprieties by subject company in order to boost company's stock price were not protected statements of opinion, as statements implied provably false assertions of fact. *Overstock.com, Inc. v. Gradient Analytics, Inc. (2007) 151 Cal. App. 4th 688, 704-705, 61 Cal. Rptr. 3d 29*

Statement made to public suggesting that head football coach at university may have been fired because of unspecified "immoral" behavior was non-actionable statement of opinion, as statement provided no hint as to specific conduct of plaintiff and was incapable of being interpreted as implying provably false assertion of fact because behavior that might qualify as immoral to one person might be perfectly acceptable to another. *McGarry v. University of San Diego (2007) 154 Cal. App. 4th 97, 116-117, 64 Cal. Rptr. 3d 467*

Derogatory statements made about plaintiff during comedy radio talk show, calling plaintiff "local loser," "chicken butt," and "skank," constituted speaker's subjective judgment or rhetorical hyperbole and, because not stating provable facts about plaintiff, were not actionable. *Seelig v. Infinity Broad. Corp. (2002) 97 Cal. App. 4th 798, 810-812, 119 Cal. Rptr. 2d 108*

Statements concerning advertisement run by plaintiff, which did not under totality of circumstances imply existence of provably false facts, as not defamatory; hyperbolic statements as protected independently of characterization as opinion. *Morningstar, Inc. v. Superior Court (1994) 23 Cal. App. 4th 676, 688-693, 29 Cal. Rptr. 2d 547*

Statements written by newspaper columnist concerning criminal defense lawyer's tactics in criminal cases involving child victims as protected speech in nature of expression of imaginative expression or rhetorical hyperbole (deputy public defender's acquisition of school records as "really scary part of this story"; deputy public defender went to "extreme lengths"), clearly recognizable as opinion and not reasonably to be understood as statements of literal fact. *James v. San Jose Mercury News, Inc. (1993) 17 Cal. App. 4th 1, 14, 20 Cal. Rptr. 2d 890*

In action against talk-show host of nationally syndicated television program, statements that charged head of local NAACP chapter with attempted "extortion" (demands for donation in exchange for not publicly charging donor with hiring discrimination), as implying provably false assertion within meaning of *Milkovich*, and therefore actionable. *Edwards v. Hall (1991) 234 Cal. App. 3d 886, 902-904, 285 Cal. Rptr. 810* (reversing summary judgment in favor of defendant)

In action by former county child welfare worker against privately employed children's counselor, statements by defendant to plaintiff's supervisor, charging plaintiff with professional incompetence, as actionable. *Kahn v. Bower (1991) 232 Cal. App. 3d 1599, 1609, 284 Cal. Rptr. 244*

In action by antique dealer against television station, implications in television broadcast entitled "Museum Fraud?" that plaintiff had knowingly sold stolen property to museum, as actionable. *Weller v. American Broad. Cos., Inc. (1991) 232 Cal. App. 3d 991, 1002-1007, 283 Cal. Rptr. 644*

Alleged defamatory statements that plaintiff was incompetent surgeon as not protected if they imply assertion of false objective fact; trial court's sustaining of demurrer to slander cause of action on ground that statements were opinion as harmless because factual determination showed that statements were true (that plaintiff was incompetent surgeon). *Gill v. Hughes (1991) 227 Cal. App. 3d 1299, 1309, 278 Cal. Rptr. 306*

Milkovich v. Lorain Journal Co. (1990) 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1 , as not substantially changing principles established by California courts by employing test of totality of circumstances to review meaning of language in context and its susceptibility of being proved true or false. *Moyer v. Amador Valley Joint Union High Sch. Dist. (1990) 225 Cal. App. 3d 720, 725-726, 275 Cal. Rptr. 494* (statements in student newspaper concerning high school teacher not actionable)

Statements written by student in high school newspaper criticizing teacher as protected speech in nature of expression of subjective judgment (that teacher was "worst in the school"), form of exaggerated expression (that teacher was "babbler"), and rhetorical hyperbole (that smoke bomb was planted in classroom to "terrorize" teacher). *Moyer v. Amador Valley Joint Union High Sch. Dist. (1990) 225 Cal. App. 3d 720, 725-726, 275 Cal. Rptr. 494*

[b] Pre-*Milkovich* Determinations of Opinion Versus Fact

Outlandish statements made in pornographic magazine about pornography opponent embroiled in debate over pornography as opinion and not fact because statements could not be understood to describe actual facts about plaintiff or actual events in which plaintiff participated, but would rather be understood as exaggerated criticism of plaintiff because of her views. *Dworkin v. Hustler Magazine, Inc. (9th Cir. 1989) 867 F.2d 1188, 1193* ; *Leidholdt v. L.F.P. Inc (9th Cir. 1988) 860 F.2d 890, 893-894*

Remarks as opinion and not actionable defamation if remarks are not themselves factual, do not suggest that conclusion is being drawn from facts not disclosed in remarks, and are made in context of heated political debate and understood by audience to be opinion rather than statement of fact. *Koch v. Goldway (9th Cir. 1987) 817 F.2d 507, 509-510*

Opinion as not actionable defamation; opinion as protected because it cannot be false, and statements as not actionable

defamation unless they are false. *In re Yagman (9th Cir. 1986) 796 F.2d 1165, 1172*

Whether statement is one of fact or opinion as, in first instance, question of law. *Okun v. Superior Court (1981) 29 Cal. 3d 442, 450, 175 Cal. Rptr. 157, 629 P.2d 1369* ; *Gregory v. McDonnell Douglas Corp. (1976) 17 Cal. 3d 596, 601, 131 Cal. Rptr. 641, 552 P.2d 425*

Poll conducted by television station, reflecting performance rating of superior court judge by members of criminal law bar, as protected opinion in absence of any evidence that results were falsified by defendant; media's right to broadcast results of opinion polls regarding elected officials as not restricted to election years. *Aisenson v. American Broad. Co. (1990) 220 Cal. App. 3d 146, 155-156, 269 Cal. Rptr. 379*

In course of interview for newspaper article, reporter's statement to interviewee that subject of article "was a crook and a crooked politician and I don't want him to be reelected" as constitutionally protected opinion. *Fletcher v. San Jose Mercury News (1989) 216 Cal. App. 3d 172, 190-192, 264 Cal. Rptr. 699*

[19] Penal Provisions

Criminal libel legislation [former *Penal Code §§ 248-251*] was unconstitutional. *Eberle v. Municipal Court (1976) 55 Cal. App. 3d 423, 432, 127 Cal. Rptr. 594*

[20] Pleading Requirements

[a] Amendments

Leave to amend allegation of complaint setting forth allegedly slanderous statement only in substance as available if there is any reasonable possibility that plaintiff can state good cause of action. *Okun v. Superior Court (1981) 29 Cal. 3d 442, 460, 175 Cal. Rptr. 157, 629 P.2d 1369*

[b] Colloquium

Pleading of colloquium as required to show that words were spoken of and concerning plaintiff. *Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 829, 136 P.2d 297 , overruled on other grounds, MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 343 P.2d 36* ; *Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 741, 20 Cal. Rptr. 405*

Fact person not named in defamatory statement as not precluding meaning that is actionable per se. *Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 829, 136 P.2d 297 , overruled on other grounds, MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 343 P.2d 36*

Single member of group as required to be able to state cause of action before group can. *Mullins v. Brando (1970) 13 Cal. App. 3d 409, 422-423, 91 Cal. Rptr. 796*

Language referring to large group of persons as not capable of being made to apply to plaintiff by use of a colloquium. *Los Angeles Fire & Police Protective League v. Rodgers (1970) 7 Cal. App. 3d 419, 425, 86 Cal. Rptr. 623* (more than 5,000); *Smith v. Harnish (1959) 167 Cal. App. 2d 115, 118, 333 P.2d 815* (indeterminate group); *Noral v. Hearst Publications, Inc. (1940) 40 Cal. App. 2d 348, 350, 104 P.2d 860* (greater than 162 persons)

If person defamed not mentioned by name, colloquium that shows that publication points to plaintiff by description or circumstance as sufficient. *Di Giorgio Fruit Corp. v. AFL-CIO (1963) 215 Cal. App. 2d 560, 569-570, 30 Cal. Rptr.*

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[c] Exact Language Not Required

Plaintiff as not required to set forth precise language in slander action. *Fleet v. Tichenor (1909) 156 Cal. 343, 346, 104 P. 458* ; *Haub v. Friermuth (1905) 1 Cal. App. 556, 557-558, 82 P. 571* ; *see also Okun v. Superior Court (1981) 29 Cal. 3d 442, 458, 175 Cal. Rptr. 157, 629 P.2d 1369* (slander can be charged by alleging substance of defamatory statement)

Plaintiff as required to prove substantially that defendant spoke words that constitute sting of charge. *Fleet v. Tichenor (1909) 156 Cal. 343, 346, 104 P. 458* ; *Carl v. McDougal (1919) 43 Cal. App. 279, 282, 184 P. 885*

Complaint as required to contain sufficient statement of language in order to notify defendant of charge. *Des Granges v. Crall (1915) 27 Cal. App. 313, 315, 149 P. 777*

[d] Good Reputation Not Required

Pleading of good reputation as not required generally because law presumes plaintiff's reputation is good until defendant attacks it. *Draper v. Hellman Commercial Trust & Sav. Bank (1928) 203 Cal. 26, 43, 263 P. 240* ; *Davis v. Hearst (1911) 160 Cal. 143, 186, 116 P. 530*

Pleading of good reputation is required where plaintiff alleges harm done to plaintiff in plaintiff's business or professional capacity. *Draper v. Hellman Commercial Trust & Sav. Bank (1928) 203 Cal. 26, 43, 263 P. 240*

[e] Inducement

Pleading of inducement as required to set forth extrinsic circumstances affecting construction of language and making it actionable. *Grand v. Dreyfus (1898) 122 Cal. 58, 62, 54 P. 389*

Pleading inducement as indicating situation or opinion of readers which made meaning of words defamatory. *Peabody v. Barham (1942) 52 Cal. App. 2d 581, 585, 126 P.2d 668 , overruled on other grounds, MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36*

[f] Innuendo

Pleading external facts by way of innuendo as not capable of enlarging or changing sense of language and thereby making innocent language defamatory. *Emde v. San Joaquin County Cent. Labor Council (1943) 23 Cal. 2d 146, 159-160, 143 P.2d 20*

Pleading of innuendo as necessary if meaning of language ambiguous. *Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 828, 136 P.2d 297 , overruled on other grounds, MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 343 P.2d 36* ; *Bates v. Campbell (1931) 213 Cal. 438, 443, 2 P.2d 383* ; *Corman v. Blanchard (1962) 211 Cal. App. 2d 126, 138, 27 Cal. Rptr. 327*

Language bearing only one meaning, which is innocent, as not capable of being made libelous by innuendo. *Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 828, 136 P.2d 297 , overruled on other grounds, MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 343 P.2d 36* ; *Corman v. Blanchard (1962) 211 Cal. App. 2d 126, 138, 27 Cal. Rptr. 327*

Pleading of explanatory matter as capable of being disregarded as surplusage when publication is libelous on its face. *Bates v. Campbell (1931) 213 Cal. 438, 443, 2 P.2d 383* ; *Menefee v. Codman (1957) 155 Cal. App. 2d 396, 404, 317 P.2d 1032* , *overruled on other grounds,* *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 343 P.2d 36*

Words as required to be reasonably understood in defamatory sense before pleading an innuendo can aid pleader. *Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 743, 20 Cal. Rptr. 405*

Pleading innuendo as recognition of fact that language may not be considered defamatory on its face. *Babcock v. McClatchy Newspapers (1947) 82 Cal. App. 2d 528, 533-534, 186 P.2d 737* , *overruled on other grounds,* *MacLeod v. Tribune Publishing Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36*

Presence of innuendo in complaint as advantageous to defendant. *Gallagher v. Chavalas (1941) 48 Cal. App. 2d 52, 57-58, 119 P.2d 408*

Plaintiff who places meaning on words by use of innuendo as required to abide by it during trial. *Gallagher v. Chavalas (1941) 48 Cal. App. 2d 52, 57, 119 P.2d 408*

[g] Malice

Complaint as required to allege presence of constitutional malice if private individual sues media defendant. *Gertz v. Welch (1974) 418 U.S. 323, 349-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789*

Complaint as required to specifically allege malice if complaint discloses qualified privilege under former *Civ. Code § 47(3)* [*now see Civ. Code § 47(c)*]. *Maidman v. Jewish Publ'ns, Inc. (1960) 54 Cal. 2d 643, 653, 7 Cal. Rptr. 617, 355 P.2d 265* , *overruled on other grounds,* *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 343 P.2d 36* ; *Locke v. Mitchell (1936) 7 Cal. 2d 599, 602, 61 P.2d 922* ; *Noonan v. Rousselot (1966) 239 Cal. App. 2d 447, 453, 48 Cal. Rptr. 817* , *overruled on other grounds,* *Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406*

Pleading that publication was motivated by hatred or ill will toward plaintiff as sufficient allegation of malice to prevent application of qualified privilege under former *Civ. Code § 47(3)* [*now see Civ. Code § 47(c)*]. *Kelly v. General Tel. Co. (1982) 136 Cal. App. 3d 278, 285, 186 Cal. Rptr. 184*

[h] Plaintiff's Burden of Proof of Falsity

Public figure plaintiff, or private figure plaintiff suing newspaper or other media defendant for publishing speech of public concern, as required by *First Amendment* to bear burden of proving falsity of defamatory statement before recovering damages. *Philadelphia Newspapers v. Hepps (1986) 475 U.S. 767, 768-769, 776-77, 106 S. Ct. 1558, 89 L. Ed. 2d 783* (but leaving open question of quantity of proof of falsity required)

[i] Publication

Publication as essential pleading requirement in defamation action. *Cunningham v. Simpson (1969) 1 Cal. 3d 301, 307, 81 Cal. Rptr. 855, 461 P.2d 39* (slander); *Draper v. Hellman Commercial Trust & Sav. Bank (1928) 203 Cal. 26, 39, 263 P. 240* (libel)

Publication to one person as sufficient. *Cunningham v. Simpson (1969) 1 Cal. 3d 301, 307, 81 Cal. Rptr. 855, 461*

P.2d 39

Newspaper as unable to state cause of action in libel against person based on letter criticizing newspaper's coverage of certain political candidate; plaintiff's publication of letter (as paid advertisement) as precluding liability. *Live Oak Publ'g Co. v. Cohagan (1991) 234 Cal. App. 3d 1277, 1287, 286 Cal. Rptr. 198*

Publication as occurring when statement communicated to any person other than party defamed. *Kelly v. General Tel. Co. (1982) 136 Cal. App. 3d 278, 284, 186 Cal. Rptr. 184*

[j] Special Damages

Purpose of special damages requirement as protecting publishers. *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 550, 343 P.2d 36*

Complaint alleging publication of language not defamatory on its face as required to allege special damages. *Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 827-829, 136 P.2d 297 , overruled on other grounds, MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 343 P.2d 36* (libel and slander); *Gautier v. General Tel. Co. (1965) 234 Cal. App. 2d 302, 309, 44 Cal. Rptr. 404* (slander)

[21] Proof of Reckless Disregard for Truth or Falsity

Criminal accusations against public official made without attempt to confirm accuracy of source and made with knowledge of source's hostility toward plaintiff as possible proof of wanton and reckless disregard of veracity. *Fisher v. Larsen (1982) 138 Cal. App. 3d 627, 640, 188 Cal. Rptr. 216*

Plaintiff's status as public official and public figure as requiring proof that publication was false and was circulated with reckless disregard for its truth or falsity; recklessness as not established by (1) failure to obtain plaintiff's version of events, (2) inaccuracies, (3) failure to provide objective picture, or (4) showing that reporting was speculative or even sloppy. *Weingarten v. Block (1980) 102 Cal. App. 3d 129, 144, 147, 162 Cal. Rptr. 701*

[22] Public Debates

Criticism of developer's wisdom and motives with implication that developer was motivated by selfish interest rather than public good as well within bounds of protected political debate. *Okun v. Superior Court (1981) 29 Cal. 3d 442, 451, 454, 175 Cal. Rptr. 157, 629 P.2d 1369*

Statement by successful candidate in school board election accusing plaintiff of violating school privacy laws as truthful and within protected speech of political campaign. *Fisher v. Larsen (1982) 138 Cal. App. 3d 627, 642, 188 Cal. Rptr. 216*

Complaint for libel by owner of large parcel of land that had been approved for planned community development against two organizers of referendum drive opposing project alleging that in course of circulating referendum petitions defendants had made false and malicious statements concerning project as properly dismissed after demurrer was sustained because statements did not impugn plaintiff's honesty or accuse it of crime but were expressions of defendants' opinions. *Blackhawk Corp. v. Ewing (1979) 94 Cal. App. 3d 640, 642-644, 156 Cal. Rptr. 581*

[23] Special Damages

Partial summary judgment as proper on issue of entitlement to special damages arising from loss of election to public office when no possibility existed that plaintiff could prove loss of election resulted from alleged defamation. *Fisher v. Larsen (1982) 138 Cal. App. 3d 627, 636-636, 188 Cal. Rptr. 216*

[24] Standard of Review

Clearly erroneous standard of *Fed. R. Civ. P., Rule 52(a)* as not prescribing standard of review of determination of actual malice in defamation action brought in federal court; independent judgment as required to be exercised to determine whether record establishes actual malice with convincing clarity. *Bose Corp. v. Consumers Union of U.S., Inc. (1984) 466 U.S. 485, 514, 104 S. Ct. 1949, 80 L. Ed. 2d 502*

[25] Summary Judgment

Clear and convincing evidence standard applicable to actual malice issue as required to be considered by federal court when ruling on motion for summary judgment under *Fed. R. Civ. P., Rule 56* in defamation action. *Anderson v. Liberty Lobby, Inc. (1986) 477 U.S. 242, 254, 106 S. Ct. 2505, 91 L. Ed. 2d 202*

Summary judgment as favored remedy in actions for defamation because unnecessarily protracted litigation would have chilling effect on exercise of *First Amendment* rights and speedy resolution of cases involving free speech is desirable; on such motion, trial court as required to determine whether there is sufficient showing of malice to warrant submission of that issue to jury. *Reader's Digest Assn. v. Superior Court (1984) 37 Cal. 3d 244, 252, 208 Cal. Rptr. 137, 690 P.2d 610* ; *Good Government Group, Inc. v. Superior Court of Los Angeles County (1978) 22 Cal. 3d 672, 685, 150 Cal. Rptr. 258, 586 P.2d 572* ; *Osmond v. EWAP Inc. (1984) 153 Cal. App. 3d 842, 854-855, 200 Cal. Rptr. 674* ; *Fuhrman v. Risner (1979) 92 Cal. App. 3d 725, 731, 155 Cal. Rptr. 122*

Summary judgment as favored remedy in libel actions because protracted proceedings cause media to hesitate printing articles carrying potential for lawsuit; importance of speech freedoms as necessitating expeditious disposition of defamation litigation. *McClatchy Newspapers, Inc. v. Superior Court (1987) 189 Cal. App. 3d 961, 966-967, 234 Cal. Rptr. 702*

In defamation action brought by public official, some showing of potential actual malice as required to avoid summary judgment in favor of defendants. *Fisher v. Larsen (1982) 138 Cal. App. 3d 627, 634, 188 Cal. Rptr. 216 , disapproved on other grounds, Reader's Digest v. Superior Court (1984) 37 Cal. 3d 244, 208 Cal. Rptr. 137, 690 P.2d 610*

Summary judgment as appropriate when defendant's declaration negated his knowledge of falsity or reckless disregard of falsity of statements about plaintiff union officers, and plaintiffs' declarations failed to raise issue of triable fact regarding defendant's state of mind in making statements. *Warren v. Herndon (1981) 115 Cal. App. 3d 141, 148-149, 171 Cal. Rptr. 220*

Summary judgment as proper where plaintiff alleged defamatory statements made outside his presence and two defendants denied allegation in affidavits. *Swope v. Moskovitz (1967) 253 Cal. App. 2d 514, 516, 61 Cal. Rptr. 277*

[26] Undertaking Not Required

Former *Code Civ. Proc. § 830* which required the filing of a $500 written undertaking in all defamations cases as an unconstitutional depri vation of property. *Allen v. Jordanos' Inc. (1975) 52 Cal. App. 3d 160, 164, 125 Cal. Rptr. 31*

[27] Uniform Single Publication Act

State's interest in redressing injuries actually occurring within its borders as extending to libel actions brought by nonresident because false statement of fact harms both subject of falsehood and readers, and state may rightly employ its libel laws to discourage deception of its citizens; state as having substantial interest in cooperating with other states through single publication rule to provide forum for efficiently litigating all issues and damage claims arising out of libel in unitary proceeding; single publication rule, forum-state's unusually long statute of limitations, and plaintiff's lack of contact with forum state as not defeating jurisdiction otherwise proper under both due process clause and law of forum state. *Keeton v. Hustler Magazine, Inc. (1984) 465 U.S. 770, 776-778, 104 S. Ct. 1473, 79 L. Ed. 2d 790*

Cause of action as accruing on first general distribution of publication to public under *Uniform Single Publication Act. Belli v. Roberts Bros. Furs (1966) 240 Cal. App. 2d 284, 289, 49 Cal. Rptr. 625*

[28] When Person Is Liable

[a] In General

Any person who actively participates without privilege in publication of false and libelous statement as liable for damages. *Di Giorgio Corp. v. Valley Labor Citizen (1968) 260 Cal. App. 2d 268, 273, 67 Cal. Rptr. 82*

[b] Author

Author of defamatory statement as not liable for publication where publication neither authorized nor intended unless reasonably foreseeable that it would occur. *Mitchell v. Superior Court (1984) 37 Cal. 3d 268, 281, 208 Cal. Rptr. 152, 690 P.2d 625* ; *Di Giorgio Corp. v. Valley Labor Citizen (1968) 260 Cal. App. 2d 268, 273, 67 Cal. Rptr. 82* ; *Curley v. Vick (1963) 211 Cal. App. 2d 670, 673, 27 Cal. Rptr. 501*

Author of nonlibelous statement as not liable for its being changed into libelous statement and so published unless he authorized, consented to, or participated in the publication of the article as changed. *Montandon v. Cox Broad. Corp. (1975) 45 Cal. App. 3d 932, 937, 120 Cal. Rptr. 196*

Original utterer of slanderous remarks as potentially liable for consequences of republications to third persons. *Stoneking v. Briggs (1967) 254 Cal. App. 2d 563, 576, 62 Cal. Rptr. 249*

Repetition of slander as bearing on extent of liability. *Mercado v. Hoefler (1961) 190 Cal. App. 2d 12, 18, 11 Cal. Rptr. 787*

[c] Corporations

Corporation as liable for slander uttered by its agent within scope of agent's employment. *Swift & Co. v. Gray (9th Cir. 1939) 101 F.2d 976, 981*

Corporation as liable for acts of general manager who deals with public. *McMann v. Wadler (1961) 189 Cal. App. 2d 124, 129, 11 Cal. Rptr. 37*

[d] Distributors

Operator of adult bookstore as not liable for distribution of libelous material absent showing of malice in sense that operator knew or had reason to know that material was libelous. *Osmond v. EWAP Inc. (1984) 153 Cal. App. 3d 842, 852-854, 200 Cal. Rptr. 674*

[e] Principal of Agent

Employer as able to be held liable for defamatory statement made by employee. *Kelly v. General Tel. Co. (1982) 136 Cal. App. 3d 278, 284-285, 186 Cal. Rptr. 184*

Master as liable for defamation of its agent acting within scope of agent's authority. *Di Giorgio Fruit Corp. v. AFL-CIO (1963) 215 Cal. App. 2d 560, 576, 30 Cal. Rptr. 350* ; *Mercado v. Hoefler (1961) 190 Cal. App. 2d 12, 18, 11 Cal. Rptr. 787*

[f] Repeater

Person who repeats another's defamatory statement as potentially liable for republishing same libel or slander. *Frommoethelydo v. Fire Ins. Exch. (1986) 42 Cal. 3d 208, 217, 228 Cal. Rptr. 160, 721 P.2d 41*

Repeater of defamatory statement as separate publication and as giving rise to new cause of action. *Neal v. Gatlin (1973) 35 Cal. App. 3d 871, 877* n4, *111 Cal. Rptr. 117* ; *Di Giorgio Corp. v. Valley Labor Citizen (1968) 260 Cal. App. 2d 268, 273, 67 Cal. Rptr. 82*

Repeater of defamation as liable even though source of defamation stated. *Di Giorgio Corp. v. Valley Labor Citizen (1968) 260 Cal. App. 2d 268, 273, 67 Cal. Rptr. 82*

[g] School Trustees

School trustees as not liable in case in which plaintiff, in open letter published in local newspapers, "challenged" trustees "to prove" certain charges, and trustees then adopted, in public meeting, resolution stating evidence supporting charges (which was published next day in official school district newspaper); trustees as protected by defense of absolute privilege arising from plaintiff's consent to publication as well as defense of immunity for official act provided by *Civ. Code § 47*. *Royer v. Steinberg (1979) 90 Cal. App. 3d 490, 498-504, 153 Cal. Rptr. 499*

School trustees liable for defamatory statements published concern ing students. *Elder v. Anderson (1962) 205 Cal. App. 2d 326, 336, 23 Cal. Rptr. 48*

[29] Who Can Sue

[a] Corporations

Application of *U.S. Const. amend. I*, to defamation claims requires that no distinction be made between plaintiffs who are individuals and plaintiffs that are corporations. *Vegod Corp. v. American Broad. Co., Inc. (1979) 25 Cal. 3d 763, 771, 160 Cal. Rptr. 97, 603 P.2d 14*

Statements buried in board campaign literature about board chairman's unruly behavior at board meeting and urging that he not be reelected was not actionable by corporation, because allegedly defamatory material could not reasonably be interpreted as having been made against corporation itself. *Palm Springs Tennis Club v. Rangel (1999) 86 Cal. Rptr. 2d 73*

Corporation as capable of suing for defamation where language directly relates to trade or business of corporation and affects its business reputation. *Washburn v. Wright (1968) 261 Cal. App. 2d 789, 793, 68 Cal. Rptr. 224* ; *Triton Ins. Underwriters Inc. v. National Chiropractic Ins. Co. (1965) 232 Cal. App. 2d 829, 832, 43 Cal. Rptr. 504* ; *Di Giorgio Fruit Corp. v. AFL-CIO (1963) 215 Cal. App. 2d 560, 570-571, 30 Cal. Rptr. 350*

[b] Multiple Plaintiffs and Class Actions

Fire and police protective league of more than 5,000 members as not "similarly situated" and thus as not able to bring class action law suit for defamation on behalf of its members. *Los Angeles Fire & Police Protective League v. Rodgers (1970) 7 Cal. App. 3d 419, 423-425, 86 Cal. Rptr. 623*

Two or more persons affected by same defamatory matter as capable of suing independently of each other. *Writers Guild of Am., W., Inc. v. Superior Court (1969) 273 Cal. App. 2d 841, 847, 78 Cal. Rptr. 520*

[c] Municipal Corporations

Municipal Corporation as not capable of bringing libel action against citizen critical of city's financial policies. *Albany v. Meyer (1929) 99 Cal. App. 651, 654-655, 279 P. 213*

[d] Partners

Partners as capable of suing for defamation directed against partnership for damage personally sustained. *Lewis v. Hayes (1918) 177 Cal. 587, 589, 171 P. 293*

[e] Unincorporated Associations

Labor union as capable of suing for defamation for libel of union as an entity. *Daniels v. Sanitarium Ass'n, Inc. (1963) 59 Cal. 2d 602, 609, 30 Cal. Rptr. 828, 381 P.2d 652*

Association of police officers as capable of suing for libel of associations as an entity. *Mullins v. Brando (1970) 13 Cal. App. 3d 409, 422, 91 Cal. Rptr. 796*

Trustees of nonprofit trust dependent on voluntary contributions as capable of suing for libel of association. *Washburn v. Wright (1968) 261 Cal. App. 2d 789, 793, 68 Cal. Rptr. 224*

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§ 340.126 Law Reviews

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[4] Definitions

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[6] Evidence

Note, *The Libel-Proof Plaintiff Doctrine, 98 Harv. L. Rev. 1909 (1985)*

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[11] Retraction

Comment, *California Civil Code Section 48a: Should the Judge or the Jury Determine Whether a Retraction is Published in a Manner Which is "Substantially as Conspicuous" as the Original Article? 23 Pac. L.J. 1575 (1992)*

[12] Uniform Single Publication Act

Note, *Torts: Defamation: Uniform Single Publication Act: Civil Code Sections 3425.3, 3425.4 , 44 Cal. L. Rev. 146 (1956)*

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§ 340.140 California Points and Authorities

For memoranda of points and authorities for use in defense to defamation actions, see California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)

For memoranda of points and authorities relating to motions for summary judgment, see California Points and Authorities, Ch. 221, *Summary Judgment* (Matthew Bender)

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§ 340.141 Forms of Discovery

For forms of discovery for use in actions involving libel and slander, see Bender's Forms of Discovery, Ch. 63, *Defamation, Libel and Slander* (Matthew Bender)

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§ 340.142 State Statutes

[1] Absolute Privileges

[a] Availability

Absolute privilege for executive officers. *Civ. Code § 47(a)*

Absolute privilege for legislative, judicial, or other official proceedings, or proceedings reviewable by *Code Civ. Proc. §§ 1084-1097* (mandate). *Civ. Code § 47(b)*

Absolute privilege for fair and true report in public journal. *Civ. Code § 47(d)*

Absolute privilege for fair and true report of public meeting. *Civ. Code § 47(e)*

[b] Exception to Absolute Privilege

Exceptions to absolute privilege for judicial proceedings. *Civ. Code § 47(b)*

[2] Anonymous Witness Program

Organization that sponsors or conducts anonymous witness program as immune from civil action for damages under specified conditions. *Civ. Code § 48.9*

[3] Automobile Insurers

No civil liability as arising out of release or receipt of information by automobile insurer or authorized agent pursuant

to Motor Vehicle Theft and Motor Vehicle Insurance Fraud Reporting Act (*Veh. Code §§ 10900-10905*), absent fraud or malice. *Ins. Code § 1874.4*

[4] Governmental Immunity

Public entity immune from liability if public employee immune. *Gov. Code § 815.2(b)*

Public employee as not liable for injury resulting from discretionary act. *Gov. Code § 820.2*

No civil liability as arising out of release or receipt of information by authorized government agency or its employees pursuant to Motor Vehicle Theft and Motor Vehicle Insurance Fraud Reporting Act (*Veh. Code §§ 10900-10905*), absent fraud or malice. *Veh. Code § 10905*

[5] Governmental Liability

Requirement of filing of claim in actions for money or damages. *Gov. Code § 905*

Required presentation of claims against state. *Gov. Code § 905.2*

Claim as required to be filed within six months for certain actions. *Gov. Code § 911.2*

Necessity of presentation of claim in order to maintain action against public employee. *Gov. Code § 950*

Suit against public employee as barred when barred against public entity. *Gov. Code § 950.2*

[6] Justification by Truth

Defendant as capable of alleging both truth and mitigation in answer. *Code Civ. Proc. § 461*

[7] Merchant's Detention of Suspect

Merchant's probable cause to believe that person detained by merchant had stolen or attempted to steal merchandise as defense to slander action if merchant acted reasonably under the circumstances. *Penal Code § 490.5(f)(6)*

[8] Mitigation

Defendant as capable of pleading justification and mitigating circumstances in defendant's answer. *Code Civ. Proc. § 461*

[9] Physicians and Other Practitioners of Healing Arts

Communication made by physician or surgeon to medical quality review committee of panel thereof that is allegedly false and malicious as admissible in defamation action. *Bus. & Prof. Code § 2124.45*

Qualified immunity of members of peer review committees of professional societies, hospital staffs, hospital governing boards, underwriting committees of malpractice insurers, and mental health quality review committees for act or

proceeding taken to review quality of professional services rendered by practitioners of healing arts. *Civ. Code § 43.7*

Qualified immunity for monetary liability regarding communication of information to certain health care and veterinary institutions and governing bodies, if communication is intended to aid in evaluation of qualifications, fitness, character, or insurability of practitioner of healing or veterinary arts. *Civ. Code § 43.8*

Civil and criminal immunity for child abuse reporting. *Penal Code §§ 11164-11174.1*

[10] Pleading

Requirements of responsive pleadings in action for libel or slander arising out of criminal prosecution for child abuse. *Civ. Code § 48.7(b)-(d)*

Objection to complaint by demurrer. *Code Civ. Proc. §§ 430.10(e)* (failure to state cause of action), *430.30(a)*

Affirmative defense as part of answer. *Code Civ. Proc. § 431.30(b)(2)*

[11] Qualified Immunity

Qualified immunity for action of specified persons acting in furtherance of goals of California State Board of Pharmacy diversion program. *Bus. & Prof. Code § 4438*

Qualified immunity for action of health professional society or member thereof as part of function of review. *Civ. Code § 43.7(b)*

Qualified immunity for action of member of underwriting committee evaluating professionals for professional liability insurance. *Civ. Code § 43.7(d)*

Qualified immunity for communication of information relating to evaluating practitioner of healing or veterinary arts or law. *Civ. Code § 43.8*

Qualified immunity for communication of information relating to employment information of person applying for police officer position. *Gov. Code § 1031.1*

Civil and criminal immunity for reporting injuries related to criminal conduct of persons other than children, elders, and dependent adults. *Penal Code §§ 11160-11163, 11163.2*

Civil and criminal immunity for child abuse reporting. *Penal Code §§ 11164-11174.3*

[12] Qualified Privilege

Qualified privilege. *Civ. Code § 47(c)*

Statutory definition of malice. *Civ. Code § 48a(4)(d)*

Malice as not inferred from communication when qualified privilege applies. *Civ. Code § 48*

[13] Statute of Limitations

Statute of limitations on action for libel or slander arising out of criminal prosecution for child abuse as tolled while criminal prosecution is pending. *Civ. Code § 48.7(a)*

Statute of limitations as one year for libel and slander actions. *Code Civ. Proc. § 340(c)*

[14] Statutory Protection for Publishers and Broadcasters

Retraction statute. *Civ. Code § 48a*

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§ 340.143 Decisions

[1] Absolute Privilege for Administrative Proceedings

[a] In General

Absolute privilege for statements made in official proceeding authorized by law as unaffected by presence of malice. *Forro Precision, Inc. v. International Bus. Machs. (9th Cir. 1982) 673 F.2d 1045, 1055*

Absolute privilege of former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] as applicable to county bar association and its officers and State Bar and its investigative officers if local bar forwarded complaints about attorney to State Bar prompting investigation, even though attorney was exonerated of misconduct. *Lebbos v. State Bar (1985) 165 Cal. App. 3d 656, 669, 211 Cal. Rptr. 847*

Former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] as providing absolute privilege for publication made in course of any proceeding authorized by law and reviewable. *Wallin v. Vienna Sausage Mfg. Co. (1984) 156 Cal. App. 3d 1051, 1054, 203 Cal. Rptr. 375*

Defamatory statements made in quasi-judicial proceeding that have some relation thereto as absolutely privileged. *King v. Borges (1972) 28 Cal. App. 3d 27, 32, 104 Cal. Rptr. 414* ; *Ascherman v. Natanson (1972) 23 Cal. App. 3d 861, 865, 100 Cal. Rptr. 656*

[b] Communications to Agencies Protected

Employer's communications to unemployment office regarding employee's dismissal as entitled to qualified privilege under former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*]; other reports by investigators and employer as also entitled to qualified privilege under former *Civ. Code § 47(3)* [*now see Civ. Code § 47(c)*]. *Ghebreselassie v. Coleman Sec. Serv. (9th Cir. 1987) 829 F.2d 892, 898*

Because proceedings undertaken by official investigative and enforcement branch of Internal Revenue Service qualify as actions by quasi-judicial agency regularly engaged in official proceeding authorized by law, communications to such agency designed to prompt regulatory enforcement actions as required to be considered part of official proceeding; even if communication maliciously motivated, privilege as still attaching if statement made to achieve intended objective of proceeding. *Tiedemann v. Superior Court (1978) 83 Cal. App. 3d 918, 926, 148 Cal. Rptr. 242*

Communication to official administrative agency designed to prompt action by that agency as protected by absolute privilege under former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*]. *Martin v. Kearney (1975) 51 Cal. App.3d 309, 311, 124 Cal. Rptr. 281* ; *Brody v. Montalbano (1978) 87 Cal. App. 3d 725, 736, 151 Cal. Rptr. 206* ; *King v. Borges (1972) 28 Cal. App. 3d 27, 34, 104 Cal. Rptr. 414*

[c] Determinative Factors

Report by supervisory committee of federal credit union concerning termination of employee as not absolutely privileged, because credit union was not governmental agency and proceedings of its supervisory committee or board of directors were not subject to review by writ of mandate. *Cuenca v. Safeway San Francisco Employees Fed. Credit Union (1986) 180 Cal. App. 3d 985, 994-995, 225 Cal. Rptr. 852*

Grievance hearings resulting in loss of fundamental vested rights as subject to review by mandate; privilege under former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] as applicable to statements made in grievance hearings reviewable by mandate. *Wallin v. Vienna Sausage Mfg. Co. (1984) 156 Cal. App. 3d 1051, 1055-1056, 203 Cal. Rptr. 375*

Three primary factors weighed as important in determining whether proceedings are quasi-judicial and thus absolutely privileged under former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*]. *Goodley v. Sullivant (1973) 32 Cal. App. 3d 619, 625, 108 Cal. Rptr. 451 , disapproved on other grounds, Hackethal v. Weissbein (1979) 24 Cal. 3d 55, 61 n.5, 154 Cal. Rptr. 423, 592 P.2d 1175* ; *Ascherman v. Natanson (1972) 23 Cal. App. 3d 861, 866, 100 Cal. Rptr. 656*

[d] Limit on Privilege

Statutory absolute privilege as not extending to communications between private parties, even if communication is required by law. *Prevost v. First W. Bank (1987) 193 Cal. App. 3d 1492, 1498-1499, 239 Cal. Rptr. 161*

Privilege as applicable only when made to achieve object of meeting. *Frisk v. Merrihew (1974) 42 Cal. App. 3d 319, 324, 116 Cal. Rptr. 781*

[e] Policy Underlying Privilege

Communication to administrative agency as absolutely privileged under former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*]. *King v. Borges (1972) 28 Cal. App. 3d 27, 34, 104 Cal. Rptr. 414*

Policy of free speech as underlying application of absolute privilege to quasi-judicial proceedings. *Ascherman v. Natanson (1972) 23 Cal. App. 3d 861, 866, 100 Cal. Rptr. 656*

[2] Absolute Privilege for Executive Officers

Absolute privilege for executive officers as applicable for state officials corresponding in rank to federal cabinet members. *Saroyan v. Burkett (1962) 57 Cal. 2d 706, 710, 21 Cal. Rptr. 557, 371 P.2d 293*

Absolute privilege for executive officers as not applicable to state officials of lesser rank than those equivalent to federal cabinet members. *White v. California (1971) 17 Cal. App. 3d 621, 626-628, 95 Cal. Rptr. 175*

[3] Absolute Privilege for Judicial Proceedings

[a] In General

Absolute immunity pursuant to former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] as applying when publication (1) was made in judicial proceeding, (2) had some connection or logical relation to action, (3) was made to achieve objectives of litigation, and (4) involved litigants or other participants authorized by law. *Silberg v. Anderson (1990) 50 Cal. 3d 205, 212, 266 Cal. Rptr. 638, 786 P.2d 365* ; *Costa v. Superior Court (1984) 157 Cal. App. 3d 673, 677, 204 Cal. Rptr. 1*

Absolute privilege of former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] as applying to defeat claims of invasion of privacy and intentional infliction of emotional distress, as well as to defeat claims of defamation. *Ribas v. Clark (1985) 38 Cal. 3d 355, 364, 212 Cal. Rptr. 143, 696 P.2d 637* ; *Williams v. Coombs (1986) 179 Cal. App. 3d 626, 645-646, 224 Cal. Rptr. 865*

Privilege granted by former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] as absolute since it protects publications made with actual malice or with intent to do harm. *Albertson v. Raboff (1956) 46 Cal. 2d 375, 379, 295 P.2d 405* ; *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 824, 106 Cal. Rptr. 718* ; *Pettitt v. Levy (1972) 28 Cal. App. 3d 484, 488, 104 Cal. Rptr. 650* ; *Rader v. Thrasher (1972) 22 Cal. App. 3d 883, 887, 99 Cal. Rptr. 670* ; *Smith v. Hatch (1969) 271 Cal. App. 2d 39, 45, 76 Cal. Rptr. 350*

Former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] as providing absolute bar to cause of action for defamation stemming from federal district court complaint alleging causes of action for federal and state antitrust violations and related causes of action regarding conduct of hospital administrator; statute as providing absolute privilege unaffected by malice if publication has reasonable relation to action and is permitted by law; filing of lawsuit as publication in course of judicial proceeding. *Abraham v. Lancaster Cmty. Hosp. (1990) 217 Cal. App. 3d 796, 809-813, 822, 266 Cal. Rptr. 360*

Privilege provided by former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] with respect to publications made in any judicial proceeding as applicable to injurious publication, of whatever nature, in protected proceeding; conduct of publishing, rather than publication itself, as what is protected. *Rosenthal v. Irell & Manella (1982) 135 Cal. App. 3d 121, 127-128, 185 Cal. Rptr. 92*

[b] Exception to Absolute Privilege

Statement in divorce action that absolutely privileged even though libelous per se. *Lyons v. Gilliland (9th Cir. 1962) 303 F.2d 452, 453*

Single exception to former *Civ. Code § 47(2)* as encompassing pleading or affidavit filed in action for marital dissolution or legal separation against person from whom no affirmative relief is being sought. *Rader v. Thrasher (1972) 22 Cal. App. 3d 883, 887, 99 Cal. Rptr. 670* ; *see Civ. Code § 47(b)(1)*

Statement in divorce action that plaintiff and ex-wife carrying on meretricious relationship as not privileged since

plaintiff not being sued for affirmative relief. *Rutherford v. Johnson (1967) 250 Cal. App. 2d 316, 317-319, 58 Cal. Rptr. 546*

[c] Liberal Application of Privilege

[i] Favored by Courts

Doubts as resolved in favor of relevancy and pertinency under former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*]. *Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 93, 53 Cal. Rptr. 706*

Courts as favoring liberal application of absolute privilege for judicial proceedings. *Lewis v. Linn (1962) 209 Cal. App. 2d 394, 399, 26 Cal. Rptr. 6*

[ii] Limits on Liberal Application

Communication as privileged under former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] only if made to achieve purpose of litigation; attorney's false representation to plaintiff that bench warrant had been issued against her for failure to appear at judgment-debtor examination as not serving purpose of litigation and therefore not privileged. *Carney v. Rotkin, Schmerin & McIntyre (1988) 206 Cal. App. 3d 1513, 1521-1523, 254 Cal. Rptr. 478*

Tendency to apply absolute privilege for judicial proceedings liberally confined to cases in which public service or administration of justice requires complete immunity. *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 824, 106 Cal. Rptr. 718*

Placement of special emphasis on requirement that publication be in furtherance of litigation as required before it is appropriate for courts to liberally expand privilege. *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 826, 106 Cal. Rptr. 718 , overruled on other grounds, Silberg v. Anderson (1990) 50 Cal. 3d 205, 266 Cal. Rptr. 638, 786 P.2d 365*

[d] Motive or Intent Irrelevant

Allegations that defendant conspired to introduce defamatory material into judicial proceedings do not obviate absolute privilege. *McClatchy Newspapers, Inc. v. Superior Court (1987) 189 Cal. App. 3d 961, 968-971, 234 Cal. Rptr. 702*

Absolute privilege is not barred by actual malice; court is bound to accept complaint allegations regarding purpose of publication if complaint does not show any other purpose. *Financial Corp. of Am. v. Wilburn (1987) 189 Cal. App. 3d 764, 776-777, 234 Cal. Rptr. 653*

[e] No Relevancy Requirement

Letter to organization membership for purpose of describing basis of pending litigation and soliciting support and views of members was covered by privilege under former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*]. *Costa v. Superior Court (1984) 157 Cal. App. 3d 673, 678, 204 Cal. Rptr. 1*

Absolute privilege for judicial proceedings as not requiring relevancy, only that publication have some connection to proceeding. *Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 90, 53 Cal. Rptr. 706*

Absolute privilege for judicial proceedings as protecting attorney from defamation regardless of purpose in publishing

material, belief in its truth, or knowledge of its falsity. *Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 93, 53 Cal. Rptr. 706*

Absolute privilege for judicial proceedings as denied to participant in legal proceeding only when matter is palpably irrelevant so that no reasonable man would doubt its impropriety. *Jordan v. Lemaire (1963) 222 Cal. App. 2d 622, 625, 35 Cal. Rptr. 337* ; *Lewis v. Linn (1962) 209 Cal. App. 2d 394, 399, 26 Cal. Rptr. 6*

[f] Perjury Protected by Privilege

Absolute privilege for judicial proceedings as covering even perjured testimony of witnesses. *Pettitt v. Levy (1972) 28 Cal. App. 3d 484, 488, 104 Cal. Rptr. 650* ; *Kachig v. Boothe (1971) 22 Cal. App. 3d 626, 641, 99 Cal. Rptr. 393*

Criminal action, not civil action for defamation, as only remedy for perjured statement in complaint. *Pettitt v. Levy (1972) 28 Cal. App. 3d 484, 489, 104 Cal. Rptr. 650*

Absolute privilege for judicial proceedings as covering perjured documentary evidence. *Pettitt v. Levy (1972) 28 Cal. App. 3d 484, 489, 104 Cal. Rptr. 650* ; *Kachig v. Boothe (1971) 22 Cal. App. 3d 626, 641, 99 Cal. Rptr. 393* ; *Agostini v. Strycula (1965) 231 Cal. App. 2d 804, 808, 42 Cal. Rptr. 314*

[g] Persons Covered by Privilege

Privilege under *Civ. Code § 47(b)* is applicable to attorney's complaints to, and communications with, State Bar regarding disciplinary proceedings, as well as to response; privilege applies to defamation action as well as related claims for infliction of emotional distress and negligence. *Rosenthal v. Vogt (1991) 229 Cal. App. 3d 69, 73-74, 280 Cal. Rptr. 1*

Privilege under former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] applies to insurer that provides defense to party. *Doctors' Co. v. Superior Court (1990) 225 Cal. App. 3d 1284, 1291-1300, 275 Cal. Rptr. 674*

Attorney general, assistant attorneys general, attorneys, and parole agents as all absolutely immune from defamation suit if all allegedly defamatory communications were made either in court proceedings or in attempts to supervise plaintiff's parole. *Kim v. Walker (1989) 208 Cal. App. 3d 375, 383-384, 256 Cal. Rptr. 223*

Attorney as absolutely privileged to publish defamatory matter concerning another in communications preliminary to proposed judicial proceedings, or in institution of, or as part of, judicial proceedings in which attorney participates as counsel, if publication has some relation to proceeding. *Financial Corp. of Am. v. Wilburn (1987) 189 Cal. App. 3d 764, 773, 234 Cal. Rptr. 653*

Absolute privilege of attorneys for allegedly defamatory publications made in course of judicial proceedings, pursuant to former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*], as applying to attorney who defames his or her client, even though publication may subject attorney to discipline by *State Bar. O'Neil v. Cunningham (1981) 118 Cal. App. 3d 466, 472-476, 173 Cal. Rptr. 422*

Absolute privilege for judicial proceedings as covering judges and other official officers. *Bradley v. Hartford Accident & Indem. Co. (1973) 106 Cal. Rptr. 718 , overruled on other grounds, Silberg v. Anderson (1990) 50 Cal. 3d 205, 266 Cal. Rptr. 638, 786 P.2d 365* ; *Lewis v. Linn (1962) 209 Cal. App. 2d 394, 399, 26 Cal. Rptr. 6*

Absolute privilege for judicial proceedings as covering attorneys. *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 824, 106 Cal. Rptr. 718* ; *Friedman v. Knecht (1967) 248 Cal. App. 2d 455, 460, 56 Cal. Rptr.*

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Absolute privilege for judicial proceedings as covering parties. *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 824, 106 Cal. Rptr. 718 , overruled on other grounds, Silberg v. Anderson (1990) 50 Cal. 3d 205, 266 Cal. Rptr. 638, 786 P.2d 365* ; *see also Albertson v. Raboff (1956) 46 Cal. 2d 375, 378-379, 295 P.2d 405*

Absolute privilege for judicial proceedings as covering witnesses and prospective witnesses. *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 824, 106 Cal. Rptr. 718 , overruled on other grounds, Silberg v. Anderson (1990) 50 Cal. 3d 205, 266 Cal. Rptr. 638, 786 P.2d 365* ; *Ascherman v. Natanson (1972) 23 Cal. App. 3d 861, 865, 100 Cal. Rptr. 656*

Absolute privilege for judicial proceedings as covering jurors. *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 824, 106 Cal. Rptr. 718 , overruled on other grounds, Silberg v. Anderson (1990) 50 Cal. 3d 205, 266 Cal. Rptr. 638, 786 P.2d 365*

[h] Pleading

Complaint showing that publication made in judicial proceeding as not stating cause of action unless other facts appear which show publication not in fact made in judicial proceeding. *Whelan v. Wolford (1958) 164 Cal. App. 2d 689, 693-694, 331 P.2d 86*

[i] Policy Underlying Privilege

Policy underlying absolute privilege for judicial proceedings as freedom of access to courts. *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 823-824, 106 Cal. Rptr. 718 , overruled on other grounds, Silberg v. Anderson (1990) 50 Cal. 3d 205, 266 Cal. Rptr. 638, 786 P.2d 365*

Purpose of absolute privilege for judicial proceedings as based on desire of law to protect attorneys in primary function of representing client. *Friedman v. Knecht (1967) 248 Cal. App. 2d 455, 462, 56 Cal. Rptr. 540*

[j] Privilege Applies to Communication, Not to Conduct

Privilege under *Civ. Code § 47(b)* as protecting communications but not tortious conduct; purposeful misrepresentation, concealment of whereabouts of plaintiff's property, and otherwise delaying resolution of plaintiff's claim against insured hotel, as communicative acts falling under judicial privilege. *Kupiec v. American Int'l Adjustment Co. (1991) 235 Cal. App. 3d 1326, 1330-1333, 1 Cal. Rptr. 2d 371*

[k] Publications Covered by Privilege

Absolute privilege for judicial proceedings as applicable even though publication made outside courtroom and no function of court or officers invoked. *Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405* ; *Rader v. Thrasher (1972) 22 Cal. App. 3d 883, 887, 99 Cal. Rptr. 670*

Privilege applied to pre-litigation attorney demand letter and could not be overcome merely by arguing that allegedly actionable statements were made to "leverage" settlement. *Knoell v. Petrovich (1999) 76 Cal. App. 4th 164, 170-171, 90 Cal. Rptr. 2d 162*

Questions and answers asked and given at deposition as enjoying absolute privilege for judicial proceedings. *McClatchy Newspapers, Inc. v. Superior Court (1987) 189 Cal. App. 3d 961, 968 n.2, 234 Cal. Rptr. 702* ; *Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 85, 93, 53 Cal. Rptr. 706*

Informal complaints received by bar association empowered by law to initiate disciplinary procedures as privileged. *Chen v. Fleming (1983) 147 Cal. App. 3d 36, 40, 194 Cal. Rptr. 913*

Toxicologist's calculations performed and communicated on request of district attorney's office in furtherance of its investigation of infant's death to determine if probable cause existed to initiate criminal charges as absolutely privileged under former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*]. *Block v. Sacramento Clinical Labs, Inc. (1982) 131 Cal. App. 3d 386, 393-394, 182 Cal. Rptr. 438*

In tort action, regardless of label or theory of liability, if duty breached is based on foreseeable result of publication in or related to judicial proceeding, publication as privileged. *Block v. Sacramento Clinical Labs, Inc. (1982) 131 Cal. App. 3d 386, 390-393, 182 Cal. Rptr. 438* (action for "professional negligence")

Statement of corporation's financial solvency made orally and in letter to avoid filing of undertaking to stay enforcement of judgment during appeal as enjoying absolute privilege for judicial proceedings. *Portman v. McDonald Law Corp. (1979) 99 Cal. App. 3d 988, 991-992, 160 Cal. Rptr. 505*

Absolute privilege for judicial proceedings as covering preliminary meetings, conduct, and activites. *Pettitt v. Levy (1972) 28 Cal. App. 3d 484, 491, 104 Cal. Rptr. 650*

Absolute privilege as covering preliminary conversations and interviews between prospective witness and attorney. *Ascherman v. Natanson (1972) 23 Cal. App. 3d 861, 865, 100 Cal. Rptr. 656*

Statements made in affidavit filed in judicial proceedings as enjoying absolute privilege for judicial proceedings. *Bernstein v. Alameda-Contra Costa Med. Ass'n (1956) 139 Cal. App. 2d 241, 246, 293 P.2d 862*

[l] Summary of Requirements for Privilege

Four requirements as necessary to be met in order for absolute privilege for judicial proceeding to apply. *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 825, 106 Cal. Rptr. 718*

[4] Absolute Privilege for Legislative Proceedings

[a] Coverage of Privilege

Newsletters and press releases of legislators as not entitled to protection of Speech or Debate Clause because they are not essential to deliberations of Congress and are not part of deliberative process. *Hutchinson v. Proxmire (1979) 443 U.S. 111, 130-133, 99 S. Ct. 2675, 61 L. Ed. 2d 411*

Examination of employee qualifications in legislative proceeding as absolutely privileged. *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 286, 112 Cal. Rptr. 609*

Absolute privilege covering legislative proceedings as applicable to all spoken or done during proceedings. *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 288, 112 Cal. Rptr. 609*

[b] No Relevancy Requirement

Absolute privilege for legislative proceedings as qualified by limitation that statement have some connection to proceeding but not that it be relevant, material, or pertinent. *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 285, 112 Cal. Rptr. 609* ; *Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 90, 53 Cal. Rptr. 706*

[c] Pleading Requirement

Complaint indicating statements made at city council meeting as required to allege facts that show statements not privileged. *Whelan v. Wolford (1958) 164 Cal. App. 2d 689, 693-694, 331 P.2d 86* ; *Harnish v. Smith (1956) 138 Cal. App. 2d 307, 310, 291 P.2d 532*

[d] Policy Underlying Coverage of Privilege

Policy underlying absolute privilege for legislative proceedings as freedom of speech. *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 288, 112 Cal. Rptr. 609*

[e] Public Included in Privilege

Public as included in absolute privilege for legislative proceedings. *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 288, 112 Cal. Rptr. 609* ; *Pettitt v. Levy (1972) 28 Cal. App. 3d 484, 488, 104 Cal. Rptr. 650*

[5] Absolute Privilege for Official Proceedings

Content of press release by county administrator regarding reasons for firing of county official as privileged under former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*]; official proceedings as including those within and before county boards of supervisors. *Young v. County of Marin (1987) 195 Cal. App. 3d 863, 872, 241 Cal. Rptr. 169*

Statements made to California Highway Patrol during employment background investigation by Patrol as absolutely privileged because made in connection with official proceeding; background investigation of law enforcement candidates pursuant to *Gov. Code § 1031(d)* as official proceeding under former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*]. *O'Shea v. General Tel. Co. (1987) 193 Cal. App. 3d 1040, 1048, 238 Cal. Rptr. 715*

Absolute privilege of former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] as applying to claims of emotional distress and bad faith breach of covenant of good faith and fair dealing because documents sought to be introduced as evidence contained statements made in course of federal investigation. *Dong v. Board of Trs. (1987) 191 Cal. App. 3d 1572, 1594, 236 Cal. Rptr. 912*

Former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] as providing for absolute privilege for statements made in any official proceeding authorized by law; communication concerning possible wrongdoing made to official governmental agency such as local police department and designed to prompt action by that agency as being as much a part of an official proceeding as communication made after official investigation has commenced. *Williams v. Taylor (1982) 129 Cal. App. 3d 745, 753-754, 181 Cal. Rptr. 423*

Employer's statement of reasons for discharging employee (theft) made to employee at State Department of Employment Development as absolutely privileged because made in connection with official proceeding. *Williams v. Taylor (1982) 129 Cal. App. 3d 745, 754, 181 Cal. Rptr. 423*

[6] Absolute Privilege for Proceedings Reviewable by Mandate

Privilege conferred by former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] (publication or broadcast made in any legislative or judicial proceeding or in any other official proceeding authorized by law, or in initiation or course of any other proceeding authorized by law and reviewable by writ of mandate) as absolute and unaffected by existence of malice. *Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 941, 242 Cal. Rptr. 259*

Board of Medical Quality Assurance (BMQA) as administrative agency created by Legislature whose responsibilities include enforcement of Medical Practice Act and review of performance of physicians and surgeons licensed in California, with duty to investigate complaints and power to initiate disciplinary proceedings against practitioners; disciplinary actions taken against licensee as reviewable by mandate; accordingly, any publication in connection with BMQA proceedings as clothed with absolute privilege set forth in former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] as having been made in course of official proceeding and proceedings reviewable by writ of mandate. *Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 941, 242 Cal. Rptr. 259*

Letters or communications designed to prompt official action as being as much part of "official proceeding" as communication made after proceeding has commenced, because, to function effectively, administrative agency as required to have "open channel" by which concerned persons may call attention to suspected wrongdoing; as matter of public policy, importance of providing to citizens free and open access to governmental agencies for reporting of suspected illegal activity as outweighing occasional harm that might befall defamed individual. *Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 941-942, 242 Cal. Rptr. 259*

Privilege provided by former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] as not subject to being defeated by asserting tort theory other than libel or slander based on same protected communication. *Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 943, 242 Cal. Rptr. 259*

[7] Absolute Privilege of Report in Public Journal

[a] Extent of Privilege

Report of family court proceeding in which mother seeking additional child support claimed that Arnold Dorsey, a.k.a. Engelbert Humperdinck, had AIDS virus as privileged under former *Civ. Code § 47(4)* [*now see Civ. Code § 47(d)*]. *Dorsey v. National Enquirer, Inc. (9th Cir. 1992) 973 F.2d 1431, 1436-1437*

Report of congressional investigation into allegations of corruption in governmental anti-racketeering activity as privileged under former *Civ. Code § 47(4)* [*now see Civ. Code § 47(d)*], even if committee investigation not open to public. *Crane v. Arizona Republic (9th Cir. 1992) 972 F.2d 1511, 1525-1526*

Privilege under former *Civ. Code § 47(4)* [*now see Civ. Code § 47(d)*] as applicable to statements made at city council meeting. *Green v. Cortez (1984) 151 Cal. App. 3d 1068, 1073, 199 Cal. Rptr. 221*

"Fair report" concept of former *Civ. Code § 47(4)* [*now see Civ. Code § 47(d)*] as permitting some degree of literary license, so that report using exaggerated terms is privileged as long as the gist of report is justified. *Jennings v. Telegram-Tribune Co. (1985) 164 Cal. App. 3d 119, 125-127, 210 Cal. Rptr. 485*

Fair and true report of judicial proceeding as privileged under former *Civ. Code § 47(4)* [*now see Civ. Code § 47(d)*] and if subject of statement is presiding judicial officer, even report that is not fair and true as not supporting imposition of liability absent malice. *Grillo v. Smith (1983) 144 Cal. App. 3d 868, 873, 193 Cal. Rptr. 414*

Application of absolute privilege of report in public journal as requiring only substantial accurancy. *Handelsman v.*

San Francisco Chronicle (1970) 11 Cal. App. 3d 381, 386, 90 Cal. Rptr. 188 ; *Hayward v. Watsonville Register-Pajaronian & Sun (1968) 265 Cal. App. 2d 255, 262, 71 Cal. Rptr. 295* ; *Kurata v. Los Angeles News Publ'g Co. (1935) 4 Cal. App. 2d 224, 227-228, 40 P.2d 520*

Privilege as applicable to oral statements of district attorneys, sheriffs, and police officers, crime reports of police department, and FBI identification records. *Hayward v. Watsonville Register-Parajonian & Sun (1968) 265 Cal. App. 2d 255, 260, 71 Cal. Rptr. 295*

Privilege as applicable to publication of charge made in complaint. *Kurata v. Los Angeles News Publ'g Co. (1935) 4 Cal. App. 2d 224, 227, 40 P.2d 520*

Error in naming paper or characterizing writing in which publication alleged to be libelous appears as not defeating privilege. *Mortensen v. Los Angeles Examiner (1931) 112 Cal. App. 194, 202, 296 P. 927 , overruled on other grounds, Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal. 2d 224, 11 Cal. Rptr. 97, 359 P.2d 465*

Privilege as applicable to report of charge of being corespondent in divorce action made during trial. *Mortensen v. Los Angeles Examiner (1931) 112 Cal. App. 194, 207, 296 P. 927 , overruled on other grounds, Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal. 2d 224, 11 Cal. Rptr. 97, 359 P.2d 465*

[b] Policy Underlying Substantial Accuracy Rule

Inaccurate and defamatory reports of judicial proceedings as not requiring showing of actual malice. *Time, Inc. v. Firestone (1976) 424 U.S. 448, 453, 454, 96 S. Ct. 958, 47 L. Ed. 2d 154*

Reason for substantial accuracy rule as fact that exact reproduction as potentially harmful as reporter's interpretation. *Handelsman v. San Francisco Chronicle (1970) 11 Cal. App. 3d 381, 386, 90 Cal. Rptr. 188*

[c] Test for Determining Accuracy

Test of accuracy for privilege as standard of accuracy for those whose function it is to give public fair report of what has occurred. *Handelsman v. San Francisco Chronicle (1970) 11 Cal. App. 3d 381, 387, 90 Cal. Rptr. 188*

[8] Absolute Privilege of Report of Public Meeting

Privilege encompassed within former *Civ. Code § 47(5)* [*now see Civ. Code § 47(e)*] as absolute privilege; malice as not proper issue if privilege asserted. *Williams v. Daily Review, Inc. (1965) 236 Cal. App. 2d 405, 518-519, 46 Cal. Rptr. 135*

Privilege as applicable to fair and true report of public meeting lawfully convened and open to public, or of public meeting not lawfully convened or not open to public if publication is for public benefit. *Williams v. Daily Review, Inc. (1965) 236 Cal. App. 2d 405, 418, 46 Cal. Rptr. 135 , overruled on other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406*

[9] Absolute Quasi-Judicial Immunity

Absolute quasi-judicial immunity under common law as properly extended to neutral third persons for their conduct in performing dispute-resolution services that are connected to judicial process and involve (1) making of binding

decisions, (2) making of findings or recommendations to court, or (3) arbitration, mediation, conciliation, evaluation, or similar resolution of pending disputes; psychologist retained by parties to prepare written report for use in child-custody determination by court as entitled to immunity. *Howard v. Drapkin (1990) 222 Cal. App. 3d 843, 860, 271 Cal. Rptr. 893*

[10] Attorney Fees in Action Against Peace Officer

Code Civ. Proc. § 1021.7 as allowing award of attorney fees in libel and slander actions involving peace officers and their employers; statute as not authorizing award of attorney fees to defendant who prevails in libel or slander lawsuit not involving peace officers or their employers. *Planned Protective Servs., Inc. v. Gorton (1988) 200 Cal. App. 3d 1, 15, 245 Cal. Rptr. 790*

[11] Child-Abuse Reporting Statutes

Psychologist, who gave written opinion of child abuse to father, as lacking immunity under *Penal Code §§ 11164-11174.3* because he failed to report suspected instance of child abuse to authorized agencies or individuals. *Searcy v. Auerbach (9th Cir. 1992) 980 F.2d 609, 610-611*

Psychotherapist as not entitled to refuse deposition request for confidential communications related to child-abuse report on basis of psychotherapist-patient privilege (*Evid. Code §§ 1012, 1014*) in defamation action brought against plaintiff's former spouse who reported suspected child abuse to psychotherapist, based on consequent report to authorities made by psychotherapist pursuant to *Penal Code § 11166(a)*; plaintiff's need for disclosure as outweighing defendant's right to privacy. *Roe v. Superior Court (1991) 229 Cal. App. 3d 832, 843, 280 Cal. Rptr. 380*

[12] Consent

Defendant as not able to utilize defense of consent where he merely repeats at plaintiff's urging the charge of being a thief which had been made in presence of third person and thus published. *Puchan v. Godeau (1914) 167 Cal. 692, 694, 140 P. 952* ; *Moranville v. Aletto (1957) 153 Cal. App. 2d 667, 671, 315 P.2d 91*

"Personal Depiction Waiver" given by plaintiff to author and publisher as not constituting consent to defamation, libel, and invasion of privacy for purposes of demurrer if waiver is ambiguous on its face or does not suggest it was knowingly made; extent of privilege conferred by consent as determined by language or acts by which consent given in light of surrounding circumstances. *Kelly v. William Morrow & Co. (1986) 186 Cal. App. 3d 1625, 1633, 1635, 231 Cal. Rptr. 497*

Plaintiff's disclosure of defendant's defamatory statement of reasons for firing plaintiff as not constituting consent to defamation because defendant could have reasonably foreseen plaintiff would be under strong compulsion to disclose statement to prospective employer. *McKinney v. County of Santa Clara (1980) 110 Cal. App. 3d 787, 796-798, 168 Cal. Rptr. 89*

Request to publish defamatory material as creating absolute privilege that cannot be overcome by showing of malice. *Royer v. Steinberg (1979) 90 Cal. App. 3d 490, 499, 153 Cal. Rptr. 499*

[13] Due Care by Radio and Television Broadcasters

Provisions of *Civ. Code § 48.5* as providing defense of due care where defamatory statement made by someone other

than owner or owner's agent. *Correia v. Santos (1961) 191 Cal. App. 2d 844, 856, 13 Cal. Rptr. 132*

[14] Governmental Immunity

Government officials as not personally liable for discretionary acts within the scope of their authority. *Burgdorf v. Funder (1966) 246 Cal. App. 2d 443, 448-449, 54 Cal. Rptr. 805* (tax official)

[15] Justification by Truth

[a] Burden of Pleading on Defendant

Burden of pleading truth of publication as resting with defendant. *Swaffield v. Universal Ecsco Corp. (1969) 271 Cal. App. 2d 147, 164, 76 Cal. Rptr. 680*

[b] Burden of Proof of Falsity

Public figure, or private figure suing newspaper or other media defendant for publishing speech of public concern, as required by *U.S. Const. amend. I*, to bear burden of proving falsity of defamatory statement before recovering damages; standards applicable to action by private plaintiff against nonmedia defendant as open question. *Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 768-769, 776-777, 779 n.4, 106 S. Ct. 1558, 89 L. Ed. 2d 783*

Burden of proving truth of falsity of publication as resting with defendant. *Shumate v. Johnson Publ'g Co. (1956) 139 Cal. App. 2d 121, 131, 293 P.2d 531*

[c] Complete Defense

Truth as complete defense against defamation action. *Draper v. Hellman Commercial Trust & Sav. Bank (1928) 203 Cal. 26, 34, 263 P. 240* ; *Snively v. Record Publ'g Co. (1921) 185 Cal. 565, 574, 198 P. 1 , overruled on other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406* ; *Davis v. Hearst (1911) 160 Cal. 143, 195, 116 P. 530* ; *Swaffield v. Universal Ecsco Corp. (1969) 271 Cal. App. 2d 147, 164, 76 Cal. Rptr. 680* ; *Washer v. Bank of Am. (1948) 87 Cal. App. 2d 501, 509, 197 P.2d 202*

[d] Liability for Part of Publication

Defendant as liable for any material part of publication proved not true. *Shumate v. Johnson Publ'g Co. (1956) 139 Cal. App. 2d 121, 132, 293 P.2d 531*

[e] Risk in Pleading Truth

Pleading defense of truth as involving risk of malice being inferred. *Shumate v. Johnson Publ'g Co. (1956) 139 Cal. App. 2d 121, 138 n.6, 293 P.2d 531*

[f] Subjective Belief Immaterial

Objective truth, not subjective truth, as standard for justification defense. *Emde v. San Joaquin County Cent. Labor Council (1943) 23 Cal. 2d 146, 160, 143 P.2d 20*

Defamatory publication as inferentially false. *Shumate v. Johnson Publ'g Co. (1956) 139 Cal. App. 2d 121, 131, 293 P.2d 531*

[g] Substantial Truth Sufficient

Defendant as required to prove only substantial, not literal, truth of publication. *Emde v. San Joaquin County Cent. Labor Council (1943) 23 Cal. 2d 146, 160, 143 P.2d 20* ; *Handelsman v. San Francisco Chronicle (1970) 11 Cal. App. 3d 381, 387, 90 Cal. Rptr. 188*

One statement that may have been false and potentially libelous in lengthy newspaper article, gist of which was substantially true, was not actionable. *Carver v. Bonds (2005) 135 Cal. App. 4th 328, 358-359, 37 Cal. Rptr. 3d 480*

Immaterial variances and defects of proof disregarded if defendant justifies substance of publication. *Stoneking v. Briggs (1967) 254 Cal. App. 2d 563, 573, 62 Cal. Rptr. 249*

[16] Mitigation

Mitigating circumstances defined as acting in good faith, with honesty of purpose, and not maliciously. *Clay v. Lagiss (1956) 143 Cal. App. 2d 441, 448, 299 P.2d 1025* ; *Shumate v. Johnson Publ'g Co. (1956) 139 Cal. App. 2d 121, 135, 293 P.2d 531*

[17] Petition Clause of First Amendment

Petition Clause of *U.S. Const. amend. I*, as guaranteeing right to petition government for redress of grievances and assuring specific freedom of expression; Petition Clause as not providing absolute immunity from damages for libel. *McDonald v. Smith (1985) 472 U.S. 479, 483-485, 105 S. Ct. 2787, 86 L. Ed. 2d 384*

[18] Privileges in General

[a] Absolute Versus Qualified Privileges

[i] Absolute Privileges

Requirement by federal and state law for insurers to provide explanation of reason for denying reimbursement of patients' claims as not creating absolute privilege for publication because insurers are neither officials nor acting in official capacity. *Slaughter v. Friedman (1982) 32 Cal. 3d 149, 155-156, 185 Cal. Rptr. 244, 649 P.2d 886*

Absolute privilege distinguished from "qualified" or "conditional" privilege. *Saroyan v. Burkett (1962) 57 Cal. 2d 706, 708, 21 Cal. Rptr. 557, 371 P.2d 293*

Absolute privilege as extending to acts of state executive officers who correspond to federal cabinet members and not to state officials of lower rank. *Saroyan v. Burkett (1962) 57 Cal. 2d 706, 710, 21 Cal. Rptr. 557, 371 P.2d 293*

Absolute privilege as extending to participants in and publications arising from judicial proceedings. *Albertson v. Raboff (1956) 46 Cal. 2d 375, 379, 295 P.2d 405*

In action for malicious prosecution and intentional infliction of emotional distress, based on defendant's statements to

police and district attorney accusing plaintiff of committing crimes against her, defendant's statements as absolutely privileged under former *Civ. Code 47(2)* [*now see Civ. Code § 47(b)*]. *Cote v. Henderson (1990) 218 Cal. App. 3d 796, 806, 267 Cal. Rptr. 274*

Absolute privilege under former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] as extending to statements made to California Highway Patrol during employment background investigation by *Patrol. O'Shea v. General Tel. Co. (1987) 193 Cal. App. 3d 1040, 1048, 238 Cal. Rptr. 715*

Absolute privilege accorded media by former *Civ. Code § 47(4)* [*now see Civ. Code § 47(d)*] as not affected by malice or abuse of privilege by speaker. *McClatchy Newspapers, Inc. v. Superior Court (1987) 189 Cal. App. 3d 961, 974, 234 Cal. Rptr. 702* ; *Green v. Cortez (1984) 151 Cal. App. 3d 1068, 1074-1075, 199 Cal. Rptr. 221*

Newspaper opinion criticizing behavior of judges and opining that court order was illegal as absolutely privileged under *First Amendment* and as not required to have any legal or factual basis to be protected. *Grillo v. Smith (1983) 144 Cal. App. 3d 868, 874-875, 193 Cal. Rptr. 414*

Absolute privilege under former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] as extending to statements made in any official proceeding authorized by law, including communication concerning possible wrongdoing made to official governmental agency designed to prompt action by that entity, and employer's statement of reasons for discharging employee made to state *Department of Employment Development. Williams v. Taylor (1982) 129 Cal. App. 3d 745, 753-754, 181 Cal. Rptr. 423* ; *but see Fenelon v. Superior Court (1990) 223 Cal. App. 3d 1476, 1483, 273 Cal. Rptr. 367* (declining to follow *Williams* regarding absolute privilege afforded to statements made solely to police outside quasi-judicial context)

Absolute privilege of former *Civ. Code § 47(1)* [*now see Civ. Code § 47(a)*] as not extending to lower level officials even if publication was made while official was exercising policymaking function and acting within the scope of official duties. *Frisk v. Merrihew (1974) 42 Cal. App. 3d 319, 323, 116 Cal. Rptr. 781* ; *White v. State of California (1971) 17 Cal. App. 3d 621, 626-627, 95 Cal. Rptr. 175*

Absolute privilege as extending to participants in and publications arising from legislative proceedings. *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 288, 112 Cal. Rptr. 609*

Absolute privilege as extending to participants in and publications arising from quasi-judicial proceedings. *Ascherman v. Natanson (1972) 23 Cal. App. 3d 861, 866, 100 Cal. Rptr. 656*

Absolute privilege conveyed by former *Civ. Code § 47(4)* [*now see Civ. Code § 47(d)*]. *See Handelsman v. San Francisco Chronicle (1970) 11 Cal. App. 3d 381, 386, 90 Cal. Rptr. 188*

Absolute privilege conveyed by former *Civ. Code § 47(5)* [*now see Civ. Code § 47(e)*]. *Williams v. Daily Review, Inc. (1965) 236 Cal. App. 2d 405, 418, 46 Cal. Rptr. 135 , overruled on other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406*

[ii] Loss of Absolute Privilege

Absolute privilege as applicable only to publication reasonably related to action, permitted by law, and made to achieve objects of proceeding. *Frisk v. Merrihew (1974) 42 Cal. App. 3d 319, 324, 166 Cal. Rptr. 781* ; *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 824-826, 106 Cal. Rptr. 718 , overruled on other grounds, Silberg v. Anderson (1990) 50 Cal. 3d 205, 266 Cal. Rptr. 638, 786 P.2d 365*

Defamatory statement initially cloaked in absolute privilege as capable of losing protection when uttered on non-privileged occasion. *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 827, 106 Cal. Rptr. 718*

[b] Abuse of Privilege Question for Jury

Issue whether privileged occasion abused as jury question unless facts permit only one conclusion. *Frisk v. Merrihew (1974) 42 Cal. App. 3d 319, 326, 116 Cal. Rptr. 781*

[c] Burden of Pleading

[i] Absence of Privilege Essential

Defendant as not required to establish privilege where complaint affirmatively discloses absolute privilege. *Whelan v. Wolford (1958) 164 Cal. App. 2d 689, 693, 331 P.2d 86*

[ii] Defendant

Defense of privilege as affirmative one requiring specific pleading unless it appears on face of complaint. *Locke v. Mitchell (1936) 7 Cal. 2d 599, 602, 61 P.2d 922* ; *Peoples v. Tautfest (1969) 274 Cal. App. 2d 630, 635, 79 Cal. Rptr. 478* ; *Everett v. California Teachers Ass'n (1962) 208 Cal. App. 2d 291, 293, 25 Cal. Rptr. 120*

Defendant as having burden of pleading and proving conditional privilege. *Fairfield v. Hagan (1967) 248 Cal. App. 2d 194, 204, 56 Cal. Rptr. 402*

[iii] Demurrer Available

Demurrer available as matter of defense where existence of privilege disclosed on face of complaint. *Locke v. Mitchell (1936) 7 Cal. 2d 599, 602, 61 P.2d 922* ; *Whelan v. Wolford (1958) 164 Cal. App. 2d 689, 693, 331 P.2d 86*

If existence of privilege is revealed on face of complaint, demurrer as appropriate. *Green v. Cortez (1984) 151 Cal. App. 3d 1068, 1072-1073, 199 Cal. Rptr. 221*

Demurrer based on privilege under former *Civ. Code § 47(4)* [*now see Civ. Code § 47(d)*] as properly sustained because plaintiff stipulated that complaint could not be amended to allege inaccurate reporting. *Green v. Cortez (1984) 151 Cal. App. 3d 1068, 1072, 1075, 199 Cal. Rptr. 221*

[d] Decisional Definition of Malice

Definition of actual malice as "a desire or disposition to injure another founded upon spite or ill will." *Siemon v. Finkle (1923) 190 Cal. 611, 618, 213 P.954* ; *White v. California (1971) 17 Cal. App. 3d 621, 628-629, 95 Cal. Rptr. 175*

Definition of actual malice as a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy, or injure another person. *Davis v. Hearst (1911) 160 Cal. 143, 160, 164, 116 P. 530* ; *Dietrich v. Litton Indus., Inc. (1970) 12 Cal. App. 3d 704, 714, 90 Cal. Rptr. 856* ; see *Cunningham v. Simpson (1969) 1 Cal. 3d 301, 308, 81 Cal. Rptr. 855, 461 P.2d 39*

Definition of actual malice as personal hatred or ill will towards the plaintiff, or wanton disregard of the civil obligations of the defendants toward the plaintiff. *Hearne v. De Young (1901) 132 Cal. 357, 361-362, 64 P. 576* ; *White v. California (1971) 17 Cal. App. 3d 621, 628-629, 95 Cal. Rptr. 175*

Malice as established by showing that publication was motivated by hatred or ill will towards plaintiff or by showing that defendant lacked reasonable grounds for belief in truth of publication and therefore acted in reckless disregard of plaintiff's rights. *Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 945, 242 Cal. Rptr. 259*

Actual malice or malice in fact as malice necessary to defeat qualified privilege; defined as state of mind arising from hatred or ill will, evidencing willingness to vex, annoy, or injure another person, or lack of reasonable grounds on part of publisher of defamatory statement to believe statement was true, with publication made with reckless disregard for plaintiff's rights. *Cuenca v. Safeway San Francisco Employees Fed. Credit Union (1986) 180 Cal. App. 3d 985, 994-995, 225 Cal. Rptr. 852*

To defeat qualified privilege of former *Civ. Code § 47(3)* [*now see Civ. Code § 47(c)*], plaintiff as required to show defendant's hatred or ill will or lack of good faith belief in truth of defamatory publication, but not both; stricter burden of proof required to show "actual malice" under *Civ. Code § 48a(4)(d)* as not applicable to show "malice" under former *Civ. Code § 47(3)* [*now see Civ. Code § 47(c)*]. *Manguso v. Oceanside Unified Sch. Dist. (1984) 153 Cal. App. 3d 574, 580-581, 200 Cal. Rptr. 535*

Malice respecting liability for libel as malice in law, to be distinguished from malice in fact or actual malice proved by evidence of evil motive and intent, which is basis for punitive damages for libel. *Burnett v. National Enquirer, Inc. (1983) 144 Cal. App. 3d 991, 1006-1007, 193 Cal. Rptr. 206*

[e] Effect of Failure to Award Punitive Damages

Mere failure to award punitive damages as not necessarily negating existence of malice and thus destroying availability of conditional privilege. *Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791, 800-801, 197 P.2d 713*

[f] Evidence of Malice; Test of Relevancy

Test of relevancy as applicable to issue of actual malice. *Scott v. Times-Mirror Co. (1919) 181 Cal. 345, 358, 361-362, 184 P. 672* ; *Larrick v. Gilloon (1959) 176 Cal. App. 2d 408, 416, 1 Cal. Rptr. 360 , overruled on other grounds, Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 114 n.4, 77 Cal. Rptr. 243, 453 P.2d 747*)

[g] Fair Comment

Qualified privilege as encompassing common law privilege of fair comment; privilege as allowing person to make fair comment on matters of public interest. *Maidman v. Jewish Publ'ns, Inc. (1960) 54 Cal. 2d 643, 651-652, 7 Cal. Rptr. 617, 355 P.2d 265 , overruled on other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406* ; *Williams v. Daily Review, Inc. (1965) 236 Cal. App. 2d 405, 416, 46 Cal. Rptr. 135 , overruled on other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406*

Qualified privilege of fair comment as not absolute; privilege as extending only to bona fide publications. *Maidman v. Jewish Publ'ns, Inc. (1950) 54 Cal. 2d 643, 652, 7 Cal. Rptr. 617, 355 P.2d 265 , overruled on other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406*

Evidence that editorial publishes thirteen months after event described as indicating absence of bona fide publication. *Maidman v. Jewish Publ'ns, Inc. (1960) 54 Cal. 2d 643, 653-654, 7 Cal. Rptr. 617, 355 P.2d 265 , overruled on other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406*

Fair comment, or statements of opinion concerning public officials, as recognized privilege against claims of libel; content of press release by county administrator regarding reasons for firing of county official as privileged. *Young v. County of Marin (1987) 195 Cal. App. 3d 863, 872, 241 Cal. Rptr. 169*

Fair comment privilege as applicable, in absence of actual malice, to paid political advertisement directed toward voters interested in information. *Tschirky v. Superior Court (1981) 124 Cal. App. 3d 534, 538, 177 Cal. Rptr. 357*

Crucial issue regarding fair comment privilege as whether or not publication made in public interest. *Williams v. Daily Review, Inc. (1965) 236 Cal. App. 2d 405, 417, 46 Cal. Rptr. 135 , overruled on other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406*

[h] Legal Inference of Malice Prohibited

Malice as not inferred in case involving qualified privilege. *Emde v. San Joaquin County Cent. Labor Council (1943) 23 Cal. 2d 146, 161, 143 P.2d 20*

Where complaint discloses qualified privilege, no malice presumed and complaint as required to allege malice in fact. *Locke v. Mitchell (1936) 7 Cal. 2d 599, 602, 61 P.2d 922*

[i] Factual Inference Permitted

Factual inference of malice as permissible if defendant does not have reasonable or probable cause to believe statement true. *Stationers Corp. v. Dun & Bradstreet, Inc. (1965) 62 Cal. 2d 412, 418, 42 Cal. Rptr. 449, 398 P.2d 785* ; *MacLeod v. Tribune Publishing Co. (1959) 52 Cal. 2d 536, 552* P.2d36; *Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791, 797-800, 197 P.2d 713*

[j] Governmental Immunity

Conduct of governmental officials in publicizing results of investigation of plaintiffs as immune from liability; therefore, state as also exempt from liability pursuant to *Gov. Code § 815.2*. *Citizens Capital Corp. v. Spohn (1982) 133 Cal. App. 3d 887, 888-889 , superseded by statute as stated in Clarke v. Upton 2008 U.S. Dist. LEXIS 38206* (Under *Cal. Gov't Code § 820.21*, social workers and other child protection workers have no civil immunity if they commit certain acts with malice).

[k] Malice as Jury Question

Question of defendant's state of mind as one of fact for jury. *Deaile v. General Tel. Co. of Cal. (1974) 40 Cal. App. 3d 841, 847, 115 Cal. Rptr. 582*

Question whether communication made with malice as jury question. *Kramer v. Ferguson (1964) 230 Cal. App. 2d 237, 245, 41 Cal. Rptr. 61*

[l] Not Dependent on Truth

Qualified privilege as not dependent on truth of defamatory charge. *Snively v. Record Publ'g Co. (1921) 185 Cal. 565, 574, 198 P. 1 , overruled on other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406*

[m] Not Limited to Defamation Actions

Former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] as applicable to action for abuse of process, interference with economic advantage, and variety of other theories, with exception of malicious prosecution. *Financial Corp. of Am. v. Wilburn (1987) 189 Cal. App. 3d 764, 771, 234 Cal. Rptr. 653*

Privileges afforded by *Civ. Code § 47* as not limited to actions for defamation. *Deaile v. General Tel. Co. of Cal. (1974) 40 Cal. App. 3d 841, 849, 115 Cal. Rptr. 582*

[n] Pleading and Proving

[i] Plaintiff

Plaintiff as required to allege and prove presence of malice if complaint alleges facts which show that statement was prima facie entitled to qualified privilege. *Gantry Constr. Co. v. American Pipe & Constr. Co. (1975) 49 Cal. App. 3d 186, 198, 122 Cal. Rptr. 834*

Pleadings as required to contain affirmative allegations of malice to defeat qualified privilege. *Locke v. Mitchell (1936) 7 Cal. 2d 599, 602, 61 P.2d 922* ; *White v. California (1971) 17 Cal. App. 3d 621, 629, 95 Cal. Rptr. 175* ; *Smith v. Hatch (1969) 271 Cal. App. 2d 39, 47, 76 Cal. Rptr. 350*

[ii] Pleadings Held Sufficient

Pleading that defendants published article without an honest belief in its truth or without reasonable grounds for believing it to be true as adequately alleging actual malice to raise issue of qualified privilege. *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 551-552, 343 P.2d 36* ; *Noonan v. Rousselot (1966) 239 Cal. App. 2d 447, 453, 48 Cal. Rptr. 817*

Pleading that defendants published article with knowledge of its falsity as adequately alleging actual malice to raise issue of qualified privilege. *Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 831, 136 P.2d 297* ; *Boyich v. Howell (1963) 221 Cal. App. 2d 801, 803, 34 Cal. Rptr. 794*

[iii] Pleadings Held Insufficient

Pleading only that statement "maliciously published" as insufficient allegation of actual malice where complaint discloses existence of qualified privilege. *Locke v. Mitchell (1936) 7 Cal. 2d 599, 603, 61 P.2d 922* ; *Boyich v. Howell (1963) 221 Cal. App. 2d 801, 803, 34 Cal. Rptr. 794*

[iv] Purpose of Specificity Requirement

Purpose of pleading malice specifically as making it impossible for plaintiff to force case to trial with naked allegation that defendant acted "maliciously." *Noonan v. Rousselot (1966) 239 Cal. App. 2d 447, 453, 48 Cal. Rptr. 817* ,

disapproved n other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406

[v] Specificity Required

Pleadings as required to set forth specific facts indicating existence of personal malice. *Maidman v. Jewish Publ'ns, Inc. (1960) 54 Cal. 2d 643, 653, 7 Cal. Rptr. 617, 355 P.2d 265* ; *Locke v. Mitchell (1936) 7 Cal. 2d 599, 603-604, 61 P.2d 922 , overruled on other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406* ; *Noonan v. Rousselot (1966) 239 Cal. App. 2d 447, 453, 48 Cal. Rptr. 817 , disapproved on other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406*

General allegation of malice as not sufficient unless article lends support to such a conclusion. *Maidman v. Jewish Publ'ns, Inc. (1960) 54 Cal. 2d 643, 653, 7 Cal. Rptr. 617, 355 P.2d 265*

[o] Presumption of Innocence Created

Qualified privilege as creating presumption that communication made innocently and without malice. *Smith v. Hatch (1969) 271 Cal App2d 39, 47, 76 Cal. Rptr. 350* ; *Lesperance v. North Am. Aviation, Inc. (1963) 217 Cal. App. 2d 336, 341, 31 Cal. Rptr. 873*

[p] Privilege as Question of Law if Facts Undisputed

If issue of mutual interest appears without conflict, defendant in action for defamation as entitled to instruction that statement was qualifiedly privileged as matter of law. *Gantry Constr. Co. v. American Pipe & Constr. Co. (1975) 49 Cal. App. 3d 186, 197, 122 Cal. Rptr. 834*

If facts and circumstances under which a defamatory publication are not disputed, question of privilege as one of law. *Kramer v. Ferguson (1964) 230 Cal. App. 2d 237, 245, 41 Cal. Rptr. 61*

[q] Privilege Greater When Reasonable

Qualified privilege as even greater when reasonably calculated to protect or further interest protected by privilege. *Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791, 797, 197 P.2d 713* ; *Emde v. San Joaquin County Cent. Labor Council (1943) 23 Cal. 2d 146, 154, 143 P.2d 20*

[r] Qualified Privilege

Triable issues existed as to whether common-interest privilege protected communications suggesting that financial problems of company supplying temporary employees was reason for reassignment of employees; issues regarding malice and good-faith belief in truth of statements made by employee of client company could not be resolved on summary judgment. *SDV/ACCI, Inc. v. AT&T Corp. (9th Cir. 2008) 522 F.3d 955, 962-964*

Despite qualified privilege of former *Civ. Code § 47(3)* [*now see Civ. Code § 47(c)*] for good faith statements made in connection with employment, employee's defamation claim against employer as raising genuine issues of fact, sufficient to defeat employer's summary judgment motion, as to whether employer acted maliciously and with knowledge of, or reckless indifference to, falsity of charges contained in employer's letter suspending employee from employment and as to whether employer sent suspension letter only to people with legitimate interests in plaintiff's suspension. *Tellez v.*

Pacific Gas & Elec. Co., Inc. (9th Cir. 1987) 817 F.2d 536, 539

Persons required by law to communicate with others but who nonetheless maintain control over contents of communications as sufficiently protected by qualified privilege within provisions of former *Civ. Code § 47(3)* [*now see Civ. Code § 47(c)*]. *Slaughter v. Friedman (1982) 32 Cal. 3d 149, 156-159, 185 Cal. Rptr. 244, 649 P.2d 886*

Defense of privilege under former *Civ. Code § 47(3)* [*now see Civ. Code § 47(c)*] as qualified since defeated by proof that utterance actuated by malice. *Slaughter v. Friedman (1982) 32 Cal. 3d 149, 156-157, 185 Cal. Rptr. 244, 649 P.2d 886* ; *Cunningham v. Simpson (1969) 1 Cal. 3d 301, 307-308, 81 Cal. Rptr. 855, 461 P.2d 39*

Conditional privilege conveyed by former *Civ. Code § 47(3)* [*now see Civ. Code § 47(c)*]. *Cunningham v. Simpson (1959) 1 Cal. 3d 301, 308, 81 Cal. Rptr. 855, 461 P.2d 39*

Complaints made by employees to employers about workplace harassment as subject to qualified privilege under *Civ. Code § 47(c)*. *Bierbower v. FHP, Inc. (1999) 70 Cal. App. 4th 1, 3, 82 Cal. Rptr. 2d 393* ; *Cruey v. Gannett Co. (1998) 64 Cal. App. 4th 356, 369, 76 Cal. Rptr. 2d 670*

Inaccurate statements regarding employment applicant's failure to take required hypertension medication, used as basis for rejecting applicant, as protected by qualified privilege under *Civ. Code § 47(c)* because contained in report from medical personnel to employer. *Felton v. Schaeffer (1991) 229 Cal. App. 3d 229, 238 n.7, 279 Cal. Rptr. 713*

In action alleging defamation in connection with wrongful termination, plaintiff as required to specifically allege malice to defeat application of privilege under former *Civ. Code § 47(3)* [*now see Civ. Code § 47(c)*]. *Robomatic, Inc. v. Vetco Offshore (1990) 225 Cal. App. 3d 270, 275, 275 Cal. Rptr. 70*

Publication or broadcast by member of news media to general public regarding private person as not privileged under former *Civ. Code § 47(3)* [*now see Civ. Code § 47(c)*], whether or not communication pertains to matter of public interest; therefore, private person as not required to prove malice to recover compensatory damages. *Carney v. Santa Cruz Women Against Rape (1990) 221 Cal. App. 3d 1009, 1015-1016, 271 Cal. Rptr. 30*

Civ. Code § 43.8 (qualified immunity of person for communication to any hospital, hospital staff, or peer review committee, among others, of information evaluating practitioner of, among others, healing arts) as affording qualified privilege to any communication of information intended to aid in evaluating physician's qualifications, character, and fitness to institutions such as hospitals and peer review committees who have strong interest in receiving such information. *Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 943-944, 242 Cal. Rptr. 259*

Reply letter written by administrator of hospital to inquiry by second hospital, to which physician had applied for staff privileges, concerning report of restrictions placed on physician's staff privileges while at first hospital, as protected by qualified privileges of *Civ. Code § 43.8* and former § 47(3) [*now see Civ. Code § 47(c)*]. *Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 943-944, 242 Cal. Rptr. 259*

Once qualified privilege is shown to be applicable, burden as on plaintiff to produce evidence of malice. *Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 944, 242 Cal. Rptr. 259*

Qualified privilege of former *Civ. Code § 47(3)* [*now see Civ. Code § 47(c)*] as existing if communicator and recipient have common interest and communication is reasonably calculated to further that interest. *Cuenca v. Safeway San Francisco Employees Fed. Credit Union (1986) 180 Cal. App. 3d 985, 994-995, 225 Cal. Rptr. 852* (communication made by supervisory committee of credit union regarding conduct of employee as involving requisite common interest); *Kelly v. General Tel. Co. (1982) 136 Cal. App. 3d 278, 285, 186 Cal. Rptr. 184* (communication among company's employees designed to insure honest and accurate records as involving requisite common interest)

[s] Specific Communications Covered

Qualified privilege as applicable to newspaper which comments on qualification of candidate for position on local city council. *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 28, 81 Cal. Rptr. 360, 459 P.2d 912*

Qualified privilege as applicable to reports of mercantile agencies. *Stationers Corp. v. Dun & Bradstreet, Inc. (1965) 62 Cal. 2d 412, 418, 42 Cal. Rptr. 449, 398 P.2d 785* ; *Tendler v. Dun & Bradstreet, Inc. (1974) 43 Cal. App. 3d 788, 791, 118 Cal. Rptr. 274*

Qualified privilege as applicable to communication among church members relating to communication concerning church-related subjects. *Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791, 796, 197 P.2d 713*

Qualified privilege as applicable to labor dispute. *Emde v. San Joaquin County Cent. Labor Council (1943) 23 Cal. 2d 146, 154, 143 P.2d 20*

Qualified privilege as applicable to either employer or employee who publishes facts of dispute between them. *Washer v. Bank of Am. Nat'l Trust & Sav. Ass'n (1943) 21 Cal. 2d 822, 832-833, 136 P.2d 297*

Qualified privilege as applicable to communications in newspapers in same way as to communications by any person. *Snively v. Record Publ'g Co. (1921) 185 Cal. 565, 571, 198 P. 1 , overruled on other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406*

Qualified privilege as applicable to newspaper publisher who comments on fact that he honestly believes public officer has committed crime indicating unfitness for office held. *Snively v. Record Publ'g Co. (1921) 185 Cal. 565, 576, 198 P. 1 , overruled on other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406*

Qualified privilege of *Civ. Code § 47(c)* protected statements made during discussions at church about perceived inappropriate relationship between adult church youth group leaders and church youth. *Terry v. Davis Cmty. Church (2005) 131 Cal. App. 4th 1534, 1556-1557, 33 Cal. Rptr. 3d 145*

Complaints made by employees to employers about workplace harassment as subject to qualified privilege under *Civ. Code § 47(c)*. *Bierbower v. FHP, Inc. (1999) 70 Cal. App. 4th 1, 3, 82 Cal. Rptr. 2d 393* ; *Cruey v. Gannett Co. (1998) 64 Cal. App. 4th 356, 369, 76 Cal. Rptr. 2d 670*

Memo written by supervisory employee to employer's personnel department documenting another employee's allegations of sexual harassment by co-worker did not supporting defamation action, despite discrepancy in memo about date of allegations that could have suggested possible fabrication of allegations, because malice sufficient to defeat qualified privilege of *Civ. Code § 47(c)* was not found. *Bierbower v. FHP, Inc. (1999) 70 Cal. App. 4th 1, 6-9, 82 Cal. Rptr. 2d 393*

Former *Civ. Code § 47(3)* [*now see Civ. Code § 47(c)*] as applying to statements made in context of business-customer relationship; hence, statements by employer concerning former employee made to insurance adjusters who referred business to, and dealt on continuing basis with, employer, as within privilege, because it was important for employer to bring fact to attention of those who directed business to employer's operation. *Williams v. Taylor (1982) 129 Cal. App. 3d 745, 751-752, 181 Cal. Rptr. 423*

Union member's allegedly slanderous statements at union meeting concerning union officers as not actionable unless made with knowledge of falsity or in reckless disregard of possible falsity, in light of free speech policy of

Labor-Management Reporting and Disclosure Act of 1959 [*29 U.S.C. § 411(a)(2)*]. *Warren v. Herndon (1981) 115 Cal. App. 3d 141, 146-147, 171 Cal. Rptr. 220*

Qualified privilege for communications to interested persons applicable to letter critical of sports psychological test sent to professional athletic organizations and sports magazines. *Institute of Athletic Motivation v. University of Ill. (1980) 114 Cal. App. 3d 1, 7-14, 170 Cal. Rptr. 411*

Matters concerning an employment situation. *Deaile v. General Tel. Co. of Cal. (1974) 40 Cal. App. 3d 841, 845-847, 115 Cal. Rptr. 582*

Qualified privilege as applicable to statement of magazine publishing corporation to advertising agency which employed account executive. *Warfield v. McGraw-Hill, Inc. (1973) 32 Cal. App. 3d 1041, 1047, 108 Cal. Rptr. 652*

Qualified privilege as applicable to dissemination of information by Bureau of Criminal Identification of California Department of Justice at authorized recipient's request. *White v. California (1971) 17 Cal. App. 3d 621, 628, 95 Cal. Rptr. 175*

Qualified privilege, not absolute privilege, as applicable to statement regarding recall proceedings. *Kramer v. Ferguson (1964) 230 Cal. App. 2d 237, 242-244, 41 Cal. Rptr. 61*

Qualified privilege as extending to response by former employer to inguiry from potential employer concerning individual's fitness for employment. *Lesperance v. North Am. Aviation, Inc. (1963) 217 Cal. App. 2d 336, 341, 31 Cal. Rptr. 873*

Qualified privilege as applicable to communications concerning matters of public interest. *Everett v. California Teachers Ass'n (1962) 208 Cal. App. 2d 291, 294, 25 Cal. Rptr. 120*

Qualified privilege as applicable to report by committee or association of certificated public school employees which has investigated conduct of one of its members. *Everett v. California Teachers Ass'n (1962) 208 Cal. App. 2d 291, 294, 25 Cal. Rptr. 120*

Qualified privilege as applicable to intra-union dispute. *Demott v. Amalgamated Meat Cutters (1958) 157 Cal. App. 2d 13, 27, 320 P.2d 50* ; *Krause v. Bertrand (1958) 159 Cal. App. 2d 318, 320-321, 323 P.2d 784*

Qualified privilege as applicable to letter addressed to superintendent of mental hospital where plaintiff's brother was a patient. *Campbell v. Jewish Comm. for Pers. Serv. (1954) 125 Cal. App. 2d 771, 775, 271 P.2d 185*

[t] Specific Evidence of Malice

[i] Exaggeration

Exaggerating, overdrawing, or coloring to detriment of plaintiff as tending to prove actual malice. *Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791, 799, 197 P.2d 713* ; *Snively v. Record Publ'g Co. (1921) 185 Cal. 565, 578, 198 P. 1 , overruled on other grounds,* *Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406*

[ii] Ill Will

Previous guarrel, rivalry, or ill feeling as evidence of actual malice. *Scott v. Times-Mirror Co. (1919) 181 Cal. 345,*

362, 184 P. 672

Fact that ill will of defendant goes "beyond that which the occasion apparently justifies" as of strong evidentiary value in determining issue of malice. *Biggins v. Hanson (1967) 252 Cal. App. 2d 16, 21, 59 Cal. Rptr. 897*

Ill will as not sufficient evidence of actual malice where defendant's primary motive is advancement of interest which qualified privilege protects. *Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791, 797, 197 P.2d 713* ; *Biggins v. Hanson (1967) 252 Cal. App. 2d 16, 20, 59 Cal. Rptr. 897*

[iii] Lying

Lying as sufficient evidence of actual malice. *Di Giorgio Fruit Corp. v. AFL-CIO (1963) 215 Cal. App. 2d 560, 574, 30 Cal. Rptr. 350*

[iv] Recklessness

Wanton and reckless disregard of consequences and of rights and feelings of others as evidence of malice. *Davis v. Hearst (1911) 160 Cal. 143, 167, 116 P. 530* ; *Roemer v. Retail Credit Co. (1970) 3 Cal. App. 3d 368, 371, 83 Cal. Rptr. 540*

Mere inadvertence or forgetfulness or careless blundering as not evidence of actual malice. *Davis v. Hearst (1911) 160 Cal. 143, 167, 116 P. 530* ; *Roemer v. Retail Credit Co. (1970) 3 Cal. App. 3d 368, 371, 83 Cal. Rptr. 540*

[v] Tenor of Statement

Tenor of statement as evidence of malice. *Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791, 799, 197 P.2d 713* ; *Moranville v. Aletto (1957) 153 Cal. App. 2d 667, 672, 315 P.2d 91*

[u] Statutory Definition of Malice

Malice as defined by *Civ. Code § 48a(4)(d)* as meaning actual or express malice and thus as distinguished from fictional form of malice. *Snively v. Record Publ'g Co. (1921) 185 Cal. 565, 576, 198 P. 1 , overruled on other grounds, Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406*

[v] When Privilege Is Lost

Qualified privilege as lost if occasion giving rise to privilege is abused. *Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791, 797, 197 P.2d 713* ; *Emde v. San Joaquin County Cent. Labor Council (1948) 23 Cal. 2d 146, 154-155, 143 P.2d 20*

Qualified privilege as lost if publication motivated by hatred or ill will or by any cause other than desire to protect interest which privileged designed to protect. *Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791, 797, 197 P.2d 713*

Qualified privilege as lost if defendant has knowledge of its falsity. *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 552, 343 P.2d 36* ; *Roemer v. Retail Credit Co. (1970) 3 Cal. App. 3d 368, 371, 83 Cal. Rptr. 540*

Claims of good faith and innocent motives as not excusing publication of known false and defamatory statements. *Patton v. Royal Indus., Inc. (1968) 263 Cal. App. 2d 760, 766, 70 Cal. Rptr. 44* ; *Russell v. Geis (1967) 251 Cal. App. 2d 560, 566, 59 Cal. Rptr. 569*

[19] No Defamatory Meaning Conveyed as Defense

Defendant as capable of showing that words not understood at all, taken in jest, or some meaning other than the obvious one was conveyed to all who heard or read them. *Arno v. Stewart (1966) 245 Cal. App. 2d 955, 962-963, 54 Cal. Rptr. 392*

Jocular intent of publisher as not relieving him from liability if it is reasonable to not understand utterance as joke. *Ervin v. Record Publ'g Co. (1908) 97 P. 21* ; *Arno v. Stewart (1966) 245 Cal. App. 2d 955, 964, 54 Cal. Rptr. 392*

[20] Opinion as Defense

Bar Association's opinion of candidate for judicial office as not defamatory; opinions as protected by *U.S. Const. amend. I*, public as well served by public comment by bar association, and bar association as having vested interest in aiding public in election of judges. *Botos v. Los Angeles County Bar Assn. (1984) 151 Cal. App. 3d 1083, 1088-1090, 199 Cal. Rptr. 236*

[21] Special Damages Not Alleged

Special damages as required to be alleged with particularity. *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 791-792, 228 P.2d 6* ; *Smith v. Los Angeles Bookbinders Union (1955) 133 Cal. App. 2d 486, 494, 284 P.2d 194 , overruled on other grounds, MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36*

Purpose of pleading special damages with particularity as protecting defendant from surprise. *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 792, 228 P.2d 6*

General allegation of loss of prospective employment, sale, or profit as not sufficient allegation of special damages. *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 792, 228 P.2d 6* (dictum); *Smith v. Los Angeles Bookbinders Union (1955) 133 Cal. App. 2d 486, 494-495, 284 P.2d 194* (general allegation of injury to business of $100,000 as not sufficient), *overruled on other grounds, MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 343 P.2d 36*

Allegation of special damages as sufficiently specific where loss of employment with specific employer, for specific period, and in specific amount alleged. *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 792, 228 P.2d 6*

[22] Statute of Limitations

Statute of limitations as one year for libel and slander actions. *Hopper v. Allen (1968) 266 Cal. App. 2d 797, 801-803, 72 Cal. Rptr. 435* ; *Rutherford v. Johnson (1967) 250 Cal. App. 2d 316, 318, 58 Cal. Rptr. 546*

Libel as occurring on publication and statute of limitations as beginning to run at that time. *Campbell v. Jewish Comm. for Pers. Serv. (1954) 125 Cal. App. 2d 771, 774, 271 P.2d 185*

[23] Statutory Protection Afforded Newspapers and Broadcasters

[a] Adequacy of Demand for Retraction

Plaintiff's demand for retraction of "certain statements" as not sufficient under *Civ. Code § 48a*. *Anderson v. Hearst Publ'g Co. (S.D. Cal. 1954) 120 F. Supp. 850, 852*

Purpose of specificity requirement as being to facilitate publisher's investigative efforts in determining whether statements were erroneous. *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 30, 81 Cal. Rptr. 360, 459 P.2d 912*

Test for adequacy of demand for retraction as whether publisher should reasonably have comprehended which statements plaintiff protested and wished corrected. *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 31-32, 81 Cal. Rptr. 360, 459 P.2d 912* ; *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 554, 343 P.2d 36*

Demand for retraction that referred to certain statements as insufficient under *Civ. Code § 48a* to give publisher notice that photograph and its caption were also included in request for retraction. *Gomes v. Fried (1982) 136 Cal. App. 3d 924, 938, 186 Cal. Rptr. 605*

[b] All Participants Covered by Retraction Statute

Coverage of retraction statute as extending to all participants in publication or broadcast. *Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 114, 77 Cal. Rptr. 243, 453 P.2d 747* ; *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 791, 228 P.2d 6*

[c] Constitutionality of Retraction Statute

Retraction statute as not violative of either *California or United States Constitutions. Werner v. Southern Cal. Associated Newspapers (1950) 35 Cal. 2d 121, 124-137, 216 P.2d 825*

[d] Effect of Demand for Retraction

Publisher as not able to refuse demand for retraction on basis of some general objections where other objections are specific. *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 33, 81 Cal. Rptr. 360, 459 P.2d 912*

[e] Magazines Not Protected by Retraction Statute

Retraction statute as not covering magazines. *Alioto v. Cowles Communications, Inc. (9th Cir. 1975) 519 F.2d 777, 778-789* ; *Montandon v. Triangle Publ'ns, Inc. (1975) 45 Cal. App. 3d 938, 949-953, 120 Cal. Rptr. 186* ; *see Burnett v. National Enquirer, Inc. (1983) 144 Cal. App. 3d 991, 1000-1001, 193 Cal. Rptr 206*

[f] Nonparticipants Not Covered by Retraction Statute

[i] In General

Coverage of retraction statute as not extending to non-participants in publishing or broadcasting enterprise. *Field Research Corp. v. Superior Court of San Francisco (1969) 71 Cal. 2d 110, 113-114, 77 Cal. Rptr. 243, 453 P.2d 747* ; *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 791, 228 P.2d 6*

Limitation of retraction statute to persons engaged in immediate dissemination of news as justified by damages, inability to check sources, and possibility of effective retraction. *Field Research Corp. v. Superior Court (1969) 71*

Cal. 2d 110, 114, 77 Cal. Rptr. 243, 453 P.2d 747 ; *Werner v. Southern Cal. Associated Newspapers (1950) 35 Cal. 2d 121, 125-134, 216 P.2d 825*

Weekly publication as not protected by *Civ. Code § 48a* because publication's content was based on "how to," celebrity, medical, or personal improvement stories and gossip items, rather than politics, sports, crime, or wire service items and because lead time for stories was one to three weeks. *Burnett v. National Enquirer, Inc. (1983) 144 Cal. App. 3d 991, 1000, 193 Cal. Rptr. 206*

[ii] Intruder on Television Program

Intruder on television program as not afforded privilege of retraction statute. *White v. Valenta (1965) 234 Cal. App. 2d 243, 249-250, 44 Cal. Rptr. 241*

[iii] Ordinary Slanderer

Ordinary slanderer as not afforded protection of retraction statute merely because his or her remarks subsequently find their way into a newspaper later. *Mercado v. Hoefler (1961) 190 Cal. App. 2d 12, 18-19, 11 Cal. Rptr. 787*

[g] Purpose of Retraction Statute

Purpose of retraction statute as to encourage free and rapid dissemination of news. *Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 114, 77 Cal. Rptr. 243, 453 P.2d 747* ; *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 228 P.2d 6*

Purpose of retraction statute as not to allow person questioned concerning his or her own conduct to give false information with impunity. *Dietrich v. Litton Indus., Inc. (1970) 12 Cal. App. 3d 704, 712, 90 Cal. Rptr. 856*

[h] Republications Protected by Retraction Statute

Retraction staute as covering republication of article where author does not authorize, consent to, or intentionally participate in republication of the article. *Di Giorgio Corp. v. Valley Labor Citizen (1968) 260 Cal. App. 2d 268, 274, 67 Cal. Rptr. 82*

Republication in another newspaper as never subjecting original newspaperman to punitive damages. *Di Giorgio Corp. v. Valley Labor Citizen (1968) 260 Cal. App. 2d 268, 275-276, 67 Cal. Rptr. 82*

[i] Service on Publisher or Broadcaster

Service requirements of retraction statute as met in libel action when notice and demand are served on publisher, on publisher's designee, or on employee other than designee if publisher acquires actual knowledge of notice and demand within statutory 20-day period. *Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652, 658, 14 Cal. Rptr. 2d 839, 842 P.2d 138* (overruling *Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 113-114, 77 Cal. Rptr. 243, 453 P.2d 747* , and *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 791, 228 P.2d 6* , to extent inconsistent with opinion)

Service of demand on author of article as not necessary if demand already served on publisher. *Larrick v. Gilloon (1959) 176 Cal. App. 2d 408, 420,421, 1 Cal. Rptr. 360 , overruled on other grounds, Field Research Corp. v.*

Superior Court (1969) 71 Cal. 2d 110, 114 n.4, 77 Cal. Rptr. 243, 453 P.2d 747

[j] Sufficiency of Retraction

Issue of whether newspaper's retraction of allegedly libelous statement was as conspicuous as allegedly libelous article as question of fact for jury. *Pierce v. San Jose Mercury News (1989) 214 Cal. App. 3d 1626, 1631-1633, 263 Cal. Rptr. 410* ; *Twin Coast Newspapers, Inc. v. Superior Court (1989) 208 Cal. App. 3d 656, 660-662, 256 Cal. Rptr. 310* (undisputed facts may, however, compel conclusion that retraction was adequate as matter of law)

Retraction as insufficient when headline to gossip column failed to mention retraction and retraction was eighth item in ten item column, whereas libelous statements had been fourth item in earlier column, and retraction was substantially shorter and occupied less column space than original item. *Burnett v. National Enquirer, Inc. (1983) 144 Cal. App. 3d 991, 1011 n.8, 193 Cal. Rptr. 206*

[24] Summary Judgment Procedure as Favored Defense

Summary judgment procedure as particularly appropriate for speedy resolution of defamation actions involving *First Amendment* interests; motion for summary judgment by defendant in such action as requiring trial court to determine whether there is sufficient showing of malice to warrant submission of that issue to jury. *Good Government Group, Inc. v. Superior Court of Los Angeles County (1978) 22 Cal. 3d 672, 685, 150 Cal. Rptr. 258, 586 P.2d 572* ; *Osmond v. EWAP Inc. (1984) 153 Cal. App. 3d 842, 854-855, 200 Cal. Rptr. 674*

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For related research and practice materials, see the following legal topics:
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§ 340.144 Law Reviews

[1] First Amendment

Comment, *First Amendment Crossroads--Extending Constitutional Defamation Protection to Commercial Speech: A Critique of U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia and Some Suggestions, 39 UCLA L. Rev. 633 (1992)*

Note, *Protection of Reputation Versus Freedom of Expression: Striking a Manageable Compromise in the Tort of Defamation, 63 S. Cal. L. Rev. 433 (1990)*

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Comment, *"Actual Malice" and the Standard of Proof in Defamation Cases in California: A Proposal for a Single Constitutional Standard, 16 Sw. U.L. Rev. 577 (1986)*

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Note, *Libel and Slander--Illegal Dissemination of Confidential Material Not Properly Alleged--Absolute Privilege for Government Officials Sustains Demurrer Without Leave to Amend-- Kilgore v. Younger, 30 Cal. 3d 770, 180 Cal. Rptr. 657, 640 P.2d 793 (1982) , 23 Santa Clara L. Rev. 319 (1983)*

Note, *Herbert v. Lando: State of Mind Discovery and the New York Times v. Sullivan Libel Balance, 66 Cal. L. Rev. 1127 (1978)*

Brosnahan, *From Times v. Sullivan to Gertz v. Welch: Ten Years of Balancing Libel Law and The First Amendment, 26* Hastings L.J. 777 (1975)

Note, *First Amendment Protection Against Libel Actions: Distinguishing Media and Non-Media Defendants, 47 S. Cal. L. Rev. 902 (1974)*]

Cohen, *A New Niche for the Fault Principle: A Forthcoming Newsworthiness Privilege in Libel Cases? 18 UCLA L. Rev. 371 (1970)*

Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy, 56 Cal. L. Rev. 935 (1968)*

[2] Privileges

Comment, *California Civil Code Section 47(3): Should There Be a Public Interest Privilege in California? 20 Loy. L.A. L. Rev. 1559 (1987)*

Note, *When Truth and Accuracy Diverge: The Fair Report of a Dated Proceeding, 34 Stan. L. Rev. 1041 (1982)*

Comment, *Absolute Privilege in California: The Scope of Cal. Civil Code Section 47(2) , 7 U.S.F. L. Rev. 176 (1972)*

Note, *Fair Comment--A California Privilege,* (1961) *1 Santa Clara Law. 32*

Comment, *Absolute Tort Immunity for Legislative Correspondence?* (1959) *11 Stan. L. Rev. 194*

[3] Retraction Statute

Schwarzbach, *Shouldn't California's Retraction Statute Protect Magazines Too? 18 Sw. U.L. Rev. 197 (1989)*

Comment, *Conflict of Laws --Public Policy-- Full Faith and Credit --Interstate Libel-- Retraction Statute, 7 Stan. L. Rev. 275 (1955)*

Note, *Conflict of Laws --Torts-- Multi-State Defamation--Noncompliance With Retraction statute of Forum a Complete Bar, 28 S. Cal. L. Rev. 179 (1955)*

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§ 340.145 Text References

N. Levy, M. Golden & L. Sacks, California Torts, Ch. 45 (Matthew Bender)

Personal Injury: Actions, Defenses, Damages, Vol. 11, *Defamation (Libel & Slander)*, §§ 4, 6 (Matthew Bender)

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§ 340.160 State Statutes

Publications conditionally privileged when made without malice. *Civ. Code § 47(c)*

Malice not inferred from fact of communication. *Civ. Code § 48*

Right to recover exemplary and punitive damages. *Civ. Code § 3294*

Right to recover compensatory damages; measure of damages. *Civ. Code § 3333*

Grounds for cancellation of instruments. *Civ. Code § 3412*

Statute of limitations for slander of title actions is three years. *Code Civ. Proc. § 338(g)*

Quiet title actions to real or personal property. Civ. Code Proc. §§ 760.010-764.080

Damages for slandering title by recording notice to preserve interest for purpose of slandering title is recoverable in quiet title action. *Civ. Code § 880.360*

Criminal liability for filing false or forged documents affecting title to certain residential realty with county recorder. *Penal Code § 115.5*

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§ 340.161 Decisions

[1] Damages

[a] Causal Connection Required

Plaintiff is required to show damages sustained as direct and natural result of disparaging remark. *Burkett v. Griffith (1891) 90 Cal. 532, 537, 27 P. 527* , *disapproved on other grounds, Gudger v. Manton (1943) 21 Cal. 2d 537, 544, 134 P.2d 217*

[b] Elements of Damages

[i] In General

Expense of legal proceedings necessary to remove doubt cast by disparagement, financial loss resulting from impairment of vendability of property, and general damages for time and inconvenience suffered by plaintiff in removing doubt cast on property as recoverable in action for wrongful disparagement of title; damages for emotional distress or for loss of advantageous use of unrealized sale proceeds as not recoverable. *Seeley v. Seymour (1987) 190 Cal. App. 3d 844, 864, 237 Cal. Rptr. 282*

Loss resulting from impairment of vendibility and expense of litigation to clear title as elements of damages in slander of title action. *Frank Pisano & Assocs. v. Taggart (1972) 29 Cal. App. 3d 1, 25, 105 Cal. Rptr. 414* ; *Davis v. Wood (1943) 61 Cal. App. 2d 788, 798, 143 P.2d 740*

[ii] Inconvenience and Time to Remove Cloud

Awarding of damages for inconvenience and time to remove cloud on title as proper elements of damages in slander of title action. *Forte v. Nolfi (1972) 25 Cal. App. 3d 656, 686, 102 Cal. Rptr. 455* ; *Wright v. Rogers (1959) 172 Cal.*

App. 2d 349, 366-367, 342 P.2d 447

Judge as capable of using his or her general knowledge to award damages for plaintiff's loss of time and inconvenience in clearing cloud on title. *Forte v. Nolfi (1972) 25 Cal. App. 3d 656, 686, 102 Cal. Rptr. 455* ; *Wright v. Rogers (1959) 172 Cal. App. 2d 349, 367, 342 P.2d 447*

[iii] Increased Cost to Make Improvements

When disparagement of title delayed plaintiff for two years in making improvements, proper damages as including increase in cost of making improvements. *Appel v. Burman (1984) 159 Cal. App. 3d 1209, 1215-1216, 206 Cal. Rptr. 259*

[c] Essential Element of Cause of Action

Pleading and proof of damages as essential to cause of action for slander of title. *Burkett v. Griffith (1891) 90 Cal. 532, 537, 27 P. 527 , disapproved on other grounds, Gudger v. Manton (1943) 21 Cal. 2d 537, 544, 134 P.2d 217*

[d] Excessive Damages

Award of $2.66 million dollars against prospective lessee for unethical business tactics that resulted in delaying property owner's lucrative land sale for several months as unjustifiably excessive. *Seeley v. Seymour (1987) 190 Cal. App. 3d 844, 868, 237 Cal. Rptr. 282*

Exemplary damages of $20,000 as excessive where general lack of evidence to sustain award. *Forte v. Nolfi (1972) 25 Cal. App. 3d 656, 688, 102 Cal. Rptr. 455*

[e] Loss of Sale to Particular Purchaser Unnecessary

Loss of sale to particular purchaser as unnecessary in order to prove damages; loss of market as proof of pecuniary loss as sufficient. *Glass v. Gulf Oil Corp. (1970) 12 Cal. App. 3d 412, 424, 96 Cal. Rptr. 902*

[f] Measure of Damages

Measure of damages as amount which will compensate plaintiff for all damage proximately caused by disparagement. *Gudger v. Manton (1943) 21 Cal. 2d 537, 557, 134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405*

[g] Punitive Damages Permitted

Punitive damages award from state-court jury of $10 million as upheld based on $19,000 compensatory damage award for common law slander of title claim. *TXO Prod. v. Alliance Res. (1993) 509 U.S. 443, 453-466, 113 S. Ct. 2711, 125 L. Ed. 2d 366*

Punitive damages as authorized by *Civ. Code § 3294* permitted in slander of title action. *Spencer v. Harmon Enters., Inc. (1965) 234 Cal. App. 2d 614, 626, 44 Cal. Rptr. 683*

Punitive damages award as proper in slander of title action to discourage oppression, fraud, or malice. *Wright v. Rogers (1959) 172 Cal. App. 2d 349, 367, 342 P.2d 447*

[2] Defenses

[a] Absence of Wrongful Conduct

Defendants as not liable in slander of title action where they did not act maliciously, acted under advice of counsel, and believed execution of deed proper. *Cavin Mem'l Corp. v. Requa (1970) 5 Cal. App. 3d 345, 361, 85 Cal. Rptr. 107*

[b] Failure to Allege Publication

Communication of disparaging remarks about title to real property as essential to slander of title action. *Southcott v. Pioneer Title Co. (1962) 203 Cal. App. 2d 673, 676-677, 21 Cal. Rptr. 917*

Allegations that a defendant "prepared" a document and that an escrow was "closed" as insufficient allegations of publication in slander of title action. *Southcott v. Pioneer Title Co. (1962) 203 Cal. App. 2d 673, 676, 21 Cal. Rptr. 917*

[c] Justification by Truth

Justification as defense to slander of title action. *Gudger v. Manton (1943) 21 Cal. 2d 537, 543, 134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405*

Truth as not disparaging. *Kirsch v. Barnes (N.D. Cal. 1957) 153 F. Supp. 260, 264 , aff'd, (9th Cir. Cal 1959) 263 F.2d 692*

[d] Privilege

[i] In General

Lack of privilege as essential to stating cause of action. *Gudger v. Manton (1943) 21 Cal. 2d 537, 544, 134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405*

Questions of privilege for actions involving disparagement of title and personal defamation as resolved in light of *Civ. Code § 47*. *Albertson v. Raboff (1956) 46 Cal. 2d 375, 378-379, 295 P.2d 405* ; *Hill v. Allan (1968) 259 Cal. App. 2d 470, 490, 66 Cal. Rptr. 676*

[ii] Burden of Proof

Burden of proving lack of privilege as being on plaintiff. *Hill v. Allan (1968) 259 Cal. App. 2d 470, 489, 66 Cal. Rptr. 676* ; *Spencer v. Harmon Enters., Inc. (1965) 234 Cal. App. 2d 614, 622, 44 Cal. Rptr. 683*

[e] Absolute Privilege

[i] In General

Absolute privilege as applicable to any publication either required or permitted by law in course of judicial proceeding to achieve objects of litigation. *Albertson v. Raboff (1956) 46 Cal. 2d 375, 380-381, 295 P.2d 405* ; *Frank Pisano & Assocs. v. Taggart (1972) 29 Cal. App. 3d 1, 24-25, 105 Cal. Rptr. 414*

[ii] Documents Absolutely Privileged

Absolute privilege for judicial proceedings as applicable to recordation of notice of lis pendens. *Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405*

Absolute privilege under *Civ. Code § 47(b)* as applicable to quasi-judicial as well as judicial proceedings, and as barring slander of title action based on cease and desist order issued by *California Coastal Commission. Ojavan Investors, Inc. v. California Coastal Comm'n (1994) 26 Cal. App. 4th 516, 528-529, 32 Cal. Rptr. 2d 103*

Publication of assessment lien by a condominium owners' association as absolutely privileged under *Civ. Code § 47(b)*, regardless of whether lien is enforced by judicial foreclosure or by private sale. *Wilton v. Mountain Wood Homeowners Assn., Inc. (1993) 18 Cal. App. 4th 565, 568-570, 22 Cal. Rptr. 2d 471*

Recording of lis pendens as absolutely privileged and thus as no basis for slander of title action. *Woodcourt II Ltd. v. McDonald Co. (1981) 119 Cal. App. 3d 245, 250-252, 173 Cal. Rptr. 836*

Absolute privilege for judicial proceedings as applicable to filing [of claim of mechanic's lien] in conjunction with judicial proceeding. *Frank Pisano & Assocs. v. Taggart (1972) 29 Cal. App. 3d 1, 25, 105 Cal. Rptr. 414*

[f] Conditional Privilege of Rival Claimant

[i] Absence of Malice Essential

Rival claimant of property as conditionally privileged to disparage another's interest in property provided action is honest and in good faith. *Gudger v. Manton (1943) 21 Cal. 2d 537, 545, 134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405* ; *Hill v. Allan (1968) 259 Cal. App. 2d 470, 490, 66 Cal. Rptr. 676*

Existence of actual malice as defeating assertion of qualified privilege. *Gudger v. Manton (1943) 21 Cal. 2d 537, 543, 134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405*

Conditional privilege of rival claimant as dependent on absence of actual malice. *Hill v. Allan (1968) 259 Cal. App. 2d 470, 490, 66 Cal. Rptr. 676*

[ii] Burden of Proof on Plaintiff

Burden of alleging and proving lack of privilege and existence of malice as on the plaintiff. *Gudger v. Manton (1943) 21 Cal. 2d 537, 543, 134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405*

[iii] Evidence of Actual Malice

Plaintiff as not required to prove actual malice where defendants have engaged in all-pervasive fraud. *Spencer v. Harmon Enters., Inc. (1965) 234 Cal. App. 2d 614, 625, 44 Cal. Rptr. 683*

[iv] Malice Not Inferred From Communication

Actual malice as not inferred from mere fact of communication. *Hill v. Allan (1968) 259 Cal. App. 2d 470, 490, 66 Cal. Rptr. 676*

[3] Definition of Slander of Title

[a] In General

Definition of slander of title. *Gudger v. Manton (1943) 21 Cal. 2d 537, 541, 134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405* ; *Frank Pisano & Assocs. v. Taggart (1972) 29 Cal. App. 3d 1, 24, 105 Cal. Rptr. 414*

[b] Complete Denial of Title Unnecessary

Complete denial of title as unnecessary to constitute disparagement of title. *Gudger v. Manton (1943) 21 Cal. 2d 537, 542-543, 134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405* ; *Phillips v. Glazer (1949) 94 Cal. App. 2d 673, 677, 211 P.2d 37*

Action for disparagement as not requiring that published matter create legal "cloud" on title of property. *Seeley v. Seymour (1987) 190 Cal. App. 3d 844, 857, 237 Cal. Rptr. 282*

Recordation of memorandum of agreement purporting to lease real property as capable of giving rise to action for slander of title even though memorandum did not create interest in property, constitute constructive notice, or have any other legal effect. *Seeley v. Seymour (1987) 190 Cal. App. 3d 844, 858-859, 237 Cal. Rptr. 282*

Matter reasonably understood to cast doubt on the existence or extent of another's interest in land as disparaging where so understood by recipient. *Hill v. Allan (1968) 259 Cal. App. 2d 470, 489, 66 Cal. Rptr. 676*

[c] Defamation Distinguished

Gravamen of action for disparagement of title as different from that of action for personal defamation. *Albertson v. Raboff (1956) 46 Cal. 2d 375, 379, 295 P.2d 405*

Action for disparagement of title as alleviating injury to real property. *Coley v. Hecker (1928) 206 Cal. 22, 27, 272 P. 1045*

[d] Interest Invaded

Slander of title as invasion of interest in vendibility of property. *Phillips v. Glazer (1949) 94 Cal. App. 2d 673, 677, 211 P.2d 37*

Slander of title as invasion of interest in immediate salability of property. *Smith v. Stuthman (1947) 79 Cal. App. 2d 708, 709, 181 P.2d 123*

[e] Written and Spoken Words Included

Term "slander of title" as including both spoken and written means by which property right is invaded. *Coley v. Hecker (1928) 206 Cal. 22, 27, 272 P. 1045*

Term "slander of title" as merely figure of speech in which title is personified. *Coley v. Hecker (1928) 206 Cal. 22, 27, 272 P. 1045*

[4] Description of Property

Description of property as well as allegation of title to the property as necessary to complaint in slander of title action. *Burkett v. Griffith (1891) 90 Cal. 532, 541, 27 P. 527 , disapproved on other grounds, Gudger v. Manton (1943) 21 Cal. 2d 537, 544, 134 P.2d 217*

Description of property in slander of title action as not requiring as much specificity as in action to quiet title. *Davis v. Wood (1943) 61 Cal. App. 2d 788, 793, 143 P.2d 740*

[5] Falsity

Falsity as essential element in cause of action for slander of title. *Gudger v. Manton (1943) 21 Cal. 2d 537, 541-542, 544, 134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405* ; *Burkett v. Griffith (1891) 90 Cal. 532, 537, 27 P. 527 , disapproved on other grounds, Gudger v. Manton (1943) 21 Cal. 2d 537, 544, 134 P.2d 217*)

[6] Liability of Principal

Principal as liable for acts of agent in action for slander of title when agent acts within scope of agent's authority; agent's knowledge as imputed to principal. *Gudger v. Manton (1943) 21 Cal. 2d 537, 549, 134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405*

[7] Malice

Actual malice as not necessary element of slander of title action. *Phillips v. Glazer (1949) 94 Cal. App. 2d 673, 677, 211 P.2d 37*

Accusation against seller made falsely and without foundation as implying malice in slander of title action. Contra *Costa County Title Co. v. Waloff (1960) 184 Cal. App. 2d 59, 66-67, 7 Cal. Rptr. 358*

[8] Punitive Damages

Punitive damages as proper in slander of title action involving malice, oppression, or fraud. *Spencer v. Harmon Enters., Inc. (1965) 234 Cal. App. 2d 614, 626, 44 Cal. Rptr. 683* (malice); *Wright v. Rogers (1959) 172 Cal. App. 2d 349, 367, 342 P.2d 447*

[9] Similarity to Malicious Prosecution

Close relationship as existing between action for slander of title and one for malicious prosecution of claim to real

property. *Albertson v. Raboff (1956) 46 Cal. 2d 375, 382-385, 295 P.2d 405* ; *Wick v. Mattison (1962) 207 Cal. App. 2d 608, 609, 24 Cal. Rptr. 677*

[10] Statute of Limitations

Statute of limitations for cause of action for slander of title as three years. *Howard v. Hudson (9th Cir. Cal 1958) 259 F.2d 29, 31-32*

[11] Survival of Action

Cause of action for slander of title as surviving death of its owner. *Smith v. Stuthman (1947) 79 Cal. App. 2d 708, 709, 181 P.2d 123*

[12] Types of Documents Found Disparaging

[a] Disparaging

Abstract of judgment as disparaging. *Coley v. Hecker (1928) 206 Cal. 22, 28-29, 272 P. 1045*

Assignment of royalties under mining lease as disparaging. *Ezmirlian v. Otto (1934) 139 Cal. App. 486, 493, 34 P.2d 774*

Executed deed as disparaging. *Fearon v. Fodera (1915) 169 Cal. 370, 380, 148 P. 200*

Forged deed of trust as disparaging. *Forte v. Nolfi (1972) 25 Cal. App. 3d 656, 688-692, 102 Cal. Rptr. 455*

Lien as disparaging. *Gudger v. Manton (1943) 21 Cal. 2d 537, 542-543, 134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405*

Master plan for residential development as disparaging. *Glass v. Gulf Oil Corp. (1970) 12 Cal. App. 3d 412, 424-425, 96 Cal. Rptr. 902*

Recording of notices of location of mining claims as disparaging. *Davis v. Wood (1943) 61 Cal. App. 2d 788, 793-799, 143 P.2d 740*

Sign as disparaging. *Phillips v. Glazer (1949) 94 Cal. App. 2d 673, 677-678, 211 P.2d 37*

[b] Not Disparaging

Certificate of acknowledgment as not disparaging. *Kirsch v. Barnes (N.D. Cal. 1957) 153 F. Supp. 260, 264 , aff'd, (9th Cir. 1959) 263 F.2d 692*

[13] Venue

Venue for slander of title action as place where real property is situated. *Coley v. Hecker (1928) 206 Cal. 22, 27-28, 272 P. 1045* ; *Wick v. Mattison (1962) 207 Cal. App. 2d 608, 609, 24 Cal. Rptr. 677*

[14] Trade Libel

[a] Definition

Scienter as not required under *Erlich v. Etner (1964) 224 Cal. App. 2d 69, 36 Cal. Rptr. 256* . *In re Kasler (9th Cir. 1979) 611 F.2d 308, 311, 312*

Definition of trade libel as intentional disparagement of quality of property resulting in pecuniary damage. *Erlich v. Etner (1964) 224 Cal. App. 2d 69, 73, 36 Cal. Rptr. 256*

[b] Defamation Distiguished

Trade libel as requiring (1) publication (2) that induces others not to deal with plaintiff, and (3) special damages; trade libel as not true libel, and not actionable as defamation. *Aetna Cas. & Sur. Co. v. Centennial Ins. Co. (9th Cir. 1988) 838 F.2d 346, 351*

Trade libel and defamation as protecting different interests. *Polygram Records v. Superior Court (1985) 170 Cal. App. 3d 543, 548, 216 Cal. Rptr. 252*

Trade libel as imposing more stringent requirements on plaintiff than defamation; *Civ. Code §§ 44-46* as not concerned with statements that do not call into question plaintiff's honesty, integrity, or competence, or do not reasonably imply any reprehensible personable characteristic. *Polygram Records v. Superior Court (1985) 170 Cal. App. 3d 543, 549-550, 216 Cal. Rptr. 252*

Trade libel compared with defamation action for libel. *Erlich v. Etner (1964) 224 Cal. App. 2d 69, 73, 36 Cal. Rptr. 256* ; *Rosenberg v. J. C. Penney Co. (1939) 30 Cal. App. 2d 609, 621, 86 P.2d 696*

[c] Injunctive Relief Available

Although trade libel, as opposed to defamation, may be enjoined in proper case, injunction is not available to restrain disparagement published in context of public debate to influence government action on matter of public interest. *Leonardini v. Shell Oil Co. (1989) 216 Cal. App. 3d 547, 574-579, 264 Cal. Rptr. 883*

[d] Special Damages Required

Trade libel action as requiring proof of special damages. *Aetna Cas. & Sur. Co. v. Centennial Ins. Co. (9th Cir. 1988) 838 F.2d 346, 351* ; *Erlich v. Etner (1964) 224 Cal. App. 2d 69, 75, 36 Cal. Rptr. 256*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsSlander of TitleDefensesTortsBusiness TortsSlander of TitleElementsTortsBusiness TortsTrade LibelDefensesTortsBusiness TortsTrade LibelElements

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C. Slander Of Title And Trade Libel

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§ 340.162 Law Reviews

Comment, *The Availability of Preliminary Injunctions Against Trade Libel, 6 U.S.F. L. Rev. 418 (1972)*

Note, *Trade Libel and Its Special Damage Requirement, 17 Hastings L.J. 394 (1965)*

Note, *Lis Pendens--Disparagement of Title--Absolute Privilege--Malicious Prosecution, 30 So Cal. L. Rev. 107 (1956)*

Note, *Torts: Slander of Title: Recordation of Lis Pendens Absolutely Privileged, 4 UCLA L. Rev. 159 (1956)*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsSlander of TitleDefensesTortsBusiness TortsSlander of TitleElementsTortsBusiness TortsTrade LibelDefensesTortsBusiness TortsTrade LibelElements

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§ 340.163 Text References

Witkin, California Procedure, Vol. 5, *Pleading*, § 705 (4th ed. 1997)

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 640-650 (slander of title and trade libel) (10th ed. 2005)

53 C.J.S., *Libel and Slander*, §§ 269-280 (slander of title)

50 Am. Jur. 2d, *Libel and Slander*, §§ 539-558 (slander of title)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsSlander of TitleGeneral OverviewTortsBusiness TortsTrade LibelGeneral OverviewTortsIntentional TortsDefamationGeneral Overview

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[Reserved]

§§ 340.164[Reserved]

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30-340 California Forms of Pleading and Practice--Annotated § 340.180

§ 340.180 Facts to Be Ascertained

NOTE:
The following plaintiff's general procedural checklist is illustrative only of the basic points which counsel for a plaintiff in a defamation action should cover. Not all of the following facts will be ascertainable from the client in the initial interview. Subsequent interviews may be required or it may be necessary to ascertain the facts from other persons, including the potential defendant, by use of discovery proceedings.

1. Facts relating to plaintiff:

a. Name, address, and telephone number of plaintiff.

b. Capacity of plaintiff (such as minor, adult, corporation, unincorporated association (e.g., union), partner in partnership, public employee, etc.).

c. Additional facts, as desired, relating to plaintiff's stability and financial solvency (such as employment status, prior residences, credit, bank, and personal references).

2. Facts relating to defendants:

a. Name and address of each potential defendant.

b. Capacity of each potential defendant (such as corporation, unincorporated association, agent, employee, public entity, public employer, newspaper publisher, radio broadcaster, television broadcaster, etc.).

3. Facts relating to possible privileges available to defendant(s):

a. Whether the words were spoken or written by an executive officer in state government [see *Civ. Code § 47(a)*].

b. Whether the words were spoken or written in connection with a legislative, judicial, or other official proceeding, or proceeding reviewable by mandate pursuant to *Code Civ. Proc. §§ 1084-1097* [*Civ. Code § 47(b)*].

c. Whether the words were spoken or written by the defendant to a person who was interested in the communication, to a person who was related to the defendant, or to a person who requested the defendant to give him the information [see *Civ. Code § 47(c)*]. If so, whether the words were spoken or written with sufficient malice to negate the qualified privilege.

d. Whether the words were written in a public journal concerning an official proceeding or verified complaint [see *Civ. Code § 47(d)*].

e. Whether the words were written in a report of a public meeting or of a matter for the public benefit [see *Civ. Code § 47(e)*].

4. Facts relating to defamatory publication by private defendant(s):

a. The precise words which were spoken or written by the defendant(s).

b. The reason the words were false.

c. The way in which the words were harmful to the plaintiff's reputation.

d. The names and other pertinent facts concerning potential witnesses of the publication of the defamatory words (where slander is involved).

e. The meaning of the words, if ambiguous, as understood by the plaintiff and others who read, saw, or heard the words (the "innuendo").

f. The circumstances under which the words were communicated (the "inducement").

g. The reason the words referred to the plaintiff if the plaintiff was not named specifically (the "colloquium").

h. Whether the words were spoken or written (in order to apply relevant choice of law principles).

NOTE:
After collecting all of the above facts, counsel for plaintiff must determine whether the words were libelous per se [*see Civ. Code §§ 45, 45a*] or slanderous per se [*see Civ. Code § 46*]. If the language is clearly defamatory per se, it is not necessary to plead special damages, and general damages will be presumed [*see Contento v. Mitchell (1972) 28 Cal. App. 3d 356, 358, 104 Cal. Rptr. 591]* . However, if the words are not clearly defamatory per se, then it is necessary to plead and prove special damages [*see Civ. Code §§ 45a, 46(5)*].

5. Facts relating to defamatory publication by media defendant:

NOTE:
In addition to the data that counsel should obtain from a plaintiff who is suing a private individual, the *first amendment* places constraints on a private individual who is suing a newspaper publisher, radio broadcaster, or television broadcaster for a publication defamatory on its face [*see Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789]* .

a. Circumstances or any other information available to plaintiff which would indicate that the defendant was at fault, or negligent, in publishing or broadcasting the defamatory language.

b. The amount ascertainable to date, or before the complaint will be filed, of the actual injury which plaintiff has suffered as a result of the defamatory publication.

c. Any circumstances or other information available to plaintiff which would indicate that defendant published or broadcast the defamatory language either intentionally knowing that it was false or with a reckless disregard for the truth of the publication. (Facts obtained in this area are essential to recover ing presumed, or general, damages as well as punitive damages.)

6. Facts relating to damages:

a. The relationship between the defamatory words and plaintiff's loss of reputation in the community and any feeling of shame, mortification, and hurt feelings [see *Civ. Code § 48a(4)(a)*].

b. The amount ascertainable to date, or before the complaint will be filed, of any damages to property, business, trade, profession, or occupation (e.g., accounts lost, decrease in business volume, etc.) [see *Civ. Code § 48a(4)(b)*].

c. Facts showing the existence of oppression, fraud, or malice which would give rise to punitive damages [*Civ. Code §§ 48a(4)(c), 3294*].

d. Facts showing defendant(s) knowingly or recklessly published defamatory communication where plaintiff is either a public official or a public figure or where defendant is either a publisher or a broadcaster.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsIntentional TortsDefamationProcedure

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§ 340.181 Documents to Be Obtained

NOTE:

Not all of the following documents will be obtainable from the client in the initial interview. Subsequent interviews may be required or, where circumstances will permit, they might be mailed to the attorney. Also, it might be necessary to obtain the documents from persons other than the client.

1. Libel: Copies of the written document which plaintiff asserts is libelous. The closer to the date of publication of a newspaper the easier it is to obtain copies of the edition in which the libelous article appears. Where the libel appears in a letter, counsel should retain the original and have several copies made immediately. Where the libel appears on a sign, an attempt should be made to photograph the sign or, if the sign has been taken down, to obtain declarations from persons who saw the sign.

2. Slander: Declarations from persons who heard the defendant utter the slanderous words. If the slander occured on a radio or television broadcast, counsel should attempt to obtain a tape recording or video tape of the broadcast.

Legal Topics:

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

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30-340 California Forms of Pleading and Practice--Annotated § 340.182

§ 340.182 Procedure Applicable When Media Defendant Sued

NOTE:
Any person suing a newspaper publisher or radio or television broadcaster in California must comply with the provisions of *Civ. Code § 48a*, the retraction statute, in order to recover more than special damages.

1. Prepare a demand for retraction indicating with specificity which statements the plaintiff claims are defamatory [see *Civ. Code § 48a(1)*; Forms 14 & 29].

2. Within 20 days after plaintiff became aware of the publication or broadcast, serve the demand for retraction on the publisher or broadcaster at the place of publication or broadcast [see *Civ. Code § 48a(2)*].

3. Make certain that the publisher or broadcaster complies with the retraction statute by correcting the defamatory statements within three weeks of service of the demand. Further, the retraction must be published or broadcast in substantially as conspicuous a manner as the statements that were defamatory [see *Civ. Code § 48a(2)*].

Legal Topics:

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

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§ 340.183 Additional Counts and Causes of Action

1. Facts giving rise to a cause of action for damages for libel or slander might also give rise to one or more of the following actions which counsel will want to consider:

a. Negligent misrepresentation or intentional fraud [for procedure and forms, see Ch. 269, *Fraud and Deceit* ; for memoranda of points and authorities, see California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender)].

b. Malicious prosecution or abuse of process [for procedure and forms, see Ch. 357, *Malicious Prosecution and Abuse of Process*].

c. Intentional infliction of mental suffering and forms, see Ch. 362, *Mental Suffering and Emotional Distress*].

d. Invasion of privacy [for procedure and forms, see Ch. 429, *Privacy*].

e. Infringement of trademarks and trade names [for procedure and forms, see Ch. 549, *Trademarks and Trade Names*].

f. Unfair competition [for procedure and forms, see Ch. 565, *Unfair Competition*].

2. Factors to be considered for all causes of action:

a. Financial solvency of possible defendants.

b. Difficulties, if any, involved in obtaining jurisdiction over the various defendants.

c. Difficulties, if any, in proving liability.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationGeneral OverviewTortsIntentional TortsDefamationProcedureTortsIntentional TortsMalicious ProsecutionGeneral OverviewTrademark LawFederal Unfair Competition LawGeneral OverviewTrademark LawInfringement ActionsGeneral OverviewTrademark LawSpecial MarksTrade NamesInfringement

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30-340 California Forms of Pleading and Practice--Annotated § 340.184

§ 340.184 Essential Allegations of Complaint

1. Exact language: There is no requirement that the plaintiff plead the precise language alleged to be defamatory in an action for libel [see des *Des Granges v. Crall (1915) 27 Cal. App. 313, 315, 149 P. 777]* or slander [see *Fleet v. Tichenor (1909) 156 Cal. 343, 346, 104 P. 458]* . However, it is common practice to do so.

2. Publication: The publication of the defamatory words to at least one person is an essential element in every cause of action for defamation [see *Draper v. Hellman Commercial Trust & Sav. Bank (1928) 203 Cal. 26, 39, 263 P. 240* (libel); *Cunningham v. Simpson (1960) 1 Cal. 3d 301, 307, 81 Cal. Rptr. 855, 461 P.2d 39* (slander)].

3. Good Reputation: The plaintiff is required to plead his or her good reputation only when alleging harm caused plaintiff in his or her business or professional capacity [see *Draper v. Hellman Commercial Trust & Sav. Bank (1928) 203 Cal. 26, 43, 263 P. 240]* . However, it is common practice to allege plaintiff's good reputation in all defamation actions.

4. Colloquium: Where the plaintiff is not specifically named, it is necessary to plead that the matter was published or spoken concerning the plaintiff [*Code Civ. Proc. § 460*; *Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 829, 136 P.2d 297]* .

5. Falsity: Under the common law, a plaintiff is not required to allege that the statements are false [see *Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal. 2d 224, 233, 11 Cal. Rptr. 97, 359 P.2d 465* ; *see also Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 776, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* , although it is common practice to do so. However, if the plaintiff is a public figure, or if the plaintiff is a private figure who is suing a newspaper or other media defendant for publishing speech of a public concern, the *First Amendment* requires that the plaintiff bear the burden of proving the falsity of the defamatory statement before recovering damages [*Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 768-769, 776-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* .

6. Innuendo: When the words used are susceptible of either a defamatory or an innocent interpretation, an innuendo explaining what the words meant is necessary [*see Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 828, 136 P.2d 297]* .

7. Inducement: When the circumstances in which the words were written or spoken are necessary in order to make the defamatory meaning clear, it is necessary to explain those circumstances by way of an inducement [*see Grand v. Dreyfus (1898) 122 Cal. 58, 62, 54 P. 389* (slander); *Peabody v. Barham (1942) 52 Cal. App. 2d 581, 585 , overruled on other grounds, MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36* (libel)].

8. Statutory malice: Statutorily defined "actual malice" (hatred or ill will), not to be confused with the constitutionally required "actual malice" standard (reckless disregard for falsity), must be pleaded and proved by a plaintiff seeking exemplary damages in an action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, when plaintiff has demanded a retraction and the defendant has failed to publish or broadcast the retraction under the circumstances described in *Civ. Code § 48a(1)-(3)* [*see Civ. Code § 48a(1)-(3), (4)(c), (d)*; *see also Manguso v. Oceanside Unified Sch. Dist. (1984) 153 Cal. App. 3d 574, 581, 200 Cal. Rptr. 535* (*Civ. Code § 48a* as special statutory protection given to newspapers); *Burnett v. National Enquirer, Inc. (1983) 144 Cal. App. 3d 991, 1000-1004, 193 Cal. Rptr. 206* (discussing applicability of *Civ. Code § 48a*)].

9. Constitutional malice: Malice in the constitutional sense means that the defendant published the statement intentionally knowing that it was false or with reckless disregard for whether it was true or not [*New York Times Co. v. Sullivan (1964) 376 U.S. 254, 279-280, 84 S. Ct. 710, 11 L. Ed. 2d 686]* . It must be pleaded in two situations: (1) where public officials or public figures are trying to recover for defamatory statements [*New York Times Co. v. Sullivan (1964) 376 U.S. 254, 279-280, 84 S. Ct. 710, 11 L. Ed. 2d 686* ; *Curtis Publ'g Co. v. Butts (1967) 388 U.S. 130, 164, 87 S. Ct. 1975, 18 L. Ed. 2d 1094* (Warren, Ch. J., concurring)] and (2) where private individuals are seeking to recover presumed or punitive damages from a media defendant [*Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 346-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789]* .

10. Special damages: When language is not libelous on its face or slanderous per se, it is necessary to allege special damages [*see Civ. Code §§ 45a, 46(5), 48a(4)(b)*]. A plaintiff who is suing a media defendant must allege actual injury as a result of the defamatory publication or broadcast [*see Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 346-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789]* .

11. General damages: When words are defamatory per se, the law presumes the existence of general damages when a private individual is suing another private individual [*see Contento v. Mitchell (1972) 28 Cal. App. 3d 356, 358, 104 Cal. Rptr. 591]* . However, if plaintiff is suing a media defendant, he or she must show intentionality or recklessness before presumed, or general, damages may be recovered [*see Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 346-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789]* .

12. Punitive damages: In general, malice, fraud, or oppression, as defined in *Civ. Code § 3294*, must be shown before a plaintiff may recover punitive damages in a defamation action [*see Civ. Code § 3294*]. However, statutory malice, as defined in *Civ. Code § 48a(4)(d)* (hatred or ill will), must be shown if punitive damages are sought by a plaintiff in an action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, when plaintiff has demanded a retraction and the defendant has failed to publish or broadcast the retraction under the circumstances described in *Civ. Code § 48a(1)-(3)* [*see Civ. Code § 48a(1)-(3), (4)(a)*]. Additionally, if the plaintiff is either a public figure or a private figure who brings a defamation action against a media defendant for publishing speech

involving a matter of public concern, that plaintiff must show constitutional "actual malice" (reckless disregard for falsity) before he or she may recover punitive damages [*Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 349, 94 S. Ct. 2997, 41 L. Ed. 2d 789* ; *see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 759-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsTortsIntentional TortsDefamationElementsGeneral OverviewTortsIntentional TortsDefamationProcedure

California Forms of Pleading and Practice--Annotated

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 340 LIBEL AND SLANDER
PART IV. PROCEDURAL CHECKLIST
A. Defamation: Libel And Slander Complaints

30-340 California Forms of Pleading and Practice--Annotated §§ 340.185-340.199

[Reserved]

§§ 340.185[Reserved]

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PART IV. PROCEDURAL CHECKLIST
B. Defenses To Defamation Actions

30-340 California Forms of Pleading and Practice--Annotated § 340.200

§ 340.200 Facts to Be Ascertained

NOTE:
The following checklist is illustrative only of the basic points which counsel for a defendant in a defamation action should cover. Not all of the following facts will be ascertainable from the client in the initial interview. Subsequent interviews may be required or it may be necessary to ascertain the facts from others, including the plaintiff, by use of discovery proceedings.

1. Facts relating to defendant:

a. Name, address, and telephone number of defendant.

b. Capacity of defendant (such as corporation, unincorporated association, agent, employee, public entity, public employer, newspaper publisher, radio broadcaster, television broadcaster, etc.

NOTE:
Defendant's capacity generally will be revealed by the complaint. Nevertheless, counsel will wish to confirm the allegation with his or her client. Of course, if the capacity is not disclosed by the complaint, counsel will wish to ascertain it.

c. Additional facts, as desired, relating to defendant's stability and financial solvency (such as employment status, prior residences, credit, bank, and personal references).

2. Facts required for the answer:

NOTE:
Counsel should advise his or her client not to discuss the case with any third person.

a. Date, manner, and place of service of the complaint and summons.

b. Allegations of complaint.

Ascertain which of the facts alleged in the complaint are true, which are false, and which ones defendant does not know the truth or falsity of.

c. Affirmative defenses.

NOTE:
Affirmative defenses can be raised by demurrer, as well as by answer, where they appear on the face of the complaint or from matters of which the court must or may take judicial notice [*Code Civ. Proc. §§ 430.10, 430.30*].

There are various defenses which might be raised to an action for defamation. Among such defenses counsel should consider the following:

(1) Failure of the plaintiff to allege special damages where the publication is not defamatory per se (*see § 340.260*) or to allege special damages with sufficient specificity (*see §§ 340.261* and *340.262*).

(2) Defenses based on plaintiff's failure to allege constitutional malice where plaintiff is a public official, public figure, or private individual or where defendant is a newspaper publisher, radio broadcaster, or television broadcaster (*see §§ 340.264 -340.273*).

(3) Defenses based on the plaintiff's failure to comply with the retraction statute [*Civ. Code § 48a*] (*see §§ 340.274 -340.277*).

(4) Statutory immunity afforded broadcaster [*Civ. Code § 48.5*] (*see § 340.278*).

(5) Truth of the defendant's statements (*see § 340.279*).

(6) Mitigating circumstances (*see § 340.280*).

(7) Absolute privileges [*Civ. Code § 47(a), (b), (d), (e)*] (*see §§ 340.282 -340.287*).

(8) Qualified privilege [*Civ. Code § 47(c)*] (*see § 340.288*).

(9) Consent (*see § 340.289*).

(10) Statute of limitations [*Code Civ. Proc. § 340(c)*] (*see §§ 340.290* and *340.291*).

(11) Failure to convey a defamatory meaning (*see § 340.292*).

(12) Failure to file a claim with defendant public entity (*see § 340.293*).

(13) Immunity afforded public employee (*see § 340.294*).

(14) Immunity afforded a public entity (*see § 340.295*).

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated §§ 340.201-340.219

[Reserved]

§§ 340.201[Reserved]

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 340 LIBEL AND SLANDER
PART V. FORMS
A. Defamation: Libel And Slander Complaints

30-340 California Forms of Pleading and Practice--Annotated § 340.220

§ 340.220 Complaint for General [Civ. Code § 3333], Special [Civ. Code §§ 45a, 48a(4)(b)], and Punitive [Civ. Code § 3294] Damages for Libel [Civ. Code § 45]--Private Individual Suing Private Individual--General Form

[1] FORM Complaint for General [Civ. Code § 3333], Special [Civ. Code §§ 45a, 48a(4)(b)], and Punitive [Civ. Code § 3294] Damages for Libel [Civ. Code § 45]--Private Individual Suing Private Individual--General Form

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR LIBEL
_____ [*name*(*s*)], [and DOES 1	)	[Amount demanded _____
through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is and at all times herein mentioned was a resident of _____ County, California.

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-10, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as

herein alleged were proximately caused by their conduct.)]

[3. Defendants _____ (*names*) at all times herein mentioned were the agents and employees of their codefendants _____ (*names*) and in doing the things hereinafter alleged were acting within the course and scope of such agency and the permission and consent of their codefendants.]

4. At all times herein mentioned, plaintiff was, and now is, a _____ [*state occupation*] and resides in the City of _____, County of _____, State of California. Plaintiff has resided in the City of _____ for _____ [*number*] years and at all times has enjoyed a good reputation both generally and in his/her occupation.

[*EITHER*]

5. On or about _____ [*date*], defendant(s) published _____ [*describe type of written material, e.g.,* a letter *or* a sign], which stated: _____ [*set forth precise language alleged to be defamatory*].

[*OR*]

5. On or about _____ [*date*], defendant(s) published _____ [*describe type of written material, e.g.,* a letter *or* a sign], which is attached hereto as Exhibit A and made a part hereof.

6. [*If material does not mention the plaintiff by name, add*: The publication was made of and concerning the plaintiff and was so understood by those who read the publication.]

[*EITHER*]

7. The entire _____ [*describe type of material*] is false as it pertains to the plaintiff.

[*OR*]

7. The following statements are false as they apply to the plaintiff: _____ [*set forth specific false statements*].

[*EITHER*]

8. This _____ [*describe type of material*] is libelous on its face. It clearly exposes plaintiff to hatred, contempt, ridicule, and obloquy because it _____ [*specify facts which support allegation*].

[*OR*]

8. [*If the language is ambiguous, allege*: This _____ (*describe type of material*) is defamatory because the language _____ (*set forth facts which indicate why the words carried a defamatory meaning to those who read them rather than an innocent meaning*).]

[9. *If the language is ambiguous, allege*: This _____ (*describe type of material*) was understood by those who saw and heard it in a way which defamed plaintiff because _____ (*set forth extrinsic facts which show why language was understood within the meaning as detailed in the alternative allegation of Paragraph 7*).]

[*EITHER*]

10. This _____ [*describe type of material*] was seen and read by _____ [*names of persons who saw and read publication*] in _____, California.

[*OR*]

10. This _____ [*describe type of material*] was seen and read by persons who reside in and around _____ [*describe general location of their residence where specific persons who read publication are not known*].

11. As a proximate result of the above-described publication, plaintiff has suffered loss of his/her reputation, shame, mortification, and hurt feelings all to his/her general damage.

[12. *If publication is not clearly libelous on its face, it is essential to allege*: As a further proximate result of the above-described publication, plaintiff has suffered the following special damages: _____ (*specify facts that entitle plaintiff to recover special damages such as injury to plaintiff's property, business, trade, profession, or occupation*), all to his/her injury.]

13. The above-described publication was published by the defendant(s) with _____ [malice *and/or* oppression *and/or* fraud] in that _____ [*specify circumstances*], and thus plaintiff seeks an award of punitive damages.

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

1. For general damages according to proof.

2. For special damages according to proof.

3. For punitive damages.

4. For costs of suit incurred herein.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].

_____ [*signature*]
_____ [*signature*]

[2] Use of Form

This complaint is for use by a private individual to obtain damages from another private individual for a libelous publication. For a form of complaint for use by a private individual to obtain damages from a newspaper for a libelous publication, *see § 340.233*.

[3] Allegations

This complaint alleges:

- The capacity and residence of defendant (Paragraph 1).
- An optional allegation a s to fictitiously named defendant (Paragraph 2).
- An optional allegation for use when agents are being sued (Paragraph 3).
- The plaintiff's occupation, residence, and good reputation (Paragraph 4).
- What published language was defamatory (Paragraph 5).
- An optional allegation for use when the plaintiff is not named and a colloquium must be pleaded (Paragraph 6) [*Code Civ. Proc. § 460*; *Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 829, 136 P.2d 297]* .
- The falsity of the publication as it pertains to the plaintiff (Paragraph 7).
- Alternative to be used depending on whether the publication is clearly libelous on its face or ambiguous and requires the pleading of an innuendo (Paragraph 8) [*Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 828, 136 P.2d 297]* .
- An optional allegation of inducement for use when the language is ambiguous (Paragraph 9) [*Grand v. Dreyfus (1898) 122 Cal. 58, 62, 54 P. 389]* .
- Publication of the material (Paragraph 10) [*see Draper v. Hellman Commercial Trust & Sav. Bank (1928) 203 Cal. 26, 39, 263 P. 240]* .

The allegation of general damages is always pleaded when the publication is libelous on its face (Paragraph 11) [*cf. Civ.*

Code § 48a(4)(a)]. The allegation of special damages (Paragraph 12) [*Civ. Code § 48a(4)(b)*] is pleaded only when appropriate if the publication is clearly libelous on its face, but is an essential allegation otherwise [*Civ. Code § 45a*; *Gautier v. General Tel. Co. (1965) 234 Cal. App. 2d 302, 309, 44 Cal. Rptr. 404]* . An allegation for punitive damages is also included Paragraph 13) [*Civ. Code § 3294*].

[4] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complain [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[5] Verification

Verification of this complaint is not required, but verification of the complaint requires the defendant to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446*] and precludes a general denial in superior court and some limited civil cases [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[6] Venue

An action for defamation must be tried in the county in which the defendants, or some of them, reside at the commencement of the action [*see Code Civ. Proc. § 395(a)*]. This is true because an action for defamation is not an action for a physical injury, the only type of "personal injury" that is contemplated by the provisions of *Code Civ. Proc. § 395(a)* that allow such an action to be brought in the county in which the injury occurred [*see Graham v. Mixon (1917) 177 Cal. 88, 92, 169 P. 1003* (libel)]. Hence, *Code Civ. Proc. § 395* does not give a person against whom an alleged libel is published in a newspaper the right to maintain his or her action, against the defendant's protest, in any county in which the newspaper may circulate [*Graham v. Mixon (1917) 177 Cal. 88, 93, 169 P. 1003]* .

[7] Pleading of Exact Language

In a libel action the complaint must contain a sufficient statement of the language alleged to be defamatory in order to notify the defendant of the charge he or she must answer [*see* des *Des Granges v. Crall (1915) 27 Cal. App. 313, 315, 149 P. 777]* . And because the court must determine as a matter of law whether the matter is libelous on its face, it is common practice to set forth the exact language or other defamatory material in the complaint itself or attached as an exhibit. There is, however, no statutory or decisional requirement that the exact language be pleaded in the complaint.

[8] Colloquium

When plaintiff was not named specifically, it is not necessary to state any extrinsic facts in the complaint for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose [

Code Civ. Proc. § 460]. It is sufficient to state generally that the matter was published or spoken concerning the plaintiff [*Code Civ. Proc. § 460*; *Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 829, 136 P.2d 297]* . If this type of general allegation is challenged, the plaintiff must establish at trial that it was so published or spoken [*Code Civ. Proc. § 460*].

[9] Falsity

The United States Supreme Court has recently held that, at least when the plaintiff is either a public figure or a private figure who is suing a newspaper or other media defendant for publishing speech of a public concern, the *First Amendment* requires that the plaintiff bear the burden of proving the falsity of the defamatory statement before recovering damages [*Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 776-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* . However, the Court has continued to leave open the question of what standards would apply if a private plaintiff sues a nonmedia defendant [*see, e.g.,* *Philadelphia Newspapers, Inc.v. Hepps (1986) 475 U.S. 767, 779 n.4, 106 S. Ct. 1558, 89 L. Ed. 2d 783* ; *see also* *Hutchinson v. Proxmire (1979) 443 U.S. 111, 133 n.16, 99 S. Ct. 2675, 61 L. Ed. 2d 411* (open question as to whether the protection of *First Amendment* extends to cases involving nonmedia defendants)], although it appears that a private figure plaintiff suing a nonmedia defendant over a statement that is a matter of public concern must prove fault, and therefore must plead and prove falsity [*see* *Dun & Bradstreet v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 758-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593]* .

Under the common law, a plaintiff is not required to allege that the statements are false, and an omission of an allegation of falsity in the complaint may not be grounds for a demurrer [*see* *Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal. 2d 224, 233, 11 Cal. Rptr. 97, 359 P.2d 465* ; *see also* *Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 776, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* . Therefore, although it is currently unclear whether or not a private plaintiff who sues a nonmedia defendant is required to plead and prove falsity, it appears that at least under *Lipman*, and until the United States Supreme Court rules otherwise, the burden remains on the defendant rather than on the plaintiff. Nevertheless, it is common practice for a plaintiff to allege falsity in the complaint, and because the point is unclear, it is advisable to do so.

[10] Actual Malice

A private plaintiff who sues a defendant for publishing a statement that is not a matter of public concern is not required to prove actual malice to recover presumed damages or punitive damages [*Dun & Bradstreet v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 759-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593]* .

For discussion of actual malice, see *§ 340.18[1]*.

[11] Good Reputation

Plaintiff is not required generally to plead that he or she possessed a good reputation before the defamatory publication by the defendant because the law presumes that the plaintiff's reputation is good until the defendant attacks it [*Draper v. Hellman Commercial Trust & Sav. Bank (1928) 203 Cal. 26, 43, 263 P. 240* ; *Davis v. Hearst (1911) 160 Cal. 143, 186, 116 P. 530]* . However, the pleading of plaintiff's good reputation in a general sense is common in defamation complaints. More importantly, it is an essential allegation if the plaintiff is alleging that the harm was caused to him or her in his or her business or professional capacity [*Draper v. Hellman Commercial Trust & Sav. Bank (1928) 203 Cal. 26, 43, 263 P. 240]* .

[12] Innuendo When Language Ambiguous

The office of an innuendo is to declare what the words meant to those to whom they were published. When the words themselves, under any circumstances, would convey to those who read or hear them a meaning within the statutory definitions, there is no occasion for the pleading of an innuendo. Conversely, if the words under no circumstances could convey a defamatory meaning, then no innuendo can make them defamatory. An innuendo is necessary if the words

used are susceptible of either a defamatory or an innocent interpretation [*Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 828, 136 P.2d 297]* .

[13] Inducement When Language Ambiguous

An inducement indicates that the words were understood in a defamatory sense and shows the situation or opinion of the readers was such that they derived a defamatory meaning from them [*Peabody v. Barham (1942) 52 Cal. App. 2d 581, 585, 126 P.2d 668 , overruled on other grounds, MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36]* .

[14] Publication

It is essential in an action for libel that the complaint allege that the defamatory matter was published or communicated to some third person [*Draper v. Hellman Commercial Trust & Sav. Bank (1928) 203 Cal. 26, 39, 263 P. 240]* .

[15] General Damages

General damages for defamation actions generally are not specially defined in the Civil Code [*but see generally Civ. Code § 3333* (damages for proximately caused detriment)]. However, the Code does define those general damages sought by a plaintiff in an action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, when plaintiff has demanded a retraction and the defendant has failed to publish or broadcast the retraction under the circumstances described in *Civ. Code § 48a(1)-(3)* [*see Civ. Code § 48a(1)-(3), (4)(a)*]. In this latter situation, general damages are defined as those damages for loss of reputation, shame, mortification, and hurt feelings [*Civ. Code § 48a(4)(a)*].

In an action for libel on its face, general damages are presumed [*see Civ. Code § 45a*; *Di Giorgio Fruit Corp. v. AFL-CIO (1963) 215 Cal. App. 2d 560, 577, 30 Cal. Rptr. 350]* .

[16] Special Damages

Special damages are all the damages that the plaintiff alleges and proves that he or she has suffered in respect to his or her property, business, trade, profession, or occupation, including the amount of money that he or she alleges and proves that he or she has expended as a result of the alleged libel [*Civ. Code §§ 45a, 48a(4)(b)*]. They must be alleged with particularity [*Smith v. Los Angeles Bookbinders Union (1955) 133 Cal. App. 2d 486, 494, 284 P.2d 194 , overruled on other grounds, Macleod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36* ; *see also Pridonoff Balokovich (1951) 36 Cal. 2d 788, 791-792, 228 P.2d 6]* and are an essential allegation when a publication is not libelous on its face [*Civ. Code § 45a*].

[17] Punitive Damages

Punitive damages are awarded for the sake of example and to punish a defendant who has made a publication or broadcast with malice as defined in *Civ. Code § 3294(c)(1)* (which should not be confused with the constitionally required "actual malice" standard, discussed in *§ 340.18[1]*), oppression, or fraud [*see Civ. Code § 3294(a), (c)*].

[18] Cross References

For alternative fictitious name allegations and allegations of capacity and residence, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introduction, see Ch. 108, *Captions and Introductions*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively

[19] Forms of Discovery

For forms of discovery for use in actions involving libel and slander, see Bender's Forms of Discovery, Ch. 63, *Defamation, Libel and Slander*

[20] State Statutes

Libel defined. *Civ. Code § 45*

Libel on its face defined. *Civ. Code § 45a*

Publication not libelous on its face as requiring allegation of special damages. *Civ. Code § 45a*

Pleading of extrinsic facts in colloquium as unnecessary in complaint for defamation, but must be proved if application of defamatory matter to plaintiff is controverted at trial. *Code Civ. Proc. § 460*

[21] Decisions

[a] Broad Definition of Libel

Definition of libel as very broad in California. *Maidman v. Jewish Publications, Inc. (1960) 54 Cal. 2d 643, 649, 7 Cal. Rptr. 617, 355 P.2d 265 , overruled on other grounds, Brown v. Kelly Broad. Co. (1989) 48 Cal. 3d 711, 732-733, 257 Cal. Rptr. 708, 771 P.2d 406* ; *Bates v. Campbell (1931) 213 Cal. 438, 441, 2 P.2d 383*

[b] Colloquium

Pleading of colloquium as required to show that words were spoken of and concerning plaintiff. *Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 829, 136 P.2d 297* ; *Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 741, 20 Cal. Rptr. 405*

Fact person not named in defamatory statement as not precluding meaning which is actionable per se. *Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 829, 136 P.2d 297*

Where person defamed not mentioned by name, colloquium which shows that publication points to plaintiff by description or circumstance as sufficient. *Di Giorgio Fruit Corp. v. AFL-CIO (1963) 215 Cal. App. 2d 560, 569-570, 30 Cal. Rptr. 350*

Language referring to large group of persons as not capable of being made to apply to plaintiff by use of a colloquium. *Los Angeles Fire & Police Protective League v. Rodgers (1970) 7 Cal. App. 3d 419, 425, 86 Cal. Rptr. 623* (more than 5,000); *Smith v. Harnish (1959) 167 Cal. App. 2d 115, 118, 333 P.2d 815* (indeterminate group); *Noral v. Hearst Publications, Inc. (1940) 40 Cal. App. 2d 348, 350, 104 P.2d 860* (greater than 162 persons)

[c] Falsity

Plaintiff as not required to allege falsity of allegedly defamatory publication. *Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal. 2d 224, 233, 11 Cal. Rptr. 97, 359 P.2d 465*

Public figure plaintiff, or private figure plaintiff suing newspaper or other media defendant for publishing speech of public concern, is required by *U.S. Const. amend. I*, to bear burden of proving falsity of defamatory statement before recovering damages; standards applicable to private plaintiff suing nonmedia defendant is open question. *Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 775-776, 779 n.4, 106 S. Ct. 1558, 89 L. Ed. 2d 783*

[d] Inducement

Pleading of inducement as required to set forth extrinsic circumstances affecting construction of language. *Grand v. Dreyfus (1898) 122 Cal. 58, 62, 54 P. 389*

Pleading of inducement as indicating situation or opinion of readers which made meaning of words defamatory. *Peabody v. Barham (1942) 52 Cal. App. 2d 581, 585, 126 P.2d 668 , overruled on other grounds, MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36*

[e] Innuendo

Pleading of innuendo as necessary where meaning of language ambiguous. *Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 828, 136 P.2d 297* ; *Bates v. Campbell (1931) 213 Cal. 438, 443, 2 P.2d 383* ; *Corman v. Blanchard (1962) 211 Cal. App. 2d 126, 138, 27 Cal. Rptr. 327*

Pleading external facts by way of innuendo as not capable of enlarging or changing sense of language and thereby making innocent language defamatory. *Emde v. San Joaquin County Cent. Labor Council (1943) 23 Cal. 2d 146, 159-160, 143 P.2d 20*

Words as required to be reasonably understood in defamatory sense before pleading an innuendo can aid pleader. *Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 743, 20 Cal. Rptr. 405*

Language bearing only one meaning which is innocent as not capable of being made libelous by innuendo. *Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 828, 136 P.2d 297* ; *Corman v. Blanchard (1962) 211 Cal. App. 2d 126, 138, 27 Cal. Rptr. 327*

[f] Interpretation of Defamatory Language

Question of whether language is libelous on its face as question of law for court. *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 546, 343 P.2d 36* ; *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 288-289, 112 Cal. Rptr. 609*

Question of whether or not language is reasonably susceptible of defamatory meaning as question of law. *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 546, 343 P.2d 36* ; *Arno v. Stewart (1966) 245 Cal. App. 2d 955, 959, 54 Cal. Rptr. 392*

[g] Publication

Publication as essential pleading requirement in defamation action. *Draper v. Hellman Commercial Trust & Sav.*

Bank (1928) 203 Cal. 26, 39, 263 P. 240

[h] Special Damages

Pleading of reduction in number of new clients and loss of clients as sufficient pleading of special damages for purposes of *Civ. Code § 48a*. *Kanarek v. Bugliosi (1980) 108 Cal. App. 3d 327, 337, 166 Cal. Rptr. 526*

Complaint alleging publication of language not defamatory on its face as required to allege special damages. *Gautier v. General Tel. Co. (1965) 234 Cal. App. 2d 302, 309, 44 Cal. Rptr. 404*

[i] Test for Libel on Its Face

Test for libel on its face as whether publication will constitute libel without averment, colloquium, or innuendo. *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 549, 343 P.2d 36*

[j] Venue

Person as required under *Code Civ. Proc. § 395* to bring libel action in county where defendant resides; action for alleged libel in newspaper as not capable of being maintained, against defendant's protest, in any county in which the newspaper may circulate. *Graham v. Mixon (1917) 177 Cal. 88, 92-93, 169 P. 1003*

[22] Text References

Personal Injury: Actions, Defenses, Damages, Vol. 11, *Defamation (Libel and Slander)*, §§ 1-3, 5 (Matthew Bender)

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30-340 California Forms of Pleading and Practice--Annotated § 340.221

§ 340.221 Allegation--For Use When Complaint Discloses Privilege Under Civ. Code § 47

[1] FORM Allegation--For Use When Complaint Discloses Privilege Under Civ. Code § 47

[*EITHER*]

The above described publication was not privileged because defendant _____ [*specify facts which precluded defendant from relying on the absolute privileges afforded by Civ. Code § 47(a), (b), (d), or (e)*].

[*OR*]

The above-described publication was not privileged because defendant published it with personal animosity, hatred, and ill will toward plaintiff and with either the knowledge that it was false or without any reasonable grounds for believing that it was true in that _____ [*specify facts prohibiting defendant from relying on the qualified privilege granted by Civ. Code § 47(c)*].

[2] Use of Form

This allegation must be used to avoid a demurrer based on the existence of a privilege [*see Civ. Code § 47*] if the complaint itself discloses the privilege.

[3] Decisions

Defenses of privilege as affirmative defense requiring specific pleading unless it appears on face of complaint. *Locke v. Mitchell (1936) 7 Cal. 2d 599, 602, 61 P.2d 922* ; *Peoples v. Tautfest (1969) 274 Cal. App. 2d 630, 635, 79 Cal. Rptr. 478*

Defendant as not required to set up claim of privilege by either answer or demurrer if complaint affirmatively discloses absolute privilege; complaint as failing to state legal cause of action. *Whelan v. Wolford (1958) 164 Cal. App. 2d 689, 693, 331 P.2d 86*

[4] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 556-592 (10th ed. 2005)

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30-340 California Forms of Pleading and Practice--Annotated § 340.222

§ 340.222 Allegation--For Use When Complaint Discloses Apparent Statute of Limitations Bar--Facts Supporting Equitable Estoppel

[1] FORM Allegation--For Use When Complaint Discloses Apparent Statute of Limitations Bar--Facts Supporting Equitable Estoppel

1. Defendant _____ [*name*] intentionally concealed his/her/its authorship of the above-described publication by _____ [*specify facts tending to show intentional concealment, e.g.,* not identifying himself/herself/itself in the publication, and by denying authorship when confronted by plaintiff].

2. Plaintiff exercised reasonable diligence in attempting to determine the author of the above-described publication, in that he/she _____ [*specify steps taken to determine authorship, e.g.,* investigated the various possible sources of the publication, and received only denials from defendant until _____ (*date*), when plaintiff discovered that defendant had in fact authored the publication].

[2] Use of Form

This allegation is for use if it otherwise appears on the face of the complaint that the action was filed more than a year from the date of the allegedly defamatory publication. The allegation sets forth the facts that establish the requirements for equitable estoppel based on the defendant's concealment of his or her identity.

[3] Equitable Estoppel

A defendant may be equitably estopped from asserting the statute of limitations if, as the result of intentional concealment, the plaintiff is unable to discover the defendant's actual identity [*Bernson v. Browning-Ferris Indus. (1994) 7 Cal. 4th 926, 936, 30 Cal. Rptr. 2d 440, 873 P.2d 613]* . For the doctrine of equitable estoppel to apply, the plaintiff must have exercised reasonable diligence [*Bernson v. Browning-Ferris Indus. (1994) 7 Cal. 4th 926, 936, 30 Cal. Rptr. 2d 440, 873 P.2d 613]* . The requirement that the plaintiff exercise reasonable diligence permits tolling of the statute of limitations only until the plaintiff knows, or through the exercise of reasonable diligence should have discovered, the defendant's identity. Lack of knowledge alone is not sufficient to stay the statute; a plaintiff may not

disregard reasonably available avenues of inquiry that, if vigorously pursued, might yield the desired information [*Bernson v. Browning-Ferris Indus. (1994) 7 Cal. 4th 926, 936, 30 Cal. Rptr. 2d 440, 873 P.2d 613]* . One factor that must be considered pertinent to the diligence inquiry is whether a timely Doe complaint [*see Code Civ. Proc. § 474*] would, as a practical matter, have facilitated the discovery of the defendant's identity within the three-year period for service of process under Code Civ. Proc. § 583.210 [*Bernson v. Browning-Ferris Indus. (1994) 7 Cal. 4th 926, 936-937, 30 Cal. Rptr. 2d 440, 873 P.2d 613]* . If the identity of at least one defendant is known, the plaintiff must avail himself or herself of the opportunity to file a timely complaint naming Doe defendants and take discovery [*Bernson v. Browning-Ferris Indus. (1994) 7 Cal. 4th 926, 937, 30 Cal. Rptr. 2d 440, 873 P.2d 613]* . However, if the facts are such that even discovery cannot pierce a defendant's intentional efforts to conceal his or her identity, the plaintiff will not be penalized [*Bernson v. Browning-Ferris Industries (1994) 7 Cal. 4th 926, 937, 30 Cal. Rptr. 2d 440, 873 P.2d 613]* .

[4] Decisions

Equitable estoppel as available to preclude defendant from asserting statute of limitations if defendant intentionally concealed identity from plaintiff, who exercised reasonable diligence to determine defendant's identity. *Bernson v. Browning-Ferris Indus. (1994) 7 Cal. 4th 926, 928, 936, 30 Cal. Rptr. 2d 440, 873 P.2d 613*

Legal Topics:

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30-340 California Forms of Pleading and Practice--Annotated § 340.223

§ 340.223 Allegation--Libel on Its Face Based on Imputation of Crime

[1] FORM Allegation--Libel on Its Face Based on Imputation of Crime

This _____ [*describe type of material*] is libelous on its face because it charges plaintiff with committing the crime of _____ [*specify crime*].

[2] Use of Form

This allegation may be used in place of Paragraph VIII of *see § 340.220* in which the defendant has published material that charges plaintiff with commission of a crime.

[3] Decisions

Imputing crime to a person as libel per se. *Boyich v. Howell (1963) 221 Cal. App. 2d 801, 802-803, 34 Cal. Rptr. 794* (stuffing ballot box in union election); *Draper v. Hellman Commercial Trust & Sav. Bank (1928) 203 Cal. 26, 34, 263 P. 240* (fraudulent appropriation of funds); *Morris v. National Fed'n of Blind (1961) 192 Cal. App. 2d 162, 164, 13 Cal. Rptr. 336* (calling person "racketeer")

[4] Text References

Witkin, Summary of California Law, Vol. 5, *Torts*, § 542 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-340 California Forms of Pleading and Practice--Annotated § 340.224

§ 340.224 Allegation--Libel on Its Face Based on Injury to Occupation

[1] FORM Allegation--Libel on Its Face Based on Injury to Occupation

This _____ [*describe type of material*] has a tendency to injure the plaintiff in his/her occupation because it _____ [*specify facts that support allegation*].

[2] Use of Form

This allegation may be used in place of Paragraph VIII of *see § 340.220* in which the defendant has published material that tends to injure the plaintiff in his or her occupation.

[3] Decisions

[a] In General

Publication as libelous per se where allegation is inconsistent with due fulfillment of what person has undertaken. *Maidman v. Jewish Publ'ns, Inc. (1960) 54 Cal. 2d 643, 650, 7 Cal. Rptr. 617, 355 P.2d 265*

Publication as capable of being libelous per se regardless of whether it reflects on office held for profit or not. *Correia v. Santos (1961) 191 Cal. App. 2d 844, 855, 13 Cal. Rptr. 132*

[b] Specific Occupations

Foreign diplomat. *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 790, 228 P.2d 6*

Attorney. *Maidman v. Jewish Publications, Inc. (1960) 54 Cal. 2d 643, 651, 7 Cal. Rptr. 617*

Agent in fiduciary relation to principal. *Bates v. Campbell (1931) 213 Cal. 438, 445, 2 P.2d 383*

Union relationships with business community. *Daniels v. Sanitarium Ass'n, Inc. (1963) 59 Cal. 2d 602, 603, 30 Cal. Rptr. 828, 381 P.2d 652*

Engineer. Rodriguez v. North Am. Aviation, Inc. (1967) 252 Cal. App. 2d 889, 894, 61 Cal. Rptr. 579

Businessman. Cameron v. Wernick (1967) 251 Cal. App. 2d 890, 894-895, 60 Cal. Rptr. 102

Administrator of estate. *Fairfield v. Hagan (1967) 248 Cal. App. 2d 194, 201, 56 Cal. Rptr. 402*

Street pavers. *Williams v. Daily Review, Inc. (1965) 236 Cal. App. 2d 405, 411, 46 Cal. Rptr. 135*

Teacher and writer. *Menefee v. Codman (1957) 155 Cal. App. 2d 396, 402, 317 P.2d 1032 , overruled on other grounds, MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36*).

Baseball player. *Cepeda v. Cowles Magazines & Broad., Inc. (9th Cir. 1964) 328 F.2d 869, 870-871*

[4] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, § 543 (10th ed. 2005)

6 Cal. Jur. 3d, *Assault and Other Wilful Torts*, §§ 158-163

30 Cal. Jur. 2d, *Libel and Slander*, §§ 105-107

53 C.J.S., *Libel and Slander*, §§ 32-52

50 Am. Jur. 2d, *Libel and Slander*, §§ 102-124

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30-340 California Forms of Pleading and Practice--Annotated § 340.225

§ 340.225 Allegation--Libel on Its Face Based on Imputation of Immoral Conduct

[1] FORM Allegation--Libel on Its Face Based on Imputation of Immoral Conduct

This _____ [*describe type of material*] is libelous on its face because it charges plaintiff with improper and immoral conduct.

[2] Use of Form

This allegation may be used in place of Paragraph VIII of *see § 340.220* where the defendant has published material which charges plaintiff with improper and immoral conduct.

[3] Decisions

Publication as libelous per se where plaintiff understood to be guilty of improper and immoral conduct. *Ervin v. Record Publ'g Co. (1908) 154 Cal. 79, 82, 97 P. 21*

[4] Text References

53 C.J.S., *Libel and Slander*, §§ 29, 30

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30-340 California Forms of Pleading and Practice--Annotated § 340.226

§ 340.226 Allegation--Libel on Its Face Based on Imputation of Dishonesty

[1] FORM Allegation--Libel on Its Face Based on Imputation of Dishonesty

This _____ [*describe type of material*] is libelous on its face because it charges plaintiff with dishonesty.

[2] Use of Form

This allegation may be used in place of Paragraph VIII of *see § 340.220* where the defendant has published material which charges plaintiff with dishonesty.

[3] Decisions

Publication as libelous per se where person falsely accused of being hypocrite. *Newby v. Times-Mirror Co. (1916) 173 Cal. 387, 394, 160 P. 233*

Publication as libelous per se where members of city council imputed to be dishonest and corrupt. *Kramer v. Ferguson (1964) 230 Cal. App. 2d 237, 242, 41 Cal. Rptr. 61*

Publication as libelous per se where person falsely accused of being untruthful. *Axelbank v. Rony (9th Cir. Cal 1960) 277 F.2d 314, 318*

[4] Text References

53 C.J.S., *Libel and Slander*, § 18

50 Am. Jur. 2d, *Libel and Slander*, § 74

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30-340 California Forms of Pleading and Practice--Annotated § 340.227

§ 340.227 Allegation--Libel on Its Face Based on Imputation of Communism

[1] FORM Allegation--Libel on Its Face Based on Imputation of Communism

This _____ [*describe type of material*] is libelous on its face because it charges plaintiff with being _____ [*either* a communist *or* a communist sympathizer].

[2] Use of Form

This allegation may be used in place of Paragraph VIII of *see § 340.220* where the defendant has published material which charges plaintiff with being either a communist or a communist sympathizer.

[3] Decisions

Publication as libelous per se that labels plaintiff as communist or as communist sympathizer. *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36* ; *Farr v. Bramblett (1955) 132 Cal. App. 2d 36, 48, 281 P.2d 372* , *overruled on other grounds, Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 114 n.4, 77 Cal. Rptr. 243, 453 P.2d 747*

[4] Text References

6 Cal. Jur. 3d, *Assault and Other Wilful Torts*, § 157

30 Cal. Jur. 2d, *Libel and Slander*, § 104

50 Am. Jur. 2d, *Libel and Slander*, § 77

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30-340 California Forms of Pleading and Practice--Annotated § 340.228

§ 340.228 Allegation--Libel on Its Face Based on Exposing Plaintiff to Contempt and Ridicule

[1] FORM Allegation--Libel on Its Face Based on Exposing Plaintiff to Contempt and Ridicule

This _____ [*describe type of material*] is libelous on its face because it subjects the plaintiff to contempt and ridicule.

[2] Use of Form

This allegation may be used in place of Paragraph VIII of *see § 340.220* where the defendant has published material which subjects plaintiff to contempt and ridicule.

[3] Decisions

Publication as libelous per se where sign said "Nuts to You--You Old Witch" since it exposed plaintiffs to contempt and ridicule. *Megarry v. Norton (1955) 137 Cal. App. 2d 581, 582-583, 290 P.2d 571*

[4] Text References

Witkin, Summary of California Law, *Torts*, § 544 (10th ed. 2005)

50 Am. Jur. 2d, *Libel and Slander*, §§ 71-95

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30-340 California Forms of Pleading and Practice--Annotated § 340.229

§ 340.229 Allegation--Libel on Its Face Based on Imputing Lack of Chastity to Woman

[1] FORM Allegation--Libel on Its Face Based on Imputing Lack of Chastity to Woman

This _____ [*describe type of material*] is libelous on its face because it imputes a lack of chastity to the plaintiff.

[2] Use of Form

This allegation may be used in place of Paragraph VIII of *see § 340.220* where the defendant has published material which imputes a lack of chastity to the female plaintiff.

[3] Decisions

Letter imputing lack of chastity to woman as libelous on its face. *Peterson v. Rasmussen (1920) 47 Cal. App. 694, 699, 191 P. 30*

[4] Text References

6 Cal. Jur. 3d, *Assault and Other Wilful Torts,* § 154

53 C.J.S., *Libel and Slander,* § 29

50 Am. Jur. 2d, *Libel and Slander,* §§ 60, 63-70

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30-340 California Forms of Pleading and Practice--Annotated § 340.230

§ 340.230 Allegation--Defendant Is Candidate, State Ballot Measure Proponent, or Committee Sponsor [Elec. Code § 20501] Liable for Defamatory Campaign Advertising or Communication [Elec. Code § 20500]

[1] FORM Allegation--Defendant Is Candidate, State Ballot Measure Proponent, or Committee Sponsor [Elec. Code § 20501] Liable for Defamatory Campaign Advertising or Communication [Elec. Code § 20500]

1. At all times herein mentioned, defendant was _____ [*specify, e.g.,* a candidate for the office of mayor of the City of _____ in the _____ [*month and year*] general election], and as such, controlled the _____ [*name*] committee, a _____ [*specify type of committee, e.g.,* controlled] committee as defined by *Section 82016 of the Government Code*.

2. Defendant willfully and knowingly _____ [directed *or* permitted] the _____ [*name*] committee to publish the abovementioned _____ [*describe campaign advertisement or communication, e.g.,* direct mailing].

[3. *If plaintiff is public official, allege falsity. See § 340.220, alternative Paragraphs 7.*]

4. Defendant _____ [directed *or* permitted] publication of the _____ [*describe campaign advertisement or communication, e.g.,* direct mailing] either with knowledge that it was false and defamatory of plaintiff or, if its false and defamatory nature was not known to defendant, then with reckless disregard for its obvious falsity and defamatory nature.

[2] Use of Form

These allegations may be used to allege that a committee controlled by defendant electoral candidate or state ballot measure proponent, as defined by *Gov. Code § 82016*, published a libelous campaign advertisement or communication at or with the willful and knowing direction or permission of the candidate or measure proponent [*see Elec. Code §§ 304, 20501(a)*]. This form may also be used to allege that a sponsored committee, as defined by *Gov. Code § 82048.7*, published a libelous campaign advertisement or communication at or with the willful and knowing direction or permission of defendant committee sponsor [*see Elec. Code §§ 304, 20501(a)*]. This form may be adapted for use when

the campaign advertising or communication is alleged to be slanderous, rather than libelous [*see Elec. Code § 20501*].

For further discussion of defamatory campaign advertising or communication, see *§ 340.21[6]*.

[3] Allegations

This form alleges: defendant's capacity as a candidate or ballot measure proponent in control of a committee defined by *Gov. Code § 82016*, or as a sponsor of a sponsored committee defined by *Gov. Code § 82048.7* (Paragraph 1); that defendant willfully and knowingly directed or permitted his or her committee to commit the libel (Paragraph 2) [*see Elec. Code § 20501*]; and that defendant published the libelous material with malice (Paragraph 4) [*see Miller v. Nestande (1987) 192 Cal. App. 3d 191, 201, 237 Cal. Rptr. 359]* . Optional Paragraph 3 alleges the falsity of the libelous material, and is for use when plaintiff is a public official, such as an incumbent public officeholder who is a candidate for election [*see Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 776, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* .

[4] Falsity

The United States Supreme Court has held that *U.S. Const. amend. I*, requires a public figure or official who brings a defamation action to bear the burden of proving the falsity of the defamatory statement before recovering damages [*see Garrison v. Louisiana (1964) 379 U.S. 64, 74, 85 S. Ct. 209, 13 L. Ed. 2d 125* ; *see also Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 776, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* . Therefore, the common law rule that plaintiff is not required to allege the falsity of the statements [*see Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 776, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* is preempted and inapplicable to a defamation action by a public official [*see Gomes v. Fried (1982) 136 Cal. App. 3d 924, 934, 186 Cal. Rptr. 605]* .

For discussion of the constitutional requirements of pleading and proof in defamation actions by public officials, see the § 340.18[1].

For allegations for use to allege that plaintiff is a public official, *see § 340.235*.

[5] Actual Malice

If plaintiff is an incumbent candidate for political office suing an opponent for damages arising out of libelous campaign advertising or communication, and the advertising or communication relates to matters of public concern, then plaintiff must prove defendant either knew the advertising or communication to be false or reckless when made, or made it with reckless disregard of its truth or falsity [*see Miller v. Nestande (1987) 192 Cal. App. 3d 191, 198-201, 237 Cal. Rptr. 359]* . It appears likely that plaintiff would have to make the same showing even if he or she were not an incumbent seeking election [*see Miller v. Nestande (1987) 192 Cal. App. 3d 191, 201, 237 Cal. Rptr. 359]* .

For further discussion of the requirement that plaintiff plead and prove actual malice, see *§ 340.21[6]*.

[6] State Statutes

"Campaign advertising or communication" defined. *Elec. Code § 304*

Civ. Code §§ 43-53 as applicable to campaign advertising or communication. *Elec. Code § 20500*

Liability of candidate, state measure proponent, or committee sponsor for defamatory campaign advertising or communication. *Elec. Code § 20501*

[7] Cross References

For discussion of the application of statutes prohibiting false advertising to campaign advertising, see Ch. 14, *Advertising*

For discussion of information disseminated in relation to candidates for election, see Ch. 242, *Election Campaigns*

For discussion of information disseminated in relation to ballot measures, see Ch. 302, *Initiative, Referendum, and Recall*

For a related form, *see § 340.235*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationPublic FiguresTortsIntentional TortsDefamationProcedure

California Forms of Pleading and Practice--Annotated

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 340 LIBEL AND SLANDER
PART V. FORMS
A. Defamation: Libel And Slander Complaints

30-340 California Forms of Pleading and Practice--Annotated § 340.231

§ 340.231 Complaint for General and Punitive Damages for Libel [Civ. Code § 45]--By Student Against School Superintendent and Trustees for Publication of Unprivileged School Information

[1] FORM Complaint for General and Punitive Damages for Libel [Civ. Code § 45]--By Student Against School Superintendent and Trustees for Publication of Unprivileged School Information

[*Caption. See § 340.220* .]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 340.220, Paragraph 1*.]

2. [*Fictitious name allegation, if appropriate*. *See § 340.220, Paragraph 2*.]

3. At all times herein mentioned defendant _____ [*name*] was the superintendent of the _____ School District.

4. At all times herein mentioned defendants _____, _____, _____, and _____ [*names*] were the duly elected trustees of the _____ School District.

5. Plaintiff _____ [*name*] is a minor of the age of _____ years, and _____ [*name*] is the mother of the plaintiff; prior to the commencement of the above-entitled action, the above-entitled court did by its order in writing appoint _____ [*name*] guardian ad litem of _____ [*name*] for the purpose of instituting and prosecuting this action, and the appointment has never been revoked.

6. Prior to _____ [*date*], _____ [*name*] was a student regularly enrolled in the _____ High School, located at _____, _____ County, California.

7. On or about _____ [*date*], defendants, and each of them, caused to be written _____ [*set out defamatory matter including circumstances under which uttered, e.g.*, in a mimeographed announcement the following words of and concerning _____ (*name*):

"At a special public meeting to be held _____ (*date*), in the _____ High School Gymnasium at _____ (*time*), the _____ High School Board of Trustees, the administration and teachers will bring the public in full focus of the serious violation of manners, morals and discipline that occurred in _____ as the direct result of interference by _____ (*name*) who is now suspended from school."]

8. Defendants, and each of them, caused the _____ [*Specify, e.g.*, mimeographed announcement] to be published by mailing copies thereof to many box holders in the _____ [High] School District.

9. The statements in the announcement of and concerning plaintiff were false and untrue and were made by each of the defendants through evil motive, malice, and ill will toward plaintiff _____ [*name*] wilfully, wickedly, wrongfully, maliciously and with intent and design to injure, disgrace, and defame _____ [*name*] and to bring him/her into public disregard as a person and to cause the public to hold _____ [*name*] in contempt and ridicule.

10. As a direct and proximate result of the statements and publication thereof, _____ [*name*] has been greatly injured and prejudiced in his/her reputation and has incurred and suffered great mental anguish and pain, all to his/her damage [in the sum of $_____].

11. [*Punitive damages. See § 340.220, Paragraph 13*].

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages.

2. For punitive damages.

3. For costs of suit incurred herein.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 340.220.*]

[2] Use of Form

This complaint is for use by a student to obtain damages for a defamatory publication published by a school superintendent and trustees. It is based on complaint filed in *Elder v. Anderson (1962) 205 Cal. App. 2d 326, 23 Cal. Rptr. 48* .

[3] Falsity

The United States Supreme Court has held that, at least when the plaintiff is either a public figure or a private figure who is suing a newspaper or other media defendant for publishing speech of a public concern, the *First Amendment* requires that the plaintiff bear the burden of proving the falsity of the defamatory statement before recovering damages [*Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 768-769, 776-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* . However, the Court has continued to leave open the question of what standards would apply if a private plaintiff sues a nonmedia defendant [*see, e.g., Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 779 n.4, 106 S. Ct. 1558, 89 L. Ed. 2d 783* ; *see also Hutchinson v. Proxmire (1979) 443 U.S. 111, 133 n.16, 99 S. Ct. 2675, 61 L. Ed. 2d 411* (open question as to whether the protection of *U.S. Const. amend. I*, extends to cases involving nonmedia defendants)], although it appears that a private figure plaintiff suing a nonmedia defendant over a statement that is a matter of public concern must prove fault, and therefore must plead and prove falsity [*see Dun & Bradstreet v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 757-761]* . Whether a statement is a matter of public concern will depend on a variety of factors, including whether the statement requires any special protection to ensure that debate on public issues remains robust, uninhibited, and wide-open; in whose interest the statement is made; and the breadth of dissemination of the statement [*see Dun & Bradstreet v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 756, 761-763, 105 S. Ct. 2939, 86 L. Ed. 2d 593]* .

Under the common law, a plaintiff is not required to allege that the statements are false, and an omission of an allegation of falsity in the complaint may not be grounds for a demurrer [*see Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal. 2d 224, 233, 11 Cal. Rptr. 97, 359 P.2d 465* ; *see also Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 776, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* . Therefore, although it is currently unclear whether or not a private plaintiff who sues a nonmedia defendant is required to plead and prove falsity, it appears that at least under *Lipman*, and until the United States Supreme Court rules otherwise, the burden remains on the defendant rather than on the plaintiff. Nevertheless, it is common practice for a plaintiff to allege falsity in the complaint, and because the point is unclear, it is advisable to do so.

[4] Actual Malice

A private plaintiff who sues a defendant for publishing a statement that is not a matter of public concern is not required to prove actual malice to recover presumed damages or punitive damages [*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 759-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593]* .

For additional discussion of the constitutional requirements of pleading and proof, see *§ 340.18[1]*.

[5] State Statutes

Access to pupil records prohibited without parental consent or judicial order except to enumerated groups of persons. *Educ. Code § 49076*

[6] Decisions

Violation of former Educ. Code § 10751 as providing no direct penalty; publication by trustees of false and defamatory information as subjecting trustees to defamation action just as other private citizens. *Elder v. Anderson (1962) 205 Cal. App. 2d 326, 336, 23 Cal. Rptr. 48*

School trustees as immune from suit for discretionary acts within scope of employment. *Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal. 2d 224, 230, 11 Cal. Rptr. 97, 359 P.2d 465*

[7] Cross References

For a related form, *see § 340.220*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesPunitive DamagesConduct Supporting AwardsTortsIntentional TortsDefamationProcedureTortsIntentional TortsDefamationRemediesDamages

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30-340 California Forms of Pleading and Practice--Annotated § 340.232

§ 340.232 Demand for Retraction of Libelous Publication [Civ. Code § 48a]

[1] FORM Demand for Retraction of Libelous Publication [Civ. Code § 48a]

To _____: [*name of publisher or publisher's designee*]

I call your attention to an article that appeared in the _____ [*name of newspaper*] on _____ [*date*] on page _____ [*number*] and appeared in all of the editions of the newspaper for that date. [The article read as follows: _____ (*set forth the exact language of the article*) *or* A copy of the article is attached hereto as Exhibit A and made a part hereof.]

_____ [The entire article is grossly libelous as it applies to me *or* The following statements contained in the article that apply to me are grossly libelous _____ (*repeat statements alleged to be libelous*)]. I therefore demand that _____ [this article *or* these statements] be corrected in the manner required by *Civil Code Section 48a(3).*
Dated: _____

_____ [*signature*]

[2] Use of Form

This form is for use to demand that allegedly defamatory material be corrected or retracted by a newspaper publisher or by an employee of the publisher who, on the publisher's behalf, is designated to receive such demands, to determine whether and how to respond to them, and to make corrections or retractions if he or she determines to do so [*see Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652, 658, 14 Cal. Rptr. 2d 839, 842 P.2d 138]* . Service of the demand is a condition precedent to recovering either general or punitive damages from a newspaper publisher [*Civ. Code § 48a(1), (2)*].

A demand for retraction is only effective as to the plaintiffs listed or so described in the demand such that the defendant fairly knows who is objecting to the challenged publication. Thus, merely stating that a business entity is seeking a

retraction does not preserve the rights of that entity's parent corporation to seek general or punitive damages, even if the business entity listed in the demand is a wholly owned subsidiary of the parent corporation and this fact of ownership is common knowledge [*Anschutz Entertainment Group, Inc. v. Snepp (2009) 171 Cal. App. 4th 598, 642-643, 90 Cal. Rptr. 3d 133*].

The demand may be served on the publisher, on a person designated by the publisher to receive such demands, or on an employee at the newspaper other than the publisher or the publisher's designee if the publisher acquires actual knowledge of the demand within the 20-day period set forth in *Civ. Code § 48a(1)* [*Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652, 658, 14 Cal. Rptr. 2d 839, 842 P.2d 138]* . When the demand is served by mail, it need not be sent by registered mail [*Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652* (expressly disapproving any suggestion to the contrary in *San Leandro Collection Serv. v. Dunbar (1968) 259 Cal. App. 2d Supp. 933)*]. For further discussion of legally sufficient service of the demand, see *§ 340.53[5]*.

[3] Constitutional Limitations

In addition to the statutory requirement of a demand before recovering either general or punitive damages [*Civ. Code § 48a*], the United States Supreme Court has forbidden the imposition of liability without fault on publishers in suits by private individuals and has required that private individual plaintiffs meet the *New York Times* "actual malice" standard required for public figure plaintiffs before recovering either general or punitive damages from newspaper publishers [*Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 346-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789]* . Ho wever, it appears that the constitutional restrictions set forth in *Gertz* only apply to a private plaintiff when the defamatory statement relates to a matter of public concern [*see* *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 759-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593]* . In addition to the actual malice requirement, if the plaintiff is a public figure, or a private figure who is suing a newspaper or other media defendant for publishing speech of a public concern, *U.S. Const. amend. I*, requires that the plaintiff bear the burden of proving the falsity of the defamatory statement before recovering damages [*Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 768-769, 776-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* .

[4] State Statutes

Retraction statute governing suits for libelous publications against publishers. *Civ. Code § 48a*

[5] Decisions

Constitutional limitations on defamation in suits by private plaintiffs. *Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 768-769, 776-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783* ; *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 759-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593* ; *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 346-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789*

Service of demand for correction or retraction on publisher, publisher's designee, or other employee of publisher. *Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652, 658, 14 Cal. Rptr. 2d 839, 842 P.2d 138* (impliedly overruling *Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 113-114, 77 Cal. Rptr. 243, 453 P.2d 747* and *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 791, 228 P.2d 6* to the extent inconsistent with opinion)

Adequacy of demand for correction or retraction. *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 31-32, 81 Cal. Rptr. 360, 459 P.2d 912* ; *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 554, 343 P.2d 36*

Publisher as not able to refuse demand for correction or retraction on basis of some general objections when other objections are specific. *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 33, 81 Cal. Rptr. 360, 459 P.2d 912*

Service of demand on publisher. *Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 113-114, 77 Cal. Rptr. 243, 453 P.2d 747* ; *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 791, 228 P.2d 6* ; *but see Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652, 658, 14 Cal. Rptr.2d 839, 842 P.2d 138* (discussing when service on specified individuals other than publisher is permissible)

Coverage of retraction statute as extending to all participants in publication or broadcast. *Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 114, 77 Cal. Rptr. 243, 453 P.2d 747* ; *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 791, 228 P.2d 6*

[6] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 630-639 (10th ed. 2005)

6 Cal. Jur. 3d, *Assault and Other Wilful Torts*, §§ 178-182

Legal Topics:

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

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30-340 California Forms of Pleading and Practice--Annotated § 340.233

§ 340.233 Complaint for General [Civ. Code § 48a(4)(a)], Special [Civ. Code § 48a(4)(b)], and Punitive [Civ. Code §§ 48a(4)(c), 3294] Damages for Libel on Its Face [Civ. Code §§ 45, 45a]--By Private Individual Against Newspaper--General Form

[1] FORM Complaint for General [Civ. Code § 48a(4)(a)], Special [Civ. Code § 48a(4)(b)], and Punitive [Civ. Code §§ 48a(4)(c), 3294] Damages for Libel on Its Face [Civ. Code §§ 45, 45a]--By Private Individual Against Newspaper--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR LIBEL
_____ [*name(s)*],	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times hereinmentioned was, a corporation duly organized and existing under and by virtue of the laws of California and has its principal place of business in _____ County, California.

[2. Defendants _____, _____, and _____ (*names*) are, and at all times mentioned herein were, residents of _____ County, California.]

3. [*Fictitious name allegation, if appropriate. See § 340.220, Paragraph 2.*]

4. [*Agency allegation, if appropriate. See § 340.220, Paragraph 3.*]

5. At all times herein mentioned, defendant _____ [*name of corporation*] was, and now is, doing business as a publisher and disseminator of news and current events, and was, and now is, publishing and circulating a daily newspaper in the City of _____, County of _____, State of California, known as the "_____" [*name*]. The paper has a wide circulation and is read by a great number of persons and citizens of the area in which it is published and circulated.

6. At all times herein mentioned, plaintiff was, and now is, _____ [*state occupation*] and resides in the City of _____, County of _____, State of California. Plaintiff has resided in the City of _____ for _____ [*number*] years and at all times has enjoyed a good reputation generally and in his/her occupation.

[*EITHER*]

7. On _____ [*date*], in all the editions of the _____ [*name of newspaper*], defendant(s) printed, published, and circulated, or caused to be printed, published, and circulated in the newspaper on page _____ [*number*] thereof, an article in writing that stated: _____ [*set forth precise language of the article*].

[*OR*]

7. On _____ [*date*], in all the editions of the _____ [*name of newspaper*], defendant(s) printed, published, and circulated, or caused to be printed, published, and circulated in the newspaper on page _____ [*number*] thereof, an article, which is attached hereto as Exhibit A and incorporated herein for all purposes.

[*CONTINUE*]

[8. *Allegation of colloquium, if appropriate. See § 340.220, Paragraph 6.*]

9. This article is libelous on its face because _____ [*specify facts that support allegation.*]

10. This article is false because _____ [*specify facts that support allegation*].

11. This article was read by readers of the _____ [*name of newspaper*] at that time and on that occasion in the City of _____, County of _____ and throughout the State of California.

12. Defendant(s) _____ was/were negligent in publishing this article. With ordinary and reasonable care defendant(s) would have realized or could have discovered that the article was obviously false and grossly libelous as it applied to this plaintiff.

13. Furthermore, defendant(s) published the article either knowing that it was false or with reckless disregard for whether it was true because _____ [*specify facts that support allegation*].

[*EITHER, if demand is served on publisher*]

14. On _____ [*date*], within 20 days after the article appeared in _____ [*name of newspaper*], plaintiff served on defendant publisher a demand for correction or retraction as required by *Civil Code Section 48a*. A copy of the demand is attached hereto, marked Exhibit _____, and incorporated herein by reference.

[*OR, if demand is served on publisher's designee*]

14. On _____ [*date*], within 20 days after the article appeared in _____ [*name of newspaper*], plaintiff served on _____ [*name*] a demand for correction or retraction as required by *Civil Code Section 48a*. _____ [*Name*], an employee of defendant publisher, had actual authority, either by delegation from the publisher or by a pattern or practice developed over a period of years, to receive such demands, to determine on the publisher's behalf whether and how to respond to them, and to make corrections or retractions if he/she determined to do so. A copy of the demand is attached hereto, marked Exhibit _____, and incorporated herein by reference.

[*OR, if demand is served on employee other than publisher's designee and publisher timely acquires actual knowledge of demand*]

14. On _____ [*date*], within 20 days after the article appeared in _____ [*name of newspaper*], plaintiff served on _____ [*name*], an employee of defendant publisher, a demand for correction or retraction as required by *Civil Code Section 48a*. On _____ [*date*], also within 20 days after the article appeared, defendant publisher acquired actual knowledge of the demand. A copy of the demand is attached hereto, marked Exhibit _____, and incorporated herein by reference.

[*CONTINUE WITH EITHER*]

15. Up to and including the date of the filing of this complaint, defendant(s) _____ [has *or* have] failed and refused, and still fail and refuse, to publish a correction or retraction as required by law.

[*OR*]

15. On _____ [*date*], defendant(s) published what it claimed to be a retraction that comports with the law. A copy of that retraction is attached hereto, marked Exhibit _____, and made a part hereof. The retraction is not legally sufficient because it fails to meet the requirements of *Civil Code Section 48a(3)*. It was not published in substantially as conspicuous a manner in the newspaper as the original article and does not have the same force and effect as though the correction had been published within three weeks after a demand for it.

[*CONTINUE*]

16. [*General damages allegation. See § 340.220, Paragraph 11.*]

17. [*Special damages allegation. See § 340.220, Paragraph 12.*]

18. The above-described article was published with knowledge of its falsity or with a reckless disregard for whether it was true, without a good faith belief in the truth of the matter, and with hatred or ill will toward the plaintiff, and thus plaintiff seeks an award of punitive damages.

[*Prayer. See § 340.220.*]

_____ [*firm name, if any*]
_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____

[*Verification, if desired. See § 340.220.*]

CAUTION:
Service of a demand for correction of the allegedly libelous publication is a condition precedent to suing a newspaper publisher for libel [*see Civ. Code § 48a(1), (2)*; *see also § 340.232*].

[2] Use of Form

This complaint is for use to obtain damages from a newspaper for a defamatory article which was libelous on its face. Counsel should use *see § 340.244* rather than this form to draft a similar action for slander against a radio broadcaster.

[3] Allegations

This complaint alleges:

- The falsity of the article (Paragraph 10) [*Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 768-769, 776-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* .

- Negligence by the publisher in publishing the defamatory article (Paragraph 12) [*Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 346-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789]* .

- Intentionality or recklessness in publishing the article (Paragraph 13) [*Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 346-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789]* .

- The service of a demand for correction (Alternative Paragraphs 14) [*Civ. Code § 48a(1), (2)*; *Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652, 658, 14 Cal. Rptr. 2d 839, 842 P.2d 138]* .

- The publisher's failure to comply with the demand (Alternative Paragraphs 15) [*Civ. Code § 48a(2), (3)*].

The allegation concerning punitive damages alleges both constitutional "actual malice" and statutory "actual malice" under *Civ. Code § 48a*, both of which are required to support an award of punitive damages in an action covered by the retraction statute [*see* *McCoy v. Hearst Corp. (1986) 42 Cal. 3d 835, 872, 231 Cal. Rptr. 518, 727 P.2d 711]* .

[4] Falsity

The United States Supreme Court has held that a private figure suing a newspaper or other media defendant for publishing speech of a public concern is required by *U.S. Const. amend. I*, to bear the burden of proving the falsity of the defamatory statement before recovering damages [*Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 768-769, 776-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* .

However, the Court has expressly left open the question of what standards would apply if a private plaintiff sues a nonmedia defendant [*Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 768-769, 776-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783* ; *Hutchinson v. Proxmire (1979) 443 U.S. 111, 133 n.16, 99 S. Ct. 2675, 61 L. Ed. 2d 411]* . Presumably, then, the question is also left open as to what standards would apply if a private plaintiff sued a newspaper or other media defendant for publishing speech not of a public concern. Under the common law, a plaintiff is not required to allege that the statements are false, and an omission of an allegation of falsity in the complaint may not be grounds for a demurrer [*see Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal. 2d 224, 233, 11 Cal. Rptr. 97, 359 P.2d 465* ; *see also Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 776-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* . Therefore, at this time, although it is unclear whether or not a private plaintiff who sues a media defendant for publishing speech not of a public concern is required to plead and prove falsity, it appears that at least under *Lipman*, and until the United States Supreme Court rules otherwise, the burden remains on the defendant rather than on the plaintiff. Nevertheless, it is common practice for a plaintiff to allege falsity in the complaint, and because the point is unclear, it is advisable to do so.

[5] Actual Malice

The United States Supreme Court has held that the states may not impose liability for defamation without fault [*Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 347, 94 S. Ct. 2997, 41 L. Ed. 2d 789]* . However, except as explained below, the Court has not yet decided the minimal standard of fault that may be imposed in a defamation suit brought by a private plaintiff [*see, e.g., Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 779 n.4, 106 S. Ct. 1558, 89 L. Ed. 2d 783, 790-792* (discussion of recent defamation case law)]. California courts also have yet to establish a requisite standard of fault, but it has been suggested in dicta that the standard is one of negligence [*see Widener v. Pacific Gas & Elec. Co. (1977) 75 Cal. App. 3d 415, 433, 142 Cal. Rptr. 304]* .

The United States Supreme Court has held, however, that a private figure plaintiff who brings a defamation action against a media defendant for publishing speech involving a matter of public concern may not recover presumed or punitive damages if the plaintiff fails to show that the defendant published the speech with knowledge of its falsity or with reckless disregard for the truth [*Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 349, 94 S. Ct. 2997, 41 L. Ed. 2d 789* ; *see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 759-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593]* . Rather, such a plaintiff may only recover those damages as are sufficient to compensate him or her for actual injury [*Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 349-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789]* . On the other hand, if the speech is not a matter of public concern, the constitutional actual malice standard does not apply [*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 759-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593]* .

For discussion of constitutional requirements of pleading and proof, see *§ 340.18[1]*.

[6] State Statutes

Retraction statute governing suits for libelous publications against publishers. *Civ. Code § 48a*

[7] Decisions

Constitutional limitations on defamation suits by private plaintiffs. *Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 768-769, 776-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783* ; *Dun & Bradstreet, Inc. v. Greenmoss Builders,*

Inc. (1985) 472 U.S. 749, 759-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593 ; *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 346-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789*

[8] Text References

Witkin, California Procedure, Vol. 5, *Pleading*, § 693 (4th ed. 1997)

[9] Cross References

For a related form, see *§ 340.232*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesDamagesPunitive DamagesTortsIntentional TortsDefamationDefamation Per SeTortsIntentional TortsDefamationProcedureTortsIntentional TortsDefamationRemediesDamages

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30-340 California Forms of Pleading and Practice--Annotated § 340.234

§ 340.234 Complaint for General [Civ. Code § 48a(4)(a)], Special, and Punitive Damages for Libel on Its Face [Civ. Code §§ 45, 45a]--By Private Individual Against Newspaper for Insinuation That Plaintiff Was Communist Sympathizer

[1] FORM Complaint for General [Civ. Code § 48a(4)(a)], Special, and Punitive Damages for Libel on Its Face [Civ. Code §§ 45, 45a]--By Private Individual Against Newspaper for Insinuation That Plaintiff Was Communist Sympathizer

[*Caption. See § 340.233.*]

Plaintiff alleges:

1. [*Capacity and residence of corporate defendant. See § 340.233, Paragraph 1.*]

[2. *Capacity and residence of other defendants, if appropriate. See § 340.233, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 340.220, Paragraph 2.*]

[4. *Agency allegation, if appropriate. See § 340.220, Paragraph 3.*]

5. [*Business of corporate defendant as publisher of newspaper. See § 340.233, Paragraph 5.*]

6. At all times herein mentioned, plaintiff was, and now is, _____ [*state occupation, e.g.,* a doctor of dental surgery, duly licensed as such under and by virtue of the laws of the State of California to practice his/her profession as a dentist in said State of California]; and at all said times was, and now is, so practicing his/her profession in the City of _____, County of _____, State of California.

7. By reason of his/her profession and occupation, at all times plaintiff has been well known and recognized by

numerous and diverse citizens and people of the City of _____, County of _____, State of California, where plaintiff resides, and at all times has enjoyed a good name and reputation in his/her profession and occupation.

8. On _____ [*date*], in all the editions of the newspaper, defendant(s) printed, published, and circulated, or caused to be printed, published, and circulated in the newspaper, on page _____ [*number*] thereof, an article in writing in which defendant(s) falsely and maliciously and with intent to injure, disgrace, and defame plaintiff used and published the following language of and concerning plaintiff: _____ [*set out publication verbatim, e.g.,*

"Red Paper Issues Election Extra"

"The _____ (*name of other publication*) recognized throughout the state as the mouthpiece of the communist party, distributed a last-minute extra edition in _____ (*name of city*) yesterday, on the eve of the city election.

"It verified reports that the paper is showing unusual interest in _____ (*name of city*) and its city election.

"The communist-line paper defended the proposal to revive ward politics in _____ (*name of city*) and printed a list of recommendations which included the name of council candidate _____ (*name of plaintiff*).

"The polls are open until _____ p.m. today."]

9. [*Allegation of falsity. See § 340.233, Paragraph 10.*]

10. [*Allegation of negligence. See § 340.233, Paragraph 12.*]

11. [*Allegation of intentionality or recklessness. See § 340.233, Paragraph 13.*]

12. [*Allegation of service of demand for correction. See § 340.233, Paragraphs 14.*]

13. [*Allegation of failure of publisher to comply with demand. See § 340.233, Paragraphs 15.*]

14. The article and publication was read by the readers of the newspaper at that time and on that occasion in the City of _____, County of _____ and throughout the State of California. Defendant(s) by the publication intended to be understood by the general public and readers, and it was so understood by them, as charging, asserting, and imputing that this plaintiff was a communist sympathizer or fellow traveler, that this plaintiff had received a recommendation from "_____" [*other publication*], and that "_____" [*other publication*] had "distributed a last-minute extra edition in _____" [*name of city*], which allegedly contained the recommendation as aforesaid, when in truth and in fact "_____" [*other publication*] did not endorse or recommend plaintiff in the article. All charges, references, assertions, and imputations were false, malicious, and unprivileged, and were calculated to and did expose plaintiff to hatred, contempt, ridicule, and obloquy, causing him/her to be shunned and avoided, and proximately caused him/her to sustain a severe and continuing nervous shock and strain and to suffer great mental anguish, mortification, humiliation, and shame; all to his/her damage.

[15. As a proximate result of the foregoing, plaintiff has suffered _____ (*allege special damages, if*

any, e.g., pecuniary loss in his/her profession as a dentist in the following that (1) an unusually large percentage of old and established patients have been canceling appointments; and, (2) there has been a sharp decline in the number of new patients normally to be expected. Plaintiff does not at this time know the exact extent of pecuniary loss resulting from the foregoing, but is informed and believes, and thereon alleges, that the loss is a continuing one.]

16. [*Allegation of punitive damages. See § 340.233, Paragraph 18.*]

[*Prayer. See § 340.220.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 340.220.*]

CAUTION:
Service of a demand for retraction of the allegedly libelous publication is a condition precedent to suing a newspaper publisher for libel [*see Civ. Code § 48a(1), (2)*; *see also § 340.232*].

[2] Use of Form

This complaint is for use to obtain damages for a defamatory article appearing in a newspaper, which insinuated that the plaintiff was a communist sympathizer. The complaint is based on the one filed in *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 343 P.2d 36* .

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[3] Decisions

Publication as libelous per se that labels plaintiff as communist or as communist sympathizer. *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36* ; *Farr v. Bramblett (1955) 132 Cal. App. 2d 36, 48, 281 P.2d 372* , *overruled on other grounds, Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 114 n.4, 77 Cal. Rptr. 243, 453 P.2d 747* .

[4] Cross References

For a related form, *see § 340.233*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesDamagesSpecial DamagesTortsIntentional TortsDefamationRemediesDamagesTortsWrongful Death & Survival ActionsRemediesPunitive Damages

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30-340 California Forms of Pleading and Practice--Annotated § 340.235

§ 340.235 Allegations--Public Official Suing for Defamatory Publication Libelous on Its Face [Civ. Code §§ 45, 45a]

[1] FORM Allegations--Public Official Suing for Defamatory Publication Libelous on Its Face [Civ. Code §§ 45, 45a]

1. At all times herein mentioned, plaintiff was, and now is, _____ [*state office held, e.g.,* a member of the City Council of _____ City]. Plaintiff has resided in the City of _____ for _____ [*number*] years and at all times has enjoyed a good reputation generally. He/She has served as a _____ [*state nature of office*] for _____ [*number*] years and at all times has enjoyed a good reputation as an honest and conscientious public servant.

2. Defendant(s) published the _____ [*specify form in which statements were made, e.g.,* article *or* pamphlet] either with knowledge that it was false and defamatory of the plaintiff or, if the false and defamatory nature of it was not known to _____ [him/her *or* them], with reckless disregard for its obvious falsity and defamatory nature.

[2] Use of Form

These allegations are for use by a public official to obtain damages for a defamatory newspaper article that was libelous on its face. Allegation 1 is for use in place of Allegation 6 in *see § 340.233*. Allegation 2 is for use in place of Allegation 12 in *see § 340.233*.

For forms of allegations for use when a public official is seeking damages for defamatory campaign advertising from an electoral candidate, a state ballot measure proponent, or the sponsor of a campaign committee, *see § 340.229*.1.

These allegations may also be used by a public official to obtain damages for defamatory statements disseminated by a nonmedia defendant that are libelous on their face [*see Miller v. Nestande (1987) 192 Cal. App. 3d 191, 200, 237 Cal. Rptr. 359]* . For this purpose, Allegation 1 should be used in place of Allegation 4 in *see § 340.220*, and Allegation 2 should be inserted after Allegation 10 in *see § 340.220*.

[3] Allegations

Allegation 1 states the nature of the public office held by the plaintiff and the fact that he or she has enjoyed a good reputation generally in the community as well as a public official. Allegation 2 contains the constitutionally imposed assertion that the newspaper article was published either intentionally or recklessly [*New York Times Co. v. Sullivan (1964) 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686]* .

Paragraph 10 of *see § 340.233* is an appropriate allegation of falsity that is constitutionally required [*see Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 768-769, 775, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* , and should be used by a public official bringing a defamation suit. *see § 340.220*, in alternative Paragraphs 7, also includes allegations of falsity which should be used.

[4] Falsity

The United States Supreme Court has held that the *First Amendment* requires a public figure or official who brings a defamation action to bear the burden of proving the falsity of the defamatory statement before recovering damages [*see Garrison v. Louisiana (1964) 379 U.S. 64, 74, 85 S. Ct. 209, 13 L. Ed. 2d 125* ; *see also Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 768-769, 775, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* . Therefore, the common law rule that a plaintiff is not required to allege that the statements are false [*see Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal. 2d 224, 233, 11 Cal. Rptr. 97, 359 P.2d 465* ; *see also Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 775, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* has been preempted and does not apply to a defamation action by a public official [*see Gomes v. Fried (1982) 136 Cal. App. 3d 924, 934, 186 Cal. Rptr. 605]* .

[5] Actual Malice

The United States Supreme Court has held that a public official or public figure who brings a defamation action against a publisher is required to prove actual malice, that is, that the defendant published the statement with knowledge of, or reckless disregard as to, whether the statement was true or false [*New York Times Co. v. Sullivan (1964) 376 U.S. 254, 279-280, 84 S. Ct. 710, 11 L. Ed. 2d 686* ; *see Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 768-769, 773, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* .

For discussion of constitutional requirements of pleading and proof in actions by public officials, see *§ 340.18[1]*.

[6] Decisions

Public figure plaintiff as required to show falsity of defamatory statement before recovering damages and prevailing on suit for defamation. *Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 768-769, 776, 106 S. Ct. 1558, 89 L. Ed. 2d 783* (dictum)

Public official as prohibited from recovering damages for defamation relating to his or her official conduct unless knowledge of falsity or recklessness with regard to truth of article proved on part of publisher. *New York Times Co. v. Sullivan (1964) 376 U.S. 254, 279-280, 84 S. Ct. 710, 11 L. Ed. 2d 686*

Incumbent candidate for public office as required to prove actual malice even though defendants are not members of media, in action against opponent and several former prisoners of war (POW) for dissemination of pamphlet accusing incumbent of cooperating with enemy while POW during Vietnam war. *Miller v. Nestande (1987) 192 Cal. App. 3d 191, 200-202, 237 Cal. Rptr. 359*

[7] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 592, 600 (10th ed. 2005)

[8] Law Reviews

Kovner, *Disturbing Trends in the Law of Defamation: A Publishing Attorney's Opinion, 3 Hastings Const. L.Q. 363 (1976)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationPublic FiguresTortsIntentional TortsDefamationElementsLibelTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.236

§ 340.236 Complaint for General, Special, and Punitive Damages for Cartoon Libelous on Its Face [Civ. Code §§ 45, 45a]--By Public Official Against Newspaper

[1] FORM Complaint for General, Special, and Punitive Damages for Cartoon Libelous on Its Face [Civ. Code §§ 45, 45a]--By Public Official Against Newspaper

[*Caption. See § 340.233.*]

Plaintiff alleges:

1. [*Capacity and residence of corporate defendant. See § 340.233, Paragraph 1.*]

[2. *Capacity and residence of other defendants, if appropriate. See § 340.233, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 340.220, Paragraph 2.*]

[4. *Agency allegation, if appropriate. See § 340.220, Paragraph 3.*]

5. [*Business of corporate defendant as publisher of newspaper. See § 340.233, Paragraph 5.*]

6. [*Allegation of plaintiff holding public office and enjoying good reputation. See § 340.235, Allegation 1.*]

7. On _____ [*date*], in all the editions of the _____ [*name of newspaper*], defendant(s) printed, published, and circulated, or caused to be printed, published, and circulated in the newspaper on page _____ [*number*] thereof, a cartoon. A copy of the cartoon is attached hereto as Exhibit A and made a part hereof.

8. [*Allegation of colloquium, if appropriate. See § 340.220, Paragraph 6.*]

9. This cartoon is libelous on its face because it _____ [*specify facts that support allegation, e.g.*, depicts plaintiff accepting a bribe].

10. [*Allegation of falsity. See § 340.233, Paragraph 10.*]

11. This cartoon was seen and read by readers of the _____ [*name of newspaper*] at that time and on that occasion in the City of _____, County of _____, and throughout the State of California.

12. Defendant(s) published the cartoon either with knowledge that it was false and defamatory of the plaintiff or, if the false and defamatory nature of the article was not known to _____ [him/her *or* them], with reckless disregard for its obvious falsity and defamatory nature because _____ [*specify facts which support allegation*].

13. [*Allegation of service of demand for retraction on publisher. See § 340.233, Paragraph 14.*]

14. [*Allegation of failure of publisher to comply with retraction demand. See § 340.233, Paragraph 15.*]

15. [*Allegation of general damages. See § 340.220, Paragraph 11.*]

16. [*Special damages allegation. See § 340.220, Paragraph 12.*]

17. The above-described cartoon was published by the defendant(s) because of his/her/its/their feelings of hatred and ill-will toward plaintiff and with willfull and conscious disregard for the rights of plaintiff, thereby justifying an award of punitive damages against defendant(s).

[*Prayer. See § 340.220.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 340.220.*]

CAUTION:
Service of a demand for retraction of the allegedly libelous publication is a condition precedent to suing a newspaper publisher for libel [*see Civ. Code §§ 48a(1), 48a(2)*; *see also § 340.232*].

[2] Use of Form

This complaint is for use by a public official to obtain damages from a newspaper for a defamatory cartoon that is libelous on its face.

[3] Decisions

Cartoon as subject to law of libel like any other form of depiction or representation. *Yorty v. Chandler (1970) 13 Cal.*

App. 3d 467, 472, 91 Cal. Rptr. 709

Cartoon as libelous that maliciously presents as fact defamatory material that is false. *Yorty v. Chandler (1970) 13 Cal. App. 3d 467, 472, 91 Cal. Rptr. 709* ; *see Snively v. Record Publ'g Co. (1921) 185 Cal. 565, 580, 198 P. 1 , overruled on other grounds, Brown v. Kelly Broad. Co. (1989) 48 Cal. 3d 711, 732-733, 257 Cal. Rptr. 708, 771 P.2d 406*

Court as required to ferret out underlying themes of cartoon and then determine whether they can reasonably be considered libelous. *Yorty v. Chandler (1970) 13 Cal. App. 3d 467, 472, 91 Cal. Rptr. 709*

[4] Cross References

For a related form, *see § 340.235*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsSpecial DamagesTortsIntentional TortsDefamationElementsLibelTortsIntentional TortsDefamationProcedureTortsIntentional TortsDefamationRemediesDamages

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§ 340.237 Complaint for General, Special, and Punitive Damages for Slander Per Se [Civ. Code § 46]--Private Individual Suing Private Individual--General Form

[1] FORM Complaint for General, Special, and Punitive Damages for Slander Per Se [Civ. Code § 46]--Private Individual Suing Private Individual--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR SLANDER
_____ [*name*(*s*)],	)	PER SE
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 340.220, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 340.220, Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 340.220, Paragraph 3.*]

4. On or about _____ [*date*], defendant spoke the following words of and concerning the plaintiff: _____ [*specify the precise language, or words which convey substantially the same meaning*].

5. The words were heard by _____ [*name*] and several other persons whose names are not known to plaintiff.

6. These words were slanderous per se because they _____ [*specify facts that support allegation, e.g.,* accused plaintiff of committing the crime of _____].

[7. The words uttered were a false statement because _____ (*specify facts indicating falsity*).]

[8. The words carried a defamatory meaning because _____ (*set forth facts that indicate why the words carried a defamatory meaning to those who heard them rather than an innocent meaning*).]

[9. The words were understood by those who saw and heard them in a way that defamed plaintiff because _____ (*set forth extrinsic facts that show why language was understood within the meaning as detailed in Paragraph 8*).]

10. As a result of the above-described words, plaintiff has suffered general damages to his/her reputation.

11. [As a further proximate result of the above-described words, plaintiff has suffered the following special damages: _____ (*specify facts that entitle plaintiff to recover special damages, such as injury to plaintiff's property, business, trade, profession, or occupation*), all to his/her injury _____ (*either* in the sum of $_____ *or according to proof*).]

12. The above-described words were spoken by the defendant with _____ [malice *and/or* oppression *and/or* fraud] in that _____ [*specify circumstances*], and thus an award of exemplary and punitive damages is justified.

[*Prayer. See § 340.220.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 340.220.*]

[2] Use of Form

This complaint is for use to obtain damages for words slanderous per se. For a form of complaint for use by a private individual to obtain damages from a radio broadcaster for a slanderous publication, *see § 340.244*.

[3] Allegations

The complaint alleges:

- The exact words spoken or their substantial equivalent (Paragraph 4) [*Fleet v. Tichenor (1909) 156 Cal. 343, 346, 104 P. 458]* .

- The publication of the words to at least one person (Paragraph 5) [*Cunningham v. Simpson (1969) 1 Cal. 3d 301, 307, 81 Cal. Rptr. 855, 461 P.2d 39]* .

- The reason the words were slanderous per se (Paragraph 6) [*Civ. Code § 46*].

- An optional allegation that the words were false (Paragraph 7).

- An optional allegation pleading an innuendo if the words are ambiguous (Paragraph 8) [*Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 828, 136 P.2d 297* , *overruled on other grounds,* *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 343 P.2d 36]* .

- An optional allegation pleading an inducement (Paragraph 9) [*Jarman v. Rea (1902) 137 Cal. 339, 345, 70 P. 216* , *overruled on other grounds,* *Snively v. Record Publ'g Co. (1921) 185 Cal. 565, 576, 198 P. 1]* .

The complaint also contains allegations for general damages (Paragraph 10), for special damages (Paragraph 11) [*Civ. Code § 3333*], and for punitive damages (Paragraph 12) [*Civ. Code § 3294*].

[4] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281*, *3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11*, *425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[5] Pleading of Exact Language

In a slander action the plaintiff need not set forth with absolute precision the exact words alleged to be defamatory [*Fleet v. Tichenor (1909) 156 Cal. 343, 346, 104 P. 458* ; *Haub v. Friermuth (1905) 1 Cal. App. 556, 557-558, 82 P. 571]* . However, the plaintiff must substantially prove that the defendant spoke words that constitute the sting of the charge contained in the complaint [*Fleet v. Tichenor (1909) 156 Cal. 343, 346, 104 P. 458* ; *Carl v. McDougal (1919) 43 Cal. App. 279, 282, 184 P. 885]* .

[6] Slander Per Se

Statements can be slanderous per se even though they do not appear to be defamatory on their face, and an innuendo and inducement are required to make the words actionable [*Jarman v. Rea (1902) 137 Cal. 339, 345-346, 70 P. 216* , *overruled on other grounds,* *Snively v. Record Publ'g Co. (1921) 185 Cal. 565, 576, 198 P. 1* ; *White v. Valenta (1965) 234 Cal. App. 2d 243, 251-254, 44 Cal. Rptr. 241]* . Thus, if words can be shown to have carried a meaning that made them slanderous within any of the first four categories of *Civ. Code § 46*, damages are presumed and there is not need to plead and prove special damages to sustain a cause of action [*see* *Jarman v. Rea (1902) 137 Cal. 339, 345-346,*

70 P. 216 , overruled on other grounds, Snively v. Record Publ'g Co. (1921) 185 Cal. 565, 576, 198 P. 1 ; *White v. Valenta (1965) 234 Cal. App. 2d 243, 252, 44 Cal. Rptr. 241]* .

[7] General, Special, and Punitive Damages

Neither general, special, nor punitive damages in an action for slander per se are specially defined in the Civil Code [*but see generally Civ. Code §§ 3294* (punitive damages), 3333 (damages for proximately caused detriment)]. However, the code does define these types of damages sought by a plaintiff in an action for slander by a radio broadcast when plaintiff has demanded a retraction and the defendant has failed to broadcast the retraction under the circumstances described in *Civ. Code § 48a(1)-(3)* [*see Civ. Code § 48a(4)*]. For further discussion, see *§§ 340.22*, *340.24*, and *340.25*.

[8] Falsity

The United States Supreme Court has recently held that, at least when the plaintiff is either a public figure or a private figure who is suing a newspaper or other media defendant for publishing speech of a public concern, the *First Amendment* requires that the plaintiff bear the burden of proving the falsity of the defamatory statement before recovering damages [*Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 768-769, 775-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* . However, the Court has continued to leave open the question of what standards would apply if a private plaintiff sues a nonmedia defendant [*see, e.g.*, *Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 779 n.4, 106 S. Ct. 1558, 89 L. Ed. 2d 783* ; *see also Hutchinson v. Proxmire (1979) 443 U.S. 111, 133 n.16, 99 S. Ct. 2675, 61 L. Ed. 2d 411* (open question whether protection of *First Amendment* extends to cases involving nonmedia defendants)].

Under the common law, a plaintiff is not required to allege that the statements are false, and an omission of an allegation of falsity in the complaint may not be grounds for a demurrer [*see Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal. 2d 224, 233, 11 Cal. Rptr. 97, 359 P.2d 465* ; *see also Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 775, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* . Therefore, although it is currently unclear whether or not a private plaintiff who sues a nonmedia defendant is required to plead and prove falsity, it appears that at least under *Lipman*, and until the United States Supreme Court rules otherwise, the burden remains on the defendant rather than on the plaintiff. Nevertheless, it is common practice for a plaintiff to allege falsity in the complaint, and because the point is unclear, it is advisable to do so.

[9] State Statutes

Slander defined. *Civ. Code § 46*

[10] Decisions

Publication of words to one person as sufficient. *Cunningham v. Simpson (1969) 1 Cal. 3d 301, 307, 81 Cal. Rptr. 855, 461 P.2d 39*

Pleading of innuendo as required where words ambiguous. *Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 828, 136 P.2d 297 , overruled on other grounds, MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 343 P.2d 36*

Plaintiff as not required to set forth exact words alleged to be defamatory in action for slander. *Fleet v. Tichenor (1909) 156 Cal. 343, 346, 104 P. 458* ; *Haub v. Friermuth (1905) 1 Cal. App. 556, 557-558, 82 P. 571*

Plaintiff as required to prove defendant spoke words which constitute sting of charge contained in complaint. *Fleet v. Tichenor (1909) 156 Cal. 343, 346, 104 P. 458* ; *Carl v. McDougal (1919) 43 Cal. App. 279, 282, 184 P. 885*

Pleading of inducement as required to set forth extrinsic circumstances affecting construction of language and making it actionable when words ambiguous. *Jarman v. Rea (1902) 137 Cal. 339, 345, 70 P. 216* ; *White v. Valenta (1965) 234 Cal. App. 2d 243, 254, 44 Cal. Rptr. 241* .

Statement that plaintiff lawyer was dishonest and unethical as having substantially same meaning as words alleged in complaint for slander that plaintiff was crook or thief; words that plaintiff's corporation was front or alter ego for plaintiff as having substantially same meaning as allegation in complaint that company was scam corporation or entity. *Albertini v. Schaefer (1979) 97 Cal. App. 3d 822, 834-835, 159 Cal. Rptr. 98*

[11] Text References

Witkin, California Procedure, vol. 5, *Pleading*, §§ 690-701 (4th ed. 1997)

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 529-538, 551-555, 616 (10th ed. 2005)

[12] Cross References

For a related form, *see § 340.220*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationElementsGeneral OverviewTortsIntentional TortsDefamationProcedure

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Chapter 340 LIBEL AND SLANDER
PART V. FORMS
A. Defamation: Libel And Slander Complaints

30-340 California Forms of Pleading and Practice--Annotated § 340.238

§ 340.238 Allegation--Slander Per Se Based on Accusation of Crime [Civ. Code § 46(1)]

[1] FORM Allegation--Slander Per Se Based on Accusation of Crime [Civ. Code § 46(1)]

These words were slanderous per se because they charge the plaintiff with _____ [the crime of _____ (*specify*) *or* having been indicted for a crime *or* having been convicted of a crime *or* having been punished for committing a crime].

[2] Use of Form

This allegation may be used in place of Paragraph 6 of *see § 340.237* when the defendant has charged the plaintiff with committing a crime, having been indicted for a crime, having been convicted of a crime, or having been punished for committing a crime [*Civ. Code § 46(1)*].

[3] State Statutes

Words falsely charging person with crime as slanderous. *Civ. Code § 46(1)*

[4] Decisions

Publication as slanderous per se that states person has "hot title" to car. *Cunningham v. Simpson (1969) 1 Cal. 3d 301, 306, 81 Cal. Rptr. 855, 461 P.2d 39*

Publication as slander per se that charges person with theft. *Moranville v. Aletto (1957) 153 Cal. App. 2d 667, 672, 315 P.2d 91* ; *Clay v. Lagiss (1956) 143 Cal. App. 2d 441, 448, 299 P.2d 1025*

Publication as slanderous per se that reasonably imputes commission of murder to person. *Mullins v. Brando (1970) 13 Cal. App. 3d 409, 414, 91 Cal. Rptr. 796*

[5] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 551, 552 (10th ed. 2005)

[6] Cross References

For related forms, *see §§ 340.220* and *340.237*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationDefamation Per SeTortsIntentional TortsDefamationElementsSlanderTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.239

§ 340.239 Allegation--Slander Per Se Based on Imputation of Disease [Civ. Code § 46(2)]

[1] FORM Allegation--Slander Per Se Based on Imputation of Disease [Civ. Code § 46(2)]

These words were slanderous per se because they impute in the plaintiff the existence of an infectious, contagious, or loathsome disease, namely _____ [*specify disease, e.g.,* syphilis].

[2] Use of Form

This allegation may be used in place of Paragraph 6 of *see § 340.237* when the defendant has imputed to the plaintiff the presence of an infectious, contagious, or loathsome disease [*Civ. Code § 46(2)*].

[3] State Statutes

Words falsely imputing disease to person as slanderous. *Civ. Code § 46(2)*

[4] Decisions

Publication as slanderous per se that states that person has syphilis. *Schessler v. Keck (1954) 125 Cal. App. 2d 827, 832, 271 P.2d 588*

[5] Cross References

For a related form, *see § 340.237*

Legal Topics:

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

TortsIntentional TortsDefamationDefamation Per SeTortsIntentional TortsDefamationElementsSlanderTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.240

§ 340.240 Allegation--Slander Per Se Based on Tendency to Injure Occupation [Civ. Code § 46(3)]

[1] FORM Allegation--Slander Per Se Based on Tendency to Injure Occupation [Civ. Code § 46(3)]

These words were slanderous per se because they tend to injure plaintiff in his/her _____ [office *or* profession *or* trade *or* business] by imputing to him /her _____ [a general disqualification in those respects that the _____ (office *or* occupation) peculiarly requires *or* something that has a natural tendency to lessen the profits of the plaintiff's _____ (office *or* occupation)].

[2] Use of Form

This allegation may be used in place of Paragraph 6 of *see § 340.237* when the defendant has said things that have a tendency to injure the plaintiff in his or her office or occupation by imputing to him or her either a general disqualification peculiarly required by his or her work or something that naturally tends to lessen plaintiff's profits.

[3] State Statutes

Words falsely published as slanderous that have tendency to injure person in office or occupation. *Civ. Code § 46(3)*

[4] Decisions

Publication as slanderous per se under *Civ. Code § 46(3)* that on its face has natural tendency to injure person's general o r occupational reputation. *Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 827, 136 P.2d 297*

Publication as slanderous per se that accuses automobile dealer of having a "hot title" to a car. *Cunningham v. Simpson (1969) 1 Cal. 3d 301, 306, 81 Cal. Rptr. 855, 461 P.2d 39*

Publication as slanderous per se that alleges that master mariner was in habit of getting drunk. *Swan v. Thompson*

(1899) 124 Cal. 193, 199, 56 P. 878

Publication as slanderous per se that calls car dealer a "son of a bitch." *White v. Valenta (1965) 234 Cal. App. 2d 243, 257, 44 Cal. Rptr. 241*

Publication as slanderous per se that accuses a doctor of malpractice. *Hanley v. Lund (1963) 218 Cal. App. 2d 633, 644, 32 Cal. Rptr. 733 , disapproved on other grounds, Adams v. Murakami (1991) 54 Cal. 3d 105, 115-116, 284 Cal. Rptr. 318, 813 P.2d 1348*

Publication as slanderous per se that calls jeweler "crook" and says he "got away" with ring since it reflects on his integrity. *Williams v. Seiglitz (1921) 186 Cal. 767, 772, 200 P. 635*

Publications as slanderous per se that accuse plaintiff principal of being "weak spot" in school system. *Oberkotter v. Woolman (1921) 187 Cal. 500, 504, 202 P. 669*

Publication as slanderous per se that accuses plaintiff principal of permitting "petting" and "embracing" in school building. *Larive v. Willitt (1957) 154 Cal. App. 2d 140, 142, 315 P.2d 732*

[5] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, § 553 (10th ed. 2005)

[6] Cross References

For a related form, *see § 340.237*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationDefamation Per SeTortsIntentional TortsDefamationElementsSlanderTortsIntentional TortsDefamationProcedure

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A. Defamation: Libel And Slander Complaints

30-340 California Forms of Pleading and Practice--Annotated § 340.241

§ 340.241 Allegation--Slander Per Se Based on Accusation of Impotence or Lack of Chastity [Civ. Code § 46(4)]

[1] FORM Allegation--Slander Per Se Based on Accusation of Impotence or Lack of Chastity [Civ. Code § 46(4)]

These words were slanderous per se because they accuse the plaintiff of _____ [impotence *or* a lack of chastity].

[2] Use of Form

This allegation may be used in place of Paragraph 6 of *see § 340.237* when the defendant has charged the plaintiff with either impotence or a lack of chastity [*Civ. Code § 46(4)*].

[3] State Statutes

Words falsely charging person with impotence or lack of chastity as slanderous. *Civ. Code § 46(4)*

[4] Decisions

Stating that plaintiff had been in house of prostitution, had been afflicted with venereal disease, had conceived an illegitimate child, and had offered herself to a young man as imputing lack of chastity and actionable per se. *Preston v. Frey (1891) 91 Cal. 107, 109, 27 P. 533*

Stating that plaintiff was cohabitating with man as his mistress, that plaintiff was being kept for immoral purposes, and that plaintiff was being used as a mistress as imputing lack of chastity and actionable per se. *Hitchcock v. Caruthers (1890) 82 Cal. 523, 526, 23 P. 48*

Statement imputing commission of homosexual act as imputing lack of chastity. *Schomer v. Smidt (1980) 113 Cal. App. 3d 828, 835, 170 Cal. Rptr. 662*

Stating that plaintiff was "bitch" as not imputing unchastity. *Martin v. Sutter (1922) 60 Cal. App. 8, 12, 212 P. 60*

[5] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 551, 552 (10th ed. 2005)

[6] Cross References

For a related form, *see § 340.237*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationDefamation Per SeTortsIntentional TortsDefamationElementsSlanderTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.242

§ 340.242 Complaint for General, Special [Civ. Code § 3333], and Punitive [Civ. Code § 3294] Damages for Defamatory Publication Not Slanderous Per Se [Civ. Code § 46(5)]--Required Pleading of Actual Damages--Private Individual Suing Private Individual

[1] FORM Complaint for General, Special [Civ. Code § 3333], and Punitive [Civ. Code § 3294] Damages for Defamatory Publication Not Slanderous Per Se [Civ. Code § 46(5)]--Required Pleading of Actual Damages--Private Individual Suing Private Individual

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR SLANDER
_____ [*name*(*s*)],	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 340.220, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 340.220, Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 340.220, Paragraph 3.*]

4. [*Allegation containing spoken words. See § 340.237, Paragraph 4.*]

5. [*Publication of words to third person. See § 340.237, Paragraph 5.*]

6. [*Allegation of innuendo. See § 340.237, Paragraph 8.*]

7. [*Allegation of inducement. See § 340.237, Paragraph 9.*]

[8. *Allegation of falsity. See § 340.237, Paragraph 7.*]

9. The above-described words were the direct and proximate cause of the following actual damages suffered by the plaintiff: _____ [*specify facts that entitle plaintiff to recover special damages, such as injury to plaintiff's property, business, trade, profession, or occupation*].

10. Plaintiff has also suffered general damages because of damage to his/her reputation and the suffering of same and hurt feelings.

11. [*Allegation of punitive damages. See § 340.237, Paragraph 12.*]

[*Prayer. See § 340.220.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 340.220.*]

[2] Use of Form

This complaint is for use to obtain damages for words not slanderous per se. The essential allegation is one for special damages (Paragraph 9) because an action for defamation not slanderous per se is not actionable without it [*see Gautier v. General Tel. Co. (1965) 234 Cal. App. 2d 302, 309, 44 Cal. Rptr. 404]* .

[3] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments*

.

[4] State Statutes

Words falsely published that by their natural consequence cause actual damage to plaintiff as slanderous. *Civ. Code § 46(5)*

[5] Decisions

Averment of special damages as required if publication not defamatory on its face. *Gautier V General Telephone Co. (1965) 234 Cal. App. 2d 302, 309, 44 Cal. Rptr. 404*

On proof of actual damages in action for slander under *Civ. Code § 46(5)*, jury as capable of considering plaintiff's loss of reputation, shame, and hurt feelings in awarding general damages. *Cunningham v. Simpson (1969) 1 Cal. 3d 301, 309, 81 Cal. Rptr. 855, 461 P.2d 39*

[6] Text References

Witkin, California Procedure, Vol. 5, *Pleading*, § 895 (4th ed. 1997)

[7] Cross References

For related forms, *see §§ 340.220* and *340.237*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsSpecial DamagesTortsIntentional TortsDefamationProcedureTortsIntentional TortsDefamationRemediesDamages

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30-340 California Forms of Pleading and Practice--Annotated § 340.243

§ 340.243 Demand for Retraction of Slanderous Comment [Civ. Code § 48a]

[1] FORM Demand for Retraction of Slanderous Comment [Civ. Code § 48a]

To _____ [*name of broadcaster*]:

I call your attention to a _____ [*describe type of comment, e.g.*, statement *or* program] which was made on _____ [*date*], on your _____ [radio *or* television] station. The _____ [*describe type of comment*] was made by _____ [*name of person making comment*] who stated: _____ [*set forth exact language of the comment or allege substance of comment*].

[The entire _____ (*describe nature of comment*) is grossly slanderous as it applies to me *or* The portions of the _____ (*describe nature of comment*) that apply to me are grossly slanderous: _____.] I therefore demand that _____ [the entire _____ (*describe nature of comment*) *or* those portions of the _____ (*describe nature of comment*)] be corrected in the manner required by *Section 48a(3) of the Civil Code* of the State of California.
Dated: _____

_____ [*signature*]

[2] Use of Form

This form is for use to demand that allegedly defamatory material be corrected or retracted by a radio or television broadcaster in compliance with *Civ. Code § 48a(3)*. Such a demand is a condition precedent to recovering either general or punitive damages from a radio or television broadcaster [*Civ. Code §§ 48a(1), 48a(2)*].

[3] Constitutional Limitation on Damages

In addition to the statutory requirement of a demand before recovering either general or punitive damages, the United

States Supreme Court had forbidden the imposition of "liability without fault" on publishers in suits by private individuals, and has required that private individual plaintiffs meet the *New York Times* standard before recovering either general or punitive damages from broadcasters for a statement that is a matter of public concern [*Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 346-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789* ; *see Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 768-769, 775-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* . Also, a public figure plaintiff, or a private plaintiff who is suing a media defendant for publishing speech of a public concern, is required by the *First Amendment* to bear the burden of proving the falsity of the defamatory statement before recovering damages [*Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 768-769, 776-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* .

[4] State Statutes

Retraction statute governing suits for slanderous broadcasts against broadcasters. *Civ. Code § 48a*

Nonliability of owner or agent for damages resulting from defamatory broadcast of another if owner or agent exercised due care to prevent utterance. *Civ. Code § 48.5*

[5] Decisions

Constitutional limitations on suits against broadcasters. *Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 768-769, 776-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783* ; *Dun & Bradstreet v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 759-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593* ; *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 346-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789*

Coverage of retraction statute as extending to all participants in publication or broadcast. *Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 114, 77 Cal. Rptr. 243, 453 P.2d 747* ; *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 791, 228 P.2d 6*

Persons speaking through television medium as in same position, legally, as newspaper writers. *White v. Valenta (1965) 234 Cal. App. 2d 243, 248, 250, 44 Cal. Rptr. 241* (dictum)

Civ. Code § 48.5 as conferring defense on owner and agent and as not raising cause of action against them in favor of person defamed. *Correia v. Santos (1961) 191 Cal. App. 2d 844, 856, 13 Cal. Rptr. 132*

[6] Cross References

For related forms, *see §§ 340.232* and *340.233*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationElementsSlanderTortsIntentional TortsDefamationProcedureTortsIntentional TortsDefamationRemediesRetractions

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30-340 California Forms of Pleading and Practice--Annotated § 340.244

§ 340.244 Complaint for General, Special, and Punitive Damages for Broadcast Slanderous Per Se [Civ. Code § 46]--By Private Individual Against Broadcaster

[1] FORM Complaint for General, Special, and Punitive Damages for Broadcast Slanderous Per Se [Civ. Code § 46]--By Private Individual Against Broadcaster

[*Caption. See § 340.237.*]

Plaintiff alleges:

1. [*Allegation of corporate status of broadcaster. See § 340.233, Paragraph 1.*]

[2. *Capacity and residence of other defendants, if applicable. See § 340.233, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 340.220, Paragraph 2.*]

[4. *Agency allegation, if appropriate. See § 340.220, Paragraph 3.*]

5. At all times herein mentioned, the corporation was, and now is, doing business as a _____ [radio *or* television] broadcaster and was and now is broadcasting _____ [radio *or* television] programs in the City of _____, County of _____, State of California. The programs are broadcast over _____ [station _____ at _____ (*number*) _____ (AM *or* FM) *or* Channel _____ (*number*)]. The programs are _____ [heard *or* seen] by a great number of persons and citizens of the area in which it is broadcast.

6. [*Capacity and residence of plaintiff. See § 340.220, Paragraph 4.*]

[*EITHER*]

7. On _____ [*date*], in a broadcast that occurred around _____ [*time*], defendant(s) broadcast or caused to be broadcast a _____ [*describe nature of comment*] made by _____ [*name of person making comment*], which stated: _____ [*set forth precise language of the comment*].

[*OR*]

7. On _____ [*date*], in a broadcast that occurred around _____ [*time*], defendant(s) broadcast or caused to be broadcast a _____ [*describe nature of comment*] made by _____ [*name of person making comment*], a transcript of which is attached hereto as Exhibit A and incorporated herein for all purposes.

[8. *Allegation of colloquium, if appropriate. See § 340.220, Paragraph 6.*]

9. The broadcast was slanderous per se because _____ [*specify facts that support allegation.*]

10. This broadcast was false because _____ [*specify facts that support allegation.*]

11. The broadcast was heard by those who _____ [listen to *or* watch] _____ [radio *or* television] programs of _____ [station _____ *or* Channel _____] in the City of _____, County of _____ and throughout the State of California.

12. Defendant(s) _____ [was *or* were] negligent in broadcasting this program. With ordinary and reasonable care defendant(s) would have realized or could have discovered that the program was obviously false and grossly slanderous as it applied to this plaintiff.

13. Furthermore, defendant(s) broadcast the program either knowing that it was false as it applied to plaintiff or with reckless disregard for whether or not it was true.

14. On _____ [*date*], within 20 days after the broadcast was made, plaintiff served on defendant broadcaster a demand for correction or retraction as required by *Section 48a of the Civil Code*. A copy of that demand is attached hereto, marked Exhibit _____, and incorporated herein by reference.

[*EITHER*]

15. Up to and including the date of the filing of this complaint, defendant(s) _____ [has *or* have] failed and refused, and still fail and refuse, to broadcast a correction or retraction as required by law.

[*OR*]

15. On _____ [*date*], defendant(s) broadcast what is claimed to be a retraction that comports with the law. A copy of that retraction is attached hereto, marked Exhibit _____ [B *or* C], and incorporated herein by reference. The retraction is not legally sufficient because it fails to meet the requirements of *Section 48a(3) of the Civil Code*. It was not broadcast in substantially as conspicuous a manner as the original program was broadcast and does not have the same force and effect as though the correction had been broadcast within three weeks after a demand

for it.

16. [*General damages allegation. See § 340.220, Paragraph 11.*]

17. [*Special damages allegation. See § 340.220, Paragraph 12.*]

18. The above-described program was broadcast by the defendant(s) because of his/her/its/their feelings of hatred and ill-will toward plaintiff and with willful and conscious disregard for the rights of plaintiff, thereby justifying an award of punitive damages against defendant(s) _____ in an amount appropriate to punish defendant(s) for his/her/its/their wrongful conduct and to deter others from engaging in such conduct.

[*Prayer. See § 340.220.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 340.220.*]

CAUTION:
Service of a demand for retraction of the allegedly slanderous comment is a condition precedent to suing a broadcaster for slander [*see Civ. Code §§ 48a(1), 48a(2)*; *see also § 340.243*].

[2] Use of Form

This complaint is for use to obtain damages from a radio or television broadcaster for a defamatory program that is slanderous per se.

[3] Allegations

The complaint alleges:

- The falsity of the broadcast (Paragraph 10) [*Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 768-769, 776-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* .

- Negligence by the broadcaster in broadcasting the defamatory program (Paragraph 12) [*Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 346-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789]* .

- Intentionality or recklessness in broadcasting the program (Paragraph 13) [*Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 346-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789]* .

- The serving of a demand for retraction on the broadcaster (Paragraph 14) [*Civ. Code §§ 48a(1), 48a(2)*; *Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 113-114, 77 Cal. Rptr. 243, 453 P.2d 747]* .

- The failure of the broadcaster to comply with the demand (Paragraph 15) [*Civ. Code §§ 48a(2), 48a(3)*].

[4] State Statutes

Retraction statute governing suits for slanderous broadcasts against broadcasters. *Civ. Code § 48a*

Nonliability of owner or agent for damages resulting from defamatory broadcast of another if owner or agent exercised due care to prevent utterance. *Civ. Code § 48.5*

Slander as including defamation by radio or television broadcast. *Civ. Code §§ 46, 48a*

[5] Decisions

Constitutional limitations on suits against broadcasters. *Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 768-769, 776-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783* ; *Dun & Bradstreet v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 759-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593* ; *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 346-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789*

Coverage of retraction statute as extending to all participants in publication or broadcast. *Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 114, 77 Cal. Rptr. 243, 453 P.2d 747* ; *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 791, 228 P.2d 6*

Fact that oral defamation is subsequently quoted or printed in newspaper as not making it libel. *Mercado v. Hoefler (1961) 190 Cal. App. 2d 12, 18, 11 Cal. Rptr. 787*

Slander as including defamation by radio or television in *California. Arno v. Stewart (1966) 245 Cal. App. 2d 955, 961, 54 Cal. Rptr. 392*

[6] Cross References

For related forms, *see §§ 340.232, 340.233,* and *340.243*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationDefamation Per SeTortsIntentional TortsDefamationElementsSlanderTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.245

§ 340.245 Claim Against Public Entity (State or Local) [Gov. Code §§ 905, 905.2, 910, 910.2]

[1] FORM Claim Against Public Entity (State or Local) [Gov. Code §§ 905, 905.2, 910, 910.2]

CLAIM FOR DAMAGES FOR DEFAMATORY STATEMENTS

TO _____ [*e.g.*, Clerk of the City Council of the City of _____, *or* The State Board of Control of California]:

This claim is presented _____ [by _____ (*name*) *or* on behalf of _____ (*name*)]. The post office address of claimant is _____ [*specify*] and all notices respecting this claim should be sent to _____ [that address *or* to _____ (*specify address of other party such as attorney*)].

The date and place of the remarks and statements that gave rise to this claim are: _____ [*date*], _____, California.

At the above date and place, _____ [*name(s) of public employee(s*)] published the following statement about _____ [*name of claimant*]: _____ [*set out language with as much precision as possible*].

Claimant has been injured as a result of this statement in the amount of $_____ as of the filing of this claim. The basis of the above computation is as follows:

(1) General damages in the sum of $_____.

(2) Special damages in the sum of $_____.
Dated: _____

_____

[*signature of claimant or of person acting in claimant's behalf*]

[2] Use of Form

This form is for use in filing a claim with either the state or a local public entity when either one or a number of its employees has made defamatory remarks or statements about the claimant [*see Gov. Code §§ 905, 905.2, 910, 910.2*]. The filing of a claim with the appropriate public entity is a prerequisite to an action for defamation [*Neal v. Gatlin (1973) 35 Cal. App. 3d 871, 875-877, 111 Cal. Rptr. 117* (college teacher)].

For additional discussion and forms, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[3] State Statutes

Required presentation of claims against local public entities. *Gov. Code § 905*

Required presentation of claims against State. *Gov. Code § 905.2*

Contents of claim. *Gov. Code § 910*

Signing of claim. *Gov. Code § 910.2*

Necessity of presentation of claim to maintain action against public employee. *Gov. Code § 950*

Action against public employee barred if action against employing public entity barred. *Gov. Code § 950.2*

[4] Decisions

Former public employee as required to file claim with public entity as prerequisite for defamation action. *Neal v. Gatlin (1973) 35 Cal. App. 3d 871, 875-877, 111 Cal. Rptr. 117* (college teacher); *Hopper v. Allen (1968) 266 Cal. App. 2d 797, 799, 72 Cal. Rptr. 435* (police officer)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationProcedureTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural Requirements

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PART V. FORMS
A. Defamation: Libel And Slander Complaints

30-340 California Forms of Pleading and Practice--Annotated § 340.246

§ 340.246 Allegations--Presentation of Claim to Public Entity [Gov. Code §§ 905, 905.2] and Rejection of Claim by Public Entity [Gov. Code §§ 912.4, 912.6, 912.8]

[1] FORM Allegations--Presentation of Claim to Public Entity [Gov. Code §§ 905, 905.2] and Rejection of Claim by Public Entity [Gov. Code §§ 912.4, 912.6, 912.8]

1. On or about _____ [*date*], plaintiff duly presented to defendant _____ [*name of public entity*] a claim in the amount of $_____ for the damages sought herein.

[*EITHER*]

2. On or about _____ [*date*], defendant rejected the claim _____ [*either* in its entirety *or* allowed the claim in the amount of $_____ and rejected it as to the remainder.

[*OR*]

2. Defendant failed and refused to act on the claim within the period of 45 days after its presentation, and the claim was thus rejected under the provisions of *Section 912.4 of the Government Code* of the State of California on _____ [*date*].

These allegations are for use in a complaint for libel or slander against either a public entity or public employee. The allegations state that the plaintiff filed a claim with the public entity [*see Gov. Code §§ 905, 910*] and that the entity rejected that claim either explicitly [*see Gov. Code § 912.6*] or by the elapse of the 45 day period in which it must act [*see Gov. Code § 912.4*].

[2] State Statutes

Ways local public entity may act on claim. *Gov. Code § 912.6*

Ways board may act in claim against State. *Gov. Code § 912.8*

Time for board's action on claim. *Gov. Code § 912.4*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationProcedureTortsPublic Entity LiabilityLiabilityClaim PresentationGeneral Overview

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30-340 California Forms of Pleading and Practice--Annotated §§ 340.247-340.259

[Reserved]

§§ 340.247[Reserved]

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B. Defenses To Defamation Actions

30-340 California Forms of Pleading and Practice--Annotated § 340.260

§ 340.260 General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Failure to Allege Special Damages If Language Not Defamatory on Its Face [Civ. Code §§ 45a, 46(5)]

[1] FORM General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Failure to Allege Special Damages If Language Not Defamatory on Its Face [Civ. Code §§ 45a, 46(5)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	GENERAL DEMURRER
Defendant(s).	)	
	)	
	)	

_____

Defendant demurs to the complaint herein on the following ground:

The complaint does not state facts sufficient to constitute a cause of action in that it appears on the face of the complaint that the language claimed to be defamatory is not _____ [libelous on its face *or* slanderous per se] and that plaintiff has not alleged special damages as a proximate result thereof as required by Civil Code Section _____ [Section 45a *or* Section 46(5)].

Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Defendant _____ [*name*]

CAUTION:

A party filing a demurrer is required to serve and file with the demurrer a notice hearing [*Cal. Rules of Ct., Rule 3.1320(c)*] and a memorandum of points and authorities in support of each ground of the demurrer *Cal. Rules of Ct., Rule 3.1113(a)*. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form is for use in objecting, by general demurrer, to a complaint for defamation on the ground that the pleading does not state factssufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*] because the language is not defamatory on its face and the plaintiff has failed to allege special damages [*see Civ. Code §§ 45a, 46(5)*]. This defect must appear on the face of the complaint [*Code Civ. Proc. § 430.30(a)*].

[3] Cross References

For alternative forms of demurrer and notice of hearing, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

[4] California Points and Authorities

For a memorandum of points and authorities supporting this demurrer, see California Points and Authorities, Ch. 142, *Libel and Slander* (*Defamation*) (Matthew Bender)

[5] State Statutes

Objection to complaint by demurrer. *Code Civ. Proc. §§ 430.10(e)* (failure to state cause of action), *430.30(a)*

Pleading of special damages required where publication not libelous on its face. *Civ. Code § 45a*

Publication not slanderous per se as requiring allegation of actual damage. *Civ. Code § 46(5)*

[6] Decisions

Communication not libelous on its face as requiring averment of special damages. *Williams v. Daily Review, Inc. (1965) 236 Cal. App. 2d 405, 409-410* ; *46 Cal. Rptr. 135* ; *Gautier v. General Tel. Co. (1965) 234 Cal. App. 2d 302, 309, 44 Cal. Rptr. 404*

Special damages as essential element of cause of action where alleged libel is not actionable per se. *Smith v. Los Angeles Bookbinders Union (1955) 133 Cal. App. 2d 486, 494-495, 284 P.2d 194 , overruled on other grounds, MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36*

[7] Text References

Witkin, California Procedure, Vol. 4, *Pleading*, § 603 (4th ed. 1997)

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 1107, 1108, 1110 (general demurrer) (4th ed. 1997)

Witkin, Summary of California Law, Vol. 6, *Torts*, §§ 1071, 1072 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDefects of FormCivil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsSpecial DamagesTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.261

§ 340.261 Notice of Motion to Strike [Code Civ. Proc. §§ 435-437] Prayer for Special Damages [Civ. Code § 48a(4)(b)]--Insufficient Particularity

[1] FORM Notice of Motion to Strike [Code Civ. Proc. §§ 435-437] Prayer for Special Damages [Civ. Code § 48a(4)(b)]--Insufficient Particularity

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MOTION AND NOTICE OF MOTION TO STRIKE
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*(*s*)],	)	Location: _____
Defendant(s).	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]
	)	

_____

To plaintiff and plaintiff's attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*] or as soon therafter as the matter may be heard, in [Department _____ of] this court, located at _____ [*address*] defendant will, and hereby does, move for an order striking that portion of the complaint seeking special damages. The motion will be made on the ground that the complaint does not allege special damages with sufficient particularity in that _____ [*specify reasons why allegation of special damages is not sufficient*].

The motion will be based on this notice of motion, on the memorandum of points and authorities served and filed herewith, and on the papers and records on file herein.
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant(s) _____ [*name(s)*]

CAUTION:
A memorandum of points and authorities must accompany this notice of motion [*Cal. Rules of Ct., Rule 3.1113*].

[2] Use of Form

This form is for use as a notice of motion to strike that portion of the complaint seeking special damages. The basis for the motion is that thecomplaint does not allege special damages with sufficient particularity [*Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 791-792, 228 P.2d 6* ; *Smith v. Los Angeles Bookbinders Union (1955) 133 Cal. App. 2d 486, 494, 284 P.2d 194]* .

[3] California Points and Authorities

For a memorandum of points and authorities supporting this notice of motion, see California Points and Authorities, Ch. 142, *Libel and Slander* (*Defamation*) (Matthew Bender)

[4] State Statutes

Motions to strike. *Code Civ. Proc. §§ 435-437*

[5] Decisions

Special damages as required to be alleged with particularity. *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 791-792, 228 P.2d 6* ; *Smith v. Los Angeles Bookbinders Union (1955) 133 Cal. App. 2d 486, 494, 284 P.2d 194*

Purpose of pleading special damages with particularity as protecting defendant from surprise. *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 792, 228 P.2d 6*

General allegation of loss of prospective employment, sale, or profit as not sufficient allegation of special damages. *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 792, 228 P.2d 6* (dictum); Smith v. Los Angeles bookbinders *Union (1955) 133 Cal. App. 2d 486, 494-495, 284 P.2d 194* (general allegation of injury to business of $100,000 as not sufficient)

Allegation of special damages as sufficiently specific where loss of employment with specific employer, for specific period, and in specific amount alleged. *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 792, 228 P.2d 6*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsSpecial DamagesTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.262

§ 340.262 Order Granting Defendant's Motion to Strike Prayer for Special Damages [Civ. Code § 48a(4)(b)]

[1] FORM Order Granting Defendant's Motion to Strike Prayer for Special Damages [Civ. Code § 48a(4)(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER GRANTING MOTION TO STRIKE
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name(s)*],	)	Location: _____
Defendant(s).	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]
	)	

_____

The motion of defendant _____ [*name*] for an order striking that portion of the complaint on file herein seeking special damages on the ground that the complaint does not allege special damages with sufficient particularity came on regularly for hearing on _____ [*date*]; plaintiff appearing through counsel _____ [*name*] and defendant appearing through counsel _____ [*name*], and good cause appearing therefor,

IT IS ORDERED that the motion of defendant is granted as to that portion of the complaint seeking special damages and that that portion of the complaint is hereby stricken.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This order is for use when the motion to strike that portion of the complaint seeking special damages is granted.

[3] Cross References

For related forms, *see §§ 340.260* and *340.261*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesSpecial DamagesTortsIntentional TortsDefamationProcedure

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B. Defenses To Defamation Actions

30-340 California Forms of Pleading and Practice--Annotated § 340.263

§ 340.263 General Demurrer--Expression of Opinion

[1] FORM General Demurrer--Expression of Opinion

[*Caption. See § 340.260*]

Defendant demurs to the complaint herein on the following grounds:

The complaint does not state facts sufficient to constitute a cause of action in that it appears on the face of the complaint that the language claimed to be defamatory is _____ [not a false statement of fact *or* an expression of opinion].

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant(s) _____ [*name(s)*]

CAUTION:
The United States Supreme Court has held that *U.S. Const. amend. I*, does not require that state defamation laws establish a privilege for statements of opinion, as opposed to factual statements. The Court held in *Milkovich v. Lorain Journal Co. (1990) 497 U.S. 1, 17-21, 110 S. Ct. 2695, 111 L. Ed. 2d 1* , that whether or not a statement is defamatory depends not on an opinion/fact dichotomy, but rather on whether it is based on the facts presented and, under existing constitutional guarantees, it is of a defamatory nature. It is unclear whether the California courts will adopt the Supreme Court's holding and likewise eliminate the opinion exemption or whether they will continue on the basis of the California Constitution or common law to exempt statements of opinion. *Milkovich* is discussed in *§ 340.16[1]*.

CAUTION:

A party filing a demurrer is required to serve and file therewith a notice of hearing [*Cal. Rules of Ct., Rule 3.1320(c)*] and a memorandum of points and authorities in support of each ground thereof [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form is for use in objecting, by general demurrer, to a complaint for defamation on the grounds that the pleading does not state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*] because it appears on the face of the complaint that the allegedly defamatory language is merely a statement of opinion [*see Botos v. Los Angeles County Bar Assn. (1984) 151 Cal. App. 3d 1083, 1088-1089, 199 Cal. Rptr. 236* ; *see also Code Civ. Proc. § 430.30(a)* (grounds for objection to complaint by demurrer must appear on face of complaint)].

[3] Decisions

False statement of fact as essential element of libel; legal distinction of fact from opinion as varying with context. *Okun v. Superior Court (1981) 29 Cal. 3d 442, 450-451, 175 Cal. Rptr. 157, 629 P.2d 1369*

Statements written by newspaper columnist concerning criminal defense lawyer tactics in criminal cases involving child victims as protected speech in nature of expression of imaginative expression or rhetorical hyperbole (deputy public defender's acquisition of school records as "really scary part of this story"; deputy public defender went to "extreme lengths"), clearly recognizable as opinion and not reasonably to be understood as statements of literal fact. *James v. San Jose Mercury News, Inc. (1993) 17 Cal. App. 4th 1, 14, 20 Cal. Rptr. 2d 890*

Expression of opinion in heat of political controversy as not libelous. *Carr v. Warden (1984) 159 Cal. App. 3d 1166, 1170, 206 Cal. Rptr. 162*

Distinction between fact and opinion as question of law when statement unambiguously constitutes either fact or opinion; but when statement can be understood by average listener or reader in either sense, issue must be left to trier of fact. *O'Connor v. McGraw-Hill, Inc. (1984) 159 Cal. App. 3d 478, 484, 206 Cal. Rptr. 33*

When statements made in context of public controversy, political or public debate, heated labor dispute, or other setting in which audience expects parties to persuade others to their positions by use of epithets or fiery rhetoric, court as allowed to determine, as question of law, that statements should be viewed in context and treated as expression of opinion. *O'Connor v. McGraw-Hill, Inc. (1984) 159 Cal. App. 3d 478, 483, 206 Cal. Rptr. 33*

[4] Cross References

For a related form, see *§ 340.260*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationDefensesFair Comment & OpinionTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.264

§ 340.264 General Demurrer--Failure of Public Official Suing for Defamation to Allege Malice

[1] FORM General Demurrer--Failure of Public Official Suing for Defamation to Allege Malice

[*Caption. See § 340.260.*]

Defendant demurs to the complaint herein on the following ground:

The complaint does not state facts sufficient to constitute a cause of action in that it appears on the face of the complaint that plaintiff is a public official and yet has failed to allege that defendant _____ [published *or* broadcast] the allegedly defamatory statements concerning plaintiff's official conduct with knowledge of their falsity or with reckless disregard for their truth as required by the *First Amendment*.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant(s) _____ [*name(s)*]

CAUTION:
A party filing a demurrer is required to serve and file therewith a notice of hearing [*Cal. Rules of Ct., Rule 3.1320(c)*] and a memorandum of points and authorities in support of each ground thereof [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form is for use in objecting, by general demurrer, to a complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*] because the plaintiff, a public official, has failed to allege that the defendant either published or broadcast the statement with actual malice [*see New York Times*

Co. v. Sullivan (1964) 376 U.S. 254, 279-280, 84 S. Ct. 710, 11 L. Ed. 2d 686] . This defect must appear on the face of the complaint [*see Code Civ. Proc. § 430.30(a)*]. If the complaint fails to allege that plaintiff is a public official, the objection should be taken by an affirmative defense [*see § 340.265*].

[3] Decisions

Public official suing for defamatory falsehood relating to his or her official conduct as prohibited from any recovery without proving statement made with knowledge of its falsity or with reckless disregard for whether it was true. *New York Times Co. v. Sullivan (1964) 376 U.S. 254, 279-280, 84 S. Ct. 710, 11 L. Ed. 2d 686*

Government employees who have or who appear to have substantial responsibility or control over conduct of governmental affairs as "public officials" forthe purpose of the *New York Times* test. *Rosenblatt v. Baer (1966) 383 U.S. 75, 85, 86 S. Ct. 669, 15 L. Ed. 2d 597*

Former superintendent of junior college suing for defamation as required to meet *New York Times* test. *McCunn v. California Teachers Ass'n (1970) 3 Cal. App. 3d 956, 962-964, 83 Cal. Rptr. 846*

[4] Text References

Witkin, Summary of California Law, Vol. 5, *Torts*, §§ 601-604, 611 (10th ed. 2005)

[5] Cross References

For a related form, see *§ 340.260*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationPublic FiguresTortsIntentional TortsDefamationDefensesPrivilegesQualified PrivilegesTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.265

§ 340.265 Affirmative Defense--Defendant Did Not Publish [or Broadcast] Statement About Public Official With Malice

[1] FORM Affirmative Defense--Defendant Did Not Publish [or Broadcast] Statement About Public Official With Malice

AS A [_____ (*if more than one, specify number, e.g.*, FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.*, SECOND) CAUSE OF ACTION], defendant alleges that:

The _____ [publication *or* broadcast] complained of in plaintiff's complaint concerned plaintiff's official conduct as a public official. It was not _____ [published *or* broadcast] by the defendant either with knowledge that it was false or with reckless disregard of the truth of the statements. It thus is protected by constitutional privilege.

[2] Use of Form

This affirmative defense may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint for libel or slander where plaintiff has failed to identify himself as a public official. It alleges that defendant did not make the publication or broadcast with actual malice toward the plaintiff, and thus the statements are protected by the constitutional privilege afforded by *New York Times Co. v. Sullivan (1964) 376 U.S. 254, 279-280, 84 S. Ct. 710, 11 L. Ed. 2d 686* .

[3] California Points and Authorities

For a memorandum of points and authorities supporting a motion for summary judgment based on this defense, see California Points and Authorities, Ch. 142, *Libel and Slander* (*Defamation*) (Matthew Bender)

[4] State Statutes

Affirmative defense as part of answer. *Code Civ. Proc. § 431.30(b)(2)*

[5] Decisions

Public official suing for defamatory falsehood relating to his or her official conduct as prohibited from any recovery without proving statement made with knowledge of its falsity or with reckless disregard for whether it was true. *New York Times Co. v. Sullivan (1964) 376 U.S. 254, 279-280, 84 S. Ct. 710, 11 L. Ed. 2d 686*

Plaintiff public official as required to present proof of convincing clarity in order to overcome constitutional privilege. *New York Times Co. v. Sullivan (1964) 376 U.S. 254, 286-288, 84 S. Ct. 710, 11 L. Ed. 2d 686*

Public official suing for defamation as required to show that defendant was subjectively aware of possible doubts regarding truth of defamatory publication. *St. Amant v. Thompson (1968) 390 U.S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262*

New York Times test as applicable to books as well as news media. *Church of Scientology of Cal. v. Dell Publ'g Co., Inc. (N.D. Cal. 1973) 362 F. Supp. 767, 768-770*

Incumbent candidate for public office as required to prove actual malice, even though defendants were not members of media, in action against opponent and several former prisoners of war for dissemination of pamphlet accusing incumbent of cooperating with enemy while POW during Vietnam war. *Miller v. Nestande (1987) 192 Cal. App. 3d 191, 200-202, 237 Cal. Rptr. 359*

Political candidates as required to meet *New York Times* test in *California. Noonan v. Rousselot (1966) 239 Cal. App. 2d 447, 452, 48 Cal. Rptr. 817*

[6] Law Reviews

Kovner, *Disturbing Trends in the Law of Defamation: A Publishing Attorney's Opinion, 3 Hastings Const. L.Q. 363 (1976)*

[7] Cross References

For related forms, see *§§ 340.264* and *340.296*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationPublic FiguresTortsIntentional TortsDefamationDefensesPrivilegesConstitutional PrivilegesTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.266

§ 340.266 Demurrer--Failure of Public Figure Suing for Defamation to Allege Malice

[1] FORM Demurrer--Failure of Public Figure Suing for Defamation to Allege Malice

[*Caption. See § 340.260.*]

Defendant demurs to the complaint herein on the following ground:

The complaint does not state facts sufficient to constitute a cause of action in that plaintiff has pleaded facts which identify him as a public figure but yet has failed to allege that defendant _____ [published *or* broadcast] the allegedly defamatory statements concerning him with knowledge of their falsity or with reckless disregard for their truth as required by the *first amendment*.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant(s) _____ [*name(s)*]

CAUTION:
A party filing a demurrer is required to serve and file therewith a notice of hearing [*Cal. Rules of Ct., Rules 3.1320(c)*] and a memorandum of points and authorities in support of each ground thereof [*Cal. Rules of Ct., Rules 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form is for use in objecting, by demurrer, to a complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*] because plaintiff has pleaded facts which identify himself as a public figure but yet has failed to allege that the defendant either published or broadcast the statements with

actual malice [*see* *Curtis Publ'g Co. v. Butts (1967) 388 U.S. 130, 164, 87 S. Ct. 1975, 18 L. Ed. 2d 1094* (Warren, Ch. J., concurring)]. This defect must appear on the face of the complaint [*see Code Civ. Proc. § 430.30(a)*]. Where plaintiff has not identified himself as a public figure, the constitutional privilege should be raised by answer [*see § 340.267*].

[3] Decisions

New York Times test as applicable to suits by public figures as well as public officials. *Curtis Publ'g Co. v. Butts (1967) 388 U.S. 130, 164, 87 S. Ct. 1975, 18 L. Ed. 2d 1094*

Public figure as determined either on basis of general fame or on basis of involvement in a particular controversy. *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 351, 94 S. Ct. 2997, 41 L. Ed. 2d 789*

Well-known national attorney as a public figure. *Belli v. Curtis Publ'g Co. (1972) 25 Cal. App. 3d 384, 388, 102 Cal. Rptr. 122*

[4] Cross References

For a related form, see *§ 340.260*

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-340 California Forms of Pleading and Practice--Annotated § 340.267

§ 340.267 Affirmative Defense--Defendant Did Not Publish [or Broadcast] Statement About Public Figure With Malice

[1] FORM Affirmative Defense--Defendant Did Not Publish [or Broadcast] Statement About Public Figure With Malice

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

The _____ [publication *or* broadcast] complained of in plaintiff's complaint was not _____ [published *or* broadcast] by the defendant either with knowledge that it was false or with reckless disregard of the truth of the statements. Because plaintiff is a public figure, defendant is protected by constitutional privilege from defamation actions in which the statements were not _____ [published *or* broadcast] with actual malice.

[2] Use of Form

This affirmative defense may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint for libel or slander where plaintiff has failed to identify himself as a public figure. It alleges that defendant did not make the publication or broadcast with actual malice toward the plaintiff, and that thus the statements are protected by the constitutional privilege under New York Times [*see Curtis Publ'g Co. v. Butts (1967) 388 U.S. 130, 164, 87 S. Ct. 1975, 18 L. Ed. 2d 1094* (Warren, Ch. J., concurring)].

[3] California Points and Authorities

For a memorandum of points and authorities supporting a motion for summary judgment based on this defense, see California Points and Authorities, Ch. 142, *Libel and Slander* (*Defamation*) (Matthew Bender)

[4] Law Reviews

Louis, *Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases, 57 S. Cal. L. Rev. 707 (1984)*

[5] Cross References

For related forms, see *§§ 340.266* and *340.296*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationPublic FiguresTortsIntentional TortsDefamationDefensesPrivilegesConstitutional PrivilegesTortsIntentional TortsDefamationDefensesPrivilegesConstitutional PrivilegesTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.268

§ 340.268 Affirmative Defense--Defendant Not at Fault in Publishing Allegedly Defamatory Statement About Private Plaintiff Which Related to Matter of Public Concern

[1] FORM Affirmative Defense--Defendant Not at Fault in Publishing Allegedly Defamatory Statement About Private Plaintiff Which Related to Matter of Public Concern

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

The allegedly defamatory statement of which plaintiff complains related to a matter of public concern and thus is constitutionally protected in the absence of fault. The defendant was not negligent in _____ [publishing *or* broadcasting] the statement complained of. Therefore, defendant is protected from liability by constitutional privilege.

[2] Use of Form

This affirmative defense may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint for libel or slander when plaintiff is a private individual and defendant wishes to allege that the statement complained of related to a matter of public concern in order to invoke the constitutional privileges set forth in *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 347, 349-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789* . For discussion of these constitutional privileges, see *§ 340.18[4][a]*.

[3] Decisions

Allegedly defamatory statements about private plaintiffs as not within protection of *First Amendment* if the statement does not relate to a matter of public concern. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 759-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593*

States as prohibited from imposing liability without fault on a defendant sued by a private individual. *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 349-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789*

Deputy public defender's performance, and administration of criminal laws in general and laws relating to child molestation in particular, as matters of legitimate public interest and concern. *James v. San Jose Mercury News, Inc. (1993) 17 Cal. App. 4th 1, 4, 11, 20 Cal. Rptr. 2d 890*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechDefamationGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesQualified PrivilegesTortsIntentional TortsDefamationProcedure

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B. Defenses To Defamation Actions

30-340 California Forms of Pleading and Practice--Annotated § 340.269

§ 340.269 General Demurrer--Failure of Private Individual to Allege Negligence

[1] FORM General Demurrer--Failure of Private Individual to Allege Negligence

[*Caption. See § 340.260.*]

Defendant demurs to the complaint herein on the following ground:

The complaint does not state facts sufficient to constitute a cause of action in that plaintiff has failed to allege that defendant _____ [published *or* broadcast] the allegedly defamatory statement concerning him negligently, and the face of plaintiff's complaint shows that the subject of the statement was a matter of public concern.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant(s) _____ [*name*]

CAUTION:
A party filing a demurrer is required to serve and file therewith a notice of hearing [*Cal. Rules of Ct., Rule 3.1320(c)*] and a memorandum of points and authorities in support of each ground thereof [*Cal. Rules of Ct., Rules 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form is for use in objecting, by general demurrer, to a complaint for defamation on the ground that the pleading does not state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*] because the plaintiff has failed to allege that the defendant either published or broadcast the statements negligently [*see Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 347, 350, 94 S. Ct. 2997, 41 L. Ed. 2d 789]* , and the statements were related to a matter of

public concern [*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 759-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593]* . This defect must appear on the face of the complaint [*see Code Civ. Proc. § 430.30(a)*].

[3] California Points and Authorities

For a memorandum of points and authorities to support this demurrer, see California Points and Authorities, *Libel and Slander* (*Defamation*) (Matthew Bender)

[4] Decisions

Allegedly defamatory statements about private plaintiffs as not within protection of *First Amendment* if the statement does not relate to a matter of publicconcern. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 759-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593*

States as prohibited from imposing liability without fault on a media defendant sued by a private individual. *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 347, 94 S. Ct. 2997, 41 L. Ed. 2d 789*

[5] Cross References

For a related form, see *§ 340.260*

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-340 California Forms of Pleading and Practice--Annotated § 340.270

§ 340.270 General Demurrer--Failure of Private Individual to Allege Actual Injury and Malice

[1] FORM General Demurrer--Failure of Private Individual to Allege Actual Injury and Malice

[*Caption. See § 340.260.*]

Defendant demurs to the complaint herein on the following ground:

The complaint does not state facts sufficient to constitute a cause of action in that it appears from the face of the complaint that the statement complained of relates to a matter of public concern, and the plaintiff has failed to allege that the allegedly defamatory statements concerning him which defendant _____ [published *or* broadcast] caused him any actual injury. Plaintiff has also failed to allege that defendant _____ [published *or* broadcast] the allegedly defamatory statements concerning him with knowledge of their falsity or with reckless disregard for their truth.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant(s) _____ [*name(s)*]

CAUTION:
A party filing a demurrer is required to serve and file therewith a notice of hearing [*Cal. Rules of Ct., Rule 3.1320(c)*] and a memorandum of points and authorities in support of each ground thereof [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form is for use in objecting, by general demurrer, to a complaint seeking general and punitive damages for

defamation on the grounds that the statement complained of relates to a matter of public concern [*see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 759-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593]* , and the pleading does not state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*] because the plaintiff has failed to allege that the defendant caused actual injury to the plaintiff or that the statements were published or broadcast with malice [*see Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 349-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789]* . This defect must appear on the face of the complaint [*see Code Civ. Proc. § 430.30(a), (b)*].

[3] California Points and Authorities

For a memorandum of points and authorities to support this demurrer, see California Points and Authorities, Ch. 142, *Libel and Slander* (*Defamation*) (Matthew Bender)

[4] Decisions

Allegedly defamatory statements about private plaintiffs as not within protection of *First Amendment* if the statement does not relate to a matter of public concern. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. (1985) 472 U.S. 749, 759-761, 105 S. Ct. 2939, 86 L. Ed. 2d 593*

Private individual suing for defamation as required to prove actual injury unless *New York Times* test met and as required to meet *New York Times* test in order to recover presumed and punitive damages. *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 349-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789*

[5] Cross References

For a related form, see *§ 340.260*

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-340 California Forms of Pleading and Practice--Annotated § 340.271

§ 340.271 Demurrer--Failure of Plaintiff (Suing Publisher or Broadcaster) to Allege Notice and Demand for Retraction [Civ. Code § 48a(2)]

[1] FORM Demurrer--Failure of Plaintiff (Suing Publisher or Broadcaster) to Allege Notice and Demand for Retraction [Civ. Code § 48a(2)]

[*Caption. See § 340.260.*]

Defendant demurs to the complaint herein on the following ground:

The complaint does not state facts sufficient to constitute a cause of action in that plaintiff has failed to allege that, within 20 days after his/her knowledge of the _____ [publication *or* broadcast], he/she notified defendant of the allegedly defamatory statements which had been _____ [published *or* broadcast] concerning him/her and has failed to allege that he/she demanded a correction of the allegedly defamatory statements. Plaintiff has not alleged any special damages resulting from the _____ [publication *or* broadcast]. Because *Section 48a of the Civil Code* bars recovery of any damages except special damages without the pleading and proof of the above-mentioned notice and demand, plaintiff's complaint therefore fails to state a cause of action.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

CAUTION:
A party filing a demurrer is required to serve and file therewith a notice of hearing [*Cal. Rules of Ct., Rule 3.1320(c)*] and a memorandum of points and authorities in support of each ground thereof [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form is for use in objecting, by demurrer, to a complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*] because the plaintiff has failed to plead notice, demand, and failure of the publisher or broadcaster to correct the allegedly defamatory statements [*Civ. Code § 48a(2)*]. This defect must appear on the face of the complaint [*see Code Civ. Proc. § 430.30(a)*].

[3] California Points and Authorities

For a memorandum of points and authorities to support this demurrer, see California Points and Authorities, Ch. 142, *Libel and Slander* (*Defamation*) (Matthew Bender)

[4] State Statutes

Requirements that plaintiff plead notice, demand, and failure to correct allegedly defamatory publication or broadcast. *Civ. Code § 48a(2)*

[5] Decisions

Retraction statute as not violative of either *California or United States Constitutions. Werner v. Southern Cal. Associated Newspapers (1950) 35 Cal. 2d 121, 124-137, 216 P.2d 825*

Purpose of retraction statute as to encourage free and rapid dissemination of news. *Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 114, 77 Cal. Rptr. 243, 453 P.2d 747* ; *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 791, 228 P.2d 6*

[6] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 629-631, 633 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-340 California Forms of Pleading and Practice--Annotated § 340.272

§ 340.272 Affirmative Defense--Failure of Plaintiff Suing Publisher [or Broadcaster] to Notify Defendant With Sufficient Specificity What Statements Were Allegedly Defamatory [Civ. Code § 48a(1)]

[1] FORM Affirmative Defense--Failure of Plaintiff Suing Publisher [or Broadcaster] to Notify Defendant With Sufficient Specificity What Statements Were Allegedly Defamatory [Civ. Code § 48a(1)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

The _____ [publication *or* broadcast] complained of in plaintiff's complaint made numerous statements about plaintiff. The notice and demand which plaintiff served on defendant within the 20 days statutory period was not sufficiently specific to enable defendant to ascertain which statements in the _____ [publication *or* broadcast] were claimed by plaintiff to be defamatory. Thus, defendant was not able to make the required correction or retraction.

[2] Use of Form

This affirmative defense may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint for defamation against a publisher or broadcaster. It alleges that the notice and demand served on the publisher or broadcaster by the plaintiff were not specific enough to enable the defendant to make a correction or retraction [*see Kapellas v. Kofman (1969) 1 Cal. 3d 20, 31-32, 81 Cal. Rptr. 360, 459 P.2d 912]* .

[3] California Points and Authorities

For a memorandum of Points and Authorities supporting a motion for summary judgment based on this defense, see California Points and Authorities, Ch. 142, *Libel and Slander* (*Defamation*) (Matthew Bender)

[4] State Statutes

Plaintiff suing publisher or broadcaster as required to serve written notice specifying statements claimed defamatory and demanding correction. *Civ. Code § 48a(1)*

[5] Decisions

Test for adequacy of demand for retraction as whether publisher should reasonably have comprehended which statements plaintiff protested and wished corrected. *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 31-32, 81 Cal. Rptr. 360, 459 P.2d 912* ; *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 554, 343 P.2d 36*

Plaintiff's demand for retraction of "certain statements" as not sufficient under *Civ. Code § 48a*. *Anderson v. Hearst Publ'g Co. (S.D. Cal. 1954) 120 F. Supp. 850, 852*

[6] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, § 632 (10th ed. 2005)

[7] Cross References

For a related form, *see § 340.296*

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-340 California Forms of Pleading and Practice--Annotated § 340.273

§ 340.273 Affirmative Defense--Failure of Plaintiff Suing Publisher [or Broadcaster] to Notify Defendant of Allegedly Defamatory Statements Within Statutory Period [Civ. Code § 48a(1)]

[1] FORM Affirmative Defense--Failure of Plaintiff Suing Publisher [or Broadcaster] to Notify Defendant of Allegedly Defamatory Statements Within Statutory Period [Civ. Code § 48a(1)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

Plaintiff did not serve the notice and demand for correction on defendant within the 20 day period as required by *Section 48a(1) of the Civil Code*. Because plaintiff's complaint does not allege any special damages, plaintiff can not recover any damages.

[2] Use of Form

This affirmative defense may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint for defamation against a publisher or broadcaster. It alleges that the required notice and demand for retraction where not served on the publisher or broadcaster within the 20-day statutory period required by *Civ. Code § 48a(1)*.

[3] California Points and Authorities

For a memorandum of points and authorities supporting a motion for summary judgment based on this defense, see California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)

[4] State Statutes

Retraction statute; 20 day period for plaintiff to serve notice and demand for correction. *Civ. Code § 48a(1)*

[5] Cross References

For a related form, *see § 340.296*

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-340 California Forms of Pleading and Practice--Annotated § 340.274

§ 340.274 Affirmative Defense--Failure of Plaintiff Suing Broadcaster to Serve Demand on Owner Rather Than Originator of Allegedly Defamatory Statements [Civ. Code § 48a(1)]

[1] FORM Affirmative Defense--Failure of Plaintiff Suing Broadcaster to Serve Demand on Owner Rather Than Originator of Allegedly Defamatory Statements [Civ. Code § 48a(1)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

Plaintiff did not serve the notice and demand for correction on defendant. Plaintiff served _____ [*name of originator of statement*], an employee who works for defendant as a _____ [*specify capacity of person served, such as disc jockey*]. Such service does not comply with the retraction statute and is legally insufficient.

[2] Use of Form

This affirmative defense may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint for defamation against a broadcaster. It alleges that the required notice and demand for correction were not served on the owner or operator of the broadcasting station and thus is legally insufficient [*see Civ. Code § 48a(1)*; *Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 113-114, 77 Cal. Rptr. 243, 453 P.2d 747]* .

In the case of an alleged libel by a newspaper or other publication, the service requirements of *Civ. Code § 48a(1)* are satisfied by serving the notice and demand (1) on the publisher; (2) on the employee designated by the publisher to receive, respond to, and act on such notices and demands; or (3) on any other employee of the publication if the publisher has acquired actual knowledge of the notice and demand within the 20-day period of *Civ. Code § 48a(1)* [*Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652, 658, 14 Cal. Rptr. 2d 839, 842 P.2d 138]* .

Case law has not addressed the question of whether these service options are permissible in the case of an allegedly defamatory broadcast. However, the rationale underpinning the holding in *Freedom Newspapers* does not appear to

preclude these service options in that situation [*see Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652, 656-658, 14 Cal. Rptr. 2d 839, 842 P.2d 138]* . For a form raising the affirmative defense of plaintiff's failure to properly serve the notice and demand in the case of an allegedly defamatory publication, *see § 340.274*.5.

[3] California Points and Authorities

For a memorandum of points and authorities supporting a motion for summary judgment based on this defense, see California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)

[4] State Statutes

Service of notice and demand for correction on publisher. *Civ. Code § 48a(1)*

[5] Decisions

Service of notice and demand for correction or retraction on publisher, publisher's designee, or other employee of publisher. *Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652, 658, 14 Cal. Rptr. 2d 839, 842 P.2d 138* (impliedly overruling *Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 113-114, 77 Cal. Rptr. 243, 453 P.2d 747* , and *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 791, 228 P.2d 6* , to the extent inconsistent with opinion)

Service of notice and demand as required to be made on publisher, publisher's employees under specified conditions, or broadcaster, rather than on originator of defamatory statements. *Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652, 658, 14 Cal. Rptr. 2d 839, 842 P.2d 138* (service on publisher or publisher's employees as permitted); *Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 113-115, 77 Cal. Rptr. 243, 453 P.2d 747* (service on originator as not permitted); *Pridonoff v. Balokovich (1951) 36 Cal. 2d 788, 791, 228 P.2d 6* (service on originator as not permitted)

Reason for serving broadcaster as fact that only he or she has power effectively to retract statement. *Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 114, 77 Cal. Rptr. 243, 453 P.2d 747* ; *but see Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652, 658, 14 Cal. Rptr. 2d 839, 842 P.2d 138* (when service on specified individuals other than publisher in libel action is permissible)

[6] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, § 631 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-340 California Forms of Pleading and Practice--Annotated § 340.275

§ 340.275 Affirmative Defense--Failure of Plaintiff Suing Publisher to Serve Demand on Owner or Appropriate Employee Rather Than Originator of Allegedly Libelous Statements [Civ. Code § 48a(1)]

[1] FORM Affirmative Defense--Failure of Plaintiff Suing Publisher to Serve Demand on Owner or Appropriate Employee Rather Than Originator of Allegedly Libelous Statements [Civ. Code § 48a(1)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

Plaintiff did not serve the notice and demand for correction on either defendant or _____ [*name of employee*], the employee designated by defendant to receive, respond to, and act on such notices and demands on defendant's behalf. Plaintiff served _____ [*name of originator of statement*], an employee of defendant who works for defendant as a _____ [*specify capacity of person served, such as reporter*]. Even though plaintiff served the notice and demand on this employee within the 20-day time period set forth in *Civil Code Section 48a(1)*, defendant did not acquire actual knowledge of the notice and demand within this time period. Therefore, service does not comply with the statute and is legally insufficient.

[2] Use of Form

This affirmative defense may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint for libel against a newspaper publisher. This defense is for use when plaintiff has served the notice and demand for correction on the originator of the allegedly libelous statements, who is a person other than the publisher or the employee designated by the publisher to receive, respond to, and act on such notices and demands, and when, despite service on this person, the publisher has not acquired actual knowledge of the notice and demand within the 20-day period specified in the retraction statute [*Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652, 658, 14 Cal. Rptr. 2d 839, 842 P.2d 138* ; *see Civ. Code § 48a(1)*]. If the originator of the allegedly libelous statements is, in fact, the publisher's designee for receipt of and action on such notices and demands, or if the publisher has acquired actual knowledge of the notice and demand within the 20-day period specified in the retraction statute, then plaintiff has met its service requirements under the statute and this defense is inapplicable [*see Freedom Newspapers, Inc. v. Superior Court*

(1992) 4 Cal. 4th 652, 658, 14 Cal. Rptr. 2d 839, 842 P.2d 138] .

Case law does not address the question of whether these service options are permissible in the case of an allegedly defamatory radio or television broadcast. However, the rationale underpinning the holding in *Freedom Newspapers* does not appear to preclude these service options in that situation [*see Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652, 656-658, 14 Cal. Rptr. 2d 839, 842 P.2d 138]* . Counsel wishing to apply the *Freedom Newspapers* rationale to the broadcast context may therefore choose to adapt this form for use against a complaint for an allegedly defamatory broadcast. Counsel choosing not to apply the rationale to the broadcast context may use the affirmative defense set out in *see § 340.274*.

[3] Decisions

Service requirements of retraction statute as met when notice of statements and demand for correction are served on publisher, on publisher's designee, or on employee other than designee if publisher acquires actual knowledge of notice and demand within statutory 20-day period. *Freedom Newspapers, Inc. v. Superior Court (1992) 4 Cal. 4th 652, 658, 14 Cal. Rptr. 2d 839, 842 P.2d 138*

Service of notice and demand on author of article as not necessary when demand already served on publisher. *Larrick v. Gilloon (1959) 176 Cal. App. 2d 408, 420, 1 Cal. Rptr. 360 , overruled on other grounds, Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 114, 77 Cal. Rptr. 243, 453 P.2d 747*

[4] Cross References

For a related form, *see §§ 340.274 -340.296*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.276

§ 340.276 Notice of Motion for Summary Adjudication [Code Civ. Proc. § 437c(f)] of Claim for Punitive Damages [Civ. Code § 3294]--Private Individual Suing Publisher or Broadcaster

[1] FORM Notice of Motion for Summary Adjudication [Code Civ. Proc. § 437c(f)] of Claim for Punitive Damages [Civ. Code § 3294]--Private Individual Suing Publisher or Broadcaster

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MOTION AND NOTICE OF MOTION FOR SUMMARY ADJUDICATION OF CLAIM FOR PUNITIVE DAMAGES
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed _____
		[Trial Date: _____]

_____

To plaintiff _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], defendant will, and hereby does, move for an order of summary adjudication of the claim for punitive damages. The motion will be made on the ground that _____ [*specify the grounds, e.g.,* the complaint fails to allege compliance with *Civil*

Code Section 48a, the retraction statute, by serving the defendant with notice and demand for correction *or* the complaint fails to allege that the defendant _____ (published *or* broadcast) the allegedly defamatory material with hatred or ill will toward the plaintiff and without a good faith belief in the truth of the matter)].

The motion will be based on this notice of motion, the attached declaration(s) of _____ [*name(s)*], [the admission(s) of _____ (*name(s)*),] [the depositions of _____ (*name(s)*),] [the answers to interrogatories by _____ (*name(s)*),] [judicial notice, which is hereby requested, of (the attached) _____ (*specify matters of which notice is to be taken*),] the attached statement of undisputed material facts, the attached memorandum of points and authorities, the records and file herein, and such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

CAUTION:
A memorandum of points and authorities is required to be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. A statement of undisputed material facts must also accompany the motion [*Code Civ. Proc. § 437c(b)*; for a form of statement, *see* Ch. 537, *Summary Judgment*]. For discussion and forms, see Ch. 417, *Points and Authorities*].

[2] Use of Form

This notice of motion is for use by a defendant to give notice of a motion for summary adjudication of the claim for punitive damages in a complaint for libel or slander against a publisher or broadcaster. The basis for granting the motion is either that the complaint failed to allege compliance with the retraction statute [*Civ. Code § 48a*] or that it failed to allege malice as required by the retraction statute [*see Civ. Code § 48a(4)(d)*; *see also McCoy v. Hearst Corp. (1986) 42 Cal. 3d 835, 872, 231 Cal. Rptr. 518, 727 P.2d 711* (suggesting that both constitutional "actual malice" and statutory "actual malice" are required to support award of punitive damages in action covered by retraction statute)]. The defendant should use this motion for summary adjudication of the claim for punitive damages when the complaint also alleges special damages. If the complaint fails to allege special damages and seeks general and punitive damages without alleging compliance with the retraction statute and actual malice according to the *New York Times* standard, the appropriate pleading is a demurrer for failure to state a cause of action [*see §§ 340.270* and *340.271*].

[3] California Points and Authorities

For a form of points and authorities supporting this motion, see California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)

[4] State Statutes

Retraction statute; compliance with statute as prerequisite to recovery of general or punitive damages. *Civ. Code § 48a*

Summary adjudication of claim for punitive damages. *Code Civ. Proc. § 437c(f)*

[5] Decisions

Allegation and proof of actual malice under *New York Times* test as prerequisite to recovery of general or punitive damages from media defendant. *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 349-350, 94 S. Ct. 2997, 41 L. Ed. 2d 789*

[6] Cross References

For related forms, *see §§ 340.270* and *340.271*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentNoticesTortsIntentional TortsDefamationProcedureTortsIntentional TortsDefamationRemediesGeneral Overview

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30-340 California Forms of Pleading and Practice--Annotated § 340.277

§ 340.277 Order [Code Civ. Proc. § 1003] Granting Defendant's Motion for Summary Adjudication of Claim for Punitive Damages

[1] FORM Order [Code Civ. Proc. § 1003] Granting Defendant's Motion for Summary Adjudication of Claim for Punitive Damages

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	ORDER [*Code Civ. Proc. § 1003*] GRANTING DE-
Defendant(s).	)	FENDANT'S MOTION FOR SUMMARY ADJU-
	)	DICATION
	)	

_____

The motion of defendant _____ [*name*] for an order granting summary adjudication of the claim for punitive damages on the ground that _____ [*specify*] came on regularly for hearing on _____ [*date*]; plaintiff appearing through counsel _____ [*name*] and defendant appearing through counsel _____ [*name*], and good cause appearing therefor,

IT IS ORDERED that the motion of defendant is granted as to that portion of the complaint seeking general and punitive damages and that the issue is without substantial controversy.
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

This order is for use if the motion for partial summary judgment with respect to that portion of the complaint seeking general and punitive damages is granted.

[3] Cross References

For a related form, *see § 340.276*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentPartial Summary JudgmentsCivil ProcedureRemediesDamagesPunitive DamagesTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.278

§ 340.278 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Nonliability of Radio [or Television] Broadcaster Who Has Exercised Due Care to Prevent Defamatory Statement [Civ. Code § 48.5]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Nonliability of Radio [or Television] Broadcaster Who Has Exercised Due Care to Prevent Defamatory Statement [Civ. Code § 48.5]

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

Defendant is not liable for the defamatory statement made by _____ [*name of person making statement*] during the course of the _____ [radio *or* television] broadcast that took place on _____ [*date*]. _____ [*Name of person making statement*] is not the agent or employee of defendant, and defendant exercised due care to prevent the publication of the defamatory statement by _____ [*specify*].

[2] Use of Form

This affirmative defense may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint for defamation against a radio or television broadcaster if the person who made the statement is not an agent or employee of the defendant and the defendant exercised due care to prevent publication of the statement.

[3] California Points and Authorities

For a memorandum of points and authorities supporting a motion for summary judgment based on this defense, see California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)

[4] State Statutes

Nonliability of radio and television broadcasters for defamatory statements made by persons not their agents or

employees if due care exercised to prevent statement. *Civ. Code § 48.5*

[5] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, § 628 (9th ed. 1988)

6 Cal. Jur. 3d, *Assault and Other Wilful Torts*, § 188

[6] Cross References

For a related form, *see § 340.296*

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawRelated Legal IssuesDefamationTortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.279

§ 340.279 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Justification--Defendant's Statements Were Truthful

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Justification--Defendant's Statements Were Truthful

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

The statements complained of in plaintiff's complaint were not false. To the contrary, they were completely truthful in that _____ [*specify facts that support defense of truth*].

[2] Use of Form

This affirmative defense may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint in a libel or slander action. It alleges that the defendant's statements about the plaintiff were truthful. Truth is a complete defense to an action for defamation [*Draper v. Hellman Commercial Trust & Sav. Bank (1928) 203 Cal. 26, 34, 263 P. 240* ; *Swaffield v. Universal Ecsco Corp. (1969) 271 Cal. App. 2d 147, 164, 76 Cal. Rptr. 680]* .

[3] Burden of Pleading and Proving Falsity

The United States Supreme Court has held that, at least if the plaintiff is either a public figure or a private figure who is suing a newspaper or other media defendant for publishing speech of a public concern, *U.S. Const. amend. I*, requires that the plaintiff bear the burden of proving the falsity of the defamatory statement before recovering damages [*Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 768-769, 776-777, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* . However, the Court has continued to leave open the question of the standards that would apply if a private plaintiff sues a nonmedia defendant [*see, e.g.,* *Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 779 n.4, 106 S. Ct. 1558, 89 L. Ed. 2d 783* ; *see also* *Hutchinson v. Proxmire (1979) 443 U.S. 111, 133 n.16, 99 S. Ct. 2675, 61 L. Ed. 2d 411* (open question as to whether the protection of *U.S. Const. amend. I*, extends to cases involving nonmedia defendants)].

Under the common law, a plaintiff is not required to allege that the statements are false, and an omission of an allegation of falsity in the complaint may not be grounds for a demurrer [*see Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal. 2d 224, 233, 11 Cal. Rptr. 97, 359 P.2d 465* ; *see also Philadelphia Newspapers v. Hepps (1986) 475 U.S. 767, 775-776, 106 S. Ct. 1558, 89 L. Ed. 2d 783]* . Therefore, although it is currently unclear whether or not a private plaintiff who sues a nonmedia defendant is required to plead and prove falsity, it appears that, at least under *Lipman*, and until the United States Supreme Court rules otherwise, the burden remains on the defendant rather than on the plaintiff. However, the better practice is for a plaintiff to allege falsity in a complaint, and a defendant might have a valid argument against a plaintiff who fails to do so.

[4] Risk in Pleading Truth

There is always a certain risk involved in pleading truth as an affirmative defense since, in proper cases and under proper instructions, the jury may infer malice from the fact that a defendant repeats the defamatory matter that is later found to be false [*Shumate v. Johnson Publ'g Co. (1956) 139 Cal. App. 2d 121, 138 n.6, 293 P.2d 531* , quoting *Reynolds v. Pegler (2d Cir. 1955) 223 F.2d 429, 434]* . Thus, pleading truth as well as other facts and circumstances might provide evidence from which the jury could have inferred the existence of oppression and malice--a motive to vex, harass, and annoy the plaintiff--sufficient to support an award of exemplary damages [*Shumate v. Johnson Publ'g Co. (1956) 139 Cal. App. 2d 121, 138, 293 P.2d 531]* .

[5] California Points and Authorities

For a memorandum of points and authorities based supporting a motion for summary judgment based on this defense, see California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)

[6] State Statutes

Defendant as capable of alleging both truth and mitigation in answer. *Code Civ. Proc. § 461*

[7] Decisions

[a] Absolute Defense

Truth as absolute defense against defamation action regardless of bad faith or malicious purpose. *Draper v. Hellman Commercial Trust & Sav. Bank (1928) 203 Cal. 26, 34, 263 P. 240* ; *Swaffield v. Universal Ecsco Corp. (1969) 271 Cal. App. 2d 147, 164, 76 Cal. Rptr. 680*

[b] Burden of Proof of Falsity

Public figure, or private figure suing newspaper or other media defendant for publishing speech of public concern, as required by *U.S. Const. amend. I*, to bear burden of proving falsity of defamatory statement before recovering damages; standards applicable to action by private plaintiff against nonmedia defendant as open question. *Philadelphia Newspapers, Inc. v. Hepps (1986) 475 U.S. 767, 776-777, 779 n.4, 106 S. Ct. 1558, 89 L. Ed. 2d 783*

Burden of proving truth or falsity of publication as resting with defendant. *Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal. 2d 224, 233, 11 Cal. Rptr. 97, 359 P.2d 465* ; *Shumate v. Johnson Publ'g Co. (1956) 139 Cal. App. 2d 121, 131, 293 P.2d 531* ; *see also Swaffield v. Universal Ecsco Corp.(1969) 271 Cal. App. 2d 147, 164, 76 Cal. Rptr. 680* (decided under common law)

[c] Falsity Inferred

Defamatory publication as inferentially false. *Shumate v. Johnson Publ'g Co. (1956) 139 Cal. App. 2d 121, 131, 293 P.2d 531*

[d] Liability for Part of Publication

Defendant as liable for any material part of publication proved not true. *Shumate v. Johnson Publishing Co. (1956) 139 Cal. App. 2d 121, 132, 293 P.2d 531*

[e] Risk in Pleading Truth

Pleading defense of truth as involving risk of malice being inferred. *Shumate v. Johnson Publ'g Co. (1956) 139 Cal. App. 2d 121, 138 n.6, 293 P.2d 531*

[f] Subjective Belief Immaterial

Objective truth, not subjective truth, as standard for justification defense. *Emde v. San Joaquin County Cent. Labor Council (1943) 23 Cal. 2d 146, 160, 143 P.2d 20*

[g] Substantial Truth Sufficient

Defendant as required to prove only substantial, not literal, truth of publication. *Emde v. San Joaquin County Cent. Labor Council (1943) 23 Cal. 2d 146, 160, 143 P.2d 20* ; *Handelsman v. San Francisco Chronicle (1970) 11 Cal. App. 3d 381, 387, 90 Cal. Rptr. 188*

Immaterial variances and defects of proof disregarded if defendant justifies substance of publication. *Stoneking v. Briggs (1967) 254 Cal. App. 2d 563, 573, 62 Cal. Rptr. 249*

[8] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 556-560, 611, 614 (10th ed. 2005)

6 Cal. Jur. 3d, *Assault and Other Wilful Torts*, § 196-201, 287, 308, 309

[9] Cross References

For a related form, *see § 340.296*

Legal Topics:

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

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30-340 California Forms of Pleading and Practice--Annotated § 340.280

§ 340.280 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Mitigation

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Mitigation

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

The statements complained of in plaintiff's complaint were made by defendant in good faith, honestly, and not maliciously in that _____ [*specify facts that support allegation*].

[2] Use of Form

This affirmative defense may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint in a libel or slander action. It alleges that the defendant's statements about the plaintiff were made in good faith, honestly, and not maliciously [*see Clay v. Lagiss (1956) 143 Cal. App. 2d 441, 448, 299 P.2d 1025]* . The facts that support the allegation constitute mitigating circumstances that serve to reduce the damages for which defendant is liable [*see Code Civ. Proc. § 461*].

[3] State Statutes

Defendant as capable of alleging both truth and mitigation in answer. *Code Civ. Proc. § 461*

[4] Decisions

Mitigating circumstances defined as acting in good faith, with honesty of purpose, and not maliciously. *Clay v. Lagiss (1956) 143 Cal. App. 2d 441, 448, 299 P.2d 1025* ; *Shumate v. Johnson Publ'g Co. (1956) 139 Cal. App. 2d 121, 135, 293 P.2d 531*

[5] Text References

6 Cal. Jur. 3d, *Assault and Other Wilful Torts*, §§ 251-258

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.281

§ 340.281 General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Presence of Privilege Disclosed on Face of Plaintiff's Complaint

[1] FORM General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Presence of Privilege Disclosed on Face of Plaintiff's Complaint

[*Caption. See § 340.260.*]

Defendant demurs to the complaint herein on the following ground:

The complaint does not state facts sufficient to constitute a cause of action in that the _____ [absolute *or* qualified] privilege conveyed by Section _____ [*number*] of the Civil Code is disclosed by reason of the fact that _____ [*specify facts disclosed in complaint that indicate presence of privilege*].

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

CAUTION:
A party filing a demurrer is required to serve and file therewith a notice of hearing [*Cal. Rules of Ct., Rule 3.1320(c)*] and a memorandum of points and authorities in support of each ground thereof [*Cal. Rules of Ct., Rules 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form is for use in objecting, by demurrer, to a complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*] because it discloses the existence of a privilege

on its face [*see* *Locke v. Mitchell (1936) 7 Cal. 2d 599, 602, 61 P.2d 922]* .

[3] California Points and Authorities

For memoranda of points and authorities supporting demurrers based on the presence either of the qualified privilege or an absolute privilege, see California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)

[4] Decisions

Defense of privilege as affirmative one requiring specific pleading unless it appears on face of complaint. *Locke v. Mitchell (1936) 7 Cal. 2d 599, 602, 61 P.2d 922* ; *Peoples v. Tautfest (1969) 274 Cal. App. 2d 630, 635, 79 Cal. Rptr. 478*

Demurrer available as matter of defense when existence of privilege disclosed on face of complaint. *Locke v. Mitchell (1936) 7 Cal. 2d 599, 602, 61 P.2d 922* ; *Whelan v. Wolford (1958) 164 Cal. App. 2d 689, 693, 331 P.2d 86*

Demurrer as proper when existence of privilege appears on face of complaint. *Green v. Cortez (1984) 151 Cal. App. 3d 1068, 1072-1073, 199 Cal. Rptr. 221*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureAccusatory InstrumentsComplaintsGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesGeneral OverviewTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.282

§ 340.282 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Privilege Publication by Executive Officer [Civ. Code § 47(a)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Privilege Publication by Executive Officer [Civ. Code § 47(a)]

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

The statements complained of in plaintiff's complaint were made by defendant in his/her official capacity as _____ [*specify position of state official*]. The statements were absolutely privileged under *Civ. Code § 47(a)* in that they clearly had a relationship to the _____ [*state nature of executive proceeding*] in which defendant was participating when they were made because _____ [*specify facts supporting allegation*].

[2] Use of Form

This affirmative defense may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint for libel or slander if the defendant is a state official of a rank corresponding to federal cabinet members and the statements complained of were made in an executive proceeding [*see Saroyan v. Burkett (1962) 57 Cal. 2d 706, 710, 21 Cal. Rptr. 557, 371 P.2d 293]* .

[3] California Points and Authorities

For a memorandum of points and authorities supporting a motion for summary judgment based on this defense, see California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)

[4] State Statutes

Privileged pubilication as one made in proper discharge of an official duty. *Civ. Code § 47(a)*

[5] Decisions

Absolute privilege for executive officers as applicable to state Attorney General who calls press conference and releases report on organized crime that contains name of plaintiff. *Kilgore v. Younger (1982) 30 Cal. 3d 770, 782, 180 Cal. Rptr. 657, 640 P.2d 793*

Absolute privilege for executive officers as applicable for state officials corresponding in rank to federal cabinet members. *Saroyan v. Burkett (1962) 57 Cal. 2d 706, 710, 21 Cal. Rptr. 557, 371 P.2d 293*

Absolute privilege of former *Civ. Code § 47(1)* [*now see Civ. Code § 47(a)*] as extending to state and local officials below level corresponding to federal cabinet level if publication was made while official was exercising policymaking function and acting within the scope of official duties. *Neary v. Regents of Univ. of Cal. (1986) 185 Cal. App. 3d 1136, 1141, 230 Cal. Rptr. 281* ; *see also Sanborn v. Chronicle Publ'g Co. (1976) 18 Cal. 3d 406, 412-413, 134 Cal. Rptr. 402, 556 P.2d 764* ; *Royer v. Steinberg (1979) 90 Cal. App.3d 490, 501, 153 Cal. Rptr. 499* ; *but see Frisk v. Merrihew (1974) 42 Cal. App. 3d 319, 323, 116 Cal. Rptr. 781* ; *White v. State of California (1971) 17 Cal. App. 3d 621, 626-627, 95 Cal. Rptr. 175* (both cases adhering to cabinet-officer limitation)

Absolute privilege for executive officers as not applicable to state officials of lesser rank than those equivalent to federal cabinet members. *White v. California (1971) 17 Cal. App. 3d 621, 626-628, 95 Cal. Rptr. 175*

[6] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 565, 566 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationDefensesPrivilegesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesStatutory PrivilegesTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.283

§ 340.283 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Privilege Publication Made in Connection With Legislative Proceeding [Civ. Code § 47(b)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Privilege Publication Made in Connection With Legislative Proceeding [Civ. Code § 47(b)]

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

The statements complained of in plaintiff's complaint were made by defendant during the legislative proceedings of _____ [*specify legislative body*]. The statements were absolutely privileged under *Civ. Code § 47(b)* in that they clearly had a relationship to the proceedings in which defendant was participating when they were made because _____ [*specify facts supporting allegation*].

[2] Use of Form

This affirmative defense may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint for libel or slander if the statements were related to the legislative proceedings in which defendant was participating [*see Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 285, 112 Cal. Rptr. 609]* .

[3] California Points and Authorities

For a memorandum of points and authorities supporting a motion for summary judgment based on this defense, see California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)

[4] State Statutes

Privileged publication as one made in legislative proceedings authorized by law. *Civ. Code § 47(b)*

[5] Decisions

[a] Absolute Privilege

Absolute privilege as attaching to statements made before legislative body. *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 288, 112 Cal. Rptr. 609*

Examination of employee qualification in legislative proceeding as absolutely privileged. *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 286, 112 Cal. Rptr. 609*

Absolute privilege covering legislative proceedings as applicable to person protesting action before planning commission. *Whelan v. Wolford (1958) 164 Cal. App. 2d 689, 693-694, 331 P.2d 86*

[b] Coverage

Absolute privilege as extending to statements made while circulating petition in preparation for city council meeting when statements were directed toward achievement of objects of city council proceedings. *Cayley v. Nunn (1987) 190 Cal. App. 3d 300, 304, 235 Cal. Rptr. 385*

Absolute privilege covering legislative proceedings as applicable to all spoken or done during proceedings. *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 288, 112 Cal. Rptr. 609*

[c] No Relevancy Requirement

Absolute privilege for legislative proceedings as qualified by limitation that statement have some connection to proceeding but not that it be relevant, material, or pertinent. *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 285, 112 Cal. Rptr. 609* ; *Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 90, 53 Cal. Rptr. 706*

[d] Pleading

Complaint indicating statements made at city council meeting as required to allege facts that show statements not privileged. *Whelan v. Wolford (1958) 164 Cal. App. 2d 689, 693-694, 331 P.2d 86* ; *Harnish v. Smith (1956) 138 Cal. App. 2d 307, 310, 291 P.2d 532*

[e] Policy

Policy underlying absolute privilege for legislative proceedings as freedom of speech. *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 288, 112 Cal. Rptr. 609*

[f] Public Included

Public as included in absolute privilege for legislative proceedings. *Scott v. McDonnell Douglas Corp. (1974) 37 Cal. App. 3d 277, 288, 112 Cal. Rptr. 609* ; *Pettitt v. Levy (1972) 28 Cal. App. 3d 484, 488, 104 Cal. Rptr. 650* ; *Whelan v. Wolford (1958) 164 Cal. App. 2d 689, 694, 331 P.2d 86*

[6] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 579-582, 591 (10th ed. 2005)

6 Cal. Jur. 3d, *Assault and Other Wilful Torts*, § 210

[7] Cross References

For a related form, *see § 340.296*

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-340 California Forms of Pleading and Practice--Annotated § 340.284

§ 340.284 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Privilege Publication Made in Connection With Judicial Proceeding [Civ. Code § 47(b)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Privilege Publication Made in Connection With Judicial Proceeding [Civ. Code § 47(b)]

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

The statements complained of in plaintiff's complaint were made by defendant during the course of _____ [*specify type of judicial proceeding*]. They were made _____ [orally *or* contained in a _____ (*specify type of document*)] and clearly had a relationship to the proceedings in which defendant was participating when they were made because _____ [*specify facts supporting allegation*].

[2] Use of Form

This affirmative defense may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint for libel or slander if the statements were related to the judicial proceeding in which the defendant was participating [*see Albertson v. Raboff (1956) 46 Cal. 2d 375, 379, 295 P.2d 405]* .

The California Supreme Court has held that the litigation privilege applies to protect statements made in contractual arbitration proceedings [*Moore v. Conliffe (1994) 7 Cal. 4th 634, 658, 29 Cal. Rptr. 2d 152, 871 P.2d 204]* . The Court declined to state whether the privilege also applies to statements made in the course of other "alternative dispute resolution" proceedings [*Moore v. Conliffe (1994) 7 Cal. 4th 634, 651 n.8, 29 Cal. Rptr. 2d 152, 871 P.2d 204]* .

[3] California Points and Authorities

For a memorandum of points and authorities supporting a motion for summary judgment based on this defense, see California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)

[4] State Statutes

Privileged publication as one made in judicial proceedings authorized by law. *Civ. Code § 47(b)*

[5] Decisions

[a] Extent of Privilege

Privilege granted by former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] as absolute since it protects even publications made with actual malice or with intent to do harm. *Albertson v. Raboff (1956) 46 Cal. 2d 375, 379, 295 P.2d 405* ; *Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 85, 53 Cal. Rptr. 706*

Former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] privilege for publications made in judicial proceeding as applicable to injurious publication, of whatever nature, in protected proceeding; conduct of publishing, rather than publication itself, as what is protected. *Rosenthal v. Irell & Manella (1982) 135 Cal. App. 3d 121, 127-128, 185 Cal. Rptr. 92*

[b] No Relevancy Requirement

Absolute privilege for judicial proceedings as not requiring relevancy, only that publication have some connection to proceeding. *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 824, 106 Cal. Rptr. 718 , disapproved on other grounds, Silberg v. Anderson (1990) 50 Cal. 3d 205, 218-219, 266 Cal. Rptr. 638, 786 P.2d 365* ; *Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 90, 53 Cal. Rptr. 706*

[c] Perjury Protected

Absolute privilege for judicial proceedings as covering even perjured testimony of witnesses. *Pettitt v. Levy (1972) 28 Cal. App. 3d 484, 488, 104 Cal. Rptr. 650* ; *Kachig v. Boothe (1971) 22 Cal. App. 3d 626, 641, 99 Cal. Rptr. 393*

[d] Persons Covered

Absolute privilege for judicial proceedings as covering attorneys. *Rubin v. Green (1993) 4 Cal. 4th 1187, 1194-1196, 17 Cal. Rptr. 2d 828, 847 P. 2d 1044* ; *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 824, 106 Cal. Rptr. 718 , disapproved on other grounds, Silberg v. Anderson (1990) 50 Cal. 3d 205, 218-219, 266 Cal. Rptr. 638, 786 P.2d 365* ; *Friedman v. Knecht (1967) 248 Cal. App. 2d 455, 460, 56 Cal. Rptr. 540*

Defendant's lack of standing to file motion in underlying action as not precluding assertion of *Civ. Code § 47(b)* privilege so long as motion was connected to underlying action; privilege as not limited to parties. *Adams v. Superior Court (1992) 2 Cal. App. 4th 521, 528-529, 532, 3 Cal. Rptr. 2d 49*

Absolute privilege for judicial proceedings as covering judges and other official officers. *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 824, 106 Cal. Rptr. 718 , disapproved on other grounds, Silberg v. Anderson (1990) 50 Cal. 3d 205, 218-219, 266 Cal. Rptr. 638, 786 P.2d 365* ; *Lewis v. Linn (1962) 209 Cal. App. 2d 394, 399, 26 Cal. Rptr. 6*

Absolute privilege for judicial proceedings as covering parties. *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 824, 106 Cal. Rptr. 718 , disapproved on other grounds, Silberg v. Anderson (1990) 50 Cal. 3d 205,*

218-219, 266 Cal. Rptr. 638, 786 P.2d 365 ; *Albertson v. Raboff (1956) 46 Cal. 2d 375, 378-379, 295 P.2d 405*

Absolute privilege for judicial proceedings as covering witnesses and prospective witnesses. *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 824, 106 Cal. Rptr. 718 , disapproved on other grounds, Silberg v. Anderson (1990) 50 Cal. 3d 205, 218-219, 266 Cal. Rptr. 638, 786 P.2d 365* ; *Ascherman v. Natanson (1972) 23 Cal. App. 3d 861, 865, 100 Cal. Rptr. 656*

Absolute privilege for judicial proceedings as covering jurors. *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 824, 106 Cal.Rptr. 718 , disapproved on other grounds, Silberg v. Anderson (1990) 50 Cal. 3d 205, 218-219, 266 Cal. Rptr. 638, 786 P.2d 365*

[e] Policy

Policy underlying absolute privilege for judicial proceedings as freedom of access to courts. *Bradley v. Hartford Accident & Indem. Co. (1973) 30 Cal. App. 3d 818, 823-824, 106 Cal. Rptr. 718 , disapproved on other grounds, Silberg v. Anderson (1990) 50 Cal. 3d 205, 218-219, 266 Cal. Rptr. 638, 786 P.2d 365*

[f] Publications Covered

Unless elements of malicious prosecution can be proven, statements made to police regarding potential criminal activity are protected from civil liability by absolute privilege under *Civ. Code § 47(b). Hagberg v. California Fed. Bank (2004) 32 Cal. 4th 350, 355, 373-375, 7 Cal. Rptr. 3d 803, 81 P.3d 244* ; *Mulder v. Pilot Air Freight (2004) 32 Cal. 4th 384, 387, 7 Cal. Rptr. 3d 828, 81 P.3d 264*

Attorneys' communications with residents in plaintiff's mobile home park concerning park conditions and possibility of attorneys being retained to prosecute action against park owner for failure to maintain park as having "some relation" to anticipated lawsuit and therefore as privileged, even if attorneys' conduct constituted wrongful solicitation. *Rubin v. Green (1993) 4 Cal. 4th 1187, 1194-1196, 17 Cal. Rptr. 2d 828, 847 P.2d 1044*

Statement of corporation's financial solvency made to avoid filing of undertaking to stay enforcement of judgment during appeal as enjoying absolute privilege for judicial proceedings. *Portman v. George McDonald Law Corp. (1979) 99 Cal. App. 3d 988, 991-992, 160 Cal. Rptr. 505*

Absolute privilege for judicial proceedings as covering preliminary meetings, conduct, and activities. *Pettitt v. Levy (1972) 28 Cal. App. 3d 484, 491, 104 Cal. Rptr. 650* (administrative and legislative proceedings involved)

Questions and answers asked and given at deposition as enjoying absolute privilege for judicial proceedings. *Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 85, 93, 53 Cal. Rptr. 706*

Statements made in affidavit filed in judicial proceeding as enjoying absolute privilege for judicial proceedings. *Bernstein v. Alameda-Contra Costa Med. Ass'n (1956) 139 Cal. App. 2d 241, 246, 293 P.2d 862*

[6] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 470, 473, 561, 563, 567-569, 571-578 (10th ed. 2005)

6 Cal. Jur. 3d, *Assault and Other Wilful Torts*, § 211

[7] Cross References

For a related form, *see § 340.296*

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-340 California Forms of Pleading and Practice--Annotated § 340.285

§ 340.285 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Privilege Publication Made in Connection With Administrative Proceeding [Civ. Code § 47(b)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Privilege Publication Made in Connection With Administrative Proceeding [Civ. Code § 47(b)]

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

The statements complained of in plaintiff's complaint were made by defendant during the course of _____ [*specify type of governmental proceeding other than legislative or judicial proceeding, or specify other proceeding reviewable by mandate*]. They were made _____ [orally *or* contained in a _____ (*specify type of document*)] and clearly had a relationship to the proceedings in which defendant was participating when they were made because _____ [*specify facts supporting allegation*].

[2] Use of Form

Civ. Code § 47(b) extends a privilege to publications or broadcasts made in an official proceeding other than a legislative or judicial proceeding. The words "official proceeding" as used in former *Civ. Code § 47(2)* as it existed at the time did not encompass nongovernmental proceedings [*Hackethal v. Weissbein (1979) 24 Cal. 3d 55, 60, 154 Cal. Rptr. 423, 592 P.2d 1175* (decided under former *Civ. Code § 47(2)*)]. However, after the Court's decision in *Hackethal*, the legislature amended *Civ. Code § 47(b)* by adding protection of publications or broadcasts made in the initiation or course of any other proceeding authorized by law and reviewable by mandate pursuant to *Code Civ. Proc. §§ 1084-1097* [*see Civ. Code § 47(b)*]. This form may therefore be used if the statement was made in the initiation of such a proceeding.

[3] California Points and Authorities

For a memorandum of points and authorities supporting a motion for summary judgment based on this defense, see California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)

[4] State Statutes

Privileged publication as one made in official proceeding other than legislative or judicial proceeding or in proceeding reviewable by mandate pursant to *Code Civ. Proc. §§ 1084-1097. Civ. Code § 47(b)*

[5] Decisions

[a] In General

Defamatory statements made in quasi-judicial proceeding that have some relation thereto as absolutely privileged. *King v. Borges (1972) 28 Cal. App.3d 27, 32, 104 Cal. Rptr. 414* ; *Ascherman v. Natanson (1972) 23 Cal. App. 3d 861, 865, 100 Cal. Rptr. 656*

[b] Determinative Factors

Factors weighted as important in determining whether proceedings are quasi-judicial and thus absolutely privileged under former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*]. *Goodley v. Sullivant (1973) 32 Cal. App. 3d 619, 625, 108 Cal. Rptr. 451* ; *Ascherman v. Natanson (1972) 23 Cal. App. 3d 861, 866, 100 Cal. Rptr. 656*

[c] Policy

Policy of free speech as underlying application of absolute privilege to quasi-judicial proceedings. *Ascherman v. Natanson (1972) 23 Cal. App. 3d 861, 866, 100 Cal. Rptr. 656*

[6] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 579-582, 591 (10th ed. 2005)

6 Cal. Jur. 3d, *Assault and Other Wilful Torts*, § 209

[7] Cross References

For a related form, *see § 340.296*

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-340 California Forms of Pleading and Practice--Annotated § 340.286

§ 340.286 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Privilege--Fair and True Report in Public Journal [Civ. Code § 47(d)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Privilege--Fair and True Report in Public Journal [Civ. Code § 47(d)]

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

The statements complained of in plaintiff's complaint were made by defendant on _____ [*date*], in a fair and true report contained in _____ [*specify public journal*]. The report accurately described _____ [a judicial proceeding *or* a legislative proceeding *or* a _____ (*specify*) public proceeding *or* statements made in the course of a _____ (*specify*) proceeding *or* a verified charge or complaint made by _____ (*identify person*) to _____ (*identify public official*) on which a warrant has been issued].

[2] Use of Form

This affirmative defense may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint for libel if the statements were a fair and true report in a public journal that described (1) a judicial proceeding, (2) a legislative proceeding, (3) another type of public official proceeding, (4) statements made in the course of such a proceeding, or (5) a verified charge or complaint made by any person to a public official on which a warrant has been issued [*Civ. Code § 47(d)*].

[3] California Points and Authorities

For a memorandum of points and authorities supporting a motion for summary judgment based on this defense, see California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*

[4] State Statutes

Privileged publication as one made in fair and true report in public journal. *Civ. Code § 47(d)*

[5] Decisions

[a] Communications Protected

Report of state administrative agency investigation into expenditure of public funds as within privilege. *Howard v. Oakland Tribune (1988) 199 Cal. App. 3d 1124, 1128, 245 Cal. Rptr. 449*

Privilege as applicable to report of police investigation and discussion thereof at city council meeting. *Green v. Cortez (1984) 151 Cal. App. 3d 1068, 1073, 199 Cal. Rptr. 221*

Privilege as applicable to oral statements of district attorneys, sheriffs, and police officers; crime reports of police department; and FBI identification records. *Hayward v. Watsonville Register-Pajaronian & Sun (1968) 265 Cal. App. 2d 255, 260, 71 Cal. Rptr. 295*

Privilege as applicable to publication of charge made in complaint. *Kurata v. Los Angeles News Publ'g Co. (1935) 4 Cal. App. 2d 224, 227, 40 P.2d 520*

Privilege as applicable to report of charge of being correspondent in divorce action made during trial. *Mortensen v. Los Angeles Examiner (1931) 112 Cal. App. 194, 207, 296 P. 927*

[b] Substantial Accuracy

Former *Civ. Code § 47(4)* [*now see Civ. Code § 47(d)*] as requiring reporter to ensure that "gist or sting" of report, in its very substance, is accurately conveyed, but as allowing certain degree of literary license, because reporter is not bound by testifier's exact words. *McClatchy Newspapers, Inc. v. Superior Court (1987) 189 Cal. App. 3d 961, 975-976, 234 Cal. Rptr. 702*

"Fair report" concept of former *Civ. Code § 47(4)* [*now see Civ. Code § 47(d)*] as permitting some degree of literary license, so that report using exaggerated terms is privileged as long as the gist of report is justified. *Jennings v. Telegram-Tribune Co. (1985) 164 Cal. App. 3d 119, 125-127, 210 Cal. Rptr. 485*

Application of absolute privilege of report in public journal as requiring only substantial accuracy. *Handelsman v. San Francisco Chronicle (1970) 11 Cal. App. 3d 381, 386, 90 Cal. Rptr. 188*

Reason for substantial accuracy rule as fact that exact reproduction as potentially harmful as reporter's interpretation. *Handelsman v. San Francisco Chronicle (1970) 11 Cal. App. 3d 381, 386, 90 Cal. Rptr. 188*

Test of accuracy for privilege as standard of accuracy for those whose function it is to give public fair report of what has occurred. *Handelsman v. San Francisco Chronicle (1970) 11 Cal. App. 3d 381, 387, 90 Cal. Rptr. 188*

Error in naming paper or characterizing writing in which publication alleged to be libelous appears as not defeating privilege. *Mortensen v. Los Angeles Examiner (1931) 112 Cal. App. 194, 202, 296 P. 927*

[6] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 585-587 (10th ed. 2005)

6 Cal. Jur. 3d, *Assault and Other Wilful Torts*, § 213, 214

[7] Cross References

For a related form, *see § 340.296*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationDefensesFair Comment & OpinionTortsIntentional TortsDefamationDefensesPrivilegesStatutory PrivilegesTortsIntentional TortsDefamationDefensesTruthTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.287

§ 340.287 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Privilege--Fair and True Report of Public Meeting or of Matter for Public Benefit [Civ. Code § 47(e)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Privilege--Fair and True Report of Public Meeting or of Matter for Public Benefit [Civ. Code § 47(e)]

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

The statements complained of in plaintiff's complaint were made by defendant on _____ [*date*], in a fair and true report contained in _____ [*specify publication*]. The report accurately described _____ [the proceedings of a public meeting held for the lawful purpose of _____ (*specify*) *or* matter for the public benefit in that _____ (*specify*)].

[2] Use of Form

This affirmative defense may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint for libel if the statements were a fair and true report of either a public meeting held for a lawful purpose or matter that was for the public benefit [*Civ. Code § 47(e)*].

[3] California Points and Authorities

For a memorandum of points and authorities supporting a motion for summary judgment based on this defense, see California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)

[4] State Statutes

Privileged publication as one made in fair and true report of public meeting or matter of public interest. *Civ. Code § 47(e)*

[5] Decisions

Privilege as applicable to media defendants who summarized report on organized crime containing name of plaintiff released by state Attorney General at press conference. *Kilgore v. Younger (1982) 30 Cal. 3d 770, 782, 180 Cal. Rptr. 657, 640 P.2d 793*

Privilege encompassed within *Civ. Code § 47(e)* as absolute privileges; malice as not proper issue if privilege asserted. *Williams v. Daily Review, Inc. (1965) 236 Cal. App. 2d 405, 418-419, 46 Cal. Rptr. 135*

Privilege as applicable to fair and true report of public meeting lawfully convened and open to public, or if not lawfully convened or not open to public if publication concerns public meeting and is for public benefit. *Williams v. Daily Review, Inc. (1965) 236 Cal. App. 2d 405, 418, 46 Cal. Rptr. 135*

[6] Text References

Witkin, Summary of California Law, Vol. 5, *Torts*, § 589 (10th ed. 2005)

6 Cal. Jur. 3d, *Assault and Other Wilful Torts*, §§ 213, 214

[7] Cross References

For a related form, *see § 340.296*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationDefensesFair Comment & OpinionTortsIntentional TortsDefamationDefensesPrivilegesStatutory PrivilegesTortsIntentional TortsDefamationDefensesTruthTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.288

§ 340.288 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Privilege--Publication Made Without Malice [Civ. Code § 47(c)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Privilege--Publication Made Without Malice [Civ. Code § 47(c)]

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

The statements complained of in plaintiff's complaint were made by defendant about plaintiff on _____ [*date*]. Such statements were, however, made without any feelings by defendant of hatred or ill will for plaintiff and in a _____ [*specify type of communication, e.g.,* conversation *or* letter] to _____ [*name of person to whom made*] who was interested in the subject matter of the _____ [*specify type of communication*]. Defendant is a person who _____ [was also interested in the subject matter of the communication *or* was related to _____ (*name*) in that _____ (*specify relationship*) and had an innocent motive in making the statements complained of by plaintiff *or* was requested by _____ (*name*) to make the statements] and therefore is eligible for the qualified privilege under *Civ. Code § 47(c)*.

[2] Use of Form

This affirmative defense may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint for libel or slander if the statements were made without malice and are covered by the conditions applicable to the qualified privilege under *Civ. Code § 47(c)*.

[3] California Points and Authorities

For a memorandum of points and authorities supporting a motion for summary judgment based on this defense, see California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)* (Matthew Bender)

[4] State Statutes

Qualified privilege. *Civ. Code § 47(c)*

Inferrence of malice prohibited. *Civ. Code § 48*

[5] Decisions

[a] Definitions of Malice

Definition of actual malice is "a desire or disposition to injure another founded on spite or ill will." *Siemon v. Finkle (1923) 190 Cal. 611, 618, 213 P. 954* ; *White v. California (1971) 17 Cal. App. 3d 621, 628-629, 95 Cal. Rptr. 175*

Definition of actual malice is "a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy, or injure another person." *Davis v. Hearst (1911) 160 Cal. 143, 160, 164, 116 P. 530* ; *Dietrich v. Litton Indus., Inc. (1970) 12 Cal. App. 3d 704, 714, 90 Cal. Rptr. 856*

Definition of actual malice is "personal hatred or ill will towards the plaintiff, or wanton disregard of the civil obligations of the defendants toward the plaintiff." *Hearne v. De Young (1901) 132 Cal. 357, 361-362, 64 P. 576* ; *White v. California (1971) 17 Cal. App. 3d 621, 628-629, 95 Cal. Rptr. 175*

[b] Inferrence of Malice

Factual inference of malice permissible if defendant does not have reasonable or probable cause to believe statement true. *Stationers Corp. v. Dun & Bradstreet, Inc. (1965) 62 Cal. 2d 412, 418, 42 Cal. Rptr. 449, 398 P.2d 785* ; *MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 552, 343 P.2d 36*

Malice not inferred in case involving qualified privilege. *Emde v. San Joaquin County Cent. Labor Council (1943) 23 Cal. 2d 146, 161, 143 P.2d 20*

[c] Presumption of Innocence

Qualified privilege creates presumption that communication made innocently and without malice. *Smith v. Hatch (1969) 271 Cal. App. 2d 39, 47, 76 Cal. Rptr. 350* ; *Lesperance v. North Am. Aviation, Inc. (1963) 217 Cal. App. 2d 336, 341, 31 Cal. Rptr. 873*

[d] Specific Evidence of Malice

Exaggeration, overdrawing, or detrimental coloring. *Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791, 799, 197 P.2d 713*

Tenor of statement. *Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791, 799, 197 P.2d 713*

Previous quarrel, rivalry, or ill-feeling. *Scott v. Times-Mirror Co. (1919) 181 Cal. 345, 362, 184 P. 672* ; *Larrick v. Gilloon (1959) 176 Cal. App. 2d 408, 416, 1 Cal. Rptr. 360 , overruled on other grounds, Field Research Corp. v. Superior Court (1969) 71 Cal. 2d 110, 114 n.4, 77 Cal. Rptr. 243, 453 P.2d 747*

Wanton and reckless disregard of consequences and of rights and feelings of others. *Davis v. Hearst (1911) 160 Cal. 143, 167, 116 P. 530*

Lying. Di Giorgio Fruit Corp. v. AFL-CIO (1963) 215 Cal. App. 2d 560, 574, 30 Cal. Rptr. 350

[e] Specific Communications Covered

Investigative committee. *Everett v. California Teachers Ass'n (1962) 208 Cal. App. 2d 291, 294, 25 Cal. Rptr. 120*

Prospective employer of teacher. *Neal v. Gatlin (1973) 35 Cal. App. 3d 871, 877, 111 Cal. Rptr. 117*

Church matters. *Brewer v. Second Baptist Church (1948) 32 Cal. 2d 791, 796, 197 P.2d 713*

Information disseminated by *Bureau of Criminal Identification. White v. California (1971) 17 Cal. App. 3d 621, 628, 95 Cal. Rptr. 175*

Information concerning dispute between employer and former employee. *Washer v. Bank of Am. (1943) 21 Cal. 2d 822, 832-833, 136 P.2d 297 , overruled on other grounds, MacLeod v. Tribune Publ'g Co. (1959) 52 Cal. 2d 536, 343 P.2d 36*

Response to prospective employer of former employee. *Lesperance v. North Ame. Aviation, Inc. (1963) 217 Cal. App. 2d 336, 31 Cal. Rptr. 873*

Labor dispute. *Emde v. San Joaquin County Cent. Labor Council (1943) 23 Cal. 2d 146, 154, 143 P.2d 20*

Newspapers. *Snively v. Record Publ'g Co. (1921) 185 Cal. 565, 571, 198 P. 1 , overruled on other grounds, Brown v. Kelly Broad. Co. (1989) 48 Cal. 3d 711, 257 Cal. Rptr. 708, 771 P.2d 406*); *Stockton Newspapers, Inc. v. Superior Court (1988) 206 Cal. App. 3d 966, 980-981, 254 Cal. Rptr. 389*

Comment on qualifications of political candidate. *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 28, 81 Cal. Rptr. 360, 459 P.2d 912*

Complaints made by employees to employers about workplace harassment. *Cruey v. Gannett Co. (1998) 64 Cal. App. 4th 356, 369, 76 Cal. Rptr. 2d 670*

Matters of public interest. *Everett v. California Teachers Ass'n (1962) 208 Cal. App. 2d 291, 294, 25 Cal. Rptr. 120*

Intra-union dispute. *Demott v. Amalgamated Meat Cutters (1958) 157 Cal. App. 2d 13, 27, 320 P.2d 50*

[f] Fair Comment

Publication or broadcast by member of news media to general public regarding private person is not privileged under former *Civ. Code § 47(3)* [*now see Civ. Code § 47(c)*], regardless of whether the communication pertains to a matter of public interest. *Brown v. Kelly Broad. Co. (1989) 48 Cal. 3d 711, 738, 257 Cal. Rptr. 708, 771 P.2d 406*

Qualified privilege as encompassing common law privilege of fair comment; privilege as allowing person to make fair comment on matters of public interest. *Maidman v. Jewish Publ'ns, Inc. (1960) 54 Cal. 2d 643, 651-652, 7 Cal. Rptr. 617, 355 P.2d 265* (limited to its facts regarding a public interest communication about a public figure as being privileged under former *Civ. Code § 47(3)* [*now see Civ. Code § 47(c)*] in *Brown v. Kelly Broad. Co. (1989) 48 Cal.*

3d 711, 734-735, 257 Cal. Rptr. 708, 771 P.2d 406); *Williams v. Daily Review, Inc. (1965) 236 Cal. App. 2d 405, 416, 46 Cal. Rptr. 135*

Qualified privilege of fair comment as not absolute; privilege as extending only to bona fide publications. *Maidman v. Jewish Publ'ns, Inc. (1960) 54 Cal. 2d 643, 652, 7 Cal. Rptr. 617, 355 P.2d 265* (limited to its facts regarding a public interest communication about a public figure as being privileged under former *Civ. Code § 47(3)* [*now see Civ. Code § 47(c)*] in *Brown v. Kelly Broad. Co. (1989) 48 Cal. 3d 711, 734-735, 257 Cal. Rptr. 708, 771 P.2d 406*)

[6] Law Reviews

Note, *Fair Comment--A California Privilege, 1 Santa Clara Lawyer 32 (1961)*

Gilbert, *Privileged Publications in Labor Disputes Under California Libel Laws, 30 S. Cal. L. Rev. 35 (1956)*

[13] Text References

Witkin, California Procedure (4th ed), Vol. 5, *Pleading* § 1027

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 556, 591-600 (10th ed. 2005)

[14] Cross References

For a related form, *see § 340.296*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationDefensesPrivilegesQualified PrivilegesTortsIntentional TortsDefamationDefensesPrivilegesStatutory PrivilegesTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.289

§ 340.289 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Consent

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Consent

AS A SEPARATE AND AFFIRMATIVE DEFENSE, DEFENDANT ALLEGES:

The statements complained of in plaintiff's complaint were made by defendant on _____ [*date*] about plaintiff. Such statements were consented to by plaintiff in that _____ [*specify circumstances constituting consent*]. Therefore, plaintiff cannot complain that any harm to plaintiff's reputation was caused by defendant's statements.

[2] Use of Form

This affirmative defense may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint for libel or slander where the statements were consented to by the plaintiff [*see Moranville v. Aletto (1957) 153 Cal. App. 2d 667, 671, 315 P.2d 91]* .

[3] California Points and Authorities

For a memorandum of points and authoritites supporting a motion for summary judgment based on this defense, see California Points and Authorities, Ch. 142, *Libel and Slander* (*Defamation*) (Matthew Bender)

[4] Decisions

Defendant as not able to utilize defense of consent where he merely repeats at plaintiff's urging the charge of being a thief which had been made in presence of third person and thus published. *Puchan v. Godeau (1914) 167 Cal. 692, 694, 140 P. 952* ; *Moranville v. Aletto (1957) 153 Cal. App. 2d 667, 671, 315 P.2d 91*

"Personal Depiction Waiver" given by plaintiff to defendant author and publisher as not constituting consent to defamation, libel, and invasion of privacy for purposes of demurrer when waiver is ambiguous on its face or does not suggest it was knowingly made; extent of privilege conferred by consent as determined by language or acts by which consent given in light of surrounding circumstances. *Kelly v. William Morrow & Co. (1986) 186 Cal. App. 3d 1625, 1633, 1635, 231 Cal. Rptr. 497*

Plaintiff's disclosure of defendant's defamatory statement of reasons for firing plaintiff as not constituting consent to defamation when defendant could have reasonably foreseen plaintiff would be under strong compulsion to disclose statement to prospective employer. *McKinney v. County of Santa Clara (1980) 110 Cal. App. 3d 787, 796-798, 168 Cal. Rptr. 89*

Request to publish defamatory material as creating absolute privilege that cannot be overcome by showing of malice. *Royer v. Steinberg (1979) 90 Cal. App. 3d 490, 499, 153 Cal. Rptr. 499*

[5] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, § 590 (10th ed. 2005)

[6] Cross References

For a related form, *see § 340.296*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesAbsolute PrivilegesTortsIntentional TortsDefensesConsent

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30-340 California Forms of Pleading and Practice--Annotated § 340.290

§ 340.290 General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Bar of Statute of Limitations [Code Civ. Proc. § 340(c)]

[1] FORM General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Bar of Statute of Limitations [Code Civ. Proc. § 340(c)]

[*Caption. See § 340.260.*]

Defendant demurs to the complaint herein on the following ground:

The complaint does not state facts sufficient to constitute a cause of action in that it clearly appears on the face of the complaint that the alleged _____ [libel *or* slander] occurred on _____ [*date*] and that the complaint was filed on _____ [*date*]. The intervening period of time is thus obviously greater than one year and is barred by *Section 340(c) of the Code of Civil Procedure.*

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant(s) _____ [*name*]

CAUTION:
A party filing a demurrer is required to serve and file therewith a notice of hearing [*Cal. Rules of Ct., Rule 3.1320(c)*] and a memorandum of points and authorities in support of each ground thereof [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form is for use in objecting, by general demurrer, to a complaint on the ground that the pleading does not state

facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*] because the plaintiff has failed to file the complaint within the one year period permitted by the statute of limitations applicable to defamation actions [*Code Civ. Proc. § 340(c)*]. This defect must appear on the face of the complaint; otherwise, the ground for objection should be taken by answer [*see § 340.291*] rather than by demurrer [see *Code Civ. Proc. § 430.30(a), (b)*].

[3] California Points and Authorities

For a memorandum of points and authorities supporting this demurrer, see California Points and Authorities, Ch. 142, *Libel and Slander* (*Defamation*) (Matthew Bender)

[4] State Statutes

Statute of limitations as one year for libel and slander actions. *Code Civ. Proc. § 340(c)*

[5] Decisions

One-year limitation period of former *Code Civ. Proc. § 340(3)* [*now see Code Civ. Proc. § 340(c)*] as beginning on first date that substantial distribution of publication to retail outlets took place under Uniform Single Publication Act (*Civ. Code § 3425.3*). *Strick v. Superior Court (1983) 143 Cal. App. 3d 916, 922, 192 Cal. Rptr. 314*

Libel cause of action as accruing on date of first general distribution of publication to public, not cover date of magazine; statute of limitations as not tolled until plaintiff discovers alleged libel if libel was contained in nationally distributed magazine, widely available to public, including plaintiff. *McGuiness v. Motor Trend Magazine (1982) 129 Cal. App. 3d 59, 63, 180 Cal. Rptr. 784*

Cause of action for libel as not accruing, for purpose of limitation under *Code Civ. Proc. § 340*, until plaintiff discovers, or with reasonable diligence should discover, facts constituting cause of action (e.g., fact of publication of defamatory statement). *Manguso v. Oceanside Unified Sch. Dist. (1979) 88 Cal. App. 3d 725, 731, 152 Cal. Rptr. 27*

State of limitations as one year for libel and slander actions. *Hopper v. Allen (1968) 266 Cal. App. 2d 797, 801-803, 72 Cal. Rptr. 435* ; *Rutherford v. Johnson (1967) 250 Cal. App. 2d 316, 318, 58 Cal. Rptr. 546*

Libel as occuring on publication and statute of limitation as beginning to run at that time. *Campbell v. Jewish Comm. for Pers. Serv. (1954) 125 Cal. App. 2d 771, 774, 271 P.2d 185*

[6] Text References

Witkin, California Procedure (4th ed), Vol. 5, *Pleading*, §§ 915, 1107, 1108, 1110

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDefects of FormGovernmentsLegislationStatutes of LimitationsGeneral OverviewTortsIntentional TortsDefamationDefensesStatutes of LimitationsTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.291

§ 340.291 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Bar of Statute of Limitations [Code Civ. Proc. § 340(c)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Bar of Statute of Limitations [Code Civ. Proc. § 340(c)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the statements complained of in plaintiff's complaint were made by defendant about plaintiff on _____ [*date*]. The complaint in this action was filed on _____ [*date*]. Therefore, the intervening period of time is obviously greater than one year and is barred by *Section 340(c) of the Code of Civil Procedure.*

[2] Use of Form

This affirmative defense may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint for libel or slander where the statements made over one year before the complaint was filed and thus any action for defamation is barred by the statute of limitations [*Code Civ. Proc. § 340(c)*].

[3] Text References

Witkin, California Procedure (4th ed), Vol. 5, *Pleading,* §§ 1043-1047

[4] Cross References

For a related form, see *§ 340.296*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsPleading & ProofTortsIntentional TortsDefamationDefensesStatutes of LimitationsTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.292

§ 340.292 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Publication Did Not Convey a Defamatory Meaning

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Publication Did Not Convey a Defamatory Meaning

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges the statements complained of in plaintiff's complaint were made by defendant about plaintiff on _____ [*date*]. Such statements were made without any feelings by defendant of hatred or ill will for plaintiff. To the contrary, they were made in good humor and as a joke and thus did not carry any defamatory meaning to those who heard the remarks.

[2] Use of Form

This affirmative defense may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint for libel or slander where the statements failed to convey a defamatory meaning to those who heard them because they were made as a joke.

[3] California Points and Authorities

For a memorandum of points and authorities supporting a motion for summary judgment based on this defense, see California Points and Authorities, Ch. 142, *Libel and Slander* (*Defamation*) (Matthew Bender)

[4] Decisions

Defendant as capable of showing that words not understood at all, taken in jest, or some meaning other than the obvious one was conveyed to all who heard or read them. *Arno v. Stewart (1966) 245 Cal. App. 2d 955, 962-963, 54*

Cal. Rptr. 392

Jocular intent of publisher as not relieving him from liability if it is reasonable to not understand utterance as joke. *Ervin v. Record Publ'g Co. (1908) 154 Cal. 79, 82, 97 P. 21* ; *Arno v. Stewart (1966) 245 Cal. App. 2d 955, 964, 54 Cal. Rptr. 392*

[5] Text References

Witkin, Summary of California Law, Vol. 5, *Torts*, § 554 (10th ed. 2005)

[6] Cross References

For a related form, see *§ 340.296*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationDefensesExaggerations & Imaginative CommentaryTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.293

§ 340.293 General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Failure of Plaintiff Suing Public Employee to Allege Filing of Claim With Public Entity [Gov. Code §§ 905, 911.2, 950.2]

[1] FORM General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Failure of Plaintiff Suing Public Employee to Allege Filing of Claim With Public Entity [Gov. Code §§ 905, 911.2, 950.2]

Defendant demurs to the complaint herein on the following ground:

The complaint does not state facts sufficient to constitute a cause of action in that defendant is a public employee who is employed by _____ [*specify public entity*] and works as a _____ [*specify capacity*]. Defendant made the statements complained of in plaintiff's complaint herein during the course of defendant's employment. Plaintiff has failed to allege that he filed a claim with _____ [*specify public entity*] as requred by *Sections 950.2* and *905 of the Government Code*. Moreover, since the statements were made on _____ [*date*] and the complaint was noted filed until _____ [*date*], the period of time of six months permitted for the filing of such a claim has elapsed [*Gov. Code § 911.2*]. Thus, this complaint fails to state a cause of action.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant(s) _____ [*name*]

CAUTION:
A party filing a demurrer is required to serve and file therewith a notice of hearing [*Cal. Rules of Ct., Rule 3.1320(c)*] and a memorandum of points and authorities in support of each ground thereof [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form is for use if objecting, by general demurrer, to a complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*] because plaintiff is suing a public employee without having filed a claim with the appropriate public entity [*see Gov. Code §§ 950.2, 905, 911.2*; *Neal v. Gatlin (1973) 35 Cal. App. 3d 871, 875-877, 111 Cal. Rptr. 117]* .

[3] California Points and Authorities

For a memorandum of points and authorities supporting this demurrer, see California Points and Authorities, Ch. 142, *Libel and Slander* (*Defamation*) (Matthew Bender)

[4] State Statutes

Required presentation of claims against local public entities. *Gov. Code § 905*

Required presentation of claims against State. *Gov. Code § 905.2*

Necessity of presentation of claim in order to maintain action against public employee. *Gov. Code § 950*

Action against public employee barred if action against employing public entity barred. *Gov. Code § 950.2*

[5] Decisions

Former public employee as requred to file claim with public entity as prerequisite for defamation action. *Neal v. Gatlin (1973) 35 Cal. App. 3d 871, 875-877, 111 Cal. Rptr. 117* (college teacher); *Hopper v. Allen (1968) 266 Cal. App. 2d 797, 799, 72 Cal. Rptr. 435* (police officer)

[6] Cross References

For a related form, see *§ 340.260*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationDefensesGeneral OverviewTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.294

§ 340.294 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Public Employee Immune for Statement Made Within Scope of Authority [Gov. Code § 820.2]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Public Employee Immune for Statement Made Within Scope of Authority [Gov. Code § 820.2]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that defendant is a public employee employed by _____ [*specify public entity*]. The statements complained of by plaintiff were made in the exercise of discretion properly vested in defendant as a result of defendant's employment by _____ [*specify public entity*] and were within the scope of defendant's employment. Thus, the statements are immune to a cause of action for _____ [*either* libel *or* slander] under *Section 820.2 of the Government Code*.

[2] Use of Form

This affirmative defense may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint for libel or slander where the statements were made by a public employee within the scope of his or her employment and thus are immune to a libel or slander action [*see Gov. Code § 820.2*].

[3] California Points and Authorities

For a memorandum of points and authorities supporting a motion for summary judgment based on this defense, see California Points and Authorities, Ch. 142, *Libel and Slander* (*Defamation*) (Matthew Bender)

[4] State Statutes

Public employee immune where act or omission result of exercise of discretion. *Gov. Code § 820.2*

[5] Decisions

Government officials as not personally liable for discretionary acts within the scope of their authority. *Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal. 2d 224, 229, 233, 11 Cal. Rptr. 97, 359 P.2d 465* (school trustees); *Burgdorf v. Funder (1966) 246 Cal. App. 2d 443, 448-449, 54 Cal. Rptr. 805* (tax official)

[6] Cross References

For a related form, see *§ 340.296*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationDefensesPrivilegesAbsolute PrivilegesTortsIntentional TortsDefamationDefensesPrivilegesStatutory PrivilegesTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.295

§ 340.295 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Public Entity Immune for Discretionary Statement of Public Employee

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Public Entity Immune for Discretionary Statement of Public Employee

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that _____ [*Name of employee*] is a public employee employed by defendant. The statements complained of by plaintiff were made in the exercise of discretion properly vested in _____ [*name of employee*] and were within the scope of his/her employment. Thus, since _____ [*name of employee*] is immune from liability for the statements under *Section 820.2 of the Government Code*, defendant is likewise immune under *Section 815.2(b) of the Government Code*.

[2] Use of Form

This affirmative defense may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint for libel or slander where defendant public entity is immune for the discretionary statements made by one of its employees about the plaintiff [*Gov. Code § 815.2(b)*].

A public entity would also not be liable for a defamatory statement made by one of its employees outside the scope of his or her employment. This is true because *Gov. Code § 815.2(a)* limits a public entity's liability to an act or omission of the employee which was within the scope of his or her employment.

[3] California Points and Authorities

For a memorandum of points and authorities supporting a motion for summary judgment based on this defense, see California Points and Authorities, Ch. 142, *Libel and Slander* (*Defamation*) (Matthew Bender)

[4] State Statutes

Public entity immune from liability where public employee immune. *Gov. Code § 815.2(b)*

[5] Decisions

Conduct of state officials in instituting newspaper publicity charging certain collection agencies with improper conduct as immune from liability since publicity merely reported results of official investigations of plaintiffs; thus state also exempt from liability pursuant to *Gov. Code § 815.2*. *Citizens Capital Corp. v. Spohn (1982) 133 Cal. App. 3d 887, 888-889, 184 Cal. Rptr. 269 , superseded by statute as stated in Clarke v. Upton 2008 U.S. Dist. LEXIS 38206* (Under *Cal. Gov't Code § 820.21*, social workers and other child protection workers have no civil immunity if they commit certain acts with malice).

[6] Cross References

For a related form, see *§ 340.294*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstTortsIntentional TortsDefamationDefensesPrivilegesAbsolute PrivilegesTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.296

§ 340.296 Notice of Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--General Form

[1] FORM Notice of Motion for Summary Judgment [Code Civ. Proc. § 437c]--By Defendant--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	NOTICE OF MOTION FOR SUMMARY JUDG-
_____ [*name*],	)	MENT
Plaintiff,	)	[Amount demanded _____
vs.	)	(exceeds *or* does not exceed) $10,000]
_____ [*name*],	)	[LIMITED CIVIL CASE]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To plaintiff _____ [*name*] and _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] _____ [*name*] will, and hereby does, move for an order under *Code of Civil Procedure Section 437c* dismissing the complaint herein and entering judgment for defendant. The motion will be

made on the ground that the action has no merit in that _____ [*specify the grounds, e.g., based on the fact that there is not triable issue of fact or that there are facts which clearly indicate that defendant can make use of one of the affirmative defenses relevant to a libel or slander action*].

The motion will be based on this notice of motion, on the affidavit of _____ [*name*] and the memorandum of points and authorities served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

CAUTION:
A memorandum of points and authorities must be filed and a copy served with this notice of motion [*Cal Rules of Ct, Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*].

[2] Use of Form

This form is for use as a notice of motion for summary judgment [*Code Civ. Proc. § 437c*]. The notice of motion must be served on all other parties to the action at least 28 days before the hearing of the motion [*Code Civ. Proc. § 437c(a)*], and it must be supported by affidavits that are based on the personal knowledge of the affiant [*Code Civ. Proc. § 437c(b), (d)*]. A motion for summary judgment should be used by counsel whenever a complaint has no merit because there is not triable issue of fact or because it is clear that defendant can make use of one of the affirmative defenses relevant to a libel or slander action. Raising the substance of an affirmative defense by way of summary judgment is obviously a quicker and more efficient way of resolving a dispute than by way of an answer since it eliminates the necessity of other pretrial proceedings or even a trail itself.

[3] Cross References

For discussion of motions for summary judgment, alternative notice of motion forms, and forms for declarations and orders, see Ch. 537, *Summary Judgment*

[4] California Points and Authorities

For memoranda of points and authorities relating to motions for summary judgment, see California Points and Authorities, Ch. 221, *Summary Judgments* (Matthew Bender)

[5] State Statutes

Motions for summary judgment. *Code Civ. Proc. § 437c*

[6] Decisions

Summary judgment for defendant as proper when facts alleged in complaint show logical connection between defamatory statement and objective of official proceedings. *Cayley v. Nunn (1987) 190 Cal. App. 3d 300, 305, 235*

Cal. Rptr. 385

Defense motion for summary judgment as improperly denied when all disputed communications were subject to absolute privileges under former *Civ. Code§ 47(2), (4)* [*now see Civ. Code § 47(b), (d)*]. *McClatchy Newspapers, Inc.v. Superior Court (1987) 189 Cal. App. 3d 961, 968-977, 234 Cal. Rptr. 702*

[7] Text References

Witkin, California Procedure (4th ed), Vol. 6, *Proceedings Without Trial*, §§ 178-249 (summary judgment)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentNoticesTortsIntentional TortsDefamationProcedure

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30-340 California Forms of Pleading and Practice--Annotated § 340.297

§ 340.297 Order Granting Defendant's Motion for Summary Judgment

[1] FORM Order Granting Defendant's Motion for Summary Judgment

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER GRANTING DEFENDANT'S MOTION
_____ [*name*],	)	FOR SUMMARY JUDGMENT
Plaintiff,	)	[Amount demanded _____
vs.	)	(exceeds *or* does not exceed) $10,000]
_____ [*name(s)*],	)	[LIMITED CIVIL CASE]
Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

The motion of defendant _____ [*name*] for an order granting a motion for summary judgment dismissing the complaint on file herein and entering judgment for defendant came on regularly for hearing on _____ [*date*]; plaintiff appearing through counsel _____ [*name*] and defendant appearing through counsel _____ [*name*], and good cause appearing therefor,

IT IS ORDERED that the motion of defendant is granted and that judgment be entered for defendant.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This order is for use where defendant's motion for summary judgment in a defamation action is granted.

[3] Cross References

For a related form, *see § 340.296*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewTortsIntentional TortsDefamationProcedure

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 340 LIBEL AND SLANDER
PART V. FORMS
B. Defenses To Defamation Actions

30-340 California Forms of Pleading and Practice--Annotated §§ 340.298-340.309

[Reserved]

§§ 340.298[Reserved]

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PART V. FORMS
C. Slander Of Title And Trade Libel

30-340 California Forms of Pleading and Practice--Annotated § 340.310

§ 340.310 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for Slander of Title and to Cancel Instrument Constituting Cloud on Title to Real Property [Civ. Code § 3412]--General Form

[1] FORM Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for Slander of Title and to Cancel Instrument Constituting Cloud on Title to Real Property [Civ. Code § 3412]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR DAMAGES
_____ [*name*(*s*)],	)	AND TO CANCEL INSTRUMENT
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST COUNT

(Slander of Title)

1. [*Capacity and residence of defendant. See § 340.220, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 340.220, Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 340.220, Paragraph 3.*]

4. On or about _____ [*date*], plaintiff was the owner in fee of title to the property described below, situated in the County of _____, State of California. The property is located _____ [in *or* near] _____ [*name of city*] and is _____ [*describe with particularity the location of the property*].

5. On or about _____ [*date*], defendant(s) willfully, wrongfully, without justification, and without privilege _____ [published *or* caused to be recorded] a _____ [*describe type of document*].

6. The _____ [*type of document*] was false and caused doubt to be cast on plaintiff's title to the property described above.

7. The _____ [publication *or* recording] of the _____ [*type of document*] directly impaired the _____ [immediate salability of the property to a particular purchaser *or* vendibility of the property on the open market] in the sum of $_____.

8. The _____ [publication *or* recording] _____ [*type of document*] made it necessary for plaintiff to retain attorneys and to bring this action to cancel the instrument casting doubt on plaintiff's title. Therefore, plaintiff is entitled to recover attorney's fees and costs incurred in cancelling the instrument. The exact amount of such damages is not known to plaintiff at this time, and plaintiff will move to amend this complaint to state such amount when the same becomes known, or on proof thereof.

9. Furthermore, the aforementioned _____ [publication *or* recording] was motivated by _____ [oppression *or* fraud *or* malice] on the part of the defendant in that _____ [*specify facts supporting allegation*]. Therefore, the awarding of exemplary and punitive damages is justified.

SECOND COUNT

(Cancellation of Cloud on Title)

1. Plaintiff incorporates by reference Paragraphs 1-9 of plaintiff's First Count as though fully set out herein.

2. Defendant(s) claim(s) and assert(s) an interest in the above-described real property which is adverse to plaintiff. That interest is based on a _____ [*describe instrument*] which was _____ [published *or* recorded] on or about _____ [*date*]. [*If recorded, state location of county recorder as well as the book and page number where it is recorded.*]

3. The _____ [*describe instrument*] is invalid and void because _____ [*describe reasons for the invalidity such as falsity, forgery, or fraud*].

4. The claim of the defendant(s) to the above-described property clouds plaintiff's title to that property, depreciates the property's market value, and prevents plaintiff from enjoying the use of the property and premises in the manner most to plaintiff's interest as its owner.

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

1. For general damages in the sum of $_____.

2. For punitive damages.

3. For the _____ [*describe instrument*] to be delivered to the clerk of the court for cancellation and that it be declared void.

4. For damages caused plaintiff by the inconvenience and time suffered by plaintiff in removing this cloud on plaintiff's title.

5. For attorney's fees and costs incurred in removing the cloud on plaintiff's title according to proof.

6. For costs of suit incurred herein.

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 340.220.*]

[2] Use of Form

This complaint is for use to obtain damages for disparagement of title to real property [*see Gudger v. Manton (1943) 21 Cal. 2d 537, 543, 134 P.2d 217* (disapproved with respect to statement that levy of a writ of execution is not an act in the course of a judicial proceeding in *Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405*)] and to remove a cloud on the title to that property [*see Civ. Code § 3412*].

[3] Allegations

The complaint alleges in the first count:

- The ownership in fee of a parcel of real property and the description of that property (Paragraph 4).
- The publication or recording by the defendant of a document done willfully, wrongfully, without justification, and without privilege (Paragraph 5).
- The falsity of the document (Paragraph 6).
- The casting of doubt on the plaintiff's title in the property (Paragraph 6).
- The causation of damages resulting from the impairment of the immediate salability of the property or of the general vendibility of the property (Paragraph 7).

- The incurring of attorney's fees in cancelling the instrument (Paragraph 8).

- Oppression, fraud, and malice by the defendant which justifies the awarding of punitive damages (Paragraph 9).

It alleges in the second count:

- The assertion by the defendant(s) of a claim or claims which are adverse to the plaintiff (Paragraph 2).

- The reasons why the instrument is void (Paragraph 3).

- The fact that the instrument constitutes a cloud on plaintiff's title and prevents plaintiff from obtaining the full use of the property (Paragraph 4).

[4] Quiet Title Action Distinguished

The distinction between an action for the cancellation of an instrument clouding the title to real property (Second Count) and an action to quiet title to it lies in the nature of the relief sought. In an action for cancellation brought pursuant to *Civ. Code § 3412* the relief sought is an order that a particular instrument be cancelled by the court because it is void or voidable and may cause injury to the plaintiff [*Civ. Code § 3412*]. In an action to quiet title, the relief sought is for the court to determine and eliminate claims or interests in real property adverse to the party seeking relief [*Code Civ. Proc. § 760.020(a)*]. More often than not in slander of title actions the plaintiff is seeking to remove a cloud on the plaintiff's title in addition to obtaining damages for the decrease in value of the plaintiff's property. However, occasionally the plaintiff is attempting to quiet title to his or her real property rather than remove a cloud on it. In that case, the second count may be based on the forms which appear in Ch. 482, *Quieting Title*, in place of the allegations which appear in the Second Count of this form.

[5] Cross References

For forms for use in actions to cancel instruments which constitute clouds on title to real property, see Ch. 107, *Cancellation of Instruments*

For general discussion, forms, and a procedural guide for use in actions to quiet title to real property, see Ch. 482, *Quieting Title*

[6] State Statutes

Right to recover exemplary and punitive damages. *Civ. Code § 3294*

Right to recover compensatory damages; measure of damages. *Civ. Code § 3333*

Grounds for cancellation of instruments. *Civ. Code § 3412*

Statute of limitations for slander of title action as three years. *Code Civ. Proc. § 338(g)*

Quiet title actions to real or personal property. *Code Civ. Proc. §§ 760.010-764.080*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTitle QualityAdverse Claim ActionsGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral OverviewTortsBusiness TortsSlander of TitleGeneral OverviewTortsBusiness TortsSlander of TitleElements

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C. Slander Of Title And Trade Libel

30-340 California Forms of Pleading and Practice--Annotated § 340.311

§ 340.311 Complaint for Compensatory [Civ. Code § 3333] and Exemplary [Civ. Code § 3294] Damages for Slander of Title--Spoken Words

[1] FORM Complaint for Compensatory [Civ. Code § 3333] and Exemplary [Civ. Code § 3294] Damages for Slander of Title--Spoken Words

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Slander of Title)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 340.220, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 340.220, Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 340.220, Paragraph 3.*]

4. [*Ownership of property by plaintiff and description of it. See § 340.310, Paragraph 4.*]

5. On or about _____ [*date*], defendant wilfully, wrongfully, without justification, and without

privilege spoke in the presence of _____ [*names*] the following words concerning plaintiff and plaintiff's property: _____ [*reiterate exact language*].

6. The words were false and caused doubt to be cast on plaintiff's title to the property described above.

7. Defendant's words directly impaired the _____ [immediate salability of the property to a particular purchaser *or* vendibility of the property on the open market] in the sum of $_____.

8. Furthermore, defendant's words were motivated by _____ [oppression *or* fraud *or* malice] on the part of the defendant in that _____ [*specify facts supporting allegation*], therefore, justifying the awarding of exemplary and punitive damages.

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages in the sum of $_____.

2. For punitive damages.

3. For costs of suit incurred herein.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 340.220.*]

[2] Use of Form

This form is for use to obtain damages for disparagement of title to real property by spoken words.

[3] Allegations

This complaint alleges: (1) the publication by the defendant of words concerning the plaintiff and the plaintiff's property (Paragraph 5); (2) the falsity of the words (Paragraph 6); (3) the casting of doubt on the plaintiff's title by the words (Paragraph 6); (4) the causation of damages resulting from the impairment of the immediate salability of the property or of the general vendibility of the property (Paragraph 7); and (5) oppression, fraud, and malice by the defendant, which justifies the awarding of punitive damages (Paragraph 8).

[4] Cross References

For a related form, *see § 340.310*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsSlander of TitleGeneral OverviewTortsBusiness TortsSlander of TitleElements

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C. Slander Of Title And Trade Libel

30-340 California Forms of Pleading and Practice--Annotated § 340.312

§ 340.312 Affirmative Defense--Justification

[1] FORM Affirmative Defense--Justification

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff incorrectly alleges that the _____ [*describe document*] was false. On the contrary, it was true because _____ [*specify facts*].

[2] Use of Form

This defense is for use in an answer to a complaint for slander of title by either publishing or recording of an allegedly false document where the document was, in reality, true.

[3] State Statutes

Affirmative defense as part of answer. *Code Civ. Proc. § 431.30(b)(2)*

[4] Decisions

Truth as not disparaging. *Kirsch v. Barnes (N.D. Cal. 1957) 153 F. Supp. 260, 264 , aff'd, (9th Cir. 1959) 263 F.2d 692*

Lack of truth as part of definition of slander of title. *Gudger v. Manton (1943) 21 Cal. 2d 537, 541, 134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405* ; *Frank Pisano & Assocs. v. Taggart (1972) 29 Cal. App. 3d 1, 24, 105 Cal. Rptr. 414*

Falsity as essential element in cause of action for slander of title. *Gudger v. Manton (1943) 21 Cal. 2d 537, 541-542,*

134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405 ; *Burkett v. Griffith (1891) 90 Cal. 532, 537, 27 P. 527 , disapproved on other grounds, Gudger v. Manton (1943) 21 Cal. 2d 537, 544, 134 P.2d 217*

Justification as defense to slander of title action. *Gudger v. Manton (1943) 21 Cal. 2d 537, 543, 134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405*

[5] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, § 647 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsSlander of TitleGeneral OverviewTortsBusiness TortsSlander of TitleDefenses

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30-340 California Forms of Pleading and Practice--Annotated § 340.313

§ 340.313 Affirmative Defense--Absolute Privilege for Judicial Proceedings [Civ. Code § 47(b)]

[1] FORM Affirmative Defense--Absolute Privilege for Judicial Proceedings [Civ. Code § 47(b)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. The _____ [*specify document, e.g.,* lis pendens] complained of was filed in good faith and in conjunction with an action defendant filed against the above-named plaintiff titled _____ vs. _____, No. _____, filed on _____ [*date*], in the _____ court of _____ County, California. The action was one to _____ [*specify, e.g.,* cancel deed to real property].

2. Defendant recorded the _____ [*specify document*] in the recorder's office of _____ County, California, in Book _____, page _____.

[2] Use of Form

This defense is for use in an answer to a complaint for slander of title when the allegedly disparaging document was filed in conjunction with a judicial proceeding and is thus absolutely privileged.

Although a defendant normally has the burden of pleading and proving an affirmative defense, when the existence of an absolute privilege appears on the face of plaintiff's complaint, the complaint may be subject to a demurrer [*Stevens v. Snow (1923) 191 Cal. 58, 64-65, 214 P. 968* ; *see also Smith v. Commonwealth Land Title Ins. Co. (1986) 177 Cal. App. 3d 625, 630-631, 223 Cal. Rptr. 339]* .

If the instrument claimed to be privileged is a lis pendens, the privilege will not attach unless the lis pendens identifies an action previously filed with a court of competent jurisdiction that affects the title or right of possession of real property, as authorized or required by law [*Civ. Code § 47(b)(4)*].

[3] State Statutes

Absolute privilege for publications in conjunction with judicial proceedings. *Civ. Code § 47(b)*

[4] Decisions

Absolute privilege for judicial proceedings as applicable to recordation of notice of lis pendens. *Albertson v. Raboff (1946) 46 Cal. 2d 375, 381, 295 P.2d 405* ; *Earp v. Nobmann (1981) 122 Cal. App. 3d 270, 281-282, 175 Cal. Rptr. 767*

Absolute privilege as applicable to any publication either required or permitted by law in course of judicial proceeding to achieve objects of litigation. *Albertson v. Raboff (1956) 46 Cal. 2d 375, 380-381, 295 P.2d 405* ; *Frank Pisano & Assocs. v. Taggart (1972) 29 Cal. App. 3d 1, 24-25, 105 Cal. Rptr. 414*

Burden of pleading and proving privilege as on defendant, except when existence of privilege appears on the face of plaintiff's complaint. *Smith v. Commonwealth Land Title Ins. Co. (1986) 177 Cal. App. 3d 625, 630-631, 223 Cal. Rptr. 339*

Former *Civ. Code § 47(2)* [*now see Civ. Code § 47(b)*] privilege for publications made in judicial proceeding as applicable to injurious publication, of whatever nature, in protected proceeding; conduct of publishing, rather than publication itself, as what is protected. *Rosenthal v. Irell & Manella (1982) 135 Cal. App. 3d 121, 127-128, 185 Cal. Rptr. 92*

Absolute privilege for judicial proceedings as applicable to filing of claim of mechanic's lien in conjunction with judicial proceedings. *Franck Pisano & Assocs. v. Taggart (1972) 29 Cal. App. 3d 1, 25, 105 Cal. Rptr. 414*

Burden of proving lack of privilege as being on plaintiff. *Hill v. Allan (1968) 259 Cal. App. 2d 470, 489, 66 Cal. Rptr. 676* ; *Spencer v. Harmon Enters., Inc. (1965) 234 Cal. App. 2d 614, 622, 44 Cal. Rptr. 683*

[5] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, § 648 (10th ed. 2005)

6 Cal. Jur. 3d, *Assault and Other Wilful Torts*, § 211

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsBusiness TortsSlander of TitleGeneral OverviewTortsBusiness TortsSlander of TitleDefenses

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30-340 California Forms of Pleading and Practice--Annotated § 340.314

§ 340.314 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Conditional Privilege of Rival Claimant to Real Property [Civ. Code § 47(c)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Conditional Privilege of Rival Claimant to Real Property [Civ. Code § 47(c)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. The defendant claims an interest in the real property that plaintiff alleges the _____ [*describe document*] disparaged. That interest is _____ [*specify interest of defendant, e.g.,* a leasehold interest] in that real property.

2. The _____ [*describe document*] was _____ [published *or* recorded] by the defendant without malice and in good faith.

3. The _____ [publishing *or* recording] of the _____ was conditionally privileged and prevents plaintiff from recovering from any impairment in the value of the property that the _____ [*describe document*] caused.

[2] Use of Form

This defense is for use in an answer to a complaint for slander of title by either publishing or recording in which the defendant was conditionally privileged to do so because of the defendant's status as a rival claimant of or interested party in the property that plaintiff has alleged was disparaged.

Although a defendant normally has the burden of pleading and proving an affirmative defense, when the existence of a qualified privilege appears on the face of plaintiff's complaint, the plaintiff has the burden of pleading malice sufficient to overcome the privilege [*Smith v. Commonwealth Land Title Ins. Co. (1986) 177 Cal. App. 3d 625, 630-631, 223*

Cal. Rptr. 339] . If the plaintiff's complaint discloses the existence of a qualified privilege and does not allege malice, a demurrer is the proper response [*Smith v. Commonwealth Land Title Ins. Co. (1986) 177 Cal. App. 3d 625, 630-631, 223 Cal. Rptr. 339]* .

[3] State Statutes

Publications conditionally privileged if made without malice. *Civ. Code § 47(c)*

Malice not inferred from fact of communication. *Civ. Code § 48*

[4] Decisions

Rival claimant of property is conditionally privileged to disparage another's interest in property provided action is honest and in good faith. *Gudger v. Manton (1943) 21 Cal. 2d 537, 545, 134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1946) 46 Cal. 2d 375, 381, 295 P.2d 405* ; *Hill v. Allan (1968) 259 Cal. App. 2d 470, 490, 66 Cal. Rptr. 676*

Burden of alleging and proving lack of privilege and existence of malice is on plaintiff. *Gudger v. Manton (1943) 21 Cal. 2d 537, 543, 134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405* ; *Spencer v. Harmon Enters., Inc. (1965) 234 Cal. App. 2d 614, 622, 44 Cal. Rptr. 683*

Existence of malice defeats assertion of qualified privilege. *Gudger v. Manton (1943) 21 Cal. 2d 537, 543, 134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405*

Burden of pleading and proving privilege is on defendant except when existance of privilege appears on the face of plaintiff's complaint. *Smith v. Commonwealth Land Title Ins. Co. (1986) 177 Cal. App. 3d 625, 630-631, 223 Cal. Rptr. 339*

Conditional privilege of rival claimant is dependent on absence of malice. *Hill v. Allan (1968) 259 Cal. App. 2d 470, 490, 66 Cal. Rptr. 676*

Existence of actual malice is not inferred from mere fact of communication. *Hill v. Allan (1968) 259 Cal. App. 2d 470, 490, 66 Cal. Rptr. 676*

Plaintiff is not required to prove actual malice when defendants have engaged in all-pervasive fraud. *Spencer v. Harmon Enters., Inc. (1965) 234 Cal. App. 2d 614, 625, 44 Cal. Rptr. 683*

[5] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, § 649 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsTortsBusiness TortsSlander of TitleGeneral OverviewTortsBusiness TortsSlander of TitleDefenses

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30-340 California Forms of Pleading and Practice--Annotated § 340.315

§ 340.315 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Statute of Limitations [Code Civ. Proc. § 338(g)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Statute of Limitations [Code Civ. Proc. § 338(g)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. The _____ [*describe document*] was _____ [published *or* recorded] on or about _____ [*date*], by defendant.

2. The plaintiff's complaint in this action was filed on _____ [*date*].

3. The plaintiff's action is barred by *Code Civ. Proc. § 338(g)*.

[2] Use of Form

This defense is for use in an answer to a complaint for slander of title if the action has been filed more than three years after the alleged disparagement occured and is thus barred by *Code Civ. Proc. § 338(g)*.

[3] Cross References

For general forms for alleging defenses based on fact statute of limitations has run, see Ch. 345, *Limitation of Actions*

[4] State Statutes

Statute of limitations for slander of title actions is three years. *Code Civ. Proc. § 338(g)*

Pleading statute of limitations as defense. *Code Civ. Proc. § 458*

[5] Decisions

Statute of limitations for cause of action for slander of title is three years. *Howard v. Hudson (9th Cir. 1958) 259 F.2d 29, 31-32*

Attorney's knowledge as imputed to clients to commence running of limitations period. *Stalberg v. Western Title Ins. Co. (1991) 230 Cal. App. 3d 1223, 1231, 282 Cal. Rptr. 43*

Limitations period as commencing when plaintiff could reasonably be expected to discover existence of claim. *Stalberg v. Western Title Ins. Co. (1991) 230 Cal. App. 3d 1223, 1230, 282 Cal. Rptr. 43*

Discovery of wild deed as creating duty of inquiry and as possibly commencing running of limitations period. *Stalberg v. Western Title Ins. Co. (1991) 230 Cal. App. 3d 1223, 1230, 282 Cal. Rptr. 43*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsPleading & ProofReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsTortsBusiness TortsSlander of TitleGeneral OverviewTortsBusiness TortsSlander of TitleDefenses

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30-340 California Forms of Pleading and Practice--Annotated § 340.316

§ 340.316 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Acted in Good Faith

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Acted in Good Faith

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that defendant _____ [published *or* recorded] the _____ [*describe document*] in good faith, under advice of counsel, and in a belief that what he was doing was proper

[2] Use of Form

This defense is for use in an answer to a complaint for slander of title if the defendant acted in good faith.

[3] Decisions

Fictional form of malice implying wrongdoing is necessary element in slander of title actions. See *Gudger v. Manton (1943) 21 Cal. 2d 537, 543-544, 134 P.2d 217 , disapproved on other grounds, Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405* ; *Cavin Mem'l Corp. v. Requa (1970) 5 Cal. App. 3d 345, 361, 85 Cal. Rptr. 107*

Actual malice is not necessary element in slander of title actions. *Phillips v. Glazer (1949) 94 Cal. App. 2d 673, 677, 211 P.2d 37*

Defendants were not liable in slander of title action where they did not act maliciously, acted under advice of counsel, and believed execution of deed proper. *Cavin Mem'l Corp. v. Requa (1970) 5 Cal. App. 3d 345, 361, 85 Cal. Rptr. 107*

Legal Topics:

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

TortsBusiness TortsSlander of TitleGeneral OverviewTortsBusiness TortsSlander of TitleDefenses

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PART V. FORMS
C. Slander Of Title And Trade Libel

30-340 California Forms of Pleading and Practice--Annotated § 340.317

§ 340.317 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Failed to Publish Allegedly Disparaging Material

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Failed to Publish Allegedly Disparaging Material

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that defendant has never published or communicated the _____ [*describe document*] to any person.

[2] Use of Form

This defense is for use in an answer to a complaint for slander of title if the defendant has never published or recorded the allegedly disparaging document to any person.

Although a defendant normally has the burden of pleading and proving an affirmative defense, if the the failure to publish appears on the face of the complaint, it is subject to a demurrer for failure to state a cause of action [*see Southcott v. Pioneer Title Co. (1962) 203 Cal. App. 2d 673, 676-677, 21 Cal. Rptr. 917]* . This form may be adapted for use in a demurrer. For discussion and forms of demurrer, see Ch. 206, *Demurrers Motions for Judgment on the Pleadings*].

[3] Decisions

Communication of disparaging remarks about title to real property is essential to slander of title action. *Southcott v. Pioneer Title Co. (1962) 203 Cal. App. 2d 673, 676-677, 21 Cal. Rptr. 917*

Allegations that defendant "prepared" a document and that an escrow was "closed" were insufficient allegations of publication in slander of title action. *Southcott v. Pioneer Title Co. (1962) 203 Cal. App. 2d 673, 676-677* ,

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTitle QualityAdverse Claim ActionsGeneral OverviewTortsBusiness TortsSlander of TitleGeneral OverviewTortsBusiness TortsSlander of TitleDefenses

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30-340 California Forms of Pleading and Practice--Annotated § 340.318

§ 340.318 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for Trade Libel

[1] FORM Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages for Trade Libel

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name (s)*],	)	(Trade Libel)
[and DOES 1 through _____,]	)	[Amount _____ (exceeds *or* does
Defendant(s).	)	not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 340.220, Paragraph 1.*]

[2. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.)]

3. [*Agency allegation, if appropriate. See § 340.220, Paragraph 3.*]

4. On or about _____ [*date*], plaintiff was the owner of certain business goods located in the County of _____, State of California, more particularly described as follows: _____ [*describe business goods*].

5. On or about _____ [*date*], defendant(s) willfully, without justification, and without privilege _____ [published *or* communicated *or* caused to be published *or* caused to be communicated] to other persons _____ [*describe type of communication, e.g.*, a letter] which stated: _____ [*set forth disparaging statements in precise language*].

[6. *If material does not mention plaintiff or his/her goods by name, add:* The defendant's(s') statements were made of and concerning the plaintiff's above-described business goods and were so understood by those who read the statements.]

7. The defendant's(s') statements disparaged plaintiff's above-described business goods in that _____ [*set forth reasons why defendant's statements are disparaging to plaintiff's business goods, e.g.*, the defendant's statements falsely indicated that plaintiff's above-described business goods are made with inferior materials].

8. The defendant's(s') statements were false.

[9. *If plaintiff is public figure, or statements concerned matter of public interest add:* The statements of defendant(s) were made with knowledge of their falsity or with reckless disregard for their truth or falsity.]

[10. *If plaintiff is private person suing a media defendant, and is not alleging knowledge or reckless disregard, allege negligence. See § 340.233, Paragraph 12.*]

11. As a proximate result of defendant's(s') publication of the statements, prospective customers have been deterred from buying plaintiff's above-described business goods and from otherwise dealing with plaintiff, and plaintiff has thereby suffered injury to plaintiff's business and pecuniary loss in the sum of $_____.

12. [*Punitive damages allegation. See § 340.311 , Paragraph 8.*]

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

1. For damages in the sum of $_____.

2. For punitive damages.

3. For costs of suit incurred herein.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This complaint is for use in obtaining damages for statements which disparage the quality of plaintiff's business goods and thereby cause pecuniary loss to plaintiff.

[3] Allegations

This complaint alleges the following [*see Erlich v. Etner (1964) 224 Cal. App. 2d 69, 73-75, 36 Cal. Rptr. 256]* :

- The ownership and description of plaintiff's business goods (Paragraph 4).
- The publication or communication of statements by defendants to third persons (Paragraph 5).
- That the statements of defendant(s) referred to plaintiff's business goods and were so understood by those who read them (Paragraph 6).
- That the defendant's statements disparaged plaintiff's business goods (Paragraph 7).
- The falsity of defendant's(s') statements (Paragraph 8).
- The "special damage" plaintiff thereby suffered (Paragraph 11).

In addition, to meet *First Amendment* limitations on liability, if the plaintiff is a public figure, or the allegedly actionable statements concerned a matter of public interest, the optional paragraph alleging actual malice must be used regardless of the identity of the defendant (Paragraph 9). If the plaintiff is a private person but the defendant is a member of the media, either Paragraph 9 or Paragraph 10 must be used to satisfy the requirements of the *First Amendment* (Paragraphs 9, 10) [*see Blatty v. New York Times Co. (1986) 42 Cal. 3d 1033, 1042, 232 Cal. Rptr. 542, 728 P.2d 1177* ; *Melaleuca, Inc. v. Clark (1998) 66 Cal. App. 4th 1344, 1363-1365, 78 Cal. Rptr. 2d 627]* .

[4] "Special Damage": Pleading and Proof

In an action for trade libel, the plaintiff must plead and prove that the publication of the disparaging statements has played a substantial part in inducing others not to deal with plaintiff and that as a result, he or she has suffered "special damage" (pecuniary loss) [*Leonardini v. Shell Oil Co. (1989) 216 Cal. App. 3d 547, 573, 264 Cal. Rptr. 883]* . In California, the plaintiff may plead this by means of a general allegation that persons have been dissuaded from dealing with plaintiff by reason of the publication, together with an allegation of pecuniary loss in a specific sum [*see Erlich v. Etner (1964) 224 Cal. App. 2d 69, 74, 75, 36 Cal. Rptr. 256* ; *Wright v. Coules (1906) 4 Cal. App. 343, 347, 87 P. 809]* . Although the plaintiff may allege loss of business in general terms, it nevertheless appears that the plaintiff must prove

loss by showing the effect of the disparaging statements on the conduct of specific persons [*see Erlich v. Etner (1964) 224 Cal. App. 2d 69, 73-74, 75, 36 Cal. Rptr. 256* ; *but see Restatement (Second) of Torts § 633 cmts. g, h*].

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[6] Defamation Action Distinguished

When the disparaging statements affect not only a business person's goods but also his or her reputation for honesty, the appropriate action is one for libel per se under *Civ. Code §§ 45, 45a*. The advantage of such an action is that general damages are presumed and special damages need not be alleged or proved [*Erlich v. Etner (1964) 224 Cal. App. 2d 69, 73, 36 Cal. Rptr. 256* ; *Rosenberg v. J.C. Penney Co. (1939) 30 Cal. App. 2d 609, 621, 86 P.2d 696]* .

[7] Decisions

Constitutional limitations on liability applicable in trade libel actions. *Blatty v. New York Times Co. (1986) 42 Cal. 3d 1033, 1042-1043, 232 Cal. Rptr. 542, 728 P.2d 1177* ; *Melaleuca, Inc. v. Clark (1998) 66 Cal. App. 4th 1344, 1363-1365, 78 Cal. Rptr. 2d 627* ; *Leonardini v. Shell Oil Co. (1989) 216 Cal. App. 3d 547, 574-579, 264 Cal. Rptr. 883* ; *Hofmann Co. v. E. I. Du Pont de Nemours & Co. (1988) 202 Cal. App. 3d 390, 397, 248 Cal. Rptr. 384*

Definition of trade libel. *Leonardini v. Shell Oil Co. (1989) 216 Cal. App. 3d 547, 574-579, 264 Cal. Rptr. 883* ; *Hofmann Co. v. E. I. Du Pont de Nemours & Co. (1988) 202 Cal. App. 3d 390, 397, 248 Cal. Rptr. 384* ; *Erlich v. Etner (1964) 224 Cal. App. 2d 69, 73, 36 Cal. Rptr. 256*

Trade libel compared with defamation action for libel. *Leonardini v. Shell Oil Co. (1989) 216 Cal. App. 3d 547, 573, 264 Cal. Rptr. 883* ; *Erlich v. Etner (1964) 224 Cal. App. 2d 69, 73, 36 Cal. Rptr. 256* ; *Rosenberg v. J.C. Penney Co. (1939) 30 Cal. App. 2d 609, 621, 86 P.2d 696*

[8] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 645, 650 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
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[2] Use of Form

[3] Time for Filing

[4] More Than One Writ Involved

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[1] FORM

[2] Use of Form

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§ 342.283 Legal Assistance Costs

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§ 342.285 Loggers

§ 342.286 Mining

§ 342.287 Mosquitoes

§ 342.288 Oil and Gas

§ 342.289 Personal Property

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§ 342.291 Plastic Fabricators

§ 342.292 Poultry and Fish Supply

§ 342.293 Producers

§ 342.294 Public Nuisance

§ 342.295 Radioactive Contamination

§ 342.296 Railway Roadbeds

§ 342.297 Real Property

§ 342.298 Repairs

§ 342.299 Rodents

§ 342.300 Storage Facilities

§ 342.301 Taxes

§ 342.302 Threshers

§ 342.303 Tolls

§ 342.304 Trailer Parks

§ 342.305 Unemployment Insurance

§ 342.306 Utility Services

§ 342.307 Vehicles

§ 342.308 Veterinarian

§ 342.309 Vessels

§ 342.310 Warehousemen

§ 342.311 Water

§ 342.312 Water Pollution

§ 342.313 Weeds

§ 342.314 Worker's Compensation

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PART I. SCOPE

30-342 California Forms of Pleading and Practice--Annotated § 342.01

§ 342.01 Scope of Chapter

This chapter discusses the general provisions of the Civil Code that regulate liens. The chapter contains forms for use in enforcing various miscellaneous liens [*see §§ 342.150 -342.157*], as well as a complaint to marshal assets [*see § 342.158*] and an affirmative defense [*see § 342.160*].

This chapter also discusses and contains forms for use in actions to impress and foreclose equitable liens. It includes the following forms:

- A general complaint to impress and foreclose an equitable lien on real or personal property by one who has a security interest in the property [*see § 342.180*].

- A complaint against a decedent's personal representative to impress and foreclose an equitable lien on the decedent's real property [*see § 342.181*].

- A complaint by an assignee of a contractor and holder of a promissory note to impress and foreclose an equitable lien on real property [*see § 342.182*].

- A stipulation creating a lien on a cause of action [*see § 342.183*].

This chapter discusses and contains forms for use by an unpaid wage claimant who seeks priority in the distribution of the proceeds that result from a levy by a nonlabor, secured creditor [*see §§ 342.200 -342.205*]. The chapter also includes discussion and a form for use by an unpaid wage claimant when his or her employer has made an assignment either for the benefit of creditors or as a result of a proceeding in insolvency or receivership [*see § 342.206*].

Concluding this chapter is Part V. Table of Liens [*see § 342.250* et seq.], which is an extensive table of California statutes relating to the creation of liens, including both liens discussed in this chapter and those covered in other chapters of this publication. Convenient cross references to the other chapters are included in the table.

For references to liens discussed in other chapters of this publication, and relevant forms, see the cross references in §

342.02.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiensContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensEquitable Liens

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§ 342.02 Cross References

For discussion of dairy cattle supply liens and a form for a complaint to foreclose a dairy cattle supply lien, see Ch. 24, *Animals: Liens*

For discussion and forms for use generally in cases involving assignments, see Ch. 60, *Assignments*

For discussion and forms for use in actions involving nonpossessory security interests in the personal property of a debtor, see Ch. 62, *Attachment*

For discussion of attorney's liens and forms for use in actions by attorneys for compensation for professional services, see Ch. 72, *Attorney Practice and Ethics*

For discussion and a form relating to repairperson's liens, see Ch. 93, *Bailments*

For discussion of avoidable transfers and the avoidance of liens that impair exemptions in bankruptcy proceedings, see Ch. 94, *Bankruptcy*

For discussion relating to a bank's lien and setoff rights, see Ch. 95, *Banks, Deposits, and Checks*

For a complaint by the owner of personal property against a lienholder refusing tender, see Ch. 119, *Claim and Delivery*

For a complaint for conversion by a lienholder against the owner of personal property, see Ch. 150, *Conversion*

For forms for use by warehouse operators in enforcing a lien against stored goods, see Ch. 213, *Documents of Title*

For forms for use generally in the enforcement of judgments by execution, see Ch. 254, *Executions and Enforcement of Judgments*

For forms to enforce orders in dissolution proceedings by impressing a lien on real property, see Ch. 258, *Family Law Enforcement*

For discussion and forms relating to a garage's lien for work or services provided, see Ch. 274, *Garages and Gas Stations*

For discussion and forms for use generally in garnishment proceedings, see Ch. 276, *Garnishment*

For a form for giving notice of public auction to satisfy an innkeeper's lien, see Ch. 297, *Hotels and Motels*

For discussion and forms for use generally relating to insolvency proceedings and assignments for the benefit of creditors, see Ch. 307, *Insolvency*

For discussion and forms for judgment liens, see Ch. 318, *Judgments*

For a complaint by a remainder beneficiary against a life tenant to foreclose a lien when the life tenant has failed to pay real property taxes, see Ch. 344, *Life Estates and Remainders*

For a complaint by a logger to foreclose a logging lien, see Ch. 350, *Logs and Timber*

For discussion and forms for use in actions involving mechanics' liens, see Ch. 361, *Mechanics' Liens*

For discussion and forms for use in actions involving promissory notes, see Ch. 385, *Negotiable Instruments*

For forms to use in ascertaining rights of nonparty lienholders in a partition action, see Ch. 397, *Partition*

For discussion and forms for use by a lienholder when enforcing a security interest against estate property, see Ch. 454, *Probate: Claims Against the Estate*

For discussion and forms for use generally in receivership proceedings, see Ch. 486, *Receivers*

For discussion and forms for use relating to rights in collateral and to security transactions relating to inventories, see Ch. 503, *Sales: Secured Transactions*

For discussion and forms relating to liens and enforcement of liens for unpaid rent and charges against personal property located at a self-service storage facility, see Ch. 517, *Self-Service Storage Facilities*

For actions against shipowners by materialmen for supplies and by seamen for wages, see Ch. 522, *Ships and Shipping*

For discussion and forms for use in actions concerning property taxes, see Ch. 540, *Taxes and Assessments*

For forms for use in proceedings to foreclose trust deeds and real property mortgages, and forms relating to proceedings based on equitable mortgages, see Ch. 555, *Trust Deeds and Real Property Mortgages*

For a complaint by a vendor to enforce a vendor's lien under *Civ. Code § 3046*, see Ch. 569, *Vendor and Purchaser*

For a complaint by a purchaser to enforce a purchaser's lien for the amount paid toward the purchase price under *Civ. Code § 3050*, see Ch. 569, *Vendor and Purchaser*

For forms for use in obtaining liens on any sum paid as compensation benefits under workers' compensation, see Ch. 577, *Workers' Compensation*

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawMaritime LiensPriority & SourcesGeneral OverviewCommercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsLiensCommercial Law (UCC)Secured Transactions (Article 9)PriorityLiensContracts LawSales of GoodsDamages & RemediesGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsTax LiensTax LawState & Local TaxesReal Property TaxCollectionTax Liens

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[Reserved]

§§ 342.03[Reserved]

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§ 342.10 Governing Statutes

[1] In General

Liens are governed generally by *Civ. Code §§ 2872-2914*. Hospital liens are governed by *Civ. Code §§ 3045.1-3045.6*, various miscellaneous liens by *Civ. Code §§ 3046-3066*, and vehicle liens by *Civ. Code §§ 3067-3074*. Certain sections of the Code of Civil Procedure also govern specific liens, such as oil and gas liens [*Code Civ. Proc. §§ 1203.50-1203.66*], liens on animals [*Code Civ. Proc. § 1208.5*], and liens on aircraft [*Code Civ. Proc. §§ 1208.61-1208.70*. In addition, numerous sections in other codes create and regulate the enforcement of liens in specific instances. For a comprehensive listing of specific liens, see the Table of Liens in § 342.250.

[2] Secured Interests Under Uniform Commercial Code

Any transaction or security interest governed by the Uniform Commercial Code is not affected by *Civ. Code § 2872 et seq.* [*Civ. Code § 2914*].

Note, however, that Division 9 of the Commercial Code governs consensual security interests in personal property and fixtures, except those arising from the types of transactions excluded by *Com. Code § 9109(c)* [*Com. Code § 9109(a)*]. For instance, an assignment of a claim arising in tort, other than a commercial tort claim, is not governed by Division 9 (although *Com. Code §§ 9315* and *9322* would apply with respect to proceeds and priorities in proceeds) [*Com. Code § 9109(c)(12)*].

For further discussion of the creation, enforcement, and priority of liens created pursuant to Division 9 of the Commercial Code, see Ch. 503, *Sales: Secured Transactions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PriorityCreditor PrioritiesProceedsCommercial Law (UCC)Secured Transactions (Article

9)PriorityLiensCommercial Law (UCC)Secured Transactions (Article 9)PriorityPurchasers & Perfected Secured PartiesGeneral Overview

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§ 342.11 Definitions

[1] Lien

A lien is a charge imposed in some mode other than by a transfer in trust on specific property by which it is made security for the performance of an act [*Civ. Code § 2872*; *Code Civ. Proc. § 1180*]. It is either general or special [*Civ. Code § 2873*].

[2] General Lien

A general lien is one that the holder is entitled to enforce as a security for the performance of all the obligations, or all of a particular class of obligations, which exist in his favor against the owner of the property [*Civ. Code § 2874*]. Thus, a general lien covers the indebtedness to the lien claimant that has arisen from a series of transactions. General liens include:

- A vendor's lien on real property [*Civ. Code § 3046*].
- A foundry proprietor's lien [*Civ. Code § 3051*].
- A laundry or dry cleaning proprietor's lien [*Civ. Code § 3051*].
- A factor's lien [*Civ. Code § 3053*].
- A banker's lien [*Civ. Code § 3054*].
- A master's lien [*Harb. & Nav. Code § 492*].
- A seaman's lien [*Harb. & Nav. Code § 493*].

[3] Special Lien

A special lien is one that the holder can enforce only as security for the performance of a particular act or obligation, and of any obligations that may be incidental thereto [*Civ. Code § 2875*]. Thus, a special lien arises from a single transaction between the lien claimant and property owner. Special liens include an artisan's or repair person's lien for services [*Civ. Code § 3051*], and a purchaser's lien on real property [*Civ. Code § 3050*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiensReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview

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§ 342.12 Lien as Form of Encumbrance

The term "encumbrances" includes taxes, assessments, and all liens on real property [*Civ. Code § 1114* (statutory spelling is "incumbrances")]. Thus, an encumbrance, although the term is sometimes used synonymously with the term "lien," is broader than a lien with respect to real property [*see Civ. Code § 2872*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawNonmortgage LiensTax LiensReal Property LawTitle QualityMarketable TitleDefects & EncroachmentsTax LawState & Local TaxesAdministration & ProceedingsTax Liens

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§ 342.13 Creation of Liens

[1] By Contract or Operation of Law

A lien is created (1) by contract of the parties or (2) by operation of law [*Civ. Code § 2881*].

A lien that arises by mere operation of law, however, does not arise until the time at which the act to be secured by the lien ought to be performed [*Civ. Code § 2882*].

The parties do not have to use the word "lien" in their contract to create a valid lien. Terms such as "granting a security interest in collateral" are sufficient [*Bluxome Street Associates v. Fireman's Fund Ins. Co. (1988) 206 Cal. App. 3d 1149, 1153, 254 Cal. Rptr. 198]* .

Unlike liens governed by Division 9 of the Commercial Code, the filing of a financing statement is not necessary to create a valid lien under *Civ. Code § 2881(1)* [*Bluxome Street Associates v. Fireman's Fund Ins. Co. (1988) 206 Cal. App. 3d 1149, 1156, 254 Cal. Rptr. 198]* . Although providing notice of a lien is a statutory prerequisite to the creation or enforceability of certain types of liens [*see, e.g., Code Civ. Proc. §§ 491.410(b)* (attachment lien), *697.310(a), 697.510(a)* (judgment liens on real and personal property, respectively)], creation and enforcement of contractual liens under *Civ. Code § 2881(1)* do not require the giving of any notice [*Cetenko v. United California Bank (1982) 30 Cal. 3d 528, 532, 179 Cal. Rptr. 902, 638 P.2d 1299* ; *Bluxome Street Associates v. Fireman's Fund Ins. Co. (1988) 206 Cal. App. 3d 1149, 1157, 254 Cal. Rptr. 198]* .

[2] On Unacquired Property

An agreement may be made to create a lien on property not yet acquired by the party agreeing to give the lien, or not yet in existence. In that case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing, to the extent of that interest [*Civ. Code § 2883(a)*]. For these purposes, an agreement by a beneficiary of an estate that is subject to administration [*see Prob. Code § 7000 et seq.*] to create a lien on real property in the estate that is undistributed at the time the agreement is entered into will not create a lien on the real property unless and until the property is distributed to that beneficiary. On recordation of an order confirming the sale of the real property [*see Prob.*

Code § 10313] and the recording of a duly executed deed in accordance with that order, any expectancy of a lien in the real property under the agreement will be extinguished [*Civ. Code § 2883(b)*].

For further discussion of the encumbrance and sale of estate property, see Ch. 445, *Probate: Sale of Estate Property* .

[3] As Security for Future Obligations

A lien may be created by contract, to take immediate effect, as security for the performance of obligations not then in existence [*Civ. Code § 2884*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensEnforcementCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsRequirements

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§ 342.14 Notice of State Tax Lien

Any state agency, on recording a state tax lien against real property, must mail written notice of the recordation to the tax debtor, unless previous correspondence mailed to the address of record was returned undelivered with no forwarding address. Failure to notify the tax debtor does not affect the constructive notice otherwise imparted by recordation, nor does it affect the force, effect, or priority otherwise accorded the tax lien [*Civ. Code § 2885*; *see* the discussion in Ch. 540, *Taxes and Assessments*, § 538.30 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensTax LiensTax LawState & Local TaxesAdministration & ProceedingsTax Liens

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§ 342.15 Accessory, Not Personal, Obligation Created

A lien is accessory to the act for whose performance it is a security, whether any person is bound for the performance or not [*Civ. Code § 2909*]. The creation of a lien does not of itself imply that any person is bound to perform the act for which the lien is a security [*Civ. Code § 2890*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiensReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawNonmortgage LiensGeneral Overview

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§ 342.16 Assignability

The transfer of a thing transfers all of its incidents, unless expressly excepted [*Civ. Code § 1084*]. Further, a lien is extinguishable in the same manner as any other accessory obligation [*Civ. Code § 2909*]. Thus, a statutory lien or one created by contract is generally assignable. The assignability of certain liens is controlled by statute [*see, e.g., Civ. Code § 3069* (labor on, or storage of, vehicle).

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)Third Party RightsAssignmentsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersGeneral OverviewReal Property LawNonmortgage LiensGeneral Overview

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§ 342.17 No Title Transferred

Notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien [*Civ. Code § 2888*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiensCommercial Law (UCC)Secured Transactions (Article 9)Third Party RightsAssignmentsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersGeneral Overview

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§ 342.18 Limited Right to Compensation or Indemnification

One who holds property by virtue of a lien on the property is not entitled to compensation from the owner of the property for any trouble or expense that the lienholder incurs respecting it, except to the same extent as a borrower may recover expenses necessarily incurred by him or her to preserve the property from unexpected and unusual injury [*Civ. Code §§ 1892, 2892*], and may be indemnified for any damages caused by defects in the property that the lender knew of at the time of lending and concealed from the borrower [*Civ. Code §§ 1893, 2892*; *see Owens v. Pyeatt (1967) 248 Cal. App. 2d 840, 845, 57 Cal. Rptr. 100]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)DefaultCreditor MisbehaviorRemedies for NoncomplianceReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's Interests

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§ 342.19 No Right to Performance of Additional Obligations

The existence of a lien on property does not of itself entitle the person in whose favor it exists to a lien on the same property for the performance of any other obligation than that originally secured by the lien [*Civ. Code § 2891*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)Attachment of Security InterestsEnforceabilityReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's Interests

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§ 342.20 Contracts for Forfeiture or Restraint of Redemption Void

All contracts for the forfeiture of property subject to a lien in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void [*Civ. Code § 2889*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)Attachment of Security InterestsEnforceabilityCommercial Law (UCC)Secured Transactions (Article 9)Security AgreementsEffectivenessContracts LawDefensesIllegal BargainsContracts LawSecured TransactionsDefaultForeclosure & RepossessionRedemption

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§ 342.21 Redemption

[1] Right of Interest Holder in Property

Every person who has an interest in property subject to a lien has a right to redeem it from the lien at any time after the claim is due and before his or her right of redemption is foreclosed [*Civ. Code § 2903*].

[2] Subrogation

By the redemption, the person redeeming the interest becomes subrogated to all the benefits of the lien, as against all owners of other interests in the property, except in so far as he or she was bound to make the redemption for their benefit [*Civ. Code § 2903*].

[3] Method of Redemption

Redemption from a lien is made by performing or offering to perform the act whose performance is secured by the lien and paying or offering to pay the damages, if any, to which the holder of the lien is entitled for delay [*Civ. Code § 2905*].

[4] Junior Lienor's Right to Redemption

One who has a lien that is inferior to another on the same property has a right (1) to redeem the property in the same manner as its owner might from the superior lien, and (2) to be subrogated to all the benefits of the superior lien, when necessary for the protection of his or her interests, on satisfying the claim secured thereby [*Civ. Code § 2904*].

When the holder of special lien is compelled to satisfy a prior lien for his or her own protection, the special lienholder may enforce payment of the amount so paid as part of the claim for which his or her own lien exists [*Civ. Code § 2876*].

[5] Effectiveness of Option to Redeem

An option granted to a secured party by a debtor to acquire an interest in real property collateral is effective according to its terms if the right to exercise the option is not dependent on the occurrence of default with respect to the security agreement [*Civ. Code § 2906*]. If the real property subject to the option is other than residential real property containing four or fewer units, the option will not be deemed invalid or ineffective on the basis that the secured party has impaired the debtor's equity of redemption in violation of common law or *Civ. Code § 2889* [*Civ. Code § 2906*].

Civ. Code § 2906 shall not be construed to make valid or effective an otherwise unlawful option, nor shall any inference be drawn from this section as to the validity or application of common law with respect to residential property containing four or fewer units [*Civ. Code § 2906*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsDefaultGeneral OverviewContracts LawSecured TransactionsDefaultForeclosure & RepossessionRedemptionReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionMortgagor's Right

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§ 342.22 Priority Between Lien Claimants

[1] First in Time

Other things being equal, different liens on the same property have priority according to the time of their creation, except in cases of bottomry and respondentia [*Civ. Code § 2897*; *see Harb. & Nav. Code §§ 450 et seq.* (bottomry), *470 et seq.* (respondentia).

Unless a statute provides otherwise, the priority accorded by *Civ. Code § 2897* to the first lien created is not altered by the fact that no notice was given of that lien while notice was given of a subsequently created lien [*Bluxome Street Associates v. Fireman's Fund Ins. Co. (1988) 206 Cal. App. 3d 1149, 1158, 254 Cal. Rptr. 198* (subsequent attachment lien of which notice was required by *Code Civ. Proc. § 491.410* as subordinate to lien created earlier of which no notice was given)].

[2] Equitable Considerations

Analysis of the priority of liens pursuant to *Civ. Code § 2897* does not end with the determination that a particular lien was created first. The language of the statute also requires a determination that the equities of the lienholders are equal [*Bluxome Street Associates v. Fireman's Fund Ins. Co. (1988) 206 Cal. App. 3d 1149, 1159, 254 Cal. Rptr. 198]* . Appropriate considerations include whether one lienholder detrimentally relied on the availability of the property subject to the lien, and whether or not a lienholder's efforts or services resulted in the creation of the fund or property subject to the lien [*Bluxome Street Associates v. Fireman's Fund Ins. Co. (1988) 206 Cal. App. 3d 1149, 1159, 254 Cal. Rptr. 198* ; *see also Nicoletti v. Lizzoli (1981) 124 Cal. App. 3d 361, 369-370, 177 Cal. Rptr. 685* (judgment creditor's subsequent lien subordinated to medical lienors' prior consensual lien; equity supports first-in-time principle); *Del Conte Masonry Co. v. Lewis (1971) 16 Cal. App. 3d 678, 681, 94 Cal. Rptr. 439* (judgment creditor's subsequent lien held superior on basis of equities)].

In personal injury cases, public policy and equity favor giving an attorney's lien for fees and costs priority over a medical lien, regardless of which lien was first in time. Priority of the attorney's lien is essential (1) to ensure that injured persons can obtain legal representation in lawsuits to obtain adequate compensation for the injuries they have

suffered, (2) to hold tortfeasors accountable for the harm they have caused, and (3) to provide medical lienholders with a source for compensation that they otherwise might not have. Accordingly, as a matter of law, the amount recovered by the plaintiff in a personal injury lawsuit always goes first to satisfy the attorney's lien for fees and costs before it is used to satisfy medical liens. If the payment of the attorney's lien completely depletes the amount of the judgment, there is nothing left to support a medical lienholder's action to reach the proceeds of the judgment [*Gilman v. Dalby (2009) 176 Cal. App. 4th 606, 619-620, 98 Cal. Rptr. 3d 231*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityCreditor PrioritiesGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityLiensReal Property LawFinancingSecondary FinancingLien Priorities

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§ 342.23 Extinguishment of Lien

[1] Tender

An offer of payment or other payment that is duly made stops the running of interest on an obligation and has the same effect on all its incidents as a performance of the obligation, even though the title to the thing offered is not transferred to the creditor [*Civ. Code § 1504*]. Thus, tender that is duly made of the amount of an obligation discharges the lien that has been given as collateral security for the obligation [*Sondel v. Arnold (1934) 2 Cal. 2d 87, 89, 39 P.2d 793* (deed of trust)]. While the general rule is that the owner must make a demand for his or her property along with the tender, tender is excused if the lien claimant absolutely refuses to deliver the property to the owner [*Enfield v. Hoffman Motor Co. (1953) 117 Cal. App. 2d 800, 807, 257 P.2d 458]* .

[2] Performance of Principal Obligation

Since a lien is deemed accessory to the act for the performance of which it is a security whether any person is bound for the performance or not, it is extinguishable in the same manner along with any other accessory obligation [*Civ. Code § 2909*].

[3] Merger

A lien is extinguished under ordinary circumstances by merger of the lien and ownership of the property in one person, unless it is necessary for the protection of that person's rights that it be kept alive [*Strike v. Trans-West Discount Corp. (1979) 92 Cal. App. 3d 735, 742-743, 155 Cal. Rptr 132* (lien not extinguished by merger since trial court found title was retained in owner at all times); *Ralph C. Sutro Co. v. Paramount Plastering, Inc. (1963) 216 Cal. App. 2d 433, 438, 31 Cal. Rptr. 174]* .

[4] Sale

Once an underlying debt has been satisfied through the sale of the property for the full amount of the obligation owed to the beneficiary, the lien on the property is extinguished [*Civ. Code § 2910*; *Duarte v. Lake Gregory Land and Water*

Co. (1974) 39 Cal. App. 3d 101, 104-105, 113 Cal. Rptr. 893] .

[5] Wrongful Conversion of Personal Property

A lien on personal property is extinguished by the wrongful conversion of the property by the lienholder [*Civ. Code § 2910*; *Ralph C. Sutro Co. v. Paramount Plastering, Inc. (1963) 216 Cal. App. 2d 433, 438, 31 Cal. Rptr. 174]* .

However, an act that is done to preserve and protect property in order that it may remain subject to lien, and that is equally beneficial to those having subordinate rights and not in antagonism to those rights, is not a wrongful conversion under *Civ. Code § 2910* [*Gardena Valley Airport, Inc. v. All American Sports Enterprises, Inc. (1964) 230 Cal. App. 2d 478, 483, 41 Cal. Rptr. 93]* .

[6] Voluntary Relinquishment

The voluntary restoration of property to its owner by the holder of a lien thereon dependent on possession extinguishes the lien as to the property unless otherwise agreed by the parties [*Civ. Code § 2913*]. Although the parties may agree otherwise, this exception does not apply, for example, when a repairman relinquishes repaired property to a a vendee under a conditional sales contract on the condition that the property be returned subject to the lien if the legal owner of the property does not also agree to the lien [*Jess H. Young & Son, Inc. v. Victory Tool & Die Co. (1961) 189 Cal. App. 2d 824, 828, 11 Cal. Rptr. 516]* . Moreover, notwithstanding any such agreement, the voluntary restoration extinguishes the lien as to creditors of the owner and persons subsequently acquiring a title to the property, or a lien on it, in good faith and for value [*Civ. Code § 2913*].

[7] Waiver or Subordination

A lienholder may waive its rights in a number of ways. For example, a vessel manufacturer who constructed a sailboat pursuant to a customer's order through a vessel dealer, and who, at the request of the purchaser's lender, issued a certificate stating that the manufacturer had transferred all of its interest in the vessel to the dealer who sold the vessel, was estopped from asserting a lien against the vessel [Islander Yachts, Inc. v. One Freeport 36-Foot Vessel, No. 145 *(1985) 173 Cal. App. 3d 1081, 1088, 219 Cal. Rptr. 654]* . Also, if a lienholder's refusal to deliver property is based on a ground inconsistent with the lien, the lien is waived [*Enfield v. Hoffman Motor Co. (1953) 117 Cal. App. 2d 800, 808, 257 P.2d 458]* .

Although different liens on the same property have priority according to the time of their creation, a party may agree to waive or subordinate priority [*Collins v. Home Sav. & Loan Asso. (1962) 205 Cal. App. 2d 86, 95, 22 Cal. Rptr. 817]* .

[8] Lapse of Time

A lien is extinguished by the lapse of time within which, under the provisions of the Code of Civil Procedure, either (1) an action can be brought on the principal obligation; or (2) a treasurer, street superintendent, or other public official may sell any real property to satisfy a public improvement assessment or any bond issued to represent the assessment when that assessment is secured by a lien on the real property, whichever is later [*Civ. Code § 2911*]. This section does not, however, control the enforcement of liens created by particular statutes [*Martin v. Board of Administration (1969) 276 Cal. App. 2d 795, 799, 81 Cal. Rptr. 432]* .

[9] No Extinguishment by Partial Performance

The partial performance of an act secured by a lien does not extinguish the lien on any part of the property subject thereto, even if it is divisible [*Civ. Code § 2912*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawMaritime LiensDischargeCommercial Law (UCC)Secured Transactions (Article 9)General OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral Overview

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§ 342.24 Right to Marshal Assets

The right of a junior lienholder to require a senior lienholder to marshal assets is provided in *Civ. Code §§ 2899* and *3433*. This right enables the junior lienholder to force the senior lienholder to resort to property other than the property in which both have liens. For further discussion, see the Comments to *§ 342.159*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityCreditor PrioritiesGeneral OverviewReal Property LawFinancingSecondary FinancingMarshaling Assets

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§ 342.25 Enforcement of Lien

[1] Sale Only if Authorized by Statute

A lien on personal property dependent on possession may be enforced by sale of the property if authorized by statute and only in the manner prescribed by the applicable statute [*see, e.g., Civ. Code §§ 1857* (depositaries for hire), *1861 et seq.* (innkeepers), *3052 et seq.* (miscellaneous liens); *see also § 342.250* for a comprehensive listings of liens].

[2] As Equitable Action

The enforcement of liens, whether equitable or statutory, is a well-recognized function of courts of equity. The only distinction in this respect between the different kinds of liens is that in the case of statutory liens equity will interpose only if there is no other adequate remedy [*Hibernia etc. Soc. v. London & Lancashire Fire Ins. Co. (1903) 138 Cal. 257, 259, 71 P. 334]* .

[3] Jurisdiction Over Enforcement Actions

In an action to enforce a lien on real estate, the superior court in which the property is situated must hear the action [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. § 392(a)(2)*]. An action to enforce and foreclose liens on personal property is a limited civil case if the amount of the liens is $25,000 or less [*see Code Civ. Proc. § 86(a)(5)*]. Actions to enforce and foreclose, or petitions to release, liens of mechanics, materialmen, artisans, laborers, and of all other persons to whom liens are given under *Civ. Code § 3109 et seq.*, or to enforce and foreclose an assessment lien on a common interest development as defined in *Civ. Code § 1351*, if the amount of the liens is $25,000 or less, are also limited civil cases, with certain exceptions [*see Code Civ. Proc. § 86(a)(6)*].

[4] Effect of Homestead Exemption

The homestead exemption does not apply if the judgment to be enforced is for the foreclosure of a mortgage, deed of trust, or other lien or encumbrance on the property other than a lien created pursuant to *Code Civ. Proc. § 697.010 et seq.* (liens for enforcement of money judgments generally) and to *Code Civ. Proc. §§ 488.500* and *488.510* (attachment

lien) [*Code Civ. Proc. § 703.010*].

If homestead property has been sold, the levying officer must distribute the proceeds in the order established by *Code Civ. Proc. § 704.850*. The first priority for distribution is the discharge of all liens and encumbrances on the property [*see Code Civ. Proc. 704.850(a)*]. A levy on a homestead that is subject to a lien or encumbrance, however, is not by itself grounds for acceleration of the obligation secured by the lien or encumbrance, notwithstanding any provision of the obligation, lien, or encumbrance [*Code Civ. Proc. § 704.810*].

For further discussion, see Ch. 294, *Homesteads* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionGeneral Overview

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[Reserved]

§§ 342.26[Reserved]

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§ 342.40 Definition

An equitable lien is a direct charge or encumbrance on property such that the property itself may be proceeded against in an equitable action and either sold or sequestered and its proceeds applied in favor of the person in whose favor it exists [*Okuda v. Superior Court (1983) 144 Cal. App. 3d 135, 141, 192 Cal. Rptr. 388]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefCommercial Law (UCC)Secured Transactions (Article 9)DefaultGeneral OverviewReal Property LawNonmortgage LiensEquitable Liens

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30-342 California Forms of Pleading and Practice--Annotated § 342.41

§ 342.41 Relation to Other Equitable Remedies

Constructive trusts, resulting trusts, and equitable liens are similar. All three have the basic purposes of identifying and impressing on certain property the beneficial rights that have arisen in an innocent party who in some way contributed to the acquisition, protection, or improvement of property [*Holder v. Williams (1959) 167 Cal. App. 2d 313, 315, 334 P.2d 291]* . For further discussion and forms relating to constructive and resulting trusts, see Ch. 561, *Trusts: Constructive Trusts* , and Ch. 562, *Trusts: Resulting Trusts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefEstate, Gift & Trust LawTrustsConstructive TrustsEstate, Gift & Trust LawTrustsResulting TrustsReal Property LawNonmortgage LiensEquitable LiensReal Property LawTrustsConstructive TrustsReal Property LawTrustsResulting Trusts

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§ 342.42 Creation

[1] By Express Agreement

Every express, executory agreement in writing whereby a contracting party sufficiently indicates an intention to make some particular real or personal property or fund that is therein described or identified a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien on the property so indicated [*McColgan v. Bank of Cal. Ass'n (1929) 208 Cal. 329, 337, 281 P. 381* ; *Holder v. Williams (1959) 167 Cal. App. 2d 313, 316, 334 P.2d 291]* . By appropriate agreement, an equitable lien may arise on subsequently acquired property or on property not yet in existence [*Civ. Code §§ 2877, 2883, 2884*; *Garter v. Metzdorf Associates (1963) 217 Cal. App. 2d 812, 821, 32 Cal. Rptr. 113]* .

[2] By Implication

An equitable lien may also be inferred from the circumstances surrounding a particular transaction [*see Smith v. Anglo-California Trust Co. (1928) 205 Cal. 496, 503, 271 P. 898* ; *Miller v. Mountain View Sav. & L. Ass'n (1965) 238 Cal. App. 2d 644, 662, 48 Cal. Rptr. 278]* .

[3] Intent

An equitable lien is imposed if it appears that the parties intended to give, charge, or pledge real or personal property as security for an obligation and the property can be sufficiently identified [*Garter v. Metzdorf Associates (1963) 217 Cal. App. 2d 812, 821, 32 Cal. Rptr. 113* ; *see Lentz v. Lentz (1968) 267 Cal. App. 2d 891, 894, 73 Cal. Rptr. 686]* .

[4] Nonstatutory Origin

While many liens formerly cognizable only as "equity liens" have been incorporated into a statutory form, an "equity lien" is still mainly nonstatutory [*Holder v. Williams (1959) 167 Cal. App. 2d 313, 316, 334 P.2d 291]* .

[5] On Cause of Action

An equitable lien may be created on a cause of action. For example, a debtor may grant an equitable lien on a cause of action to creditors such as materialmen [*Del Conte Masonry Co. v. Lewis (1971) 16 Cal. App. 3d 678, 680, 94 Cal. Rptr. 439* ; *see Civ. Code § 2883*]. For discussion and a form for a stipulation creating an equitable lien on a cause of action, *see § 342.183*.

[6] Relation-Back Doctrine

Although an equitable lien is not judicially recognized until a judgment is rendered that declares its existence, the lien relates back to the time it was created by the conduct of the parties [*Hise v. Superior Court (1943) 21 Cal. 2d 614, 627, 134 P.2d 748* ; *Holder v. Williams (1959) 167 Cal. App. 2d 313, 317, 334 P.2d 291]* .

[7] Unjust Enrichment

A court of equity may impress property with an equitable lien to prevent unjust enrichment [*Beckman v. Mayhew (1975) 49 Cal. App. 3d 529, 534, 122 Cal. Rptr. 604]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)Attachment of Security InterestsGeneral OverviewReal Property LawNonmortgage LiensEquitable Liens

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§ 342.43 Liberal Construction

Equity courts look with favor on equitable liens, and they are frequently employed to create justice and equity and to prevent unfair results [*Holder v. Williams (1959) 167 Cal. App. 2d 313, 316, 334 P.2d 291* ; *Mannon v. Pesula (1943) 59 Cal. App. 2d 597, 606, 139 P.2d 336* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefCommercial Law (UCC)Secured Transactions (Article 9)Attachment of Security InterestsEnforceabilityReal Property LawNonmortgage LiensEquitable Liens

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§ 342.44 Enforcement

[1] By Judicial Action

The possessor of an equitable lien must obtain an order to sell the property and satisfy his or her debt [*see White v. White (1936) 11 Cal. App. 2d 570, 574, 54 P.2d 482]* .

[2] Against Third Persons

An equitable lien may be enforced against a third person who has notice of the lien [*Jud Whitehead Heater Co. v. Obler (1952) 111 Cal. App. 2d 861, 873, 245 P.2d 608]* or who does not give value for the property [*Dodd v. Cantwell (1960) 179 Cal. App. 2d 727, 734-735, 4 Cal. Rptr. 113* ; *Jud Whitehead Heater Co. v. Obler (1952) 111 Cal. App. 2d 861, 873, 245 P.2d 608]* .

[3] Venue

An action to foreclose a lien on real property must be brought in the county in which the property is situated [*Code Civ. Proc. § 392(a)(2)*]. Further, in situations in which there is one cause of action to foreclose a lien on real property and another cause of action to obtain a personal judgment that arises out of the same transaction involving the lien, the causes are consolidated and venue is proper in the county in which the land is situated [*Case v. Kirkwood (1931) 119 Cal. App. 207, 211, 6 P.2d 110]* . An action to foreclose a lien on personal property based on a contract would seem to be required to be brought in the county in which one or more of the defendants reside at the commencement of the action, in which the security for the debt or other obligation was created, or in which the debt is to be repaid or obligation performed [*see Code Civ. Proc. § 395(a)*].

[4] Limitation Period on Principal Obligation

Civ. Code § 2911(1) (discussed in *§ 342.10* et seq.) applies to equitable liens to extinguish the lien by lapse of the time within which an action could be brought on the principal obligation. Thus, for instance, an action to foreclose an equitable lien arising from industry custom is barred if an action for breach of the underlying oral contract for services

is barred by the applicable period of limitation [*Filmservice Laboratories, Inc. v. Harvey Bernhard Enterprises, Inc. (1989) 208 Cal. App. 3d 1297, 1308-1309, 256 Cal. Rptr. 735]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefCommercial Law (UCC)Secured Transactions (Article 9)Attachment of Security InterestsEnforceabilityReal Property LawNonmortgage LiensEquitable Liens

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30-342 California Forms of Pleading and Practice--Annotated § 342.45

§ 342.45 Construction Fund Claimants

[1] Contract Rights Enforced by Stop Notice Procedures

The rights of all person furnishing labor, services, equipment, or materials for any work of improvement, with respect to any fund for payment of construction costs, are governed exclusively by *Civ. Code § 3156 et seq.* (stop notices for private works of improvement) and *Civ. Code § 3179 et seq.* (stop notices for public work). No person may assert any legal or equitable right, other than a right created by direct written contract between the person and the person holding the fund, except pursuant to the provisions of the above-cited sections [*Civ. Code § 3264*]. Thus, *Civ. Code § 3264* has abolished all theories of equitable liens or trust funds [*Boyd & Lovesee Lumber Co. v. Western Pacific Corp. (1975) 44 Cal. App. 3d 460, 465, 118 Cal. Rptr. 699]* . For further discussion and forms relating to stop notices for private works of improvement, see Ch. 361, *Mechanics' Liens* ,. For further discussion and forms relating to stop notices for public works, see *Ch. 481, Public Works, § 481.40* et seq.

Civ. Code § 3264 applies to bar claims of general contractors as well as claims of suppliers, and applies whether the claim is against the construction loan fund or against the general assets of the lender [*Nibbi Brothers, Inc. v. Home Federal Sav. & Loan Assn. (1988) 205 Cal. App. 3d 1415, 1420-1421, 253 Cal. Rptr. 289]* .

[2] Availability of Unjust Enrichment Claim

Despite the fact that claims against construction funds are governed exclusively by statute, it does not follow that *Civ. Code § 3264* always bars a supplier of labor and materials from recovering from a construction lender on a theory of unjust enrichment. The equitable principle of unjust enrichment provided part of the doctrinal underpinning of the equitable lien, but the law of restitution may give a supplier a cause of action against a lender for unjust enrichment under a broad range of circumstances distinct from those on which the equitable lien was predicated. In an appropriate case, the lender's fraudulent inducement to the supplier to perform work on the property may give rise to a cause of action distinct from the equitable lien [*Nibbi Brothers, Inc. v. Home Federal Sav. & Loan Assn. (1988) 205 Cal. App. 3d 1415, 1421-1422, 253 Cal. Rptr. 289]* .

However, a lender's request to the supplier, made when the loan is in default, that the supplier perform work, coupled

with assurances that the supplier will be paid for that work, are not sufficient basis for a cause of action for the value of the benefit conferred by the work unless the lender promised that it would pay for the work. Without a specific promise to pay for the work itself, a lender's promise of payment must be construed as an optimistic and nonactionable opinion about the owner-borrower's performance [*Nibbi Brothers, Inc. v. Home Federal Sav. & Loan Assn. (1988) 205 Cal. App. 3d 1415, 1422-1423, 253 Cal. Rptr. 289]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefContracts LawRemediesEquitable ReliefGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawNonmortgage LiensEquitable Liens

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[Reserved]

§§ 342.46[Reserved]

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30-342 California Forms of Pleading and Practice--Annotated § 342.60

§ 342.60 Preference to Wage Claims

If a levy of any attachment or execution is not founded on a claim for labor, then any miner, mechanic, salesman, servant, clerk, laborer, or other person who has performed work or rendered personal services for the defendant within 90 days prior to the levy has a preferred wage claim of up to $900 from the proceeds of the levy unless it is disputed by the procedures outlined in *Code Civ. Proc. § 1207* [*Code Civ. Proc. § 1206(a)*]. If the claim is disputed, the petition process set forth in *Code Civ. Proc. § 1206(c)* must be used [*see* discussion in *§ 342.62*].

The preference granted by *Code Civ. Proc. § 1206* provides a preferred claim, but it does not create a lien on the debtor's property [*Winrod v. Wolters (1903) 141 Cal. 399, 402, 74 P. 1037]* . The discussion of this preference is included in this chapter, however, because *Code Civ. Proc. §§ 1206-1208* are placed in Part III, Title 4 of the Code of Civil Procedure, which is entitled "Enforcement of Liens." They are also placed in Chapter 3 of Title 4, which is entitled "Certain Liens and Priorities for Salaries, Wages and Consumer Deposits." Thus, even though these preferences for labor performed are not liens, they are often mistaken for liens on property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityLiensLabor & Employment LawWage & Hour LawsRemediesBackpayLabor & Employment LawWage & Hour LawsWage PaymentsReal Property LawNonmortgage LiensMechanics' Liens

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30-342 California Forms of Pleading and Practice--Annotated § 342.61

§ 342.61 Method of Securing Preferred Claim on Levy of Attachment or Execution

[1] Verified Statement of Claim

Whenever a laborer has a preferred claim under *Code Civ. Proc. § 1206*, he or she must file a verified statement of his or her claim [*see § 342.200*] with the officer executing the writ and file a copy of it with the court that issued the writ. The claimant may serve copies of it that contain the claimant's address on the plaintiff and the defendant, or their agents, or the claimant may mail copies to the plaintiff and the defendant by registered mail at their last known address. If copies of the claim are mailed and if they are returned by the post office undelivered, then that is deemed a sufficient service if no better address is available [*Code Civ. Proc. § 1206(a)*].

[2] Endorsement on Writ or Abstract of Judgment

The court issuing the writ of attachment or execution must make a notation in the register of actions of every preferred labor claim of which it receives a copy [*Code Civ. Proc. § 1206(b)*]. The court must also endorse on any writ of execution or abstract of judgment issued subsequently in the case that it is issued subject to the rights of a preferred labor claimant or claimants and give the names and amounts of all such preferred labor claim of which it has notice [*Code Civ. Proc. § 1206(b)*].

In levying under any writ of execution, the officer making the levy must include in the amount due under the execution any and all preferred labor claims that have been filed in the action and of which the officer has notice, except any claims that may have been finally disallowed by the court under the procedure provided and of which disallowance the officer has actual notice [*Code Civ. Proc. § 1206(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesProvisional RemediesAttachmentsLabor & Employment LawWage & Hour LawsWage Payments

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30-342 California Forms of Pleading and Practice--Annotated § 342.62

§ 342.62 Dispute of Claim

[1] Verified Denial

Within five days after receiving a copy of the statement provided for in *Code Civ. Proc. § 1206*, either the plaintiff or the defendant in the action in which the writ issued may file with the officer a sworn statement that denies that any part of such a claim is due for services rendered within 90 days prior to the issuing of the writ, or that denies that any part of the claim is due beyond a specified sum [*see § 342.201*]. If part of the claim is admitted to be due and the claimant nevertheless files a petition for hearing and the court does not allow more than the amount so admitted, the claimant cannot recover costs. The costs must be deducted from the sum that is determined to be due to the claimant [*Code Civ. Proc. § 1207*].

[2] Petition for Hearing When Claim Disputed

If any claim is disputed within the time and in the manner prescribed in *Code Civ. Proc. § 1207* and if the claimant or claimant's attorney has been served by registered mail or personally with a copy of the dispute, then the claimant or his or her assignee must petition the court having jurisdiction of the action on which the writ is based for a hearing to determine his or her claim for priority [*see § 342.202*]. If more than one attachment or execution is involved, the petition must be filed in the court having jurisdiction over the senior attachment or execution [*Code Civ. Proc. § 1206(c)*].

The petition must be filed within 10 days after the copy is deposited in the mail or served personally on the claimant or claimant's attorney. The hearing must be held within 20 days from the filing of the petition unless the court continues it for good cause [*Code Civ. Proc. § 1206(c)*].

[3] Failure to Petition Bars Claim

If such a petition is not filed by the laborer, the claim to priority is barred [*Code Civ. Proc. § 1206(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsRemediesBackpayLabor & Employment LawWage & Hour LawsWage PaymentsReal Property LawNonmortgage LiensMechanics' Liens

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30-342 California Forms of Pleading and Practice--Annotated § 342.63

§ 342.63 Hearing

[1] Notice

Ten days' notice of the hearing must be given by the petitioner to the plaintiff and the defendant, and to all parties or their attorneys claiming an interest in the property [*see § 342.204*]. The notice may be informal and needs to specify merely the name of the court, names of the principal parties to the senior attachment or execution, and of the wage claimant or claimants on whose behalf it is filed. It must also specify that the hearing is for the purpose of determining the claim for priority [*Code Civ. Proc. § 1206(c)*].

[2] Who May Contest Claim at Hearing

The plaintiff or the defendant or any other party claiming an interest may contest the amount or validity of the claim in spite of a confession of judgment or failure to appear or to contest the claim on the part of any other person [*Code Civ. Proc. § 1206(c)*].

[3] Conduct of Hearing

There is no cost for filing or hearing the petition for a hearing to determine a laborer's claim for priority. The hearing is informal, but all parties testifying must be sworn. Any claimant may appear on his or her own behalf at the hearing and may call and examine witnesses to substantiate his or her claim [*Code Civ. Proc. § 1206(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsAdministrative Proceedings & RemediesGeneral OverviewLabor & Employment LawWage & Hour LawsRemediesBackpayLabor & Employment LawWage & Hour LawsWage PaymentsReal Property LawNonmortgage LiensMechanics' Liens

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30-342 California Forms of Pleading and Practice--Annotated § 342.64

§ 342.64 Payment to Levying Officer

[1] Before Payment of Principal

The amount due on preferred labor claims that have not been finally disallowed by the court are considered a part of the sum due under any attachment or execution that augments that amount. It is the duty of any person, firm, association, or corporation on whom a writ of attachment or execution is levied to pay immediately to the levying officer the amount of the preferred labor claims out of any money belonging to the defendant in the action before paying the principal sum called for in the writ [*Code Civ. Proc. § 1206(b)*].

[2] Officer Retains Possession

The officer must retain in his or her possession as much of the proceeds of the writ as may be necessary to satisfy the claim until the determination of the claim for priority [*Code Civ. Proc. § 1206(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesProvisional RemediesAttachmentsLabor & Employment LawWage & Hour LawsWage Payments

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30-342 California Forms of Pleading and Practice--Annotated § 342.65

§ 342.65 Payment of Claim

[1] By Levying Officer

A claim for wages not exceeding $900 must be paid by the levying officer immediately on expiration of the time under *Code Civ. Proc. § 1207* for disputing claims if no verified denial is filed. The officer pays the claim from the proceeds of the levy remaining in his or her hands at the time of the filing of the statement of claim, or collectible by the officer on the basis of the writ [*Code Civ. Proc. § 1206(a)*].

If the claim for priority is disputed but allowed, the levying officer must pay the amount due, including the claimant's cost of suit, from those proceeds immediately after the order allowing the claim becomes final [*Code Civ. Proc. § 1206(e)*].

[2] Pro Rata Distribution

If the claims presented under *Code Civ. Proc. § 1206* that were not disputed or, if disputed, established by judgment, exceed the proceeds of the writ not disposed of before their presentation, the proceeds must be distributed among the claimants in proportion to the amount of their respective claims. However, prior to any such pro rata distribution the costs incurred by the senior attaching plaintiff or judgment creditor in such an action must be paid first [*Code Civ. Proc. § 1208*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionLabor & Employment LawWage & Hour LawsRemediesGeneral OverviewLabor & Employment LawWage & Hour LawsWage PaymentsReal Property LawNonmortgage LiensMechanics' Liens

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§ 342.66 Appeal

An appeal may be taken from a judgment in a proceeding under *Code Civ. Proc. § 1206* in the manner provided for appeals from judgments of the court where the proceeding occurs [*Code Civ. Proc. § 1206(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsAdministrative Proceedings & RemediesGeneral OverviewLabor & Employment LawWage & Hour LawsRemediesBackpayLabor & Employment LawWage & Hour LawsWage Payments

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30-342 California Forms of Pleading and Practice--Annotated § 342.67

§ 342.67 Preferred Labor Claims on Assignment or in Insolvency Proceedings

[1] Salaries, Wages, and Contributions to Employee Benefit Plans

When any assignment, whether voluntary or involuntary, and whether formal or informal, is made for the benefit of creditors of the assignor, or results from any proceeding in insolvency or receivership commenced against him or her, or when any property is turned over to the creditors of a person, firm, association, or corporation, or to a receiver or trustee for the benefit of creditors, the following claims have priority in the following order [*Code Civ. Proc. § 1204*]:

- Allowed unsecured claims for wages, salaries, or commissions, including vacation, severance, and sick leave pay (1) earned by an individual within 90 days before the date of the making of the assignment or the taking over of the property or the commencement of the court proceeding or the date of the cessation of the debtor's business, whichever occurs first, but only (2) to the extent of $4,300 for each individual;

- Allowed unsecured claims for contributions to employee benefit plans (1) arising from services rendered within 180 days before the date of the making of the assignment or the taking over of the property or the commencement of the court proceeding or the date of the cessation of the debtor's business, whichever occurs first, but only (2) for each plan to the extent of (i) the number of employees covered by the plan multiplied by $4,300 less (ii) the aggregate amount paid to the employees under *Civ. Code § 1204(a)* plus the aggregate amount paid by the estate on behalf of the employees to any other employee benefit plan. They must be paid by the trustee, assignee, or receiver before the claim of any other creditor of the assignor, insolvent, or debtor whose property is so turned over, and must be paid as soon as the money with which to pay them becomes available.

For general discussion relating to assignments for the benefit of creditors and to the administration of receiverships, see Ch. 307, *Insolvency* , and Ch. 486, *Receivers* , respectively.

[2] Right of Refusal to Pay Labor Claims

The trustee, receiver, or assignee for the benefit of creditors has the right to require sworn claims to be presented and the right to refuse to pay any preferred labor claim, either in whole or in part, if he or she has reasonable cause to believe that the claim is not valid, but must pay any part of the claim that is not disputed, without prejudice to the claimant's rights as to the balance of his or her claim, and withhold sufficient money to cover the disputed portion until the claimant in question has a reasonable opportunity to establish the validity of his or her claim by court action, either in his or her own name or through an assignee [*Code Civ. Proc. § 1204*].

[3] Preference Applicable to All Receivership Actions

The preference afforded labor liens is binding on all the courts of California. Thus, after paying the current operating expenses, in all receivership actions the court must order the receiver to pay the preferred labor claims promptly out of the receipts and earnings of the receivership [*Code Civ. Proc. § 1204*].

[4] Priority of Consumer Deposits

In any general assignment for the benefit of creditors, the following claims must have priority, subordinate to the priorities for labor claims under *Code Civ. Proc. § 1204*, but prior to all other unsecured claims: allowed unsecured claims of individuals, to the extent of $900 for each such individual, arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of the individuals, that were not delivered or provided [*Code Civ. Proc. § 1204.5*]. The priority granted by *Code Civ. Proc. § 1204.5* is subordinate to that granted by *Rev. & Tax. Code § 19253* for personal income and bank and corporation taxes [*Code Civ. Proc. § 1204.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency LawsBusiness & Corporate LawCorporationsDissolution & ReceivershipReceivershipsAdministrative Expenses & FeesBusiness & Corporate LawCorporationsDissolution & ReceivershipReceivershipsAppointment of ReceiversBusiness & Corporate LawCorporationsDissolution & ReceivershipReceivershipsPresentation & Payment of ClaimsCivil ProcedureRemediesReceivershipsGeneral OverviewLabor & Employment LawWage & Hour LawsWage PaymentsPensions & Benefits LawEmployee Benefit PlansGeneral Overview

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30-342 California Forms of Pleading and Practice--Annotated § 342.68

§ 342.68 Insufficient Funds to Satisfy Preferred Labor Claims

[1] Pro Rata Distribution

If there is insufficient money with which to pay all labor claims as defined in *Code Civ. Proc. § 1204* in full, the money available must be distributed among the claimants in proportion to the amount of their respective claims [*Code Civ. Proc. § 1204*].

[2] Proceedings Against Property Subject to Levy

If sufficient money to pay in full all preferred labor claims filed under an attachment or execution does not become available immediately on the expiration of the time for dispute of the claims under *Code Civ. Proc. § 1207*, then any of the claimants, or their assignees, have the right to proceed directly against the money or other property levied on in individual or joint actions by themselves or by their assignees against the defendant [*Code Civ. Proc. § 1208*]. The attachment or execution under which the preferred claims were filed must be considered set aside as far as the claimants or their assignees are concerned so as to enable them, or any of them, or any of their assignees, to proceed directly against any or all of the money or other property in question by means of their own attachments or executions [*Code Civ. Proc. § 1208*].

[3] Pro Rata Distribution, Less Costs, of Proceeds of Direct Action

Any money collected in a direct action against the money or other property on behalf of any such labor claimant or his or her assignee on the basis of the new attachment or execution must be shared in by the other preferred labor claimants who have filed claims that have not been disputed, or, if disputed, established by judgment, in proportion to the amount of their respective claims, deducting only the costs in the action brought by the said labor claimant, or his or her assignee, and the costs in the original action brought by the senior attaching plaintiff or judgment creditor [*Code Civ. Proc. § 1208*].

[4] Notice of Request to Release by Senior Attaching Plaintiff

If a senior attaching plaintiff or judgment creditor requests a release of his or her original attachment or execution, and the preferred labor claims filed under the attachment or execution are not released, the officer who levied the writ must first mail notices of the request to release to each of the labor claimants who have filed claims, or to their attorneys [*Code Civ. Proc. § 1208*]. These notices must specify that, unless the claimants bring attachment actions of their own and levy on the money or property in question within five days from the date of the notice, the money or property will be released from the attachment or execution [*Code Civ. Proc. § 1208*].

[5] Alternative to Notice of Request to Release

Instead of mailing notices of request to release, the officer may collect sufficient money on the basis of the original writ to pay off the preferred labor claims in full and then release the attachment or execution [*Code Civ. Proc. § 1208*]. In no case may the officer release the attachment or execution without first taking care of the labor claims until the five-day period has expired, unless the officer's costs, keepers' fees, or storage charges have not been immediately taken care of by the parties involved [*Code Civ. Proc. § 1208*].

[6] Garnishee's Option to Pay Prior to Execution

In any case, a garnishee may pay over to the officer levying the writ any money held by the garnishee without waiting for execution to be levied, and the officer's receipt for the money will be a sufficient quittance [*Code Civ. Proc. § 1208*]. In that case, the officer must collect the money and immediately pay off the established preferred labor claims in all cases when it is possible to do so without additional court proceedings on the officer's part [*Code Civ. Proc. 1208*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency LawsLabor & Employment LawWage & Hour LawsAdministrative Proceedings & RemediesGeneral OverviewLabor & Employment LawWage & Hour LawsWage Payments

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30-342 California Forms of Pleading and Practice--Annotated § 342.69

§ 342.69 Wages as Preferred Liens on Sale or Transfer of Business

On the sale or transfer of any business or the stock in trade, in bulk, or a substantial part thereof that is not in the ordinary and regular course of business or trade, the unpaid wages of employees of the seller or transferor earned within 90 days prior to the sale, transfer, or opening of an escrow for the sale constitute preferred claims and liens as between creditors of the seller or transferor. The wages must be paid first from the proceeds of the sale or transfer [*Code Civ. Proc. § 1205*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsGeneral OverviewLabor & Employment LawWage & Hour LawsWage Payments

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30-342 California Forms of Pleading and Practice--Annotated §§ 342.70-342.89

[Reserved]

§§ 342.70[Reserved]

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A. Liens In General

30-342 California Forms of Pleading and Practice--Annotated § 342.90

§ 342.90 Forms of Discovery

For interrogatories for use by a plaintiff in an action to establish a maritime lien or a lien on a seed crop, see Benders Forms of Discovery, *Liens* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawCharterpartiesCharter ContractsRemediesMaritime LiensCivil ProcedureDiscoveryMethodsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PriorityLiensContracts LawSecured TransactionsPerfection & PriorityPriorityLiensReal Property LawNonmortgage LiensGeneral Overview

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A. Liens In General

30-342 California Forms of Pleading and Practice--Annotated § 342.91

§ 342.91 California Legal Forms

For forms for use in satisfying various types of personal property liens, including liens in sales of vehicles, livestock service liens, and vessel liens, see California Legal Forms, Ch. 102A, *Personal Property Liens* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawMaritime LiensPriority & SourcesGeneral OverviewAdmiralty LawMaritime LiensPriority & SourcesContractsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PriorityLiensContracts LawSecured TransactionsPerfection & PriorityPriorityLiens

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A. Liens In General

30-342 California Forms of Pleading and Practice--Annotated § 342.92

§ 342.92 State Constitution

Lien available for mechanics, materialmen, artisans, and laborers of every class on property on which they have bestowed labor or furnished material. *Cal. Const., art. XIV, § 3*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityLiensLabor & Employment LawWage & Hour LawsRemediesGeneral Overview

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A. Liens In General

30-342 California Forms of Pleading and Practice--Annotated § 342.93

§ 342.93 Federal Statutes

Lien for federal taxes. *I.R.C. § 6321* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityLiensLabor & Employment LawWage & Hour LawsGeneral Overview

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A. Liens In General

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§ 342.94 State Statutes

NOTE:
For an alphabetized list of specific liens, see the Table of Liens in the Appendix to this chapter.

[1] Creation of Liens

Creation of liens. *Civ. Code § 2881*

Lien on unacquired property. *Civ. Code § 2883*

Lien can be created for future obligations. *Civ. Code § 2884*

Creation of lien does not create personal obligation. *Civ. Code § 2890*

[2] Definitions

Term "encumbrances" includes all liens on real property. *Civ. Code § 1114* (statutory spelling is "incumbrance")

"Lien" defined. *Civ. Code § 2872*; *Code Civ. Proc. § 1180*

Lien as either general or special. *Civ. Code § 2873*

"General lien" defined. *Civ. Code § 2874*

"Special lien" defined. *Civ. Code § 2875*

[3] Extinguishment of Lien

Extinguishment of all incidents of obligation by offer of payment. *Civ. Code § 1504*

Extinguishment of lien by performance of principal obligation. *Civ. Code § 2909*

Extinguishment of lien by sale or wrongful conversion. *Civ. Code § 2910*

Extinguishment of lien by lapse of time. *Civ. Code § 2911*

Extinguishment of lien on real property securing payment of public improvement assessment. *Civ. Code § 2911*

Extinguishment is not effected by partial performance. *Civ. Code § 2912*

Extinguishment of lien by voluntary restoration. *Civ. Code § 2913*

[4] General Provisions Governing Liens

Satisfaction of prior lien. *Civ. Code § 2876*

Lien does not transfer title to property subject to lien. *Civ. Code § 2888*

Contracts are void that provide for forfeiture of property or restrain right of redemption. *Civ. Code § 2889*

Lienholder is not entitled to additional obligations. *Civ. Code § 2891*

Lienholder is not entitled to compensation for trouble or expenses. *Civ. Code § 2892*

Lien is accessory obligation to act it secures. *Civ. Code § 2909*

Security interest governed by Uniform Commercial Code is not affected by *Civ. Code § 2872 et seq., Civ. Code § 2914*

[5] Jurisdiction

Jurisdiction of superior courts in limited civil cases to foreclose liens on personal property. *Code Civ. Proc. §§ 85, 86(a)(5)*

Superior court in which real property situated has exclusive jurisdiction over action to foreclose lien on property. *Code Civ. Proc. § 392(a)(2)*

[6] Marshaling Assets

Right to marshal assets. *Civ. Code §§ 2899, 3433*

[7] Particular Liens

[a] Abatement of Public Nuisance

Department of Forestry is required to record lien in county where property situated; lien has same force as judgment

lien. *Pub. Res. Code § 4179*

Release or subordination of lien by Attorney General. *Pub. Res. Code § 4179.5*

[b] Agricultural Laborers

Agricultural laborer's lien expires 45 days after cessation of work for which the lien claimed unless claimant files a claim with the Labor Commissioner or brings suit to foreclose the lien. *Civ. Code § 3061.6*

[c] Alcoholic Beverages

Common carrier's unpaid freight and storage charges accruing on shipments of alcoholic beverages are to be paid from proceeds of any sale made by state of alcoholic beverages either seized or forfeited. *Bus. & Prof. Code § 23669*

[d] Assessments

Statute of limitations for foreclosing lien securing assessment against real property for street improvements is two years after date on which assessment due. *Code Civ. Proc. § 329*

Priority of special assessment liens. *Gov. Code § 53930 et seq.*

[e] Banks

Bank receiving personal property for safekeeping or storage is bailee and on issuing receipt therefor is able to enforce its lien as warehouseman in accordance with provision of Uniform Commercial Code or at its option in manner provided by *Fin. Code § 1671 et seq., Fin. Code § 1670*

[f] Cemeteries

Mortgages, deeds of trust, and other liens on property dedicated as a cemetery are subordinate to dedication for cemetery purposes. *Health & Safety Code § 8351*

[g] Electronic Repair Dealers

Lien or other right to maintain possession of equipment pending payment of charges for repair or installation is not available when charges exceed written estimate. *Bus. & Prof. Code § 9844.5*

No electronic or appliance repair dealer required to have valid registration under *Bus. & Prof. Code § 9800 et seq.* has benefit of any lien for labor or materials unless he or she has valid registration. *Bus. & Prof. Code § 9852*

Alternative procedure for sale of property subject to possessory lien when charges do not exceed $150; notice of sale. *Civ. Code § 3052b*

Service dealer registered with Bureau of Repair Services may to dispose of serviced products on which dealer has lien if product has nominal value and specified notice is given. *Civ. Code § 3052.5*

[h] Harbor Bonds

Liens of revenue bonds of harbor and port district are prior and superior to all revenue bonds subsequently issued. *Harb. & Nav. Code § 6105*

[i] Improvements to Property

Person having right to remove improvements mistakenly affixed to land of another are required to obtain written consent of lienholder in improvement. *Civ. Code § 1013.5(d)*

[j] Probate Claims

When presenting claim to executor or administrator of estate based on lien recorded in office of recorder of county in which land subject to lien is located, description of lien and recording reference for instrument that created lien is sufficient description. *Prob. Code § 9152(b)*

Except as provided in *Prob. Code § 9303* (property subject to execution lien at time of decedent's death), money judgments against decedent or personal representative on claim against decedent or estate are payable in course of administration and are not enforceable against property in estate under Enforcement of Judgments Law (*Code Civ. Proc. § 680.010 et seq.*). *Prob. Code §§ 9300, 9301*

Judgment for possession or sale of property is enforceable under Enforcement of Judgments Law (*Code Civ. Proc. § 680.010 et seq.*) despite decedent's death. *Prob. Code § 9302*

Conversion of attachment lien to judgment lien if judgment debtor dies, or judgment is entered after defendant dies, in action in which property was attached. *Prob. Code § 9304*

Enforcement of liens on property in decedent's estate. *Prob. Code § 9391*

[k] Tax Liens

State Attorney General has right to bring action to foreclose liens under Unemployment Insurance Code or Revenue and Taxation Code. *Civ. Code § 2931c*

Lien date is time when taxes for fiscal year become lien on property. *Rev. & Tax Code §§ 117, 2192*

Removal of tax lien. *Rev. & Tax Code § 2194*

[l] Vehicles

Civ. Code § 3051 has no application to any vehicle as defined in *Veh. Code § 670* that is subject to registration pursuant to that code, nor any application to any manufactured home as defined in *Health & Safety Code § 18007*, any mobilehome as defined in *Health & Safety Code § 18008*, or any commercial coach as defined in *Health & Safety Code § 18001.8*. *Civ. Code § 3051*

Costs of vehicle sale to satisfy lien is recoverable. *Civ. Code § 3074*

[m] Vessels

Fraudulently obtaining vessel from lienholder is misdemeanor. *Harb. & Nav. Code § 505.5*

Agreement by which seaman consents to abandon right to lien on vessel is void. *Harb. & Nav. Code § 864*

[n] Welfare

Aid granted to recipient of public assistance does not constitute lien on any property of recipient; cost of hospitalization furnished by county as not constituting lien on personal property or effects of recipient. *Welf. & Inst. Code § 11007*

Policies established by board of supervisors with reference to amount of property is that person is permitted to have while receiving assistance cannot be used to deny needed care in county hospital or contract hospital to any person who meets eligibility requirements for medical assistance for aged; policies may not take any lien on person's property. *Welf. & Inst. Code § 17108*

Board of supervisors may require lien on person's property as condition to grant or continuation of aid to indigent. *Welf. & Inst. Code § 17109*

Limitations on county to enforce lien. *Welf. & Inst. Code § 17401*

[o] Workers' Compensation

Employer is entitled to enforce payment of lien on employee's judgment or award in manner provided for enforcement of money judgments. *Lab. Code § 3862*

Allowable liens against any compensation in workers' compensation cases; priority is determined by appeals board. *Lab. Code § 4903*

Notice of lien required in writing to insurer or employer if uninsured. *Lab. Code § 4904*

[8] Partition Actions

Rights of lienholders in partition actions. *Code Civ. Proc. §§ 872.010, 872.540, 872.630, 873.260, 873.820, 874.120*

[9] Priority

Priority of different liens on same property is based on time of creation if other things equal. *Civ. Code § 2897*

[10] Real Estate Contract Arbitration

Court's authority with respect to supervision of real property transactions, including foreclosure of liens, is not diminished by *Code Civ. Proc. § 1298*, governing arbitration clauses in real estate contracts. *Code Civ. Proc. § 1298(d)*

[11] Redemption

Redemption as right. *Civ. Code § 2903*

Subrogation of person exercising right of redemption. *Civ. Code § 2903*

Junior lienor's right to redemption. *Civ. Code § 2904*

Method of redemption. *Civ. Code § 2905*

Right of redemption in proceedings for foreclosure of mortgage or deed of trust. *Code Civ. Proc. § 729.010 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawMaritime LiensGeneral OverviewAdmiralty LawMaritime LiensPriority & SourcesContractsWagesCommercial Law (UCC)Secured Transactions (Article 9)PriorityLiensComputer & Internet LawTrademark ProtectionProtection of RightsActual & Intended UseReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawNonmortgage LiensLien Priorities

California Forms of Pleading and Practice--Annotated

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 342 LIENS AND WAGE PREFERENCES
PART III. RESEARCH GUIDE
A. Liens In General

30-342 California Forms of Pleading and Practice--Annotated § 342.95

§ 342.95 Decisions

[1] Conversion

Act done to protect property in order that it may remain subject to lien and that is equally beneficial to junior lienholders is not wrongful conversion under *Civ. Code § 2910*. *Gardena Valley Airport, Inc. v. All American Sports Enterprises, Inc. (1964) 230 Cal. App. 2d 478, 483, 41 Cal. Rptr. 93*

Refusal by lienholder of proper demand does not constitute conversion if refusal based on ground inconsistent with lien. *Enfield v. Hoffman Motor Co. (1953) 117 Cal. App. 2d 800, 808, 257 P.2d 458*

Person who has property wrongfully taken from him or her, on which person has lien under *Civ. Code § 3051*, has right of action in trover against legal owner for damages sustained by reason of conversion and of right to receive reasonable compensation for labor or materials furnished. *Arques v. National Superior Co. (1945) 67 Cal. App. 2d 763, 767-768, 155 P.2d 643*

[2] Enforcement

Enforcement of liens is a well-recognized function of equity courts. *Curnow v. Happy Valley Blue Gravel & Hydraulic Co. (1885) 68 Cal. 262, 264, 9 P. 149* ; *Holbrook v. Phelan (1931) 121 Cal. App. Supp. 781, 783, 6 P.2d 356*

Statutory lien may be enforced only in manner prescribed by statute. *White v. White (1936) 11 Cal. App. 2d 570, 574, 54 P.2d 482* (dictum)

Lien on land created by contract under *Civ. Code § 2881* imposes no personal obligation to perform act for which lien is security according to *Civ. Code § 2890*; however, lien is binding on land in hands of subsequent grantee with notice and can be enforced by foreclosure with same effect as though title not transferred. *Madera Canal &Irrigation Co. v.*

K. Arakelian, Inc. (1930) 103 Cal. App. 592, 598, 284 P. 971

[3] Extinguishment

Civ. Code § 2911, which provides for extinguishment of liens by lapse of time within which action can be brought on principal obligation, does not control enforcement of liens created under particular statutes. *Raisch v. Myers (1946) 27 Cal. 2d 773, 778, 167 P. 2d 198* ; *Martin v. Board of Administration (1969) 276 Cal. App. 2d 795, 799, 81 Cal. Rptr. 432*

Sale of property on which there is lien, in satisfaction of the claim secured thereby, extinguishes lien pursuant to *Civ. Code § 2910*. *Duarte v. Lake Gregory Land and Water Co. (1974) 39 Cal. App. 3d 101, 104-105, 113 Cal. Rptr. 893*

Lien is extinguished under ordinary circumstances by merger of lien and ownership of land in one person unless it is necessary for protection of that person's rights that it be kept alive. *Ralph C. Sutro Co. v. Paramount Plastering, Inc. (1963) 216 Cal. App. 2d 433, 438, 31 Cal. Rptr. 174*

Relinquishment of repaired property to vendee under conditional sale contract on condition that it be returned subject to lien, without concurring agreement by owner of property, is not within exception of *Civ. Code § 2913*; reacquisition of possession of property subject to lien by lien claimant after its surrender to the vendee does not revive lien against vendor (real owner) even though vendee has agreed to return it for lien purposes. *Jess H. Young & Son, Inc. v. Victory Tool & Die Co. (1961) 189 Cal. App. 2d 824, 828, 11 Cal. Rptr. 516*

[4] Marshaling Assets

Civ. Code §§ 2899 and *3433* govern bankruptcy proceedings arising in California since validity, nature, and effect of liens are governed by law of state where property is situated. *In re T.H. Richards Processing Co. (9th Cir. 1990) 910 F.2d 639, 648* ; *Victor Gruen Associates, Inc. v. Glass (9th Cir. 1964) 338 F.2d 826, 829*

Burden of showing that creditor can marshal assets without risk of loss to himself or herself rests with creditor urging that another creditor marshal assets. *Victor Gruen Associates, Inc. v. Glass (9th Cir. 1964) 338 F.2d 826, 829*

Marshaling is well-established rule in equity that, when creditor has lien on two funds and another lien on only one of them, creditor is compelled to exhaust fund on which he or she has exclusive lien and is permitted to resort to other for deficiency only. *Citizens' Sav. Bank v. Mack (1919) 180 Cal. 246, 251-252, 180 P. 618*

Right to marshal is mere equity that may never be invoked when its operation will create inequity; lien claimant can invoke principle of marshaling assets only when it will benefit claimant without injuring others. *Harrington v. Taylor (1917) 176 Cal. 802, 807, 169 P. 690*

Equity applies doctrine of marshaling of assets only to conditions existing at time when it is invoked. *Harrington v. Taylor (1917) 176 Cal. 802, 807, 169 P. 690* ; *Shedoudy v. Beverly Surgical Supply Co. (1980) 100 Cal. App. 3d 730, 736, 161 Cal. Rptr. 164*

Doctrine of marshaling of assets, under which, if one creditor has lien on only one asset the former creditor must first proceed against that on which the latter has no lien, is established by general authority and *Civ. Code §§ 2899* and *3433*. *In re Estate of Levin Bros. (1903) 139 Cal. 350, 73 P. 159*

Application of principle of marshaling of assets is not allowed because of resulting injustice to other persons if all of mortgaged property is sold in parcels to different parties at different times. *Irvine v. Perry (1897) 119 Cal. 352, 356*

Marshaling of assets in favor of first of two creditors was proper when trial court determined that assets of debtor's parent company and parent's other subsidiaries constituted second fund, above and beyond that resorted to by first creditor. *Shedoudy v. Beverly Surgical Supply Co. (1980) 100 Cal. App. 3d 730, 734, 735, 161 Cal. Rptr. 164*

Denial of demand to marshal assets is proper if first lien claimant could not sell parcel of land in lots because bids were inadequate. *Barton v. Clough (1937) 20 Cal. App. 2d 473, 476*

[5] Merger

Lien is extinguished by merger when lienholder acquires ownership of property, but merger does not always follow union of greater and lesser estate in same ownership since question is one of actual or presumed intent of persons in whom interests are united; in absence of expression of intention, if interest of person in whom estates united would be best subserved by keeping them separate, intent to do so ordinarily is implied. *Strike v. Trans-West Discount Corp. (1979) 92 Cal. App. 3d 735, 742-743, 155 Cal. Rptr. 132*

[6] Miscellaneous Liens

[a] Banker's Lien and Setoff

Banker's lien is general lien effective by operation of law. *Goggin v. Bank of America Nat. Trust & Sav. Ass'n (9th Cir. 1950) 183 F.2d 322, 324-325*

Banker's lien is not dependent solely on any express agreement but arises by implication growing out of relationship of depositor and bank; bank has right to set off proceeds received through collections against loans made to debtor or balances remaining in reserve accounts. *Goggin v. Bank of America Nat. Trust & Sav. Ass'n (9th Cir. 1950) 183 F.2d 322, 324-325* ; *Biggins v. Southwest Bank (SD Cal. 1971) 322 F. Supp. 62, 70*

Setoff for overdraft and related fee would not implicate kind of independent debt that was at issue in *Kruger v. Wells Fargo Bank* (below), and presence of exempt funds in customer's account would not preclude setoff for overdraft and related fee; moreover, overdrafts and bank charges are not subject to *Fin. Code § 864* limitations on bank's right of setoff. *Miller v. Bank of Am. (2009) 46 Cal. 4th 630, 640-641, 94 Cal. Rptr. 3d 31, 207 P.3d 531*

Banker's lien under *Civ. Code § 3054* is lien on securities such as commercial paper deposited with bank by customer in course of business; so-called "lien" of bank on depositor's account or funds technically is not lien but rather is right of setoff, based on general equitable principles. *Kruger v. Wells Fargo Bank (1974) 11 Cal. 3d 352, 358, 113 Cal. Rptr. 449, 521 P.2d 441*

[b] Factor's Lien

Factor's lien is possessory; factor is required to have either actual or constructive possession of goods or proceeds in order for lien to attach; lien is not acquired before goods come into factor's possession or after possession has ceased. *Baumbach v. Jorgensen (1957) 149 Cal. App. 2d 799, 801, 308 P.2d 799*

[c] Hospital Lien

Lien under Hospital Lien Act (HLA) [*Civ. Code § 3045.1 et seq.*] requires existence of underlying debt owed by patient to hospital; absent such a debt, no lien may attach. *Parnell v. Adventist Health System/West (2005) 35 Cal. 4th 595,*

609, 26 Cal. Rptr. 3d 569, 109 P.3d 69

Legislature intended that lien under HLA comes into existence on giving of notice provided for in *Civ. Code § 3045.3*. *County of San Bernardino v. Calderon (2007) 148 Cal. App. 4th 1103, 1109, 56 Cal. Rptr. 3d 333*

[d] Laborer's and Repairman's Lien

[i] Acquisition and Termination

Lien under *Civ. Code § 3051* must be asserted by party with whom owner has contracted and not by subcontractor. *Quist v. Sandman (1908) 154 Cal. 748, 755, 99 P. 204* ; *Goodman v. Anglo-California Trust Co. (1923) 62 Cal. App. 702, 705, 217 P. 1078*

Lien created by *Civ. Code § 3051* is dependent on possession of the property by lien claimant. *Quist v. Sandman (1908) 154 Cal. 748, 754-757, 99 P. 204* ; *Jess H. Young & Son, Inc. v. Victory Tool & Die Co. (1961) 189 Cal. App. 2d 824, 827, 11 Cal. Rptr. 516*

Lien created by *Civ. Code § 3051* was terminated when possession was voluntarily relinquished. *Jess H. Young & Son, Inc. v. Victory Tool & Die Co. (1961) 189 Cal. App. 2d 824, 827, 11 Cal. Rptr. 516*

Lien created by *Civ. Code § 3051* is not revived when possession is regained, except in cases under *Civ. Code § 2913* when property released to its owner on agreement that lien will be revived when possession is returned to lien claimant. *Jess H. Young & Son, Inc. v. Victory Tool & Die Co. (1961) 189 Cal. App. 2d 824, 827, 11 Cal. Rptr. 516*

Statutes providing for liens for laborers as being liberally construed to attain purpose for which they were enacted. *Baker v. Waite (1958) 158 Cal. App. 2d 379, 384, 322 P.2d 512*

Lien under *Civ. Code § 3051* is acquired by virtue of work done, and fact that work done by lien claimant or by his or her agent is immaterial. *Goodman v. Anglo-California Trust Co. (1923) 62 Cal. App. 702, 705, 217 P. 1078*

[ii] Foreclosure

Every lien claimant under *Civ. Code § 3051* has same rights and remedies. *First Nat. Bank v. Silva (1927) 200 Cal. 494, 496-497, 254 P. 262* ; *Pacific States Finance Corp. v. Freitas (1931) 113 Cal. App. Supp. 757, 772, 205 P. 804*

Civ. Code § 3052 prescribes method of foreclosing liens acquired under *Civ. Code § 3051*. *Pacific States F. Corp. v. Freitas (1931) 113 Cal. App. Supp. 757, 771, 295 P. 804*

[iii] Priority Over Chattel Mortgages

Lien under *Civ. Code § 3051* has preference over lien of preexisting chattel mortgage. *First Nat'l Bank v. Silva (1927) 200 Cal. 494, 501, 254 P. 262* ; *Pacific States Finance Corp. v. Freitas (1931) 113 Cal. App. Supp. 757, 772, 295 P. 804*

[e] Landlord's Lien

Fact that tenant is behind in rent does not warrant landlord's exercise of dominion over plaintiff's personal property located on premises. *Gruber v. Pacific States Sav. & L. Co. (1939) 13 Cal. 2d 144, 147-148, 88 P.2d 137*

Civ. Code § 1861a does not authorize landlord to take possession of enough of tenant's personal property to secure payment of rent for entire term at beginning of term. *Van Dorn v. Couch (1937) 64 P.2d 1197*

[f] Laundry Proprietor's Lien

Laundry proprietor has possessory lien under *Civ. Code § 3051* only on property delivered to it that is owned by customer; proprietor cannot subject furnishings of owner's house to lien when furnishings have been delivered by tenant. *Hackett v. California Laundry (1935) 45 P.2d 833*

[g] Mining Lien

Tailings of early mining operations left on mining claim and abandoned by those who placed them there as belonging to owner of claim and work of extracting values therefrom undertaken later as affording ground for miner's lien on land. *Baker v. Waite (1958) 158 Cal. App. 2d 379, 384, 322 P.2d 512*

[h] Producer's Lien

Producer's lien [*Food & Agric. Code § 55631 et seq.*] may not be set aside by trustee in bankruptcy of processor to whom product was delivered but who had not yet paid producer for it, because lien would be good against hypothetical bona fide purchaser without possession when proceeds were not used to satisfy lien. *In re Loretto Winery Ltd. (9th Cir. 1990) 898 F.2d 715, 724-725* (state law determines whether trustee may set aside lien)

[i] Thresher's Lien

Person as able to maintain lien for services against threshing machine when labor performed for person in lawful possession but not actual owner of machine. *Holt Mfg. Co. v. Collins (1908) 154 Cal. 265, 270, 97 P. 516* ; *Lambert v. Davis (1897) 116 Cal. 292, 294, 48 P. 123*

Lien under *Civ. Code § 3061* as assignable. *Clark v. Brown (1903) 141 Cal. 93, 95, 74 P. 548*

Owner of threshing machine as liable only for value of labor as determined by court. *Clark v. Brown (1903) 141 Cal. 93, 94, 74 P. 548*

[j] Vessels

State court action to quiet title in aid of foreclosure sale based on possessory lien for unpaid wharfage fees as not within admiralty's exclusive jurisdiction when action brought against individual seller and buyer of ship; state court as having jurisdiction over quiet title decree. *Sellick v. Sun Harbor Marina, Inc. (9th Cir. 1967) 384 F.2d 870, 871-872*

Slip lessor as not entitled to sell boat pursuant to *Civ. Code § 1988* after obtaining unlawful detainer judgment against boat owner, but as subject to Boater's Lien Law (*Harb. & Nav. Code § 500 et seq.*), which provides them with possessory lien. *Mariners Bay Co. v. Department of Motor Vehicles (1991) 229 Cal. App. 3d 808, 811-815, 280 Cal. Rptr. 292* ; see *Harb. & Nav. Code § 501.5*

Bailee of boat and trailer with right to possession arising out of lien for storage charges as liable for conversion for failure to deliver property to individual who was not bailor, but who was holder of security interest in property, and

thereby had right to redeem property from lien; bailee as entitled to retain property only for reasonable time to investigate security interest holder's claim. *Messerall v. Fulwider (1988) 199 Cal. App. 3d 1324, 1330-1331, 245 Cal. Rptr. 548*

Manufacturer's lien under *Harb. & Nav. Code § 491* was not enforceable until perfected by filing of complaint to foreclose it or by attachment; transfer to bona fide purchaser for value without notice of lien before perfection extinguished lien. *Islander Yachts, Inc. v. One Freeport 36-Foot Vessel (1985) 173 Cal. App. 3d 1081, 1089-1092, 219 Cal. Rptr. 654*

Foreclosure of lien under *Harb. & Nav. Code §§ 490, 491, 495* for payment of construction of vessel is not preempted by federal admiralty law. *Islander Yachts, Inc. v. One Freeport 36-Foot Vessel (1985) 173 Cal. App. 3d 1081, 1086-1087, 219 Cal. Rptr. 654*

Maritime liens conferred by federal [former *46 U.S.C. § 971* (*now 46 U.S.C. § 31342*)] and state [*Harb. & Nav. Code § 491(d)*] law that do not depend on possession are cumulative and not exclusive remedy when possessory lien on vessel exists by virtue of *Civ. Code § 1856*. *Sun Harbor Marina, Inc. v. Sellick (1967) 250 Cal. App. 2d 281, 285, 58 Cal. Rptr. 459*

[k] Veterinarian's Lien

Veterinary proprietors' and veterinary surgeons' lien rights are governed by *Civ. Code § 3051*, rather than by *Civ. Code § 3080*, which governs all other livestock service providers. *Jakubaitis v. Fischer (1995) 33 Cal. App. 4th 1601, 1606, 40 Cal. Rptr. 2d 39*

[7] Notice

Although lien was filed under spouse's former name, purchasers was charged with notice because reasonable inspection of index would have disclosed that seller was person whose property was subject to lien. *Kivel v. U.S. (9th Cir. 1989) 878 F.2d 301, 304-305* (lien under *I.R.C. § 6323*)

[8] Priorities

Judgment creditor's lien created pursuant to *Code Civ. Proc. § 708.410* against property that was subject of fraudulent conveyance had priority over second creditor's lien for attorney fees incurred in prosecuting fraudulent conveyance lawsuit and was evidenced by notice of lien filed in fraudulent conveyance action before second creditor requested amendment of order to provide for attorney fees; "first in time, first in right" rule of *Civ. Code § 2897* controls. *Fleet Credit Corp. v. TML Bus Sales, Inc. (9th Cir. 1995) 65 F.3d 119, 122*

Priority of liens is first in time, first in right except that lien competing with federal lien must be perfected so that nothing remains to be done to establish identity of lienor, property subject to lien, or amount of lien. *In re Priest (1983) 712 F.2d 1326, 1327-28*

Contractual liens for attorney's fees and medical costs entered into before initiating legal action have priority over divorce judgment creditor's lien created by filing notice once action is pending. *Wujcik v. Wujcik (1994) 21 Cal. App. 4th 1790, 1793-1794, 27 Cal. Rptr. 2d 102*

Priority is determined by wording of statutes or codes when one lien created by contract and another under statute. *First Nat. Bank v. Silva (1927) 200 Cal. 494, 496, 254 P. 262* ; *Del Conte Masonry Co. v. Lewis (1971) 16 Cal. App.*

3d 678, 680, 94 Cal. Rptr. 439

Judgment lien attaches to debtor's interest in real estate at time of recordation; when debtor sold property before judgment lien was recorded and grantee did not record deed until after judgment lien was recorded, grantee was entitled to have title quieted against holder of lien. *Barisich v. Lewis (1990) 226 Cal. App. 3d 12, 19, 275 Cal. Rptr. 331*

Lien of trust deed recorded after abstract of judgment was superior to previously recorded judgment lien when judgment lien expired before judgment creditor recorded application for renewal of judgment lien. *Beneficial Financial, Inc. v. Durkee (1988) 206 Cal. App. 3d 912, 913, 254 Cal. Rptr. 351* (citing *Code Civ. Proc. § 683.130(a)*)

Contractual lien for attorney's fees and costs entered into prior to initiating legal action has priority over judgment creditor's lien created pursuant to *Code Civ. Proc. § 708.410*; fact that purpose of judgment creditor's lien was to reimburse state government for paying out client's child support arrearages did not justifying new exception to "first in time, first in right" rule set forth in *Civ. Code § 2897*. *Cappa v. F & K Rock & Sand, Inc. (1988) 203 Cal. App. 3d 172, 175-176, 249 Cal. Rptr. 718*

[9] Tender

Tender duly made of amount of obligation discharges lien given as collateral security therefor. *Sondel v. Arnold (1934) 2 Cal. 2d 87, 89, 39 P.2d 793* (trust deed)

General rule is that owner must make demand for his or her property accompanied by tender; tender is excused by conduct of one claiming possessory lien when claimant makes absolute refusal to deliver property. *Enfield v. Hoffman Motor Co. (1953) 117 Cal. App. 2d 800, 807, 257 P.2d 458*

[10] Thieves

Thief is not able to subject property to lien under *Civ. Code § 3051*; owner entitled to possession without paying charges for repairs and storage. *General Exch. Ins. Corp. v. Pellissier Square Garage (1937) 69 P.2d 236*

[11] Transfer of Debt

Lien is incident of debt secured; transfer of debt carries lien with it. *Lewis v. Booth (1935) 3 Cal. 2d 345, 349, 44 P.2d 560*

[12] Waiver

Manufacturer is estopped to assert lien against owner because master carpenter certificate, signed by manufacturer and issued at customer's lender's request, stated that manufacturer had transferred vessel to dealer and contained no statement that lien was being retained, and manufacturer never told customer or lender it intended to retain lien. *Islander Yachts, Inc. v. One Freeport 36-Foot Vessel (1985) 173 Cal. App. 3d 1081, 1087-1088, 219 Cal. Rptr. 654*

Conduct by lien claimant inconsistent with lien and that excuses owner from making tender as also capable of amounting to waiver of lien. *Enfield v. Huffman Motor Co. (1953) 117 Cal. App. 2d 800, 807, 257 P.2d 458*

Waiver of lien is not shown when claimant merely makes excessive demand if owner does not tender proper amount. *Enfield v. Hoffman Motor Co. (1953) 117 Cal. App. 2d 800, 807, 257 P.2d 458*

Sale of personal property prior to completion of repairs is waiver right to lien; sale premature and thus void.
Lundblade v. Pierce (1928) 95 Cal. App. 192, 194, 272 P. 329

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawMaritime LiensGeneral OverviewAdmiralty LawMaritime LiensPriority & SourcesContractsMaritime Lien ActCivil ProcedureRemediesJudgment LiensGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PriorityLiensContracts LawSecured TransactionsPerfection & PriorityPriorityLiensFamily LawChild SupportObligationsEnforcementLiensReal Property LawNonmortgage LiensGeneral OverviewTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesLiens (IRC secs. 6320-6327)Federal Tax Lien Priority

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§ 342.96 Attorney General Opinions

Among liens under following code sections, relative priority of liens to secure payment for health services rendered to person injured by tortfeasor is: first, lien established by *Welf. & Inst. Code § 14124.74* in favor of State Director of Health Services for repayment of expenditures for benefit of beneficiary under Medi-Cal program; second, lien established by *Gov. Code § 23004.1* in favor of county for reasonable value of care and treatment furnished to injured person; third, lien established by *Civ. Code § 3045.1* in favor of hospital for 3 days of emergency care and treatment services furnished to injured person. *63 Ops. Cal. Att'y Gen. 808 (1980)*

Municipality has right to enforce ordinance by towing away parked cars belonging to state or federal government and operated by California National Guard when compelling necessity requires removal; no lien attaches to vehicle for payment of towing or storage charges; against public policy to permit sale of public property to satisfy lien. *15 Ops. Cal. Att'y Gen. 3 (1950)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 342.97 Law Reviews

[1] Assessments and Taxes

Shanks, *The Tax Lien Tamed, 8 UCLA L. Rev. 339 (1961)*

Anderson, *Federal Tax Liens--Their Nature and Priority, 41 Cal. L. Rev. 214 (1953)*

[2] Bankruptcy Proceedings

Duca, *The Interaction Between Mechanic's Lien Law and the Bankruptcy Code, 53 Bus. Law. 1283 (1998)*

Note, *A Bankruptcy Trustee's Avoiding Power, a Creditor's Attachment Lien, and the Alter Ego Doctrine, 48 S. Cal. L. Rev. 56 (1974)*

Kennedy, *The Inchoate Lien in Bankruptcy: Some Reflections on Rialto Publishing Co. v. Bass, 17 Stan. L. Rev. 793 (1965)*

[3] Miscellaneous

Lambe, *Enforceability of Subordination Agreements, 19 Real Prop. Prob. & Tr. J. 631 (1984)*

McNamara, *Subordination Agreements as Viewed by Sellers, Purchasers, Construction Lenders, and Title Companies,* 12 Real Est. L.J. 347 (1984)

Note, *Spangler v. Memel: Deficiency Judgments and the Junior Lienor, 24 Hastings L.J. 453 (1973)*

[4] Specific Liens

Note, *The California Agricultural Producer's Lien, Processing Company Insolvencies, and Federal Bankruptcy Law: An Evaluation and Alternative Methods of Protecting Farmers, 36 Hastings L.J. 609 (1985)*

Comment, *California Garagemen's Liens--Impact and Aftermath of Adams v. Department of Motor Vehicles*, 6 Pac. L.J. 98 (1975)

Note, *Banker's Lien and Equitable Setoff: Constitutional and Policy Considerations for Protecting Bank Customers, 27 Stan. L. Rev. 1149 (1975)*

Note, *Banking Setoff: A Study in Commercial Obsolescence, 23 Hastings L.J. 1585 (1972)*

Hogan, *The Innkeeper's Lien at Common Law, 8 Hastings L.J. 33 (1956)*

[5] Vessels

Note, *Admiralty: Supply Liens: Effect of Provision in Time Charter That Charterer Is to Provide and Pay for Supplies: Waiver, 29 Cal. L. Rev. 59 (1940)*

Comment, *What Constitutes a Ship or Vessel for Purposes of Satisfaction of the Claims of Maritime Tort and Contract Creditors, 27 Cal. L. Rev. 572 (1939)*

Note, *Admiralty --Personal Property-- Fixtures--Maritime Liens, 12 S. Cal. L. Rev. 306 (1939)*

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Witkin, Summary of California Law, vol. 2, *Workers' Compensation*, §§ 72,104 (employer's lien on employee's judgment, recovery), 342 (liens on award when unemployment received); vol. 4, *Negotiable Instruments*, § 146 et seq. (banker's lien and setoff); vol. 13, *Equity*, § 23 (marshaling assets) (10th ed. 2005)

Legal Topics:

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

§§ 342.99[Reserved]

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B. Equitable Liens

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§ 342.110 State Statutes

[1] Creation

Lien is created by contract or operation of law. *Civ. Code § 2881*

Lien on property not yet acquired or not yet in existence, or on estate property not yet distributed. *Civ. Code § 2883*

Lien is capable of being created by contract to secure performance of future obligations. *Civ. Code § 2884*

Equitable rights with respect to construction funds are not capable of being asserted if not created by direct written contract. *Civ. Code § 3264*

[2] Probate--Claims Against Estate

Allowance and rejection of claims. *Prob. Code § 9250 et seq.*

Enforcement of liens on property in decedent's estate. *Prob. Code § 9391*

Legal Topics:

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

[1] Construction Fund Claimants

Civ. Code § 3264 abolishes all theories of equitable liens of trust funds. *Sofias v. Bank of America (1985) 172 Cal. App. 3d 583, 586-587, 218 Cal. Rptr. 388* ; *Boyd & Lovesee Lumber Co. v. Western Pacific Financial Corp. (1975) 44 Cal. App. 3d 460, 465, 118 Cal. Rptr. 699*

[2] Conversion

Suit for conversion is proper when person wrongfully exerts dominion over property subject to equitable lien. *McCafferty v. Gilbank (1967) 249 Cal. App. 2d 569, 576, 57 Cal. Rptr. 695*

[3] Creation

[a] In General

Just as an executory contract to sell land is treated in equity as transferring an equitable title to the purchaser, an executory contract to execute a mortgage creates an equitable mortgage if money has been borrowed or other obligation incurred on the faith of it. *In re Destro (9th Cir. 1982) 675 F.2d 1037, 1039*

When specific property is conveyed to trustee charged with or subject to payment of debts to third persons, even though legal title to property vests in trustee, lien is created in favor of those persons and may be enforced in equity. *Hise v. Superior Court (1943) 21 Cal. 2d 614, 626, 134 P.2d 748*

If person misappropriates money of another and purchases property with it, other person has option either to enforce equitable lien on property so acquired, holding wrongdoer personally liable for balance if any, or to enforce constructive trust of property. *Jud Whitehead Heater Co. v. Obler (1952) 111 Cal. App. 2d 861, 873, 245 P.2d 608*

When property of one person can be reached by proceeding in equity by another as security for claim on ground that otherwise the former would be unjustly enriched, equitable lien arises. *Jud Whitehead Heater Co. v. Obler (1952) 111 Cal. App. 2d 861, 873, 245 P.2d 608*

[b] By Lease

Lease creates equitable lien in favor of lessors when lessors waived requirement of formal chattel mortgage but lease required lessees to install furniture and equipment in leased motel units, and to grant lessors chattel mortgage thereon, and provided that chattel mortgage was deemed executed by execution of lease. Garter v. *Metzdorf Associates (1963) 217 Cal. App. 2d 812, 821, 32 Cal. Rptr. 113*

[c] By Violating Agreement for Insurance

When party obligated under agreement for insurance (agreement between lessor and lessee) violates his agreement by procuring insurance payable to himself alone, other party for whose benefit agreement made has equitable lien on proceeds of insurance. *Davidson v. Welch (1969) 270 Cal. App. 2d 220, 237, 75 Cal. Rptr. 676*

[d] Intent

When parties have manifested intention that real property of one of them will be specially set aside as security for payment of an obligation due the other, equity will give effect to the intention by treating the property as though it has been validly mortgaged. *In re Destro (9th Cir. 1982) 675 F.2d 1037, 1039*

Intention of parties is paramount factor in determining whether or not equitable lien created. *Title Ins. & Trust Co. v. California Dev. Co. (1915) 171 Cal. 173, 201, 152 P. 542*

Equitable lien requires intent to fasten obligation to given thing or circumstances such that a just or equitable adjustment of rights of parties contemplates dedication of the property specifically to the obligation. *Lentz v. Lentz (1968) 267 Cal. App. 2d 891, 894, 73 Cal. Rptr. 686*

[e] On Common Property of Tenants in Common

Tenant in common is entitled to redeem common property from mortgage and become entitled to equitable lien on interests of cotenant for his or her just proportion of redemption money. *A.F.C., Inc. v. Brockett (1967) 257 Cal. App. 2d 40, 43, 64 Cal. Rptr. 771*

Liability of cotenants between themselves for payment of liens against common estate is proportionate to their respective interests; one cotenant relieving common property from lien or charge for joint benefit of tenants in common is entitled to equitable lien by subrogation; paying cotenant is deemed only secondarily, not primarily, liable for his or her cotenant's proportion of debt. *A.F.C., Inc. v. Brockett (1967) 257 Cal. App. 2d 40, 43, 64 Cal. Rptr. 771*

[f] On Decedent's Real Property

To establish equitable lien against real estate in favor of widow-beneficiary of life insurance, proceeds of which were applied by insurance company trust deed holder assignee on deceased husband's loan for which policy was collateral security, widow was required to demonstrate that deceased husband intended to make real property the primary security

for debt to insurance company and the policy merely collateral security, and that husband had right to do so. *Lentz v. Lentz (1968) 267 Cal. App. 2d 891, 894, 73 Cal. Rptr. 686*

[g] On Transferred Real Property

If transfer of property made to one person and purchase price advanced by another as loan to transferee, lender is not entitled to equitable lien on property in absence of agreement with transferee that lender is to have the lien. *Hicks v. Bridges (1957) 152 Cal. App. 2d 146, 148, 313 P.2d 15*

[h] Relation-Back Doctrine

Although equitable lien is not judicially recognized until judgment is rendered declaring its existence, lien relates back to time it was created by conduct of parties. *Hise v. Superior Court of Los Angeles County (1943) 21 Cal. 2d 614, 627, 134 P.2d 748* ; *Holder v. Williams (1959) 167 Cal. App. 2d 313, 317, 334 P.2d 291*

Equitable lien is capable of being deemed created at time of occurrences giving rise to underlying substantive right rather than time of judgment or order declaring its existence. *Del Conte Masonry Co. v. Lewis (1971) 16 Cal. App. 3d 678, 681, 94 Cal. Rptr. 439*

[i] Trust Not Created

Equitable lien does not create or embrace trust. *New v. New (1957) 148 Cal. App. 2d 372, 381, 306 P.2d 987*

[j] Unjust Enrichment

Court is capable of impressing property with equitable lien to prevent unjust enrichment. *Beckman v. Mayhew (1975) 49 Cal. App. 3d 529, 534, 122 Cal. Rptr. 604*

[4] Enforcement

[a] By Judicial Action

Holder of equitable lien on personal property for payment of debt who is not in possession of property is required to establish claim and procure order to sell property and satisfy debt. *White v. White (1936) 11 Cal. App. 2d 570, 574, 54 P.2d 482*

[b] Against Third Persons

Person received property as gift and was not bona fide purchaser when person paid only $20.00 for ranch; imposition of equitable lien on property for past wages was proper. *Dodd v. Cantwell (1960) 179 Cal. App. 2d 727, 734-735, 4 Cal. Rptr. 113*

[c] Venue

Action to establish and foreclose lien against real property and for personal judgment against party also interested in land is single action; venue is proper in county in which land situated. *Case v. Kirkwood (1931) 119 Cal. App. 207,*

211, 6 P.2d 110

[5] Liberal Construction

Equity courts look with favor on equitable liens; these liens are frequently employed to do justice and equity and to prevent unfair results. *Holder v. Williams (1959) 167 Cal. App. 2d 313, 316, 334 P.2d 291* ; *Mannon v. Pesula (1943) 59 Cal. App. 2d 597, 606, 139 P.2d 336*

[6] Priorities

Priority based on time of creation is capable of being subordinated to equitable preference accorded to party who first asserted his or her claim. *Smitton v. McCullough (1920) 182 Cal. 530, 536, 189 P. 686* ; *Del Conte Masonry Co. v. Lewis (1971) 16 Cal. App. 3d 678, 681, 94 Cal. Rptr. 439*

Time of creation of lien is last element for consideration when determining priority of equitable claims; claim is capable of predominating only if two interests possess equal degree of right and justice recognized and aided by court of equity. *Smitton v. McCullough (1920) 182 Cal. 530, 534, 189 P. 686* ; *Del Conte Masonry Co. v. Lewis (1971) 16 Cal. App. 3d 678, 681, 94 Cal. Rptr. 439*

In determining priorities between judgment establishing equitable lien and judgment of competing creditor, court need not limit its inquiry to face of judgment establishing equitable lien, but must consider whether circumstances surrounding entry of that judgment render its enforcement inequitable. *Fansler v. Fansler (1988) 206 Cal. App. 3d 81, 87, 253 Cal. Rptr. 186*

[7] Relief Not Available

When development agency had no legal power to levy assessment or development fee on subsequent developer in order to refund option deposit of developer who engaged in unsuccessful negotiations with agency, neither imposition of equitable lien nor constructive trust on redevelopment property was proper because no one was unjustly enriched and unsuccessful developer received return consideration in form of period of exclusive negotiations. *Price Dev. Co. v. Redevelopment Agency (9th Cir. 1988) 852 F.2d 1123, 1127* (applying California law in diversity action)

Attorney's and medical provider's liens on personal injury judgment took precedence over later judgment for child support under *Civ. Code § 2897* rule giving liens priority according to time of their creation; duty to pay child support, which arose prior to creation of attorney's and medical provider's liens, did not give rise to equitable lien in favor of child or custodial parent. *Wujcik v. Wujcik (1994) 21 Cal. App. 4th 1790, 1795, 27 Cal. Rptr. 2d 102*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefEstate, Gift & Trust LawTrustsConstructive TrustsReal Property LawNonmortgage LiensEquitable Liens

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B. Equitable Liens

30-342 California Forms of Pleading and Practice--Annotated § 342.112

§ 342.112 Law Reviews

Gutierrez, *California Civil Code Section 3264 and the Ghost of the Equitable Lien, 30 Hastings L.J. 493 (1979)*

Lefcoe and Schaffer, *Construction Lending and the Equitable Lien, 40 So. Cal. L. Rev. 439 (1967)*

Goulden and Dent, *More on Mechanics Liens, Stop Notices and the Like, 54 Cal. L. Rev. 179 (1966)*

Yerkes, *Enforcement of Equitable Liens*, 32 State B.J. 678 (1958)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefReal Property LawNonmortgage LiensEquitable Liens

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30-342 California Forms of Pleading and Practice--Annotated § 342.113

§ 342.113 Text References

Witkin, Summary of California Law, vol. 4, *Security Transactions in Real Property*, § 13 et seq. (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawNonmortgage LiensGeneral Overview

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[Reserved]

§§ 342.114[Reserved]

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PART III. RESEARCH GUIDE
C. Wage Preferences

30-342 California Forms of Pleading and Practice--Annotated § 342.130

§ 342.130 Federal Statutes

Priority granted to wage claims under Bankruptcy Act. *11 U.S.C. § 507*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawClaimsTypesUnsecured Priority ClaimsCommissions & WagesLabor & Employment LawWage & Hour LawsWage Payments

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§ 342.131 State Statutes

[1] Farm Products and Crops

Wage lien on crops and farm products. *Civ. Code §§ 3061.5, 3061.6*

[2] Priority Relative to Other Claims

Unsecured claims for consumer deposits not exceeding $900 are subordinate to wage claims but superior to other unsecured claims. *Code Civ. Proc. § 1204.5*

Priority over specified tax liens: delinquent tax on unsecured property, tax lien certificate filed for record, personal income tax lien or bank and corporation tax lien, hazardous substance tax. *Rev. & Tax. Code §§ 2191.3, 2191.5, 19253, 43446*

Preference given to state for sales or use taxes is subordinate to preferences given claims for personal services by *Code Civ. Proc. § 1204 et seq., Rev. & Tax Code § 6756*

Any recorded lien based on preferences to wage claims under *Code Civ. Proc. § 1204* or *1206* takes precedence over states lien for wage earner and employer contributions under Unemployment Insurance Act. *Unemp. Ins. Code § 1702*

[3] Wage Claims on Attachment or Execution

Preference to wage claims when levy of any attachment or execution not founded on claim for labor. *Code Civ. Proc. § 1206*

Verified denial of wage claim by either plaintiff or defendant in action in which writ issued. *Code Civ. Proc. § 1207*

Distribution of levy when levy less than wage claims. *Code Civ. Proc. § 1208*

[4] Wages Claims on Sale or Transfer of Business

On the sale or transfer of any business or stock in trade, in bulk or substantial part thereof, that is not in ordinary and regular course of business or trade, unpaid wages of employees of seller or transferor earned within 90 days prior to sale, transfer, or opening of escrow constitute preferred claims and liens as between creditors of seller or transferor, and must be paid first from proceeds of sale or transfer. *Code Civ. Proc. § 1205*

[5] Wage or Other Labor Claims if Assignment or Insolvency

Priority of claims for wages, salaries, and certain commissions earned within 90 days before assignment made for benefit of creditors of employer, including assignment made in connection with insolvency or receivership proceedings. *Code Civ. Proc. § 1204(a)*

Priority of claims for contributions to employee benefit plans arising from services rendered within 180 days before assignment made for benefit of creditors of employer, including assignment made in connection with insolvency or receivership proceedings. *Code Civ. Proc. § 1204(b)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityAccessions & FixturesFixtures & CropsContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesFixtures & CropsLabor & Employment LawWage & Hour LawsWage Payments

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§ 342.132 Decisions

[1] Legislative Intent

Code Civ. Proc. § 1204 et seq. indicate that established policy of Legislature is to protect and promote right of wage earner to all lawfully accrued wages. *Ukiah v. Fones (1966) 64 Cal. 2d 104, 108, 48 Cal. Rptr. 865, 410 P.2d 369*

[2] Wage Claims on Attachment or Execution

[a] Lien Not Created

Code Civ. Proc. § 1206 give preferred claim against debtor and prescribing manner of enforcing claim, but do not create a lien on debtor's property. *Winrod v. Wolters (1903) 141 Cal. 399, 402, 74 P. 1037*

[b] Limitation of 90 Days Prior to Levy

Claim for vacation pay under *Code Civ. Proc. § 1206* is entitled to preferred status assuming that claim arose within 90 days prior to levy of attachment, garnishment, or execution. *American Mach. & Foundry Co. v. Golden State Lanes, Inc. (1967) 253 Cal. App. 2d 855, 857-859, 61 Cal. Rptr. 554* (construing former *Code Civ. Proc. § 1206* prior to 1982 amendment that removed term "garnishment")

Showing that work performed within 90 days prior to levy as necessary in proceeding to establish right of priority for assigned labor claims under *Code Civ. Proc. § 1206 et seq.* *Steele v. International Air Race Asso. (1942) 50 Cal. App. 2d 176, 177-178, 122 P.2d 593*

[c] No Preference if Levy Itself Based on Claim for Labor

Fact that person's compensation measured by percentage of value of work procured by him or her rather than stated salary or daily wage did not affect status of claims; claim for labor that results in action for damages and subsequent levy has priority to claim filed under *Code Civ. Proc. § 1206* after levy. *Levitt v. Faber (1937) 64 P.2d 498*

Procedure under *Code Civ. Proc. § 1206* for obtaining preference for wage claims is not available if original levy of attachment or execution is itself "founded upon a claim for labor"; "labor" as used in this phrase includes personal services and is not limited to those who perform physical labor. *Levitt v. Faber (1937) 64 P.2d 498*

[d] Statutory Creation

Right to priority under *Code Civ. Proc. § 1206* is purely statutory and, thus, is not extended to claims other than those specified in *Code Civ. Proc. § 1206*. *Legg & Shaw Co. v. Worthington (1910) 157 Cal. 488, 492, 108 P. 284* ; *American Mach. & Foundry Co. v. Golden State Lanes, Inc. (1967) 253 Cal. App. 2d 855, 857, 61 Cal. Rptr. 554*

[3] Wage or Other Labor Claims if Assignment or Insolvency

Payments made by an employer pursuant to an industrywide collective bargaining agreement into independent trust funds for medical, welfare, and retirement benefits are contributing wages under *Code Civ. Proc. § 1204*. *Dunlop v. Tremayne (1965) 62 Cal. 2d 427, 431, 42 Cal. Rptr. 438, 398 P.2d 774*

Code Civ. Proc. § 1204 is intended to ease economic burden of employees of businesses in financial distress. *Dunlop v. Tremayne (1965) 62 Cal. 2d 427, 429, 42 Cal. Rptr. 438, 398 P.2d 774* (decided prior to 1979 amendment of *Code Civ. Proc. § 1204*)

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency LawsGovernmentsLegislationInterpretationLabor & Employment LawWage & Hour LawsWage Payments

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30-342 California Forms of Pleading and Practice--Annotated § 342.133

§ 342.133 Law Reviews

Treister, *Priority Statutes and Fringe Benefits*, 40 Cal. St. B.J. 365 (1965)

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[Reserved]

§§ 342.134[Reserved]

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A. Liens In General

30-342 California Forms of Pleading and Practice--Annotated § 342.150

§ 342.150 Complaint to Foreclose Nonpossessory Statutory Lien--General Form

[1] FORM Complaint to Foreclose Nonpossessory Statutory Lien--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO FORECLOSE NONPOSSESS-
_____ [*name*],	)	ORY LIEN
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence*].

[2. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants claims an interest in the property sought to be sold in this proceeding or is indebted to plaintiff on the obligation hereinafter described.)]

[*EITHER, if alleging special lien*

arising from single transaction]

3. On or about _____ [*date*], plaintiff performed the following services for defendant: _____ [*specify facts that give rise to a special lien resulting from the transaction*], for which defendant agreed to pay plaintiff the sum of $_____.

[*OR, if alleging general lien arising from series of transactions*]

3. From _____ [*date*] to _____ [*date*], plaintiff performed the following services for defendant: _____ [*specify facts that give rise to a general lien resulting from the series of transactions*], for which defendant agreed to pay plaintiff the sum of $_____.

[*CONTINUE*]

4. Plaintiff has repeatedly demanded that defendant pay him/her the sum of $_____ for _____ [*specify nature of services*], but defendant has failed and refused, and still fails and refuses, to make the payment, or any part thereof, and no part of that sum has been paid.

5. The performance of the services by plaintiff has given rise to a lien on _____ [*describe defendant's property*] under _____ [*specify code section*].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a lien in the amount of $_____ on defendant's _____ [*specify type of property*];

2. That the lien be foreclosed;

3. That the property be ordered sold for the payment of the lien;

4. For payment of the amount of the lien from the proceeds of the sale;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein

alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This complaint is for use in foreclosing a nonpossessory lien. It should be noted that liens dependent on possession, such as a service lien under *Civ. Code § 3051* or a jeweler's lien under *Civ. Code § 3052a*, may be enforced by the lienholder by selling the property at a sale after the appropriate notice requirements have been met. See *§§ 342.157* and *342.158* for forms of notice under *Civ. Code §§ 3051, 3051a*.

[3] Allegations

This complaint includes initial paragraphs that allege the capacity of defendant and a basis for venue (Paragraph 1), and, at plaintiff's option, fictitiously named defendants (Paragraph 2) [*Code Civ. Proc § 474*]. The complaint also alleges the acts giving rise to a special [*Civ. Code § 2875*] or general [Civ. Code § 2974] lien (Optional Paragraphs 3); plaintiff's demand for performance (Paragraph 4); and the statutory authority for the lien (Paragraph 5) [*see Civ. Code § 2881 et seq.*; *see, e.g., Civ. Code § 3051* (service lien)].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*; *see also Code Civ. Proc. § 128.7(j)*, verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Jurisdiction

An action to enforce a lien on real estate is filed in the superior court [*Cal. Const., art. VI, § 10*]. An action to enforce and foreclose liens on personal property is a limited civil case if the amount of the liens is $25,000 or less [*see Code Civ. Proc. § 86(a)(5)*]. Actions to enforce and foreclose, or petitions to release, liens of mechanics, materialmen, artisans, laborers, and of all other persons to whom liens are given under *Civ. Code § 3109 et seq.*, or to enforce and foreclose an assessment lien on a common interest development as defined in *Civ. Code § 1351*, if the amount of the liens is $25,000 or less, are also limited civil cases, with certain exceptions [*see Code Civ. Proc. § 86(a)(6)*].

[6] Venue

An action to foreclose a lien on real property is to be brought in the county in which the property is situated [*Cal. Const., art. VI, § 5(a)*; *Code Civ. Proc. § 392(a)(2)*]. An action to foreclose a lien on on personal property based on a statute is to be brought in the county in which one or more of the defendants reside at the commencement of the action [*Code Civ. Proc. § 395(a)*] or in which the cause of action arose [*see Code Civ. Proc. § 393(a)*].

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20,

Allegations Commonly Used

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to FAX service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For discussion and forms for use generally in foreclosing mechanics' liens, see Ch. 361, *Mechanics' Liens*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue*

For alternative verification forms, see Ch. 572, *Verification*

[8] State Constitution

Enforcement of lien on real estate must be commenced in county in which real estate affected by the action is situated. *Cal. Const., art. VI, § 5(a)*

Lien is available for mechanics, materialmen, artisans, and laborers of every class on property on which they have bestowed labor or furnished material. *Cal. Const., art. XIV, § 3*

[9] State Statutes

Creation of liens. *Civ. Code § 2881*

Priority of liens is based on time if other things equal. *Civ. Code § 2897*

Jurisdiction to foreclose liens on personal property. *Code Civ. Proc. §§ 85, 86(a)(5)*

Superior court of county in which real property situated has exclusive jurisdiction over action to foreclose lien on property. *Code Civ. Proc. § 392(a)(2)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensLien Priorities

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PART IV. FORMS
A. Liens In General

30-342 California Forms of Pleading and Practice--Annotated § 342.151

§ 342.151 Complaint to Enforce Thresher's Lien [Civ. Code § 3061]

[1] FORM Complaint to Enforce Thresher's Lien [Civ. Code § 3061]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO ENFORCE THRESHER'S LIEN
_____ [*name*],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

Plaintiff alleges:

1. Defendant owns and operates a threshing machine for hire in _____ County, California, and uses that machine to thresh _____ [*name of crop threshed*] for various persons in that county [and throughout the state].

[2. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants claims an interest in the machine.)]

3. At the special request of defendant, plaintiff worked on that threshing machine as a laborer from

_____ [*date*] to _____ [*date*]. Defendant agreed to pay plaintiff the sum of $_____ [per day *or* per hour] for his/her labor.

4. Although plaintiff has repeatedly demanded that defendant pay him/her the sum of $_____ for the work and labor performed, the sum still remaining to be paid by defendant, defendant has failed and refused, and still fails and refuses, to make the payment, or any part thereof, and no part of that sum has been paid.

5. Plaintiff stopped working for defendant on _____ [*date*], within 10 days of the date of filing this action. Therefore, pursuant to *Civil Code Section 3061*, plaintiff claims a lien on defendant's threshing machine for the amount due plaintiff for his/her labor.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a lien in the amount of $_____ on defendant's threshing machine;

2. That the lien be foreclosed;

3. That the threshing machine be ordered sold for the payment of the lien;

4. For payment of the amount of the lien from the proceeds of the sale;

5. For costs of suit incurred herein; and

6. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 342.150.*]

[2] Use of Form

This complaint is for use in enforcing a laborer's lien on a threshing machine on which the laborer has worked.

[3] Thresher's Lien

Every person performing work or labor in, with, about, or on any barley crusher, threshing machine or engine, horse-power, wagon, or other appliance thereof, while engaged in crushing or threshing, has a lien thereon to the extent of the value of his services [*Civ. Code § 3061*].

[4] Statute of Limitations

A thresher's lien extends for ten days after any such person ceases the work or labor, provided that within that time an action is brought to recover the amount of the claim [*Civ. Code § 3061*; *see* Paragraph 5].

[5] Satisfaction of Lien

If judgment is given in favor of the plaintiff in any such action, and it is further found that plaintiff is entitled to a lien

under *Civ. Code § 3061*, property subject to that lien or as much of that property as may be necessary may be sold to satisfy the judgment. However, if several judgments have been recovered against the same property for the enforcement of the liens, the proceeds of the sale must be divided pro rata among the judgment creditors [*Civ. Code § 3061*].

[6] Decisions

Person may maintain lien for services against threshing machine when labor performed for person in lawful possession but not actual owner of machine. *Holt Mfg. Co. v. Collins (1908) 154 Cal. 265, 270, 97 P. 16* ; *Lambert v. Davis (1897) 116 Cal. 292, 294, 48 P. 123*

Action to foreclose lien on threshing machine is not proceeding in rem; action to foreclose lien affects only owner made party defendant to action. *Holt Mfg. Co. v. Collins (1908) 154 Cal. 265, 270, 97 P. 16*

Owner of threshing machine was liable only for value of labor as determined by court; lien was assignable. *Clark v. Brown (1903) 141 Cal. 93, 94-95, 74 P. 548*

[7] Cross References

For a related form, see *§ 342.150*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsTrue in Rem ActionsCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 342 LIENS AND WAGE PREFERENCES
PART IV. FORMS
A. Liens In General

30-342 California Forms of Pleading and Practice--Annotated § 342.152

§ 342.152 Complaint to Enforce Harvester's Lien [Civ. Code § 3061.5]

[1] FORM Complaint to Enforce Harvester's Lien [Civ. Code § 3061.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO ENFORCE HARVESTER'S LI-
_____ [*name*],	)	EN
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Defendant is a limited partnership that _____ [owns and grows *or* produces] _____ [crops *and/or* farm products], as defined in *Food and Agricultural Code Section 55403*, in _____ County, California.

[2. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is and agent of defendant or is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.)]

3. At the special request of defendant [and his/her agent(s)], plaintiff worked to _____ [harvest *and/or* transport harvested] _____ [crops *and/or* farm products] from _____ [*date*] to _____ [*date*]. Defendant agreed to pay plaintiff the sum of $_____ [per day *or* per hour] for his/her labor.

4. Although plaintiff has repeatedly demanded that defendant pay him/her the sum of $_____ for the work and labor performed, the sum still remains to be paid by defendant, defendant has failed and refused, and still fails and refuses, to make the payment, or any part thereof, and no part of that sum has been paid.

5. Plaintiff stopped working for defendant on _____ [*date*], within 45 days of the date of filing this action. Therefore, pursuant to *Civil Code Section 3061.5*, plaintiff claims a lien on the severed crops or farm products or their sale for the amount due plaintiff for his/her labor.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a lien in the amount of $_____ on defendant's severed crops or farm products or their sale;

2. That the lien be foreclosed;

3. That the severed crops or farm products be ordered sold for the payment of the lien;

4. For payment of the amount of the lien from the proceeds of the sale;

5. For costs of suit incurred herein; and

6. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 342.150.*]

[2] Use of Form

This complaint is for use in enforcing a harvester's lien on the severed crops or farm products that he or she has harvested or transported.

[3] Harvester's Lien

Every person who as an employee has performed work or labor harvesting or transporting harvested crops or farm products, as defined in *Food & Agric. Code § 55403*, that are owned and grown or produced by a limited partnership has a lien on any and all of the severed crops or severed farm products or proceeds from their sale for the value of the labor done up to a maximum of earnings for two weeks [*Civ. Code 3061.5(a)*].

The liens attach whether the work was done at the instance of the owner who is the grower or producer of severed crops or farm products or of any other person acting by or under the owner's authority, directly or indirectly, as contractor or otherwise; and every contractor, subcontractor, or other person having charge of the harvesting or transporting of the severed crops or farm products is the agent of the owner for the purposes of *Civ. Code § 3061.5* [*Civ. Code § 3061.5(a)*

].

Civil Code § 3061.5(a) refers to a limited partnership "as defined in *Section 15501 of the Corporations Code*," which was enacted as part of the Uniform Limited Partnership Act (ULPA) [*see Corp. Code § 15501 et seq.* (ULPA)]. However, after the enactment of the ULPA, California limited partnership laws have undergone two major revisions, in the California Revised Limited Partnership Act (CRLPA) [*see Corp. Code § 15611 et seq.* (CRLPA)] and the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code § 15900 et seq.* (ULPA '08)]. Until January 1, 2010, a limited partnership may be governed by any of the three acts, depending on the partnership's date of formation and certain elections made by the partnership [*see Corp. Code § 15534* (ULPA); *Corp. Code §§ 15711, 15714, 15724* (CRLPA); *Corp. Code § 15912.06(a)(1)* (ULPA '08)]. However, effective January 1, 2010, all limited partnerships, regardless of the date of formation, generally will be governed by the ULPA '08 [*Corp. Code § 15912.06(b)* (ULPA '08)]. All three of the acts contain substantially the same definition of a limited partnership [*see Corp. Code § 15501* (ULPA); *Corp. Code § 15611(r)* (CRLPA); *Corp. Code § 15901.02(q)* (ULPA '08)]. Accordingly, although *Civil Code § 3061.5(a)* refers only to the ULPA definition of a limited partnership [*see Corp. Code § 15501* (ULPA)], it presumably is applicable to harvested crops or farm products owned, grown, or produced by any California limited partnership. For further coverage of limited partnership laws, see Ch. 400, *Partnerships: Governing Statutes* ; Ch. 404, *Partnerships: Actions Between Limited Partners and Partnerships* ; Ch. 405, *Partnerships: Actions Between Limited Partners or Partnerships and Third Parties* ; and Ch. 406, *Partnerships: Dissolution* .

[4] Statute of Limitations

The lien expires 45 days after claimant ceases the work or labor unless within that time the claimant, his or her assignee, or successor in interest files a claim with the Labor Commissioner or brings suit to foreclose the lien, in which case the lien continues in force until the claim filed with the Labor Commission or the lien foreclosure suit is finally determined and closed [*Civ. Code § 3061.6(a)*; *see* Paragraph 5].

[5] Claim Filed With Labor Commissioner

If a claim is filed with the Labor Commissioner, the Labor Commissioner must act on and finally determine the claim within 180 days after filing. If the proceedings are not prosecuted to trial within two years after their commencement, the court may in its discretion dismiss them for want of prosecution [*Civ. Code § 3061.6(a)*].

When a claim is filed with the Labor Commissioner, the Labor Commissioner, if the owner who is the grower or producer has failed to satisfy the conditions of *Civ. Code § 3061.5(d)*, must determine whether or not the owner is capable financially of satisfying the claim [*Civ. Code § 3061.6(b)*]. If the Labor Commissioner determines that a lien is necessary to protect the interest of claimants, the Labor Commissioner must file the lien on the crop, the severed farm product, or their proceeds, and notify, in writing, the owner and all persons who have filed financing statements on the crop, the farm product, or their proceeds pursuant to the provisions of the Commercial Code [*Civ. Code § 3061.6(b)*].

[6] Attachment of Crops, Farm Products, or Sale Proceeds

The plaintiff in any lien foreclosure suit, at the time of issuing the summons or at any time afterwards, may have the severed crops or severed farm products or proceeds from their sale on which the lien subsists attached, as provided in *Code Civ. Proc. § 488.010 et seq.*, on delivering to the clerk an appropriate affidavit, by or on behalf of the plaintiff [*Civ. Code § 3061.6(c)*; *see generally* Ch. 15, *Affidavits, Certificates, and Declarations* and Ch. 62, *Attachment*]. The affidavit must show that [*Civ. Code § 3061.6(c)*]:

- The plaintiff, or his assignor or predecessor in interest, performed labor in harvesting or transporting the severed corps or farm products, or both.

- The labor has not been paid for.

- The sum for which the attachment is asked does not exceed the lesser of the reasonable value of the services rendered or if earnings, does not exceed the lesser of two weeks unpaid earnings or reasonable value of actual services rendered, or 25 percent of the fair market value of the severed crop or severed farm products.

- The attachment is not sought and the action is not brought to hinder, delay or defraud any creditor or creditors of any defendant.

[7] Joinder of Claimants

Any number of persons claiming liens under *Civ. Code §§ 3061.5* and *3061.6* may join in the same action. When separate actions are commenced, the court may consolidate them [*Civ. Code § 3061.6(d)*; *see generally* Ch. 125, *Consolidation, Severance, and Coordination of Actions*].

If after sale of the property subject to the liens provided for in *Civ. Code §§ 3061.5* and *3061.6*, under the judgment or decree of foreclosure of the lien or liens, there is a deficiency of proceeds, the proceeds must be divided pro rata among the lien claimants whose liens are established, regardless of the order in which the liens were created or the order in which the suits to foreclose same were commenced [*Civ. Code § 3061.6(d)*]. Judgment for the deficiency may be docketed against the party personally liable therefor and his or her sureties [*Civ. Code § 3061.6(d)*].

[8] Priority of Lien

The liens provided for in *Civ. Code § 3061.5* attach from the date of the commencement of the work or labor, and are preferred liens, prior in dignity to all other liens, claims, or encumbrances [*Civ. Code § 3061.5(b)*].

[9] Limit of Lien Amount

Except as provided in *Civ. Code § 3061.5(a)* and *(c)*, the liens provided for in *Civ. Code § 3061.5* will not be limited as to amount by any contract price agreed on between the owner who is the grower or producer of the severed crops or severed farm products and any contractor, but may not exceed in amount the reasonable value of the labor done, nor the price agreed on for the labor between the claimant and the employer [*Civ. Code § 3061.5(b)*].

[10] Buyer in Ordinary Course of Business Takes Free of Lien

A buyer in the ordinary course of business, as defined in *Com. Code § 1201(b)(9)*, takes free of a harvester's lien, notwithstanding the fact that the lien is perfected and the buyer knows of its existence [*Civ. Code § 3061.5(e)*].

[11] Order for Sale of Perishable Goods

If the harvester's lien has attached to perishable goods, the lienholder, during the period for which the lien is in effect and prior to the filing of a foreclosure suit, may obtain a court order for the sale of the perishable goods pursuant to the provisions of *Code Civ. Proc. § 488.530* [*Civ. Code § 3061.6(f)*]. However, in the event that the perishable crop is subject in whole or in part to a valid marketing agreement that is in force between the owner who is the grower or producer and an agricultural marketing cooperative organized under the Food and Agriculture Code or similar laws of other states, the agricultural marketing cooperative may purchase or otherwise take possession or custody of the crop or portion thereof according to the terms of the marketing agreement [*Civ. Code § 3061.6(f)*]. Any moneys due and payable to the owner who is the grower or producer in return for the crop must be paid by the agricultural marketing cooperative to the court [*Civ. Code § 3061.6(f)*].

[12] Separate Action and Attachment Possible

Civ. Code § 3061.5 or *3061.6* do not impair or affect the right of any person to whom any debt may be due for work done to maintain a personal action to recover the debt against the person liable therefor, or his or her sureties, either in connection with the lien suit or in a separate action [*Civ. Code § 3061.6(e)*]. The person bringing a personal action may take out a separate attachment notwithstanding his or her lien, and in his or her affidavit to procure an attachment need not state that his or her demand is not secured by a lien [*Civ. Code § 3061.6(e)*; *see § 342.152[6]* (affidavit procedure)]. The judgment, if any, obtained by the plaintiff in the personal action will not impair or merge any harvester's lien held by the plaintiff, provided that any money collected on the judgment must be credited on the amount of the lien in any action brought to enforce the same, in accordance with *Civ. Code § 3061.5* [*Civ. Code § 3061.6(e)*].

[13] Bond Eliminates Lien

No person has a lien if the owner who is the grower or producer of the severed crops or farm products, or their proceeds, who otherwise would be subject to a lien pursuant to *Civ. Code § 3061.5(a)*, either gives directly, or requires a person or entity hired or used to furnish labor in connection with harvesting or transporting the severed crops, to give to the Labor Commissioner prior to the harvest and for 45 days after its completion, a bond executed by an admitted surety insurer in an amount and form acceptable to the Labor Commissioner, which is conditioned on the payment of all wages found to be due and unpaid in connection with the operations under any provision of the Civil Code [*Civ. Code § 3061.5(d)*].

[14] Cross References

For a related form, see *§ 342.150*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGoodsFarm ProductsCommercial Law (UCC)Secured Transactions (Article 9)PriorityLiensContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesFixtures & CropsReal Property LawNonmortgage LiensMechanics' Liens

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30-342 California Forms of Pleading and Practice--Annotated § 342.153

§ 342.153 Breeder's Lien--Verified Claim [Civ. Code § 3062]

[1] FORM Breeder's Lien--Verified Claim [Civ. Code § 3062]

CLAIM OF BREEDER'S LIEN

I, _____ [*name*], depose and say that:

1. I _____ [am the owner of *or* have charge of] a _____ [stallion *or* jack *or* bull] that is named _____ [*name*] and registered under Register No. _____.

2. On _____ [*date*], propagating services were performed at _____ [*location*], California, on a _____ [mare *or* cow] that is named _____ [*name*] and registered under Register No. _____.

3. The name of the [reputed] owner of the _____ [mare *or* cow] is _____ [*name*].

4. The value of the above-mentioned services was $_____, neither all nor any part of which has been paid. Therefore, pursuant to *Civil Code Section 3062*, a lien is claimed on the _____ [mare *or* cow] and on the offspring of the above-mentioned services in that amount.
Dated: _____.

_____ [*signature of owner*]

VERIFICATION

)

STATE OF CALIFORNIA) ss
COUNTY OF_____)
_____

_____ [*Name*], being duly sworn, deposes and says that:

He/She _____ [is the owner *or* has charge] of the _____ [stallion *or* jack *or* bull] in the foregoing claim of breeder's lien. He/She has read the claim of breeder's lien and knows the contents thereof. The same is true of his/her own knowledge, except as to those matters that are therein stated on his/her information or belief, and as to those matters, he/she believes it to be true.

_____ [*signature*]

Subscribed and sworn to before me on _____ [*date*].

_____ [*signature*]

Notary Public

[2] Use of Form

This claim is for use in recording a verified claim of breeder's lien on a mare or cow and any offspring that resulted from propagating services provided by a stallion, jack, or bull.

[3] Lien for Services of Stallion, Jack, or Bull

Every owner or person having in charge any stallion, jack, or bull used for propagating purposes has a lien for the agreed price of its service on any mare or cow and on the offspring of the service [*Civ. Code § 3062*].

The lien is not available when some willfully false representation concerning the breeding or pedigree of the stallion, jack, or bull has been made or published by the owner or person in charge or some other person at the request or instigation of the owner or person in charge [*Civ. Code § 3062*]. Every person who willfully advertises any cattle, horse, sheep, swine, or other domestic animal for purposes of copulation or profit as having a pedigree other than the true pedigree of the animal forfeits all right by law to collect pay for the services of the animal [*Civ. Code § 3064.1*].

[4] Recording Claim of Lien

Within 90 days after the service on account of which the lien is claimed, every claimant of lien under *Civ. Code § 3062* must record in the office of the county recorder of the county where the mare or cow subject thereto is kept a verified claim. It must contain a particular description of the mare or cow, the date and place of service, the name of the owner or reputed owner of the mare or cow, a description by name or otherwise of the stallion, jack, or bull performing the service, the name of the owner or person in charge thereof, and the amount of the lien [*Civ. Code § 3063*].

When the claim is recorded it is notice to subsequent purchasers and encumbrancers of the mare or cow and of the offspring of the service. The length of the notice is one year after the recording [*Civ. Code § 3063*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCommercial Law (UCC)Secured Transactions (Article 9)Attachment of Security InterestsGeneral OverviewContracts LawSecured TransactionsAttachment of Security InterestsGeneral Overview

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30-342 California Forms of Pleading and Practice--Annotated § 342.154

§ 342.154 Complaint to Impress and Foreclose Breeder's Lien for Service of Stallion, Jack, or Bull [Civ. Code § 3062 et seq.]

[1] FORM Complaint to Impress and Foreclose Breeder's Lien for Service of Stallion, Jack, or Bull [Civ. Code § 3062 et seq.]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO ENFORCE BREEDER'S LIEN
_____ [*name*],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

1. At all times herein mentioned, plaintiff owned, and still owns, a certain _____ [stallion *or* jack *or* bull] named _____ [*name*] with Register No. _____, which is kept by plaintiff on his/her ranch in _____ County, California.

2. At all times herein mentioned, defendant owned, and still owns, a certain _____ [mare *or* cow] named _____ [*name*] with Register No. _____, which is kept by defendant on his/her ranch in _____ County, California.

[3. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants claims an interest in the _____ [stallion *or* jack *or* bull].)]

4. On _____ [*date*], at the ranch of plaintiff and at the special request of defendant, plaintiff furnished propagation services of his _____ [stallion *or* jack *or* bull] to the _____ [mare *or* cow] of defendant. Defendant promised to pay plaintiff the sum of $_____ for those services.

[5. Offspring born to the mare as a result of the service of plaintiff's _____ (stallion *or* jack *or* bull) is being kept by defendant at his/her ranch in _____ County, California.]

6. Pursuant to *Civil Code Section 3063*, plaintiff filed a verified claim of breeder's lien in the office of the County Recorder of _____ County, California on _____ [*date*], which is within 90 days after the services were furnished. A copy of the claim of breeder's lien is attached hereto as Exhibit A and made a part hereof.

7. Although plaintiff has repeatedly demanded payment from defendant of the sum of $_____ for the services, defendant failed and refused, and still fails and refuses, to make the payment or any part of it.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____;

2. That plaintiff have a lien in the amount of $_____ on the _____ [mare *or* cow] [and offspring];

3. That the lien be foreclosed and the _____ [mare *or* cow] [and offspring] be sold to satisfy the lien;

4. That plaintiff be paid the amount of the lien from the proceeds of the sale;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 342.150.*]

[2] Use of Form

This complaint is for use in enforcing a breeder's lien for the value of unpaid propagation services rendered by a stallion, jack, or bull to a mare or cow.

[3] Venue

An action to enforce any lien created under *Civ. Code § 3062* may be brought in any county wherein any of the property

subject thereto may be found [*Civ. Code § 3064*].

[4] Allegations

This complaint includes initial paragraphs that allege the identity and capacity of plaintiff and defendant, and a basis for venue (Paragraphs 1, 2), and, at plaintiff's option, fictitiously named defendants (Paragraph 3) [*Code Civ. Proc § 474*]. The complaint also alleges the acts giving rise to the lien (Paragraph 4), the existence of offspring (Optional Paragraph 5), adherence to statutory prerequisites (Paragraph 6) [*see Civ. Code § 3063*], and plaintiff's demand for performance, and defendant's refusal to perform (Paragraph 7).

[5] Cross References

For related forms, see *§§ 342.150* and *342.153*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCommercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionGeneral OverviewContracts LawSecured TransactionsDefaultForeclosure & RepossessionGeneral Overview

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30-342 California Forms of Pleading and Practice--Annotated § 342.155

§ 342.155 Hospital Lien--Notice of Claim of Lien by Hospital to Person Alleged to Be Liable to Injured Person [Civ. Code § 3045.1 et seq.]

[1] FORM Hospital Lien--Notice of Claim of Lien by Hospital to Person Alleged to Be Liable to Injured Person [Civ. Code § 3045.1 et seq.]

TO: _____ [*name of person alleged to be liable to injured person*]
_____ [*street address*]
_____ [*city*], California

NOTICE IS HEREBY GIVEN that the undersigned furnished _____ [*specify services rendered, e.g.,* emergency medical treatment and ongoing medical and other services] to _____ [*name of injured person*] on _____ [*date*] [through _____ (*date*)]. Pursuant to *Civil Code Sections 3045.1* and *3045.2*, the undersigned claims a lien on any damages that _____ [*name of injured person*] may recover from you.

Pursuant to *Civil Code Section 3045.3*, the following information is provided:

1. Name and address of person _____ [insured *or* injured]:

_____ [*name of person*]
_____ [*street address*]
_____ [*city*], California

2. Name and address of hospital:

_____ Hospital
_____ [*street address*]
_____ [*city*], California

3. Date of accident: _____ [*date*].

4. Amount claimed as reasonable and necessary charges: $_____.

5. Name of person alleged to be liable:

_____ [*name of person*]
_____ [*street address*]
_____ [*city*], California
Dated: _____.

_____ Hospital

By _____ [*signature*]

_____ [*office or title*]

[2] Use of Form

This notice is for use by a hospital in giving notice to all known tortfeasors and their liability insurers of the claim of a lien for the value of emergency and ongoing medical services that the hospital rendered to an injured person.

[3] Hospital Lien on Damages Recovered by Injured Person

[a] Availability

Every person, partnership, association, corporation, public entity, or other institution or body maintaining a hospital licensed under the laws of California that furnishes emergency and ongoing medical or other services to any person injured by reason of an accident or negligent or other wrongful act that is not covered by the workers' compensation laws, if the person has a claim against another for damages on account of his or her injuries, has a lien on the damages recovered or to be recovered by the person or by his or her heirs or personal representative in case of his or her death. The lien extends to the amount of the reasonable and necessary charges of the hospital and any hospital affiliated health facility [*see Health and Safety Code § 1250*] in which services are provided for the treatment, care, and maintenance of the person in the hospital (or health facility affiliated with the hospital) resulting from the accident or negligent or other wrongful act [*Civ. Code § 3045.1*].

A lien under the Hospital Lien Act (HLA) [*Civ. Code § 3045.1 et seq.*] requires the existence of an underlying debt owed by the patient to the hospital. Absent such a debt, no lien may attach. In one case, a hospital received payment from a patient and his health insurer and agreed to accept that payment as "payment in full" for its services. Nonetheless, after the patient brought a tort claim against the driver who caused the underlying accident, the hospital filed a notice of lien under the HLA against any settlement or judgement in the tort action, seeking to recover the difference between the "actual" cost of the medical services provided and the negotiated amount received by the hospital under its provider agreement. The California Supreme Court concluded that the hospital could not assert a lien under the HLA against the patient's recovery from the third party tortfeasor [*Parnell v. Adventist Health System/West (2005) 35 Cal. 4th 595, 609, 26 Cal. Rptr. 3d 569, 109 P.3d 69 , disapproving Swanson v. St. John's Regional Medical Center (2002) 97 Cal. App. 4th 245, 118 Cal. Rptr. 2d 325*].

The HLA does not state that a hospital lien takes priority over competing liens. On the contrary, the HLA expressly recognizes that other liens may take priority. It provides that any entity which makes payment to the injured person

must first pay the hospital as much of its reasonable costs as can be satisfied out of 50 percent of the proceeds of a judgment or settlement "after paying any prior liens" [*Civ. Code § 3045.4*]. By failing to afford hospital liens first priority and by expressly acknowledging that other liens may take priority over hospital liens, the Legislature expressed its intent to apply the time-based priority (that is, the lien first-in-time has priority) set forth in *Civ. Code § 2897* to liens arising under the HLA [*County of San Bernardino v. Calderon (2007) 148 Cal. App. 4th 1103, 1113, 56 Cal. Rptr. 3d 333]* .

[b] Lien on Damages by Judgment or by Settlement

The hospital lien is applicable whether the damages are recovered or are to be recovered by judgment, settlement, or compromise [*Civ. Code § 3045.2*].

[c] Exemption for Claims Against Common Carrier

Hospital liens do not apply to any claim or cause of action against a common carrier subject to the jurisdiction of the Public Utilities Commission or the Interstate Commerce Commission [*Civ. Code § 3045.6*]; for discussion of who are common carriers, see Ch. 109, *Carriers* .

[4] Notice to Person Liable and Insurance Carrier

A hospital lien is not effective unless a written notice is delivered or mailed by registered mail, return receipt request and postage prepaid, to each person, firm, or corporation known to the hospital and alleged to be liable to the injured person for the injuries sustained. The notice must contain the name and address of the injured person, the date of the accident, the name and location of the hospital, the amount claimed as reasonable and necessary charges, and the name of each person, firm, or corporation known to the hospital and alleged to be liable to the injured person for the injuries received. The notice must be served or mailed prior to the payment of any moneys to the injured person or his or her attorney or legal representative as compensation for the injuries [*Civ. Code § 3045.3*]. The Legislature intended that a lien under the Hospital Lien Act [*Civ. Code § 3045.1 et seq.*] comes into existence when the notice provided for in *Civ. Code § 3045.3* is given [*County of San Bernardino v. Calderon (2007) 148 Cal. App. 4th 1103, 1109, 56 Cal. Rptr. 3d 333]* .

The hospital also must deliver or mail by registered mail, return receipt requested and postage prepaid, a copy of the notice to any insurance carrier known to the hospital that has insured the person, firm, or corporation alleged to be liable to the injured person against the liability. The person, firm, or corporation alleged to be liable to the injured person must, on request of the hospital, disclose to the hospital the name of the insurance carrier that insured it against the liability [*Civ. Code § 3045.3*].

The class of persons who are "alleged to be liable to the injured person for the injuries received" [*Civ. Code § 3045.3*] would not include the injured person's insurer that provided uninsured motorist coverage (including underinsured motorist coverage), even though the insurer could resist a claim under such coverage by asserting any defense that the tortfeasor could assert. The possibility that the uninsured-motorist insurer could stand in the tortfeasor's place for the limited purpose of resisting a claim by its own insured cannot make the Hospital Lien Act applicable to that insurer, as though the claim for uninsured-motorist benefits were equivalent to a claim for damages against the tortfeasor. For the same reason, that insurer is not in the class of "insurance carrier[s that have] ... insured the person, firm, or corporation alleged to be liable to the injured person against the liability" [*Civ. Code § 3045.3*]. A notice delivered or mailed to that insurer would be ineffectual under the Act, since the hospital can have no lien on the injured person's uninsured motorist benefits [*Weston Reid, LLC v. American Ins. Group, Inc. (2009) 174 Cal. App. 4th 940, 949-950, 94 Cal. Rptr. 3d 748*].

[5] Liability for Payment of Hospital's Lien Claim

Any person, firm, or corporation, including but not limited to an insurance carrier, making any payment to the injured person, or to his or her attorney, heirs, or legal representative, for the injuries sustained, after the receipt of the notice as provided by *Civ. Code § 3045.3*, without paying to the hospital the amount of its lien claimed in the notice (or so much thereof as can be satisfied out of 50 percent of the moneys due under any final judgment, compromise, or settlement agreement after paying any prior liens) is liable to the hospital for the amount of its lien claimed in the notice that the hospital was entitled to receive as payment for the medical care and services rendered to the injured person [*Civ. Code § 3045.4*]. When an insurer or other payor fails to pay a hospital "the amount of its lien ... or so much thereof as can be satisfied out of 50 percent of the moneys" at the time the judgment, compromise, or settlement is disbursed, the insurer or other payor remains liable to the hospital for only that amount, not the full amount of the lien [*Mercy Hospital v. Farmers (1997) 15 Cal. 4th 213, 223, 61 Cal. Rptr. 2d 638, 932 P.2d 210]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationGeneral OverviewHealthcare LawInsurancePatient ObligationsTortsDamagesGeneral OverviewTortsDamagesCompensatory DamagesMedical ExpensesTortsProcedureSettlementsGeneral Overview

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30-342 California Forms of Pleading and Practice--Annotated § 342.156

§ 342.156 Complaint to Enforce Hospital Lien for Emergency and Ongoing Medical Treatment [Civ. Code §§ 3045.1, 3045.4, 3045.5]

[1] FORM Complaint to Enforce Hospital Lien for Emergency and Ongoing Medical Treatment [Civ. Code §§ 3045.1, 3045.4, 3045.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ Hospital, a corporation,	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ Insurance Company,	)	COMPLAINT TO ENFORCE LIEN FOR EMER-
a corporation,	)	GENCY AND ONGOING MEDICAL TREAT-
[and DOES I through _____,]	)	MENT
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of California and authorized to do business, and engaging in the business of conducting a [private] hospital in _____ County, California.

2. Defendant _____ Insurance Company is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of California and engaged in the insurance business with its principal office for the transaction of business in _____ County, California [*or other capacity and residence of defendant*].

[3. *Fictitious name allegation, if appropriate. See § 342.150, Paragraph 2.*]

4. From _____ [time], on _____ [*date*], to _____ [*time*], on _____ [*date*], plaintiff furnished _____ [*specify services rendered, e.g.,* emergency medical treatment and ongoing medical and other services] to _____ [*name of injured person*] for a total of _____ hours. The treatment was for injuries received by him/her and had a reasonable value of $_____. The amount owed by _____ [*name of injured person*] and due and unpaid to plaintiff is $_____.

5. Pursuant to *Civil Code Section 3045.3*, on _____ [*date*], plaintiff sent a notice of lien to defendant by registered mail, with return receipt requested and proper postage prepaid. A copy of that notice is attached hereto as Exhibit A and incorporated by reference.

6. Plaintiff is informed and believes and thereon alleges that defendant thereafter paid _____ [*name of injured person*] $_____ in satisfaction of all claims that _____ [*name of injured person*] had against defendant for personal injuries received in the accident referred to in the notice of lien. That payment was made by defendant without paying to plaintiff the amount of its lien claim or any part thereof.

7. Although plaintiff repeatedly demanded that defendant pay $_____ to plaintiff prior to filing this complaint, defendant has failed and refused and still fails and refuses to make such a payment. Plaintiff has received nothing in payment from defendant for the services rendered to _____ [*name of injured person*].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For $_____ as the amount of the lien, or as much as can be satisfied out of 50 percent of the money due under any final judgment, compromise, or settlement agreement after paying any prior liens;

2. For costs of suit incurred herein; and

3. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am _____ [*specify office, e.g.,* chief administrative officer] of _____ Hospital, which is the plaintiff in this action, and I have been authorized to make this verification on its behalf. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This complaint is for use by a hospital to enforce its lien on the damages that a person to whom it rendered emergency and ongoing medical treatment recovered from an insurance company. With appropriate modifications, the complaint may also be used to enforce the lien against the person alleged to be liable for those injuries.

[3] Amount of Lien

If a hospital is paid at the time the judgment, compromise, or settlement is disbursed, it is entitled to receive as much of its lien as can be satisfied out of 50 percent of the recovery [*Civ. Code §§ 3045.2, 3045.4*; *see § 342.155[5]*]. Even if the hospital is not paid at the time the patient's recovery against the third person's insurer is disbursed, however, the insurer or other payor remains liable to the hospital for only that amount, not the full amount of the lien [*Mercy Hospital v. Farmers (1997) 15 Cal. 4th 213, 223, 61 Cal. Rptr. 2d 638, 932 P.2d 210]* .

[4] Enforcement of Hospital Lien

The person, partnership, association, corporation, or other institution or body maintaining the hospital may enforce its lien by filing an action at law against the person, firm, or corporation making the payment and to whom the notice was given [*Civ. Code § 3045.5*].

[5] Allegations

This complaint includes initial paragraphs that allege the identity and capacity of plaintiff and defendant, and a basis for venue (Paragraphs 1, 2), and, at plaintiff's option, fictitiously named defendants (Paragraph 3) [*Code Civ. Proc § 474*]. The complaint also alleges the acts giving rise to the lien (Paragraph 4) [*see Civ. Code § 3045.1*; *Parnell v. Adventist Health System/West (2005) 35 Cal. 4th 595, 609, 26 Cal. Rptr. 3d 569, 109 P.3d 69* (lien under *Civ. Code § 3045.1* requires existence of underlying debt owed by patient to hospital; in absence of such debt, no lien may attach)], adherence to statutory prerequisites (Paragraphs 5, 6) [*see Civ. Code § 3045.3*], and plaintiff's demand for performance and defendant's refusal to perform (Paragraph 7).

[6] Statute of Limitations

The action may be filed at any time within one year after the date of the payment to the injured person or to the injured person's heirs, attorney, or legal representative [*Civ. Code § 3045.5*].

[7] Cross References

For related forms, see *§§ 342.150, 342.155*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsHealthcare LawBusiness Administration & OrganizationGeneral OverviewHealthcare LawInsurancePatient Obligations

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30-342 California Forms of Pleading and Practice--Annotated § 342.157

§ 342.157 Possessory Lien--Notice to Legal Owner of Property That Lien Will Be Claimed [Civ. Code §§ 3051, 3051a]

[1] FORM Possessory Lien--Notice to Legal Owner of Property That Lien Will Be Claimed [Civ. Code §§ 3051, 3051a]

_____ [*name of holder of legal title*]

_____ [*street address*]

_____ [*city, state, zip code*]

NOTICE OF INTENT TO CLAIM LIEN FOR
_____ [WORK *and/or* SERVICES
and/or CARE *and/or* SAFEKEEPING]

NOTICE IS HEREBY GIVEN pursuant to *Civil Code Section 3051a* that on _____ [*date*], _____ [*name of person requesting work*] requested the undersigned to _____ [*specify nature of work, services, care, or safekeeping requested*] on _____ [*identify article of personal property*]. The undersigned expects to commence the work specified above on _____ [*date*]. The approximate charge for the work is estimated to be $_____. The undersigned will claim a lien for the services pursuant to *Civil Code Section 3051* for the amount of charges actually incurred. If you have any objections to the above-specified work, please contact the undersigned at _____ [*address*], before work commences. The phone number of the undersigned is _____.
Dated: _____.

_____ [*lien claimant*]

By _____ [*signature*]

_____ [*typed name and title*]

[2] Use of Form

This notice is for use in giving notice to the holder of the legal title to personal property that the person giving the notice is about to perform work, services, or care on the property of a value in excess of $300, or is about to provide safekeeping of the property of a value in excess of $200. It notifies the legal owner that a possessory lien will be claimed on the property under *Civ. Code § 3051* [*Civ. Code § 3051a*].

[3] Persons Who Qualify for Lien

The following classes of persons may claim possessory liens under *Civ. Code § 3051*:

- Persons rendering service for the protection, improvement, safekeeping, or carriage of personal property.
- Persons who make, alter, or repair personal property.
- Foundry proprietors and persons conducting a foundry business.
- Plastic fabricators and persons conducting a plastic fabricating business.
- Laundry proprietors and persons conducting a laundry business.
- Drycleaning establishment proprietors and persons conducting a drycleaning business.
- Veterinary proprietors and veterinary surgeons [*see Jakubaitis v. Fischer (1995) 33 Cal. App. 4th 1601, 1606, 40 Cal. Rptr. 2d 39* (veterinary proprietors' and veterinary surgeons' lien rights are governed by Section 3051 rather than *Civ. Code § 3080*, which governs all other livestock service providers)].

Civ. Code § 3051, however, has no application to any vessel as defined in *Harb. & Nav. Code § 21*, to any vehicle as defined in *Veh. Code § 670* that is subject to registration pursuant to that code, or to any manufactured home as defined in *Health & Safety Code § 18007*, any mobilehome as defined in *Health & Safety Code § 18008*, or any commercial coach as defined in *Health & Safety Code § 18001.8*, whether or not the manufactured home, mobilehome, or commercial coach is subject to regulation under the Health and Safety Code [*Civ. Code § 3051*].

[4] Written Notice as Prerequisite to Lien

That portion of any lien, as provided for in *Civ. Code § 3051*, that is in excess of $300 for any work, services, or care, or in excess of $200 for any safekeeping, rendered or performed at the request of any person other than the holder of the legal title, is invalid unless prior to commencing any such work, service, care, or safekeeping the person claiming the lien gives actual notice in writing. It must be served either by personal service or by registered letter addressed to the holder of the legal title to the property if known [*Civ. Code § 3051a*].

[5] Alternative Lien-Sale Procedure

[a] For Charges Not Exceeding $150

Civ. Code § 3052b provides an alternative to the lien-sale procedure set forth in *Civ. Code § 3052*, but is applicable

only to liens under *Civ. Code § 3051* for charges not exceeding $150.00, exclusive of additional charges and interest authorized by that section [*Civ. Code § 3052b(a)*].

[b] Conditions Precedent

The lienholder must have, as a condition precedent to using the alternative procedure:

- Provided the property owner with written notice of the lien provisions of *Civ. Code § 3052b*.

- Obtained the property owner's address and telephone number, together with a written declaration signed by the property owner stating that the property owner has read and understands the summary provided pursuant to *Civ. Code § 3052(a)(1)*, at the time of entering into the transaction from which the lien arose.

- Posted, at the time of the transaction from which the lien arose, a notice that fully and fairly informs the public of the substance of *Civ. Code § 3052b*, which notice must be posted in a location clearly visible to the public in the lienholder's business premises [*Civ. Code § 3052(b)(a)(1)-(3)*].

[c] Written Notice

Any lienholder proceeding under *Civ. Code § 3052b* must notify the owner of the property subject to the lien by first-class mail on completion of the work for which the lien is claimed [*Civ. Code § 3052b(b)*]. Not less than 30 days following the above notice, the lienholder must notify the property owner by first class mail that the property will be sold to satisfy the lien, unless the charges are paid within 30 days following the mailing of the notice [*Civ. Code § 3052b(d)*].

[d] Lien Sale

If the lienholder has complied with the notice provisions of *Civ. Code §§ 3052b*, 3051d, not less than 30 days have elapsed since the mailing of the notice of sale, and the property owner has not fully paid the original charges for which the lien is claimed plus any additional charges authorized for storage of the property, the lienholder may sell the property subject to the lien at a public or bona fide private sale to satisfy the sum of those obligations, all costs and expenses of the sale, and interest at the rate of 12 percent per annum from 30 days following receipt of the notice that the work had been completed [*Civ. Code § 3052b(e)*]. The proceeds of the sale shall first be applied to the discharge of the lien, the costs of sale, and authorized interest, and the remainder, if any, must be paid to the former owner of the property so sold [*Civ. Code § 3052b(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)Attachment of Security InterestsRequirementsContracts LawSecured TransactionsAttachment of Security InterestsRequirementsReal Property LawNonmortgage LiensGeneral Overview

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§ 342.158 Possessory Lien--Notice of Sale of Property at Public Auction [Civ. Code §§ 3051, 3052]

[1] FORM Possessory Lien--Notice of Sale of Property at Public Auction [Civ. Code §§ 3051, 3052]

NOTICE IS HEREBY GIVEN that at _____ [*time*] on _____ [*date*], _____ [*name of lienholder*] will conduct a public auction to satisfy his/her lien in the _____ [*describe property*] owned by _____ [*name of legal owner*]. The sale will be conducted at _____ [*street address*], _____ [*city*], California.
Dated: _____.

_____ [*name of lienholder*]

[2] Use of Form

This notice is for either publishing in a newspaper or posting in order to satisfy the notice requirements of *Civ. Code § 3052*. Such notice must be given prior to the sale of personal property in order to satisfy a possessory lien established by *Civ. Code § 3051* [*Civ. Code § 3052*].

[3] Authority of Lienholder to Sell Property

If the person entitled to a lien provided in *Civ. Code § 3051* is not paid the amount due, and for which the lien is given, within 10 days after the same has become due, then the lienholder may proceed to sell the property or so much thereof as may be necessary to satisfy the lien and the costs of sale at public auction [*Civ. Code § 3052*].

[4] Time and Manner of Notice

Before selling the property at public auction, at least 10 but not more than 20 days' previous notice of the sale must be given by advertising in some newspaper published in the county in which the property is situated. If there is no newspaper printed in the county, then notice may be given by posting notice of the sale in three of the most public

places in the town and at the place where the property is to be sold for 10 days prior to the date of sale [*Civ. Code § 3052*].

[5] Right of Redemption

Within 20 days after a sale to enforce a possessory lien, the legal owner may redeem any property so sold by paying the lien amount, all costs and expenses of the sale, and interest on the sum at the annual rate of 12 percent from the due date, or the date when the amount was advanced, until the repayment [*Civ. Code § 3052*].

[6] Proceeds of Sale to Enforce Possessory Lien

The proceeds of the sale of personal property to enforce a possessory lien must be applied to the discharge of the lien and cost of keeping and selling the property. The remainder, if any, must be paid over to the legal owner of the property [*Civ. Code § 3052*].

[7] Cross References

For a related form, see *§ 342.157*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)DefaultForeclosure & RepossessionNotice of SaleContracts LawSecured TransactionsDefaultForeclosure & RepossessionNotice RequirementsReal Property LawNonmortgage LiensGeneral Overview

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§ 342.159 Complaint to Marshal Assets [Civ. Code §§ 2899, 3433]--By Lien Creditor Against Other Secured Creditors

[1] FORM Complaint to Marshal Assets [Civ. Code §§ 2899, 3433]--By Lien Creditor Against Other Secured Creditors

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT TO MARSHAL ASSETS
[and DOES I through _____,]	)	
Defendant(s).	)	
	)	
	)	

Plaintiff alleges:

1. On _____ [*date*], defendant _____ [*name of debtor*] became indebted to plaintiff in sum of $_____.

[2. The indebtedness of defendant _____ (*name of debtor*) was evidenced by a _____ (*describe instrument, e.g.*, lease agreement), a copy of which is attached hereto as Exhibit A and made a part hereof.]

3. In order to secure repayment of the debt to plaintiff, defendant _____ [*name of debtor*] executed and delivered to plaintiff a _____ [*describe security instrument*] on _____ [*date*]. A

copy of the _____ [*describe security instrument*] is attached hereto as Exhibit _____ [A *or* B], and made a part hereof. The _____ [*describe security instrument*] conveyed a lien on _____ [real *or* personal] property owned by defendant, which is more particularly described as _____ [*describe nature of property*].

4. Prior to the time defendant _____ [*name of debtor*] became indebted to plaintiff, defendant was indebted to defendant(s) _____ [*name(s) of other creditor(s)*] in the amount of $_____.

5. To secure payment of the debt to defendant(s) _____ [*name(s) of other creditor(s)*], plaintiff is informed and believes and based on that information and belief alleges that defendant _____ [*name of debtor*] executed and delivered to defendant(s) _____ [*name(s) of other creditor(s)*] a _____ [*describe security instrument*] on _____ [real *or* personal] property owned by defendant _____ [*name of debtor*], which is more particularly described as _____ [*describe nature of property*]. This property includes property by which defendant's debt to plaintiff is also secured.

6. Defendant _____ [*name of debtor*] currently owes plaintiff $_____ of unpaid principal on the indebtedness secured by Exhibit _____ [A *or* B] together with interest at the rate of _____ percent per annum from _____ [*date*].

7. Defendant _____ [*name of debtor*] currently owes defendant(s) _____ [*name(s) of other creditor(s)*] $_____ of unpaid principal on the indebtedness that is secured by the above-described property.

8. Plaintiff is informed and believes and based on that information and belief alleges that defendant _____ [*name of debtor*] is currently unable and will be unable in the future to pay plaintiff and defendant(s) _____ [*name(s) of other creditor(s)*] the sums that are currently due and that will become due and owing.

9. Plaintiff is informed and believes and based on that information and belief alleges that defendant(s) _____ [*name(s) of other creditor(s)*] intend to foreclose the security interest(s) he/she/they hold in the above-described property, including the property by which defendant _____'s [*name of debtor*] indebtedness is secured.

10. The value of the _____ [real *or* personal] property described in Exhibit _____ [A *or* B] is $_____. The value of the _____ [real *or* personal] property that secures payment of the debt of defendant(s) _____ [*name(s) of other creditor(s)*] is $_____, exclusive of the value of the property that also secures the debt to plaintiff. The value of the property securing the debt of defendant(s) _____ [*name(s) of other creditor(s)*] is thus more than sufficient to satisfy defendant's debt to him/her/them.

11. Defendant(s) _____ [*name(s) of other creditor(s)*] can resort to the property securing his/her/their indebtedness that does not also secure plaintiff's interest without any possibility of injury to his/her/their interest and without any injustice to anyone.

12. On _____ [*date*], plaintiff demanded that defendant(s) _____ [*name(s) of other creditor(s)*] resort only to property of defendant _____ [*name of debtor*] that is not also securing the indebtedness of defendant _____ [*name of debtor*] to plaintiff according to the provisions of *Civil Code sections 2899* and *3433*. [A copy of the demand is attached as Exhibit _____ (B *or* C) and incorporated by reference.]

WHEREFORE, plaintiff prays judgment against defendant(s)[, and each of them,] as follows:

1. That defendant(s) be required to apply the property other than that in which plaintiff has a security interest for payment of his/her indebtedness according to the provisions contained in *Civil Code Sections 2899* and *3433*; and

2. For such other relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 342.150.*]

[2] Use of Form

This complaint is for use by a creditor to force another debtor or other debtors to foreclose a security interest in property other than the property that also secures the debtor's indebtedness to plaintiff.

[3] Allegations

A complaint to marshal assets alleges the facts of the debtor's indebtedness to plaintiff (Paragraphs 1-3), the facts of the debtor's indebtedness to another creditor or creditors (Paragraphs 4, 5), the amounts currently owing to plaintiff and the other creditor or creditors (Paragraphs 6, 7), the fact that the debtor is not and will not be able to meet his or her obligations to plaintiff and the other creditor or creditors (Paragraph 8), the type of property that secures the debtor's indebtedness to the other creditor or creditors (Paragraph 9), the value of the property that secures the other creditor's or creditors' interest exclusive of the value of the property that also secures plaintiff's interest (Paragraph 10), the fact that the other creditor or creditors can resort to the property not securing the debtor's indebtedness to plaintiff without any injustice or possibility of injuring their own interests (Paragraph 11) [*Harrington v. Taylor (1917) 176 Cal. 802, 807, 169 P. 690]* , and plaintiff's demand that the other creditor or creditors marshal their assets according to the provisions of *Civ. Code §§ 2899* and *3433* (Paragraph 12) [*see Civ. Code §§ 2899, 3433*].

[4] Jurisdiction

An action to marshal assets is an equitable action [*Citizens' Sav. Bank v. Mack (1919) 180 Cal. 246, 251-252, 180 P. 618]* . Jurisdiction has not been extended to limited civil cases [*see Code Civ. Proc. §§ 85, 86*; *cf. Code Civ. Proc. § 708.210 et seq.* (creditor's suits after judgment, over which *Code Civ. Proc. § 86(a)(9)* confers jurisdiction in limited civil cases)], and therefore jurisdiction over the action is in the superior court as other than a limited civil case [*see Cal. Const., art. VI, § 10*].

[5] Venue

If the action involves personal property, the proper forum is the place where one or more of the defendants reside at the commencement of the action, the county in which the indebtedness is to be paid, or the county in which the security interest was created [*Code Civ. Proc. § 395(a)*]. If the action involves real property, the county in which the real property is situated is the proper forum [*Code Civ. Proc. § 392(a)(2)*].

[6] Costs

In actions or proceedings in which a party recovers other than monetary relief and in situations other than as specified,

the "prevailing party" is as determined by the court; in such a case, the court may allow costs or not and, if allowed, may apportion costs between the parties on the same or adverse sides [*Code Civ. Proc. § 1032(a)(4)*]. For further discussion of costs, procedure, and forms, see *Ch. 174, Costs and Attorney's Fees, § 174.10* et seq.

[7] Decisions

Burden of showing that creditor can marshal assets without risk of loss to himself or herself rests with creditor urging that another creditor marshal assets. *Victor Gruen Associates, Inc. v. Glass (9th Cir. 1964) 338 F.2d 826, 829*

Civ. Code §§ 2899 and *3433* govern bankruptcy proceedings arising in California since validity, nature, and effect of liens are governed by law of state where property is situated. *Victor Gruen Associates, Inc. v. Glass (9th Cir. 1964) 338 F.2d 826, 829*

Marshaling is well established rule in equity that, when creditor has lien on two funds and another lien on only one of them, creditor is compelled to exhaust fund on which he or she has exclusive lien and is permitted to resort to other for deficiency only. *Citizens' Sav. Bank v. Mack (1919) 180 Cal. 246, 251-252, 180 P. 618* ; *Shedoudy v. Beverly Surgical Supply Co. (1980) 100 Cal. App. 3d 730, 734, 161 Cal. Rptr. 164*

Right to marshal is mere equity that may never be invoked when its operation will create inequity; lien claimant is capable of invoking principle of marshaling assets only when it will benefit him or her without injuring others. *Harrington v. Taylor (1917) 176 Cal. 802, 807, 169 P. 690* ; *Shedoudy v. Beverly Surgical Supply Co. (1980) 100 Cal. App. 3d 730, 736, 161 Cal. Rptr. 164*

Equity applies doctrine of marshaling of assets only to conditions existing at time when it is invoked. *Harrington v. Taylor (1917) 176 Cal. 802, 807, 169 P. 690*

Doctrine of marshaling of assets under which if one creditor has lien on only one of assets the former must first proceed against that on which the latter has no lien is fully established by general authority and by *Civ. Code §§ 2899* and *3433*. *In re Estate of Levin Bros. (1903) 139 Cal. 350, 73 P. 159*

When judgment debtor has alienated all property that he or she owns, parcel last alienated by judgment debtor is property that must be first subjected to satisfaction of judgment lien. *Commonwealth Land Title Co. v. Kornbluth (1985) 175 Cal. App. 3d 518, 529, 220 Cal. Rptr. 774*

When party holding prior or paramount lien covering property releases, with knowledge of prior conveyance by debtor, property that is primarily chargeable with debt, and does so without consent of parties interested in property that is only secondarily liable, value of released property is required to be credited on debt secured by prior or paramount lien. *Commonwealth Land Title Co. v. Kornbluth (1985) 175 Cal. App. 3d 518, 528-529, 220 Cal. Rptr. 774*

"Transfer" under *Civ. Code § 2899(4)(3)* (resort of lienholder to things that have been transferred for valuable consideration, since creation of prior lien, in inverse order of transfer) refers to original conveyance of property by debtor and not to most recent sale of property. *Commonwealth Land Title Co. v. Kornbluth (1985) 175 Cal. App. 3d 518, 526-527, 220 Cal. Rptr. 774*

Under *Civ. Code § 2899(2)*, unencumbered property owned by judgment debtor when abstracts of judgment were recorded must be sold prior to sale of other presently encumbered properties, also owned by judgment debtor when abstracts of judgment were recorded, as long as sale can be accomplished without risk of loss to judgment creditor. *Commonwealth Land Title Co. v. Kornbluth (1985) 175 Cal. App. 3d 518, 525, 220 Cal. Rptr. 774*

Marshaling is equitable principle in accordance with which assets and securities of debtor are resorted to or apportioned so as to secure protection to rights of each of two or more creditors, or of creditor and some person other than creditor having interest in assets and securities. *Commonwealth Land Title Co. v. Kornbluth (1985) 175 Cal. App. 3d 518, 524, 220 Cal. Rptr. 774*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationExaminers, Officers & TrusteesVoidable TransfersAsset MarshalingCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsReal Property LawFinancingSecondary FinancingMarshaling Assets

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Chapter 342 LIENS AND WAGE PREFERENCES
PART IV. FORMS
A. Liens In General

30-342 California Forms of Pleading and Practice--Annotated § 342.160

§ 342.160 Affirmative Defense Allegation to Complaint to Marshal Assets [Civ. Code §§ 2899, 3433]--Defendant Would Be Substantially Injured if Required to Marshal Assets

[1] FORM Affirmative Defense Allegation to Complaint to Marshal Assets [Civ. Code §§ 2899, 3433]--Defendant Would Be Substantially Injured if Required to Marshal Assets

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that he/she would be substantially injured by an order requiring him/her to marshal his/her assets under *Civil Code section 2899* in that _____ [*specify reasons why defendant should be permitted to foreclose his/her interest in property that also secures plaintiff's lien*]. Thus, defendant would be caused the injustice prohibited by *Civil Code Sections 2899* and *3433* if required to marshal his/her assets in order to protect plaintiff's lien in _____ [*describe property in which plaintiff claims a lien*].

[2] Use of Form

This affirmative defense is for use by a creditor who has a prior security interest in property in which the plaintiff also has a lien.

[3] Cross References

For discussion and forms relating to answers and affirmative defenses generally, see Ch. 26, *Answers*

For a related form, see *§ 342.159*.

[4] Decisions

Application of principle of marshaling of assets is not allowed because of injustice to other persons if all of mortgaged

property sold in parcels to different parties at different times. *Irvine v. Perry (1897) 119 Cal. 352, 356*

Denial of demand to marshal assets is proper when first lien claimant could not sell parcel of land in lots because bids inadequate. *Barton v. Clough (1937) 20 Cal. App. 2d 473, 476, 67 P.2d 358*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationExaminers, Officers & TrusteesVoidable TransfersAsset MarshalingCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewReal Property LawFinancingSecondary FinancingMarshaling Assets

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[Reserved]

§§ 342.161[Reserved]

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B. Equitable Liens

30-342 California Forms of Pleading and Practice--Annotated § 342.180

§ 342.180 Complaint to Impress and Foreclose Equitable Lien--By Holder of Security Interest--General Form

[1] FORM Complaint to Impress and Foreclose Equitable Lien--By Holder of Security Interest--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT TO IMPRESS EQUITABLE LIEN
[and DOES I through _____,]	)	
Defendant(s).	)	
	)	
	)	

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California.

[2. *Fictitious name allegation, if appropriate. See § 342.150, Paragraph 2.*]

3. On _____ [*date*], _____ [*name of defendant or other person*] became indebted to plaintiff in the sum of $_____ and made the following _____ [real *or* personal] property security for the debt: _____ [*describe real or personal property*].

[*EITHER*]

4. The agreement was made in writing, a copy of which is attached as Exhibit A incorporated by reference.

[*OR*]

4. The agreement was made orally and was to the effect that _____ [*describe effect of agreement*].

[*OR*]

4. It was the intention and understanding between _____ [*name of defendant or other person*] and plaintiff that the above-described property would serve as security for the debt owed by _____ [*name of defendant or other person*] to plaintiff. _____ [*Describe the facts underlying the intention and understanding between the parties on the basis of which an equitable lien should be inferred.*]

[*CONTINUE*]

[5. *If person in possession of property was not person who created equitable lien, add:* _____ (*Name of defendant*) was not a bona fide purchaser of the property since he/she _____ (received it as a gift *or* had notice of plaintiff's right to an equitable lien).]

WHEREFORE, plaintiff prays judgment against defendant(s) as follows:

1. That plaintiff be adjudged as having an equitable lien in the amount of $_____ in the above-described property;

2. That the lien be foreclosed;

3. That the property be ordered sold for the payment of the lien;

4. For payment of the amount of the lien from the proceeds of the sale;

5. For costs of suit incurred herein; and

6. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 342.150.*]

[2] Use of Form

This complaint is for use by a person who has an equitable lien in either real or personal property.

[3] Allegations

The essential allegations in an action to impress an equitable lien on property are that the defendant or another person became indebted to plaintiff (Paragraph 3), that the plaintiff and the defendant or another person intended to make the property security for the indebtedness (Paragraph 3, Alternative Paragraphs 4) [*Lentz v. Lentz (1968) 267 Cal. App. 2d 891, 894, 73 Cal. Rptr. 686* ; *Garter v. Metzdorf Associates (1963) 217 Cal. App. 2d 812, 821, 32 Cal. Rptr. 113]* , and when the person who has possession of the property at the time the complaint is filed is not the person who created the equitable lien, that the person was not a bona fide purchaser since he or she received it as a gift or had notice of the plaintiff's right to an equitable lien in the property (Optional Paragraph 5) [*Dodd v. Cantwell (1960) 179 Cal. App. 2d 727, 734-735, 4 Cal. Rptr. 113* ; *Jud Whitehead Heater Co. v. Obler (1952) 111 Cal. App. 2d 861, 873, 245 P.2d 608]* .

[4] Jurisdiction

The superior court has jurisdiction over claims for equitable liens [*see* Cal. *Const., art. VI, § 10*]. There is no authority permitting claims for equitable liens to be filed as limited civil cases [*see Code Civ. Proc. §§ 85, 86*].

[5] Venue

An action to foreclose a lien on real property must be brought in the county in which the property is situated [*Code Civ. Proc. § 392(a)(2)*]. Moreover, in situations in which there is one cause of action to foreclose a lien on real property and another cause of action to obtain a personal judgment that arises out of the same transaction involving the lien, the causes are consolidated and venue is proper in the county in which the land is situated [*Case v. Kirkwood (1931) 119 Cal. App. 207, 211, 6 P.2d 110]* . An action to foreclose a lien on personal property based on a contract would appear to be required to be brought in the county in which one or more of the defendants reside at the commencement of the action, in which the security for the debt or other obligation was created, or in which the debt is to be repaid or obligation performed [*see Code Civ. Proc. § 395(a)*].

[6] Decisions

[7] Creation

Form of agreement creating lien is not material since equity looks at intent and purpose rather than form. *Lentz v. Lentz (1968) 267 Cal. App. 2d 891, 894, 73 Cal. Rptr. 686*

Equitable lien requires intent to fasten obligation to given thing or circumstances such that just or equitable adjustment of rights of parties contemplates dedication of property specifically to obligation. *Lentz v. Lentz (1968) 267 Cal. App. 2d 891, 894, 73 Cal. Rptr. 686*

Equitable lien is created when intent appears to give or to charge or to pledge real or personal property as security for obligation and property can be sufficiently identified. *Garter v. Metzdorf Associates (1963) 217 Cal. App. 2d 812, 821, 32 Cal. Rptr. 113*

Equitable lien relates to time it was created by conduct of parties. *Hise v. Superior Court (1943) 21 Cal. 2d 614, 627, 134 P.2d 748* ; *Holder v. Williams (1959) 167 Cal. App. 2d 313, 317, 334 P.2d 291*

[8] Enforcement

If property subject to equitable lien is transferred to third person who has notice of equitable lien or who does not give value, equitable lien can be enforced against property in hands of third person. *Jud Whitehead Heater Co. v. Obler (1952) 111 Cal. App. 2d 861, 873, 245 P.2d 608*

Holder of equitable lien on personal property for payment of debt who is not in possession of property is required to establish claim and procure order to sell property and satisfy debt. *White v. White (1936) 11 Cal. App. 2d 570, 574, 54 P.2d 482*

[9] Cross References

For a related form, see *§ 342.150*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsReal Property LawNonmortgage LiensEquitable Liens

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30-342 California Forms of Pleading and Practice--Annotated § 342.181

§ 342.181 Complaint [Code Civ. Proc. § 425.10] Against Personal Representative to Impress and Foreclose Equitable Lien on Decedent's Real Property

[1] FORM Complaint [Code Civ. Proc. § 425.10] Against Personal Representative to Impress and Foreclose Equitable Lien on Decedent's Real Property

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs. Personal Representative of	)	NO. _____
_____ [*name*],	)	COMPLAINT TO IMPRESS EQUITABLE LIEN
Deceased,	)	
Defendant.	)	
	)	
	)	

Plaintiff alleges:

1. On or about _____ [*date*], the deceased _____ [*name*] died, and his/her estate is now pending administration in a proceeding in the Superior Court of _____ County, California, entitled _____, No. _____.

2. Defendant is the duly appointed, qualified, and acting personal representative of the estate of the deceased.

[3. On _____ (*date*), plaintiff duly _____ (filed in duplicate with the clerk of the court in the estate proceeding *or* presented to defendant, as the personal representative of the estate of the deceased)

his/her verified claim in writing in the sum of $_____ on the matters on which this action is based. A copy of the claim as so _____ (filed *or* presented) is attached hereto as Exhibit A and made a part hereof.]

[*If claim was filed, EITHER*]

4. Defendant, as the personal representative of the estate of the deceased, rejected the claim and on _____ [*date*], served on plaintiff notice in writing of the rejection.

[*OR*]

4. More than 30 days have elapsed since the claim was _____ [filed *or* presented], and defendant as the personal representative of the estate of the deceased has _____ [neglected *or* refused] to _____ [file *or* endorse] his/her allowance or rejection; plaintiff elects to treat the claim as thereby rejected.

[*OR*]

4. More than 30 days have elapsed since the claim was presented to the judge in the estate proceeding, and the judge has _____ [neglected *or* refused] to endorse his/her approval or rejection; plaintiff elects to treat the claim as thereby rejected.

[*CONTINUE*]

5. During his/her lifetime, decedent became the owner of certain improved real property particularly described as follows: _____ [*specify real property*].

6. Decedent was the owner in fee simple of the above-described property at his/her death, and the property is part of his/her estate in the hands of defendant as the personal representative of decedent's estate.

7. Decedent became indebted to plaintiff in the amount of the claim because _____ [*specify transaction or acts leading to obligation*]. On or about _____ [*date*], decedent represented to plaintiff that if plaintiff would forego his/her right to the $_____ due to plaintiff, decedent would give plaintiff an interest in the real property. Relying on this promise, plaintiff made no further attempt to collect the $_____ due to him/her from decedent.

8. Although plaintiff repeatedly demanded of decedent that he/she convey to plaintiff an interest in the property, decedent at all times failed and refused to make the conveyance. [A copy of plaintiff's written demand to decedent on _____ (*date*) is attached hereto as Exhibit B and made a part hereof.]

9. No part of the sum has been paid [except the sum of $_____], leaving a balance due, owing, and unpaid to plaintiff in the sum of $_____.

10. Plaintiff hereby waives recourse against property in decedent's estate other than the property described herein.

WHEREFORE, plaintiff prays judgment against defendant as personal representative of the estate of

_____ [*name*], deceased, as follows:

1. For the sum of $_____;

2. That the court declare that plaintiff is the holder of and entitled to an equitable lien on the real property in the amount of $_____;

3. That the lien be foreclosed and the interest of _____ [*name of decedent*] be sold;

4. That plaintiff be declared to be entitled to the sum of $_____ from the proceeds of the sale thereof;

5. For costs of suit incurred herein; and

6. For such other and further relief as the court deems proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 342.150.*]

[2] Use of Form

This complaint is for use in impressing an equitable lien on the property of a decedent's estate when decedent was indebted to plaintiff during his or her life and granted an interest in real property to plaintiff in return for plaintiff's forbearance in collecting his or her debt.

[3] Allegations

This complaint contains initial paragraphs that allege the status of decedent, the capacity of defendant, and a basis for venue (Paragraphs 1, 2). It is not necessary to allege the filing or presentation of a claim (Optional Paragraph 3), and the rejection of the claim (Optional Paragraphs 4), in order to state a cause of action to impress an equitable lien on the decedent's property [*see Brunson v. Babb (1956) 145 Cal. App. 2d 214, 229, 302 P.2d 647* ; *see also Prob. Code §§ 9000(b)* (claim excludes dispute regarding title of decedent to specific property), 9256 (when claim is deemed refused), 9391 (lienholder may commence enforcement action without first filing claim)]. However, it would seem to be better to file or present a claim, if possible, since the personal representative will pay the claim if he or she finds it is valid, thus avoiding the necessity of filing an action [*see Prob. Code § 9250 et seq.*; for discussion, forms, and a procedural guide for use generally in claims against an estate, *see* Ch. 444, *Probate: Claims Against the Estate* .

This form further alleges the existence of plaintiff's claim and the property of the deceased on which plaintiff asserts a lien (Paragraphs 5-7), that plaintiff demanded, and decedent refused, satisfaction (Paragraphs 8, 9), and that plaintiff expressly waives recourse to other property in the estate (Paragraph 10) [*see Prob. Code § 9391*].

[4] Cross References

For discussion and forms relating to the procedure under *Prob. Code § 850 et seq.* for petitioning the court for an order to convey or transfer property that is part of the estate, see Ch. 446, *Probate: Management of Estate Assets* .

For related forms, see *§§ 342.150, 342.180*.

[5] State Statutes

Enforcement of liens on property in decedent's estate. *Prob. Code § 9391*

[6] Decisions

Equitable action to recover money or property against estate of decedent does not require claim to be filed against estate; claiming interest in decedent's property by reason of promises and representations made by decedent is proper basis for equitable lien and is not asserting claim against estate. *Brunson v. Babb (1956) 145 Cal. App. 2d 214, 229, 302 P.2d 647*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensEquitable Liens

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30-342 California Forms of Pleading and Practice--Annotated § 342.182

§ 342.182 Complaint by Assignee of Contractor and Holder of Promissory Note to Impress and Foreclose Equitable Lien on Real Property

[1] FORM Complaint by Assignee of Contractor and Holder of Promissory Note to Impress and Foreclose Equitable Lien on Real Property

[*Caption. See § 342.180.*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 342.150, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 342.150, Paragraph 2.*]

3. On or about _____ [*date*], defendant entered into a contract in writing with _____ [*name of contractor*]. According to the terms of the contract, _____ [*name of contractor*] agreed to furnish to defendant certain labor and materials in making improvements on certain real property of defendant, described more particularly as follows: _____ [*describe*].

4. The written contract was recorded in the office of the county recorder of _____ County, State of California, on _____ [*date*], in book _____, page _____, of the official records.

5. The contractor is, and at all times herein mentioned was, a licensed contractor under the Contractors' License Law of the State of California.

6. On _____ [*date*], defendant made, executed, and delivered his/her promissory note to the contractor. A copy of that note is attached hereto as Exhibit A and made a part hereof.

7. On _____ [*date*], for a valuable consideration, the contractor sold, endorsed, and delivered the promissory note to plaintiff who, ever since, has been and now is the owner and holder thereof. The contract provides in part as follows: _____ [*set out wording granting a lien on the property to the contractor, e.g.*, "Owner hereby grants to contractor a lien on the above-described property as security for the faithful performance of the obligations of the owner under this contract"]. The promissory note was delivered by defendant to the contractor as the obligation of the owner to the contractor under the contract.

8. A payment of $_____ became due on the promissory note, according to its terms, on _____ [*date*]. Neither all nor any part of that payment has been made. The promissory note provides that if an installment is not paid when due, the entire balance of the note becomes due and payable at the option of the holder. Plaintiff has exercised his/her option to require the entire amount of the promissory note due and payable. Neither all nor any part thereof has been paid, even though plaintiff has demanded of defendant that the payment be made.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ principal, with interest thereon at the rate of _____ per cent per annum from the date of filing this complaint;

2. That plaintiff have a lien on the real property of defendant in the amount of $_____, plus interest at _____ per cent per annum from the date of filing of this complaint;

3. That this court order the lien foreclosed and that judgment be entered against the property and defendant for that sum with costs;

4. That the judgment provide that the property be sold according to law in the usual practice of this court and that the proceeds of the sale be applied to satisfy the lien and costs and expenses of levying and sale with the surplus proceeds, if any, being paid to defendant;

5. For costs of suit herein; and

6. For such other and further relief as the court deems proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 342.150.*]

[2] Use of Form

The foregoing form of complaint is for use by an assignee of a contractor who held a promissory note that gave the contractor a lien on defendant's real property in exchange for the contractor's agreement to furnish labor and materials in making improvements on the defendant's real property. This form is based on the complaint filed in *Mann v. Leasko (1960) 179 Cal. App. 2d 692, 4 Cal. Rptr. 124* .

[3] Allegations

The foregoing complaint contains initial optional paragraphs alleging the identity and capacity of defendant, and establishing a basis for venue (Paragraphs 1, 2), identifying the contract (Paragraphs 3, 4), alleging that the contractor was licensed (Paragraph 5) [*see* Ch. 104, *Building Contracts*], and alleging facts related to the promissory note itself (Paragraphs 6-8).

[4] Cross References

For discussion and forms for use in actions involving promissory notes, see Ch. 385, *Negotiable Instruments*

For a related form, see *§ 342.180*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesGeneral OverviewContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & AssignorsContracts LawNegotiable InstrumentsTransfersReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensEquitable Liens

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30-342 California Forms of Pleading and Practice--Annotated § 342.183

§ 342.183 Stipulation Creating Equitable Lien on Cause of Action [Civ. Code § 2883]

[1] FORM Stipulation Creating Equitable Lien on Cause of Action [Civ. Code § 2883]

[*Caption. As on papers previously filed.*]

STIPULATION FOR FIRST LIEN AGAINST RECOVERY

It is hereby stipulated by and between plaintiff above-named and _____ [*name of lien claimant*] through their respective attorneys that _____ [*name of lien claimant*] may have a first lien in the sum of $_____ against any judgment recovered by plaintiff in the above-entitled action or against any recovery by way of settlement in the above-entitled action.

The lien of _____ [*name of lien claimant*] is based on _____ [*state reasons for lien, e.g.*, the value of medical services furnished plaintiff].
Dated: _____.

_____ [*signature*]

Attorney for Plaintiff

_____ [*signature*]

Attorney for Lien Claimant

[2] Use of Form

This stipulation is for use by a plaintiff to create an equitable lien on and first priority to any recovery in a lien claimant.

[3] Lien in After-Acquired Property

An agreement may be made to create a lien on property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such a case, the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing to the extent of the interest [*Civ. Code § 2883(a)*; *see Civ. Code § 2883(b)* (lien on undistributed estate property)].

[4] Cross References

For a discussion of stipulations generally, see Ch. 533, *Stipulations*

[5] State Statutes

Lien on property not yet acquired or not yet in existence, or on estate property not yet distributed. *Civ. Code § 2883*

Attorney's authority to bind client in steps of action. *Code Civ. Proc. § 283*

[6] Decisions

Debtor is capable of granting equitable lien on cause of action to creditors such as materialmen. *Del Conte Masonry Co. v. Lewis (1971) 16 Cal. App. 3d 678, 680, 94 Cal. Rptr. 439*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefReal Property LawNonmortgage LiensEquitable Liens

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[Reserved]

§§ 342.184[Reserved]

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30-342 California Forms of Pleading and Practice--Annotated § 342.200

§ 342.200 Proceedings by Laborer to Obtain Priority on Wage Claim--Verified Statement of Claim by Laborer to Sheriff [Code Civ. Proc. § 1206]

[1] FORM Proceedings by Laborer to Obtain Priority on Wage Claim--Verified Statement of Claim by Laborer to Sheriff [Code Civ. Proc. § 1206]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	STATEMENT OF CLAIM FOR PRIORITY ON
Defendant.	)	WAGE CLAIM
	)	
	)	

To the Sheriff of the County of _____:

NOTICE IS HEREBY GIVEN that the undersigned, pursuant to *Code of Civil Procedure Section 1206*, hereby makes a claim for labor against defendant in the above-entitled action. The claim is for labor performed for and on behalf of defendant from _____ [*date*] to _____ [*date*], which was within 90 days of the date preceding your levy. The labor was for _____ [*specify nature of work*].

Defendant is obligated to the undersigned for that labor in the amount of $_____. The undersigned hereby claims priority over _____ [*name*], the secured creditor and plaintiff in the above-entitled action, on the writ of _____ [attachment *or* execution] levied by you, and directs you to pay that sum.

_____ [*signature of labor claimant*]

_____ [*street address*]

_____ [*city*], California

VERIFICATION

STATE OF CALIFORNIA)
COUNTY OF_____) ss
)

_____ [*Name*], being duly sworn, deposes and says that:

He/She is the claimant in the foregoing Preferred Wage Claim.

He/She has read the above claim and knows the contents thereof. The same is true of his/her own knowledge, except as to those matters which are therein stated on his/her information or belief, and as to those matters, he/she believes it to be true.

_____ [*signature*]

Subscribed and sworn to before me on _____ [*date*].

_____ [*signature*]

Notary Public

[2] Use of Form

The foregoing form of preferred wage claim is for use by a claimant who has performed labor for a person within 90 days prior to a levy on property of that person pursuant to a writ of attachment or execution by a nonlabor creditor [*see Code Civ. Proc. § 1206(a)*].

The claim is limited to wages earned but not paid that resulted from work performed 90 days prior to the date when the sheriff levied on the property and is also limited to $900 [*Code Civ. Proc. § 1206(a)*].

[3] Caption

The caption of the claim does not include the claimant's name. Rather, the caption should be patterned after the caption in the main action except for the fact that it should state that a labor claim is being filed.

[4] Filing

[a] Verified Original

The verified statement of the claim must be filed with the officer who executed the writ [*Code Civ. Proc. § 1206(a)*].

[b] Court Copy

A copy of the verified claim must be filed with the court that issued the writ [*Code Civ. Proc. § 1206(a)*].

[5] Service

Copies of the claim may be served on the plaintiff and defendant in the main action by personal service on them or their agents or by mailing copies to their last known addresses [*Code Civ. Proc. § 1206(a)*].

[6] Cross References

For discussion and forms for use generally in attachment proceedings, see Ch. 62, *Attachment*

For discussion and forms for use generally in execution proceedings, see Ch. 254, *Executions and Enforcement of Judgments*

For discussion and forms for use generally in garnishment proceedings, see Ch. 276, *Garnishment*

[7] Decisions

Right to priority under *Code Civ. Proc. § 1206* as purely statutory, and thus as not extended to claims other than those specified in *Code Civ. Proc. § 1206*. *Legg & Shaw Co. v. Worthington (1910) 157 Cal. 488, 492, 108 P. 284* ; *American Mach. & Foundry Co. v. Golden State Lanes, Inc. (1967) 253 Cal. App. 2d 855, 857, 61 Cal. Rptr. 554*

Claim for vacation pay under *Code Civ. Proc. § 1206* as entitled to preferred status assuming that claim arose within 90 days prior to levy of attachment, garnishment, or execution. *American Mach. & Foundry Co. v. Golden State Lanes, Inc. (1967) 253 Cal. App. 2d 855, 857-859, 61 Cal. Rptr. 554* (construing former *Code Civ. Proc. § 1206* prior to 1982 amendment that removed term "garnishment")

Necessity of showing that work was performed within 90 days prior to levy in proceeding to establish right of priority for assigned labor claims under *Code Civ. Proc. § 1206 et seq.* *Steele v. International Air Race Asso. (1942) 50 Cal. App. 2d 176, 177-178, 122 P.2d 593*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesGarnishmentsLabor & Employment LawWage & Hour LawsWage Payments

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PART IV. FORMS
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30-342 California Forms of Pleading and Practice--Annotated § 342.201

§ 342.201 Proceedings by Laborer to Obtain Priority on Wage Claim--Verified Denial of Claim by Declaration of Creditor [Code Civ. Proc. § 1207]

[1] FORM Proceedings by Laborer to Obtain Priority on Wage Claim--Verified Denial of Claim by Declaration of Creditor [Code Civ. Proc. § 1207]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	DENIAL OF CLAIM OF PRIORITY ON WAGE CLAIM
_____ [*name*],	)	
Defendant.	)	[*Code Civ. Proc. § 1207*]
	)	
	)	

To the Sheriff of the County of _____:

I, _____ [*name*], the creditor and plaintiff in the above-entitled action, declare that _____ [*name of labor claimant*] has filed a priority labor claim against _____ [*name of defendant*] who is the defendant in the above-entitled action; that the labor claim is _____ [false *or* excessive]; that defendant _____ [owes claimant neither the amount claimed nor any other amount *or* owes claimant $_____ rather than the $_____ that is claimed]; and that defendant can support this statement with his/her/its records.

_____ [*signature of attaching creditor*]

VERIFICATION

STATE OF CALIFORNIA)
COUNTY OF_____) ss
)

_____ [*Name*], being duly sworn, deposes and says that:

He/She is the secured creditor and plaintiff in the above-entitled action.

He/She has read the foregoing denial of labor claim and knows the contents thereof. The same is true of his/her own knowledge, except as to those matters which are therein stated on his/her information or belief.

_____ [*signature of secured creditor*]

Subscribed and sworn to before me on _____ [*date*].

_____ [*signature*]

Notary Public

[2] Use of Form

The foregoing form of denial is for use by a creditor in denying either the entire amount of a preferred labor claim under *Code Civ. Proc. § 1206*, or a partial amount of such a claim. With appropriate adaptations, the form may be used by the defendant in the main action rather than by the creditor [*see Code Civ. Proc. § 1207*].

[3] Information and Belief

The form is drafted for use by a creditor who has knowledge that the wage claim is false or excessive. If the declaration can only be made on information and belief, it should be redrafted to state the nature and source of the information and belief [*see Code Civ. Proc. § 1207*].

[4] Service and Filing of Verified Denial

The verified denial must be filed with the levying officer within five days after receiving a copy of the statement of claim [*see Code Civ. Proc. § 1207*].

The claimant's 10-day deadline for filing a petition to determine the claim of priority commences when a copy of the denial is mailed by registered mail to the claimant or the claimant's attorney at the address given in the statement of claim and the registry receipt is attached to the original denial filed with the levying officer, or when a copy of the denial is handed to the claimant or the claimant's attorney [*see Code Civ. Proc. § 1206(c)*].

[5] Cross References

For a related form, see *§ 342.200*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsWage Payments

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30-342 California Forms of Pleading and Practice--Annotated § 342.202

§ 342.202 Proceedings by Laborer to Obtain Priority on Wage Claim--Petition by Labor Claimant for Hearing on Claim [Code Civ. Proc. § 1206]

[1] FORM Proceedings by Laborer to Obtain Priority on Wage Claim--Petition by Labor Claimant for Hearing on Claim [Code Civ. Proc. § 1206]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	PETITION FOR HEARING ON PRIORITY OF
_____ [*name*],	)	WAGE CLAIM
Defendant.	)	[*Code Civ. Proc. § 1206*]
	)	
	)	

_____ [*Name of claimant*] hereby petitions the above-entitled court for a hearing on his/her claim for priority and alleges:

1. Petitioner is a claimant who has filed a claim for payment of unpaid wages under *Code of Civil Procedure section 1206*. The claim was filed in connection with the levy of a writ of _____ [*specify*] by _____ [*name of creditor*], plaintiff in the above-entitled action, against _____ [*name of claimant's employer*], defendant in the above-entitled action and claimant's employer.

2. A copy of the verified wage claim was sent to the Sheriff of _____ County, California, on _____ [*date*]. A copy of the claim is attached hereto as Exhibit A and made a part hereof.

3. The Sheriff had previously, on _____ [*date*], levied a writ of _____ [attachment *or* execution] against the property and assets of _____ [*name of claimant's employer*] according to the demand of _____ [*name of creditor*].

4. The wage claim was denied _____ [completely *or* in the amount of $_____] on _____ [*date*]. A copy of the denial is attached hereto as Exhibit B and made a part hereof.

5. The wage claim of petitioner is valid in its entirety, has priority over the right of _____ [*name of creditor*] to any proceeds resulting from the writ of _____ [attachment *or* execution], and should be paid prior to any payment to _____ [*name of secured creditor*].

WHEREFORE, petitioner prays that this court set a time and place for a hearing on the disputed claim in order to determine the validity thereof and for such other and further relief as the court deems just.
Dated: _____.

_____ [*signature*]

Petitioner

[2] Use of Form

The foregoing form of petition is for use by a labor claimant to seek a hearing to determine priority if the wage claim has been denied completely or partially by the attaching creditor or his or her employer [*see Code Civ. Proc. § 1206(c)*].

[3] Time for Filing

The petition must be filed within 10 days after the time when the attaching creditor or employer deposited the denial in the mail or served a copy of it on the claimant or the claimant's attorney; otherwise the claim for priority is barred [*Code Civ. Proc. § 1206(c)*].

[4] More Than One Writ Involved

If more than one attachment or execution is involved, the petition must be filed in the court having jurisdiction over the senior attachment or execution [*Code Civ. Proc. § 1206(c)*].

[5] Cross References

For related forms, see *§§ 342.200, 342.201*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsWage Payments

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30-342 California Forms of Pleading and Practice--Annotated § 342.203

§ 342.203 Proceedings by Laborer to Obtain Priority on Wage Claim--Order Setting Time for Hearing of Disputed Claim [Code Civ. Proc. § 1206]

[1] FORM Proceedings by Laborer to Obtain Priority on Wage Claim--Order Setting Time for Hearing of Disputed Claim [Code Civ. Proc. § 1206]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER FOR HEARING ON PRIORITY OF
Plaintiff,	)	WAGE CLAIM
vs.	)	[*Code Civ. Proc. § 1206*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

_____ [*Name of labor claimant*], labor claimant herein, today having presented a petition for hearing of his/her disputed claim of priority over the attachment of plaintiff in the above-entitled action, and good cause appearing therefor,

IT IS HEREBY ORDERED that the disputed claim of priority be set for hearing in [Department _____ of] the above-entitled court at _____ [*time*] on _____ [*date*].
Dated: _____.

_____ [*signature*]

Judge

[2] Use of Form

The foregoing form of order is for use in obtaining a time and place for a hearing at which the validity of the labor claimant's wage claim will be determined. The hearing must be held within 20 days from the filing of the petition unless the court continues it for good cause [*Code Civ. Proc. § 1206(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewGovernmentsState & Territorial GovernmentsClaims By & AgainstLabor & Employment LawWage & Hour LawsWage Payments

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30-342 California Forms of Pleading and Practice--Annotated § 342.204

§ 342.204 Proceedings by Laborer to Obtain Priority on Wage Claim--Notice of Hearing of Disputed Claim [Code Civ. Proc. § 1206]

[1] FORM Proceedings by Laborer to Obtain Priority on Wage Claim--Notice of Hearing of Disputed Claim [Code Civ. Proc. § 1206]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF HEARING OF DISPUTED CLAIM
Plaintiff,	)	[*Code Civ. Proc. § 1206*]
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]
	)	

_____

TO: _____, Plaintiff
_____, Plaintiff's Attorney
_____, Defendant
_____, Defendant's Attorney

NOTICE IS HEREBY GIVEN that the hearing to determine the claim for priority of the disputed labor claim of the undersigned over any proceeds resulting from the writ of _____ [attachment *or* execution] by

_____ [*name of attaching creditor*], plaintiff in the above-entitled action, will be heard in [Department _____ of] the above-entitled court at _____ [time] on _____ [*date*]. The parties are _____ [*name*], attaching creditor, and _____ [*name*], alleged debtor. _____ [*Name of labor claimant*] is the person making the priority labor claim.
Dated: _____.

_____ [*signature*]

Labor Claimant

[2] Use of Form

The foregoing form of notice is for use by a labor claimant in giving the required notice to the plaintiff and defendant, or their attorneys, and also all parties who are claiming an interest in the property, or their attorneys [*Code Civ. Proc. § 1206(c)*].

[3] Time Limitation

The notice of the hearing must be given 10 days prior to the hearing [*Code Civ. Proc. § 1206(c)*].

[4] Contents of Notice

The notice may be informal, and only needs to specify the name of the court, names of the principal parties to the senior attachment or execution, and name of the wage claimant or claimants on whose behalf it is filed, and that the hearing is for the purpose of determining the claim for priority [*Code Civ. Proc. § 1206(c)*].

[5] Cross References

For related forms, see *§§ 342.200 -342.203*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsWage Payments

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30-342 California Forms of Pleading and Practice--Annotated § 342.205

§ 342.205 Proceedings by Laborer to Obtain Priority on Wage Claim--Order Granting Priority of Labor Lien [Code Civ. Proc. § 1206]

[1] FORM Proceedings by Laborer to Obtain Priority on Wage Claim--Order Granting Priority of Labor Lien [Code Civ. Proc. § 1206]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER GRANTING PRIORITY OF LABOR
_____ [*name*],	)	CLAIM
Defendant.	)	[*Code Civ. Proc. § 1206*]
	)	
	)	

The disputed claim of _____ [*name*], as labor claimant, for priority over plaintiff as creditor in the above-entitled action came on regularly for hearing before me on _____ [*date*]. [_____ (*Name*) appeared as counsel for claimant, and _____ (*name*) appeared as counsel for plaintiff.] On proof made to the satisfaction of the court, being fully advised in the matter, and good cause appearing therefor,

IT IS HEREBY ORDERED that claimant has priority and is hereby granted priority over plaintiff as creditor to the extent of $_____ on any money or property secured in the above-entitled action.
Dated: _____.

_____ [*signature*]

Judge

[2] Use of Form

The foregoing form of order is for use in granting a petition for priority of a labor claimant over the attachment or execution of a nonlabor creditor [*see Code Civ. Proc. § 1206(c), (d)*].

[3] Partial Admission of Amount Due

If part of the claim was admitted to be due and the claimant nevertheless filed a petition for hearing and the court does not allow more than the amount so admitted, the claimant cannot recover costs. The costs must be deducted from the sum that is determined to be due to the claimant [*Code Civ. Proc. § 1207*].

[4] Cross References

For related forms, see *§§ 342.200 -342.202*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWage & Hour LawsWage PaymentsReal Property LawNonmortgage LiensGeneral Overview

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30-342 California Forms of Pleading and Practice--Annotated § 342.206

§ 342.206 Labor Claimant's Sworn Claim to Assignee for Benefit of Creditors

[1] FORM Labor Claimant's Sworn Claim to Assignee for Benefit of Creditors

TO: _____ [*name*]
_____ Street
_____, California

NOTICE IS HEREBY GIVEN to you as assignee for the benefit of the creditors of _____ [*name*] that the undersigned labor claimant, pursuant to *Code of Civil Procedure Section 1204*, hereby makes a claim for _____ [*specify, e.g.,* wages, including vacation, severance, and sick leave pay,] in the amount of $_____ [*specify amount not exceeding $4,300*], and for contributions to _____ [*specify employee benefit plan to which contributions were made*] in the amount of $_____. The basis of the claim is labor as a _____ [*specify nature of job*] that the undersigned performed within 90 days before the date of the assignment to you, and contributions to _____ [*specify employee benefit plan*] arising from services rendered within 180 days before the date of the assignment to you. It is the intention of the undersigned claimant to claim the full priority and lien status allowed by law. The payment should be sent to the address listed below.
Dated: _____.

_____ [*signature*]

Labor Claimant

_____ Street

_____, California

VERIFICATION

STATE OF CALIFORNIA)
COUNTY OF_____) ss
_____)

_____ [*Name*], being duly sworn, deposes and says that:

He/She is the Claimant in the foregoing _____ [*specify, e.g.,* Wage] and Benefit Claim.

He/She has read the above claim and knows the contents thereof. The claim is true of his/her own knowledge, and the amount claimed is for _____ [*specify, e.g.,* wages] earned within 90 days prior to the date of assignment and for contributions made to the employee benefit plan arising from services rendered within 180 days before the date of assignment.

_____ [*signature*]

Subscribed and sworn to before me on _____ [*date*].

_____ [*signature*]

Notary Public

[2] Use of Form

This form is for use by a labor claimant whenever any assignment is made for the benefit of creditors of the assignor. With appropriate modifications, it may be used by a labor claimant when an assignment results from any proceeding in insolvency or receivership against the assignor, or when any property is turned over to the creditors of a person, firm, association, or corporation, or to a receiver or trustee for the benefit of creditors [*see Code Civ. Proc. § 1204*].

[3] Limitations on Claims

The claim for wages, salary, or commissions is limited to those earned but not paid that resulted from work performed within 90 days before the date of the making of the assignment, the taking over of the property, the commencement of the court proceeding, or the date of the cessation of the debtor's business, whichever occurs first. The claim for wages is also limited to $4,300. The claim for contributions to employee benefit plans is limited to those arising from services rendered within 180 days before the date of the making of the assignment, the taking over of the property, the commencement of the court proceeding, or the date of the cessation of the debtor's business, whichever occurs first. The claim for contributions is also limited to the extent of the number of employees covered by the employee benefit plan multiplied by $4,300, less the aggregate amount paid to the employees under *Code Civ. Proc. § 1204(a)* plus the aggregate amount paid by the estate on behalf of the employees to any other benefit plan [*Code Civ. Proc. § 1204*].

[4] Sworn Claims and Payments

The trustee, receiver, or assignee for the benefit of creditors has the right to require sworn claims to be presented and has the right to refuse to pay any such preferred claim, either in whole or in part, if he or she has reasonable cause to believe that the claim is not valid. He or she must, however, pay any part that is not disputed without prejudice to the claimant's rights as to the balance of the claimant's claim. He or she must also withhold sufficient money to cover the

disputed portion until the claimant in question has a reasonable opportunity to establish the validity of the claim by court action, either in the claimant's own name or through an assignee [*Code Civ. Proc. § 1204*].

[5] Cross References

For discussion and forms for use generally in cases involving assignments for the benefit of creditors, see Ch. 307, *Insolvency*

For discussion and forms for use generally in receivership proceedings, see Ch. 486, *Receivers*

[6] Decisions

Assignment for benefit of creditors instanter creates in wage claimants of assignor lien on property assigned that is superior to expenses of administration and liquidation incurred by assignee under *Code Civ. Proc. § 1204*. *Division of Labor Law Enforcement v. Stanley Restaurants, Inc. (9th Cir. 1955) 228 F.2d 420, 423-424*

Payments made by an employer pursuant to an industrywide collective bargaining agreement into independent trust funds for medical, welfare, and retirement benefits constitute wages under *Code Civ. Proc. § 1204*. *Dunlop v. Tremayne (1965) 62 Cal. 2d 427, 431, 42 Cal. Rptr. 438, 398 P.2d 774* (decided prior to 1979 amendments to *Code Civ. Proc. § 1204*)

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawState Insolvency LawsCivil ProcedureRemediesReceivershipsGeneral OverviewLabor & Employment LawWage & Hour LawsAssignments, Deductions & GarnishmentsLabor & Employment LawWage & Hour LawsWage PaymentsReal Property LawNonmortgage LiensGeneral Overview

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30-342 California Forms of Pleading and Practice--Annotated § 342.250

§ 342.250 Explanation of Table

This Table of Liens is designed as a quick reference to statutes relating to the creation of liens, including statutes discussed in this chapter, Ch. 342, *Liens and Wage Preferences*. When appropriate, this table cross-refers to related chapters in California Forms of Pleading and Practice that discuss specific liens.

CAUTION:

This table is not intended to comprise an exhaustive list of all liens available by statute in California. If a particular topic being researched is not found in this table, review other chapters in California Forms of Pleading and Practice and California primary law sources.

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30-342 California Forms of Pleading and Practice--Annotated § 342.251

§ 342.251 Abandoned Excavation

Lien on property for abatement of abandoned excavation. *Gov. Code § 50247*

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30-342 California Forms of Pleading and Practice--Annotated § 342.252

§ 342.252 Agriculture

Trust for suppliers of perishable agricultural commodities. *7 U.S.C. § 499a et seq.*

Establishment and perfection of lien for equipment dealer of machines used for agriculture, livestock, grazing, light industrial, and utility. *Bus. & Prof. Code § 22906 et seq.*

Lien for providers of agricultural chemical or agricultural seed. *Food & Agric. Code § 57551 et seq.*

See also Ch. 503, *Sales: Secured Transactions*

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30-342 California Forms of Pleading and Practice--Annotated § 342.253

§ 342.253 Agricultural Laborer

Nonpossessory lien is created by statute in favor of employees who by their own labor harvest or transport crops or farm products. *Civ. Code § 3061.5*

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30-342 California Forms of Pleading and Practice--Annotated § 342.254

§ 342.254 Aircraft

Lien for repairs, labor, supplies or storage relating to aircraft. *Code Civ. Proc. § 1208.61 et seq.*; see also *Bus. & Prof. Code §§ 9798.1-9798.4*; but see *Martin v. Heady (1980) 103 Cal. App. 3d 580, 589, 163 Cal. Rptr. 117* (*Code Civ. Proc. §§ 1208.65-1208.68* is unconstitutional in authorizing involuntary sale of aircraft without opportunity for hearing)

See also Ch. 16, *Airplanes and Airports*

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30-342 California Forms of Pleading and Practice--Annotated § 342.255

§ 342.255 Airports

Lien for fees and charges at airports operated by local agency. Gov. Code § 504740

Department of Transportation has lien on personal property to enforce payment of any charges for repairs, improvements, storage, or care of that property made in connection with operation of airport owned or operated by state. *Pub. Util. Code § 21640*

See also Ch. 16, *Airplanes and Airports*

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30-342 California Forms of Pleading and Practice--Annotated § 342.256

§ 342.256 Alcoholic Beverages

Under unlawful liquor sale abatement law, when owner of building or place on which acts constituting contempt is guilty of contempt and is fined therefor, fine is lien on such building and place. *Penal Code § 11206*

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30-342 California Forms of Pleading and Practice--Annotated § 342.257

§ 342.257 Animals

Fur-bearing animal raised commercially in captivity is subject of lien and classified as domestic animal. *Civ. Code § 996*

Lien for price of breeding service of stallion, jack or bull. *Civ. Code § 3062 et seq.*

Lien for care of abused or neglected animal. *Code Civ. Proc. § 1208.5*

Lien for care and feeding of animal in transit. *Food & Agric. Code § 16907*

Lien for care of estray animal. *Food & Agric. Code § 17041*

Lien for care of hides, animals, or carcasses impounded. *Food & Agric. Code § 20439*

Lien of meat packer for animal slaughtering. *Food & Agric. Code § 55701 et seq.*

See also Ch. 24, *Animals: Liens*

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30-342 California Forms of Pleading and Practice--Annotated § 342.258

§ 342.258 Architects

Architects, engineers, and land surveyors are design professionals entitled to lien on real property for professional services rendered. *Civ. Code § 3081.1 et seq.*; see also *Civ. Code § 3082 et seq.* (mechanic's lien)

See also Ch. 361, *Mechanics' Liens*

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30-342 California Forms of Pleading and Practice--Annotated § 342.259

§ 342.259 Artisans

Lien of artisan for work done, materials furnished, and storage. Code Civ. Proc. § 3051

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30-342 California Forms of Pleading and Practice--Annotated § 342.260

§ 342.260 Assessments

Charge added by public utility district to assessment is lien on land. *Pub. Util. Code §§ 16470, 16472.1*

Assessment for construction of sidewalk or curb is special assessment and lien on property. *Sts. & Hy. Code § 5890 et seq.*

See also Ch. 540, *Taxes and Assessments*

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30-342 California Forms of Pleading and Practice--Annotated § 342.261

§ 342.261 Bail Bonds

Lien of bail bond licensee on real property used as security for bail bond. *Penal Code § 1276.5*

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30-342 California Forms of Pleading and Practice--Annotated § 342.262

§ 342.262 Bankers

Lien on property possessed by banker or savings and loan for balance due in course of business. *Civ. Code § 3054*; *Fin. Code §§ 864, 6660*

See also *Ch. 95, Banks, Deposits, and Checks, § 95.180* et seq.

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§ 342.263 Carriers

Freight carrier's lien for freightage, services rendered, care and preservation of property, money advanced at shipper's request, and fines and other charges resulting from false or erroneous certifications of gross cargo. *Civ. Code § 2144*

Lien of common carrier on luggage of passenger for fare. *Civ. Code § 2191*

Carrier's lien for freight previously delivered on promise of shipper to pay freightage, charges and advances. *Civ. Code § 3051.5*

See also Ch. 109, *Carriers* ,and Ch. 213, *Documents of Title*

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§ 342.264 Cemeteries

Lien does not affect dedication of land as cemetery, but land as subject to lien. *Health & Safety Code § 8351*

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§ 342.265 Controlled Substances

Lien for costs of abating nuisance on building or place selling or storing controlled substances. *Health & Safety Code § 11579 et seq.*

Owner of building fined for contempt involving use of building for selling or storing controlled substances has lien on building to extent of owner's interest in it. *Health & Safety Code § 11586 et seq.*

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§ 342.266 Dairy Cattle Supply

Lien for provider of feed or materials to aid the raising or maintaining of dairy cattle on proceeds of sale. *Food & Agric. Code § 57401 et seq.*

See also Ch. 24, *Animals: Liens*

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§ 342.267 Employees

Preferences to wage claims in insolvency proceedings. *Code Civ. Proc. § 1204 et seq.*

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§ 342.268 Employers

Abstract of summary judgment acquired by Director of Employment Development when employing unit delinquent in payments is lien on all property of employer in county where recorded. *Unemp. Ins. Code § 1816*

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§ 342.269 Equipment Dealers

Lien for amounts due under equipment repurchase agreement when equipment dealer agreement terminated or not renewed. *Bus. & Prof. Code § 22906 et seq.*

See also Ch. 515, *Securities and Franchise Regulation*

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§ 342.270 Factors

Lien on personal property entrusted to factor. *Civ. Code § 3053*

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§ 342.271 Fines

Under red-light abatement law, when owner of building or place on which acts constituting contempt occur is guilty of contempt and is fined therefor, fine constitutes lien on such building and place. *Penal Code § 11233*

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§ 342.272 Foundry Proprietors

Lien of foundry proprietor for work done, materials furnished, and storage. *Civ. Code § 3051*

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§ 342.273 Frozen Food Plant Owners

Lien of frozen food locker plant owner or operator for storage. *Health & Safety Code § 28718*

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§ 342.274 Gambling

Under law controlling gambling ships, whenever owner of means of conveyance or owner of any interest therein has been guilty of contempt of court and fined, fine constitutes lien on property to extent of owner's interest in it. *Penal Code § 11315*

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§ 342.275 Garagemen

Lien of garageman for work done, materials furnished, and storage. *Civ. Code § 3067 et seq.*

See also Ch. 274, *Garages and Gas Stations*

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§ 342.276 Health Care Providers

Limitations on lien for health care services (except hospital services) provided under health care service plan contract (except Medi-Cal program benefits) or disability insurance policy (except lien against worker's compensation claim). *Civ. Code § 3040*

Lien rights and procedures for recovery by health benefits trusts of medical costs paid on behalf of participants for injuries caused by third party when participant obtains settlement, award, or judgment against third party. *Gov. Code §§ 22947, 22948*

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§ 342.277 Hospitals

Lien of hospital on unclaimed personal property for sums due, including storage. *Civ. Code § 1862.5*

Lien of hospital on damages recovered by injured person for hospital care charges in consequence of actionable injury, to extent of injured person's existing debt to hospital for those charges. *Civ. Code § 3045.1 et seq.*

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§ 342.278 Innkeepers

Lien of hotel, motel, inn, boardinghouse and lodginghouse keeper on personal property on premises of guests, boarders, tenants or lodgers. *Civ. Code § 1861 et seq.*

See also Ch. 297, *Hotels and Motels*

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§ 342.279 Jewelers

Lien of jeweler for work done, materials furnished, and storage. *Civ. Code § 3052a*

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§ 342.280 Judgments

Lien of foreign money judgment. *Code Civ. Proc. § 676.7(h)*

Lien on real property for money judgment created by recording abstract of judgment with county recorder. *Code Civ. Proc. § 697.310 et seq.*

Lien on personal property for money judgment created by filing notice with Secretary of State. *Code Civ. Proc. § 697.510 et seq.*

Lien on of judgment creditor on pending action or proceeding in which judgment debtor is a party created by filing notice. *Code Civ. Proc. § 708.410 et seq.*

See also Ch. 254, *Executions and Enforcement of Judgments*

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§ 342.281 Landlords

Lien of landlord on personal property of tenants that is on premises. *Civ. Code § 1861a*

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§ 342.282 Laundry and Dry Cleaners

Lien of laundry and dry cleaning proprietor for work done, materials furnished, and storage. *Civ. Code § 3051*

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§ 342.283 Legal Assistance Costs

Lien allowed to be imposed on real property owned by indigent defendant equal to cost of legal assistance provided either through public defender or private counsel. *Penal Code § 987.8*

See also Ch. 72, *Attorney Practice and Ethics*

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§ 342.284 Livestock

General lien of livestock service for feeding, boarding, health services and other general care. *Civ. Code § 3080 et seq.*

Lien for care of livestock or carcass seized in transit. *Food and Agric. Code § 23044*

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§ 342.285 Loggers

Lien of logger and lumberman on logs for work in connection with felling, preparing or transporting logs. *Civ. Code § 3065 et seq.*

See also Ch. 350, *Logs and Timber*

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§ 342.286 Mining

Lien of miner on real property worked as a mine for work in development or subtractive process or in furnishing materials. *Civ. Code § 3060*

Lien of mining partners for advances and debts. *Pub. Res. Code § 3943*

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§ 342.287 Mosquitoes

Liens on property for mosquito abatement. *Health & Safety Code § 2284 et seq.*

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§ 342.288 Oil and Gas

Lien of any person providing services or materials under contract with owner of leasehold for oil or gas purposes on leasehold, on all materials and fixtures owned by owner of leasehold, on all oil or gas wells located on leasehold, and on oil or gas produced from wells. *Code Civ. Proc. § 1203.50 et seq.*

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§ 342.289 Personal Property

Lien on personal property located at self-service storage facility. *Bus. & Prof. Code § 21700 et seq.*

Lien of attachment on personal property. *Code Civ. Proc. §§ 488.335, 488.345*

See also Ch. 62, *Attachment* and Ch. 517, *Self-Service Storage Facilities*

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§ 342.290 Plants

Recording notice of expense relating to plant infestation as lien. *Food & Agric. Code § 5428 et seq.*

Expense of removing or destroying any neglected or abandoned plant or crop that is public nuisance as lien. *Food & Agric. Code § 5631 et seq.*

Owner's share of expense of eradication of camelthorn as lien. *Food & Agric. Code § 7305*

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§ 342.291 Plastic Fabricators

Lien of plastic fabricator for work done, materials furnished, and storage. *Civ. Code § 3051*

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§ 342.292 Poultry and Fish Supply

Lien for provider of feed or materials to aid the raising or maintaining of poultry or fish or for the production of eggs on proceeds of sale. *Food & Agric. Code § 57501 et seq.*

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§ 342.293 Producers

Lien of farm product producer on processor for labor, care, and expense in growing and harvesting. *Food & Agric. Code § 55631 et seq.*

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§ 342.294 Public Nuisance

Liens, and priorities of liens, for cost of abating nuisance. *Gov. Code § 38773 et seq.*

Violation of *Gov. Code § 51182* (requiring owner to maintain property in designated "very high fire hazard severity zone") as public nuisance pursuant to *Gov. Code § 38773. Gov. Code § 51187*

Department of Forestry as having lien on property for costs incurred in abating any public nuisance pursuant to Pub. Res. Code *§ 4170 et seq. Pub. Res. Code* § 4178

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§ 342.295 Radioactive Contamination

Lien on property or building for abatement of radioactive contamination. *Health & Safety Code § 25863*

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§ 342.296 Railway Roadbeds

Lien on property for improvement of railway roadbeds. *Pub. Contract Code §§ 20855, 20870*

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§ 342.297 Real Property

Lien on condominium for assessments. *Civ. Code § 1367*

Vendor of real property. *Civ. Code § 3046 et seq.*

Special lien as created by purchaser. *Civ. Code § 3050*

Attachment lien on real property as created by levy under writ of attachment. *Code Civ. Proc. § 488.500 et seq.*

Lien for local agency's costs of clearing fire hazards after landowner's failure to do so. *Gov. Code § 51186*; *see Gov. Code § 51182* (owner's duty); *Gov. Code § 51187* (owner's violation as nuisance pursuant to *Gov. Code § 38773*)

Delinquent municipal utility district accounts as lien on real property. *Pub. Util. Code § 12811.1*

See also Ch. 62, *Attachment* , Ch. 124, *Condominiums and Other Common Interest Developments*, Ch. 555, *Trust Deeds and Real Property Mortgages*, and Ch. 569, *Vendor and Purchaser*

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§ 342.298 Repairs

Lien on personal property for repairs, materials furnished, and storage. *Civ. Code § 3051*

See also Ch. 93, *Bailments*

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§ 342.299 Rodents

Rodents, for cost of exterminating. *Health & Safety Code § 1807 et seq.*

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§ 342.300 Storage Facilities

Lien of self-service storage facility owner on property located at facility. *Bus. & Prof. Code § 21702 et seq.*

Lien on personal property for storage. *Civ. Code §§ 1856, 1857*

See also Ch. 517, *Self-Service Storage Facilities*

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§ 342.301 Taxes

Uniform Federal Lien Registration Act. Code Civ. Proc. § 12100 et seq.

State tax lien as attaching to all property and rights to property belonging to taxpayer and located in state. *Gov. Code § 7150 et seq.*

State as having lien on any and all personal property belonging to person or entity owned for taxes due. *Gov. Code § 12419.4*

Tax on real property as lien against property assessed. *Rev. & Tax. Code § 2187*

Tax on improvements as lien on taxable land on which improvements are located. *Rev. & Tax. Code §§ 2188, 2188.1*

Sales and use tax lien as attaching to all property owned by person in county. *Rev. & Tax. Code §§ 6738, 6756 et seq.*

Motor vehicle fuel license tax lien as attaching all personal property and all real property located in county. *Rev. & Tax. Code § 7872*; *see also Gov. Code § 7150 et seq.*

Use fuel tax lien as attaching motor vehicle and any personal property. *Rev. & Tax. Code § 8991 et seq.*

Private car tax lien as attaching private cars, personal property, and real property located within county. *Rev. & Tax Code § 11491 et seq.*

Insurance tax lien as attaching all property and franchises. *Rev. & Tax. Code § 12491 et seq.*

Estate tax lien as state tax lien. *Rev. & Tax. Code § 13610*; *see also Gov. Code §§ 7150 et seq., 12419.4*

Personal income tax lien as attaching to all real property located in county. *Rev. & Tax. Code §§ 19203, 19221 et seq.*

Bank and corporation tax lien as state tax lien. *Rev. & Tax. Code §§ 19203, 19221 et seq.*; *see also Gov. Code §§ 7150 et seq., 12419.4*

Cigarette tax lien as state tax lien. *Rev. & Tax. Code § 30322 et seq.*; *see also Gov. Code §§ 7150 et seq., 12419.4*

See also Ch. 540, *Taxes and Assessments*

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§ 342.302 Threshers

Lien of thresher on machines for services rendered. *Civ. Code § 3061*

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§ 342.303 Tolls

Tolls on vehicular crossing as creating lien. *Veh. Code § 23303*

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§ 342.304 Trailer Parks

Lien of trailer park operator for work done, materials furnished, and storage. *Civ. Code § 3067 et seq.*

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§ 342.305 Unemployment Insurance

Unemployment insurance contribution lien as state tax lien. *Unemp. Ins. Code § 1701 et seq.*; *see also Gov. Code §§ 7150 et seq., 12419.4*; *Unemp. Ins. Code § 1870 et seq.*

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§ 342.306 Utility Services

Sanitary District Board as having lien on property for delinquent and unpaid charges and costs for sewer and other services. *Health & Safety Code §§ 6520.10-6520.12*

Department of Parks and Recreation or Department of General Services as having lien on real property after filing notice with recorder where charges or fees for water, sewage, gas, electricity, garbage, or other utility services furnished. *Pub. Res. Code § 5003.7*

Delinquent municipal utility district accounts as lien on real property. *Pub. Util. Code § 12811.1*

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§ 342.307 Vehicles

Lien of repairman for repairs, materials, storage, and protection. *Civ. Code §§ 3051, 3067 et seq.*

Lien on vehicles not subject to registration. *Civ. Code § 3051*

Lien on vehicles subject to registration. *Civ. Code § 3067 et seq.*

License fee and penalty on vehicle as creating lien. *Rev. & Tax. Code § 10876*

Liens of Department of Motor Vehicles on apportioned commercial fleet vehicles. *Veh. Code § 8200 et seq.*

Registration and transfer fees and penalties as lien on vehicle for which payment due. *Veh. Code § 9800 et seq.*

Recordation (pursuant to *Veh. Code §§ 40509, 40509.5*) of notice of failure to appear or failure to pay fine as creating lien on all defendant's vehicles subject to registration; enforcement pursuant to *Veh. Code § 9800 et seq., Veh. Code § 14911*

Lien on vehicles removed from highway or public or private property and stored in garage. *Veh. Code §§ 22851, 22851.1, 22851.4-22851.12, 22852.5, 22856*

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§ 342.308 Veterinarian

Lien of veterinarian for services rendered. *Civ. Code § 3051*

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§ 342.309 Vessels

Judgment entered when district attorney prosecutes acts penalized by *Harb. & Nav. Code § 250 et seq.* as lien on vessel against whose owners or master it is recovered. *Harb. & Nav. Code § 266*

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Bottomry as creating lien. *Harb. & Nav. Code § 450 et seq.*

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Debts amounting to at least fifty dollars as liens. *Harb. & Nav. Code § 490 et seq.*

Liens on vessels for services rendered, supplies furnished, work done, anchorage, breach of contract, and injuries to persons or property. *Harb. & Nav. Code § 491*

Master's lien on vessel for advances made or liability incurred. *Harb. & Nav. Code § 492*

Mate's and seamen's lien on vessel for wages. *Harb. & Nav. Code § 493*

Injury to buoy or beacon as creating lien on vessel that caused injury. *Harb. & Nav. Code § 494*

Attachment of vessel as security for satisfaction of judgment. *Harb. & Nav. Code §§ 495.1-497*

Boaters Lien Law. *Harb. & Nav. Code § 500 et seq.*

Lien on vessel for salvage. *Harb. & Nav. Code § 534*

See also Ch. 522, *Ships and Shipping*

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§ 342.310 Warehousemen

Warehousemen's lien on goods deposited for storage, transportation, and security. *Com. Code §§ 7206, 7209, 7210, 7307*

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§ 342.311 Water

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Assessment on land by irrigation improvement district as lien on land. *Water Code §§ 23672*

Unpaid charges for water and other services as lien on land and added to annual assessment. *Water Code § 25806*

Annual irrigation district assessment on land as lien against property assessed. *Water Code § 25925*

Lien on real property for unpaid water charges or other services. *Water Code § 37212*

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§ 342.312 Water Pollution

Lien on property for abatement of water pollution. *Water Code § 13305(f)*

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[1] FORM

[2] Use of Form

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[1] FORM

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§ 344.01 Scope of Chapter

This chapter discusses the rights and liabilities of life tenants and remainder beneficiaries. It contains forms of complaints for use by a remainder beneficiary against a life tenant for waste [*see § 344.60*], and against the personal representative of the estate of a deceased life tenant to recover the unconsumed portion of a life estate [*see § 344.61*]. It also includes a form of complaint by a remainder beneficiary against a life tenant to foreclose a lien when the life tenant failed to pay real property taxes [*see § 344.62*].

For forms and a procedural guide for use by a life tenant or a remainder beneficiary in an action to partition successive estates, see Ch. 397, *Partition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsWasteGeneral Overview

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§ 344.02 Cross References

For discussion, procedural checklist, and forms for use in obtaining injunctive relief, see Ch. 393, *Injunctions* .

For discussion, procedural guide, and forms for use by a life tenant in an action to partition real property, see Ch. 397, *Partition* .

For discussion and forms relating to establishing the fact of death of a life tenant, see Ch. 440, *Probate* .

For discussion and forms related to actions for trespass, see Ch. 550, *Trespass* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 344.10 Governing Law

Life estates are defined in *Civ. Code §§ 765, 766*, and remainders are defined in *Civ. Code § 769*. Additional provisions relating to life estates and remainders are set forth in *Civ. Code §§ 779* and *780*. Ascertainment of income and principal and allocation of receipts and expenses between life tenants and remainder beneficiaries is governed by the Legal Estates Principal and Income Law, *Civ. Code § 731 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEstatesFuture InterestsRemainders

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§ 344.11 "Life Estate" Defined

A life estate is an estate the duration of which is measured by the life of the person holding it, or by the life of some other person [*Estate of Nichols (1962) 199 Cal. App. 2d 783, 795, 19 Cal. Rptr. 93]* . A life estate is a freehold estate, whether it is measured in its duration by the life of the tenant, or by the life of a third person [*Civ. Code §§ 765, 766*]. The remainder interest in the property vests in the remainder beneficiary on the life tenant's death [*Civ. Code § 780*; *see Clarke v. Bates (1951) 104 Cal. App. 2d 597, 598-599, 232 P.2d 33]* .

Legal Topics:

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

Life estate and remainder interests in a given asset may be separately valued at any given point in time, based on life expectancy and an assumed rate of return on investment; the sum of their values will equal the total value of the asset at that time [*In re Estate of Malpas (1992) 7 Cal. App. 4th 1901, 1908, 9 Cal. Rptr. 2d 806]* .

Legal Topics:

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

[1] By Deed

A life estate may be created in a deed (1) by a grant of a life estate [*Barnett v. Barnett (1894) 104 Cal. 298, 301-302, 37 P. 1049* ; *Jacobs v. All Persons (1909) 12 Cal. App. 163, 168, 106 P. 896]* or (2) by a reservation in favor of the grantor [*Green v. Brown (1951) 37 Cal. 2d 391, 394-395, 232 P.2d 487* ; *Lowe v. Ruhlman (1945) 67 Cal. App. 2d 828, 834, 155 P.2d 671]* . A life estate may also be created by implication when the grant in the deed is in fee simple, but the deed is delivered to another person besides the grantee and is to be delivered to the grantee on the grantor's death [*see* *Wilhoit v. Salmon (1905) 146 Cal. 444, 448, 80 P. 705* (deed unconditionally delivered in escrow vested title but not use and possession in grantees, and impliedly reserved life estate in grantor)].

[2] By Will

A life estate may be created by will [*Colburn v. Burlingame (1923) 190 Cal. 697, 700, 214 P. 226* ; *Estate of Smythe (1955) 132 Cal. App. 2d 343, 345, 351, 282 P.2d 141]* .

[3] Language of Conveyance

To convey a life estate it is not necessary that specific language such as "life estate" be used or that the estate be expressly declared to be a life estate. Any language that describes the characteristics of the estate in such a way as to show that a life estate was intended to pass is sufficient [*Estate of Nichols (1962) 199 Cal. App. 2d 783, 795, 19 Cal. Rptr. 93* (will); *Estate of Smythe (1955) 132 Cal. App. 2d 343, 345-346, 282 P.2d 141* (will)]. Moreover, it is not necessary to the creation of a life estate or interest that the donor, trustor, or testator express in words the period of its duration, nor is it necessary that he or she provide for disposition of the property on termination of the life estate or interest [*Estate of Bjors (1951) 103 Cal. App. 2d 361, 371, 229 P.2d 468]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 344.14 Rights of Life Tenant

[1] Use of Land

The owner of a life estate has the same rights to use the land as the owner of a fee simple [*Civ. Code § 818*]. The life tenant may make reasonable use of the premises, including, for example, the taking of all issues and profits from the land [*Civ. Code § 818*; *see also Sallee v. Daneri (1942) 49 Cal. App. 2d 324, 327-328, 121 P.2d 781* (life tenant permitted to cut and sell wood to clear land for farming)]. The life tenant's use is, however, subject to the limitation that it must not injure the reversionary interest [*Civ. Code § 818*]. Thus, although the life tenant is not technically a trustee, he or she must use the premises with due regard for the rights of the remainder beneficiary [*Estate of Steiner (1966) 240 Cal. App. 2d 78, 81, 49 Cal. Rptr. 352* ; *see also* discussion in *§ 344.15[3]* regarding waste].

[2] Reimbursement for Required Improvement

Generally, a life tenant has no obligation to make permanent improvements on the property that is the subject of the life estate. Moreover, a life tenant who does so may not assert a claim for reimbursement against the remainder beneficiary. An exception exists when the improvements are made under compulsion of statute or ordinance or when they are required by changed conditions to insure reasonable income from unproductive or low-income property [*Eastman v. Peterson (1968) 268 Cal. App. 2d 169, 173, 73 Cal. Rptr. 803]* . For example, when a city had ordered that improvements be made to correct deficiencies in a building subject to a life estate, the cost of improvements made by the life tenant could be recovered in an action to impress and foreclose a lien for such improvements against the remainder beneficiary [*Eastman v. Peterson (1968) 268 Cal. App. 2d 169, 173-176, 73 Cal. Rptr. 803]* .

[3] Insurance

A life tenant who insures the dwelling and improvements on property in which he or she has a life estate is entitled to the exclusive payment of the insurance benefits, unless an arrangement has been entered into obligating the life tenant to insure the interest of the remainder beneficiary [*Corder v. McDougall (1932) 216 Cal. 773, 774-775, 16 P.2d 740]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 344.15 Duties of Life Tenant

[1] Encumbrances

If there is an existing encumbrance on the property that is the subject of the life estate, the life tenant must pay the interest on the obligation and the remainder beneficiary must pay the principal [*Boggs v. Boggs (1944) 63 Cal. App. 2d 576, 580, 147 P.2d 116]* . If the remainder beneficiary fails to meet his or her obligation to pay the principal on such an obligation, and thus forces the life tenant to make that payment in addition to the payment of interest on the obligation, the life tenant has a lien on the remainder beneficiary's interest that can be foreclosed after demand on the remainder beneficiary for reimbursement [*Boggs v. Boggs (1944) 63 Cal. App. 2d 576, 583-585, 147 P.2d 116]* .

A life tenant who encumbers the property after the life estate has been created is solely liable for payment of the obligation [*see Pryor v. Winter (1905) 147 Cal. 554, 559, 82 P. 202* (remainder beneficiary independent title not subject to mortgage foreclosure suit against life tenant)].

[2] Taxes and Assessments

The life tenant must pay the taxes and other annual charges, and a just proportion of extraordinary assessments benefitting the whole inheritance [*Civ. Code § 840*]. If a life tenant fails to pay taxes and the holder of the reversionary interest pays them to protect his or her interest in the property, that interest entitles the holder to make the payment without being considered a mere volunteer; under equitable principles of subrogation, the holder of the revisionary interest thereby succeeds to the lien held by the taxing authority [*Riley v. Turpin (1956) 47 Cal. 2d 152, 156, 301 P.2d 834* ; *see Civ. Code § 2903*]. For a form of complaint to establish and foreclose on the lien, see *§ 344.62*.

[3] Waste

[a] Waste Defined

Civ. Code § 818 requires the life tenant to do no act that would injure the inheritance, and *Civ. Code § 840* requires him or her to keep the buildings and fences in repair from ordinary waste. A more general, judicially stated definition of waste is that it is an unlawful act or omission of duty on the part of a tenant that results in permanent injury to the

inheritance [*Southern Pacific Land Co. v. Kiggins (1930) 110 Cal. App. 56, 60-61, 293 P. 708* (suit by vendor against vendee)]. For example, a life tenant would be liable for the removal of timber from the subject property to the extent that such removal injures the inheritance of the remainder beneficiary [*see Civ. Code § 818*; *see also Sallee v. Daneri (1942) 49 Cal. App. 2d 324, 327-328, 121 P.2d 781* (life tenant not liable where cutting timber appreciated rather than depreciated property)].

A life tenant generally may work open mines and open new pits or galleries in the mine without committing waste [*see Haskell v. Wood (1967) 256 Cal. App. 2d 799, 803-804, 64 Cal. Rptr. 459]* . The right to work mines and the apportionment of income between the life tenant and remainder beneficiary are governed by the Legal Estates Principal and Income Law, *Civ. Code § 731 et seq.* For discussion, see *§ 344.16*.

[b] Proving Waste

Whether a life tenant has permanently injured the reversionary interest of the remainder beneficiary is determined by proof only of conduct that has resulted in substantial depreciation of the market value of the land [*Sallee v. Daneri (1942) 49 Cal. App. 2d 324, 327, 121 P.2d 781]* . The burden of proving depreciation in market value of the land as a result of the alleged wrongful acts of waste rests on the remainder beneficiary; the remainder beneficiary must establish depreciation by satisfactory evidence, even though a life tenant may not use what might appear to be the best of care in the cultivation and care of the property [*Sallee v. Daneri (1942) 49 Cal. App. 2d 324, 327, 121 P.2d 781]* . Hence, the owner of the reversionary interest may not subject the life tenant to damages for every act that does not meet with his or her approval [*Sallee v. Daneri (1942) 49 Cal. App. 2d 324, 327, 121 P.2d 781]* .

[c] Action for Waste; Treble Damages

If a life tenant commits waste on the subject property, any person aggrieved by the waste may bring an action against him or her for it [*Code Civ. Proc. § 732*]. Treble damages may be awarded in the action [*Code Civ. Proc. § 732*]. The purpose of the statute allowing this action is not to establish a rule of treble damages in all actions for waste, but to leave that matter to the court's discretion. In exercising its discretion, the court may award treble damages only when the waste was committed willfully and wantonly or maliciously. For instance, it would not be just to subject a life tenant to treble damages if the waste was committed under an honest claim of right or as the result of an honest mistake as to the defendant's right [*Isom v. Rex Crude Oil Co. (1903) 140 Cal. 678, 679-680, 74 P. 294* (action by landlord against assignee of lease procured by fraud from tenant)].

For a form of complaint for damages for, and injunctive relief against, waste, see *§ 344.60*.

[d] Equitable Relief Available

Besides recovering damages, a remainder beneficiary may seek an injunction against threatened waste [*Code Civ. Proc. § 526(a)(2)*; *see § 344.60*]. For example, an injunction was obtained when the life tenant wanted to tear up drain pipes on the subject property and would thereby have injured the inheritance [*see Taft v. Washington (1915) 29 Cal. App. 197, 199, 154 P. 1073]* .

[e] Action for Trespass Distinguished

In the customary situation involving a life tenant and a remainder beneficiary, there will be no problem in establishing that privity of title exists between the parties, and that the wrongdoer is rightfully in possession of the property [*see Southern Pacific Land Co. v. Kiggins (1930) 110 Cal. App. 56, 61, 293 P. 708* (stating these two requirements for waste actions in general)]. However, if for some reason, it is discovered that these two requirements are not present, the action is for trespass and not for waste [*see Wagoner v. Silva (1903) 139 Cal. 559, 560, 73 P. 433]* . For discussion and forms related to the tort of trespass, see Ch. 550, *Trespass* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 344.16 Allocation Between Principal and Income

[1] Governing Law

Generally, the Legal Estates Principal and Income Law [*Civ. Code §§ 731-731.15*] governs the allocation of principal and income between a life estate and the remainder and the apportionment of receipts and expenses between a life tenant and a remainder beneficiary [*Civ. Code § 731.04*]. However, the creator of a particular estate or interest may address these matters when the estate or interest is established. If so, the creator's intention is controlling, unless it is contrary to governing law [*Estate of Traung (1947) 30 Cal. 2d 811, 816, 185 P.2d 801* ; *Estate of Heard (1951) 107 Cal. App. 2d 225, 232-233, 236 P.2d 810* ; *Union Nat. Bank v. Hunter (1949) 93 Cal.App. 2d 669, 673, 209 P.2d 621* ; *Estate of Bothwell (1944) 65 Cal. App. 2d 598, 604, 151 P.2d 298]* . The creator's intent is determined by looking at the facts that existed at the time the estates were created [*Estate of Gartenlaub (1921) 185 Cal. 648, 653, 198 P.209]* . Theconveyor or devisor who establishes a legal estate or interest may authorize the life tenant or another person to direct the manner in which income and principal are ascertained and receipts and expenses are apportioned [*Civ. Code § 731.04*]. If the life tenant or other designated person exercises this authority in good faith and according to his or her best judgment, this exercise will be conclusive although it may be contrary to any determination that a court having jurisdiction might have made [*Civ. Code § 731.04*].

Transactions that establish a principal held in trust are governed by a different law, the Revised Uniform Principal and Income Act (*Probate Code § 16300 et seq.*) [*Civ. Code § 731.02*]. For discussion of principal and income allocation when the principal is held in trust, see California Legal Forms, Ch. 64*Testamentary Trusts* , .

Before 1968, the Uniform Principal and Income Act [former *Civ. Code § 730 et seq.*] governed these matters with regard to both legal estates and trusts. Cases decided under those provisions may apply to situations now governed by the Legal Estates Principal and Income Law.

The provisions of the Legal Estates Principal and Income Law do not affect the provisions of the Personal Income Tax Law or the Bank and Corporation Tax Law [*Civ. Code § 731.01*].

[2] Principal and Income Defined

As used in the Legal Estates Principal and Income Law, "principal" is real or personal property divided into present and future interests, with one person presently entitled to use or receive income from the property until the entire property, or a substitution for it, is distributed to the same or another person at a designated future time [*Civ. Code § 731.03(a)*].

"Income" is the return derived from principal [*Civ. Code § 731.03(b)*]. "Income" means "net income," unless there is a clear intention to the contrary [*Re Estate of Duffill (1919) 180 Cal. 748, 755, 183 P. 337* (right to use property entitles life tenant to net earnings of corporate stock); *Estate of Davis (1946) 75 Cal. App. 2d 528, 533, 171 P.2d 463]* .

[3] Tenant and Remainder Beneficiary Defined

The "tenant" is the person who has the present beneficial use of the principal, the person to whom the income is currently paid, or the person for whom income is currently accumulated [*Civ. Code § 731.03(c)*].

The "remainderman" is the person who is ultimately entitled to the principal, either by the terms of the transaction that established the principal or by operation of law [*Civ. Code § 731.03(c)*]. This chapter uses the terms "remainder beneficiary" and "remainder beneficiaries" in place of the terms "remainderman" and "remaindermen."

[4] Distribution of Principal and Income

The Legal Estates Principal and Income Law (*Civ. Code § 731 et seq.*) applies to ascertain what is principal and what is income as between a life tenant and a remainder beneficiary when the conveyor or devisor has not so specified [*Civ. Code § 731.04*]. Under this law, a life tenant has the right to all income derived from the principal, reduced by expenses properly charged against the income [*Civ. Code § 731.05(c)*]. For a discussion of expenses charged against income, see *§ 344.17*. Generally, income is paid and delivered to the life tenant. The life tenant retains the income, if it is already in his or her possession. If the terms of the transaction that established the principal so direct, the income is held and accumulated for the life tenant [*Civ. Code § 731.05(c)*].

When a tenant's right to income ends, by death or in any other manner, income payments already actually paid belong to the life tenant or to his or her personal representative. Income actually received after the life tenant's right to income has terminated are to be paid to the person next entitled to the income by the terms of the transaction that established the principal [*Civ. Code § 731.06*; *see §§ 344.20, 344.42[7]*].

Generally, the principal must be held for the remainder beneficiary to be distributed under the terms of the transaction that established the remainder or under governing law [*Civ. Code § 731.05(c)*]. However, if any part of the principal in the possession of a life tenant is an obligation for the payment of money secured by a mortgage or another pledge of real or personal property, the special rules of *Civ. Code § 731.14* govern [*Civ. Code § 731.05(c)*; *see § 344.18[8]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstates Created by Trusts & WillsFuture InterestsRemainder InterestsGeneral OverviewEstate, Gift & Trust LawEstates Created by Trusts & WillsLife EstatesGeneral OverviewReal Property LawEstatesFuture InterestsRemainders

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 344 LIFE ESTATES AND REMAINDERS
PART II. LEGAL BACKGROUND

30-344 California Forms of Pleading and Practice--Annotated § 344.17

§ 344.17 Allocation of Expenses

[1] Ordinary Expenses

Generally, ordinary expenses incurred in connection with the principal and its administration and management are paid out of income. These expenses include [*Civ. Code § 731.15(a)*]:

- Regularly recurring taxes assessed against any part of the principal;
- Water rates;
- Insurance premiums taken on the estates of both the life tenant and the remainder beneficiary;
- Interest on mortgages on the principal;
- Ordinary repairs;
- Compensation of assistants; and
- Court costs on regular accountings, except attorneys' fees.

However, ordinary expenses incurred in the administration and management of unproductive property (as defined in *Civ. Code § 731.13*) are paid out of principal [*Civ. Code § 731.15(a)*; *see § 344.17[5]*].

[2] Attorney's Fees and Legal Fees

Attorney's fees for ordinary or current services are paid one-half out of income, one-half out of principal, or in whatever proportion the court directs [*Civ. Code § 731.15(a)*].

Attorney's fees and other costs incurred in maintaining or defending any action to protect the property or its title, unless the action is due to the fault or cause of the life tenant, are paid out of principal [*Civ. Code § 731.15(b)*].

[3] Taxes

Taxes levied by any federal, state, or foreign authority on profit or gain resulting from a change in the form of the principal are paid out of principal, even if the taxing authority designates the tax as a tax on income [*Civ. Code § 731.15(b)*; *see Civ. Code § 731.05(b)* (treatment of gain from change in form of principal); *see also § 344.17[8]*]. However, special rules apply when any part of the principal in possession of the life tenant is an obligation for the payment of money secured by a mortgage or another pledge of property [*Civ. Code §§ 731.05(b), 731.14*; *see § 344.18[8]*].

[4] Other Costs and Expenses

Costs or assessments for improvements to property forming part of the principal, brokers' commissions, title charges, other costs in connection with purchasing, selling, or leasing property or investing or reinvesting the principal, and all other expenses not specifically designated as ordinary expenses, must be paid out of principal [*Civ. Code § 731.15(b)*; *see Civ. Code § 731.15(a)* (costs designated ordinary expenses); *see also §§ 344.16, 344.17[1]*].

[5] Charges Against Unproductive Property

Ordinary expenses usually paid out of income are paid out of principal when they are incurred in disposing of, or as carrying charges on, unproductive property [*Civ. Code § 731.15(a)*; *see § 344.17[1]*]. However, these expenses will eventually be charged against any delayed income that is due to the life tenant if the unproductive property is disposed of before the principal is finally distributed to the remainder beneficiary [*see Civ. Code § 731.13(b)*; *see also § 344.18[7]*].

[6] Allocation of Receipts; Rents and Interest

Generally, money or other property is income if it is received as payment for rent of real property, as payment for hire of personal property, as interest on money loaned, as interest on the rental or use value of property wrongfully withheld or tortiously damaged, or as any other payment in return for the use of the principal [*Civ. Code § 731.05*].

[7] Dividends

Dividends on corporate shares, paid in stock or otherwise, are income unless they are specifically allocated to principal under *Civ. Code § 731.07(a)(1), (2)* [*Civ. Code § 731.05*]. For further discussion, see *§ 344.18[1][a]*.

[8] Change in Form of Principal

Money or other property is principal if it is paid or delivered as a refund, replacement, or any other change in form of the principal. The following changes in the form of the principal are specifically designated as receipts of principal [*Civ. Code § 731.05(b)*]:

- Consideration for the sale or other transfer of property forming part of the principal, but not a transfer that is a leasing or letting;
- Loan repayment;
- Liquidation of assets of a corporation;
- Proceeds of property taken on eminent domain proceedings unless separate awards to the life tenant and the remainding beneficiary are made; and

- Insurance proceeds on property forming part of the principal, unless the insurance has been issued for the benefit of either the life tenant or the remainder beneficiary alone.

Generally, any profit or loss resulting from a change in form is a receipt or expense attributable to the principal. However, the special rules set forth in *Civ. Code § 731.14* apply if any part of the principal in the life tenant's possession is an obligation for the payment of money secured by a mortgage or any other pledge of property [*Civ. Code § 731.05(b)*]. For a discussion of these special rules, see *§ 344.18[8]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstates Created by Trusts & WillsFuture InterestsRemainder InterestsGeneral OverviewEstate, Gift & Trust LawEstates Created by Trusts & WillsLife EstatesGeneral OverviewReal Property LawEstatesPresent EstatesLife Estates

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Chapter 344 LIFE ESTATES AND REMAINDERS
PART II. LEGAL BACKGROUND

30-344 California Forms of Pleading and Practice--Annotated § 344.18

§ 344.18 Allocation in Specific Situations

[1] Disbursement of Corporate Assets

[a] Dividends

Whether corporate dividends are treated as principal or income depends on the nature of the dividends. Corporation dividends, including ordinary and extraordinary dividends and dividends payable in shares or other securities or corporate obligations, are treated as income unless they are specifically allocated to principal under *Civ. Code § 731.07(a)(1), (2)* [*Civ. Code § 731.07(a)*]. If a life tenant may choose to receive dividends in cash or in shares of the declaring corporation, the dividends are allocated to income, regardless of the life tenant's choice, unless the dividends are distributed by a qualified real estate investment trust [*Civ. Code § 731.07(a), (f)*; *see § 344.18[1][e]*].

Dividends on corporate shares forming part of the principal are allocated to principal if they are payable (1) in shares of the declaring corporation of the same kind and rank as the shares on which the dividends are paid; or (2) in shares of the declaring corporation of a different kind or rank to the extent that they represent a capitalization of surplus not derived from earnings [*Civ. Code § 731.07(a)(1), (2)*].

The life tenant may rely on the paying corporation's statement as to any relevant facts concerning the source or character of dividends or disbursements of corporate assets, including the corporation's statement as to whether dividends are paid from profits or earnings or are a return of capital or a division of corporate property [*Civ. Code § 731.07(g)*].

The date when a dividend accrues to the person who is entitled to it is the date that the corporation specifies, or, if the corporation does not specify a date, the date that the dividend is declared [*Civ. Code § 731.07(e)*].

[b] Subscription Rights

Subscription rights to shares or other securities or obligations of a corporation that accrue on account of ownership of shares or other securities in that corporation and proceeds from the sale of such rights are allocated to principal. Subscription rights to shares or other securities or obligations of a corporation accruing on account of ownership of

shares or other securities in another corporation and proceeds from the sale of such rights are allocated to income [*Civ. Code § 731.07(b)*].

[c] Disbursements on Corporate Liquidation

Generally, the amounts paid to shareholders by a liquidating corporation on corporate shares in disbursement of corporate assets are treated as principal. However, cash dividends paid by a liquidating corporation on corporate shares declared before the liquidation or as arrears of preferred or guaranteed dividends are treated as income. All disbursements of corporate assets to shareholders that a liquidating corporation designates as a return of capital or a division of corporate property are treated as principal [*Civ. Code § 731.07(c)*].

[d] Disbursements on Corporate Merger, Consolidation, or Reorganization

When one corporation succeeds another by merger, consolidation, or reorganization, or otherwise acquires the assets of the original corporation and corporate shares of the succeeding corporation are issued to the original corporation's shareholders in like proportion to, or in substitute for, shares of the original corporation, the two corporations are treated as a single corporation in applying the provisions regarding disbursement of corporate assets. However, two corporations will not be treated as a single corporation merely because one owns corporate shares of or otherwise controls or directs the other [*Civ. Code § 731.07(d)*].

[e] Disbursements by Regulated Investment Company or Qualified Real Estate Investment Trust

Most distributions made by a regulated investment company or a trust qualifying and electing to be taxed under federal law as a real estate investment trust are treated as principal. These include distributions from capital gains, depreciation, or depletion, whether in the form of cash, an option to take new stock or cash, or an option to purchase additional shares. However, distributions from ordinary income by the company or trust are treated as income [Civ. Code § 713.07(f)].

[2] Bonds or Obligations for Payment of Money

Generally, bonds or other obligations for the payment of money that are part of the principal are treated as principal at an inventory value fixed by appraisers regularly appointed by the court. If no appraisal value is available, the value is the market value at the time the principal was established or the cost, if the obligations were purchased later, regardless of their par or maturity value. When these obligations mature or when they are sold or otherwise transferred, any realized loss or gain is allocated to the principal, except when any part of the principal in tenant's possession is an obligation for the payment of money secured by a mortgage or another pledge of property. Then, the gain or loss is allocated under *Civ. Code § 731.14* [*Civ. Code § 731.08*; *see § 344.18[8]*].

If any part of the principal consists of bonds or other obligations for the payment of money that bear no stated interest but are redeemable at maturity or at a future time at an amount in excess of the amount of consideration for which it was issued, the excess, when realized, is allocated to income [*Civ. Code 731.08*].

[3] Use of Principal to Continue Business

If the creator of the life estate authorizes the life tenant to use any part of the principal to continue a business carried on by the creator, the net profits of the business attributable to the principal are treated as income [*Civ. Code § 731.09(a)*]. If the life tenant is authorized to continue a business that consists of buying and selling property, the net profits for any period are determined by deducting the inventory value of the property at the beginning of the period and the expenses during the period from the gross returns during the period and the inventory value of the property at the end of the period [*Civ. Code § 731.09(b)*]. If the continuation authorized involves a business that does not consist of buying and selling property, the net income is computed in accordance with the customarypractice of the business, but may not be

computed in a manner that decreases the principal [*Civ. Code § 731.09(c)*].

Any increase in the value of the principal used in a continued business is allocated to principal. Any losses in a calendar year, after the income from the business has been exhausted, is also allocated to the principal [*Civ. Code § 731.09(d)*].

[4] Animals and Offspring

Generally, the offspring or increase of animals held as part of the principal are allocated to income. However, if animals are held as part of the principal partly or wholly because of the offspring or increase that they are expected to produce, the offspring or increase is allocated to the principal to the extent necessary to maintain the original number of animals; the remainder is allocated to income [*Civ. Code § 731.10*]. If any part of the principal consists of animals employed in the business, the provisions regarding the use of the principal to continue a business apply [*Civ. Code § 731.10*; *see § 344.18[3]*].

[5] Natural Resources

The rule for allocating the proceeds from land with natural resources (e.g., timber, minerals, oils, gas) that may be removed or developed depends on whether the life tenant in possession has a duty to change the form of the principle's investment. If the life tenant has no duty to change the form of the investment, the net proceeds from natural resources taken from the land are allocated to income, whether they are received as rent, a bonus on a lease, consideration, or royalties or other proceeds for the permanent severance of the natural resources from the lands. Net proceeds are also allocated to income if the life tenant in possession has no duty to change the form of the investment, is authorized by law or the terms of the transaction establishing the principal to lease or otherwise develop the natural resources, and no provision is made for disposition of the net proceeds after paying expenses and carrying charges on the property [*Civ. Code § 731.11(a)*].

In the following specified circumstances, the life tenant is authorized to develop natural resources, in spite of evidence of a duty to change the form of the investment, unless there is additional evidence of appropriate intent to create the duty [*Civ. Code § 731.11(a)*]:

- The natural resources or the right to exploit them are specifically devised or granted;
- Development or exploitation of the natural resources began before the life estate was established;
- The transaction establishing the principal confers general authority to lease or otherwise develop the property; or
- The transaction establishing the principal directs that the lands be retained.

The fact that property received when the principal was created does not fall within the category of investments the tenant is authorized to make under the terms of the instrument establishing the principal or by law is not evidence of a duty to change the investment's form. The fact that a life tenant has the authority to sell property is not evidence of a duty to change the form of the investment [*Civ. Code § 731.11(a)*].

Proceeds from lands containing natural resources and the proceeds that are not allocated to income under *Civ. Code § 731.10(a)* or by the terms of the transaction establishing the principal are allocated between income and principal. All of these proceeds that do not exceed 5 percent per annum of the inventory value of the resources, fixed by a court appraisal or, if no inventory value is available, the fair market value of the resources at the time the principal was established or their cost, if acquired later, are allocated to income. The remaining proceeds are allocated to the principal [*Civ. Code § 731.11(b)*].

The provisions in the Legal Estates Income and Principal Law regarding natural resources do not change any right that otherwise accrues by law to a life tenant to develop or work natural resources for his or her own benefit [*Civ. Code § 731.11(c)*].

[6] Property Subject to Depletion

If any part of the principal is property subject to depletion, for example, leaseholds, patents, copyrights, or royalty rights, and the life tenant in possession does not have a duty to change the form of the investment of the principal, the full amount of rents, royalties, or income from the property is income to the life tenant. However, the rents, royalties, or income from property subject to depletion must be allocated between income and the principal if the life tenant has a duty to change the form of the investment, either at once or as soon as a reasonable price may be obtained. In that case, the rents, royalties, or income are allocated to income in an amount that does not exceed 5 percent per annum of the property's inventory value, fixed by a court-appointed appraiser or, if there is no fixed inventory value, the property's market value at the time the principal was established or its cost, if purchased later. The remaining rents, royalties, or income are allocated to the principal [*Civ. Code § 731.12*].

[7] Delayed Income on Unproductive Property

If property has been unproductive for more than a year and remains so until disposed of, a life tenant in possession is under a duty to change the form of property as soon as a reasonable price may be obtained. Property is unproductive if it has not produced an average net income of at least1 percent per annum of its inventory value, fixed by a court-appointed appraiser or, if no inventory value is available, its market value at the time the principal was established or its cost, if purchased or acquired later. If the change is delayed, but is made before the property is finally distributed, the tenant is entitled to share in the net proceeds received from the property as delayed income to the extent discussed below [*Civ. Code § 731.13(a)*].

The delayed income allocated to the life tenant is the difference between the net proceeds received from final distribution of the principal and the amount which, if placed in an account bearing simple interest at the rate of 5 percent per annum during the period in which the change was delayed, would have produced the net proceeds at the time of the change. However, the income may not exceed the amount by which the net proceeds exceed the inventory value of the property, fixed by a court-appointed appraiser, or, if no inventory value is available, its market value at the time the principal was established or its cost, if purchased later. The net proceeds consist of the gross proceeds reduced by any expenses incurred in disposing of the property and all carrying charges paid out of principal during the unproductive period [*Civ. Code § 731.13(b)*]. Furthermore, the life tenant's share of the delayed income is reduced by the amount of any income received from the property and the value of any beneficial use of the property during the period in which the change is delayed [*Civ. Code § 731.13(d)*].

For the purpose of calculating delayed income, the period in which the change is delayed begins when the duty to make it first arose. Unless there is evidence to the contrary, that duty is presumed to arise one year after the life tenant first received the property, if it was unproductive at that time; otherwise, it is presumed to arise one year after the date that the property became unproductive [*Civ. Code § 731.13(c)*].

Delayed income is apportioned between successive life tenants, or a successive life tenant and a remainder beneficiary in the manner provided for distributing income on the termination of a life tenant's right to income under *Civ. Code § 731.06* [*Civ. Code § 731.13(e)*; *see § 344.16[4]*].

[8] Obligation for Payment of Money Secured by Mortgage or Pledge of Property

If part of the principal is an obligation for the payment of money that is secured by a mortgage or another pledge of

property and the life tenant in possession acquires cash or other property by enforcement or in lieu of enforcement of the obligation, the acquired property is treated as a single substituted asset. Income from the acquired property, expenses incident to the property, and proceeds on its sale, satisfaction, or transfer (but not proceeds from leasing or letting) are apportioned in the manner provided for property of like character that was purchased or held as part of the estate at the time the principal was established [*Civ. Code § 731.14(a)*].

Gain or profit realized on the transfer of the acquired property is allocated to income in an amount up to, but not exceeding, the accrued unpaid interest on the original obligation as of the date the property was acquired; the balance is allocated to the principal. The allocation of gain to income is in addition to all other credits to income under the governing law. If the original form of the income is a noncash asset that is converted to cash, the cash received in the conversion must be allocated first to income, then to principal [*Civ. Code § 731.14(a)*].

Sums paid on account of accrued interest are apportioned between successive life tenants, or a successive life tenant and a remainder beneficiary, in the manner provided for distributing income on the termination of a life tenant's right to income under *Civ. Code § 731.06* [*Civ. Code § 731.14(a)*; *see § 344.16[4]*].

The price of acquired property is the unpaid balance of the principal sum of the debt secured by the original property plus the following amounts, whenever paid [*Civ. Code § 731.14(a)*]:

- Costs, charges, and expenses incident to acquisition of the property; and
- Taxes, bonds, and assessments payable by the life tenant at the date the property was acquired.

However, interest accruing on taxes, bonds, and assessments from the date the property was acquired are allocated to principal [*Civ. Code § 731.14(a)*].

If interest has accrued on a bond or any other voluntarily created obligation since the establishment of the principal, the interest is overdue and unpaid, and the life tenant disposes of the obligation, the proceeds are divided pro rata between income and principal. The same rule applies to the disposition of a certificate of deposit that is evidence of the deposit of a bond or another obligation with a protective or reorganization committee and the disposition of stock or other security received in enforcing an obligation or in foreclosure of the security on an obligation [*Civ. Code § 731.14(b)*].

Interest is computed at the rate specified in the obligation. The allocation is made made after repayment of (1) expenses incurred in connection with the disposition and (2) any sums paid to protect or preserve the obligation. An allocation to income may not exceed the interest accrued and unpaid on the original obligation up to the time of the disposition. If another security is received in lieu of the original obligation, the allocation to income must not exceed the interest that would have accrued on the substituted security up to the time of the disposition of the original security, less income received from the original or the substituted security [*Civ. Code § 731.14(b)*].

These provisions apply to (1) the disposition of a bond, debenture, note, or any other evidence of indebtedness, voluntarily created; (2) a certificateof deposit that is evidence of the deposit of any of these instruments with a protective or reorganization committee; and (3) stock or any other security received through enforcing an obligation or through foreclosure of the security for the obligation [*Civ. Code § 731.14(b)*]. Disposition includes sale, surrender, compromise, settlement, accord and satisfaction, and similar arrangements [*Civ. Code § 731.14(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstates Created by Trusts & WillsFuture InterestsRemainder InterestsGeneral OverviewReal Property LawEstatesFuture InterestsRemainders

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30-344 California Forms of Pleading and Practice--Annotated § 344.19

§ 344.19 Partition of Life Estate and Remainder

Either the life tenant or the remainder beneficiary may initiate an action for partition of the successive estates [*Code Civ. Proc. § 872.210(a)*; *see also* Legislative Committee Comment to § 872.210]. However, partition is permitted only if it is in the best interests of all the parties, considering such factors as any change in circumstances since the estates were created, burdensome expenses, the creator's intent, and the successive owners' needs and interests [*Code Civ. Proc. § 872.710(c)*]. For discussion, procedural checklist, and forms for use in an action for partition of real property, see Ch. 397, *Partition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstates Created by Trusts & WillsFuture InterestsRemainder InterestsGeneral OverviewEstate, Gift & Trust LawEstates Created by Trusts & WillsLife EstatesGeneral Overview

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30-344 California Forms of Pleading and Practice--Annotated § 344.20

§ 344.20 Termination of Life Estate

A life estate, by nature, terminates at the termination of the measuring life [*see Civ. Code §§ 761, 765, 766, 780*]. It may also terminate by merger of the present and future interests. The merger can occur either by conveyance of the interests to the same person [*Holman v. Holman (1938) 25 Cal. App. 2d 445, 455-456, 77 P.2d 515* (joint deed of life tenant and remainder beneficiary terminated life estate and remainder)], or by agreement [*see Salles v. Loane (1928) 204 Cal. 55, 58-59, 266 P. 538]* . For discussion and forms relating to the procedure for establishing the fact of death of a life tenant, see Ch. 440, *Probate* . For a discussion of the effect of the termination of a life estate on the life tenant's right to income, see *§ 344.16[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstates Created by Trusts & WillsFuture InterestsRemainder InterestsGeneral Overview

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[Reserved]

§§ 344.21[Reserved]

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PART III. RESEARCH GUIDE

30-344 California Forms of Pleading and Practice--Annotated § 344.40

§ 344.40 Related Matthew Bender Publications--California Real Estate Law and Practice

For a discussion of life estates, see *CALIFORNIA REAL ESTATE LAW AND PRACTICE, Ch. 340 Estates in Real Property, §§ 340.40 -340.44* (Matthew Bender)

For a discussion of actions for waste, see *California Real Estate Law and Practice, Ch. 384 Trespass and Waste, §§ 384.10 -384.17* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstates Created by Trusts & WillsFuture InterestsRemainder InterestsGeneral OverviewEstate, Gift & Trust LawEstates Created by Trusts & WillsLife EstatesGeneral OverviewReal Property LawEstatesFuture InterestsRemainders

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§ 344.41 State Statutes

[1] Actions and Damages

Right of remainder beneficiary to bring action for damage to inheritance. *Civ. Code § 826*

Damages recoverable from tenant holding over after expiration of life estate is value of profits received during such holding over. *Civ. Code § 3335*

Right to injunction for waste committed by party to action. *Code Civ. Proc. § 526(a)(2)*

Right to bring action against life tenant for waste; treble damages for waste is permissible. *Code Civ. Proc. § 732*

Right of life tenant or remainder beneficiary to bring action for partition of real property. *Code Civ. Proc. § 872.210(a)(2)*

[2] Definitions

Types of estates in real property. *Civ. Code § 761*

Life estate as freehold estate. *Civ. Code § 765*

Estate measured by life of third person as freehold estate. *Civ. Code § 766*

Remainders defined. *Civ. Code § 769*

Power of termination defined as power to terminate fee simple estate in real property to enforce restriction in the form of condition subsequent. *Civ. Code § 885.010(a)*

Fee simple determinable and possibilities of reverter abolished; fee simple determinable is deemed to be fee simple subject to restriction in form of condition subsequent; possibility of reverter is deemed to be enforceable as power of termination. *Civ. Code § 885.020*

Statutory rules for expiration of powers of termination. *Civ. Code § 885.030*

[3] Duties of Life Tenant

Duty of life tenant not to injure inheritance. *Civ. Code § 818*

Life tenant has same right to use land as owner of fee simple except that no act to injure inheritance is permitted. *Civ. Code § 818*

Duty of life tenant to make repairs and to pay taxes and assessments. *Civ. Code § 840*

[4] Miscellaneous

Legal Estates Principal and Income Law. *Civ. Code § 731 et seq.*

Contingent remainders are valid. *Civ. Code § 764*

Remainder vests on life tenant's death. *Civ. Code § 780*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstates Created by Trusts & WillsFuture InterestsRemainder InterestsGeneral Overview

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Chapter 344 LIFE ESTATES AND REMAINDERS
PART III. RESEARCH GUIDE

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§ 344.42 Decisions

[1] Accounting Actions

Life tenant is not charged with depreciation in determining net income from property in action for accounting. *Steeve v. Yaeger (1956) 145 Cal. App. 2d 455, 464, 302 P.2d 704*

[2] Construction of Terms Creating Estate

Power to dispose of or consume entire life estate does not render gift void, when donor's intent was to give life estate with limited power of disposal or consumption. *Colburn v. Burlingame (1923) 190 Cal. 697, 700, 214 P. 226*

Adults adopted by testator's daughter 21 years after testator's death were not "children" of daughter to whom testator intended to devise remainder interest. *Williams v. Ward (1971) 15 Cal. App. 3d 381, 384-385, 93 Cal. Rptr. 107*

Bequest or devise to surviving spouse in general terms, without stating whether it is a fee or life estate, with broad powers of enjoyment or disposition, but with gift over to subsequent takers of what remains on survivor's death, to be construed to create life estate. *Estate of Morse (1970) 9 Cal. App. 3d 411, 417, 88 Cal. Rptr. 52*

Grant of unlimited right to consume property does not validate grant of life estate. *Estate of Morse (1970) 9 Cal. App. 3d 411, 416, 88 Cal. Rptr. 52*

Unqualified right to receive one-half of net proceeds from property during lifetime creates life estate. *Steeve v. Yaeger (1956) 145 Cal. App. 2d 455, 462, 302 P.2d 704*

Judgment for defendant administrator of life tenant's estate affirmed when evidence supported finding that property was completely consumed for her use in accordance with terms of will and no remainder was left to be distributed. *Osbourne v. First Nat. Trust & Sav. Bank (1956) 145 Cal. App. 2d 285, 287-295, 302 P.2d 417*

Clause in joint will giving surviving spouse right to "full use and enjoyment" of life estate in property with remainder over permitts expenditures for life tenant's benefit but does not permit inter vivos gifts. *Hill v. Thomas (1955) 135 Cal. App. 2d 672, 677-678, 288 P.2d 157*

Donee of life estate is capable of only making such disposition and use of property he or she receives as is fairly authorized by grant and consistent with purposes thereof; remainder beneficiary is cheated of interest in property when life tenant is entitled to consume property for "comfort and support." *King v. Hawley (1952) 113 Cal. App. 2d 534, 539-540, 546, 248 P.2d 491*

General rule that wherever possible remainder will be construed as vested rather than contingent is overcome by provisions in will creating contingent remainders. *Rhoda v. Alameda County (1933) 134 Cal. App. 726, 732, 26 P.2d 691*

[3] Creation

[a] By Deed

Life estate is capable for being created by reservation in deed in favor of grantor. *Green v. Brown (1951) 37 Cal. 2d 391, 394-395, 232 P.2d 487* ; *Lowe v. Ruhlman (1945) 67 Cal. App. 2d 828, 834, 155 P.2d 671*

Life estate is capable of being created by implication when grant in deed is in fee simple but delivery to grantee is postponed until grantor's death. *Wilhoit v. Salmon (1905) 146 Cal. 444, 448, 80 P. 705*

Life estate is capable of being created by grant in deed. *Barnett v. Barnett (1894) 104 Cal. 298, 301-302, 37 P. 1049* ; Jacobs v. All Persons, etc. *(1909) 12 Cal. App. 163, 168, 106 P. 896*

[b] By Will

Life estate is capable of being created by will. *Colburn v. Burlingame (1923) 190 Cal. 697, 700, 214 P. 226* ; *Estate of Smythe (1955) 132 Cal. App. 2d 343, 345, 351, 282 P.2d 141*

[c] Language of Conveyance

Language describing characteristics of life estate is sufficient to create life estate. *Estate of Nichols (1962) 199 Cal. App. 2d 783, 795, 19 Cal. Rptr. 93* (will); *Estate of Smythe (1955) 132 Cal. App. 2d 343, 345-346, 282 P.2d 141* (will)

Provisions stating period of duration or providing for disposition of property on termination of life estate or interest is not necessary to create life estate. *Estate of Bjors (1951) 103 Cal. App. 2d 361, 371, 229 P.2d 468*

[4] Definition

Life estate is estate the duration of which is measured by life of person holding it or by another person's life. *Estate of Nichols (1962) 199 Cal. App. 2d 783, 795, 19 Cal. Rptr. 93*

[5] Duties of Life Tenant

[a] Encumbrances

Life tenant is solely liable for payment of obligation when he or she encumbers property after life estate is created. *Pryor v. Winter (1905) 147 Cal. 554, 559, 82 P. 202* (remainder beneficiary has independent title not subject to mortgage foreclosure suit against life tenant)

Life tenant is required to pay interest on obligation and remainder beneficiary is required to pay principal where existing encumbrance on property is subject to life estate. *Boggs v. Boggs (1944) 63 Cal. App. 2d 576, 580 147 P.2d 116*

[b] Taxes and Assessments

Holder of reversionary interest is entitled to pay taxes to protect his or her interest without being considered mere volunteer; holder succeeds to lien held by taxing authority. *Riley v. Turpin (1956) 47 Cal. 2d 152, 156, 301 P.2d 834*

[c] Waste

[i] Defined

Prohibition of *Civ. Code § 818* that life tenant must do no act to injury of remainder interest is applicable to personal as well as real property. *Estate of Steiner (1966) 240 Cal. App. 2d 78, 81, 49 Cal. Rptr. 352*

Waste is unlawful act or omission of duty on tenant's part that results in permanent injury to inheritance. *Southern Pacific Land Co. v. Kiggins (1930) 110 Cal. App. 56, 60-61, 293 P. 708* (suit by vendor against vendee)

[ii] Duty of Life Tenant in Using Property

Life tenant is required to conserve rents or royalties derived from mine or well for remainder beneficiary when well or mine was not open at time of death of preceding estate or when opening was not specifically authorized. *Haskell v. Wood (1967) 256 Cal. App. 2d 799, 803-804, 64 Cal. Rptr. 459*

Life tenant is required to use premises with due regard for rights of remainder beneficiary. *Estate of Steiner (1966) 240 Cal. App. 2d 78, 81, 49 Cal. Rptr. 352*

Life tenant is required to be guided by principles of prudence to end that value of property is not diminished. *Bliss v. Security-First Nat. Bank (1947) 81 Cal. App. 2d 50, 56, 183 P.2d 312*

Duty of life tenant to protect corpus of estate against waste requires life tenant to foreclose on security that is in default.

Bliss v. Security-First Nat. Bank (1947) 81 Cal. App. 2d 50, 54-55, 183 P.2d 312

[iii] Equitable Relief

Injunctive relief is available when life tenant threatens acts that would injure inheritance. *Taft v. Washington (1915) 29 Cal. App. 197, 199, 154 P. 1073*

[iv] Proving Waste

Waste is determined by whether life tenant's conduct has substantially depreciated market value of land. *Sallee v. Daneri (1942) 49 Cal. App. 2d 324, 327, 121 P.2d 781*

Burden of proving waste is on remainder beneficiary. *Sallee v. Daneri (1942) 49 Cal. App. 2d 324, 327, 121 P.2d 781*

Owner of reversionary interest is not capable of subjecting life tenant to damages for every act that does not meet with his or her approval. *Sallee v. Daneri (1942) 49 Cal. App. 2d 324, 327, 121 P.2d 781*

[v] Treble Damages

Granting of treble damages under *Code Civ. Proc. § 732* rests with discretion of court; such damages are granted only when waste is committed willfully and wantonly or maliciously. *Isom v. Rex Crude Oil Co. (1903) 140 Cal. 678, 679-680, 74 P. 294* (action by landlord against assignee of lease procured by fraud from tenant)

[6] Rights of Life Tenant

[a] Insurance

Life tenant who insures dwelling and improvements on property in which he or she has life estate is entitled to proceeds of insurance policy unless another arrangement has been made with remainder beneficiary. *Corder v. McDougall (1932) 216 Cal. 773, 774-775, 16 P.2d 740*

[b] Reimbursement for Required Improvement

Life tenant is entitled to reimbursement from remainder beneficiary for improvements made under compulsion of statute or ordinance or necessitated by changed circumstances. *Eastman v. Peterson (1968) 268 Cal. App. 2d 169, 173, 73 Cal. Rptr. 803*

[c] Use

Donee of life estate is entitled to make only such disposition and use of property he or she receives as is fairly authorized by grant and consistent with purposes of grant. *King v. Hawley (1952) 113 Cal. App. 2d 534, 539-540, 248 P.2d 491*

Life tenant is permitted to cut and sell wood to clear land for farming when activity appreciated rather than depreciated

land value. *Sallee v. Daneri (1942) 49 Cal. App. 2d 324, 327-328, 121 P.2d 781*

[7] Termination of Life Estate

Life estate is capable of being terminated by agreement. *Salles v. Loane (1928) 204 Cal. 55, 58-59, 266 P. 538*

If life estate would terminate on life tenant's removal from property and life tenant sought partition, completion of sale is required for termination. *Forrest v. Elam (1979) 88 Cal. App. 3d 164, 171, 151 Cal. Rptr. 591*

Remainder interest in property vests in remainder beneficiary on life tenant's death. *Clarke v. Bates (1951) 104 Cal. App. 2d 597, 598-599, 232 P.2d 33*

Life estate terminates by merger of present and future interests by conveyance of same to one person. *Holman v. Holman (1938) 25 Cal. App. 2d 445, 455-456, 77 P.2d 515* (joint deed of life tenant and remainder beneficiary terminated life estate and remainder)

[8] Valuation of Life Estate and Remainder

Life estate and remainder interests in particular asset is capable of valuation at given point in time, based on life expectancy and assumed rate of return on investment; sum of their values is equal to total value of asset at that time. *In re Estate of Malpas (1992) 7 Cal. App. 4th 1901, 1908, 9 Cal. Rptr. 2d 806*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawGeneral OverviewEstate, Gift & Trust LawEstates Created by Trusts & WillsGeneral OverviewEstate, Gift & Trust LawEstates Created by Trusts & WillsEstates in FeeEstate, Gift & Trust LawEstates Created by Trusts & WillsFuture InterestsGeneral OverviewEstate, Gift & Trust LawEstates Created by Trusts & WillsLife EstatesGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsLifetime GiftsEstate, Gift & Trust LawWillsBeneficiariesGeneral OverviewEstate, Gift & Trust LawWillsInterpretationRules of ConstructionConstruction Favoring VestingEstate, Gift & Trust LawWillsJoint & Mutual WillsInsurance LawProperty InsuranceCoverageReal PropertyLife EstatesReal Property LawEstatesFuture InterestsGeneral OverviewReal Property LawEstatesFuture InterestsRemaindersReal Property LawEstatesPresent EstatesLife EstatesReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawTortsWasteElementsReal Property LawTortsWasteRemediesTax LawState & Local TaxesAdministration & ProceedingsTax LiensTortsPremises Liability & PropertyLessees & LessorsGeneral OverviewTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligenceGeneral Overview

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30-344 California Forms of Pleading and Practice--Annotated § 344.43

§ 344.43 Law Reviews

Note, *Oil and Gas: Royalties: Life Tenant and Remainderman: "Open Mine" Doctrine, 3 UCLA L. Rev. 601 (1956)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstates Created by Trusts & WillsFuture InterestsRemainder InterestsGeneral OverviewEstate, Gift & Trust LawEstates Created by Trusts & WillsLife EstatesGeneral OverviewReal Property LawEstatesFuture InterestsRemainders

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30-344 California Forms of Pleading and Practice--Annotated § 344.44

§ 344.44 Text References

Witkin, California Procedure, vol. 6, *Provisional Remedies*, §§ 276, 277, 278, 279 et seq. (injunctions) (4th ed. 1997)

Witkin, Summary of California Law, vol. 12, *Real Property*, § 22 et seq. (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstates Created by Trusts & WillsFuture InterestsRemainder InterestsGeneral OverviewEstate, Gift & Trust LawEstates Created by Trusts & WillsLife EstatesGeneral OverviewReal Property LawEstatesFuture InterestsRemaindersReal Property LawEstatesPresent EstatesLife Estates

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[Reserved]

§§ 344.45[Reserved]

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30-344 California Forms of Pleading and Practice--Annotated § 344.60

§ 344.60 Complaint for Treble Damages [Code Civ. Proc. § 732] and for Permanent Injunction [Civ. Code § 3422]--By Remainder Beneficiary Against Life Tenant for Waste [Civ. Code §§ 818, 826, 840]

[1] FORM Complaint for Treble Damages [Code Civ. Proc. § 732] and for Permanent Injunction [Civ. Code § 3422]--By Remainder Beneficiary Against Life Tenant for Waste [Civ. Code § 818, 826, 840]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR [(TEMPORARY RESTRAIN-
_____ [*name*],	)	ING ORDER,) PRELIMINARY AND] PERMAN-
Defendant.	)	ENT INJUNCTION(S), AND DAMAGES
	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

Plaintiff alleges:

1. _____ [*Name of decedent*] was the owner in fee simple of certain real property in _____ [*county or city and county*], California, more particularly described as follows: _____ [*legal description*].

2. _____ [*Name of decedent*] continued to own the property up to the time of his/her death on _____ [*date*].

3. On _____ [*date*], _____ [*name of decedent*] made, executed, and published his/her last will and testament in writing, devising the property to the defendant for the period of _____ [his/her life *or* the life of _____ (*name of other person whose life measures the estate*)], and the remainder to plaintiff.

4. After the death of _____ [*name of decedent*], the will was duly admitted to probate on _____ [*date*], by order of the Superior Court of _____ County, Probate No. _____. That court distributed the property to plaintiff and defendant in accordance with the terms of the will. A copy of the distribution order is attached as Exhibit A and made a part of this complaint.

5. On _____ [*date*], pursuant to the terms of the distribution order, the defendant entered into possession of the property and has remained in possession ever since.

6. Commencing on or about _____ [*date*], and since that time, defendant has caused injury to the property and to plaintiff's inheritance and remainder in that property by committing waste, in that _____ [*specify defendant's acts or omissions constituting waste*].

7. Prior to the commencement of defendant's conduct, the property had a reasonable market value of $_____; presently, its reasonable market value is $_____.

[8. Each act and omission of defendant as alleged above was done intentionally and over the plaintiff's objection. Defendant willfully and maliciously engaged in that conduct with the full knowledge that it would result in substantial damage to the inheritance and plaintiff's remainder interest. Therefore, plaintiff is entitled to recover treble damages from defendant.]

9. _____ [*Allege basis for preliminary and permanent injunctive relief, e.g.,* (Plaintiff is informed and believes and thereon alleges that) (P)laintiff's inheritance and remainder interest will be further wasted, thus causing a multiplicity of judicial proceedings, unless defendant's conduct is restrained].

WHEREFORE, plaintiff prays judgment as follows:

[1. For an order requiring defendant to show cause, if any he/she has, why he/she should not be enjoined as set forth below, during the pendency of this action.]

2. For [(a temporary restraining order,) a preliminary injunction, and] a permanent injunction, all enjoining defendant, and his/her agents, servants, and employees, and all persons acting under, in concert with, or for them _____ [*specify acts to be restrained or compelled*].

3. For actual damages in the sum of $_____, to be trebled pursuant to *Code of Civil Procedure Section 732* for total damages in the sum of $_____.

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form of complaint is for use by a remainder beneficiary against a life tenant for damages and injunctive relief when the life tenant has caused and continues to cause waste to the remainder beneficiary's reversionary interest.

[3] Allegations

The complaint should allege the way in which the life tenancy was created. This can occur either according to the provisions of a distribution order after probate of a decedent's will that created the life estate in defendant and reversionary interest in plaintiff (Paragraphs 1-4), or it can occur through a conveyance in a deed or trust. If the interest was created in a deed or trust, the initial paragraphs of this complaint would have to be modified accordingly.

The complaint must allege the defendant's acts that constitute waste (Paragraph 6) [*see Civ. Code §§ 818, 840*] and the amount of depreciation of the property's market value (Paragraph 7) [*see Sallee v. Daneri (1942) 49 Cal. App. 2d 324, 327, 121 P.2d 781]* . An optional allegation is included to support a claim for treble damages (Paragraph 8) [*Code Civ. Proc. § 732*; *Isom v. Rex Crude Oil Co. (1903) 140 Cal. 678, 680 74 P. 294* (treble damages are granted only when waste is committed willfully and wantonly or maliciously)].

The form also alleges a basis for the award of injunctive relief (Paragraph 9) [*see Civ. Code § 3422*; *Code Civ. Proc. § 526*; *Taft v. Washington (1915) 29 Cal. App. 197, 199, 154 P. 1073]* . Optional phrases are included in the caption and prayer for use if a temporary restraining order, preliminary injunction, or both are requested.

[4] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*]) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts

that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

Because the action for damages for waste is combined with a request for a permanent injunction, jurisdiction is in the superior court and the action may not be a limited civil case except as otherwise authorized by statute [*Cal. Const., art. VI, § 10*; *see Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*]. If plaintiff decides to seek injunctive relief in the form of a preliminary injunction or temporary restraining order only, then the case may be brought as a limited civil case if the amount in controversy, exclusive of interest, is $25,000 or less [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1), (7)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

The proper court for an action for injuries to real property is the superior court in the county in which the real property is located [*Code Civ. Proc. § 392(a)(1)*].

[6] State Statutes

[a] Actions and Damages

Right of remainder beneficiary to bring action for damage to inheritance. *Civ. Code § 826*

Grounds for injunction. *Civ. Code § 3422*; *Code Civ. Proc. § 526*

Right to bring action against life tenant for waste; treble damages. *Code Civ. Proc. § 732*

[b] Duty of Life Tenant

Duty of life tenant not to injure inheritance. *Civ. Code § 818*

[c] Statute of Limitations

Statute of limitations on actions for damage to real property is three years. *Code Civ. Proc. § 338(b)*

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers*

For forms for use in actions for injunctive relief, see Ch. 303, *Injunctions*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPermanent InjunctionsEstate, Gift & Trust LawEstates Created by Trusts & WillsFuture InterestsRemainder InterestsGeneral OverviewEstate, Gift & Trust LawEstates Created by Trusts & WillsLife EstatesGeneral Overview

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30-344 California Forms of Pleading and Practice--Annotated § 344.61

§ 344.61 Complaint to Recover Unconsumed Portion of Life Estate--By Remainder Beneficiary Against Personal Representative of Estate of Deceased Life Tenant on Rejected Claim [Prob. Code §§ 9250-9256, 9353, 9354]

[1] FORM Complaint to Recover Unconsumed Portion of Life Estate--By Remainder Beneficiary Against Personal Representative of Estate of Deceased Life Tenant on Rejected Claim [Prob. Code §§ 9250-9256, 9353, 9354]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT ON REJECTED CLAIM FOR UN-
Personal Representative of	)	CONSUMED PORTION OF LIFE ESTATE
_____ [*name*],	)	[Amount demanded _____ (exceeds
Defendant.	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. _____ [*Name of original owner*] was the owner in fee simple of certain real property in _____ [*county or city and county*], California, more particularly described as follows: _____ [*legal description*].

2. _____ [*Name of original owner*] continued to own the property up to the time of his/her death on _____ [*date*].

3. On _____ [*date*], _____ [*name of original owner*] made, executed, and published his/her last will and testament in writing, devising the property to _____ [*name of deceased life tenant*] for life and the remainder to plaintiff. A copy of the will is attached as Exhibit A and made a part of this complaint.

4. After the death of _____ [*name of original owner*], _____ [*name of deceased life tenant*] entered into possession of the property and remained in possession until he/she died on _____ [*date*].

5. On or about _____ [*date*], _____ [*name of deceased life tenant*] sold the property. The proceeds of the sale, after expenses, were $_____, and that sum was paid to and received by _____ [*name of deceased life tenant*] on or about _____ [*date*]. Plaintiff received no portion of the proceeds of the sale.

6. During his/her lifetime, _____ [*name of deceased life tenant*] consumed only $_____ of the proceeds of the sale of the above-described property. Thus, when the life tenant died on _____ [*date*], $_____ of the proceeds remained for delivery to plaintiff as the remainder beneficiary.

7. Since the death of _____ [*name of deceased life tenant*], plaintiff has received nothing from the proceeds of the sale of the property.

8. The estate of _____ [*name of deceased life tenant*] is now pending administration in a proceeding in the Superior Court of _____ County, California, entitled _____, Probate No. _____.

9. Defendant is the duly appointed, qualified, and acting personal representative of the estate of the deceased life tenant.

WHEREFORE, plaintiff prays for judgment against defendant, as personal representative of the estate of the deceased, in the sum of $_____, and for costs of suit, to be paid out of the estate in due course administration.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 344.60[1].*]

[2] Use of Form

This form is for use by a remainder beneficiary against the personal representative of the estate of a deceased life tenant to recover a portion of the life estate that was unconsumed at the time of the tenant's death. Because this complaint involves an assertion of a right to property adverse to the deceased life tenant's estate, the plaintiff is not a creditor of the estate, and need not file a claim against the estate [*see Estate of Smith (1954) 123 Cal. App. 2d 844, 851, 268 P.2d 53]* .

As an alternative to this action, the remainder beneficiary may bring an action for conveyance or transfer of property claimed to belong to the decedent or another person [*Prob. Code § 850(a)*; *see Prob. Code § 850 et seq.*]. For complete coverage of these actions, see Ch. 440, *Probate* .

[3] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

In limited civil cases, the first page of the first paper must state that it is a limited civil case and whether the amount demanded exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[4] Related Actions

If the estate was consumed by the life tenant in a manner that was willful, malicious, and outside the powers granted him or her by the terms of the conveyance, a plaintiff would want to consider an action for waste and treble damages [*see § 344.60*]. Because this is a claim against the deceased life tenant, and not an adverse claim of title to property, the remainder beneficiary would have to file a claim in the estate proceedings as a prerequisite to the action [*see Prob. Code §§ 9000, 9002*; for discussion of creditor's claims in decedent's estates proceedings, *see* Ch. 454, *Probate: Claims Against the Estate*].

If property subject to the life estate had been given away in a way that was inconsistent with the terms of the grant, defeating the remainder beneficiary's interest, plaintiff should consider a quiet title action against the donee [*see King v. Hawley (1952) 113 Cal. App. 2d 534, 536, 546, 248 P.2d 491* ; *see generally* Ch. 482, *Quieting Title*].

If both money and property were given away by the life tenant in a way that was inconsistent with the terms of the grant, it also would be proper to bring an action for damages against the donee [*see Hill v. Thomas (1955) 135 Cal. App. 2d 672, 675-676, 288 P.2d 157]* .

[5] Decisions

Judgment for defendant administrator of estate of life tenant affirmed when evidence supported finding that property was completely consumed for her use in accordance with terms of will and no remainder was left to be distributed. *Osbourne v. First Nat'l Trust & Sav. Bank (1956) 145 Cal. App. 2d 285, 287-295, 302 P.2d 417*

Clause in joint will giving surviving spouse right to "full use and enjoyment" of life estate in property with remainder over permits expenditures for benefit of life tenant but does not permit inter vivos gifts. *Hill v. Thomas (1955) 135 Cal. App. 2d 672, 677-678, 288 P.2d 157*

[6] Cross References

See *§ 344.60*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstates Created by Trusts & WillsFuture InterestsRemainder InterestsGeneral OverviewEstate, Gift & Trust LawEstates Created by Trusts & WillsLife EstatesGeneral Overview

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California Forms of Pleading and Practice--Annotated

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 344 LIFE ESTATES AND REMAINDERS
PART IV. FORMS

30-344 California Forms of Pleading and Practice--Annotated § 344.62

§ 344.62 Complaint to Foreclose Lien--By Remainder Beneficiary Against Life Tenant for Failure to Pay Taxes [Civ. Code § 840]

[1] FORM Complaint to Foreclose Lien--By Remainder Beneficiary Against Life Tenant for Failure to Pay Taxes [Civ. Code § 840]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT TO FORECLOSE LIEN FOR FAIL-
Defendant.	)	URE OF LIFE TENANT TO PAY TAXES
	)	
	)	

Plaintiff alleges:

1. Defendant is, and all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence*].

2. Plaintiff is the owner of a remainder interest, after the life estate of defendant, in that real property described as follows: _____ [*legal description*].

3. Although defendant has been in possession of the property since _____ [*date*], he/she has failed to pay any of the real property taxes levied or assessed on it. Therefore, plaintiff has been forced to pay the taxes to protect

his/her reversionary interest in the property.

4. Plaintiff has repeatedly demanded that defendant pay the taxes on the property, but to this date defendant has refused.

5. Plaintiff has paid the sum of $_____ to this date [and prior to judgment herein will have paid the further sum of $_____] in property taxes assessed against the property.

6. Defendant has failed to repay plaintiff any part of the sum of $_____ paid by plaintiff for the real property taxes.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a lien in the amount of $_____ on defendant's life estate.

2. That the lien be foreclosed.

3. That the life estate be sold for the payment of the lien.

4. For payment of the amount of the lien from the proceeds of the sale.

5. For costs of suit herein incurred.

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 344.60[1].*]

[2] Use of Form

This form is for use by a remainder beneficiary in foreclosing a lien on a life estate when the life tenant has refused to pay the real property taxes and the remainder beneficiary has been forced to pay them to protect his or her interest.

[3] Jurisdiction and Venue

Because the complaint seeks to enforce a lien on real property, the superior court has jurisdiction over the action, and it is an unlimited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(b)(5), 580(b)(3)*].

The action must be commenced in the superior court in the county in which the real property is situated [*Code Civ. Proc. § 392(a)(2)*].

[4] State Statutes

Duty of life tenant to pay taxes and other annual charges; duty to pay just proportion of extraordinary assessments benefiting whole inheritance. *Civ. Code § 840*

[5] Decisions

Holder of reversionary interest is entitled to pay taxes to protect his or her interest without being considered mere volunteer; holder succeeds to lien held by taxing authority and therefore has standing to seek partition. *Riley v. Turpin (1956) 47 Cal. 2d 152, 156, 301 P.2d 834*

[6] Cross References

See *§ 344.60*

For discussion and forms for use generally in actions to foreclose liens, see Ch. 342, *Liens and Wage Preferences*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstates Created by Trusts & WillsFuture InterestsRemainder InterestsGeneral OverviewEstate, Gift & Trust LawEstates Created by Trusts & WillsLife EstatesGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 345 LIMITATION OF ACTIONS

30-345 California Forms of Pleading and Practice--Annotated 345.syn

§ 345.syn Synopsis to Chapter 345: LIMITATION OF ACTIONS

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§ 345.10 Governing Statutes

§ 345.11 Purpose of Statutory Limitation

§ 345.12 Constitutionality of Statutes of Limitation

§ 345.13 Choice of Law

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[2] Effect of Choice of Law Provision in Contract

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§ 345.16 Application of Statutes of Limitation

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[2] Exceptions to Inflexible Application

[3] Construction of Statutes of Limitation

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[5] To Actions by a State or County

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[2] Appreciable Harm Required for Cause of Action to Accrue

[3] Delayed Accrual Under Discovery Rule

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[b] Distinguished From Tolling

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[d] What Consititutes Discovery

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§ 345.20 Suspension of Period of Limitation

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[2] Absence of Obligor From State

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[i] Time of Absence Not Counted

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[v] Period of Absence Coinciding With Plaintiff's Disability to Bring Action

[vi] Nonresidence of Obligee

[b] Motorists

[c] Absence of One of Joint Obligors

[d] Corporation or Partnership as Obligor

[e] Effect of Commerce Clause

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[a] Period Suspended While Action Is Pending

[b] Effect of Dismissal Without Prejudice

[c] In Court Without Jurisdiction; Transfer

[d] Defect in Designating Defendant

[e] Against Fictitiously-Named Defendant

[i] Avoidance of Statute of Limitations if Plaintiff Ignorant of Defendant's Identity

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[f] Defects in Form of Complaint

[g] Defect in Designating Plaintiff

[h] Effect on Cross Complaint

[6] Condition Precedent on Obligation

[a] Period of Limitation Commences on Occurrence of Condition

[b] Implicitly Required to Be Performed in Reasonable Time

[c] Effect of Filing Complaint Before Performance of Condition

[d] Rejection of Claim as Condition

[7] Court's Assumption of Jurisdiction Over Practice of Party's Attorney

[8] Death of Defendant

[a] One-Year Period Replaces Otherwise Applicable Period

[b] Tolling of One-Year Period

[c] Exceptions

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[ii] Action to Establish Decedent's Insured Liability

[iii] Action to Enforce Lien Against Decedent's Property

[iv] Pending Determination of Whether Particular Motion, Petition, or Action Would Violate No Contest Clause

[9] Death of Potential Plaintiff

[10] Beneficiary's Claims Against Third Party Regarding Trust Property

[11] Plaintiff's Disability

[a] Tolling for Minority

[i] Minority

[ii] Effect of Guardianship

[iii] Effect of Existence of Custodian Under Uniform Transfers to Minors Act

[iv] Action for Prenatal Injuries or Medical Malpractice

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[vi] Action for Employment Discrimination

[vii] Effect of Minority on Failure to File Claim or Administrative Complaint

[viii] Effect of Emancipation

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[i] Insanity

[ii] Unconsciousness

[iii] Disability Resulting From Tortious Act

[iv] Effect of Conservatorship

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[c] Effect of Minority or Insanity on Action Against Public Entity

[d] Effect of Minority or Insanity on Action for Recovery of Real Property

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[i] General Rule

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[vi] Retroactive Application

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[d] Plaintiff's Good Faith and Reasonable Conduct

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[g] Second Action in State Court When First Claim Was in Federal Court With Supplemental Jurisdiction

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[4] Fraudulent Concealment of Defendant's Identity

[a] Basis for Equitable Estoppel

[b] Nonfraudulent Concealment of Defendant's Presence or Identity

[c] Concealment of Corporate Defendant

[5] Other Deception

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§ 345.24 Revival of Barred Debt by Promise or Acknowledgment After Expiration of Period of Limitation

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[3] Elements of Promise of Acknowledgment

[a] Consideration

[b] Writing

[i] Requirement of Written Promise or Acknowledgment

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[v] Signed by Party to Be Charged

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[2] Same Parties

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[a] Correction of Technical Defect

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[2] Laches Is Question of Fact

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[d] Trust Beneficiary Where Trustee Fails to File Action Seasonably

[e] Persons With Actions for Damages Arising Out of Defendant's Felony

[f] Municipalities

[5] Change in Substantive Law Does Not Revive Barred Claims

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[e] Condition on Obligation

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[ii] Effect of Filing Complaint Before Performance of Condition

[iii] Implicitly Required to Be Performed in Reasonable Time

[iv] Rejection of Claim as Condition

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[i] General Rule

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[iii] Imprisonment

[iv] Insanity

[v] Minority

[h] Election of Remedy

[i] Equitable Tolling

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[l] Felon

[m] Fraudulent Concealment of Cause of Action

[n] Legal Inhibition to Sue

[i] Adverse Case Law Is Not Legal Inhibition to Sue

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[2] Use of Form

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§ 345.73 Allegation--Suspension of Period of Limitation--Injury to Child Conceived But Not Yet Born [Code Civ. Proc. § 340.4]

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§ 345.74 Allegation--Suspension of Period of Limitation--Plaintiff Insane When Cause of Action Accrued [Code Civ. Proc. § 352(a)]

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[2] Use of Form

[3] Insanity as Disability Suspending Period of Limitation

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[5] Allegation of Insanity

[6] Cross References

§ 345.75 Allegation--Suspension of Period of Limitation--Plaintiff Imprisoned [Code Civ. Proc. §§ 328, 352.1(a)]

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[2] Use of Form

[3] Cross References

§ 345.76 Allegation--Suspension of Period of Limitation--Death of Person Entitled to Sue [Code Civ. Proc. § 366.1]

[1] FORM

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§ 345.77 Allegation--Suspension of Period of Limitation--Court's Assumption of Jurisdiction Over Attorney's Practice Pursuant to Bus. & Prof. Code § 6180 or 6190 [Code Civ. Proc. § 353.1]

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§ 345.79 Allegation--Suspension of Period of Limitation--Reversal of Judgment for Plaintiff on Appeal [Code Civ. Proc. § 355]

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§ 345.80 Allegation--Suspension of Period of Limitation--Legal Inhibition to Sue [Code Civ. Proc. § 356]

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§ 345.84 Allegation--Revival of Barred Debt--Partial Payment of Principal or Interest [Code Civ. Proc. § 360]

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§ 345.85 Allegation--Revival of Barred Debt--Promise or Acknowledgment After Expiration of Period of Limitation [Code Civ. Proc. § 360]

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§§ 345.86-345.99 [Reserved]

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[d] Against Common Count

[e] By Amendment of Answer

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§ 345.101 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Cause of Action of Nonresident Arising Outside California [Code Civ. Proc. § 361]

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§ 345.102 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Foreign Corporation Having Designated Agent Within State for Service of Process [Corp. Code §§ 6403, 6500, 6501]

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[3] Cross References

§ 345.103 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Shortening of Period of Limitation by Private Agreement

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[3] Cross References

§ 345.104 Demurrer [Code Civ. Proc. § 430.10] to Complaint--Bar of Statute of Limitation

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[4] Form of Demurrer

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§§ 345.105-345.109 [Reserved]

§ 345.110 Ground of Demurrer [Code Civ. Proc. § 430.10]--Bar of Laches Against Complaint for Equitable Relief

[1] FORM

[2] Use of Form

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§§ 345.111-345.119 [Reserved]

§ 345.120 Separate Trial of Special Defense [Code Civ. Proc. § 597]--Bar of Statute of Limitation--Notice of Motion

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[5] Special Defense in Answer to Cross Complaint

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§ 345.121 Separate Trial of Special Defense [Code Civ. Proc. § 597]--Bar of Statute of Limitation--Order

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[2] Use of Form

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[6] Cross References

§§ 345.122-345.149 [Reserved]

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 345 LIMITATION OF ACTIONS
PART I. SCOPE

30-345 California Forms of Pleading and Practice--Annotated § 345.01

§ 345.01 Scope of Chapter

This chapter discusses the limitation of actions, including

- Determining and calculating the appropriate period [*see § 345.17* et seq.].
- Suspension and tolling of the period [*see § 345.20* et seq.].
- Revival of a barred debt by promise or acknowledgment after expiration of period of limitation [*see § 345.24*].
- Relation back of amended complaints [*see § 345.25* et seq.].
- Waiver of the bar of the statute of limitations [*see § 345.28*].
- Laches [*see § 345.40* et seq.].

A Research Guide collects statutes and cases generally applying to statutes of limitation [*see § 345.50* et seq.].

This chapter provides the following forms:

- Allegations, for inclusion in complaints, of facts causing the tolling of a period of limitation and thus excusing what would otherwise appear on the face of the complaint to be an untimely action [*see §§ 345.70* et seq.].
- Allegations that a debt barred by the statute of limitations has been revived [*see §§ 345.85*].
- Affirmative defenses alleging that an action is barred by a statute of limitations [*see §§ 345.100* et seq.].

- Demurrer raising the defense of the statute of limitations [*see § 345.104*].

- A ground of demurrer that an equitable action is barred by laches [*see § 345.110*].

- Notice of motion for separate trial of the special defense that the action is barred by the statute of limitations [*see § 345.120*] and an order granting separate trial [*see § 345.121*].

Concluding this chapter is Part V. Table of Limitation Periods [*see § 345.150* et seq.], which provides the various periods of limitation organized by types of action. The table may be used as a quick reference for researching the limitation period governing a given action or proceeding. Included in the table are convenient cross references, when applicable, to other chapters in this publication that contain related forms, further discussion, or both.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsRelation BackGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsExtension & Revival

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§ 345.02 Cross References

For discussion and forms relating to the defense that a particular action or proceeding is barred by laches, see:

- Ch. 101, *Boundaries* .
- Ch. 184, *Deeds, § 184.60 et seq.*
- Ch. 358, *Mandate and Prohibition* .
- Ch. 488, *Reformation of Instruments* .
- Ch. 490, *Rescission and Restitution* .

For discussion of periods of limitation on claims that must be filed as a condition precedent to maintaining a lawsuit, see:

- Ch. 454, *Probate: Claims Against the Estate* .
- Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

For a plaintiff's procedural guide that includes a checklist of factors to consider in computing the limitation period in a civil action, see Ch. 2, *Procedural Guide for Civil Actions* .

For further discussion and forms relating to the defense that a particular action or proceeding is barred by the lapse of the applicable limitation period, see the specific chapter relating to that action or proceeding and the General Index in this publication; for additional cross references to specific chapters, see also the Table of Limitation Periods [*see § 345.150* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral Overview

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[Reserved]

§§ 345.03[Reserved]

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30-345 California Forms of Pleading and Practice--Annotated § 345.10

§ 345.10 Governing Statutes

The limitation of actions and proceedings generally is governed by *Code Civ. Proc. §§ 312, 313* (general provisions), *315349.4* (periods of limitation), and *350-363* (general provisions regarding commencement, tolling, waiver, etc., of limitation periods). Periods of limitation for many special actions and proceedings are provided throughout the codes, most of which are identified in the Table of Limitation Periods [*see § 345.150* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral Overview

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§ 345.11 Purpose of Statutory Limitation

Statutes of limitation are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim, it is unjust not to put an adversary on notice to defend within the period of limitation; the right to be free of stale claims comes, in time, to prevail over the right to prosecute a claim [*see Gutierrez v. Mofid (1985) 39 Cal. 3d 892, 898, 218 Cal. Rptr. 313, 705 P.2d 886* ; *Bollinger v. National Fire Ins. Co. (1944) 25 Cal. 2d 399, 407, 154 P.2d 399* ; *Duty v. Abex Corp. (1989) 214 Cal. App. 3d 742, 748-749, 263 Cal. Rptr. 13]* . They are intended to enable defendants to marshall evidence while memories and facts are fresh and to provide defendants with repose for past acts [*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal. 4th 739, 755, 76 Cal. Rptr. 2d 749, 958 P.2d 1062]* .

Thus, civil statutes of limitations protect defendants from the necessity of defending stale claims and require plaintiffs to pursue their claims diligently [*Romano v. Rockwell Internat., Inc. (1996) 14 Cal. 4th 479, 488, 59 Cal. Rptr. 2d 20, 926 P.2d 1114* ; *see Downs v. Department of Water & Power (1997) 58 Cal. App. 4th 1093, 1099-1100, 68 Cal. Rptr. 2d 590* (fundamental purpose underlying statute of limitations is to protect defendants from having to defend against stale claims by providing notice in time to prepare a fair defense on the merits and second policy is to require plaintiffs to diligently pursue their claims)].

Although statutes of limitations are favored for policy reasons of necessity and expediency [*see, e.g., Fontana Land Co. v. Laughlin (1926) 199 Cal. 625, 636, 250 P. 669* ; *Kunstman v. Mirizzi (1965) 234 Cal. App. 2d 753, 757, 44 Cal. Rptr. 707]* , they run counter to the strong public policy that litigation be disposed of on the merits whenever possible. Their arbitrary time limits do not distinguish between just and unjust claims or between avoidable and unavoidable delay. Thus, because statutes of limitations are technical defenses that can bar just claims, they are to be strictly construed to avoid the forfeiture of a plaintiff's rights. Courts may not indulge in a strained construction to apply a statute of limitations to the facts of a particular case [*Duty v. Abex Corp. (1989) 214 Cal. App. 3d 742, 752-753, 263 Cal. Rptr. 13* , citing *Chase Sec. Corp. v. Donaldson (1945) 325 U.S. 304, 324-315, 65 S. Ct. 1137, 89 L. Ed. 1628]* .

The California Supreme Court has suggested that the affirmative defense based on the statute of limitations should not

be characterized as "favored" or "disfavored." Recognizing that courts have both "favored" the defense as being in accord with public policy because it promotes repose by giving stability to human affairs and, less often, "disfavored" the defense as being against public policy because it disposes of a cause of action on procedural grounds rather than on the merits, the Court noted that these public policies are equally strong. Balancing them is exclusively for the Legislature when it establishes limitation periods [*see Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 396, 87 Cal. Rptr. 2d 453, 981 P.2d 79]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 345.12 Constitutionality of Statutes of Limitation

The authority of the Legislature to provide periods of limitation is unquestionable, and the fixing of time limits within which particular rights must be asserted is a matter of legislative policy. The only restriction of the Legislature's authority is that a statute of limitation must not be so manifestly inequitable as to amount to a denial of justice [*Ocean S. R. Co. v. Santa Cruz (1961) 198 Cal. App. 2d 267, 273, 17 Cal. Rptr. 892* ; *see also Kupka v. Board of Administration (1981) 122 Cal. App. 3d 791, 797, 176 Cal. Rptr. 214]* .

Statutes of limitation are generally not subject to constitutional challenge for violation of the notice requirements of the Due Process Clause of *U.S. Const., amend. XIV*, as announced in the Supreme Court's decisions in *Mennonite Board of Missions v. Adams (1983) 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180* , and *Mullane v. Central Hanover B. & T. Co. (1950) 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865* . This is true particularly of "self-executing" statutes of limitation, in which the period of limitation is not triggered by the legal proceeding itself. When, however, a statute of limitations is not self-executing and operates to limit a cause of action that amounts to a property interest, it violates due process if it does not provide actual notice of the limitations period [*Tulsa Collection Servs. v. Pope (1988) 485 U.S. 478, 486-488, 491, 108 S. Ct. 1340, 99 L. Ed. 2d 565, 575-577, 579]* . For example, an Oklahoma nonclaim provision, limiting the period within which creditors might bring claims against a decedent's estate, violated due process notice requirements when it did not provide creditors with actual notice of the limitation period [*Tulsa Collection Servs. v. Pope (1988) 485 U.S. 478, 487-488, 491, 108 S. Ct. 1340, 99 L. Ed. 2d 565, 577, 579* ; for discussion of the California nonclaim provisions (*Prob. Code §§ 9050, 9100*), *see* Ch. 454, *Probate: Claims Against the Estate*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 345.13 Choice of Law

[1] Governmental Interest Analysis

The governmental interest analysis approach, under which the forum state searches to find the proper law to apply based on the interests of the litigants and the involved states, governs the choice of law for determining whether an action is barred by the statute of limitations [*Offshore Rental Co. v. Continental Oil Co. (1978) 22 Cal. 3d 157, 161, 148 Cal. Rptr. 867, 583 P.2d 721* ; *Reich v. Purcell (1967) 67 Cal. 2d 551, 553, 63 Cal. Rptr. 31, 432 P.2d 727]* . The forum state will generally apply its own law unless a litigant demonstrates that applying the law of another state would further the interests of the other state [*Hurtado v. Superior Court (1974) 11 Cal. 3d 574, 581, 114 Cal. Rptr. 106, 522 P.2d 666]* .

In applying the governmental interst analysis approach, the court examines the policies underlying the competing laws of the involved states to determine which states are interested in having their laws applied to the issues in question. A state will have an interest in having its law applied if the policies underlying the law would be thereby advanced. A true conflict exists if both California and the foreign state have a strong interest in applying their respective laws. The court must then engage in comparative impairment analysis and apply the law of the state whose policy would be more impaired if its law were not applied. If only one of two potentially concerned states has an interest in having its law applied, the conflict of laws is false, and the court will apply the law of the only interested state [*Hambrecht & Quist Venture Partners v. American Medical Internat., Inc. (1995) 38 Cal. App. 4th 1532, 1543 n.9, 46 Cal. Rptr. 2d 33* ; *Ashland Chemical Co. v. Provence (1982) 129 Cal. App. 3d 790, 793-794, 181 Cal. Rptr. 340]* .

ILLUSTRATION:

Identifying Governmental Interest. A Kentucky plaintiff sued three California defendants in California state court to enforce a promissory note. The note was executed and to be paid in Kentucky and was to be construed according to Kentucky law. The action was barred by California's statute of limitations, but not by Kentucky's statute of limitations which was fifteen years. Will California law apply to bar the action? Yes. The court held that Kentucky had no interest, but that California did because statutes of limitations are designed to protect the enacting state's residents and courts from burdens associated with the prosecution of stale claims. California courts and a California resident would

be protected by applying California's statute of limitations because California was the forum and the defendant was a California resident [*see Ashland Chemical Co. v. Provence (1982) 129 Cal. App. 3d 790, 794-795, 181 Cal. Rptr. 340]* .

[2] Effect of Choice of Law Provision in Contract

A choice of law provision providing that the contract shall be governed by the "laws" of a particular jurisdiction has been held to incorporate the statute of limitations of the chosen state [*Hambrecht & Quist Venture Partners v. American Medical Internat., Inc. (1995) 38 Cal. App. 4th 1532, 1536, 1538-1544, 46 Cal. Rptr. 2d 33]* . Such an arm's length contractual choice of law provision will be enforced if the chosen state has a substantial relationship to the parties to the transaction, or there is any other reasonable basis for the parties choice, and the chosen state's law is not contrary to a fundamental policy of California. If there is a fundamental conflict with California law, the court must determine if California has a materially greater interest than the chosen state in the determination of the particular issue. If California has a greater interest, the choice of law will not be enforced because California will decline to enforce a law that is contrary to this state's fundamental policy [*Hambrecht & Quist Venture Partners v. American Medical Internat., Inc. (1995) 38 Cal. App. 4th 1532, 1536, 1544-1449, 46 Cal. Rptr. 2d 33* (choice of law provision resulting in Delaware's three year statute of limitation being applied to breach of contract and declaratory relief claims rather than four year California period not in conflict with California policy and enforced)].

Hambrecht & Quist Venture Partners v. American Medical Internat., Inc. (1995) 38 Cal. App. 4th 1532, 46 Cal. Rptr. 2d 33 , distinguished *Ashland Chemical Co. v. Provence (1982) 129 Cal. App. 3d 790, 181 Cal. Rptr. 340* , cited in the Illustration, in *[1], above*. Although the *Hambrecht* court noted that the result in *Ashland Chemical Co.* that the choice of law provision was unenforceable because it violated California's policy of protecting state residents from stale claims may have been correct, the court questioned *Ashland Chemical Co.'s* analysis to determine the enforceability of such a clause and pointed out error in *Ashland Chemical Co.'s* suggestion that a choice of law provision is per se unenforceable if the chosen state's statute of limitations is longer than California's because California allows contracting parties to extend statute of limitations, although with some restrictions [*Hambrecht & Quist Venture Partners v. American Medical Internat., Inc. (1995) 38 Cal. App. 4th 1532, 1549 n. 17, 46 Cal. Rptr. 2d 33]* . The court also indicated that dicta in *Ashland Chemical Co.* suggesting that state's statutes of limitations apply only to resident of that state is incorrect and not to be followed because choice of law provision can apply to defendant who is not resident of state [*Hambrecht & Quist Venture Partners v. American Medical Internat., Inc. (1995) 38 Cal. App. 4th 1532, 1546 n.14, 46 Cal. Rptr. 2d 33]* .

In addition, a choice of law provision that states the contract will be governed by the "laws" of a particular state incorporates that state's "borrowing statute." A borrowing statute requires that each cause of action be timely under the state chosen by the contract and any state in which the claim arose--effectively applying the shorter of the two states' limitations periods [*Hughes Electronics Corp. v. Citibank Delaware (2004) 120 Cal. App. 4th 251, 260, 15 Cal. Rptr. 3d 244* (a choice of law provision in a contract stating that all claims will be resolved under the laws of New York required application of New York's borrowing statute; applying the borrowing statute resulted in the cause of action being barred because the claim arose in California, which had a shorter one-year statute of limitations)].

For further discussion of the enforceability of choice of law clauses, see Ch. 140, *Contracts* .

[3] Actions Barred in State of Origin

When a cause of action has arisen in another state or in a foreign country, and by the laws of that other state or foreign country an action cannot be maintained against a person by reason of the lapse of time, an action cannot be maintained against that person in California unless the person having the cause of action has been a citizen of California and has held the cause of action from the time it accrued [*Code Civ. Proc. § 361*]. For a form of affirmative defense raising this limitation, see *§ 345.101*.

Legal Topics:

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§ 345.14 Effect of Amending a Statute

[1] Extending Period

[a] Application to Cause of Action Not Already Barred

A legislative extension of the statutory period within which an action must be brought is valid as to any cause of action then pending and not already barred, unless the statute expressly provides to the contrary. The party claiming to be adversely affected will be deemed to have suffered no injury, if the cause of action was not already barred, because the extension affects only the remedy and not the right [*see Mudd v. McColgan (1947) 30 Cal. 2d 463, 468, 183 P.2d 10* ; *Evelyn, Inc. v. California Emp. Stab. Com. (1957) 48 Cal. 2d 588, 592, 311 P.2d 500* ; *Douglas Aircraft Co. v. Cranston (1962) 58 Cal. 2d 462, 465, 24 Cal. Rptr. 851, 374 P.2d 819* ; *Mojica v. 4311 Wilshire, LLC (2005) 131 Cal. App. 4th 1069, 1072-1073, 31 Cal. Rptr. 3d 887* ; *Society of Cal. Pioneers v. Baker (1996) 43 Cal. App. 4th 774, 784, 50 Cal. Rptr. 2d 865* ; *Resolute Ins. Co. v. Municipal Court (1970) 11 Cal. App. 3d 1006, 1009, 90 Cal. Rptr. 337]* .

[b] Revival of Barred Cause of Action

The Legislature has the power to amend a statute of limitations retroactively so as to revive a common-law civil cause of action already barred under the former limitation period [*Liebig v. Superior Court (1989) 209 Cal. App. 3d 828, 835, 257 Cal. Rptr. 574* (distinguishing cases involving statutes of limitations governing prescriptive property rights and civil liability created by statutes, as well as criminal cases, in which the law is to the contrary); *see Hellinger v. Farmers Group, Inc. (2001) 91 Cal. App. 4th 1049, 1054, 111 Cal. Rptr. 2d 268* (in *Code Civ. Proc. § 340.9*, legislature retroactively revived causes of action arising from damages caused by Northridge earthquake); *Lent v. Doe (1995) 40 Cal. App. 4th 1177, 1181, 1183-1184, 47 Cal. Rptr. 2d 389* (retroactive revival of time barred claims is constitutionally permissible provided it does not interfere with vested title to real or personal property)].

The Legislature must expressly declare that an amended statute of limitations is to be applied retroactively; if it does not, the extended time for bringing a particular action cannot be applied retroactively so as to revive an action that had already been barred by the period of limitation contained in the former statute [*see Aguilera v. Heiman (2009) 174 Cal. App. 4th 590, 596, 95 Cal. Rptr. 3d 18* ; *Bullard v. California State Automobile Assn. (2005) 129 Cal. App. 4th 211,*

216-219, 28 Cal. Rptr. 3d 225 ; *Krupnick v. Duke Energy Morro Bay, LLC (2004) 115 Cal. App. 4th 1026, 1027-1030, 9 Cal. Rptr. 3d 767* ; *Bartman v. Estate of Bartman (1978) 83 Cal. App. 3d 780, 787-788, 148 Cal. Rptr. 207* ; *Carr v. State of California (1976) 58 Cal. App. 3d 139, 144-147, 129 Cal. Rptr. 730]* .

[2] Shortening Period

The Legislature may shorten the period within which an action may be commenced, since a statute of limitation affects the remedy only and does not impair the cause of action itself. However, a statute shortening the period of limitation cannot be applied retroactively to defeat an accrued cause of action that is not barred by the statute applicable before the new statute took effect. To avoid the unconstitutional effect of retroactive application, a statute must be applied prospectively to such causes of action; and even then, the claimant must be allowed a reasonable time within which to proceed with his cause of action [*Scheas v. Robertson (1951) 38 Cal. 2d 119, 125, 238 P.2d 982* ; *Niagara Fire Ins. Co. v. Cole (1965) 235 Cal. App. 2d 40, 42-43, 44 Cal. Rptr. 889* ; *see Edward Fineman Co. v. Superior Court (1998) 66 Cal. App. 4th 1110, 1125-1126, 78 Cal. Rptr. 2d 478* (retroactive application of *Com. Code § 4111*)].

Thus, the statute must not operate within so short a time as to give the party no reasonable opportunity to exercise his or her remedy. Whether or not there is reasonable time is a question of the constitutionality of the statute. It is not a discretionary matter for the trial court, and if it appears that there was a reasonable time for exercise of the remedy before the statutory bar became fixed, the trial court cannot consider individual hardship or other circumstances, but must give effect to the express provisions of the law [*Rosefield Packing Co. v. Superior Court (1935) 4 Cal. 2d 120, 122, 124, 47 P.2d 716* ; *Mohlmann v. City of Burbank (1986) 179 Cal. App. 3d 1037, 1044, 225 Cal. Rptr. 109* ; *Eden v. Van Tine (1978) 83 Cal. App. 3d 879, 887, 148 Cal. Rptr. 215]* .

[3] Clarifying Statute

Retroactive application of an amendment that merely clarifies a statute is not prohibited merely because it applies to facts in existence before the effective date of the amendment or because the complaint or petition was filed prior to the amendment [*Noggle v. Bank of America (1999) 70 Cal. App. 4th 853, 859, 82 Cal. Rptr. 2d 829* (1996 amendment to *Prob. Code § 16460* clarifying events that trigger statute of limitations applied retroactively)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 345.15 Effect of New Judicial Opinion

A judicial opinion in a civil case does not generally supersede the operation of the statute of limitations so as to revive old claims that were not pursued because of a previously prevailing contrary rule of law, or to reincarnate dead causes of action barred by the statute of limitations [*Monroe v. Trustees of the California State Colleges (1971) 6 Cal. 3d 399, 406-407, 99 Cal. Rptr. 129, 491 P.2d 1105* ; *see also Estate of Horman (1971) 5 Cal. 3d 62, 71, 95 Cal. Rptr. 433, 485 P.2d 785 , cert. denied, 404 U.S. 1015 (1972)* (discussed under *§ 345.20[16], below*)].

When a new judicial opinion clarifies that a right of action exists, it does not extend the running of the statute of limitations [*Howard Jarvis Taxpayers Assn. v. City of La Habra (2001) 25 Cal. 4th 809, 815-816, 107 Cal. Rptr. 2d 369, 23 P.3d 601* , disapproving *McBrearty v. City of Brawley (1997) 59 Cal. App. 4th 1441, 69 Cal. Rptr. 2d 862]* . For example, in November 1986, the voters approved Proposition 62, a statewide initiative providing, inter alia, that local governments may not impose any general tax until that tax is submitted to the electorate and approved by a majority of voters. A few years after the passage of Proposition 62, an appellate court declared its voter approval requirements unconstitutional [*City of Woodlake v. Logan (1991) 230 Cal. App. 3d 1058, 1064-1068, 282 Cal. Rptr. 27]* . In 1992, the City established a utility users tax to raise revenue for general governmental purposes, starting May 1, 1993, without first submitting it to the voters for approval. In September 1995, the California Supreme Court upheld the constitutionality of Proposition 62 *[Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 238-254, 261, 45 Cal. Rptr. 2d 207, 902 P.2d 225]* . In March 1996, the plaintiffs brought an action to invalidate the utility tax. The California Supreme Court held that the statute of limitations did not begin to run when the 1995 *Guardino* opinion was issued, but began to run anew each time the tax was collected. The plaintiffs were thus allowed to challenge taxes collected within 3 years prior to the filing of their action. The court commented that the plaintiffs had the same opportunity as the taxpayers in *Guardino* to bring the issue of the constitutionality of Proposition 62 to the California Supreme Court and thus could have brought their action when the tax was first established [*Howard Jarvis Taxpayers Assn. v. City of La Habra (2001) 25 Cal. 4th 809, 815-816, 107 Cal. Rptr. 2d 369, 23 P.3d 601 , disapproving McBrearty v. City of Brawley (1997) 59 Cal. App. 4th 1441, 69 Cal. Rptr. 2d 862]* .

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§ 345.16 Application of Statutes of Limitation

[1] Inflexible as General Rule

A statute of limitation operates against the right of action, not against the holder of that right [*Record Machine & Tool Co. v. Pageman Holding Corp. (1959) 172 Cal. App. 2d 164, 174, 342 P.2d 402]* . Because statutes of limitations prescribe definite periods of time within which actions may be brought or certain steps may be taken, they are adamant rather than flexible in nature. Statutes of limitation are upheld and enforced regardless of personal hardship [*Chas. L. Harney, Inc. v. State of California (1963) 217 Cal. App. 2d 77, 91, 31 Cal. Rptr. 524]* .

A *Code Civ. Proc. § 473(b)* motion for relief based on mistake, inadvertence, surprise, or excusable neglect is not available to provide relief from an error that results in the running of the applicable statue of limitations [*Life Savings Bank v. Wilhelm (2000) 84 Cal. App. 4th 174, 177, 100 Cal. Rptr. 2d 657* ; *Carlson v. Department of Fish & Game (1998) 68 Cal. App. 4th 1268, 1279, 80 Cal. Rptr. 2d 601* ; *but see Simpson v. Williams (1987) 192 Cal. App. 3d 285, 238 Cal. Rptr. 566* (section 473 relief available in relation to action for declaratory relief following attorney fee arbitration; questioned in *Shiver, McGrane, & Martin v. Littell (1990) 217 Cal. App. 3d 1041, 1049, 266 Cal. Rptr. 298*)]. When the Legislature has decided to introduce an element of flexibility in a particular instance, it has expressly provided for extension of the limitation period on a showing of good cause, and courts have interpreted the good cause standard as equivalent to a showing under *Code Civ. Proc. § 473*, which grants relief on the ground of mistake, inadvertence, or excusable neglect. Absent a specific provision for extension, it must be inferred that the Legislature did not intend to permit relief on grounds of good cause or under *Code Civ. Proc. § 473* [*Kupka v. Board of Administration (1981) 122 Cal. App. 3d 791, 795, 176 Cal. Rptr. 214* ; *Castro v. Sacramento County Fire Protection District (1996) 47 Cal. App. 4th 927, 929, 933, 55 Cal. Rptr. 2d 193* (1992 amendments of *section 473* did not overturn *Kupka*)].

Warning:

Formal Filing Requirements Must Be Met. The action must be filed within the applicable limitations period, and all formal filing requirements must be met. For instance, the failure to tender the appropriate filing fee prior to the expiration of the statute of limitations may result in the action being dismissed. For discussion of how to cure a filing fee defect where the payment is voided due to a returned check, or the

fee tendered was below the required amount, see *Ch. 123, Complaints and Cross Complaints, § 123.28*.

[2] Exceptions to Inflexible Application

Exceptions to the rigid application of the statute of limitations include the following:

- Statutory provisions suspending or tolling the period of limitation, such when the defendant is absent from the state [*see Code Civ. Proc. § 351*] or is under a disability [*see Code Civ. Proc. § 352* (minority, insanity)]. For discussion, see *§ 345.20[1]* et seq.

- Suspension of the statute based on case law, for example, estoppel to plead the bar of the statute because of fraudulent concealment of a cause of action [*see Bollinger v. National Fire Ins. Co. (1944) 25 Cal. 2d 399, 411, 154 P.2d 399* ; *Pashley v. Pacific E. R. Co. (1944) 25 Cal. 2d 226, 229, 153 P.2d 325* ; *Community Cause v. Boatwright (1981) 124 Cal. App. 3d 888, 899, 177 Cal. Rptr. 657* ; for discussion, see *§ 345.22[3]*] or fraudulent concealment that the wrong party was sued [*see Kleinecke v. Montecito Water Dist. (1983) 147 Cal. App. 3d 240, 245-247* ; for discussion, see *§ 345.22[4]*].

[3] Construction of Statutes of Limitation

Statutes of limitation are to be strictly construed, and the court must find the Legislature's intent from the statute itself. A statute of limitation must be applied as it plainly reads [*Skidmore v. County of Alameda (1939) 13 Cal. 2d 534, 540, 90 P.2d 577* ; *but see Pryor v. Winter (1905) 147 Cal. 554, 557-558, 82 P. 202* (court ruling whether action is barred by statute of limitation should consider all statutory provisions on subject; provisions to be construed in light of presumption Legislature is acquainted with, and legislates with reference to, settled principles of law)]. If the facts relied on leave doubt as to whether an action has been brought within the applicable period of limitation, a court should not indulge a strained construction of the applicable statute for the purpose of supporting the plea of bar of the statute [*see Herman v. Los Angeles County Metropolitan Transportation Authority (1999) 71 Cal. App. 4th 819, 826-827, 84 Cal. Rptr. 2d 144* ; *County of L.A. v. Security First Nat. Bank (1948) 84 Cal. App. 2d 575, 580, 191 P.2d 78]* .

For discussion of general principles of statutory construction, see Ch. 531, *Statutes and Ordinances* .

[4] To Cases in General

Civil actions and special proceedings of a civil nature, without exception, can be commenced only within the periods of limitation prescribed in *Code Civ. Proc. §§ 312-366.2*, after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute [*Code Civ. Proc. § 312*; *see also Code Civ. Proc. § 363* ("action" as including, when necessary, special proceeding of civil nature)].

The statutes of limitations found in the Code of Civil Procedure do not apply to administrative actions [*Robert F. Kennedy Medical Center v. Department of Health Services (1998) 61 Cal. App. 4th 1357, 1362, 72 Cal. Rptr. 2d 180* ; *Little Company of Mary Hospital v. Belshe (1997) 53 Cal. App. 4th 325, 329, 61 Cal. Rptr. 2d 626]* . For discussion of the statute of limitations applicable to an administrative proceeding, see Ch. 473A, *Commencing Agency Adjudication*, § 372A.12.

[5] To Actions by a State or County

The periods of limitation prescribed in *Code Civ. Proc. §§ 335-349* 3/4 apply to actions brought in the name of the state or a county, or for the benefit of the state or a county, in the same manner a to actions by private parties, except that actions for the recovery of money due on account of the support of patients at state or county hospitals may be commenced at any time within four years after the last date of service or the last date of payment [*Code Civ. Proc. § 345*]. When the state is the plaintiff, however, certain actions relating to real property are barred by particular provisions

of the Code of Civil Procedure [*see Code Civ. Proc. § 315*].

[6] To Actions by a Municipality

Municipalities are subject to statutes of limitations [*Los Angeles v. County of Los Angeles (1937) 9 Cal. 2d 624, 627, 72 P.2d 138]* .

[7] To Actions Against Public Entities and Public Employees

Special limitation periods apply to actions against public entities and public employees. For discussion, *see* Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral Overview

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
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PART II. LEGAL BACKGROUND
A. Statute of Limitations

30-345 California Forms of Pleading and Practice--Annotated § 345.17

§ 345.17 Effect of Court Being Closed

[1] Saturday, Sunday, Holidays, and "Court Days"

The time in which an act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded [*Code Civ. Proc. § 12*].

Code Civ. Proc. § 12a provides in part that if the last day for the performance of any act provided or required by law to be performed within a specified period of time is a holiday, then that period is extended to and including the next day which is not a holiday [*Code Civ. Proc. § 12a*]. Thus, *Code Civ. Proc. § 12a* may have the effect of extending a limitation period [*see, e.g., Tran v. Fountain Valley Community Hospital (1997) 51 Cal. App. 4th 1464, 1467, 60 Cal Rptr. 2d 91* (*Section 12a* applied when last day to file action would have been a Sunday; distinguishing cases in which courts declined to extend the time within which an action must be performed which involved situations where the last date on which to act was a specified number of days before a date certain)].

The term "holiday" includes Saturday [*Code Civ. Proc. § 12a*] and Sunday [*Code Civ. Proc. § 12a, Gov. Code § 6700(a)*]. It also includes holidays specified in *Gov. Code § 6700*, as adjusted for weekends pursuant to *Gov. Code § 6701* [*Code Civ. Proc. § 12a, Gov. Code § 6700(b), (d)-(e), (g)-(o)*]:

- January 1st.
- February 12th (Lincoln Day).
- The third Monday in February (Presidents Day).
- The last Monday in May (Memorial Day).
- July 4th.

- The first Monday in September (Labor Day).
- September 9th (Admission Day).
- The second Monday in October (Columbus Day).
- November 11th (Veterans Day).
- December 25th.
- Good Friday from 12 noon to 3:00 p.m.
- Every day appointed by the President or Governor for a public fast, thanksgiving, or holiday.

Two holidays listed in *Gov. Code § 6700* are excluded from the definition of holiday in *Code Civ. Proc. § 12a*. They are [*Code Civ. Proc. § 12a*; *Gov. Code § 6700(c), (f)*]:

- The third Monday in January (Dr. Martin Luther King, Jr. Day).
- March 31st (Cesar Chavez Day).

A "court day" may be defined as any day in which the court is not closed due to a judicial holiday [*see Code Civ. Proc. § 133, 134*]. While courts of justice may be held and business transacted on any day, [*Code Civ. Proc. § 133*], courts must be closed for the transaction of judicial business on judicial holidays [as defined, *above*], for all but the following purposes [*Code Civ. Proc. § 134(a), (b)*]:

- To give, upon request, instructions to a deliberating jury.
- To receive a verdict or discharge a jury.
- For arraignments in criminal actions.
- For Saturday Small Claims court sessions.
- For injunctions and writs of prohibition, which may be issued and served on any day.

The fact that a court is open on a judicial holiday cannot make that day a nonholiday for purposes of computing the time required for the conduct of any proceeding nor for the performance of any act [*Code Civ. Proc. § 134(d)*].

If a day appointed for the holding or sitting of a court, or to which it is adjourned, falls on a judicial holiday, it is deemed appointed for or adjourned to the next day [*Code Civ. Proc. § 134(d)*].

A court may designate one or more departments to remain open on a judicial holiday or at any hours of the day or night [*Code Civ. Proc. § 134(c)*], however these courts are still judicial holidays for purposes of computing the time required for the conduct of any proceeding or for the performance of any act [*Code Civ. Proc. § 134(d)*]; and any paper lodged with the court during that time must be filed by the court on the next non-judicial holiday if the document meets the filing criteria [*Code Civ. Proc. § 134(d)*].

Discussion of county holiday having the same effect as a judicial holiday, see *57 Op. Atty. Gen. Cal. 641* .

[2] Closure for Entire Day for Treated Same as Holiday

In addition, if any city, county, or state office, other than a branch office, is closed for the whole of a day, that day is considered a holiday as to the business of that office for computing time under *Code Civ. Proc. § 12a* [*Code Civ. Proc. § 12b*; *see Code Civ. Proc. § 12a*, discussed under *§ 345.17[1], above*]. Although *Code Civ. Proc. § 12b* does not define "branch office," the ordinary definition would include outlying districts of a superior court. Thus, when local rule permitted the filing of a complaint in either the west district or the downtown central district, the downtown courthouse as well as the west district courthouse would have to have been closed before *Section 12b* could apply to give the plaintiff an additional day to file the complaint [*Bennett v. Suncloud (1997) 56 Cal. App. 4th 91, 98-99, 65 Cal. Rptr. 2d 80* (factual issue sufficient to overcome demurrer was raised as to whether central district courthouse was closed due to Northridge earthquake)].

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§ 345.18 Determination of Applicable Statute

[1] Determined by Nature of Cause of Action

The statute of limitation to be applied in a case ordinarily is determined by the nature of the right sued upon, not by the by the form of the action or the relief demanded [*Davies v. Krasna (1973) 14 Cal. 3d 502, 515, 121 Cal. Rptr. 705, 535 P.2d 1161* ; *Day v. Greene (1963) 59 Cal. 2d 404, 411, 29 Cal. Rptr. 785, 380 P.2d 385* ; *Quintilliani v. Mannerino (1998) 62 Cal. App. 4th 54, 66, 72 Cal. Rptr. 2d 359]* . Similarly stated, what is significant for statute of limitation purposes is the primary interest invaded by the defendant's wrongful conduct [*Barton v. New United Motor Manufacturing, Inc. (1996) 43 Cal. App. 4th 1200, 1207, 51 Cal. Rptr. 2d 328]* .

Thus, in determining which statute of limitation applies in a given case, the court should look beyond the relief sought and should consider instead the basic cause of action giving rise to the plaintiff's right to relief [*see* *Leeper v. Beltrami (1959) 53 Cal. 2d 195, 214, 1 Cal. Rptr. 12, 347 P.2d 12]* . The court must identify the nature of the cause of action, that is, the gravamen of cause of action [*People ex rel Dept. of Conservation v. Triplett (1996) 48 Cal. App. 4th 233, 244, 55 Cal. Rptr. 2d 610]* .

Neither the caption, the prayer, nor the form of the complaint is conclusive in determining the nature of the liability from which the cause of action flows [*Parker v. Walker (1992) 5 Cal. App. 4th 1173, 1189, 6 Cal. Rptr. 2d 908* ; *Agair, Inc. v. Shaeffer (1965) 232 Cal. App. 2d 513, 516, 42 Cal. Rptr. 883]* .

ILLUSTRATION:

Identifying Cause of Action to Apply Statute of Limitations. Shortly before two employees leave their employment, one of them, without authorization, writes checks on the employer's account payable to himself, his wife, and to the other employee. The employer commences an action against two former employees to recover money. The complaint alleges that the defendants had been employed under an oral contract and that the drawing of the checks violated their agreement. The two-year statute of limitations governing actions on unwritten obligations, *Code Civ. Proc. § 339(1)*, would bar the action. The action would be timely, however, under the three-year statute of *Code Civ. Proc. § 338(d)*, governing actions on the ground of fraud or mistake. Is the action timely brought? Yes. The facts show the violation of a

confidential relationship by misappropriation of property, and not the breach of an oral employment contract. The fact that a breach of contract may have been involved is not decisive when the gravamen of the action is actual or constructive fraud or mistake [*see Agair, Inc. v. Shaeffer (1965) 232 Cal. App. 2d 513, 516-519, 42 Cal. Rptr. 883]* .

Various statutes specify periods of limitation for specific causes of action. Most of these are identified in Part V. of this chapter, Table of Limitation Periods [*see § 345.150* et seq.]. If no other statute of limitations is provided, then the four-year period under *Code Civ. Proc. § 343* applies. When the legislature intends that another or no limitations period applies, it must say so in clear and unmistakable language [*County of Marin Assn. of Firefighters v. Marin County Employees' Retirement Assn. (1994) 30 Cal. App. 4th 1638, 1651, 36 Cal. Rptr. 2d 736* (applying *Code Civ. Proc. § 338(d)* to the case before it)].

[2] When More Than One Statute Applies

[a] More Specific Statute Applies

When two statutes of limitation may apply to a given cause of action and one is general and one specific, the specific limitation period will apply [*Collection Bureau of San Jose v. Rumsey (2000) 24 Cal. 4th 301, 310-311, 99 Cal. Rptr. 2d 792, 6 P.3d 713* ; *Howard Jarvis Taxpayers Assn. v. City of Los Angeles (2000) 79 Cal. App. 4th 242, 248, 93 Cal. Rptr. 2d 742* ; *Creditors Collection Service v. Castaldi (1995) 38 Cal. App. 4th 1039, 1043-1044, 45 Cal. Rptr. 2d 511]* .

Examples of this rule include:

- In action on accounts receivable for medical expenses that were technically open book accounts, against surviving spouse to recover expenses of deceased spouse's last illness, *Prob. Code § 13554(c)* (concerning enforcement of deceased spouse's debt against surviving spouse), which incorporated one-year limitation period of former *Code Civ. Proc. § 353* (*now Code Civ. Proc. § 366.2*), applied as more specific than *Fam. Code § 914* (concerning spouses' liability for each other's debts incurred for necessaries of life); one-year period of former section 353 also applied as more specific than four-year limitation period of *Code Civ. Proc. § 337*, generally applicable to open book accounts [*Collection Bureau of San Jose v. Rumsey (2000) 24 Cal. 4th 301, 309-311, 313, 99 Cal. Rptr. 2d 792, 6 P.3d 713]* .

- In taxpayer suit challenging ordinance extending business tax to home occupations, 90-day limitation period of former *Gov. Code § 65009(c)(2)* (*now Gov. Code § 65009(c)(1)(B)*) applied rather than general three-year period of *Code Civ. Proc. § 338(a)* [*Howard Jarvis Taxpayers Assn. v. City of Los Angeles (2000) 79 Cal. App. 4th 242, 248, 93 Cal. Rptr. 2d 742]* .

- Three-year limitation period of *Code Civ. Proc. § 338(d)* applied to quasi-contract action based on mistake rather than two-year limitation period of *Code Civ. Proc. § 339* because section 338(d) applies more specifically to quasi-contract actions that seek recovery of money obtained by fraud or mistake, while section 339 applies generally to quasi-contract actions based on contract, obligation or liability not founded on a written instrument [*Creditors Collection Service v. Castaldi (1995) 38 Cal. App. 4th 1039, 1043-1044, 45 Cal. Rptr. 2d 511]* .

- Home purchaser's negligent misrepresentation cause of action against seller's real estate brokerage and agent was governed by specific two-year limitation period of *Civ. Code § 2079.4* rather than by general *Code Civ. Proc. § 338(d)* three-year period [Loken v. Century 21- *Award Properties (1995) 36 Cal. App. 4th 263, 273, 42 Cal. Rptr. 2d 683* (when two inconsistent statutes cover same subject matter, special statute, whether or not enacted first, treated as exception to general statute and controls unless a

contrary intent clearly appears)].

- In Song-Beverly Consumer Warranty Act (*Civ. Code § 1792 et seq.*) action, specific limitation period of *Com. Code § 2725* applied over general limitation period of *Code Civ. Proc. § 338* [*Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 213-215, 285 Cal. Rptr. 717]* .

[b] Shorter Controls When Neither Is More Specific

In some circumstances, more than one statute of limitations may be applicable. For example, if two statutes of limitations appear to apply to an action, and neither is more specific than the other and both stand on equal footing, both will apply so that the statute with the shorter limitation period will be controlling [*see, e.g.,* *Anson v. County of Merced (1988) 202 Cal. App. 3d 1195, 1199, 1202, 249 Cal. Rptr. 457* (*Gov. Code § 945.6* and *Code Civ. Proc. § 340.5* applied equally to medical malpractice action brought against public entity, with shorter period under *Gov. Code § 945.6* controlling)].

[3] Actions Based on Statute

[a] Other Than for Penalty or Forfeiture

An action based on a liability created by statute, other than a penalty or forfeiture, must be commenced within three years [*Code Civ. Proc. § 338(a)*]. A cause of action is based on a liability created by statute, for purposes of applying this limitations period, only if the liability is embodied in a statutory provision and is of a type that did not exist at common law [*West Shield Investigations & Security Consultants v. Superior Court (2000) 82 Cal. App. 4th 935, 952, 98 Cal. Rptr. 2d 612* ; *Jackson v. Cedars-Sinai Medical Center (1990) 220 Cal. App. 3d 1315, 1320, 269 Cal. Rptr. 877]* . Thus, when a cause of action is based on a statute that did not create a new form of liability, but merely codified and refined existing law, the three year limitations period in *Code Civ. Proc. § 338* for actions based on statutory liability does not apply [*West Shield Investigations & Security Consultants v. Superior Court (2000) 82 Cal. App. 4th 935, 952, 98 Cal. Rptr. 2d 612]* .

A declaratory judgment action or mandate petition to enforce a statutory liability must be brought within the same three-year period after accrual of the cause of action under *Code Civ. Proc. § 338(a)* as an action for damages or injunction on the same liability [*Howard Jarvis Taxpayers Assn. v. City of La Habra (2001) 25 Cal. 4th 809, 821, 107 Cal. Rptr. 2d 369, 23 P.3d 601* (causes of action for declaration of invalidity of currently collected tax and for writ of mandate to prevent future collection of tax were no more barred by statute of limitations than would be action for refund of taxes paid)]. However, an action by taxpayer advocacy groups and individual taxpayers challenging a city's utility users tax, on the ground that under Proposition 62 (*Gov. Code § 53720 et seq.*) it required voter approval, was not barred by the statute of limitations, even though the action was brought more than three years after the city ordinance was enacted and plaintiffs were seeking declaratory and writ relief rather than a refund. Considering the plaintiffs' claim of continuous accrual of the cause of action, the Court held that here the three-year limitations period under *Code Civ. Proc. § 338(a)* applied, and no other statute or constitutional rule provided differently, and therefore the validity of a tax measure could be challenged within the statutory period after any collection, regardless of whether more than three years have passed since the measure was adopted [*Howard Jarvis Taxpayers Assn. v. City of La Habra (2001) 25 Cal. 4th 809, 818-825, 107 Cal. Rptr. 2d 369, 23 P.3d 601]* .

[b] For Penalty or Forfeiture

An action on a statute for a penalty or forfeiture, when the action is given to an individual or to an individual and the state, must be commenced within one year, unless the statute imposing it prescribes a different limitation [*Code Civ. Proc. § 340(a)*]. A penalty or forfeiture includes any law that compels a defendant to pay a plaintiff other than what is necessary to compensate the plaintiff for legal damage done by the defendant [*see* *People ex rel. Dept. of Conservation v. Triplett (1996) 48 Cal. App. 4th 233, 252, 55 Cal. Rptr. 2d 610* (cancellation fee incurred by landowner who

voluntarily opts to cancel Williamson Act contract is not a penalty for purposes of *Code Civ. Proc. § 338(a)*)]. Thus, claims based on statutes which provide for mandatory recovery of damages additional to actual losses incurred, such as treble damages, are considered penal in nature, and thus are governed by the one-year limitation set forth in *Code Civ. Proc. § 340(a)* [*Menefee v. Ostawari (1991) 228 Cal. App. 3d 239, 243, 278 Cal. Rptr. 805* ; *see Prudential Home Mortgage Co. v. Superior Court (1998) 66 Cal. App. 4th 1236, 1241-1242, 78 Cal. Rptr. 2d 566* (claims for statutory forfeiture under *Civ. Code § 2941*)].

A one-year limitation also applies to actions on statutes for a forfeiture or penalty to the people of the state [*Code Civ. Proc. § 340(b)*].

[c] For Both Actual Damages and Penalty

Some statutory schemes contain separate, independent statutory provisions for recovery of actual damages and treble damages; in that case, the three-year period of limitation of *Code Civ. Proc. § 338(a)* may apply to the claim for actual damages under one statute, while the one-year period of *Code Civ. Proc. § 340(a)* applies to the claim for treble damages under the other statute [*G.H.I.I. v. MTS, Inc. (1983) 147 Cal. App. 3d 256, 277-279, 195 Cal. Rptr. 211* (antitrust laws)].

When a statute vests the trial court with the discretionary option of awarding treble damages in addition to actual damages, a claim based on the statute is not governed by *Code Civ. Proc. § 340(a)*. When, however, the allowance of treble damages is, by the terms of the statute, mandatory, the statute provides for a penalty, and an action based on it is subject to *Code Civ. Proc. § 340(1)* [*Menefee v. Ostawari (1991) 228 Cal. App. 3d 239, 243, 278 Cal. Rptr. 805* (applying former *Code Civ. Proc. § 340(1), now see Code Civ. Proc. § 340(a)*, to wrongful eviction action based on San Francisco ordinance providing for mandatory treble damage award); *see Mitchell v. Leslie (1995) 46 Cal. Rptr. 2d 419* (applying *Code Civ. Proc. § 338(a)* in action to recover excess rent charged in violation of local rent control Charter; treble damages not mandatory on finding a violation of the Charter, and restitution of excess rent is not a penalty)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 345.19 When Period of Limitation Begins to Run

[1] Period Begins When Cause of Action Accrues

A period of limitation does not begin to run until a cause of action accrues, and a cause of action invariably accrues when there is a remedy available [*Heyer v. Flaig (1969) 70 Cal. 2d 223, 230, 74 Cal. Rptr. 225, 449 P.2d 161* (overruled on other grounds in *Laird v. Blacker (1992) 2 Cal. 4th 606, 617, 7 Cal. Rptr. 2d 550, 828 P.2d 691*); *Glue-Fold, Inc. v. Slautterback Corp. (2000) 82 Cal. App. 4th 1018, 1029, 98 Cal. Rptr. 2d 661* (limitation period does not begin to run until cause of action accrues, i.e., all essential elements are present and claim becomes legally actionable)].

Stated alternatively, in ordinary tort and contract actions, the statute of limitations begins to run on the occurrence of the last element essential to the cause of action [*Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 187, 98 Cal. Rptr. 837, 491 P.2d 421* ; *Buttram v. Owens-Corning Fiberglas Corp. (1997) 16 Cal. 4th 520, 531 n.4, 66 Cal. Rptr. 2d 438, 941 P.2d 71* ; *see Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 389, 397, 87 Cal. Rptr. 2d 453, 981 P.2d 79* (when cause of action is complete with all its elements); *see also Keru Investments, Inc. v. Cube Co. (1998) 63 Cal. App. 4th 1412, 1423, 74 Cal. Rptr. 2d 744* (cause of action accrues at moment party who owns it is entitled to bring or prosecute action thereon)].

Thus, for example, it has been said that an action accrues on the date of injury [*Naftzger v. American Numismatic Society (1996) 42 Cal. App. 4th 421, 428, 49 Cal. Rptr. 2d 784* ; *see San Francisco Unified School Dist. v. W. R. Grace & Co. (1995) 37 Cal. App. 4th 1318, 1326, 44 Cal. Rptr. 2d 305* (no cause of action accrues until there is damage)].

In actions for an insurance company's refusal to defend, the cause of action accrues not with the filing of the action to be defended, but by the insurer's refusal to defend [*Eaton Hydraulics Inc. v. Continental Casualty Co. (2005) 132 Cal. App. 4th 966, 973-974, 34 Cal. Rptr. 3d 91]* .

Accrual of the cause of action may, however, be delayed by the discovery rule, as discussed in *[3], below*.

[2] Appreciable Harm Required for Cause of Action to Accrue

In any event, the remedy must be a real legal remedy based on appreciable harm to the plaintiff, so that he or she is entitled to more than merely a symbolic judgment, such as an award of nominal damages [*Budd v. Nixen (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433* ; *see Davies v. Krasna (1975) 14 Cal. 3d 502, 513, 121 Cal. Rptr. 705, 535 P.2d 1161* (questioned in *Intermedics v. Ventritex, Inc. (N.D. Cal. 1993) 822 F. Supp. 634, 642, n.7* as to "appreciable harm" requirement in a misappropriation of trade secrets case due to subsequent enactment of *Uniform Trade Secrets Act); Slavin v. Trout (1993) 18 Cal. App. 4th 1536, 1540, 23 Cal. Rptr. 2d 219* ; *Miller v. Lakeside Village Condominium Assn. (1991) 1 Cal. App. 4th 1611, 1622-1623, 2 Cal. Rptr. 2d 796]* . The mere breach of a duty that causes only nominal damages, speculative harm or the threat of future harm not yet realized does not normally suffice to create a cause of action [*San Francisco Unified School Dist. v. W. R. Grace & Co. (1995) 37 Cal. App. 4th 1318, 1326, 44 Cal. Rptr. 2d 305]* . However, although a right to recover nominal damages will not trigger the running of the period of limitations, the infliction of appreciable and actual harm, however uncertain in amount, will commence the statutory period [*Miller v. Lakeside Village Condominium Assn. (1991) 1 Cal. App. 4th 1611, 1622, 2 Cal. Rptr. 2d 796* (quoting from *Davies v. Krasna (1975) 14 Cal. 3d 502, 514, 121 Cal. Rptr. 705, 535 P.2d 1161*); *see San Francisco Unified School Dist. v. W. R. Grace & Co. (1995) 37 Cal. App. 4th 1318, 1326, 44 Cal. Rptr. 2d 305* (if last element of cause of action is damage, statute of limitations begins to run on occurrence of appreciable and actual harm, however uncertain in amount, that consists of more than nominal damages)]. When a wrongful act of another causes injury, as general rule the statute of limitations attaches immediately even if the injury is slight and not all resulting damages are sustained at that time [*Bennett v. Shahhal (1999) 75 Cal. App. 4th 384, 391-392, 89 Cal. Rptr. 2d 272]* . Because a single tort can be foundation for but one claim for damages, if the statute of limitations bars an action based on the harm immediately caused by the defendant's wrongdoing, a separate cause of action based on subsequent harm arising from that wrongdoing would normally amount to splitting cause of action [*Bennett v. Shahhal (1999) 75 Cal. App. 4th 384, 391-392, 89 Cal. Rptr. 2d 272]* .

In addition, a statute of limitation begins to run only on the accrual of a cause of action for coercive relief. Thus, when an action for noncoercive, declaratory relief is maintained before any actual breach, an action based on a breach is not barred by the lapse of time between the noncoercive action and the breach [*see United Pacific/Reliance Ins. Co. v. DiDomenico (1985) 173 Cal. App. 3d 673, 676-677, 219 Cal. Rptr. 119]* . Although the right to declaratory relief may exist before an obligation is breached, the same statute of limitations applicable to the action for coercive relief applies to the declaratory relief action. Thus, when an action for declaratory relief is brought after the accrual of a cause of action for coercive relief, a declaratory relief action will not be time barred if the statute of limitations has not expired to bring the action for coercive relief. On the other hand, if the statute of limitations to bring the action for coercive relief has expired, an action for declaratory relief will also be time barred [*Engstrom v. Kallins (1996) 49 Cal. App. 4th 773, 784, 56 Cal. Rptr. 2d 842* (joined cause of action for declaratory relief timely filed when other causes of action alleged in complaint timely filed)].

[3] Delayed Accrual Under Discovery Rule

[a] Delayed Discovery

The discovery rule is an exception to general rule for determining when cause of action accrues [*Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 397, 87 Cal. Rptr. 2d 453, 981 P.2d 79* ; *see Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal. 4th 797, 807, 27 Cal. Rptr. 3d 661, 110 P.3d 914* ; *Samuels v. Mix (1999) 22 Cal. 4th 1, 9, 91 Cal. Rptr. 2d 273, 989 P.2d 701]* . The discovery rule postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action; until, that is, plaintiff at least suspects, or has reason to suspect, a factual basis for its elements [*Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 389, 397, 87 Cal. Rptr. 2d 453, 981 P.2d 79* ; *see also Samuels v. Mix (1999) 22 Cal. 4th 1, 9, 91 Cal. Rptr. 2d 273, 989 P.2d 701* (common law discovery rule, when applicable, indefinitely delays accrual of cause of action until plaintiff discovers or reasonably has cause to discover facts constituting it)]. Similarly stated, the discovery rule permits accrual of a cause of action to be delayed until a

plaintiff knew or should have known of the wrongful conduct at issue [*Naftzger v. American Numismatic Society (1996) 42 Cal. App. 4th 421, 428, 49 Cal. Rptr. 2d 784* ; *see San Francisco Unified School Dist. v. W. R. Grace & Co. (1995) 37 Cal. App. 4th 1318, 1326, 44 Cal. Rptr. 2d 305* (under discovery rule, cause of action does not accrue until plaintiff either discovers injury and its negligent cause or could have discovered injury and cause through exercise of reasonable diligence)].

In order to employ the discovery rule to delay accrual of a cause of action, a potential plaintiff who suspects that an injury has been wrongfully caused must conduct a reasonable investigation of all potential causes of that injury. If such an investigation would have disclosed a factual basis for a cause of action, the statute of limitations begins to run on that cause of action when the investigation would have brought such information to light. In order to adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period [*Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal. 4th 797, 808-809, 27 Cal. Rptr. 3d 661, 110 P.3d 914]* .

The discovery rule most frequently applies when it is difficult to for the plaintiff to observe or understand that there has been an injury or breach [*Shively v. Bozanich (2003) 31 Cal. 4th 1230, 1248, 7 Cal. Rptr. 3d 576, 80 P.3d 676* (discovery rule does not apply to postpone accrual of a cause of action based on the publication of a defamatory statement in a book until plaintiff learns of existence of the book)].

At least in the context of unfair competition claims based on a defendant's allegedly deceptive marketing materials and sales practices, which is simply a different legal theory for challenging fraudulent conduct and where the harm from the unfair conduct will not reasonably be discovered until a future date, the time to file a *Bus. & Prof. Code § 17200* cause of action starts to run only when a reasonable person would have discovered the factual basis for a claim [*Broberg v. The Guardian Life Ins. Co. of America (2009) 171 Cal. App. 4th 912, 90 Cal. Rptr. 3d 225*].

Whether applicable limitations periods had expired in a lawsuit brought by investors against corporate officers and shareholders alleging breach of contract, fraud, and other causes of action, and specifically whether investors exercised reasonable diligence over the business project to merit application of the delayed discovery rule, was a question for the trier of fact [*Cleveland v. Internet Specialties West, Inc. (2009) 171 Cal. App. 4th 24, 30-31, 88 Cal. Rptr. 3d 892* .

In ordinary tort and contract actions, the period of limitation begins to run on the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action or of the identity of the wrongdoer does not suspend the running of the period [*Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 187, 98 Cal. Rptr. 837, 491 P.2d 421]* . However, the discovery rule may be applied to breaches of contract which can be, and are, committed in secret and, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time [*Gryczman v. 4550 Pico Partners, Ltd. (2003) 107 Cal. App. 4th 1, 4, 131 Cal. Rptr. 2d 680]* . This exception applies when 1) the injury or the act causing the injury, or both, have been difficult for the plaintiff to detect, 2) the defendant has been in a far superior position to comprehend the act and the injury, and 3) the defendant had reason to believe the plaintiff remained ignorant that he had been wronged. In these instances, the plaintiffs should not suffer where circumstances prevented them from knowing they have been harmed and defendants should not be allowed to knowingly profit from the injured party's ignorance [*Gryczman v. 4550 Pico Partners, Ltd. (2003) 107 Cal. App. 4th 1, 5, 131 Cal. Rptr. 2d 680]* .

Some causes of action, however, are intended to remedy harm that by its nature may not be immediately apparent. With respect to some of these causes of action, plaintiffs are protected by statutes that expressly delay the time when the cause of action accrues. For example, an action for fraud or mistake is not deemed to accrue until the plaintiff or plaintiff's agent actually discovers the facts constituting the fraud or mistake [*Code Civ. Proc. § 338(d)*; *see, e.g., Aaroe v. First American Title Ins. Co. (1990) 222 Cal. App. 3d 124, 127-129, 271 Cal. Rptr. 434* (error to grant nonsuit on statute of limitations ground in action against title insurance company for conspiracy to defraud when court

recognized that action was filed within three years of plaintiffs' alleged discovery of fraud); *Lee v. Escrow Consultants, Inc. (1989) 210 Cal. App. 3d 915, 922, 259 Cal. Rptr. 117* (action for breach of contract involving a breach of fiduciary duties); *see also County of Marin Assn. of Firefighters v. Marin County Employees' Retirement Assn. (1994) 30 Cal. App. 4th 1638, 1652-1653, 36 Cal. Rptr. 2d 736* (*Code Civ. Proc. § 338(d)* delays accrual of cause of action and requires suit to be filed within three years of accrual; if this requirement is satisfied, subdivision (d) does not limit plaintiff's ability to recover for events that occurred more than three years before accrual or filing); for discussion, *see* Ch. 269, *Fraud and Deceit*].

Other particular causes of action do not accrue until the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, the acts giving rise to the cause of action. These include the following:

- Misappropriation of a trade secret [*Civ. Code § 3426.6*; for discussion, *see Ch. 565, Unfair Competition, § 565.100* et seq.].

- Injuries or death caused by asbestos poisoning [*Code Civ. Proc. § 340.2*].

- Accountant malpractice [*Code Civ. Proc § 339(1)*; *see generally International Engine Parts, Inc. v. Feddersen & Co. (1995) 9 Cal. 4th 606, 608-609, 620, 38 Cal. Rptr. 2d 150, 888 P.2d 1279* ; for discussion, *see* Ch. 462, *Public Accountants*].

Even in the absence of an express statutory provision, courts have applied the delayed discovery doctrine to certain causes of action when it would be manifestly unjust to deprive the plaintiff of a cause of action before the plaintiff is aware that he or she has been injured [*see Leaf v. City of San Mateo (1980) 104 Cal App. 3d 398, 406, 408, 163 Cal. Rptr. 711]* . For instance, a cause of action for a latent construction defect has been held not to accrue until a successive owner is aware of the damage and suffers a compensable economic injury [*Siegel v. Anderson Homes (2004) 118 Cal. App. 4th 994, 1014, 13 Cal. Rptr. 3d 462]* .

Two common themes run through the cases that apply the discovery rule of accrual [*Mark K. v. Roman Catholic Archbishop (1998) 67 Cal. App. 4th 603, 610-611, 79 Cal. Rptr. 2d 73* ; *Parsons v. Tickner (1995) 31 Cal. App. 4th 1513, 1526-1529, 37 Cal. Rptr. 2d 810]* :

- First, the rule is applied to types of actions in which it will generally be difficult for plaintiffs to immediately detect or comprehend the breach or the resulting injuries. In certain instances, the causes or injuries are actually hidden, e.g., the erasure of a video tape held in the defendant's custody, when a foreign object is left in the patient's body after surgery, or a subterranean trespass. In other instances, although the breach and damage are not physically hidden, they may be beyond what the plaintiff reasonably could be expected to comprehend.

- Second, in explaining the application of the rule, courts have relied on the nature of the relationship between the plaintiff and defendant. The delayed accrual rule is generally applicable to confidential or fiduciary relationships.

In a products liability action, for example, if the plaintiff is injured because of the defendant's wrongful act but is unaware of the injury or its cause at the time of the wrong because the injury was suffered without perceptible trauma, the statute of limitations does not begin to run until the plaintiff discovers or, by the exercise of reasonable diligence would have discovered, the cause of the injury [*see Pereira v. Dow Chemical Co. (1982) 129 Cal. App. 3d 865, 873-874, 181 Cal. Rptr. 364* ; *G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 25-26, 122 Cal. Rptr. 218]* . Delayed discovery of the negligent performance of a technical service contract also may be a reason for suspending the applicable limitations period [*see Seelenfreund v. Terminix of Northern California (1978) 84 Cal. App. 3d 133, 136-139, 148 Cal. Rptr. 307* (negligent termite inspection by structural pest control operator)].

The doctrine of fraudulent concealment of a cause of action is considered a close cousin of the discovery rule [*see Bernson v. Browning-Ferris Industries (1994) 7 Cal. 4th 926, 931, 30 Cal. Rptr. 2d 440, 873 P.2d 613]* . For discussion of that doctrine, see *§ 345.22[3]*.

In a defamation action, for example, the single-publication rule provides that, for any single edition of a newspaper or book, there is but a single potential action for a defamatory statement contained in the newspaper or book, no matter how many copies of the newspaper or the book were distributed, and the accrual of the cause of action in that case is not delayed by the discovery rule when the defamation occurred by means of a book, magazine, or newspaper that was distributed to the public [*Shively v. Bozanich (2003) 31 Cal. 4th 1230, 1248, 7 Cal. Rptr. 3d 576, 80 P.3d 676*]. The single publication rule applies to all publications, including those that receive only limited circulation and, thus, are not generally distributed to the public [*Hebrew Academy of San Francisco v. Goldman (2007) 42 Cal. 4th 883, 890, 70 Cal. Rptr. 3d 178, 173 P.3d 1004*].

The discovery rule is not so broad as to delay accrual indefinitely until the plaintiff stumbles upon a claim. Rather, the plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof--when, simply put, he at least suspects that someone has done something wrong to him, "wrong" being used, not in any technical sense, but rather in accordance with its lay understanding. Thus, under the discovery rule, the plaintiff need not be aware of the specific facts or legal theory necessary to establish the claim. He or she need not even know the identity of the wrongdoer. Rather, the plaintiff need only be aware of his or her injury and have knowledge of sufficient facts to place him or her on actual or inquiry notice that the injury has a negligent cause [*Lyles v. State of California (2007) 153 Cal. App. 4th 281, 286, 62 Cal. Rptr. 3d 696]* .

[b] Distinguished From Tolling

The statutes and case law postponing the accrual of a cause of action until a specified event occurs, e.g., until discovery of the facts constituting fraud or mistake, are to be distinguished from the rules suspending or tolling the running of the statute of limitations notwithstanding the accrual of a cause of action [*Cuadra v. Millan (1998) 17 Cal. 4th 855, 865 n.11, 72 Cal. Rptr. 2d 687, 952 P.2d 704* (noting that some case law loosely describe delayed accrual as tolling the statute of limitations; for discussion of suspension, or tolling, of the statute of limitations, *see § 345.20*)].

[c] Pleading Facts Showing Excuse for Late Discovery

The doctrine of late discovery requires a plaintiff to plead facts showing an excuse for late discovery of the facts underlying plaintiff's cause of action. Plaintiff must plead that, despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the statute of limitations period [*Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal. 4th 797, 808-809, 27 Cal. Rptr. 3d 661, 110 P.3d 914]* . Plaintiff must show that plaintiff was not at fault for failing to discover it or had no actual or presumptive knowledge of facts sufficient to put plaintiff on inquiry [*Prudential Home Mortgage Co. v. Superior Court (1998) 66 Cal. App. 4th 1236, 1247, 78 Cal. Rptr. 2d 566]* .

Plaintiff must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence. The burden is on the plaintiff to show diligence and conclusory allegations will not withstand demurrer [*Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal. 4th 797, 808, 27 Cal. Rptr. 3d 661, 110 P.3d 914* ; *McKelvey v. Boeing North Am. Inc. (1999) 74 Cal. App. 4th 151, 160*].

[d] What Consititutes Discovery

The question of when there has been a belated discovery of the cause of action is ordinarily a question of fact. It is only when reasonable minds can draw but one conclusion from the evidence that it becomes a question of law [*Johnson v.*

Haberman & Kassoy (1988) 201 Cal. App. 3d 1468, 1476, 247 Cal. Rptr. 614 ; *see Sylve v. Riley (1993) 15 Cal. App. 4th 23, 26, 18 Cal. Rptr. 2d 608* (whether reasonable diligence was exercised is generally a question of fact that precludes summary judgment); *see also 65 Butterfield v. Chicago Title Ins. Co. (1999) 70 Cal. App. 4th 1047, 1054, 83 Cal. Rptr. 2d 40* (resolution of statute of limitations issue normally question of fact)].

If the plaintiff does know the fact of injury and the identity of the person responsible for it, his or her failure to discover some or most of the resulting damage until later generally will not suspend the running of the period of limitation [*Howe v. Pioneer Mfg. Co. (1968) 262 Cal. App. 2d 330, 340-341, 68 Cal. Rptr. 617* ; *see also 65 Butterfield v. Chicago Title Ins. Co. (1999) 70 Cal. App. 4th 1047, 1054, 83 Cal. Rptr. 2d 40* (as general matter, it is discovery of facts, not their legal significance, that starts statute; thus, irrelevant that plaintiff is ignorant of legal remedy or legal theories underlying plaintiff's cause of action)]. Moreover, a plaintiff is charged with "presumptive" knowledge so as to commence the running of the statute once he or she has notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his or her investigation [*see Wilshire Westwood Associates v. Atlantic Richfield Co. (1993) 20 Cal. App. 4th 732, 740, 24 Cal. Rptr. 2d 562* (and cases cited therein)]. The plaintiff need not be aware of the specific facts necessary to establish the claim. Once a person suspects or should suspect wrongdoing, he or she must go find the facts, and cannot wait for the facts to find him or her. A plaintiff has reason to suspect when plaintiff has notice or information that would cause a reasonable person to inquire [*Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 397-398, 87 Cal. Rptr. 2d 453, 981 P.2d 79* (wrongful death based on negligence and strict liability of drug manufacturer); *Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1111, 245 Cal. Rptr. 658, 751 P.2d 923* (product liability); *Kline v. Turner (2001) 87 Cal. App. 4th 1369, 1374, 105 Cal. Rptr. 2d 699* (fraud); *Clark v. Baxter Healthcare Corp. (2000) 83 Cal. App. 4th 1048, 1057, 100 Cal. Rptr. 2d 223* (products liability action against manufacturers and distributors of latex gloves); *McKelvey v. Boeing North Am. Inc. (1999) 74 Cal. App. 4th 151, 160* (contamination of land around defendants' facilities); *San Francisco Unified School Dist. v. W.R. Grace Co. (1995) 37 Cal. App. 4th 1318, 1326-1327, 44 Cal. Rptr. 2d 305* (asbestos in building)]. However, statutes may provide that certain types of information may not be sufficient to put a plaintiff on inquiry notice [*see Code Civ. Proc. § 340.8(c)(2)* (for specified toxic injury actions,mediareports regarding hazardous material or toxic substance contamination do not, in and of themselves, constitute sufficient facts to put a reasonable person on inquiry notice that the injury or death was caused or contributed to by the wrongful act of another)].

A plaintiff may discover, or have reason to discover, the cause of action even if plaintiff does not suspect, or have reason to suspect, the identity of the defendant. That is because the defendant's identity is not an element of any cause of action. Thus, failure to discover, or have reason to discover, the identity of the defendant does not postpone the accrual of a cause of action [*Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 399, 87 Cal. Rptr. 2d 453, 981 P.2d 79]* .

With respect to actions based on progressively developing or continuing wrongs when the nature, extent, or permanence of the harm is difficult to discover, the running of the period of limitation is suspended until the time of discovery of, or the opportunity to discover, the facts [*see Bradler v. Craig (1969) 274 Cal. App. 2d 466, 471, 79 Cal. Rptr. 401]* . Similarly, the running of the limitations period is generally suspended until the detriment of which plaintiff is aware constitutes "appreciable and actual harm," rather than a merely technical injury that gives a right to nominal damages only [*see Davies v. Krasna (1975) 14 Cal. 3d 502, 513-514, 121 Cal. Rptr. 705, 535 P.2d 1161* (questioned as to "appreciable harm" requirement in misappropriation of trade secrets case due to California's subsequent enactment of *Uniform Trade Secrets Act in Intermedics v. Ventritex, Inc. (N.D. Cal. 1993) 822 F. Supp. 634, 642 n.7*)]. However, in an action for damage to real property, the statute commences to run when a reasonably prudent person becomes aware of facts indicating that an investigation should be conducted [*see Mangini v. Aerojet-General Corp. (1991) 230 Cal. App. 3d 1125, 1150, 281 Cal. Rptr. 827]* .

If a plaintiff's reasonable and diligent investigation discloses only one kind of wrongdoing when the injury was actually caused by tortious conduct of a wholly different sort, the discovery rule postpones accrual of the statute of limitations on the newly discovered claim. In such cases, the key issue is whether a reasonable investigation at that time would have revealed a factual basis for that particular cause of action [*E-Fab, Inc. v. Accountants, Inc. Services (2007) 153*

Cal. App. 4th 1308, 1322, 64 Cal. Rptr. 3d 9 .

[e] Complication After Original Personal Injury

Some courts have also allowed personal injury actions based on the delayed discovery of a serious complication arising from a tort that also resulted in an earlier, substantial injury, when the later complication was of a different type than the original, transitory injury. These courts reasoned that in such a case the plaintiff has separate causes of action for the independent injuries [*see Zambrano v. Dorough (1986) 179 Cal. App. 3d 169, 173-174, 224 Cal. Rptr. 323* (initial injuries from misdiagnosed tubal pregnancy were substantial but plaintiff as able to sue for hysterectomy that became necessary two years later); *Martinez-Ferrer v. Richardson-Merrell, Inc. (1980) 105 Cal. App. 3d 316, 318-320, 325-327, 164 Cal. Rptr. 591* (initial side effects of drug were substantial but plaintiff could sue for cataracts contracted 12 years later)]. However, one court has stated that the cause of action may not be split unless the delay between the plaintiff's earlier and later injuries causes injustice [*Miller v. Lakeside Village Condominium Assn. (1991) 1 Cal. App. 4th 1611, 1622-1623, 2 Cal. Rptr. 2d 796]* .

[f] Personal Injury From Asbestos Exposure

A special rule applies for victims of asbestosis [*see Code Civ. Proc. § 340.2*]. *Section 340.2*, which applies only to actions for injury or illness arising from asbestos exposure, does not make the limitations period run from the date of the injury or illness or its discovery as similar statutes commonly provide. *Code Civ. Proc. § 340.2(a)* provides for the limitations period to run from the date the plaintiff suffered "disability" and discovered that the disability was caused by asbestos exposure [*Hamilton v. Asbestos Corp. (2000) 22 Cal. 4th 1127, 1138, 95 Cal. Rptr. 2d 701, 998 P.2d 403]* . Under Section 340.2(a), an action for injury or illness based on exposure to asbestos must be commenced within the later of the following:

- Within one year after the date the plaintiff first suffered disability.

- Within one year after the date the plaintiff either knew, or through the exercise of reasonable diligence should have known, that such disability was caused or contributed to by such exposure.

"Disability" as used in *Code Civ. Proc. § 340.2(a)* means the loss of time from work as a result of such exposure which precludes the employee's regular occupation [*Code Civ. Proc. § 340.2(b)*]. A comparable limitation period applies in wrongful death actions based on exposure to asbestos, with the date of death standing in place of the date of disability [*see Code Civ. Proc. § 340.2(c)*].

Because a plaintiff cannot discover that his or her disability was caused by asbestos exposure before he or she suffers that disability, the disability must in all cases either precede or accompany its discovery. Thus, *Code Civ. Proc. § 340.2(a)(1), (2)* may be read as providing in effect that an action for injury or illness arising from asbestos exposure must be filed within one year after the date the plaintiff first suffered disability and either knew or should have known the disability was caused or contributed to by that exposure [*Hamilton v. Asbestos Corp. (2000) 22 Cal. 4th 1127, 1138-1142, 1146, 95 Cal. Rptr. 2d 701, 998 P.2d 403]* .

In Hamilton, plaintiff had retired before suffering disability within the meaning of *Code Civ. Proc. § 340.2*. Plaintiff brought an action seeking damages for asbestosis, for which plaintiff had been diagnosed 14 years earlier. More then two years after filing the first action plaintiff was diagnosed with a malignant peritoneal mesothelioma and within one month thereafter filed a second action to recover damages for that cancer. The court applied the rationale of *Williamson v. Plant Insulation Co. (1994) 23 Cal. App. 4th 1406, 1419-1420, 28 Cal. Rptr. 2d 751* and *Duty v. Abex Corp. (1989) 214 Cal. App. 3d 742, 749-751, 263 Cal. Rptr. 13* , in holding that neither action was barred by *Code Civ. Proc. § 340.2*. The Court, however, noted that under the facts the Court did not need to reach the question of whether plaintiff had a separate primary right to be free from each of the two diseases resulting from plaintiff's asbestos

exposure [*Hamilton v. Asbestos Corp. (2000) 22 Cal. 4th 1127, 1138-1142, 1146, 95 Cal. Rptr. 2d 701, 998 P.2d 403* ; *compare* Hamilton v. Asbestos Corp., *Puckett v. Johns-Manville Corp. (1985) 169 Cal. App. 3d 1010, 1017, 215 Cal. Rptr. 726* ("disability" as used in section intended to refer to permanent termination of individual's capacity to perform tasks involved in his or her regular occupation rather than some temporary interference with that capacity), *Nelson v. Flintkote Co. (1985) 172 Cal. App. 3d 727, 731, 735-736* (complaint timely when plaintiff who had been exposed to asbestos but continued working brought action while still employee) *and Duty v. Abex Corp. (1989) 214 Cal. App. 3d 742, 748-752, 263 Cal. Rptr. 13* , concept of "disability" does not encompass persons who retire before onset of what otherwise might be considered "disability," i.e., statute of limitation does not commence to run if retiree has not suffered "disability" as defined in statute before retirement), *with Uram v. Abex Corp. (1990) 217 Cal. App. 3d 1425, 266 Cal. Rptr. 695* (plaintiff's action filed in 1987 held time barred when plaintiff had retired in 1959 with a disability retirement, in 1976 was advised by doctors that he had pulmonary fibrosis caused by asbestos exposure and in that year filed worker's compensation claim describing the injury for the purpose of the 1959 disability retirement as asbestos in the lungs; 1987 action time barred becauseplaintiffactually knew or believed in 1976 that disability caused or at least contributed to by asbestos exposure), *see also Anderson v. Metalclad Insulation Corp. (1999) 72 Cal. App. 4th 284, 294, 85 Cal. Rptr. 2d 331* (*Uram* distinguished; when worker's compensation claim for temporary and permanent disability does not identify any time lost from work, it is not reasonable to infer from fact of filing claim alone, that employee is disabled within meaning of *Code Civ. Proc. § 340.2*)].

A cause of action may accrue for different purposes on different dates, depending on the purpose for which the accrual determination is being sought [*Buttram v. Owens-Corning Fiberglas Corp. (1997) 16 Cal. 4th 520, 530, 66 Cal. Rptr. 2d 438, 941 P.2d 71]* . For example, in determining whether a cause of action for damages arising from a latent and progressive disease such as asbestos-related pleural mesothelioma accrued prior to June 4, 1986, the effective date of Proposition 51, which limits a tortfeasor's liability for noneconomic damages [*see Civ. Code § 1431.2(a)* (liable only for proportion of damages equal to tortfeasor's own percentage of fault)] and does not apply retroactively [*see* In *Evangelatos v. Superior Court (1988) 44 Cal. 3d 1188, 1193-1194, 246 Cal. Rptr. 629, 753 P.2d 585]* , the action will be deemed to accrue when the plaintiff was first diagnosed with the disease for which damages are being sought, or otherwise discovered his or her illness or injuries [*Buttram v. Owens-Corning Fiberglas Corp. (1997) 16 Cal. 4th 520, 539-540, 66 Cal. Rptr. 2d 438, 941 P.2d 71* (rejecting appreciable harm test applied by court of appeal)].

If the asbestos action is brought pursuant to the Jones Act (*46 U.S.C.S. § 688*), a three-year period of limitations applies [*46 U.S.C.S. § 763a*; *see Wagner v. Apex Marine Ship Management Corp. (2000) 83 Cal. App. 4th 1444, 1448, 100 Cal. Rptr. 2d 533]* . The period is subject to the discovery rule [*Wagner v. Apex Marine Ship Management Corp. (2000) 83 Cal. App.4th 1444, 1446, 1453, 100 Cal. Rptr.2d 533* (applying rule; holding discovery of one asbestos-related disease does not trigger running of statute of limitations on all separate and distinct asbestos-related diseases caused by the same exposure to asbestos)]. For discussion of the Jones Act, and related forms, see Ch. 522, *Ships and Shipping* . For more detailed discussion and forms relating to the Jones Act, see Benedict on Admiralty (7th ed., Matthew Bender).

[4] Fiduciary Relationship

The statute of limitations for breach of a fiduciary duty is the four year period set forth in *Code Civ. Proc. § 343* [*Stalberg v. Western Title Ins. Co. (1991) 230 Cal. App. 3d 1223, 1230, 282 Cal. Rptr. 43]* .

As a general rule, the period of limitation does not begin to run on a cause of action by the beneficiary of a fiduciary relationship against the fiduciary as long as the fiduciary relationship is not repudiated [*Estate of Clary (1928) 203 Cal. 335, 341, 264 P. 242]* .

A total repudiation by a voluntary trustee of his or her trust starts the running of the period of limitation [*Cortelyou v. Imperial Land Co. (1913) 166 Cal. 14, 20, 134 P. 981]* , but a mere anticipatory breach does not [*Brewer v. Simpson (1960) 53 Cal. 2d 567, 593, 2 Cal. Rptr. 609, 349 P.2d 289* ; *National Auto. & Cas. Ins. Co. v. Pitchess (1973) 35 Cal.*

App. 3d 62, 65, 110 Cal. Rptr. 649] . For the period of limitation to begin running, the trustee must, by some act or by declaration, positively and unequivocally repudiate the trust, and the fact of repudiation must be brought to the attention of the beneficiary [*MacMullan v. Kelly (1912) 19 Cal. App. 700, 706, 127 P. 819* ; *see* *Strasberg v. Odyssey Group, Inc. (1996) 51 Cal. App. 4th 906, 917, 59 Cal. Rptr. 2d 474* (limitation period does not commence to run unless and until fact of repudiation brought to beneficiary's attention; rule discussed in context of *Code Civ. Proc. § 338(c)* three-year statute of limitations for conversion actions)].

No repudiation of an implied or a constructive trust (that is, an involuntary trust) is necessary to start the running of the period of limitation on an action by the beneficiary against the trustee. The cause of action in favor of the beneficiary accrues immediately on the law's creation of the trust [*Norton v. Bassett (1908) 154 Cal. 411, 416, 97 P. 894]* . This rule has been held inapplicable, however, when the beneficiary was ignorant of the facts giving rise to the cause of action due to fraudulent concealment [*see* *Strasberg v. Odyssey Group, Inc. (1996) 51 Cal. App. 4th 906, 918-919, 59 Cal. Rptr. 2d 474* (suit for conversion, unjust enrichment, injunctive relief and declaration of constructive trust; beneficiary ignorant of existence of property and of who held it and had no reason to believe trustee wrongfully withheld trust property or transferred it out of the trust to an unauthorized person)].

The statute of limitations on a breach of fiduciary duty based on concealment of facts begins to run when the plaintiff discovers or, in the exercise of reasonable diligence, could have discovered that facts had been concealed [*Stalberg v. Western Title Ins. Co. (1991) 230 Cal. App. 3d 1223, 1230, 282 Cal. Rptr. 43* (citing *Sanchez v. South Hoover Hospital (1976) 18 Cal. 3d 93, 101, 132 Cal. Rptr. 657, 553 P.2d 1129* , a medical malpractice action in which the Supreme Court characterized the doctor-patient relationship as "fiduciary in nature"); *see* *Field v. Century 21 Klowden-Forness Realty (1998) 63 Cal. App. 4th 18, 20-21, 73 Cal. Rptr. 2d 784* (statute of limitations for actions involving a fiduciary obligation normally triggered on date plaintiff discovers, or should have discovered, the negligence); *see also* *Strasberg v. Odyssey Group, Inc. (1996) 51 Cal. App. 4th 906, 916-919, 59 Cal. Rptr. 2d 474]* . While the fiduciary relationship continues, however, plaintiff's burden of discovery is reduced and he or she is entitled to rely on the statements and advice provided by the fiduciary [*Eisenbaum v. Western Energy Resources, Inc. (1990) 218 Cal. App. 3d 314, 324, 267 Cal. Rptr. 5* ; *see also* *Sanchez v. South Hoover Hospital (1976) 18 Cal. 3d 93, 102, 132 Cal. Rptr. 657, 553 P.2d 1129]* . Thus, a plaintiff need not establish that due diligence was exercised to discover the facts within the limitations period unless a duty existed to inquire, and the circumstances were such that failure to inquire would be negligent. When a plaintiff is not under such a duty to inquire, the limitations period does not begin to run until plaintiff actually discovers the facts constituting the cause of action, even though the means for obtaining the information are available [*Eisenbaum v. Western Energy Resources, Inc. (1990) 218 Cal. App. 3d 314, 325, 267 Cal. Rptr. 5* ; *see also [3], above,* and *[5], below*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime Limitations

California Forms of Pleading and Practice--Annotated

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30-345 California Forms of Pleading and Practice--Annotated § 345.20

§ 345.20 Suspension of Period of Limitation

[1] Effect of Suspension

A statute of limitations may be "tolled," that is, its operation temporarily suspended during the pendency of a particular condition specified by statute or judicial decision. Once the condition is lifted, the statute of limitations will continue to run [*Grell v. Laci Le Beau Corp. (1999) 73 Cal. App. 4th 1300, 1305, 87 Cal. Rptr. 2d 358]* .

When the running of a period of limitation is suspended for a given length of time, the effect is to add an equal period to the statutory period [*Estate of Caravas (1952) 40 Cal. 2d 33, 42, 250 P.2d 593]* .

Many situations in which the running of a period of limitation is suspended without regard to the specific underlying action are discussed in the following sections. Statutes that provide tolling provisions for specific actions, are discussed in the chapters in which those actions are discussed [*see, e.g.*, Ch. 76, *Attorney Professional Liability*].

[2] Absence of Obligor From State

[a] General Rule

[i] Time of Absence Not Counted

If a person is out of the state when a cause of action accrues against him or her, the action may be commenced within the statutory period after his or her return to the state. If a person departs the state after a cause of action accrues against him or her, the time of his or her absence is not part of the time limited for the commencement of the action [*Code Civ. Proc. § 351*].

[ii] Physical Absence Regardless of Amenability to Suit

Absence from the state within the meaning of *Code Civ. Proc. § 351* means physical absence and is to be taken literally, without regard to whether or not the defendant was amenable to suit in California during a period of absence. Thus, the

five weeks when a California resident was visiting family and friends outside California, during the year after a premises liability personal-injury cause of action accrued against him or her, would not be counted as part of the one-year limitation period, even though he or she could have been sued in California, and served with process, whether physically present in the state or not [*Dew v. Appleberry (1979) 23 Cal. 3d 630, 633-637, 153 Cal. Rptr. 219, 591 P.2d 509]* .

[iii] Nonresidence of Obligor

Code Civ. Proc. § 351 states that an action may be commenced against a person "after his return to the state." Normally, "return" implies a coming back after first having been in the state and then leaving. However, that language in *Code Civ. Proc. § 351* applies not only where the defendant was once a resident of the state, left it, and returned, but also where the defendant has never been in, or resided in, the state. "Return" in the context of *Code Civ. Proc. § 351* is equivalent to "enter" if a nonresident defendant is involved; the word applies as well to persons coming from outside the state as to citizens of the state who leave and then return [*see Cvecich v. Giardino (1940) 37 Cal. App. 2d 394, 399-400, 99 P.2d 573]* . Thus, where a cause of action accrues against a person who, at the time of accrual, resides outside the state, the action may be commenced within the time otherwise limited, after his or her entry into the state, notwithstanding that never before that moment did he or she reside in or enter the state [*see Code Civ. Proc. § 351*].

[iv] Clandestine Versus Open Return to California

A person departing from the state after a cause of action has accrued against him or her may not have reckoned in his or her favor the time of any secret, clandestine, or fraudulently contrived visit to his or her former residence in the state, for the purpose of ascertaining the time of absence from the state. But, if the person returns openly, after the action would be barred but for the absence, and especially if the return is not only open and unconcealed but also, in the case of periodic visits, repeated and prolonged, the fact that the plaintiff has not learned of his or her presence in the state before his or her departure again is immaterial [*Stewart v. Stewart (1907) 152 Cal. 162, 166, 92 P. 87]* .

[v] Period of Absence Coinciding With Plaintiff's Disability to Bring Action

A period during which the defendant was absent from the state while the plaintiff was under a disability may not be added to the period within which the plaintiff must bring an action after the disability is removed [*see Rafael v. Superior Court (1969) 1 Cal. App. 3d 457, 458-460, 81 Cal. Rptr. 748]* . For forms alleging circumstances tolling the period of limitation on this basis, see *§§ 345.70* and *345.71*.

[vi] Nonresidence of Obligee

Absent a statute to the contrary, the provision of *Code Civ. Proc. § 351*, that the period of limitation on a cause of action does not begin to run while the person against whom the cause exists is a nonresident [*see [i], below*], or is absent from the state, must be given effect notwithstanding the nonresidence of the person in whose favor the cause of action exists. This rule covers cases where neither the plaintiff nor the defendant was a resident of California when the cause of action accrued, and it also covers cases where the cause of action accrued outside the state [*but see Code Civ. Proc. § 361*, discussed in *§ 345.13[3]*]. The rationale is that *Code Civ. Proc. § 351* makes no exception for nonresident plaintiffs; thus, for the courts to infer such an exception would be to legislate by judicial decree, as well as to discriminate unjustifiably against nonresident plaintiffs [*Cvecich v. Giardino (1940) 37 Cal. App. 2d 394, 400-402, 99 P.2d 573* ; *see Kohan v. Cohan (1988) 204 Cal. App. 3d 915, 923-924, 251 Cal. Rptr. 570* (upholding *Cvecich* interpretation as constitutional)].

[b] Motorists

Veh. Code § 17463 provides that the tolling provisions of *Code Civ. Proc. § 351* do not apply to a resident motorist who could be served in the state. This exemption from *Code Civ. Proc. § 351* was extended to a nonresident motorist in

Bigelow v. Smik (1970) 6 Cal. App. 3d 10, 12-13, 85 Cal. Rptr. 613 . The court held that the statutory period for commencing action against a nonresident is not suspended when the nonresident leaves the state because a nonresident motorist is always subject to service of process within the state pursuant to *Veh. Code §§ 17451* and *17453* (use of state highways by nonresident motorist as equivalent to appointment of Director of Department of Motor Vehicles as agent for service of process).

On the other hand, it has been held that, in an action for infliction of emotional distress suffered as a result of defendant's waving a gun at plaintiff who was driving the car behind his on a highway, the four days defendant was absent from the state during the limitations period was excluded under *Code Civ. Proc. § 351* and that the provisions of *Veh. Code § 17463* did not apply because, although the incident may have arisen out of the use of defendant's vehicle, it did not arise out of its operation or ownership as those terms are used in *Veh. Code §§ 17459, 17460* (acceptance by a California resident of a certificate of ownership or registration or driver's license constitutes consent that personal service in an action arising out of the operation or ownership of a motor vehicle in California may be made within or without state, regardless of subsequent change of residency) [*Mounts v. Uyeda (1991) 227 Cal. App. 3d 111, 115-120, 277 Cal. Rptr. 730]* .

[c] Absence of One of Joint Obligors

When two or more persons are jointly liable on an obligation, the fact that the period of limitation has expired as to one of them who resides in the state, does not affect the running of the period as to another of them who is absent from the state. As to the latter, the running of the period of limitation remains suspended, as provided in *Code Civ. Proc. § 351,* while he or she is absent [*see* *Arocena v. Sawyer (1923) 60 Cal. App. 581, 591-592, 213 P. 523* (partners, one a resident and one a nonresident, jointly liable; action against nonresident partner not barred even though period of limitation expired as to resident partner)].

[d] Corporation or Partnership as Obligor

Code Civ. Proc. § 351 does not apply in the case of a foreign corporation, in view of *Corp. Code §§ 2110, 2111, 2114* (regarding service of summons on foreign corporations by delivery of summons to Secretary of State) [*see* *Cardoso v. American Medical Systems, Inc. (1986) 183 Cal. App. 3d 994, 997-999, 228 Cal. Rptr. 627* ; *Loope v. Greyhound Lines, Inc. (1952) 114 Cal. App. 2d 611, 614, 250 P.2d 651* (decided under prior law)]; and it does not apply to a domestic corporation because it cannot depart from or be absent from the state [*Loope v. Greyhound Lines, Inc. (1952) 114 Cal. App. 2d 611, 614, 250 P.2d 651]* .

Similarly, when determining the applicability of *Code Civ. Proc. § 351,* a limited partnership that has designated an agent for service of process, and is therefore always amenable to suit in California, is considered an entity permanently within the state and the statute of limitations is not tolled when the general partner is absent from the state [*Epstein v. Frank (1981) 125 Cal. App. 3d 111, 120, 177 Cal. Rptr. 831* ; *see* *Cardoso v. American Medical Systems, Inc. (1986) 183 Cal. App. 3d 994, 999, 228 Cal. Rptr. 627]* .

[e] Effect of Commerce Clause

Insofar as *Code Civ. Proc. § 351* is applied to a nonresident defendant sued on a contractual obligation incurred in interstate commerce, it has been held to violate the Commerce Clause of the U.S. Constitution (U.S. *Const., art. I, § 8, cl. 3*), because it forces the nonresident individual to choose between being present in California for several years or forfeiting the statute of limitations defense, remaining subject to suit in California in perpetuity [*Abramson v. Brownstein (9th Cir. 1990) 897 F.2d 389, 391-393]* .

Section 351 also impermissibly burdens interstate commerce with respect to residents who travel in the course of interstate commerce. This conclusion, however, is limited to travel for the facilitation of interstate commerce. The

Commerce Clause does not bar the application of the tolling provisions of section 351 to interstate travel unrelated to the facilitation of interstate commerce (*e.g.*, vacation trips) [*Filet Menu, Inc. v. Cheng (1999) 71 Cal. App. 4th 1276, 1282-1284, 84 Cal. Rptr. 2d 384]* . Thus, *Code Civ. Proc. § 351* is not facially invalid, and it continues to apply to toll periods of absences of resident defendants from the state during the applicable limitations period when no interstate commerce is involved [*Filet Menu, Inc. v. Cheng (1999) 71 Cal. App. 4th 1276, 1283-1284, 84 Cal. Rptr. 2d 384* ; *Mounts v. Uyeda (1991) 227 Cal. App. 3d 111, 120-122, 277 Cal. Rptr. 730]* .

The tolling provisions of *Code Civ. Proc. § 351* have been applied to nonresident defendants who have never entered the state and to resident defendants who are temporarily absent from the state. Whether section 351 applies to resident defendants who are permanently absent from California, i.e., those who move out of state, was considered by the court in *Heritage Marketing & Ins. Services, Inc. v. Chrustawka (2008) 160 Cal. App. 4th 754, 73 Cal. Rptr. 3d 126* , which concluded that section 351 penalizes people who move out of state by imposing a longer statute of limitations on them than on those who remain in the state, and that the *commerce clause* protects persons from such restraints on their movements across state lines [*Heritage Marketing & Ins. Services, Inc. v. Chrustawka (2008) 160 Cal. App. 4th 754, 763, 73 Cal. Rptr. 3d 126]* .

[f] Legal Malpractice Claims

Although the tolling provisions of *Code Civ. Proc. § 340.6* are exclusive with regard to legal malpractice claims, the broad terms of the fourth tolling provision of *Code Civ. Proc. § 340.6(a)*--the provision applicable to legal and physical disabilities--encompass the circumstances described in the general tolling provisions set forth in *Code Civ. Proc. § 351*, which generally provides that if, when the cause of action accrues against a person, he or she is out of the state, the action may be commenced within the applicable limitations period after his or her return to the state [*Jocer Enterprises, Inc. v. Price (2010) 183 Cal. App. 4th 559, 569, 107 Cal. Rptr. 3d 539]* .

[3] Arbitration

If contractual disputes are submitted to arbitration or some other form of reference, the running of the applicable period of limitation is usually suspended [*A. Teichert & Son, Inc. v. State of Cal. (1965) 238 Cal. App. 2d 736, 746-747, 48 Cal. Rptr. 225* (overruled on other grounds in *E.H. Morrill Co. v. State of California (1967) 65 Cal. 2d 787, 792, 56 Cal. Rptr. 479, 423 P.2d 551*)].

A court may not deny a petition to compel arbitration on the ground the statute of limitations has run on the claims the parties agreed to arbitrate [*Wagner Construction Co. v. Pacific Mechanical Corp. (2007) 41 Cal. 4th 19, 25, 58 Cal. Rptr. 3d 434, 157 P.3d 1029]* .

Cal. Code of Civ. Proc. § 1281.12 provides that if an arbitration agreement requires that arbitration of a controversy be demanded or initiated by a party to the arbitration agreement within a period of time, the commencement of a civil action by that party based upon that controversy, within that period of time, shall toll the applicable time limitations contained in the arbitration agreement with respect to that controversy, from the date the civil action is commenced until 30 days after a final determination by the court that the party is required to arbitrate the controversy, or 30 days after the final termination of the civil action that was commenced and initiated the tolling, whichever date occurs first. The end of the tolling period simply means that the contractual limitations clock begins to run again, not that the limitations period ended [*Pearson Dental Supplies, Inc. v. Superior Court (2010) 48 Cal. 4th 665, 673-675, 108 Cal. Rptr. 3d 171, 229 P.3d 83]* .

[4] Class Action Pending Certification

The filing of a class action may toll the running of the applicable statute of limitations for all members of the putative class until class certification is denied if the class action [*see* *Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103,*

1121-1125, 245 Cal. Rptr. 658, 751 P.2d 923 ; *Becker v. McMillin Construction Co. (1991) 226 Cal. App. 3d 1493, 1498-1502, 277 Cal. Rptr. 491* ; *see also San Francisco Unified School Dist. v. W. R. Grace & Co. (1995) 37 Cal. App. 4th 1318, 1340, 44 Cal. Rptr. 2d 305* (plaintiff, owner of building containing asbestos, who sued asbestos manufacturer alleging causes of action including strict liability and negligence and who became member of mandatory federal class action and thereafter opted out of class action was entitled to have limitations period tolled during time when plaintiff was member of the class; *Jolly* and *Becker* cases analyzed)]:

- Protects the efficiency and economy of litigation as promoted by the class action device, and

- It sufficiently notifies the defendant of the substantive claims of the members of the class and the number and generic identities of the potential plaintiffs who may participate in the judgment.

For discussion of class actions, see Ch. 120, *Class Actions* .

[5] Commencing Action

[a] Period Suspended While Action Is Pending

An action is commenced, within the meaning of *Code Civ. Proc. § 312 et seq.*, when the complaint is filed [*Code Civ. Proc. § 350*]. Plaintiff's act of filing the complaint fixes the date on which the action is commenced, thus allowing the defendant and the court to determine whether the action is commenced within the period prescribed by the applicable statute of limitations, and hence is timely [*Cuadra v. Millan (1998) 17 Cal. 4th 855, 864, 72 Cal. Rptr. 2d 687, 952 P.2d 704]* .

A complaint is deemed filed when it is presented to the clerk for filing during business hours in the form required by state law [*Carlson v. Department of Fish & Game (1998) 68 Cal. App. 4th 1268, 1270, 1272-1276, 80 Cal. Rptr. 2d 601]* .

The commencement of an action suspends the running of a period of limitation as to matters arising out of the transaction set forth in the complaint. This suspension continues while the action is pending; that is, until the final determination of the action on appeal, if an appeal is taken. Following a final judgment of affirmance on appeal, an action is no longer pending. The effect of the suspension because of pendency of an action is to add the period of pendency to the period of limitation. Thus, when the action is no longer pending, the period of limitation begins to run again, from the point at which it had been suspended. Another action, if the plaintiff is otherwise entitled to bring one, would have to be commenced within the time that is left, or within any extension under an applicable statute such as *Code Civ. Proc. § 355*, relating to bringing new actions after reversal on appeal [*see Record Machine & Tool Co. v. Pageman Holding Corp. (1959) 172 Cal. App. 2d 164, 175-176, 342 P.2d 402]* .

As to cross-actions against codefendants or new parties, the statute of limitations is not tolled by the commencement of a plaintiff's action. The principle underlying the rule that a statute of limitations is suspended by the filing of the original complaint is that the plaintiff has thereby waived the claim and permitted the defendant to make all proper defenses to the cause of action pleaded. But, where the controversy is limited to cross-defendants, none of whom has done any act in the nature of a waiver, the reason for the rule does not exist [*Boyer v. Jensen, 129 Cal. App. 4th 62, 70, 28 Cal. Rptr. 3d 124]* .

[b] Effect of Dismissal Without Prejudice

However, although the filing of a complaint may have tolled the statute of limitations, when an action is dismissed without prejudice, either by voluntary dismissal without prejudice, or by involuntary dismissal for delay in prosecution [*see Code Civ. Proc. § 581(b)(4)* and *(g)*], the limitation period is restored as if no action had been brought [*Wood v.*

Elling Corp. (1977) 20 Cal. 3d. 353, 359, 142 Cal. Rptr. 696, 572 P.2d 755 ; *Thomas v. Gilliland (2002) 95 Cal. App. 4th 427, 430-433, 115 Cal. Rptr. 2d 520* ; *Troche v. Daley (1990) 217 Cal. App. 3d 403, 412, 266 Cal. Rptr. 34]* .

For example, in an action contesting the right to real property, the general rule is that the five-year statutory period for adverse possession can be tolled by filing an action within that period. Such an action has the effect of interrupting the continuous-possession element of adverse possession and the statute remains tolled during the pendency of the litigation. However, if the action is unsuccessful, leading to no change of possession, the statute of limitations is not arrested whether the action is dismissed for want of prosecution, prosecuted to judgment, compromised, or voluntarily abandoned [*California Maryland Funding, Inc. v. Lowe (1995) 37 Cal. App. 4th 1798, 1803-1804, 44 Cal. Rptr. 2d 784* (institution of defendant's action in 1981, which was dismissed for failure to prosecute in 1988, did not result in any change of possession and thus did not toll statute of limitations; defendant established continuous-possession element of adverse possession as well as other elements)]. For discussion of dismissals without prejudice and restoration of pertinent statutes of limitations, see Ch. 212, *Dismissal* .

[c] In Court Without Jurisdiction; Transfer

A person who has seasonably begun an action is entitled to have it tried on the merits, notwithstanding a choice of the wrong court. If a plaintiff does not sleep on his or her rights, but merely mistakes the jurisdiction of the court to which he or she applies for relief, no constitutional right of the defendant is impaired by transferring the action to a court having jurisdiction [*see, e.g., Code Civ. Proc. § 396(b)*]; and if the action was begun within the period of limitation, such a transfer does not violate any vested right of the defendant [*see Morgan v. Somervell (1940) 40 Cal. App. 2d 398, 400, 104 P.2d 866* ; *see also Friends of Mammoth v. Board of Supervisors (1972) 8 Cal. 3d 247, 269, 104 Cal. Rptr. 761, 502 P.2d 1049]* .

[d] Defect in Designating Defendant

An error in designating or describing a defendant that amounts merely to a misnomer or a defective description or characterization, as opposed to naming or indicating the wrong person altogether, is not significant with respect to the operation of a statute of limitations. The error can be corrected by amendment [*see Code Civ. Proc. § 473(a)(1)*] after the period of limitation has otherwise expired. An example of a merely defective description is the characterization of a corporate defendant as a partnership, such as "Coca Cola Bottling Company of Sacramento, a partnership" instead of "Coca Cola Bottling Company of Sacramento, Ltd., a corporation" [*see Mayberry v. Coca Cola Bottling Co. (1966) 244 Cal. App. 2d 350, 352-353, 53 Cal. Rptr. 317]* . An example of naming the wrong defendant altogether, which is not curable by amendment after the period of limitation has expired as to the person actually intended, is the designation of the "Los Angeles County Flood Control District" as defendant if the plaintiff intended to sue the "County of Los Angeles" [*see Chitwood v. County of Los Angeles (1971) 14 Cal. App. 3d 522, 525, 92 Cal. Rptr. 441]* .

[e] Against Fictitiously-Named Defendant

[i] Avoidance of Statute of Limitations if Plaintiff Ignorant of Defendant's Identity

Under *Code Civ. Proc. § 474*, if a plaintiff is ignorant of a defendant's true name, the plaintiff has the right to sue that defendant by a fictitious name. The long-recognized purpose of this provision is to enable the plaintiff to bring suit before it is barred by a statute of limitations. If a complaint sets forth, or attempts to set forth, a cause of action against a defendant designated by a fictitious name, and the true name is later discovered and substituted by amendment, the defendant is considered a party to the action from its commencement so that the period of limitation stops running as of the date of the original pleading [*Austin v. Massachusetts Bonding & Ins. Co. (1961) 56 Cal. 2d 596, 599, 600, 602, 15 Cal. Rptr. 817, 364 P.2d 681* ; *see also Smeltzley v. Nicholson Mfg. Co. (1977) 18 Cal. 3d 932, 934, 939, 939 n.1, 136 Cal. Rptr. 269, 559 P.2d 624]* .

If a defendant is designated by a fictitious name in a complaint but no attempt is made to state any cause of action

against that defendant, the period of limitation continues to run as to him or her, even if he or she files an answer [*Williams v. Goodman (1963) 214 Cal. App. 2d 856, 861-862, 29 Cal. Rptr. 877]* .

For further discussion of the relation back of the statute of limitation with respect to fictitiously named defendants, *see § 345.25[4], below*. For discussion of the prerequisites for a proper fictitious name allegation and forms of such allegations, see *Ch. 20, Allegations Commonly Used, § 20.12* and *§ 20.30* et seq.

[ii] Effect of Additional Allegations and Causes of Action

If an amended pleading both substitutes a defendant's real name for a fictitious name and adds allegations and causes of action, the amended pleading is deemed filed as of the date of the original complaint, provided that recovery is sought in both pleadings on the same general set of facts. An amended pleading relates back if it seeks to bring in a defendant who is in the chain of causation of the original pleading, even if the particular facts concerning the new defendant were not set forth in the original pleading [*Olson v. Volkswagen of America (1988) 201 Cal. App. 3d 1437, 1442-1443, 247 Cal. Rptr. 719* (amendment relates back if original complaint is against driver of motor vehicle and amended complaint seeks to bring in other defendants on warranty and products liability theories)].

For further discussion of the relation back doctrine, *see § 345.25, below*.

[f] Defects in Form of Complaint

If a complaint filed within the applicable period of limitation exhibits a defect or an irregularity that is curable by amendment [*see Code Civ. Proc. § 473(a)(1)*], such as the omission of the plaintiff's or his attorney's signature, the running of the period of limitation is suspended by the filing of the complaint, despite the defect or irregularity [*see Canadian Bank of Commerce v. Leale (1910) 14 Cal. App. 307, 308-309, 111 P. 759]* .

[g] Defect in Designating Plaintiff

A technical defect in the complaint, such as the designation of the plaintiff's capacity as a private individual rather than a representative, is curable by an amendment which will relate back to the filing of the original complaint even if the period of limitation has otherwise expired before the filing of the amendment. If the defect is attacked on demurrer, then the order sustaining the demurrer should grant leave to amend; and if the defect is attacked on a motion for judgment on the pleadings, then judgment should be rendered without prejudice to re-filing a complaint [*Olsen v. Lockheed Aircraft Corp. (1965) 237 Cal. App. 2d 737, 742, 47 Cal. Rptr. 242* ; for discussion of the effect of amending a pleading, *see § 345.25*].

[h] Effect on Cross Complaint

Statutes of limitation, although commonly phrased in terms restricting only the commencement of actions, also apply to causes of action asserted by a defendant in a cross complaint [*Strong v. Strong (1943) 22 Cal. 2d 540, 544, 140 P.2d 386* ; *Wells Fargo Bank v. Kincaid (1968) 260 Cal. App. 2d 120, 124, 66 Cal. Rptr. 832 , cert. denied, 393 U.S. 915]* .

If, when a complaint is filed, an action that may be raised on a cross complaint is not already time barred, the filing of the complaint suspends the running of the statute of limitations as to the action that may be raised as a cross complaint [*see Union Sugar Co. v. Hollister Estate Co. (1935) 3 Cal. 2d 740, 746, 47 P.2d 273* ; *Sidney v. Superior Court (1988) 198 Cal. App. 3d 710, 715-716, 717, 244 Cal. Rptr. 31* (allowing amendment of cross complaint for property damage to add related cause of action for personal injury); *Trindade v. Superior Court (1973) 29 Cal. App. 3d 857, 859-860, 106 Cal. Rptr. 48* ; *see also Liberty Mut. Ins. Co. v. Fales (1973) 8 Cal. 3d 712, 720, 106 Cal. Rptr. 21, 505 P.2d 213* (dissent, collecting cases)]. The rationale is that the plaintiff, by filing the complaint, has waived the right to assert the statute of limitation in defense [*Trindade v. Superior Court (1973) 29 Cal. App. 3d 857, 859-860, 106 Cal. Rptr. 48]* . The filing of the plaintiff's complaint does not suspend the running of the statute of limitations as to any

claims the defendant may have against anyone other than the plaintiff because such cross defendants cannot be said to have done any act in the nature of a waiver [*Trindade v. Superior Court (1973) 29 Cal. App. 3d 857, 859-860, 106 Cal. Rptr. 48]* .

An action that is already barred when the complaint is filed may not be raised by cross complaint [*see Strong v. Strong (1943) 22 Cal. 2d 540, 544-545, 140 P.2d 386* ; *but see Liberty Mut. Ins. Co. v. Fales (1973) 8 Cal. 3d 712, 717-719, 106 Cal. Rptr. 21, 505 P.2d 213* (insurer subrogated to rights of its insured against uninsured motorist cannot rely on statute of limitations to avoid cross complaint by uninsured motorist sued by insurer under *Ins. Code § 11580.2(g)*)].

The filing of a complaint does not toll the statute of limitations on a cause of action, which, although it could be brought on a cross complaint, is not, but is brought as a subsequent complaint [*Luna Records Corp., Inc. v. Alvarado (1991) 232 Cal. App. 3d 1023 1027, 283 Cal. Rptr. 865* (defendant had not responded in any way to complaint in the original action, but filed complaint in different county after original complaint was dismissed on court's own motion for lack of prosecution)].

[6] Condition Precedent on Obligation

[a] Period of Limitation Commences on Occurrence of Condition

The period of limitation for an action based on a liability that does not arise until the occurrence of a condition precedent commences to run only when that condition occurs [*see Rose v. Foord (1892) 96 Cal. 152, 154, 30 P. 1114]* . As an example, the liability of a seller of property, who has been paid in advance to refund the purchase money in lieu of delivering the property, does not arise until the buyer demands a refund; and the period of limitation for an action to recover the purchase money does not begin to run until the demand is made.

[b] Implicitly Required to Be Performed in Reasonable Time

If a person's right to bring an action depends on his or her performing an act as a condition precedent, and he or she is under no disability or restraint to perform it, he or she cannot suspend indefinitely the running of the period of limitation by delaying performance of the act. If the time within which the act is to be performed is indefinite or not specified, then a reasonable time will be allowed after which the period will begin to run. Unless there are peculiar circumstances, a reasonable time will generally be held to be the applicable period of limitation [*Bass v. Hueter (1928) 205 Cal. 284, 287, 270 P. 958]* .

[c] Effect of Filing Complaint Before Performance of Condition

If the right to maintain an action against a person depends on the performance of a condition precedent, and a complaint is filed before performance of the condition, it is not possible for the complaint to state a cause of action against that person. That person's name cannot be substituted in place of a defendant's fictitious name after the period of limitation against that person has expired. The only way in which the cause of action against that person can be preserved is by amendment of the complaint within the period of limitation, after the condition precedent has been performed, to allege a cause of action against him or her. This may be done by the use of a fictitious name if the person's name is unknown, and then the true name can be substituted by amendment thereafter either before or after the period of limitation has otherwise expired. The crucial step is to amend the complaint seasonably so that it states a cause of action against the person in question [*see Wilson v. People ex rel. Dept. of Public Works (1969) 271 Cal. App. 2d 665, 667-669, 76 Cal. Rptr. 906]* .

ILLUSTRATION:

Failure to Timely Amend Complaint After Performance of Condition Precedent. Plaintiff files a personal injury complaint against two named and six fictitiously named defendants. The plaintiff then applies to the State of California for leave to present a late claim for damages against the state, and the

application is denied. Subsequently, plaintiff obtains a court order under *Gov. Code § 946.6* allowing her to sue the state without presentation of a written claim. Under *Section 946.6(f)*, the plaintiff must file the action related to the claim against the state within 30 days of the issuance of the order. Forty seven days after issuance of the order, plaintiff serves a copy of her complaint on the State of California as Doe I. May the plaintiff avoid the 30-day limitation period by serving the state with the complaint as one of the original fictitiously named defendants? No.

The plaintiff could have filed a separate action against the state or amended the complaint to name the state as a defendant, or simply served the state with a copy of the complaint within the 30-day period, but did not. Plaintiff argued that she could serve the state as one of the Doe defendants, and that service would relate back to the time of filing the original complaint. The court rejected this argument, pointing out that the original complaint was filed before the performance of a condition precedent to filing a complaint against the state and, not alleging the performance of that condition, stated no cause of action against the state as a Doe defendant. A subsequent pleading that sets out the subsequent performance of a condition precedent to suit cannot relate back to the time of filing the original complaint and thereby toll the running of the period of limitation, because the rule of relation back does not operate to assign the performance of a condition precedent to a date prior to its actual occurrence. Amending the original complaint after the expiration of the limitation period could not relate back to a cause of action against the state which at the time of filing did not exist. Having failed to proceed in the 30-day period when she was excused from having to plead and prove the filing of a claim, plaintiff's action against the state was properly dismissed [*Wilson v. People ex rel. Dept. of Public Works (1969) 271 Cal. App. 2d 665, 667-669, 76 Cal. Rptr. 906]* .

For discussion of relation-back of amended pleadings generally, *see § 345.25*.

[d] Rejection of Claim as Condition

When the rejection of a claim is a prerequisite to suit, the claim does not ripen into a cause of action until rejection, and the period of limitation does not begin to run until that event [*Spencer v. Los Angeles (1919) 180 Cal. 103, 119, 179 P. 163* ; *Chas. L. Harney, Inc. v. State of California (1963) 217 Cal. App. 2d 77, 102, 31 Cal. Rptr. 524]* .

With respect to actions against public entities subject to the Tort Claims Act, however, this rule appears to have been abrogated by *Gov. Code § 946.6*, the statute that provides for judicial relief from the bar to a suit because of nonpresentation of a claim [*see Savage v. State of California (1970) 4 Cal. App. 3d 793, 796-797, 84 Cal. Rptr. 650]* .

When a person has a claim against a public entity that he or she submitted for acceptance or rejection, as required by law as a condition precedent to maintaining an action, and he or she delayed beginning an action on the claim because he or she reasonably relied on the public entity's course of conduct in handling the claim and believed that the public entity was reexamining the claim, the public entity may be estopped to assert the bar of the applicable statute of limitation in defense [*see Potstada v. City of Oakland (1973) 30 Cal. App. 3d 1022, 1028-1029, 106 Cal. Rptr. 705* (affirming judgment for plaintiff and trial court's ruling that defendant city estopped to plead bar of statute)]. The issue of whether a public agency may be estopped to assert the statute of limitation against a plaintiff because of the agency's advice to the claimant concerning his or her substantive rights against the agency depends on whether the public agency acted in an unconscionable manner or otherwise set out to, or did, take unfair advantage of the plaintiff [*Driscoll v. City of Los Angeles (1967) 67 Cal. 2d 297, 306, 61 Cal. Rptr. 661, 431 P.2d 245]* .

On the effect of minority when a required claim is not filed, *see [11][a][iv], below*.

[7] Court's Assumption of Jurisdiction Over Practice of Party's Attorney

If a person entitled to bring an action or other proceeding, which has not been filed or otherwise instituted, is represented by an attorney over whose practice a California court has assumed jurisdiction pursuant to *Bus. & Prof. Code § 6180* (cessation of practice) or 6190 (incapacity to practice), and an application for the court to assume jurisdiction was filed prior to the expiration of the applicable statute of limitation or claim statute, that person has six months from the date of entry of the order assuming jurisdiction within which to file or otherwise institute the matter if the applicable statute of limitation otherwise would have expired [*Code Civ. Proc. § 353.1*].

[8] Death of Defendant

[a] One-Year Period Replaces Otherwise Applicable Period

Code Civ. Proc. § 366.2, which sets out the limitation period generally applicable when a prospective defendant has died, essentially replaces, rather than suspends, the otherwise applicable limitation period. Subject to the exceptions discussed under *[c], below* [*see Code Civ. Proc. § 366.2(b)*], *Section 366.2* provides that if a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, whether or not accrued, dies before the expiration of the applicable limitation period and if the cause of action survives, an action may be commenced within one year after the date of death, and the limitation period that would have been applicable does not apply [*Code Civ. Proc. § 366.2(a), (b)*]. Therefore, if the applicable statute of limitations has not run at the time of death, the one-year limitation period established by *Code Civ. Proc. § 366.2(a)* applies, whether it extends or shortens the period of limitation that would have otherwise applied [*see* Cal. L. Revision Comm'n Comment to 1992 addition of *Code Civ. Proc. § 366.2*].

An action need not be filed against the personal representative to satisfy *Code Civ. Proc. § 366.2*. An action is timely if a plaintiff, unaware of the decedent's death, files an action naming the decedent as defendant within one year of the decedent's death. The plaintiff may later amend the complaint to name the personal representative, and if the amended complaint seeks recovery on the same general facts as the original complaint and seeks recovery for the same injuries, the amended complaint will relate back and be deemed filed as of the date of the original complaint [*Burgos v. Tamulonis (1994) 28 Cal. App. 4th 757, 762-763, 33 Cal. Rptr. 2d 728* (construing language in former *Code Civ. Proc. § 353* which is comparable to *Code Civ. Proc. Section 366.2*)]. As in any other action against a decedent, the claim requirement applies, and it may be necessary to petition for leave to file a late claim in the decedent's estate [*see Burgos v. Tamulonis (1994) 28 Cal. App. 4th 757, 763 n.7, 33 Cal. Rptr. 2d 728]* .

Code Civ. Proc. § 366.2 has been held to bar a cross complaint against a decedent's estate and its personal representatives for equitable indemnity filed more than one year after decedent's death, despite the ordinary rule that an indemnity action does not accrue for statute of limitation purposes until a tort defendant pays a judgment or settlement for which that defendant is entitled to indemnity, when the one year limitation period of *Code Civ. Proc. § 366.2(a)* was not tolled as provided for in *Code Civ. Proc. § 366.2(b)* and the cross complaint's allegations failed to show that decedent had any insurance that would cover any of the claims at issue [*Bradley v. Breen (1999) 73 Cal. App. 4th 798, 800, 804-806, 86 Cal. Rptr. 2d 726]* . A different statute of limitations applies to claims covered by a decedent's liability insurance [*see Prob. Code § 551*; for discussion, *see [c][ii], below*]. The one-year period of *Code Civ. Proc. § 366.2* also applies to an action against the surviving spouse for recovery of hospital and medical expenses of the deceased spouse's last illness, whether the action is based on *Prob. Code § 13554(c)*, concerning enforcement of a deceased spouse's debts against a surviving spouse, or on *Fam. Code § 914*, concerning a married person's liability for his or her spouse's debts incurred for necessaries of life [*see Collection Bureau of San Jose v. Rumsey (2000) 24 Cal. 4th 301, 304-305, 307-313, 99 Cal. Rptr. 2d 792, 6 P.3d 713* (construing statutes when *section 13554* referred to former *Code Civ. Proc. § 353*, the predecessor statute to *section 366.2*)].

The one-year limitation period set forth in *Code Civ. Proc. § 366.2(a)* applies to actions brought on liabilities of persons dying on or after January 1, 1993 [*Code Civ. Proc. § 366.2(c)*]. A comparable one-year period applies to actions brought on liabilities of persons dying on or after January 1, 1991, through December 31, 1992 [*compare Code Civ.*

Proc. § 366.2(a) with former *Code Civ. Proc. § 353(b)*]. Different limitation periods apply depending on whether the decedent died between July 1, 1988, and January 1, 1991, or before July 1, 1988 [*see* former *Code Civ. Proc. § 353(b)-(d)*].

In an action arising from a surrogacy contract between a decedent and his former wife and a surrogate mother, it was undisputed that the complaint was filed more than one year after the decedent's death and that none of the enumerated exceptions in *Code Civ. Proc. § 366.2* applied. In accordance with the plain language of Section 366.2, the one-year limitations period was not tolled during the minority of the children. Moreover, the one-year limitations period in Section 366.2 applied to an action on the liability of a deceased person, without regard to the location of the decedent's personal representative or estate [*Farb v. Superior Court (2009) 174 Cal. App. 4th 678, 684, 94 Cal. Rptr. 3d 586]* .

[b] Tolling of One-Year Period

Subject to the matters excepted from *Code Civ. Proc. § 366.2* [*see [c], below*], the one-year limitations period of *Code Civ. Proc. § 366.2(a)* is not tolled or extended for any reason [*Code Civ. Proc. § 366.2(b)*].

The period of limitation may, however, be subject to the doctrine of equitable estoppel [*see Battuello v. Battuello (1998) 64 Cal. App. 4th 842, 847-848, 75 Cal. Rptr. 2d 548* ; for discussion, *see § 345.22*],

[c] Exceptions

[i] Claims Against Decedent's Estate or Revocable Trust

Code Civ. Proc. § 366.2 does not apply to the following actions and proceedings:

- Claims and actions on claims against a decedent's estate [*Code Civ. Proc. § 366.2(b)(2)*; *see Prob. Code §§ 9352, 9353* (tolling by filing claim, acceptance of claim, and time for bring action after rejection)].

- Claims and actions on claims against a revocable trust of a deceased settlor [*Code Civ. Proc. § 366.2(b)(3)*; *see Prob. Code §§ 19253, 19255* (tolling by filing claim, acceptance of claim, and time for bring action after rejection)].

These exceptions allow the claims procedure to operate by tolling the statute of limitations when a claim is filed until it is allowed, approved, or rejected [*Prob. Code §§ 9352(a)* (estates), *19253(b)* (trusts)], further tolling it until collection if the claim is allowed or approved [*Prob. Code §§ 9352(b)* (estates), *19253(c)* (trusts)], and providing different periods of limitation for bringing the action if the claim is denied [*Prob. Code §§ 9353* (estates), *19255(a)* (trusts)]. These provisions allow tolling of the absolute one-year period under limited circumstances in order to facilitate the orderly administration of the decedent's estate [*see Levine v. Levine (2002) 102 Cal. App. 4th 1256, 1263, 126 Cal. Rptr. 2d 255]* .

For discussion of claims procedure and actions based on rejected claims in decedents' estates and revocable trusts, including time limitations, and forms to bring actions on rejected claims, see Ch. 454, *Probate: Claims Against the Estate* , and Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* , respectively.

[ii] Action to Establish Decedent's Insured Liability

Actions under *Prob. Code § 550 et seq.* to establish a decedent's liability for which he or she was protected by liability insurance may be brought within one year of the end of the otherwise applicable limitation period, if it had not expired at the time of decedent's death, as an express exception to *Code Civ. Proc. § 366.2* [*Prob. Code § 551* (actions against insurance company to establish decedent's insured liability)].

These are actions to recover available insurance proceeds, rather than to pursue the estate, although the personal representative may be joined if the plaintiff complies with claim requirements [*see Prob. Code §§ 550, 554*]. For discussion of these actions, see Ch. 454, *Probate: Claims Against the Estate* .

[iii] Action to Enforce Lien Against Decedent's Property

Prob. Code § 9391 authorizes an action to enforce a mortgage or other lien on property in the decedent's estate, including but not limited to a judgment lien, when the plaintiff has waived all recourse against other property in the estate. The limitations provisions of *Code Civ. Proc. § 366.2* (*discussed under § 345.20[8], above*) do not apply in such an action [*Prob. Code § 9391*]. For further discussion of claims brought under *Prob. Code § 9391*, see Ch. 454, *Probate: Claims Against the Estate* .

[iv] Pending Determination of Whether Particular Motion, Petition, or Action Would Violate No Contest Clause

Code Civ. Proc. § 366.2 does not apply to motions, petitions, or other acts by a beneficiary as to which the statute of limitations is tolled pending a determination whether the motion, petition, or act would constitute a contest within the meaning of a no contest clause, as that part read prior to its repeal by Chapter 174 of the Statutes of 2008. [*Code Civ. Proc. § 366.2(b)(4)*; *see* former *Prob. Code §§ 21308, 21320* (repealed on January 1, 2010)]. For discussion of this procedure, see Ch. 444, *Probate: Will Contests* .

[9] Death of Potential Plaintiff

If a person entitled to bring an action dies before the expiration of the applicable limitation period and if the cause of action survives, an action may be commenced before expiration of the later of six months after the person's death or the limitations period that would have applied if the person had not died [*Code Civ. Proc. § 366.1*]. For a form alleging circumstances tolling the period of limitation on this basis, see *§ 345.76*.

In an appropriate case, the time limitations specified in *Code Civ. Proc. § 366.1* for bringing the action may be subject to the delayed discovery rule [*see, e.g., Parsons v. Tickner (1995) 31 Cal App 4th 1513, 1525-1529, 37 Cal. Rptr. 2d 810* (action based on fraud brought by daughter of deceased not time barred even though filed 19 years after decedent's death; applying *Code Civ. Proc. § 338(d)*); for discussion of delayed discovery, *see § 345.19[3]*].

When the person who has the benefit of an executory obligation dies before the obligor breaches, and thus dies before the accrual of a cause of action, the period of limitation for an action based on the breach begins to run from the time of the breach, notwithstanding that there is, at the time of the breach and accrual of the cause of action, no person in being with standing and capacity to maintain an action. Someone interested in the estate, such as a creditor, an heir, or a devisee, could at least obtain special letters of administration for the purpose of commencing an action. The running of the period of limitation would not be suspended pending appointment and qualification of, and issuance of letters to, an executor or a general administrator [*see Cortelyou v. Imperial Land Co. (1913) 166 Cal. 14, 23-24, 134 P. 981]* .

Absent an allegation of circumstances causing suspension of the running of the period of limitation, if an action in favor of a decedent was barred when the decedent died, the decedent's heirs do not derive any cause of action from the decedent [*Rogers v. Bank of America (1956) 140 Cal. App. 2d 228, 231, 294 P.2d 959]* .

[10] Beneficiary's Claims Against Third Party Regarding Trust Property

If a trustee fails to take action against a third person with respect to the trust property during the period of limitation, the beneficiary of the trust is precluded from maintaining an action against the third person [*see Triplett v. Williams (1969) 269 Cal. App. 2d 135, 137-138, 74 Cal. Rptr. 594]* . This rule applies even if the beneficiary is under a disability to sue,

such as minority [*Patchett v. Pacific Coast Ry. Co. (1893) 100 Cal. 505, 510, 35 P. 73]* .

[11] Plaintiff's Disability

[a] Tolling for Minority

[i] Minority

If, when a cause of action accrued, the person entitled to bring the action was under 18 years of age, the period of limitation under *Code Civ. Proc. § 335 et seq.* for bringing the action is tolled during the plaintiff's minority [*Code Civ. Proc. § 352(a)*; *see Fam. Code §§ 6500, 6502*]. The tolling provision is not easily overcome. The *Code Civ. Proc. § 352* tolling provisions apply to special time limitations for filing suit contained in specific statutes when there is no expression of legislative intent to the contrary [*West Shield Investigations & Security Consultants v. Superior Court (2000) 82 Cal. App. 4th 935, 947, 98 Cal. Rptr. 2d 612* ; *Jessica H. v. Allstate Insurance Co. (1984) 155 Cal. App. 3d 590, 592, 202 Cal. Rptr. 239]* .

For a form alleging circumstances tolling the period of limitation on the basis of minority, see *§ 345.72*. Exceptions to this tolling rule are discussed under *[iv]* and *[v]*, *below*, and under *[c]* et seq., *below*. The effect of emancipation on tolling during minority is discussed under [vii], *below*.

[ii] Effect of Guardianship

Appointment of a general guardian does not affect the tolling of the statute of limitations as to a cause of action accruing to or "vesting" in a minor [*Aronson v. Bank of America (1941) 42 Cal. App. 2d 710, 720, 109 P.2d 1001]* .

[iii] Effect of Existence of Custodian Under Uniform Transfers to Minors Act

The existence of a custodian under the Uniform Transfers to Minors Act (*Prob. Code § 3900 et seq.*) does not affect the tolling of the statute of limitations either [*see Epstein v. Frank (1981) 177 Cal. Rptr. 831* (involving gift under former Uniform Gifts to Minors Act; period of limitations tolled on notes payable to minor's custodian)].

[iv] Action for Prenatal Injuries or Medical Malpractice

Actions based on prenatal injuries are subject to a specific period of limitations that is not tolled by minority [*see Code Civ. Proc. § 340.4*; for a form alleging circumstances tolling the period of limitation on this basis, *see § 345.73*].

A specific period also applies to minors' actions against a health care provider for professional negligence [*see Code Civ. Proc. § 340.5*; *see also Tran v. Fountain Valley Community Hospital (1997) 51 Cal. App. 4th 1464, 1467, 60 Cal. Rptr. 2d 91* (*Code Civ. Proc. § 340.5* subject to provisions of *Code Civ. Proc. § 12a*)]. However, if the health care provider is a public entity, the period of limitation under *Gov. Code § 945.6*, rather than to extended period under *Code Civ. Proc. § 340.5* will apply [*Martell v. Antelope Valley Hospital Medical Center (1998) 67 Cal. App. 4th 978, 980, 983, 79 Cal. Rptr. 2d 329]* . For discussion, see Ch. 367A, *Minors: Tort Actions* .

[v] Action for Sexual Abuse of Minor

Actions based on the sexual abuse of a minor are subject to an extended period of limitations [*see Code Civ. Proc. § 340.1*]. For discussion, see Ch. 5, *Abuse of Minors and Elderly* .

Although *Code Civ. Proc. § 340.1* extends the limitations period for claims to the later of the plaintiff's 26th birthday or the date when the plaintiff discovered that his psychological injuries were caused by sexual abuse, it revived for only one year all such claims that were already time barred [*Hightower v. Roman Catholic Bishop of Sacramento (2006)*

142 Cal. App. 4th 759, 767 ; *see also Doe v. Roman Catholic Bishop of San Diego (2009) 178 Cal. App. 4th 1382, 101 Cal. Rptr. 3d 398*].

Further, the part of *Code Civ. Proc. § 340.1* purporting to revive previously dismissed complaints has been found to violate the state's constitutional separation of powers doctrine. Where final judgments have been entered in earlier actions under the statute of limitations that previously existed, and those judgments were upheld on appeal, they became final for separation of powers purposes and cannot be legislatively revived. Because the power to conclusively resolve cases by rendering dispositive judgments rests with the judiciary alone, the Legislature could not reverse final judgments that were rendered under the previous limitations period of § 340.1 [*Perez v. Roe (2006) 146 Cal. App. 4th 171, 188, 52 Cal. Rptr. 3d 762]* .

[vi] Action for Employment Discrimination

The one-year period of *Gov. Code § 12960* for filing an administrative complaint under the California Fair Employment and Housing Act [*Gov. Code § 12940 et seq.*] is extended for one year from the date the aggrieved party attains majority [*Gov. Code § 12960(d)(4)*].

[vii] Effect of Minority on Failure to File Claim or Administrative Complaint

When the filing of a claim or administrative complaint within a specific time is a prerequisite to maintenance of a civil action, there is authority that has held that the provisions of *Code Civ. Proc. § 352* do not toll the time periods for the filing of such a claim or administrative complaint.

Examples of periods not extended by *section 352* include:

- Period allowed under Probate Code for filing minor's claim against decedent's estate [*Billups v. Tiernan (1970) 11 Cal. App. 3d 372, 376, 90 Cal. Rptr. 246]* .

- Two-year period for insured to demand arbitration or pursue other remedies as required by *Ins. Code § 11580.2* as prerequisite to complaint against insurance carrier for uninsured motorist benefits [*Republic Indem. Co. v. Barn Furniture Mart, Inc. (1967) 248 Cal. App. 2d 517, 56 Cal. Rptr. 609]* .

For further discussion, see *[c], below*.

[viii] Effect of Emancipation

A minor who is emancipated by court order under *Fam. Code § 7000 et seq.*, is, by operation of law, subject to all legal consequences of emancipation which are set forth in *Fam. Code § 7050*, including the right to sue or be sued in the minor's own name. Once emancipated, a minor is under no legal disability with respect to bring his or her own claims. Therefore, the minor's tolling provision of *Code Civ. Proc. § 352(a)* no longer applies and the emancipated minor's causes of action accrue and statute of limitations begin to run on the date of emancipation [*West Shield Investigations & Security Consultants v. Superior Court (2000) 82 Cal. App. 4th 935, 940, 949-951, 98 Cal. Rptr. 2d 612]* .

[b] Tolling for Insanity

[i] Insanity

If, when a cause of action accrued, the person entitled to bring the action was insane, the period of limitation under *Code Civ. Proc. § 335 et seq.* for bringing the action is tolled for the time of the disability [*Code Civ. Proc. § 352(a)*]. For purposes of *Code Civ. Proc. § 352*, a plaintiff is "insane" if "incapable of caring for his or her property or transacting business or understanding the nature or effects of his or her acts" [*Alcott Rehabilitation Hospital v.*

Superior Court (2001) 93 Cal. App. 4th 94, 101, 112 Cal. Rptr. 2d 807] .

For a form alleging circumstances tolling the period of limitation on this basis, see *§ 345.74*. Exceptions to this tolling rule are discussed under [c] et seq., *below*.

[ii] Unconsciousness

Unconsciousness constitutes "insanity" sufficient to toll the limitation period [*Feeley v. Southern Pacific Transportation Co. (1991) 234 Cal. App. 3d 949, 951-953, 285 Cal. Rptr. 666]* .

[iii] Disability Resulting From Tortious Act

If incompetency results from a tortious act and the disability exists from the time of the act, the limitation period is tolled the entire time the person is disabled [*Weinstock v. Eissler (1964) 224 Cal. App. 2d 212, 230-231, 36 Cal. Rptr. 537* (day of act included); *Tzolov v. International Jet Leasing, Inc. (1991) 232 Cal. App. 3d 117, 118, 120, 283 Cal. Rptr. 314]* . This rule applies even if the incompetency is permanent [*Tzolov v. International Jet Leasing, Inc. (1991) 232 Cal. App. 3d 117, 118, 120, 283 Cal. Rptr. 314]* .

[iv] Effect of Conservatorship

The limitation period remains tolled even when a conservator is appointed for an incompetent person [*Tzolov v. International Jet Leasing, Inc. (1991) 232 Cal. App. 3d 117, 118, 120, 283 Cal. Rptr. 314* (citing cases using obsolete terminology of "general guardian," which is now "conservator"; *see Prob. Code §§ 1800.3, 1801*)]. Thus, a cause of action that belongs to an incompetent person is not affected by a general conservator's failure to an incompetent person is not affected by a general conservator's failure to sue during the limitation period [*Gottesman v. Simon (1959) 169 Cal. App. 2d 494, 502-503, 337 P.2d 906]* .

[v] Action for Medical Malpractice

The tolling provision of *Code Civ. Proc. § 352* for insanity can not extend the three-year limitation period established by *Code Civ. Proc. § 340.5* for medical malpractice actions [*Fogarty v. Superior Court (1981) 117 Cal. App. 3d 316, 320]* . It may apply, however, to extend the one-year limitation period of section 340.5 [*see Belton v. Bowers Ambulance Service (1999) 20 Cal. 4th 928, 930-931, 935, 86 Cal. Rptr. 2d 107, 978 P.2d 591* (involving *Code Civ. Proc. § 352.1* concerning prisoners); *but see Bennett v. Shahhal (1999) 75 Cal. App. 4th 384, 392, 89 Cal. Rptr. 2d 272* (one-year statute of limitations not tolled on basis of plaintiff's dementia; *Code Civ. Proc § 352* is general tolling statute that is inapplicable to MICRA actions governed by *Code Civ. Proc. § 340.5*)].

[vi] Action for Elder Abuse

The tolling provision of *Code. Civ. Proc. § 352* for insanity applies to actions for elder abuse against a health care provider. Actions for elder abuse against a health care provider are governed by the two-year statute of limitations for assault, battery, injury, or death caused by wrongful acts or neglect found in *Code Civ. Proc. § 335.1. Code Civ. Proc. § 335.1* allows for application of tolling period for insanity [*Benun v. Superior Court (2004) 123 Cal. App. 4th 113, 127, 20 Cal. Rptr. 3d 26]* .

[c] Effect of Minority or Insanity on Action Against Public Entity

The tolling provision of *Code Civ. Proc. § 352* does not apply to an action against a public entity or public employee on a cause of action subject to a claim requirement under *Gov. Code § 900 et seq., 910 et seq.*, or *950 et seq.* This exception to the rule of tolling does not apply to any claim presented to a public entity prior to January 1, 1971 [*Code Civ. Proc. § 352(b)*]. Similarly, a minor's action for medical malpractice against a public entity is subject to the *Gov.*

Code § 945.6 six-month period of limitation, rather than to extended period under *Code Civ. Proc. § 340.5* [*Martell v. Antelope Valley Hospital Medical Center (1998) 67 Cal. App. 4th 978, 980, 983, 79 Cal. Rptr. 2d 329]* .

With regard to minority, the tolling provision of *Code Civ. Proc. § 352(a)* has been held to apply to a federal civil rights action brought under *42 U.S.C. § 1983* [*City of Huntington Park v. Superior Court (1995) 34 Cal. App. 4th 1293, 1297-1300, 41 Cal. Rptr. 2d 68]* .

[d] Effect of Minority or Insanity on Action for Recovery of Real Property

The time to commence any of the following actions is tolled if the person entitled to commence the action was, at the time title first descended or accrued, either under the age of majority or insane [*Code Civ. Proc. § 328*]:

- An action for the recovery of real property.
- An action for the recovery of the possession of real property.
- An action to recover rents or services out of real property.

The same tolling provision applies to making any entry or any defense founded on the title to real property [*Code Civ. Proc. § 328*].

Under this tolling provision, the time, not exceeding 20 years, during which the disability continues is not deemed any portion of the time in *Code Civ. Proc. § 315 et seq.* limited for the commencement of the action, or the making of the entry or defense, but the action may be commenced, or entry or defense made, within five years after the disability ceases, or if the person dies while still under the disability, within five after the death [*Code Civ. Proc. § 328*].

[e] Tolling for Prisoners Serving Less Than Life Term

[i] General Rule

If, when a cause of action accrued, the person entitled to bring the action was imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life, the period of limitation under *Code Civ. Proc. § 335 et seq.* for bringing the action is tolled for the time of the disability, but not to exceed two years [*Code Civ. Proc. § 352.1(a)*]. *Code Civ. Proc. § 352.1*, enacted effective 1/1/95, applies to causes of action that accrued before the effective date of the statute; thus "[c]laims ... that accrued before January 1, 1995 are tolled for two years from accrual, or until January 1, 1995, whichever occurs later, as long as such an application does not result in manifest injustice" [*Carlson v. Blatt (2001) 87 Cal. App. 4th 646, 650, 105 Cal. Rptr. 2d 42* , adopting reasoning of *Johnson v. State of Cal. (9th Cir. 2000) 207 F.3d 650, 654* and *Fink v. Shedler (9th Cir. 1999) 192 F.3d 911, 916]* .

The qualification "for a term less than life" has been interpreted as applying to all prisoners with life terms having the possibility of parole [*see Grasso v. McDonough Power Equipment, Inc. (1968) 264 Cal. App. 2d 597, 599, 70 Cal. Rptr. 458]* .

For a form alleging circumstances tolling the period of limitation on this basis, see *§ 345.75*. Exceptions to this tolling rule are discussed under [ii] et seq., *below*.

[ii] Action Against Public Entity

The tolling provision of *Code Civ. Proc. § 352.1* does not apply to an action against a public entity or public employee on a cause of action subject to a claim requirement under *Gov. Code §§ 900 et seq., 910 et seq.*, or *950 et seq.* This exception to the rule of tolling does not apply to any claim presented to a public entity prior to January 1, 1971 [*Code*

Civ. Proc. § 352.1(b)].

[iii] Action Relating to Conditions of Confinement

The tolling provision of *Code Civ. Proc. § 352.1* does not apply to an action, other than an action for damages or that portion of an action that is for damages, relating to the conditions of confinement, including an action brought by that person under *42 U.S.C. § 1983* [*Code Civ. Proc. § 352.1(c)*].

[iv] Action for Recovery of Real Property

The time to commence any of the following actions is tolled if the person entitled to commence the action was, at the time title first descended or accrued, imprisoned on a criminal charge or in execution on conviction of a criminal offense, for a term less than life [*Code Civ. Proc. § 328.5*]:

- An action for the recovery of real property.
- An action for the recovery of the possession of real property.
- An action to recover rents or services out of real property.

The same tolling provision applies to making any entry or any defense founded on the title to real property [*Code Civ. Proc. § 328.5*].

Under this tolling provision, the time, not exceeding two years, during which the imprisonment continues is not deemed any portion of the time in *Code Civ. Proc. § 315 et seq.* limited for the commencement of the action, or the making of the entry or defense, but the action may be commenced, or entry or defense made, within five years after the imprisonment ceases, or if the person dies while imprisoned, within five after the death [*Code Civ. Proc. § 328.5*].

[v] Action for Medical Malpractice

The tolling provision of *Code Civ. Proc. § 352.1* may apply to extend the one-year limitation period for medical malpractice actions established by *Code Civ. Proc. § 340.5*, but it cannot extend the absolute three-year period of that statute [*Belton v. Bowers Ambulance Service (1999) 20 Cal. 4th 928, 930-931, 935, 86 Cal. Rptr. 2d 107, 978 P.2d 591* (disapproving *Hollingsworth v. Kofoed (1996) 45 Cal. App. 4th 423, 52 Cal. Rptr. 2d 808*)].

[vi] Retroactive Application

The tolling provisions of *Code Civ. Proc. § 352.1*, are retroactive and apply to tort actions accruing before the date of the enactment of the statute, January 1, 1995. Thus, where the statute of limitations on an attorney malpractice claim commenced to run in 1989 when a prisoner was convicted of multiple offenses, the prisoner had one year from the enactment date (until January 1, 1996) to file an action for malpractice against his former attorney and a suit filed in 1997 was time barred [*Carlson v. Blatt (2001) 87 Cal. App. 4th 646, 649-651, 105 Cal. Rptr. 2d 42]* .

[f] Disability Must Exist When Action Accrues or Arise Simultaneously

No person can avail himself or herself of a disability, with respect to the limitation of an action, unless the disability existed when the right of action accrued [*Code Civ. Proc. § 357*]. When two or more disabilities coexist at the time when the right of action accrues, the limitation does not attach until they are removed [*Code Civ. Proc. § 358*].

If a disability sufficient to suspend the running of a period of limitation arises simultaneously with accrual of the cause of action in question, then the disability exists at the time the cause of action accrues, and the period of limitation does

not begin to run until the disability is removed. An example is insanity [*see Code Civ. Proc. § 352(a)*] that is caused by, and arises simultaneously with, the wrongful act or negligence on which the cause of action is based [*see Weinstock v. Eissler (1964) 224 Cal. App. 2d 212, 231, 36 Cal. Rptr. 537]* .

[g] No Tacking of Successive Disabilities

When a plaintiff relies on a disability, he or she must show that it was a continuing one from the time when his or her cause of action accrued. A disability occurring after accrual, and hence, after the period of limitation has begun to run, does not suspend the running of the period unless such a qualification is stated in the applicable statute. Therefore, a succession of disabilities, some of which did not exist when the cause of action accrued, cannot be tacked together for the purpose of suspending the running of a period of limitation [*Rose v. Petaluma & Santa Rosa Ry. Co. (1923) 64 Cal. App. 213, 217, 221 P. 406* ; *see Code Civ. Proc. § 358*].

[h] Disability of One of Joint Obligees

If a cause of action is joint and if an action is not barred as to one of the plaintiffs because of suspension of the running of the period of limitation as the result of a disability, the action is not barred as to the other plaintiffs, even though as to them the period of limitation has expired [*Leeper v. Beltrami (1959) 53 Cal. 2d 195, 209, 1 Cal. Rptr. 12, 347 P.2d 12]* .

[12] Probationer Under Order of Restitution

If, after a cause of action accrues against a person, that person comes under an order for restitution as a condition of probation with respect to the specific act or omission giving rise to that person's liability, the time during which the order is in effect is not a part of the time limited for the commencement of an action based on that act or omission [*Code Civ. Proc. § 352.5*].

[13] Military Service and Reservists

Under the Servicemembers Civil Relief Act (*50 U.S.C. App. § 501 et seq.*), a person's period of military service is not to be included in computing any period of limitation under any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any Servicemembers or by or against his or her heirs, executors, administrators, or assignees. This provision applies whether the cause of action or right or privilege to institute the action or proceeding accrued prior to or during the period of military service [*50 U.S.C. App. § 526*; *see also 50 U.S.C. App. §§ 511* (definitions), 514, 516 (additional persons protected)]. The tolling provision of *50 U.S.C. App. § 526* is mandatory and does not require any showing that the person in military service was prejudiced [*Syzemore v. County of Sacramento (1976) 55 Cal. App. 3d 517, 522-524, 127 Cal. Rptr. 741]* .

California enacted a statutory scheme essentially mirroring the former Soldiers' and Sailors' Civil Relief Act of 1940 [*see now* Servicemembers Relief Act] in regards to suspending the period of limitations for reservists and members of the National Guard, providing that the period of military service is not to be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any service member or by or against his or her heirs, executors, administrators, or assigns, whether the cause of action or the right or privilege to institute the action or proceeding accrued prior to or during the period of service, nor will any part of the period be included in computing any period now or hereafter provided by any law for the redemption of real property sold or forfeited to enforce any obligation, tax, or assessment [*Mil. & Vet. Code § 404(a)*]. Under the state statute, service member means both [*see Mil. & Vet. Code § 401(a)*]:

- Officers and enlisted members of the National Guard called or ordered into active state service by

the Governor or President.

- Reservists of the United States Military Reserve who have been called to full-time active duty.

Military service under that state statute means full-time active state service or full-time active federal service for a period in excess of seven days in any 14-day period; and any service member who has been called to active service or duty since September 11, 2001, to engage in homeland defense against terrorism, his or her days of service prior to June 21, 2002 are credited toward this seven-day period [*Mil. & Vet. Code § 401(b)*].

[14] War

When a person is, by reason of the existence of a state of war, under a disability to commence an action, the time of continuance of that disability is not part of the period limited for the commencement of the action, whether the cause of action accrued before or during the period of disability [*Code Civ. Proc. § 354*]. The word "action" in this statute includes a special proceeding of a civil nature [*Code Civ. Proc. § 363*]. This provision applies, for example, when it is impossible for a nonresident alien to file a complaint in California because he or she is residing in a nation that is occupied by enemy military forces [*Estate of Caravas (1952) 40 Cal. 2d 33, 39, 250 P.2d 593* (limitation period suspended while Greece was occupied by German forces in World War II; period also suspended under *Code Civ. Proc. § 356*, relating to statutory prohibition to commence action, on basis of Trading With the Enemy Act)].

For a form alleging circumstances tolling the period of limitation on this basis, *see § 345.78*.

[15] Disability of Attorney

The physical disability of a plaintiff's attorney may toll the period of limitations of a client's action, if compliance is thereby made impossible, and manifest injustice would otherwise result. For example, debilitating injuries sustained by a sole practitioner immediately prior to the expiration of the statutory period was held to constitute an implicit tolling exception to the applicable statute of limitations of the client's action [*Lewis v. Superior Court (1985) 175 Cal. App. 3d 366, 372-380, 220 Cal. Rptr. 594]* .

[16] Action Stayed or Other Legal Inhibition to Sue

[a] General Rule

When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action [*Code Civ. Proc. § 356*]. This provision means, in general, that the running of a period of limitation is suspended during any period in which the plaintiff is legally restrained from taking action to protect his or her interests [*see Eistrat v. Cekada (1958) 50 Cal. 2d 289, 291-292, 324 P.2d 881]* . For example, it applies when the plaintiff is legally prevented from taking action to protect his or her rights or when the commencement of an action must await the deliberations and decision of an administrative agency [*Hoover v. Galbraith (1972) 7 Cal. 3d 519, 526, 102 Cal. Rptr. 733, 498 P.2d 981]* .

The existence of a rule of law *propounded in a judicial opinion* that, if applied to the plaintiff's case, would defeat the plaintiff's cause of action cannot be used as the basis for a claim that the plaintiff was legally prevented from suing while the rule remained the law and that the period of limitation should be held to have been suspended from the time of the decision giving rise to the rule until the rule was later abrogated in another case. Such rules of law can be changed; the existence of such rules does not prevent a person from commencing an action and challenging the soundness of the reasoning that led to the rule [*see Estate of Horman (1971) 5 Cal. 3d 62, 71, 95 Cal. Rptr. 433, 485 P.2d 785 , cert. denied, 404 U.S. 1015 (1972)]* .

For a form alleging circumstances tolling the period of limitation on this basis, see *§ 345.80*.

[b] Action Based on Health Care Provider's Professional Negligence

Code Civ. Proc. § 356 (discussed in [a], *above*) does not toll the statute of limitations for a health care provider's professional negligence action during the interval between the notice of intention to sue and the filing of the complaint. Although *Code Civ. Proc. §§ 364, 365* require that a 90-day notice be given to a defendant before commencing an action based on a health care provider's professional negligence, and provide that an attorney who does not comply with this requirement and prematurely files suit may be subject to discipline, *Code Civ. Proc. § 365* states that a medical malpractice plaintiff's failure to comply with the 90-day notice period does not invalidate court proceedings and is not jurisdictional. Because a plaintiff is not legally prevented from commencing a medical malpractice suit during the mandatory 90-day waiting period, there is no "statutory prohibition" requiring tolling under *Code Civ. Proc. § 356* during the 90-day waiting period [*Woods v. Young (1991) 53 Cal. 3d 315, 324, 279 Cal. Rptr. 613, 807 P.2d 455* ; *see Code Civ. Proc. §§ 364, 365*].

Under certain circumstances, however, *Code Civ. Proc. § 364(d)* tolls for 90 days the applicable statute of limitations for a health care provider's professional negligence. With regard to the one-year limitation period after discovery specified in *Code Civ. Proc. § 340.5*, if the notice of intent to sue is served during the last 90 days of that one-year limitation period, the one-year period is tolled under *section 364(d)* for 90 days. If the notice of intent to sue is served before the last 90 days of the one-year limitation period, section 364(d) does not toll the one-year period [*Code Civ. Proc. § 364(d)*; *Woods v. Young (1991) 53 Cal. 3d 315, 325-326, 328, 279 Cal. Rptr. 613* ; *see Barber v. Superior Court (1991) 234 Cal. App. 3d 1076, 1080-1081, 285 Cal. Rptr. 668* (Supreme Court's holding in *Woods* that 90-day tolling provision of Section 340.5 does not extend limitation period beyond one year and 90 days given retroactive effect); *see also Preferred Risk Mutual Ins. Co. v. Reiswig (1999) 21 Cal. 4th 208, 213 n.2, 218, 87 Cal. Rptr. 2d 187, 980 P.2d 895* (90-day tolling under *Code Civ. Proc. § 364(d)* applied to equitable indemnity action based on health care provider's professional negligence governed by one-year limitation period of *Code Civ. Proc. § 340(3)* rather than *Code Civ. Proc. § 340.5*); *Bennett v. Shahhal (1999) 75 Cal. App. 4th 384, 389-390, 89 Cal. Rptr. 2d 272* (when *Code Civ. Proc. § 364* notice was not served within 90 days of expiration of one-year limitation period of *Code Civ. Proc. § 340.5(a)*, subsequent service of second Section 364 notice within 90 days of expiration of that one year limitation period did not toll one year limitation)].

Code Civ. Proc. § 340.5 provides that in no event shall the time for commencement of a legal action exceed three years unless tolled by any of three specific circumstances, which do not include giving a *Code Civ. Proc. § 364* notice within the last 90 days of the three-year period. Nonetheless, service of a *Code Civ. Proc. § 364* notice within the last 90 days of the three-year period also tolls the three year limitation period of *Code Civ. Proc. § 340.5*. *Code Civ. Proc. § 364* applies equally to the one-year and three-year statutes of limitation for medical malpractice actions [*Russell v. Stanford University Hospital (1997) 15 Cal. 4th 783, 788-790, 64 Cal. Rptr. 2d 97, 937 P.2d 640* (following *Woods v. Young (1991) 53 Cal. 3d 315, 279 Cal. Rptr. 613, 807 P.2d 455*); *see Newman v. Burnett (1997) 62 Cal. Rptr. 2d 175* (three-year limitation period of *Code Civ. Proc. § 340.5* applicable to minors tolled for 90 days when *Code Civ. Proc. § 364(a)* intent-to-sue notice served during last 90 days of that three-year limitation period)].

The 90-day tolling provision of *Code Civ. Proc. § 364(d)* may apply to extend the period of limitations under statutes other than *Code Civ. Proc. § 340.5*. *Section 364(d)* is a part of the Medical Injury Compensation Reform Act (MICRA) and applies to actions based on medical malpractice, even if the action is governed by a statute of limitations that is not part of MICRA [*Preferred Risk Mutual Ins. Co. v. Reiswig (1999) 21 Cal. 4th 208, 217-218, 87 Cal. Rptr. 2d 187, 980 P.2d 895* (applied to equitable indemnity action based on health care provider's professional negligence that was governed by one-year limitation period of *Code Civ. Proc. § 340*)]. However, the tolling provisions of *Code Civ. Proc. § 364(d)* apply only to causes of action for professional negligence and not to causes of action for intentional torts such as battery, even if they arise from the same factual circumstances [*Perry v. Shaw (2001) 88 Cal. App. 4th 658, 664-666, 106 Cal. Rptr. 2d 70* (dicta), citing *Noble v. Superior Court (1987) 191 Cal. App. 3d 1189, 1191-1194, 237 Cal. Rptr. 38]* .

A *Code Civ. Proc § 364* notice may be served in the manner prescribed in Chapter 5 (commencing with *Code Civ. Proc. § 1010*) of Title 14 of Part 2 of the Code of Civil Procedure [*Code Civ. Proc. § 364(c)*]. Service of a section 364 notice by mail is complete on deposit in the mail and *Code Civ. Proc. § 1013(a)* does not delay the effectiveness of the mailed notice [*Silver v. McNamee (1999) 69 Cal. App. 4th 269, 278-283, 81 Cal. Rptr. 2d 445]* . However, if the plaintiff fails to take adequate steps likely to accomplish actual notice on a defendant, plaintiff does not effectively comply with *Code Civ. Proc. § 364* and the statute of limitations for bringing plaintiff's action against that defendant is not tolled, that is, the plaintiff cannot take advantage of the *Code Civ. Proc. § 364(d)* 90-day extension period [*Derderian v. Dietrick (1997) 56 Cal. App. 4th 892, 899-900, 65 Cal. Rptr. 2d 800* (insufficient for plaintiffs to send notice to address listed on bill when they could not have adequate assurance from face of bill that post office address of organization from whom the bill was received had any direct connection with defendant)].

On the other hand, *section 364* does not expressly require that a health care provider must receive actual notice of a plaintiff's intent to sue before the limitations period may be tolled under *Code Civ. Proc. § 364(d)*. Thus, when the plaintiff strictly complies with statutes governing the method of service by mailing the notice properly addressed to the named defendant, actual notice by the named defendant is not required for plaintiff to take advantage of the *section 364(d)* tolling provision [*Silver v. McNamee (1999) 69 Cal. App. 4th 269, 283-286, 81 Cal. Rptr. 2d 445* (cases such as *Derderian*, requiring actual notice by defendants were factually distinguished as involving situation where plaintiffs did not strictly comply with statutes governing method of service; nothing in those cases suggests that defendant's receit of actual notice is necessary when service is made in strict compliance with the statutory requirements)].

For further discussion of statutes of limitations relating to actions against health care providers, see Ch. 415, *Physicians: Medical Malpractice* .

[c] Action Barred by Law of Another State

When a cause of action has arisen in another state, or in a foreign country, and by the laws of that other state or foreign country an action cannot there be maintained on that cause of action against a person by reason of the lapse of time, an action on that cause of action cannot be maintained against that person in California, except in favor of a person who has been a citizen of California and who has held the cause of action from the time it accrued [*Code Civ. Proc. § 361*].

[d] Pending Bankruptcy Proceeding

The filing of a petition in bankruptcy operates as an automatic stay of the commencement or continuation of any action against the debtor, nonbusiness codebtors of Chapter 13 debtors, and property of the debtor and of the bankruptcy estate [*11 U.S.C. §§ 362(a), 1301*].

Creditors may seek relief from the stay for cause, including inadequate protection of their interests [*11 U.S.C. §§ 362(d), 1301(c)*]. Otherwise, the stay remains in effect until the earliest of the following times: (1) the time the case is closed; (2) the time the case is dismissed; or (3) if the case is one for the liquidation of the estate of an individual under Chapter 7, or a case under Chapter 11 (business reorganization), Chapter 12 (family farmer with regular annual income), or Chapter 13 (adjustment of debts of an individual with ordinary income), the time a discharge is granted or denied [*11 U.S.C. § 362(d)*].

Bankruptcy law extends a limitation period that did not expire prior to the filing of the bankruptcy petition until the later of the following events: (1) the ordinary expiration date of the period, plus any suspensions found in nonbankruptcy law; or (2) 30 days after notice of termination or expiration of the stay [*11 U.S.C. § 108(c)*; *see 11 U.S.C. § 524* (permanent injunction against action on discharged claim)].

Code Civ. Proc. § 356 [discussed under *[a], above*] is a suspension under nonbankruptcy law, and thus serves to extend the applicable limitation period for the time the stay was in effect [*Eistrat v. Cekada (1958) 50 Cal. 2d 289, 291-292,*

324 P.2d 881] .

However, because *Code Civ. Proc. § 356* only applies to judicial remedies, it does not extend the time under *Civ. Code § 2924* for reinstatement of a mortgage or deed of trust. Thus, if the debtor does not reinstate within the 60 days following the filing of the bankruptcy petition as provided by *11 U.S.C. § 108(b)* and the reinstatement period has expired by the time the stay is terminated, the lender can immediately post notice of sale and proceed [*Napue v. Gor-Mey West, Inc. (1985) 175 Cal. App. 3d 608, 615-620, 220 Cal. Rptr. 799]* .

[17] Pending Appeal

An action on a judgment, as distinguished from execution on a judgment, may not be commenced until the judgment has become final either on expiration of the period within which an appeal may be taken or, if an appeal is taken, on the issuance of the remittitur when the judgment has been affirmed [*Hoover v. Galbraith (1972) 7 Cal. 3d 519, 525-526, 102 Cal. Rptr. 733, 498 P.2d 981]* . If an appeal is taken, the statute of limitations restarts on the date the appellate court issues a remittitur since jurisdiction revests in the trial court on that date, pursuant to Cal. Rules of Court, former Rule 29.6 (now 8.540), rather than on the date the remittitur is filed in the trial court [*see* *Bellows v. Aliquot Associates, Inc. (1994) 25 Cal. App. 4th 426, 432-434, 30 Cal. Rptr. 2d 723]* .

If it is not possible to bring an action to trial pending determination of an appeal in a related case, the time consumed on that appeal is impliedly excluded from the period of limitation [*Hoover v. Galbraith (1972) 7 Cal. 3d 519, 526, 102 Cal. Rptr. 733, 498 P.2d 981]* .

However, in the case of a legal malpractice action based on an attorney's representation of the plaintiff in a lawsuit, the limitation period begins to run on the entry of the adverse judgment or final order of dismissal, and is not tolled pending appeal of the underlying lawsuit [*Laird v. Blacker (1992) 2 Cal. 4th 606, 615-618, 7 Cal. Rptr. 2d 550, 828 P.2d 691]* .

[18] Dismissal of Supplemental Claims in Federal Court

In cases in which the federal district court has original jurisdiction, *28 U.S.C. § 1367(a)* grants the court supplemental jurisdiction over any state law claims that are so related to claims in the action within the court's original jurisdiction that they form part of the same case or controversy under U.S. Const., art. III.

Under *28 U.S.C. § 1367(d)*, the state statute of limitations for any claim that is asserted supplementally is tolled while the claim is pending in federal court and for a period of 30 days after it is dismissed, unless state law provides a longer tolling period. The *section 1367(d)* tolling provision includes the time during which a federal appeal with the court of appeals is pursued, and the 30-day grace period commences once the judgment of dismissal is affirmed by that court. Thus, *28 U.S.C. § 1367(d)* continues to toll the state statute of limitations during the federal appeal period, but tolling ceases once the district court decision is affirmed by the federal appellate court. Tolling under *section 1367(d)* is not extended by the later filing of a petition for writ of certiorari with the United States Supreme Court [*Kendrick v. City of Eureka (2000) 82 Cal. App. 4th 364, 366, 368-369, 98 Cal. Rptr. 2d 153* (plaintiffs claims held untimely)]. For further discussion of *28 U.S.C. § 1367(d)*, *see* Moore's Federal Practice, Third Ed., Ch. 106 (Matthew Bender).

[19] Legislative Abrogation of Defendant's Immunity From Suit

While the Legislature has the authority to abrogate a defendant's immunity from suit, the general rule is that legislation is to be construed to operate prospectively only and not to apply retroactively to proceedings that began before legislation was amended unless there is clear legislative intent for retroactive application [*Barker v. Brown & Williamson Tobacco Corp. (2001) 88 Cal. App. 4th 42, 48, 105 Cal. Rptr. 2d 531* (plaintiff's wrongful death suit barred by statute of limitations against cigarette manufacturer after Legislature's 1997 abrogation of the prior immunity from

suit for injuries from tobacco products, *Civ. Code § 1714.45*, plaintiff also failed to properly raise issue of fraudulent concealment by defendant before appeal)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsEquitable EstoppelGovernmentsLegislationStatutes of LimitationsExtension & RevivalTortsProcedureStatutes of LimitationsAccrual of ActionsGeneral OverviewTortsProcedureStatutes of LimitationsTollingGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 345 LIMITATION OF ACTIONS
PART II. LEGAL BACKGROUND
A. Statute of Limitations

30-345 California Forms of Pleading and Practice--Annotated § 345.21

§ 345.21 Equitable Tolling

[1] Elements

[a] In General

A period of limitation may be tolled as to one action when plaintiff has sought an alternative form of relief, and a three-pronged test has been satisfied. The three elements are [*Addison v. State of California (1978) 21 Cal. 3d 313, 319, 146 Cal. Rptr. 224, 578 P.2d 941* ; *Collier v. City of Pasadena (1983) 142 Cal. App. 3d 917, 924, 191 Cal. Rptr. 681* ; *see Kolani v. Gluska (1998) 64 Cal. App. 4th 402, 409, 75 Cal. Rptr. 2d 257]* :

- That defendant has received timely notice of the first claim,
- That defendant has not been prejudiced in gathering evidence to defend against the second claim, and
- That plaintiff has acted reasonably and in good faith in filing the second action.

The doctrine of equitable tolling has been described as bringing together previously separate rationales for tolling periods of limitation, including situations when plaintiff pursues administrative remedies, files a complaint that is later determined to be defective, or institutes an action that seeks to lessen damages or other harm that may have to be remedied by a second action [*Collier v. City of Pasadena (1983) 142 Cal. App. 3d 917, 923, 191 Cal. Rptr. 681* ; *see also* cases discussed under *[d]* and *[2], below*].

ILLUSTRATION:

Equitable Tolling Based on Appellate Court's Denial of Petition for Writ of Mandate Without Prejudice to Filing Petition in Superior Court. Plaintiff property owner's association seeks to set aside a county board of supervisor's affirmance of the issuance of conditional use and building permits by filing a petition for mandate in the court of appeals within 30 days of the board's decision. The petition is denied by the court of appeals without prejudice to the filing of proceedings in superior court. Plaintiffs

> file in superior court 35 days after the board's decision became final. County law requires that decisions of the board become final unless court review is sought within 30 days. Are plaintiffs in violation of the county ordinance? No. By filing an identical petition in the Court of Appeal within 30 days and promptly refiling in the superior court plaintiffs effectively put defendants on notice within the 30-day statute of limitations [*see* *Friends of Mammoth v. Board of Supervisors (1972) 8 Cal. 3d 247, 269, 104 Cal. Rptr. 761, 502 P.2d 1049]* .

Tolling can only suspend the running of a statute that still has time to run. It cannot revive a statute that has already expired [*65 Butterfield v. Chicago Title Ins. Co. (1999) 70 Cal. App. 4th 1047, 1062, 83 Cal. Rptr. 2d 40]* .

Equitable tolling is not permissible when it is inconsistent with the text of the relevant statute of limitations [*FNB Mortgage Corp. v. Pacific General Group (1999) 76 Cal. App. 4th 1116, 1132-1134, 90 Cal. Rptr. 2d 841* (10-year period under *Code Civ. Proc. § 337.15* is not subject to equitable tolling for repairs)].

For a form of allegation of circumstances raising the equitable tolling of statutes of limitations, see *§ 345.82*.

[b] Timely Notice

The timely notice requires the first claim to have been filed within the statutory period [*65 Butterfield v. Chicago Title Ins. Co. (1999) 70 Cal. App. 4th 1047, 1063, 83 Cal. Rptr. 2d 40* ; *Downs v. Department of Water & Power (1997) 58 Cal. App. 4th 1093, 1100, 68 Cal. Rptr. 2d 590]* .

The filing of the first claim must alert the defendant in the second claim of the need to begin investigating the facts which form the basis for the second claim. Generally, this means that the defendant in the first claim is the same one being sued in the second [*Downs v. Department of Water & Power (1997) 58 Cal. App. 4th 1093, 1100, 68 Cal. Rptr. 2d 590* ; *see* *65 Butterfield v. Chicago Title Ins. Co. (1999) 70 Cal. App. 4th 1047, 1063, 83 Cal. Rptr. 2d 40]* .

[c] Lack of Prejudice to Defendant

The second element, lack of prejudice to the defendant in gathering evidence to defend against the second claim, essentially translates to a requirement that the facts of the two claims be identical or at least so similar that the defendant's investigation of the first claim will put him or her in a position to fairly defend the second [*Downs v. Department of Water & Power (1997) 58 Cal. App. 4th 1093, 1100, 68 Cal. Rptr. 2d 590]* .

This aspect of the test is probably the keystone of the doctrine, providing the basis for the tolling when the facts of the two claims are identical or so similar that defendant's investigation of the first claim will necessarily provide a factual basis for the defense of the second. It is the nature of the facts underlying the claims, rather than the forms of the causes of action, that are determinative; as long as the claims are based on essentially the same set of facts, it is irrelevant whether the claims are alternative or parallel, consistent or inconsistent, compatible or incompatible [*Cervantes v. City of San Diego (9th Cir. 1993) 5 F.3d 1273, 1276* (applying California law); *Collier v. City of Pasadena (1983) 142 Cal. App. 3d 917, 925, 191 Cal. Rptr. 681]* .

The doctrine of equitable tolling, however, does not apply when a plaintiff who has suffered several different wrongs pursues only one remedy as to one of those wrongs [*Aerojet General Corp. v. Superior Court (1986) 177 Cal. App. 3d 950, 956, 223 Cal. Rptr. 249]* . For example, the doctrine does not apply to toll an action against an employer for fraudulent concealment of the cause of plaintiff's injury while plaintiff pursues a workers' compensation claim for the injury because these remedies are not alternative remedies for the same harm but different remedies for different harms [*Aerojet General Corp. v. Superior Court (1986) 177 Cal. App. 3d 950, 956-957, 223 Cal. Rptr. 249]* .

[d] Plaintiff's Good Faith and Reasonable Conduct

The third element, good faith and reasonable conduct on plaintiff's part, is less clearly defined in the cases, but in *Addison v. State of California (1978) 21 Cal. 3d 313, 319, 146 Cal. Rptr. 224, 578 P.2d 941* , the Supreme Court did stress that the plaintiff filed the second claim a short time after tolling ended [*Downs v. Department of Water & Power (1997) 58 Cal. App. 4th 1093, 1100, 68 Cal. Rptr. 2d 590]* .

In the majority of cases in which courts apply the equitable tolling doctrine, the plaintiff possesses several legal remedies and in good faith pursues one designed to lessen the extent of his or her injuries or damage. In these cases, if the defendant is not prejudiced, the running of the limitations period is tolled as to the other available remedies [*Hu v. Silgan Containers Corp. (1999) 70 Cal. App. 4th 1261, 1270, 83 Cal. Rptr. 2d 333]* . If, however, the request for equitable tolling is not based on the pursuit of one legal theory over another, but rather is based on some defect concerning the first action, and there is no claim of error on the court's part concerning the first action nor an assertion of any delay or dilatory tactics on the defendant's part, there is authority that has denied application of the doctrine of equitable tolling.

In *Hu v. Silgan Containers Corp. (1999) 70 Cal. App. 4th 1261, 1270-1271, 83 Cal. Rptr. 2d 333* , the doctrine of equitable tolling was held inapplicable when the initial action was voided by the court pursuant to *Code Civ. Proc. § 411.20* for failure to pay the filing fee. The *Hu* court distinguished *Bollinger v. National Fire Ins. Co. (1944) 25 Cal. 2d 399, 154 P.2d 399* , in which the court held that the plaintiff should be able to pursue the second action although the statute of limitations had expired because (1) the trial court had erroneously granted the initial nonsuit, (2) dilatory tactics on defendant's part prevented disposition of the first action in time to permit a second timely filing, and (3) plaintiff had at all times proceeded in a diligent manner. The concurrence of the three factors present in *Bollinger* are essential for application of rule stated in *Bollinger* [*Hu v. Silgan Containers Corp. (1999) 70 Cal. App. 4th 1261, 1270-1271, 83 Cal. Rptr. 2d 333* ; *see* *Gordon v. Law Offices of Aguirre & Meyer (1999) 70 Cal. App. 4th 972, 979-980, 980 n.8, 83 Cal. Rptr. 2d 119* (doctrine of equitable tolling not applicable to *Code Civ. Proc. § 340.6*; as alternative basis for not applying equitable tolling, court noted one element that must be present to apply equitable tolling rule of *Bollinger* is that plaintiffs are left without judicial forum for resolution of their claims through forces outside their control, which was not true in this case)].

[e] First Remedy Need Not Be "Legal" Remedy

It may not be necessary that the remedy pursued be a "legal" remedy, in the sense of an action or a proceeding in court or before an administrative agency. In one case, the "remedy" pursued was an attempt to prevent damages in consequence of the defendant's negligence by means other than by such an action or a proceeding [*see* *County of Santa Clara v. Hayes Co. (1955) 43 Cal. 2d 615, 617-619, 275 P.2d 456]* .

Merely engaging in informal negotiations is not adequate to support equitable tolling [*see* *65 Butterfield v. Chicago Title Ins. Co. (1999) 70 Cal. App. 4th 1047, 1063, 83 Cal. Rptr. 2d 40* (no equitable estoppel based on title insurer's negotiations with third party)].

[f] Insurance Claims

Equitable tolling applies to toll the *Ins. Code § 2071* one-year period of limitation for actions on an insurance policy from the time the insured gives notice of damage to its insurer pursuant to applicable policy notice provisions until the insurer formally denies the claim in writing [*Prudential-LMI Com. Insurance v. Superior Court (1990) 51 Cal. 3d 674, 678, 274 Cal. Rptr. 387, 798 P.2d 1230* ; *see also* *Marselis v. Allstate Insurance Co. (2004) 121 Cal. App. 4th 122, 126, 16 Cal. Rptr. 3d 668* (equitable tolling rule does not apply to reopen insurance claims that have been paid but did not have a unequivocal written confirmation stating that the claim was closed); *Singh v. Allstate Ins. Co. (1998) 63 Cal. App. 4th 135, 145-148, 73 Cal. Rptr. 2d 546* (when insurer denies claim unequivocally, insured's request for reconsideration does not create additional period of equitable tolling); *Stanton Road Associates v. Pacific Employers*

Ins. Co. (1995) 36 Cal. App. 4th 333, 343-344, 43 Cal. Rptr. 2d 1 (equitable tolling doctrine does not apply when limitation period had expired before plaintiff gave notice of loss to its insurer)].

ILLUSTRATION:

Equitable Tolling Based on Workers' Compensation Claim. Plaintiff is injured while working on defendant's premises and files a workers' compensation claim 10 months after the injury. The workers' compensation claim is rejected 15 months after the injury and plaintiff files an action in state court approximately one month later. Is the plaintiff in violation of the one year statute of limitations? No. Defendant's interest in being promptly apprised of claims against them so they may gather and preserve evidence is fully satisfied when the plaintiff filed a compensation claim within one year of the date of the injury [*see Elkins v. Derby (1974) 12 Cal. 3d 410, 412, 115 Cal. Rptr. 641, 525 P.2d 81]* .

Equitable tolling also applies to the breach of a continuing duty under a contract or insurance policy. For example, the limitation period for an action under a title insurance policy for failure to defend the insured accrues when the insurer refuses the insured's tender of defense, but the limitation period is equitably tolled until the underlying action is terminated by final judgment [*Lambert v. Commonwealth Land Title Ins. Co. (1991) 53 Cal. 3d 1072, 1077, 1079, 1080, 282 Cal. Rptr. 445, 811 P.2d 737* (disapproving contrary language in *Central Bank v. Transamerica Title Ins. Co. (1978) 85 Cal. App. 3d 859, 149 Cal. Rptr. 822*)].

An insured's cause of action for breach of the implied covenant may accrue on the entry of the trial court's judgment, but the limitations period should not commence to run until that judgment becomes final. Until such judgment is final, the insured has either not been harmed or the amount of that harm cannot be determined [*Archdale v. American Internat. Specialty Lines Co. (2007) 154 Cal. App. 4th 449, 476, 64 Cal. Rptr. 3d 632*].

[g] Second Action in State Court When First Claim Was in Federal Court With Supplemental Jurisdiction

When the first claim is a federal court action containing state claims over which the federal court has supplemental jurisdiction, *28 U.S.C. 1367(d)* codifies the rule of equitable tolling. However, Section 1367(d) substitutes a bright line rule in place of a case-by-case analysis of "reasonableness." Under *Section 1367(d)*, the period of limitation for any pendent claim over which the federal court has supplemental jurisdiction is tolled while the claim is pending and for 30 days after it is dismissed unless state law provides for a longer tolling period, i.e., the second suit must be filed within 30 days after dismissal of the pendent state claims without prejudice unless state law extends that period [*Kolani v. Gluska (1998) 64 Cal. App. 4th 402, 408-410, 75 Cal. Rptr. 2d 257]* .

Under *28 U.S.C. 1367(d)* a plaintiff is not allowed to tack onto the limitations period the full time during which the federal action was pending [*Kolani v. Gluska (1998) 64 Cal. App. 4th 402, 410-411, 75 Cal. Rptr. 2d 257]* . Thus, when an initial federal action containing state pendent claims is filed and thereafter dismissed, what conduct is "reasonable" under the equitable tolling doctrine requirement of reasonable promptness in refiling must be assessed in light of the 30-day grace period set forth in *28 U.S.C. 1367(d)* [*Kolani v. Gluska (1998) 64 Cal. App. 4th 402, 410-411, 75 Cal. Rptr. 2d 257* (statute of limitations barred plaintiff's claims when plaintiffs did not refile in state court until 78 days after federal suit was dismissed, no California statute afforded a grace period for longer than 30 days and no extraordinary circumstances justified the delay)].

ILLUSTRATION:

Equitable Tolling Based on Action in Federal Court. Plaintiffs bring an action in federal court against the State of California and a county alleging causes of action for violation of both federal and state law. The federal court dismisses the causes of action for violation of federal law and also dismisses without prejudice the pendent state claims over which it had supplemental jurisdiction. Plaintiffs then promptly bring a similar case in state court concerning the state claims. Although the federal court case was filed within the state statute of limitations, by the time the state court case is filed the statute of limitations has

passed. Is the state court case in violation of the statute of limitations? No. Defendants were notified within the state statute of limitations by the filing of the similar federal suit. Plaintiffs were acting in good faith by filing their case first in federal court and then filing in state court promptly after dismissal of the federal suit. Defendants had the opportunity to begin gathering evidence and preparing a defense before the state statute of limitations expired [*see Addison v. State of California (1978) 21 Cal. 3d 313, 319, 146 Cal. Rptr. 224, 578 P.2d 941]* .

[2] Exhausting Administrative Remedies

A period of limitation is suspended during the pendency of administrative proceedings forming a necessary prelude to a lawsuit [*Dillon v. Board of Pension Commrs. (1941) 18 Cal. 2d 427, 431, 116 P.2d 37* ; *A. Teichert & Son, Inc. v. State of Cal. (1965) 238 Cal. App. 2d 736, 746, 48 Cal. Rptr. 225]* .

This is true even when no statute makes the exhaustion of administrative remedies in the case at hand a condition of the right to sue. That is, the exhaustion of administrative remedies before commencing suit, if those remedies are pursued reasonably and in good faith, has the effect of suspending the running of period of limitation while that course is being followed [*see Campbell v. Graham-Armstrong (1973) 9 Cal. 3d 482, 490, 107 Cal. Rptr. 777, 509 P.2d 689* ; *see also McDonald v. Antelope Valley Community College Dist. (2008) 45 Cal. 4th 88, 103, 84 Cal. Rptr. 3d 734, 194 P.3d 1026* (internal administrative remedies for resolving employment grievances are optional and need not be exhausted before filing a California Fair Employment and Housing Act, *Gov. Code, § 12900 et seq.*, action, but if an aggrieved party voluntarily elects to pursue such an administrative remedy, it does not follow from this that the voluntariness of that election renders equitable tolling unavailable); *see also* discussion under *§ 345.21[1], above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLegislationStatutes of LimitationsTolling

California Forms of Pleading and Practice--Annotated

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 345 LIMITATION OF ACTIONS
PART II. LEGAL BACKGROUND
A. Statute of Limitations

30-345 California Forms of Pleading and Practice--Annotated § 345.22

§ 345.22 Equitable Estoppel

[1] Elements

A defendant may be estopped from raising the bar of the statute of limitations if his or her conduct or statements induced the plaintiff to refrain from bringing a timely action. It is not a punitive notion, but rather a remedial judicial doctrine employed to insure fairness, prevent injustice, and do equity. It stems from the venerable judicial prerogative to redress unfairness in the application of otherwise inflexible legal dogma, based on sound public policy and equity. [*Leasequip, Inc. v. Dapeer (2002) 103 Cal. App. 4th 394, 403-404, 126 Cal. Rptr. 2d 782]* .

The equitable estoppel doctrine applies if the plaintiff establishes that the defendant was aware of the limitation period, that he or she intended that the plaintiff should rely on his or her conduct or statements, that the plaintiff was ignorant of the true facts, and that the plaintiff relied on the defendant's conduct or statements to his or her detriment [*Kleinecke v. Montecito Water Dist. (1983) 147 Cal. App. 3d 240, 245-247, 195 Cal. Rptr. 58* ; *see Barr v. ACandS, Inc. (1997) 57 Cal. App. 4th 1038, 1057-1058, 67 Cal. Rptr. 2d 494* (no estoppel when, despite evidence of custom in asbestos-litigation to encourage dismissal of marginal cases with recognition that later suit may be filed if more significant symptoms develop and first actions were dismissed without prejudice, there was no evidence that defendants made any representations to plaintiffs to induce them to dismiss)]. However, a complaint must include facts indicating defendant's conduct directly prevented plaintiff from filing suit on time [*Lantzy v. Centex Homes (2003) 31 Cal. 4th 363, 383-385, 2 Cal. Rptr. 3d 655, 73 P.3d 517* (no equitable estoppel where defendant's conduct included offers to fix problem in lieu of suit, but plaintiff failed to adequately plead facts that defendant's conduct actually and reasonably induced plaintiff to forebear suing within limitations period)]. Whether an estoppel exists--whether the acts, representations or conduct lulled a party into a sense of security preventing him or her from instituting proceedings before the running of the statute, and whether the party relied thereon to his or her prejudice--is a question of fact and not of law [*Holdgrafer v. Unocal Corp. (2008) 160 Cal. App. 4th 907, 925-926, 73 Cal. Rptr. 3d 216]* .

Application of equitable estoppel against the assertion of a limitations defense typically arises through some misleading affirmative conduct on a defendant's part [*see, e.g., Leasequip, Inc. v. Dapeer (2002) 103 Cal. App. 4th 394, 403-404, 126 Cal. Rptr. 2d 782* (attorney equitably estopped from asserting the statute of limitations defense in legal malpractice

lawsuit for giving faulty advice)]. An estoppel may also arise from silence when there is a duty to speak. For example, an insurer's direct violation of duly promulgated administrative regulations issued by the California Insurance Commissioner, requiring the insurer to notify a claimant insured of time limits pertaining to a claim, may provide the basis of an estoppel against the insurer's assertion of a contract limitations defense [*Spray, Gould & Bowers v. Associated Internat. Ins. Co. (1999) 71 Cal. App. 4th 1260, 1263, 1268-1269, 84 Cal. Rptr. 2d 552]* .

The conduct that forms the estoppel need not be fraudulent, performed in bad faith, or with an intent to mislead the plaintiff [*Barr v. ACandS, Inc. (1997) 57 Cal. App. 4th 1038, 1057, 67 Cal. Rptr. 2d 494]* .

The doctrine of estoppel also has been codified in *Evid. Code § 623*, which reads: "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it" [*see* *Leasequip, Inc. v. Dapeer (2002) 103 Cal. App. 4th 394, 403-404, 126 Cal. Rptr. 2d 782]* .

For a form of allegation raising the issue of estoppel to assert the defense of the statute of limitations, see *§ 345.81*.

[2] Independent of Limitation Period

Equitable estoppel comes into play after a limitations period has expired and addresses itself to the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because that party's conduct has induced another into forebearing suit within the applicable limitations period [*Battuello v. Battuello (1998) 64 Cal. App. 4th 842, 847-848, 75 Cal. Rptr. 2d 548* (quoting *Bomba v. W.L. Belvidere, Inc. (7th Cir. 1978) 579 F.2d 1067, 1070)]* . The doctrine is judicially created and limits the typical statute of limitations. Altough it arose in courts of equity, it also applies to actions at law. It enters into a statute of limitations, if at all, by being read into it judicially [*see* *Regents of University of California v. Superior Court (1999) 20 Cal. 4th 509, 532-533, 85 Cal. Rptr. 2d 257, 976 P.2d 808* (addressing doctrine of fraudulent concealment)].

Equitable estoppel, unlike tolling, is neither concerned with the point at which a limitations period commences to run nor with the circumstances which may suspend running of the limitation period. Application of equitable estoppel is wholly independent of the limitations period itself. It arises, not from the language of the statute, but from the equitable principle that a person will not be permitted to profit from that person's own wrongdoing in a court of justice [*Battuello v. Battuello (1998) 64 Cal. App. 4th 842, 847-848, 75 Cal. Rptr. 2d 548* (quoting *Bomba v. W.L. Belvidere, Inc. (7th Cir. 1978) 579 F.2d 1067, 1070)]* . Nonetheless, cases addressing equitable estoppel often speak in terms of "tolling" the statute of limitations [*see, e.g.,* *Regents of University of California v. Superior Court (1999) 20 Cal. 4th 509, 532-533, 85 Cal. Rptr. 2d 257, 976 P.2d 808]* .

Because equitable estoppel operates directly on the defendant without abrogating the running of the statutory limitations period, it might apply no matter how unequivocal the statutory language containing the applicable limitations period is expressed [*Battuello v. Battuello (1998) 64 Cal. App. 4th 842, 847-848, 75 Cal. Rptr. 2d 548* (quoting *Bomba v. W.L. Belvidere, Inc. (7th Cir. 1978) 579 F.2d 1067, 1070)]* .

For example, with regard to *Code Civ. Proc. 366.2*, although *Code Civ. Proc. 366.2(b)* clearly shows the Legislature intended that the statute of limitations set forth in that section not be "tolled" or "extended," the statute is silent about equitable estoppel. Absent such language, or legislative history suggesting that the Legislature intended to abrogate the doctrine of equitable estoppel, it has been held that the doctrine of equitable estoppel still applies [*Battuello v. Battuello (1998) 64 Cal. App. 4th 842, 75 Cal. Rptr. 2d 548* (allegations sufficient to support claim of equitable estoppel to bar defendant from raising Section 366.2 limitation period when defendant's false statement caused plaintiff's forbearance from suit until limitation period expired)].

However, the California Supreme Court, noting *Gov. Code § 11130.3(a)*, a part of Bagley-Keene Open Meeting Act

contained in *Gov. Code § 11120 et seq.*, does not allow any extension of time expressly or by implication and its legislative history supports this conclusion, has held that Section 11130.3(a) does not allow any extension of time even through operation of the doctrine of fraudulent concealment [*Regents of University of California v. Superior Court (1999) 20 Cal. 4th 509, 527-535, 85 Cal. Rptr. 2d 257, 976 P.2d 808]* . In reaching this conclusion, however, the court noted that the typical statute of limitations admits of the application of the doctrine of fraudulent concealment. The purposes of each are consistent the one with the other, which is not the case for *Gov. Code § 11130.3(a)* [*Regents of University of California v. Superior Court (1999) 20 Cal. 4th 509, 533-534, 85 Cal. Rptr. 2d 257, 976 P.2d 808* (defendant not equitably estopped, based on alleged fraudulent concealment of cause of action, from asserting *Gov. Code § 11130.3(a)* 30-day statute of limitation); *cf. FNB Mortgage Corp. v. Pacific General Group (1999) 76 Cal. App. 4th 1116, 1121 1132-1134, 90 Cal. Rptr. 2d 841* (*Code Civ. Proc. § 337.15* is not subject to equitable tolling); for discussion of equitable tolling, *see § 345.21*].

[3] Fraudulent Concealment of Cause of Action

When the defendant is guilty of having fraudulently concealed the facts on which a cause of action depends, the statute of limitations is tolled until the plaintiff discovers or ought to have discovered those facts [*Hernandez v. Garcetti (1998) 68 Cal. App. 4th 675, 680-681, 80 Cal. Rptr. 2d 443* ; *see Bernson v. Browning-Ferris Industries (1994) 7 Cal. 4th 926, 931, 30 Cal. Rptr. 2d 440, 873 P.2d 613* ; *Mark K. v. Roman Catholic Archbishop (1998) 67 Cal. App. 4th 603, 611, 79 Cal. Rptr. 2d 73]* . Fraudulent concealment is a close cousin to the discovery rule [*see Bernson v. Browning-Ferris Industries (1994) 7 Cal. 4th 926, 931, 30 Cal. Rptr. 2d 440, 873 P.2d 613* ; *Mark K. v. Roman Catholic Archbishop (1998) 67 Cal. App. 4th 603, 611, 79 Cal. Rptr. 2d 73* ; for discussion of delayed discovery, *see § 345.19[3]*]. The purpose of the doctrine is to disarm a defendant, who, by his or her own deception, has caused a claim to become stale and a plaintiff dilatory [*Regents of University of California v. Superior Court (1999) 20 Cal. 4th 509, 533, 85 Cal. Rptr. 2d 257, 976 P.2d 808]* .

Fraudulent concealment of the fact on the existence of which the cause of action accrues is a good answer to a plea of bar of a statute of limitation; but when discovery of the cause of action was merely tardy, and no fraud or fraudulent concealment is involved, the running of the period of limitation will not be suspended. The ground of relief is that the defendant, having by fraud or deceit concealed material facts and by misrepresentations hindered the plaintiff from bringing an action within the statutory period, is estopped from taking advantage of his or her own wrong. A statute of limitation is a shield for the defendant's protection against stale claims, and he or she may not use it to perpetrate a fraud on an otherwise diligent suitor. The rule applies whether or not the basis for the action is itself fraud [*Pashley v. Pacific Elec. Ry. Co. (1944) 25 Cal. 2d 226, 229, 230, 231, 232, 153 P.2d 325* ; *Parsons v. Tickner (1995) 31 Cal App 4th 1513, 1525-1529, 37 Cal. Rptr. 2d 810* (action labeled as fraud, breach of fiduciary duty and conversion brought by daughter of deceased not time barred although filed 19 years after decedent's death; construing *Code Civ. Proc. §§ 338(d), 366.1*)].

Mere nondisclosure of a material fact is not, absent a fiduciary relationship, the concealment of a cause of action. There must be some affirmative act calculated to obscure the existence of a cause of action, and that act must be factually alleged, before fraudulent concealment will be found [*Hesse v. Vinatieri (1956) 145 Cal. App. 2d 448, 451, 302 P.2d 699]* . However, in cases in which the defendant can be said to have a duty of disclosure, a failure to disclose a material fact may suspend the running of a period of limitation [*see discussion under § 345.19[3], above*].

A false representation or an act designed to conceal the cause of action, if made after the period of limitation has expired, is not a basis for estopping the defendant from pleading the bar of the applicable statute [*Scafidi v. Western Loan & Bldg. Co. (1946) 72 Cal. App. 2d 550, 566, 165 P.2d 260* ; *see Bank of America v. Williams (1948) 89 Cal. App. 2d 21, 25, 200 P.2d 151]* .

Fraudulent attempts to conceal a cause of action will not toll the limitation period if the plaintiff is aware of the cause of action [*Snyder v. Boy Scouts of America, Inc. (1988) 205 Cal. App. 3d 1318, 1323, 253 Cal. Rptr. 156* ; *Rita M. v.*

Roman Catholic Archbishop (1986) 187 Cal. App. 3d 1453, 1460, 232 Cal. Rptr. 685 ; *see Barber v. Superior Court (1991) 234 Cal. App. 3d 1076, 1082-1083, 285 Cal. Rptr. 668* (because plaintiffs were aware of existence of cause of action, no fraudulent concealment when defendant's attorney refused to cooperate in prefiling investigation)]. Likewise, the fraudulent concealment doctrine will not apply and the limitations period will not be tolled if the plaintiff is on notice of a potential claim, even if the plaintiff did not know for certain that claim existed; a plaintiff is under a duty to reasonably investigate, and a suspicion of wrongdoing, coupled with a knowledge of the harm and its cause, commences the limitations period [*Snapp & Associates Ins. Services, Inc. v. Robertson (2002) 96 Cal. App. 4th 884, 890-891*].

Moreover, a particular statute of limitations may not allow any extension of time even through operation of the doctrine of fraudulent concealment [*see Regents of University of California v. Superior Court (1999) 20 Cal. 4th 509, 532-535, 85 Cal. Rptr. 2d 257, 976 P.2d 808* (Gov. Code § 11130.3(a), held not to allow any extension of time even through operation of doctrine fraudulent concealment)].

For a form of allegation that defendant is estopped from raising the bar of the statute of limitations, see *§ 345.81*.

[4] Fraudulent Concealment of Defendant's Identity

[a] Basis for Equitable Estoppel

Based on the principle that one should not profit from one's own wrongdoing, a defendant may be equitably estopped from asserting the statute of limitations when, as a result of intentional concealment, the plaintiff is unable to discover the defendant's actual identity [*Bernson v. Browning-Ferris Industries (1994) 7 Cal. 4th 926, 936, 30 Cal. Rptr. 2d 440, 873 P.2d 613* (disapproving *Staples v. Zoph (1935) 9 Cal. App. 2d 369, 370, 49 P.2d 1131*)]. The rule of equitable estoppel includes the requirement that the plaintiff exercise reasonable diligence and, thus, the statute of limitations will toll only until such time that the plaintiff knows, or through the exercise of reasonable diligence should have discovered, the defendant's identity. Lack of knowledge alone is not sufficient to stay the statute; a plaintiff may not disregard reasonably available avenues of inquiry which, if vigorously pursued, might yield the desired information [*Bernson v. Browning-Ferris Industries (1994) 7 Cal. 4th 926, 936, 30 Cal. Rptr. 2d 440, 873 P.2d 613]* .

In determining whether a plaintiff has exercised reasonable diligence, courts must consider whether the filing of a timely Doe complaint would, as a practical matter, have facilitated the discovery of the defendant's identity within the requisite time period for service of process [*Bernson v. Browning-Ferris Industries (1994) 7 Cal. 4th 926, 936-937, 30 Cal. Rptr. 2d 440, 873 P.2d 613* ; *Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1118, 245 Cal. Rptr. 658, 751 P.2d 923]* . Furthermore, if the identity of at least one defendant is known, the plaintiff must avail himself or herself of the opportunity to file a timely complaint naming Doe defendants and utilize discovery to ascertain the remaining defendants' identities. However, where discovery efforts will not be successful in ascertaining a defendant's identity because of his or her intentional concealment, the plaintiff should not be penalized [*Bernson v. Browning-Ferris Industries (1994) 7 Cal. 4th 926, 937, 30 Cal. Rptr. 2d 440, 873 P.2d 613]* .

When adopting this rule, the California Supreme Court predicted that this potential equitable estoppel will not unduly burden the trial courts since it will arise only in those relatively few cases where the defendant asserts a statute of limitations defense and the plaintiff claims that he or she was totally ignorant of the defendant's identity as a result of the defendant's fraudulent concealment [*Bernson v. Browning-Ferris Industries (1994) 7 Cal. 4th 926, 937, 30 Cal. Rptr. 2d 440, 873 P.2d 613]* .

[b] Nonfraudulent Concealment of Defendant's Presence or Identity

If a defendant is present in California, neither the plaintiff's ignorance of that fact nor his or her inability to discover the defendant's presence will prevent the running of the period of limitation. Moreover, the fact that the defendant is living in this state under an assumed name, if the change of name was without fraudulent intent, will not prevent the running

of the period of limitation, even though the plaintiff does not know the defendant's assumed name [*St. Paul Title & Trust Co. v. Stensgaard (1912) 162 Cal. 178, 180-181, 121 P. 731]* .

[c] Concealment of Corporate Defendant

A domestic corporation cannot conceal itself within the state. Because it is an artificial person, its presence is always open and notorious, even though its officers and agents may conceal themselves or the corporation's business and property. The Corporation Code does not permit a domestic corporation to hide; on the contrary, it provides an effective mode of obtaining personal service on the corporation whose officers and agents cannot be found after due diligence [*Coates Capitol Corp. v. Superior Court (1967) 251 Cal. App. 2d 125, 129, 59 Cal. Rptr. 231* ; *see Corp. Code § 1702*].

[5] Other Deception

Under appropriate circumstances equitable estoppel will apply to bar a defendant from pleading the bar of the statute of limitations when the plaintiff was induced to refrain from bringing a timely action by the defendant's fraud, misrepresentation, or deceptions, with regard to factors other than the existence of the actual cause of action. For example, in a case in which the plaintiff mistakenly sued a sanitary district instead of the water district, thinking it was the same entity, the court held that the defendant was equitably estopped from pleading the statute of limitations because the counsel for both entities was the same, and his actions served to mislead plaintiff's counsel into thinking that he had sued the right defendant [*see Kleinecke v. Montecito Water Dist. (1983) 147 Cal. App. 3d 240, 245-247, 195 Cal. Rptr. 58]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefGovernmentsLegislationStatutes of LimitationsEquitable Estoppel

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§ 345.23 Extension of Period of Limitation by Partial Payment of Principal or Interest on Promissory Note

Any payment on account of principal or interest due on a promissory note made by the party to be charged shall be deemed sufficient acknowledgment or promise of a continuing contract to stop, from time to time as any such payment is made, the running of the time within which an action may be commenced upon the principal sum or upon any installment of principal or interest due on such note, and to start the running of a new period of time [*Code Civ. Proc. § 360*].

A partial payment of either principal or interest on a promissory note made within the statutory period continues the original obligation through a new statutory period; in effect the debtor waives so much of the statutory period as has run in his or her favor [*Eilke v. Rice (1955) 45 Cal. 2d 66, 73, 286 P.2d 349* ; *Kaichen's Metal Mart, Inc. v. Ferro Cast Co. (1995) 33 Cal. App. 4th 8, 15, 39 Cal. Rptr. 2d 233]* .

Thus, the effect of a partial payment is to begin a new period of limitation running from the date of the payment. The situation does not involve revival of a barred debt, but rather one where the debt has been "revitalized" by the partial payment [*see Code Civ. Proc. § 360*; *see also Eilke v. Rice (1955) 45 Cal. 2d 66, 73, 286 P.2d 349* ; *Kaichen's Metal Mart, Inc. v. Ferro Cast Co. (1995) 33 Cal. App. 4th 8, 15, 39 Cal. Rptr. 2d 233* (both distinguishing revival of a barred debt from continuation of old obligation through a new period)].

For a form of allegation of partial payments extending the period of limitation, see *§ 345.84*. For discussion of revival of a barred debt, see *§ 345.24*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewContracts LawNegotiable InstrumentsGeneral OverviewContracts LawNegotiable InstrumentsEnforcementDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsExtension & RevivalGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 345.24 Revival of Barred Debt by Promise or Acknowledgment After Expiration of Period of Limitation

[1] Revival of Barred Debt

An acknowledgment of or a promise to pay a debt after an action on the debt has become barred by a statute of limitation can revive the debt. Either an acknowledgment or a promise is sufficient [*Western Coal & Mining Co. v. Jones (1946) 27 Cal. 2d 819, 822, 167 P.2d 719* ; *see Code Civ. Proc. § 360*] as long as it is made to the creditor [*Biddel v. Brizzolara(1883) 64 Cal. 354, 355, 30 P. 609]* or to an agent who was, and whom the debtor knew to be, authorized to contract on the creditor's behalf with reference to the debt [*see In re Estate of Azevedo (1936) 17 Cal. App. 2d 710, 712, 62 P.2d 1058* ; *Visher v. Wilbur (1907) 5 Cal. App. 562, 569-570, 90 P. 1065]* .

For a form of allegation of a promise or acknowledgment reviving a barred debt, see *§ 345.85*.

[2] Effect of Partial Payment After Debt Barred

When a debt is barred by the statute of limitations, payment on account of principal or interest due on a promissory note, made by the party to be charged, is not of itself sufficient to revive the cause of action [*see Code Civ. Proc. § 360*; *Eilke v. Rice (1955) 45 Cal. 2d 66, 73, 286 P.2d 349* ; *Kaichen's Metal Mart, Inc. v. Ferro Cast Co. (1995) 33 Cal. App. 4th 8, 15, 39 Cal. Rptr. 2d 233]* .

For discussion of extension of the period of limitation on a promissory note by partial payment before the debt is barred, see *§ 345.23*.

[3] Elements of Promise of Acknowledgment

[a] Consideration

An existing debt is sufficient consideration to support a new promise to pay, whether expressed or implied from an acknowledgment, even though an action on the debt may be barred by a statute of imitation [*see Easton v. Ash (1941) 18 Cal. 2d 530, 534-535, 116 P.2d 433* (restating rule)]. This rule applies only to the case of a promise or an

acknowledgment by the debtor, however. A promise or an acknowledgment by someone who was not liable, either as debtor or as surety, while the debt was enforceable, lacks consideration (for example, an acknowledgment of debt by the debtor's widow) [*see Sullivan v. Sullivan (1893) 99 Cal. 187, 193, 33 P. 862]* .

[b] Writing

[i] Requirement of Written Promise or Acknowledgment

No particular form of promise or acknowledgment is prescribed by *Code Civ. Proc. § 360* [*Searles v. Gonzalez (1923) 191 Cal. 426, 430, 216 P. 1003]* . The statute requires only that the promise or acknowledgment be in writing and signed by the party to be charged. The purpose of this requirement is to establish a rule with respect to the kind of evidence necessary to prove the promise or acknowledgment, not with respect to the character of the promise or of the acknowledgment from which a promise may be inferred [*Easton v. Ash (1941) 18 Cal. 2d 530, 536, 116 P.2d 433]* .

A writing is sufficient if it shows that the writer treats the indebtedness as subsisting and as one which the debtor is liable and willing to pay [*Searles v. Gonzalez (1923) 191 Cal. 426, 430, 216 P. 1003* ; *see also Rounthwaite v. Rounthwaite (1902) 6 CU 878, 883, 68 P. 304* (estoppel in pais as not applicable to excuse noncompliance with requirement of *Code Civ. Proc. § 360* of writing)].

[ii] Reference to Debt

No writing is sufficient as an acknowledgment under *Code Civ. Proc. § 360* unless it contains some reference to the debt which, either by itself or with the aid of evidence of extrinsic facts in explanation, amounts to an admission that there is a debt existing to the creditor to whom the writing is addressed, which the debtor is liable and willing to pay [*see Clunin v. First Fed. Trust Co. (1922) 189 Cal. 248, 253-254, 207 P. 1009* (reviewing cases)]. The reference to the debt must be either a specification of the amount due or a reference to some fact by which that amount can be definitely and certainly ascertained [*see Outwaters v. Brownlee (1913) 22 Cal. App. 535, 539, 135 P. 300]* .

[iii] Language of Promise

A promise, within the meaning of *Code Civ. Proc. § 360*, is plainly what that word imports, namely an engagement to pay the debt [*Western Coal & Mining Co. v. Jones (1946) 27 Cal. 2d 819, 822, 167 P.2d 719]* .

The Commercial Code provides that a promise is a written undertaking to pay and an acknowledgment of an obligation by the obligor is not a promise unless the obligor also undertakes to pay [*Com. Code § 3103(a)(9)*]. This definition relates to commercial paper but is obviously applicable to a case involving revival of a debt; however, the distinction between a promise and an acknowledgment is not significant in such a case because *Code Civ. Proc. § 360* provides for either a promise or an acknowledgment.

[iv] Language of Acknowledgment

The acknowledgment must be unqualified and unconditional; that is, while the law will imply a promise to pay from a bare acknowledgment, it will not be sufficient if there are circumstances showing an unwillingness to pay or refuting an intent to contract to pay [*Western Coal & Mining Co. v. Jones (1946) 27 Cal. 2d 819, 822-823, 167 P.2d 719]* .

A promise not to assert a statute of limitation in defense, whether made before or after a debt is barred, does not amount to an acknowledgment. However, where such a promise is made, there may be found in the context something further which will amount to an acknowledgment [*see Carlston v. Shenson (1941) 47 Cal. App. 2d 52, 58-59, 117 P.2d 408]* .

[v] Signed by Party to Be Charged

No promise or acknowledgment is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of *Code Civ. Proc. § 312 et seq.* (statutes of limitation), unless it is contained in some writing, signed by the party to be charged thereby [*Code Civ. Proc. § 360*].

Because the writing must be signed by the party to be charged, a barred action on a surety's obligation is not revived by the debtor's new promise or acknowledgment [*see Easton v. Ash (1941) 18 Cal. 2d 530, 538, 116 P.2d 433* (acts by principal obligor do not suspend running of period of limitation as to guarantor, absent contrary provision in guaranty contract); *Brock v. Western Nat'l Indem. Co. (1955) 132 Cal. App. 2d 10, 16, 281 P.2d 571* (agreement between debtor and creditor extending time to pay debt did not affect running of period of limitation on action on surety's bond where surety was not party to extension agreement)].

[vi] By One of Joint Obligors

In general, the promise of one of several joint obligors cannot revive, as against the others, a cause of action barred by a statute of limitation, nor can it suspend, as to the others, the running of the period of limitation [*State Loan & Trust Co. v. Cochran (1900) 130 Cal. 245, 255, 62 P. 466* ; *Searles v. Gonzalez (1923) 191 Cal. 426, 434, 216 P. 1003]* . There are exceptions, however; for example, a partner's acknowledgment made in the course of business and before dissolution of the partnership has been held binding on the other partners where it was made before the period of limitation had expired [*Furlow P.B. Co. v. Balboa L. & W. Co. (1921) 186 Cal. 754, 766-767, 200 P. 625]* . There appears to be no reason why the other partners would not also be bound by such an acknowledgment made after the period of limitation has expired.

[vii] By Personal Representative of Decedent's Estate

The Probate Code provides that no claim which is barred by a statute of limitation may be allowed or approved by the personal representative of the decedent's estate [*Prob. Code § 9253(b)*]. The personal representative has no authority to waive the defense of bar of a statute of limitation [*Reay v. Heazelton (1900) 128 Cal. 335, 338-339, 60 P. 977]* ; therefore, it appears that the personal representative has no authority to make an acknowledgment or a promise which will revive a barred debt.

[c] Later Action Is Based on New Obligation

If the period of limitation on an action based on a debt has expired when a new agreement respecting the debt is made, then an action thereafter is based on the new promise [*Easton v. Ash (1941) 18 Cal. 2d 530, 535, 116 P.2d 433]* .

An acknowledgment made after the statutory period of limitation has expired as to the original debt constitutes a new promise, even though the promise is merely implied from the acknowledgment [*Vassere v. Joerger (1938) 10 Cal. 2d 689, 693, 76 P.2d 656]* . In other words, the acknowledgment of a debt as to which an action is already barred by a statute of limitation gives rise to a new contact and a new cause of action dating from the acknowledgment [*see Eilke v. Rice (1955) 45 Cal. 2d 66, 73, 286 P.2d 349* ; *Kaichen's Metal Mart, Inc. v. Ferro Cast Co. (1995) 33 Cal. App. 4th 8, 15, 39 Cal. Rptr. 2d 233]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsDischarge & PaymentGeneral OverviewContracts LawNegotiable InstrumentsDischarge & PaymentPaymentGeneral OverviewContracts LawNegotiable InstrumentsDischarge & PaymentPaymentInterestContracts LawNegotiable InstrumentsEnforcementDefensesStatutes of LimitationsContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesGeneral OverviewGovernmentsLegislationStatutes of LimitationsExtension & RevivalGovernmentsLegislationStatutes of LimitationsTime Limitations

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 345 LIMITATION OF ACTIONS
PART II. LEGAL BACKGROUND
A. Statute of Limitations

30-345 California Forms of Pleading and Practice--Annotated § 345.25

§ 345.25 Relation Back of Amended Complaint for Purposes of Statute of Limitations

[1] Complaint Relates Back if Recovery Based on Same General Set of Facts

An amended complaint relates back to the filing of the original complaint and thus avoids the bar of the statute of limitations, so long as both pleadings (1) rest on the same general set of facts, (2) involve the same injury, and (3) refer to the same instrumentality [*Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 409, 87 Cal. Rptr. 2d 453, 981 P.2d 79* ; *cf. Smeltzley v. Nicholson Mfg. Co. (1977) 18 Cal. 3d 932, 934, 939-940, 136 Cal. Rptr. 269, 559 P.2d 624* (amended complaint relates back to filing of original complaint if recovery is sought on same general set of facts; amended complaint related back when original complaint asserted injuries were caused by dangerous condition of employers' premises and amended complaint identified that condition as defective machine manufactured by defendant); *Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 600-603, 15 Cal. Rptr. 817, 364 P.2d 681* ; *see Woo v. Superior Court (1999) 75 Cal. App. 4th 169, 176, 89 Cal. Rptr. 2d 20* (general rule is that amended complaint that adds new defendant does not relate back to date of filing original complaint unless exception to general rule for substitution of new defendant for fictitiously named defendant under *Code Civ. Proc. § 474* applies); *Boyle v. City of Redondo Beach (1999) 70 Cal. App. 4th 1109, 1119, 83 Cal. Rptr. 2d 164* (amended complaint relates back to original complaint and avoids statute of limitations as bar only if it (1) rests on same set of general facts as original complaint, and (2) refers to same accident and same injuries as original complaint); *Winding Creek v. McGlashan (1996) 44 Cal. App. 4th 933, 940, 52 Cal. Rptr. 2d 236* (defendant whose name has been substituted for fictitiously named defendant regarded as party from commencement of suit provided complaint is not amended to seek relief on different theory based on general set of facts other than those set out in original complaint)].

Situations in which an amended complaint has been held to relate back include the following:

- Original complaint for refusal to deliver securities and money received by defendants as agent for plaintiff; amendment substituting insurance company for a fictitious defendant and stating cause of action on surety bond [*Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 600-603, 15 Cal. Rptr. 817, 364 P.2d 681]* .

- Original complaint against employer for personal injury based on providing unsafe workplace; amended complaint alleged that plaintiff's injuries resulted from defective machine manufactured by new defendant whose name was substituted for Doe defendant [*Smeltzley v. Nicholson Mfg. Co. (1977) 18 Cal. 3d 932, 934, 939 n.1, 136 Cal. Rptr. 299, 559 P.2d 624]* .

- Original complaint against employer based on respondeat superior; amendment added cause of action based on employer's negligence in continuing to employ negligent employee [*Grudt v. City of Los Angeles (1970) 2 Cal. 3d 575, 583-585, 86 Cal. Rptr. 465, 468 P.2d 825]* .

- First amended complaint for negligence in relation to construction accident in San Joaquin County; amendment to first amended complaint changed location to Napa County [*Idding v. North Bay Construction Co. (1995) 39 Cal. App. 4th 1111, 1113, 46 Cal. Rptr. 2d 149]* .

- Original complaint against vehicle operator; amendment added cause of action against manufacturer of vehicle who was substituted for a fictitiously named defendant [*Garrett v. Crown Coach Corp. (1968) 259 Cal. App. 2d 647, 651, 66 Cal. Rptr. 590]* .

Application of this basic principle in specific situations is addressed immediately below.

[2] Same Parties

[a] Changing Legal Theory

An amendment that does nothing more than express a change of legal theory underlying the original complaint is allowable, even if additional incidental facts are alleged. As long as the defendant's act for which the plaintiff seeks recovery is the same, and as long as the primary right which the plaintiff alleges to have been violated is the same, the amendment may be held to be based on the same general set of facts [*Grudt v. City of Los Angeles (1970) 2 Cal. 3d 575, 584, 86 Cal. Rptr. 465, 468 P.2d 825]* .

The amended complaint will be deemed filed as of the date of the original complaint if recovery is sought in both pleadings on the same general set of facts and if the defendant is not prejudiced by the late filing of the amended complaint. If the rights at issue in the amended complaint have been at issue, in one form or another, from the beginning of the litigation, both sets of pleadings should be deemed to arise out of the same general sets of facts [*Wilson v. Bittick (1965) 63 Cal. 2d 30, 37-39, 45 Cal. Rptr.31, 403 P.2d 159* (amended complaint, alleging trespass over wider area than original complaint alleged, held to relate back to original complaint)].

[b] Adding Facts

When there is no attempt to state a new cause of action in an amended complaint and the purpose of the amendment is merely to add matters essential to make the original cause of action complete, the amendment relates back to the time of the commencement of the action even if the amendment is made after the period of limitation has expired [*Stockwell v. McAlvay (1937) 10 Cal. 2d 368, 375, 74 P.2d 504]* .

[c] Adding Damages

An amended complaint alleging special damages not mentioned in the original complaint may relate back to the original complaint as long as the special damages are the result of the injury alleged in the original complaint [*Walton v. Guinn (1986) 187 Cal. App. 3d 1354, 1362, 232 Cal. Rptr. 451]* .

[d] Changing Caption or Prayer

An amendment in which the only changes of substance are in the caption or the prayer does not state a new cause of action. The subject matter of an action and the issues involved are determinable from the facts pleaded, rather than from the title or the prayer [*Coffelt v. Coffelt (1964) 229 Cal. App. 2d 659, 665, 40 Cal. Rptr. 513]* .

Thus, an amendment of the complaint for the purpose of changing the relief prayed for has no effect on whether the complaint was originally filed within the period of limitation, if it does not state a new cause of action or bring in new parties [*Kent v. San Francisco Sav. Union (1900) 130 Cal. 401, 406, 62 P. 620]* .

[3] New Plaintiff

[a] Correction of Technical Defect

When leave is sought to substitute a new plaintiff based on a technical defect in the plaintiff's status, such as an honest mistake in the naming of the party, courts will generally allow an amendment; however, courts will not allow an amendment that interjects a new party into the litigation for the first time under the guise of a misnomer [*compare California Air Resources Bd. v. Hart (1993) 21 Cal. App. 4th 289, 301, 26 Cal. Rptr. 2d 153* (amendment to name State of California as plaintiff appropriate as technical amendment not affecting nature of the action) *with Diliberti v. Stage Call Corp. (1992) 4 Cal. App. 4th 1468, 1471, 6 Cal. Rptr. 2d 563* (no substitution of a passenger for driver as plaintiff when original complaint did not mention existence of passenger); *see also Cloud v. NorthropGrumman Corp. (1998) 67 Cal. App. 4th 995, 1000, 1004-1008, 1011, 79 Cal. Rptr. 2d 544* (leave to amend to either substitute as plaintiff real party in interest, the bankruptcy trustee, or to obtain trustee's abandonment, did not change substantive cause of action and should have been granted; change one of form rather than substance)].

Whether an amendment to the complaint to change a party's name may relate back to avoid the statute of limitations depends on whether the nature of the action is substantially changed; it does not depend on whether the parties are technically or substantially changed [*see Cloud v. Northrop Grumman Corp. (1998) 67 Cal. App. 4th 995, 1000, 1006-1008, 1011, 79 Cal. Rptr. 2d 544* ; *California Air Resources Bd. v. Hart (1993) 21 Cal. App. 4th 289, 300, 26 Cal. Rptr. 2d 153]* .

For discussion of amending pleadings to correct an error in a party's name, see *Ch. 21, Amended Pleadings, § 21.13[1][a]*.

[b] Alleging Different Legal Theory

When a new plaintiff, joining in a suit brought before the statute of limitations has run against the original plaintiff, seeks to enforce an independent right, the amended pleading does not relate back [*Parker v. Superior Court (1985) 175 Cal. App. 3d 1082, 1088-1091, 223 Cal. Rptr. 292* (survival action of decedent under former *Prob. Code § 573* (*now see Code Civ. Proc. § 377.10 et seq.*) seeks to enforce independent right of independent entity, the estate, and is not the same as wrongful death action pursuant to former *Code Civ. Proc. § 377* (*now see Code Civ. Proc. § 377.60 et seq.*), and cannot relate back when limitation period has run); *Dominguez v. City of Alhambra (1981) 118 Cal. App. 3d 237, 243, 173 Cal. Rptr. 345* (widow who had timely filed wrongful death action in her capacity as spouse's heir could not, in her capacity as administrator of his estate, add cause of action for injuries spouse sustained before his death when that limitations period had expired); *Bartalo v. Superior Court (1975) 51 Cal. App. 3d 526, 533, 124 Cal. Rptr. 370* (husband unable to add loss of consortium cause of action after expiration of period of limitation to timely brought personal injury case of wife)].

[4] New Defendant

[a] Substituting True Name for Fictitiously Named Defendant

[i] Generally Avoids Statute of Limitations

A party sued by a fictitious name and later brought into the proceeding by an amendment substituting his or her true name for the fictitious name is considered a party to the proceeding from its commencement for the purposes of the statute of limitations [*Austin v. Massachusetts Bonding & Ins. Co. (1961) 56 Cal. 2d 596, 600, 15 Cal. Rptr. 817*]. An amended pleading may rest on a different legal theory and state a different cause of action, even against a defendant not named in the original complaint, and still "relate back" to the time the original complaint was filed if the plaintiff seeks recovery for the same accident and the same injuries. Reflecting a policy decision in favor of deciding cases on their merits, courts have gradually broadened the parties' right to amend a pleading without incurring the bar of the statute of limitations [*Smeltzley v. Nicholson Mfg. Co., (1977) 18 Cal. 3d 932, 934-940, 136 Cal. Rptr. 269, 559 P.2d 624]* . For example, an amended pleading relates back if it seeks to bring in a defendant who is in the chain of causation of the original pleading, even if the particular facts concerning the new defendant were not set forth in the original pleading [*Olson v. Volkswagen of America (1988) 201 Cal. App. 3d 1437, 1442-1443, 247 Cal. Rptr. 719* (amendment related back when original complaint was against driver of motor vehicle and manufacturers of components of automobile, and amended complaint added causes of action against manufacturer of automobile on warranty and products liability theories)].

The new defendant needs no previously established relationship with the original defendant in order for the amended complaint to relate back to the original complaint. For example, an amended complaint substituting a neighboring tavern for Doe defendant and alleging negligence in continuing to serve alcohol to an obviously intoxicated, armed person was held to relate back to the date of the original wrongful death complaint alleging that owners of a different tavern failed to warn patrons of risk created by assailant's presence [*see* *Barnes v. Wilson (1974) 40 Cal. App. 3d 199, 202-205, 114 Cal. Rptr. 839]* . However, unless the original complaint set forth or attempted to set forth some cause of action against the fictitiously named defendant, the amended pleading will not relate back even if a plaintiff has met the other requirements of Doe pleading [*Winding Creek v. McGlashan (1996) 44 Cal. App. 4th 933, 940-941, 52 Cal. Rptr. 2d 236* (original complaint must allege Doe defendants were in some way responsible for acts of which plaintiff complains; allegations in complaint satisfied requirement; charging allegations satisfying requirement discussed)].

For further discussion of relation back of amended pleadings, see *[1], above*.

[ii] Ignorance of True Name Requirement

For an amendment substituting the true name of a defendant to relate back to the original date of filing, the plaintiff must actually be ignorant of the identity of the fictitiously named defendant at the time that the complaint is filed. Ignorance of identity has not been interpreted literally. Ignorance includes a situation in which the plaintiff knew the identity of the person but was ignorant of the facts constituting a cause of action against that person. It has also been extended to a situation in which the plaintiff knew the identity of the person and all of the facts, but was unaware that the law provided a cause of action against the person and discovered that right by reason of decisions rendered after the commencement of the action [*Hazel v. Hewlett (1988) 201 Cal. App. 3d 1458, 1464, 247 Cal. Rptr. 723]* . *Code Civ. Proc. § 474* is to be liberally construed [*General Motors Corp. v. Superior Court (1996) 48 Cal. App. 4th 580, 593, 55 Cal. Rptr. 2d 871]* .

The ignorance must be real and not feigned. A plaintiff must actually be ignorant of the crucial information at the time that the complaint was filed. Unless the evidence demonstrates that the plaintiff willfully or intentionally misused *Code Civ. Proc. § 474*, a plaintiff's failure to inquire as to the defendant's name or identity will not bar the statute's application [*see* *Balon v. Drost (1993) 20 Cal. App. 4th 483, 487-490, 25 Cal. Rptr. 2d 12* (noting that the *Supreme Court, in Irving v. Carpentier (1886) 70 Cal. 23, 26, 11 P. 391* , has expressly concluded that *Code Civ. Proc. § 474* imposes no duty of inquiry on the plaintiff); *see also* *General Motors Corp. v. Superior Court (1996) 48 Cal. App. 4th 580, 596, 55 Cal. Rptr. 2d 871* (*Section 474* does not impose on plaintiff duty to go in search of facts plaintiff does not have at time plaintiff files original pleading)].

In Balon, a plaintiff who forgot the name of a known defendant before filing the complaint was not precluded from adding the defendant under *Code Civ. Proc. § 464* after the statute of limitations expired even though the defendant's name could have been easily ascertained from a public accident report. The forgetfulness was deemed a nonfeigned ignorance of the defendant's identity. The court noted that a plaintiff may act unreasonably in failing to ascertain a defendant's name and still claim the benefit of *Code Civ. Proc. § 474* [*Balon v. Drost (1993) 20 Cal. App. 4th 483, 488-490, 25 Cal. Rptr. 2d 12 (First Dist., Div. Two)]* . There is contrary authority, however, that has rejected Balon and held that if a plaintiff knows the defendant's identity and then forgets it at the time the complaint is filed, in order to use the *Code Civ. Proc. § 474* relation back doctrine to avoid the bar of the statute of limitations the plaintiff must have at least reviewed readily available information likely to refresh his or her memory. If the defendant cannot be identified from readily available information Section 474 is available. If the defendant can be identified from the readily available information Section 474 is unavailable [*Woo v. Superior Court (1999) 75 Cal. App. 4th 169, 179-180, 89 Cal. Rptr. 2d 20 (Fourth Dist., Div. One)]* .

The ignorance required by *Code Civ. Proc. § 474* is ignorance of facts giving rise to a cause of action. The pivotal question is, "did plaintiff know facts?" not "did plaintiff know or believe that plaintiff had a cause of action based on those facts?" [*General Motors Corp. v. Superior Court (1996) 48 Cal. App. 4th 580, 594, 55 Cal. Rptr. 2d 871* ; *Hazel v. Hewlett (1988) 201 Cal. App. 3d 1458, 1464-1465]* . The question of the plaintiff's good faith in this regard is for the determination of the trial court [*Hazel v. Hewlett (1988) 201 Cal. App. 3d 1458, 1464-1465]* .

While it is true plaintiff's ignorance of the defendant's name must be genuine (in good faith) and not feigned and that a plaintiff need not be aware of each and every detail concerning a person's involvement before the plaintiff loses the element of plaintiff's ignorance, it is equally true that the plaintiff does not relinquish plaintiff's rights under Section 474 simply because the plaintiff has a suspicion of wrongdoing arising from one or more facts that the plaintiff does not know. To defeat a claim of ignorance, it must be shown that the plaintiff had actual knowledge of the basic facts. The distinction between suspicion that some cause of action could exist and a factual basis to believe a cause exists is critical to the operation of Section 474. The distinction turns on when the plaintiff has knowledge of sufficient facts to cause a reasonable person to believe liability is probable [*General Motors Corp. v. Superior Court (1996) 48 Cal. App. 4th 580, 594-595, 55 Cal. Rptr. 2d 871* ; *see Fuller v. Tucker (2000) 84 Cal. App. 4th 1163, 1172, 101 Cal. Rptr. 2d 776* (trial court improperly applied duty to investigate standard that applies to determine accrual of a cause of action rather than standard articulated in *General Motors Corp.*)].

If the plaintiff is aware of the facts and defendant's name, an amended complaint correcting a party's name will not relate back to avoid the statute of limitations [*see Stephens v. Berry (1967) 249 Cal. App. 2d 474, 479, 57 Cal. Rptr. 505* (no substitution of person who rear-ended plaintiff's car for defendant plaintiff's car rear-ended)]. For example, when the plaintiff has the identity of the driver who rear-ended plaintiff's vehicle and of the driver plaintiff's vehicle was pushed into and mistakenly names as the defendant the driver of the car he was pushed into, *section 474* cannot be used to substitute the correct driver as defendant because plaintiff lacked the necessary ignorance [*Stephens v. Berry (1967) 249 Cal. App. 2d 474, 479, 57 Cal. Rptr. 505* (also holding the error was not correctable a mere misnomer)].

For further discussion, see Ch. 20, *Allegations Commonly Used* .

[iii] Effect of Prejudice From Undue Delay

A defendant who is brought into an action by amendment substituting a real for a fictitious name may avoid a relation back by showing actual prejudice resulting from unreasonable delay in filing the amendment. However, a lack of prejudice alone does not allow the addition of a new defendant by amendment after the statute of limitations has run if the plaintiff was not truly ignorant of the crucial information at the time the original complaint was filed [*Hazel v. Hewlett (1988) 201 Cal. App. 3d 1458, 1466, 247 Cal. Rptr. 723]* .

[iv] Procedure

When amending a pleading stating a different cause of action against a defendant not originally named, the plaintiff should substitute a defendant's true name for a fictitious one alleged in the original pleading, a practice long permitted despite the expiration of the limitations period before the amended pleading is filed [*see Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 599-603, 15 Cal. Rptr. 817, 364 P.2d 681* ; *see Code Civ. Proc. § 474*].

If a new defendant is added by an amended complaint, but is not served with the original complaint as a fictitiously named defendant and substituted in place of a fictitiously named defendant, the amended pleading as to that defendant does not relate back to the filing of the original complaint [*see Liberty Transport, Inc. v. Harry W. Gorst Co. (1991) 229 Cal. App. 3d 417, 428, 280 Cal. Rptr. 159* (disapproved on other grounds, *Adams v. Murakami (1991) 54 Cal. 3d 105, 115-116, 284 Cal. Rptr. 318, 813 P.2d 1348*)]. However, courts have considered noncompliance with the party substitution requirements of *Code Civ. Proc. § 474* as a procedural defect that could be cured and have been lenient in permitting rectification of defect. Thus, when plaintiff's amended complaint adds a defendant without identifying the defendant as a substitute for a previously named fictitious defendant and summons is served on the defendant identified as being sued as an individual defendant, not as a defendant previously sued under a fictitious name, the noncompliance with *Code Civ. Proc. § 474* procedural requirements may not foreclose consideration of plaintiff's relation back contention [*Woo v. Superior Court (1999) 75 Cal. App. 4th 169, 176-177, 89 Cal. Rptr. 2d 20* (noting that in other cases court may require strict compliance and cautioning counsel to follow correct procedure for substituting named defendant for fictitious Doe defendant)].

For forms of amended complaint substituting a defendant for a fictitious defendant, see *Ch. 21, Amended Pleadings, § 21.65* et seq.

[b] Estoppel of Defendant From Raising Bar of Limitations Period

The equitable estoppel doctrine applies and an amendment for the purpose of avoiding a bar by the statute of limitations is allowed if the plaintiff establishes that the defendant was aware of the limitation period, that he or she intended that the plaintiff should rely on his or her conduct or statements, that the plaintiff was ignorant of the true facts, and that the plaintiff relied on the defendant's conduct or statements to his or her detriment [*Kleinecke v. Montecito Water Dist. (1983) 147 Cal. App. 3d 240, 245-247, 195 Cal. Rptr. 58]* .

ILLUSTRATION:

Estoppel from Raising Bar of Limitations Period. Plaintiff serves a wrongly named defendant with a complaint. The attorney for the wrongly named defendant also represents the true defendant. After consulting with the true defendant and determining not to inform plaintiff of the error, the attorney responds to the complaint with an answer on behalf of the wrongly named defendant, thus lulling the plaintiff into believing that the proper defendant had been served. The plaintiff learns of the mistake after the statute of limitations had passed. May plaintiff now amend his complaint to include the proper defendant? Yes. The defendant should be estopped from asserting the statute of limitations. Defense counsel filed an answer which served to divert plaintiff counsel's attention away from the statute of limitation and was given effective notice of the action before the passing of the statute of limitations [*see Kleinecke v. Montecito Water Dist. (1983) 147 Cal. App. 3d 240, 245-47, 195 Cal. Rptr. 58]* .

For further discussion, see *§ 345.22, above*, and for a form of allegation that defendant is estopped from raising the bar of the statute of limitations and additional discussion, see *§ 345.81*.

[c] Successor of Party

As a general rule, the statute of limitations provides no defense to the successor of a party timely sued [*Hutnick v.*

United States Fidelity & Guaranty Co. (1988) 47 Cal. 3d 456, 467, 253 Cal. Rptr. 236, 763 P.2d 1326 (citing former *Code Civ. Proc. § 385* (*now see Code Civ. Proc. §§ 368.5, 375*); *Code Civ. Proc. § 1908*)]. Thus when an individual defendant dies or becomes incompetent, title to property at issue is transferred, or a corporate defendant is merged or dissolved, the substitution of a representative or successor in place of the named defendant may not be challenged on the ground that the statute of limitations has expired as to the representative or successor [*Hutnick v. United States Fidelity & Guaranty Co. (1988) 47 Cal. 3d 456, 467, 253 Cal. Rptr. 236, 763 P.2d 1326* ; for discussion, *see Ch. 21, Amended and Supplemental Pleadings, § 21.27*].

Similarly, the surety on a mechanics' lien release bond who is joined by amendment as a party defendant to an action to foreclose the lien may not assert the statute of limitations (*Civ. Code § 3144.5*) as a defense to an action to foreclose on the bond when the action to foreclose on the property subject to the lien was timely filed against the principal on the bond. Although there is no direct substitution of parties, the situation is similar in that the release bond was substituted in place of the liened property after the cause of action accrued, and the new party's liability is premised on the substitution [*Hutnick v. United States Fidelity & Guaranty Co. (1988) 47 Cal. 3d 456, 460, 466-467, 253 Cal. Rptr. 236, 763 P.2d 1326* ; for discussion of mechanics' liens, *see* Ch. 361, *Mechanics' Liens*].

[5] Curing Variance of Proof

An amendment for the purpose of curing a variance between allegations and proof, if the cause of action is not changed, has no effect on whether the action was originally filed within the period of limitation. As to that issue, such an amendment relates back to the time when the complaint was originally filed [*see Smullen v. Phillips (1891) 92 Cal. 408, 411, 28 P. 442]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsRelation BackGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsProcedureStatutes of LimitationsAccrual of ActionsContinuous TortsTortsProcedureStatutes of LimitationsAccrual of ActionsDiscovery Rule

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§ 345.26 Supplemental Complaints

The relation back doctrine can apply to supplemental, as well as amended complaints. Whether a supplemental complaint may encompass the entire period following commencement of suit depends on the nature of the claims raised in the supplemental pleading. If the claims are unrelated to those alleged in the initial complaint or rely on conduct or events different from those involved in the original action, the statute of limitations should be applied. If however, the original pleading gave notice that the alleged wrongful conduct was of a continuing nature, supplemental pleadings addressed to the same conduct should not encounter statute of limitation questions [*Bendix Corp. v. City of Los Angeles (1984) 150 Cal. App. 3d 921, 925-926, 198 Cal. Rptr. 370* (disagreeing with *ITT Gilfillan, Inc. v. City of Los Angeles (1982) 136 Cal. App. 3d 581, 589, 185 Cal. Rptr. 848* to the extent that case appears to have concluded that supplemental and amended pleadings must always be accorded different treatment regardless of the circumstances of the individual case)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsRelation BackCivil ProcedurePleading & PracticePleadingsAmended PleadingsRelation BackCivil ProcedurePleading & PracticePleadingsSupplemental PleadingsGovernmentsLegislationStatutes of LimitationsGeneral Overview

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§ 345.27 New Action After Termination of Previous Action

[1] Reversal of Judgment for Plaintiff

If an action is commenced within the time prescribed therefor and a judgment therein for the plaintiff is reversed on appeal other than on the merits, a new action may be commenced within one year after the reversal [*Code Civ. Proc. § 355*]. While the language of *Code Civ. Proc. § 355* is not so clear and definite as it might be, it must be construed as permitting a new action of any kind having as its objective the same relief as was obtained in the original action [*Kenney v. Parks (1902) 137 Cal. 527, 530, 70 P. 556* (construing statute before its 1992 amendment)].

The extended period provided in *Code Civ. Proc. § 355* can be used to save an action that was originally filed in another state, either when a judgment for the plaintiff was reversed on appeal or when a diligent plaintiff was denied a judgment on the merits and a new action was thereafter begun in California within one year. This is true even though the period of limitation has expired under California law [*see Schneider v. Schimmels (1967) 256 Cal. App. 2d 366, 370, 64 Cal. Rptr. 273* (overruled on other grounds in *Wood v. Elling Corp. (1977) 20 Cal. 3d 353, 362 n.7, 142 Cal. Rptr. 696, 572 P.2d 755*)].

Code Civ. Proc. § 355 does not apply if judgment for the plaintiff is reversed on appeal and the cause is remanded for a new trial. That is, if on the retrial the plaintiff loses and the period of limitation on his or her cause of action has run, but less than one year has elapsed since the appellate court reversed and remanded, the plaintiff nevertheless has no right under *Code Civ. Proc. § 355* to commence a new action [*see Watterson v. Owens River Canal Co. (1922) 190 Cal. 88, 95, 210 P. 625]* . The rationale is apparently that the new trial is tantamount to obtaining the benefits of *Code Civ. Proc. § 355* by commencing a new action. If the rule were otherwise, then a plaintiff might have two chances to obtain a verdict where in fairness he should have only one. For a form alleging circumstances tolling the period of limitation on this basis, see *§ 345.79*.

[2] Involuntary Dismissal

Code Civ. Proc. § 355 [*see* discussion under *[1], above*] protects a plaintiff who has mistaken his or her remedy if he or she was awarded a judgment in the first instance and then was defeated on appeal. The section is designed to ensure to

the diligent suitor the right to have a hearing in court, as often as is necessary, until he or she reaches a judgment on the merits. The protection of that section should extend, at least, to a plaintiff who has not mistaken his or her remedy, but who was not allowed, through error of the trial court, to proceed to a trial on the merits [*compare* former *Code Civ. Proc. § 355 with Code Civ. Proc. § 355* as amended by 1992 legislation (amendment made section applicable if judgment on appeal is reversed "other than on the merits"); *see Bollinger v. National Fire Ins. Co. (1944) 25 Cal. 2d 399, 409-410, 411, 154 P.2d 399* (construing statute before its 1992 amendment when section, if construed literally, would have applied in event of any reversal on appeal)]. However, if the plaintiff suffers an involuntary dismissal because of a lack of prosecution and there was no error in granting the motion to dismiss, the failure to secure a trial on the merits will likely be seen as a result of the plaintiff's, or his or her attorney's, own neglect. In such a case, if the period of limitation has expired before an action is again commenced, the new action is barred [*see Tannhauser v. Adams (1948) 31 Cal. 2d 169, 177-178, 187 P.2d 716* ; *Neff v. New York Life Ins. Co. (1947) 30 Cal. 2d 165, 174, 180 P.2d 900* ; *Stuckman v. Woodhull (1959) 170 Cal. App. 2d 424, 426-427, 338 P.2d 934]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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A. Statute of Limitations

30-345 California Forms of Pleading and Practice--Annotated § 345.28

§ 345.28 Waiving Bar of Statute

[1] By Private Agreement

[a] Predispute Agreement

There is no distinction to be made on the ground of public policy between the right of a party to waive the plea of bar of a statute of limitations as a defense to an action [*see Code Civ. Proc. § 360.5*], and his or her right to waive, by private agreement before the fact, a portion of the time granted by the applicable statute for commencement of an action [*Tebbets v. Fidelity & Cas. Co. (1909) 155 Cal. 137, 139, 99 P. 501]* . Hence, the parties to a contract may stipulate in the contract for a period of limitation shorter than that fixed by the applicable statute; this does not violate public policy if the period fixed is not so unreasonable as to show imposition or undue advantage in some way [*Beeson v. Schloss (1920) 183 Cal. 618, 622, 192 P. 292* ; *see Hambrecht & Quist Venture Partners v. American Medical Internat., Inc. (1995) 38 Cal. App. 4th 1532, 1547-1548, 1549 n.17, 46 Cal. Rptr. 2d 33]* .

The question whether an agreed upon period of limitation is in itself unreasonable is a question of law. Generally, that question must be decided as of the date when the contract was made. Financial considerations usually are irrelevant, and the fact that the agreed-on period of limitation operates as to the claims of one party but not of the other does not make the period unreasonable. However, unreasonableness may be shown by the fact that the time when the agreed upon period begins is fluctuating, vague, and indefinite. If the party in whose favor the agreed upon period operates is engaged in a business or an activity of a quasi-public nature, the agreement as to the shortened period will not be viewed in the same light as an agreement between private parties in general [*Capehart v. Heady (1962) 206 Cal. App. 2d 386, 388-391, 23 Cal. Rptr. 851]* .

[b] Construction of Agreements

Contractual stipulations limiting the right to sue to a period shorter than that granted by a statute are looked on with disfavor and should be strictly construed, although this rule cannot be used to destroy the effect of the words of the contract itself. However, this rule is a general rule of law which should not be used to destroy the effect of a more specific rule of law that applies to the case [*Sanders v. American Casualty Co. (1969) 269 Cal. App. 2d 306, 309, 74*

Cal. Rptr. 634] . A contractual stipulation to limit a statute of limitations must be clear and explicit, and is to be strictly construed against the party invoking the provision [*Western Filter Corp. v. Argan, Inc. (9th Cir. 2008) 540 F.3d 947, 2008 U.S. App. LEXIS 18147*].

[c] Formal Requirements Where Defense Barred

A waiver designed to bar a defense to an action which is based on the fact that the action was not commenced within the time limitations prescribed by *Code Civ. Proc. § 312 et seq.* is not valid unless it is in writing and is signed by the person obligated [*Code Civ Proc. § 360.5*]. A waiver of statute of limitations may also be valid if signed by the authorized agent of the person obligated [*Carlton Browne & Co. v. Superior Court (1989) 210 Cal. App. 3d 35, 46, 258 Cal. Rptr. 118* (written waiver signed by corporate defendant's attorney-agent)].

[d] Extension of Limitation Period

Similarly, parties to a contract may agree to extend the statute of limitations, although with some limitations [*Hambrecht & Quist Venture Partners v. American Medical Internat., Inc. (1995) 38 Cal. App. 4th 1532, 1547-1548, 1549 n.17, 46 Cal. Rptr. 2d 33* ; *cf. Com. Code § 2725(1)* (four-year limitation period for breach of a sales contract cannot be extended by agreement, but can be shortened to not less than one year)].

Older cases have held that private agreements regarding a limitation period may be upheld even where the effect of the agreement is that a party waives forever his right to plead the bar of the applicable statute [*see* Brownrigg v. deFrees *(1925) 196 Cal. 534, 546, 238 P. 714]* . However, since the 1951 enactment of *Code Civ. Proc. § 360.5*, it is not possible to effect a "perpetual waiver" unless it is done in successive periods of four years each.

Section 360.5 provides in part that no waiver executed prior to the expiration of the time limited for the commencement of the action by *Code Civ. Proc. § 312 et seq.* may be effective for a period exceeding four years from the date of expiration of the statutory period, and no waiver executed after the expiration of such time may be effective for a period exceeding four years from the date thereof; however, any such waiver may be renewed for a further period of not exceeding four years from the expiration of the immediately preceding waiver. Such waivers may be made successively [*Code Civ. Proc. § 360.5*; *see* *Carlton Browne & Co. v. Superior Court (1989) 210 Cal. App. 3d 35, 40-46, 258 Cal. Rptr. 118* (legislative intent discussed); *but see Com. Code § 2725(1)* which provides that four-year limitation period for breach of a sales contract cannot be extended by agreement)].

[e] Indirect Effect on Limitation

A private agreement may have an indirect effect on the period of limitation, either lengthening or shortening it. For example, if the right of a party to a contract to bring an action based on it depends on his (1) demanding that some other person, such as a trustee, bring an action, and (2) waiting a specified time until this demand has been complied with or disregarded, then the time elapsing between the demand (assuming it is made before the period of limitation has expired) and the failure to comply with it should not be part of the period of limitation [*see* *California Safe Deposit & Trust Co. v. Sierra Valleys Ry. Co. (1910) 158 Cal. 690, 697, 112 P. 274]* .

[f] Between Parties to Existing Controversy

Parties to a controversy may enter into an agreement to forego the statute of limitation for a definite period, and such an agreement may operate as an estoppel to a plea of bar of the statute [*Kemper v. Industrial Acci. Com. (1918) 177 Cal. 618, 620, 171 P. 426]* .

[g] Effect on Persons Other Than Parties to Agreement

Although parties may contract to extend the limitations period, such an agreement has no effect on other potential

parties with whom no privity exists [*FNB Mortgage Corp. v. Pacific General Group (1999) 76 Cal. App. 4th 1116, 1121, 1129-1131, 1135-1136, 90 Cal. Rptr. 2d 841* (defendant's tolling agreement with plaintiff did not extend defendant's time to file cross complaint against developer for indemnity)].

A person who is not a party to the agreement that provides a special limitation period can nevertheless be bound by it, even if he was not aware of the existence or contents of the agreement until after the agreed-upon period expired. An example is a third-party beneficiary, who must take the contract as he finds it if he wants to have benefits under it [*see Sanders v. American Casualty Co. (1969) 269 Cal. App. 2d 306, 308-310, 74 Cal. Rptr. 634* ; *see also Kaichen's Metal Mart, Inc. v. Ferro Cast Co. (1995) 33 Cal. App. 4th 8, 14-16, 39 Cal. Rptr. 2d 233* (agreement to extend statute of limitations made between senior secured lienholder creditor and its debtor before limitation period had expired in which debtor acknowledged debt, agreed to pay it and waived statute of limitations and senior secured lienholder agreed to forebear from instituting suit against debtor binding on junior lienholder; *Code Civ. Proc. §§ 360, 360.5* construed)].

[2] By Conduct

[a] Writing Not Required; Silence

It is not necessary in all cases that a waiver of the defense of bar of a statute of limitation should be in writing. The conduct, or even the silence, of a party may, under some circumstances, create an equitable estoppel (in other words, prove the fact of a waiver) which would deprive that party of his right to plead the bar of the applicable statute [*Atlas Fin. Corp. v. Kenny (1945) 68 Cal. App. 2d 504, 517, 157 P.2d 401]* .

[b] Inconsistent Action

A defendant who, before suit was begun, acted inconsistently with a claim of bar of a statute of limitation may be held to have waived his right to plead that defense [*see Lerner v. Los Angeles City Board of Education (1963) 59 Cal. 2d 382, 396, 29 Cal. Rptr. 657, 380 P.2d 97* (action of defendant board in restoring plaintiff's teaching credential without raising defense of statute of limitation as waiver)]. However, since waiver implies a voluntary and informed relinquishment of a right, such a case probably involves not waiver but estoppel [*see Church v. Public Utilities Com. (1959) 51 Cal. 2d 399, 401, 333 P.2d 321* ; *Isaacson v. Oakland (1968) 263 Cal. App. 2d 414, 419, 69 Cal. Rptr. 379]* .

[3] By Failure to Plead

The defense of the statute of limitations is typically waived by failure to plead, or to adequately plead, the defense [*see Hall v. Chamberlain (1948) 31 Cal. 2d 673, 679-680, 192 P.2d 759* ; *Hambrecht & Quist Venture Partners v. American Medical Internat., Inc. (1995) 38 Cal. App. 4th 1532, 1548, 46 Cal. Rptr. 2d 33* (once sued, defendant who does not timely raise limitations defense waives defense no matter how long plaintiff has delayed); *Stalberg v. Western Title Ins. Co. (1991) 230 Cal. App. 3d 1223, 1232* (statute of limitations defense not raised in trial court waived and not subject to being raised on appeal)].

[4] Persons in Privity

As long as there is no conflict of interest between persons in privity, a waiver by (and probably, also, an estoppel against) one of them with respect to the defense of bar of a statute of limitations is binding on the other or others [*Lerner v. Los Angeles City Board of Education (1963) 59 Cal. 2d 382, 397 ns.8, 9, 29 Cal. Rptr. 657, 380 P.2d 97]* .

In applying this rule, privity does not depend on whether the parties constitute independent legal entities; for example, successive owners of property may assume a relationship of privity although they are independent legal persons. A determination of whether privity exists requires an examination of the circumstances of each case. In general, however, privity exists between persons who are so identified in interest with each other that each represents the same legal right.

For example, agents of the same government are in privity with each other since they represent not their own rights but the right of the government [*see Lerner v. Los Angeles City Board of Education (1963) 59 Cal. 2d 382, 398 n.10, 29 Cal. Rptr. 657, 380 P.2d 97]* .

A person's waiver of the right to plead the defense of bar of a statute of limitations, made in an agreement, may remain effective after his or her death and can defeat the attempt of the personal representative of his or her estate to raise the defense in an action based on a rejected claim against the estate arising out of the agreement [*see* Brownrigg v. deFrees *(1925) 196 Cal. 534, 546, 238 P. 714* (action by decedent's handicapped daughter or enforcement of support obligations under agreement, under which decedent had made no payments for many years, and in which decedent agreed to waive defense of bar of statute of limitations in action brought within 99 years)]. This rule is limited by *Code Civ. Proc. § 360.5*, which appears to limit the effectiveness of a waiver to four years beyond the expiration of the statutory period of limitation [*see discussion under § 345.28[1][d], above*].

[5] Personal Representative of Decedent's Estate Prohibited

The personal representative of a decedent's estate has no authority to waive the defense of bar of a statute of limitations against an action based on a claim against the estate [*Bryson v. Hill (1930) 107 Cal. App. 158, 160, 290 P. 52]* . It appears that because the defense of bar of a statute of limitations is a "personal privilege" of the defendant, a defendant in a representative capacity generally has no authority to waive the defense with respect to actions involving the claims of third persons against the rights of those whom the representative represents [*see Radar v. Rogers (1957) 49 Cal. 2d 243, 253, 317 P.2d 17* (dissenting opinion)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsEquitable EstoppelGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLegislationStatutes of LimitationsWaivers

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§ 345.29 Relief From Bar of Statute Based on Extrinsic Mistake Caused by Court Clerk

Under certain circumstances, representations made by a court clerk may be construed as extrinsic mistake giving rise to equitable relief so as to preclude application of a statute of limitation [*see Mirvis v. Crowder (1995) 32 Cal. App. 4th 1684, 1686-1688, 38 Cal. Rptr. 2d 644]* . "Extrinsic mistake" is a term broadly applied when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits [*Rappleyea v. Campbell (1994) 8 Cal. 4th 975, 981, 35 Cal. Rptr. 2d 669, 884 P.2d 126* (relief granted from default and default judgment when clerk had given incorrect information to defendants regarding filing fee)].

ILLUSTRATION:

Clerk's Representation That Complaint Will Be Filed Despite Error in Filing Fee. Plaintiff's attorney sends a summons and complaint together with the filing fee by two-day priority mail to the court for filing. On receipt, the court clerk telephones a secretary at plaintiff's attorney's office and assures him that the complaint will be filed on the date received, November 17, but that the balance of the filing fee, which had recently been increased, is owing. Plaintiff's attorney immediately prepares and sends a check for the balance. The statute of limitations runs on November 19. The complaint is stamped filed November 23. Is the action barred by the statute of limitations? No. The clerk's representation that the complaint would be timely filed despite the incorrect filing fee constituted extrinsic mistake entitling plaintiff to relief. The complaint that was otherwise filed late was deemed to have been filed timely, and thus not barred by the statute of limitations [*Mirvis v. Crowder (1995) 32 Cal. App. 4th 1684, 1686-1688, 38 Cal. Rptr. 2d 644* (personal injury action); *see Rappleyea v. Campbell (1994) 8 Cal. 4th 975, 35 Cal. Rptr. 2d 669, 884 P.2d 126* (default judgment and entry of default vacated; superior court clerk's misinformation to out of state defendants who represented themselves concerning correct filing fee for their answer constituted extrinsic mistake giving rise to equitable relief)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsClerks of CourtGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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[Reserved]

§§ 345.30[Reserved]

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B. Laches

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§ 345.40 Nature of Laches

[1] Equitable Defense

Laches is a defense to a suit in equity. Under the doctrine of laches the plaintiff will be refused equitable relief because of his or her delay in bringing suit, even though the suit is commenced within the statutory period of limitation [*Trail v. Firth (1921) 186 Cal. 68, 69, 198 P 1033* ; *see In re Marriage of Dancy (2000) 82 Cal. App. 4th 1142, 1150, 98 Cal. Rptr. 2d 775]* . However, whether or not laches exists, an action not brought within the statutory period is barred unless it falls within some exception within the statute or the defense of he statute of limitations is not open to the defendant because of waiver or estoppel [*Trail v. Firth (1921) 186 Cal. 68, 69-70, 198 P. 1033]* .

The defense of laches is a creature of equity. It is not a defense at law. In an action at law, or where the plaintiff asserts no equitable rights, the statute of limitation rather than the doctrine of laches governs [*see* Brownrigg v. deFrees *(1925) 196 Cal. 534, 539, 238 P. 714* ; *see also United States Capital Corp. v. Nickelberry (1981) 120 Cal. App. 3d 864, 867-868, 174 Cal. Rptr. 814* (defense of laches not available in action on judgment, which is action at law); *cf. In re Marriage of Dancy (2000) 82 Cal. App. 4th 1142, 1148-1149, 1156, 1159 n.8, 98 Cal. Rptr. 2d 775* (although child support is legal right, actions to determine arrearages are equitable proceedings to which laches may be a defense)].

It is unsettled in California whether the equitable defense of laches applies to an action for money had and received. Although such an action is one at law it is governed by equitable principals [*Creditors Collection Service v. Castaldi (1995) 38 Cal. App. 4th 1039, 1044 n.4, 45 Cal. Rptr. 2d 511]* .

The doctrine of laches is not designed to punish the plaintiff; rather, it is meant to prevent unwarranted injustice [*see Brewer v. Simpson (1960) 53 Cal. 2d 567, 594, 2 Cal. Rptr. 609, 349 P.2d 289* (restating rule)]. Unless a litigant can show that he or she acted with reasonable diligence in the assertion of his or her equitable rights, a court of equity "will turn a deaf ear to his plea" [*Williams v. Stillwell (1933) 217 Cal. 487, 490, 19 P.2d 773]* .

[2] Laches Is Question of Fact

Laches is a question of fact, and it must be determined, on the evidence, by all of the circumstances of each particular

case [*see* *Wolpert v. Gripton (1931) 213 Cal. 474, 483, 2 P.2d 767* ; *In re Marriage of Plescia (1997) 59 Cal. App. 4th 252, 256, 69 Cal. Rptr. 2d 120]* .

There is no hard and fast rule, either as to the lapse of time or as to the circumstances, which will justify the application of the doctrine of laches [*see* *Wolpert v. Gripton (1931) 213 Cal. 474, 483, 2 P2d 767]* . Generally, existence of laches is question of fact to be determined by trial court in light of all the applicable circumstances and absent manifest injustice or a lack of substantial support in the evidence its determination will be sustained [*Board of Administration v. Wilson (1997) 52 Cal. App. 4th 1109, 1126-1127, 61 Cal. Rptr. 2d 207* (trial court's finding of no laches upheld on appeal); *see* *In re Marriage of Plescia (1997) 59 Cal. App. 4th 252, 256,69 Cal. Rptr. 2d 120* (palpable abuse of discretion standard; trial court's finding of laches upheld on appeal); *see also* *In re Marriage of Dancy (2000) 82 Cal. App. 4th 1142, 1148, 1159-1160, 98 Cal. Rptr. 2d 775* (palpable abuse of discretion standard; trial court's implied finding of no laches upheld)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 345.41 Elements of Laches

[1] Unreasonable Delay Plus Acquiescence or Prejudice

The defense of laches requires unreasonable delay plus either acquiescence in the act about which the plaintiff complains or prejudice to the defendant resulting from the delay [*Johnson v. City of Loma Linda (2000) 24 Cal. 4th 61, 68, 99 Cal. Rptr. 2d 316* ; *Board of Administration v. Wilson (1997) 52 Cal. App. 4th 1109, 1126, 61 Cal. Rptr. 2d 207* ; *see In re Marriage of Fogarty & Rasbeary (2000) 78 Cal. App. 4th 1353, 1359, 93 Cal. Rptr. 2d 653* ; *Vernon Fire Fighters Assn. v. City of Vernon (1986) 178 Cal. App. 3d 710, 719, 223 Cal. Rptr. 871]* .

Lapse of time less than the period of limitation does not in itself constitute the defense of laches [*see Conti v. Board of Civil Serv. Comm'rs (1969) 1 Cal. 3d 351, 359, 82 Cal. Rptr. 337, 461 P.2d 617* (restating rules and citing many earlier cases)]. Other circumstances besides acquiescence and lapse of time may be material (such as a change in the value or character of property involved in the action) [*Chapman v. Bank of California (1893) 97 Cal. 155, 159, 31 P. 896* ; *Stevenson v. Boyd (1908) 153 Cal. 630, 636, 96 P. 284]* .

In passing on the argument of laches, the court must look to the extent of prejudice to the opposing party, and to the reasonableness of the moving party's actions. These two factors are interrelated; the greater the prejudice, the more timely must be the relief sought [*see In re Marriage of Modnick (1983) 33 Cal. 3d 897, 909, 191 Cal. Rptr. 629, 663 P.2d 187]* .

Laches may not be pleaded, however, when the claimed prejudice is a result of the party's own wrongful actions [*Ateeq v. Najor (1993) 15 Cal. App. 4th 1351, 1359, 19 Cal. Rptr. 2d 320]* .

[2] Unreasonable Delay

[a] Case by Case Determination

There is no artificial rule as to the lapse of time that will justify the application of the doctrine of laches. Each case must be determined on the basis of its facts [*see Williams v. Marshall (1951) 37 Cal. 2d 445, 455, 235 P.2d 372* (restating

rule); *see, e.g., Johnson v. City of Loma Linda (2000) 24 Cal. 4th 61, 68-69, 99 Cal. Rptr. 2d 316* (unreasonable delay in connection with filing and pursuing petition for administrative mandate when limitation period specified in *Code Civ. Proc. § 1094.6* inapplicable)].

[b] Relationship to Statutes of Limitation

In determining whether a delay has been unreasonable, the court may use a statute of limitation as a guide [*see Vai v. Bank of America (1961) 56 Cal. 2d 329, 343, 15 Cal. Rptr. 71, 364 P.2d 247* ; *David Welch Co. v. Erskine & Tulley (1988) 203 Cal. App. 3d 884, 893, 250 Cal. Rptr. 339* ; *see also Robert F. Kennedy Medical Center v. Department of Health Services (1998) 61 Cal. App. 4th 1357, 1362, 72 Cal. Rptr. 2d 180* (statute of limitations period borrowed as measure of outer limit of reasonable delay in determining laches)].

Whether or not the statute of limitations should be borrowed as a guide to the application of laches depends on strength of analogy between the statute of limitations and the circumstances under which laches is sought to be imposed [*Brown v. State Personnel Bd. (1985) 166 Cal. App. 3d 1151, 1159-1160, 213 Cal. Rptr. 53* ; *see Fountain Valley Regional Hospital & Medical Center v. Bonta (1999) 75 Cal. App. 4th 316, 323-325, 89 Cal. Rptr. 2d 139* (recognition of analogous statute of limitations that was borrowed shifted burden of proof from party asserting doctrine of laches to party arguing against application of doctrine; *see discussion under § 345.41[3][b], below*)].

Laches may be successfully invoked, even though a relevant statute of limitations has not expired, because laches was the product of a different body of jurisprudence and has different requirements than a statute of limitations. Nothing more than the mere passage of time is required for the statute of limitations to bar an action at law. Mere passage of time alone, however, will never constitute a proper defense of laches. For laches to apply, the passage of time must be unreasonable, and it must have caused prejudice to the other party. Furthermore, since laches exists independently of a relevant statute of limitations, when a statute provides for absolutely no period of limitations, this does not mean that the statute provides for no laches defense. These two doctrines are fundamentally different, and the valid existence of one in no way inhibits or supports the valid existence of the other [*In re Marriage of Plescia (1997) 59 Cal. App. 4th 252, 259-260, 69 Cal. Rptr. 2d 120* ; *accord In re Marriage of Dancy (2000) 82 Cal. App. 4th 1142, 1150, 98 Cal. Rptr. 2d 775* ; *see also In re Marriage of Fogarty & Rasbeary (2000) 78 Cal. App. 4th 1353, 1356, 1360-1364, 93 Cal. Rptr. 2d 653* (*Plescia* holding that laches is defense available to thwart stale attempt at enforcement of judgment for past due spousal support applied to past due child support)].

When an express statute of limitations applies to a suit in equity, however, mere delay to commence the action for a period less than the statutory period is never a defense. However, even when a statute of limitations is directly applicable to a suit in equity and it has not expired, the court may properly refuse to grant an injunction when the plaintiff has assented to the acts complained of and their consequences; and such assent may, in proper cases, be inferred from the plaintiff's acquiescence with full knowledge of all the facts. Furthermore, the acquiescence proving assent may bar relief in equity although it would not be accompanied by all the other circumstances that would make it an estoppel at law [*Lux v. Haggin (1886) 69 Cal. 255* (discussing "delay," "laches," and "acquiescence" at 69 Cal. 269-288)].

[c] Delay for Settlement Negotiations

A party's delay in asserting rights is justified when it results from negotiations to reach a settlement of the controversy. This is particularly true where a defaulting party represents that he will make good his default [*Potter v. Contra Costa Realty Co. (1934) 220 Cal. 31, 34, 29 P.2d 189]* .

[3] Prejudice

[a] Material Change in Status Quo

Laches is not so much a question of lapse of time as whether prejudice has resulted. If the delay has caused no material change in the status quo, that is, no detriment suffered by the party pleading the laches, then there is no point in making the plea [*see Conti v. Board of Civil Service Commissioners (1969) 1 Cal. 3d 351, 360, 82 Cal. Rptr. 337, 461 P.2d 617]* . The loss of witnesses, for example, is a factor demonstrating prejudice, and the defendant is not required to demonstrate that their testimony would have been favorable to him [*see Gerhard v. Stephens (1968) 68 Cal. 2d 864, 904 n. 44, 69 Cal. Rptr. 612, 442 P.2d 692* (reviewing cases)].

[b] Burden of Proof

The elements of unreasonable delay and resulting prejudice may be met in two ways [*Fountain Valley Regional Hospital & Medical Center v. Bonta (1999) 75 Cal. App. 4th 316, 323-325, 89 Cal. Rptr. 2d 139]* :

- First, they may be demonstrated by the evidence in the case, and the person arguing in favor of a finding of laches has the burden of proof on the laches issue.

- Second, the element of prejudice may be "presumed" if there exists a statute of limitations that is sufficiently analogous to the facts of the case and the period of limitations has been exceeded by the party bringing the claim.

In the second situation, the limitation period is "borrowed" from the analogous statute and the burden of proof shifts from the party asserting laches to the party arguing against application of the doctrine of laches. To defeat a finding of laches in this situation, the party arguing against the application of of laches must (1) show that the delay involved in the case was excusable, and (2) rebut the presumption that such delay resulted in prejudice to the opposing party [*Fountain Valley Regional Hospital & Medical Center v. Bonta (1999) 75 Cal. App. 4th 316, 323-325, 89 Cal. Rptr. 2d 139* (involving review of administrative mandamus proceeding)].

This burden shifting analysis, however, has been rejected in situations when administrative action is of a disciplinary nature involving a professional license [*Fountain Valley Regional Hospital & Medical Center v. Bonta (1999) 75 Cal. App. 4th 316, 324 n.7, 89 Cal. Rptr. 2d 139* (citing *Green v. Board of Dental Examiners (1996) 47 Cal. App. 4th 786, 795, 55 Cal. Rptr. 2d 140*)].

When no statute of limitation sufficiently analogous to the facts of the case exist, it appears prejudice is never presumed. The defendant must affirmatively demonstrate prejudice to sustain his or her burdens of proof and of production of evidence on the issue of laches [*see Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 624, 166 Cal. Rptr. 826, 614 P.2d 258* ; *Board of Administration v. Wilson (1997) 52 Cal. App. 4th 1109, 1126-1127, 61 Cal. Rptr. 2d 207]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsPleading & ProofGovernmentsLegislationStatutes of LimitationsTime Limitations

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B. Laches

30-345 California Forms of Pleading and Practice--Annotated § 345.42

§ 345.42 Estoppel of Defendant to Plead Laches

A defendant whose conduct contributed to the delay may be estopped from asserting the defense of laches [*see Austin v. Hallmark Oil Co. (1943) 21 Cal. 2d 718, 735, 134 P.2d 777* (restating rule)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefGovernmentsLegislationStatutes of LimitationsEquitable Estoppel

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30-345 California Forms of Pleading and Practice--Annotated § 345.42A

§ 345.42A Unclean Hands

Laches is an equitable remedy, and as a general rule, a party seeking equitable relief must come into court with clean hands [*In re Marriage of Dancy (2000) 82 Cal. App. 4th 1142, 1157, 98 Cal. Rptr. 2d 775]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityMaximsClean Hands PrincipleGovernmentsLegislationStatutes of LimitationsEquitable Estoppel

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B. Laches

30-345 California Forms of Pleading and Practice--Annotated § 345.43

§ 345.43 Manner of Raising Laches

[1] By Demurrer or as Affirmative Defense

The defense of laches may be raised by demurrer where the facts constituting laches are apparent on the face of the complaint [*see Neet v. Holmes (1944) 25 Cal. 2d 447, 460, 154 P.2d 854* (restating rule)].

When the complaint does not indicate that delay occurred that would injure defendant, a demurrer on the basis of laches is not sustainable. Under these circumstances, laches should be raised in the answer and the issue determined at trial [*Sangiolo v. Sangiolo (1978) 87 Cal. App. 3d 511, 514, 151 Cal. Rptr. 27]* .

[2] Necessity to Plead Laches

The California Supreme Court has held that a defendant could not raise the defense of laches when neither the defendant nor the complaint had pleaded facts showing laches [*Reed v. Norman (1953) 41 Cal. 2d 17, 21-22, 256 P.2d 930]* . The Court has similarly stated that, in general, laches may not be relied on unless the facts giving rise to the defense appear in some pleading [*see Hamud v. Hawthorne (1959) 52 Cal. 2d 78, 84-85, 338 P.2d 387* (defendant did not plead laches but fact of delay appeared in complaint and record disclosed fact of changed circumstances)].

In earlier cases, the Court has also directly held that laches is not required to be pleaded; the court may deny equitable relief on its own initiative if the evidence shows the party seeking relief to be guilty of laches [*Akley v. Bassett (1922) 189 Cal. 625, 648, 209 P. 576* ; *Stevinson v. San Joaquin etc. Co. (1912) 162 Cal. 141, 143, 144, 121 P. 398]* . Recent cases have stated the rule that courts, in extraordinary cases, have denied relief on their own motion when laches is disclosed by the complaint or appears from evidence even if defense has not been pleaded [*see San Bernardino Valley Audubon Society v. City of Moreno Valley (1996) 44 Cal. App. 4th 593, 608, 51 Cal. Rptr. 2d 897* ; *In re Marriage of Dancy (2000) 82 Cal. App. 4th 1142, 1158, 98 Cal. Rptr. 2d 775]* . However, the issue of whether a case is extraordinary need not be reached if the issue of laches appears on the face of the adversary's pleading, the parties' trial briefs, and the evidence, because in that case it is not necessary for the defendant to plead laches as a defense [*In re Marriage of Dancy (2000) 82 Cal. App. 4th 1142, 1158-1159, 98 Cal. Rptr. 2d 775]* .

In *Akley*, the Court further stated that if a complaint seeking equitable relief discloses a great lapse of time without the assertion of any claim, and after long-continued acquiescence in acts hostile to the claim, the plaintiff must show circumstances indicating good faith and reasonable diligence on his or her part [*Akley v. Bassett (1922) 189 Cal. 625, 647, 209 P. 576]* .

If the statutory period of limitation applicable to the action has expired and the defendant relies on mere delay (which is not equivalent to laches), the defendant must plead the bar of the statute [*Lux v. Haggin (1886) 69 Cal. 255, 267, 10 P. 674]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCriminal Law & ProcedureAccusatory InstrumentsComplaintsGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsPleading & Proof

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30-345 California Forms of Pleading and Practice--Annotated §§ 345.44-345.49

[Reserved]

§§ 345.44[Reserved]

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30-345 California Forms of Pleading and Practice--Annotated § 345.50

§ 345.50 Related Matthew Bender Publications

For forms of memoranda relating to the limitation of actions generally, see California Points and Authorities, Ch. 143, *Limitation of Actions*

For forms of memoranda relating to the defense that a particular action or proceeding is barred by the lapse of the applicable limitation period or by laches, see the specific chapter relating to that action or proceeding in California Points and Authorities and the *Index* to that publication

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral Overview

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30-345 California Forms of Pleading and Practice--Annotated § 345.51

§ 345.51 Federal Statutes

Definitions under Servicemembers Civil Relief Act (*50 U.S.C. App. § 501 et seq.*). *50 U.S.C. App. § 511*

Application of Servicemembers Civil Relief Act to states. *50 U.S.C. App. § 512*

Additional persons protected under Servicemembers Civil Relief Act *50 U.S.C. App. §§ 514, 516*

Extension of period of limitations by period of military service. *50 U.S.C. App. § 526*

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-345 California Forms of Pleading and Practice--Annotated § 345.52

§ 345.52 State Statutes

NOTE:
For a comprehensive list of statutory periods of limitation, see the Table of Limitation Periods n the Appendix to this chapter.

[1] Establishment of Limitations on Actions

Requirement that civil actions be commenced within periods of limitation in *Code Civ. Proc. § 312 et seq.*, except in special cases in which different limitation is prescribed by statute. *Code Civ. Proc. § 312*

Limitation periods for particular actions. *Code Civ. Proc. § 315 et seq.*

Limitation periods in *Code Civ. Proc. §§ 335-349*3/4 generally apply to actions brought by or for benefit of state or county. *Code Civ. Proc. § 345*

Action is commenced by filing complaint. *Code Civ. Proc. § 350*

Plaintiff whose judgment is reversed on appeal other than on merits as entitled to file new complaint within one year. *Code Civ. Proc. § 355*

Action arising in other state or foreign country and barred there as barred in California except in favor of person who was California citizen and has held cause of action from accrual to commencement of action. *Code Civ. Proc. § 361*

"Action" in statutes of limitation includes special proceeding of civil nature. *Code Civ. Proc. § 363*

[2] Actions by and Against Deceased Persons

If person holding cause of action dies before period of limitation expires on action that survives, period of limitation is

extended to later of six months after death or limitation period that would have applied had person not died. *Code Civ. Proc. § 366.1*

If person against whom cause of action may be brought dies before period of limitation expires, period of limitation is extended one year after person's death. *Code Civ. Proc. § 366.2*; *see* former *Code Civ. Proc. § 353(b)-(d)* (different provisions applicable to actions brought on liabilities of persons dying before January 1, 1993)

[3] Tolling Provisions

Tolling of statute of limitations on action for libel or slander arising out of criminal prosecution for child abuse while criminal prosecution is pending. *Civ. Code § 48.7(a)*

Tolling of statute of limitations on action for injury or wrongful death during pendency of criminal action against plaintiff charging felony listed in *Civ. Code § 847(b)*. *Civ. Code § 847(e)*

Tolling provision for minority and insanity regarding actions relating to real property. *Code Civ. Proc. § 328*

Tolling provision for prisoners regarding actions relating to real property. *Code Civ. Proc. § 328.5*

General tolling provision for minority and insanity. *Code Civ. Proc. § 352*

General tolling provision for prisoners. *Code Civ. Proc. § 352.1*

Extension of period of limitations by period of military service in National Guard and United States Military Reserve. *Mil. & Vet. Code § 404(a)*

Extension of period of limitation during time of potential defendant's absence from state. *Code Civ. Proc. § 351*

Extension of period of limitation during time potential defendant is under order of restitution as condition of probation. *Code Civ. Proc. § 352.5*

Period of limitation on client's action extended by six months from date of entry of order by which court assumes jurisdiction over attorney's practice pursuant to *Bus. & Prof. Code § 6180* or *6190*. *Code Civ. Proc. § 353.1*

Extension of period of limitation by disability because of existence of state of war. *Code Civ. Proc. § 354*

Extension of period of limitation by existence of legal inhibition to sue (such as injunction or statutory prohibition). *Code Civ. Proc. § 356*

Disability as not extending period of limitation unless it existed when cause of action accrued. *Code Civ. Proc. § 357*

Period of limitation extended by disability remains extended until all coexisting disabilities removed. *Code Civ. Proc. § 358*

[4] Waiver of Statute of Limitations

Waiver of defense of bar of statute of limitations required to be in writing signed by person to be charged. *Code Civ. Proc. § 360.5*

Waivers of defense of bar of statute of limitations limited to periods of not more than four years, but subject to execution in succession. *Code Civ. Proc. § 360.5*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 345.53 Decisions

[1] Agreement Shortening Period of Limitation Disfavored

A contractual stipulation to limit a statute of limitations must be clear and explicit, and is to be strictly construed against the party invoking the provision. *Western Filter Corp. v. Argan, Inc. (9th Cir. 2008) 540 F.3d 947, 2008 U.S. App. LEXIS 18147*

Contractual stipulations fixing period of limitation shorter than statutory period are disfavored and strictly construed. *Sanders v. American Casualty Co. (1969) 269 Cal. App. 2d 306, 309, 74 Cal. Rptr. 634*

[2] Amendment of Statute of Limitation

[a] Clarification of Statute of Limitations

Retroactive application of amendment that merely clarifies statute is not prohibited merely because it applies to facts in existence before effective date of amendment; amendment consistent with original intent of section and intended to reject contrary construction of statute by case law applied retroactively. *Noggle v. Bank of America (1999) 70 Cal. App. 4th 853, 859, 82 Cal. Rptr. 2d 829*

[b] Lengthening Period of Limitation

Legislature may extend statutory period of limitation; extension is generally valid as to any cause of action then pending and not already barred. *Mudd v. McColgan (1947) 30 Cal. 2d 463, 468, 183 P.2d 10* ; *Evelyn, Inc. v. California Empl. Stab. Com. (1957) 48 Cal. 2d 588, 592, 311 P.2d 500* ; *Douglas Aircraft Co. v. Cranston (1962) 58 Cal. 2d 462, 465, 24 Cal. Rptr. 851, 374 P.2d 819* ; *Mojica v. 4311 Wilshire, LLC (2005) 131 Cal. App. 4th 1069, 1072-1073, 31 Cal. Rptr. 3d 887* ; *Battle v. Kessler (1983) 149 Cal. App. 3d 853, 860, 197 Cal. Rptr. 170*

Legislature had power to retroactively revive cause of action for childhood sexual abuse time-barred under prior statute

of limitations. *Tietge v. Western Province of the Servites, Inc. (1997) 55 Cal. App. 4th 382, 386, 64 Cal. Rptr. 2d 53* ; *see Lent v. Doe (1995) 40 Cal. App. 4th 1177, 1183-1184, 47 Cal. Rptr. 2d 389*

Amendment of statute that enlarges period of limitation applies to pending matters when not otherwise expressly excepted; such legislation affects remedy and is applicable to matters not already barred, without retroactive effect; party has no vested right in running of statute of limitation prior to its expiration and is deemed to suffer no injury if, at time of amendment extending period of limitation for recovery, party is under obligation to pay. *Sanchez v. Workers' Comp. Appeals Bd. (1990) 217 Cal. App. 3d 346, 358, 266 Cal. Rptr. 21* , citing *Mudd v. McColgan (1947) 30 Cal. 2d 463* ; *see also O'Loughlin v. Workers' Comp. Appeals Bd. (1990) 222 Cal. App. 3d 1518, 1522-1523, 272 Cal. Rptr. 499*

Legislature has power to extend civil statute of limitations retroactively to revive common law cause of action time-barred under former limitations period. *Liebig v. Superior Court (1989) 209 Cal. App. 3d 828, 835, 257 Cal. Rptr. 574* (distinguishing cases involving statutes of limitation governing prescriptive property rights and civil liability created by statutes, as well as criminal cases, in which law is contrary)

[c] Shortening Period of Limitation

Party does not have vested right in time for commencement of action nor vested right in running of statute of limitations prior to its expiration; change in statute of limitations merely effects change in procedure and Legislature may shorten period; however, reasonable time must be permitted for party affected to avail himself or herself of remedy before statute takes effect; there was no due process violation when prisoner was represented by counsel and had constructive notice of *Code Civ. Proc. § 352.1* (shortening tolling period for time during which plaintiff is imprisoned) when statute was enacted. *Carlson v. Blatt (2001) 87 Cal. App. 4th 646, 649-651, 105 Cal. Rptr. 2d 42*

Retrospective application of shortened limitations period is permissible if party has reasonable time to avail himself or herself of his or her remedy before statute cuts off his or her rights; *Com. Code § 4111* is statute of limitations and applicable retroactively. *Edward Fineman Co. v. Superior Court (1998) 66 Cal. App. 4th 1110, 1125, 78 Cal. Rptr. 2d 478*

Legislature may reduce statute of limitations and new period applies to accrued causes of action if reasonable time is allowed to assert cause of action; to avoid potentially harsh results, drafters' presumed intent regarding pending proceedings is that new time limit will begin running no earlier than effective date of new statute or rule; when no time limit governed motion to recover statutory attorney fees at time of entry of judgment, limitation period later established by amendment of Cal. Rules of Ct., Rule 870.2(b) (now *3.1702(b)*) held to apply to motion; time within which to make motion began running when amended version of rule became effective. *Save Our Forest & Ranchlands v. County of San Diego (1996) 50 Cal. App. 4th 1757, 1761, 1765-1768, 58 Cal. Rptr. 2d 708* (Fourth Dist., Div. One; declining to follow *Brown v. Swickard (1985) 163 Cal. App. 3d 820, 828-829, 209 Cal. Rptr. 844 (Third Dist.)* , dealing with amended version of *Code Civ. Proc. § 170.6*)

Plaintiff is entitled to reasonable grace period in which to file suit on claim when court establishes new statute of limitations that would bar preaccrued claim. *Espinosa v. Superior Court (1988) 202 Cal. App. 3d 409, 413, 248 Cal. Rptr. 375*

Statute of limitations, being procedural, is usually retroactively applied to accrued causes of action, but court must inquire whether, in given case, retrospective application violates due process; if time left to file suit is reasonable, no constitutional violation occurs and statute is applied as enacted; if no time is left or only unreasonably short time remains, statute cannot be applied at all; whether time left in which to sue is reasonable is question of law. *Aronson v. Superior Court (1987) 191 Cal. App. 3d 294, 297-298, 236 Cal. Rptr. 347*

Legislature may shorten statutory period of limitation; shortened period does not apply retroactively to defeat accrued cause of action not barred by statute in effect before period shortened. *Niagara Fire Ins. Co. v. Cole (1965) 235 Cal. App. 2d 40, 42-43, 44 Cal. Rptr. 889* , (reporting rules); *see Scheas v. Robertson (1951) 38 Cal. 2d 119, 125, 238 P.2d 982*

[3] Burden of Proof

Once defendant establishes prima facie case that statute of limitations applies, burden shifts to plaintiff to prove facts alleged to avoid bar of statute. *Burgon v. Kaiser Foundation Hospitals (1979) 93 Cal. App. 3d 813, 824, 155 Cal. Rptr. 763*

[4] Bar of Actions of Particular Persons and Entities

[a] Ward When Guardian Fails to File Action Seasonably

When notes are made payable to custodian for minor under Uniform Gifts to Minors Act (*Civ. Code §§ 1154-1165*) cause of action belongs to minor and is not affected by custodian's failure to sue within period of limitation. *Epstein v. Frank (1981) 125 Cal. App. 3d 111, 122, 177 Cal. Rptr. 831*

Cause of action belonging to ward is not affected by guardian's failure to sue within period of limitation. *Gottesman v. Simon (1959) 169 Cal. App. 2d 494, 502-503, 337 P.2d 906*

[b] Heirs Where Decedent Failed to File Action Seasonably

Heirs do not derive any cause of action from decedent when decedent's cause of action was barred at time of death, in absence of allegation of circumstances causing suspension of running of period of limitation. *Rogers v. Bank of America (1956) 140 Cal. App. 2d 228, 231, 294 P.2d 959*

[c] Successors in Interest

Successors in interest to party timely sued do not have defense of statute of limitations. *Hutnick v. United States Fidelity & Guaranty Co. (1988) 47 Cal. 3d 456, 467, 253 Cal. Rptr. 236, 763 P.2d 1326*

[d] Trust Beneficiary Where Trustee Fails to File Action Seasonably

Beneficiary is precluded from maintaining action against third person respecting trust property if trustee failed to take action during period of limitation, even if beneficiary was under disability. *Triplett v. Williams (1969) 269 Cal. App. 2d 135, 137-138, 74 Cal. Rptr. 594* ; *Patchett v. Pacific Coast Ry. Co. (1893) 100 Cal. 505, 510, 35 P. 73*

[e] Persons With Actions for Damages Arising Out of Defendant's Felony

Code Civ. Proc. § 340.3 (limitation period in action for damages based on commission of felony) does not apply retroactively to revive causes of action that were time-barred prior to enactment of *Code Civ. Proc. § 340.3*. *Gallo v. Superior Court (1988) 200 Cal. App. 3d 1375, 1379, 246 Cal. Rptr. 587*

Limitation period of *Code Civ. Proc. § 340.3* for bringing civil action for damages against defendant based on defendant's commission of felony is one year after original felony judgment is pronounced even when felony conviction is subse quently reduced to misdemeanor; period applies to defendant who pleads no contest, as long as judgment of conviction is entered against defendant. *Jamieson v. Hickey (1988) 199 Cal. App. 3d 595, 597, 599, 244 Cal. Rptr. 859*

[f] Municipalities

Municipalities are subject to statutes of limitation. *City of Los Angeles v. County of Los Angeles (1937) 9 Cal. 2d 624, 627, 72 P.2d 138*

[5] Change in Substantive Law Does Not Revive Barred Claims

Change in law does not revive claims already barred by statute of limitations. *Howard Jarvis Taxpayers Assn. v. City of La Habra (2001) 25 Cal. 4th 809, 816, 107 Cal. Rptr. 2d 369, 23 P.3d 601* ; *Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1116-1117, 245 Cal. Rptr. 658, 751 P.2d 923* ; *California Coastal Com. v. Superior Court (1989) 210 Cal. App. 3d 1488, 1498 n.7, 258 Cal. Rptr. 567*

[6] Choice of Law

Law of forum, not law of place where obligation arose, governs statute of limitation and its applicability. *Western Coal & Mining Co. v. Jones (1946) 27 Cal. 2d 819, 828, 167 P.2d 719*

Choice of law provision resulting in application of Delaware's three year statute of limitations to breach of contract and declaratory relief claims rather than four year California period was not in conflict with California policy. *Hambrecht & Quist Venture Partners v. American Medical Internat., Inc. (1995) 38 Cal. App. 4th 1532, 1536, 1544-1549, 46 Cal. Rptr. 2d 33* (questioning analysis used in *Ashland Chemical Co. v. Provence (1982) 129 Cal. App. 3d 790, 793-795, 181 Cal. Rptr. 340* , *below*)

When only one of two potentially concerned states has interest in having its law applied, conflict of laws is said to be false and court simply applies law of only interested state; in action against California residents on promissory note and guaranty contract executed in Kentucky, trial court did not err in applying California's four-year statute of limitations on written obligations (*Code Civ. Proc. § 337*), although note said it was governed by Kentucky laws; statute of limitations is designed to protect enacting state's residents and courts from burdens associated with prosecution of stale cases; California had interest in applying its law, whereas Kentucky had no such interest because there were no Kentucky defendants and Kentucky was not forum. *Ashland Chemical Co. v. Provence (1982) 129 Cal. App. 3d 790, 793-794, 181 Cal. Rptr. 340* (analysis questioned by *Hambrecht & Quist Venture Partners v. American Medical Internat., Inc. (1995) 38 Cal. App. 4th 1532, 1546 n.14, 1549 n.17, 46 Cal. Rptr. 2d 33* , *above*)

[7] Constitutional Rights Subject to Periods of Limitation

Assertion of constitutional right is subject to reasonable statute of limitations unless constitutional provision provides otherwise; what constitutes reasonable time is question ordinarily left to Legislature, whose decision court will not overrule except where palpable error has been committed; matters that have or could have been adjudicated in validation action under *Code Civ. Proc. § 860 et seq.*, including constitutional challenges, must be raised within statutory limitations period in *Code Civ. Proc. § 860 et seq.* or they are waived. *Friedland v. City of Long Beach (1998) 62 Cal. App. 4th 835, 846-847, 73 Cal. Rptr. 2d 427*

[8] Constitutionality of Statutes of Limitation

State's involvement in mere running of general, self-executing statute of limitations is generally insufficient to implicate notice requirements of Due Process Clause of *U.S. Const., amend. XIV*; when limitation period is not self-executing and cause of action amounts to property interest protected by *U.S. Const., amend. XIV*, of which owner will be deprived on expiration of limitation period, statute of limitations violates Due Process Clause unless it provides for actual notice of limitations period. *Tulsa Collection Servs. v. Pope (1988) 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565, 575-579* (nonclaim provision of Oklahoma's probate code unconstitutional in failing to provide for actual notice to creditors of time within which claims must be filed against decedents' estates)

The tolling provisions of *Code Civ. Proc. § 351* have been applied to nonresident defendants who have never entered the state and to resident defendants who are temporarily absent from the state. Whether section 351 applies to resident defendants who are permanently absent from California, i.e., those who move out of state, was considered by the court in *Heritage Marketing & Ins. Services, Inc. v. Chrustawka (2008) 160 Cal. App. 4th 754, 73 Cal. Rptr. 3d 126* , which concluded that section 351 penalizes people who move out of state by imposing a longer statute of limitations on them than on those who remain in the state, and that the *commerce clause* protects persons from such restraints on their movements across state lines. *Heritage Marketing & Ins. Services, Inc. v. Chrustawka (2008) 160 Cal. App. 4th 754, 763, 73 Cal. Rptr. 3d 126*

Code Civ. Proc. § 351 impermissibly burdens interstate commerce with respect to residents who travel in course of interstate commerce; this conclusion, however, limited to travel for facilitation of interstate commerce; commerce clause does not bar applying tolling provisions of section 351 to interstate travel unrelated to facilitation of interstate commerce (e.g., vacation trips). *Filet Menu, Inc. v. Cheng (1999) 71 Cal. App. 4th 1276, 1282-1284, 84 Cal. Rptr. 2d 384*

Allowing adult causes of action for medical malpractice to accrue under *Code Civ. Proc. § 340.5* on date of injury or on date on which injury should have been reasonably discovered, but requiring minors' causes of action to accrue on date of wrongful act violates minors' right to equal protection of law under *equal protection clause* of *U. S. Const., amend. XIV*, and *Cal. Const. art. 1, §§ 11* and *21*. *Photias v. Doerfler (1996) 45 Cal. App. 4th 1014, 1017-1021, 53 Cal. Rptr. 2d 202*

No constitutional impediment exists to retrospective application of *Code Civ. Proc. § 340.3* (limitation period in action for damages based on commission of felony) reviving civil cause of action, because defendant has no vested right in sense of repose conferred by knowledge that suit against him or her was time-barred; issue is one of fairness and statutory construction rather than of constitutional right. *Gallo v. Superior Court (1988) 200 Cal. App. 3d 1375, 1383, 246 Cal. Rptr. 587*

Statute of limitations is consistent with due process when plaintiff or petitioner is allowed reasonable time to bring action. *Kupka v. Board of Administration (1981) 122 Cal. App. 3d 791, 797, 176 Cal. Rptr. 214*

Statutes of limitation are within legislature's constitutional authority if not so manifestly inequitable as to amount to denial of justice. *Ocean S. R. Co. v. Santa Cruz (1961) 198 Cal. App. 2d 267, 273, 17 Cal. Rptr. 892*

[9] Construction of Statutes of Limitation

Application of statute of limitations is not always rigid; statutes and judicial decisions provide for suspension of running of period in certain cases. *Bollinger v. National Fire Ins. Co. (1944) 25 Cal. 2d 399, 411, 154 P.2d 399*

Statutes of limitation are to be strictly construed; legislative intention is to be found from statute itself; application of statute is to conform to plain reading of statute. *Skidmore v. County of Alameda (1939) 13 Cal. 2d 534, 540, 90 P.2d 577*

Civ. Code § 3426.6 is part of Uniform Trade Secret Act, which was approved by National Conference of Commissioners on Uniform State Laws and adopted without significant change in California, so it is appropriate to accord substantial weight to commissioner's comment on construction of section 3426.6; absent compelling reason for doing otherwise, statute of limitations is to be construed in accordance with its plain language. *Glue-Fold, Inc. v. Slautterback Corp. (2000) 82 Cal. App. 4th 1018, 1023, 1025, 1028, 98 Cal. Rptr. 2d 661*

When facts relied on leave it clearly in doubt whether case is within statute of limitations pleaded, courts should not indulge in strained construction to support plea. *Herman v. Los Angeles County Metropolitan Transportation Authority (1999) 71 Cal. App. 4th 819, 826-827, 84 Cal. Rptr. 2d 144*

Statutorily imposed limitations on actions are technical defenses that should be strictly construed to avoid forfeiture of plaintiff's rights; these limitations are obstacles to just claims, and courts may not indulge in strained construction to apply these statutes to facts of particular case; strong public policy that litigation be disposed of on merits whenever possible. *People ex rel. Dept. of Conservation v. Triplett (1996) 48 Cal. App. 4th 233, 251, 55 Cal. Rptr. 2d 610*

Collective term, "statute of limitations," is commonly applied to great number of acts that prescribe periods beyond which suits may not be brought; statute of limitations is statute that fixes latest time within which action may be brought; as a rule, if Legislature intends to bar bringing of suits beyond certain date, it does so explicitly by employing either term "statute of limitations" (e.g., *Code Civ. Proc. § 312 et seq.*) or some equally unambiguous formula. *Utah Property & Casualty Ins. etc. Assn. v. United Services Auto. Assn. (1991) 230 Cal. App. 3d 1010, 1025, 281 Cal. Rptr. 917*

Application of statute of limitations to bar suit of plaintiff who intentionally chose to pursue legislative remedy for clarification of statutes as opposed to judicial remedy until after limitation period had expired did not violate rule that statutorily imposed limitations on actions are technical defenses that should be strictly construed to avoid forfeiture of plaintiff's rights. *Hunt v. County of Shasta (1990) 225 Cal. App. 3d 432, 445, 275 Cal. Rptr. 113*

No showing of prejudice is required to enforce statute of limitations; statutes of limitation are upheld regardless of hardship or of underlying merits of claim. *State Farm Fire & Casualty Co. v. Superior Court (1989) 210 Cal. App. 3d 604, 612, 258 Cal. Rptr. 413*

Absent specific provision in applicable statute of limitations for extension, court is required to infer that Legislature did not intend to permit relief on grounds of good cause. *Sinetos v. Department of Motor Vehicles (1984) 160 Cal. App. 3d 1172, 1175-1176, 207 Cal. Rptr. 207*

Statutes of limitations are adamant rather than flexible in nature and are upheld and enforced regardless of personal hardship. *Sinetos v. Department of Motor Vehicles (1984) 160 Cal. App. 3d 1172, 1175, 207 Cal. Rptr. 207* ; *Chas. L. Harney, Inc. v. State of California (1963) 217 Cal. App. 2d 77, 91, 31 Cal. Rptr. 524* (reporting rule)

Court applying statute of limitations is not authorized to make order "amending" filing date of complaint so that complaint will appear to have been filed within period of limitation, unless complaint was in fact so filed and filing date appearing in record is wrong. *City of Los Angeles v. Superior Court (1968) 264 Cal. App. 2d 766, 769, 70 Cal. Rptr. 826*

Strained construction of statute for purpose of supporting plea of bar of statute is not to be indulged where facts relied on leave clear doubt whether action brought within period of limitation. *County of Los Angeles v. Security First Nat'l*

Bank (1948) 84 Cal. App. 2d 575, 580, 191 P.2d 78

Court ruling on issue whether action barred by statute of limitations should consider all statutory provisions on subject; provisions are to be construed in light of presumption legislature acquainted with, and legislates with reference to, settled principles of law. *Pryor v. Winter (1905) 147 Cal. 554, 557-558, 82 P. 202*

[10] Determination of Applicable Statute

[a] Dependent on Nature of Right on Which Suit Is Based

To determine statute of limitations that applies to cause of action, it is necessary to identify nature of cause of action, i.e., gravamen of cause of action; nature of right sued on and not form of action nor relief demanded determines applicability of statute of limitations. *Hensler v. City of Glendale (1994) 8 Cal. 4th 1, 22, 32 Cal. Rptr. 2d 244, 876 P.2d 1043* ; *People ex rel. Dept. of Conservation v. Triplett (1996) 48 Cal. App. 4th 233, 247, 55 Cal. Rptr. 2d 610*

Determination of which statute applies depends on nature of right sued upon, not form of action or relief demanded. *Day v. Greene (1963) 59 Cal. 2d 404, 411, 29 Cal. Rptr. 785, 380 P.2d 385* ; *Giffin v. United Transportation Union (1987) 190 Cal. App. 3d 1359, 1362, 236 Cal. Rptr. 6* ; *Davies v. Krasna (1973) 14 Cal. 3d 502, 515, 121 Cal. Rptr. 705, 535 P.2d 1161* ; *see also Richardson v. Allstate Ins. Co. (1981) 117 Cal. App. 3d 8, 12, 172 Cal. Rptr. 423*

Determination of which statute applies depends on basic cause of action giving rise to plaintiff's right to relief. *Leeper v. Beltrami (1959) 53 Cal. 2d 195, 214, 1 Cal. Rptr. 12, 347 P.2d 12*

Where plaintiffs' claim is based on defendant doctors' intentional acts of egregious abuse, MICRA's statute of limitations, which pertains to medical malpractice actions, would not apply. *Unruh-Haxton v. Regents of University of California (2008) 162 Cal. App. 4th 343, 356, 76 Cal. Rptr. 3d 146*

The two-year statute of limitations prescribed by *Code Civ. Proc. § 339(1)* applies to actions for accounting malpractice, and where the gravamen of the case is accounting negligence, the two-year statute is applicable, notwithstanding the existence of other claims against the professionals, such as misrepresentation, for which a different statute of limitations might otherwise apply. *Sahadi v. Scheaffer (2007) 155 Cal. App. 4th 704, 714, 66 Cal. Rptr. 3d 517*

Statute of limitations applicable to action is governed by gravamen of complaint, not cause pled; in suit by city against broker stemming from purchase of securities, where gravamen of complaint was that broker's acts constituted actual or constructive fraud, *Code Civ. Proc. § 338(d)* (3-year limitation period) applied to causes of action for breach of fiduciary duty and breach of implied covenant of good faith and fair dealing rather than 4-year statute. *City of Vista v. Robert Thomas Securities, Inc. (2000) 84 Cal. App. 4th 882, 889, 101 Cal. Rptr. 2d 237*

Statute of limitation to be applied in particular case determined by nature of right sued on or principal purpose of action, not form of action or relief requested. *Curtis v. Kellogg & Andelson (1999) 73 Cal. App. 4th 492, 503, 86 Cal. Rptr. 2d 536*

Gravamen of complaint and nature of right sued on, rather than form of action and relief demanded, determines which statute of limitation applies; attorney who prepares and signs contract obligating him or her to perform both legal and nonlegal services may not rely on legal malpractice statute of limitations of *Code Civ. Proc. § 340.6* as defense to cause of action alleging negligent performance of nonlegal services; Section 340.6 was not defense to cause of action for negligent performance of administrative consulting services, which was subject to ordinary statute of limitations, but was defense to causes of action involving defendant's role as attorney for breach of contract, breach of fiduciary duty

and negligent misrepresentation. *Quintilliani v. Mannerino (1998) 62 Cal. App. 4th 54, 57, 66, 72 Cal. Rptr. 2d 359*

To determine applicable statute of limitations, courts consider nature of right sued on, not form of action or relief demanded; although negligent misrepresentation may be species of deceit, in action against accountants for negligent misrepresentation, essence of action was negligence, not fraud; *Code Civ. Proc. § 339* two-year statute of limitations for accountant malpractice rather than *Code Civ. Proc. § 338(a)* three-year limitation period for fraud or mistake held to apply. *Ventura County Nat. Bank v. Macker (1996) 49 Cal. App. 4th 1528, 1529-1531, 57 Cal. Rptr. 2d 418*

Under primary rights theory, look to injury or harm suffered in defining particular cause of action; in negligence action against bank for its opening of account in name of corporation which allowed corporate employee to divert checks away from corporation, harm suffered was diversion of checks that were employer's property; thus, cause of action was one for injury to personal property consisting of checks subject to three-year limitation period of *Code Civ. Proc. § 338(c)* rather than two-year limitation period of *Code Civ. Proc. § 339(1)*. *Wisper Corp. v. California Commerce Bank (1996) 49 Cal. App. 4th 948, 955-957, 57 Cal. Rptr. 2d 141*

Highly questionable whether court should consider apparent motives behind particular action in determining whether statute of limitations should apply; generally, question of whether statute of limitations applies is pure question of law based on language of statute in question or any legislative intent which can be discerned from its legislative history; in determining whether general or specific statute of limitation applies, initial inquiry is whether specific statute applies; if not, then rule of *Code Civ. Proc. § 312* for application of specific rather than general statute does not come into play. *People ex rel. Dept. of Conservation v. Triplett (1996) 48 Cal. App. 4th 233, 246-247, 55 Cal. Rptr. 2d 610*

Statute of limitations to be applied in particular case is determined by nature of right sued upon or principal purpose of action, not form of action or relief requested; what is significant is primary interest invaded by defendant's wrongful conduct. *Barton v. New Unified Motor Manufacturing, Inc. (1996) 43 Cal. App. 4th 1200, 1207, 51 Cal. Rptr. 2d 328*

Applicable statute of limitations is determined by substance or gravamen of action rather than by form of pleading, and, hence, pleader's labeling of action is not controlling. *Hatch v. Collins (1990) 225 Cal. App. 3d 1104, 1110, 275 Cal. Rptr. 476*

Caption, prayer, and form of complaint are not conclusive in determining which statute applies. *Agair Inc. v. Shaeffer (1965) 232 Cal. App. 2d 513, 516, 42 Cal. Rptr. 883*

[b] Examples

[i] Contract Actions

Action for improper rescission amounted to no more than a cause of action for breach of contract under a different name. Therefore, plaintiff's claim was barred by the one-year limitations period for contractual claims. Applicable limitations period is determined by the gravamen of the complaint rather than the named cause of action. *Akin v. Certain Underwriters at Lloyd's London (2006) 140 Cal. App. 4th 291, 299, 44 Cal. Rptr. 3d 284*

Action on general contractor's claims against architect and construction manager for economic losses sustained due to their alleged professional negligence during construction was governed by two-year statute governing claims for breach of oral contract (*Code Civ Proc. § 339(1)*) rather than four-year statute of limitations for patent deficiencies in construction (*Code Civ Proc. § 337.1*). *Smith v. SHN Consulting Engineers & Geologists, Inc. (2001) 89 Cal. App. 4th 638, 642-643, 107 Cal. Rptr. 2d 424*

Code Civ. Proc. § 337(1) (four-year limitation period in action on written contract), rather than *Code Civ. Proc. §*

339(1) (two-year limitation period in action on oral contract) applied when terms of agreement were incorporated in writing that was orally accepted by charged party. *E. O. C. Ord, Inc. v. Kovakovich (1988) 200 Cal. App. 3d 1194, 1199-1202, 246 Cal. Rptr. 456*

[ii] Personal Injury or Wrongful Death

The legislature intended the phrase "injury to, or for the death of, an individual caused by the wrongful act or neglect of another" to be interpreted as embracing all infringements of personal rights, including malicious prosecution, and intended the two-year limitations period set forth in *Code Civ. Proc. § 335.1*, to apply to malicious prosecution actions. *Stavropoulos v. Superior Court (2006) 141 Cal. App. 4th 190, 197, 45 Cal. Rptr. 3d 705*

Former *Code Civ. Proc. § 340(3)*, imposing a one-year period of limitation on commencing action for damages for personal injury or wrongful death, applies whenever personal injury or death results, regardless of the tort, contract, or breach of express or implied warranty that may be involved in the case. *Cardoso v. American Medical Systems, Inc. (1986) 183 Cal. App.3d 994, 999-1000, 228 Cal. Rptr. 627* (*now see Code Civ. Proc. § 335.1*, which imposes a two-year period of limitation on actions for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another)

[iii] Change in School District Boundaries

Action by school district, students, and students' parents challenging validity of transfer of residential area from one school district to another on grounds transfer constituted invidious discrimination based on wealth and race was governed by one-year statute of limitations of former Educ. Code § 4026 (*now see Educ. Code § 35766*), expressly applying to school districts, not by six-month limitation period of *Code Civ. Proc. § 349.1*, governing actions contesting reorganization or boundary changes of any "public entity." *Fleming v. Kent (1982) 129 Cal. App. 3d 887, 890-893, 181 Cal. Rptr. 361*

[iv] Real Property Improvements

Code of Civil Procedure § 337.1 does not apply to claims alleging economic losses incurred in course of construction but rather applies only to claims arising from patent deficiencies that exist on substantial completion of construction; thus action on general contractor's claims against architect and construction manager for economic losses sustained due to their alleged professional negligence during construction was governed by two-year statute governing claims for breach of oral contract (*Code Civ Proc. § 339(1)*) rather than four-year statute of limitations (*Code Civ Proc. § 337.1*); furthermore, even if section 337.1 could be construed to encompass claims for patent deficiencies that are resolved by time of substantial completion, section 339(1) would apply since section 337.1 merely provides outer limit of when one of its protected class may be sued for patent defect: no later than four years after substantial completion of project--it does not revive claims that are barred pursuant to other applicable statutes of limitations. *Smith v. SHN Consulting Engineers & Geologists, Inc. (2001) 89 Cal. App. 4th 638, 642-652, 107 Cal. Rptr. 2d 424*

Four-year limit to institute action to recover damages for patent deficiencies in improvements to real property under *Code Civ. Proc. § 337.1* were enacted to protect construction contractors from extended liability, and therefore are not available to manufacturer and seller of swimming pool diving platform. *Nichols v. Swimquip (1985) 171 Cal. App. 3d 216, 219-222, 217 Cal. Rptr. 272*

[v] Decedent's Promise of Distribution from Estate

Where a claim arises from an alleged oral promise or agreement concerning distribution from a decedent's estate, the action is governed by the limitations period of *Code Civ. Proc., § 366.3*, which provides that a one-year limitation period applies to a promise or agreement with a decedent to distribution from an estate and specifically states that the limitations period cannot be tolled or extended. *Stewart v. Seward (2007) 148 Cal. App. 4th 1513, 1519, 56 Cal. Rptr. 3d 651*

[vi] Wage Claims and Penalties

Three-year statute of limitations applies to wage claims as provided in *Code Civ. Proc. § 338(a)*, while a one-year statute of limitations governs claims for penalties (*Code Civ. Proc. § 340(a)*). *Murphy v. Kenneth Cole Productions (2007) 40 Cal. 4th 1094, 1102, 56 Cal. Rptr. 3d 880, 155 P.3d 284*

[vii] Medical Negligence Against Public Entity

In action for medical negligence against public entities, plaintiffs must comply with both the six-month statute of limitations in the Government Claims Act (*Gov. Code § 945.6*) and the three-year statute in the Medical Injury Compensation Reform Act (MICRA) (*Code Civ. Proc. § 340.5*), and the latter statute establishes the outside date by which actions against health care providers, including public entities, must be brought. *Roberts v. County of Los Angeles (2009) 175 Cal. App. 4th 474, 476, 96 Cal. Rptr. 3d 60*

[11] Doctrine of Continuing Violations

Doctrine of continuing violations was developed in cases examining timeliness of complaints filed with Equal Employment Opportunity Commission to establish violation of Title VII of Federal Civil Rights Act of 1964 (*see* 42 U.S.C. § 2000 et seq.); under doctrine, systematic policy of discrimination is actionable even if some or all of events evidencing its inception occurred prior to limitation period; thus, in action for age and race discrimination under Fair Employment and Housing Act (*Gov. Code §§ 12940, 12941*) against state agency by employee who had been denied promotion, evidenceof discriminatory acts occurring more than one year prior to filing of employee's second charge with Department of Fair Employment and Housing were not barred by one-year limitations provided by *Gov. Code § 12960* when those acts were part of continuing course of harassing conduct occurring from time of employee's first charge several years before up to time of filing second charge and met requirements of doctrine of continuing violations. *Watson v. Department of Rehabilitation (1989) 212 Cal. App. 3d 1271, 1290-1291, 261 Cal. Rptr. 204*

[12] Effect on Individual Actions of Denial of Class Action Certification

In asbestos-in-building case, plaintiff-owner of building containing asbestos who sued asbestos manufacturer alleging causes of action including strict liability and negligence and who became member of mandatory federal class action and thereafter opted out of class action was entitled to have limitations period tolled during time when plaintiff was member of class. *San Francisco Unified School Dist. v. W.R. Grace & Co. (1995) 37 Cal. App. 4th 1336-1340, 37 Cal. App. 4th 1318, 1340, 44 Cal. Rptr. 2d 305* (*Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 751 P.2d 923* and *Becker v. McMillin Construction Co. (1991) 226 Cal. App. 3d 1493, 277 Cal. Rptr. 491* analyzed)

Pendency of class action certification proceedings, in limited circumstances, tolls statute of limitations from time of commencement of suit to time of denial of class certification for all purported members of class who either make timely motions to intervene in surviving individual action or who timely file their individual actions; rule applies only when class action and later individual action or intervention are based on same claims and subject matter and similar evidence. *Becker v. McMillin Construction Co. (1990) 226 Cal. App. 3d 1493, 1498-1499, 277 Cal. Rptr. 491*

(applying *American Pipe & Construction Co. v. Utah (1974) 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713* , as modified in *Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 245 Cal. Rptr. 658, 751 P.2d 923*)

[13] Equitable Estoppel to Assert Bar of Statute of Limitations

[a] Elements

For estoppel to prevent running of statute of limitations, there must be some wrongdoing on defendant's part; plaintiff's ignorance of cause of action or other mistake of law does not preventing running of statute of limitations. *Hinton v. NMI Pac. Enters. (9th Cir. 1993) 5 F.3d 391, 397*

Defendants who induce plaintiffs not to sue pending settlement may not assert a statute of limitations defense where their conduct caused the untimely filing of the action. *Union Oil Co. of California v. Greka Energy Corp. (2008) 165 Cal. App. 4th 129, 138, 80 Cal. Rptr. 3d 738*

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

Estoppel is applicable where the conduct of one side has induced the other to take such a position that it would be injured if the first should be permitted to repudiate its acts. Four elements must ordinarily be proved to establish an equitable estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) he must rely upon the conduct to his injury. The doctrine of estoppel is codified in *Evid. Code § 623*. *Leasequip, Inc. v. Dapeer (2002) 103 Cal. App. 4th 394, 403-404, 126 Cal. Rptr. 2d 782*

Defendant will be estopped to invoke statute of limitations when plaintiff relies on defendant's conduct and that conduct induces action to be filed late; on other hand, contractor or subcontractor, whether suspecting or unsuspecting, does not lose protection of 10-year limitation period under *Code Civ. Proc. § 337.15* because of conduct of another party that extends time for suit against itself; developer's purported conduct toward plaintiff did not induce any reliance on part of defendant that could toll limitations period for defendant to file cross complaint againstdeveloper for indemnity. *FNB Mortgage Corp. v. Pacific General Group (1999) 76 Cal. App. 4th 1116, 1121, 1135-1136, 90 Cal. Rptr. 2d 841*

To establish equitable estoppel four elements must ordinarily be proved: (1) knowledge of facts by party against whom estoppel is sought, (2) conduct by that party intended to be acted on or that party seeking estoppel had right to believe was intended to be acted on, (3) ignorance of facts by party seeking estoppel, and (4) reliance on conduct by party seeking estoppel to that party's injury; equitable estoppel typically arises through some misleading affirmative conduct on defendant's part; estoppel may also arise from silence when there is duty to speak; insurer's violation of *10 Cal. Code Reg. § 2695.4* (insurer to disclose policy time limits that may apply to claim) may provide basis of estoppel against insurer's assertion of contract limitations defense. *Spray, Gould & Bowers v. Associated Internat. Ins. Co. (1999) 71 Cal. App. 4th 1260, 1265, 1267-1269, 84 Cal. Rptr. 2d 552*

Estoppel to assert bar of statute of limitation is available when defense counsel's willful inaction led plaintiff to pursue

wrong defendant until after limitation period had run. *Cuadros v. Superior Court (1992) 6 Cal. App. 4th 671, 675-677, 8 Cal. Rptr. 2d 18*

Estoppel to assert defense of statute of limitations may be invoked when delay in commencing action was induced by defendant's conduct. *Kurokawa v. Blum (1988) 199 Cal. App. 3d 976, 990, 245 Cal. Rptr. 463*

Prerequisites to estoppel tolling statute of limitations are that party to be estopped is apprised of facts; other party is ignorant of true state of facts; party to be estopped acted so that other party had right to believe party intended its conduct to be acted on, and other party relied on conduct to its prejudice. *Muraoka v. Budget Rent-A-Car, Inc. (1984) 160 Cal. App. 3d 107, 116, 206 Cal. Rptr. 476*

Promise to settle for amount satisfactory to claimant establishes prima facie case for estoppel when party making promise was responsible for delaying settlement discussions until after running of statute and claimant relied on promise in not retaining attorney before statute ran. *Muraoka v. Budget Rent-A-Car, Inc. (1984) 160 Cal. App. 3d 107, 117, 206 Cal. Rptr. 476*

[b] Fraudulent Concealment of Defendant's Identity

Applying principle that one should not profit from one's own wrongdoing, defendant is equitably estopped from asserting statute of limitations when, as result of intentional concealment, plaintiff is unable to discover defendant's actual identity. *Bernson v. Browning-Ferris Industries (1994) 7 Cal. 4th 926, 936, 30 Cal. Rptr. 2d 440, 873 P.2d 613*

[c] Independent From Statute of Limitations

Doctrine of fraudulent concealment is judicially created and enters into statute of limitations, if at all, by being judicially read into it; *Gov. Code § 11130.3(a)*, period of limitation for nullifying actions taken in violation of notice or open meeting requirements of Bagley-Keene Open Meeting Act, does not allow any extension of time even through operation of doctrine of fraudulent concealment; purpose of doctrine of fraudulent concealment and of 30-day limitation period of section 11130.3(a) are not consistent. *Regents of University of California v. Superior Court (1999) 20 Cal. 4th 509, 532-535, 85 Cal. Rptr. 2d 257, 976 P.2d 808*

Because equitable estoppel operates directly on defendant without abrogating running of statutory limitations period, it might apply no matter how unequivocal statutory language containing applicable limitations period is expressed; although *Code Civ. Proc. § 366.2(a)* (cause of action against decedent) clearly shows Legislature intended that statute of limitations set forth in section not be "tolled" or "extended," statute is silent about equitable estoppel, and absent such language, or legislative history suggesting that Legislature intended to abrogate doctrine of equitable estoppel, doctrine of equitable estoppel still applies. *Battuello v. Battuello (1998) 64 Cal. App. 4th 842, 847-848, 75 Cal. Rptr. 2d 548*

[d] Pleading and Proof

Question whether defendant's conduct tolls statute of limitations is one of fact for jury once elements of estoppel are determined to have been pleaded adequately. *Muraoka v. Budget Rent-A-Car, Inc. (1984) 160 Cal. App. 3d 107, 117, 206 Cal. Rptr. 476*

Estoppel must be pleaded and proved as affirmative bar to defense of statute of limitations. *Hanson v. Garden Grove Unified School Dist. (1982) 129 Cal. App. 3d 942, 948, 181 Cal. Rptr. 378*

[14] Federal Causes of Action

When Congress, in creating federal cause of action, fails to supply express statute of limitations, United States Supreme Court generally concludes that Congress intended courts to apply most closely analogous statute of limitations under state law, unless rule from elsewhere in federal law clearly provides closer analogy than available state statutes and federal policies at stake and practicalities of litigation make that rule significantly more appropriate vehicle for interstitial lawmaking. *Reed v. United Transport. Union (1989) 488 U.S. 319, 323-325, 109 S. Ct. 621, 102 L. Ed. 2d 665* (involving *29 U.S.C. § 411(a)(2)*, relating to assembly and free speech rights of members of labor organizations)

When state law provides multiple statutes of limitation for personal injury actions, courts considering claims under *42 U.S.C. § 1983* (conferring general remedy for injuries to personal rights) should borrow state's general or residual statute of limitations for personal injury actions. *Owens v. Okure (1989) 488 U.S. 235, 236, 249-251, 109 S. Ct. 573, 102 L. Ed. 2d 594*

When Congress does not provide statute of limitations for federal cause of action, forum state's statute of limitations applies unless it unduly qualifies or diminishes federal right cause of action seeks to protect. *San Diego County Dist. Council v. Cory (9th Cir. 1982) 685 F.2d 1137, 1139*

When Congress has expressly set limitations period on federal claim, state statutes of limitations, including state tolling provisions, do not apply; federal equitable tolling generally applies when defendant's misconduct interferes with plaintiff's filing of lawsuit, or in special circumstances, e.g., when plaintiff files timely lawsuit which is later dismissed without plaintiff's fault; in case of federal claimfor which no federal statute of limitations exists, general rule is that state law applies, although in recent years more courts have not followed general rule and have borrowed other limitations periods from federal statutes; thus, when there is no specifically stated or otherwise relevant federal statute of limitations for federal substantive claim, controlling period is ordinarily most appropriate one provided by state law; when federal claims are governed by state statutes of limitations, state tolling provisions also apply, as long as they are not inconsistent with purpose of federal legislation. *Bunnell v. Department of Corrections (1998) 64 Cal. App. 4th 1360, 1370-1374, 76 Cal. Rptr. 2d 58*

Tolling provision of *Code Civ. Proc. § 352(a)* for minority applies to federal civil rights action brought under *42 U.S.C. § 1983*; one-year limitation period for bringing federal civil rights action tolled during plaintiff's minority; tolling not precluded by *Code Civ. Proc. § 352(b)*. *City of Huntington Park v. Superior Court (1995) 34 Cal. App. 4th 1293, 1297-1300, 41 Cal. Rptr. 2d 68*

Four-year statute of limitations for actions based on violation of guarantee under *U.S. Const., amend. IV*, against unreasonable searches and seizures by federal agent acting under color of federal authority, giving rise to claim for damages, does not extend to claims arising from acts of agents of states. *City of Los Angeles v. Superior Court (1990) 217 Cal. App. 3d 443, 445, 265 Cal. Rptr. 925*

[15] Liability Created by Statute

Cause of action is based on liability created by statute only if type of liability provided for in statute was nonexistent at common law; thus, when cause of action is based on statute that did not create new form of liability, but merely codified and refined existing law, three year limitations period in *Code Civ. Proc. § 338* for actions based on statutory liability does not apply. *West Shield Investigations & Security Consultants v. Superior Court (2000) 82 Cal. App. 4th 935, 952, 98 Cal. Rptr. 2d 612*

Obligation is liability created by statute within meaning of *Code Civ. Proc. § 338* (providing three-year period of limitation), if statutory scheme has been adopted that gives rise to newly created rights, if liability was created by law in absence of agreement, or if duty is fixed by statute itself. *County Sanitation Dist. v. Superior Court (1990) 218 Cal.*

App. 3d 98, 106-107, 266 Cal. Rptr. 777

"Liability created by law" is one that exists by virtue of express statute but does not extend to actions arising under common law; hence, three-year statute of limitations in *Code Civ. Proc. § 359* applies when there is statutory basis for actions against directors, shareholders, or members of corporation. *Smith v. Superior Court (1990) 217 Cal. App. 3d 950, 953, 266 Cal. Rptr. 253*

[16] Liability Created by Ordinance

Ordinance has same force within its jurisdictional limits as statute passed by Legislature has throughout state; therefore, action on liability created by ordinance must be commenced within three-year period prescribed by *Code Civ. Proc. § 338*; rules applicable to construction of statutes apply equally to ordinances. *County Sanitation Dist. v. Superior Court (1990) 218 Cal. App. 3d 98, 107, 266 Cal. Rptr. 777*

[17] New Action After Termination of Previous Action

[a] Reversal of Judgment for Plaintiff

Code Civ. Proc. § 355 does not apply when judgment for plaintiff is reversed on appeal and cause is remanded for new trial. *Watterson v. Owens River Canal Co. (1922) 190 Cal. 88, 95, 210 P. 625*

Code Civ. Proc. § 355 permits new action of any kind having as object same relief as obtained in original action. *Kenney v. Parks (1902) 137 Cal. 527, 530, 70 P. 556*

Extended period of limitation provided in *Code Civ. Proc. § 355* applies to action originally filed in other state and refiled in California. *Schneider v. Schimmels (1967) 256 Cal. App. 2d 366, 370, 64 Cal. Rptr. 273*

[b] Involuntary Dismissal

Plaintiff suffering involuntary dismissal because of failure to prosecute is not entitled to benefits of *Code Civ. Proc. § 355* under *Bollinger* doctrine. *Neff v. New York Life Ins. Co. (1947) 30 Cal. 2d 165, 174, 180 P.2d 900* ; *Tannhauser v. Adams (1948) 31 Cal. 2d 169, 177-178, 187 P.2d 716* ; *Stuckman v. Woodhull (1959) 170 Cal. App. 2d 424, 426-427, 338 P.2d 934*

Plaintiff is entitled in appropriate case to benefits of *Code Civ. Proc. § 355* after involuntary dismissal, if error of trial court denied plaintiff trial on merits. *Bollinger v. National Fire Ins. Co. (1944) 25 Cal. 2d 399, 409-410, 411, 154 P.2d 399*

[c] Summary Judgment

Although resolution of statute of limitations issue is normally question of fact, when uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper. *Romano v. Rockwell Internat., Inc. (1996) 14 Cal. 4th 479, 487, 59 Cal. Rptr. 2d 20, 926 P.2d 1114*

Resolution of statute of limitations defense is typically factual question for trier of fact; summary judgment proper, however, if court can draw only one legitimate inference from uncontradicted evidence about limitations issue. *San Francisco Unified School Dist. v. W. R. Grace & Co. (1995) 37 Cal. App. 4th 1318, 1325-1326, 44 Cal. Rptr. 2d 305*

Summary judgment granted on ground that action is barred by statute of limitations is technical or procedural disposition of action rather than substantive and does not preclude subsequent action on new theory on which statute of limitations has not yet run. *Koch v. Rodlin Enterprises (1990) 223 Cal. App. 3d 1591, 1595-1597, 273 Cal. Rptr. 438*

[18] Purpose of Statutory Limitation

Purpose of statute of limitations is to protect defendants from stale claims of dilatory plaintiffs and to stimulate plaintiffs to diligently assert fresh claims against defendants; statutes of limitation operate conclusively across board, not flexibly on case-by-case basis, i.e., cause of action brought within applicable limitations period is not barred, even if, in fact, action is stale and plaintiff is dilatory; conversely, cause of action brought outside limitation period is barred, even if, in fact, action is fresh and plaintiff is diligent. *Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 395-396, 87 Cal. Rptr. 2d 453, 981 P.2d 79*

Typical statute of limitations purpose is to protect defendant from dilatory plaintiff's stale claim. *Regents of University of California v. Superior Court (1999) 20 Cal. 4th 509, 533, 85 Cal. Rptr. 2d 257, 976 P.2d 808*

Limitations statutes are intended to enable defendants to marshall evidence while memories and facts are fresh and to provide defendants with repose for past acts; legislative goal underlying statutes of limitation is to require diligent prosecution of known claims so that legal affairs can have their necessary finality and predictability and so that claims can be resolved while evidence remains reasonably available and fresh. *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal. 4th 739, 755-756, 76 Cal. Rptr. 2d 749, 958 P.2d 1062*

Statutes of limitations are designed to promote justice by preventing surprises through revival of stale claims. *Bollinger v. National Fire Ins. Co. (1944) 25 Cal. 2d 399, 407, 154 P.2d 399*

Statutes of limitation are favored by law. *Fontana Land Co. v. Laughlin (1926) 199 Cal. 625, 636, 250 P. 669 ; Kunstman v. Mirizzi (1965) 234 Cal. App. 2d 753, 757, 44 Cal. Rptr. 707*

Two major purposes underlie statutes of limitations, that is, protecting defendants from having to defend stale claims by providing notice in time to prepare a fair defense on the merits, and requiring plaintiffs to diligently pursue their claims. *Grell v. Laci Le Beau Corp. (1999) 73 Cal. App. 4th 1300, 1304-1305, 87 Cal. Rptr. 2d 358*

Statutes of limitation are to be viewed favorably as affording parties who may, by lapse of time, have lost ability to procure evidence, repose and security from stale demands; statutes of limitation are designed to prevent resurgence of stale claims after lapse of periods of time as result of which loss of papers, disappearance of witnesses, feeble recollection, make ineffectual or extremely difficult fair presentation of case; but they are not intended as defenses to just demands of comparatively recent origin. *Herman v. Los Angeles County Metropolitan Transportation Authority (1999) 71 Cal. App. 4th 819, 826, 84 Cal. Rptr. 2d 144*

Fundamental purpose of statutes of limitation to prevent assertion of stale claims by plaintiffs who have failed to file their action until evidence is no longer fresh and witnesses are no longer available. *Gordon v. Law Offices of Aguirre & Meyer (1999) 70 Cal. App. 4th 972, 978, 83 Cal. Rptr. 2d 119*

Purpose of statutes of limitations is to promote justice by preventing surprises through revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared; theory is that even if one has just claim it is unjust not to put adversary on notice to defend within period of limitation, and right to be free of stale claims in time comes to prevail over right to prosecute them. *Cutujian v. Benedict Hills Estates Assn. (1996) 41 Cal. App. 4th 1379, 1387-1388, 49 Cal. Rptr. 2d 166*

Statute of limitations are designed to provide repose and protection against burden of defending against stale claims. *Kray Cabling Co. v. County of Contra Costa (1995) 39 Cal. App. 4th 1588, 1592-1593, 46 Cal. Rptr. 2d 674*

Limitation periods on suits are designed to promote justice by preventing surprises through revival of stale claims, to protect defendants and courts from handling matters in which search for truth may be impaired by loss of evidence, to encourage plaintiffs to use reasonable and proper diligence in enforcing their rights, and to prevent fraud. *State Farm Fire & Casualty Co. v. Superior Court (1989) 210 Cal. App. 3d 604, 612, 258 Cal. Rptr. 413*

Whether cause of action is barred by statute of limitation is question of fact. *Jaffe v. Carroll (1973) 35 Cal. App. 3d 53, 59, 110 Cal. Rptr. 435*

[19] Raising Bar of Statute of Limitations

Bar of statute of limitations may be raised in demurrer pleading failure to state facts sufficient to constitute cause of action. *California Safe etc. Co. v. Sierra etc. Co. (1910) 158 Cal. 690, 698, 112 P. 274*

Complaint showing on its face that cause of action is barred by statute of limitations is subject to general demurrer. *Iverson, Yoakum, Papiano & Hatch v. Berwald (1999) 76 Cal. App. 4th 990, 995, 90 Cal. Rptr. 2d 665*

Amendment of answer to set up statute of limitations. *Clinton v. Smith (1968) 268 Cal. App. 2d 550, 553-554, 74 Cal. Rptr. 745*

[20] Relation Back of Amended Complaint

[a] General Principle

Relation-back doctrine requires that amended complaint must (1) rest on same general set of facts, (2) involve same injury, and (3) refer to same instrumentality, as original one. *Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 409, 87 Cal. Rptr. 2d 453, 981 P.2d 79*

When amendment to complaint is sought after statute of limitations has run, amended complaint is deemed filed as of date of original complaint provided recovery is sought in both pleadings on same general set of facts. *Smeltzley v. Nicholson Mfg. Co. (1977) 18 Cal. 3d 932, 934, 136 Cal. Rptr. 269, 559 P.2d 624* ; *Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 600-603, 15 Cal. Rptr. 817, 364 P.2d 681* ; see also *Smeltzley v. Nicholson Mfg. Co. (1977) 18 Cal. 3d 932, 934, 939-940, 136 Cal. Rptr. 269, 559 P.2d 624* ; *Grudt v. City of Los Angeles (1970) 2 Cal. 3d 575, 583-585, 86 Cal. Rptr. 465, 468 P.2d 825* ; *Streicher v. Tommy's Electric Co. (1985) 164 Cal. App. 3d 876, 882, 211 Cal. Rptr. 22* ; *Overholser v. Glynn (1968) 267 Cal. App. 2d 800, 805, 73 Cal. Rptr. 628* (facts, not legal theory, as test); *Garrett v. Crown Coach Corp. (1968) 259 Cal. App. 2d 647, 651, 66 Cal. Rptr. 590*

General rule is that amended complaint that adds new defendant does not relate back to date of filing original complaint and statute of limitations is applied as of date amended complaint is filed, unless recognized exception to general rule for substitution of new defendant for fictitiously named Doe defendant under *Code Civ. Proc. § 474* applies. *Woo v. Superior Court (1999) 75 Cal. App. 4th 169, 176, 89 Cal. Rptr. 2d 20*

Amended complaint relates back to original complaint and avoids statute of limitation as bar only if it (1) rests on same set of general facts as original complaint, and (2) refers to same accident and same injuries as original complaint. *Boyle v. City of Redondo Beach (1999) 70 Cal. App. 4th 1109, 1119, 83 Cal. Rptr. 2d 164*

Amended complaint relates back to filing date of original complaint and avoids bar of statute of limitations so long as

recovery is sought in both pleadings on same general set of facts; amended complaint did not relate back when it was based on events occurring on two different dates (original complaint based on events of first date only), and when it referred to different accident, different injury, and different instrumentality. *Espinosa v. Superior Court (1988) 202 Cal. App. 3d 409, 414-415, 248 Cal. Rptr. 375*

Amended complaint relates back to filing of original complaint and avoids bar of statute of limitations, so long as recovery is sought in both pleadings on same general set of facts; change in parties does not prevent relation back when no new defendants are brought in for first time at time of amendment. *Slaughter v. Legal Process & Courier Service (1984) 162 Cal. App. 3d 1236, 1253, 209 Cal. Rptr. 189*

In action for share of property jointly acquired by plaintiff and man with whom she cohabited, court improperly denied plaintiff right to amend complaint to plead equitable relief in order to come within four-year limitation period of *Code Civ. Proc. § 343* for actions in equity, rather than three-year period of *Code Civ. Proc. § 339* for actions based on contract, when recovery in both pleadings was based on same general set of facts. *Nelson v. Nevel (1984) 154 Cal. App. 3d 132, 141-142, 201 Cal. Rptr. 93*

Amended complaint is based on same general set of facts and relates back to original complaint if amplified statement of facts describes same "accident" as described in original complaint, even though new defendant is identified in connection with specifying new element in chain of causation. *Coronet Mfg. Co. v. Superior Court (1979) 90 Cal. App. 3d 342, 348, 153 Cal. Rptr. 366*

[b] Adding Cause of Action

Amendment in wrongful demotion case adding new legal theory of constructive discharge based on new facts arising after filing of complaint was barred by statute of limitations. *Lee v. Bank of America (1994) 27 Cal. App. 4th 197, 214-215, 32 Cal. Rptr. 2d 388*

Statute of limitations does not bar amended complaint alleging new causes of action if it rests on same facts as original complaint and refers to same accident and same injuries as original complaint; relation-back doctrine focuses on factual similarity rather than on rights arising from facts, permitting added causes of action to relate back to initial complaint so long as they arise factually from same injury; new cause of action rests on same set of facts when it involves same accident and same offending instrumentality. *Goldman v. Wilsey Foods, Inc. (1989) 216 Cal. App. 3d 1085, 1094, 265 Cal. Rptr. 294*

Amended complaint alleging new cause of action based on new facts not alleged in original complaint does not relate back to date original complaint was filed. *Filmservice Laboratories, Inc. v. Harvey Bernhard Enterprises, Inc. (1989) 208 Cal. App. 3d 1297, 1309, 256 Cal. Rptr. 735*

Plaintiff's attempt to amend complaint to state similar, yet distinct, new cause of action was barred by statute of limitations because amendment could not relate back to filing of original complaint. *Parker v. Superior Court (1985) 175 Cal. App. 3d 1082, 1088, 223 Cal. Rptr. 292* (survival action as distinct from wrongful death action)

Amended complaint adding emotional distress causes of action to wrongful death causes of action related back to date of original complaint, and therefore avoided bar of statute of limitations, because it sought recovery for same accident (electrocution of decedent) and for same injury (loss of plaintiff's son). *Rowland v. Superior Court (1985) 171 Cal. App. 3d 1214, 1218, 217 Cal. Rptr. 786*

Proposed amendment to complaint for negligent infliction of emotional distress by failure to detect or properly apprise pregnant woman of possibility of genetic defect *in utero* to include cause of action for negligent infliction of bodily

injury by medical treatment was barred by statute of limitations, because general set of facts underlying cause of action in original complaint was distinct from that underlying proposed amendment, and instrumentality of causation of bodily injury was different in each cause of action. *Andalon v. Superior Court (1984) 162 Cal. App. 3d 600, 616, 208 Cal. Rptr. 899*

Amended complaint for wrongful death filed after statute of limitations has run relates back to plaintiff's timely action for loss of consortium, when both actions are based on same set of facts. *Lamont v. Wolfe (1983) 142 Cal. App. 3d 375, 377-379, 190 Cal. Rptr. 874*

In action involving automobile collision, proposed amendment stating additional cause of action for negligent entrustment arose from same general set of facts as original complaint for negligence, and was permitted to relate back to original complaint, thereby avoiding bar of statute of limitations. *Hirsa v. Superior Court (1981) 118 Cal. App. 3d 486, 488-491, 173 Cal. Rptr. 418*

Plaintiff's amended complaint alleging additional cause of action for damages suffered by decedent before death did not relating back to filing of original complaint for wrongful death and was barred by statute of limitations. *Dominguez v. City of Alhambra (1981) 118 Cal. App. 3d 237, 241, 173 Cal. Rptr. 345*

Amendment of complaint at outset of trial to add new theory of recovery on same set of facts. *Rainer v. Community Memorial Hosp. (1971) 18 Cal. App. 3d 240, 254, 95 Cal. Rptr. 901*

[c] Substituting True Name for Fictitiously Named Defendant

If plaintiff knows defendant's identity and then forgets it at time complaint is filed, plaintiff must have at least reviewed readily available information likely to refresh his or her memory to use *Code Civ. Proc. § 474* relation back doctrine to avoid bar of statute of limitations. *Woo v. Superior Court (1999) 75 Cal. App. 4th 169, 179-180, 89 Cal. Rptr. 2d 20* (Fourth Dist., Div. One; rejecting contrary authority of *Balon v. Drost (1993) 25 Cal. Rptr. 2d 12 (1st Dist., Div.2)*

Courts have considered noncompliance with party substitution requirements of *Code Civ. Proc. § 474* as curable procedural defect and have been lenient in permitting rectification of defect; in other cases, however, court may require strict compliance and counsel cautioned to follow correct procedure for substituting named defendant for fictitious Doe defendant. *Woo v. Superior Court (1999) 75 Cal. App. 4th 169, 176-177, 89 Cal. Rptr. 2d 20*

Amendment adding true name of Doe defendant in action filed against health care provider more than one year after discovery of cause of action was proper because serving notice of intent on named codefendants, as required by *Code Civ. Proc. § 364(a)*, extends period for commencement of suit against Does as well as against named codefendants. *Grimm v. Thayer (1987) 188 Cal. App. 3d 866, 870-871, 233 Cal. Rptr. 687*

When defendant is substituted for fictitiously named party that was allegedly liable for plaintiff's damages, date of original complaint applies for limitations purposes. *Moseley v. Abrams (1986) 170 Cal. App. 3d 355, 359, 216 Cal. Rptr. 40*

Amendment to complaint meeting requirements of *Code Civ. Proc. § 474* (adding true name of unknown defendant) related back for statute of limitations purposes to date of filing original complaint. *Olden v. Hatchell (1984) 154 Cal. App. 3d 1032, 1037, 201 Cal. Rptr. 715*

Amendment adding specific name of Doe defendant makes that defendant party as of date original complaint was filed for purpose of statute of limitation. *Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 617, 199 Cal. Rptr. 644*

In action for wrongful death resulting from stabbing in tavern, amended complaint substituting owners of another tavern in which assailant is alleged to have become intoxicated for Doe defendants was not barred by statute of limitations. *Barnes v. Wilson (1974) 40 Cal. App. 3d 199, 206, 114 Cal. Rptr. 839*

[d] Alleging Additional Damages

Amended complaint alleging special damages not mentioned in original complaint may relate back to original complaint as long as special damages are result of injury alleged in original complaint. *Walton v. Guinn (1986) 187 Cal. App. 3d 1354, 1362, 232 Cal. Rptr. 451*

[e] Adding Plaintiffs

Under Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 19-22, 108 P.2d 906 , complaint filed by party without standing may be amended to substitute real party in interest if facts of cause of action against defendant are not "wholly different" after amendment; according to *Klopstock*, amendment to substitute real party in interest as plaintiff is entitled to relation back effect so long as cause of action against defendant is not factually changed; amendment changing nothing other than identity of plaintiff would clearly pass modern "same general set of facts" test set forth in *Austin v. Massachusetts Bonding & Ins. Co. (1961) 56 Cal. 2d 596, 600, 364 P.2d 681* ; leave to amend to either substitute as plaintiff real party in interest (i.e., bankruptcy trustee), or to obtain trustee's abandonment of claim, did not change substantive cause of action and should have been granted. *Cloud v. Northrop Grumman Corp. (1998) 67 Cal. App. 4th 995, 1000, 1004-1008, 1011, 79 Cal. Rptr. 2d 544*

Amended complaint naming individual in representative capacity as defendant on behalf of decedent relates back to filing of original complaint that was timely filed against decedent whose death was unknown to plaintiff at time of filing original complaint. *Burgos v. Tamulonis (1994) 28 Cal. App. 4th 757, 762-763, 33 Cal. Rptr. 2d 728*

Amendment in which individual plaintiff adds his or her solely owned professional corporation as new plaintiff relates back to original filing of complaint if individual and corporate plaintiffs are, for purposes of action, essentially the same, when same general set of facts are alleged in amended complaint, and when defendant will not suffer prejudice. *Pasadena Hospital Assn. v. Superior Court (1988) 204 Cal. App. 3d 1031, 1033, 251 Cal. Rptr. 686*

Amendment nunc pro tunc to add new plaintiffs was permissible notwithstanding statute of limitations when new plaintiffs were originally part of class action that was not certified. *Guenter v. Lomas & Nettleton Co. (1983) 140 Cal. App. 3d 460, 468, 189 Cal. Rptr. 470*

Husband barred by statute of limitations from becoming additional plaintiff alleging cause of action for loss of consortium in action filed by injured wife. *Bartalo v. Superior Court (1975) 51 Cal. App. 3d 526, 532, 124 Cal. Rptr. 370*

[f] Miscellaneous Issues

Appointment of plaintiff as personal representative of her deceased son several years after statute of limitations had run on personal injury survival action was properly held, under facts of case, not to relate back to timely filing of original complaint, when plaintiff knew or should have known that she lacked standing to sue when complaint was filed and incorrectly alleged that she had been appointed personal representative. *Coats v. K-Mart Corp. (1989) 215 Cal. App. 3d 961, 967-968, 264 Cal. Rptr. 12*

Filing proposed amended complaint stating new cause of action with notice of motion for leave to amend is within period of limitations even though hearing and order on motion occur after period would have run. *Wiener v. Superior Court (1976) 58 Cal. App. 3d 525, 530, 130 Cal. Rptr. 61*

Amendment after statute of limitations has run to show that party who made general appearance in action is the defendant. *Chitwood v. County of Los Angeles (1971) 14 Cal. App. 3d 522, 526-528, 92 Cal. Rptr. 441*

[21] Relationship Between Statutes of Limitation, Fictitious Name Statute, and Statutory Requirement That Summons Be Served in Three Years

Statutory schemes involving various statutes of limitations, *Code Civ. Proc. § 474* (suing party by fictitious name), and *Code Civ. Proc. § 583.210* (requiring that summons and complaint be served on defendant within three years after complaint is filed) represent satisfactory compromise between harsh effect on plaintiff of statute of limitations and unfairness to defendant of attempting to litigate stale claim; the shorter the statute of limitations, the greater the need for application of fictitious-names statute. *Sobeck & Associates, Inc. v. B & R Investments No. 24 (1989) 215 Cal. App. 3d 861, 870, 264 Cal. Rptr. 156*

[21.1] Relationship Between Statute of Limitations and Statute of Repose

While statute of limitations normally sets time within which proceedings must be commenced once cause of action accrues, statute of repose limits time within which action may be brought and is not related to accrual; statute of repose is thus harsher than statute of limitations in that it cuts off right of action after specified period of time, irrespective of accrual or even notice that legal right has been invaded. *Giest v. Sequoia Ventures, Inc (2000) 83 Cal. App. 4th 300, 305-306, 99 Cal. Rptr. 2d 476*

Statute of repose differs from statute of limitations in that statutes of limitation bar suits filed more than specified period after injury occurs or is discovered, whereas statute of repose is bar on all suits brought more than specified period after date of manufacture of a product and delivery to purchaser; because date of injury is not factor used in computing running of time period and because statutes of repose typically do not have tolling provisions, they acquire substantive nature, barring rights of action even before injury has occurred if injury occurs subsequent to prescribed time period. *Burroughs v. Precision Airmotive Corp. (2000) 78 Cal. App. 4th 681, 689-690, 93 Cal. Rptr. 2d 124*

[22] Supplemental Complaints

Supplemental complaint alleging later instances of same conduct as that alleged in original complaint relates back to date of original complaint that gave defendant notice that wrong was of continuing nature. Bendix Corp. v. City of Los Angeles (198) *150 Cal. App. 3d 921, 926, 198 Cal. Rptr. 370* (disagreeing with contrary holding of *ITT Gilfillan, Inc. v. City of Los Angeles (1982) 136 Cal. App. 3d 581, 589, 185 Cal. Rptr. 848*)

Supplemental complaint does not relate back to date of filing of original complaint and thus not allowed after period of limitation expires. *ITT Gilfillan, Inc. v. City of Los Angeles (1982) 136 Cal. App. 3d 581, 586-589, 185 Cal. Rptr. 848*

[23] Suspension of Period of Limitation

[a] Effect

Effect of suspension of running period of limitation is to add to equal amount of time to period. *Estate of Caravas (1952) 40 Cal. 2d 33, 42, 250 P.2d 593*

[b] Absence of Obligor From State

[i] General Rule

Fact that defendant was amenable to service of process while outside state is irrelevant to tolling provisions of *Code Civ. Proc. § 351*. *Maurer v. Ind. and as Members of Los Angeles Cty. (9th Cir. 1982) 691 F.2d 434, 436*

Although the tolling provisions of *Code of Civ. Proc. § 340.6* are exclusive with regard to legal malpractice claims, the broad terms of the fourth tolling provision of § 340.6(a)--the provision applicable to legal and physical disabilities--encompass the circumstances described in the general tolling provisions set forth in § 351, which generally provides that if, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the applicable limitations period after his return to the state. *Jocer Enterprises, Inc. v. Price (2010) 183 Cal. App. 4th 559, 569, 107 Cal. Rptr. 3d 539*

The tolling provision of *Code Civ. Proc. § 351* applies to the one-year limitation in medical malpractice cases. Harm resulted from the trial court's denial of plaintiff's discovery motions because his notice of intent to sue was six days late, and at trial the surgeon testified that he was outside California for three days. An absence for three more days--merely a long weekend perhaps--would have made a world of difference to the timeliness of the complaint. Thus, denying discovery prevented the patient from gathering evidence on a dispositive issue. The patient did not have to accept the surgeon's testimony as the final word. *Kaplan v. Mamelak (2008) 162 Cal. App. 4th 637, 643-44, 75 Cal. Rptr. 3d 861*

Code Civ. Proc. § 351 impermissibly burdens interstate commerce with respect to residents who travel in course of interstate commerce; however, Commerce Clause does not bar applying tolling provisions of section 351 to interstate travel unrelated to facilitation of interstate commerce (e.g., vacation trips); demurrer improperly sustained when allegations of complaint did not describe extent to which defendant's absences from California were in course of interstate commerce. *Filet Menu, Inc. v. Cheng (1999) 71 Cal. App. 4th 1276, 1282-1284, 84 Cal. Rptr. 2d 384*

Limited partnership is entity permanently within state so that statute of limitations on claims against partnership is not tolled when general partner is absent from state. *Epstein v. Frank (1981) 125 Cal. App. 3d 111, 120, 177 Cal. Rptr. 831*

Absence of proposed defendant from state does not suspend running of period of limitation where defendant has agent within state authorized to receive service of process. *Bigelow v. Smik (1970) 6 Cal. App. 3d 10, 12-13, 85 Cal. Rptr. 613*

Time of proposed defendant's absence does not add to period of limitation if occurring while plaintiff under disability. *Rafael v. Superior Court (1969) 1 Cal. App. 3d 457, 458-460, 81 Cal. Rptr. 748*

[ii] Absence of One of Joint Obligors

Absence of one of two or more joint obligors suspends running of period of limitation as to absent obligor, notwithstanding expiration of period as to other joint obligor remaining in state. *Arocena v. Sawyer (1923) 60 Cal. App. 581, 591-592, 213 P. 523* (partners)

[iii] Corporation as Obligor

Code Civ. Proc. § 351 does not apply in action against foreign corporation. *Cardoso v. American Medical Systems, Inc. (1986) 183 Cal. App. 3d 994, 997-999, 228 Cal. Rptr. 627*

Code Civ. Proc. § 351 does not apply to case of corporate obligee, whether foreign or domestic corporation. *Loope v. Greyhound Lines, Inc. (1952) 114 Cal. App. 2d 611, 614, 250 P.2d 651*

[iv] Departure From State After Cause of Action Accrues

Secret, clandestine, or fraudulently contrived visits after departure do not affect suspension of period of limitation because of obligor's departure from state after accrual of cause of action; open, repeated, and prolonged visits, however, are part of period of limitation, whether or not plaintiff knows of them. *Stewart v. Stewart (1907) 152 Cal. 162, 166, 92 P. 87*

The tolling provisions of *Code Civ. Proc. § 351* have been applied to nonresident defendants who have never entered the state and to resident defendants who are temporarily absent from the state. Whether section 351 applies to resident defendants who are permanently absent from California, i.e., those who move out of state, was considered by the court in *Heritage Marketing & Ins. Services, Inc. v. Chrustawka (2008) 160 Cal. App. 4th 754, 73 Cal. Rptr. 3d 126* , which concluded that section 351 penalizes people who move out of state by imposing a longer statute of limitations on them than on those who remain in the state, and that the *commerce clause* protects persons from such restraints on their movements across state lines. *Heritage Marketing & Ins. Services, Inc. v. Chrustawka (2008) 160 Cal. App. 4th 754, 763, 73 Cal. Rptr. 3d 126*

Tolling provision of *Code Civ. Proc. § 351* increases 10-year limitation period of *Code Civ. Proc. § 337.5* for time defendant spent out of state to avoid judgment. *Green v. Zissis (1992) 5 Cal. App. 4th 1219, 1223, 7 Cal. Rptr. 2d 406*

[v] Limited Partnership as Obligor

Code Civ. Proc. § 351 does not apply to limited partnership that has designated agent for service of process. *Cardoso v. American Medical Systems, Inc. (1986) 183 Cal. App. 3d 994, 999, 228 Cal. Rptr. 627* ; *Epstein v. Frank (1981) 125 Cal. App. 3d 111, 120, 177 Cal. Rptr. 831*

[vi] Nonresidence of Obligor

Code Civ. Proc. § 351 applies where obligor never was in or resided in state and subsequently enters state; entry is equivalent to "return." *Cvecich v. Giardino (1940) 37 Cal. App. 2d 394, 399-400, 99 P.2d 573*

[c] Arbitration

Cal. Code of Civ. Proc. § 1281.12 provides that if an arbitration agreement requires that arbitration of a controversy be demanded or initiated by a party to the arbitration agreement within a period of time, the commencement of a civil action by that party based upon that controversy, within that period of time, shall toll the applicable time limitations contained in the arbitration agreement with respect to that controversy, from the date the civil action is commenced until 30 days after a final determination by the court that the party is required to arbitrate the controversy, or 30 days after the final termination of the civil action that was commenced and initiated the tolling, whichever date occurs first. The end of the tolling period simply means that the contractual limitations clock begins to run again, not that the limitations period ended. *Pearson Dental Supplies, Inc. v. Superior Court (2010) 48 Cal. 4th 665, 673-675, 108 Cal. Rptr. 3d 171, 229 P.3d 83*

A court may not deny a petition to compel arbitration on the ground the statute of limitations has run on the claims the

parties agreed to arbitrate. *Wagner Construction Co. v. Pacific Mechanical Corp. (2007) 41 Cal. 4th 19, 25, 58 Cal. Rptr. 3d 434, 157 P.3d 1029*

Under *Ins. Code § 10089.82*, any applicable period of limitations is tolled for number of days beginning from referral to mediation under *Ins. Code § 10089.70 et seq.* (mediation program for insurance disputes arising from the Northridge earthquake) until date on which mediation is either completed or declined, date on which insured fails to appear for scheduled mediation for second time, or, in the event that a settlement is completed, expiration of any applicable 3 business days cooling off period; period of tolling ended on date parties met for mediation, which was unsuccessful,where there was no indication parties wished to avail themselves further of program, rather than later date on which Department of Insurance sent courtesy letter to parties notifying them of termination of mediation; there was no statutory requirement of formal written notification. *Michelson v. Mid-Century Ins. Co. (2000) 83 Cal. App. 4th 450, 457-459, 99 Cal. Rptr. 2d 804*

Period of limitation is suspended while contractual dispute submitted to arbitration or other form of reference. *A. Teichert & Son, Inc. v. State of Cal., (1956) 238 Cal. App. 2d 736, 746-747, 48 Cal. Rptr. 225*

[d] Commencing Action

[i] General Rule

Filing of a petition to perpetuate testimony or preserve evidence under *Code of Civ. Proc. § 2035.010 et seq.* does not constitute the filing of a "suit" for purposes of satisfying the six-month statute of limitations set forth in *Gov. Code § 945.6(a)(1)* of the *California Tort Claims Act. Orr v. City of Stockton (2007) 150 Cal. App. 4th 622, 627, 58 Cal. Rptr. 3d 662*

Civil action is commenced by filing complaint with court; in ordinary lawsuits deadline for serving summons is later than deadline for filing complaint; *Gov. Code § 66499.37* (action to review decision concerning a subdivision), however, expressly requires not only that action be commenced within 90 days, but also that service of summons be effected within same 90 days. *Maginn v. City of Glendale (1999) 72 Cal. App. 4th 1102, 1104-1108, 85 Cal. Rptr. 2d 639*

Complaint deemed filed when presented to clerk for filing during business hours in form required by state law; clerk has ministerial duty to file such paper. *Carlson v. Department of Fish & Game (1998) 68 Cal. App. 4th 1268, 1270, 1272-1276, 80 Cal. Rptr. 2d 601*

Commencement of action suspends running of period of limitation as to matters arising out of transaction set forth in complaint. *Record Machine & Tool Co. v. Pageman Holding Corp. (1959) 172 Cal. App. 2d 164, 175-176, 342 P.2d 402*

Period of limitation on action in form of cross-action by defendant, if cause of action arises out of transaction set forth in complaint, is suspended by filing of complaint. *Luther v. Foster (1957) 150 Cal. App. 2d 725, 729, 310 P.2d 655* (disapproved on other grounds in *Palmer v. Gregg (1967) 65 Cal. 2d 657, 662, 56 Cal. Rptr. 97, 422 P.2d 985*)

[ii] As to Fictitiously Named Defendant

Suing defendant by fictitious name under *Code Civ. Proc. § 474* is means of bringing suit before barred by statute of limitation; party so sued is party from date of commencement if true name inserted by amendment. *Austin v.*

Massachusetts Bonding & Insurance Co. (1961) 56 Cal. 2d 596, 599, 600, 602, 15 Cal. Rptr. 817, 364 P.2d 681

Notice of intent to commence action against health care provider, when properly served on named defendants, extends period for commencement of suit against Does as well as against named defendants. *Grimm v. Thayer (1987) 188 Cal. App. 3d 866, 870-871, 233 Cal. Rptr. 687* (disapproved on another ground in *Woods v. Young (1991) 53 Cal. 3d 315, 328 n.4, 279 Cal. Rptr. 613, 807 P.2d 455*)

While duty to investigate is considered in discussing whether initial complaint is timely, that inquiry is not relevant to whether Doe amendment is timelyunder *Code Civ. Proc. § 474*; while it is true that plaintiff's ignorance of defendant's name must be genuine (in good faith) and not feigned and that plaintiff need not be aware of each and every detail concerning person's involvement before plaintiff loses claim to ignorance, it is equally true that plaintiff does not relinquish his or her right under section 474 simply because he or she has suspicion of wrongdoing arising from one or more known facts; trial court erred in medical malpractice action in holding that the plaintiff did not properly amend complaint to substitute a doctor as Doe defendant under section 474 when court applied standard that plaintiff was obligated to make reasonable investigation to discover doctor's identity to determine connection between him and plaintiff's injuries; only relevant inquiry was whether plaintiff knew of doctor's identity and facts giving rise to cause of action against him. *Fuller v. Tucker (2000) 84 Cal. App. 4th 1163, 1169-1173, 101 Cal. Rptr. 2d 776*

When lawsuit is initiated within applicable limitation period against someone and plaintiff has complied with *Code Civ. Proc. § 474* by alleging existence of unknown additional defendants, relevant inquiry when plaintiff seeks to substitute a real defendant for one sued fictitiously is what facts plaintiff actually knew at time original complaint filed; to defeat claim of ignorance required by section 474, it must be shown that plaintiff had actual knowledge of basic facts; on other hand, when lawsuit is first initiated after applicable period of limitation has expired and plaintiff is entitled to claim benefit of delayed discovery rule, relevant inquiry is what plaintiff knew or, through exercise of due diligence, reasonably could have discovered at an earlier date; statute of limitation begins to run when plaintiff suspects or should suspect that plaintiff's injury was caused by wrongdoing, that someone has done something wrong to plaintiff. *General Motors Corp. v. Superior Court (1996) 48 Cal. App. 4th 580, 587-588, 594-596, 55 Cal. Rptr. 2d 871*

Plaintiff cannot avoid statute of limitations by naming fictitious defendant and then, after statute has run, adding by amendment defendant whose identity and capacity were known from outset. *Pabitzky v. Frager (1985) 164 Cal. App. 3d 401, 403-404, 210 Cal. Rptr. 426*

Allegation of fictitiously named defendants under *Code Civ. Proc. § 474* is proper in action under Tort Claims Act (*Gov. Code § 810 et seq.*) to designate public employee defendants; under Tort Claims Act, plaintiff is necessarily not ignorant of public entity's identity at commencement of action, but is nonetheless able to be initially ignorant in good faith of public employees' true names. *Olden v. Hatchell (1984) 154 Cal. App. 3d 1032, 1034-1039, 201 Cal. Rptr. 715*

Party sued as Doe defendant is, for statute of limitations purposes, a party from time filing of original complaint; amendment adding specific name of Doe defendant after statute of limitations has run is justified, even though plaintiff originally knew of defendant's existence, when plaintiff was originally ignorant of facts giving rise to cause of action against that defendant. *Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 616-617, 199 Cal. Rptr. 644*

Period of limitation continues to run as to person sued under fictitious name where complaint states no cause of action against him. *Williams v. Goodman (1963) 214 Cal. App. 2d 856, 861-862, 29 Cal. Rptr. 877*

[iii] By Cross Complaint

Statutes of limitation apply to actions begun by cross complaint. *Strong v. Strong (1943) 22 Cal. 2d 540, 544, 140*

P.2d 386 ; *Wells Fargo Bank v. Kincaid (1968) 260 Cal. App. 2d 120, 124, 66 Cal. Rptr. 832 , cert. denied, 393 U.S. 915*

Filing of cross complaint to complaint by suspended corporation, tolls statute of limitations so that corporation may proceed with its original action upon revival if the statute of limitations as to the complaint had not yet expired at time cross complaint was filed. *American Alternative Energy Partners II v. Windridge, Inc. (1996) 42 Cal. App. 4th 551, 564-565, 49 Cal Rptr. 2d 686* (rule applied to limited partnership that failed to file certificate of limited partnership)

Action that could have been asserted in cross complaint in original action but that was filed as separate action does not relate back to filing of original action and limitation period is not tolled during pendency of original action. *Luna Records Corp., Inc. v. Alvarado (1991) 232 Cal. App. 3d 1023, 1026-1028, 1030, 283 Cal. Rptr. 865*

Cross complaint is generally barred if action barred when complaint was filed. *Trindade v. Superior Court (1973) 29 Cal. App. 3d 857, 859, 106 Cal. Rptr. 48*

Cross complaint on action otherwise barred is not barred if plaintiff took advantage of extended period of limitation to delay filing complaint until cross claim was barred. *Liberty Mut. Ins. Co. v. Fales (1973) 8 Cal. 3d 712, 717, 106 Cal. Rptr. 21, 505 P.2d 213* (construing *Ins. Code § 11580.2*)

Period of limitation on defendant's cross action against plaintiff, if not barred, is suspended by filing complaint; period of limitation on defendant's cross action against any other person is not suspended. *Trindade v. Superior Court (1973) 29 Cal. App. 3d 857, 859-860, 106 Cal. Rptr. 48*

[iv] Defect in Designating Defendant

Misnomer or merely defective description or characterization of defendant, curable by amendment, does not affect period of limitation; naming wrong defendant altogether does not suspend running of period. *Mayberry v. Coca Cola Bottling Co. (1966) 244 Cal. App. 2d 350, 352-353, 53 Cal. Rptr. 317* ; *Chitwood v. County of Los Angeles (1971) 14 Cal. App. 3d 522, 525, 92 Cal. Rptr. 441*

[v] Defects in Form of Complaint

Running of period of limitation is suspended by filing of complaint notwithstanding its having defects or irregularities curable by amendment. *Canadian Bank of Commerce v. Leale (1910) 14 Cal. App. 307, 308-309* ; *Olsen v. Lockheed Aircraft Corp. (1965) 237 Cal. App. 2d 737, 742, 47 Cal. Rptr. 242*

[vi] In Court Without Jurisdiction

Commencing action seasonably in court without jurisdiction nevertheless suspends running of period of limitation; action is transferrable to court with jurisdiction even after period of limitation would otherwise have expired. *Morgan v. Somervell (1940) 40 Cal. App. 2d 398, 400, 104 P.2d 866* ; *see Friends of Mammoth v. Board of Supervisors (1972) 8 Cal. 3d 247, 269, 104 Cal. Rptr. 761, 502 P.2d 1049*

[e] Condition on Obligation

[i] Period Begins When Condition Occurs

Period of limitation for action based on liability which does not arise until occurrence of condition precedent begins to

run only when condition occurs. *Rose v. Foord (1892) 96 Cal. 152, 154, 30 P. 1114*

[ii] Effect of Filing Complaint Before Performance of Condition

Complaint filed before performance of condition does not state cause of action, and is curable only by amendment within period alleging performance of condition. *Wilson v. People ex rel. Dept. of Public Works (1969) 271 Cal. App. 2d 665, 667-669, 76 Cal. Rptr. 906*

[iii] Implicitly Required to Be Performed in Reasonable Time

Person whose right to sue depends on his or her performing condition precedent is not allowed to suspend running of period of limitation indefinitely by delaying performance of condition; reasonable time for performance is to be allowed, generally the statutory period. *Bass v. Hueter (1928) 205 Cal. 284, 287, 270 P. 958*

[iv] Rejection of Claim as Condition

Period of limitation on claim required to be rejected before suit can be maintained does not begin to run until rejection. *Spencer v. Los Angeles (1919) 180 Cal. 103, 119, 179 P. 163* ; *Chas. L. Harney, Inc. v. State of California (1963) 217 Cal. App. 2d 77, 102, 31 Cal. Rptr. 524*

Service of trustee's notice of rejection in proper form under *Prob. Code § 19251* commences 90-day statute of limitations under *Prob. Code § 19255(a)(1)* even though filing of rejection with county clerk occurs later; having been served with trustee's written notice of rejection and thus having been on actual notice that trustee rejected claim, California Department of Health Services' complaint against decedent's trust estate filed more than 90 days later was time-barred; legislative scheme does not create separate rights of action against distributees so as to permit recovery under *Prob. Code § 19203* when creditor has failed to establish its right after bringing action against decedent's trust. *Bonta v. Baker (2000) 80 Cal. App. 4th 302, 304-307, 95 Cal. Rptr. 2d 172*

Period of limitation on claim subject to Tort Claims Act probably begins to run even though claim was not presented and rejected as required in Act. *Savage v. State (1970) 4 Cal. App. 3d 793, 796-797, 84 Cal. Rptr. 650* (interpreting effect of *Gov. Code § 946.6* providing for judicial relief from bar to suit because nonpresentation of claim)

Running of period is suspended after rejection of claim where public entity misled claimant into delaying filing of complaint by appearing to be reconsidering claim. *Potstada v. City of Oakland (1973) 30 Cal. App. 3d 1022, 1028-1029, 106 Cal. Rptr. 705*

Determination whether public entity is estopped to assert statute of limitation because of misleading advice to claimant regarding substantive rights depends on whether entity aced unconscionably or took unfair advantage. *Driscoll v. City of Los Angeles (1967) 67 Cal. 2d 297, 306, 61 Cal. Rptr. 661, 431 P.2d 245*

[v] Official Governmental Act as Condition

Accrual of cause of action is postponed when statute requires official notice by governmental agency to plaintiff as condition precedent to plaintiff bringing action and notice has not yet been given; running of limitation period commences when required condition precedent is performed. *Williams v. Pacific Mutual Life Ins. Co. (1986) 186 Cal. App. 3d 941, 950-951, 231 Cal. Rptr. 234*

[f] Death of Obligee

Death of obligee does not, in absence of contrary statutory provision, suspend running of period of limitation on cause of action accruing during lifetime. *Andersen v. Superior Court of County of Napa (1921) 187 Cal. 95, 101, 200 P. 963* ; *see* former *Code Civ. Proc. § 353* (*now see Code Civ. Proc. § 366.1*)

Death of obligee before accrual of cause of action does not suspend running of period of limitation, notwithstanding that when cause of action accrues no person exists who is entitled to sue. *Cortelyou v. Imperial Land Co. (1913) 166 Cal. 14, 23-24, 134 P. 981*

[g] Disability

[i] General Rule

Statutes of limitation are based on assumption that person having cause of action will not delay bringing it for unreasonable time; assumption does not apply where person is denied access to courts. *Estate of Caravas (1952) 40 Cal. 2d 33, 40, 250 P.2d 593*

Disability that arises simultaneously with accrual of cause of action exists when cause of action accrues and thus, suspends running of period of limitation. *Weinstock v. Eissler (1964) 224 Cal. App. 2d 212, 231, 36 Cal. Rptr. 537* (insanity caused by and arising simultaneously with wrongful act on which cause of action based)

Plaintiff relying on disability must show it to be continuing from time cause of action accrued, tacking of disabilities, some of which did not exist when cause of action accrued, is not permitted. *Rose v. Petaluma & Santa Rosa Ry. Co. (1923) 64 Cal. App. 213, 217, 221 P. 406*

[ii] Disability of One of Joint Obligees

Joint obligees not under disability are benefitted by suspension of running of period of limitation because of disability of another joint obligee. *Leeper v. Beltrami (1959) 53 Cal. 2d 195, 209, 1 Cal. Rptr. 12, 347 P.2d 12*

[iii] Imprisonment

Imprisonment for life with possibility of parole suspends running of period of limitation, notwithstanding language in former *Code Civ. Proc. § 352* (*now see Code Civ. Proc. § 352.1*) "for term less than life." *Grasso v. McDonough Power Equipment, Inc. (1968) 264 Cal. App. 2d 597, 599, 70 Cal. Rptr. 458*

[iv] Insanity

In medical malpractice action, plaintiff's mental incompetence does not toll three-year statutory period provided by *Code Civ. Proc. § 340.5*. *Fogarty v. Superior Court (1981) 117 Cal. App. 3d 316, 320, 172 Cal. Rptr. 594*

[v] Minority

When minor is emancipated by court order under *Fam. Code § 7000 et seq.*, tolling provision of *Code Civ. Proc. § 352(a)* no longer applies, and emancipated minor's causes of action accrue and statute of limitations begin to run on date of emancipation. *West Shield Investigations & Security Consultants v. Superior Court (2000) 82 Cal. App. 4th 935, 940, 949-951, 98 Cal. Rptr. 2d 612* .

Tolling provision of *Code Civ. Proc. § 352(a)* held to apply in action against wife of alleged child abuser sued on theory of negligent supervision, rather than *Code Civ. Proc. § 340.1*, which extends statute of limitations for civil action based on childhood sexual abuse; extended tolling provision of section 340.1 applies only to perpetrator of sexual abuse. *Chaney v. Superior Court (1995) 39 Cal. App. 4th 152, 155-156, 46 Cal. Rptr. 2d 73*

Tolling provision of *Code Civ. Proc. § 352(a)* for minority applies to a federal civil rights action brought under *42 U.S.C. § 1983*; tolling not precluded by *Code Civ. Proc. § 352(b)*. *City of Huntington Park v. Superior Court (1995) 34 Cal. App. 4th 1293, 1297-1300, 41 Cal. Rptr. 2d 68*

Code Civ. Proc. § 352(a)(1) (tolling during minority) applies to toll special limitation period in specific statute absent expression of contrary legislative intent, and public policy protecting minors precludes circumvention of tolling provision by incorporation of special limitation period in contract. *Jessica H. v. Allstate Ins. Co. (1984) 155 Cal. App. 3d 590, 592, 594-596, 202 Cal. Rptr. 239*

[h] Election of Remedy

Whether breach is anticipatory or not, when there are ongoing contractual obligations plaintiff may elect to rely on contract despite breach, and statute of limitations does not begin to run until plaintiff has elected to treat breach as terminating contract. *Mullins v. Rockwell Internat. Corp. (1997) 15 Cal. 4th 731, 734, 738-739, 63 Cal. Rptr. 2d 636, 936 P.2d 1246* ; *Romano v. Rockwell Internat., Inc. (1996) 14 Cal. 4th 479, 484-485, 489-490, 59 Cal. Rptr. 2d 20, 926 P.2d 1114*

Reasonable and good-faith election of one remedy, to lessen extent of injury or damages, suspends running of period of limitation on other remedies. *Myers v. County of Orange (1970) 6 Cal. App. 3d 626, 634, 86 Cal. Rptr. 198* ; Tu-Vu Drive-In *Corp. v. Davies (1967) 66 Cal. 2d 435, 437, 58 Cal. Rptr. 105, 426 P.2d 505* ; *Santa Clara County v. Hayes Co. (1955) 43 Cal. 2d 615, 617-619, 275 P.2d 456* ; *Campbell v. Graham-Armstrong (1973) 9 Cal. 3d 482, 490, 107 Cal. Rptr. 777, 509 P.2d 689* (applying rule)

[i] Equitable Tolling

Equitable tolling of statute of limitations requires that (1) plaintiff provide timely notice to defendant of claim, (2) resultant delay not cause prejudice to defendant's position, and (3) plaintiff act reasonably and in good faith; plaintiff did not act reasonably and in good faith when there was unwarranted delay in filing action in that she had conducted her own investigation of facts, and had possession of results of defendant's investigation for 18 months before filing action. *Ervin v. Los Angeles County (9th Cir. 1988) 848 F.2d 1018, 1019-1020*

Equitable tolling does not apply when plaintiff who allegedly suffered several different wrongs pursues only one remedy regarding those wrongs. *Ervin v. Los Angeles County (9th Cir. 1988) 848 F.2d 1018, 1019*

A builder's passive ownership of property from the time the construction phase was completed until the owners purchased it does not preclude the builder from asserting the limitation defense of *Code Civ. Proc. § 337.15*, which requires that a suit to recover damages for a latent construction defect be brought within 10 years of the date of substantial completion of construction, regardless of the date of discovery of the defect. Absent any allegation that conduct by the builder following completion of the home caused plaintiff's damages, the builder should not be denied the protection that section 337.15 extends to developers. *Gundogdu v. King Mai, Inc. (2009) 171 Cal. App. 4th 310, 315, 89 Cal. Rptr. 3d 489*

Code Civ. Proc. § 337.15 is not subject to equitable tolling for repairs; establishing judicially created exception for

repairs to 10-year period under *Section 337.15* would rewrite statute in way that undermines its statutory purpose and violates established rules of statutory construction; moreover, equitable tolling is not permissible when inconsistent with text of relevant statute; for courts to add judicially inspired exception to express exceptions already approved by the Legislature--in conflict with purpose of statute--would usurp Legislature's role in determining policy. *FNB Mortgage Corp. v. Pacific General Group (1999) 76 Cal. App. 4th 1116, 1132-1134, 90 Cal. Rptr. 2d 841*

In ordinary lawsuits deadline for serving summons is later than deadline for filing complaint; *Gov. Code § 66499.37* (action to review decision concerning a subdivision), however, expressly requires not only that action be commenced within 90 days, but also that service of summons be effected within same 90 days; *Gov. Code § 66499.37* is not subject to equitable tolling. *Maginn v. City of Glendale (1999) 72 Cal. App. 4th 1102, 1109, 85 Cal. Rptr. 2d 639* (delayed service of summons)

In majority of cases in which courts apply equitable tolling doctrine, plaintiff possesses several legal remedies and in good faith pursues one designed to lessen extent of his or her injuries or damage; if defendant is not prejudiced, running of limitations period is tolled as to other available remedies; if, however, request for equitable tolling is not based on pursuit of one legal theory over another, but on initial action voided by court for failure to pay filing fee and there is no claim of error on court's part concerning first action nor assertion of any delay or dilatory tactics on defendant's part, doctrine of equitable tolling is inapplicable. *Hu v. Silgan Containers Corp. (1999) 70 Cal. App. 4th 1261, 1270-1271, 83 Cal. Rptr. 2d 333* (distinguishing *Bollinger v. National Fire Ins. Co. (1944) 25 Cal. 2d 399, 154 P.2d 399* , in which court held plaintiff should be able to pursue second action although statute of limitations had expired because (1) trial court had erroneously granted initial nonsuit, (2) defendant's dilatory tactics prevented disposition of first action in time to permit second timely filing, and (3) plaintiff had at all times proceeded with diligence; all three factors present in *Bollinger* are essential to apply *Bollinger* rule)

Equitable tolling only applies when defendant receives notice, within limitations period, of plaintiff's pursuit of alternative remedy, so that defendant is aware of need to begin investigating matter; equitable tolling held not to apply when plaintiff took no formal action in pursuit of alternative remedy against defendant or third party, but merely engaged in informal negotiations. *65 Butterfield v. Chicago Title Ins. Co. (1999) 70 Cal. App. 4th 1047, 1062-1063, 83 Cal. Rptr. 2d 40*

Doctrine of equitable tolling does not apply to *Code Civ. Proc. § 340.6*; also, one element that must be present before equitable tolling rule of *Bollinger v. National Fire Ins. Co. (1944) 25 Cal. 2d 399, 154 P.2d 399* applies is that plaintiffs are left without judicial forum for resolution of their claims through forces outside their control; unlike plaintiffs in *Bollinger*, plaintiffs in this case were not denied trial on merits due to error of trial court, but because they mistakenly filed suit against California defendants in Arizona state court. *Gordon v. Law Offices of Aguirre & Meyer (1999) 70 Cal. App. 4th 972, 979-980, 980 n.8, 83 Cal. Rptr. 2d 119*

Under equitable tolling, statute of limitations in one forum is tolled as to claim being pursued in another forum. *Martell v. Antelope Valley Hospital Medical Center (1998) 67 Cal. App. 4th 978, 985, 79 Cal. Rptr. 2d 329*

28 U.S.C. § 1367(d), enacted in 1990, codifies principles of equitable tolling found in state case law; under section 1367(d), period of limitation for any pendent claim over which federal court has supplemental jurisdiction is tolled while claim is pending and for 30 days after it is dismissed unless state law provides for longer tolling period, i.e., second suit must be filed within 30 days after dismissal of pendent state claims without prejudice unless state law extends that period; plaintiff under *section 1367(d)* is not allowed to tack onto limitations period full time during which federal action was pending; thus, when initial federal action containing state pendent claims filed and thereafter dismissed, what conduct is "reasonable" under equitable tolling doctrine requirement of reasonable promptness in refiling must be assessed in light of 30-day grace period set forth in *section 1367(d)*. *Kolani v. Gluska (1998) 64 Cal. App. 4th 402, 408-411, 75 Cal. Rptr. 2d 257*

Although one-year period from date of loss to file action against insurer is equitably tolled between time insured notifies insurer of loss, and denial of claim, insured's request for reconsideration after insurer unequivocally denies claim does not create additional period of equitable tolling. *Singh v. Allstate Ins. Co. (1998) 63 Cal. App. 4th 135, 140, 145-148, 73 Cal. Rptr. 2d 546*

Action to enforce stop notice against city timely by virtue of equitable tolling of statute of limitations while plaintiff pursued claim against general contractor and bonding company; equitable tolling has three elements: (1) timely notice to the defendant, (2) lack of prejudice to defendant, and (3) good faith conduct on plaintiff's part; timely notice essentially means first claim must have been filed within statutory period; lack of prejudice to defendant translates to requirement that facts of two claims are identical or at least so similar that defendant's investigation of first claim will put defendant in position to fairly defend second one; with regard to good faith, reasoned long delay even after crediting the tolling period might be considered unreasonable, or intentionally defendant into believing second claim would not be filed might be deemed to constitute bad faith. *Structural Steel Fabricators, Inc. v. City of Orange (1995) 40 Cal. App. 4th 459, 464-465, 46 Cal. Rptr. 2d 867*

Under equitable tolling doctrine, alternative remedy pursued during limitation period, such as timely filed federal action, tolls statute of limitations; doctrine of equitable tolling requires not only that plaintiff has timely filed alternative remedy, but also that in so doing plaintiff acted reasonably and in good faith. *McAlpine v. Superior Court (1989) 209 Cal. App. 3d 1, 5, 5 n.2, 257 Cal. Rptr. 32*

Statute of limitations applicable to statutory cause of action for retaliatory discharge was not equitably tolled by action filed in federal court based on same facts when federal complaint alleging retaliatory layoff was amended to class action and state law causes of action were not included. *Ficalora v. Lockheed Corp. (1983) 193 Cal. App. 3d 489, 493, 238 Cal. Rptr. 360*

Statute of limitations applicable to petition for disability pension was tolled during time workers' compensation claim based on same facts was pending. *Collier v. City of Pasadena (1983) 142 Cal. App. 3d 917, 926, 191 Cal. Rptr. 681*

[j] Exhaustion of Administrative Remedies

Reasonable and good faith attempt to exhaust administrative remedies before suing suspends period of limitation, whether or not exhaustion is required before commencing action. *Campbell v. Graham-Armstrong (1973) 9 Cal. 3d 482, 490, 107 Cal. Rptr. 777, 509 P.2d 689*

Exhaustion of administrative remedies that is necessary prelude to action suspends running of period of limitation from time claim is made until decision. *Dillon v. Board of Pension Comm'rs (1941) 18 Cal. 2d 427, 431* ; *Community Cause v. Boatwright (1981) 124 Cal. App. 3d 888, 903, 177 Cal. Rptr. 657* ; *A. Teichert & Son, Inc. v. State of Cal., (1965) 238 Cal. App. 2d 736, 746, 48 Cal. Rptr. 225*

Limitations period for taxing entity's action against company for money due on unpaid business tax assessment was tolled until taxpayer exhausted administrative remedy. *City of Los Angeles v. Centex Telemanagement, Inc. (1994) 29 Cal. App. 4th 1384, 1389*

[k] Failure to Comply With Ins. Code § 11583

Legislative purpose of *Ins. Code § 11583* in requiring written notice of limitation period is to prevent claimant from being lulled into sense of complacency about filing suit because of apparent cooperativeness of defendant or his or her insurance company that is indicated by advance or partial payment of claim; 1985 amendment demonstrates unambiguous legislative intent to relieve insurer of duty to provide claimant with this protection where he or she has

counsel on whom law imposes identical duty. *Associated Truck Parts, Inc. v. Superior Court (1991) 279 Cal. Rptr. 76*

Ins. Code § 11583 applies to state and state agencies so as to toll the time limitation for filing claim under *Gov. Code § 945.4*; university's provision of augmented health service to injured student without demanding payment constituted advance or partial payment of damages under *section 11583*, although provision of basic services paid for at matriculation would not. *Maisel v. San Francisco State University (1982) 134 Cal. App. 3d 689, 693-694, 184 Cal. Rptr 694*

In action for damages for personal injuries sustained in motor vehicle accident, defendant was not precluded by *Ins. Code § 11583* from asserting one-year statute of limitations (former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 340(c)*)), although notice was not given when defendant's insurer paid plaintiff, when payment of property damage claim was made after statute of limitations on personal injury action had run and giving of notice would have been useless act. *Jackson v. Andco Farms, Inc. (1982) 130 Cal. App. 3d 475, 478-479, 181 Cal. Rptr. 815*

Statute of limitations under *Ins. Code § 11583* was tolled by defendant's payment to injured party under liability policy without notifying injured party of applicable statute of limitations. *Malinski v. Wegman's Nursery & Landscaping, Inc. (1980) 102 Cal. App. 3d 282, 290-292, 162 Cal. Rptr. 287*

[l] Felon

Limitation period of *Code Civ. Proc. § 340.3* (actions for damages based on defendant's felony) was tolled by *Code Civ. Proc. § 352.5* at time plaintiff filed suit against defendant, because defendant was then under order to pay restitution to plaintiff. *Jamieson v. Hickey (1988) 199 Cal. App. 3d 595, 599, 244 Cal. Rptr. 859*

Code Civ. Proc. § 340.3 tolls period of limitation against convicted defendant when judgment or sentence is stayed; defendant was not "convicted" within meaning of section 340.3 when she pleaded nolo contendre, and was ultimately found not guilty by reason of insanity. *Newman v. Newman (1987) 196 Cal. App. 3d 255, 258-259, 241 Cal. Rptr. 712*

[m] Fraudulent Concealment of Cause of Action

In products liability action arising from plaintiff's pregnancy and miscarriage while using intrauterine contraceptive device, alleged fraudulent concealment by manufacturer of actual pregnancy rate associated with use of device did not toll statute of limitations because plaintiff became aware of facts giving rise to cause of action within limitations period by virtue of miscarriage. *Braxton-Secret v. A.H. Robins Co. (9th Cir. 1985) 769 F.2d 528, 531-532*

Gov. Code § 11130.3(a), part of Bagley-Keene Open Meeting Act, does not allow any extension of time even through operation of doctrine fraudulent concealment; purpose of doctrine of fraudulent concealment and of 30 day limitation period of *Gov. Code § 11130.3(a)* are not consistent. *Regents of University of California v. Superior Court (1999) 20 Cal. 4th 509, 532-535, 85 Cal. Rptr. 2d 257, 976 P.2d 808*

Pleading of fraudulent concealment as excuse for late filing is mere surplusage if nothing appears on face of complaint suggesting that action is barred by statute of limitations, and thus plaintiff was not required to plead all elements of fraudulent concealment. *Union Carbide Corp. v. Superior Court (1984) 36 Cal. 3d 15, 25-26, 201 Cal. Rptr. 580, 679 P.2d 14*

Fraudulent concealment of cause of action suspends running of period of limitation. *Pashley v. Pacific Elec. Ry. Co. (1944) 25 Cal. 2d 226, 229-232, 153 P.2d 325* ; *Community Cause v. Boatwright (1981) 124 Cal. App. 3d 888, 899, 177 Cal. Rptr. 657*

When defendant fraudulently conceals facts on which cause of action depends, statute of limitations is tolled until plaintiff discovers or ought to have discovered facts. *Hernandez v. Garcetti (1998) 68 Cal. App. 4th 675, 680-681, 80 Cal. Rptr. 2d 443*

Defendant's fraud in concealing cause of action against defendant tolls applicable statute of limitations, but only for period claim is undiscovered by plaintiff or until such time as plaintiff, by exercise of reasonable diligence, should have discovered it; like discovery rule, rule of fraudulent concealment is equitable principle designed to effect substantial justice between parties; rationale is that culpable defendant should be estopped from profiting by defendant's own wrong to extent that it hindered otherwise diligent plaintiff in discovering plaintiff's cause of action. *Mark K. v. Roman Catholic Archbishop (1998) 67 Cal. App. 4th 603, 611, 79 Cal. Rptr. 2d 73*

In action brought on several theories for injuries sustained from intrauterine device eight years prior, cause of action for personal injuries caused by device accrued when injuries were incurred; however, cause of action in fraud based on defendant's representations accrued seven years after injuries incurred, when plaintiff discovered facts showing possible fraud. *Snow v. A.H. Robins Co. (1985) 165 Cal. App. 3d 120, 127-135, 211 Cal. Rptr. 271*

Pleading of belated discovery of facts requires appellate court to determine as matter of law whether failure to discover cause of action earlier was due to plaintiff's failure to act with reasonable diligence, and whether trial court correctly applied reasonable diligence test to each and every cause of action pleaded; test of reasonable diligence is whether plaintiff has information of circumstances sufficient to put reasonable person on inquiry, or opportunity to obtain knowledge from sources open to investigation. *Snow v. A.H. Robins Co. (1985) 165 Cal. App. 3d 120, 128, 129, 211 Cal. Rptr. 271*

Mere negligent failure to disclose cause of action is not sufficient to toll statute of limitations. *Community Cause v. Boatwright (1981) 124 Cal. App. 3d 888, 901, 177 Cal. Rptr. 657*

Mere nondisclosure of material fact, in absence of fiduciary relationship, is not fraudulent concealment of cause of action. *Hesse v. Vinatieri (1956) 145 Cal. App. 2d 448, 451, 302 P.2d 699*

Fraudulent act after period of limitation has expired is not fraudulent concealment of cause of action. *Scafidi v. Western Loan & Bldg. Co. (1946) 72 Cal. App. 2d 550, 566, 165 P.2d 260* ; *see* *Bank of America v. Williams (1948) 89 Cal. App. 2d 21, 25, 200 P.2d 151* (reporting rule)

[n] Legal Inhibition to Sue

[i] Adverse Case Law Is Not Legal Inhibition to Sue

Retroactive application of judicial decision means only that new rule of law governs events occurring prior to date of decision only if such events are at issue in timely filed actions. *Monroe v. Trustees of the California State Colleges (1971) 6 Cal. 3d 399, 407, 99 Cal. Rptr. 129, 491 P.2d 1105* (retroactive application of judicial decision that permitted teacher to challenge dismissal after refusing to take loyalty oath did not revive actions barred by statute of limitations); *Bartman v. Estate of Bartman (1978) 83 Cal. App. 3d 780, 786, 148 Cal. Rptr. 207*

Existence of judicially developed rule of law contrary to plaintiff's position is not a legal prohibition against suit and does not suspend running of period of limitation. *Estate of Horman (1971) 5 Cal. 3d 62, 71, 95 Cal. Rptr. 433, 485 P.2d 785*

[ii] Pending Appeal in Related Case

Code Civ. Proc. § 356 excludes from statutory period the time during which commencement of an action is stayed by injunction or statutory prohibition; Section 356 has also been applied where plaintiff's action is legally prohibited by means other than injunction or statutory prohibition, including periods during which the plaintiff is legally prevented from taking action to protect his or her rights, for example, pending legally required deliberations of pension board; action against corporate directors was not barred by *Code Civ. Proc. § 359* because statute of limitations was suspended pending determination of appeal in related case that established their liability. *Hoover v. Galbraith (1972) 7 Cal. 3d 519, 526, 102 Cal. Rptr. 733, 498 P.2d 981*

[iii] Pending Bankruptcy Proceeding

Running of period of limitation is suspended during period when plaintiff is legally restrained from taking action to protect his interests; period suspended for action in conversion while bankruptcy court order prohibited plaintiff "from interfering with the debtor in possession of his property." *Eistrat v. Cekada (1958) 50 Cal. 2d 289, 291-292, 324 P.2d 881*

Pendency of bankruptcy proceeding suspends running of period of limitation on creditor's action against bankrupt on provable debt. *Hoff v. Funkenstein (1880) 54 Cal. 233, 235* ; *Graybar Elec. Co. v. Lovinger (1947) 81 Cal. App. 2d 936, 937-938, 185 P.2d 370*

[o] Nonresidence of Obligee

Nonresidence of obligee does not, in absence of contrary statutory provision, affecting running of period of limitation. *Cvecich v. Giardino (1940) 37 Cal. App. 2d 394, 400-402, 99 P.2d 573*

[p] Obligor's Concealment of Self

Period of limitation runs if obligor is present in state, notwithstanding plaintiff's ignorance of that fact or inability to discover presence. *St. Paul Title & Trust Co. v. Stensgaard (1912) 162 Cal. 178, 180-181, 121 P. 731*

Domestic corporation is not able to conceal itself within state. *Coates Capitol Corp. v. Superior Court (1967) 251 Cal. App. 2d 125, 129, 59 Cal. Rptr. 231*

Obligor's fraudulent concealment of his or her identity does not suspend running of period of limitation, if obligor present in state. *Staples v. Zoph (1935) 9 Cal. App. 2d 369, 370, 49 P.2d 1131* (disapproved in *Bernson v. Browning-Ferris Industries (1994) 7 Cal. 4th 926, 936, 30 Cal. Rptr. 2d 440, 873 P.2d 613* , which holds that equitable estoppel precludes defendant from asserting statute of limitations when plaintiff is unable to discover defendant's actual identity as a result of intentional concealment)

[24] Waiving Bar of Statute

[a] By Private Agreement

[i] Before or After Action Has Begun

Parties to existing controversy are competent to agree to forego statute of limitation for definite period; agreement is estoppel against pleading bar of statute. *Kemper v. Industrial Acci. Com. (1918) 177 Cal. 618, 620, 171 P. 426*

Right to plead bar of statute of limitation is waivable either before or after action begun. *Tebbets v. Fidelity & Cas.*

Co. (1909) 155 Cal. 137, 139, 99 P. 501

[ii] Reasonableness

Parties to contract are competent to agree on period of limitation shorter than statutory period, if period agreed on is not so unreasonable as to show imposition or undue advantage. *Beeson v. Schloss (1920) 183 Cal. 618, 622, 192 P. 292*

Determination whether period of limitation agreed on in contract is unreasonable. *Capehart v. Heady (1962) 206 Cal. App. 2d 386, 388-391, 23 Cal. Rptr. 851*

[iii] By Authorized Agent of Obligor

Written waiver of statute of limitations signed by authorized agent is for all intents and purposes signed by person obligated as required by *Code Civ. Proc. § 360.5* and therefore valid; hence, corporation's waiver of statute of limitations signed by corporation's attorney-agent comports with requirement of section 360.5 that waiver of statute of limitations be signed by person obligated; because written waiver of statute of limitations is not a contract, equal dignities rule (*Civ. Code § 2309*), requiring that authority to enter into contract required by law to be in writing can only be given by an instrument in writing, does not apply to it *Carlton Browne & Co. v. Superior Court (1989) 210 Cal. App. 3d 35, 37, 45-46, 258 Cal. Rptr. 118*

[iv] Waiver by Personal Representative of Decedent's Estate Prohibited

Personal representative of decedent's estate is not authorized to waive defense of bar of statute of limitation in action based on claim against estate. *Bryson v. Hill (1930) 107 Cal. App. 158, 160, 290 P. 52*

[v] Operation as Extension of Period of Limitation

Provision of bonds making demand and failure to comply for three months prerequisite to action on bonds would give plaintiff statutory period plus three months in which to bring suit; failure to make demand cannot be used to extend indefinitely period of limitation. *California Safe Deposit & Trust Co. v. Sierra Valleys Ry. Co. (1910) 158 Cal. 690, 697, 112 P. 274*

Under *Code Civ. Proc. § 360.5*, written waiver executed prior to running of applicable statute of limitations is effective for period of four years from commencement of running of statute of limitations; for written waiver executed after statute of limitations has run, four-year period runs from date of signing waiver; thus, statute abolishes making of unlimited and indefinite waivers at time credit is extended or loan is made, and prevents any one waiver from waiving statute for period of more than four years beyond time statute would otherwise have run. *California First Bank v. Braden (1989) 216 Cal. App. 3d 672, 676-677, 264 Cal. Rptr. 820*

[vi] Total Removal of Limitation

Private agreement waiving forever party's right to plead bar of statute of limitation is valid in appropriate case. *Brownrigg v. deFrees (1925) 196 Cal. 534, 546, 238 P. 714*

Private agreement giving party right to sue at his convenience and whenever desired is valid in appropriate case. *Atlas Fin. Corp. v. Kenny (1945) 68 Cal. App. 2d 504, 514-517, 157 P.2d 401*

[vii] Effect on Persons Other Than Parties to Agreement

Waiver binds persons in privity, in absence of conflict of interest. *Lerner v. Los Angeles City Board of Education (1963) 59 Cal. 2d 382, 397 ns.8, 9, 29 Cal. Rptr. 657, 380 P.2d 97*

Privity, for purpose of applying rule regarding waiver of plea of bar of statute of limitation, generally exists between persons so identified in interest as to represent same legal right. *Lerner v. Los Angeles Bd. of Educ. (1963) 59 Cal. 2d 382, 398 n.10, 29 Cal. Rptr. 657, 380 P.2d 97*

Waiver, in agreement, is extendable beyond person's death and, in appropriate circumstances, may prevent personal representative of estate from asserting bar of statute in action under agreement on rejected claim. *Brownrigg v. deFrees (1925) 196 Cal. 534, 546, 238 P. 714*

Although parties may contract to extend limitations period, agreement has no effect on other potential parties with whom no privity exists. *FNB Mortgage Corp. v. Pacific General Group (1999) 76 Cal. App. 4th 1116, 1121, 1129-1131, 1135-1136, 90 Cal. Rptr. 2d 841*

Agreement to extend statute of limitations made between senior secured lienholder creditor and its debtor before statute of limitations has run was binding on junior lienholder. *Kaichen's Metal Mart, Inc. v. Ferro Cast Co. (1995) 33 Cal. App. 4th 8, 14-16, 39 Cal. Rptr. 2d 233*

Person not party to agreement (such as third-party beneficiary) is bound by special limitation period in agreement, although ignorant of existence and contents of agreement. *Sanders v. American Casualty Co. (1969) 269 Cal. App. 2d 306, 308-310, 74 Cal. Rptr. 634*

[b] By Conduct

Defendant's acts prior to suit, inconsistent with plea of bar of statute, amount to waiver (perhaps estoppel). *Lerner v. Los Angeles Bd. of Educ. (1963) 59 Cal. 2d 382, 396, 29 Cal. Rptr. 657, 380 P.2d 97* ; *Church v. Public Utilities Com. (1959) 51 Cal. 2d 399, 401, 333 P.2d 321* ; *Isaacson v. Oakland (1968) 263 Cal. App. 2d 414, 419, 69 Cal. Rptr. 379*

Defense that action is barred by statute of limitations is subject to waiver; thus, though bar of statute is pleaded in answer as affirmative defense, failure of defendant to assert defense at trial, or of trial court to make any factual findings based on it, forecloses consideration of issue on appeal even if it appears that plaintiff's suit was not timely filed. *RRLH, Inc. v. Saddleback Valley Unified School Dist. (1990) 222 Cal. App. 3d 1602, 1605-1606 n.2, 272 Cal. Rptr. 529*

Waiver of bar of statute is not required to be in writing; conduct, even silence, is sufficient in appropriate circumstances. *Atlas Fin. Corp. v. Kenny (1945) 68 Cal. App. 2d 504, 517, 157 P.2d 401*

[c] By Failure to Plead

Once sued, defendant who does not timely raise limitation defense waives defense no matter how long plaintiff has delayed. *Hambrecht & Quist Venture Partners v. American Medical Internat., Inc. (1995) 38 Cal. App. 4th 1532, 1548, 46 Cal. Rptr. 2d 33*

Statute of limitations defense not raised in trial court is waived and is not subject to being raised on appeal. *Stalberg v. Western Title Ins. Co. (1991) 230 Cal. App. 3d 1223, 1232, 282 Cal. Rptr. 43*

Because action may generally proceed to judgment if defense of statute of limitations is waived, statute of limitations is not usually jurisdictional. *People v. American Bankers Ins. Co. (1991) 227 Cal. App. 3d 1289, 1296-1297, 278 Cal. Rptr. 314*

[25] When Period of Limitation Begins to Run

[a] When Cause of Action Accrues

The single-publication rule provides that, for any single edition of a newspaper or book, there is but a single potential action for a defamatory statement contained in the newspaper or book, no matter how many copies of the newspaper or the book were distributed, and the accrual of the cause of action in that case is not delayed by the discovery rule when the defamation occurred by means of a book, magazine, or newspaper that was distributed to the public [*see Shively v. Bozanich (2003) 31 Cal. 4th 1230, 1248, 7 Cal. Rptr. 3d 576, 80 P.3d 676]* . The single publication rule applies to all publications, including those that receive only limited circulation and, thus, are not generally distributed to the public. *Hebrew Academy of San Francisco v. Goldman (2007) 42 Cal. 4th 883, 890, 70 Cal. Rptr. 3d 178, 173 P.3d 1004*

As general rule, cause of action accrues when cause of action is complete with all its elements. *Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 397, 87 Cal. Rptr. 2d 453, 981 P.2d 79*

Cause of action for unpaid wages accrues when wages first become legally due, i.e., on regular payday for pay period in which employee performed the work; when work is continuing and employee is therefore paid periodically (e.g., weekly or monthly), separate and distinct cause of action accrues each payday, triggering on each occasion running of new period of limitations; for statute of limitations purposes action for unpaid wages is deemed to have commenced, like all civil actions, on date on which employee files complaint. *Cuadra v. Millan (1998) 17 Cal. 4th 855, 859, 72 Cal. Rptr. 2d 687, 952 P.2d 704*

In California, harm or injury to plaintiff is essential element of ripe cause of action in negligence or strict liability; moreover, as general proposition it is settled that cause of action accrues for statute of limitation purposes on occurrence of last element essential to cause of action. *Buttram v. Owens-Corning Fiberglas Corp. (1997) 16 Cal. 4th 520, 531 n.4, 66 Cal. Rptr. 2d 438, 941 P.2d 71*

Statute of limitations does not begin to run until cause of action accrues, that is, until party that owns cause of action is entitled to begin and prosecute it; cause of action for breach of contract does not accrue before time of breach; if party repudiates contract before time of performance and plaintiff elects to disregard the repudiation, statute of limitations does not begin to run until time set by contract for performance; when there are ongoing contractual obligations, whether breach is anticipatory or not, if plaintiff elects to rely on contract despite a breach, statute of limitations does not begin to run until plaintiff has elected to treat breach as terminating contract; statute of limitations does not begin to run in tort action until plaintiff possesses true cause of action by which is meant that events have developed to point where plaintiff is entitled to legal remedy. *Romano v. Rockwell Internat., Inc. (1996) 14 Cal. 4th 479, 484-485, 487-490, 500-501, 59 Cal. Rptr. 2d 20, 926 P.2d 1114*

Period of limitation in case of professional negligence does not begin to run until plaintiff suffers appreciable harm. *Budd v. Nixen (1971) 6 Cal. 3d 195, 200-201, 98 Cal. Rptr. 849, 491 P.2d 433* (legal malpractice)

Period of limitation does not begin to run until accrual of cause of action; cause of action accrues when remedy is available. *Heyer v. Flaig (1969) 70 Cal. 2d 223, 230, 74 Cal. Rptr. 225, 449 P.2d 161*

Period of limitation begins to run when suit may be maintained, and not until then. *Osborn v. Hopkins (1911) 160 Cal. 501, 506, 117 P. 519*

In legal malpractice action, plaintiffs first sustained actual injury when they were required to obtain and pay new counsel to file a lawsuit seeking to escape the consequences of their signing lease documents that were among the actual damages plaintiffs suffered as a result of the attorney's alleged malpractice. *Truong v. Glasser (2009) 181 Cal. App. 4th 102, 103 Cal. Rptr. 3d 811*

In determining whether an agent's knowledge of certain facts is imputed to the principal for purposes of establishing the principal's notice of those facts, for purposes of *Code Civ. Proc. § 340.1(b)(2), (c)*, the court of appeal held that so long as the agent was under a duty to disclose certain information, the principal is bound by the agent's knowledge of that information whether or not the agent communicated it to the principal. For this purpose, there is no difference between constructive and actual notice. *Santillan v. Roman Catholic Bishop of Fresno (2008) 163 Cal. App. 4th 4, 10-11, 77 Cal. Rptr. 3d 343*

Even though a prior discriminatory evaluation and pay adjustment continue to have negative effects on an employee's pay throughout his or her employment, the cause of action accrues at the time the evaluation and pay adjustment are made, when the employer acted in a discriminatory manner with adverse consequences for the employee. Once the damage is such that the cause of action accrues, additional damage from the same wrong does not alter the accrual of the cause of action or otherwise extend the limitations period. *Hammond v. County of Los Angeles (2008) 160 Cal. App. 4th 1579, 1597, 73 Cal. Rptr. 3d 690*

A cause of action for a latent construction defect does not accrue until an owner is aware of the damage and suffers a compensable economic injury. The cause of action does not accrue when the structure suffers physical damage, but when the owner suffers a compensable economic injury of which the owner is aware. *Siegel v. Anderson Homes (2004) 118 Cal. App. 4th 994, 1014, 13 Cal. Rptr. 3d 462*

The accrual of causes of action growing out of the publication of defamatory or other tortious statements is governed by the single-publication rule. This rule states that one cause of action will arise and the statute of limitations will begin running upon the first general publication or broadcast of a tortious statement, no matter how may copies are distributed or how many people hear or see the broadcast. A subsequent republication gives rise to a new single cause of action. This single-publication rule applies to statements published on Internet Web sites. *The Traditional Cat Association, Inc. v. Gilbreath (2004) 118 Cal. App. 4th 392, 395, 13 Cal. Rptr. 3d 353*

Monthly installment contract payments are divisible performance obligations as revealed by the provisions of the contract and the conduct of the parties. The statute of limitations begins to run from the time of each breach. *Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co. (2004) 116 Cal. App. 4th 1375, 1388-1389, 11 Cal. Rptr. 3d 412*

When reversal of a trial court judgment gives rise to a possible cause of action for malicious prosecution, the statute of limitations first begins to run on the date the appellate court issues its remittitur. *White v. Lieberman (2002) 103 Cal. App. 4th 210, 213, 126 Cal. Rptr. 2d 608*

In professional negligence action, mere hiring of second consultant to investigate adequacy of first consultant's work only establishes speculative harm, or threat of future harm not yet realized, which is insufficient to trigger statute of limitations. *Price v. Dames & Moore (2001) 92 Cal. App. 4th 355, 361, 112 Cal. Rptr. 2d 65*

In action for writ of mandamus under *Code Civ. Proc. § 1094.5*, statute of limitations commences to run when petitioner is properly notified of decision pursuant to *Code Civ. Proc. § 1094.6(b)*, and not by an after-the-fact declaration of mailing. *Donnellan v. City of Novato (2001) 86 Cal. App. 4th 1097, 1107 103 Cal. Rptr. 2d 882*

Cause of action for professional negligence does not accrue until plaintiff (1) sustains damage and (2) discovers, or

should discover, negligence; while mere breach of professional duty, causing only nominal damages, speculative harm, or threat of future harm not yet realized does not suffice to create cause of action for negligence, action accrues, and statute begins to run, as soon as plaintiff suffers "appreciable harm" from breach; thus, in action by general contractor against architect and construction manager for economic losses allegedly caused by their professional negligence during county construction project, action was time-barred under *Code Civ. Proc. 339(1)* since general contractor did not bring suit until more than two years after it told construction manager that it had been severely damaged by construction delays and errors; although suit was filed less than two years after county refused to reimburse contractor, county's refusal merely had potential of altering amount of damage. *Smith v. SHN Consulting Engineers & Geologists, Inc. (2001) 89 Cal. App. 4th 638, 650-652, 107 Cal. Rptr. 2d 424*

In determining commencement of limitations period for disciplinary action of real estate broker under *Bus. & Prof. Code § 10176*, it is occurrence of ground for discipline that commences limitation period; where ground is licensee's actual misconduct, that misconduct commences period; however, where ground is disciplinary action of regulatory agency, it is final official action that commences period; thus, where ground for disciplinary action against broker was suspension of his law license, not underlying misappropriation of client's funds, it was irrelevant that actual misappropriation of funds took place outside statutory limitations period, since action was commenced within three years of suspension of his license to practice law. *Herrera v. Department of Real Estate (2001) 88 Cal. App. 4th 776, 779, 106 Cal. Rptr. 2d 232*

It is not enough to commence running of limitations period when plaintiff knows of his or her injury and its factual cause (or physical cause); rather, plaintiff must be aware of injury, its factual cause, and sufficient facts to put him or her on inquiry notice of negligent cause. *Clark v. Baxter Healthcare Corp. (2000) 83 Cal. App. 4th 1048, 1057, 100 Cal. Rptr. 2d 223* (product liability action against manufacturers and distributors of latex gloves)

Limitation period does not begin to run until cause of action accrues, i.e., all essential elements are present and claim becomes legally actionable. *Glue-Fold, Inc. v. Slautterback Corp. (2000) 82 Cal. App. 4th 1018, 1029, 98 Cal. Rptr. 2d 661*

Period of limitation cannot run before plaintiff possesses true cause of action, that is, events must have developed to point where plaintiff is entitled to legal remedy, not mere symbolic judgment such as award of nominal damages. *Butcher v. Truck Ins. Exchange (2000) 77 Cal. App. 4th 1442, 1468, 92 Cal. Rptr. 2d 521*

When wrongful act of another causes injury, as general rule statute of limitation attaches immediately although injury slight and not all resulting damages sustained at that time; single tort can be foundation for but one claim for damages; if statute of limitations bars action based on harm immediately caused by defendant's wrongdoing, separate cause of action based on subsequent harm arising from that wrongdoing would normally amount to splitting cause of action. *Bennett v. Shahhal (1999) 75 Cal. App. 4th 384, 391-392, 89 Cal. Rptr. 2d 272*

Well established that cause of action accrues once plaintiff suffers harm and becomes aware of necessary facts linking defendant to harm. *Curtis v. Kellogg & Andelson (1999) 73 Cal. App. 4th 492, 501, 86 Cal. Rptr. 2d 536*

Limitation period under *Code Civ. Proc. § 339(1)* for claims founded on title insurance policy cannot begin to run until policy is issued, even when insured may have discovered facts leading insured to believe claim existed before title policy issued. *Smeaton v. Fidelity Nat. Title (1999) 72 Cal. App. 4th 1000, 1001, 1004, 85 Cal. Rptr. 2d 591*

Cause of action accrues at moment party who owns it is entitled to bring or prosecute action thereon; this occurs when events have developed to point where plaintiff is entitled to legal remedy, not merely symbolic judgment like award of nominal damages. *Keru Investments, Inc. v. Cube Co. (1998) 63 Cal. App. 4th 1412, 1423, 74 Cal. Rptr. 2d 744*

Periodic monthly rental payments called for by lease agreement create severable contractual obligations where duty to

make each rental payment arises independently, and statute begins to run from time performance of each severable obligation is due; four-year limitations period applicable to plaintiff's written lease (*see Code Civ. Proc. § 337(1)*) would permit recovery for all unpaid rental installments falling due during four-year period ending with filing of action. *Tsemetzin v. Coast Federal Savings & Loan Assn. (1997) 57 Cal. App. 4th 1334, 1345, 67 Cal. Rptr. 2d 726*

Generally, cause of action accrues when, under substantive law, wrongful act is done and liability arises, that is, when suit may be brought; defendant's acts determine when accrual occurs under rule; statute of limitations ordinarily commences to run notwithstanding plaintiff's ignorance of causeof action or wrongdoer's identity; however, various exceptions are made to avoid sometimes unjust consequences of strict adherence to general rule, one of which deems accrual to occur when damage results; although right to recover nominal damages will not trigger running of limitation period, infliction of appreciable and actual harm, however uncertain in amount, commences statutory period; neither uncertainty as to amount of damages nor difficulty in proving damages tolls limitation period. *Engstrom v. Kallins (1996) 49 Cal. App. 4th 773, 783, 56 Cal. Rptr. 2d 842*

In tort actions, statute of limitation commences when last element essential to cause of action occurs; no cause action accrues and statute of limitation does not begin to run in tort action until damage has occurred; moreover, when last element of cause of action to occur is damage, statute of limitations begins to run on occurrence of appreciable and actual harm, however uncertain in amount, that consists of more than nominal damages; mere breach of duty causing only nominal, speculative harm or threat of future harm not yet realized does not normally suffice to create cause of action; common law rule that cause of action accrued on date of injury modified by discovery rule; under discovery rule, cause of action does not accrue until plaintiff discovers injury and its negligent cause or could have discovered injury and cause through exercise of reasonable diligence. *San Francisco Unified School Dist. v. W. R. Grace & Co. (1995) 37 Cal. App. 4th 1318, 1326, 44 Cal. Rptr. 2d 305*

Statute of limitations cannot begin to run until cause of action accrues; cause of action accrues when person who owns it is entitled to bring and prosecute action on it. *County of Fresno v. Lehman (1991) 229 Cal. App. 3d 340, 345-346, 280 Cal. Rptr. 310*

Date cause of action accrues is date when limitation period begins to run; generally, cause of action accrues when, under substantive law, wrongful act is done and liability arises, i.e., when suit may be brought. *Menefee v. Ostawari (1991) 228 Cal. App. 3d 239, 245, 278 Cal. Rptr. 805* ; *see also Long Beach Unified Sch. Dist. v. State of California (1990) 225 Cal. App. 3d 155, 169, 275 Cal. Rptr. 449*

Time within which plaintiff must commence action begins to run on occurrence of last fact essential to cause of action; infliction of appreciable and actual harm, however uncertain in amount, commences statutory limitations period. *Panopulos v. Westinghouse Electric Corp. (1989) 216 Cal. App. 3d 660, 670, 264 Cal. Rptr. 810* (disapproved on other grounds in *Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1253, 32 Cal. Rptr. 2d 223, 876 P.2d 1022*)

Time cause of action accrues is question of fact, and trial court's finding on accrual of cause of action for statute of limitations is upheld on appeal if supported by substantial evidence. *Institoris v. City of Los Angeles (1989) 210 Cal. App. 3d 10, 17, 258 Cal. Rptr. 418*

Occurrence of some cognizable event rather than knowledge of its legal significance starts running of statute of limitations. *Abari v. State Farm Fire & Casualty Co. (1988) 205 Cal. App. 3d 530, 535, 252 Cal. Rptr. 565*

In ordinary tort and contract actions, statute of limitations as beginning to run on occurrence of last element essential to cause of action; for "rule ofdiscovery" to come into play, cause of action itself as required to lie unsuspected; hidden facts relating to proof are of no consequence. *Spellis v. Lawn (1988) 200 Cal. App. 3d 1075, 1079-1080, 246 Cal. Rptr. 385*

When injury, although slight, is sustained in consequence of another's wrongful act and law affords remedy therefor, statute of limitations attaches at once; running of statute is not postponed by fact that actual or substantial damages do not occur until later date. *Spellis v. Lawn (1988) 200 Cal. App. 3d 1075, 1080-1081, 246 Cal. Rptr. 385*

Statute of limitations begins to run when plaintiff sustains appreciable harm; in action alleging variety of torts arising out of bank's representation regarding tax liability of loan, notification of tax deficiency rather than tax court judgment constituted appreciable harm; incurring or paying of attorney's fees, if caused by defendant's negligence, constitutes appreciable harm sufficient to trigger running of statute of limitations. *McKeown v. First Interstate Bank (1987) 194 Cal. App. 3d 1225, 1229-1231, 240 Cal. Rptr. 127*

Action on contract for declaratory relief, brought before any breach of contract, is not barred by statute of limitations because no cause of action for coercive relief has yet accrued and no statute of limitation has yet been set in motion. *United Pacific/Reliance Ins. Co. v. DiDomenico (1985) 173 Cal. App. 3d 673, 676-677, 219 Cal. Rptr. 119*

Statute of limitations on installment contract runs from date of each installment. *Conway v. Bughouse, Inc. (1980) 105 Cal. App. 3d 194, 200, 164 Cal. Rptr. 585* (agreement for monthly payments for life as installment contract)

[b] Delayed Discovery

Under the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action. *Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal. 4th 797, 808-809, 27 Cal. Rptr. 3d 661, 110 P.3d 914*

The discovery rule most frequently applies when it is difficult to for the plaintiff to observe or understand that there has been an injury or breach. *Shively v. Bozanich (2003) 31 Cal. 4th 1230, 1248, 7 Cal. Rptr. 3d 576, 80 P.3d 676*

Discovery rule does not apply to postpone accrual of a cause of action based on the publication of a defamatory statement in a book. The cause of action for defamation accrues and the statute of limitations begins to run from the date the book was first generally distributed to the public, regardless of when the plaintiff actually learned of the existence of the book. *Shively v. Bozanich (2003) 31 Cal. 4th 1230, 1248, 7 Cal. Rptr. 3d 576, 80 P.3d 676*

Common law discovery rule, when applicable, indefinitely delays accrual of cause of action until plaintiff discovers or reasonably has cause to discover facts constituting it; discovery rule may be expressed by Legislature or implied by courts and is exception to general rule that cause of action accrues when allegedly wrongful result occurs; common law discovery rule does not apply to *Code Civ. Proc. § 340.6(a)* (legal malpractice actions); defendant in legal malpractice action bears burden of proving facts necessary to enjoy benefits of *Section 340.6(a)*. *Samuels v. Mix (1999) 22 Cal. 4th 1, 9-14, 91 Cal. Rptr. 2d 273, 989 P.2d 701*

Where someone steals a trade secret and then sells it to a third party, with respect to the element of knowledge, the statute of limitations on a cause of action for misappropriation begins to run when the plaintiff has any reason to suspect that the third party knows or reasonably should know that the information is a trade secret. The third party's actual state of mind does not affect the running of the statute. *Cypress Semiconductor Corp. v. Superior Court (2008) 163 Cal. App. 4th 575, 587, 77 Cal. Rptr. 3rd 685*

Public awareness of a problem through media coverage alone does not create constructive suspicion for purposes of discovery. The statute of limitations does not begin to run when some members of the public have a suspicion of wrongdoing, but only once the plaintiff has a suspicion of wrongdoing. *Unruh-Haxton v. Regents of University of California (2008) 162 Cal. App. 4th 343, 364, 76 Cal. Rptr. 3d 146*

Discovery rule postpones accrual of cause of action until plaintiff discovers or has reason to discover cause of action, until, that is, plaintiff at least suspects or has reason to suspect a factual basis, as opposed to a legaltheory, for its elements; plaintiff has reason to suspect when plaintiff has notice or information that would cause reasonable person to inquire; plaintiff may discover or have reason to discover cause of action even if plaintiff does not suspect or have reason to suspect identity of defendant. *Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 389, 397-399, 87 Cal. Rptr. 2d 453, 981 P.2d 79*

Rules postponing accrual of cause of action until specified event occurs, e.g., until discovery of facts constituting fraud or mistake, are distinguishable from rules suspending or tolling the running of statute of limitations notwithstanding accrual of cause of action. *Cuadra v. Millan (1998) 17 Cal. 4th 855, 865 n.11, 72 Cal. Rptr. 2d 687, 952 P.2d 704*

Cause of action for latent injury does not accrue until plaintiff discovers or reasonably should have discovered that he or she has suffered compensable injury. *Buttram v. Owens-Corning Fiberglas Corp. (1997) 16 Cal. 4th 520, 530, 66 Cal. Rptr. 2d 438, 941 P.2d 71* (asbestos-related latent and progressive disease pleural mesothelioma)

Period of limitation in ordinary tort and contract actions begins to run on occurrence of last element essential to cause of action, notwithstanding plaintiff's ignorance of cause of action or identity of wrongdoer; however, in legal malpractice case casue of action does not accrue until plaintiff knows or should know all material facts essential to show elements of cause of action. *Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 187, 189, 98 Cal. Rptr. 837, 491 P.2d 421*

If a plaintiff's reasonable and diligent investigation discloses only one kind of wrongdoing when the injury was actually caused by tortious conduct of a wholly different sort, the discovery rule postpones accrual of the statute of limitations on the newly discovered claim; in such cases, the key issue is whether a reasonable investigation at that time would have revealed a factual basis for that particular cause of action. *E-Fab, Inc. v. Accountants, Inc. Services (2007) 153 Cal. App. 4th 1308, 1322, 64 Cal. Rptr. 3d 9*

The discovery rule is not so broad as to delay accrual indefinitely until the plaintiff stumbles upon a claim. Rather, the plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof--when, simply put, he at least suspects that someone has done something wrong to him, "wrong" being used, not in any technical sense, but rather in accordance with its lay understanding. *Lyles v. State of California (2007) 153 Cal. App. 4th 281, 286, 62 Cal. Rptr. 3d 696*

For purposes of *Ins. Code § 1871.7*'s limitation period, plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof. He has reason to discover the cause of action when he has reason at least to suspect a factual basis for its elements. Such reasonable suspicion exists when the plaintiff has notice or information of circumstances to put a reasonable person on inquiry. *State of California ex rel. Metz v. CCC Information Services, Inc. (2007) 149 Cal. App. 4th 402, 417, 57 Cal. Rptr. 3d 156*

A cause of action for a latent construction defect does not accrue until an owner is aware of the damage and suffers a compensable economic injury. The cause of action does not accrue when the structure suffers physical damage, but when the owner suffers a compensable economic injury of which the owner is aware. *Siegel v. Anderson Homes (2004) 118 Cal. App. 4th 994, 1014, 13 Cal. Rptr. 3d 462*

Discovery rule does not apply when the alleged defamatory material is found in a mass-media publication such as the use of plaintiff's distorted likeness on network broadcasts and the Internet. *Long v. Walt Disney Co. (2004) 116 Cal. App. 4th 868, 874, 10 Cal. Rptr. 3d 836*

In a case alleging liability of a bank under *Com. Code § 3307* for taking an instrument from a fiduciary with notice of breach of fiduciary duty, the represented person may rely on delayed discovery of the injury to postpone the accrual of the cause of action. *Cochran Investment Co. v. Bank of America (2002) 101 Cal. App. 4th 341, 348, 124 Cal. Rptr. 2d 51*

Discovery rule may be applied to breaches of contract that can be, and are, committed in secret and, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time, when 1) the injury or the act causing the injury, or both, have been difficult for the plaintiff to detect, 2) the defendant has been in a far superior position to comprehend the act and the injury, and 3) the defendant had reason to believe the plaintiff remained ignorant that he had been wronged. *Gryczman v. 4550 Pico Partners, Ltd. (2003) 107 Cal. App. 4th 1, 5, 131 Cal. Rptr. 2d 680*

Under *Code Civ. Proc. § 338(d)*, action for relief on grounds of fraud is not deemed accrued until discovery, by aggrieved party, of facts constituting fraud; discovery in this context means not when plaintiff became aware of specific wrong alleged, but when plaintiff suspected or should have suspect that injury was caused by wrongdoing; statute of limitation begins to run when plaintiff has information that would put reasonable person on inquiry; plaintiff need not be aware of specific facts necessary to establish claim since they can be developed in pretrial discovery; thus, reasonable person wouldhave concluded he was injured in 1990 and action for fraud filed in 1999 was time barred, despite claim by plaintiff that he was not put on notice of fraudulent conduct until 1996, where in 1990 plaintiff sent associate as courier to pick up check that defendant owed plaintiff, but defendant instead made check payable to associate, and where, when plaintiff questioned transaction, defendant stated that associate claimed that plaintiff had approved payment to him and that check had been cashed before there was stop payment order. *Kline v. Turner (2001) 87 Cal. App. 4th 1369, 1374-1375, 105 Cal. Rptr. 2d 699*

Common law discovery rule, developed to mitigate harsh results produced by strict definitions of accrual, postpones accrual until plaintiff discovers or has reason to discover cause of action; discovery rule is widely applied although its scope and application can be difficult. *Glue-Fold, Inc. v. Slautterback Corp. (2000) 82 Cal. App. 4th 1018, 1029, 98 Cal. Rptr. 2d 661*

When fiduciary obligation is involved, cause of action does not accrue until beneficiary has knowledge or notice of act constituting breach of fidelity; this principle applies in case of insurance agent. *Butcher v. Truck Ins. Exchange (2000) 77 Cal. App. 4th 1442, 1469, 92 Cal. Rptr. 2d 521*

Common law rule that action for personal injury or property damage accrues on date of injury, is modified by discovery rule, which provides accrual date of cause of action is delayed until plaintiff is aware of injury and its cause; plaintiff charged with awareness as of date plaintiff suspects or should suspect that injury was caused by wrongdoing, that someone has done something wrong to him or her; accordingly, period of limitations begins to run without regard to whether plaintiff is aware of specific facts necessary to establish his or her claim, provided plaintiff has suspicion of wrongdoing, which plaintiff is charged with once plaintiff has notice or information of circumstances to put reasonable person on inquiry. *McKelvey v. Boeing North Am. Inc. (1999) 74 Cal. App. 4th 151*

Accrual of cause of action is delayed until plaintiff is aware of injury and its negligent cause; once plaintiff has suspicion of wrongdoing and therefore incentive to sue, he or she must decide whether to file suit or sit on his or her rights; so long as suspicion exists, plaintiff cannot wait for facts to find him or her; plaintiff under duty to reasonably investigate and suspicion of wrongdoing, coupled with knowledge of harm and its cause, will commence limitations period. *Curtis v. Kellogg & Andelson (1999) 73 Cal. App. 4th 492, 501, 86 Cal. Rptr. 2d 536*

Under discovery rule, statute of limitations begins to run when plaintiff suspects or should suspect that defendant's injury was caused by wrongdoing, that someone has done something wrong to defendant; limitation period begins to run

once plaintiff has information or notice that would cause reasonable person to inquire; plaintiff need not be aware of specific facts necessary to establish claim, which is process contemplated by discovery; once plaintiff has suspicion of wrongdoing, and therefore incentive to sue, plaintiff must decide whether to file suit or sit on plaintiff's rights; as long as suspicion exists, plaintiff must go find the facts and cannot wait for facts to find plaintiff. *Mark K. v. Roman Catholic Archbishop (1998) 67 Cal. App. 4th 603, 611, 79 Cal. Rptr. 2d 73*

General rule is that cause of action accrues when wrongful act is done, not at time of plaintiff's discovery; under delayed discovery rule, however, cause of action will not accrue until plaintiff discovers or should have discovered through exercise of reasonable diligence, all facts essential to cause of action; doctrine of late discovery requires plaintiff to plead facts showing an excuse for late discovery of facts underlying plaintiff's cause of action; plaintiff must show plaintiff was not at fault for failing to discover it or had no actual or presumptive knowledge of facts sufficient to put plaintiff on inquiry. *Prudential Home Mortgage Co. v. Superior Court (1998) 66 Cal. App. 4th 1236, 1246-1247, 78 Cal. Rptr. 2d 566*

Statute of limitations for actions involving fiduciary obligation normally triggered on date plaintiff discovers, or should have discovered, the negligence. *Field v. Century 21 Klowden-Forness Realty (1998) 63 Cal. App. 4th 18, 20-21, 73 Cal. Rptr. 2d 784*

When lawsuit is first initiated after applicable period of limitation has expired and plaintiff is entitled to claim benefit of delayed discovery rule, relevant inquiry is what plaintiff knew or, through the exercise of due diligence, reasonably could have discovered at an earlier date; statute of limitation begins to run when plaintiff suspects or should suspect that plaintiff's injury was caused by wrongdoing, that someone has done something wrong to plaintiff; on other hand, when lawsuit is initiated within applicable limitation period against someone and plaintiff has complied with *Code Civ. Proc. § 474* by alleging existence of unknown additional defendants, relevant inquiry when plaintiff seeks to substitute real defendant for one sued fictitiously is what facts plaintiff actually knew at time original complaint was filed; to defeat claim of ignorance required by *Code Civ. Proc. § 474*, it must be shown that plaintiff had actual knowledge of basic facts. *General Motors Corp. v. Superior Court (1996) 48 Cal. App. 4th 580, 587-588, 594-596, 55 Cal. Rptr. 2d 871*

Under discovery rule, statute of limitations does not begin to run until plaintiff either (1) actually discovers injury or its cause or (2) could have discovered injury and its cause through exercise of reasonable diligence; discovery rule applied, when fiduciary relationship existed between parties and, among other things, failure of defendant attorney and collection agency to disclose ongoing status of collection matter despite plaintiffs' numerous requests precluded plaintiffs from discovering defendants wrongful conduct and that plaintiffs had cause of action. *Cross v. Bonded Adjustment Bureau (1996) 48 Cal. App. 4th 266, 277-282, 55 Cal. Rptr. 2d 801*

Although under discovery rule, limitation period begins once plaintiff acquires notice or information that would cause inquiry by reasonable person, fiduciaries have duty to make full and fair disclosure of all facts that affect plaintiff's rights and interests; breach of duty to disclose known facts with intention to hinder, and that does hinder, commencement of action until action would be outlawed is fraud practiced on plaintiff that in conscience estops defendant's reliance on statute of limitations; if duty to disclose exists, disclosure must be full and complete and any concealment or misrepresentation amounts to fraud sufficient to entitle party injured thereby to action; if fiduciary relationship exists, plaintiff's usual duty of diligence to discover facts does not exist. *Cross v. Bonded Adjustment Bureau (1996) 48 Cal. App. 4th 266, 281, 55 Cal. Rptr. 2d 801*

When plaintiff filed complaint in 1993 containing causes of action for breach of contract and negligence alleging that defendant caused contamination of plaintiff's property by severing a pipe while performing construction work in 1981, and complaint was timely filed under *Code Civ. Proc. §§ 337(1)* and *338(b)* based on application of the discovery rule, but not timely filed under *Code Civ. Proc. § 337.15* ten-year limitation period for latent construction defects, plaintiff's causes of action held not time barred by *Code Civ. Proc. § 337.15* because the mandated discovery rule of the Comprehensive Environmental Response, Compensation, and Liability Act's (CERCLA) (*42 U.S.C. § 9601 et seq.*)

preempts Code Civ. Proc. § 337.17 thereby eliminating its ten year limitation period when the claims are based on a latent construction defect that results in toxic contamination of plaintiff's property. *Angeles Chemical Co. v. Spencer & Jones (1996) 44 Cal. App. 4th 112, 51 Cal. Rptr. 2d 594*

Plaintiff is charged with "presumptive" knowledge so as to commence running of statute when plaintiff had notice or information of circumstances to put reasonable person on inquiry or had opportunity to obtain knowledge from sources open to his or her investigation. *Wilshire Westwood Associates v. Atlantic Richfield Co. (1993) 20 Cal. App. 4th 732, 740, 24 Cal. Rptr. 2d 562*

Cause of action under discovery rule accrues when plaintiff either (1) actually discovered his or her injury and its negligent cause or (2) could have discovered injury and cause through exercise of reasonable diligence; limitation period begins once plaintiff has notice or information of circumstances to put reasonable person on inquiry; subjective suspicion is not required; if person becomes aware of facts that would make reasonably prudent person suspicious, he or she has duty to investigate further and is charged with knowledge of matters that would have been revealed by such an investigation. *Mangini v. Aerojet-General Corp. (1991) 230 Cal. App. 3d 1125, 1150-1151, 281 Cal. Rptr. 827*

Delayed discovery rule of former *Code Civ. Proc. § 338(4)* [*now see Code Civ. Proc. § 338(d)*], relating to fraud, applies to causes of action for breach of contract consisting of breach of fiduciary duty. *Lee v. Escrow Consultants, Inc. (1989) 210 Cal. App. 3d 915, 922, 259 Cal. Rptr. 117*

If party could not reasonably have discovered facts giving rise to cause of action for libel based on defamatory matter contained in confidential file and communicated to person of whom party was unaware, statute of limitations starts to run on discovery of publication of defamatory matter. *Schneider v. United Airlines, Inc. (1989) 208 Cal. App. 3d 71, 77, 256 Cal. Rptr. 71*

Whether there was belated discovery of legal malpractice cause of action for purposes of beginning limitation period is question of fact. *Baright v. Willis (1984) 151 Cal. App. 3d 303, 310, 198 Cal. Rptr. 510*

Commencement of limitation period in legal malpractice action is tolled by belated discovery when plaintiff received professional advice that no cause of action existed; degree of diligence required of plaintiff in ferreting out negligence is diminished in case of professional relationship. *Baright v. Willis (1984) 151 Cal. App. 3d 303, 312-313, 198 Cal. Rptr. 510*

"Rule of discovery" provides that cause of action does not accrue until plaintiff knows, or should know, all material facts essential to show elements of cause of action. *Pereira v. Dow Chemical Co. (1982) 129 Cal. App. 3d 865, 873, 181 Cal. Rptr. 364*

When rule of discovery applies, issue of whether or not discovery of cause of action was reasonably delayed is question of fact; question becoming matter of law only when reasonable minds can draw only one conclusion from proffered evidence; whether or not due diligence has been used to discover cause of action is also question of fact. *Pereira v. Dow Chemical Co. (1982) 129 Cal. App. 3d 865, 874, 181 Cal. Rptr. 364*

Running of period of limitation in case of progressively developing or continuing wrong, where nature, extent, or permanence of harm is difficult to discover, is generally suspended until discovery of, or opportunity to discover, facts. *Bradler v. Craig (1969) 274 Cal. App. 2d 466, 471, 79 Cal. Rptr. 401*

When personal injury is suffered without perceptible trauma and by silent and insidious impregnation as consequence of act or omission of another, who knows, or is charged with the responsibility of knowing that the act or omission may result in personal injury, and injured person is unaware of cause of injury, and as a reasonably prudent and intelligent person could not, without specialized knowledge, have been made aware of cause, action for tort does not accrue until

injured person knows or by the exercise of reasonable diligence should have discovered cause of injury. *Warrington v. Charles Pfizer & Co. (1969) 274 Cal. App. 2d 564, 569-570, 80 Cal. Rptr. 130* (injury from ingestion of drug)

Period of limitation begins to run when fact of injury and identity of person responsible are known, notwithstanding plaintiff's failure to discover some or most of resulting damage until later. *Howe v. Pioneer Mfg. Co. (1968) 262 Cal. App. 2d 330, 340-341, 68 Cal. Rptr. 617*

[c] Fiduciary Relationship

Period of limitation on action by beneficiary against fiduciary generally does not run as long as fiduciary relationship has not been repudiated. *Estate of Clary (1928) 203 Cal. 335, 341, 264 P. 242*

In a case alleging liability of a bank under *Com. Code § 3307* for taking an instrument from a fiduciary with notice of breach of fiduciary duty, the represented person may rely on delayed discovery of the injury to postpone the accrual of the cause of action. *Cochran Investment Co. v. Bank of America (2002) 101 Cal. App. 4th 341, --, 101 Cal. App. 4th 341, 124 Cal. Rptr. 2d 51*

Total repudiation of voluntary trust is required to start period of limitation running. *Cortelyou v. Imperial Land Co. (1913) 166 Cal. 14, 20, 134 P. 981*

Statute of limitations for actions involving fiduciary obligation is normally triggered on date plaintiff discovers, or should have discovered, the negligence. *Field v. Century 21 Klowden-Forness Realty (1998) 63 Cal. App. 4th 18, 20-21, 73 Cal. Rptr. 2d 784*

Trustee's acts of conversion of trust property akin to fraudulent concealment; statutes of limitation do not begin to run in action for breach of voluntary trust until there is repudiation brought to beneficiary's attention, that is, repudiation of trust is not effective and cannot commence running of statute of limitations unless and until fact of repudiation is brought home to beneficiary; when fiduciary wrongfully concealed items she chose to retain from estate, statute of limitations was tolled until beneficiary discovered or ought to have discovered existence of cause of action for fiduciary's conversion. *Strasberg v. Odyssey Group, Inc. (1996) 51 Cal. App. 4th 906, 916-918, 59 Cal. Rptr. 2d 474*

Although, under discovery rule, limitation period begins once plaintiff acquires notice or information that would cause inquiry by reasonable person, defendants as fiduciaries have duty to make full and fair disclosure to plaintiffs of all facts that affect their rights and interests; breach of duty to disclose known facts with intention to hinder, and that does hinder, commencement of action until action would be outlawed is fraud practiced on plaintiff that in conscience estops defendant's reliance on statute of limitations; if duty to disclose exists, disclosure must be full and complete and any concealment or misrepresentation amounts to fraud sufficient to entitle injured party to action; if fiduciary relationship exists, plaintiffs usual duty of diligence to discover facts does not exist. *Cross v. Bonded Adjustment Bureau (1996) 48 Cal. App. 4th 266, 281, 55 Cal. Rptr. 2d 801*

Anticipatory breach of voluntary trust does not start period of limitation running. *Brewer v. Simpson (1960) 53 Cal. 2d 567, 593, 2 Cal. Rptr. 609, 349 P.2d 289* ; *National Auto. & Cas. Ins. Co. v. Pitchess (1973) 35 Cal. App. 3d 62, 65, 110 Cal. Rptr. 649*

Action for breach of fiduciary duty is subject to four-year period set forth in *Code Civ. Proc. § 338(g)* for commencement of action; statute of limitations on action for breach of fiduciary duty based on concealment commences to run when plaintiff discovers or, in exercise of reasonable diligence, should have discovered that facts had been concealed. *Stalberg v. Western Title Ins. Co. (1991) 230 Cal. App. 3d 1223, 1230, 282 Cal. Rptr. 43*

Limitation period on former partners' cause of action against other former partners for fraud based on concealment of profits derived from sale and rental of property to dissolved partnership was postponed by fraudulent concealment and did not commence until plaintiffs had actual or inquiry notice. *Rosenfeld, Meyer & Susman v. Cohen (1987) 191 Cal. App. 3d 1035, 1059-1060, 237 Cal. Rptr. 14*

Between fiduciaries, actual notice is question of fact; distribution of report, which had footnote disclosing separate interest of some partners in assets leased to partnership, at partnership meeting was not sufficient to charge other partners with notice of separate interests or profit on lease. *Rosenfeld, Meyer & Susman v. Cohen (1987) 191 Cal. App. 3d 1035, 1059, 237 Cal. Rptr. 14*

Principle that plaintiff's ignorance of cause of action is no bar to running of statute of limitations was inapposite to plaintiff in action to rescind limited partnership who was in fiduciary relationship with defendant and relied on fiduciary's advice that partnership structure was in compliance with law. *Sherman v. Lloyd (1986) 181 Cal. App. 3d 693, 699, 226 Cal. Rptr. 495*

Date-of-discovery rule applies to fiduciary when strict adherence to date of injury rule would result in unfairness to plaintiff and would encourage wrongdoers to mislead fiduciary to delay bringing suit; discovery rule is particularly appropriate when defendant maintains custody and control of plaintiff's property or interests. *April Enterprises, Inc. v. KTTV (1983) 147 Cal. App. 3d 805, 827, 195 Cal. Rptr. 421*

Trustee is required to repudiate trust positively and unequivocally; repudiation must be brought to beneficiary's attention, for period of limitation to start running. *MacMullan v. Kelly (1912) 19 Cal. App. 700, 706, 127 P. 819*

Period of limitation on action against involuntary trustee begins to run when trust created; repudiation is not necessary. *Norton v. Bassett (1908) 154 Cal. 411, 416, 97 P. 894*

[26] Limitations Period Applicable to Actions Upon Foreign Judgments

Ten-year statute of limitations in *Code Civ. Proc. § 337.5*, applicable to actions upon sister state judgments, also applies to actions upon foreign judgments. This is so regardless of whether the action is styled as a claim for "recognition" or "enforcement" or "domestication." *Manco Contracting Co. (WLL) v. Bezdikian (2008) 45 Cal. 4th 192, 208, 85 Cal. Rptr. 3d 233, 195 P.3d 604*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsEquitable EstoppelGovernmentsLegislationStatutes of LimitationsExtension & RevivalGovernmentsLegislationStatutes of LimitationsJudicial ReviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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Note, *Limitations-- Section 360 of the California Code of Civil Procedure--Part Payment--Continuing Contract, 29 So. Cal. L. Rev. 370-375 (1956)*

Note, *Limitations of Action: Promissory Notes: Tolling the Statute of Limitations by Part Payment and Payment of Interest, 3 UCLA L. Rev. 110-113 (1955)*

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Legal Topics:

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PART IV. FORMS
A. Statute of Limitations
1. Allegations of Suspension or Revival of Period of Limitations

30-345 California Forms of Pleading and Practice--Annotated § 345.70

§ 345.70 Allegation--Suspension of Period of Limitation--Absence of Defendant From State [Code Civ. Proc. § 351]

[1] FORM Allegation--Suspension of Period of Limitation--Absence of Defendant From State [Code Civ. Proc. § 351]

1. On _____[*date cause of action accrued*], defendant _____[*name, unless there is only one defendant*] was outside the State of California and had Comment, *Baker v. Beech Aircraft Corp.: Plaintiff's Burden of Reasonable Diligence Grows Heavier*, 13 U. West L.A. L. Rev. 235 (1981) 68 Cal. L. Rev. 106 (1980) 9 Sw. U. L. Rev. 291 (1977) 10 Cal. West. L. Rev. 131-146 (1973) 24 Hastings L.J. 795-811 (1973) 7 U.S.F. L. Rev. 85-109 (1972) 2 Pacific L.J. 663-677 (1971) 17 UCLA L. Rev. 542-586 (1970) 20 Stan. L. Rev. 1281-1294 (1968) 18 Hastings L.J. 1033-1041 (1967) 15 UCLA L. Rev. 230-244 (1967) 33 So. Cal. L. Rev. 321-325 (190) Section 360 of the California Code of Civil Procedure--Part 29 So. Cal. L. Rev. 370-375 (1956) 3 UCLA L. Rev. 110-113 (1955) 2 UCLA L. Rev. 425-427 (1955) 43 Cal. L. Rev. 724-729 (1955) 1 UCLA L. Rev. 619-621 (1954) 19 So. Cal. L. Rev. 432-434 (1946) 33 Cal. L. Rev. 453-458 (1945) 33 Cal. L. Rev. 152-155 (1945)no designated agent within the state for service of process.

[*EITHER*]

2. On _____[*date*], defendant _____ [returned to the state *or* had a designated agent within the state for service of process, namely _____ (*name*)]. For the entire period between _____[*date*], and _____[*date*], defendant was outside the state and had no designated agent within the state for service of process.

[*OR*]

2. As of _____[*date complaint filed*], defendant remains outside the state and has no designated agent

within the state for service of process. For the entire period between _____[*date*], and _____[*date*], defendant has been outside the state and has had no designated agent within the state for service of process.

[2] Use of Form

The allegation in *[1], above*, should be inserted into the complaint if the defendant was out of the state when the cause of action against him or her accrued, and had no agent for service of process within the state [*see Code Civ. Proc. § 351*; for discussion, *see § 345.20[2], above*].

[3] Anticipating Defense of Statute of Limitations

[a] Allegation Anticipating Defense

Where it appears from the complaint that the period of limitation has expired, the complaint should contain facts showing that the statute has not run, or that the defendant is estopped to plead the bar of the statute, or has waived the right to plead it [*see Kunstman v. Mirizzi (1965) 234 Cal. App. 2d 753, 755, 44 Cal. Rptr. 707 , see also Donahue v. Stockton Gas etc. Co. (1907) 6 Cal. App. 276, 282, 92 P. 196* (plaintiff not required to show action not barred)]. If the plaintiff fails to so plead, the defendant may assert the bar of the statute by demurrer or by affirmative defense in the answer [*see §§ 345.100, 345.104*].

[b] Complaint for Fraud in Form of Common Count

A complaint cast in the form of a common count will not always show on its face whether the action is barred by a statute of limitation. Therefore, where the plaintiff having a cause of action based on fraud pleads a common count instead of alleging a series of facts, it is neither necessary nor appropriate to state the circumstances and time of discovery of the fraud, by way of avoiding the bar of the statute of limitation [*MacDonald v. Reich & Lievre, Inc. (1929) 100 Cal. App. 736, 739-740, 281 P. 106* (disapproved on other grounds in *Mary Pickford Co. v. Bayly Bros., Inc. (1993) 12 Cal. 2d 501, 521, 86 P.2d 102*)]. If the action in such a case is in fact barred, then the defendant may show this at the trial under a general denial [*see § 345.100[4][d]*]. If the defendant attempts to do this, then the plaintiff may introduce evidence in rebuttal.

[c] Defendant's Absence From State

If the plaintiff's action can be saved from the bar of a statute of limitation by the fact that the defendant was absent from the state, then that fact should be alleged in the complaint. Unless the defendant's absence is alleged, it will be assumed that he was present in the state during the time in question [*Bass v. Berry (1876) 51 Cal. 264, 265]* .

Since *Code Civ. Proc. § 351* refers to the defendant's being "out of the state" and to "the time of his absence," an allegation based on this statute should not be restricted to the fact that the defendant was not a *resident* of California during the critical time. Such an allegation has been upheld "in the interests of justice," but only because the defendant neglected to challenge it by demurrer [*see Frantz v. Mallen (1928) 204 Cal. 159, 161, 267 P. 314]* .

For discussion of the effect of the Commerce Clause on the tolling provisions of *Code Civ. Prov. § 351*, see *§ 345.20[2][e], above*.

[4] Pleading After Answer Raising Defense of Bar

Facts on which a plaintiff wishes to rely in order to relieve himself from the bar of a statute of limitation may be deemed to have been pleaded in answer to the affirmative matters alleged in the answer of the defendant which raise the defense of bar [*Fox v. Tay (1891) 89 Cal. 339, 344, 24 P. 855, 26 P. 897]* . This rule is a corollary of the statutory

rule that the statement of any new matter in the answer, in avoidance or constituting a defense, must, on trial, be deemed controverted by the opposite party [*Code Civ. Proc. § 431.20(b)*].

Thus, where the plaintiff omits to allege in the complaint facts which avoid the bar of a statute of limitation that would otherwise appear to defeat his action, if the defendant demurs on the ground o bar, then the demurrer should be sustained, with leave to amend, and the plaintiff will be obliged to plead those facts. But if the defendant raises the bar in his answer, without demurring, then no amendment is necessary, and the missing facts will be deemed included in the complaint.

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-345 California Forms of Pleading and Practice--Annotated § 345.71

§ 345.71 Allegation--Suspension of Period of Limitation--Departure of Defendant From State [Code Civ. Proc. § 351]

[1] FORM Allegation--Suspension of Period of Limitation--Departure of Defendant From State [Code Civ. Proc. § 351]

1. On _____[*date after cause of action accrued but before period of limitation expired*], defendant _____[*name*] departed from the state of California.

[*EITHER*]

2. On _____[*date*], defendant _____ [returned to the state *or* had a designated agent within the state for service of process, namely _____ (*name*)]. For the entire period between those dates defendant was outside the state and had no designated agent for service of process within the state.

[*OR*]

2. As of _____[*date complaint filed*], defendant has not returned to the state. For the entire period between those dates defendant has been outside the state and has had no designated agent for service of process within the state.

[2] Use of Form

The allegation in *[1], above*, may be inserted into the complaint instead of the *form in § 345.70*, if the defendant was present in the state when the cause of action against him accrued but later departed from the state [*see Code Civ. Proc. § 351*; for discussion, *see § 345.20[2], above*].

[3] Cross References

For additional comments and cross references, see *§ 345.70[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-345 California Forms of Pleading and Practice--Annotated § 345.72

§ 345.72 Allegation--Suspension of Period of Limitation--Disability Because of Minority [Code Civ. Proc. §§ 328, 352(a)]

[1] FORM Allegation--Suspension of Period of Limitation--Disability Because of Minority [Code Civ. Proc. §§ 328, 352(a)]

1. On _____[*date cause of action accrued*], plaintiff was _____ years old. Plaintiff became 18 years old on _____[*date*].

[2] Use of Form

The allegation in *[1], above*, should be inserted into the complaint if the plaintiff was a minor when the cause of action accrued [*see Code Civ. Proc. § 352(a)*; for discussion, *see § 345.20[11], above*]. A minor is a person under the age of 18 years [*Fam. Code § 6500*].

If the action is for the recovery of real property, then the date in the first sentence of the allegation will be the date when title first descended or accrued [*see Code Civ. Proc. § 328*].

[3] Cross References

For additional comments, see *§ 345.70[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-345 California Forms of Pleading and Practice--Annotated § 345.73

§ 345.73 Allegation--Suspension of Period of Limitation--Injury to Child Conceived But Not Yet Born [Code Civ. Proc. § 340.4]

[1] FORM Allegation--Suspension of Period of Limitation--Injury to Child Conceived But Not Yet Born [Code Civ. Proc. § 340.4]

1. The injuries herein alleged to have been sustained by plaintiff occurred after he/she was conceived but before he/she was born.

[2] Use of Form

The allegation in *[1], above*, is for use in a complaint by a minor to recover damages for injuries sustained after conception but before birth [*see Code Civ. Proc. § 340.4*]. *Code Civ. Proc. § 340.4* extends the time in which the action may be filed until six years after birth (see discussion under *[3], below*), but does not apply to actions based on medical malpractice. These actions are governed exclusively by *Code Civ. Proc. § 340.5* [*see Young v. Haines (1986) 41 Cal. 3d 883, 894, 226 Cal. Rptr. 547, 718 P.2d 909* ; *Donabedian v. Manzer (1986) 187 Cal. App. 3d 1021, 1025, 232 Cal. Rptr. 325]* . For discussion, see Ch. 367A, *Minors: Tort Actions* .

[3] Injury to Unborn Child

Any action by or on behalf of a minor for personal injuries sustained prior to or in the course of birth must be brought within six years from the date of the minor's birth and the time the minor is under any disability mentioned in *Code Civ. Proc. § 352* (minority, insanity) is not to be excluded in computing the time limited for the commencement of the action [*Code Civ. Proc. § 340.4*; *see Young v. Haines (1986) 41 Cal. 3d 883, 890, 226 Cal. Rptr. 547, 718 P.2d 909]* . Because *Code Civ. Proc. § 340.4* mentions only *Code Civ. Proc. § 352*, it is subject to being extended on any ground of tolling set forth in *Code Civ. Proc. §§ 351-366.2*, other than as set forth in *Code Civ. Proc. § 352* [*see Young v. Haines (1986) 41 Cal. 3d 883, 892-893, 226 Cal. Rptr. 547, 718 P.2d 909* ; *Segura v. Brundage (1979) 91 Cal. App. 3d 19, 27, 153 Cal. Rptr. 777]* .

[4] Cross References

For additional comments, see *§ 345.70[2]* et seq.

Legal Topics:

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30-345 California Forms of Pleading and Practice--Annotated § 345.74

§ 345.74 Allegation--Suspension of Period of Limitation--Plaintiff Insane When Cause of Action Accrued [Code Civ. Proc. § 352(a)]

[1] FORM Allegation--Suspension of Period of Limitation--Plaintiff Insane When Cause of Action Accrued [Code Civ. Proc. § 352(a)]

1. On _____[*date cause of action accrued*], _____[*allege facts showing plaintiff's insanity, e.g.*, plaintiff was of such unsound mind that he was incapable of caring for his property or transacting business or understanding the nature and effects of his acts].

[*EITHER*]

2. On _____[*date*], _____[*allege plaintiff's recovery of sound mind, e.g.*, plaintiff recovered sufficient soundness of mind that he became capable of caring for his property, transacting business, and understanding the nature and effects of his acts].

[OR]

2. As of _____[*date complaint filed*], plaintiff's mental condition remains the same, and for the entire period between those dates plaintiff's mental condition has remained the same.

[2] Use of Form

The allegation in *[1], above*, should be inserted into the complaint if the plaintiff was "insane" when the cause of action accrued [*see Code Civ. Proc. § 352(a)*; for discussion, *see § 345.20[11][b]* et seq., *above*].

[3] Insanity as Disability Suspending Period of Limitation

As used in *Code Civ. Proc. § 352(a)*, "insane" refers to a condition of mental, derangement which renders the sufferer incapable of caring for his property or transacting business, or understanding the nature or effects of his acts [*Hsu v. Mt. Zion Hospital (1968) 259 Cal. App. 2d 562, 571, 66 Cal. Rptr. 659* ; *see* *Feeley v. Southern Pacific Transportation Co. (1991) 234 Cal. App. 3d 949, 951-953, 285 Cal. Rptr. 666* (term "insanity" sufficient to toll limitation period includes unconsciousness); *Pearl v. Pearl (1918) 177 Cal. 303, 307, 177 P. 845* (finding in terms of rule stated in *Hsu* case as sufficient to support conclusion period of limitation had not expired); *Henein v. Saudi Arabian Parsons Ltd. (9th Cir. 1987) 818 F.2d 1508* (mere physical disability or nervous shock following accident does not constitute insanity)].

A person who has been adjudicated mentally ill pursuant to provisions in the Welfare and Institutions Code might also be "insane" within the meaning of *Code Civ. Proc. § 352(a)*, but such an adjudication is not a conclusive judicial determination that the person is "insane," but the presumption is rebuttable. A person who is adjudged mentally ill and in need of hospital treatment under the Welfare and Institutions Code might nevertheless be capable of transacting business and carrying out his affairs, either during occasional lucid intervals or throughout his hospitalization [*Hsu v. Mt. Zion Hospital (1968) 259 Cal. App. 2d 562, 571-572, 572-573, 66 Cal. Rptr. 659* ; *see* *In re Zanetti (1950) 34 Cal. 2d 136, 208 P.2d 657* ; *see also* Weihofen, "Mental Incompetency to Contract or Convey," *39 S. Cal. L. Rev. 211, 221, 222* and n.49 (1966)].

The definition of "insane" given in the first paragraph is not the sole definition of insanity for the purpose of applying *Code Civ. Proc. § 352(a)*, and the three alternative conditions set out in that definition are not the exclusive tests of mental incompetence for that purpose. The basic question in a case where the plaintiff invokes *Code Civ. Proc. § 352(a)* is whether the allegedly insane plaintiff was sufficiently aware of the nature or effects of his acts to be able to comprehend such business transactions as hiring an attorney and beginning a lawsuit. If he was, then he was not "insane" within the meaning of *Code Civ. Proc. § 352(a)* [*Hsu v. Mt. Zion Hospital (1968) 259 Cal. App. 2d 562, 575, 66 Cal. Rptr. 659]* .

If an adjudication of incompetence is to be relied on as evidence of the plaintiff's being "insane" within the meaning of *Code Civ. Proc. § 352(a)*, then counsel should bear in mind that an adjudication of incompetence will not raise the presumption that the plaintiff was incompetent before the date of adjudication [*Larsson v. Cedars of Lebanon Hospital (1950) 97 Cal. App. 2d 704, 707, 218 P.2d 604]* .

[4] Application of Analogous Rules

In applying *Civ. Code §§ 38, 39*, and *40* (dealing with contracts by persons without understanding or of unsound mind), a number of decisions have held, that when it has been judicially determined in a proceeding for the appointment of a guardian that a person is incompetent to handle his person and property, the effect is to fix the status of incompetence until restoration to capacity in a proceeding for that purpose under *Prob. Code § 1470*. This rule applies in a case where the plaintiff invokes *Code Civ. Proc. § 352(a)*; thus, if a guardian has been appointed for the plaintiff because of incompetence and that guardianship continues, then it is error to receive evidence that the plaintiff was not "insane" at the time in question if the evidence is objected to after receipt of evidence of the guardianship adjudication [*Gottesman v. Simon (1959) 169 Cal. App. 2d 494, 502, 337 P.2d 906]* .

[5] Allegation of Insanity

In alleging the plaintiff's insanity for the purpose of invoking *Code Civ. Proc. § 352(a)*, it is probably insufficient to state merely that the plaintiff was insane. Also, the allegation should avoid the word "incompetent" because it is not necessarily synonymous with "insane," and a bare allegation of the plaintiff's incompetence might be inadequate to invoke *Code Civ. Proc. § 352(a)* [*see, e.g.,* *Wade v. Busby (1944) 66 Cal. App. 2d 700, 702-703* (allegation that plaintiff was "incompetent by reason of her extreme age and infirmity and mental condition" was insufficient)].

The language of the first paragraph of this form of allegation uses the disjunctive "or," whereas the language of the second paragraph uses the conjunctive "and." This format should be followed carefully. Any one of the three conditions referred to in the first paragraph could render the plaintiff "insane," but a recovery of a sound mind would require the absence of all three conditions [*see Hsu v. Mt. Zion Hospital (1968) 259 Cal. App. 2d 562, 574-575, 66 Cal. Rptr. 659* (disapproving instruction that "to find that plaintiff ceased to be insane, you must find that she was capable of caring for her property, *or* transacting business, *or* understanding the nature or effects of her acts;" emphasis added)].

[6] Cross References

For additional comments, see *§ 345.70[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-345 California Forms of Pleading and Practice--Annotated § 345.75

§ 345.75 Allegation--Suspension of Period of Limitation--Plaintiff Imprisoned [Code Civ. Proc. §§ 328, 352.1(a)]

[1] FORM Allegation--Suspension of Period of Limitation--Plaintiff Imprisoned [Code Civ. Proc. §§ 328, 352.1(a)]

1. On _____[*date cause of action accrued*], plaintiff was imprisoned _____ [on a criminal charge *or* in execution under the sentence of a criminal court for a term _____ (less than life *or* of life but with the possibility of parole)].

[*EITHER*]

2. On _____[*date*], plaintiff was released from that imprisonment. For the entire period between those dates plaintiff was confined in prison.

[*OR*]

2. As of _____[*date complaint filed*], remains imprisoned. For the entire period between those dates plaintiff has been confined in prison.

[2] Use of Form

The allegation in *[1], above*, should be inserted into the complaint when the plaintiff was imprisoned when the cause of action accrued [*see Code Civ. Proc. § 352.1(a)*], or, if the action involves real property, when his or her title first descended or accrued [*see Code Civ. Proc. § 328.5*; *see also § 345.20[11][e], above*]. Note, however, that the suspension of the period of limitation does not apply to an action, other than an action to recover damages or that portion of an action that is for the recovery of damages, relating to the conditions of confinement of an imprisoned person, including an action brought by that person pursuant to *42 U.S.C. § 1983* (civil action for deprivation of

Constitutional rights) [*Code Civ. Proc. § 352(c)*].

[3] Cross References

For additional comments, see *§ 345.70[2]* et seq.

Legal Topics:

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30-345 California Forms of Pleading and Practice--Annotated § 345.76

§ 345.76 Allegation--Suspension of Period of Limitation--Death of Person Entitled to Sue [Code Civ. Proc. § 366.1]

[1] FORM Allegation--Suspension of Period of Limitation--Death of Person Entitled to Sue [Code Civ. Proc. § 366.1]

1. On _____[*date after cause of action accrued and before period of limitation expired*], _____[*name of decedent*] died.

[2] Use of Form

The allegation in *[1], above*, should be inserted into the complaint when the person in whose favor the cause of action accrued died after accrual but before expiration of the period of limitation [*see Code Civ. Proc. 366.1*; or discussion, *see § 345.20[9], above*]. The plaintiff in such a case would often be the personal representative of the decedent's estate.

[3] Cross References

For additional comments, see *§ 345.70[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsExtension & RevivalGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLegislationStatutes of LimitationsTolling

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30-345 California Forms of Pleading and Practice--Annotated § 345.77

§ 345.77 Allegation--Suspension of Period of Limitation--Court's Assumption of Jurisdiction Over Attorney's Practice Pursuant to Bus. & Prof. Code § 6180 or 6190 [Code Civ. Proc. § 353.1]

[1] FORM Allegation--Suspension of Period of Limitation--Court's Assumption of Jurisdiction Over Attorney's Practice Pursuant to Bus. & Prof. Code § 6180 or 6190 [Code Civ. Proc. § 353.1]

1. On _____[*date application for court to assume jurisdiction over attorney's practice was filed*], an application was filed for the court to assume jurisdiction pursuant to Business and Professions Code Section _____[6180 *or* 6190] over the law practice of _____[*name of plaintiff's attorney*], and on _____[*date ordered issued*], an order assuming jurisdiction pursuant to Business and Professions Code Section _____[6180 *or* 6190] was entered.

[2] Use of Form

The allegation in *[1], above*, should be inserted into the complaint when the court has assumed jurisdiction of the plaintiff's attorney's practice pursuant to *Bus. & Prof. Code § 6180* (cessation of practice) or 6190 (incapacity to practice) [*see Code Civ. Proc. § 353.1*; for discussion, *see § 345.20[7]*].

For *Code Civ. Proc. § 353.1* to apply, the application for the court to assume jurisdiction of the plaintiff's attorney's practice pursuant to *Bus. & Prof. Code § 6180* or *690* must be filed prior to the expiration of the applicable statute of limitation [*Code Civ. Proc. § 353.1*].

[3] Cross References

For additional comments, see *§ 345.70[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsExtension & RevivalGovernmentsLegislationStatutes of LimitationsTolling

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30-345 California Forms of Pleading and Practice--Annotated § 345.78

§ 345.78 Allegation--Suspension of Period of Limitation--War [Code Civ. Proc. § 354]

[1] FORM Allegation--Suspension of Period of Limitation--War [Code Civ. Proc. § 354]

1. On _____[*date cause of action accrued*], a state of war existed between _____ and _____[*combatant nations*]. On that date and continuously thereafter until _____[*date*], because of that state of war, plaintiff _____ [*describe circumstances arising from state of war causing plaintiff's disability to sue, e.g.*, was interned as a prisoner of war by _____ (*interning authority*) and confined at _____ (*place or places of confinement during internment*)]. On _____[*date*], _____[*state facts concerning ending of hostilities or removal of plaintiff's disability, or both, e.g.*, although the state of war continued, plaintiff was released in an exchange of prisoners].

[2] Use of Form

The allegation in *[1], above*, should be inserted into the complaint if the plaintiff was, by reason of the existence of a state of war, under a disability to begin the action [*see Code Civ. Proc. § 354*; for discussion, *see § 345.20[14], above*].

The date in the first sentence of the allegation need not be the date when the cause of action accrued, although it often will be. *Code Civ. Proc. § 354* applies whether the cause of action accrued before or during the plaintiff's disability.

[3] Cross References

For additional comments, see *§ 345.70[2]* et seq.

Legal Topics:

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

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30-345 California Forms of Pleading and Practice--Annotated § 345.79

§ 345.79 Allegation--Suspension of Period of Limitation--Reversal of Judgment for Plaintiff on Appeal [Code Civ. Proc. § 355]

[1] FORM Allegation--Suspension of Period of Limitation--Reversal of Judgment for Plaintiff on Appeal [Code Civ. Proc. § 355]

1. On _____[*date*], plaintiff filed a complaint against defendant _____[*name, unless there is only one defendant*] in _____[this court *or name and location of court*] for the same relief sought in the present action. Judgment in that former action was entered for plaintiff, but that judgment was reversed on appeal other than on the merits by _____[*name of appellate court and, if not California court, jurisdiction*]. _____ [*Date of "reversal" as referred to in Code Civ. Proc. § 355; if California appellate court, e.g.,* On _____ (*date*), the remittitur was entered by the clerk of _____ (*name of appellate court*) in the register].

[2] Use of Form

The allegation in *[1], above*, should be inserted into the complaint when a former action was commenced within the applicable period of limitation, judgment for plaintiff was reversed on appeal other than the merits, and the present action is begun within one year after the reversal [*see Code Civ. Proc. § 355* and the discussion in *§ 345.27[1], above*].

No reported case has considered the question when the "year after the reversal" [*see Code Civ. Proc. § 355*] begins. As to reversals by California appellate courts, it probably begins on the day when the clerk enters the remittitur in the record of the case [*see* Cal. Rules ofCt., Rule 8.272; Witkin, California Procedure, vol. 9, *Appeal*, §§ 732, 734 (4th ed. 1997)].

[3] Cross References

For additional comments, see *§ 345.70[2]* et seq.

Legal Topics:

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30-345 California Forms of Pleading and Practice--Annotated § 345.80

§ 345.80 Allegation--Suspension of Period of Limitation--Legal Inhibition to Sue [Code Civ. Proc. § 356]

[1] FORM Allegation--Suspension of Period of Limitation--Legal Inhibition to Sue [Code Civ. Proc. § 356]

1. From _____[*date*], until _____[*date*], inclusive, plaintiff was prevented from commencing the present action in that _____ [*describe circumstances under Code Civ. Proc. § 356 constituting legal inhibition to suit, e.g.*, on _____ (*date*), _____ (*name*) filed a petition in bankruptcy in the United States _____ (District Court *or* Bankruptcy Court) for the _____ District of _____, which filing, pursuant to Title *11 of the United States Code, Section 362(a)*, operated as a stay of any action against the debtor in bankruptcy; and the stay continued until _____ (*date*), on which date _____ (*specify, e.g.*, the bankruptcy case was closed *or* the bankruptcy case was dismissed *or* the debtor in bankruptcy was granted a discharge *or* the debtor in bankruptcy was denied a discharge *or other event under 11 U.S.C. § 362(c) terminating stay*)].

[2] Use of Form

The allegation in *[1], above*, should be inserted into the complaint if the commencement of the action was stayed by injunction or statutory prohibition, or if the plaintiff was otherwise legally prevented from taking action to protect his or her interests [*see Code Civ. Proc. § 356* and the discussion in *§ 345.20[16], above, see also 11 U.S.C. §§ 362(a)-(f)* (stay of actions against debtors in bankruptcy)].

[3] Application of Code Civ. Proc. § 356

The rule in *Code Civ. Proc. § 356* has been restated by the Supreme Court to be that the period of limitation is suspended during any period in which the plaintiff is legally prevented from taking action to protect his or her rights [*see Dillon v. Board of Pension Commrs. (1941) 18 Cal. 2d 427, 431, 116 P.2d 37]* . Although no reported decision has so held, the implicit corollary of this rule is that the period of limitation is not suspended during any period in which the plaintiff has any legal means of protecting his or her rights. Also implicit in both the rule of *Code Civ. Proc. § 356*, and the general scheme of statutes of limitation, is the principle that one with a good cause of action will not delay

bringing it for an unreasonable length of time; but, when a plaintiff has been denied access to the courts, the basis of the principle is destroyed [*Estate of Caravas (1952) 40 Cal. 2d 33, 40, 250 P.2d 593]* . Thus, it would seem that if a person having a cause of action is under a legal inhibition to sue, and there is available to him or her a legal means for relief from that inhibition, his or her failure to seek relief as promptly as he or she reasonably can should be deemed a waiver of his or her right to rely on suspension of the period of limitation because of the inhibition, at least as to the portion of the time of asserted suspension when he or she neglected or omitted to act for his or her own protection.

For discussion particular situations, see *§§ 345.20[16][b] -[d], above.*

[4] Cross References

For additional comments, see *§ 345.70[2]* et seq.

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30-345 California Forms of Pleading and Practice--Annotated § 345.81

§ 345.81 Allegation--Defendant Estopped to Raise Defense of Bar

[1] FORM Allegation--Defendant Estopped to Raise Defense of Bar

1. On _____[*date*], defendant _____[*name, unless there is only one defendant*] _____ [*specify acts establishing estoppel, e.g.*, informed plaintiff that defendant would settle plaintiff's claim and pay plaintiff the sum of $_____, which was acceptable to plaintiff. Defendant promised to pay that sum forthwith. However, no payment was made as of _____ (*date of last day of period of limitation*). Between those dates, plaintiff refrained from filing a complaint because of defendant's continued assurances that payment was forthcoming. Plaintiff relied on defendant's promises to pay because of defendant's relationship to plaintiff as plaintiff's _____ (*specify, e.g.*, employer). On _____ (*date*), plaintiff discovered that defendant never had any intention of paying any settlement sum but, instead, intended to induce plaintiff not to commence an action and, thus, to prevent plaintiff not to commence an action within the period of limitation].

[2] Use of Form

The allegation in *[1], above*, illustrates the manner of pleading an estoppel against the defendant's raising the defense of bar of a statute of limitation. No general form can be given because each case will have unique facts. The most often used ground for estoppel is probably fraudulent concealment of a cause of action, which may exist in a case of professional negligence [for discussion, *see § 345.22[3], above*]. Estoppel may also arise in the case of a fiduciary relationship [for discussion, *see § 345.19[4], above*].

[3] Nature of Estoppel to Raise Defense of Bar

The equitable doctrine of estoppel *in pais* is applicable in a proper case to prevent a fraudulent or an inequitable resort to a statute of limitation [*see Ginns v. Savage (1964) 61 Cal. 2d 520, 524-525, 39 Cal. Rptr. 377, 393 P.2d 689* (absence of fraud as not preventing application of doctrine of estoppel to limitation question)]. Acts or conduct that wrongfully induce a party to believe that an amicable adjustment of his or her claim will be made may create an estoppel against pleading a statute of limitation. When the delay in commencing an action is induced by the conduct of

the defendant, it cannot be availed of by him or her as a defense. A person cannot justly or equitably lull the adversary into a false sense of security and thereby cause him or her to subject a claim to the bar of a statute of limitation, and then be permitted to plead the very delay caused by the conduct as a defense to the action when brought. Acts or conduct that wrongfully induce a party to believe that an amicable adjustment of the claim will be made may create an estoppel against pleading a statute of limitation [*Regus v. Schartkoff (1957) 156 Cal. App. 2d 382, 386-387, 319 P.2d 721* ; *see Tresway Aero, Inc. v. Superior Court (1971) 5 Cal. 3d 431, 438, 96 Cal. Rptr. 571, 487 P.2d 1211* (reporting rule of estoppel to raise statute of limitation in defense and citing *Regus* case)]. Similarly, repeated threats by a defendant that cause the plaintiff duress and result in the plaintiff's delay in bringing suit may also create an estoppel against pleading the statute of limitations [*Ateeq v. Najor (1993) 15 Cal. App. 4th 1351, 1356-1357, 19 Cal. Rptr. 2d 320* (defendant repeatedly threatened to deport plaintiff if plaintiff challenged defendant's accounting)].

Although equitable estoppel typically arises through some misleading affirmative conduct on a defendant's part, an estoppel may also arise from silence when there is a duty to speak [*Spray, Gould & Bowers v. Associated Internat. Ins. Co. (1999) 71 Cal. App. 4th 1260, 1263, 1268-1269, 84 Cal. Rptr. 2d 552* (insurer's failure to notifiy claimant of time limits pertaining to a claim in violation of California administrative regulation].

A party has a reasonable time within which to bring his action after the estoppel has expired. When a substantial period for instituting an action intervenes after expiration of the delay engendered by a party, that party's conduct, representations, or promise will not estop him or her from asserting the bar of a statute of limitation. Moreover, such a party is not estopped when the conduct, representations, or promise did not in fact induce the other party to forbear from instituting an action. When the inducement for delay has ceased to operate, the plaintiff cannot excuse his or her failure to institute the action on the ground of estoppel. A reasonable time within which a plaintiff may file an action after discovery of the alleged fraud (constituting the ground for asserting estoppel) cannot exceed the period of limitation imposed by the applicable statute [*Regus v. Schartkoff (1957) 156 Cal. App. 2d 382, 386-387, 319 P.2d 721* ; *see Tresway Aero, Inc. v. Superior Court (1971) 5 Cal. 3d 431, 438, 96 Cal. Rptr. 571, 487 P.2d 1211]* . Laches may not be pleaded, however, when the claimed prejudice is a result of the party's own wrongful actions [*Ateeq v. Najor (1993) 15 Cal. App. 4th 1351, 1359, 19 Cal. Rptr. 2d 320]* .

[4] Pleading Estoppel

Whether a complaint sufficiently alleges a fraudulent concealment of the cause of action, and when the plaintiff discovered or should have discovered the facts giving rise to the cause of action, are to be determined by the same rules that apply when the question is whether a case is within the saving provision of *Code Civ. Proc. § 338* regarding actions based on fraud [*Sears v. Rule (1945) 27 Cal. 2d 131, 147, 163 P.2d 443* (discovery of facts); *Kimball v. Pacific Gas & Elec. Co. (1934) 220 Cal. 203, 215, 30 P.2d 39* (pleading)].

If the plaintiff intends to rely on estoppel, the complaint must contain a statement of facts, not conclusions, constituting the ground for estoppel, in the same manner as when fraud is alleged under *Code Civ. Proc. § 338(d)* and the plaintiff is obliged to establish an excuse for delayed filing [*see Negaard v. Department of Aeronautics (1973) 32 Cal. App. 3d 92, 107 Cal. Rptr. 920 , cert. denied, 414 U.S. 1069]* . In the analogous case of fraud and the application of *Code Civ. Proc. § 338*, the plaintiff must plead and prove facts showing lack of knowledge, and lack of means of obtaining knowledge (i.e., in the exercise of reasonable diligence, the facts could not have been discovered at an earlier date), and how and when the plaintiff actually discovered the fraud [*see Casualty Ins. Co. v. Rees Investment Co. (1971) 14 Cal. App. 3d 716, 720, 92 Cal. Rptr. 857]* . Likewise in the case of estoppel, the plaintiff must plead and prove facts showing a lack of knowledge of the facts constituting the ground for estoppel, and a lack of means for obtaining that knowledge, and how and when the plaintiff became aware of those facts [*see Negaard v. Department of Aeronautics (1973) 32 Cal. App. 3d 92, 97, 107 Cal. Rptr. 920 , cert. denied, 414 U.S. 1069]* .

If the facts alleged in the complaint do not show that the statute of limitations has run, the plaintiff may not need to specifically plead facts supporting estoppel [*Ateeq v. Najor (1993) 15 Cal. App. 4th 1351, 1358, 19 Cal. Rptr. 2d 320*

(plaintiff timely raised issue of estoppel in response to defendant's motion for defense judgment; defendant first raised statute of limitations as affirmative defense) *see also Gallo v. Superior Court (1988) 200 Cal. App. 3d 1375, 1383, 246 Cal. Rptr. 587]* .

[5] Cross References

For additional comments, see *§ 345.70[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsEquitable EstoppelGovernmentsLegislationStatutes of LimitationsTime Limitations

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A. Statute of Limitations
1. Allegations of Suspension or Revival of Period of Limitations

30-345 California Forms of Pleading and Practice--Annotated § 345.82

§ 345.82 Allegation--Statute of Limitations Equitably Tolled

[1] FORM Allegation--Statute of Limitations Equitably Tolled

1. On _____[*date*], plaintiff _____ [*set out plaintiff's action(s) that gave defendant notice of plaintiff's claim within the applicable statute of limitations, e.g.*, filed an action in federal court naming as defendant _____[*name*], the defendant herein. A copy of that complaint is attached as Exhibit A and is incorporated herein by reference].

2. _____[Both claims arose from the defendant's conduct as alleged herein *or allege other circumstances demonstrating lack of prejudice to defendant in gathering evidence necessary for defense*].

3. _____[*Set out facts showing good faith and reasonableness of plaintiff's acts in filing second claim, e.g.*, Plaintiff filed this action immediately after his/her federal court action was dismissed without prejudice to any state cause of action due to lack of federal court jurisdiction, as he/she had maintained to defendant would be done were the federal action dismissed].

[2] Use of Form

The allegation in *[1], above*, should be inserted into the complaint when the statute of limitations would appear to have expired, but during part of the time another remedy was being pursued against the same defendant by plaintiff based on the same or similar facts. The pendency of the first claim may support a finding that the statute of limitations was equitably tolled while the first claim was pending [*see Addison v. State of California (1978) 21 Cal. 3d 313, 319, 146 Cal. Rptr. 224, 578 P.2d 941]* .

[3] Equitable Tolling

A statute of limitation applicable to a given cause of action may be found by a court to have been equitably tolled if plaintiff attempted to remedy his or her claim through another avenue and [*Addison v. State of California (1978) 21*

Cal. 3d 313, 319, 146 Cal. Rptr. 224, 578 P.2d 941 ; *Collier v. City of Pasadena (1983) 142 Cal. App. 3d 917, 924, 191 Cal. Rptr. 681* ; *Elkins v. Derby (1974) 12 Cal. 3d 410, 412, 115 Cal. Rptr. 641, 525 P.2d 81]* :

- Defendant received timely notice of the first claim;
- Defendant was not prejudiced in gathering evidence to defend against the second claim; and
- Plaintiff acted reasonably and in good faith in filing the second claim.

If the first claim is an action brought in federal court that includes a pendent state claim over which the federal court has supplemental jurisdiction, the second suit must be filed within 30 days after dismissal of the pendent state claim without prejudice unless state law extends that period [*28 U.S.C. 1367(d)*; *Kolani v. Gluska (1998) 64 Cal. App. 4th 402, 408-411, 75 Cal. Rptr. 2d 257]* .

[4] Cross References

For further discussion of equitable tolling, see *§ 345.21*

For additional comments, see *§ 345.70[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsEquitable EstoppelGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLegislationStatutes of LimitationsTolling

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30-345 California Forms of Pleading and Practice--Annotated § 345.83

§ 345.83 Allegation--Extension of Period of Limitation by Agreement [Code Civ. Proc. § 360.5]

[1] FORM Allegation--Extension of Period of Limitation by Agreement [Code Civ. Proc. § 360.5]

1. The agreement referred to above contains a clause _____ [as follows: _____ (*set out verbatim clause extending period of limitation*) *or* as set out in the copy of the agreement which is attached as Exhibit A and made a part hereof].

[2] Use of Form

The allegation in *[1]*, *above*, should be inserted into the complaint when the statutory period of limitation has been extended by agreement; in other words, when the defendant has executed a waiver of his or her right to assert the defense that the action is barred pursuant to *Code Civ. Proc. § 360.5* [for discussion, *see § 345.28, above*].

[3] Cross References

For additional comments, see *§ 345.70[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsExtension & RevivalGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLegislationStatutes of LimitationsWaivers

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30-345 California Forms of Pleading and Practice--Annotated § 345.84

§ 345.84 Allegation--Revival of Barred Debt--Partial Payment of Principal or Interest [Code Civ. Proc. § 360]

[1] FORM Allegation--Revival of Barred Debt--Partial Payment of Principal or Interest [Code Civ. Proc. § 360]

1. On _____[*date before action on original debt became barred*], defendant _____[*name, unless there is only one defendant*] paid to plaintiff the sum of $_____ on account of _____[principal *or* interest *or* both principal and interest] due on the promissory note referred to above.

[2] Use of Form

The allegation in *[1], above*, may be inserted into the complaint when the debtor made a partial payment of principal or interest due on a promissory note before the period of limitation on an action based on the note expired. The effect of such a payment is to begin a new period of limitation running from the date of the payment [*see Code Civ. Proc. § 360*; for further discussion, see *§ 345.23*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsDischarge & PaymentPaymentInterestContracts LawNegotiable InstrumentsEnforcementDefensesStatutes of LimitationsGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsExtension & RevivalGovernmentsLegislationStatutes of LimitationsTime Limitations

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30-345 California Forms of Pleading and Practice--Annotated § 345.85

§ 345.85 Allegation--Revival of Barred Debt--Promise or Acknowledgment After Expiration of Period of Limitation [Code Civ. Proc. § 360]

[1] FORM Allegation--Revival of Barred Debt--Promise or Acknowledgment After Expiration of Period of Limitation [Code Civ. Proc. § 360]

1. On _____[*date after expiration of period of limitation for action on original debt but within period as to revived debt*], defendant signed and _____[*specify manner in which writing was delivered to plaintiff, e.g.*, mailed to plaintiff] a written instrument _____[promising to pay *or* acknowledging] the _____[*describe debt, e.g.*, promissory note described above]. _____ [The instrument provided as follows: _____ (*state terms verbatim*) *or* A copy of the instrument is attached as Exhibit A and made a part hereof].

[2] Use of Form

The allegation in *[1], above*, should be inserted into the complaint when a debt has been revived by either a promise or an acknowledgment after the expiration of the period of limitation [*see Code Civ. Proc. § 360*]. For discussion, see *§ 345.24, above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsExtension & RevivalGovernmentsLegislationStatutes of LimitationsTime Limitations

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30-345 California Forms of Pleading and Practice--Annotated §§ 345.86-345.99

[Reserved]

§§ 345.86[Reserved]

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30-345 California Forms of Pleading and Practice--Annotated § 345.100

§ 345.100 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action Barred by Statute of Limitations--General Form

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action Barred by Statute of Limitations--General Form

[_____ (*if more than one, specify number, e.g.*, FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.*, SECOND) CAUSE OF ACTION]

1. The action is barred _____ [by the provisions of _____ (*insert, if appropriate* : subdivision _____ of) Section _____ of the Code of Civil Procedure *or* in that _____ (*state facts establishing bar*)].

[2] Use of Form

The affirmative defense in *[1], above*, may be inserted into the answer when the defendant wishes to raise the defense of bar of a statute of limitation. The alternative method of pleading, namely a reference to the applicable section (and subdivision, if the section is subdivided) of the Code of Civil Procedure, is authorized by *Code Civ. Proc. § 458*.

[3] Necessity of Raising Defense Affirmatively

A party who wishes to rely on the defense that an action is barred by a statute of limitation must affirmatively raise the defense in an appropriate pleading [*see Union Sugar Co. v. Hollister Estate Co. (1935) 3 Cal. 2d 740, 744, 47 P.2d 273* ; *see also County of San Mateo v. Booth (1982) 135 Cal. App. 3d 388, 399, 185 Cal. Rptr. 349]* . A defendant who fails to raise the defense by an appropriate pleading will be held to have waived his or her right to rely on it [*In re Andrew V. (1991) 232 Cal. App. 3d 1286, 1291, 284 Cal. Rptr. 38* (court's jurisdiction not affected by running of statute; party must plead defense of limitation or it is waived)].

In applying the general rule that failure to raise the defense of bar of a statute of limitation will be deemed a waiver, it does not matter whether the statute in question is a general statute of limitation or relates to a special proceeding [*Sheeter v. Lifur (1952) 113 Cal. App. 2d 729, 739, 249 P.2d 336]* .

[4] Pleading Bar of Statute

[a] By Pleading Facts or by Specifying Statute in Demurrer or Answer

A defendant may, if the defect appears on the face of a complaint, set up the bar of a statute of limitation either by demurrer or by answer. The failure to urge it by way of demurrer does not deprive the defendant of the right to rely on such defense in his or her answer [*Stafford v. Russell (1953) 117 Cal. App. 2d 319, 321, 255 P.2d 872]* . For a form of demurrer raising the bar of the statute of limitations, see *§ 345.104, below*.

There are two ways of making a plea of bar of a statute of limitation.

The first is by alleging all of the facts showing that action is barred and indicating that the lateness of the commencement of the action is being urged as a defense.

The second is stated in *Code Civ. Proc. § 458*, which states that in pleading a statute of limitation, it is not necessary to state the facts showing the defense; rather, the answer may state generally that the cause of action is barred by the provisions of a specified section (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure [*Code Civ. Proc. § 458*]. If the defendant following *Code Civ. Proc. § 458* fails to specify the applicable section and, if it is divided into subdivisions, the particular subdivision or subdivisions relied on, the plea is insufficient [*Brown v. World Church (1969) 272 Cal. App. 2d 684, 691, 77 Cal. Rptr. 669* (reporting rules)].

The court has discretion to allow an amendment of the answer for the purpose of inserting the omitted reference [*St. Paul Title & Trust Co. v. Stensgaard (1912) 162 Cal. 178, 180, 121 P. 731]* .

[b] After Demurrer Overruled

Where the defendant demurred on the ground of bar of a statute of limitation (specifying the section and subdivision as provided in *Code Civ. Proc. § 458*), the demurrer was overruled, and the defendant then pleaded the bar of the statute in the answer without specifying the section and subdivision relied on or the facts establishing the bar, he may be held to have waived his right to rely on the attempted defense [*see DeCelle v. Alameda (1963) 221 Cal. App. 2d 528, 533, 34 Cal. Rptr. 597]* .

[c] Against Claim Other Than Plaintiff's

A plea that an action is barred by a statute of limitation may be raised against a claim other than the plaintiff's claim against the defendant pleading the bar, if the two claims are sufficiently related. For example, where the plaintiff sues to foreclose a senior deed of trust and joins the beneficiary of a junior deed of trust, the junior beneficiary may plead in defense that the action to foreclose the senior deed of trust is barred by the statute of limitation, even through the trustor waived that defense as to himself by failure to plead it [*Flack v. Boland (1938) 11 Cal. 2d 103, 107, 77 P.2d 1090* (junior beneficiary, who also sought foreclosure, became in effect the senior beneficiary first in line to receive the proceeds of foreclosure sale)].

[d] Against Common Count

Where the plaintiff has cast his complaint in the form of a common count, (1) the defense of bar of a statute of

limitation may not be raised by demurrer unless it affirmatively appears on the face of the complaint that the action is barred, and (2) under a general denial, the defendant may urge any defense which tends to show that the plaintiff does not have a subsisting cause of action [*Evans v. Zeigler (1949) 91 Cal. App. 2d 226, 230-231, 204 P.2d 902]* .

[e] By Amendment of Answer

An amendment of the answer may be allowed for the purpose of raising the defense of bar of a statute of limitation, even though no attempt was made originally to plead that defense [*Wrightson v. Dougherty (1936) 5 Cal. 2d 257, 265-266, 54 P.2d 13]* . A requested amendment for the purpose of raising that defense is entitled to as much consideration as an amendment asserting any other claim or defense [*Vedder v. Superior Court (1967) 254 Cal. App. 2d 627, 629, 62 Cal. Rptr. 222]* . The trial court may, in its discretion and in furtherance of justice, deny an application to amend an answer for the purpose of raising the defense of bar of a statute of limitation [*Davenport v. Stratton (1944) 24 Cal. 2d 232, 249, 149 P.2d 4* (restating rule)].

The point in proceedings at which an amendment may be allowed for the purpose of pleading bar of a statute of limitation appears to be any time before there is a decision, verdict, or judgment [*see Trower v. City and County of San Francisco (1910) 157 Cal. 762, 766-767, 109 P. 617* (amendment allowed after cause submitted)].

A request to amend the answer so as to plead the defense of bar of a statute of limitation may properly be denied if it is made too late or if the circumstances of the case show that the defendant has no tenable ground on which to base the request [*see, e.g., L.B. Laboratories, Inc. v. Mitchell (1952) 39 Cal. 2d 56, 61, 244 P.2d 385* (request to amend answer to plead bar of *Code Civ. Proc. § 337* as properly denied where complaint showed action was based on contract, plaintiff's opening argument so stated without objection from defendant, and request was made only after defendant's motion for nonsuit on ground of lack of evidence of negligence was opposed by plaintiff's argument that action was based on contract)].

[f] In Retrial After Reversal

If the defense was not presented at the first trial in a case where the judgment was reversed on appeal and the cause was remanded for retrial, the trial court may, in its discretion, allow an amendment of the answer before the retrial, for the purpose of raising the defense for the first time [*see Estate of Horman (1971) 5 Cal. 3d 62, 72-73, 95 Cal. Rptr. 433, 485 P.2d 785* (adopting court of appeal opinion)].

[g] By Motion for Summary Judgment

Where a defendant having a good defense based on a statute of limitation fails to raise it by demurrer or in his answer, he might nevertheless be permitted to assert it by, for example, moving for summary judgment on the basis of a declaration stating the facts which show the action to be barred. The granting of a motion for summary judgment in such a case has been upheld, in derogation of the plaintiff's argument that the defendant's right to assert the bar of the applicable statute was waived, or the defendant was estopped to assert it, because of failure to demur or plead the bar in his answer. The reasoning was that since the defendant could have amended his answer and then moved for judgment on the pleadings, the granting of his motion for summary judgment simply achieved a proper result by a more direct method [*Hunter v. Los Angeles County (1968) 262 Cal. App. 2d 820, 823, 69 Cal. Rptr. 288]* .

[h] By Motion to Strike

The pleading of bar of a statute of limitation in the form of a motion to strike the complaint has been upheld where the motion was accompanied by a demurrer pleading the same objection (as well as an answer pleading the bar) [*Sullivan v. Wright (1954) 124 Cal. App. 2d 836, 837-838, 269 P.2d 671]* . The rationale in that case was that if the court of appeal were to reverse the order striking the complaint, on the basis that the bar of a statute of limitation cannot be a ground for granting a motion to strike, then the demurrer raising the bar would nevertheless remain intact even though

the action was, in fact, barred. Thus, reversing the order to strike would have achieved no useful purpose.

A motion to strike that is not accompanied by a demurrer where both raise the bar of a statute of limitation should probably be denied. The plaintiff should have at least one chance to amend the complaint so as to avoid the bar of the statute, but granting a motion to strike might deprive him of that chance (if the period of limitation has expired).

[i] In Application to Vacate, or After Vacation of, Default

A statute of limitation is a "statute of repose;" therefore, it is a meritorious defense which may properly be set up after a default has been vacated or as a ground for vacating a default. A defendant who asserts that an action is barred by lapse of time is deemed to answer to the merits [*Lilly-Brackett Co. v. Sonnemann (1910) 157 Cal. 192, 196-197, 106 P. 715]* .

[5] Plaintiff's Response to Attempted Plea of Bar

The rule in *Code Civ. Proc. § 458* as to the manner of pleading the bar of a statute of limitation in the answer is not self-operating. It depends for its enforcement on the diligence of the plaintiff in objecting to the insufficiency of the plea, either by demurrer to the answer or by timely objection at trial [*Davenport v. Stratton (1944) 24 Cal. 2d 232, 248, 149 P.2d 4]* .

If an answer attempts to raise the defense of bar of a statute of limitation following the procedure allowed in *Code Civ. Proc. § 458* but the form of the allegation is defective, the plaintiff's remedy is a demurrer on the ground of uncertainty. Absent such a demurrer, the plaintiff cannot complain of the defective pleading, at least if it is evident from the facts of the case and from the language of the statute that applies which particular statute and subdivision the defendant relies on [*St. Paul Title & Trust Co. v. Stensgaard (1912) 162 Cal. 178, 180, 121 P. 731]* .

If the defendant attempts to plead in his answer the bar of a statute of limitation, but the plea is defective, and the plaintiff does not demur (or otherwise object to the defective pleading) but allows the action to go to trial and judgment, then the plaintiff's omission to object while the action was in the trial court will be deemed a waiver of the objection [*Churchill v. Woodworth (1906) 148 Cal. 669, 676, 84 P. 155]* . However, if the plaintiff omits to demur or otherwise to object to a defective pleading of bar of a statute of limitation by the defendant but nevertheless does object during the trial to the admission of evidence in support of the plea, then the plaintiff's objection is timely [*Davenport v. Stratton (1944) 24 Cal. 2d 232, 248, 149 P.2d 4]* . And if the plaintiff makes a timely objection to the defective pleading of bar of a statute of limitation, then it is probably an abuse of discretion for the trial court to deny the defendant leave to amend his answer so as to cure the defect [*see* *Davenport v. Stratton (1944) 24 Cal. 2d 232, 252, 149 P.2d 4]* .

[6] Plaintiff's Pleading Bar of Statute

[a] In Answer to Cross Complaint

Where the plaintiff is a cross defendant under a cross complaint filed by the person (defendant) whom he sued, a defense that the action under the cross complaint is barred by a statute of limitation will be deemed waived if it is not raised in the trial court [*Hall v. Chamberlain (1948) 31 Cal. 2d 673, 679-680, 192 P.2d 759]* .

[b] Against Set-Off Claim

A statute of limitation has no application to setoff claims of an equitable nature based on the same series of transactions as the complaint [*see* *Kroepsch v. Muma (1969) 272 Cal. App. 2d 467, 475, 77 Cal. Rptr. 348]* .

[7] Cross References

For discussion and forms of answers in which this affirmative defense may be inserted, see Ch. 26, *Answers*

For discussion and forms of demurrers, see Ch. 206, *DemurrersMotions for Judgment on the Pleadings*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDefects of FormGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsPleading & Proof

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30-345 California Forms of Pleading and Practice--Annotated § 345.101

§ 345.101 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Cause of Action of Nonresident Arising Outside California [Code Civ. Proc. § 361]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Cause of Action of Nonresident Arising Outside California [Code Civ. Proc. § 361]

[_____ (*if more than one, specify number, e.g.*, FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.*, SECOND) CAUSE OF ACTION]

1. On _____[*date cause of action accrued*], plaintiff was a resident of _____[*other state or foreign country*]. On that date the cause of action alleged in the complaint arose in _____[*other state or foreign country*], as follows: _____[*briefly describe circumstances giving rise to cause of action*]. On that date, and at all times since then until the complaint was filed, there was in full force and effect in _____[*other state or foreign country*] a certain statute of limitation designated as _____[*statute number, code section, or other form of designation*] and providing _____ [as follows: _____ (*state pertinent provisions*) *or* as set forth in the true and correct copy, certified as such by _____ (*certifying officer*), which is attached hereto as Exhibit A and made a part hereof]. The action is barred by the provisions of that statute and by *Section 361 of the Code of Civil Procedure.*

[2] Use of Form

The form of affirmative defense in *[1], above*, may be inserted into the answer if the cause of action arose outside California, the plaintiff has not been a citizen of California or has not held the cause of action from the time it accrued, and the action is barred under the laws of the other state or foreign country where it arose [*see Code Civ. Proc. § 361*; *§ 345.13[3], above*].

[3] Application of Code Civ. Proc. § 361

It is a principle of conflict of laws recognized in California that the barring of an action by a statute of limitation is a procedural matter governed by the law of the forum, regardless of where the cause of action arose [*Biewend v. Biewend (1941) 17 Cal. 2d 108, 114, 109 P.2d 701]* .

Code Civ. Proc. § 361 applies to causes of action that are barred by the law of the state where they arose but not by the law of California, and only such causes of action. If the plaintiff has not been a citizen of California from the time the cause of action accrued elsewhere, then the effect of *Code Civ. Proc. § 361* is to apply the statute of limitation of the jurisdiction where the cause of action arose, unless the action is also barred by a California statute [*see Biewend v. Biewend (1941) 17 Cal. 2d 108, 115, 109 P.2d 701* ; *see also McCann v. Foster Wheeler (2010) 48 Cal. 4th 68, 85, 105 Cal. Rptr. 3d 378]* .

Although the overriding purpose of "borrowing" statutes is to curtail forum shopping, *Code Civ. Proc. § 361* does not inquire into a plaintiff's subjective intent in bringing suit in California. By its terms, *section 361* applies whenever a cause of action arises in another state and would be stale in that state, unless the holder of the cause of action is a California citizen who has held the cause from the time of accrual [*Giest v. Sequoia Ventures, Inc (2000) 83 Cal. App. 4th 300, 303, 99 Cal. Rptr. 2d 476]* . Therefore, the fact that surviving heirs and executors of the estate of a decedent, who was allegedly exposed to asbestos while working on a construction project in Montana, did not intend to avoid any limitations period, but only filed the wrongful death action in California because several other defendants were not amenable to service in Montana was immaterial, and a Montana statute of repose applied to bar the action [*Giest v. Sequoia Ventures, Inc (2000) 83 Cal. App. 4th 300, 303-304, 99 Cal. Rptr. 2d 476]* .

[4] Cross References

For additional discussion and cross references relating to asserting the defense of the statute of limitations, see *§ 345.100[2]* et seq.

For discussion and forms relating to pleading foreign statutes, see Ch. 531, *Statutes and Ordinances*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsChoice of LawForum & PlaceGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 345 LIMITATION OF ACTIONS
PART IV. FORMS
A. Statute of Limitations
2. Affirmative Defenses and Demurrers

30-345 California Forms of Pleading and Practice--Annotated § 345.102

§ 345.102 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Foreign Corporation Having Designated Agent Within State for Service of Process [Corp. Code §§ 6403, 6500, 6501]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Foreign Corporation Having Designated Agent Within State for Service of Process [Corp. Code §§ 6403, 6500, 6501]

[_____ (*if more than one, specify number, e.g.*, FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.*, SECOND) CAUSE OF ACTION]

1. On _____[*date*], pursuant to Section 6403 of the Corporations Code, defendant filed with the Secretary of State of California an instrument in writing, under the seal of and duly executed by defendant, designating _____[*name*] as a person on whom personal service of summons on any action brought against defendant might be made, and containing the other information required by that section. Also filed on that date along with that instrument was the written consent of _____[*name*] to serve as designated agent for the service of process. From that date until the filing of the complaint those written instruments remained on file, unchanged and in full force and effect. Therefore, the action is barred by the provisions of Section _____, subdivision _____, of the Code of Civil Procedure.

[2] Use of Form

The form of affirmative defense in *[1], above*, may be inserted into the answer if the complaint alleges suspension of the running of the period of limitation because of the defendant's absence from the state, and the defendant foreign corporation [*see Corp. Code §§ 2105, 2110-2111*] has had a designated agent for service of process within the state during the time in question [*see Code Civ. Proc. § 351*; *§ 345.20[2], above*].

[3] Cross References

For additional discussion and cross references relating to asserting the defense of the statute of limitations, see *§ 345.100[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessMethodsForeign ServiceCivil ProceduresPleading & PracticeService of ProcessMethodsService Upon AgentsCivil ProceduresPleading & PracticeService of ProcessTime LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral Overview

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PART IV. FORMS
A. Statute of Limitations
2. Affirmative Defenses and Demurrers

30-345 California Forms of Pleading and Practice--Annotated § 345.103

§ 345.103 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Shortening of Period of Limitation by Private Agreement

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Shortening of Period of Limitation by Private Agreement

[_____ (*if more than one, specify number, e.g.*, FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.*, SECOND) CAUSE OF ACTION]

1. The agreement described in the complaint contains the following provision: _____[*set out clause shortening period of limitation*]. Therefore, the action is barred by the terms of the agreement.

[2] Use of Form

The form of affirmative defense in *[1], above*, may be inserted into the answer where the plaintiff's action is based on an agreement having a term shortening the period of limitation. Such agreements are enforceable [*see § 345.28, above*].

If the plaintiff's action is not based on the agreement shortening the period of limitation, then the making of the agreement will have to be alleged. Regarding the pleading of the making of an agreement, see Ch. 140, *Contracts* .

[3] Cross References

For additional discussion and cross references relating to asserting the defense of the statute of limitations, see *§ 345.100[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral Overview

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30-345 California Forms of Pleading and Practice--Annotated § 345.104

§ 345.104 Demurrer [Code Civ. Proc. § 430.10] to Complaint--Bar of Statute of Limitation

[1] FORM Demurrer [Code Civ. Proc. § 430.10] to Complaint--Bar of Statute of Limitation

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

	)	
	)	NO. _____
_____[*name*],	)	DEMURRER TO COMPLAINT
Plaintiff,	)	[LIMITED CIVIL CASE]
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date:_____
	)	

_____

Defendant demurs to the complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action in that it appears on the face of the complaint that the action is barred by the statute of limitation _____ [*add, if desired, either* namely, Section _____, subdivision _____, of the Code of Civil Procedure *or* in that _____ (*state facts showing bar*)].

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

The ground of demurrer in *[1], above*, may be pleaded against a complaint which shows on its face that the action is barred. For discussion of demurrers generally, alternative forms of demurrer, a form of notice of hearing on a demurrer, and additional related forms, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Raising Bar of Statute by Demurrer

The defense that an action is barred by a statute of limitation is not specified in *Code Civ. Proc. § 430.10* as a ground of demurrer. The only subdivision of that section under which this ground could be raised is that the pleading does not state facts sufficient to constitute a cause of action [*see Bell v. Bank of California (1908) 153 Cal. 234, 245, 94 P. 889* (ground of bar of statute is deemed included in ground of failure to state facts sufficient to constitute cause of action)].

This ground is, by the provisions of *Code Civ. Proc. §§ 430.10-430.90*, not waived by failure to demur. The defendant (or plaintiff, in an appropriate situation) may, if the defect appears on the face of the pleading, set up the bar of the statute either by demurrer or by answer. If a pleading does not show on its face that the period of limitation has expired, then the bar of the statute must be pleaded by answer [*California Safe Deposit & Trust Co. v. Sierra Valleys Ry. Co. (1910) 158 Cal. 690, 698, 112 P. 274* ; *see United Western Medical Centers v. Superior Court (1996) 42 Cal. App. 4th 500, 505, 49 Cal. Rptr. 2d 682* (while demurrer based on statute of limitations lies if dates in question are shown on face of pleading, if those dates are missing, there is no ground for general demurrer)].

A demurrer on the ground of bar of a statute of limitation does not lie where the complaint shows merely that the action *may* be barred. It must appear affirmatively that, on the facts stated in the complaint, the right to maintain an action is *necessarily* barred [*see Marshall v. Gibson, Dunn & Crutcher (1995) 37 Cal. App. 4th 1397, 1403, 44 Cal. Rptr. 2d 339* ; *Moya v. Northrup (1970) 10 Cal. App. 3d 276, 283, 88 Cal. Rptr. 783]* . This will not be the case unless the complaint alleges every fact which the defendant would be required to prove if he were to plead the bar of the applicable statute of limitation as an affirmative defense [*Farris v. Merritt (1883) 63 Cal. 118, 119]* . For example, a complaint that alleged that a notice of rejection of a claim presented to a public entity was mailed "on or about" a date six months and one day before the complaint was filed was held sufficient to withstand a general demurrer based on the six-month statute of limitations of *Gov. Code § 945.6(a)(1)* [*Childs v. State of California (1983) 144 Cal. App. 3d 155, 159-162, 192 Cal. Rptr. 526]* .

[4] Form of Demurrer

Code Civ. Proc. § 458, which allows a plea of bar of a statute of limitation by reference to the applicable section and subsection of the Code of Civil Procedure [*see § 345.100[4], above*], applies only to cases in which the bar of a statute is pleaded in the answer as an affirmative defense. That section has no reference to a demurrer. In demurring to a pleading, it is sufficient simply to specify the applicable statute as a ground for the demurrer, or even to state nothing more than that the cause of action is barred by the statute of limitation [*see Bainbridge v. Stoner (1940) 16 Cal. 2d 423, 431, 106 P.2d 423* ; *see Lewis v. Security-First Nat. Bank (1943) 58 Cal. App. 2d 827, 828* and n., *137 P.2d 864* (holding as a sufficient statement in demurrer, on authority of *Bainbridge* case: "That the first amended complaint is barred by the statute of limitations of the State of California")].

[5] Notice of Hearing and Memorandum

A notice of hearing must be filed and served with a demurrer. The hearing date must be not more than 35 days following the filing of the demurrer or on the first date available to the court thereafter. Notice is given in accordance with *Code Civ. Proc. § 1005(b)* [*Cal. Rules of Ct., Rule 3.1320(c)*].

A memorandum in support of each ground of demurrer must also accompany a demurrer [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[6] Matters Subject to Discretionary Judicial Notice

Where the ground of the demurrer is based on a matter of which the court may take judicial notice pursuant to *Evid. Code §§ 452, 453*, that matter is required to be specified in the demurrer or in the supporting memoranda, except as the court may otherwise permit [*Code Civ. Proc. § 430.70*]. To comply with *Cal. Rules of Ct., Rule 3.1113(l)*, the request should also be made in a separate document listing the specific items for which notice is requested. For discussion of and forms for requesting judicial notice, see Ch. 321, *Judicial Notice* .

The taking of judicial notice does not in and of itself require acceptance of the truth of a factual matter that might be deduced from that matter. Thus, even though the court might take judicial notice of customary procedures of a public entity with respect to the preparation and mailing of notices of rejection of tort claims as an official act of a governmental entity, judicial notice of the mailing of a particular tort claim may not be taken when that is precisely the issue in dispute in the case and the evidence to be judicially noticed does not incontrovertibly show that the practice was followed in the particular case [*Cruz v. County of Los Angeles (1985) 173 Cal. App. 3d 1131, 1134*].

[7] Effect of Specifying Statute in Demurrer

When a demurrer specifies a particular section on which the defendant relies to defeat the action, no other sections are pleaded, and the only question is whether the action is barred by the particular section or sections mentioned in the demurrer [*Bank v. Wickersham (1893) 99 Cal. 655, 660, 34 P. 444]* .

[8] Order Sustaining Demurrer

Whenever a demurrer in any action or proceeding is sustained, the court is required to include in its decision or order a statement of the specific ground or grounds on which the decision or order is based, unless the party against whom the demurrer is sustained waives this requirement [*Code Civ. Proc. § 472d*].

If a complaint shows on its face that the action is barred by a statute of limitation and this defect is the only ground for a demurrer, the court is not required to state the ground on which the demurrer is sustained, despite *section 472d* [*see Rutherford v. Johnson (1967) 250 Cal. App. 2d 316, 318, 58 Cal. Rptr. 546]* .

[9] Cross References

For discussion and forms relating to demurrers generally, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

For additional discussion and cross references relating to asserting the defense of the statute of limitations, see *§ 345.100[2]* et seq.

For memoranda for use in support of, and in opposition to, a demurrer based on bar of a statute of limitation, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* ; Ch. 143, *Limitation of Actions* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDefects of FormGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsPleading & Proof

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30-345 California Forms of Pleading and Practice--Annotated §§ 345.105-345.109

[Reserved]

§§ 345.105[Reserved]

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PART IV. FORMS
B. Laches

30-345 California Forms of Pleading and Practice--Annotated § 345.110

§ 345.110 Ground of Demurrer [Code Civ. Proc. § 430.10]--Bar of Laches Against Complaint for Equitable Relief

[1] FORM Ground of Demurrer [Code Civ. Proc. § 430.10]--Bar of Laches Against Complaint for Equitable Relief

Defendant demurs to the complaint on the ground that the complaint does not state facts sufficient to constitute a cause of action in that it appears on the face of the complaint that plaintiff has inexcusably and unreasonably delayed the commencement of the action, to the prejudice of defendant in that _____[*specify how delay caused prejudice*].

[2] Use of Form

The ground for demurrer in *[1], above*, may be used where the complaint in an action for equitable relief shows on its face that the action is barred by laches. If the bar of laches is not apparent on the face of the complaint, then the facts establishing the defense should be stated in the answer in the form of an affirmative defense.

For discussion of laches, see *§ 345.40, above*.

[3] Cross References

For a complete form of demurrer into which this ground may be inserted, see *§ 345.104[1]*

For additional comments and cross references relating to demurrers generally, see *§ 345.104[2]* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative

DefensesGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral Overview

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B. Laches

30-345 California Forms of Pleading and Practice--Annotated §§ 345.111-345.119

[Reserved]

§§ 345.111[Reserved]

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Chapter 345 LIMITATION OF ACTIONS
PART IV. FORMS
C. Separate Trial of Defense

30-345 California Forms of Pleading and Practice--Annotated § 345.120

§ 345.120 Separate Trial of Special Defense [Code Civ. Proc. § 597]--Bar of Statute of Limitation--Notice of Motion

[1] FORM Separate Trial of Special Defense [Code Civ. Proc. § 597]--Bar of Statute of Limitation--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR SEP-
Plaintiff,	)	ARATE TRIAL OF SPECIAL DEFENSE
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____[*identify party, e.g.*, plaintiff] _____[*name*] and to his/her attorney of record:

1. NOTICE IS HEREBY GIVEN that on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], _____[

specify party, e.g., defendant] will, and hereby does, move for an order pursuant to *Code of Civil Procedure Section 597* for the separate trial of the special defense pleaded in defendant's answer that plaintiff's action is barred by the provisions of _____[*specify applicable statute of limitations*]. The motion will be made on the ground that the defense constitutes a complete bar to plaintiff's action, and a separate trial will therefore eliminate the need, time, and expense of a regular trial of the action.

2. The motion will be based on this notice of motion, on the declaration(s) of _____[*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form of notice of motion in *[1], above*, may be used where the defendant (or, in an appropriate case, some other party) seeks a separate trial of the defense of bar of a statute of limitation, pursuant to *Code Civ. Proc. § 597*.

A supporting memorandum must be filed and a copy served with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*; for discussion and forms, *see* Ch. 417, *Points and Authorities*].

[3] Separate Trial of Special Defense on Motion

When the answer pleads any of several special defenses, among them that the action is barred by a statute of limitation, the court may, either on the court's own motion or on the motion of any party, proceed to the trial of that special defense before the trial of any other issue in the case [*Code Civ. Proc. § 597*].

Code Civ. Proc. § 597 merely states a procedural rule which authorizes the trial court in proper cases to avoid an unjustifiable expenditure of time in the trial of issues related to the merits of an action when it appears after the trial of a special defense that the plaintiff could not recover in any event. That section has no application where it can be clearly seen, from the plaintiff's pleading and from what purports to be a comprehensive offer of proof, that he cannot present a cause of action that is not barred by a statute of limitation [*Neff v. New York Life Ins. Co. (1947) 30 Cal. 2d 165, 175, 180 P.2d 900]* .

[4] Separate Trial of Statute of Limtation Issue in Medical Malpractice Actions

In an action against any physician or surgeon or other health care professional listed in *Code Civ. Proc. § 597.5*, or against a licensed hospital as the employer of any of those persons, based on the person's alleged professional negligence, or for rendering professional services without consent, or for error or omission in the person's practice, if the answer pleads that the action is barred by the statute of limitation, and if any party so moves or the court on its own motion requires, then the issues raised by that plea must be tried separately and before any other issues in the case are tried. If the issue raised by the plea of the statute of limitation is finally determined in favor of the plaintiff, then the remaining issues must be tried [*Code Civ. Proc. § 597.5*; *Kelemen v. Superior Court (1982) 136 Cal. App. 3d 861, 864, 186 Cal. Rptr. 566* (separate trial must be ordered pursuant to *Section 597.5* when a proper motion is made)].

The health care professionals to whom *Section 597.5* applies in addition to physicians and surgeons are dentists, registered nurses, dispensing opticians, optometrists, registered physical therapists, podiatrists, licensed psychologists, osteopathic physicians and surgeons, chiropractors, clinical laboratory bioanalysts, clinical laboratory technologists, and

veterinarians [*Code Civ. Proc. § 597.5*].

[5] Special Defense in Answer to Cross Complaint

The provisions of *Code Civ. Proc. § 597* also apply to the trial of a special defense pleaded in answer to a cross complaint [*Code Civ. Proc. § 597*].

[6] Cross References

For a related form of order, see *§ 345.121*.

For discussion and forms relating to motions and orders generally, see Ch. 372, *Motions and Orders*

For memoranda for use in support of, and in opposition to, a motion for separate trial of the defense that an action is barred by a statute of limitation, see California Points and Authorities, Ch. 10, *Abatement and Survival of Actions*; Vol. 143 *Limitation of Actions*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeContent & FormGovernmentsLegislationStatutes of LimitationsGeneral Overview

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30-345 California Forms of Pleading and Practice--Annotated § 345.121

§ 345.121 Separate Trial of Special Defense [Code Civ. Proc. § 597]--Bar of Statute of Limitation--Order

[1] FORM Separate Trial of Special Defense [Code Civ. Proc. § 597]--Bar of Statute of Limitation--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

_____

1. The motion of _____[*moving party, e.g.*, defendant] for an order for the separate trial of the special defense pleaded in defendant's answer that plaintiff's action is barred by the provisions of _____[*specify applicable statute of limitations*] came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____[*name*]; defendant appeared by counsel _____[*name*].

2. Upon proof made to the satisfaction of the court that the motion ought to be granted,

3. IT IS ORDERED that the motion be and it hereby is granted, and _____ [*particular provisions, e.g.*, that a separate trial of the special defense take place in the courtroom of (_____[Department *or* Division] _____[*number*] of) the above-entitled court on _____[*date*], at

_____[*time*], or at such other time or place as the court may hereafter order].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of order in *[1], above*, may be used when the court grants a motion for separate trial of the special defense that an action is barred by a statute of limitation [*see Code Civ. Proc. §§ 597, 597.5*]. For a form of motion, see *§ 345.120*.

[3] Effect of Decision or Verdict in Plaintiff's Favor

If the decision of the court, or the verdict of the jury, on the separate trial of a special defense is in favor of the plaintiff, then trial of the other issues must thereafter be had, either on the court's own motion or on the motion of any party; and judgment must thereafter be entered in the same manner and with the same effect as if all of the issues in the case had been tried at one time [*Code Civ. Proc. § 597*].

[4] Effect of Decision of Verdict in Defendant's Favor

If the decision of the court, or the verdict of the jury, on the separate trial of a special defense is in favor of the defendant pleading it, then judgment for that defendant must thereupon be entered; and no trial of other issues in the case may be had against that defendant unless the judgment is reversed on appeal or is set aside or otherwise vacated [*Code Civ. Proc. § 597*].

[5] Review of Decision or Verdict in Plaintiff's Favor

In the event of a decision or verdict in favor of the plaintiff on the separate trial of a special defense, any and all decisions and verdicts on the special defense and all ruling on the trial of it are deemed excepted to, and they may be reviewed on a motion for a new trial or on appeal from the final judgment [*Code Civ. Proc. § 597*].

[6] Cross References

For additional discussion, see *§ 345.120*

For discussion and forms relating to motions and orders generally, including notices of entry of order, see Ch. 372, *Motions and Orders*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeContent & FormGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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30-345 California Forms of Pleading and Practice--Annotated §§ 345.122-345.149

[Reserved]

§§ 345.122[Reserved]

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PART V. TABLE OF LIMITATION PERIODS

30-V California Forms of Pleading and Practice--Annotated § 345.150

§ 345.150 Explanation of Table

This table lists periods of limitation for various types of actions and proceedings and other similar time periods, such as claim periods; it does not include general provisions relating to the triggering or tolling of the various limitation periods. It is intended for use as a quick reference guide.

The listings are under alphabetical headings that describe the most salient or commonly recognized characteristic of the particular type of action or proceeding. Thus, some headings describe the defendant (see, e.g. *§ 345.212, Financial Institutions, § 345.227*, Health Care Providers, and § 345.282, Public Entities, Officers, and Employees), whereas others describe an event, cause, injury, instrument, or other subject matter that is commonly associated with the particular type of action or proceeding (see, e.g. *§ 345.165, Asbestos Exposure, § 345.184, Contracts, § 345.270*, Personal Injury, and § 345.321, Unfair Competition).

This table also includes cross references, when applicable, to other chapters in this publication that include related forms, further discussion, or both.

CAUTION:

This table is not intended to comprise an exhaustive list of all limitation periods governed by California law. If a particular topic being researched is not found in this table, review other chapters in California Forms of Pleading and Practice and California primary law sources.

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§ 345.151 Actions for Which Limitation Is Not Otherwise Provided

- Action for relief for which statute of limitations is not otherwise provided--Four years. *Code Civ. Proc. § 343*

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§ 345.152 Abuse of Process

- Action for abuse of process--One year. *Code Civ. Proc. § 340(c)*; *Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 95, 53 Cal. Rptr. 706* (interpreting former *Code Civ. Proc. § 340(3)*)

See discussion in Ch. 357, *Malicious Prosecution and Abuse of Process*

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§ 345.153 Accountant Malpractice

- Action against accountant for malpractice--Two years after plaintiff discovers or should have discovered loss or damage, plus actual injury. *Code Civ. Proc. § 339(1)*; *International Engine Parts, Inc. v. Feddersen & Co. (1995) 9 Cal. 4th 606, 608-609, 613, 38 Cal. Rptr. 2d 150, 888 P. 2d 1279*

See discussion in Ch. 462, *Public Accountants*

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§ 345.154 Accounting, Action for

- Action for accounting--Four years. *Code Civ. Proc. § 343*; *see Moss v. Moss (1942) 20 Cal. 2d 640, 644, 128 P.2d 526* (four-year period in *Code Civ. Proc. § 343* as generally applicable to equitable actions); *Smith v. Smith (1891) 88 Cal. 572, 577-578, 26 P. 356* (action for accounting as equitable); *Manok v. Fishman (1973) 31 Cal. App. 3d 208, 211, 213, 107 Cal. Rptr. 266* (four-year period in *Code Civ. Proc. § 343* applies to action between partners for accounting); *cf. Glue-Fold, Inc. v. Slautterback Corp. (2000) 82 Cal. App. 4th 1018, 1023 n.3, 98 Cal. Rptr. 2d 661* (accounting is treated as cause of action available to wronged fiduciary which is subject to statute of limitations governing nature of underlying wrong); *see* discussion and form in Ch. 7, *Accounting, Action for*, and discussion in *Ch. 406, Partnerships: Dissolution, § 406.19*

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§ 345.155 Account Stated

- Action to recover on account stated based on account in writing--Four years. *Code Civ. Proc. § 337(2)*

- Action on account stated not based on written instrument--Two years. *Code Civ. Proc. § 339(1)*); *see Iverson, Yoakum, Papiano & Hatch v. Berwald (1999) 76 Cal. App. 4th 990, 997, 90 Cal. Rptr. 2d 665*

- Action to recover on book account--Four years. *Code Civ. Proc. § 337(2)*

- Action on book account for support of patient at state or county hospital--Four years after last service or payment. *Code Civ. Proc. § 345*

See discussion in Ch. 8, *Accounts Stated and Open Accounts*

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§ 345.156 Adjoining Landowners

- Action against landowner based on encroachment of permanent building on adjoining land--Three years. *Code Civ. Proc. § 338(b)*; *Polin v. Chung Cho (1970) 8 Cal. App. 3d 673, 677-678, 87 Cal. Rptr. 591* ; *see* discussion in Ch. 11, *Adjoining Landowners*

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§ 345.157 Administrative Proceedings

- Administrative disciplinary proceeding--Time for commencing proceeding as unlimited in absence of statute pertaining to proceeding that prescribes specific limitation period. *Bernd v. Eu (1979) 100 Cal. App. 3d 511, 515-516, 161 Cal. Rptr. 58*

- Mandate proceeding to review decision of local agency other than school district or administrative fine or penalty imposed under authority of *Gov. Code § 53069.4*--Ninety days, with possible extension if request for record filed. *Code Civ. Proc. § 1094.6(b), (d)*; *see also Cummings v. City of Vernon (1989) 214 Cal. App. 3d 919, 920-924, 263 Cal. Rptr. 97* (90-day period in *Code Civ. Proc. § 1094.6(b)* runs from date that notice required under *Code Civ. Proc. § 1094.6(f)* is mailed *and see Donnellan v. City of Novato (2001) 86 Cal. App. 4th 1097, 1102-1107, 103 Cal. Rptr. 2d 882* (90-day period does not begin to run until agency provides notice to party that section 1094.6 governs time within which judicial review of decision may be sought; letter containing copy of decision did not satisfy requirement when it did not contain written statement verified by oath or affirmation or attesting to date decision was mailed to party by first class mail, postage prepaid)

- Mandate proceeding to review decision of administrative agency subject to provisions of California Administrative Procedure Act (*Gov. Code § 11340 et seq.*)--Thirty days. *Gov. Code § 11523*; *Fair Employment and Housing Commission v. Superior Court (2004) 115 Cal. App. 4th 629, 633-637, 9 Cal. Rptr. 3d 409*

- Written petition for judicial review of Office of Administrative Law's determination whether state agency rule, guideline, etc., constitutes a regulation subject to requirements of *Gov. Code § 11340 et seq.* for adoption--Thirty days. *Gov. Code § 11340.5(d)*

- Appeal to municipal or superior court (as limited civil case) of administrative fine or penalty imposed under ordinance authorized by *Gov. Code § 53069.4*--Twenty days after service of final administrative order or decision. *Gov. Code § 53069.4(b), (c)*

See discussion in Ch. 472B, *Review of Agency Rulemaking* , Ch. 473, *Public Agency Adjudication* , et seq., Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

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§ 345.158 Adoption

- Petition to vacate, set aside, or nullify order of adoption because of mentally deficient or mentally ill child--Five years after entry of order. *Fam. Code § 9100*

- Action or proceeding to vacate, set aside, or otherwise nullify order of adoption on ground other than fraud--One year after entry of order. *Fam. Code § 9102(a)*

- Action or proceeding to vacate, set aside, or otherwise nullify order of adoption based on fraud--Three years after entry of order. *Fam. Code § 9102(b)*

See discussion in Ch. 12E, *Adoptions: Attack on Decree*

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§ 345.159 Advertising

- See *§ 345.207*

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§ 345.160 Alcoholic Beverage Control

- Petition for writ of review of final order of Alcoholic Beverage Control Appeals Board--Thirty days after filing of Board's final order. *Bus. & Prof. Code § 23090*

- Proceeding against licensee for violation of Alcoholic Beverage Control Act (*Bus. & Prof. Code § 23000 et seq.*)--One year or three years, depending on section violated. *Bus. & Prof. Code §§ 24206, 24207* (specifying sections violated); *see also Bus. & Prof. Code § 24208* (commencement of limitation period)

- Taxation. See *§ 345.312*

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§ 345.161 Animals

- Action for damages based on trespass on or injury to real property by animal--Three years. *Code Civ. Proc. § 338(b)*

- Action for damages based on injury to or death of animal or fowl in course of boarding or feeding or in course of practice of veterinary medicine--One year. *Code Civ. Proc. § 340(c)*

- Action under *Civ. Code § 3342* for damages for dog bite--One year. *Code Civ. Proc. § 340(c)*; *Pritchard v. Sharp (1974) 41 Cal. App. 3d 530, 531, 116 Cal. Rptr. 9*

See discussion in Ch. 23, *Animals: Civil Liability*

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§ 345.162 Annulment of Marriage

- See *§ 345.252*

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§ 345.163 Architects

- Disciplinary proceeding by Board of Architectural Examiners against architect--Five years from actual or constructive discovery of alleged misconduct or 10 years from occurrence of alleged misconduct, with specified exceptions. *Bus. & Prof. Code § 5561*

- Improvements to real property. See *§ 345.287[7]*

See discussion in Ch. 56, *Architects*

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§ 345.164 Art

- Action by owner, heir or beneficiary of the owner of Holocaust-era artwork to recover artwork from museum or gallery--Three years. *Code Civ. Proc. § 354.3*

WARNING--Federal Preemption at Issue.

A Ninth Circuit panel in August 2009 has held the limitation-period extension in *Code Civ. Proc. § 354.3(c)* is invalid under the field-preemption doctrine because it "intrudes on the power to make and resolve war, a power reserved exclusively to the federal government by the Constitution" [*Von Saher v. Norton Simon Museum of Art at Pasadena (9th Cir. 2009) 578 F.3d 1016*]

- Action by artist for damages based on residual rights in resale of artwork--Three years after date of sale or one year after discovery of sale, whichever is longer. *Civ. Code § 986(a)(3)*

- Action to enforce liability under California Art Preservation Act--Three years after act complained of or one year after discovery of act, whichever is longer. *Civ. Code § 987(i)*

- Action for injunctive relief to preserve or restore integrity of fine art work--Three years after act complained of or one year after discovery of such act, whichever is longer. *Civ. Code § 989(g)*

- Action to enforce liability for misrepresentation in connection with sale of political campaign artifact--One year after discovery of violation on which action is based and in no event more than three years after sale. *Civ. Code § 1739.4(c)*

- Action involving unlawful sale of fine prints--One year after discovery of violation on which action is based and in no event more than three years after sale. *Civ. Code § 1745(c)*

- Action against museum for injury to or loss of property loaned to museum--Three years from date

museum gives lender notice or 10 years from date of injury or loss, whichever occurs earlier. *Civ. Code § 1899.8*

- Action against museum to recover property on loan--Twenty-five years from date of last written contact between lender and museum, as evidenced in museum's records. *Civ. Code § 1899.10(b)*; *see Civ. Code § 1899.10(e)*

- Action for taking, detaining, or injuring any articles of historical, interpretive, scientific, or artistic significance--Three years; cause of action as accruing on discovery of article's whereabouts if article stolen. *Code Civ. Proc. § 338(c)*

See discussion in Ch. 57, *Art*

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§ 345.165 Asbestos Exposure

- Action for injury or illness based on exposure to asbestos--One year after plaintiff first suffered disability (as defined) or one year after plaintiff knew or should have known exposure to asbestos caused or contributed to disability, whichever is later. *Code Civ. Proc. § 340.2(a), (b)*; *see Hamilton v. Asbestos Corp. (2000) 22 Cal. 4th 1127, 1138, 95 Cal. Rptr. 2d 701, 998 P.2d 403* (period may be read as being within one year after date plaintiff first suffered disability *and* either knew or should have known disability was caused or contributed to by that exposure); *Duty v. Abex Corp. (1989) 214 Cal. App. 3d 742, 748-752, 263 Cal. Rptr. 13* (in case of retiree, statute does not commence to run if person retired before onset of "disability" as defined in statute); *cf. Uram v. Abex Corp. (1990) 217 Cal. App. 3d 1425, 266 Cal. Rptr. 695* (distinguishing *Duty* from case in which plaintiff took a disability retirement)

- Wrongful death. See *§ 345.327*

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§ 345.166 Assault and Battery

- Action for assault, battery, or both--Two years. *Code Civ. Proc. § 335.1*; *see* discussion in Ch. 58, *Assault and Battery*

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§ 345.167 Attachment

- Motion to enforce liability on undertaking--One year after entry of final judgment in action in which undertaking given and time for appeal has expired or, if appeal filed, one year after appeal finally determined. *Code Civ. Proc. § 996.440(b)*; *see* discussion in Ch. 62, *Attachment*

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§ 345.168 Attorney Malpractice

- Action against attorney based on professional errors and omissions--One year after plaintiff discovers or should have discovered facts constituting wrongful act or omission, or four years after error or omission, subject to suspension of period for certain causes. *Code Civ. Proc. § 340.6(a)*; *Beal Bank, SSB v. Arter & Hadden, LLP (2007) 42 Cal. 4th 503, 508, 66 Cal. Rptr. 3d 52, 167 P.3d 666* (action against individual attorney is tolled so long as *that attorney* continues representation); *Nielsen v. Beck (2007) 157 Cal. App. 4th 1041, 1053, 69 Cal. Rptr. 3d 435* (action against individual attorney is tolled so long as *that attorney* continues representation regarding the specific subject matter as to which the negligence occurred); *Truong v. Glasser (2009) 181 Cal. App. 4th 102, 103 Cal. Rptr. 3d 811* (attorney's failure to file a formal withdrawal or termination of counsel does not, standing alone, suffice to toll the statute of limitations)

- Action against attorney based on instrument in writing that becomes effective on future act or event--One year after plaintiff discovers or should have discovered facts constituting wrongful act or omission, or four years after that act or event triggering effective date of instrument. *Code Civ. Proc. § 340.6(b)*

See discussion and form in Ch. 76, *Attorney Professional Liability*

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§ 345.169 Bailments

- See *§ 345.187*

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§ 345.170 Banks

- See *§ 345.212*

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§ 345.171 Boats or Recreational Vessels

- See *§ 345.302*

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§ 345.172 Book Account

- See *§ 345.155*

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§ 345.173 Bulk Transfers

- Action brought under bulk transfer provisions of *Com. Code § 6101 et seq.*--One year after date on which transferee took possession unless transfer has been concealed; if transfer has been concealed--within one year after transfer's actual or constructive discovery by creditor. *Com. Code § 6111(a)*

- Action against buyer, auctioneer, or liquidator under bulk transfer provisions of *Com. Code § 6101 et seq.*--One year after date of bulk sale, unless buyer, auctioneer, or liquidator conceals fact that sale has occurred. *Com. Code § 6110(a)*

- Action against buyer, auctioneer, or liquidator who conceals fact that bulk sale subject to *Com. Code § 6101 et seq.* has occurred--One year after plaintiff discovers or should have discovered that sale has occurred, but no later than two years after date of bulk sale. *Com. Code § 6110(b)*

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§ 345.174 Cancellation of Instruments

- Action for cancellation based on illegality--Four years. *Code Civ. Proc. § 343*; *Moss v. Moss (1942) 20 Cal. 2d 640, 644, 128 P.2d 526*

- Action under *Civ. Code § 3412* for cancellation of instrument--Four years in ordinary case. *Code Civ. Proc. § 343*; *Zakaessian v. Zakaessian (1945) 70 Cal. App. 2d 721, 725, 161 P.2d 677*

- Case seeking cancellation on ground of execution under undue influence--Four years. *Code Civ. Proc. § 343*; *Wade v. Busby (1944) 66 Cal. App. 2d 700, 702, 152 P.2d 754*

See discussion in Ch. 107, *Cancellation of Instruments*

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§ 345.175 Carriers

- Action against common carrier under Public Utilities Act (*Pub. Util. Code § 201 et seq.*) for refund of excess freight charges--Three years. *Code Civ. Proc. § 338(a)*; *Sunset Pacific Oil Co. v. Los Angeles & S. L. R. Co. (1930) 110 Cal. App. Supp. 773, 782, 290 P. 434*

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§ 345.176 Cemeteries

- Action to suspend or revoke cemetery license for procuring cemetery license by fraud, misrepresentation, or deceit--Three years after discovery by Cemetery and Funeral Bureau of unlawful procurement. *Bus. & Prof. Code § 9727.1*

- Action against cemetery authority relating to cremated remains of person left in its possession--One year, unless specified exceptions apply. *Health & Safety Code § 7112*

- Funeral directors and embalmers. See *§ 345.222*

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§ 345.177 Childhood Sexual Abuse

- See *§ 345.301*

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§ 345.178 Child Support

- Liability of father to provide support to illegitimate child under former *Civ. Code § 196a* (*now see Fam. Code § 400*)--No limitation. *Perez v. Singh (1971) 21 Cal. App. 3d 870, 872, 97 Cal. Rptr. 920*

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§ 345.179 Civil Rights

- Action under *42 U.S.C. § 1986*--One year after accrual. *42 U.S.C. § 1986*

- Action under *42 U.S.C. § 1981*--One year. *Code Civ. Proc. § 340(3)*; *see Goodman v. Lukens Steel Co. (1987) 482 U.S. 656, 660-662, 107 S. Ct. 2617, 96 L. Ed. 572*

- Action under *42 U.S.C. § 1983*--One year. *Code Civ. Proc. § 340(3)*; *see 42 U.S.C. § 1988(a)*; *Wilson v. Garcia (1985) 471 U.S. 261, 266-270, 276, 105 S. Ct. 1938, 85 L. Ed. 2d 254* ; *see also Gibson v. United States (9th Cir. 1986) 781 F.2d 1334, 1340 , cert. denied, 479 U.S. 1054 (1987)* (accrual governed by federal law)

- Action under Unruh Civil Rights Act (*Civ. Code § 51 et seq.*)--Two Years. *Code Civ. Proc. § 335.1*; *West Shield Investigations & Security Consultants v. Superior Court (2000) 82 Cal. App. 4th 935, 940, 951-954, 98 Cal. Rptr. 2d 612* (discussing federal cases holding three-year limitation period applicable; decided under prior one-year limitation period in former *Code Civ. Proc. § 340(3)*)

See discussion in Ch. 116, *Civil Rights: Discrimination in Business Establishment* and Ch. 117, *Civil Rights: Housing Discrimination* .

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§ 345.180 Civil Service Act

- Proceeding against State Personnel Board based on or related to any civil service law of state--One year; 90-day period applicable in case of continuing claim for compensation after cause of action arose; limitation not applicable to proceeding for collection of salary or wage, amount of which is not disputed. *Gov. Code § 19630*

- Proceeding against state civil service employee by State Personnel Board for discipline based on civil service law--Three years after cause for discipline first arose; period extendable under specified circumstances. *Gov. Code § 19635*

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§ 345.181 Community Services Districts

- Validity of formation and organization of community services district--Sixty days after date that formation of district is complete. *Gov. Code § 61119(b)*

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§ 345.182 Conspiracy

- Action against conspirators--Period determined by nature of underlying civil wrong complaint alleges defendants conspired to perpetrate. *Wyatt v. Union Mortgage Co. (1979) 24 Cal. 3d 773, 786 n.2, 157 Cal. Rptr. 392, 598 P.2d 45* (noting that accrual takes place on date of commission of last overt act in pursuance of conspiracy); *see* discussion in Ch. 126, *Conspiracy*

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§ 345.183 Consumer Protection

- Action under *Civ. Code § 1747.08* (business requiring identification information as condition of acceptance of credit card)--One year. *Code Civ. Proc. § 340*; *see The TJXCompanies, Inc. v. Superior Court (2008) 163 Cal. App. 4th 80, 84-85, 77 Cal. Rptr. 3d 114*

- Action under *Civ. Code § 1770* for violation of Consumers Legal Remedies Act (*Civ. Code § 1750 et seq.*)--Three years from date of commission of unlawful practice. *Civ. Code § 1783*

- Action to enforce liability for violation of California Consumer Credit Reporting Agencies Act (*Civ. Code § 1785.1 et seq.*)--Two years from date plaintiff knew or should have known of violation, but not more than seven years from earliest date on which liability could have arisen, unless defendant materially and willfully misrepresented information, in which case action may be brought within two years after consumer's discovery of misrepresentation. *Civ. Code § 1785.33*

- Action to enforce liability created under Investigative Consumer Reporting Agencies Act (*Civ. Code § 1786 et seq.*)--Two years after date on which liability arose or, in specified circumstances, within two years of discovery of violation of Act. *Civ. Code § 1786.52*

- Action alleging failure to comply with any requirements of *Civ. Code § 1787.2* (setting forth requirements of Holden Credit Denial Disclosure Act of 1976)--Two years from date of occurrence of violation. *Civ. Code § 1787.3(e)*

- Action under *Civ. Code § 1812.31* alleging discrimination in credit transaction based on sex and marital status under *Civ. Code § 1812.30*--Two years from date on which the person is denied credit or is unlawfully offered credit. *Civ. Code § 1812.35*

- Action for breach of warranty under Song-Beverly Consumer Warranty Act (*Civ. Code § 1792 et seq.*)--Four years based on limitation period in *Com. Code § 2725*; *Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 213-215, 285 Cal. Rptr. 717*

- Action to declare that plaintiff is victim of identity theft, for declaratory relief, injuction, and damages, pursuant to *Civ. Code § 1798.93*--Four years from the date that the alleged victim of identity theft knew or should have known of the facts giving rise to the cause of action. *Civ. Code § 1798.96*

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§ 345.184 Contracts

- Action for breach of covenant of good faith and fair dealing when plaintiff elects to proceed on contract rather than tort theory--Four years. *Code Civ. Proc. § 337(1)*; *Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 220-221, 285 Cal. Rptr. 717*

- Action for negligent performance of implied obligation based on contract--Four-year limitation of *Code Civ. Proc. § 337(1)* for action based on negligence and breach. *Bruckman v. Parliament Escrow Corp. (1987) 190 Cal. App. 3d 1051, 1057-1058, 235 Cal. Rptr. 813*

- Action on written contract or for rescission thereof--Four years. *Code Civ. Proc. § 337(1), (3)*

- Action on oral contract or for rescission thereof--Two years. *Code Civ. Proc. § 339(1), (3)*

- Action in quantum meruit--Two Years. *Code Civ. Proc. § 339*; *Iverson, Yoakum, Papiano & Hatch v. Berwald (1999) 76 Cal. App. 4th 990, 996, 90 Cal. Rptr. 2d 665*

- Action for breach of contract for sale--Four years after cause of action has accrued; parties as able to reduce period of limitation to not less than one year, but extension of period not permitted. *Com. Code § 2725(1)*; *Therma-Coustics Manufacturing, Inc. v. Borden, Inc. (1985) 167 Cal. App. 3d 282, 296, 213 Cal. Rptr. 611* (one-year contract term upheld); *see also Com. Code § 2725(2)* (when cause of action accrues)

- Action for enforcement of personal services contract--Seven years from commencement of service under contract, generally. *Lab. Code § 2855(a)*

- Cancellation of instruments. See *§ 345.174*

See discussion in Ch. 121, *Common Counts* , Ch. 500, *Sales: Sales Under the Commercial Code* , Ch. 501, *Sales: Retail Installment Sales* , Ch. 502, *Sales: Warranties* , Ch. 504, *Sales: Consumers Legal Remedies Act* , Ch. 528, *Specific*

Performance , and Ch. 530, *Statute of Frauds*

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§ 345.185 Contractors

- Indictment or complaint for violation of *Bus. & Prof. Code § 7028* (acting as contractor without license)--Four years from later of contract, completion, or abandonment of work. *Bus. & Prof. Code § 7028*

- Citation under *Bus. & Prof. Code § 7028.7* to person acting as contractor without license--Three years after act or omission on which citation based. *Bus. & Prof. Code § 7028.9*

- Action, other than to recover wages or fringe benefits, against contractor's bond or bond of qualifying individual filed by an active licensee--Two years after expiration of license period during which act or omission occurred, or within two years of date license of active licensee was inactivated, cancelled, or revoked, whichever occurs first. *Bus. & Prof. Code § 7071.11(a)*

- Action, other than to recover wages or fringe benefits, against disciplinary bond filed by active licensee--Two years after expiration of license period during which act or omission occurred, or within two years of date license of active licensee was inactivated, cancelled, or revoked, or within two years after last date for which disciplinary bond filed under *Bus. & Prof. Code § 7071.8* was required, whichever occurs first. *Bus. & Prof. Code § 7071.11(a)*

- Claim to recover wages or fringe benefits--Six months from date delinquencies were discovered, but no later than two years from date wages or fringe benefit contributions were due. *Bus. & Prof. Code § 7071.11(a)*

- Complaint against licensed contractor alleging commission of acts or omissions that may be grounds for legal action--Four years after act or omission alleged as ground for discipline. *Bus. & Prof. Code § 7091(a)(1)*

- Action against a licensed contractor for latent structural defects that may be grounds for legal action under *Bus. & Prof. Code § 7091(b)(1)*--Ten years after the act or omission alleged as the ground for the

disciplinary action, and must be filed in writing with the registrar.

- Disciplinary accusation or citation against a licensed contractor or a referral to the arbitration program outlined in *Bus. & Prof. Code § 7085*--Four years after the patent act or omission alleged as the ground for disciplinary action or arbitration or within 18 months from the date of he filing of the complaint with the registrar, whichever is later (*Bus & Prof. Code § 7091(a)(2)*, except that with respect to an accusation alleging a violation of *Bus. & Prof. Code § 7112*, the accusation may be filed within two years after the discovery by the registrar or by the board of the alleged facts constituting the fraud or misrepresentation prohibited by the section. *Bus. & Prof. Code § 7091(c)*. With respect to a licensee who has been convicted of a crime and, as a result of that conviction is subject to discipline under Section 7123, the disciplinary action shall be filed within two years after the discovery of the conviction by the registrar or by the board. *Bus. & Prof. Code § 7091(d)*.

- Disciplinary accusation and citation for a latent defect--Ten years after the act or omission, or within 18 months from the date of the filing of the complaint, whichever is later (*Bus & Prof. Code § 7091(b)(2)*, except that with respect to an accusation alleging a violation of *Bus. & Prof. Code § 7112*, the accusation may be filed within two years after the discovery by the registrar or by the board of the alleged facts constituting the fraud or misrepresentation prohibited by Section 7112. *Bus. & Prof. Code § 7091(c)* With respect to a licensee who has been convicted of a crime and, as a result of that conviction is subject to discipline under Section 7123, the disciplinary action shall be filed within two years after the discovery of the conviction by the registrar or by the board. *Bus. & Prof. Code § 7091(d)*.

- Improvements to real property. See *§ 345.287[7]*

See discussion in Ch. 104, *Building Contracts*

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§ 345.186 Contribution

- Action for contribution--Two years from date of payment. *Manuel v. Hicks Iron Works (1932) 216 Cal. 459, 461, 14 P.2d 756* (following limitation period in *Code Civ. Proc. § 339(1)*); *Century Indemnity Co. v. Superior Court (1996) 50 Cal. App. 4th 1115, 1117, 58 Cal. Rptr. 2d 69* (equitable contribution); *see* discussion in Ch. 300, *Indemnity and Contribution*

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§ 345.187 Conversion

- Action for taking, detaining, or injuring any goods or chattels, including actions for specific recovery of personal property--Three years. *Code Civ. Proc. § 338(c)*

- Action for taking, detaining, or injuring any article of historical, interpretive, scientific, or artistic significance based on theft, as defined in *Penal Code § 484*--Three years; cause of action accrues on discovery of article's whereabouts. *Code Civ. Proc. § 338(c)*

- Action by owner, heir or beneficiary of the owner of Holocaust-era artwork to recover artwork from museum or gallery--Three years. *Code Civ. Proc. § 354.3*

  WARNING--Federal Preemption at Issue.

  A Ninth Circuit panel in August 2009 has held the limitation-period extension in *Code Civ. Proc. § 354.3(c)* is invalid under the field-preemption doctrine because it "intrudes on the power to make and resolve war, a power reserved exclusively to the federal government by the Constitution" [*Von Saher v. Norton Simon Museum of Art at Pasadena (9th Cir. 2009) 578 F.3d 1016]*

- Action against bailee under *Civ. Code § 3336* for wrongful conversion of personalty--Three years. *Code Civ. Proc. § 338(c)*; *see Niiya v. Goto (1960) 181 Cal. App. 2d 682, 687, 5 Cal. Rptr. 642* (statute as commencing to run at time bailee is shown to have done some act implying exercise or assumption of title, or of dominion over property, or some act inconsistent with bailor's right of ownership, or in repudiation of such right)

- Action against officer to recover value of goods seized by tax collector or stock improperly sold for delinquent assessment--Six months. *Code Civ. Proc. § 341(1), (2)*

- Action for conversion or recovery of property left at hotel, rest home, sanitarium, boarding or

lodging house, or furnished apartment or bungalow--Ninety days from departure of owner. *Code Civ. Proc. § 341a*

- Injury to personal property. See *§ 345.271*

See discussion in Ch. 150, *Conversion*

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§ 345.188 Copyright

- See *§ 345.236*

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§ 345.189 Corporations

- Action on corporation's bonded indebtedness--Six years. *Code Civ. Proc. § 336a*

- Action against shareholder to recover consideration for shares--Three years. *Code Civ. Proc. § 338(a)*; *Corp. Code § 410*; *see Code Civ. Proc. § 359*

- Action based on neglect or acquiescence of corporate directors--Two years. *Code Civ. Proc. § 339(1)*; *Burt v. Irvine Co. (1963) 237 Cal. App. 2d 828, 865, 47 Cal. Rptr. 392*

- Action against officer or officer de facto to set aside or invalidate action by majority of trustees of dissolved corporation--Six months. *Code Civ. Proc. § 341(3)*

- Action against director, shareholder, or member to recover penalty or forfeiture imposed, or to enforce liability created, by law--Three years after discovery of facts on which penalty or forfeiture attached, or date liability created. *Code Civ. Proc. § 359*; *Hoover v. Galbraith (1972) 7 Cal. 3d 519, 524-525, 102 Cal. Rptr. 733, 498 P.2d 981*

- Action based on liability for sale of shares because of delinquent assessments, on ground of irregularity in assessment, notice of sale, or sale--Six months after sale. *Corp. Code § 423(m)*

- Action against corporation, to determine value of shares of shareholder dissenting to merger--Six months from notice of approval of merger. *Corp. Code § 1304(a)*

- Claims on voluntary dissolution of corporation--Four to six months, as court directs, after first publication of notice to creditors. *Corp. Code § 1807(a)*

- Contest of petition for order declaring corporation duly wound up and dissolved--Thirty days after completion of order to show cause and contest petition. *Corp. Code § 1907(c)*

- Action, whether arising before or after dissolution of corporation, against shareholders of dissolved corporation, assets of which have been distributed to shareholders, to the extent of their pro rata share of the claim or to the extent of the corporate assets distributed to them on dissolution, whichever is less--Statute of limitations applicable to cause of action or four years after effective date of dissolution of corporation, whichever is earlier. *Corp. Code § 2011(a)(2)* (applicable to corporations dissolved on or after January 1, 1992)

- Action by person other than Attorney General for damages or accounting based on self-dealing transaction by director of nonprofit corporation--Two years after filing of written notice, or within three years after transaction occurred. *Corp. Code § 5233(e)*

- Action challenging validity of any election, appointment, or removal of a director or directors--Nine months after election, appointment, or removal. *Corp. Code § 12477*

- Taxation. See *§ 345.312*

See discussion in Ch. 160, *Corporations* , Pt. II, "Alter Ego Liability," and Pt. VII, "Directors and Management"

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§ 345.190 Credit Unions

- See *§ 345.212*

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§ 345.191 Customs Brokers or Warehousemen [Repealed]

● Provisions pertaining to filing of disciplinary actions against licensed customs broker or warehousemen were repealed by Stats 2002, ch. 1013, s. 87, eff. 1/1/2003.

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§ 345.192 Dance Studios

- Treble damages action against dance studio for violation of *Civ. Code § 1812.50 et seq.* (contracts for dance studio lessons and other services)--Three years. *Code Civ. Proc. § 338(a)*; *Holland v. Nelson (1970) 5 Cal. App. 3d 308, 313, 85 Cal. Rptr. 117* ; *but see Ashland Oil Co. of Cal. v. Union Oil Co. of Cal. (Temp. Emer. Ct. App. 1977) 567 F.2d 984, 991-993* ; *G. H. I. I. v. MTS, Inc. (1983) 147 Cal. App. 3d 256, 278 n.14, 195 Cal. Rptr. 211* (questioning *Holland* and applying separate limitations to actual damages (three-year limitation of *Code Civ. Proc. § 338*) and to trebles (one-year limitation of *Code Civ. Proc. § 340(a)*))

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§ 345.193 Debt Collection

- Action under *Civ. Code § 1788.30* for violation of Rosenthal Fair Debt Collection Practices Act (*Civ. Code § 1788 et seq.*)--One year from date of violation. *Civ. Code § 1788.30(f)*

- Action against debtor based on book, stated, mutual, open, or current account--Four years. *Code Civ. Proc. § 337*; *see Code Civ. Proc. § 344* (accrual on open account); *Maggio, Inc. v. Neal (1987) 196 Cal. App. 3d 745, 751-752, 241 Cal. Rptr. 883* (account stated, book account)

- Action against debtor based on breach of accord agreement--Two years if oral or four years if written. *Code Civ. Proc. §§ 337, 339*; *see Motion Picture Mach. Operators Union v. Glasgow Theatres, Inc. (1970) 6 Cal. App. 3d 395, 403, 86 Cal. Rptr. 33* (accord agreements as governed by contract law)

- Action against debtor on book account for support of patient at state or county hospital--Four years after last service or payment. *Code Civ. Proc. § 345*

- Decedents' estates. See *§§ 345.194*

- Judgments. See *§ 345.239*

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§ 345.194 Decedent's Estates

- Action brought on liability of decedent, whether or not accrued, if decedent died before statute of limitations expired, cause of actions survives, and action is against personal representative or successor in interest of person dying on or after January 1, 1993--One year from date of death. *Code Civ. Proc. § 366.2* (*see* former *Code Civ. Proc. § 353(b)* if decedent died on or after January 1, 1991, through December 31, 1992)

- Action to enforce claim to distribution based on promise or agreement with decedent to distribution from estate or trust or under other instrument, if decedent died on or after January 1, 2001--One year after date of death. *Code Civ. Proc. § 366.3(a), (c)*; *Stewart v. Seward (2007) 148 Cal. App. 4th 1513, 1519, 56 Cal. Rptr. 3d 651* ; *see also Ferraro v. Camarlinghi (2008) 161 Cal. App. 4th 509, 555, 75 Cal. Rptr. 3d 19*

- Action to establish decedent's liability for which decedent was covered by insurance--If limitation period otherwise applicable had not expired at time of decedent's death, within one year after expiration of limitation period otherwise applicable. *Prob. Code § 551*

- Action against surviving spouse of deceased debtor for debts chargeable against community or quasi-community property--One year from date of death. *Code Civ. Proc. § 366.2*; *Prob. Code § 13554*

- Contest of will--Before or at hearing on petition for probate. *Prob. Code §§ 1043, 8004, 8250, 8251*

- Petition of executor for administration of estate--Thirty days after knowledge of death of decedent and nomination as executor. *Prob. Code § 8001*

- Revocation of will--One hundred and twenty days after will is admitted to probate or, for minor or incompetent person, before order for final distribution. *Prob. Code § 8270*

- Creditor's claim against estate--Four months after first issuance of letters to general representative or

sixty days after giving notice of administration to creditor, whichever is later. *Prob. Code § 9100(a)* (expressly stating it does not extend the Section 366.2 limitation)

- Creditor's action on rejected litigation claim against decedent's estate--Three months after notice of rejection or, if claim not due at time notice of rejection given, three months after claim becomes due. *Prob. Code § 9353(a)* (does not apply to claim pending at time of decedent's death)

- Action for recovery of property sold by personal representative--Three years after settlement of personal representative's final account or three years after discovery of fraud on which action is based, whichever is later. *Prob. Code § 10382(a)*

- Action to enforce *Prob. Code § 13110* liability of transferee of decedent's personal property to person having superior right--Three years after affidavit or declaration is presented to holder of decedent's property, or three years after discovery of the fraud, whichever is later; period not tolled for any reason. *Prob. Code § 13110(c)*

- Action to enforce *Prob. Code § 13111* liability of transferee of decedent's personal property to make restitution to estate--Three years after presentation of affidavit or declaration to holder of decedent's property, or three years after discovery of the fraud, whichever is later; period not tolled for any reason. *Prob. Code § 13111(e)*

- Action to enforce *Prob. Code § 13205* liability of transferee of decedent's real property to person having superior right--Three years after certified copy of affidavit is issued under *Prob. Code § 13202*, or three years after discovery of the fraud, whichever is later; period not tolled for any reason. *Prob. Code § 13205(c)*

- Action to enforce *Prob. Code § 13206* liability of transferee of decedent's real property to make restitution to estate--Three years after certified copy of affidavit is issued under *Prob. Code § 13202*, or three years after discovery of the fraud, whichever is later; period not tolled for any reason. *Prob. Code § 13206(f)*

- Fraud claims based on statements of the decedent on behalf of a trust of which he was trustor and trustee is subject to *Code Civ. Proc. § 366.2* period of limitations, even if the action is against the successor trustee. *Stoltenberg v. Newman (2009) 179 Cal. App. 4th 287, 289, 101 Cal. Rptr. 3d 606*

See discussion in Ch. 441, *Probate: Disposition Without Administration,* Ch. 450, *Probate: Collecting Assets* , and Ch. 454, *Probate: Claims Against the Estate* .

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§ 345.195 Declaratory Relief

- Action for declaratory relief sought before breach of obligation in respect to which declaration is sought--No bar by lapse of time because no cause of action for coercive remedy has yet accrued and no statute of limitations has yet been set in motion. *Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719, 734, 146 P.2d 673* ; *United Pacific/Reliance Ins. Co. v. DiDomenico (1985) 173 Cal. App. 3d 673, 676-677, 219 Cal. Rptr. 119*

- Action for declaratory relief sought after breach of obligation in respect to which declaration is sought--Same period as would apply if action were ordinary action at law. *Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719, 734, 146 P.2d 673* ; *see also* *Mangini v. Aerojet-General Corp. (1991) 230 Cal. App. 3d 1125, 1155, 281 Cal. Rptr. 827* (statute of limitations governing request for declaratory relief as one applicable to ordinary legal or equitable action based on same claim)

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§ 345.196 Dentists

- See *§ 345.227*

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§ 345.197 Department of Personnel Administration

- Action or proceeding relating to any law administered by Department of Personnel Administration--Ninety days or one year after cause of action arose, depending on nature of relief sought. *Gov. Code § 19815.8(a)*

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§ 345.198 District Organization Law

- Proceeding by Attorney General to challenge district organization--One year after order establishing and describing boundaries of district. *Gov. Code § 58096*

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§ 345.199 Easements

- See *§ 345.287[2]* (quiet title) and § 345.316 (trespass)

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§ 345.200 Educational Foundations and Trusts

- Suit, action, or proceeding to set aside, annul, or affect conveyance, or to affect title to property conveyed, or right to possession or to rents, issues, and profits thereof--Two years after date of filing grant for record. *Educ. Code § 21115*; *see also Educ. Code § 21116* (two-year limitation period also applies to proceedings against property conveyed by grant)

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§ 345.200A Elder Abuse

- Action for elder abuse against health care provider--Two-year limitations period of *Code Civ. Proc. § 335.1*. *Benun v. Superior Court (2004) 123 Cal. App. 4th 113, 127, 20 Cal. Rptr. 3d 26* . 90-day tolling provisions of *Code Civ. Proc. § 364* [Medical Injury Compensation Reform Act (MICRA)] do not apply to elder abuse claims. *Smith v. Ben Bennett, Inc. (2005) 133 Cal. App. 4th 1507, 1522-1526, 35 Cal. Rptr. 3d 612*

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§ 345.201 Elections

- Declaratory relief action challenging population estimates used in supervisorial redistricting--Thirty days after adoption of redistricting ordinance. *Elec. Code § 21504*

- Declaratory relief action challenging population estimates used in council manic redistricting--Forty-two days after adoption of redistricting or resolution. *Elec. Code § 21604* (applicable in general law cities only)

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§ 345.202 Emotional Distress

- See *§ 345.270*

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§ 345.203 Employment Agencies

- Accusation against licensed employment agency--Three years after performance of act or omission alleged as ground for disciplinary action; period extendable if accusation alleges fraud or misrepresentation. *Bus. & Prof. Code § 9991*

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§ 345.204 Employment Law

- Actions based on unfair labor practices and authorized under *29 U.S.C. § 185* to be brought in state court--Six months. *29 U.S.C. § 160(b)*; *Rodriguez v. Southern Cal. Dist. Council of Laborers (1984) 160 Cal. App. 3d 956, 958-960, 207 Cal. Rptr. 75*

- Petition to compel arbitration of labor dispute in state court under *29 U.S.C. § 160(b)*--Six months. *Graphic Arts Internat. Union v. Oakland Nat. Engraving Co. (1986) 185 Cal. App. 3d 775, 778, 230 Cal. Rptr. 95*

- Action against employer under Fair Labor Standards Act of 1939 (*29 U.S.C. § 201 et seq.*) for regular and overtime pay--Three years. *Code Civ. Proc. § 338(a)*; *Murphy v. Kenneth Cole Prods., Inc. (2007) 40 Cal. 4th 1094, 56 Cal. Rptr. 3d 880, 155 P.3d 284* (action for meals, rest periods, and overtime); *Ballard v. Consolidated Steel Corporation (S.D. Cal. 1945) 61 F. Supp. 996, 998* ; cf. *Cortez v. Purolator Air Filtration Products Co. (2000) 23 Cal. 4th 163, 167-168, 178-179, 96 Cal. Rptr. 2d 518, 999 P.2d 706* (action to recover wages under unfair competition law (*Bus. & Prof. Code § 17203*); four-year limitation period of *Bus. & Prof. Code § 17208*)

- Action for claim arising out of failure to pay savings fund amounts deducted from Bracero worker wages between 1942 and 1950--Must be filed on or before December 31, 2005. *Code Civ. Proc. § 354.7*

- Action for violation of California Fair Employment and Housing Act (FELA) (*Gov. Code § 12900 et seq.*)--One year from receipt of a right-to-sue letter from the California Department of Fair Employment and Housing. *Gov. Code § 12965(b)*; *Downs v. Department of Water & Power (1997) 58 Cal. App. 4th 1093, 1099, 68 Cal. Rptr. 2d 590* ; subject to equitable tolling during administra tive proceedings before United States Equal Employment Opportunity Commission (EEOC) until a right-to-sue letter from the EEOC is received. *See Downs v. Department of Water & Power (1997) 58 Cal. App. 4th 1093, 1100-1102, 68 Cal. Rptr. 2d 590* ; administrative complaint to DFEH--One year from date of alleged unlawful practice. *Gov. Code § 12960* (providing for extensions past one year in certain instances)

- Action against labor union under Labor Management Relations Act of 1947 (*29 U.S.C. § 141 et seq.*) based on unfair labor practices--Three years. *Code Civ. Proc. § 338(a)*; *International U. of Op. Eng. v. Fischbach and Moore, Inc. (9th Cir., 1965) 350 F.2d 936, 937-939 , cert. denied, 384 U.S. 904 (1966)*

- Civil action to recover wages under *Lab. Code § 1197.5(a)* (prohibiting sex discrimination in wage rates)--Two years after cause of action occurs; three years after cause of action occurs if statutory violation wilful. *Lab. Code § 1197.5(h)*

- Proceeding by employee against former employer for wrongful termination--Variable depending on underlying cause of action

- Tort of wrongful termination in violation of public policy--One year from actual discharge. *Romano v. Rockwell Internat., Inc. (1996) 14 Cal. 4th 479, 503, 59 Cal. Rptr. 2d 20, 926 P.2d 1114* ; *Barton v. New Unified Motor Manufacturing, Inc. (1996) 43 Cal. App. 4th 1200, 1203, 1205-1209, 51 Cal. Rptr. 2d 328* (other cases applying one-year period cited); *but see Daniels v. Fesco Division of Cities Service Co. (9th Cir. 1984) 733 F.2d 622, 623* (two-year period applicable)

- Breach of contract, whether or not constructive discharge is alleged, two years from date of actual termination of employment. *Mullins v. Rockwell Internat. Corp. (1997) 15 Cal. 4th 731, 734, 743, 63 Cal. Rptr. 2d 636, 939 P.2d 1246* (applying two-year limitation period of *Code Civ. Proc. § 339* as to causes of action involving breach of covenant of good faith and fair dealing and breach of oral contract, but applicable statute was not subject to dispute)

- There are three statutes of limitations that might apply to a claim by a former employee seeking payment for unused vested vacation because the claim could be characterized as one based on (1) an oral employment contract, (2) a written employment contract, or (3) a liability created by statute. A two-year limitations period applies to oral contract claims, as provided by *Code Civ. Proc., § 339(1)*. A four-year limitations period applies to claims based on written contracts, as set forth in *Code Civ. Proc., § 337(1)*. A three-year limitations period applies to an action upon a liability created by statute, as stated in *Code Civ. Proc., § 338(a)*. When a former employee's complaint is filed within all of the potentially applicable limitation periods, a court need not decide which period applies. *Church v. Jamison (2006) 143 Cal. App. 4th 1568, 1577, 50 Cal. Rptr. 3d 166*

See other specific subject matter sections, e.g., § 345.184, on contracts, for other potentially relevant limitation periods

See discussion in *Ch. 249, Employment Law: Termination and Discipline, § 249.21*

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§ 345.205 Environmental Law

- Action commenced under *Health & Safety Code § 39000 et seq.* (air resources)--Three years from discovery of facts. *Code Civ. Proc. § 338(k)*

- Action or proceeding to challenge agency-approved activity on ground that plan or other written documentation submitted in lieu of environmental impact report does not comply with statutory requirements--Thirty days from filing notice of approval or adoption of activity. *Pub. Res. Code § 21080.5(g)*

- Action or proceeding against public agency that is carrying out or has approved project that may have significant effect on environment without having determined whether or not project may have significant effect on environment--One hundred and eighty days either after public agency's decision to carry out or approve project or after commencement of project when it was undertaken without formal decision of public agency. *Pub. Res. Code § 21167(a)*

- Action or proceeding against public agency alleging that public agency has improperly determined whether or not project may have significant effect on environment, or alleging that environmental impact report does not comply with California Environmental Quality Act (CEQA) (*Pub. Res. Code § 21000 et seq.*), or alleging that any other act or omission of public agency does not comply with CEQA provisions--Thirty days after filing of notice of approval or determination to carry out project or, in case of person who requested copy of notice, from deposit of copy of notice in mail. *Pub. Res. Code § 21167(b), (c), (e), (f)*. When an agency files a notice of determination for the approval of a subsequent activity, and, in accordance with *Pub. Res. Code § 21166*, and *14* Cal. Code Regs. § 15168, no negative declaration or environmental impact report (EIR) has been prepared for the activity, *Pub. Res. Code § 21167(e)* appears to furnish the appropriate statute of limitations for challenges to the agency's action. The issue in such cases is limited to the legality of the agency's decision about whether to require a subsequent or supplemental EIR, or subsequent negative declaration. *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors (2010) 48 Cal. 4th 32, 56-57, 105 Cal. Rptr. 3d 181*

- Action or proceeding alleging that public agency has improperly determined that project is not subject to CEQA--Thirty-five days after filing of notice of approval or determination to carry out project, 180 days after public agency's decision to carry out or approve project when notice of approval has not been filed, or 180 days after commencement of project if project is undertaken without formal decision by public agency. *Pub. Res. Code § 21167(d), (f)*. Consistent with the principle that statutes of limitations apply equally to well- and ill-founded suits, all California Environmental Quality Act, *Pub. Res. Code, § 21000 et seq.*, challenges to an agency's exemption determination--even those with merit--must be brought within 35 days after the agency files a compliant notice of exemption. *Stockton Citizens for Sensible Planning v. City of Stockton (2010) 48 Cal. 4th 481, 504, 106 Cal. Rptr. 3d 858*

See discussion in Ch. 418, *Pollution and Environmental Matters*

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§ 345.206 Escrows

- Action against escrow holder based on actual or implied provision of written escrow instructions--Four years. *Code Civ. Proc. § 337(1)*

- Action against escrow holder based on breach of oral escrow instructions--Two years. *Code Civ. Proc. § 339(1)*

See discussion in Ch. 253, *Escrows*

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§ 345.207 False Advertising

- Action under Consumer Legal Remedies Act (*Civ. Code §§ 1750-1784*) alleging false advertising--Three years after advertisement. *Civ. Code § 1783*

- Action by public attorney to impose civil penalty under *Bus. & Prof. Code § 17536*--Three years. *Code Civ. Proc. § 338(h)*

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§ 345.208 False Claims Actions

- Civil false claims action under *Gov. Code § 12652*--Three years after date of discovery by Attorney General or prosecuting authority with jurisdiction to act under the False Claims Act (*Gov. Code § 12650 et seq.*) or, in any event, not more than 10 years after violation of *Gov. Code § 12651*. *Gov. Code § 12654(a)*

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§ 345.209 False Imprisonment

- Action for false imprisonment--One year. *Code Civ. Proc. § 340(c)*; *see* discussion in Ch. 257, *False Imprisonment*

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§ 345.210 Felony, Civil Action Based on

- Civil action for damages based on commission of felony for which defendant has been convicted--One year after judgment is pronounced; however, an action for damages against a defendant based upon the defendant's commission of a felony offense for which the defendant has been convicted may be commenced within ten years of the date on which the defendant is discharged from parole if the conviction was for any of certain serious felonies. *Code Civ. Proc. § 340.3*; *Jamieson v. Hickey (1988) 199 Cal. App. 3d 595, 597-599, 244 Cal. Rptr. 859* (statute of limitations is one year after judgment is pronounced even if felony conviction is subsequently reduced to misdemeanor); *but see Gallo v. Superior Court (1988) 200 Cal. App. 3d 1375, 1377, 1379, 246 Cal. Rptr. 587* (statute of limitations under *Code Civ. Proc. § 340.3* may not be applied retroactively to revive personal injury cause of action that was already barred when statute became effective); *Newman v. Newman (1987) 196 Cal. App. 3d 255, 259, 241 Cal. Rptr. 712* (extended period of *Code Civ. Proc. § 340.3* does not apply when defendant is found not guilty by reason of insanity)

- In cases where the action might also have been brought as an action for professional negligence--One year from when defendant is convicted of the felony offense. *Guardian North Bay, Inc. v. Superior Court (2001) 94 Cal. App. 4th 963, 975-979, 114 Cal. Rptr. 2d 748* (*Code Civ. Proc. § 340.3* applies to skilled nursing facility convicted of elder abuse)

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§ 345.211 Fiduciaries

- Action for breach of fiduciary duty--Four years. *Di Grazia v. Anderlini (1994) 22 Cal. App. 4th 1337, 1349, 28 Cal. Rptr. 2d 37* ; *Stalberg v. Western Title Ins. Co. (1991) 230 Cal. App. 3d 1223, 1230, 282 Cal. Rptr. 43* (action is governed by four-year limitation set forth in *Code Civ. Proc. § 343*)

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§ 345.212 Financial Institutions

- Action under *12 U.S.C. § 4010* for violation of federal Expedited Funds Availability Act (*12 U.S.C. § 4001 et seq.*) or related regulations--One year from date violation occurred. *12 U.S.C. § 4010(d)*; *12 C.F.R. § 229.21(d)*

- Action against bank to recover excessive fees charged for untimely payment of credit card charges or for exceeding credit limit--Four years. *Code Civ. Proc. § 337(1)*; *Beasley v. Wells Fargo Bank (1991) 235 Cal. App. 3d 1383, 1401-1402, 1 Cal. Rptr. 2d 446*

- Action against bank, banker, trust company, building and loan association, savings and loan society, industrial loan company, or credit union for refund or redelivery of money or property on deposit--No limitation except when financial institution is insolvent and is in process of liquidation, in which case three years from beginning of process of liquidation. *Code Civ. Proc. §§ 338(c), 348*

- Action by depositors against their bank for payment of forged checks written on their accounts--One-year limitations period of *Code Civ. Proc, § 340(c)* rather than the three-year limitations period of *Com. Code § 4111*. *Hughes Electronics Corp. v. Citibank Delaware (2004) 120 Cal. App. 4th 251, 270, 15 Cal. Rptr. 3d 244* ; *Chatsky and Assocs. v. Superior Court (2004) 117 Cal. App. 4th 873, 875, 12 Cal. Rptr. 3d 154*

- Action by employer against financial institution for negligence that allowed employee to divert checks away from employer--Three years, subject to delayed discovery rule. *Code Civ. Proc. § 338(c)*; *Sun 'n Sand, Inc. v. United California Bank (1978) 21 Cal. 3d 671, 697-698* ; *Wisper Corp. v. California Commerce Bank (1996) 49 Cal. App. 4th 948, 955-957, 57 Cal. Rptr. 2d 141*

- Action against bank by customer for breach of warranty--One year after statement or items are made available to customer to discover and report to bank his or her unauthorized signature on, or any alteration of, item; customer who fails to meet requirement as precluded from asserting action against bank based on breach of warranty. *Com. Code § 4406(f)*; *see* *Sun 'n Sand, Inc. v. United California*

Bank (1978) 21 Cal. 3d 671, 692, 696-700, 148 Cal. Rptr. 329, 582 P. 2d 920 (construing statute before it 1992 amendment, court held that one-year period begins to run with each successive check)

- Action against bank for violation of disclosure and notice requirements for delayed withdrawal and payment of interest on deposit (*Fin. Code § 866 et seq.*)--One year from date of violation. *Fin. Code § 866.4*

- Action against selling financial institution on debt or liability assumed by purchasing financial institution in sale of a partial business unit--One year from time sale becomes effective. *Fin. Code § 4879.15*; *see Fin. Code § 4879.11* (when sale becomes effective)

- Claim against bank liquidating its assets--Before final dividend (depositor claim) or within four months of notice (other claim). *Fin. Code § 3117*

- Action on claim rejected in liquidation proceeding by Commissioner of Financial Institutions--Three months after date of mailing or personal service of notice of rejection. *Fin. Code § 3118*

- Action by state bank or state savings and loan against seller of depository corporation on account of debt or liability assumed on purchase of depository corporation--One year after sale becomes effective. *Fin. Code § 4860*

- Complaint against bank, building and loan association, credit union, industrial loan company, savings and loan society, or trust company to begin investigation of credit insurance violation--Three months after execution or modification of contract of sale, trust deed, or loan agreement at issue. *Ins. Code § 775*

- Taxation. See *§ 345.312[3]* (taxation)

See discussion in Ch. 95, *Banks, Deposits, and Checks*

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§ 345.213 Fire Protection Districts

- Proceeding to contest validity of formation and organization of fire protection district--Sixty days after formation of district complete. *Health & Safety Code § 13831(b)*

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§ 345.214 Fireworks

- Filing of charges against applicant for or holder of commercial fireworks license--Three years after alleged act or omission. *Health & Safety Code § 12606*

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§ 345.215 Fishing Industry

- Judicial action seeking review of action by Department of Fish and Game concerning refund or credit of packing and processing taxes (*Fish & Game Code § 8040 et seq.*)--Ninety days after Department has mailed notice of its action on claim. *Fish & Game Code § 8066*

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§ 345.216 Food and Agriculture

- Action against landowner to foreclose lien for weed abatement--One hundred and twenty days after notice recorded. *Food & Agric. Code § 5434*

- Action questioning validity of formation of citrus pest control district--One year after making of order establishing and describing boundaries of district. *Food & Agric. Code § 8462*

- Action brought pursuant to *Food & Agric. Code § 11891 et seq.* for violation of provisions governing pest control operations--Two years after violation or one year after submission of investigation to Director of Food and Agriculture. *Food & Agric. Code § 11895*

- Action brought pursuant to *Food & Agric. Code § 12996 et seq.* for violation of provisions governing agricultural pesticides--Two years after violation or one year after submission of investigation to Director of Food and Agriculture. Food & Agric. Code § 1300(a); *see* Food & Agric. Code § 1300(b) (exception for particular actions brought by director)

- Action to impose liability for violation of California Seed Law (*Food & Agric. Code § 52251 et seq.*)--One year after discovery of violation and no later than two years after sale. *Food & Agric. Code § 52487*

- Action for penalty or other remedy prescribed under California Marketing Act of 1937 (*Food & Agric. Code § 58601 et seq.*)--Three years from date of alleged violation. *Food & Agric. Code § 59231*

- Action seeking judicial review of order by Director of Food and Agriculture making effective a marketing program--Thirty days after effective date of complained--of order. *Food & Agric. Code § 59545*

- Action for penalties or other remedies prescribed in Agricultural Producers Marketing Law (*Food & Agric. Code § 59501 et seq.*)--Two years from date of alleged violation. *Food & Agric. Code § 60011*

- Action for any penalty or other remedy prescribed under provisions governing California Navel Orange Commission (*Food & Agric. Code § 73001 et seq.*)--Two years from date of alleged violation. *Food & Agric. Code § 73304*

- Action for any penalty or other remedy prescribed under provisions governing proceedings of California Egg Commission (*Food & Agric. Code § 75001 et seq.*)--Two years from date of alleged violation. *Food & Agric. Code § 75154*

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§ 345.217 Forestry

- Filing of disciplinary accusation against registered professional forester--Five years after act or omission alleged as ground for disciplinary action. *Pub. Res. Code § 776*

- Action on claim to recover proceeds on sale of floating lumber--Six months after judge rejects claimant's right to proceeds. *Pub. Res. Code § 4855*

See discussion in Ch. 350, *Logs and Timber*

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§ 345.218 Franchise Regulation

- Action to enforce liability for franchisor's violation of franchisee's rights of association--Two years after violation on which it is based or one year after plaintiff's discovery of facts constituting such violation, whichever occurs first. *Corp. Code § 31302.5(b)*

- Action under *Corp. Code § 31300* (enforcing liability for violation of registration or exemption requirements)--Four years after act or transaction constituting violation; one year after discovery by plaintiff of fact constituting violation; or 90 days after delivery to franchisee of written notice disclosing any violation of *Corp. Code § 31110* or *31200*, whichever limitation period expires first. *Corp. Code § 31303*

- Action under *Corp. Code § 31301* (enforcing liability for misrepresentation in franchise transactions)--Two years after violation on which action is based; one year after discovery by plaintiff of facts constituting violation; or 90 days after delivery to franchisee of written notice disclosing any violation of *Corp. Code § 31201* or *31202*, whichever limitation period expires first. *Corp. Code § 31304*

- Action by Commissioner of Corporations to impose civil penalty for violation of Franchise Investment Law--Four years after violation. *Corp. Code § 31405(c)*

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§ 345.219 Fraternal Benefit Societies

- Action at law or in equity on certificate or contract issued by fraternal benefit society--Two years after accrual of cause of action. *Ins. Code §§ 11068, 11070*; *see Ins. Code § 11067(a)* (prohibition against limiting period to less than 18 months by agreement)

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§ 345.220 Fraud or Mistake

- Action for relief on ground of fraud or mistake--Three years after discovery of facts constituting fraud or mistake. *Code Civ. Proc. § 338(d)*; *see* discussion and forms in Ch. 488, *Reformation of Instruments* , and discussion in Ch. 215, *Duress, Menace, Fraud, Undue Influence and Mistake* , Ch. 269, *Fraud and Deceit* , and Ch. 533, *Stipulations*

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§ 345.221 Fraudulent Conveyances

- Action to set aside fraudulent transfer under *Civ. Code § 3439.04(a)* (transfer made with actual intent to defraud, hinder, or delay creditor)--Four years after transfer was made or obligation was incurred or, if later, within one year after claimant's constructive or actual discovery of transfer. *Civ. Code § 3439.09(a)*

- Action to set aside transfer as fraudulent under *Civ. Code §§ 3439.04(b)* or *3439.05*--Four years after transfer made or obligation incurred. *Civ. Code § 3439.09(b)*

- Action to set aside fraudulent transfer--Seven years after transfer was made or obligation was incurred. *Civ. Code § 3439.09(c)* (applies "notwithstanding any other provision of law")

- Creditor's action or levy in action involving transfer under *Civ. Code § 3440 et seq.* of personal property made without immediate delivery and actual change of possession--One year. *Civ. Code § 3440.6* (specifying dates triggering one-year period)

See discussion in Ch. 270, *Fraudulent Conveyances* , Pts. I, II

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§ 345.222 Funeral Directors and Embalmers

- Accusation against licensed funeral director or embalmer--Two years after performance of act or omission alleged as disciplinary ground; in cases alleging fraud or misrepresentation, period extended to three years after discovery. *Bus. & Prof. Code § 7686.5*

- Cemeteries. See *§ 345.176*

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§ 345.223 Grants

- Suit, action, or proceeding to set aside, annul, or affect gift, grant, or conveyance, or to affect title to property conveyed, or right to possession or to rents, issues, and profits thereof--Two years after date of filing of grant for record. *Educ. Code § 21152* (grants to institutions of arts and sciences); *Health & Safety Code § 32508* (grants to endowment hospital)

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§ 345.224 Guardians and Conservators

- Action for recovery of property sold by guardian or conservator--Three years after termination of guardianship or conservatorship or, if legal disability exists at time of accrual, within three years after removal of disability. *Prob. Code § 2548*; *see* discussion in Ch. 290D, *Guardianship and Conservatorship: Actions Against Guardians, Conservators, and Sureties*

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§ 345.225 Harbor Districts

- Action or proceeding to test or invalidate formation of harbor improvement district or authorized indebtedness--Sixty days after Secretary of State files certificate of formation. *Harb. & Nav. Code § 5874*

- Action or proceeding to test or invalidate formation of harbor district--Sixty days after Secretary of State files certificate of formation. *Harb. & Nav. Code § 6045*

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§ 345.225A Hazardous Material

- See *§ 345.313A*

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§ 345.226 Hazardous Waste Control

- Action by state for civil penalties or punitive damages under *Health & Safety Code § 25100 et seq.* (hazardous waste control)--Five years after discovery of facts on which action based. *Code Civ. Proc. § 338.1*

- Action under *Health & Safety Code § 25360* for recovery of costs of removal or remedial action, or administrative costs--Three years after completion of removal or remedial action certified by Department of Toxic Substances Control. *Health & Safety Code § 25360.4(a)*

- Action under *Health & Safety Code § 25352(c)* to recover costs incurred for purposes specified in *Health & Safety Code § 25352(a)* or *(b)*--Three years after certification by Department of Toxic Substances Control of completion of activities authorized under section 25352(a), (b). *Health & Safety Code § 25360.4(b)*

- Claim presented to State Board of Control pursuant to *Health & Safety Code §§ 25370-25382* for compensation of losses caused by release of hazardous substance in California--Three years from date loss discovered. *Health & Safety Code § 25376*

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§ 345.227 Health Care Providers

- Action against physicians and joint venture partners for intentional tort claims--Three years. *Code Civ. Proc. § 338(c)(d)*; *see Unruh-Haxton v. Regents of University of California (2008) 162 Cal. App. 4th 343, 356, 76 Cal. Rptr. 3d 146*

- Action for damages for intentional interference with right to practice medicine--Two years. *Code Civ. Proc. § 339(1)*; *Edwards v. Fresno Community Hosp. (1974) 38 Cal. App. 3d 702, 705, 706, 113 Cal. Rptr. 579*

- Action against veterinarian for injury or death of animal or fowl in practice of veterinary medicine or in course of boarding or feeding--One year. *Code Civ. Proc. § 340(c)*

- Action for injury or death against health care provider based on alleged professional negligence--Three years after date of injury or one year after plaintiff discovers or reasonably should have discovered injury, whichever occurs first; in no event shall period exceed three years unless tolled for specified reasons. *Code Civ. Proc. § 340.5*; *see Russell v. Stanford University (1997) 15 Cal. 4th 783, 788-790, 64 Cal. Rptr. 2d 97, 937 P.2d 640* (three-year limitation period of *Code Civ. Proc. § 340.5* tolled by service of *Code Civ. Proc. § 364* 90-day notice of intention to sue within last 90 days of the three year period); *Woods v. Young (1991) 53 Cal. 3d 315, 328, 279 Cal. Rptr. 613, 807 P.2d 455* (one-year limitation period of *Code Civ. Proc. § 340.5* tolled by service of *Code Civ. Proc. § 364* 90-day notice of intention to sue within last 90 days of the one year period)

- Action for injury or death against health care provider based on alleged professional negligence when plaintiff is a minor--Three years from date of alleged wrongful act, except that actions by minor under full age of six years must be commenced within three years or prior to minor's eighth birthday, whichever period is longer. *Code Civ. Proc. § 340.5*; *see Young v. Haines (1986) 41 Cal. 3d 883, 894, 226 Cal. Rptr. 547, 718 P.2d 909* (*Code Civ. Proc. § 340.5*, rather than former *Civ. Code § 29* (*now see Code Civ. Proc. § 340.4*), applies in medical malpractice action by minor for prenatal injuries)

- Action against hospital for recovery or conversion of personal property left by owner--Ninety days from date of owner's departure from hospital. *Code Civ. Proc. § 341a*

- Action against health care provider that is public entity following rejection of Torts Claim Act claim under *Gov. Code § 913*--Six months from time claim is rejected as provided in *Gov. Code § 945.6*, subject to potential 90-day extension under *Code Civ. Proc. § 364(d)*. *Anson v. County of Merced (1988) 202 Cal. App. 3d 1195, 1202, 1204-1205, 249 Cal. Rptr. 457*

- Equitable indemnity actions based on health care provider's professional negligence--One-year limitation period of *Code Civ. Proc. § 340(3)* subject to potential 90-day extension under *Code Civ. Proc. § 364(d)*. *Preferred Risk Mutual Ins. Co. v. Reiswig (1999) 21 Cal. 4th 208, 211-213, 217-218, 87 Cal. Rptr. 2d 187, 980 P.2d 895*

- Action for medical negligence against public entities--Plaintiffs must comply with both the six-month statute of limitations in the Government Claims Act [*Gov. Code § 945.6*] and the three-year statute in the Medical Injury Compensation Reform Act (MICRA) [*Code Civ. Proc. § 340.5*], and the latter statute establishes the outside date by which actions against health care providers, including public entities, must be brought. *Roberts v. County of Los Angeles (2009) 175 Cal. App. 4th 474, 476, 96 Cal. Rptr. 3d 60*

See discussion in Ch. 209, *Dentists* , Ch. 295, *Hospitals* , Ch. 367A, *Minors: Tort Actions* ; and see discussion and forms in Ch. 414, *Physicians: Medical Malpractice* , and Ch. 416, *Physicians: Membership on Hospital Staffs or in Professional Organizations* .

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§ 345.228 Historical Rehabilitation

- Action challenging legality of historical rehabilitation financing program or of selection of historical properties for rehabilitation pursuant to *Health & Safety Code § 37600 et seq.*--Sixty days after adoption of program or 60 days after selection of properties. *Health & Safety Code § 37631*

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§ 345.229 Horse Racing

- Appeal of administrative decision excluding patron from horse racing facility--Thirty days. *Bus. & Prof. Code § 19463*; *Jones v. California Horse Racing Bd. (1986) 185 Cal. App. 3d 984, 987-988, 230 Cal. Rptr. 230*

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§ 345.230 Hospitals

- See *§ 345.227*

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§ 345.231 Housing Assistance

- Judicial action challenging validity of action of state agency or local public entity in approving proposal concerning low income housing assistance--Sixty days after either date of notice of funding commitment or date of adoption of ordinance or resolution approving proposal. *Health & Safety Code § 36005*

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§ 345.232 Illegitimate Children

- See *§ 345.178*

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§ 345.233 Indemnity

- Actions based on oral indemnity agreements and actions for implied indemnity that do not arise from breach of written contract--Two years, pursuant to *Code Civ. Proc. § 339(1). Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal. 2d 834, 843, 36 Cal. Rptr. 741, 389 P.2d 133*

- Action for indemnity for loss resulting from personal injury liability--Two years, pursuant to *Code Civ. Proc. § 335.1. Southern Pacific Transportation Co. v. Ohbayashi America Corp. (1983) 147 Cal. App. 3d 233, 235, 238-239, 195 Cal. Rptr. 63* (period commences to run at time of payment of underlying claim; decided under prior one-year limitation period in former *Code Civ. Proc. § 340(3)*); *see Preferred Risk Mutual Ins. Co. v. Reiswig (1999) 21 Cal. 4th 208, 217-218, 87 Cal. Rptr. 2d 187, 980 P.2d 895* (if indemnity action is based on health care providers' professional negligence, 90-day tolling under *Code Civ. Proc. § 364(d)* may apply)

- Action based on written indemnity agreement--Four years, pursuant to *Code Civ. Proc. § 337(1). Globe Indemnity Co. v. Larkin (1944) 62 Cal. App. 2d 891, 892, 145 P.2d 633*

See discussion in Ch. 300, *Indemnity and Contribution*

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§ 345.234 Industrial Loan Companies

- See *§ 345.212*

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§ 345.235 Insurance

- Action based on title insurance policy--Two years. *Code Civ. Proc. § 339(1)*; *Lambert v. Commonwealth Land Title Ins. Co. (1991) 53 Cal. 3d 1072, 1077, 282 Cal. Rptr. 445, 811 P.2d 737* (cause of action accrues on insurer's refusal to defend, but is equitably tolled until final judgment in the underlying action); *Smeaton v. Fidelity Nat. Title (1999) 72 Cal. App. 4th 1000, 1001, 1004, 85 Cal. Rptr. 2d 591* (period cannot begin to run until policy issued, even if insured may have earlier discovered facts leading him or her to believe claim existed)

- Complaint to initiate investigation of alleged violation of *Ins. Code § 770 et seq.* (lender requiring insurance from specific broker or agent)--Three months after execution or modification of contract of sale, trust deed, or loan agreement at issue. *Ins. Code § 775*

- Petition for judicial review of order of insurance commissioner--Before effective date of order. *Ins. Code § 1858.6*

- Suit or action on form fire insurance policy for recovery of claim--Twelve months after inception of loss. *Ins. Code §§ 2071* (California Standard Form of Fire Insurance Policy), 6010 (California Standard Form of County Fire Insurance Policy)

- Action to recover on disability policy--Three years after time written proof of loss is required to be furnished. *Ins. Code § 10350.11*

- Action under *Ins. Code § 11580.2* based on accident covered under uninsured motorist coverage that took place outside California--Three months after insolvency of tortfeasor's insurer, but no later than pertinent period of limitation of jurisdiction in which accident occurred. *Ins. Code § 11580.2(j)*

- Action on revived insurance claim for damages arising out of Northridge earthquake of 1994--Within one year of January 1, 2001. *Code Civ. Proc. § 340.9*

- Action by Armenian Genocide victim or victim's heir or beneficiary concerning specified insurance policies--December 31, 2010. *Code Civ. Proc. § 354.4*

WARNING--Federal Preemption at Issue.

A Ninth Circuit panel has held the limitation-period extension in *Code Civ. Proc. § 354.4* is invalid under the field-preemption doctrine [*Movsesian v. Victoria Versicherung AG (9th Cir. 2009) 578 F.3d 1052]*

- Action by Holocaust victim or victim's heir or beneficiary arising out of specified insurance policies--December 31, 2010. *Code Civ. Proc. § 354.5*

WARNING--Federal Preemption at Issue.

A Ninth Circuit panel has held the limitation-period extension in *Code Civ. Proc. § 354.5* is invalid under the field-preemption doctrine [*Steinberg v. International Comm'n on Holocaust Era Ins. Claims (2005) 133 Cal. App. 4th 689, 34 Cal. Rptr. 3d 944]*

See discussion and forms in Ch. 308, *Insurance* and discussion in Ch. 88, *Automobiles: Automobile Insurance* , Ch. 88A, *Automobiles: Uninsured Motorist Claims* , and Ch. 548, *Title Insurance*

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§ 345.236 Intellectual Property

- Civil action for copyright infringement under Federal Copyright Act of 1976 (*17 U.S.C. § 101 et seq.*)--Three years. *17 U.S.C. § 507*

- Action based on misappropriation or conversion of intangible interests--Two years. *Code Civ. Proc. § 339(1)*; *Italiani v. Metro-Goldwyn-Mayer Corp. (1941) 45 Cal. App. 2d 464, 466-467, 114 P.2d 370*

- Action alleging use or appropriation of idea in violation of implied in fact oral contract to pay reasonable value for obtaining idea--Two years. *Code Civ. Proc. § 339(1)*; *Thompson v. California Brewing Co. (1957) 150 Cal. App. 2d 469, 477, 310 P.2d 436*

- Action alleging breach of confidence based on violation of agreement not to disclose idea supplied to defendants without plaintiff's consent--Two years. *Code Civ. Proc. § 339(1)*; *Thompson v. California Brewing Co. (1957) 150 Cal. App. 2d 469, 477, 310 P.2d 436*

See discussion in Ch. 349, *Literary Property and Copyright* and Ch. 549, *Trademarks and Trade Names*

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§ 345.237 Interference With Contract or With Economic Relations

- See *§ 345.321*

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§ 345.238 Inverse Condemnation

- Action for inverse condemnation--Three years. *Code Civ. Proc. § 338(j)* (applicable in actions commencing on or after January 1, 1990); *Lee v. Los Angeles County Metropolitan Transit Authority, (2003) 107 Cal. App. 4th 848, 854-855, 132 Cal. Rptr. 2d 444* (where basis of inverse condemnation claim is damage to the property, as opposed to taking); *see* Stats. 1987, ch. 1201, §§ 1, 31; *see also* discussion in *Ch. 247, Eminent Domain, § 247.190* et seq.

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§ 345.239 Judgments

- Action on judgment or decree of any court of United States or of any state within United States--Ten years. *Code Civ. Proc. § 337.5(3)*; *see also Code Civ. Proc. § 683.220* (concerning judgments renewed under *Code Civ. Proc. § 683.110 et seq.*, *10*-year period under *Code Civ. Proc. § 337.5* commences on date of filing of application for renewal); *see also Manco Contracting Co. (WLL) v. Bezdikian (2008) 45 Cal. 4th 192, 208, 85 Cal. Rptr. 3d 233, 195 P.3d 604* (10-year statute of limitations in *Code Civ. Proc. § 337.5*, applicable to actions upon sister state judgments, also applies to actions upon foreign judgments)

- Proceeding under Enforcement of Judgments Law (*Code Civ. Proc. § 680.010 et seq.*) to enforce money judgment or judgment for possession or sale of property--Ten years from date of entry of judgment or from date of filing of application for renewal of judgment. *Code Civ. Proc. §§ 683.020, 683.120(b)*; *Kertesz v. Ostrovsky (2004) 115 Cal. App. 4th 369, 372-373, 8 Cal. Rptr. 3d 907* ; *see also Code Civ. Proc. §§ 683.030* (calculation of 10-year period when money judgment payable in installments), 683.040 (application for writ of enforcement of judgment after 10 years from date of entry)

- Independent action to set aside judgment based on extrinsic factors--Three years (under *Code Civ. Proc. § 338(d)*) if action is based on extrinsic fraud or mistake, or four years (under *Code Civ. Proc. § 343*) if action is based on other extrinsic factors. *Zastrow v. Zastrow (1976) 61 Cal. App. 3d 710, 714, 132 Cal. Rptr. 536*

See discussion in Ch. 254, *Executions and Enforcement of Judgments* , General Introduction, Ch. 318, *Judgments* and Ch. 489, *Relief From Judgments and Orders*, §§ 489.15, 489.141, 489.142, 489.260 et seq. For time limits to set aside judgments in proceedings for dissolution of marriage, nullity of marriage, or legal separation, *see Fam. Code §§ 2121(a), 2122*, discussed in Ch. 220, *Dissolution of Marriage and Related Proceedings*

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§ 345.240 Landlord and Tenant

- See *§ 345.243*

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§ 345.241 Landscape Architects

- Disciplinary proceeding by Board of Landscape Architects against landscape architect--Three years after Board discovers or reasonably should have discovered alleged act or omission, or six years from alleged act or omission, whichever occurs first, with specified exception. *Bus. & Prof. Code § 5661*

- Improvements to real property. See *§ 345.287[7]*

See discussion in Ch. 471B, *Licensing by Public Agency*

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§ 345.242 Lanterman-Petris-Short Act

- Civil causes of actions based on alleged violations of Lanterman-Petris-Short Act (*Welf. & Inst. Code § 5000 et seq.*) as sounding in tort and, thus, subject to two-year statute of limitations for personal injuries. *Code Civ. Proc. § 335.1*; *Jackson v. Cedars-Sinai Medical Center (1990) 220 Cal. App. 3d 1315, 1319-1321, 269 Cal. Rptr. 877* (decided under prior one-year limitation period in former *Code Civ. Proc. § 340(3)*)

See discussion in *Ch. 304, Insane and Other Incompetent Persons, § 304.30* et seq.

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§ 345.243 Leases

- Action for mesne profits of real property--Five years. *Code Civ. Proc. § 336*

- Action for breach of covenant in lease--Four years. *Code Civ. Proc. § 337(1)*; *Lawrence Barker, Inc. v. Briggs (1952) 39 Cal. 2d 654, 661, 248 P.2d 897*

- Action against tenant for termination of written lease of real property--Four years after breach of lease and abandonment of property or four years after termination of right of lessee to possession of property, whichever is earlier. *Code Civ. Proc. § 337.2*

- Action against tenant for termination of lease of real property not in writing--Two years after breach of lease and abandonment of property or two years after termination of right of lessee to possession of property, whichever earlier. *Code Civ. Proc. § 339.5*

- Action for default under personal property lease contract, including breach of warranty or indemnity--Four years after cause of action accrued. *Com. Code § 10506(a)* (applicable to actions accruing on or after January 1, 1990)

See discussion and form. Ch. 334, *Landlord and Tenant: Claims for Damages*, and Ch. 413, *Personal Property Leases*

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§ 345.244 Libel and Slander

- Action for libel, slander, or both--One year. *Code Civ. Proc. § 340(3)*; *see* discussion and *forms in Ch. 340, Libel and Slander, § 340.50* et seq.

- Slander of title. See *§ 345.287[14]*

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§ 345.245 Liens

- Trust deeds and mortgages. See *§ 345.318*

- Lien is extinguished by lapse of period within which action may be brought on principal obligation. *Civ. Code § 2911*

- Action to foreclose on mechanics' lien--Ninety days from date of recording of claim, unless credit extended. *Civ. Code § 3144(a)*

- Action to foreclose assessment lien for street improvements--Two years. *Code Civ. Proc. § 329*

- Action against owner of oil or gas lease to enforce lien for labor, materials, or services in drilling or operating well--One hundred and eighty days from recording lien. *Code Civ. Proc. § 1203.61(a)*

- Action against landowner to foreclose lien for weed abatement--One hundred and twenty days after notice recorded. *Food & Agric. Code § 5434*

- Lien on vessel--One year from time cause of action accrued. *Harb. & Nav. Code § 491*

- Action to foreclose on rodent abatement lien--Ninety days after payment of extermination expense by city or county. *Health & Safety Code § 116160*

- Lien on assessment or contractor's bond for materials or services provided in connection with construction project governed by Local Agency Public Construction Act (*Pub. Contract Code § 20100 et seq.*)--Three months after filing of verified statement claiming nonpayment. *Pub. Contract Code § 20460*

- Action to foreclose on fire hazard nuisance abatement lien--Six months after lien is filed and recorded. *Pub. Res. Code § 4180*

- Action to foreclose on real property lien for unpaid charges or fees due to Department of Parks and Recreation or Department of General Services--Four years after notice of lien filed of record. *Pub. Res. Code § 5003.7(d)*

See discussion in Ch. 342, *Liens and Wage Preferences* , and Ch. 361, *Mechanics' Liens*

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§ 345.246 Limited Obligation Bonds

- Action, suit, or proceeding challenging validity of limited obligation bonds (*Gov. Code § 50665.1 et seq.*)--Thirty days after adoption of resolution providing for bonds' issuance. *Gov. Code § 50670.1*

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§ 345.247 Local Agency Fees and Charges

- Action to contest local agency's ordinance, resolution, or motion adopting new fee or service charge, or modifying or amending existing fee or service charge--One hundred and twenty days after effective date of ordinance, resolution, or motion; 120 days after effective date of increase when ordinance, resolution, or motion provides for automatic adjustment in fee or service charge, and automatic adjustment results in increase in amount of fee or service charge. *Gov. Code § 66022*; *Regents of the Univ. of Cal. v. City and County of San Francisco (2004) 115 Cal. App. 4th 1109, 1111, 9 Cal. Rptr. 3d 728*

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§ 345.248 Local Transportation Authority and Improvement Act

- Action or proceeding challenging validity of adoption of retail transactions and use tax ordinance provided for in *Pub. Util. Code § 180250 et seq.* or issuance of any bonds thereunder--Six months from date of election at which ordinance approved. *Pub. Util. Code § 180264*

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§ 345.249 Malicious Prosecution

- Action for malicious prosecution--One from date of entry of judgment of underlying action. Code Civ. proc. § 340(c); *Bob Baker Enterprises, Inc. v. Chrysler Corp. (1994) 30 Cal. App. 4th 678, 683, 36 Cal. Rptr. 2d 12* ; *Rutherford v. Johnson (1967) 250 Cal. App. 2d 316, 319, 58 Cal. Rptr. 546*

See discussion in Ch. 357, *Malicious Prosecution and Abuse of Process*

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§ 345.250 Malpractice

- By accountant. See *§ 345.153*
- By attorney. See *§ 345.168*
- By physician or other health care provider. See *§ 345.227*

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§ 345.251 Mandate

- Administrative proceedings. See *§ 345.157*

- Mandate proceeding--Period determined by nature of right asserted. *Green v. Obledo (1981) 29 Cal. 3d 126, 140-141 n. 10, 172 Cal. Rptr. 206, 624 P.2d 256* (applying three-year period of *Code Civ. Proc. § 338(a)* because cause of action for mandate sought to enforce liability created by statute); *see McBrearty v. City of Brawley (1997) 59 Cal. App. 4th 1441, 1446, 69 Cal. Rptr. 2d 862* (depends on nature of obligation sought to be enforced); *see also* discussion in Ch. 358, *Mandate and Prohibition* , and Ch. 527, *Social Services*

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§ 345.252 Marriage

- Exercise of right to reimbursement under *Fam. Code § 1000*--Seven years after spouse in whose favor right arises has actual knowledge of application of property to satisfaction of debt. *Fam. Code § 1000(c)* (applies "notwithstanding" *Fam. Code § 920*)

- Exercise of right to reimbursement provided by *Fam. Code § 900 et seq.* for payment of certain debts from separate or community property--Three years after spouse in whose favor the right arises has actual knowledge of the application of the property to the satisfaction of the debt, or in proceedings for division of the community estate pursuant to *Fam. Code § 2500 et seq.*, or in proceedings on the death of a spouse. *Fam. Code § 920(c)*

- Action against spouse to cancel instrument executed by defendant spouse and affecting community property standing in name of defendant spouse only--One year from filing instrument for record. *Fam. Code § 1102*

- Annulment proceeding based on lack of consent because of minority--Four years from reaching majority. *Fam. Code § 2211(a)*

- Annulment proceeding based on undissolved prior marriage--Lifetime of defendant spouse. *Fam. Code § 2211(b)*

- Annulment proceeding based on spouse's unsoundness of mind--Lifetime of either spouse. *Fam. Code § 2211(c)*

- Annulment proceeding based on consent obtained fraudulently--Four years from discovery. *Fam. Code § 2211(d)*

- Annulment proceeding based on consent obtained by force--Four years from marriage date. *Fam. Code § 2211(e)*

- Annulment proceeding based on physical incapacity--Four years from marriage date. *Fam. Code § 2211(f)*

See discussion and forms in Ch. 122, *Community Property* and discussion in Ch. 359, *Marriage*

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§ 345.253 Medi-Cal

- Action by health care provider for judicial relief based on grievance or complaint concerning processing or payment of money allegedly payable under Medi-Cal--One year after decision on claim by Director of Social Services. *Welf. & Inst. Code § 14104.5*

- Action brought by Department of Health Services seeking reimbursement for medical benefits--Three years. *Code of Civ. Proc. § 338(a)*; *Shewry v. Begil (2005) 128 Cal. App. 4th 639, 644, 27 Cal. Rptr. 3d 209*

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§ 345.254 Medical Professionals

- See *§ 345.227*

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§ 345.255 Mental Sufferring

- See *§ 345.270*

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§ 345.256 Methadone Testing

- Action against licensed laboratory for violation of provisions regulating methadone program bodily fluids testing (*Health & Safety Code § 11885 et seq.*)--Three years after misconduct or, if misconduct involved misrepresentation of material fact in obtaining license, two years after discovery. *Health & Safety Code § 11895*; *see Health & Safety Code § 11893(c)*

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§ 345.257 Mines

- Action to acquire interest of coowner of mine or mining claim after coowner's failure to pay proportionate share of taxes for five years--No limitation, but action may not be brought until coowner has failed to contribute proportionate share prior to expiration of 90 days from service of notice of delinquency. *Code Civ. Proc. § 852*; *see* discussion in Ch. 363, *Mining*

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§ 345.258 Minors

- Health care providers. See *§ 345.227*
- Personal injury. See *§ 345.270*

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§ 345.259 Missing Persons

- Action by missing person to recover properties distributed out of missing person's estate--Five years after distribution made. *Prob. Code § 12408(a)(2)*; *see* discussion in Ch. 368, *Missing Persons*

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§ 345.260 Mobilehomes and Manufactured Housing

- Issuance of citation against mobilehome or manufactured housing dealer operating without license--Three years after act or omission that is basis for citation. *Health & Safety Code § 18024.2*

- Claim against Manufactured Home Recovery Fund--One year from date of final judgment or, if claim is not based on final judgment, within one year from either termination of bankruptcy proceeding or date of sale as determined by *Health & Safety Code § 18070.2(a)*, whichever is later. *Health & Safety Code § 18070.3(h)*

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§ 345.261 Mortgages

- See *§ 345.318*

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§ 345.262 Motor Vehicles

- Action alleging failure to comply with requirements of Vehicle Leasing Act (*Civ. Code § 2985.7 et seq.*)--One year after termination of lease contract. *Civ. Code § 2988.5(i)*

- Disciplinary action against transporter of explosives or operator of ambulance, armored car, or fleet owner inspection maintenance station--Three years after disciplinable act or omission or two years after discovery of misrepresentation of material fact in obtaining license. *Veh. Code § 2547*; *see Veh. Code § 2542(f)*

- Action to review order by Department of Motor Vehicles affecting person's privilege to operate motor vehicle--Ninety days from date order noticed. *Veh. Code § 14401(a)*

- Application to Department of Motor Vehicles for refund of erroneous or excessive fee or penalty--Three years after date of payment or collection. *Veh. Code §§ 42231, 42232*; *see also Veh. Code § 42235* (late application for refund)

- Carriers. See *§ 345.175*

- Insurance. See *§ 345.235*

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§ 345.262A Myers-Milias-Brown Act

- Action for making a Myers-Milias-Brown-Act unfair practice charge to the California Public Employment Relations Board--Six months. *Coachella Valley Mosquito and Vector Control Dist. v. California Public Relations Board (2005) 35 Cal. 4th 1072, 1077, 29 Cal. Rptr. 3d 234*

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§ 345.263 Negligence

- Accountant malpractice. § 345.153
- Attorney malpractice. § 345.168
- Health care providers. § 345.227
- Personal injury. § 345.270
- Personal property, injury to. § 345.271
- Trespass. § 345.316
- Wrongful death. § 345.327

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§ 345.264 Notary Public

- Action against notary public on his or her bond or in his or her official capacity--Three years, except that period extendable to one year after discovery if action involves notary's malfeasance or misfeasance. *Code Civ. Proc. § 338(f)* (also providing six-year absolute limitation period); *see* discussion in Ch. 390, *Notaries Public*

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§ 345.265 Nuisance

- Public nuisance action--No limitation. *Civ. Code § 3490*

- Private nuisance action based on encroachment or injury to real property--Three years. *Code Civ. Proc. § 338(b)*; *Kafka v. Bozio (1923) 191 Cal. 746, 750-751, 218 P. 753*

- Private nuisance action based on personal injury or wrongful death--Two years. *Code Civ. Proc. § 335.1*

- Private nuisance action for damages for special injury to real property caused by permanent public nuisance--Three years from time nuisance is created. *Mangini v. Aerojet-General Corp. (1991) 230 Cal. App. 3d 1125, 1142-1143, 1144, 281 Cal. Rptr. 827* (*Code Civ. Proc. § 338(b)*, relating to actions for trespass or injury to real property, applies); *McCoy v. Gustafson (2009) 180 Cal. App. 4th 56, 104, 103 Cal. Rptr. 3d 37* (for limitations purposes, the harm implicit in a tortious injury to property is harm to the property itself, and thus to any owner of the property once the property has been injured and not necessarily to a particular owner; an owner must bring its claim to court within the statutory period or the claim will be barred for that and all subsequent owners)

- Private nuisance action for damages for special injury to real property caused by continuing public nuisance--None. Every continuation of nuisance gives rise to separate claim for damages caused by nuisance for which injured person may bring successive actions for damages until nuisance is abated. *KFC Western, Inc. v. Meghrig (1994) 23 Cal. App. 4th 1167, 1180-1181, 28 Cal. Rptr. 676* ; *Mangini v. Aerojet-General Corp. (1991) 230 Cal. App. 3d 1125, 1143, 281 Cal. Rptr. 827* ; *see* *Mangini v. Aerojet-General Corp (1996) 12 Cal. 4th 1087, 1103, 51 Cal. Rptr. 2d 272, 912 P.2d 1220* (recovery limited to actual injury suffered during three years prior to commencement of each action; prospective damages unavailable)

See discussion and form in Ch. 391, *Nuisance*

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§ 345.266 Oil and Gas

- Action based on underground trespass, use, or occupancy by means of well drilled for oil or gas--One hundred and eighty days. *Code Civ. Proc. § 349*3/4(a)

- Action based on removal of oil or gas or other liquid or fluid by trespassing well--One hundred and eighty days. *Code Civ. Proc. § 349*3/4(b)

- Action against owner of oil or gas lease to enforce lien for labor, materials, or services in drilling or operating well--One hundred and eighty days from recording lien. *Code Civ. Proc. § 1203.61(a)*

- Action by Controller to collect delinquent charges or assessments levied for enforcement of oil and gas conservation laws--Prior to May 31st following delinquency. *Pub. Res. Code § 3426*

- Action by taxpayer to recover oil and gas production assessments paid under protest--Third Monday in February next following day on which charges were due. *Pub. Res. Code § 3430*

See discussion in Ch. 393, *Oil and Gas*

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§ 345.267 Parks, Recreation, and Open-Space Districts

- Action or proceeding challenging validity of formation of open-space district created under Open Space Maintenance Act (*Gov. Code § 50575 et seq.*)--Thirty days after time district is formed; appeal from final judgment in such action or proceeding must be perfected within 30 days after entry of judgment. *Gov. Code § 50607*

- Action to challenge validity of incorporation of park or open-space district created under *Pub. Res. Code § 5500 et seq.*--Three months after order creating district filed. *Pub. Res. Code § 5526*

- Proceeding to test validity of recreation and park district or any action of a district--60 days under *Code Civ. Proc. § 860. Pub. Res. Code § 5780.9*

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§ 345.268 Partnerships

- Action by limited partner or interested limited partnership to determine whether interest of limited partner is dissenting interest or to determine fair market value of dissenting interest following merger of limited partnerships--Six months after date on which notice of approval of reorganization was mailed to limited partner. *Corp. Code § 15679.6(a)* (California Revised Limited Partnership Act); *Corp. Code § 15911.25(a)* (Uniform Limited Partnership Act of 2008)

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§ 345.269 Penalties and Forfeitures

- See *§ 345.305*

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§ 345.270 Personal Injury

- Action for personal injury caused by wrongful act or neglect--Two years. *Code Civ. Proc. § 335.1*

- Action for intentional infliction of emotional distress--One year. *Code Civ. Proc. § 340(3)*; *Magpali v. Farmers Group, Inc. (1996) 48 Cal. App. 4th 471, 485, 55 Cal. Rptr. 225*

- Action by or on behalf of minor for personal injuries sustained prior to or in course of birth--Six years from date of minor's birth; *Code Civ. Proc. § 352* as not applicable in computing this period. *Code Civ. Proc. § 340.4*

- Action for damages suffered as result of domestic violence--Three years from date of last act of domestic violence or from date plaintiff discovered or reasonably should have discovered that injury or illness resulted from an act of domestic violence. *Code Civ. Proc. § 340.15*; *Pugliese v. Superior Court (2007) 146 Cal. App. 4th 1444, 1451, 53 Cal. Rptr. 3d 681*

- Action for injury or illness based upon exposure to a hazardous material or toxic substance--Two years from the date of injury, or two years after the plaintiff becomes aware of, or reasonably should have become aware of (1) an injury, (2) the physical cause of the injury, and (3) sufficient facts to put a reasonable person on inquiry notice that the injury was caused or contributed to by the wrongful act of another, whichever occurs later. *Code Civ. Proc § 340.8*. See *§ 345.313A*

- Action by or on behalf of Dalkon Shield victim who has timely claim (as defined) against Dalkon Shield Claimants' Trust--Fifteen years after date of injury. *Code Civ. Proc. § 340.7*

- Civil action for injury or death to a terrorist victim of September 11, 2001--Two years. *Code Civ. Proc. §§ 340.10* and *335.1*

- Health care providers. See *§ 345.227*

- Railroads. See *§ 345.286*
- Ships and shipping. See *§ 345.302*
- Wrongful death. See *§ 345.327*

See discussion and forms in Ch. 380, *Negligence* , and Ch. 460, *Products Liability* , Pt. II, and discussion in Ch. 88, *Automobiles: Automobile Insurance* , Ch. 367A, *Minors: Tort Actions* , and Ch. 460, *Products Liability* , Pt. I

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§ 345.271 Personal Property, Injury to

- Action for taking, detaining, or injuring any goods or chattels, including actions for specific recovery of personal property--Three years. *Code Civ. Proc. § 338(c)*; *see Taylor v. Forte Hotels International (1991) 235 Cal. App. 3d 1119, 1126-1127, 1 Cal. Rptr. 2d 189* ; *see also § 345.187*

- Action for injury to personal property based on agreement not founded on instrument in writing--Two years. *Code Civ. Proc. § 339(1)*; *Taylor v. Forte Hotels International (1991) 235 Cal. App. 3d 1119, 1126-1127, 1 Cal. Rptr. 2d 189*

- Conversion. See *§ 345.187*

- Nuisance. See *§ 345.265*

See discussion and forms in Ch. 380, *Nuisance*

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§ 345.272 Personal Property Leases

- See *§ 345.243*

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§ 345.273 Petroleum Products Franchises

- Action for violation of *Bus. & Prof. Code § 20999 et seq.*, regulating termination and nonrenewal of petroleum products franchises--Two years after violation on which action based or one year after discovery by plaintiff of facts constituting violation, whichever occurs first. *Bus. & Prof. Code § 20999.3(b)*

- Action for violation of *Bus. & Prof. Code § 21140 et seq.*, governing a petroleum products franchisee's recourse to outside suppliers--Four years after cause of action accrued. *Bus. & Prof. Code § 21140.4*

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§ 345.274 Physicians

- See *§ 345.227*

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§ 345.275 Political Reform Act

- Civil action alleging violation of provision of Political Campaign Reform Act (*Gov. Code § 81000 et seq.*)--Four years after violation, except violation regarding *Gov. Code § 84100 et seq.* reports or statements, which are four years after audit could begin. *Gov. Code § 91011*

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§ 345.276 Pollution

- See *§ 342.205*

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§ 345.277 Port Districts

- Proceeding challenging validity of formation of port district--Sixty days after certificate of formation filed. *Harb. & Nav. Code § 6233*

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§ 345.278 Privacy

- Action to enforce liability created by Information Practices Act (*Civ. Code § 1798 et seq.*)--Two years from date on which cause of action arises or, under specified circumstances, within two years after discovery of violation of Act. *Civ. Code § 1798.49*

- Action to enforce liability created under *Civ. Code § 1799.2* (cause of action against bookkeeping business for unautho rized disclosure of business records)--Two years from date on which cause of action arose. *Civ. Code § 1799.2(c)*

- Action to enforce liability for violation of California Right to Financial Privacy Act (*Gov. Code § 7460 et seq.*)--Three years after date on which violation occurred. *Gov. Code § 7488*

- Action based on violation of Insurance Information and Privacy Protection Act (*Ins. Code § 791 et seq.*)--Two years from date alleged violation is or should have been discovered. *Ins. Code § 791.20(d)*

See discussion in Ch. 429, *Privacy*

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§ 345.279 Professional Negligence

- Action for professional negligence that damages intangible property interests on obligation or liability not founded on an instrument or writing--Two years. *Code Civ. Proc. § 339(1)*; *see also Slavin v. Trout (1993) 18 Cal. App. 4th 1536, 1539, 23 Cal. Rptr. 2d 219*

- Accountants. See *§ 345.153*

- Attorneys. See *§ 345.168*

- Health care providers. See *§ 345.227*

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§ 345.280 Promissory Notes

- Action by assignee of FDIC to enforce promissory notes from failed banks--Six years or applicable state statute of limitations, whichever is longer. *12 U.S.C. § 1821(d)(14)(A)*; *White v. Moriarty (1993) 15 Cal. App. 4th 1290, 1297-1298, 19 Cal. Rptr. 2d 200*

- Action brought by holder of note alleging default of payment due--Four years. *Code Civ. Proc. § 337(1)*; *White v. Moriarty (1993) 15 Cal. App. 4th 1290, 1299, 19 Cal. Rptr. 2d 200* (when instrument is payable in installments, cause of action on each installment accrues on day following date installment is due)

- Action based on mistake or imperfection in promissory note--Three years from discovery of mistake. *Code Civ. Proc. § 338(d)*; *Sapin v. Security First National Bank (1966) 243 Cal. App. 2d 201, 206, 52 Cal. Rptr. 254*

See discussion and form in Ch. 385, *Negotiable Instruments*

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§ 345.281 Public Employees' Retirement System

- Action for enforcement of rights under Public Employees' Retirement Law (*Gov. Code § 20000 et seq.*)--No limitation, except that three-year period applies in specified cases concerning erroneous payments into or out of retirement fund, and 10-year period applies in actions by board when payment made as result of fraudulent report for compensation or where payment is erroneous because of the death of the retired member or beneficiary or because of the remarriage of the beneficiary. *Gov. Code § 20164*

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§ 345.282 Public Entities, Officers, and Employees

- Action or proceeding against chartered city to contest validity of assessment for public improvements--Thirty days after assessment is levied. *Code Civ. Proc. § 329.5*

- Action on bonds or coupons issued by State of California--Ten years. *Code Civ. Proc. § 337.5(1)*

- Action on general obligation bonds or coupons, not secured by real property lien, issued by public entity--Ten years. *Code Civ. Proc. § 337.5(2)*

- Action against public officer under *42 U.S.C. § 1983* for deprivation of civil rights--Three years. *Code Civ. Proc. § 338(a)*; *Ney v. State of California (9th. Cir. 1971) 439 F.2d 1285, 1287*

- Action against public entity to enforce pension rights--Three years. *Code Civ. Proc. § 338(a)*; *Dillon v. Board of Pension Commrs. (1941) 18 Cal. 2d 427, 430-431, 116 P.2d 37*

- Action against public officer based on violation of statutory duty--Three years. *Code Civ. Proc. § 338(a)*; *County of Calaveras v. Poe (1914) 167 Cal. 519, 522, 140 P. 23*

- Action against public entity to compel reinstatement of public official after dismissal--Three years. *Code Civ. Proc. § 338(a)*; *Leahey v. Dept. of Water and Power (1946) 76 Cal. App. 2d 281, 286, 173 P.2d 69*

- Action against coroner, or sheriff based on act in official capacity, or in virtue of office, or on omission of official duty--Two years. *Code Civ. Proc. § 339(2)*

- Action against public officer to recover damages arising from seizure or detention of property for statutory forfeiture to state--One year. *Code Civ. Proc. § 340(d)*; *see Code Civ. Proc. § 338(e)* (action on bond)

- Action against public officer to recover damages arising from seizure of property in official capacity as tax collector--Six months. *Code Civ. Proc. § 341(1)*; *see Code Civ. Proc. § 338(e)* (action on bond)

- Action or proceeding by any local public entity against State of California, its agencies, or officials challenging constitutionality of any statute relating to funding of local entities--Ninety days from effective date of statute at issue. *Code Civ. Proc. § 341.5*

- Action against public entity to contest formation, organization, incorporation, dissolution, consolidation, change in organization, reorganization, or change in territorial boundaries of local public entity--Six months or, when notice has been given pursuant to validation procedure, 60 days from date of mailing such notice. *Code Civ. Proc. §§ 349.1, 349.4*

- Action to contest authorization, sale, or issuance of bonds by public entity--Six months or, when notice has been given pursuant to validation procedure, 60 days from date of mailing such notice. *Code Civ. Proc. §§ 349.2, 349.4*

- Action to contest proceedings for incorporation of, annexation of territory to, or consolidation of municipal corporation or corporations--Three months after completion of proceedings. *Code Civ. Proc. § 349*1/2

- Validation action by public agency--Sixty days. *Code Civ. Proc. § 860*

- Claim against public entity--Six months after accrual of cause of action when claim relates to cause of action for death, injury to person, or injury to personal property or growing crops; one year after accrual of cause of action when claim relates to any other cause of action. *Gov. Code § 911.2*; *see Gov. Code §§ 911.4, 911.6* (extension for failure to meet six-month limitation period); *see also Gov. Code §§ 901* (date of accrual of cause of action), 911.3 (late claims)

- Action against public entity on rejected claim filed in compliance with Tort Claims Act--Six months after notice of rejection or, if no notice given by entity, two years from accrual of cause of action. *Gov. Code § 945.6(a)*; *see Code Civ. Proc. § 342*; *see also Gov. Code § 901* (date of accrual of cause of action)

- Action against public entity after court relieves plaintiff from claim presentation requirements of Tort Claims Act--Thirty days from date court makes order granting relief. *Gov. Code § 946.6(f)*

- Enforcement of judgment for payment of money against local public entity, state, or state agency--Ten years after time judgment becomes final or, if judgment is payable in installments, 10 years after final installment becomes due. *Gov. Code §§ 965.5(a)* (state or state agency), 970.1(a) (local public entity)

- Accusation by grand jury seeking removal of public officer, subject to removal other than by impeachment (*see Gov. Code §§ 3060-3074*), for willful or corrupt misconduct in office--Six years after alleged misconduct. *Gov. Code § 3074*

- Punitive action against any public safety officer under Public Safety Officers *Bill of Rights* Act--One year from date of discovering the alleged misconduct. *Gov. Code § 3304(b)*; *see also Crawford v. City of Los Angeles (2009) 175 Cal. App. 4th 249, 252, 95 Cal. Rptr. 3d 550*

See discussion and forms in Ch. 464, *Public Entities and Officers: California Tort Claims Act* , Ch. 467, *Public Entities*

and Officers: Enforcement of Judgments Against Public Entities , and discussion in Ch. 483, *Quo Warranto*

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§ 345.283 Public Lands

- Action to contest sale of school lands--Five years from issuance of certificate of purchase. Pub. Res. Code § 7362

- Action to contest sale of submerged or overflowed public lands--Thirty days after order of reference. *Pub. Res. Code § 7527*

- Action to contest sale of public lands--Sixty days after order of reference. *Pub. Res. Code § 7926*

- Action to contest county survey of public lands--Ninety days after receipt of plat of survey. *Pub. Res. Code § 7927*

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§ 345.284 Public Utilities

- Action under Public Utilities Act (*Pub. Util. Code § 201 et seq.*) for refund of excess freight charges--Three years. *Code Civ. Proc. § 338(a)*; *Sunset Pacific Oil Co. v. Los Angeles & S. L. R. Co. (1930) 110 Cal. App. Supp. 773, 782, 290 P. 434*

- Action to recover reparation for overcharges--One year after date of order for payment of reparation. *Pub. Util. Code § 735*

- Action for damages resulting from violation of provision of Public Utilities Act (*Pub. Util. Code § 201 et seq.*) other than *Pub. Util. Code §§ 494* and *532*--Two years from accrual of cause of action. *Pub. Util. Code § 735*; *see Pub. Util. Code § 738* (accrual)

- Action for damages resulting from violation of *Pub. Util. Code §§ 494* or *532* (prohibiting deviation from rate schedule)--Three years from accrual of cause of action; six-month extension applicable following noticed disallowance of claim by public utility. *Pub. Util. Code § 736*; *see Pub. Util. Code § 738* (accrual)

- Action for collection of tariff charges--Three years from accrual of cause of action; six month extension applicable following public utility's noticed refusal to pay demand. *Pub. Util. Code § 737*; *see Pub. Util. Code § 738* (accrual)

- Action contesting incorporation of municipal utility district--Three months from filing of order declaring election result. *Pub. Util. Code § 11701*

- Action contesting validity of special district, or of any bonds authorized by voters thereof pursuant to Municipal Utility District Act (*Pub. Util. Code § 11501 et seq.*)--Three months after applicable proposition approved by voters. *Pub. Util. Code § 13625*

- Action challenging validity of rates or charges of municipal utility district--One hundred and twenty

days after effective date of ordinance, resolution, or motion fixing or changing rates. *Pub. Util. Code § 14402*

- Action contesting incorporation of public utility district--Twenty days after date of certificate of incorporation. *Pub. Util. Code § 15821*

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§ 345.285 Public Works Contracts

- Petition of writ of mandate under *Code Civ. Proc. § 1094.5* by affected contractor or subcontractor to review written decision of Director of Industrial Relations affirming, modifying, or dismissing civil wage and penalty assessment--45 days after service of decision. *Lab. Code § 1742(c)*

- Action seeking relief from bid--Ninety days after opening of bid. *Pub. Contract Code §§ 5102*

- Initiation of arbitration on claim involving state public works contract--Ninety days after service of final written decision on claim. *Pub. Contract Code § 10240.1* (limitation period inapplicable to claim found on cost audit, latent defect, warranty, or guarantee under contract)

- Claim for payment on state public works contract--Ninety days after service of final written decision on claim (as provided in *Pub. Contract Code § 10240.1*). *Pub. Contract Code § 10265*

- Action or proceeding for money or damages on state public works contract--Six months after either (1) contracting agency's final written decision under contract claim provisions or (2) accrual of cause of action, if no contract claims provisions exist. *Pub. Contract Code § 19100(a)*

- Action by Division of Labor Standards Enforcement of the State of California Department of Industrial Relations on behalf of workers on a public works project for prevailing wages against a surety furnishing the payment bond required for the project--Six months, thirty days after recording notice of completion. *Civ. Code § 3249*; *Division of Labor Standards Enforcement v. Seaboard Sur. Co. (1996) 50 Cal. App. 4th 1501, 1505, 1515, 58 Cal. Rptr. 2d 532*

See discussion in Ch. 481, *Public Works*

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§ 345.286 Railroads

- Action under Federal Employers' Liability Act (*45 U.S.C. § 51 et seq.*)--Three years. *45 U.S.C. § 56*; *see* discussion in Ch. 485, *Railroads* , Pt. I

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§ 345.287 Real Property

[1] Related Sections

- Escrows. See *§ 345.206*
- Grants, setting aside or affecting. See *§ 345.223*
- Leases. See *§ 345.243*
- Trust deeds. See *§ 345.318*
- Zoning and planning. See *§ 345.329*

[2] Actions to Recover or Quiet Title to Real Property

- Action for ejectment of adverse possessor or vendee of sale contract--Five years or, if action by state, 10 years. *Code Civ. Proc. §§ 315, 318*
- Action arising out of title to real property or rents or profits from real property--Five years or, if action by state, 10 years. *Code Civ. Proc. §§ 315, 319*
- Action for recovery of real property on basis of void grant from state--Five years. *Code Civ. Proc. § 317*
- Action to quiet title based on entry on real property--One year after entry and five years after accrual of right to enter. *Code Civ. Proc. § 320*
- Action for recovery of real property or possession of real property--Within five years of other party's adverse possession of property. *Code Civ. Proc. § 321*; *see Harrison v. Welch (2004) 116 Cal. App. 4th 1084, 1097, 11 Cal. Rptr. 3d 92* (action seeking to enjoin permanent encroachment is an action for

recovery of real property subject to the five-year statute of limitations of *Code Civ. Proc. § 321*, not the three-year statute of limitation for trespass under *Code Civ. Proc. § 338*)

- Action arising from a writing such as a homeowner association's conditions, covenants, and restrictions (CCR) governing the property (*Code Civ. Proc. § 337*) involving action to quiet title--Four years. *Crestmar Owners Assn. v. Stapakis (2007) 157 Cal. App. 4th 1223, 1226, 69 Cal. Rptr. 3d 231*

- Action in ejectment against tenant--Five years. *Code Civ. Proc. § 326*

- Action to quiet title generally--No specific statute governing action, so underlying theory of relief ordinarily determines which statute applies. *Muktarian v. Barmby (1965) 63 Cal. 2d 558, 560, 47 Cal. Rptr. 483, 407 P.2d 659*

- Action to quiet title while plaintiff is in possession of property--No statute of limitations. *Muktarian v. Barmby (1965) 63 Cal. 2d 558, 560, 47 Cal. Rptr. 483, 407 P.2d 659* ; *but see Sears v. County of Calaveras (1955) 45 Cal. 2d 518, 521, 522, 289 P.2d 425* , *appeal denied, 351 U.S. 959, 76 S. Ct. 1026, 100 L. Ed. 1481 (1956)* (one-year period on action to set aside deed to state for taxes (*Rev. & Tax. Code § 175*) as applicable even if plaintiff is in possession)

See discussion and forms in Ch. 13, *Adverse Possession* , and discussion in Ch. 184, *Deeds* , Ch. 240, *Easements*, and Ch. 482, *Quieting Title*

[3] Brokers and Salespersons

- Disciplinary proceeding against real estate broker--Three years from occurrence of alleged misconduct or one year from discovery in specified cases involving fraud, misrepresentation, or false promise; total period limited to 10 years. *Bus. & Prof. Code § 10101*

- Application by judgment creditor against real estate broker or salesperson seeking court order directing payment from recovery account of real estate fund--Six months after receipt of notice by Real Estate Commissioner denying payment. *Bus. & Prof. Code § 10472(a)*

- Action for breach of duty imposed by *Civ. Code § 2079 et seq.*, governing residential real estate brokers--Two years from date of possession, close of escrow, or occupancy. *Civ. Code § 2079.4*; *but see Williams v. Wells & Bennett Realtors (1997) 52 Cal. App. 4th 857, 859, 861-865, 61 Cal. Rptr. 2d 34* (Section 2079.4 not applicable in cases of intentional fraud; distinguishing Loken v. Century 21- *Award Properties (1995) 36 Cal. App. 4th 263, 42 Cal. Rptr. 2d 683* , which held Section 2079.4 applicable to causes of action for negligent misrepresentation); *Field v. Century 21 Klowden-Forness Realty (1998) 63 Cal. App. 4th 18, 20-21* (Section 2079.4 not applicable to claims against brokers who are buyer's exclusive agent)

See discussion in Ch. 103, *Brokers*

[4] Development Projects

- Action to attack, review, set aside, void, or annul imposition of fees, dedications, reservations, or other exactions imposed on development project by a local agency--One hundred eighty days after delivery of protest notice to local agency (which must be filed at time of approval or conditional approval of development project or within 90 days of date fees, etc. are imposed). *Gov. Code § 66020(d)*

[5] Community Redevelopment Law

- Action to void purchase, conveyance, contract, encumbrance, or sublease made in violation of *Health & Safety Code § 33701 et seq.*--Three years from date of transaction. *Health & Safety Code § 33729*

[6] Good Faith Improver of Real Property

- Action against land owner by good faith improver for appropriate relief--One Year. *Code Civ. Proc. § 340(e)*

[7] Improvements to Real Property

- Action for damages against person performing or furnishing design, specifications, surveying, planning, supervision, observation of construction, or construction of improvement to real property, based on patent deficiency or based on injury to property, personal injury, or wrongful death arising out of such patent deficiency--Two years for personal injury or wrongful death under *Code Civ. Proc. § 335.1*; three years for property damage under *Code Civ. Proc. § 338(b), (c)*; but in any case no more than four years from substantial completion of improvement or, if injury occurs during fourth year after substantial completion, within five years from substantial completion of improvement. *Code Civ. Proc. § 337.1(a), (b)*; *The Luckman Partnership, Inc. v. Superior Court (2010) 184 Cal. App. 4th 30, 108 Cal. Rptr. 3d 606*

- Action for damages based on negligence in construction of improvements causing latent harm to real property--Three years from either (a) date plaintiff actually discovered injury and negligent cause or (b) earlier date plaintiff could have discovered injury and cause through exercising reasonable diligence. *Code Civ. Proc. § 338(b)*; *Kirby v. Albert D. Seeno Construction Co. (1992) 11 Cal. App. 4th 1059, 1065, 14 Cal. Rptr. 2d 604*

- Action for damages against person or surety of person who develops real property or who performs or furnishes design, specifications, surveying, planning, supervision, observation of construction, or construction of improvement to real property, based on latent deficiency or based on injury to real or personal property arising out of such latent deficiency--Four years from discovery of defects for breach of warranty, or three years from discovery of property damage for negligence, but in no case more than ten years from substantial completion of development or improvement. *Code Civ. Proc. §§ 337.1(a), 337.15(a), 338(b), (c)*; *Regents of University of Cal. v. Hartford Acci. & Indem. Co. (1978) 21 Cal. 3d 624, 630, 641, 147 Cal. Rptr. 486, 581 P.2d 197* ; *North Coast Business Park v. Nielsen Construction Co. (1993) 17 Cal. App. 4th 22, 27, 21 Cal. Rptr. 2d 104* ; *see* *Grange Debris Box & Wrecking Co. v. Superior Court (1993) 16 Cal. App. 4th 1349, 1354-1357, 20 Cal. Rptr. 2d 515* (cross complaint for indemnity barred) *FNB Mortgage Corp. v. Pacific General Group (1999) 76 Cal. App. 4th 1116, 1128-1131, 90 Cal. Rptr. 2d 841* (*Code Civ. Proc. § 337.15(c)* allows cross complaint beyond 10-year period only if main action was brought within 10-year period); *Lantzy v. Centex Homes (2003) 31 Cal. 4th 363, 367, 2 Cal. Rptr. 3d 655* (*Code Civ. Proc. § 337.15* 10-year statute of limitations for latent construction defects is not subject to a general rule of equitable tolling)

See discussion in Ch. 56, *Architects* , Ch. 104, *Building Contracts* , and Ch. 300, *Indemnity and Contribution*

[8] Injury to Property

- Action for injury to real property--Three years. *Code Civ. Proc. § 338(b)*

- Action against former owner for injury to real property resulting from alleged discharge of volatile organic chemicals on property--Three years from discovery. *Code Civ. Proc. § 338(b)*; *see CAMSI IV v. Hunter Technology Corp. (1991) 230 Cal. App. 3d 1525, 1534-1538, 282 Cal. Rptr. 80*

- Nuisance. See *§ 345.265*

- Trespass. See *§ 345.316*

[9] Partition

- Action of partition between tenants in common--No limitation period. *Adams v. Hopkins (1904) 144 Cal. 19, 27, 77 P. 712* ; *see* discussion in Ch. 397, *Partition*

[10] Real Property Sales Contracts

- Action to establish vendor's lien--Whatever period applicable to action to recover purchase money, generally four years from date of default if note given for balance of purchase price. *Code Civ. Proc. § 337(1)*; *Finnell v. Finnell (1909) 156 Cal. 589, 599, 105 P. 740*

- Action for specific performance of written contract to convey real property--Four years. *Code Civ. Proc. § 337(1)*; *Reiner v. Hermann (1947) 79 Cal. App. 2d 543, 548, 180 P.2d 385*

- Action to enforce rights of vendee or vendee's successor in interest for noncompliance with Subdivision Map Act (*Gov. Code § 66410 et seq.*)--One year after discovery of failure to comply with provisions of *Civ. Code § 2985.51*. *Civ. Code § 2985.51(c)*

See discussion in Ch. 569, *Vendor and Purchaser*

[11] Recordation of Title

- Times prescribed in *Civ. Code § 880.020 et seq.* (relating to marketable record title) for expiration of interest in real property, enforcement, bringing action, or other required act are absolute and apply notwithstanding any disability, lack of knowledge, tolling provisions, or statute of limitations. *Civ. Code § 880.250*

[12] Restrictions on Use of Property

- Action for violation of restriction on use of real property [*see Civ. Code § 784*, defining restrictions]--Five years from date person seeking to enforce restriction discovered or through reasonable diligence should have discovered the violation. *Code Civ. Proc. § 336(b)* (not a bar to action commenced before January 1, 2001).

[13] Slander of Title

- Action for slander of title to real property--Three years. *Code Civ. Proc. § 338(g)*; *see Stalberg v. Western Title Ins. Co. (1991) 230 Cal. App. 3d 1223, 1230, 282 Cal. Rptr. 43* ; *see also* discussion and form in Ch. 340, *Libel and Slander*

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§ 345.288 Redevelopment Plans

- Proceeding against redevelopment agency to attack redevelopment plan--Sixty days from adoption or amendment of redevelopment plan. *Health & Safety Code § 33500*

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§ 345.289 Religious Corporations

- Action to remedy improper self-dealing transaction--Two years after filing with attorney general of written notice setting forth material facts of transaction or, if no notice filed, five years after cause of action has accrued. *Corp. Code § 9243(e)*

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§ 345.290 Rent Control Ordinances

- Action for landlord's wrongful endeavor to recover, or recovery of, possession of rental unit in violation of local rent control ordinance providing for recovery of money damages not less than treble actual damages and other relief court deems appropriate--One year. *Code Civ. Proc. § 340(a)*; *Menefee v. Ostawari (1991) 228 Cal. App. 3d 239, 244, 278 Cal. Rptr. 805* (cause of action accrued under ordinance when 30-day notice terminating tenancy was served); *see also § 345.305*

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§ 345.291 Resource Conservation Districts

- Action or proceeding to review act by directors of Resource Conservation District concerning improvement district therein--Six months after act. *Pub. Res. Code § 9911*

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§ 345.292 Restraint of Trade

- See *§ 345.321*

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§ 345.293 Sacramento Redevelopment Plan

- Action challenging redevelopment plan or incorporation of document into redevelopment plan or any findings or determination of authority in connection with such plan--Prior to adoption of plan and no later than 60 days from date of adoption of resolution adopting plan or any document. *Gov. Code § 8187*

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§ 345.294 Sales

- See *§ 345.185*

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§ 345.295 Sanitation

- Action or proceeding contesting validity or organization of sewer and water facilities district established under *Health & Safety Code § 4605 et seq.*--Sixty days from recordation of resolution establishing district. *Health & Safety Code § 4613*

- Action on sewer revenue bond--Six months after expiration of period for filing verified claims. *Health & Safety Code § 5021*

See discussion in Ch. 511, *Sanitation and Sewerage Districts*

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§ 345.296 Savings and Loans

- See *§ 345.212*

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§ 345.297 Schools and School Districts

- Action against school district for payment of salaries to teachers not having written contracts--Three years. *Code Civ. Proc. § 338(a)*; *Campbell v. Graham-Armstrong (1973) 9 Cal. 3d 482, 489-490, 107 Cal. Rptr. 777, 509 P.2d 689*

- Action against school district, to compel reinstatement of teacher after dismissal--Three years. *Code Civ. Proc. § 338(a)*; *Lerner v. Los Angeles City Board of Education (1963) 59 Cal. 2d 382, 389, 29 Cal. Rptr. 657, 380 P.2d 97*

- Action against school district to compel classification of teacher as permanent employee--Three years. *Code Civ. Proc. § 338(a)*; *Vittal v. Long Beach Unified Sch. Dist. (1970) 8 Cal. App. 3d 112, 121, 87 Cal. Rptr. 319*

- Action against Teachers' Retirement Board or State Teachers' Retirement System--Except as provided for in *Educ. Code §§ 23302* and *24613*, three years after all obligations to or on behalf of member, former member, beneficiary, or annuity beneficiary have been discharged. *Educ. Code § 22008(a)*

- Proceeding by State Teachers' Retirement System to recover incorrect payment to member, former member, beneficiary, or annuity beneficiary--Except as provided for in *Educ. Code §§ 23302* and *24613*, three years from date of incorrect payment. *Educ. Code § 22008(b)*; *see Educ. Code § 22008(c), (d)* (delayed commencement of limitation periods if erroneous payment due to lack of or inaccurate information or to fraud or intentional misrepresentation)

- Action to question validity of order by Board of Supervisors reorganizing community college district or changing district boundaries--One year from date of order. *Educ. Code § 74251(b)*

- Unfair employment practice charge--Six months after alleged unfair practice. *Gov. Code §§ 3541.5(a), 3563.2(a)*

See discussion in Ch. 512, *Schools: Certification and Dismissal* , and Ch. 514, *Schools: Injuries to Students* .

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§ 345.297A Second World War Slave Labor and Forced Labor Victims

- Action by Second World War slave labor victim or forced labor victim, or victim's heir, for compensation for labor performed--action not to be dismissed for failure to comply with applicable statute of limitation, if action commenced on or before December 31, 2010. *Code Civ. Proc. § 354.6(c)*

WARNING--Federal Preemption at Issue.

A Ninth Circuit panel has held the limitation-period extension in *Code Civ. Proc. § 354.6* is invalid under the field-preemption doctrine [*Deustch v. Turner (9th Cir. 2003) 324 F.3d 692]*

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30-V California Forms of Pleading and Practice--Annotated § 345.298

§ 345.298 Securities Regulation

- Civil liability under Securities Act of 1933 (*15 U.S.C. § 77 l*(1), 77m) for use of mails or other instrumentality of interstate commerce for sale, delivery, or offer to sell unregistered security--One year from date of last sales-related activity. *15 U.S.C. § 77m*; *Toombs v. Leone (9th Cir. 1985) 777 F.2d 465, 468*

- Liability under Securities Act of 1933 (*15 U.S.C. § 77a et seq.*) and Securities Exchange Act of 1934 (*15 U.S.C. § 78a et seq.*) to purchaser of shares for use of deceptive devices in sale--Three years from discovery. *Code Civ. Proc. § 338(d)*; *Sackett v. Beaman (9th Cir. 1968) 399 F.2d 884, 890*

- Private "10b-5" claim (*see 15 U.S.C. § 78j(b)*)--One year from discovery of violation and within three years after violation. *Lampf v. Gilbertson (1991) 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321, 331-334, 336*

- Action for violation of regulatory requirements (*Corp. Code § 25503, 25504*, or *25504.1*)--Two years after violation on which action is based, or one year after discovery by plaintiff of facts constituting violation, whichever occurs first. *Corp. Code § 25507(a)*

- Action by corporation to enforce right of indemnification or contribution against controlling personnel based on controlling personnel's violation of corporate securities law--One year after final judgment based on liability for which right of indemnification or contribution exists. *Corp. Code § 25508*

- Action under security owner's protection law for return of compensation (*Corp. Code § 27200*)--Two years after violation on which action based, or within one year after discovery by plaintiff of facts constituting violation, whichever expires first. *Corp. Code § 27201*

See discussion in Ch. 515, *Securities and Franchise Regulation*

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§ 345.299 Seduction

- Action for seduction of person below age of legal consent--One year. *Code Civ. Proc. § 340(c)*

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§ 345.300 Sex Discrimination

- See *§ 345.204*

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§ 345.301 Sexual Molestation

- Action filed for recovery of damages suffered as a result of childhood sexual abuse--Eight years after date plaintiff attains age of majority or within three years of date plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after age of majority was caused by sexual abuse, whichever occurs later; no later than plaintiff's 26th birthday as to defendants, other than the abuser, whose acts were a legal cause of the injury, unless the person or entity against whom the action is commenced knew, had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps, and implement reasonable safeguards, to avoid future acts of unlawful sexual conduct. *Code Civ. Proc. § 340.1(a)*

- Revival of time barred childhood sexual abuse claims under *Code Civ. Proc. § 340.1(c)* only permitted actions filed between January 1, 2003 and December 31, 2003 (*Hightower v. Roman Catholic Bishop of Sacramento (2006) 142 Cal. App. 4th 759, 767)* ; *see also Perez v. Roe (2006) 146 Cal. App. 4th 171, 188, 52 Cal. Rptr. 3d 762* (revival time of *Code Civ. Proc. § 340.1* inapplicable to cases fully adjudicated before revival statute enacted)

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§ 345.302 Ships and Shipping

- Suit for recovery of damages of personal injury, death, or both, arising out of maritime tort--Three years, unless other period specified by law. *46 U.S.C. § 763a*; *see* discussion in Ch. 522, *Ships and Shipping*

- Action to enforce *Harb. & Nav. Code § 700 et seq.*, governing yacht and ship brokers--Three years. *Harb. & Nav. Code § 740*

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§ 345.303 Special Assessment and Bond Refinancing Law

- Action or proceeding against special district to cancel, annul, or correct, review, or enjoin enforcement of reassessment under Special Assessment and Bond Refunding Law of 1938 (*Gov. Code § 59100 et seq.*)--Sixty days after confirmation of reassessment. *Gov. Code § 59670*

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§ 345.304 Streets and Highways

[1] In General

- Action to foreclose assessment lien for street improvements--Two years. *Code Civ. Proc. § 329*

- Action by utility or Department of Transportation for apportionment of cost of removal and relocation of utility facility in freeway--Three years from date of completion by utility of removal or relocation. *Sts. & Hy. Code § 707*

- Proceeding against local public entity attacking validity of proceedings had under Special Assessment Investigation, Limitation and Majority Protest Act of 1931 (*Sts. & Hy. Code § 2800 et seq.*)--Thirty days after date of final action. *Sts. & Hy. Code § 3012*

- Action or proceeding contesting validity of assessment or supplementary assessment levied under Municipal Improvement Act of 1913 (*Sts. & Hy. Code § 10000 et seq.*)--Thirty days after assessment levied. *Sts. & Hy. Code § 10400* (also providing 30-day period for perfecting appeal from judgment in such action or proceeding)

- Action or proceeding contesting validity of assessment levied under Tree Planting Act of 1931 (*Sts. & Hy. Code § 22000 et seq.*)--Thirty days after assessment levied. *Sts. & Hy. Code § 22132* (also providing 30-day period for perfecting appeal from judgment in such action or proceeding)

- Action or proceeding contesting validity of assessment levied under Landscaping and Lighting Act of 1972 (*Sts. & Hy. Code § 22500 et seq.*) to pay debt service on improvement bonds--Thirty days after initial assessment levied. *Sts. & Hy. Code § 22675* (also providing 30-day period for perfecting appeal from judgment in such action or proceeding)

- Action to contest validity of emergency bond issue by Joint Highway District--Sixty days from date of bonds' issuance. *Sts. & Hy. Code § 25498*

- Proceeding to contest validity of incorporation of bridge and highway district--Three months from date of issuance of certificate of incorporation. *Sts. & Hy. Code § 27113*

[2] Improvement Act of 1911

- Action to attack validity of reassessment--Thirty days after recording of diagram and reassessment. *Sts. & Hy. Code § 5563*

- Action, suit, or proceeding to attack assessment or reassessment--Thirty days after recording of warrant, diagram, and assessment or reassessment. *Sts. & Hy. Code §§ 5563, 5660*

- Proceeding to foreclose lien for cost of sidewalk construction or repair--No limitation. *Sts. & Hy. Code §§ 5627* (repair), 5892 (construction)

- Action or suit asserting that sale of property for delinquency was invalid--One year after date notice of sale mailed. *Sts. & Hy. Code § 6570* (only applies if copy of certificate of sale sent to assessed party)

- Action, suit, or proceeding to attack deed or validity of proceedings subsequent to issuance of certificate of sale--Twelve months after issuance of deed or, in specified case, 12 months after discovery of deed's issuance. *Sts. & Hy. Code § 6571*

- Proceeding to foreclose lien of bond--Four years after due date or 30 days after service of personal demand for payment. *Sts. & Hy. Code §§ 6610, 6611*

[3] Improvement Bond Act of 1915

- Action to attack or review reassessment--Sixty days after challenged action. *Code Civ. Proc. § 860*; *Sts. & Hy. Code §§ 9478, 9481*

- Proceeding to foreclose lien of assessment--Four years after last maturity of principal secured by assessment. *Sts. & Hy. Code §§ 8830, 8834*; *see also Sts. & Hy. Code §§ 9350, 9352* (same period for foreclosure of lien for reassessment for refunding bonds)

- Action or proceeding contesting consent of landowners to refunding and reassessment--Three months after determination of legislative body. *Sts. & Hy. Code § 9187*

- Action to contest validity of refunding bonds--Three months after issuance of bonds. *Sts. & Hy. Code § 9416*

- Action, suit, or proceeding contesting validity of refunding bonds issued under Refunding Act of 1984 for 1915 Improvement Act Bonds (*Sts. & Hy. Code § 9500 et seq.*)--Thirty days after adoption of resolution providing for bonds' issuance. *Sts. & Hy. Code § 9700*

- Action, suit, or proceeding to attack reassessment levied under Refunding Act of 1984 for 1915 Improvement Act Bonds (*Sts. & Hy. Code § 9500 et seq.*) or review proceedings taken thereunder--Thirty days after adoption of resolution providing for refunding bonds' issuance. *Sts. & Hy. Code § 9707*

[4] Parking District Law of 1951

- Proceeding to contest formation of parking district--Thirty days after adoption of contested ordinance. *Sts. & Hy. Code § 35276*

- Action or proceeding to attack assessment or reassessment or to review proceedings made pursuant to Parking District Law of 1951--Thirty days after recording of diagram and assessment or reassessment. *Sts. & Hy. Code § 35474*

[5] Street Lighting Act

- Proceeding against city contesting validity of assessment levied under Street Lighting Act of 1919 (*Sts. & Hy. Code § 18000 et seq.*) or Street Lighting Act of 1931 (*Sts. & Hy. Code § 18300 et seq.*)--Thirty days after time assessment is levied. *Sts. & Hy. Code §§ 18095, 18398* (also providing 30-day period for perfecting appeal from judgment in such proceedings)

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§ 345.305 Statute, Action on

- Action on liability created by statute, other than penalty or forfeiture--Three years. *Code Civ. Proc. § 338(a)*

- Action on statute for penalty or forfeiture, when action is given to individual or to individual and state, except when statute imposing it prescribes a different limitation--One year. *Code Civ. Proc. § 340(a)*; *see Murphy v. Kenneth Cole Prods., Inc. (2007) 40 Cal. 4th 1094, 56 Cal. Rptr. 3d 880, 155 P.3d 284* (distinguishing penalty from wage claim)]

- Action on statute for forfeiture or penalty to people of California--One year. *Code Civ. Proc. § 340(b)*

See discussion in *§ 345.18[3]*

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§ 345.306 Structural Pest Control Operators

- Complaint against structural pest control operator, by injured party, filed with regulatory agency--Two years after act or omission complained of; four years in case of fraud. *Bus. & Prof. Code § 8621*

- Proceeding against structural pest control operator, as licensee, for disciplinary action--One year after filing of complaint or, in case of fraud, two years after discovery of facts by regulatory agency. *Bus. & Prof. Code § 8621*

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§ 345.307 Subrogation

- Action against tortfeasor by insurance carrier as subrogee of injured party--Same period as for action by injured party. *Liberty Mutual Ins. Co. v. Fabian (1964) 228 Cal. App. 2d 427, 436, 39 Cal. Rptr. 570*

- Subrogation action brought by Teachers' Retirement Board or its agent under contract pursuant to *Educ. Code § 24500 et seq.*--Three years after liability of plan to pay benefits is fixed. *Educ. Code § 24505*

- Action concerning liability of tortfeasor to State Personnel Board for payments made under Public Employee's Retirement Law (*Gov. Code § 20000 et seq.*) on account of injury to or death of state employee--Three years after liability of State Employees' Retirement System is fixed. *Gov. Code § 20255*

- Action concerning liability of tortfeasor to county's board of retirement for payments made under County Employees' Retirement Law of 1937 (*Gov. Code § 31450 et seq.*) on account of injury to or death of county employee--Three years after liability of retirement system to pay benefits is fixed. *Gov. Code § 31823*

- Insurer's action to subrogate claim paid to insured under uninsured motorist coverage--Three years after payment made. *Ins. Code §§ 11580.2(g)* (bodily injury liability insurance), 11580.26(d) (property damage insurance)

- Action by Director of Industrial Relations to recover damages, following payment of worker's compensation from Uninsured Employers Fund, from person or entity other than employer whose tortious act or omission caused employee's injury or death--One year after later of either (1) time Director pays compensation or (2) time Director becomes obligated to pay compensation. *Lab. Code § 3732(c)*

See discussion and form in Ch. 536, *Subrogation*

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§ 345.308 Suretyship

- Action against principal or surety under bond when obligations under surety bond are conditioned on performance of principal--Statute of limitations applicable with respect to obligations of principal, other than obligations of the principal under bond, also applies to bar action against principal or surety under bond, unless terms of bond provide otherwise. *Code Civ. Proc. § 359.5*

- Action on bond of licensed casher or seller of checks--Two years after act complained of or default. *Fin. Code § 12212*

- Action on surety bond issued by health care service plan--Two years after act on which suit based. *Health & Safety Code § 1376(b)*

- Action on bond of guardian or conservator--Four years from discharge or removal of guardian or conservator or from date order surcharging guardian or conservator becomes final, whichever is later. *Prob. Code § 2333(b)*; *Estate of Mason (1990) 224 Cal. App. 3d 634, 637-638, 274 Cal. Rptr. 61* ; *see* discussion in Ch. 290D, *Guardianship and Conservatorship: Actions Against Guardians, Conservators, and Sureties*

- Action on bond of guardian or conservator--In any case, six years from date judgment under *Prob. Code 2103* or later of the orders under *Prob. Code § 2333(b)* becomes final, notwithstanding *Prob. Code § 2103(b)* (nonfinality of judgment or order obtained by fraud, conspiracy, or misrepresentation). *Prob. Code § 2333(c)*

- Action on bond of decedent's personal representative--Four years from discharge or removal of personal representative or from date order surcharging representative becomes final, whichever is later. *Prob. Code § 8488(b)*; *see* discussion in Ch. 446, *Probate: Bonds--Increase and Decrease During Administration*

- Action on bond of decedent's personal representative--In any case, six years from date judgment

under *Prob. Code § 7250* or later of orders under *Prob. Code § 8488(b)* becomes final, notwithstanding *Prob. Code § 7250(c)* (non-finality of judgment obtained by fraud, conspiracy, or misrepresentation). *Prob. Code § 8488(c)*

- Action by Division of Labor Standards Enforcement of the State of California Department of Industrial Relations on behalf of workers on a public works project for prevailing wages against a surety furnishing the payment bond required for the project--Six months, thirty days after recording notice of completion. *Civ. Code § 3249*; *Division of Labor Standards Enforcement v. Seaboard Sur. Co. (1996) 50 Cal. App. 4th 1501, 1505, 1515, 58 Cal. Rptr. 2d 532*

See also discussion in Ch. 538, *Suretyship, Bonds, and Undertakings*

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§ 345.309 Surplus United States Property

- Action contesting finding of fact or conclusion of Surplus Property Commission (*see Gov. Code § 40500 et seq.* (Municipal Federal Surplus Property Authority Law))--Six months after finding or conclusion made. *Gov. Code § 40578*

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§ 345.310 Surveyors

- See *§ 345.287[7]*

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§ 345.311 Talent Agencies

- Action or proceeding concerning violation of provisions governing talent agencies (*Lab. Code § 1700 et seq.*)--One year after alleged violation. *Lab. Code § 1700.44*

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§ 345.312 Taxation

[1] In General

- Civil action to recover tax refund following rejection of refund claim by Board of Equalization--Ninety days after Board of Equalization mails notice of action on taxpayer's claim. *Rev. & Tax. Code §§ 6933* (sales and use tax), 8148 (motor vehicle fuel license tax), 9173 (use fuel tax), 11573 (private railroad car tax), 13103 (insurance tax), 30403 (cigarette tax), 32413 (alcoholic beverage tax), 38613 (timber yield tax), 40127 (energy resources surcharge), 41110 (emergency telephone surcharge)

See discussion in Ch. 540, *Taxes and Assessments*

[2] Alcoholic Beverage Tax

- Notice of deficiency determination--Three years after date when amount should have been paid or the return was due, or within three years after the return was filed, whichever period expires later; or, if no return made, eight years after date return was due. *Rev. & Tax. Code § 32272*

[3] Bank and Corporation Tax

- Civil action to recover tax when taxpayer failed to report over 25 percent of gross income--Six years after return filed. *Rev. & Tax. Code § 19058(a)*

- Assessment of business entity's liability for tax as transferee or fiduciary of another taxpayer--Variable periods of up to three years after expiration of period of limitation for assessment against other taxpayer. *Rev. & Tax. Code § 19074*

- Taxpayer's action against Franchise Tax Board (FTB) for recovery of interest on refund claim--Ninety days after mailing of notice of FTB's action disallowing interest or, if disallowance of interest is appealed to State Board of Equalization (SBE), 90 days after SBE's determination of appeal becomes final under *Rev. & Tax. Code 19346*; if FTB fails to mail notice of disallowance of interest, six

months after taxpayer claimed interest. *Rev. & Tax. Code §§ 19347, 19348*; *see also Rev. & Tax. Code §§ 17003, 18402* (defining board)

- Taxpayer's action against Franchise Tax Board (FTB) for refund of bank and corporation tax paid under void assessment--Four years from last date prescribed for filing return, one year from date tax paid, or 90 days after (a) notice of action by the FTB on any claim for refund, or (b) the determination the by State Board of Equalization on appeal from the FTB action on a claim for refund becomes final pursuant to *Rev. & Tax. Code § 19334*, whichever expires later. *Rev. & Tax. Code § 19384*

- Action by Franchise Tax Board (FTB) to recover erroneous refund or credit--Two years after refund or credit made or period for FTB to mail notice of proposed deficiency assessment, whichever longer. *Rev. & Tax. Code § 19411*

[4] Estate Tax

- Collection proceedings--Ten years after delinquency determination issued. *Rev. & Tax. Code § 13680*

[5] Generation-Skipping Transfer Tax

- Taxpayer's action to have tax modified because of erroneous deficiency amount--Three years after deficiency determination. *Rev. & Tax. Code § 16734*

- Collection proceedings--Ten years after issuance of deficiency determination. *Rev. & Tax. Code § 16830*

- Taxpayer's action for refund--Four years from last day prescribed for filing return, one year from date of overpayment, or 90 days after denial of claim by Controller, whichever period expires later. *Rev. & Tax. Code § 16860*

[6] Hazardous Substance Tax

- Taxpayer's action to recover refund--Three years after overpaid taxes were due and payable, six months from date of determination by Board of Equalization of amount due, or after six months from date of overpayment, whichever period expires latest or in case of determination relating to facility fees under *Health & Safety Code § 25205.2* or generator fees under *Health & Safety Code § 25205.5*, when taxpayer paid both fees for same period and site, 90 days from final board or judicial action, whichever is later. *Rev. & Tax. Code § 43452(a), (e), (f)*

[7] Personal Income Tax

- Taxpayer's protest to Franchise Tax Board (FTB) against proposed deficiency assessment--Sixty days after notice of assessment mailed; if notice specifies deadline, protest filed by that deadline deemed timely. *Rev. & Tax. Code §§ 19034, 19041*; *see also Rev. & Tax. Code § 19045* (appeal from FTB action on protest--Thirty days from mailing of FTB's notice of action to taxpayer; appeal deemed timely if filed on or before deadline, if any, specified in notice)

- Notice to taxpayer of proposed deficiency assessment--Four years, generally, after return is filed; six years if taxpayer failed to report over 25 percent of gross income. *Rev. & Tax. Code §§ 19057(a), 19058(a)*; *see also Rev. & Tax. Code §§ 19059, 19060* (extension of limitation period if amendment or correction of federal return necessary)

- Taxpayer's claim for credit or refund--Four years from date return filed (if filed within time prescribed by *Rev. & Tax. Code § 18567* or *18604*, whichever is applicable), four years from last day prescribed for filing return (determined without regard to any extension of time for filing return) or one year from date of overpayment, whichever period expires later with stated exceptions. *Rev. & Tax. Code § 19306*; *see also Rev. & Tax. Code §§ 19311* (extension of limitation period if credit or refund results from amendment of federal return), 19312 (seven-year period applicable to specified claims), 19314 (offset of overpayment against deficiency not allowed after seven years from due date of return on which overpayment is determined)

- Action against Franchise Tax Board (FTB) to recover interest on refund claim--Ninety days after mailing of notice of FTB's action disallowing interest or, if disallowance of interest is appealed to State Board of Equalization (SBE), 90 days after SBE's determination of appeal becomes final under *Rev. & Tax. Code 19346*; if FTB fails to mail notice of disallowance of interest, six months after taxpayer claimed interest. *Rev. & Tax. Code §§ 19347, 19348*; *see also Rev. & Tax. Code §§ 17003, 18402* (defining board)

- Suit against taxpayer by Franchise Tax Board to recover unpaid taxes, penalties, and interest--Ten years after determination of liability or within period during which tax lien is in force. *Rev. & Tax. Code § 19371(a)*; *see also Rev. & Tax. Code § 19371(b)* (conditions under which six-year period prescribed by former version of Rev. & Tax. Code § 17371 would remain applicable)

- Action against Franchise Tax Board for refund of personal income tax paid under void assessment--Four years from last date prescribed for filing return, one year from date tax paid, or 90 days after (a) notice of action by the FTB on any claim for refund, or (b) the determination the by State Board of Equalization on appeal from the FTB action on a claim for refund becomes final pursuant to *Rev. & Tax. Code § 19334*, whichever expires later. *Rev. & Tax. Code § 19384*

- Action by Franchise Tax Board (FTB) to recover erroneous refund or credit--Two years after refund or credit made or period for FTB to mail notice of proposed deficiency assessment, whichever longer. *Rev. & Tax. Code § 19411*

[8] Property Tax

- Action against taxing agency to determine validity of deed to agency based on tax delinquency--One year from date of execution of deed. *Rev. & Tax. Code § 175*

- Proceeding based on alleged invalidity or irregularity of deed by taxing agency (delinquent property taxes)--One year after deed recorded. *Rev. & Tax. Code § 177(a)*

- Assessment of tax on property escaping local assessment--Four years, six years, or eight years, depending on circumstances, after July 1 assessment year in which property escaped taxation or was underassessed. *Rev. & Tax. Code § 532(a), (b)*

- Assessment of tax on property escaping state assessment--Four years (escape due to nonwillful act or omission of taxpayer) or six years (fraudulent act or omission or collusion with State Board of Equalization). *Rev. & Tax. Code § 866*

- Seizure and sale of property for payment of taxes on unsecured roll--Three years from date on which taxes became lien excluding any period during which collection actions are prohibited by bankruptcy

laws or rules, or by court order. *Rev. & Tax. Code § 2963*

- Action by original owner alleging invalidity of or irregularity in proceedings for sale of tax-defaulted property by taxing agency to private party--One year after date of execution of tax collector's deed. *Rev. & Tax. Code § 3725*

- Action based on alleged invalidity or irregularity in sale of tax-deeded property by taxing agency to itself or other public entity--One year after date of execution of instrument on which claim of invalidity or irregularity is based. *Rev. & Tax. Code § 3809*

- Redemption proceeding based on right or claim under tax deed on property or interest therein not appearing on abstract list--Prior to destruction of delinquent tax roll and original secured roll (*see Rev. & Tax. Code § 4377*) unless tax deed was recorded in proper county at date of destruction or within one year after date of deed, whichever is later. *Rev. & Tax. Code § 4379*

- Declaratory relief action by taxpayer challenging legality or constitutionality of tax or assessment when tax or assessment occurred as direct result of change in administrative regulations or statutory or constitutional law--Thirty days after delinquency date of property tax bill or any installment thereof. *Rev. & Tax. Code § 4808*

- Filing claim to obtain property tax refund--Four years after making payment sought to be refunded or one year after mailing of notice (*see Rev. & Tax. Code § 2635*) or period agreed on by taxpayer and assessor (*see Rev. & Tax. Code § 532.1(a)*), or within 60 days of the date of the notice prescribed by *Rev. & Tax. Code § 4836(a)*, whichever is later. *Rev. & Tax. Code § 5097(a)(2)* However, the action must be filed within one year, if an application for a reduction in an assessment or an application for equalization of an assessment has been filed pursuant to *Rev. & Tax. Code § 1603* and the applicant does not state in the application that the application is intended to constitute a claim for a refund, of either of two specified events, whichever occurs first [*Rev. & Tax. Code § 5097(a)(3)(A)*]. And the action must be filed within six months, if an application for a reduction in an assessment or an application for equalization of an assessment has been filed pursuant to *Rev. & Tax. Code § 1603* and the applicant does not state in the application that the application is intended to constitute a claim for a refund, after the county assessment appeals board makes a final determination on the application for reduction in assessment or on the application for equalization of an escape assessment, and mails a written notice of its determination to the applicant and the notice advises the applicant to file a claim for refund within six months of the date of the county assessment appeals board's final determination [*Rev. & Tax. Code § 5097(a)(3)(B)*]. *also Rev. & Tax. Code § 532.1(b)* (extension of limitation period for filing refund claim if Notice of Proposed Escape Assessment is delivered less than 90 days before expiration of escape assessment period)

- Action to recover property tax refund following rejection of claim by board of supervisors or city council--Six months after rejection of claim. *Rev. & Tax. Code § 5141(a)* (does not apply in action under *Rev. & Tax. Code § 5148*)

- Action by to recover taxes on state-assessed property arising out of dispute concerning assessment made pursuant to *Rev. & Tax. Code § 721*--Four years after mailing of decision or findings by State Board of Equalization. *Rev. & Tax. Code § 5148(g)*

[9] Sales and Use Taxes

- Action to collect delinquent tax and penalties from taxpayer--Three years after delinquency or during

lien period. *Rev. & Tax. Code § 6711*

- Claim for refund--Three years from end of month following close of taxable period, six months from date of overpayment, or, for recovery of amounts paid pursuant to State Board of Equalization determination, six months from date determination becomes final, whichever is latest. *Rev. & Tax. Code § 6902(a)*

[10] Special Tax Under Community Facilities Act

- Action or proceeding to challenge levy of special tax or increase in special tax pursuant to Mello-Roos Community Facilities Act of 1982 (*Gov. Code § 53311 et seq.*)--Thirty days after special tax is approved by voters. *Gov. Code § 53341* (also providing 30-day period to appeal final judgment)

- Action to determine validity of bonds issued pursuant to Mello-Roos Community Facilities Act of 1982 (*Gov. Code § 53311 et seq.*), or validity of any special taxes levied pursuant to Act--30 days after voters approve issuance of bonds or special tax. *Gov. Code § 53359* (also providing 30-day period to appeal final judgment)

[11] Timber Yield Tax

- Action to collect delinquent tax amount--During period of tax lien or three years after tax becomes due and payable or delinquent. *Rev. & Tax. Code § 38511*

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§ 345.313 Title Insurance

- See *§ 345.235*

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§ 345.313A Toxic Injury

- Action for injury or illness due to exposure to a hazardous material or toxic substance, other than asbestos claims or actions against a health care provider--Two years after the plaintiff's date of injury; or two years after the plaintiff becomes aware of, or reasonably should have become aware of: (1) an injury, (2) the physical cause of the injury or death, and (3) sufficient facts to put a reasonable person on inquiry notice that the injury or death was caused or contributed to by the wrongful act of another. *CCP § 340.8*. Media reports regarding the hazardous material or toxic substance contamination do not, in and of themselves, constitute sufficient facts to put a reasonable person on inquiry notice that the injury or death was caused or contributed to by the wrongful act of another. *CCP § 340.8(c)(2)*

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§ 345.314 Trade Secrets

- See *§ 345.321*

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§ 345.315 Transit Districts

- Action, suit, or proceeding to challenge validity of proceedings concerning issuance of limited obligation bonds (*see Pub. Util. Code § 99320 et seq.*)--Thirty days after adoption of resolution providing for issuance of bonds. *Pub. Util. Code § 99371*

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§ 345.316 Trespass

- Action for trespass on or injury to real property--Three years. *Code Civ. Proc. § 338(b)*

- Action for damages for wrongful injuries to timber, trees, or underwood upon land of another, or removal thereof--Five years from date of trespass. *Civ. Code § 3346(c)*

See discussion and forms in Ch. 550, *Trespass* , and discussion in Ch. 421, *Premises Liability*

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§ 345.317 Trust Company

- See *§ 345.212*

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§ 345.318 Trust Deeds and Mortgages

- Action to foreclose trust deed or mortgage--Governed by limitation period applicable to underlying obligation. *Civ. Code § 2911*; *Flack v. Boland (1938) 11 Cal. 2d 103, 106-107, 77 P.2d 1090*

- Action arising from recorded restrictions and unrecorded restrictions--Five years. *Code Civ. Proc. §§ 336(b), 784*; *see Pacific Hills Homeowners Assn. v. Prun (2008) 160 Cal. App. 4th 1557, 1563, 73 Cal. Rptr. 3d 653*

- Action arising under *Civ. Code §§ 2956-2967*, concerning disclosures required to be made in connection with purchase money liens on residential property--Two years from date on which liability arises or two years from discovery of material and willful misrepresentation. *Civ. Code § 2967*

- Action against mortgagee in possession or successor by mortgagor, for redemption of mortgage--Five years after breach of condition of mortgage. *Code Civ. Proc. § 346*

- Action to recover balance due on debt secured by mortgage or deed of trust on real property after sale under power of sale therein--Three months from sale. *Code Civ. Proc. § 580a*

- Liens. See *§ 345.245*

See discussion and form in Ch. 555, *Trust Deeds and Real Property Mortgages*

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§ 345.319 Trusts

- Action to impose constructive trust on real property--Three years, if action based on fraud; otherwise, five years. *Code Civ. Proc. §§ 318, 338(d)*; *Coppinger v. Superior Court (1982) 134 Cal. App. 3d 883, 891, 185 Cal. Rptr. 24* ; *Security First Nat. Bank v. Ross (1963) 214 Cal. App. 2d 424, 429-430, 29 Cal. Rptr. 538*

- Action to establish resulting trust and for accounting incidental thereto--Four years. *McCosker v. McCosker (1954) 122 Cal. App. 2d 498, 501, 265 P. 2d 21 cf. Glue-Fold, Inc. v. Slautterback Corp. (2000) 82 Cal. App. 4th 1018, 1023 n.3, 98 Cal. Rptr. 2d 661* (remedy of constructive trust is not viable if underlying wrong is time-barred)

- Proceeding against trustee by attorney general to enforce charitable trust--Ten years after cause of action has accrued. *Gov. Code § 12596*

- Action to challenge endowment hospital trust--Two years after date of filing of grant for record. *Health & Safety Code § 32508*

- Proceeding by trust beneficiary against trustee for breach of trust--Three years after receiving interim or final account or other written report that adequately discloses existence of claim; or if account or report does not adequately disclose existence of claim or if no account or report is received, three years after beneficiary discovered or should have discovered subject of the claim. *Prob. Code § 16460*; *Noggle v. Bank of America (1999) 70 Cal. App. 4th 853, 858-859, 82 Cal. Rptr. 2d 829*

- Decedent's estates. See *§ 345.194*

See discussion in Chapter 560 Trusts: *Express, Public, Charitable, and Totten Trusts*

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§ 345.320 Unemployment Insurance

- Action or proceeding against employee for reimbursement of overpaid compensation--One year or three years, depending on circumstances. *Unemp. Ins. Code §§ 1379* (overpaid unemployment compensation), 2739 (overpaid disability benefits)

- Claim, action, or proceeding for refund of contributions erroneously made by employer to Unemployment Fund--Three years from determination that amount is payable as refund. *Unemp. Ins. Code § 1536*

- Proceeding for enforcement of lien for payment of delinquent contributions, by levy and sale--Three years after payment became delinquent, 10 years after last entry of unemployed contribution judgment, or 10 years after last recording or filing of notice of state tax lien. *Unemp. Ins. Code § 1785*

- Action to collect delinquent contributions or taxes--Three years after payment became delinquent, 10 years after last entry of unemployed contribution judgment, or 10 years after last recording or filing of notice of state tax lien. *Unemp. Ins. Code §§ 1852* (unemployment compensation), 2903 (disability compensation)

- Claim, action, or proceeding for refund of contribution to Disability Fund--Three years from determination that amount is payable as refund. *Unemp. Ins. Code § 3010*

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§ 345.321 Unfair Competition

- Civil action to enforce cause of action for violation of Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*)--Four years after cause of action accrued. *Bus. & Prof. Code § 16750.1*

- Criminal action based on violation of Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*)--Four years after commission of last act comprising part of any violation. *Bus. & Prof. Code § 16755(b)*

- Action to enforce cause of action pursuant to *Bus. & Prof. Code §§ 17200-17208* for unfair competition--Four years after cause of action accrued. *Bus. & Prof. Code § 17208*

- Action for misappropriation of trade secret under Uniform Trade Secrets Act (*Civ. Code § 3426 et seq.*)--Three years after actual or constructive discovery of misappropriation. *Civ. Code § 3426.6*

- Action for interference with contract or with economic relations--Two years. *Code Civ. Proc. § 339(1)*; *Knoell v. Petrovich (1999) 76 Cal. App. 4th 164, 168, 90 Cal. Rptr. 2d 162* ; *but see, e.g., Romano v. Wilbur Ellis & Co. (1947) 82 Cal. App. 2d 670, 673-674, 186 P.2d 1012* (three-year period under *Code Civ. Proc. § 338(d)* applies when action for intentional interference is based on allegations of fraud, and one-year period under *Code Civ. Proc. § 340* applies when it is based on allegations of libel, slander, or physical violence)

See discussion and forms in Ch. 565, *Unfair Competition*

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§ 345.322 Unfair Labor Practices

- See *§ 345.204*

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§ 345.323 Usury

- Treble damages action to recover usurious interest, charges assessed in connection with loan secured by lien on real estate, or both--Two years from date excess or prohibited charge received. *Bus. & Prof. Code § 10246(c)*

- Borrower's action for recovery of actual damages or double amount of usurious charges when real estate broker fails timely to return bonus, brokerage, or commission--Two years after maturity of loan at issue. *Bus. & Prof. Code § 10248.2(d)*

- Borrower's action based on lender's violation of usury law--One year after payment or delivery by borrower. Stats. 1919, p.1xxxiii and Stats. 1970, ch. 784, § 1 (Usury Law § 3); *see Cal. Const. art. XV, § 1* (exceptions to Usury Law)

See discussion in Ch. 568, *Usury*

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§ 345.324 Validation Actions Generally

[1] Complaint to Validate

- Validation action--Sixty days after existence of any matter that under any other law is authorized to be determined pursuant to *Code Civ. Proc. § 860 et seq.* (validation actions). *Code Civ. Proc. §§ 860, 863*; *Moorpark Unified School Dist. v. Superior Court (1990) 223 Cal. App. 3d 954, 957-958, 273 Cal. Rptr. 18*

- Validation action by party who answered public agency's validation action if agency later dismissed action--within 30 days after dismissal was filed by the court. *Code Civ. Proc. § 867.5*

[2] Cross Complaint Against Validation Complaint

- Cross complaint in validation action--Not later than time specified in summons on complaint. *Moorpark Unified School Dist. v. Superior Court (1990) 223 Cal. App. 3d 954, 958-959, 273 Cal. Rptr. 18* (construing *Code Civ. Proc. § 869*)

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§ 345.325 Water Law

[1] California Water Districts

- Action to determine validity of distribution district assessment--Sixty days after assessment. *Code Civ. Proc. § 860*; *Water Code § 36531*

- Proceeding to contest district election, other than general district election--Twenty days after result declared. *Water Code § 35125*

- Action based on warrants payable on demand--Four years from date of issuance of warrants. *Water Code § 35907*

- Action or proceeding challenging action, proceeding, conclusion, or finding of fact of board of district concerning distribution district--Six months after act, proceeding, conclusion, or finding. *Water Code § 36530*

- Action to determine validity of district assessment or assessment levied thereon--Thirty days after all separate parts of assessment book are filed with tax collector. *Water Code § 36728*

- Proceeding based on alleged invalidity or irregularity of tax collector's deed to district--One year after recordation of deed. *Water Code § 37161*; *but see Water Code § 37163* (stating cases in which limitation period inapplicable)

- Proceeding based on alleged invalidity or irregularity of sale agreement, deed, lease, or option executed by district concerning tax-deeded property--One year after execution of instrument by district. *Water Code § 37162*; *but see Water Code § 37163* (stating cases in which limitation period inapplicable)

[2] County Water Districts

- Proceeding to contest validity of county water district--Three months from date of certificate of

incorporation. *Water Code § 30325*

[3] Irrigation Districts

- Contest of formation election--Twenty days after canvass of vote by board of supervisors. *Water Code § 20931*

- Action or proceeding to enforce payment of registered warrant or require levy of assessment therefor--Four years from date of original presentation of warrant to treasurer. *Water Code § 24661*; *see also Water Code § 24662* (waiver of limitation)

- Action or proceeding based on invalidity or irregularity of collector's deed executed to district--One year after recordation of deed. *Water Code § 26304*; *but see Water Code § 26306* (stating cases in which limitation period inapplicable)

- Action or proceeding based on invalidity or irregularity of agreement of sale, deed, lease, or option executed by district in connection with property deeded to it by its collector--One year after execution by district of instrument. *Water Code § 26305*; *but see Water Code § 26306* (stating cases in which limitation period inapplicable)

[4] Levee Districts

- Proceeding contesting validity of organization of district--Three months from recordation of certificate of formation. *Water Code § 70047*

[5] Municipal Water Districts

- Proceeding to challenge incorporation of municipal water district--Three months from date of certificate of incorporation. *Water Code § 71196*

- Action or proceeding contesting validity of bonds and bond proceedings--Three months from date of bond election. *Water Code § 71946*

- Action or proceeding challenging validity of formation of improvement district--Three months from resolution of formation or date of election. *Water Code § 72027*

- Action or proceeding contesting validity of annexation to improvement district--Three months after date of resolution approving annexation. *Water Code §§ 72689* (inclusion proceeding initiated by petition), 72711 (inclusion proceeding initiated by resolution of district's board of directors)

- Action or proceeding contesting validity of dissolution of improvement district--Three months from effective date of ordinance dissolving improvement district. *Water Code § 72737*

[6] Porter-Cologne Water Quality Control Act

- Action commenced under Porter-Cologne Water Quality Control Act (*Water Code § 13000 et seq.*)--Three years. *Code Civ. Proc. § 338(i)*

[7] Reclamation Board or District

- Action seeking modification or annulment of assessment made by Reclamation Board--Sixty days

after board has approved assessment and assessment list has been deposited in county treasurer's office. *Water Code § 8832*

- Action against board of supervisors for modification, correction, or annulment of reclamation district assessment list--Thirty days after assessment list filed. *Water Code §§ 51259, 51260*

- Action against board of supervisors for modification, correction, or annulment of reclamation district operation and maintenance assessment roll--Thirty days after assessment roll approved by board. *Water Code §§ 51333, 51334*

- Action contesting call of installment of assessment--Six months from due date of call. *Water Code § 51424*

- Action contesting validity of credit on, or payment of, portion of assessment called--Six months after date of credit or payment. *Water Code § 51425*

- Proceeding based on alleged invalidity or irregularity of sale by county treasurer as trustee of reclamation district, of property for delinquent assessment--One year from sale date. *Water Code § 51696*

- Action based on demand or time warrant--Four years from date of date of demand warrant or four years from date of maturity of time warrant. *Water Code § 53340*

[8] State Water Resources Control Board

- Petition for writ of mandate for review of decision of State Water Resources Control Board's water rights decision--Thirty days. *Water Code § 1126(b)*

[9] Water Conservation Districts

- Contest of formation election--Twenty days after canvass of votes and declaration of result by board of supervisors. *Water Code § 74134*

[10] Water Replenishment Districts

- Proceeding contesting incorporation, annexation, exclusion, or disincorporation of district--Three months from date of contested certificate or order. *Water Code § 60048*

- Proceeding contesting incorporation of district on basis of informality in proceeding or conduct of election--Three months from date of certificate of incorporation. *Water Code § 60125*

- Action or proceeding contesting validity of bond issue--Three months from date of election. *Water Code § 60280*

[11] Water Storage Districts

- Proceeding to contest general water storage district election--Twenty days after result declared. *Water Code § 41903*

- Action, proceeding, or contest challenging conclusion or finding of fact of department, commission, or board--Sixty days after findings or conclusions made. *Water Code § 43704*

- Action, proceeding, or contest attacking organization of any district--Six months after date of organization. *Water Code § 43850(a)*

- Action, proceeding, or contest attacking inclusion of land within or exclusion of land from any district--Six months after date of inclusion or exclusion. *Water Code § 43850(b)*

- Action, proceeding, or contest attacking assessment of any district--Sixty days after date on which assessment roll is filed with county treasurer or treasurers. *Water Code § 43850(c)*

- Action, proceeding, or contest attacking validity of any bonds issued by any district--Sixty days after adoption of resolution providing for issuance of bonds. *Water Code § 43850(d)*

- Action on registered warrant--Four years from date of issuance. *Water Code § 44629*

- Action or proceeding contesting acts, proceedings, conclusions, and findings of fact by board of district in relation to direct assessment warrant-Six months after acts, proceeding, conclusions, or findings had or made. *Water Code § 45930*

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§ 345.326 Worker's Compensation

- Action against tortfeasor by employer subrogated to rights of injured employee under worker's compensation law--Two years. *Code Civ. Proc. § 335.1*; *Liberty Mutual Ins. Co. v. Fabian (1964) 228 Cal. App. 2d 427, 436, 39 Cal. Rptr. 570* (decided under former *Code Civ. Proc. § 340(3)*)

- Proceeding by injured employee against employer to recover increased worker's compensation based on employer's discriminatory act--One year from discriminatory act or date of termination. *Lab. Code § 132a*

- Proceeding against employer on worker's compensation claim-Thirty days (notice of claim, as condition precedent to claiming compensation) and either one year or, in some cases, 240 weeks (claim for medical, surgical, hospital, disability, or death benefits). *Lab. Code §§ 5400, 5405, 5406, 5406.5, 5407*

- Request by employee for vocational rehabilitation benefits--One year from date of last finding of permanent disability by appeals board or one year from date appeals board approved compromise and release of other issues. *Lab. Code § 5405.5*

- Proceeding to recover death benefits under *Lab. Code §§ 4700-4709* for death of health care worker, public safety employees and police officers described in *Lab. Code § 3212*, or parole or probation officers and others described in *Pen. Code § 830.5*, from HIV-related disease--One year from date of death, provided one or more events listed in *Lab. Code § 5406.6* occurred. *Lab. Code § 5406.6*

- Proceeding against employee by employer for reduction of worker's compensation benefits because of employee's serious and wilful misconduct--Twelve months or, in some cases, no limitation. *Lab. Code § 5407.5*

- Proceeding against employer on ground of new and further disability or the feasibility of vocational

rehabilitation from original injury--Five years after date of injury. *Lab. Code § 5410*

- Occupational disease or cumulative injury claims filed or asserted on or after January 1, 1981--One year. *Lab. Code § 5500.5(a)*

- Application for writ to review original order, decision, or award of Workers' Compensation Appeals Board or order, decision, or award following consideration--Forty-five days. *Lab. Code § 5950*

See discussion in Ch. 577, *Workers' Compensation*

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§ 345.327 Wrongful Death

- Action for death of person caused by wrongful act or neglect of another--Two years. *Code Civ. Proc. § 335.1*

- Action for wrongful death based on exposure to asbestos--One year from date of death, or one year from date plaintiff first knew or should have known exposure to asbestos caused or contributed to death, whichever later. *Code Civ. Proc. § 340.2(c)*

- Civil action for injury or death to a terrorist victim of September 11, 2001--Two years. *Code Civ. Proc. §§ 340.10* and *335.1*

See discussion and form in Ch. 181, *Death and Survival Actions*

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§ 345.328 Wrongful Discharge of Employee

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§ 345.329 Zoning and Planning

- Action for equitable relief brought by attorney general pursuant to *Gov. Code § 12607* to challenge administrative or legislative zoning decision--One hundred and eighty days after decision. *Gov. Code § 12609*

- Action against local public entity (1) to attack, review, set aside, void, or annul legislative body's decision to adopt or amend general or specific plan or mandatory element of plan, or to adopt or amend zoning ordinance, or to adopt, amend or modify development agreement, or decisions relating to conditional use permits and variances, or (2) to determine reasonableness, legality, or validity of decision to adopt or amend regulation attached to specific plan--Ninety days after legislative body's decision. *Gov. Code § 65009(c)(1)* (with exceptions; also, legislative body to be served within the 90-day period); *see also Gov. Code § 65009(c)(2)* (additionally, action or proceeding to challenge adoption or revision of certain housing elements--Sixty days following Department of Housing and Community Development report under *Gov. Code § 65585(h)*; also requiring service within same period)

- Action or proceeding to attack, review, set aside, void, or annul decision of advisory agency, appeal board or legislative body concerning subdivision, or any proceedings, acts or determinations taken, done or made before such decision, or to determine reasonableness, legality or validity of any attached conditions--Ninety days after date of decision (must both commence action or proceeding and serve summons within period). *Gov. Code § 66499.37*; *see McPherson v. City of Manhattan Beach (2000) 78 Cal. App. 4th 1252, 1264-1265, 93 Cal. Rptr. 2d 725* (filing writ of mandate within 90 days of decision granting conditional use permit (Subdivision Map Act (*Gov. Code § 66410 et seq.*) timely); *Maginn v. City of Glendale (1999) 72 Cal. App. 4th 1102, 1104-1108, 85 Cal. Rptr. 2d 689* (limitation period applies to both commencement of action and service of summons); *Hunt v. County of Shasta (1990) 225 Cal. App. 3d 432, 436, 441-445* (county board of supervisors failure to issue certificate, or conditional certificate, of compliance (*Gov. Code § 66499.35*) with Subdivision Map Act)

- Action governed by *Gov. Code § 65009(d)--90* days from the date a legislative action is taken or approval is given to notify the local land use authority of any claimed deficiencies in such an action or

approval. *Urban Habitat Program v. City of Pleasanton (2008) 164 Cal. App. 4th 1561, 1573-1574, 80 Cal. Rptr. 3d 300*

See discussion in Ch. 579, *Zoning and Planning*

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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

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§ 345A.101 Request for Statement of Witnesses and Evidence [Code Civ. Proc. § 96]--Judicial Council Form DISC-015

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§ 345A.102 Motion to Withdraw Case From Economic Litigation Provisions [Code Civ. Proc. § 91(c)]

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§ 345A.103 Motion for Additional Discovery [Code Civ. Proc. § 95(a)]

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§ 345A.104 Form Interrogatories--Limited Civil Cases--[Code Civ. Proc. § 94]--Judicial Council Form DISC-004

[1] FORM

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§ 345A.110 Notice of Appeal From Judgment or Order in Limited Civil Case [Code Civ. Proc. § 904.2; Cal. Rules of Ct., Rule 8.821(a)]--Judicial Council Form APP-102

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§ 345A.118 Stipulation Directing That Parts of Oral Proceedings Not Be Transcribed [Cal. Rules of Ct., Rule 8.834(c)]

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§ 345A.119 Request for Correction of Transcript [Cal. Rules of Ct., Rule 8.841(b)]

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§ 345A.120 Application to Extend Time to Serve and File Brief or Other Routine Matters Including Supporting Declaration [Code Civ. Proc. § 2015.5; Cal. Rules of Ct., Rule 8.810]

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§ 345A.121 Abandonment of Appeal [Cal. Rules of Ct., Rule 8.825]--Judicial Council Form APP-106

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§§ 345A.122-345A.124 [Reserved]

§ 345A.125 Application for Certification to Transfer Appeal Pending in Appellate Division of Superior Court to Court of Appeal [Code Civ. Proc. § 911; Cal. Rules of Ct., Rules 8.1002, 8.1005]

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[2] Use of Form

§ 345A.126 Motion for Imposition of Sanctions for Frivolous Appeal

[1] FORM

[2] Use of Form

Hon. Phillip J. Argento
Editorial Consultant n*

FOOTNOTES:
(n75)Footnote *. **The Honorable Phillip J. Argento** is a superior court judge in Pasadena, California.

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 345A LIMITED CIVIL CASES
PART I. SCOPE

30-345A California Forms of Pleading and Practice--Annotated § 345A.01

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.01 Scope of Chapter

This chapter discusses procedures that apply to limited civil cases.

The chapter discusses pleading, pretrial, and trial procedures established to reduce the expense of litigation in limited civil cases [*see § 345A.10* et seq.], and includes Judicial Council forms for use in discovery in limited civil cases [*see § 345A.100* et seq.].

The chapter also discusses the appeal of a judgment or an order in a limited civil case [*see § 345A.30* et seq.], and includes related forms [*see § 345A.110* et seq.]. The chapter also provides Procedural Checklists for an appellant [*see § 345A.90*] and respondent [*see § 345A.91*] and for the removal of an appeal to the court of appeal [*see § 345A.92*].

For discussion of what constitutes a limited civil case, see Ch. 324, *Jurisdiction: Subject Matter* , which also discusses and provides forms relating to reclassification of an action as a limited civil case or otherwise under *Code Civ. Proc. § 403.010 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewGovernmentsCourtsSmall Claims Courts

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Chapter 345A LIMITED CIVIL CASES
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30-345A California Forms of Pleading and Practice--Annotated § 345A.02

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.02 Cross References

[1] Procedures for Economic Litigation

- For a discussion of discovery available in limited civil cases, see Ch. 190, *Discovery: Scope, Regulation, and Timing* .

[2] Civil Appeals

- For discussion, procedural guides, and forms for use in taking an appeal from a superior court judgment other than in a limited civil case, see Ch. 40, *Appeal: An Overview* , et seq.

- For procedure and forms relating to review by extraordinary writ, see Ch. 358, *Mandate and Prohibition* , and Ch. 492, *Review (Certiorari), Writ of.*

- For forms and procedure for use in making motions after trial, see Ch. 371, *Motions After Trial* .

- For procedure and forms for use in appealing from a small claims court judgment, see Ch. 526, *Small Claims* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 345A LIMITED CIVIL CASES
PART I. SCOPE

30-345A California Forms of Pleading and Practice--Annotated § 345A.03

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.03 Superior and Municipal Court Unification

Until 1998, all counties were required to have both superior courts and municipal courts, which were sometimes called "inferior courts" [*see Cal. Const. art. VI, § 5(a)-(d)*]. Former justice courts had been eliminated bythe passage of Proposition 191 in 1994, and on January 1, 1995, all existing justice courts became municipal courts [*Cal. Const. art. VI, § 5(b)*].

In 1998, Proposition 220 amended the California Constitution to permit the unification of municipal and superior courts in any county by vote of the superior court judges and municipal court judges [*Cal. Const. art. VI, §§ 5(e), 23*]. In a county with unified courts, there was only a superior court, which had subject matter jurisdiction over all proceedings, including civil proceedings that would otherwise have been within the exclusive jurisdiction of a municipal court [*see Cal. Const. art. VI, § 5(e)*].

To accommodate court unification, the Legislature extensively amended the Code of Civil Procedure. Previously municipal courts had original jurisdiction over certain civil cases, primarily those in which the demand was less than $25,000. After unification was authorized, such cases were termed "limited civil cases" and were in the jurisdiction of the municipal court, or in counties with no municipal court, in the jurisdiction of the superior court [*see former Code Civ. Proc. §§ 85.1, 86*].

On February 8, 2001, the superior and municipal courts of Kings County unified. With this unification, all counties had unified their courts, and municipal courts no longer existed in California. In November 2002, the passage of Proposition 48 amended the California Constitution to remove references to municipal courts. Accordingly, superior courts are now the only California state trial courts, exercising general jurisdiction over all cases, including small claims and juvenile proceedings [*see Code Civ. Proc. § 116.210*; *Welf. & Inst. Code § 245*]. Thus, limited civil cases are in the jurisdiction of the superior courts [*Cal. Const., art. VI, § 10*; *see Code Civ. Proc. § 86*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionJurisdictional SourcesGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewGovernmentsCourtsSmall Claims Courts

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PART I. SCOPE

30-345A California Forms of Pleading and Practice--Annotated §§ 345A.04-345A.09

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

[Reserved]

§§ 345A.04[Reserved]

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A. Procedures for Economic Litigation

30-345A California Forms of Pleading and Practice--Annotated § 345A.10

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.10 Scope of Subpart

This subpart discusses pleading, pretrial, and trial procedures established to reduce the expense of litigation in limited civil cases [*see Code Civ. Proc. §§ 90-100*].

Forms concerning discovery in economic litigation in limited civil cases are included in They are:

- The Judicial Council case questionnaire [*see § 345A.100*].
- The Judicial Council request for witnesses and evidence [*see § 345A.101*].
- A motion to withdraw a limited civil case from the economic litigation provisions [*see § 345A.102*].
- A motion for additional discovery [*see § 345A.103*].

For a discussion of the provisions governing discovery in limited civil cases, see Ch. 190, *Discovery: Scope, Regulation, and Timing* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewGovernmentsCourtsSmall Claims Courts

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PART II. LEGAL BACKGROUND
A. Procedures for Economic Litigation

30-345A California Forms of Pleading and Practice--Annotated § 345A.11

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.11 Governing Statutes

Procedures for economic litigation in limited civil cases are governed by *Code Civ. Proc. §§ 90-100*.

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30-345A California Forms of Pleading and Practice--Annotated § 345A.12

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.12 Application of Procedures to Limited Civil Cases

[1] In General

Except as otherwise provided in *Code Civ. Proc. § 91*, the provisions of *Code Civ. Proc. §§ 90-100* apply to every limited civil case [*Code Civ. Proc. § 91(a)*; for the exceptions, *see* [2] and [4], *below*]. For discussion of what constitutes a limited civil case, see Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* .

[2] Not Applicable to Small Claims Actions and Unlawful Detainer Proceedings

Code Civ. Proc. §§ 90-100 do not apply to actions in small claims court under *Code Civ. Proc. § 116.110 et seq.* or to proceedings under *Code Civ. Proc. § 1159 et seq.* for unlawful detainer or forcible entry or detainer [*Code Civ. Proc. § 91(b)*].

[3] Effect on General Procedures for Civil Actions

Except when changed by *Code Civ. Proc. §§ 90-100*, all provisions of law applicable to civil actions generally apply to limited civil cases subject to *Code Civ. Proc. §§ 90-100* [*Code Civ. Proc. § 90*].

For discussion and forms relating to any pleading, pretrial, and trial procedures that are not affected by *Code Civ. Proc. §§ 90-100*, see the particular chapter of this publication in which the procedures are discussed.

[4] Motion to Withdraw Action From Economic Litigation Provisions

Any limited civil case may be withdrawn from the provisions of *Code Civ. Proc. §§ 90-100* on a noticed motion and a showing that it is impractical to prosecute or defend the action within the limitations of those provisions [*Code Civ. Proc. § 91(c)*]. For a form of motion, see *§ 345A.102*.

PRACTICE TIP:

Use of Withdrawal Procedure. Although withdrawal remains an option in an appropriate case, it is infrequently sought. Also, economy-driven interest in "flat fee" arrangements between defense counsel and insurance carriers is increasing the marketability of defense skill in utilizing economic litigation procedures. Economic litigation also furnishes cost advantages to plaintiff attorneys employed under a contingency fee arrangement. On the other hand, counsel must consider differences such as limited discovery and scope of collateral estoppel under economic litigation in deciding whether to move to withdraw. *By Hon. Phillip J. Argento.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewGovernmentsCourtsSmall Claims CourtsReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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30-345A California Forms of Pleading and Practice--Annotated § 345A.13

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.13 Pleadings

[1] Allowed Pleadings

The pleadings allowed in limited civil cases subject to the provisions for economic litigation are complaints, answers, cross complaints, answers to cross complaints, and general demurrers [*Code Civ. Proc. § 92(a)*].

[2] No Special Demurrers

Code Civ. Proc. § 92(c) prohibits the use of special demurrers with respect to limited civil cases subject to *Code Civ. Proc. §§ 90-100*.

This limitation leaves only two grounds for demurrer in such actions:

- That the pleading does not state facts sufficient to state a cause of action [*Code Civ. Proc. § 430.10(e)*]; and

- That the answer does not state facts sufficient to constitute a defense [*Code Civ. Proc. § 430.20(a)*].

All other grounds for demurrer are regarded as special demurrers [*see Buss v. J.O. Martin Co., Inc. (1966) 241 Cal. App. 2d 123, 133, 50 Cal. Rptr. 206]* .

For discussion of demurrers generally, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Verification of Pleadings

The answer need not be verified, even if the complaint or cross complaint is verified [*Code Civ. Proc. § 92(b)*].

Regardless of whether or not the complaint or cross complaint is verified, a general denial is sufficient, but only puts in issue the material allegations of the complaint. However, if the cause of action is a claim assigned to a third party for collection and the complaint is verified, the denial of the allegations must be made positively or according to the information and belief of the defendant [*Code Civ. Proc. § 431.30(d)*].

For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[4] Caption of Complaint to State Amount Demanded and Identify Case as Limited Civil Case

On a complaint or petition, below the character of the action, the amount demanded in the complaint or petition must be stated as: "Amount demanded exceeds $10,000" or "Amount demanded does not exceed $10,000" [*Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9)*]. There is a lower filing fee for cases demanding less than $10,000 [*see Gov. Code § 70613(a),(b)*].

The caption of the complaint or petition must also contain the words "Limited Civil Case" [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*]. Designating the case as a limited civil case effectively limits the amount demanded to $25,000, exclusive of attorney's fees, interest, and costs [*Code Civ. Proc. §§ 85(a), 580(b)(1)*; *Wozniak v. Lucutz (2002) 102 Cal. App. 4th 1031, 1044-1046, 126 Cal. Rptr. 2d 310* (defendant has right to rely on *Code Civ. Proc. § 580(b)(1)*, which provides that relief in limited civil case may not exceed maximum amount in controversy for limited civil case)].

As the first paper filed in a civil action, the complaint or petition must be accompanied by a civil case cover sheet [*Cal. Rules of Ct., Rule 3.220(a)*]. The cover sheet must be on Cal. Judicial Council Form CM-010, which requires that the case be identified as either a limited civil case or an unlimited civil case [*Cal. Rules of Ct., Rule 3.220(a), (b)*; *see Cal. Rules of Ct., Rule 1.31*; Cal. Rules of Ct., Appen. A]. For further discussion of the civil case cover sheet, along with an illustrative reproduction of the form, see Ch. 123, *Complaints and Cross Complaints* .

[5] Captions of All Subsequent Pleadings and Papers to Identify Case as Limited Civil Case

The caption of every pleading and paper filed subsequent to the complaint in a limited civil case must contain the words "Limited Civil Case" [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-345A California Forms of Pleading and Practice--Annotated § 345A.14

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.14 Availability of Motions

[1] In General

Except as restricted by *Code Civ. Proc. § 92*, all motions available in civil actions generally are permitted in limited civil cases subject to the provisions for economic litigation [*Code Civ. Proc. § 92(e)*].

[2] Motions to Strike

Motions to strike are not available in limited civil cases except on the ground that the damages or relief sought are not supported by the allegations of the complaint [*Code Civ. Proc. § 92(d)*; *see Code Civ. Proc. §§ 431.10, 435, 436* (motions to strike generally)].

PRACTICE TIP:

Combining Motion With General Demurrer. Defense counsel should consider utilizing a motion to strike in conjunction with a general demurrer if the relief sought includes punitive damages, attorney fees, or prejudgment interest on allegations that are insufficient to justify awarding such relief. A number of judges handling economic litigation take the view that law and motion matters should be infrequent, and when pursued, moving papers should be only a few pages. *By Hon. Phillip J. Argento.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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A. Procedures for Economic Litigation

30-345A California Forms of Pleading and Practice--Annotated § 345A.15

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.15 Case Questionnaires

[1] Service by Plaintiff

A plaintiff in a limited civil case subject to the economic litigation provisions has the option to serve case questionnaires with the complaint, using the Judicial Council-approved form [*Code Civ. Proc. § 93(a)*; *see Cal. Rules of Ct., Rule 1.31*; Cal. Rules of Ct., Appen. A; for an illustration of the form, *see § 345A.100*]. The questionnaires served must include a copy of the plaintiff's complete case questionnaire, and a blank copy of the defendant's case questionnaire [*Code Civ. Proc. § 93(a)*].

As stated in the instructions to the Judicial Council form, a case questionnaire should not be filed with the court. A case questionnaire is not authorized for small claims or unlawful detainers or other actions to obtainpossession of real property pursuant to *Code Civ. Proc. § 1159 et seq.* [*see Code Civ. Proc. § 91(b)*].

PRACTICE TIP:

Advantages of Case Questionnaire. The case questionnaire has been underutilized by counsel. Plaintiff's use of a case questionnaire leads to early preparation of the case, and conveys such preparedness to defense counsel. Moreover, given that defense counsel will likely receive the served summons and complaint several days after service on the defendant, the requirement that defendant furnish information with the answer [*see Code Civ. Proc. § 93(b)*] can place additional time pressure on defense counsel. Yet such "up-front" preparation by defense counsel can facilitate early and economic resolution of the case. Moreover, many judges request the questionnaires at formal settlement conferences and informal settlement opportunities, such as following the hearing of a law and motion matter. *By Hon. Phillip J. Argento.*

[2] Defendant's Response

Any defendant on whom a case questionnaire is served must serve a completed defendant's case questionnaire on the

requesting plaintiff with the answer [*Code Civ. Proc. § 93(b)*].

[3] Content of Questionnaires

The case questionnaire is designed to elicit fundamental information about each party's case, including names and addresses of all witnesses with knowledge of any relevant facts, a list of all documents relevant to the case, a statement of the nature and amount of damages, and information covering insurance coverages, injuries, and treating physicians [*Code Civ. Proc. § 93(c)*]. Pursuant to statutory direction, the Judicial Council has adopted a form of case questionnaire [*see Code Civ. Proc. § 93(c)*; *Cal. Rules of Ct., Rule 1.31*; Cal. Rules of Ct., Appen. A; for an illustration of the form, *see § 345A.100*]. The court clerk must provide the approved forms [*Code Civ. Proc. § 93(d)*].

[4] Motion to Compel Compliance

A party may move to compel compliance with the requirements of *Code Civ. Proc. § 93(a)* or *(b)* for the use of case questionnaires in accordance with *Code Civ. Proc. § 2023* (*Code Civ. Proc. § 2023.030* effective July 1, 2005) [*Code Civ. Proc. § 93(e)*]. For an example of forms of motion pursuant to *Code Civ. Proc. §§ 2023(b)* (*Code Civ. Proc. § 2023.030* effective July 1, 2005) and *2031(l)* (*Code Civ. Proc. § 2031.300* effective July 1, 2005) to compel compliance with a demand for production and inspection of documents, see Ch. 195, *Discovery: Inspection of Tangible Evidence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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A. Procedures for Economic Litigation

30-345A California Forms of Pleading and Practice--Annotated § 345A.16

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.16 Discovery

Discovery is permitted in limited civil cases subject to the economic litigation provisions only to the extent provided by *Code Civ. Proc. §§ 94* and *95* [*Code Civ. Proc. § 94*].

Code Civ. Proc. § 94 governs the availability of interrogatories, requests to identify or produce, requests for admissions, depositions, subpoenas duces tecum, identification of expert witnesses, and physical and mental examinations. For form interrogatories for limited civil cases, see *§ 345A.104*. For further discussion of interrogatories, see Ch. 194, *Discovery: Interrogatories* .

Code Civ. Proc. § 95 authorizes additional discovery on noticed motion or by stipulation of the parties. For a form of motion for additional discovery, see *§ 345A.102*. For further discussion of *Code Civ. Proc. §§ 94* and *95*, see Ch. 190, *Discovery: Scope, Regulation, and Timing* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-345A California Forms of Pleading and Practice--Annotated § 345A.17

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.17 Requests for Evidentiary Statements

[1] In General

Any party may serve on any other party a request in substantially the following form [*Code Civ. Proc. § 96(a)*]:

TO: _____, attorney for _____:

You are requested to serve on the undersigned, within 20 days, a statement of: the names and addresses of witnesses (OTHER THAN A PARTY WHO IS AN INDIVIDUAL) you intend to call at trial; a description of physical evidence you intend to offer; and a description and copies of documentary evidence you intend to offer or, if the documents are not available to you, a description of them. Witnesses and evidence that will be used only for impeachment need not be included. YOU WILL NOT BE PERMITTED TO CALL ANY WITNESS, OR INTRODUCE ANY EVIDENCE, NOT INCLUDED IN THE STATEMENT SERVED IN RESPONSE TO THIS REQUEST, EXCEPT AS OTHERWISE PROVIDED BY LAW.

The clerk must furnish forms for such requests [*Code Civ. Proc. § 96(f)*]. The Judicial Council has adopted a form of request for statement of witnesses and evidence [*see Cal. Rules of Ct., Rule 1.31*; Cal. Rules of Ct., Appen. A; *see also § 345A.101*].

[2] Service of Requests and Statements

A request for an evidentiary statement must be served no more than 45 days nor less than 30 days prior to the date first set for trial, unless otherwise ordered [*Code Civ. Proc. § 96(b)*]. A statement responding to the request must be served within 20 days from the service of the request [*Code Civ. Proc. § 96(c)*]. The time for serving and responding to requests is computed as provided by law, including extensions of time for service by mail pursuant to *Code Civ. Proc. § 1013* [*Code Civ. Proc. § 96(g)*].

No additional, amended, or late statement is permitted except by written stipulation or unless ordered for good cause on noticed motion [*Code Civ. Proc. § 96(d)*].

[3] No Filing Unless Ordered

Requests or statements served under *Code Civ. Proc. § 96* are not filed, unless otherwise ordered by the court [*Code Civ. Proc. § 96(e)*].

[4] Consequences for Failure to Comply With Request

[a] General Rules

Except as provided in *Code Civ. Proc. § 97(b)* [*see* discussion under *§ 345A.17[4][b]*], on objection of a party who served a request in compliance with *Code Civ. Proc. § 96*, no party required to serve a statement may call a witness or introduce evidence, except for purposes of impeachment, against the objecting party unless the witness or evidence was included in the statement served [*Code Civ. Proc. § 97(a)*]. However, nothing in *Code Civ. Proc. §§ 90-100* limits the introduction of evidence in any default hearing pursuant to *Code Civ. Proc. § 585* [*Code Civ. Proc. § 97(c)*].

Although no reported cases expressly interpret *Code Civ. Proc. §§ 96* and *97*, two cases have considered requests for witnesses and evidence under substantially similar predecessor statutes that governed the former pilot project on which the provisions of the economic litigation statutes arebased. In *Border v. Kuznetz (1980) 162 Cal. Rptr. 881* , the appellate court held that the trial court did not abuse its discretion in denying plaintiff's various motions to relieve him from default in filing a timely witness and evidence statement under former *Code Civ. Proc. § 1825.1* in plaintiff's action for personal injury arising from an automobile accident. In *Lumpkin v. Friedman (1982) 131 Cal. App. 3d 450, 455-456, 182 Cal. Rptr. 378* , the court stated that a dismissal because of a failure to comply with the request for witnesses and evidence under former *Code Civ. Proc. § 1825.1* constituted a dismissal on the merits, a requisite element of a subsequent suit for malicious prosecution.

[b] Exceptions

The exceptions to the prohibition against calling a witness or introducing evidence after failing to include the witness or evidence in an evidentiary statement pursuant to *Code Civ. Proc. § 96(a)* are as follows [*Code Civ. Proc. § 97(b)(1)-(4)*]:

- A person who, in his or her individual capacity, is a party to the litigation and who calls himself or herself as a witness.
- An adverse party.
- Witnesses and evidence used solely for purposes of impeachment.
- Documents obtained by discovery authorized by *Code Civ. Proc. §§ 81-100*.

Furthermore, the court may, on such terms as may be just, permit a party to call a witness or introduce evidence that is required to be, but is not included in, the party's statement if the court finds that the party has made a good faith effort to comply with *Code Civ. Proc. § 96(c)* (time within which statement must be served), or that the failure to comply was the result of his or her mistake, inadvertence, surprise, or excusable neglect as provided in *Code Civ. Proc. § 473* [*Code Civ. Proc. § 97(b)(5)*]. The conditions that the court may impose in permitting such a witness to be called or such evidence to be introduced include, but are not limited to, continuing the trial for a reasonable period of time and awarding costs and litigation expense [*Code Civ. Proc. § 97(b)(5)*]. For full discussion of relief from orders under *Code Civ. Proc. § 473*, see Ch. 489, *Relief From Judgments and Orders* .

PRACTICE TIP:

Opposition to Request for Relief. If reasonable grounds to do so exist, a complying party should oppose a noncomplying party's request for relief from a failure to comply with a responding evidentiary statement. This promotes enforcement of economic litigation rules, and may result in imposition of reasonable costs and litigation expenses arising from noncompliance on the noncomplying party or attorney, or both. *By Hon. Phillip J. Argento.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-345A California Forms of Pleading and Practice--Annotated § 345A.18

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.18 Prepared Testimony of Witnesses

A party may, in lieu of presenting direct testimony, offer the prepared testimony of relevant witnesses in the form of affidavits or declarations under penalty of perjury. The prepared testimony may include, but need not be limited to, the opinions of expert witnesses, and testimony that authenticates documentary evidence [*Code Civ. Proc. § 98*]. To the extent the contents of the prepared testimony would have been admissible were the witness to testify orally, the prepared testimony must be received as evidence in the case, provided that either of the following applies:

- A copy has been served on the party against whom it is offered at least 30 days prior to the trial, together with a current address of the affiant that is within 150 miles of the place of trial, and the affiant is available for service of process at that place for a reasonable period of time, during the 20 days immediately prior to trial [*Code Civ. Proc. § 98(a)*]; or

- The statement is in the form of all or part of a deposition in the case, and the party against whom it is offered had an opportunity to participate in the deposition [*Code Civ. Proc. § 98(b)*].

The court must determine whether or not the affidavit or declaration must be read into the record in lieu of oral testimony or admitted as a documentary exhibit [*Code Civ. Proc. § 98*].

PRACTICE TIP:

Whether to Use Prepared Testimony. Counsel should consider at least the following factors in deciding whether to utilize prepared testimony: (1) The importance of the witness's testimony to the substantive issues; (2) the importance of the witness's demeanor, credibility, and expertise, if any, to the persuasiveness of the presentation before the jury or judge; and (3) the cost of producing the in-court testimony. For example, a minor fact witness with average demeanor and credibility could well be handled through prepared testimony, whereas a credible expert on a close liability issue could lose persuasive impact if presented through prepared testimony. Some judges have ruled that when one party

complies with this procedure, and the other party nevertheless timely subpoenas that witness for trial, the cost of producing that trial testimony should fall on the subpoenaing party even if the subpoenaing party prevails in the action. *By Hon. Phillip J. Argento.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-345A California Forms of Pleading and Practice--Annotated § 345A.19

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.19 Effect of Judgment or Final Order

A judgment or final order in a limited civil case subject to the economic litigation provisions is conclusive between the parties and their successors in interest in respect to the matter directly adjudged. However, the judgment or final order does not operate as collateral estoppel of a party or a successor in interest to a party in other litigation with a person who wasnot a party or a successor in interest to a party to the action in which the judgment or order is rendered [*Code Civ. Proc. § 99*]. Thus, the scope of collateral estoppel arising from judgments in limited civil cases subject to *Code Civ. Proc. §§ 90-100* is narrower than its application to cases of unlimited jurisdiction in the superior court or to limited civil cases that were withdrawn from the economic litigation provisions under *Code Civ. Proc. § 91(c)*. For further discussion of collateral estoppel, see Ch. 491, *Res Judicata* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataGovernmentsCourtsSmall Claims Courts

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30-345A California Forms of Pleading and Practice--Annotated § 345A.20

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.20 Right to Appeal

Any party to a limited civil case subject to the economic litigation provisions has the right to appeal any judgment or final order consistent with the law governing appeals [*Code Civ. Proc. § 100*]. For discussion of appeals from judgments and orders in limited civil cases generally, see Subpart B.

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

[Reserved]

§§ 345A.21[Reserved]

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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.30 Scope of Subpart

This subpart discusses appealing the judgment or order in a limited civil case. The following related Procedural Checklists are in Part IV:

- Checklists for an appellant [*see § 345A.90*] and respondent [*see § 345A.91*].
- Checklist for removal of an appeal to the court of appeal [*see § 345A.92*].

The following forms for use in appealing the judgment or order in a limited civil case are included in § 345A.110 et seq.:

- Notices of appeal [*see § 345A.110*].
- Notices and other forms relating to preparation of the record on appeal [*see §§ 345A.112 -345A.119*].
- An application for extension of time to file a brief or other papers [*see § 345A.120*].
- Forms relating to abandonment and dismissal of appeals [*see* §§ 345A.121-345A.124].
- An application to transfer an appeal to the court of appeal [*see § 345A.125*].
- A motion for imposition of sanctions for a frivolous appeal [§ 345A.126].

For the procedure and forms for use in taking appeals from superior court in a civil case of unlimited jurisdiction, see Ch. 40, *Appeal: An Overview* , et seq., and for the procedure and forms for taking appeals in a small claims matter, see Ch. 526, *Small Claims* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-345A California Forms of Pleading and Practice--Annotated § 345A.31

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.31 Governing Law and Rules of Court Conversion Tables

Superior courts have appellate jurisdiction in causes prescribed by statute that arise in limited civil cases in their counties [*Cal. Const., art. VI, § 11*; *Code Civ. Proc. §§ 77(e), 904.2*].

Appeals generally are governed by *Code Civ. Proc. § 901 et seq.* The judgments and orders in a limited civil case from which an appeal may be taken are set forth in *Code Civ. Proc. § 904.2*. *Gov. Code § 68081* establishes a special procedure for briefing issues under consideration by the court but not discussed in party briefs.

Effective January 1, 2009, appellate division rules are set forth in *Cal. Rules of Ct., Rules 8.800-8.816*. Rules governing procedure for appellants and respondents are set forth in Cal. Rules of Ct., Rules 8.820- 8.842. Below is a chart for converting the rules in effect prior to January 1, 2009, to the new rule numbers. *Cal. Rules of Ct., Rule 8.802(a)*, provides that these rules are to be "construed to ensure that the proceedings they govern will be justly and speedily determined."

The transfer on appeal of a limited civil case to a court of appeal is governed by *Code Civ. Proc. § 911*, a statute intended to secure uniformity of decision and settle important questions of law. Rules relating to such transfers are set forth in *Cal. Rules of Ct., Rules 8.1000-8.1018*.

PRACTICE TIP:

Deadlines in Appeals of Limited Civil Cases. Numerous deadlines apply to appellate practice in the superior court; generally, those deadlines involve shorter periods of time than comparable procedures in the higher appellate courts. *By Hon. Phillip J. Argento.*

Rules of Court Conversion Tables

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Legal Topics:

For related research and practice materials, see the following legal topics:
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30-345A California Forms of Pleading and Practice--Annotated § 345A.32

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.32 Appellate Division of Superior Court

[1] Description

There is an appellate division of the superior court in every county and city and county [*Code Civ. Proc. § 77(a)*]. Most appellate divisions consist of three judges, but when the Chairman of the Judicial Council finds it necessary, the appellate division may consist of four judges [*Code Civ. Proc. § 77(a)*].

[2] Number of Judges Rendering Decision

The concurrence of two judges of the appellate division of the superior court is necessary to render a decision in every case in the appellate division [*Code Civ. Proc. § 77(d)*].

[3] Jurisdiction

[a] Appeals From Judgments and Orders in Limited Civil Cases

Superior courts have appellate jurisdiction in causes prescribed by statute that arise in limited civil cases in their counties [*Cal. Const., art. VI, § 11*; *Code Civ. Proc. §§ 77(e), 904.2*]. The appellate division of the superior court has jurisdiction on appeal from the superior court in a limited civil case except when the appeal is a retrial in the superior court [*Code Civ. Proc. § 77(e)*]. For discussion of an example of an appeal requiring retrial in the superior court, see Ch. 526, *Small Claims* .

The creation of appellate divisions in superior courts in place of the former appellate departments is intended to provide greater autonomy so that the division can exercise a true review function in a unified superior court [*see Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 74 (1998)]. Even before this, it had been held that the appellate department was a distinct and separate department of the superior court with jurisdiction and powers defined by statute pursuant to express constitutional sanction, and that it was limited to the consideration of appeals not

requiring a retrial, hence not embracing jurisdiction to review judgments through the medium of an original proceeding [*Thomasian v. Superior Court (1953) 122 Cal. App. 2d 322, 331, 265 P.2d 165* ; *see also* discussion under *§ 345A.33*].

[b] No Limit on Dollar Amount

No statute limits the jurisdiction of the appellate division of the superior court to any fixed amount in hearing appeals from limited civil cases. The appellate division, therefore, can review an order denying a motion to vacate forfeiture of bail, even though the amount of bail exceeds the ordinary jurisdictional amount in civil actions, because the order is appealable [*see* *Newman v. Superior Court (1967) 67 Cal. 2d 620, 622-623, 63 Cal. Rptr. 284, 432 P.2d 972* (making statement in context of appeals from municipal court)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.33 Proceedings for Extraordinary Relief

The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition [*Cal. Const., art. VI, § 10*].

For discussion and procedure for obtaining such relief, see Ch. 358, *Mandate and Prohibition* , and Ch. 492, *Review (Certiorari), Writ of*. If an appeal is proper, it is improper for the appellate division to hear the matter as a petition for extraordinary relief before a single judge. On an appeal to the appellate department, the decision would be concurred in by two of its judges and would be final [*see Conway v. Municipal Court (1980) 107 Cal. App. 3d 1009, 1019-1020, 166 Cal. Rptr. 246]* .

Even though appeal of a small claims court judgment is in a trial de novo to the superior court, rather than to the appellate division of the superior court, review of a postjudgment enforcement order of the small claims court is by extraordinary writ in the appellate division [*General Electric Capital Auto Financial Services, Inc. v. Appellate Division (2001) 88 Cal. App. 4th 136, 144-145, 105 Cal. Rptr. 2d 552]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.34 Scope of Review

[1] Judgments, Orders, and Rulings Appealable

The right of appeal is wholly statutory. No judgment or order can be appealed unless the right of appeal is expressly authorized by statute [*In re Taya C. (1991) 2 Cal. App. 4th 1, 6, 2 Cal. Rptr. 2d 810* ; *see Milliken v. Gray (1969) 276 Cal. App. 2d 595, 596, 81 Cal. Rptr. 525]* . *Code Civ. Proc. § 904.2* specifically lists the only orders and judgments in limited civil cases that are appealable [*see Kelly v. Kelly (1954) 270 P.2d 947* (decided under former *Code Civ. Proc. § 983*, now *Code Civ. Proc. § 904.2*)].

In limited civil cases, an appeal of a ruling by a superior court judge or other judicial officer may be taken from the following judgments or orders [*Code Civ. Proc. § 904.2*]:

- From a judgment, except (1) an interlocutory judgment, or (2) a judgment of contempt that is made final and conclusive by *Code Civ. Proc. § 1222*.
- From an order made after a judgment made appealable by the preceding paragraph.
- From an order changing or refusing to change the place of trial.
- From an order granting a motion to quash service of summons or granting a motion to stay or dismiss the action on the ground of inconvenient forum.
- From an order granting a new trial or denying a motion for judgment notwithstanding the verdict.
- From an order discharging or refusing to discharge an attachment or granting a right to attach order.

- From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.
- From an order appointing a receiver.

On an appeal under *Code Civ. Proc. § 904.2*, the appellate division may review the verdict or decision and any intermediate ruling, proceeding, order, or decision that involves the merits, necessarily affects the judgment or order appealed, or that substantially affects the rights of a party, including, on any appeal from the judgment, any order on motion for a new trial [*Code Civ. Proc. § 906*]. However, *Code Civ. Proc. § 906* does not authorize the reviewing court to review any decision or order from whichan appeal might have been taken [*Code Civ. Proc. § 906*]. For further discussion of the types of appealable orders generally, see Ch 42, *Appeal: Notice of Appeal* .

[2] Reviewable Issues

Superior courts usually review only for errors of law that, if uncorrected, would result in a miscarriage of justice; such error must result in injuryto the party in order to justify reversal [*see Cal. Const., art. VI, § 13*; *see also § 345A.36*]. The appellate division of the superior court, in rendering a decision in a proceeding other than a summary denial of a petition for extraordinary writ, may raise an issue that is neither proposed nor briefed by any party to the proceeding. However, before the appellate court renders its decision based on that issue, the court is required to afford the parties an opportunity to present their views on the matter through supplemental briefing [*Gov. Code § 68081*]. If the court fails to afford the opportunity, a rehearing must be ordered on timely petition of any party [*Gov. Code § 68081*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.35 Decision of Appellate Division

The appellate division may affirm, reverse, or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, and may, if necessary or proper, direct a new trial or further proceedings to be had [*Code Civ. Proc. § 906*]. For further discussion see Ch. 51, *Appeal: Hearing and Decision* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.36 Prejudicial Error Doctrine

It is constitutionally mandated that no judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or the improper admission of evidence, or for any error as to any matter on pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court is of the opinion that the error complained of has resulted in a miscarriage of justice [*Cal. Const., art. VI, § 13*]. A miscarriage may be found when after an examination of the entire case, including the evidence, the court is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error [*People v. Watson (1956) 46 Cal.2d 818, 836, 299 P.2d 243]* .

Cal. Const., art. VI, § 13, is clarified and strengthened *Code Civ. Proc. § 475*, which provides that the court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect in the pleadings or proceedings that, in the opinion of the court, does not affect the substantial rights of the parties. No judgment, decision, or decree may be reversed or affected by reason of any error, ruling, instruction, or defect, unless it appears from the record [*Code Civ. Proc. § 475*]:

- That the error, ruling, instruction, or defect was prejudicial;
- That by reason of such error, ruling, instruction, or defect, the party complaining or appealing sustained and suffered substantial injury; and
- That a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed.

There is no presumption that error is prejudicial or that injury was done if error is shown [*Code Civ. Proc. § 475*].

The respondent, or the party in whose favor the judgment appealed from is given, may, without appealing from the

judgment, request that the reviewing court determine whether or not the appellant was prejudiced by the errors or error on which he or she relies for reversal or modification of the judgment from which the appeal is taken [*Code Civ. Proc. § 906*].

For further discussion, see Ch. 41, *Appeal: Review Standards and Appellate Rules of Law* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.37 Who May Appeal

[1] Aggrieved Party

Any aggrieved party may appeal in the cases prescribed by the law governing appeals [*Code Civ. Proc. § 902*]. An aggrieved party is any party having an interest recognized by law in the subject matter of the judgment, whose interest is affected injuriously by the judgment [*County of Alameda v. Carleson (1971) 5 Cal. 3d 730, 737, 97 Cal. Rptr. 385, 488 P.2d 953* ; *Redevelopment Agency v. City of Berkeley (1978) 80 Cal. App. 3d 158, 166, 143 Cal. Rptr. 633]* . Any person who is party to the record is an aggrieved party [*Pacific States Sav. & L. Co. v. Mortimer (1945) 70 Cal. App. 2d 811, 814, 161 P.2d 684* (interpreting former *Code Civ. Proc. § 938*, which is substantially similar to *Code Civ. Proc. § 902*)].

A party appealing is known as an appellant, and an adverse party as a respondent [*Code Civ. Proc. § 902*].

[2] Death of Appellant

In the event of the death of any person who would, if still alive, have a right of appeal, either the attorney of record representing the decedent in the court in which the judgment was rendered, or the executor or administrator of the estate of the decedent, may file a notice of appeal from the judgment within the time the decedent could have filed such a notice if he or she had survived [*Code Civ. Proc. § 903*].

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30-345A California Forms of Pleading and Practice--Annotated § 345A.38

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.38 Notice of Appeal

[1] Requirement

An appeal from a judgment of a limited civil case, or from a particular part of the judgment, is taken by filing with the clerk of that court a notice of appeal from the judgment [*Cal. Rules of Ct., Rule 8.821(a)*].

[2] Sufficiency of Notice

A notice of appeal is sufficient if it identifies the particular limited civil case judgment or order being appealed. A notice of appeal is to be liberally construed [*Cal. Rules of Ct., Rule 8.821(a)(2)*].

Because a notice of appeal must be liberally construed in favor of its sufficiency, notices referring to an order have been interpreted to apply to a judgment in order to protect the right of appeal when it is reasonably clear that the appellant was attempting to appeal from the judgment and respondent could not possibly have been misled or prejudiced [*Vibert v. Berger (1966) 64 Cal. 2d 65, 67-68, 48 Cal. Rptr. 886, 410 P.2d 390* ; *Luz v. Lopes (1960) 55 Cal. 2d 54, 59-60, 10 Cal. Rptr. 161, 358 P.2d 289* ; *Brown v. Municipal Court (1978) 86 Cal. App. 3d 357, 360 n.1, 150 Cal. Rptr. 216* (cases interpreting former Cal. Rules of Ct., Rule 1(a) which is substantially similar to *Cal. Rules of Ct., Rule 8.821(a)(2)*].

[3] Persons Authorized to File

A notice of appeal must be signed by the appellant or by his or her attorney [*Cal. Rules of Ct., Rule 8.821(a)(1)*].

Cal. Rules of Ct., Rule 8.821(a)(1) constitutes a liberalization and a distinct departure from the general rule that a party represented by counsel may not file papers in propria persona in the litigation because Rule 8.821(a)(1) permits either the appellant or his or her attorney to sign the notice. "His or her attorney" has been construed to include an attorney not of record if he or she actually is an appealing party's attorney [*see Estate of Hultin (1947) 29 Cal. 2d 825, 832, 178*

P.2d 756 ; *City of Downey v. Johnson (1968) 263 Cal. App. 2d 775, 781, 69 Cal. Rptr. 830* (interpreting former Cal. Rules of Ct., Rule 1(a), which is substantially similar to *Cal. Rules of Ct., Rule 8.821(a)(1)*]. The rule is apparently satisfied when any person empowered to act for appellant signs the notice [*see Seeley v. Seymour (1987) 190 Cal. App. 3d 844, 853-854, 237 Cal. Rptr 282]* .

[4] What Constitutes Filing

Filing of a notice of appeal with a court clerk consists of (1) its delivery to the clerk, (2) for the purpose of filing it, (3) at the clerk's office, (4) during business hours, and (5) with payment of any required filing fee. If the filing is by mail, it is complete when the document is delivered to the clerk by the postal service, not when it is deposited in the mail; the provisions of *Code Civ. Proc. § 1013* (extension when service by mail) and *Evid. Code § 641*(presumption of receipt of mailed document) have no application to the filing of a notice of appeal [*Thompson, Curtis, Lawson & Parrish v. Thorne (1971) 21 Cal. App. 3d 797, 801, 98 Cal. Rptr. 753]* .

[5] Notification of Filing

When the notice of appeal is filed, the trial court clerk mails notification of the filing to the attorney of record of each party and to any unrepresented party. A copy of the notice of appeal is sufficient notification if the required information is on the copy or is added by the trial court clerk. The mailing is a sufficient performance of the clerk's duty despite the death of the party or the discharge, disqualification, suspension, disbarment, or death of the attorney. The failure of the clerk to give the notification does not affect the validity of the notice of appeal [*Cal. Rules of Ct., Rule 8.821(d)*].

[6] Cross Appeal

If an appellant timely appeals from a judgment or appealable order, the time for any other party to appeal from the same judgment or order is extended until 10 days after the trial court clerk mails notification of the first appeal. If an appellant timely appeals from an order granting a motion for a new trial, an order granting--within 75 days after entry of judgment--a motion to vacate the judgment, or a judgment notwithstanding the verdict, the time for any other party to appeal from the original judgment or from an order denying a motion for judgment notwithstanding the verdict is extended until 10 days after the clerk mails notification of the first appeal [*Cal. Rules of Ct., Rule 8.823(f)*].

For a discussion of motions for new trial and motions to vacate a judgment and to enter another and different judgment, see *Ch. 371, Motions After Trial, §§ 371.60 et seq., 371.90 et seq.*.

PRACTICE TIP:

Appeal of Order for New Trial. A party who loses at trial may move for a new trial. If that motion is granted, the party who won at trial may appeal the order for a new trial [*Code Civ. Proc. § 904.2(e)*]. In such case, the party who lost at trial should file a cross-appeal pursuant to *Cal. Rules of Ct., Rule 8.823(f)*. It is unusual, but if the grant of a new trial is reversed, and a cross-appeal is pending, then the appellate court can consider it. But, if no cross-appeal has been filed, and the grant of new trial is reversed, the judgment in favor of the winning party is reinstated, and it is then too late for the losing party to file an appeal from that judgment. *By Hon. Phillip J. Argento.*

Legal Topics:

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30-345A California Forms of Pleading and Practice--Annotated § 345A.39

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.39 Time for Filing Notice of Appeal

[1] After Entry of Judgment

A notice of appeal must be filed on or before the earliest of the following dates [*Cal. Rules of Ct., Rule 8.822(a)(1)* (file-stamped copy of judgment or appealable order may be used in place of "notice of entry")]:

- 30 days after the trial court clerk mails the party filing the notice of appeal a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, showing the date either was mailed.

- 30 days after the party filing the notice of appeal serves or is served by a party with a document entitled "Notice of Entry" of judgment or a file-stamped copy of the judgment, accompanied by proof of service.

- 90 days after the date of entry of the judgment.

These times are subject to exceptions provided in *Cal. Rules of Ct., Rule 8.823*, governing extensions of time and cross-appeals, or by statute [*Cal. Rules of Ct., Rule 8.822(a)*; for discussion of *Cal. Rules of Ct., Rule 8.823, see § 345A.39[5], [6]*].

[2] Prior to Entry of Judgment

A notice of appeal filed after judgment is rendered but before it is entered is valid and is treated as filed immediately after entry of judgment. The appellate division may treat a notice of appeal filed after the trial court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment [*Cal. Rules of Ct., Rule 8.822(c)*].

[3] Notice of Entry of Judgment

Except for specified family law proceedings, small claims actions, or actions or proceedings in which a prevailing party is not represented by counsel, the party submitting an order or judgment for entry must prepare and mail a copy of the notice of entry of judgment to all parties who have appeared in the action or proceeding. This party also must file with the court the original notice of entry of judgment and proof of service by mail [*Code Civ. Proc. § 664.5(a)*; *see Code Civ. Proc. § 664.5(c)* (defining "judgment")]. If a prevailing party is not represented by counsel in a contested action or special proceeding, the court clerk must mail notice of entry of judgment promptly on entry to all parties who have appeared in the action or special proceeding, and must execute a certificate of the mailing and place it in the court's file in the cause [*Code Civ. Proc. § 664.5(b)*].

[4] Date of Entry of Judgment

The entry date of a judgment is the date the judgment is filed under *Code Civ. Proc. § 668.5* or the date it is entered in the judgment book. The date of entry of an appealable order that is entered in the minutes is the date it is entered in the permanent minutes. However, if the minute order directs that a written order be prepared, the entry date is the date the signed order is filed. A written order prepared under *Cal. Rules of Ct., Rule 3.1312*, or similar local rule is not such an order prepared by direction of a minute order. The entry date of an order that is not entered in the minutes is the date the signed order is filed [*Cal. Rules of Ct., Rule 8.822(b)*].

[5] On Denial of Motion for New Trial

If any party serves and files a valid notice of intention to move for a new trial, the time to appeal from the judgment is extended for all parties. If the motion is denied, the time to appeal from the judgment is extended until the earliest of [*Cal. Rules of Ct., Rule 8.823(b)*]:

- 15 days after the trial court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order.
- 15 days after denial of the motion by operation of law.
- 90 days after entry of judgment.

[6] On Denial of Motion to Vacate Judgment

If, within the time prescribed by *Cal. Rules of Ct., Rule 8.822* [*see § 345A.39[1]*], to appeal from the judgment, any party serves and files a valid notice of intention to move to vacate the judgment or a valid motion to vacate the judgment, the time to appeal from the judgment is extended for all parties until the earliest of [*Cal. Rules of Ct., Rule 8.823(c)*]:

- 15 days after the trial court clerk mails, or a party serves, an order denying the motion or a notice of entry of that order.
- 45 days after the first notice of intention to move or motion is filed.
- 90 days after entry of judgment.

Under certain circumstances, withdrawal of a motion to vacate before the motion has been heard is the equivalent to denial of the motion and extends the time to appeal until 30 days after the date of withdrawal [*see O'Donnell v. Municipal Court (1989) 207 Cal. App. 3d 714, 716-717, 255 Cal. Rptr. 31* (defendant's motion withdrawn after trial

judge warned defendant that motion would result in larger award for plaintiff)].

Cal. Rules of Ct., Rule 8.823(c), refers generally to any motion to vacate on any ground, and thus covers all types of motions to vacate, statutory or otherwise. For example, the rule applies to motions to vacate under *Code Civ. Proc. § 473* as well as those motions made in compliance with *Code Civ. Proc. §§ 663* and *663a* (relating to filing notice of intention within 15 days, etc.) [*Knudson v. Superior Court (1968) 267 Cal. App. 2d 876, 880, 73 Cal. Rptr. 513]* . For a discussion of motions to vacate, see *Ch. 371, Motions After Trial, § 371.90 et seq.*

[7] Jurisdictional Nature of Time Requirement

Time requirements for filing a notice of appeal are mandatory and jurisdictional. In the absence of statutory authorization, neither the trial nor appellate courts may extend or shorten the time for appeal, even to relieve against mistake, inadvertence, accident, or misfortune. Nor can jurisdiction be conferred on the appellate court by the consent or stipulation of the parties, estoppel, or waiver. In strictly adhering to the statutory time for filing a notice of appeal the courts are not arbitrarily penalizing procedural missteps. Relief may be given for excusable delay in complying with many provisions in the statutes and rules on appeal, such as those governing the time within which the record and briefs must be prepared and filed. These procedural time provisions, however, become effective after the appeal is taken. The first step, taking of the appeal, is not merely aprocedural one; it vests jurisdiction in the appellate court and terminates the jurisdiction of the lower court [*Estate of Hanley (1943) 23 Cal. 2d 120, 123-24, 142 P.2d 423* ; *see also Cal. Rules of Ct., Rule 8.822(d)* (if notice of appeal filed late, appellate division must dismiss appeal); *but see Drum v. Superior Court (2006) 139 Cal. App. 4th 845, 852-853, 43 Cal. Rptr. 3d 279* (on untimely notice of appeal, appellate court has discretion to treat appeal as petition for extraordinary writ within appellate court's jurisdiction)].

[8] No Estoppel Based on Excuse

The theory of offering proof of estoppel based on a compelling excuse in order to extend the time for filing has been rejected [*Hollister Convalescent Hosp., Inc. v. Rico (1975) 15 Cal. 3d 660, 672, 674, 125 Cal. Rptr. 757, 542 P.2d 1349* (disapproving *Slawinski v. Mocettini (1965) 63 Cal. 2d 70, 45 Cal. Rptr. 15, 403 P.2d 143*)]. The notion of estoppel has no place in determining whether a timely notice of appeal has been filed within the jurisdictional period. The expiration of a jurisdictional period is not, and by its nature cannot be, affected by the actions of the parties [*Hollister Convalescent Hosp., Inc. v. Rico (1975) 15 Cal. 3d 660, 674, 125 Cal. Rptr. 757, 542 P.2d 1349* ; *see Sharp v. Union Pac. R.R. Co. (1992) 8 Cal. App. 4th 357, 361, 9 Cal. Rptr. 2d 925]* . Furthermore, it is immaterial whether misrepresentations concerning the date on which the order was filed are willful or inadvertent, or whether the parties seeking to dismiss the appeal are acting in good faith or not. The requirement as to the time for taking an appeal is mandatory, and the court is without jurisdiction to consider one which has been taken subsequent to the expiration of the statutory period [*Estate of Hanley (1943) 23 Cal. 2d 120, 122, 142 P.2d 423* ; *see Sharp v. Union Pac. R.R. Co. (1992) 8 Cal. App. 4th 357, 361, 9 Cal. Rptr. 2d 925]* .

[9] Effect of Conflicting Dates of Entry

When there is a clear conflict between the permanent minutes of the court and a formal order of denial it subsequently issues relative to the date of entry of an order denying a motion for new trial, that conflict is to be resolved for purposes of appeal in the appellant's favor. Thus, for purposes of appeal, the date of entry in such circumstances is deemed to be the later of the two conflicting dates [*Hollister Convalescent Hosp., Inc. v. Rico (1975) 15 Cal. 3d 660, 668, 125 Cal. Rptr. 757, 542 P.2d 1349* (interpreting *Slawinski v. Mocettini (1965) 63 Cal. 2d 70, 72-74, 45 Cal. Rptr. 15, 403 P.2d 143*)].

[10] Effect of Misdescription of Order or Judgment

A notice of appeal that specifies a nonappealable order but is timely with respect to an existing appealable order or judgment will be construed to apply to the latter judgment or order [*Hollister Convalescent Hosp., Inc. v. Rico (1975)*

15 Cal. 3d 660, 669, 125 Cal. Rptr. 757, 542 P.2d 1349 ; *Vesely v. Sager (1971) 5 Cal. 3d 153, 158 n.2, 95 Cal. Rptr. 623* ; *Vibert v. Berger (1966) 64 Cal. 2d 65, 68, 48 Cal. Rptr. 886, 410 P.2d 390]* .

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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.40 Filing Fee

The notice of appeal must be accompanied by the filing fee required under *Gov. Code § 70621*, an application for a waiver of court fees and costs on appeal under *Cal. Rules of Ct., Rule 8.818*, or an order granting an application for a waiver of court fees and costs. The filing fee is nonrefundable [*Cal. Rules of Ct., Rule 8.821(b)(1)*]. The clerk must file the notice of appeal even if the appellant does not present the filing fee or an application for, or order granting, a waiver of court fees and costs [*Cal. Rules of Ct., Rule 8.821(b)(2)*].

The fee for filing a notice of appeal in a limited civil case as of January 2010 is $330 [*Gov. Code § 70621(a)*]. However, if the amount demanded in the limited civil case, excluding attorney's fees and costs, is $10,000 or less, the fee is $205 [*Gov. Code § 70621(b)*]. The Judicial Council may make rules governing the time and method of payment and providing for excuse [*Gov. Code § 70621(d)*]. For a discussion of proceeding in forma pauperis in the trial court, see *Ch. 174, Costs and Attorney's Fees, § 174.110 et seq.*

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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.41 Stay on Appeal

Except as provided in *Code Civ. Proc. § 917.1 et seq.* (judgments or orders requiring undertakings), the perfecting of an appeal automatically stays proceedings in the trial court on the judgment or order appealed from or on the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed on any other matter embraced in the action and not affected by the judgment or order [*Code Civ. Proc. § 916(a)*]. For a discussion of *Code Civ. Proc. § 917.1 et seq.*, see Ch. 43, *Appeal: Stay of Proceedings* .

PRACTICE TIP:

Non-Application of Automatic Stay. Judgments or orders requiring undertakings under *Code Civ. Proc. § 917.1 et seq.*, which do not receive automatic stays on perfecting an appeal, are among the most frequently appealed limited civil case determinations. For example, absent an appeal bond, judgments and orders for money [*Code Civ. Proc § 917.1(a)(1)*] or delivery of possession of real property [*Code Civ. Proc. § 917.4*] arising from unlawful detainer actions are not stayed. Counsel for appellant should consult *Code Civ. Proc. § 917.1 et seq.* for the extent of judgments that require undertakings before receiving automatic stays on appeal. *By Hon. Phillip J. Argento.*

When there is a stay of proceedings other than the enforcement of the judgment, the trial court will have jurisdiction of proceedings related to the enforcement of the judgment as well as any other matter embraced in the action and not affected by the judgment or order appealed from [*Code Civ. Proc. § 916(b)*].

Legal Topics:

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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.42 Types of Record on Appeal

The record on appeal is the set of paper and exhibits reflecting proceedings in the trial court on which the appeal is decided. Any reversible error must be shown from this record. Generally, the record on appeal consists of a reporter's transcript and a clerk's transcript [*Cal. Rules of Ct., Rules 8.832, 8.834*]. Further, an appeal may be presented on a record consisting in whole or in part of an agreed statement [*Cal. Rules of Ct., Rule 8.836*], or a transcript officially recorded pursuant to *Gov. Code § 69957* may be used in lieu of a reporter's transcript [*Cal. Rules of Ct., Rule 8.756*].

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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.42A Notice Designating Record on Appeal

Within 10 days after filing the notice of appeal, an appellant must serve and file a notice in the trial court designating the record on appeal. The appellant may combine its notice designating the record with its notice of appeal [*Cal. Rules of Ct., Rule 8.831(a)*].

The notice must specify the date the notice of appeal was filed and which form of the record of the written documents from the trial court proceedings the appellant elects to use [*Cal. Rules of Ct., Rule 8.831(b)*]. These forms include [*Cal. Rules of Ct., Rule 8.830(a)(1)*]:

- A clerk's transcript under *Cal. Rules of Ct., Rule 8.832*.

- If the court has a local rule for the appellate division permitting this form of the record, the original trial court file under *Cal. Rules of Ct., Rule 8.833*.

- An agreed statement under *Cal. Rules of Ct., Rule 8.836*.

If an appellant wants to raise any issue that requires consideration of the oral proceedings in the trial court, the record on appeal must include a record of the oral proceedings in the form of one of the following [*Cal. Rules of Ct., Rule 8.830(a)(2)*]:

- A reporter's transcript under *Cal. Rules of Ct., Rule 8.834* or a transcript prepared from an official electronic recording under *Cal. Rules of Ct., Rule 8.835*. I

- If the court has a local rule for the appellate division permitting this form of the record, an official electronic recording of the proceedings under *Cal. Rules of Ct., Rule 8.835*.

- An agreed statement under *Cal. Rules of Ct., Rule 8.836*.
- A statement on appeal under *Cal. Rules of Ct., Rule 8.837*.

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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.43 Reporter's Transcript

[1] Appellant's Notice

An appellant's notice designating a reporter's transcript under *Cal. Rules of Ct., Rule 8.831* [*see § 345A.42A*] must specify the date of each proceeding to be included in the transcript and may specify portions of the designated proceedings that are not to be included. If the appellant designates less than all the testimony, the notice must state the points to be raised on the appeal; the appeal is then limited to those points unless, on motion, the appellate division permits otherwise [*Cal. Rules of Ct., Rule 8.834(a)(1), (2)*]. The clerk promptly mails a copy of each notice to the reporter. The copy must show the date it was mailed [*Cal. Rules of Ct., Rule 8.834(a)(4)*].

[2] Respondent's Notice to Transcribe Additional Proceedings

If the appellant serves and files a notice designating a reporter's transcript, the respondent may, within 10 days after such service, serve and file a notice in the trial court designating any additional proceedings the respondent wants included in the reporter's transcript [*Cal. Rules of Ct., Rule 8.834(a)(3)*].

[3] [Reserved]

[4] Contents of Reporter's Transcript

The reporter must transcribe all designated proceedings and must note in the transcript where any proceedings were omitted and the nature of those proceedings. The reporter must also note where any exhibit was marked for identification and where it was admitted or refused, identifying such exhibits by number or letter. The reporter may not transcribe the voir dire examination of jurors, any opening statement, or the proceedings on a motion for new trial, unless they are designated. If a party designates a portion of a witness's testimony to be transcribed, the reporter must transcribe the witness's entire testimony unless the parties stipulate otherwise. The reporter may not copy any document includable in the clerk's transcript under *Cal. Rules of Ct., Rule 8.832* [*see § 345A.44*] [*Cal. Rules of Ct., Rule 8.834(c)*].

[5] Estimate of Cost

Within 10 days after the clerk mails a notice under *Cal. Rules of Ct., Rule 8.834(a)(4)* [*see § 345A.43[1]*], the reporter must file the estimate with the clerk, or notify the clerk in writing of the date that he or she notified the appellant directly, of the estimated cost of preparing the reporter's transcript [*Cal. Rules of Ct., Rule 8.834(b)(1)*].

[6] Reporter's Charges

Within 10 days after the clerk notifies the appellant of the estimated cost of preparing the reporter's transcript or within 10 days after the reporter notifies the appellant directly, the appellant must deposit with the clerk an amount equal to the estimated cost or file with the clerk a waiver of the deposit signed by the reporter. The clerk must then promptly notify the reporter to prepare the transcript [*Cal. Rules of Ct., Rule 8.834(b)(2)*].

[7] Preparation of Reporter's Transcript

Within 20 days after the clerk notifies the reporter to prepare the transcript, or the reporter receives the fees from the appellant, the reporter must prepare and certify an original of the reporter's transcript and file it in the trial court. The reporter must also file one copy of the original transcript or more than one copy if multiple appellants equally share the cost of preparing the record [*Cal. Rules of Ct., Rule 8.834(d)(1)*].

When the transcript is completed, the reporter must bill each designating party at the statutory rate and send a copy of the bill to the clerk. The clerk must pay the reporter from that party's deposited funds and refund any excess deposit or notify the party of any additional funds needed. In a multiple reporter case, the clerk must pay each reporter who certifies under penalty of perjury that his or her transcript portion is completed [*Cal. Rules of Ct., Rule 8.834(d)(2)*].

If the appeal is abandoned or is dismissed before the reporter has filed the transcript, the reporter must inform the clerk of the cost of the portion of the transcript that the reporter has completed. The clerk must pay that amount to the reporter from the appellant's deposited funds and refund any excess deposit [*Cal. Rules of Ct., Rule 8.834(d)(3)*].

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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.44 Clerk's Transcript

[1] Appellant's Notice

A notice designating documents to be included in a clerk's transcript must identify each designated document by its title and filing date or, if the filing date is not available, the date it was signed. A notice designating additional documents may specify portions of designated documents that are not to be included in the clerk's transcript. For minute orders or jury instructions, it is sufficient to collectively designate all minute orders or all minute orders entered between specified dates, or all written instructions given, refused, or withdrawn [*Cal. Rules of Ct., Rule 8.832(b)(2)*].

All exhibits admitted in evidence, refused, or lodged are deemed part of the record, but a party wanting an exhibit included in the transcript must specify that exhibit by number or letter in its designation. If the trial court has returned a designated exhibit to a party, the party in possession of the exhibit must deliver it to the trial court clerk within 10 days after the notice designating the exhibit is served [*Cal. Rules of Ct., Rule 8.832(b)(3)*].

PRACTICE TIP:

Designating Papers for Transcript. Specificity and selectivity are important in designating papers for inclusion in the clerk's transcript; otherwise, the clerk may include unnecessary or unwanted documents that nevertheless fit the descriptions given or may overlook desired documents. This frequent occurrence results in confusion and delay. Many appellate counsel and appellate clerks recommend a personal inspection of the court file before designating papers for the clerk's transcript to ensure that documents benefitting their clients are clearly identified and included. In addition, the practice of designating such documents in a combined notice of appeal, reporter's transcript, and clerk's transcript facilitates such early examination of the file. *By Hon. Phillip J. Argento.*

[2] Respondent's Notice to Include Additional Items

Within 10 days after the appellant serves a notice under rule 8.831 indicating that the appellant elects to use a clerk's

transcript, the respondent may serve and file a notice in the trial court designating any additional documents the respondent wants included in the clerk's transcript [*Cal. Rules of Ct., Rule 8.832(b)(1)*].

[3] [Reserved]

[4] Contents of Clerk's Transcript

The clerk's transcript must contain [*Cal. Rules of Ct., Rule 8.832(a)*]:

- The notice of appeal.
- Any judgment appealed from and any notice of its entry.
- Any order appealed from and any notice of its entry.
- Any notice of intention to move for a new trial, or motion to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration of an appealed order, with supporting and opposing memoranda and attachments, and any order on such motion and any notice of its entry.
- The notice designating the record on appeal.
- The register of actions, if any.

Each document must show the date necessary to determine the timeliness of the appeal under *Cal. Rules of Ct., Rule 8.822* or *8.823* [*Cal. Rules of Ct., Rule 8.832(b)(2)*]. If designated by any party, the clerk's transcript must also contain [*Cal. Rules of Ct., Rule 8.832(b)(3)*]:

- Any other document filed or lodged in the case in the trial court.
- Any exhibit admitted in evidence, refused, or lodged.
- Any jury instructions that any party submitted in writing, the cover page required by *Cal. Rules of Ct. Rule 2.1055(b)(2)*, and any written jury instructions given by the court.

[5] Charges

Within 30 days after the respondent files a designation under *Cal. Rules of Ct., Rule 8.832(b)(1)*, [*see § 345A.44[2]*] or the time to file it expires, whichever first occurs, the trial court clerk must send to the appellant, notice of the estimated cost to prepare an original and one copy of the clerk's transcript. The trial court clerk must also send to each party other than the appellant, notice of the estimated cost to prepare a copy of the clerk's transcript for that party's use [*Cal. Rules of Ct., Rule 8.832(c)(1)*].

Within 10 days after the clerk sends the notice, the appellant and any party wanting to purchase a copy of the clerk's transcript must deposit the estimated cost with the clerk, unless otherwise provided by law or the party submits an application for a waiver of the cost under *Cal. Rules of Ct., Rule 8.818*, or an order granting a waiver of this cost [*Cal. Rules of Ct., Rule 8.832(c)(3)*].

[6] Preparation of Clerk's Transcript

Within 30 days after the appellant deposits the estimated cost of the transcript or the court files an order waiving that cost, the clerk must prepare an original and one copy of the clerk's transcript and certify the original, and prepare any

additional copies for which the parties have made deposits [*Cal. Rules of Ct., Rule 8.832(d)(1)*].

If the appeal is abandoned or dismissed before the clerk has completed preparation of the transcript, the clerk must refund any portion of the deposit exceeding the preparation cost actually incurred [*Cal. Rules of Ct., Rule 8.832(d)(2)*].

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30-345A California Forms of Pleading and Practice--Annotated § 345A.45

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.45 Appeal on Trial Court File

If the court has a local rule for the appellate division electing to use the trial court file for the record, the original trial court file may be used instead of a clerk's transcript [*Cal. Rules of Ct., Rule 8.833(a)*].

Within 10 days after the appellant serves a notice under *Cal. Rules of Ct., Rule 8.831* [*see § 345A.42A*], indicating that the appellant elects to use a clerk's transcript, the trial court clerk may mail the appellant a notice indicating that the appellate division for that court has elected by local court rule to use the original trial court file instead of a clerk's transcript and providing the appellant with an estimate of the cost to prepare the file, including the cost of sending the index [*Cal. Rules of Ct., Rule 8.833(b)(1)*].

Within 10 days after the clerk mails the estimate, the appellant must deposit the estimated cost with the clerk, unless otherwise provided by law or the party submits an application for a waiver of the cost under *Cal. Rules of Ct., Rule 8.818* or an order granting a waiver of this cost [*Cal. Rules of Ct., Rule 8.833(b)(2)*].

Within 10 days after the appellant deposits the cost or the court files an order waiving that cost, the trial court clerk must put the trial court file in chronological order, number the pages, and attach a chronological index and a list of all attorneys of record, the parties they represent, and any unrepresented parties [*Cal. Rules of Ct., Rule 8.833(b)(3)*].

The clerk must send copies of the index to all attorneys of record and any unrepresented parties for their use in paginating their copies of the file to conform to the index [*Cal. Rules of Ct., Rule 8.833(b)(4)*].

If the appellant elected to proceed with a reporter's transcript, the clerk must send the prepared file to the appellate division with the reporter's transcript. If the appellant elected to proceed without a reporter's transcript, the clerk must immediately send the prepared file to the appellate division [*Cal. Rules of Ct., Rule 8.833(b)(5)*].

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For related research and practice materials, see the following legal topics:
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35-345A California Forms of Pleading and Practice--Annotated § 345A.45A

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.45A Appeal When Trial Proceedings Were Officially Electronically Recorded

If the trial court proceedings were officially recorded electronically under *Gov. Code § 69957* and the electronic recording was prepared in compliance with applicable rules regarding electronic recording of court proceedings, the written transcripts may be used as the record on appeal [*Cal. Rules of Ct., Rule 8.835(a)*]. A written transcript of official electronic recordings prepared and certified as provided in *Cal. Rules of Ct., Rule 2.952*, is prima facie a true and complete record of the oral proceedings it purports to cover and satisfies any requirement for a reporter's transcript of oral proceedings [*Cal. Rules of Ct., Rule 8.835(b)*].

If the court has a local rule for the appellate division permitting this, on stipulation of the parties or on order of the trial court under *Cal. Rules of Ct., Rule 8.837(d)(6)*, the original of an official electronic recording of the trial court proceedings, or a copy made by the court, may be transmitted as the record of the oral proceedings without being transcribed. Such an official electronic recording satisfies any requirement for a reporter's transcript of the proceedings [*Cal. Rules of Ct., Rule 8.835(c)*].

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30-345A California Forms of Pleading and Practice--Annotated § 345A.46

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.46 Agreed Statement

[1] Contents

An agreed statement is a summary of the trial court proceedings that is agreed to by the parties. If the parties have prepared an agreed statement or stipulated to prepare one, the appellant can elect under *Cal. Rules of Ct., Rule 8.831* [*see* § 345A.46A], to use an agreed statement as the record of the documents filed in the trial court, replacing the clerk's transcript, and as the record of the oral proceedings in the trial court, replacing the reporter's transcript [*Cal. Rules of Ct., Rule 8.836(a)*].

The agreed statement must explain the nature of the action, the basis of the appellate division's jurisdiction, and the rulings of the trial court relating to the points to be raised on appeal. The statement should recite only those facts that a party considers relevant to decide the appeal and must be signed by the parties [*Cal. Rules of Ct., Rule 8.836(b)(1)*]. If the agreed statement replaces a clerk's transcript, the statement must be accompanied by copies of all items required by *Cal. Rules of Ct., Rule 8.832(a)(1)*, showing the dates required by *Cal. Rules of Ct., Rule 8.832(a)(2)* [*Cal. Rules of Ct., Rule 8.836(b)(2)*]. The statement may be accompanied by copies of any document includable in the clerk's transcript under *Cal. Rules of Ct., Rule 8.832(a)(3)* [*Cal. Rules of Ct., Rule 8.836(b)(3)*].

[2] Extension of Other Time Limits During Preparation of Statement

If an appellant indicates on its notice designating the record under *Cal. Rules of Ct., Rule 8.831* [*see* § 345A.46A], that it elects to use an agreed statement, the appellant must file with the notice designating the record either the agreed statement or a stipulation that the parties are attempting to agree on a statement [*Cal. Rules of Ct., Rule 8.836(c)(1)*]. Within 30 days after filing the notice of designation under *Cal. Rules of Ct., Rule 8.831*, the appellant must either [*Cal. Rules of Ct., Rule 8.836(c)(2)*]:

- File the statement if the parties were able to agree on the statement.

- File both a notice stating that the parties were not able to agree on the statement and a new notice designating the record under *Cal. Rules of Ct., Rule 8.831*. In the new notice designating the record, the appellant may not elect to use an agreed statement.

Legal Topics:

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30-345A California Forms of Pleading and Practice--Annotated § 345A.47

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.47 Statement on Appeal

[1] Appellant's Notice and Proposed Statement

A statement on appeal is a summary of the trial court proceedings that is approved by the trial court. An appellant can elect under *Cal. Rules of Ct., Rule 8.831* [*see § 345A.42A*], to use a statement on appeal as the record of the oral proceedings in the trial court, replacing the reporter's transcript [*Cal. Rules of Ct., Rule 8.837(a)*]. If the appellant elects in its notice designating the record use a statement on appeal, the appellant must serve and file a proposed statement within 20 days after filing the notice. If the appellant does not file a proposed statement within this time, the trial court clerk must promptly notify the appellant by mail that it must file the proposed statement within 15 days after the notice is mailed and that failure to comply will result in the appeal being dismissed [*Cal. Rules of Ct., Rule 8.837(b)*].

The proposed statement must contain a condensed narrative of the oral proceedings that the appellant believes necessary for the appeal and a summary of the trial court's holding and judgment. Subject to the court's approval, the appellant may present some or all of the evidence by question and answer [*Cal. Rules of Ct., Rule 8.837(c)(1)*].

The proposed statement must also include a statement of the points the appellant is raising on appeal. If the condensed narrative covers only a portion of the oral proceedings, then the appeal is limited to the points identified in the statement unless, on motion, the appellate division permits otherwise [*Cal. Rules of Ct., Rule 8.837(c)(2)*].

[2] Review of Appellant's Proposed Statement

Within 10 days after the appellant files the proposed statement, the respondent may serve and file proposed amendments to the statement [*Cal. Rules of Ct., Rule 8.837(d)(1)*].

No later than 10 days after the respondent files proposed amendments or the time to do so expires, a party may request a hearing to review and correct the proposed statement. No hearing will be held unless ordered by the trial court judge, and the judge will not ordinarily order a hearing unless there is a factual dispute about a material aspect of the trial court

proceedings [*Cal. Rules of Ct., Rule 8.837(d)(2)*]. If a hearing is ordered, the court must promptly set the hearing date and provide the parties with at least five days' written notice of the hearing date [*Cal. Rules of Ct., Rule 8.837(d)(3)*].

If no hearing is ordered, no later than 10 days after the time for requesting a hearing expires, the trial court judge must review the proposed statement and any proposed amendments and make any corrections or modifications to the statement necessary to ensure that it is an accurate summary of the trial court proceedings. If a hearing is ordered, the trial court judge must make any corrections or modifications to the statement within 10 days after the hearing [*Cal. Rules of Ct., Rule 8.837(d)(4)*]. The trial court judge must not eliminate the appellant's specification of grounds of appeal from the proposed statement [*Cal. Rules of Ct., Rule 8.837(d)(5)*].

[3] Review of Corrected Statement

If the trial court judge makes any corrections or modifications to the proposed statement, the clerk must send copies of the corrected or modified statement to the parties [*Cal. Rules of Ct., Rule 8.837(e)(1)*]. Within 10 days after the statement is sent to the parties, any party may serve and file proposed modifications or objections to the statement [*Cal. Rules of Ct., Rule 8.837(e)(2)*].

[4] Certification of Statement

If the trial court judge does not make any corrections or modifications to the proposed statement and does not order either the use of an official electronic recording or the preparation of a transcript in lieu of correcting the proposed statement, the judge must promptly certify the statement [*Cal. Rules of Ct., Rule 8.837(f)(1)*].

If the trial court judge corrects or modifies an appellant's proposed statement, within five days after the time for filing proposed modifications or objections has expired, the judge must review any proposed modifications or objections to the statement filed by the parties, make any corrections or modifications to the statement necessary to ensure that it is an accurate summary of the trial court proceedings, and certify the statement [*Cal. Rules of Ct., Rule 8.837(f)(2)*].

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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.51 Record Presumed Complete

The appellate division presumes that the record in an appeal includes all matters material to deciding the issues raised. If the appeal proceeds without a reporter's transcript, this presumption applies only if the claimed error appears on the face of the record [*Cal. Rules of Ct., Rule 8.830(b)*].

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30-345A California Forms of Pleading and Practice--Annotated § 345A.52

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.52 Augmentation of Record

At any time, on motion of a party or its own motion, the appellate division may order the record augmented to include any document filed or lodged in the case in the trial court or a certified transcript--or agreed statement or a statement on appeal--of oral proceedings not designated under *Cal. Rules of Ct., Rule 8.831* [*Cal. Rules of Ct., Rule 8.841(a)(1)*].

A party must attach to its motion a copy, if available, of any document or transcript that it wants added to the record. The pages of the attachments must be consecutively numbered, beginning with the number 1. If the appellate division grants the motion, it may augment the record with the copy [*Cal. Rules of Ct., Rule 8.841(a)(2)*]. If the party cannot attach a copy of the matter to be added, the party must identify it as required under *Cal. Rules of Ct., Rule 8.831* [*Cal. Rules of Ct., Rule 8.841(a)(3)*].

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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.53 Correction of Record

On agreement of the parties, motion of a party, or on its own motion, the appellate division may order the correction or certification of any part of the record [*Cal. Rules of Ct., Rule 8.841(b)(1)*]. The appellate division may order the trial court to settle disputes about omissions or errors in the record or to make corrections pursuant to stipulation filed by the parties in that court [*Cal. Rules of Ct., Rule 8.841(b)(2)*].

If a clerk or reporter omits a required or designated portion of the record, a party may serve and file a notice in the trial court specifying the omitted portion and requesting that it be prepared, certified, and sent to the appellate division. The party must serve a copy of the notice on the appellate division [*Cal. Rules of Ct., Rule 8.841(c)(1)*]. The clerk or reporter must comply with the notice within 10 days after it is filed. If the clerk or reporter fails to comply, the party may serve and file a motion to augment, attaching a copy of the notice [*Cal. Rules of Ct., Rule 8.841(c)(2)*].

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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.54 Compromise of Case by Guardian Pending Appeal

If a guardian or conservator seeks approval of a proposed compromise of a pending appeal, the appellate division may, before ruling on the compromise, direct the trial court to determine whether the compromise is in the minor's or the conservatee's best interest and to report its findings [*Cal. Rules of Ct., Rule 8.825(c)*].

Legal Topics:

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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.55 Abandonment and Dismissal

[1] Before Record Filed

An appellant may abandon the appeal at any time by filing an abandonment of the appeal signed by the appellant or the appellant's attorney of record. The appellant must file the abandonment in the appellate division. If the record has not been filed in the appellate division, filing an abandonment effects a dismissal of the appeal and restores the trial court's jurisdiction [*Cal. Rules of Ct., Rule 8.855*].

[2] After Record Filed

An appellant may abandon the appeal at any time by filing an abandonment of the appeal signed by the appellant or the appellant's attorney of record. The appellant must file the abandonment in the appellate division. If the record has been filed in the appellate division, the appellate division may dismiss the appeal and direct immediate issuance of the remittitur [*Cal. Rules of Ct., Rule 8.855(b)(3)*].

[3] Dismissal for Failure to Prosecute

If a party fails to do any act required to procure the record, the trial court clerk must promptly notify that party by mail that it must do the act specified in the notice within 15 days after the notice is mailed and that, if it fails to comply, the reviewing court may impose the following sanctions [*Cal. Rules of Ct., Rule 8.842(a)*]:

- If the defaulting party is the appellant, the court may dismiss the appeal.

- If the defaulting party is the respondent, the court may proceed with the appeal on the record designated by the appellant.

If the party fails to take the action specified in a notice from the trial court clerk, the trial court clerk must promptly

notify the appellate division of the default, and the appellate division may impose one of the following sanctions [*Cal. Rules of Ct., Rule 8.842(b)*]:

- If the defaulting party is the appellant, the reviewing court may dismiss the appeal but may vacate the dismissal for good cause.

- If the defaulting party is the respondent, the reviewing court may order the appeal to proceed on the record designated by the appellant, but the respondent may obtain relief from default under *Cal. Rules of Ct., Rule 8.60(d)*.

[4] Notification of Abandonment or Dismissal

The appellate division clerk must immediately notify the adverse party of the filing or of the order of dismissal. If the record has not been filed in the appellate division, the clerk must immediately notify the trial court. If a reporter's transcript has been requested, the clerk must immediately notify the reporter if the appeal is abandoned before the reporter has filed the transcript [*Cal. Rules of Ct., Rule 8.855(c)*].

[5] Effect of Dismissal

The dismissal of an appeal is with prejudice to the right to file another appeal within the time permitted, unless the dismissal is expressly made without prejudice to another appeal [*Code Civ. Proc. § 913*].

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For related research and practice materials, see the following legal topics:
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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.56 Briefs

[1] Filing

The appellant must serve and file an appellant's opening brief within 30 days after the record is filed in the appellate division. Any respondent's brief must be served and filed within 30 days after the appellant files its opening brief. Any appellant's reply brief must be served and filed within 20 days after the respondent files its brief. No other brief may be filed except with the permission of the presiding judge. Instead of filing a brief, or as part of its brief, a party may join in a brief or adopt by reference all or part of a brief in the same or a related appeal [*Cal. Rules of Ct., Rule 8.882(a)*].

The appellate division of the superior court must give the parties an opportunity to submit supplemental briefs on an issue that is not proposed or briefed by any party to the proceeding, but on which the court plans to base its decision; otherwise, on timely petition, any party is entitled to a rehearing [*Gov. Code § 68081*].

[2] Extension of Time to File Brief

Applications to extend time for filing briefs must be served and filed, but the presiding judge of the reviewing court may require an additional showing to be made, and for good cause shown may excuse advance service [*see Cal. Rules of Ct., Rule 8.811*; *see also* discussion in *§ 345A.58*].

[3] Format

A brief may be reproduced by any process that produces a clear, black image of letter quality. The paper must be white or unbleached, recycled, 81/2 by 11 inches, and of at least 20-pound weight. Both sides of the paper may be used if the brief is not bound at the top [*Cal. Rules of Ct., Rule 8.883(c)(1)*].

Any conventional typeface may be used. The typeface may be either proportionally spaced or monospaced [*Cal. Rules of Ct., Rule 8.883(c)(2)*]. The type style must be roman, but for emphasis, italics or boldface may be used or the text

may be underscored. Case names must be italicized or underscored. Headings may be in uppercase letters [*Cal. Rules of Ct., Rule 8.883(c)(3)*].

Unless the brief is prepared on a typewriter, the type size, including footnotes, must not be smaller than 13-point [*Cal. Rules of Ct., Rule 8.883(c)(4)*]. The lines of text must be at least one-and-a-half-spaced. Headings and footnotes may be single-spaced. Quotations may be block-indented and single-spaced. Single-spaced means six lines to a vertical inch [*Cal. Rules of Ct., Rule 8.883(c)(5)*].

The margins must be at least 11/2 inches on the left and right and 1 inch on the top and bottom [*Cal. Rules of Ct., Rule 8.883(c)(6)*]. The pages must be consecutively numbered [*Cal. Rules of Ct., Rule 8.883(c)(7)*]. The brief must be bound on the left margin, except that briefs may be bound at the top if required by a local rule of the appellate division. If the brief is stapled, the bound edge and staples must be covered with tape [*Cal. Rules of Ct., Rule 8.883(c)(8)*]. The brief need not be signed [*Cal. Rules of Ct., Rule 8.883(c)(9)*].

A typewritten original and carbon copies may be filed only with the presiding justice's permission, which will ordinarily be given only to unrepresented parties proceeding in forma pauperis. All other typewritten briefs must be filed as photocopies. Both sides of the paper may be used if a photocopy is filed; only one side may be used if a typewritten original and carbon copies are filed. The type size, including footnotes, must not be smaller than standard pica, 10 characters per inch. Unrepresented incarcerated litigants may use elite type, 12 characters per inch, if they lack access to a typewriter with larger characters [*Cal. Rules of Ct., Rule 8.883(c)(10)*].

[4] Contents and Length

Each brief must state each point under a separate heading or subheading summarizing the point and support each point by argument and, if possible, by citation of authority. Each brief must also support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears [*Cal. Rules of Ct., Rule 8.883(a)(1)*].

An appellant's opening brief must [*Cal. Rules of Ct., Rule 8.883(a)(2)*]:

- State the nature of the action, the relief sought in the trial court, and the judgment or order appealed from.
- State that the judgment appealed from is final or explain why the order appealed from is appealable.
- Provide a summary of the significant facts limited to matters in the record.

A brief produced on a computer may not exceed 6,800 words, including footnotes. A brief must include a certificate by appellate counsel or an unrepresented party stating the number of words in the brief. The person certifying may rely on the word count of the computer program used to prepare the brief [*Cal. Rules of Ct., Rule 8.883(b)(1)*]. A brief produced on a typewriter must not exceed 20 pages [*Cal. Rules of Ct., Rule 8.883(b)(2)*].

On application, the presiding judge may permit a longer brief for good cause. A lengthy record or numerous or complex issues on appeal will ordinarily constitute good cause. If the court grants an application to file a longer brief, it may order that the brief include a table of contents and a table of authorities [*Cal. Rules of Ct., Rule 8.883(b)(4)*].

For a skeletal form of appellate brief, see Ch. 50, *Appeal: Briefs* .

[5] Service

Before filing any document, a party must serve one copy of the document on the attorney for each party separately represented, on each unrepresented party, and on any other person or entity when required by statute or rule. The party must attach to the document presented for filing a proof of service showing service on each person or entity required to be served. The proof must name each party represented by each attorney served [*Cal. Rules of Ct., Rule 8.25*]. Unless the appellate division provides otherwise by local rule or order in the specific case, only the original brief, with proof of service, must be filed in the appellate division [*Cal. Rules of Ct., Rule 8.882(d)*].

In an unfair competition proceeding under *Bus. & Prof. Code § 17200 et seq.*, service must also comply with *Bus. & Prof. Code § 17209*. Specifically, the brief (or petition) must be served on the Attorney General ofCalifornia and the district attorney of the county in which the lower court action was originally filed, and each brief (or petition) must be served within three days of filing unless the time is extended for good cause [*Bus. & Prof. Code § 17209*].

[6] Copy to Trial Court Judge

A copy of each brief must be served on the trial court clerk for delivery to the judge who tried the case. A copy of each brief must be served on a public officer or agency when required by *Cal. Rules of Ct., Rule 8.29* [*Cal. Rules of Ct., Rule 8.882(d)*].

[7] Amicus Curiae

Within 14 days after the appellant's reply brief is filed or was required to be filed, whichever is earlier, any person or entity may serve and file an application for permission of the presiding judge to file an amicus curiae brief. For good cause, the presiding judge may allow later filing [*Cal. Rules of Ct., Rule 8.882(c)(1)*]. The application must state the applicant's interest and explain how the proposed amicus curiae brief will assist the court in deciding the matter [*Cal. Rules of Ct., Rule 8.882(c)(2)*]. The proposed brief must be served and accompany the application and may be combined with it [*Cal. Rules of Ct., Rule 8.882(c)(3)*].

The Attorney General may file an amicus curiae brief without the presiding judge's permission, unless the brief is submitted on behalf of another state officer or agency. However, the presiding judge may prescribe reasonable conditions for filing and answering the brief [*Cal. Rules of Ct., Rule 8.882(c)(4)*].

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30-345A California Forms of Pleading and Practice--Annotated § 345A.57

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.57 Applications on Routine Matters

Except as the California Rules of Court provide otherwise, parties must serve and file all applications, including applications to extend time to file records, briefs, or other documents and applications to shorten time. Applications to extend the time to prepare the record on appeal may be filed in either the trial court or the appellate division. All other applications must be filed in the appellate division. For good cause, the presiding judge of the court where the application was filed, or his or her designee, may excuse advance service [*Cal. Rules of Ct., Rule 8.806(a)*].

The application must state facts showing good cause to grant the application and identify any previous applications relating to the same subject filed by any party in the same appeal or writ proceeding [*Cal. Rules of Ct., Rule 8.806(b)*]. Applications must be accompanied by addressed, postage-prepaid envelopes for the clerk's use in mailing copies of the order on the application to all parties [*Cal. Rules of Ct., Rule 8.806(c)*].

Unless the court determines otherwise, the presiding judge of the court in which the application was filed, or his or her designee, may rule on the application [*Cal. Rules of Ct., Rule 8.806(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-345A California Forms of Pleading and Practice--Annotated § 345A.58

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.58 Extension and Shortening of Time

[1] Computation of Time

The time for doing any act required or permitted under the Rules of Court, will be computed and extended in the manner provided by the Code of Civil Procedure [*Cal. Rules of Ct., Rule 8.810(a)*]. Computation of time, generally, is governed by *Code Civ. Proc. §§ 10, 12, 12a*, and *12b*, and extensions of time are generally governed by *Code Civ. Proc. § 1054*. For discussion of extension of time in civil actions and proceedings, see Ch. 524, *Shortening and Extension of Time* .

[2] Extension of Time by Trial Court

For good cause, the presiding judge of the trial court, or his or her designee, may extend the time to do any act to prepare the record on appeal. The trial court may not extend the time to do an act if that time, including any valid extension, has expired. Notwithstanding anything in the California Rules of Court to the contrary, the trial court may grant an initial extension to any party to do any act to prepare the record on appeal on an ex parte basis [*Cal. Rules of Ct., Rule 8.810(b)*].

[3] Extension of Time by Reviewing Court

For good cause and except as the California Rules of Court provide otherwise, the presiding judge of the appellate division, or his or her designee, may extend the time to do any act required or permitted under the Rules, except the time to file a notice of appeal [*Cal. Rules of Ct., Rule 8.810(c)*]. An application for extension of time must be made as provided in *Cal. Rules of Ct., Rule 8.810(d)* [*Cal. Rules of Ct., Rule 8.810(d)*; *see discussion under § 345A.57*]. The factors courts use to determine good cause include the degree of prejudice to any party from a grant or denial of the extension and the number and complexity of the issues raised [*see Cal. Rules of Ct., Rule 8.811(b)*].

[4] Shortening of Time by Reviewing Court

For good cause and except as the California Rules of Court provide otherwise, the presiding judge of the appellate division, or his or her designee, may shorten the time to do any act required or permitted under the Rules [*Cal. Rules of Ct., Rule 8.813*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityTime LimitationsGovernmentsCourtsSmall Claims Courts

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30-345A California Forms of Pleading and Practice--Annotated § 345A.59

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.59 Motions in Reviewing Court

Except as the California Rules of Court provide otherwise, to make a motion in the appellate division a party must serve and file a written motion, stating the grounds and the relief requested and identifying any documents on which it is based [*Cal. Rules of Ct., Rule 8.813(a)(1)*]. A motion must be accompanied by a memorandum and, if it is based on matters outside the record, by declarations or other supporting evidence [*Cal. Rules of Ct., Rule 8.813(a)(2)*]. Any opposition to the motion must be served and filed within 15 days after the motion is filed [*Cal. Rules of Ct., Rule 8.813(a)(3)*].

The court may rule on a motion any time after an opposition or other response is filed or the time to oppose has expired [*Cal. Rules of Ct., Rule 8.813(b)(1)*]. On a party's request or its own motion, the appellate division may place a motion on calendar for a hearing. The clerk must promptly send each party a notice of the date and time of the hearing [*Cal. Rules of Ct., Rule 8.813(b)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsMotions on AppealGovernmentsCourtsSmall Claims Courts

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30-345A California Forms of Pleading and Practice--Annotated § 345A.60

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.60 Motion for Imposition of Sanctions

On motion of a party or its own motion, the appellate division may impose sanctions, including the award or denial of costs, on a party or an attorney for taking a frivolous appeal or appealing solely to cause delay or committing any unreasonable violation of the California Rules of Court [*Cal. Rules of Ct., Rule 8.891(e)(1)*].

A motion for sanctions must include a declaration supporting the amount of any monetary sanction sought and must be served and filed before any order dismissing the appeal but no later than 10 days after the appellant's reply brief is due. If a party files a motion for sanctions with a motion to dismiss the appeal and the motion to dismiss is not granted, the party may file a new motion for sanctions within 10 days after the appellant's reply brief is due [*Cal. Rules of Ct., Rule 8.891(e)(2)*].

The court must give notice in writing if it is considering imposing sanctions. Within 10 days after the court sends notice, a party or attorney may serve and file an opposition, but failure to do so will not be deemed consent. An opposition may not be filed unless the court sends notice [*Cal. Rules of Ct., Rule 8.891(e)(3)*].

Unless otherwise ordered, oral argument on the issue of sanctions must be combined with oral argument on the merits of the appeal [*Cal. Rules of Ct., Rule 8.891(e)(4)*].

PRACTICE TIP:

Basis of Sanctions. The motion procedure adopted under *Cal. Rules of Ct., Rule 8.891(e)* is patterned after the procedure governing a request for sanctions in the court of appeal under *Cal. Rules of Ct., Rule 8.276*. The underlying intent in adopting the procedure is to establish uniformity in the procedures for imposing sanctions on appeal, whether the appeal is one pending in the court of appeal or the appellate division of the superior court. For detailed discussion of the procedure under *Cal. Rules of Ct., Rule 8.276* and the imposition of sanctions on appeal in the court of appeal, including factors to consider when seeking sanctions, see Ch. 49, *Appeal: Sanctions* .

For a form of motion for sanctions on appeal, see *§ 345A.126*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsDismissals of AppealsInvoluntary DismissalsCivil ProcedureAppealsFrivolous AppealsCivil ProcedureAppealsMotions on AppealGovernmentsCourtsSmall Claims CourtsLegal EthicsSanctionsGeneral Overview

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30-345A California Forms of Pleading and Practice--Annotated § 345A.61

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.61 Hearing of Appeal

[1] Calendars

Unless otherwise ordered, all appeals in which the last reply brief was filed or the time for filing this brief expired 45 or more days before the date of a regular appellate division session must be placed on the calendar for that session by the appellate division clerk. By order of the presiding judge or the division, any appeal may be placed on the calendar for oral argument at any session [*Cal. Rules of Ct., Rule 8.885(a)*]. Oral argument may be conducted by videoconference if it is ordered by the presiding judge on application of any party or on the court's own motion [*Cal. Rules of Ct., Rule 8.885(b)*]. Parties may waive oral argument [*Cal. Rules of Ct., Rule 8.885(d)*].

[2] Notice of Hearing

As soon as all the parties' briefs are filed or the time for filing these briefs has expired, the appellate division clerk must send a notice of the time and place of oral argument to all parties. The notice must be sent at least 20 days before the date for oral argument. The presiding judge may shorten the notice period for good cause. In that event, the clerk must immediately notify the parties by telephone or other expeditious method [*Cal. Rules of Ct., Rule 8.885(c)(1)*].

An application from a party requesting that oral argument be conducted by videoconference must be filed within 10 days after the court sends notice of oral argument [*Cal. Rules of Ct., Rule 8.885(b)*]. If oral argument will be conducted by videoconference, the clerk must specify, either in the notice required under *Cal. Rules of Ct., Rule 8.885(b)(1)* or in a supplemental notice sent to all parties at least five days before the date for oral argument, the location from which each judge of the appellate division panel assigned to the case will participate in oral argument [*Cal. Rules of Ct., Rule 8.885(c)(2)*].

[3] Argument

Unless the court provides otherwise, at the hearing on the appeal the appellant, petitioner, or moving party has the right

to open and close. If there are two or more such parties, the court sets the sequence of argument [*Cal. Rules of Ct., Rule 8.885(e)(1)*].

Each side is allowed 10 minutes for argument. The appellant may reserve part of this time for reply argument. If multiple parties are represented by separate counsel, or if an amicus curiae, on written request, is granted permission to argue, the court may apportion or expand the time [*Cal. Rules of Ct., Rule 8.885(e)(2)*]. Only one counsel may argue for each separately represented party [*Cal. Rules of Ct., Rule 8.885(e)(3)*].

If oral argument is conducted by videoconference, each judge of the appellate division panel assigned to the case must participate in the entire oral argument either in person at the superior court that issued the judgment or order that is being appealed or by videoconference from another court. Unless otherwise allowed by local rule or ordered by the presiding judge, all the parties must appear at oral argument in person at the superior court that issued the judgment or order that is being appealed. The oral argument must be open to the public at the superior court that issued the judgment or order that is being appealed. If provided by local rule or ordered by the presiding judge, oral argument may also be open to the public at any of the locations from which a judge of the appellate division is participating in oral argument [*Cal. Rules of Ct., Rule 8.885(b)(2)*].

The appellate division must ensure that [*Cal. Rules of Ct., Rule 8.885(b)(2)(D)*]:

- During oral argument, the participants in oral argument are visible and their statements are audible to all other participants, court staff, and any members of the public attending the oral argument;
- Participants are identified when they speak; and
- Only persons who are authorized to participate in the proceedings speak.

A party must not be charged any fee to participate in oral argument by videoconference if the party participates from the superior court that issued the judgment or order that is being appealed or from a location from which a judge of the appellate division panel is participating in oral argument [*Cal. Rules of Ct., Rule 8.885(b)(2)(E)*].

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For related research and practice materials, see the following legal topics:
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30-345A California Forms of Pleading and Practice--Annotated § 345A.62

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.62 Factual Determinations by Reviewing Court

In all cases in which trial by jury is not a matter of right or in which trial by jury has been waived, the reviewing court may make factual determinations contrary to or in addition to those made by the trial court. The factual determinations may be based on the evidence adduced before the trial court, either with or without the taking of evidence by the reviewing court [*Code Civ. Proc. § 909*; *see Cal. Const., art. VI, § 11*].

The reviewing court may, for the purpose of making the factual determinations or for any other purpose in the interests of justice, take additional evidence of or concerning facts occurring at any time before the decision of the appeal, and may give or direct the entry of any judgment or order and may make any further or other order that the case may require [*Code Civ. Proc. § 909*].

Code Civ. Proc. § 909 is to be liberally construed for the purpose, when feasible, of encouraging causes to be disposed of by a single appeal and without further proceedings in the trial court except when, in the interests of justice, a new trial is required on some or all of the issues [*Code Civ. Proc. § 909*].

PRACTICE TIP:

Motion for Hearing on Additional Evidence. An attorney who wants the appellate court to exercise this power should make a noticed motion for hearing and schedule it sufficiently before oral argument. If the motion is granted, and evidence taken, its impact can be assessed and the briefs written accordingly before oral argument. *By Hon. Phillip J. Argento.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.63 Substitution of Parties

Substitution of parties in an appeal or original proceeding must be made by serving and filing a motion in the appellate division. The clerk of the appellate division must notify the trial court of any ruling on the motion [*Cal. Rules of Ct., Rule 8.814(a)*]. For discussion of substitution under *Code Civ. Proc. § 368.5* in the event of assignment of a judgment, see *Ch. 318, Judgments, § 318.150 et seq.* For a discussion of substitution after the death of a party, see Ch. 21, *Amended and Supplemental Pleadings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.64 Substitution and Withdrawl of Attorneys

A party may substitute attorneys by serving and filing in the appellate division a stipulation signed by the party represented and the new attorney [*Cal. Rules of Ct., Rule 8.814(b)*].

An attorney may request withdrawal by filing a motion to withdraw. Unless the court orders otherwise, the motion need be served only on the party represented and the attorneys directly affected [*Cal. Rules of Ct., Rule 8.814(c)(1)*]. The proof of service need not include the address of the party represented. However, if the court grants the motion, the withdrawing attorney must promptly provide the court and the opposing party with the party's current or last known address and telephone number [*Cal. Rules of Ct., Rule 8.814(c)(2)*]. The appellate division clerk must notify the trial court of any ruling on the motion [*Cal. Rules of Ct., Rule 8.814(c)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.65 Written Opinions

Appellate division judges are not required to prepare a written opinion in any case but may do so when they deem it advisable or in the public interest. A decision by opinion must identify the participating judges, including the author of the majority opinion and of any concurring or dissenting opinion, or the judges participating in a "by the court" opinion [*Cal. Rules of Ct., Rule 8.887(a)*].

Legal Topics:

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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.66 Finality of Judgment

Except as otherwise provided, an appellate division decision, including an order dismissing an appeal involuntarily, is final 30 days after the decision is filed [*Cal. Rules of Ct., Rule 8.888(a)(1)*].

If the appellate division certifies a written opinion for publication or partial publication after its decision is filed and before its decision becomes final in that court, the finality period runs from the filing date of the order for publication [*Cal. Rules of Ct., Rule 8.888(a)(2)*].

The following appellate division decisions are final in that court when filed [*Cal. Rules of Ct., Rule 8.888(a)(3)*]:

- The denial of a petition for writ of supersedeas.
- The denial of an application for bail or to reduce bail pending appeal.
- The dismissal of an appeal on request or stipulation.

ILLUSTRATION:

Inflexibility of Rule. A petitioner whose motion to suppress evidence in a limited civil case was denied appeals to the appellate division, which reverses. Respondent petitions for a rehearing of the appeal, and the appellate division issues a notice of hearing on the petition within 30 days of the judgment. The appellate division then issues an order granting the motion for rehearing 40 days after the judgment. Is the order timely? No, the time limit set forth in *Cal. Rules of Ct., Rule 8.888(a)*, is not subject to extension or exception; it is inflexible. Therefore, the 30-day limit set by the rule cannot be avoided by the court merely sending a notice of hearing before expiration of the 30 days and entertaining oral argument at some later date on the rehearing petition [*Weighand v. Appellate Department (1980) 108 Cal. App. 3d 629, 631, 166 Cal. Rptr. 670]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.67 Rehearing

[1] When Authorized

At any time before a judgment of an appellate division becomes final [*see* discussion under *§ 345A.66*], the appellate division may vacate the judgment and order a rehearing [*Cal. Rules of Ct., Rule 8.889(a)*].

The appellate division of the superior court must grant a rehearing on timely petition by a party when the court has based its decision on an issue that was not proposed or briefed by any party to the proceeding, and the court failed to give the parties an opportunity to submit supplemental briefs on that issue [*Gov. Code § 68081*].

[2] Petition, Answer, and Determination

A party may serve and file a petition for rehearing within 15 days after [*Cal. Rules of Ct., Rule 8.889(b)(1)*]:

- The decision is filed.
- A publication order restarting the finality period under *Cal. Rules of Ct., Rule 8.888(a)(2)*, if the party has not already filed a petition for rehearing.
- A modification order changing the appellate judgment under *California Rules of Ct., Rule 8.888(b)*.
- The filing of a consent under *California Rules of Ct., Rule 8.888(c)*.

A party must not file an answer to a petition for rehearing unless the court requests an answer. The clerk must promptly send to the parties copies of any order requesting an answer and immediately notify the parties by telephone or another expeditious method. Any answer must be served and filed within eight days after the order is filed unless the court orders otherwise. A petition for rehearing normally will not be granted unless the court has requested an answer [*Cal.*

Rules of Ct., Rule 8.889(b)(2)].

The petition and answer must comply with the relevant provisions of *California Rules of Ct., Rule 8.883* [*Cal. Rules of Ct., Rule 8.889(b)(3)*; *see § 345A.56*]. Before the decision is final and for good cause, the presiding judge may relieve a party from a failure to file a timely petition or answer [*Cal. Rules of Ct., Rule 8.889(b)(4)*].

An order granting a rehearing vacates the decision and any opinion filed in the case. If the appellate division orders rehearing, it may place the case on calendar for further argument or submit it for decision [*Cal. Rules of Ct., Rule 8.889(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-345A California Forms of Pleading and Practice--Annotated § 345A.68

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.68 Restitution on Reversal or Modification

When the judgment or order is reversed or modified, the reviewing court may direct that the parties be returned so far as possible to the positions they occupied before the enforcement of or execution on the judgment or order. In doing so, the reviewing court may order restitution on reasonable terms and conditions of all property and rights lost by the erroneous judgment or order, so far as the restitution is consistent with rights of third parties and may direct the entry of a money judgment sufficient to compensate for property or rights not restored. The reviewing court may take evidence and make findings concerning such matters or may, by order, refer such matters to the trial court for determination [*Code Civ. Proc. § 908*].

PRACTICE TIP:

Restitution From the Appellate Division. Although *Code Civ. Proc. § 908* furnishes the appellate division with statutory authority to grant restitution, such grants are infrequent. Counsel should usually take the ordinary route; seeking restitution in the trial court, which has inherent power to grant it independent of statute [*see Schubert v. Bates (1947) 30 Cal. 2d 785, 789, 185 P.2d 793] . By Hon. Phillip J. Argento.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-345A California Forms of Pleading and Practice--Annotated § 345A.69

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.69 Costs on Appeal

[1] Right to Costs

Except as otherwise provided, the prevailing party is entitled to costs on appeal [*Cal. Rules of Ct., Rule 8.891(a)(1)*]. The prevailing party is the respondent if the appellate division affirms the judgment without modification or dismisses the appeal. The prevailing party is the appellant if the appellate division reverses the judgment in its entirety [*Cal. Rules of Ct., Rule 8.891(a)(2)*]. If the appellate division reverses the judgment in part or modifies it, or if there is more than one notice of appeal, the appellate division must specify the award or denial of costs in its decision [*Cal. Rules of Ct., Rule 8.891(a)(3)*]. In the interests of justice, the appellate division may also award or deny costs as it deems proper [*Cal. Rules of Ct., Rule 8.891(a)(4)*].

For discussions of the recovery of costs and attorney's fees, generally, see Ch. 174, *Costs and Attorney's Fees* .

[2] Frivolous Appeals and Violations

On motion of a party or its own motion, the appellate division may impose sanctions, including the award or denial of costs, on a party or an attorney for taking a frivolous appeal or appealing solely to cause delay, or committing any unreasonable violation of the California Rules of Court [*Cal. Rules of Ct., Rule 8.891(e)(1)*]. Furthermore, when it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just [*Code Civ. Proc. § 907*].

For discussion of the motion procedure for requesting the imposition of monetary sanctions, see *§ 345A.60*.

[3] Judgment for Costs

The appellate division clerk must enter on the record and insert in the remittitur judgment awarding costs to the prevailing party. If the clerk fails to enter judgment for costs, the appellate division may recall the remittitur for

correction on its own motion or on a party's motion made not later than 30 days after the remittitur issues [*Cal. Rules of Ct., Rule 8.891(b)*].

[4] Items Recoverable

A party may recover only the costs of the following, if reasonable [*Cal. Rules of Ct., Rule 8.891(d)(1)*]:

- Filing fees.
- The amount the party paid for any portion of the record, whether an original or a copy or both, subject to reduction by the appellate division.
- The cost to produce additional evidence on appeal.
- The costs to notarize, serve, mail, and file the record, briefs, and other papers.
- The cost to print and reproduce any brief, including any petition for rehearing or review, answer, or reply.
- The cost to procure a surety bond, including the premium and the cost to obtain a letter of credit as collateral, unless the trial court determines the bond was unnecessary.

Unless the court orders otherwise, an award of costs neither includes attorney's fees on appeal nor precludes a party from seeking them under *Cal. Rules of Ct., Rule 3.1702* [*Cal. Rules of Ct., Rule 8.891(d)(2)*].

[5] Procedure for Claiming Costs

Within 30 days after the clerk sends notice of issuance of the remittitur, a party claiming costs awarded by the appellate division must serve and file in the trial court a verified memorandum of costs under *Cal. Rules of Ct., Rule 3.1702(a)(1)* [*Cal. Rules of Ct., Rule 8.891(c)(1)*].

[6] Motion to Tax Costs

A party may serve and file a motion in the trial court to strike or tax costs in the manner required by *Cal. Rules of Ct., Rule 3.1700* [*Cal. Rules of Ct., Rule 8.891(c)(2)*]. An award of costs is enforceable as a money judgment [*Cal. Rules of Ct., Rule 8.891(c)(3)*]. For forms and discussion of a motion to tax costs, see *Ch. 174, Costs and Attorney's Fees, § 174.10* et seq.

[7] Attorney's Fees

Contracts and statutes providing for the allowance of attorney's fees to the prevailing party have been interpreted as including allowance for legal service rendered on appeal [*see Buescher v. Lastar (1976) 61 Cal. App. 3d 73, 76, 132 Cal. Rptr. 124* (note); *Union Bank v. Ross (1976) 54 Cal. App. 3d 290, 299, 126 Cal. Rptr. 646* (contract); *Roberts v. Brian (1973) 30 Cal. App. 3d 427, 430, 106 Cal. Rptr. 360* (attorney's fees under *Welf. & Inst. Code § 10962*)]. However, a statute providing for an award of attorney's fees "upon the trial of the action" has been held to limit an award of attorney's fees to services in the trial court and not on appeal [*General Elec. Co. v. Central Surety & Ins. Corp. (1965) 232 Cal. App. 2d 590, 603-604, 43 Cal. Rptr. 48* (former *Gov. Code § 4207*, governing action on contractor's bond)].

PRACTICE TIP:

Award of Attorney's Fees by Reviewing Court. When attorney's fees are recoverable, the reviewing

court has jurisdiction to award them unless it directs the determination to the trial court. Directing the determination to the trial court is often the result because the reviewing court will usually lack necessary information to determine reasonable fees. For a fuller discussion of recovery of attorney's fees, see Ch. 174, *Costs and Attorney's Fees . By Hon. Phillip J. Argento.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsCosts & Attorney FeesGovernmentsCourtsSmall Claims Courts

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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.70 Relief From Default

The reviewing court for good cause may relieve a party from default occasioned by any failure to comply with the California Rules of Court, except the failure to give timely notice of appeal [*Cal. Rules of Ct., Rule 8.812*].

PRACTICE TIP:

Factors for Relief. In deciding whether to relieve a party from a default, the reviewing court must consider various factors such as the nature of the default, its length in time, surrounding circumstances, and relative injury to the parties. Each case will turn on its own facts [*see Jarkieh v. Badagliacco (1945) 68 Cal. App. 2d 426, 431, 156 P.2d 969* (disapproved on other grounds in *Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 30, 216 Cal. Rptr. 130, 702 P.2d 212] . By Hon. Phillip J. Argento.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.71 Remittitur to Lower Court

[1] Issuance and Effect

An appellate division must issue a remittitur after a decision in an appeal [*Cal. Rules of Ct., Rule 8.890(a)*]. If an appellate division case is not transferred to the court of appeal under *Cal. Rules of Ct., Rule 8.1000 et seq.*, the appellate division clerk must [*Cal. Rules of Ct., Rule 8.890(b)(1)*]:

- Issue a remittitur immediately after the court of appeal denies transfer, or the period for granting transfer expires.
- Send the remittitur to the trial court with a file-stamped copy of the opinion or order.
- Return to the trial court with the remittitur all original records, exhibits, and documents sent to the appellate division in connection with the appeal, except any certification for transfer, the transcripts or statement on appeal, briefs, and the notice of appeal.

If an appellate division case is transferred to a court of appeal under *Cal. Rules of Ct., Rule 8.1000 et seq.*, the appellate division clerk must issue a remittitur and return documents to the trial court as provided in *Cal. Rules of Ct., Rule 8.1018* [*Cal. Rules of Ct., Rule 8.890(b)(2)*].

[2] On Stipulation

The court may direct the immediate issuance of the remittitur on stipulation of the parties [*Cal. Rules of Ct., Rule 8.890(c)(1)*].

[3] Stay

The court, for good cause, may stay the issuance of the remittitur for a reasonable period [*Cal. Rules of Ct., Rule 8.890(c)(2)*].

[4] Recall

On a party's or its own motion or on stipulation, and for good cause, the court may order a recall of a remittitur's issuance for a reasonable period [*Cal. Rules of Ct., Rule 8.890(c)(2)*]. An order recalling a remittitur issued after a decision by opinion does not supersede the opinion or affect its publication status [*Cal. Rules of Ct., Rule 8.890(c)(3)*].

Legal Topics:

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
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PART II. LEGAL BACKGROUND
B. Civil Appeals

30-345A California Forms of Pleading and Practice--Annotated § 345A.72

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.72 Transfer to Court of Appeal

[1] Authority to Transfer

Courts of appeal have appellate jurisdiction of cases in which superior courts have original jurisdiction in causes of a type within the appellate jurisdiction of the courts of appeal on June 30, 1995, and in other causes prescribed by statute [*see Cal. Const., art. VI, § 11*]. *Code Civ. Proc. § 911* provides that a court of appeal may under certain circumstances order any case on appeal to a superior court in its district transferred to it for hearing and decision as provided by *Cal. Rules of Ct., Rules 8.1000-8.1018* [*see Code Civ. Proc. § 911*].

[2] Scope of Review

A Court of Appeal to which any case is transferred under *Code Civ. Proc. § 911* has similar power to review any matter and make orders and judgments as the appellate division of the superior court would have in such a case. If, however, the case was tried anew in the superior court, the court of appeal has similar power to review any matter and make orders and judgments as it has in a case appealed pursuant to *Code Civ. Proc. § 904.1* (that is, as in appeal of cases other than limited civil cases) [*Code Civ. Proc. § 911*].

The court of appeal, on transfer from the appellate division of the superior court, is required to decide all issues necessary to resolution ofthe appeal and transmit the remittitur to the trial court that originally heard the case. It does not have discretion to select issues for review in the same manner as the Supreme Court. Thus, it may not review only selected issues that are not dispositive of the appeal, and remand the cause to the appellate division of the superior court to decide issues it has left unresolved [*Snukal v. Flightways Manufacturing, Inc. (2000) 23 Cal. 4th 754, 761-777, 98 Cal. Rptr. 2d 1, 3 P.3d 286]* .

[3] Transfer on Motion by Court of Appeal

[a] Grounds for Transfer

A court of appeal may order a case transferred to it for hearing and decision if the appellate division certifies it pursuant to *Cal. Rules of Ct., Rule 8.1002* or the court of appeal determines under *Cal. Rules of Ct., Rule 8.1005* that transfer is necessary to secure uniformity of decision or to settle an important question of law [*Cal. Rules of Ct., Rule 8.1002*].

[b] Time for Ordering Transfer

A transfer on the court of appeal's own motion may be ordered within 20 days after the record on transfer is filed in the court of appeal [*Cal. Rules of Ct., Rule 8.1008(c)(1)*].

[c] Extension of Time for Ordering Transfer

The court of appeal may extend the time for ordering a case transferred from the superior court to the court of appeal on the court of appeal's own motion, as provided in *Cal. Rules of Ct., Rule 8.1008,* by not more than 20 days [*Cal. Rules of Ct., Rule 8.1008(c)(2)*].

[4] Transfer on Certification by Superior Court

[a] Authority to Certify

A case may be transferred to the court of appeal when the superior court certifies that such transfer appears necessary to secure uniformity of decision or to settle important questions of law [*Cal. Rules of Ct., Rule 8.1005(a)*; *see Code Civ. Proc. § 911*]. Despite certification, the court of appeal may refuse the transfer [*Dvorin v. Appellate Dep't of Superior Court (1975) 15 Cal. 3d 648, 650, 125 Cal. Rptr. 771, 542 P.2d 1363* ; *see* discussion under *§ 345A.72[4][i]*].

The superior court may certify a transfer to the court of appeal on the application of a party or on its own motion. The certification may be made by a majority of the appellate division judges to whom the case has been assigned or who decided the appeal or, if the case has not yet been assigned, by any two judges of the appellate division. If any of the assigned or deciding judges is unable to act on the certification, a judge designated or assigned to the appellate division by the chairman of the Judicial Council may act in that judge's place [*see Cal. Rules of Ct., Rule 8.1005(a)*].

[b] Application by Party for Certification

Any party may apply to the superior court for the certification of a case. The application must be served and filed any time after the record on appeal is filed in the appellate division and within 15 days after judgment is pronounced or a modification order changing the appellate judgment is filed [*Cal. Rules of Ct., Rule 8.1005(b)(1)*; *see § 345A.72[4][f]*].

[c] Opposition to Certification

Any party may serve and file an opposition within five days after the filing of the application for certification [*Cal. Rules of Ct., Rule 8.1005(b)*].

[d] Decision to Grant or Deny Certification

No hearing is held on the application, and the failure of the court to certify the case is deemed a denial of the application [*Cal. Rules of Ct., Rule 8.1005(b)*].

[e] Content of Certification

If the superior court decides to certify the case for transfer, the certification must contain a brief statement setting forth any conflict of decision (with citation of or reference to decisions creating the conflict) or important question of law to

be settled. It must also state whether there was a judgment in the superior court, and, if so, the nature and the date of the judgment [*Cal. Rules of Ct., Rule 8.1005(e)*].

[f] Time for Filing Certification

A case may be certified any time after the record on appeal is filed in the appellate division and before the appellate division judgment is final in that court, as provided by *Cal. Rules of Ct., Rule 8.888* [*Cal. Rules of Ct., Rule 8.1005(c), (d)*].

Failure to file the certification with the clerk of the superior court may result in dismissal of the appeal [*see Corcoran v. Universal Guardian Corp. (1977) 72 Cal. App. 3d 904, 909-910, 140 Cal. Rptr. 421* ; *People v. Burdzinski (1981) 118 Cal. App. 3d 540, 542-543, 173 Cal. Rptr. 440]* .

[g] Extension of Time for Filing Certification

Cal. Rules of Ct., Rule 8.1005 (Certification), as repealed and adopted effective January 1, 2007, by the California Judicial Council, has no provision for extending the time for filing certification.

[h] Transmission of Certification

On the filing of the certification, the clerk of the superior court must promptly send a copy of the order to the court of appeal clerk and the parties [*Cal. Rules of Ct., Rule 8.1005(f)(1)*].

[i] Discretion to Deny Transfer

The courts of appeal have discretion in deciding whether to transfer cases under *Code Civ. Proc. § 911*. Thus, the courts of appeal may refuse transfer despite certification by the superior court [*Dvorin v. Appellate Dep't of Superior Court (1975) 15 Cal. 3d 648, 650, 125 Cal. Rptr. 771, 542 P.2d 1363* ; *Schweiger v. Superior Court (1970) 3 Cal. 3d 507, 517 n.5, 90 Cal. Rptr. 729, 476 P.2d 97]* .

[j] Notice of Denial of Transfer

On denial of transfer on certification, the clerk of the court of appeal must return the record on transfer and any exhibits to the clerk of the superior court and must mail notice of the denial to each party [*Cal. Rules of Ct., Rule 8.1008(f)(3)*].

[k] No Review on Denial of Transfer

A petition for review by the California Supreme Court may not be filed after denial of a transfer to a court of appeal in a case within the appellate jurisdiction of a superior court [*Cal. Rules of Ct., Rule 8.500(a)(1)*].

[l] When Transfer May Be Ordered

A transfer on certification by the superior court may be ordered within 20 days after the record on transfer is filed in the court of appeal [*Cal. Rules of Ct., Rule 8.1008(c)(1)*].

No case in which there is a right on appeal to a trial anew in the superior court may be transferred under *Code Civ. Proc. § 911* before a decision in such case becomes final in the superior court [*Code Civ. Proc. § 911*].

[5] Record on Transfer

[a] Contents

The record on transfer must include the original record on appeal prepared under *Cal. Rules of Ct., Rules 8.831-8.842*, any briefs filed in the appellate division, and any order or opinion of the appellate division [*Cal. Rules of Ct., Rule 8.1010(a)*].

[b] Transmission of Record

The superior court clerk must promptly send the record on transfer to the court of appeal and notify the parties that the record was sent when any of the following occurs [*Cal. Rules of Ct., Rule 8.1010(b)(1)*]:

- The appellate division certifies a case;
- The superior court clerk sends a copy of an appellate division opinion certified for publication to the court of appeal under *Cal. Rules of Ct., Rule 8.887*;
- The superior court clerk receives a copy of a petition to transfer;
- The superior court receives a request from the court of appeal for the record on transfer.

The court of appeal clerk must promptly notify the parties when the record on transfer is filed [*Cal Rules of Ct., Rule 8.1010(B)(2)*].

[6] Order Granting or Denying Transfer

The court of appeal may order transfer after certification or on its own motion, within 20 days after the record on transfer is filed in the court of appeal, or, on petition to transfer, within 20 days after the petition is filed [*Cal. Rules of Ct., Rule 8.1008(c)(1)*]. If the court of appeal does not timely order a transfer, the transfer is deemed denied [*Cal. Rules of Ct., Rule 8.1008(c)(3)*].

[7] Notice of Order for Transfer

When a transfer order is filed, the clerk must promptly send a copy to the superior court clerk and the parties. With the transfer order, the clerk must send notice of the time to serve and file any briefs ordered under *Cal. Rules of Ct., Rule 8.1012*, and, if specified by the court of appeal, the issues to be briefed and argued [*Cal. Rules of Ct., Rule 8.1008(f)*]. The clerk's failure to mail the order or notice does not affect the court of appeal's jurisdiction [*Cal. Rules of Ct., Rule 8.1008(f)(4)*].

[8] Stay of Proceedings in Appellate Division

On the timely filing of a certification by the superior court or an order of transfer on the court of appeal's own motion, further action, other than the preparation and transmission of the record, by the superior court in the case is stayed until the termination of the proceedings in the court of appeal [*Cal. Rules of Ct., Rule 8.1014*]. Unlike some stays issued by the trial court, the stay under *Cal. Rules of Ct., Rule 8.1014* does not require an undertaking by either party.

[9] Briefs

After transfer, the parties may file briefs in the court of appeal only if the court so orders after a party's application or the court's own motion.The court of appeal may prescribe the briefing sequence in any briefing order [*Cal. Rules of Ct., Rule 8.1012(a)(1)*]. Instead of filing a brief, a party may join in or adopt by reference all or part of a brief in the same or a related case [*Cal. Rules of Ct., Rule 8.1012(a)(2)*].

The opening brief must be served and filed within 20 days after entry of the briefing order [*Cal. Rules of Ct., Rule*

8.1012(b)(1)]. The responding brief must be served and filed within 20 days after the opening brief is filed [*Cal. Rules of Ct., Rule 8.1012(b)(2)*]. Any reply brief must be served and filed within 10 days after the responding brief is filed [*Cal. Rules of Ct., Rule 8.1012(b)(3)*].

The proof of service of every brief must show delivery of a copy to the appellate division from which the case was transferred [*Cal. Rules of Ct., Rule 8.1012(c)(2)*].

Briefs may not exceed 5,600 words if produced on a computer, or 20 pages if typewritten [*Cal. Rules of Ct., Rule 8.1012(d)*]. In all other respects, briefs must comply with *Cal. Rules of Ct., Rule 8.204* [*Cal. Rules of Ct., Rule 8.1012(d)*].

[10] Transmission of Remittitur

After the decision of the court of appeal is final, the clerk must promptly issue a remittitur. The clerk must address the remittitur to the appellate division, sending that court two copies of the remittitur and two file-stamped copies of the court of appeal opinion or order [*Cal. Rules of Ct., Rule 8.1018(b)*].

On receiving the court of appeal remittitur, the clerk of the appellate division must promptly issue a remittitur if there will be no further proceedings in that court [*Cal. Rules of Ct., Rule 8.1018(c)*]. All original records, papers, documents, and exhibits, except any certification, transcripts on appeal, briefs, or notice of appeal are returned with the remittitur [*Cal. Rules of Ct., Rule 8.1018(d)*].

Legal Topics:

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PART II. LEGAL BACKGROUND
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30-345A California Forms of Pleading and Practice--Annotated §§ 345A.73-345A.79

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

[Reserved]

§§ 345A.73[Reserved]

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30-345A California Forms of Pleading and Practice--Annotated § 345A.80

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.80 California Criminal Defense Practice

For discussion and forms for use in taking an appeal from an infraction or misdemeanor offense, see Erwin, Millman, Monroe, Sevilla, and Tarlow, California Criminal Defense Practice, Ch. 101 (Matthew Bender)

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30-345A California Forms of Pleading and Practice--Annotated § 345A.81

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.81 State Constitution

Supreme Court, courts of appeals, and superior courts have original jurisdiction in proceedings for extraordinary writs. *Cal. Const., art. VI, § 10*

Jurisdiction of appellate division of superior courts. *Cal. Const., art. VI, § 11*

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30-345A California Forms of Pleading and Practice--Annotated § 345A.82

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.82 State Statutes

[1] Applicability of Economic Litigation Provisions

Application of provisions of law applicable to civil actions generally to limited civil cases subject to provisions for economic litigation. *Code Civ. Proc. § 90*

Provisions for economic litigation applicable to limited civil cases. *Code Civ. Proc. § 91(a)*

Provisions for economic litigation in limited civil cases not applicable to small claims actions or unlawful detainer proceedings. *Code Civ. Proc. § 91(b)*

Withdrawal of limited civil case from economic litigation provisions by noticed motion and showing of impracticality. *Code Civ. Proc. § 91(c)*

[2] Case Questionnaires

Plaintiff permitted to serve Judicial Council case questionnaire on defendant. *Code Civ. Proc. § 93(a)*

Defendant on whom case questionnaire is served must serve completed questionnaire on plaintiff with answer. *Code Civ. Proc. § 93(b)*

Contents of Judicial Council case questionnaire form. *Code Civ. Proc. § 93(c)*

Court clerk required to provide case questionnaire forms. *Code Civ. Proc. § 93(d)*

Any party permitted to compel completion and service of case questionnaire by opposing party. *Code Civ. Proc. §*

93(e)

[3] Discovery

Limitations on discovery in limited civil cases subject to economic litigation provisions. *Code Civ. Proc. § 94*

Availability of interrogatories, demands to produce, and requests for admission. *Code Civ. Proc. § 94(a)*

Availability of deposition. *Code Civ. Proc. § 94(b)*

Availability of subpoena duces tecum. *Code Civ. Proc. § 94(c)*

Availability of physical and mental examination. *Code Civ. Proc. § 94(d)*

Availability of demand to exchange lists of expert witnesses. *Code Civ. Proc. § 94(e)*

Additional discovery available on noticed motion and showing that moving party unable to prosecute or defend action effectively without additional discovery. *Code Civ. Proc. § 95(a)*

Additional discovery available on stipulation of parties. *Code Civ. Proc. § 95(b)*

[4] Prepared Testimony of Witness

Availability of prepared testimony of witnesses in affidavits or declarations. *Code Civ. Proc. § 98*

[5] Request for Evidentiary Statement

Availability of request for evidentiary statement. *Code Civ. Proc. § 96(a)*

Service of request for evidentiary statement. *Code Civ. Proc. § 96(b)*

Service of evidentiary statement in response to request. *Code Civ. Proc. § 96(c)*

Additional, amended, or late statements not permitted except by written stipulation or on noticed motion. *Code Civ. Proc. § 96(d)*

Requests and statements not filed unless otherwise ordered. *Code Civ. Proc. § 96(e)*

Forms of requests for evidentiary statements furnished by clerk. *Code Civ. Proc. § 96(f)*

Time for serving and responding to requests is computed according to general provisions of law, including time extensions for service by mail. *Code Civ. Proc. § 96(g)*

Party required to serve evidentiary statement may only call witness or introduce evidence included in statement served. *Code Civ. Proc. § 97(a)*

Exceptions to requirement that any witness called or evidence introduced have been included in evidentiary statement. *Code Civ. Proc. § 97(b)*

Limitations on introduction of evidence not applicable in default hearings. *Code Civ. Proc. § 97(c)*

[6] Pleadings

Available pleadings in limited civil cases. *Code Civ. Proc. § 92(a)*

Verification of answer not required, even if complaint or cross complaint is verified. *Code Civ. Proc. § 92(b)*

Special demurrers not allowed. *Code Civ. Proc. § 92(c)*

Effect of verification of complaint on content of answer. *Code Civ. Proc. § 431.30(d)*

[7] Motions

Motions to strike not allowed except on ground that damages or relief sought are not supported by allegations of complaint. *Code Civ. Proc. § 92(d)*

All motions available in civil actions generally permitted in limited civil cases subject to economic litigation provisions, except as limited by *Code Civ. Proc. § 92. Code Civ. Proc. § 92(e)*

[8] Judgment or Final Order

Conclusive effect of judgment or final order in limited civil case subject to economic litigation provisions. *Code Civ. Proc. § 99*

[9] Appeal

Right of appeal from any judgment or final order in limited civil case subject to economic litigation provisions. *Code Civ. Proc. § 100*

[10] Appealable Judgments and Orders

Order granting motion under *Code Civ. Proc. § 663* to vacate judgment or decree. *Code Civ. Proc. § 663a*

Notice of entry of judgment. *Code Civ. Proc. § 664.5*

Third-party claims. *Code Civ. Proc. § 720.420*

Appealable judgments and orders in limited civil cases. *Code Civ. Proc. § 904.2*

Order after judgment. *Code Civ. Proc. § 904.2(b)*

Order changing or refusing to change place of trial. *Code Civ. Proc. § 904.2(c)*

Order granting motion to quash service of summons or granting motion to stay or dismiss action on ground of inconvenient forum. *Code Civ. Proc. § 904.2(d)*

Order granting new trial or denying motion for judgment notwithstanding verdict. *Code Civ. Proc. § 904.2(e)*

Order discharging or refusing to discharge attachment or granting a right to attach order. *Code Civ. Proc. § 904.2(f)*

Order granting or dissolving injunction, or refusing to grant or dissolve injunction. *Code Civ. Proc. § 904.2(g)*

Order appointing receiver. *Code Civ. Proc. § 904.2(h)*

Judgment of the small claims court. *Code Civ. Proc. § 904.5*

[11] Who May Appeal

Party aggrieved as able to appeal. *Code Civ. Proc. § 902*

[12] Stay of Execution

Stay of enforcement of judgment pending appeal. *Code Civ. Proc. § 916 et seq.*

[13] Motion to Vacate or Set Aside Judgment

Relief from mistake, inadvertence, surprise, or excusable neglect. *Code Civ. Proc. § 473*

Grounds for setting aside or vacating judgment. *Code Civ. Proc. § 663*

[14] Appellate Divisions

Each county has appellate division of superior court. *Code Civ. Proc. § 77(a)*

Appellate division of superior court has jurisdiction on appeal from limited civil cases. *Code Civ. Proc. § 77(e)*

[15] Filing Fee

Filing fee for notice of appeal. *Gov. Code § 70621(a)*

[16] Powers of Reviewing Court

Powers of court on appeal. *Code Civ. Proc. § 906*

[17] Factual Determinations by Reviewing Court

Factual determinations by reviewing court in absence of trial by jury. *Code Civ. Proc. § 909*

[18] Rehearing

Opportunity for supplemental briefing must be afforded to parties by appellate division of superior court before it may render decision on issue not raised; rehearing required if court fails to do so. *Gov. Code § 68081*

[19] Remittitur

Certified copy of judgment or order remitted by reviewing court to trial court. *Code Civ. Proc. § 912*

[20] Transfer of Appeals

Transfer to court of appeal of case on appeal to superior court. *Code Civ. Proc. § 911*

[21] Costs on Appeal

Costs for frivolous appeal or appeal taken solely for delay. *Code Civ. Proc. § 907*

[22] Restitution on Reversal or Modification

Reviewing court's authority to award restitution when judgment reversed or modified. *Code Civ. Proc. § 908*

[23] Death of Appellant

Attorney's or administrator's authority to file appeal if appellant dies before filing. *Code Civ. Proc. § 903*

[24] Dismissal

Dismissal of appeal is with prejudice unless expressly made without prejudice. *Code Civ. Proc. § 913*

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30-345A California Forms of Pleading and Practice--Annotated § 345A.83

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.83 California Rules of Court

Interpretation of rules. *Cal. Rules of Ct., Rule 8.802*

Definitions. *Cal. Rules of Court, Rule 8.804*

Motions in reviewing court. *Cal. Rules of Ct., Rule 8.808*

Extension and shortening of time and routine applications. *Cal. Rules of Ct., Rules 8.810, 8.813*

Relief from default by reviewing court. *Cal. Rules of Ct., Rule 8.812*

Substitution of parties and attorneys. *Cal. Rules of Ct., Rule 8.814*

Waiver of fees and costs. *Cal. Rules of Ct., Rule 8.818*

Notice of appeal. *Cal. Rules of Ct., Rule 8.821*

Time of filing notice of appeal. *Cal. Rules of Ct., Rules 8.822, 8.823*

Abandonment and dismissal of appeal. *Cal. Rules of Ct., Rule 8.825*

Presumption that record is complete. *Cal. Rules of Ct., Rule 8.830*

Clerk's transcript on appeal. *Cal. Rules of Ct., Rule 8.832*

Reporter's transcript on appeal. *Cal. Rules of Ct., Rule 8.834*

Agreed statement. *Cal. Rules of Ct., Rule 8.836*

Statement on appeal. *Cal. Rules of Ct., Rule 8.837*

Certification, transmission, correction, and augmentation of record on appeal. *Cal. Rules of Ct., Rules 8.840, 8.841*

Filing appellant's brief. *Cal. Rules of Ct., Rule 8.882*

Notice of hearing. *Cal. Rules of Ct., Rule 8.885*

Hearing. *Cal. Rules of Ct., Rule 8.885*

Decisions of reviewing court. *Cal. Rules of Ct., Rule 8.887*

Consent to modification of judgment. *Cal. Rules of Ct., Rule 8.888*

Petition of rehearing. *Cal. Rules of Ct., Rule 8.889*

Remittitur. *Cal. Rules of Ct., Rule 8.890*

Costs on appeal. *Cal. Rules of Ct., Rule 8.891*

Transfer of appeal to court of appeal. *Cal. Rules of Ct., Rules 8.1000*-8.1018

Format of papers filed in limited civil case generally. *Cal. Rules of Ct., Rule 2.100 et seq.*

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30-345A California Forms of Pleading and Practice--Annotated § 345A.84

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.84 Decisions

[1] Appealable and Nonappealable Judgments and Orders

[a] Generally

Regular practice of courts if party appeals from both appealable and nonappealable order is dismissal of latter appeal. *Hamasaki v. Flotho (1952) 39 Cal. 2d 602, 608, 248 P.2d 910* ; *Martin v. Johnson (1979) 88 Cal. App. 3d 595, 607-608, 151 Cal. Rptr. 816*

[b] Default Judgments

Order denying motion to set aside default and vacate judgment is appealable. *Conway v. Municipal Court (1980) 107 Cal. App. 3d 1009, 1014-1015, 166 Cal. Rptr. 246*

[c] Demurrers

Reviewing court is without jurisdiction to entertain purported appeal from order sustaining or overruling demurrer to complaint even though it is without leave to amend. *Yancey v. Fink (1991) 226 Cal. App. 3d 1334, 1342, 277 Cal. Rptr. 415*

[d] Injunction

When entry of judgment renders question of right to interim relief moot, order denying motions for temporary restraining order and preliminary injunction is not appealable. *Agnew v. City of Los Angeles (1958) 51 Cal. 2d 1, 2, 330 P.2d 385*

Injunction is interpreted broadly to include preliminary injunctions. *American Ins. Co. v. Gernand (1968) 262 Cal. App. 2d 300, 305, 68 Cal. Rptr. 810*

Failure to appeal from preliminary injunction does not preclude defendants from appealing permanent injunction when preliminary injunction only restrained defendants during pendency of action and with respect to arbitration issue presented in action and permanent injunction enjoined defendants with respect to arbitration of any claim. *American Ins. Co. v. Gernand (1968) 262 Cal. App. 2d 300, 305, 68 Cal. Rptr. 810*

[e] Orders Changing Place of Trial

Order by municipal court changing or refusing to change place of trial is appealable. *Metzger v. Silverman (1976) 133 Cal. Rptr. 355*

Order transferring matter from municipal court to superior court on ground that complaint prays for amount in excess of statutory jurisdiction of municipal court is not order changing place of trial and, therefore, not appealable. *Milliken v. Gray (1969) 276 Cal. App. 2d 595, 596, 81 Cal. Rptr. 525*

Place of trial and venue are synonymous. *Milliken v. Gray (1969) 276 Cal. App. 2d 595, 598, 81 Cal. Rptr. 525* ; *Arganbright v. Good (1941) 116 P.2d 186*

[f] Order Denying New Trial

Order denying motion for new trial is nonappealable. *Rodriguez v. Barnett (1959) 52 Cal. 2d 154, 156, 338 P.2d 907* ; *Martin v. Johnson (1979) 88 Cal. App. 3d 595, 607, 151 Cal. Rptr. 816* ; *Kelly v. Kelly (1954) 270 P.2d 948* .

[g] Order Directing Entry of Summary Judgment

Order directing entry of summary judgment is order made before judgment, not in the list of appealable orders set forth in statute, and not appealable. *Gardenswartz v. Equitable Etc. Soc. (1937) 68 P.2d 322* (interpreting *Code Civ. Proc. § 903*, which is substantially similar to Code Civ. Proc. § 907.2)

[h] Post-Judgment Orders

Post-judgment order for issuance of writ of execution is directly appealable. *Weil v. Weil (1950) 97 Cal. App. 2d 378, 379, 217 P.2d 979* (interpreting former *Code Civ. Proc. § 963(2)*)

[2] Notice of Appeal

Notice of appeal referring to order is to be liberally construed to apply to judgment in order to protect right of appeal. *Vibert v. Berger (1966) 64 Cal. 2d 65, 67-68, 48 Cal. Rptr. 886, 410 P.2d 390* ; *Luz v. Lopes (1960) 55 Cal. 2d 54, 59-60, 10 Cal. Rptr. 161, 358 P.2d 289* ; *Brown v. Municipal Court (1978) 86 Cal. App. 3d 357, 360 n.1, 150 Cal. Rptr. 216* (interpreting former Cal. Rules of Ct., Rule 1(a), which is substantially the same as *Cal. Rules of Ct., Rule 8.821(a)*)

Either appellant or appellant's attorney may sign notice of appeal. *Estate of Hultin (1947) 29 Cal. 2d 825, 832, 178 P.2d 756* ; *City of Downey v. Johnson (1968) 263 Cal. App. 2d 775, 781, 69 Cal. Rptr. 830*

Filing of notice of appeal by mail is complete when notice delivered to clerk by postal service. *Thompson, Curtis, Lawson & Parrish v. Thorne (1971) 21 Cal. App. 3d 797, 801, 98 Cal. Rptr. 753*

[3] Time to File Notice of Appeal

Mailing of notice of entry of order by clerk does not initiate time for filing notice of appeal when notice undelivered due to improper address. *Triumph Precision Products, Inc. v. Insurance Co. of North America (1979) 91 Cal. App. 3d 362, 365, 154 Cal. Rptr. 120* (interpreting *Code Civ. Proc. § 664.5* prior to amendment)

[4] Extension of Time to File Appeal

Former Cal. Rules of Ct., Rule 123(b) (now see *Cal. Rules of Ct., Rule 8.823(a)*) allowing extension of time for filing notice of appeal after motion to vacate judgment is filed applies to motions to vacate judgments under *Code Civ. Proc. § 473*. *Knudson v. Superior Court (1968) 267 Cal. App. 2d 876, 879, 73 Cal. Rptr. 513*

Extension of time for filing notice of appeal by making motion to vacate judgment or to vacate judgment and enter another and different judgment does not affect time for appeal from special order but only extends time for appeal from judgment. *Palmese v. Superior Court (1961) 193 Cal. App. 2d 600, 602, 14 Cal. Rptr. 453*

Appeal dismissed when time for filing notice of appeal was extended by timely motion for new trial, but notice of appeal not filed within 15 days after entry of order denying motion. *Cannon v. Goble (1955) 283 P.2d 390*

[5] Effect of Failure to Appeal

Plaintiff who failed to exercise remedy of appeal is not entitled to annul municipal court judgment because all legal remedies must be exhaustedbefore equitable relief available. *Doran v. Sherman (1937) 18 Cal. App. 2d 479, 480, 64 P.2d 442*

[6] Record on Appeal

Appellate department may take judicial notice of own records. *Schein v. Holbrook (1952) 245 P.2d 708*

Unexcused failure of appellant to give notice to clerk to procure preparation of judgment roll is grounds for dismissal of appeal. *Schein v. Holbrook (1952) 245 P.2d 708*

Rules of Court providing for appeal on reporter's statement, settled statement, or agreed statement does not prevent submission and decision of appeal on judgment roll alone. *Schein v. Holbrook (1952) 245 P.2d 708*

[7] Settled Statement

Striking of engrossed settled statement was proper when municipal court did not properly carry out settlement and engrossment of settled statement on appeal to superior court appellate department under former Cal. Rules of Ct., Rule 127 (now see *Cal. Rules of Ct., Rule 8.837*); improper conformance with former Cal. Rules of Ct., Rule 127 (*now see Cal. Rules of Ct., Rule 8.837*) was shown when judge ordered respondent, rather than appellant, to engross statement on appeal, appellant was never served with copy of settled statement as engrossed in accordance with judge's order, and engrossed settled statement did not contain trial judge's certification that statement accurately and truly reflected oral

proceedings. *Quail v. Municipal Court (1985) 171 Cal. App. 3d 572, 575-576, 217 Cal. Rptr. 361*

Failure to include judge's oral instruction in settled statement constitutes waiver of right to argue error in oral instruction on appeal. *Cobian v. Ordonez (1980) 163 Cal. Rptr. 126*

Requirement of certification of engrossed statement by trial judge is mandatory unless parties stipulate that statement as originally served or engrossed is correct. *Potter v. Solk (1958) 327 P.2d 990*

Settled statement is not mandatory when reporter's transcript not requested. *Schein v. Holbrook (1952) 245 P.2d 708* (interpreting former Cal. Rules of Ct., Rule 7, which is substantially similar to *Cal. Rules of Ct., Rule 8.837*)

[8] Scope of Review

Nonappealing respondent is not within *Code Civ. Proc. § 906* exception permitting appellate review when respondent seeks not to save judgment, but to overthrow it. *California State Employees' Assn. v. State Personnel Bd. (1986) 178 Cal. App. 3d 372, 382 n.7, 223 Cal. Rptr. 826*

When appellate court or Supreme Court reverses judgment, trial court is bound by direction given. *Stafford v. Municipal Court (1960) 180 Cal. App. 2d 368, 371, 4 Cal. Rptr. 441*

Rules of law that apply to appeals to other appellate courts of state apply with equal force to appeals from municipal court to superior court. *Burnett v. Reyes (1953) 256 P.2d 91* ; *Mastrofini v. Swanson (1952) 250 P.2d 764*

[9] Opinion of Reviewing Court

Judges of appellate department are not required to write opinions. *People v. Alberts (1955) 292 P.2d 90*

[10] Mandate

Writ of mandate to review municipal court judgment denied when it is possible to imply sufficient findings to support judgment because lower court judgment is presumed correct. *Hall v. Municipal Court (1974) 10 Cal. 3d 641, 643-644, 111 Cal. Rptr. 721, 517 P.2d 1185*

Writ of mandate to compel superior court to hear petitioner's defense after transfer to court of appeal may be denied despite certification. *Schweiger v. Superior Court (1970) 3 Cal. 3d 507, 517-518, 90 Cal. Rptr. 729, 476 P.2d 97*

Peremptory writ of mandate is appropriate in first instance when engrossed settled statement as stricken for nonconformance with former Cal. Rules of Ct., Rule 127 (*now see Cal. Rules of Ct., Rule 8.837*). *Quail v. Municipal Court (1985) 171 Cal. App. 3d 572, 576, 217 Cal. Rptr. 361*

Procedure of former *Code Civ. Proc. § 988t* [now *Code Civ. Proc. § 911*] did not eliminate the power of court of appeal to issue writ of mandate to appellate department of superior court that has erroneously refused to exercise jurisdiction of appeal from municipal court. *Knudson v. Superior Court (1968) 267 Cal. App. 2d 876, 880, 73 Cal. Rptr. 513*

When appellate department of superior court erroneously determines it has no jurisdiction as matter of law, court of appeal has duty to mandate lower court to take jurisdiction. *Palmese v. Superior Court (1961) 193 Cal. App. 2d 600, 603, 14 Cal. Rptr. 453*

[11] Writ of Review

Writ of review may be issued to reverse municipal court judgment after judgment affirmed by appellate department of superior court when municipal court lacked subject matter jurisdiction. *Greene v. Municipal Court (1975) 51 Cal. App. 3d 446, 450-453, 124 Cal. Rptr. 139*

[12] Frivolous Appeals

Appeal not necessarily frivolous when it appears from notice of appeal that only issue tendered is one that has been decided by Supreme Court because it is not possible to make determination of frivolousness on notice of appeal alone. *Pacific States Sav. & L. Co. v. Mortimer (1945) 70 Cal. App. 2d 811, 813, 161 P.2d 684*

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 345A LIMITED CIVIL CASES
PART III. RESEARCH GUIDE

30-345A California Forms of Pleading and Practice--Annotated §§ 345A.85-345A.89

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

[Reserved]

§§ 345A.85[Reserved]

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30-345A California Forms of Pleading and Practice--Annotated § 345A.90

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.90 Appellant's Guide

[1] Obtain Copies of Relevant Documents

☐ Pleadings and all papers filed.

☐ Judgment or order appealed from.

☐ Any notice of intention to move for new trial or notice of motion to vacate judgment or order, and rulings thereon.

☐ Notice of entry of judgment.

[2] Determine if Appeal Can Be Taken

☐ Does appellant have standing [*see Code Civ. Proc. § 902*; *see also § 345A.37*]?

☐ Is judgment or order appealable [*see Code Civ. Proc. § 904.2*; *see also § 345A.34[1]*]?

☐ Did trial court commit errors of law [*see § 345A.34[2]*]?

☐ Was any error prejudicial [*see § 345A.36*]?

☐ When will deadline expire for filing notice of appeal [*see* [4], *below; see also Cal. Rules of Ct.,*

Rule 8.751; *§ 345A.39*]?

[3] Prepare Notice of Appeal

☐ Prepare notice of appeal as required by *Cal. Rules of Ct., Rule 8.822* [*see* §§ 345A.110-345A.112 (form); *see also § 345A.38*].

NOTE:
Combining Papers. The notice to prepare clerk's transcript may be prepared together with the notice to prepare reporter's transcript or both notices may be included in a single document containing the notice of appeal [*Cal. Rules of Ct., Rule 8.831*; *see* [6], *below*; *§ 345A.112*; ***see also*** *§ 345A.44*].

☐ Make the following copies:

☐ Original for filing.

☐ Copy for respondent.

☐ Office copy.

☐ Copy for client (appellant).

☐ Sign (or have appellant sign) notice as required by *Cal. Rules of Ct., Rule 8.821(a)* [*see § 345A.38[3]*].

[4] File Notice of Appeal

☐ Ascertain time limit for filing notice of appeal as follows:

☐ In absence of motion for new trial or motion to vacate judgment, time for filing is earliest of the following dates [*Cal. Rules of Ct., Rule 8.822(a)*; *see also § 345A.39*]:

☐ 30 days after mailing by the clerk of the court of document entitled "notice of entry" of judgment or appealable order.

☐ 30 days after service of document entitled "notice of entry" of judgment or appealable order by any party on the party filing the notice of appeal, or by the party filing the notice of appeal.

☐ 90 days after entry of judgment.

☐ On denial of motion for new trial, time is extended to 15 days after either entry of order denying motion or denial of motion by operation of law, but no later than 90 days after entry of judgment [*Cal.*

Rules of Ct., Rule 8.823(b); *see § 345A.39[5]*].

☐ On denial of motion to vacate judgment, time is extended to 15 days after either entry of order denying motion or 45 days after the first notice of intention to move or motion is filed, but no later than 90 days after entry of judgment [*Cal. Rules of Ct., Rule 8.823(c)*; *see § 345A.39[6]*].

☐ File notice of appeal with clerk of court in which judgment or order appealed from was rendered [*Cal. Rules of Ct., Rule 8.821(a)*; *see § 345A.38*].

☐ If the appellant is able to pay, pay filing fee, as required by *Gov. Code § 70621(a)*, at time of filing or within 10 days thereafter [*Cal. Rules of Ct., Rule 8.821(b)*; *see § 345A.40*].

☐ If the appellant is indigent, obtain waiver of filing fee [*Cal. Rules of Ct., Rule 8.821(b)*; *see § 345A.40*; *see also* Ch. 174, *Costs and Attorney's Fees*, § 174.100 et seq.].

[5] Obtain Stay of Execution

☐ Determine if judgment or order requires undertaking as required by *Code Civ. Proc. § 917.1 et seq.* [*see Code Civ. Proc. § 916*; *see also § 345A.41*].

☐ If undertaking is required, follow procedures set out in Ch. 43, *Appeal: Stay of Proceedings*

[6] Prepare and Obtain Filing of Record

☐ Determine kind of record needed by considering the following alternatives:

☐ Clerk's and reporter's transcripts [*Cal. Rules of Ct., Rules 8.832, 8.834*; *see §§ 345A.43, 345A.44*].

☐ Clerk's transcript alone (may be limited to judgment roll) [*Cal. Rules of Ct., Rule 8.832*; *see § 345A.45*].

☐ Agreed statement [*Cal. Rules of Ct., Rule 8.836*; *see § 345A.46*].

☐ Statement on appeal [*Cal. Rules of Ct., Rules 8.837*; *see § 345A.47*].

☐ Prepare notice designating record on appeal [*Cal. Rules of Ct., Rule 8.831*; *see § 345A.42A*].

NOTE:
Combining Papers. The notice designating record on appeal may be included in a single document containing the notice of appeal [*Cal. Rules of Ct., Rule 8.831*; *see* *§§ 345A.44, 345A.112* (form)].

☐ Make the following copies:

☐ Original for filing.

☐ Copy for respondent.

☐ Office copy.

☐ Copy for client.

☐ File notice within 10 days after filing notice of appeal and serve on respondent [*Cal. Rules of Ct., Rules 8.831*; *see §§ 345A.43*, *345A.44*].

☐ Arrange payment of costs to prepare clerk's and reporter's transcript within 10 days after notification by clerk of estimated cost [*Cal. Rules of Ct., Rules 8.832(c)*, *8.834(b)*; *see also §§ 345A.43[5]*, *345A.44*].

☐ In lieu of filing above notices, if respondent agrees, prepare stipulation regarding record on appeal [*Cal. Rules of Ct., Rule 8.836*; *see § 345A.114* (form); *see also § 345A.44[3]*].

☐ If appealing on clerk's transcript only, do the following:

☐ Prepare notice to designating record [*Cal. Rules of Ct., Rule 8.831*; *see also § 345A.45*].

☐ Follow procedure set out above regarding appeal on reporter's and clerk's transcript.

☐ If appealing on agreed statement, do the following:

☐ File original statement within 30 days after filing notice of appeal, setting forth the following [*Cal. Rules of Ct., Rule 8.836*; *see § 345A.46[1]*]:

☐ Nature of controversy.

☐ Basis for reviewing court's jurisdiction.

☐ How trial court decided questions to be reviewed.

☐ Any facts alleged and proved or sought to be proved that are necessary to a determination of the questions on appeal.

☐ File original statement along with the following [*Cal. Rules of Ct., Rule 8.836*; *see § 345A.46[1]*]:

☐ Copy of judgment.

☐ Copy of notice of appeal with filing date.

☐ Any notice of intention to move for a new trial or motion to vacate the judgment, the ruling thereon, if any, and a recital or resume of any oral proceedings thereon.

☐ List or records, etc., parties want transmitted to reviewing court.

☐ If appealing on statement, do the following:

☐ Serve and file notice showing intent to proceed by statement within 10 days after filing notice of appeal [*Cal. Rules of Ct., Rule 8.837*; *see § 345A.47[1]*].

☐ Within 20 days thereafter, serve and file proposed condensed statement [*Cal. Rules of Ct., Rule 8.837*; *see § 345A.47[1]*].

☐ Attend hearing at time set by clerk (not more than 10 days after response to proposed statement) [*Cal. Rules of Ct., Rule 8.837*; *see § 345A.47[4]*].

☐ Obtain respondent's stipulation or judge's certification that engrossed statement is correct [*Cal. Rules of Ct., Rule 8.837(f)*; *see § 345A.47[5]*].

[7] Correction and Certification of Record

☐ If record is correct, obtain stipulation that record is correct (stipulation renders certification by court unnecessary) [*Cal. Rules of Ct., Rule 8.841*; *see also* § 345A.48].

☐ If record requires correction, file request for correction of clerk's and/or reporter's transcript within 10 days after mailing of clerk's notice of completion of transcripts [*Cal. Rules of Ct., Rule 8.841(a)*; *see also* §§ 345A.48, *345A.119* (form)].

NOTE:
Certification if No Request. If neither party requests correction of clerk's and/or reporter's transcript within the specified time, the clerk will then certify the record as correct [*Cal. Rules of Ct., Rule 8.840*; *see also* § 345A.48].

☐ If any party files request for correction of clerk's and/or reporter's transcript, attend hearing on certification [*Cal. Rules of Ct., Rule 8.841*; *see also* § 345A.48].

[8] Briefs

☐ Prepare opening brief [*Cal. Rules of Ct., Rule 8.882*; *see § 345A.56*; for a skeletal form of brief, *see* Ch. 50, *Appeal: Briefs*].

☐ Make the following number of copies:

☐ Original and one copy for filing.

NOTE:
Local Requirements. Check local court rules for rule requiring additional copies to be filed with the clerk for assistance of members of court [*see, e.g.,* San Mateo Co. Super. Ct. Rules, Rule 1.2 (requiring three additional carbon copies)].

☐ Copy for respondent.

☐ Office copy;

☐ Copy for client, if desired.

☐ Other copies as desired.

☐ If no extension of time sought, sign, serve, and file opening brief within 30 days after filing of record on appeal [*Cal. Rules of Ct., Rule 8.882*; *see § 345A.56*].

☐ If needed, obtain extension of time to file brief, by doing the following:

☐ Prepare application that sets forth the following [*Cal. Rules of Ct., Rule 8.810*; *see § 345A.120* (form); *see also § 345A.57*]:

☐ Good cause for granting application.

☐ Any previous applications granted or denied.

☐ Make the following copies:

☐ Original for filing.

☐ Office copy.

☐ Copy for client.

☐ Two copies for each party.

☐ File application and serve copy of application on each other party; alternatively, present to presiding judge for filing with additional showing of good cause for excusing advance service.

☐ Provide clerk with addressed, postage prepaid envelopes and one copy for each of the other parties [*Cal. Rules of Ct., Rule 8.806*; *see § 345A.57*].

☐ Within 20 days after the filing of respondent's brief, prepare, serve, and file reply brief, if desired [*Cal. Rules of Ct., Rule 8.882(a)(3)*; *see also § 345A.56*].

[9] Voluntary Dismissal or Abandonment of Appeal

☐ If dismissal sought before filing record, prepare written abandonment or stipulation of abandonment and file with trial court clerk (dismissal of appeal is automatic) [*Cal. Rules of Ct., Rule 8.825(b)(2)*; *see § 345A.121* (form); *see also § 345A.55[1]*].

☐ If dismissal sought after record is filed, prepare request for dismissal or stipulation and file with appellate division clerk [*see Cal. Rules of Ct., Rule 8.825(b)(2)*; *see § 345A.55[2]*].

NOTE:
Notice. The clerk will notify the adverse party of the abandonment or dismissal [*Cal. Rules of Ct., Rule 8.825(b)*].

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30-345A California Forms of Pleading and Practice--Annotated § 345A.91

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.91 Respondent's Guide

[1] Record on Appeal

☐ If additional papers, records, etc., are desired, beyond those requested by appellant, do the following (unless written stipulation previously filed):

☐ Within 10 days after service of appellant's notice to prepare clerk's transcript, prepare respondent's designation of additions to clerk's transcript [*Cal. Rules of Ct., Rule 8.832(b)*; *see § 345A.115* (form); *see also § 345A.44[2]*].

☐ Make the following number of copies:

☐ Original for filing.

☐ Copy for appellant.

☐ Office copy.

☐ Copy for client.

☐ Additional copies as desired.

☐ Sign, serve, and file notice [*Cal. Rules of Ct., Rule 8.832(b)*].

☐ If additional oral proceedings are desired to be transcribed, beyond those requested by appellant, do the following (unless written sipulation previously filed):

☐ Within 10 days after service of appellant's notice to prepare the reporter's transcript and/or to prepare the clerk's transcript, prepare respondent's designation of additions to reporter's transcript [*Cal. Rules of Ct., Rule 8.834(a)*; *see § 345A.117* (form); *see also § 345A.43[2]*].

☐ Make the following number of copies:

☐ Original for filing.

☐ Copy for appellant.

☐ Office copy.

☐ Copy for client.

☐ Additional copies as desired.

☐ Sign, serve, and file notice [*Cal. Rules of Ct., Rule 8.834(a)*].

[2] Correction and Certification of Record

☐ Follow procedures set out in *§ 345A.90[7]*.

[3] Briefs

☐ Within 30 days after filing of appellant's opening brief, prepare, serve, and file respondent's brief [*Cal. Rules of Ct., Rule 8.882(a)*; *see § 345A.90[8*]; *see also § 345A.56*].

☐ To obtain extension of time for filing brief, follow procedure in *§ 345A.90[8]*.

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30-345A California Forms of Pleading and Practice--Annotated § 345A.92

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.92 Transfer to Court of Appeal

NOTE:
Transfer With or Without Party's Request. A court of appeal may order a case on appeal to a superior court transferred to itself for hearing on its own motion or on certification of the superior court [*Cal. Rules of Ct., Rule 8.1002*]. A case may be certified for transfer on the superior court's own motion, or on application of a party [*Cal. Rules of Ct., Rule 8.1005(a)(1)*]. The following procedures apply only when transfer is sought by a party applying to the superior court for certification for transfer of an appeal.

[1] Application for Certification

☐ Prepare, file, and serve application any time after record on appeal is filed in appellate division and within 15 days after judgment is pronounced or modification order is filed [*Cal. Rules of Ct., Rule 8.1005(b)*; *see § 345A.125* (form); *see also* § 345A.171[4][b], [f]].

NOTE:
No Hearing. The application may be included in a petition for rehearing. No hearing will be held on the application. The court's failure to certify the case within the time allowed is deemed a denial of application [*Cal. Rules of Ct., Rule 8.1005(b)(4)*].

[2] Opposition to Certification

☐ Prepare, serve, and file opposition within five days after filing of application for certification [*Cal. Rules of Ct., Rule 8.1005(b)(3)*; *see § 345A.72[4][c]*].

[3] Contents of Record

☐ Record on transfer consists of [*Cal. Rules of Ct., Rule 8.1010(a)*; *see* also *§ 345A.72[5]*]:

☐ Original record on appeal prepared under *Cal. Rules of Ct, Rules 8.830-8.837* in a limited civil case;

☐ Any brief filed in the appellate division; and

☐ Any order or opinion of the appellate division.

[4] Briefs

NOTE:

Brief Limits and Requirements. After transfer, the parties may file briefs in the court of appeal only if ordered by the court [*Cal. Rules of Ct.,Rule 8.1012(a)*]. The court will prescribe the briefing sequence in any briefing order [*Cal. Rules of Ct., Rule 8.1012(a)(1)*]. The record on appeal will include the briefs filed with the superior court appellate division [*Cal. Rules of Ct., Rule 8.1012(a)*].

☐ If designated appellant in case transferred after trial was held in superior court, do the following:

☐ Prepare, serve, and file opening brief within 20 days after entry of order of transfer [*see Cal. Rules of Ct., Rule 8.1012(b)(1)*].

☐ If desired, file reply brief within 10 days after filing of respondent's brief, but not later than time of oral argument.

☐ If designated respondent in case transferred after trial was held in superior court, prepare, serve, and file respondent's brief within 20 days after the filing of appellant's opening brief [*see Cal. Rules of Ct., Rule 8.1012(b)(2)*].

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§§ 345A.93[Reserved]

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PART V. FORMS
A. Procedures for Economic Litigation

30-345A California Forms of Pleading and Practice--Annotated § 345A.100

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.100 Case Questionnaire--For Limited Civil Cases (Under $25,000) [Code Civ. Proc. § 93]--Judicial Council Form DISC-010

[1] FORM Case Questionnaire--For Limited Civil Cases (Under $25,000) [Code Civ. Proc. § 93]--Judicial Council Form DISC-010

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative reproduction of the case questionnaire form adopted by the Judicial Council for use in a limited civil case subject to the economic litigation provisions of *Code Civ. Proc. §§ 90-100* [*see Cal. Rules of Ct., Rule 1.31*; Cal. Rules of Ct., Appen. A; *see also Code Civ. Proc. § 91(a)* (actions coming under economic litigation procedure); for discussion, *see § 345A.12*]. The form sets out questions to be answered by the party serving it relating to the pertinent facts of the case, and includes instructions for its use.

Use of the above questionnaire is initiated by the plaintiff or cross complainant, who may elect to fill it out and serve it on the defendant with the complaint or cross complaint, along with a blank form for use by the defendant [*see Code Civ. Proc. § 93(a)*]. If the plaintiff serves a case questionnaire, the defendant receiving the service must serve his or her own completed case questionnaire on the plaintiff with the answer [*Code Civ. Proc. § 93(b)*]. For further discussion of case questionnaires, see *§ 345A.15*.

Forms that have been adopted by the Judicial Council are mandatory and must be used [*Gov. Code § 68511*; *Cal. Rules of Ct., Rule 1.31*]. Copies of this form are required to be made available by the court clerk [*Code Civ. Proc. § 93(d)*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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A. Procedures for Economic Litigation

30-345A California Forms of Pleading and Practice--Annotated § 345A.101

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.101 Request for Statement of Witnesses and Evidence [Code Civ. Proc. § 96]--Judicial Council Form DISC-015

[1] FORM Request for Statement of Witnesses and Evidence [Code Civ. Proc. § 96]--Judicial Council Form DISC-015

Click here to view image.

[2] Use of Form

The form of request for a statement of witnesses and evidence in [1], *above*, has been adopted by the Judicial Council for use by a party in a limited civil case subject to the economic litigation provisions of *Code Civ. Proc. §§ 90-100* [*see Cal. Rules of Ct., Rule 1.31*; Cal. Rules of Ct., Appen. A; *see also Code Civ. Proc. § 91(a)* (actions coming under economic litigation procedure); *§ 345A.12*]. Forms adopted by the Judicial Council are mandatory and must be used [*Gov. Code § 68511*; *Cal. Rules of Ct., Rule 1.31*. Copies of this form must be furnished by the court clerk [*Code Civ. Proc. § 96(f)*]. For further discussion of requests for evidentiary statements, see *§ 345A.17*.

A request for an evidentiary statement may be served on any other party to the action [*Code Civ. Proc. § 96(a)*]. The form is self-explanatory. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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A. Procedures for Economic Litigation

30-345A California Forms of Pleading and Practice--Annotated § 345A.102

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.102 Motion to Withdraw Case From Economic Litigation Provisions [Code Civ. Proc. § 91(c)]

[1] FORM Motion to Withdraw Case From Economic Litigation Provisions [Code Civ. Proc. § 91(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	LIMITED CIVIL CASE
	)	NOTICE OF MOTION AND MOTION FOR
	)	ORDER WITHDRAWING CASE FROM
	)	ECONOMIC LITIGATION PROVISIONS
_____,	)	[*Code Civ. Proc. § 91(c)*]
Plaintiff,	)	
vs.	)	[Telephone Appearance]
_____,	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

To _____ [*identify party, e.g.*, defendant _____ (*name*)] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* plaintiff] _____ [*name*] will, and hereby does, move for an order under *Code of Civil Procedure, Section 91(c),* withdrawing this action from the economic litigation provisions of *Code of Civil Procedure, Sections 90-100*. The motion will be made on the ground that it is impractical to _____ [prosecute *or* defend] the action within the limitations imposed by the economic litigation provisions. In particular, _____ [*specify, e.g.,* the number of nonparty witnesses from whom discovery is sought makes it impractical to proceed within the limitations].

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s)*] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*movant*]

[2] Use of Form

The form in [1], *above,* is for use by a party seeking to withdraw a limited civil case from the requirements of the economic litigation provisions generally applicable to such cases [*see Code Civ. Proc. §§ 90-100*]. The court may, on noticed motion, withdraw the case from the economic litigation provisions on a showing that it is impractical to prosecute or defend the case within the limitations [*Code Civ. Proc. § 91(c)*; *see § 345A.12[4]*].

The motion must be supported by a memorandum [*Cal. Rules of Ct., Rules 3.1112(a), 3.1113*]; facts relied on to support the motion must be established by declarations under penalty of perjury [*Cal. Rules of Ct., Rules 3.1112(b), 3.1306(a)*]. For detailed coverage of the requirements for motions generally, see Ch. 372, *Motions and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeContent & FormCivil ProceduresPretrial MattersGeneral OverviewGovernmentsCourtsSmall Claims Courts

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Chapter 345A LIMITED CIVIL CASES
PART V. FORMS
A. Procedures for Economic Litigation

30-345A California Forms of Pleading and Practice--Annotated § 345A.103

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.103 Motion for Additional Discovery [Code Civ. Proc. § 95(a)]

[1] FORM Motion for Additional Discovery [Code Civ. Proc. § 95(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)
	) NO. _____
	) LIMITED CIVIL CASE
	) NOTICE OF MOTION AND MOTION FOR
	) ADDITIONAL DISCOVERY
_____,	) [*Code Civ. Proc. § 95(a)*]
Plaintiff,	) [Telephone Appearance]
vs.	) Date: _____
_____,	) Time: _____
Defendant.	) Location: _____
	) Judge: _____
	) Date Action Filed: _____
	) Trial Date: _____
	)

_____

To _____ [*identify party, e.g.,* plaintiff _____ (*name*)] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] _____ [*name*] will, and hereby does, move for an order under *Code of Civil Procedure Section 95(a)* authorizing _____ [*moving party, e.g.,* defendant] to conduct the following discovery in addition to that permitted by *Code of Civil Procedure Section 94*: _____ [*specify, e.g.,* oral depositions of both expert witnesses retained by plaintiff]. The motion will be made on the ground that _____ [*moving party, e.g.,* defendant] will be unable to _____ [prosecute *or* defend] the action effectively without the additional discovery. In particular, _____ [*specify, e.g.,* the depositions of the plaintiff's experts are necessary to enable defendant to prepare a defense].

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*movant*]

[2] Use of Form

The form in [1], *above,* is for use by a party in a limited civil case who seeks to conduct discovery in addition to that allowed by the economic litigation provisions [*see Code Civ. Proc. § 94*]. The court may, on noticed motion and subject to such terms and conditions as are just, authorize a party to conduct additional discovery, but only on a showing that the moving party will be unable to prosecute or defend the action effectively without the additional discovery. In determining whether to allow additional discovery, the court must take into account whether the moving party has used all applicable discovery in good faith, and whether the party has attempted to secure the additional discovery by stipulation or by means other than formal discovery [*Code Civ. Proc. § 95(a)*; *see Code Civ. Proc. § 95(b)* (parties may stipulate to additional discovery); *see also § 345A.16*].

The motion must be supported by a memorandum [*Cal. Rules of Ct., Rules 3.1112(a), 3.1113*]; facts relied on to support the motion must be established by declarations under penalty of perjury [*Cal. Rules of Ct., Rules 3.1112(b), 3.1306(a)*]. For detailed coverage of the requirements for motions generally, see Ch. 372, *Motions and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeContent & FormCivil ProceduresDiscoveryGeneral OverviewGovernmentsCourtsSmall Claims Courts

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A. Procedures for Economic Litigation

30-345A California Forms of Pleading and Practice--Annotated § 345A.104

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.104 Form Interrogatories--Limited Civil Cases--[Code Civ. Proc. § 94]--Judicial Council Form DISC-004

[1] FORM 345A.104.1

Click here to view image.

[2] Use of Form

The form in [1], *above*, is interrogatories designed by the Judicial Council for optional use by parties in a limited civil case subject to the economic litigation provisions of *Code Civ. Proc. §§ 90-100* [*see Code Civ. Proc. §§ 91, 94, 2030.010-2030.410, 2033.710*]. Some of these interrogatories are similar to questions in the Case Questionnaire for Limited Civil Cases [*see § 345A.100*] and may be omitted if the information sought has already been provided in a completed Case Questionnaire.

Form interrogatories may be served on any other party to the action [*see Code Civ. Proc. § 94*]. The form is self-explanatory. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesFormGovernmentsCourtsSmall Claims Courts

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30-345A California Forms of Pleading and Practice--Annotated §§ 345A.105-345A.109

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

[Reserved]

§§ 345A.105[Reserved]

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PART V. FORMS
B. Civil Appeals

30-345A California Forms of Pleading and Practice--Annotated § 345A.110

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.110 Notice of Appeal From Judgment or Order in Limited Civil Case [Code Civ. Proc. § 904.2; Cal. Rules of Ct., Rule 8.821(a)]--Judicial Council Form APP-102

[1] FORM Notice of Appeal From Judgment or Order in Limited Civil Case [Code Civ. Proc. § 904.2; Cal. Rules of Ct., Rule 8.821(a)]--Judicial Council Form APP-102

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a notice of appeal designed by the Judicial Council for optional use by parties in a limited civil case [*see Cal. Rules of Ct., Rule 8.821(a)*]. The notice is sufficient if it states in substance that the appellant appeals from a specified judgment or order, or a particular part of the judgment. The notice must be signed by the appellant or by his or her attorney [*Cal. Rules of Ct., Rule 8.821(a)*]. The notice must be filed within the time specified in *Cal. Rules of Ct., Rule 8.822* [*see § 345A.39*]. The notice must be filed with the clerk of the court from which the appeal is taken [*see Cal. Rules of Ct., Rule 8.821(a)*]. An appeal may be taken by any party aggrieved by the judgment or order, or part of the judgment or order, from which the appeal is taken [*Code Civ. Proc. § 902*; *see also Code Civ. Proc. § 903* (who may file notice on behalf of deceased party)]. For further discussion of the notice of appeal, see *§ 345A.38*. For discussion of the time for filing the notice, see *§ 345A.39*.

The notice of appeal may be combined with a notice designating papers and records the appellant desires incorporated in the record on appeal and with the notice to prepare the reporter's transcript [*Cal. Rules of Ct., Rule 8.831*]. For a form of such a combined notice, see *§ 345A.112[1]*.

This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Cross References

For forms of notices of appeal from the superior court in civil actions other than limited civil cases, see Ch. 42, *Appeal: Notice of Appeal*

For forms of notices of appeal from a small claims court judgment or order, see Ch. 526, *Small Claims*

For a Judicial Council Form of Notice Designating Record on Appeal (Limited Civil Case), see *§ 345A.112*

For a Judicial Council Form of Proposed Statement on Appeal (Limited Civil Case), see *§ 345A.113*

For a Judicial Council Form of Order Concerning Appellant's Proposed Statement on Appeal (Limited Civil Case), see *§ 345A.114*

For a Judicial Council Form of Abandonment of Appeal (Limited Civil Case), see *§ 345A.121*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewCivil ProcedureAppealsReviewabilityNotice of AppealGovernmentsCourtsSmall Claims Courts

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30-345A California Forms of Pleading and Practice--Annotated § 345A.111

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

[Reserved]

§ 345A.111[Reserved]

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30-345A California Forms of Pleading and Practice--Annotated § 345A.112

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.112 Notice Designating Record on Appeal [Cal. Rules of Ct., Rule 8.831]--Judicial Council Form APP-103

[1] FORM Notice Designating Record on Appeal [Cal. Rules of Ct., Rule 8.831]--Judicial Council Form APP-103

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a notice designating the record on appeal designed by the Judicial Council for optional use by parties in a limited civil case [*see Cal. Rules of Ct., Rule 8.831*]. For further discussion of the reporter's transcript, see *§ 345A.43*. For further discussion of the clerk's transcript, see *§ 345A.44*.

For discussion of the requirements for a notice of appeal, see *§ 345A.110[2]*, and for discussion of the requirements for notices to prepare clerk's and reporter's transcripts, see *§ 345A.113[2], [3]*, and *§ 345A.116[2], [3]*, respectively.

This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Cross References

For forms of notices of appeal from the superior court in civil actions other than limited civil cases, see Ch. 42, *Appeal: Notice of Appeal*

For forms of notices to prepare clerk's and/or reporter's transcripts in connection with an appeal from the superior court in civil actions other than limited civil cases, see Ch. 44, *Appeal: Preparing and Filing the Record*

For forms of notices of appeal from a small claims court judgment or order, see Ch. 526, *Small Claims*

For a Judicial Council Form of Notice of Appeal/Cross-Appeal (Limited Civil Case), see *§ 345A.110*

For a Judicial Council Form of Proposed Statement on Appeal (Limited Civil Case), see *§ 345A.113*

For a Judicial Council Form of Order Concerning Appellant's Proposed Statement on Appeal (Limited Civil Case), see *§ 345A.114*

For a Judicial Council Form Respondent's Notice Designating Record on Appeal (Limited Civil Case), see *§ 345A.116*

For a Judicial Council Form of Abandonment of Appeal (Limited Civil Case), see *§ 345A.121*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on AppealCivil ProcedureAppealsReviewabilityNotice of AppealGovernmentsCourtsSmall Claims Courts

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35-345A California Forms of Pleading and Practice--Annotated § 345A.113

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.113 Proposed Statement on Appeal [Cal. Rules of Ct., Rule 8.837]--Judicial Council Form APP-104

[1] FORM Proposed Statement on Appeal [Cal. Rules of Ct., Rule 8.837]--Judicial Council Form APP-104

Click here to view image.

[2] Use of Form

The form in [1], *above*, is for preparing a proposed statement on appeal, designed by the Judicial Council for optional use by parties in a limited civil case [*see Cal. Rules of Ct., Rule 8.837*]. A statement on appeal is a summary of the trial court proceedings that is approved by the trial court. For further discussion of the statement on appeal, see *§ 345A.47*.

This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Cross References

For forms of notices to prepare clerk's and/or reporter's transcripts in connection with an appeal from the superior court in civil actions other than limited civil cases, see Ch. 44, *Appeal: Preparing and Filing the Record*

For a Judicial Council Form of Notice of Appeal/Cross-Appeal (Limited Civil Case), see *§ 345A.110*

For a Judicial Council Form of Notice Designating Record on Appeal (Limited Civil Case), see *§ 345A.112*

For a Judicial Council Form of Order Concerning Appellant's Proposed Statement on Appeal (Limited Civil Case), see *§ 345A.114*

For a Judicial Council Form Respondent's Notice Designating Record on Appeal (Limited Civil Case), see *§ 345A.116*

For a Judicial Council Form of Abandonment of Appeal (Limited Civil Case), see *§ 345A.121*

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35-345A California Forms of Pleading and Practice--Annotated § 345A.114

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.114 Order Concerning Appellant's Proposed Statement on Appeal [Cal. Rules of Ct., Rule 8.837(d)]--Judicial Council Form APP-105

[1] FORM Order Concerning Appellant's Proposed Statement on Appeal [Cal. Rules of Ct., Rule 8.837(d)]--Judicial Council Form APP-105

Click here to view image.

[2] Use of Form

The form in [1], *above*, is for the court's order concerning the appellant's proposed statement on appeal, designed by the Judicial Council for optional use by parties in a limited civil case [*see Cal. Rules of Ct., Rule 8.837(d)*]. A statement on appeal is a summary of the trial court proceedings that is approved by the trial court. For further discussion of the statement on appeal, see *§ 345A.42A.*

This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Cross References

For forms of notices to prepare clerk's and/or reporter's transcripts in connection with an appeal from the superior court in civil actions other than limited civil cases, see Ch. 44, *Appeal: Preparing and Filing the Record* .

For a Judicial Council Form of Notice of Appeal/Cross-Appeal (Limited Civil Case), see *§ 345A.110*

For a Judicial Council Form of Notice Designating Record on Appeal (Limited Civil Case), see *§ 345A.112*

For a Judicial Council Form of Proposed Statement on Appeal (Limited Civil Case), see *§ 345A.113*

For a Judicial Council Form Respondent's Notice Designating Record on Appeal (Limited Civil Case), see *§ 345A.116*

For a Judicial Council Form of Abandonment of Appeal (Limited Civil Case), see *§ 345A.121*

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30-345A California Forms of Pleading and Practice--Annotated § 345A.115

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.115 Notice by Respondent Designating Additional Papers or Records to Be Included in Clerk's Transcript [Cal. Rules of Ct., Rule 8.832(b)]

[1] FORM Notice by Respondent Designating Additional Papers or Records to Be Included in Clerk's Transcript [Cal. Rules of Ct., Rule 8.832(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[_____ JUDICIAL DISTRICT]

_____ [*name*],	)	
Plaintiff and _____	)	
[*specify, e.g.,* Appellant], vs.	)	NO. _____
_____ [*name*],	)	RESPONDENT'S NOTICE DESIGNATING ADDI-
Defendant and _____	)	TIONS TO CLERK'S TRANSCRIPT
[*specify, e.g.,* Respondent].	)	
	)	

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN that _____ [*specify party, e.g.,* defendant] and respondent _____ [*name*] hereby designates the following additional papers or records in the above-entitled action to be included in the clerk's transcript on appeal: _____ [*list additions such as clerk's minutes, any written opinion of the trial court, exhibits either admitted in evidence or rejected, notices, affidavits, orders, and written*

instructions given or refused].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*specify party responding, e.g.,*
Defendant] and Respondent

[2] Use of Form

The notice in [1], *above*, is for use by a respondent to notify the clerk of the trial court to add to the clerk's transcript designated papers and records on file or lodged with the clerk of the trial court that appellant did not designate in his or her notice to prepare the clerk's transcript [*see Cal. Rules of Ct., Rule 8.832(b)*]. For further discussion of the notice to include additional items, see *§ 345A.44[2]*.

[3] Cross References

For forms of notices designating additions to clerk's transcript in connection with an appeal from the superior court in civil actions other than limited civil cases, see Ch. 44, *Appeal: Preparing and Filing the Record*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on AppealGovernmentsCourtsSmall Claims Courts

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30-345A California Forms of Pleading and Practice--Annotated § 345A.116

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.116 Respondent's Notice Designating Record on Appeal (Limited Civil Case)--Judicial Council Form APP-110

[1] FORM Respondent's Notice Designating Record on Appeal (Limited Civil Case)--Judicial Council Form APP-110

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a notice designating the record on appeal designed by the Judicial Council for optional use by respondents in a limited civil case [*see Cal. Rules of Ct., Rule 8.831*]. For further discussion of the reporter's transcript, see *§ 345A.43*. For further discussion of the clerk's transcript, see *§ 345A.44*.

For discussion of the requirements for a notice of appeal, see *§ 345A.110[2]*, and for discussion of the requirements for notices to prepare clerk's and reporter's transcripts, see *§ 345A.113[2], [3]*, and *§ 345A.116[2], [3]*, respectively.

This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Cross References

For forms of notices of appeal from the superior court in civil actions other than limited civil cases, see Ch. 42, *Appeal: Notice of Appeal*

For forms of notices to prepare clerk's and/or reporter's transcripts in connection with an appeal from the superior court

in civil actions other than limited civil cases, see Ch. 44, *Appeal: Preparing and Filing the Record*

For forms of notices of appeal from a small claims court judgment or order, see Ch. 526, *Small Claims*

For a Judicial Council Form of Notice of Appeal/Cross-Appeal (Limited Civil Case), see *§ 345A.110*

For a Judicial Council Form Notice Designating Record on Appeal (Limited Civil Case), see *§ 345A.112*

For a Judicial Council Form of Proposed Statement on Appeal (Limited Civil Case), see *§ 345A.113*

For a Judicial Council Form of Order Concerning Appellant's Proposed Statement on Appeal (Limited Civil Case), see *§ 345A.114*

For a Judicial Council Form of Abandonment of Appeal (Limited Civil Case), see *§ 345A.121*

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30-345A California Forms of Pleading and Practice--Annotated § 345A.117

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.117 Notice by Respondent to Include Additional Oral Proceedings in Reporter's Transcript [Cal. Rules of Ct., Rule 8.834(a)]

[1] FORM Notice by Respondent to Include Additional Oral Proceedings in Reporter's Transcript [Cal. Rules of Ct., Rule 8.834(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[_____ JUDICIAL DISTRICT]

_____ [*name*],	)	
Plaintiff and _____	)	
[*specify, e.g.,* Appellant], vs.	)	NO. _____
_____ [*name*],	)	RESPONDENT'S NOTICE DESIGNATING ADDI-
Defendant and _____	)	TIONS TO REPORTER'S TRANSCRIPT
[*specify, e.g.,* Respondent].	)	
	)	

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN that _____ [*specify party, e.g.,* defendant] and respondent _____ [*name*] hereby requests that the following portions of the oral proceedings be transcribed by the reporter in the above-entitled action: _____ [*specify additions, e.g.,* oral instructions given or refused, testimony of witnesses, the voir dire examination of jurors, the opening statement of counsel, objections made by

counsel, rulings of the trial court, the arguments of counsel to the jury, the proceedings on a motion for new trial, and such portions of depositions as have been either received in evidence or offered and rejected].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*specify party responding, e.g.,*
Defendant] and Respondent

[2] Use of Form

The notice in [1], *above*, is for use by a respondent to notify the clerk of the trial court to add to the reporter's transcript designated portions of the oral proceedings and instructions given by the trial court that appellant did not designate in his or her notice to prepare the reporter's transcript [*see Cal. Rules of Ct., Rule 8.834(a)*]. For further discussion of the notice to transcribe additional proceedings, see *§ 345A.43[2]*.

[3] Cross References

For forms of notices designating additions to reporter's transcript in connection with an appeal from the superior court in civil actions other than limited civil cases, see Ch. 44, *Appeal: Preparing and Filing the Record*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on AppealGovernmentsCourtsSmall Claims Courts

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30-345A California Forms of Pleading and Practice--Annotated § 345A.118

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.118 Stipulation Directing That Parts of Oral Proceedings Not Be Transcribed [Cal. Rules of Ct., Rule 8.834(c)]

[1] FORM Stipulation Directing That Parts of Oral Proceedings Not Be Transcribed [Cal. Rules of Ct., Rule 8.753(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[_____ JUDICIAL DISTRICT]

_____ [*name*],	)	
Plaintiff and _____	)	
[*specify, e.g.,* Appellant], vs.	)	NO. _____
_____ [*name*],	)	STIPULATION THAT PARTS OF ORAL PRO-
Defendant and _____	)	CEEDINGS NOT BE TRANSCRIBED IN REPORT-
[*specify, e.g.,* Respondent].	)	ER'S TRANSCRIPT
	)	

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

The above-named parties, through their respective attorneys, hereby stipulate that the reporter's transcript on appeal in the above-entitled matter omit a transcription of _____ [*specify part of oral proceedings not to be transcribed, e.g.,* the testimony of Sally Smith].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*specify party appealing, e.g.,*
Plaintiff] and Appellant
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*specify party responding, e.g.,*
Defendant] and Respondent

[2] Use of Form

The stipulation in [1], *above*, is for use by the parties to direct that parts of the oral proceedings not be transcribed [*see Cal. Rules of Ct., Rule 8.834(c)*]. For further discussion of the notice not to transcribe additional proceedings, see *§ 345A.43[2]*.

[3] Cross References

For forms of stipulations directing that parts of oral proceedings not be transcribed in connection with an appeal from the superior court in civilactions other than limited civil cases, see Ch. 44, *Appeal: Preparing and Filing the Record*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on AppealGovernmentsCourtsSmall Claims Courts

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Chapter 345A LIMITED CIVIL CASES
PART V. FORMS
B. Civil Appeals

30-345A California Forms of Pleading and Practice--Annotated § 345A.119

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.119 Request for Correction of Transcript [Cal. Rules of Ct., Rule 8.841(b)]

[1] FORM Request for Correction of Transcript [Cal. Rules of Ct., Rule 8.757]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[_____ JUDICIAL DISTRICT]

_____ [*name*],	)	
Plaintiff and _____	)	
[*specify, e.g.,* Appellant], vs.	)	NO. _____
_____ [*name*],	)	REQUEST FOR CORRECTION OF TRANSCRIPT
Defendant and _____	)	ON APPEAL
[*specify, e.g.,* Respondent].	)	
	)	

TO THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN that _____ [*specify status, e.g.,* plaintiff and appellant] _____ [*name*] requests that the _____ [clerk's *and/or* reporter's] transcript on appeal be corrected in the following particulars: _____ [*specify*].
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*specify party appealing, e.g.,*
Plaintiff] and Appellant

[2] Use of Form

The form in [1], *above*, is for use by a party to request correction of the clerk's transcript, the reporter's transcript, or both transcripts. When the record is complete, the trial court clerk must promptly send the original to the appellate division and send to the appellant and respondent copies of any certified statement on appeal and any copies of transcripts or official electronic recordings that they have purchased. The appellate division clerk must promptly file the original and mail notice of the filing date to the parties [*Cal. Rules of Ct., Rule 8.840*]. For further discussion of the correction of transcripts, see § 345A.48.

[3] Cross References

For forms of requests for corrections of transcripts in connection with an appeal from the superior court in civil actions other than limited civil cases, see Ch. 44, *Appeal: Preparing and Filing Record on Appeal*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on AppealGovernmentsCourtsSmall Claims Courts

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B. Civil Appeals

30-345A California Forms of Pleading and Practice--Annotated § 345A.120

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.120 Application to Extend Time to Serve and File Brief or Other Routine Matters Including Supporting Declaration [Code Civ. Proc. § 2015.5; Cal. Rules of Ct., Rule 8.810]

[1] FORM Application to Extend Time to Serve and File Brief or Other Routine Matters Including Supporting Declaration [Code Civ. Proc. § 2015.5; Cal. Rules of Ct., Rule 8.766]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
APPELLATE DIVISION

_____ [*name*],	)	
Plaintiff and _____	)	
[*specify, e.g.,* Appellant], vs.	)	NO. _____
_____ [*name*],	)	EX PARTE APPLICATION AND DECLARATION
Defendant and _____	)	FOR ORDER EXTENDING TIME TO
[*specify, e.g.,* Respondent].	)	_____ [*specify act, e.g.,* SERVE
	)	AND FILE APPELLANT'S OPENING BRIEF]

APPLICATION

_____ [*Specify status, e.g.,* Plaintiff and appellant] _____ [*name*] hereby applies to the above-entitled court for an order, pursuant to *California Rules of Court, Rule 8.810*, extending until _____ [*date*], the time within which _____ [*specify party, e.g.,* plaintiff and

appellant] may _____ [*specify act for which extension of time is requested, e.g.,* serve and file his/her/its opening brief].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*specify party appealing, e.g.,* Plaintiff] and Appellant

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*specify status, e.g.,* plaintiff and appellant) _____ (*name)*].

2. This is an appeal from a judgment of the Superior Court of California, County of _____, [_____ Judicial District,] for _____ [*specify the nature and the terms of the judgment or order from which the appeal is taken and in whose favor it was granted, e.g.,* defendant in the amount of $5,000].

3. In the absence of an order extending time, the _____ [*specify act for which extension is requested, e.g.,* appellant's opening brief] would have to be filed and served on or before _____ [*date*].

4. _____ [*Specify party, e.g.,* Plaintiff and appellant] is requesting that the time to _____ [*specify act for which extension of time is requested, e.g.,* serve and file his/her/its brief] be extended to _____[*date*].

5. _____ [*Specify party, e.g.,* Plaintiff and appellant] needs more time to _____ [*specify act for which extension of time is requested, e.g.,* serve and file his/her/its brief] because _____ [*set forth facts that show good cause for granting the application*].

6. [*Set forth facts regarding any previous applications granted or denied to any party after the filing of the notice of appeal.*]

7. On _____ [*date*], I notified _____ [*name*], attorney for _____ [*specify party, e.g.,* defendant and respondent], by _____ [*specify manner of notification, e.g.,* telephone], that this _____ [*specify application, e.g.,* ex parte application for order extending time to serve and file appellant's brief] would be made, and he/she refused to agree to an extension to _____ [*date*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
Declarant

ORDER

On reading the above application of _____ [*specify status, e.g.,* plaintiff and appellant] for an order permitting an extension of time within which _____ [*specify status, e.g.,* plaintiff and appellant] must _____ [*specify act for which extension of time is requested, e.g.,* serve and file his/her/its opening brief], and the supporting declaration(s), and good cause appearing therefor,

IT IS HEREBY ORDERED that the time for _____ [*specify status, e.g.,* plaintiff and appellant] to _____ [*specify act for which time is extended, e.g.,* serve and file his/her/its opening brief] is extended until _____ [*time*] on _____ [*date*].

_____ [*signature*]
Presiding Judge

[2] Use of Form

The application in [1], *above*, is for use by a party seeking an extension of time for doing an act related to a "routine" matter in the reviewing court, such as the filing of appellant's opening brief. The order is for use by the superior court in granting the application [*see Cal. Rules of Ct., Rule 8.810*]. For further discussion of applications on routine matters, see *§ 345A.57*.

[3] Requirement of Prepaid Envelopes and Copies

The applicant must provide to the clerk addressed, postage prepaid envelopes and sufficient additional copies of the application for later mailing by the clerk to all other parties of a copy of the order granting or denying the application, together with a copy of the application [*Cal. Rules of Ct., Rule 8.806(c)*]. For further discussion of applications on routine matters, see *§ 345A.57*.

[4] Cross References

For general forms of declarations under penalty of perjury, see Ch. 15, *Affidavits, Certificates, and Declarations*

For forms of ex parte applications to extend time in connection with an appeal from the superior court in civil actions other than limited civil cases, see Ch. 46, *Appeal: Extending or Shortening Time*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsBriefsGovernmentsCourtsRule Application & InterpretationGovernmentsCourtsSmall Claims Courts

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Chapter 345A LIMITED CIVIL CASES
PART V. FORMS
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30-345A California Forms of Pleading and Practice--Annotated § 345A.121

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.121 Abandonment of Appeal [Cal. Rules of Ct., Rule 8.825]--Judicial Council Form APP-106

[1] FORM Abandonment of Appeal [Cal. Rules of Ct., Rule 8.825]--Judicial Council Form APP-106

Click here to view image.

[2] Use of Form

The form in [1], *above*, is for use by an appellant to abandon an appeal. It is filed in the office of the clerk of the trial court that made the order or rendered the judgment from which the appeal was taken [*Cal. Rules of Ct., Rule 8.825*]. For further discussion of abandonment, see *§ 345A.55*.

In lieu of this form, the parties may file a stipulation for abandonment [*Cal. Rules of Ct., Rule 8.825*]. For a form of stipulation for abandonment that may be adapted for this purpose, see *Ch. 48, Appeal: Abandonment, Dismissal, and Stipulated Reversal, § 48.51*.

The filing of either a notice of abandonment or stipulation for abandonment operates to dismiss the appeal and to restore the jurisdiction of the trial court [*Cal. Rules of Ct., Rule 8.825*]. The dismissal of an appeal is with prejudice unless expressly made without prejudice [*Code Civ. Proc. § 913*]. On such a dismissal, the appellant is entitled to the return of that portion of any deposit in excess of the actual cost of preparation of the record on appeal up to that time [*Cal. Rules of Ct., Rule 8.825*].

This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Cross References

For forms of abandonment of appeal in connection with an appeal from the superior court in civil actions other than limited civil cases, see Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal*

For a Judicial Council Form of Notice of Appeal/Cross-Appeal (Limited Civil Case), see *§ 345A.110*

For a Judicial Council Form of Notice Designating Record on Appeal (Limited Civil Case), see *§ 345A.112*

For a Judicial Council Form of Proposed Statement on Appeal (Limited Civil Case), see *§ 345A.113*

For a Judicial Council Form of Order Concerning Appellant's Proposed Statement on Appeal (Limited Civil Case), see *§ 345A.114*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsDismissals of AppealsVoluntary DismissalsCivil ProcedureAppealsRecords on AppealGovernmentsCourtsSmall Claims Courts

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35-345A California Forms of Pleading and Practice--Annotated §§ 345A.122-345A.124

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

[Reserved]

§§ 345A.122[Reserved]

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Chapter 345A LIMITED CIVIL CASES
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30-345A California Forms of Pleading and Practice--Annotated § 345A.125

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.125 Application for Certification to Transfer Appeal Pending in Appellate Division of Superior Court to Court of Appeal [Code Civ. Proc. § 911; Cal. Rules of Ct., Rules 8.1002, 8.1005]

[1] FORM Application for Certification to Transfer Appeal Pending in Appellate Division of Superior Court to Court of Appeal [Code Civ. Proc. § 911; Cal. Rules of Ct., Rules 8.1002, 8.1005]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
APPELLATE DIVISION

_____ [*name*],	)	
Plaintiff and _____	)	
[*specify, e.g.,* Appellant], vs.	)	NO. _____
_____ [*name*],	)	APPLICATION FOR CERTIFICATION FOR
Defendant and _____	)	TRANSFER TO THE COURT OF APPEAL
[*specify, e.g.,* Respondent].	)	
	)	

_____ [*Specify status, e.g.,* Plaintiff and appellant] hereby applies to the above-entitled court for certification of the above-entitled case for the purpose of transferring the case to the Court of Appeal, State of California, _____ Appellate District, pursuant to *Code of Civil Procedure Section 911* and *California Rules of Court, Rule 8.1005*.

[*EITHER*]

Application for certification is made on the ground that there is a conflict of decision relating to _____ [*state ground of conflict*]. The decisions in conflict are _____ [*state citations or otherwise refer to decisions*].

[*AND/OR*]

Application for certification is _____ [also] made to enable the settlement of the following important question(s) of law _____ [*specify*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*specify party status, e.g.,*
Plaintiff] and Appellant

[2] Use of Form

The application in [1], *above*, is for use by either party seeking to transfer an appeal pending in a superior court to the court of appeal. Application is made to the appellate division of the superior court before judgment onappeal becomes final as to that court and may be included in any petition for rehearing [*see Code Civ. Proc. § 911*; *Cal. Rules of Ct., Rule 8.1005(b)*]. The superior court may certify the transfer of a case to the court of appeal if it appears necessary to secure uniformity of decision or to settle important questions of law [*Cal. Rules of Ct., Rule 8.1005(a)*]. For further discussion of certification by the superior court, see *§ 345A.72[4]*.

A court of appeal may order a case transferred to it for hearing and decision when a superior court certifies, or the court of appeal on its own motion determines, that the transfer appears necessary to secure uniformity of decision or to settle important questions of law [*Cal. Rules of Ct., Rule 8.1002(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsCase TransfersGovernmentsCourtsSmall Claims Courts

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B. Civil Appeals

30-345A California Forms of Pleading and Practice--Annotated § 345A.126

AUTHOR: Hon. Phillip J. Argento Editorial Consultant

§ 345A.126 Motion for Imposition of Sanctions for Frivolous Appeal

[1] FORM Motion for Imposition of Sanctions for Frivolous Appeal

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____
APPELLATE DIVISION

_____ [*name*],	)	
Plaintiff and Appellant/Respondent, vs.	)	CASE NO. _____
_____ [*name*],	)	MOTION FOR SANCTIONS
Defendant and Appellant/Respondent.	)	
	)	

To the Presiding Judge and Judges of the Appellate Division of the Superior Court:

_____ [*Specify party, e.g.,* Defendant and Respondent] _____ [*name*] hereby moves for an order awarding sanctions against _____ [*specify party, e.g.,* Plaintiff and Appellant] _____ [*name*] pursuant to *Rule 8.891(e) of the California Rules of Court*. The motion is made on the ground(s) that _____ [*specify that the appeal is frivolous and/or taken solely for the purpose of delay and/or an unreasonable infraction of the rules governing appeals*].

The motion is based on the declaration(s) of _____ [*name(s)*] and the memorandum of points and authorities served and filed with this motion, on the papers and records on file herein.

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[2] Use of Form

The form set out in [1], *above*, is for use by a party seeking an award of monetary sanctions against the appellant for a frivolous appeal. The motion should not be made until there are sufficient circumstances on appeal to justify an award of sanctions, normally after the appellant has filed an opening brief. The motion must be supported by a memorandumof points and authorities [*Cal. Rules of Ct., Rule 8.891(e)*], and by a declaration supporting the amount of sanctions being sought [*Cal. Rules of Ct., Rule 8.891(e)(2)*]. It is also advisable to file a declaration stating any facts or circumstances not shown in the record on appeal.

The motion must be accompanied by a proof of service on all parties to the appeal [*Cal. Rules of Ct., Rule 1.21*]. For discussion and forms relating to proof of service, see Ch. 518, *Service of Summons and Papers* .

For further discussion of the motion procedure, including the time for service and filing, see *§ 345A.60*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsFrivolous AppealsCivil ProcedureAppealsMotions on AppealGovernmentsCourtsSmall Claims Courts

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 346 LIMITED LIABILITY COMPANIES

30-346 California Forms of Pleading and Practice--Annotated 346.syn

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.syn Synopsis to Chapter 346: LIMITED LIABILITY COMPANIES

§ 346.01 Scope of Chapter

§ 346.02 Cross References

§§ 346.03-346.09 [Reserved]

§ 346.10 Governing Law: Beverly-Killea Limited Liability Company Act

[1] Effective Date of Act

[2] General Characteristics of Limited Liability Company

[3] Overriding the Act Through Articles or Operating Agreement

[4] Role of Limited Liability Companies

[5] Prohibited Activities

[a] Prohibition on Professional Practice

[b] Prohibition on Banking, Insurance, or Trust Company Business

[6] Lack of Case Law

§ 346.11 Description and Characteristics of California Limited Liability Companies

[1] Definition and Powers Under the Act

[2] Characteristics of Limited Liability Company

[a] Status as Entity

[b] Limited Liability

[c] Treatment Similar to Partnership for Income Tax Purposes

[d] Members

[3] Taxation of Limited Liability Companies

[a] Minimum California Franchise Tax

[b] California Fee Based on Income

[c] Net Income Taxes

§ 346.12 Formation of Limited Liability Company

[1] General Requirements

[2] Name

[a] Requirements

[b] Reservation

[3] Articles of Organization

[a] Filing Requirements

[b] Contents

[c] Articles of Organization Govern Operating Agreement

[d] Amendment of Articles

[e] Restatement of Articles

[f] Recording of Articles

[4] Operating Agreement

[5] Biennial Statement

§ 346.13 Agent, Office, and Recordkeeping Requirements

[1] Agent for Service of Process

[2] Office in California

[3] Records Required to Be Kept at Office

§ 346.14 Members

[1] "Member" Defined

[2] "Membership Interest" Defined

[3] Classes of Members

[4] Becoming a Member

[5] Rights and Duties of Members

[a] Rights Contained in Articles of Organization or Operating Agreement

[b] Transfer of Interests

[c] Class and Derivative Actions

[6] Authority of Members

[7] Capital Contributions and Accounts of Members

[a] In General

[b] Additional Contributions of Members

[c] Tax Consequences of Contributions

[8] Profits, Losses, and Distributions

[9] Voting

[10] Members' Meetings

[11] Information and Inspection Rights

[12] Withdrawal of Members

[13] Termination of Membership Interests

[14] Liability of Members

[a] General Non-Liability

[b] Situations Giving Rise to Personal Liability

[i] Liability Comparable to That of a Shareholder

[ii] Improper Distributions

[iii] Failure to Pay Taxes

[iv] Agreement to Be Obligated

[v] Tortious Conduct or Written Guarantee

[15] Indemnification and Insurance

[16] Standard of Conduct of Members

§ 346.15 Management

[1] "Manager" Defined

[2] Tax Implications of Management Structure

[3] Management by Members, Managers, or Officers

[4] Appointment and Removal of Managers

[5] Managers as Agents

[6] Managers' Fiduciary Duties

[a] In General

[b] Modification of Managers' Fiduciary Duties

[7] Managers' Other Duties

[8] Liability of Managers and Officers

[a] General Non-Liability

[b] Situations Giving Rise to Personal Liability

[i] Agreement to Be Personally Obligated

[ii] Breach of Fiduciary Duties

[iii] Criminal or Tortious Conduct

[iv] Misstatement in Articles of Organization

[v] Voting for Improper Distributions

[vi] Failure to Pay Sales Taxes

[c] Failure to Warn Employees of Workplace Danger

[9] Indemnification and Insurance

[10] Remuneration of Managers

[11] Failure to Report Misleading Statements

§ 346.16 Mergers, Conversions, and Reorganizations

[1] Procedure for Merger

[2] Procedure for Conversion

[3] Dissenters' Rights on Merger or Reorganization

[a] In General

[b] "Dissenting Interest" Defined

[c] Requiring Company to Purchase Dissenting Interest

[d] Loss of Status as Dissenting Interest

§ 346.17 Dissolution and Winding Up

[1] Causes of Dissolution

[2] Judicial Dissolution

[3] Continuation of Existence After Dissolution

[4] Winding Up

[5] Certificate of Dissolution and Certificate of Cancellation

§ 346.18 Foreign Limited Liability Companies

[1] Recognition and Governing Law

[2] Registration; Transacting Intrastate Business

[3] Effect of Recognition and Registration

§§ 346.19-346.29 [Reserved]

§ 346.30 State Statutes

[1] Regulation of Limited Liability Companies

[2] Taxation of Limited Liability Companies

§ 346.31 Federal Statutes

§ 346.32 Federal Regulations

§ 346.33 Decisions

§ 346.34 Revenue Rulings

§ 346.35 Law Reviews

§ 346.36 Text References

[1] Related Matthew Bender Publications

[2] Additional Text References

§§ 346.37-346.99 [Reserved]

§ 346.100 Allegation of Capacity and Principal Place of Business of Domestic Limited Liability Company [Code Civ. Proc. § 395.5]

[1] FORM

[2] Use of Form

[3] Limited Liability Company as Entity

§ 346.101 Allegation of Capacity and Principal Place of Business of Foreign Limited Liability Company Transacting Intrastate Business in California [Code Civ. Proc. § 395.5; Corp. Code §§ 17451, 17452]

[1] FORM

[2] Use of Form

[3] Limited Liability Company as Entity

[4] Registration as Prerequisite to Maintaining Action

§ 346.102 Affirmative Defense--Plaintiff Foreign Limited Liability Company May Not Maintain Action Because It Is Not Qualified to Transact Business in California [Code Civ. Proc. § 431.30(b)(2); Corp. Code §§ 17451, 17452, 17456(a)]

[1] FORM

[2] Use of Form

[3] Registration as Prerequisite to Maintaining Action

§§ 346.103-346.109 [Reserved]

§ 346.110 Complaint Against Limited Liability Company and Its Controlling Members on Limited Liability Company Obligation--Limited Liability Company as Alter Ego of Controlling Members

[1] FORM

[2] Use of Form

[3] Required Allegations

[4] Liability of Limited Liability Company Member

[5] Liability Under Alter Ego Doctrine

[6] Jurisdiction and Venue

[7] Complaint Not Normally Verified

[8] Cross References

§ 346.111 Notice of Motion to Amend Judgment to Include Member as Judgment Debtor

[1] FORM

[2] Use of Form

[3] Use of Alter Ego Doctrine

[4] Requirement to Include Supporting Memorandum

§ 346.112 Declaration in Support of Motion to Amend Judgment to Include Member as Judgment Debtor

[1] FORM

[2] Use of Form

[3] Establishing Alter Ego Relationship

[4] Use of Alter Ego Doctrine

§ 346.113 Order Granting Motion to Amend Judgment to Include Member as Judgment Debtor

[1] FORM

[2] Use of Form

[3] Use of Alter Ego Doctrine

§§ 346.114-346.119 [Reserved]

§ 346.120 Complaint for Damages Against Members for Receiving Improper Distribution [Corp. Code § 17254(e)]

[1] FORM

[2] Use of Form

[3] Required Allegations

[4] Liability for Improper Distributions

[5] Statute of Limitations

[6] Jurisdiction

[7] Cross References

§ 346.121 Complaint for Damages for Refusal to Make Distribution to Member [Corp. Code § 17251]

[1] FORM

[2] Use of Form

[3] Required Allegations

[4] Member's Right to Distribution

[5] Cross References

§§ 346.122-346.129 [Reserved]

§ 346.130 Dissenting Member's Demand for Purchase of Interest [Corp. Code § 17601(b)(3)]

[1] FORM

[2] Use of Form

[3] Contents of Demand

[4] Notice of Proposed Reorganization

[5] Right to Demand Purchase of Dissenting Interest

[6] "Dissenting Interest" Defined

§ 346.131 Complaint for Determination of Status of Membership Interest as Dissenting Interest and of Fair Market Value of Dissenting Interest [Corp. Code § 17605]

[1] FORM

[2] Use of Form

[3] Required Allegations

[4] Action for Court-Appointed Appraisal

[5] Cross References

§ 346.132 Order Appointing Appraisers to Determine Value of Dissenting Interest [Corp. Code § 17606]

[1] FORM

[2] Use of Form

[3] When Appraiser Is Appointed

§ 346.133 Report of Appraisers [Corp. Code § 17606]

[1] FORM

[2] Use of Form

[3] Submission of Report

§ 346.134 Notice of Motion for Confirmation of Report by Appraisers [Corp. Code § 17606(a)]

[1] FORM

[2] Use of Form

[3] Submission of Report on Party's Motion

[4] Requirement to Include Supporting Memorandum

§ 346.135 Order Confirming Report of Appraisers [Corp. Code § 17606]

[1] FORM

[2] Use of Form

[3] Order Confirming Report

[4] Whether Motion Is Law and Motion Proceeding

§ 346.136 Judgment Determining Fair Market Value of Dissenting Interest [Corp. Code § 17606]

[1] FORM

[2] Use of Form

[3] Rendering Judgment Against Limited Liability Company for Payment of Dissenting Interest

[4] Apportioning Costs of Action

§§ 346.137-346.149 [Reserved]

§ 346.150 Complaint for Involuntary Dissolution [Corp. Code §§ 17350(c), 17351(a)]

[1] FORM

[2] Use of Form

[3] Required Allegations

[4] Grounds for Judicial Dissolution

[5] Jurisdiction

[6] Cross References

§§ 346.151-346.159 [Reserved]

§ 346.160 Complaint for Damages by Limited Liability Company Against Manager for Breach of Fiduciary Duty [Corp. Code § 17153]

[1] FORM

[2] Use of Form

[3] Required Allegations

[4] Manager's Fiduciary Duties

[5] Who Is Affected by Fiduciary Duty

[6] Jurisdiction

[7] Cross References

§ 346.161 Complaint for Damages by Limited Liability Company Against Member for Breach of Agreement to Contribute Cash [Corp. Code § 17201]

[1] FORM

[2] Use of Form

[3] Required Allegations

[4] Requirement to Make Contribution

[5] Consequences of Failure to Make Contribution

[6] Cross References

§ 346.162 Complaint for Money--Indemnification for Defense Expenses [Corp. Code § 17155]

[1] FORM

[2] Use of Form

[3] Required Allegations

[4] Agent's Right to Indemnification

[5] Cross References

Hon. Walter L. Blackwell III n*

FOOTNOTES:
(n77)Footnote *.
The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 346 LIMITED LIABILITY COMPANIES
PART I. SCOPE

30-346 California Forms of Pleading and Practice--Annotated § 346.01

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.01 Scope of Chapter

This chapter discusses actions related to the formation, operation, and dissolution of limited liability companies (LLCs) under California's Beverly-Killea Limited Liability Company Act [*Corp. Code § 17000 et seq.*]. The Legal Background covers the following topics:

- Applicability of the Act, including domestic and foreign LLCs [*see §§ 346.10, 346.18*].
- Description and characteristics of LLCs [*see § 346.11*].
- Formation of LLCs, including structuring formalities, registration and recordkeeping requirements, and members [*see §§ 346.12 -346.14*].
- Management of LLCs [*see § 346.15*].
- Mergers and reorganizations [*see § 346.16*].
- Dissolution and winding up procedures [*see § 346.17*].
- Recognition and registration of foreign LLCs [*see § 346.18*].

Taxation and liability issues that will arise in the formation and operation of an LLC are discussed throughout the chapter where appropriate.

This chapter contains forms for use in all of the following:

- An allegation of capacity and principal place of business for both a domestic and a foreign LLC [*see*

§§ 346.100, 346.101].

- An affirmative defense that a foreign LLC is not qualified to do business in California [*see § 346.102*].

- A complaint against a member of an LLC on an alter ego theory [*see § 346.110*].

- A notice of motion, declaration, and order relating to amending a judgment to include members of an alter ego LLC as judgment debtors [*see §§ 346.111 -346.113*].

- Complaints for making an improper distribution and for failing to make a distribution [*see §§ 346.120, 346.121*].

- Forms for determining and paying the value of a dissenting interest [*see §§ 346.130 -346.136*].

- A complaint for involuntary dissolution [*see § 346.150*].

- Complaints for damages against managers and members of the LLC for breach of specified obligations [*see §§ 346.160, 346.161*].

- A complaint for indemnification for defense expenses [*see § 346.162*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 346 LIMITED LIABILITY COMPANIES
PART I. SCOPE

30-346 California Forms of Pleading and Practice--Annotated § 346.02

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.02 Cross References

For discussion, demurrers, and affirmative defenses to actions by an LLC based on lack of capacity to maintain a lawsuit, Ch. *Abatement of Actions*, Forms 1, 8, and 9.

For coverage of allegations of an LLC using a fictitious business name, see Ch. 20, *Allegations Commonly Used* .

For coverage of forms for use with corporations, see Ch. 160, *Corporations: Capacity* , through Ch. 170, *Corporations: Dissolution and Winding Up*. For coverage of forms for use with general partnerships, limited partnerships, and joint ventures, see Ch. 400, *Partnerships: Governing Statutes* , et seq. Many corporate and partnership litigation forms will be useful for LLCs with appropriate changes in language.

For forms for use in forming and operating a limited liability company, see California Legal Forms, Ch. 12C, *Limited Liability Companies* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesGeneral Overview

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Chapter 346 LIMITED LIABILITY COMPANIES
PART I. SCOPE

30-346 California Forms of Pleading and Practice--Annotated §§ 346.03-346.09

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

[Reserved]

§§ 346.03[Reserved]

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 346 LIMITED LIABILITY COMPANIES
PART II. LEGAL BACKGROUND

30-346 California Forms of Pleading and Practice--Annotated § 346.10

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§ 346.10 Governing Law: Beverly-Killea Limited Liability Company Act

[1] Effective Date of Act

On September 30, 1994, Governor Pete Wilson signed legislation enacting the Beverly-Killea Limited Liability Company Act (the "Act") [Stats. 1994, Ch. 1200, § 27 (S.B. 469); *see Corp. Code § 17000 et seq.*]. As urgency legislation, the Act became effective on that date [Stats. 1994, Ch. 1200, § 100; *see also* Stats. 1996, Ch. 57 ("clean-up" legislation effective June 6, 1996)]. California joined 45 other states and the District of Columbia that have passed legislation creating the entity known as the limited liability company (an "LLC").

The Act provides for the creation of domestic LLCs [*Corp. Code § 17050 et seq.*; *see § 346.12*] and the recognition of foreign LLCs [*Corp. Code § 17450 et seq.*; *see § 346.18*].

[2] General Characteristics of Limited Liability Company

An LLC is a relatively new type of business entity that is essentially a hybrid of a corporation and a partnership. If structured properly, a California LLC can have the income tax transparency of a partnership on both the federal and California level, without some of the restrictions imposed on corporations and limited partnerships. Properly structured LLCs can also provide their members, managers, and officers limited liability similar to that enjoyed by corporate shareholders; that is, liability limited to their investments and commitments to invest in the LLC.

LLCs offer great flexibility of form and structure, which can range from the extremely simple to the very complex and, if desired, can closely approximate management and ownership structures of either corporations or partnerships.

LLCs have two basic organizational documents. The first is the articles of organization, Form LLC-1, a one-page statutory form, which must be filed with the Secretary of State. The second is the operating agreement, a vehicle for prescribing the structural details of the LLC. It is permissible to have an oral operating agreement, though prudent practice would indicate having a written agreement. Various other registration forms are also prescribed by the

Secretary of State.

For illustrations of these organizational forms, see California Legal Forms, Ch. 12C, *Limited Liability Companies* (Matthew Bender).

[3] Overriding the Act Through Articles or Operating Agreement

The Act expressly allows an LLC's articles of organization or operating agreement to vary most of the provisions in the Act governing relations among members and relations between members and the LLC [*Corp. Code § 17005*]. The Act also states that the presence of the words "unless otherwise provided in the articles of organization or operating agreement" (or similar words) in a provision does not imply that other provisions of the Act may not be varied as among members by those documents [*Corp. Code § 17005(e)*]. In this sense, the "overridable" provisions are "default" provisions, to provide for the matters they cover if the articles or operating agreement is silent on those matters.

Some of these provisions of the Act may be overridden only by the articles or a written operating agreement. These include all of the following:

- The provision that the power to adopt, alter, amend, or repeal an operating agreement is vested in the members [*Corp. Code § 17059*].

- Certain matters as to members' voting rights [*Corp. Code § 17103*].

- Certain matters as to meetings of members [*Corp. Code § 17104*].

- Certain matters as to election, removal, resignation, or expiration of terms of managers [*Corp. Code § 17152*].

- Provisions regarding appointment, resignation, and removal of officers and their authority [*Corp. Code § 17154*].

- Provisions regarding indemnification of managers and others, and securing insurance for them [*Corp. Code § 17155*].

The provision as to the fiduciary duties of a manager [*see § 346.15[6]*] can be modified only by a written operating agreement "with the informed consent of the members" [*Corp. Code § 17005(d)*].

Corp. Code § 17005(b) lists several provisions of the Act respecting relations of members that cannot be overridden by articles of organization or an operating agreement. These include the definitions in the Act and a number of voting and other rights of members [*Corp. Code § 17005(b)*]. Certain other matters relating to formation of LLCs, class and derivative actions, mergers, and dissenting rights of members in reorganizations and dissolution of an LLC may be varied only to the extent expressly provided by the respective statutory provisions [*Corp. Code § 17005(c)*].

This chapter includes reminders in several key places that a particular provision of the Act may or may not be overridden. But many other provisions of the Act described in this chapter may also be overridden. Therefore, the reader should refer back to this section or to *Corp. Code § 17005* for guidance as to whether a particular provision of the Act may be overridden and in what way.

[4] Role of Limited Liability Companies

The Act is designed especially to assist the formation and operation of small, closely-held or closely-controlled business

arrangements. But, unlike some other states' LLC statutes, the California Act permits structures sufficiently flexible to be attractive to larger, more complex business ventures. Business areas in which the LLC structure seems particularly useful include real estate, joint ventures (particularly ventures with foreign partners), high technology and venture capital, oil and gas, and theatrical investments. Thus, LLCs are often used as alternatives to general partnerships, limited partnerships, or S corporations.

[5] Prohibited Activities

[a] Prohibition on Professional Practice

The California LLC Act, unlike similar legislation in New York, Delaware, and elsewhere, does not permit a domestic or foreign LLC to render professional services, as that term is defined in *Corp. Code § 13401(a)* and *Corp. Code § 13401.3* [*Corp. Code § 17375* (codifying previously uncodified provision); *see* Stats. 1994, Ch. 1200, § 93]. Under those sections, "professional services" are defined as to be any type of professional services that may be lawfully rendered only pursuant to a license, certification, or registration authorized by the Business and Professions Code, Chiropractic Act, or Osteopathic Act in California [*Corp. Code § 13401(a)*], and any type of professional services that may be lawfully rendered only pursuant to a license, certification, or registration authorized by the Yacht and Ship Brokers Act [*Corp. Code § 13401.3*; *see Harb. & Nav. Code § 700 et seq.*].

Chapter 9 of the Act has been reserved for possible future use if changes in law permit LLCs to render professional services. For the present, however, professional LLCs may not be formed.

[b] Prohibition on Banking, Insurance, or Trust Company Business

Limited liability companies may not engage in the banking business, the business of issuing policies of insurance and assuming insurance risks, or the trust company business [*Corp. Code § 17002(a)*]. A LLC, however, may operate as a health care service plan licensed pursuant to *Health & Safety Code § 1340 et seq.* if the LLC is a subsidiary of a health care service plan licensed pursuant to those provisions and the LLC is established to serve an existing line of business of the parent health care service plan. The tort or contract liability of a LLC created to operate as a health care service and its members is not limited or restricted in any manner because of the LLC status of the health care service plan. *Corp. Code § 17002(b)*.

[6] Lack of Case Law

Because LLCs have been authorized in California only since September, 1994, there is a shortage of reported California cases involving LLCs. This is expected to change as LLC members, managers, and creditors begin to have disputes and litigate their differences.

PRACTICE TIP:

Interim Guidance. In the absence of specific California case law involving LLCs, reference should be made to California case law on similar issues relating to corporations and partnerships, and to case law of other states involving LLCs, for guidance.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 346 LIMITED LIABILITY COMPANIES
PART II. LEGAL BACKGROUND

30-346 California Forms of Pleading and Practice--Annotated § 346.11

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.11 Description and Characteristics of California Limited Liability Companies

[1] Definition and Powers Under the Act

A "limited liability company" or "domestic limited liability company" is an entity with one or more members organized under the Beverly-Killea Limited Liability Company Act that is subject to the provisions on personal liability of members [*Corp. Code § 17001(t)*; *see Corp. Code § 17101*; *see also § 346.14[14]*].

An LLC may engage in any lawful business activity, whether or not for profit (subject to any limitations contained in its articles of organization and to compliance with any other applicable laws) except the banking business, the business of issuing policies of insurance and assuming insurance risks, or the trust company business [*Corp. Code § 17002(a)*; *see Corp. Code § 17002(b)* (operation as licensed health care service plan permitted); *see also § 346.10[5][b]*], and except for rendering professional services as described in *§ 346.10[5][a]*. In carrying out its business activities, an LLC has all of the powers of a natural person, subject to any limitations contained in its articles of organization and subject to compliance with the Act. These powers include, among others, the following [*Corp. Code § 17003*]:

- Transact the LLC's business, carry on its operations, and qualify to do business.
- Sue, be sued, complain, or defend in its own name any type of action.
- Make contracts and guarantees, incur liabilities, act as surety, and borrow money.
- Own, transfer, and lease real and personal property.
- Issue, purchase, and redeem securities.

[2] Characteristics of Limited Liability Company

[a] Status as Entity

Because an LLC is an entity [*Corp. Code § 17001(t), see § 346.11[1]*], it may conduct business, sue and be sued, and exercise all the powers of a natural person, *in its own name* [*see Corp. Code § 17003*].

[b] Limited Liability

In general, LLCs afford their members and managers (including officers) limited liability essentially like that enjoyed by a corporate shareholder. They are not personally liable for any debt, liability, or obligation of the LLC arising in "contract, tort, or otherwise" solely by being a member,manager, or officer of the LLC [*Corp. Code §§ 17101(a), 17158*]. Exceptions to limited liability of members, managers, and officers are discussed in *§§ 346.14[14][b]* and *346.15[8][b]*.

[c] Treatment Similar to Partnership for Income Tax Purposes

A properly structured LLC will receive pass-through income tax treatment essentially like that of a partnership. That treatment avoids the double taxation attributable to corporations that are not S corporations; that is, taxation once on the corporate earnings and again on shareholders' dividends. [*I.R.C. §§ 1(h)(11), 61(a)(7), 301(a), (c)(1), 316(a)*]. Double taxation of dividends, however, is less of a concern during years in which dividends are taxable at lower capital gains rates (generally tax years beginning after December 31, 2002, and before January 1, 2009), but it is still a reason to structure an LLC as a pass-through entity rather than a corporation [*see I.R.C. § 1(h)(11)*; Pub. Law No. 108-27, §§ 302(f)(1), 303 (effective date and sunset provisions for dividend taxation at capital gains rates)]. It also allows other tax benefits as contrasted not only with corporations but also, in a few respects, with partnerships.

For more detailed discussion of the tax aspects of limited partnerships, see Ballantine & Sterling, California Corporation Laws, Ch. 24A, *Limited Liability Companies* (Matthew Bender).

[d] Members

Every LLC must have at least one member [*see Corp. Code § 17001(t)*; *see also § 346.14[1]*]. A membership interest includes the member's economic interest in the LLC, any right to vote or participate in management, and any right to information about the affairs of the LLC [*Corp. Code § 17001(z)*]. The interest may, but need not, be issued in the form of certificates of interest. An "interest" in an LLC is a security under the Corporate Securities Law of 1968, except for a membership interest in an LLC in which the person claiming an exception can prove that all of the members are actively engaged in managing the LLC [*Corp. Code § 25019*]. This section includes requirements as to evidentiary matters as to proving active engagement in management.

[3] Taxation of Limited Liability Companies

[a] Minimum California Franchise Tax

Every LLC or foreign LLC classified as a partnership for California tax purposes that is doing business in California, organized in California, or registered with the Secretary of State is required to file a California tax return [*Rev. & Tax. Code § 18633.5(a)* (which also requires Franchise Tax Board to prescribe manner and extent to which required information must be included with return)]. It must pay an annual minimum franchise tax of $800 for the privilege of doing business in California [*Rev. & Tax. Code §§ 17941(a), 23153(d)(1)*]. This tax must be paid annually until a certificate of cancellation of articles of organization (LLCs) or certificate of cancellation of registration (foreign LLCs) is filed with the Secretary of State [*Rev. & Tax. Code § 17941(b)(1)*]. If a taxpayer files a return with the Franchise Tax Board that is designated as its final return, the Franchise Tax Board will notify the taxpayer that the annual tax will continue to be due annually until a certificate of cancellation is filed with the Secretary of State pursuant to *Corp. Code §§ 17356* or *17455* [*Rev. & Tax. Code § 17941(b)(2)*].

An LLC is not subject to the franchise tax for a taxable year if [*Rev. & Tax. Code § 17947(a)*]:

- It files a timely final annual return [*see Rev. & Tax. Code § 17947(b)* (definition)] for the preceding taxable year;

- It does not do business in California after the end of the taxable year for which it filed the final return; and

- It files a certificate of cancellation [*see Corp. Code §§ 17356, 17455*] with the Secretary of State before the end of the 12-month period beginning with the date the final return was filed.

PRACTICE TIP:

When to Pay Franchise Tax. An LLC should wait to be billed for the annual minimum franchise tax; if an LLC submits this payment with its articles of organization or its application for registration, it will be taxed as a corporation [*see* Secretary of State's letter accompanying LLC form packet].

If the Secretary of State files a certificate of cancellation pursuant to *Corp. Code § 17350.5* (concerning a certificate of cancellation filed within 12 months of filing the articles of organization if the LLC has not conducted any business) [*see § 346.17[5]*], then *Rev. & Tax. Code § 23153(f)(1)* will provide an exemption from the minimum franchise tax as if the LLC were properly treated as a corporation for that purpose only, and *Rev. & Tax. Code § 23153(f)(2)* (excluding LLCs from that exemption) will not apply. However, the LLC is not entitled to receive reimbursement for annual taxes or fees already paid [*Rev. & Tax. Code § 17941(e)*].

[b] California Fee Based on Income

In addition to the minimum franchise tax [*see § 346.11[3][a]*], every LLC or foreign LLC subject to the franchise tax [*Rev. & Tax. Code § 17941*] must also pay a graduated annual fee based on its total income of $250,000 or more from all sources derived from or attributable to California [*Rev. & Tax. Code § 17942(a)*; *see Rev. & Tax. Code § 17942(b)* (definition); *see also Rev. & Tax. Code § 19394* (claiming refund of discriminatory fee under *Rev. & Tax. Code § 17942*)]. The fee ranges from $900 to $11,790 [*Rev. & Tax. Code § 17942(a)*].

[c] Net Income Taxes

If properly structured, an LLC is a pass-through tax entity for California and federal income tax purposes much like a partnership, and so its members, not the LLC, pay tax on its net income much as partners would [*I.R.C. § 701*; *see § 346.11[2][c]*]. The LLC, in this case, is essentially an accounting entity.

Although the LLC is disregarded as an entity for federal tax purposes, it appears that the IRS may *not* be entitled to disregard the entity for purposes of collecting taxes owed by an individual LLC member. Thus, in a situation in which the IRS issued a notice of levy on the assets of an LLC which was validly formed under the laws of West Virginia and solely owned by an individual taxpayer, in order to satisfy that taxpayer's tax liability, it was determined that the IRS can only collect from the property of the taxpayer to satisfy that taxpayer's liability. State law controls in determining the nature of a person's interest in property for purposes of determining whether a tax lien or levy attaches, and in this case pursuant to the state LLC statutes the taxpayer had no property in the LLC's property. The mere fact that the LLC entity is disregarded for federal tax purposes does not entitle the IRS to disregard the entity for purposes of collection. The IRS, however, may have several collection options, including collecting the taxpayer's distributive interest in the LLC or collecting from the LLC's assets on the basis that it is the taxpayer's alter ego [*see* I.R.S. Internal Litigation Memorandum 199930013 (April 18, 1999)].

If business requirements, such as freedom of management structure, are more important to an LLC than partnership income tax treatment, the LLC may choose to be taxed as a corporation, and pay the two levels of tax inherent in the corporate structure (once on LLC earnings and again on member dividends) [*see I.R.C. §§ 1(h)(11)* (taxation of qualified dividends at capital gains rates), 61(a)(7), 301(a), (c)(1), 316(a)]. In this case, the LLC will be treated by the IRS and the FTB as a corporation for tax purposes.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 346 LIMITED LIABILITY COMPANIES
PART II. LEGAL BACKGROUND

30-346 California Forms of Pleading and Practice--Annotated § 346.12

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.12 Formation of Limited Liability Company

[1] General Requirements

An LLC must have at least one member [*Corp. Code § 17050(b)*] and is subject to the provisions on personal liability of members [*Corp. Code § 17001(t)*; *see Corp. Code § 17101*; *see also § 346.14[14]*]. Members may be natural persons, partnerships, limited partnerships, trusts, estates, associations, corporations, other LLCs, or other types of entities, whether domestic or foreign [*Corp. Code § 17001(x), (ae)*].

Forming an LLC is simple: it comes into existence when its articles of organization are filed with the Secretary of State [*Corp. Code § 17050(c)*; *see* [3], *below*]. Before or after (presumably promptly after) that filing, the members must enter into a written or oral operating agreement [*Corp. Code § 17050(a)*; *see* [4], *below*].

[2] Name

[a] Requirements

The Act sets forth specific requirements regarding an LLC's name. The name of the LLC must be set forth in the articles of organization [*Corp. Code § 17052*; *see* [3][b], *below*]. Chiefly, the name must not be one that the Secretary of State determines is likely to mislead the public, and must not be the same as, or resemble so closely as to tend to deceive, the name of an existing domestic or registered foreign LLC (absent consent) or a name already reserved by an LLC or foreign LLC [*Corp. Code § 17052(c)*; *see* [b], *below*].

The last words of the name must be "limited liability company" or the abbreviation "LLC" or "L.L.C." The words "limited" and "company" may be abbreviated to "Ltd." and "Co." respectively [*Corp. Code § 17052(a)*]. The words "bank," "trust," "trustee," "incorporated," "inc.," "corporation," or "corp." may not be used in the name of an LLC. Furthermore, the name must not contain the words "insurer" or "insurance company" or any other words suggesting that the LLC is in the business of issuing policies of insurance and assuming insurance risks [*Corp. Code § 17052(d)*]. An

LLC's name should not be indicative of a "professional service" [Secretary of State's letter accompanying LLC form packet; *see Corp. Code § 13401(a)*].

An LLC's name may contain the name of one or more of its members [*Corp. Code § 17052(b)*].

[b] Reservation

On payment of the required fee [*see Gov. Code § 12190(a)*], an applicant may reserve an approved LLC name with the Secretary of State for 60 days. The same person may not reserve the same name for consecutive 60-day periods [*Corp. Code § 17053*], but may do so with breaks between 60-day periods.

[3] Articles of Organization

[a] Filing Requirements

Articles of organization must be filed on Form LLC-1. This form may be obtained from any office of the Secretary of State. However, the articles, like all mandatory LLC forms, must be filed with the Limited Liability Company Unit in the Sacramento office of the Secretary of State [*see* Secretary of State's letter accompanying LLC form packet]. The articles must be executed by one or more persons, and submitted for filing with the applicable filing fee [*Corp. Code § 17050(a)*; *see Gov. Code § 12190(b) (fee)*]. Along with instructional materials provided in conjunction with the form for filing articles of organization, the Secretary of State is required to include a notice that filing the registration will obligate the limited liability company to pay an annual tax for that taxable year to the Franchise Tax Board pursuant to *Rev. & Tax. Code § 17941*. The notice must be updated annually to specify the dollar amount of the tax [*Corp. Code § 17050(d)*].

[b] Contents

The articles of organization of an LLC must set forth all of the following [*Corp. Code § 17051(a)*]:

- The name of the LLC.
- A statement regarding the purpose of the LLC in the form specified by the Act.
- The name and address of the LLC's initial agent for service of process.
- If it is to be managed by managers and not by all of its members, a statement to that effect. If it is to be managed by only one manager, a statement to that effect [*see* Form LLC-1].

PRACTICE TIP:
Management by Members. The Act contains a default provision stating that if the articles of organization are silent on the issue of management, the LLC will be deemed to be managed by its members [*Corp. Code §§ 17150, 17151(b)*]. An LLC may elect management by managers after the initial filing of the articles by amending them, or by executing restated articles [*see* [d], [e], *below*].

It is not necessary to set out in the articles any of the powers of the LLC [*Corp. Code § 17051(b)*]. However, the articles *may* include other provisions not inconsistent with law, including provisions limiting or restricting the business or powers of the LLC; governing admission of members; the time at which the LLC is to dissolve; events that will cause dissolution of the LLC [*see § 346.17[1]*]; a statement of whether there are limitations on the authority of managers or members to bind the LLC and if so what they are; and the names of the managers of the LLC [*Corp. Code § 17051(c)*].

PRACTICE TIP:

Optional Matters in Articles. Because the articles of organization are a public document and can be changed only by formal amendment filed with the Secretary of State and, unless otherwise provided in the articles or a written operating agreement, require the unanimous vote of all members for their amendment, it may be desirable not to include optional matters in the articles.

[c] Articles of Organization Govern Operating Agreement

If any provision of the articles of an LLC conflicts with its written operating agreement, the articles control [*Corp. Code § 17005(f)*; *see* [4], *below*].

[d] Amendment of Articles

Subject to the requirement that at least a majority in interest of the members vote to amend [*Corp. Code § 17103(b)*], the members of an LLC may amend its articles at any time [*Corp. Code § 17054(a)*]. An amendment may make any change in the articles determined by the members and that would be lawful to insert in original articles filed at the time the amendment is filed [*Corp. Code § 17054(a)*].

To amend articles, at least one manager of the LLC (or if it has no managers, one member) must file a certificate of amendment (Form LLC-2) with the Secretary of State [*Corp. Code § 17054(b)*]. The certificate must contain the LLC's name, its Secretary of State's file number, and the text of the amendment [*Corp. Code § 17054(b)*].

A certificate of amendment to articles must be filed to effect the following [*Corp. Code § 17054(c)*]:

- A change in the name of the LLC.
- A change in the statement regarding the existence of managers [*see Corp. Code § 17151(b)*].
- A change in the time for dissolution of the LLC.
- A change in the events that will cause dissolution of the LLC.

In addition, a certificate of amendment must be filed within 30 days of discovery by a manager of any false or erroneous material statement in the articles [*Corp. Code § 17054(d)*].

A manager may be liable for misstatements in a certificate of amendment [*Corp. Code § 17054(e)*; *see § 346.15[8][b][iii]*].

[e] Restatement of Articles

An LLC's articles of organization may be restated at any time by filing Form LLC-10 with the Secretary of State. In general, the restated articles must contain all the information required to be included in the original articles [*Corp. Code § 17054(f)*; *see Corp. Code § 17051* (requirements for original articles); *see also* [b], *above*]. For additional discussion and an illustration of form LLC-10, see California Legal Forms, Ch. 12C, *Limited Liability Companies* (Matthew Bender).

[f] Recording of Articles

An LLC may record with any county recorder a certified copy of its articles of organization and any exhibits, attachments, or amendments filed with the Secretary of State. A foreign LLC may record a certified copy of its application for registration, certificate of registration, or any amendment filed in the office of the Secretary of State. The recording will create a conclusive presumption in favor of any bona fide purchaser or encumbrancer for value of the

LLC's real property located in the county in which the certified copy has been recorded of the statements contained in the document [*Corp. Code § 17052(f)*].

[4] Operating Agreement

The members of an LLC must enter into an operating agreement either before or after filing of its articles [*Corp. Code § 17050(a)*]. The Act defines an "operating agreement" as any agreement, written or oral, among all the members as to the affairs of the LLC and the conduct of its business in a manner not inconsistent with law or its articles, including amendments [*Corp. Code § 17001(ab)*].

The operating agreement may be written or oral and may be as simple as an agreement to organize an LLC [*Corp. Code § 17001(ab)* ("operating agreement" defined)].

PRACTICE TIP:

Desirability of Written Operating Agreement. Except in unusual circumstances or when the terms of the operating agreement are relatively simple and readily provable, it seems advisable that an operating agreement be written, since it is likely to be the key document of an LLC. A written agreement may help to avoid (1) future disagreements among members and between members and managers, (2) arguments against limited liability protection based on a lack of operating agreement or the inadequacy of the agreement (for example, insufficient structuring of capital accounts), and (3) suggestions that counsel is involved in the issuance of securities.

Depending, among other things, on whether the LLC will be managed by its members or by managers other than all of the members and the complexity of the desired business structure, the operating agreement may need to contain provisions somewhat akin to those in corporate bylaws and certainly many of the provisions that would be contained in a well thought out partnership agreement. The operating agreement should also specify any respects in which the "default provisions" of the initial Act [*see § 346.10[3]*] are to be changed or rendered inapplicable to the LLC. Some changes to default provisions must be in a written operating agreement to be effective [*Corp. Code § 17005(b)-(d)*].

A well-drafted, relatively detailed operating agreement should contain some or all of the following types of provisions: definition of terms used in it; provisions as to accounting, records, financial statements and reports; names and addresses of members; rights and duties of members; if the LLC is to be managed by the members, provisions as to management and as to a management group of members, if any; if it is to be managed by managers, the necessary details of that management [*see § 346.15*]; contributions; capital accounts and capital structure; allocations of profits and losses and any special allocations; distributions; various tax matters such as tax elections and identification of the equivalent of a tax matters partner; disposition of interests of members; termination of memberships and rights of members holding terminated memberships; assignment of membership interests and admission of additional members; withdrawal of members; dissolution and winding up; amendment; and other provisions common to detailed contracts, including statements of consideration, provisions for notice, severability, integration, governing law, and confidentiality (if appropriate). For detailed discussion and a complete operating agreement, see California Legal Forms, Ch. 12C, *Limited Liability Companies* (Matthew Bender).

Many corporate bylaws or partnership agreements include, without changes, many of the matters already provided for by the relevant governing law simply as a convenient and readily available catalog. Consideration should be given, depending on the circumstances of a particular LLC, to whether this is desirable. In addition, as noted above, the operating agreement should cover any matters as to which the Act's default rules are changed.

The power to adopt and change the operating agreement of an LLC is vested in its members but its articles of organization or a written operating agreement may prescribe the manner in which the operating agreement may be changed [*Corp. Code § 17059*].

The operating agreement may not be filed with the Secretary of State [*see* Secretary of State's letter accompanying LLC form packet].

[5] Biennial Statement

Every LLC, whether domestic or foreign, must file a statement of information (Form LLC-12 for an initial statement or Form LLC-12R thereafter) with the Secretary of State within 90 days after filing its original articles of organization and biennially thereafter [*Corp. Code § 17060(a)*]. If no required information has changed since the previous statement was filed, an LLC may, in lieu of filing a biennial statement, advise the Secretary of State that no changes in the required information have occurred [*Corp. Code § 17060(b)*]. If a statement is not filed as required, an LLC is subject to monetary penalties and possible suspension of its powers and rights [*Corp. Code §§ 17651(b), 17653, 17654*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesFormation

California Forms of Pleading and Practice--Annotated

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 346 LIMITED LIABILITY COMPANIES
PART II. LEGAL BACKGROUND

30-346 California Forms of Pleading and Practice--Annotated § 346.13

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.13 Agent, Office, and Recordkeeping Requirements

[1] Agent for Service of Process

An LLC must continuously maintain an agent in California for service of process on it [*Corp. Code § 17057(b)*].

[2] Office in California

An LLC must continuously maintain an office located in California at which it keeps required records [*Corp. Code § 17057(a)*; *see* [3], *below*]. Within California the office may be located where the managers of the LLC choose.

[3] Records Required to Be Kept at Office

An LLC must keep the following records, in writing or in any other form capable of being converted into clearly legible tangible form, at its office in California [*Corp. Code § 17058(a)*]:

- A current list of the full name and last known business or residence address of each member and each holder of an economic interest in the LLC and the contribution and share in profits and losses of each member and holder of an economic interest.

- A current list of any managers [*see Corp. Code § 17151(b)*].

- A copy of its articles of organization, any amendments to the articles, and executed copies of any powers of attorney relating to the execution of the articles.

- Copies of federal, state, and local income tax or information returns and reports for the six most recent taxable years.

- A copy of any written operating agreement, any amendments to the agreement, and executed copies of any powers of attorney relating to the execution of the agreement.

- Copies of the LLC's financial statements for the six most recent fiscal years.

- The LLC's books and records as they relate to its internal affairs for at least the current and past four fiscal years.

On an assessor's request, an LLC owning, claiming, possessing, or controlling property in California must make relevant business records available [*Corp. Code § 17058(b)*]. In addition, LLC members have the right to inspect records [*Corp. Code § 17106*; *see § 346.14[11]*].

An LLC failing to comply with these recordkeeping requirements after a written request to do so by a member is subject to daily monetary penalties up to a stated maximum [*Corp. Code § 17651*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesManagement Duties & LiabilitiesBusiness & Corporate LawLimited Liability CompaniesMembers & Other Constituents

California Forms of Pleading and Practice--Annotated

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Chapter 346 LIMITED LIABILITY COMPANIES
PART II. LEGAL BACKGROUND

30-346 California Forms of Pleading and Practice--Annotated § 346.14

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.14 Members

[1] "Member" Defined

A "member" of an LLC is a person who has been admitted as a member in accordance with its articles of organization or operating agreement or is an assignee of an interest in the LLC who has become a member, and who has not resigned, withdrawn, or been expelled or dissolved [*Corp. Code § 17001(x)*]. The term "person" includes natural persons and most other types of entities, domestic and foreign [*Corp. Code § 17001(ae)*]. An LLC must have one or more members [*Corp. Code §§ 17001(t), 17050(b)*].

[2] "Membership Interest" Defined

A "membership interest" in an LLC is a member's rights in the LLC, collectively, including the member's economic interest, any right to vote or participate in its management, and any rights to information concerning its business and affairs provided by the Act [*Corp. Code § 17001(z)*]. "Economic interest" means a person's right to share in income, gains, losses, deductions, credit, or similar items of and receive distributions from an LLC but does not include any other rights of a member including rights to vote or to participate in management or, with some exceptions, rights to information concerning the business and affairs of the LLC [*Corp. Code § 17001(n)*]. Unlike a membership interest, which may or may not be a security under the Corporate Securities Law of 1968, an economic interest apparently is always a security under that Act [*see § 346.11[2][e]*]. A membership interest is personal property and neither a member nor an assignee has any interest in specific LLC property [*Corp. Code § 17300*].

A member's interest in an LLC is not subject to execution if the LLC is not a judgment debtor [*Code Civ. Proc. § 699.720(a)(2)*]. An employee's interest in an LLC issued pursuant to a membership interest purchase or option plan, or an officer's or manager's membership interest issued in any transaction in connection with securing employment, is not subject to Labor Code provisions governing employee investments in an employer's business [*Corp. Code § 17100(d)*; *see Lab. Code §§ 406, 407*].

[3] Classes of Members

The articles or a written operating agreement may provide for different classes of members. A class may have such relative rights, powers, and duties, which may be senior or subordinate to other classes, as provided by those documents [*Corp. Code § 17103(a)*].

[4] Becoming a Member

On formation of an LLC, its members are the persons who enter into its operating agreement before or after filing of its articles of organization [*Corp. Code § 17050(a)*]. After an LLC is formed, a person may become a member by acquiring a membership interest from it in conformity with its articles of organization or operating agreement or, if those documents do not otherwise provide,a majority in interest of the members, excluding the vote of the person acquiring the membership interest, and only when the person becomes a party to the operating agreement [*Corp. Code § 17100(a)(1)*].

A person who is an assignee of a membership interest may become a member on the unanimous vote (or if so provided in the articles or operating agreement, a smaller vote) of the other members and by complying with the articles or operating agreement or, if those documents do not so provide, when the person becomes a party to the operating agreement [*Corp.Code § 17100(a)(2)*]. Thus, even if membership interests are freely assignable, an assignee can become a member only as set forth in the preceding sentence.

The operating agreement may provide that interests of members or assignees may be evidenced by certificates and provide for their transfer [*Corp. Code § 17105*].

[5] Rights and Duties of Members

[a] Rights Contained in Articles of Organization or Operating Agreement

Membership rights and responsibilities generally are determined by the operating agreement or articles of organization. If those documents are silent, the Act provides default provisions [*see § 346.10[3]*; *see also Corp. Code §§ 17100-17104*].

Particularly important issues to consider include members' rights concerning classes of members, capital contributions, allocations of profits and losses, distributions, voting, management rights (and rights as to managers), transfer of interests, and dissolution or merger.

[b] Transfer of Interests

Members may freely assign or encumber their economic interests [*see* [2], *above*; *see also Corp. Code § 17001(n)*] independent of their membership interests. Free transferability of economic interests does not give an LLC the corporate characteristic of free transferability, as long as the transfer of the membership interest is adequately restricted [*see § 346.11[2][c]*]. They also may transfer their membership interests at any time with the consent of a majority in interest of the members not transferring their interests [*Corp. Code §§ 17301(a), 17303(a)*]. Assignment of an economic interest does not of itself dissolve an LLC or, except as set forth in articles of organization or the operating agreement, entitle the assignee to vote and participate in the management and affairs of the LLC or to become or exercise any rights of a member [*Corp. Code § 17301(a)(2)*]. The assignment merely entitles the assignee to receive, to the extent assigned, economic benefits to which the assignor would have been entitled [*Corp. Code § 17301(a)(3)*]. In contrast, the assignment or transfer of a membership interest entitles the assignee to all of the rights and powers, and certain of the obligations, of a member [*Corp. Code § 17303(a), (b)*].

[c] Class and Derivative Actions

Any member of a domestic or foreign LLC may bring a class action on behalf of all or a class of members to enforce a claim common to those members and may bring derivative actions in the name or right of the LLC. This type of class action is governed by the general law applicable to class actions [*see Code Civ. Proc. § 382*; *see also* Ch. 120, *Class Actions*]. However, in order to maintain a class action with regard to an LLC, there is no requirement that the class be so numerous that joinder of all members of the class is impractical [*Corp. Code §§ 17500, 17501*].

No action may be brought unless both of the following conditions exist [*Corp. Code § 17501(a)*]:

- The plaintiff alleges in the complaint that he or she was a member of record or beneficiary at the time of the transaction complained of, or that the interest devolved upon him or her from a person who was a member at the time of such transaction; and

- The plaintiff alleges in the complaint with particularity his or her efforts to obtain the desired action from the LLC's managers, and that he or she has informed the LLC or its managers in writing of each cause of action.

[6] Authority of Members

Unless the articles provide that an LLC will be managed by one or more managers [*Corp. Code § 17151(b)*], every member is an agent of the LLC for the purpose of its business and affairs [*Corp. Code § 17157(a)*]. The act of any member for the apparent purpose of carrying on in the usual way the LLC's business and affairs binds it, unless the member has no actual authority to act for it in the particular matter and the person with whom the member is dealing actually knows that the member has no such authority [*Corp. Code § 17157(a)*]. A member acting in contravention of a restriction on authority cannot bind the LLC to persons actually knowing of the restriction [*Corp. Code § 17157(c)*].

If the LLC is managed by one or more managers, then no member, acting solely as such, is an agent of the LLC or can bind or act for the LLC [*Corp. Code § 17157(b)(1)*].

[7] Capital Contributions and Accounts of Members

[a] In General

The articles or operating agreement of an LLC may provide for capital contributions of members, which may be in money, property, or services, or an obligation to contribute any of those things to the LLC [*Corp. Code § 17200(a)*]. The Act does not require that members make capital contributions, but some member capital is likely to be needed by the business and adequate capitalization may be necessary for members to avoid shareholder-like liability [*see* [14][b][i], *below*]. Subject to the articles or operating agreement, a member is not excused from an agreement to make a contribution to the LLC because of death, disability, dissolution, or other reason [*Corp. Code § 17201(a)(1)*]. For a complaint for use by an LLC against a member for failure to make a required contribution, see *§ 346.161*.

A member who does not make an agreed contribution of property or services may, at the LLC's option, be required to contribute an amount of cash equal to the fair market value (or written agreed value, if any) of the contribution not made [*Corp. Code § 17201(a)(2)*]. This option is in addition to other rights under the articles, the operating agreement, or applicable law.

An operating agreement may provide that the interest of a member who fails to make any agreed contribution or other payment will be subject to specified remedies or consequences. Such a provision is enforceable in accordance with its terms unless the member seeking to invalidate it establishes that it was unreasonable under the circumstances at the time the agreement was made. The Act lists a number of specific remedies which may be provided, including loss of voting

rights and rights to participate in management of the LLC or reduction of the defaulting member's economic rights, including specified specific methods of reduction [*Corp. Code § 17201(a)(3)*].

The capital contribution of a member to an LLC is to be credited to a capital account established for the member. That account will consist of the original contribution, increased by any additional contribution and the member's share of profits and decreased by any distribution to the member and by that member's share of losses [*see Corp. Code § 17001(d)*].

The obligation of a member to make a contribution may be compromised only by the unanimous vote of the other members. Notwithstanding any such compromise, a person whose claim against an LLC arose before receipt of notice of such a compromise may enforce the original obligation to make the contribution but any other person with a claim may enforce only the existing obligation to make a contribution after giving effect to the compromise [*Corp. Code § 17201(b)*].

If an obligation of a member to make a contribution is conditional, a person with a claim against the LLC may not enforce the obligation unless the conditions have been satisfied or waived. "Conditional obligations" include, among other things, a capital contribution payable on a discretionary call of the LLC before the call occurs [*Corp. Code § 17201(c)*].

[b] Additional Contributions of Members

Absent a provision to the contrary in the articles or operating agreement, no member is required to make a capital contribution other than any agreed initial contribution [*Corp. Code § 17200(b)*]. If additional contribution is required, the obligation to make it and the remedies for failure to do so are the same as those described above as to an initial contribution [*Corp. Code § 17201*].

[c] Tax Consequences of Contributions

Various tax consequences arise for both the member and the LLC from a member's contribution to an LLC. For example, a contribution of services by a member to an LLC in exchange for an interest in the LLC is a taxable event for the member. However, providing services to an LLC in exchange for a profit interest would not be a taxable event for either the member of the LLC [*Rev. Proc. 93-27, 1993-2 C.B. 343*]. There are likely to be other tax consequences from the receipt of services by the LLC. Allocations of LLC tax items among the members may depend on conformity to IRS rules, among other things, as to capital accounts [*see Treas. Reg. § 1.704-1(b)(2)(iv)*].

[8] Profits, Losses, and Distributions

Profits and losses of an LLC and distributions to members are allocated among them, and among the classes of members, as provided in the operating agreement. If the operating agreement does not otherwise provide, profits and losses are allocated in proportion to the contributions of each member [*Corp. Code § 17202*]. If the operating agreement does not otherwise provide, distributions that are a return of capital are allocated in proportion to the contributions of each member, and distributions that are not a return of capital are made in proportion to the allocation of profits [*Corp. Code § 17250*].

At the time that a member becomes entitled to receive a distribution, the member has the status of a creditor of the LLC with respect to the distribution and is entitled to all remedies available to creditors, subject to limitations on distributions that would result in insolvency [*Corp. Code § 17250*; *see Corp. Code §§ 17254, 17353*]. The operating agreement may provide for establishing a record date with respect to the sharing of profits and distributions [*Corp. Code § 17250*].

A member is entitled to receive distributions from an LLC while a member and before dissolution and winding up of the LLC, as specified in the operating agreement, subject to certain limitations on distributions that would result in insolvency [*Corp. Code §§ 17251, 17254*].

A member does not have the right to demand a distribution, and may not be forced to accept a distribution, except in cash or except on dissolution and winding up of an LLC [*Corp. Code § 17253*].

[9] Voting

Voting rights may be tailored on almost any basis desired by those forming an LLC. The articles or a written operating agreement may provide all or certain identified members or a specified class or group of members the right to vote separately or with all or any class or group of members on any matter and voting may be on a per capita, number, financial interest, class, group or other basis [*Corp. Code § 17103(a)*; *see* [3], *above* (classes of members)]. If no voting provision is contained in the articles or a written operating agreement, members vote in proportion to their interests in current profits (or in the case of a member whose entire economic interest in the LLC has been assigned to a person who is not a member, the interest in current profits the assigning member would have had if the assignment had not been made) [*Corp. Code § 17103(a)(1)*].

Any amendment of the articles or operating agreement requires the unanimous vote of all members [*Corp. Code § 17103(a)(2)*]. In all other matters in which a vote is required, a vote of the majority in interest of the members is sufficient [*Corp. Code § 17103(a)(3)*]. In no event may the articles be amended by a vote of less than a majority in interest of the members and members must be afforded the right to vote on a merger of the LLC or on its dissolution [*Corp. Code § 17103(b), (c)*]. These amendment provisions may not be overridden [*Corp. Code § 17005(b)(3)*].

It may be desirable to require unanimous consent for mergers with entities other than LLCs, given the potential tax consequences and changes in personal liability, rights, and duties and other matters that can occur with such a change in type of business entity.

[10] Members' Meetings

Members' meetings may be held at any placeby electronic video screen communication or by electronic transmittal by and to the LLC [*see Corp. Code § 17001(o)(1),(2)*], in or out of California specified by the caller of the meeting or by articles of organization or a written operating agreement. If no location is so specified, meetings are to be held at the principal executive office of the LLC [*Corp. Code § 17104(a)*]. Unless prohibited by the articles of organization of the LLC and if authorized by the operating agreement, members not physically present in person or by proxy at a meeting of members may do any of the following by electronic transmission by and to the LLC [*see Corp. Code § 17001(o)(1), (2)*] or by electronic video screen communication [*Corp. Code § 17104(a)*]:

- Participate in a meeting of members;
- Be deemed present in person or by proxy; and
- Vote at a meeting of members, whether that meeting is to be held at a designated place or in whole or in part by means of electronic transmission by and to the LLC or by electronic video screen communication.

A members' meeting may be called by a manager or by one or more members representing more than 10 percent of the interests of members [*Corp. Code § 17104(b)*]. Meetings must be noticed, conducted, and adjourned and special meetings may be called and adjourned as specified in the Act [*Corp. Code § 17104(c)-(e), (g), (h)*]. A majority in interest of the members represented at a meeting constitutes a quorum [*Corp. Code § 17104(h)*]. Record dates may be

set much as in the case of business corporations [*Corp. Code § 17104(k)*]. Proxies may be used much as for corporations formed under the General Corporation Law [*Corp. Code § 17104(j)*]. Members may participate in meetings by use of conference phones or electronic video screen communication [*see Corp. Code §§ 17001(o)(1),(2), 17104(f)*]. Note that many of these rules may be varied by a written operating agreement [*see §§ 346.10[3], 346.12[4]*].

Actions that may be taken at a meeting may be taken without a meeting if written consent is received within a specified time from a sufficient number of members [*Corp. Code § 17104(i)*].

A meeting of the members may be conducted, in whole or in part, by electronic transmission by and to the LLC or by electronic video screen communication, if both of the following requirements are met [*Corp. Code § 17104(l)*]:

- The LLC implements reasonable measures to provide members (in person or by proxy) a reasonable opportunity to participate in the meeting and to vote on matters submitted to the members, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with those proceedings.

- When any member votes or takes other action at the meeting by means of electronic transmission to the LLC or electronic video screen communication, a record of that vote or action must be maintained by the LLC.

[11] Information and Inspection Rights

The Act provides certain rights to members and holders of economic interests in LLCs to obtain information and to inspect records, to receive annual reports, financial statements, and federal and state income tax information [*Corp. Code § 17106*]. These rights cannot be varied by the articles of organization or an operating agreement [*Corp. Code § 17005(b)(4)*].

Special reporting requirements apply to LLCs with more than 35 members [*see Corp. Code § 17106(c)*].

If the members of a foreign limited liability company residing in California represent 25 percent or more of the voting interests of members of that limited liability company, those members are entitled to all information and inspection rights provided in *Corp. Code § 17106* [*Corp. Code § 17453*; *Burkle v. Burkle (2006) 141 Cal. App. 4th 1029, 1039-1040, 46 Cal. Rptr. 3d 562* ("those members" unambiguously refers to California members and merely distinguishes members residing in California from members residing elsewhere, who are not entitled to inspection rights under California law)].

[12] Withdrawal of Members

The articles or operating agreement may provide that a member may withdraw, resign, or retire from an LLC at the time or on the happening of events specified in the operating agreement, or that a member does not have the right to withdraw, resign, or retire [*Corp. Code § 17252(a)*; *see Corp. Code § 17001(as)* ("withdrawal" defined to include the resignation or retirement of a member)]. Notwithstanding any such restriction, a member nevertheless may withdraw at any time by giving notice to the other members. Unless the articles or operating agreement provide otherwise, however, the withdrawn member is not entitled to payment for the member's interest in the LLC. Beginning on the date of withdrawal, the withdrawn member has only the right of a holder of an economic interest [*see Corp. Code § 17001(n)* (definition); *see also § 346.14[2]* with respect to the withdrawn member's interest in the LLC, and then only with respect to any distributions to which the holder of an economic interest is entitled under the operating agreement. Furthermore, the withdrawn member will no longer be a member of the LLC [*Corp. Code § 17252(a)*]. If the withdrawal, resignation, or retirement is in violation of the operating agreement, the LLC has the right to offset any damages for breach of the operating agreement from any amounts otherwise distributable to the withdrawn member

with respect to that members's economic interest in the LLC [*Corp. Code § 17252(a)*]. Upon a member's withdrawal, the list of members must be amended accordingly [*Corp. Code § 17252(b)*; *see Corp. Code § 17058(a)(1)*].

[13] Termination of Membership Interests

An LLC's operating agreement may provide for termination in whole or part of membership interests and economic interests. If an economic interest is so terminated, the member is entitled to demand and receive a return of that interest [*Corp. Code § 17100(c)*].

[14] Liability of Members

[a] General Non-Liability

In general, a member of an LLC is not personally liable for any debt, obligation, or liability of the LLC arising in contract, tort, or otherwise solely by reason of being a member [*Corp. Code § 17101(a)*]. However, there are a number of situations in which members may be personally liable for actions taken as members. The most important of these are *covered in § 346.14[14][b]*.

[b] Situations Giving Rise to Personal Liability

[i] Liability Comparable to That of a Shareholder

A member of an LLC is subject to liability under the common law governing alter ego liability. A member of an LLC is also personally liable under a judgment of a court or for an obligation of the LLC arising in contract, tort, or otherwise under the same or similar circumstances and to the same extent as a shareholder of a corporation may be personally liable for such an obligation of the corporation, except that failure to hold meetings or to observe formalities pertaining to calling or conducting meetings may not be considered a factor tending to establish alter ego or personal liability when the articles of organization or operating agreement do not expressly require the holding of meetings of members or managers [*Corp. Code § 17101(b)*].

When a person is sued on the theory that an LLC is the person's alter ego, that person probably has standing to enforce the LLC's agreement to arbitrate the underlying dispute, even though that person was not a party to the agreement [*see Rowe v. Exline (2007) 153 Cal. App. 4th 1276, 1285, 63 Cal. Rptr. 3d 787* (rule applied in case involving corporation)]. For discussion of enforcement of an arbitration agreement, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

[ii] Improper Distributions

Personal liability will attach for receiving improper distributions (that is, distributions that, if made, would render the LLC insolvent) made before or during the winding up of an LLC [*Corp. Code §§ 17101(a), (c), 17254*]. A member or assignee of a member is personally obligated to return an improper distribution from an LLC to the extent that the member or assignee had actual knowledge of facts indicating the impropriety of the distribution [*Corp. Code § 17254(e)*].

Moreover, a member or manager who votes for a distribution in violation of the operating agreement or that is improper under the Act is personally liable to the LLC for the amount of the distribution that exceeds what could have properly been paid if the member or manager had acted in compliance with the relevant sections of the Act governing distributions [*Corp. Code § 17255(a)*].

For a complaint for use by an LLC against a member for receiving an improper distribution, see *§ 346.120*.

[iii] Failure to Pay Taxes

Personal liability may also attach to a member who is responsible for an LLC that collects sales tax and fails to remit this tax to the State Board of Equalization [*Rev. & Tax. Code § 6829(c)*]. Notwithstanding any provision in the Corporations Code to the contrary if the SBE can show that the member had a duty to comply with *Rev. & Tax. Code § 6829*, and that he or she willfully failed to pay or failed to cause the LLC to pay the taxes, personal liability will result [*Rev. & Tax. Code § 6829(a)*; *see Rev. & Tax. Code § 6829(d)* ("willfully" defined), (e), (f) (collection and notice of deficiency)]; *see also State Board of Equalization v. Wirick (2001) 93 Cal. App. 4th 411, 413, 419-421, 112 Cal. Rptr. 2d 919* (*Rev. & Tax. Code § 6829* applied to former chief financial officer of corporation, despite fact that he had resigned position over one year before corporation ceased business); *§ 346.15[8][b][vi]*].

[iv] Agreement to Be Obligated

A member of an LLC may agree to be obligated personally for any or all of the LLC's debts, obligations, and liabilities, as long as the agreement to be obligated is set forth in the articles of organization or in a written operating agreement that specifically refers to the code section (*Corp. Code § 17101(e)*) authorizing liability [*Corp. Code § 17101(e)*].

[v] Tortious Conduct or Written Guarantee

Nothing in the provisions limiting liability of members of an LLC is intended to affect a member's liability to third parties for the member's participation in tortious conduct or pursuant to the terms of a written guarantee or other contractual obligation entered into by the member, other than an operating agreement [*Corp. Code § 17101(c)*; *see Corp. Code § 17101(a)* (general liability rule)].

[15] Indemnification and Insurance

If provided in its articles or written operating agreement, an LLC may indemnify a member for any act in that capacity except a breach of fiduciary duty [*Corp. Code § 17155(a)*; *see Corp. Code § 17153* (breach of fiduciary duty); *see also § 346.15[6]*]. The standard of fiduciary duty set forth in *Corp. Code § 17153* can be varied by a written operating agreement with the "informed consent of the members" [*Corp. Code § 17005(d)*]. Similarly, an LLC may purchase insurance on behalf of any member against liabilities asserted against the member in that capacity [*Corp. Code § 17155(b)*].

For a complaint for use by an agent of an LLC against the LLC for indemnification for defense expenses, see *§ 346.162*.

[16] Standard of Conduct of Members

Controlling shareholders of a corporation are subject to rigorous scrutiny; in a transaction with the corporation, the burden is on the controlling shareholder to prove the good faith and inherent fairness of the transaction from the viewpoint of the corporation [*Efron v. Kalmanovitz (1964) 226 Cal. App. 2d 546, 556, 38 Cal. Rptr. 148]* . By analogy, it may be that members of an LLC who are not managers but hold a majority interest may owe the other members a fiduciary duty similar to that of controlling shareholders. A member of an LLC, however, is expressly permitted to lend money to and transact other business with the LLC and, "subject to other applicable law," has the same rights and liabilities as a person who is not a member [*Corp. Code § 17004*]. The interplay of these two concepts remains to be determined.

If an LLC does not provide for managers in its articles of organization, its members are deemed to be managers [*Corp. Code § 17001(w)*; *see* Form LLC-1]. As such they would seem to be held to the fiduciary duties of a manager, that is, that of partners in a partnership [*Corp. Code § 17153*; *see § 346.15[6]* (fiduciary duties of manager)], subject to possible modification as set forth in [15], *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesMembers & Other Constituents

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AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.15 Management

[1] "Manager" Defined

A "manager" of an LLC is a person elected by the members to manage the LLC if its articles contain the required statement regarding managers [*see Corp. Code § 17151(b)*; *see also § 346.12[3][b]*]. If the articles do not contain that statement, "manager" refers to each member of the LLC [*Corp. Code § 17001(w)*]. Thus, for an LLC without elected managers, the management provisions outlined in this section and references to management elsewhere in this article and the Act apply to all members of the LLC.

[2] Tax Implications of Management Structure

Prior to 1997, the management structure of an LLC could have a direct impact on its federal income tax status. Entity classification regulations in effect prior to January 1, 1997, classified unincorporated entities as "associations" (taxable as corporations) or partnerships based on the presence or absence of four "corporate characteristics": limited liability, continuity of life, centralized management, and free transferability of interests. Effective January 1, 1997, however, the IRS adopted simplified entity classifications that dispense with the former tests and permit most unincorporated entities, including LLCs, to simply elect whether to be taxed as corporations or partnerships [*see Treas. Reg. § 301.7701-3*]. For income or taxable years beginning on and after January 1, 1997, classification of a business entity as a partnership or an association taxable as a corporation for California tax purposes is the same as classification for federal tax purposes [*see Rev. & Tax. Code § 23038(b)(2)*]. For additional discussion, see Ballantine & Sterling, California Corporation Laws, Ch. 24A, *Limited Liability Partnerships*, § 652.01[2][b] (Matthew Bender). As a result of these regulations, the management structure of an LLC will have no effect on its tax classification for income tax purposes.

[3] Management by Members, Managers, or Officers

A limited liability company may be managed either by all of its members or by one or more managers [*Corp. Code §§ 17150, 17151*]. The managers may be or include some of the members [*Corp. Code § 17151(a)*] and do not need to be

natural persons [*Corp. Code § 17151(c)*]. Unless the articles of organization state that an LLC will be managed by one or more managers [*see Corp. Code § 17151(b)*; *see also § 346.12[3][b]*], its business and affairs are to be managed by all of its members, subject to any restrictions in its articles or operating agreement.

If management is vested in the members, they have the rights, duties, and obligations of managers [*Corp. Code § 17150*] and the description contained in this article as to "rights, duties, and obligations" of managers in general apply to the members in their management role. Care should be taken in applying this rule since not all of the provisions of the Act concerning managers involve the creation of rights of, or imposition of duties or obligations on, managers. For example, *Corp. Code § 17152*, dealing with election, removal, resignation, and expiration of the term of office of a manager, would seem by its terms to apply only to a situation when managers manage; the references in it ought not to apply to members as managers.

If an LLC is to be managed by managers, its articles of organization must contain a statement to that effect [*Corp. Code § 17151(b)*]. The articles need not state the number or names of managers, but if there is to be only one manager, the articles must so state [*Corp. Code § 17151(b)*]. The articles or operating agreement may, and one of them (preferably the operating agreement) should, contain provisions in detail appropriate to the particular LLC's needs about the number, qualifications, and duties of managers [*Corp. Code § 17151(c)*] and about the authority of managers to bind the LLC [*Corp. Code § 17051(c)(5)*]. One of those documents (again, preferably, the operating agreement) should also contain provisions and regulations appropriate to the particular LLC for its management [*see § 346.12[4]* (operating agreement and its contents)]. If an LLC has manager(s), a member acting solely as such is not an agent of the LLC and cannot bind it or execute any instrument on its behalf [*Corp. Code § 17157(b)(1)*].

The operating agreement may provide for the appointment of officers for the LLC. Officers may, but need not be, members or managers. Any number of offices may be held by the same person [*Corp. Code § 17154(a)*]. If the operating agreement does not provide for the appointment of officers, the managers may appoint officers [*Corp. Code § 17154(b)*]. An officer serves at the pleasure of the managers, and may be removed or resign at any time, subject in each case to rights and liabilities of the officer or LLC, as the case may be, under any contract to which the officer is a party [*Corp. Code § 17154(b)*].

[4] Appointment and Removal of Managers

Although the Act is silent on the formalities of management, leaving that to coverage by articles of organization or the operating agreement, the Act does have express provisions regarding appointment and removal of managers. These provisions cannot be varied except by the articles of organization or a written operating agreement [*Corp. Code § 17005(b)*]. Management positions must be filled by the affirmative vote of a majority in interest of the members [*Corp. Code § 17152(a)*]. Unless otherwise provided in the operating agreement, "majority in interest of the members" is more than 50 percent of the interests of members in current profits [*Corp. Code § 17001(v)*]. Unless they resign or are removed, managers hold office until expiration of their terms or until their successors have been elected and qualified [*Corp. Code § 17152(d)*].

Removal of managers may be with or without cause, but must be by a vote of a majority in interest of the members at a meeting called expressly for that purpose [*Corp. Code § 17152(b)*]. Managers may resign at any time on written notice to the LLC [*Corp. Code § 17152(c)*]. Neither removal nor resignation of a manager prejudices the rights, if any, of the manager or the LLC under any contract of employment [*Corp. Code § 17152(b), (c)*].

[5] Managers as Agents

If the articles of organization provide that an LLC is to be managed by one or more managers, every manager is an agent of the LLC for the purpose of its business and affairs [*Corp. Code § 17157(b)(2)*]. The act of any manager for the apparent purpose of carrying on in the usual way the business and affairs of the LLC binds the LLC, unless the manager

has no actual authority to act for the LLC in the particular matter and the person with whom the member is dealing actually knows that the manager has no such authority [*Corp. Code § 17157(b)(2)*]. A manager acting in contravention of a restriction on authority cannot bind the LLC to persons actually knowing of the restriction [*Corp. Code § 17157(c)*].

An LLC's articles of organization may contain a limitation on the authority of managers to bind it [*Corp. Code § 17051(c)(5)*].

Notwithstanding *Corp. Code § 17157(c)*, and subject to *Corp. Code § 17051(d)*, any written instrument, or endorsement or assignment of a written instrument, executed or entered into between an LLC and another person, when signed by at least two managers (or by the sole manager if there is only one) is not made invalid as to the LLC by the managers' lack of authority in the absence of the other person's actual knowledge1 that the signing managers had no authority [*Corp. Code § 17157(d)*].

[6] Managers' Fiduciary Duties

[a] In General

A manager owes a fiduciary duty to an LLC and its members to the same extent as a partner would owe to a partnership and to the partners of the partnership [*Corp. Code § 17153*]. A partner's standard of conduct owed to the partnership and other partners is to act in the highest good faith to the partners, and a partner may not seek to obtain an advantage in the partnership affairs by the slightest misconduct, misrepresentation, concealment, threat, or adverse pressure of any kind [*Leff v. Gunter (1983) 33 Cal. 3d 508, 514, 189 Cal. Rptr. 377, 658 P.2d 740]* . Partnership agreements can, and often do, expressly provide standards of loyalty and care expected of the partners that vary this general standard of partner's conduct. In the same manner, the Act allows the fiduciary duties of a manager to be modified as set forth in [b], *below*.

For a complaint for use against a manager for breach of a fiduciary duty, see *§ 346.160*.

[b] Modification of Managers' Fiduciary Duties

Managers' fiduciary duties to the LLC and its members may only be modified in a written operating agreement with "the informed consent of the members" [*Corp. Code § 17005(d)*]. Modification of managers' duty of care and loyalty may be beneficial not only to the manager but also to the LLC. The duties could be specifically tailored to suit the nature of its business and the relationship of the manager not only to the LLC but also to other business interests acknowledged and permitted to exist in addition to the manager's role in the LLC. Similarly, the duty of care could be graduated, ranging from breach that stems from negligence to breach stemming from willful misconduct, depending on the proscribed activity and the skills expected from the manager.

From the view of the manager, the modification could serve to narrow the scope of the duty of loyalty to allow the manager to enter into business that is competitive with the company or to take opportunities for the manager's personal advantage. Such an arrangement may be necessary to induce the manager to serve the LLC as suCh. Although a partner's duties generally are as stated in [a], *above*, partnership agreements have provided relief from the standard referred in [a], *above*. In the same manner, the operating agreement can provide exceptions to a manager's duty of loyalty.

With respect to the duty of care, partnership agreements are often drafted to delineate the level of care expected of each partner. Sometimes, for example, partnership agreements exclude negligence as a cause of breach of the partner's duty of care. An LLC manager's duty of care can also be modified to reflect the requisite conduct and skill expected in the performance of the particular managerial role.

Presumably the standard of fiduciary duty and the power of an operating agreement to change that standard apply to members in their role as managers in an LLC that they manage. It is probable that members are even more likely than managers to have outside interests that impinge on or even compete with their LLC and that need to be limited or permitted by careful drafting as to their duty of loyalty. Similarly, members entitled to participate in management of an LLC may bring entirely different skills to it so that their duty of care needs to be carefully addressed in light of the particular facts.

[7] Managers' Other Duties

The Act does not provide that managers must hold meetings or observe any formalities. Because the Act is silent in this regard, the operating agreement has the flexibility and should be used to establish whatever rules and procedures for management suit the parties' purposes. However, as with members' liability issues, if particular formalities are required in the operating agreement, failure to observe those formalities may impose personal liability on the members for obligations of the LLC [*Corp. Code § 17101(b)*].

Managers must file a certificate of amendment (Form LLC-6) to the articles of organization within 30 days after discovering any false or erroneous material statement in the articles or in any amendment to the articles [*Corp. Code § 17054(d)*; *see § 346.12[3][d]* (amendment of articles); *see also* [8][b][iii], *below* (liability for failure to file certificate)].

[8] Liability of Managers and Officers

[a] General Non-Liability

In general, managers and officers of an LLC are not personally liable for any debt, obligation, or liability of the LLC solely by reason of being a manager or officer [*Corp. Code § 17158(a)*]. However, there are a number of instances in which a manager will be personally liable for actions taken as a manager [*see* [b], *below*].

[b] Situations Giving Rise to Personal Liability

[i] Agreement to Be Personally Obligated

A manager may agree to be obligated personally for any or all of the LLC's debts, obligations, and liabilities if the agreement to be liable is set forth in the articles or a written operating agreement that specifically refers to the code section (*Corp. Code § 17158(b)*) authorizing liability [*Corp. Code § 17158(b)(1)*]. Furthermore, a manager may agree to be obligated pursuant to the terms of a written guarantee or other contractual obligation entered into by the manager, other than an operating agreement [*Corp. Code § 17158(b)(2)*].

[ii] Breach of Fiduciary Duties

A manager may be liable for breach of fiduciary duties [*Corp. Code § 17153*; *see* [6], *above*; *see also § 346.160* (complaint for breach of fiduciary duty)].

[iii] Criminal or Tortious Conduct

Although the Act does not specifically deal with the liability of a manager for participation in tortious conduct (as it does in *Corp. Code § 17101(c)*with respect to members), there seems no doubt that a manager as well as a member would be so liable. In addition, under well established criminal principles applied in a business context, a manager would have personal criminal responsibility for participation in criminal acts in the same manner as corporate officers.

[iv] Misstatement in Articles of Organization

A manager who executes a certificate of amendment to the articles of organization is personally liable for any statement materially inconsistent with the operating agreement or any material misstatement of fact in the certificate of amendment if the manager knew or should have known that the statement was false when made or that the statement became false and a required amendment was not filed, and a person suffered from reliance on those statements [*Corp. Code § 17054(e)*; *see Corp. Code § 17054(d)* (manager's duty to file certificate of amendment within 30 days of discovering false or erroneous statement)].

[v] Voting for Improper Distributions

A manager who votes for a distribution in violation of the operating agreement or *Corp. Code §§ 17254* or *17353* is personally liable to the LLC for the amount of the distribution that exceeds what could have been distributed without violating those sections or the operating agreement. For this liability to apply, it must be established that the manager did not act in compliance with *Corp. Code §§ 17254* or *17353* [*Corp. Code § 17255(a)*]. A manager held liable under this provision may compel contribution from other liable parties [*Corp. Code § 17255(b)*].

[vi] Failure to Pay Sales Taxes

A manager may become personally liable for unpaid sales taxes and interest and penalties on those taxes under certain circumstances if the manager willfully fails to pay or cause to be paid sales taxes due from the LLC [*Rev. & Tax. Code § 6829(a)*]. Notwithstanding any provision in the Corporations Code to the contrary if the SBE can show that the manager had a duty to comply with *Rev. & Tax. Code § 6829*, and that he or she willfully failed to pay or failed to cause the LLC to pay the taxes, personal liability will result [*Rev. & Tax. Code § 6829(a)*; *see Rev. & Tax. Code § 6829(d)* ("willfully" defined), (e), (f) (collection and notice of deficiency)].

The statute imposing liability for taxes upon termination of an LLC [*Rev. & Tax. Code § 6829*] has been held to apply to the former chief financial officer of a corporation, despite the fact that he resigned his position over one year before the corporation ceased business. Because the present tense in the statute includes the past tense [*see Rev. & Tax. Code § 11*], that section covers former officers as well as those in charge when the corporation ceases [*State Board of Equalization v. Wirick (2001) 93 Cal. App. 4th 411, 413, 419-421, 112 Cal. Rptr. 2d 919* (also holding that *Rev. & Tax. Code § 6829* was not unconstitutionally vague because it gave officer fair notice that he could be personally liable for company's unpaid taxes after he left corporation)].

[c] Failure to Warn Employees of Workplace Danger

Managers of an LLC are subject to fine and imprisonment for failure to warn employees of, or to abate, serious concealed workplace dangers [*see Penal Code § 387*].

[9] Indemnification and Insurance

If so provided in its articles of organization or written operating agreement, an LLC may indemnify its managers, officers, employees, or agents for any act except a breach of the fiduciary duty set forth in *Corp. Code § 17153* [*Corp. Code § 17155(a)*]. The standard of fiduciary duty set forth in *Corp. Code § 17353* can be varied with "the informed consent of the members" [*Corp. Code § 17005(d)*]. *Corp. Code § 17153* (fiduciary duty) refers only to managers, not officers or others [*see* [6], *above*]. The document providing for indemnification should set forth clearly the standards for entitlement to it and the procedures for receiving it.

In addition to indemnification permitted as just described, an employee of an LLC would be entitled to the indemnity provided by *Lab. Code § 2802*.

An LLC also may purchase insurance on behalf of its managers, officers, employees, or agents who have liability asserted against them in that capacity or arising out of their status as such [*Corp. Code § 17155(b)*].

[10] Remuneration of Managers

Managers and members of an LLC are not entitled to remuneration for acting in the LLC business, except as follows:

- The LLC operating agreement or other agreement among all LLC members may provide for remuneration to members acting in the LLC business [*Corp. Code § 17004(b)*]; and

- Managers or members winding up the affairs of the LLC are entitled by statute to reasonable compensation [*Corp. Code §§ 17004(b), 17352(c)*].

[11] Failure to Report Misleading Statements

A publicly traded LLC may be liable for a civil penalty of up to $1,000,000 if it acquires knowledge that a materially false or misleading statement that affects the public's perception of its financial condition has been made by its officers or agents, and fails to notify specified government authorities and its members [*Corp. Code § 17656*; Stats 2003, Ch. 477, § 1(b) (statement of legislative intent that publicly traded LLCs act in responsible manner with respect to statements about financial condition); *see Corp. Code § 17656(f)* (statute applies only to LLCs that are "issuers" as defined in Section 2 of the Sarbanes-Oxley Act of 2002, Pub. Law 107-204, 116 Stat. 745; *15 U.S.C. § 7201(a)(7)*)]. For detailed discussion of these requirements, see Ballantine & Sterling, California Corporation Laws, Ch. 27, *Limited Liability Companies* (Matthew Bender). However, an action seeking such a civil penalty may only be brought by the Attorney General, a district attorney, or a city attorney in the name of the people of the State of California [*Corp. Code § 17656(g)*]. No private right of action exists under this statute.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesManagement Duties & Liabilities

California Forms of Pleading and Practice--Annotated

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 346 LIMITED LIABILITY COMPANIES
PART II. LEGAL BACKGROUND

30-346 California Forms of Pleading and Practice--Annotated § 346.16

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.16 Mergers, Conversions, and Reorganizations

[1] Procedure for Merger

One or more LLCs may merge with or be acquired by any other business entity or entities [*Corp. Code § 17550(a), (b)*] if the other entity or entities are authorized to do so by their governing law. This applies to domestic as well as foreign LLCs and other business entities [*Corp. Code § 17555*].

The Act specifies the procedures for merger. First, each LLC must approve an agreement of merger by a majority vote, and each other merging entity must approve that agreement by those persons required to approve the merger by the laws under which it is organized [*Corp. Code § 17551(a)*]. The agreement of merger must contain information specified by the Act, which is similar to that required in mergers of business corporations and limited partnerships [*Corp. Code § 17551(a)(1)-(6)*]. Specific rules must be followed concerning treatment of interests in LLCs in mergers involving their parents or other entities owning more than 50 percent of the voting interests in the LLC [*Corp. Code § 17551(b)*]. An agreement of merger may be amended or abandoned [*Corp. Code § 17551(c), (d)*]. The Act provides for filings of one or more certificates of merger, the content and filing of which differ depending on the identity of the surviving entity [*Corp. Code § 17552*]. If the members of any constituent LLC would become personally liable for any obligations of a party to the merger, the principal terms of the agreement of merger must be approved by all members of the constituent LLCs unless all members would have dissenters' rights [*Corp. Code § 17551(a)*].

Mergers are effective on filing of the certificate of merger (Form LLC-9) with the Secretary of State, unless it provides for delayed effective date [*Corp. Code § 17553*]. On the effective date of merger, existence of the disappearing business entities ceases, and the surviving entity succeeds automatically to the rights, property, debts, and liabilities of the disappearing entities [*Corp. Code § 17554*]. Furthermore, the surviving domestic or foreign LLC or other business entity will be deemed to have assumed the liability of each disappearing domestic or foreign LLC or other business entity that is taxed under *Rev. & Tax. Code § 17001 et seq.* or *§ 23001 et seq.* for the following [*Corp. Code § 17554.5(a)*; *see also Corp. Code § 17554.5(b)* (Secretary of State notifies Franchise Tax Board of merger)]:

- To prepare and file, or to cause to be prepared and filed, tax and information returns otherwise required of that disappearing entity as specified in *Rev. & Tax. Code § 18501 et seq.*; and

- To pay any tax liability determined to be due.

An agreement of merger may amend the operating agreement of a constituent LLC, or adopt a new operating agreement for a constituent LLC, if it is the surviving LLC in the merger. The amendment or adoption is effective at the effective time or date of the merger. However, if a greater number of members is required to approve an amendment to the operating agreement of the constituent LLC than is required to approve the agreement of merger, any amendment or adoption takes effect if the vote of the constituent LLC in favor of the merger is at least as great as the vote required to amend the operating agreement of that LLC [*Corp. Code § 17551(e)*].

Both the merger procedures and the rules governing dissenting interests are similar to the rules applicable to mergers and reorganizations of business corporations and limited partnerships [*Corp. Code §§ 1200 et seq., 1300 et seq.*; *Corp. Code §§ 15678.1 et seq., 15679.1 et seq.* (CRLPA); *Corp. Code §§ 15911.01 et seq., 15911.10 et seq., 15911.20 et seq.* (ULPA '08)].

[2] Procedure for Conversion

An LLC may be converted into an "other business entity" [*see Corp. Code § 17001(ac)* (defined as a corporation, limited partnership, general partnership, business trust, real estate investment trust, or unincorporated association other than nonprofit corporation)], a foreign other business entity [*see Corp. Code § 17001(s)* (defined as any other business entity formed under the laws of any state other than California or under the laws of the United States or a foreign country), or a foreign limited liability company [*Corp. Code § 17540.2(a)*; *see Corp. Code § 17001(q)* (definition)]. Pursuant to a conversion into a domestic or foreign general partnership or limited partnership, or into a foreign limited liability company, each of the members of the converting LLC must receive a percentage interest in profits and capital of the converted entity equal to that member's interest in profits and capital of the converting LLC as of the effective time of the conversion [*Corp. Code § 17540.2(a)*]. Pursuant to a conversion into an other business entity or foreign other business entity not specified above, (1) each of the membership interests of the same class must be treated equally with respect to any distribution of cash, property, rights, interest, or securities of the converted entity, unless all members of the class consent; and (2) the nonredeemable membership interests of the converting limited liability company must be converted only into nonredeemable interests or securities of the converted entity, unless all holders of the nonredeemable interests consent [*Corp. Code § 17540.2(a)*]. Further, conversion is effective only if the law under which the converted entity will exist expressly permits formation of that entity pursuant to a conversion, and if the LLC complies with all requirements of any other law that applies to conversion to the converted entity [*Corp. Code § 17540.2(b)*].

To convert to an other business entity, foreign other business entity, or foreign LLC, the LLC must approve a plan of conversion. The plan must contain information specified by the Act [*Corp. Code § 17540.3(a)*]. A vote of a majority in interest of the members of the converting LLC (or any greater percentage specified in the articles or written operating agreement) must approve the plan of conversion [*Corp. Code § 17540.3(b)*]. If the LLC is converting into a limited partnership, the members who will become general partners of the converted limited partnership pursuant to the plan of conversion must also approve the plan [*Corp. Code § 17540.3(c)*]. A plan of conversion may be amended or abandoned [*Corp. Code § 17540.3(d), (e)*].

A conversion into an other business entity, foreign other business entity, or a foreign limited liability company is effective upon the earliest of the approval of the plan by the members of the converting LLC, the filing of all required documents, or the date set forth in the plan of conversion [*Corp. Code § 17540.4(a)*]. The filing of a certificate of conversion or an organizational document containing a statement of conversion by the converting LLC has the effect of

filing a certificate of cancellation, and no certificate of dissolution or cancellation [*see Corp. Code § 17356*] is required [*see Corp. Code § 17540.6(c)*]. The Act specifies treatment of the converting LLC's ownership of both real and personal property [*see Corp. Code §§ 17540.7, 17540.9*].

An other business entity, foreign other business entity, or foreign LLC may be converted to a domestic LLC. The conversion will be effective under the Act at the time it is effective under the law under which the converting entity is organized, if articles of organization are filed with the Secretary of State [*see Corp. Code § 17540.8*].

For further discussion of conversion procedures, see Ballantine & Sterling, California Corporation Laws, Ch. 27, *Limited Liability Companies* (Matthew Bender), and California Legal Forms, Ch. 12C, *Limited Liability Companies* (Matthew Bender).

[3] Dissenters' Rights on Merger or Reorganization

[a] In General

The Act provides for dissenters' rights in mergers or other reorganizations [*see Corp. Code § 17600 et seq*.]. "Reorganization" is defined to include conversions [*see Corp. Code § 17540.1 et seq.*; *see also* [2], *above*], mergers, certain acquisitions of controlling interests in other business entities, and certain acquisitions of substantially all of the assets of other business entities [*Corp. Code § 17600(a)*]. In general, in a merger or reorganization, a member who is entitled to vote on a reorganization and has taken necessary steps to have a dissenting interest [*see Corp. Code § 17601(b)* (definition)] may require the LLC to purchase that interest for cash at fair market value [*Corp. Code § 17601(a)*; *see* [c], *below*].

These dissenters' rights provisions apply to domestic LLCs, and to foreign LLCs if members holding more than 50 percent of voting interests reside in California [*Corp. Code § 17612(a)*]. These provisions do not apply to an LLC with 35 or fewer members if all the members have waived the application of dissenters' rights provisions in writing [*Corp. Code § 17612(c)*].

With certain listed exceptions, a dissenting member of an LLC that is reorganizing does not have the right to attack the validity of the reorganization or to have the reorganization set aside or rescinded [*see Corp. Code § 17613(a)*].

[b] "Dissenting Interest" Defined

A "dissenting interest" is a membership interest in an LLC that satisfies all of the following [*Corp. Code § 17601(b)*]:

- The membership interest was outstanding on the date for the determination of members entitled to vote on the reorganization.

- The membership interest was not voted in favor of the reorganization, or the membership interest was voted against the reorganization [*see Corp. Code § 17601(b)(2)*].

- The member has demanded that the LLC purchase its interest at its fair market value [*see Corp. Code § 17602* (method of demand)].

- The member has submitted the certificate of interest for endorsement, if applicable [*see Corp. Code § 17603*].

[c] Requiring Company to Purchase Dissenting Interest

If LLC members have the right to require the LLC to purchase their dissenting interests [*see Corp. Code § 17601(b)*

(definition); *see also* [b], *above*], the LLC must mail to each member a notice of approval of the proposed reorganization. The notice must contain specified information, including the price determined to be the fair market value of outstanding interests, the method of valuation, the latest available balance sheet, the latest income statement, and a description of the procedure to exercise dissenters' rights. The statement of price constitutes an offer by the LLC to purchase dissenting interests at that price [*Corp. Code § 17602(a)*]. For an illustration of this form, see California Legal Forms, Ch. 12C, *Limited Liability Companies* (Matthew Bender).

A member with a dissenting interest who wishes the LLC to purchase his or her interest must make a written demand on the LLC for the purchase of the interest and the payment to the member in cash of its fair market value. To be effective, the demand must be received by the LLC within 30 days after the notice of reorganization was mailed to members [*Corp. Code § 17602(b)*]. The demand must state the number or amount of interest, and must contain a statement of the member's claim of the fair market value of the interest on the day before the announcement of the proposed reorganization. The statement of value constitutes an offer by the member to sell the dissenting interest at that price [*Corp. Code § 17602(c)*]. For a form for making such a demand, see *§ 346.130*.

If the LLC and the dissenting member agree that the interest is a dissenting interest, and agree on the price to be paid for the interest, the dissenting member is entitled to the agreed price, with interest from the date of consummation of the reorganization. Agreements as to value of dissenting interests must be in writing and must be kept with the records of the LLC [*Corp. Code § 17604(a)*]. The LLC must pay for a dissenting interest within 30 days after the amount of the interest has been agreed on, or within 30 days after conditions to the reorganization are satisfied, whichever is later [*Corp. Code § 17604(b)*]. The dissenting member must submit certificates of interest (or, if none, written notice of the number or amount of interests) on payment [*Corp. Code § 17604(b)*; *see Corp. Code § 17603*].

If the LLC denies that an interest is a dissenting interest, or the LLC and the dissenting member cannot agree on the value of a dissenting interest, either the LLC or the member may bring an action in superior court within six months after the date of the notice of approval of the reorganization to settle the issue [*Corp. Code § 17605*; *see § 346.131* (complaint)]. The court may appoint an appraiser to determine the fair market value of dissenting interests, or may make the determination itself [*see Corp. Code § 17606*; *see §§ 346.132 -346.136* (forms for use in appraisal)].

[d] Loss of Status as Dissenting Interest

A dissenting interest loses its status as such, and the holder of that interest ceases to be a dissenting member, on the occurrence of any of the following [*Corp. Code § 17610*]:

- The LLC abandons the reorganization.
- The interest is transferred before its submission for endorsement [*see Corp. Code § 17603*].
- The dissenting member and the LLC do not agree that the interest is a dissenting interest or disagree on the purchase price of the interest, and neither files a complaint within six months after the notice of approval of the reorganization [*see Corp. Code § 17605*].
- The dissenting member, with the LLC's consent, withdraws the demand for purchase of the dissenting interest.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesFormation

California Forms of Pleading and Practice--Annotated

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Chapter 346 LIMITED LIABILITY COMPANIES
PART II. LEGAL BACKGROUND

30-346 California Forms of Pleading and Practice--Annotated § 346.17

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.17 Dissolution and Winding Up

[1] Causes of Dissolution

An LLC must be dissolved, and its affairs wound up, when the first of the following occurs [*Corp. Code § 17350*]:

- When specified in the articles of organization.
- On the happening of events specified in the articles or written operating agreement.
- By the vote of a majority in interest of the members [*see Corp. Code § 17001(v)* (definition)], or greater percentage of the voting interests of members specified in the articles or written operating agreement.
- Entry of a decree of judicial dissolution pursuant to *Corp. Code § 17351*.

[2] Judicial Dissolution

An LLC may be judicially dissolved pursuant to an action filed by a manager or member when any of the following occurs [*Corp. Code § 17351(a)*]:

- It is not reasonably practicable to carry on the LLC's business in conformity with its articles or operating agreement.
- Dissolution is reasonably necessary for the protection of the rights or interests of the complaining members.
- The LLC's business has been abandoned.

- The LLC's management is deadlocked or subject to internal dissention.

- Those in control of the LLC have been guilty of, or have knowingly countenanced, persistent and pervasive fraud, mismanagement, or abuse of authority.

For a complaint for judicial dissolution, see *§ 346.150*.

Noninitiating members may avoid dissolution by purchasing the membership interests of the initiating members at their fair market value [*Corp. Code § 17351(b)(1)*]. The Act specifies procedures for such a purchase [*see Corp. Code § 17351(b)(2)-(5)*], including a special proceeding in which the court will fix the value of the interests to be transferred, if necessary because of the parties' inability to agree on a price. The court's decree resulting from that special proceeding is separately appealable [*Corp. Code § 17351(b)(3)*; *Dickson v. Rehmke (2008) 164 Cal. App. 4th 469, 476-477, 78 Cal. Rptr. 3d 874* (decree was issued in May, and notice of appeal filed in August was filed too late even though filed within period for appeal from court's judgment in dissolution action)].

[3] Continuation of Existence After Dissolution

A dissolved LLC continues to exist for the purpose of winding up its affairs, dealing with actions by or against it, collecting or discharging its obligations, disposing of or conveying its property, and collecting and dividing its assets [*Corp. Code § 17354(a)*]. A dissolved LLC may not, however, continue business except so far as necessary for its winding up. In that connection, actions to which the LLC is a party do not abate by reason of its dissolution or its winding up proceedings and assets inadvertently omitted from its winding up continue to be owned by it for the benefit of the persons entitled to those assets [*Corp. Code § 17354(b)*].

Causes of action against a dissolved LLC may be enforced against it to the extent of its undistributed assets and, if its assets have been distributed to its members, against them to the extent of the assets distributed to them [*Corp. Code § 17355*]. The Act provides for contribution in the event a member is compelled to return distributed assets in an amount in excess of the member's pro rata share of the claim and for a statute of limitations for such claims against members [*Corp. Code § 17355(a)*]. In addition, like provisions as to business corporations, LLCs survive and continue to exist indefinitely for the purpose of being sued in quiet title actions; and judgments rendered in any such actions bind all members or other persons to the extent of their interest in the LLC [*Corp. Code § 17355(c)*]. For purposes of assessments under the Revenue and Taxation Code against persons secondarily liable [*see Rev. & Tax. Code § 19071 et seq.*], the liability described in *Corp. Code § 17355* is considered to be a liability at law with respect to a dissolved LLC [*Corp. Code § 17355(d)*].

Even if a certificate of dissolution has been filed [*see* [5], *below*], a majority in interest of the members of an LLC may file a certificate of continuation (Form LLC-8) with the Secretary of State [*Corp. Code § 17357(a)*] and on that filing, the certificate of dissolution is of no effect [*Corp. Code § 17357(c)*].

A certificate of continuation may be filed in any of the following circumstances [*Corp. Code § 17357(a)*]:

- The business of the LLC is to be continued pursuant to a unanimous vote of the remaining members.

- The dissolution of the LLC was by vote of the members pursuant to *Corp. Code § 17350(b)* and each member who consented to the dissolution has agreed in writing to revoke that member's vote in favor of or consent to the dissolution.

- The LLC was not, in fact, dissolved.

[4] Winding Up

When a limited liability company is dissolved, the managers or members must wind up its affairs. In a judicial dissolution [*see § 346.17[2]*], winding up is conducted in accordance with the decree of dissolution [*Corp. Code § 17352(a)*]. In a nonjudicial dissolution, the managers who have not wrongfully dissolved the LLC or, if none, the members may wind it up. The winding up process requires notification to known creditors and claimants, payment or adequate provision for debts and liabilities and distributions of remaining assets among members according to their respective rights and preferences as specified in the Act [*Corp. Code § 17353(a)*; *see Corp.Code § 17353(c)* (method of adequately providing for payment of debts and liabilities)] or as otherwise specified in articles of organization or the operating agreement.

On the petition of a manager, a member, or three or more creditors, a court may order the winding up of the LLC if it appears necessary for the protection of those parties [*Corp. Code § 17352(b)*]. Except as otherwise provided in the articles or written operating agreement, the managers or members winding up the LLC are entitled to reasonable compensation [*Corp. Code § 17352(c)*].

[5] Certificate of Dissolution and Certificate of Cancellation

When a limited liability company dissolves, its managers must file a certificate of dissolution (Form LLC-3) with the Secretary of State [*Corp. Code § 17356(a)*]. If, however, dissolution is made by the vote of all of the members and a statement to that effect is added to the certificate of cancellation of articles, a separate filing of a certificate of dissolution is not required [*Corp. Code § 17356(a)(3)*]. When the affairs of the LLC have been wound up, a certificate of cancellation (Form LLC-4/7) must be filed with the Secretary of State, cancelling the LLC's articles of organization [*Corp. Code § 17356(b)*].

The certificate of cancellation must contain a statement that a final franchise tax return [*see Rev. & Tax. Code § 23332*] or a final annual tax return [*see Rev. & Tax. Code § 17947*] has been or will be filed with the Franchise Tax Board as required [*Corp. Code § 17356(b)(2)(B)*]. The Secretary of State will notify the Franchise Tax Board of the filing [*Corp. Code § 17356(b)(3)*].

If a domestic LLC has not conducted any business within 12 months from the date the articles of organization were filed, a majority of the members may execute a certificate of cancellation of articles of organization, stating that the LLC has not conducted any business from the time of the filing of the articles of organization [*Corp. Code § 17350.5(a)*]. The Secretary of State will notify the Franchise Tax Board of the cancellation [*Corp. Code § 17350.5(b)*]. On the filing of the certificate of cancellation, the LLC will be canceled, and its powers, rights, and privileges will cease [*Corp. Code § 17350.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesDissolution & Winding Up

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Chapter 346 LIMITED LIABILITY COMPANIES
PART II. LEGAL BACKGROUND

30-346 California Forms of Pleading and Practice--Annotated § 346.18

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.18 Foreign Limited Liability Companies

[1] Recognition and Governing Law

A foreign limited liability company ("foreign LLC") may register as an LLC in California. A foreign LLC will be recognized as such and its organization and internal affairs, and the authority and liability of its managers and members, will be governed by the laws of the state or foreign country under which it is organized [*Corp. Code § 17450(a)*].

[2] Registration; Transacting Intrastate Business

A foreign LLC is allowed to register with the Secretary of State and must do so to transact intrastate business in California lawfully [*Corp. Code § 17450 et seq.*]. To register as a foreign LLC, it must register with the Secretary of State on Form LLC-5, comply with name requirements, and pay applicable fees [*Corp. Code §§ 17451, 17452*]. Along with instructional materials provided in conjunction with the application for registration, the Secretary of State is required to include a notice that filing the registration will obligate the LLC to pay an annual tax to the Franchise Tax Board pursuant to *Rev. & Tax. Code § 17941*. The notice must be updated annually to specify the dollar amount of the tax [*Corp. Code § 17451(d)*].

PRACTICE TIP:

When to Pay Franchise Tax. A foreign LLC should wait to be billed for the annual minimum franchise tax; if a foreign LLC submits this payment with its application for registration, it will be taxed as a corporation [*see* Secretary of State's letter accompanying LLC form packet].

A foreign LLC may not be denied registration because of a difference between the laws under which it is organized and the laws of California [*Corp. Code § 17450(b)*]. This can be of considerable importance because the definition of a "foreign LLC" [*see Corp. Code § 17001(q)*] allows considerable latitude of form and structure. However, this provision does not override the restriction described in § 346.10[5], prohibiting the rendition of professional services. Accordingly, foreign professional LLCs may not register or transact business as professional LLCs in California.

Failure to register before transacting intrastate business subjects a foreign LLC to penalties essentially the same as those applicable to unregistered foreign corporations or limited partnerships. The definition of "transacting intrastate business" [*see Corp. Code § 17001(ap)*] is also essentially the same for foreign LLCs as for other foreign business entities. Penalties include the inability to maintain proceedings in California courts until the LLC registers and monetary penalties [*Corp. Code § 17456(a), (b)*]. For an affirmative defense for use against a foreign LLC that has failed to register, see *§ 346.102[1]*. In addition, a foreign LLC transacting business in California without having registered appoints the Secretary of State as its agent for service of process for causes of action arising out of the transaction of business in California [*Corp. Code § 17456(d)*].

A member of a foreign LLC does not become liable for obligations of the foreign LLC solely because of its failure to register [*see Corp. Code § 17456(c)*]. A registered foreign LLC is required to file the same annual report as an LLC within specified periods and is subject to monetary penalties and possible loss of its right to transact intrastate business in California if it does not do so [*Corp. Code § 17655*].

[3] Effect of Recognition and Registration

Recognition of foreign LLCs is very significant for them under California law. Before the Act's enactment, a foreign LLC might have been treated as a general partnership, an unincorporated association, or a corporation. Treatment might have differed depending on the purpose; for example, liability of members, taxation, entity status, or right to hold property. The Act seems to lay most of these uncertainties to rest, subject to future judicial interpretations.

The legal significance of registration is similar to that as to other types of foreign entities doing intrastate business in California. Registration includes the privilege of transacting intrastate business, ability to maintain legal actions, requirements to pay state taxes and fees [*see § 346.11[3]*], and avoidance of pecuniary penalties for failure to register [*Corp. Code §§ 17456, 17457*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawForeign BusinessesGeneral OverviewBusiness & Corporate LawForeign BusinessesQualificationsBusiness & Corporate LawLimited Liability CompaniesGeneral Overview

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30-346 California Forms of Pleading and Practice--Annotated §§ 346.19-346.29

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

[Reserved]

§§ 346.19[Reserved]

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30-346 California Forms of Pleading and Practice--Annotated § 346.30

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.30 State Statutes

[1] Regulation of Limited Liability Companies

Owner of business entity (including LLC) disposing of entire ownership interest in entity may agree not to compete within specified geographic area as long as buyer carries on like business. *Bus. & Prof. Code § 16601*

Member of LLC may agree not to compete on dissolution of, or termination of interest in, LLC. *Bus. & Prof. Code § 16602.5*

Application of judgment debtor's interest in LLC toward satisfaction of judgment entered against member but not against LLC. *Code Civ. Proc. § 708.310*

General provisions. *Corp. Code § 17000 et seq.*

Formation. *Corp. Code § 17050 et seq.*

Members. *Corp. Code § 17100 et seq.*

Management. *Corp. Code § 17150 et seq.*

Finance. *Corp. Code § 17200 et seq.*

Distributions and withdrawals. *Corp. Code § 17250 et seq.*

Interests and assignment of interests. *Corp. Code § 17300 et seq.*

Dissolution. *Corp. Code § 17350 et seq.*

Foreign limited liability companies. *Corp. Code § 17450 et seq.*

Class actions and derivative actions. *Corp. Code § 17500 et seq.*

Conversion. *Corp. Code § 17540.1 et seq.*

Merger. *Corp. Code § 17550 et seq.*

Dissenting members' rights. *Corp. Code § 17600 et seq.*

Miscellaneous provisions. *Corp. Code § 17650 et seq.*

Fee provisions. *Gov. Code § 12190*

[2] Taxation of Limited Liability Companies

Requirement to file California tax return. *Rev. & Tax. Code § 18633.5*

Minimum franchise tax and fees on limited liability companies. *Rev. & Tax. Code §§ 17941, 17942,* 17947, *23153*

California tax classification conforms to federal tax classification. *Rev. & Tax. Code § 23038(b)(2)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-346 California Forms of Pleading and Practice--Annotated § 346.31

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.31 Federal Statutes

Income taxation of partners and partnerships. *I.R.C. § 701* et seq.

Partnership information income tax return. *I.R.C. §§ 6031, 6072*

Taxation of partnership as corporation. *I.R.C. § 7701*

Taxation of publicly traded partnership as corporation. *I.R.C. § 7704*

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-346 California Forms of Pleading and Practice--Annotated § 346.32

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.32 Federal Regulations

Income taxation of partners and partnerships. Treas. Reg. § 1.701 et seq.

Self-employment tax applicable to member managers. Treas. Reg. § 1.1402

Filing partnership information tax returns. Treas. Reg. § 1.6031-1

Valuation of business interests subject to buy-sell agreements. *Treas. Reg. §§ 20.2031-2(h), 20.2031-3(c)*

Valuation of partnership interests for federal estate tax purposes. *Treas. Reg. § 20.2031-3*

Valuation of gift of partnership interest to family member for estate tax purposes; treatment of unpaid qualified payments at death of transferor or applicable family member. *Treas. Reg. § 25.2701-1 et seq.*

Valuation of partnership interest subject to option, contract to purchase, or other agreement for estate tax purposes. *Treas. Reg. § 25.2703-1 et seq.*

Estate tax effect of (1) transfer of interest in family partnership through lapse of voting and liquidation rights, and (2) restrictions on liquidation of interest in family partnership. *Treas. Reg. § 25.2704-1 et seq.*

Entity classification regulations for federal income tax purposes. Treas. Reg. §§ 301.7701-301.7701-3

Legal Topics:

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

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30-346 California Forms of Pleading and Practice--Annotated § 346.33

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.33 Decisions

Limited liability company may enforce pre-organization contract made for its benefit, if company adopts or ratifies contract after company has been organized. *02 Dev., LLC v. 607 South Park, LLC (2008) 159 Cal. App. 4th 609, 612, 71 Cal. Rptr. 3d 608*

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30-346 California Forms of Pleading and Practice--Annotated § 346.34

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.34 Revenue Rulings

Conversion of partnership interest into LLC interest treated as partnership-to-partnership conversion. *Rev. Rul. 95-37, 1995-17 I.R.B. 10*

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-346 California Forms of Pleading and Practice--Annotated § 346.35

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.35 Law Reviews

Gevurtz, *California's New Limited Liability Company Act: A Look at the Good, the Bad, and the Ambiguous, 27 Pac. L.J. 261 (1996)*

Goforth, *Why Limited Liability Company Membership Interests Should Not be Treated as Securities and Possible Steps to Encourage This Result, 45 Hastings L.J. 1223 (1994)*

Horwood & Hechtman, *The ABCs of LLCs*, 40(6) Prac. Law. 65 (1994)

Jelsma, *Catching the Next Wave: Limited Liability Companies Come to California (Part I)*, Cal. Tax Law. 9 (Summer 1994)

Jelsma, *Catching the Next Wave: Limited Liability Companies Come to California (Part II)*, Cal. Tax Law. 20 (Fall 1994)

Norman, *A Practical Primer on the Business Law and Tax Aspects of Using a Limited Liability Company*, 27 Bev. Hills B. Ass'n J. 82 (1993)

Keatinge, et al., *The Limited Liability Company: A Study of the Emerging Entity, 47 Bus. Law. 375 (1992)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-346 California Forms of Pleading and Practice--Annotated § 346.36

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.36 Text References

[1] Related Matthew Bender Publications

Ballantine & Sterling, California Corporation Laws (Matthew Bender 4th ed.)

Ch. 25, *Limited Partnerships*

Ch. 26, *Income Taxation of Partnerships*

Ch. 27, *Limited Liability Companies*

California Legal Forms (Matthew Bender)

Ch. 12C, *Limited Liability Companies*

Ch. 15, *General Partnerships*

Ch. 15A, *Formation of Limited Partnerships;*

Ch. 15B, *Dissolution of Limited Partnerships;*

Ch. 15C, *Mergers of Limited Partnerships*

Ch. 68A, *Using Family Partnerships and Other Business Entities in Estate Planning*

California Small Business Guide (Matthew Bender)

Ch. 1A, *Family Business Entities*

Ch. 1B, *Limited Liability Companies*

[2] Additional Text References

Duboff, Guide to Organizing and Operating a Limited Liability Company in California (Business Law Section of the State Bar of California 1995)

Sargent, Limited Liability Company Handbook (Clark Boardman Callaghan 1993-1994)

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-346 California Forms of Pleading and Practice--Annotated §§ 346.37-346.99

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

[Reserved]

§§ 346.37[Reserved]

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A. Capacity

30-346 California Forms of Pleading and Practice--Annotated § 346.100

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.100 Allegation of Capacity and Principal Place of Business of Domestic Limited Liability Company [Code Civ. Proc. § 395.5]

[1] FORM Allegation of Capacity and Principal Place of Business of Domestic Limited Liability Company [Code Civ. Proc. § 395.5]

_____ [*Name of limited liability company*] is, and at all times herein mentioned was, a limited liability company duly organized and existing under the laws of the State of California [*add if applicable:*, with its principal place of business at _____ (*street address and city*), _____ County, California].

[2] Use of Form

The form in [1], *above*, is for use in any pleading to allege the capacity and principal place of business of a domestic LLC. While the LLC Act does not specifically so state, it is anticipated that venue for LLCs is the same as for corporations and associations [*see* Ch. 160, *Corporations: Capacity* ; Ch. 571, *Venue*].

This allegation of capacity and principal place of business of a domestic LLC is for insertion in any type of pleading. The allegation of principal place of business may be included if it is necessary to establish venue [*see Code Civ. Proc. § 395.5*]. However, if venue is to be established on a different basis, such as the county where the liability arises [*see Code Civ. Proc. § 395.5*], the allegation of principal place of business should be omitted. For further coverage of venue, see Ch. 571, *Venue* .

[3] Limited Liability Company as Entity

A domestic LLC is an entity separate from its members [*Corp. Code § 17001(t)*], and may sue, be sued, complain, or defend any action or proceeding in its own name [*Corp. Code § 17003(b)*].

Legal Topics:

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

30-346 California Forms of Pleading and Practice--Annotated § 346.101

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.101 Allegation of Capacity and Principal Place of Business of Foreign Limited Liability Company Transacting Intrastate Business in California [Code Civ. Proc. § 395.5; Corp. Code §§ 17451, 17452]

[1] FORM Allegation of Capacity and Principal Place of Business of Foreign Limited Liability Company Transacting Intrastate Business in California [Code Civ. Proc. § 395.5; Corp. Code §§ 17451, 17452]

_____ [*Name of limited liability company*] is, and at all times herein mentioned was, a limited liability company duly organized and existing under the laws of the State of _____ [*name*], and is authorized to transact, and is transacting, intrastate business in California [*add if applicable:*, with its place of business in this state at _____ (*street address and city*), _____ County, California].

[2] Use of Form

The form in [1], *above*, is for use in any pleading to allege the capacity and principal place of business of a foreign LLC. While the LLC Act does not specifically so state, it is anticipated that venue for LLCs is the same as for corporations and associations [*see* Ch. 160, *Corporations: Capacity* , Ch. 571, *Venue*].

This allegation of capacity and principal place of business of a foreign LLC transacting intrastate business in California [*see Corp. Code §§ 17451, 17452*] is for insertion in any type of pleading. The allegation of principal place of business may be included if it is necessary to establish venue [*see Code Civ. Proc. § 395.5*]. However, if venue is to be established on a different basis, such as the county where the liability arises [*see Code Civ. Proc. § 395.5*], the allegation of principal place of business should be omitted. For further coverage of venue, see Ch. 571, *Venue* .

For an affirmative defense alleging a plaintiff foreign LLC's incapacity to maintain an action, see *§ 346.102* [*see § 346.101[4]*].

[3] Limited Liability Company as Entity

A foreign LLC is an entity separate from its members [*Corp. Code § 17001(q)*].

[4] Registration as Prerequisite to Maintaining Action

To transact intrastate business in California, a foreign LLC must first register with the Secretary of State [*Corp. Code § 17451*; *see* California Legal Forms, Ch. 12C, *Limited Liability Companies* (Matthew Bender)]. A foreign LLC that fails to register and obtain a certificate of registration [*see Corp. Code § 17452*] may not maintain any action or proceeding in any California court until it has registered, and is subject to fine [*Corp. Code § 17456(a), (b)*].

A foreign LLC transacting business in California without having properly registered appoints the Secretary of State as its agent for service of process for causes of action that arise out of the transaction of business in California [*Corp. Code § 17456(d)*]. For further coverage of foreign LLCs, see *§ 346.18*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-346 California Forms of Pleading and Practice--Annotated § 346.102

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.102 Affirmative Defense--Plaintiff Foreign Limited Liability Company May Not Maintain Action Because It Is Not Qualified to Transact Business in California [Code Civ. Proc. § 431.30(b)(2); Corp. Code §§ 17451, 17452, 17456(a)]

[1] FORM Affirmative Defense--Plaintiff Foreign Limited Liability Company May Not Maintain Action Because It Is Not Qualified to Transact Business in California [Code Civ. Proc. § 431.30(b)(2); Corp. Code §§ 17451, 17452, 17456(a)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

Plaintiff is a foreign limited liability company that has entered into repeated and successive transactions of its business in this state, other than in interstate or foreign commerce, but does not hold a valid certificate of registration from the California Secretary of State to transact intrastate business. Plaintiff is therefore barred from maintaining any action or proceeding in any California court.

[2] Use of Form

The form in [1], *above*, is an affirmative defense for use in the answer of a defendant in an action or proceeding brought by a foreign LLC that is transacting intrastate business but that has not registered to do so. The affirmative defense alleges that the foreign LLC may not maintain an action in any California court because it has not properly registered with the Secretary of State [*see Corp. Code §§ 17451, 17452, 17456(a)*; *see also* [3], *below*].

For discussion of answers and pleading affirmative defenses, see Ch. 26, *Answers* .

[3] Registration as Prerequisite to Maintaining Action

To transact intrastate business in California, a foreign LLC must first register with the Secretary of State [*Corp. Code § 17451*; *see* California Legal Forms, Ch. 12C, *Limited Liability Companies* (Matthew Bender)]. A foreign LLC that fails to register and obtain a certificate of registration [*see Corp. Code § 17452*] may not maintain any action or proceeding in any California court until it has registered, and is subject to fine [*Corp. Code § 17456(a), (b)*].

For further coverage of foreign LLCs, see *§ 346.18*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawForeign BusinessesGeneral OverviewBusiness & Corporate LawForeign BusinessesNoncomplianceBusiness & Corporate LawLimited Liability CompaniesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswers

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30-346 California Forms of Pleading and Practice--Annotated §§ 346.103-346.109

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

[Reserved]

§§ 346.103[Reserved]

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B. Alter Ego Liability

30-346 California Forms of Pleading and Practice--Annotated § 346.110

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.110 Complaint Against Limited Liability Company and Its Controlling Members on Limited Liability Company Obligation--Limited Liability Company as Alter Ego of Controlling Members

[1] FORM Complaint Against Limited Liability Company and Its Controlling Members on Limited Liability Company Obligation--Limited Liability Company as Alter Ego of Controlling Members

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR _____ [*specify, e.g.,* DAMAGES]
_____ [*name*],	)	
a California Limited Liability Company, and	)	(Breach of Contract)
_____ [*name(s) of member(s)*],	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
Defendants.	)	
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence of plaintiff*].

2. Defendant _____ [*name of limited liability company*] is, and at all times herein mentioned was, a

limited liability company organized and existing under the laws of the State of _____, with its principal place of business at _____ [*address and city*], _____ [*county*], California.

3. Defendant _____ [*name of member*] is, and at all times herein mentioned was, _____ [*specify interest in limited liability company, e.g.*, a member of the defendant limited liability company].

[*ALLEGE, in separately numbered paragraphs for each, capacity and interest in limited liability company of any other individual defendants*]

[*CONTINUE*]

4. There exists, and at all times herein mentioned there existed, a unity of interest and ownership between defendant(s) _____ [*name(s) of member(s)*] and defendant limited liability company, such that any individuality and separateness between defendant(s) _____ [*name(s) of member(s)*] and defendant limited liability company have ceased, and defendant limited liability company is the alter ego of defendant(s) _____ [*name(s) of member(s)*] in that _____ [*set forth facts showing control and domination of limited liability company business by member(s)*].

5. Adherence to the fiction of the separate existence of the defendant limited liability company as an entity distinct from defendant(s) _____ [*name(s) of member(s)*] would permit an abuse of the limited liability company privilege and would _____ [sanction fraud *or* promote injustice] in that _____ [*set forth facts showing fraud, injustice, or bad faith on the part of individual defendants*].

6. _____ [*Allege underlying cause of action against limited liability company*].

WHEREFORE, plaintiff prays judgment against defendants and each of them as follows:

1. For _____ [*specify, e.g.*, damages in the sum of $_____];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name and title*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated

on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a complaint for use when a plaintiff seeks to impose liability for an LLC obligation on controlling members of the LLC on the "alter ego" doctrine [*see § 346.110[4]*]. For further coverage of alter ego liability, see Ch. 161, *Corporations: Alter Ego Liability* .

If additional causes of action are to be alleged in this complaint, see Ch. 123, *Complaints and Cross Complaints* .

[3] Required Allegations

This complaint alleges the following:

- The capacity of the parties (Paragraphs 1-3)

- That there is a unity of ownership and interest between the LLC and the individual defendant members (Paragraph 4) [*see Minifie v. Rowley (1921) 187 Cal. 481, 487, 202 P. 673]* .

- That adherence to the fiction of separate existence of the LLC would sanction fraud or promote injustice (Paragraph 5) [*see Minifie v. Rowley (1921) 187 Cal. 481, 487, 202 P. 673]* .

- The underlying cause of action against the LLC (Paragraph 6) [*see Design Associates, Inc. v. Welch (1964) 224 Cal. App. 2d 165, 171, 36 Cal. Rptr. 341]* .

For examples of allegations of underlying causes of action, see Ch. 16, *Corporations: Alter Ego Liability* .

[4] Liability of Limited Liability Company Member

In general, a member of an LLC is not personally liable for a debt, obligation, or liability of the LLC solely by reason of being a member of the LLC [*Corp. Code § 17101(a)*]. However, a member of an LLC is liable under the common law governing alter ego liability, and is also personally liable under the same or similar circumstances, and to the same extent, as a shareholder of a corporation would be liable for a debt, liability, or obligation of the corporation [*see § 346.110[5]*]. Failure to conduct meetings or observe formalities are not considered factors in imposing alter ego or personal liability if not required by the LLC's articles of organization or operating agreement [*Corp. Code § 17101(b)*; *see § 346.14[14]* (liability of members)].

[5] Liability Under Alter Ego Doctrine

The "alter ego" doctrine provides that, when necessary to protect the rights of third parties and to accomplish justice, a court will disregard the distinct corporate identity and will treat the obligations of the corporation as those of the equitable owners [*Minton v. Cavaney (1961) 56 Cal. 2d 576, 579, 15 Cal. Rptr. 641, 364 P.2d 473* ; *Erkenbrecher v. Grant (1921) 187 Cal. 7, 10-11, 200 P. 641]* .

Under *Corp. Code § 17101(b)* [*see § 346.110[4]*], a member of an LLC is subject to liability under the common law governing alter ego liability. Thus, alter ego liability attaches to members who are the "equitable owners" of an LLC comparable to the equitable owners of a corporation. For detailed discussion of the corporate alter ego liability, see Ch. 161, *Corporations: Alter Ego Liability* .

PRACTICE TIP:

When to Allege Alter Ego Liability. Whenever a claim is asserted against an LLC and there is a possibility that the LLC may not be able to satisfy a judgment if one is obtained, consideration should be givento asserting a cause of action against some or all of its members on the alter ego theory.

[6] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the first paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

Venue is proper in an action against an LLC in any of the following counties [*Code Civ. Proc. § 395.5*]:

- Where the contract is made or to be performed.
- Where the obligation or liability arises or the breach occurs.
- Where the principal place of business of the LLC is situated.

For further coverage of jurisdiction and venue, see Ch. 324, *Jurisdiction: Subject Matter* and Ch. 571, *Venue* .

[7] Complaint Not Normally Verified

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*].

For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[8] Cross References

For allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue*

For alternative verification forms, see Ch. 572, *Verification*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesManagement Duties & Liabilities

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Chapter 346 LIMITED LIABILITY COMPANIES
PART IV. FORMS
B. Alter Ego Liability

30-346 California Forms of Pleading and Practice--Annotated § 346.111

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.111 Notice of Motion to Amend Judgment to Include Member as Judgment Debtor

[1] FORM Notice of Motion to Amend Judgment to Include Member as Judgment Debtor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO
vs.	)	AMEND JUDGMENT TO INCLUDE ADDITION-
_____ [*name*],	)	AL JUDGMENT DEBTOR
a California Limited Liability Company, and	)	Date: _____
_____ [*name(s)*],	)	Time: _____
Defendants.	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To defendants _____ [*name of limited liability company and member defendant(s)*] and their attorneys of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], California, plaintiff will, and

hereby does, move for an order amending the judgment rendered in this case as follows:

That portion of the judgment that begins with the words "_____" on page _____, line _____ and continues with the words "_____" on page _____, line _____, and that now reads as follows: _____ [*set out portion of judgment naming limited liability company as judgment debtor*] be amended to read as follows: _____ [*restate above portion adding name of controlling member*].

The motion will be made on the following grounds:

(1) That _____ [*name of controlling member*] is, and at all times material to plaintiff's case was, the alter ego of defendant; and

(2) That the judgment as rendered contains a misnomer in failing to include the name of _____ [*name of controlling member*] as judgment debtor.

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and on the memorandum served and filed herewith, on all the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name and title*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The form in [1], *above*, is a notice of motion for use in obtaining an order to add the name of a controlling member to a judgment rendered against an LLC. This form is used when a plaintiff seeks to obtain a judgment against a controlling member of an LLC under the "alter ego" doctrine [*see § 346.110[4], [5]*]. This form typically is used when judgment has been obtained against an LLC that is unable to pay the judgment. A member's interest in an LLC is not subject to execution, however, if the LLC is not a judgment debtor [*Code Civ. Proc. § 699.720(a)(2)*].

This notice of motion states when, and the grounds on which, the motion will be made, and the papers on which it will be based [*see Code Civ. Proc. § 1010*; *see also § 346.112* (supporting declaration)].

For an order granting this motion, see *§ 346.113*. For discussion of law and motion procedure, see Ch. 372, *Motions and Orders* .

[3] Use of Alter Ego Doctrine

Under *Corp. Code § 17101(b)* [*see § 346.110[4]*], a member of an LLC is subject to liability under the common law governing alter ego liability. Thus, alter ego liability attaches to members who are the "equitable owners" of an LLC comparable to the equitable owners of a corporation. For more detailed discussion of the common law governing alter ego liability, see Ch. 161, *Corporations: Alter Ego Liability* .

PRACTICE TIP:

When to Allege Alter Ego Liability. Whenever a judgment is obtained against an LLC that the LLC is unable to pay, consideration should be given to attempting to impose liability on its controlling members by amending the judgment. For detailed discussion of the alter ego doctrine, see Ch. 161, *Corporations: Alter Ego Liability* . Note that failure to conduct meetings or otherwise observe formalities may not be the basis for imposition of alter ego or personal liability on members if those formalities are not required by the articles of organization or operating agreement [*Corp. Code § 17101(b)*].

[4] Requirement to Include Supporting Memorandum

This notice of motion must be accompanied by a supporting memorandum [*Cal. Rules of Ct., 3.1103(a), 3.1113*]. See Ch. 417, *Points and Authorities*, for a discussion of the correct forms. In addition, a copy of any paper on which the motion is to be based must accompany the notice if that paper has not previously been served on the party to be notified and was not filed by him or her [*Code Civ. Proc. § 1010*]. The notice of motion may also be, and most often is, accompanied by a declaration establishing the facts on which the motion is based [*see Code Civ. Proc. §§ 2003, 2009, 2015.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesManagement Duties & LiabilitiesCivil ProceduresPleading & PracticeMotion PracticeContent & Form

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B. Alter Ego Liability

30-346 California Forms of Pleading and Practice--Annotated § 346.112

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.112 Declaration in Support of Motion to Amend Judgment to Include Member as Judgment Debtor

[1] FORM Declaration in Support of Motion to Amend Judgment to Include Member as Judgment Debtor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	DECLARATION OF _____ [*name*]
_____ [*name*],	)	IN SUPPORT OF MOTION TO AMEND JUDG-
a California Limited Liability Company, and	)	MENT TO INCLUDE ADDITIONAL JUDGMENT
_____ [*name(s)*],	)	DEBTOR
Defendants.	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for the plaintiff *or other statement as appropriate*].

2. On _____ [*date*], judgment was entered in favor of the plaintiff against _____ [*name of defendant*], a limited liability company, in the amount of $_____.

3. On _____ [*date*], I conducted a creditor's examination of _____ [*name of defendant*] pursuant to an order by this court under *Code of Civil Procedure § 708.110*, whereat _____ [*name*] as _____ [*specify position, e.g.*, treasurer] of defendant appeared and was examined on behalf of defendant. [A copy of the transcript of the examination is attached to this declaration as Exhibit A.]

4. The examination disclosed that _____ [*set forth facts establishing "alter ego" relationship on the basis of unity of interest and ownership and inequity resulting from recognition of separate limited liability company entity*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is a declaration for use in factually establishing the relationship between a defendant LLC and its controlling member, in support of a motion to include the name of the alter ego member in the judgment as a judgment debtor. The declaration is based on facts discovered during plaintiff's examination of an officer of the defendant LLC pursuant to *Code Civ. Proc. § 708.110* (examination of debtor supplemental to execution) [*see Thomson v. L.C. Roney & Co., Inc. (1952) 112 Cal. App. 2d 420, 422, 246 P.2d 1017]* .

[3] Establishing Alter Ego Relationship

To establish the alter ego relationship, the declaration and exhibits must show that there exists a unity and identity of interest between equitable owner member and its alter ego LLC [*see Arnold v. Browne (1972) 27 Cal. App. 3d 386, 394, 103 Cal. Rptr. 775* ; *Rosen v. E.C. Losch Co., Inc. (1965) 234 Cal. App. 2d 324, 333, 44 Cal. Rptr. 377]* and that if the acts are treated as those of the LLC alone, an inequitable result will follow [*see Arnold v. Browne (1972) 27 Cal. App. 3d 386, 394, 103 Cal. Rptr. 775* ; *Schoenberg v. Romike Properties (1967) 251 Cal. App. 2d 154, 167, 59 Cal. Rptr. 359* ; *Thomson v. L.C. Roney & Co., Inc. (1952) 112 Cal. App. 2d 420, 427-429, 246 P.2d 1017]* . For the applicability of cited corporate law to LLCs, see [4], *below*.

[4] Use of Alter Ego Doctrine

Under *Corp. Code § 17101(b)* [*see § 346.110[4]*], a member of an LLC is subject to liability under the common law governing alter ego liability. Thus, alter ego liability attaches to members who are the "equitable owners" of an LLC comparable to the equitable owners of a corporation. For more detailed discussion of the common law governing alter ego liability, see Ch. 161, *Corporations: Alter Ego Liability* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesManagement Duties & LiabilitiesCivil ProceduresPleading & PracticeMotion PracticeContent & Form

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30-346 California Forms of Pleading and Practice--Annotated § 346.113

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.113 Order Granting Motion to Amend Judgment to Include Member as Judgment Debtor

[1] FORM Order Granting Motion to Amend Judgment to Include Member as Judgment Debtor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	
_____ [*name*],	)	NO. _____
a California Limited Liability Company, and	)	ORDER
_____ [*name(s)*],	)	
Defendants.	)	
	)	
	)	

The motion of plaintiff _____ [*name*] for an order amending the judgment rendered in this case on _____ [*date*], to include the name of _____ [*name of controlling member*] therein as judgment debtor came on regularly for hearing by the court on this date. Plaintiff appeared by counsel _____ [*name*]; _____ [*specify other appearances*].

On proof made to the satisfaction of the court that defendant _____ [*name of limited liability company*] is the alter ego of _____ [*name of controlling member*] and that the judgment rendered in this case should be amended to bind defendant under the name of _____ [*name of controlling member*]:

IT IS ORDERED that the judgment heretofore rendered in this action be amended as follows:

That portion of the judgment that begins with the words "_____" on page _____, line _____ and continues with the words "_____" on page _____, line _____, and that now reads "_____" [*set out portion of judgment naming limited liability company as judgment debtor*] be amended to read as follows: "_____" [*restate above portion adding name of controlling member as judgment debtor*].
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

The form in [1], *above*, is an order is for use in granting plaintiff's motion to add the name of an LLC's controlling member to a judgment against the LLC under the alter ego doctrine. This order does not include findings, in accordance with the general rule that no findings are required in an order granting a motion [*see Waller v. Weston (1899) 125 Cal. 201, 204, 57 P. 892* ; *see also Perez v. Perez (1952) 111 Cal. App. 2d 827, 829-830, 245 P.2d 344]* .

For a notice motion on which this order is based, see *§ 346.111*.

[3] Use of Alter Ego Doctrine

Under *Corp. Code § 17101(b)* [*see § 346.110[4]*], a member of an LLC is subject to liability under the common law governing alter ego liability. Thus, alter ego liability attaches to members who are the "equitable owners" of an LLC comparable to the equitable owners of a corporation. For more detailed discussion of the common law governing alter ego liability, see Ch. 161, *Corporations: Alter Ego Liability* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesManagement Duties & LiabilitiesCivil ProcedurePleading & PracticeMotion PracticeContent & Form

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30-346 California Forms of Pleading and Practice--Annotated §§ 346.114-346.119

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

[Reserved]

§§ 346.114[Reserved]

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C. Distributions

30-346 California Forms of Pleading and Practice--Annotated § 346.120

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.120 Complaint for Damages Against Members for Receiving Improper Distribution [Corp. Code § 17254(e)]

[1] FORM Complaint for Damages Against Members for Receiving Improper Distribution [Corp. Code § 17254(e)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR _____ [*specify, e.g.,* DAMAGES]
_____ [*name*],	)	
a California Limited Liability Company, and	)	(Improper Distribution)
_____ [*name(s) of member(s)*],	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
Defendants.	)	
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. [*Allege capacity of limited liability company. See § 346.100[1].*]

2. Defendant _____ [*name of member receiving improper distribution*] is a resident of _____ County, California.[*Continue to name all defendant members and their residences.*] Each of the

defendants named in this paragraph was, at the time of the distribution alleged in Paragraph 4, a member of the limited liability company.

3. Plaintiff _____ [*name of creditor*] is a creditor of the limited liability company with a _____ [debt *or* claim] for _____ [*describe nature of debt or claim*] in the currently outstanding amount of $_____. Plaintiff's _____ [debt *or* claim] arose on _____ [*date*], before the time of the distribution alleged in Paragraph 4, and plaintiff did not consent to that distribution. Plaintiff brings this action on its own behalf and on behalf of and in the name of the limited liability company.

4. On or about _____ [*date*], the limited liability company made a distribution of its _____ [cash *or* property consisting of _____ (*describe*)] to its members by _____ [*specify, e.g.*, declaring a dividend in an amount of $_____ per membership interest on _____ (*number*) outstanding _____ (*describe class or series*) membership interests, of which dividend defendants received a total of $_____ *or* _____ (redeeming *or* purchasing) _____ (*number*) membership interests of the limited liability company's outstanding _____ (*describe class or series*) for an amount of $_____ per membership interest, of which amount defendants received a total of $_____ on its _____ (transfer to them *or* irrevocable delivery to a trustee for their benefit) on _____ (*date*)].

5. Plaintiff is informed and believes, and on that basis alleges, that the distribution alleged in Paragraph 4 of this complaint was contrary to law in that _____ [*e.g.*, the limited liability company will be, as a result of making the distribution, unable to pay its debts as they become due *or* the limited liability company's total assets, as a result of making the distribution, will be less than its total liabilities plus the amount needed to satisfy preferential rights on dissolution].

6. Defendants received the distribution alleged in Paragraph 4 with knowledge of the facts indicating its impropriety. [*Continue allegation with any facts supporting allegation.*]

7. No creditor of the limited liability company whose debt or claim arose before the time of the unlawful distribution alleged in Paragraph 4 of this complaint consented to the distribution. The liabilities of the limited liability company to the nonconsenting creditors at the time of the distribution were $_____.

8. As a result of the improper distribution alleged in this complaint, each defendant is liable to the limited liability company for the benefit of all creditors not consenting to that distribution up to the amount received by that defendant plus interest thereon at the legal rate on judgments, but not exceeding $_____ [*sum equal to either liabilities of limited liability company to nonconsenting creditors as alleged in Paragraph 7*].

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____, to be apportioned among the defendants according to the improper distribution received by each defendant, and to be awarded to the limited liability company for the benefit of all nonconsenting creditors;

2. For interest at the legal rate on the amount of the distribution received by each defendant from and after _____ [*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 346.110[1].*]

[2] Use of Form

The form in [1], *above*, is a complaint that may be used by a creditor of an LLC to recover damages from members of the LLC who have received an improper distribution with knowledge of the facts indicating its impropriety [*see Corp. Code § 17254*; *see also* [4], *below*].

This form may be modified for use by a member of the LLC who did not consent to the improper distribution, to recover damages from members who did consent to and receive the improper distribution. For language that may be modified for use in this situation, see *Ch. 164, Corporations: Dividends and Reacquisition of Shares, § 164.51*.

[3] Required Allegations

This complaint alleges the following:

- The capacity of the parties (Paragraphs 1-3).
- The circumstances of the improper distribution (Paragraph 4).
- That the distribution was improper because the LLC would be unable to pay its debts or because its total assets would be less than its liabilities plus the amount needed to satisfy preferential rights on dissolution (Paragraph 5) [*Corp. Code § 17254(a)*].
- That the member voting for the distribution had actual knowledge of facts indicating the impropriety of the distribution (Paragraph 6) [*Corp. Code § 17254(e)*].
- That the plaintiff did not consent to the distribution (Paragraph 7).
- That as a result of the improper distribution, the LLC is indebted to the plaintiff and other creditors.

For purposes of the statute of limitations, the complaint also alleges the date of the distribution [*Corp. Code § 17254(f)*; *see § 346.120[5]]* .

[4] Liability for Improper Distributions

An LLC may not make a distribution if, after giving effect to the distribution, (1) the LLC would not be able to pay its debts as the become due in the usual course of business, or (2) the LLC's total assets would be less than its total liabilities plus (unless the operating agreement provides otherwise) the amount necessary to satisfy preferential rights on dissolution [*Corp. Code § 17254(a)*].

A member of an LLC who receives a prohibited distribution with knowledge of facts indicating its impropriety is liable to the LLC for the benefit of all of the creditors or members entitled to institute an action for the amount received by that member [*Corp. Code § 17254(e)*].

The member's liability for receiving an improper distribution is conditioned on his or her having knowledge of the facts indicating the impropriety [*Corp. Code § 17254(e)*]. "Impropriety" means unlawfulness or illegality [*England v. Christensen (1966) 243 Cal. App. 2d 413, 430, 52 Cal. Rptr. 402]* .

In addition, a member of manager of an LLC who votes for an improper distribution is personally liable to the LLC for the amount of the distribution that exceeds what would be permissible [*Corp. Code § 17255(a)*].

For further coverage of liability for improper distributions, see *§ 346.14[14][b][ii]*.

[5] Statute of Limitations

A cause of action with respect to an obligation to return an improper distribution must be brought within four years after the distribution is made [*Corp. Code § 17254(f)*].

[6] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the first paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[7] Cross References

For coverage of jurisdiction and venue issues related to this complaint, see *§ 346.110[6]*

For coverage of the need to, and effect, of verifying a complaint, see *§ 346.110[7]* and Ch. 26, *Answers*

For additional references, see *§ 346.110[8]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesManagement Duties & LiabilitiesBusiness & Corporate LawLimited Liability CompaniesMembers & Other ConstituentsCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 346 LIMITED LIABILITY COMPANIES
PART IV. FORMS
C. Distributions

30-346 California Forms of Pleading and Practice--Annotated § 346.121

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.121 Complaint for Damages for Refusal to Make Distribution to Member [Corp. Code § 17251]

[1] FORM Complaint for Damages for Refusal to Make Distribution to Member [Corp. Code § 17251]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR _____
a California Limited Liability Company, and	)	[*specify, e.g.,* DAMAGES]
_____ [*name(s) of member(s)*],	)	(Refusal to Make Distribution)
Defendants.	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a limited lability company duly organized and existing under the laws of the State of California, with its principal place of business in _____ County, California.

2. On _____ [*date*], plaintiff was a member of record of the defendant. Plaintiff has at all times since been a member of record of defendant.

3. On _____ [*date*], plaintiff was entitled to receive the sum of $_____ as a distribution pursuant to section _____ of the defendant's operating agreement. A true and correct copy of the operating agreement is attached hereto as Exhibit "A" and made a part hereof.

4. On _____ [*date*], at _____ [*street address and city*], California, defendant's principal place of business, plaintiff delivered a written demand, a copy of which is attached hereto as Exhibit "B" and made a part hereof, that defendant pay all such amounts then due and owing to plaintiff. Defendant has failed and refused, and continues to fail and refuse, to pay plaintiff such amounts.

5. By reason of defendant's refusal to pay such amounts, plaintiff has been damaged in the sum of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____, with interest thereon from and after _____ [*date*];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 346.110[1].*]

[2] Use of Form

The form in [1], *above*, is a complaint for use by a member of an LLC to recover damages from the LLC for refusal to make a distribution to the member required by the LLC's operating agreement [*Corp. Code §§ 17250, 17251*].

[3] Required Allegations

This complaint alleges (1) the capacity of the parties (Paragraphs 1, 2), (2) that plaintiff was entitled to a distribution under the LLC's operating agreement (Paragraph 3), (3) that plaintiff demanded the distribution and was refused by defendant (Paragraph 4), and (4) that plaintiff has been damaged by this refusal (Paragraph 5) [*Corp. Code §§ 17250, 17251*].

[4] Member's Right to Distribution

A member of an LLC is entitled to receive distributions from an LLC while still a member of the LLC, and before the dissolution and winding up of the LLC, as specified in the operating agreement. This is subject to certain limitations on distributions that would result in insolvency [*Corp. Code § 17251*; *see Corp. Code § 17254*; *see also § 346.120[4]* (improper distributions)].

Distributions are made to members of an LLC in the manner specified in the LLC's operating agreement, if any. If there is no operating agreement, distributions that are a return of capital are made in proportion to a member's contribution, and distributions that are not a return of capital are made in proportion to the allocation of profits [*Corp. Code § 17250*].

For further coverage of distributions to members, see *§ 346.14[8]*.

[5] Cross References

For coverage of jurisdiction and venue issues related to this complaint, see *§ 346.110[6]*

For coverage of the need to, and effect, of verifying a complaint, see *§ 346.110[7]* and Ch. 26, *Answers*

For additional references, see *§ 346.110[8]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesManagement Duties & LiabilitiesBusiness & Corporate LawLimited Liability CompaniesMembers & Other ConstituentsCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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Chapter 346 LIMITED LIABILITY COMPANIES
PART IV. FORMS
C. Distributions

30-346 California Forms of Pleading and Practice--Annotated §§ 346.122-346.129

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

[Reserved]

§§ 346.122[Reserved]

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Chapter 346 LIMITED LIABILITY COMPANIES
PART IV. FORMS
D. Dissenting Interests

30-346 California Forms of Pleading and Practice--Annotated § 346.130

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.130 Dissenting Member's Demand for Purchase of Interest [Corp. Code § 17601(b)(3)]

[1] FORM Dissenting Member's Demand for Purchase of Interest [Corp. Code § 17601(b)(3)]

DEMAND FOR PURCHASE OF MEMBERSHIP INTEREST

To _____ [*name of limited liability company*]:

1. I am the owner of a membership interest of _____ [*name of limited liability company*]. This membership interest is held of record in my name, and is evidenced by Certificate No. _____.

2. I demand that _____ [*name of limited liability company*] purchase this interest for cash at the price of $_____. This price is the fair market value of this interest as of _____ [*date*], the day that _____ [*name of limited liability company*] has stated is the day before the first announcement of the terms of the proposed reorganization of _____ [*name of member's limited liability company*] and_____[*name of other entity*].

3. I submit the certificate representing the interest for which I make this demand for purchase for the purpose of endorsing the certificate with a statement that the interest is a dissenting interest. I submit the certificate to the limited liability company at its principal office located at _____ [*address*].
Dated: _____.

_____ [*signature*]

_____ [*typed name of member*]

_____ [*address*]

[2] Use of Form

The form in [1], *above*, is a written demand from a member of an LLC holding a dissenting interest [*see* [6], *below*] that the LLC purchase the dissenting interest [*Corp. Code §§ 17601, 17602*].

For further discussion of dissenter's rights, see *§ 346.16* and California Legal Forms, Ch. 12C, *Limited Liability Companies* (Matthew Bender).

[3] Contents of Demand

A demand for purchase of a dissenting interest must be in writing and must contain all of the following [*Corp. Code § 17602(b), (c)*]:

- A demand that the dissenting member's interest be purchased by the LLC;
- The number and amount of the dissenting member's interest;
- The dissenting member's assertion of the fair market value of the interest to be purchased; and
- A demand that payment be in cash.

The demand must be received by the LLC within 30 days after the day on which the notice of approval of the reorganization was mailed to members [*Corp. Code § 17602(b)*]. The dissenting member must also tender the certificate of interest if one has been issued. If no certificate of interest has been issued, the member must give written notice of the number or amount of the interest [*see Corp. Code § 17603*].

[4] Notice of Proposed Reorganization

If LLC members have the right to require the LLC to purchase their dissenting interests [*see Corp. Code § 17601(b)*], the LLC must mail to each member a notice of approval of the proposed reorganization. The notice must contain specified information, including the price determined to be the fair market value of outstanding interests, the method of valuation, the latest available balance sheet, the latest income statement, and a description of the procedure to exercise dissenters' rights. The statement of price constitutes an offer by the LLC to purchase dissenting interests at that price [*Corp. Code § 17602(a)*].

For a notice of approval of a proposed reorganization, see California Legal Forms, Ch. 12C, *Limited Liability Companies* (Matthew Bender).

[5] Right to Demand Purchase of Dissenting Interest

In general, in a merger or reorganization, a member who is entitled to vote on a reorganization and has taken necessary steps to have a dissenting interest [*see Corp. Code § 17601(b)* (definition); *see also* [6], *below*], may require the LLC to purchase that interest for cash at fair market value [*Corp. Code § 17601(a)*].

A member with a dissenting interest who wishes the LLC to purchase his or her interest must make a written demand on the LLC for the purchase of the interest and the payment to the member in cash of its fair market value. The statement of value constitutes an offer by the member to sell the dissenting interest at that price [*Corp. Code § 17602(c)*]. For coverage of contents of the demand, see [3], *above*.

These dissenters' rights provisions apply to domestic LLCs, and to foreign LLCs if members holding more than 50 percent of voting interests reside in California [*Corp. Code § 17612(a)*]. These provisions do not apply to an LLC with 35 or fewer members if all the members have waived the application of dissenters' rights provisions in writing [*Corp. Code § 17612(c)*].

[6] "Dissenting Interest" Defined

A "dissenting interest" is a membership interest in an LLC that satisfies all of the following [*Corp. Code § 17601(b)*]:

- The membership interest was outstanding on the date for the determination of members entitled to vote on the reorganization.

- The membership interest was not voted in favor of the reorganization, or the membership interest was voted against the reorganization [*see Corp. Code § 17601(b)(2)*].

- The member has demanded that the LLC purchase its interest at its fair market value [*see Corp. Code § 17602* (method of demand)].

- The member has submitted the certificate of interest for endorsement, if applicable [*see Corp. Code § 17603*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesManagement Duties & LiabilitiesBusiness & Corporate LawLimited Liability CompaniesMembers & Other Constituents

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Chapter 346 LIMITED LIABILITY COMPANIES
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D. Dissenting Interests

30-346 California Forms of Pleading and Practice--Annotated § 346.131

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.131 Complaint for Determination of Status of Membership Interest as Dissenting Interest and of Fair Market Value of Dissenting Interest [Corp. Code § 17605]

[1] FORM Complaint for Determination of Status of Membership Interest as Dissenting Interest and of Fair Market Value of Dissenting Interest [Corp. Code § 17605]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], a California	)	COMPLAINT FOR DETERMINATION OF
Limited Liability Company, and	)	STATUS OF MEMBERSHIP INTEREST AS DIS-
_____ [*name(s) of member(s)*],	)	SENTING INTEREST AND OF FAIR MARKET
Defendants.	)	VALUE OF DISSENTING INTEREST
_____		

Plaintiff alleges:

1. This complaint is filed pursuant to *Corporations Code Section 17605*.

2. Defendant is a limited liability company duly organized under the laws of the State of _____, with its principal executive office located in _____ County, California.

3. On_____[*date*], defendant entered into an agreement of reorganization with_____[

name of entity] to merge defendant and that_____[*entity*] in accordance with the Corporations Code.

4. Plaintiff is, and on the date for determination of members of record entitled to vote at the members' meeting called to approve the proposed reorganization described in Paragraph 3 of this complaint was, a member of record of defendant. Plaintiff's interest were not voted in favor of that reorganization.

5. On _____ [*date*], in accordance with the provisions of *Corporations Code Section 17602*, plaintiff made timely written demand on defendant for the purchase from plaintiff of plaintiff's interest and payment to plaintiff in cash of its fair market value. The demand stated the membership interest of defendant held of record by plaintiff that the plaintiff demanded that defendant purchase, and contained a statement, that is $_____, of what plaintiff claimed to be the fair market value of plaintiff's interest as of the day before the first announcement of the terms of the _____ [reorganization *or* merger] alleged in Paragraph 3 of this complaint. A true and correct copy of the demand is attached hereto as Exhibit "A" and made a part hereof.

6. On _____ [*date*], plaintiff submitted a written notice of the amount of plaintiff's interest that plaintiff has demanded that defendant purchase to _____ [defendant at its principal office *or* _____ (*name of defendant's transfer agent*), a transfer agent of defendant, at _____ (*transfer agent's address*)].

7. _____ [*Identify issues, e.g.*, Defendant denies that plaintiff's interest as to which purchase is demanded is a dissenting interest *and/or* defendant and plaintiff are unable to agree on the fair market value of plaintiff's interest as of _____ (*date*), the day before the first announcement of the terms of the _____ (reorganization *or* merger) alleged in Paragraph 3 of this complaint.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. That plaintiff's interest is a dissenting interest;

2. That the court determine, or appoint appraisers to determine, the fair market value of plaintiff's dissenting interest as of the day before the first announcement of the terms of the _____ [reorganization *or* merger] alleged in this complaint;

3. For payment of an amount equal to the fair market value of of plaintiff's dissenting interest;

4. For interest as allowed by law;

5. For costs of suit herein incurred pursuant to *Corporations Code Section 17606*; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 346.110[1].*]

[2] Use of Form

The form in [1], *above*, is a complaint for use in an action by a dissenting member of an LLC to obtain a determination that his or her interest is a dissenting interest. This complaint is for use by a member with a dissenting interest who has already made a written demand on the LLC to purchase the dissenting interest [*see § 346.130[1]* (form of demand)], and the LLC has denied that the member has a dissenting interest. This complaint may also be used to demand a determination of the fair market value of the dissenting interest as of the day before the first announcement of the terms of the proposed reorganization to which plaintiff dissents [*see* [4], *below*].

[3] Required Allegations

This complaint alleges (1) that it is filed pursuant to *Corp. Code § 17605* (Paragraph 1); (2) the capacity of the parties (Paragraphs 2, 4), (3) that defendant entered into an agreement of reorganization (Paragraph 3), (4) that plaintiff demanded the payment for its dissenting interest and submitted its certificate of interest to defendant pursuant to *Corp. Code §§ 17602, 17603* (Paragraphs 5, 6), and (5) that defendant has denied that the interest is a dissenting interest (Paragraph 7) [*Corp. Code § 17605*].

[4] Action for Court-Appointed Appraisal

If, after written demand from a member [*see § 346.130[1]* (form of demand)], an LLC denies that an interest is a dissenting interest, or the LLC and the dissenting member cannot agree on the value of a dissenting interest, either the LLC or the member may bring an action in superior court within six months after the date of the notice of approval of the reorganization to settle the issue [*Corp. Code § 17605*]. The court may appoint an appraiser to determine the fair market value of dissenting interests [*see Corp. Code § 17606*].

For further coverage of reorganizations and dissenting interests, see *§§ 346.16, 346.130*.

[5] Cross References

For coverage of jurisdiction and venue issues related to this complaint, see *§ 346.110[6]*

For coverage of the need to, and effect, of verifying a complaint, see *§ 346.110[7]* and Ch. 26, *Answers*

For additional references, see *§ 346.110[8]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesManagement Duties & LiabilitiesBusiness & Corporate LawLimited Liability CompaniesMembers & Other ConstituentsCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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Chapter 346 LIMITED LIABILITY COMPANIES
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D. Dissenting Interests

30-346 California Forms of Pleading and Practice--Annotated § 346.132

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.132 Order Appointing Appraisers to Determine Value of Dissenting Interest [Corp. Code § 17606]

[1] FORM Order Appointing Appraisers to Determine Value of Dissenting Interest [Corp. Code § 17606]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], a California	)	ORDER
Limited Liability Company, and	)	
_____ [*name(s)*],	)	
Defendants.	)	

_____

IT IS HEREBY ORDERED that _____ [*names of appraisers*] are appointed as appraiser(s) in this action. These appraisers are directed to determine the fair market value, pursuant to *Corporations Code Section 17606*, of the interest in _____ [*name of limited liability company*], held of record by _____ [*name of plaintiff*], who is a member of that limited liability company, as of _____ [*date*]. These appraisers are directed to make and file a report in the Office of the Clerk of this Court within _____ [*number*] days from the date of this order.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is an order for use by the court to appoint one or more impartial appraisers for the purpose of determining the fair market value of plaintiff's LLC member's dissenting interest [*Corp. Code §§ 17605, 17606*; *see* [3], *below*].

[3] When Appraiser Is Appointed

If an LLC proposing a reorganization and a member of the LLC holding a dissenting interest cannot agree on the fair market value of the dissenting interest, an action may be brought in superior court by either party to determine the fair market value of the interest [*Corp. Code § 17605(a)*]. The court may then appoint one or more appraisers to determine the fair market value of the dissenting interest [*Corp. Code § 17606(a)*]. For further coverage of when this order is used, see *§§ 346.16, 346.131[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesManagement Duties & LiabilitiesBusiness & Corporate LawLimited Liability CompaniesMembers & Other Constituents

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D. Dissenting Interests

30-346 California Forms of Pleading and Practice--Annotated § 346.133

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.133 Report of Appraisers [Corp. Code § 17606]

[1] FORM Report of Appraisers [Corp. Code § 17606]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], a California	)	REPORT OF APPRAISERS
Limited Liability Company, and	)	
_____ [*name(s)*],	)	
Defendants.	)	

_____

The undersigned were duly appointed as appraisers by the court in this action to determine the fair market value of the membership interest of the plaintiff in _____ [*name*], a limited liability company, as of _____ [*date*]. The undersigned have determined, in accordance with *Corporations Code Section 17606*, that the fair market value of that interest as of that date is $_____ per share. This determination excludes any appreciation or depreciation in consequence of the reorganization of the limited liability company [and has been adjusted for _____ (*specify any interest split, reverse interest split, or interest dividend that became effective after the first announcement of the reorganization*)].
Dated: _____.

_____ [*signature(s)*]

[2] Use of Form

The form in [1], *above*, is a report to be presented to the court by the appraisers, or a majority of them, who were appointed by the court to determine the fair market value of an LLC member's dissenting interest on reorganization of the LLC [*Corp. Code § 17606*].

[3] Submission of Report

If an LLC proposing a reorganization and a member of the LLC holding a dissenting interest cannot agree on the fair market value of the dissenting interest, an action may be brought in superior court by either party to determine the fair market value of the interest [*Corp. Code § 17605(a)*].

The court may then appoint one or more appraisers to determine the fair market value of the dissenting interest. At a time fixed by the court, the appraiser, or a majority of them, must make and file a report of the value with the clerk of the court. On the motion of any party [*see § 346.134[1]* (form for notice of motion)], the report must be submitted to the court along with any additional relevant evidence. If the court finds the report reasonable, it may confirm it [*Corp. Code § 17606(a)*].

If a majority of the appraisers fail to make and file a report within 30 days from the date of their appointment (or other specified time), or the report is not confirmed by the court, the court must determine the fair market value of the outstanding interests of the LLC [*Corp. Code § 17606(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesManagement Duties & LiabilitiesBusiness & Corporate LawLimited Liability CompaniesMembers & Other Constituents

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30-346 California Forms of Pleading and Practice--Annotated § 346.134

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.134 Notice of Motion for Confirmation of Report by Appraisers [Corp. Code § 17606(a)]

[1] FORM Notice of Motion for Confirmation of Report by Appraisers [Corp. Code § 17606(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MOTION AND NOTICE OF MOTION TO CON-
vs.	)	FIRM REPORT OF APPRAISERS
_____ [*name*],	)	Date: _____
a California Limited Liability Company, and	)	Time: _____
_____ [*name(s)*],	)	Location: _____
Defendants.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____[*name of limited liability company*] and to _____[*name*], its attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], plaintiff will, and hereby does, move for an order under *Corporations Code Section 17606(a)* confirming the report by the appraiser(s) appointed

in this matter that was filed on _____ [*date*], and for judgment in accordance that report. The motion will be made on the ground that the report is reasonable.

The motion will be based on this notice of motion, on the declaration of _____ [*name*], the memorandum served and filed with this notice, on the report by the appraisers filed with the clerk of this court, a copy of which accompanies this notice, on the papers and records on file, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The form in [1], *above*, is a notice of motion for use in applying for confirmation by the court of an appraiser's report determining the fair market value of a plaintiff LLC member's dissenting interest [*see Corp. Code § 17606(a)*; *see also § 346.133[1]* (form for report)]. It states when, and the grounds on which, the motion will be made and the papers on which it is based [*see Code Civ. Proc. § 1010*].

[3] Submission of Report on Party's Motion

After the appraisers have filed their report in the office of the clerk of the court, the report is submitted to the court on the motion of any party. The report will be considered on any evidence that the court considers relevant. If the court finds the report reasonable, the court may confirm it [*Corp. Code § 17606(a)*]. If the court does not confirm the report, the court must determine the fair market value of the dissenting shares [*Corp. Code § 17606(b)*].

PRACTICE TIP:

Complying With Local Rules. Many courts have local rules concerning the filing of motions, including rules concerning the advance reservation of motion dates, the days on which motions are heard, the departments in which motions are heard, and whether motions are to be filed with the court clerk or directly with the department that will hear the motion. Some courts also allow filing by fax with the payment of the appropriate fee. The attorney should always consult the local rules of court.

[4] Requirement to Include Supporting Memorandum

This notice of motion must be accompanied by a supporting memorandum [*Cal. Rules of Ct., Rules 3.1103(a), 3.1113*]. See Ch. 417, *Points and Authorities* , for a discussion of the correct forms. A copy of any paper on which the motion is to be based must also accompany the notice if such paper has not previously been served on the party to be notified and was not filed by him or her [*Code Civ. Proc. § 1010*]. The notice of motion may also be, and most often is, accompanied by a declaration establishing the facts on which the motion is based [*see Code Civ. Proc. §§ 2003, 2009, 2015.5*]. Note that if this is a law and motion proceeding within the meaning of *Cal. Rules of Ct., Rule 3.1103(a)*, the format requirements of *Cal. Rules of Ct., Rule 3.110* will apply to the notice of motion.

Legal Topics:

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

Business & Corporate LawLimited Liability CompaniesGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesManagement Duties & LiabilitiesBusiness & Corporate LawLimited Liability CompaniesMembers & Other ConstituentsCivil ProcedurePleading & PracticeMotion PracticeContent & Form

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30-346 California Forms of Pleading and Practice--Annotated § 346.135

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.135 Order Confirming Report of Appraisers [Corp. Code § 17606]

[1] FORM Order Confirming Report of Appraisers [Corp. Code § 17606]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
a California Limited Liability Company, and	)	Location: _____
_____ [*name(s)*],	)	Judge: _____
Defendants.	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The report of _____ [*names of appraisers*], the appraisers duly appointed by the court to determine the fair market value of the plaintiff's interest in _____ [*name of limited liability company*], a limited liability company, as of _____ [*date*], was duly filed on _____ [*date*]. This report determined the fair market value of that interest to be $_____. On motion of _____ [plaintiff *or* defendant], the report was submitted to the court, and the court has taken the report on submission. Having considered all relevant evidence bearing on the report, and being fully advised, the court finds the award of the appraisers to be reasonable.

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that the report of the appraisers in the above-entitled action be and the same is hereby confirmed.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is an order for use in confirming the report of the appraisers of the fair market value of a dissenting interest in an LLC that has been submitted to the court on the motion of any party [*Corp. Code § 17606(a)*; *see § 346.134[1]* (form for notice of motion)].

[3] Order Confirming Report

After the appraisers have filed their report in the office of the clerk of the court, the report is submitted to the court on the motion of any party. The report will be considered on any evidence that the court considers relevant. If the court finds the report reasonable, the court may confirm it [*Corp. Code § 17606(a)*].

If a majority of the appraisers fail to make and file a report within 30 days from the date of their appointment (or other specified time), or the report is not confirmed by the court, the court must determine the fair market value of the outstanding interests of the LLC [*Corp. Code § 17606(b)*].

For a form for a judgment to use after confirmation of the appraiser's report, see *§ 346.136[1]*.

[4] Whether Motion Is Law and Motion Proceeding

It is not clear whether the motion relating to this order [*see § 346.134[1]* (form for notice of motion)] is a law and motion proceeding within the meaning of *Cal. Rules of Ct., Rule 3.1103(a)(2)*. If it is, the first page of each paper must specify the following information immediately below the case number [*Cal. Rules of Ct., Rule 3.1110(b)*]:

- The date, time, and location, if ascertainable, of any scheduled hearing and the name of the hearing judge, if ascertainable.
- The nature or title of any attached document (other than an exhibit).
- The date of filing of the action.
- The trial date, if set.

Both this form and the notice of motion in *§ 346.134[1]* are drafted on the assumption that the above-listed requirements do apply, and therefore include space for all the information noted above. In addition, documents bound together must be consecutively paginated [*Cal. Rules of Ct., Rule 3.1110(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesGeneral OverviewBusiness & Corporate LawLimited Liability

CompaniesManagement Duties & LiabilitiesBusiness & Corporate LawLimited Liability CompaniesMembers & Other ConstituentsCivil ProcedurePleading & PracticeMotion PracticeContent & Form

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Volume 30: Libel and Slander thru Limited Liability Companies-Chs. 340-347
Chapter 346 LIMITED LIABILITY COMPANIES
PART IV. FORMS
D. Dissenting Interests

30-346 California Forms of Pleading and Practice--Annotated § 346.136

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.136 Judgment Determining Fair Market Value of Dissenting Interest [Corp. Code § 17606]

[1] FORM Judgment Determining Fair Market Value of Dissenting Interest [Corp. Code § 17606]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	
_____ [*name*],	)	NO. _____
a California Limited Liability Company, and	)	JUDGMENT
_____ [*name(s)*],	)	
Defendants.	)	
	)	
	)	

The above-entitled action, having come on for trial on _____ [*date*], on the complaint of plaintiff and the answer of defendant, _____ [*name of limited liability company*], and the action having been tried before the court, plaintiff being represented by counsel, _____ [*name*], and defendant by counsel, _____ [*name*], and evidence, both oral and documentary, having been introduced and certain stipulations of facts having been made, and the court having considered all evidence and facts and the arguments of counsel and being fully advised in the premises, and having directed that judgment be entered in accordance therewith;

NOW, THEREFORE, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED:

1. Plaintiff's membership interest in the defendant is a dissenting interest.

2. Plaintiff have judgment entered against defendant in the sum of $ _____, representing the fair market value on _____ [*date*] of plaintiff's interest in _____ [*name of limited liability company*], with interest on that sum at the rate of 10 percent per annum from the date that judgment is entered in this action; provided, however, that the judgment will be payable only on the endorsement and delivery to defendant of the certificates of interest of the plaintiff, if any.

[*EITHER*]

3. Plaintiff and defendant shall bear their respective costs of suit except that each party shall pay one half of the reasonable compensation of the appraisers appointed in this action, each in the amount of $ _____.

[*OR, if value awarded plaintiff exceeds limited liability company's original offer*]

3. Defendant shall pay plaintiff _____ [his *or* her] costs of suit incurred in this action in the amount of $_____, including the reasonable compensation of the appraisers appointed in this action in the amount of $_____.

[*OR, if value awarded plaintiff exceeds 125 percent of limited liability company's original offer*]

3. Defendant shall pay plaintiff _____ [his *or* her] costs of suit incurred in this action in the amount of $ _____, including the reasonable compensation of the appraisers appointed in this action in the amount of $_____, plaintiff's attorney's fees in the amount of $_____, and the fees of plaintiff's expert witnesses in the amount of $_____.

[*CONTINUE*]

Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is a judgment for use in determining (1) that a plaintiff LLC member's membership interest is a dissenting interest, (2) the fair market value of dissenting interest, reflecting the court's determination of the amount, whether or not made with the aid of appraisers, and (3) how the costs of the suit will be apportioned.

Three optional forms of Paragraph 3 are provided, depending on how cost of the suit will be apportioned [*see Corp. Code § 17606(e)*; *see also § 346.136[4]*].

[3] Rendering Judgment Against Limited Liability Company for Payment of Dissenting Interest

Subject to restrictions relating to the Uniform Fraudulent Transfer Transfer Act [*see Corp. Code § 17607*], judgment

must be rendered against an LLC for payment of an amount equal to the fair market value, as determined by the court, of each dissenting interest that a dissenting member is entitled to require the LLC to purchase, with interest at the legal rate for judgments from the date of consummation of the reorganization [*Corp. Code § 17606(c)*].

The judgment is payable forthwith, provided that the member endorse and deliver to the LLC the transferable certificates of interest, if any, evidencing the membership interest [*Corp. Code § 17606(d)*].

[4] Apportioning Costs of Action

The costs of the action, including compensation of appraisers, to be fixed by the court, will be assessed or apportioned as the court deems equitable. However, if the appraisal of the dissenting interest exceeds the price offered by the LLC, the LLC must pay the costs, including, in the court's discretion, if the value awarded is more than 125 percent of the price offered by the LLC [*see Corp. Code § 17602(a)*], attorney's fees and fees of expert witnesses [*Corp. Code § 17606(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesManagement Duties & LiabilitiesBusiness & Corporate LawLimited Liability CompaniesMembers & Other Constituents

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Chapter 346 LIMITED LIABILITY COMPANIES
PART IV. FORMS
D. Dissenting Interests

30-346 California Forms of Pleading and Practice--Annotated §§ 346.137-346.149

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

[Reserved]

§§ 346.137[Reserved]

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Chapter 346 LIMITED LIABILITY COMPANIES
PART IV. FORMS
E. Dissolution

30-346 California Forms of Pleading and Practice--Annotated § 346.150

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.150 Complaint for Involuntary Dissolution [Corp. Code §§ 17350(c), 17351(a)]

[1] FORM Complaint for Involuntary Dissolution [Corp. Code §§ 17350(c), 17351(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR INVOLUNTARY DISSOLU-
a California Limited Liability Company, and	)	TION OF LIMITED LIABILITY COMPANY
_____ [*name(s) of member(s)*],	)	[Amount demanded _____ (exceeds
Defendants.	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff(s) allege(s):

1. Defendant is a limited liability company duly organized and existing under the laws of the State of California, with its principal office located in _____ County, California.

2. Plaintiff is a member of the defendant limited liability company.

[*EITHER*]

3. It is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.

[*AND/OR*]

3. Dissolution is reasonably necessary for the protection of the rights or interests of the complaining members.

[*AND/OR*]

3. The business of the limited liability company has been abandoned.

[*AND/OR*]

3. The management of the limited liability company is deadlocked or subject to internal dissention.

[*AND/OR*]

3. Those in control of the company have been guilty of, or have knowingly countenanced persistent and pervasive fraud, mismanagement, or abuse of authority.

[*CONTINUE*]

WHEREFORE, plaintiff(s) pray(s) judgment as follows:

1. That the court decree a winding up and dissolution of defendant limited liability company;

2. That the court entertain such proceedings as may be necessary or proper for the involuntary winding up or dissolution of defendant limited liability company and, in that regard, make such orders for winding up and dissolution of defendant limited liability company as justice and equity require;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name and title*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 346.110[1].*]

[2] Use of Form

The form in [1], *above*, is a complaint for use by one or more members of an LLC to seek judicial dissolution of the LLC [*Corp. Code §§ 17350(c), 17351(a)*; *see § 346.150[4]*].

[3] Required Allegations

This complaint alleges the following:

- The capacity of the parties (Paragraphs 1, 2), and
- The grounds for the judicial dissolution (Paragraph 3) [*Corp. Code § 17351(a)*].

[4] Grounds for Judicial Dissolution

An LLC may be judicially dissolved pursuant to an action filed by a manager or member when any of the following occurs [*Corp. Code § 17351(a)*; *see Corp. Code § 17350(c)*]:

- It is not reasonably practicable to carry on the LLC's business in conformity with its articles of organization or operating agreement.
- Dissolution is reasonably necessary for the protection of the rights or interests of the complaining members.
- The LLC's business has been abandoned.
- The LLC's management is deadlocked or subject to internal dissention.
- Those in control of the LLC have been guilty of, or have knowingly countenanced, persistent and pervasive fraud, mismanagement, or abuse of authority.

Noninitiating members may avoid dissolution by purchasing the membership interests of the initiating members at their fair market value [*Corp. Code § 17351(b)(1)*]. The Act specifies procedures for such purchase [*see Corp. Code § 17351(b)(2)-(5)*], including a special proceeding in which the court will fix the value of the interests to be transferred, if necessary because of the parties' inability to agree on a price. The court's decree resulting from that special proceeding is separately appealable [*Corp. Code § 17351(b)(3)*; *Dickson v. Rehmke (2008) 164 Cal. App. 4th 469, 476-477, 78 Cal. Rptr. 3d 874* (decree was issued in May, and notice of appeal filed in August was filed too late even though filed within period for appeal from court's judgment in dissolution action)].

For further coverage of dissolution, winding up, and avoiding dissolution, see *§ 346.17*.

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the first paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*]. The statement regarding the demand must use the following language: "Amount demanded

_____ [exceeds *or* does not exceed] $10,000" [*see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[6] Cross References

For coverage of jurisdiction and venue issues related to this complaint, see *§ 346.110[6]*

For coverage of the need to, and effect, of verifying a complaint, see *§ 346.110[7]* and Ch. 26, *Answers*

For additional references, see *§ 346.110[8]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesDissolution & Winding UpCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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Chapter 346 LIMITED LIABILITY COMPANIES
PART IV. FORMS
E. Dissolution

30-346 California Forms of Pleading and Practice--Annotated §§ 346.151-346.159

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

[Reserved]

§§ 346.151[Reserved]

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Chapter 346 LIMITED LIABILITY COMPANIES
PART IV. FORMS
F. Other Complaints

30-346 California Forms of Pleading and Practice--Annotated § 346.160

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.160 Complaint for Damages by Limited Liability Company Against Manager for Breach of Fiduciary Duty [Corp. Code § 17153]

[1] FORM Complaint for Damages by Limited Liability Company Against Manager for Breach of Fiduciary Duty [Corp. Code § 17153]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
a California Limited Liability Company,	)	NO. _____
Plaintiff,	)	COMPLAINT FOR _____ [*specify, e.g.,* DAMAGES]
vs.	)	
_____ [*name(s) of manager(s)*],	)	(Breach of Fiduciary Duty)
Defendant(s).	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff _____ [*name of limited liability company*] is, and at all times herein mentioned was, a limited liability company organized and existing under the laws of the State of California, with its principal place of business at _____ [*address*], _____ [*city*], California.

2. Defendant is, and at all times herein mentioned was, a resident of _____ County, California [*or*

allege other capacity and residence of plaintiff].

3. Defendant _____ [*name of manager*] is, and at all times herein mentioned was, _____ [*specify defendant's position with the limited liability company, e.g.*, one of the managers of the plaintiff limited liability company].

_____. [*In separately numbered paragraphs, state capacity in limited liability company of other individual defendants*].

4. Defendant(s) _____ [*name(s) of manager(s)*)] violated _____ [his *or* her *or* their] fiduciary _____ [duty *or* duties] to the plaintiff limited liability company in that _____ [*set forth facts showing a violation of managers' fiduciary duties to the limited liability company*].

5. As a direct and proximate result of defendant's(s') violation of his/her/their fiduciary duty(ies) as set forth herein, plaintiff has been damaged in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendants and each of them as follows:

1. For _____ [*specify, e.g.*, damages in the sum of $_____];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 346.110[1].*]

[2] Use of Form

The form in [1], *above*, is a complaint that may be used by an LLC to seek damages from a manager of the LLC for breach of his or her fiduciary duties [*see Corp. Code § 17153*].

[3] Required Allegations

This complaint alleges:

- The capacity of the parties (Paragraphs 1-3).

- That the defendants breached their fiduciary duty to the LLC (Paragraph 4) [*Corp. Code § 17153*].

- That the LLC was damaged as a result of that breach (Paragraph 5).

[4] Manager's Fiduciary Duties

A manager owes a fiduciary duty to an LLC and its members to the same extent as a partner would owe to a partnership and to the partners of the partnership [*Corp. Code § 17153*]. A partner's standard of conduct owed to the partnership and other partners is to act in the highest good faith to the partners, and a partner may not seek to obtain an advantage in the partnership affairs by the slightest misconduct, misrepresentation, concealment, threat, or adverse pressure of any kind [*Leff v. Gunter (1983) 33 Cal. 3d 508, 514, 189 Cal. Rptr. 377, 658 P.2d 740]* .

Much as partners' duties may be altered in a partnership agreement, managers' fiduciary duties to the LLC and its members may only be modified in a written operating agreement with the informed consent of the members [*Corp. Code § 17005(d)*].

[5] Who Is Affected by Fiduciary Duty

An LLC may be managed by all its members or by one or more managers [*Corp. Code §§ 17150, 17151*]. Unless the articles of organization state that an LLC will be managed by one or more managers [*see Corp. Code § 17151(b)*], the business and affairs of the LLC are to be managed by its members (subject to any restrictions in the articles or operating agreement) [*Corp. Code § 17150*]. If the articles do not contain this statement, "manager" refers to each member of the LLC [*Corp. Code § 17001(w)*]. This means that if the LLC's articles do not specifically state that the LLC will be managed by one or more managers, the fiduciary duty outlined in *§ 346.160[4]* applies to each member of the LLC.

[6] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the first paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[7] Cross References

For coverage of jurisdiction and venue issues related to this complaint, see *§ 346.110[6]*

For coverage of the need to, and effect, of verifying a complaint, see *§ 346.110[7]* and Ch. 26, *Answers*

For additional references, see *§ 346.110[8]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesManagement Duties & LiabilitiesBusiness & Corporate LawLimited Liability CompaniesMembers & Other ConstituentsCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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Chapter 346 LIMITED LIABILITY COMPANIES
PART IV. FORMS
F. Other Complaints

30-346 California Forms of Pleading and Practice--Annotated § 346.161

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.161 Complaint for Damages by Limited Liability Company Against Member for Breach of Agreement to Contribute Cash [Corp. Code § 17201]

[1] FORM Complaint for Damages by Limited Liability Company Against Member for Breach of Agreement to Contribute Cash [Corp. Code § 17201]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*], a California Limited Liability Company, Plaintiff, vs. _____ [*name(s) of member(s)*], Defendant(s).	)))))))	NO. _____ COMPLAINT FOR _____ [*specify, e.g.,* DAMAGES] (Failure to Make Contribution) [Amount demanded _____ (exceeds *or* does not exceed) $10,000] [LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff _____ [*name of limited liability company*] is, and at all times herein mentioned was, a limited liability company organized and existing under the laws of the State of California, with its principal place of business at _____ [*address*], _____ [*city*], California.

2. Defendant _____ [*name of member*] is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence of defendant*].

3. Defendant is, and at all times herein mentioned was, _____ [*specify position with the limited liability company, e.g.*, a member of the plaintiff limited liability company].

_____. [*In separately numbered paragraphs, state capacity in limited liability company of other individual defendants*].

4. Defendant(s) _____ [*name(s) of member(s)*] and the plaintiff entered into a written operating agreement, a copy of which is attached hereto as Exhibit "A" and made a part hereof, whereby defendant(s) agreed to make a capital contribution to the plaintiff in the amount of $_____ eaCh. Defendant breached this agreement with the plaintiff limited liability company in that _____ [*set forth facts showing breach of the agreement with the limited liability company*].

5. Plaintiff has performed each and every obligation required of it by the operating agreement described herein, except those obligations that have been excused by defendant's breaCh.

6. As a direct and proximate result of defendant's(s') breach of the operating agreement as set forth herein, plaintiff has been damaged in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendants and each of them as follows:

1. For _____ [*specify, e.g.*, damages in the sum of $_____];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 346.110[1].*]

[2] Use of Form

The form in [1], *above*, is a complaint that may be used by an LLC to seek damages from a member for breach of his or her obligation, contained in the operating agreement, to make a contribution to the LLC [*Corp. Code § 17201*; *see* [4], *below*].

This form may be modified to seek damages for a failure to otherwise comply with a member's obligations to the LLC contained in the operating agreement.

[3] Required Allegations

This complaint alleges (1) the capacity of the parties (Paragraphs 1-3), (2) that the parties entered into a written operating agreement and that defendants breached their obligation to contribute to the LLC (Paragraph 4) [*Corp. Code § 17201*], (3) that plaintiff has performed its obligations or that they were excused by defendant's breach (Paragraph 5), and (4) that the LLC was damaged as a result of the breach (Paragraph 6).

[4] Requirement to Make Contribution

The articles of organization or operating agreement of an LLC may provide for capital contributions of members, which may be in money, property, or services, or an obligation to contribute any of those things to the LLC [*Corp. Code § 17200(a)*]. The Act does not require that members make capital contributions, but some member capital is likely to be needed by the business and adequate capitalization may be necessary for members to avoid shareholder-like liability [*see § 346.14[14][b][i]*].

[5] Consequences of Failure to Make Contribution

A member who does not make an agreed contribution of property or services may, at the LLC's option, be required to contribute an amount of cash equal to the fair market value (or written agreed value, if any) of the contribution not made. This option is in addition to other rights, including specific performance, that the LLC may have under the articles, the operating agreement, or applicable law [*Corp. Code § 17201(a)(2)*].

The operating agreement may provide that the interest of a member who fails to make any agreed contribution or other payment shall be subject to specified remedies or consequences, including reduction of economic rights. Such a provision is enforceable in accordance with its terms unless the member seeking to invalidate it establishes that it was unreasonable under the circumstances at the time the agreement was made [*Corp. Code § 17201(a)(3)*].

Subject to the articles or operating agreement, a member is not excused from an agreement to make a contribution to the LLC because of death, disability, dissolution, or other reason [*Corp. Code § 17201(a)(1)*].

For further coverage, see *§ 346.14[7]*.

[6] Cross References

For coverage of jurisdiction and venue issues related to this complaint, see *§ 346.110[6]*

For coverage of the need to, and effect, of verifying a complaint, see *§ 346.110[7]* and Ch. 26, *Answers*

For additional references, see *§ 346.110[8]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability CompaniesGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesFormationBusiness & Corporate LawLimited Liability CompaniesMembers & Other ConstituentsCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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30-346 California Forms of Pleading and Practice--Annotated § 346.162

AUTHOR: Hon. Walter L. Blackwell III The Honorable Walter L. Blackwell III is a superior court judge in Barstow, California.

§ 346.162 Complaint for Money--Indemnification for Defense Expenses [Corp. Code § 17155]

[1] FORM Complaint for Money--Indemnification for Defense Expenses [Corp. Code § 17155]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR _____ [*specify, e.g.,* DAMAGES]
_____ [*name*], a Limited Liability Company	)	(Indemnification for Defense Expenses)
Defendants.	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a limited liability company organized and existing under the laws of the State of _____ [*e.g.*, California].

2. Plaintiff is an agent of defendant in that _____ [*specify*].

3. By reason of being an agent of the limited liability company, plaintiff was made a defendant in the

_____ [action *or* proceeding] in this court, No. _____, entitled _____ [*style of case*].

4. Plaintiff successfully defended that _____ [action *or* proceeding] on the merits.

5. Plaintiff is entitled to indemnity pursuant to the terms of the _____ [articles of organization *or* written operating agreement] of defendant, a copy of which is attached hereto as Exhibit "A" and made a part hereof.

6. Plaintiff has performed all obligations required of _____ [him *or* her] by the _____ [articles of organization *or* written operating agreement] attached as Exhibit "A" except those that have been excused by defendant's breach of Exhibit "A."

7. In connection with the defense of that _____ [action *or* proceeding], plaintiff incurred and became obligated to pay, and has paid [some of], the following expenses: _____ [*list, identifying items and stating amount of each item*].

WHEREFORE, plaintiff prays for judgment as follows:

1. That plaintiff have and recover from _____ [*name of limited liability company*] the sum of $_____ as indemnification for defense expenses pursuant to *Corporations Code Section 17155*;

2. For costs of suit herein incurred, including reasonable attorney's fees in the amount of $_____; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 346.110[1].*]

[2] Use of Form

The form in [1], *above*, is a complaint is for use by an agent of an LLC claiming that he or she is entitled to indemnification from the LLC for defense expenses incurred in a civil action or proceeding in which he or she was sued because of being an agent of the LLC, where he or she successfully defended the action or proceeding on the merits [*see Corp. Code § 17155(a)*; *see also* [4], *below*].

PRACTICE TIP:

Basis of Claim. Although the indemnification sought in this complaint is authorized by statute [*Corp. Code § 17155(a)*], this cause of action should be viewed as a cause of action for breach of contract; that is, breach of the indemnification provision in the articles of organization or written operating agreement.

[3] Required Allegations

This complaint alleges (1) the capacity of the parties (Paragraphs 1, 2), (2) that plaintiff as an agent of the LLC

successfully defended an action against the LLC (Paragraphs 3, 4), (3) that plaintiff is entitled to indemnity under the LLC's articles or operating agreement (Paragraph 5) [*Corp. Code § 17155*], (4) that plaintiff performed all its obligations to the LLC and is obligated to pay expenses based on its defense (Paragraphs 6, 7).

[4] Agent's Right to Indemnification

Except for a breach of fiduciary duty [*see Corp. Code § 17153*], the articles of organization or written operating agreement of an LLC may provide for indemnification of any person, including a manager, member, officer, employee, or agent of the LLC, against judgments, settlements, or other liabilities incurred in that capacity [*Corp. Code § 17155(a)*].

[5] Cross References

For coverage of jurisdiction and venue issues related to this complaint, see *§ 346.110[6]*

For coverage of the need to, and effect, of verifying a complaint, see *§ 346.110[7]* and Ch. 26, *Answers*

For additional references, see *§ 346.110[8]*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesIndemnityBusiness & Corporate LawLimited Liability CompaniesGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesManagement Duties & LiabilitiesBusiness & Corporate LawLimited Liability CompaniesMembers & Other ConstituentsCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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Chapter 347 [RESERVED]

30-347 California Forms of Pleading and Practice--Annotated Chapter 347

[RESERVED]

Chapter 347[RESERVED]

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Volume 31: Lis Pendens thru Mandate and Prohibition-Chs. 348-358
Chapter 348 LIS PENDENS

31-348 California Forms of Pleading and Practice--Annotated 348.syn

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§ 348.02 Cross References

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§ 348.17 Service of Notice of Lis Pendens

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[3] Required Information

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[6] Acknowledgement

[7] Service on Adverse Parties

[8] Federal Statutes

[9] State Statutes

[10] Cross References

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[1] FORM

[2] Use of Form

[3] Moving Party

[4] State Statutes

[5] Decisions

[6] Cross References

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[1] FORM

[2] Use of Form

[3] Provision of Undertaking

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[8] Decisions

[9] Cross References

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[1] FORM

[2] Use of Form

[3] Moving Party

[4] Giving of Undertaking

[5] Attorney's Fees and Costs

[6] State Statutes

§ 348.64 Proceedings to Require Claimant to Give Undertaking to Moving Party [Code Civ. Proc. § 405.34]--Order

[1] FORM

[2] Use of Form

[3] Provision of Undertaking

[4] Attorney's Fees and Costs

[5] Cross References

§ 348.65 Notice of Motion to Exonerate or Modify Undertaking [Code Civ. Proc. § 405.37]

[1] FORM

[2] Use of Form

[3] Showing for and Condition on Order

[4] Cross References

§ 348.66 Notice of Withdrawal of Lis Pendens [Code Civ. Proc. § 405.50]

[1] FORM

[2] Use of Form

[3] Required Contents

[4] Effect of Withdrawal

[5] Cross References

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FOOTNOTES:
(n79)Footnote *.
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Chapter 348 LIS PENDENS
PART I. SCOPE

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§ 348.01 Scope of Chapter

This chapter discusses the statutory requirements for giving a notice of a pending action that concerns real property, commonly referred to as a notice of lis pendens. It also discusses the procedure to be followed in expunging notices of lis pendens.

The chapter contains:

- A general form of notice of the pendency of an action [*see § 348.60*].

- Notice of motion and supporting declaration to expunge a notice of lis pendens from the record and related order [*see §§ 348.61, 348.62*].

- Notice of motion and supporting declaration to require the claimant to provide an undertaking and related order [*see §§ 348.63, 348.64*].

- Notice of motion to exonerate or modify an undertaking [*see § 348.65*].

- Notice of withdrawal of lis pendens [*see § 348.66*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNoticesCivil ProcedureRemediesLis PendensTerminationsReal Property LawPriorities & RecordingLis Pendens

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31-348 California Forms of Pleading and Practice--Annotated § 348.02

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§ 348.02 Cross References

For a notice of lis pendens for use in eminent domain actions, see Ch. 247, *Eminent Domain* .

For intervention by a nonparty, see Ch. 395, *Parties* .

For a notice of lis pendens for use in partition actions, see Ch. 397, *Partition* .

For detailed coverage of lis pendens, including strategic points, checklists, and additional forms, see Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 21, *Lis Pendens* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNoticesReal Property LawPriorities & RecordingLis Pendens

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PART I. SCOPE

31-348 California Forms of Pleading and Practice--Annotated §§ 348.03-348.09

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[Reserved]

§§ 348.03[Reserved]

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PART II. LEGAL BACKGROUND

31-348 California Forms of Pleading and Practice--Annotated § 348.10

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§ 348.10 Governing Statutes

The general requirements for the filing and recording of a notice of lis pendens and for expunging such a notice are contained in *Code Civ. Proc. §§ 405-405.61*. These provisions became operative on January 1, 1993. They replaced, and significantly revised the requirements set forth in, former *Code Civ. Proc. §§ 409-409.9*. Cases construing the former provisions are cited as persuasive authority in the following discussion to the extent that they state principles or procedures that appear to be consistent with, and not abrogated by, *Code Civ. Proc. §§ 405-405.61*.

The Research Guide to this chapter should be consulted for other lis pendens statutes covering specific actions affecting interests in real property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensNoticesReal Property LawPriorities & RecordingLis Pendens

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31-348 California Forms of Pleading and Practice--Annotated § 348.11

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§ 348.11 Purpose of Lis Pendens: Provisional Protection of Real Property Interest

When an action involves a claim affecting real property, a party to that action may, by recording a notice of lis pendens, preserve his or her rights or interests, if any, in the real property pending the final determination of the action. The notice of lis pendens provides constructive notice that the claim affecting that property is pending. Any taker of a subsequently created interest in that property thus takes that interest subject to any judgment rendered in the pending action [*see La Paglia v. Superior Court (1989) 215 Cal. App. 3d 1322, 1326, 264 Cal. Rptr. 63* ; *see also Code Civ. Proc. § 1908(a)(2)*; *Albertson v. Raboff (1956) 46 Cal. 2d 375, 379, 295 P.2d 405* ; *Brandolino v. Lindsay (1969) 269 Cal. App. 2d 319, 325, 75 Cal. Rptr. 56* and further discussion in *§ 348.20*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNoticesReal Property LawPriorities & RecordingLis Pendens

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31-348 California Forms of Pleading and Practice--Annotated § 348.12

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§ 348.12 Application of Lis Pendens to Other Actions

In addition to actions in California state courts, the lis pendens statute applies to actions pending in any United States District Court [*Code Civ. Proc. § 405.5*].

A public agency that brings an action to declare a building uninhabitable must record a lis pendens notice [*Code Civ. Proc. § 405.7*]. Nevertheless, the statute does not apply to actions by a public agency in eminent domain [*Code Civ. Proc. § 405.6*; *see Code Civ. Proc. § 1230.010 et seq.*]. In those actions, the issuance, service, and recordation of a notice of pendency of action are governed by *Code Civ. Proc. § 1250.150* [*Code Civ. Proc. § 405.6*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNoticesReal Property LawPriorities & RecordingLis Pendens

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31-348 California Forms of Pleading and Practice--Annotated § 348.13

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§ 348.13 Availability of Other Provisional Remedies

Lis pendens may be sought in addition to other provisional remedies such as attachment or preliminary injunctive relief, or any other relief available in connection with a real property claim [*see Code Civ. Proc. § 405.8*; for a definition of "real property claim," see *§ 348.14*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesProvisional RemediesGeneral OverviewReal Property LawPriorities & RecordingLis Pendens

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31-348 California Forms of Pleading and Practice--Annotated § 348.14

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§ 348.14 Persons Entitled to Record Lis Pendens

A party to an action who asserts a real property claim (see definition, *below*) may record a notice of pendency of action [*Code Civ. Proc. § 405.20*; *see Code Civ. Proc. § 405.2* ("notice of pendency of action" or "notice" means a notice of the pendency of an action in which a real property claim is alleged)]. Such a party who records a notice of lis pendens is called a "claimant" [*Code Civ. Proc. § 405.1*]. A "real property claim" is a cause or causes of action in a pleading that would, if meritorious, affect either of the following [*Code Civ. Proc. § 405.4*]:

- Title to, or the right to possession of, specific real property; or

- The use of an easement identified in the pleading, other than an easement obtained pursuant to statute by any regulated public utility.

ILLUSTRATION:

Trustee's Sale. A creditor, whose debt is secured by a deed of trust on real property, initiates a private trustee sale of the property pursuant to the terms of the deed of trust. Is it proper for the creditor or trustee to record a notice of lis pendens? No. This nonjudicial proceeding to foreclose under the deed of trust is not the type of judicial action to which the lis pendens procedures pertain [*see Carpenter v. Smallpage (1934) 220 Cal. 129, 132-133, 29 P.2d 841* (decided under prior law)].

One court has held that the California lis pendens statutes do not authorize the recording in California of a notice of litigation that is pending in the courts of another state [*The Formula Inc. v. Superior Court (2008) 168 Cal. App. 4th 1455, 1465, 86 Cal. Rptr. 3d 341*]. The court concluded that nothing in the text or history of the initial enactment of the lis pendens statutes indicates a specific legislative purpose to include litigation in the courts of other states within their reach [*The Formula Inc. v. Superior Court (2008) 168 Cal. App. 4th 1455, 1462, 86 Cal. Rptr. 3d 341*]. The court also declined to construe the statutes as authorizing the recording of such notice. Amendments to the original lis pendens statutes created a balance in which the interests of third party litigant claimants, property owners, and prospective purchasers are protected by a complicated procedural scheme. This balance is an integral part of the policy underlying the lis pendens statutes. If lis pendens notices of litigation in the courts of other states were authorized, the California statutory balance of the interests of third party litigant claimants, property owners, and prospective purchasers would depend on the willingness of the courts of the other 49 states to adopt the entire procedural scheme and substantive criteria for expungement of a California lis pendens notice. In view of the uncertainty that other states would adopt California's lis pendens procedural scheme and substantive criteria, the foreseeability that involvement in a real property transaction might include the inconvenience of litigation in the state where the property is located, and the lack of any indication that such a construction was necessary, the California lis pendens statutory scheme should not be judicially construed to extend to litigation in the courts of other states [*The Formula Inc. v. Superior Court (2008) 168 Cal. App. 4th 1455, 1465, 86 Cal. Rptr. 3d 341*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNoticesReal Property LawPriorities & RecordingLis Pendens

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31-348 California Forms of Pleading and Practice--Annotated § 348.15

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§ 348.15 Contents of Notice of Lis Pendens

The notice of lis pendens must contain the names of all parties to the action and a description of the affected property [*Code Civ. Proc. § 405.20*]. For a form of notice of lis pendens, see *§ 348.60*.

PRACTICE TIP:

Avoid Doe Defendants. Recordation is effective to provide constructive notice only of the noticed action and only of its pendency against parties who are not fictitiously named [*see Code Civ. Proc. § 405.24* and discussion in *§ 348.20*]. In other words, notice of a claim against a fictitiously named defendant will not be effective either against that defendant or his or her successors. Counsel for a party alleging a real property claim should therefore take particular care to identify and name all defendants by their proper names.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNoticesReal Property LawPriorities & RecordingLis Pendens

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31-348 California Forms of Pleading and Practice--Annotated § 348.16

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§ 348.16 Attorney Signature or Court Approval

A notice of lis pendens generally may not be recorded unless either of the following are satisfied [*Code Civ. Proc. § 405.21*]:

- The claimant's attorney of record in the pending action has signed the notice.

- If the claimant is appearing in propria persona, the claimant has signed the notice and the notice has been approved by a judge. A judge of the court in which the action is pending may approve the notice on the request of the claimant.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensNoticesReal Property LawPriorities & RecordingLis Pendens

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PART II. LEGAL BACKGROUND

31-348 California Forms of Pleading and Practice--Annotated § 348.17

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§ 348.17 Service of Notice of Lis Pendens

[1] Service Before Recordation Generally Required

Before recording a notice of lis pendens, the claimant must mail a copy of the notice, by registered or certified mail with return receipt requested, to the following persons [*Code Civ. Proc. § 405.22*]:

- All parties to whom the real property claim is adverse [*see* discussion in *§ 348.14* (defining "real property claim")]. Copies must be mailed to all known addresses of these parties.

- All owners of record of the affected real property, as determined by the latest county assessment roll.

The claimant must prepare and execute proof of service under *Code Civ. Proc. § 1013a* [*see Code Civ. Proc. § 405.23*; *see also §§ 348.17[4], 348.18*].

[2] Service on Later Named Adverse Parties

When a party to whom the real property claim is adverse is later joined in the action, the claimant must serve that party with a copy of the notice of lis pendens immediately and in the same manner as service on prior named adverse parties [*see Code Civ. Proc. § 405.22*].

[3] Declaration in Lieu of Service

If there is no known address for service on an adverse party or owner, the claimant may record a declaration under penalty of perjury to that effect [*Code Civ. Proc. § 405.22*; *see § 348.18*; *see also Code Civ. Proc. § 2015.5* (requirements for declaration)]. The claimant is not required to serve a copy of the notice on that party or owner [*Code Civ. Proc. § 405.22*].

[4] Notice Void Without Proper Service

A notice of lis pendens is void and invalid as to any adverse party or owner of record if either or both of the following occur [*Code Civ. Proc. § 405.23*]:

- The claimant fails to serve that party or owner with a copy of the notice as required under *Code Civ. Proc. § 405.22* [*see § 348.17[1]*].

- The claimant fails to record, together with the notice, a proof of service on that party or owner in the form and content specified in *Code Civ. Proc. § 1013a*.

Technical violations that render the lis pendens notice "void and invalid" permit a defendant to clear title to the affected property by filing a motion for expungement [*McKnight v. Superior Court (1985) 170 Cal. App. 3d 291, 303, 215 Cal. Rptr. 909* ; *but see Biddle v. Superior Court (1985) 170 Cal. App. 3d 135, 137-138, 215 Cal. Rptr. 848* (lis pendens valid when, notwithstanding certain technical violations, defendants had actual notice and waived defects in service by waiting more than one year to file motion to expunge); *see* discussion in *§ 348.21[5]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNoticesCivil ProcedureRemediesLis PendensTerminationsReal Property LawPriorities & RecordingLis Pendens

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31-348 California Forms of Pleading and Practice--Annotated § 348.18

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§ 348.18 Recording Notice of Lis Pendens

The notice of lis pendens may be recorded in the office of the recorder of each county in which all or part of the real property is situated [*Code Civ. Proc. § 405.20*]. Proof of prior service of copies of the notice on each adverse party or owner must be recorded together with the notice [*see Code Civ. Proc. § 405.23, covered in § 348.17[4]*].

A party to a pending arbitration may not record a notice of pendency of action without first filing a civil action in superior court [*Manhattan Loft LLC. v. Mercury Liquors Inc. (2009) 173 Cal. App. 4th 1040, 1045, 93 Cal. Rptr. 3d 457]* . In one case, the defendants recorded two notices of lis pendens during arbitration proceedings in a dispute over the sale of property. The plaintiff filed suit against defendants for slander of title, claiming that they were not authorized to file lis pendens during the arbitration proceedings. Defendants filed a special motion to strike the complaint pursuant to the anti-SLAPP statute [*Code Civ. Proc. § 425.16*]. The trial court granted the motion. The court of appeal reversed. A lis pendens may be filed only when an action in a court of law is pending. An arbitration proceeding does not constitute an "action" within the meaning of the lis pendens law [*Manhattan Loft LLC. v. Mercury Liquors Inc. (2009) 173 Cal. App. 4th 1040, 1056, 93 Cal. Rptr. 3d 457]* . Because no action was pending at the time the defendants filed the two lis pendens, they improperly recorded the notices of pendency of action. Thus, the trial court erred in granting the special motion to strike [*Manhattan Loft LLC. v. Mercury Liquors Inc. (2009) 173 Cal. App. 4th 1040, 1045, 93 Cal. Rptr. 3d 457]* .

PRACTICE TIP:

Get Acknowledgment of Notice; Record as Soon as Possible. Although some local recorders may record a lis pendens without an acknowledgment, an acknowledgment appears to be required under *Gov. Code § 27287*.

Because a notice of lis pendens is effective only from the time it is recorded, it is usually in the claimant's best interest to record the notice as soon as possible after initiating the action [*see also § 348.20*]. The notice may be recorded, however, as long as the action is still pending. For example, it is permissible to record a notice of lis pendens after rendition of judgment in the action but before the judgment becomes final [*see Kartheiser v. Superior Court (1959) 174 Cal. App. 2d 617, 619, 345 P.2d 135]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNoticesReal Property LawPriorities & RecordingLis Pendens

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§ 348.19 Filing Copy With Court After Recordation

Immediately following recordation, a copy of the notice must be filed with the court in which the action is pending [*Code Civ. Proc. § 405.22*]. A copy of each recorded proof of service should be filed with the notice [*see § 348.18*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 348.20 Effect of Lis Pendens

[1] Constructive Notice

A recorded notice of lis pendens provides constructive notice of the pendency of the noticed action as it relates to the real property described in the notice, but only of its pendency against parties who are not fictitiously named [*Code Civ. Proc. § 405.24*]. However, a recorded document does not impart constructive notice from the moment it is recorded. The operative event is the indexing of the document [*Lewis v. Superior Court (1994) 30 Cal. App. 4th 1850, 1866-1867, 37 Cal. Rptr. 2d 63* ; *see Dyer v. Martinez (2007) 147 Cal. App. 4th 1240, 1246, 54 Cal. Rptr. 3d 907* ; *Hochstein v. Romero (1990) 219 Cal. App. 3d 447, 452, 268 Cal. Rptr. 202]* . Before constructive notice may be conclusively presumed, the document must be "recorded as prescribed by law" [*Civ. Code § 1213*]. A document that is not indexed as required by statute does not impart constructive notice because it has not been recorded "as prescribed by law" [*Hochstein v. Romero (1990) 219 Cal. App. 3d 447, 452, 268 Cal. Rptr. 202* ; *Lewis v. Superior Court (1994) 30 Cal. App. 4th 1850, 1866, 37 Cal. Rptr. 2d 63]* .

The following persons are deemed to have constructive notice from the time that the notice is recorded [*Code Civ. Proc. § 405.24*]:

- Any purchaser.

- Any encumbrancer.
- Any other transferee of the real property described in the notice.

The rights and interest of the claimant in the property, as ultimately determined in the pending noticed action, relate back to the date of the recording of the notice [*Code Civ. Proc. § 405.24*].

ILLUSTRATION:

Effect of Relation Back to Recordation. Corporation sues a former officer, alleging that he had converted and sold corporate assets, invested the proceeds in real property, and fraudulently transferred the title to that property from himself to his wife. Corporation records a notice of lis pendens soon after commencing the action, in 1984. In June 1987, Corporation obtains a judgment in its favor, awarding damages and restraining defendants from conveying the real property until further order of the court. In September 1987, defendants file a bankruptcy petition under Chapter 11. In the bankruptcy proceeding, Corporation asserts a claim to the real property as a secured creditor. The Bankruptcy Appellate Panel holds that the prior judgment does not affect title to or possession of property, and therefore does not relate back to the recording of the lis pendens notice. Consequently, Corporation's claim is not secured, but is voidable as a preferential transfer under *11 U.S.C. § 547* because the abstract of judgment was filed within the 90-day "preference period" preceding the date the bankruptcy petition was filed. Is the Bankruptcy Appellant Panel correct in its holding? No. The prior judgment may not affect title to the extent that it awards damages, but it does affect title to the extent that it enjoins the conveyance of real property found to have been fraudulently transferred. The judgment therefore relates back to the date the lis pendens was recorded and is senior to any later acquired interest [*see In re Lane (9th Cir. 1992) 980 F.2d 601, 602-603* (recording of lis pendens constituted "transfer" under *11 U.S.C. § 547(e)(1)(A)*)].

[2] Period of Effectiveness

Unless a notice of lis pendens is expunged or withdrawn, it remains effective as long as the action is pending, that is, until the action is finally determined on appeal or the time for appeal has passed, unless the judgment is sooner satisfied [*see Code Civ. Proc. § 1049*; *Garcia v. Pinhero (1937) 22 Cal. App. 2d 194, 197]* .

If an action in which a lis pendens has been filed is settled and then abandoned or dismissed, without any consent decree or judgment ordering an accounting or determining any rights in the real property, the lis pendens is terminated. Thus, a person who has acquired an interest before settlement, abandonment, or dismissal is not affected by the prior lis pendens [*Harris v. Whittier Bldg. & Loan Asso. (1936) 18 Cal. App. 2d 260, 266, 63 P.2d 840* ; *Olson v. Cornwell (1933) 134 Cal. App. 419, 426-427, 25 P.2d 879]* . If, after termination of an action without judgment, a new action is commenced asserting a real property claim, a new lis pendens must be recorded and filed [*see Garcia v. Pinhero (1937) 22 Cal. App. 2d 194, 196, 70 P.2d 675]* .

[3] Practice Effect and Safeguards

While the lis pendens law is designed to protect the claimant's rights by providing notice, and not to aid plaintiffs in their claims, the practical effect of recording a lis pendens is to render a defendant's property both unmarketable and unsuitable as security for a loan. The financial pressure thus exerted on a defendant can be considerable, forcing him or her to settle not on the merits of the case but simply to get rid of the cloud on his or her title. Because of the potential for abuse, to gain an unfair advantage in litigation as distinguished from preserving the status quo, courts have tended toward a restrictive rather than a liberal application of the lis pendens statutes [*see La Paglia v. Superior Court (1989) 215 Cal. App. 3d 1322, 1326-1327, 264 Cal. Rptr. 63* ; *see, e.g., § 348.21[2]*].

The 1993 lis pendens law, to guard against such abuse, enacted several safeguards for persons who may be affected by a notice of lis pendens. The law now provides for increased oversight in the recording of notices (by requiring court approval of notices that are filed by claimants appearing in propria persona) [*see Code Civ. Proc. § 405.21* and *§ 348.16*], and imposes on claimants strict notice requirements [*see Code Civ. Proc. § 405.22*; *see § 348.17*]. It also clearly places the burden of proof on claimants in most proceedings that have been initiated by other affected persons to expunge the notice [*see Code Civ. Proc. § 405.30*; *see § 348.21[1], [4]*]. Moreover, under a related amendment to *Civ. Code § 47*, the filing of a notice of lis pendens is no longer absolutely privileged, with the result that a claimant who files an improper notice may be liable for any resulting damages in an action for slander of title [*see § 348.28*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 348.21 Grounds for Expungement of Notice of Lis Pendens

[1] Pleading Does Not Contain Real Property Claim--General Rule

The court must order a lis pendens notice expunged if it finds that the pleading on which the notice is based does not contain a real property claim. In this event, the court may not require an undertaking as a condition of the expungement order [*Code Civ. Proc. § 405.31*].

If an affected party or person seeks to expunge a notice of lis pendens on this ground, it is the claimant, or party who recorded the notice, who has the burden of proving that his or her pleading includes a real property claim [*see Code Civ. Proc. § 405.30*]. A "real property claim" means any cause or causes of action in a pleading that would, if meritorious, affect either of the following [*Code Civ. Proc. § 405.4*; *see also § 348.14*]:

- Title to, or the right to possession of, specific real property; or

- The use of an easement identified in the pleading, other than an easement obtained pursuant to statute by any regulated public utility.

For further discussion of whether particular actions constitute or include a real property claim, see *§ 348.21[2]*.

[2] Creditor Suits

[a] Fraudulent Conveyance

The law is unsettled regarding the status of creditors' suits as real property claims. The California Supreme Court has held that a creditor's action to set aside as fraudulent a debtor's transfer of real property, brought under the Uniform Fraudulent Transfer Act [*Civ. Code § 3439 et seq.*], is a "real property claim" within the meaning of *Code Civ. Proc. § 405.4* because it is a cause of action that would, if meritorious, affect title to real property [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 648, 15 Cal. Rptr. 3d 805, 93 P.3d 395* ; *see Hunting World, Inc. v. Superior Court (1994) 22 Cal. App. 4th 67, 72, 26 Cal. Rptr. 2d 923* (cited with approval on this point by *Kirkeby*, and discussed in *§ 348.21[2][b]*]. However, under the prior lis pendens statute [former *Code Civ. Proc. § 409 et seq.*, repealed as of January 1, 1993], the majority view held that creditors' suits seeking to impose an equitable lien or constructive trust on real property did not affect title to real property for the purpose of recording a notice of lis pendens [*see below*]. In *Kirkeby*, the Supreme Court expressly did not reach the question of whether a claim seeking to impose a constructive trust or equitable lien may be a basis for a lis pendens [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 650 n.7, 15 Cal. Rptr. 3d 805, 93 P.3d 395]* .

In *Kirkeby*, the plaintiff started a business with her brother and his wife (defendants). Plaintiff alleged that after she resigned from the company board of directors, defendants began looting the corporation through fraud and self-dealing. Plaintiff filed a lawsuit against defendants alleging numerous causes of action including a cause of action for fraudulent conveyance, and seeking declaratory and injunctive relief as well as damages. In her fraudulent conveyance cause of action, plaintiff alleged that her brother obtained a $50,000 loan from the business by representing that he would use the borrowed funds to construct a building to house the business operations. However, plaintiff alleged that defendants used the loan to purchase residential income property and immediately transferred their interest in the property to a family limited partnership. Plaintiff also alleged that her brother transferred his interest in his family's residence to a family trust and that defendants, as trustees of that trust, subsequently transferred the trust's interest in the residence to the family partnership. Plaintiff alleged that defendants made both of the transfers to defraud creditors, and requested that the transfers be voided to the extent necessary to satisfy the claims set forth in her complaint. These transfers formed the bases of plaintiff's fraudulent conveyance claim. Plaintiff recorded a notice of lis pendens on the two properties in question. The trial court granted defendants' motion to expunge the lis pendens on the ground the complaint primarily sought money damages. The court of appeal denied plaintiff's petition for a writ. The Supreme Court reversed the court of appeal judgment and remanded the action.

The Court explained that a fraudulent conveyance claim requesting avoidance of a transfer or obligation pursuant to *Civ. Code § 3439.07(a)(1)* may result in the voiding of a transfer of title of specific real property. By definition, the voiding of a transfer of real property will affect title to or possession of real property. Therefore, a fraudulent conveyance action seeking avoidance of a transfer under *Civ. Code § 3439.07(a)(1)* clearly "affects title to, or the right to possession of " real property and is a real property claim for the purposes of the lis pendens statutes [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 649, 15 Cal. Rptr. 3d 805, 93 P.3d 395]* . The Court held that the plaintiff in *Kirkeby* adequately pled a fraudulent conveyance claim by alleging that the defendants transferred title of the subject properties with the intent to defraud. The plaintiff also asked the court to void the transfers of both properties to the extent necessary to satisfy the claims in her complaint. As such, her fraudulent conveyance claim, if successful, would affect title to specific real property. Accordingly, the Court held that the plaintiff's lis pendens was improperly expunged [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 650-651, 15 Cal. Rptr. 3d 805, 93 P.3d 395]* .

In reaching this conclusion, the Court recognized that the lis pendens statute may be abused, and that because of the effect of a lis pendens, courts have restricted rather than broadened the application of the statute. Nevertheless, the Court stated that it could not ignore the plain language of the statute, which clearly establishes that fraudulent conveyance claims may support a lis pendens when the plaintiff seeks to void a fraudulent transfer [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 651, 15 Cal. Rptr. 3d 805, 93 P.3d 395]* .

[b] Equitable Liens and Constructive Trusts

Under the prior lis pendens law, the courts of appeal were in conflict on the issue whether a lis pendens was appropriate when a creditor sought to impose an equitable lien or constructive trust on real property in order to recover on a debt, for example, by alleging that the real property was purchased with funds that the debtor fraudulently transferred to avoid paying the creditor. The question under the prior law was whether a notice of lis pendens could properly be filed in these creditors' suits because they "affected title to" real property [*cf. Code Civ. Proc. § 405.4*; *see § 348.21[1]*].

The minority view held that creditor suits did affect title to real property for the purpose of recording a notice of lis pendens [*see Okuda v. Superior Court (1983) 144 Cal. App. 3d 135, 138-141, 192 Cal. Rptr. 388* (action to foreclose equitable lien); *Coppinger v. Superior Court (1982) 134 Cal. App. 3d 883, 890-891, 185 Cal. Rptr. 24* (action to impose constructive trust)]. The majority view favored a restrictive application of the law because of the potential for abuse by creditors to use the notice of lis pendens to obtain an unfair advantage in the prosecution of their cases. These courts held that creditor suits did not affect title to real property for the purpose of recording a notice of lis pendens, reasoning that the creditors did not have a claim to a present interest in the real property, but were simply pursuing claims for an equitable lien or constructive trust on the real property as a means of securing recovery on a debt unrelated to the real property [*see La Paglia v. Superior Court (1989) 215 Cal. App. 3d 1322, 1327-1329, 264 Cal. Rptr. 63* ; *Wardley Development, Inc. v. Superior Court (1989) 213 Cal. App. 3d 391, 393, 394 n.3, 394-398, 262 Cal. Rptr. 87* ; *Elder v. Carlisle Ins. Co. (1987) 193 Cal. App. 3d 1313, 1320 n.8, 238 Cal. Rptr. 897* ; *Urez Corp. v. Superior Court (1987) 190 Cal. App. 3d 1141, 1147-1149, 235 Cal. Rptr. 837* ; *Burger v. Superior Court (1984) 151 Cal. App. 3d 1013, 1017-1019, 199 Cal. Rptr. 227]* .

In *Hunting World* [*Hunting World, Inc. v. Superior Court (1994) 22 Cal. App. 4th 67, 26 Cal. Rptr. 2d 923* (cited with approval in *Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 651, 15 Cal. Rptr. 3d 805, 93 P.3d 395* , discussed in *§ 348.21[2][a]*)], the court found that an extension of this majority line of cases was not necessary because the current lis pendens law is designed to curb abuses of lis pendens. It provides for expungement if the claimant cannot show by a preponderance of the evidence that the action is probably valid. Further, the court may protect the property owner by expungement if adequate relief for the claimant may be secured by a bond or by requiring a bond as a condition of the lis pendens [*Hunting World, Inc. v. Superior Court (1994) 22 Cal. App. 4th 67, 73, 26 Cal. Rptr.2d 923]* . The court also found that an extension of the majority line of cases was unwarranted because the clear wording of *Code Civ. Proc. § 405.31* covers a claim to set aside a conveyance of real property. According to the court, in most of those cases, constructive trust or equitable lien causes of action were appended to lawsuits that centered on money damages; thus, those courts could conclude that the actions primarily sought money damages and did not affect title to real property. By contrast, the uniform fraudulent transfer action covered by the lis pendens in *Hunting World* affected only title to real property [*Hunting World, Inc. v. Superior Court (1994) 22 Cal. App. 4th 67, 73-74, 26 Cal. Rptr. 2d 923]* .

A later Court of Appeal decision went along with the majority line of cases precluding the use of a lis pendens in constructive trust cases. In *Lewis v. Superior Court (1994) 30 Cal. App. 4th 1850, 37 Cal. Rptr. 2d 63* , purchasers of real property sought expungement of a federal lis pendens filed in an action alleging that the seller had originally purchased the property with misappropriated funds. The court found that (1) the essence of the federal complaint was an effort to impose a constructive trust on the property, (2) the majority line of cases held that such a claim does not permit the recording of a lis pendens, and (3) the 1992 revisions to the lis pendens statute did not overrule that line of cases [*Lewis v. Superior Court (1994) 30 Cal. App. 4th 1850, 1859, 1862, 37 Cal. Rptr. 2d 63]* . The court found no reason to believe that the Legislature, when enacting the revised statute, intended to change the scope of the term "real property claim" as used in the statute. The State Bar Report that supported the legislation stated that the term neither includes nor excludes constructive trust claims and suggested leaving this area for further judicial development. In the face of this report and the majority line of decisions, the court found that the fact that the Legislature made no definitional change in the statute created a strong presumption that it was satisfied with the restrictive interpretation applied by the overwhelming majority of decisions [*Lewis v. Superior Court (1994) 30 Cal. App. 4th 1850, 1863-1864, 37 Cal. Rptr. 2d 63]* .

The *Lewis* court noted that *Hunting World* involved an entirely conventional fraudulent conveyance claim [*Lewis v. Superior Court (1994) 30 Cal. App. 4th 1850, 1863, 37 Cal. Rptr. 2d 63]* . The court acknowledged that a fraudulent conveyance claim can support a lis pendens, but found that the application of this rule depends on the specific nature of the claim. The obvious and fundamental distinction between the federal action in *Lewis* and cases like *Hunting World* was that the complaint at issue in *Lewis* did not allege that there was a conveyance of real property; it merely alleged that the eventual seller wrongfully took money and used the money to buy--not convey--the property. The fact that one of the claims was labeled "fraudulent conveyance" was irrelevant, because there was no allegation of a conveyance. Thus, the court concluded that the complaint merely re-alleged a constructive trust claim, which could not support a lis pendens [*Lewis v. Superior Court (1994) 30 Cal. App. 4th 1850, 1865al. Rptr. 2d 63* ; *see Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 650, 15 Cal. Rptr. 3d 805, 93 P.3d 395* (citing *Lewis* in support of its conclusion that fraudulent conveyance claim may support lis pendens)].

The court of appeal in *Campbell v. Superior Court (2005) 132 Cal. App. 4th 904, 34 Cal. Rptr. 3d 68* followed the majority line of cases in holding that claims seeking imposition of a constructive trust and equitable lien did not support the recording of a lis pendens. In *Campbell*, the plaintiff, as trustee of a trust established by his now-deceased father, filed a complaint alleging that the defendant exercised undue influence against the father in persuading him to expend approximately $200,000 in trust funds to pay for the remodeling of the defendant's house. The plaintiff requested the imposition of a constructive trust and an equitable lien on the defendant's house and recorded a lis pendens on the house. In affirming the expungement of the lis pendens, the court of appeal agreed with the cases holding that to allow a party to record a lis pendens when the party seeks only "to freeze the real property as a res from which to satisfy a money judgment" is not consistent with the history and purpose of the lis pendens statutes [*Campbell v. Superior Court (2005) 132 Cal. App. 4th 904, 918-919, 34 Cal. Rptr. 3d 68]* .

[c] Combined Theories of Liability

The reasoning underlying *Lewis v. Superior Court (1994) 30 Cal. App. 4th 1850, 37 Cal. Rptr. 2d 63* [*see § 348.21[2][b]*] was applied in a case in which the plaintiffs were not creditors and did not seek a constructive trust remedy solely as a collateral means to collect money damages. In that case, the plaintiffs alleged that they had formed a joint venture with one of the defendants to buy certain real properties, but that defendant and others wrongfully acquired the properties for themselves. Plaintiffs' complaint asserted causes of action seeking compensatory and punitive damages on fraud and tort theories, or a combination of compensatory and punitive damages with imposition of a constructive trust. Two causes of action focused narrowly on imposition of a constructive trust and sought orders compelling defendants to convey to plaintiffs an interest in and possession of a described portion of the properties. The court of appeal upheld the trial court's expungement of the lis pendens notice even though the plaintiffs might have been entitled to imposition of a constructive trust requiring the defendants to convey to plaintiffs the share of the legal title plaintiffs would have acquired had the defendants not breached their duties toward plaintiffs. The court concluded that when a pleading combines theories of liability for monetary damages and for a constructive trust, plaintiffs should not be able to maintain a lis pendens. The court reasoned that the danger is too great that a lis pendens, which effectively renders the property unmarketable, would have the coercive effects condemned by *Lewis* and earlier decisions [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 971-972, 89 Cal. Rptr. 2d 693]* .

[3] Other Actions

Examples other than creditor suits [*see § 348.21[2]*] decided under the prior lis pendens law, in which courts considered whether a particular action affected title to or right of possession of real property [*cf. § 348.21[1]*], include the following:

- A lis pendens is proper in an action involving a leasehold interest in real property, which affects "right to possession" [*see Goldstein v. Ray (1981) 118 Cal. App. 3d 571, 575, 173 Cal. Rptr. 550]* .

- A lis pendens is not proper in an action concerning personal property only [*see MacDermot v. Hayes (1917) 175 Cal. 95, 109-110, 170 P. 616* ; *Security First Nat'l Bank v. Sartori (1939) 34 Cal. App. 2d 408, 418, 93 P.2d 863* (chattel mortgage; dictum)].

- A lis pendens is not proper in an action to recover money damages only [*Allied E. Fin. v. Goheen Enterprises (1968) 265 Cal. App. 2d 131, 133-134, 71 Cal. Rptr. 126]* .

- A lis pendens is not proper in an action to recover attorney's fees [*Hardy v. San Fernando Valley C. of C. (1950) 99 Cal. App. 2d 572, 576, 222 P.2d 314]* .

[4] Real Property Claim Lacks "Probable Validity"

The court must order that a lis pendens notice be expunged if it finds that the claimant has not established by a preponderance of the evidence the probable validity of the real property claim [*Code Civ. Proc. § 405.32*; *see Code Civ. Proc. § 405.30* (claimant has burden of proof in motion to expunge under *Code Civ. Proc. § 405.32*)]. In this event, the court may not require an undertaking as a condition of the expungement order [*Code Civ. Proc. § 405.32*].

"Probable validity" of a claim means that it is more likely than not that the claimant will obtain a judgment against the defendant on the claim [*Code Civ. Proc. § 405.3*].

Under the "probable validity" standard, if the claimant loses at trial, the lis pendens must be expunged (unless the trial court can foresee that the judgment probably will be reversed on appeal). However, the claimant may petition for a writ of mandate to review the expungement order [*Code Civ. Proc. § 405.39*], and the petition may include a request for a temporary stay of the order [*Mix v. Superior Court (2004) 124 Cal. App. 4th 987, 996-997, 21 Cal. Rptr. 3d 826* ; *see Cal. Rules of Ct., Rule 8.486(a)(7)* (requesting temporary stay in writ petition)].

The standard for deciding whether to issue a writ of mandate vacating a postjudgment expungement order is whether a petitioner's real property claim has probable validity, i.e., whether it is more likely than not the real property claim will prevail at the end of the appellate process. In making that decision, the court of appeal assesses whether the petitioner has made out a prima facie case for reversal of the judgment, based on the record in the trial court and the arguments of the parties. However, this "mini-review" is not equivalent to a full-scale resolution of the underlying appeal [*Amalgamated Bank v. Superior Court (2007) 149 Cal. App. 4th 1003, 1008, 57 Cal. Rptr. 3d 686* ; *cf. Behniwal v. Superior Court (2005) 133 Cal. App. 4th 1048, 1050, 35 Cal. Rptr. 3d 162* (instead of embarking on intermediate "probable validity" review, appellate court decided merits of appeal and vacated its own order directing expungement)]. If the court determines that the writ petition fails to make out a prima facie case of entitlement to relief, it will be disposed of by summary denial, without a statement of reasons.

Because summary denial of a writ petition does not constitute law of the case, the court can summarily deny a writ without being hamstrung into deciding the appeal against the real property claimant. A writ denial will, however, allow the expungement order to go into effect, thereby removing the lis pendens as a cloud on the real property [*Amalgamated Bank v. Superior Court (2007) 149 Cal. App. 4th 1003, 1020, 57 Cal. Rptr. 3d 686]* .

[5] Claimant May Be Adequately Protected by Undertaking

If a court finds that a claimant alleges a real property claim and that it has probable validity [*see § 348.21[1], [4]*], it must nonetheless order that the notice of lis pendens be expunged if it also finds that an undertaking will secure adequate relief to the claimant. In this event, the expungement order must be conditioned on the giving of an undertaking sufficient to indemnify the claimant for all damages proximately resulting from the expungement that the claimant may incur if the claimant prevails on the real property claim [*Code Civ. Proc. § 405.33*]. In determining

whether an undertaking will secure adequate relief to the claimant, the presumption that real property is unique set out in *Civ. Code § 3387* does not apply, except for real property improved with a single-family dwelling that the claimant intends to occupy [*Code Civ. Proc. § 405.33*].

In its order conditionally expunging the notice, the court is required to set a return date for the moving party to show fulfillment of the condition. The court must deny the motion to expunge without further notice or hearing if the moving party fails to fulfill the condition on the return day [*Code Civ. Proc. § 405.33*].

The claimant may recover on the undertaking pursuant to the general bonds and undertakings provisions of *Code Civ. Proc. § 996.440* [*Code Civ. Proc. § 405.33*]. Nevertheless, the undertaking serves to protect only against damages that proximately result from the expungement [*Code Civ. Proc. § 405.33*]. Therefore, if a party is given a bond as a condition of expungement and prevails in the underlying action solely on a cause of action that did not support the recordation of a lis pendens, he or she may not satisfy the judgment out of the bond [*Elder v. Carlisle Ins. Co. (1987) 193 Cal. App. 3d 1313, 1318-1319, 238 Cal. Rptr. 897]* .

For discussion and forms relating to enforcement of liability on a bond pursuant to *Code Civ. Proc. § 996.440*, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

For discussion concerning an undertaking by the claimant, as distinguished from an undertaking in his or her favor, see *§ 348.21*.

[6] Failure to Comply With Service or Filing Requirements

A lis pendens will be void and invalid as to any adverse party or owner of record unless the service and filing requirements of *Code Civ. Proc. § 405.22* are met [*Code Civ. Proc. § 405.23*; *see § 348.17[4]*]. The Comments to *Code Civ. Proc. § 405 et seq.* prepared by the Real Property Law Section of the State Bar indicate that this provision was intended to continue the rule of former *Code Civ. Proc. § 409(d)* that a lis pendens was void and invalid unless applicable service and filing requirements were satisfied [*see Code Civ. Proc. § 405.23* (Comment)]. *McKnight v. Superior Court (1985) 170 Cal. App. 3d 291, 303, 215 Cal. Rptr. 909* , held that a violation of the technical requirements of former *Code Civ. Proc. § 409(d)* was a ground justifying expungement, even though the statute did not expressly provide for expungement. The violation justifying expungement in that case consisted of the plaintiff's failure to file a copy of thelis pendens and proof of service with the court [*McKnight v. Superior Court (1985) 170 Cal. App. 3d 291, 303, 215 Cal. Rptr. 909]* . However, in *Biddle v. Superior Court (1985) 170 Cal. App. 3d 135, 138, 215 Cal. Rptr. 848* , the court found that a lis pendens was valid when the plaintiffs mailed a copy of the lis pendens to the defendants at their business address by first class mail, even though the statute required it to be mailed return receipt requested to all known addresses. The court found that the plaintiffs had substantially complied with the statutory service requirement and unquestionably conveyed prompt actual notice to the defendants, thereby satisfying the purposes of the statute. Further, the court ruled that the defendants waived any service defects by waiting more than a year to file the motion to expunge based on the allegedly defective service [*Biddle v. Superior Court (1985) 170 Cal. App. 3d 135, 137-138, 215 Cal. Rptr. 848]* . The Comments to *Code Civ. Proc. § 405.23* indicate that it was not intended to disapprove the waiver principles applied in *Biddle*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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PART II. LEGAL BACKGROUND

31-348 California Forms of Pleading and Practice--Annotated § 348.22

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§ 348.22 Expungement Procedure

[1] Motion to Expunge

At any time after a notice of pendency of action has been recorded, the following persons may apply to the court in which the action is pending for an order expunging the lis pendens notice [*Code Civ. Proc. § 405.30*]:

- Any party to the pending action.

- Any nonparty with an interest in the real property that is affected by the notice. A nonparty must obtain leave to intervene from the court at or before the time that he or she brings the motion to expunge.

PRACTICE TIP:

File Separate Motion to Intervene. A nonparty's motion to intervene should not be combined with the motion to expunge for two reasons. First, in many cases, local rules require every motion to be separately filed [*see, e.g.,* Los Angeles County Superior Court Rules, Rule 9.3]. Second, the preparing and filing of separate motions should avoid confusion. For further discussion of intervention and a complete set of forms that may be used by a person who intends to intervene in an action, see Ch. 395, *Parties* .

Evidence or declarations may be filed with the motion to expunge the notice. The court may permit evidence to be

received in the form of oral testimony. It may make any orders it deems just to provide for discovery by any party affected by a motion to expunge the notice [*Code Civ. Proc. § 405.30*].

PRACTICE TIP:

Use Declarations When Possible. Although the court may permit oral testimony, such leave is rarely given. Absent unusual circumstances, counsel should ensure that all supporting or opposing evidence is offered in the form of admissible declarations or affidavits.

If the motion to expunge is made under either *Code Civ. Proc. § 405.31* or *405.32*, the claimant (or the party opposing the motion) has the burden of proof to establish either that there is a real property claim alleged, or that this claim has probable validity [*Code Civ. Proc. § 405.30*; *§ 348.21[1]*]. There is no similar provision with regard to a motion under *Code Civ. Proc. § 405.33*, that is, for expungement on the ground that the moving party may make an adequate undertaking [*see § 348.21[5]*]. Thus, it appears that if the court finds that there is a claim with probable validity, the moving party has the burden of establishing that he or she may make an adequate undertaking.

By making a motion for expungement, a party or affected person is not precluded from seeking an injunction or other relief [*see Code Civ. Proc. § 405.8*].

For discussion of the circumstances under which the court is required to order expungement, see *§ 348.21[1]*. For a form of motion to expunge a notice of lis pendens, see *§ 348.61*.

[2] Award of Attorney's Fees and Costs

In a motion to expunge, the court is required to award the party prevailing on the motion his or her reasonable attorney's fees and costs incurred in making or opposing the motion, unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust [*Code Civ. Proc. § 405.38*].

PRACTICE TIP:

Award Is Discretionary. *Code Civ. Proc. § 405.38* states that the court "shall" order an award in favor of the prevailing party unless it makes specified findings. This does not make the award absolutely mandatory, but in effect places a burden on the party subject to the sanction to establish substantial justification or other good cause for not making the award. Counsel faced with the imposition of an award should always remind the court of its discretion not to impose the award if it makes the findings set out in *Code Civ. Proc. § 405.38*.

When a lis pendens is withdrawn while a motion to expunge is pending, the moving party is not automatically entitled to attorneys' fees nor should it automatically be denied attorneys' fees under *Code Civ. Proc. § 405.38*. Instead, the trial court has discretion to award attorneys' fees based on a determination of which party would have prevailed on the motion and whether the lis pendens claimant acted with substantial justification in withdrawing the lis pendens, or whether, in light of all of the circumstances, the imposition of fees would otherwise be unjust [*Castro v. Superior Court (2004) 116 Cal. App. 4th 1010, 1022-1023, 10 Cal. Rptr. 3d 865]* .

PRACTICE TIP:

Award of Fees and Costs. The language of *Code Civ. Proc. § 405.38* resembles provisions for the imposition of monetary sanctions in discovery motions. Counsel should refer to cases construing these provisions for guidance in seeking or opposing an award under *Code Civ. Proc. § 405.38* [*see* Ch. 190, *Depositions and Discovery*].

Counsel should also consider requesting an award of fees and costs in the moving or opposing papers, specifying the party against whom the award is to be imposed and the amount requested.

Notwithstanding the "mandatory" nature of the award, due process considerations require that a person subject to monetary sanction first be given proper notice and an opportunity to be heard [*see In re Marriage of Flaherty (1982) 31 Cal. 3d 637, 651-654, 183 Cal. Rptr. 508, 646 P.2d 179]* . In any event, counsel should carefully document the costs and fees incurred, and include this documentation in the supporting papers, together with the basis for calculating fees.

[3] Order Expunging Notice

An order expunging a notice of lis pendens is not effective, and must not be recorded, until the time period for seeking review by writ has elapsed [*Code Civ. Proc. § 405.35*; *see § 348.22[4]*]. If a petition for writ of mandate is filed, an expungement order is not effective and may not be recorded, until the writ proceeding is finally adjudicated [*Code Civ. Proc. § 405.35*].

The county recorder has no duty to determine whether the above requirements, or the requirements of any order expunging a notice, have been met [*Code Civ. Proc. § 405.35*].

When the time for filing a petition for writ of mandate has elapsed, or the writ has been finally adjudicated, the prevailing party may record a certified copy of the order of expungement in the office of the recorder where the notice of lis pendens was filed [*see Code Civ. Proc. § 405.60, 405.61*; *see also Code Civ. Proc. § 1019.5* (general requirements for serving conformed copies of order on parties)].

For discussion of the effect of a recorded order of expungement, see *§ 348.27*. For discussion of the requirements for filing a subsequent notice of lis pendens, after the court has granted an order expunging a prior notice, see *§ 348.23*. For a form of an order expunging a notice of lis pendens, see *§ 348.62*.

[4] Review by Writ of Mandate

An expungement order or other court action under *Code Civ. Proc. § 405.30 et seq.* is not appealable. A party aggrieved by an order made on a motion to expunge may obtain appellate review by petition for writ of mandate. The petition for the writ must be filed and served within 20 days of service of written notice of the expungement order by the court or any party. The court that issued the order may, within the initial 20-day period, extend the initial period for one additional period not to exceed 10 days. The party petitioning for the writ must deliver a copy of the petition to the clerk of the court that issued the order and request that it be placed in the court file [*Code Civ. Proc. § 405.39*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-348 California Forms of Pleading and Practice--Annotated § 348.23

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§ 348.23 Recording Another Notice Following Expungement

Once a notice of lis pendens has been expunged, the claimant may not record another notice as to the affected property without leave of the court in which the action is pending [*Code Civ. Proc. § 405.36*].

Legal Topics:

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31-348 California Forms of Pleading and Practice--Annotated § 348.24

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§ 348.24 Motion for Undertaking by Claimant

[1] Requirements for Making Motion

As an alternative to moving for an order expunging a notice of lis pendens (*see §§ 348.21, 348.22*), a party or other person with an interest in the real property described in the notice may, in effect, seek indemnity for any damages that he or she might incur as a result of the notice of lis pendens. Specifically, a person with an interest in the property may move for an order requiring the claimant to give the moving party an undertaking as a condition of maintaining the notice in the record title [*Code Civ. Proc. § 405.34*]. A person who is not a party to the pending action must obtain leave from the court to intervene at or before the time that he or she makes the motion [*Code Civ. Proc. § 405.34*].

PRACTICE TIP:

File Separate Motion to Intervene. A nonparty's motion to intervene should not be combined with the motion to require an undertaking for two reasons. First, in many cases, local rules require every motion to be separately filed [*see, e.g.,* Los Angeles County Superior Court Rules, Rule 9.3]. Second, the preparing and filing of separate motions should avoid confusion. For further discussion of intervention and a complete set of forms that may be used by a person who intends to intervene in an action, see *Ch. 395, Parties, § 395.10* et seq.

The motion to require an undertaking may be made at any time after the notice of lis pendens is recorded, and regardless

of whether a motion to expunge has been filed. It is, however, subject to the provisions for expungement under *Code Civ. Proc. §§ 405.31* and *405.32* (*see § 348.21[1], [4]*) [*Code Civ. Proc. § 405.34*]. Apparently, this means that an undertaking as a condition to maintaining the notice is not available if the claimant's pleading does not contain a real property claim or if the claimant has not established the probable validity of the claim by a preponderance of the evidence [*see Code Civ. Proc. § 405.34*].

For a form of a motion to require an undertaking, see *§ 348.63*.

[2] Determination of Motion

The court may permit evidence to be received in the form of oral testimony and may make any orders it deems just to provide for discovery by any affected party [*Code Civ. Proc. § 405.34*].

PRACTICE TIP:

Use Declarations When Possible. Although the court may permit oral testimony, this is likely to be a rare occurrence. Absent unusual circumstances, counsel should ensure that all supporting or opposing evidence is offered in the form of admissible declarations or affidavits.

The court may order the claimant to make the undertaking, in such nature and in such amount as it determines to be just [*Code Civ. Proc. § 405.34*; *see also Code Civ. Proc. § 1019.5* (general requirements for serving conformed copies of order on parties)]. In the event that it orders an undertaking, the court must set a return date for the claimant to show compliance. If the claimant fails to do so, the court must order the notice of pendency of action expunged without further notice or hearing [*Code Civ. Proc. § 405.34*].

In a motion to require an undertaking by the claimant, the court is required to award the party prevailing on the motion his or her reasonable attorney's fees and costs incurred in making or opposing the motion, unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust [*Code Civ. Proc. § 405.38*; *see § 348.22[2]*]. For a form of an order requiring an undertaking, see *§ 348.64*.

A court is not authorized to order the filing of a recorded deed of trust for security in lieu of an undertaking as a condition of continuing a lis pendens. The provisions of the Bond and Undertaking Law [*Code Civ. Proc. § 995.110 et seq.*] apply to lis pendens undertakings. Under that law, there is no authorization for filing a recorded trust deed in lieu of an undertaking, and the statutory definition of an undertaking [*Code Civ. Proc. § 995.190*] does not include a recorded trust deed [*Markley v. Superior Court (1992) 5 Cal. App. 4th 738, 745-750]* .

[3] Recovery on Undertaking

The moving party may recover on an undertaking by the claimant pursuant to the general bonds and undertakings provisions of *Code Civ. Proc. § 996.440*, on a showing of both of the following [*Code Civ. Proc. § 405.34*]:

- The claimant did not prevail on the real property claim; and
- The person seeking recovery suffered damages as a result of the maintenance of the notice.

In assessing damages, the court may not consider the claimant's intent or the presence or absence of probable cause. The amount of recovery is limited to the amount of the undertaking [*Code Civ. Proc. § 405.34*].

If a motion to expunge is denied, but the claimant is required to post a bond, the bond may be used to collect awarded attorney's fees when the defendant prevails [*On v. Cow Hollow Properties (1990) 222 Cal. App. 3d 1568, 1572-1574, 272 Cal. Rptr. 535]* .

If property increases in value while a lis pendens prevents its sale, there are no damages under a bond posted by a plaintiff. Thus, the defendant is not entitled to damages based on evidence that the rate of inflation increased faster than the increase in the value of the property [*CMSH Co. v. Antelope Development, Inc. (1990) 223 Cal. App. 3d 174, 179-181, 272 Cal. Rptr. 605]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-348 California Forms of Pleading and Practice--Annotated § 348.25

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors Judge O'Brien is a judge of the Los Angeles County Superior Court, conducting both civil and criminal trials. Ms. Bronston is a partner with Fierstein & Sturman in Los Angeles, practicing mainly in the area of creditors' rights. Mr. Mirman is a partner in Horgan, Rosen, Beckham & Coren, located in the Toluca Lake area of Los Angeles, and specializes in the representation of financial institutions. Mr. Pasternak is a partner with the firm of Appleton, Pasternak & Pasternak in Los Angeles, practicing in all aspects of business litigation, including appointments as a receiver, referee, and corporate appraiser. This chapter was adapted from California Practice Handbook: Provisional RemediesS (Matthew Bender), Litigation and Provisional and Post-Judgment Remedies Sections, Los Angeles County Bar Association, Handbook Editor; Hon. Robert H. O'Brien, Edythe L. Bronston, Alan M Mirman, David J. Pasternak, Contributing Editors.

§ 348.25 Motion to Modify or Exonerate Undertaking

After notice and hearing, a court may exonerate or modify any undertaking required under either *Code Civ. Proc. § 405.33* (undertaking by affected person as condition to expungement; discussed in *§ 348.21[5]*) or *Code Civ. Proc. § 405.34* (undertaking by claimant; discussed in *§ 348.24*). The court may also exonerate or modify any undertaking required pursuant to stipulation made in lieu of an order [*Code Civ. Proc. § 405.37*].

The court may grant this order for good cause and on such terms as are just. The order may be made conditional on the giving of a new undertaking [*Code Civ. Proc. § 405.37*; *see also Code Civ. Proc. § 1019.5* (general requirements for serving conformed copies of order on parties)].

In a motion to exonerate or modify an undertaking, the court is required to award the party prevailing on the motion his or her reasonable attorney's fees and costs incurred in making or opposing the motion, unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust [*Code Civ. Proc. § 405.38*; *see also § 348.22[2]*]. For a form of motion to modify or exonerate an undertaking, see *§ 348.65*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesLis PendensNoticesCivil ProcedureRemediesLis PendensTerminationsReal Property LawPriorities & RecordingLis Pendens

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31-348 California Forms of Pleading and Practice--Annotated § 348.26

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§ 348.26 Withdrawal of Lis Pendens Notice

At any time after the notice of lis pendens is recorded, the claimant may withdraw the notice. The claimant, or his or her successor in interest, must execute a notice of withdrawal and have it acknowledged [*Code Civ. Proc. § 405.50*; *see § 348.27*]. For a form of notice of withdrawal, see *§ 348.66*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensNoticesCivil ProcedureRemediesLis PendensTerminationsReal Property LawPriorities & RecordingLis Pendens

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31-348 California Forms of Pleading and Practice--Annotated § 348.27

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§ 348.27 Effect of Expungement or Withdrawal of Lis Pendens Notice

On the recordation of either a certified copy of an expungement order (*discussed under § 348.22[3]*) or a notice of withdrawal (*discussed under § 348.26*), neither the notice of lis pendens nor any information derived from it constitutes actual or constructive notice of any matters contained in the notice or relating to the pending action. Nor does the notice or any information derived from it create a duty of inquiry in any person thereafter dealing with the affected property [*Code Civ. Proc. § 405.60*; *see Lewis v. Superior Court (1994) 30 Cal. App. 4th 1850, 1871, 37 Cal. Rptr. 2d 63* (once lis pendens is withdrawn or expunged, title to property must be treated as though lis pendens was never filed, and current owners may transfer property as though lis pendens never existed)].

In addition, on recordation of the withdrawal notice or order, a person shall not be deemed to have actual knowledge of the action or any matters relating to the action if all of the following apply [*Code Civ. Proc. § 405.61*]:

- The person is not a named party at the time the withdrawal notice or order is recorded.
- The person thereafter becomes a purchaser, transferee, mortgagee, or other encumbrancer of any interest in the real property subject to the action.
- The person takes that interest for a valuable consideration.

- The person takes that interest by a conveyance recorded prior to the recording of a certified copy of the judgment or decree issued in the action.

Such a person shall not be deemed to have actual knowledge of the action or any matters relating to it regardless of whether he or she possessed actual knowledge of the action or matter and regardless of when or how any such knowledge was obtained [*Code Civ. Proc. § 405.61*]. *Code Civ. Proc. § 405.61* is expressly intended "to provide for the absolute and complete free transferability of real property after the expungement or withdrawal of a notice of pendency of action" [*Code Civ. Proc. § 405.61*].

When a lis pendens is expunged in an action to enforce a judgment lien, the recorded judgment lien is not extinguished. The judgment lien makes the judgment creditor a secured creditor and can only be extinguished (1) by the recordation of an acknowledgment of satisfaction of the underlying judgment or (2) by the judgment creditor's release of the lien [*Federal Deposit Ins. Corp. v. Charlton (1993) 17 Cal. App. 4th 1066, 1070, 21 Cal. Rptr. 2d 686]* .

A withdrawn lis pendens may be admissible in a fraud action when the plaintiff had notice of the lis pendens and an issue in the defense of the fraud is whether the plaintiff had knowledge of the underlying judgment. Former *Code Civ. Proc. §§ 409.55* (*now see Code Civ. Proc. §§ 405.50, 405.60*) and 409.8 (*now see* Code Civ. Proc. § 409.61) do not apply in a fraud action [*Bishop Creek Lodge v. Scira (1996) 46 Cal. App. 4th 1721, 1733-1734, 54 Cal. Rptr. 2d 745* ; for coverage of *Code Civ. Proc. § 405.50*, see *§ 348.26*]. If they did, (1) the plaintiff could purchase property after a lis pendens had been withdrawn or expunged and claim fraudulent misrepresentation or fraudulent nondisclosure of matters as to which he or she had actual knowledge, and (2) the defendant's evidence that the plaintiff had actual knowledge could be excluded as legally irrelevant. Such a result would be manifestly unfair. The Legislature intended in former §§ 409.55 and 409.8 to protect purchasers, but not to give them a fraud cause of action that would not otherwise exist [*Bishop Creek Lodge v. Scira (1996) 46 Cal. App. 4th 1721, 1733-1734, 54 Cal. Rptr. 2d 745]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-348 California Forms of Pleading and Practice--Annotated § 348.28

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§ 348.28 When Lis Pendens Notice Is Privileged Publication

Formerly, a notice of lis pendens was held to be an absolutely privileged publication in a judicial proceeding [*see Earp v. Nobmann (1981) 122 Cal. App.3d 270, 281-282, 175 Cal. Rptr. 767* (overruled on other grounds in *Silberg v. Anderson (1990) 50 Cal. 3d 205, 212-213, 266 Cal. Rptr. 638, 786 P.2d 365*)]. The current lis pendens statute provides that a recorded notice of lis pendens does not constitute a privileged publication unless the notice identifies an action previously filed with a court of competent jurisdiction that affects the title or right of possession of real property, as authorized or required by law [*Civ. Code § 47(b)(4)*].

In other words, a notice of lis pendens now has a qualified rather than an absolute privilege. It appears, for example, that a notice is not privileged if it is subject to expungement under *Code Civ. Proc. § 405.31* because it does not contain a real property claim (discussed in *§ 348.21[1]*). It is also arguable that a notice is not privileged if it is subject to expungement under *Code Civ. Proc. § 405.32* because it contains a real property claim but that claim lacks probable validity (discussed in *§ 348.21[4]*).

The result is that a claimant who records a notice of lis pendens may be liable for damages if the title owner can prove the elements of a tort action for slander of title, i.e., an *unprivileged* publication of matter that is untrue and that impairs the vendibility of real property resulting in pecuniary loss [*see, e.g., Frank Pisano & Associates v. Taggart (1972) 29 Cal. App. 3d 1, 24, 105 Cal. Rptr. 414]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-348 California Forms of Pleading and Practice--Annotated §§ 348.29-348.39

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[Reserved]

§§ 348.29[Reserved]

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31-348 California Forms of Pleading and Practice--Annotated § 348.40

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§ 348.40 Federal Statutes

Notice of pendency of action of any United States district court action concerning real property is recordable under state statutes. *28 U.S.C. § 1964*

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-348 California Forms of Pleading and Practice--Annotated § 348.41

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§ 348.41 State Statutes

[1] Attorney's Fees

Attorney's fees and costs are awarded to prevailing party. *Code Civ. Proc. § 405.38*

Attorney's fees and costs are awarded to prevailing party after order made pursuant to *Code Civ. Proc. § 405.38*

[2] Effect of Notice

Effect of recording notice of pending action on subsequently recorded conveyance. *Civ. Code § 1214*

Effect of judgment on persons with actual or constructive notice; effect on nonparties who control action. *Code Civ. Proc. § 1908*

[3] Expunging or Withdrawing Notice

Undertaking is possible condition to court denying or granting motion to expunge. *Code Civ. Proc. §§ 405.31-405.34*

Requirement that court order lis pendens notice is expunged if court finds that claimant has not proven probable validity of real property claim by preponderance of evidence. *Code Civ. Proc. § 405.32*

Expungement of notice of lis pendens on giving of undertaking by moving party for damages if claimant prevails. *Code Civ. Proc. § 405.33*

Effective date of order expunging notice of pendency. *Code Civ. Proc. § 405.35*

Withdrawal of lis pendens notice by recording acknowledged notice of withdrawal. *Code Civ. Proc. § 405.50*

Effect of recording order expunging or withdrawing notice of pendency of action. *Code Civ. Proc. §§ 405.60, 405.61*

[4] Government Responsibilities

County recorders are required to keep indexes of notices of pendency of actions; title and contents of index pages. *Gov. Code § 27250*

[5] Other Remedies Not Affected

Attachment, injunction, and other relief in connection with real property claim or expungement of notice of pending action is not precluded. *Code Civ. Proc. § 405.8*

[6] Privileged Publication

Publications made in course of judicial proceeding are privileged unless title or right of possession to property is not in question in action. *Civ. Code § 47(b)(4)*

[7] Procedure Generally

Time to serve notice of motion to expunge. *Code Civ. Proc. § 1005*

Time during which action is deemed to be pending. *Code Civ. Proc. § 1049*

Instruments required to be acknowledged before being recorded. *Gov. Code § 27287*

[8] Recording Notice

Filing notice of pendency of action in state or federal actions concerning real property; contents of notice; effect of

filing. *Code Civ. Proc. §§ 405.5, 405.20*

[9] Review of Orders

Writ of mandate to review order granting or denying motion to expunge notice of pendency of action. *Code Civ. Proc. §§ 405.35, 405.39*

[10] Specific Actions

Removal of improvements affixed by mistake. *Civ. Code § 1013.5*

Mechanics' liens. *Civ. Code §§ 3145, 3146*

Recovery of possession of real property. *Civ. Code § 3375*

Foreclosure of mortgage. *Code Civ. Proc. § 726*

Establishment of title if public records have been lost or destroyed. *Code Civ. Proc. § 751.13*

Clouds on title arising out of public improvement assessments or bonds. *Code Civ. Proc. § 801.5*

Partition of property. *Code Civ. Proc. § 872.250*

Eminent domain. *Code Civ. Proc. §§ 1250.130, 1250.150*

Claims to property subject to escheat. *Code Civ. Proc. § 1355*

Vesting of title to escheated property to state. *Code Civ. Proc. § 1410*

Violations of State Housing Law. *Health & Safety Code §§ 17985-17987*

Action to enforce claim against estate. *Prob. Code § 9354(b)*

Quieting title to tax-deeded property. *Rev. & Tax. Code § 3950 et seq.*

Recovery on street improvement bond. *Sts. & Hy. Code § 6619*

[11] Undertaking

Form and sufficiency of undertaking. *Code Civ. Proc. § 405.34*

[12] Uninhabitable Buildings

Public agency is required to record notice of lis pendens in proceedings to declare building uninhabitable. *Code Civ. Proc. § 405.7*

Legal Topics:

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31-348 California Forms of Pleading and Practice--Annotated § 348.42

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§ 348.42 Decisions

[1] Actions Affecting Title or Possession

Cause of action based on fraudulent conveyance with proceeds invested in real property affects title to or possession of real property. *In re Lane (9th Cir. 1992) 980 F.2d 601, 604*

Fraudulent conveyance claim affects title to or right to possession of specific real property and therefore is "real property claim" supporting recording of notice of lis pendens. *Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 650, 15 Cal. Rptr. 3d 805, 93 P.3d 395*

Action based on good faith improver statute (*Code Civ. Proc. § 871.1 et seq.*) affects title to or possession of real property because court has authority to fashion equitable remedy that may include lien on property. *Okuda v. Superior Court (1983) 144 Cal. App. 3d 135, 139-141, 192 Cal. Rptr. 388*

[2] Actions Not Affecting Title or Possession

Filing of lis pendens is not effective if action is one to foreclose trust deed by nonjudicial sale of property by trustees after notice has been given as provided in trust deed. *Carpenter v. Smallpage (1934) 220 Cal. 129, 132-133, 29 P.2d 841*

[3] Constitutionality

Complaint based on failure to make a will is not basis for lis pendens because constructive trust will not be imposed if specific property is not identified by contract to make will. *Westbrook v. Superior Court (1986) 176 Cal. App. 3d 703, 712-714, 222 Cal. Rptr. 317*

Action for recovery of broker's commission was not basis for constructive trust and did not affect title to real property; lis pendens was properly expunged. *Deane v. Superior Court (1985) 164 Cal. App. 3d 292, 296-297, 210 Cal. Rptr. 406*

Action by limited partners against partnership seeking constructive trust on real property transferred by partnership did not affect real property because limited partners only had interest in partnership and not in land. *North Coast Business Park v. Superior Court (1984) 158 Cal. App. 3d 858, 860, 205 Cal. Rptr. 81*

Lis pendens statutes are constitutional and are not deprivation of significant property interest without due process of law. *Empfield v. Superior Court (1973) 33 Cal. App. 3d 105, 108, 108 Cal. Rptr. 375*

[4] Definitions

Lis pendens is a "conveyance" within meaning of *Civ. Code §§ 1214, 1215*. *Putnam Sand & Gravel Co. v. Albers (1971) 14 Cal. App. 3d 722, 725, 92 Cal. Rptr. 636*

[5] Describing Property

If lis pendens is to protect potential interest in property effectively, petition in action forming basis of lis pendens must designate specific property to be affected and nature and full extent of relief sought; lis pendens filed after wife petitioned for dissolution of marriage claiming only community interest in property protected only one-half interest in property even though court awarded it entirely to wife as separate property. *Head v. Crawford (1984) 156 Cal. App. 3d 11, 16, 202 Cal. Rptr. 534* (disapproved on related point in *Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 36-39, 283 Cal. Rptr. 584, 812 P.2d 931*)

Description of property in lis pendens is sufficient to give notice if, on inquiry, it would lead to ascertainment of identity of property involved in litigation. *Stearns v. Los Angeles City School Dist. (1966) 244 Cal. App. 2d 696, 743, 53 Cal. Rptr. 482*

[6] Duration of Notice

Lis pendens notice is purely incidental to action in which it is filed; lis pendens notice has no existence apart from such action. *Garcia v. Pinhero (1937) 22 Cal. App. 2d 194, 197, 70 P.2d 675*

New notice of lis pendens must be recorded when second action is commenced after first action was terminated. *Garcia v. Pinhero (1937) 22 Cal. App. 2d 194, 196, 70 P.2d 675*

Person acquiring interest before settlement, abandonment, or dismissal of case is not affected by prior lis pendens. *Harris v. Whittier Bldg. & Loan Asso. (1936) 18 Cal. App. 2d 260, 266, 63 P.2d 840* ; *Olson v. Cornwell (1933) 134 Cal. App. 419, 426-427, 25 P.2d 879*

[7] Effect of Failure to File

Mere pendency of action, without more, does not impair constructive notice to all the world of fact of such litigation. *MacDermot v. Hayes (1917) 175 Cal. 95, 110, 170 P. 616* ; *Agnew v. Cronin (1957) 148 Cal. App. 2d 117, 126, 306 P.2d 527*

Filing of lis pendens with county recorder is not essential prerequisite to court's jurisdiction of subject matter of suit in which recordation of such notice is required; failure to record lis pendens is immaterial as against party to action who had actual notice of its pendency and participated in it. *Patten-Blinn Lumber Co. v. Francis (1958) 166 Cal. App. 2d 196, 200, 333 P.2d 255*

[8] Effect on Prior Unrecorded Conveyance

Civ. Code § 1214 subordinated unrecorded conveyance to judgment cutting down or voiding title that grantor in unrecorded conveyance purported to convey. *Torrez v. Gough (1955) 137 Cal. App. 2d 62, 71, 289 P.2d 840*

[9] Expungement of Notice

[a] Availability

Entry of judgment does not automatically entitle party in whose favor judgment was rendered to expungement of lis pendens; after judgment, lis pendens remains until statutory ground for expungement is established. *McKnight v. Faber (1986) 185 Cal. App. 3d 639, 651, 230 Cal. Rptr. 57* (disapproved on other ground in *Silberg v. Anderson (1990) 50 Cal. 3d 205, 212-213, 266 Cal. Rptr. 638, 786 P.2d 365*)

Court, in proper case, is permitted to direct that lis pendens be expunged from record. *Allied Eastern Financial v. Goheen Enterprises (1968) 265 Cal. App. 2d 131, 134, 71 Cal. Rptr. 126*

[b] Effect of Expungement or Withdrawal

Withdrawn lis pendens may be admissible in fraud action when plaintiff had notice of lis pendens and issue in defense of fraud is whether plaintiff had knowledge of underlying judgment. *Bishop Creek Lodge v. Scira (1996) 46 Cal. App. 4th 1721, 54 Cal. Rptr. 2d 745*

Once lis pendens is expunged or withdrawn, title to property must be treated as though lis pendens was never filed, and current owners may transfer property as though lis pendens never existed. *Lewis v. Superior Court (1994) 30 Cal.*

App. 4th 1850, 1871, 37 Cal. Rptr. 2d 63

Order expunging lis pendens has no effect on previously recorded abstracts of judgment and judgment liens created by them. *Federal Deposit Ins. Corp. v. Charlton (1993) 17 Cal. App. 4th 1066, 1069-1070, 21 Cal. Rptr. 2d 686*

Sale after expungement gives nonparty purchaser bona fide purchaser status regardless of actual knowledge of proceeding. *Knapp Development & Design v. Pal-Mal Properties Ltd. (1987) 195 Cal. App. 3d 786, 789-790, 240 Cal. Rptr. 920*

[c] If Undertaking Given

Trial court abuses its discretion in denying motion to expunge notice of lis pendens if adequate relief could be secured by filing suitable undertaking. *Empfield v. Superior Court (1973) 33 Cal. App. 3d 105, 108, 108 Cal. Rptr. 375*

Order of expungement in favor of state is improper if sole evidentiary basis for court's order is affidavit or equivalent declaration offered by moving party and facts stated do not constitute grounds for relief sought. *Swanston v. Superior Court (1971) 15 Cal. App. 3d 355, 357, 92 Cal. Rptr. 572*

Court, in setting amount of undertaking of party moving to expunge lis pendens, has discretion to fix amount less than asserted value of total victory by claimant. *Howden-Goetzl v. Superior Court (1970) 7 Cal. App. 3d 135, 139-140, 86 Cal. Rptr. 323*

Petition for writ of mandate is proper to compel superior court to set aside its order to expunge notice of lis pendens or to increase amount of undertaking. *Howden-Goetzl v. Superior Court (1970) 7 Cal. App. 3d 135, 137-138, 86 Cal. Rptr. 323*

[d] Review of Expungement Order

Summary denial of petition for writ of mandate to reverse order expunging lis pendens is not res judicata. *McKnight v. Faber (1986) 185 Cal. App. 3d 639, 651 n.4, 230 Cal. Rptr. 57* (disapproved on other ground in *Silberg v. Anderson (1990) 50 Cal. 3d 205, 212-213, 266 Cal. Rptr. 638, 786 P.2d 365*)

Although order expunging lis pendens is not separately appealable, such order is subject to review pursuant to *Code Civ. Proc. § 906* (involving merits, affecting judgment, or substantially affecting rights of party) on appeal of summary judgment. *McKnight v. Faber (1986) 185 Cal. App. 3d 639, 651, 230 Cal. Rptr. 57* (disapproved on other ground in *Silberg v. Anderson (1990) 50 Cal. 3d 205, 212-213, 266 Cal. Rptr. 638, 786 P.2d 365*)

[10] Homesteads

Lis pendens does not ordinarily give precedence to later judgment over intervening declaration of homestead. *Putnam Sand & Gravel Co. v. Albers (1971) 14 Cal. App. 3d 722, 725, 92 Cal. Rptr. 636*

[11] Leasehold Interests

Lis pendens gave successful plaintiff rights superior to tenant from defendant for term of more than year when lease entered into after lis pendens recorded. *Goldstein v. Ray (1981) 118 Cal. App. 3d 571, 574-577, 173 Cal. Rptr. 550*

Lis pendens recorded as to leasehold interest for years on real property is proper. *Parker v. Superior Court (1970) 9 Cal. App. 3d 397, 400, 88 Cal. Rptr. 352*

[12] Notice as Privileged Publication

Slander of title cause of action properly based on recordation of lis pendens; underlying action challenging sale of property to enforce judgment was not a "real property claim." *Palmer v. Zaklama (2003) 109 Cal. App. 4th 1367, 1377-1380, 1 Cal. Rptr. 3d 116*

Notice of lis pendens is absolutely privileged in action for disparagement of title, as a republication of pleadings. *Albertson v. Raboff (1956) 46 Cal. 2d 375, 379, 295 P.2d 405* ; *Ahmanson Bank & Trust Co. v. Tepper (1969) 269 Cal. App. 2d 333, 342, 74 Cal. Rptr. 774* (*but see* 1992 amendment to *Civ. Code § 47*, making privilege qualified, not absolute)

Notice of lis pendens is absolutely privileged and constitutes no basis of action for slander of title. *Woodcourt, II Limited v. McDonald Co. (1981) 119 Cal. App. 3d 245, 250-252, 173 Cal. Rptr. 836* (*but see* 1992 amendment to *Civ. Code § 47*, making privilege qualified, not absolute)

[13] Purpose of Lis Pendens to Give Constructive Notice

Sole purpose of recording notice of lis pendens is giving constructive notice of pendency of proceeding. *Albertson v. Raboff (1956) 46 Cal. 2d 375, 379, 295 P.2d 405*

Recorded document does not impart constructive notice from moment it is recorded; instead, operative event is indexing of document. *Lewis v. Superior Court (1994) 30 Cal. App. 4th 1850, 1866, 37 Cal. Rptr. 2d 63* ; *Hochstein v. Romero (1990) 219 Cal. App. 3d 447, 452, 268 Cal. Rptr. 202*

Recordation of lis pendens was in effect republication of pleadings to give constructive notice of all facts apparent on face of pleadings and of other facts, which facts being stated necessarily put purchaser on inquiry. *Ahmanson Bank & Trust Co. v. Tepper (1969) 269 Cal. App. 2d 333, 342, 74 Cal. Rptr. 774*

Lis pendens gives notice of what may be established by judgment and is effective with respect to what is established. *Ahmanson Bank & Trust Co. v. Tepper (1969) 269 Cal. App. 2d 333, 342, 74 Cal. Rptr. 774*

[14] Real Property Claim

Fraudulent conveyance claim affects title to or right to possession of specific real property and therefore is "real property claim" supporting recording of notice of lis pendens. *Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 650, 15 Cal. Rptr. 3d 805, 93 P.3d 395*

Easement dispute affects title or right of possession of dominant tenement, and therefore lis pendens may be recorded on dominant tenement. *Park 100 Investment Group II v. Ryan (2009) 180 Cal. App. 4th 795, 812, -- Cal. Rptr. 3d --*

Pleading that combines theories of liability for monetary damages and for constructive trust did not support lis pendens, even though plaintiff might have been entitled to imposition of constructive trust requiring conveyance of legal title plaintiff would have acquired had defendants not breached their duties toward plaintiff. *BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 971-972, 89 Cal. Rptr. 2d 693*

Constructive trust claim does not support lis pendens, and neither does fraudulent conveyance claim that merely alleges that money was wrongfully taken and used to buy--not convey--property. *Lewis v. Superior Court (1994) 30 Cal. App. 4th 1850, 1862-1865, 37 Cal. Rptr. 2d 63*

Creditor's action to set aside debtor's fraudulent transfer of real property is "real property claim" within meaning of *Code Civ. Proc. § 405.4*. *Hunting World, Inc. v. Superior Court (1994) 22 Cal. App. 4th 67, 72, 26 Cal. Rptr. 2d 923*

[15] Recording

Recording of lis pendens after judgment rendered but before its finality is permissible. *Kartheiser v. Superior Court (1959) 174 Cal. App. 2d 617, 619, 345 P.2d 135*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNoticesCivil ProcedureRemediesLis PendensTerminationsReal Property LawPriorities & RecordingLis Pendens

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Volume 31: Lis Pendens thru Mandate and Prohibition-Chs. 348-358
Chapter 348 LIS PENDENS
PART III. RESEARCH GUIDE

31-348 California Forms of Pleading and Practice--Annotated § 348.43

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§ 348.43 Law Reviews

Comment, *The Use of Lis Pendens in Actions Alleging Constructive Trusts or Equitable Liens: Due Process Considerations*, *24 Santa Clara L. Rev. 137 (1984)*

Note, *The Protection of Land Decrees: The Use of Lis Pendens in Interstate Litigation Affecting California Real Property*, *36 Hastings L.J. 255 (1984)*

Note, *After Malcolm v. Superior Court and Peery v. Superior Court: A Due Process Analysis of California Lis Pendens*, *70 Cal. L. Rev. 909 (1982)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNoticesCivil ProcedureRemediesLis PendensTerminationsReal Property LawPriorities & RecordingLis Pendens

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31-348 California Forms of Pleading and Practice--Annotated § 348.44

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§ 348.44 Matthew Bender Publications

Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 21, *Lis Pendens*

California Points and Authorities, Ch. 145, *Lis Pendens* (Matthew Bender)

California Real Estate Law and Practice, Ch. 121, *Priorities of Liens* , pt. C (Lis Pendens and Priority of Interests) (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewReal Property LawPriorities & RecordingLis Pendens

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PART III. RESEARCH GUIDE

31-348 California Forms of Pleading and Practice--Annotated §§ 348.45-348.59

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[Reserved]

§§ 348.45[Reserved]

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PART IV. FORMS

31-348 California Forms of Pleading and Practice--Annotated § 348.60

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§ 348.60 Notice of Lis Pendens [Code Civ. Proc. §§ 405.2, 405.4, 405.20]

[1] FORM Notice of Lis Pendens [Code Civ. Proc. §§ 405.2, 405.4, 405.20]

Recording requested by _____ [*name*]
When recorded mail to _____ [*name*]
_____ [*address*]
_____ [*city, state, zip*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF PENDENCY OF ACTION
Defendant.	)	
	)	
	)	

NOTICE IS GIVEN that the above-captioned action was commenced on _____ [*date*], in the above-captioned court by _____ [*name of plaintiff*], plaintiff, against _____ [*name of defendant*], defendant; the action is now pending in the above court.

The above-captioned action alleges a real property claim affecting certain real property that is situated [in part] in _____ [*county in which notice is to be recorded*] County, California, and that is described as follows: _____ [*set forth legal description of real property and, if appropriate, its street address*].
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*claimant's status and name*]

ACKNOWLEDGEMENT

State of _____)
County of _____) ss.
)

_____

On _____ [*date*], before me, _____ [*name and title of officer*], personally appeared _____ [*name*], who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity/capacities, and that by his/her/their signature(s) on the instrument the person(s), or the entity on behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

(Seal)

Signature: _____

Name of Office: _____

[2] Use of Form

This form is for use as a general form of notice of pendency of action, commonly referred to as a notice of lis pendens.

It is prescribed by *Code Civ. Proc. § 405 et seq.*

[3] Required Information

The form contains provisions for inserting the following required statutory information [*Code Civ. Proc. § 405.20*]:

- The names of all the parties to the pending action.
- A description of the property affected by the action.

Code Civ. Proc. § 405.20 does not specifically require that the notice contain a recitation of the object of a plaintiff's complaint or of a defendant's cross complaint, as did its predecessor [*see* former *Code Civ. Proc. § 409(a)*]. Thus, the pleadings will have to be reviewed to determine the object and nature of the underlying action. See cross references to other chapters that discuss actions that may involve the recording of a lis pendens in *§ 348.60[10]*.

[4] Real Property Claim

A notice of lis pendens must be based on a "real property claim." Thus, the notice must be one that, if meritorious, would affect either of the following [*Code Civ. Proc. § 405.4*]:

- Title to, or right to possession of, specific real property; or
- The use of an easement identified in the pleading, other than an easement obtained pursuant to statute by any regulated public utility.

[5] Issuance Requirement

A lis pendens may not be recorded unless it is issued (1) by an attorney of record in the action to be recorded, (2) by a judge on request of a party or (3) by a party acting in propria persona if approved by a judge [*Code Civ. Proc. § 405.21*]. This form assumes that the lis pendens will be issued by the attorney but can be adapted if it will be issued by the court.

[6] Acknowledgement

The form also contains the form of acknowledgement [*see Civ. Code § 1189*] that *Gov. Code § 27287* apparently requires.

[7] Service on Adverse Parties

Prior to recording the notice of lis pendens, the claimant must first cause a copy of the notice to be mailed, by registered or certified mail, return receipt requested, to all known addresses of the adverse parties and to all owners of record as shown by the latest county assessment roll. If there is no known address for service on an adverse party or owner, then, as to that party, a declaration under penalty of perjury to such effect may be recorded instead of the proof of service described above, and service on that party is not required [*Code Civ. Proc. § 405.22*].

Immediately following recordation, a copy of the notice must be filed with the court in which the action is pending. Service must also be made immediately on each adverse party who is later brought into the action [*see Code Civ. Proc. § 405.22*].

A notice of lis pendens is void and invalid as to any adverse party or owner of record unless the above-described service requirements are met for the party or owner and a proof of service, as set forth in *Code Civ. Proc. § 1013a*, has been

recorded with the notice of lis pendens [*Code Civ. Proc. § 405.22*].

[8] Federal Statutes

Notice of pendency of action of any United States district court action concerning real property is recordable under state statutes. *28 U.S.C. § 1964*

[9] State Statutes

Effect of recording notice of action on subsequently recorded conveyance. *Civ. Code § 1214*

Filing notice of pendency of action in state and federal actions with recorder. *Code Civ. Proc. §§ 405.5, 405.20*

Effect of judgment on persons with actual or constructive notice of action or proceeding. *Code Civ. Proc. § 1908*

[10] Cross References

For alternative forms of acknowledgements, see Ch. 9, *Acknowledgements*

For discussion and forms relating to actions for cancellation of written instruments, see Ch. 107, *Cancellation of Instruments*

For discussion and forms relating to actions in ejectment for the recovery of real property, see Ch. 241, *Ejectment*

For discussion and forms relating to actions to establish title and to determine adverse claims under the Destroyed Land Records Relief Law, see Ch. 356, *Lost Papers*

For discussion and forms relating to actions to foreclose mechanics' liens, see Ch. 361, *Mechanics' Liens*

For discussion and forms relating to actions to quiet title, including actions to quiet title to property by a purchaser of tax-defaulted property, see Ch. 482, *Quieting Title*

For discussion of suits by a purchaser to tax-defaulted property to determine adverse claims, see Ch. 540, *Taxes and Assessments*

For discussion and forms relating to foreclosure proceedings, see Ch. 555, *Trust Deeds and Real Property Mortgages*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNoticesReal Property

LawPriorities & RecordingLis Pendens

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31-348 California Forms of Pleading and Practice--Annotated § 348.61

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§ 348.61 Proceedings to Expunge Notice of Lis Pendens From Record [Code Civ. Proc. §§ 405.30-405.33]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Expunge Notice of Lis Pendens From Record [Code Civ. Proc. §§ 405.30-405.33]--Notice of Motion and Supporting Declaration

[*Attorney identification*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION AND MOTION TO EX-
_____ [*name*],	)	PUNGE LIS PENDENS, SUPPORTING DECLAR-
Defendant.	)	ATION OF _____ [*name*], AND
	)	SUPPORTING MEMORANDUM
	)	Date: _____
	)	Time: _____
		Dept: _____

Trial Date: _____

_____

To _____ [*specify claimant, e.g.,* plaintiff] _____ [*name*], and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon after as the matter may be heard, in [_____ (Department *or* Division)] of the above court, located at _____ [*street address*], in the City of _____, California, _____ [*specify moving party, e.g.,* defendant *or* intervenor] _____ [*name*] will, and hereby does, move for an order to expunge the notice of pendency of action (lis pendens) recorded on _____ [*date*], in Book _____, at Page _____, of the Official Records of _____ County, California. The motion will be made on the grounds that _____ [the pleading on which the notice is based does not contain a real property claim *and/or* the real property claim alleged in the pleading on which the notice is based lacks probable validity *and/or* adequate relief can be secured to the claimant by the giving of an undertaking *and/or* the lis pendens is void and invalid for a failure to comply with the _____ (service *or* filing) requirements of *Code of Civil Procedure Section 405.22*].

The motion further requests that _____ [*specify moving party, e.g.,* defendant] _____ [*name*] be awarded reasonable attorney's fees and costs incurred in connection with this motion pursuant to *Code of Civil Procedure Section 405.38*, in the amount of $_____.

The motion will be based on the following: this notice of motion; the attached declaration(s) of _____ [*name(s)*]; the attached supporting memorandum; the papers, records, and files of this action; and any evidence presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* the defendant in the above-entitled matter, and the owner of the property on which plaintiff has recorded the notice of lis pendens, which is the subject of this motion to expunge].

2. _____ [*Here and in subsequent paragraphs set forth additional facts from declarant's knowledge that support the motion and grounds on which it is based, e.g.,* Plaintiff's lawsuit is based on an alleged loan of money from plaintiff to declarant to finance certain improvements on declarant's property. The alleged loan did not provide for any lien or encumbrance on declarant's property but was evidenced only by a promissory note signed by declarant in

which I allegedly personally promised and agreed to pay to plaintiff the sum of $_____ in installments over a period of _____ years. Plaintiff's lawsuit is based on declarant's alleged default in payment of that loan, which declarant denies and disputes in my answer on file with this court in the above-entitled matter].

3. Declarant has incurred expenses as follows in making this motion: _____ [*itemize reasonable expenses, including attorney's fees, and explain basis of computing each expense*], for a total of $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*signature*]

[*typed name*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion*]

CAUTION:
A supporting memorandum is required to be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*; *see also Cal. Rules of Ct., Rule 3.1114(a)* (motions for which memorandum is not required)].

[2] Use of Form

This form is for use as a notice of motion to expunge a notice of lis pendens from the record under *Code Civ. Proc. § 405 et seq.* It should be filed with the court and served on the adverse party along with a supporting declaration or affidavit [*Code Civ. Proc. § 405.30*]. The notice of motion contains a request for an order for reasonable attorney's fees and costs if the moving party prevails [*see Code Civ. Proc. § 405.38*]. For discussion of expungement of lis pendens, see *§ 348.21[1]*.

The declaration in this form is based on the case of *Allied Eastern Financial v. Goheen Enterprises (1968) 265 Cal. App. 2d 131, 71 Cal. Rptr. 126* . The factual situation stated in the declaration supports a notice of motion on the grounds that the action on which the notice of lis pendens is based does not affect title to or right of possession of the real property described in the notice [*Code Civ. Proc. § 405.4*]. The form also contains factual information supporting an award of reasonable attorney's fees and costs that the moving party has incurred [*see Code Civ. Proc. § 405.38*].

[3] Moving Party

At any time after a notice of lis pendens has been recorded, the following persons may apply to the court in which the action is pending for an order expunging the lis pendens notice [*Code Civ. Proc. § 405.30*]:

- Any party to the pending action.

- Any nonparty with an interest in the real property that is affected by the notice. A nonparty must obtain leave to intervene from the court at or before the time that he or she brings the motion to expunge.

A motion to intervene should not be combined with the motion to expunge (1) to avoid confusion, and (2) because local rules often require every motion to be separately filed [*see, e.g.,* Los Angeles Superior Court Rules, Rule 9.3]. Although *Code Civ. Proc. § 405.30* is silent regarding whether the motion to intervene should be made under *Code Civ. Proc. § 387(a)* (permissive intervention) or (b) (mandatory intervention), the motion should be made under *Code Civ. Proc. § 387(b)* if the intervenor is asserting that the disposition of the action may impair or impede the intervenor's interest in the real property. For further discussion of intervention and a complete set of intervention forms, see Ch. 395, *Parties* .

[4] State Statutes

Requirement that court order lis pendens notice expunged unless lis pendens claimant carries burden of proof in opposition by preponderance of evidence. *Code Civ. Proc. § 405.32*

Undertaking is possible condition to court denying or granting motion to expunge. *Code Civ. Proc. §§ 405.33, 405.34*

[5] Decisions

Declaration of third party on information and belief is insufficient to establish that action affects real property. *Burger v. Superior Court (1984) 151 Cal. App. 3d 1013, 1019-1020, 199 Cal. Rptr. 227*

Order expunging lis pendens is justified in action by buyers for specific performance if buyers failed to perform according to contract (no timely deposit of loan funds into escrow). *Nash v. Superior Court (1978) 86 Cal. App. 3d 690, 696-701, 150 Cal. Rptr. 394* (disapproved on other ground in *Malcolm v. Superior Court (1981) 29 Cal. 3d 518, 528, 174 Cal. Rptr. 694, 629 P.2d 495* , but holding in *Malcolm* regarding "state-of-mind" requirement for expungement now superseded by 1992 amendment requiring showing of probable validity)

[6] Cross References

See *§ 348.60*

For forms of declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensTerminationsReal Property LawPriorities & RecordingLis Pendens

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PART IV. FORMS

31-348 California Forms of Pleading and Practice--Annotated § 348.62

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§ 348.62 Proceedings to Expunge Notice of Lis Pendens From Record [Code Civ. Proc. §§ 405.30-405.33]--Order

[1] FORM Proceedings to Expunge Notice of Lis Pendens From Record [Code Civ. Proc. §§ 405.30-405.33]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*specify moving party, e.g.,* defendant *or* intervenor] for an order expunging a

notice of pendency of action (lis pendens) came on regularly for hearing by the court on this date. Plaintiff appeared by counsel _____ [*name*], and defendant appeared by counsel _____ [*name*]. [*Identify any other moving parties, claimants, and attorneys who made appearances.*]

On proof made to the satisfaction of the court that the motion ought to be granted, the court finds that

[*EITHER, if pleading does not contain a real property claim*]

the _____ [*specify pleading, e.g.,* complaint] on which the notice of pendency of action is based does not contain a real property claim,

[*OR, if claimant has not established probability of claim*]

the _____ [*specify claimant, e.g.,* plaintiff] has not established by a preponderance of the evidence the probable validity of the real property claim,

[*OR, if adequate relief can be secured by an undertaking*]

the real property claims have probable validity, but adequate relief can be secured to the _____ [*specify claimant, e.g.,* plaintiff] by the giving of an undertaking,

[*OR, if claimant has failed to comply with statutory service and filing requirements*]

the lis pendens is void and invalid for a failure to comply with the _____ (service *or* filing) requirements of *Code of Civil Procedure Section 405.22*

[*CONTINUE*]

and, thus,

IT IS ORDERED that the motion of the _____ [*specify moving party, e.g.,* defendant] be granted and that the notice of lis pendens recorded on _____ [*date*], in Book _____, at Page _____, of the Official Records of _____ County, California, be expunged[, subject to _____ (*specify moving party, e.g.,* defendant) providing an undertaking to _____ (*specify claimant, e.g.,* plaintiff) as ordered below].

[*ADD, if order conditioned on giving of undertaking*]

IT IS FURTHER ORDERED that expungement be conditioned on the requirement that _____ [*specify moving party, e.g.,* defendant] file with this court on or before _____ [*date*], an undertaking in the amount of $_____ for the indemnification of _____ [*specify claimant, e.g.,* plaintiff] should _____ [*specify claimant, e.g.,* plaintiff] prevail on the real property claim. _____ [*Specify moving party, e.g.,* Defendant] must show fulfillment of this condition by _____ [*date*]; if this showing is not made by the return date, the motion to expunge is denied without

further notice or hearing.

[*CONTINUE*]

IT IS FURTHER ORDERED that _____ [*specify claimant, e.g.,* plaintiff] pay to _____ [*specify moving party, e.g.,* defendant] the sum of $_____ as reasonable attorney's fees and costs.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use as an order expunging a notice of lis pendens pursuant to *Code Civ. Proc. § 405.30 et seq.* The order may be issued at any time after the recordation of the notice of lis pendens [*Code Civ. Proc. § 405.30*].

The court must order that the notice of lis pendens be expunged unless the party filing the notice shows to the court's satisfaction, by a preponderance of the evidence, that (1) the action does affect title to, the right of possession of, or the use of an easement in the real property described in the notice, and (2) the real estate claim has probable validity [*Code Civ. Proc. §§ 405.30-405.32*]. Alternatively, the notice of lis pendens must be ordered expunged if the court finds the real property claim has probable validity, but adequate relief can be secured to the claimant by the giving of an undertaking [*Code Civ. Proc. § 405.33*]. Finally, a violation of the service and filing requirements of *Code Civ. Proc. § 405.22* may be a ground justifying expungement [*see McKnight v. Superior Court (1985) 170 Cal. App. 3d 291, 303, 215 Cal. Rptr. 909* ; *Code Civ. Proc. § 405.23*]. For discussion of the effect of violations of service and filing requirements, see *§ 348.21[6]*.

[3] Provision of Undertaking

If expungement is conditioned on the giving of an undertaking, the undertaking must be of such nature and in such amount as will indemnify the claimant for all damages proximately resulting from the expungement that the claimant may incur if the claimant prevails on the real property claim. The court must set a return date for the moving party to show fulfillment of the undertaking condition. If the moving party fails to show fulfillment of the condition by the return date, the court must deny the motion to expunge without further notice or hearing [*Code Civ. Proc. § 405.33*].

[4] Attorney's Fees and Costs

The order should also direct that the prevailing party be awarded reasonable attorney's fees and costs, unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust [*Code Civ. Proc. § 405.38*].

[5] Review of Order by Writ of Mandate

An order granting or denying a motion to expunge a notice of lis pendens is not appealable. If such an order is made, the party aggrieved by the order may petition the proper reviewing court to review the order by writ of mandate. The petition for writ of mandate must be filed within 20 days after service of written notice of the order or within any additional time (not exceeding 10 days) that the trial court allows [*Code Civ. Proc. § 405.39*].

No expungement order is effective, nor is it allowed to be recorded in the office of any county recorder, until the time within which a petition for writ of mandate may be filed has expired [*Code Civ. Proc. § 405.35*]. If a petition for mandate has been filed, the expungement order is not effective until the proceeding commenced by the petition is finally adjudicated [*Code Civ. Proc. § 405.35*].

[6] Recordation of Another Notice

After a lis pendens has been ordered expunged, the claimant may not record another notice of lis pendens as to the affected property without first obtaining leave of the court in which the action is pending [*Code Civ. Proc. § 405.36*].

[7] State Statutes

Effect of recording order expunging notice of pendency of action. *Code Civ. Proc. §§ 405.60, 405.61*

Form and sufficiency of undertaking. *Code Civ. Proc. § 995.310 et seq.*

[8] Decisions

Whether to expunge lis pendens under former *Code Civ. Proc. § 409.2* (*now see Code Civ. Proc. 405.33*) on filing of undertaking if court finds that undertaking secures adequate relief to claimant is within discretion of trial court. *Sheets v. Superior Court (1978) 86 Cal. App. 3d 68, 70, 149 Cal. Rptr. 912*

[9] Cross References

See *§ 348.61*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensTerminationsReal Property LawPriorities & RecordingLis Pendens

California Forms of Pleading and Practice--Annotated

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Volume 31: Lis Pendens thru Mandate and Prohibition-Chs. 348-358
Chapter 348 LIS PENDENS
PART IV. FORMS

31-348 California Forms of Pleading and Practice--Annotated § 348.63

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors Judge O'Brien is a judge of the Los Angeles County Superior Court, conducting both civil and criminal trials. Ms. Bronston is a partner with Fierstein & Sturman in Los Angeles, practicing mainly in the area of creditors' rights. Mr. Mirman is a partner in Horgan, Rosen, Beckham & Coren, located in the Toluca Lake area of Los Angeles, and specializes in the representation of financial institutions. Mr. Pasternak is a partner with the firm of Appleton, Pasternak & Pasternak in Los Angeles, practicing in all aspects of business litigation, including appointments as a receiver, referee, and corporate appraiser. This chapter was adapted from California Practice Handbook: Provisional RemediesS (Matthew Bender), Litigation and Provisional and Post-Judgment Remedies Sections, Los Angeles County Bar Association, Handbook Editor; Hon. Robert H. O'Brien, Edythe L. Bronston, Alan M Mirman, David J. Pasternak, Contributing Editors.

§ 348.63 Proceedings to Require Claimant to Give Undertaking to Moving Party [Code Civ. Proc. § 405.34]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Require Claimant to Give Undertaking to Moving Party [Code Civ. Proc. § 405.34]--Notice of Motion and Supporting Declaration

[*Attorney identification*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO RE-
vs.	)	QUIRE CLAIMANT TO PROVIDE UNDERTAK-
_____ [*name*],	)	ING, SUPPORTING DECLARATION OF
Defendant.	)	_____ [*name*], AND SUPPORTING
	)	MEMORANDUM
	)	Date: _____
	)	Time: _____

Dept: _____
Trial Date: _____

_____

To _____ [*specify claimant, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], in the City of _____, California, _____ [*specify moving party, e.g.,* defendant *or* intervenor] _____ [*name*] will, and hereby does, move for an order requiring _____ [*specify claimant, e.g.,* plaintiff] _____ [*name*], the claimant herein, to give an undertaking to the _____ [*specify moving party, e.g.,* defendant] as a condition of maintaining the notice of pendency of action (lis pendens) that _____ [*specify claimant, e.g.,* plaintiff] had recorded on _____ [*date*], in Book _____, at Page _____, of the Official Records of _____ County, California. The motion will be made on the grounds that the undertaking is necessary to indemnify _____ [*specify moving party, e.g.,* defendant] for all damages proximately resulting from the maintenance of the notice if _____ [*specify claimant, e.g.,* plaintiff] does not prevail on the real property claim.

The motion further requests that _____ [*specify moving party, e.g.,* defendant] be awarded reasonable attorney's fees and costs incurred in connection with this motion pursuant to *Code of Civil Procedure Section 405.38*, in the amount of $_____.

The motion will be based on the following: this notice of motion; the attached declaration(s) of _____ [*name(s)*]; the attached supporting memorandum; the papers, records, and files of this action; and any evidence presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record for _____ defendant in the above action].

2. _____ [*Identify moving party, e.g.,* Defendant] is seeking an order of this court to require

_____ [*identify claimant, e.g.,* plaintiff] _____ [*name of claimant*], claimant, to provide _____ [*identify moving party, e.g.,* defendant] with an undertaking as a condition of maintaining the lis pendens recorded by claimant in the office of the County Recorder of _____ County, City of _____, California.

3. There is good cause for the order sought by _____ [*specify moving party, e.g.,* defendant] in that _____ [*set forth facts, e.g.,* defendant will suffer damages because the real property described in the lis pendens notice will be unmarketable during the pendency of the lawsuit. An undertaking is necessary to protect defendant's financial interest in the event the property decreases in value during the pendency of the lawsuit].

4. _____ [*Identify moving party, e.g.,* Defendant] has incurred expenses as follows in making this motion: _____ [*itemize reasonable expenses, including attorney's fees, and explain basis of computing each expense*], for a total of $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*signature*]

[*typed name*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion*]

CAUTION:
A supporting memorandum is required to be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005,* 1010; *Cal. Rules of Ct., Rule 3.1113(a)*; *see also Cal. Rules of Ct., Rule 3.1114(a)* (motions for which memorandum is not required)].

[2] Use of Form

This form is for use as a notice of motion to require the claimant to provide the moving party with an undertaking as a condition of maintaining a lis pendens notice in the record title. The motion may be brought at any time after the notice of lis pendens is recorded, and regardless of whether a motion to expunge has been filed. It is, however, subject to the provisions for expungement under *Code Civ. Proc. §§ 405.31* and *405.32* (discussed in *§ 348.21[1], [4]*) [*Code Civ. Proc. § 405.34*].

The court may receive oral testimony and provide for discovery by any affected party [*Code Civ. Proc. § 405.34*].

[3] Moving Party

A motion to require a claimant to provide an undertaking as a condition of maintaining a lis pendens notice may be brought by any person with an interest in the real property described in the notice. A person who is not a party to the pending action must obtain leave from the court to intervene at or before the time that he or she makes the motion [*Code Civ. Proc. § 405.34*].

A nonparty's motion to intervene should not be combined with the motion to require an undertaking (1) to avoid confusion, and (2) because local rules often require every motion to be separately filed [*see, e.g.,* Los Angeles Superior

Court Rules, Rule 9.3]. Although *Code Civ. Proc. § 405.34* is silent regarding whether the motion to intervene should be made under *Code Civ. Proc. § 387(a)* (permissive intervention) or (b) (mandatory intervention), the motion should be made under *Code Civ. Proc. § 387(b)* if the intervenor is asserting that the disposition of the action may impair or impede the intervenor's interest in the real property. For further discussion of intervention and a complete set of intervention forms, see Ch. 395, *Parties* .

[4] Giving of Undertaking

The court must determine the nature and amount of the undertaking [*Code Civ. Proc. § 405.34*]. The undertaking should state that the claimant will indemnify the moving party for damages suffered as a result of the maintenance of the notice if the claimant does not prevail on the real property claim. In its order requiring an undertaking, the court must set a return date for the claimant to show compliance and must order the lis pendens notice expunged without further notice or hearing if the claimant fails to do so [*Code Civ. Proc. § 405.34*]. The moving party may recover on the undertaking by showing (1) that the claimant did not prevail on the real property claim and (2) that the moving party suffered damages as a result of the maintenance of the lis pendens [*Code Civ. Proc. § 405.34*; *see Code Civ. Proc. § 996.440* (procedure for recovery on undertaking)].

[5] Attorney's Fees and Costs

When an order is made under the lis pendens statute granting or denying a motion to require the claimant to give the moving party an undertaking, the court must direct that the prevailing party be awarded reasonable attorney's fees and costs, unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust [*Code Civ. Proc. § 405.38*].

[6] State Statutes

Form and sufficiency of undertaking. *Code Civ. Proc. § 995.310 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureRemediesLis PendensGeneral OverviewReal Property LawPriorities & RecordingLis Pendens

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Volume 31: Lis Pendens thru Mandate and Prohibition-Chs. 348-358
Chapter 348 LIS PENDENS
PART IV. FORMS

31-348 California Forms of Pleading and Practice--Annotated § 348.64

AUTHOR: Edythe L. Bronston Alan M. Mirman Hon. Robert H. O'Brien David J. Pasternak Contributing Editors Judge O'Brien is a judge of the Los Angeles County Superior Court, conducting both civil and criminal trials. Ms. Bronston is a partner with Fierstein & Sturman in Los Angeles, practicing mainly in the area of creditors' rights. Mr. Mirman is a partner in Horgan, Rosen, Beckham & Coren, located in the Toluca Lake area of Los Angeles, and specializes in the representation of financial institutions. Mr. Pasternak is a partner with the firm of Appleton, Pasternak & Pasternak in Los Angeles, practicing in all aspects of business litigation, including appointments as a receiver, referee, and corporate appraiser. This chapter was adapted from California Practice Handbook: Provisional RemediesS (Matthew Bender), Litigation and Provisional and Post-Judgment Remedies Sections, Los Angeles County Bar Association, Handbook Editor; Hon. Robert H. O'Brien, Edythe L. Bronston, Alan M Mirman, David J. Pasternak, Contributing Editors.

§ 348.64 Proceedings to Require Claimant to Give Undertaking to Moving Party [Code Civ. Proc. § 405.34]--Order

[1] FORM Proceedings to Require Claimant to Give Undertaking to Moving Party [Code Civ. Proc. § 405.34]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*specify moving party, e.g.,* defendant *or* intervenor] _____ [*name*] for an order requiring the giving of an undertaking came on regularly for hearing by the court on this date. Plaintiff appeared by counsel _____ [*name*], and defendant appeared by counsel _____ [*name*]. [*Identify any other moving parties, claimants, and attorneys who made appearances.*]

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion of _____ [*specify moving party, e.g.,* defendant] be granted and that _____ [*specify claimant, e.g.,* plaintiff] file with this court on or before _____ [*date*], an undertaking in the amount of $_____ for the indemnification of _____ [*specify moving party, e.g.,* defendant] should _____ [*specify claimant, e.g.,* plaintiff] not prevail on the real property claim. _____ [*Specify claimant, e.g.,* Plaintiff] must show fulfillment of this condition by _____ [*date*]. If this showing is not made by the return date, this court shall issue an order, without further notice or hearing, expunging the notice of pendency of action recorded on _____ [*date*], in Book _____, at Page _____, of the Official Records of _____ County, California.

IT IS FURTHER ORDERED that _____ [*specify claimant, e.g.,* plaintiff] pay to _____ [*specify moving party, e.g.,* defendant] the sum of $_____ as reasonable attorney's fees and costs.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use as an order requiring a claimant to give the moving party an undertaking as a condition of maintaining the notice of lis pendens in the record title. The order may be issued at any time after the notice of lis pendens has been recorded [*Code Civ. Proc. § 405.34*].

[3] Provision of Undertaking

The undertaking must be of a nature and in an amount as the court determines to be just. In its order requiring the undertaking, the court must set a return date for the claimant to show compliance. If the claimant fails to do so by the return date, the court must order the notice of lis pendens expunged without further notice or hearing [*Code Civ. Proc. § 405.34*].

[4] Attorney's Fees and Costs

The order should direct that the prevailing party be awarded reasonable attorney's fees and costs, unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney's fees and costs unjust [*Code Civ. Proc. § 405.38*].

[5] Cross References

See *§§ 348.62, 348.63*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewReal Property LawPriorities & RecordingLis Pendens

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31-348 California Forms of Pleading and Practice--Annotated § 348.65

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§ 348.65 Notice of Motion to Exonerate or Modify Undertaking [Code Civ. Proc. § 405.37]

[1] FORM Notice of Motion to Exonerate or Modify Undertaking [Code Civ. Proc. § 405.37]

[*Attorney identification*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO
vs.	)	_____ [EXONERATE *or* MODIFY]
_____ [*name*],	)	UNDERTAKING
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept: _____
		Trial Date: _____

_____

To _____ [*specify responding party, e.g.,* defendant] _____ [*name*], and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon after as the matter may be heard, in [_____ (Department *or* Division) _____ of] the above court, located at _____ [*street address*], in the City of _____, California, _____ [*specify moving party, e.g.,* plaintiff] _____ [*name*] will, and hereby does, move for an order to _____ [exonerate *or* modify] the undertaking ordered by the above court pursuant to _____ [*Code of Civil Procedure Section 405.33 or Code of Civil Procedure Section 405.34 or* stipulation between the parties]. The motion will be made pursuant to *Code of Civil Procedure Section 405.37* on the grounds that _____ [*specify good cause for exoneration or modification*].

The motion further requests that _____ [*specify moving party, e.g.,* plaintiff] _____ [*name*] be awarded reasonable attorney's fees and costs incurred in connection with the motion, pursuant to *Code of Civil Procedure Section 405.38*, in the amount of $_____.

The motion will be based on the following: this notice of motion; the attached declaration(s) of _____ [*name(s*)]; the attached supporting memorandum; the papers, records, and files of this action; and any evidence presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____
[*moving party's status and name*]

CAUTION:
A supporting memorandum is required to be served and filed with this notice of motion [***see*** *Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*; *see also Cal. Rules of Ct., Rule 3.1114(a)* (motions for which memorandum is not required)].

[2] Use of Form

This form is a notice of motion for use by a party seeking exoneration or modification of an undertaking previously ordered by the court in the action or pursuant to a stipulation made in lieu of an order [*see Code Civ. Proc. § 405.37*]. The form also requests an order for reasonable attorney's fees and costs if the moving party prevails [*see Code Civ. Proc. § 405.38*].

[3] Showing for and Condition on Order

A court may exonerate or modify an undertaking on a showing of good cause and on terms that are just [*Code Civ. Proc. § 405.37*]. Facts should be set forth in an accompanying affidavit or declaration satisfying the requirement for showing good cause.

The order may be made conditional on the giving of a new undertaking under *Code Civ. Proc. § 405.33* or *405.34* [*Code Civ. Proc. § 405.37*; *see §§ 348.21[4], 348.24[1]*].

[4] Cross References

See *§§ 348.61, 348.63*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensTerminationsReal Property LawPriorities & RecordingLis Pendens

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Volume 31: Lis Pendens thru Mandate and Prohibition-Chs. 348-358
Chapter 348 LIS PENDENS
PART IV. FORMS

31-348 California Forms of Pleading and Practice--Annotated § 348.66

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§ 348.66 Notice of Withdrawal of Lis Pendens [Code Civ. Proc. § 405.50]

[1] FORM Notice of Withdrawal of Lis Pendens [Code Civ. Proc. § 405.50]

Recording requested by
_____ [*name*]
When recorded mail to
_____ [*name*]
_____ [*address*]
_____ [*city, state, zip*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF WITHDRAWAL OF LIS PENDENS
Defendant.	)	

)
)
_____

NOTICE IS HEREBY GIVEN THAT _____ [*name*] withdraws the notice of pendency of action (lis pendens) that was recorded in the above action on _____ [*date*], in Book _____, at Page _____, of the Official Records of _____ County, California. _____ [*Repeat name*] is the [successor in interest of the] party who recorded the above lis pendens.

The above lis pendens affected certain real property that is situated [in part] in _____ [*county in which notice is to be recorded*] County, California, and that is described as follows: _____ [*set forth legal description, including street address, of real property*].

This notice of withdrawal is recorded pursuant to *Code of Civil Procedure Section 405.50*.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[*Acknowledgement. See § 348.60[1]*]

[2] Use of Form

This form is a notice for use in withdrawing a lis pendens by the party or parties who recorded it or by a successor in interest [*Code Civ. Proc. § 405.50*].

[3] Required Contents

The form must be executed by the party who recorded the notice of lis pendens or the party's successor in interest and must also be acknowledged [*Code Civ. Proc. § 405.50*; *see Gov. Code § 27287*].

[4] Effect of Withdrawal

Recordation of a notice of withdrawal of a notice of lis pendens has the same effect on subsequent purchasers or encumbrancers as recordation of an order expunging such a notice [*see Code Civ. Proc. §§ 405.60, 405.61*]. That is, it clears the title of the property from the effect of the lis pendens [*see § 348.27*].

[5] Cross References

See *§ 348.60*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensTerminationsReal Property LawPriorities & RecordingLis Pendens

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Volume 31: Lis Pendens thru Mandate and Prohibition-Chs. 348-358
Chapter 349 LITERARY PROPERTY AND COPYRIGHT

31-349 California Forms of Pleading and Practice--Annotated 349.syn

§ 349.syn Synopsis to Chapter 349: LITERARY PROPERTY AND COPYRIGHT

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[1] In General

[2] Moral Rights as Opposed to Economic and Proprietary Rights

§ 349.02 Cross References

§§ 349.03-349.09 [Reserved]

§ 349.10 Governing Statutes

§ 349.11 "Fixed in Tangible Medium of Expression" Defined

§ 349.12 Federal Preemption

§§ 349.13-349.19 [Reserved]

§ 349.20 Federal Copyright Act of 1976

§ 349.21 Subject Matter of Copyright

[1] In General

[2] Fixation in Tangible Medium of Expression

[3] Compilations and Derivative Works

§ 349.22 Scope of Copyright

[1] Exclusive Rights in Copyrighted Works

[2] Limitations on Exclusive Rights

[3] Compulsory Licensing

[4] Reasonable License of Music for Individual Proprietors

[5] Implied Grant of License

§ 349.23 Copyright Ownership

[1] In General

[2] Work for Hire

[3] Joint Work

§ 349.24 Transfer of Ownership

§ 349.25 Duration of Copyright

§ 349.26 Notice and Registration of Copyright

[1] Notice of Copyright on Copies or Phonorecords Publicly Distributed on or After March 1, 1989

[2] Notice of Copyright on Copies or Phonorecords Publicly Distributed Before March 1, 1989

[3] Preregistration of Unpublished Work

[4] Registration of Published Work

§ 349.27 Infringement of Copyright

[1] Violation of Exclusive Rights

[a] Direct Infringement

[b] Contributory Infringement

[c] Vicarious Infringement

[2] Inapplicability to Infringing Acts Occurring Outside United States

[3] Civil Action for Infringement

[a] Commencement of Action

[b] Action Against Public Entities

[4] Proof of Infringement

[a] Ownership and Copying

[b] Proof of Copying by Circumstantial Evidence

[c] Access and Substantial Similarity

[d] Displaying Work on Web Site

[5] Remedies for Infringement

[a] Availability

[b] Damages

[c] Costs and Attorney's Fees

[d] Interest

[e] Injunctive and Impounding Relief

[6] Defenses

[a] In General

[b] Fair Use

[i] Nature of Defense

[ii] Purpose and Character of Use

[iii] Nature of Copyrighted Work

[iv] Amount and Substantiality of Portion Used

[v] Effect of Use on Potential Market or Value

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§ 349.01 Scope of Chapter

[1] In General

This chapter discusses the protection afforded to intellectual property, and contains forms for use in protecting that property, under the federal copyright law. It also discusses related protection of intellectual property and ideas, and contains forms for use in protecting that property and those ideas under various principles of California law. Part B discusses the federal Copyright Act of 1976. Part C discusses California law. Part D discusses the federal Semiconductor Chip Protection Act of 1984.

The chapter contains a form of complaint for use in federal district court for infringement of copyright [*see § 349.100*]. The chapter also contains a form of complaint for use in a state court for damages arising out of a breach of an express contract, breach of confidence, or wrongful use of an idea [*see § 349.101*], and an order for the viewing of an infringing work in connection with a complaint for wrongful use of an idea [*see § 349.102*].

For discussion and forms concerning causes of action related to this chapter, see Ch. 57, *Art* ; Ch. 269, *Fraud and Deceit* ; Ch. 429, *Privacy* ; Ch. 549, *Trademarks and Trade Names* ; and Ch. 565, *Unfair Competition* .

[2] Moral Rights as Opposed to Economic and Proprietary Rights

The scope of this chapter is limited to a discussion of and forms for use in the protection and enforcement of economic and proprietary rights in intellectual property under federal and state copyright laws, and in ideas under California law. In addition, both federal and California law recognize the existence of and provide protection for and methods of enforcement of moral rights in certain types of intellectual property. Certain aspects of artists' moral rights have been codified in the federal copyright law [*see 17 U.S.C. § 106A*]. Discussion of, and forms for use in protecting and enforcing, an artist's moral rights in intellectual property under federal and California law are contained in Ch. 57, *Art* .

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§ 349.02 Cross References

For discussion and forms relating to moral rights in and ownership and transfer of works of fine art, see Ch. 57, *Art*

For discussion, procedural guide, and forms related to actions for breach of contract, see Ch. 140, *Contracts*

For jurisdictional allegations for use in federal district courts, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For discussion and forms related to fraud and deceit, see Ch. 269, *Fraud and Deceit*

For discussion and forms involving actions in state court relating to patents, see Ch. 411, *Patents and Inventions*

For discussion and forms for use in actions involving the right of privacy, see Ch. 429, *Privacy*

For discussion and forms related to trademarks and trade names, see Ch. 549, *Trademarks and Trade Names*

For discussion and forms related to unfair competition, see Ch. 565, *Unfair Competition*

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[Reserved]

§§ 349.03[Reserved]

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A. General Principles

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§ 349.10 Governing Statutes

Federal copyright protection is governed by Title 17 of the United States Code. State protection for works of authorship not protectible under federal law, including works of authorship that are not fixed in any tangible medium of expression, and sound recordings fixed prior to February 15, 1972, is governed by *Civ. Code § 980 et seq.*

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§ 349.11 "Fixed in Tangible Medium of Expression" Defined

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that is being transmitted, is "fixed" for purposes of the Federal Copyright Act of 1976 if a fixation of the work is being made simultaneously with its transmission [*17 U.S.C. § 101*].

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§ 349.12 Federal Preemption

State common law copyright protection is expressly preempted by the Federal Copyright Act of 1976 [*17 U.S.C. § 301(a)*]. Exceptions to this rule of preemption apply to all of the following [*17 U.S.C. § 301(b)*]:

- Works not copyrightable under federal law, including works not fixed in any tangible medium of expression [*see, e.g., Civ. Code § 980 et seq.*; *see also* discussion in *§ 349.41*].

- Causes of action arising from undertakings commenced before January 1, 1978. For copyright claims under California common law, this exception applies when the defendant's infringement, not just the plaintiff's creation of the work, occurred before January 1, 1978 [*Klekas v. EMI Films, Inc. (1984) 150 Cal. App. 3d 1102, 1110, 198 Cal. Rptr. 296*].

- Causes of action arising from works protected by the Copyright Act of 1909, which was applicable prior to January 1, 1978, the effective date of the Copyright Act of 1976. The 1909 Act applies in such cases even if the alleged infringement occurred in 1978 or later. [*Magnuson v. Video Yesteryear (9th Cir. 1996) 85 F.3d 1424, 1427-1428*].

- Activities violating legal or equitable rights that are not equivalent to any of the exclusive rights specified by *17 U.S.C. § 106* [*see also* discussion in *§ 349.22[1]*].

- State and local landmarks, historic preservation, zoning, or building codes relating to architectural works.

For further discussion of the effect of the 1976 Act on state common law copyright protection see *§ 349.41*.

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§§ 349.13[Reserved]

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§ 349.20 Federal Copyright Act of 1976

Under the Federal Copyright Act of 1976 (*17 U.S.C. § 101 et seq.*) a single federal system has been established for the protection of literary property. The act abolishes the former dual system of "common law copyright" for unpublished works and federal statutory copyright for published works. Formerly, federal copyright protection, with some exceptions, began once a work had been published. Under the 1976 Act, however, copyright protection in an original work of authorship begins as soon as it is created by being fixed in any tangible medium of expression from which it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device [*see 17 U.S.C. § 102(a)*; *see also* H.R. Rep. No. 1476, 94th Cong., 2nd Sess. (1976)].

The superseded Copyright Act of 1909 is not necessarily immaterial in current cases. In a case of alleged infringement of copyright [*see § 349.27*], for instance, that act could be relevant on the issue of whether the work in question either received copyright protection under the 1909 act or fell into the public domain while that act was in force [*see* Societe Civile Succession Richard Guino v. Renoir (9th Cir. 2008) 549F.3d 1182, 1185-1190 (defendant infringed plaintiff's copyright in sculptures that were created in 1913-1917 and first published in 1917 in France; from 1917 to 1978, those sculptures were neither protected by copyright in United States nor in public domain; on January 1, 1978, they became subject to Copyright Act of 1976, under which in 1984 copyright protection was secured by registration)].

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B. Federal Copyright Law

31-349 California Forms of Pleading and Practice--Annotated § 349.21

§ 349.21 Subject Matter of Copyright

[1] In General

Copyright protection under the 1976 Act subsists in original works of creation that are fixed in any tangible medium of expression. The medium may be one now known, or one later developed. A work is considered to be sufficiently fixed if it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device [*17 U.S.C. § 102(a)*]. The Copyright Act does not contemplate the copyrighting of a now-nonexistent original work on the basis of a tendered reconstruction [*Kodadek v. MTV Networks, Inc. (9th Cir. 1998) 152 F.3d 1209*].

Works of authorship protected by the 1976 Act include the following [*17 U.S.C. § 102(a)*]:

- Literary works.
- Musical works, including any accompanying words.
- Dramatic works, including any accompanying music.
- Pantomimes and choreographic works.
- Pictorial, graphic, and sculptural works.
- Motion pictures and other audiovisual works.
- Sound recordings.
- Architectural works.

These terms are further defined in *17 U.S.C. § 101*.

[2] Fixation in Tangible Medium of Expression

The concept of fixation under the 1976 Act is central to the application of the statute to any given work. Fixation requires that the work contained in a material object must, in some manner, take on the physical aspects of the protected work such that the "copy" of that work may be perceived by an observer [*Walker v. University Books, Inc. (9th Cir. 1979) 602 F.2d 859, 864* (blueprint sufficiently tangible and permanent to permit fixation)].

Under the present copyright statute, it makes no difference what the form, manner, or medium of fixation is, or may be, so long as there is a fixation and it is capable of being perceived directly or by means of any machine or device now known or later developed. For example, a live television broadcast of a news event, sporting event, or live performance of music or drama is disseminated to the public in an unfixed form; however, the coverage is almost always simultaneously recorded. The copyright owner, in such an event, would be protected by the federal copyright law and could proceed in a federal court against an infringing user of the live broadcast [*see* Notes of Committee on the Judiciary to § 102, H.R. Rep. No. 1476, 94th Cong., 2nd Sess. (1976)].

In one case, the Ninth Circuit held that the act of loading copyrighted system maintenance software into a computer's random access memory (RAM) created a copy of protectable expression that was sufficiently "fixed" to constitute an infringement of the copyright, even though the copy is lost from the RAM when the computer is switched off, because the operator could view the system error log and diagnose any problems with the computer while the software was in the RAM [*MAI Systems Corp. v. Peak Computer, Inc. (9th Cir. 1993) 991 F.2d 511, 518-519*].

[3] Compilations and Derivative Works

The 1976 Act also extends protection for works that are either derivative or compilations [*17 U.S.C. § 103(a)*; *see 17 U.S.C. § 101* ("compilation" and "derivative work" defined); *Jarvis v. K2 Inc. (9th Cir. 2007), 486 F.3d 526, 530-532* (collage ads incorporating edited versions of plaintiff's photographs were not collective works--that is, not compilations--but were derivative works)]. However, the copyright in the "new version" covers only the material contributed by the later author, and is independent of and does not affect one way or another any preexisting copyright or public domain status of the preexisting material [*17 U.S.C. § 103(b)*]. In deciding whether to grant copyright protection to a derivative work, courts must be concerned about the impact that a derivative copyright will have on the copyright privileges and rights of the owner of the underlying work. The body of law regarding derivative copyrights is designed to strike a balance between the holder of a copyright in the underlying work and the creator of a work that is made by copying that underlying work [*Entertainment Research Group, Inc. v. Genesis Creative Group, Inc. (9thCir. 1998) 122 F.3d 1211, 1219]* . The test of a derivative copyright is two-fold. First, to support a copyright, the original aspects of a derivative work must be more than trivial. Second, the original aspects of a derivative work must reflect the degree to which it relies on preexisting material and must not in any way affect the scope of any copyright protection in that preexisting material [*Entertainment Research Group, Inc. v. Genesis Creative Group, Inc. (9th Cir. 1998) 122 F.3d 1211, 1220* (adopting so-called *Durham* test and discussing at length district court's proper application of that test in this case); *see Durham Industries, Inc. v. Tomy Corp. (2d Cir. 1980) 630 F.2d 905, 909*]. In addition, copyright protection under the 1976 Act does not extend to any part of the work in which preexisting material was unlawfully used [*17 U.S.C. § 103(a)*].

In the case of compilations, originality rather than the time and effort expended by the compiler (the so-called "sweat of the brow") in making the compilation is the touchstone of copyright protection, at least in such compilations as directories and other fact-based works [*Feist Pub. v. Rural Tel. Serv. (1991) 499 U.S. 340, 359-360, 111 S. Ct. 1282, 113 L. Ed. 2d 358* (repudiating the "sweat of the brow" doctrine)]. To merit copyright protection, the facts, materials, or data must be selected, coordinated, or arranged in such a way as to render the work as a whole original. Therefore, there will be some fact-based (or data-based or other materials-based) work in which the selection, coordination, and arrangement will not be sufficiently original to trigger copyright protection [*Feist Pub. v. Rural Tel. Serv. (1991) 499 U.S. 340, 358, 111 S. Ct. 1282, 113 L. Ed. 2d 358*]. The requisite originality is not a stringent standard, and does not

require that facts, data, or other materials be presented in an innovative or surprising way. The selection and arrangement of those facts, data, or materials, however, cannot be so mechanical or routine as to require no creativity whatsoever [*Feist Pub. v. Rural Tel. Serv. (1991) 499 U.S. 340, 358, 362, 111 S. Ct. 1282, 113 L. Ed. 2d 358*]. Thus, a telephone book's white pages listings, limited to basic subscriber information (name, town, and telephone number) and arranged alphabetically does not contain the requisite originality to be copyrightable as a compilation [*Feist Pub. v. Rural Tel. Serv. (1991) 499 U.S. 340, 362-363, 111 S. Ct. 1282, 113 L. Ed. 2d 358*]. On the other hand, "organizers" (calendar-type books produced to help users plan daily activities and typically containing uncopyrightable blank forms for recording calendar and address information, as well as uncopyrightable utilitarian features such as pockets for business cards) can be copyrightable as compilations if the selection, coordination, and arrangement of materials and data in the organizer attain sufficient originality [*Harper House, Inc. v. Thomas Nelson, Inc. (9th Cir. 1989) 889 F.2d 197, 204-205*].

A combination of unprotectable elements may qualify for copyright protection [*Apple Computer, Inc. v. Microsoft Corp. (9th Cir. 1994) 35 F.3d 1435, 1446*], but only if those elements are numerous enough and their selection and arrangement are original enough that their combination constitutes an original work of authorship [*Satava v. Lowry (9th Cir. 2003) 323 F.3d 805, 811*]. On the other hand, the creator of such a work that is not eligible for regular copyright protection can still have a so-called "thin copyright," which would protect against identical copying of that work [*Satava v. Lowry (9th Cir. 2003) 323 F.3d 805, 812* ; *Ets-Hokin v. Skyy Spirits, Inc. (9th Cir. 2003) 323 F.3d 763, 766*].

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§ 349.22 Scope of Copyright

[1] Exclusive Rights in Copyrighted Works

Title *17 U.S.C. § 106* confers a package of exclusive rights on the owner of a copyright. A copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections [*Dowling v. United States (1985) 473 U.S. 207, 216, 105 S. Ct. 3127, 87 L. Ed. 2d 152*]. A copyright owner has the exclusive right to do and to authorize any or all of the following activities [*17 U.S.C. § 106*]:

- Reproducing the copyrighted work in copies or phonorecords.
- Preparing derivative works based on the copyrighted work.
- Distributing copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership or by rental, lease, or lending.
- Performing publicly the copyrighted work in the case of literary, musical, dramatic, and choreographic works, pantomimes, motion pictures, and other audiovisual works.
- Displaying publicly the copyrighted work in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work.
- In the case of sound recordings, performing the copyrighted work publicly by means of a digital audio transmission.

[2] Limitations on Exclusive Rights

Title *17 U.S.C. § 106* does not accord the copyright owner complete control over all possible uses of his or her work.

The property rights of a copyright holder have a character distinct from the possessory interest of the owner of simple goods, wares, or merchandise because the copyright holder's dominion is subjected to precisely defined limits [*Dowling v. United States (1985) 473 U.S. 207, 217, 105 S. Ct. 3127, 87 L. Ed. 2d 152*]. Thus, there are a number of statutory limitations on the exclusive rights afforded to a copyright owner under the 1976 Act. These limitations include:

- Fair use of a copyrighted work by reproduction for purposes of criticism, comment, news reporting, teaching, scholarship, or research [*see 17 U.S.C. § 107*; *see also* discussion in *§ 349.27[6][b]*].

- Reproduction or distribution by libraries and archives made without any purpose of direct or indirect commercial advantage [*see 17 U.S.C. § 108*].

- Distribution of copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending [*17 U.S.C. § 106(3)*; *see also 17 U.S.C. § 602(a)* (unauthorized importation)]. However, under the "first sale doctrine" set out in *17 U.S.C. § 109(a)*, this distribution right may be exercised solely with respect to the initial disposition of copies of a work, not to prevent or restrict the resale or other further transfer of possession of such copies [*see Nimmer on Copyright, Ch. 8, The Nature of the Rights Protected by Copyright, § 8.12*(B)(1) (Matthew Bender)]. In the Ninth Circuit, the general rule is that the first sale doctrine provides a defense only when the claims involve domestically made copies of U.S.-copyrighted works [*Omega S.A. v. Costco Wholesale Corp. (9th Cir. 2008) 541 F.3d 982, 985, 990-991* (holding that Supreme Court's ruling in *Quality King Distribs., Inc. v. L'Anza Research Int'l, Inc. (1998) 523 U.S. 135, 139-152, 118 S. Ct. 1125, 140 L. Ed. 2d 254* did not invalidate Ninth Circuit's established rule)]. Therefore, in the Ninth Circuit, unauthorized sale of a U.S.-copyrighted item that was manufactured *outside* the United States is an infringement of copyright [*Omega S.A. v. Costco Wholesale Corp. (9th Cir. 2008) 541 F.3d 982, 986, 990-991* (no defense available under *17 U.S.C. § 709* available to retailer who sold Swiss-manufactured watches in the United States without manufacturer's consent)].

- Performance or display of a copyrighted work for educational, religious, personal, or promotional purposes in which there is no direct or indirect admission charge, or there is an admission charge but the net proceeds are used exclusively for educational, religious, or charitable purposes [*see 17 U.S.C. § 110*; *see also § 349.27[6][e]*].

- Permitted secondary transmissions, including transmissions by cable systems under compulsory license, of primary transmissions by secondary retransmission systems [*see 17 U.S.C. § 111*].

- "Ephemeral recordings" of a copyrighted work, other than a motion picture or other audiovisual work, by a transmitting organization entitled to transmit a performance or display of the work to the public under a license or transfer of the copyright or under the limitations on exclusive rights in sound recordings (*17 U.S.C. § 114(a)*), to facilitate a legally-permitted later transmission [*see 17 U.S.C. § 112*].

- Manufacture, distribution, or display of a useful article portrayed as such in a copyrighted pictorial, graphic, or sculptural work, and manufacture, distribution, or display of pictures or photographs of such articles in connection with advertisements or commentaries related to their distribution or display, or in news reports [*see 17 U.S.C. § 113*].

- Performance rights in copyrighted sound recordings [*see 17 U.S.C. § 114*].

- Limited rights of an owner of a copy of a computer program to make another copy or adaptation of that program [*see 17 U.S.C. § 117*].

- Manufacture, distribution, or public display of pictorial representations of an architectural work, if the building in which the work is embodied is located in or ordinarily visible from a public place [*see 17 U.S.C. § 120(a)*].

- A building owner's alteration, destruction, or authorization of alteration or destruction, of a building embodying architectural work without the consent of the author or copyright owner of the architectural work [*see 17 U.S.C. § 120(b)*].

For detailed discussion of the scope of exclusive rights in a copyrighted work, see Nimmer on Copyright, Ch. 8, *The Nature of the Rights Protected by Copyright* (Matthew Bender), and Notes of Committee on the Judiciary to *17 U.S.C. §§ 106-118*, House Report No. 94-1476.

[3] Compulsory Licensing

The 1976 Act also provides for compulsory licensing of various uses of a copyrighted work [*see 17 U.S.C. §§ 111(c), (d), 115, 119*]. Compulsory licensing is essentially a statutory exception to the Act's provision that the copyright owner has certain statutorily specified exclusive rights in the work [*see 17 U.S.C. § 106* (discussed in [1], *above*)] and the Act's provision that anyone who violates any of those rights is an infringer of the copyright [*see 17 U.S.C. § 501(a)* (discussed under *§ 349.27[1]*)].

The Copyright Act provides for compulsory licensing in the following circumstances:

- A cable system may obtain a compulsory license to make secondary transmissions to the public of primary transmissions made by a broadcast station licensed by the Federal Communications Commission (FCC) or an appropriate governmental authority of Canada or Mexico [*see 17 U.S.C. § 111(c), (d)*].

- Once phonorecords of a nondramatic musical work have been distributed to the public under authority of the copyright owner, others may obtain a compulsory license to make and distribute their own phonorecords of that work, under specified circumstances [*see 17 U.S.C. § 115*; *Peer Intern. Corp. v. Pausa Records, Inc. (9th Cir. 1990) 909 F.2d 1332, 1337]* .

- "Satellite carriers" may obtain a "statutory" (i.e., compulsory) license to make secondary transmissions to the public for private home viewing of a primary transmission made by a "super station" or by a network station, under specified circumstances [*see 17 U.S.C. § 119*].

The Copyright Act also provides for negotiated licensing of the performances of nondramatic musical works on coin-operated phonorecords ("jukeboxes") and for negotiated licensing for the use of pictorial, graphic, sculptural, and nondramatic musical works by public broadcasting entities [*see 17 U.S.C. §§ 116, 118*]. In the absence of an effective agreement, royalties are to be determined by a panel of experts appointed by the Librarian of Congress and called copyright royalty judges (or, before June 1, 2005, by ad hoc copyright arbitration royalty panels) [*17 U.S.C. §§ 116(b)(2), 118(b)(4)*; *see 17 U.S.C. § 801 et seq.* (appointment of and proceedings by copyright royalty judges); *see also* former *17 U.S.C. §§ 116(b)(2), 118(b)(3)*; Pub. L. No. 108-419, § 6 (operative date of amendments enacted by Copyright Royalty and Distribution Reform Act of 2004; transitional application of former provisions of Copyright Act mandating proceedings by ad hoc copyright arbitration royalty panels pursuant to former *17 U.S.C. § 801 et seq.*)].

For detailed discussion of compulsory and negotiated license provisions under the Copyright Act, Nimmer on Copyright, Ch. 8, *The Nature of the Rights Protected by Copyright* (Matthew Bender).

[4] Reasonable License of Music for Individual Proprietors

Notwithstanding that a performing rights society is subject to a consent decree providing for a reasonable license rate or fee to be charged for use of its music, an individual proprietor who owns or operates fewer than seven nonpublicly traded establishments in which nondramatic musical works are publicly performed, and who claims that a music license agreement offered by the performing rights society is unreasonable as to him or her, may bring a judicial proceeding to determine a reasonable license fee or rate with regard to his or her business [*17 U.S.C. § 513*]. The industry rate is presumed to have been reasonable at the time it was set, but the presumption does not affect a determination of whether the rate is correctly applied to music used by the proprietor in his or her business [*17 U.S.C. § 513(4)*].

[5] Implied Grant of License

A license is deemed to have been granted implicitly if the following three facts are established [*Asset Mktg. Sys. v. Gagnon (9th Cir. 2008) 542 F.3d 748, 2008 U.S. App. LEXIS 19179, at *14-*15*]:

First, a person--the licensee--requested the creation of a work (which is a work of the kind that can be subject to copyright). The request need not be explicit or formalized; what matters is that the licensee took the initial steps toward creation of the work, having that result in mind. Creation of the work was responsive to the licensee's initiative [*see Asset Mktg. Sys. v. Gagnon (9th Cir. 2008) 542 F.3d 748, 2008 U.S. App. LEXIS 19179, at *16*].

Second, the creator--the copyright owner and licensor--made that particular work and delivered it to the licensee who requested it. That is, the work was created specifically for the licensee. Whether the work was actually delivered could be disputed; for instance, a customized computer program could have been installed on the licensee's computer as object code (which is readable by the computer but not easily readable by a person), while the creator retained the source code (which a person can read and which can be modified by a programmer), and then the creator could plausibly deny that the program was delivered. In any event, as long as the other two facts are established, and the licensee in fact has some meaningful use of the work, a court may conclude that an implied license has been granted [*see Asset Mktg. Sys. v. Gagnon (9th Cir. 2008) 542 F.3d 748, 2008 U.S. App. LEXIS 19179, at *17*].

Third, the licensor intended that the licensee-requestor would use the work in some way appropriate to the nature of the work: for example, copying and distributing it (for example, the work is a special effect created for use in a film) or using and modifying it for use in business operations (for example, the work is a customized computer program) [*Asset Mktg. Sys. v. Gagnon (9th Cir. 2008) 542 F.3d 748, 2008 U.S. App. LEXIS 19179, at *15*]. The relevant intent is the licensor's objective intent at the time of the creation and delivery of the work, as manifested by the parties' conduct. A court should consider the following factors to determine whether the creator had such an intent [*Asset Mktg. Sys. v. Gagnon (9th Cir. 2008) 542 F.3d 748, 2008 U.S. App. LEXIS 19179, at *18-*19*]:

- Whether the parties were engaged in a short-term discrete transaction as opposed to an ongoing relationship;

- Whether the creator submitted (regardless of whether the parties signed) a written contract providing that copyrighted material could be used only with the creator's future involvement or express permission; and

- Whether the creator's conduct during the creation or delivery of the copyrighted material indicated that use of the material without the creator's involvement or consent was permissible.

If an implied license was granted, two dependent issues can arise. First, as to the durability of the license, if the licensee gave consideration--in the usual case, the licensee pays money to the creator--then the license may be irrevocable [*see Asset Mktg. Sys. v. Gagnon (9th Cir. 2008) 542 F.3d 748, 757*], or it may have been converted into a contract [*see Effects Assoc., Inc. v. Cohen (9th Cir. 1990) 908 F.2d 555, 559 n.7*]. Second, issues can arise regarding the scope of the

license--whether it is limited in any way (such as by geographic area), whether it is exclusive or not, and what the licensee is entitled to do with, and with respect to, the work (for instance, whether a computer program may be modified). Evidence of the parties' intent must be considered in each case [*see, e.g., Asset Mktg. Sys. v. Gagnon (9th Cir. 2008) 542 F.3d 748, 757* (court's finding that creator of work intended to grant nonexclusive, unlimited license was supported by fact that creator submitted draft of agreement to licensee, which contained statement to that effect; and fact that parties never signed it was irrelevant)]. A licensee infringes the owner's copyright if the licensee's use exceeds the scope of the license [*S.O.S., Inc. v. Payday, Inc. (9th Cir. 1989) 886 F.2d 1081, 1087*].

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§ 349.23 Copyright Ownership

[1] In General

The copyright in a work protected by the 1976 Act vests initially in the author or authors of the work [*17 U.S.C. § 201(a)*]. In the case of a work made for hire [*see* discussion *§ 349.23[2]*], the employer (or other person for whom the work was specially prepared) is considered the author of the work and is regarded as the initial owner of the work unless there is a specific written agreement otherwise by the parties [*17 U.S.C. § 201(b)*]. However, when the work consists of separate contributions in a collective work, the author of a separate contribution is regarded as the initial owner of the separate contribution even though copyright ownership of the collective work as a whole may vest with another person [*17 U.S.C. § 201(c)*; *see* Notes of Committee on the Judiciary to § 201, House Report No. 94-1476].

Under *17 U.S.C. § 201(c)*, a publisher could reprint a contribution from one issue in a later issue of a magazine, for example, or could reprint an article from one edition of an encyclopedia in a later revision of it; but the publisher could not revise the contribution itself or include it in a new anthology or an entirely different collective work. Essentially, that section of the 1976 Act adjusts a publisher's copyright in its collective work to accommodate a freelance contributor's copyright in the contribution. If there is demand for a freelance article standing alone or in a new collection, the 1976 Act allows the freelance contributor to benefit from that demand; after authorizing initial publication, the contributor may also sell the article to others [*New York Times Co. v. Tasini (2001) 533 U.S. 483, 497, 121 S. Ct. 2381, 150 L. Ed. 2d 500* (freelance-contributed articles first published in *New York Times* could not, without contributors' consent, be later published in NEXIS database or other similar computer database; that database must be viewed as entirely new collective work rather than "revision" of original collective work)].

[2] Work for Hire

A work is "for hire" when it is prepared by an employee within the scope of his or her employment or when it is specially ordered or commissioned for use in a collective work or for other purposes specified by statute [*17 U.S.C. § 101*]. In determining whether a work was prepared by an employee, principles of the general common law of agency apply. Many factors, including the hiring party's right to control the manner and means by which the product is accomplished, the skill required, and the duration of the relationship between the parties, must be considered, and no

one factor is determinative [*see Community for Creative Non-Violence v. Reid (1989) 490 U.S. 730, 752-753, 109 S. Ct. 2166, 104 L. Ed. 2d 811*].

In weighing the factors, a court may draw some guidance from the alleged employer's status as a technology start-up company, in the light of common practices for such a business and of the way the company operated. In particular, a contemplated indefinite duration of the relationship between the company and the individual (who would appear to be an employee if not hired for a specific term nor with a discretely defined end-product in mind), the individual's performing and being available to perform employee-like tasks for the company (such as doing work in several areas and having a title suggesting broad duties), the fact that the individual received a salary from the company during the relationship (even if the salary was paid in stock in lieu of cash), and the nature of the company's business (to develop and sell a thing that required continual technological innovation), all could support a finding that the individual was an employee. Factors pointing to the opposite conclusion might be given little weight in the light of the way the company operated because of being a technology start-up. For instance, having control over the manner and means of doing work--a typical indicator of an employment relationship--is comparatively unimportant for a start-up company, if not actually counter-productive [*JustMed, Inc. v. Byce (9th Cir. 2010) 600 F.3d 1118, 2010 U.S. App. LEXIS 6976, at *18-*24]* .

[3] Joint Work

A work is a "joint work" when it is prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole [*17 U.S.C. § 101*]. The authors of a joint work are coowners of the copyright in that work [*17 U.S.C. § 201(a)*]. In the Ninth Circuit, joint authorship requires each author to make an independently copyrightable contribution to the work [*Ashton-Tate Corp. v. Ross (9th Cir. 1990) 916 F.2d 516, 521*].

In the case of a work, such as a motion picture, that is the result of many individuals' creative contributions, authorship entails more than merely making a valuable and copyrightable contribution. In the absence of a determinative contract, several factors may be among the criteria for authorship. First, an author superintends the work by exercising control. Second, putative coauthors make objective manifestations of their shared intent to be coauthors. Third, the audience appeal of a joint work turns on the combined contributions of the coauthors, and the share of each in the work's success cannot be appraised. Control in many cases will be the most important factor: absence of control is strong evidence of the absence of coauthorship. The factors cannot be reduced to a rigid formula, however, because the creative relationships to which they apply vary too much. Different people do creative work together in different ways, and even among the same people working together the relationship may change over time as the work proceeds [*Aalmuhammed v. Lee (9th Cir. 2000) 202 F.3d 1227, 1234-1235* (plaintiff could not support claim to be coauthor of motion picture *Malcolm X,* although plaintiff did have quantum meruit claim for making valuable, copyrightable contribution)].

Laches may be a defense to a copyright coauthorship claim, and the period for determining laches starts when the plaintiff knew or should have known of the defendant's claim of sole authorship [*Jackson v. Axton (9th Cir. 1994) 25 F.3d 884, 887-889*].

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§ 349.24 Transfer of Ownership

The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and is to be treated as personal property on death of the owner. Moreover, any of the exclusive rights comprised in a copyright under the 1976 Act may be transferred and owned separately [*17 U.S.C. § 201(d)*; *see also* Notes of Committee on the Judiciary to § 201, House Report No. 94-1476].

To be valid, any transfer of copyright ownership, other than by operation of law, must be in writing and signed by the copyright owner or by his or her agent [*17 U.S.C. § 204(a)*]. The Ninth Circuit has held that the writing must be a product of the parties' negotiations and that execution of the writing must be substantially contemporaneous with the parties' agreement [*Konigsberg Intern., Inc. v. Rice (9th Cir. 1994) 16 F.3d 355, 357*].

When contracting for a transfer of any of the exclusive rights under a copyright, the transferee must obtain a writing executed by the copyright owner, which the owner intends as a memorandum of contract transferring the exclusive right [*PMC, Inc. V. Saban Entertainment, Inc. (1996) 45 Cal. App. 4th 579, 591-592, 52 Cal. Rptr. 2d 877*].

Whenever a person who owns a copyright transfers that copyright to another person so that the transferee can make and sell a product embodying that copyright, the value of the copyright interest is exempt from sales and use tax under *Rev. & Tax. Code §§ 6011(c)(10)* and *6012(c)(10)* [*Preston v. State Bd. of Equalization (2001) 25 Cal. 4th 197, 214, 105 Cal. Rptr. 2d 407, 19 P.3d 1148*].

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§ 349.25 Duration of Copyright

A copyright in a work created on or after January 1, 1978, subsists from its creation and endures for the lifetime of the author plus 70 years [*17 U.S.C. § 302(a)*]. In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author plus 70 years [*17 U.S.C. § 302(b)*]. For anonymous and pseudonymous works and works made for hire, the copyright endures for a period of 95 years after its publication, or 120 years after its creation, whichever comes first [*17 U.S.C. § 302(c)*].

A copyright in a work created but not copyrighted before January 1, 1978, endures for the same term as provided in § 302 of the Act. In no case, however, will a term of copyright for this type of work expire before December 31, 2002. In the event that such a created work is published on or before December 31, 2002, the term of copyright will not expire before December 31, 2047 [*17 U.S.C. § 303(a)*; *see also* Notes of Committee on the Judiciary to § 303, House Report No 94-1476]. The distribution of a phonorecord before January 1, 1978, does not for any purpose constitute a publication of the musical work embodied in it [*17 U.S.C. § 303(b)*; *see ABKCO Music, Inc. v. LaVere (9th Cir. 2000) 217 F.3d 684, 691* (Congress intended that *17 U.S.C. § 303(b)* would clarify law on this issue and nullify Ninth Circuit's "aberrational" *La Cienega* decision); *La Cienega Music Co. v. ZZ Top (9th Cir. 1995) 53 F.3d 950, 953* (distribution of phonorecord was "publication" of underlying work and "the clock started ticking under the Copyright Act of 1909")].

Any copyright that was existing in its first term on January 1, 1978, endures for a term of 28 years from the date that it was originally secured [*17 U.S.C. § 304(a)(1)(A)*]. Specified persons are entitled to a renewal and extension of such copyrights for an additional 67 years [*see 17 U.S.C. § 304(a)(1)(B), (C)*]. Renewal is automatic, and no application for renewal is required [*17 U.S.C. § 304(a)(3)(B)*]. The renewal owner may, however, apply to register the renewed copyright [*see 17 U.S.C. § 304(a)(3)(A)*], in which case the extended term vests on the date of application for registration; otherwise, the extended term vests on the last day of the original term of the copyright [*see 17 U.S.C. § 304(a)(2)(A), (B)*; *see also Marascalco v. Fantasy, Inc. (9th Cir. 1991) 953 F.2d 469, 470-476, 21 U.S.P.Q.2d 1376*]. Renewed copyrights that were subsisting in their second terms between December 31, 1976, and December 31, 1977, have been extended to endure for terms of 95 years from the date copyright was originally secured [*17 U.S.C. § 304(b)*; *see 17 U.S.C. § 304(c), (d)* (governing termination of transfers and licenses covering extended renewal term and termination rights that expired on or before effective date of Sonny Bono Copyright Term Extension Act); *see also*

Eldred v. Ashcroft (2003) 537 U.S. 186, 123 S. Ct. 769, 154 L. Ed. 2d 683 (Copyright Term Extension Act's extension of existing copyrights did not exceed Congress's power under Copyright Clause, nor did extension of existing and future copyrights violate *First Amendment*)].

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§ 349.26 Notice and Registration of Copyright

[1] Notice of Copyright on Copies or Phonorecords Publicly Distributed on or After March 1, 1989

A notice of copyright may be placed on publicly distributed copies of a protected work or on all publicly distributed phonorecords [*17 U.S.C. §§ 401(a), 402(a)*]. If a notice in the form and position specified by *17 U.S.C. § 401(b)* (copy) or 402(b) (phonorecord) appears on the published copy or phonorecord to which a defendant in a copyright infringement suit had access, then no weight will be given to the defendant's interposition of a defense based on innocent infringement in mitigation of actual or statutory damages, except as provided in the last sentence of *17 U.S.C. § 504(c)(2)* (statutory damages against nonprofit educational institution, library, archives, or public broadcaster as remitted if infringer believed fair use doctrine applied) [*17 U.S.C. §§ 401(d), 402(d)*].

Under former *17 U.S.C. §§ 401* and *402*, a notice of copyright was *required* to be placed on publicly distributed copies of a protected work and on publicly distributed phonorecords. The requirement was deleted by the Berne Convention Implementation Act of 1988 [Pub. L. No. 100-568], which took effect on March 1, 1989, the date on which the Berne Convention entered into force with respect to the United States [Pub. L. No. 100-568 § 13(a)]. Any cause of action arising under the Federal Copyright Act before March 1, 1989, is governed by the provisions of the Federal Copyright Act in effect when the cause of action arose [Pub. L. No. 100-568 § 13(b)].

[2] Notice of Copyright on Copies or Phonorecords Publicly Distributed Before March 1, 1989

With respect to copies and phonorecords publicly distributed by authority of the copyright owner before March 1, 1989, but after 1977, the omission of the copyright notice described in *17 U.S.C. §§ 401-403* will not invalidate the copyright if the omission occurs only on a small number of copies or phonorecords distributed publicly, or if the omission is the result of an unauthorized removal of a notice, or if the copyright owner registers the work within five years after the publication without notice and a reasonable effort is made to add notice to all copies or phonorecords distributed publicly [*17 U.S.C. § 405(a)*; *see Lloyd v. Schlag (9th Cir. 1989) 884 F.2d 409, 415* ; *Lifshitz v. Walter Drake & Sons, Inc. (9th Cir. 1986) 806 F.2d 1426, 1432-1433* ; *see also 17 U.S.C. § 406* (governing the effect of error in the name of the copyright owner or date contained in pre-Berne Convention Act notices)]. In addition, copyright protection has been statutorily restored for motion pictures that were first fixed or published without the required copyright notice in the

territory of a North American Free Trade Agreement (NAFTA) country after January 1, 1978, and before March 1, 1989, under certain circumstances [*see 17 U.S.C. § 104A*; *see also 37 C.F.R. § 201.31* (procedure for restoring copyright protection)].

[3] Preregistration of Unpublished Work

It is possible to preregister an unpublished work that is being prepared for commercial distribution, if the work is in a class that has had a history of infringement prior to authorized commercial distribution [*see 17 U.S.C. § 408(f)(1),(2)*]. The Register of Copyrights has determined that the following classes of works are eligible for preregistration [*37 C.F.R. § 202.16(b)(1)*]:

- Motion pictures.
- Sound recordings.
- Musical compositions.
- Literary works being prepared for publication in book form.
- Computer programs (including video games).
- Advertising or marketing photographs.

Preregistration enables the registrant to commence an action based on infringement occurring before normal registration [*see 17 U.S.C. § 411(a)*]. However, as an incentive for the copyright owner to follow up with a normal registration, an action based on preregistration will be subject to mandatory dismissal insofar as the action concerns infringement occurring before publication or within two months after publication, unless the copyright owner has completed a normal registration within either three months after publication of the work or one month after the copyright owner learned of the infringement [*see 17 U.S.C. § 408(f)(4)*; *see also 17 U.S.C. § 412* (copyright owner may not recover statutory damages or attorney's fees, in action based on preregistration, unless normal registration has been completed within stated period)].

In addition, any person who willfully infringes a copyright by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, is guilty of an offense, if the person knew or should have known that the work was intended for commercial distribution [*17 U.S.C. § 506(a)(1)(C)*].

While preregistration of a work offers advantages to a copyright owner [*see 17 U.S.C. §§ 408(f), 411, 412*], preregistration of a work does not constitute prima facie evidence of the validity of the copyright or of the facts stated in the application for preregistration or in the preregistration record. The fact that a work has been preregistered does not create any presumption that the Copyright Office will register the work on submission of an application for registration [*37 C.F.R. § 202.16(c)(13)*].

For discussion of preregistration of an unpublished work, see California Legal Forms, Ch. 103A, *Copyrights* (Matthew Bender).

[4] Registration of Published Work

The owner of a copyright or of any exclusive right in a published work may register a claim to that work in the Copyright Office by depositing copies of the work together with an application and deposit fee [*see 17 U.S.C. §§*

408-410]. Registration is not a condition of copyright protection [*17 U.S.C. § 408(a)*], except in some instances to preserve a pre-Berne Convention Act copyright that otherwise would be invalidated because of omission of the required copyright notice [*see 17 U.S.C. § 405(a)(2)*].

However, registration, or preregistration in an appropriate case [*see § 349.26[3]*], usually is a prerequisite to bringing an infringement suit [*17 U.S.C. § 411(a)*; *Reed Elsevier, Inc. v. Muchnick (2010) -- U.S. --, 130 S. Ct. 1237, 176 L. Ed. 2d 18, 2010 U.S. LEXIS 2202, at *6* (insofar as section 411(a) requires registration, that requirement is merely precondition to commencing copyright infringement action; copyright holder's failure to comply with that requirement does not restrict federal court's subject-matter jurisdiction over infringement claims involving unregistered works)]. A plaintiff who brings an infringement action under the Copyright Act may not recover statutory damages or attorney's fees for (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration, unless preregistration requirements were met [*see § 349.26[3]*]; or (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless registration is made within three months after the first publication of the work [*17 U.S.C. § 412*]. The first act of infringement in a series of ongoing infringements of the same kind marks the commencement of one continuing infringement under *17 U.S.C. § 412* [*Derek Andrew, Inc. v. Poof Apparel Corp. (9th Cir. 2008) 528 F.3d 696, 701-702* (plaintiff was not entitled to recover either statutory damages or attorney's fees from defendant that began its infringing activity--commercially distributing its garments bearing "hang tags" that imitated copyrighted design of tags used on garments distributed by plaintiff--before effective date of plaintiff's copyright registration and repeated same act after that date each time defendant distributed garments bearing infringing tags; fact that defendant distributed different kinds of garments each time was irrelevant)].

Limited exceptions exist to the requirement of registration as a prerequisite to a copyright infringement action. An action brought for violation of the author's rights under *17 U.S.C. § 106A* (relating to the attribution and related rights of the author of a work of *visual* art [*see Ch. 57, Art, § 57.52[4]*]) may be instituted without regard to registration [*17 U.S.C. § 411(a)*]. In addition, in the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner, either before or after that fixation takes place, may institute an action for infringement [*see 17 U.S.C. § 501*] if the copyright owner does both of the following [*17 U.S.C. § 411(c)*]:

- Serves notice on the infringer, not less than 48 hours before the fixation, identifying the work and the specific time and source of its first transmission and declaring an intention to secure copyright in the work; and

- Registers the work, if required by *17 U.S.C. § 411(a)*, within three months after its first transmission.

For discussion of copyright registration procedures and forms for use in registering a copyright, see California Legal Forms, Ch. 103A, *Copyrights* (Matthew Bender); see also Nimmer on Copyright, Ch. 7, *Statutory Formalities* , and Ch. 21, *Copyright Office Forms and Related Materials* (Matthew Bender).

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§ 349.27 Infringement of Copyright

[1] Violation of Exclusive Rights

[a] Direct Infringement

Anyone who violates any of the exclusive rights of the copyright owner [*see 17 U.S.C. §§ 106-119*; *see also § 349.22[1]*], or who imports copies or phonorecords into the United States in violation of *17 U.S.C. § 602*, is an infringer of the copyright [*17 U.S.C. §§ 501(a), 511(a)*].

There are three types of copyright infringement [*Ellison v. Robertson (9th Cir. 2004) 357 F.3d 1072, 1076*]:

- Direct infringement.
- Contributory infringement [*see* [b], *below*].
- Vicarious infringement [*see* [c], *below*].

To prove a claim of direct copyright infringement, the owner of the copyright must show that the defendant directly violated one or more of the plaintiff's exclusive rights under the Copyright Act [*A&M Records, Inc. v. Napster, Inc. (9th Cir. 2001) 239 F.3d 1004, 1013, 57 U.S.P.Q.2d 1729*].

When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, and the only practical alternative may be to go against the distributor of the copying device for indirect liability on a theory of contributory infringement or vicarious infringement. One infringes contributorily by intentionally inducing or encouraging direct infringement, or infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it. Although the Copyright Act does not expressly render anyone liable for infringement committed by another, these doctrines of secondary liability emerged from common law principles and are well established in the law [*MGM Studios, Inc. v. Grokster, Ltd. (2005) 545 U.S. 913, 929-930, 125 S. Ct. 2764, 162 L. Ed. 2d 781* ; *see* [b], [c], *below*].

[b] Contributory Infringement

One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement--that is, inducement--is liable for the resulting acts of infringement by third parties. Mere knowledge of infringing potential or of actual infringing uses is not enough to subject a distributor to liability, nor are ordinary acts incidental to product distribution, such as offering customers technical support or product updates, support liability in themselves. The rule of inducement premises liability on purposeful, culpable expression and conduct (and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise) [*MGM Studios, Inc. v. Grokster, Ltd. (2005) 545 U.S. 913, 936-937, 125 S. Ct. 2764, 162 L. Ed. 2d 781* ; *see Perfect 10, Inc. v. Amazon.com, Inc. (9th Cir. 2007), 487 F.3d 701, 729* (defendant "could be held contributorily liable if it had knowledge that infringing ... images were available using its search engine, [and it] could take simple measures to prevent further damage to [plaintiff's] copyrighted works, and [it] failed to take such steps")].

The theory of contributory infringement can be summarily described by reference to rules for cases at the ends of the scale of pertinent activities. On one hand, if a thing is "good for nothing else" but infringement, there is no legitimate public interest in its uncontrolled availability, and there is no injustice in presuming or imputing an intent to infringe on the part of one who distributes it. On the other hand, the theory allows the equivocal conduct of distributing a thing having substantial legitimate usefulness as well as the potential for infringing use, as the theory limits liability to instances of more acute fault than the mere understanding that some users will undertake infringing activity [*MGM Studios, Inc. v. Grokster, Ltd. (2005) 545 U.S. 913, 932-933, 125 S. Ct. 2764, 162 L. Ed. 2d 781]* .

A credit card company cannot be said to materially contribute to copyright infringement by web site owners when the company processes credit card payments by cardholders to the infringing web sites in spite of having knowledge of the ongoing infringement, because the company has no direct connection to that infringement. In providing payment services, the credit card company in no way assists or enables internet users to locate infringing material, nor does the company distribute it. Although the credit card company can make it easier for web sites to profit from infringing activity, the issue is whether a defendant charged with contributory infringement somehow participated in reproduction, alteration, display, or distribution of copyrighted material--all of which can occur without payment [*Perfect 10, Inc. v. Visa Int'l Serv. Ass'n (9th Cir. 2007) 494 F.3d 788, 796]* .

While a credit card company might induce customers to use their cards to purchase goods and services, the company is not, by virtue of that inducement, guilty of specifically inducing infringement when the cards are used to buy copyrighted material from web sites providing content appropriated from the copyright holder, in the absence of "affirmative steps taken to foster infringement" [*MGM Studios, Inc. v. Grokster, Ltd. (2005) 545 U.S. 913, 936-937, 125 S. Ct. 2764, 162 L. Ed. 2d 781]* or other facts suggesting that the company promoted its payment system as a means to infringe [*Perfect 10, Inc. v. Visa Int'l Serv. Ass'n (9th Cir. 2007) 494 F.3d 788, 800-801]* .

[c] Vicarious Infringement

A defendant is vicariously liable for copyright infringement if the defendant enjoys a direct financial benefit from another's infringing activity and,having the right and ability to supervise the infringing activity, allows it to continue [*A&M Records v. Napster, Inc. (9th Cir. 2001) 239 F.3d 1004, 1022, 57 U.S.P.Q.2d 1729*].

When a credit card company becomes aware that its cards are being used to buy copyrighted material from web sites providing content appropriated from the copyright holder, no vicarious liability arises from the fact that the company has power to stop processing credit card payments to the infringing web sites, in the absence of proof that the company has the right and ability to control the infringing activity [*Perfect 10, Inc. v. Visa Int'l Serv. Ass'n (9th Cir. 2007) 494 F.3d 788, 803-804* ("the mere ability to withdraw a financial 'carrot' does not create the 'stick' of 'right and ability to control' that vicarious infringement requires")].

[2] Inapplicability to Infringing Acts Occurring Outside United States

The Copyright Act does not apply extraterritorially to infringing acts that take place entirely outside the United States [*Subafilms, Ltd. v. MGM-Pathe Communications (9th Cir. 1994) 24 F.3d 1088, 1095-1098* (citing, among other authority, Nimmer on Copyright, Ch. 12, *Infringement Actions--Procedural Aspects* (Matthew Bender)]. Furthermore, the Ninth Circuit has held that a defendant cannot be held liable under the Copyright Act for merely authorizing within the United States acts of infringement that occur entirely abroad [*Subafilms, Ltd. v. MGM-Pathe Communications (9th Cir. 1994) 24 F.3d 1088, 1093-1095*]. However, a copyright holder is entitled to recover profits flowing from the infringer's exploitation abroad of domestic acts of infringement [*Los Angeles News Service v. Reuters Television Int'l, Ltd. (9th Cir. 1998) 149 F.3d 987, 992* ; *see Los Angeles News Service v. Reuters Television Intern., Ltd. (9th Cir. 2003) 340 F.3d 926, 931-932* (holding that actual damages are not recoverable and clarifying that 1998 decision in same case actually held that profits are recoverable, even though that opinion spoke in terms of damages)].

[3] Civil Action for Infringement

[a] Commencement of Action

The legal or beneficial owner of any of the exclusive rights of copyright can, subject to the registration requirements of *17 U.S.C. § 411* (discussed in *§ 349.26[3]* and *[4]*), institute an action for infringement of any of those rights committed while he or she is the owner [*17 U.S.C. § 501(b)*]. To do so, the owner, as plaintiff, must file a complaint in federal district court, which has original exclusive subject matter jurisdiction in copyright matters, and serve the defendant in accordance with the Federal Rules of Civil Procedure [*see 28 U.S.C. §§ 1338* (jurisdiction), 1400 (venue)]. The court will require the plaintiff to serve notice of the action on any person whose interest is likely to be affected by a decision in the case. The court may require that notice be served on any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright. The court may require the joinder, and must permit the intervention, of any person having or claiming an interest in the copyright [*17 U.S.C. § 501(b)*]. For a complaint for infringement of copyright, see *§ 349.100*.

The creator of a work for hire does not retain a beneficial interest under which the creator may sue for copyright infringement, unless there is an express contractual provision to the contrary [*see Warren v. Fox Family Worldwide, Inc. (9th Cir. 2003) 328 F.3d 1136, 1144-1145*]. However, a legal or beneficial owner of a copyright may assign the right to an accrued cause of action for copyright infringement, without any other copyright rights accompanying the assignment, to the creator of a work for hire, or to any other person; and such an assignee may sue on that cause of action for infringement [*Silvers v. Sony Pictures Entertainment, Inc. (9th Cir. 2003) 330 F.3d 1204, 1206-1207, 1209*].

A person who lacks standing to bring an infringement suit under the Copyright Act, but who complains of competitive injury stemming from acts of alleged copyright infringement, also lacks standing to bring suit on a claim under the Lanham Act or the Racketeer Influenced and Corrupt Organizations Act, or under a state unfair competition law, if successful prosecution of the action would require determination of the underlying infringement claim [*Sybersound Records, Inc. v. UAV Corp. (9th Cir. 2008) 517 F.3d 1137, 1141*].

[b] Action Against Public Entities

For acts of infringement committed on or after November 15, 1990, any state, instrumentality of a state, or officer or employee of a state or instrumentality of a state acting in his or her official capacity can be sued as a defendant in a copyright infringement action [*17 U.S.C. §§ 501(a), 511(a)*; Pub. L. No. 101-553 § 3, 104 Stat. 2749 (1990) (effective date)]. Neither *U.S. Const., amend. XI*, nor any other doctrine of sovereign immunity immunizes these individuals and entities from suit in federal court for acts of copyright infringement occurring on or after that date [*17 U.S.C. § 511(a)*; Pub. L. No. 101-553, § 3, 104 Stat. 2749 (1990)]. For acts of infringement committed by these individuals and entities

before November 15, 1990, the rule of sovereign immunity in the Ninth Circuit and elsewhere, barring suit against them, stands [*see BV Engineering v. Univ. of Cal., Los Angeles (9th Cir. 1988) 858 F.2d 1394, 1400*].

[4] Proof of Infringement

[a] Ownership and Copying

The elements required to be proven to establish infringement of copyright are ownership by the plaintiff of a valid copyright and copying by the defendant of the constituent original elements of the copyrighted work [*Feist Pub. v. Rural Tel. Serv. (1991) 499 U.S. 340, 361, 111 S. Ct. 1282, 113 L. Ed. 2d 358* ; *Pasillas v. McDonald's Corp. (9th Cir. 1991) 927 F.2d 440, 442*]. "Copying" is shorthand for the violation of any of the copyright owner's exclusive rights described in *17 U.S.C. §§ 106-118* [*see S.O.S., Inc. v. Payday, Inc. (9th Cir. 1989) 886 F.2d 1081, 1085* ; *see also MAI Systems Corp. v. Peak Computer, Inc. (9th Cir. 1994) 991 F.2d 511, 519* (loading software into computer RAM creates a "copy")]. In cases involving licensees, assignees, and other successors in interest to the copyright, the plaintiff may also be required to show the chain of title from the original copyright owner [*see Bell v. Combined Registry Co. (N.D. Ill. 1975) 397 F. Supp. 1241, 1244*].

The plaintiff has the burden of proof on both elements of the prima facie case [*see Walker v. University Books, Inc. (9th Cir. 1979) 602 F.2d 859, 862*]. However, the copyright registration certificate, if made within five years after first publication of the work, provides prima facie evidence of the validity of the copyright and of the facts stated in the certificate and shifts the burden to the defendant to demonstrate why the copyright is not valid [*see, e.g., Entertainment Research Group, Inc. v. Genesis Creative Group, Inc. (9th Cir. 1998) 122 F.3d 1211, 1218* (defendant overcame prima facie proof of validity of copyright by presenting evidence that plaintiff's work was not sufficiently original to merit copyright protection)]. The evidentiary weight to be accorded a certificate of registration issued more than five years after first publication of the work is within the district court's discretion [*17 U.S.C. § 410(c)*; *Bibbero Systems, Inc. v. Colwell Systems, Inc. (9th Cir. 1990) 893 F.2d 1104, 1106*].

For an unauthorized use of a copyrighted work to be actionable, there must be substantial similarity between the plaintiff's work and the defendant's work [*see* [b], *below*]. This means that even when the fact of copying is conceded, no legal consequences will follow from that fact unless the copying was substantial. A use is trivial--that is, not substantial--only if the average audience would not recognize the appropriation [*Fisher v. Dees (9th Cir. 1986) 794 F.2d 432, 434* ("[A] taking is considered de minimis only if it is so meager and fragmentary that the average audience would not recognize the appropriation.")]. In other words, the general test for substantial similarity looks to the response of the average audience, or ordinary observer, to determine whether a use is infringing [*see, e.g., Cavalier v. Random House, Inc. (9th Cir. 2002) 297 F.3d 815, 822*]. To say that a use is trivial because no audience would recognize the appropriation is thus to say that the works are not substantially similar [*Newton v. Diamond (9th Cir. 2003) 349 F.3d 591*].

[b] Proof of Copying by Circumstantial Evidence

Because direct evidence of copying is rarely available, the plaintiff can establish this element through circumstantial evidence by demonstrating that [*Pasillas v. McDonald's Corp. (9th Cir. 1991) 927 F.2d 440, 442* ; *Baxter v. MCA, Inc. (9th Cir. 1987) 812 F.2d 421, 423*]:

- The defendant had access to the allegedly infringed work prior to creation of the defendant's work, and

- The two works are substantially similar in both idea and expression of that idea.

In the Ninth Circuit, once the plaintiff demonstrates access and substantial similarity, the burden shifts to the defendant

to prove that the latter's work was not copied but independently created [*Kamar Intern., Inc. v. Russ Berrie and Co. (9th Cir. 1981) 657 F.2d 1059, 1062* ; *see Transgo, Inc. v. Ajac Transmission Parts Corp. (9th Cir. 1985) 768 F.2d 1001, 1018*]. This analysis has been criticized in at least one other circuit on the ground that proof of access and substantial similarity merely creates a rebuttable presumption of copying that, once established, shifts the burden of going forward, rather than the burden of persuasion, to the defendant. Under this view, if the defendant successfully rebuts the presumption, the fact finder then weighs all the evidence, keeping in mind that the plaintiff has the ultimate burden of persuasion on the issue of copying [*see, e.g., Keeler Brass Co. v. Continental Brass Co. (4th Cir. 1988) 862 F.2d 1063, 1066*].

[c] Access and Substantial Similarity

Proof of access can be established by showing that the defendant had a reasonable opportunity to view the copyrighted work [*see Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp. (9th Cir. 1977) 562 F.2d 1157, 1162-1163*]. Where there is no direct evidence of access, circumstantial evidence can be used to prove access, either by establishing a chain of events linking the plaintiff's work and the defendant's access or by showing that the plaintiff's work has been widely disseminated [*Three Boys Music Corp. v. Bolton (9th Cir. 2000) 212 F.3d 477, 482* , *citing* Nimmer On Copyright, Ch. 13, *Infringement Actions -Substantive Aspects*, § 13.02[A] (Matthew Bender); *e.g., Art Attacks Ink, LLC v. MGA Entm't Inc. (9th Cir. 2009) 581 F.3d 1138, 1143-1145* (plaintiff failed to show either sufficient chain of events or wide dissemination of protected work)].

Proof of substantial similarity can be established by showing literal similarity between the two works. However, duplication or near identity does not necessarily prove infringement and is not necessarily required in order to show infringement. The plaintiff must prove not only a substantial similarity of the general ideas involved in the two works, but also a substantial similarity in the expression of those ideas [*see Sid & Marty Krofft Television v. McDonald's Corp. (9th Cir. 1977) 562 F.2d 1157, 1164*].

In assessing the amount of proof required to show access and substantial similarity, the Ninth Circuit has adopted the "inverse ratio rule" [*Shaw v. Lindheim (9th Cir. 1990) 919 F.2d 1353, 1361-1362* ; *but see Aliotti v. R. Dakin & Co. (9th Cir. 1987) 831 F.2d 898, 902* (questioning, in dictum, the continuing viability of the inverse ratio rule)]. Under the rule, when the quantum of proof of access is very high, the degree of similarity required to be shown between the plaintiff's work and the defendant's work may be relatively low. For example, if clear and convincing evidence of access is presented, the quantum of proof required to show substantial similarity may be lower than when access is shown merely by a preponderance of the evidence. Conversely, a very high degree of similarity is required in order to dispense with proof of access. However, no amount of proof of access will suffice to show copying if there are no similarities between the works at issue, because access without similarity cannot create an inference of copying [*Shaw v. Lindheim (9th Cir. 1990) 919 F.2d 1353, 1361-1362* ; *Sid & Marty Krofft Television v. McDonald's Corp. (9th Cir. 1977) 562 F.2d 1157, 1172*].

Similarity is a factual issue to be determined by the trier of fact. In determining whether the plaintiff has proved substantial similarity, the federal courts have adopted a bifurcated test. As originally formulated in the Ninth Circuit, the first, or extrinsic, test involved a determination of whether there is a substantial similarity of the "general ideas" in the two works involved. If the extrinsic test was satisfied, then the trier of fact applied the second, or intrinsic, test to determine whether a reasonable, ordinary person would find substantial similarity in the expression of those ideas, without the aid of any analytical dissection [*see Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp. (9th Cir. 1977) 562 F.2d 1157, 1164]* .

In later cases, Ninth Circuit panels have recharacterized the difference between the extrinsic and intrinsic tests, at least as applied to literary works such as books, scripts, plays, and motions pictures. According to these later decisions, the extrinsic test can no longer be seen as a test for mere similarity of ideas. The factors in the extrinsic test now include virtually every element that can be considered concrete in a literary work [*Shaw v. Lindheim (9th Cir. 1990) 919 F.2d*

1353, 1357]. These elements include plot, themes, dialogue, mood, setting, pace, characters, and sequence [*Shaw v. Lindheim (9th Cir. 1990) 919 F.2d 1353, 1356-1357* ; *e.g., Funky Films, Inc. v. Time Warner Entm't Co. (9th Cir. 2006) 462 F.3d 1072, 1078-1082* ("At first blush, these apparent similarities in plot appear significant; however, an actual reading of the two works reveals greater, more significant differences and few real similarities at the levels of plot, characters, themes, mood, pace, dialogue, or sequence of events.")]. Because the criteria incorporated into the extrinsic test encompass virtually all objective manifestations of creativity, the two tests, in the case of literary works, are more sensibly described as objective and subjective analyses of expression, inasmuch as they have strayed from the *Krofft* division between expression and ideas [*Shaw v. Lindheim (9th Cir. 1990) 919 F.2d 1353, 1357*]. Under this latter view, the intrinsic test is a subjective test that focuses on whether the ordinary, reasonable audience would recognize the defendant's work as a dramatization or picturization of the plaintiff's work, i.e., whether an average reasonable person would find substantial similarity between the two expressions based on the total concept and feel of the two works [*see Kouf v. Walt Disney Pictures & Television (9th Cir. 1994) 16 F.3d 1042, 1045* ; *Shaw v. Lindheim (9th Cir. 1990) 919 F.2d 1353, 1357*].

For the purposes of a defense summary judgment motion, only the extrinsic test is applicable. If the plaintiff can satisfy the extrinsic test, then a triable issue of fact regarding substantial similarity is presented, and summary judgment must be denied [*see Kouf v. Walt Disney Pictures & Television (9th Cir. 1994) 16 F.3d 1042, 1045* ; *Shaw v. Lindheim (9th Cir. 1990) 919 F.2d 1353, 1359-1361*]. If the plaintiff cannot satisfy the extrinsic test, then the defendant is entitled to summary judgment [*see Kouf v. Walt Disney Pictures & Television (9th Cir. 1994) 16 F.3d 1042, 1045*].

Substantial similarity analysis is only germane in cases in which the accused infringer denies that he or she copied the plaintiff's work; it is not relevant when the defendant admits copying the plaintiff's work. Even a small amount of copying may constitute an infringement. However, the amount and substantiality of the work copied may be relevant to the defense of fair use [*see Norse v. Henry Holt and Co. (9th Cir. 1993) 991 F.2d 563, 566*]. For discussion of the fair use doctrine, see *§ 349.27[6][b]*.

[d] Displaying Work on Web Site

One of the exclusive rights of a copyright owner [*see § 349.22[1]*] is the right "to display the copyrighted work publicly" [*17 U.S.C. § 106(5)*]. If a person using Internet browser software on the person's own computer can make a copyrighted work viewable on that computer by means of a connection, over the Internet, to another computer, then courts in the Ninth Circuit may apply a so-called "server test" to determine whose computer "displays" the work, and thereby identify who, if anyone, is chargeable with infringement. A "server" is a computer connected to the Internet for the purpose of locating specified data that is stored in the computer's memory or in a separate storage device and transmitting ("serving") that data to another computer also connected to the Internet, pursuant to a request sent to the server by that computer.

When a server stores and transmits a copy of a work, the server owner "displays" the work, for purposes of copyright law [*Perfect 10, Inc. v. Amazon.com, Inc. (9th Cir. 2007) 508 F.3d 1146, 1159-1160* ; *see § 349.27[1][a]*]. However, the server owner may raise the defense of fair use [*Perfect 10, Inc. v. Amazon.com, Inc. (9th Cir. 2007) 508 F.3d 1146, 1163, 1168* (display of thumbnail images on search engine website could have been fair use); *see § 349.27[6][b]*].

On the other hand, when a server stores and transmits, not a copy of a work, but only the Internet address of another server--what is commonly called a "link" (or "hypertext link")--where a copy of a work is stored, this does not constitute "displaying" the work. The coded instructions of the link do not themselves cause infringing images to appear on a user's computer screen, but merely give the location of the stored image to the user's browser. Only if the browser then interacts with the indicated server, which then transmits its stored image back to the browser, is the (possibly infringing) image "displayed" when it appears on the user's computer screen [*Perfect 10, Inc. v. Amazon.com, Inc. (9th Cir. 2007) 508 F.3d 1146, 1161*]. In this situation, it would be irrelevant if the user's perception was that the image appearing on the user's computer screen came from the initial server (which provided only the link) instead of the ultimate server

(where the image actually was stored). The Copyright Act, unlike the Trademark Act, does not protect a copyright holder against acts that cause consumer confusion [*Perfect 10, Inc. v. Amazon.com, Inc. (9th Cir. 2007) 508 F.3d 1146, 1161*].

Another of the exclusive rights of a copyright owner is the right "to distribute copies ... of the copyrighted work to the public" [*17 U.S.C. § 106(3)*]. Again, by applying the server test, a court may determine whether a given computer actually is used to "distribute copies" or merely provides a link to another computer where a copy of the work is stored [*Perfect 10, Inc. v. Amazon.com, Inc. (9th Cir. 2007) 508 F.3d 1146, 1162* ("search engine communicates HTML instructions that tell a user's browser where to find full-size images on a website publisher's computer, but engine does not itself distribute copies of the infringing photographs. It is the website publisher's computer that distributes copies of the images by transmitting the photographic image electronically to the user's computer")].

The server test may lead a court to the conclusion that a server owner is not liable for direct infringement. However, the server owner could be liable for contributory infringement [*Perfect 10, Inc. v. Amazon.com, Inc. (9th Cir. 2007) 508 F.3d 1146, 1172* (search engine could be held contributorily liable if it had knowledge that infringing images were available using its search engine, could take simple measures to prevent further damage to copyrighted works, and failed to take such steps); *see § 349.27[1][b]*] or vicarious infringement [*Perfect 10, Inc. v. Amazon.com, Inc. (9th Cir. 2007) 508 F.3d 1146, 1175* ; *see § 349.27[1][c]*]. In such a case, however, the server owner might be eligible to raise one of the safe-harbor defenses created in the Digital Millennium Copyright Act [*Perfect 10, Inc. v. Amazon.com, Inc. (9th Cir. 2007) 508 F.3d 1146, 1172* ; *see § 349.27[6][d]*].

[5] Remedies for Infringement

[a] Availability

The Copyright Act of 1976 provides a variety of civil and criminal remedies for infringement of copyright [*see 17 U.S.C. §§ 502-511*], the highlights of which are discussed immediately below.

[b] Damages

In an action for copyright infringement, the copyright owner is entitled to recover the actual damages suffered as a result of the infringement, plus any of the infringer's profits that are attributable to the infringement and are not taken into account in computing the actual damages [*17 U.S.C. §§ 504(b), 511(b)*; *see Jarvis v. K2 Inc. (9th Cir. 2007), 486 F.3d 526, 534* (district court's calculations of damages were "entirely consistent" with *17 U.S.C. § 504(b)* and case law)]. Actual damages are to be measured by the extent to which the market value of the copyrighted work has been injured or destroyed by the infringement [*Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc. (9th Cir. 1985) 772 F.2d 505, 512* (market value is what willing buyer would have been reasonably required to pay to willing seller for copyrighted work)]. Actual damages must be suffered "as a result of the infringement," and recoverable profits must be "attributable to the infringement" [*17 U.S.C. § 504(b)*]. From the statutory language, it is apparent that a causal link between the infringement and the monetary relief sought is a predicate to recovery of both actual damages and profits. The plaintiff must establish this causal connection, and this requirement is akin to the tort requirement for proof of causation and damages [*Polar Bear Prods., Inc. v. Timex Corp. (9th Cir. 2004) 384 F.3d 700, 708* (award of indirect profits vacated because plaintiff failed to prove causal connection)].

When a defendant proprietor of an establishment claims its activities were exempt under *17 U.S.C. § 110(5)*, but a court can find no reasonable grounds for believing the use of a copyrighted work was exempt under that subsection, the plaintiff is entitled to an additional award of two times the amount of the license fee that the proprietor should have paid for the use during the preceding period (up to three years) [*17 U.S.C. § 504(d)*].

For an infringement plaintiff who failed to register his or her copyright before infringement, *17 U.S.C. § 504(b)*

provides the sole means to obtain monetary remedies, namely, the indirect profits of the infringer that are attributable to the infringement (and are not taken into account in computing actual damages) [*Mackie v. Rieser (9th Cir. 2002) 296 F.3d 909, 914* ; *see 17 U.S.C. § 412*] (statutory damages under *17 U.S.C. § 504(c)* are not available for infringement before registration, except when requirements for preregistration were met); *see also § 329.26[3]*]. On its face, that subsection does not differentiate between "direct profits"--those that are generated by selling an infringing product--and "indirect profits"--revenue that has a more attenuated nexus to the infringement. Nor does it discuss whether tort principles, such as causation, should play a role in determining whether the infringer's profits were a result of the infringing act. Nevertheless, the Ninth Circuit holds that the copyright owner must establish the existence of a causal link before indirect-profits damages can be recovered [*Mackie v. Rieser (9th Cir. 2002) 296 F.3d 909, 914*].

Willful infringers may not deduct income taxes [*L.P. Larson, Jr., Co. v. Wm. Wrigley, Jr., Co. (1928) 277 U.S. 97, 99-100, 48 S. Ct. 449, 72 L. Ed. 800*], but the Supreme Court has left open the possibility that nonwillful infringers could deduct their income taxes from the infringing profits. The Ninth Circuit holds that nonwillful infringers may deduct income taxes, to the extent that income taxes were actually paid, from their infringing profits [*Three Boys Music Corp. v. Bolton (9th Cir. 2000) 212 F.3d 477, 487-488* (but net operating loss may not be deducted); *accord*, In *Design v. K-Mart Apparel Corp. (2d Cir. 1994) 13 F.3d 559, 567* ; *contra*, *Schnadig Corp. v. Gaines Mfg. Co., Inc. (6th Cir. 1980) 620 F.2d 1166, 1169-1170*].

Alternatively, the plaintiff in the infringement suit may elect, at any time before final judgment is rendered, to recover an award of statutory damages rather than actual damages and profits. The statutory damages with respect to all infringements involved in the action with respect to any one work are to be not less than $750 nor more than $30,000, as the court considers just [*17 U.S.C. §§ 504(c)(1), 511(b)*; *see 17 U.S.C. § 412* (statutory damages are available only if copyright was registered or if unpublished work was preregistered); *Mackie v. Rieser (9th Cir. 2002) 296 F.3d 909, 912*]. The court has wide discretion within the statutory maximum and minimum dollar figures to determine the amount of statutory damages to be awarded [*Peer Intern. Corp. v. Pausa Records, Inc. (9th Cir. 1990) 909 F.2d 1332, 1336* ; *see F.W. Woolworth Co. v. Contemporary Arts (1952) 344 U.S. 228, 231-232, 73 S. Ct. 222, 97 L. Ed. 276, 280* (construing similar statutory damages provision in 1909 Copyright Act)]. Furthermore, statutory damages are recoverable regardless of whether there is adequate evidence of actual damage suffered by the plaintiff or of profits reaped by the defendant. The trial court's award will be overturned only for an abuse of discretion [*Los Angeles News Service v. Reuters Television Intern., Ltd. (9th Cir. 1998) 149 F.3d 987, 996* (upholding maximum statutory damages award); *Peer Intern. Corp. v. Pausa Records, Inc. (9th Cir. 1990) 909 F.2d 1332, 1336* (upholding maximum statutory damages award of $4 million for 80 infringements even though plaintiff suffered nominal damages; calculation based on former maximum statutory award of $50,000 for willful infringement); *Harris v. Emus Records Corp. (9th Cir. 1984) 734 F.2d 1329, 1335*].

If the court finds the infringement to have been willful, statutory damages may be increased to not more than $150,000 [*17 U.S.C. §§ 504(c)(2), 511(b)*]. In this context, neither the 1976 Act nor its legislative history defines "willful." In the Ninth Circuit, willful infringement is defined as knowledge by a defendant that itsconduct constitutes an act of infringement [*Peer Intern. Corp. v. Pausa Records, Inc. (9th Cir. 1990) 909 F.2d 1332, 1335, 1335 n.3, 1336*]. To refute evidence of willful infringement, a defendant must not only establish its good faith belief in the innocence of its conduct, but it must also show that it was reasonable in holding that belief [*Peer Intern. Corp. v. Pausa Records, Inc. (9th Cir. 1990) 909 F.2d 1332, 1336*].

If the court finds the infringement to have been made by a person not aware that his or her acts caused an infringement, statutory damages may be reduced to $200 [*17 U.S.C. §§ 504(c)(2), 511(b)*].

There is no statutory right to a jury trial when a copyright owner elects to recover statutory damages. However, the *Seventh Amendment* provides a right to a jury trial on all issues pertinent to an award of statutory damages, including the amount, under *17 U.S.C. § 504(c)* [*Feltner v. Columbia Pictures Television, Inc. (1998) 523 U.S. 340, 118 S. Ct. 1279, 1283-1284, 1287-1288, 140 L. Ed. 2d 438*].

[c] Costs and Attorney's Fees

The court in its discretion may allow the recovery of full costs by or against any party (other than the United States or an officer thereof); and, except as otherwise provided by the Copyright Act, the court may also award reasonable attorney's fees to the prevailing party as part of the costs [*17 U.S.C. §§ 505, 511(b)*; *see 17 U.S.C. § 412* (attorney's fees are available only if copyright was registered or if unpublished work was preregistered); *Mackie v. Rieser (9th Cir. 2002) 296 F.3d 909, 912* (same)]. Prevailing-party status turns on whether there has been a material alteration of the legal relationship of the parties in consequence of the action respecting which attorney's fees are claimed. When there has been no material alteration of the parties' legal relationship--for instance, after the plaintiff has taken a voluntary dismissal without prejudice--there is no "prevailing" party, hence no party is entitled to attorney's fees [*Cadkin v. Loose (9th Cir. 2009) 569 F.3d 1142, 1144-1145* ("Because the plaintiffs in this lawsuit remained free to refile their copyright claims against the defendants in federal court following their voluntary dismissal of the complaint, we hold the defendants are not prevailing parties and thus not entitled to the attorney's fees the district court awarded them"), *overruling Corcoran v. Columbia Broad. Sys., Inc. (9th Cir. 1941) 121 F.2d 575, 576]* .

Historically, the Ninth Circuit had established a dual standard, awarding attorney's fees to a prevailing plaintiff as a matter of course while requiring a finding of bad faith or frivolity on the part of a plaintiff before awarding attorney's fees to a prevailing defendant [*see, e.g., McCulloch v. Albert E. Price, Inc. (9th Cir. 1987) 823 F.2d 316, 322*]. However, the United States Supreme Court subsequently rejected this dual standard and held that the standard for awarding attorney's fees is the same for both prevailing plaintiffs and prevailing defendants, and that an attorney's fee award to either prevailing party is subject to the trial court's discretion [*Fogerty v. Fantasy, Inc. (1994) 510 U.S. 517, 534, 114 S. Ct. 1023, 127 L. Ed. 2d 455*); *see Mattel, Inc. v. Walking Mountain Prods. (9th Cir. 2003) 353 F.3d 792, 816* (regarding award of fees to defendant: "Under the Copyright Act, the question is whether a successful *defense* of the action furthered the purposes of the Act, not whether a *fee award* would do so.")].

The United States Supreme Court identified the following nonexclusive list of factors to guide the award or denial of attorney's fees [*Fogerty v. Fantasy, Inc. (1994) 510 U.S. 517, 534 n.19, 114 S. Ct. 1023, 127 L. Ed. 2d 455*]:

- Frivolousness.
- Motivation.
- Objective unreasonableness (both in the factual and in the legal components of the case).
- The need in particular circumstances to advance considerations of compensation and deterrence.

The Ninth Circuit has added the following as additional considerations [*Ets-Hokin v. Skyy Spirits, Inc. (9th Cir. 2003) 323 F.3d 763, 766* ; *Fantasy, Inc. v. Fogerty (9th Cir. 1996) 94 F.3d 553, 559-560*]:

- The degree of success obtained.
- The purposes of the Copyright Act.
- Whether the chilling effect of attorney's fees may be too great or impose an inequitable burden on an impecunious plaintiff.

When a party prevails on both a copyright claim and a noncopyright claim, the court should first decide whether the copyright and noncopyright claims are related. If they are, then the court should proceed to compute a reasonable fee award. If the court determines that the copyright and noncopyright claims are not related, the prevailing party cannot recover fees for the noncopyright claim, but the court must attempt to arrive at a fair apportionment and then compute a

reasonable fee award. There is no precise rule or formula for making these determinations. For example, the court may attempt to identify specific hours that should be eliminated, or it may simply reduce the total award to account for the limited success. The court necessarily has discretion in making this equitable judgment [*Traditional Cat Ass'n v. Gilbreath (9th Cir. 2003) 340 F.3d 829, 834-835]* .

[d] Interest

Prejudgment interest is a generally available remedy, and its application in a particular case hinges on whether such an award would further the statute's purpose. Prejudgment interest may be necessary in some cases, in order to effectuate the legislative purpose of making copyright holders whole and removing incentives for copyright infringement. The ability to recover multiple forms of remedies does not render prejudgment interest superfluous. Frequently, a copyright plaintiff can only recover one type of remedy, be it actual damages or indirect profits, and the statutory availability of both remedies does not mitigate harm caused by the defendant's delay in making reparations--a harm that the remedy of prejudgment interest is uniquely tailored to address [*Polar Bear Prods., Inc. v. Timex Corp. (9th Cir. 2004) 384 F.3d 700, 718*].

[e] Injunctive and Impounding Relief

A plaintiff in an infringement action, in addition to obtaining damages for an infringement, may obtain temporary and final injunctive relief to prevent or restrain infringement of a copyright [*see 17 U.S.C. §§ 502, 511(b)*; *see Fed. R.Civ. P., Rule 65* (injunctions generally); *see, e.g., LGS Architects, Inc. v. Concordia Homes (9th Cir. 2006) 434 F.3d 1150, 1155-1157* ; *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc. (9th Cir. 1997) 109 F.3d 1394, 1403-1406, 42 U.S.P.Q.2d 1184]* . Registration generally is a jurisdictional prerequisite to a suit for copyright infringement [*see 17 U.S.C. § 411*; *see also § 349.26[4]*], but that rule does not limit the remedies that a court may grant. Rather, the Copyright Act gives courts broad authority to issue injunctive relief [*see 17 U.S.C. § 502(a)*]. Once a court has jurisdiction over an action for infringement under *17 U.S.C. § 411* with respect to a registered copyright, the court may grant injunctive relief to restrain infringement of an unregistered copyright that the owner seeks to protect in the same action [*Perfect 10, Inc. v. Amazon.com, Inc. (9th Cir. 2007), 487 F.3d 701, 710]* .

Additionally, at any time while an infringement action is pending, the court may order the impounding, on such terms as it may deem reasonable, of (1) all copies or phonorecords claimed to have been made or used in violation of the exclusive right of the copyright owner; (2) all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced; and (3) records documenting the manufacture, sale, or receipt of things involved in any the violation, provided that any records seized must be taken into the custody of the court [*17 U.S.C. §§ 503(a)(1), 511(b)*]. As part of a final judgment or decree, the court may order the destruction or other reasonable disposition of all copies or phonorecords found to have been made or used in violation of the copyright owner's exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced [*17 U.S.C. §§ 503(b), 511(b)*].

Preliminary injunctive relief is available to a copyright owner that demonstrates either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) that serious questions are raised and the balance of hardships tips in its favor. These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases [*A&M Records, Inc. v. Napster, Inc. (9th Cir. 2001) 239 F.3d 1004, 1013]* . In order to demonstrate likely success on the merits, the copyright owner must necessarily demonstrate that defenses available to the alleged infringer--such as fair use [*see § 349.27[6][b]*] or the Online Copyright Infringement Liability Limitation Act [*17 U.S.C. § 512*; *see § 349.27[6][d]*]--can be overcome. This burden is properly placed on the copyright owner seeking to demonstrate entitlement to the extraordinary remedy of a preliminary injunction at an early stage of the litigation, before the defendant has had the opportunity to undertake extensive discovery or develop defenses. However, because the defendant in an infringement action has the burden of proving an affirmative defense such as fair use, the defendant is obliged to introduce evidence to support the defense, in

response to the copyright owner's request for preliminary relief. The copyright owner then must show a likelihood of success by challenging the alleged infringer's evidence [*Perfect 10, Inc. v. Amazon.com, Inc. (9th Cir. 2007), 487 F.3d 701, 714-715]* .

The plaintiff may take an interlocutory appeal from the district court's denial of a preliminary injunction [*28 U.S.C. § 1292(a)(1)*]. In that event, the appeal is not rendered moot by the defendant's voluntary termination of the infringing activity unless "it is *absolutely* clear that the ... [infringing activity] could not reasonably be expected to recur" [*Adarand Constructors, Inc. v. Slater (2000) 528 U.S. 216, 222, 120 S. Ct. 722, 145 L. Ed. 2d 650* (emphasis in original; internal quotation marks omitted); *LGS Architects, Inc. v. Concordia Homes (9th Cir. 2006) 434 F.3d 1150, 1153-1154*].

The plaintiff seeking a preliminary injunction must post a bond for the payment of costs and damages incurred by a party who is later found to have been wrongfully enjoined [*Fed. R. Civ. P., Rule 65(c)*]. A prevailing defendant then may have the bond executed in its favor and recover damages, including lost profits, up to the amount of the bond [*Nintendo of America v. Lewis Galoob Toys (9th Cir. 1994) 16 F.3d 1032, 1036*].

[6] Defenses

[a] In General

A defendant in a copyright infringement action may defend against the ultimate facts by challenging plaintiff's claims as to ownership and copying [*see* discussion in *§ 349.27[4]*]. In addition, the defendant may claim abandonment of copyright [*Bell v. Combined Registry Co. (7th Cir. 1976) 536 F.2d 164, 170*], or that defendant's actions were within the limitations on the exclusive rights of the plaintiff copyright owner as set forth under *17 U.S.C. §§ 107-120* [*see § 349.22[2]*; *see also § 349.27[6][b]*], or that the plaintiff attempts to misuse the copyright so as to secure an exclusive right or limited monopoly not granted by the Copyright Office [*Practice Mgmt. Info. Corp. v. AMA (9th Cir. 1997) 121 F.3d 516, 520* (AMA misused its copyright by licensing its copyrighted medical procedures coding system to federal agency in exchange for agency's agreement not to use any competing coding system)], which is known as the defense of misuse [*see Lasercomb America, Inc. v. Reynolds (4th Cir. 1990) 911 F.2d 970, 977-979*]. Defendant also may raise defenses based on procedural and equitable issues such as:

- Jurisdictional defects [*see 28 U.S.C. §§ 1338, 1400* (jurisdiction and venue of federal courts in copyright cases); *e.g., Subafilms, Ltd. v. MGM-Pathe Communications (9th Cir. 1994) 24 F.3d 1088, 1095-1098* (no extraterritorial effect of federal copyright law over foreign acts of infringement)].

- Laches [*see, e.g., Blackburn v. Southern Cal. Gas Co. (S.D. Cal. 1936) 14 F. Supp. 553, 554* ; *see also Kling v. Hallmark Cards, Inc. (9th Cir. 2000) 225 F.3d 1030, 1038-1039* (period of delay for laches for copyright infringement claim starts when plaintiff knew or should have known about impending or actual infringement, not when plaintiff knew of adverse claim of ownership)].

- Estoppel [*see, e.g., Hampton v. Paramount Pictures Corporation (9th Cir. 1960) 279 F.2d 100, 104*].

- Statute of limitations [*see § 349.27[6][c]*].

- Unclean hands [*see, e.g., Testa v. Janssen (W.D. Pa. 1980) 492 F. Supp. 198, 201*].

- Misuse of the copyright [*Practice Mgmt. Info. Corp. v. AMA (9th Cir. 1997) 121 F.3d 516, 520*].

For further discussion of defenses to copyright infringement, see Nimmer on Copyright, Ch. 13, *Infringement*

Actions--Substantive Aspects (Matthew Bender).

[b] Fair Use

[i] Nature of Defense

The 1976 Act accorded for the first time an express statutory right of fair use of a copyrighted work [*see 17 U.S.C. § 107*]. The defense of fair use, however, had been a well-established judicially created doctrine long before the 1976 Act [*see, e.g.,* Mathews Conveyor Co. v. Palmer-Bee Co. (6th Cir. 1943) 135 F.2d 73, 85 (discussion of factors to consider in determining fair use)]. The statutory defense of fair use embraced the scope and general purpose of the judicial doctrine, but did not change, narrow, or enlarge it in any way [*see Elsmere Music, Inc. v. National Broad. Co. (S.D.N.Y. 1980) 482 F. Supp. 741, 744-745 , aff'd per curiam, 623 F.2d 252 (2d Cir. 1980)* ("the District Court correctly applied the doctrine of fair use")]. Regarding the scope and limits of the fair use doctrine, cases antedating the 1978 Act will continue to be valid.

In determining whether the use made of a work in any particular case is a fair use, "the factors to be considered shall include" the following [*17 U.S.C. § 107*; *see, e.g., Los Angeles News Serv. v. KCAL-TV Channel 9 (9th Cir. 1997) 108 F.3d 1119, 1121*]:

- The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes [*see* [ii], *below*].

- The nature of the copyrighted work [*see* [iii], *below*].

- The amount and substantiality of the portion used in relation to the copyrighted work as a whole [*see* [iv], *below*].

- The effect of the use upon the potential market for and value of the copyrighted work [*see* [v], *below*].

This analysis should not be simplified with bright-line rules, but instead requires a case-by-case analysis [*Los Angeles News Serv. v. CBS Broad., Inc. (9th Cir. 2002) 305 F.3d 924, 938 , amended,* 313 F.3d 1093] . The court should not treat the factors in isolation from one another. All are to be explored, and the results are to be weighed together, in light of the purposes of copyright [*Elvis Presley Enters. v. Passport Video (9th Cir. 2003) 349 F.3d 622, 627*]. The fact that a work is unpublished does not itself bar a finding of fair use if such a finding is made after consideration of all factors listed above [*17 U.S.C. § 107*].

First Amendment concerns in copyright cases are subsumed within the fair-use inquiry. In other words, if the use of the alleged infringer is not fair use, there are no *First Amendment* prohibitions against granting a preliminary injunction [*Elvis Presley Enters. v. Passport Video (9th Cir. 2003) 349 F.3d 622, 626*].

For further discussion of the defense of fair use, see Nimmer on Copyright, Ch. 13, *Infringement Actions--Substantive Aspects* (Matthew Bender).

[ii] Purpose and Character of Use

The most important component of the inquiry into the purpose and character of the use is the question whether the allegedly fair use was transformative [*Los Angeles News Serv. v. CBS Broad., Inc. (9th Cir. 2002) 305 F.3d 924, 938]* , that is, whether the second use adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message. The more transformative the new work, the less will be the significance of other

factors, like commercialism, that may weigh against a finding of fair use [*Campbell v. Acuff-Rose Music, Inc. (1994) 510 U.S. 569, 579, 114 S. Ct. 1164, 127 L. Ed. 2d 500*].

A commercial use of a copyrighted work does not necessarily preclude a finding of fair use [*see, e.g.,* *Campbell v. Acuff-Rose Music, Inc. (1994) 510 U.S. 569, 114 S. Ct. 1164, 127 L. Ed. 2d 500* (commercial nature of song parody does not render it presumptively unfair); *Triangle Publications, Inc. v. Knight-Ridder Newspapers, Inc. (5th Cir. 1980) 626 F.2d 1171, 1174-1175*]. Although not controlling, however, the fact that a new use is commercial as opposed to nonprofit weighs against a finding of fair use [*Harper & Row Publishers, Inc. v. Nation Enters. (1985) 471 U.S. 539, 562, 105 S. Ct. 2218, 85 L. Ed. 2d 588*]. The degree to which the new user exploits the copyright for commercial gain (as opposed to incidental use as part of a commercial enterprise) affects the weight to be afforded commercial nature as a factor [*Elvis Presley Enters. v. Passport Video (9th Cir. 2003) 349 F.3d 622, 627*].

Use of copyrighted materials for educational purposes, when the materials were purchased from the copyright owner, enhanced the value of the copyright, and that use was protected by the fair use doctrine [*Allen v. Academic Games League of Am., Inc. (9th Cir. 1996) 89 F.3d 614, 617*]. An educational nonprofit use would usually be fair use, but a finding of a nonprofit educational purpose does not compel a finding of fair use if other factors are contrary [*Marcus v. Rowley (9th Cir. 1983) 695 F.2d 1171, 1175*].

The fair use doctrine has been applied to:

- Criticism and comment [*see, e.g.,* *Suid v. Newsweek Magazine (D.D.C. 1980) 503 F. Supp. 146, 148* (quoting passages from book about John Wayne in article following actor's death)].

- Parody [*see, e.g.,* *Campbell v. Acuff-Rose Music, Inc. (1994) 510 U.S. 569, 114 S. Ct. 1164, 127 L. Ed. 2d 500* (rap song parody of copyrighted popular song may be fair use, depending on balancing of factors under *17 U.S.C. § 107*); *Elsmere Music Inc. v. National Broad. Co. (2d Cir. 1980) 623 F.2d 252, 253* (Saturday Night Live sketch parodying "I Love New York" campaign); *but see* *Walt Disney Productions v. Mature Pictures Corp. (S.D.N.Y. 1975) 389 F. Supp. 1397, 1398* (parody of Mickey Mouse Club in X-rated film); *Loew's Inc. v. Columbia Broad. Sys. (S.D. Cal. 1955) 131 F. Supp. 165, 175-181* (parody of "Gaslight" in Jack Benny television sketch), *aff'd sub nom.* *Benny v. Loew's Inc. (9th Cir. 1956) 239 F.2d 532]* .

- Matters of public interest [*see, e.g.,* *Meeropol v. Nizer (2d Cir. 1977) 560 F.2d 1061, 1068* (publication of Julius and Ethel Rosenberg letters); *Time Inc. v. Bernard Geis Assocs. (S.D.N.Y. 1968) 293 F. Supp. 130, 146* (sketches based on film of President Kennedy's assassination)].

Home video recording of copyrighted works that (1) amounted mostly to "time-shifting," (2) would not be objected to by substantial numbers of copyright holders who licensed their works for free television, and (3) did not impair the value of the copyrighted works, was held to be fair use [*Sony Corp. v. Universal City Studios, Inc. (1984) 464 U.S. 417, 419-428, 104 S. Ct. 774, 78 L. Ed. 2d 574 , superseded by statute as stated in* *641 F. Supp. 2d 913 (2009)*].

[iii] Nature of Copyrighted Work

The Supreme Court has passed over the nature of the copyrighted work without giving it much attention, stating that this factor is often not much help [*Campbell v. Acuff-Rose Music, Inc. (1994) 510 U.S. 569, 586, 114 S. Ct. 1164, 127 L. Ed. 2d 500*]. It is of most relevance in the fair use analysis when the original material and the copy are different in nature [*Sony Computer Entertainment Am., Inc. v. Bleem, LLC (9th Cir. 2000) 214 F.3d 1022, 1028*].

Fair use has been successfully asserted with respect to limited copying of textbooks or other informational material prepared primarily for limited distribution and dealing with scientific or historical topics [*see, e.g.,* *Eisenschiml v.*

Fawcett Publications, Inc. (7th Cir. 1957) 246 F.2d 598, 604 (historical facts about Lincoln)]. Creative material prepared for general public distribution has also been found to be the subject of fair use [*see, e.g., Triangle Publications, Inc. v. Knight-Ridder Newspapers (5th Cir. 1980) 626 F.2d 1171, 1175* (magazine cover used in television ad); *but see Dr. Pepper Co. v. Sambo's Restaurants, Inc. (N.D. Tex. 1981) 517 F. Supp. 1202, 1208* (use of television commercial too similar to "Be a Pepper" commercial)].

[iv] Amount and Substantiality of Portion Used

A standard of reasonableness is to be applied when evaluating the amount and substantiality of the portion used in relation to the copyrighted work as a whole [*see, e.g., Rosemont Enters., Inc. v. Random House, Inc. (2d Cir. 1966) 366 F.2d 303, 310*].

In the case of parody, the Supreme Court has recognized that the parodist must be able to use enough of the original work to make the object of the parody's critical wit recognizable. Such a use may be a fair use, even though the portion taken was the heart of the original [*Campbell v. Acuff-Rose Music, Inc. (1994) 510 U.S. 569, 114 S. Ct. 1164, 127 L. Ed. 2d 500*].

[v] Effect of Use on Potential Market or Value

Perhaps the most important of the four factors is the effect of the use on the potential market for or value of the copyrighted work [*see, e.g., Triangle Publications, Inc., v. Knight-Ridder Newspapers (5th Cir. 1980) 626 F.2d 1171, 1177*]. In determining that effect of the defendant's use, the courts have looked to the function of each work regardless of the media in which each appeared. Thus, if the use adversely affects the value of any future adaptation rights (even though unexercised) in the copyrighted works, the courts will find the use unfair even if defendant's work was in a different media [*see, e.g., Iowa State Univ. Research Found., Inc. v. American Broad. Cos., Inc. (2d Cir. 1980) 621 F.2d 57, 61-62*]. On the other hand, if the defendant's use of material similar to the plaintiff's work performs a substantially different function than the copyrighted work, the courts may permit the fair use defense, even though both works employ the same or similar media [*see, e.g., Karll v. Curtis Publ'g Co. (E.D. Wisc. 1941) 39 F. Supp. 836, 837-838*]. For example, a rap parody of a popular song may be found not to be a fair use to the extent that the parody harms the potential derivative market for other rap versions of the original song. However, the fact that a parody may (like a scathing critical review) harm the market for the original work by reducing demand for it does not give rise to damages that are remediable under copyright law, and such harm may not be considered in determining whether the parody is a fair use [*Campbell v. Acuff-Rose Music, Inc. (1994) 510 U.S. 569, 114 S. Ct. 1164, 127 L. Ed. 2d 500*].

[c] Statute of Limitations

Title *17 U.S.C. § 507(b)* provides a three-year statute of limitations for civil actions for copyright infringement. The statute of limitations begins to run from the time the infringement claim "accrued" [*17 U.S.C. § 507(b)*]. A copyright infringement claim "accrues" when the copyright owner has knowledge of a violation or is chargeable with such knowledge [*Roley v. New World Pictures, Ltd. (9th Cir. 1994) 19 F.3d 479, 481*].

Therefore, an infringement suit is time-barred if it is based on an act of infringement that the plaintiff discovered, or reasonably should have discovered, more than three years before commencement of the suit. If the suit is not time-barred, the plaintiff may recover for (1) all infringing acts that occurred within the three-year limitation period and (2) any infringing act that occurred before the three-year limitation period began, if the plaintiff did not discover it, and reasonably could not have discovered it, before the limitation period began [*Polar Bear Prods., Inc. v. Timex Corp. (9th Cir. 2004) 384 F.3d 700, 705-707*]. The plaintiff may not recover forany infringing act that the plaintiff discovered before the three-year limitation period began [*Roley v. New World Pictures, Ltd. (9th Cir. 1994) 19 F.3d 479, 481*].

[d] Limitations on Liability for Online Copyright Infringement

The Online Copyright Infringement Liability Limitation Act [*17 U.S.C. § 512*], enacted as title II of the Digital Millennium Copyright Act DMCA [Pub. L. No. 105-304 (DMCA)], creates four safe harbor defenses that Internet service providers may raise to limit their liability for claims of copyright infringement. These defenses relate to (1) transitory digital network communications, (2) system caching, (3) information residing on systems or networks at the direction of users, and (4) information location tools [*17 U.S.C. § 512(a)-(d)*; *see generally Perfect 10, Inc. v. CCBill LLC (9th Cir. 2007) 481 F.3d 751, 758-767* (explanation of what is required for service provider to be eligible to invoke each of those four safe harbor defenses)]. However, claims against service providers for copyright infringement "are generally evaluated just as they would be in the non-online world" [*see* [1]-[5], *above*], and a safe harbor defense would apply to limit a service provider's liability only if the provider could be found liable under the usual principles of copyright law [*Ellison v. Robertson (9th Cir. 2004) 357 F.3d 1072, 1077*].

To invoke any of the four safe harbor limitations of liability, a service provider must meet two conditions for eligibility. The safe harbor limitations of liability apply only if [*17 U.S.C. § 512(i)(1)*]:

- The service provider has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers. A service provider "implements" a policy if it has a working notification system, has a procedure for dealing with DMCA-compliant notifications, and does not actively prevent copyright owners from collecting information needed to issue such notifications. An implementation is "reasonable" if, under appropriate circumstances, the service provider terminates users who repeatedly or blatantly infringe copyright. Circumstances would be "appropriate" for action by a service provider when it either has actual knowledge of infringing activity, is aware of facts or circumstances from which infringing activity is apparent, or has received notification of claimed infringement meeting the requirements of *17 U.S.C. § 512(c)(3)*. A service provider need not affirmatively police its users for evidence of repeat infringement [*Perfect 10, Inc. v. CCBill LLC (9th Cir. 2007) 481 F.3d 751, 758-759, 760-764* (what constitutes implicit awareness of apparent infringing activity; what constitutes copyright holder's effective notification of infringement)].

- The service provider accommodates and does not interfere with standard technical measures. These are technical measures that copyright owners use to identify or protect copyrighted works and that (1) have been developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process, (2) are available to any person on reasonable and nondiscriminatory terms, and (3) do not impose substantial costs on service providers or substantial burdens on their systems or networks [*17 U.S.C. § 512(i)(2)*].

A service provider that does not meet these threshold requirements is not entitled to invoke the safe-harbor limitations on liability [*17 U.S.C. § 512(i)(1)*]. Whether these requirements have been met is an issue of fact [*Ellison v. Robertson (9th Cir. 2004) 357 F.3d 1072, 1080* (trial court erred in concluding, on summary judgment motion, that defendant had met requirements)].

A service provider "implements" a policy if the service provider has a working notification system and a procedure for dealing with DMCA-compliant notifications, and if it does not actively prevent copyright owners from collecting information needed to issue such notifications [*Perfect 10, Inc. v. Amazon.com, Inc. (9th Cir. 2007), 487 F.3d 701 , ___, 2007 U.S. App. LEXIS 12508, at *6-*10]* .

An implementation of the service provider's policy is "reasonable" if, under appropriate circumstances, the service provider terminates users who repeatedly or blatantly infringe copyright. To identify and terminate repeat infringers, a service provider need not affirmatively police its users for evidence of repeat infringement, but in order to invoke the safe harbor protection, a service provider must act expeditiously to remove, or disable access to, the infringing material

when it has actual knowledge of infringing activity, or is aware of facts or circumstances from which infringing activity is apparent, or has received notice of claimed infringement that substantially complies with all of the requirements of *17 U.S.C. § 512(c)(3)*. A compliant notice need not have come from the plaintiff in the present case, however; it could have come from a nonparty, and that could have made the service provider aware of facts or circumstances from which infringing activity was apparent. On the other hand, receipt of a noncompliant notice would not be sufficient to make the service provider aware of facts or circumstances from which infringing activity is apparent [*Perfect 10, Inc. v. Amazon.com, Inc. (9th Cir. 2007), 487 F.3d 701, 711-716]* .

[e] Statutory Exemption From Liability for Making, Providing, or Using Technology to Skip Portions of Movies Viewed at Home

Notwithstanding the exclusive rights of owners of copyrighted works under *17 U.S.C. § 106* [*see § 349.22[1]*], no infringement of copyright arises from either of the following acts [*17 U.S.C. § 110(11)*]:

- Making imperceptible--that is, skipping--limited portions of audio or video content of a motion picture, by or at the direction of a member of a private household, during a performance in or transmission to that household for private home viewing, from an authorized copy of the motion picture.

- Creating or providing a computer program or other technology that enables skipping of limited audio or video portions of a motion picture and that is designed and marketed to be used, at the direction of a member of a private household, for that purpose, if no fixed copy of the altered version of the motion picture is created by that computer program or other technology.

The term "making imperceptible" does not include the addition of audio or video content that is performed or displayed over or in place of existing content in a motion picture [*17 U.S.C. § 110* (penultimate paragraph)].

This exemption does not imply further rights under *17 U.S.C. § 106*, or have any effect on defenses or limitations on rights granted under any other section of the Copyright Act or under any other paragraph of *17 U.S.C. § 110*, which generally specifies various limitations on a copyright holder's exclusive rights [*17 U.S.C. § 110* (last paragraph)].

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Chapter 349 LITERARY PROPERTY AND COPYRIGHT
PART II. LEGAL BACKGROUND
B. Federal Copyright Law

31-349 California Forms of Pleading and Practice--Annotated § 349.28

§ 349.28 Security Interests in Copyrights

The Copyright Act permits the owner of a copyright to create a security interest in it. The Ninth Circuit has stated that the Copyright Act's use of the word "mortgage" as one definition of a "transfer" [*see 17 U.S.C. § 101*] is properly read to include security interests under Article 9 of the Uniform Commercial Code [*Aerocon Engineering, Inc. v. Silicon Valley Bank (In re World Auxiliary Power Co.) (9th Cir. 2002) 303 F.3d 1120, 1126*].

Division 9 of the Commercial Code, which generally governs security interests in property other than real property [*see generally* Ch. 503, *Sales: Secured Transactions*], does not apply to security interests in copyrights "to the extent that any ... statute ... of the United States preempts" Division 9 [*Com. Code § 9109(c)(1)*]. Insofar as the Copyright Act concerns security interests in copyrights, it preempts state law [*see 17 U.S.C. § 301(a)*; *see also § 349.12*]. Therefore, security interests in copyrights are governed primarily by the Copyright Act [*see* In re Cybernetic Services, Inc. (9th Cir. 2001) 252 F.3d 1039, 1056 ("The Copyright Act, by its terms, governs security interests.")]; but, to the extent that the Copyright Act couldnot be applied with respect to the matter, security interests in copyrights would be governed by Division 9 of the Commercial Code.

The Copyright Act permits a security agreement covering a *registered* copyright--that is, any document evidencing the transfer of a security interest in a registered copyright--to be recorded in the Copyright Office [*see 17 U.S.C. § 205(c)*]. A duly recorded security agreement preserves the priority of the creditor's security interest [*see 17 U.S.C. § 205(d)*]. Since the Copyright Act covers the matter of preserving priority, no filing is necessary under Division 9 of the Commercial Code; indeed, no filing under Division 9 is even possible, with respect to a security interest in a registered copyright [*see Com. Code §§ 9310(a), (b)(3), 9311(a)(1)*; *cf. Aerocon Engineering, Inc. v. Silicon Valley Bank (In re World Auxiliary Power Co.) (9th Cir. 2002) 303 F.3d 1120, 1128* (construing former *Com. Code §§ 9104* and *9302*, now superseded but essentially continued in *Com. Code §§ 9109, 9310*, and *9311*: "For registered copyrights, the only proper place to file is the Copyright Office.")].

A security agreement covering an *unregistered* copyright cannot be recorded in the Copyright Office, however; and there is no other way, under the Copyright Act, for a creditor to preserve the priority of the creditor's security interest in an unregistered copyright [*Aerocon Engineering, Inc. v. Silicon Valley Bank (In re World Auxiliary Power Co.) (9th*

Cir. 2002) 303 F.3d 1120, 1128]. Therefore, Division 9 of the Commercial Code, by its terms, "governs perfection and priority of security interests in unregistered copyrights", and on this matter the Copyright Act does not preempt state law [*Aerocon Engineering, Inc. v. Silicon Valley Bank (In re World Auxiliary Power Co.) (9th Cir. 2002) 303 F.3d 1120, 1128*].

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[Reserved]

§§ 349.29[Reserved]

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31-349 California Forms of Pleading and Practice--Annotated § 349.40

§ 349.40 Preempted Law Copyright Repealed

In 1982, the California Legislature repealed those provisions of state law relating to the filing and recordation of original works of authorship fixed in a tangible medium of expression, as well as those other provisions that granted or conferred any legal or equitable right equivalent to any of the exclusive rights within the general scope of the Copyright Act of 1976 [*see 17 U.S.C. § 301(a)* (preemption of state law); *see also § 349.12*].

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31-349 California Forms of Pleading and Practice--Annotated § 349.41

§ 349.41 Recovery Under State Law

[1] Theories Not Preempted

The Copyright Act 1976 does not affect or limit any right or remedies under the common law or statutes of any state relating to activitiesviolating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of the copyright as specified in *17 U.S.C. § 106* [*see, e.g., KNB Enterprises v. Matthews (2000) 78 Cal. App. 4th 362, 365, 92 Cal. Rptr. 2d 713* (claim under *Civ. Code § 3344* was not preempted when based on invasion of plaintiff's right of publicity, which was not equivalent to exclusive rights under Copyright Act, arising from defendant's unauthorized use of noncopyrightable subject matter--model's likeness--even though it was captured in copyrightable photograph)]. The common law rights of privacy, publicity, and trade secrets, as well as the general laws of defamation and fraud, appear to remain unaffected by federal preemption [*see* Notes of Committee on the Judiciary to *17 U.S.C. § 301*, H.R. Rep. No. 1476, 94th Cong., 2nd Sess. (1976); *see also Orth-O-Vision, Inc. v. Home Box Office (S.D.N.Y. 1979) 474 F. Supp. 672, 684* n.12]. Furthermore, state courts are fully competent to adjudicate state-law breach of contract claims, even when the underlying contract involves ownership, assignment, or license of a copyright, much less mere assignment of royalties from a copyrighted work [*Durgom v. Janowiak (1999) 74 Cal. App. 4th 178, 180, 87 Cal. Rptr. 2d 619]* .

The courts generally use an "extra element test" to determine whether a state cause of action is equivalent to a copyright claim. If, under state law, the act of reproduction, performance, distribution, or display will *in itself* infringe the state-created right, then the right is preempted. If other elements are required, however, in addition to or instead of the acts of reproduction, performance, distribution, or display in order to constitute a state-created cause of action, then the right does not lie within the general scope of copyright and there is no preemption [*Summit Mach. Tool Mfg. v. Victor CNC Systems (9th Cir. 1993) 7 F.3d 1434, 1439-1440* ; *Gladstone v. Hillel (1988) 203 Cal. App. 3d 977, 987, 250 Cal. Rptr. 372* ; *see Oddo v. Ries (9th Cir. 1984) 743 F.2d 630, 635*]. The "extra element" must be one that changes the nature of the action so that it is qualitatively different from a copyright infringement claim [*Summit Mach. Tool Mfg. v. Victor CNC Systems (9th Cir. 1993) 7 F.3d 1434, 1439-1440* ; *Gladstone v. Hillel (1988) 203 Cal. App. 3d 977, 987, 250 Cal. Rptr. 372* ; *see Donald Frederick Evans v. Continental Homes, Inc. (11th Cir. 1986) 785 F.2d 897, 914*].

[2] Recovery Under Personal Rights Theory

Causes of action under common law or state statute arising out of personal rights such as breach of contract or a breach of trust or confidence are still available so long as those rights are distinct from copyright infringement [*see 17 U.S.C. § 301*; *see also* discussion in *§ 349.41[1]*]. For example, a state cause of action for interference with contractual relations arising out of the reproduction and distribution of a copyrighted work would be preempted by the Copyright Act 1976 since the rights allegedly interfered with were not different in kind from those rights protected under the Act, that is, exclusive rights to reproduce and distribute the work in question [*see Harper & Row, Publishers v. Nation Enterprises (S.D.N.Y. 1980) 501 F. Supp. 848, 850-852 , aff'd, 723 F.2d 195, 201 (2d Cir. 1983) , rev'd on other grounds, 471 U.S. 539, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985)* ; *Maheu v. CBS, Inc. (1988) 201 Cal. App. 3d 662, 672-673, 247 Cal. Rptr. 304]* .

[3] Recovery Under Property Rights Theory

More problematic is recovery under common law or state statute for misappropriation and conversion. The House Judiciary Committee Report indicates that recovery under these theories has not been preempted [*see* Notes of Committee on the Judiciary to *17 U.S.C. § 301*, H.R. Rep. No. 1476, 94th Cong., 2nd Sess. (1976)]. Under the "extra element" test applied by the courts [*see* discussion in *§ 349.41[1]*], a state cause of action for conversion is not preempted because conversion involves the extra element of wrongful possession of the tangible embodiment of a work [*Gladstone v. Hillel (1988) 203 Cal. App. 3d 977, 987, 250 Cal. Rptr. 372* ; *see Oddo v. Ries (9th Cir. 1984) 743 F.2d 630, 635*]. Nevertheless, the remedy obtained by the plaintiff must be closely tailored to rights conferred by state law. A plaintiff in state court cannot, on a theory of conversion, enforce a right equivalent to copyright--the right to restrain copying of his or her work. An example of a properly tailored remedy for the tort of conversion is an injunction that prevents the defendant from using the work or other representations of plaintiff's designs that the defendant wrongfully acquired or retained possession of, and from using copies of the work or other representations of designs that were derived from the work or other representations of the design while defendant wrongfully retained possession [*Gladstone v. Hillel (1988) 203 Cal. App. 3d 977, 989-990, 250 Cal. Rptr. 372*].

In contrast, an action for conversion of copyrightable property is preempted when plaintiff seeks damages arising from the reproduction and distribution, rather than from the physical possession, of plaintiff's work [*Maheu v. CBS, Inc. (1988) 201 Cal. App. 3d 662, 671-673, 247 Cal. Rptr. 304*]. This conforms to the general rule that an action is preempted when the rights sought to be protected are equivalent to those rights protected under the Copyright Act of 1976, such as an alleged act of misappropriation consisting simply of an act of public performance [*see Orth-O-Vision, Inc. v. Home Box Office (S.D.N.Y. 1979) 474 F. Supp. 672, 684*], or an act of conversion consisting of exercising dominion and control over reproduction and distribution of derivative works based on a copyrighted work [*see, e.g., Harper & Row, Publishers v. Nation Enterprises (S.D.N.Y. 1980) 501 F. Supp. 848, 850-852 , aff'd, 723 F.2d 195, 201 (2d Cir. 1983) , rev'd on other grounds, 471 U.S. 539, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985)]* .

Similarly, recovery under quasi-contract may also be subject to federal preemption. In quasi-contract, the plaintiff seeks to recover under the theory that the defendant received a benefit, such as an idea, and that he or she ought to pay for the wrongful appropriation of the idea. However, defendant's obligation to pay arises out of an obligation imposed by law in order to do justice and not out of an obligation imposed by the parties themselves for services rendered [*see Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 794, 256 P.2d 947* ; *Fink v. Goodson-Todman Enterprises, Ltd. (1970) 9 Cal. App. 3d 996, 1010, 88 Cal. Rptr. 679*]. In addition, recovery under quasi-contract requires that the material in question constitute protectible property, which requires the plaintiff to show concreteness and novelty [*see Fink v. Goodson-Todman Enterprises, Ltd. (1970) 9 Cal. App. 3d 996, 1009-1010, 88 Cal. Rptr. 679*]. The requirement of concreteness may well fix the material in question in a tangible form of expression, thereby falling within the scope of exclusive rights protectible under the Copyright Act of 1976 [*see 17 U.S.C. § 106*].

[4] Recovery Under Unfair Competition Theory

Recovery under a state unfair competition law is generally subject to preemption under federal copyright and patent laws. A state may not, when an article is unpatented and uncopyrighted, prohibit by statute the copying of the article itself or award damages for that copying [*Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 232-233, 84 S. Ct. 784, 11 L. Ed. 2d 661* (preemption by federal patent law)]. When a complaint alleges no facts other than the lawful copying of an article in the public domain, no cause of action for misappropriation of the article, under a theory of unfair competition, is stated [*Sammons & Sons v. Ladd-Fab, Inc. (1982) 138 Cal. App. 3d 306, 309, 187 Cal. Rptr. 874* (copying of unpatented products and reproduction of uncopyrighted catalog)].

The Copyright Act of 1976 does not preempt an action for unfair competition based on "reverse palming off," i.e., appropriating the property of another and selling it as one's own. The courts have reasoned that such actions require the plaintiff to establish "extra elements" beyond those necessary to establish a copyright infringement [*see* discussion *§ 349.41[1]*], such as the deceptive conduct of "palming off" another's product as one's own and the likelihood of customer confusion [*see Summit Mach. Tool Mfg. v. Victor CNC Systems (9th Cir. 1993) 7 F.3d 1434, 1441* ; *Gladstone v. Hillel (1988) 203 Cal. App. 3d 977, 987, 990, 250 Cal. Rptr. 372* ; *see generally* Ch. 549, *Trademarks and Trade Names* ; Ch. 565, *Unfair Competition* ; *but see Norse v. Henry Holt and Co. (9th Cir. 1993) 991 F.2d 563, 568* (author's claims that defendants misappropriated his unpublished letters for use in a book and "palm[ed]" them off as their own were preempted by federal copyright law)]. However, the United States Supreme Court has ruled, in the patent context, that the likelihood of public confusion about the source of the defendant's goods is not enough to support an injunction against copying or an award of damages for copying an article that the federal laws permit to be copied [*Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 232, 84 S. Ct. 784, 11 L. Ed. 2d 661* (Illinois statute)].

Whether a state law regulating marketing practices relating to copyrighted subject matter is violative of the Copyright Act of 1976 may well be determined on what right the law is protecting or establishing. For example, a state law prohibiting blind bidding relating to the right to exhibit motion pictures has been held to be a proper state regulation that was not preempted by the federal law [*see Allied Artists Pictures Corp. v. Rhodes (S.D. Ohio 1980) 496 F. Supp. 408, 446-448*]. However, a state unfair competition law regulating retransmission of copyrighted works was held to be preempted by the Copyright Act of 1976 [*see Orth-O-Vision, Inc. v. Home Box Office (S.D.N.Y. 1979) 474 F. Supp. 672, 683-684*].

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§ 349.42 Protection for Unfixed Works of Authorship

[1] In General

Under the California copyright laws as amended in 1982, state copyright protection is provided for works of authorship not protectible under federal law. Included within the works of authorship protected under state law are works of authorship that are not fixed in any tangible medium of expression. A work is considered not fixed when it is not embodied in a tangible medium of expression or when its embodiment in a tangible medium of expression is not sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration, either directly or with the aid of a machine or device [*see Civ. Code § 980(a)(1)*; *see also § 349.12*].

[2] Classroom Lectures

[a] Prohibited Copying

Special provisions of the Education Code establish special intellectual property rights relating to classroom lectures and related presentations. Under these provisions, no business, agency, or person, including, but not necessarily limited to, an enrolled student, may prepare, cause to be prepared, give, sell, transfer, or otherwise distribute or publish, for any commercial purpose, any contemporaneous recording of an academic presentation in a classroom or equivalent site of instruction by an instructor of record. This prohibition applies to a recording made in any medium, including, but not necessarily limited to, handwritten or typewritten class notes [*Educ. Code § 66450(a)*]. However, this prohibition must not be construed so as to interfere with the rights of disabled students under law [*Educ. Code § 66450(b)*]. "Academic presentation" means any lecture, speech, performance, exhibit, or other form of academic or aesthetic presentation, made by an instructor of record as part of an authorized course of instruction that is not fixed in a tangible medium of expression [*Educ. Code § 66450(c)(1)*]. "Commercial purpose" means any purpose that has financial or economic gain as an objective [*Educ. Code § 66450(c)(2)*]. "Instructor of record" means any teacher or staff member employed to teach courses and authorize credit for the successful completion of courses [*Educ. Code § 66450(c)(3)*].

It does not constitute a violation for a business, agency, or person solely to provide access or connection to or from a

facility, system, or network over which that business, agency, or person has no control, including related capabilities that are incidental to providing access or connection. This exemption does not apply to a business or agency that is owned by, or to a business, agency, or person that is controlled by, or a conspirator with, a business, agency, or person actively involved in the creation, editing, or knowing distribution of a contemporaneous recording that violates the anticopying prohibition [*Educ. Code § 66451(c)*].

The anticopying prohibition is not intended to change existing law as it pertains to the ownership of academic presentations [*Educ. Code § 66452(a)*].

[b] Judicial Relief

Any court of competent jurisdiction may grant relief that it finds necessary to enforce the anticopying prohibition, including the issuance of an injunction. Any person injured by a violation of the anticopying prohibition may recover court costs, attorney's fees, and a civil penalty, in addition to actual damages, from any person who is not a student enrolled in the institution at which the instructor of record makes his or her academic presentation and who seeks to obtain financial or economic gain through the unauthorized dissemination of the academic presentation. The amount of the civil penalty must not exceed $1,000 for the first offense or $5,000 for the second offense; and for any subsequent offense, a penalty of not less than $10,000 or more than $25,000 may be imposed [*Educ. Code § 66451(a)*]. For complaints for use in obtaining injunctive relief, which may be adapted for use in this situation, see Ch. 303, *Injunctions* .

Actions for any relief may be prosecuted in a court of competent jurisdiction by the attorney general or any district attorney or by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, or any city attorney of a city, or city and county, having a population in excess of 750,000, and, with the consent of the district attorney, by a city prosecutor in any city having a full-time city prosecutor or, with the consent of the district attorney, by a city attorney in any city, or city and county, in the name of the people of the State of California on their own complaint or on the complaint of any board, officer, person, corporation, or association or by any person acting for the interests of itself, its members, or the general public [*Educ. Code § 66451(b)*].

[c] Policies of Academic Institutions

By statute, the Regents of the University of California and the governing boards of private postsecondary institutions are requested to, the Trustees of the California State University must, and the governing board of each community college district may, in consultation with faculty and in accordance with applicable procedures, develop policies to prohibit the unauthorized recording, dissemination, and publication of academic presentations for commercial purposes [*Educ. Code § 66452(a)*].

The Regents of the University of California and the governing boards of private postsecondary institutions are requested to, the Trustees of the California State University must, and the governing board of each community college district may, adopt or provide for the adoption of specific regulations governing a violation of the anticopying prohibition by students, along with applicable penalties for a violation of the regulations. The regents are requested to, the trustees must, and the governing board of each community college district may, adopt procedures to inform all students of those regulations, with applicable penalties, and any revisions [*Educ. Code § 66452(b)*].

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§ 349.43 Protection for Sound Recordings Fixed Prior to February 15, 1972

Civ. Code § 980 also provides state copyright protection to an author of a sound recording fixed before February 15, 1972. This protection will endure until February 15, 2067, when federal law will govern all copyright protection for sound recordings [*17 U.S.C. § 301(c)*; *cf. Civ. Code § 980(a)(2)*].

In addition to the state civil copyright protection of *Civ. Code § 980(a)(2)*, various criminal penalties provide protection under state law for owners of sound recordings fixed before February 15, 1972 [*see Penal Code §§ 653h* (violations relating to transferring sound recordings), 653s, 653u (violations relating to recording live performances), 653w (violations relating to nondisclosure of origins of recording; see below)]. When a person is convicted under *Penal Code § 653h*, *653s*, *653u*, or *653w*, a court, in addition to other statutory penalties, must order the forfeiture, destruction, or other disposition of all articles on which sounds can be recorded or stored, and all devices for manufacturing, reproducing, or assembling these articles [*Penal Code § 653v*]. Neither *Penal Code § 653h* or *653s* enlarges or diminishes the rights and remedies of parties in civil litigation [*see Penal Code §§ 653h(f), 653s(e)*].

Until January 1, 2015, if there is a conviction for a violation of *Penal Code § 653w* (knowingly advertising or offering for sale or resale, or selling or reselling, or causing the rental, sale or resale, or renting, or manufacturing, or possessing for these purposes, any recording or audiovisual work, the cover, box, jacket, or label of which does not disclose the actual true name and address of the manufacturer thereof and the name of the actual author, artist, performer, producer, programmer, or group), then a nonresidential building or place used by the convicted person in committing that violation is deemed a nuisance that may be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance [*Bus. & Prof. Code § 17800(a),(c)*; *see Bus. & Prof. Code § 17802* (sunset provision)]. The district attorney of the county where the nuisance exists, or any city attorney in the county, or any citizen of California who resides in the county, may maintain an action to abate and prevent the nuisance and to perpetually enjoin the person conducting or maintaining it, and the owner, lessee, or agent of the building or place, in or on which the nuisance exists, from directly or indirectly maintaining or permitting it. The complaint must be verified unless filed by the district attorney or a city attorney [*Penal Code § 11226*]. An owner must be provided with 30 days' notice prior to the filing of an action to abate the nuisance [*Bus. & Prof. Code § 17800(a)*]. For discussion and forms for use in an action to abate a nuisance, see Ch. 391, *Nuisance* .

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§ 349.44 Protection of Ideas

Federal copyright protection for an original work of authorship does not extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in any work [*see 17 U.S.C. § 102(b)*]. Under California law, an idea is not considered to be literary property [*Desny v. Wilder (1956) 46 Cal. 2d 715, 731-733, 299 P.2d 257*]. However, a person whose idea has been wrongfully used by another person may be able to recover under state law by either proceeding against the wrongdoer for breaching a confidential relationship when the plaintiff has disclosed an idea in confidence, for breach of contract, or for inducing a breach of contract [*see §§ 349.45, 349.46[3]*].

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§ 349.45 Breach of Confidence

A person who discloses or makes use of an idea transmitted to him or her in confidence may be liable for breach of confidence under California law [*see Blaustein v. Burton (1970) 9 Cal. App. 3d 161, 186-187, 88 Cal. Rptr. 319* ; *Thompson v. California Brewing Co. (1957) 150 Cal. App. 2d 469, 474-476, 310 P.2d 436*]. The tort of breach of confidence is based on the concept of an implied obligation or contract between the parties, created by law for reasons of justice when no contract otherwise exists. Because breach of confidence is not predicated solely on an express agreement protecting the confidence, the tort can be established without proof of a promise. Nevertheless, since the gravamen of the tort is an understanding between the parties that an idea is offered on a condition of confidence, there can be no breach of confidence in the absence of an understanding between the parties that the confidential nature of the information will be maintained [*Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal. App. 3d 455, 466, 214 Cal. Rptr. 276*].

Liability for breach of confidence arises if the plaintiff submits a new idea to the defendant in confidence, and the defendant accepts it in confidence with the understanding that the idea would not be used or disclosed, or used for purposes beyond the limits of the confidence, without the plaintiff's consent [*Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal. App. 3d 455, 462, 214 Cal. Rptr. 276* , citing *Faris v. Enberg (1979) 97 Cal. App. 3d 309, 321, 158 Cal. Rptr. 704*]. Additionally, the idea must be confidential and novel, the defendant's knowlege of the confidential nature of the information must precede its disclosure, and the defendant must have an opportunity to reject disclosure in advance, since the unsolicited submission of an idea is not actionable [*Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal. App. 3d 455, 462, 465, 214 Cal. Rptr. 276* ; *cf. Fink v. Goodson-Todman Enterprises, Ltd. (1970) 9 Cal. App. 3d 996, 1009, 88 Cal. Rptr. 679* (novel idea is not element of cause of action for breach of contract for unauthorized use or disclosure of idea)].

One appellate court has suggested that the plaintiff must establish that, under the circumstances, the defendant knew or should have known that the disclosure was made in confidence [*see Thompson v. California Brewing Co. (1957) 150 Cal. App. 2d 469, 476, 310 P.2d 436*]. Apparently, however, *actual notice* of confidentiality is required to establish defendant's knowledge that the disclosure was made in confidence [*Aliotti v. R. Dakin & Co. (9th Cir. 1987) 831 F.2d 898, 903* (applying California law); *Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal. App. 3d 455,*

465, 214 Cal. Rptr. 276]. Mere constructive notice, or a showing that the defendant should have known of the confidential nature of the information imparted, would improperly subject a defendant to liability without the requisite understanding or voluntary acceptance of the confidential disclosure [*Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal. App. 3d 455, 465, 214 Cal. Rptr. 276]* .

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§ 349.46 Contractual Protection of Ideas

[1] Ideas as Consideration

The transmission or conveyance of an idea can constitute valuable consideration that can be bargained for before it is disclosed to the proposed purchaser. In the publishing or entertainment field, the publisher or producer often will enter into a contractual agreement in which he or she will agree to pay for the service of having transmitted or conveyed to him or her ideas that are valuable and that can be put to profitable use [*see Desny v. Wilder (1956) 46 Cal. 2d 715, 737-738, 299 P.2d 257* ; *Donahue v. Ziv Television Programs, Inc. (1966) 245 Cal. App. 2d 593, 609, 54 Cal. Rptr. 130*].

Claims under state law are preempted by the Copyright Act if (1) the work at issue comes within the subject matter of copyright, and (2) the state law rights are equivalent to any of the exclusive rights within the general scope of copyright [*17 U.S.C. § 301*]. To survive preemption, the state cause of action must protect rights that are qualitatively different from the rights protected by copyright; in other words, the complaint must allege an extra element that changes the nature of the action. For purposes of avoiding preemption, the implied promise to pay required by *Desny* is such an extra element [*Grosso v. Miramax Film Corp. (9th Cir. 2004) 383 F.3d 965, 968* ; *see Landsberg v. Scrabble Crossword Game Players, Inc. (9th Cir. 1986) 802 F.2d 1193, 1196* (defendants, who used plaintiff's idea for game-strategy book without paying expected compensation, were liable on *Desny* claim, which "turns not upon the existence of a [copyright] ... but upon the implied promise to pay the reasonable value of the material disclosed")].

[2] Novelty Not Required

An idea that can be the subject matter of a contract is not required to be novel or original since the recipient of the idea has willingly agreed to pay [*see Fink v. Goodson-Todman Enterprises, Ltd. (1970) 9 Cal. App. 3d 996, 1008-1009 n.16, 88 Cal. Rptr. 679* ; *Blaustein v. Burton (1970) 9 Cal. App. 3d 161, 183, 88 Cal. Rptr. 319*]. The fact that the idea used was one that the publisher or producer could have thought of himself or herself is no defense against the claim of the writer [*Blaustein v. Burton (1970) 9 Cal. App. 3d 161, 183, 88 Cal. Rptr. 319*]. The idea may be valuable to its recipient simply because the disclosure took place at the right time [*see Donahue v. United Artists Corp. (1969) 2 Cal. App. 3d 794, 809, 83 Cal. Rptr. 131*].

[3] Breach of Contract

For a purveyor of an abstract idea to prevail in an action to recover compensation for the use of that idea, he or she must be able to show that either (1) before or after disclosure he or she had obtained an express promise to pay for use of the idea, or (2) the circumstances preceding and attending disclosure, together with the conduct of the offeree acting with knowledge of the circumstances, showed a promise of the type usually referred to as implied-in-fact [*see Desny v. Wilder (1956) 46 Cal. 2d 715, 737-738, 299 P.2d 257* ; *Klekas v. EMI Films, Inc. (1984) 150 Cal. App. 3d 1102, 1114, 198 Cal. Rptr. 296*].

In the case of an implied-in-fact contract to pay for the use of an idea, the circumstances involving a writer transmitting or conveying an idea to a publisher or producer would include the understanding that a professional author expects payment for the reasonable value of the idea submitted, if used, and that the conduct of the publisher or producer in accepting the idea implies a promise to fulfill those reasonable expectations [*see Davies v. Krasna (1966) 245 Cal. App. 2d 535, 549, 54 Cal. Rptr. 37* ; *Chandler v. Roach (1957) 156 Cal. App. 2d 435, 440-441, 319 P.2d 776*].

When warranted by the facts, a purveyor of an idea may also proceed against the recipient for inducing a breach of contract [*see Donahue v. Ziv Television Programs, Inc. (1966) 245 Cal. App. 2d 593, 607, 54 Cal. Rptr. 130*].

[4] Basic Similarities

The use of an idea does not imply that there was any copying as to form or manner of expression. When there exist basic similarities in plot ideas, themes, sequences, and dramatic gimmicks, a jury may infer that plaintiff's ideas and format were used by the defendant [*Minniear v. Tors (1968) 266 Cal. App. 2d 495, 504-505, 72 Cal. Rptr. 287*].

[5] Assignment of Rights in Idea

Even though a cause of action for breach of an implied-in-fact contract would be assignable, the purported assignment of various interests in a noncopyrighted literary work does not give the assignee the right to pursue a cause of action for breach of an implied-in-fact contract to pay for the disclosure of an idea, if the idea is used, that may have arisen prior to the purported assignment as the result of negotiations between the creator and a third party [*Rokos v. Peck (1986) 182 Cal. App. 3d 604, 616, 227 Cal. Rptr. 480*].

Even though the assignability of things in action is the rule and nonassignability the exception, contracts of a purely personal nature generally fall under the exception. The creation of a contract between an author, on the one hand, and an agent, producer, or director, on the other is of such a personal nature that it is effective only between the contracting parties [*Rokos v. Peck (1986) 182 Cal. App. 3d 604, 617, 227 Cal. Rptr. 480*].

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§ 349.47 Defenses

[1] Lack of Similarity

The test for similarity is whether or not the defendant appropriated and used a qualitatively important part of the plaintiff's idea in such a way that features in the defendant's works are substantially similar to features in the plaintiff's works. If the determination is favorable to the plaintiff, the trier of fact must make the additional inquiry as to whether or not, despite the similarities that suggest appropriation and use, the similarities are purely coincidental and, in fact, defendant's work product was achieved independently of any use of plaintiff's idea [*see Fink v. Goodson-Todman Enterprises, Ltd. (1970) 9 Cal. App. 3d 996, 1007, 1009-1010, 88 Cal. Rptr. 679* (question of similarity interdependent with issue of access)].

[2] Statute of Limitations

The two-year period of limitation under *Code Civ. Proc. § 339(1)* governs an action alleging the use or appropriation of an idea in violation of an agreement to pay for the reasonable value for obtaining the idea when the actions are for implied breach of contract or breach of confidence [*see Donahue v. United Artists Corp. (1969) 2 Cal. App. 3d 794, 801, 83 Cal. Rptr. 131* ; *Thompson v. California Brewing Co. (1957) 150 Cal. App. 2d 469, 477, 310 P.2d 436*].

The two-year period of limitation under *Code Civ. Proc. § 339(1)* governs an action alleging the use or appropriation of an idea in violation of an agreement to pay for the reasonable value for obtaining the idea [*see Donahue v. United Artists Corp. (1969) 2 Cal. App. 3d 794, 801, 83 Cal. Rptr. 131* ; *Thompson v. California Brewing Co. (1957) 150 Cal. App. 2d 469, 477, 310 P.2d 436*].

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[Reserved]

§§ 349.48[Reserved]

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§ 349.60 Semiconductor Chip Protection Act of 1984

[1] In General

The Semiconductor Chip Protection Act of 1984 (*17 U.S.C. § 901 et seq.*) provides protection for and exclusive rights to persons owning semiconductor chip products. The Act is specific to semiconductor chips, but other applicable copyright provisions are still available [*17 U.S.C. § 912(a)*]. *17 U.S.C. § 901(a)(1)* and *(2)* define "semiconductor chip product" and "mask work," respectively [*see generally 17 U.S.C. § 901(a)(1)* (definitions)]. The owner of a mask work protected under *17 U.S.C. § 901 et seq.* has the exclusive rights to do and to authorize the reproduction of the mask work by any means or the importation or distribution of a semiconductor chip product in which the mask work is embodied [*17 U.S.C. § 905*; *see 17 U.S.C. § 902(a), (b)* (eligibility for protection); *see also 17 U.S.C. §§ 902(c), 906(a)* (limitations on protected rights)].

[2] Duration of Protection

The protection provided for a mask work commences on the date the mask work is registered or the date it is first commercially exploited, whichever occurs first. The protection ends at the end of the calendar year ten years after the date on which the protection commenced [*17 U.S.C. § 904*].

[3] Demarcation of Protection

The owner of a mask work for which protection is provided may affix notice to the mask work and to masks and semiconductor chip products embodying the mask work, in a manner and location as to give reasonable notice of that protection. The affixation of notice is not a condition of protection, but constitutes prima facie evidence of notice of protection [*17 U.S.C. § 909*].

[4] Documentation of Protection

The exclusive rights in a mask work subject to protection belong to the owner of the mask work, who may transfer or bequeath all or any part of those rights by written instrument [*17 U.S.C. § 903(a), (b)*]. Any document pertaining to a

mask work may be recorded in the Copyright Office, and the recordation of any transfer or license gives all persons constructive notice of the facts stated in the recorded document [*17 U.S.C. § 903(c)(1)*]. In the case of a conflicting transfer of the exclusive rights in a mask work, the first executed shall be void as against a subsequent transfer that is made for a valuable consideration and without notice of the first transfer, unless the first transfer is recorded within three months after the date of its execution and prior to the date of the subsequent transfer [*17 U.S.C. § 903(c)(2)*].

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§ 349.61 Application for Protection

The owner of a mask work may apply to the Register of Copyrights for registration of a claim of protection in a mask work. Protection shall terminate if the application is not made within two years after the date on which the mask work is first commercially exploited [*17 U.S.C. § 908(a)*]. The effective date of registration of a claim of protection is the date on which an application and necessary accompanying material was received in the Copyright Office [*17 U.S.C. § 908(e)*].

Any applicant for registration who is dissatisfied with the refusal of the Register of Copyrights to issue a certificate of registration may seek judicial review of that refusal. The failure of the Register of Copyrights to issue a certificate of registration within four months after an application was filed constitutes a refusal [*17 U.S.C. § 908(g)*].

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§ 349.62 Infringement

[1] Violation of Exclusive Rights

Any person who violates any of the exclusive rights of the owner of a mask work by conduct in or affecting commerce is liable as an infringer of those rights [*17 U.S.C. § 910(a)*]. For purposes of infringements occurring on or after November 15, 1990, "any person" includes any state, any instrumentality of a state, and any officer or employee of a state or instrumentality of a state acting in his or her official capacity [*17 U.S.C. § 910(a)*; Pub. L. No. 101-553 § 3, 104 Stat. 2749 (1990) (effective date)]. For infringement occurring on and after that date, any state, and any instrumentality thereof, officer, or employee, is subject to the provisions of *17 U.S.C. 901 et seq.* in the same manner and to the same extent as any nongovernmental entity [*17 U.S.C. § 910(a)*; *see 17 U.S.C. § 911(g)(1)*; for discussion, *see § 349.27[3][b]*].

[2] Civil Action

[a] In General

The owner of a protected mask work or its exclusive licensee is entitled to institute a civil action for any infringement with respect to the mask work that is committed after the commencement of that protection [*17 U.S.C. § 910(b)(1)*]. Any court having jurisdiction of a civil action arising under *17 U.S.C. § 901 et seq.* may grant temporary and permanent injunctive relief on terms the court deems reasonable to prevent or restrain infringement of the exclusive rights in a mask work [*17 U.S.C. § 911(a)*].

An action for infringement must be commenced within three years after the claim accrues [*17 U.S.C. § 911(d)*].

[b] Damages

On finding liability for infringement of any exclusive right, the court shall award actual damages suffered as a result of the infringement. The court shall also award the infringer's profits that are attributable to the infringement and that are

not taken into account in computing the award of actual damages. In establishing the infringer's profits, the injured person need present proof only of the infringer's gross revenue; the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the mask work [*17 U.S.C. § 911(b), (g)(2)*].

A person entitled to institute a civil action for infringement may elect, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one mask work for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in an amount not more than $250,000 [*17 U.S.C. § 911(c), (g)(2)*].

[c] Other Relief

At any time while an action for infringement of the exclusive rights in a mask work is pending, the court may order the impounding of all semiconductor chip products, and any articles by means of which those products may be reproduced, that are claimed to have been made, imported, or used in violation of those exclusive rights. Applications for those orders will be heard and determined in the same manner as an application for preliminary injunctive relief [*17 U.S.C. § 911(e)(1), (g)(2)*]. As part of a final judgment, the court may order the destruction or other disposition of any infringing semiconductor chip products, and any articles by means of which those products may be reproduced [*17 U.S.C. § 911(e)(2), (g)(2)*].

[d] Attorney's Fees and Costs

The court may allow the recovery of full costs, including reasonable attorney's fees, to the prevailing party [*17 U.S.C. § 911(f), (g)(2)*].

[e] Evidentiary Effect of Registration Certificate

In any action for infringement, the certificate of registration constitutes prima facie evidence of the facts stated in the certificate and of the fact that the applicant who was issued the certificate has met the requirements of *17 U.S.C. § 901 et seq.* and applicable regulations, with respect to the registration of claims [*17 U.S.C. § 908(f)*].

[f] When Application for Protection Refused

If the application for registration of a claim of protection and registration of the mask work has been refused, the applicant may institute a civil action for infringement if notice of the action, together with a copy of the complaint, is served on the Register of Copyrights. The Register may opt to become a party to the action with respect to the issue of whether the claim of protection is eligible for registration, but his or her failure to become a party does not deprive the court of jurisdiction to determine that issue [*17 U.S.C. § 910(b)(2)*].

[3] Imported Goods

Articles imported in violation of the owner's rights are subject to seizure and forfeiture in the same manner as property imported in violation of the customs laws. Any forfeited articles shall be destroyed as directed by the Secretary of the Treasury or the court, except that the articles may be returned to the country of export whenever it is shown that the importer had no reasonable grounds for believing that his or her acts constituted a violation of the law [*17 U.S.C. § 910(c)(2)*].

[4] Limitation of Liability of Innocent Purchaser

An innocent purchaser of an infringing semiconductor chip product shall not incur liability with respect to the importation or distribution of units of the infringing semiconductor chip product that occurs before the innocent purchaser has notice of protection with respect to the mask work embodied in the semiconductor chip product. That

innocent purchaser is liable only for a reasonable royalty on each unit of the infringing semiconductor chip product that he or she imports or distributes after having notice of protection with respect to the mask work embodied in the semiconductor chip product. These limitations extend to any person who directly or indirectly purchases an infringing semiconductor chip product from an innocent purchaser [*17 U.S.C. § 907*].

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§§ 349.63[Reserved]

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§ 349.80 Related Texts From Matthew Bender

For a compendium of California and federal statutes governing the protection of literary property, see California Intellectual Property Handbook (Matthew Bender)

For extensive coverage of copyright law, see Nimmer on Copyright (Matthew Bender)

For related forms of discovery, see Bender's Forms of Discovery, *Literary Property and Copyright* (Matthew Bender)

For discussion, transaction guide, and forms for use in obtaining federal copyright protection, see California Legal Forms, Ch. 103A, *Copyrights* (Matthew Bender)

For additonal related issues, see the following texts:

Bigelow, Computer Contracts (Matthew Bender)

Bender, Computer Law (Matthew Bender)

Farber, Entertainment Industry Contracts (Matthew Bender)

Horwitz & Horwitz, Intellectual Property Counseling and Litigation (Matthew Bender)

Keustermans & Arckens, International Computer Law (Matthew Bender)

Nimmer & Geller, International Copyright Law and Practice (Matthew Bender)

Milgrim on Licensing (Matthew Bender)

Petry, Taxation of Intellectual Property Transactions (Matthew Bender)

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§ 349.81 Federal Constitution

Power of Congress to secure to authors exclusive right to their writings. U.S. Const., art. I, § 8, cl. 8

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§ 349.82 Federal Statutes

Digital Millennium Copyright Act (amending Copyright Act in order to implement World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty). Pub. L. No. 105-304

Subject matter and scope of copyright. *17 U.S.C. § 101 et seq.*

Copyright right and ownership. *17 U.S.C. § 201 et seq.*

Duration of copyright. *17 U.S.C. § 301 et seq.*

Notice and registration of copyrights. *17 U.S.C. § 401 et seq.*

Infringement proceedings and remedies. *17 U.S.C. § 501 et seq.*

Copyright Office and regulations. *17 U.S.C. § 701 et seq.*

Semiconductor Chip Protection Act of 1984. *17 U.S.C. § 901 et seq.*

Trafficking in counterfeit label or illicit label affixed to, enclosing, or accompanying, or designed to be affixed to, enclose, or accompany, any phono record, copy of computer program, copy of motion picture or other audiovisual work, copy of literary work, copy of pictorial, graphic, or sculptural work, work of visual art, or related documentation or packaging, is criminal offense. *18 U.S.C. § 2318*

Federal courts have exclusive jurisdiction over actions arising under federal copyright statutes. *28 U.S.C. § 1338(a)*

Federal courts have jurisdiction over unfair competition claim related to copyright action. *28 U.S.C. § 1338(b)*

Venue in actions arising under federal copyright statutes. *28 U.S.C. § 1400*

Exclusive remedy for infringement of copyright by United States government. *28 U.S.C. § 1498(b)*

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§ 349.83 State Statutes

[1] Attaching Publication

When copy of publication required to be attached to complaint. *Code Civ. Proc. § 429.30(b)*

[2] Breach of Contract

Express or implied contracts defined. *Civ. Code §§ 1620, 1621*

Validity of oral contracts. *Civ. Code § 1622*

Measure of compensatory damages for breach of contract. *Civ. Code § 3333*

[3] Literary Property in Unfixed Medium of Expression

Exclusive right of ownership of original work of authorship not fixed in any tangible medium of expression. *Civ. Code § 980(a)(1)*

Joint ownership of original work of authorship not fixed in any tangible medium of expression. *Civ. Code § 981*

Transfer of rights in original work of authorship not fixed in any tangible medium of expression. *Civ. Code § 982(a)*

Prohibition against unauthorized distribution of copies of classroom lectures for commercial purpose. *Educ. Code § 66450 et seq.*

[4] Sound Recordings

Exclusive right of ownership of sound recording initially fixed prior to February 15, 1972. *Civ. Code § 980(a)(2)*

Possession for causing sale or transportation in California for consideration of article containing recorded sounds with knowledge that sounds were transferred to article without owner's consent is prohibited. *Penal Code § 653h(a)-(d)*

Transfer of recorded sounds, without owner's consent, with intent to use article to which sounds are transferred for commercial advantage or private financial gain through public performance is prohibited. *Penal Code § 653h(a)(1)*

Possession for sale, sale, or transportation in California for consideration, of article containing recorded sounds of live performance with knowledge that sounds were recorded without consent of owner of sounds is prohibited. *Penal Code § 653s(a)*

Recording or fixing, with intent to sell for commercial advantage or private financial gain, sounds of live performance with knowledge that sounds have been recorded or fixed without consent of owner of sounds is prohibited. *Penal Code § 653u*

Court order for forfeiture and destruction of articles containing sound recording made or transferred without owner's consent. *Penal Code § 653v*

Failure to disclose origin of recording containing information, sound, or images is prohibited. *Penal Code § 653w*

[5] Statute of Limitations

Two-year period of limitation in action on contract, obligation, or liability not founded on instrument in writing. *Code Civ. Proc. § 339(1)*

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§ 349.84 California Rules of Court

Judicial Council complaint for breach of contract. *Cal. Rules of Ct., Rule 1.45(a), (b)*; Cal. Judicial Council Form PLD-C-001

Format requirements for cause of action prepared by counsel for attachment to Judicial Council form of complaint. *Cal. Rules of Ct., Rule 1.45(c)*

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§ 349.85 Decisions

[1] Federal Copyright

[a] Contributory Infringement

Manufacturers, distributors, retailers, and advertising agencies sued for contributory copyright infringement based on manufacture and sale of video tape recorders is not liable, even if home use was not fair use, when video tape recorders were capable of substantial noninfringing uses. *Sony Corp. v. Universal City Studios, Inc. (1984) 464 U.S. 417, 434-451, 104 S. Ct. 774, 78 L. Ed. 2d 574 , superseded by statute as stated in 641 F. Supp. 2d 913 (2009).*

[b] Copyrightable Articles

[i] In General

Characters in pictorial works such as films and comic books, but not purely literary characters (for example, protagonists in novels), can be protected by copyright, provided character is especially distinctive and displays consistent, widely identifiable traits. *Halicki Films v. Sanderson Sales & Mktg. (9th Cir. 2008) 547 F.3d 1213, 2008 U.S. App. LEXIS 23396* , at **24-25 (citing cases extending copyright protection to film characters Godzilla, James Bond, and Rocky Balboa, and citing case holding that Sam Spade character in Dashiel Hammett novels is not protectable by copyright)

Prices listed in wholesale coin price guide contained sufficient originality to merit copyright protection. *CDN, Inc. v. Kapes (9th Cir. 1999) 197 F.3d 1256, 1262*

Architectural works embodied in plans and drawings are protected by federal copyright law even if work is not constructed. *Hunt v. Pasternack (9th Cir. 1998) 179 F.3d 683, 685-686*

"Superbills," billing forms used by physicians to obtain reimbursement from insurance companies, were

uncopyrightable blank forms; text in formsconsisting of instructions to patient on how to file insurance claim was too simple to be copyrightable as text in itself. *Bibbero Systems, Inc. v. Colwell Systems, Inc. (9th Cir. 1990) 893 F.2d 1104, 1107-1108* (distinguishing other 9th Circuit "text with forms" cases and rejecting cases from other circuits holding to the contrary)

Nonliteral components of computer software program are protected by copyright on program when they constitute expression rather than idea; protection of nonliteral components is dependent on facts of each case. *Johnson Controls v. Phoenix Control Systems (9th Cir. 1989) 886 F.2d 1173, 1175, 1177*

Literal components of computer software program are protected by copyright on program. *Johnson Controls v. Phoenix Control Systems (9th Cir. 1989) 886 F.2d 1173, 1175*

Defendants' use of factual content in plaintiff's "trivia encyclopedias" in developing and marketing defendants' trivia board game was noninfringing. *Worth v. Selchow & Righter Co. (9th Cir. 1987) 827 F.2d 569, 573*

Copyright law never protects facts and ideas contained in published works; author is capable of owning copyright interest only in original arrangement of facts or original manner of expressing ideas. *Cooling Systems and Flexibles v. Stuart Radiator (9th Cir. 1985) 777 F.2d 485, 491*

Work that results from independent efforts of author is copyrightable, even though identical work is already in public domain. *Transgo, Inc. v. Ajac Transmission Parts Corp. (9th Cir. 1985) 768 F.2d 1001, 1019*

Whether plaintiff's work is copyrightable as soft sculptural artwork or uncopyrightable as useful article of clothing raises genuine issue of material fact requiring reversal of summary judgment for defendants in copyright infringement action. *Poe v. Missing Persons (9th Cir. 1984) 745 F.2d 1238, 1241*

Computer programs are entitled to federal copyright protection. *Apple Computer v. Formula Intern, Inc. (9th Cir. 1984) 725 F.2d 521, 523-525*

Display folders for carpet samples and specifications were useful articles under *17 U.S.C. § 101* and therefore not copyrightable. *Fabrica Inc. v. El Dorado Corp. (9th Cir. 1983) 697 F.2d 890, 892-894*

Architectural drawings are copyrightable articles under *17 U.S.C. §§ 101, 102*. *Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc. (1984) 159 Cal. App. 3d 637, 643, 205 Cal. Rptr. 620* (*but see* Historical and Statutory Notes under *17 U.S.C. § 101* concerning effective date of Pub. L. No. 101-650 § 706, and providing that unconstructed architectural work embodied in unpublished plans or drawings are copyrightable on and after December 1, 1990, until December 31, 2002)

[ii] Compilations

Telephone directory's white pages listing of subscriber names, towns, and telephone numbers in alphabetical order was uncopyrightable compilation because selection and arrangement of material lacks sufficient originality. *Feist Pub. v. Rural Tel. Serv. (1991) 499 U.S. 340, 111 S. Ct. 1282, 113 L. Ed. 2d 358, 380-381*

Originality rather than "sweat of the brow" is touchstone of copyright protection in compilations. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co. (1991) 499 U.S. 340* (repudiating "sweat of the brow" doctrine)

Factual compilation is eligible for copyright if it features original selection or arrangement of facts; copyright is limited to particular selection or arrangement and never extends to facts themselves. *Feist Pub. v. Rural Tel. Serv. (1991) 499*

U.S. 340, 111 S. Ct. 1282, 113 L. Ed. 2d 358, 372

Organizers, produced to help users plan daily activities, and copyrightable as compilations consisting largely of uncopyrightable elements, are entitled to only limited copyright protection, such that infringement should not be found absent copying or unauthorized use of substantially the entire item. *Harper House, Inc. v. Thomas Nelson, Inc. (9th Cir. 1989) 889 F.2d 197, 205*

Business correspondence (letters) are copyrightable compilation of facts. *Maheu v. CBS, Inc. (1988) 201 Cal. App. 3d 662, 671, 247 Cal. Rptr. 304*

[iii] Derivative Works

Under *17 U.S.C. § 304(c)(6)(A)* (derivative works exception to power of termination of copyright grant), termination by author's heirs of grant to music publisher of copyright in song does not terminate publisher's contractual right to share in royalties on sound recordings of song generated by licenses issued by publisher, when sound recordings are derivative works prepared under authority of copyright grant before its termination. *Mills Music, Inc. v. Snyder (1985) 469 U.S. 153, 163-164, 105 S. Ct. 638, 83 L. Ed. 2d 556*

Preliminary injunction against further production and distribution of "Nuke It" CD, which contained 300 downloaded, user-created "levels" for use when playing "Duke Nukem 3D" computer game that contained utility enabling players to create and post on Internet their own levels of play, was warranted as unauthorized derivative work because audiovisual displays generated when player chooses "Nuke It" level of play came entirely out of "Duke Nukem 3D" source art library. *Micro Star v. Formgen, Inc. (9th Cir. 1998) 154 F.3d 1107, 1112*

Analysis of whether computer programs altering displays are derivative works. *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc. (9th Cir. 1992) 964 F.2d 965, 967-969*

Plaintiff's tapes of radio play and phonograph record scripts, as sound recordings fixed before February 15, 1972, are derivative works of scripts, and copyright in scripts are infringed under Copyright Act of 1909 by defendant's unauthorized duplication, remixing, and distribution of plaintiff's tapes. *Lone Ranger Television v. Program Radio Corp. (9th Cir. 1984) 740 F.2d 718, 723*

[c] Defenses to Infringement

[i] In General

Iranian trade embargo [*see 31 C.F.R. § 560.101 et seq.*] did not provide any basis for defense when infringement action was based on copyrights in Iranian films that plaintiff imported and licensed for showing in United States,since that trade embargo neither prohibited commercial importation of movies from Iran, nor prohibited obtaining copyrights in such movies, nor prohibited assignment to plaintiff of exclusive rights to copyright, distribute, and exhibit movies in *North America. Kalantari v. NITV, Inc. (9th Cir. 2003) 352 F.3d 1202, 1210*

Laches is defense to action seeking declaration of coauthorship and coownership to copyrightable work. *Jackson v. Axton (9th Cir. 1994) 25 F.3d 884, 887*

License to use copyrighted works is defense to copyright infringement action unless licensee exceeded scope of licensing agreement or substantially and materially breached agreement in manner that justifies rescission. *Rano v. Sipa Press, Inc. (9th Cir. 1993) 987 F.2d 580, 586*

Musician's allegations regarding fraudulent tax shelter plan as basis for rescinding music publishing agreement with copyright holder's predecessors were barred by statute of limitations and res judicata. *Fantasy, Inc. v. Fogerty (9th Cir. 1993) 984 F.2d 1524, 1527* (affirming summary judgment in favor of copyright holder on original songwriter's counterclaim in infringement action by copyright holder)

License to use copyrighted works is defense to copyright infringement and as required to be affirmatively pleaded. *Oddo v. Ries (9th Cir. 1984) 743 F.2d 630, 634*

Unclean hands is defense to copyright infringement. *Testa v. Janssen (W.D. Pa. 1980) 492 F. Supp. 198, 201*

[ii] Antitrust Issues

Antitrust issues raised in counterclaim to copyright infringement action were properly subject to summary judgment; antitrust immunity doctrine protects litigation that is not objectively baseless when law is unclear. *Real Est. Investors v. Columbia (1993) 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611, 625* (suit by studios holding copyrights to certain motion pictures and counterclaim by resort hotels that recorded motion pictures on video discs and rented discs to hotel guests)

[iii] Fair Use

Parody of song "Oh Pretty Woman" was not presumptively unfair because of its commercial nature; parody use was required to be viewed with respect to all relevant factors establishing fair use and to be judged, case by case, in light of ends of *Campbell v. Acuff-Rose Music (1994) 510 U.S. 569, 114 S. Ct. 1164, 127 L. Ed. 2d 500, 517*

Magazine's unauthorized verbatim copying of direct quotations from soon-to-be-published memoirs, involving original expressions of great qualitative importance in memoirs and in article, resulting in cancellation of another magazine's agreement to pay money for exclusive right to print prepublication excerpts, was not fair use of memoirs sanctioned by *17 U.S.C. § 107*. *Harper & Row v. Nation Enterprises (1985) 471 U.S. 539, 569, 105 S. Ct. 2218, 85 L. Ed. 2d 588*

Home recording of copyrighted works (1) amounted mostly to "time-shifting," (2) would not be objected to by substantial numbers of copyright holders who licensed their works for free television, and (3) did not impair the value of the copyrighted works, was fair use. *Sony Corp. v. Universal City Studios, Inc. (1984) 464 U.S. 417, 419-428, 104 S. Ct. 774, 78 L. Ed. 2d 574 , superseded by statute as stated in 641 F. Supp. 2d 913 (2009).*

No fair use defense was available to avoid infringement liability when sheriff's department bought 3,663 single-computer licenses for software, then installed that software on more than 6,000 computers in network and configured network-managing servers so that not more than 3,663 of those computers could use that software at any given time. *Wall Data Inc. v. Los Angeles County Sheriff's Dep't (9th Cir. 2006) 447 F.3d 769, 774*

Unauthorized creation and use of "thumbnail" versions of copyrighted photographs in internet search engine was fair use. *Kelly v. Arriba Soft Corp. (9th Cir. 2003) 336 F.3d 811, 822*

All four factors of fair use test in *17 U.S.C. § 107* weighed in favor of conclusion that competitor's use of copyrighted video game screen shots in comparative advertising was fair use. *Sony Computer Entertainment America v. Bleem, LLC (9th Cir. 2000) 214 F.3d 1022, 1029*

Copying and disassembling (that is, translating into version that programmers could read) was fair use of copyrighted object code (which is readable bycomputer but not by person) for purpose of gaining access to unprotected elements (ideas and functions) in software, so that competitor could make emulator version. *Sony Computer Entertainment v.*

Connectix Corp. (9th Cir. 2000) 203 F.3d 596, 603-604

Use of copyrighted materials for educational purposes when materials were purchased from copyright owner enhanced value of copyright and was protected by fair use doctrine. *Allen v. Academic Games League of American, Inc. (9th Cir. 1996) 89 F.3d 614, 617*

Disassembly of copyrighted computer video game program was fair use protected by *17 U.S.C. § 107* when disassembly was only way to gain access to unprotected ideas and functional elements embodied in program. *Sega Enterprises Ltd. v. Accolade, Inc. (9th Cir. 1992) 977 F.2d 1510, 1527-1528* (dissolving preliminary injunction in favor of copyright holder)

Use of confidential documents of religious organization to prepare expert witnesses in state tort litigation against organization constituted fair use under *17 U.S.C. § 107*. *Religious Technology Center v. Wollersheim (9th Cir. 1992) 971 F.2d 364, 367*

Analysis of whether computer program alteration of displays constitutes fair use. *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc. (9th Cir. 1992) 964 F.2d 965, 969-972*

Defendant political lobbying group's use of magazine's copyrighted parody of group was fair use. *Hustler Magazine, Inc. v. Moral Majority Inc. (9th Cir. 1986) 796 F.2d 1148, 1152-1156*

Fair use is mixed question of law and fact, and absent any genuine issues of material fact, or, if after resolving all issues in favor of opposing party, reasonable trier of fact can reach only one conclusion, court ai permitted to determine, as matter of law, whether challenged use qualifies as fair. *Hustler Magazine, Inc. v. Moral Majority Inc. (9th Cir. 1986) 796 F.2d 1148, 1151*

Because fair use presupposes good faith and fair dealing, courts properly weigh propriety of defendant's conduct in equitable balance of fair use determination. *Fisher v. Dees (9th Cir. 1986) 794 F.2d 432, 436-437*

Parody is not presumptively fair use; each assertion of parody defense is required to be considered individually, in light of reason, experience, statutory factors for determination of fair use, and general principles developed in past cases. *Fisher v. Dees (9th Cir. 1986) 794 F.2d 432, 435*

Defendant's publication of plaintiff's photograph was not fair use under when jury could reasonably have concluded that (1) photograph was used as humorous feature designed to enhance readership of defendant's magazine, (2) photograph was creative product; (3) only small portion of photograph was not reproduced; and (4) value of photograph as novelty item suffered from overexposure by defendant's publication. *Brewer v. Hustler Magazine, Inc. (9th Cir. 1984) 749 F.2d 527, 529*

[iv] Statute of Limitations

Act of infringement within the three-year statutory limitation period under *17 U.S.C. § 507(b)* did not permit plaintiff to "reach back" to recover damages for infringing acts discovered more than three years before filing suit and not sued on earlier. *Roley v. New World Pictures, Ltd. (9th Cir. 1994) 19 F.3d 479, 481*

[d] Exclusive Rights

Manufacturer of karaoke device was obliged to obtain reprint license for reproducing copyrighted song lyrics and synchonization license for displaying those lyrics so that user of device could sing along with recorded music, in

addition to obtaining any compulsory license available under *17 U.S.C. § 115*. *Leadsinger, Inc. v. BMG Music Publ'g (9th Cir. 2008), 512 F.3d 522, 529*

Copyright Act construed as providing that licensing agreement is not terminable at will of author except during five-year period beginning at end of 35 years from date of execution of license, unless agreement explicitly specifies earlier termination date. *Rano v. Sipa Press, Inc. (9th Cir. 1993) 987 F.2d 580, 585*

Conditions under which copyright license to exhibit film on television do not include right to distribute videocassettes of film. *Cohen v. Paramount Pictures Corp. (9th Cir. 1988) 845 F.2d 851, 854-855*

Copyright license is required to be construed in accordance with purpose underlying federal copyright law. *Cohen v. Paramount Pictures Corp. (9th Cir. 1988) 845 F.2d 851, 854*

Under "first sale" doctrine of *17 U.S.C. § 109*, copyright owner parting with title to particular copy of copyrighted work thereby divests himself or herself of exclusive right to vend that particular copy and is unable to restrict subsequent sales or transfers thereof. *United States v. Minor (9th Cir. 1985) 756 F.2d 731, 734*

[e] Jurisdiction

Copyright Act has no extraterritorial application to acts of infringement occurring entirely outside *United States. Subafilms, Ltd. v. MGM-Pathe Communications (9th Cir. 1994) 24 F.3d 1088, 1095-1098*

Presence of arbitration clause in copyright license agreement and state appellate review of arbitration award did not justify stay of copyright infringement action that was subject to exclusive federal court jurisdiction. *Intel Corp. v. Advanced Micro Devices, Inc. (9th Cir. 1993) 12 F.3d 908, 913*

Federal district court has subject matter jurisdiction over copyright infringement action by photograph copyright licensor who is British citizen seeking remedies against licensee under *17 U.S.C. §§ 502-505*. *Rano v. Sipa Press, Inc. (9th Cir. 1993) 987 F.2d 580, 584*

Pendent jurisdiction over state law claims accompanying copyright infringement action as discretionary with federal district court. *Rano v. Sipa Press, Inc. (9th Cir. 1993) 987 F.2d 580, 588*

Action arises under federal copyright laws only if complaint is for remedies expressly granted by Copyright Act, asserts claim requiring construction of Act, or, at very least and perhaps more doubtfully, presents case when distinctive policy of Act requires that federal principles control disposition of claim. *Effects Associates, Inc. v. Cohen (9th Cir. 1987) 817 F.2d 72, 73*

Inclusion of single paragraph, in complaint for copyright infringement, for purposes of pleading separate claim for fraud and deceit and alluding to oral promise concerning use of plaintiff's works, did not transform infringement claim into one for breach of contract or defeat federal question jurisdiction. *Effects Associates, Inc. v. Cohen (9th Cir. 1987) 817 F.2d 72, 73*

State courts are fully competent to adjudicate state law breach of contract claims, even where underlying contract involves ownership, assignment, or license of copyright, much less mere assignment of royalties from copyrighted work. *Durgom v. Janowiak (1999) 74 Cal. App. 4th 178, 180, 87 Cal. Rptr. 2d 619*

[f] Notice and Registration

Copyright Act does not contemplate copyright of now-nonexistent original based on tendered reconstruction because types of material that must be deposited with application for certificate of copyright registration include bona fide copies of original work only. *Seiler v. Lucasfilm, Ltd. (9th Cir. 1986) 808 F.2d 1316, 1322*

Copyright on product design is invalidated by public distribution of copies of product, amounting to approximately 40 percent of owner's total product sales, without prescribed copyright notice. *Lifshitz v. Walter Drake & Sons, Inc. (9th Cir. 1986) 806 F.2d 1426, 1432-1433*

Misstatement or clerical error in copyright registration application, absent fraud, neither invalidates copyright nor renders registration certificate incapable of supporting infringement action. *Cooling Systems and Flexibles v. Stuart Radiator (9th Cir. 1985) 777 F.2d 485, 487*

Registration of work by Copyright Office is prima facie evidence of copyrightability and presumption shifts burden of proof to challenging party to demonstrate why work is not copyrightable. *Transgo, Inc. v. Ajac Transmission Parts Corp. (9th Cir. 1985) 768 F.2d 1001, 1019*

[g] Proof of Infringement

[i] In General

Elements required to be proven to establish infringement is ownership of valid copyright and copying of constituent original elements of copyrighted work. *Feist Pub. v. Rural Tel. Serv. (1991) 499 U.S. 340, 111 S. Ct. 1282, 113 L. Ed. 2d 358, 379*

Holder of copyrights in motion picture soundtrack musical composition rebutted presumption that songs composed in 1930's were "works for hire" and so established infringement by distributor of phonorecords. *Dolman v. Agee (9th Cir. 1998) 157 F.3d 708, 712-713*

Loading of software into computer RAM is creating copy within meaning of *17 U.S.C. § 101*, and computer service company that loaded copyrighted maintenance software into RAM was engaged in copying. *MAI Systems Corp. v. Peak Computer, Inc. (9th Cir. 1993) 991 F.2d 511, 519*

Computer servicing company was licensed to use copyrighted software to operate only one system; other activities were copyright infringement. *MAI Systems Corp. v. Peak Computer, Inc. (9th Cir. 1993) 991 F.2d 511, 517-519*

Licensee of right to use copyright infringes copyright by exceeding scope of license without licensor's permission. *S.O.S., Inc. v. Payday, Inc. (9th Cir. 1989) 886 F.2d 1081, 1087, 1089*

Successful copyright infringement claim requires plaintiff to show (1) plaintiff's ownership of copyright; (2) defendant's access to plaintiff's work; and (3)substantial similarity, in both idea and expression, between defendant's work and plaintiff's work. *Berkic v. Crichton (9th Cir. 1985) 761 F.2d 1289, 1291, 1292* ; *Litchfield v. Spielberg (9th Cir. 1984) 736 F.2d 1352, 1355* ; *Sid & Marty Krofft Television v. McDonald's Corp. (9th Cir. 1977) 562 F.2d 1157, 1162-1163*

Direct evidence of copying is not necessary to establish prima facie case of copyright infringement. *Walker v. University Books, Inc. (9th Cir. 1979) 602 F.2d 859, 864*

[ii] Copyright Validity

Raw videotapes of newsworthy events were original works of authorship entitled to copyright protection. *Los Angeles News Service v. Tullo (9th Cir. 1992) 973 F.2d 791, 793* (affirming judgment in favor of news service on copyright infringement claim against video news clipping service that copied and sold newscasts containing copyright holder's material)

Presumption of validity of copyright is rebuttable by showing that copyright holder's work is not original; test of lack of originality is identical to test for copyright infringement, namely whether copyright holder had access to prior work and whether its work is substantially similar to prior work. *North Coast Industries v. Jason Maxwell, Inc. (9th Cir. 1991) 972 F.2d 1031, 1033* (reversing summary judgment for plaintiff clothing manufacturer in copyright infringement action against competitor using similar geometric design)

[iii] Substantial Similarity

In determining substantial similarity, performing "analytic dissection" in comparing expressions of ideas embodied in two computer programs was proper application of "extrinsic test." *Brown Bag Software v. Symantec Corp. (9th Cir. 1992) 960 F.2d 1465, 1475*

In assessing similarity of published directories, appearance in defendant's publication of one or more wholly or partially fictitious entries (known as "seeds") that also appear in plaintiff's copyrighted publication is strong evidence that copyrighted material has been appropriated. *Business Guides v. Chromatic Com. Enterprises (9th Cir. 1989) 892 F.2d 802, 804*

Reasonable person test for ascertaining substantial similarity in total concept and feel of infringing work to copyrighted work refers to reasonable person in intended audience of copyrighted work. *Johnson Controls v. Phoenix Control Systems (9th Cir. 1989) 886 F.2d 1173, 1176*

Quantitatively insignificant similarity between two works is not "substantial" unless appropriated material is qualitatively important to either defendant's or plaintiff's work. *Narell v. Freeman (9th Cir. 1989) 872 F.2d 907, 913*

When similar features in copyrighted videogame and allegedly infringing videogame are expressive of basic ideas of videogames in general, expression is indispensable in treatment of those ideas, based on technical requirements of videogame medium, and therefore is protected only against virtually identical copying. *Frybarger v. International Business Machines Corp. (9th Cir. 1987) 812 F.2d 525, 530*

Even though copied portion of copyrighted work is relatively small relative to entire work, if copied portion is qualitatively important, finder of fact properly finds substantial similarity between copyrighted and allegedly infringing works because no bright line rule governs how much similarity is substantial. *Baxter v. MCA, Inc. (9th Cir. 1987) 812 F.2d 421, 425*

Under "intrinsic" test for substantial similarity of expression, focus is not whether substantial similarity exists in total concept and feel of works in issue, but is whether that amount of protectible expression in allegedly infringed work is substantially similar to equivalent portions in allegedly infringing work. *Cooling Systems and Flexibles v. Stuart Radiator (9th Cir. 1985) 777 F.2d 485, 492-493*

Factual works are considered fundamentally different from more artistic works; therefore, similarity of expression is probably required to amount to verbatim reproduction or very close paraphrasing before factual work will be deemed infringed. *Cooling Systems and Flexibles v. Stuart Radiator (9th Cir. 1985) 777 F.2d 485, 491*

Two-part test for substantial similarity consists of (1) objective, "extrinsic" test, and (2) subjective, "intrinsic" test.

Berkic v. Crichton (9th Cir. 1985) 761 F.2d 1289, 1291, 1292

Similarity is not proved by general similarity of ideas but by similarity of expression of ideas; test for similarity of expression is whether reasonable person can detect substantial similarity between works. *Sid & Marty Krofft Television v. McDonald's Corp. (9th Cir. 1977) 562 F.2d 1157, 1162-1165*

[h] Public Performance

Playing copyrighted academic games in not-for-profit, educational tournament was not public "performance" within meaning of *17 U.S.C. § 101*. *Allen v. Academic Games League of America, Inc. (9th Cir. 1996) 89 F.3d 614, 616*

Hotel's rental of videodiscs to guests for viewing in hotel rooms on hotel-provided video equipment is not public performance of copyrighted works within meaning of *17 U.S.C. §§ 101, 106(4)*. *Columbia Pictures v. Professional Real Estate, Inv. (9th Cir. 1989) 866 F.2d 278, 279-280, 282*

[i] Purpose of Federal Copyright Law

Subsisting "copyright" in preexisting work within meaning of Copyright Act of 1909 does not apply to common law copyrights. *Batjac Productions, Inc. v. Goodtimes Home Video Corp. (9th Cir. 1998) 160 F.3d 1223, 1231*

Copyright Act is intended to grant valuable enforceable rights to authors, publishers, and others, to afford greater encouragement to production of literary works of lasting benefit to world. *Cohen v. Paramount Pictures Corp. (9th Cir. 1988) 845 F.2d 851, 854*

[j] Remedies for Infringement

[i] Criminal Penalties

Punishment for conspiracy to commit misdemeanor copyright infringement is not permitted to exceed maximum punishment for misdemeanor copyright infringement. *United States v. Minor (9th Cir. 1988) 846 F.2d 1184, 1187 , superseded by statute as stated in 29 F.3d 1390 (1994)*

28 U.S.C. § 1498(b), providing that suit against federal government is exclusive remedy for owners claiming copyright infringement by federal government, is no defense to criminal prosecution for willful infringement of copyright. *United States v. McCool (9th Cir. 1985) 751 F.2d 1112, 1113*

[ii] Class Action

Availability of class action for infringement of copyright. *Peer Intern. Corp. v. Pausa Records, Inc. (9th Cir. 1990) 909 F.2d 1332, 1333 , cert. denied, 498 U.S. 1109 (1991)*

[iii] Costs and Attorney's Fees

Award of attorney's fees under *17 U.S.C. § 505* was equally available to prevailing plaintiffs and prevailing defendants, within the trial court's discretion. *Fogerty v. Fantasy, Inc. (1994) 510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455, 468-470* (unsuccessful infringement action by holder of copyright on song against original songwriter)

Plaintiff in infringement action can be prevailing party and so can be eligible to recover attorney's fees by establishing defendant's liability, whether or not judgment awards all damages that plaintiff sought, and even if only nominal damages are awarded. *Wall Data Inc. v. Los Angeles County Sheriff's Dep't (9th Cir. 2006) 447 F.3d 769, 787*

Factors to be considered include degree of success obtained, frivolousness of claim or defense, motivation of parties, and need in particular circumstances to advance considerations of compensation and deterrence. *Magnuson v. Video Yesteryear (9th Cir. 1996) 85 F.3d 1424, 1432*

[iv] Damages

Proper jury instruction on damages: "Actual damages means the amount of money to adequately compensate the copyright owner for the reduction of the market value of the copyrighted work caused by the infringement. The reduction of the market value of the copyrighted work is the amount a willing buyer would have been reasonably required to pay a willing seller at the time of the infringement for the actual use made by the [defendant] of the plaintiff's work. That amount also could be represented by the lost license fees [the plaintiff] would have received for the unauthorized copies." *Wall Data Inc. v. Los Angeles County Sheriff's Dep't (9th Cir. 2006) 447 F.3d 769, 786* (sheriff's department bought 3,663 single-computer licenses for software, then installed that software on more than 6,000 computers in network)

Noneconomic and punitive damages are available in common law right-of-publicity action that is not preempted by federal copyright law. *Waits v. Frito-Lay, Inc. (9th Cir. 1992) 978 F.2d 1093, 1104-1106* (affirming award of $75,000 for injury to goodwill, professional standing and future publicity value, $200,000 for injury to peace, happiness, and feelings, and $2 million in punitive damages)

Actual damages are defined as extent to which market value of copyrighted work has been injured or destroyed by infringement; Ninth Circuit test for market value is what willing buyer would have been reasonably required to pay to willing seller for plaintiff's work. *United States v. King Features Entertainment, Inc. (9th Cir. 1988) 843 F.2d 394, 400*

When copyright is infringed, all infringers are jointly and severally liable for plaintiff's actual damages. *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc. (9th Cir. 1985) 772 F.2d 505, 519*

In action against defendants' brewing company and advertising agency, alleging infringement of copyright in music used in commercial prepared by agency to advertise brewing company's beer, court is required to avoid unjust enrichment of agency by assessing separate award of damages against agency through reasonable approximation of portion of agency's profits from use of infringing music. *Cream Records, Inc. v. Jos. Schlitz Brewing Co. (9th Cir. 1985) 754 F.2d 826, 829*

In infringement action, copyright owner is entitled to recover actual damages amounting to reasonable value of license for use of copyrighted work when defendants' unauthorized use destroyed value of work for licensing incommercial advertisements. *Cream Records, Inc. v. Jos. Schlitz Brewing Co. (9th Cir. 1985) 754 F.2d 826, 827-828*

[v] Declaratory Relief

Licensee's claim for declaration that licensor lacks valid and subsisting copyrights to films that are subject of licensing agreement presents case or controversy suitable for declaratory relief when licensee has real and reasonable apprehension that it would be subject of infringement action by licensor if it continues with use and exploitation of films. *Hal Roach Studios v. Richard Feiner and Co. (9th Cir. 1989) 883 F.2d 1429, 1443*

[vi] Injunctive Relief

In infringement action in which defendant ultimately prevailed, defendant was permitted to have bond executed in its favor for damages, including lost profits, incurred during pendency of preliminary injunction. *Nintendo of America v. Lewis Galoob Toys (9th Cir. 1994) 16 F.3d 1032, 1036*

Party requesting preliminary injunction is required to show either likelihood of success on merits and possibility of irreparable injury, or that serious questions going to merits are raised and balance of hardships tips sharply in its favor; in infringement claim, showing of reasonable likelihood of success on merits raises presumption of irreparable harm, and plaintiff is therefore only required to show reasonable likelihood of success on infringement claim. *Johnson Controls v. Phoenix Control Systems (9th Cir. 1989) 886 F.2d 1173, 1174*

[vii] Profits

When copyright is infringed, each defendant is severally liable for its own illegal profit; one defendant is not liable for profit made by another. *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc. (9th Cir. 1985) 772 F.2d 505, 519*

Even though *17 U.S.C. § 504(b)* places burden on infringer to show elements of profit attributable to factors other than copyrighted work, when it is clear that not all profits are attributable to infringing material, copyright owner is not entitled to recover all profits merely because infringer fails to establish with certainty that portion of profits not attributable to infringement. *Cream Records, Inc. v. Jos. Schlitz Brewing Co. (9th Cir. 1985) 754 F.2d 826, 828-829*

Partner, as co-owner of partnership's copyrights, is not liable to copartner for infringement, because each copyright co-owner has independent right to use or license use of copyright; but partner is required to account to copartner for profits made from use of copyrights. *Oddo v. Ries (9th Cir. 1984) 743 F.2d 630, 633*

[viii] Seizure

Malicious prosecution, rather than abuse of process, is defendant's appropriate counterclaim under California law when plaintiff in copyright infringement suit improperly obtains writ of seizure for allegedly infringing copies. *S.O.S., Inc. v. Payday, Inc. (9th Cir. 1989) 886 F.2d 1081, 1091-1092*

[k] Transfer of Copyright Ownership

Transfer of interest in co-owned copyright by one co-owner to third person, without like transfer from each other co-owner, cannot be assignment of copyright or grant of exclusive license that gives transferee any co-ownership interest in copyright. *Sybersound Records, Inc. v. UAV Corp. (9th Cir. 2008) 517 F.3d 1137, 1141*

Potential claims under Copyright Act can be extinguished by release given in exchange for consideration and stated in unambiguous language broad enough to encompass those claims, in absence of evidence that either particular claim was not intended to be covered or release was obtained by fraud, deception, misrepresentation, duress, or undue influence. *Marder v. Lopez (9th Cir. 2006) 450 F.3d 445, 449-450*

Valid transfer of copyright ownership in motion picture is required by *17 U.S.C. § 204(a)* to be made in writing, and writing requirement as applicable to motion picture industry regardless of industry custom of oral agreements. *Effects Associates, Inc. v. Cohen (9th Cir. 1990) 908 F.2d 555, 556, 556-558*

Special effects company impliedly granted nonexclusive license to producer to incorporate special effects footage into film and to distribution company to distribute film. *Effects Associates, Inc. v. Cohen (9th Cir. 1990) 908 F.2d 555,*

558-559

In addition to requirement under *17 U.S.C. § 204* that transfer of copyright be in writing to be valid, writing is required to be product of parties' negotiations and be executed contemporaneously with parties' agreement. *Konigsberg Intern., Inc. v. Rice (9th Cir. 1994) 16 F.3d 355, 357*

Civ. Code § 988 provides that written agreement is required before transfer of property rights may accompany transfer of copyright rights. *Chamberlain v. Cocola Associates (9th Cir. 1992) 958 F.2d 282, 282-285* (remanding case to determine whether transaction at issue was loan or sale)

Civ. Code § 988 does not apply to sale of underlying property rights to art object. *Chamberlain v. Cocola Associates (9th Cir. 1992) 958 F.2d 282, 282-285* (remanding case to determine whether transaction at issue was loan or sale)

When contracting for transfer of any of exclusive rights under copyright, transferee must obtain writing executed by copyright owner, which owner intends as memorandum of contract transferring exclusive right. *PMC, Inc. v. Saban Entertainment, Inc. (1996) 45 Cal. App. 4th 579, 591-592, 52 Cal. Rptr. 2d 877*

[2] Federal Preemption

[a] State Law Action Preempted

Singer's claims for violation of her common law right to privacy and her California statutory right of publicity [*see Civ. Code § 3344*], based on alleged misappropriation of her voice and name in defendant's song, were preempted by Copyright Act; however, this holding does not extinguish common law or statutory rights of privacy, publicity, and trade secrets, or general law of defamation and fraud (or other similar causes of action), as long as those causes of action do not concern subject matter of copyright and contain qualitatively different elements than those contained in copyright infringement suit. *Laws v. Sony Music Entm't, Inc. (9th Cir. 2006) 448 F.3d 1134, 1145-1146*

Author's state law claims that defendants misappropriated his unpublished letters for use in book by "palm[ing] them off" as their own was preempted by federal copyright law. *Norse v. Henry Holt and Co. (9th Cir. 1993) 991 F.2d 563, 568*

In construing scope of license to use copyright, California rule of contract construction that contract should be interpreted against drafter, thereby deeming licensor-drafter to have granted licensee any right not expressly retained by licensor, is preempted by federal copyright policy that copyright licenses are assumed to prohibit any use not authorized. *S.O.S., Inc. v. Payday, Inc. (9th Cir. 1989) 886 F.2d 1081, 1088*

Even if defendant's alleged false claim of authorship of music, words, and title of song parody constitutes tort under California law of unfair competition, cause of action is preempted by federal copyright law. *Fisher v. Dees (9th Cir. 1986) 794 F.2d 432, 440*

In enacting Copyright Act of 1976, Congress intended that state law claims for interference with contract or prospective economic advantage would be preempted when based on unauthorized use or copying of copyrightable property. *Maheu v. CBS, Inc. (1988) 201 Cal. App. 3d 662, 677, 247 Cal. Rptr. 304*

State law conversion claim is preempted by federal Copyright Act if damages sought emanate from reproduction and distribution, rather than physical possession, of work. *Maheu v. CBS, Inc. (1988) 201 Cal. App. 3d 662, 672-673, 247 Cal. Rptr. 304*

Federal Copyright Act of 1976 preempted rights created by state common law copyright if those rights are equivalent to those protected by federal copyright law and subject matter of copyright falls under federal *Act. Robert H. Jacobs, Inc. v. Westoaks Realtors, Inc. (1984) 159 Cal. App. 3d 637, 642-643, 205 Cal. Rptr. 620*

[b] State Law Action Not Preempted

Statute against pirating recordings produced by others [*Penal Code § 653h*] is not preempted by federal copyright laws. *Goldstein v. California (1973) 412 U.S. 546, 571, 93 S. Ct. 2303, 37 L. Ed. 2d 163* ; *but see Nimmer on Copyright, Ch. 1, Constitutional Aspects of Copyright, § 1.01* (Matthew Bender) (discussing whether *Goldstein* holding was preempted by section 301 of Copyright Act of 1976, *17 U.S.C. § 301*)

When complaint essentially alleges copyright infringement for sole purpose of obtaining determination of ownership of copyright, federal court lacks subject matter jurisdiction, because questions regarding the ownership of a copyright are governed by state law. *Scholastic Entm't, Inc. v. Fox Entm't Group, Inc. (9th Cir. 2003) 336 F.3d 982, 983*

Penal Code § 653w, making it criminal offense to sell or lease recorded music for commercial advantage or private financial gain without disclosing its "origin" (that is, manufacturer, artist, producer, etc.) is not preempted by federal copyright laws. *Anderson v. Nidorf (9th Cir. 1994) 26 F.3d 100, 102*

Voice misappropriation claim was variation of California common law right of publicity that was not preempted by federal copyright law because copyright infringement claim challenged unauthorized use of song or recording while voice misappropriation claim challenged use of voice. *Waits v. Frito-Lay, Inc. (9th Cir. 1992) 978 F.2d 1093, 1100* (action by widely known singer against manufacturer's radio commercial featuring vocal performance that imitated singer's voice)

Noneconomic and punitive damages were available in right-of-publicity action under California law. *Waits v. Frito-Lay, Inc. (9th Cir. 1992) 978 F.2d 1093, 1104-1106* (affirming award of $75,000 for injury to goodwill, professional standing and future publicity value, $200,000 for injury to peace, happiness, and feelings, and $2 million in punitive damages)

Plaintiff's pendent state law claim for misappropriation of trade secrets is not preempted by federal copyright law when trade secrets action does not involve legal or equitable right equivalent to any exclusive right of copyright owner under federal copyright law. *S.O.S., Inc. v. Payday, Inc. (9th Cir. 1989) 886 F.2d 1081, 1090*

Professional singer's action for damages for unauthorized imitation of her distinctive voice in product advertisement is not preempted by federal copyright law when singer is not seeking damages for use of song, because singer's voice is not protectible as original work of authorship fixed in tangible medium of expression. *Midler v. Ford Motor Co. (9th Cir. 1988) 849 F.2d 460, 462*

In copyright infringement action, plaintiff's state causes of action for conversion of tangible property and breach of partner's fiduciary duty was not preempted by federal Copyright Act of 1976 when state claims involved actions different from those proscribed and interests different from those protected by federal copyright law. *Oddo v. Ries (9th Cir. 1984) 743 F.2d 630, 635*

Federal action seeking to overturn assignment of copyright renewal rights was properly dismissed because questions of contract rights that are dependent on common law or equitable principles are state law questions even if copyright interests are involved. *Dolch v. United California Bank (9th Cir. 1983) 702 F.2d 178, 180-181*

Claim under *Civ. Code § 3344* was not preempted when based on invasion of right (plaintiff's right of publicity) not

equivalent to exclusive rights under Copyright Act and on use of noncopyrightable subject matter (model's likeness), even though it was captured in copyrightable photograph. *KNB Enterprises v. Matthews (2000) 78 Cal. App. 4th 362, 365, 92 Cal. Rptr. 2d 713*

[3] Ideas Protected Under State Law

[a] Breach of Confidence

[i] In General

To prevail on claim for breach of confidence in disclosing or using idea without permission, plaintiff is required to show (1) plaintiff conveyed confidential and novel information to defendant, (2) defendant knew information was conveyed in confidence, (3) plaintiff and defendant understood that confidence be maintained, and (4) defendant disclosed or used information in violation of confidential understanding. *Aliotti v. R. Dakin & Co. (9th Cir. 1987) 831 F.2d 898, 903*

Action for breach of confidential relationship when plaintiff disclosed idea in confidence. *Davies v. Krasna (1975) 14 Cal. 3d 502, 506-510, 121 Cal. Rptr. 705, 535 P.2d 1161* ; *Faris v. Enberg (1979) 97 Cal. App. 3d 309, 323, 158 Cal. Rptr. 704* ; *Donahue v. United Artists Corp. (1969) 2 Cal. App. 3d 794, 801, 83 Cal. Rptr. 131* ; *Thompson v. California Brewing Co. (1957) 150 Cal. App. 2d 469, 474-476, 310 P.2d 436*

Breach of confidence is not predicated solely on express agreement protecting confidence and can be established without proof of promise, but no breach of confidence can arise absent understanding that confidential nature of information will be maintained. *Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal. App. 3d 455, 466, 214 Cal. Rptr. 276*

Confidential relationship is not created from mere submission of idea to another; evidence of communication of confidentiality of submission or evidence from which confidential relationship can be inferred is required. *Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal. App. 3d 455, 462, 214 Cal. Rptr. 276*

[ii] Novelty Required

Even though information need not be protectible under copyright law to be subject of breach of confidence action, idea is required to be confidential and novel. *Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal. App. 3d 455, 462, 214 Cal. Rptr. 276*

[b] Breach of Contract

[i] In General

To prevail on claim for breach of implied-in-fact contract to pay for conveyance or use of idea, plaintiff is required to show (1) plaintiff prepared work embodying idea, (2) plaintiff disclosed work to defendant for sale, (3) defendant voluntarily accepted disclosure knowing conditions on which it was tendered, and (4) reasonable value of work; contract to pay for conveyance of idea is not implied when plaintiff discloses idea solely to induce defendant to enter future business relationship, rather than to gain compensation for idea. *Aliotti v. R. Dakin & Co. (9th Cir. 1987) 831 F.2d 898, 902*

Implied-in-fact contract to pay for conveyance of idea is enforceable only if circumstances and conduct manifesting terms and existence of contract precede or attend disclosure of idea, but if disclosure made in confidence, even though

apparently not preceded by conduct indicating existence of implied-in-fact contract, disclosing party is not held to have lost opportunity to be beneficiary of such a contract. *Landsberg v. Scrabble Crossword Game Players, Inc. (9th Cir. 1984) 736 F.2d 485, 489-490*

Defendants' profits were proper measure of plaintiff's compensatory contract damages under *Civ. Code § 3358* for defendant's breach of implied-in-fact contract to pay plaintiff for use of idea, and plaintiff was therefore entitled to more than fair value of defendant's use of his idea, when contract was not for use of idea, but for defendant to refrain from using idea without plaintiff's permission, i.e., required both compensation and plaintiff's permission to plaintiff's manuscript. *Landsberg v. Scrabble Crossword Game Players, Inc. (9th Cir. 1986) 802 F.2d 1193, 1198*

Imposition of punitive damages against defendant for breach of implied-in-fact contract to pay plaintiff for use of his idea was not clearly erroneous when defendant denied existence of contract in bad faith and without probable cause. *Landsberg v. Scrabble Crossword Game Players, Inc. (9th Cir. 1986) 802 F.2d 1193, 1199*

Conveyance of idea is capable of constituting valuable consideration and of being bargained for before it is disclosed to proposed purchaser. *Desny v. Wilder (1956) 46 Cal. 2d 715, 737-738, 299 P.2d 257*

Idea purveyor must show an express promise to pay or circumstances indicating implied-in-fact promise. *Desny v. Wilder (1956) 46 Cal. 2d 715, 737-738, 299 P.2d 257*

Plaintiff who is purported assignee of certain rights in third party's idea, but who has no contact with defendant, is unable to assert claim for breach of confidence against defendant arising out of defendant's unauthorized use of third party's idea, regardless of implied-in-fact promise by defendant to third party not to use idea without paying for use. *Rokos v. Peck (1986) 182 Cal. App. 3d 604, 619, 227 Cal. Rptr. 480*

Action for breaching either express or implied-in-fact contract. *Desny v. Wilder (1956) 46 Cal. 2d 715, 737-738, 299 P.2d 257* ; *Mann v. Columbia Pictures, Inc. (1981) 128 Cal. App. 3d 628, 634-651, 180 Cal. Rptr. 522*

Conditions for implied-in-fact contract were not met when plaintiff did not allege access to ideas by defendants who engaged in alleged pirating of ideas. *Klekas v. EMI Films, Inc. (1984) 150 Cal. App. 3d 1102, 1114-1115, 198 Cal. Rptr. 296*

Complaint by plaintiff, who developed fully worked-out subtheme into complete television series, against defendant who allegedly produced series based on plaintiff's ideas stated cause of action for breach of contract. *Fink v. Goodson-Todman Enterprises, Ltd. (1970) 9 Cal. App. 3d 996, 1006-1016, 88 Cal. Rptr. 679*

[ii] Novelty and Concreteness Not Required

Action on express or implied contract is not required to prove concreteness or novelty of idea. *Fink v. Goodson-Todman Enterprises, Ltd. (1970) 9 Cal. App. 3d 996, 1008-1009 n.16, 88 Cal. Rptr. 679* ; *Blaustein v. Burton (1970) 9 Cal. App. 3d 161, 183, 88 Cal. Rptr. 319* ; *Donahue v. Ziv Television Programs, Inc. (1966) 245 Cal. App. 2d 593, 600, 54 Cal. Rptr. 130*

Idea to be subject matter of contract is not required to be novel or concrete. *Donahue v. Ziv Television Programs, Inc. (1966) 245 Cal. App. 2d 593, 600, 54 Cal. Rptr. 130*

[c] Ideas Not Literary Property

Abstract ideas are not entitled to protection in action for plagiarism under either federal or state law. *Rokos v. Peck*

(1986) 182 Cal. App. 3d 604, 612, 227 Cal. Rptr. 480

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§ 349.86 Attorney General Opinions

Department of Savings and Loan, through its Commissioner, was permitted to copy and distribute copyright-protected working papers and other documents prepared in connection with an audit of savings and loan association. *72 Ops. Cal. Atty. Gen. 72 (1989)*

Videorecording of regularly broadcast television programs containing copyrighted motion pictures and other works did not infringe copyright when recording was for purpose of showing video to institutionalized Youth Authority wards; however, showing of prerecorded store-bought or rented videocassettes of copyrighted motion pictures to institutionalized Youth Authority wards infringed copyright. *71 Ops. Cal. Atty. Gen. 16 (1988)*

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§ 349.87 Law Reviews

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[Reserved]

§§ 349.88[Reserved]

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PART IV. FORMS

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§ 349.100 Complaint [Fed. R. Civ. P., Rule 7] in United States District Court [28 U.S.C. § 1338] for Accounting, Damages [17 U.S.C. § 504], Preliminary and Final Injunctions [17 U.S.C. § 502; Fed. R. Civ. P., Rule 65] for Infringement of Copyright [17 U.S.C. § 501] and for Unfair Competition--Against Infringer--By Copyright Holder--Fed. R. Civ. P. Official Form No. 17

[1] FORM Complaint [Fed. R. Civ. P., Rule 7] in United States District Court [28 U.S.C. § 1338] for Accounting, Damages [17 U.S.C. § 504], Preliminary and Final Injunctions [17 U.S.C. § 502; Fed. R. Civ. P., Rule 65] for Infringement of Copyright [17 U.S.C. § 501] and for Unfair Competition--Against Infringer--By Copyright Holder--Fed. R. Civ. P. Official Form No. 17

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF
CALIFORNIA, _____ DIVISION

_____ [*name*], Plaintiff,	)	
vs.	)	Civil Action, File No. _____
_____ [*name*], Defendant.	)	COMPLAINT
	)	(Infringement of Copyright)
	)	

_____

Plaintiff alleges:

1. This action arises under the Act of October 19, 1976, Title I § 101, 90 Stat. 2541; *17 U.S.C. § 501*; and this court has jurisdiction under the Act of June 25, 1948, c. 646, 62 Stat. 931; *28 U.S.C. § 1338*, as hereinafter more fully appears.

2. Prior to _____ [*date copyright protection sought and secured*], plaintiff _____ [*name*], who then was and ever since has been a citizen of the United States, created and _____ [

specify mode of creation, e.g., wrote] an original _____ [*specify copyrighted work, e.g.,* novel], entitled _____ [*name*].

3. This _____ [*specify copyrighted work, e.g.,* novel] contains a large amount of material wholly original with plaintiff and is copyrightable subject matter under the laws of the United States.

4. Between _____ [*date*] and _____ [*date*], plaintiff complied in all respects with the Act of October 19, 1976, Title I § 101, 90 Stat. 2541; *17 U.S.C. §§ 401-412*, and all other laws governing copyright and secured the exclusive rights and privileges in and to the copyright of the above-entitled work, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "_____ [*date*], Class _____, No. _____."

5. Since _____ [*date copyright secured*], the above entitled work has been _____ [*specify nature of fixation in tangible medium, e.g.,* published] by plaintiff and all copies of it made by plaintiff or under his or her authority or license have been _____ [*specify manner of fixation, e.g.,* published] in strict conformity with the provisions of the Act of October 19, 1976, Title I § 101, 90 Stat. 2541 and all other law governing copyright.

6. Since _____ [*date copyright secured*], plaintiff has been and still is the sole proprietor of all rights, title, and interest in and to the copyright in the above-entitled work.

7. After _____ [*date copyright secured*], defendant _____ [*name*] infringed plaintiff's copyright by _____ [*specify nature of infringement, e.g.,* by publishing and placing on the market a book entitled _____ (*name*)], which was copied largely from plaintiff's copyrighted work entitled _____ [*name*].

8. A copy of plaintiff's copyrighted work is attached hereto as Exhibit 1; and a copy of defendant's infringing work is attached hereto as Exhibit 2.

9. Plaintiff has notified defendant that defendant has infringed the copyright of plaintiff, and defendant has continued to infringe the copyright.

10. After _____ [*date copyright secured*], and continuously since about _____ [*date*], defendant has been _____ [*specify nature of infringement, e.g.,* publishing and placing on the market a book entitled _____ (*name*)], and has thereby been engaging in unfair trade practices and unfair competition against plaintiff to plaintiff's irreparable damage.

WHEREFORE, plaintiff demands:

1. That defendant, his or her agents, and servants be enjoined during the pendency of this action and permanently from infringing the copyright of plaintiff in any manner, and from _____ [*specify manner of infringement, e.g.,* publishing, selling, marketing, or otherwise disposing of any copies of the book entitled _____ (*name*)].

2. That defendant be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendant's infringement of plaintiff's copyright and the unfair trade practices and unfair competition, and to account for:

a. All gains, profits, and advantages derived by defendant by said trade practices and unfair competition; and

b. All gains, profits, and advantages derived by defendant by his or her infringement of plaintiff's copyright or such

damages as the court shall deem proper within the provisions of the copyright statutes, but not less than $250.

3. That defendant deliver up to be impounded during the pendency of this action all copies of said work entitled _____ [*name*] in his or her possession or under his or her control and deliver up for destruction all infringing copies and all plates, molds, and other matter for making such infringing copies.

4. That defendant pay to plaintiff the costs of this action and reasonable attorney's fees to be allowed to the plaintiff by the court.

5. That plaintiff have such other and further relief as is just.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff
_____ [*Address*]

VERIFICATION

State of _____)) ss.
County of _____)

_____ [*Name of plaintiff*], being duly sworn, deposes and says that he/she is the plaintiff herein; and that he/she has read the foregoing complaint and knows the contents thereof and that the same is true of his or her own knowledge except as to matters therein stated on information and belief, and as to those matters, he/she believes it to be true.

_____ [*signature of plaintiff*]

Subscribed and sworn to before me this _____ day of _____.

[*notary seal*]

_____ [*signature of notary*]
Notary Public in and for the State of
California, _____ County
My commission expires _____.

[2] Source of Form

This complaint is adapted from Official Form Number 17 contained in the Appendix of Forms of the Federal Rules of Civil Procedure. It is sufficient under the rules and is intended to indicate the simplicity and brevity of statement which the rules contemplate [*Fed. R. Civ. P., Rule 84*].

[3] Use of Form

This complaint is for use in a federal district court to obtain an accounting and damages [*see 17 U.S.C. § 504*], injunctive relief [*see 17 U.S.C. § 502*], and the impoundment and destruction of infringing articles [*see 17 U.S.C. § 503*] in an action for infringement of a federal statutory copyright [*see 17 U.S.C. § 501 et seq.*].

Paragraph 10 contains pleadings under state law for unfair competition for misappropriation of a copyrighted work. However, some federal courts have held that under the Federal Copyright Act of 1976, these claims are preempted by the federal copyright statute [*see, e.g., Mitchell v. Penton/Indus. Pub. Co. (N.D. Ohio 1979) 486 F. Supp. 22, 24-26* ; *Orth-O-Vision, Inc. v. Home Box Office (S.D. N.Y. 1979) 474 F. Supp. 672, 683-684*].

An award of attorney's fees under *17 U.S.C. § 505* is equally available to prevailing plaintiffs and prevailing defendants, within the trial court's discretion [*Fogerty v. Fantasy, Inc. (1994) 510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455, 468-470* (unsuccessful infringement action by holder of copyright on song against original songwriter)].

For discussion of federal statutory copyright, see *§ 349.20* et seq.

[4] Jurisdiction and Venue

Federal district courts have exclusive jurisdiction of actions involving copyrights arising under federal statutes [*28 U.S.C. § 1338(a)*]. Federal district courts also have jurisdiction of a civil action for unfair competition joined with a substantial, related copyright claim [*28 U.S.C. § 1338(b)*].

In the Ninth Circuit, an action arising under federal copyright law is sufficient to confer subject-matter jurisdiction on the federal district court if the complaint satisfies any one of the three following independent grounds [*Vestron, Inc. v. Home Box Office, Inc. (9th Cir. 1988) 839 F.2d 1380, 1381*]:

- The complaint is for a remedy expressly granted by the Copyright Act,
- The complaint asserts a claim requiring construction of the Copyright Act, or
- The complaint presents case in which the distinctive policy of the Copyright Act requires that federal principles control disposition of the claim.

When a suit is for a naked declaration of copyright ownership, absent a bona fide infringement claim, federal courts properly decline jurisdiction [*Vestron, Inc. v. Home Box Office, Inc. (9th Cir. 1988) 839 F.2d 1380, 1381*]. However, the fact that the plaintiff claims ownership of copyright through a contested contract governed by state law is not fatal to federal jurisdiction, because beneficial owner of the copyright is entitled to establish facts supporting claim of beneficial ownership, even though that requires interpretation of contract [*Vestron, Inc. v. Home Box Office, Inc. (9th Cir. 1988) 839 F.2d 1380, 1382*].

When a fatal flaw appears on the face of a complaint that purports to assert a copyright infringement action, the action is properly dismissed for lack of subject matter jurisdiction, but when no such flaw appears, the federal court properly possesses subject matter jurisdiction [*Vestron, Inc. v. Home Box Office, Inc. (9th Cir. 1988) 839 F.2d 1380, 1382* (court had jurisdiction)].

In copyright infringement actions, venue is proper in the district in which the defendant or the defendant's agent resides or may be found [*28 U.S.C. § 1400(a)*]. The Ninth Circuit interprets this statutory rule to allow venue in any judicial district in which the defendant would be amenable to personal jurisdiction if the district were a separate state [*Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc. (9th Cir. 1997) 106 F.3d 284, 289 , rev'd on other grounds, Feltner v. Columbia Pictures Television, Inc. (1998) 523 U.S. 340, 118 S. Ct. 1279, 140 L. Ed. 2d 438]* .

When the defendant would not be susceptible to general personal jurisdiction in the district (if it were a separate state)--that is, the defendant is not a resident there--the court uses a three-part test to determine whether the defendant has had sufficient minimum contacts with the district (considering it as a separate state) to be susceptible to specific personal jurisdiction there [*Schwarzenegger v. Fred Martin Motor Co. (9th Cir. 2004) 374 F.3d 797, 802]* .

(1) The nonresident defendant must purposefully direct activities toward, or consummate some transaction with a resident of, the district; or the defendant must perform some act by which to purposefully avail himself/herself/itself of the privilege of conducting activities in the district, thereby invoking the benefits and protections of the laws in effect there [*see generally* Brayton Purcell LLP v. Recordon & Recordon (9th Cir. 2009) 575 F.3d 981, 985-986 (discussing this test and applying it to hold that venue was proper in Northern District of California, in action against resident of Southern District)].

(2) The claim must be one that arises out of or relates to the defendant's district-related activities.

(3) The exercise of jurisdiction must comport with fair play and substantial justice, that is, it must be reasonable.

[5] Verification

Verification of the complaint is not required [*Fed. R. Civ. P., Rule 11(a)*], but if a temporary restraining order is sought without notice to the defendant, it must clearly appear from specific facts shown by affidavit or verified complaint that immediate and irreparable injury, loss, or damage will result if the order is not granted [*Fed. R. Civ. P., Rule 65*]. Hence, verification is included [*see Code Civ. Proc. § 446*].

[6] Cross References

For a form of complaint for accounting by copyright owner against motion picture producer, see Ch. 7, *Accounting, Action for*

For jurisdictional allegations for use in federal district courts, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For extensive coverage of practice in federal courts, see Moore's Federal Practice, (3d ed. Matthew Bender)

For extensive, detailed coverage of copyright law, *see* Nimmer on Copyright (Matthew Bender)

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31-349 California Forms of Pleading and Practice--Annotated § 349.101

§ 349.101 Judicial Council Trial Court Pleading Form--Complaint for Damages [Civ. Code § 3300] for Breach of Contract [Civ. Code § 1620]--With Breach of Contract Attachment [Cal. Rules of Ct., Rule 1.45(a), (b); Cal. Judicial Council Forms PLD-C-001, PLD-C-001(1)] and Allegations for Damages [Civ. Code § 3333] for Breach of Implied Contract [Civ. Code § 1621] and for Breach of Confidence--Wrongful Use of Idea

[1] FORM Judicial Council Trial Court Pleading Form--Complaint for Damages [Civ. Code § 3300] for Breach of Contract [Civ. Code § 1620]--With Breach of Contract Attachment [Cal. Rules of Ct., Rule 1.45(a), (b); Cal. Judicial Council Forms PLD-C-001, PLD-C-001(1)] and Allegations for Damages [Civ. Code § 3333] for Breach of Implied Contract [Civ. Code § 1621] and for Breach of Confidence--Wrongful Use of Idea

Click here to view image.

[2] Judicial Council Trial Court Forms

Code Civ. Proc. § 425.12 (Stats. 1982, Ch. 272) requires that the Judicial Council develop and approve official forms for use in California trial courts for any complaint, cross complaint, or answer in any action based on breach of contract. Use of these forms is optional [*see Code Civ. Proc. § 425.12*].

[3] Use of Form

The complaint in [1], *above*, is for use in an action for damages for the unlawful and unauthorized use of an idea. For discussion of contractual protection of ideas, see *§ 349.46*.

It consists of the Judicial Council contract complaint to which a Judicial Council breach of contract cause of action form has been added [*see Code Civ. Proc. § 425.12*; *Cal. Rules of Ct., Rule 1.45(a), (b)*; Cal. Judicial Council Forms PLD-C-001, PLD-C-001(1)]. Additionally the form includes two causes of action, implied contract and breach of confidence, that have been prepared as attachments to the Judicial Council contract complaint [*see Cal. Rules of Ct., Rule 1.45(c)*]. The attachments have been prepared on the Judicial Council's form that may be used as an additional page with any form [*see* Cal. Judicial Council Form MC-020].

For general information relating to use of Judicial Council complaint forms, see Ch. 123, *Complaints and Cross*

Complaints . These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[4] Preemption by Copyright Act of 1976

Counsel should carefully analyze the facts of the case and consider whether the cause of action is preempted by the Copyright Act of 1976, which preempts equivalent state law claims [*see Endermol Enterntainment, B.V. v. Twentieth Television, Inc. (C.D. Cal. 1998) 1998 U.S. Dist. LEXIS 19049* ; *48 U.S.P.Q.2D (BNA) 1524]* .

[5] Filling Out Breach of Contract Complaint Form

For general instructions on how to fill out the first cause of action for breach of contract, see *Ch. 140, Contracts, § 140.100[3]*.

Attachments that are not on Judicial Council cause of action forms, such as the second and third causes of action in this form, must be numbered consecutively beginning with "1," and must be preceded with one or more identifying letters derived from the title of the cause of action [*Cal. Rules of Ct., Rule 1.45(c)*]. The paragraphs in this form for the second count are lettered "IC" as derived from the title "Implied Contract," while theparagraphs for the third count are lettered "BCF" as derived from the title "Breach of Confidence."

[6] Contents of Form

[a] Breach of Contract

In an action for breach of contract, as contained in the first cause of action, plaintiff should:

- Either attach a copy of the written agreement to the complaint or allege the essential terms of the agreement (Paragraph BC-1);

- Allege the facts showing how defendant breached the agreement (Paragraph BC-2); and

- Specify the damages proximately caused by defendant's breach that were suffered by plaintiff (Paragraph BC-4) [*see Civ. Code § 3300*].

For further discussion of a cause of action for breach of contract, see Ch. 140, *Contracts* .

[b] Breach of Implied Contract

In an action for breach of an implied contract, as contained in the second cause of action, plaintiff should allege:

- Defendant's liability under *Civ. Code § 1621* (Paragraph IC-1);

- Facts implying that a contract was made between the parties (Paragraph IC-2) [*see Desny v. Wilder (1956) 46 Cal. 2d 715, 737-738, 299 P.2d 257* ; *see also Grosso v. Miramax Film Corp. (9th Cir. 2004) 383 F.3d 965, 967* ("Grosso's complaint mirrors the requirements of *Desny* and states that 'the idea was submitted by Plaintiff to Defendants with the understanding and expectation, fully and clearly understood by Defendants that Plaintiffs would be reasonably compensated for its use by Defendants.' We conclude that the complaint stated a *Desny* claim.")];

- The reasonable value of the defendant's use of the idea (Paragraph IC-3); and

- Defendant's breach of the implied agreement, plaintiff's performance of all obligations, and the damages that plaintiff suffered (Paragraph IC-4, incorporating Paragraphs BC-2, BC-3, and BC-4 of the first cause of action by reference).

[c] Breach of Confidence

Actionable breach of confidence arises when a novel and confidential idea is offered to another in confidence after an opportunity to reject the disclosure, and the disclosure is voluntarily received by the offeree in confidence with the understanding that the idea is not to be disclosed to others or used by the offeree for purposes beyond the limits of the confidence without the offeror's permission [*Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal. App. 3d 455, 462, 465, 214 Cal. Rptr. 276*].

Thus, in an action for breach of confidence, as contained in the third cause of action, plaintiff should allege:

- Defendant's liability for the breach of confidence (Paragraph BCF-1) [*see Thompson v. California Brewing Co. (1957) 150 Cal. App. 2d 469, 474-476, 310 P.2d 436*].

- Facts showing submission of idea to defendant in confidence (Paragraph BCF-2) [*see Tele-Count Engineers, Inc. v. Pacific Tel. & Tel. Co. (1985) 168 Cal. App. 3d 455, 465, 214 Cal. Rptr. 276* (actual notice of confidentiality required)].

- The reasonable value of defendant's use of plaintiff's idea disclosed in confidence (Paragraph BCF-3).

- Facts showing acceptance of idea in confidence by defendant (Paragraph BCF-4).

- Facts showing the breach of confidence by defendant (Paragraph BCF-5).

- Plaintiff's performance of all obligations and the damages that plaintiff suffered (Paragraph BCF-6, incorporating Paragraphs BC-3 and BC-4 of the first cause of action by reference) [*see Civ. Code § 3333*].

[7] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case in the superior court [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[8] Attachment of Documentation

Code Civ. Proc. § 429.30(b) applies to an action for breach of contract based on use of the plaintiff's idea [*see Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 785, 256 P.2d 947*]. A copy of any written material or production embodying the idea together with a copy of the alleged infringing work, must be attached to the complaint [*see Code Civ. Proc. § 429.30(b)*]. If, however, by reason of bulk or the nature of the production it is not practicable to attach a copy to the complaint, that fact and the reasons why it is impracticable must be alleged [*Code Civ. Proc. § 429.30(b)*].

[9] Cross References

For discussion, procedural guide, and forms for use in actions involving the breach of contracts, generally, see Ch. 140, *Contracts*

Nimmer on Copyright, Ch. 16, *The Law of Ideas*, §§ 16.01 -16.08 (Matthew Bender)

Witkin, California Procedure, Vol. 4, *Pleading*, § 665 (4th ed.)

Witkin, Summary of California Law, vol. 1, *Contracts*, § 223; Vol. 13, *Personal Property*, §§ 69-71 (10th ed. 2005)

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31-349 California Forms of Pleading and Practice--Annotated § 349.102

§ 349.102 Order for View of Alleged Infringing Work in Connection with Complaint for Breach of Contract [Code Civ. Proc. § 429.30(b)]

[1] FORM Order for View of Alleged Infringing Work in Connection with Complaint for Breach of Contract [Code Civ. Proc. § 429.30(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

	)	
	)	NO. _____
_____ [*name*]	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The _____ [demurrer *or* motion *or specify other proceeding*] of _____ [*name of moving party*] came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*], pursuant to the request of _____ [*moving party*] in the _____ [demurrer *or* motion *or specify other*

proceeding] that the court make an order for the viewing of _____ [*specify, e.g.,* the motion picture entitled "_____"] according to the provisions of *Code of Civil Procedure Section 429.30(b).*

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED:

1. That the court will view _____ [*specify work, e.g.,* the motion picture entitled "_____"] at _____ [*address*], _____ [*city*], California, on _____ [*date*], at _____ [*time*].

2. [That _____ (plaintiff *or* defendant) make all necessary arrangements for the viewing;]

3. That, after the viewing, the contents of the _____ [*specify work, e.g.,* the motion picture entitled "_____" will be deemed a part of the complaint to the same extent and with the same force as though such production had been attached to the complaint.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above,* is for use in ordering that a production which was not attached to a complaint for breach of contract be viewed by the court [*Code Civ. Proc. § 429.30(b)*]. The form may be adapted for use by a plaintiff, cross plaintiff, defendant, or cross defendant in connection with a demurrer, motion, or other proceeding in an action for breach of contract involving literary, artistic, or intellectual property [*see Code Civ. Proc. § 429.30(b)*].

[3] Cross References

For a form of complaint for use in an action for damages for the unlawful and unauthorized use of an idea, see *§ 349.101*

For discussion of law and motion proceedings, including orders, and notice of orders, see Ch. 372, *Motions and Orders*

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§ 350.02 Cross References

§§ 350.03-350.09 [Reserved]

§ 350.10 Governing Statutes

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§ 350.12 Wrongful Timber Removal or Injury

[1] Treble Damages

[2] Double Damages for Negligent Injuries

[3] Actual Damages for Public Taking

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[4] Proper Place for Trial

[5] Evidentiary Issues

[6] Measure of Compensatory Damages

[7] Punitive Damages

[8] Post-Trial Challenge to Method of Valuation

§ 350.13 Sales

[1] Standing Timber as Goods

[2] Recordation of Contract

[3] Removal Within Specified Time

[4] Wrongful Interference With Severance Contract

§ 350.14 Reservation of Timber Rights

§ 350.14A Failure to Deliver Timber With Land

§ 350.15 Logger's and Lumber-Millman's Liens

§ 350.16 Labor Commissioner's Stop Order

§ 350.17 Security Deposits by Contractors

§ 350.18 Marking of Logs and Timber

§ 350.19 Floating or Drifting Logs

§ 350.20 State Control of Timber Resources

§ 350.21 Growing Trees by Planned Production

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§ 350.40 Related Matthew Bender Publications

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[2] California Legal Forms

[3] Forms of Discovery

§ 350.41 State Constitution

§ 350.42 Federal Statutes

§ 350.43 State Statutes

[1] Agricultural Industry

[2] Crimes and Offenses

[3] Damages for Injuries or Removal

[4] Drifting Lumber

[5] Easements

[6] Forests and Forestry

[7] Logger's and Lumber-Millman's Liens

[8] Marking of Logs and Timber

[9] Sale of Logs and Timber

[10] Secured Transactions

[11] Taxation

[12] Transporting Logs and Timber

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§ 350.44 State Regulations

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[1] Damages for Injury to Timber

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[6] Ownership of Trees

[7] Permits for Loggers

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[a] In General

[b] Severance of Standing Timber

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[12] Wrongful Interference With Severance Contract

[13] Wrongful Removal of Timber

§ 350.46 Attorney General Opinions

§ 350.47 Law Reviews

§§ 350.48-350.59 [Reserved]

§ 350.60 Complaint [Code Civ. Proc. § 425.10] for Damages for Breach of Contract [Civ. Code § 3300]--By Seller of Timber Rights Against Buyer--Failure to Pay Balance of Guaranteed Minimum Price and to Exhaust All Merchantable Saw or Better Timber

[1] FORM

[2] Use of Form

[3] Jurisdiction

[4] Verification

[5] Interest on Awarded Damages

[6] "Stumpage" Defined

[7] Statutes

[8] Decisions

§ 350.61 Complaint [Code Civ. Proc. § 425.10] for Damages for Breach of Contract [Civ. Code § 3300]--By Purchaser of Timber Against Seller--Refusal to Sell Timber on Exercise by Purchaser of Option to Purchase

[1] FORM

[2] Use of Form

[3] "Timber Cruiser" Defined

§ 350.62 Complaint [Code Civ. Proc. § 425.10] for Damages for Breach of Contract [Civ. Code § 3300]--By Mill Operator Against Logging Contractor--Failure to Furnish Agreed Amount of Logs for Sawing Into Lumber

[1] FORM

[2] Use of Form

[3] Cross References

§ 350.63 Complaint [Code Civ. Proc. § 425.10] for Damages for Breach of Contract [Civ. Code § 3300]--By Lumber Company Against Purchaser of Lumber--Failure to Pay for Lumber Furnished and to Complete Purchase of

Agreed Amount

[1] FORM

[2] Use of Form

[3] Cross References

§ 350.64 Complaint [Code Civ. Proc. § 425.10] to Recover Value of Timber Removed From Land After Elapse of Time for Removal--By Buyer of Land Against Seller Acting Under Prior Timber Sales Contract

[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

§ 350.65 Complaint [Code Civ. Proc. § 425.10] by Owner of Timber for Treble Damages for Wrongful Cutting or Removal of Timber [Civ. Code § 3346(a); Code Civ. Proc. § 733]--Willful Removal of Cut and Bucked Timber

[1] FORM

[2] Use of Form

[3] Treble Damages

[4] "Bucked" Timber Defined

[5] Statutes

[6] Decisions

§ 350.66 Complaint [Code Civ. Proc. § 425.10] by Owner of Timber for Treble Damages for Wrongful Cutting or Removal of Timber [Civ. Code § 3346(a); Code Civ. Proc. § 733]--Willful and Malicious Topping of Growing Trees

[1] FORM

[2] Use of Form

[3] "Top" Defined

[4] Cross References

§ 350.67 Complaint [Code Civ. Proc. § 425.10] by Logger Against Timber Owner and Mill Operator to Foreclose Lien [Civ. Code §§ 3065, 3065a, 3065b]

[1] FORM

[2] Use of Form

[3] Logger's and Lumber-Millman's Liens

[4] Statutes

[5] Decisions

§ 350.68 Declaration Under Penalty of Perjury [Code Civ. Proc. § 2015.5]--By Logger or Lumber-Millman for Writ of Attachment [Civ. Code § 3065a]--To Attach Logs and Products on Which Logging Lien Subsists [Civ. Code § 3065]

[1] FORM

[2] Use of Form

[3] Statutes

[4] Cross References

§ 350.69 Declaration Under Penalty of Perjury [Code Civ. Proc. § 2015.5]--By Faller, Bucker, or Millhand for Stop Notice From Labor Commissioner to Mill Operator [Civ. Code § 3065c]--To Withhold Money Owing to Contractor-Employer in Amount of Unpaid Wages

[1] FORM

[2] Use of Form

[3] Definitions

[4] Stop Orders

[5] Statutes

§ 350.70 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Treble Damages Not Available [Civ. Code § 3346; Code Civ. Proc. § 733]--Defendant Did Not Act Maliciously

[1] FORM

[2] Use of Form

[3] Statutes

[4] Decisions

§ 350.71 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Treble Damages Not Available [Civ. Code § 3346; Code Civ. Proc. § 733]--Defendant Did Not Wrongfully Enter and Remove Timber

[1] FORM

[2] Use of Form

[3] Cross References

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31-350 California Forms of Pleading and Practice--Annotated § 350.01

§ 350.01 Scope of Chapter

This chapter discusses and provides forms for several different kinds of actions involving logs and timber. It also contains a brief discussion of the statutory framework regulating timber resources in California, on both state and private lands.

Forms are included for use in actions for damages from the breach of an agreement to sell timber [*see* §§ 350.60-350.64], actions for damages from the wrongful cutting or removal of timber [*see §§ 350.65, 350.66*], forms connected with the assertion of logger's and lumber-millman's liens [*see §§ 350.67, 350.68*], and a declaration for an application to the Labor Commissioner by a logging employee for a stop notice because of unpaid wages [*see § 350.69*].

The chapter also includes forms of affirmative defense to claims for treble damages on the grounds that the defendant did not act maliciously [*see § 350.70*], and that the defendant's entry and removal of timber was not wrongful [*see § 350.71*].

For a form of a remainderman's complaint that a life tenant's behavior constituted waste, see Ch. 344, *Life Estates and Remainders* . For a form for use in abating a private nuisance caused by encroachment of roots and branches from adjoining property, see *Ch. 11, Adjoining Landowners, § 11.75*. For a form for use in an action for trespass when timber, trees, or underwood has been damaged, see Ch. 550, *Trespass* .

For detailed coverage of forestry issues in California, see Manaster and Selmi, California Environmental Law and Land Use Practice, Ch. 80, *Forestry Development* (Matthew Bender).

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§ 350.02 Cross References

For a form for use in abating a private nuisance caused by the encroachment of roots and branches from trees located on adjoining land, see Ch. 11, *Adjoining Landowners* .

For a form for use in alleging that a life tenant's behavior constitutes waste in an action by a remainderman against a life tenant for injury to his or her inheritance, see Ch. 344, *Life Estates and Remainders* .

For discussion of the requirements and duration of financing statements, see Ch. 503, *Sales: Secured Transactions* .

For forms for use in an action for trespass when plaintiff is seeking treble damages for injury to timber, trees, or underwood, see Ch. 550, *Trespass* .

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[Reserved]

§§ 350.03[Reserved]

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31-350 California Forms of Pleading and Practice--Annotated § 350.10

§ 350.10 Governing Statutes

Timber resources in national forests and on federal lands are governed by *16 U.S.C. § 471a et seq.* Timber resources in California, on both state and privately owned lands, are governed by *Pub. Res. Code § 4101 et seq.* Damages for injury to or removal of standing timber are governed by *Civ. Code § 3346* and *Code Civ. Proc. § 733*.

Contracts for the sale of standing timber are held by *Com. Code § 2107(2)* to be within the scope of and governed by Division 2 of the Uniform Commercial Code [*Com. Code § 2101 et seq.*]. The recordation of such contracts is governed by *Civ. Code § 1220*. Financing statements regarding standing timber are governed by *Com. Code §§ 9203(b)(3)(A), 9301(3)(B), 9501(a)(1)(A), 9502(b), (c), 9519(d), (e),* and *9525(d)*. The tax treatment of cutting or disposal of standing timber is governed by *I.R.C. §§ 611-638* and *Rev. & Tax. Code § 17681*.

Transportation of logs and timber by motor vehicles is governed by *Veh. Code §§ 35414, 35552*.

Logger's and lumber-millman's liens are governed by *Civ. Code §§ 3065-3065b*. Stop notices by the Labor Commissioner regarding wages due but not paid to logging employees are governed by *Civ. Code § 3065c*. Funds or bonds to cover wages due logging employees are governed by *Lab. Code § 270.5*.

Criminal statutes regarding logs and timber appear in *Health & Safety Code § 13003, Penal Code §§ 356, 593a,* and *Pub. Res. Code §§ 4021, 4601, 4605,* and *4879*.

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31-350 California Forms of Pleading and Practice--Annotated § 350.11

§ 350.11 Definitions and Common Logging Terms

The word "log" has been defined as a usually bulky piece or length of unshaped timber. The word "timber" has been generally defined as trees fit to be used for lumber in building or construction [*Buffum v. Texaco, Inc. (1966) 241 Cal. App. 2d 732, 735, 50 Cal. Rptr. 852]* , but also has a more specific definition--large squared or dressed pieces of wood ready for use or forming part of a structure.

Several terms describing people employed in the logging industry appear in this chapter. A "faller" (sometimes called "feller") is a logger who fells trees. A "bucker" is a worker who cuts felled trees into shorter lengths. A "cruiser" (sometimes called "timber cruiser") is a person who estimates the volume and value of marketable timber on a tract of land and maps it out for logging. A "millhand" is a worker in a lumber mill.

The terms "boom company" and "booming company" refer to companies involved in the floating of logs down rivers (or other bodies of water) to the place of milling or manufacture.

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31-350 California Forms of Pleading and Practice--Annotated § 350.12

§ 350.12 Wrongful Timber Removal or Injury

[1] Treble Damages

For wrongful injuries to timber, trees, or underwood on the land of another or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment [*Civ. Code § 3346(a)*; *Code Civ. Proc. § 733*]. However, an award of treble damages under *Civ. Code § 3346* or *Code Civ. Proc. § 733* is warranted only when the defendant's acts were willful or malicious, [*Caldwell v. Walker (1963) 211 Cal. App. 2d 758, 762, 27 Cal. Rptr. 675*], and such an award is strictly within the trial court's discretion [*Caldwell v. Walker (1963) 211 Cal. App. 2d 758, 763, 27 Cal. Rptr. 675*].

Although an award of double the actual damages is mandatory under *Civ. Code § 3346*, the court retains discretion whether to triple them under that statute or *Code Civ. Proc. § 733* [*Ostling v. Loring (1994) 27 Cal. App. 4th 1731, 1742, 33 Cal. Rptr. 2d 391* ; *Heninger v. Dunn (1980) 101 Cal. App. 3d 858, 869, 162 Cal. Rptr. 104]* . The effect of *Civ. Code § 3346* as amended, read together with *Code Civ. Proc. § 733*, is that the Legislature intended, insofar as willful and malicious trespass is concerned under either section, to leave the imposition of treble damages discretionary with the court, but to place a floor upon that discretion at double damages that must be applied whether the trespass be wilful and malicious or casual and involuntary [*Ostling v. Loring (1994) 27 Cal. App. 4th 1731, 1742, 33 Cal. Rptr. 2d 391* (award of $150,000 in actual damages on complaint requesting $50,000 unsupportable)].

A default judgment is an admission of malice sufficient for an award of double damages, but without more evidence of malice, will not support an award of triple damages [*Ostling v. Loring (1994) 27 Cal. App. 4th 1731, 1750, 33 Cal. Rptr. 2d 391* (double damages awarded)]

For forms of complaint for treble damages, see *§§ 350.65, 350.66*. For affirmative defenses claiming treble damages are not available, see *§§ 350.70, 350.71*

[2] Double Damages for Negligent Injuries

When the injuries were caused by casual or involuntary trespass, or when defendant in any action brought under *Civ. Code § 3346* had probable cause to believe that the land on which the trespass was committed was his or her own or the

land of the person in whose service or by whose direction the act was done, the measure of damages is twice the sum as would compensate for the actual detriment [*Civ. Code § 3346(a)*].

The removal of trees after the expiration of a contractual right to do so is subject to double damages for wrongful removal [*Hendren v. Yonash (1966) 243 Cal. App. 2d 672, 680-681, 52 Cal. Rptr. 738* (affirming double damage award)]. All timber removed from the property after the expiration date is to be included in the calculation of that timber wrongfully removed [*Hendren v. Yonash (1966) 243 Cal. App. 2d 672, 680-681, 52 Cal. Rptr. 738* (award based on value of timber delivered to mill after expiration date, regardless of when cut)].

In a case involving damages caused to plaintiff's trees by a fire negligently caused by defendant, the court turned down plaintiff's attempt to recover under the double damages provision of *Civ. Code § 3346(a)*, stating [*Gould v. Madonna (1970) 5 Cal. App. 3d 404, 408, 85 Cal. Rptr. 457*]:

"The normal use of *Civil Code Section 3346* is in cases where timber has been cut from another's land, either with or without knowledge that the cutting was wrongful. It has been suggested that the purpose of the statute is to educate blunderers (persons who mistake location of boundary lines) and to discourage rogues (persons who ignore boundary lines), to protect timber from being cut by others than the owner. [Citations.] We have found no indication anywhere that anyone has considered that the double damages provisions of Section 3346 are applicable to fire damage caused by negligence... . Section 3346 is irrelevant to the damage in this case."

[3] Actual Damages for Public Taking

When the injuries were caused by the taking of wood by the authority of highway officers for the purpose of repairing a public highway or bridge on the land or adjoining it, judgment must only be given in a sum equal to the actual detriment [*Civ. Code § 3346(a)*].

[3A] Statute of Limitations

The time limitation for wrongful injuries to timber, trees, or underwood in violation of *Civ. Code § 3346* is five years from the date of trespass [*Civ. Code § 3346(c)*].

For a form for pleading the affirmative defense of statute of limitations in a *trespass* case, see *Ch. 550, Trespass, § 550.48*.

[3B] Standing

When plaintiffs own the subject property as trustees of a trust holding title, and are the beneficiaries of such trust, plaintiffs can maintain an action under *Civ. Code § 3346* in their own name, without mentioning the trust [*Hassoldt v. Patrick Media Group, Inc. (2000) 84 Cal. App. 4th 153, 171, 100 Cal. Rptr. 2d 662* (standing affirmed)]. Likewise, an out-of-possession landowner who has leased the property to a third party still has sufficient possessory interest to maintain an action for wrongful destruction or injury to timber, trees, or underwood [*Hassoldt v. Patrick Media Group, Inc. (2000) 84 Cal. App. 4th 153, 171, 100 Cal. Rptr. 2d 662]* .

[3C] Pleading Multiple Damages

A complaint that asks for actual damages and "treble said damages pursuant to statute" for a claim under *Civ. Code § 3346* and *Code Civ. Proc. § 733* is sufficient to put defendant on notice of a demand for multiple damages under those statutes [*Ostling v. Loring (1994) 27 Cal. App. 4th 1731, 1750-1751, 33 Cal. Rptr. 2d 391]* .

[4] Proper Place for Trial

The proper place for the trial of an action for damages from defendant's wrongful injuries to or removal of timber is the county in which the trees were located [*Wolfe v. Wallace (1957) 154 Cal. App. 2d 523, 527, 316 P.2d 697*].

[5] Evidentiary Issues

A witness's testimony concerning his or her prior, nefarious tree trimming activities on behalf of a party charged with wrongful injury to timber, trees, or underwood must contain a striking degree of similarity to that tree trimming at issue in order to be admissible under *Evid Code § 1101* primarily as evidence of the identity of the party who injured the timber [*Hassoldt v. Patrick Media Group, Inc. (2000) 84 Cal. App. 4th 153, 164, 165, 100 Cal. Rptr. 2d 662]* . For identity to be established, the misconduct not at issue and the misconduct at issue must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. The matching pattern and characteristics of the two sets of misconduct must be so unusual and distinctive as to be like a signature [*Hassoldt v. Patrick Media Group, Inc. (2000) 84 Cal. App. 4th 153, 165, 100 Cal. Rptr. 2d 662]* . Likewise, where the identity of the actor is in dispute and the uncharged misconduct fails to satisfy the stringent "so unusual and distinctive as to be like a signature" standard, the uncharged conduct is not admissible on such issues as intent, motive, or lack of mistake or accident in the wrongful injury to timber [*Hassoldt v. Patrick Media Group, Inc. (2000) 84 Cal. App. 4th 153, 166, 167, 100 Cal. Rptr. 2d 662]* .

[6] Measure of Compensatory Damages

The usual measure of compensatory damages in a case involving damage to timber, trees, or underwood is the difference between the value of the real property before and after the injury [*Hassoldt v. Patrick Media Group, Inc. (2000) 84 Cal. App. 4th 153, 167, 100 Cal. Rptr. 2d 662]* .

An alternative measure of damages is the cost of restoring the timber, trees, or underwood to their condition prior to the injury. Courts will normally not award costs of restoration if they exceed the diminution in the value of the timber, trees, or underwood. The plaintiff may be awarded the lesser of the two amounts. Stated otherwise, a recovery for diminution in value can never exceed the value of the timber, trees, or underwood prior to the injury [*Hassoldt v. Patrick Media Group, Inc. (2000) 84 Cal. App. 4th 153, 167-168, 100 Cal. Rptr. 2d 662* ; *Heninger v. Dunn (1980) 101 Cal. App. 3d 858, 862-863, 162 Cal. Rptr. 104]* . However, the rule precluding recovery of restoration costs in excess of diminution in value is not of invariable application. Restoration costs may be awarded even though they exceed the decrease in market value when there is a reason personal to the owner for restoring the original condition or where there is reason to believe that the plaintiff will, in fact, make the repairs [*Hassoldt v. Patrick Media Group, Inc. (2000) 84 Cal. App. 4th 153, 168, 100 Cal. Rptr. 2d 662* ; *Heninger v. Dunn (1980) 101 Cal. App. 3d 858, 863, 162 Cal. Rptr. 104]* .

Furthermore, if the restoration of the timber, trees, or underwood to a reasonable approximation of their former condition is impossible or impracticable, the landowner may recover the value of the timber, trees, or underwood, either as timber or for their aesthetic qualities, again without regard to the diminution in the value of the timber, trees, or underwood. However, only reasonable costs of replacing destroyed timber, trees, or underwood with identical or substantially similar timber, trees, or underwood may be recovered. Proposed replacement costs may be unreasonable or excessive in relation to the damage inflicted upon the timber, trees, or underwood or their value prior to the trespass. In that case, the achievement of a reasonable approximation of the land's former condition may involve something less than substantially identical restoration [*Heninger v. Dunn (1980) 101 Cal. App. 3d 858, 865, 162 Cal. Rptr. 104* (restoration damages in excess of diminution in value of timber)].

[7] Punitive Damages

Due to the penal nature of the provisions, the damages for wrongful destruction or injury to timber, trees, or underwood may be neither doubled nor tripled under *Civ. Code § 3346* if punitive damages are awarded under *Civ. Code § 3294*. If

the fact finder finds the defendant responsible for damaging the plaintiff's tree and also finds that defendant's conduct was engaged in fraudulently, oppressively or maliciously, the jury is to be permitted to determine, under proper instruction, the punitive damages to which the plaintiffs are entitled. The plaintiffs may then elect to have a judgment entered that reflects either the court's multiplication of the compensatory damage under *Civ. Code § 3346* or the compensatory and punitive damages under *Civ. Code § 3294* [*Hassoldt v. Patrick Media Group, Inc. (2000) 84 Cal. App. 4th 153, 169, 100 Cal. Rptr. 2d 662]* .

[8] Post-Trial Challenge to Method of Valuation

A proper post-trial challenge to the method of valuation of a claim under *Civ. Code § 3346* and *Code Civ. Proc. § 733* is by either a motion for new trial or an appeal from the default judgment, rather than a motion to vacate judgment [*Ostling v. Loring (1994) 27 Cal. App. 4th 1731, 1749-1750, 33 Cal. Rptr. 2d 391* (denying of motion to vacate)].

For discussion of motions for new trial, see Ch. 371, *Motions After Trial* . For discussion of appeal, see Ch. 40, *Appeal: An Overview* , et seq.

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§ 350.13 Sales

[1] Standing Timber as Goods

The fee interest in standing timber (i.e., timber not yet cut) is conveyable separately from the title to the property on which the timber stands [*Buffum v. Texaco, Inc. (1966) 241 Cal. App. 2d 732, 734, 50 Cal. Rptr. 852* ; *Miller v. Taber (1957) 149 Cal. App. 2d 792, 795, 309 P.2d 110*]. Such a sale is considered to be a contract for the sale of goods subject to Division 2 (Sales) of the Commercial Code, whether it is to be severed by the buyer or the seller even though it forms part of the realty at the time of contracting, if the parties can, by identification, effect a present sale before severence [*Com. Code § 2107(2)*].

[2] Recordation of Contract

Contracts for the purchase or sale of standing timber or trees, for severance or otherwise, may be recorded in like manner and with like effect as grants of real property, and all statutory provisions relating to the recordation or nonrecordation of conveyances of real property and to the effect thereof apply to such contracts with like effect [*Civ. Code § 1220*].

[3] Removal Within Specified Time

When a contract for the sale of standing trees states that the trees are to be removed within a specified time, title passes to the buyer only as to those trees that he or she cuts and removes within the designated period, with title to the remaining trees staying in the seller [*Whittaker v. Thompson (1959) 53 Cal. 2d 192, 194, 1 Cal. Rptr. 7, 347 P.2d 7* ; *Drewry v. Welch (1965) 236 Cal. App. 2d 159, 165, 46 Cal. Rptr. 65* ; *see Mallett v. Doherty (1919) 180 Cal. 225, 229, 180 P. 531*]. The severed timber is considered the buyer's personal property [*Eistrat v. Western Hardwood Lbr. Co. (1958) 164 Cal. App. 2d 374, 379, 330 P.2d 629*].

The fact that the instrument employs words of present grant does not necessarily establish title in the vendee beyond the period allowable for removal. The question in each case is as to what is the contract between the parties [*Hendren v. Yonash (1966) 243 Cal. App. 2d 672, 677, 52 Cal. Rptr. 738* (no title absolute conveyed)].

The expiration of rights by failure to exercise an option to extend a contract for standing timber does not work a forfeiture against the optionee. The reversion of title on an expiration date has the same effect. There simply is nothing left for the optionee to act upon [*Hendren v. Yonash (1966) 243 Cal. App. 2d 672, 677, 52 Cal. Rptr. 738* (option not exercised solely by act of continued removal of timber)]. In the absence of a contract clause to the contrary, the landowner has no duty to notify the buyer of the approaching deadline for extending the contract [*Hendren v. Yonash (1966) 243 Cal. App. 2d 672, 680, 52 Cal. Rptr. 738* (landowner did not waive rights or act in manner justifying estoppel)].

The removal of trees after the expiration of the right to do so is subject to double damages for wrongful removal [*Hendren v. Yonash (1966) 243 Cal. App. 2d 672, 680-681, 52 Cal. Rptr. 738* (buyer failed to exercise extension option but continued to remove trees); *see § 350.12[2]*].

[4] Wrongful Interference With Severance Contract

Generally, when a landowner prevents or interferes with performance of a contract to sever timber standing on his or her land, the court may extendthe term of the contract by operation of law [*Mallett v. Doherty (1919) 180 Cal. 225, 230, 180 P. 531* ; *Rossi v. Hackett (1961) 190 Cal. App. 2d 400, 408, 12 Cal. Rptr. 12*]. The court's power to extend the term of such a contract, however, does not include the power to grant further extensions because of contingencies not related to procedural matters intended to accomplish the enforcement of the judgment; for example, the inability of the logger to obtain rights-of-way over adjacent land in order to reach the property to be logged [*Orban Lbr. Co. v. Fearrien (1966) 240 Cal. App. 2d 853, 858-859, 50 Cal. Rptr. 41*].

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§ 350.14 Reservation of Timber Rights

A deed reserving to the grantor the right to remove timber "at any time" in the future from the deeded land was held to give the grantor a perpetual right to remove the timber [*Cochran v. Union Lumber Co. (1972) 26 Cal. App. 3d 423, 426, 102 Cal. Rptr. 632*]. On the other hand, a deed granting land with a reservation of the use of the surface by the grantor for pasturage and farming until the construction of a dam did not by implication reserve timber rights, even though the deed allowed the owner to take timber from the land for the upkeep of his fences and buildings [*Coffill v. Bach (1958) 159 Cal. App. 2d 163, 168, 323 P.2d 873*].

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§ 350.14A Failure to Deliver Timber With Land

When specific performance of an exercised option to convey timber-land is ordered, but the vendors cut and removed some of the timber before exercise of the option, rendering full performance impossible, the purchaser is entitled to take the land and timber remaining as partial performance, with compensation for the timber removed. The measure of damages is the same as in an action at law for partial breach of the contract of sale [*McCowen v. Pew (1905) 147 Cal. 299, 303, 81 P. 958* (compensation cannot be allowed in the enhanced value thereof, as if the timber removed had been left standing when the proposed railroad was completed)]. Namely, damages are to be calculated at the value at the time when the vendors were ready to complete the contract by making a deed sufficient to convey good title to the vendees [*McCowen v. Pew (1905) 147 Cal. 299, 303, 81 P. 958* (deed satisfying option contract was delayed)].

For full discussion of specific performance, see Ch. 528, *Specific Performance* .

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§ 350.15 Logger's and Lumber-Millman's Liens

Any person who uses his or her own labor or his or her livestock, machinery, or appliances in connection with felling, preparing, or transporting any logs or in manufacturing lumber or other products therefrom, has a lien on the logs and products for unpaid wages [*Civ. Code § 3065*]. For these purposes, a corporation is a "person" eligible to obtain a logger's lien [*Acco Contractors, Inc. v. McNamara & Peepe Lumber Co. (1976) 63 Cal. App. 3d 292, 294, 297, 133 Cal. Rptr. 717]* . This law does not allow a lien for hauling lumber as such after it has been manufactured to a point where it is prepared for consumption merely because the person who purchases it wants to have it hauled to another point for remanufacture [*Morehouse v. Shipman Lbr. Servaes Co. (1959) 168 Cal. App. 2d 135, 141, 335 P.2d 496]* .

The lien extends to all logs and manufactured products not removed from the county [*Civ. Code § 3065a*]. This limitation renders the statute largely ineffective. It is common knowledge that the method of handling logs and the manufacture of logs into lumber has changed radically with the advent of powerful trucking equipment and powerful machinery for use in the woods. Instead of mills located in the woods whereby the process of making lumber was carried at least to the point of rough lumber manufacture before the materials were hauled out, it is now common for the trees to be felled, prepared for shipment and then trucked as logs or cants to centrally-located mills that may be hundreds of miles from the point where the trees were felled. As the industry is now conducted, loggers' liens limited to the county where the work is done are often lost before the next payday of the laborer. These considerations, however, do not justify a distortion by way of construction of plain legislative provisions. Any needed change in the legislation is for the Legislature [*Morehouse v. Shipman Lbr. Servaes Co. (1959) 168 Cal. App. 2d 135, 138, 335 P.2d 496]* .

The lien is limited in duration to 30 days unless an action is instituted within 30 days of cessation of work by plaintiff to foreclose the lien [*Civ. Code § 3065a*; *see § 350.67* for form of complaint]. The date of cessation of the work must be construed to mean the final date work was done or services rendered on any of the logs, lumber, or other manufactured timber products on which the lien is claimed, so as to give the lien claiment or his or her assignee or successor in interest a full 30 days after final cessation of labor to bring suit to foreclose the lien [*Civ. Code § 3065b*; *see Virden v. Neese (1944) 66 Cal. App. 2d 724, 730-731, 152 P.2d 761*]. The lien does not depend on possession or notice [*Division of Labor Law Enforcement v. Siskiyou Mills (1964) 229 Cal. App. 2d 105, 109, 40 Cal. Rptr. 111*].

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§ 350.16 Labor Commissioner's Stop Order

Whenever any faller, bucker, or millhand [*see § 350.11* for definitions] has a logger's lien pursuant to *Civ. Code § 3065* and has not been paid for his or her labor by the contractor employing him or her and money is owing to such contractor by a mill operator, the faller, bucker, or millhand may file with the Labor Commissioner an affidavit stating the amount of wages unpaid and describing the labor for which the wages are owed and the period in which the labor was performed [*Civ. Code § 3065c*]. If the Labor Commissioner finds the affidavit in order, he or she must send to the mill operator a stop notice directing the mill operator to withhold funds in the amount of the unpaid wages from the contractor [*Civ. Code § 3065c*; *see § 350.69* for form of declaration].

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§ 350.17 Security Deposits by Contractors

Before commencing work in any period for which a payment of wages would be due, a logging contractor or sawmill operations contractor must either (1) have on hand or on deposit with a bank or trust company sufficient cash or readily salable market securities to pay the wages of each person to be employed during the pay period (or for four weeks, whichever is longer); or (2) deposit with the Labor Commissioner an acceptable bond conditioned on the payment of all wages found by the Labor Commissioner to be due and unpaid in connection with such operations [*Lab. Code § 270.5*]. An exception from compliance with this rule is made only if the person has an unencumbered title to the fee of real property located within California which has a market value sufficient to pay the wages of every person to be employed during the pay period or for four weeks, whichever is longer [*Lab. Code § 270.5*].

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§ 350.18 Marking of Logs and Timber

In all cases when two or more persons, firms, or corporations are engaged in or intend to engage in putting or placing logs or timber into any navigable water in California to raft or float them for one mile or more to a place of manufacture or sale, the person, firm, or corporation may have some mark of his, her, or its selection, authenticated as provided by statute, impressed in a conspicuous place on the end or surface of each log or piece of timber [*Pub. Res. Code § 4875*]. Any log or timber that has such a recorded mark impressed on it must be presumed to belong to the person, firm, or corporation in whose name it was recorded [*Pub. Res. Code § 4877*].

It is unlawful, except for boom companies that may be required to catch and hold logs or timber, to take up or have in possession, sell, dispose of, or convert or appropriate to one's own use any marked log without the owner of the mark's written consent, and knowledge of the ownership of all such timber must be conclusively presumed on proof that the timber was marked and the mark recorded [*Pub. Res. Code § 4879*]. Cutting or altering a mark is also a criminal offense [*Penal Code § 356*].

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§ 350.19 Floating or Drifting Logs

Whenever any lumber drifts on any island in any of the waters in California or on the bank of any such waters, the owner of the lumber may remove it on payment or tendering to the owner or occupant of the land the amount of damages sustained by the owner or occupant by reason of the drifting of the lumber, and which may accrue in its removal [*Pub. Res. Code § 4853*]. As used in *Pub. Res. Code §§ 4851-4855*, "lumber" means all timber, whether in logs, boards, planks, or beams, and whether in rafts or otherwise, but does not include driftwood [*Pub. Res. Code § 4851*]. If the owner of the lumber does not remove it within three months from the time it drifted, the landowner or occupant must deliver a bill of charges and the lumber to the county sheriff for disposal [*Pub. Res. Code § 4853*]. When sold, the proceeds of the lumber must be applied first to the payment of the charges of sale and liquidation of the expenses and damages awarded to the claimant, with the residue going to the county treasurer [*Pub. Res. Code § 4854*]. On production by the former lumber owner of proof of ownership satisfactory to the judge of the county and his or her order therefor, the county treasurer must pay the residue over to the former lumber owner [*Pub. Res. Code § 4854*]. The rejection by the judge of any claimant's right to such proceeds is conclusive unless he or she commences action within six months thereafter to obtain the proceeds [*Pub. Res. Code § 4855*].

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§ 350.20 State Control of Timber Resources

Control of timber resources in California is vested in the State Board of Forestry and Fire Protection, part of the Department of Forestry [*see Pub. Res. Code § 730*]. Among the board's responsibilities are (1) representation of the state's interest in the acquisition and management of state forests as provided by law and in federal land matters relating to forestry protection of the state's interests in forest resources on private lands, and (2) the determination, establishment, and maintenance of an adequate forest policy [*Pub. Res. Code § 740*]. The board is also mandated to prepare and implement a forest management information storage and retrieval program [*Pub. Res. Code § 743*], and implement a public information program on matters involving forest management [*Pub. Res. Code § 745*]. State agencies submit to the board plans for, and the results of, all investigations relating to or having an effect on forest resource utilization for review and comment, and the board may, at its expense, contract with any state or local agency to investigate and report on any technical factors involved in forest management [*Pub. Res. Code § 743*].

Detailed implementation of the State Board of Forestry's functions appears in *Pub. Res. Code § 4001 et seq.* Among the more important of these sections for purposes of this chapter are *Pub. Res. Code § 4101 et seq.*, dealing with prevention and control of forest fires, and *Pub. Res. Code § 4511 et seq.*, known as the Z'berg-Nejedly Forest Practice Act of 1973, which creates a comprehensive system of regulation and use of all timberlands [*see Pub. Res. Code § 4513*; *see also Laupheimer v. State of California (1988) 200 Cal. App. 3d 440, 457, 246 Cal. Rptr. 82* (holding Forest Practice Act facially constitutional); for detailed coverage of the Forest Practice Act, see Manaster and Selmi, California Environmental Law and Land Use Practice, Ch. 80, *Forestry Development* (Matthew Bender)]. Other sections of note are *Pub. Res. Code § 4851 et seq.*, dealing with floating lumber, and *Pub. Res. Code § 4875 et seq.*, dealing with the marking of logs.

Finally, a specific logging operation on privately owned timberlands is subject to *Pub. Res. Code § 21000 et seq.*, commonly known as the California Environmental Quality Act (CEQA), even though the logger may prepare a timber harvesting plan under the Forest Practice Act instead of a complete environmental impact report (EIR) [*Environmental Protection Info. Ctr., Inc. v. Johnson (1985) 170 Cal. App. 3d 604, 609, 616, 216 Cal. Rptr. 502* ; *see Pub. Res. Code § 21080.5* (exemption from filing complete EIR); *Laupheimer v. State of California (1988) 200 Cal. App. 3d 440, 462, 246 Cal. Rptr. 82* ("cumulative impact" analysis not required in timber harvesting plan); *see also Sierra Club v. State Bd. of Forestry (1994) 7 Cal. 4th 1215, 1230-1231, 1234, 32 Cal. Rptr. 2d 19, 876 P.2d 505* (timber

harvesting exempt only from EIR requirements and CEQA time limits)]. For complete coverage of CEQA, see Ch. 418, *Pollution and Environmental Matters* , and Manaster and Selmi, California Environmental Law and Land Use Practice, Chs. 20-23 (Matthew Bender).

The Forest Practice Act [*Pub. Res. Code § 4101 et seq.*] and the California Timberland Productivity Act [*Gov. Code § 51100 et seq.*] do not expressly or impliedly preempt all local zoning regulations with regard to timber operations. Thus, county ordinances restricting timber harvesting operations to specific areas and regulating the areas where helicopter operations associated with harvesting could occur were not preempted. Local zoning ordinances that speak to the location of timber operations, but not to the manner in which they are carried out, are not preempted [*Big Creek Lumber Co. v. City of Santa Cruz (2006) 38 Cal. 4th 1139, 1157*].

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§ 350.21 Growing Trees by Planned Production

The growing of trees by planned production is considered to be a branch of the agricultural industry of the state for purposes of any law providing for the benefit or protection of the agricultural industry [*Food & Agric. Code § 22*]. Additionally, trees grown by planned production are considered to be growing agricultural crops for the purpose of any laws pertaining to the agricultural industry of the state [*Food & Agric. Code § 23(a)*].

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[Reserved]

§§ 350.22[Reserved]

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31-350 California Forms of Pleading and Practice--Annotated § 350.40

§ 350.40 Related Matthew Bender Publications

[1] California Environmental Law and Land Use Practice

For detailed coverage of forestry issues in California, including discussion of timber harvesting and land use regulation of forest land, see Manaster and Selmi, sCalifornia Environmental Law and Land Use Practice, Ch. 80, *Forestry Development* (Matthew Bender).

For coverage of wildlife protection, including detailed discussions of the federal and state Endangered Species Acts, see Manaster and Selmi, sCalifornia Environmental Law and Land Use Practice, Ch. 81, *Endangered, Threatened, and Sensitive Species Regulation* (Matthew Bender).

[2] California Legal Forms

For coverage of establishing a timber operation, including forms of contracts and grant deeds, see sCalifornia Legal Forms--sTransaction Guide, Ch. 36A, *Mining Claims, Timber Interests, and Water Rights* (Matthew Bender).

[3] Forms of Discovery

For forms of interrogatories for use in an action for damages for trees cut and removed, see sBender' sS sForms of Discovery, Ch. 123, *Logs and Timber* (Matthew Bender)

For forms of interrogatories in an action against a cotenant for waste from the cutting and sale of timber, see sBender' sS sForms of Discovery, Ch. 158, *Real Property*, pt. IV, "Cotenancy" (Matthew Bender)

For forms of interrogatories in an action to enjoin waste when trees were cut or destroyed, see sBender' sS sForms of

Discovery, Ch. 212, *Waste* (Matthew Bender)

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§ 350.41 State Constitution

Taking of private property by logging railroad is deemed to be taking for public use. *Cal. Const., art. I, § 19* (Annotations)

Exemption of immature trees from taxation. *Cal. Const., art. XIII, § 3(j)*

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31-350 California Forms of Pleading and Practice--Annotated § 350.42

§ 350.42 Federal Statutes

National forests. *16 U.S.C. §§ 471a et seq., 551 et seq.*

Protection of timber on federal lands. *16 U.S.C. § 593 et seq.*

Exemption of certain timber industry employees from Fair Labor Standards Act. *29 U.S.C. § 213(b)(28)*

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§ 350.43 State Statutes

[1] Agricultural Industry

Planned production of trees is considered as branch of agricultural industry of state for purposes of any law providing for benefit or protection of agricultural industry. *Food & Agric. Code § 22*

Trees, vines, and other horticultural crops grown by planned production are growing agricultural crops for purpose of any laws pertaining to agricultural industry of state. *Food & Agric. Code § 23*

[2] Crimes and Offenses

Cutting or altering marks on log, lumber, or wood is misdemeanor. *Penal Code § 356*

Driving metallic or ceramic object into tree intended for harvest or wood intended for manufacture is felony; additional prison term in case of injury to another. *Penal Code § 593a*

Possession of any iron, steel, ceramic, or other substance sufficiently hard to injure saws or wood manufacturing or processing equipment with intent to violate *Penal Code § 593a* is punishable by imprisonment not in excess of one year. *Penal Code § 593g*

Willful or negligent commission of acts prohibited by or omission of acts required by *Pub. Res. Code § 4251 et seq.* (statutes protecting forest lands) is misdemeanor. *Pub. Res. Code § 4021*

Violation of any provision of Z'berg-Nejedly Forest Practice Act of 1973 [*Pub. Res. Code § 4511 et seq.*] is

misdemeanor. *Pub. Res. Code § 4601*

Imposition of civil penalty in misdemeanor action for violation of Z'berg-Nejedly Forest Practice Act of 1973. *Pub. Res. Code § 4601.1(a)(2)*

Violation of procedural rule or regulation that does not result in any environmental damage is an infraction. *Pub. Res. Code §§ 4601.4, 4601.5*

Possession, sale, disposal, or conversion of marked logs or timber is punishable by fine or imprisonment. *Pub. Res. Code § 4879*

Running steam-powered logging locomotive or other steam-run machine near forest land without adequate devices to prevent escape of fire or sparks is misdemeanor. *Health & Safety Code § 13003*

[3] Damages for Injuries or Removal

Treble damages for wrongful injuries to timber, trees, or underwood on another's land, or removal thereof. *Civ. Code § 3346(a)*; *Code Civ. Proc. § 733*

Double damages when trespass causing injuries was casual or involuntary, or when defendant had probable cause to believe that land on which trespass committed was his or her own or land of person in whose service or by whose direction act was done. *Civ. Code § 3346(a)*

Actual damages when injury to wood caused by taking by highway officers to repair public highway or bridge on land or adjoining it. *Civ. Code § 3346(a)*

Damages to owner of land injured by drifting lumber. *Pub. Res. Code § 4852*

[4] Drifting Lumber

Term "lumber" in *Pub. Res. Code § 4851 et seq.* includes all timber, but excludes driftwood. *Pub. Res. Code § 4851*

Damages payable to owner of land injured by drifting lumber. *Pub. Res. Code § 4852*

Disposition of lumber by sheriff when owner does not remove it within three months from time of drifting. *Pub. Res. Code § 4853*

Application of proceeds of sale of drifting lumber. *Pub. Res. Code §§ 4854, 4855*

[5] Easements

Right to take wood from land is type of easement appurtenant to land. *Civ. Code § 801(5)*

Right to take wood is easement creatable by grant. *Civ. Code § 802(6)*

[6] Forests and Forestry

California Timberland Productivity Act. *Gov. Code § 51100 et seq.*

Protection of forest and other open lands. *Pub. Res. Code § 4101 et seq.*

Z'berg-Nejedly Forest Practice Act of 1973. *Pub. Res. Code § 4511 et seq.*

Dividing forest areas of state into districts and formation of district technical advisory committees. *Pub. Res. Code § 4531 et seq.*

Resource conservation standards for timber operations. *Pub. Res. Code § 4561 et seq.*

Timber operations and harvesting. *Pub. Res. Code § 4571 et seq.*

Injunctions and corrective action for violation of Z'berg-Nejedly Forest Practice Act of 1973 [*Pub. Res. Code § 4511 et seq.*]. *Pub. Res. Code § 4605 et seq.*

Conversion of timberland to purposes other than growing of timber. *Pub. Res. Code § 4621 et seq.*

Management, protection, and reforestation of state forests. *Pub. Res. Code §§ 4645, 4738*

Forest resources. *Pub. Res. Code § 4790 et seq.*

California Forest Legacy Program Act of 2007, allowing Department of Forestry and Fire Protection, federal and state agencies, local governments, and nonprofit land trust organizations to acquire and hold conservation easements in private forest lands. *Pub. Res. Code § 12200 et seq.*

[7] Logger's and Lumber-Millman's Liens

Right of logger and those performing work or services in connection with manufacturing lumber or timber products from logs to lien on logs and products. *Civ. Code § 3065*

Limitation of logger's lien to 30 days from cessation of work or rendition of services. *Civ. Code §§ 3065a, 3065b*

[8] Marking of Logs and Timber

Selection, authentication, and impression of mark on logs to be placed into navigable waters within *California. Pub. Res. Code § 4875*

Recordation and notice in writing of mark. *Pub. Res. Code § 4876*

Presumption that log bearing mark belongs to person, firm, or corporation in whose name mark was recorded. *Pub. Res. Code § 4877*

Effect of neglecting to record mark. *Pub. Res. Code § 4878*

[9] Sale of Logs and Timber

Recordation of contracts for sale of standing timber or trees. *Civ. Code § 1220*

Contract for sale of timber to be cut is within scope of Division 2--Sales of the Uniform Commercial Code. *Com. Code § 2107(2)*

[10] Secured Transactions

Enforceability of security interest covering timber to be cut. *Com. Code § 9203(b)(1), (2), (3)(A)*

Requirements for financing statement covering timber to be cut. *Com. Code § 9502(b), (c)*

Indexing in real property index of grantors of financing or continuation statement relating to timber. *Com. Code § 9519(d), (e)*

[11] Taxation

California taxation of natural resources is determined in accordance with *I.R.C. § 611 et seq. Rev. & Tax. Code § 17681*

Valuation of timberland. *Rev. & Tax. Code § 423.5*

[12] Transporting Logs and Timber

Vehicle length limitations do not apply to poles or timbers not exceeding 80 feet in length transported in manner provided by statute. *Veh. Code § 35414*

Weight limits of vehicles transporting loads composed solely of logs (Christensen-Belotti Act). *Veh. Code § 35552*

Penalty for use of steam-powered logging locomotive or other steam-run machine near forest land without adequate devices to prevent escape of fire or sparks. *Health & Safety Code § 13003*

[13] Unpaid Wages

Stop notice by Labor Commissioner when mill operator failed to pay wages due and owing. *Civ. Code § 3065c*

Logging or sawmill operations contractor or agents are required to have sufficient funds on hand to pay wages for pay period or four calendar weeks, whichever is longer, or to deposit bond of surety company with Labor Commissioner sufficient to cover same, or to own property sufficient to cover wages. *Lab. Code § 270.5*

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§ 350.44 State Regulations

Regulations for forest districts. *14 Cal. Code Reg. § 895 et seq.*

Timber operator permits. *14 Cal. Code Reg. § 1020 et seq.*

Conversion of timberland. *14 Cal. Code Reg. § 1100 et seq.*

State forest timber sales. *14 Cal. Code Reg. § 1510 et seq.*

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§ 350.45 Decisions

[1] Damages for Injury to Timber

Damages for both value of timber and restoration of property through reforestation was proper when both timber and soil were damaged by fire caused by defendant and when plaintiff required by law to replant to certain minimum density. *People v. Southern Pacific Co. (1983) 139 Cal. App. 3d 627, 635, 188 Cal. Rptr. 913*

[2] Definitions

Word "timber," unless modified or controlled by other expressions in an instrument, means trees fit to be used for lumber in building or construction. *Buffum v. Texaco, Inc. (1966) 241 Cal. App. 2d 732, 735, 50 Cal. Rptr. 852* ; *Crain v. Hoefling (1942) 56 Cal. App. 2d 396, 405, 132 P.2d 882*

[3] Drifting or Floating Logs

Former *Pub. Res. Code § 4702* [*see now Pub. Res. Code § 4852*], providing that when lumber (which term includes logs) drifts on any island in any of the waters of this state, or on the bank of any such waters, its owner may remove it on payment or tendering to owner or occupant of land amount of damages sustained by reason thereof and which may accrue in its removal, requires payment of damages to tenant in possession of damaged land and does not requiring any allocation of any portion of such damages to landlord. *Bess v. Wise (1969) 275 Cal. App. 2d 158, 163, 79 Cal. Rptr. 611*

Former *Pub. Res. Code § 4702* [*see now Pub. Res. Code § 4852*], does not directly indemnify owner or occupant of riparian land against damage from floating logs or require owner of logs to pay such damages, but permits owner of logs to recover them from land on payment or tender of damages to owner or occupant thereof. *Bess v. Wise (1969) 275 Cal. App. 2d 158, 163-164, 79 Cal. Rptr. 611*

Right of landlord to be subrogated to right of tenant to receive damages caused by floating logs under *Pub. Res. Code § 4702* [*see now Pub. Res. Code § 4852*] to the extent that landlord has made expenditures in repairing damage done to leased premises by flood-borne logs. *Bess v. Wise (1969) 275 Cal. App. 2d 158, 165, 79 Cal. Rptr. 611*

Lessee is entitled to proceeds of sale of unmarked logs lodged on leased premises by floodwater. *Bess v. Wise (1969) 275 Cal. App. 2d 158, 165-167, 79 Cal. Rptr. 611*

[4] Environmental Requirements for Logging Operation

Timber harvest operations are subject to all provisions of California Environmental Quality Act (CEQA) except environmental impact report (EIR) requirements and CEQA time limits [*Pub. Res. Code § 21167*]; Department of Forestry is authorized by *Pub. Res. Code § 21160* to request information needed to identify significant adverse impacts of timber harvest plan, even if information is not required by forest practice rules. *Sierra Club v. State Bd. of Forestry (1994) 7 Cal. 4th 1215, 1230-1231, 1234, 32 Cal. Rptr. 2d 19, 876 P.2d 505*

Declaratory relief action alleging Department of Forestry engaged in "pattern and practice" of improperly assessing cumulative impacts of logging in Mokelumne River watershed but not alleging any specific violations raised actual controversy for which relief could be available; plaintiff failed to prove that Department's pattern and practice of assessing cumulative impacts was legally inadequate. *East Bay Mun. Utility Dist. v. Department of Forestry (1996) 43 Cal. App. 4th 1113, 1119, 1129, 51 Cal. Rptr. 2d 299*

Pub. Res. Code § 21167.4, which requires request for hearing to be filed within 90 days of filing writ of mandate challenging an EIR, applies to writs challenging timber harvest plans. *Dakin v. Department of Forestry & Fire Protection (1993) 17 Cal. App. 4th 681, 686-687, 21 Cal. Rptr. 2d 490*

"Cumulative impact" provisions of CEQA Guidelines (*14 Cal. Code Reg. § 15000 et seq.*) do not apply literally to timber harvesting plan procedure set forth in Forest Practice Act of 1973 (*Pub. Res. Code § 4511 et seq.*); Forestry Department is only required to look for, and in some reasonable manner assess, potential cumulative environmental effects and to give sufficient consideration to any effect reasonably considered significant; requisite consideration was not given when cumulative impact issues were repeatedly brought to Department's attention and Department failed to incorporate adequate response into major issue statement prepared pursuant to *Pub. Res. Code § 4582.6*. *Laupheimer v. State of California (1988) 200 Cal. App. 3d 440, 462, 466, 246 Cal. Rptr. 82* (distinguishing *Environmental Protection Information Center, Inc. v. Johnson (1985) 170 Cal. App. 3d 604, 216 Cal. Rptr. 502*)

California Department of Transportation had no duty to comply with CEQA requirements before issuing encroachment permits that allowed timber to be hauled off logging site via busy mountain highway, because Department had no power of approval over activities integral to logging project. *Lexington Hills Assn. v. State of California (1988) 200 Cal. App. 3d 415, 429, 430-431, 246 Cal. Rptr. 97*

CEQA and its substantive criteria for evaluation of proposed project's environmental impact apply to timber harvesting industry, and is deemed part of Forest Practice Act of 1973 (*Pub. Res. Code § 4511 et seq.*) and *Forestry Rules. Environmental Protection Information Center, Inc. v. Johnson (1985) 170 Cal. App. 3d 604, 626, 216 Cal. Rptr. 502*

Exemption granted to timber harvesting industry under *Pub. Res. Code § 21080.5* is not blanket exemption from CEQA, but instead grants only limited exemption from CEQA by allowing timber harvester to prepare timber harvesting plan pursuant to Forest Practice Act of 1973 (Pub. Res. Code§ 4511 et seq.) in lieu of complete EIR; remainder of CEQA applies to timber harvesting industry. *Environmental Protection Information Center, Inc. v. Johnson (1985) 170 Cal. App. 3d 604, 616, 620, 216 Cal. Rptr. 502*

CEQA provides that agencies evaluating timber harvesting project for environmental impact consult with all agencies having jurisdiction over affected natural resources, including archaeological sites; Native American Heritage Commission has that jurisdiction [*Pub. Res. Code § 21080.4*]. *Environmental Protection Information Center, Inc. v. Johnson (1985) 170 Cal. App. 3d 604, 626, 216 Cal. Rptr. 502*

[5] Logger's and Lumber-Millman's Liens

Logger's lien provided by *Civ. Code § 3065* is not dependent on possession or notice. *Division of Labor Law Enforcement v. Siskiyou Mills (1964) 229 Cal. App. 2d 105, 109, 40 Cal. Rptr. 111*

Lien, and not attachment, creates logger's interest in property. *Division of Labor Law Enforcement v. Siskiyou Mills (1964) 229 Cal. App. 2d 105, 113, 40 Cal. Rptr. 111*

Logger's lien was lost when owner ships logs or lumber out of county before commencement of foreclosure action. *Division of Labor Law Enforcement v. Siskiyou Mills (1964) 229 Cal. App. 2d 105, 109, 40 Cal. Rptr. 111* ; *Morehouse v. Shipman Lbr. Servaes Co. (1959) 168 Cal. App. 2d 135, 138, 335 P.2d 496*

Thirty day period for logger's lien prescribed by statute [*see Civ. Code § 3065*] does not commence to run until final cessation of labor on all logs covered by logging contract. *Virden v. Neese (1944) 66 Cal. App. 2d 724, 730-731, 152 P.2d 761*

[6] Ownership of Trees

Rule that in common ownership of trees each of owners is entitled to realize value of his or her own interest and that in considering situation when one owner sells trees from part of common property, court is entitled to view all of contiguous lands owned by persons involved, so that if one owner takes no more than his or her legitimate fractional interest of total, other owners in common may not complain, is qualified by another rule of equal authority that one owner in common cannot take more than his or her fractional share in value of products of common property involved. *Garibaldi v. Garibaldi (1968) 264 Cal. App. 2d 9, 11, 70 Cal. Rptr. 92*

[7] Permits for Loggers

Logger is not a specialty contractor required to be licensed under Contractors License Law [*Bus. & Prof. Code § 7000 et seq.*], but is subject to former Forest Practice Act [*Pub. Res. Code § 4521 et seq.*], which controls activities of loggers in logging and clearing of timberlands, and permit required by *Pub. Res. Code § 4586* is only permit state requires. *Fray v. Rogers (1969) 272 Cal. App. 2d 858, 863, 77 Cal. Rptr. 776*

[8] Protection of Forests

County ordinance requiring use permit before designating land as timberland preserve zone conflicted with Forest Taxation Reform Act of 1976 (*Gov. Code § 51110 et seq.*), which allows landowners to receive tax benefits as incentive for protecting and conserving timberland. *State of California v. County of Santa Clara (1983) 142 Cal. App. 3d 608, 613-614, 191 Cal. Rptr. 204*

[9] Reservation of Timber Rights

Deed reserving to grantor right to remove timber "at any time" in future gave grantor perpetual right to do so. *Cochran v. Union Lbr. Co. (1972) 26 Cal. App. 3d 423, 426, 102 Cal. Rptr. 632*

[10] Sales Contracts of Timber

[a] In General

Fee interest in standing timber is conveyable separately from title to property on which timber stands. *Buffum v. Texaco, Inc. (1966) 241 Cal. App. 2d 732, 734, 50 Cal. Rptr. 852* ; *Miller v. Taber (1957) 149 Cal. App. 2d 792, 795, 309 P.2d 110*

Where grant is of "all the merchantable timber," court looks first to grant itself for definition of what parties intended "merchantable timber" to mean. *Mailliard v. Willow Creek Ranch Co. (1969) 273 Cal. App. 2d 370, 374, 78 Cal. Rptr. 139*

Grant of land with reservation of use of surface for pasturage and farming until construction of dam did not constitute reservation of ownership in timber, even though deed allowed owner to take timber for upkeep of fencing and repair of buildings on land. *Coffill v. Bach (1958) 159 Cal. App. 2d 163, 168, 323 P.2d 873*

In action for breach of contract to sell both land and timber, statutory measure of contract damages [*Civ. Code § 3300*] does not allow plaintiff to recover damages both for appreciation in value of timber on land and depreciation in value of mill erected by plaintiff on land, when latter was not caused by breach itself. *Crag Lbr. Co., Inc v. Crofoot (1956) 144 Cal. App. 2d 755, 777, 301 P.2d 952*

[b] Severance of Standing Timber

Contract for sale of standing trees to be severed and removed within specified period of time passes title to vendee to only those trees cut and removed within period. *Whittaker v. Thompson (1959) 53 Cal. 2d 192, 194, 1 Cal. Rptr. 7, 347 P.2d 7* ; *Drewry v. Welch (1965) 236 Cal. App. 2d 159, 165, 46 Cal. Rptr. 65* ; *see Mallett v. Doherty (1919) 180 Cal. 225, 229, 180 P. 531*

Standing timber purchased separately from land under contract for severance becomes personalty under *Civ. Code §§ 658* and *660* for all purposes depending on contract of purchase. *Sloan v. Hiatt (1966) 245 Cal. App. 2d 926, 929, 54 Cal. Rptr. 351* ; *see Palmer v. Wahler (1955) 133 Cal. App. 2d 705, 711, 285 P.2d 8*

Fact that growing timber is treated as goods in sales contract does not cause title to pass ipso facto unless contract

shows that to be intention of parties. *Drewry v. Welch (1965) 236 Cal. App. 2d 159, 166, 46 Cal. Rptr. 65* (decided under former *Civ. Code § 1739*)

Formal notice of rescission of logging contract given five months after discovery of mutual mistake as to boundaries of land to be logged is sufficiently prompt when facts showed other grounds of rescission arose during five-month interval which were continuing subjects of discussion between parties. *Hil-Mac Corp. v. Mendo Wood Products, Inc. (1965) 235 Cal. App. 2d 526, 530, 45 Cal. Rptr. 396*

In action against timber owner for breach of contract to cut and remove merchantable timber, trial court's failure to take into account value to plaintiff of being able to remove logging equipment and accept employment elsewhere was error requiring reduction in damages awarded plaintiff. *Pfaff v. Fair-Hipsley, Inc. (1965) 232 Cal. App. 2d 274, 281-283, 42 Cal. Rptr. 624*

Severed timber is personal property of purchaser. *Eistrat v. Western Hardwood Lbr. Co. (1958) 164 Cal. App. 2d 374, 379, 330 P.2d 629*

Measure of damages where defendant failed to deliver precision cut lumber under logging contract is value to contractee of performance of contract as against damage occasioned by reason of nonperformance. *Israel v. Campbell (1958) 163 Cal. App. 2d 806, 816-817, 330 P.2d 83*

Contract for right to sever and remove timber is contract for sale of goods. *Ascherman v. McKee (1956) 143 Cal. App. 2d 277, 282-283, 299 P.2d 367*

Damages were properly awardable to supplier of logs when evidence showed that defendant's method of measuring supplied logs resulted in deprival to plaintiff of credit for 63,540 feet of lumber. *Kinkle v. Fruit Growers Supply Co. (1944) 63 Cal. App. 2d 102, 107-108, 146 P.2d 8*

[11] State Control of Timber Resources

Forest Practice Act and California Timberland Productivity Act do not preempt county ordinances regulating location of timber operations. *Big Creek Lumber Co. v. City of Santa Cruz (2006) 38 Cal. 4th 1139, 1157*

County ordinance requiring conditional use permit to harvest timber on residential-zoned property is preempted by *Pub. Res. Code § 4516.5* of Forest Practice Act (*Pub. Res. Code § 4511 et seq.*) when timber operations are to occur on land area of three or more acres. *Westhaven Community Development Council v. County of Humboldt (1998) 61 Cal. App. 4th 365, 371-372, 71 Cal. Rptr. 2d 536*

Regulation exempting timber operations on any parcel of land of less than three acres from requirement of preparing timber harvest plan [former *14 Cal. Code Reg. § 1038(c)*] was not authorized by statute and therefore was invalid. *Environmental Protection Information Center v. Department of Forestry & Fire Protection (1996) 43 Cal. App. 4th 1011, 1027, 50 Cal. Rptr. 2d 892*

County ordinance establishing timber harvest buffer zone is not preempted by *Forest Practice Act. Big Creek Lumber*

Co. v. County of San Mateo (1995) 31 Cal. App. 4th 418, 422, 37 Cal. Rptr. 2d 159

[12] Wrongful Interference With Severance Contract

Extension by operation of law of time for performance of contract to enter another's land and cut timber where landowner prevented performance ofcontract. *Mallett v. Doherty (1919) 180 Cal. 225, 230, 180 P. 531* ; *Rossi v. Hackett (1961) 190 Cal. App. 2d 400, 408, 12 Cal. Rptr. 12*

Court's power to extend term of logging contract on finding of wrongful interference does not include power to grant further extension because of contingencies not related to procedural matters intended to accomplish enforcement of judgment, e.g., inability to obtain rights-of-way over land adjacent to defendant's property to reach standing timber covered by contract. *Orban Lbr. Co. v. Fearrien (1966) 240 Cal. App. 2d 853, 858-859, 50 Cal. Rptr. 41*

[13] Wrongful Removal of Timber

Damages for wrongful removal of orange trees was cost of replacement of trees; plaintiff was entitled to doubled damages even though punitive damages were not awarded, but not if punitive damages are awarded. *Baker v. Ramirez (1987) 190 Cal. App. 3d 1123, 1137-1138, 235 Cal. Rptr. 857*

Damages for injury to trees to be doubled or trebled pursuant to *Civ. Code § 3346* are those damages determined by trier of fact to constitute just compensation within overall limits of reasonableness regardless of what specific measure of damages was used. *Heninger v. Dunn (1980) 101 Cal. App. 3d 858, 869, 162 Cal. Rptr. 104*

Double damages provision of *Civ. Code § 3346* is irrelevant when trees are damaged by fire, and legislative intent is that only actual damages are recoverable therefor. *Gould v. Madonna (1970) 5 Cal. App. 3d 404, 407-408, 85 Cal. Rptr. 457*

Right of landowner on expiration of contract for removal of timber to damages for all timber removed after that time. *Hendren v. Yonash (1966) 243 Cal. App. 2d 672, 680-681, 52 Cal. Rptr. 738*

Treble damage statute for wrongful removal of timber [*Civ. Code § 3346*] is penalty statute calling for strict construction. *Ghera v. Sugar Pine Lbr. Co. (1964) 224 Cal. App. 2d 88, 92, 36 Cal. Rptr. 305*

Award of treble damages pursuant to *Civ. Code § 3346* or *Code Civ. Proc. § 733* is warranted only when defendant's acts were willful and malicious. *Caldwell v. Walker (1963) 211 Cal. App. 2d 758, 762, 27 Cal. Rptr. 675* ; *Crofoot Lumber, Inc. v. Ford (1961) 191 Cal. App. 2d 238, 246, 12 Cal. Rptr. 639*

Discretion of trial court in awarding treble damages for wrongful removal of timber. *Caldwell v. Walker (1963) 211 Cal. App. 2d 758, 763, 27 Cal. Rptr. 675* ; *Roche v. Casissa (1957) 154 Cal. App. 2d 785, 788, 316 P.2d 776* ; *Butler v. Zeiss (1923) 63 Cal. App.73, 77, 218 P. 54*

Intent of defendant wrongfully removing timber from plaintiff's land is question of fact for the trial court. *Crofoot*

Lumber, Inc. v. Ford (1961) 191 Cal. App. 2d 238, 246-247, 12 Cal. Rptr. 639

Jury instruction in accord with *Civ. Code § 3346* treble damage provision was proper, even though complaint alleged conversion of "logs" and statute only mentioned "timber and trees." *Sweet v. Erickson (1958) 166 Cal. App. 2d 598, 601, 333 P.2d 369*

Proper place for trial of action for damages from defendant's cutting down of trees is county in which trees were located. *Wolfe v. Wallace (1957) 154 Cal. App. 2d 523, 527, 316 P.2d 697*

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§ 350.46 Attorney General Opinions

Contractor performing logger's tasks to prepare trees for mill and only then hauling logs to mill is not highway carrier within Public Utilities Code. *49 Cal. Op. Att'y Gen. 23, 24 (1967)*

Standards for loggers' and sawmill operators' bonds. *30 Ops. Cal. Att'y Gen. 194 (1957)*

Calculating of excess weight for purposes of fine on vehicles transporting logs. *32 Ops. Cal. Att'y Gen. 77, 78 (1958)*

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§ 350.47 Law Reviews

Comment, *Delegation of Power to Regulatory Agencies: Standards and Due Process in the Bayside Timber Case, 1 Ecol. L.Q. 773 (1971)*

Comment, *Trees, Earth, Water and Ecological Upheaval: Logging Practices and Watershed Protection in California, 54 Cal. L. Rev. 1117 (1966)*

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[Reserved]

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PART IV. FORMS

31-350 California Forms of Pleading and Practice--Annotated § 350.60

§ 350.60 Complaint [Code Civ. Proc. § 425.10] for Damages for Breach of Contract [Civ. Code § 3300]--By Seller of Timber Rights Against Buyer--Failure to Pay Balance of Guaranteed Minimum Price and to Exhaust All Merchantable Saw or Better Timber

[1] FORM Complaint for Damages for Breach of Contract [Civ. Code § 3300]--By Seller of Timber Rights Against Buyer--Failure to Pay Balance of Guaranteed Minimum Price and to Exhaust All Merchantable Saw or Better Timber

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	(Contract)
Defendants.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[*EITHER*]

1. Defendants _____ [*names*] are, and at all times herein mentioned were, residents of _____ County, California [, in the _____ (*name*) _____ Judicial Court District].

[*OR*]

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California with its principal place of business in _____ [*city*], _____ County, California [, in the _____ (*name*) _____ Judicial Court District].

[*CONTINUE*]

2. [Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by their conduct.)]

3. [Defendants _____ (*names*) at all times herein mentioned were the agents and employees of their codefendants _____ (*names*) and in doing the things hereinafter alleged were acting within the course and scope of such agency and the permission and consent of their codefendants.]

4. On or about _____ [*date*], in _____ [*city*], _____ County, California, plaintiff and defendants entered into an agreement in writing, whereby defendants agreed to cut and remove timber from certain tracts on which plaintiff held timber rights, as more fully set out in the agreement. A copy of the agreement is attached to this complaint as Exhibit A and made a part of this complaint.

5. By the agreement, defendants agreed to pay plaintiff as the purchase price of plaintiff's timber rights the sum of $_____ per thousand board feet on all timber removed with a guaranteed minimum of $_____, payable as more particularly set out in Paragraph _____ of the agreement.

6. In breach of the agreement, defendants have paid the sum of $ _____ only on account of the purchase price, leaving a balance of $ _____ due and unpaid.

7. By the agreement, defendants also agreed to exhaust all merchantable saw or better timber on the tracts and to pay plaintiff the sum of $_____ per thousand board feet on all such timber removed in excess of _____ million board feet, as more particularly set out in Paragraph _____ of the agreement.

8. At the time of making the agreement, there was standing on the tracts in excess of _____ million board feet of merchantable saw or better timber.

9. In breach of the agreement, defendants harvested only _____ board feet of said timber, leaving unharvested _____ board feet of merchantable saw or better timber.

10. By reason of the breach of agreement, plaintiff has been further damaged in the sum of $_____, as follows: _____ [*specify, e.g.*, _____ board feet unharvested at the rate of $_____ per thousand board feet, less $_____ per thousand board feet payable as stumpage to the owner of the land on which the tracts of timber stand].

11. [By the agreement, defendants agreed to pay plaintiff a reasonable attorney's fee in any action brought to enforce any of the provisions of the agreement, as more particularly set out in Paragraph _____ of the

agreement. The sum of $_____ is a reasonable sum to allow plaintiff as an attorney's fee.]

12. Plaintiff has duly performed all of the conditions of the agreement to be performed on the plaintiff's part.

WHEREFORE, plaintiff prays judgment against defendant's, and each of them, as follows:

1. For damages in the sum of $_____.

2. For interest at _____ percent per annum from _____ [*date*].

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.
Date: _____

_____ [*signature*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*signature*]

[2] Use of Form

This form is a complaint for damages for breach of contract by a seller of timber rights against a buyer of rights. It can be used when the buyer failed to pay the balance of a guaranteed minimum price and to exhaust all merchantable saw or better timber. The form was adapted from the complaint filed in *Price v. Tree Topper Timber Co. (1962) 202 Cal. App. 2d 412, 415-416, 20 Cal. Rptr. 817* .

[3] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*].

If the action is a limited civil case, the caption must state whether the demand exceeds or does not exceed $10,000 and must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is an unlimited civil case in the superior court [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case ifthe action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Interest on Awarded Damages

Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him or her on a particular day, is also entitled to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt [*Civ. Code § 3287(a)*]. Every person who is entitled under any judgment to receive damages based on a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed [*Civ. Code § 3287(b)*].

[6] "Stumpage" Defined

The word "stumpage," used in Paragraph 10 in this form, means "the value of standing timber."

[7] Statutes

Contract for sale of timber to be cut is within scope of Division 2--Sales of the Uniform Commercial Code. *Com. Code § 2107(2)*

Attorney's fees in contract actions. *Civ. Code § 1717*

[8] Decisions

Fee interest in standing timber is conveyable separately from title to property on which timber stands. *Buffum v. Texaco, Inc. (1966) 241 Cal. App. 2d 732, 734, 50 Cal. Rptr. 852* ; *Miller v. Taber (1957) 149 Cal. App. 2d 792, 795, 309 P.2d 110*

Severed timber is personal property of purchaser. *Eistrat v. Western Hardwood Lbr. Co. (1958) 164 Cal. App. 2d 374, 379, 330 P.2d 629*

Contract for right to sever and remove timber is contract for sale of goods. *Ascherman v. McKee (1956) 143 Cal. App. 2d 277, 282-283, 299 P.2d 367*

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31-350 California Forms of Pleading and Practice--Annotated § 350.61

§ 350.61 Complaint [Code Civ. Proc. § 425.10] for Damages for Breach of Contract [Civ. Code § 3300]--By Purchaser of Timber Against Seller--Refusal to Sell Timber on Exercise by Purchaser of Option to Purchase

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages for Breach of Contract [Civ. Code § 3300]--By Purchaser of Timber Against Seller--Refusal to Sell Timber on Exercise by Purchaser of Option to Purchase

[*Caption. See § 350.60[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 350.60[1], Paragraph 1.*]

2. [*Allegation for fictitious defendants. See § 350.60[1], Paragraph 2.*]

3. [*Allegation for agency. See § 350.60[1], Paragraph 3.*]

4. On or about _____ [*date*], in _____ [*city*], _____ County, California, plaintiff and defendants entered into an agreement in writing, whereby defendants agreed to sell and granted plaintiff an option to purchase certain timber and timberlands situated in _____ County, California, and described as follows: _____ [*description*].

5. A copy of the agreement is attached to this complaint as Exhibit A and made a part of this complaint.

6. The agreement provided that the purchase price would be determined by a cruise being conducted by _____ [*name of timber cruiser*], multiplied by $_____ per thousand board feet, and provided for a cash down payment by plaintiff in the sum of $_____, or _____ percent of the total purchase price, whichever amount were smaller as determined by said cruise, and as more particularly set out in Paragraph _____ of the agreement.

7. The agreement provided for exercise by plaintiff of his/her option to purchase within _____ [*number*] days of the date of the agreement, as more particularly set out in Paragraph _____ of the agreement.

8. Within this period and on _____ [*date*], plaintiff exercised by notice in writing his/her option to purchase and advised defendants that plaintiff was ready, able, and willing to pay the cash down payment as provided for and to be determined by the cruise. A copy of the notice is attached to this complaint as Exhibit B and made a part of this complaint.

9. In breach of the agreement, defendants failed and refused to furnish plaintiff with a copy of the cruise that would determine the amount of the cash down payment and failed and refused to sell the timber and timberlands to plaintiff and continue to so do.

10. By reason of the breach of agreement by defendants, plaintiff has been damaged in the sum of $_____, as follows: _____ [*specify*].

11. Plaintiff has duly performed all of the conditions of the agreement to be performed on the plaintiff's part.

[*Prayer. See § 350.60[1].*]

Date: _____

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 350.60[1].*]

[2] Use of Form

This form is a complaint for damages for breach of contract by a buyer of timber against a seller. It can be used when the seller refused to sell after the buyer exercised an option to purchase. The form was adapted from the complaint filed in *Hansen Pac. Corp. v. Buck Mountain Logging Co. (1961) 191 Cal. App. 2d 826, 831-832, 13 Cal. Rptr. 82* .

[3] "Timber Cruiser" Defined

A "timber cruiser" is a person who estimates the volume and value of marketable standing timber and maps it out for logging.

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31-350 California Forms of Pleading and Practice--Annotated § 350.62

§ 350.62 Complaint [Code Civ. Proc. § 425.10] for Damages for Breach of Contract [Civ. Code § 3300]--By Mill Operator Against Logging Contractor--Failure to Furnish Agreed Amount of Logs for Sawing Into Lumber

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages for Breach of Contract [Civ. Code § 3300]--By Mill Operator Against Logging Contractor--Failure to Furnish Agreed Amount of Logs for Sawing Into Lumber

[*Caption. See § 350.60[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 350.60[1], Paragraph 1.*]

2. [*Allegation for fictitious defendants. See § 350.60[1], Paragraph 2.*]

3. [*Allegation for agency. See § 350.60[1], Paragraph 3.*]

4. On or about _____ [*date*], in _____ [*city*], _____ County, California, plaintiff and defendants entered into an agreement in writing, whereby defendants agreed to furnish _____ board feet of logs suitable for sawing and plaintiff agreed to saw the same into lumber for defendants. A copy of the agreement is attached to this complaint as Exhibit A and made a part of this complaint.

5. By the agreement, defendants agreed to pay plaintiff the sum of $_____ per _____ thousand board feet of lumber sawed, payable as more particularly set out in Paragraph _____ of the agreement.

6. Defendants have furnished only _____ board feet of logs for sawing, leaving a balance of _____ board feet of logs to be furnished for sawing under the agreement.

7. In breach of the agreement, defendants have failed and refused to furnish the balance of logs for sawing and continue

to so do.

8. By reason of the breach of agreement by defendants, plaintiff has been damaged in the sum of $_____ [*amount payable for sawing unfurnished balance of logs*].

9. Plaintiff has duly performed all of the conditions of the agreement to be performed on the plaintiff's part.

[*Prayer. See § 350.60[1].*]

Date: _____

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 350.60[1].*]

[2] Use of Form

This form is a complaint for damages for breach of contract by a lumber mill operator against a logging contractor. It can be used when thecontractor failed to furnish an agreed amount of logs to the mill operator for sawing into lumber.

[3] Cross References

See *§ 350.60*

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31-350 California Forms of Pleading and Practice--Annotated § 350.63

§ 350.63 Complaint [Code Civ. Proc. § 425.10] for Damages for Breach of Contract [Civ. Code § 3300]--By Lumber Company Against Purchaser of Lumber--Failure to Pay for Lumber Furnished and to Complete Purchase of Agreed Amount

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages for Breach of Contract [Civ. Code § 3300]--By Lumber Company Against Purchaser of Lumber--Failure to Pay for Lumber Furnished and to Complete Purchase of Agreed Amount

[*Caption. See § 350.60[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 350.60[1], Paragraph 1.*]

2. [*Allegation for fictitious defendants. See § 350.60[1], Paragraph 2.*]

3. [*Allegation for agency. See § 350.60[1], Paragraph 3.*]

4. On or about _____ [*date*], in _____ [*city*], _____ County, California, plaintiff and defendants entered into a written agreement, whereby plaintiff agreed to sell and defendants agreed to buy lumber of designated sizes and in designated amounts. A copy of the agreement is attached to this complaint as Exhibit A and made a part of this complaint.

5. By the agreement, plaintiff agreed to sell and defendants agreed to buy the following lumber: _____ pcs - _____" x _____" x _____' [DF S4S] - _____ pcs - _____" x _____" x _____' [DF S4S], all lumber to be certified _____ [*e.g.*, # 2] and better and to be precision cut to length, at a price of $_____ per thousand board feet, delivery to be made within _____ days, and payment for each shipment to be made within _____ days after delivery.

6. Plaintiff has duly performed all of the conditions of the agreement to be performed on the plaintiff's part.

7. Pursuant to the agreement, plaintiff delivered to defendants _____ board feet of lumber on the following respective dates, for which defendants agreed to pay the following respective amounts:

Date	B.F.	Amount
_____	___	$_____
	___	_____
	___	
	___	
	___	
	___	
	__	
_____	___	$_____
	___	_____
	___	
	___	
	___	
	___	
	__	
Total	_____	_____
		____

B.F. $__
___
___
___
___
___
___

The total amount due from defendant to plaintiff is $_____.

8. Defendants have not paid any part of the sum, and the whole amount of $_____ remains due, owing, and unpaid from defendants to plaintiff.

9. On or about _____ [*date*], defendants requested plaintiff [by letter, a copy of which is attached to this complaint as Exhibit B and made a part of this complaint] to hold up any further deliveries under the agreement, except those en route, or in process, or specifically ordered as listed above.

10. On or about _____ [*date*], defendants notified plaintiff to proceed no further with the deliveries under the agreement.

11. Labor and expense of material amount were necessary on the part of plaintiff to enable him/her to fulfill his/her obligation under the written agreement. The profit plaintiff would have made if defendants had accepted and paid for the balance of the lumber, amounting to _____ board feet, would have been the sum of $_____, being $_____ per thousand board feet. The plaintiff has thereby been damaged in the sum of $_____, no part of which has been paid by defendants to plaintiff.

[*Prayer. See § 350.60[1].*]

Date: _____

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 350.60[1].*]

[2] Use of Form

This form is a complaint for damages for breach of contract by a lumber company against a purchaser of lumber. It can be used when the buyer has failed to pay for lumber provided and to complete the purchase of an agreed amount. The complaint is adapted from the complaint filed in *Israel v. Campbell (1958) 163 Cal. App. 2d 806, 815-816, 330 P.2d 83* .

[3] Cross References

See *§ 350.60*

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31-350 California Forms of Pleading and Practice--Annotated § 350.64

§ 350.64 Complaint [Code Civ. Proc. § 425.10] to Recover Value of Timber Removed From Land After Elapse of Time for Removal--By Buyer of Land Against Seller Acting Under Prior Timber Sales Contract

[1] FORM Complaint [Code Civ. Proc. § 425.10] to Recover Value of Timber Removed From Land After Elapse of Time for Removal--By Vendee of Land Against Vendor Acting Under Prior Timber Sales Contract

[*Caption. See § 350.60[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 350.60[1], Paragraph 2.*]

2. [*Allegation for fictitious defendants. See § 350.60[1], Paragraph 2.*]

3. [*Allegation for agency. See § 350.60[1], Paragraph 3.*]

4. On or about _____ [*date*], in _____ [*city*], _____ County, California, plaintiff and defendants entered into an agreement in writing, whereby defendants agreed to sell and plaintiff agreed to purchase certain timberlands situated in _____ County, California, and described as follows: _____ [*description*].

5. A copy of the agreement is attached to this complaint as Exhibit A and made a part of this complaint.

6. The agreement provided that the rights of plaintiff as purchaser were subject to a previously executed timber contract, whereby defendants sold to _____ [*name of timber purchaser*] for cash _____ [*e.g.*, seven] million board feet of timber growing on the property and the timber purchaser agreed to cut _____ [*e.g.*, one and one-half] million board feet of timber a year over a period of _____ [*e.g.*, five] years. A copy of the timber contract is attached to this complailnt as Exhibit B and made a part of this complaint.

7. The agreement set forth as Exhibit A also provided that defendants had the right to cut within a _____ [*e.g.*, six] -year period any timber on the lands not included in the timber contract set forth as Exhibit B, for which defendants agreed to pay plaintiff the sum of $_____ per thousand board feet for all merchantable timber so removed.

8. Pursuant to the agreement set forth as Exhibit A and on or about _____ [*date*], plaintiff took title to the timberlands from defendants under a deed subject to the sale by defendants of timber to the timber purchaser.

9. On or about _____ [*date*], the _____ [*e.g.*, five] -year period provided by timber contract Exhibit B for removing _____ [*e.g.*, seven] million board feet of timber elapsed; during the period the timber purchaser removed approximately _____ [*e.g.*, four] million board feet, leaving a balance uncut and unremoved of approximately _____ [*e.g.*, three and one-half] million board feet.

10. After elapse of the _____ [*e.g.*, five] -year period, but within the _____ [*e.g.*, six] -year period provided by agreement Exhibit A for removalby defendants of any timber not included in the timber contract Exhibit B, defendants cut and removed _____ [*e.g.*, 3,140,452] board feet from the timberlands, obligating defendants to pay plaintiff therefor at the rate of $_____ per thousand board feet.

11. Defendants have failed and refused to pay plaintiff for the timber so removed by defendants and continue to so do, claiming the volume is includable in the uncut balance sold the timber purchaser under timber contract Exhibit B.

12. Title to any uncut balance under timber contract Exhibit B remained in defendants and passed to plaintiff under the deed of conveyance of the timberlands on elapse of the _____ [*e.g.*, five] -year period for removal, and the volume cut by defendants thereafter is not includable in or chargeable to the timber contract.

13. Plaintiff has duly performed all of the conditions of agreement Exhibit A to be performed on the plaintiff's part.

[*Prayer. See § 350.60[1].*]

Date: _____

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 350.60[1].*]

[2] Use of Form

This form is a complaint by a purchaser of land under a timber sales contract against the seller. It can be used to recover the value of timber removed from the land after the time for removal has lapsed. The complaint is adapted from the facts of *Whittaker v. Thompson (1959) 53 Cal. 2d 192, 194, 1 Cal. Rptr. 7, 347 P.2d 7* .

[3] Decisions

Contract for sale of standing timber to be cut and removed within specified time passes title to buyer to only those trees

cut and removed within designated period, even though payment was made for greater volume. *Whittaker v. Thompson (1959) 53 Cal. 2d 192, 194, 1 Cal. Rptr. 7, 347 P.2d 7* ; *Mallett v. Doherty (1919) 180 Cal. 225, 229, 180 P. 531*

[4] Cross References

See *§ 350.60*

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§ 350.65 Complaint [Code Civ. Proc. § 425.10] by Owner of Timber for Treble Damages for Wrongful Cutting or Removal of Timber [Civ. Code § 3346(a); Code Civ. Proc. § 733]--Willful Removal of Cut and Bucked Timber

[1] FORM Complaint [Code Civ. Proc. § 425.10] by Owner of Timber for Treble Damages for Wrongful Cutting or Removal of Timber [Civ. Code § 3346(a); Code Civ. Proc. § 733]--Willful Removal of Cut and Bucked Timber

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	(Wrongful Cutting and Removal of Timber)
Defendants.	)	[*Civ. Code § 3346(a)*; *Code Civ. Proc. § 733*]
	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 350.60[1], Paragraph 1.*]

2. [Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES _____ [*e.g.*,1-25], inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by their conduct.)]

3. [Defendants _____ (*names*) at all times herein mentioned were the agents and employees of their codefendants _____ (*names*) and in doing the things hereinafter alleged were acting within the course

and scope of such agency and the permission and consent of their codefendants.]

4. At all times mentioned herein, plaintiff was the owner of certain land and timber rights situtated in _____ County, California, and described as follows: _____ [*description*].

5. At all times mentioned herein, plaintiff owned a large volume of cut and bucked timber lying on the land which consisted of _____ [*amount and description of timber*].

6. In or about the month of _____ [*month and year*], defendants wrongfully entered on the land with full knowledge of the ownership of plaintiff of the land and of all standing and cut timber thereon, and willfully andmaliciously logged out all the cut and bucked timber for defendants' own use.

7. At the time of removal, the cut and bucked timber had a reasonable value of $_____. By reason of the wrongful entry and willful and malicious removal, plaintiff is entitled to treble damages in the sum of $_____ under the provisions of *Civil Code Section 3346(a)* and *Code of Civil Procedure Section 733*.

WHEREFORE, plaintiff prays for judgment against defendants, and each of them, as follows:

1. Treble damages in the sum of $_____.

2. Costs of suit herein incurred.

3. Such other and further relief as the court may deem proper.
Date: _____

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 350.60[1].*]

[2] Use of Form

This form is a complaint by an owner of timber for treble damages for the wrongful cutting or removal of timber. It can be used when the defendant has willfully removed cut and "bucked" timber. The complaint was adapted from the facts in *Sweet v. Erickson (1958) 166 Cal. App. 2d 598, 601, 333 P.2d 369* .

[3] Treble Damages

For wrongful injuries to or removal of timber, trees, or underwood on another's land, the measure of damages is three times the sum as would compensate for the actual detriment [*Civ. Code § 3346(a)*; *Code Civ. Proc. § 733*]. Although the statutes do not specifically mention willfulness or malice as a precondition for such an award, recovery of treble damages cannot be had except on such a showing [*Caldwell v. Walker (1963) 211 Cal. App. 2d 758, 762, 27 Cal. Rptr. 675* ; *Crofoot Lumber, Inc. v. Ford (1961) 191 Cal. App. 2d 238, 246, 12 Cal. Rptr. 639]* .

[4] "Bucked" Timber Defined

"Bucked" timber is felled timber that has been cut into log lengths suitable for transportation from the tract to the mill.

[5] Statutes

Treble damages for wrongful injuries to or removal of timber. *Civ. Code § 3346(a)*; *Code Civ. Proc. § 733*

[6] Decisions

Precondition of willfulness or malice to recovery of treble damages under *Civ. Code § 3346(a)* or *Code Civ. Proc. § 733*. *Caldwell v. Walker (1963) 211 Cal. App. 2d 758, 762, 27 Cal. Rptr. 675* ; *Crofoot Lumber, Inc. v. Ford (1961) 191 Cal. App. 2d 238, 246, 12 Cal. Rptr. 639*

Damages recoverable for wrongful cutting to timber. *Drewry v. Welch (1965) 236 Cal. App. 2d 159, 172, 46 Cal. Rptr. 65*

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§ 350.66 Complaint [Code Civ. Proc. § 425.10] by Owner of Timber for Treble Damages for Wrongful Cutting or Removal of Timber [Civ. Code § 3346(a); Code Civ. Proc. § 733]--Willful and Malicious Topping of Growing Trees

[1] FORM Complaint [Code Civ. Proc. § 425.10] by Owner of Timber for Treble Damages for Wrongful Cutting or Removal of Timber [Civ. Code § 3346(a); Code Civ. Proc. § 733]--Willful and Malicious Topping of Growing Trees

[*Caption. See § 350.65[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 350.60[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 350.65[1], Paragraph 2.*]

3. [*Agency allegation, if appropriate. See § 350.65[1], Paragraph 3.*]

4. At all times mentioned herein, plaintiff was, and now is, the owner of a certain lot situated in _____ County, California, and described as follows: _____ [*description*].

5. At all times mentioned herein to and including _____ [*date*], there were numerous growing trees on the lot consisting of _____ [*type, varying height, and age of trees*].

6. In or about the month of _____ [*month and year*], defendants wrongfully entered on the lot with full knowledge of the ownership of plaintiff of the lot and growing trees thereon, and willfully and maliciously topped and destroyed the trees by cutting several feet from the tops and trunks of the trees.

7. Immediately before the topping and destruction of trees, the lot with growing trees had a reasonable value of $_____; after the topping and destruction of trees the lot had a reasonable value of only

$_____, resulting in a loss of $_____.

8. By reason of the wrongful entry and willful and malicious topping and destruction of trees by defendant, plaintiff is entitled to treble damages in the sum of $_____ under the provisions of *Civil Code Section 3346(a)* and *Code of Civil Procedure Section 733*.

[*Prayer. See § 350.65[1].*]

Date: _____

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 350.60[1].*]

[2] Use of Form

This form is a complaint by an owner of timber for treble damages for the wrongful cutting or removal of timber. It can be used when the defendant has willfully and maliciously "topped" growing trees. The form is adapted from the complaint filed in *Roche v. Casissa (1957) 154 Cal. App. 2d 785, 788, 316 P.2d 776* .

[3] "Top" Defined

To "top" is to remove or cut the top of. The word "topping," the noun form of the verb "top," appears in this form.

[4] Cross References

See *§ 350.65*

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Chapter 350 LOGS AND TIMBER
PART IV. FORMS

31-350 California Forms of Pleading and Practice--Annotated § 350.67

§ 350.67 Complaint [Code Civ. Proc. § 425.10] by Logger Against Timber Owner and Mill Operator to Foreclose Lien [Civ. Code §§ 3065, 3065a, 3065b]

[1] FORM Complaint [Code Civ. Proc. § 425.10] by Logger Against Timber Owner and Mill Operator to Foreclose Lien [Civ. Code §§ 3065, 3065a, 3065b]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO FORECLOSE LOGGER'S LIEN
_____ [*names*],	)	[*Civ. Code §§ 3065, 3065a, 3065b*]
Defendants.	)	
	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 350.60[1], Paragraph 1.*]

2. [*Allegation for fictitious defendants. See § 350.60[1], Paragraph 2.*]

3. [*Allegation for agency. See § 350.60[1], Paragraph 3.*]

4. At all times mentioned herein, defendant _____ [*timber owner*] was the owner of certain timberlands situated in _____ County, California, and described as follows: _____ [*description*].

5. At all times mentioned herein, defendant _____ [*mill owner and operator*] was the owner and operator of a certain lumber mill located at _____, in _____ County, California.

6. On or about _____ [*date*], defendant _____ [*timber owner*] employed plaintiff to _____ [*specify, e.g.*, fall, buck, and limb logs on the lands], at the rate of _____ [*amount and method of computing pay*].

7. Pursuant to *Civil Code Section 3065*, a copy of the contract of employment by which defendant employed plaintiff was recorded in the office of the county recorder of _____ County. A copy of the contract is attached to this complaint as Exhibit A and made a part of this complaint.

8. Pursuant to the employment, plaintiff began work on _____ [*date*], and thereafter to and including _____ [*date*], plaintiff _____ [*describe services, e.g.*, cut, bucked, and limbed approximately _____ feet of timber], for which services defendant _____ [*timber owner*] became indebted to plaintiff in the sum of $_____.

9. Plaintiff did not finally cease to perform these services until _____ [*date*], which is within 30 days last past.

10. Plaintiff claims a lien under *Civil Code Sections 3065*, *3065a*, and *3065b* on all the logs in connection with which the services were rendered and on all of the products manufactured therefrom, which logs and products are located within the county and described as follows: _____ [*location and description*].

11. Defendant _____ [*mill owner and operator*] claims some interest in the logs and products, but, such interest, if any, is subordinate to the lien of plaintiff.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. Adjudging that plaintiff has a lien on all the logs and products in the sum of $_____.

2. Awarding judgment against defendant _____ [*timber owner*] in the sum of $_____.

3. Adjudging the interest, if any, of defendant _____ [*mill owner and operator*] in the logs and products to be subject to the lien of plaintiff.

4. Ordering the sale of sufficient logs and products to satisfy plaintiff's lien.

5. For costs of suit herein incurred.

6. For such other and further relief as the court may deem proper.
Date: _____

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 350.60[1].*]

[2] Use of Form

This form is a complaint by a logger against a timber owner and mill operator to foreclose the logger's lien. The complaint is adapted from the complaint used in *Virden v. Neese (1944) 66 Cal. App. 2d 724, 730-731, 152 P.2d 761* .

[3] Logger's and Lumber-Millman's Liens

A complaint to foreclose a logger's lien must be filed within 30 days after final cessation of work by plaintiff [*Civ. Code §§ 3065a, 3065b*; *see Virden v. Neese (1944) 66 Cal. App. 2d 724, 730-731, 152 P.2d 761*]. The lien only applies to logs and timber products remaining in the county [*Civ. Code § 3065a*; *Morehouse v. Shipman Lbr. Servaes Co. (1959) 168 Cal. App. 2d 135, 138, 335 P.2d 496*]. The lien as provided by *Civ. Code § 3065* is not dependent on possession or notice [*Division of Labor Law Enforcement v. Siskiyou Mills (1964) 229 Cal. App. 2d 105, 109, 40 Cal. Rptr. 111*].

The plaintiff in a foreclosure suit may have the logs, lumber, and other manufactured timber products on which such lien subsists attached, as provided in the Civil Code and Code of Civil Procedure [*Civ. Code § 3065a*].

[4] Statutes

Logger's and lumber-millman's liens. *Civ. Code § 3065*

Thirty-day limitation of lien; attachment. *Civ. Code § 3065a*

Cessation of work defined. *Civ. Code § 3065b*

[5] Decisions

Action to foreclose logger's lien. *Virden v. Neese (1944) 66 Cal. App. 2d 724, 730-731, 152 P.2d 761*

Statutory lien is not dependent on possession or notice. *Division of Labor Law Enforcement v. Siskiyou Mills (1964) 229 Cal. App. 2d 105, 109, 40 Cal. Rptr. 111*

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31-350 California Forms of Pleading and Practice--Annotated § 350.68

§ 350.68 Declaration Under Penalty of Perjury [Code Civ. Proc. § 2015.5]--By Logger or Lumber-Millman for Writ of Attachment [Civ. Code § 3065a]--To Attach Logs and Products on Which Logging Lien Subsists [Civ. Code § 3065]

[1] FORM Declaration Under Penalty of Perjury [Code Civ. Proc. § 2015.5]--By Logger or Lumber-Millman for Writ of Attachment [Civ. Code § 3065a]--To Attach Logs and Products on Which Logging Lien Subsists [Civ. Code § 3065]

[*Caption. As on papers previously filed in proceeding.*]

I, _____ [*name*], declare:

I am the plaintiff in the above-entitled action and make this declaration under penalty of perjury for the purpose of having attached the logs and products on which my logging lien subsists, which logs and products are located and described as follows: _____ [*location and description*].

I _____ [performed labor *or* used my _____ (livestock *or* machinery *or* appliances *or combination*)] in _____ [_____ (felling *or* bucking *or* preparing *or* transporting) said logs *or* manufacturing the lumber and other timber products *or combination*], for a period from _____ [*date*] to _____ [*date*] in _____ County, California.

Such _____ [labor *or* use of _____ (livestock *or* machinery *or* appliances) *or combination*] has not been paid for.

The sum for which the attachment is asked, namely $_____, does not exceed the reasonable value of the _____ [services rendered *or* use of _____ (livestock *or* machinery *or* appliances) *or combination*].

The attachment is not sought and the action is not brought to hinder, delay, or defraud any creditor of any defendant

herein.

The attachment is made pursuant to *Civil Code Sections 3065* and *3065a*. The attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any other creditor of the defendant. Plaintiff has no information or belief that the defendant has filed any proceeding under the National Bankruptcy Act or has made a general assignment for the benefit of creditors [*or* Defendant's proceeding under the National Bankruptcy Act was terminated on _____ [*date*] and plaintiff's claim was not discharged in that proceeding as shown by the attached _____ [*specify document*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

Plaintiff

[2] Use of Form

This form is a declaration for use in obtaining attachment of logs, lumber, and other manufactured timber products on which a logger's lien subsistspursuant to *Civ. Code §§ 3065, 3065a* and which lien is the subject of a foreclosure suit [*see § 350.67*]. *Civ. Code § 3065a* provides that the attachment may be made as provided in the Civil Code and Code of Civil Procedure. Thus, counsel is advised to attach this declaration to the Judicial Council-approved form of Application and Declaration for Attachment and Temporary Restraining Order [*Code Civ. Proc. §§ 482.040, 486.010*; *see* Ch. 62, *Attachment ; see also § 350.60*] and to follow the attachment procedure set forth in that chapter.

Nothing contained in the logger's lien foreclosure sections [*Civ. Code §§ 3065, 3065a*] may be construed to impair or affect the right of any person to whom any debt may be due for work done, or for the use of livestock, machinery, or appliances, to maintain a personal action to recover the debt against the person liable therefor or his or her sureties, either in connection with the lien suit or in a separate action [*Civ. Code § 3065a*]. The person bringing such a personal action may take out a separate attachment, notwithstanding his or her lien or the amount of his or her debt [*Civ. Code § 3065a*]. The judgment, if any, obtained by plaintiff in his or her personal action shall not be construed to impair or merge any lien held by plaintiff under *Civ. Code §§ 3065, 3065a*, provided only that any money collected on the judgment must be credited on the amount of the lien in any action brought to enforce the same in accordance with *Civ. Code § 3065a* [*Civ. Code § 3065a*].

[3] Statutes

Attachment of logs and products on which logger's lien subsists; affidavit. *Civ. Code § 3065a*

Declaration under penalty of perjury. *Code Civ. Proc. § 2015.5*

[4] Cross References

See *§ 350.67*

For a discussion and forms relating to the provisional remedy of attachment, see Ch. 62, *Attachment*

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31-350 California Forms of Pleading and Practice--Annotated § 350.69

§ 350.69 Declaration Under Penalty of Perjury [Code Civ. Proc. § 2015.5]--By Faller, Bucker, or Millhand for Stop Notice From Labor Commissioner to Mill Operator [Civ. Code § 3065c]--To Withhold Money Owing to Contractor-Employer in Amount of Unpaid Wages

[1] FORM Declaration Under Penalty of Perjury [Code Civ. Proc. § 2015.5]--by Faller, Bucker, or Millhand for Stop Notice From Labor Commissioner to Mill Operator [Civ. Code § 3065c]--To Withhold Money Owing to Contractor-Employer in Amount of Unpaid Wages

To: Labor Commissioner of the State of California

I, _____ [*name*], declare:

I am a _____ [faller *or* bucker *or* millhand] having a lien pursuant to *Civil Code Section 3065* and have not been paid for labor performed for _____ [*name*], contractor, described as follows: _____ [*description of labor performed*].

The period in which this labor was performed is _____ [*date*], to and including _____ [*date*].

The amount of wages unpaid to me for this labor is $_____.

Money is owing to the contractor by _____ [*name*], mill operator, whose address is _____.

I make this declaration under penalty of perjury for the purpose of securing a stop notice directing the mill operator to withhold funds owing to the contractor in the amount of my unpaid wages.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on _____ [*date*], at _____ [*city*], California.

_____ [*signature*]

[2] Use of Form

This form may be filed by a faller, bucker, or millhand with the Labor Commissioner to obtain a stop notice directing a mill operator to withhold from funds due a contractor the amount of unpaid wages as described in the affidavit or declaration of the faller, bucker, or millhand [*Civ. Code § 3065c*].

[3] Definitions

A "faller" is a logger who fells trees. A "bucker" is a worker who cuts felled trees into shorter lengths. A "millhand" is a worker in a lumber mill.

[4] Stop Orders

Whenever any faller, bucker, or millhand has a lien pursuant to *Civ. Code § 3065* and has not been paid for his or her labor by the contractor employing him or her and money is owed to the contractor by a milloperator, the worker, or several of them acting jointly, may file with the Labor Commissioner an affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) stating the amount of unpaid wages, describing the labor for which the wages are owed, and the period in which the labor was performed [*Civ. Code § 3065c*]. If the Labor Commissioner finds the affidavit or declaration in order, he or she must send a stop notice to the mill operator, directing the mill operator to withhold funds in the amount of the unpaid wages from the contractor [*Civ. Code § 3065c*]. The mill operator must withhold such funds for 15 days from the date of service of the notice, subject to garnishment within that time by the worker or any assignee of the worker [*Civ. Code § 3065c*].

[5] Statutes

Faller's, bucker's, or millhand's lien. *Civ. Code § 3065*

Affidavit for stop notice from Labor Commissioner to mill operator to withhold money owing to employer contractor. *Civ. Code § 3065c*

Declaration under penalty of perjury. *Code Civ. Proc. § 2015.5*

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31-350 California Forms of Pleading and Practice--Annotated § 350.70

§ 350.70 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Treble Damages Not Available [Civ. Code § 3346; Code Civ. Proc. § 733]--Defendant Did Not Act Maliciously

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Treble Damages Not Available [Civ. Code § 3346; Code Civ. Proc. § 733]--Defendant Did Not Act Maliciously

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

Treble damages are not available because defendant did not act willfully or maliciously.

[2] Use of Form

This form of affirmative defense is for use by a defendant in an answer to a complaint for treble damages for the wrongful cutting or removal of timber. *Civ. Code § 3346* and *Code Civ. Proc. § 733* allow treble damages for the wrongful injury or removal of timber. Under these statutes the wrongful act must be willful and malicious for treble damages to be recovered [*Caldwell v. Walker (1963) 211 Cal. App. 2d 758, 762, 27 Cal. Rptr. 675* ; for further discussion, *see § 350.12[1]*]. The above affirmative defense is adapted from the fact situation in *Crofoot Lumber, Inc. v. Ford (1961) 191 Cal. App. 2d 238, 12 Cal. Rptr. 639* .

[3] Statutes

Treble damages for wrongful injuries to trees on another's land; double damages if trespass was casual or involuntary; actual damages if trespass was in reliance on survey by licensed surveyor. *Civ. Code § 3346*

Person cutting down or carrying off wood on land of another without lawful authority is liable for treble damages. *Code Civ. Proc. § 733*

[4] Decisions

Actual damages measure under *Civ. Code § 3346* does not apply when defendant relied on survey made by unlicensed surveyor. *Lindroth v. Windbigler (1965) 232 Cal. App. 2d 844, 845-847, 43 Cal. Rptr. 355*

Treble damages are available only when wrongdoer intentionally acted willfully or maliciously, intending to vex, harass, annoy, or injure. *Caldwell v. Walker (1963) 211 Cal. App. 2d 758, 762, 27 Cal. Rptr. 675* ; *Crofoot Lumber, Inc. v. Ford (1961) 191 Cal. App. 2d 238, 12 Cal. Rptr. 639*

Treble damages under *Civ. Code § 3346* and *Code Civ. Proc. § 733* are inappropriate against one who entered property of another, cut trees, and removed stumps when (1) actor had been considerably damaged over lengthy period, (2) owner did nothing to alleviate damage even though prior owner had allowed action, (3) action appeared to be only way to prevent damage, and (4) actor made real attempts to determine true owner of landbefore acting to protect his land from further damage. *Fick v. Nilson (1950) 98 Cal. App. 2d 683, 685-686, 220 P.2d 752*

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31-350 California Forms of Pleading and Practice--Annotated § 350.71

§ 350.71 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Treble Damages Not Available [Civ. Code § 3346; Code Civ. Proc. § 733]--Defendant Did Not Wrongfully Enter and Remove Timber

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Treble Damages Not Available [Civ. Code § 3346; Code Civ. Proc. § 733]--Defendant Did Not Wrongfully Enter and Remove Timber

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

There was no wrongful entry or removal of timber because there was an agreed on boundary line that was not crossed.

[2] Use of Form

This form of affirmative defense is for use by a defendant in an answer to a complaint for treble damages for the wrongful entry and willful removal of timber. When the requirements for an agreed boundary have been met, a defendant may assert that boundary as an adequate defense to a claim of damages for trespass to timber and treble damages [*Aborigine Lumber Co. v. Hyman (1966) 245 Cal. App. 2d 938, 941-943, 54 Cal. Rptr. 371]* .

[3] Cross References

For discussion relating to agreed boundary lines, see Ch. 101, *Boundaries*

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Chapter 351 LONG-TERM HEALTH AND RESIDENTIAL CARE

31-351 California Forms of Pleading and Practice--Annotated 351.syn

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.syn Synopsis to Chapter 351: LONG-TERM HEALTH AND RESIDENTIAL CARE

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[5] Licensee

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§ 351.220 Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)], Permanent Injunction [Civ. Code § 3422], and Damages [Civ. Code § 3333]--By Patient of Long-Term Health Care Facility Against Licensee for Class A or Class B Violation [Health & Safety Code § 1430(a)]

[1] FORM

[2] Use of Form

[3] Allegations

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[6] Attorney's Fees

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§ 351.221 Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)], Permanent Injunction [Civ. Code § 3422], and Damages [Civ. Code § 3333]--By Patient of Skilled Nursing Facility or Intermediate Care Facility Against Licensee for Violation of Patients' Bill of Rights [Health & Safety Code §§ 1430(b), 1599.1]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Limitation on Damages

[5] Attorney's Fees and Costs

[6] Jurisdiction

[7] State Statutes

[8] Administrative Regulations

[9] Cross References

§ 351.222 Affirmative Defense--By Licensee of Long-Term Health Care Facility in Action for Unlawful Relocation Due to Change in Payment to Medi-Cal [Welf. & Inst. Code § 14124.7]--Misrepresentation of Finances [Health & Safety Code § 1439.7]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§§ 351.223-351.239 [Reserved]

§ 351.240 Complaint Against Residential Care Facility for the Elderly by Resident--Reimbursement for or Replacement of Stolen or Lost Property [Health & Safety Code § 1569.152]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction

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§ 351.241 Affirmative Defense--By Residential Care Facility for Elderly in Action for Reimbursement for or Replacement of Stolen or Lost Patient's Property [Health & Safety Code § 1569.152]--Failure to Add Items to Inventory or Deletion of Items From Inventory [Health & Safety Code § 1569.153(d)]

[1] FORM

[2] Use of Form

[3] State Statutes

§§ 351.242-351.259 [Reserved]

§ 351.260 Notice of Cancellation of Continuing Care Contract [Health & Safety Code § 1788(h)]

[1] FORM

[2] Use of Form

[3] Inclusion of Form in Continuing Care Contract

[4] State Statutes

Carol S. Sanders n*

FOOTNOTES:
(n81)Footnote *.
By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

California Forms of Pleading and Practice--Annotated

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Volume 31: Lis Pendens thru Mandate and Prohibition-Chs. 348-358
Chapter 351 LONG-TERM HEALTH AND RESIDENTIAL CARE
PART I. SCOPE

31-351 California Forms of Pleading and Practice--Annotated § 351.01

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§ 351.01 Scope of Chapter

This chapter discusses the duties of facilities and the rights of residents and patients under the Long-Term Care, Health, Safety, and Security Act of 1973 (*Health & Safety Code § 1417 et seq.*). It discusses procedures for the issuance and enforcement of a citation by the Department of Health Services for violations of provisions of the Act and related regulations. It also discusses the Patients' *Bill of Rights* (*Health & Safety Code § 1599 et seq.*), which concerns patients in skilled nursing facilities or intermediate care facilities, as well as a long-term health care facility's duty to establish a loss or theft program to safeguard patients' property and requirements for admission contracts. It includes forms of complaint for use in actions against a long-term health care facility based on conduct constituting Class A or Class B violations [*see § 351.220*], and on violation of a patient's rights [*see § 351.221*]. It also contains a form of affirmative defense for use in response to a complaint against a long-term health care facility for unlawful relocation based on a change in the manner of payment to Medi-Cal [*see § 351.222*].

This chapter also discusses and contains forms relating to residential care facilities for the elderly. It discusses licensing requirements for those facilities and remedies for license violations. It discusses obligations of facilities to provide certain services and policies for the benefit of the residents, as well as personal rights of the residents and administrative and civil remedies for violation of those provisions. It includes a form of complaint for use against a residential care facility for the elderly based on theft or loss of a resident's property [*see § 351.240*], as well as a form of affirmative defense for use in response to that complaint [*see § 351.241*].

This chapter also discusses continuing care contracts. It includes discussion of requirements regarding the format and contents of continuing care contracts, as well as statutory rights to cancel or void the contract. It also discusses some remedies available only to the Department of Social Services, some of which may be undertaken on behalf of the patient. This part contains a form for giving notice of cancellation [*see § 351.260*].

This chapter does not discuss licensing and other preliminary requirements regarding the internal organization and financing of facilities that offer continuing life care services, nor does it discuss "deposit subscriptions," which concern

payments for continuing care services that are made before the construction of the facility is completed [*see generally Health & Safety Code §§ 1771.2 et seq., 1779 et seq., 1780 et seq., 1786 et seq.*]. It also does not discuss most of the administrative remedies available only to the Department of Social Services for violation of licensing and related provisions, or remedies available only to prosecuting agencies, that affect only a facility's licensing status or result only in penalties that do not directly inure to the benefit of the resident [*see generally Health & Safety Code § 1793.5 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsServicesHealthcare LawGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral Overview

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PART I. SCOPE

31-351 California Forms of Pleading and Practice--Annotated § 351.02

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.02 Cross References

For discussion and forms relating to tort actions against health-care providers and to patient's access to health records generally, see Ch. 295, *Hospitals* .

For discussion and forms related to negligence generally, see Ch. 380, *Negligence* .

For discussion and forms relating to malpractice actions against physicians, see Ch. 415, *Physicians: Medical Malpractice* .

For discussion and forms relating to durable powers of attorney for health care, see Ch. 427, *Principal and Agent* .

For discussion and forms relating to contracts and breach of contract generally, see Ch. 140, *Contracts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPowers of AttorneyDurable PowersHealthcare LawActions Against Healthcare WorkersGeneral OverviewHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansTortsMalpractice & Professional LiabilityHealthcare Providers

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31-351 California Forms of Pleading and Practice--Annotated §§ 351.03-351.09

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[Reserved]

§§ 351.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Long-Term Health Care Facilities

31-351 California Forms of Pleading and Practice--Annotated § 351.10

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§ 351.10 Governing Law

Notice requirements regarding a long-term health care facility's inability to care for patients because of a change in license or operation are governed by *Health & Safety Code §§ 1336-1336.4*. The Long-Term Care, Health, Safety, and Security Act of 1973 is set forth in *Health & Safety Code § 1417 et seq.* The rights of residents in skilled nursing and intermediate care facilities are governed by *Health & Safety Code § 1599 et seq.* Admission contracts for long-term care health facilities, and abbreviated admission contracts for respite care services, are governed by *Health & Safety Code § 1599.60 et seq.* Public disclosure of violations is governed by *Health & Safety Code §§ 1599.85-1599.89*. Licensing provisions governing health facilities generally are governed by *Health & Safety Code § 1250 et seq.* Provisions governing the state Long-Term Care Ombudsman Program are set forth in *Welf. & Inst. Code § 9700 et seq.* Provisions regarding current or prospective Medi-Cal patients are governed generally by *Welf. & Inst. Code § 14000 et seq.*

Regulations governing the state Long-Term Care Ombudsman Program are set forth in *22 Cal. Code Reg. § 8010 et seq.* Regulations governing skilled nursing facilities are contained in *22 Cal. Code Reg. § 72001 et seq.* Regulations governing intermediate care facilities are contained in *22 Cal. Code Reg. § 73001 et seq.* Regulations governing intermediate care facilities for the developmentally disabled are contained in *22 Cal. Code Reg. § 76000 et seq.* Regulations governing intermediate care facilities for the developmentally disabled regarding nursing care are contained in 22 Cal. Code Reg. § 73800 et seq. Regulations governing intermediate care facilities for the developmentally disabled regarding habilitative care are contained in *22 Cal. Code Reg. § 76800 et seq.*

Federal statutes governing standards of care for Medicare payments to skilled nursing facilities and other nursing facilities are set forth in *42 U.S.C. §§ 1395i-3* and *1396r*. Federal regulations governing standards for Medicaid payments for skilled nursing facilities and intermediate care facilities are set forth in 42 C.F.R. §§ 442-442.346. Additional requirements affecting the quality of care that a skilled nursing facility must meet in order to participate in the Medicare program, and that a nursing facility must meet in order to participate in the Medicaid program, are set forth in *42 C.F.R. §§ 483.1-483.80*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesFacility LiabilityNursing FacilitiesPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing FacilitiesPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCostsPublic Health & Welfare LawSocial SecurityMedicaidProvidersTypesIntermediate Care FacilitiesPublic Health & Welfare LawSocial SecurityMedicareProvidersReimbursementGeneral OverviewPublic Health & Welfare LawSocial SecurityMedicareProvidersTypesGeneral OverviewPublic Health & Welfare LawSocial SecurityMedicareProvidersTypesNursing Facilities

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31-351 California Forms of Pleading and Practice--Annotated § 351.11

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§ 351.11 Definitions

[1] Long-Term Health Care Facility

"Long-term health care facility" means any facility licensed pursuant to *Health & Safety Code § 1250 et seq.* that is any of the following [*Health & Safety Code § 1418(a)*; *see Health & Safety Code §§ 1250, 1326* (definitions of facilities)].

- A skilled nursing facility.
- An intermediate care facility.
- An intermediate care facility for the developmentally disabled.
- An intermediate care facility for the developmentally disabled that provides habilitative care.
- An intermediate care facility for the developmentally disabled that provides nursing care.
- A congregate living health facility.
- A nursing facility.
- Intermediate care facility/developmentally disabled continuous nursing.

"Long-term health care facility" also includes a pediatric day health and respite care facility licensed under *Health & Safety Code § 1760 et seq.* [*Health & Safety Code § 1418(b)*; *see Health & Safety Code § 1760.2* (definitions)]. The term does not include a general acute care hospital or an acute psychiatric hospital, except for that distinct part of the

hospital that provides skilled nursing facility services, intermediate care facility services, or pediatric day health and respite care facility services [*Health & Safety Code § 1418(c)*].

[2] Skilled Nursing Facility

"Skilled nursing facility" means a health facility that provides skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis [*Health & Safety Code § 1250(c)*].

[3] Intermediate Care Facility

"Intermediate care facility" means a health facility that provides inpatient care to ambulatory or nonambulatory patients who have recurring need for skilled nursing supervision and need supportive care, but who do not require availability of continuous skilled nursing care [*Health & Safety Code § 1250(d)*].

[4] Nursing Facility

"Nursing facility" means a California-licensed health facility that is certified to participate as a provider of care either as a skilled nursing facility in the Medicare program under Title XVIII of the Social Security Act or as a nursing facility in the medicaid program under Title XIX of the Social Security Act, or as both [*Health & Safety Code § 1250(k)*].

[5] Licensee

"Licensee" means the holder of a license issued under *Health & Safety Code §§ 1250-1339.25* or *1760 et seq.* (pediatric day health and respite care facility) for a long-term health care facility [*Health & Safety Code § 1418(d)*].

[6] Contract of Admission

"Contract of admission" includes all documents that a resident (or his or her representative) must sign at the time of, or as a condition of, admission to a long-term health care facility, as defined in *Health & Safety Code § 1326* [*Health & Safety Code § 1599.60(b)*].

[7] Abbreviated Contract of Admission; Respite Care Services

"Abbreviated contract of admission" means a contract that meets the provisions of *Health & Safety Code § 1599.60 et seq.*, except as otherwise provided, for a resident who is receiving respite care services, as defined in *Health & Safety Code § 1418.1* [*Health & Safety Code § 1599.60(a)*]. The term "respite care services" means services provided to frail elderly or functionally impaired persons in a licensed skilled nursing facility or intermediate care facility on a temporary or periodic basis to relieve persons who are providing their care at home [*Health & Safety Code § 1418.1(e)*; *see Health & Safety Code § 1250(c), (d)* (definitions of facilities)].

Provisions under *Health & Safety Code §§ 1599.65(b), 1599.67(b), 1599.69, 1599.76(b)* (Medi-Cal), and *1599.79* (bedhold during transfer to acute care hospital) do not apply to an abbreviated contract of admission [*Health & Safety Code § 1599.60(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsServicesHealthcare LawBusiness Administration & OrganizationGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawInsuranceGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled &

Elderly PersonsCare FacilitiesNursing FacilitiesPublic Health & Welfare LawSocial SecurityMedicareProvidersTypesGeneral OverviewPublic Health & Welfare LawSocial SecurityMedicareProvidersTypesNursing Facilities

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31-351 California Forms of Pleading and Practice--Annotated § 351.12

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§ 351.12 Ombudsman Program

Under the Long-Term Care Ombudsman Program, established by the California Department of Aging, the Ombudsman investigates and resolves complaints made by or on behalf of older individuals who are residents of long-term care facilities relating to action, inaction, or decisions of providers (or their representatives) of long-term care services, public agencies, or social service agencies that may adversely affect the health, safety, welfare, or rights of the residents [*see 42 U.S.C. § 3027(a)(9)*; *see also Welf. & Inst. Code § 9700 et seq.*; *22 Cal. Code Reg. § 8010 et seq.*]. The Office of the Long-Term Ombudsman must investigate and seek to resolve complaints and concerns communicated by or on behalf of patients, residents, or clients of any long-term care facility, and must report its conclusions to the complainant, or notify the complainant of its reasons for not conducting an investigation [*Welf. & Inst. Code § 9720*]. The Ombudsman Office may refer any complaint to any appropriate state or local government agency. Certain licensing agencies, including that of the Department of Health Services, must give priority to an Ombudsman complaint [*Welf. & Inst. Code § 9721*; *see Welf. & Inst. Code 9720 et seq.* (investigation and resolution of complaints)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare LawHealthcareGeneral Overview

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31-351 California Forms of Pleading and Practice--Annotated § 351.13

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.13 Citation Procedure

[1] Request for Inspection

Any person may request an inspection of any long-term health care facility by giving oral or written notice to the Department of Health Services of an alleged violation of applicable requirements of state law. The notice may be in writing signed by the complainant setting forth with reasonable particularity the matters complained of. The complaint may also be made by telephone or personal visit. Any oral complaint must be reduced to writing by the Department. The substance of the complaint must be provided to the licensee no earlier than at the commencement of the inspection [*Health & Safety Code § 1419(d)*; *see Health & Safety Code § 1419(a), (b)* (centralized consumer-response unit for department)].

Neither the substance of the complaint provided to the licensee nor any copy of the complaint or record published, released, or otherwise made available to the licensee may disclose the name of any individual complainant or other person mentioned in the complaint, except the name of any duly authorized officer, employee, or agent of the Department of Health Services conducting the investigation or inspection, unless the complainant specifically requests the release of the name or names or the matter results in a judicial proceeding [*Health & Safety Code § 1419(e)*].

[2] Inspection

Unless the Department of Health Services determines that the complaint is willfully intended to harass a licensee or is without any reasonable basis, an inspector appointed by the Department must make an on-site inspection or investigation within 10 working days of the receipt of the complaint [*Health & Safety Code § 1420(a)(1)*; *see Health & Safety Code § 1421* (conduct of inspections)]. In any case in which the complaint involves a serious threat of imminent danger of death or serious bodily harm, the Department must make an onsite inspection or investigation within 24 hours of receipt of the complaint. In any event, the complainant must be promptly informed of the Department's proposed course of action and of the opportunity to accompany the inspector on the inspection or investigation of the facility. On

the request of either the complainant or the Department, the complainant or his or her representative, or both, may be allowed to accompany the inspector to the site of the violation, unless the inspector determines that the privacy of any patient would be violated thereby [*Health & Safety Code § 1420(a)(1)*; *see Jongepier v. Lopez (1983) 142 Cal. App. 3d 535, 538-539, 191 Cal. Rptr. 131* (complainant's right to anonymity may not be waived as condition of accompanying Department inspector on inspection of facility)].

In addition to inspections conducted pursuant to a complaint, periodic unannounced inspections of long-term health care facilities by the department are also mandated [*see Health & Safety Code §§ 1422(b), (c), 1422.1*].

[3] Complainant's Rights of Review

The Department of Health Services must notify the complainant of his or her right to an informal conference with the designee of the Director of Health Services in the county in which the facility is located if the complainant is dissatisfied with the Department's determination on the complaint. A complainant who requests that conference must do so within five business days after receiving the notice [*Health & Safety Code § 1420(b)*].

If the complainant is dissatisfied with the determination of the Director's designee following the informal conference, the complainant, within 15 days after receipt of that determination, may notify in writing the Deputy Director of the Licensing and Certification Division of the Department, who must assign the request to a representative of the Complainant Appeals Unit for review of the facts that led to both determinations. As a part of the Complainant Appeals Unit's independent investigation and at the request of the complainant, the representative must interview the complainant in the district office where the complaint was initially referred. Based on this review, the Deputy Director of the Licensing and Certification Division of the Department must make his or her own determination and notify the complainant and the facility within 30 days [*Health & Safety Code § 1420(c)*].

Under specified circumstances, when the Department issues a citation as a result of a complaint and a resident is specifically identified in a citation by name as being specifically affected by the violation, the complainant also has a right to attend a citation review conference requested by the licensee to contest a citation [*see Health & Safety Code § 1428(f)*].

[4] Prohibition Against Retaliation

No licensee may discriminate or retaliate in any manner against any complainant (meaning any person who has filed a complaint [*Health & Safety Code § 1432(I)*]), or any patient or employee in its long-term health care facility, on the basis or for the reason that the complainant, patient, employee, or any other person has presented a grievance or complaint, or has initiated or cooperated in an investigation or proceeding of any governmental entity relating to care, services, or conditions at that facility. A licensee who violates this provision is subject to a civil penalty of no more than $10,000, to be assessed by the Director of Health Services and collected in the manner provided in *Health & Safety Code § 1430* [*Health & Safety Code § 1432(a)*; *see Health & Safety Code § 1432(e)* (violation enforced as Class A or B violation), (f) (willful violation as infraction), (g) (licensee subject to either civil penalty or criminal fine)].

Any attempt to expel a patient from the facility, or any discriminatory treatment of a patient by whom, or on whose behalf, a grievance or complaint has been submitted, directly or indirectly, to any governmental entity, or received by a long-term health care facility administrator, or any proceeding instituted under or related to the Long-Term Care, Health, Safety, and Security Act of 1973, within 180 days of the filing of the complaint or the institution of the action, raises a rebuttable presumption that the action was taken by the licensee in retaliation for the filing of the complaint [*Health & Safety Code § 1432(b)*]. The presumption affects the burden of producing evidence under *Evid. Code § 603* [*Health & Safety Code § 1432(d)*; for discussion of *Evid. Code § 603, see Ch. 551, Trial, § 551.102*].

A rebuttable presumption that an action was taken by the licensee in retaliation arises when any attempt to terminate the

employment of, or any other discriminatory treatment of, an employee is made within 120 days of the filing of a grievance or complaint, or an action is instituted against any employee who has presented a grievance or complaint or who has initiated, participated, or cooperated in any investigation or proceeding of any governmental entity as specified in *Health & Safety Code § 1432(a)*, and the facility or licensee had knowledge of the employee's initiation, participation, or cooperation [*Health & Safety Code § 1432(c)*]. The presumption affects the burden of producing evidence under *Evid. Code § 603* [*Health & Safety Code § 1432(d)*].

[5] Issuance of Citation

If on inspection or investigation, the Director of Health Services determines that any nursing facility is in violation of any state or federal law or regulation relating to the operation or maintenance of the facility, or determines that any other long-term health care facility is in violation of any statutory provision or regulation relating to the operation or maintenance of the facility, the director must promptly issue a notice to correct the violation and of intent to issue a citation to the licensee [*Health & Safety Code § 1423(a)*]. The Director must issue the notice promptly (not later than 24 hours, excluding Saturday, Sunday, and holidays) after determining or having reasonable cause to determine that an alleged violation has occurred [*Health & Safety Code § 1423(a)*].

Before completing the investigation and making the determination whether to issue a citation, the Department will hold an exit conference with the licensee to identify the potential for issuing a citation for any violation, discuss investigative findings, and allow the licensee to provide the department with additional information related to the violation. The Department will consider this additional information, in conjunction with information from the inspection or investigation, in determining whether to issue a citation, or whether other action would be appropriate. If the Department determines that the violation warrants the issuing of a citation and an exit conference has been completed it will either (1) recommend the imposition of a federal enforcement remedy on a nursing facility in accordance with federal law, or (2) issue a citation pursuant to state licensing laws. If the facility is a nursing facility, it may recommend the imposition of a federal enforcement remedy other than a federal civil monetary penalty for a federal violation. No violation may result in the issuance of both a citation pursuant to state law and the recommendation that a federal civil monetary penalty be imposed [*Health & Safety Code § 1423(a)*].

If a state citation is issued, it must be served on the licensee within three days after completion of the inspection (excluding Saturday, Sunday, and holidays), unless the licensee agrees in writing to an extension. Service must be made personally or by registered or certified mail. A copy of the citation must also be sent to each complainant. The citation must fix the earliest feasible time for the elimination of the condition constituting the alleged violation, when appropriate [*Health & Safety Code § 1423(a)*]. If no harm to patients, residents, or guests has occurred, a single incident, event, or occurrence must result in no more than one citation for each statute or regulation violated [*Health & Safety Code § 1423(b)*].

The Department must provide a copy of all citations issued under *Health & Safety Code § 1424* (discussed under *§§ 351.14, 351.15*) to the affected residents whose treatment was the basis for the issuance of the citation, to the affected residents' designated family member or representative of each of the residents, and to the complainant if the citation was issued as a result of a complaint [*Health & Safety Code § 1424(j)*].

[6] Circumstances Under Which Citation May Not Be Issued

No citation will be issued for a violation that has been reported by the licensee to the Department of Health Services, or its designee, as an "unusual occurrence," if all of the following conditions are met [*Health & Safety Code § 1423(c)*]:

- The violation has not caused harm to any patient, resident, or guest, or significantly contributed to any harm;

- The licensee has promptly taken reasonable measures to correct the violation to prevent a recurrence; and

- The unusual occurrence report was the first source of information reported to the Department of Health Services, or its designee, regarding the violation.

In addition, a citation will not be issued if the violation was first discovered by the facility and recorded in a quality assurance log, was not willful, resulted in no actual harm to any patient or guest, and the facililty took prompt remedial action satisfactory to the Department of Health Services [*see Health & Safety Code § 1424.1(a)*; *see also Health & Safety Code § 1424.1(b), (c)* (discovery and admissibility of log)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawGeneral OverviewHealthcare LawActions Against FacilitiesGeneral OverviewHealthcare LawBusiness Administration & OrganizationPatient ConfidentialityGeneral OverviewHealthcare LawBusiness Administration & OrganizationPeer ReviewGeneral OverviewPublic Health & Welfare LawHealthcareGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities

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31-351 California Forms of Pleading and Practice--Annotated § 351.14

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.14 Classification of Violations and Penalties

[1] Class AA

Class AA violations are violations that meet the criteria for a Class A violation, and that the Department of Health Services determines to have been a direct proximate cause of death of a patient or resident of a long-term health care facility. Generally, a Class AA citation is subject to a civil penalty in the amount of not less than $5,000 and not exceeding $25,000 for each citation [*Health & Safety Code § 1424(c)*]. The penalty is enhanced in the case of a skilled nursing facility or an intermediate care facility: not less than $25,000 and not exceeding $100,000 for each citation [*Health & Safety Code § 1424.5(a)(1)*]. Class AA citations may also result in suspension or revocation of the facility's license [*Health & Safety Code §§ 1424(c), 1424.5(a)(1)*; *§ 351.14[2]*].

For each Class AA citation within a 12-month period that has become final, the Department must consider the suspension or revocation of the facility's license pursuant to *Health & Safety Code § 1294*. For a third or subsequent Class AA citation in a facility within that 12-month period that has been sustained following a citation review conference, the Department must commence action to suspend or revoke the facility's license pursuant to *Health & Safety Code § 1294* [*Health & Safety Code §§ 1424(c), 1424.5(a)(1)*].

[2] Class A

Class A violations are violations that the Department of Health Services determines present either (1) imminent danger that death or serious harm to the patients or residents of the facility would result from the violation, or (2) substantial probability that death or serious physical harm to the patients or residents would result from the violation [*Health & Safety Code § 1424(d)*; *see 22 Cal. Code Reg. §§ 72701, 72703* (skilled nursing facilities), *73701, 73702* (intermediate care facilities)]. A physical condition or one or more practices, means, methods, or operations in use in a long-term health care facility may constitute a Class A violation. The condition or practice constituting a Class A violation must be abated or eliminated immediately, unless a fixed period of time, as determined by the Department, is required for

correction [*Health & Safety Code § 1424(d)*].

Generally, a Class A citation is subject to a civil penalty in an amount not less than $1,000 and not exceeding $10,000 for each citation [*Health & Safety Code § 1424(d)*]. The penalty is enhanced in the case of a skilled nursing facility or an intermediate care facility: not less than $2,000 and not exceeding $20,000 for each citation [*Health & Safety Code § 1424.5(a)(2)*].

[3] Class B

Class B violations are violations that the Department of Health Services determines have a direct or immediate relationship to the health, safety, or security of long-term health care facility patients or residents, other than Class A or AA violations [*Health & Safety Code § 1424(e)*; *see 22 Cal. Code Reg. § 73705* (intermediate care facilities)]. Unless otherwise determined by the Department to be a Class A violation, any violation of a patient's rights as set forth in *22 Cal. Code Reg. §§ 72527* and *73523* that is determined by the Department to cause or, under the circumstances, is likely to cause significant humiliation, indignity, anxiety, or other emotional trauma to a patient is a Class B violation [*Health & Safety Code § 1424(e)*].

A Class B citation is subject to a civil penalty in an amount not less than $100 and not exceeding $1,000 for each citation [*Health & Safety Code § 1424(d)*].

Failure to post a notice specifying the name, address, and phone number of the office and the nearest approved organization, and containing a brief description of the services provided by the office and the approved organization, in the approved form, in the manner required by *Welf. & Inst. Code § 9718* and *Health & Safety Code § 1422.6*, will result in a daily $100 penalty and will be a Class B violation until the total penalty exceeds $2,000, in which case it will be a Class A violation [*see Health & Safety Code § 1424(h)*].

[4] Determination of Amount of Penalty

In determining the amount of the civil penalty, all relevant facts must be considered, including, but not limited to, the following [*Health & Safety Code § 1424(a)*]:

- The probability and severity of the risk that the violation presents to the patient's or resident's mental and physical condition;
- The patient's or resident's medical condition;
- The patient's or resident's mental condition and his or her history of mental disability or disorder;
- The good faith efforts exercised by the facility to prevent the violation from occurring; and
- The licensee's history of compliance with regulations.

The Department will document the relevant facts it considered in determining the amount of the civil penalty on an attachment to the citation that will be available in the public record. This requirement will not preclude the Department or a facility from introducing facts not listed on the citation to support or challenge the amount of the civil penalty in any proceeding set forth in *Health & Safety Code § 1428* [*Health & Safety Code § 1424(b)*].

[5] Burden of Proof

In any action to enforce a citation for a Class AA violation, the Department must prove all of the following [*Health &*

Safety Code § 1424(c)]:

- The violation was a direct proximate cause of death of a patient or resident;
- The death resulted from an occurrence of a nature that the regulation was designed to prevent; and
- The patient or resident who died was among the class of persons for whose protection the regulation was adopted.

If the Department meets this burden of proof, the licensee has the burden of proving that the licensee violating the regulation did what might reasonably be expected of a long-term health care facility licensee, acting under similar circumstances, to comply with the regulation. If the licensee sustains this burden, the citation may be reduced or dismissed [*Health & Safety Code § 1424(c)*].

With respect to Class A and B violations, if the Department of Health Services establishes that a violation occurred, the licensee has the burden of proving that the licensee did what might reasonably be expected of a long-term health care facility licensee, acting under similar circumstances, to comply with the regulation. If the licensee sustains this burden, the citation must be dismissed [*Health & Safety Code § 1424(d), (e)*].

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31-351 California Forms of Pleading and Practice--Annotated § 351.15

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§ 351.15 Willful Falsification of Health Records

Any willful material falsification or willful material omission in the health record for a patient of a long-term health care facility is a violation [*Health & Safety Code § 1424(f)(1)*]. "Willful material falsification" means any entry in the patient health care record pertaining to the administration of medication or treatments ordered for the patient, or pertaining to services for the prevention or treatment of decubitus ulcers or contractures, or pertaining to tests and measurements of vital signs, or notations of input and output of fluids, that was made with the knowledge that the records falsely reflect the condition of the resident or the care or services provided [*Health & Safety Code § 1424(f)(2)*].

"Willful material omission" means the willful failure to record any untoward event that has affected the health, safety, or security of the specific patient, and that was omitted with the knowledge that the records falsely reflect the condition of the resident or the care or services provided. Violation of this provision may result in a civil penalty not to exceed $10,000, or $20,000 in the case of a skilled nursing facility or an intermediate care facility [*Health & Safety Code §§ 1424(f)(3), 1424.5(a)(3)*; *see Health & Safety Code § 1424(g)(1), (2)* (factors for use in determining amount of penalty, and enforcement of violations in same manner as Class A or B violations)]. The Department of Health Services may issue a Class A or B citation for any violation that meets the requirements for that citation, regardless whether the violation also constitutes a violation of *Health & Safety Code § 1424(g)*. No single act, omission, or occurrence, however, may be cited both as a Class A or B violation and as a violation of *Health & Safety Code § 1424(g)* [*Health & Safety Code § 1424(g)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities

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31-351 California Forms of Pleading and Practice--Annotated § 351.16

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§ 351.16 Daily Penalty for Continuing Violation

If a licensee fails to correct a violation within the specified time limit for correction, a civil penalty of $50 may be assessed for each day that the violation continues beyond the date specified for correction. If the licensee disputes a determination regarding an alleged failure to correct a violation or regarding the reasonableness of the proposed deadline for correction, the licensee may request an informal conference and contest the determination [*Health & Safety Code § 1425*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-351 California Forms of Pleading and Practice--Annotated § 351.17

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§ 351.17 Contest of Citation by Licensee

[1] Procedure

A licensee who desires to contest a citation must notify the Director of Health Services within 15 business days after service of the citation [*Health & Safety Code § 1428(a)*].

With respect to a Class AA or A citation, or a citation alleging a Class B and either a Class AA or A violation, or the proposed assessment of a civil penalty for those citations, the Director's designee must hold, within 15 business days from the receipt of the request, a citation review conference, at the conclusion of which he or she may affirm, modify, or dismiss the citation or proposed assessment of a civil penalty [*Health & Safety Code § 1428(a)*; *see Health & Safety Code § 1428.2* (extension of time limit based on request by facility); *see also Health & Safety Code § 1428.2* (enforcement by Attorney General on notification of contest by licensee)]. A licensee who desires to contest the resulting decision must inform the Director in writing within 15 business days after receiving the decision. If the licensee fails to do so, the citation or proposed assessment is deemed a final order not subject to further administrative review, except that the licensee may seek judicial relief from the specified time limits [*Health & Safety Code § 1428(a)*].

If a licensee desires to contest a class B citation, he or she may request, within 15 business days after service of the citation, a citation review conference, by writing the director or the director's designee of the licensee's intent to appeal the citation through the citation review conference. If the licensee wishes to appeal a citation that has been upheld in a citation review conference, the licensee must, within 15 working days from the date the citation review conference decision was rendered, notify the director or the director's designee that he or she wishes to appeal the citation through the procedures set forth in *Health & Safety Code § 100171* or elects to submit the matter to binding arbitration in accordance with *Health & Safety Code § 1428(d)* [*Health & Safety Code § 1428(c)*; *see Health & Safety Code § 1428(e)* (burden of proof and procedures on appeal)]. The administrative law judge may affirm, modify, or dismiss the citation

or the proposed assessment of a civil penalty. The licensee may choose to have his or her appeal heard by the administrative law judge, or submit the matter to binding arbitration, without having first appealed the decision to a citation review conference by notifying the director in writing within 15 business days of the service of the citation [*Health & Safety Code § 1428(c)*].

A licensee may seek judicial relief from the 15-day limit to file a notice to contest the citation or the 60-day limit to file the complaint in a timely manner [*Demchuk v. State Dep't. of Health Services (1992) 4 Cal. App. 4th Supp. 1, 6 Cal. Rptr. 2d 635* ; *see Health & Safety Code § 1428(c)*]. However, the licensee may not seek judicial relief from the 60-day limit for serving the summons and complaint on the Department after filing [*Demchuk v. State Dep't. of Health Services (1992) 4 Cal. App. 4th Supp. 1, 6 Cal. Rptr. 2d 635]* .

Health & Safety Code § 1428(c) does not permit a contesting licensee to obtain judicial relief under *Code Civ. Proc. § 473* after failing to timely file an at-issue memorandum in the civil action. The licensee's complaint is subject to dismissal in that situation [*see County of San Diego v. Department of Health Services (1991) 1 Cal. App. 4th 656, 663, 2 Cal. Rptr. 2d 256]* . However, the court may exercise its inherent equitable power, independent of *Code Civ. Proc. § 473*, and permit the licensee to file a tardy memorandum in appropriate circumstances [*cf. County of San Diego v. Department of Health Services (1991) 1 Cal. App. 4th 656, 664-665, 2 Cal. Rptr. 2d 256* (finding no extrinsic fraud, mistake, or neglect sufficient to warrant exercise of court's inherent equitable power of relief from default)].

[2] Arbitration

If a licensee is dissatisfied with the decision of the administrative law judge, the licensee may, in lieu of seeking judicial review of the decision as provided in *Code Civ. Proc. § 1094.5*, elect to submit the matter to binding arbitration by filing, within 60 days of its receipt of the decision, a request for arbitration with the American Arbitration Association [*Health & Safety Code § 1428(d)*].

The parties must agree on an arbitrator designated from the American Arbitration Association in accordance with the association's established rules and procedures [*Health & Safety Code § 1428(d)*].

The arbitration hearing must be set within 45 days of the election to arbitrate, but in no event less than 28 days from the date of selection of an arbitrator. The arbitration hearing may be continued up to 15 additional days if necessary at the arbitrator's discretion [*Health & Safety Code § 1428(d)*].

A resident, or resident's designated representative (or both) entitled to participate in the citation review conference [*see Health & Safety Code § 1428(f)*] may make an oral or written statement regarding the citation at any arbitration hearing to which the matter has been submitted after the citation review conference [*Health & Safety Code § 1428(d)*].

Except as *Health & Safety Code § 1428(d)* specifically provides otherwise, the arbitration hearing must be conducted in accordance with the American Arbitration Association's established rules and procedures [*Health & Safety Code § 1428(d)*].

The arbitrator must determine whether the licensee violated the regulations cited by the Department, and whether the citation meets the criteria established in *Health & Safety Code §§ 1423, 1424*. If the arbitrator determines that the licensee has violated the regulations cited and that the class of citation should be upheld, the proposed assessment of a civil penalty will be affirmed, subject to the limitations set forth in *Health & Safety Code § 1424* [*Health & Safety Code § 1428(d)*].

The licensee and the Department must each bear their respective portion of the arbitration cost [*Health & Safety Code § 1428(d)*].

[3] Persons Permitted to Attend Review Conference

When the Department of Health Services issues a citation as a result of a complaint or regular inspection visit, and a resident is specifically identified in a citation by name as being specifically affected by the violation, certain persons, including the complainant, may attend the citation review conference [*see Health & Safety Code § 1428(f)*]. When residents whose names were not specified are affected, representatives of the Office of the State Long-Term Care Ombudsman, of the residents, or of the family council may participate to represent all residents [*see Health & Safety Code § 1428(f)*; *see also § 351.12*].

[4] Civil Penalty Assessment

In assessing the civil penalty for a violation, relevant factors are essentially the same as those set forth in *Health & Safety Code § 1424(a)* [*see Health & Safety Code § 1428(g)*; *see also § 351.14[4]*].

The immunity of a public entity under *Gov. Code § 818* from imposition of punitive or exemplary damages does not prevent the state from imposing the statutory civil penalties in the Long-Term Care Act on a state-licensed, county-operated, long-term health care facility [*Kizer v. County of San Mateo (1991) 53 Cal. 3d 139, 151, 279 Cal. Rptr. 318, 806 P.2d 1353]* . There is nothing in the Tort Claims Act to suggest that *Gov. Code § 818* was intended to apply to statutory civil penalties designed to ensure compliance with a detailed regulatory scheme affecting minimum health and safety standards, even though the penalties may have a punitive effect [*Kizer v. County of San Mateo (1991) 53 Cal. 3d 139, 146, 279 Cal. Rptr. 318, 806 P.2d 1353]* .

[5] Treble Penalties for Class A or B Violations

An assessment of civil penalties for a class A or B violation must be trebled and collected for a second or subsequent violation of the same class within any 12-month period. Trebling must occur only if the first citation issued within the 12-month period was issued in the same class, a civil penalty was assessed, and a plan of correction was submitted for the previous same-class violation occurring within the period without regard to whether the action to enforce the previous citation has become final [*Health & Safety Code § 1428(h)*]. The increment to the civil penalty is not due and payable, however, unless and until the previous action has terminated in favor the Department of Health Services. The penalty for a Class B violation that is a patient's rights violation pursuant to *Health & Safety Code § 1424(e)* is not to be trebled unless the Department determines the violation has a direct or immediate relationship to the health, safety, security, or welfare of long-term health care facility residents [*Health & Safety Code § 1428(h)*; *see § 351.14[3]*].

[6] Contest of Class A or Class AA Citation

If a licensee notifies the director that he or she intends to contest a class AA or a class A citation, the licensee may first within 15 business days after service of the citation notify the director in writing of his or her request for a citation review conference. The licensee must inform the director in writing, within 15 business days of the service of the citation or the receipt of the decision of the director's designee after the citation review conference, of the licensee's intent to adjudicate the validity of the citation in the superior court in the county in which the long-term health care facility is located. The action must be filed no later than 90 calendar days after a licensee notifies the director he or she intends to contest the citation or no later than 90 days after the receipt of the decision by the director's designee after the citation review conference, and served not later than 90 days after filing. Notwithstanding any other provision of law, a licensee prosecuting a judicial appeal must file and serve a case management statement [*see Cal. Rules of Ct., Rule 3.720 et seq.*] within six months after the Department files its answer in the appeal. Notwithstanding *Health & Safety Code § 1428(d)* [*see § 351.17[2]*], the court must dismiss the appeal on motion of the Department if the case management statement is not filed by the licensee within the period specified. The court may affirm, modify, or dismiss the citation, the level of the citation, or the amount of the proposed assessment of the civil penalty [*Health & Safety Code § 1428(b)*; *see* Ch. 425, *Pretrial Proceedings*].

Legal Topics:

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§ 351.18 Payment of Reduced Penalty in Lieu of Contest

A licensee, in lieu of contesting a citation pursuant to *Health & Safety Code § 1428*, may transmit to the State Department of Health Services the minimum amount specified by law, or 65 percent of the amount specified in the citation, whichever is greater, for each violation within 15 business days--or 30 business days in the case of a skilled nursing facility or an intermediate care facility--after the issuance of the citation [*Health & Safety Code §§ 1424.5(b), 1428.1*; *see also Kizer v. Waterman Convalescent Hospital, Inc. (1992) 13 Cal. Rptr. 2d 239* (*Health & Safety Code § 1428.1* does not create unconstitutional chilling or abridgement of rights of free access to courts and right to petition government for redress of grievances)].

Legal Topics:

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31-351 California Forms of Pleading and Practice--Annotated § 351.19

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§ 351.19 Action for Injunction or Damages for Classified Violations

[1] In General

Any licensee who commits a Class A or B violation may be enjoined from permitting the violation to continue or may be sued for civil damages in a court of competent jurisdiction, unless the Department of Health Services has taken action and the violations have been corrected to its satisfaction. Actions for injunction or civil damages, or both, may be prosecuted by the Attorney General in the name of the people of the State of California on the complaint of the Attorney General or on the complaint of any board, officer, person, corporation, or association, or by any person acting for the interest of itself, its members, or the general public [*Health & Safety Code § 1430(a)*]. The remedies specified in *Health & Safety Code § 1430(a)* are in addition to any other remedy provided by law [*Health & Safety Code § 1430(c)*].

For a complaint for damages and injunction pursuant to *Health & Safety Code § 1430(a)*, see *§ 351.220*.

[2] Effect of Governmental Inaction

Because *Health & Safety Code § 1430(a)* excludes actions for injunctions or for civil damages if the Department of Health Services has taken action and the violations have been corrected to its satisfaction, if the Department has investigated the alleged conduct and found it not to constitute a Class A or Class B violation, an action under *Health & Safety Code § 1430(a)* presumably could not be brought. An action under *Health & Safety Code § 1430*, however, apparently may be brought if the Department has made no determination and issued no citation [*see Myers v. Eastwood Care Center, Inc. (1982) 31 Cal. 3d 628, 635, 183 Cal. Rptr. 386, 645 P.2d 1218* (dictum contrasting private action under *Health & Safety Code § 1430* with enforcement action by Attorney General under *Health & Safety Code § 1428*, which may only be brought after citation has been issued)]. It is not clear by what authority the court would be empowered to classify the alleged violation as A or B, because classification of these violations is, by definition, dependent on a determination made by the Department [*see Health & Safety Code § 1424(d), (e), discussed under § 351.14*].

If an action under *Health & Safety Code § 1430(a)* is precluded, a complaint based on the alleged wrongful conduct could still be sought under other causes of action [*see Health & Safety Code § 1430(c)* (remedies are in addition to other remedies provided by law)].

[3] Limit on Damages

The amount of civil damages that may be recovered in an action for Class A and B violations brought pursuant to *Health & Safety Code § 1430* may not exceed the maximum amount of civil penalties that could be assessed on account of the violation [*Health & Safety Code § 1430(a)*; *see Health & Safety Code §§ 1423-1425* (citations and assessment of civil penalties)].

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31-351 California Forms of Pleading and Practice--Annotated § 351.20

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§ 351.20 Jurisdiction

An action brought pursuant to the Long-Term Care, Health, Safety, and Security Act of 1973 is a limited civil case if civil penalties are not sought or amount to $25,000 or less [*Code Civ. Proc. § 86.1*]. The superior court has jurisdiction [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

If the action seeks permanent injunctive relief, it may not be a limited civil case except as otherwise authorized by statute [*Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*]. For further discussion of limited civil case classification, see Ch. 324, *Jurisdiction: Subject Matter* . For discussion of procedures unique to limited civil cases, see Ch. 345A, *Limited Civil Cases* .

Legal Topics:

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31-351 California Forms of Pleading and Practice--Annotated § 351.21

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§ 351.21 Rights of Patients

[1] Bill of Rights Under State Law

Pursuant to the Patients' *Bill of Rights*, skilled nursing and intermediate care facilities must establish written policies and procedures ensuring that each patient admitted to the facility possesses, and has notice of, the following facility obligations [*Health & Safety Code § 1599.1(a)-(g)*]:

- The facility must employ an adequate number of qualified personnel to carry out all of the functions of the facility.

- Each patient must show evidence of good personal hygiene and must be given care to prevent bedsores, and measures must be used to prevent and reduce incontinence for each patient [*see 22 Cal. Code Reg. §§ 72315(d)(f)* (skilled nursing facility), *73315(d)* (intermediate care facility)].

- The facility must provide food of the quality and quantity to meet the patients' needs in accordance with physician's orders [*see 22 Cal. Code Reg. §§ 72315(h), 72335(a)* (skilled nursing facility), *73325(a)* (intermediate care facility)].

- The facility must provide an activity program staffed and equipped to meet the needs and interests of each patient and to encourage self-care and resumption of normal activities; patients must be encouraged to participate in activities suited to their individual needs [*see Health & Safety Code § 1439.2* (nature of mandated activity program); *22 Cal. Code Reg. §§ 72379-72389* (requirements for activity program for skilled nursing facility), *73377-73389* (requirements for activity program for intermediate care facility)].

- The facility must be clean, sanitary, and in good repair at all times [*see 22 Cal. Code Reg. §§*

72601-72665 (regulations governing skilled nursing facility's physical plant), *73601-73685* (regulations governing intermediate care facility's physical plant)];

- A nurses' call system must be maintained in operating order in all nursing units and must provide visible and audible signal communication between nursing personnel and patients; extension cords to each patient's bed must be readily accessible to patients at all times [*see 22 Cal. Code Reg. § 72315(m)*] (patient's call signals must be answered promptly in skilled nursing facility).

- The facility must disclose in writing any significant beneficial interest in an ancillary health service provider or in another facility, or any significant beneficial interest of an ancillary health service provider in the facility, to the patient or the patient's representative, and must advise the patient of the right to choose to have another ancillary health service provider or facility provide any supplies or services ordered by the medical staff of the facility [*see Health & Safety Code § 1323(a)* (facility's disclosure of interest in ancillary health service provider), (c) (facility's disclosure of health service provider's interest in facility)].

If a resident of a long term health care facility has been hospitalized in an acute care hospital and asserts his or her rights to readmission pursuant to bed-hold provisions or readmission rights of either state or federal law, and the facility refuses to readmit the resident, the resident may appeal the facility's refusal [*Health & Safety Code § 1599.1(h)(1)*]. In connection with the appeal:

- The refusal of the facility will be treated as if it were an involuntary transfer under federal law, and the rights and procedures that apply to appeals of transfers and discharges of nursing facility residents will apply to the resident's appeal [*Health & Safety Code § 1599.1(h)(2)*].

- If the resident appeals, and the resident is eligible under the Medi-Cal program, the resident must remain in the hospital, and the hospital may be reimbursed at the administrative day rate, pending the final determination of the hearing officer, unless the resident agrees to placement in another facility [*Health & Safety Code § 1599.1(h)(3)*].

- If the resident appeals, and the resident is not eligible under the Medi-Cal program, the resident must remain in the hospital if other payment is available, pending the final determination of the hearing officer, unless the resident agrees to placement in another facility [*Health & Safety Code § 1599.1(h)(4)*].

- If the resident is not eligible for participation in the Medi-Cal program and has no other source of payment, the hearing and final determination must be made within 48 hours [*Health & Safety Code § 1599.1(h)(5)*].

Notwithstanding any other provision of law, a skilled nursing facility, any intermediate care facility, or a congregate living facility must make reasonable efforts to contact the person named in the resident's admission agreement as the resident's contact person, or the resident's responsible person, within 24 hours after a significant change in the resident's health or mental status [*Health & Safety Code § 1795(a)*].

[2] Regulatory Rights Under State Law

In addition, the rights of patients embodied in the policies and procedures of those facilities must include those specified by regulation [*Health & Safety Code § 1599.1*].

Skilled nursing facilities and intermediate care facilities must establish written policies, and must make them available to patients (or their representatives, as enumerated) and to the public. The policies and procedures must ensure that each

patient has the following rights [*22 Cal. Code Reg. §§ 72527(a)* (skilled nursing facilities), *73523(a)* (intermediate care facilities)]:

- To be informed fully, as evidenced by the patient's written acknowledgment prior to or at the time of admission and during stay, of the rights and of all rules and regulations governing patient conduct.

- To be informed fully, prior to or at the time of admission and during stay, of services available in the facility and of any related charges, including any charges for services not covered by the facility's basic per diem rate or not covered under Titles XVIII [*42 U.S.C. § 1395 et seq.*] or XIX of the Social Security Act [*42 U.S.C. § 1396 et seq.*].

- To be informed fully by a physician of his or her medical condition unless medically contraindicated, and to be afforded the opportunity to participate in the planning of medical treatment and to refuse to participate in experimental research.

- To refuse treatment to the extent permitted by law and to be informed of the medical consequences of that refusal.

- To be transferred or discharged only for medical reasons, for reasons based on the welfare of the patient or other patients, or for nonpayment; to be given reasonable advance notice to ensure orderly transfer or discharge; and to have the actions documented in the patient's health record [*see Health & Safety Code § 1325* (legislative intent to protect patients from "transfer trauma"); *see also O'Bannon v. Town Court Nursing Center (1980) 447 U.S. 773, 784 n.16, 100 S. Ct. 2467, 65 L. Ed. 2d 506* (noting damage caused by "transfer trauma")].

- To be encouraged and assisted throughout the period of stay to exercise rights as a patient and as a citizen, and to voice grievances and recommend changes in policies and services to facility staff or outside representatives of the patient's choice, free from restraint, interference, coercion, discrimination, or reprisal.

- To manage personal financial affairs, or to be given at least a quarterly accounting of financial transactions made on the patient's behalf if the facility accepts written delegation of this responsibility subject to the provisions of *22 Cal. Code Reg. § 72529* or *73557*.

- To be free from mental and physical abuse and to be free from chemical and (except in emergencies) physical restraints, except as authorized in writing by a physician or other lawfully authorized person, or when necessary to protect the patient or others from injury.

- To be assured confidential treatment of personal and medical records, and to approve or refuse their release to any individual outside the facility, except in the case of transfer to another facility or as required by law or third-party payment contract.

- To be treated with consideration, respect, and full recognition of dignity and individuality, including privacy in treatment and in care of personal needs.

- Not to be required to perform services for the facility that are not included for therapeutic purposes in the patient's plan of care.

- To associate and communicate privately with persons of the patient's choice, and to send and receive personal mail unopened, unless medically contraindicated.

- To meet with others and participate in activities of social, religious, and community groups, unless medically contraindicated.

- To retain and use personal clothing and possessions as space permits, unless to do so would infringe on rights of other patients and unless medically contraindicated.

- If married, to be assured privacy for visits by the patient's spouse and if both are patients in the facility, to be permitted to share a room, unless medically contraindicated.

- To have daily visiting hours established.

- To have visits from members of the clergy at any time, at the request of the patient or the patient's guardian.

- To allow relatives, or persons responsible, to visit critically ill patients at any time, unless medically contraindicated.

- To be allowed privacy for visits with family, friends, clergy, or social workers, or for professional or business purposes.

- To have reasonable access to telephones and to make and receive confidential calls.

- With regard only to patients in intermediate care facilities, to be permitted to purchase drugs or to rent or purchase medical supplies or equipment, pursuant to *Health & Safety Code § 1320*.

With regard to skilled nursing facilities, a patient's regulatory rights may be denied or limited only for good cause, which must be evidenced by the written order of the attending physician, and may only be denied or limited when otherwise authorized by law. The reasons must be documented in the patient's health record by the attending physician [*22 Cal. Code Reg. § 72527(b)*].

With regard to intermediate care facilities, a patient's regulatory rights may be denied for good cause only by the attending physician, and must be documented in the patient's health record by the attending physician [*22 Cal. Code Reg § 73523(b)*].

Effective July 1, 2007, the written policies and procedures of a skilled nursing facility or intermediate care facility must ensure that specified federal regulations regarding the rights of residents in long-term care facilities and the duties of those facilities toward their residents [*see 42 C.F.R. §§ 483.10, 483.12, 483.13, 483.15* (as in effect July 1, 2006); *see also § 351.21[3]*] are applied to the facility, in addition to state law requirements and regardless of a resident's payment source or the Medi-Cal or Medicare certification status of the facility in which the resident resides, except that a noncertified facility is not obligated to provide notice of Medicaid or Medicare benefits, covered services, or eligibility procedures [*Health & Safety Code § 1599.1(i)*].

[3] Rights Under Federal Law

A long-term health care facility (that is, an intermediate care facility, skilled nursing facility, and nursing facility) that participates in Medicare or Medicaid programs must conform to the federal regulations set forth in *42 C.F.R. § 483.1 et seq.*, some of which apply to all such facilities, and some of which apply only to the facilities specified in the provision. These regulations are based on such residents' rights as freedom from discrimination for exercising one's rights, limitations on transfer and discharge, and freedom from physical restraints [*see 42 C.F.R. §§ 483.10, 483.12, 483.13,*

respectively]. Under these regulations, the facility must provide each resident with the necessary nursing, medical, and psychosocial services to attain and maintain the highest possible mental and physical functional status [*42 C.F.R. § 483.25*]. In addition, the facility is required to develop a comprehensive care plan for each resident, and to conduct periodic assessments of each resident's functional capacity for that purpose [*see 42 C.F.R. § 483.20*].

Skilled nursing facilities must also adhere to federal statutes establishing requirements for participation in Medicare and Medicaid reimbursement programs. A skilled nursing facility participating in the Medicare program must comply with the standards set forth in *42 U.S.C. § 1395i-3*, such as the protection of a patient's right to privacy [*see 42 U.S.C. § 1395i-3(c)*]. A skilled nursing facility participating in the Medicaid program must comply with the standards set forth in *42 U.S.C. § 1396r*, including limitations on transfer and discharge [*see 42 U.S.C. § 1396r(c)*; *see also 42 U.S.C. § 1396r(a)* (defining "nursing facility")]. Enforcement of the both these statutes generally inhere to the federal and state governments [*see 42 U.S.C. §§ 1395i-3(h)* (Medicare), *1396r(h)* (Medicaid)]. They are in addition to any other state or federal remedies, and do not preclude any remedies available to an individual at common law [*42 U.S.C. §§ 1395i-3(h)(5)* (Medicare), *1396r(h)(8)* (Medicaid)]. Many of the patients' rights specified under federal law are similar to those specified under California law and regulations [*compare, e.g., 42 U.S.C. § 1395i-3(c) with 22 Cal. Code Reg. § 72527(a)*].

Federal law regarding skilled nursing facilities participating in the Medicare program also affords a patient the right to receive written information at the time of admission of his or her rights under state law to make decisions concerning medical care received from the facility, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives [*see 42 U.S.C. §§ 1395cc(f), 1395i-3(c)(1)(E)*; *but see* Pub. L. No. 101-508, § 4206(c) (not prohibiting application of any state law that allows for objection on basis of conscience by health care provider)]. This provision could be relevant, for example, with respect to an issue regarding the patient's "right to die" [*see Cruzan v. Director, Mo. Health Dept. (1990) 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224, 245-246* (patient's "right to die" under *U.S. Const., amend. XIV*)].

[4] Civil Action for Violation of Regulations

A current or former resident or patient of a skilled nursing facility or an intermediate care facility may bring a civil action against the licensee of a facility who violates any rights of the resident or patient as set forth in *22 Cal. Code Reg. § 72527* or any other right provided for by federal or state law or regulation. The suit must be brought in a court of competent jurisdiction. The licensee is liable for the acts of the licensee's employees. The licensee is liable for up to $500, and for costs and attorney's fees, and may be enjoined from permitting the violation to continue [*Health & Safety Code § 1430(b)*; *see Health & Safety Code § 1250(c)* (definition of skilled nursing facility), (d) (definition of intermediate care facility)]. The remedies specified in *Health & Safety Code § 1430(b)* are in addition to any other remedy provided by law [*Health & Safety Code § 1430(c)*]. For a form for a complaint for damages and injunctive relief under *Health & Safety Code § 1430(b)*, see *§ 351.221*.

An agreement by a resident or patient of a skilled nursing facility or intermediate care facility to waive his or her rights to sue pursuant to *Health & Safety Code § 1430(b)* is void as contrary to public policy [*Health & Safety Code § 1430(b)*].

A cause of action under *Health & Safety Code § 1430(b)* survives the death of the resident or patient, since under the general rule, except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death but survives subject to the applicable limitation period [*Code Civ. Proc. § 377.20(a)*], and there is no contrary statutory provision respecting a cause of action under *Health & Safety Code § 1430(b)* [*Fitzhugh v. Granada Healthcare & Rehab. Ctr. (2007) 150 Cal. App. 4th 469, 473-474, 58 Cal. Rptr. 3d 585]* .

Any rights under *Health & Safety Code § 1599 et seq.* of a patient judicially determined to be incompetent, or who is found by his or her physician to be medically incapable of understanding that information, or who exhibits a

communication barrier, devolve to that patient's guardian, conservator, next of kin, sponsoring agency, or representative payer, unless the facility itself is the representative payer [*Health & Safety Code § 1599.3*; *see 22 Cal. Code Reg. §§ 72527(c)* (devolution of rights in skilled nursing facility), *73523(c)* (devolution of rights in intermediate care facility)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesFacility LiabilityNursing FacilitiesHealthcare LawBusiness Administration & OrganizationPatient ConfidentialityGeneral OverviewHealthcare LawTreatmentEnd-of-Life DecisionsAdvance DirectivesHealthcare LawTreatmentEnd-of-Life DecisionsDo-Not-Resuscitate OrdersHealthcare LawTreatmentPatient ConsentRight to Refuse TreatmentPublic Health & Welfare LawSocial SecurityMedicaidEligibilityGeneral Overview

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Chapter 351 LONG-TERM HEALTH AND RESIDENTIAL CARE
PART II. LEGAL BACKGROUND
A. Long-Term Health Care Facilities

31-351 California Forms of Pleading and Practice--Annotated § 351.22

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.22 Protection Against Unlawful Relocation

[1] In General

The Patients' *Bill of Rights* includes the right not to be transferred except for enumerated purposes [*see 22 Cal. Code Reg. §§ 72527(a)(5)* (skilled nursing facility), *73523(a)(5)* (intermediate care facility); *see also § 351.21[2]*].

[2] Civil Action for Unlawful Relocation

A civil action against the licensee for unlawful relocation may be brought pursuant to *Health & Safety Code § 1430(b)* [*see § 351.21[4]*]. If the violation also constitutes a Class A or B violation, an action may be brought pursuant to *Health & Safety Code § 1430(a)*, which provides a private right of action for injunction or damages for classified violations [*see § 351.19*].

[3] Restrictions Under Medi-Cal Program

[a] Disclosures

Every long-term health care facility must reveal to applicants for admission, or to their designated representatives, orally and in writing and prior to admission whether the facility participates in the Medi-Cal program, and the circumstances under which the law permits a Medi-Cal recipient to be transferred involuntarily [*Health & Safety Code § 1439.8*; *see Welf. & Inst. Code § 14022.3* (virtually identical provision)].

[b] Prohibition Against Transfer After Conversion to Medi-Cal

No long-term health care facility participating as a provider under the Medi-Cal program may seek to evict any resident or, after 2001, transfer any resident within the facility, because the resident changed his or her manner of purchasing

services from private payment or Medicare to Medi-Cal, except that a facility may transfer a resident from a private room to a semiprivate room if the resident changes to Medi-Cal payment status. This prohibition also applies to residents who have made a timely and good faith application for Medi-Cal benefits and for whom an eligibility determination has not yet been made [*Welf. & Inst. Code § 14124.7(a)*; *see Welf. & Inst. Code § 14124.10* (prohibiting discrimination against Medi-Cal patients based on source of payment)]. This prohibition does not apply to any resident of a skilled nursing facility or intermediate care facility receiving respite care services, unless the services are already provided through a Medicaid waiver program, or are already allowed as a covered service by the Medi-Cal program [*Welf. & Inst. Code § 14124.7(b)*; *see 42 U.S.C. § 1396n* (Medicaid waiver program); *see also Health & Safety Code § 1418.1* (respite care services), discussed in *§ 351.11[7]*]. In addition, this prohibition does not limit a facility's ability to transfer a resident within a facility, as provided by law, because of a change in a resident's health care needs or if the bed retention would result in there being no available Medicare-designated beds within a facility [Health & Safety Code § 14124.7(c)]. All of these rules, however, are to be implemented only to the extent that there is no conflict with federal law [Health & Safety Code § 14124.7(d)]. For a complaint based on violation of a patient's rights, which includes allegations asserting violation of *Welf. & Inst. Code § 14124.7(a)*, *see § 351.221*.

[c] Transfer for Misrepresentation of Finances

A long-term health care facility participating as a provider under the Medi-Cal program may transfer or seek to evict a resident if the facility discovers, within 90 days of admission, that a private-pay patient's financial assets and liabilities are materially different than represented prior to acceptance of the patient, after requesting specific financial information, relying on it, and promptly and diligently investigating [*see Health & Safety Code § 1439.7(a)-(c)*]. This provision applies notwithstanding *Welf. & Inst. Code § 14124.7* [*Health & Safety Code § 1439.7*]. For a form for an affirmative defense based on *Health & Safety Code § 1439.7*, for use in response to a complaint for unlawful relocation under *Welf. & Inst. Code § 14124.7*, see *§ 351.222*.

The 90-day limit on transfer or eviction does not apply if the resident fraudulently misrepresented his or her assets and liabilities so that if the material facts were known at the time by the facility the resident would not have been admitted, and the facility could not have discovered the misrepresentation by exercising reasonable diligence [*Health & Safety Code § 1439.7(d)*; *see Health & Safety Code § 1439.7(e)* (limit of 18 months from admission date to transfer or evict)]. A facility must promptly notify the Department of Health Services and the Office of the Long-Term Care Ombudsman prior to taking action to transfer or evict a resident under *Health & Safety Code § 1439.7* [*Health & Safety Code § 1439.7(f)*; *see § 351.104[2]*].

[d] Eviction After Facility's Voluntary Withdrawal From Medi-Cal Program

Any nursing facility, or any category of intermediate care facility for the developmentally disabled currently certified to participate in the Medi-Cal program, may not voluntarily withdraw from the program unless all of the following conditions are met [*Welf. & Inst. Code § 14022.4(a)*; *see* Health & Safety Code § 14022.4(b) (not applicable to facilities that filed notice of intent prior to May 1, 1987)]:

- The facility must file with the Department of Health Services a notice of intent to withdraw from the Medi-Cal program.

- The facility is prohibited from subsequently evicting any Medi-Cal recipient or private pay patient residing at the facility at the time the notice of intent to withdraw from the Medi-Cal program, except for patients transferred or discharged only for medical reasons, or for the welfare of that patient or other patients, or for nonpayment.

- Patients admitted to the facility on or after the date of the notice of intent to withdraw from the Medi-Cal program must be advised orally and in writing that the facility intends to withdraw from the

Medi-Cal program, and that the facility is not required to keep a new resident who converts from private pay to Medi-Cal, notwithstanding *Welf. & Inst. Code § 14124.7*.

The facility may formally withdraw from the Medi-Cal program when all patients residing in the facility at the time the facility filed the notice of intent to withdraw from the program no longer reside in the facility [*Welf. & Inst. Code § 14022.4(d)*].

Welf. & Inst. Code § 14022.4 does not apply to any facility that ceases operations entirely (that is, not in operation for a period of 12 months or longer) [*Welf. & Inst. Code § 14022.4(g)*].

[4] Relocation Procedures When Facility Unable to Care for Patients

[a] Notice Requirement

Notwithstanding any other provisions of law, a long-term health care facility must give written notice to the affected patients or to the guardians of the affected patients at least 30 days prior to any change in the status of the license or in the operation of the facility resulting in the inability of the facility to care for its patients. If patients' placement problems are encountered that cannot satisfactorily be resolved within the 30-day period, the Department of Health Services and the health facility must agree on an extension that does not exceed an additional 60 days [*Health & Safety Code § 1336*; *see also Health & Safety Code § 1336.2(a), (c)* (30-day notice must include notice of right to relocation services) and discussion in *§ 351.22[4][c]*]. The notice requirements under *Health & Safety Code § 1336* are inapplicable to actions initiated by the Department of Health Services to suspend or revoke the facility's license [*Health & Safety Code § 1336*].

[b] Relocation Services

Before residents are transferred because of any change in the status of the license or operation of a facility, including a facility closure or voluntary or involuntary termination of a facility's Medi-Cal or Medicare certification, the facility must take reasonable steps to transfer affected residents safely and minimize possible transfer trauma by doing, at a minimum, all of the following [*Health & Safety Code § 1336.2(a)*]. In addition, the facility must provide an appropriate team of professional staff to perform these required services [*Health & Safety Code § 1336.2(b)*].

- The facility must be responsible for ensuring that the resident's attending physician, if available, or a facility medical director, if available, completes the medical assessment of the resident's condition and susceptibility to adverse health consequences, including psychosocial effects, before written notice of transfer is given to the resident. The assessment cannot be considered complete unless it provides, in accordance with these assessments, recommendations for counseling, follow-up visits, and other recommended services, by designated health professionals, and for preventing or ameliorating potential adverse health consequences in the event of transfer.

- The facility must be responsible for ensuring that the facility nursing staff and activity director complete an assessment of the social and physical functioning of the resident based on the relevant portions of the minimum data set, as described in *Welf. & Inst. Code § 14110.15*, before written notice of transfer is given to the resident. The assessment cannot be considered complete unless it provides recommendations for preventing or ameliorating potential adverse health consequences in the event of transfer. The assessment may be amended because of a change in the resident's health care needs. The assessment must also include a recommendation for the type of facility that would best meet the resident's needs.

- The facility must be responsible for evaluating the relocation needs of the resident, including

proximity to the resident's representative, and must determine the most appropriate and available type of future care and services for the resident before written notice of transfer is given to the resident or the resident's representative. The health facility must discuss the evaluation and medical assessment with the resident or the resident's representative and make the evaluation and assessment part of the medical records for transfer. If the resident or resident's representative chooses to make a transfer before completion of assessments, the facility must inform the resident or the resident's representative, in writing, of the importance of obtaining the assessments and follow-up consultation.

- At least 30 days in advance of the transfer, the facility must inform the resident or the resident's representative of alternative facilities that are available and adequate to meet resident and family needs.

- The facility must arrange for appropriate future medical care and services, unless the resident or resident's representative has otherwise made these arrangements. This requirement does not obligate a facility to pay for future care and services.

The Department of Health Services may make available assistance for the placement of hard-to-place residents based on the department's determination of the benefit and necessity of that assistance. A hard-to-place resident is a resident whose level of care, physical malady, or behavioral management needs are substantially beyond the norm [*Health & Safety Code § 1336.2(e)*].

The department may provide, or arrange for the provision of, necessary relocation services at a facility, including medical assessments, counseling, and placement of patients, if the department determines that these services are needed promptly to prevent adverse health consequences to patients, and the facility refuses, or does not have adequate staffing, to provide the services. In these cases, the facility or the licensee must reimburse the department for the cost of providing the relocation services. The department's participation will not relieve the facility of any responsibility under *Health & Safety Code § 1336.2*. If the department does not provide or arrange for the provision of the necessary relocation services, and the facility refuses to provide the relocation services as required above, then the department must request that the attorney general's office or the local district attorney's office seek injunctive relief and damages in the same manner as provided for in *Bus. & Prof. Code § 17200 et seq.* (remedies for unfair competition and unfair business practices) [*Health & Safety Code § 1336.2(f)*].

[c] Notice of Right to Relocation Services

The facility must give written notice to affected residents or their representatives, advising them of the requirements in *Health & Safety Code § 1336.2(a)* at least 30 days in advance of transfer. If a facility is required to give written notice pursuant to *Health & Safety Code § 1336* [*see § 351.22[4][a]*], then the notice must advise the affected resident or resident's representative of the requirements in *Health & Safety Code § 1336.2(a)*. If the transfer is made pursuant to *Health & Safety Code § 1336.2(g)* (discussed under *§ 351.22[4][d]*), the notice must include notification to the resident or resident's representative that the transfer plan is available to the resident or resident's representative free of charge on request [*Health & Safety Code § 1336.2(c)*].

In the event of a temporary suspension of the facility's license pursuant to *Health & Safety Code § 1296* (temporary suspension to protect public welfare), the 30-day notice requirement will not apply, but the facility must provide the relocation services required in *Health & Safety Code § 1336.2(a)* (discussed under *§ 351.22[4][b]*) unless the department provides the services [*Health & Safety Code § 1336.2(d)*].

[d] Submission of Relocation Plan

If 10 or more residents are likely to be transferred because of any voluntary or involuntary change in the status of the license or operation of a facility, including a facility closure or voluntary or involuntary termination of a facility's

Medi-Cal or Medicare certification, the facility must submit a proposed relocation plan for the affected residents to the Department of Health Services for approval at least 15 days before the written transfer notification is given to any resident or resident's representative. The plan must provide for implementation of the relocation services in *Health & Safety Code § 1336.2(a)* (discussed under *§ 351.22[4][b]*) and must describe the availability of beds in the area for residents to be transferred, the proposed discharge process, and the staffing available to assist in the transfers. The plan will become effective on the date the department grants its approval. The department must base its approval of a relocation plan on the standards specified in *Health & Safety Code § 1336.2*. The department must promptly either approve or reject the plan within 10 working days of receipt from the facility. If the department rejects the plan, the facility may resubmit amended relocation plans, each of which the department must promptly either approve or reject within 10 working days of receipt from the facility. Until one plan has been approved by the department, and until the facility has complied with the requirements in *Health & Safety Code § 1336.2(a)*, the facility may not issue a notice of transfer. The facility must submit the relocation plan to the local long-term care ombudsman at the same time the plan is submitted to the department [*Health & Safety Code § 1336.2(g)*].

Any resident has the right to remain in the facility for up to 60 days after the approved written notice of the facility's intent to transfer the resident if an appropriate placement based on the relocation assessment and relocation recommendations has not been made. The facility must maintain an appropriate level of staffing in order to ensure the well-being of all residents as they continue to reside in the facility. The department must monitor the facility's staging of transfers, and if the facility's staging of placements is causing a detrimental impact on those residents being transferred, then the department must limit the number of residents being transferred per day until the department determines that it would be safe to increase the number [*Health & Safety Code § 1336.2(h)*].

[e] Appointment of Receiver

When the facility is found to be in such a condition that continued operation presents a substantial probability or imminent danger of serious physical harm or death to the patients, the Director of the Department of Health Services may petition the court for an order appointing a receiver to operate a long-term health care facility temporarily [*see Health & Safety Code § 1325 et seq.* (management of long-term health care facilities by temporary receiver); *see also Newland v. Kizer (1989) 209 Cal. App. 3d 647, 652-654, 257 Cal. Rptr. 450* (residents' right to seek court order compelling Department to adopt regulations for management of long-term care facilities by receivership)]. The intent of the Legislature in enacting the receivership provisions is to provide an alternative to transfer trauma and to protect the patients in the absence of other reasonable available alternatives [*see Health & Safety Code § 1325*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsHealthcare LawActions Against FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing FacilitiesPublic Health & Welfare LawSocial SecurityMedicareProvidersTypesNursing Facilities

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Chapter 351 LONG-TERM HEALTH AND RESIDENTIAL CARE
PART II. LEGAL BACKGROUND
A. Long-Term Health Care Facilities

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§ 351.23 Loss or Theft of Patients' Property

A long-term health care facility that fails to make reasonable efforts to safeguard patients' property must reimburse residents for, or replace, stolen or lost property at its then current value [*Health & Safety Code § 1289.3(a)*; *see 22 Cal. Code Reg. §§ 72529* (safeguards for valuables in skilled nursing facility), 73557 (safeguards for valuables in intermediate care facility)]. A long-term health care facility's obligations to provide a program to prevent loss and theft, set forth in *Health & Safety Code § 1289.4*, are essentially the same as those set forth in *Health & Safety Code § 1569.153*, which apply to residential care facilities for the elderly, discussed in *§ 351.44*.

The resident or the resident's representative may bring an action to enforce this duty [*Health & Safety Code § 1289.3(a)*; *see § 351.240* (complaint for reimbursement or replacement against residential care facility for elderly, which may be adapted for use by patient of long-term care facility)]. If a facility has shown clear and convincing evidence of its efforts to meet each of the requirements under *Health & Safety Code § 1289.4*, a rebuttable presumption is established that it has made reasonable efforts to safeguard patient property [*Health & Safety Code § 1289.3(a)*; *see Health & Safety Code § 1289.4* (enumerating requirements); *see also Health & Safety Code § 1418.7* (requiring policies and procedures to reduce theft and loss pursuant to *Health & Safety Code § 1289.4*)].

A facility that fails to implement an adequate theft and loss program is subject to the issuance of a citation by the Department of Health Services [*Health & Safety Code § 1289.3(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsServicesHealthcare LawActions Against FacilitiesFacility LiabilityNursing FacilitiesHealthcare LawInsuranceReimbursementGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesCommunity ResidencePublic Health & Welfare

LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities

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AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.24 Requirements for Admission Contracts

[1] In General

Health & Safety Code § 1599.60 et seq. contain extensive requirements governing the form, content, and availability of admission contracts for long-term health care facilities, as well as mandated disclosures of patients' rights and facility obligations, and prohibited clauses. Some of the required provisions are designed to protect patients who are or may become Medi-Cal beneficiaries against unlawful or discriminatory treatment because of their Medi-Cal status [*see Health & Safety Code §§ 1599.65(b)*, *1599.66*, *1599.67(b)*, *1599.69*, *1599.70*, and *1599.76(b)*; *see also Health & Safety Code § 1599.60(a)* (definition of admission contracts), discussed § 351.11[6]].

An admission contract for a skilled nursing facility must have an attachment that is placed before any other attachment and that discloses the name of the owner and licensee of the facility and the name and contact information of a single entity that is responsible for all aspects of patient care and the operation of the facility [*Health & Safety Code § 1599.64(c)*; *see Health & Safety Code § 1599.645(a)* (requirement to update that information by written notice of changes, which must be sent to residents and patients and their primary contacts within 30 days after regulatory approval of change of ownership)].

A skilled nursing facility [*see Health & Safety Code § 1250(c)*] may admit a patient only on a physician's order and only if the facility is able to provide necessary care for the patient [*Health & Safety Code § 1262.7(a)*]. The administrator or designee of a skilled nursing facility is responsible for screening patients for admission to the facility to ensure that the facility admits only those patients for whom it can provide necessary care. The administrator, or his or her designee, must conduct preadmission personal interviews as appropriate with the patient's physician, the patient, the patient's next of kin or sponsor, or the representative of the facility from which the patient is being transferred. A telephone interview may be conducted when a personal interview is not feasible [*Health & Safety Code § 1262.7(b)*].

[2] Applicability of Governing Provisions

The provisions governing admission contracts under *Health & Safety Code § 1599.60 et seq.* apply only to new admissions to skilled nursing and intermediate care facilities on and after January 1, 1988. Execution of new admission agreements for patients already residing in those facilities prior to January 1, 1988 is not required. Nevertheless, those patients must be given notice of changes in admission contracts pursuant to *Health & Safety Code § 1599.60 et seq.* [*see Health & Safety Code § 1599.84*].

Although *Health & Safety Code § 1599.60(b)* defines "contract of admission" in terms of documents regarding admission "to a long term health care facility, as defined in Section 1326," *Health & Safety Code § 1599.84* states that *Health & Safety Code § 1599.60 et seq.* apply to "skilled nursing and intermediate care facilities," which are only two of the seven categories of long term health care facilities listed in *Health & Safety Code § 1326*.

[3] Prohibited Provisions

Contracts of admission may not include unlawful waivers of facility liability for the health and safety or personal property of residents. No contract of admission may include any provision that the facility knows or should know to be deceptive or unlawful under state or federal law [*Health & Safety Code § 1599.62(a)*].

In addition, no contract of admission may include a clause that purports to alter the statutory period for filing an action against a facility [*Health & Safety Code § 1599.82*; for general disucssion of limitation periods, *see* Ch. 345, *Limitation of Actions*].

[4] Disclosure of Grievance Procedure Required

The contract of admission must state that the rules must be reasonable, and that there is a procedure for suggesting changes in the rules. It must also specify that a copy of the facility grievance procedure for resolution of residents complaints about facility practices is available [*Health & Safety Code § 1599.75(a), (b)*]. The agreement must also inform residents of their right to contact the Department of Health Services or the long-term care ombudsman, or both, regarding grievances against the facility [*Health & Safety Code § 1599.75(c)*; for discussion of complaints to the Department of Health Services, *see § 351.13*; for discussion of the long-term care ombudsman, *see § 351.12*].

[5] Arbitration Clause Requirements

All contracts of admission that contain an arbitration clause must clearly indicate that agreement to arbitration is not a precondition for medical treatment or for admission to the facility [*Health & Safety Code § 1599.81(a)*].

Arbitration clauses must be included on a form separate from the rest of the admission contract. The attachment must contain space for the signature of any applicant who agrees to arbitration of disputes [*Health & Safety Code § 1599.81(b)*]. On the attachments, clauses referring to arbitration of medical malpractice claims under *Code Civ. Proc. § 1295* must be clearly separated from other arbitration clauses, and separate signatures are required for each clause [*Health & Safety Code § 1599.81(c)*]. The attachment must contain notice that under *Health & Safety Code § 1430*, the patient may not waive his or her ability to sue for violation of the Patient's *Bill of Rights* [*Health & Safety Code § 1599.81(d)*; for discussion of actions for violations of Patient's *Bill of Rights, see § 351.21[4]*]. For additional discussion of the arbitration of medical malpractice claims, see Ch. 39, *Tactics and New Developments in ADR*, and Ch. 415, *Physicians: Medical Malpractice*.

[6] Attorney's Fees

If a provision for the payment of attorney's fees is included in the admission contract, it must state that, in disputes arising from the admission contract, the prevailing party is entitled to attorney's fees [*Health & Safety Code § 1599.83*; *see generally* Ch. 174, *Costs and Attorney's Fees*].

[7] Cause of Action for Violations

A violation of the admission contract requirements that is determined to be a Class B violation gives rise to a private right of action for classified violations under *Health & Safety Code § 1430(a)* (discussed under *§ 351.19*) [*see Health & Safety Code § 1599.62(c)* (remedies not exclusive)]. For a form of complaint for Class A or B violations under *Health & Safety Code § 1430(a), see § 351.220*.

[8] Administrative Penalties for Violations

Violation of *Health & Safety Code § 1599.60 et seq.* is subject to a Class B citation or a deficiency from the Department of Health Services. The admission agreement must be viewed as a whole and results in only one citation [*Health & Safety Code § 1599.62(b)*]. Unless otherwise expressly provided, the remedies or penalties provided by *Health & Safety Code § 1599.60 et seq.* do not preclude a resident from seeking any other remedy and penalties available under all other laws of California [*Health & Safety Code § 1599.62(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesGeneral OverviewHealthcare LawActions Against Healthcare WorkersGeneral OverviewHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral Overview

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AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.25 Requirements for Abbreviated Admission Contracts

Abbreviated admission contracts, applying to respite care service to frail elderly or functionally impaired persons in certain facilities on a temporary or periodic basis, are subject to content and form requirements under *Health & Safety Code § 1599.64* [*see Health & Safety Code § 1599.64(e)*; *see also Health & Safety Code § 1418.1* (respite care services), discussed under *§ 351.11[7]*]. For example, such a contract must include a statement informing the admittee that the contract is designed specifically for the provision of respite care services and cannot be used for any other type of admission to the facility [*Health & Safety Code § 1599.64(f)*].

A person who seeks to be admitted to the same facility to receive respite care services for which there already exists a prior executed abbreviated contract of admission that was signed by that person (or his or her representative) need not execute a new abbreviated contract of admission if he or she signs a written statement containing modifications of the previous contract [*see Health & Safety Code § 1599.652*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsServicesHealthcare LawGeneral OverviewHealthcare LawBusiness Administration & OrganizationGeneral Overview

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A. Long-Term Health Care Facilities

31-351 California Forms of Pleading and Practice--Annotated §§ 351.26-351.39

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[Reserved]

§§ 351.26[Reserved]

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31-351 California Forms of Pleading and Practice--Annotated § 351.40

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§ 351.40 Governing Law

The California Residential Care Facilities for the Elderly Act, set forth in *Health & Safety Code § 1569 et seq.*, governs residential care facilities for the elderly generally. Additional provisions applicable to residential care facilities for the elderly are contained in *Welf. & Inst. Code §§ 11006.9* (duty to deliver personal needs allowance to resident who is Medi-Cal recipient) and 15601 et seq. (mandated reporting of elder abuse) [*see Welf. & Inst. Code § 15610.17* (identifying certain personnel of residential care facilities for elderly as "care custodians" for purposes of mandated reports of elder abuse)]. Regulations governing residential care facilities for the elderly are set out in *22 Cal. Code Reg. § 87100 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareElderly PersonsServicesHealthcare LawActions Against FacilitiesFacility LiabilityNursing FacilitiesPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesCommunity ResidencePublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsProtection From Abuse & Neglect

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31-351 California Forms of Pleading and Practice--Annotated § 351.41

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.41 Definitions

[1] Residential Care Facility for the Elderly

A "residential care facility for the elderly" is a housing arrangement chosen voluntarily by persons 60 years of age or older, or by their authorized representatives, under which varying levels and intensities of care and supervision, protective supervision, or personal care are provided based on their varying needs, as determined in order to be admitted and to remain in the facility. Persons under 60 years of age with compatible needs may be allowed to be admitted or retained in a residential care facility for the elderly as specified in *Health & Safety Code § 1569.316* (compatiblity criteria) [*Health & Safety Code § 1569.2(k)* (operative only until enactment of legislation implementing three levels of care pursuant to *Health & Safety Code § 1569.70*); *see Health & Safety Code § 1569.2(l)* (similar later-enacted provision and including "health-related services" among types of services defining facility); *see also 22 Cal. Code Reg. §§ 87101(r)(5)* (definition of "residential care facility for elderly"), 87582(b), (c) (residence requirements)].

[2] License

"License" means a basic permit to operate a residential care facility for the elderly [*Health & Safety Code § 1569.2(h)*; *see Health & Safety Code §§ 1569.10-1569.24* (licensing procedures)].

[3] Care and Supervision

"Care and supervision" means that the facility assumes responsibility for, or provides or promises to provide in the future, ongoing assistance with activities of daily living without which the resident's physical health, mental health, safety, or welfare would be endangered. Assistance includes assistance with taking medications, money management, or personal care [*Health & Safety Code § 1569.2(b)*].

Notwithstanding any other provision of law, a residential care facility for the elderly must make reasonable efforts to

contact the person named in the resident's admission agreement as the resident's contact person, or the resident's responsible person, within 24 hours after a significant change in the resident's health or mental status [*Health & Safety Code § 1795(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsServicesPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesCommunity ResidencePublic Health & Welfare LawSocial ServicesDisabled & Elderly PersonsGeneral Overview

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31-351 California Forms of Pleading and Practice--Annotated § 351.42

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§ 351.42 Facilities Not Covered by Act

The California Residential Care Facilities for the Elderly Act does not apply to any of the following facilities [*Health & Safety Code § 1569.145*; *see 22 Cal. Code Reg. § 87107* (facilities allowed to operate without license)]:

- Health facilities [*Health & Safety Code § 1569.145(a)*; *see Health & Safety Code § 1250* (definition); *see also § 351.11[1] -[4]*];

- Clinics [*Health & Safety Code § 1569.145(b)*; *see Health & Safety Code §§ 1200, 1200.1* (definitions)];

- A facility conducted by and for the adherents of a well recognized church or religious denomination for the purpose of providing facilities for the care or treatment of the sick who depend on prayer or spiritual means for healing in the practice of the religion of that church or denomination [*Health & Safety Code § 1569.145(c)*; *see Universal Life Church, Inc. v. State of California (1984) 158 Cal. App. 3d 533, 538, 205 Cal. Rptr. 11* (unlicensed community care facilities operated by church for elderly members were not exempt from licensing requirements, since church was not providing care or treatment of sick who depend on prayer or spiritual means for healing: residents were cared for by private physicians and attended to their own medical needs)];

- A recovery house or other similar facility that provides group living arrangements for persons recovering from alcoholism or drug addiction, if it provides no care or supervision [*Health & Safety Code § 1569.145(e)*];

- A house, institution, hotel, congregate housing project for the elderly (other than a family arrangement described in the item below), or other similar place that has residents independently

accessing supporting services or that is limited to providing one or more of the following: housing, meals, transportation, housekeeping, or recreational and social activities, provided, however, that no resident requires any element of care and supervision or protective supervision as determined by the Director of Social Services [*Health & Safety Code § 1569.145(d)*];

- An arrangement for the care and supervision of a person or persons by a family member [*Health & Safety Code § 1569.145(f)(1)*; *see Health & Safety Code § 1569.145(l)* (definition of family member)]; or an arrangement for the care and supervision of a person or persons from only one family by a close friend, whose friendship preexisted the contact between the provider and the recipient, if the care and supervision are provided in a home or residence chosen by the care recipient, and the care arrangement is not of a business nature and occurs only as long as the needs of the recipient for care and supervision are adequately met [*Health & Safety Code § 1569.145(f)(2)*];

- Any housing of the following kind if occupied by elderly or disabled persons, or both, and if supportive services are made available to residents at their option, as long as the project owner or operator does not contract for or provide the supportive services [*but see Health & Safety Code § 1569.145(g)(2)* (project owner or operator may coordinate, or help residents gain access to, supportive services, either directly or through service coordinator)]:

  - Housing approved and operated pursuant to *12 U.S.C. § 1701q* (supportive housing for the elderly) or *42 U.S.C. § 8013* (supportive housing for the elderly with disabilities), or housing subject to a mortgage insured pursuant to *12 U.S.C. § 1715z* (home ownership for low-income families), or housing receiving mortgage assistance pursuant to *12 U.S.C. § 1715 l* (housing for moderate-income families) [*Health & Safety Code § 1569.145(g)(1)(A)*]; or

  - Housing that qualifies for a low income housing credit pursuant to *I.R.C. § 42* or is subject to the requirements for rental dwellings for low-income families pursuant to *42 U.S.C. § 1437f* [*Health & Safety Code § 1569.145(g)(1)(B)*]; or

- Any similar facility determined by the Director of Social Services [*Health & Safety Code § 1569.145(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-351 California Forms of Pleading and Practice--Annotated § 351.43

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.43 Licensing Requirement

[1] In General

No person, firm, partnership, association, or corporation within California, and no state or local public agency, may operate, establish, manage, conduct, or maintain a residential facility for the elderly in California without a current valid license or current valid special permit as provided under *Health & Safety Code § 1569 et seq.* [*Health & Safety Code § 1569.10*]. A facility must be licensed as a residential care facility for the elderly if it offers care and supervision, as defined, to its residents [*see Health & Safety Code § 1569.45*; *§ 351.41[3]*].

The licensing procedures for residential care facilities for the elderly are set forth under *Health & Safety Code § 1569.10 et seq.*

[2] Facilities Deemed to Be Unlicensed

A facility is deemed to be an "unlicensed residential care facility for the elderly" and "maintained and operated to provide residential care" if it is unlicensed, not exempt from licensure, and any one of the following conditions is satisfied [*Health & Safety Code § 1569.44(a)*]:

- The facility is providing care and supervision [*see Health & Safety Code § 1569.2(b)* (definition of "care and supervision"), discussed under *§ 351.41[3]*];

- The facility is held out as, or represented as, providing care and supervision [*see Health & Safety Code § 1569.2(b)*];

- The facility accepts or retains residents who demonstrate the need for care and supervision [*see Health & Safety Code § 1569.2(b)*]; or

- The facility represents itself as a licensed residential facility for the elderly.

[3] Operation of Unlicensed Facility as Unfair Business Practice

[a] In General

Operation of an unlicensed facility is an act of unfair competition and an unfair business practice within the meaning of *Bus. & Prof. Code § 17200 et seq.* [*Health & Safety Code § 1569.46*]. For a discussion and forms relating to actions for unfair business practices and unfair competition, see Ch. 565, *Unfair Competition* .

[b] Enhanced Remedies Under Civil Code

Civ. Code § 3345 provides for the enhancement of a fine, civil penalty, or any other remedy imposed in an action brought by, on behalf of, or for the benefit of senior citizens (or disabled persons) to redress unfair practices or unfair competition. For discussion and forms regarding *Civ. Code § 3345*, see Ch. 504, *Sales: Consumers Legal Remedies Act* .

[4] Action by Director to Enjoin Unlicensed Facility

The Director of Social Services may bring an action to enjoin the violation or threatened violation of *Health & Safety Code § 1569.10* or *1569.44* (prohibiting operation of unlicensed residential care facilities for the elderly), or both. If the court finds that the alleged violations are true, it must issue an order enjoining the residential care facility for the elderly from continuance of the violation [*see Health & Safety Code § 1569.41*].

[5] Civil Penalties for Operating Unlicensed Facilities

The Department of Social Services may assess an immediate civil penalty against any person who violates *Health & Safety Code § 1569.10* or *1569.44*, in the amount of $100 per resident for each day of the violation, notwithstanding any other provision of *Health & Safety Code § 1569 et seq.*, unless the Department deems that other available remedies, including criminal prosecution, are more effective [*Health & Safety Code § 1569.485(a)*]. The civil penalty must be doubled if the operator refuses to seek licensure or if the operator's licensure application is denied and the operator continues to operate the unlicensed facility, unless the Department deems that other available remedies, including criminal prosecution, are more effective [*Health & Safety Code § 1569.485(b)*; *see 22 Cal. Code Reg. § 87768(a)*].

An operator may appeal the assessment to the Director of Social Services [*Health & Safety Code § 1569.485(c)*; *see 22 Cal. Code Reg. § 87769(a)*]. The appeal must be made within 10 working days after service of the assessments. If the unlicensed facility operation has not ceased, the $200 per day penalty continues to accrue during the appeal process [*22 Cal. Code Reg. § 87769(a)*].

[6] Criminal Penalties for Operating Unlicensed Facilities

Operation of a residential care facility for the elderly without a license may be punishable as a misdemeanor pursuant to *Health & Safety Code § 1569.40(b), (d)*, or as an infraction pursuant to *Health & Safety Code § 1569.405*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesCommunity ResidencePublic Health & Welfare LawSocial ServicesDisabled & Elderly PersonsGeneral OverviewPublic Health & Welfare LawSocial ServicesDisabled & Elderly PersonsAgency Actions & ProceduresGeneral Overview

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31-351 California Forms of Pleading and Practice--Annotated § 351.44

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.44 Theft and Loss of Patients' Property

[1] Required Prevention Program

Residential care facilities for the elderly must implement a theft and loss program that includes all of the following [*see Health & Safety Code § 1569.153*]:

- Establishment and posting of the facility's policy regarding theft and investigative procedures.

- Orientation to the policies and procedures for all employees within 90 days of employment.

- Documentation of lost and stolen resident property with a value of $25 or more within 72 hours of the discovery of the loss or theft.

- Written personal property inventories established on admission and retained during the resident's stay in the facility, written in ink, witnessed by the facility and the resident or resident's representative, and dated. Items subsequently brought into or removed from the facility must be added to or deleted from the personal property inventory by the facility. The facility is not liable for items omitted or deleted from the inventory. A copy of a current inventory must be made available on request to the resident, responsible party, or other authorized representative. The resident, resident's family, or a responsible party may list items that are not subject to addition or deletion from the inventory, such as personal clothing or laundry, that are subject to frequent removal from the facility.

- Inventory and surrender of the resident's personal effects and valuables on discharge to the resident or authorized representative in exchange for a signed receipt.

- Inventory and surrender of personal effects and valuables, following the death of a resident, to the authorized representative in exchange for a signed receipt; and immediate written notice to the public administrator of the county on the death of a resident whose heirs are unable or unwilling to claim the property [*see Prob. Code §§ 7600-7666* (governing public administration of estate)].

- Documentation of efforts to control theft and loss.

- Establishment of a method of marking personal property for identification purposes.

- Reports to local law enforcment agencies within 36 hours when the administrator has reason to believe property worth $100 or more has been stolen.

- Maintenance of a secured area for residents' property, and provision of locks for the resident's bedside drawer or cabinet on the request and at the expense of the resident or the resident's family or authorized representative.

- Provision of copies of *Health & Safety Code §§ 1569.152*, *1569.153*, and *1569.154* to all residents and their responsible parties and, on request, to all prospective residents and their responsible parties.

- Notification to all current residents and all new residents, on admission, of policies and procedure relating to the theft and loss prevention program.

Only residential units that can be secured by residents, and in which there are no unrelated residents, are exempt from the requirements under *Health & Safety Code § 1569.153* [*Health & Safety Code § 1569.153(m)*].

Special regulations govern the licensee's obligations when a resident's cash resources, personal property, or valuables are given to the licensee for safeguarding [*see 22 Cal. Code Reg. § 87217*].

[2] Prohibition Against Lesser Contractual Standard

No provision of a contract of admission, which includes all documents that a resident or his or her representative is required to sign at the time of, or as a condition of, admission to a residential care facility for the elderly, may require or imply a lesser standard of responsibility for the personal property of residents than is required by law [*Health & Safety Code § 1569.154*].

[3] Right of Action by Resident Against Facility

A residential care facility for the elderly that fails to make reasonable efforts to safeguard residents' property must reimburse residents for or replace stolen or lost resident property at its then current value. The facility is presumed to have made reasonable efforts to safeguard resident property if it has shown clear and convincing evidence of its efforts to meet each of the requirements specified in *Health & Safety Code § 1569.153*. The presumption is rebuttable, and the resident or the resident's representative may pursue this matter in any court of competent jurisdiction [*Health & Safety Code § 1569.152*]. The Department is prohibited from determining that a facility's program is inadequate based solely on the occasional occurrence of theft or loss in a facility [*Health & Safety Code § 1569.152(c)*].

A civil penalty must be levied if the facility has no program or has not shown clear and convincing evidence of its efforts to meet all of the requirements under *Health & Safety Code § 1569.153*. If implemented policies are inadequate, or the situation warrants, the Department must issue a deficiency [*Health & Safety Code § 1569.152(b)*].

For a form for a complaint by a resident of a residential care facility for the elderly for reimbursement or replacement of

lost or stolen property, see *§ 351.240*. For a form for an affirmative defense to a complaint for reimbursement or replacement of lost or stolen property, based on the resident's failure to add the lost or stolen items to the written inventory or the resident's deletion of the items from the inventory, see *§ 351.241*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsServicesHealthcare LawActions Against FacilitiesFacility LiabilityNursing FacilitiesPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesCommunity Residence

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31-351 California Forms of Pleading and Practice--Annotated § 351.45

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.45 Other Facility Obligations Under Statute

[1] Resident Councils

Every licensed residential care facility for the elderly, at the request of a majority of its residents, must assist the residents in establishing and maintaining a resident-oriented facility council. The council must be composed of residents of the facility and may include family members of residents of the facility. The council may, among other things, make recommendations to facility administrators to improve the quality of daily living in the facility, and may negotiate to protect residents' rights with facility administrators [*Health & Safety Code § 1569.157(a)*].

Violation of *Health & Safety Code § 1569.157(a)* is not subject to criminal prosecution as a misdemeanor, pursuant to *Health & Safety Code § 1569.40*, but is subject to any other provision of *Health & Safety Code § 1569 et seq.* [*Health & Safety Code § 1569.157(b)*].

[2] Family Councils

No residential care facility for the elderly may prohibit the formation of a family council, and, if requested by a member of the resident's family or the resident's responsible party, the family council must be allowed to meet in a common meeting room of the facility during hours mutually acceptable to the parties [*Health & Safety Code § 1569.158(a)*]. A "family council" is a meeting of family members, friends, responsible parties, or agents of two or more patients to confer in private without facility staff [*Health & Safety Code § 1569.158(c)*]. An "agent" is a person who manages, uses, or controls those funds or assets that legally are required to be used to pay the resident's share of cost and other charges not paid for by the Medi-Cal program [*Health & Safety Code § 1569.158(c)*; *Welf. & Inst. Code § 14110.8(a)(3)*].

Facility policies on family councils may in no way limit the right of residents and family members to meet independently with outside persons, including members of nonprofit or government organizations or with facility

personnel during nonworking hours [*Health & Safety Code § 1569.158(b)*]. Family councils must also be provided adequate space on a prominent bulletin board or other posting area for the display of meeting notices, minutes, and newsletters [*Health & Safety Code § 1569.158(d)*].

[3] Mandated Services

Every facility required to be licensed as a residential care facility for the elderly must provide at least the following basic services [*Health & Safety Code § 1569.312*]:

- Care and supervision [*see § 351.41[3]*].

- Assistance with instrumental activities of daily living in the combinations that meet the needs of residents.

- Help for residents to gain access to appropriate supportive services in the community. "Supportive services" are resources available to the residents in the community that help to maintain their functional ability and meet their needs as identified in the individual resident assessment. Supportive services may include any of the following: medical, dental, and other health care services; transportation; recreational and leisure activities; social services; and counseling services [*Health & Safety Code § 1569.2(n)*].

- Awareness of the resident's general whereabouts, although the resident may travel independently in the community.

- Monitoring of activities of the residents while they are under the supervision of the facility to ensure their general health, safety, and well-being.

- Encouragement of residents to maintain and develop their maximum functional abilities through participation in planned activities.

[4] Visiting Policy

Each residential care facility for the elderly must state, on its client information form or admission agreement and on its patient's rights form, the facility's policy concerning family visits and other communication with resident clients. The facility must promptly post notice of its visiting policy at a location in the facility that is accessible to residents and families. The facility's policy concerning family visits and communication must be designed to encourage regular family involvement with the resident client, and must provide ample opportunities for family participation in activities at the facility [*Health & Safety Code § 1569.313*].

[5] Choice of Supplier of Drugs or Medical Equipment

A residential care facility for the elderly may not require residents to purchase medications or to rent or purchase medical equipment from any particular pharmacy or other source [*Health & Safety Code § 1569.314*].

Health & Safety Code § 1569.314 does not preclude a residential care facility for the elderly from requiring that residents who need assistance with the purchasing, storing, or taking of medications comply with the facility's policies and procedures regarding storage of medications and methods of assisting residents with the taking of medications, if the policies and procedures are reasonably necessary and meet the intent of state or federal regulations [*Health & Safety Code § 1569.314*].

[6] Recordkeeping and Confidentiality of Records

Each facility required to be licensed must keep a current record, and must respect the privacy and confidentiality, of all of the following information [*Health & Safety Code § 1569.315*]:

- Clients in the facility, including each client's name and ambulatory status.
- The name and telephone number of each client's physician.
- The name, address, and telephone number of any person or agency responsible for the care of a client.

[7] Eviction Notice

In addition to complying with other applicable regulations, a licensee of a residential care facility for the elderly who sends a notice of eviction to a resident must set forth in the notice to quit the reasons relied on for the eviction, with specific facts to permit determination of the date, place, witnesses, and circumstances concerning those reasons. In addition, the notice to quit must include all of the following [*Health & Safety Code § 1569.683(a)*]:

- The effective date of the eviction.
- Resources available to assist in identifying alternative housing and care options, including public and private referral services and case management organizations.
- Information about the resident's right to file a complaint with the Department of Social Services regarding the eviction, with the name, address, and telephone number of the nearest office of community care licensing and the State Ombudsman.
- The following statement: "In order to evict a resident who remains in the facility after the effective date of the eviction, the residential care facility for the elderly must file an unlawful detainer action in superior court and receive a written judgment signed by a judge. If the facility pursues the unlawful detainer action, you must be served with a summons and complaint. You have the right to contest the eviction in writing and through a hearing."

The licensee, in addition to either serving a 30 day notice on the resident or seeking approval from the Department of Social Services and serving a three-day notice on the resident, must notify, or mail a copy of the notice to quit to, the resident's responsible person [*Health & Safety Code § 1569.683(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsServicesHealthcare LawBusiness Administration & OrganizationPatient ConfidentialityGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesCommunity ResidencePublic Health & Welfare LawSocial ServicesDisabled & Elderly PersonsGeneral Overview

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AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.46 Residents' Personal Rights Under Regulations

[1] Nature of Rights

Each resident has personal rights that include, but are not limited to, the following [*22 Cal. Code Reg. § 87468(a)*]:

- To be accorded dignity in his or her personal relationships with staff, residents, and other persons.

- To be accorded safe, healthful, and comfortable accomodations, furnishings, and equipment.

- To be free from corporal or unusual punishment, humiliation, intimidation, mental abuse, or other actions of a punitive nature, such as withholding of monetary allowances or interfering with daily living functions (for example, eating or sleeping patterns or elimination).

- To be informed by the licensee of the provisions of law regarding complaints, and of procedures to register complaints confidentially, including, but not limited to, the address and telephone number of the complaint-receiving unit of the licensing agency.

- To have the freedom to attend religious services or activities of his or her choice, and to have visits from the spiritual advisor of his or her choice. Attendance at religious services, either in or outside the facility, must be on a completely voluntary basis.

- To leave or depart the facility at any time and not to be locked into any room or building or on facility premises by day or night. This does not prohibit the establishment of house rules, such as the locking of doors at night, for the protection of the residents; nor does it prohibit, with permission of the licensing agency, the barring of windows against intruders.

- To visit the facility prior to residence along with his or her family and responsible persons.

- To have his or her family or responsible persons regularly informed by the facility of activities related to his or her care or services, including ongoing evaluations, as appropriate to the resident's needs.

- To have communications to the facility from his or her family and responsible persons answered promptly and appropriately.

- To be informed of the facility's policy concerning family visits and other communications with residents, as specified in *Health & Safety Code § 1569.313* [*see § 351.45[4]*].

- To have private visits with permitted visitors (including ombudsmen and advocacy representatives) during reasonable hours and without prior notice, provided that the rights of other residents are not violated.

- To wear his or her own clothes, to keep and use his or her own personal possessions including toilet articles, and to keep and be allowed to spend his or her own money.

- To have access to individual storage space for private use.

- To have reasonable access to telephones, and to make and receive confidential calls, although the licensee may require reimbursement for long distance calls.

- To mail and receive unopened correspondence in a prompt manner.

- To receive or reject medical care or other services.

- To receive assistance in exercising the right to vote.

- To move from the facility.

[2] Disclosure of Rights

All persons accepted to facilities, or their responsible persons, must be personally advised and given a copy of their personal rights at admission. A copy of these rights signed by the resident or his or her responsible person must be included in the resident's record [*22 Cal. Code Reg. § 87468(b)*].

Facilities licensed for seven or more residents must prominently post in areas accessible to the residents and their relatives (1) procedures for filing confidential complaints, and (2) a copy of residents' personal rights, or in lieu of a posted copy, instructions on how to obtain additional copies [*22 Cal. Code Reg. § 87468(c)*].

A licensee of a residential care facility for the elderly that advertises or promotes special care, programming, or environments for persons with a health-related condition, except as specified in *Health & Safety Code § 1569.72* (resident requires 24-hour skilled nursing or intermediate care or is bedridden for reason other than temporary illness or recovery from surgery), must provide to each prospective resident an accurate narrative description of these programs and services. The description must be provided in writing before admission. All reasonable efforts must be made to communicate the information in the narrative description to a person who is unable to read it himself or herself, including, but not limited to, reading the description out loud [*Health & Safety Code § 1569.628*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsServicesPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesCommunity Residence

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31-351 California Forms of Pleading and Practice--Annotated § 351.47

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§ 351.47 Inspection of Facility

[1] Request for Inspection

Any person may request an inspection of any residential care facility for the elderly by transmitting to the Department of Social Services notice of an alleged violation of applicable requirements prescribed by state statutes or regulations including, but not limited to, a denial of access of any person authorized to enter the facility pursuant to *Welf. & Inst. Code § 9722* (governing right of entry of representative of Ombudsman's office). A complaint may be made either orally or in writing [*Health & Safety Code § 1569.35(a)*; *see 22 Cal. Code Reg. § 87468(c)*; § 351.46[2]]. The substance of the complaint must be provided to the licensee no earlier than the time of the inspection [*Health & Safety Code § 1569.35(b)*].

Unless the complainant specifically requests otherwise, neither the substance of the complaint provided the licensee nor any copy of the complaint or any record published, released, or otherwise made available to the licensee may disclose the name of any person mentioned in the complaint except the name of any duly authorized officer, employee, or agent of the Department conducting the investigation or inspection pursuant to *Health & Safety Code § 1569 et seq.* [*Health & Safety Code § 1569.35(b)*].

[2] Required Inspection

On receipt of a complaint, other than a complaint alleging denial of a statutory right of access to a residential care facility for the elderly, the Department must make a preliminary review. Unless the Department determines that the complaint is willfully intended to harass a licensee or is without any reasonable basis, it must make an on-site inspection within 10 days after receiving the complaint, except when the visit would adversely affect the licensing investigation or the investigation of other agencies, including, but not limited to, law enforcement agencies. In either event, the complainant must be promptly informed of the Department's proposed course of action [*Health & Safety Code § 1569.35(c)*].

On receipt of a complaint alleging denial of a statutory right of access to a residential facility for the elderly, the Department must review the complaint. The complainant must be promptly notified of the Department's proposed course of action [*Health & Safety Code § 1569.35(d)*].

[3] Prohibition Against Retaliation

No licensee may discriminate or retaliate in any manner against any person receiving the services of that licensee's residential care facility for the elderly, or against any employee of the licensee's facility, because the person or employee or any other person has initiated or participated in an inspection pursuant to *Health & Safety Code § 1569.35* [*Health & Safety Code § 1569.37*].

[4] Periodic Inspections

Every licensed residential care facility must be periodically inspected and evaluated for quality of care by a representative designated by the Director of Social Services. Evaluations must be conducted at least once per year and as often as necessary to ensure the quality of care being provided [*Health & Safety Code § 1569.33(a)-(d)*]. The Department of Social Services must notify the facility in writing of all deficiencies, and must keep inspection reports and related documents on file [*see Health & Safety Code § 1569.33(e), (f)*]. As a part of the Department's annual evaluation process, the Department must review the plan of operation, training logs, and marketing materials of any residential care facility for the elderly that advertises or promotes special care, special programming, or a special environment for persons with dementia [*Health & Safety Code § 1569.33(g)*], in order to monitor compliance with *Health & Safety Code §§ 1569.626* and *1569.627* (prescribing staff-training requirements and information-disclosure requirements).

[5] Posting of Licensing Reports

Every residential care facility for the elderly must put in a conspicuous place copies of all licensing reports issued by the Department within the preceding 12 months, and all licensing reports issued by the Department resulting from the most recent annual visit of the Department to the facility. This requirement does not apply to any portion of a licensing report referring to a complaint that was found by the Department to be unfounded or unsubstantiated. During the admission process, the facility must inform the resident and the resident's responsible person in writing that licensing reports are available for review at the facility, and that copies of licensing reports and other documents pertaining to the facility are available from the appropriate district office of the Department. The facility must provide the telephone number and address of the appropriate district office [*Health & Safety Code § 1569.38*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsServicesPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesCommunity ResidencePublic Health & Welfare LawSocial ServicesDisabled & Elderly PersonsGeneral OverviewPublic Health & Welfare LawSocial ServicesDisabled & Elderly PersonsAgency Actions & ProceduresGeneral OverviewPublic Health & Welfare LawSocial ServicesDisabled & Elderly PersonsEducation & TrainingGeneral Overview

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31-351 California Forms of Pleading and Practice--Annotated § 351.48

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§ 351.48 Removal of Resident Because of Extraordinary Needs

When the Department of Social Services does not suspend the license of a facility, it may still order the licensee to remove a resident who has a health condition that cannot be cared for within the limits of the license, or requires inpatient care in a health facility as determined by the Department [*Health & Safety Code § 1569.54(a)(1)*]. If the Department determines that the resident's mental or physical condition requires immediate transfer from the facility in order to protect the health and safety of the resident, it may order the licensee to remove the resident after the Department consults with a physician or other medical professional about the transfer and ways in which transfer trauma can be minimized [*Health & Safety Code § 1569.54(a)(2)*].

If the Department alleges that a resident has a health condition that cannot be cared for within the limits of the license or requires inpatient care in a health facility, it must give notice to the resident, his or her legal representative when appropriate, and the licensee. The notice must specify a deadline for submitting a written plan for relocation, and must inform the resident of his or her right to a review and determination by an interdisciplinary team pursuant to *Health & Safety Code § 1569.34*. The resident, or his or her legal representative, has three working days to inform the licensee of the request for review. On receiving a request from a resident, or his or her legal representative, for a review and determination, the licensee must forward the request to the Department within two working days of receipt. Failure or refusal by the licensee to submit the request for review and determination to the Department may be subject to the civil penalties specified in *Health & Safety Code § 1569.49* [*Health & Safety Code § 1569.54(b)(1)*; *see* § 351.29[2]]. The review and determination must be completed within 30 days from the date that the resident was initially informed of the need to relocate [*Health & Safety Code § 1569.54(b)(2)*].

The provisions allowing for a resident's right to a review prior to transfer as provided for in *Health & Safety Code § 1569.54(b)* do not negate the Department's authority and responsibility to require an immediate transfer under *Health & Safety Code § 1569.54(a)(2)* when the Department finds and provides evidence that the resident must be relocated in order to protect his or her health and safety. Moreover, the provisions do not imply any right to a fair hearing pursuant

to *Welf. & Inst. Code § 10950 et seq.* [*Health & Safety Code § 1569.54(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationGeneral OverviewHealthcare LawBusiness Administration & OrganizationJudicial ReviewGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral Overview

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31-351 California Forms of Pleading and Practice--Annotated § 351.49

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§ 351.49 Remedies for Violations

[1] Denial, Suspension, or Revocation of License

Violation by a licensee of the provisions of the Residential Care Facilities for the Elderly Act or of the rules and regulations adopted under that Act is a ground for suspension or revocation of a license [*Health & Safety Code § 1569.50(a)*; *see also Health & Safety Code §§ 1569.51* (procedures for suspension, revocation, or denial of license), 1569.525 (relocation and transfer of residents when facility's license is temporarily suspended)].

The Director of Social Services may temporarily suspend any license, prior to any hearing, when, in the opinion of the Director, the action is necessary to protect residents or clients of the facility from physical or mental abuse, abandonment, or any other substantial threat to health or safety. The Director must notify the licensee of the temporary suspension and its effective date and at the same time must serve the provider with an accusation. On receipt of a notice of defense to the accusation by the licensee, the Director must, within 15 days, set the matter for hearing, and the hearing must be held as soon as possible but not later than 30 days after receipt of the notice. The temporary suspension must remain in effect until the time the hearing is completed and the Director has made a final determination on the merits. The temporary suspension will be deemed vacated, however, if the Director fails to make a final determination on the merits within 30 days after the original hearing has been completed [*see Health & Safety Code § 1569.50*; *see also Habrun v. Department of Social Services (1983) 145 Cal. App. 3d 318, 322, 193 Cal. Rptr. 340* (summary suspension of license of residential care facility for elderly under former *Health & Safety Code § 1550* pending hearing on allegations of abuse and neglect endangering health and safety of residents did not violate due process rights of owners since citizen may be temporarily deprived of property rights if state has compelling interest and timely hearing is provided)].

[2] Civil Penalties Levied by Department of Social Services

In addition to suspension, temporary suspension, or revocation of a license, the Department of Social Services may levy

a civil penalty [*Health & Safety Code § 1569.49(a)*]. The amount of the civil penalty must not be less than $25 or more than $50 per day for each violation of the provisions of the Act, except when the nature or seriousness of the violation or the frequency of the violation warrants a higher penalty or an immediate civil penalty assessment, or both, as determined by the Department. In no event may a civil penalty assessment exceed $150 per day per violation [*Health & Safety Code § 1569.49(b)*].

Notwithstanding *Health & Safety Code § 1569.33*, governing inspection and notification of deficiencies in compliance with the Act, the department must assess an immediate civil penalty of $150 per day per violation for specified serious violations of *Health & Safety Code § 1569 et seq.* [*Health & Safety Code § 1569.49(c)*], and any facility that is cited for repeating the same violation of *Health & Safety Code § 1569 et seq.* within 12 months of the first violation is subject to an immediate civil penalty of $150, and $50 for each day the violation continues until the deficiency is corrected [*Health & Safety Code § 1569.49(c)*]. Any facility that is assessed a civil penalty pursuant to *Health & Safety Code § 1569.49(c)* that repeats the same violation within 12 months of the violation subject to *Health & Safety Code § 1569.49(c)* must be assessed an immediate civil penalty of $150, and $50 for each day the violation continues until the deficiency is corrected [*Health & Safety Code § 1569.49(d)*].

Additional provisions govern civil penalties for the operation of residential care facilities for the elderly without a license [*see § 351.43[5]*].

[3] Criminal Penalties

Violation of the *Health & Safety Code § 1569 et seq.*, or willful or repeated violation of any rule or regulation adopted under the Act, is punishable as a misdemeanor [*Health & Safety Code § 1569.40(a)*; *see also Health & Safety Code § 1569.406* (unauthorized disclosure to facility of proposed or pending evaluation punishable as misdemeanor)].

Special provisions govern prosecution for the operation of residential care facilities for the elderly without a license [*see § 351.43[6]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectFamily LawFamily Protection & WelfareElderly PersonsServicesHealthcare LawBusiness Administration & OrganizationLicensesRevocation & SuspensionPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesCommunity ResidencePublic Health & Welfare LawSocial ServicesDisabled & Elderly PersonsAgency Actions & ProceduresGeneral Overview

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31-351 California Forms of Pleading and Practice--Annotated §§ 351.50-351.69

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[Reserved]

§§ 351.50[Reserved]

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31-351 California Forms of Pleading and Practice--Annotated § 351.70

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§ 351.70 Governing Law

Continuing care contracts are governed by *Health & Safety Code § 1770 et seq.* generally. Definitions are set forth in *Health & Safety Code § 1771*. Contract requirements are governed by *Health & Safety Code §§ 1787* and *1788*. Cancellation provisions are set forth in *Health & Safety Code §§ 1788.2* and *1788.4*. Criminal penalties for violations are governed by *Health & Safety Code § 1793.5*. Liens against a continuing care provider are governed by *Health & Safety Code § 1793.15*. Injunctive relief obtainable by the Department of Social Services is governed by *Health & Safety Code § 1793.29*. Requirements that a provider must meet in the event of the permanent closure of a continuing care retirement community facility, or a portion of one, are prescribed in *Health & Safety Code § 1793.80 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service AgreementsHealthcare LawBusiness Administration & OrganizationGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral Overview

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31-351 California Forms of Pleading and Practice--Annotated § 351.71

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.71 Protection of Elderly Regarding Continuing Care Needs

The Legislature has found that the elderly require protection from tragic consequences that can result from a continuing care provider's insolvency or inability to provide responsible care [*see Health & Safety Code § 1770(b)*]. It therefore has enacted *Health & Safety Code § 1770 et seq.*, which provide for administrative control over continuing health care providers and empower the purchasers under continuing care contracts with certain contractual safeguards and remedies. An elderly person is defined as an individual who is 60 years of age or older [*Health & Safety Code § 1771(e)(1)*].

Health & Safety Code § 1770 et seq. must be liberally construed for the protection of persons attempting to secure their care for the remainder of their lifetime or for a period in excess of one year [*Health & Safety Code § 1775(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewFamily LawFamily Protection & WelfareElderly PersonsServicesHealthcare LawBusiness Administration & OrganizationGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral Overview

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31-351 California Forms of Pleading and Practice--Annotated § 351.72

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.72 Definitions

[1] Continuing Care Contract

A continuing care contract is a written contract that includes a promise by a provider to provide one or more elements of care to an elderly resident for the duration of his or her life or for a term in excess of one year in exchange for the payment of an entrance fee or payment of periodic charges, or both types of payments. A continuing care contract may consist of one or a series of agreements, and may have other writings incorporated by reference. A continuing care contract includes a life care contract [*Health & Safety Code § 1771(c)(8)*].

[2] Life Care Contract

A life care contract is a continuing care contract that includes a promise by a provider to provide all levels of care, including acute care and physicians' and surgeons' services, to a resident for the duration of his or her life. Care must be provided in a facility having a comprehensive continuum of care, including a skilled nursing facility, under the ownership and supervision of the provider on, or adjacent to, the premises. In a life care contract, no change is made in the monthly fee based on the level of service. A life care contract must also include provisions to subsidize residents who become financially unable to pay their monthly care fees [*Health & Safety Code § 1771(l)(1)*]. For discussion of skilled nursing facilities, see *§ 351.10* et seq.

[3] Transferor

A transferor, within the meaning of *Health & Safety Code § 1770 et seq.*, is a person who transfers or promises to transfer consideration in exchange for care and related services under a continuing care contract or proposed continuing care contract, for the benefit of another [*Health & Safety Code § 1771(t)(3)*].

[4] Facility

A facility, for the purposes of *Health & Safety Code § 1770 et seq.*, is any place or accommodation in which a provider provides or will provide a resident with care or related services, whether or not it is constructed, owned, leased, rented, or otherwise contracted for by the provider [*Health & Safety Code § 1771(f)(1)*].

[5] Provider

A provider, within the meaning of *Health & Safety Code § 1770 et seq.*, is an entity that provides, promises to provide, or proposes to promise to provide, continuing care. The term includes any entity that controls an entity that provides continuing care, makes a continuing care promise, or proposes to promise to provide continuing care. No homeowner's association, cooperative, or condominium association may be a provider [*Health & Safety Code § 1771(p)(10)*; *see Health & Safety Code § 1771(p)(11)* (provisional certificate of authority indicating department authorization)].

[6] Resident

A resident, within the meaning of *Health & Safety Code § 1770 et seq.*, is a person who enters into a continuing care contract with a provider, or who is designated in a continuing care contract to be a person being provided or to be provided services, including care, board, or lodging [*Health & Safety Code § 1771(r)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsServicesPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities

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31-351 California Forms of Pleading and Practice--Annotated § 351.73

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.73 Inapplicability of Provisions

Health & Safety Code § 1770 et seq. do not apply to any arrangement for the care of a person by a relative, or any arrangement for the care of a person or persons from only one family by a friend [*Health & Safety Code § 1771.3(a)*].

Health & Safety Code § 1770 et seq. do not apply to any admission or residence agreements offered by residential communities for the elderly or residential care facilities for the elderly that promise residents preferred access to assisted living services or nursing care, when each of the following conditions is satisfied [*Health & Safety Code § 1771.3(b)*]:

- Residents pay on a fee-for-service basis for available assisted living services and nursing care.

- The fees paid for available assisted living services and nursing care are the same for residents who have previously occupied a residential living unit as for residents who have not previously occupied a residential living unit.

- No entrance fee or prepayment for future care or access, other than monthly care fees, is paid by, or charged to, any resident at the community or facility. For purposes of this requirement, the term entrance fee does not include initial, deferred, or amortized payments that cumulatively do not equal $7,500.

- The provider has not made a continuing care promise of preferred access, other than a promise as described in the next paragraph.

- The admission or residence agreement states the following:

> "This agreement does not guarantee that an assisted living or nursing bed will be available for residents, but, instead, promises preferred access to any assisted living or

nursing beds that are available at the community or facility. The promise of preferred access gives residents who have previously occupied a residential living unit a right over other persons to such beds. A continuing care contract promises that care will be provided to residents for life or for a term in excess of a year. _____ [*name of community or facility*] is not a continuing care retirement community and _____ [*name of provider*] does not hold a certificate of authority to enter into continuing care contracts and is not required to have the same fiscal reserves as a continuing care provider. This agreement is not a continuing care contract and is exempted from the continuing care statutes under subdivision (b) of *section 1771.3 of the Health and Safety Code* so long as the conditions set forth in that section are met."

- The admission or residence agreement also states the policies and procedures regarding transfers to higher levels of care within the community or facility.

Any entity may apply to the Department for a letter of exemption stating that the requesting entity satisfies the requirements for an exemption under *Health & Safety Code § 1771.3* [*Health & Safety Code § 1771.3(c)*; *see Health & Safety Code § 1771.3(d), (e)* (necessary conditions for issuance of letter; contents of application)].

If at any time any of the conditions stated in this section are not satisfied, then the requirements of *Health & Safety Code § 1770 et seq.* apply, and the Department may impose appropriate remedies and penalties set forth in *Health & Safety Code § 1793.5 et seq.* [*Health & Safety Code § 1771.3(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsServicesHealthcare LawGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsGeneral Overview

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31-351 California Forms of Pleading and Practice--Annotated § 351.74

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.74 Relation of Continuing Care Provisions to Other Remedies and Laws

To the extent that *Health & Safety Code § 1770 et seq.*, as interpreted by the Department of Social Services, may be in conflict with the statutes, regulations, or departmental interpretations governing the sale or hire of real property, the provisions governing continuing care contracts will prevail [*Health & Safety Code § 1775(a)*].

Notwithstanding any law or regulation to the contrary, a provider for a continuing care retirement community may restrict or abridge the right of any resident, whether or not the resident owns an equity interest, to sell, lease, encumber, or otherwise convey any interest in the resident's unit, and may require that the resident only sell, lease, or otherwise convey the interest to persons approved by the provider. Provider approval may be based on factors that include, but are not limited to, age, health status, insurance risk, financial status, or burden on the provider's personnel, resources, or physical facility. The provider must record any restrictions on a real property interest [*Health & Safety Code § 1775(b)*].

To the extent that *Health & Safety Code § 1770 et seq.* conflict with *Civ. Code §§ 51.2* (housing discrimination prohibited based on age) and *51.3* (accessible housing for elderly), *Health & Safety Code § 1770 et seq.* have precedence. A continuing care facility, at its discretion, may limit entrance based on age [*Health & Safety Code § 1775(c)*]. For discussion of *Civ. Code §§ 51.2* and *51.3*, see Ch. 117, *Civil Rights: Housing Discrimination* .

A resident's entry into a continuing care contract described in *Health & Safety Code § 1770 et seq.* is presumptive evidence of the resident's intent not to return to his or her prior residence to live for purposes of qualifying for Medi-Cal coverage under *Welf. & Inst. Code § 14000 et seq.* and *22 Cal. Code Reg. § 50425* [*Health & Safety Code § 1775(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawContractual

Relations & HousingFair Housing RightsAge DiscriminationHealthcare LawGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsGeneral Overview

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31-351 California Forms of Pleading and Practice--Annotated § 351.75

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.75 Requirements for Continuing Care Contract

All continuing care contracts must be in writing, and must contain all information required by *Health & Safety Code § 1788* (discussed under *§ 351.76*) [*Health & Safety Code § 1787(a)*]. All continuing care contract forms must be approved by the Department of Social Services prior to their use, based on the requirements under *Health & Safety Code §§ 1770 et seq.* and *1569 et seq.* [*Health & Safety Code § 1787(b), (c)*]. The contract constitutes the full and complete agreement between the parties [*Health & Safety Code § 1787(d)*]. More than one contract form may be used if multiple program options are available [*Health & Safety Code § 1787(e)*].

The provider must require a written acknowledgment from the transferor (and the resident, if other than the transferor) that the executed copy of the contract and attachments have been received [*Health & Safety Code § 1787(h)*].

The continuing care contract constitutes an admissions agreement for purposes of the residential care facility for the elderly and long-term health care facility requirements [*Health & Safety Code § 1775(i)*]. Only the skilled nursing admission agreement sections of continuing care contracts that cover long-term health care facility services are subject to *Health & Safety Code § 1599.60 et seq.* ("contract of admission," discussed in Part I in *§ 351.24*) [*Health & Safety Code § 1787(j)*].

A clearly legible copy of the continuing care contract, executed by each provider named on the provisional certificate of authority or the certificate of authority, the resident, and any transferor, must be furnished with all required or included attachments to the resident at the time the continuing care contract is executed. A copy must also be furnished within 10 calendar days to any transferor who is not a resident [*Health & Safety Code § 1787(g)*].

All text in contract forms must be printed in at least 10-point type [*Health & Safety Code § 1787(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsServicesHealthcare LawActions Against FacilitiesFacility LiabilityNursing FacilitiesHealthcare LawBusiness Administration & OrganizationGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesCommunity Residence

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31-351 California Forms of Pleading and Practice--Annotated § 351.76

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.76 Mandatory Provisions of Contract

[1] In General

Any continuing care contract must contain all of the following:

- The legal name and address of each provider [*Health & Safety Code § 1788(a)(1)*].

- The name and address of the continuing care retirement community [*Health & Safety Code § 1788(a)(2)*].

- The resident's name and the identity of the unit the resident will occupy [*Health & Safety Code § 1788(a)(3)*].

- If there is a transferor other than the resident: the transferor's name and address (the transferor must be a party to the contract) [*Health & Safety Code § 1788(a)(4)*].

- If the provider has used the name of any charitable or religious or nonprofit organization in its title before January 1, 1979, and continues to use that name, and that organization is not responsible for the financial and contractual obligations of the provider or the obligations specified in the continuing care contract, the provider must include in every continuing care contract a conspicuous statement that clearly informs the resident that the organization is not financially responsible [*Health & Safety Code § 1788(a)(5)*].

- The date the contract is signed by the resident and any other transferor [*Health & Safety Code § 1788(a)(6)*].

- The duration of the contract [*Health & Safety Code § 1788(a)(7)*].

- A list of the services to be provided to the resident [*Health & Safety Code § 1788(a)(8)*].

- An itemization of the services that are included in the monthly fee and the services that are available at an extra charge [*Health & Safety Code § 1788(a)(9)*; *§ 351.76[6]*].

- The procedures and conditions under which residents may be voluntarily and involuntarily transferred from their designated living units [*Health & Safety Code § 1788(a)(10)*; *see also § 351.76[5]*].

- Provisions describing any changes in the resident's monthly fee and any changes in the entrance fee refund payable to the resident that will occur if the resident transfers from any unit [*Health & Safety Code § 1788(a)(11)*; *§ 351.76[6]*].

- The obligations of the provider in the event a resident is transferred [*Health & Safety Code § 1788(a)(12)*].

- Whether the provider has any responsibility to resume care [*Health & Safety Code § 1788(a)(13)*].

- The obligations of the provider for services provided while the resident is absent from the facility [*Health & Safety Code § 1788(a)(14)*].

- The conditions under which the resident must permanently release his or her living unit [*Health & Safety Code § 1788(a)(15)*].

- If real or personal properties are transferred in lieu of cash: a statement specifying each item's value at the time of transfer, and how the value was ascertained [*Health & Safety Code § 1788(a)(16)*].

- Specified information about fees and charges [*Health & Safety Code § 1788(a)(17)-(23), (33)*; *§ 351.76[6]*].

- Whether the resident's rights under the contract include any proprietary interests in the provider's assets, in the continuing care retirement community, or both. If so, any statement in a contract concerning an ownership interest must appear in a large-sized font or print [*Health & Safety Code § 1788(a)(24)*].

- If there is a loan on the property, a provision advising residents that rights they may have to enforce continuing care contracts are subordinate to the rights of the lender [*Health & Safety Code § 1788(a)(25)*].

- Notice that the living units are part of a continuing care retirement community that is licensed as a residential care facility for the elderly and, as a result, any duly authorized agent of the Department of Social Services may, on proper identification and on stating the purpose of the visit, enter and inspect the entire premises at any time, without advance notice [*Health & Safety Code § 1788(a)(26)*].

- Prescribed notices concerning the parties' rights to cancel the contract [*Health & Safety Code § 1788(a)(27), (28)*; *§ 351.78*].

- The terms and conditions under which the contract may be terminated after the cancellation period by either party, including any health or financial conditions [*Health & Safety Code § 1788(a)(29)*].

- A statement that unilateral termination of the resident by the provider after the cancellation period requires good and sufficient cause [*Health & Safety Code § 1788(a)(30)*].

- A statement that at least 90 days' written notice is required for an unilateral termination [*Health & Safety Code § 1788(a)(31)*].

- A statement concerning the length of notice that is required by a resident for the voluntary termination after the cancellation period [*Health & Safety Code § 1788(a)(32)*].

- The policy or terms for refunding any portion of the entrance fee, in the event of cancellation, termination, or death [*Health & Safety Code § 1788(a)(33)*].

- A prescribed notice about the nature of the contract [*Health & Safety Code § 1788(a)(34)*; *§ 351.76[7]*].

- The following statement: "Nothing in this continuing care contract limits either the provider's obligation to provide adequate care and supervision for the resident or any liability on the part of the provider which may result from the provider's failure to provide this care and supervision" [*Health & Safety Code § 1788(a)(35)*].

- Provisions describing how the provider will proceed in the event of a closure, including an explanation of how the provider will comply with *Health & Safety Code § 1793.80 et seq.* [*Health & Safety Code § 1788(a)(36)*; § 351.85].

A life care contract must also provide that [*Health & Safety Code § 1788(b)*]:

- All levels of care, including acute care and physicians' and surgeons' services, will be provided to a resident.

- Care will be provided for the duration of the resident's life unless the life care contract is canceled or terminated by the provider during the cancellation period or after the cancellation period for good cause.

- A comprehensive continuum of care will be provided to the resident, including skilled nursing, in a facility under the ownership and supervision of the provider on, or adjacent to, the continuing care retirement community premises.

- Monthly care fees will not be changed based on the resident's level of care or service.

- A resident who becomes financially unable to pay his or her monthly care fees will be subsidized, provided the resident's financial need does not arise from action by the resident to divest the resident of his or her assets.

[2] Just Cause, Good Cause or Good and Sufficient Cause

Any contract containing a clause that allows a resident to be evicted or a contract to be cancelled for "just cause," "good cause," or "good and sufficient cause," must also contain a provision that neither of the following activities activate the eviction of cancellation provision [*Health & Safety Code § 1788(a)(30)(A)*]:

- Filing or lodging a formal or informal complaint with the Department or other appropriate agency; or

- Participation in an organization or affiliation of residents, or other similar lawful activity.

[3] Cancellation

A continuing care contract must contain the following provisions regarding cancellation:

- A conspicuous statement, in at least 10-point boldface type in immediate proximity to the space reserved for the signatures of the resident and, if applicable, the transferor, that provides as follows: "You, the resident or transferor, may cancel the transaction without cause at any time within 90 days from the date you first occupy your living unit. See the attached notice of cancellation form for an explanation of this right" [*Health & Safety Code § 1788(a)(27)*].

- Notice that during the cancellation period, the contract may be canceled by the provider without cause, on 30 days written notice; or a statement that the provider waives this right [*Health & Safety Code § 1788(a)(28)*].

In addition, every contract must contain a completed form in duplicate of a notice of cancellation. The notice must be attached to the contract, must be easily detachable, and must contain, in at least 10-point boldface type, the statement set forth in *Health & Safety Code § 1788(h)* [*see Health & Safety Code § 1788(h)*]. For a form for this notice, *see § 351.260*.

[4] Transferred Property

A continuing care contract must state all real and personal properties transferred, their value at the time of transfer, and how the value was ascertained. An itemized receipt that includes that information is acceptable if incorporated as a part of the contract. With respect to the transfer of real property, the contract must include a statement that the deed or other instrument of conveyance must contain a recital that the transaction is made pursuant to a continuing care contract and may be subject to rescission by the transferor within 90 days from the date the resident first occupies the residential unit. The failure to comply with this provision does not affect the validity of title to real property transferred pursuant to *Health & Safety Code § 1770 et seq.* [*Health & Safety Code § 1788(a)(16)*].

[5] Transfer of Patient

[a] Contract Must Specify Transfer Procedures and Conditions

A continuing care contract must contain the procedures and conditions under which a resident may be voluntarily and involuntarily transferred from a designated living unit. The transfer procedures, at a minimum, must include provisions addressing all of the circumstances described in [b]-[f], *below*, under which a transfer may be authorized [*Health & Safety Code § 1788(a)(10)*].

[b] Circumstances Under Which Facility May Transfer Patient

A continuing care retirement community may transfer a resident under the following conditions, taking into account the appropriateness and necessity of the transfer and the goal of promoting resident independence [*Health & Safety Code § 1788(a)(10)(A)*]:

- The resident is nonambulatory. The definition of "nonambulatory," as provided in *Health & Safety Code § 13131*, must either be stated in full in the continuing care contract or be cited. If cited, a copy of

the statute must be made available to the resident, either as an attachment to the continuing care contract or by specifying that it will be provided on request. If a nonambulatory resident occupies a room that has a fire clearance for nonambulatory residence, transfer will not be necessary.

- The resident develops a physical or mental condition that endangers the health, safety, or well-being of the resident or another person.

- The resident's condition or needs require the resident's transfer to an assisted living care unit or skilled nursing facility, because the level of care required by the resident exceeds that which may be lawfully provided in the living unit.

- The resident's condition or needs require the resident's transfer to a nursing facility, hospital, or other facility, and the provider has no facilities available to provide that level of care.

[c] Preconditions for Transfer

Before the continuing care retirement community transfers a resident under any of the conditions specified for obligatory transfers [*see* [b], *above*], the community must satisfy all of the following requirements [*Health & Safety Code § 1788(a)(10)(B)(i)-(iii)*]:

- Involve the resident and the resident's responsible person [*see 22 Cal. Code Regs. § 87101(r)(6)* (definition)] and, on the resident's or responsible person's request, family members, or the resident's physician or other appropriate health professional, in the assessment process that forms the basis for the level of care transfer decision by the provider. The provider must offer an explanation of the assessment process. If an assessment tool or tools, including scoring and evaluating criteria, will be used in the determination of the appropriateness of the transfer, the provider must make copies of the completed assessment available on the request of the resident or the resident's responsible person.

- Prior to sending a formal notification of transfer, conduct a care conference with the resident and the resident's responsible person and, on the resident's or responsible person's request, family members, and the resident's health care professionals, to explain the reasons for transfer.

- Notify the resident and the resident's responsible person as to the reasons for the transfer in writing.

If the resident does not have impairment of cognitive abilities, the resident may request that his or her responsible person not be involved in the transfer process [*Health & Safety Code § 1788(a)(10)(B)(iv)*].

The notice of transfer must be made at least 30 days before the transfer is expected to occur, except when the health or safety of the resident or other residents is in danger, or the transfer is required by the resident's urgent medical needs. Under those circumstances, the written notice must be made as soon as practicable before the transfer [*Health & Safety Code § 1788(a)(10)(B)(v)*].

The written notice must contain the reasons for the transfer, the effective date, the designated level of care or location to which the resident will be transferred, a statement of the resident's right to a review of the transfer decision at a care conference [*see Health & Safety Code § 1788(a)(10)(C)*], and, for disputed transfer decisions, the right to review by the Continuing Care Contracts Branch of the Department of Social Services [*see Health & Safety Code § 1788(a)(10)(D)*]. The notice must also contain the name, address, and telephone number of the Continuing Care Contracts Branch [*Health & Safety Code § 1788(a)(10)(B)(vi)*].

The continuing care retirement community must provide sufficient preparation and orientation to the resident to ensure

a safe and orderly transfer and to minimize trauma [*Health & Safety Code § 1788(a)(10)(B)(vii)*].

[d] Care Conference to Review Transfer Decision

The resident has the right to review the transfer decision at a subsequent care conference that must include the resident, the resident's responsible person and, on the resident's or responsible person's request, family members, the resident's physician or other appropriate health care professional, and members of the provider's interdisciplinary team. The local ombudsperson may also be included in the care conference, on the request of the resident, the resident's responsible person, or the provider [*Health & Safety Code § 1788(a)(10)(C)*].

[e] Agency Review of Disputed Transfer Decision

For disputed transfer decisions, the resident or the resident's responsible person has the right to a prompt and timely review of the transfer process by the Continuing Care Contracts Branch of the Department of Social Services [*Health & Safety Code § 1788(a)(10)(D)*].

The decision of the Continuing Care Contracts Branch must be in writing and must determine whether the provider failed to comply with the transfer process pursuant to *Health & Safety Code § 1788(a)(10)(A)-(C)*. Pending the decision of the Continuing Care Contracts Branch, the provider must specify any additional care the provider believes is necessary in order for the resident to remain in his or her unit. The resident may be required to pay for the extra care, as provided in the contract [*Health & Safety Code § 1788(a)(10)(E)*].

[f] Shared Accommodations

The continuing care contract must provide for the transfer of a second resident when a shared accommodation arrangement is terminated [*Health & Safety Code § 1788(a)(10)(F)*].

[6] Fees and Charges

The contract must contain the following information regarding fees and charges:

- A list of all services for which charges in excess of the monthly fee will be made and the fees at the date of the contract for those services [*Health & Safety Code § 1788(a)(9)*];

- Provisions for any change in the monthly rate and any refund of entrance fees when a resident transfers from any unit [*Health & Safety Code § 1788(a)(11)*];

- The amount of the entrance fee [*Health & Safety Code § 1788(a)(17)*];

- In the event two parties have jointly paid the entrance fee or other payment that allows them to occupy the unit, a definition of the allocation of fees [*Health & Safety Code § 1788(a)(18)*];

- The amount of any processing fee [*Health & Safety Code § 1788(a)(19)*];

- The amount of any monthly care fee [*Health & Safety Code § 1788(a)(20)*];

- A provision for notification of the resident at least 30 days in advance of any change in the scope or price of any component of care or other services [*Health & Safety Code § 1788(a)(23)*]; and

- The policy for refunding any portion of the entrance fee, in the event of cancellation, termination, or death [*Health & Safety Code § 1788(a)(33)*].

In addition, contracts requiring a monthly care fee or other periodic rate must provide additional specified information [*see Health & Safety Code § 1788(a)(21)*]. All contracts must specify a basic method for calculating changes in monthly care fees among those enumerated in *Health & Safety Code § 1788(a)(22)* [*see Health & Safety Code § 1788(a)(22)*].

[7] Notice Regarding Approval of Department of Social Services

The contract must contain the following notice at the bottom of the signatory page [*Health & Safety Code § 1788(a)(34)*]:

NOTICE

_____ [*date*]

This is a continuing care contract as defined by paragraph (8) of subdivision (c), or subdivision (l) of *Section 1771 of the California Health and Safety Code*. This continuing care contract form has been approved by the State Department of Social Services as required by subdivision (b) of *Section 1787 of the California Health and Safety Code*. The basis for this approval was a determination that (provider name) has submitted a contract that complies with the minimum statutory requirements applicable to continuing care contracts. The department does not approve or disapprove any of the financial or health care coverage provisions in this contract. Approval by the department is NOT a guaranty of performance or an endorsement of any continuing care contract provisions. Prospective transferors and residents are strongly encouraged to carefully consider the benefits and risks of this continuing care contract and to seek financial and legal advice before signing.

[8] Inclusion of Provider's Financial Statement

Every contract must contain a copy of the current audited financial statement [*Health & Safety Code § 1788(e)*]. New providers unable to furnish a current audited financial statement that will accurately reflect its ability to fulfull the continuing care contract must include certain specified information [*see Health & Safety Code § 1788(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewFamily LawFamily Protection & WelfareElderly PersonsServicesHealthcare LawBusiness Administration & OrganizationGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesCommunity Residence

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31-351 California Forms of Pleading and Practice--Annotated § 351.77

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.77 Optional Provisions of Contract

A continuing care contract may include, but is not limited to, and need not include, any of the following items:

- Provisions that limit responsibility for costs associated with the treatment or medication of an ailment or illness existing prior to the date of admission. In such cases, the medical or surgical exceptions, as disclosed by the medical entrance examination, must be listed in the contract or in the medical report, which may be attached to and made a part of the contract [*Health & Safety Code § 1788(c)(2)*].

- Legal remedies that may be applied in case any material misrepresentation or omission pertaining to assets or health has been made by the resident [*Health & Safety Code § 1788(c)(3)*].

- A clause that restricts transfer or assignments of the resident's rights and privileges under a continuing care contract because of the personal nature of the contract [*Health & Safety Code § 1788(c)(4)*].

- A clause for the protection of the provider who may wish to waive any of the terms or provisions of the contract in specific instances in which the resident has breached the contract, without relinquishment of its right to insist on compliance by the resident with all of the other terms or provisions [*Health & Safety Code § 1788(c)(5)*].

- Provision for the reimbursement of any loss or damage beyond normal wear and tear suffered by the provider as the result of carelessness or negligence on the part of the resident [*Health & Safety Code § 1788(c)(6)*].

- Provision that the resident agrees to observe off-limit areas of the facility as designated by the provider for safety reasons. However, the provider is prohibited from absolving itself in the contract from liability for past or future negligence by any statement to that effect [*Health & Safety Code § 1788(c)(7)*].

- Provision for the subrogation to the provider of the resident's rights in the case of injury to a resident caused as a result of the act or negligence of a third party [*Health & Safety Code § 1788(c)(8)*].

- Provision for a lien on any judgment, settlement, or recovery for any additional expense incurred by the provider in caring for the resident as a result of injury [*Health & Safety Code § 1788(c)(9)*].

- Provision that requires the cooperation of the resident in assisting in the diligent prosecution of any claim or action against any third party [*Health & Safety Code § 1788(c)(10)*].

- Provision for the appointment of a conservator or guardian by a court of competent jurisdiction in the event a resident becomes unable to handle his or her personal or financial affairs [*Health & Safety Code § 1788(c)(11)*].

- Provision that, in the event a provider whose property is tax-exempt is required to pay property taxes or in-lieu taxes, the additional costs will be charged to the resident on a pro rata basis [*Health & Safety Code § 1788(c)(12)*].

- Other provisions approved by the Department of Social Services [*Health & Safety Code § 1788(c)(13)*].

In addition, the contract may include a provision for a resident who becomes financially unable to pay monthly care fees at some future date to be subsidized. Particular provisions that may be included in that regard are set forth in *Health & Safety Code § 1788(c)(1)* [*Health & Safety Code § 1788(c)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewHealthcare LawBusiness Administration & OrganizationGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewTortsProcedureSettlementsReleasesGeneral Overview

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31-351 California Forms of Pleading and Practice--Annotated § 351.78

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§ 351.78 Cancellation

[1] Cancellation by Either Party Within 90 Days

The contract may be canceled without cause by written notice from either party, within 90 days from the date of the resident's initial occupancy [*Health & Safety Code § 1788.2(a)*; *see also § 351.78*].

[2] Death of Patient

Death of the resident before or during the cancellation period constitutes a cancellation, unless the contract includes specific provisions otherwise [*Health & Safety Code § 1788.2(b)*].

[3] Contract Executed in Conjunction With Equity Interest

The cancellation period and the associated refund obligations apply to (1) all executed continuing care contracts regarding a unit in a continuing care retirement community that is not an equity continuing care retirement community and (2) continuing care contracts executed in conjunction with a purchase of an equity interest from a provider, but not to continuing care contracts executed in conjunction with sales of an equity interest by one resident to another [*Health & Safety Code § 1788.2(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewHealthcare LawBusiness Administration & OrganizationGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral Overview

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31-351 California Forms of Pleading and Practice--Annotated § 351.79

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§ 351.79 Allowable Fees on Cancellation

If possession of the living unit in a continuing care retirement community that is not an equity continuing care retirement community is returned to the provider in substantially the same condition as when received, the resident's only obligations are to pay a reasonable fee to cover costs and to pay the reasonable value of services rendered pursuant to the canceled continuing care contract [*Health & Safety Code § 1788.2(d)(1)*].

Equity project providers may impose a resale fee on sellers. For contracts entered into after January 1, 1996, on the cancellation of a continuing care contract executed in conjunction with the purchase of an equity interest from the provider, the provider may charge a resale fee not to exceed the remainder of the gross resale price of the equity interest minus the purchase price paid by the resident or on behalf of the resident for the interest [*Health & Safety Code § 1788.2(d)(2)*]. No resale fee may exceed the sum of 10 percent of either the original or resale price of the equity interest and 100 percent of the remainder of the gross resale price of the equity interest minus the purchase price paid by the resident or on behalf of the resident for the interest if either (1) the continuing care contract involved the purchase of an equity interest from the provider and is terminated after the cancellation period, or (2) the continuing care contract involved the purchase of an equity interest from another resident and is terminated at any time [*Health & Safety Code § 1788.2(e)*]. "Gross resale price" means the resale price before any deductions for resale fees, transfer taxes, real estate commissions, periodic fees, late charges, interest, escrow fees, or any other fees incidental to the sale of real property [*Health & Safety Code § 1788.2(f)*].

These provisions regarding fees may not be construed to limit the provider's ability to withhold delinquent periodic fees, late charges, accrued interest, or assessments from the sale proceeds, as provided by the continuing care contract or the real estate documents governing the equity continuing care retirement community [*Health & Safety Code § 1788.2(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewHealthcare LawBusiness Administration & OrganizationGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral Overview

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§ 351.80 Refunds Under Contract

During the cancellation period, the provider must pay all refunds owed to a resident within 14 calendar days after a resident makes possession of the living unit available to the provider [*Health & Safety Code § 1788.4(a)*].

After the cancellation period, any refunds due to a resident under a continuing care contract must be paid within 14 calendar days after the resident makes possession of the living unit available to the provider or 90 calendar days after death or receipt of notice of termination, whichever is later [*Health & Safety Code § 1788.4(b)*].

In nonequity projects, if the continuing care contract is canceled by either party during the cancellation period or terminated by the provider after the cancellation period, the resident must be refunded the difference between the total amount of entrance, monthly, and optional fees paid and the amount used for care of the resident [*Health & Safety Code § 1788.4(c)*].

If a resident has paid additional amounts for upgrades, special features, or modifications to the living unit and the provider terminates the resident's continuing care contract, the provider must amortize those additional amounts at the same rate as the entrance fee and must refund the unamortized balance to the resident [*Health & Safety Code § 1788.4(d)*].

A lump-sum payment to a resident after termination of a continuing care contract that is conditioned on resale of a unit must not be considered to be a refund and may not be characterized or advertised as a refund. The lump sum payment must be paid to the resident within 14 calendar days after resale of the unit [*Health & Safety Code § 1788.4(e)*].

Legal Topics:

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

Contracts LawPerformanceDischarges & TerminationsFamily LawFamily Protection & WelfareElderly PersonsGeneral OverviewHealthcare LawBusiness Administration & OrganizationGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral Overview

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§ 351.81 Transfer of Money or Property Voidable When Contract Unlawful

Any transfer of money or property, pursuant to a continuing care contract found by the Department of Social Services to be executed in violation of *Health & Safety Code § 1770 et seq.* is voidable at the option of the resident or transferor for a period of 90 days from the execution of the transfer [*Health & Safety Code § 1793.11(a)*].

Any deed or other instrument of conveyance must contain a recital that the transaction is made pursuant to rescission by the resident or transferor within 90 days from the date of first occupancy [*Health & Safety Code § 1793.11(b)*].

No action may be brought for the reasonable value of any services rendered between the date of transfer and the date the resident disaffirms the continuing care contract [*Health & Safety Code § 1793.11(c)*].

With respect to real property, the right of disaffirmance or rescission is conclusively presumed to have terminated if a notice of intent to rescind is not recorded with the county recorder of the county in which the real property is located within 90 days from the date of first occupancy of the residential living unit [*Health & Safety Code § 1793.11(d)*].

A transfer of money or property, real or personal, to anyone pursuant to a continuing care contract that was not approved by the Department is voidable at the option of the Department or transferor or his or her assigns or agents [*Health & Safety Code § 1793.11(e)*].

A transaction determined by the Department to be in violation of *Health & Safety Code § 1770 et seq.* is voidable at the option of the resident or his or her assignees or agents [*Health & Safety Code § 1793.11(f)*].

Legal Topics:

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

Contracts LawRemediesRescission & RedhibitionGeneral OverviewFamily LawFamily Protection & WelfareElderly PersonsGeneral OverviewHealthcare LawBusiness Administration & OrganizationGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral Overview

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31-351 California Forms of Pleading and Practice--Annotated § 351.82

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§ 351.82 Preferred Claim on Liquidation

Obligations pursuant to continuing care agreements executed by a provider constitute a preferred claim against all assets owned by the provider in the event of receivership or liquidation. The preferred claim, however, is subject to any perfected claims secured by mortgage, deed of trust, pledge, deposit as security, escrow, or otherwise secured [*Health & Safety Code § 1793.9*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawClaimsTypesUnsecured Priority ClaimsGeneral OverviewHealthcare LawBusiness Administration & OrganizationGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral Overview

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31-351 California Forms of Pleading and Practice--Annotated § 351.83

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§ 351.83 Remedies Available to Department of Social Services

[1] Lien

When necessary to secure an applicant's or a provider's performance of its obligations to depositors or residents, the Department may record a notice or notices of lien on behalf of the depositors or residents. From the date of recording, the lien attaches to all real property owned or acquired by the provider during the pendency of the lien, provided the property is not exempt from the execution of a lien and is located within the county in which the lien is recorded. The lien has the force, effect, and priority of a judgment lien [*Health & Safety Code § 1793.15(a)*]. For discussion and forms related to judgment liens, see Ch. 318, *Judgments* .

The Department may record a lien on any real property owned by the provider if the provider's annual report indicates that the provider has an unfunded statutory or refund requirement. The filed lien has the effect, force, and priority of a judgment lien filed against the property [*Health & Safety Code § 1793.15(b)*].

The Department must file a release of the lien if it deems the lien no longer necessary to secure the performance of all obligations of the applicant or provider to the depositors or residents [*Health & Safety Code § 1793.15(c)*].

Within 10 days following the Department's denial of a request for a release of the lien, the applicant or provider may file an appeal with the Department [*Health & Safety Code § 1793.15(d)*].

The decision is subject to court review pursuant to *Code Civ. Proc. § 1094.5* on petition of the applicant or provider filed within 30 days of service of the decision [*Health & Safety Code § 1793.15(e)*]. For discussion and forms related to *Code Civ. Proc. § 1094.5*, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , and succeeding chapters.

[2] Injunctive Relief

In the case of any violation or threatened violation of *Health & Safety Code § 1770 et seq.*, the Department of Social Services may institute a proceeding or may request the Attorney General to institute a proceeding to obtain injunctive or other equitable relief in the superior court in and for the county in which the violation has occurred or will occur or in which the principal place of business of the provider is located. The proceeding must conform with the requirements of *Code Civ. Proc. § 525 et seq.*, except that no undertaking is required of the Department in any action commenced under *Health & Safety Code § 1793.29*, nor is the Department required to allege facts necessary to show lack of adequate remedy at law or to show irreparable loss or damage [*Health & Safety Code § 1793.29*]. For discussion and forms regarding *Code Civ. Proc. § 525 et seq.*, see Ch. 303, *Injunctions* .

[3] Escrow Account

When necessary to secure the interests of depositors or residents, the Department may require that the applicant or provider reestablish an escrow account, return previously released moneys to escrow, and escrow all future entrance fee payments [*Health & Safety Code § 1793.17(a)*; *see Health & Safety Code § 1779.4(v)(2)(G)* (escrow account for reserve funding on application for permit to sell deposit subscriptions and for certificate of authority)]. The Department may release funds from escrow as it deems appropriate, or terminate the escrow requirement when it determines that the escrow is no longer necessary to secure the performance of all obligations of the applicant or provider to depositors or residents [*Health & Safety Code § 1793.17(b)*].

[4] Additional Remedies

Several additional remedies and regulatory measures are available to the Department of Social Services to prevent and remedy violations of *Health & Safety Code § 1770 et seq.* by providers of continuing care services [*see* generally *Health & Safety Code § 1793.7 et seq.*].

Certain administrative remedies are specifically provided [*see, e.g., Health & Safety Code § 1793.13* (financial plan may be required), *1793.21* (limitation, suspension, revocation of permits for deposit subscriptions and certificates of authority), *1793.27* (civil penalties)]. Moreover, the civil, criminal, and administrative remedies available to the Department of Social Services pursuant to *Health & Safety Code § 1793.5 et seq.* are not exclusive and may be sought and employed by the Department in any combination deemed advisable to enforce *Health & Safety Code § 1770 et seq.* [*Health & Safety Code § 1793.19*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationJudicial ReviewGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensLien Priorities

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PART II. LEGAL BACKGROUND
C. Continuing Care Contracts

31-351 California Forms of Pleading and Practice--Annotated § 351.84

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§ 351.84 Criminal Penalties

Certain violations of *Health & Safety Code § 1770 et seq.* constitute misdemeanor offenses [*see Health & Safety Code § 1793.5*]. For example, an entity that executes a continuing care contract without holding a current and valid provisional or final certificate of authority issued by the Department of Social Services is guilty of a misdemeanor [*Health & Safety Code § 1793.5(c)*; *see Health & Safety Code §§ 1786, 1786.2* (issuance of provisional or final certificate of authority)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesFacility LiabilityNursing FacilitiesHealthcare LawBusiness Administration & OrganizationLicensesRequirementsPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral Overview

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31-351 California Forms of Pleading and Practice--Annotated § 351.85

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§ 351.85 Requirements for Permanent Closure of Continuing Care Retirement Community Facility

[1] Notice to Residents and Department of Health Services

Notwithstanding any other provisions of law, a regulated provider of a continuing care retirement community facility [*see Health & Safety Code § 1771(p)(3)* (definition)] must, no less than 120 days before the intended date of the permanent closure of the facility, provide written notice to the Department of Health Services and to the affected residents and their designated representatives. The notice must contain a prescribed statement of residents' rights under *Health & Safety Code § 1793.80 et seq.* [*Health & Safety Code § 1793.80(a)*]. When closure is planned for all units in a facility, the provider is prohibited from accepting new residents or entering into new continuing care contracts at the facility being closed once the closure notice has been served [*Health & Safety Code § 1793.80(b)*].

[2] Closure and Relocation Plan

No less than 90 days before the permanent closure of the continuing care retirement community facility, the provider must provide to the Department of Health Services, to the affected residents of the facility and their designated representatives, and to the local long term care ombudsman program, a written closure and relocation plan [*Health & Safety Code § 1793.81*]. The plan must contain specified information [*Health & Safety Code § 1793.81(a)-(h)*]. No action may be taken by the provider to relocate any resident or to close the facility until the relocation plan has been prepared and provided as required [*Health & Safety Code § 1793.84(c)*].

[3] Options for Residents

In the case of a permanent closure, the provider must secure replacement housing and care at a comparable facility for a resident under a life care contract, at no additional cost to the resident. The replacement housing and care must comply with *Health & Safety Code § 1771*(*l*) (stating criteria for what is a life care contract; see *§ 351.72[2]*) and *Health & Safety Code § 1788(b)* (stating special terms for a life care contract, in addition to prescribed terms for all continuing

care contracts; see *§ 351.76[1]*) [*Health & Safety Code § 1793.82(c)*].

The provider must offer every other resident the choice of the following options, the terms of which must not be less than the terms of the continuing care contract entered into between the resident and the provider as if that contract had been fully performed [*Health & Safety Code § 1793.82(a)*].

- The resident can choose to receive monetary compensation equal to the value of the remainder of the contract as if the contract had been fully performed [*Health & Safety Code § 1793.82(a)(3)*].

- The resident can choose to be relocated to another continuing care facility owned or operated by the provider, if available, or relocated to a continuing care facility that is not owned by the provider [*Health & Safety Code § 1793.82(a)(1), (2)*]. The replacement housing must be housing that is, overall, comparable in cost, size, services, features, and amenities to the unit being vacated. If the resident chooses either of these replacement housing options, the provider must provide the reasonable costs of moving, storage, if applicable, and transportation [*Health & Safety Code § 1793.82(b)*]. The provider may provide relocation in a facility not owned by the provider on a month to month basis, provided that the terms are otherwise consistent with the requirements for a relocation option. After 120 days, a resident selecting relocation to a facility not owned by the provider may not seek monetary compensation [*Health & Safety Code § 1793.82(d)*].

- The resident can choose an alternative arrangement that is mutually agreed on by the provider and the resident or his or her representative [*Health & Safety Code § 1793.82(a)(3)*].

[4] Financial Security for Provider's Obligations

When there is to be a permanent closure of a continuing care retirement community facility, within 30 days of submitting the relocation plan to the Department of Health Services, the provider must fund a reserve, set up a trust fund, or secure a performance bond to ensure the fulfillment of the obligations and commitments associated with the relocation plan. The amount of the reserve trust fund or performance bond must be equal to or greater than the estimated costs of relocating residents and the costs associated with the relocation options [*Health & Safety Code § 1793.83(a)*].

The reserve, trust fund, or performance bond must be funded with qualifying assets [*see Health & Safety Code § 1792.2(a)(1)-(5)*] and must not be subject to any liens, judgments, garnishments, or creditor's claims [*Health & Safety Code § 1793.83(b)*].

[5] Regulatory Oversight of Provider Implementing Closure Plan

The provider must submit monthly progress reports to the Department of Health Services detailing the progress and problems associated with the permanent closure, until all affected residents are relocated and all required payments to, or on behalf of, affected residents are made [*Health & Safety Code § 1793.84(a)*].

The Department must monitor the implementation of the permanent closure and relocation plan as necessary to ensure full compliance by the provider. If the Department determines that a provider is closing a facility in violation of the law or is doing so in a manner that endangers the health or safety of residents, the Department must take appropriate enforcement action [*Health & Safety Code § 1793.84(b)*; *see Health & Safety Code § 1793.5 et seq.* (enforcement powers); §§ 351.83[4], 351.84].

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31-351 California Forms of Pleading and Practice--Annotated §§ 351.86-351.99

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[Reserved]

§§ 351.86[Reserved]

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31-351 California Forms of Pleading and Practice--Annotated § 351.100

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§ 351.100 Related Matthew Bender Publications

For discussion, a transaction guide, admission agreements, and other forms relating to skilled nursing and community care facilities, see California Legal Forms, Ch. 105, *Nursing Homes and Other Long-Term Care Facilities* (Matthew Bender)

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31-351 California Forms of Pleading and Practice--Annotated § 351.101

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§ 351.101 Federal Statutes

Standards applicable to skilled nursing facilities regarding participation in Medicare program. *42 U.S.C. § 1395i-3*

Standards applicable to skilled nursing facilities regarding participation in Medicaid program. *42 U.S.C. § 1396r*

Older Americans Act of 1965. *42 U.S.C. § 3001 et seq.*

State plans' requirements for eligibility under Older Americans Act of 1965, including establishment of a long-term care ombudsman program. *42 U.S.C. § 3027(a)(9)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsFair Housing Amendments Act & Housing for RetireesHealthcare LawActions Against FacilitiesFacility LiabilityNursing FacilitiesPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing FacilitiesPublic Health & Welfare LawSocial SecurityMedicareProvidersTypesNursing Facilities

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31-351 California Forms of Pleading and Practice--Annotated § 351.102

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§ 351.102 State Statutes

[1] Admission Contracts

Admission contracts for long-term care health facilities. *Health & Safety Code § 1599.60 et seq.*

Abbreviated admission contracts for respite care services. *Health & Safety Code §§ 1599.60, 1599.64, 1599.652*

[2] Bankruptcy

Licensee of long-term health care facility required to notify department in writing of filing of bankruptcy petition. *Health & Safety Code § 1421.5*

[3] Definitions

Categories of long-term health care facilities for purposes of licensing provisions. *Health and Safety Code § 1250(c)-(e), (g)-(i), (k),* (m)

Long-term health care facilities. *Health & Safety Code § 1418*

[4] Disclosures

Disclosure by nursing facility or any category of intermediate care facility for developmentally disabled, of ownership interests. *Welf. & Inst. Code § 14022.1*

Disclosure by long-term health care facilities as to Medi-Cal participation. *Welf. & Inst. Code § 14022.3*

[5] Discrimination or Retaliation

Registered nurses, certified nurse assistants, licensed vocational nurses, and physicians working in skilled nursing facilities are required to participate in training program prescribed by Department of Public Health that focuses on preventing and eliminating discrimination based on sexual orientation and gender identity. *Health & Safety Code § 1257.5*

Penalties for discrimination or retaliation against complainant. *Health & Safety Code § 1432*

Fundamental rights of residents in skilled nursing and intermediate care facilities. *Health & Safety Code §§ 1599-1599.4*

Prohibition against discriminatory treatment of residents receiving Medi-Cal by long-term health care facility. *Welf. & Inst. Code § 14124.10*

[6] Enforcement

[a] In General

Receivership of long-term health care facilities. *Health & Safety Code §§ 1325-1335*

Long-Term Care, Health, Safety, and Security Act. *Health & Safety Code § 1417 et seq.*

State Ombudsman. *Welf. & Inst. Code § 9700 et seq.*

[b] Citation for Violations

Citation for violations. *Health & Safety Code § 1423*

Classification of violations. *Health & Safety Code § 1424*

Contesting citation and enforcement actions. *Health & Safety Code §§ 1428-1428.2*

[c] Civil Action

Civil action for violations by long-term health care facility. *Health & Safety Code § 1430*

[7] Inspection of Facility

Right to request inspection. *Health & Safety Code § 1419*

Inspection of facilities. *Health & Safety Code §§ 1419-1422.1*

[8] Insurance

Long-term health care insurance. *Ins. Code § 10231 et seq.*

[9] Licensing

Licensing provisions governing health care facilities. *Health & Safety Code §§ 1250-1339.67*

License revocation for retaining personal allowance of Medi-Cal recipient. *Welf. & Inst. Code § 11006.9*

[10] Medi-Cal

Medi-Cal eligibility of married persons residing in long-term care facilities. *Welf. & Inst. Code §§ 14005.12(d), 14005.16, 14006-14006.6*

Conditions for voluntary withdrawal of nursing facility or any category of intermediate care facility for the developmentally disabled, from Medi-Cal program. *Welf. & Inst. Code § 14022.4*

Facility prohibited from requiring security deposit from Medi-Cal patients. *Welf. & Inst. Code §§ 14110.8, 14110.9.*

Medi-Cal claims and payments. *Welf. & Inst. Code §§ 14115-14120*

Restrictions against involuntary transfer of long-term health care facility residents because of change to Medi-Cal payment. *Welf. & Inst. Code § 14124.7*

Prohibition against discriminatory treatment of residents receiving Medi-Cal by long-term health care facility. *Welf. & Inst. Code § 14124.10*

Medi-Cal Long-Term Care Reimbursement Act of 1990. *Welf. & Inst. Code § 14126 et seq.*

[11] Removal or Transfer of Patients or Residents

Advance notice and planning requirements when facility is unable to care for patients because of change in license or operation. *Health & Safety Code §§ 1336-1336.4*

Eviction of patient from Medi-Cal certified facility for misrepresentation of finances. *Health & Safety Code § 1439.7*

Disclosure of Medi-Cal status of facility and permissible grounds for involuntary transfer of Medi-Cal recipient. *Health & Safety Code § 1439.8*

[12] Rights of Patients

Rights of persons receiving respite care services. *Health & Safety Code § 1418.1*

Resident councils in skilled nursing facilities. *Health & Safety Code § 1418.2*

Consumer's access to skilled nursing facility's rating information determined by federal Centers for Medicare and Medicaid Services. *Health & Safety Code § 1418.21*

Privacy of family meetings in skilled nursing facilities. *Health & Safety Code § 1418.3*

Family councils in skilled nursing facilities. *Health & Safety Code § 1418.4*

Bedside storage of nonprescription medications in skilled nursing and intermediate care facilities. *Health & Safety Code § 1418.5*

Resident who is unable to give informed consent as entitled to have attending physician make medical care decisions when no other person has legal authority to make such decisions. *Health & Safety Code § 1418.8*

Activity programs for residents. *Health & Safety Code § 1439.2*

Fundamental human rights of residents in skilled nursing and intermediate care facilities. *Health & Safety Code §§ 1599-1599.4*

[13] Theft and Loss Policies

Development of theft and loss policies. *Health & Safety Code § 1418.7*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawGeneral OverviewHealthcare LawActions Against FacilitiesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawTreatmentGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities

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31-351 California Forms of Pleading and Practice--Annotated § 351.103

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§ 351.103 Federal Administrative Regulations

Standards for Medicaid payments for skilled nursing facilities and intermediate care facilities. *42 C.F.R. §§ 442.1-442.346*

Service and quality-of-care requirements for long term care facilities participating in Medicare or Medicaid. *42 C.F.R. § 483.1 et seq.*

Service and quality-of-care requirements for participation by intermediate care facilities for mentally retarded. *42 C.F.R. § 483.400 et seq.*

Survey and certification procedures for health care providers, including skilled nursing facilities. *42 C.F.R. § 488.1 et seq.*

Provider agreements under Medicare, including agreements with skilled nursing facilities. *42 C.F.R. § 489.1 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationGeneral OverviewHealthcare LawInsuranceGeneral OverviewPublic Health & Welfare LawSocial SecurityMedicaidProvidersTypesGeneral OverviewPublic Health & Welfare LawSocial SecurityMedicaidProvidersTypesIntermediate Care FacilitiesPublic Health & Welfare LawSocial SecurityMedicareProvidersTypesNursing Facilities

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AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.104 State Administrative Regulations

[1] Intermediate Care Facilities

Regulations governing intermediate care facilities. *22 Cal. Code Reg. § 73301 et seq.*

Intermediate care patient's rights. *22 Cal. Code Reg. § 73523*

Violations and penalties relating to intermediate care facilities. *22 Cal. Code Reg. §§ 73701-73727*

Examples of classified violations of regulations governing intermediate care facilities. *22 Cal. Code Reg. §§ 73702-73709*

Regulations governing intermediate care facilities/developmentally disabled--nursing. 22 Cal. Code Reg. § 73800 et seq.

Regulations governing intermediate care facilities for the developmentally disabled. *22 Cal. Code Reg. § 76000 et seq.*

Regulations governing intermediate care faciliities/developmentally disabled--habilitative. *22 Cal. Code Reg. § 76800 et seq.*

[2] Ombudsman Program

Long-term care ombudsman program provisions. *22 Cal. Code Reg. § 8010 et seq.*

[3] Skilled Nursing Facilities

Regulations governing skilled nursing facilities. *22 Cal. Code Reg. § 72001 et seq.*

Skilled nursing facility Patients' *Bill of Rights*. *22 Cal. Code Reg. § 72527*

Violations and penalties relating to skilled nursing facilities. *22 Cal. Code Reg. § 72701 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesFacility LiabilityNursing FacilitiesPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing Facilities

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AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.105 Decisions

[1] Administrative Complaints

Five-business-day limitation period under former *Health & Safety Code § 1428* (amended by 1988 legislation to provide for 15-day notice) for notifying Department of Health Services of intention to contest decision after citation review conference are subject to relief under *Code Civ. Proc. § 473*, but petition for relief must be filed within reasonable time after knowledge that notification of intention was untimely. *Summit Care-California, Inc. v. Department of Health Services (1986) 186 Cal. App. 3d 1584, 1587-1590, 231 Cal. Rptr. 476*

Requirement that proper identification be provided to facility during inspection under *Health & Safety Code § 1278* applies to officers, employees, or agents of Department of Health Services, and not to complainant accompanying inspector; complainant's identity is governed by *Health & Safety Code § 1419*, prohibiting disclosure of name of complainant without consent. *Jongepier v. Lopez (1983) 142 Cal. App. 3d 535, 538-539, 191 Cal. Rptr. 131*

[2] Administrative Regulation

In action brought by state against nursing home alleging repeated violations of regulations governing conduct of nursing homes, claim of industry-wide noncompliance is not a lawful excuse and not evidence of impossibility of compliance. *People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 527, 206 Cal. Rptr. 164*

"Substantial compliance" with regulations is no defense against civil action or criminal prosecution, and operator of skilled nursing facility is required to comply with all statutory provisions, absent exemption granted by *Department of Health Services. People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 530-531, 206 Cal. Rptr. 164*

Regulation requiring nursing facilities to be "clean and sanitary" is not unconstitutionally vague; formula under *22 Cal. Code Reg. § 72329(a)*, requiring adequate staff to provide necessary nursing services for patients admitted for care, is plain and clear, although no specific number is preset by rule. *People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 528-529, 206 Cal. Rptr. 164*

Violations of record requirements under *22 Cal. Code Reg. § 72547*, including requirement to keep records of fluid intake, blood pressure, and body temperature and to turn body of bedridden patient, does not involve vague, technical matters. *People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 529, 206 Cal. Rptr. 164*

As matter of public policy and sound reason, doctrine of equitable estoppel is inapplicable to action by state against nursing home for regulatory violations, insofar as doctrine would, inter alia, protect defendant nursing home from sanctions for violations of applicable regulations on theory that some tolerance of its conduct immunized it in all respects. *People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 532, 206 Cal. Rptr. 164*

[3] Classification of Violations and Penalties

With respect to patient having propensity for climbing over bedrails and falling, convalescent hospital's failure to adopt care plan identifying problem and establishing prevention program constituted Class "A" violation under *Health & Safety Code § 1424(c)*. *Kizer v. Waterman Convalescent Hospital, Inc. (1992) 13 Cal. Rptr. 2d 239*

Statutory scheme for imposition of penalties (*Health and Safety Code §§ 1424, 1428, 1428.1*) does not violate federal and state guarantees of due process and equal protection. *Kizer v. Waterman Convalescent Hospital, Inc. (1992) 13 Cal. Rptr. 2d 239*

[4] Disclosure Requirements

Disclosure requirements enacted by Proposition 105 (*Health & Safety Code §§ 1599.85-1599.89*) held unconstitutional because they violate single- subject rule. *Chemical Specialties Manufacturers Assn., Inc. v. Deukmejian (1991) 227 Cal. App. 3d 663, 667-672, 278 Cal. Rptr. 128*

[5] Involuntary Transfer of Patient

Nursing home patients have no constitutional right to hearing prior to transfer by facility or physician on ground they no longer need level of care paid for under Medicaid program, because no state action is involved in decision to transfer, notwithstanding extensive federal regulation and federally-funded payments. *Blum v. Yaretsky (1982) 457 U.S. 991, 1010-1011, 102 S. Ct. 2777, 73 L. Ed. 2d 534*

Nursing home patients have no constitutional right to prerevocation hearing prior to transfer from nursing home caused by Medicaid decertification. *O'Bannon v. Town Court Nursing Center (1980) 447 U.S. 773, 785-790, 100 S. Ct. 2467, 65 L. Ed. 2d 506*

[6] Unfair Business Practice

Defendant nursing home's practice of providing insufficient nursing personnel is not only illegal but also unfair business practice in violation of *Bus. & Prof. Code § 17200*; "unfair" business practice occurrs when it offends established public policy or when practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to

consumers. *People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 530, 206 Cal. Rptr. 164*

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-351 California Forms of Pleading and Practice--Annotated § 351.106

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.106 Attorney General Opinions

Private citizens who bear no legal or familial relationship to deceased patient of private nursing home have no right to review deceased's medical records to investigate cause of death. *69 Ops. Cal. Att'y Gen. 14 (1986)*

Long-term care ombudsman not permitted under Elder Abuse Reporting Law to disclose identity of victim of elder abuse who is resident of long-term care facility to law enforcement agency without victim's consent or court order. *68 Ops. Cal. Att'y Gen. 313 (1985)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & NeglectHealthcare LawActions Against FacilitiesFacility LiabilityNursing FacilitiesPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsProtection From Abuse & Neglect

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PART III. RESEARCH GUIDE
A. Long-Term Health Care Facilities

31-351 California Forms of Pleading and Practice--Annotated § 351.107

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.107 Law Reviews

Schuster, *Legal Support to the Long-Term Care Ombudsman Program: A Practical Guide, 23 Clearinghouse Rev. 418 (1989)*

Edwards, *Long-Term Care for the Elderly: A Primer for the Estate Planner*, 22 Inst. on Est. Planning 6.1 (1988)

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewHealthcare LawActions Against FacilitiesFacility LiabilityNursing FacilitiesHealthcare LawBusiness Administration & OrganizationGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral Overview

California Forms of Pleading and Practice--Annotated

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Chapter 351 LONG-TERM HEALTH AND RESIDENTIAL CARE
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A. Long-Term Health Care Facilities

31-351 California Forms of Pleading and Practice--Annotated §§ 351.108-351.119

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

[Reserved]

§§ 351.108[Reserved]

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Chapter 351 LONG-TERM HEALTH AND RESIDENTIAL CARE
PART III. RESEARCH GUIDE
B. Residential Care Facilities

31-351 California Forms of Pleading and Practice--Annotated § 351.120

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.120 State Statutes

Remedy against unlicensed facility. *Civ. Code § 3345*; *Health & Safety Code §§ 1569.41, 1569.46*

Registered nurses, certified nurse assistants, licensed vocational nurses, and physicians working in congregate living health facilities are required to participate in training program prescribed by Department of Public Health that focuses on preventing and eliminating discrimination based on sexual orientation and gender identity. *Health & Safety Code § 1257.5*

Residential Care Facilities for the Elderly Act. *Health & Safety Code § 1569 et seq.*

Definitions. *Health & Safety Code § 1569.2*

Licensing requirements. *Health & Safety Code §§ 1569.10-1569.24, 1569.44*

Loss or theft of property. *Health & Safety Code §§ 1569.152-1569.154*

Inspection. *Health & Safety Code §§ 1569.32-1569.35*

Residential care facility resident's right to participate in decision making regarding care and services to be provided. *Health & Safety Code § 1569.80*

Penalties against unlicensed facility. *Health & Safety Code §§ 1569.40, 1569.405, 1569.485*

Removal of resident with health condition that cannot be cared for within limits of license; resident's right to review,

hearing; regulations. *Health & Safety Code § 1569.54*

Form and content of admission agreement. *Health & Safety Code § 1569.880 et seq.*

Personnel of residential care facilities for elderly are "care custodians" for purpose of mandated reporting of elder abuse. *Welf. & Inst. Code § 15610.17*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewFamily LawFamily Protection & WelfareElderly PersonsServicesPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesCommunity ResidencePublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsProtection From Abuse & Neglect

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B. Residential Care Facilities

31-351 California Forms of Pleading and Practice--Annotated § 351.121

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.121 Administrative Regulations

Regulations governing residential care facilities for the elderly. *22 Cal. Code Reg. § 87100 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsServicesHealthcare LawBusiness Administration & OrganizationGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral Overview

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B. Residential Care Facilities

31-351 California Forms of Pleading and Practice--Annotated § 351.122

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§ 351.122 Decisions

Residential care facility for elderly assumes special relationship with person when it agrees to have person as resident, and thereby agrees to execute duties imposed on it by regulations to monitor resident and report changes and conditions in physical and mental health; facility does not have absolute duty to prevent resident's suicide, but has duty to exercise reasonable care to prevent resident from self-inflicted harm if it has knowledge or notice of facts from which it might reasonably conclude that resident was likely to so act unless protective measures were taken. *Klein v. BIA Hotel Corp. (1996) 41 Cal. App. 4th 1133, 1140-1142, 49 Cal. Rptr. 2d 60* (reversing summary judgment for defendant in wrongful death action)

Unlicensed community care facilities operated by church for elderly members are not exempt from licensing requirements because church was not providing "care or treatment of sick who depend upon prayer or spiritual means for healing." *Universal Life Church, Inc. v. State of California (1984) 158 Cal. App. 3d 533, 538, 205 Cal. Rptr. 11* (decided under former *Health & Safety Code § 1505(g)* (*now see Health & Safety Code § 1505(f)*))

Summary suspension of license and operations of residential care facility for the elderly under *Health & Safety Code § 1550* pending hearing on allegations of abuse and neglect endangering health and safety of residents did not violate due process rights of owners, because citizen may be temporarily deprived of enjoyment of property rights if state has compelling interest and timely hearing is provided. *Habrun v. Department of Social Services (1983) 145 Cal. App. 3d 318, 322, 193 Cal. Rptr. 340*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsServicesHealthcare LawBusiness Administration &

OrganizationGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawSocial ServicesDisabled & Elderly PersonsAgency Actions & ProceduresGeneral Overview

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31-351 California Forms of Pleading and Practice--Annotated §§ 351.123-351.139

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[Reserved]

§§ 351.123[Reserved]

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C. Continuing Care Contracts

31-351 California Forms of Pleading and Practice--Annotated § 351.140

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§ 351.140 State Statutes

Continuing care contracts and services. *Health & Safety Code § 1770 et seq.*

Definitions regarding continuing care contracts and services. *Health & Safety Code § 1771*

Deposit subscriptions. *Health & Safety Code §§ 1771.2, 1780 et seq.*

Letter of nonapplicability. *Health & Safety Code § 1771.6*

Relation of provisions to other law. *Health & Safety Code § 1775*

Disclosure under *Civ. Code § 1798 et seq.* and *Gov. Code § 6250 et seq. Health & Safety Code § 1776.6*

Applications for permit to sell deposit subscriptions and certificate of authority. *Health & Safety Code § 1779 et seq.*

Certificate of authority. *Health & Safety Code §§ 1786, 1786.2*

Continuing care contracts. *Health & Safety Code §§ 1787, 1788*

Cancellation. *Health & Safety Code § 1788.2*

Refunds due under contract. *Health & Safety Code § 1788.4*

Criminal penalties. *Health & Safety Code § 1793.5*

Remedies and penalties generally. *Health & Safety Code § 1793.5 et seq.*

Pilot program to provide continuous skilled nursing care is Medi-Cal program benefit. *Welf. & Inst. Code § 14495.10*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service AgreementsFamily LawFamily Protection & WelfareElderly PersonsGeneral OverviewFamily LawFamily Protection & WelfareElderly PersonsServicesHealthcare LawBusiness Administration & OrganizationGeneral Overview

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C. Continuing Care Contracts

31-351 California Forms of Pleading and Practice--Annotated § 351.141

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.141 Administrative Regulations

Regulations regarding supervision of life care contracts. 22 Cal. Code Reg. § 89501 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service AgreementsFamily LawFamily Protection & WelfareElderly PersonsServicesHealthcare LawBusiness Administration & OrganizationGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral Overview

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PART III. RESEARCH GUIDE
C. Continuing Care Contracts

31-351 California Forms of Pleading and Practice--Annotated §§ 351.142-351.219

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[Reserved]

§§ 351.142[Reserved]

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PART IV. FORMS
A. Long-Term Health Care Facilities

31-351 California Forms of Pleading and Practice--Annotated § 351.220

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.220 Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)], Permanent Injunction [Civ. Code § 3422], and Damages [Civ. Code § 3333]--By Patient of Long-Term Health Care Facility Against Licensee for Class A or Class B Violation [Health & Safety Code § 1430(a)]

[1] FORM Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)], Permanent Injunction [Civ. Code § 3422], and Damages [Civ. Code § 3333]--By Patient of Long-Term Health Care Facility Against Licensee for Class A or Class B Violation [Health & Safety Code § 1430(a)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], [by and through _____ (*name*), his/her guardian ad litem,] Plaintiff, vs. _____ [*name*], [and DOES I-_____,] Defendant(s).	)))))))	NO. _____ COMPLAINT FOR [TEMPORARY RESTRAINING ORDER, PRELIMINARY AND PERMANENT INJUNCTION, AND] DAMAGES [Amount demanded _____ (exceeds *or* does not exceed) $10,000] [LIMITED CIVIL CASE]

Plaintiff _____ [*name*] [, acting by and through his/her guardian ad litem, _____ (*name*),] alleges:

1. Plaintiff is, and at all times herein mentioned was, a patient at _____ [*name of facility*].

2. Defendant _____ [*name*] is licensed to operate a long-term health care facility pursuant to *Section 1417 et seq. of the Health and Safety Code* and, under this license, maintains and operates _____ [*name of facility*], which is _____ [*specify type of facility, e.g.,* a skilled nursing facility] as defined in *Sections 1418* and *1250 of the Health and Safety Code*, located at _____ [*street address and city*], _____ County, California.

[3. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.)]

[4. At all times herein mentioned each of the defendants sued herein as DOE was the agent and employee of each of the remaining defendants and was at all times acting within the purpose and scope of the agency and employment.]

[5. _____ (*Allege facts relating to plaintiff's age, medical and mental condition and any history of mental disability, duration of residency at facility, and other factors relevant to a determination of the severity of the impact of the violation on the particular resident*).]

[*EITHER, if alleging Class A violation*]

6. Defendant, on or about _____ [*date*], and at all relevant times, _____ [*describe conduct constituting Class A violation, e.g.,* has failed to provide the facility with structural and equipment requirements in conformance with the regulations adopted by the State Fire Marshal to establish minimum standards for fire prevention, in violation of *Title 22, Section 72505 of the California Code of Regulations.* Specifically, defendant has failed to provide _____ (*specify*)].

7. The above-described conduct constitutes a Class A violation pursuant to *Section 1424(d) of the Health & Safety Code* in that it presents _____ [imminent danger that death or serious harm *or* the substantial probability that death or serious physical harm] to plaintiff will result.

[*OR, if alleging Class B violation*]

6. Defendant, on or about _____ [*date*], and at all relevant times, _____ [*describe conduct constituting Class B violation, e.g.,* has failed to keep the facility's kitchen areas free from litter and rubbish and protected from rodents, cockroaches, flies, and other insects, in violation of *Title 22, Section 72345 of the California Code of Regulations*, and specifically _____ (*specify conditions*)].

7. The above-described conduct constitutes a Class B violation pursuant to *Section 1424(e) of the Health & Safety Code* in that it has a direct or immediate relationship to the health, safety, or security of plaintiff.

[*CONTINUE*]

8. On or about _____ [*date*], the State Department of Health Services issued to defendant a citation for Class _____ [A *or* B] violation based on the above-described conduct. A copy of the citation is attached and

incorporated by reference as Exhibit "A." The _____ [State Department of Health Services has not taken action corrective action *or* violation has not been corrected to the satisfaction of the State Department of Health Services].

[9. _____ (*Allege facts, if appropriate, regarding other instances of noncompliance with regulations by the facility and citations issued and penalties assessed for other Class A or B violations within 12 months of violations for which damages are being sought.*)]

[10. Defendant's wrongful conduct has caused and, unless restrained and enjoined by order of this court, will continue to cause great and irreparable injury to plaintiff in that _____ (*specify facts showing danger of great and irreparable injury, e.g.,* plaintiff is in danger of being trapped in the facility in the event of fire).]

[11. Plaintiff has no adequate remedy at law for the injuries currently being suffered in that _____ (*specify facts in addition to those previously alleged showing the inadequacy of any legal remedies, especially monetary damages, e.g.,* monetary damages or other legal remedies will not prevent imminent and serious physical danger to plaintiff caused by defendant's conduct).]

[12. As a proximate result of defendant's wrongful conduct as stated above, the plaintiff has suffered _____ (*describe damage, e.g.,* great mental suffering and distress), to his/her damage (in the sum of $_____).]

[*ADD, if defendant is state entity*]

13. On or about _____ [*date*], plaintiff _____ [*name*] filed a claim with _____ [*name of governmental entity*] by _____ [delivering *or* mailing] the claim to the _____ [clerk *or* secretary *or* auditor] for the injuries, disability, losses, and damages suffered and incurred by him/her by reason of the above-described occurence, all in compliance with the requirements of *Section 905 of the Government Code*. A copy of the claim is attached as Exhibit _____ incorporated by reference.

14. On or about _____ [*date*], _____ [*name of governmental entity*] _____ [rejected the claim in its entirety *or* allowed the claim in the amount of $_____ and rejected it as to the remainder *or* failed to act on the claim within the period of 45 days after its presentation, and the claim was thus deemed rejected, under the provisions of *Section 912.4 of the Government Code*, at the expiration of the 45-day period, which was on _____ (*date*)].

[*CONTINUE*]

WHEREFORE, plaintiff prays a judgment against defendant as follows:

[1. For a temporary restraining order, preliminary injunction, and permanent injunction restraining and enjoining defendant and his/her/its agents, servants, and employees, and all persons acting in concert with or for them, from _____ (*specify act to be enjoined, e.g.,* permitting the above-described violation to continue, that is, from maintaining the facilities in violation of the regulations prescribed by the State Fire Marshal);]

2. For damages of $_____ pursuant to *Section 1430(a) of the Health and Safety Code*;

[3. For compensatory damages (in the amount of $_____);]

[4. For award of attorney fees;]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am _____ [the plaintiff *or specify, e.g.,* the guardian ad litem for the plaintiff] in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

CAUTION:

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits or declarations, counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581* ; *see Leach v. City of San Marcos (1989) 213 Cal. App. 3d 648, 661, 261 Cal. Rptr. 805]* .

[2] Use of Form

This complaint is for use by a patient in a long-term health care facility to seek damages and, if appropriate, injunctive relief against the licensee of the facility, based on a Class A or B violation that the Department of Health Services has not taken action to correct, or that has not been corrected to the satisfaction of the Department [*see Health & Safety Code § 1430(a)* (cause of action); *see also Health & Safety Code § 1424(d), (e)* (defining nature of Class A and Class B violations, respectively)].

This form may be adapted for use in a class action. For discussion and forms relating to allegations used in class actions, see Ch. 120, *Class Actions* .

[3] Allegations

This form alleges:

- The plaintiff's standing (Paragraph 1) [*see Health & Safety Code § 1430(a)*].

- The status of the defendant as a licensee of a long-term health care facility and the basis for venue (Paragraph 2) [*see Health & Safety Code §§ 1250, 1418* (defining facilities); *see also Code Civ. Proc. § 393(a)* (venue)].

- A description of the conduct constituting a Class A or B violation (Paragraphs 6, 7) [*see Health & Safety Code § 1424(d), (e)*].

- A statement that the Department of Health Services has issued a citation, and that the Department has not sought to correct the condition, or has found any corrections taken to be inadequate (Paragraph 8) [*see Health & Safety Code § 1430(a)*].

Optional Paragraphs 3 and 4 are for use to allege fictitious defendants and their capacities as agents and employees, respectively.

Optional Paragraph 5 is for use to state facts regarding the patient's medical, physical, and mental condition [*see Health & Safety Code §§ 1424(a)* (patient's condition relevant to determination of amount of civil penalty), *1430(a)* (limit on amount of civil damages)].

Optional Paragraph 9 is for use to set forth defendant's prior history of violations [*see Health & Safety Code §§ 1424(a)(5)* (relevance of history of violations on penalty), *1428(h)* (civil penalty trebled)].

Optional Paragraphs 10 and 11 are for use to establish the basis for injunctive relief [*see Code Civ. Proc. §§ 526, 527(a)* (temporary injunction); *see also Civ. Code § 3422* (permanent injunction)].

Optional Paragraph 12 is for use to describe damages incurred in addition to those authorized under *Health & Safety Code § 1430(a)*.

Optional Paragraphs 13 and 14 are for use to set forth facts regarding compliance with procedural prerequisites when the defendant is a governmental entity [*see Gov. Code §§ 905, 945.4*].

[4] Guardian Ad Litem

If the action is brought by a patient who is incompetent or under a conservatorship, he or she must appear either by a guardian or conservator of his or her estate, or by a guardian ad litem appointed by the court in which the action is pending [*see Code Civ. Proc. § 372*]. For a discussion of procedures for appointment of a guardian ad litem, see Ch. 291, *Guardians ad Litem* .

[5] Other Causes of Action

If the violation constitutes an independently actionable wrong, for example, breach of the admission contract, invasion of privacy, negligent or intentional infliction of mental distress, assault and battery, or conversion, this form may be combined with a complaint asserting that cause of action. Frequently, violations by long-term health care facilities affecting patients' care also constitute unfair trade practices under *Bus. & Prof. Code § 17200* [*see People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 530, 206 Cal. Rptr. 164* (facility's practice of providing insufficient nursing personnel as not only illegal but also unfair business practice in violation of *Bus. & Prof. Code § 17200*); *see also Civ. Code § 3345* (enhanced penalties when conduct constitutes unfair business practice or unfair competition)].

[6] Attorney's Fees

Health & Safety Code § 1430(a) does not provide for attorney's fees. In an appropriate case, however, counsel might seek attorney's fees pursuant to the following: (1) the private attorney general theory [*Code Civ. Proc. § 1021.5*; *see* Ch. 174, *Costs and Attorney's Fees*]; (2) inclusion in the complaint of a cause of action for breach of the admissions contract if the admissions contract contains a provision for attorney's fees [*see Health & Safety Code § 1599.83*, discussed in *§ 351.24[6]*]; or (3) inclusion in the complaint of a cause of action for violation of the patient's rights [*see Health & Safety Code § 1430(b)* (expressly providing for attorney's fees); *see also § 351.221* for a form for a complaint for violation of patient's rights under *Health & Safety Code § 1430(b)*].

[7] Jurisdiction

An action brought pursuant to the Long-Term Care, Health, Safety, and Security Act of 1973 is a limited civil case if civil penalties are not sought or amount to $25,000 or less [*Code Civ. Proc. § 86.1*]. The superior court has jurisdiction of the action [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*]. In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

An action seeking permanent injunctive relief is not a limited civil case [*Code Civ. Proc. §§ 85, 86(a)(8)*].

In an action that is not a limited civil case, brought to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*]. Otherwise, the amounts claimed as damages must be alleged [*Code Civ. Proc. § 425.10(a)(2)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[8] State Statutes

Classification of violations relating to health, safety, or security. *Health & Safety Code § 1424*

Assessment of penalties. *Health & Safety Code § 1428*

Remedies for violations. *Health & Safety Code § 1430(a)*

[9] Administrative Regulations

Regulations governing skilled nursing facilities. *22 Cal. Code Reg. § 72001 et seq.*

Regulations governing intermediate care facilities. *22 Cal. Code Reg. § 73001 et seq.*

Class B violations in intermediate care facilities. *22 Cal. Code Reg. § 73705*

[10] Decisions

Immunity of public entity under *Gov. Code § 818* from punitive or exemplary damages does not prevent imposition of statutory civil penalties under Long-Term Care Act on state-licensed, county-operated, long-term health care facility. *Kizer v. County of San Mateo (1991) 53 Cal. 3d 139, 151, 279 Cal. Rptr. 318, 806 P.2d 1353*

[11] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used* .

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions* .

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints* .

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages* .

For discussion and forms relating to FAX service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers* .

For discussion and forms relating to obtaining injunctive relief generally, see Ch. 303, *Injunctions* .

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter* .

For alternative forms for prayers, see Ch. 420, *Prayers* .

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers* .

For forms for allegations showing proper venue, see Ch. 571, *Venue* .

For alternative forms for verification, see Ch. 572, *Verification* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersHealthcare LawActions Against FacilitiesFacility LiabilityNursing FacilitiesPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral Overview

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A. Long-Term Health Care Facilities

31-351 California Forms of Pleading and Practice--Annotated § 351.221

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.221 Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)], Permanent Injunction [Civ. Code § 3422], and Damages [Civ. Code § 3333]--By Patient of Skilled Nursing Facility or Intermediate Care Facility Against Licensee for Violation of Patients' Bill of Rights [Health & Safety Code §§ 1430(b), 1599.1]

[1] FORM Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)], Permanent Injunction [Civ. Code § 3422], and Damages [Civ. Code § 3333]--By Patient of Skilled Nursing Facility or Intermediate Care Facility Against Licensee for Violation of Patients' Bill of Rights [Health & Safety Code §§ 1430(b), 1599.1]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
[by and through _____ (*name*),	)	
his/her guardian ad litem,]	)	NO. _____
Plaintiff,	)	COMPLAINT FOR [TEMPORARY RESTRAIN-
vs.	)	ING ORDER, PRELIMINARY AND PERMANENT
_____ [*name*],	)	INJUNCTION, AND] DAMAGES
[and DOES I-_____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff _____ [*name*] [, acting by and through his/her guardian ad litem, _____ (*name*),] alleges:

1. [*Plaintiff's status. See § 351.220[1], Paragraph 1.*]

2. Defendant _____ [*name*] is licensed to operate _____ [a skilled nursing facility as defined in *Section 1250(c) of the Health and Safety Code or* an intermediate care facility as defined in *Section 1250(d) of the Health and Safety Code*] and, under this license, maintains and operates _____ [*name of facility*], located at _____ [*street address and city*], _____ County, California.

[3. *Fictitious defendants allegation. See § 351.220[1], Paragraph 3.*]

[4. *Agency allegation regarding fictitious defendants. See § 351.220[1], Paragraph 4.*]

5. On or about _____ [*date*], and at all relevant times, defendant _____ [*describe violation of plaintiff's rights, e.g.,* without plaintiff's knowledge or consent, subjected plaintiff to a course of treatment that is part of experimental research, in violation of *Title 22, Section 72527(a)(3) of the California Code of Regulations*, in that _____ (*specify*).]

[*ADD, if plaintiff subject to unlawful relocation based on change in manner of payment to Medi-Cal*]

6. On or about _____ [*date*], defendant facility served plaintiff with a notice of _____ [eviction *or* transfer] as a result of plaintiff's notification to defendant, on or about _____ [*date*], that he/she would change his/her manner of purchasing defendant's services from _____ [private payment *or* Medicare] to Medi-Cal effective _____ [*date*]. [Plaintiff was subsequently _____ (transferred *or* evicted) for that reason on or about _____ (*date*).]

7. Plaintiff is/was not receiving respite care services as a resident of a skilled nursing facility or intermediate care facility, as defined in *Section 1418.1 of the Health and Safety Code*, within the meaning of the exception to the prohibition against transfer or eviction pursuant to *Section 14124.7 of the Welfare and Institutions Code*.

[*CONTINUE*]

[8-9. *Bases for injunctive relief. See § 351.220[1], Paragraphs 10 and 11.*]

[10. *Bases for compensatory damages. See § 351.220[1], Paragraph 12.*]

[11-12. *Compliance with required procedures if defendant is state entity. See § 351.220[1], Paragraphs 13 and 14.*]

WHEREFORE, plaintiff prays a judgment against defendant as follows:

[1. For a temporary restraining order, preliminary injunction, and permanent injunction restraining and enjoining defendant and his/her/its agents, servants, and employees, and all persons acting in concert with or for them, from _____ (*specify act to be enjoined, e.g.,* subjecting plaintiff to any experimental treatment against his/her will or without his/her knowledge, in violation of *Title 22, Section 72527(a)(3) of the California Code of Regulations*);]

2. For damages of _____ [$500 *or* $_____, representing $500 for each of the _____ (*specify number, e.g.,* four) above-described violations of Patients' Rights] pursuant to *Section 1430(b) of the Health and Safety Code*;

[3. For compensatory damages (in the amount of $_____);]

4. For an award of attorney's fees pursuant to *Section 1430(b) of the Health and Safety Code*;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 351.220[1].*]

CAUTION:
A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits or declarations, counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581* ; *Leach v. City of San Marcos (1989) 213 Cal. App. 3d 648, 661, 261 Cal. Rptr. 805]* .

[2] Use of Form

This complaint is for use by a current or former resident or patient of a skilled nursing facility or intermediate care facility to seek damages and, if appropriate, injunctive relief, as well as attorney's fees and costs, against the licensee of that facility for violation of the resident's or patient's rights as set forth in the Patients' *Bill of Rights* [*see Health & Safety Code §§ 1430(b)* (right of civil action), *1599 et seq.* (requirement for establishment of policies regarding patients' rights); *see also 22 Cal. Code Reg. §§ 72527* (skilled nursing facility), *73523* (intermediate care facility)].

This form may be combined with *§ 351.220* if the conduct also constitutes one or more Class A or B violations [*see Health & Safety Code § 1424(d), (e)*].

This form can be modified to state a cause of action by a current or former resident for a violation of any other right provided for by federal or state law or regulation [*see Health & Safety Code § 1430(b)*].

[3] Allegations

The form alleges:

- The status of the defendant as a licensee of a skilled nursing or intermediate care facility and venue (Paragraph 2) [*see Health & Safety Code §§ 1250(c), (d), 1430(b)* (definitions of facilities); *see also Code Civ. Proc. § 393(a)* (venue)]; and

- A description of defendant's violation of plaintiff's rights (Paragraph 5) [*see Health & Safety Code § 1599 et seq.*].

Optional Paragraphs 6 and 7 are for use if plaintiff is subject to unlawful transfer or eviction because he or she changed the manner of payment from private payment or Medicaid to Medi-Cal [*see Welf. & Inst. Code § 14124.7*; *see also 22 Cal. Code Reg. §§ 72527(a)(5)* (unlawful transfer or discharge in skilled nursing facility), *73523(a)(5)* (unlawful transfer or discharge in intermediate care facility)].

[4] Limitation on Damages

Damages recoverable pursuant to *Health & Safety Code § 1430(b)* are limited to a maximum of $500 [*Health & Safety Code § 1430(b)*]. Presumably, the $500 limit is applicable to *each* such violation, and, if violation of more than one specified right has been alleged, the plaintiff may be entitled to seek the appropriate multiple of the $500 limit.

[5] Attorney's Fees and Costs

Attorney's fees and costs may be sought [*see Health & Safety Code § 1430(b)*].

[6] Jurisdiction

The action will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

If the optional language in the form seeking permanent injunctive relief is used, the action may not be a limited civil case except as otherwise authorized by statute [*Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*].

[7] State Statutes

Remedies for violations of rights of patients in skilled nursing or intermediate care facilities. *Health & Safety Code § 1430(b)*

Patient's *Bill of Rights*. *Health & Safety Code § 1599 et seq.*

[8] Administrative Regulations

Patients' rights in skilled nursing facility. *22 Cal. Code Reg. § 72527*

Patients' rights in intermediate care facility. *22 Cal. Code Reg. § 73523*

[9] Cross References

See also *§ 351.220*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersHealthcare LawActions Against FacilitiesFacility LiabilityNursing FacilitiesHealthcare LawBusiness Administration & OrganizationGeneral OverviewHealthcare LawBusiness Administration & OrganizationWrongful TerminationGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesNursing FacilitiesPublic Health & Welfare LawSocial SecurityMedicareProvidersTypesNursing Facilities

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Volume 31: Lis Pendens thru Mandate and Prohibition-Chs. 348-358
Chapter 351 LONG-TERM HEALTH AND RESIDENTIAL CARE
PART IV. FORMS
A. Long-Term Health Care Facilities

31-351 California Forms of Pleading and Practice--Annotated § 351.222

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.222 Affirmative Defense--By Licensee of Long-Term Health Care Facility in Action for Unlawful Relocation Due to Change in Payment to Medi-Cal [Welf. & Inst. Code § 14124.7]--Misrepresentation of Finances [Health & Safety Code § 1439.7]

[1] FORM Affirmative Defense--By Licensee of Long-Term Health Care Facility in Action for Unlawful Relocation Due to Change in Payment to Medi-Cal [Welf. & Inst. Code § 14124.7]--Misrepresentation of Finances [Health & Safety Code § 1439.7]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. Plaintiff was admitted to _____ [*name of facility*] on or about _____ [*date*].

2. On or about _____ [*date*], prior to plaintiff's admission and at the request of defendant, _____ [plaintiff *or* plaintiff's representative, _____ (*name*),] provided the following information regarding plaintiff's assets and liabilities: _____ [*specify*]. [A copy of plaintiff's written statement containing that information is attached and incorporated by reference as Exhibit _____.]

3. Defendant relied on that information in deciding to admit plaintiff to the facility.

4. On or about _____ [*date*], defendant investigated the representations concerning plaintiff's finances and discovered that the plaintiff's financial assets and liabilities are materially different than those represented by plaintiff, in that _____ [*specify*].

[*EITHER*]

5. Defendant _____ [transferred *or* evicted] plaintiff on or about _____ [*date*], within 90 days of admission.

[*OR*]

5. Plaintiff fraudulently misrepresented his/her assets and liabilities so that if the material facts were known at the time by the facility, plaintiff would not have been admitted.

6. Defendant could not have discovered the misrepresentation with the exercise of reasonable diligence [because _____ (*specify*)].

7. Defendant _____ [transferred *or* evicted] plaintiff on or about _____ [*date*], within 18 months from the date of plaintiff's admission.

[*CONTINUE*]

8. On or about _____ [*date*], and promptly after discovering themisrepresentations, defendant notified the State Department of Health Services and the Office of the Long-Term Care Ombudsman of its intent to _____ [transfer *or* evict] plaintiff. A copy of each of those notices is attached and incorporated by reference as Exhibits _____ and _____, respectively.

[2] Use of Form

This affirmative defense may be used by the licensee of a long-term health care facility participating in the Medi-Cal program, in an answer to a complaint alleging unlawful transfer of a resident based on the plaintiff's eviction or transfer from the facility because he or she changed the manner of payment from private payment or Medicare to Medi-Cal [*see Health & Safety Code § 1439.7* (right to transfer or evict based on misrepresentation of finances); *see also Welf. & Inst. Code § 14124.7* (prohibition against transfer or eviction based on change in manner of payment to Medi-Cal)]. It may be used to provide an affirmative defense to the allegations set forth in Paragraphs 6 and 7 of § 351.221[1].

[3] State Statutes

Permissible transfer or eviction notwithstanding *Welf. & Inst. Code § 14124.7. Health & Safety Code § 1439.7*

Prohibition against transfer or eviction based on change in manner of payment to Medi-*Cal. Welf. & Inst. Code § 14124.7*

[4] Cross References

For further discussion and forms for affirmative defenses, see Ch. 26, *Answers*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesGeneral OverviewHealthcare LawActions Against FacilitiesDefensesGeneral

OverviewHealthcare LawInsuranceReimbursementGeneral OverviewPublic Health & Welfare LawSocial SecurityMedicareProvidersReimbursementGeneral Overview

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PART IV. FORMS
A. Long-Term Health Care Facilities

31-351 California Forms of Pleading and Practice--Annotated §§ 351.223-351.239

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[Reserved]

§§ 351.223[Reserved]

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Chapter 351 LONG-TERM HEALTH AND RESIDENTIAL CARE
PART IV. FORMS
B. Residential Care Facilities

31-351 California Forms of Pleading and Practice--Annotated § 351.240

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§ 351.240 Complaint Against Residential Care Facility for the Elderly by Resident--Reimbursement for or Replacement of Stolen or Lost Property [Health & Safety Code § 1569.152]

[1] FORM Complaint Against Residential Care Facility for the Elderly by Resident--Reimbursement for or Replacement of Stolen or Lost Property [Health & Safety Code § 1569.152]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
[by and through _____ (name),	)	
his/her guardian ad litem,]	)	NO. _____
Plaintiff,	)	COMPLAINT FOR REIMBURSEMENT OR RE-
vs.	)	PLACEMENT OF LOST OR STOLEN PATIENT
_____ [*name*],	)	PROPERTY
[and DOES I-_____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff _____ [*name*] [, acting by and through his/her guardian ad litem, _____ (*name*),] alleges:

1. [*Plaintiff's status. See § 351.220[1], Paragraph 1.*]

2. Defendant _____ [*name*] is licensed to operate a residential care facility for the elderly pursuant to *Health & Safety Code § 1569.10 et seq.*, and under this license operates _____ [*name of facility*], located in _____ County, California.

[3. *Fictitious defendants allegation. See § 351.220[1], Paragraph 3.*]

[4. *Agency allegation regarding fictitious defendants. See § 351.220[1], Paragraph 4.*]

5. Plaintiff had in her/his possession at _____ [*name of facility*] _____ [*identify lost or stolen property, e.g.*, one necklace consisting of a gold-plated heart-shaped locket and chain].

6. Defendant failed to make reasonable efforts to safeguard the personal belongings of plaintiff in that _____ [*specify, e.g.*, defendant failed to maintain a secured area for the safekeeping of patients' property and failed, after a request by plaintiff, to provide plaintiff with a lock for his/her bedside drawer at plaintiff's expense].

7. As a proximate result of defendant's failure to safeguard plaintiff's personal belongings, the above-decribed property was lost or stolen at _____ [*name of facility*] on or about _____ [*date*].

8. At the time of the above-described loss or theft, the _____ [*identify lost or stolen property*] had a value of $_____.

WHEREFORE, plaintiff prays a judgment against defendant as follows:

1. For replacement of or reimbursement in the amount of $_____ for plaintiff's _____ [*identify lost or stolen property*].

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 351.220[1].*]

[2] Use of Form

This form is a complaint for use by a resident of a residential care facility for the elderly to seek replacement of or reimbursement for property that was stolen or lost in the facility [*see Health & Safety Code §§ 1569.152* (cause of action), *1569.153* (theft and loss program required)].

This form may be adapted for use in an action against a long-term health care facility for theft or loss of a patient's property, pursuant to *Health & Safety Code § 1289.3*, which contains provisions similar to that of *Health & Safety Code § 1569.152* governing residential care facilities for the elderly. For discussion of *Health & Safety Code § 1289.3* and related provisions, see *§ 351.23*.

[3] Allegations

The complaint alleges:

- The status of the defendant as a licensed residential care facility for the elderly and the basis for venue (Paragraph 2) [*see Health & Safety Code § 1569.152*; *see also Code Civ. Proc. § 395* (venue)].

- The existence of fictitious defendants, and their capacities as agents and employees (optional Paragraphs 3, 4).

- A description of the lost or stolen property (Paragraph 5).

- The failure of defendant to make reasonable efforts to safeguard the property, and the resultant loss or theft (Paragraphs 6, 7) [*see Health & Safety Code § 1569.153* (requirement for theft and loss program)].

- The value of the property (Paragraph 8).

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[5] State Statutes

Replacement of or reimbursement for lost or stolen patient property in residential care facilities for elderly. *Health & Safety Code § 1569.152*

Requirements of residential care facility for the elderly's theft and loss prevention program, policies, and procedures. *Health & Safety Code § 1569.153*

[6] Cross References

See also *§ 351.220*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsServicesHealthcare LawActions Against FacilitiesFacility LiabilityNursing FacilitiesPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawSocial ServicesDisabled & Elderly PersonsGeneral Overview

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PART IV. FORMS
B. Residential Care Facilities

31-351 California Forms of Pleading and Practice--Annotated § 351.241

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.241 Affirmative Defense--By Residential Care Facility for Elderly in Action for Reimbursement for or Replacement of Stolen or Lost Patient's Property [Health & Safety Code § 1569.152]--Failure to Add Items to Inventory or Deletion of Items From Inventory [Health & Safety Code § 1569.153(d)]

[1] FORM Affirmative Defense--By Residential Care Facility for Elderly in Action for Reimbursement for or Replacement of Stolen or Lost Patient's Property [Health & Safety Code § 1569.152]--Failure to Add Items to Inventory or Deletion of Items From Inventory [Health & Safety Code § 1569.153(d)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

[*EITHER*]

On or about _____ [*date*], plaintiff _____ submitted to defendant a written inventory of his/her personal property, which did not include the property that is the subject of the action. A copy of the written inventory is attached and incorporated by reference as Exhibit _____. At no time did plaintiff subsequently add that property to the written inventory.

[*OR*]

On or about _____ [*date*], plaintiff deleted the property that is the subject of the action from his/her written inventory. A copy of the written inventory is attached and incorporated by reference as Exhibit _____.

[2] Use of Form

This form of affirmative defense is for use by a residential care facility for the elderly in an answer to a complaint by a resident for reimbursement or replacement of lost or stolen resident property if the resident or his or her representative either omitted the property from the written inventory or subsequently deleted it from a prior written inventory that included the item [*see Health & Safety Code § 1569.153(d)*]. The form may be submitted in response to *§ 351.240*.

[3] State Statutes

Nonliability of residential care facility for items omitted or deleted from written inventory. *Health & Safety Code § 1569.153(d)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Protection & WelfareElderly PersonsGeneral OverviewFamily LawFamily Protection & WelfareElderly PersonsServicesHealthcare LawActions Against FacilitiesDefensesGeneral OverviewHealthcare LawActions Against FacilitiesFacility LiabilityNursing FacilitiesPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesCommunity Residence

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31-351 California Forms of Pleading and Practice--Annotated §§ 351.242-351.259

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[Reserved]

§§ 351.242[Reserved]

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Chapter 351 LONG-TERM HEALTH AND RESIDENTIAL CARE
PART IV. FORMS
C. Continuing Care Contracts

31-351 California Forms of Pleading and Practice--Annotated § 351.260

AUTHOR: Carol S. Sanders By Carol S. Sanders, formerly the directing attorney of Contra Costa Legal Assistance for the Elderly, and the Publisher's Editorial Staff.

§ 351.260 Notice of Cancellation of Continuing Care Contract [Health & Safety Code § 1788(h)]

[1] FORM Notice of Cancellation of Continuing Care Contract [Health & Safety Code § 1788(h)]

NOTICE OF CANCELLATION

_____ [*date of transaction*]

Your first date of occupancy under this contract is: _____ [*date*].

You may cancel this transaction, without any penalty within 90 calendar days from the above date.

If you cancel, any property transferred, any payments made by you under the contract, and any negotiable instrument executed by you will be returned within 14 calendar days after making possession of the living unit available to the provider. Any security interest arising out of the transaction will be canceled.

If you cancel, you are obligated to pay a reasonable processing fee to cover costs and to pay for the reasonable value of the services received by you from the provider up to the date you canceled or made available to the provider the possession of any living unit delivered to you under this contract, whichever is later.

If you cancel, you must return possession of any living unit delivered to you under this contract to the provider in substantially the same condition as when you took possession.

Possession of the living unit must be made available to the provider within 20 calendar days of your notice of cancellation. If you fail to make the possession of any living unit available to the provider, then you remain liable for

performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice, or any other written notice, or send a telegram to _____ [*name of provider*] at _____ [*address of provider's place of business*] not later than midnight of _____ [*date*].

I hereby cancel this transaction.

_____

[*resident or transferor's signature*]

[2] Use of Form

This form is for use by a transferor under a continuing care contract, to cancel the contract without penalty within 90 calendar days of the execution of the contract [*Health & Safety Code § 1788(h)*].

[3] Inclusion of Form in Continuing Care Contract

This form must be attached to the continuing care contract. It must be easily detachable, and must be printed in at least 10-point boldface type [*Health & Safety Code § 1788(h)*].

[4] State Statutes

Notice of cancellation form. *Health & Safety Code § 1788(h)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceDischarges & TerminationsFamily LawFamily Protection & WelfareElderly PersonsGeneral OverviewHealthcare LawBusiness Administration & OrganizationGeneral OverviewPublic Health & Welfare LawHealthcareServices for Disabled & Elderly PersonsCare FacilitiesGeneral Overview

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Chapters 352-353 [RESERVED]

31-352 California Forms of Pleading and Practice--Annotated Chapters 352-353

[RESERVED]

Chapters 352[RESERVED]

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Volume 31: Lis Pendens thru Mandate and Prohibition-Chs. 348-358
Chapter 354 LOSS OF CONSORTIUM

31-354 California Forms of Pleading and Practice--Annotated 354.syn

§ 354.syn Synopsis to Chapter 354: LOSS OF CONSORTIUM

§ 354.01 Scope of Chapter

§ 354.02 Cross References

§§ 354.03-354.09 [Reserved]

§ 354.10 Governing Law

§ 354.11 Definitions

[1] "Plaintiff" Spouse and "Nonplaintiff" Spouse

[2] Loss of Consortium

§ 354.12 Essential Elements of Loss of Consortium Cause of Action

[1] Valid and Lawful Marriage

[2] Tortious Injury to Nonplaintiff Spouse

[3] Plaintiff Spouse Suffered Loss of Consortium

[4] Loss Was Caused by Defendant's Wrongful Act

§ 354.13 Joinder of Plaintiff Spouse's Loss of Consortium Action With Nonplaintiff Spouse's Action

[1] Joinder Encouraged

[2] Causes of Action Are Independent

[3] Recovery by Spouse Not Subject to Lien for Workers' Compensation Benefits Paid

§ 354.14 Damages

[1] Nature of Recoverable Damages

[2] Damages by Injured Spouse Not Recoverable

§ 354.15 Cause of Action Not Available

[1] Alienation of Affection or Seduction

[2] Parental Consortium

[3] Filial Consortium

§ 354.16 Defense of Comparative Negligence

§ 354.17 Statute of Limitations

[1] In General

[2] Governmental Entity Claims Requirements

§ 354.18 Mandatory Contractual Arbitration

§§ 354.19-354.29 [Reserved]

§ 354.30 Decisions

§ 354.31 Law Reviews

§§ 354.32-354.49 [Reserved]

§ 354.50 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Injuries Based on Negligence or Intentional Tort [Civ. Code § 1714(a)]--Action for Loss of Consortium Based on Defendant's Negligent or Intentional Injury to Plaintiff's Spouse

[1] FORM

[2] Use of Form

[3] Allegations

[4] Specification of Damages

[5] Action for Loss of Consortium

[6] Damages

[7] Statute of Limitations

§ 354.51 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Loss of Consortium--Action Barred by Exclusive Remedy Principle of Workers' Compensation Law [Lab. Code §§ 3600(a), 3601(a), 3602(a)]

[1] FORM

[2] Use of Form

§ 354.52 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Loss of Consortium--Action Barred by Two-Year Statute of Limitations [Code Civ. Proc. § 335.1]

[1] FORM

[2] Use of Form

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Chapter 354 LOSS OF CONSORTIUM
PART I. SCOPE

31-354 California Forms of Pleading and Practice--Annotated § 354.01

§ 354.01 Scope of Chapter

This chapter discusses general civil liability for loss of consortium by a spouse. It discusses the essential elements necessary to state a cause of action for loss of consortium and the nature of recoverable damages and damages that are not recoverable. The chapter includes discussion of various situations in which of an action for loss of consortium is not available. Defenses to a loss of consortium action and the underlying tort action are discussed.

The chapter also includes a form of complaint for an action by a spouse for loss of consortium based on negligent or intentional injury to the other spouse by a third party [*see § 354.50*], and forms of affirmative defense [*§§ 354.51, 354.52*].

For discussion of loss of consortium issues in the context of wrongful death actions, see Ch. 181, *Death and Survival Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsCauses of ActionLoss of ConsortiumTortsDamagesConsortium DamagesGeneral OverviewTortsWrongful Death & Survival ActionsGeneral OverviewTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesConsortium

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Chapter 354 LOSS OF CONSORTIUM
PART I. SCOPE

31-354 California Forms of Pleading and Practice--Annotated § 354.02

§ 354.02 Cross References

For discussion and forms relating to the recovery of damages for loss of consortium in wrongful death actions, see Ch. 181, *Death and Survival Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 354 LOSS OF CONSORTIUM
PART I. SCOPE

31-354 California Forms of Pleading and Practice--Annotated §§ 354.03-354.09

[Reserved]

§§ 354.03[Reserved]

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§ 354.10 Governing Law

The leading case setting forth the general rule that each spouse can recover for loss of consortium caused by negligent or intentional injury to the other spouse by a third party is *Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 115 Cal. Rptr. 765, 525 P.2d 669* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-354 California Forms of Pleading and Practice--Annotated § 354.11

§ 354.11 Definitions

[1] "Plaintiff" Spouse and "Nonplaintiff" Spouse

The following terms will be used in this chapter to refer to the two spouses involved in the loss of consortium action: the spouse who is seeking damages for loss of consortium will be referred to as the "plaintiff spouse" and the spouse whose physical or nonphysical injuries are the basis for the loss of consortium action will be referred to as the "nonplaintiff spouse." Although in most cases the nonplaintiff spouse will also be a plaintiff in an action brought by that spouse for his or her own injuries, the use of these terms will avoid confusion when referring to the spouses involved in the loss of consortium action.

[2] Loss of Consortium

The "loss of consortium" is the loss of conjugal fellowship and sexual relations and includes not only the loss of support or service but also the loss of love, affection, society, companionship, sexual relations, and solace. An important aspect of consortium is the moral support each spouse gives the other through the triumph and despair of life [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 385, 405-406, 408, 115 Cal. Rptr. 765, 525 P.2d 669]* . Loss of consortium refers to a complete loss of these elements for a definite period of time or a nondeterminable length of time; it does not refer to the inevitable physical, mental, and emotional damage normally sustained by a spouse when the other spouse is injured [*Park v. Standard Chem Way Co. (1976) 60 Cal. App. 3d 47, 50-51, 131 Cal. Rptr. 338* ; for further discussion of the issue whether one can recover for a "partial" loss of consortium, see *§ 354.12[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 354.12 Essential Elements of Loss of Consortium Cause of Action

[1] Valid and Lawful Marriage

The first essential element of a loss of consortium cause of action is a lawful marriage between the plaintiff and his or her spouse at the time of the latter's injury [*Elden v. Sheldon (1988) 46 Cal. 3d 267, 279, 250 Cal. Rptr. 254, 758 P.2d 582* ; *Borelli v. Brusseau (1993) 12 Cal. App. 4th 647, 653, 16 Cal. Rptr. 2d 16]* . The spouse suing for loss of consortium must be married to the spouse who suffers the underlying injury at the time the intentional or negligent act causing the underlying injury occurs. An injury occurring before the marriage does not give rise to a cause of action for loss of consortium, regardless of whether the plaintiff first learns of the injury before or after the marriage [*Zwicker v. Altamont Emergency Room Physicians Med. Group (2002) 98 Cal. App. 4th 26, 35, 118 Cal. Rptr. 2d 912* (wife had no loss of consortium claim based on conduct leading to husband's sterility that occurred before marriage)].

Although California does not recognize common-law marriages [*see Fam. Code § 300*; *Etienne v. DKM Enters., Inc. (1982) 136 Cal. App. 3d 487, 490, 186 Cal. Rptr. 321]* , a common-law marriage that would be valid in the state in which the marriage was contracted is recognized by California law [*see Fam. Code § 308*; *cf. Etienne v. DKM Enters., Inc. (1982) 136 Cal. App. 3d 487, 490-492, 186 Cal. Rptr. 321* (parties' alleged common-law marriage not recognized because of its apparent invalidity under Texas law)]. Therefore, a loss of consortium action may be maintained by the party to a common-law marriage entered into under the laws of another state if the plaintiff can establish the legality of the marriage under the laws of that state.

Beginning in 2005, registered domestic partners are provided by statute with the same legal rights and protections as married spouses, which presumably would extend to these parties the right to recover for loss of consortium [*see Fam. Code § 297.5(a)*]. However, the statutory right to register as domestic partners extends only to couples of the same sex over the age of 18 and opposite-sex couples in which at least one person is over the age of 62 and meets the eligibility criteria for old-age social security benefits [*Fam. Code § 297(a), (b)(4), (5)*]. In addition, beginning in 2002, members of unmarried couples meeting these statutory criteria may sue for wrongful death and thus presumably could recover for loss of consortium in those cases [*see Code Civ. Proc. § 377.60(a)*].

[2] Tortious Injury to Nonplaintiff Spouse

The second essential element of a loss of consortium cause of action is a tortious injury suffered by the nonplaintiff spouse [*Blain v. Doctor's Co. (1990) 222 Cal. App. 3d 1048, 1067, 272 Cal. Rptr. 250* ; *see* *Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 408, 115 Cal. Rptr. 765, 525 P.2d 669]* . Often the injuries incurred by the nonplaintiff spouse are ones involving a major physical trauma, such as brain damage, paralysis, or amputation, that disable that spouse and thereby deprive the plaintiff spouse of spousal consortium [*see, e.g.,* *Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 386, 115 Cal. Rptr. 765, 525 P.2d 669* (extensive and permanent paralysis)]. However, less grievous physical injuries, or nonphysical, psychological injuries suffered by the nonplaintiff spouse, can also be the basis for a loss of consortium action. In *Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 167 Cal. Rptr. 831, 616 P.2d 813* , the Supreme Court addressed this issue in a case in which a husband brought a consortium action against a hospital and doctor for their negligence in misdiagnosing and treating his wife for syphilis, which ultimately led to the destruction of their marriage.

The defendants' argument that the action required a severe physical injury to the nonplaintiff spouse was rejected by the Court, which observed that a mental and physical injury may be equally disabling and the detriment to the mentally injured person's spouse may be just as serious as if the disability involved physical impairment [*Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 931, 167 Cal. Rptr. 831, 616 P.2d 813]* . Acknowledging that the landmark case that gave rise to the cause of action for loss of consortium [*see* *Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 115 Cal. Rptr. 765, 525 P.2d 669]* contemplated an injury that was sufficiently serious and disabling to create an inference that the relationship was more than superficially or temporarily impaired, the Court stated in *Molien* that there could be no doubt that certain psychological injuries can be just as severe and debilitating as physical injuries [*Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 932-933, 167 Cal. Rptr. 831, 616 P.2d 813]* . Injuries such as traumatically induced neurosis, psychosis, chronic depression, or phobia, when sufficiently severe, can support a consortium claim; a determination of the requisite seriousness is a matter of proof for the jury [*Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 933, 167 Cal. Rptr. 831, 616 P.2d 813]* . Thus, if the injury to the nonplaintiff spouse is sufficiently severe, a loss of consortium action does not require physical injury [*compare* *Long v. PKS, Inc. (1993) 12 Cal. App. 4th 1293, 1301, 16 Cal. Rptr. 2d 103* (nonplaintiff spouse had suffered both physical and emotional injury in automobile accident that killed spouse's foster daughter; loss of consortium recovery affirmed) *with* *Anderson v. Northrop Corp. (1988) 203 Cal. App. 3d 772, 780-781, 250 Cal. Rptr. 189* (allegations that nonplaintiff spouse became "mentally upset, distressed, and aggravated" held insufficient to state loss of consortium cause of action, at least absent independent claim for intentional or negligent infliction of emotional distress)].

[3] Plaintiff Spouse Suffered Loss of Consortium

The third essential element of a loss of consortium cause of action is loss of consortium suffered by the plaintiff spouse [*see* *United Servs. Auto. Ass'n v. Warner (1976) 64 Cal. App. 3d 957, 964-965, 135 Cal. Rptr. 34]* . This includes not only the loss of support or service but also the loss of love, affection, society, companionship, sexual relations, and solace [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 385, 405-406, 408, 115 Cal. Rptr. 765, 525 P.2d 669]* .

The issue of whether a "partial" loss of consortium is compensable was discussed by the court of appeal in *Carlson v. Wald (1984) 151 Cal. App. 3d 598, 199 Cal. Rptr. 10* . In *Carlson*, there was evidence that the couple's sexual frequency diminished from once a day to once a month, that Mr. Wald's help around the house was reduced, and that there was no longer any discussion of future plans, an element of conjugal fellowship and moral support [*Carlson v. Wald (1984) 151 Cal. App. 3d 598, 603, 199 Cal. Rptr. 10]* . The court concluded that these facts presented a triable issue of the extent of lost consortium, and that the trier of fact must determine the reasonable compensation for that loss [*Carlson v. Wald (1984) 151 Cal. App. 3d 598, 603, 199 Cal. Rptr. 10]* .

In contrast, in *Park v. Standard Chem Way Co. (1976) 60 Cal. App. 3d 47, 131 Cal. Rptr. 338* , a wife alleged that, as a result of the burns and scars her husband received when a drain-opening product exploded, their physical and marital relationship had been altered and she suffered "great mental and emotional pain and suffering, due to the injury to her

husband" [*Park v. Standard Chem Way Co. (1976) 60 Cal. App. 3d 47, 49, 131 Cal. Rptr. 338]* . The wife concluded that her husband's injury had caused "a partial loss of consortium in that his disfiguring scars cause her grief, humiliation, and embarrassment" [*Park v. Standard Chem Way Co. (1976) 60 Cal. App. 3d 47, 49, 131 Cal. Rptr. 338]* . The court held that a consortium claim was not stated because allegations of a partial loss and mental and emotional pain and suffering do not meet the Supreme Court definition of loss of consortium as a loss of support, comfort, protection, society, and pleasure [*Park v. Standard Chem Way Co. (1976) 60 Cal. App. 3d 47, 50, 131 Cal. Rptr. 338]* . The court stated in *Park* that the mental and emotional distress that a husband or wife inevitably experiences when the other is injured does not suffice; the loss must be complete and for a definite or indeterminable period of time [*Park v. Standard Chem Way Co. (1976) 60 Cal. App. 3d 47, 50-51, 131 Cal. Rptr. 338]* .

In *Carlson*, the court characterized the language in *Park* that disallowed recovery for a partial loss of consortium as dicta, because the issue in that case was the sufficiency of the pleading; that is, tehe court merely held that the plaintiff did not plead any of the consortium definitions [*Carlson v. Wald (1984) 151 Cal. App. 3d 598, 602, 199 Cal. Rptr. 10]* . The court in *Carlson* observed that in *Rodriguez* the Court had never mentioned the concept of a complete loss of consortium, but instead referred to a loss or "impairment" of consortium rights [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 409, 115 Cal. Rptr. 765, 525 P.2d 669* ; *see Carlson v. Wald (1984) 151 Cal. App. 3d 598, 602, 199 Cal. Rptr. 10]* . An "impairment" suggests a diminution of a spouse's rights; therefore, the court in *Carlson* held that a diminution of a spouse's rights to consortium is compensable [*Carlson v. Wald (1984) 151 Cal. App. 3d 598, 602, 199 Cal. Rptr. 10]* .

[4] Loss Was Caused by Defendant's Wrongful Act

The fourth essential element of a loss of consortium cause of action is that the loss was proximately caused by the defendant's wrongful act [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 408, 115 Cal. Rptr. 765, 525 P.2d 669]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-354 California Forms of Pleading and Practice--Annotated § 354.13

§ 354.13 Joinder of Plaintiff Spouse's Loss of Consortium Action With Nonplaintiff Spouse's Action

[1] Joinder Encouraged

The possibility of a prohibited double recovery can be prevented, or significantly reduced, by a joinder of actions [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 406, 115 Cal. Rptr. 765, 525 P.2d 669]* . Noting that the cases from other jurisdictions are almost equally divided regarding compulsory and permissive joinder of the consortium action with the other spouse's personal injury action, the California Supreme Court has stated that the California statutory scheme strongly encourages joinder, but it is not mandatory [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 406-407, 115 Cal. Rptr. 765, 525 P.2d 669]* . The procedural rules permit and invite joinder, and usually the consortium and personal injury claims are set forth in the same action [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 407, 115 Cal. Rptr. 765, 525 P.2d 669* ; *see Code Civ. Proc. § 378* (regarding permissive joinder of plaintiffs)]. If for some reason separate actions have been filed, defendant or plaintiffs would generally be entitled to have them consolidated for trial [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 407, 115 Cal. Rptr. 765, 525 P.2d 669* ; *see Code Civ. Proc. § 1048(a)* (authorizing consolidation of actions with common questions of law or fact)].

[2] Causes of Action Are Independent

Although the causes of action of the plaintiff and nonplaintiff spouses are normally joined, a loss of consortium claim is considered an independent injury to the plaintiff spouse [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 405, 407, 115 Cal. Rptr. 765, 525 P.2d 669]* . The loss of consortium injury is not parasitic on the nonplaintiff spouse's cause of action, nor is it an injury to the marital unit as a whole [*Uram v. Abex Corp. (1990) 217 Cal. App. 3d 1425, 1436, 266 Cal. Rptr. 695* ; *Abellon v. Hartford Ins. Co. (1985) 167 Cal. App. 3d 21, 26, 212 Cal. Rptr. 852]* . As a result, an action for loss of consortium can be maintained independently of the action by the nonplaintiff spouse [*Atkins v. Strayhorn (1990) 223 Cal. App. 3d 1380, 1394, 273 Cal. Rptr. 231* ; *Abellon v. Hartford Ins. Co. (1985) 167 Cal. App. 3d 21, 25-26, 212 Cal. Rptr. 852]* .

[3] Recovery by Spouse Not Subject to Lien for Workers' Compensation Benefits Paid

An employer who has paid workers' compensation benefits to an injured employee has a statutory right to subrogation

from any proceeds obtained in an action by the employee against a third party responsible for the injuries [*see Lab. Code § 3860*]. However, even when a spouse joins a loss of consortium action with a claim for injuries brought by an injured employee against a third party, the spouse's loss of consortium action is for the spouse's own pain and anguish caused by the third party and an employer has no subrogation right to proceeds allocated to that claim [*Gapusan v. Jay (1998) 66 Cal. App. 4th 734, 742, 78 Cal. Rptr. 2d 250]* . Thus, for example, when a settlement is in satisfaction of both the employee's claims and the spouse's loss of consortium claim, the trial court must ascertain the damages to which each plaintiff is entitled and apportion the settlement [*Gapusan v. Jay (1998) 66 Cal. App. 4th 734, 743, 78 Cal. Rptr. 2d 250]* .

Legal Topics:

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

[1] Nature of Recoverable Damages

If a spouse is tortiously injured to the extent that his or her ability to provide love, affection, companionship, comfort, or sexual relations is diminished, the other spouse is entitled to damages for his or her own physical, psychological, and emotional pain, suffering, and anguish resulting from the injury [*Lantis v. Condon (1979) 95 Cal. App. 3d 152, 157, 157 Cal. Rptr. 22* ; *but see Ledger v. Tippitt (1985) 164 Cal. App. 3d 625, 640, 210 Cal. Rptr. 814* (damages for grief and emotional distress not recoverable in loss of consortium actions)].

The official California jury instruction on loss of consortium succinctly delineates the items recoverable. The instruction provides that the plaintiff is entitled to damages for any past or future loss of love, companionship, comfort, affection, society, solace, moral support, enjoyment of sexual relations or ability to have children, and physical assistance in the operation and maintenance of the home [*see BAJI No. 14.40* (1979 Revision)].

Although apparently no case has discussed the point, it would seem that certain special damages caused by the loss of consortium, such as the plaintiff spouse's expenses for psychological or family counseling, should also be recoverable to the extent that they are not recoverable by the other spouse in his or her action for personal injuries [*see generally Civ. Code § 3333* (tort damages include all detriment proximately caused by defendant's wrongful conduct)].

[2] Damages by Injured Spouse Not Recoverable

The paramount consideration in a determination of nonrecoverable damages is whether the award would result in double recovery. If an item of damages is a component of the injured spouse's action, the consortium claimant cannot obtain those damages [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 409, 115 Cal. Rptr. 765, 525 P.2d 669]* .

The approved jury instruction [*see BAJI No. 14.40* (1979 Revision)] states that the award shall not include any compensation for losses that the physically injured spouse may be entitled to recover, and specifically indicates that jurors should not award plaintiff any compensation for loss of financial support and for personal services, such as nursing, rendered to the injured spouse [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 409, 115 Cal.*

Rptr. 765, 525 P.2d 669 (holding that recovery of nursing services in consortium action would constitute double recovery because injured spouse is entitled to medical expenses)]. The instruction cautions that the jurors also should not include any loss of earnings that the plaintiff has suffered if he or she gave up employment to take care of the injured spouse [*see BAJI No. 14.40* (1979 Revision)].

Legal Topics:

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§ 354.15 Cause of Action Not Available

[1] Alienation of Affection or Seduction

Loss of consortium actions cannot include allegations based on claims for alienation of affection or seduction, because those causes of action are precluded by statute [*see Civ. Code § 43.5*].

[2] Parental Consortium

The California Supreme Court has held that policy considerations weigh against a cause of action for loss of parental consortium. The Court set forth three reasons why it rejected a cause of action by a child for loss of parental consortium. First, interference with the sexual relationship of spouses (a significant aspect of spousal consortium) is not present in an action by a child [*Borer v. American Airlines, Inc. (1977) 19 Cal. 3d 441, 448, 138 Cal. Rptr. 302, 563 P.2d 858]* . Second, multiplicity of actions and double recovery of damages is a greater problem in the parent-child context [*Borer v. American Airlines, Inc. (1977) 19 Cal. 3d 441, 448-449, 138 Cal. Rptr. 302, 563 P.2d 858]* . Third, the decisions of other jurisdictions have unanimously rejected a child's suit for loss of parental consortium [*Borer v. American Airlines, Inc. (1977) 19 Cal. 3d 441, 449, 138 Cal. Rptr. 302, 563 P.2d 858* ; *but see Nix v. Preformed Line Prods. Co. (1985) 170 Cal. App. 3d 975, 981-986, 216 Cal. Rptr. 581* (following *Borer* but criticizing its reasoning; court noted that several other jurisdictions have since recognized an action for loss of parental consortium)]. Inadequacy and difficulty of measuring damages as well as the dangers of unduly excessive liability were also mentioned by the Court as reasons for nonrecognition of parental consortium claims [*Borer v. American Airlines, Inc. (1977) 19 Cal. 3d 441, 447, 138 Cal. Rptr. 302, 563 P.2d 858]* .

[3] Filial Consortium

The California Supreme Court has also held that the policy considerations set forth in *Borer v. American Airlines Inc. (1977) 19 Cal. 3d 441, 138 Cal. Rptr. 302, 563 P.2d 858* , also preclude an action brought by a parent seeking to recover damages for the loss of a child's support, comfort, protection, society, and pleasure [*Baxter v. Superior Court (1977) 19 Cal. 3d 461, 463, 138 Cal. Rptr. 315, 563 P.2d 871]* . Dictum in appellate decisions [*see Mobaldi v. Regents of Univ. of Cal. (1976) 55 Cal. App. 3d 573, 586, 127 Cal. Rptr. 720* ; *Hair v. County of Monterey (1975) 45 Cal. App. 3d 538, 545, 547, 119 Cal. Rptr. 639* (stating that although distinction between spousal and filial consortium is not

reasonable, Legislature or Supreme Court should decide issue)] expressing a contrary view was disapproved [*Baxter v. Superior Court (1977) 19 Cal. 3d 461, 466 n.4, 138 Cal. Rptr. 315, 563 P.2d 871]* . The Court noted that there is division among the states on the issue of a parent's claim, but indicated that those jurisdictions permitting recovery had not presented compelling reasons to do so [*Baxter v. Superior Court (1977) 19 Cal. 3d 461, 464-465, 138 Cal. Rptr. 315, 563 P.2d 871* ; *see Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 522, 150 Cal. Rptr. 1, 585 P.2d 851]* .

Legal Topics:

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§ 354.16 Defense of Comparative Negligence

Prior to passage of Proposition 51 in 1986, the contributory negligence of the nonplaintiff spouse did not reduce the damages for loss of consortium awarded to the plaintiff spouse [*see Lantis v. Condon (1979) 95 Cal. App. 3d 152, 155-156, 157 Cal. Rptr. 22]* . However, Proposition 51's addition of *Civ. Code § 1431.2* has changed that rule. Under *Civ. Code § 1431.2*, a defendant's liability for noneconomic damages is limited to that defendant's percentage of fault [*Civ. Code § 1431.2(a)*]. The statute specifically defines noneconomic damages to include damages for loss of consortium [*Civ. Code § 1431.2(b)(2)*; *see generally § 354.14[1]*]. Thus, under current law, the damages awarded on a claim for loss of consortium brought against a particular defendant are subject to reduction by the percentage of comparative fault of the nonplaintiff spouse [*Craddock v. Kmart Corp. (2001) 89 Cal. App. 4th 1300, 1310-1311, 107 Cal. Rptr. 2d 881]* , as well as by the percentage of comparative fault of any other tortfeasors who have been allocated a share of responsibility for the injury that serves as the basis for the loss of consortium claim [*see Civ. Code § 1431.2(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 354.17 Statute of Limitations

[1] In General

The two-year (one-year, prior to January 1, 2003) statute of limitations [*Code Civ. Proc. § 335.1*; *see* former Code Civ. Proc. § 340(3); *Ch. 345,Limitation of Actions, § 345.14*] applies to a loss of consortium cause of action [*Shelton v. Superior Court (1976) 56 Cal. App. 3d 66, 81, 128 Cal. Rptr. 454* ; *see* *Evans v. Dayton Hudson (1991) 234 Cal. App. 3d 49, 53-55, 285 Cal. Rptr. 550* (partial payments made to injured spouse under *Ins. Code § 11583* without notice of statute of limitations do not toll statute for loss of consortium); *Uram v. Abex Corp. (1990) 217 Cal. App. 3d 1425, 1436, 266 Cal. Rptr. 695* (refusing to apply *Code Civ. Proc. § 340.2* to claim for loss of consortium arising from asbestos-related disability)]. The action must generally be filed within one year after the date of injury that produces the loss of consortium [*Priola v. Paulino (1977) 72 Cal. App. 3d 380, 383, 140 Cal. Rptr. 186]* . The cause of action accrues and the statute of limitations commences to run at the time the physical injury is sustained by the nonplaintiff spouse [*Priola v. Paulino (1977) 72 Cal. App. 3d 380, 388, 140 Cal. Rptr. 186]* .

Accrual of the cause of action is delayed, pursuant to the discovery rule, until the spouse is aware, or in the exercise of reasonable diligence should have been aware, of the injury to the spouse and its negligent cause [*Uram v. Abex Corp. (1990) 217 Cal. App. 3d 1425, 1433, 1435, 266 Cal. Rptr. 695]* . In one case, a contention that the cause of action did not arise at the time of the initial accident and injuries, but arose when permanent disability was sustained, was rejected by the court, concluding that disastrous injuries were not a sine qua non for loss of consortium actions [*Priola v. Paulino (1977) 72 Cal. App. 3d 380, 388-391, 140 Cal. Rptr. 186]* .

An amendment adding a consortium claim to the injured spouse's original complaint, proposed after the statute period has run, is not permissible because it represents a new cause of action that is personal to the spouse of the injured person, and the amendment does not relate back to the date the original complaint was filed, notwithstanding that the underlying facts are the same [*Shelton v. Superior Court (1976) 56 Cal. App. 3d 66, 74-81, 128 Cal. Rptr. 454* ; *see also* *Priola v. Paulino (1977) 72 Cal. App. 3d 380, 383, 140 Cal. Rptr. 186* (following *Shelton*)].

[2] Governmental Entity Claims Requirements

In consortium actions against public entities, a claim by the injured party will not suffice in regard to the timeliness of

the spouse's consortium claim; a specific claim, complying with the claims statutes, must be timely filed by the party seeking loss of consortium damages [*Shelton v. Superior Court (1976) 56 Cal. App. 3d 66, 82-83, 128 Cal. Rptr. 454]* .

Legal Topics:

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31-354 California Forms of Pleading and Practice--Annotated § 354.18

§ 354.18 Mandatory Contractual Arbitration

The nonplaintiff spouse's agreement to arbitrate a claim for professional negligence against a health care provider extends to the plaintiff spouse's claim for loss of consortium arising from the same injury [*Mormile v. Sinclair (1994) 21 Cal. App. 4th 1508, 1510-1516, 26 Cal. Rptr. 2d 725* ; *Gross v. Recabaren (1988) 206 Cal. App. 3d 771, 778-783, 253 Cal. Rptr. 820* ; *see Herbert v. Superior Court (1985) 169 Cal. App. 3d 718, 215 Cal. Rptr. 477* (same as to wrongful death); *but see Baker v. Birnbaum (1988) 202 Cal. App. 3d 288, 248 Cal. Rptr. 336* (*contra*)]. The Medical Injury Compensation Reform Act of 1975 (MICRA) includes a statute expressly authorizing arbitration clauses in contracts for medical services as long as specified language is included [*see Code Civ. Proc. § 1295*]. MICRA is considered in detail in Ch. 415, *Physicians: Medical Malpractice* . Whether other contracts requiring mandatory arbitration would be construed as encompassing the nonplaintiff spouse's loss of consortium claim is unresolved. The public policy in favor of arbitration over litigation, and the conservation of judicial resources accomplished through joinder, suggest that enforcement is likely [*see Mormile v. Sinclair (1994) 21 Cal. App. 4th 1508, 1511, 26 Cal. Rptr. 2d 725* ; *Gross v. Recabaren (1988) 206 Cal. App. 3d 771, 775, 253 Cal. Rptr. 820]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration ClausesFamily LawMarital Duties & RightsCauses of ActionLoss of ConsortiumTortsProcedureAlternative Dispute Resolution

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Chapter 354 LOSS OF CONSORTIUM
PART II. LEGAL BACKGROUND

31-354 California Forms of Pleading and Practice--Annotated §§ 354.19-354.29

[Reserved]

§§ 354.19[Reserved]

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Chapter 354 LOSS OF CONSORTIUM
PART III. RESEARCH GUIDE

31-354 California Forms of Pleading and Practice--Annotated § 354.30

§ 354.30 Decisions

Right to recover for loss of consortium is founded on marriage relationship and cannot exist without marriage; accordingly, person who witnesses tortious injury and death of person with whom he or she shared cohabitant relationship allegedly akin to marital relationship is not permitted to recover damages for loss of consortium. *Elden v. Sheldon (1988) 46 Cal. 3d 267, 277-278, 250 Cal. Rptr. 254, 758 P.2d 582 , disapproving Butcher v. Superior Court (1983) 139 Cal. App. 3d 58, 188 Cal. Rptr. 503*

Consortium defined as conjugal fellowship and sexual relations between spouses. *Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 385, 115 Cal. Rptr. 765, 525 P.2d 669*

Each spouse has cause of action for loss of consortium caused by negligent or intentional injury to other spouse by third party. *Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 408, 115 Cal. Rptr. 765, 525 P.2d 669*

Concept of consortium not only includes loss of support or services but also embraces elements of love, companionship, affection, society, sexual relations, solace, and more. *Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 405, 115 Cal. Rptr. 765, 525 P.2d 669*

Under Proposition 51, damages awarded for loss of consortium are subject to reduction by percentage of comparative fault of nonplaintiff spouse. *Craddock v. Kmart Corp. (2001) 89 Cal. App. 4th 1300, 1310-1311, 107 Cal. Rptr. 2d 881*

One-year limitation period of former Code Civ. Proc. § 340(3) (*now see Code Civ. Proc. § 335.1* (two-year limitation period)) applies to cause of action for loss of consortium (even if based on spouse's asbestos-related injury subject to *Code Civ. Proc. § 340.2*), subject to deferred accrual of cause of action to time when plaintiff knew, or in exercise of

reasonable diligence should have known, of injury to spouse and its negligent cause. *Uram v. Abex Corp. (1990) 217 Cal. App. 3d 1425, 1436-1438, 266 Cal. Rptr. 695*

Emotional disquiet described as "mentally upset, distressed, and aggravated" did not rise to level of mental health impairment sufficient to substantially disturb marital relationship on more than temporary basis. *Anderson v. Northrop Corp. (1988) 203 Cal. App. 3d 772, 780, 250 Cal. Rptr. 189*

If pattern before injury was that seaman would go on two-month or three-month fishing trips with two-week or three-week intervals between trips, failure to award seaman's spouse damages for loss of consortium was not error; evidence was sufficient to support finding that there was no net loss of society, comfort, and companionship. *Da Silva v. Pacific King, Inc. (1987) 195 Cal. App. 3d 1, 12, 240 Cal. Rptr. 395*

Wife failed to state cause of action for loss of consortium because husband's injury was compensable under Workers' Compensation Law. *Santiago v. Employee Benefits Servs. (1985) 168 Cal. App. 3d 898, 214 Cal. Rptr. 679*

Wife's claim for loss of consortium was not merged with husband's injury for purposes of denying her recovery under "per person" limitation in insurancepolicy. *Abellon v. Hartford Ins. Co. (1985) 167 Cal. App. 3d 21, 24-32, 212 Cal. Rptr. 852* (distinguishing *United Servs. Auto. Ass'n v. Warner (1976) 64 Cal. App. 3d 957, 964-965, 135 Cal. Rptr. 34* , which held that loss of consortium was not separate bodily injury within meaning of policy)

Loss of consortium action is limited to actual or putative spouses, or to persons in common law marriages from states recognizing those marriages. *Ledger v. Tippitt (1985) 164 Cal. App. 3d 625, 633, 639-640, 210 Cal. Rptr. 814*

Diminution or impairment of consortium rights is sufficient to state cause of action; complete loss not required. *Carlson v. Wald (1984) 151 Cal. App. 3d 598, 602-603, 199 Cal. Rptr. 10* (criticizing contrary statement in *Park v. Standard Chem Way Co. (1976) 60 Cal. App. 3d 47, 50, 131 Cal. Rptr. 338*)

Action for loss of consortium does not exist in favor of married person whose spouse sustained personal injuries while couple was engaged to marry, but before marriage. *Lieding v. Commercial Diving Ctr. (1983) 143 Cal. App. 3d 72, 76, 191 Cal. Rptr. 559*

Award of loss of consortium to husband in civil action for battery/rape of wife was proper because same jurors found that battery/rape occurred and because husband at all times linked loss of consortium action to inability of wife to perform marital responsibilities as result of battery/rape. *Delia S. v. Torres (1982) 134 Cal. App. 3d 471, 484, 184 Cal. Rptr. 787*

Judgment awarding both husband and wife damages for loss of consortium of other spouse does not constitute double recovery. *Godfrey v. Steinpress (1982) 128 Cal. App. 3d 154, 168-169, 180 Cal. Rptr. 95*

Recovery by husband for loss of consortium not permitted if couple were living together at time of injury, but were not married until after injury. *Tong v. Jocson (1977) 76 Cal. App. 3d 603, 604-605, 142 Cal. Rptr. 726*

Consortium means complete loss of consortium for definite period of time or nondeterminable length of time and does not refer to inevitable physical, mental, and emotional damage normally or usually suffered by one spouse when other spouse wrongfully injured. *Park v. Standard Chem Way Co. (1976) 60 Cal. App. 3d 47, 50-51, 131 Cal. Rptr. 338*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsCauses of ActionLoss of ConsortiumTortsDamagesConsortium DamagesGeneral OverviewTortsDamagesConsortium DamagesSpousesTortsDamagesConsortium DamagesUnmarried Cohabitants

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Chapter 354 LOSS OF CONSORTIUM
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31-354 California Forms of Pleading and Practice--Annotated § 354.31

§ 354.31 Law Reviews

Comment, *Loss of Parental Consortium: Why Children Should Be Compensated, 18 Pac. L.J. 233 (1986)*

Note, *Loss of Consortium: Should California Protect Cohabitants' Relational Interest? 59 S. Cal. L. Rev. 1467 (1985)*

Comment, *Loss of Consortium and Unmarried Cohabitors: An Examination of Tong v. Jocson, 14 U.S.F. L. Rev. 133 (1980)*

Note, *Limiting the Cause of Action for Loss of Consortium, 66 Cal. L. Rev. 430 (1978)*

De Gorter, *Rodriguez v. Bethlehem Steel Corporation--California's New Common Law Rule on Actions for Loss of Consortium, 7 U. West L.A. L. Rev. 240 (1975)*

Comment, *The Child's Claim for Loss of Consortium Damages: A Logical and Sympathetic Appeal, 13 San Diego L. Rev. 231 (1975)*

Note, *Right to Recover for Loss of Consortium, 63 Cal. L. Rev. 323 (1975)*

Note, *Loss of Consortium--Either Spouse is Entitled to Recover for Loss of Consortium Caused by the Negligent or Intentional Injury to His or Her Spouse by a Third Party-- Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974) , 15 Santa Clara Law. 495 (1975)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsCauses of ActionLoss of ConsortiumTortsDamagesConsortium DamagesGeneral OverviewTortsDamagesConsortium DamagesChildren & ParentsTortsDamagesConsortium DamagesSpousesTortsDamagesConsortium DamagesUnmarried Cohabitants

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31-354 California Forms of Pleading and Practice--Annotated §§ 354.32-354.49

[Reserved]

§§ 354.32[Reserved]

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Chapter 354 LOSS OF CONSORTIUM
PART IV. FORMS

31-354 California Forms of Pleading and Practice--Annotated § 354.50

§ 354.50 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Injuries Based on Negligence or Intentional Tort [Civ. Code § 1714(a)]--Action for Loss of Consortium Based on Defendant's Negligent or Intentional Injury to Plaintiff's Spouse

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Injuries Based on Negligence or Intentional Tort [Civ. Code § 1714(a)]--Action for Loss of Consortium Based on Defendant's Negligent or Intentional Injury to Plaintiff's Spouse

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], [and DOES 1	)	COMPLAINT FOR DAMAGES
through_____,] Defendant(s).	)	(Negligence or Intentional Tort)
	)	

Plaintiff alleges:

1. _____ [*Allege capacity and residence of defendant, e.g.,* Defendant _____ (*name*) is and at all times herein mentioned was a resident of _____ County, California].

2. Plaintiff and plaintiff's spouse _____ [*name*] are, and at all times herein mentioned were, husband and wife.

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1 through _____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true

names and capacities when ascertained. (Plaintiff is informed and believes that each of these defendants is an agent and employee of defendant _____ (*name*), and proximately caused plaintiff's damages as herein alleged while acting in such capacity)].

4. _____ [*Specify basis of defendant's liability in tort for injury to nonplaintiff spouse that caused loss of consortium, e.g.,* As alleged in Paragraphs _____ through _____, inclusive, defendant(s) _____ (*name(s)*) are liable in tort for the injury to _____ (*name of nonplaintiff spouse*)].

5. Prior to the injuries, plaintiff's spouse was able to and did perform his/her duties as a spouse. Subsequent to the injuries and as a proximate result thereof, plaintiff's spouse has been unable to perform the necessary duties as a spouse[, in that he/she no longer _____ (*set forth duties that injury precludes spouse from performing, e.g.,* can perform the work and services usually performed by him/her in the care, maintenance, and management of the family home)]. Plaintiff's spouse will be unable to perform such work, services, and duties in the future. By reason thereof, plaintiff has been _____[permanently] deprived and will be deprived of the consortium of plaintiff's spouse, including the performance of his/her spouse's necessary duties, all to plaintiff's damage.

WHEREFORE, plaintiff prays judgment against defendant(s) [, and each of them,] as follows:

1. For general damages according to proof;

2. For special damages according to proof;

3. For costs of suit herein incurred;

4. For costs of superior court filing; and

5. For such other and further relief as the court may deem proper.

_____ [*date*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Add verification, if desired*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of complaint is for use in an action by a spouse for loss of consortium resulting from negligent or intentional injury to the other spouse by a third party [*see Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 408, 115 Cal. Rptr. 765, 525 P.2d 669]* .

[3] Allegations

This form of complaint includes: an optional allegation regarding the capacity of defendant(s), for use if desired (Paragraph 1); an allegation thatthe plaintiff and the injured person were in fact married at the time of the injury (Paragraph 2); and an optional fictitious name allegation (Paragraph 3). Paragraph 4 is for allegations necessary to establish that the defendant was liable for a tortious injury to plaintiff's spouse, which liability is the basis for liability for loss of consortium. In the typical case in which the loss of consortium action is brought together with the injured spouse's cause of action for his or her injuries, it will be sufficient to refer to the paragraphs in the complaint that establish the liability to the injured spouse; but if the action for loss of consortium is brought independently, the complaint must allege the basis for the defendant's liability for the spouse's injury.

Paragraph 5 alleges the loss of consortium suffered by plaintiff. The complaint should allege in detail the evidence comparing the nature of the marital relationship before and after the injury. The disastrous consequences of the injury to the spouse were dramatically presented in *Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 386, 115 Cal. Rptr. 765, 525 P.2d 669* , in which the wife detailed the objective changes and the severe psychological effects of her husband's injury. After explaining that to be deeply in love and having no way of physically expressing it is extremely difficult physically and mentally, the wife convincingly demonstrated that her husband's life had been ruined by the accident, and as his partner, her life had also been ruined [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 386, 115 Cal. Rptr. 765, 525 P.2d 669]* .

A "partial loss of consortium" should not be specifically alleged, but instead the definitions of consortium formulated in *Rodriguez* should be alleged (for example, loss of love, companionship, affection, society, sexual relations, and solace). Anything less than a permanent loss should be stated in terms of "impairment" or "diminution" of the right to consortium [*see Carlson v. Wald (1984) 151 Cal. App. 3d 598, 602, 199 Cal. Rptr. 10]* .

[4] Specification of Damages

In an action brought in the superior court to recover damages for personal injury or wrongful death, the complaint or cross complaint cannot state the amount of damages demanded [*Code Civ. Proc. § 425.10*].

[5] Action for Loss of Consortium

Consortium has been defined as conjugal fellowship and sexual relations between spouses [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 385, 115 Cal. Rptr. 765, 525 P.2d 669]* . In California, each spouse has a cause of action for loss of consortium caused by a negligent or intentional injury to the other spouse by a third party [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 408, 115 Cal. Rptr. 765, 525 P.2d 669]* . Although a complaint for loss of consortium need not allege a complete loss of these elements, it must allege a diminution or impairment of them that is more serious than the inevitable physical, mental, and emotional damage normally sustained

by a spouse when the other spouse is injured [*Carlson v. Wald (1984) 151 Cal. App. 3d 598, 602-603, 199 Cal. Rptr. 10* ; criticizing requirement of complete loss of consortium stated in *Park v. Standard Chem Way Co. (1976) 60 Cal. App. 3d 47, 50, 131 Cal. Rptr. 338]* .

[6] Damages

In the *Rodriguez* decision, the court noted that the plaintiff, the wife of the injured person, would not be able to recover for the reasonable value of nursing services because her husband, in his own cause of action, was already entitled to recover medical expenses including the value of her nursing services. Therefore, to permit her to recover for such services would constitute an unlawful double recovery [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 409, 115 Cal. Rptr. 765, 525 P.2d 669]* . In addition, the wife could not recover damages for lost earnings based on the rationale that she was required to quit her job to provide nursing services for her husband. This, too, would be letting her recover damages for nursing services indirectly [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 409, 115 Cal. Rptr. 765, 525 P.2d 669* ; *but see Godfrey v. Steinpress (1982) 128 Cal. App. 3d 154, 168-169, 180 Cal. Rptr. 95* (judgment awarding each spouse damages for loss of consortium of other spouse as not constituting double recovery)].

[7] Statute of Limitations

The two-year (one-year, prior to January 1, 2003) limitations period [*Code Civ. Proc. § 335.1*; *see* former Code Civ. Proc. § 340(3); *Ch. 345, Limitation of Actions, § 345.14*] applies to actions for loss of consortium. The limitations period may be tolled during the period when the plaintiff does not know, and could not discover through the exercise of reasonable diligence, of the injury to his or her spouse and its negligent cause [*Uram v. Abex Corp. (1990) 217 Cal. App. 3d 1425, 1436-1438, 266 Cal. Rptr. 695]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsCauses of ActionLoss of ConsortiumTortsDamagesConsortium DamagesGeneral OverviewTortsDamagesConsortium DamagesSpousesTortsProcedureCommencement & ProsecutionGeneral Overview

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Chapter 354 LOSS OF CONSORTIUM
PART IV. FORMS

31-354 California Forms of Pleading and Practice--Annotated § 354.51

§ 354.51 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Loss of Consortium--Action Barred by Exclusive Remedy Principle of Workers' Compensation Law [Lab. Code §§ 3600(a), 3601(a), 3602(a)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Loss of Consortium--Action Barred by Exclusive Remedy Principle of Workers' Compensation Law [Lab. Code §§ 3600(a), 3601(a), 3602(a)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

The plaintiff's claim for loss of consortium against Defendant _____ [*name of employer named as defendant*], the injured spouse's employer, is barred because the action is based on the spouse's claim agaisnt the employer, which is barred because it falls under the exclusive remedy principle of workers' compensation law.

[2] Use of Form

This form of affirmative defense is for use by a defendant in an action for loss of consortium against the injured spouse's employer to place in issue the exclusive remedy of workers' compensation law. The exclusive remedy principle bars a claim for loss of consortium against an employer arising from an injury to an employee spouse [*Cole v. Fair Oaks Fire Prot. Dist. (1987) 43 Cal. 3d 148, 162-163, 233 Cal. Rptr. 308, 729 P.2d 743* ; *Semore v. Pool (1990) 217 Cal. App. 3d 1087, 1105, 266 Cal. Rptr. 280* ; *Casaccia v. Green Valley Disposal Co. (1976) 62 Cal. App. 3d 610, 612-613, 133 Cal. Rptr. 295* ; *see Lab. Code §§ 3600(a), 3601(a), 3602(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewFamily LawMarital Duties & RightsCauses of ActionLoss of ConsortiumTortsDamagesConsortium DamagesGeneral OverviewTortsDamagesConsortium DamagesSpousesTortsProcedureCommencement & ProsecutionGeneral Overview

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Chapter 354 LOSS OF CONSORTIUM
PART IV. FORMS

31-354 California Forms of Pleading and Practice--Annotated § 354.52

§ 354.52 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Loss of Consortium--Action Barred by Two-Year Statute of Limitations [Code Civ. Proc. § 335.1]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Loss of Consortium--Action Barred by Two-Year Statute of Limitations [Code Civ. Proc. § 335.1]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

The plaintiff's claim for loss of consortium is barred because the action was not filed within two years after the date of injury that produced the loss of consortium is barred because the action was not filed with one year from the date of injury that produced the loss of consortium [*Code Civ. Proc. § 335.1*].

[2] Use of Form

This form of affirmative defense is for use by a defendant in an action for loss of consortium to place in issue the statute of limitations period. The two-year (one-year, prior to January 1, 2003) statute of limitations period [*Code Civ. Proc. § 335.1*; *see* former Code Civ. Proc. § 340(3); *Ch. 345, Limitation of Actions, § 345.14*] applies to a loss of consortium cause of action [*Shelton v. Superior Court (1976) 56 Cal. App. 3d 66, 81, 128 Cal. Rptr. 454* ; *see* *Evans v. Dayton Hudson (1991) 234 Cal. App. 3d 49, 53-55, 285 Cal. Rptr. 550* (partial payments made to injured spouse under *Ins. Code § 11583* without notice of statute of limitations do not toll statute for loss of consortium); *Uram v. Abex Corp. (1990) 217 Cal. App. 3d 1425, 1433, 1435, 1436, 266 Cal. Rptr. 695* (refusing to apply *Code Civ. Proc. § 340.2* to claim for loss of consortium arising from asbestos-related disability)]. The action must generally be filed within two years (one year, prior to January 1, 2003) [*Code Civ. Proc. § 335.1*; *see* former Code Civ. Proc. § 340(3); *Ch. 345, Limitation of Actions, § 345.14*] after the the date of injury that produces the loss of consortium [*Priola v. Paulino (1977) 72 Cal. App. 3d 380, 383, 140 Cal. Rptr. 186]* .

The cause of action accrues and the statute of limitations commences to run at the time the physical injury is sustained by the nonplaintiff spouse [*Priola v. Paulino (1977) 72 Cal. App. 3d 380, 388, 140 Cal. Rptr. 186]* . Accrual of the cause of action is delayed, pursuant to the discovery rule, until the spouse is aware, or in the exercise of reasonable

diligence should have been aware, of the injury to the spouse and its negligent cause [*Uram v. Abex Corp. (1990) 217 Cal. App. 3d 1425, 266 Cal. Rptr. 695]* . In one case, a contention that the cause of action did not arise at the time of the initial accident and injuries, but arose when permanent disability was sustained, was rejected by the court, concluding that disastrous injuries were not a sine qua non for loss of consortium actions [*Priola v. Paulino (1977) 72 Cal. App. 3d 380, 388-391, 140 Cal. Rptr. 186]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewFamily LawMarital Duties & RightsCauses of ActionLoss of ConsortiumGovernmentsLegislationStatutes of LimitationsPleading & ProofTortsDamagesConsortium DamagesGeneral OverviewTortsProcedureStatutes of LimitationsGeneral Overview

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Chapter 355 LOST AND UNCLAIMED PROPERTY

31-355 California Forms of Pleading and Practice--Annotated 355.syn

§ 355.syn Synopsis to Chapter 355: LOST AND UNCLAIMED PROPERTY

§ 355.01 Scope of Chapter

§ 355.02 Cross References

§§ 355.03through 355.09 [Reserved]

§ 355.10 Governing Statutes

§ 355.11 Definitions

[1] "Lost"

[2] "Unclaimed"

[3] "Property"

§ 355.12 Duties of Lost Property's Finder

§ 355.13 Penal Provisions

§ 355.14 Delivery of Property to Police

§ 355.15 Duties of Police or Sheriff's Department; Disposition of Property

[1] Notification of Known Owner

[2] Disposition of Property if Not Claimed

[a] Property Valued at $250 or More

[b] Property Valued at Less Than $250

§ 355.16 Agencies' Powers to Prescribe Alternatives

§ 355.17 Lost Property Statutes Not Applicable to Abandoned Property

§ 355.18 Responsibilities of Public Agency on Obtaining Possession of Property for Temporary Safekeeping

§ 355.19 Owner's Remedies if Finder Refuses to Surrender Property

§ 355.20 Unclaimed Property

[1] Course of Business

[2] Left by Patients in Hospitals

§§ 355.21through 355.39 [Reserved]

§ 355.40 State Statutes

[1] Abandoned Property

[2] Duties of Lost Property's Finder

[3] Disposition of Lost and Unclaimed Property

[4] Penal Provisions

§ 355.41 Decisions

§ 355.42 Attorney General Opinions

§ 355.43 Law Reviews

§ 355.44 Text References

§§ 355.45through 355.59 [Reserved]

§ 355.60 Letter Informing Known Owner That Lost Property Has Been Found or Domestic Animal Saved [Civ. Code § 2080]

[1] FORM

[2] Use of Form

§ 355.61 Declaration of Finder or Saver on Delivery of Property Worth $100 or More to Police or Sheriff's Department [Civ. Code § 2080.1(a)]

[1] FORM

[2] Use of Form

§ 355.62 Complaint for Damages [Civ. Code § 3336] for Conversion--Refusal of Finder to Return Lost Property to True Owner

[1] FORM

[2] Use of Form

[3] Conversion

[a] Defined

[b] Damages

[4] Verification

[5] Jurisdiction

[6] Cross References

§ 355.63 Complaint by Owner Against Finder to Recover Property [Civ. Code § 2080; Code Civ. Proc. § 667]--Finder's Failure to Restore Property to Owner on Demand

[1] FORM

[2] Use of Form

[3] Cross References

§ 355.64 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] of Finder or Saver to Action by Owner to Recover Lost Property [Civ. Code § 2080]--Owner's Failure to Pay or Tender Reasonable Charges for Saving and Taking Care of Property

[1] FORM

[2] Use of Form

[3] Cross References

§ 355.65 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] of Finder or Saver to Action by Owner to Recover Lost Property [Civ. Code § 2080]--Plaintiff's Failure to Make Reasonable Proof of Ownership

[1] FORM

[2] Use of Form

[3] Cross References

§ 355.66 Notice of Auction Sale of Unclaimed Property [Civ. Code § 2081.1]

[1] FORM

[2] Use of Form

§ 355.67 Notice of Public Auction of Unclaimed Goods--By Licensed Hospital [Civ. Code § 1862.5]

[1] FORM

[2] Use of Form

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Chapter 355 LOST AND UNCLAIMED PROPERTY
PART I. SCOPE

31-355 California Forms of Pleading and Practice--Annotated § 355.01

§ 355.01 Scope of Chapter

This chapter discusses lost and unclaimed property [*see § 355.10* et seq.]. It includes the following forms:

- A letter notifying a known owner that lost property has been found [*see § 355.60*].
- A declaration of a finder or saver of lost property on delivery of the property to a police or sheriff's department [*see § 355.61*].
- Complaints by the owner of lost property against the finder for damages for conversion [*see § 355.62*] or restitution of the property [*see § 355.63*].
- Defenses of finders or savers to an action by the owner of lost property [*see §§ 355.64, 355.65*].
- Notices of auction sales of unclaimed goods [*see §§ 355.66, 355.67*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionDefenses

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31-355 California Forms of Pleading and Practice--Annotated § 355.02

§ 355.02 Cross References

- For more detailed discussion and forms relating to conversion, see Ch. 150, *Conversion* .
- For a discussion and forms relating to the provisional remedy of claim and delivery, see Ch. 119, *Claim and Delivery* .
- For forms and discussion relating to unclaimed property that was on loan to a museum, see Ch. 57, *Art* .

Legal Topics:

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

§§ 355.03[Reserved]

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31-355 California Forms of Pleading and Practice--Annotated § 355.10

§ 355.10 Governing Statutes

General provisions covering lost and unclaimed property appear in Chapter 4 of Title VI of the Civil Code [*Civ. Code §§ 2080-2082*].

More specific provisions appear in other sections of the Civil Code covering disposition of unclaimed property by licensed hospitals [*Civ. Code §§ 1862.5*] and property intentionally abandoned by tenants and guests [*Civ. Code §§ 1980-1991*].

Provisions appearing in other codes include disposition of unclaimed property by regional park districts [*Pub. Res. Code § 5561.5*] and the highway patrol department [*Veh. Code §§ 2414, 2415*], as well as of unclaimed firearms in the possession of a governmental officer [*Penal Code § 12032*].

Regulations concerning lost public property issued to National Guard enlisted men and officers are set forth in *Mil. & Vet. Code §§ 414-416*.

Duties of finders of certain containers and equipment appear in *Bus. & Prof. Code § 14434* (general statute) and *Food & Agric. Code § 34561* (dairy equipment).

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-355 California Forms of Pleading and Practice--Annotated § 355.11

§ 355.11 Definitions

[1] "Lost"

The word "lost" has been defined as "gone out of one's possession or control" [Webster's Third International Dictionary, p. 1338]. One commentator has noted that goods are considered lost when from their nature, the place in which they were found, and their condition on finding, it is evident that they were inadvertently and unintentionally dropped where found [Paulus, *Finder vs. Locus in Quo--An Outline, 6 Hastings LJ 180, 190 (1955)*].

[2] "Unclaimed"

The word "unclaimed" has been defined as "not called for by an owner or consignee" [Webster's Third International Dictionary, p. 2485]. Both property belonging to a known owner and an unknown owner may be considered "unclaimed" [*Shedoudy v. Spreckels Bros. Commercial Co. (1908) 9 Cal. App. 398, 400-401, 99 P. 535]* .

[3] "Property"

For purposes of the Civil Code, a thing of which there may be ownership is called property, with ownership being defined as the right of one or morepersons to possess and use the thing to the exclusion of others [*Civ. Code § 654*]. Property is either real or immovable [*Civ. Code § 657(1)*], or personal or movable [*Civ. Code § 657(2)*]. Every kind of property that is not real is personal [*Civ. Code § 663*]. For purposes of this chapter, the word "property" refers to personal, movable property as opposed to real, immovable property.

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-355 California Forms of Pleading and Practice--Annotated § 355.12

§ 355.12 Duties of Lost Property's Finder

A person who finds a thing lost is not bound to take charge of it, but if he or she does so he or she becomes a depositary for the owner, with the rights and obligations of a depositary for hire. Any person who finds and takes possession of money, goods, things in action, or other personal property, or saves any domestic animal from drowning or starvation, is required, within a reasonable time, to inform the owner, if known, and to make restitution without compensation, except a reasonable charge for saving and taking care of the property. [*Civ. Code § 2080*].

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§ 355.13 Penal Provisions

One who finds lost property under circumstances which give him or her knowledge of or means of inquiry as to the true owner, and who appropriates the property to his or her own use, or to the use of another person not entitled to it, without first making reasonable and just efforts to find the owner and to restore the property to the owner, is guilty of theft [*Penal Code § 485*].

A similar provision makes one who acquires with intent to use, sell, or transfer an access card known to have been lost or mislaid guilty of petty theft [*Penal Code § 484e(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesFraudCredit Card FraudElementsCriminal Law & ProcedureCriminal OffensesProperty CrimesLarceny & TheftGeneral OverviewCriminal Law & ProcedureScienterKnowledge

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31-355 California Forms of Pleading and Practice--Annotated § 355.14

§ 355.14 Delivery of Property to Police

If the owner is unknown or fails to claim lost property, the person finding or saving it, where it is of the value of $100 or more, must, within a reasonable time, turn it over to the police department of the city, if found in a city, or to the sheriff's department, if found outside city limits, and make an affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) stating when and where he or she found or saved the property, particularly describing it [*Civ. Code § 2080.1(a)*]. For a form for use as a declaration, see *§ 355.61*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsPolice PowerGovernmentsLocal GovernmentsProperty

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§ 355.15 Duties of Police or Sheriff's Department; Disposition of Property

[1] Notification of Known Owner

The police or sheriff's department must notify the owner, if the owner's identity is reasonably ascertainable, that it has the property and where it may be claimed. The department may require the owner to pay a reasonable charge to defray costs of storage and care of the property [*Civ. Code § 2080.1(b)*].

If within 90 days after receipt of the property by the department, the owner appears, proves ownership, and pays all reasonable charges, the department must restore the property to him or her [*Civ. Code § 2080.2*].

[2] Disposition of Property if Not Claimed

[a] Property Valued at $250 or More

If the reported value of the property is $250 or more and no owner appears and proves ownership of the property within 90 days, the police or sheriff's department must cause notice of the property to be published at least once in a newspaper of general circulation [*Civ. Code § 2080.3(a)*].

If, after seven days following the first publication of the notice, no owner appears and proves ownership of the property and the person who found or saved the property pays the cost of publication, then the title vests in the person who found or saved the property unless the property was found in the course of employment by an employee of any public agency, in which case the property must be sold at public auction. Title to the property does not vest in the person who found or saved the property or in the successful bidder at the public auction unless the cost of publication is first paid to the city, county, or city and county, the police or sheriff's department of which caused the notice to be published [*Civ. Code § 2080.3(a)*].

[b] Property Valued at Less Than $250

If the reported value of the property is less than $250 and no owner appears and proves his ownership within 90 days, the title vests in the person who found or saved the property, unless the property was found in the course of employment

by and employee of any public agency, in which case the property is sold at public auction [*Civ. Code § 2080.3(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsPolice PowerGovernmentsLocal GovernmentsProperty

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31-355 California Forms of Pleading and Practice--Annotated § 355.16

§ 355.16 Agencies' Powers to Prescribe Alternatives

Cities may, by ordinance, make other provisions for the care, restitution, sale or destruction of unclaimed property [*Civ. Code § 2080.4*], as may public agencies by regulation [*Civ. Code § 2080.6*], the Regents of the University of California by resolution or regulation [*Civ. Code § 2080.8*], and the Trustees of the California State Universities by resolution or regulation [*Civ. Code § 2080.9*; *see also Educ. Code § 89724*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-355 California Forms of Pleading and Practice--Annotated § 355.17

§ 355.17 Lost Property Statutes Not Applicable to Abandoned Property

The Civil Code provisions dealing with lost money and goods [*Civ. Code §§ 2080-2080.9*] have no application to things which have been intentionally abandoned by their owner [*Civ. Code § 2080.7*].

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31-355 California Forms of Pleading and Practice--Annotated § 355.18

§ 355.18 Responsibilities of Public Agency on Obtaining Possession of Property for Temporary Safekeeping

When a public agency obtains possession of personal property from a person for temporary safekeeping, the public agency must do all of the following [*Civ. Code § 2080.10(a)*]:

- Take responsibility for the storage, documentation, and disposition of the property.

- Provide the person from whom the property was taken with a receipt and instructions for the retrieval of the property. The receipt and instructions must either be given to the person from whom the property was taken at the time the public agency obtains the property or immediately mailed, by first-class mail, to the person from whom the property was taken.

- If the public agency has knowledge that the person from whom the property was taken is not the owner, the agency must make reasonable efforts to identify the owner. If the owner is identified, the public agency must mail, by first-class mail, a receipt and instructions for the retrieval of the property.

The receipt and instructions must notify the person from whom the property was taken that the property must be claimed within 60 days after the public agency obtains possession or the property will be disposed of in accordance with the disposal provisions of this article [*Civ. Code § 2080.10(b)*]. Within 60 days, the person may do one of the following:

- Retrieve the property.

- Authorize in writing another person to retrieve the property.

- Notify the public agency in writing that he or she is unable to retrieve the property, because he or she is in custody, and request the public agency to hold the property. If a person notifies the public agency that he or she is unable to retrieve the property within 60 days, or have an authorized person retrieve the property, the public agency must hold the property for not longer than 10 additional months.

The public agency will not be liable for damages caused by any official action performed with due care regarding the

disposition of personal property pursuant to this provision [*Civ. Code § 2080.10(c)*].

"Public agency" is defined as any state agency, any city, county, city and county, special district, or other political subdivision [*Civ. Code § 2080.10(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 355.19 Owner's Remedies if Finder Refuses to Surrender Property

The owner of lost property which the finder has refused to surrender, despite the owner's tender of reasonable expenses for saving and caring for the property [*see Civ. Code § 2080*], has the following possible courses of action:

- Seeking damages from the finder for conversion [for a form of complaint, *see § 355.62*]; or

- Seeking restitution of the property pursuant to *Civ. Code § 2080* [for a form of complaint, *see § 355.63*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 355.20 Unclaimed Property

[1] Course of Business

Property received by carriers, innkeepers, or warehousemen for transportation or safekeeping if not delivered to the owner, consignee, or other designated person, may be held or stored until freight and all just and reasonable charges are paid [*Civ. Code § 2081*].

If no person claims the property within 60 days, it may be sold by the holder at public auction, with the proceeds used to pay applicable charges, any balance being held for the owner [*Civ. Code §§ 2081.1-2081.3*]. For a form of notice of auction, see *§ 355.66*.

The person with whom the property is stored is liable for loss or damage only if it results from his negligence or want of proper care [*Civ. Code § 2081.4*].

[2] Left by Patients in Hospitals

Whenever any personal property is found in or deposited with any licensed hospital and remains unclaimed for 180 days following the departure of the owner from the hospital, the hospital may proceed to sell the property at public auction, and from the proceeds of sale may retain storage charges, reasonable expenses of sale, and sums due the hospital from the last known owner [*Civ. Code § 1862.5*].

The sale may not be held until at least four weeks after written notice is given to the last known owner, containing a description of each item of personal property to be sold, the hospital's and last known owner's name, and the time and place of sale. The notice may be sent by regular mail, postage prepaid, to the last known owner at his last known address [*Civ. Code § 1862.5*]. For a form of notice of auction, see *§ 355.67*.

Legal Topics:

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

§§ 355.21[Reserved]

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31-355 California Forms of Pleading and Practice--Annotated § 355.40

§ 355.40 State Statutes

[1] Abandoned Property

Provisions dealing with found property [*Civ. Code §§ 2080-2080.9*] as inapplicable to things intentionally abandoned by owner. *Civ. Code § 2080.7*

Sale of intentionally abandoned property in possession of innkeeper or keeper of furnished apartment house or bungalow court. *Civ. Code §§ 1980-1991*

[2] Duties of Lost Property's Finder

Duties of finder of personal property or domestic animal. *Civ. Code § 2080*

Delivery of found or saved property to police or sheriff's department. *Civ. Code § 2080.1(b)*

Duties of finders of certain containers and equipment. *Food & Agric. Code § 34561* (dairy); *Bus. & Prof. Code § 14434* (in general)

[3] Disposition of Lost and Unclaimed Property

Unclaimed property on loan to museum. *Civ. Code § 1899 et seq.*

Duties of police or sheriff's department. *Civ. Code §§ 2080.1(b)-2080.3*

Power of cities to enact ordinances for care, etc., of unclaimed property. *Civ. Code § 2080.4*

Sale of property by police or sheriff's department. *Civ. Code § 2080.5*

Power of public agencies to adopt regulations for care, etc., of unclaimed property in its possession. *Civ. Code § 2080.6*

Power of Regents of University of California to provide by resolution or regulation for care, etc., of unclaimed property. *Civ. Code § 2080.8*

Power of Trustees of California State Colleges to provide by resolution or regulation for care, etc., of unclaimed property. *Civ. Code § 2080.9*; see also *Educ. Code § 89724*

Rights and duties of holders of unclaimed property. *Civ. Code §§ 2081-2081.6, 2082*

Sale of unclaimed property in hands of hospital. *Civ. Code § 1862.5*

Escheat of unclaimed property. *Code Civ. Proc. §§ 1300-1615*

Lost public property issued to National Guard officer or enlisted man. *Mil. & Vet. Code §§ 414-416*

Sale or destruction of unclaimed firearm in governmental officer's possession for at least 180 days (except those in possession of Department of Fish and Game). *Penal Code § 12032*

Unclaimed property in possession of regional park district. *Pub. Res. Code § 5561.5*

Storage and sale of lost, stolen, abandoned, or otherwise unclaimed property, by highway patrol department. *Veh. Code §§ 2414, 2415*

Use of unclaimed bicycles and toys to combat juvenile delinquency. *Welf. & Inst. Code § 217*

[4] Penal Provisions

Appropriation of access card known by finder to be lost as petty theft. *Penal Code § 484e(b)*

Appropriation of lost property by finder as theft. *Penal Code § 485*

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-355 California Forms of Pleading and Practice--Annotated § 355.41

§ 355.41 Decisions

Instruction as to wrongful retention of lost property based on *Penal Code § 485* was improper where evidence showed defendant believed property to be his own. *People v. Devine (1892) 95 Cal. 227, 230-231, 30 P. 378*

Supermarket shopping carts left by patrons in areas adjacent to markets and picked up by defendant charged with grand theft were not lost within meaning of *Civ. Code § 2080*. *People v. Stay (1971) 19 Cal. App. 3d 166, 171-175, 96 Cal. Rptr. 651*

Finder's right of possession as against all the world save true owner, subject to compliance with statutes. *People v. Beach (1944) 62 Cal. App. 2d 803, 806, 145 P.2d 685*

Effect of noncompliance with former Pol. Code §§ 3136-3142 (now *Civ. Code §§ 2080-2080.9*) in action to quiet title to lost receipt for gold coins. *Lilley v. Leggett (1943) 61 Cal. App. 2d 25, 28, 142 P.2d 57*

Duties of police officer finding personal property of value on city streets. *Noble v. Palo Alto (1928) 89 Cal. App. 47, 53-54, 264 P. 529*

Right of finder to reward offered by owner of lost goods, and liability of owner for reward assuming no retraction of reward before finding of goods. *Berthiaume v. John Doe (1913) 22 Cal. App. 78, 80, 133 P. 515*

Applicability of statutory sections giving warehouseman right to sell unclaimed goods where express contract between parties existed. *Shedoudy v. Spreckels Bros. Commercial Co. (1908) 9 Cal. App. 398, 400-401, 99 P. 535*

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-355 California Forms of Pleading and Practice--Annotated § 355.42

§ 355.42 Attorney General Opinions

Rights of finders (vs. state) in sunken vessels. *31 Ops. Cal. Att'y Gen. 107 (1958)* ; *23 Ops. Cal. Att'y Gen. 1 (1956)*

Rights of finders of birds of prey which were trained and subsequently lost. *56 Ops. Cal. Att'y Gen. 190 (1973)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-355 California Forms of Pleading and Practice--Annotated § 355.43

§ 355.43 Law Reviews

Comment, *Property Owners' Constructive Possession of Treasure Trove: Rethinking the Finders Keepers Rule, 38 UCLA L. Rev. 1659 (1991)*

Paulus, *Finder vs. Locus in Quo--An Outline, 6 Hastings L.J. 180 (1955)*

Comment, *Contracts: Offer of Reward for Return of Lost Property: Consideration, 1 Cal. L. Rev. 470 (1913)*

Legal Topics:

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31-355 California Forms of Pleading and Practice--Annotated § 355.44

§ 355.44 Text References

1 Am. Jur. 2d, *Abandoned, Lost, and Unclaimed Property*, §§ 2-5, 19-31

Legal Topics:

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[Reserved]

§§ 355.45[Reserved]

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31-355 California Forms of Pleading and Practice--Annotated § 355.60

§ 355.60 Letter Informing Known Owner That Lost Property Has Been Found or Domestic Animal Saved [Civ. Code § 2080]

[1] FORM Letter Informing Known Owner That Lost Property Has Been Found or Domestic Animal Saved [Civ. Code § 2080]

_____ [*date*]

Dear _____ [*name of known owner*],

[*EITHER, if property or animal was found*]

Please be informed that on _____ [*date*], at _____ [*place of finding*], _____ [*name of finder or saver*] found _____ [*describe property found*], which I/we believe you may own.

[*OR, if animal was saved*]

Please be informed that on _____ [*date*], at _____ [*place of finding or saving*], _____ [*name of finder or saver*] saved _____ [*describe domestic animal saved*] from _____ (drowning *or* starvation)]. I/We believe you may be the owner of this animal.

[*CONTINUE*]

The _____ [*describe property or animal*] _____ [will be held for you *or* has been placed in storage with _____ (*name*)] at _____ [*address*], and will be restored to you, if and when you appear at the place to claim it, making reasonable proof that you own it, and paying me the sum of

$_____ plus $_____ per day for each day on and after _____ [*date*] as a reasonable charge for saving and caring for it.

If this _____ [*describe property or animal*] is yours and you wish to claim it, please contact _____ [me *or name*] at _____ [*telephone number*] to arrange a time when you may claim it.

If you do not so appear, prove ownership, and pay the charges, the _____ [*describe property or animal*] will be disposed of according to law.

Yours truly,

_____ [*signature of finder*]

[2] Use of Form

Although the statutes do not prescribe any particular form for informing a known owner that his or her property has been found, use of a dated letter may be helpful in evidencing and establishing the finder's rights, as well as in fulfilling the obligation to inform the known owner [*see Civ. Code § 2080*].

Legal Topics:

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31-355 California Forms of Pleading and Practice--Annotated § 355.61

§ 355.61 Declaration of Finder or Saver on Delivery of Property Worth $100 or More to Police or Sheriff's Department [Civ. Code § 2080.1(a)]

[1] FORM Declaration of Finder or Saver on Delivery of Property Worth $100 or More to Police or Sheriff's Department [Civ. Code § 2080.1(a)]

TO: _____ [*name of police or sheriff's department*] of the _____ [City *or* County] of _____, California:

I, _____ [*name*], declare:

On _____ [*date*], [at about _____ (*time*)] at _____ [*state with particularity where property was found or domestic animal was saved*], in _____ [*name of city or county*], _____ California, I _____ [found *or* saved] _____ [*describe property or domestic animal*]. [*Add where applicable* I believe the property has an approximate value of $_____].

[*ADD, if the property was saved*]

The _____ [property *or* animal] was saved from _____ [*specify threat to property*] by _____ [*state how it was saved*].

The owner of the _____ [property *or* animal] is _____ [not known to me *or* _____ (*name*)].

I have not secreted, withheld, or disposed of any part of the _____ [property *or* animal].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The declaration under penalty of perjury in [1], *above,* may be used when it is executed in California [*Code Civ. Proc. § 2015.5, see also Civ. Code § 2080.1(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsPolice PowerGovernmentsLocal GovernmentsPropertyTortsIntentional TortsConversionGeneral Overview

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Volume 31: Lis Pendens thru Mandate and Prohibition-Chs. 348-358
Chapter 355 LOST AND UNCLAIMED PROPERTY
PART IV. FORMS

31-355 California Forms of Pleading and Practice--Annotated § 355.62

§ 355.62 Complaint for Damages [Civ. Code § 3336] for Conversion--Refusal of Finder to Return Lost Property to True Owner

[1] FORM Complaint for Damages [Civ. Code § 3336] for Conversion--Refusal of Finder to Return Lost Property to True Owner

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Conversion)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. _____ [*Allege capacity and residence of defendant, e.g.*, Defendant is, and at all times herein mentioned was, a resident of _____ County, California].

2. [Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by their conduct.)]

3. At all times herein mentioned, and in particular on or about _____ [*date*], plaintiff was, and still is,

the _____ [*e.g.*, owner] and was, and still is, entitled to possession of _____ [*describe personal property*].

4. On or about _____ [*date*], the personal property described above had a value of $_____, and on that date was in the possession of plaintiff at _____ [*location, including city and county*], California.

5. On or about _____ [*date*], plaintiff lost the property at or near _____ [*location*]. On or after that date, defendant found the property and took charge of it by _____ [*e.g.*, taking it up and carrying it to his house at _____ (*location*)].

6. On or about _____ [*date*], plaintiff appeared at [*e.g.*, defendant's house] and made reasonable proof to defendant that plaintiff was the owner of the property by _____ [*e.g.*, exhibiting to defendant a certain bill of sale naming plaintiff as the buyer of the property]. Plaintiff tendered to defendant the sum of $_____ for defendant's expenses and reasonable compensation for saving, preserving, and caring for the property, and plaintiff demanded that defendant restore the property to plaintiff.

7. On or about _____ [*date*], defendant refused to surrender the property to plaintiff, converted and has continued to convert the property to his/her own use, all to plaintiff's damage in the sum of $_____.

[8. Between the time of defendant's conversion of the property to his/her own use and the filing of this action, plaintiff _____ (*describe time and money properly expended in pursuit of the converted property*], all to plaintiff's further damage in the sum of $_____.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the value of the property converted in the sum of $_____.

2. For interest at _____ percent on the foregoing sum, from and after _____ [*date*].

3. For damages for time and money expended in pursuit of the converted property in the sum of $_____.

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowlege, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form of complaint and the form of complaint in *§ 355.63* are meant to present alternatives for the true owner of lost property faced with the finder's refusal to return lost property on reasonable demand and tender of reasonable expenses for saving and caring for the property set forth in *Civ. Code § 2080*. This form presupposes that the true owner is seeking damages for conversion, and the form in *§ 355.63* presupposes that the true owner is seeking the lost property itself.

[3] Conversion

[a] Defined

Conversion has been defined as any act of dominion wrongfully exerted over another person's personal property [*Beverly Fin. Co. v. American Cas. Co. (1969) 273 Cal. App. 2d 259, 264, 78 Cal. Rptr. 334]* . Another authority has defined conversion as an act of willful interference with a chattel, done without lawful justification, by which any person entitled thereto is deprived of use and possession [*De Vries v. Brumback (1960) 53 Cal. 2d 643, 647, 2 Cal. Rptr. 764, 349 P.2d 532]* . For full discussion of the elements of conversion and related forms, see Ch. 150, *Conversion* .

[b] Damages

The detriment caused by the wrongful conversion of personal property is presumed to be:

- The value of the property at the time of the conversion with the interest from that time, or an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable, and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; and

- A fair compensation for the time and money expended in pursuit of the property [*Civ. Code § 3336*].

The interest allowable under *Civ. Code § 3336* is the legal rate of 10 percent [*Cal. Const. art. XV, § 1*; *Code Civ. Proc. § 685.010(a)*].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil

case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive ofinterest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[6] Cross References

For alternative allegations of capacity and residence of parties, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For a further discussion and forms relating to conversion, see Ch. 150, *Conversion*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionElementsTortsIntentional TortsConversionRemedies

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31-355 California Forms of Pleading and Practice--Annotated § 355.63

§ 355.63 Complaint by Owner Against Finder to Recover Property [Civ. Code § 2080; Code Civ. Proc. § 667]--Finder's Failure to Restore Property to Owner on Demand

[1] FORM Complaint by Owner Against Finder to Recover Property [Civ. Code § 2080; Code Civ. Proc. § 667]--Finder's Failure to Restore Property to Owner on Demand

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO RECOVER LOST PROPERTY
_____ [*name*],	)	[Amount demanded _____
Defendant.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff Alleges:

1. At all times herein mentioned, plaintiff was, and now is, the owner of [a] certain _____ [*describe property*]. The value of the property is $_____.

2. On or about _____ [*date*], plaintiff lost the property at or near _____ [*location*]. On or after that date, defendant found the property at or near the place and took charge of it by _____ [*e.g.*, taking it up and carrying it to his/her house at _____ (*location*)].

3. On or about _____ [*date*], plaintiff appeared at _____ [*e.g.*, defendant's house]; plaintiff made reasonable proof to defendant that plaintiff was the owner of the property by _____ [*e.g.*, exhibiting to defendant a certain bill of sale wherein plaintiff was named as the buyer of the property]. Plaintiff

tendered to defendant the sum of $_____ for defendant's expenses and charges and reasonable compensation for his/her saving, preserving, and caring for the property, and plaintiff demanded that defendant restore the property to plaintiff.

4. By reason of his/her ownership of the property, plaintiff is entitled to immediate and exclusive possession of the property.

5. Defendant has failed and refused, and continues to fail and refuse, to restore the property to plaintiff.

6. The reasonable value of the use of the property to plaintiff is $_____ per day, and plaintiff has been, and will be, damaged in the sum each day after _____ [*date of plaintiff's demand for return of the property*], that the property is not returned to plaintiff.

WHEREFORE, plaintiff prays judgment as follows:

1. For possession of the _____ [*property*], and in case delivery thereof to the plaintiff cannot be made, for the sum of $_____.

2. For damages for loss of use in the sum of $_____ per day for each day after _____ [*date*], that possession of the property, or its value, is withheld from plaintiff.

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 355.62.*]

[2] Use of Form

The forms of complaint in [1], *above*, and in *§ 355.62* are meant to present alternatives for the true owner of lost property faced with the finder's refusal to return lost property on reasonable demand and tender of reasonable expenses for saving and caring for the property set forth in *Civ. Code § 2080*. The form in [1], *above*, presupposes that the true owner is seeking the lost property itself, and the form in *§ 355.62* presupposes that the true owner is seeking damages for conversion.

[3] Cross References

For discussion of *Code Civ. Proc. § 667 see Ch. 119, Claim and Delivery, § 119.29*

For additional comments and cross references relating to complaints generally, see *§ 355.62*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesProperty DamageLoss of UseTortsIntentional TortsConversionGeneral Overview

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31-355 California Forms of Pleading and Practice--Annotated § 355.64

§ 355.64 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] of Finder or Saver to Action by Owner to Recover Lost Property [Civ. Code § 2080]--Owner's Failure to Pay or Tender Reasonable Charges for Saving and Taking Care of Property

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] of Finder or Saver to Action by Owner to Recover Lost Property [Civ. Code § 2080]--Owner's Failure to Pay or Tender Reasonable Charges for Saving and Taking Care of Property

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. [*Note: Defendant may admit the allegations of the complaint as to the finding or saving of the property, or he may choose to give his own version by way of factual allegations in his answer, e.g.,* On or about _____, (*date*), at about _____ (*time*), at _____ (*location*) defendant found _____ (*the property or animal*) in _____ (*describe circumstances of finding*) and _____ took charge of *or* saved) the _____ (property *or* animal) by _____ (*the steps taken by the finder may be detailed as a basis for his claims for expenses*)].

2. In finding, saving, caring for, and preserving the _____ [property *or* animal] it was necessary for defendant to, and he/she did, incur the following expenses: _____ [*specify nature and amounts*]. In addition, defendant was further required to, and did, perform the following services in connection with the finding, saving, caring for, and preserving: _____ [*describe*].

3. On or about _____ [*date*], when plaintiff demanded that defendant turn over the property to plaintiff, defendant demanded that plaintiff pay to defendant as and for compensation for the expenses and services the sum of $_____. Plaintiff has failed and refused, and continues to fail and refuse, to pay or to tender payment of the sum, or any other reasonable sum, for defendant's the expenses.

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer to an action by an owner of property which has been found by defendant. One who finds lost property is intitled to a reasonable charge for saving and taking care of the property [*Civ. Code § 2080*].

[3] Cross References

For a form of affirmative defense based on the plaintiff's failure to provide reasonable proof of ownership, see *§ 355.65*

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionDefenses

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31-355 California Forms of Pleading and Practice--Annotated § 355.65

§ 355.65 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] of Finder or Saver to Action by Owner to Recover Lost Property [Civ. Code § 2080]--Plaintiff's Failure to Make Reasonable Proof of Ownership

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] of Finder or Saver to Action by Owner to Recover Lost Property [Civ. Code § 2080]--Plaintiff's Failure to Make Reasonable Proof of Ownership

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

At all times since defendant found the property, plaintiff has failed to communicate to defendant reasonable proof that plaintiff owns the property.

[2] Use of Form

The form of affirmative defense in [1], *above,* is for use in an answer to an action by an alleged owner of property which has been found by defendant. *Civ. Code § 2080,* the statute governing the duties of a finder of lost property, requires that restitution be made to the owner. The statute does not specify how the owner is to be identified. However, the finder is a depositary for the owner, with the same rights and duties as a depositary for hire [*Civ. Code § 2080*]. Since a depositary for hire is required to exercise at least ordinary care for the preservation of the property [*Civ. Code § 1852*], it would appear that the finder would be justified in demanding adequate identification before restoring the property. Failure to do so might result in the finder being liable to the real owner if the purported owner received the property when he or she was not entitled to it.

[3] Cross References

For a form of affirmative defense based on the owner's failure to pay the finder's reasonable expenses, see *§ 355.64*

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersTortsIntentional TortsConversionGeneral OverviewTortsIntentional TortsConversionDefenses

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31-355 California Forms of Pleading and Practice--Annotated § 355.66

§ 355.66 Notice of Auction Sale of Unclaimed Property [Civ. Code § 2081.1]

[1] FORM Notice of Auction Sale of Unclaimed Property [Civ. Code § 2081.1]

To _____ [*name owners, consignees, and other persons authorized to receive the property or interested in it*]:

NOTICE IS HEREBY GIVEN:

1. That on _____ [*date*], _____ [*identify holder of the property*] received, has held, and _____ [now holds *or* has caused to be stored with _____ (*a responsible person*)], the property described below in his/her/its capacity as _____ [a railroad company *or* an express company *or some other common carrier or* a commission merchant *or* an innkeeper *or* a warehouseman] for _____ [transportation from _____ to _____ *or* safekeeping *or* storage at _____], on the order of _____ [*consignor*], to be delivered to _____ [*owner, consignee, or other authorized person*];

2. That the property was not delivered to _____ [*owner, consignee, or other authorized person*] because _____ [*reason briefly stated*];

3. That [the freight and] just and reasonable charges for such [transportation, safekeeping, storage, and] holding now total $_____ and continue to accrue at the rate of $_____ per day;

4. That, unless some person entitled thereto calls for the property and pays the [freight and] charges on it, _____ [*holder*] will _____ [sell *or* cause to be sold] _____ [the property *or* so much of the property as will pay the (freight and) charges] to the highest bidder at public auction on _____ [*a date more than 60 days after the date the property was received*], at _____ [*time*], at _____ [*location*].
Dated: _____.

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, may be used to give notice of an auction of unclaimed property [*see Civ. Code §§ 2081-2081.3*; *see also Shedoudy v. Spreckels Bros. Commercial Co. (1908) 9 Cal. App. 398, 400-401, 99 P. 535]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsPolice PowerGovernmentsLocal GovernmentsPropertyTortsIntentional TortsConversionGeneral Overview

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31-355 California Forms of Pleading and Practice--Annotated § 355.67

§ 355.67 Notice of Public Auction of Unclaimed Goods--By Licensed Hospital [Civ. Code § 1862.5]

[1] FORM Notice of Public Auction of Unclaimed Goods--By Licensed Hospital [Civ. Code § 1862.5]

TO _____ [*name of last known owner*]:

Please be informed that the following personal property has been _____ [found in *or* deposited with] _____ Hospital, and is believed to be owned by you: _____ [*describe each item of personal property which has not been claimed*]. This property has remained unclaimed at _____ Hospital for _____ [*state time, which must be at least 180 days*] days since your departure.

The property has been stored, and _____ Hospital has expended $_____ so far for storage fees, which continue to accrue at the rate of $_____ per day.

Unless the property described above is called for and the accrued storage fees are paid, the property shall be sold to the highest bidder at public auction to be held on _____ [*a date at least four weeks from the date of written notice*], at _____ [*time*], at _____ [*location of auction*].

Yours truly,

_____

[*signature of officer or authorized agent of hospital*]

[2] Use of Form

The form in [1], *above*, is for use by a hospital to notify the last known owner of unclaimed property at his last known address of its intention to sell the property at public auction if not called for and storage charges due thereon paid. The notice may be sent by regular mail, postage prepaid [*Civ. Code § 1862.5*].

The property must remain unclaimed for a period of 180 days following the departure of the owner from the hospital [*Civ. Code § 1862.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationGeneral Overview

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Chapter 356 LOST PAPERS

31-356 California Forms of Pleading and Practice--Annotated 356.syn

§ 356.syn Synopsis to Chapter 356: LOST PAPERS

§ 356.01 Scope of Chapter

§ 356.02 Cross References

§§ 356.03-356.09 [Reserved]

§ 356.10 Governing Statutes

§ 356.11 Reestablishing Land Records

[1] Who May Bring Action

[2] Venue

[3] Land Included in Action

§ 356.12 Commencing the Action

[1] Complaint

[2] Plaintiff's Declaration

[3] Issuance of Summons

[4] Publication of Summons

[5] Posting of Summons and Memorandum

[6] Service of Summons

§ 356.13 Jurisdiction of Superior Court

§ 356.14 Answer to Complaint

§ 356.15 Lis Pendens Notice Required

§ 356.16 Judgment

§ 356.17 No Default Judgment

§ 356.18 Successive Actions on Property

§ 356.19 Notice of Ownership or Claim

[1] Filing Notice

[2] Effect of Notice

§ 356.20 Effective Date of Records

§ 356.21 Restoration of Recorded Maps

[1] By Verified Petition

[2] Notice of Hearing

[3] Evidence Taken at Hearing

[4] Effect of Recording Copy

§ 356.22 Restoration of Court Record

[1] By Certified Copy

[2] No Copy Available

[3] Proceedings in Rem

§ 356.23 [Reserved]

§ 356.24 Lost Pleadings

§ 356.25 Restoring Private Documents or Records

[1] Petition and Notice

[2] Hearing and Order

§ 356.26 Action to Restore Private Written Document or Instrument

[1] By Complaint

[2] Security for Negotiable Instrument

§ 356.27 Proving Content of Lost Writings With Other Evidence

§§ 356.28-356.39 [Reserved]

§ 356.40 State Statutes

[1] Effective Date of Restored Records

[2] Land Records

[3] Lost Pleadings

[4] [Reserved]

[5] Notice

[6] Private Records Destroyed in Disaster

[7] Restoration of Court Record

[a] In General

[b] By Certified Copy

[c] Without Certified Copy

[8] Private Written Instrument or Document

[9] Recorded Maps

§ 356.41 California Rules of Court

§ 356.42 Decisions

§ 356.43 Text References

§§ 356.44-356.49 [Reserved]

§ 356.50 Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Complaint by Party Claiming an Estate in or Possession of Real Property Against All Adverse Claimants

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction and Venue

§ 356.51 Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Declaration of Plaintiff [Code Civ. Proc. §§ 751.09, 2015.5]

[1] FORM

[2] Use of Form

[3] Contents of Declaration

[4] Declaration in Lieu of Affidavit

[5] Where No Ability to State Facts

[6] Part of Judgment Roll

[7] Who Makes Declaration

[8] Service With Complaint and Summons

§ 356.52 Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Summons With Memorandum [Code Civ. Proc. §§ 751.05-751.07]

[1] FORM

[2] Use of Form

[3] Contents of Form

[a] Summons

[b] Memorandum

[4] Posting on Property

§ 356.53 Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Court Order for Publication of Summons [Code Civ. Proc. § 751.06]

[1] FORM

[2] Use of Form

§ 356.54 Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Notice of Pendency of Action [Code Civ. Proc. § 751.13]

[1] FORM

[2] Use of Form

[3] Acknowledgment

[4] Recording

[5] Cross References

§ 356.55 Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Notice of Ownership and Claim [Code Civ. Proc. § 751.23]

[1] FORM

[2] Use of Form

[3] Verification

[4] Recordation

[5] Notice of Contents

§ 356.56 Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Answer [Code Civ. Proc. §§ 431.30(b)(1), (2),751.12]

[1] FORM

[2] Use of Form

[3] Verification

[4] Cross References

§ 356.57 Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Statement of Decision [Code Civ. Proc. § 632]

[1] FORM

[2] Use of Form

[3] Cross References

§ 356.58 Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Judgment [Code Civ. Proc. §§ 751.14, 751.15]

[1] FORM

[2] Use of Form

[3] Recordation

§ 356.59 Proceedings to Restore Injured, Destroyed, Lost, or Stolen Recorded Map--Petition [Code Civ. Proc. § 1855]

[1] FORM

[2] Use of Form

[3] Service

§ 356.60 Proceedings to Restore Injured, Destroyed, Lost, or Stolen Recorded Map--Notice of Hearing [Code Civ. Proc. § 1855b]

[1] FORM

[2] Use of Form

§ 356.61 Proceedings to Restore Injured, Destroyed, Lost, or Stolen Recorded Map--Order and Decree [Code Civ. Proc. § 1855]

[1] FORM

[2] Use of Form

§ 356.62 Proceedings to Restore Court Record by Certified Copy--Petition [Code Civ. Proc. § 1953.01]

[1] FORM

[2] Use of Form

[3] Verification

[4] Notice

[5] Cross References

§ 356.63 Proceedings to Restore Court Record by Certified Copy--Notice of Hearing on Petition [Code Civ. Proc. §§ 1010, 1953.02]

[1] FORM

[2] Use of Form

[3] Cross Reference

§ 356.64 Proceedings to Restore Court Record by Certified Copy--Order [Code Civ. Proc. § 1953.02]

[1] FORM

[2] Use of Form

§ 356.65 Proceedings to Restore Court Record Without Certified Copy--Petition [Code Civ. Proc. § 1953.03]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Notice

[5] Cross References

§ 356.66 Proceedings to Restore Court Record Without Certified Copy--Order [Code Civ. Proc. § 1953.04]

[1] FORM

[2] Use of Form

§ 356.67 [Reserved]

§ 356.68 Proceedings to Establish Private Records Destroyed in Disaster or Calamity--Petition [Code Civ. Proc. § 1953.10]

[1] FORM

[2] Use of Form

[3] Verification

§ 356.69 Proceedings to Establish Private Records Destroyed in Disaster or Calamity--Order for Notice [Code Civ. Proc. § 1953.11]

[1] FORM

[2] Use of Form

§ 356.70 Proceedings to Establish Private Records Destroyed in Disaster or Calamity--Notice [Code Civ. Proc. § 1953.11]

[1] FORM

[2] Use of Form

§ 356.71 Proceedings to Establish Private Records Destroyed in Disaster or Calamity--Order [Code Civ. Proc. §§ 1953.12, 1953.13]

[1] FORM

[2] Use of Form

§ 356.72 Complaint to Compel Execution of Duplicate of Lost or Destroyed Private Written Instrument or Document [Civ. Code § 3415]--Promissory Note

[1] FORM

[2] Use of Form

[3] Cross Reference

§ 356.73 Order Compelling Execution of Duplicate of Lost or Destroyed Private Written Instrument or Document [Civ. Code § 3415]--Promissory Note

[1] FORM

[2] Use of Form

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Chapter 356 LOST PAPERS
PART I. SCOPE

31-356 California Forms of Pleading and Practice--Annotated § 356.01

§ 356.01 Scope of Chapter

This chapter covers the restoration of lost, destroyed, or stolen records, documents, and papers. It includes:

- Forms for establishing title and determining adverse claims under the Destroyed Land Records Relief Law [*see §§ 356.50 -356.58*].

- Forms for restoring recorded maps [*see §§ 356.59 -356.61*].

- Forms for restoring court records when a certified copy of the record is available [*see §§ 356.62 -356.64*] or when such certified copy is not available [*see §§ 356.65, 356.66*].

- Forms for restoring private records destroyed in disaster [*see §§ 356.68 -356.71*].

- Forms for compelling the execution of a duplicate of a lost or destroyed promissory note [*see §§ 356.72, 356.73*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCourt RecordsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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31-356 California Forms of Pleading and Practice--Annotated § 356.02

§ 356.02 Cross References

- For a complaint by an executor of a payee against the maker for restoration of a lost note, see Ch. 385, *Negotiable Instruments*

- For a petition for the probate of a lost will and an order admitting it to probate, see Ch. 440, *Probate: Is Probate Necessary ?*

- For a discussion of notice pursuant to *Code Civ. Proc. § 1010 et seq.*, see Ch. 518, *Service of Summons and Papers*

- For detailed coverage of the Evidence Code, see Cotchett, California Courtroom Evidence (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawWillsLost Wills

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[Reserved]

§§ 356.03[Reserved]

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31-356 California Forms of Pleading and Practice--Annotated § 356.10

§ 356.10 Governing Statutes

The restoration of lost, destroyed, or stolen records, documents, or papers is governed by the following statutes:

- *Civ. Code § 3415* (private written documents or instruments).
- *Code Civ. Proc. § 751.01 et seq.* (land records).
- *Code Civ. Proc. § 1045* (lost pleadings).
- *Code Civ. Proc. § 1046a* (lost or burnt records).
- *Code Civ. Proc. § 1953 et seq.* (court records).
- *Code Civ. Proc. § 1953.10 et seq.* (private records or documents).
- *Code Civ. Proc. § 1855* (recorded maps).

The admissibility of secondary evidence as proof of the content of lost writings is governed by *Evid. Code §§ 1521, 1523*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawWillsLost WillsGovernmentsCourtsCourt RecordsReal Property LawDeedsLost Deeds

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31-356 California Forms of Pleading and Practice--Annotated § 356.11

§ 356.11 Reestablishing Land Records

[1] Who May Bring Action

Whenever the public records in the office of a county recorder of any county are lost or destroyed in whole or in any material part by flood, fire, earthquake, enemy attack, or from any other cause, any person who claims an estate of inheritance or for life in, and who is by himself or herself or by another person holding under him or her in the actual and peaceable possession of any real property in that county may bring and maintain an action in rem against all the world to establish title to such property and to determine all adverse claims thereto [*Code Civ. Proc. § 751.02*] under *Code Civ. Proc. § 751.01 et seq.* These sections are collectively known as the Destroyed Land Records Relief Law [*Code Civ. Proc. § 751.01*] and commonly referred to as the McEnerney Act. They were enacted immediately after the San Francisco earthquake and fire of 1906 to restore records of title destroyed by public disaster [*Berton v. All Persons (1917) 176 Cal. 610, 615, 170 P. 151]* . They are constitutional and do not violate due process [*see American Land Co. v. Zeiss (1911) 219 U.S. 47, 58-71, 31 S. Ct. 200, 55 L. Ed. 82]* .

[2] Venue

A person bringing an action under the Destroyed Land Records Relief Law [*Code Civ. Proc. § 751.01 et seq.*] will usually bring the action in the superior court of the county where the real property is situated [*Code Civ. Proc. § 751.02*]. The action may also be brought in the county in which the real property is situated if any real property is in another county, but was formerly in the county of which the records were lost or destroyed, as well as if the lost or destroyed records included the public records of the office of the county recorder covering all or a material part of the timewhen the real property was in the county whose records were lost or destroyed [*Code Civ. Proc. § 751.02*].

[3] Land Included in Action

Any number of separate parcels of land claimed by the plaintiff may be included in the same action [*Code Civ. Proc. § 751.03*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsTrue in Rem ActionsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 356.12 Commencing the Action

[1] Complaint

An action under the Destroyed Land Records Relief Law to establish title to property and to determine all adverse claims thereto must be commenced by filing a verified complaint. The party commencing an action must be named as plaintiff, and the defendants must be described as "all persons claiming any interest in, or lien upon, the real property herein described, or any part thereof." The complaint must contain a statement of the facts enumerated in *Code Civ. Proc. § 751.02*, a particular description of the real property, and a specification of the estate, title, or interest of the plaintiff in the property [*Code Civ. Proc. § 751.04*; for complaint to establish title against all adverse claimants, *see § 356.50*].

[2] Plaintiff's Declaration

At the time of filing the complaint, the plaintiff must file with it an affidavit (declaration in lieu of affidavit; *see Code Civ. Proc. § 2015.5*). This affidavit must fully and explicitly set forth and show certain specified facts [*see Code Civ. Proc. § 751.09*; for plaintiff's declaration, *see § 356.51*].

[3] Issuance of Summons

After the filing of the complaint, a summons must be issued under the seal of the court and in a statutorily specified form [*see Code Civ. Proc. § 751.05*; for summons with memorandum, *see § 356.52*].

[4] Publication of Summons

The summons must be published in a newspaper of general circulation published in the county in which the action is brought. The newspaper in which publication is to be made must be designated by an order of the court or a judge thereof; it is to be signed and filed with the clerk. No other order for the publication of the summons is necessary, nor is any affidavit therefor required. A copy of the complaint need not be served except as required by *Code Civ. Proc. § 751.10*. The summons must be published pursuant to *Gov. Code § 6065* (once a week for eight weeks). To each publication of the summons must be appended a memorandum which states, in substance: "The first publication of this

summons was made in _____ (*name of newspaper*) on the _____ day of _____ (*specify*)."

[5] Posting of Summons and Memorandum

A copy of the summons and a copy of the memorandum must be posted in a conspicuous place on each separate parcel of the property described in the complaint within 15 days after the first publication of the summons [*Code Civ. Proc. § 751.08*].

[6] Service of Summons

If the plaintiff's affidavit discloses the name of any person claiming any interest in or lien on the property which is adverse to the plaintiff, a copy of the summons and the complaint and affidavit must be served on such person, if he or she can be found, in the manner provided for the service of a summons in a civil action, other than by publication [*see Code Civ. Proc. §§ 415.10, 415.20*]. Service must be made during the period of the publication of the summons. A copy of the memorandum provided for in *Code Civ. Proc. § 751.07* must be appended to the copy of the summons served upon any such person [*Code Civ. Proc. § 751.10*].

If such a person cannot, with reasonable diligence, be served as provided above within the period of publication of the summons, then a copy of the summons, memorandum, complaint, and affidavit must be mailed, with postage prepaid, to him or her at the address given in the affidavit or, if no address is given, at his last address known to the plaintiff. If no such address is known, then it must be mailed to the county seat of the county in which the action is brought [*Code Civ. Proc. § 751.10*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProceduresPleading & PracticeService of ProcessMethodsPublicationCivil ProceduresPleading & PracticeService of ProcessProofGeneral OverviewReal Property LawEstatesPresent EstatesMarital EstatesGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 356.13 Jurisdiction of Superior Court

After the completion of the publication and posting of the summons and its service or mailing as provided for in *Code Civ. Proc. § 751.10*, the court has complete jurisdiction over the plaintiff and the property as well as over the person of everyone having or claiming any estate, right, title, or interest in or to or lien on all or any part of the property. The court is deemed to have obtained the possession and control of the property for the purposes of the action with complete jurisdiction to render the judgment provided for by *Code Civ. Proc. § 751.15* [*Code Civ. Proc. § 751.11*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsGeneral OverviewReal Property LawDeedsLost DeedsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 356.14 Answer to Complaint

At any time within three months after the first publication of the summons, or within such further time not to exceed 30 days as the court may grant for good cause, any person having or claiming any estate, right, title, or interest in or to or lien on all or any part of the property may appear and make himself or herself a party to the action by pleading to the complaint. All answers must be verified and must specifically set forth the estate, right, title, interest, or lien so claimed [*Code Civ. Proc. § 751.12*; for answer to complaint, *see § 356.56*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersReal Property LawDeedsLost DeedsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 356.15 Lis Pendens Notice Required

At the time of filing the complaint and at the time of filing the answer, the plaintiff and every defendant respectively must record in the office of the recorder of the county in which the property is situated a notice of the pendency of the action containing the object of the action or defense as well as a particular description of the property affected by it [*Code Civ. Proc. § 751.13*; for notice of pendency of action, *see § 356.54*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensNoticesReal Property LawDeedsLost DeedsReal Property LawPriorities & RecordingLis PendensReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 356.16 Judgment

A judgment must determine all estates, rights, titles, interest, and claims in and to such property and every part thereof, whether legal or equitable, present or future, vested or contingent. It must also determine whether they consist of mortgages or liens of any description. It must be conclusive on every person who at the commencement of the action had or claimed any estate, right, title, or interest in or to all or any part of such property; it must also be conclusive on every person claiming under him or her by title subsequent to the commencement of the action [*Code Civ. Proc. § 751.15*; for judgment, *see § 356.58*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsLost DeedsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 356.17 No Default Judgment

There may be no judgment by default in an action under the Destroyed Land Records Relief Law [*Code Civ. Proc. § 751.01 et seq.*]. The court must require proof of the facts alleged in the complaint and the other pleadings [*Code Civ. Proc. § 751.14*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsReal Property LawDeedsLost DeedsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 356.18 Successive Actions on Property

Whenever judgment in an action pursuant to the Destroyed Land Records Relief Law [*Code Civ. Proc. § 751.01 et seq.*] has been entered as to any real property, no other action relative to any part of the same property can be tried until proof has first been made to the court that all persons who appeared in the first action or their successors in interest have been personally served either within or without California more than one month before the time to plead expired [*Code Civ. Proc. § 751.20*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsLost DeedsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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31-356 California Forms of Pleading and Practice--Annotated § 356.19

§ 356.19 Notice of Ownership or Claim

[1] Filing Notice

Where the title to real property may be established or quieted pursuant to the Destroyed Land Records Relief Law [*Code Civ. Proc. § 751.01 et seq.*], any person who is or claims to be the owner of such real property or of any interest therein or lien thereon, may himself or herself, or by his or her agent duly authorized by letter of attorney previously recorded in the office of the county recorder of the county where the property is situated, sign, verify, and file for record a notice of ownership and claim [*Code Civ. Proc. § 751.23*; for notice of ownership and claim, see *§ 356.55*]. The notice must be verified [*Code Civ. Proc. § 751.24*]. After three days from when the notice has been filed for record, all persons who may begin actions pursuant to the Destroyed Land Records Relief Law will be deemed to have notice of the facts stated in the notice. Neither the filing of the notice for record nor its recordation constitute constructive notice to any other person or for any other purpose [*Code Civ. Proc. § 751.26*].

[2] Effect of Notice

After three days from the filing of the notice for record, any person who begins an action pursuant to the Destroyed Land Records Relief Law [*Code Civ. Proc. § 751.01 et seq.*] to perfect or establish his title to the real property described in the notice, or any interest therein, must name in the affidavit [*see § 356.51[1]*] and memorandum appended to the summons [*see § 356.52[1]*] the claimant in the notice, or any person who is a successor in interest of such claimant under a subsequently duly recorded written instrument, judgment, or decree, as a party who claims an interest in or lien on the property adverse to the plaintiff. He or she must cause such claimant, or successor in interest, to be served with summons in the action. Otherwise, neither the action nor any judgment or decree made therein will affect the title or interest in the property described in the notice and owned either by the claimant at the time of the filing of the notice or by any such successor in interest prior to the commencement of the action. The failure to name such claimant or successor in interest in the affidavit or memorandum or to serve such claimant or such successor in interest will not affect the validity of the judgment or decree rendered in such action as to any othe person [*Code Civ. Proc. § 751.27*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsLost DeedsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 356.20 Effective Date of Records

In all cases brought under the provisions of any state statute providing for the establishment and quieting of title to real property in cases where the public records in the office of the county recorder are lost or destroyed, in whole or in any material part, by flood, fire, or earthquake, all papers filed under order of court nunc pro tunc as of the date when they are filed, will have the same force and effect as if filed on the date when they should have been filed [*Code Civ. Proc. § 1046a*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsLost DeedsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 356.21 Restoration of Recorded Maps

[1] By Verified Petition

When any map which has been recorded in the office of the recorder of any county is injured, destroyed, lost, or stolen, any person interested mayfile in the superior court of the county in which the map was originally filed or recorded a verified petition in writing alleging that such map has been injured, destroyed, lost, or stolen without fault of the person making the application. The petition must also allege that the petitioner has a true and correct copy of the original map which he or she is offering for record in the place of the original map. The petition must be accompanied by a copy of the true copy offered for recording [*Code Civ. Proc. § 1855*; for petition, *see § 356.59*].

[2] Notice of Hearing

After filing the verified petition, the clerk sets it for hearing by the court and gives notice of the hearing by posting notice of the time and place of the hearing at the courthouse in the county where the court is held at least 10 days before the hearing. A copy of the petition and a copy of the true copy which is being offered for record must be served on the recorder of the county in which the proceedings are brought at least 10 days before the hearing. The court may order such further notice to be given as it deems proper [*Code Civ. Proc. § 1855*; for notice of hearing, *see § 356.60*].

The county recorder is a proper party to a proceeding brought pursuant to *Code Civ. Proc. § 1855b* since he or she is the only person required by statute to be served with a copy of the petition. The statute contemplates that the recorder is a real party in interest in any such action [*Lakeside Park Ass'n v. Sweeney (1958) 157 Cal. App. 2d 101, 104, 320 P.2d 513]* .

[3] Evidence Taken at Hearing

At the time set for the hearing, the court must take evidence for and against the peitition. If it appears to the court from the evidence presented that the copy of the map is a true copy of the original map, the court orders the copy placed of record in the office of the recorder in place of the original map [*Code Civ. Proc. § 1855*; for order and decree, *see § 356.61*].

[4] Effect of Recording Copy

A certified copy of the court's decree must accompany the copy of the map for record. When presented to the county recorder, the recorder must place the copy of the map in the place of the original map. When placed of record, the copy will have the same effect as the original map, and conveyances of property, referring to the original map will have the same effect as though the original map had not been injured, destroyed, lost, or stolen. Conveyances thereafter made referring to the copy of the original map will be deemed to refer also to the original map [*Code Civ. Proc. § 1855*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesReal Parties in InterestGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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31-356 California Forms of Pleading and Practice--Annotated § 356.22

§ 356.22 Restoration of Court Record

[1] By Certified Copy

Whenever in any civil or criminal action or special proceeding in any California court, any record is lost, injured, or destroyed by any reason or conflagration or other public calamity, any person interested therein may apply to the court by a verified petition in writing [*see § 356.62*] for an order authorizing such defect to be supplied by a certified copy of the original, where such copy can be obtained [*Code Civ. Proc. § 1953.01*]. After notice [*see § 356.63*] given pursuant to *Code Civ. Proc. § 1010 et seq.*, and after it is shown to the satisfaction of the court that the record has been so lost, injured, or destroyed, the court makes an order [*see § 356.64*] that the certified copy is thereafter to have the same effect in all respects as the original would have had [*Code Civ. Proc. § 1953.02*].

When the proceeding is undertaken by a person who is not a person interested in the lost record, the judgment is void for lack of jurisdiction [*In re Estate of Klepsch (1940) 36 Cal. App. 2d 483, 488, 97 P.2d 987]* .

[2] No Copy Available

Whenever in any civil or criminal action or special proceeding in any California court any record is lost, injured, or destroyed by reason of conflagration or other public calamity and a certified copy of the original cannot be supplied, any person interested therein may make a verified written petition [*see § 356.65*] to the court for restoration of the information or material contained in the record. After such application is made, the court will cause notice [*see § 356.63*] of the application to be given pursuant to *Code Civ. Proc. § 1010 et seq.* [*Code Civ. Proc. § 1953.03*].

After the hearing of the application, if the court is satisfied that the statements contained in the written application are true, it makes an order [*see § 356.66*] reciting the substance and effect of the lost, injured, or destroyed record. The order has the same effect that the original record would have had if it had not been lost, injured, or destroyed, insofar as it concerns the person making the application as well as the persons who have received notice pursuant to *Code Civ. Proc. §§ 1010 et seq., 1953.03* [*Code Civ. Proc. §§ 1953.04*].

Upon an application for the restoration of the record, the court, if not fully satisfied from the evidence adduced in support thereof that a provision alleged to have been a part of the original record, correctly expresses the lost order, is

justified in refusing to direct the restoration of the record to the extent of including the alleged provision [*Richmond v. Denny (1920) 47 Cal. App. 745, 747, 191 P. 554]* .

[3] Proceedings in Rem

The record in all cases when the proceeding is in rem, including probate, guardianship, conservatorship, and insolvency proceedings, may be supplied in like manner on like notice to all persons who have appeared therein, and on notice by publication or postings for not less than 10 days, as the court may order, to all persons who have not appeared. When restored, the record will have the same effect as the original on all persons who have been personally served with the notice of the application, and as to all other persons it will be prima facie evidence of the contents of the original [*Code Civ. Proc. § 1953.05*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewGovernmentsCourtsCourt Records

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[Reserved]

§ 356.23[Reserved]

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31-356 California Forms of Pleading and Practice--Annotated § 356.24

§ 356.24 Lost Pleadings

If an original pleading or paper in any action or proceeding is lost, the court may authorize a copy thereof to be filed and used instead of the original [*Code Civ. Proc. § 1045*]. There is no need for special proceedings under *Code Civ. Proc. § 1953 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral Overview

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31-356 California Forms of Pleading and Practice--Annotated § 356.25

§ 356.25 Restoring Private Documents or Records

[1] Petition and Notice

Any person, corporation, copartnership, organization, institution, business, or member of a profession or calling interested in establishing the existence, substance, genuineness, or authenticity of any memorandum, book, map, chart, manuscript, writing, account, entry, record, print, document, representation, or combination thereof which has been either damaged, rendered wholly or partially illegible, destroyed in whole or in part, or lost by explosion, conflagration, earthquake, disaster, or other public calamity may apply to a court by verified petition [*see § 356.68*] for an order establishing, reciting, or declaring the existence, substance, genuineness, or authenticity of such document or record [*Code Civ. Proc. § 1953.10*; *see § 356.71* for order].

Notice [*see § 356.70*] of the filing of the petition and of the time and place of the hearing thereon must be given to such persons, if any, as the court may designate by an order [*see § 356.69*]. The order must specify how notice is to be given; it may be by publication, posting, personal service, or otherwise as the court directs [*Code Civ. Proc. § 1953.11*].

The petition may be decided in a special proceeding in the course of a case [*see Daddario v. Snow Valley (1995) 36 Cal. App. 4th 1325, 1330, 1339, 43 Cal. Rptr. 2d 726]* without violating a party's right to a jury trial [*Daddario v. Snow Valley (1995) 36 Cal. App. 4th 1325, 1339, 43 Cal. Rptr. 2d 726* (special proceeding deciding petition under *Code Civ. Proc. § 1953.10* was not trial)].

[2] Hearing and Order

At the hearing on the petition, proof must be submitted to the court that the statements in the petition are true. If the court is satisfied, it makes an order reciting the existence, substance, genuineness, or authenticity of the document [*Code Civ. Proc. § 1953.12*]. The order is to refer to the document and shall be deemed in lieu of the original [*Code Civ. Proc. § 1953.13*]. The issuance of such an order precludes the admission or crediting of assertions about the contents of the restored document that are contrary to the findings in the order [*Daddario v. Snow Valley (1995) 36 Cal. App. 4th 1325, 1330, 43 Cal. Rptr. 2d 726* (declaration that plaintiff never signed release did not prevent summary judgment for defendant based on restored release)].

Given that an order restoring a private document is deemed in lieu of the original document, the order constitutes best evidence of the content of the document [*Daddario v. Snow Valley (1995) 36 Cal. App. 4th 1325, 1338, 43 Cal. Rptr. 2d 726]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDocumentary EvidenceBest Evidence RuleEvidenceDocumentary EvidenceWritingsGeneral Overview

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31-356 California Forms of Pleading and Practice--Annotated § 356.26

§ 356.26 Action to Restore Private Written Document or Instrument

[1] By Complaint

An action may be maintained by any person interested in any private document or instrument in writing which has been lost or destroyed to prove or establish such document or instrument or to compel the issuance, execution, and acknowledgment of a duplicate thereof [*Civ. Code § 3415(a)*; for complaint to compel execution of duplicate of lost or destroyed promissory note, *see § 356.72*].

[2] Security for Negotiable Instrument

If the document or instrument is a negotiable instrument, the court must compel the owner of the negotiable instrument to give an indemnity bond to the person reissuing, reexecuting, or reacknowledging the same, against loss, damage, expense, or other liability that may be suffered by the person by reason of the issuance of the duplicate instrument or by the original instrument still remaining outstanding [*Civ. Code § 3415(b)*; for a form order compelling execution of duplicate of lost or destroyed promissory note, *see § 356.73*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsContracts LawNegotiable InstrumentsEnforcementLost & Stolen Instruments

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31-356 California Forms of Pleading and Practice--Annotated § 356.27

§ 356.27 Proving Content of Lost Writings With Other Evidence

Generally, when best evidence is not available [*Daddario v. Snow Valley (1995) 36 Cal. App. 4th 1325, 1330, 43 Cal. Rptr. 2d 726* (order restoring lost private document constitutes best evidence precluding admission of secondary evidence)], the content of a writing may be proved by otherwise admissible secondary evidence [*Evid. Code § 1521(a)*]. These provisions give trial courts discretion to permit the use of copies to prove the content of a writing [*Kahn v. Lasorda's Dugout, Inc. (2003) 109 Cal. App. 4th 1118, 11231124, 135 Cal. Rptr. 2d 790]* .

However, in permitting the introduction of otherwise admissible secondary evidence to prove the contents of a writing, the statute does not excuse compliance with the hearsay rule [*Pajaro Valley Water Management Agency v. McGrath (2005) 128 Cal. App. 4th 1093, 1108, 27 Cal. Rptr. 3d 741]* .

The rule for the admission of secondary evidence of a lost paper requires that a bona fide and diligent search has been unsuccessfully made for it in the place where it was most likely to be found. The party is also expected to show that he or she has in good faith exhausted in a reasonable degree all the sources of information and means of discovery that [*Dart Industries, Inc. v. Commercial Union Ins. Co. (2002) 28 Cal. 4th 1059, 1068, 52 P.3d 79* ; *124 Cal. Rptr. 2d 142]* :

- The nature of the case would naturally suggest; and
- Are accessible to that party.

A corollary of the rule that the contents of lost documents may be proved by secondary evidence is that the law does not require the contents of such documents be proved verbatim. The substance of a lost or destroyed document is all that is required [*Dart Industries, Inc. v. Commercial Union Ins. Co. (2002) 28 Cal. 4th 1059, 1069, 52 P.3d 79* ; *124 Cal. Rptr. 2d 142]* .

By way of exception to the statutory rule, secondary evidence is not admissible to prove the content of a writing if either a genuine dispute exists concerning material terms of the writing and justice requires the exclusion, or admission of the secondary evidence would be unfair [*Evid. Code § 1521(a)*].

Under another exception, oral testimony is generally not admissible to prove the content of a writing [*Evid. Code § 1523(a)*]. However, oral testimony of the content of a writing is not inadmissible if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence [*Evid. Code § 1523(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsContracts LawNegotiable InstrumentsEnforcementLost & Stolen Instruments

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[Reserved]

§§ 356.28[Reserved]

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PART III. RESEARCH GUIDE

31-356 California Forms of Pleading and Practice--Annotated § 356.40

§ 356.40 State Statutes

[1] Effective Date of Restored Records

Restored records of county recorder as having same force and effect as if filed on date they should have been. *Code Civ. Proc. § 1046a*

[2] Land Records

Action under Destroyed Land Records Relief Law. *Code Civ. Proc. § 751.02*

More than one parcel of land in single action. *Code Civ. Proc. § 751.03*

Contents of verified complaint. *Code Civ. Proc. § 751.04*

Form and issuance of summons. *Code Civ. Proc. § 751.05*

Publication of summons. *Code Civ. Proc. § 751.06*

Names of adverse claimants as required to be stated in memorandum to summons. *Code Civ. Proc. § 751.07*

Posting of summons. *Code Civ. Proc. § 751.08*

Plaintiff's affidavit. *Code Civ. Proc. § 751.09*

Service of Summons. *Code Civ. Proc. § 751.10*

Jurisdiction of court. *Code Civ. Proc. § 751.11*

Contents of answer. *Code Civ. Proc. § 751.12*

Record of pendency of action as required to be filed. *Code Civ. Proc. § 751.13*

Judgment by default not permitted. *Code Civ. Proc. § 751.14*

Contents of judgment. *Code Civ. Proc. § 751.15*

Recordation of judgment. *Code Civ. Proc. § 751.16*

Applicable rules of practice. *Code Civ. Proc. § 751.17*

Depositions. *Code Civ. Proc. § 751.18*

Numbering of actions. *Code Civ. Proc. § 751.19*

Successive actions involving property where records reestablished. *Code Civ. Proc. § 751.20*

Executor, administrator, guardian, and conservator as authorized to bring action. *Code Civ. Proc. § 751.21*

Remedies as cumulative. *Code Civ. Proc. § 751.22*

Notice of ownership and claim. *Code Civ. Proc. § 751.23*

Verification of notice of ownership and claim. *Code Civ. Proc. § 751.24*

Recordation and indexing of notice of ownership and claim. *Code Civ. Proc. § 751.25*

Persons bringing actions as deemed to have notice of facts stated in notice of ownership and claim. *Code Civ. Proc. § 751.26*

Claimant as party in subsequent suit. *Code Civ. Proc. § 751.27*

Executor, administrator, guardian, and conservator as authorized to file notice and affidavit. *Code Civ. Proc. § 751.28*

[3] Lost Pleadings

Substitution of copy of court pleading or paper for lost original. *Code Civ. Proc. § 1045*

[4] [Reserved]

[5] Notice

Content and service of written notice. *Code Civ. Proc. § 1010 et seq.*

[6] Private Records Destroyed in Disaster

Contents and requirements of verified petition to establish existence and authenticity of record. *Code Civ. Proc. §*

1953.10

Notice of hearing. *Code Civ. Proc. § 1953.11*

Contents of order establishing private record. *Code Civ. Proc. § 1953.12*

Order as deemed in lieu of original record. *Code Civ. Proc. § 1953.13*

[7] Restoration of Court Record

[a] In General

Record defined. *Code Civ. Proc. § 1953*

Restoration in proceedings in rem. *Code Civ. Proc. § 1953.05*

Records on appeal. *Code Civ. Proc. § 1953.06*

[b] By Certified Copy

Contents of verified petition to restore record by certified copy. *Code Civ. Proc. § 1953.01*

Contents and effect of order substituting certified copy. *Code Civ. Proc. § 1953.02*

[c] Without Certified Copy

Contents and notice of petition to restore. *Code Civ. Proc. § 1953.03*

Contents of order restoring record. *Code Civ. Proc. § 1953.04*

[8] Private Written Instrument or Document

Action to compel issuance, execution, and acknowledgment of lost or destroyed private written instrument or document; requirement of indemnity to obligor where negotiable instrument involved. *Civ. Code § 3415*

[9] Recorded Maps

Restoring injured, destroyed, lost, or stolen recorded maps.*Code Civ. Proc. § 1855*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsContracts LawNegotiable InstrumentsEnforcementLost & Stolen InstrumentsEvidenceDocumentary EvidenceWritingsGeneral OverviewReal Property LawDeedsLost DeedsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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31-356 California Forms of Pleading and Practice--Annotated § 356.41

§ 356.41 California Rules of Court

Statement of decision. *Cal. Rules of Ct., Rule 3.1590*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsLost DeedsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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31-356 California Forms of Pleading and Practice--Annotated § 356.42

§ 356.42 Decisions

Destroyed Land Records Relief Law is constitutional and does not violate due process. *American Land Co. v. Zeiss (1911) 219 U.S. 47, 58-71, 31 S. Ct. 200, 55 L. Ed. 82*

Code Civ. Proc. § 1953.10 et seq. (governing issuance of order establishing existence, substance, and authenticity of document destroyed in disaster or calamity) do not require showing that petitioner is free of fault or fraudulent intent as otherwise referred to in *Code Civ. Proc. § 1953.03* or former *Evid. Code § 1501*. *Daddario v. Snow Valley, Inc. (1995) 36 Cal. App. 4th 1325, 1343, 43 Cal. Rptr. 2d 726*

Action under Destroyed Land Records Relief Law is in rem. *Callan v. Superior Court (1962) 204 Cal. App. 2d 652, 663, 22 Cal. Rptr. 508*

Effect of laches and statutes of limitation in actions pursuant to Destroyed Land Records Relief Law. *Universal Land Co. v. All Persons (1959) 172 Cal. App. 2d 739, 744-747, 342 P.2d 958*

County recorder is real party in interest in action to restore recorded map under former *Code Civ. Proc. § 1855b* (*now see Code Civ. Proc. § 1855*). *Lakeside Park Ass'n v. Sweeney (1958) 157 Cal. App. 2d 101, 104, 320 P.2d 513*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsTrue in Rem ActionsReal Property LawDeedsLost DeedsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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31-356 California Forms of Pleading and Practice--Annotated § 356.43

§ 356.43 Text References

Witkin, California Procedure, Vol. 3, *Actions*, § 983 (4th ed. 1996) (lost summons)

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31-356 California Forms of Pleading and Practice--Annotated §§ 356.44-356.49

[Reserved]

§§ 356.44[Reserved]

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31-356 California Forms of Pleading and Practice--Annotated § 356.50

§ 356.50 Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Complaint by Party Claiming an Estate in or Possession of Real Property Against All Adverse Claimants

[1] FORM Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Complaint by Party Claiming an Estate in or Possession of Real Property Against All Adverse Claimants

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
All Persons Claiming Any Interest in, or Lien Upon,	)	COMPLAINT UNDER DESTROYED LAND RE-
the Real Property Herein Described or Any Part	)	CORDS RELIEF LAW
Thereof,	)	
Defendants.	)	

Plaintiff alleges:

1. On or about _____ [*date*], the public records of the Office of the County Recorder of _____ County, California, were _____ [lost *or* destroyed] in _____ [whole *or* material part] by _____ [*describe how records were lost or destroyed, e.g.,* flood, fire, earthquake, enemy attack, *or any other cause*].

2. Among the public records so _____ [lost *or* destroyed] were all of the records and documents pertaining to real property described as follows: _____ [*set forth particular description of the real property*].

3. Plaintiff is _____ [*specify estate, title, or interest of plaintiff in property, e.g.*, the owner in fee simple absolute of all the real property herein described, and is and was, _____ (at all times herein mentioned *or* and has been for _____ years), in actual and exclusive occupation and possession of the above-described real property].

4. In addition to the interest plaintiff claims herein, there are no other or subsisting interests, mortgages, deeds of trust, liens, encumbrances, or estates of any kind or nature of other persons in the above-described real property, or in any part thereof, which are known to plaintiff [, except _____ (*specify any other actual or alleged interests of other persons in the real property known to plaintiff*)].

5. Plaintiff brings this action in rem against all the world pursuant to the Destroyed Land Records Relief Law, *Section 751.01-751.28 of the Code of Civil Procedure*, to establish his title to the above-described real property and to determine all adverse claims thereto.

WHEREFORE, plaintiff prays judgment as follows:

1. That he/she be adjudged the owner of such property in fee simple absolute.

2. That his title to the above-described property be established and quieted.

3. That the court ascertain and determine all estates, rights, titles, interests, and claims in and to the above-described property and every part thereof, whether the same be legal or equitable, present or future, vested or contingent, or whether the same consist of mortgages or liens of any description.

4. For costs and disbursements.

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*signature*]

[2] Use of Form

The complaint in [1], *above*, is for use in commencing an action under the Destroyed Land Records Relief Law [*Code Civ. Proc. §§ 751.01-751.28*] to establish title and determine all adverse claims to real property after the relevant public records in the office of the county recorder have been lost or destroyed. For further discussion on commencing action, see *§§ 356.11, 356.12*.

Plaintiff must also file a declaration setting forth certain specific facts [*Code Civ. Proc. § 751.09*; for plaintiff's declaration, *see § 356.51*].

[3] Allegations

The complaint must contain [*Code Civ. Proc. § 751.04*]:

- A statement of the facts enumerated in *Code Civ. Proc. § 751.02* (Paragraph 1).
- A particular description of the real property (Paragraph 2).
- A specification of the estate, title, or interest of the plaintiff in the property (Paragraph 3).

[4] Verification

The complaint must be verified [*Code Civ. Proc. § 751.04*; *see Code Civ. Proc. §§ 446, 2015.5*].

[5] Jurisdiction and Venue

The superior court has jurisdiction of the action as an unlimited civil case [*see Code Civ. Proc. §§ 85, 88, 580(b)(3), 751.02*].

The action may be brought in the superior court for the county in which the real property is situated. It may also be brought in the county in which the real property is situated either if any real property is in another county but was formerly in the county of which all or a material part of the records were lost or destroyed or if the lost or destroyed records included all or a material part of the public records in the office of the county recorder covering all or a material part of the time when the real property was in the county whose records were so lost or destroyed [*Code Civ. Proc. § 751.02*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsGeneral OverviewReal Property LawDeedsLost DeedsReal Property LawTitle QualityAdverse Claim ActionsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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31-356 California Forms of Pleading and Practice--Annotated § 356.51

§ 356.51 Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Declaration of Plaintiff [Code Civ. Proc. §§ 751.09, 2015.5]

[1] FORM Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Declaration of Plaintiff [Code Civ. Proc. §§ 751.09, 2015.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
All Persons Claiming Any Interest in, or Lien Upon,	)	DECLARATION OF PLAINTIFF
the Real Property Herein Described or Any Part	)	
Thereof,	)	
Defendants.	)	

_____

I, _____ [*name*], declare:

I am the plaintiff in the above-entitled action.

I am and have been for _____ [*number*] years _____ [*specify the character of declarant's estate, right, title, interest, or claim in the real property, e.g.*, the owner in fee simple absolute] of the parcel of real estate described in the complaint herein, and am, and have been for _____ [*number*] years, in actual and exclusive possession of the property and of the whole thereof.

I obtained this _____ [estate *or* right *or* title *or* interest *or* claim] in and possession of the real property from _____ [*name of person from whom interest was obtained*] on _____ [*date*], pursuant to _____ [*describe how interest was obtained, e.g.*, her last Will and Testament and under

and by virtue of a Decree of Final Distribution made and entered on _____ (*date*), in the Superior Court of the State of California, _____ County, in proceedings entitled "In the Estate of _____ (*name*), deceased," No. _____, a certified copy of which Decree was recorded in the office of the County Recorder of _____ County, on _____ (*date*), in Volume _____ of Official Records, at page _____].

I have never made any conveyance of the real property, or any part thereof, or any interest therein, to any person [, except _____ (*specify any conveyances made by declarant and the dates when made*)]. In addition to the interest claimed herein by me, there are no other or subsisting interests, mortgages, deeds of trust, liens, encumbrances, or estates of any kind or nature of other persons in the real property, or in any part thereof, known to me [, except _____ (*specify any other actual or alleged interests of other persons in the real property known to the declarant*)].

I do not know, and have not been informed, or any person who claims, or may claim, any interest in or lien on the property or any part thereof adversely to me [, except _____ (*specify the names and addresses of any person claiming an adverse interest in the real property*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].

_____ [*signature*]

[2] Use of Form

The plaintiff's declaration in [1], *above*, must be filed with a complaint in an action under the Destroyed Land Records Relief Law [*Code Civ. Proc. §§ 751.01-751.28*; for a complaint under the Destroyed Land Records Relief Law, see *§ 356.50*].

[3] Contents of Declaration

The declaration must fully and explicitly set forth and show the following [*Code Civ. Proc. § 751.09*]:

- The character of plaintiff's estate, right, title, interest, or claim in, and possession of the property as well as the period it has existed and from whom it was obtained.

- Whether or not the plaintiff has ever made any conveyance of all or any part of the property, or any interest therein, and if so when and to whom as well as a statement of any and all subsisting mortgages, deeds of trust, and other liens thereon.

- That the plaintiff does not know and has never been informed of any other person who claims or who may claim any interest in or lien on all or any part of the property adversely to him or her, or if he or she does know or has been informed of any such person, including persons filing notices of ownership under *Code Civ. Proc. §§ 751.23, 751.27*, the name and address of each such person.

[4] Declaration in Lieu of Affidavit

Although *Code Civ. Proc. § 751.09* refers to the statement which must accompany the complaint as an affidavit, *Code Civ. Proc. § 2015.5* permits the substitution of a declaration under penalty of perjury. Since this is the form of statement most commonly used, the form in [1], *above*, is presented as a declaration rather than an affidavit.

[5] Where No Ability to State Facts

If the plaintiff is unable to state any of the matters required by *Code Civ. Proc. § 751.09*, he or she must set forth and show fully and explicitly the reasons for such inability [*Code Civ. Proc. § 751.09*].

[6] Part of Judgment Roll

The plaintiff's declaration constitutes a part of the judgment roll [*Code Civ. Proc. § 751.09*].

[7] Who Makes Declaration

If the plaintiff is a corporation, the declaration is made by an officer of the corporation, and if the plaintiff is a person under guardianship or conservatorship, the declaration is made by his guardian or conservator [*Code Civ. Proc. § 751.09*]. An executor, administrator, guardian, conservator, or other person holding the possession of property in the right of another may make, sign, verify, and file for record the declaration on behalf of the estate or interest which he or she represents [*Code Civ. Proc. § 751.28*].

[8] Service With Complaint and Summons

If the declaration discloses the name of any person claiming any interest in or lien on the property adverse to the plaintiff, a copy of the declaration, along with a copy of the summons and the complaint must be served on such person if he or she can be found in the manner provided by law for the service of a summons in a civil action [*see Code Civ. Proc. §§ 415.10, 415.20*], other than by publication. Service must be made during the period of the publication of the summons as provided by *Code Civ. Proc. § 751.06* [*Code Civ. Proc. § 751.10*].

If the person cannot, with reasonable diligence, be served personally within the period of publication of the summons, then upon the expiration of the period of publication, a copy of the summons, memorandum, complaint, and declaration must be mailed, postage prepaid, addressed to him or her as follows [*Code Civ. Proc. § 751.10*]:

- At the address given in the declaration;
- If no such address is given, at his last address known to the plaintiff; or
- If no such address is available, at the county seat of the county in which the action is brought.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsLost DeedsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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31-356 California Forms of Pleading and Practice--Annotated § 356.52

§ 356.52 Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Summons With Memorandum [Code Civ. Proc. §§ 751.05-751.07]

[1] FORM Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Summons With Memorandum [Code Civ. Proc. §§ 751.05-751.07]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
All Persons Claiming Any Interest in, or Lien Upon,	)	SUMMONS
the Real Property Herein Described or Any Part	)	
Thereof,	)	
Defendants.	)	

To all persons claiming any interest in, or lien on, the real property herein described, or any part thereof, defendants:

You are hereby required to appear and answer the complaint of _____ [*name*], plaintiff, filed with the clerk of the above-entitled court, within three months after the first publication of this summons, and to set forth what interest or lien, if any, you have in or on that certain real property or any part thereof, situated in _____ County, California, particularly described as follows: _____ [*set forth description of real property*].

And you are hereby notified that, unless you so appear and answer, the plaintiff will apply to the court for the relief demanded in the complaint, to wit: _____ [*set forth statement of relief demanded, e.g.,* That it be adjudged that plaintiff is the owner of the property in fee simple absolute; that his title to the property be established and quieted; that the court ascertain and determine all estates, rights, titles, interests, and claims in and to the property, and

every part thereof, whether the same be legal or equitable, present or future, vested or contingent, and whether the same consists of mortgages or liens of any description; that plaintiff recover his costs herein and have such further relief as may be deemed proper by the court].
Dated: _____.

WITNESS my hand and the seal of this Court _____, Clerk

By _____ Deputy Clerk

MEMORANDUM

The first publication of this summons was made in _____ [*name of publication*] newspaper on _____ [*date*].

The following persons are said to claim an interest in, or lien on, the property adverse to plaintiff:

Names	Ad-dresses
_____	_____
_____	_____

[2] Use of Form

The form in [1], *above*, is for use as a summons to be issued under the seal of the superior court after the filing of a complaint [*Code Civ. Proc. §§ 751.02, 751.04, 751.05*] in proceedings to establish title and determine adverse claims under the Destroyed Land Records Relief Law [*Code Civ. Proc. §§ 751.01-751.28*].

[3] Contents of Form

[a] Summons

The summons must contain the name of the court and county in which the action is brought, the name of the plaintiff, and a particular description of the real property involved [*Code Civ. Proc. § 751.05*].

The description of the defendants as set forth in the form's caption is a statutory requirement [*see Code Civ. Proc. § 751.05*].

[b] Memorandum

The memorandum at the end of the summons meets the requirements of *Code Civ. Proc. § 751.06*. That section requires the summons to be published in a newspaper of general circulation in the county in which the action is brought; it also requires that the publication be made pursuant to *Gov. Code § 6065*, which provides for publication of a summons once a week for eight successive weeks [*Code Civ. Proc. § 751.06*]. If the declaration of the plaintiff [*see § 356.51[1]*] required by *Code Civ. Proc. § 751.09* discloses the name of any person claiming an interest in or a lien on the property, that fact and the name and address of such person must also be stated in the memorandum appended to the summons [*Code Civ. Proc. §§ 751.07, 751.27*]. This person must then be served with a copy of the summons and attached

memorandum, the complaint [for the form of complaint, *see § 356.50*], and the plaintiff's declaration [*Code Civ. Proc. § 751.10*; for the form of declaration, *see § 356.51*].

[4] Posting on Property

A copy of the summons and attached memorandum must also be posted in a conspicuous place on each separate parcel of property described in the complaint within 15 days after the first publication of the summons [*Code Civ. Proc. § 751.08*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsLost DeedsReal Property LawTitle QualityAdverse Claim ActionsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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31-356 California Forms of Pleading and Practice--Annotated § 356.53

§ 356.53 Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Court Order for Publication of Summons [Code Civ. Proc. § 751.06]

[1] FORM Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Court Order for Publication of Summons [Code Civ. Proc. § 751.06]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
All Persons Claiming Any Interest in, or Lien Upon,	)	ORDER FOR PUBLICATION OF SUMMONS
the Real Property Herein Described or Any Part	)	
Thereof,	)	
Defendants.	)	

The above-entitled action having been commenced by the above-named plaintiff against the above-named defendants in _____ County, California, under, by virtue of, and in accordance with the provisions of the Destroyed Land Records Relief Law, *Sections 751.01 to 751.28, inclusive, of the Code of Civil Procedure* of the State of California, and good cause appearing therefor, now therefore,

IT IS HEREBY ORDERED that the summons in this action be published in _____ [*name*], a newspaper of general circulation published in _____ County, California, at least once a week for eight successive weeks, pursuant to *Section 6065 of the Government Code*, and that to such summons when published shall be appended and published the memorandum required by *Section 751.06 of the Code of Civil Procedure* of the State of California.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use in designating the newspaper in which publication of the summons is to be made. The newspaper must be one of general circulation published in the county in which the action is brought, and the summons must be published at least once a week for eight successive weeks pursuant to *Gov. Code § 6065*. The order when signed by the court is filed with the clerk; no other order for publication of the summons is necessary, nor is any affidavit for such order required [*Code Civ. Proc. § 751.06*]. For a form of summons with memorandum, see *§ 356.52*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsClerks of CourtReal Property LawDeedsLost DeedsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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31-356 California Forms of Pleading and Practice--Annotated § 356.54

§ 356.54 Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Notice of Pendency of Action [Code Civ. Proc. § 751.13]

[1] FORM Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Notice of Pendency of Action [Code Civ. Proc. § 751.13]

Recorded at request of
and to be returned when
recorded to:
_____
[*name and address of party*
or attorney filing notice]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
All Persons Claiming Any Interest in, or Lien Upon,	)	NOTICE OF ACTION PENDING
the Real Property Herein Described or Any Part	)	
Thereof,	)	
Defendants.	)	

NOTICE IS HEREBY GIVEN that the above-entitled action was commenced on _____ [*date*], in the

above-named court by _____ [*plaintiff's name*], the above-named plaintiff against all person as defendants claiming any interest in, or liens on the real property described herein or any part thereof under and pursuant to the Destroyed Land Records Relief Law, *Sections 751.01-751.28 of the Code of Civil Procedure.* The action is now pending in the above-named court.

The object of plaintiff's action is to establish plaintiff's title as against all the world, and to determine all adverse claims, to the real property particularly described herein, the public records relating to which, in the office of the recorder of _____ County, have been _____ [lost *or* destroyed] by _____ [flood *or* fire *or* earthquake *or* enemy attack *or specify any other cause*].

The above-entitled action affects real property situated in _____ County, California, and is described as follows:

_____ [*set forth legal description, including street address, of real property*].
Dated: _____.

_____ [*signature*]

ACKNOWLEDGMENT

State of _____
County of _____

On _____ [*date*], before me _____ [*name and quality of officer*], personally appeared _____ [*name*], who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument, and acknowledged to me that he/she/they executed the same in his/her/their authorized _____ [capacity *or* capacities], and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal:

_____ [*signature*]

_____ [*name of office*]

_____ [*seal of office*]

[2] Use of Form

The form in [1], *above*, is for use as a notice of the pendency of an action, commonly referred to as a notice of lis pendens, which is required to be filed pursuant to *Code Civ. Proc. § 751.13*. At the time of filing the complaint, the plaintiff must record a notice of lis pendens in the office of the recorder of the county in which the property is situated. The form must contain the object of the action or defense and a particular description of the property affected by the action or defense [*Code Civ. Proc. § 751.13*]. For a form of complaint under the Destroyed Land Records Relief Law,

see *§ 356.50*.

[3] Acknowledgment

The form contains the standard form of acknowledgment [*see* Code Civ. Proc. § 1189], which would appear to be required on such notices by *Gov. Code § 27287*. However, in practice most county recorders do not appear to require such notices to be acknowledged; thus, the county recorder should be consulted for local requirements when the notice is being prepared.

[4] Recording

The notice is recorded in the same manner as provided in *Code Civ. Proc. § 405.20* (notice of action concerning or affecting real property) [*Code Civ. Proc. § 751.13*].

[5] Cross References

For alternative forms and general discussion of acknowledgments, see Ch. 8, *Acknowledgments*

For alternative forms and general discussion of notices of lis pendens, see Ch. 348, *Lis Pendens*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNoticesReal Property LawDeedsLost DeedsReal Property LawPriorities & RecordingLis PendensReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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31-356 California Forms of Pleading and Practice--Annotated § 356.55

§ 356.55 Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Notice of Ownership and Claim [Code Civ. Proc. § 751.23]

[1] FORM Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Notice of Ownership and Claim [Code Civ. Proc. § 751.23]

NOTICE OF OWNERSHIP AND CLAIM TO REAL PROPERTY UNDER THE DESTROYED LAND RECORDS RELIEF LAW

Notice is hereby given that _____ [*name of claimant*], whose residence is at _____ [*street and number*], _____ [*city*], _____ County, _____ [*state*], is an owner of an interest in the real property situated in the _____ [*city*], _____ County, California, described as follows: _____ [*set forth particular description of the property*].

The character of the interest in the real property owned by the claimant is _____ [*describe character of interest in or lien on*] and the interest was obtained from _____ [*name of party from whom interest was obtained*], and at the time and in the following manner: _____ [*time at which and manner in which the interest was acquired*].
Dated: _____.

_____ [*signature*]

VERIFICATION

I, _____ [*name*], am the claimant in the above Notice of Ownership and Claim to Real Property Under the Destroyed Land Records Relief Law. I have read the foregoing notice and know the contents thereof. The same is true of my own knowledge, and I declare under penalty of perjury under the laws of the State of California that the

foregoing is true and correct.

_____ [*signature*]

[2] Use of Form

The form in [1], *above,* is for use by any person who is or claims to be the owner of real property or of any interest therein or lien thereon. It may be filed for record by such person or a duly authorized agent in the office of the county recorder in situations where the title to the real property may be established or quieted pursuant to the Destroyed Land Records Relief Law [*Code Civ. Proc. §§ 751.01-751.28*]. If filed by an agent, the agent must be duly authorized by letter of attorney, which must be recorded in the office of the county recorder of the county where the property is situated prior to the signing and filing of this form [*Code Civ. Proc. § 751.23*].

[3] Verification

The notice must be signed by the claimant or by his agent and must be verified by the party signing it. The verification must be to the effect thatall of the statements therein contained are true to his knowledge [*Code Civ. Proc. § 751.24*; *see Code Civ. Proc. § 2015.5* (form of declaration)].

[4] Recordation

The notice is recorded in the same manner as provided in *Code Civ. Proc. § 405.20* (notice of action concerning or affecting real property) [*Code Civ. Proc. § 751.25*].

[5] Notice of Contents

Three days after the notice has been filed, all persons who may begin actions pursuant to *Code Civ. Proc. §§ 751.01-751.28* are deemed to have notice of facts stated. Neither the filing of the notice for record nor its recordation constitutes constructive notice to any other person or for any other purpose. The original of the notice is returned to the party requesting the recordation as provided in *Gov. Code § 27321* [*Code Civ. Proc. § 751.26*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsLost DeedsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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31-356 California Forms of Pleading and Practice--Annotated § 356.56

§ 356.56 Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Answer [Code Civ. Proc. §§ 431.30(b)(1), (2),751.12]

[1] FORM Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Answer [Code Civ. Proc. §§ 431.30(b)(1), (2),751.12]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiffs	)	
vs.	)	NO. _____
All Persons Claiming Any Interest in, or Lien Upon	)	ANSWER
the Real Property Herein Described or Any Part	)	
Thereof,	)	
Defendants.	)	

_____

Defendant _____ [*name*] answers plaintiff's complaint herein as follows:

1. Admits the truth of the allegations as contained in paragraph(s) _____ [*numbers*] of plaintiff's complaint.

2. Specifically denies _____ [*set out specific objections to paragraphs of plaintiff's complaint, e.g.*, that there are no other interests in the real property except plaintiff's interest as alleged in paragraph(s) _____ (*numbers*)]. Defendant states and asserts that he/she/it is _____ [*specifically set forth the estate, right, title, interest, or lien claimed by defendant*].

VERIFICATION

I, _____ [*name*], am a defendant in the above-entitled action. I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is an answer which may be used in responding to a complaint under the Destroyed Land Records Relief Law [*Code Civ. Proc. §§ 751.01-751.28*; for the form of complaint, *see § 356.50*] by any person having or claiming any estate, right, title, or interest in or to, or lien on, all or any part of the real property which is the subject of the action. The answer may be made at any time within three months after the first publication of the summons, or during such further time not exceeding 30 days as the court for good cause may grant. It must specifically set forth the estate, right, title, interest, or lien so claimed [*Code Civ. Proc. § 751.12*].

[3] Verification

The answer must be verified [*Code Civ. Proc. § 751.12*; *Code Civ. Proc. § 2015.5* (form of verification)].

[4] Cross References

For alternative forms and general discussion of answers, see Ch. 26, *Answers*

For alternative forms of verification, see Ch. 572, *Verification*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsLost DeedsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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31-356 California Forms of Pleading and Practice--Annotated § 356.57

§ 356.57 Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Statement of Decision [Code Civ. Proc. § 632]

[1] FORM Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Statement of Decision [Code Civ. Proc. § 632]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
All Person Claiming Any Interest in, or Lien Upon,	)	STATEMENT OF DECISION
the Real Property Herein Described or Any Part	)	
Thereof,	)	
Defendants.	)	

The above-entitled matter came on regularly for trial on _____ [*date*], before the above-entitled court without a jury [, a jury having been waived by the parties to the action]. Plaintiff, _____ [*name*], appeared [personally and] by and through his attorney, _____ [*name of attorney*]; _____ [there were no appearances by any defendants in the matter *or* defendant, _____ (*name*), appeared (personally and) by and through his attorney _____ (*name of attorney*)]. The matter having been heard, evidence both oral and documentary having been introduced, the court being fully advised in the matter, the matter having been submitted to the court for decision, and, after careful deliberation thereon, the court now renders its decision in writing and makes the following Statement of Decision:

STATEMENT OF DECISION

1. Plaintiff, pursuant to statute, duly filed his verified complaint and _____ [affidavit *or* declaration] with the court, and at the same time, filed a notice of the pendency of this action in the office of the County Recorder of _____ County, California, where the notice was recorded by the recorder, pursuant to statute, in a book devoted exclusively to the recordation of such notices [*if the property is still situated in the same county in which the records were destroyed*, add: and entered upon a map or plat of the parcels of land kept by him/her for that purpose, on that part of the map or plat representing the parcel described in the notice, areference to the date of the filing of the notice, and to the book and page of the record thereof].

2. Pursuant to order of this court dated _____, a copy of the summons in this matter together with an attached memorandum as prescribed by statute was published commencing on _____ [*date*], in _____ [*name*], a newspaper of general circulation as designated by order of this court, at least once a week for eight successive weeks as required by statute, and was posted in a conspicuous place on the real property described in the complaint on _____ [*date*], within 15 days after the first publication of the summons as prescribed by statute.

3. Plaintiff has used due diligence to discover the names and addresses of any other person who claims or who may claim any interest in or lien on any part of the real property described in the complaint, and _____ [has been unable to locate and has not been informed of any such person *or* has properly served all such persons as listed in plaintiff's _____ (affidavit *or* declaration) with a copy of the summons, complaint, and _____ (affidavit *or* declaration), as prescribed by statute].

4. On or about _____ [*date*], the public records of the office of the County Recorder of _____ County, California, were _____ [lost *or* destroyed] by _____ [*describe how records where lost or destroyed, e.g.*, flood, fire, earthquake, enemy attack, *or any other cause*], and among the public records so _____ [lost *or* destroyed] were all the records and documents pertaining to the real property described in the complaint.

5. Plaintiff is _____ [*specify estate, title, or interest of plaintiff in property, e.g.*, the owner in fee simple absolute of all the real property described in the complaint, and is and was, _____ (at all times mentioned herein *or* and has been for _____ years), in actual and peaceable occupation and possession of the real property].

6. There are no other or subsisting interests, mortgages, deeds of trust, liens, encumbrances, or estates of any kind or nature of persons other than plaintiff in the real property described in the complaint, or any part thereof [, except _____ (*specify all interests of persons other than plaintiff in real property, stating their names and addresses*)].

Let judgment be entered accordingly.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This statement of decision is not required in actions under the Destroyed Land Records Relief Law [*Code Civ. Proc. § 751.01 et seq.*]. It may, however, be used pursuant to *Code Civ. Proc. § 632*. On the request of any party appearing at the trial, made within 10 days after the court announces a tentative decision [*Cal. Rules of Ct., Rule 3.1590(d)*], or if the trial has lasted less than one calendar day, or less than eight hours over more than one day, made prior to submission of

the matter for decision [*Cal. Rules of Ct., Rule 3.1590(n)*], the court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial. The request for a statement of decision must specify those controverted issues as to which the party is requesting a statement of decision. After a party has requested such a statement, any party may make proposals as to the content of the statement of decision [*Code Civ. Proc. § 632*].

[3] Cross References

For further discussion and forms relating to statements of decision, see Ch. 529, *Statement of Decision*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsLost DeedsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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31-356 California Forms of Pleading and Practice--Annotated § 356.58

§ 356.58 Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Judgment [Code Civ. Proc. §§ 751.14, 751.15]

[1] FORM Proceedings to Establish Title and Determine Adverse Claims Under Destroyed Land Records Relief Law [Code Civ. Proc. §§ 751.01-751.28]--Judgment [Code Civ. Proc. §§ 751.14, 751.15]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
All Persons Claiming Any Interest in, or Lien Upon,	)	JUDGMENT
the Real Property Herein Described or Any Part	)	
Thereof,	)	
Defendants.	)	

The above-entitled matter came on regularly for trial on _____ [*date*], before the above-entitled court, the Honorable _____ [*name of judge*], Judge, presiding, sitting without a jury [, a jury having been duly waived]. Plaintiff appeared [personally and] by and through his attorney, _____ [*name of attorney*], and _____ [there were no appearances by any defendants in the matter *or* defendant, _____ (*name*), appeared (personally and) by and through his attorney _____ (*name of attorney*)]. Evidence, both oral and documentary, having been presented [by the parties], the matter having been argued and submitted to this court for decision, and the court, on request of _____ [*specify party*], having caused to be made and filed its written Statement of Decision, now therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that plaintiff was on _____, the date of the commencement of the above-entitled action, and now is _____ [*specify the estate, title, or interest of plaintiff in the property, e.g.*, the owner in fee simple absolute], and in actual and peaceable possession, of the real

property which is the subject of this matter, described as follows: _____ [*set forth particular description of the real property*].

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that no person other than plaintiff [, including defendant, _____ (*name*)], at the time of the commencement of this matter had or now has any estate, right, title, interest, or claim in or to the real property described herein, or any part thereof, either legal or equitable, present or future, vested or contingent [, except _____ (*specify all interests of persons other than plaintiff in the real property*)].

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that no person other than plaintiff [, including defendant, _____ (*name*)], at the time of the commencement of this lawsuit had or now has any mortgage or other lien of any description on the property or any part thereof [, except _____ (*specify all such interests in the real property and describe the persons holding them*)].

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiff's title to the real property described herein is hereby established and quieted against all the world.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The judgment in [1], *above*, is for use in proceedings under the Destroyed Land Records Relief Law [*Code Civ. Proc. §§ 751.01-751.28*]. It is patterned after the statement of decision as set forth in the form in *§ 356.57*. Judgment in such an action cannot be obtained by default; the court must require proof of the facts alleged in the complaint and other pleadings [*Code Civ. Proc. § 751.14*]. The judgment must determine all estates, rights, titles, interests, and claims in and to the property and every part thereof, whether legal or equitable, present or future, vested or contingent, or whether they consist of mortgages or liens of any decription. It is conclusive on every person who at the commencement of the action had or claimed any estate, right, title, or interest in or to all or any part of such property as well as on every person claiming under him or her by title subsequent to the commencement of the action [*Code Civ. Proc. §§ 751.15, 751.27*].

[3] Recordation

A certified copy of the judgment must be recorded in the office of the recorder of the county in which the action was commenced. Any party or the successor in interest of any party to the action may file the entire judgment roll for record in the office of the county recorder [*Code Civ. Proc. § 751.16*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsLost DeedsReal Property LawTitle QualityAdverse Claim ActionsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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31-356 California Forms of Pleading and Practice--Annotated § 356.59

§ 356.59 Proceedings to Restore Injured, Destroyed, Lost, or Stolen Recorded Map--Petition [Code Civ. Proc. § 1855]

[1] FORM Proceedings to Restore Injured, Destroyed, Lost, or Stolen Recorded Map--Petition [Code Civ. Proc. § 1855]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Petition of _____ [*name*] for a Decree and Order to Substitute a True Copy of Record in Place of a[n] _____ [Injured *or* Destroyed *or* Lost *or* Stolen] Original Map _____	))))	NO. _____ PETITION FOR RESTORATION OF _____ [INJURED *or* DESTROYED *or* LOST *or* STOLEN] MAP

Petitioner states and alleges:

1. He/She is the _____ [*describe petitioner's interest in having map restored of record, e.g.*, owner in fee simple *or* life tenant] of a certain tract of land commonly known as _____ [*street address*], _____ [*city*], _____ County, California, and more fully described as: _____ [*give legal description of property*].

2. On _____ [*date*], a map of the _____ [*describe what the map contained, e.g.*, the town site *or* subdivision plat] [on which the location of the real property was contained] was recorded in Map Book _____, page _____ of the Official Records of the County Recorder's office of _____ County, California.

3. _____ [On _____ (*date*), the map was _____ (injured *or* destroyed *or* lost *or* stolen) by _____ (*state cause, e.g.*, fire *or* earthquake), *or* Since _____ (*date*), the map has not been on file in the County Recorder's office, and petitioner is informed and believes it has been _____ (injured *or* destroyed *or* lost *or* stolen)] without fault on the part of petitioner.

4. He/She has a true and correct copy of the original map which is the subject of this petition, a copy of which is attached hereto as Exhibit A and made a part hereof, and which copy petitioner offers for record in place of the _____ [injured *or* destroyed *or* lost *or* stolen] original map.

WHEREFORE, petitioner prays:

1. That Exhibit A be decreed a true and correct copy of the original map described herein.

2. That the true and correct copy of the original map be ordered placed of record in the Official Records in the office of the County Recorder of _____ County, California, with such recordation to have the same force and effect as the recordation of the original map.

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled action. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*signature*]

[2] Use of Form

The petition in [1], *above*, is for use in obtaining restoration of a previously recorded original map which was injured, destroyed, lost, or stolen without the fault of the petitioner. The petition must be accompanied by a true and correct copy of the original map, and it must be verified [*Code Civ. Proc. § 1855*]. For discussion on the restoration of recorded maps, see *§ 356.21*.

[3] Service

A copy of the petition and a copy of the map offered for record must be served on the recorder of the county in which the proceedings are brought at least 10 days prior to the hearing. Further notice may be ordered given by the court as it deems proper [*Code Civ. Proc. § 1855*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSubdivisionsLocal RegulationReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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31-356 California Forms of Pleading and Practice--Annotated § 356.60

§ 356.60 Proceedings to Restore Injured, Destroyed, Lost, or Stolen Recorded Map--Notice of Hearing [Code Civ. Proc. § 1855b]

[1] FORM Proceedi ngs to Restore Injured, Destroyed, Lost, or Stolen Recorded Map--Notice of Hearing [Code Civ. Proc. § 1855b]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Petition of _____ [*name*], for a Decree and Order to Substitute a True Copy of Record in Place of a[n] _____ [Injured *or* Destroyed *or* Lost *or* Stolen] Original Map	))))	NO. _____ ORDER OF HEARING FOR RESTORATION OF _____ [INJURED *or* DESTROYED *or* LOST *or* STOLEN] MAP

_____

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], a hearing will be held to determine whether the court should grant a petition brought by _____ [*name of petitioner*], petitioner in the above-entitled matter, pursuant to *Section 1855 of the Code of Civil Procedure* for a decree that a copy of a map of the _____ [*describe what the map contains, e.g.,* town site *or* subdivision plat], now in the possession of petitioner, is a true and correct copy of an original map, which is alleged to have been recorded in the office of the _____ County Recorder and to have been _____ [injured *or* destroyed *or* lost *or* stolen], and for an order declaring the copy to be placed on record in the Official Records of the County Recorder of _____ County.
Dated: _____.

_____ [*name*], Clerk

By: _____ [*signature*], Deputy Clerk

[2] Use of Form

The notice of the time and place of the hearing in [1], *above*, is for use in proceedings to restore a recorded map which was injured, destroyed, lost, or stolen. It must be issued by the clerk and posted at least 10 days prior to the hearing at the courthouse in the county where the court is held [*Code Civ. Proc. § 1855*]. While it is not required by statute, it is suggested that a copy of this notice of hearing be served upon the recorder of the county in which the proceedings are brought at the same time that the petition is served pursuant to *Code Civ. Proc. § 1855*. For a petition to restore a recorded map, see *§ 356.59[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSubdivisionsLocal RegulationReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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Volume 31: Lis Pendens thru Mandate and Prohibition-Chs. 348-358
Chapter 356 LOST PAPERS
PART IV. FORMS

31-356 California Forms of Pleading and Practice--Annotated § 356.61

§ 356.61 Proceedings to Restore Injured, Destroyed, Lost, or Stolen Recorded Map--Order and Decree [Code Civ. Proc. § 1855]

[1] FORM Proceedings to Restore Injured, Destroyed, Lost, or Stolen Recorded Map--Order and Decree [Code Civ. Proc. § 1855]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Petition of _____ [*name*], for a Decree and Order to Substitute a True Copy of Record in Place of a[n] _____ [Injured *or* Destroyed *or* Lost *or* Stolen] Original Map _____	))))	NO. _____ ORDER AND DECREE FOR RESTORATION OF _____ [INJURED *or* DESTROYED *or* LOST *or* STOLEN] MAP

The above-entitled matter came on regularly for hearing on _____ [*date*], before the above-entitled court, the Honorable _____ [*name of judge*], Judge, presiding. The petitioner appeared [personally and] by and through his attorney, _____ [*name of attorney*], and _____ [there were no appearances by any other parties in the matter *or* _____ (*name of attorney*) appeared as attorney for _____ (*name*), _____ (*designate character of person making appearance*, *e.g.*, the Recorder of _____ County, California)]. Evidence, both oral and documentary, having been presented [by the parties], both for and against the petition herein, the court being fully advised in the matter, the matter having been submitted to the court, and it appearing to the court from the evidence presented that the copy of the map submitted by petitioner with his petition is a true and correct copy of the original map which is the subject of these proceedings, now therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the copy of the map of _____ [

describe map or its contents] submitted by petitioner herein is a true and correct copy of the original map previously recorded in the office of the Recorder of _____ County, California, and _____ [injured *or* destroyed *or* lost *or* stolen] on _____ [*date*], through no fault of the petitioner.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the copy of the original map be placed of record in the office of the Recorder of _____ County, California, in place of the original map, and when so placed of record, that it have the same force and effect as the original map would have had if it had not been _____ [injured *or* destroyed *or* lost *or* stolen].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is an order and decree restoring a previously recorded original map which was injured, destroyed, lost, or stolen without the fault of the petitioner by substituting a copy in place of the original map.

At the time set for hearing on the petition, the court takes evidence for and against the petition. If it appears to the court from the evidence presented that the copy of the map submitted is a true copy of the original map, it decrees that such copy is a true copy of the original map and orders the copy placed of record in the office of the recorder in the place of the original map [*Code Civ. Proc. § 1855*].

For the related petition, see *§ 356.59*. For a notice of hearing on the petition, see *§ 356.60*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSubdivisionsLocal RegulationReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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Volume 31: Lis Pendens thru Mandate and Prohibition-Chs. 348-358
Chapter 356 LOST PAPERS
PART IV. FORMS

31-356 California Forms of Pleading and Practice--Annotated § 356.62

§ 356.62 Proceedings to Restore Court Record by Certified Copy--Petition [Code Civ. Proc. § 1953.01]

[1] FORM Proceedings to Restore Court Record by Certified Copy--Petition [Code Civ. Proc. § 1953.01]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR RESTORATION OF COURT RE-
Defendant.	)	CORD BY CERTIFIED COPY
	)	
	)	

Petitioner states and alleges:

1. He/She is the _____ [*describe petitioner's capacity in proceeding, e.g.*, plaintiff] in the above-entitled matter and petitioner herein.

2. On _____ [*date*], all of the records of the clerk of the above-named court were _____ [lost *or* injured *or* destroyed] by reason of _____ [*describe conflagration or*

other public calamity, e.g., fire *or* earthquake], which was not caused in any way by the fault or neglect of petitioner.

3. Among the records so _____ [lost *or* injured *or* destroyed] were the _____ [*describe record sought to be restored, e.g.*, judgment record], in the above-entitled matter, of which petitioner _____ [*describe interest of petitioner in record, e.g.*, is the judgment creditor and holder thereof], and a duly certified copy of which is attached hereto as Exhibit A and made a part hereof.

WHEREFORE, petitioner prays:

1. That Exhibit A be ordered to have the same effect in all respects as the original would have had if it had not been _____ [lost *or* injured *or* destroyed].

2. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

[*Verification. See § 356.59[1].*]

[2] Use of Form

The petition in [1], *above*, is for use in any civil action, criminal action, or special proceeding in any court the purpose of which is to restore a record which was lost, injured, or destroyed by reason of conflagration or other public calamity when a certified copy of the original exists [*Code Civ. Proc. § 1953.01*]. When a certified copy of the original is not available for substitution, the petition in § 356.65 should be used. For discussion on restoring a court record if a certified copy exists, see *§ 356.22*.

[3] Verification

The petition must be verified [*Code Civ. Proc. § 1953.01*].

[4] Notice

Notice [for a form, *see § 356.63[1]*] must be given pursuant to *Code Civ. Proc. §§ 1010-1020*.

[5] Cross References

For discussion of notice pursuant to *Code Civ. Proc. §§ 1010-1020*, see Ch. 518, *Service of Summons and Papers*

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDocumentary EvidenceBest Evidence RuleGovernmentsCourtsClerks of CourtGovernmentsCourtsCourt

Records

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Volume 31: Lis Pendens thru Mandate and Prohibition-Chs. 348-358
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PART IV. FORMS

31-356 California Forms of Pleading and Practice--Annotated § 356.63

§ 356.63 Proceedings to Restore Court Record by Certified Copy--Notice of Hearing on Petition [Code Civ. Proc. §§ 1010, 1953.02]

[1] FORM Proceedings to Restore Court Record by Certified Copy--Notice of Hearing on Petition [Code Civ. Proc. §§ 1010, 1953.02]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF HEARING
Defendant.	)	
	)	
	)	

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard by the above-entitled court in Room _____ of the _____ [County] courthouse, a hearing will be held to determine whether the court on the petition of _____ [*name of petitioner*] in the above-entitled matter, pursuant to *Section 1953.02 of the Code of Civil Procedure*, should grant an order that the certified copy of _____ [*describe record to be restored,*

e.g., the default judgment] be restored, and that it be given the same force and effect in all respects as the original record, which was alleged to hae been _____ [lost *or* injured *or* destroyed].
Dated: _____.

_____ [*name*], Clerk

_____ [*signature*], Deputy Clerk

[2] Use of Form

The form in [1], *above*, is for use as a notice in proceedings for the restoration of a court record where a certified copy of the original exists [*Code Civ. Proc. § 1953.02*; for the related petition, *see § 356.62*].

The form may be adapted for use in proceedings where no certified copy of the original record exists [*Code Civ. Proc. § 1953.03*; *see* for a form of petition to restore court record without certified copy, *see § 356.65*]. The notice must be in writing, must state the grounds on which the petition or application is made, and indicate the papers, if any, on which the proceeding and hearing will be based [*Code Civ. Proc. § 1010*].

[3] Cross Reference

For discussion of giving notice pursuant to *Code Civ. Proc. §§ 1010-1020*, see Ch. 518, *Service of Summons and Papers*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsGovernmentsCourtsCourt Records

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31-356 California Forms of Pleading and Practice--Annotated § 356.64

§ 356.64 Proceedings to Restore Court Record by Certified Copy--Order [Code Civ. Proc. § 1953.02]

[1] FORM Proceedings to Restore Court Record by Certified Copy--Order [Code Civ. Proc. § 1953.02]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

	)	
	)	NO. _____
_____ [*name*],	)	ORDER FOR RESTORATION OF COURT RE-
Plaintiff,	)	CORD
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

The above-entitled matter came on regularly for hearing on _____ [*date*], before the above-entitled court, the Honorable _____ [*name of judge*], Judge, presiding. The petitioner appeared [personally and] by and through his attorney, _____ [*name of attorney*], and _____ [there were no appearances by any other parties in the matter *or* _____ (*name of party*) appeared (personally and)

by and through his attorney, _____ (*name of attorney*)]. Evidence, both oral and documentary, having been presented [by the parties], the court being fully advised in the matter, the matter having been submitted to the court, and it appearing to the court from the evidence presented that the original [*describe record sought to be restored, e.g.*, judgment record] was _____ [lost *or* injured *or* destroyed] as stated in petitioner's petition, now therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the certified copy _____ [*describe record, e.g.*, judgment record] attached to the petition herein as Exhibit A shall hereafter have the same force and effect in all respects as the original would have had if it had not been _____ [lost *or* injured *or* destroyed].
Dated: _____.

_____ [*signature*]

Judge of the [Superior] Court

[2] Use of Form

The order in [1], *above*, is for use in restoring a lost, injured, or destroyed, court record by substituting a certified copy in place of the original. After notice of the hearing on the petition for restoration has been made pursuant to *Code Civ. Proc. §§ 1010-1020*, and after the court has been shown to its satisfaction that the record has been lost, injured, or destroyed as claimed in the petition, the court makes an order that the certified copy will thereafter have the same effect in all respects as the original would have had [*Code Civ. Proc. § 1953.02*]. For a petition to restore a court record with its certified copy, see *§ 356.62*, and for a notice of hearing on the petition, see *§ 356.63*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewGovernmentsCourtsCourt Records

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31-356 California Forms of Pleading and Practice--Annotated § 356.65

§ 356.65 Proceedings to Restore Court Record Without Certified Copy--Petition [Code Civ. Proc. § 1953.03]

[1] FORM Proceedings to Restore Court Record Without Certified Copy--Petition [Code Civ. Proc. § 1953.03]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR RESTORATION OF COURT RE-
Defendant.	)	CORD
	)	
	)	

Petitioner states and alleges:

1. He/She is the _____ [*describe declarant's capacity in proceeding or interest in record, e.g.*, plaintiff and judgment creditor] in the above-entitled matter.

2. On _____ [*date*], all of the records of the clerk of the above-named court were _____ [lost *or* injured *or* destroyed] by reason of _____ [*describe conflagration or*

other public calamity causing loss, injury, or destruction, e.g., fire *or* earthquake], which was not caused in any way by the fault of neglect of petitioner.

3. Among the records so _____ [lost *or* injured *or* destroyed] was _____ [*describe record sought to be restored, e.g.*, the record of a default judgment against defendant and in favor of petitioner, entered on _____ [*date*], in the sum of $_____].

4. Certified copies of this record are not available or obtainable by petitioner and cannot be supplied to the court [, but a noncertified copy from the records of petitioner's attorney, _____ (*name of attorney*), containing the substance of the default judgment is attached hereto as Exhibit A and made a part hereof].

5. Unless this _____ [lost *or* injured *or* destroyed] record is restored by order of this court, petitioner will suffer great damage in that _____ [*state damage to declarant, e.g.*, petitioner will be unable to enforce the judgment as provided by law].

WHEREFORE, petitioner prays:

1. For an order of this court reciting the substance and effect of this _____ [lost *or* injured *or* destroyed] record.

2. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

[*Verification. See § 356.59[1].*]

[2] Use of Form

The petition in [1], *above*, is for use in any civil action, criminal action, or special proceeding in any court to restore a record which was lost, injured, or destroyed by reason of conflagration or other public calamity when a certified copy of the original does not exist [*Code Civ. Proc. § 1953.03*]. When a certified copy of the original is available for substitution, the petition in § 356.62 should be used. For discussion on restoring a court record when no certified copy exists, see *§ 356.22[2]*.

[3] Allegations

The petition must allege [*Code Civ. Proc. § 1953.03*]:

- That the loss, injury, or destruction occurred (Paragraphs 2, 3).
- That a certified copy of the record cannot be obtained by petitioner (Paragraph 4).

- That the loss, injury, or destruction occurred by conflagration, or other calamity, without the fault or neglect of petitioner (Paragraph 2).

- That the loss, injury, or destruction, unless supplied or remedied, may result in damage to petitioner (Paragraph 5).

[4] Notice

Notice must be given pursuant to *Code Civ. Proc. §§ 1010-1020* [*Code Civ. Proc. § 1953.03*]. For a form of notice which may be adapted for use when the petition in [1], *above*, is used, see *§ 356.63[1]*.

[5] Cross References

For discussion of notice pursuant to *Code Civ. Proc. §§ 1010-1020*, see Ch. 518, *Service of Summons and Papers*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsGovernmentsCourtsCourt Records

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31-356 California Forms of Pleading and Practice--Annotated § 356.66

§ 356.66 Proceedings to Restore Court Record Without Certified Copy--Order [Code Civ. Proc. § 1953.04]

[1] FORM Proceedings to Restore Court Record Without Certified Copy--Order [Code Civ. Proc. § 1953.04]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

	)	
	)	NO. _____
_____ [*name*],	)	ORDER FOR RESTORATION OF COURT RE-
Plaintiff,	)	CORD
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

The above-entitled matter came on regularly for hearing on _____ [*date*], before the above-entitled court, the Honorable _____ [*name of judge*], Judge, presiding. The petitioner appeared [personally and] by and through his attorney, _____ [*name of attorney*], and _____ [there were no appearances by any other parties in the matter *or* _____ (*name of party*) appeared (personally and)

by and through his attorney, _____ (*name of attorney*)]. Evidence, both oral and documentary, having been presented [by the parties], the court being fully advised in the matter, the matter having been submitted to the court, and the court being satisfied as to the truth of the statements contained in the petition, now therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the certified copy _____ [*state substance of lost, injured, or destroyed record, e.g.*, judgment was entered against defendant by default and in favor of petitioner, who is also the judgment creditor, in the above-entitled matter on _____ [*date*], in the sum of $_____ (as a result of goods sold and delivered between _____ [*date*] and _____ [*date*])].

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this order shall have the same effect as the original _____ [*describe record lost, injured, or destroyed, e.g.*, default judgment] would have had if it had not been _____ [lost *or* injured *or* destroyed], as to _____ [*name*], petitioner, and to all persons who have been notified of this proceeding pursuant to *Section 1953.03 of the Code of Civil Procedure.*
Dated: _____.

_____ [*signature*]

Judge of the [Superior] Court

[2] Use of Form

The order in [1], *above*, is for use in restoring a lost, injured, or destroyed court record where a certified copy of the original record is not available. After notice is given pursuant to *Code Civ. Proc. §§ 1010-1020* [*Code Civ. Proc. § 1953.03*; *see § 356.63[1]* for notice of hearing], a hearing is held where the court must be satisfied that the statements contained in the petition are true. The court will then issue an order reciting the substance and effect of the record being restored. The order has the same effect that the original record would have had if it had not been lost, injured, or destroyed, so far as concerns the petitioner and all persons who have been notified pursuant to *Code Civ. Proc. § 1953.03* [*Code Civ. Proc. § 1953.04*]. For a petition to restore a court record without a certified copy, see *§ 356.65[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsGovernmentsCourtsCourt Records

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31-356 California Forms of Pleading and Practice--Annotated § 356.67

[Reserved]

§ 356.67[Reserved]

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31-356 California Forms of Pleading and Practice--Annotated § 356.68

§ 356.68 Proceedings to Establish Private Records Destroyed in Disaster or Calamity--Petition [Code Civ. Proc. § 1953.10]

[1] FORM Proceedings to Establish Private Records Destroyed in Disaster or Calamity--Petition [Code Civ. Proc. § 1953.10]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

In the Matter of the Petition of _____ [*name and description of petitioner's identity if not a person*] for a Decree and Order Establishing the _____ [Existence *or* Substance *or* Genuineness *or* Authenticity] of _____ [*identify record or document*], which was _____ [Damaged *or* Rendered Illegible *or* Lost]	))))	NO. _____ PETITION TO ESTABLISH EXISTENCE OF _____ [*identify document or record*]

_____

Petitioner states and alleges:

1. He/She is _____ [*identity of petitioner*], who is the _____ [*describe petitioner's interest in document or record to be established*] of a certain _____ [*describe document or record to be established*].

2. On _____ [*date*], the _____ [*identify document or record to be established*] was in the possession of _____ [petitioner *or name of other party having possession*] at _____ [*street address*], _____ [*city*], California, where the _____ [*identify document or record*] was _____ [damaged *or* rendered _____ (wholly *or* partially) illegible *or* destroyed in _____ (whole *or* part) *or* lost] by reason of _____ [*describe cause, e.g.*, explosion *or* conflagration *or* earthquake *or* disaster *or other public calamity*].

3. Petitioner _____ [has in his possession a true and correct copy of the _____ (*identify document or record*), a copy of which is attached hereto as Exhibit A and made a part hereof, which Exhibit contains the full substance of such _____ (*identify document or record*) *or* does not have and is unable to obtain a copy of the _____ (*identify document or record*), but the substance and effect and the contents of the _____ (*identify document or record*) are as follows: _____ (*set forth in detail contents and substance of document or record to be established*)].

4. _____ [There are no other persons or parties having any interest in the _____ (*identify document or record*) to the knowledge of petitioner *or* The persons or parties having any interest in the _____ (*identify document or record*) to the knowledge of petitioner are as follows: _____ (*list the names and addresses of all interested persons or parties and describe their interests in the document or record to be established*)].

WHEREFORE, petitioner prays:

1. For an order _____ [establishing *or* reciting *or* declaring] the _____ [existence *or* substance *or* genuineness *or* authenticity] of _____ [*identify document or record*] _____ [as contained in Exhibit A attached hereto *or* pursuant to the information as stated herein], such order being deemed in lieu of the original _____ [*identify document or record*] and having the same effect as if the original had not been _____ [damaged *or* destroyed *or* lost *or* rendered _____ (wholly *or* partly) illegible].

2. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

Verification. See § 356.59[1].]

[2] Use of Form

The petition in [1], *above*, is for use in establishing the existence, substance, genuineness, or authenticity of any

memorandum, book, map, chart, manuscript, writing, account, entry, record, print, document, representation, or combination thereof that has been damaged, rendered wholly or partially illegible, destroyed in whole or in part, or lost by explosion, conflagration, earthquake, disaster, or other public calamity. The petition may be made by any person, corporation, copartnership, organization, institution, business, or member of a profession or calling interested in the document or record [*Code Civ. Proc. § 1953.10*]. For discussion on restoring private documents or records, see *§ 356.25*.

[3] Verification

The petition must be verified [*Code Civ. Proc. § 1953.10*].

Legal Topics:

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

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31-356 California Forms of Pleading and Practice--Annotated § 356.69

§ 356.69 Proceedings to Establish Private Records Destroyed in Disaster or Calamity--Order for Notice [Code Civ. Proc. § 1953.11]

[1] FORM Proceedings to Establish Private Records Destroyed in Disaster or Calamity--Order for Notice [Code Civ. Proc. § 1953.11]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

	)	
	)	NO. _____
	)	ORDER FOR NOTICE OF PETITION FILED AND
	)	HEARING THEREON
	)	Date: _____
In the Matter of the Petition of	)	Time: _____
_____ [*name and description of pe-*	)	Location: _____
titioner's identity if not a person] for a Decree and Or-	)	Judge: _____
der Establishing the _____	)	Date Action Filed: _____
[Existence *or* Substance *or* Genuineness *or* Authenti-	)	Trial Date: _____
city] of _____ [*identify record or*		
document], which was _____		
[Damaged *or* Rendered Illegible *or* Lost]		
_____		

A petition of _____ [*name of petitioner*], having been filed in the above-entitled matter on _____ [*date*], for an order _____ [establishing *or* reciting *or* declaring] the _____ [existence *or* substance *or* genuineness *or* authenticity] of _____ [*identify document or record to be established*] pursuant to *Code Civ. Proc. § 1953.10* and a hearing on the petition having been set for _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in Room _____ of the _____ [County] courthouse, located at _____ [*address*], _____ [*city*], California, now therefore,

IT IS HEREBY ORDERED that notice of the filing of the petition and the time and place of the hearing thereon be given pursuant to *Section 1953.11 of the Code of Civil Procedure* to the following persons in the manner specified as follows: _____ [*list names and address of persons and manner of notice to be given or served on each*].

[IT IS FURTHER ORDERED that notice of the filing of the petition and the time and place of the hearing thereon be posted in the _____ [County] courthouse at least _____ days prior to such hearing.]
Dated: _____.

_____ [*signature*]

Judge of the [Superior] Court

[2] Use of Form

The order in [1], *above*, is for use in directing that notice be given to persons interested in a petition to establish the existence of a private document or record and the hearing thereon. Such notice of the filing of the petition and the time and place of the hearing thereon must be given to any persons that the court may designate by order. The order must specify how such notice is to be given and may be by publication, posting, personal service, or otherwise as the court directs [*Code Civ. Proc. § 1953.11*]. For a petition to establish the existence of private records destroyed in disaster, see *§ 356.68*.

Legal Topics:

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

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31-356 California Forms of Pleading and Practice--Annotated § 356.70

§ 356.70 Proceedings to Establish Private Records Destroyed in Disaster or Calamity--Notice [Code Civ. Proc. § 1953.11]

[1] FORM Proceedings to Establish Private Records Destroyed in Disaster or Calamity--Notice [Code Civ. Proc. § 1953.11]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

	)	
	)	NO. _____
	)	NOTICE OF PETITION FILED AND HEARING THEREON
	)	
In the Matter of the Petition of	)	Time: _____
_____ [*name and description of petitioner's identity if not a person*] for a Decree and Order Establishing the _____ [Existence *or* Substance *or* Genuineness *or* Authenticity] of _____ [*identify record or document*], which was _____ [Damaged *or* Rendered Illegible *or* Lost]	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard by the above-entitled court, in Room _____ of the _____ [County] courthouse, located at _____ [*address*], _____ [*city*], California, a hearing will be held on the petition of _____ [*name of petitioner*] for an order _____ [establishing *or* reciting *or* declaring] the _____ [existence *or* substance *or* genuineness *or* authenticity] of _____ [*identify document or record to be established*] pursuant to *Code Civ. Proc. § 1953.10*.
Dated: _____.

_____ [*name*], Clerk

By _____ [*signature*], Deputy Clerk

[2] Use of Form

The notice in [1], *above,* is for use in giving notice of the filing of a petition to establish the existence of a private document or record pursuant to court order. Proof must be submitted to the court at the hearing on the petition that notice has been given as prescribed by the order [*Code Civ. Proc. § 1953.11*; for order for notice, see *§ 356.69[1]*].

Legal Topics:

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

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California Forms of Pleading and Practice--Annotated

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Volume 31: Lis Pendens thru Mandate and Prohibition-Chs. 348-358
Chapter 356 LOST PAPERS
PART IV. FORMS

31-356 California Forms of Pleading and Practice--Annotated § 356.71

§ 356.71 Proceedings to Establish Private Records Destroyed in Disaster or Calamity--Order [Code Civ. Proc. §§ 1953.12, 1953.13]

[1] FORM Proceedings to Establish Private Records Destroyed in Disaster or Calamity--Order [Code Civ. Proc. §§ 1953.12, 1953.13]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

In the Matter of the Petition of _____ [*name and description of petitioner's identity if not a person*] for a Decree and Order Establishing the _____ [Existence *or* Substance *or* Genuineness *or* Authenticity] of _____ [*identify record or document*], which was _____ [Damaged *or* Rendered Illegible *or* Lost] _____	))))))))))	NO. _____ ORDER ESTABLISHING EXISTENCE OF PRIVATE DOCUMENT OR RECORD Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

The above-entitled matter came on regularly for hearing on _____ [*date*], before the above-entitled court, the Honorable _____ [*name of judge*], Judge, presiding. The petitioner appeared [personally and] by and through his attorney, _____ [*name of attorney*], and _____ [there were no appearances by any other parties in the matter *or* _____ (*name of party*) appeared (personally and) by and through his attorney, _____ (*name of attorney*)]. It appearing that notice of the petition herein and hearing thereon having been given to all interested parties pursuant to an order of this court dated _____, evidence, both oral and documentary, having been presented [by the parties] [both for and against the petition herein], the court being fully advised in the matter, the matter having been submitted to the court, and the court being satisfied that the statements contained in the petition are true, now therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the _____ [*describe document or record to be established*], which was _____ [damaged *or* rendered _____ (wholly *or* partially) illegible *or* destroyed in _____ (whole *or* part) *or* lost] by reason of _____ [*describe cause, e.g.*, explosion *or* conflagration *or* earthquake *or* disaster *or other public calamity*] on _____ [*date*], _____ [was *or* is] _____ [*recite the existence, substance, genuineness, or authenticity of documentto be established*] [_____ as contained in Exhibit A attached to the petition herein *or* pursuant to information as stated in the petition].

IT IS FURTHER ORDERED that this order shall be deemed in lieu of the original _____ [*identify document or record to be established*] and have the same effect as if the original had not been _____ [damaged *or* rendered _____ (wholly *or* partially) illegible *or* destroyed in _____ (whole *or* part) *or* lost].
Dated: _____.

_____ [*signature*]

Judge of the [Superior] Court

[2] Use of Form

The order in [1], *above*, is for use in establishing the existence of a private document or record. Before the order can be issued, a hearing must be held where proof must be submitted to the court that notice [for a form, *see § 356.70*] has been given as prescribed by court order [*Code Civ. Proc. § 1953.11*; *see § 356.69[1]*]. The court receives such evidence as may be required, and if it is satisfied that the statements contained in the petition [for a form, *see § 356.68*] are true, its order recites the existence, substance, genuineness, or authenticity of the destroyed or lost document or papers [*Code Civ. Proc. § 1953.12*]. The order must refer to the memorandum, book, map, chart, manuscript, writing, account, entry, record, print, document, representation, or combination thereof which is the subject of the petition. The order is deemed in lieu of the original document or paper and has the same effect as if the original had not been damaged, destroyed, or otherwise rendered wholly or partially illegible [*Code Civ. Proc. § 1953.13*].

Legal Topics:

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

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Volume 31: Lis Pendens thru Mandate and Prohibition-Chs. 348-358
Chapter 356 LOST PAPERS
PART IV. FORMS

31-356 California Forms of Pleading and Practice--Annotated § 356.72

§ 356.72 Complaint to Compel Execution of Duplicate of Lost or Destroyed Private Written Instrument or Document [Civ. Code § 3415]--Promissory Note

[1] FORM Complaint to Compel Execution of Duplicate of Lost or Destroyed Private Written Instrument or Document [Civ. Code § 3415]--Promissory Note

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT TO COMPEL EXECUTION OF DU-
Defendant.	)	PLICATE OF LOST OR DESTROYED PRIVATE
	)	WRITTEN INSTRUMENT OR DOCUMENT
	)	

Plaintiff states and alleges:

1. At all times herein mentioned plaintiff was and is a resident of _____ [*city*], _____ County, California, and defendant was and is a resident of [*city*], _____ County, California.

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

3. On _____ [*date*], for value received, defendant made, executed, and delivered to plaintiff a promissory note in the amount of $_____, payable to plaintiff as follows: _____ [*specify terms and conditions of instrument*].

4. _____ [On or about _____ (*date*) *or* On a date unknown to plaintiff but subsequent to the delivery of the promissory note to plaintiff by defendant], the [original] promissory note was _____ [*describe what happened to instrument, e.g.*, lost *or* destroyed as a result of _____ (*state cause*)] and no longer is in existence. [A copy of such promissory note is attached hereto as Exhibit A and made a part hereof.]

5. The balance due and owing on the promissory note at the time of its _____ [loss *or* destruction] was $_____.

6. On _____ [*date*], plaintiff requested and demanded that defendant execute and deliver a new promissory note to plaintiff to replace the _____ [lost *or* destroyed] note, but defendant failed and refused, and continues to fail and refuse to execute and deliver such new promissory note.

7. Plaintiff stands ready to give an indemnity bond to defendant pursuant to *Section 3415 of the Civil Code* with sureties approved by the court at the court's direction to indemnify defendant against loss, damage, expense, or other liability which may be suffered by him/her by reason of the issuance of the duplicate promissory note.

WHEREFORE, plaintiff prays judgment as follows:

1. For an order compelling defendant to make, execute, and deliver a new promissory note to plaintiff pursuant to the terms as stated _____ [in Exhibit A attached to this complaint *or* herein] as a replacement for the _____ [lost *or* destroyed] original note after plaintiff gives adequate security or an indemnity bond as directed by the court.

2. For costs and disbursements.

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 356.50[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in compelling the issuance, execution, and acknowledgment of a duplicate of a promissory note that has been lost or destroyed. Any person interested may bring the action [*Civ. Code § 3415*]. The form alleges the loss or destruction of the note, its contents or terms and the current amount due; it also contains an offer to post an indemnity bond. The court must order such security or bond to indemnify the defendant against any loss, damage, expense, or other liability which may be suffered by reason of the issuance of a duplicate instrument or by the original instrument still remaining outstanding [*Civ. Code § 3415*]. For discussion on actions to restore private written documents or instruments, see *§ 356.26*.

[3] Cross Reference

For a complaint by an executor of a payee against the maker for restoration of a lost note, see Ch. 385, *Negotiable Instruments*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsEnforcementLost & Stolen InstrumentsContracts LawNegotiable InstrumentsNegotiationDelivery

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Chapter 356 LOST PAPERS
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31-356 California Forms of Pleading and Practice--Annotated § 356.73

§ 356.73 Order Compelling Execution of Duplicate of Lost or Destroyed Private Written Instrument or Document [Civ. Code § 3415]--Promissory Note

[1] FORM Order Compelling Execution of Duplicate of Lost or Destroyed Private Written Instrument or Document [Civ. Code § 3415]--Promissory Note

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

	)	
	)	NO. _____
_____ [*name*],	)	ORDER COMPELLING EXECUTION OF DU-
Plaintiff,	)	PLICATE OF LOST OR DESTROYED PROMIS-
vs.	)	SORY NOTE
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

The above-entitled matter came on regularly for hearing on _____ [*date*], before the above-entitled

court, the Honorable _____ [*name of judge*], Judge, presiding. The plaintiff appeared [personally and] by and through his attorney, _____ [*name of attorney*], and the defendant appeared [personally and] by and through his attorney, _____ [*name of attorney*]. Evidence, both oral and documentary, having been presented by the parties hereto, the court being fully advised in the matter, the matter having been submitted to the court, and the court being satisfied that the promissory note, which is the subject of plaintiff's complaint, has been _____ [lost *or* destroyed] as stated in the complaint, now therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendant make, execute, and deliver to plaintiff a new promissory note in the amount of $_____ containing the following terms and conditions: _____ [*specify terms and conditions of instrument*], which duplicate promissory note shall replace the original note.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that defendant's making, executing, and delivering to plaintiff of the duplicate promissory note be conditioned upon plaintiff giving an indemnity bond in the amount of $_____ [containing the following provisions: _____ (*state any special terms, conditions, or provisions to be contained in the bond such as duration or when the bond may be released*)], which will exist toindemnify defendant against loss, damage, expense, or other liability that may be suffered by reason of the issuance of the duplicate promissory note or by the original instrument still remaining outstanding.

[IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that defendant pay to plaintiff the sum of $_____ as costs herein.]
Dated: _____.

_____ [*signature*]

Judge of the [Superior] Court

[2] Use of Form

The order in [1], *above*, is for use in ordering defendant to execute a duplicate of a promissory note that was either lost or destroyed. The order may be conditioned on the plaintiff's giving an indemnity bond [*Civ. Code § 3415(b)*]. It appears that the bond no longer has to be approved by the court [*see Code Civ. Proc. § 995.410(a)*]. Such security or bond is required by *Civ. Code § 3415* when the document to be restored is a negotiable instrument, and the purpose of the security or bond is to indemnify the defendant against loss, damage, expense, or other liability which may be suffered by him or her by reason of the issuance of the duplicate instrument or by the original instrument still remaining outstanding [*Civ. Code § 3415*]. For a form of complaint to compel execution of duplicate of lost promissory note, see *§ 356.72*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsGeneral OverviewContracts LawNegotiable InstrumentsEnforcementLost & Stolen Instruments

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Volume 31: Lis Pendens thru Mandate and Prohibition-Chs. 348-358
Chapter 357 MALICIOUS PROSECUTION AND ABUSE OF PROCESS

31-357 California Forms of Pleading and Practice--Annotated 357.syn

§ 357.syn Synopsis to Chapter 357: MALICIOUS PROSECUTION AND ABUSE OF PROCESS

§ 357.01 Scope of Chapter

§ 357.02 Cross References

§§ 357.03-357.09 [Reserved]

§ 357.10 Proceedings on Which Action May Be Based

§ 357.11 Proceedings on Which Action May Not Be Based

[1] Small Claims

[2] Binding Arbitration

[3] Motions and Writs During Course of Litigation

[4] Appellate Proceedings

[5] Administrative Proceedings Not Resulting in Formal Action

[6] Family Law Motions

[7] Injunction Against Harassment

[8] Contempt Proceeding Ancillary to Ongoing Action

[9] Motions in Related Proceedings

§ 357.12 Unfavored Action

§ 357.13 Elements of Tort

§ 357.14 Favorable Termination

[1] On or Reflecting Merits

[2] Action Still Pending

[3] Voluntary Dismissal

[4] Judicial Arbitration Award

[5] Multiple Theories and Multiple Causes of Action

[6] Criminal Actions

[7] Burden of Proof

[8] Effect of Requirement

§ 357.15 Affirmative Relief Sought in Underlying Action

§ 357.16 Lack of Probable Cause

[1] In General

[2] Evidence

[3] Objective and Subjective Standard of Proof

[4] Burden of Proof

[5] Relation to Favorable Termination Requirement

[6] No Inference From Malice

[7] Question of Law or Fact

[8] Irrelevance of Attorney Research

[9] Vicarious Liability

§ 357.17 Malice

[1] In General

[2] Evidence

[a] Direct and Circumstantial

[b] Inference From Lack of Probable Cause

[3] Question of Fact

[4] Malice Per Se

§ 357.18 Damages

[1] Compensatory

[2] Punitive Damages

[a] In General

[b] Malice Defined

[c] Wealth of Defendant as Factor in Award

§ 357.19 Test for Malicious Criminal Prosecution

§ 357.20 Alternative Theories of Recovery or Charges Actionable

§ 357.21 Cross Complaints Actionable

[1] In General

[2] Cross Complaints Prohibited in Main Action

§ 357.22 Absolute Privilege Not Available

§ 357.23 Defenses

[1] In General

[2] Advice of Counsel

[a] In General

[b] Limitations

[c] Burden of Proof

[d] Questions of Fact

[3] Honest Statement of Facts

[4] Probable Cause

[5] Action by Governmental Entity Not Permitted

[6] Immunity of Public Employees

[7] Immunity of Public Entity

[8] Immunity of Anonymous Witness Program

§ 357.24 Motion to Strike Cause of Action Based on Constitutionally Privileged Conduct (Anti-SLAPP Statute)

[1] Purpose and Use

[2] Requirements

[3] Procedure

[4] Underlying Suit Dismissed Under Anti-SLAPP Statute ("SLAPPback" Suit)

§ 357.25 Request for Defense Costs Under Code Civ. Proc. § 1038

§ 357.26 Statute of Limitations

[1] In General

[2] When Period Begins to Run

[3] Effect of Pending Appeal

§ 357.27 Effect of Insurance Coverage for Tort

§ 357.28 False Imprisonment Distinguished

§ 357.29 Personal Action

§ 357.30 Criminal Penalties Imposed

§ 357.31 Cost Payment by Criminal Complainant

§ 357.32 Prior Court Approval for Pleading Action Against Attorney Not Required Under Civ. Code § 1714.10

§§ 357.33-357.49 [Reserved]

§ 357.50 Definition

§ 357.51 Elements of Tort

§ 357.52 Acts Held to Constitute Abuse of Process

§ 357.53 Acts Held Not to Constitute Abuse of Process

[1] No Misuse

[2] No Action Under Judicial Authority

§ 357.54 Malicious Prosecution Distinguished

§ 357.55 Damages

§ 357.56 Absolute Privilege for Judicial Proceedings

[1] Availability

[2] Not an Evidentiary Privilege

[3] Effect of Defendant's Standing

§ 357.57 Statute of Limitations

§ 357.58 Abuse of Process as Contempt

§§ 357.59-357.69 [Reserved]

§ 357.70 Forms of Discovery

§ 357.71 State Statutes

§ 357.72 Decisions

[1] Absolute Privilege Not Available

[2] Alternative Theories of Recovery or Charges Actionable

[3] Cross Complaints Actionable

[4] Cross Complaints Prohibited in Main Action

[5] Damage Without a Wrong Possible

[6] Damages

[a] Compensatory

[b] Punitive Damages

[7] Defenses

[a] Advise of Counsel

[i] In General

[ii] Burden of Proof

[iii] Limitations

[iv] Question of Fact

[b] Attorney's Reasonable Belief

[c] Generally

[d] Honest Statement of Facts

[e] Immunity of Public Employees

[f] Immunity of Public Entity

[g] Probable Cause

[h] Res Judicata

[i] Unclean Hands

[8] Definition

[9] Elements of Tort

[10] False Imprisonment Distinguished

[11] Favorable Termination

[a] In General

[b] Burden of Proof

[c] Effect of Requirement

[d] Examples for Civil Actions

[e] Examples for Criminal Actions

[f] Theory Underlying Requirement

[12] Lack of Probable Cause

[a] In General

[b] Burden of Proof

[c] Evidence

[d] No Inference From Malice

[e] Question of Law or Fact

[f] Relation to Favorable Termination Requirement

[g] Standard of Proof

[h] Vicarious Liability

[13] Liability of Corporation

[14] Malice

[15] Evidence

[a] In General

[b] Inference From Lack of Probable Cause

[c] Malice Per Se

[d] Question of Fact

[16] Personal Action

[17] Proceedings on Which Action May Be Based

[18] Proceedings on Which Action May Not Be Based

[a] Administrative Proceedings

[b] Bankruptcy

[c] Suit Against Government

[19] Statute of Limitations

[20] Test for Malicious Criminal Prosecution

[21] Unfavored Action

§ 357.73 Law Reviews

§ 357.74 Text References

§§ 357.75-357.89 [Reserved]

§ 357.90 California Points and Authorities

§ 357.91 California Torts

§ 357.92 Forms of Discovery

§ 357.93 State Statutes

§ 357.94 Decisions

[1] Absolute Privilege for Judicial Proceedings

[2] Acts Constituting Abuse of Process

[3] Acts Not Constituting Abuse of Process

[a] No Misuse

[b] No Action Under Judicial Authority

[4] Contempt

[5] Damages

[6] Definition

[a] In General

[b] "Process" Defined

[7] Elements of Tort

[8] Malicious Prosecution Distinguished

[9] Order to Show Cause re Contempt

[10] Permissible Inferences

[11] Statute of Limitations

§ 357.95 Law Reviews

§ 357.96 Text References

§§ 357.97-357.109 [Reserved]

§ 357.110 Facts and Documents re Complaint

§ 357.111 Prepare Complaint

§ 357.112 Verification of Complaint

§ 357.113 Prepare Summons

§ 357.114 File Complaint

§ 357.115 Service of Summons and Complaint

§ 357.116 Default Judgment

§ 357.117 Discovery

§ 357.118 Set for Trial

§§ 357.119-357.129 [Reserved]

§ 357.130 Facts and Documents re Answer

§ 357.131 Prepare Response

§ 357.132 File Response

§ 357.133 Discovery

§ 357.134 Set for Trial

§§ 357.135-357.149 [Reserved]

§ 357.150 Facts and Documents re Complaint

§ 357.151 Prepare Complaint

§ 357.152 Verification of Complaint

§ 357.153 Prepare Summons

§ 357.154 File Complaint

§ 357.155 Service of Summons and Complaint

§ 357.156 Default Judgment

§ 357.157 Discovery

§ 357.158 Set for Trial

§§ 357.159-357.169 [Reserved]

§ 357.170 Facts and Documents re Answer

§ 357.171 Prepare Response

§ 357.172 File Response

§ 357.173 Discovery

§ 357.174 Set for Trial

§§ 357.175-357.189 [Reserved]

§ 357.190 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages--Malicious Prosecution of Criminal Action--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Venue

[6] Alternative Count for False Imprisonment

[7] Pleading

[a] Generally

[b] Favorable Termination

[c] Probable Cause

[d] Malice

[8] Favorable Termination

[9] Lack of Probable Cause

[a] In General

[b] No Inference From Malice

[10] Malice

[a] In General

[b] Inference From Lack of Probable Cause

[c] Malice Per Se

[11] Cross References

[12] State Statutes

[13] Decisions

[a] Burden of Proof

[b] Damages

[i] Compensatory

[ii] Punitive Damages

[c] False Imprisonment

[d] Favorable Termination

[e] Lack of Probable Cause

[i] In General

[ii] No Inference From Malice

[f] Malice

[g] Pleading

§ 357.191 Allegation--Favorable Termination of Criminal Prosecution--Dismissal by Prosecutor

[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

§ 357.192 Allegation--Favorable Termination of Criminal Prosecution--Acquittal

[1] FORM

[2] Use of Form

[3] Acquittal as Favorable Termination

[4] Decisions

[5] Cross References

§ 357.193 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages--Malicious Prosecution of Civil Action--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Favorable Termination

[a] In General

[b] Pleading

[5] Lack of Probable Cause

[6] Decisions

[a] Favorable Termination

[b] Lack of Probable Cause

[c] Proximate Cause

[7] Cross References

§ 357.194 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages--Malicious Prosecution of Administrative Proceeding--Several Defendants Conspiring to Charge Plaintiff With Gross Immorality and Unprofessional Conduct During Employment

[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

§ 357.195 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Criminal Action--No Favorable Termination of Prior Proceeding--Innocence of Plaintiff Not Indicated

[1] FORM

[2] Use of Form

[3] Decisions

§ 357.196 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Criminal Action--Probable Cause Established by Advice of Prosecuting Attorney

[1] FORM

[2] Use of Form

[3] Burden of Proof

[4] Proof After General Denial Permitted

[5] Evidence; Limitation

[6] Decisions

§ 357.197 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Criminal Action--Probable Cause Established Because Plaintiff Was in Fact Guilty of Offense Charged

[1] FORM

[2] Use of Form

[3] Availability of Defense After Acquittal

[4] Decisions

§ 357.198 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Criminal Action--Honest Statement of Facts to Authorities

[1] FORM

[2] Use of Form

[3] Decisions

§ 357.199 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Civil Action--No Favorable Termination of Prior Proceeding--Settlement

[1] FORM

[2] Use of Form

[3] Decisions

§ 357.200 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Civil Action--No Favorable Termination of Prior Proceeding--Case Still Pending

[1] FORM

[2] Use of Form

[3] Decisions

§ 357.201 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Civil Action--Probable Cause Established by Advice of Counsel

[1] FORM

[2] Use of Form

[3] Burden of Proof

[4] Questions of Fact

[5] Decisions

§ 357.202 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Civil Action--Probable Cause Established by Attorney's Honest and Reasonable Belief in Client's Claim

[1] FORM

[2] Use of Form

[3] Decisions

§ 357.203 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Civil Action--Waiver of Action by Request for Defense Costs Under Code Civ. Proc. § 1038 [Code Civ. Proc. § 1038(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 357.204 General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Favorable Termination of Prior Proceeding Not Alleged

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

[5] Decisions

[6] Text References

§ 357.205 General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Immunity of Public Employee [Gov. Code § 821.6]

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

[5] Decisions

[6] Cross References

§ 357.206 General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Immunity of Public Entity [Gov. Code §§ 815.2(b), 821.6]

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

[5] Decisions

[6] Cross References

§§ 357.207-357.219 [Reserved]

§ 357.220 Complaint for Damages [Civ. Code § 3333] for Abuse of Process--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Venue

[5] Broad Interpretation of "Process"

[6] Damages

[7] Cross References

[8] Forms of Discovery

[9] State Statutes

[10] Decisions

[a] Acts Constituting Abuse of Process

[b] Damages

[c] Definitions

[i] Abuse of Process

[ii] "Process"

[d] Elements of Tort

[i] In General

[ii] Favorable Termination of Prior Action Unnecessary

[e] Malicious Prosecution Distinguished

[f] Permissible Inferences

[g] Statute of Limitations

§ 357.221 Complaint for Damages [Civ. Code § 3333] for Abuse of Process Regarding Wage Garnishment [Code Civ. Proc. §§ 706.050-706.051]; Unlawful Debt Collection [Civ. Code § 1788.11]; and for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction [Bus. & Prof. Code § 17200 et seq.; Civ. Code § 3422]--By Judgment Debtor--Against Judgment Creditor

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction

[6] Specification of Damages

[7] Cross References

[8] State Statutes

[9] Law Reviews

§ 357.222 General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--No Improper Use of Process Alleged

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

[5] Decisions

[6] Cross References

§ 357.223 General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--No Action Taken Pursuant to Judicial Authority Alleged

[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

§ 357.224 General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Action Barred on Its Face by Statute of Limitations [Code Civ. Proc. § 335.1]

[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

§ 357.225 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Absolute Privilege [Civ. Code § 47(b)] for Publication in Judicial Proceedings

[1] FORM

[2] Use of Form

[3] Standing to Raise Defense

[4] Decisions

§ 357.226 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--No Malice Present When Defendant Has Acted on Advice of Attorney--No Liability for Punitive Damages

[1] FORM

[2] Use of Form

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Volume 31: Lis Pendens thru Mandate and Prohibition-Chs. 348-358
Chapter 357 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART I. SCOPE

31-357 California Forms of Pleading and Practice--Annotated § 357.01

§ 357.01 Scope of Chapter

This chapter discusses the tort of malicious prosecution and contains the following forms:

- Complaints and allegations for use when the original proceeding was a criminal action [*see* §§ 357.190-357.192].
- Complaints for use when the original proceeding was a civil action [*see* §§ 357.193-357.194].
- Affirmative defenses [*see* §§ 357.195-357.202.5].
- Demurrers [*see* §§ 357.204-357.206].

For discussion and forms for use in actions involving torts which often arise from the same factual situations as actions for malicious prosecution, see Ch. 58, *Assault and Battery* , Ch. 257, *False Imprisonment* , Ch. 340, *Libel and Slander* , and Ch. 362, *Mental Suffering and Emotional Distress* .

This chapter also discusses the tort of abuse of process and contains forms of complaints for abuse of process [*see §§ 357.220*, *357.221*], forms of demurrers to complaints for abuse of process [*see* §§ 357.222-357.224], and forms of affirmative defenses to such complaints [*see §§ 357.225*, *357.226*].

For discussion and forms involving wrongful attachment as an abuse of process, see Ch. 62, *Attachment* .

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For related research and practice materials, see the following legal topics:
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§ 357.02 Cross References

For forms and discussion involving the defense that act was committed by police officer in making arrest, see Ch. 58, *Assault and Battery* .

For forms and discussion relating to a tort action against an attorney for incorrectly given advice, see Ch. 76, *Attorney Professional Liability* .

For forms and discussion relating to damages in tort actions, see Ch. 177, *Damages* .

For forms and discussion relating to false imprisonment, see Ch. 257, *False Imprisonment* .

For forms and discussion relating to recovery of damages for mental suffering and emotional distress and for the cause of action for intentional infliction of mental distress, see Ch. 362, *Mental Suffering and Emotional Distress* .

For forms and discussion relating to governmental immunity, see generally, Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

For discussion and forms involving wrongful attachment as an abuse of process, see Ch. 62, *Attachment* .

For discussion and forms relating to actions for possession of personal property and the provisional remedy of claim and delivery, see Ch. 119, *Claim and Delivery* .

For discussion and illustrative forms of complaints and cross complaints, see Ch. 123, *Complaints and Cross Complaints* .

For discussion and forms for use in contempt proceedings, see Ch. 135, *Contempt* .

For discussion and forms for use in enforcement of judgments by execution, see Ch. 254, *Executions and Enforcement of Judgments* .

For discussion and forms related to a violation of personal liberty, see Ch. 257, *False Imprisonment* .

For discussion and forms relating to garnishment, see Ch. 276, *Garnishment* .

For discussion and forms related to injury to reputation, see Ch. 340, *Libel and Slander* .

For forms and discussion relating to recovery of damages for mental suffering and emotional distress and for the cause of action for intentional infliction of mental distress, see Ch. 362, *Mental Suffering and Emotional Distress* .

For discussion and forms related to interference with contracts, see Ch. 565, *Unfair Competition* .

Legal Topics:

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[Reserved]

§§ 357.03[Reserved]

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31-357 California Forms of Pleading and Practice--Annotated § 357.10

§ 357.10 Proceedings on Which Action May Be Based

Actions for malicious prosecution may be predicated on either a malicious criminal prosecution or a malicious civil action [*Webb v. Youmans (1967) 248 Cal. App. 2d 851, 854, 57 Cal. Rptr. 11* (civil)].

Actions may also be based on ancillary process or an ancillary proceeding such as a writ of execution [*see McPheeters v. Bateman (1936) 11 Cal. App. 2d 106, 108, 53 P.2d 195*], an attachment levied in an action prosecuted maliciously and without probable cause [*see White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 348-349, 66 Cal. Rptr. 697, 438 P.2d 345* (dictum)], an order for civil arrest [*Siffert v. McDowell (1951) 103 Cal. App. 2d 373, 378, 229 P.2d 388*], an injunction [*see Asevado v. Orr (1893) 100 Cal. 293, 297-298, 34 P. 777*], or an order appointing a receiver [*see Jones v. Richardson (1935) 9 Cal. App. 2d 657, 660, 50 P.2d 810*].

Malicious prosecution actions may also be based on insanity proceedings [*Brock v. Southern Pac. Co. (1948) 86 Cal. App. 2d 182, 185, 195 P.2d 66*].

The offering of a forged will for probate may support an action for malicious prosecution [*Steiner v. Eikerling (1986) 181 Cal. App. 3d 639, 645, 226 Cal. Rptr. 694*].

One court has stated that proceedings ancillary to a marital dissolution action, such as an order to show cause re modification of support or contempt, will support a malicious prosecution action [*see Chauncey v. Niems (1986) 182 Cal. App. 3d 967, 975-976, 227 Cal. Rptr. 718*]. However, subsequent cases have characterized that statement as dicta and have declined to follow it, holding that such contempt proceedings cannot be the basis of a malicious prosecution action [*Bidna v. Rosen (1993) 19 Cal. App. 4th 27, 37-38, 23 Cal. Rptr. 2d 251* ; *Green v. Uccelli (1989) 207 Cal. App. 3d 1112, 1120-1123, 255 Cal. Rptr. 315* ; *Lossing v. Superior Court (1989) 207 Cal. App. 3d 635, 637-638, 255 Cal. Rptr. 18* ; *see § 357.72[18]*].

Administrative proceedings may be the basis for a malicious prosecution action [*Hardy v. Vial (1957) 48 Cal. 2d 577, 581, 311 P.2d 494*].

However, malicious prosecution actions cannot be based on proceedings that are not instituted *against* another. For example, proceedings that deal instead with broader issues of public interest, such as a comparative hearing concerning the issuing of an FCC license, are not proceedings *against* another for purposes of a malicious prosecution action [*Stolz v. Wong Communications Limited Partnership (1994) 25 Cal. App. 4th 1811, 1820-1821, 31 Cal. Rptr. 2d 229*].

Several court opinions have held that a malicious prosecution action can be based on a denial of privileges that triggers a right to appeal, even though the appeal proceeding is actually triggered by the malicious prosecution plaintiff [*Axline v. Saint John's Hosp. & Health Ctr. (1998) 63 Cal. App. 4th 907, 916-917, 74 Cal. Rptr. 2d 385* ; *Nicholson v. Lucas (1994) 21 Cal. App. 4th 1657, 1666, 26 Cal. Rptr. 2d 778* (letter denying staff privileges to physician that triggered right to seek appeal with hospital was sufficient to support malicious prosecution action by physician; both cases)].

For a listing of additional cases in which malicious prosecution actions have been allowed, see the Research Guide, § 357.70 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 357.11 Proceedings on Which Action May Not Be Based

[1] Small Claims

An action for malicious prosecution cannot be based on the institution of a small claims proceeding, because otherwise a prudent claimant would be forced to consult with an attorney before using a statutory process intended as an attorney-free method of settling disputes over small amounts [*Black v. Hepner (1984) 156 Cal. App. 3d 656, 658-659, 202 Cal. Rptr. 799* ; *Pace v. Hillcrest Motor Co. (1980) 101 Cal. App. 3d 476, 479, 161 Cal. Rptr. 662*]. Nor can the action be based on a successful appeal in superior court from the small claims judgment [*Cooper v. Pirelli Cable Corp. (1984) 160 Cal. App. 3d 294, 298-300, 206 Cal. Rptr. 581*].

[2] Binding Arbitration

The California Supreme Court has held that a proceeding terminated through contractual arbitration, unlike judicial arbitration [*see § 357.14[4]*], cannot be the basis for a subsequent malicious prosecution action, regardless of whether the underlying action originated in court or in arbitration [*Brennan v. Tremco Inc. (2001) 25 Cal. 4th 310, 314, 105 Cal. Rptr. 2d 790, 20 P.3d 1086*]. The Court based its decision on the trend against creating or expanding derivative tort remedies, together with the recognition that parties who voluntarily choose arbitration generally expect and desire that the arbitration will end the dispute [*Brennan v. Tremco Inc. (2001) 25 Cal. 4th 310, 315, 105 Cal. Rptr. 2d 790, 20 P.3d 1086*].

In addition, the Court noted that binding contractual arbitration is fundamentally different from judicial arbitration in important ways. A dissatisfied party to private contractual arbitration does not have a right to request a trial de novo or judicial review of the arbitrator's decision. Moreover, an arbitrator in most instances of contractual arbitration does not even need to provide an explanation of the basis for the decision. The lack of a written rationale for the decision would frustrate any determination of whether or why the action was terminated in favor of a particular party, which is an indispensable inquiry in prosecuting a malicious prosecution action [*Brennan v. Tremco Inc. (2001) 25 Cal. 4th 310, 316, 105 Cal. Rptr. 2d 790, 20 P.3d 1086* ; *see also Sagonowsky v. More (1998) 64 Cal. App. 4th 122, 131-134, 75 Cal. Rptr. 2d 118* ; *see generally § 357.14*].

The holding in *Brennan v. Tremco Inc.* prohibits a malicious prosecution action against both the actual party who brought the underlying action and that party's attorney [*Brennan v. Tremco Inc. (2001) 25 Cal. 4th 310, 317, 105 Cal. Rptr. 2d 790, 20 P.3d 1086* (disapproving *Rogers v. Peinado (2000) 85 Cal. App. 4th 1, 101 Cal. Rptr. 2d 817* , which would have allowed malicious prosecution action against attorney who was not actually party to arbitration agreement)]. However, the Supreme Court's opinion does not entirely foreclose the possibility of a malicious prosecution action if the arbitration agreement explicitly states that such an action may be brought [*see* *Brennan v. Tremco Inc. (2001) 25 Cal. 4th 310, 318, 105 Cal. Rptr. 2d 790, 20 P.3d 1086* ; *see also* *Sagonowsky v. More (1998) 64 Cal. App. 4th 122, 134, 75 Cal. Rptr. 2d 118*].

[3] Motions and Writs During Course of Litigation

Motions and writs that are filed during the course of existing litigation that are not separate proceedings may not by themselves be the basis for a malicious prosecution action [*Merlet v. Rizzo (1998) 64 Cal. App. 4th 53, 60, 75 Cal. Rptr. 2d 83* ; *Silver v. Gold (1989) 211 Cal. App. 3d 17, 24, 259 Cal. Rptr. 185*].

[4] Appellate Proceedings

Thus, a malicious prosecution action cannot be based on an allegedly frivolous appeal, because an appeal cannot be considered a separate action seeking affirmative relief [*Coleman v. Gulf Ins. Group (1986) 41 Cal. 3d 782, 793-794, 226 Cal. Rptr. 90, 718 P.2d 77*]. Similarly, an unsuccessful motion to disqualify opposing counsel will not support a suit for malicious prosecution [*Silver v. Gold (1989) 211 Cal. App. 3d 17, 23-24, 259 Cal. Rptr. 185*]. The filing of a writ of sale as an attempt to enforce an existing judgment cannot be the basis for a malicious prosecution action, nor can the filing of a motion for reconsideration [*Merlet v. Rizzo (1998) 64 Cal. App. 4th 53, 60-64, 75 Cal. Rptr. 2d 83*].

[5] Administrative Proceedings Not Resulting in Formal Action

Additionally, an investigation by an official body or administrative board that has the power to take action adversely affecting the legally protected interests of the person being investigated cannot be the basis of a malicious prosecution action if the investigation does not lead to the initiation of formal proceedings against the investigated person [*Lebbos v. State Bar (1985) 165 Cal. App. 3d 656, 670, 211 Cal. Rptr. 847* ; *Brody v. Montalbano (1978) 87 Cal. App. 3d 725, 736, 151 Cal. Rptr. 206*]. If, however, the invasion of the investigated person's legally protected interest occurs without a formal hearing, and it is the investigated person who mustinitiate the formal proceeding to secure reinstatement of a position or a license, then a malicious prosecution action may lie [*Imig v. Ferrar (1977) 70 Cal. App. 3d 48, 60, 138 Cal. Rptr. 540* (plaintiff allowed to amend complaint to state cause of action for malicious prosecution)].

[6] Family Law Motions

No malicious prosecution action may arise out of unsuccessful family law motions or orders to show cause [*Bidna v. Rosen (1993) 19 Cal. App. 4th 27, 37, 23 Cal. Rptr. 2d 251* (rejecting language in *Chauncey v. Niems (1986) 182 Cal. App. 3d 967, 975-976, 227 Cal. Rptr. 718* , stating that order to show cause could have sufficiently independent existence to justify malicious prosecution, as unpersuasive dicta)]. A litigant in a proceeding under the Family Code who has been subjected to meritless motions and/or orders to show cause is limited to remedies under *Code Civ. Proc. § 128.5* and *Fam. Code § 271*, despite the arguable "inadequacy" of those remedies [*Bidna v. Rosen (1993) 19 Cal. App. 4th 27, 36-37, 23 Cal. Rptr. 2d 251*].

However, this does not preclude a malicious prosecution action based on otherwise ordinary civil actions or cross-actions that just happen to originate in the course of family law proceedings, at least if family law issues such as marital status, child custody, or spousal support are not implicated [*Nicholson v. Fazeli (2003) 113 Cal. App. 4th 1091, 1098-1099, 6 Cal. Rptr. 3d 881*]. In one case, for example, a malicious prosecution action based on a cross-complaint brought by a trust seeking the return of trust property, or damages for the property's loss, was not barred merely because the cross-complaint originated during a marital dissolution action [*Nicholson v. Fazeli (2003)*

113 Cal. App. 4th 1091, 1098-1099, 6 Cal. Rptr. 3d 881].

[7] Injunction Against Harassment

For many of the same reasons that a family law motion will not generally support a malicious prosecution action, an unsuccessful petition for an injunction prohibiting harassment under *Code Civ. Proc. § 527.6* is not a proper basis for a subsequent malicious prosecution action [*Siam v. Kizilbash (2005) 130 Cal. App. 4th 1563, 1572-1574, 31 Cal. Rptr. 3d 368*]. Harassment actions often stem from bitter and even irrational disputes, and this background of bitterness often makes it difficult to distinguish between a malicious petition and one that is not malicious. *Code Civ. Proc. § 527.6* also provides for attorney's fees as a sanction for filing a frivolous petition. Moreover, proceedings under *Code Civ. Proc. § 527.6* were designed to be processed simply and expeditiously, with little or no involvement by attorneys, a goal that would be frustrated if consultation with an attorney were necessary to protect against a subsequent lawsuit [*Siam v. Kizilbash (2005) 130 Cal. App. 4th 1563, 1572-1573, 31 Cal. Rptr. 3d 368*].

Subsequently, the court of appeal also held that filing an action for an injunction under the Workplace Violence Safety Act, *Code Civ. Proc. § 527.8*, will not support a subsequent malicious prosecution action if the request for an injunction is denied. The court concluded that because the provisions and goals of *Code Civ. Proc. § 527.8* are substantially similar to those of *Code Civ. Proc. § 527.6*, the justification for not allowing a subsequent malicious prosecution action following an unsuccessful petition under *Code Civ. Proc. § 527.6* applied with equal force to an unsuccessful petition under *Code Civ. Proc. § 527.8* [*Robinzine v. Vicory (2006) 143 Cal. App. 4th 1416, 1422-1424, 50 Cal. Rptr. 3d 65]* .

[8] Contempt Proceeding Ancillary to Ongoing Action

It has generally been held that a malicious prosecution action cannot be based on the institution of a contempt proceeding that is ancillary to an ongoing action [*Lossing v. Superior Court (1989) 207 Cal. App. 3d 635, 638-639, 255 Cal. Rptr. 18* (contempt proceedings to sanction discovery abuse); *Green v. Uccelli (1989) 207 Cal. App. 3d 1112, 1121-1122, 255 Cal. Rptr. 315* (contempt proceedings for disobedience of court order in family law proceeding)]. The malicious prosecution action is not permitted even if an order to show cause re contempt was taken off calendar or discharged by the court after hearing [*Green v. Uccelli (1989) 207 Cal. App. 3d 1112, 1122, 255 Cal. Rptr. 315*]. These courts have reasoned that to permit the action would have a chilling effect on access to the courts to enforce orders, and on the vigorous legal representation to which a client is entitled. Moreover, a variety of statutory remedies exists that can be applied within the ongoing action to prevent or remedy abuse of the contempt sanction [*Lossing v. Superior Court (1989) 207 Cal. App. 3d 635, 639-639, 255 Cal. Rptr. 18* ; *Green v. Uccelli (1989) 207 Cal. App. 3d 1112, 1122-1124, 255 Cal. Rptr. 315*].

[9] Motions in Related Proceedings

A malicious prosecution action cannot be based on the making of a motion, by a party to an ongoing action, in litigation to which the movant is not a party, when making the motion is legitimately related to the ongoing action. One rationale for this prohibition is that to permit the cause of action would disrupt the ongoing action by injecting tort claims against the parties' lawyers. The other rationale is that the court with jurisdiction over the litigation in which the motion is made has inherently broad powers to control the proceedings before it [*Adams v. Superior Court (1992) 2 Cal. App. 4th 521, 528, 3 Cal. Rptr. 2d 49* (motion by counsel for adverse party in ongoing civil action for reconsideration of orders issued during plaintiff's criminal trial to reduce or expunge the plaintiff's prior felony convictions)].

For a listing of additional cases in which malicious prosecution actions have been held not to lie, see the Research Guide, § 357.70 et seq.

Legal Topics:

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§ 357.12 Unfavored Action

Malicious prosecution is a cause of action not favored by the law [*Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 872-873, 254 Cal. Rptr. 336, 765 P.2d 498* (civil); *Babb v. Superior Court (1971) 3 Cal. 3d 841, 847, 92 Cal. Rptr. 179, 479 P.2d 379* (civil)]. This means, at least in the context of criminal actions, the public policy is in favor of the apprehension and punishment of criminals; that policy, therefore, limits the person complaining of criminal charges by placing on him or her the burden of proving the basic elements of the tort of malicious prosecution [*Grove v. Purity Stores, Ltd. (1957) 153 Cal. App. 2d 234, 242, 314 P.2d 543* (criminal)]. But, since public policy does not limit the right to seek redress for the malicious abuse of judicial process, the phrase stating that these actions are not favored should not be employed to defeat a legitimate cause of action [*Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 53, 118 Cal. Rptr. 184, 529 P.2d 608* (civil)].

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§ 357.13 Elements of Tort

To establish a cause of action for malicious prosecution, a plaintiff must plead and prove all of the following:

- The prior action was commenced by or at the direction of the defendant and was pursued to a legal termination in the plaintiff's favor.

- The prior action was brought without probable cause.

- The prior action was initiated with malice [*Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 871, 254 Cal. Rptr. 336, 765 P.2d 498* (civil); *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 50, 118 Cal. Rptr. 184, 529 P.2d 608* (civil); *Jaffe v. Stone (1941) 18 Cal. 2d 146, 149, 114 P.2d 335* (criminal); *Robbins v. Blecher (1997) 52 Cal. App. 4th 886, 892-893, 60 Cal. Rptr. 2d 815*].

- The plaintiff suffered an injury or damage as a result [*Maxon v. Security Ins. Co. (1963) 214 Cal. App. 2d 603, 613, 29 Cal. Rptr. 586* (criminal)].

The plaintiff has the burden of proving the basic elements of the tort. However, these same elements, viewed from the defendant's perspective, furnish full defenses [*Jaffe v. Stone (1941) 18 Cal. 2d 146, 159, 114 P.2d 335* (criminal)].

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§ 357.14 Favorable Termination

[1] On or Reflecting Merits

The plaintiff in a malicious prosecution action must plead and prove that the prior judicial proceeding of which he or she complains terminated in his or her favor [*Babb v. Superior Court (1971) 3 Cal. 3d 841, 845, 92 Cal. Rptr. 179, 479 P.2d 379* (civil)]. A favorable termination is one that tends to indicate the innocence of the accused, and although the termination need not be one that follows a trial on the merits, it must reflect the merits of the underlying action [*De La Pena v. Wolfe (1986) 177 Cal. App. 3d 481, 484, 223 Cal. Rptr. 325*]. For example, termination by bar of the statute of limitations does not reflect on the merits of the action, and thus does not constitute favorable termination for purposes of a malicious prosecution action [*Lackner v. LaCroix (1979) 25 Cal. 3d 747, 752, 159 Cal. Rptr. 693, 602 P.2d 393*]. However, an action is favorably terminated if a trial court grants summary judgment to the defendant based on the statute of limitations, but a reviewing court then affirms the judgment on thegrounds the action lacks intrinsic merit as a matter of law [*Ray v. First Fed. Bank (1998) 61 Cal. App. 4th 315, 317, 71 Cal. Rptr. 2d 436* (court of appeal decision affirming summary judgment reflected on merits and on malicious prosecution plaintiff's innocence)].

Application of the parol evidence rule to exclude evidence of terms that vary, alter, or add to an integrated written agreement, leading to a judgment in favor of the party asserting the integrated written agreement, is not procedural in nature, but instead is a judgment on the merits. As such, it constitutes a favorable termination for purposes of a subsequent malicious prosecution action [*Casa Herrera, Inc. v. Beydoun (2004) 32 Cal. 4th 336, 343-345, 9 Cal. Rptr. 3d 97, 83 P.3d 497*]. However, dismissal of an action for failure to comply with discovery orders does not constitute a favorable termination if there is a doubt as to the liability or innocence of the prevailing party in the action that was dismissed [*Pattiz v. Minye (1998) 61 Cal. App. 4th 822, 884, 827, 71 Cal. Rptr. 2d 802*]. However, dismissal following a terminating sanction granted for abuse of the discovery process may support a finding that the favorable termination element has been satisfied, if the record from the underlying action shows that the underlying plaintiff made no attempt during discovery to substantiate the allegations in the complaint and the court's dismissal of that action was justified by the plaintiff's lack of evidence [*Daniels v. Robbins (2010) 182 Cal. App. 4th 204, 219, 105 Cal. Rptr. 3d 683* ; *see also Ross v. Kish (2006) 145 Cal. App. 4th 188, 200, 51 Cal. Rptr. 3d 484* (plaintiff's refusal to attend own deposition was concession that action lacked merit)]. In malicious prosecution actions against the underlying plaintiff's

attorney, the fact that the discovery abuses were the fault of the client rather than the attorney does not matter for purposes of establishing the favorable termination element [*Daniels v. Robbins (2010) 182 Cal. App. 4th 204, 220-222, 105 Cal. Rptr. 3d 683*].

Dismissal due to lack of standing, which is a jurisdictional defect, does not constitute a favorable termination reflecting on the merits of the action [*Hudis v. Crawford (2005) 125 Cal. App. 4th 1586, 1592, 24 Cal. Rptr. 3d 50*].

However, the favorable termination of the allegedly malicious proceeding need not be a final determination of the controversy. It is sufficient to show that the former proceeding was legally terminated. The fact that the termination would not be a bar to another civil suit or criminal prosecution founded on the same action is no defense to the action for malicious prosecution [*Jaffe v. Stone (1941) 18 Cal. 2d 146, 157, 114 P.2d 335* (criminal); *MacDonald v. Joslyn (1969) 275 Cal. App. 2d 282, 289* (civil)].

A malicious prosecution plaintiff cannot meet the favorable termination requirement merely by demonstrating that the termination was more favorable to that party than the terms of a settlement offer made by that party earlier in the underlying action [*StaffPro, Inc. v. Elite Show Servs., Inc. (2006) 136 Cal. App. 4th 1392, 1400-1401, 39 Cal. Rptr. 3d 682]* .

[2] Action Still Pending

If the action is still pending, then there has not been a favorable termination [*Rich v. Siegel (1970) 7 Cal. App. 3d 465, 469, 86 Cal. Rptr. 665* (civil)]. An action is still pending, and there is no favorable termination, if an appeal is pending [*Friedman v. Stadum (1985) 171 Cal. App. 3d 775, 779, 217 Cal. Rptr. 585* (civil); *see Feld v. Western Land & Dev. Co. (1992) 2 Cal. App. 4th 1328, 1334, 1335, 4 Cal. Rptr. 2d 23* (civil); *see also § 357.72[11][b]*].

If the plaintiff in an underlying action deletes a cause of action in an amended complaint, but the defendant remains in the case with respect to other causes of action, the defendant may not complain for malicious prosecution with respect to the deleted cause until the entire action has reached a favorable termination [*Jenkins v. Pope (1990) 217 Cal. App. 3d 1292, 1298-1301, 266 Cal. Rptr. 557*].

In a proceeding in administrative mandate that results in an order remanding the matter for reconsideration of the decision with respect to the correctness of the standard used to assess the evidence, the petitioneressentially prevails on its procedural challenge, even though its petition was ultimately denied, precluding an action by the real parties in interest for malicious prosecution [*Sierra Club v. Superior Court (1985) 168 Cal. App. 3d 1138, 1144-1147, 214 Cal. Rptr. 740*].

[3] Voluntary Dismissal

A voluntary dismissal of a civil action by the plaintiff, even though expressly made "without prejudice," may be a favorable termination that will support an action for malicious prosecution [*Robbins v. Blecher (1997) 52 Cal. App. 4th 886, 893, 60 Cal. Rptr. 2d 815* ; *MacDonald v. Joslyn (1969) 275 Cal. App. 2d 282, 289, 79 Cal. Rptr. 707* (civil)]. It is not enough merely to show that the proceeding was dismissed. The reasons for the dismissal must be examined to determine whether the termination reflected on the merits. Voluntary dismissal on technical grounds, such as lack of jurisdiction, laches, the statute of limitations or prematurity does not constitute a favorable termination because it does not reflect on the substantive merits of the underlying claim [*Robbins v. Blecher (1997) 52 Cal. App. 4th 886, 893-894, 60 Cal. Rptr. 2d 815* (voluntary dismissal with prejudice based on mootness was not favorable termination); *see Chauncey v. Niems (1986) 182 Cal. App. 3d 967, 976-977, 227 Cal. Rptr. 718* (allegation of voluntary termination by the plaintiff, even with prejudice, may be insufficient to withstand a demurrer; court, in its discretion, is entitled to require a clear allegation of favorable termination rather than a questionable inference)].

Similarly stated, the dismissal of the previous proceeding is not considered to constitute a favorable termination if it was on technical grounds, for procedural reasons, or for any other reason not inconsistent with the person's guilt [*Jaffe v. Stone (1941) 18 Cal. 2d 146, 157, 114 P.2d 335* (criminal); *see Drummond v. Desmarais (2009) 176 Cal. App. 4th 439, 450, 98 Cal. Rptr. 3d 183* (dismissal of fee petition for failure to bring petition as compulsory cross-complaint in different action brought by clients was technical disposition not reflecting on merits)]. For example, an action for malicious prosecution cannot be maintained when the termination of the prior criminal prosecution or civil action has been brought about either by the procurement of defendant therein or by compromise and settlement [*Paskle v. Williams (1931) 214 Cal. 482, 484, 6 P.2d 505* (civil)]. Voluntary dismissal in order to save the cost of further litigation, rather than because the plaintiff lost faith in the merits of the claim, does not constitute a favorable termination for the defendant [*Contemporary Services Corp. v. Staff Pro Inc. (2007) 152 Cal. App. 4th 1043, 1056-1057, 61 Cal. Rptr. 3d 434]* .

Voluntary dismissal of an underlying action, when based on mootness caused by reversal on appeal of a previous judgment that was a predicate for the underlying action, does not constitute a favorable termination on the merits [*Robbins v. Blecher (1997) 52 Cal. App. 4th 886, 894, 60 Cal. Rptr. 2d 815*]. Consistent with this general rule, if a malicious prosecution action is stayed on the grounds that an appeal from the underlying judgment is pending, and the underlying appeal is then resolved adversely to the malicious prosecution plaintiff, a voluntary dismissal of the malicious prosecution action by that plaintiff in response to losing the underlying appeal is considered a technical disposition and not a termination on the merits for purposes of any subsequent malicious prosecution action that might be brought by the defendant in the first malicious prosecution action [*Drummond v. Desmarais (2009) 176 Cal. App. 4th 439, 459, 98 Cal. Rptr. 3d 183*].

A dismissal after a settlement generally does not constitute a favorable termination. In such a case, the dismissal reflects ambiguously on the merits of the action as it results from the joint action of the parties, thus leaving open the question of the guilt or innocence of the defendant in the underlying action [*Haight v. Handweiler (1988) 199 Cal. App. 3d 85, 88, 244 Cal. Rptr. 488* ; *see Cantu v. Resolution Trust Corp. (1992) 4 Cal. App. 4th 857, 881-882, 6 Cal. Rptr. 2d 151* (dismissal of interpleader action in which malicious-prosecution plaintiff was named as one of claimants, after settlement in which all claimants except malicious-prosecution plaintiff participated)].

If the underlying case is terminated through negotiations and compromise by the parties, it does not matter that a procedure other than voluntary dismissal is used to resolve the lawsuit. Thus, a plaintiff is not allowed to maintain a malicious prosecution action if a compromise reached in the underlying action resulted in a stipulated judgment [*Dalany v. American Pac. Holding Corp. (1996) 42 Cal. App. 4th 822, 828, 50 Cal. Rptr. 2d 13*]. This is the result even if prior to the negotiated settlement the jury had returned a verdict in favor of the party who subsequently seeks to prosecute the malicious prosecution action [*Ferreira v. Gray, Cary, Ware & Freidenrich (2001) 87 Cal. App. 4th 409, 413, 104 Cal. Rptr. 2d 683*].

However, if the malicious prosecution plaintiff received a favorable judgment on the merits at trial in the underlying action, but the parties subsequently settled the action and dismissed all appeals without the malicious prosecution plaintiff giving up any portion of the favorable trial court judgment, the postjudgment settlement constitutes a favorable termination of the underlying action for the malicious prosecution plaintiff [*Siebel v. Mittlesteadt (2007) 41 Cal. 4th 735, 743, 62 Cal. Rptr. 3d 155, 161 P.3d 527]* . In addition, a party who prevails on the merits at trial does not forgo favorable termination status merely by stipulating to accept a reduction to that party's requested costs [*HMS Capital, Inc. v. Lawyers Title Co. (2004) 118 Cal. App. 4th 204, 214-216, 12 Cal. Rptr. 3d 786*].

[4] Judicial Arbitration Award

A judicial arbitration award denying the plaintiff's claim may or may not be a favorable termination, depending on the reasons why the litigation resulted as it did. For example, a showing that the arbitration award merely reflects the plaintiff's inability to prove damages without reflecting a finding that the defendant was not guilty of misconduct, or a

showing that plaintiff failed to seek a trial de novo because he or she discovered that the defendant was a judgment-proof shell corporation and not because plaintiff believed that the suit was meritless, might be sufficient to show that the arbitration award and judgment following it do not constitute a favorable termination [*Stanley v. Superior Court (1982) 130 Cal. App. 3d 460, 465-466, 181 Cal. Rptr. 878*].

[5] Multiple Theories and Multiple Causes of Action

There is a split among court of appeal opinions as to whether the favorable termination element may be met if the underlying proceeding involved multiple, severable causes of action, only some of which were terminated in favor of the malicious prosecution plaintiff. Some opinions have held that the element may be met if favorable termination can be shown on at least one severable cause of action [*Tabaz v. Cal Fed Fin. (1994) 27 Cal. App. 4th 789, 794, 33 Cal. Rptr. 2d 134* ; *Paramount Gen. Hosp. Co. v. Jay (1989) 213 Cal. App. 3d 360, 363, 372, 261 Cal. Rptr. 723]* . Other opinions have held that severability only comes into play when analyzing the lack of probable cause element of the malicious prosecution cause of action [see *§ 357.16[1]*], and that the element of favorable termination is concerned only with the result in the underlying proceeding as a whole [*StaffPro, Inc. v. Elite Show Servs., Inc. (2006) 136 Cal. App. 4th 1392, 1402-1405, 39 Cal. Rptr. 3d 682* (relying on language in *Crowley v. Katleman (1994) 8 Cal. 4th 666, 34 Cal. Rptr. 2d 386, 881 P.2d 1083*); *Dalany v. American Pac. Holding Corp. (1996) 42 Cal. App. 4th 822, 829, 50 Cal. Rptr. 2d 13]* .

[6] Criminal Actions

In criminal actions, if there was no trial on the merits, then the determination of the prior action must be of such a nature as to indicate the innocence of the accused [*Jaffe v. Stone (1941) 18 Cal. 2d 146, 150, 114 P.2d 335* (criminal)]. It is not necessary, though, that further prosecution be precluded on the ground of double jeopardy [*Jaffe v. Stone (1941) 18 Cal. 2d 146, 156, 114 P.2d 335* (criminal)]. For instance, there was a favorable termination of the proceeding if it was dismissed by the prosecutor in the interests of justice and for the lack of sufficient evidence [*Jackson v. Beckham (1963) 217 Cal. App. 2d 264, 270, 31 Cal. Rptr. 739* (criminal)] or if it was dismissed by the magistrate at the preliminary hearing on the ground of insufficiency of evidence [*Jaffe v. Stone (1941) 18 Cal. 2d 146, 151, 156, 114 P.2d 335* (criminal)]. However, if a criminal proceeding goes to trial, it is ordinarily necessary as a foundation for a malicious prosecution action that the accused was acquitted [*Jaffe v. Stone (1941) 18 Cal. 2d 146, 150, 114 P.2d 335* (criminal)].

However, when the criminal action terminates favorably and the plaintiff then brings an action for malicious prosecution, the defendant in that action may show that the plaintiff actually committed the offense charged, even though the jury acquitted the plaintiff. This showing, although it has no bearing on the favorable termination of the criminal charge, will be used to negate the plaintiff's claim that the criminal action was commenced without probable cause [*Verdier v. Verdier (1957) 152 Cal. App. 2d 348, 353, 313 P.2d 123* (criminal); *see § 357.16*].

[7] Burden of Proof

The plaintiff in an action for malicious prosecution bears the burden of proving the favorable termination of the earlier proceedings [*Kassan v. Bledsoe (1967) 252 Cal. App. 2d 810, 812, 60 Cal. Rptr. 799* (civil)].

[8] Effect of Requirement

The requirement of a favorable termination means that a defendant in the principal action who loses will not institute a malicious prosecution suit, because the adverse judgment operates to establish conclusively that the plaintiff had probable cause [*Babb v. Superior Court (1971) 3 Cal. 3d 841, 847, 92 Cal. Rptr. 179, 479 P.2d 379* (civil); *Roos v. Harris (1928) 203 Cal. 201, 202, 263 P. 225* (criminal)].

The requirement also means that a malicious prosecution action that is instituted while an appeal of the underlying

action is pending, may be dismissed [*see Friedman v. Stadum (1985) 171 Cal. App. 3d 775, 779* al. Rptr. 585 (civil) (First Appellate District)]. One court has recommended in dictum, however, that a court should abate the action, rather than dismiss it. Even though an action that has been dismissed can be refiled, it must overcome additional procedural obstacles, including but not limited to, applicable statutes of limitation [*see Feld v. Western Land & Dev. Co. (1992) 2 Cal. App. 4th 1328, 1336, 4 Cal. Rptr. 2d 23* (civil) (Fourth Appellate District)]. For discussion of and forms for use in the abatement of actions filed prematurely, see Ch. 3, *Abatement of Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsMalicious ProsecutionElementsGeneral OverviewTortsIntentional TortsMalicious ProsecutionElementsFavorable Termination

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Volume 31: Lis Pendens thru Mandate and Prohibition-Chs. 348-358
Chapter 357 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART II. LEGAL BACKGROUND
A. Malicious Prosecution

31-357 California Forms of Pleading and Practice--Annotated § 357.15

§ 357.15 Affirmative Relief Sought in Underlying Action

A cause of action for malicious prosecution will not lie unless the defendant sought affirmative relief in the underlying action. Mere resistance to an opponent's attack, motivated by a desire to preserve, or to return to, the status quo as it existed before judicial proceedings had commenced, cannot be the basis for a malicious prosecution action [*Coleman v. Gulf Ins. Group (1986) 41 Cal. 3d 782, 793-794, 226 Cal. Rptr. 90, 718 P.2d 77* ; *Idell v. Goodman (1990) 224 Cal. App. 3d 262, 273 Cal. Rptr. 605*]. For example, a defendant's appeal, which is merely the continuation of an attempt to repel the plaintiff's attack, cannot be the basis of a malicious prosecution action [*Coleman v. Gulf Ins. Group (1986) 41 Cal. 3d 782, 794, 226 Cal. Rptr. 90, 718 P.2d 77*]. Similarly, a creditor's proceeding to block discharge of a debtor's debts in bankruptcy, brought with the sole objective of preserving the creditor's rights as they existed before the debtor filed for bankruptcy, cannot be the basis for the action [*Idell v. Goodman (1990) 224 Cal. App. 3d 262, 272-273, 273 Cal. Rptr. 605*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsMalicious ProsecutionElementsGeneral Overview

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Chapter 357 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART II. LEGAL BACKGROUND
A. Malicious Prosecution

31-357 California Forms of Pleading and Practice--Annotated § 357.16

§ 357.16 Lack of Probable Cause

[1] In General

Probable cause is defined insofar as it applies to the malicious prosecution of civil actions as a suspicion founded on circumstances sufficiently strong to warrant a reasonable person in the belief that the charge is true [*Davis v. Local Union No. 11, Int'l Bhd. of Elec. Workers, AFL-CIO (1971) 16 Cal. App. 3d 686, 692* (civil)]. Stated differently, one who commences a civil suit acts on probable cause if he or she has an honest belief, founded on facts sufficiently strong to justify that belief, that grounds exist for the proceeding [*Kennedy v. Byrum (1962) 201 Cal. App. 2d 474, 480, 20 Cal. Rptr. 98* (civil)]. It does not mean "legal cause" because, if it did, then every plaintiff who failed to recover in a lawsuit would be liable to an action for malicious prosecution [*Lucchesi v. Giannini & Uniack (1984) 158 Cal. App. 3d 777, 785, 205 Cal. Rptr. 62* (civil); *Albertson v. Raboff (1960) 185 Cal. App. 2d 372, 385, 8 Cal. Rptr. 398* (civil)].

In the context of an action alleging malicious prosecution of a prior civil suit, the standard for determining probable cause is whether any reasonable attorney would have thought the civil claim was tenable [*Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d. 863, 885-886, 254 Cal. Rptr. 336, 765 P.2d 498* (civil); *Klein v. Oakland Raiders, Ltd. (1989) 211 Cal. App. 3d 67, 76, 259 Cal. Rptr. 149* (civil)]. In evaluating whether or not probable cause exists, a court must take into account the evolutionary potential of legal principles [*Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 886, 254 Cal. Rptr. 336, 765 P.2d 498* (civil)].

Probable cause to bring a civil action, or the lack of it, must be determined with regard to the theory on which the allegedly malicious civil action was actually based. The test for malicious prosecution is not whether the defendant had reasonable grounds to seek some kind of relief in the original action, but whether he or she had reasonable grounds for asserting the theory for relief contained in the complaint and tried to the fact finder. Thus, even if the defendant had grounds for a suit against the plaintiff, if he or she failed to prosecute the suit on those grounds and instead prosecuted the suit on untenable grounds, the defendant may be found liable for malicious prosecution [*Kreeger v. Wanland (2006) 141 Cal. App. 4th 826, 835-836, 46 Cal. Rptr. 3d 790* (civil); *Williams v. Coombs (1986) 179 Cal. App. 3d 626, 644, 224 Cal. Rptr. 865 , criticized, Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 885-886, 254 Cal. Rptr. 336, 765 P.2d 498* (civil)]. In assessing the tenability of the underlying action, the complaint must be construed

liberally in favor of the pleader, rather than restrictively in favor of the malicious prosecution plaintiff [*Leonardini v. Shell Oil Co. (1989) 216 Cal. App. 3d 547, 571, 264 Cal. Rptr. 883*].

If the plaintiff in the underlying action is put on notice that a fundamental factual element of the case is disputed, probable cause to prosecute the action may be lacking unless that plaintiff possesses either evidence sufficient to support a favorable judgment on that element or information sufficient to support an inference that such evidence can be obtained [*see* *Arcaro v. Silva & Silva Enters. Corp. (1999) 77 Cal. App. 4th 152, 158-159, 91 Cal. Rptr. 2d 433* (no probable cause to prosecute underlying debt collection action because alleged debtor provided credible evidence that signature on credit application and guarantee had been forged, and collection agency lacked facts showing that signature was genuine)]. In one case, for example, the court of appeal held that a malicious prosecution action could be prosecuted because the creditor in an underlying debt collection action sought to recover much more than the creditor had probable cause to seek to recover from the debtor [*Citi-Wide Preferred Couriers, Inc. v. Golden Eagle Ins. Corp. (2003) 114 Cal. App. 4th 906, 914, 8 Cal. Rptr. 3d 199* (creditor sought $7861, despite admission that only about $1900 was owed)].

If the client has lied to the attorney about the facts underlying the claim, and the attorney has no reason to know that the given facts were incorrect, the relevant facts for determining probable cause on the part of the attorney are the facts as given to the attorney [*Swat-Fame, Inc. v. Goldstein (2002) 101 Cal. App. 4th 613, 625, 124 Cal. Rptr. 2d 556* ; *see also* *Morrison v. Rudolph (2002) 103 Cal. App.4th 506, 512-513, 126 Cal. Rptr. 2d 747*]. However, even if probable cause exists as to the attorney under those facts, the client may still be liable for malicious prosecution if the client knew the facts as given were false [*Swat-Fame, Inc. v. Goldstein (2002) 101 Cal. App. 4th 613, 632 n.14, 124 Cal. Rptr. 2d 556* ; *see also* *Morrison v. Rudolph (2002) 103 Cal. App. 4th 506, 514, 126 Cal. Rptr. 2d 747*].

An attorney may be liable for malicious prosecution for continuing to prosecute a claim after the attorney discovers that the action in fact lacks probable cause, even if the attorney had probable cause to initiate the action [*Zamos v. Stroud (2004) 32 Cal. 4th 958, 970, 12 Cal. Rptr. 3d 54, 87 P.3d 802* (disapproving of any inconsistent language in *Swat-Fame, Inc. v. Goldstein (2002) 101 Cal. App. 4th 613, 124 Cal. Rptr. 2d 556* , *Morrison v. Rudolph (2002) 103 Cal. App. 4th 506, 126 Cal. Rptr. 2d 747* , and *Vanzant v. DaimlerChrysler Corp. (2002) 96 Cal. App. 4th 1283, 118 Cal. Rptr. 2d 48*); *see also* *Bergman v. Drum (2005) 129 Cal. App. 4th 11, 23-24, 28 Cal. Rptr. 3d 112* (*Zamos* applied retroactively)]. This principle applies to a plaintiff's attorney who files an appeal in a case after the attorney discovers that the action lacks probable cause [*Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal. 4th 260, 297, 46 Cal. Rptr. 3d 638, 139 P. 3d 30]* .

An attorney joining in as cocounsel for a plaintiff in a case that has already been filed may be held liable for malicious prosecution and should promptly become familiar with the bases for the asserted claims before or immediately after joining the case in order to minimize or eliminate any grounds for malicious prosecution liability. In one case, attorneys filed a suit in representation of multiple tenants and employees of defendant apartment owner, alleging multiple causes of action based on dismal living conditions at the apartment and resulting physical ailments, as well as employment-related torts such as wrongful termination. Unfortunately, the attorneys listed both tenants and employees as plaintiffs on all causes of action, even though some of the causes of action clearly had no application to all plaintiffs. After the suit had been filed, other attorneys joined as cocounsel for the limited purpose of assisting in prosecution of toxic mold claims. After one of the tenant plaintiffs dismissed herself from the suit, the apartment owner brought a malicious prosecution action against the original attorneys and their cocounsel, arguing that there was no basis for asserting many of the causes of action on behalf of the dismissed plaintiff. Defendant attorneys filed a motion to strike the malicious prosecution action under *Code Civ. Proc. § 425.16*, the anti-SLAPP statute [*see § 357.24*], but the court of appeal held that the apartment owner had demonstrated a sufficient probability of success on the merits to withstand the motion to strike, even as applied to cocounsel, at least for any damage sustained during the time that cocounsel was associated with the suit and failed to take corrective steps. While stopping short of stating that the landowner should win at trial on the merits of the malicious prosecution claims [*see* *Sycamore Ridge Apartments LLC v. Naumann (2008) 157 Cal. App. 4th 1385, 1392 n.1, 69 Cal. Rptr. 3d 561*], the court noted that cocounsel joining after a suit is filed

should be familiar with the client's claims, and whether or not probable cause exists for bringing or sustaining such claims, before agreeing to join [*Sycamore Ridge Apartments LLC v. Naumann (2008) 157 Cal. App. 4th 1385, 1407-1411, 69 Cal. Rptr. 3d 561* (evidence of lack of probable cause, malice, and damages was sufficient to withstand motion to strike)].

If the plaintiff in an underlying civil action has some evidence suggesting that a particular party may be liable, a mere assertion by the attorney for that potentially-liable party that the party is not liable, without more, is not enough to defeat a finding of probable cause for bringing an action against that party [*Marijanovic v. Gray, York & Duffy (2006) 137 Cal. App. 4th 1262, 1271-1272, 40 Cal. Rptr. 3d 867]* .

If the issue is whether the facts as known at the time were sufficient to justify bringing the underlying action against the particular defendant, the test for establishing probable cause may be more stringent in California than in other jurisdictions, because California procedure allows for filing suit against Doe defendants pending further fact finding [*see* *Puryear v. Golden Bear Ins. Co. (1998) 66 Cal. App. 4th 1188, 1197, 78 Cal. Rptr. 2d 507* (California rule more stringent than Restatement rule); *see also Code Civ. Proc. § 474*].

Each claim prosecuted must be supported by probable cause. Thus, even if probable cause is present for one of multiple claims in an underlying action, a plaintiff is entitled to sue for the malicious prosecution of the claim(s) not supported by probable cause [*Mabie v. Hyatt (1998) 61 Cal. App. 4th 581, 584, 71 Cal. Rptr. 2d 657*].

Probable cause as an element in an action for the malicious prosecution of a criminal action requires that there be such a state of facts as would lead a person of ordinary care and prudence to believe and entertain an honest and strong suspicion that the accused person is guilty [*Kincaid v. Sears, Roebuck & Co. (1968) 259 Cal. App. 2d 733, 741, 66 Cal. Rptr. 915* (criminal)]. It does not depend on the possession of facts that satisfactorily prove the guilt of the accused person. Rather, it has reference to a common standard of human judgment and conduct and exists if one is possessed of information or facts that are sufficient to cause a reasonable person to honestly believe the charge is true [*Northrup v. Baker (1962) 202 Cal. App. 2d 347, 354, 20 Cal. Rptr. 797* (criminal); *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 540-541, 222 P.2d 136* (criminal)]. Therefore, a person may act on what appears to be true, even if it turns out to be false [*Fry v. Bank of Am. (1956) 142 Cal. App. 2d 150, 156, 298 P.2d 34* (criminal)].

[2] Evidence

In order to prove the lack of probable cause, plaintiff must present substantial evidence to create a conflict or an inference of the lack ofprobable cause [*Davis v. Local Union No. 11, Int'l Bhd. of Elec. Workers, AFL-CIO (1971) 16 Cal. App. 3d 686, 692* (civil); *Kassan v. Bledsoe (1967) 252 Cal. App. 2d 810, 816, 60 Cal. Rptr. 799* (civil)]. It should be noted, though, that in a criminal case, proof that no crime was committed or that the accused is innocent does not necessarily negate the existence of probable cause [*Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 541, 222 P.2d 136* (criminal)].

The plaintiff in a malicious prosecution action is not required to present expert testimony concerning whether an attorney's actions in instituting and maintaining an action were reasonable [*Gerard v. Ross (1988) 204 Cal. App. 3d 968, 987-988, 251 Cal. Rptr. 604* (rejecting contention by defendant appellant that reversal was required due to failure of plaintiff in underlying action to present expert testimony)]. Indeed, a party is generally prohibited from calling expert witnesses to give their opinions concerning whether a reasonable attorney would conclude that claims advanced in the prior action were tenable; as a general rule, experts may not give opinions on matters that are essentially within the province of the court to decide [*Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 884, 254 Cal. Rptr. 336, 765 P.2d 498*].

[3] Objective and Subjective Standard of Proof

The probable cause element calls on the trial court to make an objective determination of the "reasonableness" of the defendant's conduct in instituting a prior civil action. Because the malicious prosecution tort is intended to protect an individual's interest in freedom from unjustifiable and unreasonable litigation, if the trial court determines that the prior action was objectively reasonable, the plaintiff has failed to meet the threshold requirement of demonstrating an absence of probable cause, and the defendant is entitled to prevail [*Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 878, 254 Cal. Rptr. 336, 765 P.2d 498* (civil)].

In a criminal proceeding, probable cause does not depend on the actual state of the case; rather, it depends on the honest and reasonable belief of the party commencing the prosecution which must appear to have existed in the party's mind at the time of his or her proceedings. The actual guilt or innocence of plaintiff is not the controlling factor since it is only necessary that defendant have met the standard of conduct of the ordinarily prudent person in believing plaintiff guilty [*Clary v. Hale (1959) 175 Cal. App. 2d 880, 888-889, 1 Cal. Rptr. 91* (criminal)]. Thus, it is evident that subjective good faith is an independent element of probable cause [*Klotz v. Alexander (1962) 203 Cal. App. 2d 238, 243, 21 Cal. Rptr. 305* (criminal)] and that the element of probable cause must be viewed from a subjective as well as an objective point of view [*White v. Brinkman (1937) 23 Cal. App. 2d 307, 312, 73 P.2d 254* (criminal)].

Because an objective determination by the trial court that the underlying action was objectively reasonable may establish probable cause, denial of a defendant's motion for summary judgment in the underlying civil action will normally be sufficient to establish probable cause [*Roberts v. Sentry Life Ins. (1999) 76 Cal. App. 4th 375, 384, 90 Cal. Rptr. 2d 408* ; *see also Hufstedler, Kaus & Ettinger v. Superior Court (1996) 42 Cal. App. 4th 55, 68-69, 49 Cal. Rptr. 2d 551*]. However, under certain circumstances, a denial of summary judgment in the underlying action would not preclude a finding that probable cause was lacking--for example, if the underlying motion for summary judgment was denied on procedural or technical grounds, rather than due to the existence of triable issues of material fact [*see Wilson v. Parker, Covert & Chidester (2002) 28 Cal. 4th 811, 823, 123 Cal. Rptr. 2d 19, 50 P.3d 733 , superseded by statute on other grounds as stated in Hutton v. Hafif (2007) 150 Cal. App. 4th 527*], or was denied due to materially false facts submitted in opposition [*see Roberts v. Sentry Life Ins. (1999) 76 Cal. App. 4th 375, 384, 90 Cal. Rptr. 2d 408* ; *see, e.g., Slaney v. Ranger Ins. Co. (2004) 115 Cal. App. 4th 306, 319-321, 8 Cal. Rptr. 3d 915*].

Denial of a motion to strike brought under *Code Civ. Proc. § 425.16* in the underlying action cannot be used to support a finding that the underlying action was brought with probable cause [*Hutton v. Hafif (2007) 150 Cal. App. 4th 527, 548-550, 59 Cal. Rptr. 3d 109* (2005 amendment to *Code Civ. Proc. § 425.16(b)(3)* overruled holding in *Wilson v. Parker, Covert & Chidester (2002) 28 Cal. 4th 811, 50 P.3d 733* , that allowed denial of special motion to strike to be used to support finding of probable cause)].

Code Civ. Proc. § 425.16, the so-called Anti-SLAPP Statute, is discussed further in Ch. 376, *Motions to Strike: Anti-SLAPP* .

A preliminary injunction granted to the plaintiff in the underlying action after a hearing on the merits establishes probable cause as to all causes of action that were reasonably related to the injunction [*Fleishman v. Superior Court (2002) 102 Cal. App. 4th 350, 355-358, 125 Cal. Rptr. 2d 383*]. In deciding whether to issue a preliminary injunction, a trial court must evaluate the likelihood that the party seeking the injunction will ultimately prevail on the merits and balance the consequences of the issuing the injunction with the consequences of not doing so [*Fleishman v. Superior Court (2002) 102 Cal. App. 4th 350, 355-356, 125 Cal. Rptr. 2d 383*]; *see also Paiva v. Nichols (2008) 168 Cal. App. 4th 1007, 1022, 85 Cal. Rptr. 3d 838]* . The failure to post a required undertaking or bond under *Code Civ. Proc. § 529(a)* in order to perfect a preliminary injunction does not negate that the order granting the preliminary injunction conclusively establishes probable cause for bringing the action [*Paiva v. Nichols (2008) 168 Cal. App. 4th 1007, 1024, 85 Cal. Rptr. 3d 838*].

A default judgment in the underlying action does not establish probable cause for bringing that action because the trial court does not have the benefit of the presentation of evidence on the merits by both sides in the lawsuit [*Bergman v.*

Drum (2005) 129 Cal. App. 4th 11, 22, 28 Cal. Rptr. 3d 112].

[4] Burden of Proof

The plaintiff in an action for malicious prosecution bears the burden of proving the lack of probable cause on the part of defendant [*Kassan v. Bledsoe (1967) 252 Cal. App. 2d 810, 812, 60 Cal. Rptr. 799* (civil); *Walker v. Jensen (1949) 95 Cal. App. 2d 269, 275, 212 P.2d 569* (criminal)].

[5] Relation to Favorable Termination Requirement

The elements of probable cause and favorable termination are distinct elements, serving different purposes. Probable cause reflects on whether the defendant had an honest and reasonable belief in the truth of the allegations. Favorable termination reflects on the innocence of the defendant in the prior action [*Crowley v. Katleman (1994) 8 Cal. 4th 666, 686, 34 Cal. Rptr. 2d 386, 881 P.2d 1083* ; *Warren v. Wasserman, Comden & Casselman (1990) 220 Cal. App. 3d 1297, 1303, 271 Cal. Rptr. 579*].

The objective tenability of the underlying action, or lack of it, does not bear on whether the underlying action was favorably terminated [*Crowley v. Katleman (1994) 8 Cal. 4th 666, 686, 34 Cal. Rptr. 2d 386, 881 P.2d 1083* ; *Warren v. Wasserman, Comden & Casselman (1990) 220 Cal. App. 3d 1297, 1303, 271 Cal. Rptr. 579*]. An action brought without probable cause may be decided on technical or procedural grounds, precluding a favorable termination on the merits [*see* *Warren v. Wasserman, Comden & Casselman (1990) 220 Cal. App. 3d 1297, 1303, 271 Cal. Rptr. 579*].

The existence of probable cause is not negated by merely showing that the accused was successful at the trial of the proceedings in securing an exoneration. Not even a conflict on the issue of probable cause is created by such favorable termination of the proceeding that gave rise to the malicious prosecution action [*Kassan v. Bledsoe (1967) 252 Cal. App. 2d 810, 816, 60 Cal. Rptr. 799* (civil); *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 541, 222 P.2d 136* (criminal)].

[6] No Inference From Malice

While malice may be inferred from the lack of probable cause, the reverse is not true; the lack of probable cause may not be implied from even the most express malice [*Kassan v. Bledsoe (1967) 252 Cal. App. 2d 810, 816, 60 Cal. Rptr. 799* (civil); *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 542, 222 P.2d 136* (criminal)]. This is the rule because malice and the lack of belief in the guilt of the accused are not the same thing. For example, a defendant who honestly believes in the guilt of a person may prosecute that person even with a vindictive motive when reasonable grounds exist for the belief [*see* *Franzen v. Shenk (1923) 192 Cal. 572, 583, 221 P. 932* (insanity proceeding)].

[7] Question of Law or Fact

Whether the defendant had probable cause for instituting the prosecution is always a matter of law to be determined by the court, and is never left to the determination of the jury. Even when the facts are in dispute, the court determines the issue of probable cause once the jury has determined the facts [*Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 875, 254 Cal. Rptr. 336, 765 P.2d 498* (civil); *Ball v. Rawles (1892) 93 Cal. 222, 227, 28 P. 937* (criminal); *Williams v. Coombs (1986) 179 Cal. App. 3d 626, 636, 224 Cal. Rptr. 865 , criticized,* *Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 885-886, 254 Cal. Rptr. 336, 765 P.2d 498* (civil)]. The determination is made by the court because the probable cause question requires a sensitive evaluation of legal principles and precedents, a task generally beyond the capabilities of lay jurors [*Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 875, 254 Cal. Rptr. 336, 765 P.2d 498* (civil)].

When there is no dispute concerning the facts on which an attorney acted in filing a prior action, the question whether

there was probable cause to institute the prior action is purely a legal question, to be determined by the trial court on the basis of whether, as an objective matter, the prior action was legally tenable or not [*Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 875, 254 Cal. Rptr. 336, 765 P.2d 498* (civil); *Klein v. Oakland Raiders, Ltd. (1989) 211 Cal. App. 3d 67, 75, 259 Cal. Rptr. 149* (civil)].

[8] Irrelevance of Attorney Research

The adequacy of an attorney's research is not relevant to the determination of probable cause, because the determination of probable cause relates solely to whether the attorney's claim was objectively tenable [*Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 875, 883, 254 Cal. Rptr. 336, 765 P.2d 498* (civil; disapproving holding to contrary in *Tool Research & Eng'g Corp. v. Henigson (1975) 46 Cal. App. 3d 675, 120 Cal. Rptr. 291*)]. However, if a trial court determines that a prior action by a defendant was not objectively tenable, the extent of a defendant attorney's investigation and research may be relevant to the further question of whether the attorney acted with malice [*Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 875, 883, 254 Cal. Rptr. 336, 765 P.2d 498*].

[9] Vicarious Liability

If an agent, while acting within the scope of his or her authority, acquires knowledge or receives notice of any fact material to the subject matter of the agency, the principal is charged with constructive notice of that fact. Thus, a principal may be charged with the lack of probable cause and bad faith by one of its agents [*see Davis v. Local Union No. 11, Int'l Bhd. of Elec. Workers, AFL-CIO (1971) 16 Cal. App. 3d 686, 694-695* (civil); *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 544, 222 P.2d 136* (criminal)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsMalicious ProsecutionElementsGeneral OverviewTortsIntentional TortsMalicious ProsecutionElementsProbable CauseGeneral OverviewTortsIntentional TortsMalicious ProsecutionElementsProbable CauseDefinitionsTortsIntentional TortsMalicious ProsecutionElementsProbable CauseEvidence

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§ 357.17 Malice

[1] In General

The tort of malicious prosecution connotes something more blameworthy than mere negligence. Thus, its chief element is malice [*Maxon v. Security Ins. Co. (1963) 214 Cal. App. 2d 603, 615, 29 Cal. Rptr. 586* (criminal)]. Malice means actual ill will or some improper motive or purpose, whether express or implied. It may range anywhere from open hostility to indifference [*Grindle v. Lorbeer (1987) 196 Cal. App. 3d 1461, 1465, 242 Cal. Rptr. 562* (civil); *see Maxon v. Security Ins. Co. (1963) 214 Cal. App. 2d 603, 615, 29 Cal. Rptr. 586* (criminal)].

[2] Evidence

[a] Direct and Circumstantial

Malice may be proved by direct evidence; it also may be inferred from all the circumstances in the case [*Weber v. Leuschner (1966) 240 Cal. App. 2d 829, 837, 50 Cal. Rptr. 86* (criminal)], including declarations of the defendant indicating prejudice, ill will, or malicious motive [*Jackson v. Beckham (1963) 217 Cal. App. 2d 264, 272, 31 Cal. Rptr. 739* (criminal)], as well as the absence of good faith of the accuser [*Bulkley v. Klein (1962) 206 Cal. App. 2d 742, 750, 23 Cal. Rptr. 855* (criminal)]. It is not necessary, though, for a plaintiff to prove that the prosecution was inspired by personal hostility, a grudge, or ill will. It is sufficient if it appears that the previous action was instituted in bad faith to vex, annoy, or wrong the adverse party [*Weber v. Leuschner (1966) 240 Cal. App. 2d 829, 837, 50 Cal. Rptr. 86* (criminal)].

An attorney's failure to conduct adequate research or investigation prior to filing suit may be considered in determining the question of malice [*see Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 883, 254 Cal. Rptr. 336, 765 P.2d 498]* . In addition, malice formed by an attorney after the filing of the underlying complaint may be actionable [*Daniels v. Robbins (2010) 182 Cal. App. 4th 204, 226, 105 Cal. Rptr. 3d 683]* . In the case so holding, however, the court determined that the malicious prosecution plaintiff had failed to present evidence of such malice on the part of the attorneys who maintained the underlying suit. The evidence in the record showed only a lack of evidentiary support for the allegations in the underlying complaint, a lack of factual investigation after the complaint was filed as evidenced by

an inability to comply with discovery requests, a client who may have had ill will against the underlying defendant, and a refusal of the underlying plaintiff to dismiss without a waiver of claims by the underlying defendant [*Daniels v. Robbins (2010) 182 Cal. App. 4th 204, 227, 105 Cal. Rptr. 3d 683]* .

Although malice may normally be inferred from lack of probable cause to initiate the underlying action [*see, e.g., Pond v. Insurance Co. of N. Am. (1984) 151 Cal. App. 3d 280, 288, 198 Cal. Rptr. 517* ; *see also § 357.17[2][b]*], in actions in which the underlying case was a family law action, malice requires a more convincing and precise showing than mere inference [*Chauncey v. Niems (1986) 182 Cal. App. 3d 967, 978-979, 227 Cal. Rptr. 718*].

[b] Inference From Lack of Probable Cause

Malice may be inferred from the lack of probable cause [*MacDonald v. Joslyn (1969) 275 Cal. App. 2d 282, 292, 79 Cal. Rptr. 707* (civil); *Weber v. Leuschner (1966) 240 Cal. App. 2d 829, 836, 50 Cal. Rptr. 86* (criminal)]. Therefore, if plaintiff fails to show the lack of probable cause, no inference of malice on the part of defendant may be drawn [*Clary v. Hale (1959) 175 Cal. App. 2d 880, 889, 1 Cal. Rptr. 91* (criminal)].

An inference of malice from a lack of probable cause requires that the party's behavior in bringing an action be clearly unreasonable. However, the inference is not automatic on a finding of no probable cause, because it is necessary that actual malice be found. For example, there is always the possibility that a party's behavior before filing might be unreasonable enough to support a finding of no probable cause, yet would not support an inference of malice as a matter of fact [*Weaver v. Superior Court (1979) 95 Cal. App. 3d 166, 193, 156 Cal. Rptr. 745* ; *see Grindle v. Lorbeer (1987) 196 Cal. App. 3d 1461, 1466-1468, 242 Cal. Rptr. 562* (attorney's mere negligence in investigation of facts before filing is insufficient to constitute malicious prosecution)].

[3] Question of Fact

The question of malice presents an issue of fact to be determined by the trier of fact [*Northrup v. Baker (1962) 202 Cal. App. 2d 347, 354, 20 Cal. Rptr. 797* (criminal)].

[4] Malice Per Se

One who knowingly presses a baseless criminal charge acts without probable cause and is guilty of malice per se [*Jackson v. Beckham (1963) 217 Cal. App. 2d 264, 272, 31 Cal. Rptr. 739* (criminal)], because the only justification for a criminal proceeding is to bring an offender to justice [*Bulkley v. Klein (1962) 206 Cal. App. 2d 742, 750, 23 Cal. Rptr. 855* (criminal)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-357 California Forms of Pleading and Practice--Annotated § 357.18

§ 357.18 Damages

[1] Compensatory

Malice must be proven against a particular defendant in order to justify an award of compensatory damages against that defendant [*Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 541-542, 222 P.2d 136* (criminal)]. When proven, the measure of compensatory damages for the malicious prosecution of a civil action includes attorney's fees and court costs for defending the prior action and compensation for emotional distress, mental suffering, and impairment to reputation proximately caused by the initiation and prosecution of the action [*Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 51, 59, 118 Cal. Rptr. 184, 529 P.2d 608* (civil)]. Damages may also be recovered for loss of time, deprivation of liberty, injury to fame and character, general impairment of social and mercantile standing, injury to credit, and all losses sustained to plaintiff's business as the direct and natural result of the proceedings complained of [*Davis v. Local Union No. 11, Int'l Bhd. of Elec. Workers, AFL-CIO (1971) 16 Cal. App. 3d 686, 695-696* (civil)]. Plaintiff can also recover any damages for bodily harm [*Singleton v. Perry (1955) 45 Cal. 2d 489, 495, 289 P.2d 794* (criminal)].

If a defendant in the underlying lawsuit was successful in whole or in part on a special motion to strike under *Code Civ. Proc. § 425.16* (the so-called anti-SLAPP statute discussed in *§ 357.24*), and recovered attorney's fees and costs under that statute, that party may not recover as damages in a subsequent malicious prosecution action any attorney's fees and costs that were awarded and actually paid to him or her under the motion to strike for defending against the underlying action [*Jackson v. Yarbray (2009) 179 Cal. App. 4th 75, 97, 101 Cal. Rptr. 3d 303]* . However, the malicious prosecution plaintiff may seek all fees and costs incurred in the underlying suit and the defendant bears the burden of challenging recovery of that portion of the fees and costs that were already awarded and actually paid for the successful motion to strike, and that defendant must provide proof of an appropriate allocation if some causes of action in the underlying lawsuit withstood the motion to strike and were not included in the underlying fee award [*Jackson v. Yarbray (2009) 179 Cal. App. 4th 75, 96-98, 101 Cal. Rptr. 3d 303]* .

[2] Punitive Damages

[a] In General

When it is proven by clear and convincing evidence that the defendant has been guilty of malice, the jury may award damages against him or her for the sake of example and by way of punishing him or her [*Civ. Code § 3294(a)*]. For example, flagrant abuse of the judicial process by the filing of fabricated claims, in order to force the settlement or abandonment of a legitimate claim, is precisely the type of tortious conduct that an award of punitive damages is designed to deter [*Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 65, 118 Cal. Rptr. 184, 529 P.2d 608* (civil; decided before 1987 amendment to *Civ. Code § 3294(a)*)].

[b] Malice Defined

Malice, as used in *Civ. Code § 3294(a)*, is defined as conduct intended to cause injury, or despicable conduct that is carried on with willful and conscious disregard of the safety or rights of others [*Civ. Code § 3294(c)(1)*].

[c] Wealth of Defendant as Factor in Award

The wealthier the wrongdoing defendant, the larger the award of punitive damages need be in order to accomplish the statutory objective of making the defendant an example and punishing him or her [*Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 65, 118 Cal. Rptr. 184, 529 P.2d 608* (civil)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 357.19 Test for Malicious Criminal Prosecution

The test for determining whether a criminal action was prosecuted maliciously is whether the defendant was actively instrumental in causing the prosecution [*Cedars-Sinai Med. Ctr. v. Superior Court (1988) 206 Cal. App. 3d 414, 417, 253 Cal. Rptr. 561*]. The plaintiff need not show, however, that the defendant sought out the police or prosecutorial authorities and reported facts to them indicating that plaintiff had committed a crime. It is sufficient for the plaintiff to show that defendant knowingly gave false information to the police or testified falsely at a hearing [*Williams v. Hartford Ins. Co. (1983) 147 Cal. App. 3d 893, 897-898, 195 Cal. Rptr. 448* (citing with approval *Rupp v. Summerfield (1958) 161 Cal. App. 2d 657, 326 P.2d 912*)]. *Williams* distinguished language in *Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 720, 117 Cal. Rptr. 241, 527 P.2d 865* that stated that the plaintiff must show that defendant has at least sought out the police or prosecutorial authorities and falsely reported facts to them indicating that plaintiff had committed a crime. The *Williams* court stated that this language should not be applied to malicious prosecution actions because *Sullivan* was not a malicious prosecution case but a case involving false imprisonment, and at the point in the opinion when that language was used, the court was considering an argument based on institution of an action in a context other than for malicious prosecution. A person may be liable for malicious prosecution without personally signing the complaint initiating the criminal proceeding if he or she has instigated or procured the proceeding [*Siffert v. McDowell (1951) 103 Cal. App. 2d 373, 378-379, 229 P.2d 388* (civil arrest); *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 544, 222 P.2d 136* (criminal)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-357 California Forms of Pleading and Practice--Annotated § 357.20

§ 357.20 Alternative Theories of Recovery or Charges Actionable

There is no reason for permitting plaintiffs and cross complaints to pursue shotgun tactics by proceeding on counts and theories which they know or should know to be groundless. Thus, an action for malicious prosecution lies when but one of alternate theories of recovery is maliciously asserted [*Crowley v. Katleman (1994) 8 Cal. 4th 666, 679, 695, 34 Cal. Rptr. 2d 386, 881 P.2d 1083* ; *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 57, 118 Cal. Rptr. 184, 529 P.2d 608* (civil); *Mabie v. Hyatt (1998) 61 Cal. App. 4th 581, 584, 71 Cal. Rptr. 2d 657* ; *see also § 357.14[5]*].

Similarly, a plaintiff who was prosecuted under a justified criminal charge as well as under a maliciously joined unjustified charge does not need to prove that the damage was specifically attributable to the unjustified one [*Singleton v. Perry (1955) 45 Cal. 2d 489, 497-498, 289 P.2d 794* (criminal)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-357 California Forms of Pleading and Practice--Annotated § 357.21

§ 357.21 Cross Complaints Actionable

[1] In General

An action for malicious prosecution lies when a cross pleading allegedly is filed maliciously. The harm to society and to the individual cross defendant caused by the filing of a cross pleading without probable cause and with malice is substantially similar to that occasioned by the filing of a complaint or other initial pleading known to be false or meritless. Thus, cross pleadings are actionable as in the case of other affirmative malicious prosecutions [*Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 50-53, 118 Cal. Rptr. 184, 529 P.2d 608* (civil)].

[2] Cross Complaints Prohibited in Main Action

A party defendant may not cross complain for malicious prosecution in the first or main action until there has been a favorable termination with respect to the first or main action [*Babb v. Superior Court (1971) 3 Cal. 3d 841, 846, 92 Cal. Rptr. 179, 479 P.2d 379* ; *Loomis v. Murphy (1990) 217 Cal. App. 3d 589, 593, 266 Cal. Rptr. 82* (authorizing defendant to cross complain for malicious prosecution following dismissal of complaint)]. If the plaintiff in the first or main action amends his or her complaint to delete one or more causes of action that appeared in the first complaint, the defendant may not cross complain for malicious prosecution of the deleted cause or causes until favorable termination of the entire proceeding [*Jenkins v. Pope (1990) 217 Cal. App. 3d 1292, 1298-1301, 266 Cal. Rptr. 557*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 357.22 Absolute Privilege Not Available

The fact that a communication may be absolutely privileged for purposes of a defamation action under *Civ. Code § 47(b)* since it was made in connection with a judicial proceeding does not prevent its being an element of an action for malicious prosecution in a proper case. The policy of encouraging free access to the courts is outweighed by the policy of affording redress for individual wrongs when the elements of a cause of action for malicious prosecution are proved [*Albertson v. Raboff (1956) 46 Cal. 2d 375, 382, 295 P.2d 405* (civil); *Williams v. Hartford Ins. Co. (1983) 147 Cal. App. 3d 893, 897, 195 Cal. Rptr. 448* (civil); *see Ribas v. Clark (1985) 38 Cal. 3d 355, 364, 212 Cal. Rptr. 143, 696 P.2d 637*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefamationDefensesPrivilegesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesAbsolute PrivilegesTortsIntentional TortsMalicious ProsecutionElementsGeneral Overview

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31-357 California Forms of Pleading and Practice--Annotated § 357.23

§ 357.23 Defenses

[1] In General

Since the plaintiff has the burden of proving the basic elements of the cause of action, the negation of any of the elements furnishes a full defense to the defendant [*see Jaffe v. Stone (1941) 18 Cal. 2d 146, 159, 114 P.2d 335* (criminal)]. The most common defense proved in this manner is showing that the institution of the prior proceeding was based on probable cause [*see § 357.23[2], [4]*].

[2] Advice of Counsel

[a] In General

Reliance in good faith on the advice of counsel is a defense to an action for malicious prosecution inasmuch as the defense shows probable cause [*Mabie v. Hyatt (1998) 61 Cal. App. 4th 581, 598, 71 Cal. Rptr. 2d 657* ; *Sosinsky v. Grant (1992) 6 Cal. App. 4th 1548, 1556, 8 Cal. Rptr. 2d 552* ; *Kennedy v. Byrum (1962) 201 Cal. App. 2d 474, 481, 20 Cal. Rptr. 98* (civil); *see Pond v. Insurance Co. of N. Am. (1984) 151 Cal. App. 3d 280, 288, 198 Cal. Rptr. 517*]. Thus, if a person has acted on the opinion and advice of counsel to the effect that he or she had a good cause of action after laying all of the facts of the case in good faith before his or her counsel, then probable cause is established and it is presumed that he or she has made out a complete defense to a malicious prosecution action [*Brinkley v. Appleby (1960) 276 Cal. App. 2d 244, 247, 80 Cal. Rptr. 734* (civil)]. This rule is especially applicable when the advice of a regularly elected prosecuting officer of a state or county is sought and relied on because it is the prosecutor's official duty to enforce the criminal statutes in the interest of public welfare [*Walker v. Jensen (1949) 95 Cal. App. 2d 269, 274, 212 P.2d 569* (criminal)]. After a public prosecutor has been consulted, the defense is available no matter how erroneous the advice may have been [*Richter v. Neilson (1936) 11 Cal. App. 2d 503, 508, 54 P.2d 54* (criminal)].

In order to rely on the defense, the requisite disclosure is the disclosure of *facts*, and a client who turns over evidence to his or her attorney is not required to advance any particular legal theory or point out any statute or particular aspect of the evidence that may seem especially relevant. For example, a client who provides a copy of a relevant contract to his or her attorney has met the disclosure requirement with regard to that contract without having to point out any particular

provision of the contract or any statute that may impact on the interpretation or application of the contract. It is the role of the attorney to tell the client what facts are relevant and how the law applies [*Bisno v. Douglas Emmett Realty Fund 1988 (2009) 174 Cal. App. 4th 1534, 1545-1546, 95 Cal. Rptr. 3d 492*].

[b] Limitations

The defense of advice of counsel is not applicable when the initiator of the action acts in bad faith or withholds from counsel facts the initiator knew or should have known would defeat a cause of action otherwise appearing from the information supplied. Similarly, counsel's advice must be sought in good faith and not as a mere cloak to protect one against a suit for malicious prosecution [*Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 53-54, 118 Cal. Rptr. 184, 529 P.2d 608* (civil); *see Walker v. Jensen (1949) 95 Cal. App. 2d 269, 274, 212 P.2d 569* (criminal)]. Thus, it is not a defense when defendant did not believe the accused to be guilty [*Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 545, 222 P.2d 136* (criminal)]. In addition, good-faith reliance on counsel may also be rejected if the party asserting that good faith admits that he or she had no evidence to prove his or her underlying claim, but was merely acting on suspicions [*Palmer v. Zaklama (2003) 109 Cal. App. 4th 1367, 1383-1384, 1 Cal. Rptr. 3d 116*].

[c] Burden of Proof

The burden of proving the affirmative defense of advice of counsel is on the party seeking to benefit by it [*Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 54, 118 Cal. Rptr. 184, 529 P.2d 608* (civil)].

[d] Questions of Fact

Whether there was a full and fair disclosure of all the facts to counsel and whether counsel gave any advice are questions of fact [*Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 545, 222 P.2d 136*].

[3] Honest Statement of Facts

A person is not liable for malicious prosecution when the person does nothing more than lay the facts before a magistrate and leaves to the magistrate such action as he or she may deem proper. That person is not liable when he or she has taken no active part in the arrest but has left the matter to the public officials and no bad faith appears [*Gogue v. MacDonald (1950) 35 Cal. 2d 482, 486-487, 218 P.2d 542*].

[4] Probable Cause

The existence of probable cause constitutes a complete defense to an action for malicious prosecution, and it is often the primary issue in theaction [*Kassan v. Bledsoe (1967) 252 Cal. App. 2d 810, 815-816, 60 Cal. Rptr. 799* (civil)]. Even a malicious motive on the part of defendant is not important if a legal ground existed on which the action could be based [*Paskle v. Williams (1931) 214 Cal. 482, 487, 6 P.2d 505* (civil)]. The fact that the plaintiff made a settlement offer in the underlying action is inadmissible to show probable cause. Probable cause is a function of the state of mind of the defendant; the plaintiff's state of mind is irrelevant [*Covell v. Superior Court (1984) 159 Cal. App. 3d 39, 43, 205 Cal. Rptr. 371*].

One of the most frequent ways of establishing probable cause is by proving good-faith reliance on the advice of counsel [*see § 357.23[2]*]. Probable cause may also be shown by the fact that plaintiffs actually committed an offense charged in the criminal action, even though the jury acquitted them of the charge [*Verdier v. Verdier (1957) 152 Cal. App. 2d 348, 353, 313 P.2d 123* (criminal)]. It should be noted, though, that knowledge of facts that may constitute probable cause is knowledge possessed at the time of the prosecution, not knowledge that was subsequently acquired [*Centers v. Dollar Markets (1950) 99 Cal. App. 2d 534, 543, 222 P.2d 136* (criminal); *Hudson v. Zumwalt (1944) 64 Cal. App. 2d 866, 872, 149 P.2d 457* (civil)]. However, a defendant is not required to have exhausted all sources of information bearing on the relevant facts in order to have had probable cause for instituting the prior proceeding [*Brock v.*

Southern Pac. Co. (1948) 86 Cal. App. 2d 182, 199, 195 P.2d 66 (insanity proceeding)]. If the underlying proceeding was a civil action and the defendant is an attorney, probable cause may be established by showing that the attorney's claim was legally tenable [*Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 885-886, 254 Cal. Rptr. 336, 765 P.2d 498*].

Absent proof of fraud, a jury verdict against the malicious prosecution plaintiff in the prior proceeding of which he or she complains constitutes a conclusive presumption that probable cause existed for the prior proceeding, even if the verdict is upset by the trial judge or on appeal [*Cowles v. Carter (1981) 115 Cal. App. 3d 350, 355-356, 359-360, 171 Cal. Rptr. 269*]. If probable cause for bringing the underlying action is established, probable cause also exists for the continuation of the same action after it has been reversed on appeal [*Vanzant v. DaimlerChrysler Corp. (2002) 96 Cal. App. 4th 1283, 1291, 118 Cal. Rptr. 2d 48*], but subject to the rule that an attorney may be liable for continuing to prosecute a claim after the attorney discovers that the action in fact lacks probable cause [*Zamos v. Stroud (2004) 32 Cal. 4th 958, 970, 12 Cal. Rptr. 3d 54, 87 P.3d 802* ; *see § 357.16[1]*].

Although generally a trial court judgment in the underlying action in favor of the malicious prosecution defendant will establish probable cause for bringing the action even if that decision is subsequently reversed on appeal, there is an exception applicable when the underlying initial judgment was procured by fraud or perjury [*Wilson v. Parker, Covert & Chidester (2002) 28 Cal. 4th 811, 817, 123 Cal. Rptr. 2d 19, 50 P.3d 733* ; *Carpenter v. Sibley (1908) 153 Cal. 215, 218, 94 P. 879*]. However, where such claims of fraud or perjury are litigated and rejected by the fact finder in the underlying action, a malicious prosecution plaintiff cannot rely on those same claims of fraud or perjury to establish the absence of probable cause in the malicious prosecution action [*Plumley v. Mockett (2008) 164 Cal. App. 4th 1031, 1056, 79 Cal. Rptr. 3d 822* (malicious prosecution plaintiff could not relitigate claim that fraudulent evidence and perjury were used to obtain initial adverse decision in underlying proceeding with Board of Patent Appeals and Interferences, when Board rejected exact same claim when reaching initial decision)].

[5] Action by Governmental Entity Not Permitted

Governmental entities may not maintain malicious prosecution actions against persons who have previously sued the entity without success. The bringing of suits against the government is absolutely privileged and cannot form the basis for the imposition of civil liability for malicious prosecution [*City of Long Beach v. Bozek (1982) 31 Cal. 3d 527, 538-539, 183 Cal. Rptr. 86, 645 P.2d 137 , cert. granted and opinion vacated, 459 U.S. 1095 (1983) , opinion reinstated, 33 Cal. 3d 727, 190 Cal. Rptr. 918, 661 P.2d 1072 (1983)*].

However, the court of appeal has held that this rule does not prevent a private party from bringing a malicious prosecution action based on an earlier lawsuit that was also brought against a public entity [*Padres L.P. v. Henderson (2003) 114 Cal. App. 4th 495, 510, 8 Cal. Rptr. 3d 584*]. In that case, for example, a private party that was working with a city to arrange for the financing of a new baseball stadium was entitled to sue for malicious prosecution based on a meritless reverse validation action brought by private citizens challenging the financing plans, even though the city itself would be precluded from bringing such an action [*Padres L.P. v. Henderson (2003) 114 Cal. App. 4th 495, 510-513, 8 Cal. Rptr. 3d 584*]. The court concluded that parties with a unique and substantial interest in a project who participate in a reverse validation action to protect that interest are entitled to seek redress for damages suffered as a result of the action, if they can establish that the reverse validation action was frivolous and brought with malice [*Padres L.P. v. Henderson (2003) 114 Cal. App. 4th 495, 513, 8 Cal. Rptr. 3d 584*].

[6] Immunity of Public Employees

Under *Gov. Code § 821.6*, a public employee is not liable for injury caused by the institution or prosecution of any judicial or administrative proceeding within the scope of his or her employment, even if the employee acts maliciously, and without probable cause [*Tur v. City of Los Angeles (1996) 51 Cal. App. 4th 897, 901, 59 Cal. Rptr. 2d 470*]. Judges, executive heads of administrative departments, public prosecutors, grand jurors, and fire marshals [*see White*

v. Towers (1951) 37 Cal. 2d 727, 731-732, 235 P.2d 209 (investigator for Fish and Game Commission held immune)], county building inspectors and supervisors [*Dawson v. Martin (1957) 150 Cal. App. 2d 379, 381-382, 309 P.2d 915*], deputy sheriffs and city police officers [*Coverstone v. Davies (1952) 38 Cal. 2d 315, 322, 239 P.2d 876*], court marshals [*Keylon v. Kelley (1961) 188 Cal. App. 2d 490, 493-494, 10 Cal. Rptr. 549*], and school officials [*Hardy v. Vial (1957) 48 Cal. 2d 577, 582-584, 311 P.2d 494*] all qualify for immunity when acting within the scope of their duties or employment [*see Gov. Code § 821.6*]. However, the immunity of a public employee from liability for malicious prosecution extends only to proceedings instituted within the scope of his or her employment [*Gov. Code § 821.6*; *Vivell v. Belmont (1969) 274 Cal. App. 2d 38, 40-41, 78 Cal. Rptr. 841*]. For example, it does not extend either to a city council member who acts wholly outside the scope of his or her duties by seeking private gain in urging the criminal prosecution of a person by the city [*see Vivell v. Belmont (1969) 274 Cal. App. 2d 38, 41, 78 Cal. Rptr. 841*] or to a police officer who maliciously and without cause initiates a posecution against a citizen [*Prentice v. Bertken (1942) 50 Cal. App. 2d 344, 349, 123 P.2d 96*].

Under *Gov. Code § 822.2*, a public employee may be liable for misrepresentations if the employee is guilty of actual fraud, corruption, or actual malice. This potential liability for malicious representations, however, does not create an exception to a public employee's *Gov. Code § 821.6* immunity from liability for malicious prosecution, and the immunity from malicious prosecution applies even if the public employee instigates the prosecution by means of fraudulent, corrupt, or malicious misrepresentations [*Tur v. City of Los Angeles (1996) 51 Cal. App. 4th 897, 899-900, 902-903, 59 Cal. Rptr. 2d 470* (firefighters immune under *Gov. Code § 821.6* for presenting accusation to city attorney's for prosecution)].

[7] Immunity of Public Entity

A public entity is immune from suits for malicious prosecution [*Gov. Code §§ 815.2(b), 821.6*; *Blackburn v. Los Angeles County (1974) 42 Cal. App. 3d 175, 176-178, 116 Cal. Rptr. 622* (criminal); *Vivell v. Belmont (1969) 274 Cal. App. 2d 38, 40-41, 78 Cal. Rptr. 841* (criminal)].

[8] Immunity of Anonymous Witness Program

An organization that sponsors or conducts an anonymous witness program, and its employees and agents, are immune from civil actions for damages resulting from its receipt of information regarding possible criminal activity or from dissemination of that information to a law enforcement agency [*Civ. Code § 48.9(a)*]. The immunity does not apply when the information was disseminated with actual knowledge that it was false [*Civ. Code § 48.9(c)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefenses

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31-357 California Forms of Pleading and Practice--Annotated § 357.24

§ 357.24 Motion to Strike Cause of Action Based on Constitutionally Privileged Conduct (Anti-SLAPP Statute)

[1] Purpose and Use

To protect the public interest that encourages continued participation in matters of public significance, and to protect this participation from being chilled through abuse of the judicial process [*see Code Civ. Proc. § 425.16(a), (h)*], the California legislature enacted *Code Civ. Proc. § 425.16*, which provides a special motion to strike so-called SLAPP suits (Strategic Litigation Against Public Participation). If the requirements of the statute are otherwise met, a defendant (including a defendant who is an attorney) may use this special motion to strike in a malicious prosecution action [*see, e.g., Jarrow Formulas, Inc. v. LaMarche (2003) 31 Cal. 4th 728, 741, 3 Cal. Rptr. 3d 636, 74 P.3d 737* (malicious prosecution action based on underlying civil lawsuit); *Dickens v. Provident Life & Accident Ins. Co. (2004) 117 Cal. App. 4th 705, 716, 11 Cal. Rptr. 3d 877* (malicious prosecution action based on underlying participation in procuring criminal prosecution); *White v. Lieberman (2002) 103 Cal. App. 4th 210, 221, 126 Cal. Rptr. 2d 608* (attorney who prosecuted underlying claim entitled to bring motion to strike)].

For further discussion of the special motion to strike, see Ch. 376, *Motions to Strike: Anti-SLAPP* .

[2] Requirements

A motion to strike a cause of action may be brought under *Code Civ. Proc. § 425.16* if the defendant's underlying conduct was in furtherance of the defendant's right of petition or free speech under the United States or California Constitutions in connection with a public issue [*Code Civ. Proc. § 425.16(b)(1)*]. Specifically, a motion to strike may be made if any of the following actions by the defendant form the basis for the complaint [*Code Civ. Proc. § 425.16(e)*]:

- Any written or oral statement made before a legislative, executive, or judicial proceeding, or any other proceeding authorized by law.

- Any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.

- Any written or oral statement or writing made in a place open to the public or in a public forum in connection with an issue of public interest.

- Any other conduct in furtherance of the exercise of the constitutional right of petition or free speech in connection with a public issue or an issue of public interest.

Unlike cases falling under the last two paragraphs listed above, a defendant moving to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding need not separately demonstrate that the statement concerned an issue of public interest [*Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal. 4th 1106, 1123, 81 Cal. Rptr. 2d 471, 969 P.2d 564*].

For further discussion of the special motion to strike, see Ch. 376, *Motions to Strike: Anti-SLAPP* .

[3] Procedure

A motion to strike may be filed within 60 days after the filing of the complaint, or at any later time at the court's discretion on terms the court deems proper [*Code Civ. Proc. § 425.16(f)*]. The moving defendant bears the initial burden of showing that the cause of action arose from protectedactivity [*Shekhter v. Financial Indem. Co. (2001) 89 Cal. App. 4th 141, 150-151, 106 Cal. Rptr. 2d 843*]. However, a defendant moving to strike does not bear the burden of actually proving that the plaintiff intended to chill the defendant's exercise of *First Amendment* rights [*Equilon Enters. v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 58, 124 Cal. Rptr. 2d 507, 52 P.3d 685*], nor need the defendant show that the targeted action has or will have an actual chilling effect [*City of Cotati v. Cashman (2002) 29 Cal. 4th 69, 75-76, 124 Cal. Rptr. 2d 519, 52 P.3d 695*]. It is sufficient that the defendant establish that the challenged lawsuit arose from an act by the defendant in furtherance of the right of petition or free speech [*Equilon Enters. v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 58, 124 Cal. Rptr. 2d 507, 52 P.3d 685*].

In response, the plaintiff has the burden of establishing, with admissible evidence, that there is a probability that the plaintiff will prevail on the claim [*see Code Civ. Proc. § 425.16(b)*]. In making its determination, the court considers the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based [*Code Civ. Proc. § 425.16(b)(2)*]. The court cannot weigh the credibility or comparative strength of competing evidence, although the court must grant a defendant's motion to strike if the defendant's supporting evidence defeats the plaintiff's claim as a matter of law [*Tuchscher Dev. Enters., Inc. v. San Diego Unified Port Dist. (2003) 106 Cal. App. 4th 1219, 1235, 132 Cal. Rptr. 2d 57*].

In any action subject to *Code Civ. Proc. § 425.16*, a defendant prevailing on a special motion to strike is entitled to recover his or her attorney's fees and costs [*Code Civ. Proc. § 425.16(c)*].

For further discussion of the special motion to strike, see Ch. 376, *Motions to Strike: Anti-SLAPP* .

[4] Underlying Suit Dismissed Under Anti-SLAPP Statute ("SLAPPback" Suit)

Effective October 5, 2005, the legislature has provided special procedures for a motion to strike a cause of action for malicious prosecution or abuse of process if that cause of action arises from the filing or maintenance of a prior cause of action that was itself dismissed pursuant to the anti-SLAPP statute discussed in *§ 357.24[1]*. The legislature has found these so-called "SLAPPback" lawsuits to be consistent with the goal of the anti-SLAPP statute--namely, protecting the valid exercise of the right of free speech and petition. Therefore, the legislature's stated intent in enacting *Code Civ. Proc. § 425.18* was to treat these lawsuits differently from other malicious prosecution or abuse of process actions [*Code Civ. Proc. § 425.18(a), (b)(1)*]. Because the statute effects only procedural changes, *Code Civ. Proc. § 425.18* applies to cases pending at the time of its enactment [*Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal. 4th 260, 280-281, 46 Cal. Rptr. 3d 638, 139 P. 3d 30]* . If a cause of action for malicious prosecution or abuse of process

qualifies as a SLAPPback suit, a motion to strike may be brought under *Code Civ. Proc. § 425.16*, but it is subject to certaindifferent procedures, as described below. Although *Code Civ. Proc. § 425.16* still governs many aspects of the motion to strike a SLAPPback suit, subsections (c), (f), (g), and (i) of *Code Civ. Proc. § 425.16* are inapplicable because *Code Civ. Proc. § 425.18* supplies its own provisions to govern those procedural aspects of the motion to strike [*Code Civ. Proc. § 425.18(c)*].

A special motion to strike a SLAPPback lawsuit must be filed within 120 days after the service of the complaint, or, at the discretion of the court, within six months after the service of the complaint or at any later time in extraordinary cases due to no fault of the defendant and upon written findings of the court stating the extraordinary case and circumstance [*Code Civ. Proc. § 425.18(d)(1)*]. The motion to strike must be scheduled by the clerk of the court for a hearing not more than 30 days after service of the motion, unless docket conditions of the court require a later hearing [*Code Civ. Proc. § 425.18(d)(2)*].

A party opposing a special motion to strike a SLAPPback suit may file an ex parte application for a continuance to obtain necessary discovery. If it appears that facts essential to justify opposition to the motion may exist, but cannot be presented at that time, the court is required either to grant a reasonable continuance to permit the party to obtain affidavits or conduct discovery or to make any other order as may be just [*Code Civ. Proc. § 425.18(e)*].

If the court finds that a special motion to strike a SLAPPback suit is frivolous or solely intended to cause unnecessary delay, the court is required to award costs and reasonable attorney's fees, pursuant to *Code Civ. Proc. § 128.5*, to the plaintiff who prevails on the motion [*Code Civ. Proc. § 425.18(f)*]. As noted above, a defendant prevailing on a special motion to strike a SLAPPback suit is not entitled to attorney's fees under *Code Civ. Proc. § 425.16(c)* [*Hutton v. Hafif (2007) 150 Cal. App. 4th 527, 539-540, 59 Cal. Rptr. 3d 109]* .

A party aggrieved by an order denying a special motion to strike under *Code Civ. Proc. § 425.18*, or by an order granting a motion to strike as to some but less than all causes of action alleged in the complaint, may petition an appropriate reviewing court for a peremptory writ within 20 days after service of written notice of entry of the order [*Code Civ. Proc. § 425.18(g)*].

In addition to these procedural differences applicable to all SLAPPback suits, a special motion to strike a SLAPPback suit may not be filed at all by a party whose filing or maintaining of the underlying cause of action was illegal as a matter of law [*Code Civ. Proc. § 425.18(h)*]. The underlying suit is "illegal as a matter of law" if the defendant concedes the illegality of the assertedly protected activity or if the illegaliity is conclusively established by the evidence presented in connection with the motion to strike [*Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal. 4th 260, 286-287, 46 Cal. Rptr. 3d 638, 139 P. 3d 30]* .

The plaintiff bears the burden of establishing that the underlying action was illegal as a matter of law. In meeting this burden, the plaintiff must identify with particularity the statutes violated by the filing of the underlying action and the specific manner in which the statutes were violated with reference to their elements [*Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal. 4th 260, 286-287, 46 Cal. Rptr. 3d 638, 139 P. 3d 30]* . A showing that only part of the underlying action violated a particular statute, but other parts did not, does not meet the plaintiff's burden of showing that the underlying action was "illegal as a matter of law" [*Hutton v. Hafif (2007) 150 Cal. App. 4th 527, 542-543, 59 Cal. Rptr. 3d 109]* . A plaintiff must meet these requirements to exempt the plaintiff's SLAPPback suit from a motion to strike. The SLAPPback statute does not create a broader exemption from application of the anti-SLAPP statute, even if there is evidence that the underlying lawsuit was otherwise baseless [*Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal. 4th 260, 290, 46 Cal. Rptr. 3d 638, 139 P. 3d 30]* .

A SLAPPback suit filed by a public entity is not subject to the provisions of *Code Civ. Proc. § 425.18* [*Code Civ. Proc. § 425.18(i)*].

For further discussion of the special motion to strike, see Ch. 376, *Motions to Strike: Anti-SLAPP* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechForumsConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of FreedomTortsIntentional TortsMalicious ProsecutionGeneral Overview

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§ 357.25 Request for Defense Costs Under Code Civ. Proc. § 1038

A defendant or cross defendant in any civil proceeding under the California Tort Claims Act (*Gov. Code § 810 et seq.*) or for indemnity orcontribution in any civil action waives any right to seek damages for malicious prosecution by requesting defense costs incurred in opposing the proceeding claimed by the defendant or cross defendant to have been brought in bad faith and without reasonable cause. However, failure to request defense costs does not constitute a waiver of the right to pursue a malicious prosecution action [*Code Civ. Proc. § 1038(c)*]. For further discussion of *Code Civ. Proc. § 1038* see Ch. 174, *Costs and Attorney's Fees* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCosts & Attorney FeesStatutory AvailabilityTortsIntentional TortsMalicious ProsecutionRemedies

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§ 357.26 Statute of Limitations

[1] In General

The period of limitation for filing an action for malicious prosecution is two years (one year, prior to January 1, 2003) [*Code Civ. Proc. § 335.1*; *see Stavropoulos v. Superior Court (2006) 141 Cal. App. 4th 190, 197, 45 Cal. Rptr. 3d 705* ; *see also* former *Code Civ. Proc. § 340(3)*; Ch. 345, *Limitation of Actions, § 345.14*].

[2] When Period Begins to Run

A cause of action for malicious prosecution first accrues at the conclusion of litigation in favor of the party allegedly prosecuted maliciously. Thus, the period of limitations begins to run on the date that the proceedings in the prior action were dismissed or terminated [*Babb v. Superior Court (1971) 3 Cal. 3d 841, 846, 92 Cal. Rptr. 179, 479 P.2d 379*]. The fact that the time for appeal from the judgment has not yet run does not prevent the filing of the malicious prosecution action, and therefore the running of the statute is not stayed merely because anappeal could still be filed [*Feld v. Western Land & Dev. Co. (1992) 2 Cal. App. 4th 1328, 1334, 4 Cal. Rptr. 2d 23* ; *Gibbs v. Haight, Dickson, Brown & Bonesteel (1986) 183 Cal. App. 3d 716, 719, 228 Cal. Rptr. 398*].

[3] Effect of Pending Appeal

The rule that the malicious prosecution cause of action accrues on entry of judgment in the trial court in the underlying action applies even if an appeal is taken from that judgment [*Feld v. Western Land & Dev. Co. (1992) 2 Cal. App. 4th 1328, 1334, 4 Cal. Rptr. 2d 23* (*harmonizing Friedman v. Stadum (1985) 171 Cal. App. 3d 775, 778-779, 217 Cal. Rptr. 585* (not statute of limitations case, but assuming that malicious prosecution cause of action does not accrue until appeal from underlying action is resolved); *and Gibbs v. Haight, Dickson, Brown & Bonesteel (1986) 183 Cal. App. 3d 716, 719, 228 Cal. Rptr. 398* (assuming that malicious prosecution cause of action accrues on entry of trial court judgment in underlying action))]. However, when an appeal is taken, special rules govern the running of the statute of limitations. The statute runs from the time of entry of judgment in the trial court until the notice of appeal is filed. Once the notice of appeal is filed, the appeals process tolls the running of the statute until the process is exhausted, at which point the statute commences to run again [*Feld v. Western Land & Dev. Co. (1992) 2 Cal. App. 4th 1328, 1334, 4 Cal.*

Rptr. 2d 23 ; *Gibbs v. Haight, Dickson, Brown & Bonesteel (1986) 183 Cal. App. 3d 716, 722, 228 Cal. Rptr. 398*].

If no review is sought beyond the California Supreme Court, the issuance of the remittitur in the underlying action exhausts the appellate process [*Rare Coin Galleries, Inc. v. A-Mark Coin Co., Inc. (1988) 202 Cal. App. 3d 330, 338, 248 Cal. Rptr. 341* ; *see* *Feld v. Western Land & Dev. Co. (1992) 2 Cal. App. 4th 1328, 1334, 4 Cal. Rptr. 2d 23*]. If a trial court judgment for the plaintiff is reversed on appeal, the issuance of the remittitur first triggers the running of the statute of limitations [*White v. Lieberman (2002) 103 Cal. App. 4th 210, 217, 126 Cal. Rptr. 2d 608*].

If the underlying action involves an appeal in federal appeals court, the statute of limitations for malicious prosecution is tolled until the court of appeals issues its mandate [*Korody-Colyer Corp. v. General Motors Corp. (1989) 208 Cal. App. 3d 1148, 1152-1153, 256 Cal. Rptr. 658*]. Although a federal circuit court is required under the Federal Rules of Appellate Procedure to issue its mandate within 21 days of entry of judgment [*Fed. R. App. P., Rule 41(a)*], the statute of limitations is nevertheless tolled until the mandate issues, even if the court takes longer than 21 days to issue its mandate [*Korody-Colyer Corp. v. General Motors Corp. (1989) 208 Cal. App. 3d 1148, 1153, 256 Cal. Rptr. 658* (mandate issued 39 days after entry of judgment)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefenses

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§ 357.27 Effect of Insurance Coverage for Tort

Some insurance policies specifically cover the insured for damages resulting from malicious prosecution, if the offense is committed during the policy period. However, the court of appeal has held that *Ins. Code § 533*, which provides as a matter of California public policy that an insurer is not liable for losses caused by a wilful act of the insured [*see Ins. Code § 533*], shields an insurer from liability for indemnification for malicious prosecution despite express coverage for such loss provided in the insurance policy. The court reasoned that an act of malicious prosecution necessarily constitutes a "wilful" act under *Ins. Code § 533*, since the required showing of malice in a malicious prosecution action constitutes proof of willfulness [*Downey Venture v. LMI Ins. Co. (1998) 66 Cal. App. 4th 478, 500-501, 506, 78 Cal. Rptr. 2d 142*].

While insurance indemnification for direct liability for malicious prosecution may be against public policy, *Ins. Code § 533* does not shield an insurer from indemnification for its insured's *vicarious* liability for malicious prosecution, such as might be provided if an insured corporation is liable for an act of malicious prosecution committed by an agent for the corporation. In such cases, the party vicariously liable has not, by definition, personally committed the wrongful actions [*Downey Venture v. LMIIns. Co. (1998) 66 Cal. App. 4th 478, 512-513, 78 Cal. Rptr. 2d 142*]. Coverage for malicious prosecution losses may also be enforceable for claims arising in other jurisdictions that do not have a public policy comparable to that embodied by *Ins. Code § 533* [*Downey Venture v. LMI Ins. Co. (1998) 66 Cal. App. 4th 478, 514-515, 78 Cal. Rptr. 2d 142*].

Additionally, although indemnification for direct malicious prosecution liability may be precluded, a separate contractual promise to provide a defense in a claim for malicious prosecution is valid and enforceable [*Downey Venture v. LMI Ins. Co. (1998) 66 Cal. App. 4th 478, 507, 78 Cal. Rptr. 2d 142*].

For further discussion of insurance issues generally and an insurer's duty to defend, see Ch. 308, *Insurance* .

Legal Topics:

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

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§ 357.28 False Imprisonment Distinguished

In malicious prosecution, the detention is malicious but under due forms of law. In false imprisonment, on the other hand, the detention is without color of legal authority [*Cummings v. Farmers Ins. Exch. (1988) 202 Cal. App. 3d 1407, 1422, 249 Cal. Rptr. 568* (criminal); *Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 676, 123 Cal. Rptr. 525* (criminal)]. Moreover, the provocation, motive, and good faith of the defendant in an action for false imprisonment do not constitute material elements, whereas malice and the lack of probable cause are the gist of a malicious prosecution action. Also, the requirement of a final determination is not present in an action for false imprisonment because that action is based on an illegal arrest and nothing that occurs subsequent to the arrest can legalize an illegal arrest [*Singleton v. Perry (1955) 45 Cal. 2d 489, 494-495, 289 P.2d 794* (criminal)]. It is apparent, therefore, that the two torts are mutually inconsistent. A defendant cannot be held liable for both false imprisonment and malicious prosecution. Although it is common to plead both torts as different counts in the same complaint, the plaintiff may be required to elect which count to send to the jury [*see* *Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 676, 123 Cal. Rptr. 525* (criminal); *Bulkley v. Klein (1962) 206 Cal. App. 2d 742, 747, 23 Cal. Rptr. 855* (criminal)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 357.29 Personal Action

An action for malicious prosecution is a personal action that does not give rise to a cause of action in anyone other than the person directly aggrieved [*Coverstone v. Davies (1952) 38 Cal. 2d 315, 324, 239 P.2d 876* (criminal)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 357.30 Criminal Penalties Imposed

If two or more persons conspire falsely and maliciously to indict another for any crime, or to procure another to be charged or arrested for any crime, or conspire falsely to move or maintain any suit, action or proceeding, they are subject to punishment by imprisonment in the county jail for not more than one year, or in the state prison, or by a fine not exceeding $10,000, or both [*Penal Code § 182*]. Every person who maliciously and without probable cause procures a search warrant or warrant of arrest to be issued and executed, is guilty of a misdemeanor [*Penal Code § 170*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 357.31 Cost Payment by Criminal Complainant

When a defendant is acquitted in a misdemeanor or infraction case, if the court certifies in the minutes that the prosecution was malicious and without probable cause, it may order the complainant to pay the costs of the action, or to give an undertaking to pay the costs within 30 days after the trial [*Penal Code § 1447*]. The undertaking must be in writing and signed by the sureties under oath [*see Code Civ. Proc. § 995.320(a)*]. It must be executed by two or more sufficient personal sureties, by one sufficient admitted surety insurer, or by any combination of sufficient personal sureties and admitted surety insurers [*see Code Civ. Proc. § 995.310*]. For a discussion of bonds and undertakings and related forms, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-357 California Forms of Pleading and Practice--Annotated § 357.32

§ 357.32 Prior Court Approval for Pleading Action Against Attorney Not Required Under Civ. Code § 1714.10

Under *Civ. Code § 1714.10*, a cause of action against an attorney that is based on a civil conspiracy with his or her client, arising from any attempt to contest or compromise a claim or dispute, and that is based on the attorney's representation to the client, may not be included in a complaint or other pleading unless the court enters an order allowing the pleading to be filed [*Civ. Code § 1714.10(a)*]. However, *Civ. Code § 1714.10* does not apply to a malicious prosecution action against an attorney who allegedly prosecuted an action without probable cause and adequate investigation, if that action was one that any reasonable attorney would have recognized as untenable. A wholly independent malicious prosecution action may be brought against an attorney for his or her wrongful conduct in bringing the untenable action without pleading a civil conspiracy, even if the attorney's client is also sued for malicious prosecution [*Westamco Inv. Co. v. Lee (1999) 69 Cal. App. 4th 481, 487-488, 81 Cal. Rptr. 2d 634*].

If the operative pleading contains a conspiracy claim in addition to a malicious prosecution claim, but the plaintiff has failed to obtain judicial authorization in compliance with *Civ. Code § 1714.10*, only the conspiracy claim is subject to dismissal under that statute, and the malicious prosecution claim may still be prosecuted [*Alden v. Hindin (2003) 110 Cal. App. 4th 1502, 1507-1508, 2 Cal. Rptr. 3d 845*].

For a discussion of civil conspiracy and *Civ. Code § 1714.10* generally, see Ch. 126, *Conspiracy*
._____

Legal Topics:

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

§§ 357.33[Reserved]

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31-357 California Forms of Pleading and Practice--Annotated § 357.50

§ 357.50 Definition

One who uses legal process, whether criminal or civil, against another to accomplish a purpose for which it is not designed is liable to the other for the pecuniary loss caused thereby [*Spellens v. Spellens (1957) 49 Cal. 2d 210, 231, 317 P.2d 613* ; *Czap v. Credit Bureau of Santa Clara Valley (1970) 7 Cal. App. 3d 1, 5, 86 Cal. Rptr. 417*]. Abuse of process differs from malicious prosecution in that the gist of the tort of abuse of process is not commencing an action or causing process to issue without justification, but rather misusing or misapplying process, justified in itself, for an end other than that which it was designed to accomplish [*Drasin v. Jacoby & Meyers (1984) 150 Cal. App. 3d 481, 485, 197 Cal. Rptr. 768* ; *see Younger v. Solomon (1974) 38 Cal. App. 3d 289, 297, 113 Cal. Rptr. 113*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 357.51 Elements of Tort

The two essential elements of a cause of action for abuse of process have been stated to be an ulterior purpose and a willful act in the use of process not proper in the regular conduct of the proceeding. Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability if the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance of any formal use of the process itself, that constitutes the tort [*Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 466, 72 Cal. Rptr. 344, 446 P.2d 152* ; *Spellens v. Spellens (1957) 49 Cal. 2d 210, 232-233, 317 P.2d 613* ; *see Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 Cal. 3d 1157, 1168-1169, 232 Cal. Rptr. 567, 728 P.2d 1202*].

These elements must be specifically pleaded, or a demurrer will lie. For example, it is not enough to allege malice and intent to harm, because those allegations do not satisfy the willful act element [*Friedman v. Stadum (1985) 171 Cal. App. 3d 775, 779, 217 Cal. Rptr. 585*]. Moreover, the second element (a willful act in the use of process that is not proper in the regular conduct of the proceeding) is not satisfied by alleging, for instance, that the defendant instituted and continued to prosecute a civil action under the California Environmental Quality Act (*Pub. Res. Code § 21000 et seq.*) for the purpose of coercing a monetary settlement rather than to further environmental concerns. Although a defendant's act of improperly instituting or maintaining an action may, in an appropriate case, give rise to a cause of action for malicious prosecution, the mere filing or maintenance of a lawsuit--even for an improper purpose--is not a proper basis for an abuse of process action [*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 Cal. 3d 1157, 1168-1169, 232 Cal. Rptr. 567, 728 P.2d 1202*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 357.52 Acts Held to Constitute Abuse of Process

When process is used to obtain a collateral advantage, an action for abuse of process will lie [*see Golden v. Dungan (1971) 20 Cal. App. 3d 295, 301, 97 Cal. Rptr. 577*]. For example, filing complaints in improper counties for the ulterior purpose of coercing inequitable settlements and default judgments [*Barquis v. Merchants Collection Ass'n (1972) 7 Cal. 3d 94, 104, 101 Cal. Rptr. 745, 496 P.2d 817*], seizing a second lender's collateral in the hands of a debtor in order to coerce the former to pay the debtor's original obligation [*Templeton Feed & Grain Co. v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 466, 72 Cal. Rptr. 344, 446 P.2d 152*], attaching property which has a value greatly in excess of the amount of a legitimate claim in order to restrain the debtor from asserting a claim [*White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 347, 66 Cal. Rptr. 697*], seizing the property of a wife in order to coerce her into dropping claims against her husband [*Spellens v. Spellens (1957) 49 Cal. 2d 210, 230, 317 P.2d 613*], and garnishing exempt wages in order to force a debtor to apply her exempt property to the payment of the debt [*Czap v. Credit Bureau of Santa Clara Valley (1970) 86 Cal. Rptr. 417*] are all uses of process in which the tort of abuse of process has been held to be present. Thus, the term "process" has normally been considered to mean those actions that are initiated either independently, such as the original commencement of a suit, or those processes initiated collaterally, such as an attachment [*Tellefsen v. Key Sys. Transit Lines (1961) 198 Cal. App. 2d 611, 613, 17 Cal. Rptr. 919*].

It should be noted, however, that the term "process" is not limited to this strict sense of the term and has been interpreted broadly to encompass the entire range of "procedures" incident to litigation [*Barquis v. Merchants Collection Ass'n (1972) 7 Cal. 3d 94, 104 n.4, 101 Cal. Rptr. 745, 496 P.2d 817*]. For example, giving of a notice that a deposition will be taken [*Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 94-95, 53 Cal. Rptr. 706*], taking an appeal [*Tellefsen v. Key Sys. Transit Lines (1961) 198 Cal. App. 2d 611, 613, 17 Cal. Rptr. 919*], and using a written interrogatory [*Younger v. Solomon (1974) 38 Cal. App. 3d 289, 296-297, 113 Cal. Rptr. 113*] all involve uses of legal process in which courts have stated that it would be possible to recover damages for the abuse of process if the essential elements of the tort were present. This broad interpretation can be explained historically; the tort evolved as a "catch-all" category to cover improper uses of the judicial machinery that did not fit within the earlier established, but narrowly circumscribed, action of malicious prosecution [*Barquis v. Merchants Collection Ass'n (1972) 7 Cal. 3d 94, 104 n. 4, 101 Cal. Rptr. 745, 496 P.2d 817*].

In one case, the court of appeal held that delaying service of process in one lawsuit with knowledge that another identical complaint has already been filed and served by a different plaintiff, with the ulterior motive of obtaining a larger settlement than would be obtained had defendant known of the second claim when settling the first, can support a finding of abuse of process [*Booker v. Rountree (2007) 155 Cal. App. 4th 1366, 1372, 66 Cal. Rptr. 3d 733]* . However, the court cites no legal authority in support of its conclusion that a plaintiff has to serve process at a time that will be beneficial to a defendant [*see Booker v. Rountree (2007) 155 Cal. App. 4th 1366, 1372, 66 Cal. Rptr. 3d 733]* .

Legal Topics:

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§ 357.53 Acts Held Not to Constitute Abuse of Process

[1] No Misuse

If the defendant has not used legal process for a purpose for which it was not designed and has not obtained collateral advantage over the plaintiff, there is no action for abuse of process [*Golden v. Dungan (1971) 20 Cal. App. 3d 295, 302, 97 Cal. Rptr. 577*]. In addition, even if the process of the court is used with a bad motive and with malice, but for a proper purpose, there is no abuse of process [*Golden v. Dungan (1971) 20 Cal. App. 3d 295, 302, 97 Cal. Rptr. 577*]. Mere vexation or harasssment is not recognized as an objective sufficient to give rise to the tort [*Younger v. Solomon (1974) 38 Cal. App. 3d 289, 297, 113 Cal. Rptr. 113*]. Hence, there is no cause of action for abuse of process stated when a request for appointment of a receiver was proper [*Spira v. Superior Court (1974) 41 Cal. App. 3d 536, 539-540, 116 Cal. Rptr. 93*], when a complaint is directed at the manner rather than the actual service of a prior complaint [*Golden v. Dungan (1971) 20 Cal. App. 3d 295, 302, 97 Cal. Rptr. 577*], when a judgment creditor examines a judgment debtor and telephones third parties who may be indebted to the judgment debtor even if such examination is done with bad intentions [*Kyne v. Eustice (1963) 215 Cal. App. 2d 627, 633, 30 Cal. Rptr. 391*], when a cross complaint alleges only that the primary action only commenced to harass and cause defendant financial loss [*Muller v. Muller (1962) 206 Cal. App. 2d 731, 733, 23 Cal. Rptr. 900*], when a right to appeal is exercised even though with an alleged malicious intent [*Coleman v. Gulf Ins. Group (1986) 41 Cal. 3d 782, 792-793, 226 Cal. Rptr. 90, 718 P.2d 77* ; *Tellefsen v. Key Sys. Transit Lines (1961) 198 Cal. App. 2d 611, 613, 17 Cal. Rptr. 919*], and when a creditor levies an attachment that destroys the debtor financially but that is within the creditor's rights [*Pimentel v. Houk (1951) 101 Cal. App. 2d 884, 886, 226 P.2d 739*].

Continuing to pursue litigation that has been determined to be meritless, such as through the filing of an amended complaint or a motion for attorney's fees, is not actionable as an abuse of process, although it may be actionable under a cause of action for malicious prosecution [*Ramona Unified School Dist. v. Tsiknas (2005) 135 Cal. App. 4th 510, 521, 37 Cal. Rptr. 3d 381*]. The fact that a plaintiff chooses to file an amended complaint, rather than appeal an adverse decision rendered against a prior complaint, does not render the action subject to an abuseof process claim, even if the amended complaint is frivolous [*Ramona Unified School Dist. v. Tsiknas (2005) 135 Cal. App. 4th 510, 521, 37 Cal. Rptr. 3d 381*].

[2] No Action Under Judicial Authority

The gravamen of a complaint for abuse of process is the misuse of the power of the court [*see Meadows v. Bakersfield Sav. & Loan Ass'n (1967) 250 Cal. App. 2d 749, 753, 59 Cal. Rptr. 34*]. However, before the power of the court can be abused, process must issue. If no process issues, there can be no abuse of process and, therefore, no tort. "Process" has been defined as action taken pursuant to judicial authority, either directly or by ancillary proceedings [*see, e.g., Adams v. Superior Court (1992) 2 Cal. App. 4th 521, 530, 3 Cal. Rptr. 2d 49* ; *Meadows v. Bakersfield Sav. & Loan Ass'n (1967) 250 Cal. App. 2d 749, 753, 59 Cal. Rptr. 34*]. Process is not action taken without reference to the power of the court [*Adams v. Superior Court (1992) 2 Cal. App. 4th 521, 530, 3 Cal. Rptr. 2d 49*]. Thus, serving a plaintiff with a false notice that a bench warrant has been issued is not process, because in making the false statement the defendant took no action pursuant to court authority [*Carney v. Rotkin, Schmerin & McIntyre (1988) 206 Cal. App. 3d 1513, 1526, 254 Cal. Rptr. 478*]. Similarly, recording a notice of default and publishing a notice of trustee's sale pursuant to the terms of a deed of trust is not process, because it is not action taken pursuant to court authority, directly or by ancillary proceedings [*Meadows v. Bakersfield Sav. & Loan Ass'n (1967) 250 Cal. App. 2d 749, 753, 59 Cal. Rptr. 34* ; *see also Palmer v. Zaklama (2003) 109 Cal. App. 4th 1367, 1380-1381, 1 Cal. Rptr. 3d 116* (recording of notice of lis pendens is not "process")]. Finally, a motion filed by a party to an ongoing action to reconsider an order to reduce or expunge a felony conviction in criminal litigation to which the movant is not a party, is not process, especially when it does not produce any act of judicial authority, such as a writ or order, that is then subsequently abused [*Adams v. Superior Court (1992) 2 Cal. App. 4th 521, 530, 3 Cal. Rptr. 2d 49* (motion to reconsider denied)].

Abuse of process may consist of a threat that process will be invoked for an improper purpose. Therefore, it could also consist of an attempt to invoke process for an improper purpose. However, process must in fact issue at a defendant's behest before a cause of action will lie [*see Adams v. Superior Court (1992) 2 Cal. App. 4th 521, 531, 3 Cal. Rptr. 2d 49*].

Specific instances of process are discussed in *§ 357.52*. For a listing of cases both finding and declining to find process, see *§ 357.90 et seq.*

Legal Topics:

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§ 357.54 Malicious Prosecution Distinguished

Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing or misapplying process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance. Consequently, in an action for abuse of process, it is unnecessary for the plaintiff to prove either that the proceeding has terminated in his or her favor or that it was obtained without probable cause or in the course of a proceeding begun without probable cause [*Spellens v. Spellens (1957) 49 Cal. 2d 210, 232, 317 P.2d 613* ; *Tellefsen v. Key Sys. Transit Lines (1961) 198 Cal. App. 2d 611, 615, 17 Cal. Rptr. 919*].

Legal Topics:

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§ 357.55 Damages

The damages recoverable for abuse of process include mental suffering [*Spellens v. Spellens (1957) 49 Cal. 2d 210, 233, 317 P.2d 613*]. Emotional distress damages may be recovered as compensatory damages for abuse of process even if the plaintiff has no viable cause of action for negligent or intentional infliction of emotional distress [*Yu v. Signet Bank/Virginia (2002) 103 Cal. App. 4th 298, 321, 126 Cal. Rptr. 2d 516*]. However, a corporate plaintiff cannot sustain mental suffering [*Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 468, 72 Cal. Rptr. 344, 446 P.2d 152*].

A plaintiff may also recover punitive damages where the defendant has acted willfully with the wrongful intention of injuring plaintiff and from an improper or evil motive amounting to malice [*Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 471, 72 Cal. Rptr. 344, 446 P.2d 152*]. In addition, malice may be inferred from the defendant's conduct in order to make a case for punitive damages [*Spellens v. Spellens (1957) 49 Cal. 2d 210, 230, 317 P.2d 613*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 357.56 Absolute Privilege for Judicial Proceedings

[1] Availability

The absolute privilege applicable to publications made in the course of judicial proceedings under *Civ. Code § 47(b)* applies to the tort of abuse of process, as well as to defamation actions [*Adams v. Superior Court (1992) 2 Cal. App. 4th 521, 528-529, 3 Cal. Rptr. 2d 49* ; *Younger v. Solomon (1974) 38 Cal. App. 3d 289, 300-301, 113 Cal. Rptr. 113* ; *Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 94, 53 Cal. Rptr. 706*].

For the privilege to be operative, the publication must have some bearing on or connection with the subject matter of the litigation [*Adams v. Superior Court (1992) 2 Cal. App. 4th 521, 529, 3 Cal. Rptr. 2d 49* ; *Younger v. Solomon (1974) 38 Cal. App. 3d 289, 301-302, 113 Cal. Rptr. 113*].

Specifically, the privilege attaches if the publication [*Profile Structures, Inc. v. Long Beach Bldg. Material Co. (1986) 181 Cal. App. 3d 437, 441-444, 226 Cal. Rptr. 192*]:

- Was made in a judicial proceeding;
- Had some connection or logical relation to the action;
- Was made to achieve the objects of the litigation; and
- Involved litigants or other participants authorized by law.

The privilege is broadly applied to protect most publications within lawsuits, as long as there is some connection between the lawsuit and the publication. Any doubt as to whether the privilege applies is resolved in favor of applying it [*Adams v. Superior Court (1992) 2 Cal. App. 4th 521, 529, 3 Cal. Rptr. 2d 49*].

For example, the privilege precludes a cause of action for abuse of process based on a complaint's factual allegations in

support of a claim for punitive damages (such as alleging malicious, intentional, willful, wanton, and reckless acts) even though under existing statutory and case law the plaintiff could not in any circumstances recover punitive damages, regardless of whether the allegations are true [*Umansky v. Urquhart (1978) 84 Cal. App. 3d 368, 372, 148 Cal. Rptr. 547* (action by heirs against physician for wrongful death of plaintiffs' decedent)].

The litigation privilege may be used as a defense to an abuse of process claim that is based on actions taken to enforce a judgment. The California Supreme Court has held that if the gravamen of the action is a communicative act, the litigation privilege extends to noncommunicative acts that are necessarily related to the communicative conduct, including acts necessary to enforce a judgment [*Rusheen v. Cohen (2006) 37 Cal. 4th 1048, 1065, 39 Cal. Rptr. 3d 516, 128 P.3d 713*]. In that case, the Court held that the gravamen of the action was the filing of declarations of service in order to obtain a default judgment, and this was privileged communicative conduct. Although the declarations were alleged to have been false, because the gravamen of the action was based on this privileged communicative conduct, subsequent noncommunicative conduct taken to enforce the default judgment, which included application for writ of execution and the act of levying on property, was also privileged and could not support an abuse of process claim [*Rusheen v. Cohen (2006) 37 Cal. 4th 1048, 1065, 39 Cal. Rptr. 3d 516, 128 P.3d 713* ; *see also Brown v. Kennard (2001) 94 Cal. App. 4th 40, 47-51, 113 Cal. Rptr. 2d 891* ; *O'Keefe v. Kompa (2000) 84 Cal. App. 4th 130, 134, 100 Cal. Rptr. 2d 602*]. The Court noted that although extending the litigation privilege has the effect of limiting these types of abuse of process claims, an aggrieved party has other remedies that do not involve another round of litigation. These remedies could include moving to set aside the judgment, posting an undertaking or seeking a writ of supersedeas to counter enforcement efforts, or filing a claim of exemption from execution of the judgment [*see Rusheen v. Cohen (2006) 37 Cal. 4th 1048, 1064, 39 Cal. Rptr. 3d 516, 128 P.3d 713*].

The assertion of a lien that is permitted by statute is a privileged communication under the litigation privilege [*see, e.g., Olszewski v. Scripps Health (2003) 30 Cal. 4th 798, 831, 135 Cal. Rptr. 2d 1, 69 P.3d 927*]. However, not all litigation-related conduct will constitute communicative conduct protected by the privilege. For example, delaying service of process in one lawsuit with knowledge that another identical complaint has already been filed and served by a different plaintiff, with the ulterior motive of obtaining a larger settlement than would be obtained had defendant known of the second claim when settling the first, is non-communicative conduct that is unprotected by the litigation privilege [*Booker v. Rountree (2007) 155 Cal. App. 4th 1366, 1372-1373, 66 Cal. Rptr. 3d 733]* .

For further discussion of absolute privilege under *Civ. Code § 47(b)*, see Ch. 340, *Libel and Slander* .

[2] Not an Evidentiary Privilege

Code Civ. Proc. § 47(b) does not, however, create an evidentiary privilege for statements made in the course of judicial proceedings. Accordingly, when, for example, allegations of misconduct properly put an individual's intent at issue in a civil action, statements made during the course of a judicial proceeding may be used for evidentiary purposes in determining whether the individual acted with the requisite intent. Hence, if the filing and pursuit of a civil action could support a cause of action for abuse of process, *Civ. Code § 47(b)* would not prevent the plaintiff from making evidentiary use of the defendant's statements during settlement negotiations to prove the intent with which the defendant's conduct was undertaken [*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 Cal. 3d 1157, 1168, 232 Cal. Rptr. 567, 728 P.2d 1202* (tracing history of former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*) and its applicability to abuse of process actions, but declining to rule on whether former *Civ. Code § 47(2)* applied in abuse of process context)].

[3] Effect of Defendant's Standing

A lack of standing on the part of the defendant to, in fact, publish material or make statements claimed to be privileged does not necessarily vitiate application of the privilege to that defendant [*Adams v. Superior Court (1992) 2 Cal. App. 4th 521, 532, 3 Cal. Rptr. 2d 49*]. Thus, in a case in which the abuse of process defendants, who were counsel to parties

adverse to plaintiff in an ongoing lawsuit, filed motions to reconsider orders to reduce or expunge the abuse of process plaintiff's felony convictions in unrelated criminal proceedings to which the defendants were not parties, the fact that one of the motions was denied for lack of standing on the part of defendants did not destroy the privilege applicable to the motions. In holding that the privilege applied, the court reasoned that the motions were connected to the ongoing lawsuit between the parties because that lawsuit involved allegations of fraud in connection with a real estate transaction. Furthermore, to hold the privilege inapplicable would be tantamount to rendering any attempt to intervene in a lawsuit actionable abuse of process. Finally, the court noted that the courts with jurisdiction over the criminal proceedings had inherently broad powers to control the proceedings before them, and could therefore remedy any abusive interference in those proceedings [*Adams v. Superior Court (1992) 2 Cal. App. 4th 521, 531-532, 3 Cal. Rptr. 2d 49*].

Legal Topics:

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§ 357.57 Statute of Limitations

The two-year (one-year, prior to January 1, 2003) period of limitations set forth in *Code Civ. Proc. § 335.1* [*see* former *Code Civ. Proc. § 340(3)*; Ch. 345, *Limitation of Actions, § 345.14*] is applicable to action filed for abuse of process [*Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 95, 53 Cal. Rptr. 706* ; *McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 590-591, 33 Cal. Rptr. 389*].

The limitation period begins when the abuse of process occurs or, if the injury to the plaintiff does not occur at the time the abuse of processoccurs, the limitation period begins when the injury occurs [*Cantu v. Resolution Trust Corp. (1992) 4 Cal. App. 4th 857, 887, 6 Cal. Rptr. 2d 151*].

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§ 357.58 Abuse of Process as Contempt

Abuse of process or the proceedings of a court is an act of contempt [*Code Civ. Proc. § 1209*]. For discussion and forms involving contempt, see Ch. 135, *Contempt* .

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§ 357.70 Forms of Discovery

For forms of interrogatories for use by plaintiffs and defendants in actions for malicious prosecution, see Bender's Forms of Discovery, Ch. 126, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

Legal Topics:

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Chapter 357 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART III. RESEARCH GUIDE
A. Malicious Prosecution

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§ 357.71 State Statutes

Organization that sponsors or conducts anonymous witness program as granted immunity from civil action for damages under specified conditions. *Civ. Code § 48.9*

Punitive damages for oppression, fraud, or malice. *Civ. Code § 3294*

Damages recoverable in tort. *Civ. Code § 3333*

Two-year period of limitations. *Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)* (one-year period prior to 2003)

Vexatious litigants. *Code Civ. Proc. § 391*

Venue. *Code Civ. Proc. § 395(a)*

Immunity of public entity from malicious prosecution suits. *Gov. Code §§ 815.2(b), 821.6*

Immunity of public employees from malicious prosecution suits where acting within scope of employment. *Gov. Code § 821.6*

Malicious procurement of search warrant or arrest as crime. *Penal Code § 170*

Punishment for conspiracy to falsely and maliciously charge person with crime. *Penal Code § 182*

Cost payment by criminal complainant. *Penal Code § 1447*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsMalicious ProsecutionGeneral Overview

California Forms of Pleading and Practice--Annotated

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31-357 California Forms of Pleading and Practice--Annotated § 357.72

§ 357.72 Decisions

[1] Absolute Privilege Not Available

Absolute privilege under former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*) as not available in malicious prosecution actions. *Albertson v. Raboff (1956) 46 Cal. 2d 375, 382, 295 P.2d 405* ; *Brody v. Montalbano (1978) 87 Cal. App. 3d 725, 736, 151 Cal. Rptr. 206*

Privilege set forth by former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*) to publications or broadcasts made in legislative, judicial, and other official proceedings as applicable not only in defamation case but in any other action except one for malicious prosecution. *Pettitt v. Levy (1972) 28 Cal. App. 3d 484, 488-491* , *104 Cal. Rptr. 650*

[2] Alternative Theories of Recovery or Charges Actionable

Alternative theories of recovery as actionable where maliciously asserted. *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 57, 57 n.5, 118 Cal. Rptr. 184, 529 P.2d 608*

Maliciously joined unjustified criminal charge as actionable. *Singleton v. Perry (1955) 45 Cal. 2d 489, 497-498, 289 P.2d 794*

[3] Cross Complaints Actionable

Cross complaints filed maliciously as actionable. *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 50-53, 118 Cal. Rptr. 184, 529 P.2d 608*

[4] Cross Complaints Prohibited in Main Action

Defendant in main action as prohibited from cross complaining in main action. *Babb v. Superior Court (1971) 3 Cal. 3d 841, 846, 92 Cal. Rptr. 179, 479 P.2d 379*

Defendant in main action as permitted to cross complain in main action following favorable termination, such as dismissal of plaintiff's complaint. *Loomis v. Murphy (1990) 217 Cal. App. 3d 589, 593, 266 Cal. Rptr. 82*

[5] Damage Without a Wrong Possible

No one as capable of recovering damages for legal arrest unless elements of tort proved; legal arrest without presence of elements as damage without a wrong. *Maxon v. Security Ins. Co. (1963) 214 Cal. App. 2d 603, 614, 29 Cal. Rptr. 586*

[6] Damages

[a] Compensatory

Compensatory damages as including out of pocket expenditures such as attorney's fees, other legal fees, business loss, general harm to reputation, social standing and credit, and mental and bodily harm. *Allard v. Church of Scientology of Cal. (1976) 58 Cal. App. 3d 439, 451, 129 Cal. Rptr. 797*

Nature of damages recoverable in malicious prosecution actions. *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 51, 59, 118 Cal. Rptr. 184, 529 P.2d 608* ; *Singleton v. Perry (1955) 45 Cal. 2d 489, 495, 289 P.2d 794* ; *Davis v. Local Union No. 11, Int'l Bhd. of Elec. Workers, AFL-CIO (1971) 16 Cal. App. 3d 686, 695-696*

Malice as required to be proven against particular defendant in order to justify award of compensatory damages against that defendant. *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 541-542, 222 P.2d 136*

Principal injury resulting from malicious prosecution of criminal charge as injury to feelings and reputation of defendant therein. *Maxon v. Security Ins. Co. (1963) 214 Cal. App. 2d 603, 613, 29 Cal. Rptr. 586*

[b] Punitive Damages

Person who flagrantly abuses judicial process as liable for punitive damages. *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 65, 118 Cal. Rptr. 184, 529 P.2d 608*

Awarding of punitive damages as requiring showing of malice in fact. *Bertero v. National General Corp. (1974) 13 Cal. 3d 43, 66, 118 Cal. Rptr. 184, 529 P.2d 608*

Wealth of defendant as factor in award of punitive damages. *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 65, 118 Cal. Rptr. 184, 529 P.2d 608*

Jury award of punitive damages as properly reduced by court when award does not bear reasonable relationship to defendant's assets or annual income. *Gerard v. Ross (1988) 204 Cal. App. 3d 968, 978-980, 251 Cal. Rptr. 604*

[7] Defenses

[a] Advise of Counsel

[i] In General

Probable cause as established by malicious prosecution defendants when they prove that they have in good faith consulted a lawyer, have stated all the facts to him or her, have been advised by the lawyer that they have a good cause of action, and have honestly acted on the advice of the lawyer. *Lucchesi v. Giannini & Uniack (1984) 158 Cal. App. 3d 777, 788, 205 Cal. Rptr. 62*

Reliance in good faith on advice of counsel as defense inasmuch as it shows probable cause. *Kennedy v. Byrum (1962) 201 Cal. App. 2d 474, 481, 20 Cal. Rptr. 98*

Advice of counsel as presumed to be complete defense where defendant presented all facts in good faith to counsel. *Brinkley v. Appleby (1960) 276 Cal. App. 2d 244, 247, 80 Cal. Rptr. 734*

Defense as especially applicable where facts presented to prosecutor. *Walker v. Jensen (1949) 95 Cal. App. 2d 269, 274, 212 P.2d 569*

Defense as available no matter how erroneous advice may have been where public prosecutor consulted. *Richter v. Neilson (1936) 11 Cal. App. 2d 503, 508, 54 P.2d 54*

[ii] Burden of Proof

Burden of proving defense as on defendant. *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 54, 118 Cal. Rptr. 184, 529 P.2d 608*

[iii] Limitations

Defense of advice of counsel as not applicable where initiator of action acts in bad faith or withholds vital facts from counsel or where advice sought as cloak to protect one against suit for malicious prosecution. *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 53-54, 118 Cal. Rptr. 184, 529 P.2d 608*

Defense as not available where defendant does not believe accused to be guilty. *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 545, 222 P.2d 136*

Defense that probable cause is based on advice of counsel as failing where there are any circumstances within knowledge of prosecuting witness which would destroy apparent effect of facts stated by witness to attorney. *Northrup v. Baker (1962) 202 Cal. App. 2d 347, 355, 20 Cal. Rptr. 797*

[iv] Question of Fact

Whether there was full and fair disclosure of all facts to counsel and whether counsel gave any advice as question of fact. *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 545, 222 P.2d 136*

[b] Attorney's Reasonable Belief

Adequacy of attorney's research as not relevant to probable cause determination. *Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 883, 883 n.9, 254 Cal. Rptr. 336, 765 P.2d 498* (disapproving *Tool Research & Eng'g Corp. v. Henigson (1975) 46 Cal. App. 3d 675, 120 Cal. Rptr. 291* to extent that it reached contrary conclusions)

When facts known by attorney are not in dispute, probable cause issue as properly determined by trial court under objective standard; probable cause determination as not including determination of whether attorney subjectively believed that prior claim was legally tenable. *Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 881, 883 n.9, 254 Cal. Rptr. 336, 765 P.2d 498* (disapproving *Tool Research & Eng'g Corp. v. Henigson (1975) 46 Cal. App. 3d 675, 120 Cal. Rptr. 291* to extent that it reached contrary conclusions)

[c] Generally

Governmental entities as not permitted to sue for malicious prosecution. *City of Long Beach v. Bozek (1982) 31 Cal. 3d 527, 538-539, 183 Cal. Rptr. 86, 645 P.2d 137 , cert. granted and opinion vacated, 459 U.S. 1095, 103 S. Ct. 712, 74 L. Ed. 2d 943 (1983) , opinion reinstated, 33 Cal. 3d 727, 190 Cal. Rptr. 918, 661 P.2d 1072 (1983)*

Negation of one of elements of cause of action as full defense. *Jaffe v. Stone (1941) 18 Cal. 2d 146, 159, 114 P.2d 335*

[d] Honest Statement of Facts

Person as not liable for laying out facts for public officials where action is in good faith. *Gogue v. MacDonald (1950) 35 Cal. 2d 482, 486-487, 218 P.2d 542*

[e] Immunity of Public Employees

County employee acting within scope of employment as immune from claim of malicious prosecution under *Gov. Code § 821.6* for initiating criminal prosecution against plaintiff, to whom county detective had previously granted immunity from prosecution; county as consequently immune also under *Gov. Code § 815.2(b).* *Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 604, 199 Cal. Rptr. 644*

Immunity of public employee as extending only to proceedings instituted within scope of employment. *Vivell v. Belmont (1969) 274 Cal. App. 2d 38, 40-41, 78 Cal. Rptr. 841*

School officials as immune from malicious prosecution suit. *Hardy v. Vial (1957) 48 Cal. 2d 577, 582-584, 311 P.2d 494*

Deputy sheriffs and city policeman as immune from malicious prosecution suit. *Coverstone v. Davies (1952) 38 Cal. 2d 315, 322, 239 P.2d 876*

Investigator for Fish and Game Commission as immune from malicious prosecution suit. *White v. Towers (1951) 37 Cal. 2d 727, 731-732, 235 P.2d 209*

Court marshal as immune from malicious prosecution suit. *Keylon v. Kelley (1961) 188 Cal. App. 2d 490, 493-494, 10 Cal. Rptr. 549*

Immunity as not extending to city councilman seeking prosecution of citizen for private gain. *Vivell v. Belmont (1969) 274 Cal. App. 2d 38, 41, 78 Cal. Rptr. 841* (dictum); *Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 604-605, 199 Cal. Rptr. 644*

County building inspector and supervisors as immune from malicious prosecution suit. *Dawson v. Martin (1957) 150 Cal. App. 2d 379, 381-382, 309 P.2d 915*

Immunity as not extending to police officer who maliciously and without cause initiates prosecution against citizen. *Prentice v. Bertken (1942) 50 Cal. App. 2d 344, 349, 123 P.2d 96*

[f] Immunity of Public Entity

Combined effect of *Gov. Code §§ 815.2(b), 821.6* as immunizing public entity from liability from malicious prosecution suits. *Blackburn v. Los Angeles County (1974) 42 Cal. App. 3d 175, 176-178, 116 Cal. Rptr. 622* ; *Vivell v. Belmont (1969) 274 Cal. App. 2d 38, 40-41, 78 Cal. Rptr. 841*

County as immune from malicious prosecution suits; immunity as capable of being raised by demurrer as well as by answer. *Dawson v. Martin (1957) 150 Cal. App. 2d 379, 381-382, 309 P.2d 915*

[g] Probable Cause

Malicious motive is not important if legal ground for action existed. *Paskle v. Williams (1931) 214 Cal. 482, 487, 6 P.2d 505*

Grant of nonsuit in malicious prosecution action was appropriate because, based on undisputed facts, it was objectively reasonable to suspect that plaintiff had committed underlying crime; when plaintiff was detained by security at amusement park with probable cause to believe that plaintiff had committed some crime by surreptitiously videotaping young boys, uncertainty as to precise crime committed was irrelevant to determination of probable cause. *Ecker v. Raging Waters Group, Inc. (2001) 87 Cal. App. 4th 1320, 1332, 105 Cal. Rptr. 2d 320*

Existence of probable cause as complete defense to action for malicious prosecution. *Walsh v. Bronson (1988) 200 Cal. App. 3d 259, 264, 245 Cal.Rptr. 888* ; *Kassan v. Bledsoe (1967) 252 Cal. App. 2d 810, 815-816, 60 Cal. Rptr. 799*

Probable cause as established by showing offense charged was committed even though jury acquitted plaintiffs of it. *Verdier v. Verdier (1957) 152 Cal. App. 2d 348, 353, 313 P.2d 123*

Defendant in malicious prosecution action as always able to show plaintiff was in fact guilty of offense charged; this defense as analogous to defense of truth in actions for defamation. *Clary v. Hale (1959) 175 Cal. App. 2d 880, 889-890, 1 Cal. Rptr. 91*

Knowledge of facts as time prosecution initiated as that which constitutes probable cause and not that knowledge acquired later. *Centers v. Dollar Markets (1950) 99 Cal. App. 2d 534, 543, 222 P.2d 136* ; *Hudson v. Zumwalt (1944) 64 Cal. App. 2d 866, 872, 149 P.2d 457*

Defendant as not required to have exhausted all sources of information bearing on relevant facts to have probable cause. *Brock v. Southern Pac. Co. (1948) 86 Cal. App. 2d 182, 199, 195 P.2d 66*

Prima facie showing of probable cause as established by proof of fact that at preliminary defense hearing accused was duly held by magistrate for trial; mere fact of acquittal of defendant on trial of criminal charge as not prima facie evidence of want of probable cause for prosecution. *Randleman v. Boeres (1928) 93 Cal. App. 745, 752-753, 270 P. 374*

[h] Res Judicata

Doctrine of res judicata as barring relitigation of malicious prosecution claim. *Aronow v. LaCroix (1990) 219 Cal. App. 3d 1039, 1046-1053, 268 Cal. Rptr. 866*

[i] Unclean Hands

When applying equitable doctrine of "unclean hands" to malicious prosecution action, conduct supporting defense must bear direct relationship to claim, although conduct need not relate directly to defendant's decision to file underlying action. *Kendall-Jackson Winery, Ltd. v. Superior Court (1999) 76 Cal. App. 4th 970, 984-987, 90 Cal. Rptr. 2d 743*

Unclean hands defense as applicable if plaintiff's malicious prosecution action relates to his or her unconscientious conduct in underlying litigation. *De Rosa v. Transamerica Title Ins. Co. (1989) 213 Cal. App. 3d 1390, 1396-1397, 262 Cal. Rptr. 370*

Summary judgment for defendant as proper under doctrine of unclean hands when plaintiff failed to disclose crucial information that might have led to different result in action on prior prosecution. *Pond v. Ins. Co. of N. Am. (1984) 151 Cal. App. 3d 280, 292, 198 Cal. Rptr. 517*

[8] Definition

Definition of malicious prosecution. *Singleton v. Perry (1955) 45 Cal. 2d 489, 494, 289 P.2d 794* (criminal)

[9] Elements of Tort

Elements of tort. *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 50, 118 Cal. Rptr. 184, 529 P.2d 608* ; *Jaffe v. Stone (1941) 18 Cal. 2d 146, 159, 114 P.2d 335* ; *Zeavin v. Lee (1982) 136 Cal. App. 3d 766, 769, 186 Cal. Rptr. 545*

In action for malicious prosecution resulting from defendant's having initiated criminal proceedings against plaintiff, plaintiff as having burden to demonstrate (1) institution of criminal proceedings at instigation of defendants, (2) termination of those proceedings favorable to plaintiff, (3) lack of probable cause, and (4) malice. *Williams v. Taylor (1982) 129 Cal. App. 3d 745, 754, 181 Cal. Rptr. 423*

Essential element of tort as not established when association of which defendants allegedly were members, and not defendants themselves, brought prior action. *Iram Enterprises v. Veditz (1981) 126 Cal. App. 3d 603, 608, 179 Cal. Rptr. 1*

[10] False Imprisonment Distinguished

False imprisonment distinguished from malicious prosecution. *Singleton v. Perry (1955) 45 Cal. 2d 489, 494-495, 289 P.2d 794* ; *Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 676, 123 Cal. Rptr. 525* ; *Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 607-608, 199 Cal. Rptr. 644*

Malicious prosecution distinguished from false imprisonment; termination of prosecution favorable to person prosecuted as essential to claim of malicious prosecution, whereas subsequent exoneration of arrestee as having no bearing on validity of arrest for purposes of false imprisonment. *Gomez v. Garcia (1980) 112 Cal. App. 3d 392, 399, 169 Cal. Rptr. 350*

False imprisonment and malicious prosecution as mutually inconsistent; plaintiff as sometimes required to elect upon which count to go to the jury. *Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 676, 123 Cal. Rptr. 525* ; *Bulkley v. Klein (1962) 206 Cal. App. 2d 742, 747, 23 Cal. Rptr. 855*

[11] Favorable Termination

[a] In General

Termination by bar of statute of limitations as not reflecting on merits of action and thus not constituting favorable termination for purposes of malicious prosecution action. *Lackner v. LaCroix (1979) 25 Cal. 3d 747, 752, 159 Cal. Rptr. 693, 602 P.2d 393* ; *Warren v. Wasserman, Comden & Casselman (1990) 220 Cal. App. 3d 1297, 1302, 1303, 271 Cal. Rptr. 579*

Final termination not required; legal termination as sufficient. *Jaffe v. Stone (1941) 18 Cal. 2d 146, 157, 114 P.2d 335* ; *MacDonald v. Joslyn (1969) 275 Cal. App. 2d 282, 289, 79 Cal. Rptr. 707*

Because favorable termination reflecting on merits of underlying action was proven, this favorable termination as not affected by settlement not reflecting on merits reached in separate and independent, but related, action between malicious prosecution plaintiff and party who was not malicious prosecution defendant. *Sierra Club Found. v. Graham (1999) 72 Cal. App. 4th 1135, 1152, 85 Cal. Rptr. 2d 726*

Summary judgment for malicious prosecution plaintiff in underlying action as not favorable termination for purposes of malicious prosecution action because underlying judgment was based on statute of frauds and parol evidence rule and therefore grounds for judgment were primarily procedural in nature. *Hall v. Harker (1999) 69 Cal. App. 4th 836, 844-845, 82 Cal. Rptr. 2d 44 , overruled in part, Casa Herrera, Inc. v. Beydoun (2004) 32 Cal. 4th 336* , to extent *Hall* held that judgment based on application of parol evidence rule does not constitute favorable termination for purposes of malicious prosecution action)

Voluntary dismissal of underlying action due to technical or procedural defect in action does not supply requisite favorable termination. *Eells v. Rosenblum (1995) 36 Cal. App. 4th 1848, 1855, 43 Cal. Rptr. 2d 323* (dismissal because initial filing was premature)

Underlying suit terminated by settlement, even if plaintiff in malicious prosecution action paid nothing in settlement, as not constituting favorable termination. *Pender v. Radin (1994) 23 Cal. App. 4th 1807, 1816-1817, 29 Cal. Rptr. 2d 36*

Underlying state court cross action as favorably terminated although cross plaintiff filed for bankruptcy protection before entry of judgment, since cross plaintiff's motion for summary judgment was heard, orally granted, and documented by minute order. *Shorr v. Kind (1991) 1 Cal. App. 4th 249, 253-254, 259, 2 Cal. Rptr. 2d 192*

Voluntary dismissal of civil action as not constituting favorable termination when dismissal was not on merits and resulted from practical decision that further litigation was too expensive to pursue. *Oprian v. Goldrich, Kest & Assocs. (1990) 220 Cal. App. 3d 337, 345, 269 Cal. Rptr. 429*

Expert testimony of attorneys who participated in underlying action as admissible to show whether or not voluntary dismissal constituted favorable termination. *Leonardini v. Shell Oil Co. (1989) 216 Cal. App. 3d 547, 583, 264 Cal. Rptr. 883*

When underlying action alleges multiple, severable causes of action that could have been subject of separate proceedings, favorable termination of severable cause of action as sufficient basis for malicious prosecution action.

Paramount Gen. Hosp. Co. v. Jay (1989) 213 Cal. App. 3d 360, 372, 261 Cal. Rptr. 723

Voluntary dismissal of defendant in underlying action as not constituting termination in favor of defendant when plaintiff's purpose for dismissing defendant was to effect settlement with another defendant in same action. *Haight v. Handweiler (1988) 199 Cal. App. 3d 85, 88-89, 244 Cal. Rptr. 488*

Favorable termination requirement as met in declaratory relief action when court declines to make declaration sought by defendant and instead issues declaratory judgment favoring adversarial position of plaintiff. *Camarena v. Sequoia Ins. Co. (1987) 190 Cal. App. 3d 1089, 1099-1100, 235 Cal. Rptr. 820*

Dismissal of underlying action on ground that defendant-attorney's allegedly defamatory statement is privileged under former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*) as favorable termination for purposes of malicious prosecution action subsequently brought by attorney. *Berman v. RCA Auto Corp. (1986) 177 Cal. App. 3d 321, 323-327, 222 Cal. Rptr. 877*

Demurrer without leave to amend as proper when action still pending on appeal, because there has been no favorable termination. *Friedman v. Stadum (1985) 171 Cal. App. 3d 775, 779, 217 Cal. Rptr. 585*

Trial court as properly sustaining demurrer to complaint for malicious prosecution without leave to amend when statute of limitations barred action; bar raised by statute of limitations as not reflecting on merits of action and thus as not constituting favorable termination for purposes of subsequent malicious prosecution action. *Drasin v. Jacoby & Meyers (1984) 150 Cal. App. 3d 481, 483-484, 197 Cal. Rptr. 768*

Dismissal as not favorable termination when based on the successful raising of the defense of laches since such dismissal does not reflect in any way on merits of action. *Asia Inv. Co. v. Borowski (1982) 133 Cal. App. 3d 832, 838, 184 Cal. Rptr. 317*

Judgment based on evidence presented, even if judgment also resulted from sanctions for failure to produce witness and evidence statement required under economical litigation project, as favorable termination. *Lumpkin v. Friedman (1982) 131 Cal. App. 3d 450, 455-456, 182 Cal. Rptr. 378*

Whether or not judicial arbitration award denying plaintiff's claim followed by plaintiff's failure to seek trial de novo constitutes favorable termination as depending on whether or not facts show that conclusion of proceedings reflects defendant's innocence of wrongdoing. *Stanley v. Superior Court (1982) 130 Cal. App. 3d 460, 465-466, 181 Cal. Rptr. 878*

Whether voluntary dismissal with prejudice was unfavorable determination as question of fact. *Weaver v. Superior Court (1979) 95 Cal. App. 3d 166, 185, 156 Cal. Rptr. 745*

Final termination requirement as satisfied in civil action where plaintiff must institute another action to try issues presented. *Rich v. Siegel (1970) 7 Cal. App. 3d 465, 469, 86 Cal. Rptr. 665* ; *Kennedy v. Byrum (1962) 201 Cal. App. 2d 474, 480, 20 Cal. Rptr. 98*

Final termination requirement as satisfied in criminal action where prosecutor must institute proceedings de novo. *Hurgren v. Union Mut. Life Ins. Co. (1904) 141 Cal. 585, 588, 75 P. 168*

Dismissal as not favorable termination where it was on technical grounds, for procedural reasons, or for any other reason not inconsistent with person's guilt. *Jaffe v. Stone (1941) 18 Cal. 2d 146, 157, 114 P.2d 335*

Favorable termination requirement as not met where termination brought about either by procurement of defendant

therein or by compromise and settlement. *Paskle v. Williams (1931) 214 Cal. 482, 484, 6 P.2d 505*

[b] Burden of Proof

Plaintiff as bearing burden of proving favorable termination of prior proceedings. *Kassan v. Bledsoe (1967) 252 Cal. App. 2d 810, 812, 60 Cal. Rptr. 799*

[c] Effect of Requirement

Defendant in principal action as not capable of instituting malicious prosecution action since adverse judgment operates to establish conclusively that plaintiff had probable cause. *Babb v. Superior Court (1971) 3 Cal. 3d 841, 847, 92 Cal. Rptr. 179, 479 P.2d 379*

[d] Examples for Civil Actions

Voluntary dismissal of civil action as favorable termination on which action for malicious prosecution may be based. *Hurgren v. Union Mut. Life Ins. Co. (1904) 141 Cal. 585, 587-590, 75 P. 168* ; *Kennedy v. Byrum (1962) 201 Cal. App. 2d 474, 477, 479-480, 20 Cal. Rptr. 98*

In malicious prosecution action against attorney based on attorney's representation of client in prior suit, dismissal of prior action for client's refusal to cooperate with attorney or make discovery as not favorable termination. *Zeavin v. Lee (1982) 136 Cal. App. 3d 766, 771, 186 Cal. Rptr. 545*

Voluntary dismissal of civil action as favorable termination which will support action for malicious prosecution even though expressly made without prejudice. *MacDonald v. Joslyn (1969) 275 Cal. App. 2d 282, 289, 79 Cal. Rptr. 707*

Dismissal of contempt proceedings ancillary to probate proceedings as favorable termination on which to bring malicious prosecution action. *Ferraris v. Levy (1963) 223 Cal. App. 2d 408, 410-411, 36 Cal. Rptr. 30*

Dismissal of contempt proceeding ancillary to a bankruptcy proceeding which was dismissed by mutual consent after a compromise of conflicting claims as not a favorable termination. *Eustace v. Dechter (1942) 53 Cal. App. 2d 726, 732-733, 128 P.2d 367*

Where facts alleged and judicially noticed in action against persons who won prior judgments based on false document and perjured testimony were not sufficient to warrant setting aside prior judgments, such facts could not serve as basis for action for damages on theory of fraud or malicious prosecution. *Kachig v. Boothe (1971) 22 Cal. App. 3d 626, 636-641, 99 Cal. Rptr. 393*

Favorable termination as not possible where action still pending. *Rich v. Siegel (1970) 7 Cal. App. 3d 465, 469, 86 Cal. Rptr. 665*

[e] Examples for Criminal Actions

Favorable termination in criminal action as required to indicate innocence of accused if no trial occurred. *Jaffe v. Stone (1941) 18 Cal. 2d 146, 150, 114 P.2d 335*

That proceedings should have gone so far as to preclude further prosecution on ground of double jeopardy as not

necessary in order that there may be sufficient termination in favor of accused for malicious prosecution action. *Jaffe v. Stone (1941) 18 Cal. 2d 146, 156, 114 P.2d 335*

When defendant in criminal proceeding entered plea of nolo contendere to one or more charges in accusatory pleading pursuant to a plea bargain, dismissal of criminal charges remaining as not constituting favorabletermination. *Cote v. Henderson (1990) 218 Cal. App. 3d 796, 804, 267 Cal. Rptr. 274*

Favorable termination as sufficiently stated by allegation of dismissal of underlying criminal action on basis of known prior grant of immunity to accused. *Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 612-614, 199 Cal. Rptr. 644*

Dismissal by prosecutor in interests of justice and for lack of sufficient evidence as constituting favorable termination. *Jackson v. Beckham (1963) 217 Cal. App. 2d 264, 270, 31 Cal. Rptr. 739*

Dismissal by magistrate at preliminary hearing based on insufficiency of evidence as favorable termination unless further proceedings growing out of same misconduct have been instituted. *Jaffe v. Stone (1941) 18 Cal. 2d 146, 151, 156, 114 P.2d 335*

Acquittal is ordinarily necessary foundation for malicious prosecution suit when criminal proceeding goes to trial. *Jaffe v. Stone (1941) 18 Cal. 2d 146, 150, 114 P.2d 335*

Dismissal by court for lack of evidence is favorable termination of criminal action. *Bulkley v. Klein (1962) 206 Cal. App. 2d 742, 750, 23 Cal. Rptr. 855*

Dismissal of criminal proceeding by prosecutor "in the interests of justice" is not favorable termination when innocence of accused not indicated by record. *De La Riva v. Owl Drug Co. (1967) 253 Cal. App. 2d 593, 599-600, 61 Cal. Rptr. 291*

Dismissal of criminal proceeding after issuance of writ of habeas corpus is favorable termination. *Holliday v. Holliday (1898) 123 Cal. 26, 31, 55 P. 703*

[f] Theory Underlying Requirement

Favorable termination indicates absence of probable cause, supported by doctrine of finality of judgments. *Kachig v. Boothe (1971) 22 Cal. App. 3d 626, 639, 99 Cal. Rptr. 393*

[12] Lack of Probable Cause

[a] In General

Underlying claims brought under unfair competition statute were objectively tenable and therefore sufficient to defeat malicious prosecution action, because it could not be said that all reasonable lawyers would have agreed that underlying claims lacked merit. *Paulus v. Bob Lynch Ford, Inc. (2006) 139 Cal. App. 4th 659, 680-684, 43 Cal. Rptr. 3d 148*

Although probable cause may have supported underlying conversion action, malicious prosecution action could be prosecuted if no probable cause existed to add underlying negligence and fraud claims. *Videotape Plus, Inc. v. Lyons (2001) 89 Cal. App. 4th 156, 161-162, 107 Cal. Rptr. 2d 1*

Denial of defendant's motion for summary judgment in underlying civil action will normally be sufficient to establish

probable cause for bringing underlying action. *Roberts v. Sentry Life Ins. (1999) 76 Cal. App. 4th 375, 384, 90 Cal. Rptr. 2d 408*

Trial court's granting of plaintiff's motion under *Penal Code § 995* to dismiss underlying criminal action insufficient to establish that defendant lacked probable cause to bring action. *Cummings v. Farmers Ins. Exch. (1988) 202 Cal. App. 3d 1407, 1421, 249 Cal. Rptr. 568*

Denial of motions for summary judgment and nonsuit in prior action insufficient to show as matter of law that probable cause for prior action existed. *Lucchesi v. Giannini & Uniack (1984) 158 Cal. App. 3d 777, 788, 205 Cal. Rptr. 62* ; *but see Roberts v. Sentry Life Ins. (1999) 76 Cal. App. 4th 375, 384, 90 Cal. Rptr. 2d 408* (questioning continued viability of *Lucchesi*, which was decided when probable cause included element of subjective good faith)

Lack of probable cause sufficiently stated in allegation that private defendant filed criminal complaint against plaintiff in face of knowledge that prosecution could not succeed because of prior grant of immunity of prosecution. *Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 610-611, 199 Cal. Rptr. 644*

Plaintiff's acquittal of criminal charge not evidence of lack of probable cause; abandonment of criminal proceeding by public prosecutor is matter not subject to consideration by court in malicious prosecution action in determining existence of probable cause if prosecutor acted on own initiative; same is true when prosecutor decides to dismiss charges on which magistrate refused to bind plaintiff over for trial while binding plaintiff over on other charges, rather than reallege them in information, when magistrate refrained from ruling on merits of charges on which plaintiff was not bound over for trial. *Williams v. Taylor (1982) 129 Cal. App. 3d 745, 755, 181 Cal. Rptr. 423*

Definition for civil action. *Davis v. Local Union No. 11, Int'l Bhd. of Elec. Workers, AFL-CIO (1971) 16 Cal. App. 3d 686, 692* ; *Kennedy v. Byrum (1962) 201 Cal. App. 2d 474, 480, 20 Cal. Rptr. 98*

Definition for criminal action. *Kincaid v. Sears, Roebuck & Co. (1968) 259 Cal. App. 2d 733, 741, 66 Cal. Rptr. 915*

Probable cause for instituting insanity proceedings require facts that would lead reasonably prudent man to believe that person was insane. *Rouse v. Twin Pines Sanitarium, Inc. (1958) 162 Cal. App. 2d 639, 642-643, 328 P.2d 536*

Probable cause is not legal cause. *Albertson v. Raboff (1960) 185 Cal. App. 2d 372, 385, 8 Cal. Rptr. 398*

Fact that lawsuit was unsuccessful does not justify inference that it was brought without probable cause. *Masterson v. Pig'n Whistle Corp. (1958) 161 Cal. App. 2d 323, 335, 326 P.2d 918*

Probable cause in criminal action not equivalent to possessing facts that satisfactorily prove guilt of accused person. *Northrup v. Baker (1962) 202 Cal. App. 2d 347, 354, 20 Cal. Rptr. 797* ; *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 540-541, 222 P.2d 136*

Person capable of acting on what appears to be true even if it turns out to be false. *Fry v. Bank of Am. (1956) 142 Cal. App. 2d 150, 156, 298 P.2d 34*

Good faith is independent element of probable cause in malicious prosecution cases actual and honest belief in guilt of plaintiff; is integral part of good faith. *Klotz v. Alexander (1962) 203 Cal. App. 2d 238, 243, 21 Cal. Rptr. 305*

[b] Burden of Proof

Plaintiff bears burden of proving lack of probable cause on part of defendant. *Kassan v. Bledsoe (1967) 252 Cal. App.*

2d 810, 812, 60 Cal. Rptr. 799 ; *Walker v. Jensen (1949) 95 Cal. App. 2d 269, 212 P.2d 569*

[c] Evidence

Plaintiff failed to create triable dispute about lack of probable cause for filing underlying action, despite conflicting evidence about whether evidence was fabricated in underlying action, when other, undisputed evidence provided objectively reasonable basis for bringing underlying causes of action. *Sangster v. Paetkau (1998) 68 Cal. App. 4th 151, 167-168, 80 Cal. Rptr. 2d 66*

Defendant's evidence regarding basis of administrative action to deny hospital surgery privileges to dentist established probable cause as matter of law; plaintiff's evidence challenging defendant's conclusion insufficient to establish triable issue of fact regarding reasonableness of defendant's decision. *Nicholson v. Lucas (1994) 21 Cal. App. 4th 1657, 1666-1671, 26 Cal. Rptr. 2d 778*

Plaintiff required to present substantial evidence to create conflict or inference of lack of probable cause. *Davis v. Local Union No. 11, Int'l Bhd. of Elec. Workers, AFL-CIO (1971) 16 Cal. App. 3d 686, 692* ; *Kassan v. Bledsoe (1967) 252 Cal. App. 2d 810, 816, 60 Cal. Rptr. 799*

Proof that no crime committed or that accused innocent does not necessarily negate existence of probable cause. *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 541, 222 P.2d 136*

Question of plaintiff's guilt permitted to be retried in malicious prosecution action; thus, while unreversed conviction conclusive as to guilt, barring malicious prosecution, acquittal as not conclusive as to plaintiff's innocence. *Clary v. Hale (1959) 175 Cal. App. 2d 880, 889-890, 1 Cal. Rptr. 91*

Court's order of commitment to mental institution is bar to action for malicious prosecution based on institution of insanity proceeding. *Rouse v. Twin Pines Sanitarium, Inc. (1958) 162 Cal. App. 2d 639, 642-643, 328 P.2d 536*

[d] No Inference From Malice

Lack of probable cause not implied from even most express malice. *Kassan v. Bledsoe (1967) 252 Cal. App. 2d 810, 816, 60 Cal. Rptr. 799* ; *Centers v. Dollar Mkts. (1960) 99 Cal. App. 2d 534, 542, 222 P.2d 136*

[e] Question of Law or Fact

Probable cause always properly determined by court, although resolution of preliminary facts may be submitted to jury when factual dispute exists. *Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 884, 254 Cal. Rptr. 336, 765 P.2d 498*

Question of probable cause is legal question, to be determined by trial court, when there is no dispute concerning facts on which attorney acted in filing prior action. *Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 868, 254 Cal. Rptr. 336, 765 P.2d 498* ; *Klein v. Oakland Raiders, Ltd. (1989) 211 Cal. App. 3d 67, 74-75, 259 Cal. Rptr. 149*

Probable cause is question for court when facts not in dispute; when conflict in evidence exists, jury required to determine whether facts exist that warrant or reject inference of probable cause. *Masterson v. Pig'n Whistle Corp. (1958) 161 Cal. App. 2d 323, 337, 326 P.2d 918* ; *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 541, 222 P.2d 136*

[f] Relation to Favorable Termination Requirement

Not even conflict on issue of probable cause created by favorable termination of prior proceeding. *Kassan v. Bledsoe (1967) 252 Cal. App. 2d 810, 816, 60 Cal. Rptr. 799* ; *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 541, 222 P.2d 136*

[g] Standard of Proof

Lack of probable cause established by proof that civil action commenced despite initiator's knowledge of falsity of claim. *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 55, 118 Cal. Rptr. 184, 529 P.2d 608*

Lack of probable cause in criminal action established by honest and reasonable belief of person commencing prosecution. *Clary v. Hale (1959) 175 Cal. App. 2d 880, 888-889, 1 Cal. Rptr. 91*

Probable cause required to be proved from subjective as well as objective point of view. *White v. Brinkman (1937) 23 Cal. App. 2d 307, 312, 73 P.2d 254*

[h] Vicarious Liability

Vicarious liability of principal for agent's lack of probable cause and good faith in initiating proceeding. *Davis v. Local Union No. 11, Int'l Bhd. of Elec. Workers, AFL-CIO (1971) 16 Cal. App. 3d 686, 694-695*

[13] Liability of Corporation

Corporation liable for punitive damages for malicious prosecution when tort committed with malice in fact by official, who having the power to bind the corporation, constituted, in contemplation of law, corporation itself. *City Prod. Corp. v. Globe Indem. Co. (1979) 88 Cal. App. 3d 31, 36, 151 Cal. Rptr. 494*

[14] Malice

Summary judgment for defendants proper when plaintiffs failed to demonstrate evidence of malice; lack of probable cause, by itself, insufficient to demonstrate malice, which requires evidence of defendant's subjective intent. *Estate of Tucker v. Interscope Records (9th Cir. 2008) 515 F.3d 1019, 1031-1032*

Chief element in malicious prosecution is malice; malice is improper motive or purpose. *Maxon v. Security Ins. Co. (1963) 214 Cal. App. 2d 603, 615, 29 Cal. Rptr. 586*

Malice means defendant has some evil or sinister purpose in mind. *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 541, 222 P.2d 136*

Element of malice involves processes of mind and its thinking. *Grove v. Purity Stores, Ltd. (1957) 153 Cal. App. 2d 234, 241, 314 P.2d 543*

[15] Evidence

[a] In General

Plaintiff in malicious prosecution action is not collaterally estopped from proving malice merely because plaintiff was denied sanctions under Code *Civ. Proc. § 128.5* in prior action for failing to prove that prior action was brought in bad faith, because sanction motions are normally decided summarily. *Wright v. Ripley (1998) 65 Cal. App. 4th 1189, 1191, 77 Cal. Rptr. 2d 334*

Mere fact that attorney failed to perform thorough research before filing action insufficient to establish that attorney acted with malice. *Grindle v. Lorbeer (1987) 196 Cal. App. 3d 1461, 1467, 242 Cal. Rptr. 562*

In action against private citizen for malicious prosecution, evidence that defendant did nothing more than truthfully recount his observations to police and prosecutor, insufficient to establish that he acted with malice and without probable cause. *Gomez v. Garcia (1980) 112 Cal. App. 3d 392, 399, 169 Cal. Rptr. 350*

Malice capable of being proved by either direct or indirect evidence. *Weber v. Leuschner (1966) 240 Cal. App. 2d 829, 837, 50 Cal. Rptr. 86*

Malice proved when previous action instituted in bad faith to vex, annoy, or wrong adverse party. *Weber v. Leuschner (1966) 240 Cal. App. 2d 829, 50 Cal. Rptr. 86*

Malice capable of being inferred from declaration of defendant indicating prejudice, ill will, or malicious motive. *Jackson v. Beckham (1963) 217 Cal. App. 2d 264, 272, 31 Cal. Rptr. 739*

Malice capable of being inferred from absence of good faith of accuser. *Bulkley v. Klein (1962) 206 Cal. App. 2d 742, 750, 23 Cal. Rptr. 855*

[b] Inference From Lack of Probable Cause

Malice capable of being inferred from lack of probable cause. *Jacques Interiors v. Petrak (1987) 188 Cal. App. 3d 1363, 1371, 234 Cal. Rptr. 44* ; *MacDonald v. Joslyn (1969) 275 Cal. App. 2d 282, 292, 79 Cal. Rptr. 707* ; *Weber v. Leuschner (1966) 240 Cal. App. 2d 829, 836, 50 Cal. Rptr. 86*

No inference of malice possible from plaintiff's failure to show lack of probable cause. *Clary v. Hale (1959) 175 Cal. App. 2d 880, 889, 1 Cal. Rptr. 91*

[c] Malice Per Se

Knowingly pressing baseless criminal charge constitutes malice per se. *Jackson v. Beckham (1963) 217 Cal. App. 2d 264, 272, 31 Cal. Rptr. 739*

[d] Question of Fact

Existence of malice is question of fact. *Northrup v. Baker (1962) 202 Cal. App. 2d 347, 354, 20 Cal. Rptr. 797*

[16] Personal Action

Action for malicious prosecution is personal one. *Coverstone v. Davies (1952) 38 Cal. 2d 315, 324, 239 P.2d 876*

[17] Proceedings on Which Action May Be Based

Attachment levied in action prosecuted maliciously and without probable cause is basis for malicious prosecution action. *White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 348-349, 66 Cal. Rptr. 697, 438 P.2d 345* (dictum)

Administrative proceeding is basis for malicious prosecution action. *Hardy v. Vial (1957) 48 Cal. 2d 577, 581, 311 P.2d 494*

Malicious prosecution action brought in state court may be based on underlying action brought in federal court under federal patent or copyright law; because malicious prosecution tort action does not "arise under" federal Copyright Act, federal law does not vest exclusive jurisdiction over claim in federal courts. *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps (2002) 99 Cal. App. 4th 1179, 1185-1187, 121 Cal. Rptr. 2d 794* ; *see 28 U.S.C.S. § 1338(a)*

Declaratory relief proceeding is sufficient basis for malicious prosecution action. *Camarena v. Sequoia Ins. Co. (1987) 190 Cal. App. 3d 1089, 1097, 235 Cal. Rptr. 820*

Malicious criminal prosecution or civil action is basis for malicious prosecution action. *Webb v. Youmans (1967) 248 Cal. App. 2d 851, 854, 57 Cal. Rptr. 11*

Order for civil arrest is basis for malicious prosecution action. *Siffert v. McDowell (1951) 103 Cal. App. 2d 373, 378, 229 P.2d 388*

Insanity proceeding is basis for malicious prosecution action. *Brock v. Southern Pac. Co. (1948) 86 Cal. App. 2d 182, 185, 195 P.2d 66*

[18] Proceedings on Which Action May Not Be Based

[a] Administrative Proceedings

Report to State License Board submitted by evaluator hired by insurance company to review work of flooring installer could not be basis for malicious prosecution action, because Board initiated subsequent citation proceeding after conducting investigation pursuant to its authority to do so. *Rodas v. Spiegel (2001) 87 Cal. App. 4th 513, 520-521, 104 Cal. Rptr. 2d 439*

Attorney not permitted to bring action for malicious prosecution against parties who filed complaint with State Bar alleging that attorney was guilty of unprofessional and unethical conduct, even though proceeding eventually terminated in attorney's favor, when State Bar conducted independent investigation of charges. *Stanwyck v. Horne (1983) 146 Cal. App. 3d 450, 452, 194 Cal. Rptr. 228*

[b] Bankruptcy

Claim brought against party other than debtor in bankruptcy for inducing debtor to seek bankruptcy is preempted by federal bankruptcy law, because claim would require determination of good faith of bankruptcy petition, which rests within exclusive jurisdiction of bankruptcy courts; relying on malicious prosecution precedent, abuse of process claim against bankruptcy debtor's insurer and attorneys was preempted. *Choy v. Redland Ins. Co. (2002) 103 Cal. App. 4th 789, 801, 127 Cal. Rptr. 2d 94*

Action for malicious prosecution brought in state court was not preempted; underlying litigation was state-law fraud action brought in state court by debtor-in-bankruptcy against creditor and bankruptcy trustee, was only removed to federal bankruptcy court because of involvement of bankruptcy trustee, was not brought under federal statute, and was

resolved by bankruptcy court through application of state law; under circumstances, state court jurisdiction over malicious prosecution claim would not interfere with federal bankruptcy process or with uniform application of federal bankruptcy law. *Satten v. Webb (2002) 99 Cal. App. 4th 365, 385-387, 121 Cal. Rptr. 2d 234*

Federal bankruptcy action provides exclusive remedy for claim that prior action to prohibit discharge of debts in bankruptcy was abuse of procedure, precluding state law action for malicious prosecution and abuse of process. *Ross v. Universal Studios Credit Union (2002) 95 Cal. App. 4th 537, 541-542, 115 Cal. Rptr. 2d 712*

Federal bankruptcy law provides exclusive remedy for party who successfully defends action by another party in bankruptcy to recover funds allegedly owed. *Saks v. Parilla, Hubbard & Militzok (1998) 67 Cal. App. 4th 565, 567, 573-574, 79 Cal. Rptr. 2d 120*

Malicious prosecution action cannot be based on authorized bankruptcy proceeding, because such state-law tort claim impermissibly intrudes on exclusive federal authority over bankruptcy proceedings and threatens uniformity of federal bankruptcy law, regardless of nature of underlying proceeding. *Pauletto v. Reliance Ins. Co. (1998) 64 Cal. App. 4th 597, 605-606, 75 Cal. Rptr. 2d 334*

Adversary proceeding brought by creditor to block discharge of debtor's fiscal obligations in bankruptcy (*11 U.S.C. § 727(a)*) is insufficient basis for malicious prosecution action; proceeding within exclusive jurisdiction of federal courts; debtors may seek sanctions under federal law if proceedings were filed in bad faith. *Idell v. Goodman (1990) 224 Cal. App. 3d 262, 271, 273 Cal. Rptr. 605*

Congressional grant of exclusive jurisdiction over bankruptcy petitions to federal courts precludes action by debtor in state court for malicious prosecution of involuntary bankruptcy. *Gene R. Smith Corp. v. Terry's Tractor, Inc. (1989) 209 Cal. App. 3d 951, 953-955, 257 Cal. Rptr. 598*

[c] Suit Against Government

Malicious prosecution action against those who have previously sued governmental entity unsuccessfully unavailable to governmental entity; bringing of suits against government is absolutely protected, and forming no basis of liability of malicious prosecution. *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 11, 244 Cal. Rptr. 581*

[19] Statute of Limitations

Limitations period begins to run on date prior action dismissed or terminated. *Babb v. Superior Court (1971) 3 Cal. 3d 841, 846, 92 Cal. Rptr. 179, 479 P.2d 379*

Former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 335.1* (two-year statute of limitations)) requires cause of action for malicious prosecution to be brought within one year after entry of judgment in underlying action. *Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 616, 199 Cal. Rptr. 644*

One-year limitation period begins to run on entry of judgment rather than on expiration of time to appeal. *Soble v. Kallman (1976) 57 Cal. App. 3d 719, 721, 129 Cal. Rptr. 373*

Period of limitations for filing action for malicious prosecution is one year. *Rutherford v. Johnson (1967) 250 Cal. App. 2d 316, 319, 58 Cal. Rptr. 546*

[20] Test for Malicious Criminal Prosecution

Test for determining whether criminal action prosecuted maliciously is whether defendant was actively instrumental in causing prosecution. *Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 720, 117 Cal. Rptr. 241, 527 P.2d 865* ; *Cedars-Sinai Med. Ctr. v. Superior Court (1988) 206 Cal. App. 3d 414, 417, 253 Cal. Rptr. 561*

Person who procures third person to institute malicious prosecution is just as liable as if having personally instituted action. *Stearns v. County of Los Angeles (1969) 275 Cal. App. 2d 134, 137, 79 Cal. Rptr. 757*

Person potentially liable for malicious prosecution without personally signing complaint initiating criminal proceeding. *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 544, 222 P.2d 136* ; *Siffert v. McDowell (1951) 103 Cal. App. 2d 373, 378-379, 229 P.2d 388*

[21] Unfavored Action

Malicious prosecution not favored by law. *Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 872-873, 254 Cal. Rptr. 336, 765 P.2d 498* ; *Babb v. Superior Court (1971) 3 Cal. 3d 841, 847, 92 Cal. Rptr. 179, 479 P.2d 379*

Public policy does not limit plaintiff's right to seek redress for malicious abuse of judicial process. *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 53, 118 Cal. Rptr. 184*

Public policy requires plaintiff to prove basic elements of tort of malicious prosecution. *Grove v. Purity Stores, Ltd. (1957) 153 Cal. App. 2d 234, 242, 314 P.2d 543*

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Comment, *It Is Time to End the Lawyer's Immunity From Countersuit, 35 UCLA L. Rev. 99 (1987)*

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Comment, *Attorney Liability for Malicious Prosecution and Legal Malpractice: Do They Overlap? 8 Pac. L.J. 897 (1977)*

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Brown, *Advice of Counsel As Insurance, 41* Cal. St. B.J. 62 (1966)

Comment, *Extradition as Malicious Prosecution, 5 Stan. L. Rev. 560 (1953)*

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I. Silver, Police Civil Liability, ch. 7 (Matthew Bender)

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 706-714, 870 (4th ed. 1997)

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§ 357.90 California Points and Authorities

For forms of points and authorities relating to abuse of process, see California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

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§ 357.91 California Torts

For discussion of actions for abuse of process, see N. Levy, L. Golden & L. Sacks, California Torts, Ch. 43 (Matthew Bender)

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§ 357.92 Forms of Discovery

For forms of interrogatories for use by plaintiff in an action for abuse of process through successive levies on exempt property, see Bender' S Forms of Discovery, Ch. 126, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

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"Process" defined. *Code Civ. Proc. § 17*; *Penal Code § 7(15)*

Sheriff justified in executing process regular on its face. *Code Civ. Proc. § 262.1*

Statute of limitations. *Code Civ. Proc. § 335.1*

Abuse of process is contempt of court. *Code Civ. Proc. § 1209(4)*

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§ 357.94 Decisions

[1] Absolute Privilege for Judicial Proceedings

If gravamen of action is communicative act, litigation privilege extends to noncommunicative acts that are necessarily related to communicative conduct, including acts necessary to enforce judgment. *Rusheen v. Cohen (2006) 37 Cal. 4th 1048, 1065, 39 Cal. Rptr. 3d 516, 128 P.3d 713*

Privilege of former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*), unlike evidentiary privileges that function by exclusion of evidence, is limitation on liability but does not extend to evidentiary use of statements to prove one element of cause of action. *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 Cal. 3d 1157, 1167-1168, 232 Cal. Rptr. 567, 728 P.2d 1202* ; *see also* *Asia Inv. Co. v. Borowski (1982) 133 Cal. App. 3d 832, 184 Cal. Rptr. 317*

Judicial privilege protects against abuse of process action based on use of writ of execution to enforce purported judgment pursuant to purpose for which process was created, even if wrongful writ of execution is levied on exempt assets of nonparty to invalid judgment; moreover, privilege extends to act of carrying out directive of writ, and not merely to act of applying for writ. *Brown v. Kennard (2001) 94 Cal. App. 4th 40, 47-51, 113 Cal. Rptr. 2d 891*

Levying on bank account and filing abstract of judgment to secure payment of attorney's fee judgment are extensions of underlying action and protected by judicial privilege from abuse of process claim. *O'Keefe v. Kompa (2000) 84 Cal. App. 4th 130, 134, 100 Cal. Rptr. 2d 602*

Filing of writ of sale as attempt to enforce existing judgment and filing of motion for reconsideration are protected by judicial privilege and may not support abuse of process action. *Merlet v. Rizzo (1998) 64 Cal. App. 4th 53, 65-66, 75 Cal. Rptr. 2d 83*

Absolute privilege under former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*) applicable only when communication was made to achieve purpose of litigation. *Carney v. Rotkin, Schmerin & McIntyre (1988) 206 Cal. App. 3d 1513,*

1522-1523, 254 Cal. Rptr. 478

Absolute privilege under former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*) denied to participant in legal proceedings only if matter is so palpably irrelevant to subject matter of controversy that no reasonable person can doubt its irrelevancy and impropriety. *Loomis v. Superior Court (1987) 195 Cal. App. 3d 1026, 1030, 241 Cal. Rptr. 236*

In action for abuse of process and emotional distress, publications made in document prepared by expert witness for use in settlement agreement negotiations between plaintiff and plaintiff's former wife and in expert witness's false testimony at dissolution proceedings covered by absolute privilege of former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*). *Carden v. Getzoff (1987) 190 Cal. App. 3d 907, 913, 235 Cal. Rptr. 698*

Absolute privilege under former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*) applicable even though publication made outside courtroom. *Asia Inv. Co. v. Borowski (1982) 133 Cal. App. 3d 832, 842-843, 184 Cal. Rptr. 317* (settlement conference; impliedly disapproved by *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 Cal. 3d 1157, 1167-1168, 232 Cal. Rptr. 567, 728 P.2d 1202* , to extent it holds that such publications may not be used for evidentiary purposes to prove ulterior purpose)

Knowing execution of false declaration of service as abuse of process. *Kappel v. Bartlett (1988) 200 Cal. App. 3d 1457, 1463-1467, 246 Cal. Rptr. 815*

Absolute privilege under former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*) for publications made in course of judicial proceedings as applicable to actions for abuse of process. *Younger v. Solomon (1974) 38 Cal. App. 3d 289, 300-301, 113 Cal. Rptr. 113* ; *Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 94, 53 Cal. Rptr. 706*

Absolute privilege under former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*) as applicable only where publication has some bearing on or connection with subject matter of litigation. *Younger v. Solomon (1974) 38 Cal. App. 3d 289, 301-302, 113 Cal. Rptr. 113*

[2] Acts Constituting Abuse of Process

Filing complaints in improper counties as abuse of process. *Barquis v. Merchants Collection Asso. (1972) 7 Cal. 3d 94, 104, 101 Cal. Rptr. 745, 496 P.2d 817* ; *see also Yu v. Signet Bank/Va. (1999) 69 Cal. App. 4th 1377, 1389-1390, 82 Cal. Rptr. 2d 304* (relying on *Barquis,* abuse of process action could be based on intentionally filing collection suits in Virginia against California credit card holders, despite inadequate basis for personal jurisdiction in Virginia)

Filing action for claim and delivery and then seizing property to force payment of debt owed by another as abuse of process. *Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 466, 72 Cal. Rptr. 344, 446 P.2d 152*

Excessive attachment as abuse of process. *White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 347, 66 Cal. Rptr. 697, 438 P.2d 345*

Claim and delivery used improperly as abuse of process. *Spellens v. Spellens (1957) 49 Cal. 2d 210, 229-232, 317 P.2d 613*

Allegations that defendant's ulterior motive in executing writ of attachment in face of stay of judgment was to cause such financial harm to plaintiff that plaintiff would be unable or unwilling to file and prosecute appeal of underlying judgment were sufficient to support cause of action for abuse of process. *Drum v. Bleau, Fox & Assocs. (2003) 107 Cal. App. 4th 1009, 1020, 132 Cal. Rptr. 2d 602*

Using written interrogatory for improper purpose as abuse of process. Younger v. *Solomon (1974) 38 Cal. App. 3d 289, 296-297, 113 Cal. Rptr. 113*

Garnishing exempt wages for improper purpose as abuse of process. *Czap v. Credit Bureau of Santa Clara Valley (1970) 7 Cal. App. 3d 1, 5-7, 86 Cal. Rptr. 417*

[3] Acts Not Constituting Abuse of Process

[a] No Misuse

Improper purpose underlying maintenance of lawsuit as insufficient basis for abuse of process action. *Warren v. Wasserman, Comden & Casselman (1990) 220 Cal. App. 3d 1297, 1300-1301, 271 Cal. Rptr. 579*

Filing of motion to disqualify counsel as not supporting claim of abuse of process when plaintiff fails to show that movant committed unauthorized or wrongful act. *Silver v. Gold (1989) 211 Cal. App. 3d 17, 24-25, 259 Cal. Rptr. 185*

Abuse of process as existing only when process is used to obtain collateral advantage; challenge to propriety of method of service, rather than to reasons for service, as not establishing basis for collateral advantage; summary judgment for defendant in abuse of process action as proper after plaintiff had default judgment set aside in earlier action when process server failed to serve plaintiff properly and signed false affidavit of service. *Slaughter v. Legal Process & Courier Serv., (1984) 162 Cal. App. 3d 1236, 1247-1248, 209 Cal. Rptr. 189*

Element of coercion as present in filing of every lawsuit; combination of desire to coerce a settlement with filing of complaint for legal malpractice as not constituting actionable abuse of process. *Drasin v. Jacoby & Meyers (1984) 150 Cal. App. 3d 481, 485, 197 Cal. Rptr. 768*

Abuse of process as not present where appointment of receiver requested for proper purpose. *Spira v. Superior Court (1974) 41 Cal. App. 3d 536, 539-540, 116 Cal. Rptr. 93*

Abuse of process as not present where only vexation or harassment alleged. *Younger v. Solomon (1974) 38 Cal. App. 3d 289, 297, 113 Cal. Rptr. 113*

Abuse of process as not present where process used for proper even with bad motive and malice. *Golden v. Dungan (1971) 20 Cal. App. 3d 295, 302, 97 Cal. Rptr. 577*

Abuse of process as not present where complaint directed at manner of service. *Golden v. Dungan (1971) 20 Cal. App. 3d 295, 302, 97 Cal. Rptr. 577*

Abuse of process as not present if process not misused and no collateral advantage obtained over plaintiff. *Golden v. Dungan (1971) 20 Cal. App. 3d 295, 302, 97 Cal. Rptr. 577*

Abuse of process as not present where judgment creditor properly examines judgment debtor and third parties. *Kyne v. Eustice (1963) 215 Cal. App. 2d 627, 633, 30 Cal. Rptr. 391*

Abuse of process as not present where only allegation is that complaint filed to harass and cause defendant financial loss. *Muller v. Muller (1962) 206 Cal. App. 2d 731, 733, 23 Cal. Rptr. 900*

Abuse of process as not present where right to appeal exercised. *Tellefsen v. Key Sys. Transit Lines (1961) 198 Cal. App. 2d 611, 613, 17 Cal. Rptr. 919*

Abuse of process as not present where attachment levied is within creditor's rights. *Pimentel v. Houk (1951) 101 Cal. App. 2d 884, 886, 226 P.2d 739*

[b] No Action Under Judicial Authority

Abuse of process as not present if no action taken pursuant to judicial authority. *Carney v. Rotkin, Schmerin & McIntyre (1988) 206 Cal. App. 3d 1513, 1526, 254 Cal. Rptr. 478* ; *Meadows v. Bakersfield Sav. & Loan Ass'n (1967) 250 Cal. App. 2d 749, 753, 59 Cal. Rptr. 34*

[4] Contempt

Abuse of process as contempt of court. *Arc Inv. Co. v. Tiffith (1958) 330 P.2d 305*

[5] Damages

Corporate plaintiff as not capable of recovering damages for mental suffering in abuse of process action. *Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 468, 72 Cal. Rptr. 344, 446 P.2d 152*

Punitive damages as available in abuse of process action where defendant has acted intentionally and maliciously. *Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 468, 72 Cal. Rptr. 344, 446 P.2d 152*

Advice of counsel as constituting defense to charge of malice in action for abuse of process seeking punitive damages if defendant has fully disclosed relevant facts to attorney. *Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 472 n.7, 72 Cal. Rptr. 344, 446 P.2d 152*

Malice as capable of being inferred from defendant's conduct to prove malice in seeking punitive damages in abuse of process action. *Spellens v. Spellens (1957) 49 Cal. 2d 210, 230, 317 P.2d 613*

Damages recoverable in abuse of process action as including mental suffering. *Spellens v. Spellens (1957) 49 Cal. 2d 210, 233, 317 P.2d 613*

[6] Definition

[a] In General

Abuse of process as use of criminal or civil process against another to accomplish purpose for which process was not designed. *Spellens v. Spellens (1957) 49 Cal. 2d 210, 231, 317 P.2d 613* ; *Czap v. Credit Bureau of Santa Clara Valley (1970) 7 Cal. App. 3d 1, 5, 86 Cal. Rptr. 417*

Gist of abuse of process as misuse of power of court. *Younger v. Solomon (1974) 38 Cal. App. 3d 289, 297, 113 Cal. Rptr. 113*

[b] "Process" Defined

Orders to show cause re contempt as properly considered "process" within definition of tort of abuse of process. *Clark Equip. Co. v. Wheat (1979) 92 Cal. App. 3d 503, 526, 154 Cal. Rptr. 874*

"Process," as used in tort of abuse of process, as having never been limited to strict sense of term, but instead as having been interpreted broadly to encompass entire range of procedures incident to litigation. *Barquis v. Merchants Collection Ass'n (1972) 7 Cal. 3d 94, 104 n.4, 101 Cal. Rptr. 745, 496 P.2d 817*

"Process" as means whereby court compels compliance with its demands. *Meadows v. Bakersfield Sav. & Loan Ass'n (1967) 250 Cal. App. 2d 749, 753, 59 Cal. Rptr. 34* (posting of notice of default and notice of sale under provisions of deed of trust as not constituting process for abuse of process action)

[7] Elements of Tort

Elements of abuse of process as ulterior purpose and improper willful act. *Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 466, 72 Cal. Rptr. 344, 446 P.2d 152* ; *Spellens v. Spellens (1957) 49 Cal. 2d 210, 232-233, 317 P.2d 613*

Complaint containing no allegations of misuse of process other than filing of complaint as insufficient to state abuse of process action. *Loomis v. Murphy (1990) 217 Cal. App. 3d 589, 595, 266 Cal. Rptr. 82*

To establish cause of action for abuse of process, plaintiff as required to plead that defendant entertained ulterior motive in using process and committed willful act in wrongful manner; ulterior motive as properly inferrable from willful abuse of process. *Kappel v. Bartlett (1988) 200 Cal. App. 3d 1457, 1465, 246 Cal. Rptr. 815*

Tort of abuse of process as consisting of willful misuse of process to accomplish purpose for which it was not designed and as requiring showing of malice, either express or implied. *Slaughter v. Legal Process & Courier Serv. (1984) 162 Cal. App. 3d 1236, 1247, 209 Cal. Rptr. 189*

Elements of tort of abuse of process as ulterior motive in using process, and use of process in wrongful manner. *Drasin v. Jacoby & Meyers (1984) 150 Cal. App. 3d 481, 485, 197 Cal. Rptr. 768*

Essential element of tort as not established when association of which defendants were allegedly members, and not members themselves, brought action in which process was abused. *Iram Enterprises v. Veditz (1981) 126 Cal. App. 3d 603, 608, 179 Cal. Rptr. 1*

[8] Malicious Prosecution Distinguished

Distinction between malicious prosecution and abuse of process. *Spellens v. Spellens (1957) 49 Cal. 2d 210, 232, 317 P.2d 613* ; *Tellefsen v. Key Sys. Transit Lines (1961) 198 Cal. App. 2d 611, 615, 17 Cal. Rptr. 919*

Abuse of process as differing from malicious prosecution in that gist of tort as not commencing or causing process to issue without justification, but as misusing or misapplying process justified in itself for end other than that which it was designed to accomplish. *Weisenburg v. Molina (1976) 58 Cal. App. 3d 478, 488, 129 Cal. Rptr. 813*

[9] Order to Show Cause re Contempt

Filing orders to show cause re contempt, seeking to enforce prior court orders in dissolution action, as not constituting basis for independent action for abuse of process against attorney for moving party. *Green v. Uccelli (1989) 207 Cal. App. 3d 1112, 1125, 255 Cal. Rptr. 315*

Improper use of contempt order to obtain collateral advantage in litigation as constituting basis for action for abuse of process. *Clark Equip. Co. v. Wheat (1979) 92 Cal. App. 3d 503, 526-527, 528, 154 Cal. Rptr. 874*

[10] Permissible Inferences

In abuse of process action, ulterior motive or purpose as permitted to be inferred from what is said or done about process, but inproper act as not permitted to be inferred from motive. *Tellefsen v. Key Sys. Transit Lines (1961) 198 Cal. App. 2d 611, 616, 17 Cal. Rptr. 919*

[11] Statute of Limitations

Cause of action for abuse of process as accruing, for purposes of commencement of limitation period under former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 335.1*, when defendant's wrongful conduct actually injures plaintiff. *Kappel v. Bartlett (1988) 200 Cal. App. 3d 1457, 1467-1469, 246 Cal. Rptr. 815*

One-year period of limitation under former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 335.1* (two-year statute of limitations)) as applicable to actions filed for abuse of process. *Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 95, 53 Cal. Rptr. 706* ; *McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 590-591, 33 Cal. Rptr. 389*

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§ 357.95 Law Reviews

Comment, *It Is Time to End the Lawyer's Immunity From Countersuit, 35 UCLA L. Rev. 99 (1987)*

Note, *Abuse of Process--An Excessive Attachment Supports a Claim for Abuse of Process Rather Than Malicious Prosecution and Such Claim May Be Brought in the Action in Which the Attachment Was Issued, 6 San Diego L. Rev. 139 (1969)*

Comment, *Excessive Attachments As Abuse of Process in California, 9 Santa Clara Law. 132 (1968)*

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§ 357.96 Text References

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 715-718 (4th ed. 1997)

Witkin, Summary of California Law, Vol. 6, *Torts*, § 1434 (9th ed. 1988)

Prosser and Keeton, Law of Torts, Ch. 21, *Misuse of Legal Procedure*, § 121 (5th ed. 1984)

6 Cal. Jur. 3d, *Assault and Other Wilful Torts*, §§ 9-20

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[Reserved]

§§ 357.97[Reserved]

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31-357 California Forms of Pleading and Practice--Annotated § 357.110

§ 357.110 Facts and Documents re Complaint

Obtain the facts and documents necessary for preparing the complaint, including the following:

1. Facts to be ascertained.

NOTE:
Not all of the following facts will be ascertainable from the client in the initial interview. Subsequent interviews may be required or it may be necessary to ascertain the facts from others, including the potential defendant(s) by use of discovery proceedings. Notes following facts listed below indicate sources from which the facts required might be obtained.

a. Facts about plaintiff.

b. Capacity of plaintiff to sue.

c. Facts relating to the alleged malicious prosecution.
(1) Date, time, and place of arrest or of institution of civil proceeding.

(2) Description of what happened and of what each person did as far as plaintiff can recollect, including identification of all persons involved.

(3) Nature of cause of action or type of crime charged.

(4) Plaintiff's statement as to motivation of defendant(s) for instituting proceeding.

(5) Whether and when prosecution was terminated in plaintiff's favor; if so, at what stage of the proceeding and in what manner it was terminated.

d. Damages sustained by plaintiff.

(1) Personal injuries.

(2) Name, address, and telephone number of each physician who treated, or is treating, plaintiff for injuries. Communication may thereafter be had with these doctors for more detailed information regarding plaintiff's injuries.

(3) Name and address of hospital in which treatment was rendered to plaintiff as a result of the injuries sustained.

(4) Amount of medical and hospital bills resulting from the malicious prosecution; amount paid and amount owed.

(5) Amount of time lost to plaintiff as a result of the prosecution and plaintiff's estimation of the reasonable value thereof.

(6) If plaintiff was deprived of liberty for any period of time, determine the nature of the deprivation and plaintiff's estimation of the nature of damages suffered therefrom.

(7) Injury to plaintiff's fame, reputation, and character as a result of the prosecution.

(8) Mental suffering.

(9) Name, address, and telephone number of each physician or psychiatrist who treated, or is treating, plaintiff as a result of the mental suffering and distress. Communication may thereafter be had with these physicians or psychiatrists, subject to plaintiff's consent, for more detailed information regarding these injuries.

(10) General impairment of social and mercantile standing, injury to credit, and all losses sustained to plaintiff's business.

(11) Expenses incurred in defense of prior proceeding, including reasonable attorney's fees and court costs.

(12) Facts showing that defendant acted with actual malice and ill will toward plaintiff which can support an award of punitive damages.

e. Facts relating to each defendant.

(1) Name, address, and telephone number of each potential defendant, whether an individual or a legal entity (e.g., a corporation), and the sex and approximate age of each potential individual defendant.

NOTE:
A public employee is not liable for injury caused by his or her institution or prosecution of any judicial or administrative proceeding within the scope of employment, even if he or

she acts maliciously and without probable cause [*Gov. Code § 821.6*]. For a further discussion of the immunity of a public employee, see *§ 357.23[6]*. In a malicious prosecution action potential defendants might include a person procuring a third person to initiate the proceeding, as well as the person or persons who actually initiate the proceeding [***see*** *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 50, 118 Cal. Rptr. 184, 529 P.2d 608* (civil); *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 544, 222 P.2d 136* (criminal)]. If the person instigating the action has honestly relied on the advice of counsel, even if the advice is incorrect, this is conclusive of the existence of probable cause and neither party may be liable [***see*** discussion in *§ 357.23[2]*].

(2) Occupation, including name and address of employer, of each individual defendant.

(3) Status of each individual defendant at time of malicious prosecution as creditor, agent, officer of corporation, or similar status.

(4) Capacity of each potential defendant.

f. Facts relating to other causes of action.

(1) Violation of plaintiff's right to protection from bodily harm [*see* Ch. 58, *Assault and Battery*];

(2) Violation of plaintiff's personal liberty [*see* Ch. 257, *False Imprisonment*];

(3) Injury to plaintiff's reputation [*see* Ch. 340, *Libel and Slander*];

(4) Intentional infliction of mental distress [*see* Ch. 362, *Mental Suffering and Emotional Distress*]; and

(5) Ch. 357, *Malicious Prosecution and Abuse of Process* [*see § 357.50 et seq.*].

2. Documents to be obtained.

NOTE:
Not all of the following documents will be obtainable from the client in the initial interview. Subsequent interviews may be required, or, when circumstances will permit it, they might be mailed to the attorney. It might, however, be necessary to obtain the documents from someone other than the client. Notes following the documents listed indicate sources from which the documents may be obtained. If the contents of any such document must be proved at trial, the document itself must be presented [*Evid. Code § 1520*] unless secondary evidence is admissible [*see Evid. Code § 1521 et seq.*].

a. An attested copy of the complaint or ancillary proceeding in a civil action.

NOTE:
The a copy must be obtained from, and attested by, the clerk of the court in which the prior malicious prosecution was maintained or initiated; no other copy will suffice. This copy may serve as evidence showing defendant's initiation of the prior malicious prosecution. If the prior prosecution was criminal, defendant's instigation of the prosecution may be shown by testimony of any person to whom information was relayed

leading to the issuance of the warrant.

b. Letters, correspondence, or any other written documents reflecting malice on behalf of the defendant toward the plaintiff. These documents may be obtainable from the plaintiff; however, if they are in the possession of the defendant, they may have to be obtained through discovery [*see* Ch. 190, *Depositions and Discovery* .

c. Attested record of the prior malicious proceedings.

NOTE:
Attested copies of these records as necessary to show that the prior proceeding was terminated favorably to the plaintiff. If these records contain comments of the judge, they may serve as forceful evidence of the absence of probable cause for the initiation of the prior proceeding. Judicial notice may be taken of any judgment, act of any judicial department, or records of any court of record of any state or of the United States [*Evid. Code § 452(a), (c), (d)*].

d. Bills, receipts, cancelled checks, or similar items, which might serve as evidence of the amount of plaintiff's damages.

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§ 357.111 Prepare Complaint

1. The allegations of a complaint for malicious prosecution are:

a. Capacity and residence of defendant(s).

b. Fictitious name allegation, if appropriate [*see § 357.190*, Paragraph 2].

c. Facts showing that defendant(s) initiated, or caused a third person to initiate, a criminal or civil proceeding against plaintiff [*see §§ 357.190* and *357.193*, Paragraph 3].

d. Facts showing that the proceeding was terminated in favor of plaintiff [*see §§ 357.190* and *357.193*, Paragraph 4].

e. Facts showing or a general allegation that defendant(s) acted without probable cause in initiating the prior criminal or civil proceeding [*see §§ 357.190* and *357.193*, Paragraph 5].

f. Facts showing or a general allegation that defendant(s) acted maliciously in initiating the prior criminal or civil proceeding [*see §§ 357.190* and *357.193*, Paragraph 6].

g. Damages [*see §§ 357.190* and *357.193*, Paragraphs 7, 8, and 9].

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-357 California Forms of Pleading and Practice--Annotated § 357.112

§ 357.112 Verification of Complaint

Have the complaint verified by plaintiff if desired [*see § 357.190*].

NOTE:
For a full discussion of the requirements of verifying a complaint, see Ch. 572, *Verification* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-357 California Forms of Pleading and Practice--Annotated § 357.113

§ 357.113 Prepare Summons

NOTE:
For a full discussion of the requirements regarding preparation, issuance and service of papers, see Ch. 518, *Service of Summons and Papers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-357 California Forms of Pleading and Practice--Annotated § 357.114

§ 357.114 File Complaint

File the complaint and have the summons issued by the appropriate court having jurisdiction and venue for the action.

NOTE:
For a full discussion of the requirements regarding venue and jurisdiction, see Ch. 571, *Venue* , and Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-357 California Forms of Pleading and Practice--Annotated § 357.115

§ 357.115 Service of Summons and Complaint

Have the summons and complaint served on the defendant.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 357.116 Default Judgment

If defendant does not file and answer within 30 days after service (or any extension thereof), obtain a default judgment.

NOTE:
For a full discussion of the requirements regarding obtaining a default judgment, see Ch. 205, *Defaults and Default Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-357 California Forms of Pleading and Practice--Annotated § 357.117

§ 357.117 Discovery

When the answer is served and filed conduct discovery as appropriate.

NOTE:
For a further discussion of the requirements regarding discovery, see Ch. 190, *Depositions and Discovery* . For forms of interrogatories for use by plaintiffs in actions for malicious prosecution, see Bender' S Forms of Discovery, Ch. 126, *Malicious Prosecution and Abuse of Process* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 357.118 Set for Trial

Set the matter for trial.

NOTE:
For a full discussion of this subject, see Ch. 551, *Trial* , and Ch. 552, *Trial Court Delay Reduction* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsMalicious ProsecutionGeneral Overview

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Volume 31: Lis Pendens thru Mandate and Prohibition-Chs. 348-358
Chapter 357 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART IV. PROCEDURAL CHECKLIST
A. Malicious Prosecution
1. Plaintiff's Checklist

31-357 California Forms of Pleading and Practice--Annotated §§ 357.119-357.129

[Reserved]

§§ 357.119[Reserved]

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A. Malicious Prosecution
2. Defendant's Checklist

31-357 California Forms of Pleading and Practice--Annotated § 357.130

§ 357.130 Facts and Documents re Answer

Obtain the facts and documents necessary for preparing the answer, including the following:

1. Facts to be ascertained.

NOTE:
Not all of the following facts will be ascertainable from the client in the initial interview. Subsequent interviews may be required or it may be necessary to ascertain the facts from others, including the plaintiff, by use of discovery proceedings.

a. Facts relating to defendant.

b. Facts required for the answer.

NOTE:
Counsel should advise the client not to discuss the case with any third person without obtaining prior permission from counsel to do so.

(1) Date, manner, and place summons was served on defendant and contents of summons.

NOTE:
This information will enable counsel to determine when the responsive pleading must be filed and may reveal a defect in service or that the summons did not comply with law, subjecting the summons to a motion to quash [*Code Civ. Proc. § 418.10*; *see* Ch. 518, *Service of Summons and Papers*].

(2) Allegations of complaint.

Ascertain which of the facts alleged in the complaint are true, which are false, and which ones defendant does not know the truth or falsity of.

(3) Affirmative defenses and demurrers:

NOTE:
Affirmative defenses can be raised by demurrer, as well as by answer, if they appear on the face of the complaint or from matters of which the court must or may take judicial notice.

(a) There was no favorable termination of the prior criminal proceeding because plaintiff's innocence was not indicated thereby [*see Jaffe v. Stone (1941) 18 Cal. 2d 146, 150, 114 P.2d 335* ; *see § 357.195*].

(b) Probable cause existed for instituting the prior criminal proceeding because a prosecuting attorney was consulted [*see Walker v. Jensen (1949) 95 Cal. App. 2d 269, 274, 212 P.2d 569* ; *see § 357.196*].

(c) Probable cause existed for instituting the prior criminal proceeding because plaintiff actually committed the offense charged [*see Clary v. Hale (1959) 175 Cal. App. 2d 880, 889-890, 1 Cal. Rptr. 91* ; *see § 357.197*].

(d) There is no liability for merely making an honest statement of facts to public authorities which later results in the initiation of a criminal proceeding [*see Gogue v. MacDonald (1950) 35 Cal. 2d 482, 486-487, 218 P.2d 542* ; *see § 357.198*].

(e) There was no favorable termination of the prior civil proceeding because it was settled [*see Paskle v. Williams (1931) 214 Cal. 482, 484, 6 P.2d 505* ; *see § 357.199*].

(f) There was no favorable termination of the prior civil proceeding because it is still pending [*see Rich v. Siegel (1970) 7 Cal. App. 3d 465, 469, 86 Cal. Rptr. 665* ; *see § 357.200*].

(g) Probable cause existed for instituting the prior civil proceeding because counsel was fully, fairly, and honestly advised of all of the facts and defendant acted on counsel's advice [*see Kennedy v. Byrum (1962) 201 Cal. App. 2d 474, 481, 20 Cal. Rptr. 98* ; *see § 357.201*].

(h) Probable cause existed for an attorney in representing a client because the attorney honestly believed that the client had a tenable claim [*see Tool Research & Eng'g Corp. v. Henigson (1975) 46 Cal. App. 3d 675, 683-684, 120 Cal. Rptr. 291* ; *see § 357.202*].

(i) The defendant failed to allege the favorable termination of the prior proceeding [*see Rutherford v. Johnson (1967) 250 Cal. App. 2d 316, 320, 58 Cal. Rptr. 546* ; *see § 357.204*].

(j) The defendant is a public employee whose actions were immune from suit for malicious prosecution [*see Gov. Code § 821.6*; *White v. Towers (1951) 37 Cal. 2d 727, 734, 235 P.2d 209* ; *see § 357.205*].

(k) The defendant is a public entity which is immune from suit for malicious prosecution [*see Gov. Code §§ 815.2(b), 821.6*; *Blackburn v. Los Angeles County (1974) 42 Cal. App. 3d 175, 176-178, 116 Cal. Rptr. 622* ; *see § 357.206*].

(l) The action is barred by the two-year (one-year, prior to January 1, 2003) period of limitations [*see Code Civ. Proc. § 335.1*; *Rutherford v. Johnson (1967) 250 Cal. App. 2d 316, 319, 58 Cal. Rptr. 546* ; *see also* former *Code Civ. Proc. § 340(3)*; Ch. 345, *Limitation of Actions, § 345.14*].

(m) The court lacks jurisdiction, there is improper venue, or there are defects in the complaint.

(n) The plaintiff, as defendant or cross defendant in a prior proceeding under the California Tort Claims Act (*Gov. Code § 810 et seq.*) or for indemnity or contribution in any civil action which he or she claimed was brought in bad faith and without reasonable cause, waived any right to seek damages by requesting defense costs under *Code Civ. Proc. § 1038* [*Code Civ. Proc. § 1038(c)*; *see* Ch. 174, *Costs and Attorney's Fees*].

NOTE:
For discussion of these defenses, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter* , Ch. 571, *Venue* , and Ch. 123, *Complaints and Cross Complaints* .

2. Documents to be obtained.

NOTE:
Not all of the following documents will be obtainable from the client in the initial interview. Subsequent interviews may be required, or, if circumstances will permit it, they might be mailed to the attorney. It might, however, be necessary to obtain the documents from someone other than the client. Notes following the documents listed indicate sources from which the documents may be obtained. If the contents of any of these documents must be proved at trial, the document itself must be presented [*Evid. Code § 1520*] unless secondary evidence is admissible [*see* Evid. Code § 15021 et seq.].

a. Written statements, if any, of parties or witnesses.

b. Medical histories and reports of plaintiff's present injuries and past injuries and illnesses if damages for personal injuries have been alleged.

c. Receipts of expenses paid in connection with the damages sustained by plaintiff as a result of the alleged malicious prosecution.

d. Letters, correspondence, or any other written documents reflecting lack of malice on behalf of the defendant toward the plaintiff.

NOTE:

Some of the above documents may be obtainable from the defendant; however, if they are in the possession of the plaintiff, they may have to be obtained through discovery [*see* Ch. 190, *Depositions and Discovery*].

e. Attested record of the alleged prior malicious proceedings.

NOTE:

Attested copies of such records would be necessary to show that the prior proceeding was terminated unfavorably to the plaintiff. Judicial notice may be taken of any judgment, act of any judicial department, or records of any court of record of any state or of the United States [*Evid. Code § 452(a), (c), (d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefenses

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2. Defendant's Checklist

31-357 California Forms of Pleading and Practice--Annotated § 357.131

§ 357.131 Prepare Response

Prepare the response to the complaint, which may include as appropriate:

1. Demurrer. For procedures and forms, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

2. Answer. For procedure and forms, see Ch. 26, *Answers* .

3. Motions to strike, change venue, or to quash service of summons. For procedure and forms see Ch. 375, *Motions to Strike: Pleadings* ; Ch. 376, *Motions to Strike: Anti-SLAPP* ; Ch. 518, *Service of Summons and Papers* , Ch. 571, *Venue* .

4. Other pretrial motions. For a further discussion of this subject, see Ch. 2, *Procedural Guide for Civil Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePretrial JudgmentsJudgment on the PleadingsTortsIntentional TortsMalicious ProsecutionDefenses

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2. Defendant's Checklist

31-357 California Forms of Pleading and Practice--Annotated § 357.132

§ 357.132 File Response

File the response within 30 days after service of the complaint on the defendant.

NOTE:
For a full discussion of service and filing, see Ch. 518, *Service of Summons and Papers* .

Legal Topics:

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

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31-357 California Forms of Pleading and Practice--Annotated § 357.133

§ 357.133 Discovery

Conduct any appropriate discovery.

NOTE:
For forms of interrogatories for use by defendants in actions for malicious prosecution, see Bender' S Forms of Discovery, Ch. 126, *Malicious Prosecution and Abuse of Process* (Matthew Bender); *see also* Ch. 190, *Depositions and Discovery* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefenses

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31-357 California Forms of Pleading and Practice--Annotated § 357.134

§ 357.134 Set for Trial

Set the matter for trial if not already set by plaintiff.

NOTE:
For a full discussion of the procedure for the setting for trial of an action see Ch. 425, *Pretrial Proceedings* , Ch. 551, *Trial* , and Ch. 552, *Trial Court Delay Reduction* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefenses

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31-357 California Forms of Pleading and Practice--Annotated §§ 357.135-357.149

[Reserved]

§§ 357.135[Reserved]

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B. Abuse of Process
1. Plaintiff's Checklist

31-357 California Forms of Pleading and Practice--Annotated § 357.150

§ 357.150 Facts and Documents re Complaint

Obtain the facts and documents necessary for preparing the complaint, including the following:

1. Facts to be ascertained.

NOTE:
Not all of the following facts will be ascertainable from the client in the initial interview. Subsequent interviews may be required or it may be necessary to ascertain the facts from others, including the potential defendant(s) by use of discovery proceedings. Notes following facts listed below indicate sources from which the facts required might be obtained.

a. Facts about plaintiff.

b. Capacity of plaintiff to sue.

c. Facts relating to the alleged abuse of process.
(1) Type of process used against plaintiff;

(2) Date, time, and place of process used;

(3) Description of what occurred after issuance of process; and

(4) Plaintiff's statement as to defendant's ulterior purpose in misusing the process and type of collateral advantage defendant attempted to obtain over plaintiff.

d. Damages sustained by plaintiff.

(1) Amount of lost wages or loss of employment resulting from misuse of process by defendant;

(2) Mental and emotional suffering;

(3) Name, address, and telephone number of each doctor or psychiatrist who has treated, or is treating, plaintiff as a result of the mental suffering or distress; and

(4) General impairment of social and mercantile standing, injury to credit, and all losses sustained by plaintiff's business.

e. Facts relating to each defendant.

(1) Name, address, and telephone number of each potential defendant, whether an individual or a legal entity (for example, a corporation); sex and approximate age of each potential individual defendant.

NOTE:
A sheriff or other ministerial officer is justified in the execution of all process and orders regular on their face and issued by competent authority [*Code Civ. Proc. § 262.1*].

(2) Occupation, including name and address of employer, of each individual defendant.

(3) Status of each individual defendant at time of abuse of process such as creditor, agent, officer of corporation, or similar status.

(4) Capacity of each potential defendant.

f. Facts relating to other causes of action.

(1) Violation of plaintiff's personal liberty [*see* Ch. 257, *False Imprisonment*];

(2) Injury to plaintiff's reputation [*see* Ch. 340, *Libel and Slander*];

(3) Intentional infliction of mental distress [*see* Ch. 362, *Mental Suffering and Emotional Distress*];

(4) Ch. 357, *Malicious Prosecution and Abuse of Process*, [*see § 357.10* et seq.];

(5) Unfair business practice by collection agency [*see Bus. & Prof. Code § 17200 et seq.*; *see also § 357.221*]; and

(6) Injunctive relief [*see* Ch. 303, *Injunctions* ; *see also § 357.221*].

2. Documents to be obtained.

NOTE:
Not all of the following documents will be obtainable from the client in the initial interview. Subsequent

interviews may be required, or, if circumstances will permit it, they might be mailed to the attorney. It might, however, be necessary to obtain documents from someone other than the client. If the contents of any document must be proved at trial, the document itself must be presented [*Evid. Code § 1520*] unless secondary evidence is admissible [*see Evid. Code § 1521 et seq.*].

a. Evidence of the issuance of process regular on its face.

NOTE:
Evidence of issuance of a summons may be the plaintiff's copy if it is certified by the court. If plaintiff does not have a copy or, if plaintiff's copy is uncertified, the clerk of the court from which the summons issued may be consulted regarding obtaining sufficient evidence of its issuance. If the original copy is in the court's records, judicial notice must be taken of it [*Evid. Code § 451(a)*].

b. Letters, correspondence, or any other written documents reflecting malice on behalf of the defendant toward the plaintiff. These documents may be obtained from the plaintiff; however, if they are in the possession of the defendant, they may have to be obtained through discovery [*see* Ch. 190, *Depositions and Discovery*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAbuse of ProcessGeneral OverviewTortsIntentional TortsAbuse of ProcessElements

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1. Plaintiff's Checklist

31-357 California Forms of Pleading and Practice--Annotated § 357.151

§ 357.151 Prepare Complaint

1. The allegations of a complaint for abuse of process are:

a. Capacity and residence of defendant(s) [*see § 357.190*, Paragraph 1].

b. Fictitious name allegation, if appropriate [*see § 357.190*, Paragraph 2].

c. Facts showing that defendant obtained issuance of process [*see § 357.220*, Paragraph 3].

d. Facts showing willful misuse of process by defendant for a purpose other than that for which it was designed in order to obtain collateral advantage over plaintiff [*see § 357.220*, Paragraphs 4 and 5].

e. Damages [*see § 357.220*, Paragraphs 6, 7, and 8].

Legal Topics:

For related research and practice materials, see the following legal topics:
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1. Plaintiff's Checklist

31-357 California Forms of Pleading and Practice--Annotated § 357.152

§ 357.152 Verification of Complaint

Have the complaint verified by plaintiff if desired [*see § 357.220*].

NOTE:
For a discussion of the requirements of verifying a complaint, see Ch. 572, *Verification* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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1. Plaintiff's Checklist

31-357 California Forms of Pleading and Practice--Annotated § 357.153

§ 357.153 Prepare Summons

NOTE:
For a further discussion of the requirements regarding preparation, issuance, and service of summons and papers, see Ch. 518, *Service of Summons and Papers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAbuse of ProcessGeneral Overview

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1. Plaintiff's Checklist

31-357 California Forms of Pleading and Practice--Annotated § 357.154

§ 357.154 File Complaint

File the complaint and have the summons issued by the appropriate court having jurisdiction and venue.

NOTE:
For a full discussion of the requirements regarding venue and jurisdiction, see Ch. 571, *Venue* , and Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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1. Plaintiff's Checklist

31-357 California Forms of Pleading and Practice--Annotated § 357.155

§ 357.155 Service of Summons and Complaint

Have the summons and complaint served on the defendant.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAbuse of ProcessGeneral Overview

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1. Plaintiff's Checklist

31-357 California Forms of Pleading and Practice--Annotated § 357.156

§ 357.156 Default Judgment

If defendant does not file an answer within 30 days after service (or any extension thereof), obtain a default judgment.

NOTE:
For a full discussion of the requirements regarding obtaining a default judgment, see Ch. 205, *Defaults and Default Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsTortsIntentional TortsAbuse of ProcessGeneral Overview

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1. Plaintiff's Checklist

31-357 California Forms of Pleading and Practice--Annotated § 357.157

§ 357.157 Discovery

When the answer is served and filed conduct discovery as appropriate.

NOTE:
For a further discussion of the requirements regarding discovery, see Ch. 190, *Depositions and Discovery* . For a form of interrogatories for use by a plaintiff in an action for abuse of process through excessive levies on exempt property, see Bender' S Forms of Discovery, Ch. 126, *Malicious Prosecution and Abuse of Process* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAbuse of ProcessGeneral Overview

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1. Plaintiff's Checklist

31-357 California Forms of Pleading and Practice--Annotated § 357.158

§ 357.158 Set for Trial

Set the matter for trial.

NOTE:
For a full discussion of this subject, see Ch. 551, *Trial* , and Ch. 552, *Trial Court Delay Reduction* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAbuse of ProcessGeneral Overview

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31-357 California Forms of Pleading and Practice--Annotated §§ 357.159-357.169

[Reserved]

§§ 357.159[Reserved]

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2. Defendant's Checklist

31-357 California Forms of Pleading and Practice--Annotated § 357.170

§ 357.170 Facts and Documents re Answer

Obtain the facts and documents necessary for preparing the answer, including the following:

1. Facts to be ascertained.

NOTE:
Not all of the following facts will be ascertainable from the client in the initial interview. Subsequent interviews may be required or it may be necessary to ascertain the facts from others, including the plaintiff, by use of discovery proceedings.

a. Facts relating to defendant.

b. Facts required for the answer.

NOTE:
Counsel should advise the client not to discuss the case with any third party without obtaining prior permission from counsel to do so.

(1) Date, manner and place summons was served on defendant and contents of summons.

NOTE:
This information will enable counsel to determine when the responsive pleading must be filed and may reveal a defect in service or that the summons does not comply with law, subjecting the summons to a motion to quash [*Code Civ. Proc. § 418.10*; *see* Ch. 518, *Service of Summons and Papers*].

(2) Allegations of complaint.

Ascertain which of the facts alleged in the complaint are true, which are false, and which ones defendant does not know the truth or falsity of.

(3) Affirmative defenses and demurrers:

NOTE:
Affirmative defenses can be raised by demurrer, as well as by answer, if they appear on the face of the complaint or from matters of which the court must or may take judicial notice.

(a) Defendant was not the person who obtained issuance of the process.

(b) There was no improper use of process; that is, process was not used for a purpose other than that for which it was designed [*see Golden v. Dungan (1971) 20 Cal. App. 3d 295, 302, 97 Cal. Rptr. 577* ; *see § 357.222*].

(c) No action was taken pursuant to judicial authority [*see Meadows v. Bakersfield Sav. & Loan Ass'n (1967) 250 Cal. App. 2d 749, 753, 59 Cal. Rptr. 34* ; *see § 357.223*].

(d) The action is barred by two-year (one-year, prior to January 1, 2003) period of limitations [*see Code Civ. Proc. § 335.1*; *McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 590-591, 33 Cal. Rptr. 389* ; *see § 357.224*; *see also* former *Code Civ. Proc. § 340(3)*; Ch. 345, *Limitation of Actions, § 345.14*].

(e) The use of process was absolutely privileged [*see Civ. Code § 47(b)*; *Younger v. Solomon (1974) 38 Cal. App. 3d 289, 300-301, 113 Cal. Rptr. 113* ; *see also § 357.225*].

(f) There was no malice that can support an award of punitive damages if defendant acted on the advice of counsel [*see Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 472 n.7, 72 Cal. Rptr. 344, 446 P.2d 152* ; *see also § 357.226*].

(g) The court lacks jurisdiction, there is improper venue, or there are defects in the complaint.

NOTE:
For discussion of these defenses, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter* , Ch. 571, *Venue* , and Ch. 123, *Complaints and Cross Complaints* .

2. Documents to be obtained.

NOTE:
Not all of the following documents will be obtainable from the client in the initial interview. Subsequent interviews may be required, or, if circumstances will permit it, they might be mailed to the attorney. It might, however, be necessary to obtain the documents from someone other than the client. Notes following the documents listed indicate sources from which the documents may be obtained. If the contents of any such document must be proved at trial, the document itself must be presented [*Evid.*

Code § 1520] unless secondary evidence is admissible [*see Evid. Code § 1521 et seq.*].

a. Written statements, if any, of parties or witnesses.

b. Medical histories and reports of plaintiff's present injuries and of past injuries and illnesses if damages for personal injuries are alleged.

c. Receipts of expenses paid in connection with the damage sustained by plaintiff as a result of the alleged abuse of process.

d. Letters, correspondence, or any other written documents reflecting lack of malice on behalf of the defendant toward the plaintiff.

NOTE:
Some of the above documents may be obtainable from the defendant; however, if they are in the possession of the plaintiff, they may have to be obtained through discovery [*see* Ch. 190, *Depositions and Discovery*].

e. Evidence of the issuance of process.

NOTE:
This may be used to show that the defendant was not the person obtaining the issuance of the process. If the defendant is not in possession of the original process issued by the court, or of a certified copy thereof, the clerk of the court from which the process issued may be consulted to obtain sufficient evidence of its issuance. If the original is the court's records, judicial notice must be taken of it [*Evid. Code § 451(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-357 California Forms of Pleading and Practice--Annotated § 357.171

§ 357.171 Prepare Response

Prepare the response to the complaint, which may include as appropriate:

1. Demurrer [*see § 357.224*; *see also* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*].

2. Answer [*see §§ 357.225* and *357.226*; *see also* Ch. 26, *Answers*].

3. Motions to strike, change venue, or quash service of summons [*see* Ch. 375, *Motions to Strike: Pleadings* , Ch. 376, Motions to Strike: Anti-SLAPP, and Ch. 518, *Service of Summons and Papers* , and Ch. 571, *Venue*].

4. Other pretrial motions [*see* Ch. 2, *Procedural Guide for Civil Actions*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPretrial JudgmentsJudgment on the PleadingsTortsIntentional TortsAbuse of ProcessGeneral OverviewTortsIntentional TortsAbuse of ProcessDefenses

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Chapter 357 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART IV. PROCEDURAL CHECKLIST
2. Defendant's Checklist

31-357 California Forms of Pleading and Practice--Annotated § 357.172

§ 357.172 File Response

File the response within 30 days after service of the complaint on the defendant.

NOTE:
For a full discussion of service and filing, see Ch. 518, *Service of Summons and Papers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAbuse of ProcessGeneral OverviewTortsIntentional TortsAbuse of ProcessDefenses

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31-357 California Forms of Pleading and Practice--Annotated § 357.173

§ 357.173 Discovery

Conduct any appropriate discovery.

NOTE:
For further discussion of this subject, see Ch. 190, *Depositions and Discovery* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAbuse of ProcessGeneral Overview

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31-357 California Forms of Pleading and Practice--Annotated § 357.174

§ 357.174 Set for Trial

Set the matter for trial if not already set by plaintiff.

NOTE:
For a full discussion of the procedure for the setting for trial of an action, see Ch. 425, *Pretrial Proceedings* , Ch. 551, *Trial* , and Ch. 552, *Trial Court Delay Reduction* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAbuse of ProcessGeneral Overview

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[Reserved]

§§ 357.175[Reserved]

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Volume 31: Lis Pendens thru Mandate and Prohibition-Chs. 348-358
Chapter 357 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART V. FORMS
A. Malicious Prosecution

31-357 California Forms of Pleading and Practice--Annotated § 357.190

§ 357.190 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages--Malicious Prosecution of Criminal Action--General Form

[1] FORM Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages--Malicious Prosecution of Criminal Action--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Malicious Prosecution)
Defendant(s).	)	
	)	
	)	

Plaintiff alleges:

1. Defendant(s) _____ [*name(s)*] is/are, and at all times mentioned herein was/were, _____ [a resident *or* residents] of _____ County, California [*or allege other capacity and residence of defendant(s)*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1- _____, inclusive and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible as hereinafter shown for the occurrences and injuries alleged in this complaint.)]

3. _____ [*Allege initiation of criminal proceeding against plaintiff, e.g.,* On or about _____ (*date*), in _____ (*city*), California, defendant(s) _____ (filed a criminal complaint *or* caused _____ [*name of third person*] to file a criminal complaint) with _____ (*name*), a _____ (*specify official, e.g.,* deputy district attorney) of _____ County, California. The complaint accused plaintiff of the crime of violating Section _____ (*number*) of the Penal Code, a _____ (felony *or* misdemeanor). This caused a warrant to issue for plaintiff's arrest on _____ [*date*]. Plaintiff was arrested on _____ [*date*], detained in custody, charged by information with committing that crime, arraigned on _____ [*date*], and held for preliminary hearing.]

4. _____ [*Allege favorable termination of proceeding, e.g.,* A preliminary hearing was held on _____ [*date*], in the Superior Court, _____ County, California, in a proceeding entitled People of the State of California, Plaintiff vs. _____ (*name of plaintiff*), Defendant, No. _____. At that time the court dismissed the proceeding for lack of evidence against plaintiff.]

5. _____ [*Allege lack of probable cause, e.g.,* Defendant(s) acted without probable cause in initiating the prosecution of plaintiff in that _____ [he *or* they] did not honestly, reasonably, and in good faith believe plaintiff to be guilty of the crime charged because _____ (*specify facts known to plaintiff, if any, constituting defendant(s) lack of probable cause*).]

6. _____ [*Allege malice, e.g.,* Defendant(s) acted maliciously in instigating the criminal prosecution in that _____ (*specify type of malice such as an improper motive or purpose, prejudice, or a desire to annoy and wrong plaintiff*).]

7. As a proximate result of the criminal prosecution initiated by defendant, plaintiff has been damaged.

8. _____ [*If appropriate, allege costs and attorney's fees expended in defending against the prosecution, e.g.,* As a further proximate result of the criminal prosecution so initiated by defendant(s), plaintiff incurred the cost of posting bail and as attorney's fees in defending against the prosecution.]

9. _____ [*Allege facts constituting actual malice in order to recover punitive damages, e.g.,* Defendant's acts were willful, wanton, malicious, and oppressive in that _____ (*specify facts showing that defendant(s) motivated by hatred of or ill will toward plaintiff*). These acts therefore justify the awarding of punitive damages.]

WHEREFORE, plaintiff prays judgment against defendants, and each of them,] as follows:

1. For general damages according to proof.

2. [For punitive damages.]

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This complaint for damages for malicious prosecution is for use by a plaintiff against a person who has maliciously and without probable cause prosecuted a criminal action against plaintiff.

[3] Allegations

The complaint alleges that:

- Defendant initiated or caused to be initiated a criminal proceeding against plaintiff (Paragraph 3) [*see Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 544, 222 P.2d 136*],

- Maliciously (Paragraph 6) [*see Weber v. Leuschner (1966) 240 Cal. App. 2d 829, 837, 50 Cal. Rptr. 86* ; *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 541, 222 P.2d 136*],

- Without probable cause (Paragraph 5) [*see Klotz v. Alexander (1962) 203 Cal. App. 2d 238, 243, 21 Cal. Rptr. 305* ; *Clary v. Hale (1959) 175 Cal. App. 2d 880, 888-889, 1 Cal. Rptr. 91*], and

- The proceeding terminated favorably for plaintiff (Paragraph 4) [*see Jaffe v. Stone (1941) 18 Cal. 2d 146, 157, 114 P.2d 335* ; *Hurgren v. Union Mut. Life Ins. Co. (1904) 141 Cal. 585, 588, 75 P. 168*].

The complaint also alleges compensatory damages (Paragraphs 7 and 8) [*see Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 51, 59, 118 Cal. Rptr. 184, 529 P.2d 608* ; *Singleton v. Perry (1955) 45 Cal. 2d 489, 495, 289 P.2d 794*], and if appropriate, punitive damages (Paragraph 9) [*see Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 65, 118 Cal. Rptr. 184, 529 P.2d 608*].

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example,

property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[5] Venue

The county in which the defendant resides at the time of the commencement of an action for malicious prosecution is the proper county in which to bring it [*see Code Civ. Proc. § 395(a)*]. Unless there is physical or personal injury, damages resulting from the malicious prosecution of an action do not constitute injuries to persons or property as contemplated by *Code Civ. Proc. § 395(a)*. Therefore, such actions may not be tried in the county where the arrest and the allegedly malicious prosecution occurred [*see Plum v. Newhart (1931) 118 Cal. App. 73, 75, 4 P.2d 805* ; *see also Monk v. Ehret (1923) 192 Cal. 186, 192-193, 219 P. 452*].

[6] Alternative Count for False Imprisonment

Plaintiff may wish to allege an alternative count for false imprisonment. When pleading false imprisonment a plaintiff would have to plead and prove facts showing that the warrant issued and served was void or illegal or that the detention took place without a warrant. [*Bulkley v. Klein (1962) 206 Cal. App. 2d 742, 747, 23 Cal. Rptr. 855*]. However, when a complaint is filed it is often not known whether the requirements for the tort of false imprisonment or those for malicious prosecution can be proved. Thus, even though the two causes of action may be joined in separate counts even though they are inconsistent, the defendant cannot be held liable for both, and there may have to be an election upon which count plaintiff wants to go to the jury [*see Bulkley v. Klein (1962) 206 Cal. App. 2d 742, 747, 23 Cal. Rptr. 855*]. Where plaintiff has pleaded both counts and fails to prove false imprisonment but does prove malicious prosecution, a judgment for plaintiff will not be reversed on appeal [*Bulkley v. Klein (1962) 206 Cal. App. 2d 742, 747-748, 23 Cal. Rptr. 855*].

For discussion of false imprisonment and complaints that may be adapted to constitute a count in this complaint, see Ch. 257, *False Imprisonment* .

[7] Pleading

[a] Generally

A complaint for malicious prosecution is properly confined to a statement of the elements of malice and the lack of probable cause. Averments of conspiracy, knowledge of the falsity of the charge, and vituperative epithets are merely embellishments and add nothing material to the statement of the case. They will be treated as surplusage [*White v.*

Brinkman (1937) 23 Cal. App. 2d 307, 313, 73 P.2d 254].

[b] Favorable Termination

The complaint must allege the grounds of the dismissal since a bare allegation that a prior proceeding had been "dismissed" is not sufficient [*see Oppenheimer v. Tamblyn (1958) 162 Cal. App. 2d 293, 295-296, 327 P.2d 574*]. Similarly, alleging that a prior proceeding had "legally ceased and terminated favorably to the plaintiff" does not allege sufficient facts to satisfy the requirement of a favorable termination [*see Prentice v. Bertken (1942) 50 Cal. App. 2d 344, 351, 123 P.2d 96*].

[c] Probable Cause

Pleading the lack of probable cause may be accomplished in either of two ways. It may be pleaded generally [*see Hardy v. Vial (1957) 48 Cal. 2d 577, 584, 311 P.2d 494*], or it may be pleaded by stating facts necessarily showing its absence [*see Pulvermacher v. Los Angeles Co-ordinating Comm. for Aid to Jewish Refugees (1943) 61 Cal. App. 2d 704, 707, 143 P.2d 974*]. The allegation of the lack of probable cause (*see* Paragraph 5) combines these approaches. If plaintiff is not aware of facts which would support this allegation, it is sufficient merely to allege the lack of probable cause in a general fashion [*see Hardy v. Vial (1957) 48 Cal. 2d 577, 584, 311 P.2d 494*].

[d] Malice

It is sufficient to allege malice generally [*see Albertson v. Raboff (1956) 46 Cal. 2d 375, 378, 383, 295 P.2d 405* ; *Goland v. Peter Nolan & Co. (1934) 2 Cal. 2d 96, 97, 38 P.2d 783*].

[8] Favorable Termination

The favorable termination of a malicious prosecution does not need to be a final determination of the controversy. It is sufficient to show that the former proceeding was legally terminated. The fact that such legal termination would not be a bar to another prosecution founded on the same action is no defense to the action for malicious prosecution [*Jaffe v. Stone (1941) 18 Cal. 2d 146, 157, 114 P.2d 335*]. A prosecution is deemed to have been favorably terminated when it has been disposed of in such a manner that the prosecutor, if he or she intends to proceed further, must institute proceedings de novo [*Hurgren v. Union Mut. Life Ins. Co. (1904) 141 Cal. 585, 588, 75 P. 168*]. The disposition of the prior proceeding must also be of such a nature as to indicate the innocence of the accused [*Jaffe v. Stone (1941) 18 Cal. 2d 146, 150, 114 P.2d 335*]. For example, the discharge of the case by a magistrate at the preliminary hearing on the ground of insufficiency of evidence constitutes a favorable termination unless further proceedings growing out of the same misconduct have been instituted [*Jaffe v. Stone (1941) 18 Cal. 2d 146, 151, 156, 114 P.2d 335*] as does the dismissal by the prosecutor in the interests of justice and for the lack of sufficient evidence [*Jackson v. Beckham (1963) 217 Cal. App. 2d 264, 270, 31 Cal. Rptr. 739*].

For further discussion, *see § 357.14[1],*

[9] Lack of Probable Cause

[a] In General

Probable cause as an element in an action for the malicious prosecution of a criminal action requires that there be such a state of facts as would lead a man of ordinary care and prudence to believe and entertain an honest and strong suspicion that the person is guilty [*Kincaid v. Sears, Roebuck & Co. (1968) 259 Cal. App. 2d 733, 741, 66 Cal. Rptr. 915*]. It does not depend on the possession of facts which satisfactorily prove the guilt of the accused person. Rather, it has reference to the common standard of human judgment and conduct and exists if one is possessed of information or facts which are sufficient to cause a reasonable person to honestly believe the charge is true [*Northrup v. Baker (1962) 202*

Cal. App. 2d 347, 354, 20 Cal. Rptr. 797 ; *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 540-541, 222 P.2d 136*]. Therefore, a person may act upon what appears to be true, even if it turns out to be false [*Fry v. Bank of Am. (1956) 142 Cal. App. 2d 150, 156, 298 P.2d 34*]. It should be noted, though, that a person's subjective good faith in prosecuting a criminal action is an independent element of probable cause [*Klotz v. Alexander (1962) 203 Cal. App. 2d 238, 243, 21 Cal. Rptr. 305*]. Therefore, the element of probable cause must be viewed from a subjective as well as an objective point of view [*White v. Brinkman (1937) 23 Cal. App. 2d 307, 312, 73 P.2d 254*].

For further discussion, *see § 357.16[1]*.

[b] No Inference From Malice

The lack of probable cause may not be implied from even the most express malice [*Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 542, 222 P.2d 136*].

[10] Malice

[a] In General

In order to constitute malice, the defendant must have had in mind an improper motive or sinister purpose in instituting the prosecution [*Maxon v. Security Ins. Co. (1963) 214 Cal. App. 2d 603, 615, 29 Cal. Rptr. 586* ; *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 541, 222 P.2d 136*]. It is not necessary for a plaintiff to prove that the prosecution was inspired by personal hostility, a grudge, or ill will. It is sufficient if it appears that the prosecution was instituted in bad faith to vex, annoy, or wrong the adverse party. [*Weber v. Leuschner (1966) 240 Cal. App. 2d 829, 837, 50 Cal. Rptr. 86*].

For further discussion, see *§ 357.17*.

[b] Inference From Lack of Probable Cause

Malice may be inferred from the lack of probable cause [*Weber v. Leuschner (1966) 240 Cal. App. 2d 829, 836, 50 Cal. Rptr. 86*].

[c] Malice Per Se

One who knowingly presses a baseless criminal charge acts without probable cause and is guilty of malice per se [*Jackson v. Beckham (1963) 217 Cal. App. 2d 264, 272, 31 Cal. Rptr. 739*]. This is true since the only justification for a criminal proceeding is the bringing of an offender to justice [*Bulkley v. Klein (1962) 206 Cal. App. 2d 742, 750, 23 Cal. Rptr. 855*].

[11] Cross References

For discussion and forms for use in actions involving torts which are similar to malicious prosecution, see Ch. 58, *Assault and Battery* , Ch. 257, *False Imprisonment* , Ch. 340, *Libel and Slander* , and Ch. 362, *Mental Suffering and Emotional Distress* , respectively

For related discussion and forms, see Ch. 20, *Allegations Commonly Used* , Ch. 108, *Captions and Introductions* , Ch. 420, *Prayers* , and Ch. 572, *Verification*

[12] State Statutes

Punitive damages for oppression, fraud, or malice. *Civ. Code § 3294*

Damages recoverable in tort. *Civ. Code § 3333*

Two-year period of limitations. *Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)* (one-year period prior to 2003)

Venue. *Code Civ. Proc. § 395(a)*

[13] Decisions

[a] Burden of Proof

Burden of proving three basic elements of malicious prosecution as on plaintiff. *Klotz v. Alexander (1962) 203 Cal. App. 2d 238, 242, 21 Cal. Rptr. 305*

[b] Damages

[i] Compensatory

Nature of damages recoverable in malicious prosecution actions. *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 51, 59, 118 Cal. Rptr. 184, 529 P.2d 608* ; *Singleton v. Perry (1955) 45 Cal. 2d 489, 495, 289 P.2d 794* ; *Davis v. Local Union No. 11, Int'l Bhd. of Elec. Workers, AFL-CIO (1971) 16 Cal. App. 3d 686, 695-696*

Malice as required to be proven against particular defendant in order to justify award of compensatory damages against that defendant. *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 541-542, 222 P.2d 136*

[ii] Punitive Damages

Person as capable of recovering punitive damages in malicious prosecution action. *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 65, 118 Cal. Rptr. 184, 529 P.2d 608*

Awarding of punitive damages as requiring showing of malice in fact. *Bertero v. National General Corp. (1974) 13 Cal. 3d 43, 66, 118 Cal. Rptr. 184, 529 P.2d 608*

[c] False Imprisonment

Defendant as not capable of being held liable for both false imprisonment and malicious prosecution; plaintiff as possibly required to make election. *Bulkley v. Klein (1962) 206 Cal. App. 2d 742, 747-748, 23 Cal. Rptr. 855*

False imprisonment distinguished from malicious prosecution. *Singleton v. Perry (1955) 45 Cal. 2d 489, 494-495, 289 P.2d 794* ; *Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 676, 123 Cal. Rptr. 525*

[d] Favorable Termination

Final termination not required; legal termination as sufficient. *Jaffe v. Stone (1941) 18 Cal. 2d 146, 157, 114 P.2d 335*

Final termination requirement as satisfied in criminal action where prosecutor must institute proceedings de novo. *Hurgren v. Union Mut. Life Ins. Co. (1904) 141 Cal. 585, 588, 75 P. 168*

Favorable termination in criminal action as required to indicate innocence of accused if no trial occurred. *Jaffe v. Stone (1941) 18 Cal. 2d 146, 150, 114 P.2d 335*

Dismissal by magistrate at preliminary hearing based on insufficiency of evidence as favorable termination unless further proceedings growing out of same misconduct have been instituted. *Jaffe v. Stone (1941) 18 Cal. 2d 146, 151, 156, 114 P.2d 335*

Dismissal by prosecutor in interests of justice and for lack of sufficient evidence as constituting favorable termination. *Jackson v. Beckham (1963) 217 Cal. App. 2d 264, 270, 31 Cal. Rptr. 739*

Acquittal as ordinarily necessary as foundation for malicious prosecution suit where criminal proceeding goes to trial. *Jaffe v. Stone (1941) 18 Cal. 2d 146, 150, 114 P.2d 335*

Dismissal by court for lack of evidence as favorable termination of criminal action. *Bulkley v. Klein (1962) 206 Cal. App. 2d 742, 750, 23 Cal. Rptr. 855*

Dismissal of criminal proceeding by prosecutor "in the interests of justice" as not favorable termination where innocence of accused not indicated by record. *De La Riva v. Owl Drug Co. (1967) 253 Cal. App. 2d 593, 599-600, 61 Cal. Rptr. 291*

Dismissal of criminal proceeding after issuance of writ of habeas corpus as favorable termination. *Holliday v. Holliday (1898) 123 Cal. 26, 31, 55 P. 703*

[e] Lack of Probable Cause

[i] In General

Definition for criminal action. *Kincaid v. Sears, Roebuck & Co. (1968) 259 Cal. App. 2d 733, 741, 66 Cal. Rptr. 915*

Probable cause as not equivalent to possessing facts which satisfactorily prove guilt of accused person. *Northrup v. Baker (1962) 202 Cal. App. 2d 347, 354, 20 Cal. Rptr. 797* ; *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 540-541, 222 P.2d 136*

Person as capable of acting upon what appears to be true even if it turns out to be false. *Fry v. Bank of Am. (1956) 142 Cal. App. 2d 150, 156, 298 P.2d 34*

Good faith as independent element of probable cause; actual and honest belief in guilt of plaintiff as integral part of good faith. *Klotz v. Alexander (1962) 203 Cal. App. 2d 238, 243, 21 Cal. Rptr. 305*

Proof that no crime committed or that accused innocent as not necessarily negativing existence of probable cause. *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 541, 222 P.2d 136*

Element of probable cause as viewed from subjective as well as objective point of view. *White v. Brinkman (1937) 23 Cal. App. 2d 307, 312, 73 P.2d 254*

[ii] No Inference From Malice

Lack of probable cause as not implied from even the most express malice. *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 542, 222 P.2d 136*

[f] Malice

Malice as improper motive or purpose. *Maxon v. Security Ins. Co. (1963) 214 Cal. App. 2d 603, 615, 29 Cal. Rptr. 586*

Malice as meaning defendant had evil or sinister purpose in mind. *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 541, 222 P.2d 136*

Malice as proved where previous action instituted in bad faith to vex, annoy, or wrong adverse party. *Weber v. Leuschner (1966) 240 Cal. App. 2d 829, 837, 50 Cal. Rptr. 86*

Malice as capable of being inferred from lack of probable cause. *Jacques Interiors v. Petrak (1987) 188 Cal. App. 3d 1363, 1371, 234 Cal. Rptr. 44* ; *Weber v. Leuschner (1966) 240 Cal. App. 2d 829, 836, 50 Cal. Rptr. 86*

Knowingly pressing baseless criminal charge as constituting malice per se. *Jackson v. Beckham (1963) 217 Cal. App. 2d 264, 272, 31 Cal. Rptr. 739*

[g] Pleading

Complaint as properly confined to statement of elements of malice and lack of probable cause; averments of conspiracy, knowledge of falsity of charge, and epithets as surplusage. *White v. Brinkman (1937) 23 Cal. App. 2d 307, 313, 73 P.2d 254*

Pleading of probable cause generally as valid. *Hardy v. Vial (1957) 48 Cal. 2d 577, 584, 311 P.2d 494*

Pleading of probable cause by stating facts necessarily showing lack thereof as valid. *Pulvermacher v. Los Angeles Co-ordinating Comm. for Aid to Jewish Refugees (1943) 61 Cal. App. 2d 704, 707, 143 P.2d 974*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionElementsGeneral Overview

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A. Malicious Prosecution

31-357 California Forms of Pleading and Practice--Annotated § 357.191

§ 357.191 Allegation--Favorable Termination of Criminal Prosecution--Dismissal by Prosecutor

[1] FORM Allegation--Favorable Termination of Criminal Prosecution--Dismissal by Prosecutor

On _____ [*date*], the deputy district attorney dismissed the charge against plaintiff in the interests of justice and because of the lack of evidence against plaintiff.

[2] Use of Form

This allegation is for use in pleading the element of a favorable termination which is established by the fact that the prosecutor dismissed the charge against plaintiff in the interests of justice and because of a lack of evidence. It may be used in place of Paragraph 4 in *see § 357.190*.

[3] Decisions

Dismissal by prosecutor in interests of justice and for lack of sufficient evidence as constituting favorable termination. *Jackson v. Beckham (1963) 217 Cal. App. 2d 264, 270, 31 Cal. Rptr. 739*

[4] Cross References

For a related form, *see § 357.190*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionElementsGeneral OverviewTortsIntentional TortsMalicious ProsecutionElementsFavorable Termination

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31-357 California Forms of Pleading and Practice--Annotated § 357.192

§ 357.192 Allegation--Favorable Termination of Criminal Prosecution--Acquittal

[1] FORM Allegation--Favorable Termination of Criminal Prosecution--Acquittal

On _____ [*date*], plaintiff was acquitted of the charge by the Superior Court for the County of _____, _____ [sitting without a jury *or* sitting with a jury] in a proceeding entitled People of the State of California, Plaintiff vs. _____ [*name of plaintiff*], Defendant, No. _____.

[2] Use of Form

This allegation is for use in pleading the element of favorable termination by reason of a prior acquittal after a criminal action has gone to trial.

[3] Acquittal as Favorable Termination

If a criminal proceeding goes to trial, it is ordinarily necessary as a foundation for malice prosecution action that the accused was acquitted [*Jaffe v. Stone (1941) 18 Cal. 2d 146, 150, 114 P.2d 335*]. However, while such an acquittal is thus deemed to be a condition precedent to instituting an action for malicious prosecution, it does not establish that defendant acted without probable cause in initiating the proceeding. That is, the existence of probable cause is not negatived by merely showing that the accused was successful at the trial of the proceedings in securing an exoneration. Not even a conflict on the issue of probable cause is created by such a favorable termination of the prosecution which gave rise to the malicious prosecution action [*Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 541, 222 P.2d 136*]. Therefore, even after establishing the fact that he or she was acquitted of a criminal charge, plaintiff must still prove with independent evidence that defendant lacked probable cause in initiating the prosecution.

[4] Decisions

Acquittal as ordinarily necessary as foundation for malicious prosecution action where criminal proceeding goes to

trial. *Jaffe v. Stone (1941) 18 Cal. 2d 146, 150, 114 P.2d 335*

Not even conflict on issue of probable cause as created by acquittal in previous criminal prosecution. *Centers v. Dollar Mkt. (1950) 99 Cal. App. 2d 534, 541, 222 P.2d 136*

[5] Cross References

For related forms, *see §§ 357.190* and *357.191*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionElementsGeneral OverviewTortsIntentional TortsMalicious ProsecutionElementsFavorable Termination

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Chapter 357 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART V. FORMS
A. Malicious Prosecution

31-357 California Forms of Pleading and Practice--Annotated § 357.193

§ 357.193 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages--Malicious Prosecution of Civil Action--General Form

[1] FORM Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages--Malicious Prosecution of Civil Action--General Form

[*Caption. See § 357.190.*]

Plaintiff alleges:

1. [*Capacity and residence of defendant*(*s*). *See § 357.190, Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 357.190, Paragraph 2.*]

3. _____ [*Allege initiation of civil action against plaintiff, e.g.,* On _____ [*date*], defendant herein _____ (instituted a civil action against plaintiff *or* caused _____ [*name of third person*] to initiate a civil action against plaintiff) in the _____ (*specify*) Court of _____ County, California. The complaint claimed damages in the sum of $_____ for _____ (*specify nature of cause of action*). The action was entitled _____ (*name of defendant*), Plaintiff, vs. _____ (*name of plaintiff*), Defendant, No. _____.]

4. On _____ [*date*], defendant voluntarily dismissed said action against plaintiff.

5. _____ [*Allege lack of probable cause, e.g.,* Defendant(s) acted without probable cause in _____ (bringing the above-mentioned action *or, if probable cause supported some but not all grounds of the action,* in asserting at least one ground of the above-mentioned action) that _____ [he *or* they] did not honestly and reasonably believe that there were grounds for the action because _____ (*specify facts known to plaintiff, if any, constituting defendant(s) lack of probable cause*)].

6. _____ [*Allege malice, e.g.*, Defendant(s) acted maliciously in bringing the above-mentioned action against plaintiff in that _____ (*specify facts constituting malice such as an improper motive or purpose, prejudice, or a desire to annoy and wrong plaintiff*).]

7. As a proximate result of the defendant(s) bringing the above-mentioned action against plaintiff, plaintiff has been damaged in the sum of $_____.

8. _____ [*Allege costs and attorney's fees expended in defending the prior action, e.g.*, As a further proximate result of the action initiated by defendant(s), plaintiff incurred costs in the sum of $_____ and the sum of $_____ as attorney's fees in defending against the action.]

9. [*Punitive damages allegation, if appropriate. See § 357.190, Paragraph 9.*]

[*Prayer. See § 357.190.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 357.190.*]

[2] Use of Form

This complaint for damages for malicious prosecution is for use by a plaintiff against a person who has maliciously and without probable cause brought a previous civil action against plaintiff.

[3] Allegations

The complaint alleges:

- Defendant(s) initiated or caused to be initiated a civil action against plaintiff (Paragraph 3) [*see Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 50, 118 Cal. Rptr. 184, 529 P.2d 608*].

- The civil action was initiated maliciously (Paragraph 6) [*see Albertson v. Raboff (1956) 46 Cal. 2d 375, 383, 295 P.2d 405*];

- The civil action was initiated without probable cause (Paragraph 5) [*see Crowley v. Katleman (1994) 8 Cal. 4th 666, 679, 695, 34 Cal. Rptr. 2d 386, 881 P.2d 1083* ; *Davis v. Local Union No. 11, Int'l Bhd. of Elec. Workers, AFL-CIO (1971) 16 Cal. App. 3d 686, 692*].

- The proceeding terminated favorably for plaintiff (Paragraph 4) [*see MacDonald v. Joslyn (1969) 275 Cal. App. 2d 282, 289, 79 Cal. Rptr. 707*].

- Compensatory damages (Paragraphs 7 and 8) [*see Bertero v. National Gen. Corp. (1974) 13 Cal.*

3d 43, 51, 59, 118 Cal. Rptr. 184, 529 P.2d 608].

- If appropriate, punitive damages (Paragraph 9) [*see* *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 65, 118 Cal. Rptr. 184, 529 P.2d 608*].

[4] Favorable Termination

[a] In General

In a civil case, the former proceeding must have been disposed of in such a manner as to require the plaintiff therein to institute another action to try the issues presented [*Rich v. Siegel (1970) 7 Cal. App. 3d 465, 469, 86 Cal. Rptr. 665* ; *Kennedy v. Byrum (1962) 201 Cal. App. 2d 474, 480, 20 Cal. Rptr. 98*]. For instance, a voluntary dismissal of a civil action or a proceeding by the plaintiff therein is a favorable termination even though it was expressly made "without prejudice" [*MacDonald v. Joslyn (1969) 275 Cal. App. 2d 282, 289, 79 Cal. Rptr. 707*]. However, the dismissal of the prior action is not considered to be a favorable termination if it was brought about by the procurement of the defendant therein or by compromise and settlement [*Paskle v. Williams (1931) 214 Cal. 482, 484, 6 P.2d 505*]. A favorable termination is one that tends to indicate the innocence of the accused, and while the termination need not be one that follows a trial on the merits, it must reflect the merits of the underlying action [*De La Pena v. Wolfe (1986) 177 Cal. App. 3d 481, 484, 223 Cal. Rptr. 325*]. There is no favorable termination of an action if an appeal is pending [*Friedman v. Stadum (1985) 171 Cal. App. 3d 775, 779, 217 Cal. Rptr. 585*].

For further discussion, *see § 357.14[1],*

[b] Pleading

Standing alone, an allegation that all proceedings terminated favorably to plaintiff would be a mere conclusion and insufficient to satisfy pleading requirements. It is necessary to allege facts from which a definite conclusion can be drawn that the prior proceedings terminated favorably to the plaintiff [*Webb v. Youmans (1967) 248 Cal. App. 2d 851, 854, 57 Cal. Rptr. 11*].

[5] Lack of Probable Cause

Probable cause means a suspicion founded upon circumstances sufficiently strong to warrant a reasonable person in the belief that the charge is true [*Davis v. Local Union No. 11, Int'l Bhd. of Elec. Workers, AFL-CIO (1971) 16 Cal. App. 3d 686, 692*]. Stated differently, one who commences a civil suit acts upon probable cause if he or she has an honest belief, founded upon facts sufficiently strong to justify his or her belief, that grounds exist for the proceeding [*Kennedy v. Byrum (1962) 201 Cal. App. 2d 474, 480, 20 Cal. Rptr. 98*]. In the context of an action against an attorney for malicious prosecution of a prior civil suit, the standard for determining probable cause is whether any reasonable attorney would have thought the civil claim was tenable [*Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d. 863, 885-886, 254 Cal. Rptr. 336, 765 P.2d 498* ; *Klein v. Oakland Raiders, Ltd. (1989) 211 Cal. App. 3d 67, 76, 259 Cal. Rptr. 149*]. Probable cause does not mean "legal cause" because, if it did, then every plaintiff who failed to recover in his or her lawsuit would be liable to an action for malicious prosecution [*Albertson v. Raboff (1960) 185 Cal. App. 2d 372, 385, 8 Cal. Rptr. 398*]. Probable cause to bring a civil action, or the lack thereof, is determined with regard to the theory on which the allegedly malicious action was actually based. The test for malicious prosecution is not whether the defendant had reasonable grounds to seek some kind of relief in the original action, but whether he or she had reasonable grounds for asserting the theory for relief contained in the complaint and tried to the factfinder. Thus, even if the defendant had grounds for an action against the plaintiff, if he or she failed to prosecute the action on those grounds and instead prosecuted the action on untenable grounds, the defendant may be found liable for malicious prosecution [*Williams v. Coombs (1986) 179 Cal. App. 3d 626, 644, 224 Cal. Rptr. 865 , criticized,* *Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 885-886, 254 Cal. Rtpr. 336, 765 P.2d 498* (civil)].

A malicious prosecution cause of action can be based on a lack of probable cause as to one (or more) of the grounds asserted in an underlying action, even if probable cause existed for one or more of the other grounds asserted [*see Crowley v. Katleman (1994) 8 Cal. 4th 666, 679, 695, 34 Cal. Rptr. 2d 386, 881 P.2d 1083* ; *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 57, 118 Cal. Rptr. 184, 529 P.2d 608*].

Whether or not the defendant had probable cause for instituting the prosecution is always a matter of law to be determined by the court, and is never left to the determination of the jury. Even when the facts are in dispute, the court determines the issue of probable cause after the jury determines the factual issues [*Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 875, 254 Cal. Rptr. 336, 765 P.2d 498* (civil); *Ball v. Rawles (1892) 93 Cal. 222, 227, 28 P. 937* (criminal); *Williams v. Coombs (1986) 179 Cal. App. 3d 626, 636, 224 Cal. Rptr. 865 , criticized, Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 885-886, 254 Cal. Rptr. 336, 765 P.2d 498* (civil)]. Thus, it is a judicial determination whether or not the defendant acted reasonably and in good faith as a matter of law [*Williams v. Coombs (1986) 179 Cal. App. 3d 626, 637, 224 Cal. Rptr. 865 , criticized, Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 885-886, 254 Cal. Rptr. 336, 765 P.2d 498* (civil); *see Evid. Code § 310(a)*; *but see Weaver v. Superior Court (1979) 95 Cal. App. 3d 166, 189, 192, 156 Cal. Rptr. 745* (civil; reasonableness question as determined by jury)].

For further discussion, *see § 357.16[1]*.

[6] Decisions

[a] Favorable Termination

Voluntary dismissal of civil action as favorable termination on which action for malicious prosecution may be based. *Hurgren v. Union Mut. Life Ins. Co. (1904) 141 Cal. 585, 587-590, 75 P. 168* ; *Kennedy v. Byrum (1962) 201 Cal. App. 2d 474, 477, 479-480, 20 Cal. Rptr. 98*

Favorable termination as one tending to indicate innocence of accused; no favorable termination when initial action dismissed for failure of plaintiff to answer interrogatories, and when defendant in malicious prosecution action was attorney who substituted into former case after motion to dismiss was granted and mistakenly filed at-issue memorandum. *De La Pena v. Wolfe (1986) 177 Cal. App. 3d 481, 484, 223 Cal. Rptr. 325*

Demurrer without leave to amend as proper when action still pending on appeal, because there has been no favorable termination. *Friedman v. Stadum (1985) 171 Cal. App. 3d 775, 779, 217 Cal. Rptr. 585*

Voluntary dismissal of civil action as favorable termination which will support action for malicious prosecution even though expressly made without prejudice. *MacDonald v. Joslyn (1969) 275 Cal. App. 2d 282, 289, 79 Cal. Rptr. 707*

Dismissal of contempt proceedings ancillary to probate proceedings as favorable termination on which to bring malicious prosecution action. *Ferraris v. Levy (1963) 223 Cal. App. 2d 408, 410-411, 36 Cal. Rptr. 30*

Dismissal of contempt proceeding ancillary to a bankruptcy proceeding which was dismissed by mutual consent after a compromise of conflicting claims as not a favorable termination. *Eustace v. Dechter (1942) 53 Cal. App. 2d 726, 732-733, 128 P.2d 367*

[b] Lack of Probable Cause

Test of attorney's probable cause in representing client as whether any attorney would have thought that client's claim was tenable. *Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 886, 254 Cal. Rptr. 336, 765 P.2d 498*

Fact that probable cause existed for prosecution of prior action by one party as not exonerating defendant who acted wrongfully. *Jacques Interiors v. Petrak (1987) 188 Cal. App. 3d 1363, 1370-1371, 234 Cal. Rptr. 44*

Probable cause as determined by court rather than jury. *Williams v. Coombs (1986) 179 Cal. App. 3d 626, 636-637, 224 Cal. Rptr. 865 , criticized, Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 885-886, 254 Cal. Rptr. 336, 765 P.2d 498*

Definition for civil action. *Davis v. Local Union No. 11, Int'l Bhd. of Elec. Workers, AFL-CIO (1971) 16 Cal. App. 3d 686, 692* ; *Kennedy v. Byrum (1962) 201 Cal. App. 2d 474, 480, 20 Cal. Rptr. 98*

Probable cause as not meaning legal cause. *Albertson v. Raboff (1960) 185 Cal. App. 2d 372, 385, 8 Cal. Rptr. 398*

Plaintiff as required to present substantial evidence to create conflict or inference of lack of probable cause. *Davis v. Local Union No. 11, Int'l Bhd. of Elec. Workers, AFL-CIO (1971) 16 Cal. App. 3d 686, 692* ; *Kassan v. Bledsoe (1967) 252 Cal. App. 2d 810, 816, 60 Cal. Rptr. 799*

Lack of probable cause as not implied from even the most express malice. *Kassan v. Bledsoe (1967) 252 Cal. App. 2d 810, 816, 60 Cal. Rptr. 799*

Not even conflict on issue of probable cause as created by favorable termination of prior proceeding. *Kassan v. Bledsoe (1967) 252 Cal. App. 2d 810, 816, 60 Cal. Rptr. 799*

[c] Proximate Cause

Proximate cause as established when defendant's actions set law in motion and "in natural and continuous sequence" produced harm that defendant suffered. *Jacques Interiors v. Petrak (1987) 188 Cal. App. 3d 1363, 1372-1373, 234 Cal. Rptr. 44*

[7] Cross References

For a related form, *see § 357.190*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionElementsGeneral OverviewTortsIntentional TortsMalicious ProsecutionRemedies

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31-357 California Forms of Pleading and Practice--Annotated § 357.194

§ 357.194 Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages--Malicious Prosecution of Administrative Proceeding--Several Defendants Conspiring to Charge Plaintiff With Gross Immorality and Unprofessional Conduct During Employment

[1] FORM Complaint for Compensatory [Civ. Code § 3333] and Punitive [Civ. Code § 3294] Damages--Malicious Prosecution of Administrative Proceeding--Several Defendants Conspiring to Charge Plaintiff With Gross Immorality and Unprofessional Conduct During Employment

[*Caption. See § 357.190.*]

Plaintiff alleges:

1. [*Capacity and residence of defendant*(*s*). *See § 357.190, Paragraph 1.*]

[2. (Plaintiff is informed and believes and thereon alleges that) at all times herein mentioned defendants _____ (*names*) were the agents, servants, and employees of their codefendants, and (in doing the things hereinafter mentioned) were acting in the scope of their authority as such agents, servants, and employees with the permission and consent of their codefendants.]

[3. *Fictitious name allegation, if appropriate. See § 357.190, Paragraph 2.*]

4. On or about _____ [*date*], in _____ [*city*], _____ County, California, defendants _____ [*names*], and each of them, conspired to falsely charge and accuse plaintiff _____ [*specify charge and accusation, e.g.*, of gross immorality and unprofessional conduct during the period of plaintiff's employment as _____ (*set out occupation*) with the _____ (*set out name of employer*)] for the purpose of procuring plaintiff's dismissal from that employment.

5. On or about _____ [*date*], in _____ [*city*], _____ County, California, and in pursuance of the conspiracy, the defendants, and each of them, filed _____ [affidavits *or specify other as appropriate*] with _____ [*specify situation or agency, e.g.,* _____ (*name*) College] which charged plaintiff, falsely, with the commission of acts of a base and depraved nature. By reason of these charges in the _____ [affidavits *or specify other as appropriate*] plaintiff was dismissed from his/her employment, effective _____ [*date*].

6. On _____ [*date*], plaintiff was _____ [*specify disposition of matter, e.g.,* reinstated in his/her employment and the dismissal was revoked] by the _____ [*specify board or other administrative agency, e.g.,* State Personnel Board] after a hearing entitled _____ [*name*], No. _____, in which hearing the charges and accusations against plaintiff herein were found to be untrue and the grounds for dismissal not sustained by the evidence.

7. Defendants, and each of them, in furtherance of this conspiracy, acted without reasonable or probable cause in so instigating the action taken against plaintiff.

8. Defendants, and each of them, in furtherance of this conspiracy, acted maliciously in so instigating the action taken against plaintiff in that _____ [*allege actual ill will or other improper purpose for instigating action taken against plaintiff, e.g.,* defendants, and each of them, knew the charges and accusations against plaintiff were false and made these charges and accusations with the intent to vex, harass, and injure plaintiff].

9. As a proximate result of this administrative proceeding so instigated by defendants, plaintiff has been damaged.

10. As a further proximate result of the administrative proceeding so instigated by defendants, plaintiff has incurred attorney's fees in defending against the proceedings.

11. As a further proximate result of the administrative proceeding so instigated by defendants, plaintiff has been prevented from attending to his/her regular employment as _____ [*specify type of employment*], to his/her loss of earnings.

12. [*Punitive damages allegation, if appropriate. See § 357.190, Paragraph 9.*]

[*Prayer. See § 357.190.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 357.190.*]

[2] Use of Form

This complaint for damages for malicious prosecution is for use by a plaintiff against several defendants conspiring to charge the plaintiff in an administrative proceeding with gross immorality and unprofessional conduct during

employment. The form was adapted from the complaint filed by the plaintiff in *Hardy v. Vial (1957) 48 Cal. 2d 577, 311 P.2d 494* .

[3] Decisions

Cause of action for malicious prosecution as available for maliciously prosecuting administrative proceeding. *Hardy v. Vial (1957) 48 Cal. 2d 577, 580, 311 P.2d 494*

[4] Cross References

For related forms, *see §§ 357.190* and *357.193*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-357 California Forms of Pleading and Practice--Annotated § 357.195

§ 357.195 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Criminal Action--No Favorable Termination of Prior Proceeding--Innocence of Plaintiff Not Indicated

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Criminal Action--No Favorable Termination of Prior Proceeding--Innocence of Plaintiff Not Indicated

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that: dismissal of the proceeding by the district attorney did not constitute a favorable termination in that _____ [*specify grounds of termination*] and did not indicate the innocence of plaintiff.

[2] Use of Form

This affirmative defense is for use in an answer to plead that there was no favorable termination of the criminal prosecution because plaintiff's innocence was indicated by the dismissal of the proceeding by the district attorney.

[3] Decisions

Favorable termination in criminal action as required to indicate innocence of accused if no trial occurred. *Jaffe v. Stone (1941) 18 Cal. 2d 146, 150, 114 P.2d 335*

Dismissal of criminal proceeding by prosecutor "in the interests of justice" as not favorable termination where innocence of accused not indicated by record. *De La Riva v. Owl Drug Co. (1967) 253 Cal. App. 2d 593, 599-600, 61 Cal. Rptr. 291*

Legal Topics:

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

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31-357 California Forms of Pleading and Practice--Annotated § 357.196

§ 357.196 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Criminal Action--Probable Cause Established by Advice of Prosecuting Attorney

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Criminal Action--Probable Cause Established by Advice of Prosecuting Attorney

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. On or about _____ [*date*], defendant consulted [*specify name and title of official, e.g.,* _____ (*name*), a deputy district attorney of _____ County, California].

2. Defendant informed _____ [*name of official*] fully, fairly, and in good faith, of all pertinent facts defendant knew concerning the transaction referred to in the criminal complaint against plaintiff, referred to in plaintiff's complaint herein.

3. Thereafter, in good faith reliance on the advice of _____ [*name of official*], defendant subscribed and swore to the criminal complaint against plaintiff herein, which is the basis of the present action brought by plaintiff against defendant herein.

[2] Use of Form

This affirmative defense is for use in an answer to plead that defendant acted on the advice of a public prosecutor in initiating the criminal prosecution against plaintiff. Where there has been a full disclosure of the facts in good faith, this defense is available no matter how erroneous the advice given may have been [*Richter v. Neilson (1936) 11 Cal. App. 2d 503, 508, 54 P.2d 54*].

[3] Burden of Proof

The burden of proving that defendant relied upon the advice of counsel is on defendant [*Klotz v. Alexander (1962) 203 Cal. App. 2d 238, 245, 21 Cal. Rptr. 305*].

[4] Proof After General Denial Permitted

The defense of reliance upon the advice of counsel may be shown under a general denial of the complaint [*Walker v. Jensen (1949) 95 Cal. App. 2d 269, 275, 212 P.2d 569*].

[5] Evidence; Limitation

The defense of advice of counsel can only be established by proving the facts that were stated by a defendant to counsel, not by what was disclosed by the defendant to a police officer [*Klotz v. Alexander (1962) 203 Cal. App. 2d 238, 245, 21 Cal. Rptr. 305*]. If there are any circumstances within the knowledge of the prosecuting witness that would destroy the apparent effect of facts stated by the witness to an attorney, then the defense of probable cause based on advice of counsel fails [*Northrup v. Baker (1962) 202 Cal. App. 2d 347, 355, 20 Cal. Rptr. 797*].

[6] Decisions

Defense of advice of counsel as especially applicable where facts presented to prosecutor. *Walker v. Jensen (1949) 95 Cal. App. 2d 269, 274, 212 P.2d 569*

Defense as available no matter how erroneous advice may have been where public prosecutor consulted. *Richter v. Neilson (1936) 11 Cal. App. 2d 503, 508, 54 P.2d 54*

Defense as not available where defendant does not believe accused to be guilty. *Centers v. Dollar Mkts. (1950) 99 Cal. App. 2d 534, 545, 222 P.2d 136*

Burden of proving defense of reliance on advice of counsel as on defendant. *Klotz v. Alexander (1962) 203 Cal. App. 2d 238, 245, 21 Cal. Rptr. 305*

Proof of defense of reliance on advice of counsel as permitted after general denial of complaint. *Walker v. Jensen (1949) 95 Cal. App. 2d 269, 275, 212 P.2d 569*

Defense of advice of counsel as only established by proving facts stated to counsel, not police officer. *Klotz v. Alexander (1962) 203 Cal. App. 2d 238, 245, 21 Cal. Rptr. 305*

Defense of advice of counsel as not available where circumstances are within knowledge of prosecuting witness which would destroy apparent effect of facts stated to attorney. *Northrup v. Baker (1962) 202 Cal. App. 2d 347, 355, 20 Cal. Rptr. 797*

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-357 California Forms of Pleading and Practice--Annotated § 357.197

§ 357.197 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Criminal Action--Probable Cause Established Because Plaintiff Was in Fact Guilty of Offense Charged

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Criminal Action--Probable Cause Established Because Plaintiff Was in Fact Guilty of Offense Charged

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. Notwithstanding the acquittal and favorable termination of the criminal proceeding referred to in plaintiff's complaint herein, plaintiff herein was, in fact, guilty of the offense charged.

2. Defendant herein acted without malice and with probable cause in instituting the criminal proceeding referred to in plaintiff's complaint herein.

[2] Use of Form

This affirmative defense is for use in an answer to plead that defendant acted with probable cause in initiating the criminal prosecution of plaintiff even though plaintiff was acquitted of the charge.

[3] Availability of Defense After Acquittal

This defense is available notwithstanding an acquittal in the prior criminal proceeding. The question of plaintiff's guilt may be retried in the malicious prosecution action because a verdict of not guilty does not necessarily establish innocence; rather, it merely indicates a failure of the prosecution to prove guilt beyond a reasonable doubt. Thus, in a subsequent civil action where all that is required is a preponderance of the evidence on the issue, a further inquiry may be made before a new jury as to whether the lesser burden of proof can be sustained [*Clary v. Hale (1959) 175 Cal. App. 2d 880, 890, 1 Cal. Rptr. 91*].

[4] Decisions

Defendant in malicious prosecution action may always show plaintiff was in fact guilty of offense charged. *Clary v. Hale (1959) 175 Cal. App. 2d 880, 889-890, 1 Cal. Rptr. 91*

Question of plaintiff's guilt may be retried in malicious prosecution action; while unreversed conviction as conclusive as to guilt, acquittal as not conclusive as to innocence. *Clary v. Hale (1959) 175 Cal. App. 2d 880, 889-890, 1 Cal. Rptr. 91*

Proof that plaintiff committed offense charged in criminal action shows existence of probable cause and as a complete defense to malicious prosecution action. *Verdier v. Verdier (1957) 152 Cal. App. 2d 348, 352, 313 P.2d 123*

Proof that no crime was committed or that accused was innocent does not necessarily negative existence of probable cause. *Centers v. Dollar Mkt. (1950) 99 Cal. App. 2d 534, 541, 222 P.2d 136*

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-357 California Forms of Pleading and Practice--Annotated § 357.198

§ 357.198 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Criminal Action--Honest Statement of Facts to Authorities

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Criminal Action--Honest Statement of Facts to Authorities

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

On _____ [*date*], defendant fully, fairly, honestly, and in good faith informed _____ [*name*], a _____ [*specify public official, e.g.,* deputy district attorney] of _____ County, California, of all the facts concerning the transaction referred to in the criminal _____ [information *or* indictment]. Defendant did nothing more than present these facts to [*name of public official*] and took no further action in the proceeding. The decision to arrest and prosecute plaintiff was made solely by the district attorney's office.

[2] Use of Form

This affirmative defense is for use in an answer to plead that defendant is not liable because defendant merely presented a full, fair, honest, and good-faith statement of the relevant facts to a public official.

[3] Decisions

Person is not liable for laying out facts for public officials where action is in good faith. *Gogue v. MacDonald (1950) 35 Cal. 2d 482, 486-487, 218 P.2d 542*

Private person is not liable for malicious prosecution when person was not actively instrumental in causing criminal prosecution. *Cedars-Sinai Med. Ctr. v. Superior Court (1988) 206 Cal. App. 3d 414, 417, 253 Cal. Rptr. 561*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefenses

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A. Malicious Prosecution

31-357 California Forms of Pleading and Practice--Annotated § 357.199

§ 357.199 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Civil Action--No Favorable Termination of Prior Proceeding--Settlement

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Civil Action--No Favorable Termination of Prior Proceeding--Settlement

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

There was no favorable termination of the prior action because defendant and plaintiff agreed that the case should be dismissed after a settlement was entered into. The settlement provided that _____ [*specify terms of settlement*].

[2] Use of Form

This affirmative defense is for use in an answer to plead that there was no favorable termination of the prior civil action because it was dismissed only after defendant and plaintiff agreed to a settlement of the issues presented therein.

[3] Decisions

Favorable termination requirement as not met where termination brought by compromise and settlement. *Paskle v. Williams (1931) 214 Cal. 482, 484, 6 P.2d 505*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsFavorable Termination

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31-357 California Forms of Pleading and Practice--Annotated § 357.200

§ 357.200 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Civil Action--No Favorable Termination of Prior Proceeding--Case Still Pending

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Civil Action--No Favorable Termination of Prior Proceeding--Case Still Pending

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

There was no favorable termination of the prior action because it is still pending in that _____ [*specify facts showing case still pending*].

[2] Use of Form

This affirmative defense is for use in an answer to plead that there was no favorable termination of the prior civil action because it is still pending.

[3] Decisions

Favorable termination as not possible where action still pending. *Rich v. Siegel (1970) 7 Cal. App. 3d 465, 469, 86 Cal. Rptr. 665*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsFavorable Termination

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31-357 California Forms of Pleading and Practice--Annotated § 357.201

§ 357.201 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Civil Action--Probable Cause Established by Advice of Counsel

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Civil Action--Probable Cause Established by Advice of Counsel

1. On or about _____ [*date*], defendant consulted _____ [*name*], an attorney at law, duly licensed to practice law in California.

2. Defendant informed this attorney fully, fairly, and in good faith of all the pertinent facts that defendant knew concerning the transaction referred to in plaintiff's complaint, and thereupon the attorney advised defendant that defendant had a good and sufficient cause of action against plaintiff.

3. Thereafter, and in good faith reliance on the advice of this attorney, defendant instituted the action against plaintiff, which is the basis of the present action brought by plaintiff against this defendant.

[2] Use of Form

This affirmative defense is for use in an answer to plead that probable cause existed for instituting the prior civil action because defendant consulted an attorney in good faith and relied on the attorney's advice in bringing the action.

[3] Burden of Proof

The defense of reliance upon the advice of counsel is an affirmative defense. While it may be shown under a general denial in the answer, the burden of establishing it is upon the defendant [*Albertson v. Raboff (1960) 185 Cal. App. 2d 372, 386, 8 Cal. Rptr. 398*].

[4] Questions of Fact

Where the evidence conflicts or is subject to different inferences as to whether there was a full, fair, and complete

disclosure to the attorney of all of the facts of the case within the knowledge of the client or as to whether the client acted in good faith on the advice of the attorney, it is for the trier of fact to resolve such conflict or draw the credible inferences [*Albertson v. Raboff (1960) 185 Cal. App. 2d 372, 386, 8 Cal. Rptr. 398*].

[5] Decisions

Reliance in good faith on advice of counsel is defense inasmuch as it shows probable cause. *Kennedy v. Byrum (1962) 201 Cal. App. 2d 474, 481, 20 Cal. Rptr. 98*

Advice of counsel is presumed to be complete defense where defendant presented all facts in good faith to counsel. *Brinkley v. Appleby (1960) 276 Cal. App. 2d 244, 247, 80 Cal. Rptr. 734*

Burden of proving defense is on defendant. *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 54, 118 Cal. Rptr. 184, 529 P.2d 608*

Defense of advice of counsel is not applicable where initiator of action acts in bad faith or withholds vital facts from counsel or where advice sought as cloak to protect one against suit for mali cious prosecution. *Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 53-54, 118 Cal. Rptr. 184, 529 P.2d 608*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsProbable CauseGeneral Overview

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31-357 California Forms of Pleading and Practice--Annotated § 357.202

§ 357.202 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Civil Action--Probable Cause Established by Attorney's Honest and Reasonable Belief in Client's Claim

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Civil Action--Probable Cause Established by Attorney's Honest and Reasonable Belief in Client's Claim

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. From _____ [*date*], until _____ [*date*], defendant represented plaintiff in a trial in the _____ [*specify*] Court of _____, County, California. The action was entitled _____ [*name*], Plaintiff, vs. _____ [*name*], Defendant, No. _____. It involved _____ [*specify nature of case*].

2. At all times before and during that trial, defendant held a reasonable belief that _____ [*name of plaintiff*] had a tenable cause of action against _____ [*name of defendant*] for _____ [*specify nature of cause of action*].

[2] Use of Form

This affirmative defense is for use in an answer to plead that probable cause existed for an attorney to represent a client because he or she had a reasonable belief that his or her client had a tenable cause of action.

[3] Decisions

Test of attorney's probable cause in representing client as whether any attorney would have thought that attorney's claim was tenable. *Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 886, 254 Cal. Rptr. 336, 765 P.2d 498*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsProbable CauseGeneral Overview

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31-357 California Forms of Pleading and Practice--Annotated § 357.203

§ 357.203 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Civil Action--Waiver of Action by Request for Defense Costs Under Code Civ. Proc. § 1038 [Code Civ. Proc. § 1038(c)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Civil Action--Waiver of Action by Request for Defense Costs Under Code Civ. Proc. § 1038 [Code Civ. Proc. § 1038(c)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

Plaintiff waived his/her action for damages for malicious prosecution by requesting defense costs pursuant to *Section 1038 of the Code of Civil Procedure* on or about _____ [*date*] which costs were incurred in opposing a prior proceeding _____ [under the California Tort Claims Act *or* for indemnity *or* for contribution] claimed by plaintiff to have been brought in bad faith and without reasonable cause

[2] Use of Form

This affirmative defense is for use in an answer to plead that the plaintiff waived his or her action for damages by requesting defense costs incurred in opposing a prior proceeding brought under the California Tort Claims Act or for indemnity or contribution in any civil action that the plaintiff claimed had been brought in bad faith and without reasonable cause [*Code Civ. Proc. § 1038(c)*].

[3] State Statutes

Waiver of action for damages for malicious prosecution by request for defense costs. *Code Civ. Proc. § 1038(c)*

Legal Topics:

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

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31-357 California Forms of Pleading and Practice--Annotated § 357.204

§ 357.204 General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Favorable Termination of Prior Proceeding Not Alleged

[1] FORM General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Favorable Termination of Prior Proceeding Not Alleged

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	GENERAL DEMURRER
Plaintiff,	)	[LIMITED CIVIL CASE]
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

Defendant demurs to the complaint on the ground that _____ [*designate cause of action or count number, e.g.*, the complaint *or* the First Cause of Action] because it fails to allege that there was a favorable termination of the _____ [*describe nature of prior proceeding*].

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

CAUTION:

A party filing a demurrer must serve and file with it a memorandum of points and authorities in support of each ground raised in the demurrer [*Cal. Rules of Ct., Rules 3.1103(c), 3.1113(a)*; for discussion and forms, *see* Ch. 417, *Points and Authorities*] and a notice of hearing [*see Cal. Rules of Ct., Rules 3.1103(c), 3.1112(a)*].

[2] Use of Form

This general demurrer is for use by a defendant to object to a complaint for malicious prosecution where the objection that plaintiff has failed to state facts sufficient to constitute a cause of action appears on the face of the complaint or from any matter of which the court is required to or may take judicial notice [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*]. This objection is based on the fact that plaintiff has not alleged that there wasa termination of the prior proceeding favorable to plaintiff [*see Rutherford v. Johnson (1967) 250 Cal. App. 2d 316, 320, 58 Cal. Rptr. 546*].

[3] Cross References

For additional forms of general demurrer, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

[4] State Statutes

Objection by demurrer to complaint on ground it does not state facts sufficient to constitute cause of action. *Code Civ. Proc. § 430.10(e)*

Objection to complaint as allowed to be taken by demurrer when ground for objection appears on face of complaint or from any matter of which court is required to or may take judicial notice. *Code Civ. Proc. § 430.30(a)*; see also *Code Civ. Proc. § 430.70* (specifying matter of which court may take judicial notice)

[5] Decisions

Court in its discretion may require clear allegation of favorable termination rather than questionable inference; allegation of voluntary termination with prejudice is insufficient to withstand a demurrer. *Chauncey v. Niems (1986) 182 Cal. App. 3d 967, 977, 227 Cal. Rptr. 718*

Complaint is demurrable where it alleges neither proceedings brought by defendant against plaintiff nor their termination in plaintiff's favor. *Rutherford v. Johnson (1967) 250 Cal. App. 2d 316, 320, 58 Cal. Rptr. 546*

[6] Text References

Witkin, California Procedure, Vol. 5, *Pleading*, § 713 (4th ed. 1997)

Legal Topics:

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

TortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsIntentional TortsMalicious ProsecutionElementsFavorable Termination

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31-357 California Forms of Pleading and Practice--Annotated § 357.205

§ 357.205 General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Immunity of Public Employee [Gov. Code § 821.6]

[1] FORM General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Immunity of Public Employee [Gov. Code § 821.6]

[*Caption. See § 357.204.*]

Defendant demurs to the complaint on the ground that _____ [*designate cause of action or count number, e.g.*, the complaint *or* the First Cause of Action] does not state facts sufficient to constitute a cause of action because it alleges that defendant is a public employee who was performing actions within the proper exercise of the discretion vested with him/her and were within the scope of his/her employment.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

CAUTION:
A party filing a demurrer must serve and file with it a memorandum of points and authorities in support of each ground raised [*Cal. Rules of Ct., Rules 3.1103(c), 3.1113(a)*; for discussion and forms, *see* Ch. 417, *Points and Authorities*] and a notice of hearing [*see Cal. Rules of Ct., Rules 3.1103(c), 3.1112(a)*].

[2] Use of Form

This general demurrer is for use by a defendant to object to a complaint for malicious prosecution where the objection that plaintiff has failed to state facts sufficient to constitute a cause of action appears on the face of the complaint or from any matter of which the court is required to or may take judicial notice [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*]. This objection is based on the fact that defendant is a public employee who is immune for the acts complained of [*see Gov. Code § 821.6*; *White v. Towers (1951) 37 Cal. 2d 727, 734, 235 P.2d 209*].

[3] Cross References

For discussion and forms concerning tort actions generally against public employees, see generally Ch. 464, *Public Entities and Officers: California Tort Claims Act*

[4] State Statutes

Immunity of public employees for malicious prosecution suits where acting within scope of employment. *Gov. Code § 821.6*

[5] Decisions

Immunity of public employee extends only to proceeding instituted within scope of employment. *Vivell v. Belmont (1969) 274 Cal. App. 2d 38, 40-41, 78 Cal. Rptr. 841*

School officials immune from malicious prosecution suit. *Hardy v. Vial (1957) 48 Cal. 2d 577, 582-584, 311 P.2d 494*

Deputy sheriffs and city policemen immune from malicious prosecution suit. *Coverstone v. Davies (1952) 38 Cal. 2d 315, 322, 239 P.2d 876*

Investigator for Fish and Game Commission immune from malicious prosecution suit. *White v. Towers (1951) 37 Cal. 2d 727, 731-732, 235 P.2d 209*

Immunity does not extend to city councilman seeking prosecution of citizen for private gain. *Vivell v. Belmont (1969) 274 Cal. App. 2d 38, 41, 78 Cal. Rptr. 841* (dictum)

County building inspector and supervisors as immune from malicious prosecution suit. *Dawson v. Martin (1957) 150 Cal. App. 2d 379, 381-382, 309 P.2d 915*

Immunity as not extending to police officer who maliciously and without cause initiates prosecution against citizen. *Prentice v. Bertken (1942) 50 Cal. App. 2d 344, 349, 123 P.2d 96*

[6] Cross References

For a related form, see *§ 357.204*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityState

Tort Claims ActsScope of Employment

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31-357 California Forms of Pleading and Practice--Annotated § 357.206

§ 357.206 General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Immunity of Public Entity [Gov. Code §§ 815.2(b), 821.6]

[1] FORM General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Immunity of Public Entity [Gov. Code §§ 815.2(b), 821.6]

[*Caption. See § 357.204.*]

Defendant demurs to the complaint on the ground that _____ [*designate cause of action or count number, e.g.*, the complaint *or* the First Cause of Action] does not state facts sufficient to constitute a cause of action because it alleges that defendant is a public entity.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

CAUTION:
A party filing a demurrer must serve and file with it a memorandum of points and authorities in support of each ground raised [*Cal. Rules of Ct., Rules 3.1103(c), 3.1113(a)*; for discussion and forms, *see* Ch. 417, *Points and Authorities*] and a notice of hearing [*see Cal. Rules of Ct., Rules 3.1103(c), 3.1112(a)*].

[2] Use of Form

This general demurrer is for use by a defendant to object to a complaint for malicious prosecution where the objection

that plaintiff has failed to state facts sufficient to constitute a cause of action appears on the face of the complaint or from any matter of which the court is required to or may take judicial notice [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*]. This objection is based on the fact that defendant is a public entity which is immune for the acts complained of [*see Gov. Code §§ 815.2(b), 821.6*; *Blackburn v. Los Angeles County (1974) 42 Cal. App. 3d 175, 177-178, 116 Cal. Rptr. 622*].

[3] Cross References

For discussion and forms concerning claims and actions against public entities, see generally Ch. 464, *Public Entities and Officers: California Tort Claims Act*

[4] State Statutes

Immunity of public entities from malicious prosecution suits. *Gov. Code §§ 815.2(b), 821.6*

[5] Decisions

Combined effect of *Gov. Code §§ 815.2(b), 821.6* as immunizing public entity from liability from malicious prosecution suits. *Blackburn v. Los Angeles County (1974) 42 Cal. App. 3d 175, 176-178, 116 Cal. Rptr. 622* ; *Vivell v. Belmont (1969) 274 Cal. App. 2d 38, 40-41, 78 Cal. Rptr. 841*

County as immune from malicious prosecution suits; immunity as capable of being raised by demurrer as well as by answer. *Dawson v. Martin (1957) 150 Cal. App. 2d 379, 381-382, 309 P.2d 915*

[6] Cross References

For related forms, see *§§ 357.204* and *357.205*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionDefensesTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral Overview

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31-357 California Forms of Pleading and Practice--Annotated §§ 357.207-357.219

[Reserved]

§§ 357.207[Reserved]

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B. Abuse Of Process

31-357 California Forms of Pleading and Practice--Annotated § 357.220

§ 357.220 Complaint for Damages [Civ. Code § 3333] for Abuse of Process--General Form

[1] FORM Complaint for Damages [Civ. Code § 3333] for Abuse of Process--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Abuse of Process)
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	or does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant(s). See § 357.190, Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 357.190, Paragraph 2.*]

3. On or about _____ [*date*], defendant(s) _____ [*describe type of process which defendant(s) obtained and used against plaintiff*].

4. Defendant(s) misused the _____ [*describe process*] by _____ [*state way in which process misused*]. This use of the process was not authorized in the regular course of the proceeding.

5. The ulterior purpose and motivation of defendant(s) in so misusing the process in the above-described manner was to

obtain the following collateral advantage over the plaintiff: _____ [*describe collateral advantage sought by defendant*].

6. As a proximate result of the actions of defendant(s), plaintiff has been damaged generally.

7. At all times mentioned herein, defendant(s) acted willfully with the wrongful intention of injuring plaintiff and from an improper or evil motive amounting to malice in that _____ [*specify facts constituting malice*].

WHEREFORE, Plaintiff prays judgment against defendant(s)[, and each of them,] as follows:

1. For general damages according to proof.

2. For damages for mental and emotional distress according to proof.

3. For punitive damages.

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 357.190.*]

[2] Use of Form

This form of complaint is a general form that can be adapted for use in all actions for abuse of process.

[3] Allegations

This complaint alleges:

- The type of process that defendant obtained and used against plaintiff (Paragraph 3).

- The misuse of that process (Paragraph 4) [*see Spellens v. Spellens (1957) 49 Cal. 2d 210, 231, 317 P.2d 613*].

- The ulterior purpose and motivation in misusing the process in order to gain a collateral advantage (Paragraph 5) [*see Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 466, 72 Cal. Rptr. 344, 446 P.2d 152*].

- General damages (Paragraph 6) [*see Spellens v. Spellens (1957) 49 Cal. 2d 210, 233, 317 P.2d 613*].

- Punitive damages (Paragraph 7) [*see Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 471, 72 Cal. Rptr. 344, 446 P.2d 152*].

[4] Venue

An action for abuse of process is properly brought only at the place of residence of the defendant [*see Code Civ. Proc. § 395(a)*; *Cacciaguidi v. Superior Court (1990) 226 Cal. App. 3d 181, 184-187, 276 Cal. Rptr. 465*].

[5] Broad Interpretation of "Process"

The term "process" is not limited to the strict sense of the term and has been interpreted broadly to encompass the entire range of "procedures" incident to litigation [*Barquis v. Merchants Collection Ass'n (1972) 7 Cal. 3d 94, 104 n.4, 101 Cal. Rptr. 745, 496 P.2d 817*].

[6] Damages

The damages recoverable for abuse of process include mental suffering [*Spellens v. Spellens (1957) 49 Cal. 2d 210, 233, 317 P.2d 613*]. A plaintiff may also recover punitive damages if the defendant has acted willfully with the wrongful intention of injuring plaintiff and from an improper or evil motive amounting to malice [*see Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 471, 72 Cal. Rptr. 344, 446 P.2d 152*].

[7] Cross References

For discussion and forms involving wrongful attachment as an abuse of process, see Ch. 62, *Attachment*

For discussion and forms relating to actions for possession of personal property and the provisional remedy of claim and delivery, see Ch. 119, *Claim and Delivery*

For discussion and forms for use in enforcement of judgments by execution, see Ch. 254, *Executions and Enforcement of Judgments*

For discussion and forms relating to garnishment, see Ch. 276, *Garnishment*

[8] Forms of Discovery

For forms of interrogatories for use by plaintiff in an action for abuse of process through successive levies on exempt property, see Bender' S Forms of Discovery, Ch. 126, *Malicious Prosecution and Abuse of Process* (Matthew Bender)

[9] State Statutes

"Process" defined. *Code Civ. Proc. § 17*; *Penal Code § 7(15)*

Sheriff as justified in executing process regular on its face. *Code Civ. Proc. § 262.1*

Statute of limitations. *Code Civ. Proc. § 335.1*

Abuse of process as contempt of court. *Code Civ. Proc. § 1209(a)(4)*

[10] Decisions

[a] Acts Constituting Abuse of Process

Filing complaints in improper counties as abuse of process. *Barquis v. Merchants Collection Asso. (1972) 7 Cal. 3d 94, 104, 101 Cal. Rptr. 745, 496 P.2d 817*

Filing action for claim and delivery and then seizing property to force payment of debt owed by another as abuse of process. *Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 466, 72 Cal. Rptr. 344, 446 P.2d 152*

Excessive attachment as abuse of process. *White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 347, 66 Cal. Rptr. 697, 438 P.2d 345*

Claim and delivery used improperly as abuse of process. *Spellens v. Spellens (1957) 49 Cal. 2d 210, 229-232, 317 P.2d 613*

Using written interrogatory for improper purpose as abuse of process. *Younger v. Solomon (1974) 38 Cal. App. 3d 289, 296-297, 113 Cal. Rptr. 113*

Garnishing exempt wages for improper purpose as abuse of process. *Czap v. Credit Bureau of Santa Clara Valley (1970) 7 Cal. App. 3d 1, 5-7, 86 Cal. Rptr. 417*

[b] Damages

Advice of counsel as constituting defense to charge of malice in action for abuse of process (asking for exemplary damages) if defendant has fully disclosed relevant facts to attorney. *Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 472 n.7, 72 Cal. Rptr. 344, 446 P.2d 152*

Punitive damages as available in abuse of process action when defendant has acted intentionally and maliciously. *Templeton Feed & Grain Co. v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 468, 72 Cal. Rptr. 344, 446 P.2d 152*

Damages recoverable in abuse of process action as including mental suffering. *Spellens v. Spellens (1957) 49 Cal. 2d 210, 233, 317 P.2d 613*

Malice as capable of being inferred from defendant's conduct to prove malice in seeking punitive damages in abuse of process action. *Spellens v. Spellens (1957) 49 Cal. 2d 210, 230, 317 P.2d 613*

[c] Definitions

[i] Abuse of Process

Abuse of process as use of criminal or civil process against another to accomplish purpose for which process was not designed. *Spellens v. Spellens (1957) 49 Cal. 2d 210, 231, 317 P.2d 613* ; *Czap v. Credit Bureau of Santa Clara Valley (1970) 7 Cal. App. 3d 1, 5, 86 Cal. Rptr. 417*

Gist of abuse of process as misuse of power of court. *Younger v. Solomon (1974) 38 Cal. App. 3d 289, 297, 113 Cal. Rptr. 113*

[ii] "Process"

"Process," as used in tort of abuse of process, as having never been limited to strict sense of term, but instead as having been interpreted broadly to encompass entire range of procedures incident to litigation. *Barquis v. Merchants Collection Ass'n (1972) 7 Cal. 3d 94, 104 n.4, 101 Cal. Rptr. 745, 496 P.2d 817*

"Process" as means by which court compels compliance with its demands. *Meadows v. Bakersfield Sav. & Loan Ass'n (1967) 250 Cal. App. 2d 749, 753, 59 Cal. Rptr. 34* (posting of notice of default and notice of sale under provisions of deed of trust as not constituting process for abuse of process action)

[d] Elements of Tort

[i] In General

Elements of abuse of process as ulterior purpose and improper willful act. *Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 466, 72 Cal. Rptr. 344, 446 P.2d 152* ; *Spellens v. Spellens (1957) 49 Cal. 2d 210, 232-233, 317 P.2d 613*

[ii] Favorable Termination of Prior Action Unnecessary

In cases in which alleged wrongfulness of process does not depend on alleged lack of probable cause and malice in instituting action in which process issued, termination of that action in favor of defendant as having no bearing on determination of whether process was maliciously procured or improperly used and defendant as not required until termination of primary action to seek damages for alleged wrongful process. *White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 350-351, 66 Cal. Rptr. 697, 438 P.2d 345* (action involving wrongful attachment)

[e] Malicious Prosecution Distinguished

Distinction between malicious prosecution and abuse of process. *Spellens v. Spellens (1957) 49 Cal. 2d 210, 232, 317 P.2d 613* ; *Tellefsen v. Key Sys. Transit Lines (1961) 198 Cal. App. 2d 611, 615, 17 Cal. Rptr. 919*

[f] Permissible Inferences

In abuse of process action, ulterior motive or purpose as permitted to be inferred from what is said or done about process, but improper act as not permitted to be inferred from motive. *Tellefsen v. Key Sys. Transit Lines (1961) 198 Cal. App. 2d 611, 616, 17 Cal. Rptr. 919*

Inferences to be drawn from evidence as lying in sound discretion of trial judge acting as trier of fact; intention with which party did act as permissibly inferred from evidence of party's subsequent conduct. *Tranchina v. Arcinas (1947) 78 Cal. App. 2d 522, 524, 178 P.2d 65*

[g] Statute of Limitations

One-year period of limitation under former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 335.1* (two-year statute of limitations)) as applicable to actions filed for abuse of process. *Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 95, 53 Cal. Rptr. 706* ; *McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 590-591, 33 Cal. Rptr. 389*

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-357 California Forms of Pleading and Practice--Annotated § 357.221

§ 357.221 Complaint for Damages [Civ. Code § 3333] for Abuse of Process Regarding Wage Garnishment [Code Civ. Proc. §§ 706.050-706.051]; Unlawful Debt Collection [Civ. Code § 1788.11]; and for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction [Bus. & Prof. Code § 17200 et seq.; Civ. Code § 3422]--By Judgment Debtor--Against Judgment Creditor

[1] FORM Complaint for Damages [Civ. Code § 3333] for Abuse of Process Regarding Wage Garnishment [Code Civ. Proc. §§ 706.050-706.051]; Unlawful Debt Collection [Civ. Code § 1788.11]; and for Temporary Restraining Order, Temporary Injunction, and Permanent Injunction [Bus. & Prof. Code § 17200 et seq.; Civ. Code § 3422]--By Judgment Debtor--Against Judgment Creditor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AND INJUNC-
_____ [*name(s)*],	)	TION
Defendant(s).	)	(Abuse of Process and Unlawful Debt Collection)
	)	
	)	

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Abuse of Process)

1. [*Capacity and residence allegation. See § 357.190, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 357.190, Paragraph 2.*]

3. On or about _____ [*date*], defendant _____ [*name*], as plaintiff, obtained a judgment in the approximate amount of $_____ against plaintiff herein, as defendant. The prior judgment is case number _____ in the Superior Court, _____ County, California, and was entered on an action for _____ [*specify nature of action, e.g.,* attorney's fees].

4. Thereafter, plaintiff offered to pay defendant the amount of the prior judgment and costs at the rate of $_____ per _____ [*specify period, e.g.,* month], and defendant rejected plaintiff's offer.

5. On or about _____ [*date*], defendant caused a garnishment of plaintiff's wages to be made by execution on the prior judgment, and plaintiff duly filed a claim of exemption pursuant to Code of Civil Procedure Section 706.05, under which all but $_____ of plaintiff's earnings were declared exempt from execution.

6. Despite defendant's knowledge that all but $_____ of plaintiff's earnings are exempt from execution, defendant has caused a garnishment of plaintiff's wages to be made each week since _____ [*date of first garnishment*], with malice and the intent to cause plaintiff embarrassment with his/her employer and to coerce plaintiff to pay the judgment out of the proceeds of his/her exempt wages in order to avoid embarrassment to plaintiff and inconvenience to the employer resulting from the garnishments.

7. As a proximate result of the conduct set forth above, plaintiff _____ [*specify damages caused by defendant's conduct, e.g.,* suffered mental distress and became highly nervous and unable to properly perform his/her duties at his/her place of employment. Plaintiff has thereby sustained injury to his/her nervous system and person and has suffered general damages].

8. In engaging in the conduct described above, defendant has acted maliciously, willfully, and with specific intent to injure plaintiff and endanger his/her employment. Plaintiff is therefore entitled to exemplary and punitive damages.

SECOND CAUSE OF ACTION
(Unlawful Debt Collection)

9. Plaintiff incorporates herein Paragraphs 1-4, inclusive, of the First Cause of Action.

10. Defendant _____ [*name*] is a debt collector, within the meaning of *Civil Code Section 1788.2(c)*, duly licensed by the State of California.

11. On or about _____ [*date*], and continuing daily thereafter, defendant has repeatedly and maliciously telephoned plaintiff at plaintiff's home and employment with regard to the prior judgment, in order to annoy and harass plaintiff, in violation of *Civil Code Sections 1788.11(d)* and *1788.11(e)*.

12. As a proximate result of defendant's conduct, plaintiff suffered mental distress and has been damaged thereby.

THIRD CAUSE OF ACTION
(Injunctive Relief from Abuse of Process)

13. Plaintiff incorporates herein Paragraphs 1-6, inclusive, of the First Cause of Action.

14. The practices of defendant as herein alleged are defendant's usual and customary methods to collect debts. Only $_____ of plaintiff's wages are subject to garnishment each week. Unless restrained by the court, defendant will attempt to garnish all of plaintiff's wages repeatedly each week in an effort to collect the entire judgment of $_____. Plaintiff will therefore be compelled to file repeated exemption claims, causing him/her and his/her employer further annoyance and harassment, and causing plaintiff irreparable harm in his/her employment relationship.

15. Plaintiff has no defense to defendant's abuse of process, has no adequate remedy at law, and would suffer permanent and unconscionable damages by their continuance unless defendant is enjoined and restrained from continuing the practice of garnishing plaintiff's wages.

FOURTH CAUSE OF ACTION
(Injunctive Relief From Unlawful Debt Collection)

16. Plaintiff incorporates herein Paragraphs 1-4, inclusive, of the first cause of action, and Paragraphs 10-11, inclusive, of the Second Cause of Action.

17. Defendant's conduct in repeatedly telephoning plaintiff is defendant's usual and customary business practice. Plaintiff is powerless to alter his/her employment telephone number, or to avoid the harmful consequences to plaintiff's employment relationship caused by defendant's conduct. Moreover, defendant's continuous harassment of plaintiff both at home and at plaintiff's employment constitutes a violation of *Civil Code Sections 1788.11(d)* and *1788.11(e)*.

18. Plaintiff has no defense to defendant's unlawful debt collection practices, has no adequate remedy at law, and would suffer permanent and unconscionable damages by their continuance unless the defendant is enjoined and restrained from repeatedly and vexatiously telephoning plaintiff.

19. Defendant's conduct is an unfair business practice within the meaning of *Business and Professions Code Section 17200*.

WHEREFORE, plaintiff prays judment against defendant as follows:

1. For a temporary injunction staying garnishments during the pendency of this action until this matter is decided and for a temporary restraining order staying such garnishments until a hearing may be had on the application for the temporary injunction.

2. For a temporary injunction preventing defendant from telephoning plaintiff until this matter is decided, and for a temporary restraining order preventing defendant from telephoning plaintiff until a hearing may be had on the application for the temporary injunction.

3. For a permanent injunction against defendant restraining it from garnishing by writ of execution the wages due defendant for personal services rendered at any time within 30 days next preceding the levy.

4. For a permanent injunction restraining defendant from telephoning plaintiff regarding the prior judgment and payment thereof.

5. For general damages according to proof.

6. For punitive damages.

7. For costs of suit herein incurred.

8. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

This complaint for damages for abuse of process and unfair collection practices and for a permanent injunction, a temporary restraining order, and a temporary injunction is for use when there has been a series of wrongful garnishments of plaintiff's wages and unlawful debt collection practices.

[3] Allegations

The complaint sets forth four causes of action arising out of the defendant's actions. The first cause of action alleges:

- Abuse of process from wrongful repeated garnishment of plaintiff's wages (Paragraphs 3-6) [*see Czap v. Credit Bureau of Santa Clara Valley (1970) 7 Cal. App. 3d 1, 86 Cal. Rptr. 417* ; *see also Code Civ. Proc. §§ 706.050-706.051* (wages exempt from garnishment)].

- Resulting damages incurred (Paragraphs 7-8).

The second cause of action alleges:

- Unlawful debt collection (Paragraph 10-11) [*see Civ. Code § 1788.11*].

- Resulting damages incurred (Paragraph 12).

The third cause of action alleges grounds for injunctive relief from abuse of process (Paragraphs 14-15), and the fourth cause of action alleges grounds for injunctive relief from unlawful debt collection (Paragraphs 17-19) [*see Bus. & Prof. Code § 17203* (injunctive relief)].

[4] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581*]. For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

For alternative forms of verification for use when the plaintiff is an individual or other noncorporate entity, see Ch. 572, *Verification* .

[5] Jurisdiction

An action seeking permanent injunctive relief is not a limited civil case [*see Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*].

[6] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[7] Cross References

For discussion and forms involving injunctive relief, see Ch. 303, *Injunctions*

For a related form, *see § 357.220*.

[8] State Statutes

Allowance of injunctions for unfair business practices. *Bus. & Prof. Code § 17200 et seq.*

Unlawful debt collection practices. *Civ. Code § 1788.11*

Grounds for injunctive relief. *Civ. Code § 3422*

Exemptions on earnings withholdings. *Code Civ. Proc. §§ 706.050-706.051*

[9] Law Reviews

Comment, *Proposals for Limiting Collection Practices: New Hope for the Debtor in Default, 17 Santa Clara L. Rev.*

685 (1977)

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-357 California Forms of Pleading and Practice--Annotated § 357.222

§ 357.222 General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--No Improper Use of Process Alleged

[1] FORM General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--No Improper Use of Process Alleged

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	GENERAL DEMURRER
Defendant.	)	
	)	
	)	

Defendant demurs to the complaint on the ground that _____ [*designate cause of action or count number, e.g.,* the complaint *or* the First Cause of Action] does not state facts sufficient to constitute a cause of action because it fails to allege that _____ [*describe nature of process allegedly abused*] was used for an improper purpose.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

CAUTION:

A party filing a demurrer must serve and file with it a memorandum of points and authorities in support of each ground of demurrer [*Cal. Rules of Ct., Rules 3.1103(c), 3.1113(a)*; for discussion and forms, see Ch. 417, *Points and Authorities*] and a notice of hearing [*see Cal. Rules of Ct., Rule Rules 3.1103(c), 3.1112(a)*].

[2] Use of Form

This general demurrer is for use by a defendant to object to a complaint for abuse of process when the objection that plaintiff has failed to state facts sufficient to constitute a cause of action appears on the face of the complaint or from matter of which the court is required to or may take judicial notice [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*]. This objection is based on the fact that plaintiff has failed to allege that the process in question was used for an improper purpose to obtain a collateral advantageover plaintiff [*see Golden v. Dungan (1971) 20 Cal. App. 3d 295, 301-302, 97 Cal. Rptr. 577*]. With appropriate modifications, the form may be used in response to a cross complaint.

[3] Cross References

For additional forms of general demurrer, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

[4] State Statutes

Objection by demurrer to complaint on ground it does not state facts sufficient to constitute cause of action. *Code Civ. Proc. § 430.10(e)*

Objection to complaint as allowed to be taken by demurrer when ground for objection appears on face of complaint or from any matter of which court is required to or may take judicial notice. *Code Civ. Proc. § 430.30(a)*; *see also Code Civ. Proc. § 430.70* (specifying matter of which court may take judicial notice)

[5] Decisions

Abuse of process as not present when appointment of receiver requested for proper purpose. *Spira v. Superior Court (1974) 41 Cal. App. 3d 536, 539-540, 116 Cal. Rptr. 93*

Abuse of process as not present when only vexation or harassment alleged. *Younger v. Solomon (1974) 38 Cal. App. 3d 289, 297, 113 Cal. Rptr. 113*

Abuse of process as not present when process not misused and no collateral advantage obtained over plaintiff. *Golden v. Dungan (1971) 20 Cal. App. 3d 295, 302, 97 Cal. Rptr. 577*

Abuse of process as not present when process used for proper purpose even with bad motive and malice. *Golden v. Dungan (1971) 20 Cal. App. 3d 295, 302, 97 Cal. Rptr. 577*

Abuse of process as not present when complaint directed at manner of service. *Golden v. Dungan (1971) 20 Cal. App. 3d 295, 302, 97 Cal. Rptr. 577*

Abuse of process as not present when judgment creditor properly examines judgment debtor and third parties. *Kyne v. Eustice (1963) 215 Cal. App. 2d 627, 633, 30 Cal. Rptr. 391*

Abuse of process as not present when only allegation is that complaint filed to harass and cause defendant financial loss. *Muller v. Muller (1962) 206 Cal. App. 2d 731, 733, 23 Cal. Rptr. 900*

Abuse of process as not present when right to appeal exercised. *Tellefsen v. Key Sys. Transit Lines (1961) 198 Cal. App. 2d 611, 613, 17 Cal. Rptr. 919*

Abuse of process as not present when attachment levied is within creditor's rights. *Pimentel v. Houk (1951) 101 Cal. App. 2d 884, 886, 226 P.2d 739*

[6] Cross References

For a related form, see *§ 357.220*

Legal Topics:

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31-357 California Forms of Pleading and Practice--Annotated § 357.223

§ 357.223 General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--No Action Taken Pursuant to Judicial Authority Alleged

[1] FORM General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--No Action Taken Pursuant to Judicial Authority Alleged

[*Caption. See § 357.222.*]

Defendant demurs to the complaint on the ground that _____ [*designate cause of action or count number, e.g.,* the complaint *or* the First Cause of Action] does not state facts sufficient to constitute a cause of action because it fails to allege that defendant took any action pursuant to judicial authority.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

CAUTION:

A party filing a demurrer must serve and file with it a memorandum of points and authorities in support of each ground of demurrer [*Cal. Rules of Ct., Rules 3.1103(c), 3.1113(a)*; for discussion and forms, see Ch. 417, *Points and Authorities*] and a notice of hearing [*see Cal. Rules of Ct., Rules 3.1103(c), 3.1112(a)*].

[2] Use of Form

This general demurrer is for use by a defendant to object to a complaint for abuse of process when the objection that plaintiff has failed to state facts sufficient to constitute a cause of action appears on the face of the complaint or from any matter of which the court is required to or may take judicial notice [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*]. This objection is based on the fact that plaintiff has failed to allege that defendant has taken any action pursuant to judicial authority [*see, e.g., Adams v. Superior Court (1992) 2 Cal. App. 4th 521, 530, 3 Cal. Rptr. 2d 49*]. With appropriate modifications, the form may be used in response to a cross complaint.

[3] Decisions

Abuse of process not present when no action taken pursuant to judicial authority. *Adams v. Superior Court (1992) 2 Cal. App. 4th 521, 530, 3 Cal. Rptr. 2d 49* ; *Carney v. Rotkin, Schmerin & McIntyre (1988) 206 Cal. App. 3d 1513, 1526, 254 Cal. Rptr. 478* ; *Meadows v. Bakersfield Sav. & Loan Ass'n (1967) 250 Cal. App. 2d 749, 753, 59 Cal. Rptr. 34*

[4] Cross References

For a related form, see *§ 357.222*

Legal Topics:

For related research and practice materials, see the following legal topics:
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31-357 California Forms of Pleading and Practice--Annotated § 357.224

§ 357.224 General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Action Barred on Its Face by Statute of Limitations [Code Civ. Proc. § 335.1]

[1] FORM General Demurrer [Code Civ. Proc. §§ 430.10(e), 430.30(a)]--Action Barred on Its Face by Statute of Limitations [Code Civ. Proc. § 335.1]

[*Caption. See § 357.222.*]

Defendant demurs to the complaint on the ground that _____ [*designate cause of action or count number, e.g.,* the complaint *or* the First Cause of Action] does not state facts sufficient to constitute a cause of action in that it is barred by the two-year period of limitation in *Code of Civil Procedure Section 335.1*.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

CAUTION:

A party filing a demurrer must serve and file with it a memorandum of points and authorities in support of each ground of demurrer [*Cal. Rules of Ct., Rules 3.1103(c), 3.1113(a)*; for discussion and forms, see Ch. 417, *Points and Authorities*] and a notice of hearing [*see Cal. Rules of Ct., Rules 3.1103(c), 3.1112(a)*].

[2] Use of Form

This general demurrer is for use by a defendant to object to a comlaint for abuse of process when the objection that plaintiff has failed to state facts sufficient to constitute a cause of action appears on the face of the complaint or from any matter of which the court is required to or may take judicial notice [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*]. This objection is based on the fact that the complaint shows on its face that the action is barred by the two-year (one-year, prior to January 1, 2003) period of limitations applicable to actions for abuse of process [*see Code Civ. Proc. § 335.1*; *McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 590-591, 33 Cal. Rptr. 389* ; *see also* former *Code Civ. Proc. § 340(3)*; Ch. 345, *Limitation of Actions, § 345.14*].

[3] Decisions

One-year period of limitation under former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 335.1* (two-year statute of limitations)) as applicable to actions filed for abuse of process. *McFaddin v. H. S. Crocker Co. (1963) 219 Cal. App. 2d 585, 590-591, 33 Cal. Rptr. 389*

[4] Cross References

For a related form, see *§ 357.222*

Legal Topics:

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31-357 California Forms of Pleading and Practice--Annotated § 357.225

§ 357.225 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Absolute Privilege [Civ. Code § 47(b)] for Publication in Judicial Proceedings

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Absolute Privilege [Civ. Code § 47(b)] for Publication in Judicial Proceedings

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the use of the process that plaintiff claims was abused was a publication made in the course of the proceedings before the court and as such was absolutely privileged under *Civil Code Section 47(b).*

[2] Use of Form

This form of affirmative defense is for insertion in defendant's answer to raise the defense that the use of process that plaintiff claims was abused is protected by the absolute privilege of *Civ. Code § 47(b)*, protecting publications made during the course of judicial proceedings [*see, e.g., Adams v. Superior Court (1992) 2 Cal. App. 4th 521, 529-530, 3 Cal. Rptr. 2d 49*]. Unlike evidentiary privileges that function by exclusion of evidence, the privilege of *Civ. Code § 47(b)* functions as a limitation on liability. Therefore, it does not extend to the evidentiary use of statements to prove an element of cause of action [*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 Cal. 3d 1157, 1167-1168, 232 Cal. Rptr. 567, 728 P.2d 1202* (disapproving by implication *Asia Inv. Co. v. Borowski (1982) 133 Cal. App. 3d 832, 843-843, 184 Cal. Rptr. 317* , to extent that it holds these publications may not be used for evidentiary purposes to prove existence of ulterior purpose)]. For further discussion, see *§ 357.56[2]*.

[3] Standing to Raise Defense

A lack of standing on the part of the defendant to, in fact, publish material or make statements claimed to be privileged does not necessarily vitiate application of the privilege to that defendant [*Adams v. Superior Court (1992) 2 Cal. App. 4th 521, 532, 3 Cal. Rptr. 2d 49* (defendants entitled to raise defense even though found to lack standing in another court to file motion alleged by plaintiff to constitute abuse of process)]. For further discussion, see *§ 357.56[3]*.

[4] Decisions

Absolute privilege under former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*) as denied to participant in legal proceedings only if matter is so palpably irrelevant to subject matter of controversy that no reasonable person can doubt its irrelevancy and impropriety. Loomis v. Superior Court (1987) 195Cal. App. 3d 1026, 1030, *241 Cal. Rptr. 236* (absolute privilege held to apply in abuse of process action based on filing of public records of State Bar disciplinary proceeding in support of motion to strike another motion allegedly filed by suspended attorney during period of suspension)

In action for abuse of process and emotional distress, publications made in document prepared by expert witness for use in settlement agreement negotiations between plaintiff and plaintiff's former wife and in expert witness's false testimony at dissolution proceedings as covered by absolute privilege of former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*). *Carden v. Getzoff (1987) 190 Cal. App. 3d 907, 913, 235 Cal. Rptr. 698*

Absolute privilege of former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*) attaches if publication (1) was made in judicial proceeding, (2) had some connection or logical relation to action, (3) was made to achieve objects of litigation, and (4) involved litigants or other participants authorized by law. *Profile Structures, Inc. v. Long Beach Bldg. Material Co. (1986) 181 Cal. App. 3d 437, 441-444, 226 Cal. Rptr. 192*

Absolute privilege under former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*) for publications made in course of judicial proceedings as applicable to actions for abuse of process. *Younger v. Solomon (1974) 38 Cal. App. 3d 289, 300-301, 113 Cal. Rptr. 113* ; *Thornton v. Rhoden (1966) 245 Cal. App. 2d 80, 94, 53 Cal. Rptr. 706*

Absolute privilege under former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*) as applicable only if publication has some bearing on or connection with subject matter of litigation. *Younger v. Solomon (1974) 38 Cal. App. 3d 289, 301-302, 113 Cal. Rptr. 113*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAbuse of ProcessGeneral OverviewTortsIntentional TortsAbuse of ProcessDefenses

California Forms of Pleading and Practice--Annotated

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Volume 31: Lis Pendens thru Mandate and Prohibition-Chs. 348-358
Chapter 357 MALICIOUS PROSECUTION AND ABUSE OF PROCESS
PART V. FORMS
B. Abuse Of Process

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§ 357.226 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--No Malice Present When Defendant Has Acted on Advice of Attorney--No Liability for Punitive Damages

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--No Malice Present When Defendant Has Acted on Advice of Attorney--No Liability for Punitive Damages

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that all of defendant's actions in _____ [*describe type of process allegedly misused*] were taken after defendant fully disclosed all of the relevant facts to his/her/its attorney and was advised to follow the legal procedures complained of in plaintiff's cause of action for abuse of process. Therefore, defendant is not liable for punitive damages as alleged by plaintiff.

[2] Use of Form

This form of affirmative defense is for insertion in defendant's answer to raise the defense that there is no liability for punitive damages, because all of the relevant facts were disclosed to counsel, who advised the legal procedures complained of [*Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 472 n.7, 72 Cal. Rptr. 344, 446 P.2d 152*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAbuse of ProcessGeneral OverviewTortsIntentional TortsAbuse of ProcessDefenses

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Chapter 358 MANDATE AND PROHIBITION

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

§ 358.132 Allegation re Beneficial Interest of Petitioner in Petition to Superior Court in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103]

[1] FORM

[2] Use of Form

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[1] FORM

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[1] FORM

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Format

[4] Related Appeal Pending

[5] Request for Stay

[6] Proceeding Involving Unfair Competition Case

§ 358.138 Basic Form of Petition to Appellate Court in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103; Cal. Rules of Ct., Rule 8.486]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Real Party in Interest

[5] Verification

[6] Format of Petition

[a] Generally Subject to Requirements for Appellate Briefs

[b] Headings, References, Index, and Tables

[c] Format Requirements

[d] Word or Page Limit

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[7] Copies

[8] Attach Complete Record

[9] Service and Filing

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[2] Use of Form

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[4] Preparation of Alternative Writs

[5] Time for Filing

[6] Issuance of Ex Parte Alternative Writs

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[a] Generally

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[d] Whom to Serve

[e] Serving Particular Types of Parties

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§ 358.140 Order Directing Issuance of Alternative Writ in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1087, 1102, 1103, 1104]

[1] FORM

[2] Use of Form

§ 358.141 Notice of Application for Order Directing Issuance of Peremptory Writ in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1088, 1102, 1103, 1105]

[1] FORM

[2] Use of Form

§ 358.142 Notice of Motion for Peremptory Writ in Superior Court in Special Proceeding for Writ of Mandate or

Prohibition [Code Civ. Proc. §§ 1085, 1086, 1088, 1102, 1103, 1105]

[1] FORM

[2] Use of Form

[3] Appellate Courts

[4] Parties to Be Served

[5] Proof of Service

[6] Time Required

§ 358.143 Order to Show Cause Why Peremptory Writ Should Not Issue in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1088, 1102, 1103, 1105]

[1] FORM

[2] Use of Form

§ 358.144 Demurrer--Return to Petition for Writ in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1089, 1102, 1103, 1105; Cal. Rules of Ct., Rule 8.487(b)]

[1] FORM

[2] Use of Form

[3] Time for Return

[4] Joint Filing

[5] Effect of Filing Demurrer Alone

[6] Motion to Quash as Recognized Alternative Procedure

[7] Cross References

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[1] FORM

[2] Use of Form

[3] Time for Answer

[4] Joint Filing

[5] Verification

[5a] Certificate of Interested Entities or Persons

[6] Cross References

§ 358.146 Replication to Answer in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1091, 1102, 1103, 1105]

[1] FORM

[2] Use of Form

[3] Verification

[4] Service

[5] Continuance

[6] Cross References

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[1] FORM

[2] Use of Form

[3] Preparation of Written Judgment

[4] Notice of Entry of Judgment

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[1] FORM

[2] Use of Form

§ 358.149 Peremptory Writ in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103]

[1] FORM

[2] Use of Form

[3] Cross References

§ 358.150 Respondent's Return to Peremptory Writ in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103, 1108]

[1] FORM

[2] Use of Form

§ 358.151 Order to Show Cause re Failure to Obey Peremptory Writ in Special Proceeding for Enforcement of Writ [Code Civ. Proc. §§ 1097, 1105]

[1] FORM

[2] Use of Form

[3] Cross References

§ 358.152 Notice of Motion in Special Proceeding for Judgment on Peremptory Writ of Mandate [Code Civ. Proc. §§ 1010, 1094, 1109]

[1] FORM

[2] Use of Form

[3] Cross References

§ 358.153 Judgment in Special Proceeding for Judgment on Peremptory Writ of Mandate [Code Civ. Proc. § 1094]

[1] FORM

[2] Use of Form

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Chapter 358 MANDATE AND PROHIBITION
PART I. SCOPE

31-358 California Forms of Pleading and Practice--Annotated § 358.01

§ 358.01 Scope of Chapter

This chapter discusses and includes forms relating to proceedings to obtain an extraordinary writ of mandate or prohibition.

The Introduction is divided into several parts:

- Part A of the Legal Background discusses the governing law, briefly compares writs of mandate and prohibition, and distinguishes them from other extraordinary writs commonly used in civil proceedings [*see § 358.11* et seq.].

- Part B of the Legal Background discusses the availability of writs of mandate [*see § 358.30* et seq.].

- Part C of the Legal Background discusses the availability of writs of prohibition [*see § 358.40* et seq.].

- Part D of the Legal Background discusses in greater detail the requirement, common to both writs, that the petitioner lacks a plain, speedy, and adequate remedy at law [*see § 358.50* et seq.].

- Part E of the Legal Background discusses grounds for opposing the issuance of both writs [*see § 358.60* et seq.].

- Part F of the Legal Background discusses the procedures for obtaining both writs [*see § 358.80* et seq.].

The chapter includes the following forms for use by a petitioner:

- A general form of petition for a writ of mandate or prohibition [*see § 358.130*] and specific allegations that may be included in that form [*see* §§ 358.131-358.136].

- An alternative writ and order [*see* §§ 358.139-358.140].
- An application for an order directing the issuance of a peremptory writ [*see § 358.141*].
- A notice of motion for a peremptory writ [*see § 358.142*].
- An order to show cause [*see § 358.143*].
- A replication to the respondent's or real party in interest's answer [*see § 358.146*].
- A peremptory writ [*see § 358.149*].
- Judgment for the petitioner [*see § 358.147*].
- An order to show cause re failure to obey peremptory writ [*see § 358.151*].

The chapter also includes the following forms for use by a respondent or real party in interest:

- A demurrer to the petition [*see § 358.144*].
- A verified answer to the petition [*see § 358.145*].
- Judgment denying the writ [*see § 358.148*].
- A return to a peremptory writ [*see § 358.150*].

Finally, the chapter includes a form of notice of motion for judgment on a peremptory writ of mandate [*see § 358.152*] and a form of judgment granting or denying relief on a noticed motion for judgment on a peremptory writ of mandate [*see § 358.153*].

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Chapter 358 MANDATE AND PROHIBITION
PART I. SCOPE

31-358 California Forms of Pleading and Practice--Annotated § 358.02

§ 358.02 Cross References

For discussion, procedural guide, and forms for use in appeals from judgments and orders of the superior court in civil actions generally, see Ch. 40, *Appeal: An Overview* , et seq.

For discussion and a form of skeletal memorandum of points and authorities, see Ch. 417, *Points and Authorities* .

For discussion and forms for use in obtaining relief by way of habeas corpus in civil situations, see Ch. 292, *Habeas Corpus* .

For discussion, procedural guide, and forms for use in petitioning a court for a writ of administrative mandate, to review a decision of a public administrative agency, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , Ch. 474A, *Timing of Judicial Review of Agency Decisions* , Ch. 474B, *Standards in Reviewing Agency Decisions* , and Ch. 474C, *Procedures in Reviewing Agency Decisions* .

For discussion, procedural guide, and forms relating to proceedings seeking a writ of certiorari, see Ch. 492, *Review (Certiorari), Writ of* .

For a form of petition for writ of mandate to dismiss an action or stay proceedings on the ground that the action is pending in another state, see *Ch. 3, Abatement of Actions, § 3.30* et seq.

For a form of petition for writ of mandate to compel the admittance of a pregnant woman to a local district hospital for an abortion, see Ch. 4, *Abortion and Birth Control Methods* .

For a form of petition for writ of mandate to compel the Department of Alcoholic Beverage Control to perform administrative duties, see Ch. 18, *Alcoholic Beverages Licenses* .

For a form of petition for writ of mandate to restore the membership privileges of a purportedly expelled member of an incorporated association, see Ch. 61, *Associations and Clubs* .

For a form of petition for writ of mandate to compel issuance of a discovery order, see Ch. 200, *Discovery: Review of Discovery Orders* .

For a form of petition for writ of mandate to compel registration of an elector as a voter, see Ch. 243, *Elections* .

For a form of petition for writ of mandate to compel correction of error or omissions on a ballot or voter pamphlet or to enjoin a neglect of duty, see Ch. 243, *Elections* .

For a form of petition for writ of mandate to compel a public entity to rescind a resolution of necessity or to commence an eminent domain proceeding, see Ch. 247, *Eminent Domain* .

For forms of petitions for writs of mandate to review a trial court's determination of good faith issue of settlement, see Ch. 300, *Indemnity and Contribution* .

For forms of petitions for writs of mandate to compel a clerk to accept and process an initiative or a referendum petition and to compel the amendment of a ballot title or summary of a proposed measure, see Ch. 302, *Initiative, Referendum, and Recall* .

For a form of petition for writ of mandate to compel a clerk to process a recall petition, see Ch. 302, *Initiative, Referendum, and Recall* .

For a form of petition for writ of mandate to compel lower court to enter order quashing service of summons or staying or dismissing action on ground of inconvenient forum, see Ch. 323, *Jurisdiction: Personal* .

For a form of petition for writ of mandate to compel a local enforcement agency to grant an extension of a mobilehome park construction permit, see Ch. 369, *Mobilehomes and Mobilehome Parks* .

For a form of petition for writ of mandate by a limited partner to compel making and mailing or delivering partnership records, see Ch. 404, *Partnerships: Actions Between Limited Partners and Partnerships* .

For a form of petition for writ of mandate to compel the State Board of Accountancy to admit petitioner to accountant's examination or to practice as accountant, see Ch. 462, *Public Accountants* .

For forms of petitions for writs of mandate to compel public entities to perform statutory duties, see Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities* .

For forms of petitions for writs of mandate to compel a licensing agency to act on a license application, to set aside a summary denial of an application, and to allow a licensee to resume business, see Ch. 471B, *Licensing by Public Agencies* .

For forms of petitions for writs of mandate to compel school district to rehire teacher and to pay teacher's salary, see Ch. 512, *Schools: Certification, Dismissal, and Related Employment Issues*

For a form of petition for writ of mandate to compel the payment of welfare benefits in a class action, see Ch. 527, *Social Services*

For a form of petition for writ of prohibition to restrain proceedings when a prior action is pending between the same parties for the same cause in another California court, see *Ch. 3, Abatement of Actions, § 3.50* et seq.

For a form of petition for writ of prohibition to restrain enforcement of a local ordinance purported to abridge *First*

Amendment rights, see Ch. 59, *Assemblies, Meetings, and Demonstrations* .

For a form of petition for writ of prohibition to arrest a contempt proceedings of a court taken in excess of its jurisdiction, see Ch. 135, *Contempt* .

For a form of petition for writ of prohibition to restrain enforcement of a discovery order, see Ch. 200, *Discovery: Review of Discovery Orders* .

For a form of petition for writ of prohibition to restrain a particular judge from acting when he or she has been disqualified under a peremptory challenge, see *Ch. 317, Judges, § 317.130* et seq.

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[Reserved]

§§ 358.03[Reserved]

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§ 358.10 Governing Law

[1] Authorizing Law

Proceedings for writ of mandate and writ of prohibition are governed generally by *Cal. Const., art. VI § 10, Code Civ. Proc. §§ 1063, 1064, 1084-1110b*, and, in appellate courts, *Cal. Rules of Ct., Rule 8.485-8.493*. Local appellate or superior court rules may also affect writ proceedings [*see, e.g.,* Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Policy Statement A].

[2] Application of General Rules of Practice and Appeal

Except as otherwise required by *Code Civ. Proc. §§ 1084-1110b*, the provisions of the Code of Civil Procedure governing civil actions, generally [i.e., *Code Civ. Proc. § 307 et seq.*], control mandate and prohibition proceedings [*Code Civ. Proc. § 1109*]. Likewise, the provisions of *Code Civ. Proc. § 307 et seq.* relating to new trials and appeals also apply to mandate and prohibition proceedings, except to the extent that they are inconsistent with the provisions of *Code Civ. Proc. §§ 1084-1110b* [*Code Civ. Proc. § 1110*].

Similarly, the civil law and motion rules for trial courts, *Cal. Rules of Ct., Rule 3.1100 et seq.* apply to proceedings for a writ of mandate or prohibition in superior courts [*see Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(2)*].

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§ 358.11 Function and Scope of Prerogative Writs

[1] Nature of Prerogative Writs

Courts and commentators have characterized writs of mandate and prohibition, as "prerogative writs" [*see, e.g., American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 588, 113 Cal. Rptr. 561*], that is, a court order requiring the performance of a specified act, or giving authority to have it done, issued by the exercise of the extraordinary power of the court on proper cause shown [Black's Law Dictionary 1441, 1442 (5th ed. 1979)].

Prerogative writs are utilized as a means for reviewing judicial, nonjudicial, and administrative rulings [*see Code Civ. Proc. §§ 1085, 1103*]. They are available only in extraordinary circumstances and courts are vested with discretion to accept or reject requests for them [*see American Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal. App. 3d 579, 588-589, 113 Cal. Rptr. 561* ; *Renken v. Compton City School Dist. (1962) 207 Cal. App. 2d 106, 112, 24 Cal. Rptr. 347*].

[2] Types of Prerogative Writs

The three major prerogative writs available in California civil proceedings are as follows:

- Writs of mandate, or mandamus, may issue to compel performance of aministerial act or mandatory duty if there is a clear legal right in the person seeking relief, a corresponding duty in the defendant, and a lack of any other adequate remedy [see *Code Civ. Proc. §§ 1085(a), 1086*].

- Writs of prohibition may issue to prevent an inferior court or tribunal possessing judicial or quasi-judicial powers from exercising its jurisdiction in matters over which it lacks sufficient jurisdiction [see *Code Civ. Proc. §§ 1102, 1103(a)*].

- Writs of review (or certiorari) may issue to review miscellaneous actions of inferior tribunals, boards, and officers exercising judicial functions if these bodies have exceeded their jurisdiction [see *Code Civ. Proc. §§ 1068(a), 1074*].

Of the three prerogative writs, writs of mandate and prohibition are much more commonly used than writs of certiorari in California civil proceedings. For discussion comparing these writs, see *§ 358.12*. For discussion relating to the less commonly used writ of writ of review, see *§ 358.13[2]*.

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§ 358.12 Writs of Mandate and Prohibition Compared

Mandate and prohibition are similar in several basic respects:

- Both remedies are prerogative writs [*see § 358.11*], issuable by any court on the verified petition of the party beneficially interested if there is no plain, speedy, and adequate remedy in the ordinary course of law [*Code Civ. Proc. §§ 1085(a), 1086, 1103(a)*].

- The writs may be issued and directed to "an inferior tribunal, or to a corporation, board, or person" [*Code Civ. Proc. §§ 1085(a), 1103(a)*].

- To a large degree, the procedural requirements for the writs overlap [*see Code Civ. Proc § 1105*].

- In some cases, the writs can be used interchangeably [*see, e.g., Rio Del Mar. etc. Club v. Superior Court (1948) 84 Cal. App. 2d 214, 217, 190 P.2d 295* (mandamus or prohibition appropriate to secure meritorious dismissal denied by trial court)].

Mandate and prohibition differ in what they can compel the ordered party (known as the "respondent") to do. Generally speaking, mandate is used to compel ministerial action; prohibition is used to restrain or prevent judicial action. Mandate can compel a respondent to perform an act that the law specially enjoins. It can also compel the admission of a party to the use and enjoyment of a right or office to which that party is entitled and from which the party is unlawfully precluded [*Code Civ. Proc. § 1085(a)*]. Prohibition, on the other hand, can arrest the proceedings of a respondent (typically a court) exercising judicial functions if the proceedings are without or in excess of the respondent's jurisdiction [*Code Civ. Proc. § 1102*].

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§ 358.13 Writs Other Than Mandate and Prohibition Distinguished

[1] Administrative Mandate

[a] Purpose of Administrative Mandate

The writ of administrative mandate is a specialized writ of mandate that is used to obtain review of administrative decisions [*Code Civ. Proc. § 1094.5(a)*]. The writ is only available if conditions specified in *Code Civ. Proc. § 1094.5* obtain [*Keeler v. Superior Court (1956) 46 Cal. 2d 596, 599, 297 P.2d 967*]. That is, there must be a final decision by an administrative agency that has discretionary authority to make findings of fact and that is required by law to hold a hearing at which evidence was required to be taken, and discretion in the determination of facts is vested in that inferior tribunal, corporation, board, or officer [*see Code Civ. Proc. § 1094.5(a)*; *O.W.L. Foundation v. City of Rohnert Park (2008) 168 Cal. App. 4th 568, 585, 86 Cal. Rptr. 3d 1* (traditional mandamus appropriate when city chose to hold public hearing although no hearing legally required); *Blue Cross of California v. State Department of Health Services (2007) 153 Cal. App. 4th 322, 329-330, 62 Cal. Rptr. 3d 772* ; *Winkelman v. City of Tiburon (1973) 32 Cal. App. 3d 834, 840, 108 Cal. Rptr. 415*]. Additionally, the petitioner for the writ must be beneficially interested in issuance of the writ and have no plain and speedy remedy in the ordinary course of law [*see Code Civ. Proc. § 1086*].

For detailed discussion and forms relating to administrative mandate proceedings, see Ch. 474, *Availability of Judicial Review of Agency Decision* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[b] Review of Administrative Adjudicatory Acts

The choice of remedy between regular and administrative mandate depends to a large degree on whether the agency action is adjudicatory or legislative in nature [*Garrick Development Co. v. Hayward Unified School Dist. (1992) 3 Cal. App. 4th 320, 327-328, 4 Cal. Rptr. 2d 897* ; *Tielsch v. City of Anaheim (1984) 160 Cal. App. 3d 570, 574, 206 Cal. Rptr. 738*]. Generally speaking, a legislative action is the formulation of a rule to be applied to all future cases, whereas an adjudicatory action involves the actual application of such a rule to a specific set of existing facts [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 35 n.2, 112 Cal. Rptr. 805, 520 P.2d 29* ; *Tielsch v. City of Anaheim (1984) 160 Cal. App. 3d 570, 574, 206 Cal. Rptr. 738*].

If the statutory requirements for relief are otherwise met, acts by an administrative body that are of an adjudicatory nature typically are reviewable under administrative mandate, whereas acts by such a body that are of a legislative or quasi-legislative nature are reviewable under regular, or traditional, mandate [*see City of Arcadia v. State Water Resources Control Bd. (2006) 135 Cal. App. 4th 1392, 1408-1409, 38 Cal. Rptr. 3d 373* ; *Langsam v. City of Sausalito (1987) 190 Cal. App. 3d 871, 879, 235 Cal. Rptr. 672* ; *Santa Ana Tustin Community Hospital v. Board of Supervisors (1982) 127 Cal. App. 3d 644, 653, 179 Cal. Rptr. 620*]. Administrative mandate is used to review an adjudicatory decision if an agency is not required to hold an evidentiary hearing [*O.W.L. Foundation v. City of Rohnert Park (2008) 168 Cal. App. 4th 568, 585, 86Cal. Rptr. 3d 1* (traditional mandamus appropriate when city chose to hold public hearing although no hearing legally required); *Johnston v. Sonoma County Agricultural Preservation and Open Space District (2002) 100 Cal. App. 4th 973, 983-984, 123 Cal. Rptr. 2d 226*].

[2] Writ of Review (Certiorari)

The writ of review, traditionally known as the writ of certiorari, is used to review miscellaneous actions of inferior tribunals, boards, and officers exercising judicial functions, if these bodies have exceeded their jurisdiction and there is neither any appeal nor, in the judgment of the court, any plain, speedy, and adequate remedy [*Code Civ. Proc. § 1068(a)*].

Unlike other writs, the writ of review does not command the respondent to do something or show cause why it has not been done. Instead, it commands the respondent to certify to the court the transcript of what has been done and may, in addition, require the respondent to temporarily desist from further proceedings in the matter to be reviewed [*Code Civ. Proc. § 1071*].

After a court issues the writ of review, it reviews the certified record and then issues a judgment affirming, annulling, or modifying the decision below [*Code Civ. Proc. § 1075*].

The usefulness of the writ has become limited over time by three factors: (1) most decision-making bodies, other than courts, do not exercise judicial functions; (2) few judicial orders, outside of contempt orders, are unappealable; and (3) the writs of mandate and of administrative mandate provide a broader scope of review of a challenged decision. As one court put it, "*Code of Civil Procedure section 1068* explains when a writ of review or certiorari may be granted; and that is, to put it bluntly, not very often" [*Freedom Newspapers, Inc. v. Superior Court (1986) 186 Cal. App. 3d 1102, 1107, 231 Cal. Rptr. 189*].

Special statutory writs of review are available in a number of administrative proceedings, including:

- Review of Alcohol Beverage Control Appeals Board decision [*see, e.g., Bus. & Prof. Code §§ 23090, 23090.1*];
- Review of Workers' Compensation Appeals Board decision [*Lab. Code § 5950*];
- Review of Public Utilities Commission decision [*Pub. Util. Code § 756*].

For discussion and forms relating to these specialized writs of review, see respectively Ch. 18, *Alcoholic Beverage Licenses* , Ch. 577, *Workers' Compensation* , and Ch. 480, *Public Utilities* .

For detailed discussion and forms relating to writs of review generally, see Ch. 492, *Review (Certiorari), Writ of* .

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§ 358.14 Parties to Writ Proceeding

[1] Petitioner, Respondent, and Real Party in Interest

In a proceeding to obtain a writ of mandate or prohibition, there are generally three parties [*see Code Civ. Proc. § 1107*]:

(1) The petitioner, who seeks the writ;

(2) The respondent, whose act the petitioner wishes to compel or prohibit; and

(3) The real party in interest, a party having interests that will be directly or adversely affected if the writ is issued and that therefore has standing to appear in the proceeding and oppose the petition.

In many cases, it is the real party in interest, not the respondent, who participates as the opposing party in the writ proceeding. For example, if a plaintiff in a tort action seeks a writ of mandate in an appellate court to compel a trial court to issue a discovery order against the defendant, the defendant, as real party in interest, will oppose the petition; the trial court, the respondent, will not participate [*see Daly v. Superior Court (1977) 19 Cal. 3d 132, 137-140, 137 Cal. Rptr. 14, 560 P.2d 1193*)]. A respondent superior court is not justified in filing a return unless there are issues directly impacting the efficient operation of the court or the court's budget [*Howard Gunty Profit Sharing Plan v. Superior Court (2001) 88 Cal. App. 4th 572, 576, n.6, 105 Cal. Rptr. 2d 896*].

There may be more than one real party in interest, so long as each has an interest that would be directly affected by issuance of the writ [*see Cal. Rules of Ct, Rule 8.486(a)(2)* (writ petition in appellate court must disclose name of real party in interest, if any, or party whose interest would be directly affected by the proceeding)]. For example, if an attorney seeks a writ to review a trial court's denial of an application to withdraw as counsel, real parties in interest would include not only the attorney's client, but also the party opposing that client. The latter also has standing to appear and oppose the petition because issuance of a writ compelling the trial court to grant the withdrawal would further delay the litigation, which could in turn work an injustice on the opposing party [*see Manfredi & Levine v. Superior Court*

(1998) 66 Cal. App. 4th 1128, 1132, 78 Cal. Rptr. 2d 494]. But a respondent superior court is not justified in filing a return unless there are issues directly impacting the efficient operation of the court or the court's budget [*Howard Gunty Profit Sharing Plan v. Superior Court (2001) 88 Cal. App. 4th 572, 576, n.6, 105 Cal. Rptr. 2d 896*].

Conversely, in certain types of writ proceedings, typically involving nonjudicial action, there is no real party in interest, and it is the respondent who opposes the petition for the writ. For example, if a corporate shareholder files a petition for a writ of mandate, seeking to compel a corporation to allow inspection of corporate records, there is no real party in interest, and the corporation, as respondent, opposes the petition [*see* *Webster v. Bartlett Estate Co. (1917) 35 Cal. App. 283, 284, 169 P. 702*].

[2] Use of Terms "Plaintiff" and "Defendant"

Code of Civil Proc. § 1063 provides that the "party prosecuting a special proceeding" (such as the petitioner in a proceeding for a writ of mandate or prohibition) may be known as the "plaintiff," and that the "adverse party" (the respondent or real party in interest in a writ proceeding) may be known as the "defendant." For the sake of clarity and convenience, however, only the terms "petitioner," "respondent," and "real party in interest" are used in this chapter.

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§ 358.15 Petitions Seeking Relief in the Alternative and Mislabeled Petitions

When a petitioner is in doubt concerning the type of writ to seek, it is proper to pray for relief in the alternative form. This follows from the modern principle of pleading that neither mislabeling nor a defective prayer will bar relief justified by properallegations and proof [*Peck's Liquors, Inc. v. Superior Court (1963) 221 Cal. App. 2d 772, 775, 34 Cal. Rptr. 735*]. Because of the overlapping use and common features of the writs of mandate and prohibition, and because their distinct functions are not always appreciated, it is not uncommon in modern practice for a petitioner to request either a writ of mandate or prohibition in the alternative, to ensure that the proper writ is requested [*see also* discussion under *§ 358.12*].

If a petitioner does request the wrong prerogative writ in the given circumstances, the court may nevertheless treat the petition as one for the proper writ [*see, e.g.,* *Owens v. Superior Court (1959) 52 Cal. 2d 822, 826, 345 P.2d 921*].

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§ 358.16 Peremptory and Alternative Writ Procedure

[1] Basic Attributes

There are two procedurally distinct types of writs of mandate and prohibition: (1) peremptory writs, which absolutely command the respondent to provide the relief requested in the writ petition, and (2) alternative writs, which command the respondent either to provide the relief requested or, alternatively, to show cause why he or she has not provided the relief requested. Thus, a court presented with a petition for a writ of mandate or prohibition generally may do any of the following [*see Code Civ. Proc. §§ 1087, 1088, 1105*; *Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 177-178, 203 Cal. Rptr. 626, 681 P.2d 893*]:

- The court may deny the petition summarily.

- The court may issue an alternative writ that commands the respondent to act in conformity with the prayer of the petition or, alternatively, show cause before the court why it should not be ordered so to act.

- The court may issue a peremptory writ in the first instance, commanding the respondent to act in conformity with the prayer of the petition.

[2] Alternative Writ

If the court issues an alternative writ, the respondent may choose to act in conformity with the prayer, in which case the petition becomes moot. Otherwise, the respondent, the real party in interest, or both, may file a written return setting forth the factual and legal bases that justify the respondent's refusal to do so [*Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 177-178, 203 Cal. Rptr. 626, 681 P.2d 893*]. The court may then decide whether to issue a peremptory writ. If a respondent court chooses to act in conformity with an alternative writ, thus rendering the petition moot, the reviewing court that issued the alternative writ may retain jurisdiction and decide the issue raised in the petition if the issue is of general interest, likely to recur, and likely to be dispositive of other claims [*County of Los Angeles v. Superior Court (Crystal B., Steven G., Anita G.) (2001) 91 Cal. App. 4th 1303, 1307, 111 Cal. Rptr. 2d 471*].

[3] Peremptory Writ in the First Instance

The court may issue a peremptory writ in the first instance only in truly exceptional cases, primarily those in which a compelling temporal urgency requires an immediate decision [*Lewis v. Superior Court (1999) 19 Cal. 4th 1232, 1261, 82 Cal. Rptr. 2d 85, 970 P.2d 872*]. More specifically, this accelerated procedure may be used in the limited circumstances: if entitlement to relief is conceded, if there has been clear error under well-settled principles of law and undisputed facts, or if there is an unusual urgency requiring acceleration of the normal process [*Lewis v. Superior Court (1999) 19 Cal. 4th 1232, 1258, 82 Cal. Rptr. 2d 85, 970 P.2d 872* ; *Alexander v. Superior Court (1993) 5 Cal. 4th 1218, 1223, 23 Cal. Rptr. 2d 397, 859 P.2d 96*].

Before a peremptory writ can issue in the first instance the party adversely affected must receive notice that a peremptory writ in the first instance is being sought and considered, and, absent truly exceptional circumstances requiring immediate action, the court must receive or solicit opposition from the party adversely affected [*Lewis v. Superior Court (1999) 19 Cal. 4th 1232, 1236, 1261, 82 Cal. Rptr. 2d 85, 970 P.2d 872* ; *Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 180, 203 Cal. Rptr. 626, 681 P.2d 893* ; *Kernes v. Superior Court (2000) 77 Cal. App. 4th 525, 530, 91 Cal. Rptr. 2d 765* ; *see Code Civ. Proc. § 1088* (10-day notice period)].

An appellate court may issue a "suggestive" *Palma* notice whereby the court provides notice that the court intends to issue a peremptory writ in the first instance granting the relief requested by the petitioner; a discussion of the merits of the writ petition, with a suggestion that the trial court erred in the manner claimed by the petitioner; a specific grant to the trial court of "power and jurisdiction" to change the disputed interim order and enter in its place a new order consistent with the views of the appellate court, in which event the writ petition will be vacated as moot; and a solicitation of opposition to the issuance of a peremptory writ in the first instance, should the trial court elect not to follow the appellate court's recommendation [*Brown, Winfield & Canzoneri, Inc. v. Superior Court (2010) 47 Cal. 4th 1233, 2010 Cal. LEXIS 588, **2-3]* . If a trial court decides on its own motion to revisit its interim ruling in response to a suggestive *Palma* notice, that court must inform the parties of its intent to do so, and provide them with an opportunity to be heard [*Brown, Winfield & Canzoneri, Inc. v. Superior Court (2010) 2010 Cal. LEXIS 588, **2-35]* .

[4] Judicial Considerations in Determining Appropriate Writ

The opposition from the party adversely affected will determine whether the court issues the peremptory writ or follows the standard operating procedure of using the alternative writ or order to show cause. The court must follow the usual writ procedure and issue an alternative writ or order to show cause if the opposition presents any reasonable argument that [*Lewis v. Superior Court (1999) 19 Cal. 4th 1232, 1261, 82 Cal. Rptr. 2d 85, 970 P.2d 872* ; *Kernes v. Superior Court (2000) 77 Cal. App. 4th 525, 530, 91 Cal. Rptr. 2d 765*]:

- The applicable law is unsettled;

- The applicable law does not govern the precise issue presented in light of the particular undisputed facts;

- The application of legal principles set out in various sources of law might lead to different results and there is no compelling need for an expedited decision.

Due to the usually exigent circumstances under which a court considers issuing a peremptory writ in the first instance, it need not give the opposition an opportunity to present oral argument [*Lewis v. Superior Court (1999) 19 Cal. 4th 1232, 1252-1253, 1258-1261, 82 Cal. Rptr. 2d 85, 970 P.2d 872*].

Notwithstanding the limited circumstances in which an appellate court may issue a peremptory writ in the first instance, one court of appeal has adopted a rule providing that it will not accept petitions praying for an alternative writ. Rather, it

will accept for filing only those petitions for writs of mandate or prohibition that pray solely for a peremptory writ in the first instance, which, if meritorious, the court may grant after due notice [Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 4th App. Dist., Rule 3 (applicable only in Division One of the Fourth Appellate District)]. This local appellate rule would appear to be merely one of convenience for the court, giving it the option in all cases to issue a peremptory writ in the first instance whenever it is otherwise appropriate to do so, without necessarily precluding it from issuing an alternative writ or order to show cause in those cases requiring a full hearing [*cf.* First App. Dist., Internal Operating Practices and Procedures, § 28 (petition for mandate or prohibition *should* pray for peremptory writ in first instance, to facilitate possible grant of summary relief)].

For discussion of the limited circumstances in which an appellate court will exercise its original jurisdiction by granting an extraordinary writ in any case, see *§ 358.30[2]*. For a detailed discussion of the procedures for obtaining a writ, see *§ 358.80* et seq.

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§ 358.30 Jurisdiction in Mandate Proceedings

[1] Courts With Original Jurisdiction

The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus [*Cal. Const., art. VI, § 10*; *see Code Civ. Proc. § 1084* ("mandamus" synonymous with "mandate")]. In other words, any court may issue a writ of mandate to any inferior tribunal or to any corporation, board, or person [*Code Civ. Proc. § 1085(a)*].

The appellate division of the superior court has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus directed to the superior court in causes subject to its appellate jurisdiction [*Cal. Const., art. VI, § 10*]. If the appellate division of the superior court issues a writ of mandate to the superior court (in a limited civil case or in a misdemeanor or infraction case), the superior court is an inferior tribunal for purposes of *Code Civ. Proc. §§ 1084-1097* [*Code Civ. Proc. § 1085(b)*].

When the superior court has original jurisdiction in a writ proceeding, as distinguished from the appellate division, the court conducts the proceeding pursuant to its general powers and it properly decides the petition through a single judge rather than through a panel of judges sitting as the appellate division [*Rosenberg v. Superior Court (1998) 67 Cal. App. 4th 860, 870, 79 Cal. Rptr. 2d 365*].

[2] Appellate Courts' Exercise of Original Jurisdiction

[a] Assessment of Whether Circumstances Warrant Issuing a Writ

Although an appellate court has original jurisdiction in any mandate proceeding involving an inferior court or other entity [*see Code Civ. Proc. § 1085* and *§ 358.30[1]*], absent a showing of exceptional circumstances, it will not exercise this jurisdiction if the petition for a writ of mandate could have been made first to a lower court [*Funeral Dir. Assn. v. Bd. of Funeral Dirs. (1943) 22 Cal. 2d 104, 110, 136 P.2d 785* ; *Cohen v. Superior Court (1968) 267 Cal. App. 2d 268, 270, 274, 72 Cal. Rptr. 814*]. Thus, if a petitioner for a writ of mandate files in an appellate court, but could have lawfully petitioned a lower court in the first instance, the petition must set forth the circumstances that render it proper

for the writ to issue originally from the reviewing court [*Cal. Rules of Ct., Rule 8.486(a)(1)*].

If exceptional circumstances do exist, a court of appeal may exercise its original jurisdiction in a mandate proceeding notwithstanding the fact that another mandate proceeding, seeking the same relief, is pending in a superior court within another appellate district [*see Rivera v. Division of Industrial Welfare (1968) 265 Cal. App. 2d 576, 581, 71 Cal. Rptr. 739*].

A court of appeal will exercise its original jurisdiction in the first instance to issue a writ of mandate, in order to resolve issues of great public import whose prompt resolution is necessary [*Faulder v. Mendocino County Bd. of Sup'rs (2005) 144 Cal. App. 4th 1362, 1368-1369, 51 Cal. Rptr. 3d 251* ; *Corbett v. Superior Court (2002) 101 Cal. App. 4th 649, 657, 125 Cal. Rptr. 2d 46* (court determines whether class actions may be brought under *Bus. & Prof. Code § 17200 et seq.*); *Aden v. Younger (1976) 57 Cal. App. 3d 662, 670, 129 Cal. Rptr. 535*]. Similarly, the Supreme Court exercises its original jurisdiction in mandate proceedings only in cases in which the issues presented are of great public importance and require prompt resolution [*Bramberg v. Jones (1999) 20 Cal. 4th 1045, 1054-1055, 86 Cal. Rptr. 2d 319, 978 P.2d 1240* ; *Legislature v. Eu (1991) 54 Cal. 3d 492, 500, 286 Cal. Rptr. 283, 816 P.2d 1309* ; *Wenke v. Hitchcock (1972) 6 Cal. 3d 746, 750, 100 Cal. Rptr. 290, 493 P.2d 1154*].

[b] Effect of Court's Decision

Absent a showing sufficient to justify an appellate court's exercise of its original jurisdiction, the court may deny the petition, and the petitioner's right to reapply for the writ in the proper lower tribunal will not be prejudiced [*Funeral Dir. Assn. v. Bd. of Funeral Dirs. (1943) 22 Cal. 2d 104, 110, 136 P.2d 785* ; *see also Cal. Const., art. VI, § 12*; *Cal. Rules of Ct., Rule 10.1000(a)* (transfer of causes from Supreme Court to court of appeal)].

Some statutes provide that the California Supreme Court has exclusive jurisdiction to hear certain types of writ petitions [*see, e.g., Pub. Res. Code § 25531*]. If a writ petition in the California Supreme Court is the exclusive means of obtaining review of an administrative decision, the Supreme Court's summary denial of the petition is a final judicial determination on the merits [*Santa Teresa Citizen Action Group v. California Energy Commission (2003) 105 Cal. App. 4th 1441, 1447, 130 Cal. Rptr. 2d 392* (rejecting due process challenge to Supreme Court's exclusive jurisdiction)].

For discussion of the appellate courts' appellate jurisdiction (as distinguished from their original jurisdiction), to review the judgment of a lower court granting or denying a petition for writ of mandate, see *§ 358.90*.

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§ 358.31 Requirements for Issuance of Writ of Mandate

[1] Essential Elements

To obtain a writ of mandate, the petitioner must generally show a duty on the part of the respondent [*see Code Civ. Proc. § 1085(a)* and *discussion under § 358.31[2]*], the petitioner's beneficial interest in compelling the performance of that duty [*see Code Civ. Proc. § 1086* and *discussion under § 358.31[3][a]*], and the inadequacy of other legal remedies [*see Code Civ. Proc. § 1086* and *discussion under § 358.31[4]*].

The petition for a writ of mandate must be verified [*see Code Civ. Proc. § 1086*; *see also Cal. Rules of Ct., Rule 8.486(a)(4)* (appellate courts)], and must demonstrate theright to the writ by clear, certain, and positive evidence [*California Federation of Teachers v. Oxnard Elementary Sch. (1969) 272 Cal. App. 2d 514, 545, 77 Cal. Rptr. 497*]. The right to relief in a mandate proceeding is determined by facts existing at the time that the petition is filed [*King v. Martin (1971) 21 Cal. App. 3d 791, 795, 98 Cal. Rptr. 711* ; *Palmer v. Fox (1953) 118 Cal. App. 2d 453, 456, 258 P.2d 30*].

Each party must also serve and file a Certificate of Interested Entities or Persons at the time it files its first document in the Court of Appeal [*Cal. Rules of Ct., Rule 8.208(d)*]. The petitioner's certificate must be included in the petition [*Cal. Rules of Ct., Rule 8.488(c)(1)*]. The certificates of the respondent and real party in interest must be included in their preliminary opposition or, if no such opposition is filed, in their return, if any. The certificate must appear after the cover and before the tables [*Cal. Rules of Ct., Rule 8.488(c)(3)*].

The writ may be issued by any court, only to an inferior tribunal or to a corporation, board, or person [*see Code Civ. Proc. § 1085(a)*; *see also Code Civ. Proc. § 1085(b)*, discussed in *§ 358.30[1]*].

[2] Duty of Respondent or Right of Petitioner

A court may issue a writ of mandate to compel the performance of an act that the law specially enjoins, such as a duty resulting from an office, trust, or station [*Code Civ. Proc. § 1085(a)*]. If a writ is sought to compel the performance of an act that the law specially enjoins, the petitioner must establish a clear, present, and usually ministerial duty on the

part of the respondent [*City of Dinuba v. County of Tulare (2007) 41 Cal. 4th 859, 868, 62 Cal. Rptr. 3d 614, 161 P.3d 1168* ; *Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 539540, 28 Cal. Rptr. 2d 617, 869 P.2d 1142* ; *Galbiso v. Orosi Public Utility Dist. (2010) 182 Cal. App. 4th 652, 673-674, 107 Cal. Rptr. 3d 36* (plaintiff did not allege agency had duty to act in certain way); *Coachella Valley Unified School District v. State of California (2009) 176 Cal. App. 4th 93, 113, 98 Cal. Rptr. 3d 9* ; *Mednik v. State Department of Health Care Services (2009) 175 Cal. App. 4th 631, 639, 96 Cal. Rptr. 3d 112* ; *Rancho Murieta Airport, Inc. v. County of Sacramento (2006) 142 Cal. App. 4th 323, 326-327, 47 Cal. Rptr. 3d 609* (county had duty to trim trees blocking airport visibility)].

A writ of mandate may also issue to compel the admission of a party to the use and enjoyment of a right or office to which that party is entitled and from which the party has been unlawfully precluded by the respondent [*Code Civ. Proc. § 1085(a)*]. If a writ is sought to compel the admission of a party to the use and enjoyment of a right or office, the petitioner must establish having a clear, present, and beneficial right to performance of the respondent's duty [*Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 539-540, 28 Cal. Rptr. 2d 617, 869 P.2d 1142* ; *Norton v. San Bernardino City Unified School District (2008) 158 Cal. App. 4th 749, 756-757, 69 Cal. Rptr. 3d 917* ; *Santa Monica Mun. Employees Assn. v. City of Santa Monica (1987) 191 Cal. App. 3d 1538, 1547, 237 Cal. Rptr. 185*]. A writ is granted only if it is necessary to protect a substantial right and it is shown that substantial damage will be suffered if the writ is denied [*Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6* ; *California Federation of Teachers v. Oxnard Elementary Sch. (1969) 272 Cal. App. 2d 514, 545, 77 Cal. Rptr. 497*]. That is, the writ must be necessary to enforce or protect a specific legal right that is clear, present, certain, and substantial [*American Friends Service Committee v. Procunier (1973) 33 Cal. App. 3d 252, 256, 109 Cal. Rptr. 22*].

[3] Petitioner Must Have Beneficial Interest

[a] Beneficial Interest May Be a Private Interest

A writ of mandate may be issued only on the verified petition of a party beneficially interested [*Code Civ. Proc. § 1086*]. If the issue is not one of public right and public interest [*see § 358.31[3][b]*], a particular private interest constitutes a sufficient beneficial interest. Thus, a person who has some special interest to be served or some particular right to be preserved or protected (independent of rights or interests held in common with the public at large) has such a beneficial interest under *Code Civ. Proc. § 1086* [*Carsten v. Psychology Examining Com. (1980) 27 Cal. 3d 793, 796, 166 Cal. Rptr. 844, 614 P.2d 276* ; *Mission Hospital Regional Medical Center v. Shewry (2008) 168 Cal. App. 4th 460, 479-480, 85 Cal. Rptr. 3d 639* (beneficial interest requirement is very broad); *California Association for Health Services at Home v. State Department of Health Services (2007) 148 Cal. App. 4th 696, 704-707, 56 Cal. Rptr. 3d 102*].

If, however, the petitioner shares an interest with a large segment of the population and the issue is not considered significant by the court, the petitioner's interest will not support issuance of a writ [*see Sacramento County Fire Protection Dist. v. Sacramento County Assessment Appeals Bd. II (1999) 75 Cal. App. 4th 327, 332-333, 89 Cal. Rptr. 2d 215* (interest of special district in obtaining proper funding through taxes is not beneficial interest in insuring property is properly assessed for tax purposes); *Braude v. City of Los Angeles (1990) 226 Cal. App. 3d 83, 88-89, 276 Cal. Rptr. 256* (petitioner seeking to halt development that would increase traffic congestion on particular freeway shared interest with hundreds of thousands of commuters who used same freeway, though not with all urban area commuters, and increased traffic would only have incremental effect on overall traffic in area)].

[b] Zone of Interest Must Pertain to Duty at Issue

The beneficial-interest analysis may also evaluate whether the interest the petitioner seeks to advance is within the zone of interests to be protected or regulated by the legal duty asserted [*Regency Outdoor Advertising, Inc. v. City of West Hollywood (2007) 153 Cal. App. 4th 825, 829, 63 Cal. Rptr. 3d 287* (relevant statute did not create standing to promote petitioner's commercial or competitive interests); *State Water Resources Control Bd. v. Superior Court (2002) 97 Cal. App. 4th 907, 915, 118 Cal. Rptr. 2d 784*]. For example, in a case in which the Attorney General, in violation of *Water*

Code § 186, undertook representation of both the Water Resources Board (which made the challenged underlying administrative determination) and the Department of Fish and Game, a private party had a beneficial interest in a mandamus action in the Court of Appeal after the trial court had disqualified the Attorney General. The interest the private party sought to enforce was within the zone of interests that *Water Code § 186* is designed to protect. The Attorney General was thus prevented from representing both the agency that made the challenged determination and another agency that was a separate party to the action [*State Water Resources Control Bd. v. Superior Court (2002) 97 Cal. App. 4th 907, 915, 118 Cal. Rptr. 2d 784*].

Prior to the unification of the superior and municipal courts in 1998, a municipal court had no standing to petition in its own name for a writ of mandate against the superior court because the municipal court had no "beneficial interest" in the outcome of the litigation [*Municipal Court v. Superior Court (Gonzalez) (1993) 5 Cal. 4th 1126, 1129-1132, 22 Cal. Rptr. 2d 504, 857 P.2d 325* ; *Municipal Court v. Superior Court (Swenson) (1988) 202 Cal. App. 3d 957, 962-963, 249 Cal. Rptr. 182* ; *Municipal Court v. Superior Court (Sinclair) (1988) 199 Cal. App. 3d 19, 24-25, 244 Cal. Rptr. 591*]. For example, when a municipal court sought a writ to overturn a superior court ruling regarding peremptory challenges under *Code Civ. Proc. § 170.6*, the court of appeal held that, although the municipal court may have had an actual interest in limiting the exercise of peremptory challenges against municipal court judges, the policy of preventing a lower court from suing a higher court takes precedence for the sake of proper and harmoniousfunctioning of the judicial system [*Municipal Court v. Superior Court (Swenson) (1988) 202 Cal. App. 3d 957, 962-963, 249 Cal. Rptr. 182*].

[c] Public-Interest Exception

The requirement concerning the nature of the petitioner's right is greatly relaxed, if not virtually abandoned, if the question involved is one of public interest [*City of Garden Grove v. Superior Court (2007) 157 Cal. App. 4th 355, 365-371, 68 Cal. Rptr. 3d 656* ; *Residents of Beverly Glen, Inc. v. City of Los Angeles (1973) 34 Cal.App. 3d 117, 127, 109 Cal. Rptr. 724*]. That is, the petitioner is not required to show any legal or special interest in the result when the question is one of public right and the object of the petition is to procure the enforcement of a public duty [*Environmental Protection and Information Center v. California Department of Forestry and Fire Protection (2008) 44 Cal. 4th 459, 479-480, 80 Cal. Rptr. 3d 28, 187 P.3d 888* (labor union had standing to sue regarding enforcement of administrative regulations governing logging plan); *Common Cause v. Board of Supervisors (1989) 49 Cal. 3d 432, 439, 261 Cal. Rptr. 574, 777 P.2d 610* ; *Green v. Obledo (1981) 29 Cal. 3d 126, 144, 172 Cal. Rptr. 206, 624 P.2d 256* ; *Timmons v. McMahon (1991) 235 Cal. App. 3d 512, 518, 286 Cal. Rptr. 620* ("beneficial interest" requirement for mandate satisfied when public right is at stake and relator is citizen interested in having laws executed and duty in question enforced)]. Stated differently, if the respondent's duty is sharp and the public need weighty, mandate will be granted if petitioner is a citizen who is merely seeking the enforcement of the law [*Marshall v. Pasadena Unified School District (2004) 119 Cal. App. 4th 1241, 1252, 15 Cal. Rptr. 3d 344* (contractor and taxpayer had standing to file petition challenging school district's failure to use competitive bidding procedure when petition sought to protect public fisc); *McDonald v. Stockton Met. Transit Dist. (1973) 36 Cal. App. 3d 436, 440, 111 Cal. Rptr. 637*]. This exception remains viable despite United States Supreme Court precedent limiting a similar public interest exception [*California Homeless & Housing Coalition v. Anderson (1995) 31 Cal. App. 4th 450, 457-458, 37 Cal. Rptr. 2d 639*].

Even if a party has a different primary interest, it may have standing under the public-interest exception to compel action of benefit to the public. In one case, a court of appeal found that a hospital had standing to compel a county to adopt standards for care of the indigent, even though the hospital's primary interest was financial, because the hospital was acting as a citizen in seeking to procure the enforcement of a public duty [*see* *Madera Community Hospital v. County of Madera (1984) 155 Cal. App. 3d 136, 141-146, 201 Cal. Rptr. 768* ; *see also* *Driving Sch. Ass'n of Cal. v. San Mateo Union High Sch. Dist. (1992) 11 Cal. App. 4th 1513, 1517-1519, 14 Cal. Rptr. 2d 908* (association of for-profit driving schools as having standing to petition for writ directing public school district to stop charging fees for high school students to take driver training course in "adult school" operated by district due to public-interest issue regarding school district's authority to charge tuition)].

The public-duty or public-right exception can be nullified by "competing considerations of a more urgent nature" [*Green v. Obledo (1981) 29 Cal. 3d 126, 144, 145, 172 Cal. Rptr. 206, 624 P.2d 256* ; *see, e.g.,* *Carsten v. Psychology Examining Com. (1980) 27 Cal. 3d 793, 798, 799, 166 Cal. Rptr. 844, 614 P.2d 276* (policy that militates against allowing administrative board member to sue own agency outweighs public right of board member as taxpayer to challenge legality of expenditure of public funds by government agency); *Nowlin v. Department of Motor Vehicles (1997) 53 Cal. App. 4th 1529, 1538-1539, 62 Cal. Rptr. 2d 409* (in case challenging DMV's authority to collect SSN prior to issuing driver's license, legislative aims of streamlining penalty collections to substantially fund trial courts, and locating errant parents for purposes of carrying out child support programs outweigh public duty of DMV to carry out its purposes)].

[4] Inadequacy of Legal Remedy

A writ of mandate must be issued in all cases when there is not a plain, speedy, and adequate remedy in the ordinary course of law [*Code Civ. Proc. § 1086*; *Phelan v. Superior Court (1950) 35 Cal. 2d 363, 366, 217 P.2d 951* ; *Vineyard Springs Estates, LLC v. Superior Court (2004) 120 Cal. App. 4th 633, 643, 15 Cal. Rptr. 3d 587* (party had no adequate remedy at law because trial court failed to rule on evidentiary objections before denying summary judgment motion)]. Conversely, the writ does not issue when an adequate remedy exists at law [*Betancourt v. Workmen's Comp. App. Bd. (1971) 16 Cal. App. 3d 408, 412, 94 Cal. Rptr. 9*]. For example, mandate in the court of appeal is appropriate if an appeal from the trial court judgment is not an adequate remedy [*Tracy Educators Assn. v. Superior Court (2002) 96 Cal. App. 4th 530, 534, 116 Cal. Rptr. 2d 916*].

The showing that there is no plain, speedy, and adequate remedy at law is therefore crucial to obtaining issuance of a writ of mandate. This requirement, which must also be satisfied when seeking a writ of prohibition, is discussed in detail in *§ 358.50* et seq.

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§ 358.32 Appropriate Applications of Writ of Mandate

[1] Writ to Compel Action by Court

A writ of mandate is proper if the court's discretion can be exercised in only one way [*Hurtado v. Superior Court (1974) 11 Cal. 3d 574, 579, 114 Cal. Rptr. 106, 522 P.2d 666* ; *Babb v. Superior Court (1971) 3 Cal. 3d 841, 851, 92 Cal. Rptr. 179, 479 P.2d 379*] and if the duty of the court to which the writ is directed is absolute [*Bales v. Superior Court (1942) 21 Cal. 2d 17, 25, 129 P.2d 685* ; *Butler v. Superior Court (2002) 104 Cal. App. 4th 979, 982, 128 Cal. Rptr. 2d 403* (writ of mandate proper because trial court failed to comply with appellate court's remand instructions)].

For example, a trial court is under a legal duty to apply the proper law, and it may be directed to perform that duty by writ of mandate [*Hurtado v. Superior Court (1974) 11 Cal. 3d 574, 579, 114 Cal. Rptr. 106, 522 P.2d 666* ; *Babb v. Superior Court (1971) 3 Cal. 3d 841, 851, 92 Cal. Rptr. 179, 479 P.2d 379]* .

[2] Writ to Compel Action by Nongovernmental Party

Mandate can be used to compel a corporation, board, or person to perform a legal duty or to admit or reinstate a party to an office or right from which he or she was illegally removed or expelled [*see Code Civ. Proc. § 1085(a)*]. Consequently, a writ of mandate is proper to compel a corporation to permit a stockholder to inspect its booksand corporate property [*Hobbs v. Tom Reed Gold Min. Co. (1913) 164 Cal. 497, 502, 129 P. 781*]; it is the proper proceeding to enforce the plain rights of stockholders or members of corporations in the absence of any other adequate remedy [*Miller v. Imperial Water Co. No. 8 (1909) 156 Cal. 27, 29, 103 P. 227*]. Mandate is also the proper proceeding to compel a labor union to admit a person to membership [*Thorman v. Intl. Alliance etc. Employees (1958) 49 Cal. 2d 629, 634, 320 P.2d 494* (*overruled on other grounds* in *Consolidated Theatres, Inc. v. Theatrical Stage Employees Union (1968) 69 Cal. 2d 713, 721 n.8, 73 Cal. Rptr. 213, 447 P.2d 325*)] or to reinstate a suspended member [*Cason v. Glass Bottle Blowers Asso. (1951) 37 Cal. 2d 134, 140, 231 P.2d 6*]. It may be used to compel a medical association to restore a physician to membership [*Bernstein v. Alameda etc. Med. Assn. (1956) 139 Cal. App. 2d 241, 254, 293 P.2d 862*]. Mandate has also been upheld as a valid method of requiring citrus growers to comply with administrative regulations regarding the submission of information to the Agricultural Labor Relations Board [*Agricultural Labor Relations Bd. v. Exeter Packers, Inc. (1986) 184 Cal. App. 3d 483, 489-491, 229 Cal. Rptr. 87*].

Likewise, mandate is appropriate to correct the action of a nongovernmental organization if the organization has not followed prescribed procedures in taking action [*Hard v. California State Employees Assn. (2002) 96 Cal. App. 4th 708, 711, 117 Cal. Rptr. 2d 615* (reviewing action of employee organization)]. The court's review under such circumstances is limited to determining whether the organization's decision was arbitrary or whether the organization failed to follow prescribed procedures [*Lewin v. St. Joseph Hospital of Orange (1978) 82 Cal. App. 3d 368, 383, 146 Cal. Rptr. 892* (hospital did not act arbitrarily or fail to follow procedures and give notices required by law)].

[3] Writ to Compel Action by Public Agency

A writ of mandate is proper to compel action by a public entity [*see* *City of Dinuba v. County of Tulare (2007) 41 Cal. 4th 859, 868, 62 Cal. Rptr. 3d 614, 161 P.3d 1168* (one public entity seeks to force another to release funds); *Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 540, 28 Cal. Rptr. 2d 617, 869 P.2d 1142*].

The courts may not frustrate a public agency's statutory duty by refusing to enforce it through normal judicial means [*Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 540, 28 Cal. Rptr. 2d 617, 869 P.2d 1142*]. If the Legislature wishes to limit the use of mandamus to enforce a public agency's duty, it must do so affirmatively [*Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 540, 28 Cal. Rptr. 2d 617, 869 P.2d 1142*].

[4] Writ to Compel Action by Public Official

A writ of mandate is proper to compel a governmental official to perform a ministerial act [*California Educational Facilities Authority v. Priest (1974) 12 Cal. 3d 593, 598, 116 Cal. Rptr. 361, 526 P.2d 513* ; *Flora Crane Service, Inc. v. Ross (1964) 61 Cal. 2d 199, 204, 37 Cal. Rptr. 425, 390 P.2d 193* ; *Syngenta Crop Protection, Inc. v. Helliker (2006) 138 Cal. App. 4th 1135, 1181, 42 Cal. Rptr. 3d 191*]. A public official's functions are ministerial when a statute requires him or her to perform a prescribed act on a prescribed contingency. Thus, a statute that clearly defines the specific duties or course of conduct that a governing body must take creates a ministerial duty that is mandatory and eliminates any element of discretion [*Rodriguez v. Solis (1991) 1 Cal. App. 4th 495, 504-505, 2 Cal. Rptr. 2d 50*]. In determining whether an act is ministerial, the word "may" in a rule or statute can be construed as mandatory rather than permissive under certain circumstances [*Hollman v. Warren (1948) 32 Cal. 2d 351, 356, 196 P.2d 562* (statute providing that governor "may" appoint notaries in such number as governor deems necessary construed by Court to mean that governor must appoint notaries); *Betancourt v. Workmen's Comp. App. Bd. (1971) 16 Cal. App. 3d 408, 413, 94 Cal. Rptr. 9* ("may" given mandatory construction in worker's compensation rule providing that referee may issue order to show cause)].

[5] Writ to Compel Exercise of Discretion

A writ of mandate is proper to compel the exercise of discretion by a court or a governmental officer [*Anderson v. Phillips (1975) 13 Cal. 3d 733, 736, 119 Cal. Rptr. 879, 532 P.2d 1247* ; *Ballard v. Anderson (1971) 95 Cal. Rptr. 1, 484 P.2d 1345* ; *but see* *Common Cause v. Board of Supervisors (1989) 49 Cal. 3d 432, 442, 445-446, 261 Cal. Rptr. 574, 777 P.2d 610* (mandate as improper to compel particular course of action committed to discretion of governmental entity by statute)]. For example, mandate is the proper proceeding to compel a court to assume jurisdiction and to exercise its discretion when the court has erroneously refused to act under the mistaken view that it did not have jurisdiction to act [*Erlich v. Superior Court (1965) 63 Cal. 2d 551, 556, 47 Cal. Rptr. 473, 407 P.2d 649* ; *McMahon v. Municipal Court (1970) 6 Cal. App. 3d 194, 197, 85 Cal. Rptr. 782*], to compel county officials to exercise their discretionary powers in some manner and negotiate with a public employees' union pursuant to the requirements of state and county legislation [*Los Angeles County Employees Assn., Local 660 v. County of Los Angeles (1973) 33 Cal. App. 3d 1, 8, 108 Cal. Rptr. 625*], and to compel a medical committee to exercise its discretion either to approve or to disapprove an application for an abortion according to statutory criteria [*Ballard v. Anderson (1971) 4 Cal. 3d 873,*

884-885, 95 Cal. Rptr. 1, 484 P.2d 1345].

[6] Writ to Control Abuse of Discretion by Agency

A writ of mandate is proper when the action taken by an administrative board is so palpably unreasonable and arbitrary as to indicate that it has abused its discretion as a matter of law [*Sanders v. City of Los Angeles (1970) 3 Cal. 3d 252, 261, 90 Cal. Rptr. 169, 475 P.2d 201* ; *Walker v. County of Los Angeles (1961) 55Cal. 2d 626, 639, 12 Cal. Rptr. 671, 361 P.2d 247*]. Such a situation should be distinguished from that in which petitioner is seeking judicial review of an adjudicatory decision of an administrative agency through the use of administrative mandate under *Code Civ. Proc. § 1094.5* [*see* *Golden Drugs Co. v. Maxwell-Jolly (2010) 179 Cal. App. 4th 1455, 1466, 102 Cal. Rptr. 3d 446* (different review standards for agency mandamus and ordinary mandamus); *American Board of Cosmetic Surgery v. Medical Board of California (2008) 162 Cal. App. 4th 534, 547-548, 75 Cal. Rptr. 3d 574* ; *California Water Impact Network v. Newhall County Water District (2008) 161 Cal. App. 4th 1464, 1482-1484, 75 Cal. Rptr. 3d 393* ; *Wal-Mart Stores, Inc. v. City of Turlock (2006) 138 Cal. App. 4th 273, 299-300* ; *Bright Development v. City of Tracy (1993) 20 Cal. App. 4th 783, 795, 24 Cal. Rptr. 2d 618*]. For a discussion of administrative mandate proceedings, *see* Ch. 474, *Availability of Judicial Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* .

The only evidence allowed to be presented in an administrative mandate proceeding (absent special circumstances) is the administrative hearing transcript [*Vernon Fire Fighters v. City of Vernon (1980) 107 Cal. App. 3d 802, 808, 810, 165 Cal. Rptr. 908]* .

[7] Writ to Control Abuse of Discretion by Court

A court abuses its discretion when it exceeds the bounds of reason, considering all the circumstances before it [*State Farm etc. Ins. Co. v. Superior Court (1956) 47 Cal. 2d 428, 432, 304 P.2d 13* ; *National Life of Florida Corp. v. Superior Court (1971) 21 Cal. App. 3d 281, 288, 98 Cal. Rptr. 435*]. For instance, a court that has a clear legal duty to grant certain relief abuses its discretion when it refuses to do so, and may be compelled by writ of mandate to grant that relief [*San Diego Wholesale Credit Men's Assn. v. Superior Court (1973) 35 Cal. App. 3d 458, 464, 110 Cal. Rptr. 657* (compelling court to issue writ of attachment); *Pacific Indem. Co. v. Superior Court (1966) 246 Cal. App. 2d 63, 72, 54 Cal. Rptr. 470* (compelling court to issue preliminary injunction)].

A petitioner must, however, make a clear showing of a trial court's abuse of discretion before an appellate court will reverse an order of the court [*Big Bear Mun. Water Dist. v. Superior Court (1969) 269 Cal. App. 2d 919, 925, 75 Cal. Rptr. 580*]. A writ of mandate to compel the exercise of discretion in a particular manner by a court lies only when the facts support only one decision [*Nathanson v. Superior Court (1974) 12 Cal. 3d 355, 361, 115 Cal. Rptr. 783, 525 P.2d 687* ; *Williams v. Superior Court (1989) 216 Cal. App. 3d 378, 384, 264 Cal. Rptr. 677*]. Although a trial court's refusal to sustain a demurrer or grant a judgment on the pleadings is normally reviewed under an abuse of discretion standard, if the issue is (1) tendered on undisputed facts, (2) significant, and (3) purely legal in nature, the appellate court may issue a writ of mandate after an independent review [*American Internat. Group, Inc. v. Superior Court (1991) 234 Cal. App. 3d 749, 755, 285 Cal. Rptr. 765* (purely legal issue of federal preemption properly handled by motion for judgment on pleadings and reviewed by writ of mandate)].

[8] Writ to Prevent Unlawful Performance of Duty by Public Official

Mandate may be used to restrain a public official from the unlawful performance of a duty; in such a case, the writ is known as "prohibitory mandate" [*Horwath v. City of East Palo Alto (1989) 212 Cal. App. 3d 766, 773 n.8, 261 Cal. Rptr. 108*]. Such a writ may issue, for example, to prevent the implementation of an invalid statute [*see* *Hotel Employees and Restaurant Employees Intern. Union v. Davis (1999) 21 Cal. 4th 585, 590, 88 Cal. Rptr. 2d 56, 981 P.2d 990* ; *Connerly v. State Personnel Bd. (2001) 92 Cal. App. 4th 16, 30, 112 Cal. Rptr. 2d 5* (mandate may be used to test constitutionality of legislative enactment)] or to prohibit enforcement of an opinion of the attorney general that is

unconstitutional [*Planned Parenthood Affiliates v. Van de Kamp (1986) 181 Cal. App. 3d 245, 263, 226 Cal. Rptr. 361*]. The writ may also issue, for example, to require a public official to enforce a statute that the official believes is unconstitutional, but that the judiciary has not determined is unconstitutional [*Lockyer v. City and County of San Francisco (2004) 33 Cal. 4th 1055, 1081, 17 Cal. Rptr. 3d 225, 95 P.3d 459* (writ issued requiring mayor of San Francisco to enforce statute mandating marriage only between a man and a woman)].

[9] Writ for Expedited Review of Public Agency Decision Regarding Permit Involving Expressive Conduct Protected by First Amendment

If a public agency makes a decision regarding the issuance, revocation, suspension or denial of a permit or other entitlement for expressive conduct protected by *U.S. Const., amend. I*, either the public agency or the permit applicant or permit holder may bring an action for expedited judicial review of that decision [*Code Civ. Proc. § 1094.8*]. If the permit applicant or permit holder brings the action, it must be in the form of a petition for writ of mandate pursuant to *Code Civ. Proc. § 1085* or *1094.5* [*Code Civ. Proc. § 1094.8(d)(2)*].

For discussion of and a form for a petition for writ of mandate for expedited judicial review of a public agency's decision relating to a permit involving expressive conduct protected by *U.S. Const., amend. I, see* Ch. 59 *Assemblies, Meetings, and Demonstrations* .

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§ 358.33 Inappropriate Applications of Writ of Mandate

[1] Mandate Not Proper to Control Discretion

Mandate is proper to compel the exercise of discretion [see *§ 358.32[5]*] and even to compel a particular act if the failure to act in that manner constitutes a clear abuse of discretion [*see § 358.32[7]*]. It is not, however, generally appropriate to require the exercise of discretion in a particular manner:

- By the state [*US Ecology, Inc. v. State of California (2001) 92 Cal. App. 4th 113, 137-139, 111 Cal. Rptr. 2d 689*];

- By a court [*Anderson v. Phillips (1975) 13 Cal. 3d 733, 737, 119 Cal. Rptr. 879, 532 P.2d 1247* ; *Hurtado v. Superior Court (1974) 11 Cal. 3d 574, 579, 114 Cal. Rptr. 106, 522 P.2d 666*];

- By a public officer [*Parker v. Dumke (1981) 117 Cal. App. 3d 237, 243, 172 Cal. Rptr. 577* ; *Ballard v. Anderson (1971) 4 Cal. 3d 873, 885, 95 Cal. Rptr. 1, 484 P.2d 1345*].

- By an administrative board [*Lindell Co. v. Board of Permit Appeals (1943) 23 Cal. 2d 303, 315, 144 P.2d 4* ; *California State Auto. Assn. Inter-Ins. Bureau v. Garamendi (1992) 6 Cal. App. 4th 1409, 1422-1423, 8 Cal. Rptr. 2d 366* ; *T.R.E.E.S. v. Department of Forestry & Fire Protection (1991) 233 Cal. App. 3d 1175, 1181-1182, 285 Cal. Rptr. 26* ; *Barrett v. Stanislaus County Employees Retirement Assn. (1987) 189 Cal. App. 3d 1593, 1613-1614, 234 Cal. Rptr. 900*]; or

- By a legislative body [*Hutchinson v. City of Sacramento (1993) 17 Cal. App. 4th 791, 796, 21 Cal. Rptr. 2d 779*].

[2] Mandate Not Proper to Compel Enactment of Legislation

Mandate will not lie to compel the legislature to enact any legislation [*City of Sacramento v. California State Legislature (1986) 187 Cal. App. 3d 393, 397, 231 Cal. Rptr. 686*].

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31-358 California Forms of Pleading and Practice--Annotated § 358.34

§ 358.34 Review of Particular Court Orders

In a number of instances, parties are specifically authorized by statute to seek review of a nonfinal court order by means of a petition for writ of mandate, including:

- Right of minor to petition for writ of mandate to review denial of petition for declaration of emancipation [*see, e.g., Fam. Code § 7123(a)*];

- Petition for writ of mandate to review determination of question of disqualification of judge [*see Code Civ. Proc. § 170.3(d)*];

- Petition for writ of mandate to review order granting or denying change in venue [*see Code Civ. Proc. § 400*];

- Petition for writ of mandate to review order relating to motion for coordination of actions [*see Code Civ. Proc. § 404.6*];

- Petition for writ of mandate to review order granting or denying motion to expunge lis pendens [*see Code Civ. Proc. § 405.39*];

- Petition for "peremptory writ" to review nonappealable order relating to motion for summary judgment [*see Code Civ. Proc. § 437c(m)(1)*];

- Petition for writ of mandate to review order on motion to determine good faith settlement [*see Code Civ. Proc. § 877.6(e)*]; and

- Right to petition for writ of mandate to review resolution of necessity prior to commencement of eminent domain proceeding [*see Code Civ. Proc. § 1245.255(a)(1)*].

These statutory provisions generally operate simply to impose time limitations or other procedural requirements in obtaining the writ [*see, e.g., Code Civ. Proc. § 170.3(d)* (requiring party to file petition for writ of mandate within 10 days after notice to parties of decision relating to disqualification of judge); Civ. Code § 400 (generally requiring party to file petition within 20 days after service of notice of order relating to motion to change venue), *Code Civ. Proc. § 437c(m)(1)* (generally requiring party to file petition within 20 days after service of notice of entry of order relating to summary judgment)].

Courts have held that time limits imposed by statute for filing writs of mandate are jurisdictional. Thus failure to file within the limit divests the court of jurisdiction to hear and decide the writ [*People v. Superior Court (Brent) (1992) 2 Cal. App. 4th 675, 683-684, 3 Cal. Rptr. 2d 375*]. For discussion of statutory procedural requirements that may apply in seeking a writ of mandate to review a particular court order, see the chapter in which the particular order is discussed [*see also generally § 358.100 et seq.*].

Although statutes authorizing review of a particular order by petition for writ of mandate may impose procedural limitations, they otherwise generally do no more than codify the right to seek relief by mandate in a particular situation. In other words, they do not otherwise change the standards employed by appellate courts in deciding whether to entertain a writ of mandate on its merits [*see, e.g., Parsons Manufacturing Corp., Inc. v. Superior Court (1984) 156 Cal. App. 3d 1151, 1155 n.1, 203 Cal. Rptr. 419* (review of order relating to motion for summary judgment by petition for "peremptory writ" under *Code Civ. Proc. § 437c(l)* (*now Code Civ. Proc. § 437c(m)(1)*) is subject to traditional standards applicable to petition for writ of mandate)].

In other instances, the use of a petition for writ of mandate to review a particular nonfinal court order is authorized, not by statute, but by established decisional law. One common example of this is the review of certain discovery orders that allegedly violate a party's privilege or other protection against disclosure [*see, e.g., Ombudsman Services of Northern California v. Superior Court (2007) 154 Cal. App. 4th 1233, 1241, 65 Cal. Rptr. 3d 456* ; *Thomas B. v. Superior Court (1985) 175 Cal. App. 3d 255, 260, 220 Cal. Rptr. 577* ; for discussion and forms relating to the use of extraordinary writs to review discovery orders generally, see Ch. 200, *Discovery: Review of Discovery Orders*].

But appellate courts have stated that they do not have the time or resources to police law and motion rulings on the pleadings through the mandamus power and, absent unusual circumstances, will decline to do so, except in such instances of grave nature or significant legal impact that intervention is compelled [*James W. v. Superior Court (1993) 17 Cal. App. 4th 246, 252-253, 21 Cal. Rptr. 2d 169*]. For example, reviewing courts have entertained writs to review an order that involve an important matter of first impression on which trial courts are in conflict [*Stavropoulos v. Superior Court (2006) 141 Cal. App. 4th 190, 193, 45 Cal. Rptr. 3d 705* ; *Friese v. Superior Court (2005) 134 Cal. App. 4th 693, 701, 36 Cal. Rptr. 3d 558* (writ relief appropriate because case raised important issue of statutory construction not yet confronted by appellate court or Supreme Court); *Smith v. Superior Court (1996) 41 Cal. App. 4th 1014, 1020, 49 Cal. Rptr. 2d 20* (*citing also Williamson v. Superior Court (1978) 21 Cal. 3d 829, 833, 148 Cal. Rptr. 39, 582 P.2d 126* ; *Oceanside Union School Dist. v. Superior Court (1962) 58 Cal. 2d 180, 185-186, n.4, 23 Cal. Rptr. 375, 373 P.2d 439*)].

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31-358 California Forms of Pleading and Practice--Annotated § 358.40

§ 358.40 Jurisdiction in Prohibition Proceedings

[1] Original Jurisdiction

The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in proceedings for extraordinary relief in the nature of prohibition [*Cal. Const., art. VI, § 10*]. In other words, any court may issue a writ of mandate to any inferior tribunal or to any corporation, board, or person [*Code Civ. Proc. §§ 1103(a)*].

The appellate division of the superior court has original jurisdiction in proceedings for extraordinary relief in the nature of prohibition directed to the superior court in causes subject to its appellate jurisdiction [*Cal. Const., art. VI, § 10*]. When the appellate division of the superior court issues a writ of prohibition to the superior court, the superior court is an inferior tribunal for purposes of *Code Civ. Proc. §§ 1102-1105*, the provisions governing prohibition generally [*Code Civ. Proc. § 1103(b)*].

When the superior court has original jurisdiction in a writ proceeding, as distinguished from the appellate division, the court conducts the proceeding pursuant to its general powers and it properly decides the petition through a single judge rather than through a panel of judges sitting as the appellate division [*Rosenberg v. Superior Court (1998) 67 Cal. App. 4th 860, 870, 79 Cal. Rptr. 2d 365*].

[2] Limits on Exercise of Original Jurisdiction by Appellate Courts

Although the appellate courts have original jurisdiction to issue writs of prohibition under *Cal. Const., art. VI, § 10*, these courts, and the Supreme Court in particular, will exercise this jurisdiction only in cases in which the issues presented are of great public importance and must be resolved promptly [*Bramberg v. Jones (1999) 20 Cal. 4th 1045, 1054-1055, 86 Cal. Rptr. 2d 319, 978 P.2d 1240* ; *Wenke v. Hitchcock (1972) 6 Cal. 3d 746, 750, 100 Cal. Rptr. 290, 493 P.2d 1154* (mandate proceeding); *Jolicoeur v. Mihaly (1971) 5 Cal. 3d 565, 570 n.1, 96 Cal. Rptr. 697, 488 P.2d 1* (mandate proceeding)]. For further discussion, see *§ 358.30[2]*.

For discussion of the appellate jurisdiction, as distinguished from original jurisdiction, of appellate courts, to review the judgment of a lower court granting or denying a petition for writ of prohibition, see *§ 358.90*.

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§ 358.41 Requirements for Issuance of Writ of Prohibition

[1] Essential Elements

To obtain a writ of prohibition, the petitioner must generally show the fact of a proceeding of a tribunal, corporation, board, or person exercising judicial functions [*see Code Civ. Proc. § 1102* and discussion in *§ 358.41[2]*], the fact that the proceeding is without or in excess of the jurisdiction of the tribunal, corporation, board, or person [*see Code Civ. Proc. § 1102* and discussion in *§ 358.41[3]*], the petitioner's beneficial interest in arresting that proceeding [*see Code Civ. Proc. §§ 1102, 1103* and discussion in *§ 358.41[4]*], and the inadequacy of other legal remedies [*see Code Civ. Proc. § 1103* and discussion in *§ 358.41[5]*].

The petition for a writ of prohibition must be verified [*see Code Civ. Proc. § 1103*; *see also Cal. Rules of Ct., Rule 8.486(a)(4)* (appellate courts)].

Each party must also serve and file a Certificate of Interested Entities or Persons at the time it files its first document in the Court of Appeal [*Cal. Rules of Ct., Rule 8.208(d)*]. The petitioner's certificate must be included in the petition [*Cal. Rules of Ct., Rule 8.488(c)(1)*]. The certificates of the respondent and real party in interest must be included in their preliminary opposition or, if no such opposition is filed, in their return, if any. The certificate must appear after the cover and before the tables [*Cal. Rules of Ct., Rule 8.488(c)(3)*].

The writ of prohibition may be issued by any court, only to an inferior tribunal or to a corporation, board, or person [*see Code Civ. Proc. § 1103*]. Thus, one court may issue a writ of prohibition directed to another court only if the latter is a court of inferior jurisdiction [*Haldane v. Superior Court (1963) 221 Cal. App. 2d 483, 485-486, 34 Cal. Rptr. 572*]. Therefore, a prayer in a complaint may not requesta superior court to issue prohibition against itself since a superior court has no power, authority, or jurisdiction to do that [*Haldane v. Superior Court (1963) 221 Cal. App. 2d 483, 485, 34 Cal. Rptr. 572*].

[2] Judicial-Action Requirement

[a] Judicial Action Narrowly Construed

A writ of prohibition arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions [*Code Civ. Proc. § 1102*]. Thus, to justify issuance of a writ of prohibition, it must be shown that the act sought to be restrained is judicial in nature [*Housing Authority v. Superior Court (1950) 35 Cal. 2d 550, 556, 219 P.2d 457*]. Conversely, a writ of prohibition clearly may not issue except for the purpose of arresting the proceedings of those exercising judicial functions [*Walsh v. Railroad Commission (1940) 16 Cal. 2d 691, 694, 107 P.2d 611*]. For example, a city attorney who is prosecuting petitioners after having charged them with violating a statute is not exercising any judicial function and a demurrer to a petition seeking to prohibit the prosecution must be sustained [*Walsh v. Railroad Commission (1940) 16 Cal. 2d 691, 694, 107 P.2d 611*].

[b] Ministerial Acts Not Prohibitable

A writ of prohibition does not lie when an officer or board is exercising purely ministerial functions [*Whitten v. California State Board, etc. (1937) 8 Cal. 2d 444, 445, 65 P.2d 1296*]. Stated differently, a writ of prohibition is not obtainable to prevent the commission of an act that is merely ministerial, such as [*Duke v. Justice's Court (1940) 42 Cal. App. 2d 178, 179, 108 P.2d 707*]:

- The issuance of a writ of execution [*see* *Santini v. Justice's Court (1933) 218 Cal. 671, 672, 24 P.2d 761* ; *Community Nat. Bank v. Superior Court (1966) 242 Cal. App. 2d 770, 773, 51 Cal. Rptr. 782*];

- The certifying of the result of a registrar's completed examination of voters' signatures on a recall petition [*Baines v. Zemansky (1917) 176 Cal. 369, 376, 168 P. 565*];

- The collecting of revenues by a tax collector [*Hobart v. Tillson (1884) 66 Cal. 210, 212, 5 P. 83*];

- The drawing of warrants on the state treasury by the Controller to pay claims arising under a statute [*Camron v. Kenfield (1881) 57 Cal. 550, 553*];

- The canvassing of election returns by a board of supervisors [*Olsen v. Board of Supervisors (1939) 30 Cal. App. 2d 635, 637, 87 P.2d 36*]; and

- The delivery of an order confining the petitioner to jail pursuant to a contempt order by the county clerk to the sheriff and the execution of the order by the sheriff [*Ames v. Superior Court (1938) 28 Cal. App. 2d 502, 504, 82 P.2d 948*].

[c] Threatened Action Required

A writ of prohibition will issue only to enjoin threatened judicial action [*Chodos v. Superior Court (1964) 226 Cal. App. 2d 703, 714, 38 Cal. Rptr. 301*]. For instance, when petitioners sought to restrain a court from proceeding with a new trial of an action in which judgment was rendered for petitioners, but then failed to show any threatened action on the part of the trial court to reset the matter for a new trial or to proceed therewith, a petition for a writ of prohibition was denied [*Chodos v. Superior Court (1964) 226 Cal. App. 2d 703, 714-715, 38 Cal. Rptr. 301*].

[d] Completed Judicial Action Not Prohibitable

A writ of prohibition is a preventative, rather than a corrective, remedy and issues only to prevent the commission of a future act and not to undo an act already performed. Therefore, prohibition will not lie if the proceedings that petitioner sought to prohibit have already been disposed of by the court and nothing remains to be done either by the court or the parties, the cause having been absolutely dismissed by the inferior tribunal [*Havemeyer v. Superior Court (1890) 84*

Cal. 327, 394, 24 P. 121]. Thus, completed judicial action cannot be reviewed by prohibition [*Big Jim Mines, Inc. v. Superior Court (1937) 9 Cal. 2d 503, 504, 71 P.2d 67* ; *King v. Superior Court (1950) 99 Cal. App. 2d 91, 94, 221 P.2d 120]* . For example, prohibition is not a proper remedy to annul a judgment already entered since a writ of prohibition does not lie after judgment is entered when there are no further judicial acts to be performed even though the judgment is erroneous [*Crittenden v. Municipal Court (1963) 216 Cal. App. 2d 811, 812, 31 Cal. Rptr. 280*].

[e] Incomplete Judicial Action Prohibitable

If a lower court's action is not completed and ended, its further proceedings may be stayed; if necessary to afford complete and adequate relief, what has been done will be undone. If this were not so, the inferior court, by proceeding expeditiously and arbitrarily, could defeat the remedy [*Havemeyer v. Superior Court (1890) 84 Cal. 327, 390-391, 24 P. 121*]. Hence, if there is jurisdiction to issue a writ of prohibition, the court granting it can afford complete relief. A party will not be compelled to resort to more than one proceeding or to more than one court for redress of one injury [*Havemeyer v. Superior Court (1890) 84 Cal. 327, 394-395, 24 P. 121*]. Consequently, if a superior court has issued a temporary restraining order and has made its minute order for mandamus (even though its peremptory writ has not issued), an appellate court is not precluded from issuing a writ of prohibition if the superior court acted in excess of its jurisdiction [*see City & County of San Francisco v. Superior Court (1959) 53 Cal. 2d 236, 245, 1 Cal. Rptr. 158, 347 P.2d 294* (writ restraining the superior court from any further proceedings in the action and ordering vacation of temporary restraining order)].

A court may allow a writ of prohibition if the act to be prohibited is a continuing one and the circumstances are so aggravated as to justify immediate relief. Aggravating circumstances may be present if a receiver has been appointed, an injunction has issued, or property has been seized under a void order. Continuing acts also may be subject to prohibition if, because of delay, there would be consequential damages [*see Melancon v. Superior Court (1954) 42 Cal. 2d 698, 704-705, 268 P.2d 1050* (denying writ of prohibition on ground that no aggravating circumstances or consequential damages flowed from lower court's order and entry of appealable judgment)].

[3] Lack- or Excess-of-Jurisdiction Requirement

[a] Term of Art as It Pertains to Petition for Writ of Prohibition

A writ of prohibition will issue to arrest the proceeding of a lower tribunal or other entity only if that proceeding is without or in excess of jurisdiction [*see Code Civ. Proc. § 1102*].

The phrase "lack of jurisdiction" as applied to determining the right to restraint by prohibition means that, it has no jurisdiction (or power) except to act in a particular manner, to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288, 109 P.2d 942* (rule obtains even though the court has jurisdiction over the subject matter and the parties in the fundamental sense)].

Any acts that exceed the defined power of a court in any instance--whether that power is defined by constitutional provision, express statutory declaration, or rules developed by the court and followed under the doctrine of *stare decisis*--are in excess of jurisdiction in the sense that those acts may be restrained by prohibition [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 291, 109 P.2d 942* ; *see Safer v. Superior Court (1975) 15 Cal. 3d 230, 242, 124 Cal. Rptr. 174, 540 P.2d 14*]. The term "jurisdiction" thus has a broader meaning when used in considering the availability of prohibition to review an order than when used in determining whether a court has jurisdiction over the subject matter and parties [*Crittenden v. Superior Court (1964) 61 Cal. 2d 565, 567, 39 Cal. Rptr. 380, 393 P.2d 692* ; *Tide Water Assoc. Oil Co. v. Superior Court (1955) 43 Cal. 2d 815, 821, 279 P.2d 35*].

[b] Prohibition Not Available if Nonjurisdictional Error Committed

A writ of prohibition never issues to restrain a lower tribunal from committing mere error in deciding a question properly before it. If the lower court has power to make a correct determination of a particular issue, it clearly has power to make an incorrect decision, subject only to appellate review, and not to restraint by prohibition [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 287, 109 P.2d 942* ; *Childress v. Municipal Court (1970) 8 Cal. App. 3d 611, 613, 87 Cal. Rptr. 383*].

[4] Beneficial Interest Requirement

A writ of prohibition may be issued only on the petition of the person beneficially interested [*Code Civ. Proc. § 1103(a)*]. For example, a petitioner who sought to stop a superior court from further proceedings on a petition for a writ of mandate was "beneficially interested" because he was a voter and taxpayer of the relevant county as well as the person who was claiming title to the office in controversy in the mandate proceeding [*Klose v. Superior Court (1950) 96 Cal. App. 2d 913, 916, 217 P.2d 97*].

[5] Inadequate Legal Remedy Requirement

A court may issue a writ of prohibition in all cases lacking a plain, speedy, and adequate remedy in the ordinary course of law [*Code Civ. Proc. § 1103(a)*]. For example, the availability of a right to appeal typically will preclude extraordinary relief by writ of prohibition. Other legal remedies may, however, also be deemed adequate under given circumstances [*see, e.g.,* *Barnard v. Municipal Court (1956) 142 Cal. App. 2d 324, 326, 298 P.2d 679* (claim and delivery provided adequate remedy); *Macfarland v. Superior Court (1934) 3 Cal. App. 2d 173, 176, 38 P.2d 800* (intervention was adequate remedy)].

A showing that there is no plain, speedy, and adequate remedy at law is crucial to obtaining issuance of a writ of prohibition. This requirement, which must also be satisfied when seeking a writ of mandate, is discussed in detail in *§ 358.50*.

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§ 358.42 Instances in Which Prohibition Is Proper

The following are some common situations in which courts have issued writs of prohibition:

- To restrain a lower appellate court from reviewing on appeal a matter over which it has no jurisdiction [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 287, 109 P.2d 942*].

- When a second tribunal or court has obtained concurrent jurisdiction over the same parties and the same subject matter [*Scott v. Industrial Acci. Com. (1956) 46 Cal. 2d 76, 81, 293 P.2d 18* ; *Maddern v. Superior Court (1972) 22 Cal. App. 3d 998, 1002, 99 Cal. Rptr. 832* ; *Mungia v. Superior Court (1964) 225 Cal. App. 2d 280, 283, 37 Cal. Rptr. 285* ; *see* Ch. 324, *Jurisdiction: Subject Matter*].

- When a summons has not been served and returned within the three-year period prescribed by *Code Civ. Proc. § 583.210* [*Coates Capitol Corp. v. Superior Court (1967) 251 Cal. App. 2d 125, 126-127, 59 Cal. Rptr. 231* (decided under former *Code Civ. Proc. § 581a*); see Ch. 212, *Dismissal*].

- When an action has not been brought to trial within the five-year period prescribed by *Code Civ. Proc. § 583.310* [*J.C. Penney Co. v. Superior Court (1959) 52 Cal. 2d 666, 669, 343 P.2d 919* (decided under former *Code Civ. Proc. § 583*); *Bella Vista Dev. Co. v. Superior Court (1963) 223 Cal. App. 2d 603, 607, 36 Cal. Rptr. 106* (decided under former *Code Civ. Proc. § 583*); see Ch. 212, *Dismissal*].

- When a court is proceeding to act on the basis of a void order [*Greene v. Superior Court (1961) 55 Cal. 2d 403, 406, 10 Cal. Rptr. 817, 359 P.2d 249* ; *Thompson v. Superior Court (1962) 206 Cal. App. 2d 702, 710-711, 23 Cal. Rptr. 841*].

- When a discovery order violates a privilege [*Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal. 3d 1, 5, 8, 123 Cal. Rptr. 283, 538 P.2d 739* ; *Payless Drug Stores, Inc. v. Superior Court (1976) 54 Cal. App. 3d 988, 989-991, 127 Cal. Rptr. 4* ; *Sheets v. Superior Court (1967) 257 Cal. App. 2d 1, 8, 64 Cal. Rptr. 753* ; *see* Ch. 200, *Discovery: Review of Discovery Orders*].

- When dismissal of an action is mandatory for lack of subject matter jurisdiction [*River Farms, Inc. v. Superior Court (1967) 252 Cal. App. 2d 604, 609, 60 Cal. Rptr. 665* ; *see* Ch. 324, *Jurisdiction: Subject Matter*].

- When the trial court judge fails to disqualify himself or herself if required to do so on the basis of *Code Civ. Proc. § 170.6* [*see* *Calhoun v. Superior Court (1958) 51 Cal. 2d 257, 262, 331 P.2d 648* ; *see Ch. 317, Judges, § 317.130* et seq.].

For a listing and brief discussion of many examples of situations in which a lack of jurisdiction has been found and in which prohibition is therefore properly issued, see *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288-290, 109 P.2d 942* .

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§§ 358.43[Reserved]

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§ 358.50 Function of Inadequate Legal Remedy Requirement

The petitioner for a writ of mandate or prohibition must establish by pleading and proof that there is "not a plain, speedy, and adequate remedy, in the ordinary course of law" [*Code Civ. Proc. § 1086, 1103(a)*; *Barratt American, Inc. v. City of Rancho Cucamonga (2005) 37 Cal. 4th 685, 704-705, 37 Cal. Rptr. 3d 149, 124 P.3d 719* (issue in writ of mandate to compel City to review and adjust building permit fees could be determined in validation action); *Phelan v. Superior Court (1950) 35 Cal. 2d 363, 370, 217 P.2d 951* ; *Vineyard Springs Estates, LLC v. Superior Court (2004) 120 Cal. App. 4th 633, 643, 15 Cal. Rptr. 3d 587* (party had no adequate remedy at law because trial court failed to rule on evidentiary objections before denying summary judgment motion)]. The petitioner must show that possible alternatives to the writ procedure, such as appeal, will not afford plain, speedy, and adequate relief.

The requirement is necessary in order to discourage piecemeal litigation and to avoid overburdening the appellate courts [*see* *Johnson v. City and County of San Francisco (2006) 137 Cal. App. 4th 7, 19, 40 Cal. Rptr. 3d 8* ; *Omaha Indemnity Co. v. Superior Court (1989) 209 Cal. App. 3d 1266, 1272-1273, 258 Cal. Rptr. 66*]. One court has noted that if reviewing courts made themselves routinely available to intervene by writ whenever a litigant claimed error in law and motion department rulings, trials would be delayed, litigants would be vexed with multiple proceedings, and judgment appeals would be kept waiting [*Burrus v. Municipal Court (1973) 36 Cal. App. 3d 233, 236, 111 Cal. Rptr. 539*].

Code Civ. Proc. § 1086 provides that a writ of mandate "must" issue in all cases lacking a plain, speedy, and adequate remedy in the ordinary course of law. In contrast, *Code Civ. Proc. § 1103(a)* provides that a writ of prohibition "may" issue if there is not a plain, speedy, and adequate remedy in the ordinary course of law. As a general rule, however, the requirement of inadequate legal remedies has been construed by the courts to be similar for both mandate and prohibition [*see* *W.A. Rose Co. v. Municipal Court (1959) 176 Cal. App. 2d 67, 75, 1 Cal. Rptr. 49*].

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§ 358.51 Determining Inadequacy of Legal Remedy

[1] In General

The inadequacy of other remedies in the ordinary course of law is a factual question whose determination lies largely in the discretion of the court considering the writ petition. Therefore, on appeal from the decision either granting or denying the writ, that court's determination regarding adequacy will not be disturbed in the absence of a showing of abuse of discretion [*W.A. Rose Co. v. Municipal Court (1959) 176 Cal. App. 2d 67, 74, 1 Cal. Rptr. 49* ; *San Joaquin County Employees Ass'n v. City of Stockton (1984) 161 Cal. App. 3d 813, 820, 207 Cal. Rptr. 876*]. The lack of an adequate alternative remedy is necessarily determined if the court issues a writ [*see Langford v. Superior Court,233 Cal. Rptr. 387, 729 P.2d 822 , cert. denied, 484 U.S. 824 (1987)*].

[2] Remedies Other Than Appeal

In certain cases, remedies other than appeal may be at least as "plain, speedy, and adequate" as mandamus or prohibition. The petitioner must consider whether such remedies are available, and if so, show why such remedies are inadequate. Examples of such alternative remedies that might be available in addition to mandate or prohibition would include actions at law or equity [*see, e.g., Barratt American, Inc. v. City of Rancho Cucamonga (2005) 37 Cal. 4th 685, 704-705, 37 Cal. Rptr. 3d 149, 124 P.3d 719* (issue in writ of mandate to compel City to review and adjust building permit fees could be determined in validation action); *Malibu West Swimming Club v. Flournoy (1976) 60 Cal. App. 3d 161, 164, 131 Cal. Rptr. 279* (suit for recovery of disputed taxes was proper alternative to mandamus proceeding against *State Controller); Ross v. O'Brien (1934) 1 Cal. App. 2d 496, 502, 36 P. 2d 1108* (action for claim and deliveryw as adequate remedy, "equally convenient" to mandamus)] and motions [*see, e.g., Neal v. State of California (1960) 55 Cal. 2d 11, 16, 9 Cal. Rptr. 607, 357 P.2d 839* (motion to vacate judgment as proper alternative to mandamus under circumstances of case)].

[3] Direct Appeal

If there is a right to an immediate and direct review by appeal from an order or judgment, that remedy is almost as speedy as a writ proceeding, and the petitioner must show some special reason why such appeal is rendered inadequate

by the particular circumstances of his or her case. One such showing is when the petitioner has already "stood in line" in the appellate process through one complete turn, and the review sought by the petition involves a fairly narrow issue. For example, although the issue might be decided by another appeal, one reviewing court granted a writ to review a "dangling issue" raised regarding an award of certain costs as litigation expenses, when that award was issued by the trial court on remand after an initial appeal [*see Science Applications Internat. Corp. v. Superior Court (1995) 39 Cal. App. 4th 1095, 1102, 46 Cal. Rptr. 2d 332* (petition for writ of mandate proper in such circumstances)]. Otherwise, direct appeal will be deemed to be an adequate remedy and writ relief will not be granted [*In re Marriage of Skelley (1976) 18 Cal. 3d 365, 369, 134 Cal. Rptr. 197, 556 P.2d 297* ; *Phelan v. Superior Court (1950) 35 Cal. 2d 363, 370, 217 P.2d 951*].

[4] Review of Order on Appeal From Final Judgment

[a] Factors Considered in Determining Whether Delay Causes Inadequate Relief

If an order is not appealable directly, but is reviewable only on appeal from a final judgment, the party seeking review must show why appeal from final judgment is an inadequate remedy [*Phelan v. Superior Court (1950) 35 Cal. 2d 363, 370, 217 P.2d 951*]. However, the presumption of adequacy of remedy by appeal [*see* [3], *above*] does not apply if a trial court's nonappealable order can only be reached by appeal from a subsequent final judgment [*Tyco Industries, Inc. v. Superior Court (1985) 164 Cal. App. 3d 148, 154, 211 Cal. Rptr. 540*]. Recognizing the possible prejudice that can arise from delaying adjudication of a particular issue until after final judgment, courts consider a wide array of factors in determining whether appeal from a final judgment is adequate relief. Such factors include the following:

- The expense of proceeding with an unnecessary trial [*see Hogya v. Superior Court (1977) 75 Cal. App. 3d 122, 130-131, 142 Cal. Rptr. 325* (mandate proper to remedy denial of class certification motion because expense of proceeding through trial as individual litigant would have been "grossly disproportionate" to damages petitioner might have expected to recover in litigation)];

- Inordinate, unnecessary pretrial expenses [*see San Diego Unified Port Dist. v. Superior Court (1977) 67 Cal. App. 3d 361, 364-365, 136 Cal. Rptr. 557*];

- The possibility that the trial court's order will deprive petitioner of an opportunity to present a substantial portion of petitioner's cause of action [*see Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 806-807, 94 Cal. Rptr. 796, 484 P.2d 964* (trial court sustained demurrers to one of plaintiff's two causes of action without leave to amend; mandate issued by Supreme Court to compel trial court to vacate order sustaining demurrers); *see also* [c]];

- A trial court's order that is clearly erroneous as a matter of law and substantially prejudicial to petitioner's case [*see Babb v. Superior Court (1971) 3 Cal. 3d 841, 851, 92 Cal. Rptr. 179, 479 P.2d 379* (mandate issued by Supreme Court directing trial court to vacate order overruling petitioner's demurrer to cross complaint; Court found cross complaint legally defective "on its face"); *City of Ontario v. Superior Court (1993) 12 Cal. App. 4th 894, 898, 16 Cal. Rptr. 2d 32* (mandate issued directing trial court to vacate order overruling petitioner's demurrer to complaint; because issue had substantial legal importance and was one of first impression, expense and delay of trial would be avoided if demurrer was well grounded)];

- The likelihood that petitioner will suffer harm or prejudice in a matter that cannot be corrected on appeal [*see Roberts v. Superior Court of Butte County (1973) 9 Cal. 3d 330* (prohibition issued by Supreme Court barring production and inspection of psychotherapist'srecords concerning mental condition of personal injury plaintiff)];

- The possibility that the purported error can be corrected by a lower tribunal before or during trial, or that the purported error might otherwise not infect the trial [*see People v. Medina (1972) 6 Cal. 3d 484, 491, 99 Cal. Rptr. 630, 492 P.2d 686* ; *Rescue Army v. Municipal Court (1946) 28 Cal. 2d 460, 466, 171 P.2d 8* , *appeal dismissed, 331 U.S. 549 (1947)*]; and

- Resolution on the merits on a writ petition would avoid a multiplicity of appeals on the same issue [*County of Santa Clara v. Superior Court (1992) 2 Cal. App. 4th 1686, 1693-1694, 5 Cal. Rptr. 2d 7* (instant case was one of 14 pending matters raising same issue)].

- Resolution after a final judgment would undermine a party's sovereign immunity [*Big Valley Band of Pomo Indians v. Superior Court (2005) 133 Cal. App. 4th 1185, 35 Cal. Rptr. 3d 357*].

Although the court may consider prejudice resulting from delay [*see Phelan v. Superior Court (1950) 35 Cal. 2d 363, 370, 217 P.2d 951* (dictum)], postjudgment appeal will not be deemed inadequate merely because more time would be consumed by pursuing it through the ordinary course of law than would be required in the use of an ordinary writ [*see Rescue Army v. Municipal Court (1946) 28 Cal. 2d 460, 466, 171 P.2d 8* , *appeal dismissed, 331 U.S. 549 (1947)*].

In many cases, the public importance of the litigated issue is the deciding factor in a court's determination regarding the adequacy of postjudgment appeal [*see, e.g., Babb v. Superior Court (1971) 3 Cal. 3d 841, 851, 92 Cal. Rptr. 179, 479 P.2d 379*].

For discussion of this consideration, see *§ 358.51[5]*.

[b] Discovery Orders

As a general policy, courts are reluctant to grant prerogative writs concerning discovery orders; generally a party aggrieved by a trial court's discovery order can only challenge the order on direct appeal from the final judgment [*see Oceanside Union School Dist. v. Superior Court (1962) 58 Cal. 2d 180, 185 n.4, 23 Cal. Rptr. 375, 373 P.2d 439*]. This general policy rests on the premise that in the great majority of cases, the protracted delay likely to result from interim review of discovery orders would be cause greater harm to the judicial process than the enforcement of possibly improper discovery orders [*Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal. 3d 1, 5, 123 Cal. Rptr. 283, 538 P.2d 739* ; *Perlan Therapeutics, Inc. v. Superior Court (2009) 178 Cal. App. 4th 1333, 1342, 101 Cal. Rptr. 3d 211]* .

Notwithstanding the general rule disfavoring the use of prerogative writs as a method to review discovery orders, courts have authorized the use of prerogative writs in limited discovery situations. A prerogative writ may be proper to expedite review of questions of first impression that are of general importance to the trial courts and to the legal profession, if general guidelines can be laid down for future cases [*Oceanside Union School Dist. v. Superior Court (1962) 58 Cal. 2d 180, 186 n.4, 23 Cal. Rptr. 375, 373 P.2d 439* ; *Toshiba America Electronics Components v. Superior Court (2004) 124 Cal. App. 4th 762, 767, 21 Cal. Rptr. 3d 532* (ruling for first time on question of which party should pay to translate electronic data compilations to obtain usable information responsive to discovery requests); *see also* discussion under [5]]. Also, a prerogative writ may be proper relief if a trial court order violates a discovery privilege of the petitioning party [*Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 170 n.11, 84 Cal. Rptr. 718, 465 P. 2d 854* ; *Perlan Therapeutics, Inc. v. Superior Court (2009) 178 Cal. App. 4th 1333, 1342, 101 Cal. Rptr. 3d 211* ; *Ombudsman Services of Northern California v. Superior Court (2007) 154 Cal. App. 4th 1233, 1241, 65 Cal. Rptr. 3d 456]* .

For general discussion and forms relating to review of discovery orders by extraordinary writ, see Ch. 200, *Discovery: Review of Discovery Orders* .

[c] Ruling Depriving Party of Opportunity to Plead Cause of Action or Defense

Courts are generally reluctant to extend extraordinary relief at the pleading stage [*Coulter v. Superior Court (1978) 21 Cal. 3d 144, 148, 145 Cal. Rptr. 534, 577 P.2d 669*], especially if the trial court has overruled a demurrer [*State of California v. Superior Court (2001) 87 Cal. App. 4th 1409, 1412, 105 Cal. Rptr. 2d 499*]. If, however, a trial court has made a ruling at the pleading stage that deprives a party of the opportunity to plead a cause of action or defense, an appeal from final judgment may be inadequate; in such a case, a prerogative writ may be appropriate to prevent a needless and expensive trial and reversal [*Holtz v. Superior Court (1970) 3 Cal. 3d 296, 301 n.4, 90 Cal. Rptr. 345, 475 P.2d 441* ; *Grange Debris Box. & Wrecking Co. v. Superior Court (1993) 16 Cal. App. 4th 1349, 1354-1357, 20 Cal. Rptr. 2d 515* (writ issued directing trial court to sustain demurrer against city's indemnity action for construction defect; 10-year limitation period had expired)]. For example, if a plaintiff alleges multiple causes of action and the court erroneously sustains the defendant's demurrer regarding one of the causes of action, the plaintiff may challenge the ruling immediately by petitioning for a prerogative writ, rather than waiting until final judgment [*see* *Coulter v. Superior Court (1978) 21 Cal. 3d 144, 148, 145 Cal. Rptr. 534, 577 P.2d 669* ; *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 806-807, 94 Cal. Rptr. 796, 484 P.2d 964* ; *see also* *Foot's Transfer & Storage Co. v. Superior Court (1980) 114 Cal. App. 3d 897, 901-902, 171 Cal. Rptr. 1* (mandate as proper remedy to review trial court's denial of petitioner's right to file cross complaint)].

There are some variances between at least two courts of appeal regarding whether striking a claim for punitive damages deprives the plaintiff of an opportunity to plead a cause of action. Applying the rule that "where a ruling on the pleadings deprives a party of a substantial part of its claim, and where a significant issue of law is involved, extraordinary review is appropriate," the court implicitly equated striking a claim for punitive damages with depriving theplaintiff of an opportunity to plead a cause of action and proceeded to consider the merits of the petition [*Courtesy Ambulance Service v. Superior Court (1992) 8 Cal. App. 4th 1504, 1510-1511, 11 Cal. Rptr. 2d 161* (4th Dist., Div. 2, noting that 2nd Dist., Div. 5, apparently in an unpublished opinion affecting the same defendant, held that in this position the remedy at law is adequate)].

In addition to the exception made for rulings that deny a particular party the opportunity to plead a cause or defense, a court may also depart from the general policy against granting relief by extraordinary writ in pretrial pleading matters if thereis an issue of great public importance [*County of Los Angeles v. Superior Court (1998) 68 Cal. App. 4th 1166, 1172-1178, 80 Cal. Rptr. 2d 860* (recent decisions by United States Supreme Court and California Supreme Court affecting liability of local public entities for alleged violations of the Federal Civil Rights Act and thus affecting many existing and potential causes of action); *see also discussion under § 358.51[5]*].

[5] Importance of Matter Litigated

The public importance of the matter litigated can be a significant factor affecting a court's determination of the adequacy of alternative legal remedies. Courts may consider whether a case raises an issue of widespread interest [*see, e.g.,* *Brandt v. Superior Court (1985) 37 Cal. 3d 813, 816, 210 Cal. Rptr. 211, 693 P.2d 796*] or presents a significant and novel constitutional issue [*see, e.g.,* *Britt v. Superior Court (1978) 20 Cal. 3d 844, 851, 143 Cal. Rptr. 695, 574 P.2d 766*]. They also may consider whether conflicting trial court interpretations of the law require an immediate resolution of the conflict at issue [*see, e.g.,* *Brandt v. Superior Court (1985) 37 Cal. 3d 813, 816, 210 Cal. Rptr. 211, 693 P.2d 796* ; *San Bernardino Associated Governments v. Superior Court (2006) 135 Cal. App. 4th 1106, 1113, 38 Cal. Rptr. 3d 293* (compelling county board of supervisors to conduct California Environmental Quality Act review before placing sales tax measure on ballot was issue of public importance); *California Highway Patrol v. Superior Court (2006) 135 Cal. App. 4th 488, 495-496, 38 Cal. Rptr. 3d 16* (mandate granted for issue of first impression that is of widespread interest)], whether a multiplicity of similar actions would be avoided by granting of the writ [*see, e.g.,* *County of Los Angeles v. Superior Court (1998) 68 Cal. App. 4th 1166, 1170, 80 Cal. Rptr. 2d 860* ; *Rivera v. Division of Industrial Welfare (1968) 265 Cal. App. 2d 576, 581, 71 Cal. Rptr. 739*], and whether delay in adjudicating an issue would have an adverse impact on the public welfare [*see, e.g.,* *Brown v. Superior Court (1971) 5 Cal. 3d 509, 515, 96 Cal. Rptr. 584, 487 P.2d 1224*]. Related to these factors, a court may also consider whether the questions presented are

ones of first impression and general importance to the bench and bar, so that general guidelines can be laid down for future cases [*Stavropoulos v. Superior Court (2006) 141 Cal. App. 4th 190, 193, 45 Cal. Rptr. 3d 705* ; *Friese v. Superior Court (2005) 134 Cal. App. 4th 693, 701, 36 Cal. Rptr. 3d 558* (writ relief appropriate because case raised important issue of statutory construction not yet confronted by appellate court or Supreme Court); *Simon v. Superior Court (1992) 4 Cal. App. 4th 63, 68, 5 Cal. Rptr. 2d 428*], or whether there is a conflict of law among the appellate courts regarding an issue of widespread importance [*Milwaukee Electric Tool Corp. v. Superior Court (1993) 15 Cal. App. 4th 547, 554, 19 Cal. Rptr. 2d 24*]. If review is sought by both appeal and extraordinary writ regarding an issue of widespread public importance that should be determined without delay, the reviewing court may elect to proceed on the writ petition and consider the appeal as moot [*Los Angeles City Ethics Com. v. Superior Court (1992) 8 Cal. App. 4th 1287, 1298 n.13, 1299, 11 Cal. Rptr. 2d 150*].

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[Reserved]

§§ 358.52[Reserved]

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§ 358.60 Adequate Legal Remedy Available

A writ of mandate or prohibition will not issue if an adequate remedy exists in the ordinary course of law [*Nguyen v. Superior Court (2007) 150 Cal. App. 4th 1006, 1009-1010, 58 Cal. Rptr. 3d 802* (mandate); *Betancourt v. Workmen's Comp. App. Bd. (1971) 16 Cal. App. 3d 408, 412, 94 Cal. Rptr. 9* (mandate); *Citizens Utilities Co. v. Superior Court (1963) 59 Cal. 2d 805, 813, 31 Cal. Rptr. 316, 382 P.2d 356* (prohibition)].

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§ 358.61 Failure to Exhaust Administrative Remedies

[1] Pleading Fails to Show Petitioner Sought Relief

The doctrine of exhaustion of administrative remedies is the rule that, if an administrative remedy is provided by statute, relief must be sought from the administrative body and this pursuit of this remedy exhausted before the courts will act [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 292, 109 P.2d 942* (prohibition proceeding); *see also Metcalf v. County of Los Angeles (1944) 24 Cal. 2d 267, 269, 148 P.2d 645* (mandate proceeding)]. A split of authority exists as to whether exhaustion of remedies defense implicates subject matter jurisdiction or whether it is a judicially created rule of procedure, with numerous exceptions, which must be applied by the courts equitably and depends on a qualitative analysis on a case-by-case basis of the facts presented at trial [*see Cummings v. Stanley (2009) 177 Cal. App. 4th 493, 506, 99 Cal. Rptr. 3d 284*].

[2] Exceptions to Exhaustion Requirement

There does appear to be a limited exception to the rule requiring the petitionerto allege exhaustion of administrative remedies prior to resorting to judicial relief as a prerequisite to the issuance of a writ of mandate or prohibition: if the pursuit of an administrative remedy would result in irreparable harm [*County of San Diego v. State of California (1995) 33 Cal. App. 4th 1787, 1800, 40 Cal. Rptr. 2d 193* ; *Ogo Associates v. City of Torrance (1974) 37 Cal. App. 3d 830, 834, 112 Cal. Rptr. 761*].

Another exception arises if a statute provides both an administrative and judicial remedy, in which case the party challenging the administrative action may choose between these remedies [*City of Susanville v. Lee C. Hess Co. (1955) 45 Cal. 2d 684, 689, 290 P.2d 520* ; *Syngenta Crop Protection, Inc. v. Helliker (2006) 138 Cal. App. 4th 1135, 1181, 42 Cal. Rptr. 3d 191* ; *San Elijo Ranch, Inc. v. County of San Diego (1998) 65 Cal. App. 4th 608, 613, 76 Cal. Rptr. 2d 601*].

[3] Attack on Constitutionality of Statute or Ordinance

If a petitioner wishes to attack the constitutionality of a statute or ordinance that either compels or restrains an act, it

may not be necessary to exhaust the administrativeremedies established in the statute or ordinance before petitioning for a writ of mandate or prohibition [*see United States v. Superior Court (1941) 19 Cal. 2d 189, 195-196, 120 P.2d 26* (dictum in prohibition proceeding stating that exhaustion may not be required when statute under attack creates administrative board or establishes method of administrative review)].

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§ 358.62 Failure to Request Lower Court Action or to Raise Objection in Lower Court

A party seeking an appellate court writ of mandate compelling action by a lower court must have first requested the lower court to act, unless it appears that such a demand would have been futile [*Phelan v. Superior Court (1950) 35 Cal. 2d 363, 372, 217 P.2d 951* ; *Fitch v. Justice Court (1972) 24 Cal. App. 3d 492, 495, 101 Cal. Rptr. 227*].

A petition for a writ of prohibition should affirmatively allege that the petitioner's challenge to jurisdiction was raised in the lower court [*Rescue Army v. Municipal Court (1946) 28 Cal. 2d 460, 465, 171 P.2d 8 , appeal dismissed, 331 U.S. 549 (1947)*]. However, an objection to jurisdiction in the trial court is not essential to the jurisdiction of an appellate court to grant a writ of prohibition [*City Council v. Superior Court (1962) 204 Cal. App. 2d 68, 72, 21 Cal. Rptr. 896* ; *Monterey Club v. Superior Court (1941) 48 Cal. App. 2d 131, 143, 119 P.2d 349*]. It is merely a rule of practice based on courtesy to lower courts and on the desire to prevent unnecessary litigation [*Citizens Utilities Co. v. Superior Court (1963) 59 Cal. 2d 805, 814, 31 Cal. Rptr. 316, 382 P.2d 356* ; *Havemeyer v. Superior Court (1890) 84 Cal. 327, 403-404, 406, 24 P. 121*]. Exceptions to the rule occur if the lack of jurisdiction of the lower court is apparent on the face of the record, if that court has persisted in a course of action in such a manner as to indicate that it would be useless to object, or if there was no opportunity to interpose an objection [*Hanrahan v. Superior Court (1947) 81 Cal. App. 2d 432, 434-435, 184 P.2d 157*].

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§ 358.63 Lapse of Statute of Limitations

There is no general statutory time limit on the application for writs [*see State v. Superior Court of San Mateo County (1968) 263 Cal. App. 2d 396, 399, 69 Cal. Rptr. 683*].

In a number of instances, however, if a particular statute expressly authorizes review of a specific court order by petition for writ of mandate or peremptory writ, the petition must be filed within strict time limitations [*see, e.g., Code Civ. Proc. § 170.3(d)*; *§ 358.32[12]*]. Moreover, some courts have held that if a petition for writ of mandate filed in an appellate court seeks review of a trial court ruling and there is no other statutory time limit, the petition may be denied as untimely if not filed within the 60-day period normally applicable to filing notice of appeal [*see Popelka, Allard, McCowan & Jones v. Superior Court (1980) 107 Cal. App. 3d 496, 499, 165 Cal. Rptr. 748* (court has discretion to deny petition on this basis regardless of actual prejudice)]. However, absent an applicable statute, courts have discretion to hear a writ petition filed beyond the judicially imposed 60-day limit [*Bob Parrett Constr., Inc. v. Superior Court (2006) 140 Cal. App. 4th 1180, 1185, 45 Cal. Rptr. 3d 250]* .

In addition, petitions for writ of *mandate* have been held to be subject to a statute of limitations, the applicable period being determined by the nature of the right asserted in the petition [*see Allen v. Humboldt County Bd. of Supervisors (1963) 220 Cal. App. 2d 877, 884, 34 Cal. Rptr. 232*]. The applicable limitation period begins to run when the petitioner's right first accrues [*Monroe v. Trustees of the California State Colleges (1971) 6 Cal. 3d 399, 405, 99 Cal. Rptr. 129, 491 P.2d 1105* ; *Barlow v. City Council of Inglewood (1948) 32 Cal. 2d 688, 697, 197 P.2d 721*].

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§ 358.64 Laches

Laches is a also proper ground for denying relief in a writ proceeding, even if, in a mandate proceeding, the applicable statute of limitations has been satisfied [*Ragan v. City of Hawthorne (1989) 212 Cal. App. 3d. 1361, 1368, 261 Cal. Rptr. 219* (mandate proceeding); *see also State v. Superior Court of San Mateo County (1968) 263 Cal. App. 2d 396, 399, 69 Cal. Rptr. 683* (laches not established in prohibition proceeding)]. To defeat a writ petition based on laches, the real party in interest or respondent must show that there was an unreasonable delay in filingthe petition and that prejudice to the real party resulted from the delay [*see Peterson v. Superior Court (1982) 31 Cal. 3d 147, 163, 181 Cal. Rptr. 784, 642 P.2d 1305* (mandate proceeding)]. The defense of laches is raised very infrequently in prohibition proceedings because these are usually promptly initiated, given thatthe writ will issue only to arrest a threatened but uncompleted judicial action [*see § 358.41[2]*].

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§ 358.65 Mootness

Mandate is not proper if a proceeding has become moot [*Genser v. McElvy (1969) 276 Cal. App. 2d 709, 711, 82 Cal. Rptr. 521*] and if issuance of the writ would be useless, unenforceable, or unavailing [*Genser v. McElvy (1969) 276 Cal. App. 2d 709, 711, 82 Cal. Rptr. 521* ; *Zagoren v. Hall (1932) 122 Cal. App. 460, 462, 10 P.2d 202*]. For example, a decision and order that has been vacated presents a moot question [*Crestlawn Memorial Park Asso. v. Sobieski (1962) 210 Cal. App. 2d 43, 47, 26 Cal. Rptr. 421*]. It is also not proper to enforce an abstract right [*Slater v. City Council (1965) 238 Cal. App. 2d 864, 868, 47 Cal. Rptr. 837* ; *Clementine v. Board of Civ. Ser. Commrs. (1941) 47 Cal. App. 2d 112, 114, 117 P.2d 369*], because mandate issues to protect a party against substantial damages, not to vindicate abstract claims [*Rivera v. Division of Industrial Welfare (1968) 265 Cal. App. 2d 576, 592, 71 Cal. Rptr. 739*].

A proceeding is considered moot if respondent either has complied with petitioner's demands after issuance of the alternative writ or is willing to do the act without coercion [*Bruce v. Gregory (1967) 65 Cal. 2d 666, 671, 56 Cal. Rptr. 265, 423 P.2d 193* ; *Environmental Protection Information Center, Inc. v. State Bd. of Forestry (1993) 20 Cal. App. 4th 27, 32, 24 Cal. Rptr. 2d 344* ; *State Bd. of Education v. Honig (1993) 13 Cal. App. 4th 720, 742, 748, 16 Cal. Rptr. 2d 727* ; *Cooke v. Superior Court (1989) 213 Cal. App. 3d 401, 417, 261 Cal. Rptr. 706*]. If a case poses an issue of broad public interest that is likely to recur, however, the court may exercise its inherent discretion to resolve the substantive issue raised by the petition for mandate, even if the matter is moot regarding the particular parties who raised the issue [*Municipal Court v. Superior Court (Sinclair) (1988) 199 Cal. App. 3d 19, 22-23, 25, 244 Cal. Rptr. 591* (drunk driving defendants wishing to enter guilty pleas raised constitutional challenge to court's practice of requiring that uncharged priors be disclosed); *Okuda v. Superior Court (1983) 144 Cal. App. 3d 135, 137 n.1, 192 Cal. Rptr. 388* (court ruled on application of lis pendens to real estate dispute after parties entered stipulation and requested dismissal of action)].

Like mandamus, prohibition is not available when the question involved is moot [*Pacific G. & E. Co. v. Superior Court (1938) 10 Cal. 2d 545, 546, 76 P.2d 108* ; *Campbell v. Superior Court (1932) 126 Cal. App. 652, 653, 14 P.2d 925*]. However, a question involved in a prohibition proceeding will not be treated as moot if it is one of continuing importance to the parties, if the situation is not one in which the parties are no longer interested in the legal issue

involved, if no purpose but delay would be served by treating the question as moot, and if the orderly administration of justice compels a determination immediately [*DiGiorgio Fruit Corp. v. Dep. of Employment (1961) 56 Cal. 2d 54, 58-59, 13 Cal. Rptr. 663, 362 P.2d 487* (mandate proceeding); *Heavy, Highway Bldg. Constr. Teamsters Committee v. Superior Court (1962) 203 Cal. App. 2d 591, 597, 21 Cal. Rptr. 840*].

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§ 358.66 Res Judicata

The doctrine of res judicata is generally applicable to judgments on the merits in mandate and prohibition proceedings [*see Hollywood Circle, Inc. v. Department of Alcoholic Beverage Control (1961) 55 Cal. 2d 728, 733, 13 Cal. Rptr. 104, 361 P.2d 712* ; *Loeb v. Berman (1933) 217 Cal. 716, 720, 20 P.2d 685*]. A summary denial of a petition for a writ of mandate, however, is not res judicata [*Hagan v. Superior Court (1962) 57 Cal. 2d 767, 770, 22 Cal. Rptr. 206, 371 P.2d 982* ; *De Bottari v. Melendez (1975) 44 Cal. App. 3d 910, 914 n.3, 119 Cal. Rptr. 256*], regardless of whether the denial is based on the merits or on some other reason [*Kowis v. Howard (1992) 3 Cal. 4th 888, 899, 12 Cal. Rptr. 2d 728, 838 P.2d 250* (discrediting and rejecting long-standing "sole possible ground" exception and disapproving sole case that applied rule and many cases that contain dicta implying existence of exception, including *Hagan v. Superior Court (1962) 57 Cal. 2d 767, 770, 22 Cal. Rptr. 206, 371 P.2d 982*)].

In any case in which the court issues an alternative writ and renders a written decision granting or denying relief, that decision has ordinary res judicata effect. However, if a party has no notice that a peremptory writ is sought or might issue, there is no alternative writ, and the document issued by the court of appeal is not preceded by a decision or order subject to petition for hearing, the doctrine of res judicata will not apply [*Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 182-183, 203 Cal. Rptr. 626, 681 P.2d 893*].

If an appellate court has denied a writ of prohibition to prevent a trial court from proceeding with the trial of an action and the appellate court's decision has become final, its adjudication is res judicata as against the same petitioner who later seeks a writ of prohibition (on an application based on a set of facts identical with those previously presented) against the same real parties in interest for the same purpose [*Overstreet v. County of Butte (1962) 57 Cal. 2d 504, 506, 20 Cal. Rptr. 631, 370 P.2d 335* ; *Calhoun v. Superior Court (1958) 51 Cal. 2d 257, 262, 331 P.2d 648*].

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§ 358.67 Unclean Hands

The doctrine of unclean hands is applicable to mandate and prohibition proceedings [*Allen v. Los Angeles County District Council of Carpenters (1959) 51 Cal. 2d 805, 811-812, 337 P.2d 457 , cert. denied, 361 U.S. 936 (1960)* (mandate proceedings); *see Funfar v. Superior Court (1930) 107 Cal. App. 488, 490-491, 290 P. 626* (prohibition proceedings)]. For example, a petitioner for awrit of prohibition from a reviewing court who, at the same time, is willfully disobeying an order of the superior court is in contempt of that court and cannot ask the aid and assistance of the reviewing court [*Funfar v. Superior Court (1930) 107 Cal. App. 488, 490-491, 290 P. 626*].

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§ 358.68 Future Acts

A writ of mandate does not issue to compel the performance of future acts [*Treber v. Superior Court (1968) 68 Cal. 2d 128, 134, 65 Cal. Rptr. 330, 436 P.2d 330* (dictum); *Northridge etc. Water Dist. v. McDonell (1958) 158 Cal. App. 2d 123, 127-129, 322 P.2d 25*] or if there is merely an anticipated or possible refusal to perform a future act [*Diller v. Flynn (1964) 226 Cal. App. 2d 449, 453, 38 Cal. Rptr. 229* ; *Northridge etc. Water Dist. v. McDonell (1958) 158 Cal. App. 2d 123, 127, 322 P.2d 25*].

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[Reserved]

§§ 358.69[Reserved]

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31-358 California Forms of Pleading and Practice--Annotated § 358.80

§ 358.80 Application of General Pleading Rules

Mandate and prohibition proceedings are subject to the general rules of pleading applicable to civil actions, except as otherwise provided in *Code Civ. Proc. §§ 1063-1110b* [*Code Civ. Proc. § 1109*].

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§ 358.81 Cover Sheet Must Be Filed With Initial Petition

The first paper filed in an action or proceeding must be accompanied by a case cover sheet as required in *Cal. Rules of Ct., Rule 3.220(b)*. This cover sheet is a form prescribed by the Judicial Council [*Cal. Rules of Ct., Rule 3.220(a)*]. Under *Cal. Rules of Ct., Rule 3.220(b)(1)*, the Judicial Council cover sheet form 3.220(b)(1) must be used in each civil action or proceeding, except those filed in small claims court or filed under the Probate Code, Family Law Code, or Welfare and Institutions Code [*Cal. Rules of Ct., Rule 3.220(b)(1)*].

Although the cover sheet must be filed, it need not be served with a petition or other first paper. The sheet is to be used only for statistical purposes [*Cal. Rules of Ct., Rule 3.220(a)*]. For further discussion and an illustrative example of the Judicial Council from of Case Cover Sheet, see Ch. 123, *Complaints and Cross Complaints* .

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§ 358.82 Petition for Writ

[1] Governing Procedural Law

Proceedings to obtain a writ of mandate or prohibition are initiated by filing a verified petition in the appropriate superior or appellate court [*see Code Civ. Proc. §§ 1085, 1086, 1103*; *Cal. Rules of Ct., Rule 8.486(a)* (petition filed in reviewing court)]. For discussion concerning the determination of the proper court in which to file the petition, see *§§ 358.30, 358.40*. For discussion of the elements that must be alleged in the petition, see *§§ 358.31, 358.41*.

The petition may pray for an alternative writ, a peremptory writ, or both [*see Code Civ. Proc. §§ 1088, 1105*; for further discussion, *see § 358.16*]. The prayer may also request an award of damages, if any, sustained by the petitioner, and an award of costs [*see Code Civ. Proc. § 1095* and discussion under *§ 358.87[8]*].

For a form of petition for use in a superior court, see *§ 358.130*. For forms of petition for use in an appellate court, see *§ 358.137* and *§ 358.138*. Forms of specific allegations to be used in these petitions are set out in *§§ 358.131 -358.136*.

[2] Format and Content Requirements

[a] Superior Court

A petition for writ of mandate or prohibition filed in superior court must include the substantive allegations necessary to support issuance of the writ [*see Code Civ. Proc. §§ 1085, 1086, 1102, 1103*; *§ 358.82[1]*]. It also must comply with *Cal. Rules of Ct., Rule 2.100 et seq.*, which specifies the general format of papers presented for filing. Local superior court rules or policies may prescribe additional requirements and should be consulted [*see, e.g.*, Sacramento Co. Super. Ct. Rules, Rule 2.01; San Diego Co. Super. Ct. Rules, Div. II, Rule 8.1].

For further discussion of format and content requirements, see *§ 358.130*.

[b] Appellate Court

In addition to legal requirements necessary to support the petition [*see Cal. Rules of Ct., Rule 8.486(a)*; *see also § 358.82[1]*], an original petition for a writ of mandate or prohibition filed in an appellate court is subject to the general format provisions set out in the appellate rules of court [*see Cal. Rules of Ct., Rule 8.4*].

A number of format and content requirements are contained in *Cal. Rules of Ct., Rule 8.486 et seq.*, which generally governs original writ proceedings in reviewing courts. Unless otherwise provided in that rule or in other related rules governing such proceedings [*see Cal. Rules of Ct., Rules 8.486-8.493*], a writ petition in a reviewing court must also comply with the format and content requirements of *Cal. Rules of Ct., Rules 8.204* and *8.208*, governing appellate briefs [*Cal. Rules of Ct., Rule 8.485(a)*]. Additional format requirements, applicable to all papers filed in a reviewing court, are set out in *Cal. Rules of Ct., Rule 8.40*.

For detailed discussion of the format and content requirements relating to writ petitions, set out in *Cal. Rules of Ct., Rules, 8.204, 8.40*, and *8.490*, see *§§ 358.137 -358.138*.

[3] Verification

[a] Basic Requirements

The petition for a writ of mandate or prohibition must be verified by the beneficially interested party [*Code Civ. Proc. §§ 1086, 1103(a)*; *Cal. Rules of Ct., Rule 8.486(a)(4)*; *see also Perlman v. Municipal Court (1979) 99 Cal. App. 3d 568, 573-574, 160 Cal. Rptr. 567* (circumstances under which attorney can verify petition)]. The verification generally must be prepared in accordance with *Code Civ. Proc. § 446*, governing verification in civil actions [*see Code Civ. Proc. § 1109*; [*see § 358.80*] for discussion and forms relating to verification generally, *see* Ch. 572, *Verification*]. For further discussion of this requirement as it applies to petitions filed by public entities, see *§ 358.82[3][b]*.

To some degree, verification should be based on personal knowledge, because a verification made solely on information and belief is generally insufficient to support a petition for mandate or prohibition [*see Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 204-205, 151 Cal. Rptr. 721*]. A verification made solely on information and belief, however, may be accepted by a court if the petitioner otherwise supplies a sufficient record of the underlying facts and proceedings, thus making judicial reliance on the factual allegations in the petition unnecessary [*see Fall River Joint Unified School Dist. v. Superior Court (1988) 206 Cal. App. 3d 431, 436, 253 Cal. Rptr. 587*]. The purpose of the verification requirement is to assure good faith in the averments or statements of the petitioner. Thus, if there is no allegation of counsel's bad faith in verifying the petition on information and belief, a claim of inadequate verification is without merit [*League of Women Voters v. Eu (1992) 7 Cal. App. 4th 649, 656, 9 Cal. Rptr. 2d 416*].

Failure to verify an original petition may be cured if the court permits an amendment of the petition to include a verification [*Franchise Tax Bd. v. Municipal Court (1975) 45 Cal. App. 3d 377, 383-384, 119 Cal. Rptr. 552*].

[b] Verification by Public Entity

Under *Code Civ. Proc. § 446*, which generally governs verification in civil actions, pleadings of public entities need not be verified [*Code Civ. Proc. § 446*]. The California courts of appeal have disagreed concerning the extent to which this provision applies in mandate or prohibition proceedings:

- The First District has held that the provisions requiring verification in mandate proceedings [*Code Civ. Proc. §§ 1086, 1089*; *Cal. Rules of Ct., Rule 8.486(a)(4)*] control over *Code Civ. Proc. § 446*. Thus, verification is required in mandate proceedings "without exception" [*Municipal Court v. Superior Court (Sinclair) (1988) 199 Cal. App. 3d 19, 25-26, n.1, 244 Cal. Rptr. 591 (First District, Division Four)*].

- The Fourth District, however, has taken the opposite view, holding that *Code Civ. Proc. § 446* exempts public entities and their officers from the verification requirement in mandate proceedings [*Murrieta Valley Unified School Dist. v. County of Riverside (1991) 228 Cal. App. 3d 1212, 1223, 279 Cal. Rptr. 421 (Fourth District, Division Two)* ; *Verzi v. Superior Court (1986) 183 Cal. App. 3d 382, 385, 228 Cal. Rptr. 299 (Fourth District, Division Two)]* .

- The Sixth District has followed the Fourth District in holding that public entities are exempt from the requirement of verification of a petition for mandate [*Fremont Union High Sch. Dist. v. Santa Clara County Board of Education (1991) 235 Cal. App. 3d 1182, 1188, 286 Cal. Rptr. 915*].

- The Second District, reviewing the split of authority, has endorsed the First District's view that verification is required, noting that verification is essential when a paper, such as a mandate petition, is to be used as evidence of the facts stated therein [*People v. Superior Court (Alvarado) (1989) 207 Cal. App. 3d 464, 469-470, 255 Cal. Rptr. 46 (Second District, Division Three)*].

[4] Record Supporting Petition

[a] In Superior Court

If the petition seeks an extraordinary writ in the superior court, it should, to the extent possible, be accompanied by any record or evidence necessary for the determination of the petition. In any case, the petitioner should consult local superior court rules and practice for requirements relating to the preparation of the record or evidence to be presented in support of the petition [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 9.31(h) (in writ proceedings other than those for administrative mandate, evidence is presented by declarations, deposition testimony, etc.,--not by oral testimony, unless permitted by the court; record should be prepared before setting the writ for hearing)].

If mandamus is sought against an administrative agency, the parties may present evidence outside the administrative record [*Bright Development v. City of Tracy (1993) 20 Cal. App. 4th 783, 795, 24 Cal. Rptr. 2d 618*].

[b] In Appellate Court

If a petition to a reviewing court seeks review of a trial court ruling, it must be accompanied by a record adequate to permit the review [*Cal. Rules of Ct., Rule 8.486(b)*; *see also Sherwood v. Superior Court (1979) 24 Cal. 3d 183, 186*]. Specifically, the record must include the following [*Cal. Rules of Ct., Rule 8.486(b)*; *see Pedlow v. Superior Court (1980) 112 Cal. App. 3d 368, 371, 169 Cal. Rptr. 326*]:

(1) A copy of the order or judgment from which relief is sought;

(2) Copies of all documents and exhibits submitted to the trial court supporting and opposing the petitioner's position;

(3) Copies of all other documents submitted to the trial court that are necessary for a complete understanding of the case and the ruling; and

(4) A transcript of the proceedings leading to the order or judgment below or, if a transcript is unavailable:

- A declaration by counsel explaining why a transcript is unavailable and fairly summarizing the proceedings, including arguments by counsel and the basis of the trial court's decision, if stated, or

- A declaration by counsel stating that the transcript has been ordered, the date it was ordered, and the date it is expected to be filed, which must be a date prior to any action requested of the reviewing court other than issuance of a stay supported by other parts of the record.

In exigent circumstances, a petition may be filed without a copy of the order, judgment, or relevant documents, other than the transcript, if a declaration by counsel or by an unrepresented petitioner explains the urgency and the circumstances making the documents unavailable and fairly summarizes their substance [*Cal. Rules of Ct., Rule 8.486(b)*].

If a petitioner does not submit the required record and explanations, or does notpresent facts sufficient to excuse the failure to submit them, the court may summarily deny the petition [*Cal. Rules of Ct., Rule 8.486(b)*].

Documents submitted in support of a petition must comply with the following requirements [*Cal. Rules of Ct., Rule 8.486(c)*]:

- They must be bound together at the end of the petition or in separate volumes not to exceed 300 pages each, with consecutive pagination throughout.

- They must be index-tabbed by number or letter.

- They must begin with a table of contents listing each document by title and its index-tab number or letter.

The appellate court clerk is required to accept for filing petitions and supporting documents not in compliance with *Cal. Rules of Ct., Rule 8.486(c)*, but the court may give the petitioner notice requiring that the petition and documents be brought into compliance within a stated reasonable time of not less than five days, or the petition may be stricken or denied summarily [*Cal. Rules of Ct., Rule 8.486(c)*].

If a party seeks to seal or unseal all or a portion of the record supporting the petition, that party must follow the procedures of *Cal. Rules of Ct., Rule 8.46* [*Cal. Rules of Ct., Rule 8.486(d)*; *see Cal. Rules of Ct., Rule 8.46(e), (f)* (motions to seal, unseal records in reviewing court)]. Rule 8.46 also sets out other requirements relating to sealed records in appeals or writ proceedings in reviewing courts, including the manner of filing a sealed record in a reviewing court [*Cal. Rules of Ct., Rule 8.46(e)*], and the requirement that publically filed documents, including writ petitions and supporting and opposing papers, not disclose material contained in a sealed record or a record proposed to be sealed [*Cal. Rules of Ct., Rule 8.46(g)*]. For detailed discussion and forms relating to sealed records and proceedings in the reviewing court to seal or unseal records under Rule 8.46, see *Ch. 44, Appeal: Preparing and Filing the Record, § 44.100 et seq. and § 44.300* et seq.

[5] Points and Authorities

[a] Supporting Petition in Superior Court

Neither the Code of Civil Procedure nor the California Rules of Court expressly requires that points and authorities be filed in support of a petition in the superior court for writs of mandate or prohibition. Such a requirement may nevertheless reasonably be implied. The rules set out in Cal. Rules of Ct., Rules 3.1101 et seq., apply in proceedings on application for writs of mandate or prohibition [*see* Cal. Rules of Ct., Rule 3.1101 et seq.; *§ 358.80*]. *Cal. Rules of Ct., Rule 3.1113(a)*, requires, in turn, that a notice of motion be supported by a memorandum. A petition for a writ of mandate or prohibition may fairly be characterized as a motion, if not a notice of motion [*but see § 358.82[6][a]*]. The

definitions of a motion and order in civil actions apply to similar acts in a proceeding for a writ of mandate or prohibition [*see Code Civ. Proc. § 1064*], and under *Code Civ. Proc. § 1003*, a motion is an application for order, which, in turn, is defined as any written direction by a court not included in a judgment [*see also Code Civ. Proc. §§ 1088, 1089, 1090, 1107* (referring to petition as "motion" or "application")].

The advisability of filing points and authorities to support a petition is buttressed not only by statutory language, but also by practical considerations. A court may summarily deny an ex parte petition for an alternative writ if it appears from the face of the petition that an alternative writ will not be issued [*see Kingston v. Dept. of Motor Vehicles (1969) 271 Cal. App. 2d 549, 552, 76 Cal. Rptr. 614*]. And although the respondent and real party in interest have the right to file a memorandum of points and authorities in opposition to the petition [*Code Civ. Proc. § 1107*], a petitioner has no right to respond to the memorandum. Thus, it is the practice of counsel in many counties throughout California to file points and authorities in support of petitions sought in the superior courts.

For forms of points and authorities that may be used to support a petition for a writ of mandate or prohibition, see California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender). For discussion and a form of skeletal memorandum of points and authorities, see Ch. 417, *Points and Authorities* .

[b] Supporting Petition in Appellate Court

A memorandum in support of a petition for a writ of mandate or prohibition are required when the petition is filed in an appellate court [*Cal. Rules of Ct., Rule 8.486(a)*]. For forms of memoranda that may be used to support a petition for a writ of mandate or prohibition in an appellate court, see California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender).

[5a] Certificate of Interested Entities or Persons

If a party files a motion, an application, or an opposition to a motion or application in the Court of Appeal before filing its principal brief, the party must serve and file its Certificate of Interested Entities or Persons at the time it files the first such motion, application, or opposition and must include a copy of the certificate in the party's principal brief. If no motion, application, or opposition to such motion or application is filed before the parties file their principal briefs, each party must serve and file a certificate at the time it files its first document in the Court of Appeal. Each party must also include a copy of its certificate in its principal brief [*Cal. Rules of Ct., Rule 8.208(d)(1)*]. If the identity of any party or any entity or person subject to disclosure has not been publicly disclosed in the proceedings and a party wants to keep that identity confidential, the party may serve and file an application for permission to file its certificate under seal separately from its principal brief, motion, application, or opposition. If the application is granted, the party must file the certificate under seal and without service within 10 days of the court's order granting the application [*Cal. Rules of Ct., Rule 8.208(d)(2)*].

If a party is an entity, the certificate must list any other entity or person that the party knows has an ownership interest of 10 percent or more in the party [*Cal. Rules of Ct., Rule 8.208(e)(1)*]. All parties must also list any person or entity, other than the parties themselves, that has a financial or other interest in the outcome of the proceeding that the party reasonably believes the justices should consider in determining whether to disqualify themselves under Canon 3E of the Code of Judicial Ethics [*Cal. Rules of Ct., Rule 8.208(e)(2)*]. If the party knows of no entity or person that is required to bedisclosed under the rule, he or she must so state in the certificate [*Cal. Rules of Ct., Rule 8.208(e)(3)*]. Furthermore, if a party learns of changed or additional information that must be disclosed under *Cal. Rules of Ct., Rule 8.208*, he or she must promptly serve and file a supplemental certificate [*Cal. Rules of Ct., Rule 8.208(f)*].

For a form of the Certificate of Interested Entities or Persons--Judicial Council Form APP-008, see *Ch. 50, Appeal: Briefs, § 50.83*.

The petitioner's certificate must be included in the petition [*Cal. Rules of Ct., Rule 8.488(c)(1)*]. The certificates of the respondent and real party in interest must be included in their preliminary opposition or, if no such opposition is filed, in their return, if any. The certificate must appear after the cover and before the tables [*Cal. Rules of Ct., Rule 8.488(c)(3)*]. If a party fails to file a certificate, the clerk must notify the party by mail that the party must file the certificate within 10 days after the clerk's notice is mailed and that failure to comply may result in one of the following sanctions: (1) If the party is the petitioner, the court may strike the petition; (2) If the party is the respondent or the real party in interest, the court may strike the document [*Cal. Rules of Ct., Rule 8.488(d)*].

[6] Service of Petition

[a] In General

Code Civ. Proc. §§ 1010-1020, prescribing appropriate methods of service in civil actions, govern service of a petition for a writ of mandate or prohibition [*Code Civ. Proc. § 1107*; for general discussion and forms relating to service under *Code Civ. Proc. §§ 1010-1020*, *see* Ch. 518, *Service of Summons and Papers*]. If, however, a writ of mandate is sought under *Code Civ. Proc. § 1088.5*, service of the petition is governed by *Code Civ. Proc. §§ 411.10-417.40* [*see Code Civ. Proc. § 1107*; for discussion of *Code Civ. Proc. § 1088.5*, *see § 358.82[6][d]*; for general discussion and forms relating to service under *Code Civ. Proc. §§ 411.10-417.40*, *see* Ch. 518, *Service of Summons and Papers*].

Some superior courts prefer to conduct writ proceedings by way of the noticed-motion procedure. Under this procedure, the petitioner serves with the petition a notice of motion specifying a hearing date, the opposing party files a return, a hearing is held, and the court decides whether or not to issue a peremptory writ [*see, e.g.*, Los Angeles Co. Super. Ct. Rules, Rule 9.31(d)(1); San Diego Co. Super. Ct. Rules, Div. II, Rule 10.11; *see also Code Civ. Proc. §§ 1005, 1006* (noticed motion procedure)]. No alternative writ is sought or issued. If noticed-motion procedure is followed, the petitioner must prepare a notice of motion form to accompany the petition [for a form of notice, *see § 358.142*].

[b] Service on Board or Commission

If the real party in interest is a board or commission, service must be made on the presiding officer, or on the secretary, or on a majority of the members, of the board or commission [*Code Civ. Proc. § 1107*].

[c] Service in Unfair Competition Cases

Service of petitions filed in the Court of Appeal or Supreme Court in unfair competition cases under *Bus. & Prof. Code § 17200 et seq.* must comply with the service requirements applicable to appellate briefs under *Bus. & Prof. Code § 17209*. *Bus. & Prof. Code § 17209* requires service of each brief or petition in an unfair competition case to be made on the Attorney General and the district attorney of the county in which the action was originally filed, with such service to be made within three days of the filing the brief or petition.

For discussion and forms relating to unfair competition cases under *Bus. & Prof. Code § 17200 et seq.*, generally, see *Ch. 565, Unfair Competition, § 565.10* et seq.

[d] Timing and Proof of Service

Generally, a petition for a writ of mandate or prohibition must be accompaniedby proof of service on the respondent and real party in interest. In other words, copies of the petition must generally be served on interested parties before the petition is actually filed [*see Code Civ. Proc. § 1107*; *Cal. Rules of Ct. Rule 8.486(e)*].

A court may, however, in its discretion and for good cause, grant a petition ex parte, without notice or service of the petition on the respondent or real party in interest [*Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.486(e)*; *see also* Los Angeles Co. Super. Ct. Rules, Rule 9.31(a) (permitting petition to be filed without proof of service)].

If a petition to a superior court for a writ of mandate or prohibition does not seek an alternative writ (that is, if only a peremptory writ is sought or if the noticed motion procedure is used), the petitioner is not required to serve copies of the petition on interested parties prior to filing [*see Code Civ. Proc. §§ 1088.5* (proof of service as not required to accompany petition), 1105 (provisions governing mandate as applicable in prohibition proceedings)]. The petitioner, however, must provide proof of service before a hearing or any action by the court [*see Code Civ. Proc. § 1088.5*].

Courts of appeal and the Supreme Court may permit the filing of a petition accompanied by a defective proof of service, provided that the petitioner files a proper proof of service within five days after the clerk gives notice of the defective proof of service [*Cal. Rules of Ct., Rule 8.486(e)* (permitting striking of the petition and lesser sanctions if the improper proof of service is not remedied within five-day period)].

In addition to complying with *Cal. Rules of Ct., Rule 8.25*, the proof of service must give the telephone number of each attorney served [*Cal. Rules of Ct., Rule 8.486(e)*]. Although there is no similar express requirement for proofs of service filed in superior court, it is good practice to identify which attorney represents which party.

[7] Filing Petition

A petitioner should not delay in filing the petition for a writ of mandate or prohibition. The real party in interest or respondent may be able to assert a defense to the petition based on laches or on the lapse of a limitation period [*see Peterson v. Superior Court (1982) 31 Cal. 3d 147, 163-164, 181 Cal. Rptr. 784, 642 P.2d 1305* ; § 358.63]. Furthermore, when a statute authorizes the petition of writ to review a particular court order, the petition may be subject to strict time limitations [*see § 358.32[12]*].

If the petition challenges a judicial ruling, and there is no other statutory time limit, the petition may be denied as untimely if it is not filed within 60 days after the entry of the order of which review is sought [*see Popelka, Allard, McCowan & Jones v. Superior Court (1980) 107 Cal. App. 3d 496, 499 165 Cal. Rptr. 748* (filing beyond that time as untimely by analogy to period for filing notice of appeal); *but see Peterson v. Superior Court (1982) 31 Cal. 3d 147, 163, 181 Cal. Rptr. 784, 642 P.2d 1305* (laches as requiring actual prejudice to real party, in addition to unreasonable delay)]. However, absent an applicable statute, courts have discretion to hear a writ petition filed beyond the judicially imposed 60-day limit [*Bob Parrett Constr., Inc. v. Superior Court (2006) 140 Cal. App. 4th 1180, 1185, 45 Cal. Rptr. 3d 250]* .

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§ 358.83 Notice to Parties If Peremptory Writ Sought in First Instance

A petitioner who intends to seek a peremptory writ in the first instance in the superior court must provide at least 10 days' notice to the parties. With the notice, a copy of the petition must be served on each person against whom the writ is sought [*Code Civ. Proc. § 1088*].

In *Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 203 Cal. Rptr. 626, 681 P.2d 893* , the California Supreme Court held that a peremptory writ may not be issued by an appellate court in the first instance unless the respondent and real party in interest have "due notice" that the procedure is being considered, or at least requested, and have either filed a response on the merits or been given the opportunity to do so [*Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 176, 203 Cal. Rptr. 626, 681 P.2d 893*]. The parties adversely affected by the writ must receive 10 days' notice, from the petitioner or from the court, that the issuance of such a writ in the first instance is being sought or considered [*Code Civ. Proc. §§ 1088, 1105*; *Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 180, 203 Cal. Rptr. 626, 681 P.2d 893*].

Unless there are exceptional circumstances, the reviewing court is required to receive or solicit opposition from the party or parties adversely affected by issuance of the writ [*see Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 180, 203 Cal. Rptr. 626, 681 P.2d 893*]. Opposition from the party adversely affected, if any, will enable to the court to determine whether it is proper to grant a peremptory writ. While the court must solicit opposition, it need not permit opposition in the form of oral argument, given the urgent and exceptional circumstances in which the peremptory writ procedure is typically utilized [*see Lewis v. Superior Court (1999) 19 Cal. 4th 1232, 1252-1253, 82 Cal. Rptr. 2d 85, 970 P.2d 872*].

If the opposition presents any reasonable argument that the applicable law is unsettled or does not govern the precise issue presented in light of the particular undisputed facts, or if the application of legal principles set out in various sources of law might lead to different results and there is no compelling need for an expedited decision, the court must follow the usual writ procedure and issue an alternative writ or order to show cause [*Lewis v. Superior Court (1999) 19 Cal. 4th 1232, 1261, 82 Cal. Rptr. 2d 85, 970 P.2d 872* ; *Kernes v. Superior Court (2000) 77 Cal. App. 4th 525, 530, 91 Cal. Rptr. 2d 765*].

It is unclear whether a petition that merely states in the prayer of the petition a request for a peremptory writ in the first instance satisfies the *Palma* notice requirement [*see* *Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 177, 179, 203 Cal. Rptr. 626, 681 P.2d 893* (because petitioner's prayer did not seek peremptory writ in first instance, Supreme Court did not directly address issue of whether prayer seeking such writ would provide adequate notice); *see also* *City of Santa Cruz v. Superior Court (1987) 190 Cal. App. 3d 1669, 1675, 236 Cal. Rptr. 155* (seemingly finding notice adequate because petitioner prayed for peremptory writ in first instance, real party in interest was duly served with petition, and real party in interest filed opposition)].

Apparently, it is common practice for appellate courts to assume responsibility for providing *Palma* notice [*see, e.g.,* Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 4th App. Dist., Rule 3 (Division One, Fourth Appellate District; court notifies parties by telephone and confirmation letter of possibility of peremptory writ in first instance); *Swaithes v. Superior Court (1989) 212 Cal. App. 3d 1082, 1089-1090, 261 Cal. Rptr. 41* ; *Trailmobile, Inc. v. Superior Court (1989) 210 Cal. App. 3d 1451, 1458, 259 Cal. Rptr. 100* ; *see also* *Nissan Motor Corp. v. Superior Court (1989) 212 Cal. App. 3d 980, 981, 261 Cal. Rptr. 80* (court provided *Palma* notice and requested opposition in letter to opposing parties)].

An appellate court may issue a "suggestive" *Palma* notice whereby the court provides notice that the court intends to issue a peremptory writ in the first instance granting the relief requested by the petitioner; a discussion of the merits of the writ petition, with a suggestion that the trial court erred in the manner claimed by the petitioner; a specific grant to the trial court of "power and jurisdiction" to change the disputed interim order and enter in its place a new order consistent with the views of the appellate court, in which event the writ petition will be vacated as moot; and a solicitation of opposition to the issuance of a peremptory writ in the first instance, should the trial court elect not to follow the appellate court's recommendation [*Brown, Winfield & Canzoneri, Inc. v. Superior Court (2010) 2010 Cal. LEXIS 588, **2-3]* . If a trial court decides on its own motion to revisit its interim ruling in response to a suggestive *Palma* notice, that court must inform the parties of its intent to do so, and provide them with an opportunity to be heard [*Brown, Winfield & Canzoneri, Inc. v. Superior Court (2010) 47 Cal. 4th 1233, 2010 Cal. LEXIS 588, **2-35]* .

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§ 358.84 Preliminary Opposition to Petition

[1] If Petition Filed in Superior Court

If the petition is filed in the superior court, the respondent, the real party in interest, or both, may file with the court and serve on the petitioner a memorandum of points and authorities in opposition to the granting of the writ within five days after being served with the petition [*Code Civ. Proc. § 1107*]. If, however, the petition is one for a writ of mandate filed under *Code Civ. Proc § 1088.5* [*see § 358.82[6][d]*], the respondent must answer or otherwise respond to the petition within 30 days after service of the petition so long as a record of the proceedings to be reviewed has been filed with the petition or when no record is required. Otherwise, the party on whom the petition has been served, including any real party in interest, must answer or otherwise respond within 30 days following receipt of a copy of the record [*see Code Civ. Proc. § 1089.5*].

The five-day time period granted to the respondent and real party in interest has been held to be jurisdictional in the superior court; a judgment directing the issuance of an alternative writ may be reversed when the trial court fails to afford the respondent or the real party in interest the five days to file points and authorities in opposition to the petition as required by *Code Civ. Proc. § 1107* [*see City of Culver City v. State Bd. of Equalization (1972) 29 Cal. App. 3d 404, 412, 105 Cal. Rptr. 602* (mandate proceeding)].

[2] If Petition Filed in Appellate Court

If the petition is filed in an appellate court, the respondent or any real party in interest, separately or jointly, may serve and file a preliminary opposition within 10 days after the petition is filed [*Cal. Rules of Ct., Rule 8.487(a)(1)*]. An opposition mustcontain a memorandum and a statement of any material fact not included in the petition [*Cal. Rules of Ct., Rule 8.487(a)(2)*]. Within 10 days after an opposition is filed, the petitioner may serve and file a reply [*Cal. Rules of Ct., Rule 8.487(a)(3)*].

In addition, if a party files a motion, an application, or an opposition to a motion or application before filing its principal brief, the party must serve and file a Certificate of Interested Entities or Persons at the time it files the first such motion, application, or opposition and must include a copy of this certificate in the party's principal brief. If no motion,

application, or opposition to such motion or application is filed before the parties file their principal briefs, each party must serve and file a certificate at the time it files its first document in the Court of Appeal [*Cal. Rules of Ct., Rule 8.208(d)*]. If the identity of any party or any entity or person subject to disclosure has not been publicly disclosed in the proceedings and a party wants to keep that identity confidential, the party may serve and file an application for permission to file its certificate under seal separately from its principal brief, motion, application, or opposition. If the application is granted, the party must file the certificate under seal and without service within 10 days of the court's order granting the application [*Cal. Rules of Ct., Rule 8.208(d)(2)*].

If a party is an entity, the certificate must list any person or entity, other than the parties themselves, that the party knows has an ownership interest of 10 percent or more in the party [*Cal. Rules of Ct., Rule 8.208(e)(1)*]. All parties must also list any other person or entity that has a financial or other interest in the outcome of the proceeding that the party reasonably believes the justices should consider in determining whether to disqualify themselves under Canon 3E of the Code of Judicial Ethics [*Cal. Rules of Ct., Rule 8.208(e)(2)*]. If the party knows of no entity or person that is required to be disclosed under the rule, he or she must so state in the certificate [*Cal. Rules of Ct., Rule 8.208(e)(3)*]. Furthermore, if a party learns of changed or additional information that must be disclosed under *Cal. Rules of Ct., Rule 8.208*, he or she must promptly serve and file a supplemental certificate [*Cal. Rules of Ct., Rule 8.208(f)*]. The certificates of the respondent and real party in interest must be included in their preliminary opposition or, if no such opposition is filed, in their return, if any. The certificate must appear after the cover and before the tables [*Cal. Rules of Ct., Rule 8.488(c)*].

For a form of the Certificate of Interested Entities or Persons--Judicial Council Form APP-008, see *Ch. 50, Appeal: Briefs, § 50.83*.

The court has discretion to grant or deny a request for temporary stay, deny the petition, issue an alternative writ or order to show cause, or notify the parties that it is considering issuing a peremptory writ in the first instance, without requesting opposition or waiting for a reply [*Cal. Rules of Ct., Rule 8.487(a)(4)*].

If the respondent and real party in interest, if any, have received *Palma* notice from the petitioner or the court [*see § 358.83*], it is in the interest of the party opposing the writ to provide as detailed a preliminary opposition as possible, raising all matters that might be raised in a demurrer or answer. At least 10 days after *Palma* notice is provided, the court may issue a peremptory writ without having issued an alternative writ and without having waited for a full-scale return [*Code Civ. Proc. §§ 1088, 1105*; *see Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 178, 203 Cal. Rptr. 626, 681 P.2d 893*]. Thus, if *Palma* notice is provided, the preliminary opposition may be the respondent's or real party in interest's only opportunity to block issuance of the writ [*see Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 178, 180, 203 Cal. Rptr. 626, 681 P.2d 893*].

In order to encourage full review of the issue presented and to preserve for later review the issue of the propriety of using the expedited writ process, the opposing party should also raise in its preliminary opposition any reasons the court should not grant expedited relief by issuing a peremptory writ in the first instance [*see Alexander v. Superior Court (1993) 5 Cal. 4th 1218, 1223, 23 Cal. Rptr. 2d 397, 859 P.2d 96*].

An appellate court may issue a "suggestive" *Palma* notice whereby the court provides notice that the court intends to issue a peremptory writ in the first instance granting the relief requested by the petitioner; a discussion of the merits of the writ petition, with a suggestion that the trial court erred in the manner claimed by the petitioner; a specific grant to the trial court of "power and jurisdiction" to change the disputed interim order and enter in its place a new order consistent with the views of the appellate court, in which event the writ petition will be vacated as moot; and a solicitation of opposition to the issuance of a peremptory writ in the first instance, should the trial court elect not to follow the appellate court's recommendation [*Brown, Winfield & Canzoneri, Inc. v. Superior Court (2010) 2010 Cal. LEXIS 588, **2-3]* . If a trial court decides on its own motion to revisit its interim ruling in response to a suggestive *Palma* notice, that court must inform the parties of its intent to do so, and provide them with an opportunity to be heard

[*Brown, Winfield & Canzoneri, Inc. v. Superior Court (2010) 47 Cal. 4th 1233, 2010 Cal. LEXIS 588, **2-35]* .

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§ 358.85 Return to Writ by Demurrer or Answer

[1] In General

A party on whom an alternative writ or notice of motion has been served may make a return by demurrer, verified answer, or both [*see Code Civ. Proc. §§ 1089, 1105*]. A return must be in the form of a demurrer or verified answer, not a memorandum of points and authorities in opposition to the petition; otherwise, all facts pleaded in the petition are accepted as true [*Caliber Bodyworks, Inc. v. Superior Court (2005) 134 Cal. App. 4th 365, 372 n.5, 36 Cal. Rptr. 3d 31*]. In an appellate court, if the court issues an alternative writ or order to show cause, then the respondent or real party in interest, or both, separately or jointly, may make a return by demurrer, by verified answer, or by both [*Cal. Rules of Ct., Rule 8.487(b)(1)*].

The demurrer asserts that the petition for writ fails to state a claim on which relief may be granted. If a demurrer and answer both allege only that issues of law preclude the relief requested, there is no need to consider the demurrer and answer separately [*StorMedia Inc. v. Superior Court (1999) 20 Cal. 4th 449, 455, n.7, 84 Cal. Rptr. 2d 843, 976 P.2d 214*].

For forms of answer and demurrer to a petition for an extraordinary writ, see *§ 358.144* and *§ 358.145*.

[2] Verification of Answer

An answer by the respondent or real party in interest must be verified [*Code Civ. Proc. §§ 1089, 1105*; *Cal. Rules of Ct., Rule 8.487(b)(1)*]. When an unverified opposition contains new or different facts not contained in the verified petition or the record, those facts will be ignored [*Motion Picture & Television Fund Hosp. v. Superior Court (2001) 88 Cal. App. 4th 488, 492, 105 Cal. Rptr. 2d 872*]. For discussion of the verification requirement in mandate and prohibition proceedings, see *§ 358.82[3]*.

[3] Time to Make Return

If the court issues an alternative writ, the return must be made on or before the date specified in the writ [*see Code Civ.*

Proc. §§ 1089, 1105]. If local rules allow the determination of writ relief on noticed motion [*see § 358.82[6][a]*], and such procedure is followed, then the return generally must be made before the datescheduled for the hearing [*see Code Civ. Proc. §§ 1089, 1105*].

If a petition for a writ of mandate or prohibition, not seeking an alternative writ, is filed in a trial court pursuant to *Code Civ. Proc. § 1088.5*, without proof of prior service of a copy of the petition, the respondent must answer or otherwise respond within 30 days after service of the petition if a record of the proceeding to be reviewed has been filed with the petition or if no record of a proceeding is required. If, however, a record of the proceeding to be reviewed has been requested pursuant to *Gov. Code § 11523* or otherwise, and has not been filed with the petition, the party on whom the petition has been served, including any real party in interest, must answer or otherwise respond within 30 days after receiving a copy of the record [*Code Civ. Proc. §§ 1089.5, 1105*].

If the proceeding is in an appellate court for an alternative writ, then the return or opposition must be served and filed within 30 days after the court issues the alternative writ or order to show cause or notifies the parties that it is considering issuing a peremptory writ in the first instance [*Cal. Rules of Ct., Rule 8.487(b)(2)*].

[4] Effect of Filing Return by Demurrer Only

If the return is by demurrer alone and the demurrer is overruled, the overruling court may allow an answer to be filed within such time as it may designate [*Code Civ. Proc. §§ 1089, 1105*]. The overruling court, however, may also refuse to allow the filing of an answer, in which case it may issue a peremptory writ without leave to answer [*Rhyne v. Municipal Court (1980) 113 Cal. App. 3d 807, 819, 170 Cal. Rptr 312* (discretion of superior court to refuse filing of answer); *Cal. Rules of Ct., Rule 8.487(b)(4)* (discretion of appellate court to refuse filing of answer)]. It is good practice to file an answer with a demurrer to avoid the possibility that a demurrer filed alone will be overruled without leave to file an answer.

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§ 358.86 Replication

Code Civ. Proc. § 1091 provides that, on the trial, the petitioner is not precluded by the return from any valid objection to its sufficiency; the return may be countervailed by either direct proof or proof by way of avoidance. This provision has been interpreted to permit a replication denying the affirmative averments of the answer in addition to controverting them at the hearing [*see Lotus Car Ltd. v. Municipal Court (1968) 263 Cal. App. 2d 264, 268, 69 Cal. Rptr. 384* (mandate proceeding); *Day v. City of Los Angeles (1961) 189 Cal. App. 2d 415, 418, 11 Cal. Rptr. 325* (mandate proceeding)]. *Code Civ. Proc. § 1091* applies to prohibition proceedings as well as mandate proceedings [*see Code Civ. Proc. § 1105*].

For a form of replication, see *§ 358.146*.

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§ 358.87 Determination of Petition

[1] Initial Grant or Denial

If the court grants the petition, it may issue either an alternative writ or a peremptory writ [*see Code Civ. Proc. §§ 1087* (mandate), 1104 (prohibition)]. A peremptory writ may be issued in the first instance only on satisfaction of certain procedural requirements [*see § 358.83*]. More commonly, courts granting a petition will issue an alternative writ, which is essentially an order to show cause at some later hearing why a specified act should not be absolutely compelled or enjoined [*see Code Civ. Proc. §§ 1087* (mandate), 1104 (prohibition)]. In an appellate court, the issuance of the alternative writ, or order to show cause, is a necessary prerequisite both for setting the matter for oral argument and for issuing a written opinion in the matter [*Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 228, n.2, 45 Cal. Rptr. 2d 207, 902 P.2d 225*].

The court may of course deny the petition summarily, whenever the petition fails to satisfy the requirements for issuance of a writ. Thus, a court may summarily deny a petition for an alternative writ, even though the respondent has not appeared by answer or demurrer, if it appears from the face of the petition that a peremptory writ will not be issued [*Kingston v. Dept. of Motor Vehicles (1969) 271 Cal. App. 2d 549, 552, 76 Cal. Rptr. 614* (mandate proceeding)]. Summary denial of a petition is neither precedent nor res judicata [*see People v. Medina (1972) 6 Cal. 3d 484, 490-492, 99 Cal. Rptr. 630, 492 P.2d 686* (prohibition proceeding); *De Bottari v. Melendez (1975) 44 Cal. App. 3d 910, 914, n.3, 119 Cal. Rptr. 256* (mandate proceeding); *see also § 358.65*], and it does not establish the law of the case, regardless of whether the denial is intended to be on the merits or is based on some other reason [*Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal. 4th 180, 200-201, 25 Cal. Rptr. 3d 298* (rejecting argument that court of appeal's summary denial of defendants' earlier petition for writ of supersedeas seeking a stay pending appeal was law of the case); *Kowis v. Howard (1992) 3 Cal. 4th 888, 899, 12 Cal. Rptr. 2d 728, 838 P.2d 250* (discrediting and rejecting long-standing "sole possible ground" exception, and disapproving the one case that applied the rule and the many cases that contain dicta implying the existence of the exception, including *Hagan v. Superior Court (1962) 57 Cal. 2d 767, 770, 22 Cal. Rptr. 206, 371 P.2d 982*)].

[2] On Demurrer

A showing on demurrer that the petition for writ does not state facts sufficient to justify relief is a complete answer to the petition, and the court is warranted in discharging the order to show cause and dismissing the proceeding [*StorMedia Inc. v. Superior Court (1999) 20 Cal. 4th 449, 455, n.7, 84 Cal. Rptr. 2d 843, 976 P.2d 214*].

[3] Motion for Judgment on Peremptory Writ

If a petition that does not seek an alternative writ is filed pursuant to *Code Civ. Proc. § 1088.5* and presents no triable issue of fact or is based solely on an administrative record, the matter may be determined by the court by noticed motion of any party for a judgment on the peremptory writ [*Code Civ. Proc. § 1094*; *see Code Civ. Proc. § 1105*]. For forms of noticed motion and judgment, see *§ 358.152* and *§ 358.153, below* .

[4] Factual Hearing by Jury or Court

[a] Trial of Factual Questions

If a return is made raising a question of fact essential to the determination of thepetition that affects the substantial rights of the parties, and on the supposed truth of which the petition is based, the court has discretion to order the question be tried before a jury. It may then postpone a hearing on the petition until the trial of the factual question occurs [*Code Civ. Proc. § 1090*; *see Code Civ. Proc. § 1105*].

[b] Factual Hearing in Mandate Proceeding

If a question of fact is raised by an answer to a petition for writ of mandate, the matter is heard in the same manner as any other trial [*Lotus Car Ltd. v. Municipal Court (1968) 263 Cal. App. 2d 264, 268, 69 Cal. Rptr. 384* ; *Lassen v. City of Alameda (1957) 150 Cal. App. 2d 44, 48, 309 P.2d 520*]. In a law and motion evidentiary hearing in the trial court, the court has the discretion to decide a writ of mandate petition on the basis of declarations and other documents, as well as oral testimony [*California School Employees Assn. v. Del Norte County Unified Sch. Dist. (1992) 2 Cal. App. 4th 1396, 1405, 4 Cal. Rptr. 2d 35* ; *see also § 358.82[4][a]*].

Trial courts have the discretionary power in mandate proceedings to try controverted factual questions of an essential nature before a jury [*McDonough v. Garrison (1945) 68 Cal. App. 2d 318, 322, 156 P.2d 983* ; *see Code Civ. Proc. § 1290*]. There is no discretion to deny a hearing, however, if a petitioner presents a factual issue that, if determined favorably, would require the entry of judgment; the petitioner is entitled as a matter of right to a trial by either the court or, in the court's discretion, by a jury [*English v. City of Long Beach (1952) 114 Cal. App. 2d 311, 316, 250 P.2d 298*].

Thus, if a trial court must review an administrative proceeding in determining whether or not a peremptory writ of mandate should issue, it is clearly not limited to reviewing the administrative record alone. Unlike proceedings for administrative mandate under *Code Civ. Proc. § 1094.5*, it may receive additional evidence at the hearing [*see No Oil, Inc. v. City of Los Angeles (1974) 13 Cal. 3d 68, 79, n.6, 118 Cal. Rptr. 34, 529 P.2d 66* ; *City of Pasadena v. State of California (1993) 14 Cal. App. 4th 810, 821, 17 Cal. Rptr. 2d 766*].

There are limitations, however. Extra-record evidence is generally not admissible when a quasi-legislative administrative decision is challenged in a traditional mandamus action [*Golden Drugs Co. v. Maxwell-Jolly (2009) 179 Cal. App. 4th 1455, 1468-1469, 102 Cal. Rptr. 3d 446* ; *Western States Petroleum Assn. v. South Coast Air Quality (2006) 136 Cal. App. 4th 1012, 1024-1025, 39 Cal. Rptr. 3d 354*]; but extra-record evidence is admissible in challenging ministerial or informal administrative actions [*SN Sands Corp. v. City & County of San Francisco (2008) 167 Cal. App. 4th 185, 194, 83 Cal. Rptr. 3d 885*]. A narrowly construed exception to inadmissibility in challenges to quasi-legislative administrative decisions applies in the following situation [*Western States Petroleum Assn. v. Superior Court (1995) 9 Cal. 4th 559, 576-578, 38 Cal. Rptr. 2d 139, 888 P.2d 1268*]:

- If the evidence in question existed before the agency made its decision; and

- It was not possible in the exercise of reasonable diligence to present this evidence to the agency before it made its decision.

An appellate court may not hold a factual hearing under *Code Civ. Proc. § 1090*; that section provides for the trial of factual issues by jury, a provision that is singularly inappropriate for appellate courts [*Mooney v. Pickett (1971) 4 Cal. 3d 669, 682-683, 94 Cal. Rptr. 279, 483 P.2d 1231*]. Since most petitions for writs of mandate that invoke the original jurisdiction of the appellate courts are presented either on a demurrer or on a stipulation of the relevant facts, cases in which a question of fact is raised by the answer are rare. In the few cases in which a genuine factual issue is raised by the answer [*see Reber v. Superior Court (1961) 189 Cal. App.2d 622, 624, 11 Cal. Rptr. 534* (holding there was no genuine factual issue requiring a trial under *Code Civ. Proc. § 1090*)], it is possible for the appellate court to refer the question to a trial court for determination [*Mash v. Superior Court (1923) 192 Cal. 258, 259, 219 P. 742*]. It would also be possible for an appellate court to refer the question to a referee [*see Code Civ. Proc. § 639* (grounds for court appointment of referee); for discussion relating to the appointment of referees generally, *see* Ch. 38, *Reference*].

[c] Factual Hearing Generally Unnecessary in Prohibition Proceeding

Factual issues to be resolved by a jury seldom arise in prohibition proceedings, since prohibition primarily involves a legal question of a lack or excess of jurisdiction, not factual questions for resolution by a jury [*see Code Civ. Proc. § 1102*].

[d] Order for Jury Trial

If the court decides to try the issue before a jury, the question to be tried must be distinctly stated in the order for trial and the county must be designated in which the trial is to be held [*Code Civ. Proc. § 1090*; *see Code Civ. Proc. § 1105*].

[e] Countervailing the Return at Trial

At the trial, the petitioner is not precluded from making any valid objection to the sufficiency of the return. The return may be countervailed by proof either in direct denial of it or by way of avoidance [*Code Civ. Proc. § 1091*; *see Code Civ. Proc. § 1105*]. Hence, the petitioner can file a replication denying the affirmative allegations of the answer or can controvert them by proof presented at the hearing [*see Lotus Car Ltd. v. Municipal Court (1968) 263 Cal. App. 2d 264, 268, 69 Cal. Rptr. 384* (mandate proceeding); for a form of replication, *see § 358.146*].

[f] Burden of Proof

The burden of proof in a mandate proceeding is on the petitioner to prove every foundational fact except such allegations as are admitted by the answer [*Lotus Car Ltd. v. Municipal Court (1968) 263 Cal. App. 2d 264, 270, 69 Cal. Rptr. 384*]. If the petitioner presents a prima facie case or if the petition contains a presumption, however, the burden of proof shifts [*Lotus Car Ltd. v. Municipal Court (1968) 263 Cal. App. 2d 264, 270, 271, 69 Cal. Rptr. 384*].

A petitioner who seeks a writ of prohibition to restrain a lower court's action has the burden to show that the lower court's action is in excess of that court's jurisdiction [*Franklin v. Superior Court (1950) 98 Cal. App. 2d 292, 294, 220 P.2d 8*].

[g] Motion for New Trial

A party who is aggrieved by a judgment involving a writ of mandate or prohibition may move for a new trial [*see Code Civ. Proc. §§ 1092, 1105, 1110*]. A motion for anew trial must be made in the court in which the issue of fact was tried [*Code Civ. Proc. §§ 1092, 1105*]. For discussion and forms relating to motions after trial generally, see Ch. 371,

Motions After Trial, § 357.60 et seq.

[h] Certifying the Verdict

If no notice of a motion for a new trial is given or if the motion is denied, then within five days after rendition of the verdict or denial of the motion, the clerk must transmit a certified copy of the verdict attached to the order of trial to the court in which the application for the writ is pending. After transmission of the certified verdict, either party may give reasonable notice to the adverse party and proceed to bring on the argument of the petition [*Code Civ. Proc. §§ 1093, 1105*].

[i] Statement of Decision

A statement of decision is required if requested by any party appearing to the trial. The request must be made within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day, in which event the request must be made prior to the submission of the matter for decision. The statement of decision must explain the factual and legal basis for the court's decision as to each of the principal controverted issues at trial. The request for a statement of decision must specify those controverted issues as to which the party is requesting a statement of decision [*Code Civ. Proc. § 632*].

[5] Hearing If No Return Made

[a] In General

If no return is made, the case must be heard on the papers of the petitioner. If the return raises only questions of law or puts in issue immaterial statements not affecting substantial rights of the parties, the court must proceed to hear or fix a day for hearing the argument in the case [*Code Civ. Proc. § 1094*; *see Code Civ. Proc. § 1105*].

[b] No Default Permitted

A peremptory writ of prohibition or mandate may not be granted by default. The case must be heard by the court whether or not the adverse party appears [*Code Civ. Proc. §§ 1088, 1105*].

[6] Peremptory Writ After Hearing

If a judgment is in favor of the petitioner after the hearing, a peremptory writ must be awarded without delay [*Code Civ. Proc. § 1095*; *see Code Civ. Proc. § 1105*; *but see Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 181 n.9, 203 Cal. Rptr. 626, 681 P.2d 893* (court of appeal precluded from issuing writ before judgment or order directing that writ issue has been filed and has become final)].

A decision by a court of appeal or the Supreme Court to issue a peremptory writ is a determination of a "cause" within the meaning of *Cal. Const., art. VI, § 14*. Consequently, the writ must be in writing with reasons stated [*Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 178 n.6, 203 Cal. Rptr. 626, 681 P.2d 893* ; *La Paglia v. Superior Court (1989) 215 Cal. App. 3d 1322, 1324 n.1, 264 Cal. Rptr. 63* ; *see Cal. Const., art. VI, § 14*].

[7] Service of Peremptory Writ

A peremptory writ of mandate or prohibition must be served in the same manner as a summons in a civil action except when otherwise expressly directed by order of the court. Service on a majority of the members of any board or body is considered service on the board or body, whether or not at the time of the service the board or body was in session [*Code Civ. Proc. §§ 1096, 1105*]. Service of summons in civil actions is governed by *Code Civ. Proc. §§ 413.10-417.40*. For a discussion of the requirements governing service of summons in civil actions, see Ch. 518, *Service*

of Summons and Papers .

[8] Damages and Costs After Hearing

[a] In General

If a judgment in favor of the petitioner allows the petitioner to recover the damages that the jury, court, or referee determines that petitioner has sustained, together with any costs [*Code Civ. Proc. §§ 1095, 1105*]. The term "costs" in *Code Civ. Proc. § 1095* means those fees and charges that are required by law to be paid to the courts or to some of their officers or an amount fixed by law [*Escrow Guar. Co. v. Savage (1963) 213 Cal. App. 2d 595, 597, 28 Cal. Rptr. 889* (mandate proceeding)].

[b] Execution May Issue After Hearing

Execution may issue for damages and costs incurred after hearing [*see Code Civ. Proc. §§ 1095, 1105*].

[c] Award Against Public Entity

[i] Basic Rules

In all cases in which the respondent is an officer of a public entity, all damages and costs that may be recovered or awarded must be recovered or awarded against the public entity represented by the respondent officer that appears in the proceeding. Such damages are a proper claim against the public entity for which the officer has appeared and are payable as are other claims against the public entity. In cases involving such an officer, the court must first determine that the officer appeared and made a defense in the proceeding in good faith. The term "public entity" includes the state, a county, city, district, or other public agency or public corporation; the term "officer" includes any officer, agent, or employee [*Code Civ. Proc. § 1095*; *see Code Civ. Proc § 1105*]. A court is not a "state, county, or municipal officer" within the meaning of *Code Civ. Proc. § 1095* [*McCarthy v. Superior Court (1944) 65 Cal. App. 2d 42, 43-45, 149 P.2d 871*].

[ii] Damage and Cost Rules Inapplicable in Certain Prohibition Proceedings

The provisions for both damages and costs in *Code Civ. Proc. § 1095* [*see § 358.87[8][c][i]*] do not apply to a prohibition proceeding brought against a superior court to restrain the erroneous exercise of judicial power in litigation between private individuals to which the state is not a party, in which it is in no way interested, and wherein it has no right of representation [*McCarthy v. Superior Court of SanFrancisco, (1944) 65 Cal. App. 2d 42, 43-44, 149 P.2d 871*].

[d] Award of Costs Discretionary

The awarding of costs under *Code Civ. Proc. § 1095* is subject to the court's discretion [*Kramer v. State Board of Accountancy (1962) 200 Cal. App. 2d 163, 177, 19 Cal. Rptr. 226* (mandate proceeding)].

[e] Award of Costs in Original Writ Proceeding in Appellate Court

[i] In General

Cal. Rule of Ct., Rule 8.493, governs the recovery of costs in an original writ proceeding brought in an appellate court. This rule was adopted to establish a uniform procedure for the recovery of costs in such proceedings, and is patterned after the procedure for recovering costs on civil appeals from the superior court set out in *Cal. Rules of Ct., Rule 8.278* [*cf.* discussion regarding recovery of costs on appeal in Ch. 51, *Appeal: Hearing and Decision*].

Except as otherwise specified in *Cal. Rules of Ct., Rule 8.493*, the prevailing party in the original proceeding is entitled to costs if the reviewing court resolves the original proceeding by written opinion after issuing an alternative writ, order to show cause, or peremptory writ in the first instance [*Campbell v. Superior Court (2005) 132 Cal. App. 4th 904, 922, 34 Cal. Rptr. 3d 68* (although party waived right to contest adverse trial court ruling regarding fees by failing to take cross-appeal, appellate court ruled she was entitled to costs pursuant to rules governing original proceedings in appellate court)]. The appellate court, in any case in which the interests of justice require it, may also make any award or apportionment of costs it deems proper, or, it may decline to award costs. The award or denial of costs must be provided for in the court's opinion or order on the granting or denial of the writ [*Cal. Rule of Ct., Rule 8.493(a)* (but these provisions do not apply in proceedings in which party is entitled to court-appointed counsel)].

[ii] Recoverable Items

The items recoverable as costs are those specified in *Cal. Rules of Ct., Rule 8.278* (costs on civil appeals from superior court) and may include the cost of preparing and providing the record used in the writ proceeding [*see Cal. Rules of Ct., Rule 8.493*]. For discussion regarding items recoverable as costs under Rule 8.278, see Ch. 53, *Appeal: Remittitur and Costs on Appeal, § 53.30 et seq*.

[iii] Memorandum of Costs

A party who claims costs awarded by the reviewing court must, within 40 days after the opinion of the reviewing court becomes final as to that court, serve and file in the trial court a memorandum of costs, verified as prescribed by *Cal. Rules of Ct., Rule 3.1700(a)(1)* [*see* Ch. 174, *Costs and Attorney's Fees, § 174.10 et seq.*].

[iv] Motion to Tax Costs and Enforcement of Award

A party may move to have costs taxed in the same manner and within a like time after service of a copy of the memorandum of costs, as prescribed by *Cal. Rules of Ct., Rule 3.1700(b)*. After the costs have been taxed, or after the time for taxing the costs has expired, the award of costs may be enforced in the same manner as a money judgment [*Cal. Rules of Ct., Rule 8.493*; *cf.* similar provision for costs on appeal in Ch. 53, *Appeal: Remittitur and Costs on Appeal*]. For forms and discussion relating to proceedings to tax costs under *Cal. Rules of Ct. Rule 3.1700(b)*, see Ch. 174, *Costs and Attorney's Fees, § 174.10 et seq.* For forms and discussion relating to the enforcement of money judgments, see Ch. 254, *Executions and Enforcement of Judgments, § 254.40 et seq.*

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§ 358.88 Notification of Issuance of Writ or Order

If a writ or order issues from an appellate court that is directed to any judge, court, board, or other officer, the clerk of the reviewing court must promptly send a certified copy of the writ or order to the entity or person to whom it is addressed [*Cal. Rules of Ct., Rule 8.489(a)*].

If the writ or order stays or prohibits proceedings scheduled to occur within seven days of its issuance, or if it requires that action be taken by the respondent within seven days, or in any other urgent situation, the clerk of the reviewing court must make a reasonable effort to give telephone notice to the clerk of the respondent court. The clerk of the respondent court must then notify the judge or other officer most directly concerned. Telephone notice of the summary denial of a writ is not required, whether or not a stay was previously issued [*Cal. Rules of Ct., Rule 8.489(b)*].

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§ 358.89 Finality of Writ or Order Issued by Reviewing Court

A decision in an original writ proceeding in a reviewing court is filed with the clerk, who then transmits copies of the decision to the lower court or tribunal and to the parties [*Cal. Rules of Ct., Rules 8.264(a), 8.532(a)*].

A decision of a court of appeal becomes final as to that court 30 days after filing. The decision becomes final as to that court immediately after filing upon the denial of a writ of supersedeas [*Cal. Rules of Ct., Rule 8.264(b)(2)*].

A decision of the Supreme Court becomes final 30 days after filing unless the court orders a shorter time or, prior to the expiration of the 30-day period or any extension, orders one or more additional periods not to exceed a total of 60 additional days [*Cal. Rules of Ct., Rule 8.532(b)(1)*].

For further discussion of the rules relating to finality of decisions in reviewing courts generally, and related discussion and forms regarding rehearing or modification, see respectively Ch. 51, *Appeal: Hearing and Decision* , and Ch. 52, *Appeal: Rehearing* .

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§ 358.90 Appellate Review of Grant or Denial of Writ Petition

[1] In General

Even if no final judgment has been entered, an order granting or denying a petition for a writ of mandate or prohibition is generally appealable [*see Charles S. v. Board of Education (1971) 20 Cal. App. 3d 83, 87, 97 Cal. Rptr. 422 , appeal denied, 405 U.S. 1005 (1972)* (mandate proceeding); *Daggs v. Personnel Commission (1969) 1 Cal.App. 3d 925, 930, 82 Cal. Rptr. 157* (mandate proceeding); *see also Save the Welwood Murray Memorial Library Com. v. City Council (1989) 215 Cal. App. 3d 1003, 1011, 263 Cal. Rptr. 896* (appeal lies from judgment directing issuance of writ; peremptory writ itself is not appealable)].

If an order granting or denying a petition for writ of mandate or prohibition is appealable, the proper procedure is to appeal from that order, rather than pursue another writ in the higher court [*see Lambert v. Municipal Court (1959) 174 Cal. App. 2d 601, 602, 345 P.2d 98* (order denying petition for writ of prohibition)]. The higher court may nevertheless review such an order by means of another petition, rather than on appeal, in exceptional cases in which an appeal would not be an adequate remedy. For example, since a writ of prohibition lies to restrain the issuance of court orders based on unconstitutional statutes, an appellate court is justified in deciding that an appeal is not a speedy or adequate remedy by which to determine important constitutional issues [*Mihans v. Municipal Court (1970) 7 Cal. App. 3d 479, 483, 87 Cal. Rptr. 17* (whether an appeal is a speedy or adequate remedy in a given case is a question for the appellate court)].

In some instances, however, review by appeal is not an option. An appeal may not be taken from a judgment of the appellate division of a superior court granting or denying a petition for issuance of a writ of mandamus or prohibition directed to the superior court, or a judge of the superior court, in a limited civil case or a misdemeanor or infraction case [*Code Civ. Proc. § 904.1*]. If an order is not appealable under these circumstances, an appellate court has discretion to review the order on a petition to that court for an extraordinary writ [*Code Civ. Proc. § 904.1*; *see also Nassif v. Municipal Court (1989) 214 Cal. App. 3d 1294, 1297, 263 Cal. Rptr. 195* ; *Shortridge v. Municipal Court (1984) 151 Cal. App. 3d 611, 615, 198 Cal. Rptr. 749*].

A petition for a writ of mandate or prohibition is a special proceeding and, as such, any order that is the final

determination of the rights of the parties is a "judgment" [*Code Civ. Proc. §§ 1064, 1084-1105*]. Courts of appeal will hear appeals from the denial of, the sustaining of, and a demurrer to petitions for the writs even though other causes of action remain undetermined [*Elmore v. Imperial Irrigation Dist. (1984) 159 Cal. App. 3d 185, 190-192, 205 Cal. Rptr. 433* (appeal from denial of mandate petition while actions for damages and injunctive relief pending); *California Teachers Assn. v. Board of Education (1980) 109 Cal. App. 3d 738, 751, 167 Cal. Rptr. 429* (appeal from denial of mandate petition while actions for injunctive and declaratory relief pending)]. For example, a reviewing court may consider an appeal from a judgment granting or denying a writ of mandate even though a count seeking injunctive relief remains undecided [*Sierra Club v. County of Sonoma (1992) 6 Cal. App. 4th 1307, 1312 n. 1, 8 Cal. Rptr. 2d 473*]. It may also hear an appeal from a separate judgment severed from the plaintiff's damage claims, notwithstanding the one-judgment rule and the unresolved state of the damage claims [*Greenwood Addition Homeowners Ass'n v. City of San Marino (1993) 14 Cal. App. 4th 1360, 1366 n.4, 18 Cal. Rptr. 2d 350*].

Review of a court of appeal's granting or denial of a writ petition may be sought by filing a petition for review in the California Supreme Court [*see Cal. Rules of Ct., Rule 8.500*]. A party desiring to bring the case before the Supreme Court usually should petition for review and not file another original petition for a writof mandate or prohibition if it has already been before a court of appeal [*see* *Paige Co. of N. Cal. v. Superior Court (1924) 194 Cal. 795, 796, 231 P. 344* (prohibition proceeding)].

An order of the California Supreme Court reversing a summary denial of the court of appeal and directing issuance of an alternative writ is a determination that the petitioner is without an adequate remedy at law. It is not, however, a determination on the merits, which is left to the court of appeal [*TRW, Inc. v. Superior Court (1994) 25 Cal. App. 4th 1834, 1843 n.5, 31 Cal. Rptr. 2d 460*].

For discussion of review by the Supreme Court, see Ch. 54, *Appeal: California Supreme Court Review* .

[2] Scope of Review of Mandate Proceeding

[a] In General

The scope of appellate review in a mandate proceeding is limited to a determination of whether substantial evidence exists in the record to support the decision or order from which relief in mandate was sought [*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal. 4th 412, 427, n.4, 53 Cal. Rptr. 3d 821, 150 P.3d 709* ; *Norton v. San Bernardino City Unified School District (2008) 158 Cal. App. 4th 749, 763, 69 Cal. Rptr. 3d 917* ; *Veguez v. Governing Board of Long Beach Unified School District (2005) 127 Cal. App. 4th 406, 414, 25 Cal. Rptr. 3d 526* (review of trial court order); *American Federation of State, County & Municipal Employees v. Metropolitan Water Dist. (2005) 126 Cal. App. 4th 247, 24 Cal. Rptr. 3d 285* (upholding trial court's denial of petition for writ of mandate); *Armando D. v. State Department of Health Services (2004) 124 Cal. App. 4th 13, 15, 21 Cal. Rptr. 3d 66* (reviewing writ of mandate regarding child health and disability prevention program and termination of benefits to respondents); *Jackson v. Gourley (2003) 105 Cal. App. 4th 966, 970, 130 Cal. Rptr. 2d 72* (review of trial court order); *Taylor Bus Service, Inc. v. San Diego Bd. of Education (1987) 195 Cal. App. 3d 1331, 1340, 241 Cal. Rptr. 379* (review of administrative decision)]. All factual conflicts are resolved in favor of the prevailing party [*National Life of Florida Corp. v. Superior Court (1971) 21 Cal. App. 3d 281, 285, 98 Cal. Rptr. 435*]. Factual conflicts are resolved in favor of the trial court's express or implicit findings that are supported by substantial evidence [*City of Pasadena v. State of California (1993) 14 Cal. App. 4th 810, 821, 17 Cal. Rptr. 2d 766*].

Out of deference to the agency's authority and presumed expertise, the scope of review is limited [*Johnston v. Sonoma County Agricultural Preservation and Open Space District (2002) 100 Cal. App. 4th 973, 984, 123 Cal. Rptr. 2d 226*]. Nevertheless, an appellate court is not bound by a trial court's finding and granting of a writ if the finding was a question of law that involved the proper application of a statute or administrative regulation [*City of Fremont v. Board of Administration (1989) 214 Cal. App. 3d 1026, 1030, 263 Cal.Rptr. 164* ; *Shoban v. Board of Trustees (1969) 276*

Cal. App. 2d 534, 541, 81 Cal. Rptr. 112 ; *see* *Baker v. Aubry (1989) 216 Cal. App. 3d 1259, 1262, 265 Cal. Rptr. 381*]. If a purely legal question is involved, the reviewing court will exercise its independent judgment, notwithstanding whether the issue arises by traditional or administrative mandate [*Jackson v. Gourley (2003) 105 Cal. App. 4th 966, 970, 130 Cal. Rptr. 2d 72* (question of law whether DMV may refuse driver education certificates of completion for correspondence courses); *McIntosh v. Aubry (1993) 14 Cal. App. 4th 1576, 1584, 18 Cal. Rptr. 2d 680*].

If a petition for review is filed in the Supreme Court, after a court of appeal denies a writ of mandate relating to quashing service of summons, the time for filing a responsive pleading in the trial court under *Code Civ. Proc. § 418.10(c)* is extended until 10 days after the Supreme Court files an order denying the petition [Cal. Rules of Ct., Rule 8.49l; for discussion relating to motions to quash service of summons, *see* Ch. 323, *Jurisdiction: Personal*].

[b] Presumptions

The presumptions usually made by an appellate court in considering appeals are applicable to mandate proceedings. A judgment is presumed correct and the burden is on the appellant to show reversible error [*Jackson v. Carleson (1974) 39 Cal. App. 3d 12, 16, 113 Cal. Rptr. 890* ; *Cosgrove v. County of Sacramento (1967) 252 Cal. App. 2d 45, 50, 59 Cal. Rptr. 919*]. Similarly, an administrative action is presumed to be supported by substantial evidence, and the appellant has the burden to show that there is no substantial evidence whatsoever to support the findings of the administrative body [*Taylor Bus Service, Inc. v. San Diego Bd. of Education (1987) 195 Cal. App. 3d 1331, 1341, 241 Cal. Rptr. 379*]. The presumption that public officials have performed their duties as required by law is also applicable to an appeal from a decision in a mandate proceeding [*Cosgrove v. County of Sacramento (1967) 252 Cal. App. 2d 45, 50-51, 59 Cal. Rptr. 919*].

[3] Scope of Review of Prohibition Proceeding

The appellant from a superior court's denial of a petition for a writ of prohibition has a burden to convince the appellate court that the judgment was rendered through error. Under this rule, it is necessary for the appellant to demonstrate that the denial of the writ did not result from a failure on his or her part to support the petition by proof. In the absence of such a showing, the appellate court is bound to assume that the writ was denied for that reason, and that the evidence that was heard justified the finding of the trial court that it was not sufficient to warrant the issuance of the writ [*Jaquith v. Justice's Court (1926)77 Cal. App. 542, 548, 247 P. 224* ; *see also* *W.A. Rose Co. v. Municipal Court (1959) 176 Cal. App. 2d 67, 74, 1 Cal. Rptr. 49* ; *Ertman v. Municipal Court (1945) 68 Cal. App. 2d 143, 149, 155 P.2d 908* (on appeal from decision of trial court either granting or denying the writ of prohibition, its determination will not be disturbed in the absence of a showing of abuse of discretion)].

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§ 358.91 Enforcement of Writ

[1] Special Statutory Procedure

When a peremptory writ of mandate or prohibition has been issued and directed to any inferior tribunal, corporation, board, or person, if it appears to the court that any member of such tribunal, corporation, board, or such person on whom the writ has been personally served, has, without just excuse, refused or neglected to obey the writ, then the court may, on motion, impose a fine not exceeding $1,000. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed, and it may make any orders necessary and proper for the complete enforcement of the writ [*Code Civ. Proc. §§ 1097, 1105*]. Thus, the remedy in cases of refusal or neglect to obey a peremptory writ is in the nature of sanctions for contempt [*Carroll v. Civil Service Commission (1970) 11 Cal. App. 3d 727, 733, 90 Cal. Rptr. 128* (mandate proceeding)].

For a form of order to show cause for noncompliance with a peremptory writ, see *§ 358.151*.

[2] Contempt Proceeding

It would also be possible to enforce a peremptory writ of prohibition through a contempt proceeding since the failure to obey such a writ would constitute the disobedience of a lawful order or process of the court [*see Code Civ. Proc. § 1209(a)(5)*]. For discussion and forms concerning contempt proceedings, see Ch. 135, *Contempt* .

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[Reserved]

§§ 358.92[Reserved]

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§ 358.100 Related Matthew Bender Publications

For memoranda supporting and opposing petitions for writ of mandate or prohibition generally, see California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender)

For additional references to memoranda in supporting and opposing petitions for writs of mandate or prohibition in particular actions or fact situations, see California Points and Authorities, *Cumulative Index* (Matthew Bender)

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§ 358.101 California Constitution

Supreme Court, courts of appeal, superior courts, and their judges as having original jurisdiction in mandate and prohibition proceedings. *Cal. Const., art. VI, § 10*

Court action to enjoin or prevent collection of tax prohibited, and alternative action to recover tax claimed to have been illegally collected, with interest, as authorized. *Cal. Const., art. XIII, § 32*

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§ 358.102 State Statutes

[1] Answer to Alternative Writ

Adverse party as capable of answering by both demurrer and verified answer simultaneously. *Code Civ. Proc. §§ 1089, 1105*

[2] Answer to Petition for Peremptory Writ

Time to answer or otherwise respond to petition for peremptory writ filed pursuant to *Code Civ. Proc. § 1088.5* as dependent on whether or not record of proceedings to be reviewed is required and filed. *Code Civ. Proc. §§ 1089.5, 1105*

[3] Appeal

Appeal from writ of mandate compelling delivery of water as not staying operation of order. *Code Civ. Proc. § 1110a*

Appeal as not operating as stay of execution when irreparable damage in petitioner's business or profession would result. *Code Civ. Proc. § 1110b*

[4] Damages and Costs

Applicant as capable of recovering damages if judgment given to him or her. *Code Civ. Proc. §§ 1095, 1105*

[5] Default

Writ of mandate or prohibition as not capable of being issued by default. *Code Civ. Proc. §§ 1088, 1105*

[6] Ex Parte Writ

Ex parte granting of petition of writ as permitted. *Code Civ. Proc. § 1107*

[7] Fees

County clerk's fee for issuing writ of mandate or prohibition. *Gov. Code § 26828*

[8] Hearing

Hearing as based on papers of applicant when no return made. *Code Civ. Proc. §§ 1094, 1105*

Hearing as based on argument of parties when return either raises only questions of law or disputes only immaterial statements. *Code Civ. Proc. §§ 1094, 1105*

[9] Jurisdiction

Justices of Supreme Court and district courts of appeal as not capable of granting in chambers ex parte writ of mandate or prohibition. *Code Civ. Proc. § 165*

Any court has power to issue writ of mandate or prohibition. *Code Civ. Proc. §§ 1085(a), 1103(a)*

Supreme Court, court of appeal, and superior court as capable of issuing writ of mandate or prohibition. *Code Civ. Proc. § 1108*

[10] Jury Trial of Factual Issue

Court as capable of requiring jury trial when return raises essential factual question affecting substantial rights of parties. *Code Civ. Proc. §§ 1090, 1105*

[11] Mandate Authorized for Specific Situations

[a] Civil Service

Mandate proceeding as proper to compel appointing power to comply with decision or order of civil service board. *Gov. Code § 18710*

Failure to apply for rehearing with civil service board as not affecting right to petition court for writ of mandate based on civil service laws or administration thereof. *Gov. Code § 19588*

[b] Disqualification of Judge

Writ of mandate as sole means for review of determination relating to disqualification of judge under *Code Civ. Proc. §§ 170-170.5. Code Civ. Proc. § 170.3(d)*

[c] Food and Agriculture

Mandate procedure applicable to action or proceeding to challenge decision by Department of Food and Agriculture concerning pest eradication project. *Code Civ. Proc. § 1085.5*

[d] General Plan

Mandate proceeding as proper to review adoption or amendment of general plan. *Gov. Code § 65301.5*

Mandate proceeding as proper to challenge adequacy of general plan. *Gov. Code § 65751*

[e] Good Faith Settlement

Mandate as proper to review determination whether or not settlement involving plaintiff and one or more of joint tortfeasors or co-obligors on a contract debt was made in good faith. *Code Civ. Proc. § 877.6(e)*

[f] Lis Pendens

Writ of mandate as proper to review order granting or denying of motion to expunge notice of pendency of action concerning real property. *Code Civ. Proc. §§ 405.35, 405.39*

[g] Public Utilities

Public Utilities Commission as having authority to seek writ of mandate to compel public utility to abide by law. *Pub. Util. Code § 2102*

[h] Quashing Service

Writ of mandate as proper to require trial court to enter order quashing service of summons or staying or dismissing action. *Code Civ. Proc. § 418.10(c)*

[i] Sewer District

Sewer district bond holder as having right to petition for writ of mandate to compel district to raise rates. *Health & Safety Code § 5042*

[j] Streets and Highways

Holder of bond issued by California Toll Bridge Authority as capable of seeking writ of mandate to compel performance of duties imposed on public officials or employees under Toll Bridge Authority Act. *Sts. & Hy. Code § 30238*; *see Sts. & Hy. Code § 30050* (Toll Bridge Authority abolished in 1978; California Transportation Commission now controls bonds)

Party contracting with parking authority as capable of seeking writ of mandate to compel compliance with contract. *Sts. & Hy. Code § 33400*

Parking district bond holder as having right to bring mandate proceeding to enforce ordinance or resolution that issued

bonds. *Sts. & Hy. Code § 35417*

[k] Summary Judgment or Summary Adjudication of Issues

Mandate as proper to review order, other than entry of judgment, made in summary judgment proceeding under *Code Civ. Proc. § 437c. Code Civ. Proc. § 437c(m)(1)*

[l] Venue

Petition to court of appeal for writ of mandate as available to party aggrieved by granting or denying motion for change of venue. *Code Civ. Proc. § 400*

[m] Water

Department of Public Works as able to commence mandate proceeding to enforce Water Code provisions concerning dams. *Water Code § 6150*

Reclamation Board as capable of bringing mandate proceeding to force compliance with Water Code *§ 8700 et seq. Water Code* § 8704

Attorney General as having power to bring mandate proceeding to compel Reclamation Board to perform duties imposed by Reclamation Board Bond Act. *Water Code § 9266*

Central Valley Project bond holder as having right to petition for writ of mandate to compel performance of duties. *Water Code § 11708*

[n] Workers' Compensation

Writ of mandate from Supreme Court or court of appeal as available in proper cases to review order, rule, decision, or award of Compensation Appeals Board. *Lab. Code § 5955*

[12] Motion for Judgment on Peremptory Writ

Court as authorized to determine petition for peremptory writ of mandate or prohibition by noticed motion for judgment if petition presents no triable issue of fact or is based solely on administrative record. *Code Civ. Proc. §§ 1094, 1105*

[13] Motion for New Trial

Motion for new trial as required to be made in court that tried issue. *Code Civ. Proc. §§ 1093, 1105*

Either party as arguing on basis of verdict on factual issue after transmittal of verdict to original court and reasonable notice to adverse party. *Code Civ. Proc. §§ 1093, 1105*

[14] Notice Requirements

Alternative writ as required to be issued first if no notice to adverse party. *Code Civ. Proc. §§ 1088, 1105*

Peremptory writ as capable of being issued if notice given. *Code Civ. Proc. §§ 1088, 1105*

Petition as required to be served with notice. *Code Civ. Proc. §§ 1088, 1105*

Notice, when given, as required to be at least 10 days. *Code Civ. Proc. §§ 1088, 1105*

[15] Purpose of Writ

Writ of mandate as issued to compel performance of legally required act and admission of excluded party to right or office. *Code Civ. Proc. § 1085(a)*

Writ of prohibition as issued to arrest proceedings of any tribunal, corporation, board, or person exercising judicial functions when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person. *Code Civ. Proc. § 1102*

[16] Refusal to Obey Writ

Person refusing or neglecting to obey peremptory writ as subject to fine or, when refusal is persistent, to imprisonment. *Code Civ. Proc. §§ 1097, 1105*

[17] Replication

Return as not precluding applicant from valid objection to its sufficiency. *Code Civ. Proc. §§ 1091, 1105*

[18] Requirements for Issuing Writ

Writ as issued when plain, speedy, and adequate remedy in ordinary course of law not available. *Code Civ. Proc. §§ 1086, 1103*

Writ as issued on verified petition of party beneficially interested. *Code Civ. Proc. §§ 1086, 1103(a)*

[19] Service of Petition

In trial court, if no alternative writ is sought, proof of service of petition as not required to accompany application when filed, but proof of service as required to be lodged with court prior to hearing or action by court. *Code Civ. Proc. § 1088.5*

Proof of service of copy of petition for alternative writ as required to be filed with application. *Code Civ. Proc. § 1107*

If only peremptory writ of mandate is sought pursuant to *Code Civ. Proc. § 1088.5*, action as permitted to be filed and served in same manner as ordinary action. *Code Civ. Proc. § 1107*; *see Code Civ. Proc. §§ 411.10-417.40*

[20] Service of Writ

Issuance and service of writ of prohibition as permitted on any day, including holidays. *Code Civ. Proc. § 134(b)*

Service of writ as in same manner as summons in civil action. *Code Civ. Proc. §§ 1096, 1105*

[21] Taxation

Writ of mandate not allowed to prevent assessment or collection of tax. *Rev. & Tax. Code §§ 4807* (property tax), 6931 (sales and use tax), 19381 (personal income, bank and corporate taxes), 32411 (alcoholic beverage tax)

Franchise Tax Board as able to petition court for writ of mandate to require taxpayer to file tax return if taxpayer fails to file return within 60 days after Board issues notice and demand for return. *Rev. & Tax. Code § 19710*

[22] Types of Writ

Alternative writ as requiring party to do act or show cause why act not done. *Code Civ. Proc. §§ 1087, 1105*

Peremptory writ as requiring party to do act. *Code Civ. Proc. §§ 1087, 1105*

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§ 358.103 California Rules of Court

Certificate of Interested Entities or Persons. *Cal. Rules of Ct., Rule 8.208*

Color of cover of petition for original writ filed in reviewing court or answer (opposition) to writ petition as required so far as practicable to be red. *Cal. Rules of Ct., Rule 8.40(b)*

Petitions to reviewing courts for writ. *Cal. Rules of Ct., Rule 8.486*

Opposition and attorney general amicus briefs. *Cal. Rules of Ct., Rule 8.487*

Certificate of Interested Entities or Persons. *Cal. Rules of Ct., Rule 8.488*

Notice to trial court. *Cal. Rules of Ct., Rule 8.489*

Filing, finality, and modification of decisions; remittitur. *Cal. Rules of Ct., Rule 8.490*

Sanctions. *Cal. Rules of Ct., Rule 8.492*

Costs. *Cal. Rules of Ct., Rule 8.493*

Civil law and motion rules (*Cal. Rules of Ct., Rules 3.1100-3.1390*) as applicable to applications for orders regarding writs of mandate or prohibition in trial court. *Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(2)*

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§ 358.104 Local Court Rules

[1] Alameda County

Writ proceedings. Alameda Co. Unified Super. Ct. Rules, Rule 5.10

[2] Los Angeles County

Petitions for mandate and prohibition generally required to be filed in Central District. Los Angeles Co. Super. Ct. Rules, Rules 2.00(b), (c)

Assignment of writ proceedings. Los Angeles Co. Super. Ct. Rules, Rules 2.5(a), 9.30 Procedures for prerogative writs. Los Angeles Co. Super. Ct. Rules, Rules 9.31, 11.0(c), 11.10

[3] Monterey County

Writ procedure generally. Monterey Co. Super. Ct. Rules, Rules 9.26, 15.01, 15.02

[4] Sacramento County

Filing and assignment of, and procedural requirements for, prerogative writs. Sacramento Co. Local Ct. Rules, Rules 2.01, 3.00(b), 11.01(b)

[5] San Diego County

Extraordinary writ proceedings. San Diego Co. Coordinated Ct. Rules, Div. II, Rule 10.11

[6] San Francisco City and County

Petitions for writ of mandate or prohibition heard in Law and Motion Departments. San Francisco Uniform Local Ct. Rules, Rule 8.1

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§ 358.105 Internal Operating Practices and Procedures of the Courts of Appeal

Assignment of, and procedures for, extraordinary writ proceedings. First App. Dist., Internal Operating Practices and Procedures, §§ 25, 26, 28; Second App. Dist., Internal Operating Practices and Procedures, Assignment of Cases; Fourth App. Dist., Div. One, Internal Operating Practices and Procedures, § V; Fourth App. Dist., Div. Three, Internal Operating Practices and Procedures, § III(B); Sixth App. Dist., Internal Operating Practices and Procedures, § II(D)

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§ 358.106 Local Rules of the Courts of Appeal

Assignment of writ petitions in First District. Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Policy Statement A

Petition for extraordinary writ in Division One of Fourth Appellate district as required to pray solely for peremptory writ. Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 4th App. Dist., Rule 3

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§ 358.107 Decisions

[1] Combination of Mandate With Prohibition for Complete Relief

Single writ as not always granting relief required; writ of prohibition as capable of issuing to prevent lower court from acting in excess of its jurisdiction and writ of mandate as issuing to compel mandatory act. *W.A. Rose Co. v. Municipal Court (1959) 176 Cal. App. 2d 67, 75, 1 Cal. Rptr. 49*

[2] Defenses

[a] Adequacy of Legal Remedy

[i] In General

There is an adequate remedy at law when statute specifically provides for appeal. *Nguyen v. Superior Court (2007) 150 Cal. App. 4th 1006, 1009-1010, 58 Cal. Rptr. 3d 802*

Relief by petition for mandate as available when party had no adequate remedy at law when trial court failed to rule on evidentiary objections before denying summary judgment motion. *Vineyard Springs Estates, LLC v. Superior Court (2004) 120 Cal. App. 4th 633, 643, 15 Cal. Rptr. 3d 587*

Relief by extraordinary writ as available when legal remedy inadequate due to specter of expensive trial and ultimate reversal. *City of Glendale v. Superior Court (1993) 18 Cal. App. 4th 1768, 1776, 23 Cal. Rptr. 2d 305*

Requirement of inadequacy of legal remedy as relaxed when issue raised in writ petition is of widespread public importance. *City of Glendale v. Superior Court (1993) 18 Cal. App. 4th 1768, 1776, 23 Cal. Rptr. 2d 305*

In proceeding for writ to prevent deposition of opposing counsel prior to hearing on issue of good faith settlement, availability of right to challenge trial court's finding on good faith of settlement as not adequate remedy, because

damage done by improperly allowing such discovery cannot readily be cured. *Spectra-Physics, Inc. v. Superior Court (1988) 198 Cal. App. 3d 1487, 1493, 244 Cal. Rptr. 258*

Mandate as not applicable to review decision of Board of Control because adequate legal remedy of action at law exists after rejection of claim by *Board. Teresi v. State of California (1986) 180 Cal. App. 3d 239, 245, 225 Cal. Rptr. 517*

[ii] Appeal

Aggrieved party as allowed to bypass appellate process and pursue extraordinary relief if remedy by appeal is inadequate. *California Trial Lawyers Assn. v. Superior Court (1986) 187 Cal. App. 3d 575, 578-579, 231 Cal. Rptr. 725*

Review by mandate of declaratory relief decision affecting rights of multiple parties as unwarranted when petition for mandate is brought by only one affected individual, appellate remedy appears to be adequate, and claims of others would remain for piecemeal determination after issue was determined as to petitioner. *Augustyn v. Superior Court (1986) 186 Cal. App. 3d 1221, 1225-1226, 231 Cal. Rptr. 298*

Although injunctions are specifically made appealable under former *Code Civ. Proc. § 904.1(f)* (*now see Code Civ. Proc. § 904.1(a)(6)*), mandamus as available to review orders relating to preliminary injunctions when appeal is not plain, speedy, and adequate. *County of Butte v. Superior Court (1985) 176 Cal. App. 3d 693, 697, 222 Cal. Rptr. 429*

Party as not entitled to review by extraordinary writ after waiving right to review by appeal. *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1985) 176 Cal. App. 3d 480, 492 n.5, 222 Cal. Rptr. 228*

[iii] Damages

Court as not abusing discretion in granting peremptory writ of mandate when effect of party's unlawful action could not be calculated with reasonable economic certainty so that damage remedy at law was inadequate. *San Joaquin County Employees Ass'n v. City of Stockton (1984) 161 Cal. App. 3d 813, 820, 207 Cal. Rptr. 876*

Exception to rule that claim for money damages is adequate legal remedy precluding writ of mandamus as existing when obligation to pay such money rests on governing boards and depends on interpretation of statute or ordinance. *California Teachers' Assn. v. Governing Board (1983) 145 Cal. App. 3d 735, 747, 193 Cal. Rptr. 650*

[iv] Enforcement of Contract

Civil action to enforce contract as normally adequate remedy that precludes availability of mandate. *ABI, Inc. v. City of Los Angeles (1984) 153 Cal. App. 3d 669, 687-688, 200 Cal. Rptr. 563*

[v] Failure to Exhaust Administrative Remedies

Exception to exhaustion requirement when administrative remedy inadequate as applying when petitioner was not given proper notice of right to administrative hearing, ruling in administrative hearing was foregone conclusion, and agency did not respond to petitioner's request for hearing. *Haller v. Burbank Community Hospital Foundation (1983) 149 Cal. App. 3d 650, 657-658, 197 Cal. Rptr. 45*

As general rule, prior to seeking judicial relief from erroneous assessment, taxpayer as required to exhaust remedies

before administrative body empowered initially to correct error, but rule as having no application to proceeding in mandate seeking increase in assessments of other property owners rather than reduction of plaintiffs' assessments since there are no administrative remedies available. *TRIM, Inc. v. County of Monterey (1978) 86 Cal. App. 3d 539, 544, 150 Cal. Rptr. 351*

Rule that party must exhaust administrative remedies prior to seeking relief in courts as inapplicable when administrative remedy not available or inadequate. *Diaz v. Quitoriano (1969) 268 Cal. App. 2d 807, 812, 74 Cal. Rptr. 358*

[b] Financial Distress

Financial distress as no defense to issuance of writ of mandate; thus, health care department may not ignore duty to act because it foresees purported financial difficulties on horizon. *California Assn. of Health Facilities v. Kizer (1986) 178 Cal. App. 3d 1109, 1114-1115, 224 Cal. Rptr. 247*

[c] Laches

Petition for mandate as untimely if, under circumstances of case, it is not filed in reasonable time and no statute of limitation governs filing. *In re Twighla T. (1992) 4 Cal. App. 4th 799, 802-803, 5 Cal. Rptr. 2d 752*

[d] Mootness

[i] Generally

Writ of mandate as not proper when facts arise after petition filed that prevent writ from serving any useful purpose. *Bruce v. Gregory (1967) 65 Cal. 2d 666, 671, 56 Cal. Rptr. 265, 423 P.2d 193*

Petition for writ of mandate as moot when respondent has complied with petitioner's demands after issuance of alternative writ. *Bruce v. Gregory (1967) 65 Cal. 2d 666, 671, 56 Cal. Rptr. 265, 423 P.2d 193* ; *Environmental Protection Information Center, Inc. v. State Bd. of Forestry (1993) 20 Cal. App. 4th 27, 32, 24 Cal. Rptr. 2d 344*

Appeal from denial of petition for writ of mandate as dismissed when original justiciable controversy had become moot. *Environmental Coalition of Orange County, Inc. v. Local Agency Formation Com. (1980) 110 Cal. App. 3d 164, 170, 167 Cal. Rptr. 735*

Writ of mandate not proper when all contentions raised in petition had already been raised and decided in appeal arising out of same litigation. *County of Sacramento v. Superior Court (1969) 274 Cal. App. 2d 315, 316, 79 Cal. Rptr. 139*

[ii] Public Interest

Mandate proceedings concerning election procedures as properly reviewable by appellate courts, even though election in question has already taken place and issuance of writ would be meaningless remedy when issues raised are of general public interest and likely to occur in future elections in a manner evasive of timely appellate review. *Gebert v. Patterson (1986) 186 Cal. App. 3d 868, 872, 231 Cal. Rptr. 150*

Purity of elections and full disclosure of contributions and expenditures are matters of public interest for purposes of determining whether matter is moot. *Californians for Fair Representation--No on 77 v. Superior Court (2006) 138*

Cal. App. 4th 15, 22-23, 41 Cal. Rptr. 3d 148

Event that would normally render action moot as not depriving court of discretion to resolve matter of continuing public interest. *Okuda v. Superior Court (1983) 144 Cal. App. 3d 135, 137 n.1, 192 Cal. Rptr. 388*

Mandate proceeding as not moot when public interest in orderly administration of justice requires determination of issues on the merits. *Montgomery v. Superior Court (1975) 46 Cal. App. 3d 657, 665, 121 Cal. Rptr. 44*

[e] No Beneficial Interest

Under public interest exception, labor union had standing to sue regarding enforcement of administrative regulations governing logging plan. *Environmental Protection and Information Center v. California Department of Forestry and Fire Protection (2008) 44 Cal. 4th 459, 479-480, 80 Cal. Rptr. 3d 28, 187 P.3d 888*

Member of medical examining board as lacking beneficial interest in proceedings challenging actions of board on which he or she sits. *Carsten v. Psychology Examining Com. (1980) 27 Cal. 3d 793, 795-797, 166 Cal. Rptr. 844, 614 P.2d 276*

No beneficial interest when relevant statute did not create standing to promote petitioner's commercial or competitive interests. *Regency Outdoor Advertising, Inc. v. City of West Hollywood (2007) 153 Cal. App. 4th 825, 829, 63 Cal. Rptr. 3d 287*

Contractor and taxpayer as having public interest to file petition challenging school district's failure to use competitive bidding procedure when petition sought to protect public fisc. *Marshall v. Pasadena Unified School District (2004) 119 Cal. App. 4th 1241, 1252, 15 Cal. Rptr. 3d 344*

In negligence action by named insured vehicle owner against permissive driver, plaintiff as not having requisite beneficial interest for issuance of writ to remove attorney who was provided by insurer to defendant as potential insured; right to insurer-provided independent attorney as belonging to insured, not insured's adversary. *McGee v. Superior Court (1985) 176 Cal. App. 3d 221, 228, 221 Cal. Rptr. 421*

Surety of defendant as having beneficial interest in proceedings and thus as having standing to sue. *Bakkebo v. Municipal Court (1981) 124 Cal. App. 3d 229, 233-234, 177 Cal. Rptr. 239*

[f] Pendency of Same Action Elsewhere

Writ of mandate as denied if similar petition between same parties on same matter already pending before another court; pendency of another action as not defense unless it is between same parties for same cause of action. *Perry v. Jordan (1949) 34 Cal. 2d 87, 90, 207 P. 2d 47*

[g] Statute of Limitations

Nature of right asserted in mandate proceeding as determining applicable statute of limitations and period of limitation. *Green v. Obledo (1981) 29 Cal. 3d 126, 140-141 n.10, 172 Cal. Rptr. 206, 624 P.2d 256* ; *Allen v. Humboldt County Board of Supervisors (1963) 220 Cal. App. 2d 877, 884, 34 Cal. Rptr. 232*

Statute of limitations in mandate proceeding as beginning to run when petitioner's right first accrues. *Monroe v. Trustees of the California State Colleges (1971) 6 Cal. 3d 399, 405, 99 Cal. Rptr. 129, 491 P.2d 1105*

[3] Evidence

In traditional mandamus review of quasi-legislative action by agency, evidence not contained in administrative record is not admissible to show that quasi-legislative administrative decision was prejudicial abuse of discretion; proposed "all relevant factors" exception would place unworkable qualification on general rule of admissibility. *Western States Petroleum Assn. v. Superior Court (1995) 9 Cal. 4th 559, 567, 38 Cal. Rptr. 2d 139, 888 P. 2d 1268*

Extra-record evidence is generally inadmissible in traditional mandamus actions challenging quasi-legislative administrative decisions, though extra-record evidence may be admitted in traditional mandamus actions challenging ministerial or informal administrative actions. *Golden Drugs Co. v. Maxwell-Jolly (2009) 179 Cal. App. 4th 1455, 1468-1469, 102 Cal. Rptr. 3d 446*

Extra-record evidence is not admissible in traditional mandamus actions challenging quasi-legislative administrative decisions, except in traditional mandamus actions challenging ministerial or informal administrative actions if the facts are in dispute. *SN Sands Corp. v. City & County of San Francisco (2008) 167 Cal. App. 4th 185, 194, 83 Cal. Rptr. 3d 885*

Extra-record evidence may not be admitted to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision. *Western States Petroleum Assn. v. South Coast Air Quality (2006) 136 Cal. App. 4th 1012, 1024-1025, 39 Cal. Rptr. 3d 354*

Court entertaining original proceeding for writ of mandate as properly considering all relevant evidence, including facts not existing until after petition for writ was filed. *Cooke v. Superior Court (1989) 213 Cal. App. 3d 401, 407, 261 Cal. Rptr. 706*

When answer of defendant in mandate proceeding raises only questions of law, taking of testimony by trial court as not required. *Ellerbroek v. Saddleback Valley Unified School Dist. (1981) 125 Cal. App. 3d 348, 35/1-/283, 177 Cal. Rptr. 910*

Party seeking writ of mandate to compel performance of act as having burden of proving that official body that fails to perform act has thus violated its duty toward him or her by denying him or her clear and present right. *Fair v. Fountain Valley School Dist. (1979) 90 Cal. App. 3d 180, 186, 153 Cal. Rptr. 56* (burden not sustained)

Party seeking writ of mandate to correct abuse of discretion as required to make some showing that body invested with discretion has acted arbitrarily, capriciously, fraudulently, or without due regard for his or her rights and that action was prejudicial to him or her. *Fair v. Fountain Valley School Dist. (1979) 90 Cal. App. 3d 180, 187, 153 Cal. Rptr. 56* (showing not made)

Factual issues presented in mandate proceeding as normally resolved by introduction of evidence according to rules governing ordinary civil trials; factual issues as also subject to being resolved by evidence in written declarations that parties stipulate court may consider. *Fair v. Fountain Valley School Dist. (1979) 90 Cal. App. 3d 180, 188 n.6, 153 Cal. Rptr. 56*

[4] Examples of Uses of Mandate

[a] To Compel Action by Nongovernmental Party

[i] Corporations

Mandate as proper proceeding by which stockholder can compel corporation to permit inspection of books and corporate property; when right given by statute, unless statute imposes restrictions then such right is absolute regardless of purposes or motives of stockholder or existence of good cause. *Hobbs v. Tom Reed Gold Min. Co. (1913) 164 Cal. 497, 502, 129 P. 781* ; *Johnson v. Langdon (1902) 135 Cal. 624, 625-626, 67 P. 1050*

Mandate as proper proceeding to enforce plain rights of stockholders or members ofcorporations in absence of any other adequate remedy. Miller v. Imperial Water Co. No. 8 *(1909) 156 Cal. 27, 29, 103 P. 227*

[ii] Labor Unions

Mandate as proper proceeding to compel local labor union to admit person to membership. *Thorman v. Intl. Alliance etc. Employees (1958) 49 Cal. 2d 629, 631, 634, 320 P.2d 494* (overruled on other grounds in *Consolidated Theatres, Inc. v. Theatrical Stage Employees Union (1968) 69 Cal. 2d 713, 721 n.8, 73 Cal. Rptr. 213, 447 P.2d 325*)

Writ of mandate as proper to compel labor union either to reinstate suspended member or to give member full and fair hearing. *Cason v. Glass Bottle Blowers Asso. (1951) 37 Cal. 2d 134, 140, 147, 231 P.2d 6*

Writ of mandate as proper to compel reinstatement to membership in labor union of one who has been illegally expelled. *Smetherham v. Laundry Workers' Union (1941) 44 Cal. App. 2d 131, 135, 111 P.2d 948*

[iii] Other Associations

Writ of mandate as proper to compel admission of physician to membership on medical staff of hospital maintained by local hospital district. *Rosner v. Eden Township Hospital Dist. (1962) 58 Cal. 2d 592, 599, 25 Cal. Rptr. 551, 375 P.2d 431*

Writ of mandate as proper to compel fraternal society to reinstate person to membership. Taboada v. Sociedad Espanola etc. *(1923) 191 Cal. 187, 194, 215 P. 673*

Mandate as proper action to compel hearing that organization improperly refused to hold in making membership decision adverse to petitioner. *Haller v. Burbank Community Hospital Foundation (1983) 149 Cal. App. 3d 650, 657-659, 197 Cal. Rptr. 45*

Mandate as proper proceeding by which to compel medical association to restore physician to membership. *Bernstein v. Alameda etc. Med. Assn. (1956) 139 Cal. App. 2d 241, 243, 254, 293 P.2d 862*

[b] To Compel Action by Public Agency or Official

Mandate available where one public entity seeks to force another to release funds in accordance with a statutory duty. *City of Dinuba v. County of Tulare (2007) 41 Cal. 4th 859, 868, 62 Cal. Rptr. 3d 614, 161 P.3d 1168*

Writ of mandate as proper to require public official to enforce statute that official believes is unconstitutional, but that judiciary has not determined is unconstitutional. *Lockyer v. City and County of San Francisco (2004) 33 Cal. 4th 1055, 1081,17 Cal. Rptr. 3d 225, 95 P.3d 459*

Mandate as proper to compel performance of public agency's statutory duty. *Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 540, 28 Cal. Rptr. 2d 617, 869 P.2d 1142*

Writ of mandate as proper to compel governmental official to perform ministerial act such as issuing bonds. *California Educational Facilities Authority v. Priest (1974) 12 Cal. 3d 593, 598, 116 Cal. Rptr. 361, 526 P.2d 513*

Writ of mandate as proper to compel return of property wrongfully in possession of custodial officers in civil action, even without compliance with claims statute. *Minsky v. City of Los Angeles (1974) 11 Cal. 3d 113, 123, 113 Cal. Rptr. 102, 520 P.2d 726*

Writ of mandate as proper to compel taxing authorities to levy taxes and make assessments to provide fund required by law. *County of Sacramento v. Hickman (1967) 66 Cal. 2d 841, 845, 59 Cal. Rptr. 609, 428 P.2d 593*

Writ of mandate as proper to compel officer to conduct election according to law. *Miller v. Greiner (1964) 60 Cal. 2d 827, 830, 36 Cal. Rptr. 737, 389 P.2d 129*

Mandamus is available to compel a public agency's performance or correct an agency's abuse of discretion whether the action being compelled or corrected can itself be characterized as ministerial or legislative. *Mission Hospital Regional Medical Center v. Shewry (2008) 168 Cal. App. 4th 460, 478, 85 Cal. Rptr. 3d 639*

Writ of mandate as proper to compel return of property wrongfully in possession of custodial officers in civil action. *Escamilla v. California Dept. of Corrections & Rehab. (2006) 141 Cal. App. 4th 498, 509-510, 46 Cal. Rptr. 3d 408*

Writ of mandate is available only if the respondent has a clear, present, and usually ministerial duty and the petitioner has a clear, present, and beneficial interest in the performance of that duty. *Syngenta Crop Protection, Inc. v. Helliker (2006) 138 Cal. App. 4th 1135, 1181, 42 Cal. Rptr. 3d 191*

Mandate as proper to control exercise of administrative discretion only when discretion can be exercised lawfully in just one way. *Bayside Auto & Truck Sales, Inc. v. Department of Transportation (1993) 21 Cal. App. 4th 561, 570, 26 Cal. Rptr. 2d 109*

Mandate as proper to correct abuse of discretion by public agency. *Bright Development v. City of Tracy (1993) 20 Cal. App. 4th 783, 795, 24 Cal. Rptr. 2d 618*

Writ of mandate as proper to compel public official to follow statutory procedures for effecting forfeiture of property. *Nasir v. Sacramento County Off. of the Dist. Atty. (1992) 11 Cal. App. 4th 976, 990-995, 15 Cal. Rptr. 2d 694*

Writ of mandate as proper to compel public official to perform ministerial duty to release funds wrongly withheld. *City of Los Angeles v. County of Los Angeles (1989) 216 Cal. App. 3d 916, 926, 265 Cal. Rptr. 461*

Writ of mandate as proper to compel reversal of administrative decision imposing discipline on civil service employee when decision not supported by substantial evidence. *Coelho v. State Personnel Bd. (1989) 209 Cal. App. 3d 968, 971, 971 n.2, 257 Cal. Rptr. 557*

Mandate as proper to compel public agency to follow its own rules when it has ministerial duty to do so. *Pozar v. Department of Transportation (1983) 145 Cal. App. 3d 269, 271, 193 Cal. Rptr. 202*

Writ of mandate as proper to compel public officer to comply with his or her lawful obligation when conduct or declarations of public officer against whom relief is sought indicates that officer does not intend to comply with such obligation. *King v. Martin (1971) 21 Cal. App. 3d 791, 795-796, 98 Cal. Rptr. 711*

[c] To Compel Judicial Action

[i] Amend Pleading

Writ of mandate as proper under some circumstances to compel court to allow amendment of pleading. *Coy v. Superior Court (1962) 58 Cal. 2d 210, 215, 23 Cal. Rptr. 393, 373 P.2d 457* ; *Vedder v. Superior Court (1967) 254 Cal. App. 2d 627, 628, 62 Cal. Rptr. 222*

Interlocutory review of an order at pleading stage is appropriate when question of first impression and of statewide importance is raised, and denial of writ review could result in reversal and retrial. *Page v. Superior Court (1995) 31 Cal. App. 4th 1206, 1210, 37 Cal. Rptr. 2d 529*

Writ of mandate as proper to compel court to permit amendment of complaint on contract to allege anticipatory breach and excuse of conditions when court has abused its discretion in denying motion. *Daum v. Superior Court (1964) 228 Cal. App. 2d 283, 287-290, 39 Cal. Rptr. 443*

Writ of mandate as proper to compel court to allow amendment of answer to allege contributory negligence of employer as defense. *Vegetable Oil Products Co. v. Superior Court (1963) 213 Cal. App. 2d 252, 255, 28 Cal. Rptr. 555*

Writ of mandate as proper to compel court to permit amendment of answer to plead discharge in bankruptcy. *Marr v. Superior Court (1939) 30 Cal. App. 2d 275, 279, 86 P.2d 141*

[ii] Appeal

Mandate as appropriate to compel appellate court to accept appeal from order of lower trial court, which it erroneously refused to entertain. *Newman v. Superior Court (1967) 67 Cal. 2d 620, 621, 63 Cal. Rptr. 284, 432 P.2d 972* (appeal from municipal court to appellate department of superior court)

[iii] Application of Proper Law

Writ of mandate as proper to direct trial court to apply proper law. *Hurtado v. Superior Court (1974) 11 Cal. 3d 574, 579, 114 Cal. Rptr. 106, 522 P.2d 666*

[iv] Assumption of Jurisdiction

Writ of mandate as proper to compel court to assume or exercise jurisdiction when it has jurisdiction and has refused to proceed on ground of lack of jurisdiction. *Wisely v. Superior Court (1985) 175 Cal. App. 3d 267, 270, 220 Cal. Rptr. 893*

[v] Contempt Proceeding

Mandate as proper to compel trial court to entertain contempt proceedings when applicant has clear right and no other specific and adequate remedy to compel compliance with prior court judgments, and trial court dismisses contempt proceeding on lack of jurisdiction. *Butler v. Butler (1967) 255 Cal. App. 2d 132, 136, 62 Cal. Rptr. 825*

[vi] Cross Complaint

Writ of mandate as proper to compel court to permit filing of cross complaint if denial of defendant's motion for leave to file cross complaint was abuse of discretion. *Foot's Transfer & Storage Co. v. Superior Court (1980) 114 Cal. App. 3d 897, 901-902, 171 Cal. Rptr. 1*

[vii] Demurrer

Discretionary writ review of an order overruling a demurrer is appropriate where the issue is a matter of public importance and requires immediate resolution. *San Bernardino Associated Governments v. Superior Court (2006) 135 Cal. App. 4th 1106, 1113, 38 Cal. Rptr. 3d 293*

Mandamus is available to prevent needless and expensive trial followed by reversal when demurrer sustained without leave to amend with respect to fewer than all causes of action and it appears the trial court deprived a party of the opportunity to plead cause of action. *Campbell v. Superior Court (1996) 44 Cal. App. 4th 1308, 1314-1315, 52 Cal. Rptr. 2d 385*

Writ of mandate as proper to direct trial court to overrule defendant's demurrer to complaint when plaintiff unable to appeal because of one final judgment rule, and when refusal to consider petition would result in piecemeal disposition of case. *Wallis v. Superior Court (1984) 160 Cal. App. 3d 1109, 1114 n.1, 207 Cal. Rptr. 123*

Writ of mandate as proper to direct respondent court to vacate order sustaining demurrer based on petitioner's lack of standing when standing did exist. *Pearce v. Superior Court (1983) 149 Cal. App. 3d 1058, 1068, 197 Cal. Rptr. 238* (shareholder's derivative action)

Mandate as proper to review ruling on demurrer when court's discretion could be exercised in only one way. *Outboard Marine Corp. v. Superior Court (1975) 52 Cal. App. 3d 30, 38, 124 Cal. Rptr. 852*

Writ of mandate as proper to compel court to vacate order sustaining demurrers to several causes of action when court's ruling was erroneous and if case went to trial there would be eventual appeal and reversal on basis of such error. *U.S. Financial v. Sullivan (1974) 37 Cal. App. 3d 5, 12, 112 Cal. Rptr. 18*

[viii] Discovery

Although writ review of discovery rulings is generally disfavored, interlocutory review by writ is the only adequate remedy when a court compels the disclosure of documents or information that may be subject to a privilege, because once privileged matter has been disclosed there is no way to undo the harm which consists in the very disclosure. *Ombudsman Services of Northern California v. Superior Court (2007) 154 Cal. App. 4th 1233, 1241, 65 Cal. Rptr. 3d 456*

Appellate courts rarely review discovery orders by way of extraordinary writ, except if appellate remedies are inadequate or if discretionary review is necessary to answer question of first impression of general importance to trial courts and legal profession. *Toshiba America Electronic Components, Inc. v. Superior Court (2004) 124 Cal. App. 4th 762, 76/1-/268, 21 Cal. Rptr. 3d 532*

Mandamus is available to review discovery order when it presents a matter of first impression and lack of review would result in a new, unduly burdensome discovery tactic. *Catanese v. Superior Court (1996) 46 Cal. App. 4th 1159, 1163-1164, 54 Cal. Rptr. 2d 280*

[ix] Dismissal of Action

Writ of mandate as proper to compel dismissal when there is a failure to bring action to trial within period prescribed in *Code Civil Procedure. J.C. Penney Co. v. Superior Court (1959) 52 Cal. 2d 666, 669, 343 P.2d 919*

[x] Distribution of Estate

Mandate as appropriate to direct probate court to distribute estate in accordance with applicable statute. *Mannheim v. Superior Court (1970) 3 Cal. 3d 678, 685-686, 91 Cal. Rptr. 585, 478 P.2d 17*

[xi] Opening Court Records

Writ of mandate as proper remedy to review failure or refusal of court to open court records to public view. *Copley Press, Inc. v. Superior Court (1992) 6 Cal. App. 4th 106, 108, 7 Cal. Rptr. 2d 841*

[xii] Proceed With Stayed Action

Writ of mandate as proper to compel court to proceed with action when order has been entered staying proceedings. *Bailey v. Fosca Oil Co., Ltd. (1962) 211 Cal. App. 2d 307, 308, 27 Cal. Rptr. 454*

[xiii] Summary Judgment

Writ of mandate as proper to review and correct erroneous partial summary judgment, since partial summary judgment is not appealable order. *Mason v. Superior Court (1985) 163 Cal. App. 3d 989, 994, 210 Cal. Rptr. 63*

Writ of mandate as properly issued to vacate order granting partial summary judgment when order erroneously bars substantial portion of petitioner's case from being tried on merits. *Bundren v. Superior Court (1983) 145 Cal. App. 3d 784, 787 n.1, 193 Cal. Rptr. 671* Mandate as proper when party legally entitled to judgment moved for summary judgment and trial court denied motion. *Aetna Casualty & Surety Co. v. Superior Court (1980) 114 Cal. App. 3d 49, 54-55, 170 Cal. Rptr. 527*

Mandate proper to compel trial court to reverse denial of summary judgment when at issue was whether informer's communication to enforcement agency concerning possible perpetration of tax fraud fell within scope of absolute privilege under former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*). *Tiedemann v. Superior Court (1978) 83 Cal. App. 3d 918, 923-924, 148 Cal. Rptr. 242*

Writ of mandate as proper to compel trial court to grant motion for summary judgment when affidavits in support of moving party are sufficient to sustain judgment in moving party's favor and opponent does not by counter-affidavit show facts sufficient to present triable issue of fact. *Roman Catholic Archbishop v. Superior Court (1971) 15 Cal. App. 3d 405, 410, 93 Cal. Rptr. 338*

Writ of mandate as proper to correct abuse of discretion in denial of motion for summary judgment. *Roman Catholic Archbishop v. Superior Court (1971) 15 Cal. App. 3d 405, 410-412, 93 Cal. Rptr. 338*

Granting of summary judgment by way of writ of mandate as used sparingly, with doubts resolved in favor of denial of review; affidavits of moving party as required to be strictly construed and those of opponent liberally construed. *Roman Catholic Archbishop v. Superior Court (1971) 15 Cal. App. 3d 405, 410-411, 93 Cal. Rptr. 338*

[xiv] Vacate Discretionary Order

Mandate as not issuing to control judicial discretion unless discretion is abused or may be exercised only one way. *Gertner v. Superior Court (1993) 20 Cal. App. 4th 927, 930, 25 Cal. Rptr. 2d 47*

Writ of mandate as proper to compel court to vacate discretionary order when no rational basis in record supports decision. *Lyle v. Superior Court (1981) 122 Cal. App. 3d 470, 479, 175 Cal. Rptr. 918*

[xv] Venue

Writ of mandate as appropriate to compel court to vacate order denying motion for change of venue and enter new order granting motion. *State of California v. Superior Court (1987) 193 Cal. App. 3d 328, 330, 238 Cal. Rptr. 315*

[5] Examples of Uses of Prohibition

Writ of prohibition issues when discovery order violates a privilege. *Sav-On Drugs, Inc. v. Superior Court (1975) 15 Cal. 3d 1, 5, 123 Cal. Rptr. 283, 538 P.2d 739*

Writ of prohibition issues when court is proceeding to act on basis of void order. *Greene v. Superior Court (1961) 55 Cal. 2d 403, 406, 10 Cal. Rptr. 817, 359 P.2d 249*

Writ of prohibition issues when action has not been brought to trial within five-year period prescribed by former *Code Civ. Proc. § 583* (*now see Code Civ. Proc. § 583.310*). *J.C. Penney Co. v. Superior Court (1959) 52 Cal. 2d 666, 669, 343 P.2d 919*

Writ of prohibition issues when Agricultural Labor Relations Board acts in excess of its jurisdiction and petitioner has no other plain, speedy, and adequate remedy. *Agricultural Labor Relations Bd. v. Superior Court (1994) 29 Cal. App. 4th 688, 693, 34 Cal. Rptr. 2d 546*

Writ of prohibition issues when second tribunal or court has obtained concurrent jurisdiction over same parties and same subject matter. *Scott v. Industrial Acci. Com. (1956) 46 Cal. 2d 76, 81, 293 P.2d 18* ; *Maddern v. Superior Court (1972) 22 Cal. App. 3d 998, 1002, 99 Cal. Rptr. 832*

Situations in which lack of jurisdiction exists and, therefore, in which prohibition properly issues. *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288-290, 109 P.2d 942*

Writ of prohibition issues when court is attempting to proceed in an action without presence of indispensable parties. *Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 522-523, 106 P.2d 879* ; *Peabody Seating Co. v. Superior Court (1962) 202 Cal. App. 2d 537, 542, 20 Cal. Rptr. 792*

Writ of prohibition issues when dismissal of an action is mandatory. *River Farms, Inc. v. Superior Court (1967) 252 Cal. App. 2d 604, 609, 60 Cal. Rptr. 665*

Writ of prohibition issues when summons has not been served and returned within three-year period prescribed by former *Code Civ. Proc. § 581a* (*now see Code Civ. Proc. § 583.210*). *Coates Capitol Corp. v. Superior Court (1967) 251 Cal. App. 2d 125, 126-127, 59 Cal. Rptr. 231*

[6] Original Jurisdiction of Court of Appeal

If a trial court decides on its own motion to revisit its interim ruling in response to a suggestive *Palma* notice, that court must inform the parties of its intent to do so, and provide them with an opportunity to be heard. *Brown, Winfield & Canzoneri, Inc. v. Superior Court (2010) 47 Cal. 4th 1233, 2010 Cal. LEXIS 588, **2-35*

Issuance of alternative writ by appellate court as determining absence of another adequate remedy. *Nathanson v. Superior Court of Los Angeles County (1974) 12 Cal. 3d 355* ; *Mannheim v. Superior Court (1970) 3 Cal. 3d 678, 686, 91 Cal. Rptr. 585, 478 P.2d 17*

Issuance of mandate by court of appeal as reviewable on petition for hearing to Supreme Court. *Nathanson v. Superior Court of Los Angeles County (1974) 12 Cal. 3d 355, 360, 115 Cal. Rptr. 783, 525 P.2d 687*

Fact respondent fails to object to court of appeal exercising its original jurisdiction as factor in that court's decision to exercise its original jurisdiction. *East Bay Mun. Util. Dist. v. Sindelar (1971) 16 Cal. App. 3d 910, 917, 94 Cal. Rptr. 431*

Courts of appeal as possessing coequal jurisdiction with Supreme Court to administer extraordinary relief without regard to existence of appellate jurisdiction over pending lawsuit. *Rivera v. Division of Industrial Welfare (1968) 265 Cal. App. 2d 576, 581, 71 Cal. Rptr. 739*

[7] Original Jurisdiction of Supreme Court

[a] Effect of Issuing Alternative Writ

Issuance of alternative writ of mandate by Supreme Court as necessarily including determination that no adequate remedy exists in ordinary course of law and that case is proper for exercise of court's original jurisdiction. *Mills v. Municipal Court (1973) 10 Cal. 3d 288, 297, 110 Cal. Rptr. 329, 515 P.2d 273*

[b] If Original Jurisdiction Exercised

Supreme Court as exercising its original jurisdiction in mandate proceedings only in cases in which issues presented are of great public importance and require prompt resolution. *Wenke v. Hitchcock (1972) 6 Cal. 3d 746, 750, 100 Cal. Rptr. 290, 493 P.2d 1154*

[8] Parties Against Whom Mandate Will Lie

Writ of mandate as capable of issuing against county, city, other public body, or public officer. *People ex rel. Younger v. County of El Dorado (1971) 5 Cal. 3d 480, 491, 96 Cal. Rptr. 553, 487 P.2d 1193*

Writ of mandate as properly running against administrative agency and not individual members or staff personnel when agency's action sought. *Memorial Hosp. of So. Cal. v. State Health Planning Council (1972) 28 Cal. App. 3d 167, 177, 104 Cal. Rptr. 492*

When mandate is sought to compel act by lower tribunal, that court and not the trial judge as proper party respondent in petition. *Pettie v. Superior Court (1960) 178 Cal. App. 2d 680, 682, 3 Cal. Rptr. 267*

[9] Pleadings

[a] Answer

Verified return containing affirmative factual statement and declaration of counsel as procedurally sufficient. *Department of Corrections v. Superior Court (1982) 131 Cal. App. 3d 245, 250, 182 Cal. Rptr. 294*

Although uncontroverted matters in return to alternative writ accepted as true, such matters as required to be both relevant and allegations of ultimate fact, not conclusions. *Most v. First Nat. Bank of San Diego (1966) 246 Cal. App. 2d 425, 432, 54 Cal. Rptr. 669*

[b] Demurrer to Test Sufficiency of Petition

Allegation that petitioner for writ of mandate "has exhausted his administrative remedies" as sufficient allegation to withstand demurrer to petition for writ of mandate. *Wong v. Regents of University of California (1971) 15 Cal. App. 3d 823, 829, 93 Cal. Rptr. 502*

[10] Procedural Issues

[a] Appeals

Postjudgment order relating to enforcement of final judgment granting peremptory relief as constituting appealable order, although minute order is technically nonappealable. *Stoneham v. Rushen (1984) 156 Cal. App. 3d 302, 306 n.1, 203 Cal. Rptr. 20*

[b] Continuing Jurisdiction After Peremptory Writ

Trial court as retaining inherent power to make any orders necessary and proper for complete enforcement of peremptory writ it had issued; trial court as having jurisdiction to determine adequacy of regulations promulgated in compliance with writ. *Stoneham v. Rushen (1984) 156 Cal. App. 3d 302, 310-311, 203 Cal. Rptr. 20*

Court as able to reserve jurisdiction to make further award of damages when it anticipates that there will be delay in compliance with peremptory writ. *Gonzales v. International Asso. of Machinists (1963) 213 Cal. App. 2d 817, 820, 29 Cal. Rptr. 190*

[c] Costs

Award of sanctions against respondent under *Code Civ. Proc. § 128.5* as proper when respondent fails to comply with peremptory writ of prohibition; fact that writ of prohibition is being appealed as not excusing respondent's failure to comply. *Union Pacific R.R. Co. v. State Bd. of Equalization (1989) 49 Cal. 3d 138, 157-158, 260 Cal. Rptr. 565, 776 P.2d 267*

Sanctions for frivolous and bad faith maintenance of mandate proceeding as not warranted even though petition is devoid of merit, when evidence fails to show that petition was filed purely to spite counsel or for other improper purpose. *McGee v. Superior Court (1985) 176 Cal. App. 3d 221, 229, 221 Cal. Rptr. 421*

Successful petitioner for writ of mandate as precluded from contending trial court ought to have made award of costs when petitioner failed to apply for an award of costs after granting of peremptory writ and failed to prepare findings of fact and conclusions of law as requested by trial court. *Ellis v. City Council (1963) 222 Cal. App. 2d 490, 501, 35 Cal. Rptr. 317*

[d] Evidence

Evidence outside the administrative record as admissible in mandamus proceeding against administrative agency. *Bright Development v. City of Tracy (1993) 20 Cal. App. 4th 783, 795, 24 Cal. Rptr. 2d 618*

[e] Filing Against Clerk in Superior Court

Proceeding for writ of mandate in superior court as capable of being filed against clerk of that court but not against court itself. *Miller v. Hamm (1970) 9 Cal. App. 3d 860, 865 n.3, 88 Cal. Rptr. 538*

[f] Hearing

Judge hearing mandate proceeding as properly considering, in deciding whether to issue peremptory writ, all relevant evidence, including facts not existing until after petition filed, because mandamus is action in which equitable principles apply. *Bruce v. Gregory (1967) 65 Cal. 2d 666, 670-671, 56 Cal. Rptr. 265, 423 P.2d 193*

Court as required in mandate proceeding to apprise itself of facts that arise after pleading that render dispute moot or make remedy useless. *Bruce v. Gregory (1967) 65 Cal. 2d 666, 671, 56 Cal. Rptr. 265, 423 P.2d 193*

In absence of return, all proper allegations of petition for writ of mandate as deemed admitted and only legal issues as subject to decision. *Coppinger v. Superior Court (1982) 134 Cal. App. 3d 883, 885, 185 Cal. Rptr. 24*

Hearing under *Code Civ. Proc. §§ 1088, 1094* as hearing to try questions of law and not issues of fact when there are only the admitted factual allegations contained in petition. *Rodriguez v. Municipal Court (1972) 25 Cal. App. 3d 521, 526, 102 Cal. Rptr. 45*

Petitioner as having right to countervail question of fact raised in answer to petition by proof either in direct denial or by way of avoidance; question of fact in mandate proceeding heard in same manner as in any other trial. *Lotus Car Ltd. v. Municipal Court (1968) 263 Cal. App. 2d 264, 268, 69 Cal. Rptr. 384*

Court in mandate proceeding as permitted to hear the matter on the papers filed when only a question of law is raised. *Lotus Car Ltd. v. Municipal Court (1968) 263 Cal. App. 2d 264, 267, 69 Cal. Rptr. 384*

[g] Judgment Required

Proceeding for mandate as terminated by a judgment, not by a minute order signed by the clerk. *Hadley v. Superior Court (1972) 29 Cal. App. 3d 389, 394, 105 Cal. Rptr. 500*

[h] Late Filing

Court of appeal as authorized to grant relief under equitable principles or under *Code Civ. Proc. § 473* (relief from default) for late filing of petition for writ of mandate to compel trial court to quash summons (*see Code Civ. Proc. § 418.10(c)*, requiring petition to be filed within 10 days after denial of motion to quash). *Quattrone v. Superior Court (1975) 44 Cal. App. 3d 296, 301, 118 Cal. Rptr. 548*

[i] Relation of Peremptory to Alternative Writ

General rule as being that peremptory writ will not issue when it legally cannot follow the directions set forth in alternative writ; exception to rule as being that when principles of justice and fairness may require its issuance, writ may issue in appropriate case despite provisions of alternative writ. *Johnson v. Fontana County F.P. Dist. (1940) 15 Cal. 2d 380, 391-392, 101 P.2d 1092*

Peremptory writ that departs from alternative writ as proper when petition not entitled to complete relief sought and peremptory writ more limited in scope than alternative writ. *Olney v. Municipal Court (1982) 133 Cal. App. 3d 455, 459 n.3, 184 Cal. Rptr. 78*

[j] Stay Pending Appeal

Mandatory peremptory writ as stayed by notice of appeal; prohibitory peremptory writ as not stayed by notice of appeal; test for whether writ mandatory or peremptory as whether writ was designed to preserve status quo between parties. *Union Pacific R.R. Co. v. State Bd. of Equalization (1989) 49 Cal. 3d 138, 158, 260 Cal. Rptr. 565, 776 P.2d 267*

[k] Summary Denial

Court of appeal's summary denial of defendants' earlier petition for writ of supersedeas seeking a stay pending appeal was not law of the case. *Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal. 4th 180, 200-201, 25 Cal. Rptr. 3d 298*

Summary denial of petition for writ of mandate or prohibition as not precedent, not res judicata, and not law of the case, regardless of whether denial is intended to be on merits or is based on some other ground. *Kowis v. Howard (1992) 3 Cal. 4th 888, 899, 12 Cal. Rptr. 2d 728, 838 P.2d 250* (rejecting "sole possible ground" exception); *People v. Medina (1972) 6 Cal. 3d 484, 490-492, 99 Cal. Rptr. 630, 492 P.2d 686* (prohibition proceeding); *Hagan v. Superior Court (1962) 57 Cal. 2d 767, 770, 22 Cal. Rptr. 206, 371 P.2d 982* (mandate proceeding); *De Bottari v. Melendez (1975) 44 Cal. App. 3d 910, 914 n.3, 119 Cal. Rptr. 256* (mandate proceeding)

Court as allowed to deny ex parte petition for alternative writ of mandate out of hand when it appears from face of petition that peremptory writ will not be issued; court as allowed to do so even though defendant has not appeared by answer or demurrer; denial must not, however, constitute abuse of discretion. *Kingston v. Dept. of Motor Vehicles (1969) 271 Cal. App. 2d 549, 552, 76 Cal. Rptr. 614*

[l] Summary Judgment Not Applicable

Motion for summary judgment as not applicable to mandate proceeding. *Loveland v. City of Oakland (1945) 69 Cal. App. 2d 399, 401-402, 159 P.2d 70*

[m] Time to Respond

Judgment directing issuance of writ of mandate reversed when trial court lacked any discretion to exercise because it issued writ without affording respondent five days to file points and authorities in opposition to petition as required by *Code Civ.Proc. § 1107*. *City of Culver City v. State Bd. of Equalization (1972) 29 Cal. App. 3d 404, 412, 105 Cal. Rptr. 602*

[11] Requirements for Issuance of Writ of Mandate

[a] Beneficial Interest of Petitioner

Clear, present, and beneficial right of petitioner as necessary prerequisite to issuance of writ of mandate. *Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 539-540, 28 Cal. Rptr. 2d 617, 869 P.2d 1142*

No beneficial interest when relevant statute did not create standing to promote petitioner's commercial or competitive interests. *Regency Outdoor Advertising, Inc. v. City of West Hollywood (2007) 153 Cal. App. 4th 825, 829, 63 Cal. Rptr. 3d 287*

A beneficial interest means the petitioner has a special interest over and above the interest of the public at large. This is equivalent to the federal injury in fact test, which requires a party to prove by a preponderance of the evidence that it has suffered an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *California Association for Health Services at Home v. State Department of Health Services (2007) 148 Cal. App. 4th 696, 706-707, 56 Cal. Rptr. 3d 102*

Standing to seek a writ of mandate ordinarily requires that a party be beneficially interested, i.e., have some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. *Savient Pharmaceuticals, Inc. v. Department of Health (2007) 146 Cal. App. 4th 1457, 1465, 53 Cal. Rptr. 3d 689*

Member of government entity does not necessarily have a beneficial interest in the operation of that entity. *Holbrook v. City of Santa Monica (2006) 144 Cal. App. 4th 1242, 1251-1252, 51 Cal. Rptr. 3d 181*

To have standing to seek a writ of mandate, a party must be beneficially interested, i.e., have some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. *Syngenta Crop Protection, Inc. v. Helliker (2006) 138 Cal. App. 4th 1135, 1181, 42 Cal. Rptr. 3d 191*

An advisory committee to a governmental entity, such as a local assessment committee appointed by a county, does not have a sufficient beneficial interest independent of the governmental entity to seek mandate on its own behalf. *Laidlaw Environmental Services, Inc. Local Assessment Committee v. Kern County (1996) 44 Cal. App. 4th 346, 51 Cal. Rptr. 2d 666*

Persons permitted by statute and administrative regulations to take part in administrative proceedings and who appeared and presented oral and written evidence at original hearing as persons "beneficially interested" within meaning of *Code Civ. Proc. § 1086*. *Memorial Hosp. of So. Cal. v. State Health Planning Council (1972) 28 Cal. App. 3d 167, 178-179, 104 Cal. Rptr. 492*

[b] Duty of Respondent

Clear, present, and usually ministerial duty on the part of respondent as necessary prerequisite to issuance of writ of mandate. *Santa Clara County Counsel Attys. Assn. v. Woodside (1994) 7 Cal. 4th 525, 539, 28 Cal. Rptr. 2d 617, 869 P.2d 1142*

Plaintiff's failure to allege agency had duty to act in certain way was fatal to cause of action for mandate. *Galbiso v. Orosi Public Utility Dist. (2010) 182 Cal. App. 4th 652, 673-674, 107 Cal. Rptr. 3d 36*

Because city had no clear, present and ministerial duty to provide credit for private open space, trial court erred when it granted writ of mandate. *Branciforte Heights, LLC v. City of Santa Cruz (2006) 138 Cal. App. 4th 914, 933-939, 42*

Cal. Rptr. 3d 96

Fiscal difficulty as not generally applicable excuse from performance of mandatory official duty. *King v. Martin (1971) 21 Cal. App. 3d 791, 796, 98 Cal. Rptr. 711*

Writ of mandate as denied when public officer named as respondent is not the officer whose duty is involved. *Wenzler v. Municipal Court (1965) 235 Cal. App. 2d 128, 132, 45 Cal. Rptr. 54*

[12] Requirements for Issuance of Writ of Prohibition

[a] Judicial Action Requirement

Writ of prohibition as proper to restrain enforcement of order compelling arbitration, but not to restrain commencement of arbitration, as arbitrator's act is not judicial action subject to such writ. *International Film Investors v. Arbitration Tribunal of Directors Guild (1984) 152 Cal. App. 3d 699, 704, 199 Cal. Rptr. 690*

[13] Specific Situations in Which Mandate Not Appropriate

[a] To Compel Action Outside Court's Jurisdiction

Writ of mandate purporting to hold all of specific type of property exempt from local rent control as beyond court's jurisdiction when action was brought by single plaintiff and was not declaratory relief or class action. *Bayside Manor, Inc. v. City of Santa Monica (1983) 141 Cal. App. 3d 51, 53, 190 Cal. Rptr. 76*

Mandate as not proper to compel municipal court to process parking violations since filing of complaint is necessary to invoke municipal court's jurisdiction in matters involving parking violations. *City of San Diego v. Municipal Court (1980) 102 Cal. App. 3d 775, 778, 162 Cal. Rptr. 420*

Mandate as not proper to compel action that is not within court's jurisdiction. *Franklin v. Municipal Court (1972) 26 Cal. App. 3d 884, 898, 103 Cal. Rptr. 354*

Trial court as required as matter of law to deny petition to vacate arbitration award when none of grounds under *Code Civ. Proc. § 1286.2* are alleged; granting of petition in such a case as an act in excess of court's jurisdiction. *National Union Fire Ins. Co. v. Superior Court (1967) 252 Cal. App. 2d 568, 573, 60 Cal. Rptr. 535*

[b] To Compel Entry of Judgment on Ambiguous Stipulation

Writ of mandate as not lying to compel clerk or judge to enter judgment on ambiguous stipulation that requires clerk or judge to exercise legal discretion as to meaning of stipulation. *Glende Motor Co. v. Superior Court (1984) 159 Cal. App. 3d 389, 395, 205 Cal. Rptr. 682*

[c] To Compel Legislative Act

Mandate as not proper to compel legislative act of establishing speed limits by local jurisdiction. *Hutchinson v. City of Sacramento (1993) 17 Cal. App. 4th 791, 796, 21 Cal. Rptr. 2d 779*

Rescinding of resolution by board of supervisors as legislative act beyond court's power to command; writ of mandate commanding board to rescind resolution as violating doctrine of separation of powers. *Eller Outdoor Advertising Co.*

v. Board of Supervisors (1979) 89 Cal. App. 3d 76, 83, 152 Cal. Rptr. 358

[d] To Compel Performance of Act Law Does Not Enjoin

Mandamus as not lying to compel performance of act that law does not enjoin and that respondent has no present duty to perform. *King v. Berkeley Unified School Dist. (1979) 89 Cal. App. 3d 1016, 1024, 152 Cal. Rptr. 782* (trial court properly refused to issue writ of mandate to compel school district to hire laid-off teacher subject to preferential employment rights under former Educ. Code § 13448, if position sought no longer existed)

[e] To Enforce Contractual Obligation Against Public Entity

Writ of mandate as not proper when there is no cause for reinstatement of public employee but merely claim for damages for breach of contract. *Tevis v. City & County of San Francisco (1954) 43 Cal. 2d 190, 198, 272 P.2d 757*

General rule that mandate not proper for enforcement of contractual obligation against public entity as relaxed in cases involving dispute as to proper construction of statute or ordinance defining or giving rise to exercise of official duty. *Tevis v. City & County of San Francisco (1954) 43 Cal. 2d 190, 198, 272 P.2d 757* ; *City of Culver City v. State Bd. of Equalization (1972) 29 Cal. App. 3d 404, 409, 105 Cal. Rptr. 602*

Relief by writ of mandate against public body as not defeated by availability of specific performance for breach of contract if performance of public acts by public officials is sought. *California Teachers Assn. v. Nielsen (1978) 87 Cal. App. 3d 25, 28-29, 149 Cal. Rptr. 728*

Writ of mandate as not proper remedy to enforce contractual obligation against public entity because civil action is adequate and because mandamus enforces official duty, not contractual duty. *Wenzler v. Municipal Court (1965) 235 Cal. App. 2d 128, 132, 45 Cal. Rptr. 54*

[f] To Recover Money

Writ of mandate as not proper to recover money. *Wenzler v. Municipal Court (1965) 235 Cal. App. 2d 128, 133, 45 Cal. Rptr. 54*

[14] Specific Situations In Which Prohibition Not Appropriate

Prohibition as inappropriate when it stayed rent control board decisions decreasing rent during pendency of appeal because administrative mandamus was available in each particular case to stay execution of board's administrative action. *Sterling v. Santa Monica Rent Control Bd. (1985) 168 Cal. App. 3d 176, 186-187, 214 Cal. Rptr. 71*

[15] Standard of Review

Review of quasi-legislative actions is limited to an inquiry into whether the action was arbitrary, capricious or entirely lacking in evidentiary support, and the petitioner has the burden of proof to show that the decision is unreasonable or invalid as a matter of law. *California Correctional Peace Officers' Assn. v. California (2010) 181 Cal. App. 4th 1454, 1459-1460, 105 Cal. Rptr. 3d 566*

In ordinary mandamus actions, the scope of review is limited, out of deference to the agency's authority and presumed expertise. The court may not reweigh the evidence or substitute its judgment for that of the agency. In general the

inquiry is limited to whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support. *Polster v. Sacramento County Office of Education (2009) 180 Cal. App. 4th 649, 2009 Cal. App. LEXIS 2048, *34*

Whether agency action is entirely lacking in evidentiary support is not the same as a substantial evidence test. *Golden Drugs Co. v. Maxwell-Jolly (2009) 179 Cal. App. 4th 1455, 1466, 102 Cal. Rptr. 3d 446*

In traditional mandamus actions, an agency's action must be upheld upon review unless it constitutes an abuse of discretion. *O.W.L. Foundation v. City of Rohnert Park (2008) 168 Cal. App. 4th 568, 585, 86 Cal. Rptr. 3d 1*

Judicial review of quasi-legislative decision under *Code Civ. Proc. § 1085* limited to examination of proceedings before agency to determine whether its actions have been arbitrary or capricious, entirely lacking in evidentiary support, or whether it failed to follow proper procedures or failed to give notice as required by law. *SN Sands Corp. v. City & County of San Francisco (2008) 167 Cal. App. 4th 185, 191, 83 Cal. Rptr. 3d 885*

In determining whether to uphold trial court's denial of writ of mandate under *Code Civ. Proc. § 1085*, appellate court applies substantial evidence standard of review. *American Federation of State, County and Municipal Employees v. Metropolitan Water District of Southern California (2005) 126 Cal. App. 4th 247, 260-270, 24 Cal. Rptr. 3d 285*

In reviewing trial court's ruling on writ of mandate, court of appeal considers whether findings and judgment are supported by substantial evidence. However, when facts are undisputed and issue turns on statutory interpretation, appellate review is de novo. *Veguez v. Governing Board of Long Beach Unified School District (2005) 127 Cal. App. 4th 406, 414, 25 Cal. Rptr. 3d 526*

On appeal following trial court's decision on petition for writ of mandate, reviewing court need only review record to determine whether trial court's findings are supported by substantial evidence. *Armando D. v. State Department of Health Services (2004) 124 Cal. App. 4th 13, 15, 21 Cal. Rptr. 3d 66*

In reviewing decision on petition for administrative mandamus, appellate court stands in same shoes as trial court, applying substantial evidence rule. Court does not reweigh evidence; it indulges all presumptions and resolves all conflicts in favor of agency's decision. *California Department of Corr. v. State Pers. Bd. (2004) 121 Cal. App. 4th 1601, 1611, 18 Cal. Rptr. 3d 390*

In traditional mandate under *Code Civ. Proc. § 1085*, judicial review as limited to examination of proceedings before agency to determine whether its actions have been arbitrary, capricious, entirely lacking in evidentiary support, or whether it failed to follow proper procedures or to give notice as required by law. *Taylor Bus Service, Inc. v. San Diego Bd. of Education (1987) 195 Cal. App. 3d 1331, 1340, 241 Cal. Rptr. 379* ; *Court House Plaza Co. v. City of Palo Alto (1981) 117 Cal. App. 3d 871, 880, 173 Cal. Rptr. 161 , cert. denied, 454 U.S. 1074, 102 S. Ct. 623, 70 L. Ed. 2d 607*

In determining whether evidentiary support is present in traditional mandate proceeding under *Code Civ. Proc. § 1085*, applicable standard of review as being substantial evidence test; court as not permitted to reweigh evidence but as required to view evidence in light most favorable to agency's actions and to indulge all reasonable inferences in support of them; substantial evidence as defined as relevant evidence that reasonable mind might accept as adequate support for conclusion. *Taylor Bus Service, Inc. v. San Diego Bd. of Education (1987) 195 Cal. App. 3d 1331, 1340, 241 Cal. Rptr. 379*

Scope of appellate court review of superior court judgment on petition for writ of mandate as limited to determination of whether evidence, viewed in light most favorable to respondent, sustains findings of trial court; any reasonable doubts as resolved in favor of findings of trial court. *O'Toole v. Retirement Board (1983) 139 Cal. App. 3d 600, 602, 188 Cal. Rptr. 853*

In determining whether court abused its discretion, reviewing court governed by same principles concerning scope of review as in appeal. *Winton v. Municipal Court (1975) 48 Cal. App. 3d 228, 237, 121 Cal. Rptr. 561*

When superior court reviews municipal court proceedings and does not itself take evidence or make independent factual determination, scope of review of court of appeal as coextensive with that of superior court since only pure question of law involved. *Winton v. Municipal Court (1975) 48 Cal. App. 3d 228, 237, 121 Cal. Rptr. 561*

[16] Substitution of Mandate for Other Remedies

[a] Appeal

Petition for mandate proper when appeal from final judgment would undermine party's sovereign immunity. *Big Valley Band of Pomo Indians v. Superior Court (2005) 133 Cal. App. 4th 1185, 35 Cal. Rptr. 3d 357*

Purported appeal from order sustaining demurrer as properly treated as petition for writ of mandate when question of public importance and statewide concern is presented, parties have fully briefed propriety of trial court's ruling, and respondent did not challenge appealability of order. *Mounger v. Gates (1987) 193 Cal. App. 3d 1248, 1254, 239 Cal. Rptr. 18*

Court as having power to treat improvident appeal as petition for mandate when all conditions necessary for issuing writ of mandate are present and refusal to decide issues raised by appeal would result in unnecessarily dilatory and circuitous litigation. *Southern Pacific Land Co. v. Westlake Farms, Inc. (1987) 188 Cal. App. 3d 807, 826, 233 Cal. Rptr. 794*

Order granting summary judgment as not appealable when judgment never entered; however, plaintiff's appeal treated as petition for writ of mandate because *Code Civ. Proc. § 437c* provides that decision is reviewable by mandate, issues were fully briefed and argued, and no protest to appeal was made by defendants. *Witchell v. De Korne (1986) 179 Cal. App. 3d 965, 969 n.1, 225 Cal. Rptr. 176* (abrogated on another ground by 1990 amendment to *Code Civ. Proc. § 437c* [*see* Stats. 1990, ch. 1561, § 1])

Appellate court as permitted to treat appeal from denial of motion for relief from judgment under *Code Civ. Proc. § 473* as application for writ of mandate if fundamental due process rights involved, even though time for appeal from order imposing discovery sanctions has expired. *In re Marriage of Fuller (1985) 163 Cal. App. 3d 1070, 1076, 210 Cal. Rptr. 73*

Court of appeal as capable of treating record on appeal as petition for writ of mandate when parties so stipulated and circumstances are compelling enough to indicate propriety of such petition in the first instance. *U. S. Financial v. Sullivan (1974) 37 Cal. App. 3d 5, 12, 112 Cal. Rptr. 18*

Appeal from nonappealable interlocutory judgment as not capable of being construed by appellate court as petition for writ of prohibition or mandate when trial court not party to the action. *People ex rel. Dept. of Public Works v. Rodoni (1966) 243 Cal. App. 2d 771, 775, 52 Cal. Rptr. 857*

[b] Certiorari

Writ of mandate as more appropriate than writ of certiorari when court erroneously refuses to assume jurisdiction; appropriate writ granted when complete record before court. *Morrison Drilling Co., Inc. v. Superior Court (1962) 208 Cal. App. 2d 740, 744, 25 Cal. Rptr. 682*

[c] Declaratory Relief

Complaint for declaratory relief and petition for writ of mandate as frequently combined in single action. *Taschner v. City Council (1973) 31 Cal. App. 3d 48, 56, 107 Cal. Rptr. 214* (*disapproved on other grounds* in *Associated HomeBuilders etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 596 n.14, 135 Cal. Rptr. 41, 557 P.2d 473*)

Mandate as an available alternative remedy to declaratory relief action. *Leahey v. Department of Water & Power (1946) 76 Cal. App. 2d 281, 284, 285, 173 P.2d 69*

[d] Prohibition

Mandate as issuing to prohibit official conduct when prohibition would not lie because threatened official act was not judicial but ministerial in nature. *Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 7, 95 Cal. Rptr. 329, 485 P.2d 529*

Mandate as capable of being substituted for prohibition when warranted by circumstances. *Babb v. Superior Court (1971) 3 Cal. 3d 841, 850, 92 Cal. Rptr. 179, 479 P.2d 379* ; *Powell v. Superior Court (1957) 48 Cal. 2d 704, 705, 312 P.2d 698*

Writ of mandate as opposed to writ of prohibition proper when writ of prohibition uncalled for but when facts warrant positive relief. *Williams v. Superior Court (1964) 226 Cal. App. 2d 666, 668, 38 Cal. Rptr. 291* ; *Proctor & Gamble Co. v. Superior Court (1954) 124 Cal. App. 2d 157, 162, 268 P.2d 199*

[17] Substitution of Other Remedies for Prohibition

[a] Certiorari

General rule as being that prohibition lies only to prevent and restrain commission of future judicial acts, not to undo or review action that has already been performed. *Chase v. Superior Court (1962) 210 Cal. App. 2d 872, 878, 27 Cal. Rptr. 383* ; *O'Brien v. Olson (1941) 42 Cal. App. 2d 449, 457, 109 P.2d 8*

Writ of prohibition as not capable of being used to serve purpose of writ of certiorari for review and nullification of judicial act already performed. *Duke v. Justice's Court (1940) 42 Cal. App. 2d 178, 179, 108 P.2d 707*

Appellate court as capable of treating writ of prohibition that is insufficient for that purpose as application for writ of review when entire record of inferior tribunal, including evidence on which it acted, is presented. *Donner Finance Co. v. Municipal Court (1938) 28 Cal. App. 2d 112, 115, 81 P.2d 1054*

[b] Supersedeas

Appellate court as treating application for writ of prohibition as one for writ of supersedeas if appropriate. *Rogers v. Superior Court (1910) 158 Cal. 467, 468-469, 111 P. 357*

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Davis, *Tips for Obtaining a Civil Writ*, 5(8) Cal. Law. 55 (1985)

Review of Selected 1982 California Legislation, *Civil Procedure: Writs of Mandate, 14 Pac. L.J. 481 (1983)*

Chernoff and Watson, *Writ Lore*, 56 Cal. State B.J. 12 (1981)

Moskowitz, *Spinning Gold Into Straw: The Ordinary Use of the Extraordinary Writ of Mandamus to Review Quasi-Legislative Actions of California Administrative Agencies, 20 Santa Clara L. Rev. 351 (1980)*

Fowler, *Mandamus as an Original Proceeding in the California Appellate Courts, 15 Hastings L.J. 177 (1963)*

Note, *Extraordinary Writs--Discretion or Matter of Right? 15 Hastings L.J. 218 (1963)*

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Comment, *Appellate Review in California With the Extraordinary Writs, 36 Calif. L. Rev. 75 (1948)*

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California Civil Writ Practice (Cal. CEB 3d ed. 2000)

Witkin, California Procedure, vol. 8, *Extraordinary Writs*, §§ 1-30, 46 et seq. (4th ed. 1997)

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PART IV. PROCEDURAL CHECKLIST

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§ 358.120 Petitioner's Checklist

NOTE:
The following checklist is for use in a mandate or prohibition proceeding in the Supreme Court, a court of appeal, or a superior court; it is illustrative only.

[1] Facts to Be Ascertained

NOTE:
The following facts ordinarily will be within the knowledge of counsel representing petitioner.

1. Respondent and real party in interest.

NOTE:
The court, not an individual judge, is the proper party respondent to a petition for a writ of mandate seeking an order for the court to act [*Beltone Electronics Corp. v. Superior Court (1978) 87 Cal. App. 3d 452, 454, 151 Cal. Rptr. 109*]. Similarly, when a petitioner seeks to prohibit a tribunal's action by way of a writ of prohibition, the proper respondent is the tribunal as such, not the judge [*Lois R. v. Superior Court (1971) 19 Cal. App. 3d 895, 903, 97 Cal. Rptr. 158*].

a. Name and address of respondent.

b. Name and address of real party in interest if applicable.

2. Facts relating to cause of action.

a. In mandate proceeding.
(1) Type of act sought to be compelled.

(2) Remedies other than mandate that would be available, such as appeal, certiorari, a civil action, declaratory relief, or prohibition.

(3) Circumstances, if any, which would justify filing petition in appellate court [*see Cal. Rules of Ct., Rule 8.486(a)*].

b. In prohibition proceeding.

(1) Type of threatened judicial action sought to be restrained.

(2) Manner in which jurisdictional challenge was made in lower tribunal and ruling thereon.

(3) Remedies other than prohibition that might be available, such as appeal, certiorari, declaratory relief, or mandate.

(4) Circumstances, if any, that would justify filing petition in appellate court [*see Cal. Rules of Ct., Rule 8.486(a)*].

[2] Documents to Be Obtained

Obtain copies of all pleadings, affidavits, minutes, rulings, transcripts, or other documentary evidence necessary to make a complete record [*see* forms at *§ 358.130* and *§ 358.138*].

If review is sought of a trial court ruling, copies of the order or judgment, all documents and exhibits, and a transcript must be attached to the petition. If a stay is requested, prepare an explanation of the reasons for its urgency and all relevant time constraints [*Cal. Rules of Ct., Rule 8.486(b)*; *see also Cal. Rules of Ct., Rule 8.486(c)* (format for supporting documents)].

NOTE:
Clerk's fees for preparing copies of records, proceedings, or papers are set forth in *Gov. Code §§ 26831-26837*, court reporter's fees for preparation of transcripts are set forth in *Gov. Code § 69950*.

[3] Preliminary Determinations

1. In both mandate and prohibition proceedings.

a. Petitioner must be a party beneficially interested in the proceeding [*Code Civ. Proc. §§ 1086, 1103*].

b. Determine whether another remedy such as an appeal exists that is plain, speedy, and adequate.

NOTE:
It is critical to set forth and emphasize to the court that no plain, speedy, and adequate remedy exists [*see* *Code Civ. Proc. §§ 1086, 1103(a)*]. Many petitions are summarily denied because they lack this allegation entirely, or because the allegation is insufficient.

c. Determine proper court in which to file petition.

NOTE:

The petition is usually filed in the superior court of the county in which the lower tribunal, board, corporation, or officer is situated. The Supreme Court and courts of appeal also have original jurisdiction to issue the writ [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 1085(a), 1103(a)*]; thus, the petition may be filed in any one of those courts. When filed in a court of appeal, it is filed in the court of the appellate district in which the lower tribunal, board, corporation, or officer is situated.

If the petition is filed in a reviewing court and might lawfully have been filed in a lower court in the first instance, it must set forth the circumstances that, in the opinion of the petitioner, render it proper that the writ should issue originally from the reviewing court [*Cal. Rules of Ct., Rule 8.486(a)(1)*; *see* basic form of petition to appellate court at *§ 358.138*]. Absent such a showing, the petition may be summarily denied or, if filed in the Supreme Court, transferred to a court of appeal [***see*** *Cal. Rules of Ct., Rule 10.1000*].

2. In mandate proceeding.

a. Respondent must have failed to perform a clear, present, and ministerial duty or have abused its discretion or have failed or refused to exercise its discretion [see *Code Civ. Proc. § 1085(a)*; allegation re duty of respondent in *§ 358.131*].

b. Petitioner must have a clear, present, and substantial right to the performance of respondent's duty if the question is private or, if the question is public in nature, the petitioner must be a citizen [*see Code Civ. Proc. § 1085(a)*; allegation re judicial action in *§ 358.133*].

c. Petitioner must have performed all conditions precedent to maintaining the proceeding, such as exhausting administrative remedies [*see* basic form of petition to superior court in *§ 358.130*].

d. Petitioner must have made a demand if respondent's duty is conditionalon a demand [*see* basic form of petition to superior court in *§ 358.130*].

3. In prohibition proceeding.

a. Respondent must be exercising a judicial function [see *Code Civ. Proc. § 1102*; allegation re judicial action in *§ 358.133*].

b. Respondent must be threatening to act in a manner either in which it lacks jurisdiction or in excess of its jurisdiction [*see Code Civ. Proc. § 1102*; allegation re threatened action in *§ 358.135*; allegation re lack or excess of jurisdiction in *§ 358.136*].

[4] Preparation of Petition for Writ

1. Review essential allegations [*see* forms at §§ 358.130-358.136, *358.138*

2. Draft petition.

For the number of copies to prepare and the format requirements of a petition, see *§ 358.130* and *§ 358.138*. For a cover for use in filing a petition in an appellate court, see *§ 358.137*.

3. Signing.

Whether the petition is to be filed in the superior or appellate court, it is signed by the attorney, or by the party if he or she is not represented by an attorney [*Code Civ. Proc. §§ 128.7(a), 446(a), 1109*].

4. Verification.

For a sample form of verification and for discussions of verification in superior courts and appellate courts, see *§ 358.130* and *§ 358.138*.

[5] Preparation of Points and Authorities

Draft a memorandum of points and authorities in the same number of copies as the petition, and attach a copy to each copy of the petition. For discussions of preparing a memorandum, see *§ 358.130* and *§ 358.138*. For forms of memoranda of points and authorities for use in supporting a petition for writ of mandamus or prohibition, see California Points and Authorities, Ch. 150, *Mandate and Prohibition* .

[6] Preparation of Alternative Writ, Notice of Motion, or Order to Show Cause

For a proceeding in a superior court, depending on which method of giving notice of a hearing for a peremptory writ is being followed [*see Code Civ. Proc. §§ 1088, 1105*], prepare either the alternative writ of mandate and the order [*see § 358.139* and *§ 358.140*], the notice of motion for a peremptory writ [*see § 358.142*], or the order to show cause why a peremptory writ should not issue [*see § 358.144*]. Counsel should draft the alternative writ and order as one document [*see § 358.139*], or separately [*see § 358.140*], depending on local practice.

For a proceeding in the Court of Appeal or in the Supreme Court, the court generally prepares the alternative writ or order to show cause.

NOTE:

A peremptory writ should not be issued in the first instance by an appellate court unless the respondent, and real party in interest, have notice that the procedure is being considered or requested, and have either filed a response on the merits or been given the opportunity to do so. The notice provisions of *Code Civ. Proc. §§ 1088* and *1107* apply if the Court of Appeal is requested to issue a peremptory writ in the first instance [*see* *Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 176, 203 Cal. Rptr. 626, 681 P.2d 893]* . It is common practice for appellate courts to take primary responsibility for providing notice and for soliciting opposition [***see, e.g.,*** *Nissan Motor Corp. v. Superior Court (1989) 212 Cal. App. 3d 980, 981, 261 Cal. Rptr. 80* (court of appeal provided notice and requested opposition in letter to opposing parties before granting peremptory writ in first instance)].

[7] Service of Petition and Points and Authorities

If the proceeding is an original one in an appellate court or if local practice so requires, serve a copy of the petition and a copy of the memorandum on respondent and a copy of each on the real party in interest. In addition, each party must serve and file a Certificate of Interested Entities or Persons at the time it files its first document in the court of appeal and must include a copy of the certificate in its principal brief [*Cal. Rules of Ct., Rule 8.208(d)*]. The provisions of *Code Civ. Proc. §§ 1010-1020*, governing the service of papers in civil actions, apply to the service of the petition and accompanying papers [*Code Civ. Proc. § 1107*]. If the real party in interest is a board or commission, service is made on the presiding officer, on the secretary, or on a majority of the members of the board or commission [*Code Civ. Proc. § 1107*]. For discussion of various methods of service, see *§ 358.130*.

NOTE:

The sequence of service and filing of a petition for writ of mandate or prohibition is usually in the

reverse order of the filing and service of a complaint in an ordinary civil action. Thus, in a mandate or prohibition proceeding, the petition, with accompanying points and authorities, generally is served on respondent and real party in interest before it is presented to the clerk for filing; proof of service is then filed with the petition [*see* *Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.386(e)*].

If no alternative writ is sought pursuant to *Code Civ. Proc. § 1088.5*, the action may be filed and served in the same manner as an ordinary civil action under *Code Civ. Proc. §§ 411.10-417.40* [*Code Civ. Proc. § 1107*]. In a trial court, if no alternative writ is sought, proof of service of a copy of the petition need not accompany the application for a writ at the time of filing, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or to any action by the court [*Code Civ. Proc. §§ 1088.5, 1105*].

The court in its discretion, however, may permit the filing of the petition without prior service [*see* *Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.386(e)(6)*]. The practice in superior courts varies throughout the state and should be checked before serving the petition. If, as a matter of general practice, the court permits the filing of petitions without prior service and then orders the issuance of alternative writs ex parte whenever a petition appears meritorious, petitioner will be able to serve the petition and the alternative writ simultaneously and thus avoid the costs of double service. Double service may also be avoided when there is a bona fide emergency that would permit the issuance of an alternative writ without prior service of the petition. For discussion of issuance of ex parte writs, see *§ 358.139*.

[8] Preparation of Proof of Service of Petition

In the general situation in which proof of service is required before the petition can be filed, prepare the affidavit [*Code Civ. Proc. §§ 417.10, 1013a, 1109, 2009*]or declaration [*Code Civ. Proc. § 2015.5*] of service of the petition by either personal service or by mail, in as many copies as the court requires [*see* forms at *§§ 358.130, 358.138*], plus one office copy. Append the original and copies to the original petition and copies thereof. For forms of proof of service, see Ch. 518, *Service of Summons and Papers* .

NOTE:

Service of the petition before filing is, of course, not necessary when the practice of the court is to grant alternative writs ex parte on showing of good cause or when there is a justified emergency. See Note in § 358.120[7].

In the Supreme Court or in a court of appeal, the proof of service must name each party represented by each attorney served. A petition accompanied by a defective proof of service shall be filed, but if a proper proof of service is not filed within five days after the clerk gives notice of the defect, the court may strike the petition or impose a lesser sanction [*Cal Rules of Ct., Rule 8.386(e)*].

[9] Filing Petition

When the proceeding is an original one in an appellate court, file the petition and the required number of copies [*see Cal. Rules of Ct., Rule 8.44*, and §§ 358.130, *358.138*], the supporting memorandum of points and authorities, the Certificate of Interested Entities or Persons, and the proof of service with the clerk of the proper court. When the proceeding is in a superior court, local practice must be checked to ascertain the applicable procedure. Some courts permit the filing of the petition after a judge (usually the Presiding Judge or the Law and Motion Judge) has signed an order ex parte directing the clerk to issue an alternative writ. Other courts adhere more closely to the procedure followed in the appellate courts. See generally *§ 358.139*, for discussion of the issuance of ex parte alternative writs. For a

discussion of the manner of filing when no alternative writ is sought, see *§ 358.120[7]*.

NOTE:

A filing fee of $655, payable to the clerk of the court, must accompany the filing of a petition for a writ of mandate or prohibition in a court of appeal [*Gov. Code §§ 68926* (requires $485), *68926.1(b)* (requires $170 for deposit in appellate court trust fund)].

The fee is $590 for a filing with the Supreme Court [*Gov. Code § 68927* (requires $420); *Gov. Code § 68926.1* (requires $170 for deposit in appellate court trust fund)].

For a form of waiver of filing fees in proceedings *in forma pauperis*, see Ch. 174, ***Costs and Attorney's Fees,*** *§ 174.110 et seq.*

[10] Consideration and Ruling on Petition

1. Hearing of petition.

A superior court judge may hear and dispose of the writ petition in chambers [*Code Civ. Proc. § 166(a)(1)*]. Appellate courts usually determine in conference whether to grant the petition and issue the alternative writ or to deny the petition.

2. Summary denial.

Denial of the petition is usually by minute order. Summary denial is neither precedent nor res judicata [*see People v. Medina (1972) 6 Cal. 3d 484, 490-492, 99 Cal. Rptr. 630, 492 P.2d 686* (prohibition proceeding); *Hagan v. Superior Court (1962) 57 Cal. 2d 767, 770, 22 Cal. Rptr. 206, 371 P.2d 982* (mandate proceeding); *De Bottari v. Melendez (1975) 44 Cal. App. 3d 910, 914 n.3, 119 Cal. Rptr. 256* (mandate proceeding)], and it does not establish the law of the case, regardless of whether the denial is intended to be on the merits or is based on some other reason [*Kowis v. Howard (1992) 3 Cal. 4th 888, 899, 12 Cal. Rptr. 2d 728, 838 P.2d 250*].

3. Motion for judgment on peremptory writ.

If a petition for a writ of mandate does not seek an alternative writ pursuant to *Code Civ. Proc. § 1088.5*, and presents no triable issue of fact or is based solely on an administrative record, the matter may be determined by the court by noticed motion of any party for a judgment on the peremptory writ [*Code Civ. Proc. § 1094*; *see §§ 358.152, 358.153*].

4. Review of denial.

The usual method of review of an order denying a petition for a writ of mandate or prohibition filed in the superior court is appeal to a court of appeal. If this method is inadequate, a new petition invoking the original jurisdiction of an appellate court may be filed [*see Farley v. Healey (1967) 67 Cal. 2d 325, 326-327, 62 Cal. Rptr. 26, 431 P.2d 650* (mandate proceeding); *Mihans v. Municipal Court (1970) 7 Cal. App. 3d 479, 483, 87 Cal. Rptr. 17* (prohibition proceeding)].

NOTE:

If the denied petition sought a writ directed to a municipal court, relating to a pending matter therein, appeal is unavailable; review in such a case may, however, be obtained by filing a new petition for extraordinary writ in an appellate court [

***Code Civ. Proc. § 904.1(a)*]**.

5. Granting of order to issue alternative writ.

If the superior court grants an order commanding an alternative writ to issue [*see* forms at *§§ 358.139* and *358.139*], the clerk then issues the writ. In a superior court proceeding counsel will have drafted [*see § 358.120[6]*] the alternative writ and order as one document [*see* forms at *§§ 358.139, 358.140*] or separately [*see* form at *§ 358.139*], depending on what the local practice is. Appellate courts draft their own alternative writs or orders to show cause.

6. Date for hearing.

The date for hearing on the alternative writ is supplied by the judge or the clerk. A hearing date may be set at any time [*see Code Civ. Proc. § 1108*]. When the date is supplied by the clerk, counsel should obtain the date prior to filing the alternative writ. When the noticed-motion procedure is used by petitioner, the hearing date is determined by counsel with attention to the10-day prior notice requirement [*see Code Civ. Proc. § 1088*].

[11] Service of Alternative Writ

NOTE:

If it appears that the parties adversely affected by the writ have been provided with due notice, the petition and opposing papers on file adequately address the issues raised by the petition, no factual dispute exists, and additional briefing that would follow issuance of an alternative writ is unnecessary to disposition of the petition, the peremptory writ may be issued in the first instance [*see* *Code Civ. Proc. §§ 1088, 1105*; *Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 178, 180, 203 Cal. Rptr. 626, 681 P.2d 893*].

The court may issue a peremptory writ in the first instance only if it determines the petitioner's relief is so obvious that no purpose could reasonably be served by issuance of an alternative writ requesting full review, or if there is a compelling and unusual urgency requiring acceleration of the process [*Alexander v. Superior Court (1993) 5 Cal. 4th 1218, 1223, 23 Cal. Rptr. 2d 397, 859 P.2d 96*]. This principle seems confined to the issuance of a peremptory writ by an appellate court. Superior courts do not appear to issue ex parte peremptory writs.

1. Parties to be served.

If the alternative writ is issued, a copy must be served on respondent and each real party in interest in the same manner as a summons in a civil action unless otherwise directed by the court [*see Code Civ. Proc. §§ 1096, 1105*]. If not already served, petitioner must serve a copy of the petition and memorandum of points and authorities on each person against whom the writ is sought [*see Code Civ. Proc. §§ 1088, 1105*]. See *§ 358.139* for methods of service on certain types of parties.

2. Method of service.

See *§ 358.139*, for discussion of the various methods of service.

3. Proof of Service.

See discussion in *§§ 358.120[8], 358.130*.

[12] Preparation of Petitioner's Response to Actions by Respondent and Real Party in Interest

1. Replication to answer.

If a replication is to be served and filed [*see* form at *§ 358.146*], draft the replication in the same number of copies as required for filing in the case of the petition plus an additional copy for serving on the party to whose answer replication is made or a copy for each adverse party and an office copy. Sign it as counsel for petitioner [*see Code Civ. Proc. §§ 128.7(a), 446(a), 1109*].

2. Response to demurrer to petition.

If respondent, real party in interest, or both demur to the petition [*Code Civ. Proc. § 1089*; *Cal. Rules of Ct., Rule 8.487(b)*], prepare a memorandum of points and authorities in opposition to it in the same number of copies as required for filing the petition.

3. Response to other motions.

If any other motions are filed, prepare a memorandum of points and authorities in opposition in the same number of copies as above.

[13] Service and Filing of Petitioner's Responses

1. Serve papers.

See *§ 358.130*.

2. Proof of service.

See discussion in *§ 358.120[8]*.

3. Filing.

See discussion in *§ 358.120[9]*.

[14] Hearing and Determination

NOTE:

The peremptory writ of mandate cannot be issued by default; the case must be heard by the court whether the adverse party appears or not [*Code Civ. Proc. §§ 1088, 1105*]. If a return is not made by respondent or real party in interest, the case is heard on the papers of petitioner [*Code Civ. Proc. §§ 1094, 1105*]. If the return raises only questions of law or puts in issue immaterial statements that do not affect the substantial rights of the parties, the court must proceed to hear or fix a day for hearing the argument of the case [*Code Civ. Proc. §§ 1094, 1105*].

1. Consider requesting jury trial.

Counsel for petitioner should consider requesting the judge to exercise his or her discretion and order a key factual issue tried by a jury [*see Code Civ. Proc. §§ 1090, 1105*].

2. Preparing and presenting evidence.

Counsel for petitioner must be careful to put in issue all affirmative allegations raised in the return to the petition, either through the replication or at the hearing. Naturally, if there is a hearing the evidence also must be presented persuasively to the judge or jury.

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31-358 California Forms of Pleading and Practice--Annotated § 358.121

§ 358.121 Checklist for Respondent and Real Party in Interest

[1] Preliminary Opposition

NOTE:

Although no statement in opposition to the petition is required unless requested by the court, *Code Civ. Proc. § 1107* and *Cal. Rules of Ct., Rule 8.487(a)(1)* provide that respondent or real party in interest may file an initial opposition to the petition within 10 days after it is filed. This opportunity is, of course, negated when a court issues an alternative writ or order to show cause immediately with the filing of the petition. If counsel receives a copy of the petition and an alternative writ or order to show cause has not issued, however, consideration should be given to an initial opposition stating the reasons why an alternative writ or order ought not issue. If the petition appears obviously flawed, counsel may want to save the respondent or real party in interest the expense of the drafting of an initial opposition, since, many times, a court will summarily deny thepetition even without the benefit of counsel's opposing points and authorities.

If respondent and real party in interest, if any, have received notice that a peremptory writ may issue in the first instance [*see* *§ 358.120[6]*], counsel must provide as detailed a preliminary opposition as possible, raising all matters that might be raised in a demurrer or answer. At least 10 days after notice is provided that a peremptory writ may issue in the first instance, the court may issue the writ without having issued an alternative writ without hearing oral argument, and without having waited for a full scale return [*Code Civ. Proc. §§ 1088, 1105*; ***see*** *Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 178-180, 203 Cal. Rptr. 626, 681 P.2d 893* ; *Lewis v. Superior Court (1999) 19 Cal. 4th 1232, 1243-1261, 82 Cal. Rptr. 2d 85, 970 P.2d 872*]. Thus, when notice is provided that a peremptory writ may issue in the first instance, the preliminary opposition may be the respondent's or real party in interest's only opportunity to block issuance of the writ [***see*** *Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 178, 180, 203 Cal. Rptr. 626, 681 P.2d 893*].

In order to encourage full review of the issue presented and to preserve for later review the issue of the propriety of using the expedited writ process, the opposing party should also raise in its preliminary opposition any reasons the court should not grant expedited relief by issuing a

peremptory writ in the first instance [*see* *Alexander v. Superior Court (1993) 5 Cal. 4th 1218, 1223, 23 Cal. Rptr. 2d 397, 859 P.2d 96*].

1. Points and authorities.

If counsel decides to oppose the petition, draft the memorandum in opposition to the granting of the writ in the same number of copies for filing as is required for the petition [*see §§ 358.130, 358.138*], plus an additional copy for service on petitioner and an office copy.

NOTE:
If the alternative writ issues, the foregoing memorandum may not subsequently be adopted as a return to the writ [*see* *Pacific Indem. Co. v. Superior Court of San Francisco (1966) 246 Cal. App. 2d 63, 65 , 54 Cal. Rptr. 470]* .

2. Statement of fact in appellate court.

When the petition has been filed in an appellate court, draft a statement of any material fact not included in the petition [*Cal. Rules of Ct., Rule 8.487(a)(2)*]. There should be the same number of copies as the memorandum.

3. Service of papers.

Serve a copy of the memorandum of points and authorities, a Certificate of Interested Entities or Persons [*Cal. Rules of Ct., Rule 8.208(d)*], and any statement of fact on petitioner. Service may be made by delivering a copy to him or her personally or by mail [*Code Civ. Proc. §§ 1011-1013a, 1109*]. If petitioner is represented by counsel, the papers are served on him or her rather than on petitioner [*Code Civ. Proc. §§ 1015, 1109*].

4. Proof of service.

Prepare proof of service of the memorandum [*see § 358.120[8]*].

5. Filing.

Within 10 days after service and filing of the petition [*Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.487(a)*], file with the clerk of the court either in person or by mail the original of the memorandum of points and authorities, the statement of fact if there is one, the proof of service, and the required number of copies if the proceeding is in an appellate court.

[2] Return to Alternative Writ

1. Drafting pleadings and papers.

a. Answer [*see* form at *§ 358.145*].

Draft the answer in the same number of copies for filing as is required for the petition [*see* forms at *§§ 358.130, 358.138*], plus an additional copy for service on petitioner and an office copy.

b. Verification [*see* form at *§ 358.145*].

Draft the verification required for the answer [*Code Civ. Proc. §§ 1089, 1105*; *Cal. Rules of Ct, Rule 8.487(b)(1)*], either in affidavit form or in the form of a declaration under penalty of perjury [*Code Civ. Proc. §§ 446, 1109, 2015.5*].

c. Demurrer [*see* form at *§ 358.144*].

Draft the demurrer if there is to be one in the same number of copies as required for the answer.

NOTE:
If the return is by demurrer alone, and the demurrer is overruled, the overruling court may refuse to allow the subsequent filing of an answer, in which case it may issue a peremptory writ without leave to answer [*Rhyne v. Municipal Court (1980) 113 Cal. App. 3d 807, 819, 170 Cal. Rptr 312* (discretion of superior court to refuse filing of answer); *Cal. Rules of Ct., Rule 8.487(b)(4)* (discretion of appellate court to refuse filing of answer)]. It is good practice to file an answer with a demurrer to avoid the possibility that a demurrer filed alone will be overruled without leave to file an answer.

d. Points and authorities.

Draft the memorandum in support of the demurrer [*see Cal. Rules of Ct., Rule 3.1113(a)*] in the same number of copies as the demurrer.

2. Execution of pleadings.

a. Answer and demurrer.

Sign the answer and demurrer as counsel for respondent or real party in interest [*see Code Civ. Proc. §§ 128.7(a), 446(a), 1109*].

b. Verification of answer.

If the verification is in the form of a declaration under penalty of perjury, have it signed by the party making the answer. If it is in affidavit form, have it acknowledged by an appropriate officer such as a notary public.

3. Service of pleadings and papers.

See *§ 358.121[1]*.

4. Proof of service.

See *§ 358.121[1]*.

5. Filing.

File either in person or by mail the original of the pleadings and papers with proof of service together with the required number of copies if the proceeding is in an appellate court. The pleadings and papers are, of course, filed with the clerk of the court that issued the writ.

6. Time of filing.

The alternative writ will ordinarily set forth the time within which the return must be made.

NOTE:
With proceedings in appellate courts, the return must be served and filed within 30 days after the court issues the alternative writ or order to show cause or notifies the parties that it is considering issuing a peremptory writ in the first instance [*Cal. Rules of Ct., Rule 8.487(b)(2)*].

7. Time of filing when no alternative writ is sought in a trial court.

If no alternative writ is sought in the trial court pursuant to *Code Civ. Proc. § 1088.5*, and if a record of the proceedings to be reviewed has been filed with the petition or if no record is required, the respondent must answer or otherwise respond within 30 days after service of the petition. If, however, a record has been requested pursuant to *Gov. Code § 11523* or otherwise, and has not been filed with the petition, the party on whom the petition has been served, including any real party in interest, must answer or otherwise respond within 30 days following receipt of a copy of the record [*Code Civ. Proc. §§ 1089.5, 1105*].

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§ 358.122 Hearing Procedure

NOTE:

When respondent or real party in interest fails to make a return, the hearing mentioned in *Code Civ. Proc. §§ 1088, 1094* is to try only questions of law and not issues of fact [***see*** *Rodriguez v. Municipal Court (1972) 25 Cal. App. 3d 521, 526, 102 Cal. Rptr. 45* (mandate proceeding)]. When there is a question of fact in a mandate or prohibition proceeding that is raised either in the replication or the hearing, the matter is heard in the same manner as any other trial [*see* *Lotus Car Ltd. v. Municipal Court of Southern Judicial Dist. (1968) 263 Cal. App. 2d 264, 269, 69 Cal. Rptr. 384* (mandate proceeding)]. Because of these facts, there is nothing peculiar about hearings in mandate or prohibition proceedings. Hence, this guide offers no specific suggestions for presenting the argument and the evidence, if there is any, at the hearing.

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§ 358.123 Post-hearing Procedure

[1] Superior Court

1. Judgment

a. Proposed judgment.

If no party requests or is ordered to prepare a statement of decision and a written judgment is required, the court must prepare and serve a proposed judgment on all parties that appeared at the trial within 20 days after the announcement or service of the tentative decision or the court may order a party to prepare, serve, and submit the proposed judgment to the court within 10 days 10 after the date of the order [*Cal. Rules of Ct., Rule 3.1590(h)*]. If the court orders that the statement of decision is deemed waived and a written judgment is required, the court must, within 10 days of the order deeming the statement of decision waived, either prepare and serve a proposed judgment on all parties that appeared at the trial or order a party to prepare, serve, and submit the proposed judgment to the court within 10 days [*Cal. Rules of Ct., Rule 3.1590(i)*; for procedure when statement of decision is requested, *see Cal. Rules of Ct., Rule 3.1590(d)*]. For a form of judgment, see *§ 358.147*.

b. Preparation of objections to proposed judgment.

When served with a proposed judgment, prepare, serve, and file any objections to it within 10 days [*Cal. Rules of Ct., Rule 3.1590(j)*].

2. Peremptory writ [*see* form at *§ 358.149*].

a. Preparation.

If the judgment grants the peremptory writ, petitioner must prepare the writ in three

or four copies (original for filing, copy for service on respondent, copy for service on real party in interest if there is any, and office copy).

b. Service

Serve a copy of the writ in the same manner as a summons in a civil action on the respondent and real party in interest [*Code Civ. Proc §§ 1096, 1105*]. Serve on a majority of the members of any board or body is service on the board or body whether at the time of the service the board or body was in session or not [*Code Civ. Proc. §§ 1096, 1105*].

3. Costs.

NOTE:
The term "costs" in *Code Civ. Proc. § 1095* means those fees and charges which are required by law to be paid to the courts or some of their officers or an amount fixed by law [*Escrow Guar. Co. v. Savage (1963) 213 Cal. App. 2d 595, 597, 28 Cal. Rptr. 889*]. The court has discretion in deciding whether to award costs under *Code Civ. Proc. § 1095* [*Kramer v. State Board of Accountancy (1962) 200 Cal. App. 2d 163, 177, 19 Cal. Rptr. 226*].

a. Memorandum.

Counsel for the prevailing party prepares a verified memorandum of his costs [*Code Civ. Proc. §§ 1032-1034, 1095, 1105, 1109*; *Cal. Rules of Ct., Rules 3.1700 et seq.*] in three or four copies (one for filing, copy for respondent, copy for real party in interest if there is any, and office copy).

For discussion, procedural checklist, and forms for use in obtaining costs generally, see Ch. 174, *Costs and Attorney's Fees* .

b. Service.

Within 15 days after the date of mailing of the notice of entry of judgment or the date of service of written notice of entry of judgment or within 180 days after entry of judgment, whichever is earlier [*Cal. Rules of Ct., Rule 3.1700(a)(1)*], serve a copy of the memorandum on each party or on his attorney if he or she is represented by counsel [*Code Civ. Proc. §§ 1015, 1109*] and file the original memorandum with the superior court clerk.

4. Motion for new trial.

Code Civ. Proc. § 1110 makes applicable to mandate and prohibition proceedings the provisions of Part Two of the Code of Civil Procedure relating to new trial [*Code Civ. Proc. §§ 655-662.5*] except insofar as they are inconsistent with the provisions relating to mandamus and/or prohibition. *Code Civ. Proc. § 1092* (made applicable to prohibition proceedings by *Code Civ. Proc. § 1105*) provides that a motion for new trial must be made in the court in which the issue of fact was tried.

5. Appeal.

Code Civ. Proc. § 1110 makes applicable to mandate and prohibition proceedings the provisions of Part Two of the Code of Civil Procedure relating to appeals. Hence, either party aggrieved by the judgment, or both parties if both are aggrieved, may appeal from the judgment [*Code Civ. Proc. §§ 902,*

904.1, 1110] to the proper court of appeal.

Except as otherwise provided by *Code Civ. Proc. § 870* (relating to validation proceedings) or other statute, notice of appeal from a superior court judgment must be filed within 60 days after the date of serving notice of entry of judgment by the clerk of the court pursuant to *Code Civ. Proc. § 664.5*, or within 60 days after the date of service of written notice of entry of judgment by any party on the party filing the notice of appeal, or within 180 days after the date of entry of the judgment, whichever is earliest, unless the time is extended as provided in *Cal. Rules of Ct., Rule 8.108* [*Cal. Rules of Ct., Rule 8.104(a)*].

For discussion, procedural guide, and forms for use in appealing from judgments and orders of the superior court in civil actions generally, see Ch. 40, *Appeal: An Overview* .

NOTE:

If the remedy of appeal from a judgment denying a writ is inadequate, petitioner may file an original petition for writ of mandate with the proper court of appeal or the Supreme Court [*see Farley v. Healey (1967) 67 Cal. 2d 325, 32/1-/227, 62 Cal. Rptr. 26, 431 P.2d 650* (mandate proceeding); *Mihans v. Municipal Court (1970) 7 Cal. App. 3d 479, 483, 87 Cal. Rptr. 17* (prohibition proceeding)].

Appeal will be unavailable if the denied petition sought a writ directed to a municipal court or justice court, relating to a pending matter therein; review in such a case may, however, be obtained by filing a new petition for extraordinary writ in an appellate court [*Code Civ. Proc. § 904.1(a)*].

[2] Court of Appeal and Supreme Court

1. Judgment.

a. Preparation.

The written opinion of the court constitutes its judgment and therefore counsel does not prepare a form of judgment.

b. Service.

The clerk files all opinions and orders of the court. The clerk then promptly sends copies showing the filing date to the parties and, when relevant, to the lower court or tribunal [*Cal. Rules of Ct., Rules 8.264(a)(1), 8.532(a)*].

2. Peremptory writ.

Ordinarily, the court's opinion serves as sufficient direction to the respondent or real party in interest. If the respondent or real party in interest fails to comply, petitioner should draft a peremptory writ, have it issued by the clerk of the court, and serve it in the same manner as a summons [*Code Civ. Proc. § 1096, 1105*].

3. Costs.

NOTE:

When a mandate or prohibition proceeding is commenced in an appellate court, if the prevailing petitioner desires an allowance for costs and the judgment does not allow them, he or she should apply to the court for allowance within such time as will enable the court to pass upon the application. If costs are

allowed, the court will then have time to modify the judgment before it becomes final [*Union Trust Co. v. Superior Court (1939) 13 Cal. 2d 541, 543, 90 P.2d 582* (mandate proceeding)].

a. Preparation of motion for costs.

If the opinion fails to mention costs and the prevailing party wishes to apply for them, counsel should prepare a motion for modification of the opinion to include an award of costs. Copies should be prepared for service on respondents and real party in interest, if any, and for use as office copies as needed. In addition to filing the original, eight filing copies are required in the Supreme Court, and three in the court of appeal [*Cal. Rules of Ct., Rule 8.44(b)*].

b. Service.

Serve a copy of the motion on each party or the party's attorney [*Code Civ. Proc. §§ 1015, 1109*]. File the original, together with the required number of copies, with the clerk of the court in sufficient time to enable the court to act on the motion before the court's judgment becomes final [*see Union Trust Co. v. Superior Court (1939) 13 Cal. 2d 541, 543-544, 90 P.2d 582* (mandate proceeding)].

NOTE:

If a court or judge is named as respondent, the award of costs cannot run against it or him if it be found that the proceeding was defended in good faith. This, however, does not preclude an award of costs against an unsuccessful real party in interest [*Oksner v. Superior Court (1964) 229 Cal. App. 2d 672, 690-691, 40 Cal. Rptr. 621* (mandate proceeding)].

4. Petition for rehearing.

Either the Supreme Court or a court of appeal may grant a rehearing after its decision if a petition therefor is filed within 15 days after the filing of the decision [*Cal. Rules of Ct., Rules 8.268, 8.536*].

5. Petition for review in Supreme Court.

A party seeking review in the Supreme Court, after decision in a court of appeal, serves and files a petition for review within 10 days after the decision of the court of appeal becomes final regarding that court [*Cal. Rules of Ct., Rule 8.500(e)*]. The petition should contain allegations establishing that Supreme Court review is necessary to secure uniformity of decision or the settlement of important questions of law [*see Cal. Rules of Ct., Rule 8.500(b)*]. An answer to the petition may be served and filed within 20 days after the petition is filed [*Cal. Rules of Ct., Rule 8.500(e)*]. A party desiring to bring the case before the Supreme Court should, under ordinary circumstances, petition for review and should not file another original petition for a writ of mandate or prohibition when it has already been before a court of appeal [*see Paige Co. of N. Cal. v. Superior Court (1924) 194 Cal. 795, 796, 231 P. 344* (prohibition proceeding)]. For discussion of review in the California Supreme Court, see Ch. 54, *Appeal: California Supreme Court Review* .

[3] Enforcement

Code Civ. Proc. § 1097 (made applicable to prohibition proceedings by *Code Civ. Proc. § 1105*) provides sanctions in the nature of contempt in cases of either refusal or neglect to obey a peremptory writ. For a form of an order to show cause re failure to obey a peremptory writ, see *§ 358.151*.

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[Reserved]

§§ 358.124[Reserved]

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PART V. FORMS

31-358 California Forms of Pleading and Practice--Annotated § 358.130

§ 358.130 Basic Form of Petition to Superior Court in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103]

[1] FORM Basic Form of Petition to Superior Court in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF

_____ [*name*],	)	
Petitioner,	)	
vs.	)	
_____ [*name of board, corporation, or person*],	)	NO. _____
Respondent[,]	)	PETITION FOR WRIT OF _____
[_____ (*name*),	)	[MANDATE *or* PROHIBITION *or* MANDATE OR PROHIBITION]
Real Party in Interest].	)	[*Code Civ. Proc. §§ 1085, 1086, 1102, 1103*]
	)	
	)	

_____

Petitioner alleges:

1. Petitioner is _____ [*identify petitioner and describe capacity, if other than as an individual, in which the proceeding is being brought*].

2. Respondent _____ [*name*] is _____ [*describe title, capacity, and status of respondent*].

3. [Real party in interest is _____ (*name*) and has an interest that is directly affected by this proceeding

in that _____ (*specify reasons that make person the real party in interest*).]

4. [*If petitioner seeks writ of mandate, allege here and in subsequent numbered paragraphs, as necessary, facts showing the respondent's duty that the law specially enjoins (§ 358.131) or the petitioner's right or office to which he or she entitled to be admitted. If petitioner seeks writ of prohibition, allege here and in subsequent numbered paragraphs, as necessary, facts showing respondent's threatened judicial action (§§ 358.133, 358.135), an objection to respondent's jurisdiction on the basis of its lack or excess of jurisdiction (§§ 358.134, 358.136), and the court's ruling on the objection, if any (§ 358.135). Petitioner should allege here and in subsequent numbered paragraphs, as necessary, all the above facts when he or she is requesting the issuance of either writ in the alternative.*]

5. [*Allege facts showing petitioner's beneficial interest in the issuance of the writ (§ 358.132).*]

[6. Petitioner has performed all conditions precedent to the filing of this petition by _____ (*describe performance of conditions such as raising objection underlying petition in the inferior court or exhausting administrative or contractual remedies*).]

[7. *If petitioner seeks writ of mandate and respondent has failed to perform a duty that is conditional on a demand being made by petitioner, allege either a demand for the performance of respondent's duty or facts that excuse the making of the demand.*]

[8. _____ (*If petitioner seeks writ of mandate and is seeking either the performance of respondent's duty or the exercise of respondent's discretion, add:* At all times herein mentioned, respondent has been able to _____ (perform the duty mentioned above *or* exercised the discretion mentioned above). Notwithstanding such ability (and despite petitioner's demand for the _____ (performance of the duty *or* exercise of such discretion)), respondent continues to fail (and refuse) to _____ (perform such duty *or* exercise such discretion).]

9. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition, in that _____ [*state specific facts showing absence of an adequate legal remedy such as appeal*].

[10. Respondent's _____ (failure to perform the duty herein mentioned *or* abuse of discretion *or* failure to exercise discretion *or* action) has damaged petitioner in the sum of $_____ in that _____ (*describe facts showing petitioner's damages*).]

WHEREFORE, petitioner prays:

1. That the court issue a peremptory writ in the first instance commanding respondent to _____ [*describe duty to be performed or action to be prohibited*]; or

2. That the court, alternatively, first issue an alternative writ commanding respondent to _____ [*describe duty to be performed or action to be prohibited*] or, in the alternative, show cause why it should not do so, and thereafter issue a peremptory writ commanding respondent to _____ [*describe duty to be performed or action to be prohibited*];

[3. For damages in the sum of $_____;] and

4. For costs of this proceeding and for such other and further relief as the court deems just and proper.

Dated _____.

_____ [*firm name, if any*]
_____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in this proceeding. I have read the foregoing petition and know its contents. The facts stated therein are true and are within my personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above* is a general form for use in filing a petition for a writ of mandate, prohibition, or for either writ in the alternative. The form is necessarily very general because of the multitude of factual situations in which mandate and prohibition are appropriate remedies. Thus, counsel may adapt the form to meet the facts peculiar to the situation. Because a petition may be denied summarily, however, care must be taken in adapting the form to make certain that no essential allegations are inadvertently omitted.

[3] Requesting Specific Writ

The prayer in this form does not request a specific writ. If it is clear in a particular case that either mandate or prohibition is the appropriate remedy, the petitioner may wish to modify the foregoing form to specify the particular writ requested. If, however, it is unclear whether one remedy or the other is appropriate, or if only both remedies combined will afford complete relief, counsel need not couch the petition in terms of a specific writ [*see Peck's Liquors, Inc. v. Superior Court (1963) 221 Cal. App. 2d 772, 775, 34 Cal. Rptr. 735*].

If the petitioner seeks the wrong writ, the court may treat the petition as one for the proper writ [*see, e.g., Owens v. Superior Court (1959) 52 Cal. 2d 822, 345 P.2d 921* ; *see also Peck's Liquors, Inc. v. Superior Court (1963) 221 Cal. App. 2d 772, 775, 34 Cal. Rptr. 735* ("neither mislabeling nor a defective prayer will bar relief justified by proper allegations and proof")].

Apparently, ex parte peremptory writs are rarely issued in the superior courts. Before the court can issue a peremptory writ in the first instance, the respondent and real party in interest, if any, must be provided with at least 10 days' notice [*see Code Civ. Proc. § 1088*]. Counsel may serve a separate paper on the opposing parties to provide the required notice [*see* form at *§ 358.141*].

[4] Allegations

[a] In General

Although mandate and prohibition share certain requirements (i.e., the petitioner must be "beneficially interested" [*see Code Civ. Proc. §§ 1086, 1103(a)*]), the requisite allegations for obtaining the writs differ in many respects. For the sake of convenience, the allegations in the petition applicable to the two writs will be discussed separately below.

[b] Mandate

A petition for a writ of mandate should allege the following:

- The identity of respondent as inferior tribunal, corporation, board, or person (Paragraph 2) [*Code Civ. Proc. § 1085(a)*].

- The identity of the real party in interest, if any (Paragraph 3) [*cf. Cal. Rules of Ct., Rule 8.486(a)* (applicable only to petitions filed in reviewing courts)].

- The action sought to be compelled, that is, either the performance of an act that the respondent is specially enjoined by law to do (Paragraph 4; form at § 358.131) or the admission of the petitioner to the use and enjoyment of a right, or to an office, to which he or she is entitled (Paragraph 4) [*Code Civ. Proc. § 1085(a)*].

- The petitioner's beneficial interest (Paragraph 5; form at *§ 358.132*) [*Code Civ. Proc. § 1086*; *California Association for Health Services at Home v. State Department of Health Services (2007) 148 Cal. App. 4th 696, 704-707, 56 Cal. Rptr. 3d 102* ; *Taschner v. City Council (1973) 31 Cal. App. 3d 48, 55-56, 107 Cal. Rptr. 214* (*disapproved on other grounds* in *Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 596 n.14, 135 Cal. Rptr. 41, 557 P.2d 473*)].

- The performance of all conditions precedent, if any (Optional Paragraph 6) [*see* *Igna v. City of Baldwin Park (1970) 9 Cal. App. 3d 909, 914, 88 Cal. Rptr. 581*].

- The making of a demand on respondent if the duty was conditioned on demand (Optional Paragraph 7) [*see* *Metropolitan Life Ins. Co. v. Rolph (1920) 184 Cal. 557, 559, 194 P. 1005*].

- The ability of respondent to perform the duty or exercise the discretion when the writ seeks to compel performance of duty or exercise of discretion (Optional Paragraph 8) [*see* *Treber v. Superior Court (1968) 68 Cal. 2d 128, 134, 65 Cal. Rptr. 330, 436 P.2d 330*].

- The lack of an adequate legal remedy (Paragraph 9) [*see* *Phelan v. Superior Court (1950) 35 Cal. 2d 363, 366, 217 P.2d 951* ; for detailed discussion of this crucial allegation, *see §§ 358.50 -358.51*].

- Damages, if any (Optional Paragraph 10) [see *Code Civ. Proc. § 1095*].

[c] Prohibition

A petition for a writ of prohibition should allege the following:

- The identity of respondent as inferior tribunal, corporation, board, or person (Paragraph 2) [*Code Civ. Proc. § 1103(a)*; *Haldane v. Superior Court (1963) 221 Cal. App. 2d 483, 485-486, 34 Cal. Rptr. 572*].

- Identity of real party in interest, if any (Paragraph 3) [*cf. Cal. Rules of Ct., Rule 8.490(b)(2)* (applicable only to petitions filed in reviewing courts)].

- The facts that respondent is exercising a judicial function and is threatening to take judicial action without or in excess of its jurisdiction (Paragraph 4; *see* forms at *§§ 358.133, 358.135, 358.136*) [see *Code Civ. Proc. § 1102*].

- The fact that petitioner objected to respondent's exercise of jurisdiction (and the court's ruling on the objection), that respondent's lack of jurisdiction was apparent on the face of the relevant pleading, or that such an objection would have been useless (Paragraph 4; *see* form at § 358.134) [*see Rescue Army v. Municipal Court (1946) 28 Cal. 2d 460, 465, 171 P.2d 8 , appeal dismissed, 331 U.S. 549 (1947)* ; *Hanrahan v. Superior Court (1947) 81 Cal. App. 2d 432, 434-435, 184 P.2d 157*].

- The beneficial interest of petitioner (Paragraph 5; *see* allegation at *§ 358.132*) [*Code Civ. Proc. § 1103(a)*; *Seven Up Bottling Co. v. Superior Court (1951) 107 Cal. App. 2d 75, 76, 236 P.2d 623*].

- Facts indicating the absence of an adequate legal remedy (Paragraph 9) [*Code Civ. Proc. § 1103(a)*; *Peebler v. Superior Court (1944) 63 Cal. App. 2d 651, 653, 147 P.2d 34* ; for detailed discussion of this crucial allegation, *see §§ 358.50 -358.51*].

- Damages, if any (Optional Paragraph 10) [*see Code Civ. Proc. §§ 1095, 1105*; *McCarthy v. Superior Court (1944) 65 Cal. App. 2d 42, 43, 149 P.2d 871*].

[5] Verification

The requirement that the petition be verified [*see Code Civ. Proc. §§ 1086, 1103(a)*] may be met by affidavit or by declaration under penalty of perjury [*Code Civ. Proc. §§ 446, 1109, 2015.5*]. The declaration under penalty of perjury is executed by the petitioner if an individual is involved. It is executed by counsel if petitioner is out of the county in which counsel has his or her office or for some cause is unable to verify it or if the facts are within counsel's knowledge. An officer of a corporation executes the declaration if the corporation is the petitioner. The Code of Civil Procedure fails to state who is to verify a pleading filed by a partnership or other unincorporated association [*see Code Civ. Proc. § 369.5* (authorizing suits by and against such entities)]. Nevertheless, a pleading by such entity apparently may be verified in the case of a partnership by any partner and, in the case of an unincorporated association, by any officer who has knowledge of the facts.

If the verification is to be by affidavit, the affidavit must be prepared foracknowledgment by the appropriate officer such as a notary public. Although the verification is expressly permitted to be by affidavit [*Code Civ. Proc. §§ 446, 1109, 2009*], it is usually made by declaration under penalty of perjury when executed in California [*Code Civ. Proc. §§ 446, 1109, 2015.5*].

A split of authority among the courts of appeal makes it somewhat unclear whether the general rule that a public entity does not need to verify pleadings [*see Code Civ. Proc. § 446*] applies in a mandate or prohibition proceeding. For further discussion, *see § 358.82[3][b]*.

[5a] Certificate of Interested Entities or Persons

If a party files a motion, an application, or an opposition to a motion or application before filing its principal brief, the party must serve and file a Certificate of Interested Entities or Persons at the time it files the first such motion, application, or opposition and must include a copy of this certificate in the party's principal brief. If no motion, application, or opposition to such motion or application is filed before the parties file their principal briefs, each party must serve and file a certificate at the time it files its first document in the Court of Appeal [*Cal. Rules of Ct., Rule 8.208(d)*]. If the identity of any party or any entity or person subject to disclosure has not been publicly disclosed in the proceedings and a party wants to keep that identity confidential, the party may serve and file an application for permission to file its certificate under seal separately from its principal brief, motion, application, or opposition. If the application is granted, the party must file the certificate under seal and without service within 10 days of the court's order granting the application [*Cal. Rules of Ct., Rule 8.208(d)(2)*]. The petitioner's certificate must be included in the

petition [*Cal. Rules of Ct., Rule 8.488(c)(1)*]. The certificates of the respondent and real party in interest must be included in their preliminary opposition or, if no such opposition is filed, in their return, if any. The certificate must appear after the cover and before the tables [*Cal. Rules of Ct., Rule 8.488(c)(3)*].

For a form of the Certificate of Interested Entities or Persons--Judicial Council Form APP-008, see *Ch. 50, Appeal: Briefs, § 50.83*.

[6] Naming Respondent in Petition

When a writ seeks to prohibit action by a tribunal, the respondent is the tribunal as such, not the judge or referee as a person [*Lois R. v. Superior Court (1971) 19 Cal. App. 3d 895, 903, 97 Cal. Rptr. 158* ; *Lawson v. Superior Court (1957) 155 Cal. App. 2d 755, 761, 318 P.2d 812*]. It should be observed, however, that in those cases in which a petitioner is seeking to prohibit a judge from proceeding based on his or her peremptory disqualification under *Code Civ. Proc. § 170.6*, the judge as a person is also a proper respondent in addition to the court [*see Calhoun v. Superior Court (1958) 51 Cal. 2d 257, 260, 331 P.2d 648*].

[7] Attaching Complete Record

If the basis for the petition is a proceeding before an inferior tribunal, corporation, board, or person, and a partial or complete record of those proceedings was made, the petitioner should attach as exhibits all pleadings, affidavits, declarations, stipulations, minutes, orders, rulings, transcripts, or other documents comprising that record [*see Sherwood v. Superior Court (1979) 24 Cal. 3d 183, 186-187, 154 Cal. Rptr. 917, 593 P.2d 862*]. Whether the court is persuaded to issue an alternative writ might depend on how thorough a record is attached to the petition. For further discussion, see *§ 358.82[4]*.

[8] Number of Copies

The petition should be drafted in the following number of copies:

(1) Original for filing;

(2) Copy for service on respondent;

(3) Copy for service on real party in interest;

NOTE:
If there are two or more respondents or real parties in interest, a copy for service on each such party should be prepared.

(4) Office copy;

(5) Copy for petitioner, if desired; and

(6) Additional copies as desired.

[9] Supporting Memorandum

A supporting memorandum is not generally required when the petition is filed in a superior court, even though it is required to support a notice of motion or demurrer in a proceeding on a writ of mandate or prohibition [*see Cal. Rules of Ct., Rules 3.1103(a)(2), 3.1113(a)*]. Local rules of court, however, might impose a requirement, or it might be the local practice to file such a memorandum. Because the court may deny the petition summarily if it does not show a prima

facie case for issuance of a peremptory writ [*see Kingston v. Dept. of Motor Vehicles (1969) 271 Cal. App. 2d 549, 552, 76 Cal. Rptr. 614*], it is advisable to take every opportunity to strengthen the petition. Therefore, the filing of a supporting memorandum is recommended. For further discussion, see *§ 358.82[5][a]*.

For general discussion and a form of skeletal memorandum, see Ch. 417, *Points and Authorities* .

[10] Filing in Los Angeles County

A petition for a writ of mandate or prohibition may be filed in either the Central District or the local district if the "defendant functions wholly therein." All other petitions are filed in the Central District [Los Angeles Co. Super. Ct. Rules, Rule 2.0(b), (c)]. The department in which they should be filed depends on the nature of the proceeding or who the respondent is.

A civil petition involving class action proceedings (prior to adjudication regarding class certification) is filed in the Class Action Department [Los Angeles Co. Super. Ct. Rules, Rule 2.5(j)]. All other petitions for writs of mandate and prohibition are filed inthe Writs and Receivers Department [Los Angeles Co. Super. Ct. Rules, Rule 2.5(i)].

[11] Service Before Filing Petition

Code Civ. Proc. § 1107 requires that a petition that seeks an alternative writ be accompanied by proof of service of a copy on the respondent and the real party in interest named in the petition. It also contains an exception that the court in which the petition is filed may grant the petition ex parte in its discretion and for good cause without notice or service [*Code Civ. Proc. § 1107*]. The practice in California varies widely with regard to how loosely or strictly this exception is followed and, consequently, how easy it is to obtain an ex parte alternative writ [*see* discussion of the varying practices in § 358.139]. In a trial court, if no alternative writ is sought, proof of service of a copy of the petition need not accompany the application for the writ at the time of filing, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. §§ 1088.5, 1105*].

For discussion and forms relating to a declaration of proof of service of papers and pleadings generally, see Ch. 518, *Service of Summons and Papers* .

[12] Methods of Service

Service of a copy of the petition and a memorandum of points and authorities on respondent and on each real party in interest may be made by delivering a copy to each person personally or by mail [*Code Civ. Proc. §§ 1011-1013a, 1109*].

[13] Communication Between Trial Court and Respondent Court

When a petition for an original writ names a court as a party, there must be no communication, directly or indirectly, between any judge hearing the petition and the judge or judicial officer of the court named as a party, except written communications of which copies are transmitted to all other parties [*Gov. Code § 68070.5(b), (c)*].

[14] Cross References

For alternative allegations concerning capacity of parties, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion, procedural guide, and forms related to proceedings seeking declaratory relief, see Ch. 182, *Declaratory Relief*

For discussion and a form of skeletal memorandum of points and authorities, see Ch. 417, *Points and Authorities*

For discussion, procedural guide, and forms for use in petitioning a court to review a decision of a public administrative agency through the use of administrative mandate under *Code Civ. Proc. § 1094.5*, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions*

For discussion, procedural guide, and forms relating to proceedings seeking a writ of certiorari, see Ch. 489, *Relief From Judgments and Orders*

For discussion and forms relating to service of papers generally, see Ch. 518, *Service of Summons and Papers*

California Civil Writ Practice (Cal. CEB 3d ed. 2000)

Witkin, California Procedure, vol. 8, *Extraordinary Writs*, §§ 1-30, 46 et seq. (4th ed. 1997)

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1-358 California Forms of Pleading and Practice--Annotated § 358.130A

§ 358.130A Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case) [Cal. Rules of Ct, Rules 8.930-8.936]--Judicial Council Form APP-151

[1] FORM Petition for Writ (Misdemeanor, Infraction, or Limited Civil Case) [Cal. Rules of Ct, Rules 8.930-8.936]--Judicial Council Form APP-151

Click here to view image.

[2] Use of Form

The form in [1], *above*, is used for requesting a writ in a misdemeanor, infraction, or limited civil case, and complies with *Cal. Rules of Ct., Rules 8.930-8.936*. For general information regarding filing and serving petitions for writs, see *§ 358.130*. For information about limited civil cases, see Ch. 345A, *Limited Civil Cases* .

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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31-358 California Forms of Pleading and Practice--Annotated § 358.131

§ 358.131 Allegation re Beneficial Interest of Petitioner in Petition to Superior Court in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103]

[1] FORM Allegation re Beneficial Interest of Petitioner in Petition to Superior Court in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103]

[*EITHER*]

Respondent has a clear, present and ministerial duty to _____ [*state nature of duty*] by reason of _____ [*describe and cite to statute, ordinance, administrative regulation, or other authority that makes respondent's duty mandatory and not subject to the exercise of discretion*].

[*OR*]

Respondent has abused its discretion by _____ [*describe way in which respondent has abused its discretion*].

[*OR*]

Respondent has _____ [failed *or* refused] to exercise its discretion by _____ [*describe way in which respondent has not exercised its discretion*].

[2] Use of Form

The allegation in [1], *above,* should be inserted in the basic petition at § 358.130 (*see* Paragraph 4) if the petitioner seeks a writ of mandate.

A petition for a writ of mandate should allege the existence of respondent's duty [*see Code Civ. Proc. § 1085(a)*;

People ex rel. Younger v. County of El Dorado (1971) 5 Cal. 3d 480, 491, 96 Cal. Rptr. 553, 487 P.2d 1193], respondent's abuse of discretion [*see Sanders v. City of Los Angeles (1970) 3 Cal. 3d 252, 261, 90 Cal. Rptr. 169, 475 P.2d 201* (agency); *State Farm etc. Ins. Co. v. Superior Court (1956) 47 Cal. 2d 428, 432, 304 P.2d 13* (court)], or respondent's failure to exercise its discretion [*see Anderson v. Phillips (1975) 13 Cal. 3d 733, 736, 119 Cal. Rptr. 879, 532 P.2d 1247*]. For further discussion about respondent's duty, see *§ 358.31[2]*.

For a general form of petition for writ of mandate or prohibition, see *§ 358.130*.

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31-358 California Forms of Pleading and Practice--Annotated § 358.132

§ 358.132 Allegation re Beneficial Interest of Petitioner in Petition to Superior Court in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103]

[1] FORM Allegation re Beneficial Interest of Petitioner in Petition to Superior Court in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103]

[*EITHER*]

Petitioner is a person beneficially interested in the issuance of the writ because he/she has a clear, present, and substantial right to the performance of respondent's duty in that _____ [*specify facts supporting existence of each aspect of such right*]. Furthermore, the interest the petitioner seeks to advance is within the zone of interests to be _____ [*specify, e.g.*, protected *or* regulated] by the legal duty asserted because _____ [*specify facts supporting assertion that interest is within zone of interests to be protected or regulated by legal duty asserted*].

[*OR*]

Petitioner is a person beneficially interested in the issuance of the writ because he/she is a citizen and taxpayer and is concerned that respondent perform its duty under the law because _____ [*discuss reasons why petitioner seeks to compel respondent to perform its duty with the issuance of a writ of mandate*].

[*OR*]

Petitioner is a person beneficially interested in the issuance of the writ because he/she is entitled to be admitted to _____ [*specify use and enjoyment of right, or office, to which petitioner is entitled to be admitted*], in that _____ [*allege facts showing petitioner's entitlement to use and enjoyment of right or to office*].

[*OR*]

Petitioner is a person beneficially interested in the issuance of the writ because he/she/it is the party _____ [plaintiff *or* defendant *or specify other party status*] in the above-described judicial action.

[2] Use of Form

The alternative allegations in [1], above, may be inserted in the basic petition in *§ 358.130* (*see* Paragraph 5) to show the petitioner's beneficial interest. The first three alternative paragraphs illustrate possible situations in which the petitioner has a beneficial interest in the issuance of a writ of mandate [*see Code Civ. Proc. §§ 1085, 1086* and *§ 358.31[3]*], whereas the last alternative paragraph illustrates a possible situation in which the petitioner has a beneficial interest in the issuance of a writ of prohibition [*Code Civ. Proc. §§ 1102, 1103* and *§ 358.41[4]*].

For a general form of petition for writ of mandate or prohibition, see *§ 358.130, above.*

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31-358 California Forms of Pleading and Practice--Annotated § 358.133

§ 358.133 Allegation re Judicial Action in Petition to Superior Court in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103]

[1] FORM Allegation re Judicial Action in Petition to Superior Court in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103]

_____ [*Allege facts constituting judicial action that is being exercised by respondent, e.g.,* On _____ (*date*), petitioner was served with a copy of the complaint in the above-entitled action. A copy of that complaint is attached hereto as Exhibit A and made a part hereof. That complaint seeks to _____ (*describe cause of action*) and is now pending before respondent court].

[2] Use of Form

The allegation in [1], *above,* should be inserted in the basic petition at § 358.130 (*see* Paragraph 4) if the petitioner seeks a writ of prohibition.

A petition for a writ of prohibition should allege the fact that judicial action is being exercised by the respondent [*Code Civ. Proc. § 1102*; *Housing Authority v. Superior Court (1950) 35 Cal. 2d 550, 556, 219 P.2d 457* ; *see § 358.41[2]*].

For a general form of petition for writ of mandate or prohibition, see *§ 358.130, above.*

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31-358 California Forms of Pleading and Practice--Annotated § 358.134

§ 358.134 Allegation re Objection to Jurisdiction in Petition to Superior Court in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103]

[1] FORM Allegation re Objection to Jurisdiction in Petition to Superior Court in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103]

[*EITHER*]

_____ [*Allege objection to respondent's exercise of jurisdiction, e.g.,* On _____ (*date*), petitioner filed a motion to dismiss the action pursuant to the provisions of *Sections 583.310* and *583.360 of the Code of Civil Procedure* on the ground that the real party in interest had failed to bring his/her/its action to trial within five years after commencement thereof. A copy of that motion and the memorandum of points and authorities filed in support thereof are attached hereto as Exhibit B and made a part hereof].

[*OR*]

_____ [*Allege facts showing that the lack of respondent's jurisdiction was apparent on the face of the relevant pleading and that, therefore, petitioner was not required to raise the objection before respondent*].

[*OR*]

_____ [*Allege facts showing that any objection to respondent's exercise of jurisdiction would have been useless and that, therefore, petitioner was not required to raise the objection before respondent*].

[2] Use of Form

The allegation in [1], *above,* should be inserted in the basic petition at *§ 358.130* (*see* Paragraph 4) if the petitioner seeks a writ of prohibition.

A petition for a writ of prohibition should allege the fact either that petitioner objected to respondent's exercise of jurisdiction [*Rescue Army v. Municipal Court (1946) 28 Cal. 2d 460, 464-465, 171 P.2d 8 , appeal dismissed, 331 U.S. 549 (1947)*] or that respondent's lack of jurisdiction was apparent on the face of the relevant pleading [*Hanrahan v. Superior Court (1947) 81 Cal. App. 2d 432, 434, 184 P.2d 157*] or that such an objection would have been useless [*Hanrahan v. Superior Court (1947) 81 Cal. App. 2d 432, 434, 184 P.2d 157*]. For further discussion regarding failure to request lower court action or to raise objection in lower court, see *§ 358.62*.

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31-358 California Forms of Pleading and Practice--Annotated § 358.135

§ 358.135 Allegation re Threatened Action in Special Proceeding in Petition to Superior Court for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103]

[1] FORM Allegation re Threatened Action in Special Proceeding in Petition to Superior Court for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103]

_____ [*Allege the threatened action that is in excess of respondent's jurisdiction and, if appropriate, the ruling on the objection, e.g.,* On _____ (*date*), at a hearing on the above-described motion, respondent court denied the motion on the ground that it has jurisdiction to proceed to try the case. Thus, notwithstanding petitioner's objection, respondent is threatening to proceed and, unless restrained by this court, will proceed with the trial thereof. A copy of respondent's order is attached hereto as Exhibit C and made a part hereof].

[2] Use of Form

The allegation in [1], *above,* should be inserted in the basic petition at *§ 358.130* (*see* Paragraph 4) if the petitioner seeks a writ of prohibition.

A petition for a writ of prohibition should allege the judicial action that is being threatened and, if appropriate, the court's ruling on the objection to its jurisdiction [*Chodos v. Superior Court (1964) 226 Cal. App. 2d 703, 714, 38 Cal. Rptr. 301* ; *see also § 358.41[2][c]*].

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31-358 California Forms of Pleading and Practice--Annotated § 358.136

§ 358.136 Allegation re Lack or Excess of Jurisdiction in Petition to Superior Court in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103]

[1] FORM Allegation re Lack or Excess of Jurisdiction in Petition to Superior Court in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103]

_____ [*Specify reason(s) for lack or excess of jurisdiction, e.g.,* Respondent has no jurisdiction to proceed with the trial of the above-described action for the reason that dismissal of the action for failure to bring it to trial within five years, as required by *Sections 583.310* and *583.360 of the Code of Civil Procedure*, is mandatory and jurisdictional.]

[2] Use of Form

The allegation in [1], *above*, should be inserted in the basic petition at § 358.130 (*see* Paragraph 4) if the petitioner seeks a writ of prohibition.

A petition for a writ of prohibition should allege the reasons for the court's lack or excess of jurisdiction [*Code Civ. Proc. § 1102*; *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288, 291, 109 P.2d 942* ; *see also § 358.41[3]*].

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31-358 California Forms of Pleading and Practice--Annotated § 358.137

§ 358.137 Cover of Petition to Appellate Court in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103; Cal. Rules of Ct., Rules 8.40, 8.486]

[1] FORM Cover of Petition to Appellate Court in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103; Cal. Rules of Ct., Rules 8.40, 8.490]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[*OR*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
_____ APPELLATE DISTRICT

_____ [*name*],	)	
Petitioner,	)	
vs.	)	
_____ [*name*],	)	[CIVIL NO. _____]
Respondent[,]	)	PETITION FOR WRIT OF _____
[_____ (*name*),	)	[MANDATE *or* PROHIBITION *or* MANDATE OR
Real Party in Interest].	)	PROHIBITION]
	)	
	)	

_____

The Honorable _____ [*name of trial judge*], Judge

[Case Number _____ (*specify case number in trial court, if any*)]

_____ [*firm name, if any*]
By: _____ [*typed name*]
_____ [*address*]
_____ [*telephone number*]
California State Bar No. _____
Attorney for Petitioner _____ [*name*]

[2] Use of Form

The form in [1], *above,* illustrates the format of a cover for a petition for a writ of mandate or prohibition to be filed in the Supreme Court or in a court of appeal.

[3] Format

A petition to a reviewing court for a writ of mandate, certiorari, or prohibition, or for any other writ within its original jurisdiction must, on its cover, contain the title of the case, the name, address, and telephone number of the attorney filing the petition, the name of the trial judge, and the number of the case in the trial court, if any [*Cal. Rules of Ct., Rule 8.204*].

The cover must also contain the California State Bar membership number of the attorney filing the petition and of every attorney who joins in the petition. California State Bar membership numbers of the supervisors in a law firm or public law office of the attorney responsible for the case need not be stated [*Cal. Rules of Ct., Rule 8.204*].

So far as practicable, the cover of any petition for an original writ should be red incolor [*Cal. Rules of Ct., Rule 8.40(b)*]. The court will accept a petition with the wrong color cover for filing but, in the case of repeated violations by an attorney or party, may order the petition returned or stricken until corrected within a specific time [*Cal. Rules of Ct., Rules 8.204(e), 8.40(b)*]. The use of recycled paper for the cover is encouraged [*Cal. Rules of Ct., Rule 8.204(b)*].

[4] Related Appeal Pending

If the petition seeks review of trial court proceedings that are also the subject of a pending appeal, the title of the petition must include the notation "Related Appeal Pending." In such a case, this form should be modified accordingly [*Cal. Rules of Ct., Rule 8.486(a)(3)*].

[5] Request for Stay

If the petition for writ of mandate or prohibition is bound with or includes a petition for writ of supersedeas or other request for stay, this form of cover of the petition must be modified to include the conspicuous notation "STAY REQUESTED" and identify the nature and date of the proceeding or act sought to be stayed. Otherwise, the reviewing court may decline to consider the request or petition for the stay [*see Cal. Rules of Ct., Rule 8.116*; for discussion and forms relating to petitions for writ of supersedeas pending review, *see* Ch. 43, *Appeal: Stay of Proceedings*].

For additional requirements to be included in the petition itself when a stay is requested, see the basic form of petition to the appellate court at *§ 358.138*.

[6] Proceeding Involving Unfair Competition Case

For discussion of service requirements in an unfair competition case under *Bus. & Prof. Code § 17209*, see *§ 358.82[6][c]*.

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31-358 California Forms of Pleading and Practice--Annotated § 358.138

§ 358.138 Basic Form of Petition to Appellate Court in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103; Cal. Rules of Ct., Rule 8.486]

[1] FORM Basic Form of Petition to Appellate Court in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103; Cal. Rules of Ct., Rule 8.490]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
[*OR*]
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA,
_____ APPELLATE DISTRICT

_____ [*name*],	)	
Petitioner,	)	
vs.	)	[CIVIL NO. _____]
_____ [*name*],	)	PETITION FOR WRIT OF MANDATE, PROHIBI-
Respondent[,]	)	TION, OR OTHER EXTRAORDINARY RELIEF
[_____ (*name*),	)	[Related Appeal Pending]
Real Party in Interest].	)	
	)	
	)	

[TO THE HONORABLE CHIEF (*or* PRESIDING) JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT (*or* COURT OF APPEAL OF THE _____ (*number*) APPELLATE DISTRICT OF THE STATE OF CALIFORNIA:]

Petitioner alleges:

[1. *If the petition seeks review of trial court proceedings that are also the subject of a pending appeal, note such fact and set forth the title, superior court docket number, and appellate court docket number, if any, of the pending appeal.*]

[2. *If petition could lawfully be made to lower court in the first instance, specify circumstances as required by Cal. Rules of Ct., Rule 8.486(a)(1), that render it proper and necessary that the writ issue originally from the appellate court.*]

3. [*In this and following numbered paragraphs, allege, as in the form of basic petition at § 358.130, Paragraphs 1 through 10, all matters necessary to support issuance of the writ.*]

[4. *If the petitioner is requesting an immediate stay of trial court proceedings, set forth reasons for the urgency and set forth all relevant time constraints.*]

[*Prayer. See form at § 358.130.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification. See form at § 358.130.*]

[2] Use of Form

The form in [1], *above*, is for use when filing a petition for writ of mandate,prohibition, or both, in either a court of appeal or in the Supreme Court.

[3] Allegations

If the petition seeks review of trial court proceedings that are also the subject of a pending appeal, the title of the petition must include the notation "Related Appeal Pending," and the first paragraph must set forth the title, superior court docket number, and appellate court docket number, if any, of the pending appeal (Paragraph 1) [*Cal. Rules of Ct., Rule 8.486(a)(3)*].

If the petition might lawfully have been made to a lower court in the first instance, it must set forth the circumstances that, in the opinion of the petitioner, render it proper that the writ should issue originally from the reviewing court (Paragraph 2) [*Cal. Rules of Ct., Rule 8.486(a)(1)*].

The form must set forth the matters required by law to support the petition (Paragraph 3) [set forth in *Cal. Rules of Ct., Rule 8.486(a)*]. Allegations to support a petition for a writ of mandate or prohibition are *§ 358.130* (Paragraphs 1 through 10), and §§ 358.131-358.136. These allegations may be inserted in the form in [1], *above*, in support of the petition.

A petitioner who requests an immediate stay must explain in the petition the reasons for the urgency and set forth all relevant time constraints (Paragraph 4) [*Cal. Rules of Ct., Rule 8.486(a)(7)*].

[4] Real Party in Interest

If any judge, court, board, or other officer, or tribunal in the discharge of duties of a public character is named in the

petition as a respondent, the petition must disclose the name of the real party in interest, if any, or the party whose interest would be directly affected by the proceeding (*see* form at § 358.130, Paragraph 3) [*Cal. Rules of Ct., Rule 8.486(a)(2)*; *see also Tracy Press, Inc. v. Superior Court (2008) 164 Cal. App. 4th 1290, 1296, 80 Cal. Rptr. 3d 464* (failure to name real party in interest is not mere defect, but a failure to include the individual not named as a party); *Inland Counties Regional Center, Inc. v. Office of Administrative Hearings (1987) 193 Cal. App. 3d 700, 704-705, 238 Cal. Rptr. 422* (body of petition must disclose capacity of real party in interest)].

[5] Verification

A petition filed in an original proceeding in an appellate court must be verified [*Cal. Rules of Ct., Rule 8.486(a)(4)*]. For a discussion of verification by either a declaration under penalty of perjury or by affidavit, see *§ 358.130[5]*.

[6] Format of Petition

[a] Generally Subject to Requirements for Appellate Briefs

Except as otherwise provided in *Cal. Rules of Ct., Rules 8.486-8.493*, a petition must, insofar as practicable, comply with *Cal. Rules of Ct., Rule 8.204* [*Cal. Rules of Ct., Rule 8.485(a)*]. Rule 8.204 sets out the format requirements governing appellate briefs. Accordingly, in the following discussion of the requirements of Rule 8.204, the term "petition" has been substituted for the term "brief."

[b] Headings, References, Index, and Tables

Each point in a petition must appear separately under an appropriate heading, with subheadings if desired. Such headings should be concise headings which are generally descriptive of the subject matter covered [*Cal. Rules of Ct., Rule 8.204(a)(1)(B)*; *San Joaquin River Exchange Contractors Water Authority v. State Water Resources Control Board (2010) 183 Cal. App. 4th 1110, 1135, 108 Cal. Rptr. 3d 290* (party waived argument by failing to separately head it)].

The statement of any matter in the record must be supported by appropriate reference to the record [*Cal. Rules of Ct., Rule 8.204(a)(1)(C)*].

A petition must be prefaced by a topical index of its contents and a table of authorities, separately listing cases, statutes, court rules, constitutional provisions, and other authorities [*Cal. Rules of Ct., Rule 8.204(a)(1)(A)*].

For a form of appellate brief illustrating compliance with the heading, index, and tables requirements of *Cal. Rules of Ct., Rule 8.204(a)(1)*, see Ch. 50, *Appeal: Briefs* .

[c] Format Requirements

A petition may be reproduced by any process that produces a clear, black image of letter quality. The paper must be white or unbleached, recycled, 81/2 by 11 inches, and of at least 20-pound weight [*Cal. Rules of Ct., Rule 8.204(b)(1)*]. Any conventional typeface may be used. The typeface may be either proportionally spaced or monospaced [*Cal. Rules of Ct., Rule 8.204(b)(2)*]. The type style must be roman; but for emphasis, italics or boldface may be used, or the text may be underscored. Case names must be italicized or underscored. Headings may be in uppercase letters [*Cal. Rules of Ct., Rule 8.204(b)(3)*]. The type size, including footnotes, must not be smaller than 13-point, and both sides of the paper may be used [*Cal. Rules of Ct., Rule 8.204(b)(4)*]. The lines of text must be unnumbered and at least one-and-a-half spaced. Headings and footnotes may be single-spaced. Quotations may be block-indented and single-spaced. Single-spaced means six lines to a vertical inch [*Cal. Rules of Ct., Rule 8.204(b)(5)*]. The margins must be at least 11/2 inches on the left and right and 1 inch on the top and bottom [*Cal. Rules of Ct., Rule 8.204(b)(6)*]. The pages must be consecutively numbered. The tables and the body of the petition may have different numbering systems [*Cal. Rules of*

Ct., Rule 8.204(b)(7)].

A typewritten original and carbon copies may be filed only with the presiding justice's permission, which will ordinarily be given only to unrepresented parties proceeding in forma pauperis. All other typewritten petitions must be filed as photocopies [*Cal. Rules of Ct., Rule 8.204(b)(11)(A)*]. Both sides of the paper may be used if a photocopy is filed; only one side may be used if a typewritten original and carbon copies are filed [Cal. Rules of Ct., Rule 8.2044(b)(11)(B)]. The type size, including footnotes, must not be smaller than standard pica, 10 characters per inch. Unrepresented incarcerated litigants may use elite type, 12 characters per inch, if they lack access to a typewriter with larger characters [Cal. Rules of Ct., Rule 8.2044(b)(11)(C)]. In all other respects, the typewritten motion must conform to the requirements for all other papers [*Cal. Rules of Ct., Rule 8.204(b)*].

[d] Word or Page Limit

A petition produced on a computer must not exceed 14,000 words, including footnotes. Such a petition must include a certificate by appellate counsel or anunrepresented party stating the number of words in the petition. The person certifying may rely on the word count of the computer program used to prepare the petition [*Cal. Rules of Ct., Rule 8.204(c)(1)*]. A petition produced on a typewriter must not exceed 50 pages [*Cal. Rules of Ct., Rule 8.204(c)(2)*].

The following items are not included in the word or page limit [*Cal. Rules of Ct., Rule 8.204(c)(3)*]:

- The tables.

- The certificate stating the number of words in the petition.

- Any attachment, not to exceed 10 pages, except with permission from the presiding justice, consisting of copies of exhibits or other materials in the appellate record [*see Cal. Rules of Ct., Rule 8.204(d)*].

- A copy of an opinion required to be attached to the brief under *Cal. Rules of Ct., Rule 8.1115(c)* [*Cal. Rules of Ct., Rule 8.204(d)*].

[e] Certificate of Interested Entities or Persons

If a party files a motion, an application, or an opposition to a motion or application before filing its principal brief, the party must serve and file a Certificate of Interested Entities or Persons at the time it files the first such motion, application, or opposition and must include a copy of this certificate in the party's principal brief. If no motion, application, or opposition to such motion or application is filed before the parties file their principal briefs, each party must serve and file a certificate at the time it files its first document in the Court of Appeal [*Cal. Rules of Ct., Rule 8.208(d)*]. If the identity of any party or any entity or person subject to disclosure has not been publicly disclosed in the proceedings and a party wants to keep that identity confidential, the party may serve and file an application for permission to file its certificate under seal separately from its principal brief, motion, application, or opposition. If the application is granted, the party must file the certificate under seal and without service within 10 days of the court's order granting the application [*Cal. Rules of Ct., Rule 8.208(d)(2)*]. The petitioner's certificate must be included in the petition [*Cal. Rules of Ct., Rule 8.488(c)(1)*]. The certificates of the respondent and real party in interest must be included in their preliminary opposition or, if no such opposition is filed, in their return, if any. The certificate must appear after the cover and before the tables [*Cal. Rules of Ct., Rule 8.488(c)(3)*].

For a form of the Certificate of Interested Entities or Persons--Judicial Council Form APP-008, see *Ch. 50, Appeal: Briefs, § 50.83*.

[7] Copies

Format requirements applicable generally to appellate papers, include the requirement that copies be clear and legible [*Cal. Rules of Ct., Rule 8.204(b)(1)* (the clerk or the court may reject for filing or strike any petition that is not clearly legible, or that appears to be printed with the characters artificially close to each other)].

The petition must be drafted in the following number of copies:

- Original and 13 copies for filing if petition is filed in Supreme Court [*Cal. Rules of Ct., Rule 8.44(a)(1)*]; original and four copies for filing if petition is filed in Court of Appeal [*Cal. Rules of Ct., Rule 8.44(b)(1)*].

- Copy for service on respondent.

- Copy for service on real party in interest. When there are two or more respondents or two or more real parties in interest, a copy for service on each such party will be prepared.

- Office copy.

- Copy for petitioner, if desired.

- Additional copies as desired.

[8] Attach Complete Record

Whenever a petition for a writ of mandate in an appellate court seeks review of a trial court ruling, it must be accompanied by a record adequate to permit the review, including the following [*Cal. Rules of Ct., Rule 8.486(b)*]:

- A copy of the order or judgment from which relief is sought;

- Copies of all documents and exhibits submitted to the trial court supporting and opposing the petitioner's position;

- Copies of all other documents submitted to the trial court that are necessary for a complete understanding of the case and the ruling; and

- A transcript of the proceedings leading to the order or judgment below or, if a transcript is unavailable, a declaration by counsel explaining why a transcript is unavailable and fairly summarizing the proceedings, including arguments by counsel and the basis of the trial court's decision, if stated; or a declaration by counsel stating that the transcript has been ordered, the date it was ordered, and the date it is expected to be filed, which must be a date prior to any action requested of the reviewing court other than issuance of a stay supported by other parts of the record.

In exigent circumstances, a petition may be filed without a copy of the order,judgment, or relevant documents, other than the transcript, if a declaration by counsel explains the urgency and the circumstances making the documents unavailable and fairly summarizes their substance [*Cal. Rules of Ct., Rule 8.486(b)*].

All copies of documents must be legible [*Cal. Rules of Ct., Rule 8.204*].

Documents submitted in support of a petition must comply with the following requirements [*Cal. Rules of Ct., Rule*

8.486(c)]:

- They must be bound together at the end of the petition or in separate volumes not to exceed 300 pages each, with consecutive pagination throughout.

- They must be index-tabbed by number or letter.

- They must begin with a table of contents listing each document by title and its index-tab number or letter. If a document has attachments, the table of contents must give the title of each attachment and a brief description of its contents.

The appellate court clerk is required to accept for filing petitions and supporting documents not in compliance with *Cal. Rules of Ct., Rule 8.486(c)*, but the court may give the petitioner notice requiring that the petition and documents be brought into compliance within a stated reasonable time of not less than five days, or the petition may be stricken or denied summarily [*Cal. Rules of Ct., Rule 8.486(c)*].

[9] Service and Filing

If the respondent is the Superior Court or a judge of that court, the petition and one set of supporting documents must be served on any named real party in interest, but only the petition must be served on the respondent. If the respondent is not the Superior Court or a judge of that court, both the petition and one set of supporting documents must be served on the respondent and on any named real party in interest [*Cal. Rules of Ct., Rule 8.486(e)(1), (2)*]. The proof of service must name each party represented by each attorney served along with each attorney's telephone number. A petition accompanied by a defective proof of service shall be filed, but if a proper proof of service is not filed within five days after the clerk gives notice of the defect, the court may strike the petition or impose a lesser sanction [*Cal. Rules of Ct., Rule 8.486(e)(3), (5)*].

For discussion of proof of service and filing requirements under *Cal. Rules of Ct., Rule 8.486(e)*, see *§ 358.82[6][d]*.

[10] Filing in Supreme Court

Original proceedings should be filed in the Supreme Court only in cases of overwhelming public importance. Although counsel may be tempted to consider the case at hand as a case of overwhelming significance, in fact, such cases are considered rare by the Court. Thus, when counsel files a case that the Supreme Court refuses to accept, it is transferred to the appropriate court of appeal. Not only does counsel lose time, more petitions than necessary are filed. Counsel already will have filed at least the original and 13 copies with the Supreme Court when only an original and four could have been filed with the court of appeal. Moreover, if there is an unfavorable decision in the court of appeal, counsel will have to file an additional original and 13 copies if a decision is made to petition for another hearing in the Supreme Court.

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Volume 31: Lis Pendens thru Mandate and Prohibition-Chs. 348-358
Chapter 358 MANDATE AND PROHIBITION
PART V. FORMS

31-358 California Forms of Pleading and Practice--Annotated § 358.139

§ 358.139 Alternative Writ in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1087, 1102, 1103, 1104]

[1] FORM Alternative Writ in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1087, 1102, 1103, 1104]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	
_____ [*name*],	)	NO. _____
Respondent[,]	)	ALTERNATIVE WRIT OF _____
[_____ (*name*),	)	[MANDATE *or* PROHIBITION]
Real Party in Interest].	)	
	)	
	)	

_____

To _____ [*name*] Respondent:

WHEREAS it is alleged by the verified petition of _____ [*name of petitioner*] that _____ [*state briefly facts giving rise to petition for writ*];

WHEREAS it appears that petitioner is a party beneficially interested in this proceeding; and

WHEREAS it appears from the verified petition that petitioner has no plain, speedy, and adequate remedy in the ordinary course of law and that an alternative writ of _____ [mandate *or* prohibition] should issue;

[*EITHER, if writ is alternative writ of mandate*]

NOW THEREFORE, you are commanded, _____ [immediately on the receipt of this writ *or* on or before _____ (*date*)], to _____ [*specify what respondent is ordered to do*], or in the alternative, to show cause before this court at the courtroom thereof at _____ [*address*] on _____ [*date*], at _____ [*time*] why you have not done so.

[*OR, if writ is alternative writ of prohibition*]

NOW, THEREFORE, you are commanded, immediately on the receipt of this writ, to _____ [desist *or* refrain] from further proceedings in the _____ [action *or* matter] specified in the petition, and to show cause before this court at the courtroom thereof at _____ [*address*], _____ [*city*] on _____ [*date*], at _____ [*time*] why you should not be absolutely restrained from any further proceedings in such _____ [action *or* matter].

[*CONTINUE*]

The writ shall be served on respondent and real party in interest on or before _____ [*date*].

[The written return, if any, to this writ shall be filed and served by respondent or real party in interest on or before _____ (*date*).]

Dated: _____.

Witness the Honorable _____, [*name and title of judge or justice*].

Attest my hand and the seal of this court this _____ day of _____ [*date*].

_____
Clerk of the _____ Court
By _____
Deputy Clerk

ORDER

Let the foregoing writ issue.

[IT IS FURTHER ORDERED that a copy of this alternative writ (and a copy of the petition) be served at least _____ days before the hearing on the above order to show cause.]
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The form in [1], *above*, is for use as an alternative writ of mandate or prohibition issued by a superior court. Use of the attached order depends on local practice; it is used only if the local practice permits or requires the combining of the writ and the order. For a form of a separate order, see *§ 358.140*.

The alternative writ usually is not prepared by counsel when it is being sought from an appellate court because appellate courts generally prepare their own writs or orders to show cause.

For further discussion of alternative writs, see *§ 358.16*.

[3] Order Directing Issuance of Alternative Writ

The second paragraph in the order in [1], *above*, is optional. The court may want to direct that a copy of the petition be served together with the writ. It may also want to direct that service occur a certain time before a hearing on the merits.

[4] Preparation of Alternative Writs

When seeking an alternative writ in a superior court, the proposed writ is written to conform with the petition.

[5] Time for Filing

Ordinarily, a proposed writ and order are submitted at the same time that the petition is filed. Except in cases in which the issuance of an alternative writ is sought ex parte [*see Code Civ. Proc. § 1107*], the respondent and real party in interest will have five days to file points and authorities in opposition to the granting of an alternative writ [*see Code Civ. Proc. § 1107*]. Thus, in such cases the proposed writ may be submitted at any time within that five-day period.

[6] Issuance of Ex Parte Alternative Writs

Code Civ. Proc. § 1107 provides that a petition for a writ of mandate must be accompanied by proof of service of a copy of it on the respondent and real party in interest. The section also provides an exception that the court may, in its discretion and for good cause, grant the petition ex parte without notice or service of the petition. The practice with regard to how narrowly or broadly this exception is interpreted varies throughout the state. Thus, local court rules and local practice should be consulted before a petition is served. If the court grants ex parte writs routinely or if there is an emergency that precludes prior service of the petition, counsel should obtain issuance of the alternative writ and then serve the petition, memorandum of points and authorities, and writ simultaneously; petitioner may thus avoid the double service that is involved in prior service of the petition. Also, when the writ has been issued and the petition filed, the proceeding has been given a number by the clerk. This number will, of course, make it easier for counsel representing respondent and real party in interest to obtain information about the proceeding from the clerk if the need arises.

[7] Service of Writs

[a] Generally

The writ must be served in the same manner as a summons in a civil action unless the court expressly directs otherwise. Service of the writ on a majority of the members of any board or body is service on the board or body whether at the time of the service the board or body was in session or not [*Code Civ. Proc. § 1096*]. *See generally* Ch. 518, *Service of Summons and Papers* .

[b] Personal Service

Code Civ. Proc. § 1088 requires that a copy of the petition be served with the alternative writ or notice of motion on each person against whom the writ is sought. Whether this section requires personal service is debatable, but practice

seems well established in the state that personal service is preferred. *Code Civ. Proc. § 1109* provides that the rules of practice governing civil actions constitute the rules of practice for mandate proceedings; thus, *Code Civ. Proc. § 415.30*, which permits service of summons and complaint by mail, is applicable to mandate proceedings. Nevertheless, courts prefer personal service because of the certainty that notice of the hearing has been received by the respondent and real party in interest.

[c] Methods of Service

Service may be effected by counsel, provided that he or she is not a party to the action, or by any other person over the age of 18 who is not a party to the action [*Code Civ. Proc. §§ 414.10, 1109*]. If service is made by counsel, he or she must deliver a copy of the alternative writ to respondent and a copy to each real party in interest [*see Code Civ. Proc. § 1015*]. If service is to be made by any other person, counsel must deliver, either personally or by mail, sufficient copies to the person who is to effect service to serve on respondent and each real party in interest. For requirements for transmitting the writ by telegraph for service, see *Code Civ. Proc. § 1017*.

[d] Whom to Serve

The writ must be served not only on the respondent but also on any real party in interest [*see Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.486(a)*]. It may not be served on counsel for respondent or real party in interest as a substitute for such service [*see Code Civ. Proc. § 1015*]. If a real party in interest is not served, the court may hold such a party to be an indispensable party and refuse to proceed to a hearing on the merits [*see Younger v. Jordan (1954) 42 Cal. 2d 757, 758-759, 269 P.2d 616*].

[e] Serving Particular Types of Parties

Special methods are provided for service of summons on certain entities and persons, such as corporations [*Code Civ. Proc. § 416.10*], unincorporated associations [*Code Civ. Proc. § 416.40*], minors [*Code Civ. Proc. § 416.60*], persons residing within this state for whom a guardian or conservator has been appointed [*Code Civ. Proc. § 416.70*], public entities [*Code Civ. Proc. § 416.50*], candidates for public office [*Code Civ. Proc. § 416.80*], and persons authorized to receive service [*Code Civ. Proc. § 416.90*]. In all other cases service should be effected by personal service on respondent and real party in interest [*Code Civ. Proc. §§ 415.10, 1109*].

[8] Cross References

For discussion, procedural guide, and forms for use generally in serving summons papers, see Ch. 518, *Service of Summons and Papers* .

California Civil Writ Practice, ch. 9 (Cal. C.E.B. 1987)

Witkin, California Procedure, vol. 8, *Extraordinary Writs*, §§ 186-188 (4th ed. 1997)

43 Cal. Jur. 3d Mandamus and Prohibition §§ 41, 42, 65, 113, 122 (1978)

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Chapter 358 MANDATE AND PROHIBITION
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31-358 California Forms of Pleading and Practice--Annotated § 358.140

§ 358.140 Order Directing Issuance of Alternative Writ in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1087, 1102, 1103, 1104]

[1] FORM Order Directing Issuance of Alternative Writ in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1087, 1102, 1103, 1104]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER DIRECTING ISSUANCE OF ALTERN-
Respondent[,]	)	ATIVE WRIT OF _____
[_____ (*name*),	)	[MANDATE *or* PROHIBITION]
Real Party in Interest].	)	[Code Civ. Proc. § _____ (1087 *or*
	)	1104)]
	)	

_____

GOOD CAUSE APPEARING from the verified petition on file in this action,

[*EITHER, if order directs issuance of alternative writ of mandate*]

IT IS HEREBY ORDERED that an alternative writ of mandate issue under the seal of this court directed to respondent in this action commanding it, _____ [immediately on the receipt of the writ *or* on or before _____ (*date*)], to _____ [*specify what respondent is ordered to do*], or in the alternative, to show cause before this court at the courtroom thereof at _____ [*address*] on _____ [*date*], at _____ [*time*], why you have not done so.

[*OR, if order directs issuance of alternative writ of prohibition*]

IT IS HEREBY ORDERED that an alternative writ of prohibition issue under the seal of this court directed to respondent in this proceeding commanding it, immediately on the receipt of the writ, to _____ [desist *or* refrain] from further proceedings in the _____ [action or matter] specified in the petition, and to show cause before this court why it should not be absolutely restrained from any further proceedings in such _____ [action or matter].

[*CONTINUE*]

[IT IS FURTHER ORDERED that a copy of the alternative writ (and a copy of the petition and this order) be served at least _____ days before the hearing on the above order to show cause.]
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The order in [1], *above*, is for use when local practice requires the writ and order to be prepared separately.

For a form of alternative writ, see *§ 358.139*.

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31-358 California Forms of Pleading and Practice--Annotated § 358.141

§ 358.141 Notice of Application for Order Directing Issuance of Peremptory Writ in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1088, 1102, 1103, 1105]

[1] FORM Notice of Application for Order Directing Issuance of Peremptory Writ in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1088, 1102, 1103, 1105]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF APPLICATION FOR ORDER DIR-
vs.	)	ECTING ISSUANCE OF PEREMPTORY WRIT OF
_____ [*name*],	)	_____ [MANDATE *or* PROHIBI-
Defendant.	)	TION *or* MANDATE OR PROHIBITION]
	)	[Code Civ. Proc. _____ (§ 1088 *or*
	)	§§ 1088, 1105)]
		Date: _____
		Time: _____
		Location: _____

_____

To _____ [*identify party, e.g.,* respondent and real party in interest] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], petitioner will apply to the court for a peremptory writ of _____ [mandate *or* prohibition *or* mandate or prohibition] commanding respondent, _____ [immediately on receipt of the writ *or* on or before

_____ (*date*)], to _____ [*describe duty to be performed or action to be prohibited*]. The application will be made on the grounds that _____ [*specify legal basis on which writ may be granted*]. A copy of the petition seeking the peremptory writ is attached to this notice and is served herewith.
Dated: _____.

_____ [*firm name, if any*]
_____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[2] Use of Form

The notice in [1], *above,* is for use by a petitioner to provide notice to the respondent and real party in interest, if any, that the petitioner is seeking a peremptory writ in the first instance. The parties must be provided with at least 10 days' notice of the application for the peremptory writ [*Code Civ. Proc. § 1088*].

A copy of the writ petition must be served with the notice [*Code Civ. Proc. § 1088*].

For further discussion, including notice that is typically provided by the appellate court when it is considering granting a peremptory writ in the first instance, see *§ 358.83*.

For a variation on the foregoing form, for use in courts that prefer the noticed motion procedure to conduct writ proceedings generally, see *§ 358.142, below.*

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PART V. FORMS

31-358 California Forms of Pleading and Practice--Annotated § 358.142

§ 358.142 Notice of Motion for Peremptory Writ in Superior Court in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1088, 1102, 1103, 1105]

[1] FORM Notice of Motion for Peremptory Writ in Superior Court in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1088, 1102, 1103, 1105]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Petitioner,	)	NOTICE OF MOTION AND MOTION FOR PER-
vs.	)	EMPTORY WRIT OF _____
_____ [*name*],	)	[MANDATE *or* PROHIBITION *or* MANDATE OR
Respondent[,]	)	PROHIBITION]
[_____ (*name*),	)	[Code Civ. Proc. _____ (§ 1088 or
Real Party in Interest].	)	§§ 1088, 1105)]
	)	Date: _____
	)	Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____

_____

To _____ [*name of respondent and name of real party in interest, if any*], and to _____ [*name(s)*], his/her/their attorney(s) of record:

[*EITHER, if seeking writ of mandate*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], petitioner will, and hereby does, move for a peremptory writ of _____ [mandate *or* prohibition *or* mandate or prohibition] commanding respondent _____ [immediately on the receipt of the writ *or* on or before _____ (*date*)], to _____ [*specify what respondent will be ordered to do*]. The motion will be made on the grounds that _____ [*state the legal bases on which the writ may be granted as discussed in the memorandum of points and authorities that will accompany the notice*].

[*AND/OR, if seeking writ of prohibition*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], petitioner will, and hereby does, move for a peremptory writ of _____ [mandate *or* prohibition *or* mandate or prohibition] commanding respondent immediately on the receipt of the writ to _____ [desist *or* refrain] from _____ [*specify judicial action sought to be restrained*]. The motion will be made on the grounds that _____ [*state the legal bases on which the writ may be granted as discussed in the memorandum of points and authorities that will accompany the notice*].

[*CONTINUE*]

The motion will be based on this notice of motion, on the verified petition in the action, a copy of which is served with this notice, on the memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
_____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[2] Use of Form

The notice of motion in [1], *above,* is a variation of the notice of application for a peremptory writ set out in *§ 358.141, above.* It is intended for use in those courts that prefer that petitioner use the noticed-motion procedure for a peremptory writ, as authorized under *Code Civ. Proc. § 1088* (made applicable to prohibition proceedings by *Code Civ. Proc. § 1105*), in all proceedings for writ of mandate or prohibition [*see* Los Angeles Co. Super. Ct. Rules, Rule § 9.31(d); San Diego Co. Coordinated Ct. Rules, Div. II, Rule 10.11]. Under this procedure, the petitioner serves with the petition a notice of motion specifying a hearing date, the opposing party files a return, a hearing is held, and the court decides whether or not to issue a peremptory writ [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule § 9.31(d); San Diego Co. Coordinated Ct. Rules, Div. II, Rule 10.11; *see also Code Civ. Proc. §§ 1005, 1006* (noticed motion procedure)]. No alternative writ is sought or issued.

Although the noticed-motion procedure is employed less frequently than the alternative writ procedure, counsel should consider utilizing when feasible or when it is preferred by the court, as it is more direct than the alternative writ procedure [*see also § 358.82[6]*].

[3] Appellate Courts

Although there is no statutory authority that would prevent a petitioner from noticing a motion for the issuance of a peremptory writ, such a procedure seems never to be followed in the appellate courts.

[4] Parties to Be Served

Copies of the notice and petition must be served "on each person against whom the writ is sought" [*Code Civ. Proc. § 1088*]. The respondent is certainly such a person; and, because the writ is sought against the interests of a real party in interest, it is apparent that each real party in interest must also be served. This view is supported by *Code Civ. Proc. § 1107*, which requires proof of service on both the respondent and each real party in interest, and by some decisions [*see also Younger v. Jordan (1954) 42 Cal. 2d 757, 758-759, 269 P.2d 616* (real party in interest as indispensable party and, thus, entitled to service)].

[5] Proof of Service

In a trial court, when no alternative writ is sought, proof of service of a copy of the petition need not accompany the application for a writ at the time of filing, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

[6] Time Required

Petitioner must give at least 10 days notice to respondent and real party in interest [*see Code Civ. Proc. § 1088*]. Petitioner must give lengthier notice to respondent, however, when no alternative writ is sought and proof of service of a copy of the petition is not filed at the same time as the petition pursuant to *Code Civ. Proc. § 1088.5*. In that case, when a record of the proceedings to be reviewed has been filed with the petition in the trial court or when no record is required, respondent has 30 days after service of the petition to answer or otherwise respond. When a record of the proceeding to be reviewed has been requested but has not been filed with the petition, the party on whom the petition has been served, including any real party in interest, has 30 days following receipt of a copy of the record to answer or otherwise respond [*see Code Civ. Proc. § 1089.5*].

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31-358 California Forms of Pleading and Practice--Annotated § 358.143

§ 358.143 Order to Show Cause Why Peremptory Writ Should Not Issue in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1088, 1102, 1103, 1105]

[1] FORM Order to Show Cause Why Peremptory Writ Should Not Issue in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1088, 1102, 1103, 1105]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER TO SHOW CAUSE WHY PEREMPTORY
Respondent[,]	)	WRIT OF _____ [MANDATE *or*
[_____ (*name*),	)	PROHIBITION] SHOULD NOT ISSUE
Real Party in Interest].	)	[Code Civ. Proc. _____ (§ 1088 or
	)	§§ 1088, 1105)]
	)	

_____

To _____ [*name*], Respondent:

Good cause appearing from the verified petition of _____ [*name of petitioner*] for a writ of _____ [mandate *or* prohibition] on file in the above-entitled proceeding,

You are hereby ordered to appear before this court [in Department _____ thereof] on _____ [*date*], at _____ [*time*], then and there to show cause, if any you have, why a peremptory writ of _____ [mandate *or* prohibition] should not issue as prayed for in the verified petition.

This order shall be served on you by delivering a copy thereof, attached to a copy of the verified petition, at least _____ day(s) prior to the date of the hearing.
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The order to show cause in [1], *above*, may be used to give the notice required by *Code Civ. Proc. § 1088* when petitioning for a writ of mandate or prohibition in a superior court. It is used in place of the noticed motion set out in *§ 358.142* [*see also § 358.141*]. It is for use in superior courts and not in appellate courts since appellate courts prepare their own orders to show cause or alternative writs.

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31-358 California Forms of Pleading and Practice--Annotated § 358.144

§ 358.144 Demurrer--Return to Petition for Writ in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1089, 1102, 1103, 1105; Cal. Rules of Ct., Rule 8.487(b)]

[1] FORM Demurrer--Return to Petition for Writ in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1089, 1102, 1103, 1105; Cal. Rules of Ct., Rule 8.487(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Petitioner,	)	DEMURRER OF _____ [*name*] TO
vs.	)	PETITION BY _____ [*name*] FOR
_____ [*name*],	)	WRIT OF _____ [MANDATE *or*
Respondent[,]	)	PROHIBITION *or* MANDATE OR PROHIBITION]
[_____ (*name*),	)	[*Code Civ. Proc. §§ 1089, 1105*; *Cal. Rules of Ct., Rule 8.487(b)*]
Real Party in Interest].	)	Hearing Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____

_____

_____ [Respondent *or* Real party in interest] _____ [*name*] demurs to the petition for a writ of _____ [mandate *or* prohibition] herein on [each of] the following ground(s):

1. The petition fails on its face to state facts sufficient to constitute a cause of action for issuance of a writ of _____ [prohibition *or* mandate] in that _____ [*specify reasons for facial deficiency of petition*].

[*CONTINUE, stating additional grounds for demurrer*]

WHEREFORE, _____ [respondent *or* real party in interest] prays that this demurrer be sustained [without leave to amend], [that the alternative writ of _____ (mandate *or* prohibition) be discharged], that the petition be dismissed, that _____ [respondent *or* real party in interest] recover costs in this proceeding, and that the court grant all other relief it considers proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[Respondent *or* Real Party in Interest *or both*]

[2] Use of Form

The demurrer set forth in [1], *above*, is for use in either a superior or an appellate court when either respondent or real party in interest demurs to a petition for a writ of mandate [*see Code Civ. Proc. § 1089*].

A party filing a demurrer must serve with it a notice of hearing [*Cal. Rules of Ct., Rule 3.1320(c)*] and a memorandum in support of each of its grounds [*Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms regarding a memorandum of points and authorities, see Ch. 417, *Points and Authorities* .

[3] Time for Return

The demurrer must be filed on the date for the return of the alternative writ or, if the noticed-motion procedure is used and proof of service is filed with the petition, the date on which the application is noticed to be heard [*see Code Civ. Proc. §§ 1089, 1105*].

When a petition filed in the trial court pursuant to *Code Civ. Proc. § 1088.5* (no alternative writ sought and proof of service not filed with petition), and when a record of the proceedings to be reviewed has been filed with the petition or when no record is required, the respondent must answer or otherwise respond within 30 days after service of the petition. If, however, a record of the proceeding to be reviewed has been requested pursuant to *Gov. Code § 11523* (Administrative Procedure Act), or otherwise, and has not been filed with the petition, the party on whom the petition has been served, including any real party in interest, must answer or otherwise respond within 30 days following receipt of a copy of the record [*Code Civ. Proc. §§ 1089.5, 1105*].

The demurrer must be filed within 30 days after the court issues the alternative writ or order to show cause or notifies the parties that it is considering issuing a peremptory writ in the first instance [*Cal. Rules of Ct., Rule 8.487(b)(2)*].

[4] Joint Filing

Cal. Rules of Ct., Rule 8.490(h)(1) expressly allows the respondent and real party in interest to file a joint demurrer in an original proceeding. Such filing is not expressly permitted in a superior court, but there seems to be no reason for prohibiting it.

[5] Effect of Filing Demurrer Alone

In a superior court, if the return is by demurrer alone, and the demurrer is overruled, the court may allow an answer to

be filed within such time as it may designate [*Code Civ. Proc. § 1089*]. Nevertheless, the court may also refuse to allow the subsequent filing of an answer, in which case it may issue a peremptory writ without leave to answer [*Rhyne v. Municipal Court (1980) 113 Cal. App. 3d 807, 819, 170 Cal. Rptr. 312* (discretion of superior court to refuse filing of answer); *Cal. Rules of Ct., Rule 8.487(b)(4)* (discretion of appellate court to refuse filing of answer)]. Thus, it is good practice generally to file an answer with a demurrer, to avoid the possibility that a demurrer filed alone will be overruled without leave to file an answer.

[6] Motion to Quash as Recognized Alternative Procedure

A court has statutory authority and inherent power to recall and quash an alternative writ that has been issued inadvertently on a misapprehension of the facts involved [*Joerger v. Superior Court (1934) 2 Cal. App. 2d 360, 363, 37 P.2d 1084*]. A motion to quash a writ of mandamus or prohibition is the equivalent of a demurrer [*Motors Ins. Corp. v. Division of Fair Employment Practices (1981) 118 Cal. App. 3d 209, 216, 173 Cal. Rptr. 332* (mandate proceeding); *Joerger v. Superior Court (1934) 2 Cal. App. 2d 360, 364, 37 P.2d 1084* (prohibition proceeding)].

[7] Cross References

See generally Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

California Civil Writ Practice, ch. 8, *Responsive Pleadings* (Cal. CEB 3d ed. 1996)

Witkin, California Procedure, vol. 8, *Extraordinary Writs*, § 194 et seq. (4th ed. 1997)

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31-358 California Forms of Pleading and Practice--Annotated § 358.145

§ 358.145 Verified Answer--Return to Petition for Writ in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1089, 1102, 1103, 1105; Cal. Rules of Ct., Rule 8.487(b)(1)]

[1] FORM Verified Answer--Return to Petition for Writ in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1089, 1102, 1103, 1105; Cal. Rules of Ct., Rule 8.490(h)(1)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Petitioner,	)	VERIFIED ANSWER OF _____
vs.	)	[*name*] TO PETITION BY _____
_____ [*name*],	)	[*name*] FOR WRIT OF _____
Respondent[,]	)	[MANDATE *or* PROHIBITION *or* MANDATE OR PROHIBITION]
[_____ (*name*),	)	
Real Party in Interest].	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

_____ [Respondent *and/or* real party in interest] _____ [*name*] answers the petition for writ of mandate as follows:

1. Admits that _____ [*set forth admissions*].

2. Denies each and every allegation in the petition not heretofore expressly admitted.

FIRST AFFIRMATIVE DEFENSE

3. [*In this, and subsequently numbered paragraphs if necessary, allege ultimate facts constituting defense.*]

SECOND AFFIRMATIVE DEFENSE

4. [*In this, and subsequently numbered paragraphs if necessary, allege ultimate facts constituting defense.*]

WHEREFORE, _____ [respondent *or* real party in interest] prays that the petition for writ of _____ [mandate *or* prohibition *or* mandate or prohibition] be denied, [that the alternative writ of _____ (mandate *or* prohibition *or* mandate or prohibition) herein be discharged,] that this proceeding be dismissed, that _____ [respondent *or* real party in interest] recover costs in the proceeding, and that the court grant all other relief it considers proper.

Dated _____.

_____ [*firm name, if any*]
_____ [*signature*]
_____ [*typed name*]
Attorney for [Respondent *or* Real Party in Interest *or both*]

[*Verification. See § 358.130.*]

[2] Use of Form

The answer in [1], *above,* is for use in either a superior or an appellate court when a respondent or real party in interest files a verified answer to a petition for a writ of mandate or prohibition [*see Code Civ. Proc. § 1089*; *Cal. Rules of Ct., Rule 8.487(b)(1)*].

[3] Time for Answer

The answer must be filed on the date for the return of the alternative writ or, if the notice motion procedure is being followed by petitioner, on the date on which the motion has been noticed [*see Code Civ. Proc. § 1089*]. The answer must be filed within 30 days after the court issues the alternative writ or order to show cause or notifies the parties that it is considering issuing a peremptory writ in the first instance [*Cal. Rules of Ct., Rule 8.487(b)(2)*]. For discussion of when the respondent must answer a petition that does not seek an alternative writ, see *§ 358.144[3], above.*

[4] Joint Filing

Cal. Rules of Ct., Rule 8.487(b)(1) expressly allows the respondent and real party in interest to file a joint answer in an original proceeding. Such filing is not expressly permitted in a superior court, but there seems to be no reason for prohibiting it.

[5] Verification

The return to a petition by use of an answer must be verified [*Code Civ. Proc. § 1089*; *Cal. Rules of Ct., Rule 8.487(b)(1)*]. The verification of the petition presented in *§ 358.130* may be modified for this purpose.

[5a] Certificate of Interested Entities or Persons

Each party to an appeal must serve and file a Certificate of Interested Entities or Persons at the time it files its first document in the Court of Appeal [Cal. Rules of Ct., Rule 2.208(c)] and must include a copy of the certificate in its principal brief [*Cal. Rules of Ct., Rule 8.208(d)*]. The petitioner's certificate must be included in the petition [*Cal. Rules of Ct., Rule 8.488(c)(1)*]. The certificates of the respondent and real party in interest must be included in their preliminary opposition or, if no such opposition is filed, in their return, if any. The certificate must appear after the cover and before the tables [*Cal. Rules of Ct., Rule 8.488(c)(3)*].

[6] Cross References

See generally Ch. 26, *Answers*

California Civil Writ Practice, ch. 8, *Responsive Pleadings* (Cal. CEB 3d ed. 1996)

Witkin, California Procedure, vol. 8, *Extraordinary Writs*, § 194 et seq. (4th ed. 1997)

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31-358 California Forms of Pleading and Practice--Annotated § 358.146

§ 358.146 Replication to Answer in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1091, 1102, 1103, 1105]

[1] FORM Replication to Answer in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1091, 1102, 1103, 1105]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs. _____ [*name*],	)	REPLICATION OF _____ [*name*]
Respondent[,]	)	TO PETITION BY _____ [*name*]
[_____ (*name*),	)	FOR WRIT OF _____ [MANDATE
Real Party in Interest].	)	*or* PROHIBITION *or* MANDATE OR PROHIBI-
	)	TION]
	)	[Code Civ. Proc. _____ (§ 1091 or §§ 1091, 1105)]
		Hearing Date: _____
		Time: _____
		Location: _____

_____

Petitioner replies to the answer filed in this proceeding by _____ [respondent *or* real party in interest] as follows:

1. Admits that _____ [*set forth admissions*].

2. Denies each and every allegation in the answer not heretofore expressly admitted.

3. In reply to affirmative defense(s) _____ [*specify*], petitioner states that _____ [*set forth response(s) to affirmative defense(s)*].
Dated: _____.

_____ [*firm name, if any*]
_____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[*Verification. See § 358.130.*]

[2] Use of Form

The form in [1], *above*, is for use by petitioner in replying to the answer of respondent or real party in interest. It is important for petitioner to file and serve such a replication whenever an answer containing affirmative allegations has been made by respondent, real party in interest, or both, because affirmative averments contained in the answer to the petition are accepted as true unless they are controverted by either pleading or proof [*Lotus Car Ltd. v. Municipal Court (1968) 263 Cal. App. 2d 264, 268, 69 Cal. Rptr. 384*].

[3] Verification

There is no express requirement that a replication be verified. Because the petition and answer must be verified, however, it may be assumed that a verification of the replication ought to be included. The verification of the petition presented in *§ 358.130* may be modified for this purpose by changing the word "petition" to "replication."

[4] Service

Unless the court orders otherwise, the petitioner may serve and file a reply within 15 days after the return or opposition is filed [*Cal. Rules of Ct., Rule 8.487(b)(3)*]. Either service by mail or personal service would be acceptable [*see generally* Ch. 518, *Service of Summons and Papers*].

[5] Continuance

It may be necessary for petitioner's counsel to seek a continuance of the hearing so that a replication can be prepared to controvert the affirmative allegations of the answer. Counsel may also need time to gather evidence that will sufficiently countervail the allegations of the answer.

[6] Cross References

California Civil Writ Practice, ch. 8, *Responsive Pleadings* (Cal. CEB 3d ed. 1996)

Witkin, California Procedure, vol. 8, *Extraordinary Writs*, § 197 (4th ed. 1997)

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31-358 California Forms of Pleading and Practice--Annotated § 358.147

§ 358.147 Judgment for Petitioner in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103]

[1] FORM Judgment for Petitioner in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	JUDGMENT FOR PETITIONER
Respondent[,]	)	
[_____ (*name*),	)	
Real Party in Interest].	)	
	)	
	)	

This cause came on regularly for hearing before this court on _____ [*date*], in the courtroom of _____ [*specify*] pursuant to the verified petition of _____ [*name of petitioner*]. [An alternative writ of _____ (mandate *or* prohibition) issued herein on _____ (*date*), and was served on respondent and real party in interest.]

_____ [*Name*] appeared as attorney for petitioner, [_____ (*name*) appeared as attorney for respondent,] and _____ [*name*] appeared as attorney for real party in interest.

[*EITHER*]

The cause was submitted and heard on stipulated facts.

[*OR*]

The court ordered questions of fact to be tried before a jury. Such trial was held on _____ [*date*], and the verdict of the jury was certified to the court on _____ [*date*].

[*OR*]

The cause was heard and [both oral and] documentary evidence was received.

[*CONTINUE*]

The cause having been argued and submitted for decision, the court being fully advised, _____ [the court (, on request of _____ (petitioner *or* respondent *or* real party in interest,) having caused to be made and filed herein its written statement of decision *or* a statement of decision not having been requested], and the court having directed that judgment and a peremptory writ of _____ (mandate *or* prohibition) should issue in the cause;

IT IS ORDERED, ADJUDGED, AND DECREED

1. That a peremptory writ of _____ [mandate issue commanding respondent to _____ (*specify what respondent is being ordered to do*) *or* prohibition issue commanding respondent to _____ (desist *or* refrain) from _____ (*specify judicial action that is being restrained*)];

2. That petitioner _____ [*name*] have and recover from respondent _____ [*name*] [*and/or* real party in interest _____ (*name*)] the sum of $_____ together with interest thereon at the rate of _____ percent from _____ [*date*];

3. That petitioner have and recover costs and disbursements herein in the sum of $_____ from _____ [respondent *and/or* real party in interest].

4. [*Specify any further relief.*]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use by a petitioner in whose favor the superior court has decided the matter and for whom, consequently, a judgment will be rendered. The appellate courts will include the judgment in the opinion embodying the decision in the case; therefore, this form will not be used when the mandate or prohibition proceeding has been in one of those courts.

[3] Preparation of Written Judgment

In the superior courts of most counties, it is customary for the judge to order counsel for one of the parties to prepare, serve on the others, and submit to the court a proposed judgment. If a statement of decision has been requested, the court may prepare the statement of decision and proposed judgment or order a party to do so [*see Cal. Rules of Ct., Rule 3.1590(a)-(f)*]. If a statement of decision has not been requested or has been waived and a written judgment is required, the court may prepare the proposed judgment or may order a party to prepare it [*Cal. Rules of Ct., Rule 3.1590(h)*]. In either case, any party may object to the proposed statement of decision and/or proposed judgment [*Cal. Rules of Ct., Rule 3.1590(g), (j)*].

For discussion and forms relating to statements of decision generally, see Ch. 529, *Statement of Decision* . For discussion and forms related to judgments generally, see Ch. 318, *Judgments* .

[4] Notice of Entry of Judgment

Except for specified family law proceedings, small claims actions, and actions and proceedings in which a prevailing party is not represented by counsel, the prevailing party is required to serve notice of entry of judgment on all the parties and file the original of the notice with proof of service [*Code Civ. Proc. § 664.5(a)*; *see Code Civ. Proc. § 1109*].

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31-358 California Forms of Pleading and Practice--Annotated § 358.148

§ 358.148 Judgment Denying Writ in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103]

[1] FORM Judgment Denying Writ in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	
_____ [*name*],	)	NO. _____
	)	JUDGMENT DENYING PETITION FOR WRIT OF
Respondent[,]	)	_____ [MANDATE *or* PROHIBI-
[_____ (*name*),	)	TION]
Real Party in Interest].	)	[*Code Civ. Proc. §§ 1064, 1105*]
	)	
	)	

This cause came on regularly for hearing before this court on _____ [*date*], in the courtroom of _____ [*specify*] pursuant to the verified petition of _____ [*name of petitioner*]. [An alternative writ of prohibition issued herein on _____ (*date*) and was served on respondent and real party in interest.]

_____ [*Name*] appeared as attorney for petitioner, [_____ (*name*) appeared as attorney for respondent,] and _____ [*name*] appeared as attorney for real party in interest.

[*EITHER*]

The cause was submitted and heard on stipulated facts.

[*OR*]

The court ordered questions of fact to be tried before a jury. Such trial was held on _____ [*date*], and the verdict of the jury was certified to the court on _____ [*date*].

[*OR*]

The cause was heard and [both oral and] documentary evidence was received.

[*CONTINUE*]

The cause having been argued and submitted for decision, the court being fully advised, _____ [the court (, on request of _____ (petitioner *or* respondent *or* real party in interest),) having caused to be made and filed herein its written statement of decision *or* a statement of decision not having been requested], and the court having directed that judgment and a peremptory writ of _____ (mandate *or* prohibition) should not issue in the cause;

IT IS ORDERED, ADJUDGED, AND DECREED

1. That the peremptory writ of _____ [mandate *or* prohibition] applied for herein is denied;

[2. That the alternative writ of prohibition granted herein is discharged;]

3. That _____ [respondent *or* real party in interest *or both*] have and recover costs and disbursements herein in the sum of $_____ from petitioner.

[4. *Specify any further relief.*]
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The form in [1], *above,* is for use by a respondent or real party in interest in whose favor the superior court has decided the matter and for whom, consequently, a judgment will be rendered. The appellate courts will include the judgment in the opinion embodying the decision in the case; therefore, the foregoing form will not be used when the mandate or prohibition proceeding has been in one of those courts.

For a judgment for petitioner, see *§ 358.147*.

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PART V. FORMS

31-358 California Forms of Pleading and Practice--Annotated § 358.149

§ 358.149 Peremptory Writ in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103]

[1] FORM Peremptory Writ in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PEREMPTORY WRIT OF _____
Respondent[,]	)	[MANDATE *or* PROHIBITION]
[_____ (*name*),	)	[Code Civ. Proc. § _____ (1087 *or*
Real Party in Interest].	)	1104)]
	)	
	)	

To _____ [*name*], Respondent:

[*EITHER, if writ is peremptory writ of mandate*]

WHEREAS petitioner served and filed herein his/her/its duly verified petition for a writ of mandate [, an alternative writ of mandate issued herein on _____ (*date*),] and a hearing was held herein on _____ (*date*);

[*OR, if writ is peremptory writ of prohibition*]

WHEREAS petitioner served and filed herein his/her/its duly verified petition for a writ of prohibition, _____ [an alternative writ of prohibition issued herein on _____ (*date*) *or* notice having been given], and a hearing having been held herein on _____ (*date*);

[*CONTINUE*]

WHEREAS it appears to this court that petitioner has no other plain, speedy, and adequate remedy in the ordinary course of law;

[*EITHER, if writ is peremptory writ of mandate*]

WHEREAS it appears to this court that you _____ [have failed to perform your legal duty *or* have abused your discretion *or* have failed to exercise your discretion by _____ (*specify facts constituting grounds for relief*)];

THEREFORE, you _____ [*name of respondent*] are hereby commanded, _____ [immediately after receipt of this writ *or* on or before _____ (*date*)], to _____ [*set forth with particularity what the judgment orders respondent to do*].

[*OR, if writ is peremptory writ of prohibition*]

WHEREAS it appears to this court that you _____ [lack *or* have exceeded your] jurisdiction to proceed in the _____ action *or* matter]specified in the petition in that _____ [*specify reason(s) why respondent lacks or has exceeded its jurisdiction*].

THEREFORE, you _____ [*name of respondent*] are hereby commanded to absolutely _____ [desist *or* refrain] from any further proceedings in the _____ [action *or* matter] immediately on the receipt of this writ.

[*CONTINUE*]

[You are further commanded to make and file a return to this writ _____ (on or before _____ (*date*) *or* within _____ (*number*) day(s) from the date a copy of this writ is served on you), showing what you have done to comply with this writ.]

Witness the Honorable _____ [*name*], Judge of the Superior Court.

Attest my hand and the seal of this court his _____ day of _____ [*date*].

_____ [*signature*]
Clerk
By _____ [*signature*]
Deputy Clerk

[2] Use of Form

The form of peremptory writ in [1], *above*, is for use by a petitioner who has prevailed in a mandate or prohibition proceeding in a superior court. The use of the paragraph requiring a return is optional and, since the respondent will usually be another court, is not included ordinarily.

In the Supreme Court and the courts of appeal, the court's opinion constitutes its judgment and thus ordinarily serves as sufficient direction to the respondent and real party in interest. If the respondent fails to comply, petitioner should draft a peremptory writ, have it issued by the clerk of the court, and serve it on respondent [*see Code Civ. Proc. § 1015*] in the same manner as a summons [*see Code Civ. Proc. § 1096*].

[3] Cross References

Witkin, California Procedure, vol. 8, *Extraordinary Writs*, § 204 (4th ed. 1997)

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31-358 California Forms of Pleading and Practice--Annotated § 358.150

§ 358.150 Respondent's Return to Peremptory Writ in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103, 1108]

[1] FORM Respondent's Return to Peremptory Writ in Special Proceeding for Writ of Mandate or Prohibition [Code Civ. Proc. §§ 1085, 1086, 1102, 1103, 1108]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs. _____ [*name*],	)	NO. _____
Respondent[,]	)	RESPONDENT'S RETURN TO PEREMPTORY
[_____ (*name*),	)	WRIT OF _____ [MANDATE *or*
Real Party in Interest].	)	PROHIBITION]
	)	[*Code Civ. Proc. § 1108*]
	)	

To the above-entitled court:

Respondent _____ [*name*] makes the following return to the peremptory writ of _____ [mandate *or* prohibition] issued on _____ [*date*], in this proceeding:

[*EITHER*]

On _____ [*date*], respondent complied with the command(s) of the peremptory writ of _____ [mandate *or* prohibition] by _____ [*specify action that respondent took to comply with peremptory writ*].

[A copy of that _____ (order *or* decision) is attached as Exhibit A.]

[*OR*]

Respondent is appealing from the judgment entered in this proceeding and filed a notice of appeal in the _____ [*name of appellate court*] on _____ [*date*].

Dated _____.

_____ [*firm name, if any*]
_____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[2] Use of Form

The return in [1], *above*, is for use by respondent in complying with a provision in a peremptory writ of mandate ordering such a response.

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31-358 California Forms of Pleading and Practice--Annotated § 358.151

§ 358.151 Order to Show Cause re Failure to Obey Peremptory Writ in Special Proceeding for Enforcement of Writ [Code Civ. Proc. §§ 1097, 1105]

[1] FORM Order to Show Cause re Failure to Obey Peremptory Writ in Special Proceeding for Enforcement of Writ [Code Civ. Proc. §§ 1097, 1105]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER TO SHOW CAUSE RE FAILURE TO
Respondent[,]	)	OBEY PEREMPTORY WRIT OF
[_____ (*name*),	)	_____ [MANDATE *or* PROHIBI-
Real Party in Interest].	)	TION]
	)	[Code Civ. Proc. _____ (§ 1097 or
	)	§§ 1097, 1105)]

_____

To _____ [*name*], Respondent:

You are hereby ordered to appear before this court [_____ (Department or Division) _____ of] on _____ [*date*], at _____ [*time*], then and there to show cause, if any you have, why you should not be fined [or imprisoned, or both,] for willfully disobeying the peremptory writ of _____ [mandate *or* prohibition] on file in this proceeding that issued from this court on _____ [*date*], which writ and your disobedience thereof are more fully described in the declaration of _____ [*name of petitioner*].

This order shall be served on you by delivering a copy thereof, attached to a copy of the declaration of

_____ [*name of petitioner*], at least _____ day(s) prior to the date of the hearing.

_____ [*date*]
_____ [*signature*]
Judge

[2] Use of Form

The form in [1], *above*, is for use in bringing a respondent charged with refusing to obey the commands of a peremptory writ of mandate or prohibition to answer therefor [*see Code Civ. Proc. § 1097*].

For discussion of the requirement of *Cal. Rules of Ct., Rule 3.1204*, that an ex parte order be supported by affidavit or declaration relating to the giving of or the attempt to give notice or that for specified reasons notice should not be required, see Ch. 372, *Motions and Orders* .

[3] Cross References

California Civil Writ Practice, ch. 11 (Cal. C.E.B. 1987)

Witkin, California Procedure, vol. 8, *Extraordinary Writs*, § 207 (4th ed. 1997)

43 Cal. Jur. 3d Mandamus and Prohibition §§ 55, 123 (1978)

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31-358 California Forms of Pleading and Practice--Annotated § 358.152

§ 358.152 Notice of Motion in Special Proceeding for Judgment on Peremptory Writ of Mandate [Code Civ. Proc. §§ 1010, 1094, 1109]

[1] FORM Notice of Motion in Special Proceeding for Judgment on Peremptory Writ of Mandate [Code Civ. Proc. §§ 1010, 1094, 1109]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Petitioner,	)	NOTICE OF MOTION AND MOTION FOR JUDG-
vs.	)	MENT ON PEREMPTORY WRIT
_____ [*name*],	)	[*Code Civ. Proc. § 1094*]
Respondent[,]	)	Date: _____
[_____ (*name*),	)	Time: _____
Real Party in Interest].	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____

_____

To _____ [*identify party, e.g.,* respondent] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* petitioner] will, and hereby does, move for an order on the peremptory writ pursuant to *Section 1094 of the Code of Civil Procedure.* The motion will be made on the ground that a petition for a peremptory writ of mandate filed in the above-entitled proceeding under *Section 1088.5 of the Code of Civil Procedure*

_____ [presents no triable issue of fact *or* is based solely on the administrative record].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

[2] Use of Form

The form of notice of motion in [1], *above*, is for use by any party to obtain a judgment on the peremptory writ if a petition for a peremptory writ of mandate filed under *Code Civ. Proc. § 1088.5* is based solely on an administrative record or presents no triable issue of fact [*see Code Civ. Proc. §§ 1088.5*, *1094*, *1105*; *§ 358.87[3]*].

A memorandum must be served and filed with the foregoing notice of motion [*see Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[3] Cross References

For a discussion and forms relating to noticed motions in civil actions, see Ch. 372, *Motions and Orders*

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31-358 California Forms of Pleading and Practice--Annotated § 358.153

§ 358.153 Judgment in Special Proceeding for Judgment on Peremptory Writ of Mandate [Code Civ. Proc. § 1094]

[1] FORM Judgment in Special Proceeding for Judgment on Peremptory Writ of Mandate [Code Civ. Proc. § 1094]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	JUDGMENT ON PEREMPTORY WRIT
Respondent[,]	)	[*Code Civ. Proc. § 1094*]
[_____ (*name*),	)	
Real Party in Interest].	)	
	)	
	)	

This cause came on regularly for trial on _____ [*date*], at _____ [*time*], in [_____ (Department *or* Division) _____ of] the above-entitled court, the Honorable _____ [*name*], Judge, presiding, sitting without a jury. Petitioner appeared by his/her attorney, _____ [*name*], and _____ [respondent *and/or* real party in interest] appeared by _____ [his/her/their] attorney(s), _____ [*name(s)*]. _____ [Petitioner *or* Respondent *or* Real Party in Interest] having moved the court for a judgment on the peremptory writ pursuant to *Section 1094 of the Code of Civil Procedure*, [and the court having weighed the evidence,]

IT IS ORDERED, ADJUDGED, AND DECREED as follows:

[*EITHER*]

1. The peremptory writ of mandate applied for herein is denied; and

2. The _____ [respondent *and/or* real party in interest] have and recover costs and disbursements herein in the sum of $_____ from petitioner.

[*OR*]

1. A peremptory writ of mandate issue commanding respondent to _____ [*specify what respondent is being ordered to do*]; and

2. The petitioner have and recover costs and disbursements herein in the sum of $_____ from _____ [respondent *and/or* real party in interest].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of judgment in [1], *above*, is for use by any party who has prevailed on a motion for judgment on a peremptory writ [*Code Civ. Proc. § 1094*]. The bracketed material stating that the court has weighed the evidence is included if the motion is based on the administrative record [*see Code Civ. Proc. § 1094*].

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Chapter 359 MARRIAGE

32-359 California Forms of Pleading and Practice--Annotated 359.syn

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[1] Marriage as State-Regulated Status

[2] Power of State to Regulate Marriage

[3] Extent of State Regulation of Marriage

[4] Constitutional Challenges to State Regulation of Marriage

[a] Impairment of Contracts

[b] Right to Privacy

§ 359.11 Marriage as Fundamental Right

§ 359.12 Contracts Restricting Marriage

§ 359.13 Absolute Prohibitions on Right to Marry

[1] Bigamous, Incestuous, and Same-Sex Marriages

[2] Bigamous Marriages

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[4] Same-Sex Marriages

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§ 359.14 Defects Rendering Marriage Voidable

[1] Minority

[2] Force and Fraud

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§ 359.15 Marriage of Persons Convicted of Crimes

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§ 359.17 Legal Rights and Duties Incident to Marriage

[1] General Rights

[2] Right to Contract Regarding Property and Other Matters

[3] Consortium

[4] General Duties

[5] Mutual Obligation of Support

[a] Binding Duty of Support

[b] Support Defined

[c] Sources of Support

[d] Waiver of Support

[e] Duration of Support Obligation

[f] Support of Incompetent Spouse

[g] Right to Family Allowance and Homestead on Death of Spouse

[h] Enforcement of Support Obligation

[6] Prohibited "Heartbalm" Actions

§ 359.18 Evidentiary Privileges Arising From Marriage

[1] Two Distinct Privileges

[2] When Privileges May Be Asserted

[3] Testimonial Privilege

[a] Dual Nature of Testimonial Privilege

[b] Who May Invoke Testimonial Privilege

[c] Requirement of Valid Marriage

[d] Scope of Testimonial Privilege

[e] Exceptions to Testimonial Privilege

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[4] Privilege for Confidential Marital Communications

[a] Nature of Privilege

[b] Meaning of Communication

[c] Presumption of Confidentiality and Rebuttal of Presumption

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[e] Who May Invoke Confidential Communications Privilege

[f] Scope of Confidential Communications Privilege

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§ 359.20 Emancipation of Minors Through Marriage

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§ 359.41 General Requirements for Valid Marriage

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[2] Knowingly Solemnizing Prohibited Marriage

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[1] License Requirements

[2] Effect of Incapacity, Influence of Liquor or Drugs, or Illegality

[3] License to Remarry Not Necessary or Proper

[4] License Application Process

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[b] Completion of Application Form

[5] Oath and Signature

[a] In General

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[c] Effect of Supplying False Information

[d] Fees

[e] Health Information Brochure

[6] Expiration of License

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[1] General Requirements

[2] Consent of Parent or Guardian

[3] Permission of Superior Court

[4] Combined Consent and Permission of Superior Court When No Parent Capable of Consenting

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§ 359.46 Former Health Certificate Requirement

§ 359.47 Solemnization of Marriage

[1] General Requirements

[2] Who May Solemnize

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[5] Presentation of License

[6] Form of Ceremony

[7] Witnesses

[8] Unconventional Religious Ceremonies

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[1] Function of Certificate of Registry

[2] Contents of Certificate

[3] Lost or Destroyed Certificate

[4] Filing of Certificate

[5] Certified Copies of Certificate

§ 359.49 Ceremonial Certificate of Marriage

§§ 359.50-359.69 [Reserved]

§ 359.70 Common-Law Marriages

§ 359.71 Confidential Marriages

[1] Nature and Purpose of Confidential Marriage Act

[2] Eligibility for Confidential Marriage

§ 359.72 Confidential Marriage License

[1] In General

[2] Solemnization of Confidential Marriages

[3] Confidential Marriage Certificate

[a] Completion of Certificate

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[c] Obtaining Additional Copies of Certificate

[d] Confidentiality of Certificate Information

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§ 359.75 Tribal Alliances and Other Unconventional Marriage Arrangements

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§ 359.93 Investigation of Bona Fides of Marriage

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[1] Duration of Marriage and Bad Faith

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[1] Nature and Effect of Presumption

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§ 359.111 Hearsay Exceptions Relevant to Proof of Marriage

[1] Recorded Statistical Information Exception

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[3] Exception for Prior Statements of Spouses

[4] Exception for Prior Statements of Relatives and Friends

[5] Family Records Exception

[6] Exception for Evidence of Reputation in Family or Community

[7] Church Records Exception

§ 359.112 Declaration of Unrecorded Marriage

§ 359.113 Action to Establish Validity of Marriage

§ 359.114 Proceeding to Establish Record of Marriage

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[2] Where Proceeding May Be Brought

[3] Contents of Petition

[4] Fee for Filing Petition

[5] Hearing on Petition

[6] Order Granting Petition

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§§ 359.115-359.129 [Reserved]

§ 359.130 California Family Law Practice and Procedure

§ 359.131 California Points and Authorities

§ 359.132 California Legal Forms

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[1] Capacity to Marry

[2] Children of Married Persons

[3] Community Property Treatment of Property of Married Persons

[4] Contracts and Conditions Restraining Marriage

[5] Contracts Between Spouses

[6] Effect of Marriage on Distribution of Decedent's Property

[7] Emancipation of Minors Through Marriage

[8] Evidentiary Privileges of Arising Out of Marriage

[9] Gifts in Contemplation of Marriage

[10] Mutual Duty of Spousal Support

[11] Parties' Names

[12] Nature of Marriage Relationship

[13] Rights Incident to Marriage

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[5] Dissolution of Valid Marriage

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[8] Noncompliance With Formalities

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[1] False Information Given to Procure Marriage License

[2] Formalities of Marriage

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[1] Confidential Marriage

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[1] Confidential Marriage

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[1] Classification of Aliens

[2] Deportation

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[1] Annulment of Fraudulent Marriage Involving Alien

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[3] Proof of Bona Fide Marriage

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[1] Action to Determine Validity of Marriage

[2] Declaration of Unrecorded Marriage

[3] Establishment of Record of Marriage

[4] Hearsay Exceptions Relevant to Proving Fact of Marriage

[5] Presumptions Affecting Proof of Marriage

[6] Proof of Marriage

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[1] Estoppel to Deny Validity of Marriage

[2] Sufficiency of Evidence

[3] Time Limits for Bringing Action to Determine Validity of Marriage

§§ 359.212-359.229 [Reserved]

§ 359.230 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3302] for Goods Sold and Delivered as Necessaries to Spouse [Fam. Code § 914] While Spouses Living Together [Fam. Code § 4301]--By Creditor Against Both Spouses

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction, Venue, and Procedural Requirements

[5] Cross References

[6] State Statutes

[7] Decisions

[a] Necessaries Defined

[b] Other Spouse as Necessary Party

[c] Pleading

[d] Property Available to Creditor for Necessaries

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§ 359.250 Combined Application for License to Marry [Fam. Code § 355], License to Marry [Fam. Code § 351], and Certificate of Registry of Marriage [Fam. Code § 359]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 359.251 Request of Minor to Marry [Fam. Code §§ 302, 303, 304]--Cal. Judicial Council Form FL-910

[1] FORM

[2] Use of Form

[3] State Statutes

§ 359.252 Order on Request of Minor to Marry [Fam. Code §§ 302, 303, 304]--Cal. Judicial Council Form FL-915

[1] FORM

[2] Use of Form

[3] Cross References

§§ 359.253-359.269 [Reserved]

§ 359.270 Petition for Declaration of Validity of Marriage [Fam. Code § 309]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Rules of Court

§ 359.271 Petition to Establish Record of Marriage [Health & Safety Code § 103450]

[1] FORM

[2] Use of Form

[3] State Statutes

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Chapter 359 MARRIAGE
PART I. SCOPE

32-359 California Forms of Pleading and Practice--Annotated § 359.01

§ 359.01 Scope of Chapter

This chapter discusses the regulation of marriage by the state, possible constitutional grounds for challenging state regulation of marriage and family life, and the right to marry and legal restrictions on that right. The legal effects of marriage are also discussed, including spousal rights to contract regarding property, the mutual obligation of support owed by one spouse to the other, evidentiary privileges arising from marriage, the effect of marriage on minority status and the right to parental support, and the effect of marriage on credit. This chapter includes a form of complaint for an action brought against both spouses by a creditor who supplied necessaries to one spouse while the spouses were living together (*see § 359.230*).

For a complete discussion of the effect of marriage on property rights and the characterization of property, see Ch. 122, *Community Property* . For discussion of the procedures for dissolution of a marriage, see Ch. 221, *Dissolution of Marriage: Procedure* . For discussion of the procedures for annulment of a void marriage, see Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights* .

This chapter also discusses the formal requirements for a valid marriage, including the issuance of marriage licenses to adults and minors, and the process of solemnizing and authenticating a valid marriage. It also covers criminal penalties for certain wrongful acts done in connection with marriage licensing, solemnization, and authentication, and the effect of deviations from the formal requirements on the validity of a marriage. A sample marriage license application and certificate of registry is provided (*see § 359.250*), as are an application for an order granting permission for a minor's marriage (*see § 359.251*) and various forms of order granting such permission (*see §§ 359.252* -359.254).

This chapter also discusses common law marriages, proxy marriages, tribal alliances, and other unconventional marriage arrangements. It discusses the general rule that out-of-state marriages are recognized in California if they were valid in the place they were contracted [*Fam. Code § 308*], and the various exceptions to the rule. It also covers confidential marriages contracted under the California Confidential Marriage Act [*Fam. Code § 500 et seq.*].

This chapter also discusses the effect of marriage between an alien and a United States citizen or a permanent resident on the alien's visa status. It covers the preferential visa status accorded spouses of United States Citizens and resident aliens, the conditional residency period that may be imposed on the alien spouse under specified circumstances, the

investigatory power of the Immigration and Naturalization Service concerning marriages involving aliens, and the penalties for marriage fraud perpetrated in order to obtain an alien's entry into the United States.

For discussion of immigration and naturalization generally, see Gordon & Mailman, Immigration Law and Procedure (Matthew Bender).

This chapter also discusses proof of a marriage other than a marriage with an alien. The presumption that a ceremonial marriage is valid, the exceptions to the hearsay rule that may be useful in proving the existence of a marriage, and procedures for establishing the existence and validity of a marriage are covered. A petition to have the validity of a marriage judicially established (*see § 359.270*), and a petition to establish an official record of marriage (*see § 359.271*), are included in this part.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsGeneral OverviewFamily LawMarital Termination & Spousal SupportGeneral OverviewFamily LawMarriageGeneral Overview

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PART I. SCOPE

32-359 California Forms of Pleading and Practice--Annotated § 359.02

§ 359.02 Cross References

For a form of allegation for use in pleading that the parties are husband and wife, see Ch. 20, *Allegations Commonly Used*

For discussion, procedures, and forms relating to annulment of marriage, and related discussion of putative spouses, see Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights*

For forms for use in actions to recover a gift made in contemplation of marriage, see Ch. 140, *Contracts* , and Ch. 278, *Gifts*

For discussion, procedures, and forms relating to dissolution of marriage, see Ch. 221, *Dissolution of Marriage: Procedure*

For discussion and forms for use in declaring or abandoning a homestead, see Ch. 294, *Homesteads*

For forms for use in obtaining temporary restraining orders to prevent domestic violence, see Ch. 303, *Injunctions*

For discussion of rights of unmarried persons who cohabit without marriage and related forms for enforcing their agreements, see Ch. 387, *Nonmarital Cohabitation*

For discussion of procedures for probate of a married person's estate, see Ch. 440, *Probate: Is Probate Necessary* through Ch. 458E, *Probate: Discharge*

For forms and procedures for use in bringing mandate proceedings to compel issuance of marriage license, see Ch. 358, *Mandate and Prohibition*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsGeneral OverviewFamily LawMarital Termination & Spousal SupportGeneral OverviewFamily LawMarriageGeneral Overview

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[Reserved]

§§ 359.03[Reserved]

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§ 359.10 State Regulation of Marriage

[1] Marriage as State-Regulated Status

The Legislature has defined marriage as a personal relation arising out of a civil contract between a man and a woman [*Fam. Code § 300*]. The rights, duties, and obligations of that relation [*see* discussions in *§ 359.17[1], [3]*, and *[4]*] rest not on their agreement but on the general law of the state, statutory or common, which defines and prescribes those rights, duties, and obligations [*Ikuta v. Ikuta (1950) 97 Cal. App. 2d 787, 790, 218 P.2d 854]* . Marriage is, therefore, a status, based on and arising out of a preexisting contract [*Vaughn v. Vaughn (1944) 62 Cal. App. 2d 260, 267, 144 P.2d 658]* .

A frequently quoted dictum by the United States Supreme Court in 1888 expresses the view of marriage that has been generally accepted by courts since the turn of the century [*Maynard v. Hill (1888) 125 U.S. 190, 210-211, 8 S. Ct. 723, 31 L. Ed. 654]* :

> It is also to be observed that, whilst marriage is often termed by text writers and in decisions of courts a civil contract--generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization--it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.

[2] Power of State to Regulate Marriage

The power of the state to regulate marriage is justified as an exercise of the police power [*see* *Stokes v. County Clerk (1953) 122 Cal. App. 2d 229, 232, 264 P.2d 959]* . The police power is the power inherent in a government to enact

laws within constitutional limits to protect the order, safety, health, morals, and general welfare of society. [*In re Rameriz (1924) 193 Cal. 633, 649-650, 226 P. 914* ; *see In re Quinn (1973) 35 Cal. App. 3d 473, 486, 110 Cal. Rptr. 881* (Legislature has "any power it chooses to exercise unless it is restricted by the federal or state Constitution")].

Most cases dealing with the state power to regulate the creation, incidents, and termination of marriage have failed to articulate explicitly the basis of the state's exclusive regulatory power. Instead, they have relied on categorical statements to the effect that regulation of marriage is solely within the province of the Legislature [*see, e.g., Lockyer v. City & County of San Francisco (2004) 33 Cal. 4th 1055, 1074, 17 Cal. Rptr. 3d 225, 95 P.3d 459* ; *Beeler v. Beeler (1954) 124 Cal. App. 2d 679, 682, 268 P.2d 1074]* , or that the state has a vital interest in the institution of marriage, and plenary power to fix the conditions under which the marital status may be created or terminated [*see, e.g., In re Marriage of Walton (1972) 28 Cal. App. 3d 108, 113, 104 Cal. Rptr. 472]* .

The courts have been more explicit in articulating their views on the impact of the institution of marriage on the general welfare of society. The California Supreme Court has declared that the structure of society itself depends largely upon the institution of marriage, and that the joining of a man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 684, 134 Cal. Rptr. 815, 557 P.2d 106]* . The courts have also said that marriage and procreation are "fundamental to the very existence and survival of the race" [*Skinner v. Oklahoma (1942) 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655* ; *see Perez v. Sharp (1948) 32 Cal. 2d 711, 715, 198 P.2d 17]* , and that marriage accomplishes the following social purposes [*De Burgh v. De Burgh (1952) 39 Cal. 2d 858, 863-864, 250 P.2d 598* ; *Woodworth v. Woodworth (1966) 242 Cal. App. 2d 301, 304, 51 Cal. Rptr. 410]* :

- Channeling biological drives that might otherwise become socially destructive.
- Ensuring the care and education of children in a stable environment.
- Establishing continuity from one generation to another.
- Nurturing and developing the individual initiative that distinguishes free people.

Given the importance that the courts have traditionally attached to the institution of marriage, it is not surprising that the California Supreme Court has declared it to be the public policy of the state to foster and protect marriage, to encourage spouses to live together, and to prevent separation [*Glickman v. Collins (1975) 13 Cal. 3d 852, 857, 120 Cal. Rptr. 76, 533 P.2d 204* ; *see Evid. Code § 605*].

Nevertheless, the intensive state regulation aimed at preserving the institution of marriage [*see* discussion in *§ 359.10[1]*] may be subject to certain constitutional challenges, as discussed in *§ 359.10[4][a]* and *[b], below.*

[3] Extent of State Regulation of Marriage

The state has appropriated the right to regulate virtually every aspect of the institution of marriage. State authority over the incidents of marriage includes almost exclusive control and regulation of the following matters [*see Maynard v. Hill (1888) 125 U.S. 190, 205, 8 S. Ct. 723, 31 L. Ed. 654* ; *In re Marriage of Walton (1972) 28 Cal. App. 3d 108, 112, 104 Cal. Rptr. 472]* :

- Who may marry [*see* discussion in *§ 359.13[1]*].
- The procedure for contracting a valid marriage [*see* discussion in *§ 359.40* et seq].
- The rights and duties imposed on married persons [*see* discussions in *§ 359.17[1], [3],* and *[4]*].

- The procedure for dissolving marriage and the rights and duties imposed on former spouses by virtue of the fact that they were once married.

[4] Constitutional Challenges to State Regulation of Marriage

[a] Impairment of Contracts

Because marriage is a contractual relationship [*Fam. Code § 300*], it has been argued that state regulation of various aspects of the marital relationship, such as prescribing the grounds for dissolution, constitutes an impairment of contractual freedom in violation of the United States and California constitutions [*see* U.S. Const., art. I, § 10; *Cal. Const., art. I, § 9*]. Such contentions have been rejected on the ground that marital rights and obligations are not contractual rights and obligations within the meaning of the constitutional provisions prohibiting impairment. As discussed in *§ 359.10[1]*, marriage is considered more than an ordinary civil contract because of the interest of the state in the marital relationship and the consequent public policy surrounding the marital status [*In re Marriage of Walton (1972) 28 Cal. App. 3d 108, 112, 104 Cal. Rptr. 472]* .

[b] Right to Privacy

The United States Supreme Court recognizes the existence of a constitutional right of personal privacy [*e.g.,* *Zablocki v. Redhail (1978) 434 U.S. 374, 384, 98 S. Ct. 673, 54 L. Ed. 2d 618* ; *Roe v. Wade (1973) 410 U.S. 113, 152, 93 S. Ct. 705, 35 L. Ed. 2d 147* ; *Griswold v. Connecticut (1965) 381 U.S. 479, 485, 85 S. Ct. 1678, 14 L. Ed. 2d 510]* . The court was originally in doubt as to the exact constitutional provision giving rise to the right of privacy [*see* *Griswold v. Connecticut (1965) 381 U.S. 479, 484, 486-502, 85 S. Ct. 1678, 14 L. Ed. 2d 510]* , but it has since established that the right of privacy is an aspect of the liberty guaranteed by the *due process clause of the Fourteenth Amendment to the United States Constitution* [*Roe v. Wade (1973) 410 U.S. 113, 153, 93 S. Ct. 705, 35 L. Ed. 2d 147]* .

Only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty fall within the "zones of protection" afforded by the right of privacy. If a fundamental right is involved, regulation limiting the right may be justified only by a compelling state interest [*Roe v. Wade (1973) 410 U.S. 113, 152, 155, 93 S. Ct. 705, 35 L. Ed. 2d 147]* . As discussed in *§ 359.11*, marriage is considered a fundamental right [*Perez v. Sharp (1948) 32 Cal. 2d 711, 714, 198 P.2d 17]* .

Many of the cases invalidating specific state statutes or local ordinances on privacy grounds have involved marriage and the family. For example, privacy considerations have been involved in the invalidation of laws prohibiting abortion [*Roe v. Wade (1973) 410 U.S. 113, 152-166, 93 S. Ct. 705, 35 L. Ed. 2d 147]* , miscegenation [*Loving v. Virginia (1967) 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010]* , and the dispensing of contraception information or devices [*Carey v. Population Services International (1977) 431 U.S. 678, 684-692, 97 S. Ct. 2010, 52 L. Ed. 2d 675* ; *Griswold v. Connecticut (1965) 381 U.S. 479, 484-486, 85 S. Ct. 1678, 14 L. Ed. 2d 510]* . The right to privacy also served as the basis for striking down a city ordinance prohibiting occupancy of a dwelling unit by members of an extended family [*Moore v. East Cleveland (1977) 431 U.S. 494, 505-506, 97 S. Ct. 1932, 52 L. Ed. 2d 531]* and a state law that forbade issuance of a marriage license to a noncustodial parent whose child support payments were in arrears [*Zablocki v. Redhail (1978) 434 U.S. 374, 390-391, 98 S. Ct. 673, 54 L. Ed. 2d 618]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsGeneral OverviewFamily LawMarriageGeneral OverviewFamily LawMarriageGeneral OverviewFamily LawMarriageNature of MarriageGovernmentsState & Territorial GovernmentsPolice Power

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§ 359.11 Marriage as Fundamental Right

Marriage has been declared a fundamental right of free men and women. Thus, no prohibitions can be imposed on the right to marry except for an important social objective and by reasonable means [*Loving v. Virginia (1967) 388 U.S. 1, 12, 87 S. Ct. 1817, 18 L. Ed. 2d 1010* ; *Perez v. Sharp (1948) 32 Cal. 2d 711, 714, 198 P.2d 17.]* . This test was applied to invalidate California's former antimiscegenation statutes [former *Civ. Code §§ 60, 69*], which had declared marriage between Caucasians and members of other races to be illegal and void and had prohibited county clerks from issuing marriage licenses to such couples [*Perez v. Sharp (1948) 32 Cal. 2d 711, 715-718, 198 P.2d 17]* .

Not every state regulation that relates in any way to the incidents of or requirements for marriage must be subjected to rigorous scrutiny. Reasonable regulations that do not significantly interfere with the decision to marry may legitimately be imposed. However, when a statute significantly interferes with the exercise of the right to marry, it cannot be upheld unless it is supported by important state interests and is closely tailored to effectuate only those interests [*Zablocki v. Redhail (1978) 434 U.S. 374, 388, 98 S. Ct. 673, 54 L. Ed. 2d 618* ; *see Turner v. Safley (1987) 482 U.S. 78, 94-99, 107 S. Ct. 2254, 96 L. Ed. 2d 64]* . The United States Supreme Court struck down a Wisconsin statute that forbade a noncustodial parent of a minor child from marrying unless his or her child support payments were not in arrears and the child was not likely to become a public charge. The court held this statute to be a direct and substantial interference with the fundamental right to marry. The court invalidated the statute because it did not appear designed to achieve either of the purported state interests of providing counseling for the nonsupporting parent and protecting the welfare of out-of-custody children, even if it were assumed that both of these objectives constitute legitimate and substantial state interests [*Zablocki v. Redhail (1978) 434 U.S. 374, 390-391, 98 S. Ct. 673, 54 L. Ed. 2d 618]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageGeneral OverviewFamily LawMarriageCertificates & LicensesGeneral OverviewFamily LawMarriageNature of MarriageFamily LawMarriageValidityGeneral OverviewFamily LawMarriageValidityInterracial Marriages

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§ 359.12 Contracts Restricting Marriage

Every contract in the restraint of the marriage of any person other than a minor is void [*Civ. Code § 1669*]. Conditions imposing restraints on marriage, except on the marriage of a minor, are also void. This prohibition does not affect limitations when the intent was not to forbid marriage, but only to give the use of property until marriage [*Civ. Code § 710*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAgeFamily LawMarriageGeneral OverviewFamily LawMarriageValidityGeneral OverviewFamily LawMarriageValidityVoid & Voidable MarriagesGeneral OverviewFamily LawMarriageValidityVoid & Voidable MarriagesVoid Marriages

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32-359 California Forms of Pleading and Practice--Annotated § 359.13

§ 359.13 Absolute Prohibitions on Right to Marry

[1] Bigamous, Incestuous, and Same-Sex Marriages

There are only three absolute prohibitions on the right to marry in California. These are the prohibitions against bigamy [*Fam. Code § 2201(a)*; *see Penal Code §§ 281-284*; discussion in *§ 359.13[2]*], incestuous marriage [*Fam. Code § 2200*; *see Penal Code § 285*; discussion in *§ 359.13[3]*], and same-sex marriage [*see Fam. Code § 300*; *Lockyer v. City & County of San Francisco (2004) 33 Cal. 4th 1055, 1075-1076, 17 Cal. Rptr. 3d 225, 95 P.3d 459* ; *see* discussion in *§ 359.13[4]*]. In all three cases, even assuming compliance with statutory requirements, the purported marriages would be void from the beginning [*see, e.g., Lockyer v. City & County of San Francisco (2004) 33 Cal. 4th 1055, 1113-1114, 17 Cal. Rptr. 3d 225, 95 P.3d 459* (same-sex marriages performed by city officials acting outside their authority are void from inception)]. Furthermore, in the case of an incestuous or bigamous marriage, criminal penalties could be imposed [*see Penal Code §§ 281-285*].

[2] Bigamous Marriages

A bigamous marriage occurs if one of the spouses already has a living spouse, a previous marriage not having been dissolved or adjudged a nullity before the date of the bigamous marriage [*Fam. Code § 2201*; *Penal Code §§ 281(a), 282(b)*]. Ordinarily bigamous marriages are void [*Fam. Code § 2201(a)*]. However, a bigamous marriage is voidable, in a nullity proceeding, rather than void if (1) the preexisting spouse has been absent for five successive years immediately preceding the bigamous marriage and is not known to be living by the petitioner, and (2) the preexisting spouse was generally reputed to be dead or was believed by the petitioner to be dead at the time of the bigamous marriage [*Fam. Code §§ 2201(a)(2), (b), 2210(b), 2211(b)*].

When a bigamous marriage is voidable rather than void, a proceeding to declare the marriage a nullity may be brought by either spouse during the life of the other or by the preexisting spouse [*Fam. Code § 2211(b)*].

The prohibition against bigamy does not prevent bigamous marriages from taking place. The fact that one person entering into a marriage is already married is unlikely to be evident to one who issues a marriage license [*see* discussions in *§ 359.44[1]* et seq.], solemnizes a marriage, or files a certificate of registry [*see* discussions in *§*

359.47[1] et seq.], unless this fact is voluntarily revealed by one of the spouses. Thus, bigamous marriages may be contracted and become a part of the public record. However, as discussed *above*, the public policy against bigamy is such that the legal incidents of such a marriage will, with a few limited exceptions, be nonexistent. Furthermore, the marriage will be subject to collateral attack in any proceeding in which its validity is raised [*Estate of Karau (1938) 26 Cal. App. 2d 606, 607-608, 80 P.2d 108* ; *cf. Estate of Anderson (1997) 60 Cal. App. 4th 436, 439, 442-444, 70 Cal. Rptr. 2d 266* (undivorced, bigamous spouse was prevented by doctrine of estoppel from asserting inheritance rights as surviving spouse against estate of legally recognized first spouse who died intestate)].

Any person who knowingly enters into a bigamous marriage is guilty of a crime [*Penal Code §§ 281(a), 283, 284*]. The crime of bigamy is punishable by a fine or by imprisonment in a county jail or in the state prison [*Penal Code § 283*]. The previously unmarried partner to a bigamous marriage is also subject to criminal punishment if he or she enters the bigamous marriage knowingly and willfully. The punishment is a fine or imprisonment in the state prison [*Penal Code § 284*]. However, in the case of a bigamous marriage entered into when the preexisting spouse has been absent for five successive years and is not known to the bigamous spouse to be living, the bigamous spouse and the new spouse will not be subject to criminal penalties [*Penal Code § 282(a)*]. Unlike the Family Code provision [*Fam. Code § 2201(a)(2)*; *see Fam. Code § 2210(b)(2)*], the criminal statute does not require that the preexisting spouse be "generally reputed or believed" to be dead. Every person authorized to solemnize marriage who willfully and knowingly solemnizes any bigamous or other marriage forbidden by law is punishable by fine or by imprisonment in the county jail or by both [*Penal Code § 359*].

The prohibition against bigamy has been challenged on *First Amendment* grounds as an unconstitutional limitation on the free exercise of religion. However, the United States Supreme Court has ruled that a state legislature may declare monogamy to be the law of social life under its dominion, even though such a rule may curtail certain religious practices [*Davis v. Beason (1890) 133 U.S. 333, 10 S. Ct. 299, 33 L. Ed. 637]* .

Nullity proceedings are discussed in further detail in Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights* .

[3] Incestuous Marriages

An incestuous marriage is a marriage between persons who have one of the following relationships to each other [*Fam. Code § 2200*]:

- Parent and child.
- Ancestor and descendant.
- Brother and sister of the whole or half blood.
- Uncle and niece of the whole blood.
- Aunt and nephew of the whole blood.

An incestuous marriage is void from the beginning [*Fam. Code § 2200*], and contracting an incestuous marriage or engaging in an incestuous sexual relationship in California is a crime [*Penal Code § 285*]. If a marriage that would be incestuous under California law is validly contracted in another state or country, the spouses' vulnerability to prosecution for engaging in a sexual relationship in California would depend on whether the marriage is recognized in California under the general rule that marriages are valid here if they would be valid where they were performed [*see Fam. Code § 308*], or denied recognition for being "incestuous by the laws of nature" [*see McDonald v. McDonald (1936) 6 Cal. 2d 457, 459-460, 58 P.2d 163]* . For further discussion, see *§ 359.74[2]*. In cases involving incestuous

marriages illegally contracted in other states or countries, California lacks jurisdiction to prosecute for the act of contracting the marriage, but may prosecute after the spouses return to California for acts of sexual intercourse that occur in the state [*see People v. MacDonald (1938) 24 Cal. App. 2d 702, 711, 76 P.2d 121]* . In order to find a defendant guilty of incestuous marriage, the jury must find not only that the spouses were related within the proscribed degree of consanguinity but also that the defendant knew that they were so related when the marriage or sexual act took place [*People v. Russell (1971) 22 Cal. App. 3d 330, 336, 99 Cal. Rptr. 277]* .

The prohibition against incestuous marriages does not appear to have been challenged in California on constitutional grounds.

As with bigamous marriages [*see* discussion in *§ 359.13[2]*], incestuous marriages may be contracted and become a part of the public record [*see People v. MacDonald (1938) 24 Cal. App. 2d 702, 711, 76 P.2d 121* (marriage contracted in Arizona between father and daughter)]. However, the incestuous marriage, because completely void [*Fam. Code § 2200*], will be subject to collateral attack in any proceeding in which its validity is raised, and the legal incidents of the marriage will be nonexistent.

[4] Same-Sex Marriages

In the 2009 case of *Strauss v. Horton* [*Strauss v. Horton (2009) 46 Cal. 4th 364, 93 Cal. Rptr. 3d 591, 207 P. 3d 48]* , the California Supreme Court addressed the question of whether same-sex marriage may be prohibited under California law. The Court began by summarizing California law relating to marriage and same-sex couples, namely

- *Fam. Code § 300*, which defines marriage as a personal relation arising from a civil contract between a man and a woman.

- *Fam. Code § 308.5*, which codifies Proposition 22 approved by California voters in March 2000, and states that only marriage between a man and a woman is valid or recognized in California. It follows federal legislation (the Defense of Marriage Act) [Pub. L. No. 104-199, § 3(a)], which defines "marriage" and "spouse" under federal law to include only partners of the opposite sex [*1 U.S.C. § 7*], and provides that a state is not required to recognize same-sex marriages performed in other states [*28 U.S.C. § 1738C*].

- *Lockyer v. City & County of San Francisco*, in which the Court held that *Fam. Code § 300* limits marriage in California to marriage between a man and a woman, and prohibits persons of the same sex from lawfully marrying in California [*Lockyer v. City & County of San Francisco (2004) 33 Cal. 4th 1055, 1117, 17 Cal. Rptr. 3d 225, 95 P.3d 459]* . In this case, the Court was faced with the question of whether public officials in the City and County of San Francisco acted lawfully in issuing marriage licenses to same-sex couples in the absence of a judicial determination that the California statutes limiting marriage to a union between a man and a woman were unconstitutional. It concluded that the public officials acted unlawfully in issuing licenses in the absence of such a judicial determination, but emphasized that the substantive question of the constitutional validity of the marriage statutes was not before the court in this proceeding.

- *In re Marriage Cases*, in which the Court addressed the constitutional validity of the California marriage statutes (*Fam. Code §§ 300, 308.5*) that limit marriage to a union between a man and a woman. The Court held that these statutes were unconstitutional insofar as they exclude same-sex couples from the designation of marriage [*In re Marriage Cases (2008) 43 Cal. 4th 757, 848-856, 76 Cal. Rptr. 3d 683, 183 P.3d 384]* . The Court concluded that same-sex couples, as well as opposite-sex couples, enjoy the protection of the constitutional right to marry that is embodied in the privacy and due process provisions of the California Constitution. By granting access to the designation of "marriage" to

opposite-sex couples, while denying this access to same-sex couples, the California marriage statutes impinge on the privacy and due process rights of same-sex couples and violate their right to equal protection of the laws that is guaranteed by the California Constitution. To remedy these constitutional violations, the California marriage statutes should be interpreted to grant both opposite-sex and same-sex couples access to the designation of marriage and to the rights inherent in that institution [*In re Marriage Cases (2008) 43 Cal. 4th 757, 829, 76 Cal. Rptr. 3d 683, 183 P.3d 384]* .

- Proposition 8, an initiative approved by voters in November 2008, which adds a new section [*Cal. Const. art. I, § 7.5*) to article I of the California Constitution. It provides that "[o]nly marriage between a man and a woman is valid or recognized in California."

In *Strauss v. Horton*, the Court was asked to decide whether Proposition 8 constitutes a permissible change to the California Constitution, and, if it does, the effect, if any, that it has on the estimated 18,000 same-sex marriages that were performed after In *Re Marriage* was issued in May 2008 and the adoption of Proposition 8 in November 2008 [*Strauss v. Horton (2009) 46 Cal. 4th 364, 385, 93 Cal. Rptr. 3d 591, 207 P.3d 48]* . The Court concluded that Proposition 8 is a permissible constitutional amendment, not an impermissible constitutional revision, and that it does not violate the separation of powers doctrine and is not invalid under an "inalienable rights" theory [*Strauss v. Horton (2009) 46 Cal. 4th 364, 390-391, 474, 93 Cal. Rptr. 3d 591, 207 P.3d 48]* . It applies both to marriages performed in California and to those performed in other jurisdictions [*Strauss v. Horton (2009) 46 Cal. 4th 364, 405-406, 93 Cal. Rptr. 3d 591, 207 P.3d 48]* . The Court observed that if there is to be a change to the state constitutional rule embodied in that measure, it must "find its expression at the ballot box" [*Strauss v. Horton (2009) 46 Cal. 4th 364, 474-475, 93 Cal. Rptr. 3d 591, 207 P.3d 48]* . The Court also concluded that Proposition 8 does not apply retroactively. Therefore, the marriages of same-sex couples that were performed between the time of the Court's decision in *In re Marriage Cases* and the effective date of Proposition 8 (November 5, 2008), remain valid in all respects and must continue to be recognized in this state [*Strauss v. Horton (2009) 46 Cal. 4th 364, 470-474, 93 Cal. Rptr. 3d 591, 207 P. 3d 48]* .

The Court noted that Proposition 8 did not entirely repeal or abrogate a same-sex couple's state constitutional rights of privacy, due process, and equal protection that the Court had previously recognized in *In re Marriage Cases*. In that case, the Court noted that same-sex couples have a constitutional right to "choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage" [*In re Marriage Cases (2008) 43 Cal. 4th 757, 829, 76 Cal. Rptr. 3d 683, 183 P.3d 384]* . Instead, the Court concluded that Proposition 8 carves out a narrow and limited exception to these state constitutional rights by reserving the official designation of the term "marriage" for the union of opposite-sex couples as a matter of state constitutional law, while leaving undisturbed all of the other extremely significant substantive aspects of a same-sex couple's state constitutional rights to establish an officially recognized and protected family relationship with the person of one's choice and to raise children within that family [*Strauss v. Horton (2009) 46 Cal. 4th 364, 387-388, 390-391, 408-409, 411-412, 93 Cal. Rptr. 3d 591, 207 P.3d 48*]. Section 7.5 of article I that was added by Proposition 8 does not affect the continued validity of the provisions of the California Constitution that protect the familial rights of same-sex couples, except to the extent that those rights include access to the designation of "marriage" [*Strauss v. Horton (2009) 46 Cal. 4th 364, 409, 411-412, 93 Cal. Rptr. 3d 591, 207 P.3d 48]* .

[5] Domestic Partnerships

Although same-sex couples are not permitted to marry under California law, if they register as domestic partners under the California Domestic Partner Rights and Responsibilities Act of 2003 (the Domestic Partner Act) (*Fam. Code §§ 297-299.6*), which became effective January 1, 2005 [Stats. 2003, ch. 421, § 2], they have the same rights, protections, and benefits, and are subject to the same responsibilities, obligations, and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed on spouses [*Fam. Code § 297.5(a)*]. These rights and responsibilities are extended to current domestic partners, former domestic partners, and surviving domestic partners [*Fam. Code § 297.5(a)-(c)*]. As

the California Supreme Court has noted, by enacting the Domestic Partner Act, the legislature has made clear its intention to substantially equalize the status of registered domestic partners and spouses [*Koebke v. Bernardo Heights Country Club (2005) 36 Cal. 4th 824, 836, 839, 31 Cal. Rptr. 3d 565, 115 P.3d 1212]* . To couples who meet the requirements of establishing a domestic partnership under the Domestic Partner Act and who have registered under that Act, the legislature has granted legal recognition comparable to marriage both procedurally and in terms of the substantive rights and obligations granted to and imposed on partners, which are supported by policy considerations similar to those that favor marriage [*Koebke v. Bernardo Heights Country Club (2005) 36 Cal. 4th 824, 845, 31 Cal. Rptr. 3d 565, 115 P.3d 1212]* . Registered domestic partners are granted significant rights and bear important responsibilities toward one another by virtue of the Domestic Partner Act, which are not shared by couples who cohabit or who have not registered as domestic partners [*Koebke v. Bernardo Heights Country Club (2005) 36 Cal. 4th 824, 845, 31 Cal. Rptr. 3d 565, 115 P.3d 1212]* .

The Supreme Court has also noted that the practical considerations served by the policy favoring marriage are now also promoted by the Domestic Partner Act. For example, the required declaration of domestic partnership provides a readily verifiable method of proof for determining eligibility for services and benefits; and the mutual obligations undertaken by registered domestic partners, comparable to those of spouses, minimizes any economic risk to third parties that extend services and benefits to domestic partners [*Koebke v. Bernardo Heights Country Club (2005) 36 Cal. 4th 824, 845, 847, 31 Cal. Rptr. 3d 565, 115 P.3d 1212* (registered domestic partners occupy legal status that, like marital status, is formalized, public, and verifiable)].

The Supreme Court has held that in light of the legislature's intent to create a policy favoring domestic partnerships similar to the policy favoring marriage, the Unruh Act (*Civ. Code § 51*) requires businesses to treat registered domestic partners the same as married couples, and precludes them from granting married couples benefits they deny to persons registered as domestic partners [*Koebke v. Bernardo Heights Country Club (2005) 36 Cal. 4th 824, 836-837, 845-846, 31 Cal. Rptr. 3d 565, 115 P.3d 1212]* . Subsequent to this decision, *Civ. Code § 51* was amended to prohibit discrimination based on marital status or sexual orientation [Stats. 2005, ch. 420, § 3].

By enacting the Domestic Partner Act, however, the legislature has not created a "same-sex marriage" by another name [*Knight v. Superior Court (2005) 128 Cal. App. 4th 14, 19, 26 Cal. Rptr. 3d 687]* . The Act does not violate Proposition 22, which was intended only to limit the status of marriage to heterosexual couples and to prevent the recognition in California of same sex marriages that have been, or may in the future be, legitimized by laws of other jurisdictions [*Knight v. Superior Court (2005) 128 Cal. App. 4th 14, 18, 26 Cal. Rptr. 3d 687]* . Proposition 22 was not intended to protect the institution of marriage by precluding the legislature from giving the rights and benefits of marriage to alternative relationships [*Knight v. Superior Court (2005) 128 Cal. App. 4th 14, 22, 26 Cal. Rptr. 3d 687]* .

There are still a number of dissimilarities between the rights conferred by marriage and domestic partnership. Domestic partners are not entitled to many of the benefits the federal government provides to married couples, such as marital benefits related to social security, Medicare, federal housing, food stamps, veterans' benefits, military benefits, and federal employment benefit laws [*Knight v. Superior Court (2005) 128 Cal. App. 4th 14, 21, 26 Cal. Rptr. 3d 687]* . Registered domestic partners *are* entitled to file their California income tax returns jointly or separately on terms similar to those governing spouses [*Rev. & Tax. Code § 18521(c)*-(f)]. The earned income of registered partners may be recognized as community property. Registered partners who file separate income tax returns must each report one-half of their combined earned income, rather than their respective individual incomes for the taxable year [*Rev. & Tax. Code § 17024.5(h)(2)(B)*].

A same-sex union, other than a marriage, that is validly formed in another jurisdiction, and that is substantially equivalent to a domestic partnership under the Domestic Partner Act, will be recognized as a valid domestic partnership in California regardless of whether it bears the name domestic partnership [*Fam. Code § 299.2*]. It will not, however, be recognized as a marriage [*Fam. Code § 308.5*].

A growing number of cities, in California and other states, have adopted ordinances designed to extend some of the employee benefits enjoyed by married city employees to same-sex couples and other unmarried couples. These "domestic partners" ordinances, as they are often called, typically require the couple to file an affidavit or declaration stating that they have lived together for at least the minimum number of months required by the ordinance, share the common necessaries of life, and are each other's sole domestic partner, before claiming the benefits [Note, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others), 51 Ohio State L. J. 1067 (1990)*]. Some private employers also have benefits plans designed to provide equitable coverage for unmarried employees with nonmarital partners.

Same-sex couples and other unmarried couples may also use powers of attorney and powers of attorney for health care to secure for themselves the rights to manage one another's property and to be involved with one another's health care decisions [*see Prob. Code §§ 4000 et seq., 4400 et seq., 4600 et seq.* (Power of Attorney Law; Uniform Statutory Form Power of Attorney Act; Health Care Decisions Law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageValidityIncestuous MarriagesFamily LawMarriageValidityPlural MarriagesFamily LawMarriageValiditySame-Sex MarriagesFamily LawMarriageValidityVoid & Voidable MarriagesGeneral OverviewFamily LawMarriageValidityVoid & Voidable MarriagesVoid Marriages

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§ 359.14 Defects Rendering Marriage Voidable

[1] Minority

In addition to the absolute prohibitions on bigamous, incestuous, and same-sex marriages, there are certain defects in the capacity to marry that may neither prevent the parties from satisfying the formal requirements for marriage nor render the marriage void. One of these defects is minority [*see Fam. Code §§ 301, 302, 2210(a)*]. Minority is not a complete bar to contracting a valid marriage. A minor may secure the issuance of a valid marriage license by obtaining and filing parental and court consents in accordance with statutory procedures [*see Fam. Code §§ 302, 353*; discussion in *§ 359.45[1]* et seq.]. If a minor evades these requirements and obtains a license and enters into a marriage without having filed the appropriate consents, the marriage thus contracted is voidable at the request of the minor, the minor's parent, guardian, or conservator, or the person having charge of the minor [*Fam. Code § 2211(a)*]. An action to void a minor's marriage may be brought by the minor at any time within four years after he or she reaches the age of consent (18) [*Fam. Code § 2211(a)(1)*]. If the action is brought by a person other than the minor, it must be brought before the minor reaches the age of consent [*Fam. Code § 2211(a)(2)*]. A minor's marriage cannot be voided if the minor freely cohabits with his or her spouse for any length of time after reaching the age of consent [*Fam. Code § 2210(a)*].

The right to marry without parental and judicial consent is not one of the rights conferred by emancipation, regardless of whether the emancipation occurs under the terms of the Emancipation of Minors Law [*Fam. Code § 7000 et seq.*] or under pre-1978 case law [*see Fam. Code § 7001*]. Emancipation of minors is discussed in Ch. 364, *Minors* .

[2] Force and Fraud

The use of force or fraud in the procurement of either spouse's consent to the marriage will render the marriage voidable [*Fam. Code § 2210(d), (e)*; *see In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 155-156, 242 Cal. Rptr. 649* (marriage annulled when wife fraudulently entered into marriage to obtain green card and had no intention of consummating marriage); see also *In re Marriage of Meagher & Maleki (2005) 131 Cal. App. 4th 1, 6-7, 31 Cal. Rptr. 3d 663* (marriage may only be annulled for fraud that relates to matter which state deems vital to marriage relationship)]. No specific statutory provision prohibits the issuance of a marriage license to a person whose consent to the marriage was obtained by force or fraud. In any case, these defects may easily escape the notice of both the person

issuing the license and the person solemnizing the marriage. If a license is obtained and the marriage is solemnized, the marriage will be valid, although subject to the right of the injured spouse to seek a judgment of nullity [*Fam. Code § 2210(d), (e)*].

A proceeding to annul a marriage due to the use of force in the procurement of the marriage must be brought within four years after the marriage [*Fam. Code § 2211(e)*]. The injured spouse's right to bring such a proceeding terminates if he or she freely cohabits with the other spouse after the marriage [*Fam. Code § 2210(e)*]. A proceeding to annul a marriage due to fraud in the procurement of the marriage must be brought within four years after discovery of the facts constituting the fraud [*Fam. Code § 2211(d)*], and the injured spouse's right to bring the proceeding terminates if he or she freely cohabits with the other spouse after obtaining full knowledge of the facts constituting the fraud [*Fam. Code § 2210(d)*].

[3] Unsound Mind and Incurable Disability to Consummate Marriage

A marriage contracted by a person of unsound mind is voidable at the request of that person or his or her relative or conservator [*Fam. Code §§ 2210(c), 2211(c)*]. A proceeding to adjudge the marriage a nullity may be commenced at any time before the death of either spouse [*Fam. Code § 2211(c)*], unless the person of unsound mind has freely cohabited with the other spouse after coming to reason [*Fam. Code § 2210(c)*]. The few reported cases concerning annulment for reasons of unsound mind do not set forth a precise definition of this term. It seems likely that, at the very least, competent medical testimony would be required to establish the existence of the purported illness or condition [*see Vitale v. Vitale (1957) 147 Cal. App. 2d 665, 305 P.2d 690]* .

The marriage of a person who is physically incapable of entering into the marriage state is voidable within four years after the marriage takes place, if the incapacity continues and appears to be incurable [*Fam. Code §§ 2210(f), 2211(f)*]. The term "physically incapable of entering into the marriage state" refers to the ability to consummate the marriage, not the ability to procreate [*Stepanek v. Stepanek (1961) 193 Cal. App. 2d 760, 762, 14 Cal. Rptr. 793* ; *see Aufort v. Aufort (1935) 9 Cal. App. 2d 310, 311, 49 P.2d 620* (marriage may be voidable for fraud if one spouse has concealed his or her inability to procreate)]. A proceeding to annul a marriage on the basis of a spouse's physical incapability to enter into the marriage state may be brought by "the injured party" [*Fam. Code § 2211(f)*]. Apparently, this means the normal spouse [*see, e.g. Stepanek v. Stepanek (1961) 193 Cal. App. 2d 760, 762, 14 Cal. Rptr. 793]* .

A marriage license may not be issued when either applicant lacks the capacity to enter into a valid marriage [*Fam. Code § 352*]. This prohibition would not seem to apply to persons of unsound mind, since such persons are not incapacitated from marrying, but may marry subject to their right to obtain an annulment. No statute specifically prohibits the issuance of a marriage license to a person who lacks the capability to consummate the marriage.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportAnnulmentGeneral OverviewFamily LawMarital Termination & Spousal SupportAnnulmentGroundsConcealmentFamily LawMarital Termination & Spousal SupportAnnulmentGroundsDuress, Force & FraudFamily LawMarital Termination & Spousal SupportAnnulmentGroundsImpotenceFamily LawMarriageValidityVoid & Voidable MarriagesGeneral OverviewFamily LawMarriageValidityVoid & Voidable MarriagesVoidable Marriages

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32-359 California Forms of Pleading and Practice--Annotated § 359.15

§ 359.15 Marriage of Persons Convicted of Crimes

California does not consider the fact that a person has been convicted of a crime to constitute a defect in the person's capacity to marry. The right to marry is one of the civil rights guaranteed to inmates in state prisons [*Penal Code § 2601(e)*].

Although conceding that inmate marriages pose special security problems and that prison security is an important state interest, the United States Supreme Court held that a prison regulation permitting inmates to marry only if they obtained permission from the Superintendent of Prisons, and providing that such permission should be granted only in the case of a pregnancy or the birth of a child to an unmarried woman, was impermissible under both the strict-scrutiny test generally applicable to fundamental rights and the reasonable-relationship test urged by prison officials [*Turner v. Safley (1987) 482 U.S. 78, 97, 107 S. Ct. 2254, 96 L. Ed. 2d 64]* .

Nevertheless, while the right to marry survives imprisonment, many attributes of marriage, such as cohabitation, physical intimacy, and bearing and raising children, do not [*Gerber v. Hickman (9th Cir. 2002) 291 F.3d 617, 621]* . Thus, the constitutional rights of a married prisoner are not violated by the refusal of a state prison to allow him to provide his wife with a sperm specimen for artificial insemination [*Gerber v. Hickman (9th Cir. 2002) 291 F.3d 617, 620-623]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageValidityGeneral OverviewFamily LawMarriageValidityVoid & Voidable MarriagesVoidable Marriages

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§ 359.16 Marriage of Conservatees

The appointment of a conservator of the person or estate or both does not affect the capacity of the conservatee to marry [*Prob. Code § 1900*]. However, on the petition of the conservator, the conservatee, any relative or friend of the conservatee, or any interested person, a court may determine whether a conservatee has the capacity to enter into a valid marriage [*Prob. Code § 1901(a), (b)*].

A limited conservator may be granted the power to consent or withhold consent to the marriage of the limited conservatee, if a request for such authority is made in the petition for appointment of a limited conservator [*Prob. Code § 2351.5(b)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 359.17 Legal Rights and Duties Incident to Marriage

[1] General Rights

The marriage relation gives rise to reciprocal rights and obligations between the parties, and also affects their status in society at large [*Estate of Axcelrod (1944) 23 Cal. 2d 761, 767, 147 P.2d 1]* . The rights incident to married status include the following:

- The right to live together as husband and wife, and to hold oneself out to the public as married;

- The right to submit joint income tax returns [*I.R.C. § 6013*];

- The right to bring tort actions for loss of consortium [*see* discussion in *§ 359.17[3]*] or wrongful death if a third party injures or kills the other spouse [*Code Civ. Proc. § 377.60*; *Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 408, 115 Cal. Rptr. 765, 525 P.2d 669]* ;

- The right to refuse to be called as a witness against or to testify against one's spouse in certain actions and proceedings [*Evid. Code §§ 970 et seq., 980 et seq.*; *see* discussions in *§ 359.18[1]* et seq.];

- The right to division of community property on dissolution of the marriage [*see Fam. Code § 2500 et seq.*];

- The right to seek spousal support on termination of the marriage [*see Fam. Code § 4300 et seq.*];

- The power of testamentary disposition over half of the community property of the marriage [*Prob. Code §§ 100, 6101(b)*];

- The right to take all community property and a portion of the decedent's separate property if a spouse dies intestate [*Prob. Code § 6401(a), (c)*];

- The right to half of the spouses' quasi-community property on the death of a spouse [*Prob. Code § 101*], and the right to succeed to all of the quasi-community property of the marriage when a spouse dies intestate [*Prob. Code § 6401(b)*];

- The right of a surviving spouse in some cases to a probate homestead and family allowance from the estate of a decedent spouse [*see Prob. Code §§ 6520 et seq., 6540 et seq.*; discussion in *§ 359.17[5][g]*]; and

- The right to priority in the receipt of certain government payments and benefits.

[2] Right to Contract Regarding Property and Other Matters

Spouses (and prospective spouses) may enter into binding property agreements between themselves that, if otherwise valid under the law of contracts, generally will be given effect by courts in later family law or other proceedings, so long as they are not unconscionable or have an improper purpose, or otherwise violate public policy [*see Fam. Code §§ 721, 1500, 1620*; *In re Marriage of Dawley (1976) 17 Cal. 3d 342, 357-358, 131 Cal. Rptr. 3, 551 P.2d 323* ; *see also In re Marriage of Mehren & Dargan (2004) 118 Cal. App. 4th 1167, 1171, 13 Cal. Rptr. 3d 522* (spouses' unenforceable contract in which husband promised to grant wife all of his interest in their community property if he used illicit drugs); *Diosdado v. Diosdado (2002) 97 Cal. App. 4th 470, 473-474, 118 Cal. Rptr. 2d 494* (spouses' unenforceable contract for liquidated damages in event of sexual infidelity contravened public policy)].

Specific statutory schemes govern various types of agreements. For example, premarital agreements that have been executed on or after January 1, 1986, are subject to the provisions of *Fam. Code § 1500 et seq.* and to *Fam. Code § 1600 et seq.* (Uniform Premarital Agreement Act) [*see Fam. Code § 1601*]. Premarital agreements executed before that date remain subject to the provisions of former law [*see Fam. Code § 1503*; former *Civ. Code §§ 1624(3), 5133-5137* (applicable to premarital agreements executed before January 1, 1986)]. For a complete discussion of premarital agreements and forms for drafting such agreements, see California Family Law Practice and Procedure, Ch. 201 (Matthew Bender 2d ed.).

Property agreements between spouses that are entered into during an ongoing marriage are subject to certain general provisions, including *Fam. Code §§ 721, 1500 et seq.*, and *1620*. In general, except as otherwise provided by law, spouses cannot by a contract "alter their legal relations" except with respect to property [*Fam. Code § 1620*]. Spouses are permitted, for example, to change or "transmute" the character of property from separate to community, or otherwise [*see Fam. Code § 850 et seq.*]. However, they cannot "alter their legal relations" by, for example, contracting to waive or limit the right to support from one another, except in the context of an agreement for their separation or for the termination of their marriage [*see generally Fam. Code §§ 3580, 4302*; *Estate of Kalal (1981) 121 Cal. App. 3d 841, 851, 175 Cal. Rptr. 582* ; see additional discussion, in *§ 359.17[5][d]*].

In transactions between themselves, spouses are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other. This confidential relationship imposes a duty of the highest good faith and fair dealing [*Fam. Code § 721(b)*]. Nevertheless, subject to this duty, they may enter into any transaction with one another or any other person that either might if unmarried [*see Fam. Code § 721(a)*; *see also Fam. Code § 1100(e)*].

For a general discussion of spousal fiduciary duties and rights to manage and control property, see Ch. 122, *Community Property* . For discussion of agreements between spouses made in contemplation of dissolution of marriage in general, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* . For discussion of agreements concerning child custody, child support, and spousal support that are made in the context of dissolution proceedings, see Ch. 223, *Dissolution of Marriage: Child Custody* and Ch. 224, *Dissolution of Marriage: Child Support* . For a complete

discussion of postnuptial agreements and forms for drafting such agreements, see California Family Law Practice and Procedure, Ch. 210 (Matthew Bender 2d ed.).

[3] Consortium

Consortium is the right of one spouse to have the company, affection, and service of the other [*e.g., Borelli v. Brusseau (1993) 12 Cal. App. 4th 647, 653, 16 Cal. Rptr. 2d 16]* . As each spouse has such a right, each spouse also has the corresponding duty. Spouses owe each other a mutual duty to provide personal attention and care. For example, each is bound "to offer ... sympathy, confidence, and fidelity" to the other [*In re Marriage of Rabie (1974) 40 Cal. App. 3d 917, 922, 115 Cal. Rptr. 594]* . Each spouse is obligated to provide nursing-type care to the other when the other is sick [*Borelli v. Brusseau (1993) 12 Cal. App. 4th 647, 652, 16 Cal. Rptr. 2d 16]* .

One important legal consequence of consortium is that a separate contract (apart from the marriage contract) by which one spouse is to receive compensation from the other for providing the personal attention and care that consortium comprises would be void as against public policy (as well as unsupported by consideration) [*Borelli v. Brusseau (1993) 12 Cal. App. 4th 647, 652, 16 Cal. Rptr. 2d 16]* . In addition, a spouse is entitled to recover damages from a third person whose wrongful acts cause a loss of consortium [*Elden v. Sheldon (1988) 46 Cal. 3d 267, 277, 250 Cal. Rptr. 254, 758 P.2d 582* ; *but see Zwicker v. Altamont Emergency Room Physicians Medical Group (2002) 98 Cal. App. 4th 26, 35, 118 Cal. Rptr. 2d 912* (no loss of consortium action for premarital injury)].

[4] General Duties

The obligations and limitations inherent in the marital status include:

- The spouses' mutual duty of support [*Fam. Code §§ 720, 4300*; *see* discussions in *§ 359.15[5][a]* et seq.];

- The prohibition against contracting a second marriage before the first has terminated [*Fam. Code § 2201(a)*; *see Penal Code §§ 281(a), 283, 284*; discussion in *§ 359.13[2]*];

- In the absence of an enforceable contract providing otherwise [*see Fam. Code §§ 1500 et seq., 1600 et seq.*], the operation of the community property system [*see Fam. Code § 760 et seq.*] on the spouses' property;

- The prohibition against spouses contracting to alter their legal relations [*Fam. Code § 1620*]; and

- The obligation of spouses, in their property contracts with each other, to adhere to the rules regulating contracts between persons in a confidential relationship [*Fam. Code § 721(b)*].

The fact of marriage also gives rise to presumptions regarding the parent-child relation [*Fam. Code §§ 7540, 7611* (presumption that child of wife cohabiting with her husband is child of husband; other facts giving rise to presumption of paternity)], which in turn give rise to duties of support [*Fam. Code §§ 3900, 3910*] and inheritance rights [*Prob. Code § 6402(a)*].

[5] Mutual Obligation of Support

[a] Binding Duty of Support

Upon entering into the marital relationship, the husband and wife assume mutual obligations of support [*Fam. Code §§ 720, 4300*]. The obligation of support is an implicit term of the marriage relationship, and has been said to be as binding on husband and wife as if an express avowal of the obligation had been made [*Boyd v. Boyd (1964) 228 Cal. App. 2d*

374, 379, 39 Cal. Rptr. 400] .

The duty of spousal support in the context of dissolution and legal separation is discussed in Ch. 225, *Dissolution of Marriage: Spousal Support* .

[b] Support Defined

The term "support" is usually defined in monetary terms, and has been said to be synonymous with "maintenance" [*In re Lazar (1940) 37 Cal. App. 2d 327, 332, 99 P.2d 342* , *disapproved on other grounds*, *Bradley v. Superior Court (1957) 48 Cal. 2d 509, 522, 310 P.2d 634]* . At minimum, the obligation of support means that each spouse must supply the other with the "necessaries of life," if he or she is able to do so and the other spouse is in need [*see Fam. Code § 914(a)*].

Support can be viewed both as an obligation owing from spouse to spouse and as an obligation to pay creditors when the other spouse contracts debts for the necessaries of life [*see Fam. Code § 914(a)*]. Necessaries of life generally include all goods and services reasonably incurred for and on account of the family, such as wearing apparel, furniture, food, habitation, and medical treatment [*see Department of Mental Hygiene v. Kolts (1966) 247 Cal. App. 2d 154, 157, 55 Cal. Rptr. 437]* . There is authority for the view that the mutual obligation of support encompasses not only those items that constitute necessaries, but includes an obligation to support the other spouse according to the spouses' station in life and means [*Nielsen v. Richards (1925) 75 Cal. App. 680, 685, 243 P. 697]* .

[c] Sources of Support

When the spouses are living together, one spouse must support the other out of his or her separate property if there is no community or quasi-community property [*Fam. Code § 4301*; *In re Marriage of Epstein (1979) 24 Cal. 3d 76, 83, 154 Cal. Rptr. 413, 592 P.2d 1165* ; *see Fam. Code § 914*]. If one spouse incurs a debt for the necessaries of life [*see* discussion in *§ 359.17[5][b]*], the separate property of the other spouse is liable for payment of the debt; however, the liability attaches only to debts for the "common necessaries of life" if the spouses were living separately when the debt was incurred [*Fam. Code § 914(b)*].

For further discussion of the liability of community and separate property for debts incurred before and during marriage, see Ch. 122, *Community Property* .

[d] Waiver of Support

Under the general rule that spouses are prohibited from contracting to alter their legal relations [*Fam. Code § 1620*], spouses are generally prohibited from contracting either to waive or to limit spousal support obligations during marriage [*In re Marriage of Higgason (1973) 10 Cal. 3d 476, 485, 110 Cal. Rptr. 897, 516 P.2d 289]* .

Agreements to waive or limit support on dissolution or legal separation are discussed in Ch. 225, *Dissolution of Marriage: Spousal Support* .

[e] Duration of Support Obligation

The mutual obligation of support between spouses arises with the creation of the marital relationship, and exists during the mutual lifetime of the spouses [*see generally Fam. Code §§ 720, 4300*; *In re Marriage of Dawley (1976) 17 Cal. 3d 342, 352, 131 Cal. Rptr. 3, 551 P.2d 323]* . A person is not liable for support of his or her spouse when the spouses are living separate by agreement, unless support is stipulated in the agreement [*Fam. Code § 4302*]. Such an agreement must be in writing in order to be enforceable [*Fam. Code § 3580*]. As of this writing, there were no reported cases dealing with the question of whether the duty to support one's spouse continues when the separation is not by agreement, such as when one spouse abandons the other.

The authority of the court to order spousal support during the pendency of an action for dissolution or legal separation [*see Fam. Code § 3600*], and after the entry of a judgment of dissolution or legal separation [*see Fam. Code § 4330*], is discussed in Ch. 225, *Dissolution of Marriage: Spousal Support* .

[f] Support of Incompetent Spouse

The duty to support one's spouse does not cease when the spouse becomes incompetent [*Guardianship of Thrasher (1951) 105 Cal. App. 2d 768, 776, 234 P.2d 230]* or is institutionalized [*Department of Mental Hygiene v. Kolts (1966) 247 Cal. App. 2d 154, 156-158, 165, 55 Cal. Rptr. 437]* . When a spouse has been hospitalized in a state mental institution, the other spouse is liable for the cost of his or her care [*Welf. & Inst. Code § 7275*]. This liability may be enforced by the Department of Health Services [*Welf. & Inst. Code § 7282*].

When one spouse has a conservator and the other spouse has the management or control of the spouses' community property, a petition may be brought in the court in which the conservatorship proceeding is pending to compel the spouse who has the management or control of the community property to apply the community property to the support of the conservatee [*Prob. Code § 3080*].

[g] Right to Family Allowance and Homestead on Death of Spouse

On the death of a spouse, the surviving spouse and children are entitled to such reasonable family allowance out of the estate as is necessary for their maintenance, according to their circumstances, during administration of the estate [*Prob. Code § 6540(a)*]. The right to a family allowance is conditioned on the surviving spouse's entitlement to support from the decedent at the time of the decedent's death [*Estate of Kalal (1981) 121 Cal. App. 3d 841, 847, 175 Cal. Rptr. 582]* . For further discussion, see Ch. 448, *Probate: Family Allowance* .

A decedent's surviving spouse and minor children are entitled to remain in possession of the family home until 60 days after the inventory of the estate is filed or for such other period as is ordered by the probate court [*Prob. Code § 6500*]. They may also petition the court to set aside, for a limited time, a probate homestead out of the decedent's estate [*Prob. Code §§ 6520, 6524*]. For further discussion, see Ch. 294, *Homesteads* , and Ch. 449, *Probate: Exempt Personal Property and Probate Homesteads* .

[h] Enforcement of Support Obligation

The duty to support one's spouse may be enforced during the marriage through a civil proceeding against the supporting spouse brought by the supported spouse or, in some situations, by the county [*Fam. Code § 4303*; *see Fam. Code § 4800 et seq.* (Uniform Reciprocal Enforcement of Support Act)]. The county obtains a right to reimbursement from one spouse for the support of the other spouse when one spouse has received public assistance from the county [*In re Marriage of Shore (1977) 71 Cal. App. 3d 290, 296, 139 Cal. Rptr. 349]* .

It is a misdemeanor for a spouse to fail to provide the necessary food, clothing, shelter, and medical attention for the other spouse when he or she has the ability to provide for such support, unless there was justification for the failure to provide support [*Penal Code § 270a*; *see Fam Code §§ 4810, 4811*].

[6] Prohibited "Heartbalm" Actions

Although married persons are free to bring civil actions against one another, there is a group of legal actions that are statutorily prohibited from being brought by spouses or any other persons. These actions, whether based on contract or tort theories of recovery, are collectively referred to as "heartbalm" actions because of their historic use to redress the emotional pain caused by a breakup of the parties' interpersonal relationship, often as the result of the involvement of a third person [*see Askew v. Askew (1994) 22 Cal. App. 4th 942, 954-957, 28 Cal. Rptr. 2d 284* ; *see also Diosdado v.*

Diosdado (2002) 97 Cal. App. 4th 470, 473-474, 118 Cal. Rptr. 2d 494 (spouses' unenforceable contract for liquidated damages in event of sexual infidelity)]. The "anti-heartbalm" statutes, *Civ. Code §§ 43.4* and *43.5*, prohibit a person from bringing a civil action based on any of the following grounds [*see Civ. Code §§ 43.4, 43.5*; *Askew v. Askew (1994) 22 Cal. App. 4th 942, 953-957, 28 Cal. Rptr. 2d 284* ; *Boyd v. Boyd (1964) 228 Cal. App. 2d 374, 378, 39 Cal. Rptr. 400* ; *Jacks v. Jacks (1956) 140 Cal. App. 2d 852, 853, 295 P.2d 921]* :

(1) Alienation of affection;

(2) Criminal conversation;

(3) Seduction of a person over the age of legal consent;

(4) Breach of promise of marriage; or

(5) Fraudulent promise to marry or to cohabit after marriage.

Courts look to the substance of the action, rather than to how the action is characterized or plead by the plaintiff, in determining whether it is, in reality, a "heartbalm" action. For example, a court will not permit an action for "fraud," when it actually constitutes one of the prohibited actions [*see Askew v. Askew (1994) 22 Cal. App. 4th 942, 953-957, 28 Cal. Rptr. 2d 284* (husband's action for wife's purported "fraudulent" misrepresentations of attraction before marriage was subject to dismissal as improper "breach of promise" action)].

For a general discussion of tort actions between spouses, including the abolition of the former interspousal disability in maintaining actions for certain personal torts, see Levy, Golden & Sacks, California Torts, Ch. 58 (Matthew Bender) [*see Klein v. Klein (1962) 58 Cal. 2d 692, 693-694, 26 Cal. Rptr. 102, 376 P.2d 70* ; *Self v. Self (1962) 58 Cal. 2d 683, 689, 26 Cal. Rptr. 97, 376 P.2d 65]* .

Legal Topics:

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Chapter 359 MARRIAGE
PART II. LEGAL BACKGROUND
A. Legal Aspects Of Marriage

32-359 California Forms of Pleading and Practice--Annotated § 359.18

§ 359.18 Evidentiary Privileges Arising From Marriage

[1] Two Distinct Privileges

Two separate evidentiary privileges arise as the result of a marital relationship. The first protects confidential communications between spouses from disclosure [*see Evid. Code § 980 et seq.*]. The other is a testimonial privilege [*see Evid. Code § 970 et seq.*], which has two aspects: (1) the privilege not to testify against one's spouse [*Evid. Code § 970*] and (2) the privilege not to be called as a witness against one's spouse [*Evid. Code § 971*].

These marital evidentiary privileges are based on the public policy to preserve the confidence that is held to arise naturally from the relationship of husband and wife [*People v. Peak (1944) 66 Cal. App. 2d 894, 903, 153 P.2d 464* , *disapproved on other grounds,* *People v. Hood (1969) 1 Cal. 3d 444, 454, 82 Cal. Rptr. 618, 462 P.2d 370]* . The social benefits arising from these privileges are held to justify any risk that an unjust decision may occur as the result of either of the privileges being invoked [*see* *People v. Flores (1977) 71 Cal. App. 3d 559, 565, 139 Cal. Rptr. 546]* .

A spouse who seeks to suppress evidence by virtue of the marital privileges has the burden of proving that he or she comes within the terms of the privileges as set forth in the Evidence Code [*Tanzola v. De Rita (1955) 45 Cal. 2d 1, 6, 285 P.2d 897]* .

[2] When Privileges May Be Asserted

The privilege not to testify against a spouse may be asserted by a married person in any proceeding [*Evid. Code § 970*], and the privilege not to be called as a witness by a party adverse to one's spouse may be asserted by a married person whenever the spouse is a party to a proceeding [*Evid. Code § 971*]. The privilege to prevent disclosure of confidential marital communications may be asserted in any proceeding, except as otherwise provided by statute [*Evid. Code § 910*].

"Proceeding" means any action, hearing, investigation, inquest, or inquiry in which, pursuant to law, testimony can be compelled to be given, whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law [*Evid. Code § 901*]. The privileges are applicable in civil proceedings [*Evid. Code § 970*; *see Evid. Code § 902*] and, with certain exceptions [*see Evid. Code §§ 972(e), (f), 985, 987*], criminal

proceedings [*Evid. Code §§ 902, 903*]. They may also be asserted in out-of-court proceedings such as depositions and interrogatories [*Frey v. Superior Court (1965) 237 Cal. App. 2d 201, 203, 46 Cal. Rptr. 747]* .

Statutes making the rules of evidence inapplicable in particular proceedings or limiting the applicability of rules of evidence in particular proceedings do not affect the rules of evidence relating to privilege [*Evid. Code § 910*]. Therefore, although the Evidence Code does not generally apply in grand jury proceedings [*Evid. Code § 300*], the privileges are available in such proceedings [*see Ex parte McDonough (1915) 170 Cal. 230, 235, 149 P. 566]* . However, because a potential defendant under investigation in a grand jury proceeding does not have the status of a party [*In re Lemon (1936) 15 Cal. App. 2d 82, 84-85, 59 P.2d 213]* , his or her spouse cannot invoke the privilege not to be called as a witness in a grand jury investigation. The privilege not to testify against one's spouse and the confidential communications privilege are applicable to grand jury proceedings, because they do not require that either spouse be a party to the proceeding [*see Evid. Code §§ 970, 980*; *see also In re Grand Jury Investigation of Hugle (9th Cir. 1985) 754 F.2d 863, 864-865]* .

[3] Testimonial Privilege

[a] Dual Nature of Testimonial Privilege

The testimonial privilege has two aspects. First, except as otherwise provided by statute, a married person has a privilege not to testify against his or her spouse in any proceeding [*Evid. Code § 970*; *see Sabado v. Moraga (1987) 189 Cal. App. 3d 1, 5 n.4, 234 Cal. Rptr. 249]* . Second, except as otherwise provided by statute, a married person whose spouse is a party to a proceeding has a privilege not to be called as a witness by an adverse party in that proceeding without the prior express consent of the spouse having the privilege [*Evid. Code § 971*]. Thus, the first aspect of the privilege, while not protecting a spouse from being called as a witness, protects the spouse from being compelled to testify against the other spouse regardless of whether the other spouse is a party to the proceeding. The second aspect of the privilege is broader in that it protects a spouse from being called as a witness rather than merely from testifying, but it is narrower in that it applies only when the other spouse is a party to the proceeding.

Limitations on the application of the testimonial privilege discussed under the subsections, *below*, apply equally to the two aspects of the privilege unless otherwise indicated.

[b] Who May Invoke Testimonial Privilege

The privilege to refuse to testify or to refuse to be called as a witness belongs only to the spouse whose testimony is sought [*People v. Bradford (1969) 70 Cal. 2d 333, 342-343, 74 Cal. Rptr. 726, 450 P.2d 46 , cert. denied, 399 U.S. 911 (1970)]* , and may not be claimed by the spouse against whom the testimony is to be offered [*People v. Dorsey (1975) 46 Cal. App. 3d 706, 120 Cal. Rptr. 508]* . Thus, with regard to both aspects of the privilege, the spouse about whom the testimony is to be given cannot prevent the other spouse from testifying or from being called as a witness [*People v. Chavez (1968) 262 Cal. App. 2d 422, 429, 68 Cal. Rptr. 759]* .

[c] Requirement of Valid Marriage

The testimonial privilege extends only to a person who is legally married at the time the privilege is asserted. The privilege does not apply in the case of a void marriage because the relationship that exists between the parties to a void marriage is not one that the law has traditionally desired to protect [*People v. Mabry (1969) 71 Cal. 2d 430, 439-440, 78 Cal. Rptr. 655, 455 P.2d 759 , cert. denied, 406 U.S. 972 (1972)]* . Thus, for example, the privilege does not apply to bigamous or incestuous marriages [*People v. Keller (1958) 165 Cal. App. 2d 419, 423, 332 P.2d 174* ; *see* discussions in *§§ 359.13[2], [3]*].

A spouse who is in a marriage that is moribund, abandoned, or no longer viable, may nevertheless claim the testimonial privilege so long as the marriage is still legally intact. Hence, a wife who had not even seen her husband for 17 years

prior to his charged commission of a double murder, could assert the privilege not to testify against him at the preliminary hearing [*Jurcoane v. Superior Court (2001) 93 Cal. App. 4th 886, 900, 113 Cal. Rptr. 2d 483* (construing *Evid. Code §§ 970-973*)].

The Ninth Circuit Court of Appeals held that mere suspicious timing of a marriage does not support a finding of a sham marriage that would preclude a witness from asserting the marital privilege against adverse spousal testimony. The court reversed a district court order that had held a wife in civil contempt for refusing to testify in grand jury proceedings that concerned her husband. The wife had lived with the husband for two years and had married him after being subpoenaed, but before appearing in court [*In re Grand Jury Proceedings (9th Cir. 1985) 777 F.2d 508, 508-509]* .

Note, however, that federal courts interpreting Federal Rules of Evidence are expressly permitted to engage in common-law development of privileges and exceptions, while courts construing the privileges under the California Evidence Code are not. Unlike the California statutory scheme, federal rules provide an extremely broad exception to privileges. Therefore, a federal court's liberal interpretation of an exception to a privilege under federal common law may not apply to California law [*see* *Jurcoane v. Superior Court (2001) 93 Cal. App. 4th 886, 892-900, 113 Cal. Rptr. 2d 483* (spousal testimonial privilege applied even though spouses were estranged for 17 years prior to husband's charged crimes)].

[d] Scope of Testimonial Privilege

The privilege of a married person not to testify applies only to testimony against his or her spouse [*Evid. Code § 970*]. Thus, for example, in a case in which a husband and wife were joined as defendants and plaintiff sought to depose the wife regarding her name, address, and ownership of an automobile, the privilege not to testify did not apply because such information did not constitute testimony against her husband [*Dean v. Superior Court (1951) 103 Cal. App. 2d 892, 893, 230 P.2d 362]* . Similarly, spouses joined as defendants could not invoke the testimonial privilege to refuse to answer interrogatories relating to their own personal liability. The answers to the interrogatories did not require either spouse to testify against the other [*Frey v. Superior Court (1965) 237 Cal. App. 2d 201, 203-204, 46 Cal. Rptr. 747]* . A married person has no privilege to refuse to testify for his or her spouse [*People v. Coleman (1969) 71 Cal. 2d 1159, 1167, 80 Cal. Rptr. 920, 459 P.2d 248]* .

The testimonial privilege applies only in proceedings in which the witness's spouse is a party and in which the person is called as a witness by a party adverse to his or her spouse [*Evid. Code § 971*]. Thus, a married person cannot avoid being called as a witness by his or her own spouse or by a party who is not adverse to the party spouse.

The Ninth Circuit Court of Appeals has held that a witness's grand jury testimony may be admissible hearsay at trial even if the witness subsequently married the defendant and invoked the spousal privilege not to testify at the spouse's later trial [*United States v. Marchini (9th Cir. 1986) 797 F.2d 759, 762-765 , cert. denied, 479 U.S. 1085 (1987)* ; *see Fed. Rules of Evid., Rule 804*].

[e] Exceptions to Testimonial Privilege

Exceptions to the testimonial privilege are limited to those expressly created by the Legislature, and no other exceptions to the applicability of the privilege may be added by judicial construction [*Stein v. Superior Court (1959) 174 Cal. App. 2d 21, 24, 344 P.2d 406]* . The Legislature has determined that a married person may not invoke the testimonial privilege in the following proceedings [*Evid. Code § 972*]:

(1) Proceedings brought by or on behalf of one spouse against the other spouse;

(2) Proceedings to commit or otherwise place a spouse or a spouse's property, or both, under the control of another

because of the spouse's alleged mental or physical condition;

(3) Proceedings brought by or on behalf of a spouse to establish his or her competence;

(4) Juvenile court proceedings [*see Welf. & Inst. Code § 200 et seq.*];

(5) Criminal proceedings in which one spouse is charged with:

(a) A crime against the person or property of the other spouse or of a child, including a foster child [*see Dunn v. Superior Court (1993) 21 Cal. App. 4th 721, 725-726, 26 Cal. Rptr. 2d 365]* , parent, relative, or cohabitant of either, whether committed before or during marriage;

(b) A crime against a third person or the property of a third person committed in the course of committing a crime against the person or property of the other spouse, whether committed before or during marriage [*see People v. Sinohui (2002) 28 Cal. 4th 205, 220, 120 Cal. Rptr. 2d 783, 47 P.3d 629]* ;

(c) Bigamy [*see* discussion in *§ 359.13[2]*]; or

(d) Neglect or abandonment of child or destitute spouse [*see Penal Code §§ 270, 270a*];

(6) Proceedings resulting from a criminal act that occurred before legal marriage of the spouses to each other regarding knowledge acquired before that marriage, if before the legal marriage, the witness spouse was aware that his or her spouse had been arrested for or had been formally charged with the crime or crimes about which the spouse is called to testify;

(7) Proceedings brought against the spouse by a former spouse so long as the property and debts of the marriage have not been adjudicated, or in order to establish, modify, or enforce a child, family, or spousal support obligation arising from the marriage to the former spouse;

(8) Proceedings brought against a spouse by the other parent in order to establish, modify, or enforce a child support obligation for a child of a nonmarital relationship of the spouse;

(9) Proceedings brought against a spouse by the guardian of a child of that spouse in order to establish, modify, or enforce a child support obligation of the spouse; and

(10) Proceedings under *Code Civ. Proc. § 708.110 et seq.* for the examination of a judgment debtor [*Code Civ. Proc. § 708.130(b)*].

In the described proceedings against the other spouse, the married person does not have a privilege to refuse to provide information relating to the issues of income, expenses, assets, debts, and employment of either spouse, but may assert the privilege not to testify against his or her spouse if other information is requested by the former spouse or the guardian or other parent of the child [*Evid. Code § 972(g)*]. Any person demanding the otherwise privileged information in any of the described proceedings against the other spouse, who also has an obligation to support the child for whom an order to establish, modify, or enforce child support is sought, waives his or her marital privilege to the same extent as the spouse from whom the privileged information is demanded [*Evid. Code § 972(g)*].

[f] Waiver of Testimonial Privilege

A married person waives the privilege not to testify and not to be called as a witness against his or her spouse whenever he or she either (a) testifies in a proceeding to which the other spouse is a party or (b) testifies against the other spouse

in any proceeding [*Evid. Code § 973(a)*].

Once a spouse has waived either aspect of the testimonial privilege in a given proceeding, neither aspect of the privilege may be reasserted in that proceeding [*Evid. Code § 973(a)*]. Thus, for example, a spouse who testifies against his or her spouse at a preliminary hearing may not later refuse to testify at the trial [*People v. Lankford (1976) 55 Cal. App. 3d 203, 210, 127 Cal. Rptr. 408 , disapproved on other grounds, People v. Collins (1976) 17 Cal. 3d 687, 695 n.4, 131 Cal. Rptr. 782, 552 P.2d 742]* . Likewise, once the testimonial privilege has been waived, the spouse cannot rely on it to limit the extent of questioning on cross-examination [*People v. Odmann (1958) 160 Cal. App. 2d 693, 696-697, 325 P.2d 495]* .

There is no waiver when the married person was erroneously compelled to testify [*Evid. Code § 973(a)*], or when waiver of the privilege was involuntary or coerced [*see People v. Lankford (1976) 55 Cal. App. 3d 203, 210, 127 Cal. Rptr. 408 , disapproved on other grounds, People v. Collins (1976) 17 Cal. 3d 687, 695 n.4, 131 Cal. Rptr. 782, 552 P.2d 742]* .

[4] Privilege for Confidential Marital Communications

[a] Nature of Privilege

A spouse (or a spouse's guardian or conservator, if applicable), whether or not he or she is a party to the relevant proceeding, has a privilege to refuse to disclose and to prevent another from disclosing a communication made in confidence to or by the other spouse while they were husband and wife [*Evid. Code § 980*]. The privilege protecting confidential marital communications from disclosure may be invoked after, as well as during, the marriage and may be asserted by either or both of the spouses or by a former spouse. Thus this privilege differs from the testimonial privilege in two major respects.

[b] Meaning of Communication

The privilege for confidential marital communications primarily protects verbal exchanges between the spouses. It does not prevent disclosure of physical facts that one spouse observed about the other [*see People v. Dorsey (1975) 46 Cal. App. 3d 706, 120 Cal. Rptr. 508]* , nor does it prevent one spouse from being compelled to identify the handwriting of the other [*see People v. Saidi-Tabatabai (1970) 7 Cal. App. 3d 981, 986, 86 Cal. Rptr. 866]* . Similarly, a married person cannot rely on the privilege to refuse to disclose information such as the delivery of a deed, the passing of letters between husband and wife, or the actions that were taken as the result of a conversation [*Tanzola v. De Rita (1955) 45 Cal. 2d 1, 6-7, 285 P.2d 897]* .

There is no requirement that confidential marital communications must be oral. The privilege may be applied to written communications if, under the circumstances, oral communications would be entitled to protection from disclosure [*see People v. Daniels (1969) 1 Cal. App. 3d 367, 377, 81 Cal. Rptr. 675]* .

[c] Presumption of Confidentiality and Rebuttal of Presumption

The privilege exempting marital communications from disclosure applies only to those communications between a husband and wife that are confidential [*Evid. Code § 980*]. The critical factor in determining whether or not a marital communication qualifies as confidential is whether the spouses had a reasonable expectation of confidentiality at the time the communication was made [*People v. Carter (1973) 34 Cal. App. 3d 748, 753, 110 Cal. Rptr. 324 , cert. denied, 419 U.S. 846 (1974)]* . The presence or absence of third parties is not always of critical importance in determining whether or not the spouses had a reasonable expectation of confidentiality. The spouses may have a reasonable expectation of confidentiality in the presence of an eavesdropper [*see North v. Superior Court (1972) 8 Cal. 3d 301, 310-311, 104 Cal. Rptr. 833, 502 P.2d 1305]* and yet not have an expectation of confidentiality when only the two of them are present. For example, a reasonable expectation of confidentiality did not exist where a husband

made verbal threats against third persons (who were not present) while criminally assaulting his wife, particularly since the privilege would not have applied had the husband been prosecuted for the assault on his wife [*People v. Carter (1973) 34 Cal. App. 3d 748, 752-753, 110 Cal. Rptr. 324 , cert. denied, 419 U.S. 846 (1974)* ; *see Evid. Code § 985*].

In another case, a husband's statement, made while beating his wife, that "what happened to [his first wife] will happen to you" was held to be admissible at the husband's trial for murdering his first wife. The court's rationale for admitting the statement was that the second wife had testified concerning the statement at the preliminary hearing, at which time the husband was also charged with attempting to murder her, and the privilege was thus not applicable [*see Evid. Code § 985*]. Once the evidence was properly disclosed at the preliminary hearing, it lost its confidential character. However, the court also stated in dicta that it was doubtful that statements made by a spouse while that spouse is abusing the relationship on which the privilege is predicated are protected by the privilege [*People v. Johnson (1991) 233 Cal. App. 3d 425, 437-438, 284 Cal. Rptr. 579 , cert. denied, 118 L. Ed. 2d 213 (1992)]* .

Whenever a privilege is claimed on the ground that the matter sought to be disclosed is a confidential marital communication, the communication is presumed to be confidential and the opponent of the claim of privilege has the burden of proving that the communication was not confidential [*Evid. Code § 917*; *North v. Superior Court (1972) 8 Cal. 3d 301, 310, 104 Cal. Rptr. 833, 502 P.2d 1305]* . The presumption of confidentiality cannot be overcome merely by showing that good cause exists for the discovery or introduction of the evidence [*see Romo v. Southern Pac. Transportation Co. (1977) 71 Cal. App. 3d 909, 922, 139 Cal. Rptr. 787]* . A communication does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to it [*Evid. Code § 917(b)*]. However, evidence of any of the following facts may be useful in rebutting the presumption of confidentiality:

(1) Other persons were openly present at the time of the communication [*see People v. Castiel (1957) 153 Cal. App. 2d 653, 659, 315 P.2d 79]* .

(2) The communication was made for the purpose of disclosing information to a third person [*Solon v. Lichtenstein (1952) 39 Cal. 2d 75, 79, 244 P.2d 907]* .

(3) The substance of the communication was repeated to others [*Solon v. Lichtenstein (1952) 39 Cal. 2d 75, 80, 244 P.2d 907]* .

[d] Jailhouse Conversations

In the absence of unusual circumstances, such as a deliberate attempt on the part of police officers to create an expectation of privacy, a jailhouse conversation between spouses is not deemed to be confidential [*People v. Hill (1974) 12 Cal. 3d 731, 764-765, 117 Cal. Rptr. 393, 528 P.2d 1 , disapproved on other grounds, People v. De Vaughn (1977) 18 Cal. 3d 889, 896 n.5, 135 Cal. Rptr. 786, 558 P.2d 872]* . For example, a communication is clearly not confidential when a prisoner is aware that the conversation is being monitored and even warns his or her spouse that the visiting room is bugged [*People v. Santos (1972) 26 Cal. App. 3d 397, 401-402, 102 Cal. Rptr. 678]* . However, there are circumstances under which a prisoner could reasonably believe that communications to his or her spouse were being made in confidence and that no officials could overhear the conversation. Under such circumstances, governmental intrusion, without prior judicial approval, may constitute an unreasonable search and seizure within the meaning of the *Fourth Amendment* [*North v. Superior Court (1972) 8 Cal. 3d 301, 308-311, 104 Cal. Rptr. 833, 502 P.2d 1305]* . In one such case, a jail officer gave a husband and wife his private office, left them alone, and shut the door so that they could talk. These circumstances, taken together with the presumption that spousal communications are confidential, constituted a sufficient showing of a reasonable expectation of confidentiality and made a secret tape recording of the conversation inadmissible [*North v. Superior Court (1972) 8 Cal. 3d 301, 309-312, 104 Cal. Rptr. 833, 502 P.2d 1305]* . Even in prison, relationships that the law has endowed with particularized confidentiality, such as that of husband and wife, must continue to receive protection [*Lanza v. New York (1962) 370 U.S. 139, 143-144, 82 S. Ct.*

1218, 8 L. Ed. 2d 384] .

[e] Who May Invoke Confidential Communications Privilege

The privilege to prevent disclosure of confidential marital communications may be asserted by either spouse, by the guardian or conservator of either spouse, or, if the communication occurred before termination of a former valid marriage, by either spouse from the former marriage [*Evid. Code § 980*].

The confidential marital communications privilege only extends to spouses who have been validly married [*People v. Mabry (1969) 71 Cal. 2d 430, 440, 78 Cal. Rptr. 655, 455 P.2d 759 , cert. denied, 406 U.S. 972 (1972)]* , but this includes persons who have entered into an out-of-state "common-law marriage" (*see § 359.70*, and *§ 359.74[2] below*) that is in fact valid under the law of the state in which it was contracted. However, it is not applicable if such a purported common law marriage *does not* meet the requirements of the sister state in which it was contracted [*People v. Badgett (1995) 10 Cal. 4th 330, 363-366, 41 Cal. Rptr. 2d 635, 895 P.2d 877* ; *see Fam. Code § 308*], and otherwise is not applicable when the marriage is void from the beginning [*People v. Mabry (1969) 71 Cal. 2d 430, 439, 78 Cal. Rptr. 655, 455 P.2d 759 , cert. denied, 406 U.S. 972 (1972)]* . However, the privilege arguably applies when a marriage is merely voidable, to protect confidential marital communication made before the marriage is adjudged a nullity [*see People v. Mabry (1969) 71 Cal. 2d 430, 440, 78 Cal. Rptr. 655, 455 P.2d 759 , cert. denied, 406 U.S. 972 (1972)* ; *see also People v. Godines (1936) 17 Cal. App. 2d 721, 727, 62 P.2d 787]* .

The confidential communication privilege differs from the testimonial privilege in that it is vested in each spouse [*Evid. Code § 980*]. Before either spouse is permitted to testify as to the contents of a confidential communication both spouses must consent to the disclosure. Thus, either spouse may claim the privilege on his or her own behalf, and may also prevent the other spouse from disclosing a confidential communication [*People v. Dorsey (1975) 46 Cal. App. 3d 706, 120 Cal. Rptr. 508]* .

The confidential communication privilege also differs from the testimonial privilege in that it survives the termination of a marriage--that is, it may be asserted both during and after the marriage [*Evid. Code § 980*; *see In re Grand Jury Investigation of Hugle (9th Cir. 1985) 754 F.2d 863, 865]* . It makes no difference whether the marriage relationship terminated by death [*see Hixson v. International Harvester Co. (1963) 219 Cal. App. 2d 88, 96, 32 Cal. Rptr. 905]* , dissolution [*see People v. Dorsey (1975) 46 Cal. App. 3d 706, 120 Cal. Rptr. 508]* , or annulment [*People v. Godines (1936) 17 Cal. App. 2d 721, 727, 62 P.2d 787]* , as long as the marriage was valid. Although the privilege may be asserted after the marriage has ended, it protects only those communications that were made during the period when the marriage was in effect [*People v. Dorsey (1975) 46 Cal. App. 3d 706, 120 Cal. Rptr. 508]* .

[f] Scope of Confidential Communications Privilege

The confidential communications privilege not only permits a spouse to refuse to disclose confidential marital communications, but also permits him or her to prevent another from disclosing such communications [*Evid. Code § 980*]. This means that the privilege may be asserted to prevent testimony by anyone, including an eavesdropper, as long as the communication in question is determined to be confidential [*North v. Superior Court (1972) 8 Cal. 3d 301, 310, 104 Cal. Rptr. 833, 502 P.2d 1305]* .

The privilege protects only the substance of confidential marital communications. It does not apply to relieve a spouse from disclosing whether or not an act of communication occurred between the spouses [*People v. Saidi-Tabatabai (1970) 7 Cal. App. 3d 981, 986, 86 Cal. Rptr. 866]* , nor does it give a spouse the right to ignore a subpoena, since at that point disclosure of a confidential communication is not yet at issue [*see People v. Villarino (1970) 7 Cal. App. 3d 56, 62, 86 Cal. Rptr. 338]* .

The privilege against disclosure of confidential marital communications has been closely limited by statute. The

privilege does not apply to communications made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or fraud [*Evid. Code § 981*], nor does it apply in any of the following proceedings:

(1) A proceeding to commit either spouse or otherwise to place the spouse or his or her property in control of another because of the spouse's alleged mental condition [*Evid. Code § 982*];

(2) A proceeding brought by or on behalf of a spouse to establish his or her competence [*Evid. Code § 983*];

(3) A proceeding brought by one spouse against the other [*Evid. Code § 984*];

(4) A proceeding between a surviving spouse and a person who claims through the deceased spouse [*Evid. Code § 984*];

(5) A proceeding in which one spouse is charged with a crime committed against the person or property of the other spouse or a child of either, or with a crime committed against the person or property of a third party in the course of committing a crime against the person or property of the other spouse [*Evid. Code § 985*];

(6) A proceeding in which one spouse is charged with bigamy, child neglect, or abandonment of a destitute spouse [*Evid. Code § 985*];

(7) A proceeding brought under the Juvenile Court Law [*Evid. Code § 986*; *see Welf. & Inst. Code § 200 et seq.*]; or

(8) A proceeding in which the communication is offered in evidence by a defendant-spouse charged with a criminal offense [*Evid. Code § 987*].

As discussed in *§ 359.18[4][c]*, there is dicta to support the position that the privilege should not apply when the statement in question was made while the declarant spouse was physically abusing the other spouse, even if the proceeding in which disclosure is sought does not concern that abuse [*see People v. Johnson (1991) 233 Cal. App. 3d 425, 437-438, 284 Cal. Rptr. 579 , cert. denied, 118 L. Ed. 2d 213 (1992)]* .

[g] Waiver of Confidential Communications Privilege

The confidential marital communications privilege is waived if the holder of the privilege discloses a significant portion of the communication to someone other than his or her spouse or if the holder of the privilege has consented to such disclosure by someone else [*Evid. Code § 912(a)*; *see Feldman v. Allstate Insurance Co. (2003) 322 F.3d 660, 667-669* (limited waiver at deposition waived privilege); *but see Eisendrath v. Superior Court (2003) 109 Cal. App. 4th 351, 362, 134 Cal. Rptr. 2d 716* , waiver principles applicable to Evid. Code privileges are inapplicable to confidential mediation communications)]. Consent may be manifested by any statement or conduct of the holder of the privilege indicating his or her consent to disclosure, including the failure to claim the privilege in any proceeding in which he or she has the standing and opportunity to claim the privilege [*Evid. Code § 912(a)*]. A waiver of the privilege by one spouse does not constitute a waiver by the other spouse and does not affect the right of the other to claim the privilege [*Evid. Code § 912(b)*].

To effect a waiver of the privilege, a disclosure must involve a significant part of the communication. The mere disclosure of the existence of a communication or of the confidential relationship is not sufficient [*see Roberts v. Superior Court (1973) 9 Cal. 3d 330, 340, 107 Cal. Rptr. 309, 508 P.2d 309]* .

It would appear that the privilege must be asserted at the earliest possible time or else the privilege is waived as to that particular communication for the duration of the proceeding [*see Evid. Code § 912(a)*]. It has also been held that disclosure of a communication at a point in the proceedings when it is not protected strips the communication of its confidential character, with the result that the privilege cannot be asserted as to that communication at a later point in

the proceedings even if it would otherwise be protected at that time [*People v. Johnson (1991) 233 Cal. App. 3d 425, 437-438, 284 Cal. Rptr. 579 , cert. denied, 118 L. Ed. 2d 213 (1992)]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesMarital PrivilegesGeneral OverviewEvidencePrivilegesMarital PrivilegesAdverse Spousal TestimonyGeneral OverviewEvidencePrivilegesMarital PrivilegesConfidential CommunicationsGeneral OverviewFamily LawMarital Duties & RightsGeneral Overview

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32-359 California Forms of Pleading and Practice--Annotated § 359.19

§ 359.19 Parties' Names

Parties to a marriage are not required to have the same name [*Fam. Code § 306.5(a)*]. Neither party is required to change his or her name, and a person's name does not change on marriage unless that person elects to change his or her name [*Fam. Code § 306.5(a)*].

On or after January 1, 2009, one or both parties to a marriage may elect to change the middle or last names by which that party wishes to be known after solemnization of the marriage by entering the new name in the spaces provided on the marriage license application without intent to defraud [*Fam. Code § 306.5(b)(1)*]. A person may adopt the current last name of the other spouse, the last name of either spouse given at birth, a name combining into a single last name all or a segment of the current last name or the last name of either spouse given at birth, or a hyphenated combination of last names [*Fam. Code § 306.5(b)(2)*]. Such an election serves as a record of the name change, and a certified copy of a marriage certificate containing the new name, or retaining the former name, constitutes proof that the use of the new name or retention of the former name is lawful [*Fam. Code § 306.5(b)(3)(A)*].

The adoption of a new name, or the choice not to adopt a new name, by means of a marriage license application, may only be made at the time the marriage license is issued [*Fam. Code § 306.5(b)(4)*]. After a marriage certificate is registered by the local registrar, it may not be amended to add a new name or change an adopted name [*Fam. Code § 306.5(b)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawName ChangesGeneral OverviewFamily LawName ChangesProcedures

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32-359 California Forms of Pleading and Practice--Annotated § 359.20

§ 359.20 Emancipation of Minors Through Marriage

A minor who enters into a valid marriage is thereby emancipated, even if the marriage is later dissolved [*Fam. Code § 7002(a)*]. Emancipation, whether by marriage, assumption of active military duty [*see Fam. Code § 7002(b)*], or judicial emancipation proceedings [*see Fam. Code §§ 7002(c), 7110 et seq.*], removes many of the legal disabilities of minority [*see Fam. Code § 7050*]. It also terminates the minor's right to be supported by his or her parents [*Fam. Code § 7050(a)*; *see* discussion in *§ 359.21*].

For discussion of the requirements that must be satisfied in order for a minor's marriage to be valid, see *§ 359.45[1]* et seq..

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageGeneral OverviewFamily LawMarriageValidityGeneral OverviewFamily LawParental Duties & RightsEmancipation of Minors

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32-359 California Forms of Pleading and Practice--Annotated § 359.21

§ 359.21 Effect of Marriage on Authority and Duties of Parent or Guardian

Parental authority over a minor ceases on the marriage of the minor [*Fam. Code § 7505(b)*]. The following aspects of the parent-child relationship also cease with emancipation of the minor through marriage (or otherwise):

(1) The minor's right to be supported by the parents [*Fam. Code § 7050(a)*]. However, a parent is obligated to support his or her emancipated minor child who is incapacitated from earning a living and without sufficient means [*Fam. Code § 3910(a)*; *see Chun v. Chun (1987) 190 Cal. App. 3d 589, 596, 235 Cal. Rptr. 553]* .

(2) The right of the minor's parents to the minor's earnings [*Fam. Code § 7050(b)*].

(3) The vicarious or imputed liability of the minor's parents for the minor's torts [*Fam. Code § 7050(d)*].

(4) The right of the minor's parents to establish the minor's residence [*Fam. Code § 7050(e)(15)*].

(5) The necessity for the minor to obtain parental consent for a work permit [*Fam. Code § 7050(e)(16)*; *see Educ. Code § 49110*].

(6) The right of the state to make the minor a ward of the court for being beyond the control of his or her parents, guardian, or custodian, or for refusing to obey the reasonable and proper orders or his or her parents, guardian, or custodian [*Fam. Code § 7050(c)*; *Welf. & Inst. Code § 601(a)*].

A guardianship of the person of a minor terminates on the marriage of the minor [*see Prob. Code § 1600(b)* (also providing for termination of guardianship through minor's adoption or other emancipation)]. However, a guardianship of the estate of a minor continues, despite the minor's marriage, until the minor attains majority [*Prob. Code § 1600(a)*]. No guardian of the person may be appointed for a minor who is married or whose marriage has been dissolved, although a guardian may be appointed for a minor whose marriage has been annulled [*Prob. Code § 1515*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawGuardiansGeneral OverviewFamily LawGuardiansDuties & RightsFamily LawParental Duties & RightsConsentGeneral OverviewFamily LawParental Duties & RightsEmancipation of Minors

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32-359 California Forms of Pleading and Practice--Annotated § 359.22

§ 359.22 Effect of Marriage on Credit

No person may be denied credit or offered credit on less favorable terms because of his or her marital status or gender. Both federal law [*15 U.S.C. § 1691 et seq.* (Equal Credit Opportunity Act)] and state law [*Civ. Code §§ 1747.80(a), 1812.30(c), (d)*] prohibit such credit discrimination. Regardless of marital status, a person cannot be denied credit in his or her own name if the earnings and property over which he or she has management and control are such that a person of the opposite gender managing and controlling the same amount of earnings and property would receive credit [*Civ. Code § 1812.30(a)*]. Likewise, a person, regardless of marital status, who manages and controls earnings and other property cannot be offered credit on terms less favorable than those offered to a person of the opposite gender seeking the same type of credit and managing and controlling the same amount of earnings and other property [*Civ. Code § 1812.30(b)*].

All credit reporting agencies receiving information on both spouses on a joint credit account must file the information in a manner that would enable either spouse automatically to gain access to the credit history without having to refer to the other person, and the agency must provide access to all information about the account in the name of each spouse [*Civ. Code § 1812.30(e)*; *see Civ. Code § 1812.30(f)* (slightly different requirements applicable to accounts established before 1977)].

For purposes of credit eligibility, spousal, family, and child support payments must be included in a married person's earnings and considered in the same manner as earnings from a salary or wages where they are received pursuant to a written agreement or court decree [*Civ. Code § 1812.30(h)*]. Although the creditor may evaluate the reliability of earnings in determining whether or not to extend credit, such an evaluation must be made without regard to the gender or marital status of the applicant, and the fact that an applicant is of child-bearing age is not relevant and cannot be considered [*Civ. Code § 1812.30(i)*]. Credit applications must clearly state that married applicants may apply for separate accounts [*Civ. Code § 1812.30(j)*].

A creditor who has violated these provisions may be liable to the aggrieved person for damages, costs, and attorney's fees and may be enjoined by the court from continuing the prohibited practices [*Civ. Code §§ 1812.31-1812.35*].

If a credit card issuer has determined to issue a card to a married woman, the woman may direct that either her married name or birth name appear on the card [*Civ. Code § 1747.81(a)*]. If the woman directs that the card bear her birth name, the issuer may require that she open a new account in that name [*Civ. Code § 1747.81(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionCredit Card AgreementsLiabilityBanking LawConsumer ProtectionEqual Credit OpportunityGeneral OverviewFamily LawMarriageGeneral OverviewFamily LawMarriageNature of Marriage

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32-359 California Forms of Pleading and Practice--Annotated § 359.23

§ 359.23 Effect of Marriage on Enforcement of Judgments

In general, except as otherwise provided by statute, community property is liable for a debt incurred by either spouse during marriage, regardless of whether both spouses are parties (as long as one spouse is a party) to a judgment for the debt [*Fam. Code § 910*; *see, e.g., Fam. Code § 1000* (exceptions)].

A court enforcing a judgment against one spouse only is not empowered to add the other spouse as a judgment debtor solely because of the marriage relation [*Oyakawa v. Gillett (1992) 8 Cal. App. 4th 628, 631-632, 10 Cal. Rptr. 2d 469]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsDebt LiabilityFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarriageGeneral OverviewFamily LawMarriageNature of Marriage

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[Reserved]

§§ 359.24[Reserved]

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32-359 California Forms of Pleading and Practice--Annotated § 359.40

§ 359.40 Governing Statutes

The procedural requirements for a marriage in California are set forth primarily in *Fam. Code § 300 et seq.* Special requirements relating to confidential marriage are set forth in *Fam. Code § 500 et seq.*

Additional provisions relating to the licensing and authentication of marriages are set forth in the Health and Safety Code. Fee provisions are set forth in the Government Code, and penalties for crimes relating to marriage formalities are set forth in the Penal Code.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageGeneral OverviewFamily LawMarriageValidityGeneral Overview

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32-359 California Forms of Pleading and Practice--Annotated § 359.41

§ 359.41 General Requirements for Valid Marriage

Because the Legislature has full control of the subject of marriage [*see* discussion in *§ 359.10[2]*], it may fix the conditions under which the marital status may be created [*Estate of Gregorson (1911) 160 Cal. 21, 24, 116 P. 60]* . It is possible to have a confidential marriage; that is, an unmarried man and an unmarried woman who are not minors and who are living together as husband and wife may have their marriage solemnized without first obtaining a license [*see Fam. Code § 500 et seq.*; discussions in *§ 359.71[1]* et seq.]. In most cases, however, the only way to contract a valid marriage in California is by complying with the statutory requirements to (1) obtain a marriage license, (2) participate in a ceremony of solemnization [*but see Fam. Code § 307* (inapplicability of solemnization requirements to certain religious societies or denominations not having clergy for purpose of solemnizing marriages)], and (3) authenticate the marriage by filing a certificate of registry of marriage [*Fam. Code § 306*; *Estate of DePasse (2002) 97 Cal. App. 4th 92, 99-101, 118 Cal. Rptr. 2d 143]* . The following sections deal with each formal requirement separately.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageGeneral OverviewFamily LawMarriageCertificates & LicensesGeneral OverviewFamily LawMarriageProofCeremonial MarriagesSolemnization of MarriageFamily LawMarriageValidityGeneral OverviewGovernmentsState & Territorial GovernmentsLicenses

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32-359 California Forms of Pleading and Practice--Annotated § 359.42

§ 359.42 Effect of Failure to Comply With Requirements on Validity of Marriage

In general, all of the statutory requirements for a marriage must be met [*see Fam. Code § 306*; discussion in *§ 359.44[1]*], otherwise no marriage results [*e.g.,* *Estate of DePasse (2002) 97 Cal. App. 4th 92, 101-103, 118 Cal. Rptr. 2d 143* (license required for valid marriage); *Estate of Shipp (1914) 168 Cal. 640, 641, 144 P. 143* (participation in marriage ceremony but failure to obtain license)]. However, in view of the strong public policy in favor of promoting and protecting marriage, a technical failure to meet all of the requirements will not necessarily invalidate a marriage [*see* *Argonaut Ins. Co. v. Industrial Acci. Com. (1962) 204 Cal. App. 2d 805, 810, 23 Cal. Rptr. 1]* . The public policy of promoting and protecting marriage is so strong that a marriage may be determined to be valid even when the spouses used false names in applying for the marriage license, in obvious violation of the governing law [*Argonaut Ins. Co. v. Industrial Acci. Com. (1962) 204 Cal. App. 2d 805, 810, 23 Cal. Rptr. 1* ; *see Fam. Code § 351(b)*].

Noncompliance with the licensing, solemnization, authentication, or filing requirements by a person other than the spouses will not invalidate the marriage [*Fam. Code § 306*].

The effects of specific technical and substantive defects are discussed in the sections *below* dealing with the specific licensing, solemnization, authentication, and filing requirements.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageCertificates & LicensesGeneral OverviewFamily LawMarriageProofCeremonial MarriagesSolemnization of MarriageFamily LawMarriageValidityGeneral Overview

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32-359 California Forms of Pleading and Practice--Annotated § 359.43

§ 359.43 Criminal Penalties for Noncompliance With Requirements

[1] Perjury

If either spouse makes false statements or misrepresents facts under oath in connection with obtaining a marriage license or satisfying any of the other formal requirements for a valid marriage, such as by a false affidavit to the marriage license clerk, he or she is guilty of perjury [*Penal Code § 118*; *e.g., People v. Brown (1954) 125 Cal. App. 2d 83, 84-85, 269 P.2d 918]* . Perjury is punishable by imprisonment in the state prison [*Penal Code § 126*].

[2] Knowingly Solemnizing Prohibited Marriage

Every person authorized to solemnize marriages [*see* discussion in *§ 359.47[2]*] who willfully and knowingly [*see Penal Code § 7*] solemnizes any incestuous marriage [*see Fam. Code § 2200*; *Penal Code § 285*; discussion in *§ 359.13[3]*] or other marriage forbidden by law, such as a bigamous marriage [*see Fam. Code § 2201*; *Penal Code §§ 281-284*; discussion in *§ 359.13[2]*], is guilty of a misdemeanor [*Penal Code § 359*].

[3] Other Improper Solemnization Activities

Any person authorized to solemnize a marriage who does any of the following acts is guilty of a misdemeanor [*Penal Code § 360*]:

(1) Solemnizes a marriage without first being presented with the marriage license [*see Fam. Code § 421*];

(2) Solemnizes a confidential marriage [*see Fam. Code § 500 et seq.*] without the authorization required by statute [*see Fam. Code §§ 501-505*]; or

(3) Willfully makes a false return of any marriage or pretended marriage to the recorder or clerk [*see Fam. Code § 423*].

[4] Making False Record of Marriage

Any person, whether or not authorized to solemnize marriages, who willfully makes a false record of any marriage return is guilty of a misdemeanor [*Penal Code § 360*]. In most cases this liability falls on the county recorder, who is responsible for recording the certificate of registry [*see Fam. Code § 423*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageCertificates & LicensesGeneral OverviewFamily LawMarriageCertificates & LicensesRequirementsFamily LawMarriageProofCeremonial MarriagesSolemnization of MarriageFamily LawMarriageValidityGeneral Overview

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32-359 California Forms of Pleading and Practice--Annotated § 359.44

§ 359.44 Marriage License

[1] License Requirements

All persons who wish to marry or who are about to declare a marriage [*see Fam. Code § 425*; discussion in *§ 359.112*] must first obtain a marriage license from a county clerk [*Fam. Code §§ 350, 501*]. Issuance of a marriage license is a mandatory requirement for a valid marriage in California [*Estate of DePasse (2002) 97 Cal. App. 4th 92, 95, 101-103, 118 Cal. Rptr. 2d 143]* . The license must be obtained within 90 days before the date of the ceremony [*see Fam. Code § 356*]. It may be obtained in any county, and it need not be obtained either in the county where the applicants reside or in the county where the marriage ceremony will take place. (A confidential marriage license may be used only in the county where the license was issued [*Fam. Code § 504*].)

A marriage license is required to set forth each spouse's identity, real and full name and place of residence, and age [*Fam. Code § 351*]. The application for a marriage license, of which the marriage license forms an integral part, also requires that other information be supplied by the applicants under oath.

[2] Effect of Incapacity, Influence of Liquor or Drugs, or Illegality

A marriage license may not be issued when either applicant lacks the capacity to enter into a valid marriage or is, at the time of applying for the license, under the influence of an intoxicating liquor or narcotic drug [*Fam. Code § 352*]. Additionally, if either of the applicants for a marriage license is a minor, the clerk may not issue the license unless the minor files required parental and court consents [*Fam. Code § 302*].

No statute expressly prohibits the county clerk from issuing a marriage license to persons attempting to enter a bigamous or incestuous marriage, or to persons of the same sex. However, in view of the absolute prohibitions on such marriages contained in other statutes [*Fam. Code §§ 2200, 2201*; *see Fam. Code § 300*] and the criminal penalties attached to such marriages [*Penal Code §§ 281-285*], it would appear that the clerk is forbidden to issue a license to such a couple, if he or she is aware of the nature of their relationship [*see Lockyer v. City & County of San Francisco (2004) 33 Cal. 4th 1055, 1118-1119, 17 Cal. Rptr. 3d 225, 95 P.3d 459* (city officials who issued marriage licenses to same-sex couples required to correct city records, to notify couples of invalidity of marriages, and to refund license

fees)].

Writ of mandate for improper refusal to issue a license is discussed in *§ 359.44[7]*.

[3] License to Remarry Not Necessary or Proper

It is neither necessary nor proper for the clerk to issue a marriage license to enable persons already validly married to each other to remarry. This situation may arise in the case of persons who were married outside California in a jurisdiction having laws differing from those of California, so that the marriage is valid where contracted but would have been void if performed in California. Such marriages might include a common-law marriage [*see* discussion in *§ 359.74[1]*] and a marriage between persons under the age of 18 without parental or court consent in a state permitting such marriages. The rationale for not requiring remarriage in California is that it would serve no purpose, since California recognizes the validity of a marriage validly contracted elsewhere even if the marriage would be invalid if contracted in California [*see Fam. Code § 308*].

[4] License Application Process

[a] General Requirements

Applicants for a marriage license must:

- Appear in person together at the office of the county clerk [*see Fam. Code §§ 350, 354*];
- Answer the clerk's questions and, if necessary, supply documentary evidence to support their answers [*Fam. Code § 354*; *see* discussion in *§ 359.44[4][b]*];
- Sign and swear to the truth of the facts stated in the application [*Fam. Code § 354(b)*; *see* discussion in *§ 359.44[5][d]*];
- Pay a fee [*Gov. Code § 26840*; *see* discussion in *§ 359.44[5][d]*]; and
- Receive a brochure, which provides information about genetic counseling (including information on Acquired Immune Deficiency Syndrome--AIDS) and concerning domestic violence [*Fam. Code § 358*; *see* discussion in § 359.4[5][e]].

[b] Completion of Application Form

The process of applying for a marriage license consists in large part of the clerk's filling out the application for marriage license using information supplied by the applicants in response to the clerk's questions. As shown in § 359.250, the clerk will ask for the following information from each applicant:

- Name;
- Date of birth;
- Residence address, including city and county;
- State of birth;
- The number of the proposed marriage, that is, whether it is the applicant's first, second, and so forth;

- When last marriage, if any, was terminated, and whether by death, dissolution, or annulment;
- Occupation;
- Highest grade of school completed;
- Father's name and state of birth; and
- Mother's birth name and state of birth.

This information goes beyond the information that must be contained in a marriage license, namely the identities of the spouses and their real and full names, places of residence, and ages [*Fam. Code § 351*]. However, at least arguably, all of the above information pertains to the identity of the spouses, and its compilation is thus authorized by statute [*see Fam. Code §§ 351, 354*]. Furthermore, the additional information is required by statute to be set forth in the certificate of registry of marriage [*see Health & Safety Code § 103175*], which must be filled out by the spouses in the presence of the clerk issuing the marriage license and returned after the marriage by the person who solemnized the marriage [*Fam. Code § 359(c), (e), (f)*]. The application for license to marry, the license to marry, and the certificate of registry are all incorporated in a single multipage form. Thus, the above information is elicited by the clerk to satisfy both the statute specifying the contents of the marriage license [*Fam. Code § 351*] and the statute prescribing the contents of the certificate of registry of marriage [*Health & Safety Code § 103175*].

Each applicant for a marriage license may be required to present proof of identification as to name [*Fam. Code § 354(a)*]. While a birth certificate would serve as such identification, the presentation of a birth certificate is not a statutory requirement.

When the marriage ceremony is unconventional [*see Fam. Code § 307*], registration of the marriage and the content of the required License and Certificate of Declaration of Marriage are governed by separate statutory provisions [*see Health & Safety Code § 103180*.].

No applicant for a marriage license may be required to state, for any purpose, his or her race or color [*Fam. Code § 354(d)*].

[5] Oath and Signature

[a] In General

After the applicants have furnished the required information [*see* discussion in *§ 359.44[4][b]*] to the clerk, and the information has been inserted in the marriage license application form, the applicants must sign the application and swear that the information given is true to the best of their knowledge and belief. There does not appear to be any statutory authority for requiring that the applicants swear to the veracity of the information they furnish. As discussed in *§ 359.44[5][a]*, the clerk's authority to examine an applicant for a marriage license under oath, with the examination subsequently reduced to writing and signed by the applicant, appears limited to ascertaining the truth regarding the applicants' identities, names, places of residence, and ages (the information required to be set forth in the marriage license itself) [*see Fam. Code §§ 351, 354(b)*]. However, applicants for a marriage license are routinely required to swear to the veracity of all information that they furnish the clerk.

The application form for license to marry must include an affidavit on the back that the bride and groom must sign, which affirms that they have received the brochure provided for in *Family Code Section 358* dealing with domestic violence, genetic counseling and information on acquired immune deficiency syndrome (AIDS) [*Fam. Code § 355(b)*].

[b] Further Examination Under Oath

If it is necessary for the purpose of ascertaining the facts required for issuance of a marriage license, the clerk may examine the applicants under oath [*Fam. Code § 354(b)*]. The examination must be reduced to writing by the clerk and subscribed by the applicants [*Fam. Code § 354(b)*]. If necessary, the clerk may also request additional documentary proof of the accuracy of the facts stated [*Fam. Code § 354(c)*]. Documents that might be requested include:

- Passport;
- Copy of court order changing name;
- Copy of adoption decree;
- Copy of birth certificate;
- Permanent residence visa [*see, e.g., 8 U.S.C. § 1184(d)*];
- Citizenship papers; and
- Driver's license.

This authorization to the clerk to take the affidavit of an applicant for marriage license appears to apply only to information required for the marriage license itself, namely the applicants' identities, names, places of residence, and ages [*see Fam. Code § 351*]. The clerk does not ordinarily have the authority to require affidavits on other questions regarding vital statistics, which are asked in the marriage license application to comply with the statutory requirements for completion of the certificate of registry of marriage [*Health & Safety Code § 103175*; *see* discussion in *§ 359.44[4][b]*].

The Attorney General has stated that, ordinarily, if an applicant for a marriage license is willing to answer those other vital statistics questions unqualifiedly and under oath, the clerk has no authority to require the applicant to submit a supporting affidavit *[29 Ops. Cal. Atty. Gen. 103, 105 (1957)]* . However, in one case, the Attorney General reasoned that the clerk was authorized to take an affidavit on a vital statistics subject other than the applicant's name, address, and identity. In that case, although her husband had been missing and presumed dead for over five years, the applicant was unwilling to declare under oath that she was a "widow" in response to the clerk's question regarding marital status. The Attorney General ruled that the clerk had the authority to take her affidavit based upon the woman's refusal unqualifiedly to complete the application for license to marry. However, once it appeared from the affidavit that the marriage would be valid under the applicable statute [*see Fam. Code § 2201*; discussion in *§ 359.13[2]*], notwithstanding the fact that the woman's first husband was not conclusively known to be dead, the clerk had a duty to issue the marriage license *[29 Ops. Cal. Atty. Gen. 103, 105 (1957)]* .

[c] Effect of Supplying False Information

Making a false statement under oath in connection with obtaining a marriage license constitutes perjury [*Penal Code § 118*; *see People v. Brown (1954) 125 Cal. App. 2d 83, 84-85, 269 P.2d 918* (false information about marital status); *People v. Torterice (1924) 66 Cal. App. 115, 119, 225 P. 760* (false information about age)]. However, such acts as giving false names and ages (except for concealing an applicant's minority) should not affect the validity of the marriage. Such acts will be viewed by a court as defects in form; they do not constitute such serious noncompliance with the legal requirements for a valid marriage as to render the license and the subsequent marriage void [*Argonaut Ins. Co. v. Industrial Acci. Com. (1962) 204 Cal. App. 2d 805, 806-810, 23 Cal. Rptr. 1]* . Supplying a false place of residence should be viewed in the same light, since there is no residency requirement for marriage.

[d] Fees

A modest fee is collected at the time the license is issued [*Gov. Code § 26840*]. An additional small fee may be charged if the board of supervisors of a particular county provides for the issuance of marriage licenses outside of normal business hours [*Gov. Code § 26840.2*]. County clerks are required to collect an additional fee upon issuance of a marriage license, for distribution under the Domestic Violence Centers Act [*Gov. Code § 26840.7*; *see Welf. & Inst. Code § 18290 et seq.* (Domestic Violence Centers Act)].

Counties are authorized by statute to increase the marriage license fee by a small amount, to help support the family conciliation court and for conciliation and mediation services [*Gov. Code § 26840.3(a)(1)*].

There is no provision for waiving the license fee in any circumstances. This fact could raise a constitutional question, since marriage is considered a fundamental right [*see* discussion in *§ 359.11*].

[e] Health Information Brochure

The clerk is responsible for distributing to each applicant for a marriage license a brochure combining, to the extent possible, all information required by statute to be given to marriage license applicants [*Fam. Code § 358(a), (b), (d)*]. The brochure must include information on the possibilities of genetic defects and diseases and must list centers available for testing and treatment of those defects and diseases. The brochure must also provide information concerning acquired immune deficiency syndrome (AIDS), including the availability of testing for antibodies to the probable causative agent of AIDS [*Fam. Code § 358(a)*]. In addition, the brochure must contain information concerning domestic violence, including resources available to victims and a statement concerning the illegality of various forms of abuse. The Department of Health Services is responsible for preparing and publishing this brochure [*Fam. Code § 358(a)*].

[6] Expiration of License

A marriage license expires 90 days after it is issued. The expiration date appears on the face of the license [*Fam. Code § 356*]. As a reminder to the applicants, the county recorder must notify applicants whose certificates have not been returned within 60 days after the date of issuance of the license that the license will expire on the date shown on the face of the license [*Fam. Code § 357(b)*]. The recorder's notice also must state that the person solemnizing the marriage is required to return the certificate of registry and endorsed license to the recorder's office within 10 days after the ceremony [*Fam. Code § 357(c)*].

[7] Writ of Mandate for Refusal to Issue License

When all statutory requirements are met, the county clerk is required to issue a marriage license. If the clerk improperly refuses to issue a license, the applicants may petition for a writ of mandate from the superior court to compel the clerk to issue the license [*see Perez v. Sharp (1948) 32 Cal. 2d 711, 712, 198 P.2d 17]* or to test the validity of the clerk's grounds for refusing to do so [*see Stokes v. County Clerk (1953) 122 Cal. App. 2d 229, 229-230, 264 P.2d 959]* . Forms and procedures for a mandate proceeding are discussed in Ch. 358, *Mandate and Prohibition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageCertificates & LicensesGeneral OverviewFamily LawMarriageCertificates & LicensesRecordingFamily LawMarriageCertificates & LicensesRequirements

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32-359 California Forms of Pleading and Practice--Annotated § 359.45

§ 359.45 Issuance of Marriage License to Minor

[1] General Requirements

Minority is not a complete bar to contracting a valid marriage [*see Fam. Code § 2210(a)*]. However, if either applicant for a marriage license is a minor, the county clerk will not issue a marriage license unless the applicants file both (1) the written consent of a parent or guardian of the minor [*see* discussion in *§ 359.45[2]*] and (2) an order of the superior court granting the minor permission to marry [*Fam. Code § 302*; *see* discussion in *§ 359.45[3]*].

If a minor manages to obtain a license and marry without obtaining and filing the proper consents and court order, the marriage is voidable [*Fam. Code § 2210(a)*; *see* discussion in *§ 359.14[1]*].

There is no statutory minimum age for marrying with parental consent and court permission. However, the court may in its discretion deny permission for a marriage involving a minor who, in the court's opinion, is too young to marry even with parental consent [*see Fam. Code § 302(b)*].

[2] Consent of Parent or Guardian

The statutory requirement that a minor obtain parental consent before marrying does not require the minor to obtain the consent of both parents. Either parent's consent is sufficient [*Fam. Code § 302(a)*]. There is no provision allowing a parent to prevent the marriage of a minor when the other parent has given consent, even when the nonconsenting parent has sole custody and control of the minor. However, the superior court, which must also give its permission for a minor to marry [*Fam. Code § 302(b)*], may in its discretion refuse to grant permission for a marriage that is opposed by one of the minor's parents. The objecting parent may be able to bring his or her objection before the superior court at the hearing on the minor's motion for court permission to marry [*see* discussion in *§ 359.45[3]*]. However, there is no requirement that formal notice of the hearing be given to anyone, and, in consequence, the objecting parent may lose this opportunity to be heard unless he or she has independent knowledge of the hearing. Should the court decide in favor of permitting the minor to marry, the objecting parent probably has no right of appeal since the statute requiring parental consent does not require the consent of both parents [*see Fam. Code § 302(a)*].

Since a parent's authority over a minor child is terminated by the appointment of a guardian of the person of the child [*Fam. Code § 7505(a)*], it appears that the guardian, rather than the parent, would be required to consent to the minor's marriage when such an appointment has been made. As with the case in which one parent consents to the marriage over the objection of the other parent, the court may in its discretion refuse to grant permission for a marriage that is opposed by the parents but consented to by the guardian.

The form for consent of a parent to the issuance of a marriage license to his or her minor child is part of the multipurpose Department of Health Services Form VS-117, which also contains the license application, the license itself, and the certificate of registry.

[3] Permission of Superior Court

In addition to obtaining the consent of his or her parent or guardian, a minor who wishes to marry in California must obtain an order of the superior court granting permission for the marriage [*Fam. Code § 302(b)*]. Normally, no fee is charged for issuing such an order.

Before issuing an order permitting a minor to marry, the court may require a showing of any facts or evidence it deems necessary to justify issuance of the order [*Fam. Code § 302(b)*]. As discussed in *§ 359.45[2]*, the minor may be called upon to show why he or she should be permitted to marry in spite of the objections of one parent, when consent was granted by the other parent, or both parents, when consent was granted by the minor's guardian. There is no provision for giving notice to any persons interested in the hearing.

In counties having family conciliation court services, the court often delegates the duty of soliciting information and making recommendations relating to marriages of minors [*see Fam. Code § 1814(b)(5)*]. If the court solicits the information itself, it will ordinarily do so in chambers to preserve the confidentiality of the persons involved.

[4] Combined Consent and Permission of Superior Court When No Parent Capable of Consenting

If a minor who wishes to marry in California has no parent, or no parent capable of consenting to the marriage, the minor may file a verified application in the court from which the permission to marry is sought [*see* discussion in *§ 359.45[3]*], seeking an order consenting to the issuance of a marriage license [*Fam. Code §§ 212, 303*]. A filing fee is not normally required for filing the application. If the court is satisfied that its consent should be given, the order will issue. The minor must file the order with the county clerk at the time the marriage license is issued [*Fam. Code § 303*].

The Judicial Council forms of Request of Minor to Marry [Cal. Judicial Council Form FL-910] and Order on Request of Minor to Marry [Cal. Judicial Council Form FL-915] are *set forth in §§ 359.251* and *359.252*.

There is no statutory distinction between, on the one hand, a minor who has no parents and no guardian and, on the other hand, a minor who has no parents but does have a guardian. Thus, a minor who has no parent or no parent capable of consenting to the marriage but does have a guardian may, apparently, elect to seek the court's consent rather than the guardian's consent to the marriage. However, the court may in its discretion refuse to consent to a marriage that is opposed by the guardian [*see Fam. Code § 303*].

As in cases in which the minor has parental permission to marry, the court may refer the matter to the county's family conciliation court services, if any, before issuing its ruling on the application [*see Fam. Code § 1814(b)(5)*].

[5] Premarital Counseling Orders

As part of its order granting permission or permission and consent for a minor to marry, the court may require the prospective spouses to participate in premarital counseling concerning the social, economic, and personal

responsibilities of marriage. In determining whether to require counseling the court must consider, among other factors, the ability of the prospective spouses (not of their parents) to pay for the counseling. The court may impose a reasonable fee to cover the cost of any counseling provided by the county. These fees must be used exclusively to cover the cost of the counseling services [*Fam. Code § 304*].

When a court orders premarital counseling, it will usually provide a list of public and private counseling agencies from which to choose. The prospective spouses may not be required without their consent to confer with counselors provided by religious organizations of any denomination [*Fam. Code § 304*].

Some counties have promulgated guidelines for premarital counseling.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageCertificates & LicensesGeneral OverviewFamily LawMarriageCertificates & LicensesMinor ApplicantsFamily LawMarriageCertificates & LicensesRequirementsFamily LawMarriageValidityGeneral OverviewFamily LawParental Duties & RightsConsentMarriage

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§ 359.46 Former Health Certificate Requirement

Before January 1, 1995, in order to obtain a marriage license, each applicant had to present to the county clerk when applying for the license either a properly completed health certificate or a court order waiving the certificate requirement [former *Fam. Code §§ 580, 591* (repealed, operative January 1, 1995)]. The certificate had to state that the applicant was given an examination by a licensed physician and surgeon for discovery of syphilis not more than 30 days before the issuance of the license, and that the applicant was either not infected with syphilis or, if infected, was not in a stage of the disease that could be communicable to a marital partner [former *Fam. Code §§ 580, 581* (repealed, operative January 1, 1995)]. The certificate also had to state whether the female applicant showed laboratory evidence of immunological response to rubella (German measles) [former *Fam. Code § 582* (repealed, operative January 1, 1995)]. The health certificate requirement was repealed in 1994, operative January 1, 1995 [Stats. 1994, ch. 197 (repealing *Fam. Code § 580 et seq.*)].

Note that health certificates neither presently are, nor previously were, required in the case of "confidential marriages" [*Fam. Code § 500*; *see* discussion in *§ 359.71[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageCertificates & LicensesGeneral OverviewFamily LawMarriageCertificates & LicensesRequirementsGovernmentsLocal GovernmentsLicenses

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32-359 California Forms of Pleading and Practice--Annotated § 359.47

§ 359.47 Solemnization of Marriage

[1] General Requirements

Solemnization is essential to a marriage in California [*Fam. Code § 300*; *Estate of Shipp (1914) 168 Cal. 640, 641, 144 P. 143]* . A man and a woman may agree to marry and may make preparations to marry, but without a license and a ceremony, there is no marriage [*People v. MacDonald (1938) 24 Cal. App. 2d 702, 708-709, 76 P.2d 121]* . Moreover, unless they participate in a marriage ceremony performed by an authorized person before witnesses as authorized by the Family Code, the marriage is not valid [*Estate of Abate (1958) 166 Cal. App. 2d 282, 292-293, 333 P.2d 200]* .

[2] Who May Solemnize

A marriage may be solemnized by any of the following who is an adult [*Fam. Code § 400*]:

(1) A priest, minister, or rabbi of any religious denomination [*see 64 Ops. Cal. Atty. Gen. 409 (1981)* (persons certified to perform marriages by Fellowship of Christian Ministry may solemnize marriage in California even though Fellowship of Christian Ministry is not incorporated in California)];

(2) A judge or retired judge, a commissioner of civil marriages [*see Fam. Code § 401* (county clerks as commissioners of civil marriages and authorized to appoint deputy commissioners)] or retired commissioner of civil marriages, a commissioner or retired commissioner, or an assistant commissioner of a court of record or a court of justice in California;

(3) A judge or magistrate who has resigned from office; or

(4) Any of the following judges or magistrates of the United States:

(a) A justice or retired justice of the United States Supreme Court;

(b) A judge or retired judge of a court of appeals, a district court, or a court created by an act of Congress the judges of which are entitled to hold office during good behavior;

(c) A judge or retired judge of a bankruptcy court or a tax court; or

(d) A United States magistrate or retired magistrate.

Additionally, a county may license officials of nonprofit religious institutions whose articles of incorporation are registered with the Secretary of State to solemnize marriages of members or affiliates of that religious institution. A person licensed under this provision must have a doctor of philosophy degree and must perform religious services or rites for the institution on a regular basis [*Fam. Code § 402*].

A marriage ceremony may not be solemnized by a county sheriff, assessor, or supervisor *[82 Ops. Cal. Att'y Gen. 172 (1999)]* .

Prohibited solemnization activities and criminal penalties for those activities are discussed in *§ 359.43[2], [3]*.

[3] Solemnization Fees

Every commissioner or deputy commissioner of civil marriages who accepts any money or other thing of value for performing a marriage, including money or things tendered voluntarily by the spouses, other than (1) a fee expressly imposed by law for performing the ceremony, or (2) a fee for performing a marriage on a Saturday, Sunday, or legal holiday, is guilty of a misdemeanor. No proof of extortion or other criminal intent is required. This prohibition does not apply to retired commissioners of civil marriage or retired court commissioners [*Penal Code § 70.5*].

Every judge, justice, commissioner, or assistant commissioner of a court of this state who accepts any money or other thing of value for performing any marriage, including any money or thing of value voluntarily tendered by the persons about to be married or who have been married by the judge, justice, commissioner, or assistant commissioner, whether the acceptance occurs before or after performance of the marriage and whether or not performance of the marriage is conditioned on the giving of the money or the thing of value by the persons being married, is guilty of a misdemeanor. No intent to commit extortion or other criminal intent is required. This prohibition does not apply to (1) fees imposed by law, (2) fees requested or accepted for performing a marriage on a Saturday, Sunday, or holiday, or (3) fees requested or accepted by a retired judge, justice, or commissioner. For this purpose a judge or justice is not considered to be retired if he or she is sitting on assignment in court [*Penal Code § 94.5*].

Solemnizations performed by licensed officials of nonprofit religious institutions for members or affiliates of the institution must be performed without a fee to the spouses [*Fam. Code § 402*]. However, donations are not prohibited.

[4] Where Solemnization May Take Place

A person authorized to solemnize a marriage [*see Fam. Code § 400*; discussion in *§ 359.47[2]*] may do so anywhere in the state. Solemnization of marriage is not a judicial function, although judicial officers are among those authorized to perform the ceremony. Thus, judicial officers may perform marriage ceremonies outside their normal geographical jurisdictions and outside the county in which the license was issued *[13 Ops. Cal. Atty. Gen. 250, 251-254 (1949)* ; *see People v. Lininger (1937) 22 Cal. App. 2d 440, 441, 71 P.2d 306* ; *but see Fam. Code § 504* (confidential marriages may be performed only in county where license issued); discussion in *§ 359.72[1]*]. There is no provision of law requiring a person solemnizing a marriage to register with the county clerk before performing the ceremony. However, the person is required to state his or her official position or the denomination of which he or she is a priest or minister in the certificate of registry of marriage [*Health & Safety Code § 103175*; *2 Ops. Cal. Atty. Gen. 134 (1943)]* .

[5] Presentation of License

The person who will solemnize a marriage is bound, first, to require the bride and groom to present a marriage license [*Fam. Code § 421*; *see Fam. Code § 359(c)*; *Penal Code § 360* (misdemeanor to solemnize marriage without prior presentation of license); discussion in *§ 359.43[2], [3]*]. The person solemnizing the marriage must be satisfied, before performing the ceremony, that the facts stated in the marriage license are correct. If he or she doubts the correctness of any of the facts stated, he or she may administer oaths and examine the prospective spouses and witnesses just as the county clerk may do before issuing the license [*Fam. Code § 421*; *see* discussion in *§ 359.44[5]*].

[6] Form of Ceremony

No particular form is required for a marriage ceremony, but the prospective spouses must declare, in the presence of the person solemnizing the marriage and the necessary witnesses, that they take each other as husband and wife [*Fam. Code §§ 359(d), 420(a)*]. A procedure is provided for a member of the armed forces, who is stationed overseas and serving in a conflict or a war and is unable to appear for the licensure and solemnization, to enter into marriage by the appearance of an attorney-in-fact [*Fam. Code § 420(b)*; *see Fam. Code §§ 350(b), 354(e), 355(b)*]. No contract of marriage, if otherwise duly made, can be invalidated for want of conformity to the requirements of any religious sect [*Fam. Code § 420(c)*].

[7] Witnesses

A marriage ceremony must be witnessed by at least one person other than the person who performs the solemnization [*see Fam. Code §§ 359(d), 422(b)*]. An unconventional marriage ceremony (that is, one not involving solemnization by a judge, member of the clergy, or other person authorized to solemnize marriages) must be witnessed by at least two persons [*see Fam. Code § 307(a)(2)*; discussion in *§ 359.47[8]*]. The Family Code does not specify any qualifications for witnesses to the solemnization of a marriage [*see Fam. Code §§ 307(a)(2), 359(d), 422(b)*]. There is no prohibition, for example, on using minors as witnesses. Every person, regardless of age, is qualified to be a witness unless he or she is either (a) incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him or her, or (b) incapable of understanding the duty of a witness to tell the truth [*Evid. Code §§ 700, 701(a)*].

Confidential marriages (discussed in *§ 359.170* et seq.) are not required to be witnessed.

[8] Unconventional Religious Ceremonies

Some religious groups may have unconventional forms for solemnizing marriage that do not involve the participation of a priest, minister, rabbi, or other person authorized to solemnize marriages [*see 57 Ops. Cal. Atty. Gen. 397, 398-401 (1974)]* . The provisions of the Family Code relating to the solemnization of marriage [*Fam. Code § 400 et seq.*] are not applicable to members of any particular religious society or denomination not having clergy for the purpose of solemnizing marriage or entering the marriage relation, if the following requirements are met [*Fam. Code § 307*; *Health & Safety Code § 103180(b), (c)(5)*]:

> (1) The spouses must sign, and endorse on, or attach to, their marriage license a statement in the form prescribed by the Department of Health Services, showing (a) the fact, time, and place of entering into the marriage, (b) the signatures and addresses of two witnesses to the ceremony, and (c) the religious society or denomination of the spouses and that the marriage was entered into in accordance with the rules and customs of that religious society or denomination.
>
> (2) The License and Certificate of Declaration of Marriage, endorsed as described in paragraph (1), is returned to the county recorder of the county in which the license was issued within a prescribed number

of days after the ceremony [*Fam. Code § 307(b)* (requiring return of License and Certificate of Declaration of marriage within 30 days after ceremony to county recorder); *Health & Safety Code § 103180(b)* (requiring registration of marriage with local registrar of marriages within four days after ceremony)].

The statement of the spouses that the marriage was entered into in accordance with the rules and customs of a particular religious society or denomination is conclusively presumed to be true [*Fam. Code § 307(a)(3)*].

The License and Certificate of Declaration of Marriage may be obtained by the spouses from the county clerk in their county of residence, in the same manner as a conventional marriage license [*see Fam. Code § 425*]. The information required for the license portion of the form consists of personal data about the spouses, such as their full names, birthplaces, residences, names and birthplaces of their parents, birth name of their mothers, number of previous marriages, marital status, and the birth name of the woman, if different from her current surname [*Health & Safety Code § 103180(c)*].

In an opinion interpreting prior law, the Attorney General ruled that the county recorder must refuse to record a declaration of marriage tendered pursuant to the then-applicable statute when a marriage license had not been issued *[65 Ops. Cal. Atty. Gen. 321, 325 (1982)]* . That policy would not appear to have changed under the current statute. However, since a combination license-and-declaration form is now used [*see Fam. Code §§ 307, 425*; *Health & Safety Code § 103180*], the problem is unlikely to arise.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 359.48 Authentication of Marriage

[1] Function of Certificate of Registry

The function of the certificate of registry of marriage is to provide a permanent record of the fact of the marriage and permanently to record certain vital statistics about the spouses [*see Fam. Code §§ 359, 422, 423*; *Health & Safety Code §§ 102100, 102140*].

When a couple obtains a marriage license from the county clerk, they will also receive a certificate of registry of marriage [*Fam. Code § 359(a)*]. The form for certificate of registry of marriage is part of Department of Health Services Form VS-117, which also includes the license to marry and the application for license to marry. A sample form VS-117 is set forth in *§ 359.250*.

The bride and groom must present the certificate to the person solemnizing the marriage [*Fam. Code § 421*]. That person must complete the certificate and have at least one of the witnesses to the marriage sign it [*see Fam. Code §§ 359(d), 422*].

The fact that there are two statutes in the Family Code governing certificates of registry [*Fam. Code §§ 359, 422*] might make it appear that there are two separate pieces of paper to be returned by the person solemnizing the ceremony, one containing the vital statistics data required by the Health and Safety Code [*see Health & Safety Code § 103175*] and one containing the certification by the person solemnizing the marriage. In practice, form VS-117 provides spaces for all of the information required by both statutes.

[2] Contents of Certificate

The certificate of registry of marriage consists of four parts.

(1) Vital statistics on the spouses are required by law [*Health & Safety Code § 103175*]. For a complete list of the required information, see *§ 359.44[4][b]*.

(2) The signatures of the spouses are required. When applying for the marriage license, the applicants must sign the combined application/license/certificate and swear before the county clerk that the vital statistics data is correct to the best of their knowledge and belief and that no legal objection to the marriage or to the issuance of a license is known to them [*see Penal Code §§ 118, 126*; (criminal penalties for making false affidavit); discussion in *§ 359.44[5][b]*].

(3) The marriage license is a part of the certificate of registry. It consists of a small printed statement that the applicants are authorized to marry, followed by the signature of the county clerk and specification of the county of issuance, the dates of issuance and expiration of the license, and the marriage license number.

(4) A prescribed statement signed by the person solemnizing the marriage must show all of the following [*Fam. Code § 422*; *see Fam. Code § 359(d)*]:

(a) The fact, date (month, day, and year), and place (city and county) of solemnization;

(b) The names and places of residence of witnesses to the ceremony (at least one witness);

(c) The official position of the person solemnizing the marriage or the denomination of which that person is a priest, minister, rabbi, or member of the clergy; and

(d) The typed or printed name and address of the person solemnizing the marriage.

[3] Lost or Destroyed Certificate

When a certificate of registry is lost or destroyed after the marriage ceremony but before it is returned to the county recorder [*see* discussion in *§ 359.48[4]*], the person solemnizing the marriage must obtain a duplicate certificate by filing an affidavit setting forth relevant facts concerning the loss or destruction with the county clerk of the county in which the license was issued [*Fam. Code § 360(a)*]. The duplicate certificate of registry may not be issued more than one year after issuance of the original license and must be returned by the person solemnizing the marriage to the county recorder within 10 days after issuance [*Fam. Code § 360(b)*]. The fee for a duplicate certificate is set by statute [*Fam. Code § 360(c)*].

[4] Filing of Certificate

The person who solemnized the marriage must return the completed certificate of registry to the county recorder in the county in which the license was issued, within 10 days after the ceremony [*Fam. Code §§ 359(e), (f), 423*; *Health & Safety Code § 103150*]. It is the recorder's duty to examine each certificate before accepting it for registration. If a certificate is presented that is incomplete or unsatisfactory, the recorder must require any further information to be furnished as may be necessary to make the record satisfactory before accepting the certificate [*Health & Safety Code § 102310*]. However, it is not the duty of the recorder to determine the validity of the marriage. This is a judicial function [*see 2 Ops. Cal. Atty. Gen. 532, 533 (1943)]* . The validity of a marriage is not affected by the failure of the person who solemnized the marriage to return the certificate of registry [*Fam. Code § 306*].

The recorder will prepare a copy of the certificate of registry and then forward the original certificate to the State Registrar of Vital Statistics.

[5] Certified Copies of Certificate

If for any reason a certified copy of the certificate of registry is needed by any person, it may be obtained upon payment of a modest fee [*see Health & Safety Code § 103625(c)*] to either the county recorder of the county in which the license was issued or the State Registrar of Vital Statistics [*Health & Safety Code § 103525*]. A person who changes his or her surname after becoming married may need a certified copy of the certificate in order to change his or her name on bank accounts and various documents of title.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageCertificates & LicensesGeneral OverviewFamily LawMarriageCertificates & LicensesRequirementsFamily LawMarriageProofCeremonial MarriagesSolemnization of MarriageFamily LawMarriageValidityGeneral OverviewGovernmentsLocal GovernmentsLicenses

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§ 359.49 Ceremonial Certificate of Marriage

At the request of either spouse, the person solemnizing the marriage must issue a ceremonial marriage certificate showing the fact, date, and place of the marriage, the names and places of residence of the witnesses, and the name and official position of the person solemnizing the marriage [*Fam. Code § 424*]. This certificate has no official significance and serves primarily as a keepsake, although it may be used in some circumstances as evidence of the marriage in subsequent litigation [*see* discussion in *§ 359.111[2]*]. The certificate is normally supplied as a matter of course. The form used is Department of Health Services Form VS-118.

On request of an applicant, the state registrar may provide a decorative heirloom marriage certificate on payment of a special fee [*see Health & Safety Code § 103595*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageGeneral OverviewFamily LawMarriageCertificates & LicensesGeneral OverviewFamily LawMarriageProofCeremonial MarriagesSolemnization of Marriage

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[Reserved]

§§ 359.50[Reserved]

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32-359 California Forms of Pleading and Practice--Annotated § 359.70

§ 359.70 Common-Law Marriages

California has not recognized the validity of common-law marriages contracted in the state since 1895 [*see* Stats. 1895, ch. 129 § 3]. However, California does recognize common-law marriages validly contracted in other states [*Knight v. Superior Court (2005) 128 Cal. App. 4th 14, 19, 26 Cal. Rptr. 3d 687]* . This policy reflects the general rule that all marriages contracted outside California that would be valid by the laws of the jurisdiction in which they were contracted are valid in California [*Fam. Code § 308*; *People v. Badgett (1995) 10 Cal. 4th 330, 363, 41 Cal. Rptr. 2d 635, 895 P.2d 877* ; *Colbert v. Colbert (1946) 28 Cal. 2d 276, 280, 169 P.2d 633* ; *see § 359.74[1]*].

The least that is necessary to establish a valid common-law marriage in any jurisdiction is mutual consent of the spouses. However, the weight of authority seems also to require some evidence of consummation or a holding out that the spouses are married, by their living together or in some way showing that the marriage relationship exists [*Estate of Keig (1943) 59 Cal. App. 2d 812, 816, 140 P.2d 163]* .

For example, in Texas a common-law marriage may be recognized upon proof that the spouses (1) agreed to be married, (2) lived together in Texas as husband and wife, and (3) represented to others that they were married. An agreement to marry may be inferred from proof that the spouses lived together as husband and wife and represented to others that they were married [*People v. Badgett (1995) 10 Cal. 4th 330, 363-366, 41 Cal. Rptr. 2d 635, 895 P.2d 877* (recognizing rule, but finding defendant did not have valid common-law marriage under Texas law)].

Although California does not recognize common-law marriages, there is a statutory procedure whereby unmarried adults who have been living together as husband and wife may marry and obtain a confidential marriage certificate [*see § 359.71[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageProofGeneral OverviewFamily LawMarriageProofCommon Law MarriagesGeneral OverviewFamily LawMarriageProofCommon Law MarriagesElementsCohabitationFamily LawMarriageProofCommon

Law MarriagesElementsGeneral ReputeFamily LawMarriageValidityGeneral OverviewFamily LawMarriageValidityCommon Law Marriages

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32-359 California Forms of Pleading and Practice--Annotated § 359.71

§ 359.71 Confidential Marriages

[1] Nature and Purpose of Confidential Marriage Act

The California Confidential Marriage Act [*Fam. Code § 500 et seq.*], like its statutory predecessor [former Civ. Code § 79] was enacted at a time when health certificates were ordinarily required to obtain a marriage license [*see* former *Fam. Code § 580 et seq.* (repealed January 1, 1995); former *Civ. Code § 4300 et seq.* (repealed January 1, 1994)]. Under the California Confidential Marriage Act, an unmarried man and an unmarried woman, not minors, who are living together as husband and wife may marry without first obtaining and filing health certificates [*Fam. Code § 500*; *see People v. Hassan (2008) 168 Cal. App. 4th 1306, 1314-1315, 86 Cal. Rptr. 3d 314* ("living together" means actually residing in same dwelling)]. The original purpose of the California Confidential Marriage Act was to encourage persons who had been living together without marriage, perhaps having had children, to legalize their relationship by allowing them to do so with a minimum of publicity and embarrassment [*Encinas v. Lowthian Freight Lines (1945) 69 Cal. App. 2d 156, 163, 158 P.2d 575* (construing former Civ. Code § 79)]. Because the official record of a confidential marriage, including the date of the marriage, may not be disclosed except by court order [*Fam. Code § 511(a), (c), (d)*; *see § 359.72[3][d]*], the confidential marriage procedure may be attractive to couples who, because of children born to or conceived by them before their marriage, do not wish to make a public record of the date of their marriage.

However, many of the persons who used the procedure may have done so simply to avoid the health certificate requirements imposed by former law to obtain a marriage license. Because of the 1994 repeal of the premarital examination and health certificate requirements for "conventional" marriage license applicants, this aspect of the Confidential Marriage Act is no longer a compelling reason for seeking a marriage license under the Act [*see* former *Fam. Code § 580 et seq.* (repealed January 1, 1995); *see § 359.46*]. Nevertheless, because of the Act's provisions for confidentiality of marriage certificates, discussed in *§ 359.72[2][d]*, some persons may still choose to utilize its provisions [*see Fam. Code § 511*].

[2] Eligibility for Confidential Marriage

In order to be eligible to be married pursuant to the California Confidential Marriage Act [*Fam. Code § 500 et seq.*], the spouses must be adults [*see Fam. Code § 6501*] and unmarried, and they must have been living together as husband and

wife [*Fam. Code § 500*]. Unlike the situation with conventional marriages, there are no provisions authorizing a minor to contract a confidential marriage by obtaining parental consent and judicial permission [*see Fam. Code § 302*].

In 1931 the California Supreme Court stated that cohabitation conforming to the intent of the confidential marriage statute (former Civ. Code § 79, which contained the same "living together" language as the current statute) would consist of holding forth to the world by the manner of daily life, conduct, demeanor, and habit, that the man and woman who live together have agreed to take each other in marriage and to stand in the mutual relation of husband and wife. The court stated that such cohabitation may be evidenced by general repute or belief among relatives, neighbors, and acquaintances that the spouses are husband and wife, and that occasional sexual intercourse between the man and woman will not, by itself, furnish the basis for a confidential marriage [*People v. McIntyre (1931) 213 Cal. 50, 54-55, 1 P.2d 443]* . Changing social mores have made it much less common than it was in 1931 for cohabiting couples to hold themselves out as being married, with the result that relatively few modern couples would be eligible for a confidential marriage license under the standards formerly articulated by the court. However, as a practical matter, it is unusual for a couple applying for a confidential marriage license to be questioned concerning whether they have lived together as husband and wife. Evidence that they have the same address, together with their willingness to sign an affidavit stating that they meet the requirements for confidential marriage, is probably sufficient in most cases.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageCertificates & LicensesGeneral OverviewFamily LawMarriageCertificates & LicensesRequirementsGovernmentsLegislationExpirations, Repeals & Suspensions

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§ 359.72 Confidential Marriage License

[1] In General

To obtain a license for a confidential marriage, the spouses must personally appear before the county clerk in a county of their choice, complete the license application, and pay the required fees [*Fam. Code §§ 501, 504*; *see Gov. Code §§ 26840.1, 26840.3, 26840.8* (fees)]. The fee for filing the certificate of confidential marriage [*see* discussion in *§ 359.48[4]*], as well as the license fees, must be paid at the time the license is obtained [*Fam. Code § 501*; *Gov. Code § 26840.1*]. If either or both of the spouses is physically unable to appear in person to obtain the license, the clerk must issue the license to the person solemnizing the marriage if he or she presents to the clerk an affidavit signed by him or her and the spouses and explaining the reason for the inability to appear [*Fam. Code § 502*]. Confidential marriage licenses may also be obtained through a notary public approved by the county clerk to authorize confidential marriages [*Fam. Code § 503*; *see Fam. Code § 530 et seq.*]. If the spouses obtain a license through a notary public, they must reimburse the notary public for the license and filing fees [*Fam. Code § 503*; *see Gov. Code §§ 26840.1, 26840.8*].

The form of the confidential marriage license is prescribed by the State Registrar of Vital Statistics [*Fam. Code § 505(a)*]. The form, which includes a certificate of marriage, requires the spouses to declare or affirm that they meet all of the requirements of the Confidential Marriage Act [*Fam. Code § 505(b), (c)*]. The form includes an affidavit, which must be signed by the spouses, affirming that they have received a brochure published by the Department of Health Services that sets forth information concerning genetic defects and diseases and acquired immune deficiency syndrome (AIDS) [*Fam. Code § 505(d), (e)*; *see Fam. Code § 358*]. This brochure is the same one distributed to applicants for conventional marriage licenses [*see* discussion in *§ 359.44[5][e]*].

A confidential marriage license is valid for a period of 90 days after its issuance. Unlike a conventional marriage license, it may only be used in the county in which it was issued [*Fam. Code § 504*].

[2] Solemnization of Confidential Marriages

As with conventional marriages [*see* discussion in *§ 359.47[1]*], the bride and groom must participate in a ceremony of solemnization to validate the confidential marriage [*see Fam. Code §§ 505(c), 506-508*]. The ceremony may be

performed by any person authorized to solemnize marriages [*see Fam. Code § 400*; discussion in *§ 359.47[2]*]. The confidential marriage license must be presented to the person performing the ceremony [*Fam. Code § 506(a)*].

[3] Confidential Marriage Certificate

[a] Completion of Certificate

On performance of the marriage ceremony, the bride and groom must complete the certificate of marriage portion of the confidential marriage license, which then must be authenticated by the person who solemnized the marriage [*Fam. Code §§ 505(c), 506(a), (b)*]. The combination license and certificate form is printed in duplicate, so that the person solemnizing the marriage can simply separate the copy from the original and give it to the spouses at the time of the ceremony. On issuance of the confidential marriage certificate, the county clerk will provide the parties with an application to obtain a certified copy of the confidential marriage certificate [*Fam. Code § 508*].

[b] Filing of Certificate

The person solemnizing the confidential marriage must return the certificate of marriage to the county clerk in the county in which the license was issued, within 30 days after the ceremony [*Fam. Code § 506(c)*; *see Penal Code § 360*]. The filing fee is set by statute. [*see Gov. Code § 26840.1*]. This fee is payable at the time the confidential marriage license is issued [*Gov. Code § 26840.1(a)*].

The county clerk must keep all original certificates of confidential marriages for one year from the date of filing. After one year, the clerk may microfilm the certificate and dispose of the original certificate, or microfilm the certificate and send the original certificate to the Office of the State Registrar [*Fam. Code § 511(b)*]. The county clerk is also required to file copies of confidential marriage certificates with the State Registrar of Vital Statistics at least quarterly. The State Registrar may destroy these copies after they have been recorded and indexed [*Fam. Code § 511(d)*].

[c] Obtaining Additional Copies of Certificate

Either spouse may obtain a certified copy of the confidential marriage certificate from the county clerk of the county in which the certificate is filed in any of the following ways [*Fam. Code § 509(a)*]:

(1) Submit the application for a certified copy of the confidential marriage certificate that was provided to the spouses at the time of the marriage [*see Fam. Code § 508*; *see also § 359.72[2]*].

(2) Personally appear before a notary public or at the county clerk's office in the spouse's county of residence, produce proper identification, obtain a certificate attesting to the spouse's identity from the notary public or county clerk, and transmit that certificate, together with a request for the certified copy of the confidential marriage certificate, to the county clerk of the county in which the certificate is filed.

(3) Personally appear at the county clerk's office where the certificate is filed and produce proper identification.

Copies of a confidential marriage certificate may be issued to the spouses on the payment of a fee equivalent to that charged for copies of a conventional certificate of marriage [*Fam. Code § 509(b)*].

In the event that a confidential marriage certificate is lost, damaged, or destroyed after the performance of the marriage and before it is returned, the county clerk may issue a replacement on the payment of a modest fee [*Fam. Code § 510(a)*]. The duplicate license may not be issued more than one year after issuance of the original license and must be returned by the person solemnizing the marriage to the county recorder within 10 days after issuance [*Fam. Code § 510(b)*].

[d] Confidentiality of Certificate Information

Confidential marriage certificates are maintained in the county in which the marriage license was issued as permanent, but confidential, records. The records are not open to public inspection except on a court order issued on a showing of good cause [*Fam. Code § 511(a)*]. The county clerk may conduct a search for a confidential marriage certificate for the purpose of confirming the existence of a marriage; however, the date of the marriage and any other information contained in the certificate must not be disclosed except by court order [*Fam. Code § 511(c)*]. Similarly, the State Registrar of Vital Statistics may respond to an inquiry as to the existence of a confidential marriage, but may not disclose the date of the marriage [*Fam. Code § 511(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 359.73 Proxy Marriages

A proxy marriage is a marriage in which one, or conceivably each, of the spouses is represented at the marriage ceremony by another person, in lieu of being present. Generally, the other requirements for a valid marriage in the particular jurisdiction (for example, license and health certificate requirements) must be satisfied by the spouses themselves. In the past there have been strong policy reasons in favor of recognition of proxy marriages, the foremost being the legitimation of children born out of wedlock. This situation has most frequently arisen where a serviceman on active duty has sought to legitimize a child born to a woman left at home, or to a woman met overseas after the serviceman has been transferred to another duty station. Such marriages have often been arranged by the Red Cross [*see* Comment, *Persons --Marriage-- Validity of Proxy Marriage, 25 So. Cal. L. Rev. 181 (1952)*].

California statutory law expresses no policy on proxy marriages, and case law presents no authority on the validity of proxy marriages performed in California. The only statements concerning the validity in California of such marriages have involved proxy marriages performed outside of the state. Both the Attorney General and the courts have ruled that such marriages are valid in California if they are valid in the jurisdiction in which they were performed, under the general rule that all marriages that are valid by the laws of the jurisdiction in which they are contracted are valid in California [5 Ops. Cal. Atty. Gen. 104, 104-105 (1945) ; *Barrons v. United States (9th Cir. 1951) 191 F.2d 92, 95* ; *see Fam. Code § 308*; discussion in *§ 359.74[1]*]. Dicta in the Attorney General opinion stated without discussion that proxy marriages may not be consummated in California because California law requires marriages contracted in this state to be licensed, solemnized, and authenticated [*see Fam. Code § 300*], which cannot be done without the personal presence of both spouses *[5 Ops. Cal. Atty. Gen. 104 (1945)]* . However, the Ninth Circuit has held that there exists no strong policy in California against proxy marriages [*Barrons v. United States (9th Cir. 1951) 191 F.2d 92, 95]* . Given the general policy favoring the validity of marriage, especially when the legitimacy of children is a motivating factor, there is a strong argument in favor of recognizing the validity of proxy marriages contracted in California [*see* Comment, *Persons --Marriage--Validity of Proxy Marriages, 25 So. Cal. L. Rev. 181, 187-189 (1952)*]. Nevertheless, no reported California decision has yet so held.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageProofCeremonial MarriagesSolemnization of MarriageFamily LawMarriageValidityGeneral OverviewFamily LawMarriageValidityProxy Marriages

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§ 359.74 Out-of-State Marriages

[1] General Rule of Validity

In general, all marriages contracted outside California that would be valid by the laws of the jurisdiction in which they were contracted are valid in California [*Fam. Code § 308*]. Thus, the law of the place of the marriage controls the question of its validity in California.

This rule has been applied to validate the following kinds of marriages that, if contracted in California, would be invalid or of dubious validity:

(1) Common-law marriage [*e.g., Colbert v. Colbert (1946) 28 Cal. 2d 276, 280, 169 P.2d 633* ; *In re Marriage of Smyklo (1986) 180 Cal. App. 3d 1095, 1099, 226 Cal. Rptr. 174* ; *see* discussion in *§ 359.74[2]*];

(2) Proxy marriage, the validity of which has not been formally recognized in California [*Barrons v. United States (9th Cir. 1951) 191 F.2d 92, 95* ; *see* discussion in *§ 359.73*]; and

(3) Polygamous marriage, for the limited purpose of determining inheritance rights [*Estate of Bir (1948) 83 Cal. App. 2d 256, 261-262, 188 P.2d 499* ; *see* discussion in *§ 359.74[3]*].

In addition, the rule that a marriage is valid in California if valid where performed might conceivably be applied to validate the following types of out-of-state marriages:

(1) Marriages between persons, at least one of whom is under age 18 and who lacked parental consent and judicial permission to marry [*see Fam. Code § 302*; discussion in *§§ 359.14[1]* and *359.45[1]*];

(2) Marriages not considered incestuous where performed but incestuous under California law [*see Fam. Code § 2200*; discussion in *§ 359.13[3]*]; or

(3) Marriages between persons of the same sex in a jurisdiction recognizing the validity of such marriages [*see Fam. Code § 300*; discussion in *§ 359.13[4]*].

The general rule recognizing marriages validly contracted elsewhere operates to validate an out-of-state marriage between California residents even though they married outside the state for the avowed purpose of evading the laws of California. Such a motive will not invalidate the marriage [*Estate of Perez (1950) 98 Cal. App. 2d 121, 122, 219 P.2d 35* (out-of-state marriage to avoid health certificate requirements)].

The burden of proof rests on the party claiming the validity of the marriage to show that it was performed or contracted under some recognized law. If no such law is shown, the validity of the marriage will be judged by the law of the domicile of the spouses. Thus, a marriage ceremony performed on the high seas by the captain of a vessel between citizens and residents of California, who went there for the avowed purpose of evading the license requirement in California, was void, since the party with the burden of proof could show no recognized law to which the marriage conformed [*Norman v. Norman (1898) 121 Cal. 620, 626-627, 54 P. 143]* .

If a marriage is invalid under the laws of the place where it was contracted, it will not be valid in California even if it could have been validly contracted in California. For example, the marriage in Nevada of first cousins, which would have been valid if performed in California, was not valid under Nevada law and thus was not recognized in California [*Estate of Levie (1975) 50 Cal. App. 3d 572, 576, 123 Cal. Rptr. 445]* .

A legal relationship that is recognized out of state that does not confer on the parties all of the rights and duties of marriage, for example, a concubinage under Mexican law, will not be recognized in California as a common law marriage [*see Rosales v. Battle (2003) 113 Cal. App. 4th 1178, 1184, 7 Cal. Rptr. 3d 13]* .

[2] Out-of-State Common-Law Marriages

Although California does not recognize the validity of common-law marriages contracted within the state [*see* discussion in *§ 359.70*], it will recognize a common-law marriage contracted outside the state if it would be valid under the laws of the jurisdiction where it was contracted [*Fam. Code § 308*; *see Colbert v. Colbert (1946) 28 Cal. 2d 276, 280, 169 P.2d 633* ; *Coefield v. Coefield (1979) 92 Cal. App. 3d 959, 961 n.2, 155 Cal. Rptr. 335]* . This policy holds even when the spouses are California residents at the time the validity of the common-law marriage is at issue [*Tatum v. Tatum (9th Cir. 1957) 241 F.2d 401, 407* ; *Estate of McKanna (1951) 106 Cal. App. 2d 126, 234 P.2d 673]* .

[3] Out-of-State Polygamous and Incestuous Marriages

Generally, marriages validly contracted in other countries as well as elsewhere in the United States will be recognized in California [*Fam. Code § 308*; *see Toshiko Inaba v. Nagle (9th Cir. 1929) 36 F.2d 481, 481* ; *Estate of Bir (1948) 83 Cal. App. 2d 256, 261-262, 188 P.2d 499* (polygamous marriage)]. However, a marriage that is regarded as "odious by common consent of nations, *e.g.*, where it is polygamous or incestuous by the laws of nature," probably would not be recognized in California, even though it might be valid where contracted [*see McDonald v. McDonald (1936) 6 Cal. 2d 457, 459-460, 58 P.2d 163]* . Any marriage between a parent and his or her biological child would probably be considered incestuous "by the laws of nature." However, marriages between aunts and nephews, or uncles and cousins, validly contracted in another state or country, would probably be accepted in California.

The policy against the recognition of polygamous marriages validly contracted elsewhere in the world has been circumvented only for the limited purpose of allowing successive spouses to share equally in the estate of the deceased bigamous spouse. When a decedent had two wives--both of whom were legal under the law of Punjab Province of India, but with whom he had not cohabited in California--the court of appeals, in recognition of the equities involved, held the public policy of California against polygamous marriages would not be injured by recognizing the validity of both marriages for inheritance purposes only [*Estate of Bir (1948) 83 Cal. App. 2d 256, 261-262, 188 P.2d 499]* . The

rationale of this case could be used to support recognition for similar limited purposes of the validity of a marriage that was valid where performed but incestuous if performed in California.

Given the relatively liberal nature of the California incestuous-marriage statute [*see Fam. Code § 2200*], a more likely situation would be one involving a marriage that was incestuous and thus void where performed but that would have been valid if performed in California. This issue arose in a case involving a marriage contracted in Nevada between two California residents who were first cousins. The marriage was incestuous and thus void under Nevada law but would have been valid if performed in California. The alleged husband died intestate and the wife, as surviving spouse, contested the application of the husband's daughter for letters of administration. Failing in that effort, she then petitioned for a determination of heirship, again alleging she was decedent's surviving spouse and thus entitled to a surviving spouse's share of the deceased's property [*see Prob. Code §§ 100, 101, 6401*]. The court of appeals refused to recognize the validity of the attempted Nevada marriage, basing its decision on the general rule that the law of the jurisdiction where a marriage is performed controls its validity [*see Fam. Code § 308*]. However, the court accorded the petitioner the rights of a putative spouse, that is, a person who believes erroneously, but in good faith, that he or she is legitimately married. Thus, the putative wife was treated as the decedent's spouse for purposes of intestate succession [*Estate of Levie (1975) 50 Cal. App. 3d 572, 576-577, 123 Cal. Rptr. 445]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageProofGeneral OverviewFamily LawMarriageProofBurdens of ProofFamily LawMarriageValidityGeneral Overview

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32-359 California Forms of Pleading and Practice--Annotated § 359.75

§ 359.75 Tribal Alliances and Other Unconventional Marriage Arrangements

As discussed in *§ 359.47*, tribal alliances and other unconventional marriage arrangements contracted within California without solemnization by a member of the clergy or another person authorized to solemnize marriages [*see Fam. Code § 400*] will be recognized in California if certain requirements are met [*Fam. Code § 307*; *see Fam. Code § 295* (recognition of tribal alliances entered into before 1958)]. The statute authorizing such marriages only relieves the spouses from the statutory solemnization requirements [*Fam. Code § 307*]. It does not authorize or validate incestuous, bigamous, or same-sex marriages, or other marriages prohibited under California law [*see Fam. Code §§ 300, 2200, 2201*].

A tribal alliance or other unconventional marriage arrangement entered into outside California will be valid in California if it would be valid by the laws of the jurisdiction in which it was contracted [*Fam. Code § 308*], subject to the exception discussed in *§ 359.74[3]*, for marriages that are considered "odious by common consent of nations" [*see McDonald v. McDonald (1936) 6 Cal. 2d 457, 459-460, 58 P.2d 163]* .

Legal Topics:

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

§§ 359.76[Reserved]

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§ 359.90 Governing Statutes

The effect of marriage between an alien and a United States citizen or a resident alien on the nonresident alien's immigration status is governed generally by the Immigration and Nationality Act [*8 U.S.C. § 1101 et seq.*]. Procedures and regulations for the investigation of marriages between aliens and citizens or permanent residents are set forth in Title 8 of the Code of Federal Regulations. The Immigration Marriage Fraud Amendments of 1986 [*see 8 U.S.C. §§ 1152, 1154, 1184, 1186a, 1251, 1255, 1325*], enacted in response to an escalating national problem concerning so-called green-card marriages, provide criminal penalties for marriage fraud involving aliens.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageNature of MarriageFamily LawMarriageValidityFraudulent MarriagesImmigration LawDuties & Rights of AliensRegistration & ReportingImmigration LawEnforcementCriminal OffensesMarriage Fraud

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§ 359.91 Preferential Visa Status

An alien who marries a citizen of the United States or marries an alien lawfully residing within the United States generally acquires preferential status for purposes of entering and remaining in the United States. However, with limited exceptions [*see 8 U.S.C. § 1186a(g)(1)*], such an alien may be subject to a period of *conditional status* if the marriage was entered into less than 24 months before the date the alien obtained his or her admission status by virtue of the marriage [*see 8 U.S.C. § 1186a(a)(1), (g)(1)*; discussion in *§ 359.92*].

An alien who is engaged to a citizen of the United States and who gains entry into the country intending to marry the citizen within 90 days after entry is accorded the status of a nonimmigrant alien [*8 U.S.C. § 1101(a)(15)(K)*]. The alien's intended spouse may petition for a visa for the alien on the basis of that status. The petition may only be approved after the petitioner submits satisfactory evidence establishing that he or she previously met the alien within two years before the date of filing the petition, that they have a bona fide intention to marry, and that they are legally able and actually willing to conclude a valid marriage in the United States within 90 days after the alien's arrival. The requirement to have personally met is subject to waiver, at the discretion of the Attorney General [*8 U.S.C. § 1184(d)*]. If the marriage is concluded within the 90-day period, the alien may be granted conditional permanent residence status, subject to later petition to obtain final permanent residency [*8 U.S.C. § 1186a(a)(1), (g)(1)*].

An immigrant alien who is already the spouse of a United States citizen is considered an immediate relative of a citizen and may enter the country without regard to the limitations set by Congress on the number of immigrants who may lawfully enter the United States [*8 U.S.C. § 1151(b)(2)(A)(i)*]. In addition, naturalization preferences are accorded aliens who are married to United States citizens [*8 U.S.C. § 1430(a)*]. An immigrant alien who is married to an alien lawfully admitted for permanent residence within the United States occupies the second most preferred category in the priority schedule for permanent residency [*8 U.S.C. § 1153(a)(2)*]. The immigrant spouse may be subject to a period of conditional residency [*see 8 U.S.C. § 1186a(a)(1), (g)(1)*].

An alien who does not enter the country solely to marry a United States citizen is classified as an immigrant [*see 8 U.S.C. § 1101(a)(15)(K)*]. If an immigrant alien is not already married to a citizen of the United States, he or she will ordinarily be subject to the numerical limitations on immigration [*see 8 U.S.C. §§ 1151, 1152*] and will be allotted a

visa according to the statutory categories of preference [*see 8 U.S.C. § 1153*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 359.92 Conditional Residency Period and Petition for Permanent Residency

Most alien spouses who have been granted permanent residency by virtue of marriages that were entered into less than 24 months before the date residency was obtained are subject to a period of *conditional* residency [*8 U.S.C. § 1186a(a)(1), (g)(1)*]. The period of conditional residency is two years [*8 U.S.C. § 1186a(b)(1)*], and the spouses must jointly petition the Attorney General to have the conditional status removed. The petition must be filed during the last 90 days of the two-year period [*8 U.S.C. § 1186a(c)(1), (d)(2); see 8 U.S.C. § 1186a(d)(2)(B)* (late petitions may be considered if good cause and extenuating circumstances are shown)]. The procedures for filing the petition and completing the required personal interview are set forth in *8 U.S.C. § 1186a*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 359.93 Investigation of Bona Fides of Marriage

Because of an increase in the number of persons seeking preferential visa status as the spouses of United States citizens or permanent residents, the Immigration and Naturalization Service has established procedures and regulations for the investigation of marriages between aliens and citizens or permanent residents. In order to establish that such a marriage was entered into in good faith and not for the purpose of procuring the alien's entry into the United States as an immigrant, a citizen or permanent resident petitioning the INS to obtain preferential immigration status for an alien spouse must submit to the INS evidence such as [*8 C.F.R. § 204.2(a)(1)(iii)(E)*]:

(1) Documentation showing joint ownership of a home or other property;

(2) A lease showing joint tenancy of a common residence;

(3) Documentation showing commingling of financial resources;

(4) Birth certificates of children born to the petitioner and the alien spouse;

(5) Affidavits of third parties having knowledge of the bona fides of the marital relationship; or

(6) Other documentation establishing that the marriage was not entered into in order to evade the immigration laws of the United States.

The precise nature and amount of evidence required in a given case will depend on the facts of the case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageValidityGeneral OverviewFamily LawMarriageValidityFraudulent MarriagesImmigration LawAdmissionSelection SystemPreferences & Priorities

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32-359 California Forms of Pleading and Practice--Annotated § 359.94

§ 359.94 Effect of Dissolution, Annulment, or Bad Faith

[1] Duration of Marriage and Bad Faith

Marriages of relatively short duration involving aliens are subject to special statutory provisions that may affect the alien's ability to retain a given status, such as permanent residency. Under these provisions, if a marriage between an alien and a United States citizen or permanent resident is dissolved or annulled within two years after the alien enters the United States, and was entered into within two years before the entry, the alien may be subject to deportation unless he or she establishes to the satisfaction of the Attorney General that the marriage was not contracted for the purpose of evading any provisions of the immigration laws [*8 U.S.C. § 1251(a)(1)(G)(i)*; *see Sideropoulos v. Immigration & Naturalization Service (6th Cir. 1966) 357 F.2d 642, 643-644* (burden on alien to prove marriage not contracted to evade immigration laws, once substantial evidence of prima facie case shown)].

[2] Deportation for Failure to Fulfill Marital Agreement

Even if the marriage is not dissolved or annulled within two years after the alien enters the United States, the alien can be deported if it appears to the satisfaction of the Attorney General that he or she has failed or refused to fulfill the marital agreement and that the marital agreement was made for the purpose of procuring the alien's entry into the country as an immigrant [*8 U.S.C. § 1251(a)(1)(G)(ii)*]. The term "marital agreement" as used in the statute involves more than merely going through a marriage ceremony. In order to fulfill the marital agreement, the spouses must at least begin in good faith to live together as husband and wife [*Giannoulias v. Landon (9th Cir. 1955) 226 F.2d 356, 359]* . It would appear that the type of evidence that can be relied on to establish fraud in a nullity proceeding, such as statements by a spouse indicating an intent never to fulfill the spousal obligations of respect, fidelity, and support [*see In re Marriage of Rabie (1974) 40 Cal. App. 3d 917, 922, 115 Cal. Rptr. 594* (marriage between alien and United States citizen annulled when alien's statements indicated he married merely to remain in United States and had no bona fide intention of fulfilling spousal duties)], could also be relied on in a deportation proceeding to demonstrate that the alien married in bad faith to evade the immigration laws.

[3] Revocation of Conditional Residency Status

During the two-year conditional residency period imposed on aliens who married United States citizens or aliens lawfully residing within the United States less than 24 months before obtaining preferential admission to the United States by virtue of the marriage [*see 8 U.S.C. § 1186a(a)(1), (g)(1)*; discussion in *§ 359.92*], the Attorney General has authority to terminate the alien's conditional status and commence deportation proceedings upon determining that either (a) the marriage was entered into for the purpose of procuring the alien's entry as an immigrant, (b) the marriage has been judicially annulled or terminated, other than by a spouse's death, or (c) a fee or other consideration was improperly given to file a petition on the alien's behalf under *8 U.S.C. § 1154(a)* or *1184(d)* (for a fiance/fiancee), except for a fee or consideration given for assistance by an attorney in preparation of a lawful petition. The alien may request a hearing to review the Attorney General's determination [*8 U.S.C. § 1186a(b)(2)*].

The alien spouse may be deported at the end of the two-year period if the spouses failed to timely file a petition to remove the conditional status or complete the personal interview required by law [*see 8 U.S.C. § 1186a(c)(2)*; *but see 8 U.S.C. § 1186a(c)(4)* (waiver of requirements for extreme hardship)], or if the Attorney General determines that the facts and information revealed in the required personal interview or in the spouses' petition to remove the conditional status [*see* discussion in *§ 359.92*] are untrue [*see 8 U.S.C. § 1186a(c)(3)(C)*]. The alien may request a review of a determination that the facts and information revealed in the interview or petition are untrue. During the review, the burden is on the Attorney General to establish, by a preponderance of the evidence, that the facts and information are untrue [*8 U.S.C. § 1186a(c)(3)(D)*].

[4] Criminal Penalties and Restriction of Immigration

There are criminal penalties for fraudulent marriage [*see 8 U.S.C. § 1325(b)*] and restrictions on future entry into the United States by aliens involved with marriage fraud [*see 8 U.S.C. §§ 1154(c), 1182(a)(6)(C)*]. In addition, there are restrictions on the adjustment of status or approval of petitions for immediate relative or preference status based on a marriage that takes place during deportation proceedings [*8 U.S.C. §§ 1154(g), 1255(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageProofCeremonial MarriagesSolemnization of MarriageFamily LawMarriageValidityFraudulent MarriagesImmigration LawEnforcementCriminal OffensesMarriage FraudImmigration LawInadmissibilityGroundsMisrepresentationImmigration LawNonimmigrantsFiancees & Fiances (K Visas)

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32-359 California Forms of Pleading and Practice--Annotated §§ 359.95-359.109

[Reserved]

§§ 359.95[Reserved]

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32-359 California Forms of Pleading and Practice--Annotated § 359.110

§ 359.110 Presumption of Validity of Ceremonial Marriage

[1] Nature and Effect of Presumption

A ceremonial marriage is presumed to be valid [*Evid. Code § 663*]. This rule is a codification of the common-law presumption recognized in California case law that dictates that when a marriage is shown in evidence, a strong presumption of its validity arises [*In re Pusey (1916) 173 Cal. 141, 143, 159 P. 433]* .

The statutory presumption that a ceremonial marriage is valid is a presumption affecting the burden of proof [*Evid. Code § 660*]. The effect of the presumption is to require the party against whom the presumption operates to prove the invalidity of the marriage in question [*Evid. Code § 606*; *see In re Marriage of Recknor (1982) 138 Cal. App. 3d 539, 547, 187 Cal. Rptr. 887]* . A presumption affecting the burden of proof is established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied [*Evid. Code § 605*]. The public policy implemented by the presumption that ceremonial marriages are valid is the general policy favoring marriage [*see Glickman v. Collins (1975) 13 Cal. 3d 852, 857, 120 Cal. Rptr. 76, 533 P.2d 204]* .

The fact of ceremonial marriage may be established under the same general rules of evidence as facts are proved in other cases [*Fam. Code § 305*]. Some of the more common forms of proof include the admission into evidence of:

(1) A certificate of registry [*see* discussion in *§ 359.48[1]*];

(2) A License and Certificate of Declaration of Marriage [*see Fam. Code § 425*; discussion in *§ 359.112*];

(3) Testimony of the spouses;

(4) Testimony of a witnesses to the ceremony;

(5) Testimony of the person performing the ceremony; and

(6) Evidence admissible under hearsay exceptions [*see* discussion in *§ 359.111* et seq.].

[2] Operation of Presumption on Surviving Spouse Controversies

The presumption that a ceremonial marriage is valid [*Evid. Code § 663*; *see* discussion in *§ 359.110[1]*] is often raised when a decedent has entered into two successive marriages and the two surviving spouses both claim the status and benefits of lawful spouse. In this situation, the second marriage is initially presumed valid and the first spouse has the burden of proving that it was not valid [*Evid. Code §§ 606, 663*]. Usually, this is done by showing that the first marriage was neither dissolved nor annulled [*Vargas v. Superior Court (1970) 9 Cal. App. 3d 470, 473-474, 88 Cal. Rptr. 281]* . If the first spouse presents sufficient evidence that the first marriage has not been dissolved or annulled, the presumption is rebutted and the burden of proof shifts to the second spouse to establish that the first marriage was in fact dissolved or annulled. If the second spouse does not meet this burden of proof, the first spouse is deemed to have established his or her status as the lawful spouse [*see Spearman v. Spearman (5th Cir. 1973) 482 F.2d 1203, 1205* ; *Estate of Smith (1949) 33 Cal. 2d 279, 281, 201 P.2d 539* ; *Vargas v. Superior Court (1970) 9 Cal. App. 3d 470, 473-474, 88 Cal. Rptr. 281]* .

Evidence other than a record search was sufficient to rebut the presumption of a valid second marriage when a decedent's first and second wives both claimed to be his surviving legal spouse. The first wife failed to show she had made any search of court records for a divorce judgment. However, she testified that there had never been a divorce, that she had written a note to the decedent some years earlier referring to herself as his wife, and that she and the decedent had reconciled for a short period of time after the decedent's separation from his second wife. This constituted substantial evidence to support the trial court's finding that the first wife was the decedent's legal wife and the second wife was only his putative wife [*Patillo v. Norris (1976) 65 Cal. App. 3d 209, 216, 135 Cal. Rptr. 210]* .

[3] Use of Presumption for Estoppel Purposes

A court of appeal has applied the common-law theory of estoppel and the statutory presumption that ceremonial marriages are valid [*Evid. Code § 663*] to uphold the validity of a bigamous marriage [*see Fam. Code § 2201*; discussion in *§ 359.13[2]*]. The bigamous spouses had separated after being married for 15 years and having two children together. The wife had sued for temporary support, which was opposed by the husband on the ground that he had never been validly married to the wife. The court found that the parties had married while an action to dissolve the wife's first marriage was pending but not final. There was conflicting evidence as to whether the husband knew, at the time of the marriage, that the wife was still married to her previous husband. However, he apparently knew this within a short time after the bigamous marriage. The court found that, in these circumstances, the husband was estopped to deny the validity of the bigamous marriage. Therefore, he could not produce evidence to overcome the statutory presumption that the marriage was valid; and, therefore, the wife was entitled to temporary support [*In re Marriage of Recknor (1982) 138 Cal. App. 3d 539, 546-547, 187 Cal. Rptr. 887]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageProofGeneral OverviewFamily LawMarriageProofBurdens of Proof

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32-359 California Forms of Pleading and Practice--Annotated § 359.111

§ 359.111 Hearsay Exceptions Relevant to Proof of Marriage

[1] Recorded Statistical Information Exception

Proof of marriage may call into play several exceptions to the hearsay rule, which may allow the admission of various forms of evidence. The hearsay rule does not, for example, prohibit the admission of evidence of a writing made as a record of marriage, provided the maker of the writing was required by law to file the writing in a designated public office and the writing was in fact made and filed as required [*Evid. Code § 1281*]. The most obvious examples of such a writing include a properly filed certificate of registry of marriage [*see Fam. Code § 359*; discussion in *§ 359.48[1]*] and a properly filed License and Certificate of Declaration of Marriage [*see Fam. Code §§ 307, 425*; discussion in *§ 359.112*].

Arguably, the writing should be inadmissible if it has any substantial defects. Possible defects [*see Estate of Cooper (1950) 97 Cal. App. 2d 186, 192-193, 217 P.2d 499]* include late filing [*see Fam. Code §§ 359(e), 423*; discussion in *§ 359.48[4]*], improper witnessing [*see Fam. Code §§ 307, 359(d), 422(b)*; discussion in *§ 359.47[7]*] and use of false names in the certificate of registry [*see Fam. Code § 351(b)*; *but see Argonaut Ins. Co. v. Industrial Acci. Com. (1962) 204 Cal. App. 2d 805, 810, 23 Cal. Rptr. 1* (marriage determined to be valid even when spouses used false names in applying for marriage license)]. However, it may be argued that defects that would not affect the validity of the marriage, such as late filing [*see Fam. Code § 306*], should not affect the admissibility of the writing.

[2] Ceremonial Marriage Certificate Exception

The hearsay rule will not prevent the admission of evidence of a written statement concerning a person's marriage or divorce, if (1) the statement is contained in a certificate stating the maker performed a marriage or other ceremony or administered a sacrament, (2) the maker was a member of the clergy, civil officer, or other person authorized to perform the acts reported in the certificate by law or by the rules, regulations, or requirements of a church, religious denomination, or religious society, and (3) the certificate was issued by the maker at the time and place of the ceremony or sacrament or within a reasonable time thereafter [*Evid. Code § 1316*].

The most obvious example of such a written statement is the ceremonial marriage certificate that may be issued to a

couple at their request by the person performing the marriage ceremony [*see Fam. Code § 424*; discussion in *§ 359.111[2]*]. Arguably, a certificate of registry or License and Certificate of Declaration of Marriage that is inadmissible under the recorded statistical information exception because it was never filed or was improperly filed [*see* discussion in *§ 359.111[1]*] could also be admitted under this exception to the hearsay rule.

[3] Exception for Prior Statements of Spouses

The hearsay rule will not prevent the admission of evidence of a statement by a declarant who is currently unavailable as a witness [*see Evid. Code § 240*] concerning his or her own marriage or divorce, even though the declarant had no means of acquiring personal knowledge of the matter declared [*Evid. Code § 1310(a)*]. Such evidence is inadmissible, however, if the statement was made under circumstances that indicate its lack of trustworthiness [*Evid. Code § 1310(b)*].

[4] Exception for Prior Statements of Relatives and Friends

The hearsay rule will not prevent the admission of evidence of a statement of a person concerning the marriage or divorce of a person other than the declarant when the declarant is unavailable as a witness [*see Evid. Code § 240*] and the declarant either was related to the other person by blood or marriage or was so intimately associated with the other person's family as to be likely to have had accurate information concerning the matter declared [*Evid. Code § 1311(a)*]. The evidence is only admissible in this situation if the declarant made the statement upon information received from the other person or from a relative of that person, or upon repute in the other person's family [*Evid. Code § 1311(a)*]. The evidence is inadmissible if the statement was made under circumstances indicating its lack of trustworthiness [*Evid. Code § 1311(b)*]. This exception covers a situation in which the declarant was a family housekeeper or doctor or a friend so close as to be included in discussions of family history.

[5] Family Records Exception

Evidence of the following family records is not made inadmissible by the hearsay rule when the evidence is offered to prove the marriage or divorce of a member of the family by blood or marriage [*Evid. Code § 1312*]:

(1) Entries in family Bibles;

(2) Entries in other family books or charts;

(3) Engravings on rings;

(4) Family portraits;

(5) Engravings on urns, crypts, or tombstones; and

(6) Other like records.

These types of evidence are admissible on the principle that they are the natural effusions of a person who is acquainted with the truth and who records the facts on an occasion when his or her mind stands in an even position without any temptation to exceed or fall short of the truth [*Estate of Monticelli (1951) 107 Cal. App. 2d 90, 91-92, 236 P.2d 661]* .

[6] Exception for Evidence of Reputation in Family or Community

The hearsay rule will not prevent the admission of evidence of reputation among members of a family, when the reputation concerns the marriage or divorce of a member of the family by blood or marriage [*Evid. Code § 1313*]. The hearsay rule also will not prevent the admission of evidence of reputation in a community, when the evidence concerns

the date or fact of marriage, divorce, or death of a person living in the community at the time the reputation arose [*Evid. Code § 1314*].

[7] Church Records Exception

The hearsay rule will not prevent the admission of evidence of a statement concerning a person's marriage or divorce that is contained in a writing made as a record of a church, religious denomination, or religious society, if (1) the statement is contained in a writing made as a record of an act, condition, or event that would be admissible as evidence of the act, condition, or event under the business records rule [*see Evid. Code § 1271*], and (2) the statement is of a kind customarily recorded in connection with the act, condition, or event recorded in the writing [*Evid. Code § 1315*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceHearsayExceptionsFamily Records & StatementsEvidenceHearsayExceptionsPublic RecordsGeneral OverviewEvidenceHearsayExceptionsPublic RecordsVital StatisticsEvidenceHearsayExceptionsReligious RecordsEvidenceHearsayExceptionsReputationGeneral Overview

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32-359 California Forms of Pleading and Practice--Annotated § 359.112

§ 359.112 Declaration of Unrecorded Marriage

If no record of the solemnization of a marriage previously contracted is known to exist, the spouses may obtain a License and Certificate of Declaration of Marriage from the county clerk in the spouses' county of residence [*Fam. Code §§ 350, 425*]. This is the same form used to declare an unconventional religious ceremony not involving solemnization [*see Fam. Code § 307*; discussion in *§ 359.47[8]*]. The license and certificate must be returned to the county recorder of marriages in the county where the license was issued [*Fam. Code § 425*].

In an opinion interpreting prior law, the Attorney General ruled that the county recorder must refuse to record a declaration of marriage tendered pursuant to the then-applicable statute when a marriage license had not been issued *[65 Ops. Cal. Atty. Gen. 321, 325 (1982)]* . That policy would not appear to have changed under the current statute. However, since a combination license-and-declaration form is now used [*see Fam. Code §§ 307, 425*; *Health & Safety Code § 103180*], the problem is unlikely to arise.

If one spouse is deceased, or there is some other reason the spouses cannot both participate in the declaration of marriage procedure, either spouse acting alone may bring a proceeding to establish a record of the marriage under *Health & Safety Code § 103450 et seq.* For further discussion, see *§ 359.113*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageCertificates & LicensesGeneral OverviewFamily LawMarriageCertificates & LicensesRecordingFamily LawMarriageProofCeremonial MarriagesSolemnization of Marriage

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§ 359.113 Action to Establish Validity of Marriage

If either spouse denies the marriage or refuses to join in a declaration of the marriage [*see Fam. Code § 425*; discussion in *§ 359.112*], the other spouse may proceed, by action in the superior court, to have the validity of the marriage determined and declared [*Fam. Code §§ 200, 309*].

The action could conceivably be used in connection with a petition for dissolution or for legal separation. However, it would seem that the issue of the validity of the marriage would be raised in the original proceeding without the necessity of a separate action. Other possibilities for use of this action would be where no record of the marriage exists and one spouse denies the marriage ever took place, where two persons both claim to be the legal spouse of a third person, or where a spouse seeks a judicial declaration that the marriage was validly contracted and a determination of the spouses' property rights [*e.g., Spellens v. Spellens (1957) 49 Cal. 2d 210, 215, 317 P.2d 613]* .

Legal Topics:

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

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32-359 California Forms of Pleading and Practice--Annotated § 359.114

§ 359.114 Proceeding to Establish Record of Marriage

[1] Nature of Proceeding

A proceeding to establish a record of marriage may be brought when no record of the fact, time, and place of a marriage is obtainable [*Health & Safety Code § 103450 et seq.*], such as when the record of the marriage was destroyed in a fire or by wartime bombing [*see 3 Ops. Cal. Atty. Gen. 86, 88 (1944)]* . Proceedings to establish a record of marriage differ from actions to establish the validity of a marriage [*see* discussion in *§ 359.113*] in two important respects. First, the purpose of a proceeding to establish a record of marriage is to establish the fact of the marriage, rather then to establish its validity [*see Health & Safety Code § 103450*]. Second, a proceeding to establish a record of marriage is not required to be brought by one of the spouses but may be brought by any beneficially interested person [*Health & Safety Code § 103450*; *see Fam. Code § 309* (action to establish validity of marriage as required to be brought by one of spouses)]. This also means that either spouse alone may bring a proceeding to establish a record of marriage. Thus, the procedure may be used when the declaration of marriage procedure [*see Fam. Code § 307*] is unavailable to a spouse because the other spouse is deceased or otherwise unable to participate in the declaration procedure.

An ex parte order establishing the fact of marriage as of a certain date under *Health and Safety Code § 103450 et seq.* has been held to be merely a statistical record acknowledging the late registration of marriage. It is not proof of the fact of marriage, and has no evidentiary effect in a proceeding involving third parties who may have had contractual dealings with the spouses but were not privy to the ex parte proceeding. The statutory scheme under the Health and Safety Code does not accord to ex parte "marriage record" orders conclusive [*see Code Civ. Proc. § 1908(a)*] or even prima facie effect, and to give these orders any evidentiary weight in an action involving such a third party would infringe that party's due process rights [*see Schmidt v. Retirement Board (1995) 37 Cal. App. 4th 1204, 1210, 1215-1216, 44 Cal. Rptr. 2d 297* ; *see also Estate of DePasse (2002) 97 Cal. App. 4th 92, 105, 118 Cal. Rptr. 2d 143* (procedure designed to cure failure to register marriage, not failure to obtain marriage license); *cf. Mah Toi v. Brownell (9th Cir. 1955) 219 F.2d 642, 643-644 , cert. denied, 350 U.S. 823 (1955)* ; *see United States v. Casares-Moreno (N.D. Cal. 1954) 122 F. Supp. 375, 378 , aff'd, 226 F.2d 873 (1955)]* . Thus, ex parte "marriage record" orders under the Health and Safety Code should be viewed as being in the nature of administrative functions or acts of recordation that the Legislature has authorized the courts to perform, rather than as orders or judgments to which effect must be given

under the Code of Civil Procedure [*Schmidt v. Retirement Board (1995) 37 Cal. App. 4th 1204, 1210, 1215-1216, 44 Cal. Rptr. 2d 297* ; *cf. Code Civ. Proc. § 1908(a)(1)* (providing that judgment or final order of court having jurisdiction over matter is conclusive on "title to the thing ... or the condition or relation of the person")].

[2] Where Proceeding May Be Brought

A proceeding to establish a record of marriage may be brought in any of the following places [*Health & Safety Code § 103450*]:

- The county where the marriage is alleged to have occurred;
- The county of residence of the person whose marriage is sought to be established; or
- If the person whose marriage is sought to be established is dead, the county of his or her domicile at the time of death.

[3] Contents of Petition

A petition to establish a record of marriage must contain all the facts necessary to enable the court to determine the fact, time, and place of the marriage upon the proofs adduced on behalf of the petitioner at the hearing. The petition must also be verified [*Health & Safety Code § 103455*]. A sample petition to establish a record of marriage is set out in *§ 359.271*.

[4] Fee for Filing Petition

There is a modest fee for filing the petition, in addition to the law library fee of the county in which the petition is filed [*Health & Safety Code § 103470*].

[5] Hearing on Petition

On the filing of the petition a hearing must be fixed by the clerk of the court, and set at a time at the convenience of the court at least five days but not more than 10 days after the petition is filed [*Health & Safety Code § 103465*]. In counties having more than one superior court judge, the petition may be heard by any judge hearing probate matters. If a probate department has been designated for hearing probate matters, the clerk must assign the matter to the probate department [*Health & Safety Code § 103470*].

[6] Order Granting Petition

If, upon the hearing, the allegations of the petition are established to the satisfaction of the court, the court may make an order determining that the marriage did in fact occur at the time and place shown by the proofs adduced at the hearing [*Health & Safety Code § 103475*]. The order must be made in the form and upon the blank prescribed and furnished by the State Registrar of Vital Statistics. It will become effective only on the filing of a certified copy of the order with the State Registrar [*Health & Safety Code § 103485*].

[7] Distribution of Copies of Petition

Once the State Registrar of Vital Statistics has filed the court order [*see* discussion in *§ 359.114[6]*], the State Registrar must send certified copies of the order (termed a "delayed certificate") to the local registrar and the county recorder in the county where the marriage took place and in whose offices copies of records for the year of the marriage are on file. If the marriage took place outside California, a certified copy of the order must be sent to the county recorder of the county where the petitioner resides [*Health & Safety Code § 103490*].

Legal Topics:

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

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32-359 California Forms of Pleading and Practice--Annotated §§ 359.115-359.129

[Reserved]

§§ 359.115[Reserved]

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§ 359.130 California Family Law Practice and Procedure

See generally Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2d Ed. (Matthew Bender), Chs. 10- 12, 201, 210

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 359.131 California Points and Authorities

See generally California Points and Authorities, Ch. 114, *Husband and Wife* (Matthew Bender)

Legal Topics:

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32-359 California Forms of Pleading and Practice--Annotated § 359.132

§ 359.132 California Legal Forms

For legal forms related to forms in this chapter, see California Legal Forms, Ch. 101, *Vital Records* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-359 California Forms of Pleading and Practice--Annotated § 359.133

§ 359.133 State Statutes

[1] Capacity to Marry

Minors as capable of consenting to and consummating marriage on presentation of written consent of parent or guardian, and order of superior court granting permission to marry. *Fam. Code § 302*

Inmates in state prisons as having right to marry. *Penal Code § 2601(f)*.

Appointment of conservator of person or estate as not affecting capacity of conservatee to marry. *Prob. Code § 1900*

Petition to determine whether conservatee has capacity to enter into valid marriage. *Prob. Code § 1901(a), (b)*

Authority of limited conservator to consent or withhold consent to marriage of limited conservatee. *Prob. Code § 2351.5(b)(3)*

[2] Children of Married Persons

Child of woman cohabiting with her husband who is not impotent or sterile as conclusively presumed to be husband's child, with some exceptions. *Fam. Code §§ 7540, 7541*

Declaration of paternity pursuant to *Fam. Code § 7570 et seq.* that is signed by child's biological parents and filed with State Office of Vital Records as establishing paternity of child and as having same force and effect as judgment of paternity, subject to statutory exceptions. *Fam. Code § 7573*

Man as presumed to be natural father of child if he and child's natural mother are or have been married to each other and child is born during marriage or within 300 days after termination of marriage or judgment of legal separation. *Fam. Code § 7611(a)*

Man as presumed to be natural father of child if, before child's birth, he and child's natural mother attempt to marry each other by marriage solemnized in apparent compliance with law, and child is born during attempted marriage, within 300 days after its termination, or, in case of void marriage, within 300 days after termination of cohabitation. *Fam. Code § 7611(b)*

Man as presumed to be natural father of child if, after child's birth, he and child's natural mother marry or attempt to marry by marriage solemnized in apparent compliance with law, and man consents to be and is named as child's father on child's birth certificate, or is obligated to support child under written voluntary promise or by court order. *Fam. Code § 7611(c)*

Husband of woman artificially inseminated with another man's donated semen, with husband's consent and under supervision of licensed physician, as treated in law as natural father of child thereby conceived. *Fam. Code § 7613(a)*

[3] Community Property Treatment of Property of Married Persons

Each spouse's interest in community property during marriage as present, existing, and equal. *Fam. Code § 751*

Property acquired by married persons during marriage while domiciled in California as community property, in absence of contrary statute. *Fam. Code § 760*

Property of married person owned before marriage, property of married person acquired after marriage by gift, bequest, devise, or descent, rents, issues, profits of above-described property, and earnings and accumulations of married person while living separate and apart from spouse as separate property. *Fam. Code § 770(a)*

Characterization under community property system of damages for injuries to married persons. *Fam. Code § 780 et seq.*

Presumptions concerning nature of property acquired or held by married persons. *Fam. Code §§ 802, 803*

[4] Contracts and Conditions Restraining Marriage

Conditions imposing restraints on marriage of adults as void, but limitations giving use of property until marriage as valid. *Civ. Code § 710*

Contracts in restraint of marriage of adults as void. *Civ. Code § 1669*

[5] Contracts Between Spouses

Spouses as obligated, in their property contracts with each other, to adhere to rules regulating contracts between persons in confidential relationships. *Fam. Code § 721(b)*

Spouses as prohibited from contracting to alter their legal relations. *Fam. Code § 1620*

Spouses as permitted to agree in writing to immediate separation and to spousal and/or child support during separation or upon dissolution of their marriage. *Fam. Code § 3580*

[6] Effect of Marriage on Distribution of Decedent's Property

Married person as having power of testamentary disposition over half of community and quasi-community property of the marriage. *Prob. Code §§ 100, 101, 6101(b), (c)*

Surviving spouse as taking half of community and quasi-community property on death of spouse by operation of law. *Prob. Code §§ 100, 101*

Surviving spouse as taking all community and quasi-community property, and specified portion of decedent spouse's separate property, if decedent spouse dies intestate. *Prob. Code § 6401*

Married person's right to probate homestead and family allowance on death of spouse. *Prob. Code §§ 6520 et seq., 6540 et seq.*

Rights of pretermitted spouse to take against will of decedent spouse. *Prob. Code § 6560 et seq.*

[7] Emancipation of Minors Through Marriage

Minor as emancipated by entering into valid marriage, whether or not marriage is subsequently dissolved. *Fam. Code § 7002(a)*

Parental authority as terminated by marriage of child. *Fam. Code § 7505(b)*

No guardian of person may be appointed for minor who is married or whose marriage has been dissolved. *Prob. Code § 1515*

Guardianship of person of minor as terminated by marriage of minor. *Prob. Code § 1600(b)*

[8] Evidentiary Privileges of Arising Out of Marriage

Married person as having privilege not to testify against spouse in any proceeding. *Evid. Code § 970*

Married person whose spouse is party to proceeding as having privilege not to be called as witness by adverse party without prior express consent of married person. *Evid. Code § 971*

Exceptions to privilege not to testify against spouse and not to be called as witness by adverse party in action in which spouse is party. *Evid. Code § 972*

Privileges not to testify against spouse and not to be called as witness by adverse party in action in which spouse is party as waived, respectively, by voluntarily testifying against spouse or voluntarily testifying in proceeding. *Evid. Code § 973(a)*

No privilege not to testify against spouse, and no privilege not to be called as witness by adverse party in action in which spouse is party, in civil proceeding brought or defended by married person for immediate benefit of spouse or of self and spouse. *Evid. Code § 973(b)*

Each spouse as having privilege, during marital relationship and afterwards, to refuse to disclose, and to prevent others from disclosing, confidential communications between spouses made during marriage, subject to specified exceptions. Evid. Code § 980 et seq.

[9] Gifts in Contemplation of Marriage

Recovery of gift made in contemplation of marriage when donee refuses to enter into marriage or marriage given up by mutual consent. *Civ. Code § 1590*

[10] Mutual Duty of Spousal Support

Enforcement of support duty during marriage through proceeding brought by supported spouse or county. *Fam. Code § 4303*

Uniform Reciprocal Enforcement of Support Act. *Fam. Code § 4800 et seq.*

Husband and wife as contracting toward each other obligations of mutual respect, fidelity, and support. *Fam. Code § 720*

Spouse as personally liable for debts incurred by other spouse during marriage for necessaries of life. *Fam. Code § 914*

Court as authorized to order spousal support during pendency of dissolution or legal separation proceedings. *Fam. Code § 3600*

Spouses as obligated to support each other. *Fam. Code § 4300*

Spouse's duty to apply his or her separate property to support of other spouse when spouses are living together and there is no community or quasi-community property available for such support. *Fam. Code § 4301*

No liability for support of spouse while spouses are living separately, absent agreement between spouses to contrary. *Fam. Code § 4302*

Authority of court to order spousal support on dissolution of marriage or legal separation of spouses. *Fam. Code § 4330*

Spouse's unjustifiable failure to provide necessary food, clothing, shelter, and medical attention for other spouse when he or she is able to provide such support as misdemeanor. *Penal Code § 270a*

Duty to support incompetent spouse. *Prob. Code § 3080*; *Welf. & Inst. Code §§ 7275, 7282*

[11] Parties' Names

Parties to marriage are not required to have same name, neither party is required to change his or her name, and person's name does not change on marriage unless that person elects to change his or her name. *Fam. Code § 306.5*

[12] Nature of Marriage Relationship

Marriage as personal relation arising out of civil contract between man and woman. *Fam. Code § 300*

[13] Rights Incident to Marriage

Married person as having right to bring tort action for loss of consortium or wrongful death if third party injures or kills

spouse. *Code Civ. Proc. § 377.60*

Spouses as having mutual duty of support. *Fam. Code §§ 720, 4300*

Rights of married persons concerning judicial division of marital property on dissolution of marriage. *Fam. Code § 2500 et seq.*

Right of married person to seek spousal support on termination of marriage. *Fam. Code § 4300 et seq.*

[14] Void and Voidable Marriages

Marriage of minor as voidable unless statutory requirements satisfied. *Fam. Code §§ 301-304, 2210(a)*

Marriages between parents and children, ancestors and descendants of every degree, brothers and sisters of half or whole blood, uncles and nieces, or aunts and nephews as incestuous and void. *Fam. Code § 2200*

Subsequent marriage contracted during life of preexisting spouse as bigamous and void; circumstances under which bigamous marriages are voidable rather than void. *Fam. Code §§ 2201, 2210(b)*

Marriage of person of unsound mind as voidable, unless person freely cohabits with spouse after coming to reason. *Fam. Code § 2210(c)*

Marriage as voidable when consent of either spouse was obtained by fraud, unless defrauded spouse freely cohabits with other spouse after obtaining full knowledge of facts constituting fraud. *Fam. Code § 2210(d)*

Marriage as voidable when consent of either spouse was obtained by force, unless spouse whose consent was obtained by force afterwards freely cohabits with other spouse. *Fam. Code § 2210(e)*

Marriage as voidable when either spouse was physically incapable of entering into marriage state at time of marriage, and incapacity continues and appears to be incurable. *Fam. Code § 2210(f)*

Persons with standing to seek annulment of voidable marriages and limitations periods for annulment. *Fam. Code § 2211*

Judgment of nullity of marriage as restoring parties to status of unmarried persons. *Fam. Code § 2212(a)*

Judgment of nullity of marriage as conclusive only as to parties to proceeding and those claiming under them. *Fam. Code § 2212(b)*

Procedure for commencing action for judgment of nullity of marriage. *Fam. Code § 2250*

Determination of putative spouse status and resulting property rights. *Fam. Code §§ 2251, 2252, 2254*

Custody determinations in annulment of marriage proceedings. *Fam. Code § 2253*

Court's authority to award attorney's fees and costs in annulment of marriage proceedings. *Fam. Code § 2255*

Criminal penalties for contracting bigamous or incestuous marriage. *Penal Code §§ 281-285*

Criminal penalties for solemnizing any marriage prohibited by law. *Penal Code § 359*

Legal Topics:

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

[1] Fraud in Inducement to Marry

Marriage as voidable for fraud when wife entered into marriage to obtain green card and had no intention of consummating marriage. *In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 155-156, 242 Cal. Rptr. 649*

Husband's cause of action against former wife, alleging that wife fraudulently induced him to enter into void marriage, as barred by *Civ. Code § 43.4*, prohibiting actions for damages based on fraudulent promises to marry or cohabit after marriage. *In re Marriage of Buckley (1982) 133 Cal. App. 3d 927, 931-934, 184 Cal. Rptr. 290*

[2] Prison Inmates' Right to Marry

Prison regulation permitting inmates to marry only if they obtained permission from the Superintendent of Prisons, and providing that such permission should be granted only in cases involving pregnancy of or birth of child to unmarried women, as impermissible under both strict-scrutiny test and reasonable-relation test. *Turner v. Safley (1987) 482 U.S. 78, 97, 107 S. Ct. 2254, 96 L. Ed. 2d 64*

[3] Wrongful Death of Spouse

Former wife as not permitted to maintain cause of action for wrongful death of former husband under *Code Civ. Proc. § 377* when final judgment of dissolution was entered two years before decedent's death. *Villacampa v. Russell (1986) 178 Cal. App. 3d 906, 908-911, 224 Cal. Rptr. 73*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 359.135 Law Reviews

Note, *Looking for a Family Resemblance: The Limits to the Functional Approach to the Legal Definition of Family, 104 Harv. L. Rev. 1640 (1991).*

Note, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others), 51 Ohio State L.J. 1067 (1990).*

Note, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage, 97 Yale L.J. 1783 (1988).*

Comment, *Transsexual Marriages: Are They Valid Under California Law?, 16 Sw. U. L. Rev. 505 (1986).*

Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry? 18 Family L.Q. 257 (1984).*

Mennell, *Survivorship Rights in Community Property,* 1 Community Prop. J. 5 (1984)

Shultz, *Contractual Ordering of Marriage: A New Model for State Policy, 70 Cal. L. Rev. 207 (1982).*

Comment, *Capacity, Parental Power, and a Minor's Right to Remain Married, 22 Santa Clara L. Rev. 447 (1982).*

Legal Topics:

For related research and practice materials, see the following legal topics:
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B. Formal Requirements For Valid Marriage

32-359 California Forms of Pleading and Practice--Annotated § 359.150

§ 359.150 State Statutes

[1] Certificate of Registry of Marriage

Certificate required to be completed by applicants and person solemnizing marriage. *Fam. Code § 359*

Person solemnizing marriage as responsible for returning completed certificate of registry to county recorder within 10 days after ceremony. *Fam. Code §§ 359, 423*; *Health & Safety Code § 103150*

Procedure for obtaining duplicate certificate of registry in case original lost or destroyed before being returned. *Fam. Code § 360*

Information to be stated in certificate of registry. *Health & Safety Code § 103175*

Procedure and fee for obtaining certified copy of certificate of registry. *Health & Safety Code §§ 103525, 103625*

[2] Consent to Marriage

Marriage as requiring consent by persons capable of contracting. *Fam. Code § 300*

Unmarried adults, not otherwise disqualified, as capable of consenting to and contracting marriage. *Fam. Code § 301*

[3] Crimes Concerning Formalities of Marriage

Making of false statements or misrepresentations in connection with obtaining of marriage license as perjury. *Penal Code § 118*

Criminal penalties for knowingly solemnizing marriage forbidden by law. *Penal Code § 359*

Acceptance of unauthorized fee or consideration for performance of ceremonial marriage as misdemeanor. *Penal Code §§ 70.5, 94.5*

[4] Decorative Heirloom Marriage Certificate

Decorative heirloom marriage certificate issued by State Registrar on payment of special fee by applicant. *Health & Safety Code § 103595*

[5] Dissolution of Valid Marriage

Valid marriage dissolved only by death, judgment of dissolution of marriage, or judgment of nullity of marriage. *Fam. Code § 310*

[6] Marriage Licenses

Requirement to obtain marriage license from county clerk before entering into or declaring marriage. *Fam. Code § 350*

Information shown on marriage license. *Fam. Code § 351*

No marriage license to be granted if either applicant intoxicated or otherwise lacks capacity at time of license application. *Fam. Code § 352*

Identification and other proof of facts necessary to obtain marriage license. *Fam. Code § 354*

Form of marriage license. *Fam. Code § 355*

Marriage license expires 90 days after issuance. *Fam. Code § 356*

Marriage license fees. *Gov. Code §§ 26840, 26840.2, 26840.3, 26840.7*

[7] Marriage of Minors

Age of consent for marriage. *Fam. Code § 301*

Parental consent, court permission, and premarital counseling requirements for marriage of minor. *Fam. Code §§ 302-304*

Requirements for issuing marriage license to minor. *Fam. Code § 353*

[8] Noncompliance With Formalities

License, solemnization, authentication, and certification required for valid marriage; noncompliance by person other than spouse as not invalidating marriage. *Fam. Code § 306*

[9] Health Brochure

Distribution to marriage license applicants of brochure concerning genetic defects, genetic diseases, and AIDS. *Fam. Code § 358*

"Acquired immune deficiency syndrome" (AIDS) and "human immunodeficiency virus" (HIV) defined. *Health & Safety Code § 26*

[10] Solemnization of Marriage

Persons authorized to solemnize marriages. *Fam. Code § 400 et seq.*

No particular form of ceremony required, except that prospective spouses must declare in presence of person solemnizing marriage and necessary witnesses that they take each other as husband and wife. *Fam. Code § 420(a)*

Member of armed forces may enter into marriage in some circumstances by appearance of attorney-in-fact. *Fam. Code § 420(b)*

Otherwise valid contract of marriage not invalidated by want of conformity to requirements of any particular religious sect. *Fam. Code § 420(c)*

Confirmation of facts stated in marriage license by person solemnizing marriage. *Fam. Code § 421*

Statement to be endorsed on marriage license by person solemnizing marriage. *Fam. Code § 422*

Person solemnizing marriage authorized to issue ceremonial certificate to spouses. *Fam. Code § 424*

[11] Unconventional Religious Ceremonies

Compliance with solemnization requirements not required for members of religious societies or denominations not having clergy for purpose of solemnizing marriage, as long as License and Certificate of Declaration of Marriage is completed and returned. *Fam. Code § 307*

Information required to be stated in License and Certificate of Declaration of Marriage. *Health & Safety Code § 103180*

Legal Topics:

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

[1] False Information Given to Procure Marriage License

Acts such as giving false name or age in connection with procurement of marriage license considered mere defects in form rather than defects rendering license and subsequent marriage void. *Argonaut Ins. Co. v. Industrial Acci. Com. (1962) 204 Cal. App. 2d 805, 806-810, 23 Cal. Rptr. 1*

[2] Formalities of Marriage

Marriage ceremony performed by authorized person, before witnesses, and otherwise in conformity with statutory requirements, necessary to create valid marriage in *California. Estate of Abate (1958) 166 Cal. App. 2d 282, 292-293, 333 P.2d 200*

[3] Mandate Proceedings

Persons improperly refused marriage license as having right to compel issuance of license through mandate proceedings. *Perez v. Sharp (1948) 32 Cal. 2d 711, 712, 198 P.2d 17*

Persons refused marriage license as having right to bring mandate proceedings to test validity of clerk's grounds for refusing to issue license. *Stokes v. County Clerk (1953) 122 Cal. App. 2d 229, 229-230, 264 P.2d 959*

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C. Unconventional and Out-Of-State Marriages

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§ 359.170 State Statutes

[1] Confidential Marriage

Unmarried man and woman living together as husband and wife eligible for confidential marriage. *Fam. Code § 500*

Confidential marriage license as issued by county clerk upon personal appearance of spouses and payment of fees. *Fam. Code § 501*

Confidential marriage license fees. *Fam. Code § 501*; *Gov. Code §§ 26840.1, 26840.3, 26840.8*

Procedure for obtaining confidential marriage license when either or both spouses physically unable to appear in person before county clerk. *Fam. Code § 502*

Confidential marriage license obtainable through notary public approved by county clerk to authorize confidential marriages. *Fam. Code § 503*

Confidential marriage license valid for 90 days after issuance and only in county where issued. *Fam. Code § 504*

Form of confidential marriage license prescribed by State Registrar of Vital Statistics. *Fam. Code § 505*

Person solemnizing confidential marriage as responsible for returning certificate of confidential marriage to county clerk within 30 days after ceremony. *Fam. Code § 506(c)*

Copy of confidential marriage certificate and application for certified copy of certificate to be given to spouses married by person solemnizing confidential marriage. *Fam. Code §§ 507, 508*

Procedure for obtaining certified copy of confidential marriage certificate. *Fam. Code § 509*

Procedure for obtaining replacement copy of confidential marriage certificate when original lost, damaged, or destroyed before being returned. *Fam. Code § 510*

Confidential marriage certificate as confidential record to be disclosed only pursuant to court order. *Fam. Code § 511*

Approval of notary publics to authorize confidential marriages. *Fam. Code § 530 et seq.*

[2] Out-of-State Marriages

Marriage contracted outside California and valid where contracted as valid in *California. Fam. Code § 308*

[3] Tribal Alliances

Customary tribal alliances entered into by Native Americans before 1958 deemed valid California marriages. *Fam. Code § 295*

Legal Topics:

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

[1] Confidential Marriage

Occasional sexual intercourse between man and woman as not, by itself, furnishing basis for confidential marriage. *People v. McIntyre (1931) 213 Cal. 50, 54-55, 1 P.2d 443*

Original purpose of California Confidential Marriage Act to encourage persons living together without marriage to legalize their relationship by allowing them to do so with minimum of publicity and embarrassment. *Encinas v. Lowthian Freight Lines (1945) 69 Cal. App. 2d 156, 163, 158 P.2d 575*

[2] Out-of-State Marriages

Marriage validly contracted in another country recognized in California even though such marriage could not be validly contracted in *California. Toshiko Inaba v. Nagle (9th Cir. 1929) 36 F.2d 481, 481*

Marriage contracted outside California that would be valid by laws of jurisdiction where contracted as valid in *California. Colbert v. Colbert (1946) 28 Cal. 2d 276, 280, 169 P.2d 633*

Marriage considered "odious by common consent of nations" because polygamous or incestuous "by laws of nature" as not recognized in California even if valid where contracted. *McDonald v. McDonald (1936) 6 Cal. 2d 457, 459-460, 58 P.2d 163*

Common-law marriage validly contracted in Alabama recognized as valid in *California. In re Marriage of Smyklo (1986) 180 Cal. App. 3d 1095, 1099, 226 Cal. Rptr. 174*

Nevada marriage contracted by first cousins in violation of Nevada law as not recognized in California, even though they could have validly married in *California. Estate of Levie (1975) 50 Cal. App. 3d 572, 576, 123 Cal. Rptr. 445*

Where marriage between first cousins was incestuous and thus void where contracted, but could have been validly contracted in California, California court refused to recognize marriage for probate purposes but accorded survivor intestate succession rights as putative spouse. *Estate of Levie (1975) 50 Cal. App. 3d 572, 576-577, 123 Cal. Rptr. 445*

General rule recognizing marriages validly contracted elsewhere as validating out-of-state marriage between California residents even though they married outside state for avowed purpose of evading California premarital medical examination laws. *Estate of Perez (1950) 98 Cal. App. 2d 121, 122, 219 P.2d 35*

Polygamous marriage validly contracted in India recognized in California for limited purpose of allowing successive spouses to share equally in estate of deceased bigamous spouse. *Estate of Bir (1948) 83 Cal. App. 2d 256, 261-262, 188 P.2d 499*

[3] Proxy Marriage

California as having no strong policy against proxy marriages. *Barrons v. United States (9th Cir. 1951) 191 F.2d 92, 95*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageValidityGeneral OverviewFamily LawMarriageValidityCommon Law MarriagesFamily LawMarriageValidityIncestuous MarriagesFamily LawMarriageValidityPlural MarriagesFamily LawMarriageValidityProxy MarriagesFamily LawMarriageValidityPutative Marriages

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§ 359.190 Federal Statutes

[1] Classification of Aliens

Preferred immigration status for immediate relatives. *8 U.S.C. § 1154*

Excludable aliens. *8 U.S.C. § 1182*

[2] Deportation

Deportable aliens. *8 U.S.C. § 1251*

Apprehension and deportation; judicial review of deportation determination. *8 U.S.C. § 1252*

Suspension of deportation and adjustment of status for permanent residency. *8 U.S.C. § 1254*

[3] Immigration Generally

"Alien," "immigrant," and "spouse" defined. *8 U.S.C. § 1101*

Numerical limitations on immigrants. *8 U.S.C. §§ 1151-1152*

Prohibition on preferences, priorities, or discrimination in issuance of visas, except as provided by statute. *8 U.S.C. § 1152*

Allocation of immigrant visas; categories of preference priorities. *8 U.S.C. § 1153*

[4] Immigration Procedures

Procedure for granting immigrant status. *8 U.S.C. § 1154*

Revocation of petition for immigrant status. *8 U.S.C. § 1155*

Documents required for admission of immigrant. *8 U.S.C. § 1181*

Admission of nonimmigrants. *8 U.S.C. § 1184*

Conditional permanent residency status for alien spouses and children. *8 U.S.C. § 1186a*

Adjustment of status of nonimmigrant to that of permanent resident. *8 U.S.C. § 1255*

Rescission of adjustment of status. *8 U.S.C. § 1256*

[5] Naturalization

Naturalization of person whose spouse is United States citizen. *8 U.S.C. § 1430*

[6] Penalties for Violations

Restriction of future entry by aliens involved with marriage fraud. *8 U.S.C. §§ 1154(c), 1182(a)(6)(C)*

Penalties for misrepresentation or concealment of facts in connection with entry into United States. *8 U.S.C. § 1325(a)*

Penalties for marriage fraud in connection with immigration. *8 U.S.C. § 1325(b)*

[7] Visas

Issuance of visas. *8 U.S.C. § 1201*

Application for visa. *8 U.S.C. § 1202*

Immediate relative and special immigrant visas. *8 U.S.C. § 1204*

Legal Topics:

For related research and practice materials, see the following legal topics:
Immigration LawAdmissionSelection SystemPreferences & PrioritiesImmigration LawEnforcementCriminal OffensesMarriage Fraud

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§ 359.191 Decisions

[1] Annulment of Fraudulent Marriage Involving Alien

Marriage between alien and United States citizen annulled when alien's statements indicated he married merely to remain in United States and had no bona fide intention of fulfilling spousal duties. *In re Marriage of Rabie (1974) 40 Cal. App. 3d 917, 922, 115 Cal. Rptr. 594*

[2] Residency of Alien

Husband's status as nonimmigrant alien as not precluding finding of residency for purposes of dissolution of marriage. *In re Marriage of Dick (1993) 15 Cal. App. 4th 144, 154, 18 Cal. Rptr. 2d 743*

[3] Proof of Bona Fide Marriage

Burden on alien to prove marriage to United States citizen or permanent resident not contracted to evade immigration laws, once substantial evidence of fraud shown. *Sideropoulos v. Immigration & Naturalization Service (6th Cir. 1966) 357 F.2d 642, 643-644*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageValidityFraudulent MarriagesImmigration LawEnforcementCriminal OffensesMarriage Fraud

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32-359 California Forms of Pleading and Practice--Annotated § 359.192

§ 359.192 Law Reviews

Santana, *The Proverbial Catch-22: The Unconstitutionality of Section Five of the Immigration Marriage Fraud Amendments of 1986, 25 Cal. W.L. Rev. 1 (1988-1989)*

Note, *Alienating Sham Marriage for Tougher Immigration Penalties: Congress Enacts the Marriage Fraud Act, 15 Pepperdine L. Rev. 181 (1988)*

Livingston, *Plyer v. Doe: Illegal Aliens and the Misguided Search for Equal Protection, 11 Hastings Const. L.Q. 599 (1984).*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageValidityFraudulent MarriagesImmigration LawEnforcementCriminal OffensesMarriage Fraud

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32-359 California Forms of Pleading and Practice--Annotated §§ 359.193-359.209

[Reserved]

§§ 359.193[Reserved]

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E. Proof Of Marriage

32-359 California Forms of Pleading and Practice--Annotated § 359.210

§ 359.210 State Statutes

[1] Action to Determine Validity of Marriage

Right of either spouse to bring action to have validity of marriage determined and declared if other spouse denies marriage or refuses to join in declaration of marriage. *Fam. Code § 309*

[2] Declaration of Unrecorded Marriage

Procedure for purchasing and returning License and Certificate of Declaration of Marriage when no record of solemnization of marriage exists. *Fam. Code § 425*; *Health & Safety Code § 103180*

[3] Establishment of Record of Marriage

Filing of petition to establish fact, time, and place of marriage; venue. *Health & Safety Code § 103450*

Contents and verification of petition. *Health & Safety Code § 103455*

Time, place, and continuance of hearing. *Health & Safety Code § 103465*

Filing fee; hearing in probate department. *Health & Safety Code § 103470*

Order determining fact, time, and place of marriage. *Health & Safety Code § 103475*

Form and effective date of order. *Health & Safety Code § 103485*

Transmittal of certified copies of order to local registrar and county recorder. *Health & Safety Code § 103490*

[4] Hearsay Exceptions Relevant to Proving Fact of Marriage

"Hearsay evidence" defined. *Evid. Code § 1200*

Hearsay exception for evidence of writing made as record of marriage by one required to file such writing in designated public office and who actually completed filing. *Evid. Code § 1281*

Hearsay exception for evidence of statement of unavailable declarant concerning own marriage or divorce. *Evid. Code § 1310*

Hearsay exception for evidence of statement concerning marriage or divorce of relative or close family friend. *Evid. Code § 1311*

Hearsay exception for evidence of entry in family bible, other family books or charts, or similar record. Fam. Code § 1312

Hearsay exception for evidence of reputation among family members concerning marriage or divorce. *Evid. Code § 1313*

Hearsay exception for evidence of reputation in community concerning marriage or divorce of person residing in community when reputation arose. *Evid. Code § 1314*

Hearsay exception for evidence of statement in church record concerning marriage or divorce. *Evid. Code § 1315*

Hearsay exception for evidence of statement concerning marriage contained in marriage certificate. *Evid. Code § 1316*

[5] Presumptions Affecting Proof of Marriage

"Presumption" defined. *Evid. Code § 600*

Purpose and effect of presumptions affecting burden of proof. *Evid. Code §§ 605, 606*

Presumption of validity of ceremonial marriage as affecting burden of proof. *Evid. Code § 660*

Ceremonial marriage presumed valid. *Evid. Code § 663*

[6] Proof of Marriage

Consent to and solemnization of marriage provable under same general rules of evidence applicable in other cases. *Fam. Code § 305*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageProofGeneral OverviewFamily LawMarriageProofBurdens of ProofFamily LawMarriageValidityGeneral Overview

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32-359 California Forms of Pleading and Practice--Annotated § 359.211

§ 359.211 Decisions

[1] Estoppel to Deny Validity of Marriage

Husband who knew of wife's previous, undissolved marriage either before or shortly after his marriage to wife as estopped to deny validity of marriage and therefore bound by presumption that marriage was valid under *Evid. Code § 663*. *In re Marriage of Recknor (1982) 138 Cal. App. 3d 539, 546-547, 187 Cal. Rptr. 887*

[2] Sufficiency of Evidence

First wife's testimony that she was never divorced from decedent, referred to self as wife in letter to decedent, and briefly reconciled with decedent after he separated from second wife as sufficient to rebut presumption of validity of second marriage for probate purposes. *Patillo v. Norris (1976) 65 Cal. App. 3d 209, 216, 135 Cal. Rptr. 210*

[3] Time Limits for Bringing Action to Determine Validity of Marriage

No specific limitation period for establishing validity of marriage under former statute superseded by *Fam. Code § 309*; action may be brought any time during joint lives of spouses. *In re Marriage of Smyklo (1986) 180 Cal. App. 3d 1095, 1099-1100, 226 Cal. Rptr. 174*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageGeneral OverviewFamily LawMarriageValidityGeneral OverviewFamily LawMarriageValidityPresumptions

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32-359 California Forms of Pleading and Practice--Annotated §§ 359.212-359.229

[Reserved]

§§ 359.212[Reserved]

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32-359 California Forms of Pleading and Practice--Annotated § 359.230

§ 359.230 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3302] for Goods Sold and Delivered as Necessaries to Spouse [Fam. Code § 914] While Spouses Living Together [Fam. Code § 4301]--By Creditor Against Both Spouses

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3302] for Goods Sold and Delivered as Necessaries to Spouse [Fam. Code § 914] While Spouses Living Together [Fam. Code § 4301]--By Creditor Against Both Spouses

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	COMPLAINT FOR DAMAGES FOR GOODS
Defendants.	)	SOLD AND DELIVERED
	)	
	)	

Plaintiff alleges:

1. Defendants _____ [*name*] and _____ [*name*] are, and at all times herein mentioned were, husband and wife.

2. Defendants are, and at all times herein mentioned were, residents of [the _____ (*name*) (Municipal Court *or* Judicial *or* Justice Court) District in] _____ County, California [*or allege other basis of venue as appropriate*].

3. On or about _____ [*date*], defendant _____ [*name*] became indebted to plaintiff for the following goods sold and delivered [at defendant's special request] by plaintiff to defendant _____ [*name*]: _____ [*describe goods*]. Defendant _____ [*name*] then and there agreed to pay plaintiff the _____ [sum of $ _____ *or* reasonable value of the goods].

4. Defendants _____ [*name*] and _____ [*name*] were living together at the time the goods were delivered to defendant _____ [*name of spouse contracting for necessaries*].

5. The debt agreed to by defendant _____ [*name*] was for goods necessary for his/her support and maintenance.

[6. *If plaintiff seeks reasonable value of goods sold and delivered, allege:* At the time the goods were delivered to defendant _____ (*name*), the reasonable value of the goods was $_____.]

7. Neither the whole nor any part of the amount due[, except the sum of $_____,] has been paid, although demand therefor has been made. There is now due and unpaid from defendants to plaintiff the sum of $_____[, together with interest at the rate of _____ percent a year from _____ (*date*)].

[8. Defendant _____ (*name of spouse not contracting for necessaries*) holds certain separate property from which a judgment against defendants could be satisfied.]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For the sum of $_____;

[2. For interest on the sum of $_____ at _____ percent a year from and after _____ (*date*);]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____[*signature*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled matter. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to matters therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____[*signature*]

[2] Use of Form

This form of complaint is for use by a creditor supplying necessaries to a spouse while the spouses are living together. The complaint is for use for goods sold and delivered for an agreed price or for reasonable value. It names as defendants both spouses since creditors, to whom amounts are owing for necessaries provided to a spouse while the spouses are living together, may sue the other spouse directly to reach that spouse's separate property [*see In re Marriage of Higgason (1973) 10 Cal. 3d 476, 488, 110 Cal. Rptr. 897, 516 P.2d 289]* .

[3] Allegations

The complaint contains the following allegations: (1) that the defendants were husband and wife (Paragraph 1) [*Fam. Code § 914(a)*; *Credit Bureau of Santa Monica Bay Dist., Inc. v. Terranova (1971) 15 Cal. App. 3d 854, 860, 93 Cal. Rptr. 538* (spouse not contracting for necessaries as necessary party to action)]; (2) capacity and residence of defendants (Paragraph 2); (3) that articles were sold or furnished to defendant (Paragraph 3) [*Nissen v. Bendixsen (1886) 69 Cal. 521, 523, 11 P. 29]* ; (4) that the spouses were living together at the time the goods were supplied to one of them (Paragraph 4) [*Fam. Code § 4301*; *In re Marriage of Higgason (1973) 10 Cal. 3d 476, 488, 110 Cal. Rptr. 897, 516 P.2d 289]* ; (5) that the debt incurred was for necessaries (Paragraph 5) [*Fam. Code § 914*; *Nissen v. Bendixsen (1886) 69 Cal. 521, 522, 11 P. 29* ; *Credit Bureau of Santa Monica Bay Dist., Inc. v. Terranova (1971) 15 Cal. App. 3d 854, 860, 93 Cal. Rptr. 538]* ; (6) an optional allegation for use when the creditor seeks the reasonable value of the goods sold and delivered (Paragraph 6); (7) that no part or some part of the price of the goods has been paid and the amount still due on the obligation (Paragraph 7) [*Nissen v. Bendixsen (1886) 69 Cal. 521, 523, 11 P. 29]* ; and (8) an optional allegation that the noncontracting spouse owns separate property from which a judgment in favor of plaintiff could be satisfied (Paragraph 8) [*Credit Bureau of Santa Monica Bay Dist., Inc. v. Terranova (1971) 15 Cal. App. 3d 854, 860, 93 Cal. Rptr. 538* (plaintiff as permitted to allege that separate property exists from which judgment may be satisfied, although not required to do so)].

[4] Jurisdiction, Venue, and Procedural Requirements

If this action is brought under the Family Code, jurisdiction is in the superior court [*Fam. Code § 200*]. Proper venue for this action is established by the allegation concerning the defendants' residence (Paragraph 2) [*Code Civ. Proc. § 395(a)*].

Pleadings filed under the Family Code must be verified [*Fam. Code § 212*].

[5] Cross References

For a related form, see *§ 359.270*.

For discussion and forms relating to complaints for goods sold and delivered, see Ch. 121, *Common Counts* .

For discussion and forms relating to community property, see Ch. 122, *Community Property* .

For discussion relating to support obligations of spouses on termination of marriage, see Ch. 225, *Dissolution of Marriage: Spousal Support* .

[6] State Statutes

When interest recoverable on damages. *Civ. Code § 3287*

Measure of damages for breach of obligation to pay money. *Civ. Code § 3302*

Personal liability of married person for debts incurred by spouse for necessaries of life. *Fam. Code § 914(a)*

Liability of married person's separate property for debts incurred by spouse for necessaries of life; right of reimbursement if nonexempt community property was available at time debt was paid. *Fam. Code § 914(b)*

Spouse's duty to support other spouse, out of his or her separate property if there is no community property available, while they are living together. *Fam. Code § 4301*

[7] Decisions

[a] Necessaries Defined

Necessaries supplied to spouse defined as goods suitable to his or her condition and suitable to his or her spouse's station and circumstances in life. *Nissen v. Bendixsen (1886) 69 Cal. 521, 521-522, 11 P. 29*

Spouse's obligations incurred while spouses living together as necessaries when reasonably necessary for spouse's support according to spouses' station in life. *In re Marriage of Higgason (1973) 10 Cal. 3d 476, 488, 110 Cal. Rptr. 897, 516 P.2d 289*

[b] Other Spouse as Necessary Party

Under former statute superseded by *Fam. Code § 914*, creditor to whom amounts are owing for necessaries supplied to husband as permitted to sue wife directly and to reach certain of her separate property. *In re Marriage of Higgason (1973) 10 Cal. 3d 476, 488, 110 Cal. Rptr. 897, 516 P.2d 289*

In action for debts incurred by husband for necessaries, wife as necessary party in order that she may have opportunity to litigate issues on which her separate property may be found liable. *Credit Bureau of Santa Monica Bay Dist., Inc. v. Terranova (1971) 15 Cal. App. 3d 854, 860, 93 Cal. Rptr. 538*

[c] Pleading

Complaint as sufficient when it alleges that creditor supplied spouse with certain specified articles that were necessary for her support and maintenance even though it did not allege that goods were sold and delivered to other spouse. *Nissen v. Bendixsen (1886) 69 Cal. 521, 522-523, 11 P. 29*

Complaint as required to allege that (a) debt was for necessaries and (b) that the husband and wife were living together at the time the necessaries were furnished. *Credit Bureau of Santa Monica Bay Dist., Inc. v. Terranova (1971) 15 Cal. App. 3d 854, 860, 93 Cal. Rptr. 538*

Complaint as permitted, but not required, to allege that separate property exists from which a judgment under former statute superseded by *Fam. Code § 914* may be satisfied. *Credit Bureau of Santa Monica Bay Dist., Inc. v. Terranova (1971) 15 Cal. App. 3d 854, 860, 93 Cal. Rptr. 538*

[d] Property Available to Creditor for Necessaries

Spouse as required to support other spouse out of his or her separate property when spouses are living together and there is no community or quasi-community property. *In re Marriage of Epstein (1979) 24 Cal. 3d 76, 83, 154 Cal. Rptr. 413, 592 P.2d 1165*

Duty of support imposed on husbands and wives as requiring use of separate property of spouses when there is no community property. *See v. See (1966) 64 Cal. 2d 778, 784, 51 Cal. Rptr. 888, 415 P.2d 776*

Community property as available in its entirety to satisfy spouse's debts to creditors. *Hansford v. Lassar (1975) 53 Cal. App. 3d 364, 379, 125 Cal. Rptr. 804*

Judgment for creditor as properly directing the separate property of a spouse from which the obligation for necessaries may be satisfied. *Credit Bureau of Santa Monica Bay Dist., Inc. v. Terranova (1971) 15 Cal. App. 3d 854, 860-861, 93 Cal. Rptr. 538*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsGeneral OverviewFamily LawMarital Termination & Spousal SupportGeneral OverviewFamily LawMarriageGeneral Overview

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A. Legal Aspects Of Marriage

32-359 California Forms of Pleading and Practice--Annotated §§ 359.231-359.249

[Reserved]

§§ 359.231[Reserved]

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32-359 California Forms of Pleading and Practice--Annotated § 359.250

§ 359.250 Combined Application for License to Marry [Fam. Code § 355], License to Marry [Fam. Code § 351], and Certificate of Registry of Marriage [Fam. Code § 359]

[1] FORM Combined Application for License to Marry [Fam. Code § 355], License to Marry [Fam. Code § 351], and Certificate of Registry of Marriage [Fam. Code § 359]

Click here to view image.

[2] Use of Form

This form is a sample of Department of Health Services Form VS-117, which is distributed to the counties by the State Registrar of Vital Statistics. This form serves as the application for license to marry, the license to marry, and the certificate of registry of marriage [*see Fam. Code § 359*]. The first three sections of the form (Groom Personal Data, Bride Personal Data, and Affidavit) constitute the application for license to marry. The personal data sections are filled out by the court clerk, using information and documents provided by the applicants [*see Fam. Code § 354*]. The bride and groom must both sign the application (lines 23, 24) after the personal data sections have been completed. The fourth section of the form (lines 25A-25F) constitutes the license to marry, which is to be completed by the clerk.

The license application process and the requirements for issuance of a marriage license are discussed in *§ 359.44[4][a]* et seq.

The fifth through seventh sections of the form (lines 26A-31) constitute the certificate of registry of marriage. These sections will still be blank when the applicants receive the form from the clerk. The applicants must take the form with them to the person who is to perform the marriage ceremony [*Fam. Code § 421*]. That person must complete the certification section of the form (lines 28-29F), obtain the signature and address of at least one witness to the ceremony (lines 26A-27C), and return the form to the county recorder of the county where the license was issued within 10 days after the ceremony [*Fam. Code §§ 359(d)-(f), 422, 423*]. The form may be hand delivered or mailed to the recorder.

After checking the form to ascertain that it has been completely and correctly filled out, the recorder will sign and date the certificate of registry (lines 30A-31), prepare a copy of the certificate, and forward the original certificate to the

State Registrar.

The married couple does not permanently retain any part of Form VS-117. They may, on request, obtain a ceremonial (that is, unofficial) marriage certificate from the person who performs the marriage ceremony [*Fam. Code § 424*; *see* discussion in *§ 359.49*]. If, after the ceremony has been performed and the certificate of registry has been returned, either spouse needs proof of the marriage, he or she may obtain a certified copy of the certificate of registry from the county recorder or the State Registrar [*Health & Safety Code § 103525*; *see* discussion in *§ 359.48[5]*].

When the marriage ceremony is unconventional [*see Fam. Code § 307*], registration of the marriage and the content of the required License and Certificate of Declaration of Marriage are governed by *Health & Safety Code § 103180*. An unconventional marriage must be registered by the spouses, or by a witness who signed the License and Certificate of Declaration of Marriage, within 4 days after the ceremony with the local registrar of marriages for the county in which the License and Certificate was issued, and the endorsed License and Certificate must be returned to the county recorder of the county in which it was issued within 10 days after the ceremony [*Fam. Code § 307(b)*; *Health & Safety Code § 103180(b)*]. In these cases, a different Department of Health Services form would be used instead of Form VS-117 [*see Fam. Code § 307(a)*; *Health & Safety Code § 103180(a)*].

[3] State Statutes

Requirement to obtain marriage license from county clerk before entering into or declaring marriage. *Fam. Code § 350*

Form of marriage license. *Fam. Code § 355*

Certificate of registry of marriage required to be completed by applicants and person solemnizing marriage. *Fam. Code § 359*

Procedure for obtaining duplicate certificate of registry in case original lost or destroyed before being returned. *Fam. Code § 360*

Information to be stated in certificate of registry. *Health & Safety Code § 103175*

Procedure and fee for obtaining certified copy of certificate of registry. *Health & Safety Code §§ 103525, 103625*

Making of false statements or misrepresentations in connection with obtaining of marriage license as perjury. *Penal Code § 118*

Information shown on marriage license. *Fam. Code § 351*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageProofGeneral OverviewFamily LawMarriageValidityGeneral Overview

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B. Formal Requirements For Valid Marriage

32-359 California Forms of Pleading and Practice--Annotated § 359.251

§ 359.251 Request of Minor to Marry [Fam. Code §§ 302, 303, 304]--Cal. Judicial Council Form FL-910

[1] FORM Application for Order Granting Minor Permission to Marry [Fam. Code §§ 302, 303]

Click here to view image.

[2] Use of Form

The form in [1], *above,* is a reproduction of the optional Judicial Council form of Request of Minor to Marry [Cal. Judicial Council Form FL-910]. This form is available in an interactive electronic format in *LexisNexis Automated California Judicial Council Forms,* which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

An unmarried male or female under 18 years of age who wishes to marry must obtain a court order granting permission to marry [*see Fam. Code § 302(a)*; § 359.252]. When a minor has no parent or has no parent who is capable of consenting to the marriage, the court may make an order consenting to the issuance of a marriage license and granting the minor permission to marry [*Fam. Code § 303*].

When a minor has written permission to marry from a parent or guardian, this permission must be attached to the form [*see Fam. Code § 302(b)*].

An application for a court order permitting a minor to marry must be verified [*Fam. Code § 212*].

[3] State Statutes

Minor as capable of consenting to and consummating marriage if both written consent of parent or parents and court order granting permission for marriage filed with court. *Fam. Code § 302*

Superior court as authorized to consent to marriage of minor if minor has no parent capable of giving such consent. *Fam. Code § 303*

Superior court as authorized to require both prospective spouses to participate in premarital counseling if either one is minor. *Fam. Code § 304*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageCertificates & LicensesMinor ApplicantsFamily LawParental Duties & RightsConsentGeneral OverviewFamily LawParental Duties & RightsConsentMarriage

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B. Formal Requirements For Valid Marriage

32-359 California Forms of Pleading and Practice--Annotated § 359.252

§ 359.252 Order on Request of Minor to Marry [Fam. Code §§ 302, 303, 304]--Cal. Judicial Council Form FL-915

[1] FORM Order Granting Minor Permission to Marry With Consent of Parent or Guardian [Fam. Code § 302]

Click here to view image.

[2] Use of Form

The form in [1], *above,* is a reproduction of the optional Judicial Council form of Order on Request of Minor to Marry [Cal. Judicial Council Form FL-915]. This form is available in an interactive electronic format in *LexisNexis Automated California Judicial Council Forms,* which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

An unmarried male or female under 18 years of age who wishes to marry must obtain a court order granting permission to marry [*see Fam. Code § 302(a)*]. The court order and written consent of the parents of each underage person must be filed with the clerk of the court and a certified copy of the order must be presented to the county clerk at the time the marriage license is issued [*Fam. Code § 302(b)*].

When a minor has no parent or has no parent who is capable of consenting to the marriage, the court may make an order consenting to the issuance of a marriage license and granting the minor permission to marry [*Fam. Code § 303*]. The order must be filed with the clerk of the court and a certified copy of the order must be presented to the county clerk at the time the marriage license is issued [*Fam. Code § 303*].

As part of the court order granting permission to marry, the court must require the parties to the prospective marriage to participate in premarital counseling concerning the social, economic, and personal responsibilities incident to marriage, when the court considers the counseling to be necessary [*Fam. Code § 304*]. In determining whether to order the parties to participate in premarital counseling, the court must consider, among other factors, the parties' ability to pay for the counseling [*Fam. Code § 304*]. Without their consent, the parties cannot be required to confer with counselors provided by religious organizations of any denomination [*Fam. Code § 304*].

When a court order is not obtained, a marriage of a minor is voidable and may be adjudged a nullity [*see Fam. Code § 2210*].

A parent's authority over a minor child ceases on the child's marriage [*Fam. Code § 7505(b)*].

[3] Cross References

For a related form, see *§ 359.251*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageCertificates & LicensesMinor ApplicantsFamily LawParental Duties & RightsConsentGeneral OverviewFamily LawParental Duties & RightsConsentMarriage

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32-359 California Forms of Pleading and Practice--Annotated §§ 359.253-359.269

[Reserved]

§§ 359.253[Reserved]

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C. Proof Of Marriage

32-359 California Forms of Pleading and Practice--Annotated § 359.270

§ 359.270 Petition for Declaration of Validity of Marriage
[Fam. Code § 309]

[1] FORM Petition for Declaration of Validity of Marriage
[Fam. Code § 309]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR DECLARATION OF VALIDITY
Respondent.	)	OF MARRIAGE
	)	
	)	

Petitioner alleges:

1. Respondent is now and at all times herein mentioned was a resident of _____ County, California [*or allege other basis for venue*].

2. On _____ [*date*], the county clerk of _____ County, California, issued a marriage license to petitioner and respondent, who were both over the age of 18 and otherwise capable of consenting to marriage under the laws of the State of California.

3. Pursuant to the terms of the marriage license, and by the mutual and freely given consent of petitioner and respondent, petitioner and respondent were married in _____ County on _____ [*date*

]. The marriage was solemnized by _____ [*name, title, and other pertinent information, e.g.,* Reverend Jane C. Pope of the Ecumenical Church at 1320Page Street, San Francisco, California]. The ceremony was witnessed by _____ [*name and current address of witness or witnesses*].

4. The marriage of petitioner and respondent has not been annulled or dissolved, and there has been no legal separation of the parties.

[5. No record of the solemnization of the marriage is known to exist.]

[*EITHER*]

6. Respondent refuses to join in a written declaration of the marriage, as provided for by *Family Code Section 425*.

[*OR/AND*]

7. Respondent denies the marriage _____ [*specify context of denial, if applicable, e.g.,* and has refused to support petitioner and to recognize petitioner's community property rights].

[*CONTINUE*]

8. Petitioner desires to have the validity of the marriage established in order to _____ [*specify, e.g.,* institute proceedings to dissolve the marriage and establish his/her rights to community property and support.
WHEREFORE, petitioner prays judgment as follows:

1. For a declaration that the marriage of _____ [*name of petitioner*] and _____ [*name of respondent*] is valid;

2. For costs of suit herein incurred; and

3. For such other relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 359.251.*]

[2] Use of Form

This form is a petition designed to be used by a spouse who brings an action to determine the validity of the marriage. If either spouse denies the marriage or refuses to join in a declaration of the marriage [*see Fam. Code § 425*; discussion in

§ 359.112], the other spouse may proceed, by action, to have the validity of the marriage determined and declared [*Fam. Code § 309*].

The form includes an optional provision stating that there is no known record of the marriage (Paragraph 5). Ordinarily, an action to establish the validity of a marriage would not be necessary when there is an official record of the marriage. However, the lack of an official record is not a prerequisite to commencing such an action [*see Fam. Code § 309*].

The pleading is designated as a petition and the parties as petitioner and respondent [*Cal. Rules of Ct., Rule 5.22*]. This action is governed by the provisions of law applicable to civil actions generally [*Cal. Rules of Ct., Rule 5.22*]. Thus, the petition must be filed with the superior court in the county in which the respondent resides at the commencement of the action, unless the respondent resides outside California or his or her county of residence is unknown to the petitioner. In either of these cases, the petitioner may file the petition in the county of his or her choice. If the respondent is about to depart from California, the action may be filed where either spouse resides or where service on the respondent is made [*Code Civ. Proc. § 395(a)*; *see Fam. Code § 200* (superior court has jurisdiction of proceedings under Family Code)].

The petition must be verified [*Fam. Code § 212*]. The response, if any, must be filed within 30 days after service upon the respondent of the summons and a copy of the petition [*Cal. Rules of Ct., Rule 5.22*] and must be verified [*Fam. Code § 212*].

If neither spouse disputes the validity of the marriage, but no record is known to exist of the solemnization of the marriage, the spouses should obtain and return a License and Certificate of Declaration of Marriage [*Fam. Code § 425*; *see* discussion in *§ 359.112*] rather than bring a validation action. If one spouse is deceased, or there is some other reason the spouses cannot both participate in the declaration of marriage procedure, either spouse alone may bring a proceeding to establish a record of the marriage under *Health & Safety Code § 103450 et seq.* [*see § 359.271*]. This type of proceeding may also be brought by someone other than one of the spouses, if the petitioner is a legitimately interested person [*Health & Safety Code § 103450*]. Like the declaration of marriage procedure, it establishes only the fact of the marriage and not its validity.

[3] State Statutes

Action to determine validity of marriage. *Fam. Code § 309*

Venue in civil actions. *Code Civ. Proc. § 395*

[4] Rules of Court

Actions pursuant to Family Law Act governed by provisions of law applicable to civil actions generally; actions commenced by filing of petition and defended by filing of appropriate response within 30 days after service of summons and petition. *Cal. Rules of Ct., Rule 5.22*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageProofGeneral OverviewFamily LawMarriageValidityGeneral Overview

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 359 MARRIAGE
PART IV. FORMS
C. Proof Of Marriage

32-359 California Forms of Pleading and Practice--Annotated § 359.271

§ 359.271 Petition to Establish Record of Marriage [Health & Safety Code § 103450]

[1] FORM Petition to Establish Record of Marriage [Health & Safety Code § 103450]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION TO ESTABLISH RECORD OF MARRIAGE
Respondent.	)	
	)	
	)	

Petitioner, _____ [*name*], respectfully represents:

1. Petitioner is a resident of _____ County.

2. On or about _____ [*date*], the county clerk of _____ County, California [*or specify state where license was issued*], issued a marriage license to petitioner and _____ [*name of spouse*].

3. Pursuant to the terms of the marriage license, petitioner and _____ [*name of spouse*] were married in _____ County, California [*or specify state where marriage was entered into*] on _____ [*date*]. The marriage was solemnized by _____ [*name, title, and other pertinent information, e.g.,* Reverend Jane C. Pope of the Ecumenical Church at 1320 Page Street, San Francisco, California]. The ceremony was witnessed by _____ [*name and current address of witness or witnesses*].

[*EITHER*]

4. The marriage was never registered because [*briefly set forth reason for nonregistration*].

[*OR*]

4. No certified copy of the certificate of registration of the marriage is available because [*briefly set forth reason that copy is unavailable*].

[*CONTINUE*]

WHEREFORE, petitioner prays judgment as follows:

1. For an order determining that the marriage of petitioner and _____ [*name of spouse*] did occur on the date and at the place stated in the above petition; and

2. For such other relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

[*Verification. See § 359.251.*]

[2] Use of Form

This form is a petition designed to be used by a person who brings an action to establish the fact, time, and place of a marriage that is not registered or for which a certified copy of the registration is not available. Such a proceeding may be brought by either spouse or by any other interested person [*Health & Safety Code § 103450*]. This form is designed to be used by a spouse.

A petition to establish the fact, time, and place of a marriage may be filed in the superior court in the county where the marriage is alleged to have occurred, the county where the person whose marriage is sought to be established resides, or the county where that person was domiciled at the date of death, if he or she is deceased [*Health & Safety Code § 103450*]. The petition must be verified, and must contain all the facts necessary to enable to the court to determine the fact, time, and place of the marriage upon the proofs adduced on behalf of the petitioner at the hearing [*Health & Safety Code § 103455*]. There is a modest filing fee, in addition to the county's law library fee [*Health & Safety Code § 103470*].

The form of the order establishing a record of marriage is prescribed by the State Registrar of Vital Statistics. The order

must be entered on a blank form provided by the State Registrar [*Health & Safety Code § 103485*].

If both spouses are available to assist in establishing a record of the marriage, they may establish such a record through a declaration procedure [*see Fam. Code § 425*] rather than through a court proceeding. This procedure is discussed in *§ 359.112*.

[3] State Statutes

Establishment of fact, time, and place of marriage. *Health & Safety Code § 103450 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarriageProofGeneral OverviewFamily LawMarriageValidityGeneral Overview

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
SPECIAL ALERT TO CHAPTER 359 SPECIAL ALERT--CALIFORNIA SUPREME COURT RULING ON PROPOSITION 8: STRAUS v. HORTON

32-359SA California Forms of Pleading and Practice--Annotated Scope

Scope

The California Supreme Court ruled for the third time on the validity of same-sex marriages in *Strauss v. Horton* (May 26, 2009) 2009 Cal. LEXIS 4626, commonly referred to as the Prop 8 challenge. In a densely reasoned decision, it upheld the right of the people to reverse the Court's 2008 decision in *In re Marriage Cases* (2008) 43 Cal. 4th 757 by voter initiative, prospectively eliminated the rights of same-sex partners to marry in California and upheld the validity of 18,000 marriages performed prior to the enactment of Proposition 8.

This case presents profoundly difficult questions that go far beyond the validity of same-sex marriage in California. One significant question is: Who is the final authority on an issue of equal protection?

The majority opinion minimizes the effect of Proposition 8, interpreting it as limiting use of the designation of "marriage" and not the substantive rights of property, parenting and the like, thus gutting much of the Court's 2008 decision that the core of the deprivation was of the respect and recognition accorded the status of marriage itself. *Strauss v. Horton* contradicts the Court's 2008 holding that the right of marriage per se was constitutionally required under the privacy, due process, and equal protection clauses of the California Constitution.

Acknowledging all constitutional provisions establishing individual rights serve as a countermajoritarian check, the majority also acknowledged the people's right to delimit individual rights. This is the essence of the difficulty of the case. In a concurring opinion, Justice Werdegar noted the majority's definition of "revision" "avoids the daunting task of reconciling with our constitutional tradition a voter initiative clearly motivated at least in part by group bias."

This opinion should spark debate on whether California should revise its initiative system--perhaps to curtail the power of initiatives to limit core individual rights such as privacy and equal protection.

This opinion will be incorporated into this chapter and other chapters in future releases.

This summary is taken from the *Emerging Issue Analysis of Richmond on the Challenge to California Proposition 8*, which may be accessed in full for a fee at Lexis.com at the following location: Legal > Secondary Legal > Emerging Issues Analysis > All Emerging Issues, Combined by Area of Law > Family Law

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[b] Separate Residential Units

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§ 361.21 Nature and Purpose of Mechanics' Lien

§ 361.22 Personal Liability of Owner

§ 361.23 Types of Liens

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[2] Liens on Works of Improvement

[3] Site Improvement Liens

[4] Union Trust Fund Liens

§ 361.24 Design Professionals' Lien

[1] In General

[2] Amount of Lien

[3] Procedure for Obtaining Lien

[a] Demand for Payment

[b] Recording Notice of Lien

[4] Priority of Lien

[5] Automatic Expiration

[6] Release of Lien on Satisfaction by Owner

[7] Enforcement

[8] Other Remedies Not Affected

§ 361.25 Prerequisites to Entitlement

[1] Attachment of Lien

[2] Furnishing Materials

[3] Permanency of Improvement

[4] Permanency of Contribution to Improvement

[a] General Requirement

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[1] Required Owner's Authorization

[2] Statutory Agents of Owner

[3] Subcontractor Distinguished From Materialman

[4] Owner's Knowledge of Improvement

[a] Effect of Knowledge

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§ 361.27 Property Subject to Lien

[1] Works of Improvement

[2] Site Improvements

[3] Condominiums

[4] Homesteads Not Exempt From Lien

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[1] In General

[2] Limitation of Owner's Liability

[a] Filing Contract and Recording Bond

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[a] No Priority Until Commencement

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§ 361.30 Effect of Agreement to Arbitrate

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[9] Other Causes of Action or Claims for Relief Not Barred

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[2] Stop Notice as Sole Remedy

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[1] Persons Entitled to Serve

[2] Owner's Demand for Notice

[3] Owner's Duty to Withhold

§ 361.43 Service on Construction Lender

[1] Construction Lender Defined

[2] Service of Stop Notice

[3] Bonded Stop Notice Defined

[4] Persons Entitled to Serve

[5] Lender's Duty to Withhold

[6] Amount Withheld

§ 361.44 Priority Over Assignments

§ 361.45 Action on Stop Notice Claim

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[2] Claim Coextensive With Owner's Obligation

[3] Insufficient Funds for Claims

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[2] Performance Bond Distinguished

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[6] Preference for Subordinated Secured Encumbrances

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[10] Prerequisites for Limiting Recovery

[11] Effect of Recording Bond and Contract

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§ 361.62 Suit on Bond

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[2] Invalidity of "Pay If Paid" Provision

[3] Performance Required by Claimant

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§ 361.71 Forfeiture

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[b] Recording Claim of Lien

[8] Priority

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[4] Permanency of Contribution to Improvement

[5] Amount of Lien

[6] Property Subject to Lien

[7] Scope of Owner's Responsibility

[8] Priority of Mechanics' Liens

[9] Preliminary 20-Day Notice

[10] Recording of Claim of Lien

[a] Completion of Work of Improvement

[b] Separate Residential Units

[c] Conformity With Lien Claim Demand

[d] Prerequisite Fees

[11] Foreclosure of Lien

[a] Actions to Foreclose Lien

[b] Defenses

[c] Time Limitations

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[ii] Indispensable Parties

[d] Lis Pendens

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[13] Interest Before Judgment

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[2] Persons Entitled to Serve

[3] Prerequisites for Effective Service

[4] Bonded Stop Notices

[5] Duty to Withhold

[a] In General

[b] Assignment of Loan Fund

[6] Action to Enforce Stop Notice

[7] Insufficient Funds to Meet Claims

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[1] Nature of Remedy

[a] In General

[b] Equitable Garnishment

[c] Compared to Mechanics' Lien

[d] Abolition of Equitable Lien

[2] Duty to Withhold

[a] In General

[b] Estoppel

[c] Assignment

[d] Time for Service

[3] Actions to Enforce Claim

[a] In General

[b] Independent Remedy

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[e] Necessary Party

[f] Right to Personal Judgment

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[b] Construction of Bonds

[2] Recording of Contractor's Payment Bond

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[c] Requirements

[2] Forfeiture

[3] Progress Payments

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[5] Waiver

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[3] Laches

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[1] When Notice Is Required

[2] Preparation of Notice

[3] Time for Service

[4] Place and Manner of Service

[5] Proof of Service

[6] File With Recorder

§ 361.161 Preparation, Recording, and Service of Claim of Lien

[1] Preparation of Claim of Lien

[2] Place of Recording

[3] Time to Record

§ 361.162 Action to Foreclose Lien

[1] Commencement of Time to File Action

[2] Expiration of Time to File Action

[3] Preparation of Complaint

[4] Preparation and Service of Summons

[5] Joinder of Indispensable Parties

[6] Venue

[7] Claimant's Right to Join in Pending Action

[8] Consolidation of Action

[9] Notice of Lis Pendens

[10] Jury Trial

[11] Defense of Action

[12] Dismissal

[13] Judgment

§ 361.163 Petition to Release Property From Lien

[1] Time to File Petition

[2] Venue

[3] Preparation of Petition

[4] Service of Petition and Order for Hearing

[5] Judgment

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§ 361.170 Service of Stop Notice and Bonded Stop Notice

[1] Preparation

[2] Service

[3] Effect

§ 361.171 Enforcement of Payment of Claim in Stop Notice or Bonded Stop Notice

[1] Commencement of Time to File Action Against Owner or Construction Lender

[2] Expiration of Time to File Action

[3] Preparation of Complaint

[4] Preparation and Service of Summons

[5] Indispensable Parties

[6] Venue

[7] Notice of Commencement

[8] Prosecution of Action

[9] Claimants' Right to Join in Pending Action

[10] Consolidation of Actions

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§ 361.180 Action on Payment Bond [Civ. Code §§ 3239-3242]

[1] Time Limitations

[2] Notice Requirements (Contracts Entered Into On or After January 1, 1995)

[3] Preparation of Complaint

[4] Preparation and Service of Summons

[5] Venue

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§ 361.190 Preliminary 20-Day Notice (Private Work) [Civ. Code § 3097]

[1] FORM

[2] Use of Form

[3] Contents of Notice

[a] General Requirements

[b] Description of Labor or Materials

[c] Invoice as Substitute for Notice

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[5] Cross References

§ 361.191 Declaration of Proof of Service of Preliminary 20-Day Notice [Civ. Code § 3097.1]

[1] FORM

[2] Use of Form

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§ 361.192 Claim of Lien [Civ. Code § 3084]

[1] FORM

[2] Use of Form

[3] Contents of Claim of Lien

[a] In General

[b] Errors in Claim

[i] Prohibition

[ii] Property Description Errors

[iii] Willful Errors

[iv] Preliminary Notice or Complaint

[c] Variance in Complaint

[4] Acknowledgment

[5] Cross References

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[1] FORM

[2] Use of Form

[3] When Claimant Must Segregate

[a] In General

[b] Separate Residential Units

[c] Failure to Segregate When Required

[4] Single Structure on Multiple Parcels

[5] Binding Effect of Designated Amounts

§ 361.194 Claim of Design Professionals' Lien [Civ. Code §§ 3081.2, 3081.3]

[1] FORM

[2] Use of Form

[3] Acknowledgement

[4] Time to Record

[5] Contents of Claim of Lien

§ 361.195 Extension of Credit and Notice Thereof [Civ. Code § 3144]--Between Claimant and Owner

[1] FORM

[2] Use of Form

[3] Extension of Credit

[4] Cross References

§ 361.196 Notice of Extension of Credit [Civ. Code § 3144]--Allegation of Agreement Between Claimant and Contractor

[1] FORM

[2] Use of Form

§ 361.197 Waiver of Statute of Limitations by Owner and Notice Thereof

[1] FORM

[2] Use of Form

§ 361.198 Assignment of Debt and Lien

[1] FORM

[2] Use of Form

[3] Assignment of Debt Secured by Mechanics' Lien

[4] Cross References

§ 361.199 Notice of Nonresponsibility by Owner [Civ. Code § 3094]

[1] FORM

[2] Use of Form

[3] Contents of Notice

[4] Requirements for Effective Posting

[a] Knowledge

[b] When Notice May Be Given

[5] Responsibility for Improvement

[a] Owner's Responsibility

[b] Holder of Deed of Trust

[6] Cross References

§ 361.200 Notice of Completion [Civ. Code § 3093]

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[2] Use of Form

[3] Contents of Notice

[4] Owner Defined

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[a] Defined

[b] Use or Occupation

[c] Acceptance

[d] By Public Entity

[e] Cessation of Labor

[6] Owner's Duty to Notify Claimants That Notice of Completion or Cessation Has Been Recorded

[7] Cross References

§ 361.201 Complaint for Damages [Civ. Code § 3300] for Breach of Written Contract--And to Foreclose Mechanics' Lien--By Original Contractor

[1] FORM

[2] Use of Form

[3] Essential Allegations

[4] Defendants

[5] Verification

[6] Jurisdiction and Venue

[7] Cross References

§ 361.202 Complaint for Damages [Civ. Code § 3300] for Breach of Written Contract--And to Foreclose Mechanics' Lien--By Persons Other Than Original Contractor

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[2] Use of Form

[3] Allegations

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Cross References

§ 361.205 Allegation--Notice of Completion Ineffective to Shorten Time Period Required for Recording of Claim of Lien

[1] FORM

[2] Use of Form

[3] Cross References

§ 361.206 Statement of Decision

[1] FORM

[2] Use of Form

[3] Cross References

§ 361.207 Judgment of Foreclosure of Mechanics' Lien and Order of Sale

[1] FORM

[2] Use of Form

[3] Order of Sale

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[2] Use of Form

[3] Allegations

[4] Verification

[5] Petition as Deemed Controverted

[6] Attorney's Fees

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[2] Use of Form

[3] Contents of Judgment

[4] Proof of Service Required

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[1] FORM

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[3] Contents of Notice

[4] Cross References

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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[2] Use of Form

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[4] Verification

[5] Jurisdiction and Venue

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[1] FORM

[2] Use of Form

§ 361.225 Complaint in Interpleader [Code Civ. Proc. §§ 386, 386.5]--By Construction Lender Where Total Amount of Stop Notice Claims Exceeds Amount Withheld

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[2] Use of Form

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§ 361.230 Post-Completion Bond Notice (Private Work) [Civ. Code §§ 3227, 3242(b)]

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[2] Use of Form

[3] Contents of Notice

[4] Service of Written Notice

[5] Cross References

§ 361.231 Complaint--Against Original Contractor for Damages [Civ. Code § 3300] for Breach of Contract--And Against Surety on Contractor's Payment Bond [Civ. Code §§ 3096, 3097, 3235-3242]--By Subcontractor, Laborer, or Materialman

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[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction and Venue

[6] Cross References

§ 361.232 Complaint--Against Subcontractor for Damages [Civ. Code § 3300] for Breach of Contract--And Against Surety on Subcontractor's Payment Bond [Civ. Code §§ 3096, 3097, 3235-3242]--By Subcontractor, Laborer, or Materialman

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

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§ 361.240 Owner's Demand for Stop Notice [Civ. Code § 3158]

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[2] Use of Form

[3] Cross References

§ 361.241 Conditional Waiver and Release on Progress Payment [Civ. Code § 3262(d)(1)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 361.242 Unconditional Waiver and Release on Progress Payment [Civ. Code § 3262(d)(2)]

[1] FORM

[2] Use of Form

§ 361.243 Conditional Waiver and Release on Final Payment [Civ. Code § 3262(d)(3)]

[1] FORM

[2] Use of Form

§ 361.244 Unconditional Waiver and Release on Final Payment [Civ. Code § 3262(d)(4)]

[1] FORM

[2] Use of Form

§ 361.245 Endorsement on Joint Check

[1] FORM

[2] Use of Form

[3] Effect of Endorsement

[4] Cross References

§ 361.246 Release of Lien

[1] FORM

[2] Use of Form

§ 361.247 Release of Lien--Partial Release

[1] FORM

[2] Use of Form

§ 361.248 Demurrer [Code Civ. Proc. § 430.10(e)] to Complaint to Foreclose Mechanics' Lien--Failure to Show Substantial Compliance With Requirements Relating to Contents of Claim of Lien [Civ. Code § 3084]

[1] FORM

[2] Use of Form

[3] Cross References

§ 361.249 Demurrer [Code Civ. Proc. § 430.10(e)] to Complaint to Foreclose Mechanics' Lien--Failure to Allege Substantial Compliance With Requirements Relating to Recording of Claim of Lien [Civ. Code § 3115-3117]

[1] FORM

[2] Use of Form

[3] Cross References

§ 361.250 Demurrer [Code Civ. Proc. § 430.10(e)] to Complaint to Foreclose Mechanics' Lien--Failure to Allege That Preliminary Notice Was Given [Civ. Code § 3114]

[1] FORM

[2] Use of Form

[3] Cross References

§ 361.251 Demurrer [Code Civ. Proc. § 430.10(e)] to Complaint to Foreclose Mechanics' Lien--Failure to Allege That Plaintiff Was Duly Licensed [Bus. & Prof. Code § 7031]

[1] FORM

[2] Use of Form

[3] Cross References

§ 361.252 Demurrer [Code Civ. Proc. § 430.10(e)] to Complaint to Foreclose Mechanics' Lien--Brought by Materialman--Failure of Complaint to Contain Substantial Allegations That Materials Were Furnished to Be Used in, and Were Used in Work of Improvement

[1] FORM

[2] Use of Form

[3] Cross References

§ 361.253 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] in Action to Foreclose Mechanics' Lien--Chattel Installed Is Not Fixture Attached to Realty

[1] FORM

[2] Use of Form

[3] Cross References

§ 361.254 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] in Action to Foreclose Mechanics' Lien--Labor Performed Did Not Result in Permanent Improvement to Realty

[1] FORM

[2] Use of Form

[3] Cross References

§ 361.255 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Waiver of Mechanics' Lien--By Written Contract

[1] FORM

[2] Source of Form

[3] Use of Form

§ 361.256 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Recordation of Notice of Nonresponsibility by Owner [Civ. Code §§ 3097, 3129]

[1] FORM

[2] Use of Form

§ 361.257 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Senior Lien of Trust Deed Holder [Civ. Code § 1214]

[1] FORM

[2] Use of Form

[3] Cross References

§ 361.258 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] in Action to Foreclose Mechanics' Lien--Execution by Original Contractor of Bond Releasing Property From Claim of Mechanics' Lien [Civ. Code § 3143]

[1] FORM

[2] Use of Form

[3] Bond Releasing Property Subject to Lien

[4] Bonds Releasing Funds Subject to Stop Notice

[5] Cross References

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32-361 California Forms of Pleading and Practice--Annotated § 361.01

§ 361.01 Scope of Chapter

NOTE:
SB 189, which was introduced in February 2009 as a two-year bill, would comprehensively revise the law governing mechanics' liens and associated construction remedies. If enacted, the legislation will be operative January 1, 2011. For further information, see the Special Alert preceding Ch. 361, *Mechanics' Liens*.

This chapter discusses mechanics' liens, stop notices, and payment bonds insofar as these remedies apply to private works of improvements and private site improvement. The forms include the following:

- Forms for the enforcement of mechanic's liens [*see §§ 361.190 -361.209*].
- Forms for the enforcement of stop notices [*see §§ 361.220 -361.225*].
- Forms for recovery on payment bonds [*see §§ 361.230 -361.232*].
- Forms of demands, waivers, releases, demurrers, and affirmative defenses that may be asserted in the above actions [*see §§ 361.240 -361.258*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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§ 361.02 Cross References

- For discussion and forms relating to actions involving building contracts, see Ch. 104, *Building Contracts*
- See generally Ch. 140, *Contracts*
- For discussion and forms relating to licensing of building contractors, see Ch. 471B, *Licensing by Public Agency*
- For forms for use in actions involving liens other than mechanics' liens, see Ch. 342, *Liens and Wage Preferences*
- For a form of notice of pendency of mechanics' lien foreclosure proceedings, see Ch. 348, *Lis Pendens*
- For discussion and forms relating to stop notices and payment bonds in actions involving public works, see Ch. 481, *Public Works*
- For discussion and forms for use in actions involving subrogation rights of sureties, see Ch. 536, *Subrogation*
- For discussion and forms for actions against sureties on bonds, see Ch. 538, *Suretyship, Bonds, and Undertakings*
- For discussion and forms for actions involving mortgages, see Ch. 555, *Trust Deeds and Real Property Mortgages*

Legal Topics:

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

§§ 361.03[Reserved]

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32-361 California Forms of Pleading and Practice--Annotated § 361.10

§ 361.10 Governing Laws

The statutes that generally govern mechanics' liens, stop notices, and payment bonds in connection with private works of improvement and private site improvements are set forth in *Civ. Code §§ 3082-3175, 3225-3242, 3258-3267*. Mechanics' liens are specifically governed by *Civ. Code §§ 3109-3153*, stop notices by *Civ. Code §§ 3156-3175*, and payment bonds by *Civ. Code §§ 3235-3242*.

Except as otherwise provided in *Civ. Code §§ 3082-3267* (mechanics' lien law), the provisions of *Code Civ. Proc. §§ 307-1062a* (rules governing civil actions) are applicable to, and constitute the rules of practice in, the proceedings mentioned in the mechanics' lien law. The provisions of *Code Civ. Proc. § 307 et seq.* which relate to new trials and appeals, except insofar as they are inconsistent with the provisions of the mechanics' lien law or with rules adopted by the Judicial Council, also apply to proceedings mentioned in the mechanics' lien law [*Civ. Code § 3259*].

Because of the remedial character of the mechanics' lien law, its provisions should be liberally construed in their entirety with a view to effecting their objects and to promoting justice [*Hendrickson v. Bertelson (1934) 1 Cal. 2d 430, 432-433, 35 P.2d 318* ; *Nolte v. Smith (1961) 189 Cal. App. 2d 140, 144, 11 Cal. Rptr. 261]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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§ 361.11 Definitions

[1] In General

The definitions set forth below govern the construction of the provisions of the mechanics' lien law unless the context otherwise requires a different construction [*Civ. Code § 3082*].

[2] Claimant

A claimant is any person entitled to record a claim of mechanics' lien, to give a stop notice in connection with any work of improvement, or to recover on any payment bond, or any combination of the above [*Civ. Code § 3085*].

[3] Work of Improvement

[a] Definition

A work of improvement includes but is not restricted to the construction, alteration, addition to, or repair in whole or in part of any building, wharf,bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, or road; the seeding, sodding, or planting of any lot or tract of land for landscaping purposes; the filling, leveling, or grading of any lot or tract of land; the demolition of buildings; and the removal of buildings [*Civ. Code § 3106*]. Except as otherwise provided in *Civ. Code §§ 3082-3266*, "work of improvement" means the entire structure or scheme of improvement as a whole [*Civ. Code § 3106*]. However, the sentence at the end of *Civ. Code § 3106* regarding "the entire structure or scheme of improvement as a whole" does not mean that the removal or demolition of buildings is not a work of improvement unless it is part of a larger project leading to an outcome beyond mere removal or demolition. The sentence about a "scheme" only says that the term "work of improvement" refers to the entirety of a work of improvement. Since "work of improvement" is defined to include demolition and removal of buildings, the entirety of a work of improvement can consist of the demolition or removal of a building. There is no basis for the view that removal of a building--or anything else included in the definition--only counts if something else is done to the land in addition [*United Rentals Northwest, Inc. v. Snider Lumber Products, Inc. (2009) 174 Cal. App. 4th 1479, 1485, 95 Cal. Rptr. 3d 471]* .

[b] Separate Residential Units

If a work of improvement consists of the construction of two or more residential units, defined as residential structures, including a residential structure containing multiple condominium units together with any common area or garage or other improvements appurtenant to the structures, each residential unit is considered a separate work of improvement [*Civ. Code § 3131*]. Materials delivered to or on or furnished to be used in any portion of such a work of improvement and ultimately used or consumed in one of the residential units are deemed for all purposes of *Civ. Code §§ 3082-3267* (mechanics' liens, stop notices, and payment bonds) to have been furnished to be used or consumed in the separate residential unit in which they have actually been used or consumed [*Civ. Code § 3131*].

The completion of a residential structure containing multiple condominium units, together with any common area, or any garage or other improvements appurtenant thereto, does not operate to impair the rights of a union trust fund lien claimant if the claim is recorded within 120 days of the completion [*Civ. Code § 3131*].

[4] Site Improvement

A site improvement includes the demolishing or removing of improvements, trees, or other vegetation located thereon; the drilling of test holes on or grading, filling, or otherwise improving of any lot, tract of land, or street, highway, or sidewalk in front of, or adjoining, any lot or tract of land; the constructing or installing of sewers or other public utilities therein; or the constructing of any areas, vaults, cellars, or rooms under such sidewalks, or the making of any improvements thereon [*Civ. Code § 3102*].

[5] Laborer

A laborer is any person who, acting as an employee, performs labor on or bestows skill or other necessary services on any work of improvement [*Civ. Code § 3089(a)*]. "Laborer" also includes any person or entity, including an express trust fund [*see Civ. Code § 3111*], to whom a portion of the compensation of a laborer, as defined in *Civ. Code § 3089(a)*, is paid by agreement with that laborer or the laborer's collective bargaining agent. To the extent that such a person or entity has standing to maintain a direct legal action to collect any portion of compensation owed for a laborer, that person or entity has standing to enforce any rights under the Mechanics' Lien Law to the same extent as the laborer. The intent of this statutory provision is to give effect to the public policy in favor of protecting laborers' entire compensation on works of improvement, regardless of the form in which that compensation is to be paid [*Civ. Code § 3089(b)*].

[6] Materialman

A materialman is any person who furnishes materials or supplies to be used or consumed in any work of improvement [*Civ. Code § 3090*].

[7] Contract

A contract is an agreement between the owner and any original contractor providing for the work of improvement or any part thereof [*Civ. Code § 3088*].

[8] Owner

The term "owner" is not given a general definition under any code provision of the mechanics' lien law. However, for purposes of recording a notice of completion or a notice of cessation following the completion or cessation of labor on any work of improvement, an owner is the one who causes a building, improvement, or structure to be constructed, altered, or repaired, whether the owner's interest or estate is in fee, as vendee under a contract of purchase, is as a lessee, or is as the holder of any other interest or estate which is less than fee [*Civ. Code § 3092(g)*; for a form of notice of

completion, *see § 361.200*].

For purposes of the owner's duty to notify the original contractor and any claimants who have provided a preliminary 20-day notice that a notice of completion or cessation has been recorded [*see Civ. Code § 3259.5(a)*], an "owner" is a person who has an interest in real property, or the person's successor in interest on the date the notice of completion or cessation from labor is recorded, who causes a building, improvement, or structure, to be constructed, altered, or repaired on the property. If the property is owned by two or more persons as joint tenants or tenants in common, any one of the cotenants may be deemed to be the owner. However, "owner" does not include a person who occupies the property as a personal residence and the dwelling contains not more than four residential units, nor does it include a person who has a security interest in the property or obtains an interest by virtue of a court order, a default on a mortgage, or a transfer by a fiduciary in the course of administering a decedent's estate, guardianship, conservatorship, or trust [*Civ. Code § 3259.5(b)*; *see Civ. Code § 1102.2(b)-(d)*].

[9] Original Contractor

An original contractor is any contractor who has a direct contractual relationship with the owner [*Civ. Code § 3095*].

[10] Subcontractor

A subcontractor is any contractor who has no direct contractual relationship with the owner [*Civ. Code § 3104*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 361.12 Constitutional Guarantee of Mechanics' Lien

The right to a mechanics' lien is guaranteed by *Cal. Const., art. XIV, § 3*. It provides that mechanics, persons furnishing materials, artisans, and laborers have a lien on property on which they have bestowed labor or furnished materials. The lien is for the value of the labor done and materials furnished [*Cal. Const., art. XIV, § 3*].

Since the Legislature must provide for the speedy and efficient enforcement of such a lien [*Cal. Const., art. XIV, § 3*], the constitutional right to a mechanics' lien is not self-executing and must be supplemented by legislative action [*Spinney v. Griffith (1893) 98 Cal. 149, 151-152, 32 P. 974]* . It should be noted, though, that the constitutional guarantee is a two-way street; the Legislature must balance the interests both of lien claimants and of property owners [*Borchers Bros. v. Buckeye Incubator Co. (1963) 59 Cal. 2d 234, 238-239, 28 Cal. Rptr. 697, 379 P.2d 1]* . The words "speedy and efficient" have been interpreted to mean that the Legislature must arrange for lien claimants to receive their money as soon as possible after supplying labor or materials. However, at the same time it must arrange for property owners, whose interests must also be protected, to have their titles cleared as soon as possible so that they will have some marketability [*Borchers Bros. v. Buckeye Incubator Co. (1963) 59 Cal. 2d 234, 239, 28 Cal. Rptr. 697, 379 P.2d 1]* . The Legislature thus is empowered to adopt legislation which will relieve the owner of the burden of the lien while at the same time affording the lien claimant reasonable assurance that his or her claim, if valid, will be paid in full [*Frank Curran Lumber Co. v. Eleven Co. (1969) 271 Cal. App. 2d 175, 183-184, 76 Cal. Rptr. 753* (constitutionality of release bonds freeing property subject to mechanics' liens)].

A statute exempting certain property from legal process [*see, e.g., Gov. Code § 31452* (county employees' retirement association's property)] may not be applied so as to interfere with the constitutional right to mechanics' liens [*Parsons Brinckerhoff Quade & Douglas, Inc. v. Kern County Employees Retirement Assn. (1992) 5 Cal. App. 4th 1264, 1269-1270, 7 Cal. Rptr. 2d 456]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 361.13 Mechanics' Lien Law Remedies

The use of the phrase "mechanics' lien law" to describe the various statutory remedies available to claimants who have furnished labor or materials to private works of improvement or private site improvements actually is a misnomer. The remedy of a mechanics' lien, which is the nature of a mortgage and which is a charge on the land [*Mercantile Collection Bureau v. Roach (1961) 195 Cal. App. 2d 355, 357, 15 Cal. Rptr. 710]* , is a separate remedy from that of the stop notice or the payment bond. The remedy of a stop notice is in the nature of an equitable garnishment of funds held by an owner or construction lender for use in defraying the costs of a work of improvement [*see Civ. Code §§ 3083, 3103*]. The remedy of a payment bond, as set forth in *Civ. Code §§ 3225-3242*, is a bond for the protection of the owner of property subject to a mechanics' lien; it inures to the benefit of mechanics' lien claimants so as to give them a right of action to recover on the bond [*see Civ. Code § 3096*]. These three remedies are cumulative and independent of each other [*see Civ. Code §§ 3096, 3242* (payment bonds); *A-1 Door & Materials Co. v. Fresno Guar. Sav. & L. Ass'n (1964) 61 Cal. 2d 728, 732, 40 Cal. Rptr. 85, 394 P.2d 829* (stop notices)] since the right to recover on a stop notice claim or on any bond provided for in the mechanics' lien law is not dependent on the establishment of a mechanics' lien [*A-1 Door & Materials Co. v. Fresno Guar. Sav. & L. Ass'n (1964) 61 Cal. 2d 728, 732, 40 Cal. Rptr. 85, 394 P.2d 829* (stop notice); *see Civ. Code § 3226* (sole condition of recovery on any bond is that person is entitled to claim mechanics' lien and has not been paid full amount of claim)].

Nothing in the mechanics' lien law which provides for the remedies of the mechanics' lien, stop notice, and payment bond may be construed to impair or affect the right of any claimant to maintain a personal action to recover his or her debt against the person liable therefor either in a separate action or in the action to foreclose his or her lien [*Civ. Code § 3152*]. Any personal judgment obtained in the personal action does not impair or merge any mechanics' lien held by the plaintiff. However, any money collected on the judgment must be credited on the amount of the lien [*Civ. Code § 3152*].

Thus it is possible and, in fact, customary, to pursue simultaneously the three remedies provided in the mechanics' lien law together with the personal remedy a claimant may have on his or her contract in a law suit. Actions are often brought against the person with whom the claimant contracted, against the owner to foreclose his or her mechanics' lien, against the construction lender if there was one, against the owner to enforce his or her stop notice, and against the sureties on a payment bond. In addition, *Civ. Code § 3152* is permissive, not prohibitive, and does not prohibit a

mechanic's lien claimant from enforcing a personal debt after foreclosing or releasing the lien [*Paykar Construction, Inc. v. Spilat Construction Corp. (2001) 92 Cal. App. 4th 488, 495, 111 Cal. Rptr. 2d 863]* .

Legal Topics:

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

§§ 361.14[Reserved]

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32-361 California Forms of Pleading and Practice--Annotated § 361.20

§ 361.20 Governing Statutes

Mechanics' liens are governed by *Civ. Code §§ 3109-3154, 3259-3262*. Definitions of terms used in these code provisions are contained in *Civ. Code §§ 3082-3106*.

Design professionals' liens are governed by *Civ. Code §§ 3081.1-3081.10*.

The statutes governing mechanics' liens do not apply to any public work [*Civ. Code § 3109*]. A public work is defined as any work of improvement that is contracted for by a public entity [*Civ. Code § 3100*].

Because of principles of sovereign immunity, any right to impress a mechanic's lien on public property must be expressly, not implicitly, provided for by statute [*Mayrhofer v. Board of Education (1891) 89 Cal. 110, 112, 26 P. 646* ; *see North Bay Construction, Inc. v. City of Petaluma (2006) 143 Cal. App. 4th 552, 557, 49 Cal. Rptr. 3d 455]* . Thus, a paving contractor who contracted with a developer to perform grading work on property leased by the developer from the city could not enforce a mechanic's lien against the city's property, even though the express exemption for public work provided by *Civ. Code § 3109* did not apply. No statute imposes liability on a public entity for debts incurred by a lessee for improving property owned by and leased from the public entity [*North Bay Construction, Inc. v. City of Petaluma (2006) 143 Cal. App. 4th 552, 557-558, 49 Cal. Rptr. 3d 455]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-361 California Forms of Pleading and Practice--Annotated § 361.21

§ 361.21 Nature and Purpose of Mechanics' Lien

The mechanics' lien itself is in the nature of a mortgage and is a charge on the land [*Mercantile Collection Bureau v. Roach (1961) 195 Cal. App. 2d 355, 357, 15 Cal. Rptr. 710]* . It proceeds on the theory that the laborer and the materialman have an equitable right to follow their labor and materials into a building of which such labor and materials have become a component part [*Humboldt Lumber Mill Co. v. Crisp (1905) 146 Cal. 686, 687, 81 P. 30]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-361 California Forms of Pleading and Practice--Annotated § 361.22

§ 361.22 Personal Liability of Owner

An action to foreclose a mechanics' lien is in rem and is local in nature since the plaintiff is resorting primarily to his or her security for the payment of the indebtedness [*see Central Bank v. Superior Court (1973) 106 Cal. Rptr. 696]* . No personal liability arises on the part of an owner of property that is subject to a mechanics' lien unless a contract, either express or implied, exists between the owner and the lien claimant [*R.D. Reeder Lathing Co. v. Allen (1967) 66 Cal. 2d 373, 376, 57 Cal. Rptr. 841, 425 P.2d 785* ; *Golden Gate Bldg. Materials Co. v. Fireman (1928) 205 Cal. 174, 177-178, 270 P. 214]* . For a contract to exist, there must be privity between the owner and the claimant [*see Blackmore Equip. Co. v. Braddock, Logan & Valley (1969) 269 Cal. App. 2d 12, 15, 74 Cal. Rptr. 484]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 361.23 Types of Liens

[1] In General

Two types of mechanics' liens are provided for in *Civ. Code §§ 3110-3112*. A lien is granted (1) to persons who have furnished labor or materials in connection with works of improvement as described in *Civ. Code § 3110* and *(2)* to persons who have made site improvements [*see Civ. Code § 3112*]. Design professionals' liens for professional architectural, engineering, or surveying services rendered prior to construction are discussed *§ 361.24*. For forms of claim of lien, see *§§ 361.192 -361.194*.

[2] Liens on Works of Improvement

Mechanics, materialmen, contractors, subcontractors, lessors of equipment, artisans, architects, registered engineers, licensed land surveyors, machinists, builders, teamsters, draymen, and all persons and laborers of every class who, at the instance of an owner of property or his or her agent, perform labor or bestow skill or other necessary services on, furnish materials or leasing equipment to be used or consumed in, or furnish appliances, teams, or power that contribute to a work of improvement are entitled to liens on the property on which they have performed or furnished such labor, services, materials, or equipment [*Civ. Code § 3110*].

The list of occupations in *Civ. Code § 3110* is not exclusive [*see Contractors Dump Truck Serv., Inc. v. Gregg Constr. Co. (1965) 237 Cal. App. 2d 1, 4-5, 46 Cal. Rptr. 738* (transportation motor broker)]. However, whether or not a person occupies a position specifically listed in *Civ. Code § 3110*, that person must also bring his or her case clearly within the terms of the statute; a mechanics' lien is a creature of the statute, and it must be looked to both for the right to the lien and for the mode by which it is enforced [*see Reese v. Bald Mountain Consol. Gold Mining Co. (1901) 133 Cal. 285, 290, 65 P. 578* (construing former Code Civ. Proc. § 1183)].

The mechanics' lien law contemplates that the "mechanic" and the "owner" will be two different persons. The law does not entitle an owner to claim a lien for materials furnished under another name [*Superior Lbr. Co. v. Sutro (1979) 92 Cal. App. 3d 954, 957-958, 155 Cal. Rptr. 333* (owner who lost property through trustee's sale is not entitled to assert priority lien against property for value of materials that owner furnished)].

[3] Site Improvement Liens

Any person who, at the instance of the owner of any lot or tract of land, has made any site improvement has a lien on the lot or tract of land for work done or materials furnished [*Civ. Code § 3112*].

[4] Union Trust Fund Liens

For purposes of the Mechanics' Lien Law, an express trust fund to which a portion of a laborer's total compensation is to be paid pursuant to an applicable employment agreement or a collective bargaining agreement for the provision of benefits (including, but not limited to, employer payments for health and welfare, pension, vacation, travel time, and subsistence pay, apprenticeship or other training programs, specified worker protection and assistance programs or committees, industry advancement and collective bargaining agreement administrative fees, and similar purposes [*see Lab. Code § 1773.1*]) is entitled to assert the same rights and claims as laborers performing labor on, or bestowing skill or other necessary services on, a work of improvement, to the extent of the compensation agreed to be paid to that express trust fund for labor on that improvement only [*Civ. Code § 3111*]. As amended in 1999 [*see* Stats. 1999, ch. 795, § 7], *Civ. Code 3111* is intended to reinstate the ability of laborers and employee trust funds to use mechanics' liens and creditor priorities to obtain payment of unpaid wages and fringe benefits. The amendment was drafted in an attempt to avoid having state remedies for collection of those wages and fringe benefits be preempted by the federal Employee Retirement Income Security Act of 1974 (ERISA) [24 U.S.C. § 1001 et seq.]. Prior to this amendment, the California Supreme Court held that *Civ. Code § 3111* was preempted by ERISA [*see Carpenters So. Cal. Admin. Corp. v. El Capitan Development Co. (1991) 53 Cal. 3d 1041, 1049-1054, 282 Cal. Rptr. 277, 811 P.2d 296]* .

ERISA does not preempt an action under § *Civ. Code § 3110*, a mechanic's lien law of general application that does not itself refer to ERISA plans [*Betancourt v. Storke Housing Investors (2003) 31 Cal. 4th 1157, 1166, 8 Cal. Rptr. 3d 259]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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§ 361.24 Design Professionals' Lien

[1] In General

A design professional has a lien on real property for which a work of improvement is planned to be constructed, notwithstanding the absence of commencement of actual construction of the planned work of improvement, if the landowner contracted for the design professional's services and is also the owner of the real property at the time of recordation of the lien [*Civ. Code § 3081.2*]. The lien is not applicable, however, to a work of improvement relating to a single-family owner-occupied residence when the construction costs are less than $100,000 [*Civ. Code § 3081.10*].

A "design professional" is any certificated architect, registered professional engineer, or licensed land surveyor who furnishes services pursuant to a written contract with a landowner for the design, engineering, or planning of a work of improvement [*Civ. Code § 3081.1*].

For a design professional's claim of lien, see *§ 361.194*.

[2] Amount of Lien

The lien is for the amount of the design professional's fee for any services rendered prior to commencement of the work of improvement or the reasonable value of those services, whichever is less. The amount of the lien must be reduced by the amount of any deposit or prior payments, as specified by a written contract entered into by the design professional and by the landowner or his or her agent. However, no lien arises unless a building permit or other governmental approval in furtherance of the work of improvement has been obtained in connection with or utilizing the services rendered by the design professional [*Civ. Code § 3081.2*].

[3] Procedure for Obtaining Lien

[a] Demand for Payment

A design professional is entitled to a lien only if the landowner defaults in a payment required pursuant to the terms of

the written contract or refuses to pay on the demand of the design professional made in accordance with the written contract [*Civ. Code § 3081.3(a)*]. Then, at least 10 days prior to recording a notice of lien (discussed under [b], *below*), the design professional must mail by first-class registered or certified mail, postage prepaid, addressed to the landowner, a written demand for payment specifying that a default has occurred pursuant to the contract or agreement and the amount of the default [*Civ. Code § 3081.3(b)*].

[b] Recording Notice of Lien

No later than 90 days after the design professional knows or has reason to know that the landowner is not commencing the work of improvement, he or she must record a notice of lien with the county recorder in the county where the property is located. [*Civ. Code §§ 3081.3(c), 3081.7*]. The notice must specify that a lien is created in favor of the named design professional, specify the amount of the lien, identify the current owner of record of the real property, provide a legal description of the real property to be improved, and specify the building permit or other governmental approval for the work of improvement required as a condition of the lien [*Civ. Code § 3081.3(c)*; for a form, *see § 361.194*].

Recording a notice of lien creates a lien in favor of the named design professional [*Civ. Code § 3081.4(a)*].

[4] Priority of Lien

A design professionals' lien does not affect or take priority over the interest of record of a purchaser, lessee, or encumbrancer, if the interest of the purchaser, lessee, or encumbrancer in the real property was duly recorded before recordation of the design professionals' lien [*Civ. Code § 3081.9(a)*]. The lien also does not affect or take priority over an encumbrance of a construction lender that funds the loan to commence the work of improvement for which the design professional furnished services at the request of the landowner [*Civ. Code § 3081.9(b)*].

[5] Automatic Expiration

A design professionals' lien automatically expires and is null, void, and of no further force or effect on the occurrence of either of the following [*Civ. Code § 3081.4(b)*]:

- Commencement of the work of improvement for which the design professional furnished services at the request of the landowner; or

- Expiration of 90 days after recordation of the notice of lien, unless a suit is filed to enforce the lien within 90 days.

[6] Release of Lien on Satisfaction by Owner

If the landowner partially or fully satisfies the lien, the design professional must execute and record a document that evidences a partial or full satisfaction and release of the lien [*Civ. Code § 3081.4(c)*].

[7] Enforcement

A perfected design professionals' lien must be enforced in the same manner as a mechanics' lien [*Civ. Code § 3081.5*]. For discussion of enforcement of mechanics' liens, see *§ 361.31*. For procedural checklist of an action to foreclose a lien, see *§ 361.162*.

[8] Other Remedies Not Affected

The right to a design professionals' lien does not affect a design professional's ability to obtain a mechanics' lien [*Civ.*

Code § 3081.6], or to pursue other remedies [*Civ. Code § 3081.8*]. In the case of contracts entered into on or after January 1, 1996, those other remedies include the right to negotiate and enforce a late payment penalty provision in lieu of any interest otherwise due for late payment under a private works contract [*Civ. Code § 3319*], and the right to receive a penalty for late payment of progress payments or a final retention payment under a public works contract [*Civ. Code § 3320*]. For further discussion, *see* Ch. 57, *Architects* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 361.25 Prerequisites to Entitlement

[1] Attachment of Lien

The general rule is that a mechanics' lien does not attach unless and until construction has been undertaken by the doing of actual visible work on, or delivery of construction materials to, the land on which there is a work of improvement [*Walker v. Lytton Sav. & L. Ass'n (1970) 2 Cal. 3d 152, 156-157, 84 Cal. Rptr. 521, 465 P.2d 497]* . This rule is derived from the language of *Civ. Code § 3110* (former *Code Civ. Proc. § 1181*), which specifies that services giving rise to a mechanics' lien are those bestowed on or contributing to any work of improvement. Once actual construction commences on the ground or material for the construction is delivered to the site, the lien of the laborer or materialman then attaches for all services rendered by him or her, including services rendered before commencement of construction and that contributed to the construction [*Walker v. Lytton Sav. & L. Ass'n (1970) 2 Cal. 3d 152, 156 n.5, 84 Cal. Rptr. 521, 465 P.2d 497]* .

The slightest visible work taking place on property on which a work of improvement is to be constructed is sufficient for a finding that the work had commenced. Thus the setting of permanent monuments in the ground, for land subdivision, following extensive engineering services, is a commencement of the improvement, because it is an essential part of the "scheme of improvement" as those terms are used in *Civ. Code § 3106* defining work of improvement [*Design Associates, Inc. v. Welch (1964) 224 Cal. App. 2d 165, 174, 36 Cal. Rptr. 341]* .

[2] Furnishing Materials

No lien may be claimed for materials furnished or delivered for a work of improvement unless a lien claimant shows that the materials were furnished or delivered for a particular work of improvement [*Ensele v. Jolley (1922) 188 Cal. 297, 300, 204 P. 1085]* . It is not enough that materials be sold or leased and then in fact used in a work of improvement; it must also be shown that in furnishing or delivering the materials the vendor or lessor intended that they be used or consumed in the work of improvement [*see W.P. Fuller & Co. v. Fleisher (1923) 63 Cal. App. 78, 79-80, 218 P. 53* ; *see also Consolidated Elec. Distributors, Inc. v. Kirkham, Chaon & Kirkham, Inc. (1971) 18 Cal. App. 3d 54, 58, 95 Cal. Rptr. 673]* .

In addition to the requirement that a lien claimant show an intent to furnish or deliver materials for a particular improvement, the claimant must show that the materials were actually used or consumed in the improvement [*Ensele v. Jolley (1922) 188 Cal. 297, 300, 204 P. 1085]* . In this regard, no presumption exists that because the materials were delivered to the improvement site the materials were used in the improvement [*Consolidated Elec. Distributors, Inc. v. Kirkham, Chaon & Kirkham, Inc. (1971) 18 Cal. App. 3d 54, 58, 95 Cal. Rptr. 673]* .

[3] Permanency of Improvement

Because the mechanics' lien is a charge on the real property of the owner, before a lien can be claimed for labor and materials furnished in connection with the installation of a chattel on the owner's property it must be shown that the chattel installed became a fixture attached to the realt y [*R. Barcroft & Sons Co. v. Cullen (1933) 217 Cal. 708, 711-712, 20 P.2d 665* ; *Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 131, 95 Cal. Rptr. 728]* . Whereas *Civ. Code § 660*, the common law definition of a fixture, emphasizes the manner of the chattel's annexation, more recent decisions hold that the manner of annexation is not the sole or the most important test [*Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 132, 95 Cal. Rptr. 728]* . Three main factors are used in determining whether the chattel has become a fixture: (1) physical annexation; (2) adaptation to use with real property; and (3) intention to annex to realty [*Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 132, 95 Cal. Rptr. 728]* . Intention is considered the most important factor, but the manner of annexation and the use to which the property is put are relevant in determining such intention. Other factors, including the relationship of the claiming parties, the relative difficulty of removal, the nature of the article annexed, and whether the fact of annexation is open and apparent are used if the three main factors do not suffice in the particular fact situation [*Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 132, 95 Cal. Rptr. 728]* .

Although all the factors listed above may be taken into consideration, the status of the lien claimant is generally favored in determining whether or not a disputed item, attached to real estate, is personalty or real estate. Therefore, the rules governing fixture law between vendor-vendee or between mortgagor-mortgagee are applicable when the rights with respect to fixtures are construed most strongly in favor of the vendee or mortgagee; to the contrary, the rules governing fixture law between landlord and tenant are generally not applicable [*R. Barcroft & Sons Co. v. Cullen (1933) 217 Cal. 708, 714, 20 P.2d 665]* .

Although the controlling factor in determining whether the property is permanently attached to the land is the intent of the parties, if the rights of a person who is unconnected with the transaction are being determined, the question of the permanency of the attachment is one of apparent intent as it would appear to a third person [*Kruse Metals Mfg. Co. v. Utility Trailer Mfg. Co. (1962) 206 Cal. App. 2d 176, 183, 23 Cal. Rptr. 514]* .

[4] Permanency of Contribution to Improvement

[a] General Requirement

The character of the work done and materials furnished for a work of improvement for which a mechanics' lien is claimed must be of a structural or permanent nature [*Ogden v. Byington (1926) 198 Cal. 151, 157* ; *Howard A. Deason & Co. v. Costa Tierra, Ltd. (1969) 2 Cal. App. 3d 742, 753, 83 Cal. Rptr. 105]* . This does not mean that the work or materials furnished must be a visible part of the work of improvement, because a lien may be claimed for materials consumed in the work [*Civ. Code § 3110*; *see Pacific Sash & Door Co. v. Bumiller (1912) 162 Cal. 664, 667, 124 P. 230* (lien allowed for lard oil applied to threads of joints of pipe)]. It does mean that the work or material must have added to the construction of the work of improvement. For example, a lien may be claimed for landscaping and maintenance that is necessary to insure that planting is well established on the ground, but not for maintenance work such as the mowing and watering of a lawn that takes place after the permanence of the lawn is insured [*Howard A. Deason & Co. v. Costa Tierra Ltd. (1969) 2 Cal. App. 3d 742, 753, 83 Cal. Rptr. 105]* .

[b] Destruction or Abandonment of Improvement

If a work of improvement is destroyed before completion and delivery to the owner through no fault of the owner or if the improvement project is abandoned by mutual agreement between the owner and the potential lien claimant, then no lien can be claimed in connection with the work because no unjust benefit has been conferred on the owner [*Humboldt Lumber Mill Co. v. Crisp (1905) 146 Cal. 686, 688, 81 P. 30* ; *McDonald v. Filice (1967) 252 Cal. App. 2d 613, 618, 60 Cal. Rptr. 832]* . A person otherwise entitled to a mechanics' lien may enforce his or her lien claim against the owner, however, if the destruction of the improvement, or abandonment of the project after work has commenced, was the fault of the owner [*McIntosh v. Funge (1930) 210 Cal. 592, 599-602, 292 P. 960* ; *McDonald v. Filice (1967) 252 Cal. App. 2d 613, 620, 60 Cal. Rptr. 832]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 361.26 Scope of Owner's Responsibility

[1] Required Owner's Authorization

No person is entitled to a lien unless the labor or materials have been furnished in connection with a work of improvement or site improvement at the instance of the owner or any other person acting by the owner's authority or under him or her as contractor or otherwise [*Civ. Code §§ 3110, 3112*].

[2] Statutory Agents of Owner

For the purposes of conferring mechanics' liens rights under *Civ. Code §§ 3109-3153*, a contractor, subcontractor, sub-subcontractor, architect, builder, or other person having charge of a work of improvement or any portion of the improvement is held to be an agent of the owner [*Civ. Code § 3110*].

[3] Subcontractor Distinguished From Materialman

Subcontractors must be distinguished from materialmen, because a subcontractor is both entitled to a lien and is, for the purposes of conferring liens on other persons, a statutory agent of the owner. Therefore, those who work under him or her are entitled to the benefits of the mechanic's lien [*see Civ. Code §§ 3110, 3112*]. However, a materialman who furnishes materials or supplies to be used or consumed in a work of improvement [*Civ. Code § 3090*] cannot confer lien rights on those who have furnished him or her materials or supplies [*see Blakemore Equip. Co. v. Braddock, Logan & Valley (1969) 269 Cal. App. 2d 12, 15, 74 Cal. Rptr. 484* ; *Tarter, Webster Johnson, Inc. v. Windsor Developers, Inc. (1963) 217 Cal. App. 2d Supp. 875, 878-887* 9, *31 Cal. Rptr. 452]* .

Despite the fact that a subcontractor is defined generally as any contractor who has no direct relationship with the owner [*Civ. Code § 3104*], for the purposes of being determined to be a statutory agent of the owner a subcontractor must be one who agrees with the original contractor to perform a substantial, specified portion of a work of improvement pursuant to the original contract in accord with the plans and specifications by which the original contractor is bound [*Theisen v. Los Angeles County (1960) 54 Cal. 2d 170, 183, 5 Cal. Rptr. 161, 352 P.2d 529]* . Construction of a definite, substantial part of the improvement in accord with the original contract's plans and specifications, rather than

incorporation of a portion of a projected structure into the improvement on the job site as some earlier cases had held, is the essential feature that makes one a subcontractor rather than a materialman [*Theisen v. County of Los Angeles (1960) 54 Cal. 2d 170, 183, 5 Cal. Rptr. 161, 352 P.2d 529]* .

[4] Owner's Knowledge of Improvement

[a] Effect of Knowledge

If an owner or any person who has or claims an estate in some real property knows either of a work of improvement being constructed on the property or of labor or materials furnished in connection with the work of improvement that was originally contracted for by one having some interest in the property less than a fee simple, then the construction, labor performed, and materials furnished are held to be at the instance of the owner or person having or claiming an estate in the property [*see Civ. Code § 3129*; *Blakemore Equip. Co. v. Braddock, Logan & Valley (1969) 269 Cal. App. 2d 12, 17, 74 Cal. Rptr. 484* (decided under former Code Civ. Proc. § 1183.1(a))]. The basis of this provision is estoppel. Because the owner has received the benefit of the improvement, the noncontracting owner is placed in the position of a party to the contract by the conclusive presumption that the work was done at his or her instance and request [*M. Arthur Gensler, Jr., & Associates, Inc. v. Larry Barrett, Inc. (1972) 7 Cal. 3d 695,708, 103 Cal. Rptr. 247, 499 P.2d 503* ; *Nolte v. Smith (1961) 189 Cal. App. 2d 140, 144, 11 Cal. Rptr. 261]* .

The interest or claimed interest in the land is subject to any recorded mechanics' lien that a claimant may be entitled to assert under *Civ. Code §§ 3110-3112* [*Civ. Code § 3129*]. To be subject to a recorded mechanics' lien, the owner or person claiming an interest must either have *actual* knowledge of the work of improvement or furnished labor and materials, or have received a preliminary 20-day notice under *Civ. Code § 3097*. Constructive knowledge is not sufficient [*Kim v. JF Enterprises (1996) 42 Cal. App. 4th 849, 856-859, 50 Cal. Rptr. 2d 141]* . For an outline of procedures related to the preliminary 20-day notice, see *§ 361.160*. For a form for preliminary 20-day notice, see *§ 361.190*.

[b] Notice of Nonresponsibility

If the owner of or person having or claiming an interest in the estate records a notice of nonresponsibility and posts it at some conspicuous place on the construction site within 10 days after obtaining knowledge of a work of improvement being constructed on the estate, he or she will not be responsible for any mechanics' liens claims arising from the improvement so long as he or she has not caused the improvement to be constructed or performed [*Civ. Code § 3129*; *see Civ. Code § 3094*; for a form of notice of nonresponsibility by owner, see *§ 361.199*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 361.27 Property Subject to Lien

[1] Works of Improvement

Mechanics' liens attach to the work of improvement and the land on which it is situated, together with as much of the property surrounding the work as is required for its convenient use and occupation, if at the commencement of the work or of the furnishing of materials for the work the land belonged to the person who caused the work to be constructed [*Civ. Code § 3128*]. If the person who caused the work to be constructed owns less than a fee simple in the land, then only his or her interest in the land is subject to mechanics' liens [*Civ. Code § 3128*]. Hence, a lien that is claimed for work or materials furnished in connection with a work of improvement attaches primarily to the superstructure, the work of improvement, and only to the land as it is embraced in common ownership with the superstructure [*English v. Olympic Auditorium, Inc. (1933) 217 Cal. 631, 639, 20 P.2d 946]* .

In determining the area that is required for the necessary and convenient use of the erected structure, the intended use of the structure must be considered [*Anselmo v. Sebastiani (1933) 219 Cal. 292, 297-298, 26 P.2d 1]* . For example, in the case of a separate and distinct unit, the only area that may be subject to a mechanics' lien is that area necessary for ingress and egress. But if the uses of the structure require the entire tract of land on which it is situated or even adjacent structures, the lien may attach to the whole tract of land or such other structures [*Anselmo v. Sebastiani (1933) 219 Cal. 292, 298, 299, 26 P.2d 1]* . The lien attaches to the whole of the structure and land required for its necessary and convenient use as distinct from a part of the structure or land [*see A.A. Baxter Corp. v. Home Owners & Lenders (1970) 7 Cal. App. 3d 725, 732, 86 Cal. Rptr. 854]* .

For the lien to attach to the adjacent property, the purpose for which the building or improvement in question is erected must be so intimately and directly connected with the operations carried on in the adjacent buildings as to constitute it an essential part and parcel of the improvement [*Pacific Coast Refrigeration, Inc. v. Badger (1975) 52 Cal. App. 3d 233, 244, 124 Cal. Rptr. 786]* . In one case, the general contractor for construction of a public golf course and flood channel brought a breach of contract and foreclosure action against the owners of the golf course property as well as adjacent property owners. The trial court found that the contractor's mechanics' lien attached to the golf course property and to the adjacent property. The court of appeal reversed, concluding that the mechanics' lien did not attach to the

entirety of the adjacent property because not all of the adjacent property was required for the convenient use and occupation of the golf course. The evidence established that the lien attached only to a limited part of the adjacent property, such as the area where a tee box was located outside the golf course property, and the part of the property where the contractor installed irrigation, provided landscaping, and performed grading and leveling in connection with removal of topsoil transported to the golf course [*Forsgren Associates Inc. v. Pacific Golf Community Development LLC (2010) 182 Cal. App. 4th 135, 154, 105 Cal. Rptr. 3d 654]* .

In one case, when a contractor who built a street in a development filed nine individual mechanics' liens for the full amount claimed to be owed on nine separate parcels, the trial court should have granted the developers' ex parte application for an order permitting them to release all nine parcels from the liens by posting a single surety bond in an amount equal to one and one-half times the total amount claimed [*Civ. Code § 3141*]. The surety bond would not extinguish the contractor's lien or affect its priority, but would only substitute the bond for the land as the object to which the lien attached. This result avoided both the absurdity of requiring multiple bonds to release duplicative liens securing a single debt and the absurdity of forfeiting all security for the payment of that debt [*T.O. IX, LLC v. Superior Court (2008) 165 Cal. App. 4th 140, 148, 80 Cal. Rptr. 3d 602*].

[2] Site Improvements

A person who has a site improvement lien has a lien on the entire lot or tract of land. It is not on any single part of the lot or tract unless the claimant has waived his or her lien on only a portion of the lot [*A.A. Baxter Corp. v. Home Owners & Lenders (1970) 7 Cal. App. 3d 725, 732, 86 Cal. Rptr. 854]* .

[3] Condominiums

Any labor performed or services or material furnished with the consent of or at the request of a condominium owner or his or her agent or contractor or subcontractor may not be the basis for filing a lien against the condominium of any other condominium owner, or against any part thereof, or against any other property of any other condominium owner, unless the other owner has expressly consented to or requested the performance of the labor or the furnishing of the materials or services. An owner is deemed to have given express consent in the case of emergency repairs to his or her condominium. Labor performed or services or materials furnished for the common areas, if duly authorized by the management body provided for in a declaration of restrictions governing the property, is deemed to be performed or furnished with the express consent of each condominium owner. The owner of any condominium may remove his or her condominium from a lien against two or more condominiums or any part thereof by payment to the holder of the lien of the fraction of the total sum secured by the lien that is attributable to his or her condominium [*Civ. Code § 1369*; *see* Ch. 124, *Condominiums and Other Common Interest Developments*]. For a form of claim of lien with an allegation of segregated amounts for work or materials furnished to multiple works of improvement, see *§ 361.193*.

[4] Homesteads Not Exempt From Lien

Homesteads [*see Code Civ. Proc. § 704.710 et seq.*] are subject to execution or forced sale in satisfaction of judgments obtained on debts secured by mechanics' liens [*see Code Civ. Proc. § 703.010(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 361.28 Amount of Lien

[1] In General

Mechanics' liens are direct liens either for the reasonable value of the labor, services, equipment, or materials furnished or for the price agreed on by the claimant and the person with whom he or she contracted, whichever is less [*Civ. Code § 3123*].

Once the lien has attached, that is, once construction on the work of improvement or site improvement has commenced, the claim of lien may include a demand for the reasonable or contract value of all services that the lien claimant has rendered, including services rendered before commencement if they contributed to the construction [*see Walker v. Lytton Sav. & L. Ass'n (1970) 2 Cal. 3d 152, 156 n.5, 84 Cal. Rptr. 521, 465 P.2d 497]* .

A mechanics' lien may not include attorney's fees awarded pursuant to a contractual clause for attorney's fees to the prevailing party; the amount of the lien is limited by *Civ. Code § 3123(a)* to the value added to the property by the lien claimant [*Abbett Electric Corp. v. California Fed. Savings & Loan Assn. (1991) 230 Cal. App. 3d 355, 359-360, 281 Cal. Rptr. 362]* . Likewise, a mechanics' lien may not include delay or interest damages [*Lambert v. Superior Court (1991) 228 Cal. App. 3d 383, 387-388, 279 Cal. Rptr. 32]* .

[2] Limitation of Owner's Liability

[a] Filing Contract and Recording Bond

The amount of a lien is not limited by the contract between the owner and original contractor unless the owner files the original contract and records a payment bond under *Civ. Code §§ 3235, 3236* [*Civ. Code § 3123*] and thereby limits his or her liability to the measure of the contract price [*Civ. Code § 3236*; *see* Part III, *below*].

The claimant is not precluded from including in the lien any amount due for labor, services, equipment, or materials furnished based on a written modification of the contract or as a result of the rescission, abandonment, or breach of the contract. In the event of rescission, abandonment, or breach of the contract, however, the amount of the lien may not

exceed the reasonable value of the labor, services, equipment, and materials furnished by the claimant [*Civ. Code § 3123(b)*].

[b] Work Not Included in Original Contract

In any case in which the claimant was employed by a contractor or subcontractor, his or her claim of lien does not extend to any labor, services, equipment, or materials not included in the original contract between the owner and the original contractor or any modification thereof, if the claimant had actual knowledge or constructive notice of the contract [*see Civ. Code § 3088*], or in any modification of the contract before he or she furnished the labor, service, equipment, or materials. The filing of a contract or a modification of a contract for a work of improvement with the county recorder of the county where the property is situated, before the commencement of work, is equivalent to the giving of actual notice of its provisions by the owner to all persons performing work or furnishing materials under the contract [*Civ. Code § 3124*].

[c] Liens of Original Contractors and Subcontractors

Any original contractor or subcontractor who has recorded a claim of lien is entitled to recover only such an amount as may be due him or her according to the terms of the contract after deducting all the claims of other claimants for labor, services, equipment or materials furnished and embraced within his or her contract [*Civ. Code § 3140*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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§ 361.29 Lien Priorities

[1] Nonsite Improvement Liens

Unless a holder of any mortgage or deed of trust procures a payment bond as provided in *Civ. Code § 3138*, all mechanics' liens other than site improvement liens are preferred to any lien, mortgage, deed of trust, or other encumbrance on the work of improvement and the site that attaches subsequent to the commencement of the work of improvement. They are also preferred to any lien, mortgage, deed of trust, or other encumbrance of which the claimant had no notice and that was unrecorded at the time of commencement of the work of improvement [*Civ. Code § 3134*].

[2] Site Improvement Liens

Unless the owner or holder of any mortgage or deed of trust procures a payment bond as provided in *Civ. Code § 3139*, site improvement liens are preferred (a) to any mortgage, deed of trust, or other encumbrance that attaches subsequent to the commencement of the site improvement work; (b) any mortgage, deed of trust, or other encumbrance of which the claimant had no notice and that was unrecorded at the time of the commencement of the site improvement; and (c) to any mortgage, deed of trust, or other encumbrance recorded before the commencement of the site improvement given for the sole or primary purpose of financing the site improvements, unless the load proceeds are, in good faith, placed in the control of the lender under a binding agreement with the borrower to the effect that the proceeds are to be applied to the payment of claims of claimants and that no portion of the proceeds will be paid to the borrower in the absence of satisfactory evidence that all claims have been paid orthat the time for recording claims of liens had expired and no claims have been recorded [*Civ. Code § 3137*].

[3] Commencement of Work Required

[a] No Priority Until Commencement

The condition precedent to acquiring any priority is the commencement of the work of improvement or site improvement; that is, there is no priority unless or until construction has been undertaken either by the doing of actual visible work on the land or by the delivery of construction materials to the land [*see Walker v. Lytton Sav. & L. Ass'n*

(1970) 2 Cal. 3d 152, 156-157, 158, 84 Cal. Rptr. 521, 465 P.2d 497] . For example, an architect who prepares plans according to which a building is later constructed has not done work that is of a structural character but only work in anticipation of a structure being built. Only when the building operation has commenced on the ground can it be held under the statutory priority rules that it has commenced so as to give preference to the lien of an architect who prepared the plans [*Walker v. Lytton Sav. & L. Ass'n (1970) 2 Cal. 3d 152, 159, 84 Cal. Rptr. 521, 465 P.2d 497* (decided under former Code Civ. Proc. § 1188.1, *now Civ. Code § 3134*); *see D'Orsay Int'l Partners v. Superior Court (2004) 123 Cal. App. 4th 836, 844, 20 Cal. Rptr. 3d 399* (general contractor who performed design-related services for proposed hotel/commercial development could not record mechanic's lien against property because no construction had ever commenced on project)].

[b] Separate Contract for Site Improvements

If a contract for a site improvement is provided for separately from a contract for the erection of residential units or other structures on the site, then the commencement of the site improvement does not constitute commencement of the erection of the residential units or other structures [*Civ. Code § 3135*]. The date on which any lien attaches to work or materials furnished in connection with a site improvement is, thus, separate from the date on which any lien attaches in connection with an erection of a unit or structure.

The phrase "residential units or other structures" as used in *Civ. Code § 3135* does not limit the application of that statute to residential construction; instead, it refers to other types of structures in addition to residential units. Thus, when a contract for site improvement and a contract for the erection of a structure exist in a given construction project, *Civ. Code § 3135* applies, regardless of whether the project is residential or commercial [*Lambert Steel Co. v. Heller Financial, Inc. (1993) 16 Cal. App. 4th 1034, 1039-1042, 20 Cal. Rptr. 2d 453]* .

[4] Advancements From Secured Lender

When a loan agreement that is secured by a mortgage or deed of trust recorded before commencement of a work of improvement on the secured property provides for obligatory advancements to be made for the construction of the improvement, the mortgage or deed of trust for the advances retains priority over mechanics' liens even though the advances are made after the commencement of the improvement [*Hayward Lbr. & Inv. Co. v. Corbett (1934) 138 Cal. App. 644, 648, 33 P.2d 41]* . The mortgage or deed of trust also retains its priority for nonobligatory advances when they are used in payment of any claim of lien recorded at the date or dates of the advances and thereafter in payment of costs of the work of improvement [*Civ. Code § 3136*]. Otherwise, the mortgage or deed of trust for the advances under the loan agreement is postponed to the dates on which the optional advances are actually made [*see Hayward Lbr. & Inv. Co. v. Corbett (1934) 138 Cal. App. 644, 649, 33 P.2d 41]* .

Even if the secured loan holder actively promotes the making of improvements on the property, the priority of the security is not lost so long as such promotion is for the purpose of increasing the security [*Rheem Mfg. Co. v. United States (1962) 57 Cal. 2d 621, 625, 21 Cal. Rptr. 802, 371 P.2d 578]* . However, if the beneficiary under a deed of trust is either found to be a joint venturer who is sharing in the profits derived from improvements or acts in bad faith or fraudulently, then the priority given to the security might be denied [*see Rheem Mfg. Co. v. United States (1962) 57 Cal. 2d 621, 626-627, 21 Cal. Rptr. 802, 371 P.2d 578]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensContracts LawTypes of ContractsJoint ContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.30

§ 361.30 Effect of Agreement to Arbitrate

If a lien claimant is a party to an agreement to arbitrate that governs the case, arbitration must generally be pursued before an action is begun; however, the right to arbitrate is not waived by bringing an action first, if the claimant (1) includes an allegation in the complaint that he or she does not intend to waive any right of arbitration, and intends to move the court, within 30 days after service of the summons and complaint, for an order to stay further proceedings; and (2) when the complaint is filed, files an application for stay pending arbitration [*Code Civ. Proc. § 1281.5(a)*]. If the claimant fails to request the stay, the right to compel arbitration is waived [*Code Civ. Proc. § 1281.5(b)*]. For further discussion, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.31

§ 361.31 Perfection and Foreclosure of Lien

Before a lien claimant is entitled to enforce his or her lien, he or she must first (1) give a preliminary 20-day notice (private work), if required under *Civ. Code § 3097* [*see §§ 361.160* (procedural checklist), *361.190* (form of preliminary 20-day notice)], and (2) record a claim of lien within the time periods prescribed by *Civ. Code §§ 3115-3117* [*see §§ 361.161* (checklist to record claim of lien), *361.192* (form of claim of lien)].

An action to foreclose must be commenced within 90 days after the recording of the claim of lien unless credit has been extended by the lienclaimant or the time period has been waived [*see Civ. Code § 3114*; *see also §§ 361.162* (procedural checklist), *361.201* and *361.202* (forms of complaints to foreclose liens), 361.203-361.205 (allegations that can be included in complaint)].

A judgment resulting from foreclosure of a mechanics' lien is not enforceable against a person who has an interest in the property but is not named as a defendant and served with process. For example, when property was owned by a limited partnership, a preliminary 20-day notice given to a general partner did not constitute notice on the owner and a resulting judgment of foreclosure did not bind the limited partnership when the limited partnership was not a designated defendant [*see Barr Lumber Co. v. Old Ivy Homebuilders, Inc. (1995) 34 Cal. App. 4th Supp. 1, 40 Cal. Rptr. 2d 717]* . For a judgment of foreclosure of lien, see *§ 361.207*.

If the claimant fails to commence an action to foreclose the lien within the time limitation provided, the lien automatically is null and void and of no further force and effect [*Civ. Code § 3144(b)*]. However, if the period for recording a lien is still open, the inchoate right to the lien is not terminated and a subsequent claim of lien for the same work may be recorded [*Solit v. Tokai Bank (1999) 68 Cal. App. 4th 1435, 1447-1448, 81 Cal. Rptr. 2d 243* ; *Koudmani v. Ogle Enterprises, Inc. (1996) 47 Cal. App. 4th 1650, 1657-1658, 55 Cal. Rptr. 2d 330* ; *Coast Central Credit Union v. Superior Court (1989) 209 Cal. App. 3d 703, 711, 257 Cal. Rptr. 468]* .

Legal Topics:

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

GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.32

§ 361.32 Releasing Property From Lien When No Foreclosure Action Filed

[1] Petition and Controversion of Petition

At any time after expiration of the time period specified by *Civ. Code § 3144* with regard to the period during which property is bound by a lien after recordation of a claim of lien, when no action has been brought to enforce the lien, the owner of the property or the owner of any interest in it may petition the proper court for a decree to release the property from the lien [*Civ. Code § 3154(a)*]. The petition must be verified and allege the matters set forth in *Civ. Code § 3154(b)* [*see § 361.208* (form of petition)]. The petition is deemed controverted by the lien claimant [*Civ. Code § 3154(b)(5)*].

[2] Inapplicability of Arbitration Provisions

The provisions of *Code Civ. Proc. §§ 1141.10-1141.31* (judicial arbitration) do not apply to causes commenced pursuant to *Civ. Code § 3154* to have property released from a mechanic's lien [*Civ. Code § 3154(i)*].

[3] Order Fixing Hearing Date and Continuances

On the filing of the petition, and before any further proceedings are held, the clerk, or if there is no clerk, the judge, will set a hearing date, which must be not more than 30 days after the petition is filed. The court may continue the hearing beyond the 30-day period, but good cause must be shown for any continuance [*Civ. Code § 3154(c)*].

[4] Service of Petition and Order

A copy of the petition and the order fixing the hearing date must be served on the lien claimant at least 10 days prior to the date set for hearing. Service is made either in the manner in which a summons is required to be served [*see* Ch. 518, *Service of Summons and Papers*], or by certified or registered mail, postage prepaid, return receipt requested, addressed to the lien claimant at the claimant's address as shown (1) on the preliminary 20-day notice served by the claimant pursuant to *Civ. Code § 3097, (2)* in the records of the registrar of contractors, (3) on the contract on which the lien is based, or (4) on the claim of lien itself [*Civ. Code § 3154(d)*]. Service by mail is complete on the fifth day following the

day of mailing [*Civ. Code § 3154(e)*].

[5] Proof of Compliance With Service Requirement

No decree may issue in favor of the petitioner unless he or she proves that service of the petition and the order fixing the hearing date was made in compliance with *Civ. Code § 3154(d)* [*see* [4], *above*]. The issue of compliance is deemed to be controverted by the lien claimant [*Civ. Code § 3154(e)*].

[6] Judgment and Decree

In the event judgment is rendered in favor of the petitioner, the decree must indicate all of the matters set forth in *Civ. Code § 3154(e)* [*see § 361.209* (form of judgment)].

[7] Attorney Fees

The prevailing party is entitled to attorney's fees not to exceed $2,000 [*Civ. Code § 3154(g)*].

[8] Release of Lien on Recordation of Decree

On the recordation of a certified copy of the decree, the property described in the decree is released from the lien [*Civ. Code § 3154(f)(4)*]. Once a decree releasing the property has been granted, the lien is extinguished, and there is no lien on which to base a new claim of lien. If such a second claim of lien is recorded, it can be cancelled [*Maris Management Corp. v. Assured Drywall & Textures (1984) 152 Cal. App. 3d 268, 273-275, 199 Cal. Rptr. 309* (overruled on other grounds in *Solit v. Tokai Bank (1999) 68 Cal. App. 4th 1435, 81 Cal. Rptr. 2d 243*)].

[9] Other Causes of Action or Claims for Relief Not Barred

Nothing in *Civ. Code § 3154* is to be construed to bar any other cause of action or claim for relief by the owner of the property or an interest in the property, nor shall a decree canceling a claimant's lien bar the lien claimant from bringing any other cause of action or claim for relief other than an action foreclosing the lien. However, no other action or claim may be joined with the claim for relief established by *Civ. Code § 3154* [*Civ. Code § 3154(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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[Reserved]

§§ 361.33[Reserved]

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§ 361.40 Governing Statutes

Stop notices are governed by *Civ. Code §§ 3156 et seq., 3264*. Definitions of terms used in these code provisions are contained in *Civ. Code §§ 3082-3106*.

The provisions of *Civ. Code § 3156 et seq.* governing stop notices do not apply to any public work [*Civ. Code § 3156*], that is, any work of improvement contracted for by a public entity [*Civ. Code § 3100*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.41

§ 361.41 Nature of Stop Notice Remedy

[1] In General

The stop notice is a remedy that permits most mechanics' liens claimants, on the giving of the notice, in effect equitably to garnish any construction funds the proceeds of which are being held by either an owner or construction lender to defray the costs of a work of improvement, when the claimants are entitled to assert mechanics' liens in connection with the improvement [*see Civ. Code §§ 3083, 3161, 3162*; *A-1 Door & Materials Co. v. Fresno Guar. Sav. & L. Ass'n (1964) 61 Cal. 2d 728, 732-733, 40 Cal. Rptr. 85, 394 P.2d 829]* . The remedy involves a proceeding against the construction fund and is, thus, different than and in addition to the mechanics' lien remedy [*Calhoun v. Huntington Park First Sav. & L. Ass'n (1960) 186 Cal. App. 2d 451, 459, 9 Cal. Rptr. 479]* . Hence, the right to recover on the stop notice claim is not dependent on the establishment of a mechanics' lien [*A-1 Door & Materials Co. v. Fresno Guar. Sav. & L. Ass'n (1964) 61 Cal. 2d 728, 732, 40 Cal. Rptr. 85, 394 P.2d 829]* .

If there is no property against which a mechanics' lien can be asserted, as when the lien has been wiped out by a trust deed foreclosure because the trust deed had priority over the lien, the stop notice is an effective remedy for receiving payment for labor performed or materials furnished [*Rossman Mill & Lbr. Co. v. Fullerton Sav. & L. Ass'n (1963) 221 Cal. App. 2d 705, 708, 34 Cal. Rptr. 644]* . Even if there is no money due to the original contractor or the owner under a lender's agreement with the owner, a lien claimant still has a right to serve a stop notice which may require the construction lender to withhold sufficient funds to answer his or her claims [*A-1 Door & Materials Co. v. Fresno Guar. Sav. & L. Ass'n (1964) 61 Cal. 2d 728, 733-735, 40 Cal. Rptr. 85, 394 P.2d 829]* .

The stop notice remedy may not be applied to construction funds held and administered in California for private works of improvement on sites located outside California [*see Mechanical Wholesale Corp. v. Fuji Bank, Ltd (1996) 42 Cal. App. 4th 1647, 1656, 50 Cal. Rptr. 2d 466]* .

For a form of stop notice, see *§ 361.220*.

[2] Stop Notice as Sole Remedy

Before 1967, persons who had not filed stop notices were not precluded from going against construction loan funds if they could establish the requisite facts for imposition of an equitable lien. These facts were that an owner or construction lender must have directly induced a supplier to supply materials or labor in reliance on the existence of a loan fund and that the funds to which the lien was applied must represent a surplus left in the fund after completion of the project [*see Boyd & Lovesee Lumber Co. v. Western Pacific Financial Corp. (1975) 44 Cal. App. 3d 460, 464, 118 Cal. Rptr. 699]* . In 1967, the Legislature enacted *Civ. Code § 3264* to provide that no person may assert any legal or equitable right with respect to a construction fund for the payment of construction costs other than a right created by direct written contract between the persons and the person holding the funds except pursuant to the provisions of *Civ. Code §§ 3156-3175* governing stop notices and that the rights of all persons furnishing labor, services, equipment, or materials for any work of improvement, with respect to such a fund, are to be governed by those provisions governing stop notices [*Civ. Code § 3264*].

The language of *Civ. Code § 3264* did not completely satisfy the court of appeal in *Swinerton & Walberg Co. v. Union Bank (1972) 25 Cal. App. 3d 259, 101 Cal. Rptr. 665* . In a dictum, it expressed the opinion that equitable liens may still be asserted in particular situations. However, in *Boyd & Lovesee Lumber Co. v. Western Pacific Financial Corp. (1975) 44 Cal. App. 3d 460, 465, 118 Cal. Rptr. 699* , the court of appeal held that *Civ. Code § 3264* abolished all theories of equitable liens or trust funds.

Civ. Code § 3264 applies to claims of general contractors even though they do not have stop notice rights [*Nibbi Brothers, Inc. v. Home Federal Sav. & Loan Assn. (1988) 205 Cal. App. 3d 1415, 1420-1421, 253 Cal. Rptr. 289* ; *Sofias v. Bank of America (1985) 172 Cal. App. 3d 583, 585-587,218 Cal. Rptr. 388]* . *Civ. Code § 3264* bars all claims of the general contractor against the construction lender, not just those against the construction loan funds [*Nibbi Brothers, Inc. v. Home Federal Sav. & Loan Assn. (1988) 205 Cal. App. 3d 1415, 1420-1421, 253 Cal. Rptr. 289]* . If a contractor signs the construction loan agreement between the lender and the owner, agreeing to be bound by certain of its provisions, but the agreement is not made expressly for the contractor's benefit, the contractoris not a third party beneficiary of the construction loan agreement, and cannot satisfy the requirement of *Civ. Code § 3264* that claims be based on the written contract with the construction fund's holder [*Sofias v. Bank of America (1985) 172 Cal. App. 3d 583, 586-587, 218 Cal. Rptr. 388]* .

It does not follow, however, that *Civ. Code § 3264* bars a supplier of labor and materials from recovering from a construction lender on a theory of unjust enrichment. Although the equitable principle of unjust enrichment is part of the doctrinal underpinning of the equitable lien, the law of restitution may give a supplier a cause of action against a lender for unjust enrichment under a broad range of circumstances distinct from those on which an equitable lien was predicated [*Nibbi Brothers, Inc. v. Home Federal Sav. & Loan Assn. (1988) 205 Cal. App. 3d 1415, 1421-1422, 253 Cal. Rptr. 289]* . For example, a contractor who confers a benefit on a construction lender by doing additional construction in reliance on the lender's fraudulent misrepresentations may have a valid cause of action to recover the value of the benefit conferred on the lender if the lender is in fact unjustly enriched by the contractor's performance [*Nibbi Brothers, Inc. v. Home Federal Sav. & Loan Assn. (1988) 205 Cal. App. 3d 1415, 1423, 253 Cal. Rptr. 289]* . In *Nibbi Brothers*, however, the alleged misrepresentations were not actionable because they did not amount to actual promises of payment, but only vague assurances and opinions regarding the developer's capacity to pay [*Nibbi Brothers, Inc. v. Home Federal Sav. & Loan Assn. (1988) 205 Cal. App. 3d 1415, 1423-1426, 253 Cal. Rptr. 289]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 361.42 Service on Owner

[1] Persons Entitled to Serve

Any person who is entitled to claim a mechanics' lien under *Civ. Code §§ 3110* (furnishers of labor or material to work of improvement), or *3112* (site improvements), other than an original contractor, may serve on the owner a stop notice [*Civ. Code § 3158*] at any time after the agreement is made for the furnishing of labor or materials for which a mechanics' lien may be claimed [*Miller v. Mountain View Sav. & L. Ass'n (1965) 238 Cal. App. 2d 644, 653, 48 Cal. Rptr. 278* (decided under former Code Civ. Proc. § 1190.1(b), *now Civ. Code §§ 3158, 3159*)].

[2] Owner's Demand for Notice

The owner may demand in writing that any person entitled to serve a stop notice actually serve him or her with one [*see Civ. Code § 3158*]. If the person fails to serve the notice after such a demand, he or she forfeits the right to a mechanics' lien [*Civ. Code § 3158*].

[3] Owner's Duty to Withhold

Once the owner receives a stop notice given pursuant to *Civ. Code § 3158*, he or she must withhold from the original contractor, or from any person acting under his or her authority and to whom labor or materials, or both, have been furnished or would be furnished by prior agreement, sufficient money due or to become due to such contractor to answer any claim and claim of lien that may be recorded therefor, unless a payment bond has been recorded [*see Civ. Code § 3235*], in which case the owner may, but is not obligated to, withhold such money [*Civ. Code § 3161*].

If the owner elects not to withhold pursuant to a stop notice by reason of a payment bond having been previously recorded, the owner must, within 30 days after receipt, give a written notice to the claimant at the address shown in the stop notice that the bond has been recorded and furnish to the claimant a copy of that bond [*Civ. Code § 3161*]. For a form of notice, see *§ 361.222*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-361 California Forms of Pleading and Practice--Annotated § 361.43

§ 361.43 Service on Construction Lender

[1] Construction Lender Defined

A construction lender is any mortgagee or beneficiary under a deed of trust lending funds with which the cost of a work of improvement is wholly or partly to be defrayed, or any assignee or successor in interest of either, or any escrow holder or other party holding any funds furnished or to be furnished by the owner, lender, or any other person as a fund from which to pay construction costs [*Civ. Code § 3087*].

Typically, a construction lender is the holder of a construction loan fund through an assignment of the loan funds by the owner in the original loan agreement. Under the loan agreement, it is the duty of the lender to maintain a construction loan account from which progress payments are made to the contractor or contractors on a work of improvement [*see A-1 Door & Materials Co. v. Fresno Guar. Sav. & L. Ass'n (1964) 61 Cal. 2d 728, 731, 40 Cal. Rptr. 85, 394 P.2d 829* ; *Idaco Lumber Co. v. Northwestern S. & L. Assn. (1968) 265 Cal. App. 2d 490, 493, 71 Cal. Rptr. 422]* . The construction loan fund is ordinarily secured by a deed of trust that has priority over any mechanics' liens that may attach to the work of improvement, because the lender and owner entered into the loan agreement before the commencement of the work of improvement [*see § 361.29*]. Thus, the proceeds of the construction loan for a claimant who is entitled to serve a stop notice are often substituted for the real property against which a mechanics' lien might be claimed, since the remedy of a mechanics' lien has been rendered inadequate because of the prior deed of trust [*see Miller v. Mountain View Sav. & L. Ass'n (1965) 238 Cal. App. 2d 644, 658, 48 Cal. Rptr. 278]* .

[2] Service of Stop Notice

A construction lender may be given either a stop notice or a bonded stop notice at any time after the agreement is made for the furnishing ofmaterials or labor [*Miller v. Mountain View Sav. & L. Ass'n (1965) 238 Cal. App. 2d 644, 653, 48 Cal. Rptr. 278* (decided under former Code Civ. Proc. § 1190.1(b), *now Civ. Code §§ 3158, 3159*)].

[3] Bonded Stop Notice Defined

A bonded stop notice is a stop notice accompanied by a bond with good and sufficient sureties. The bond must be in a

penal sum equal to 1.25 times the amount of the claim conditioned that, if the defendant recovers judgment in an action brought on the verified claim or on the lien filed by the claimant, the claimant will pay all costs that may be awarded against the owner, original contractor, construction lender, or any of them, and all damages that such owner, original contractor, or construction lender may sustain by reason of the equitable garnishment effected by the claim or by reason of the claim, not exceeding the sum specified in the bond [*Civ. Code § 3083*]. When the proffered bond is only in the amount of the claim, the lender is not required to withhold funds. There is no statutory basis for the claim that the lender is required to withhold a proportionate amount of funds [*Manos v. Degen (1988) 203 Cal. App. 3d 1237, 1239-1241, 250 Cal. Rptr. 493]* . For a general form of a statutory undertaking, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[4] Persons Entitled to Serve

Any person entitled to serve the owner a stop notice may serve the construction lender a stop notice or bonded stop notice except that the notice may only be given for materials, equipment, or services furnished or labor performed [*Civ. Code § 3159(a)*].

[5] Lender's Duty to Withhold

A construction lender who has been properly served with a stop notice is required to withhold funds when (1) the stop notice is a bonded stop notice filed by an original contractor, regardless of whether a payment bond has been previously recorded [*Civ. Code §§ 3159(a)(1), 3162(a)(1)*; *see Civ. Code § 3235* (effect of recording payment bond)]; or (2) the stop notice is a bonded stop notice filed by any person entitled to do so [*see Civ. Code § 3159(a)*] other than an original contractor and a payment bond was *not* recorded pursuant to *Civ. Code § 3235* before the first stop notice was served [*Civ. Code §§ 3159(a)(2), 3162(a)(2), (3)*].

A construction lender may, but is not required to, withhold funds on receipt of a stop notice when (1) the stop notice is not bonded, regardless of who gives it [*Civ. Code § 3161(a)*]; or (2) the stop notice is a bonded stop notice filed by any person entitled to do so [*see Civ. Code § 3159(a)*] other than an original contractor and a payment bond was recorded pursuant to *Civ. Code § 3235* before the first stop notice was served [*Civ. Code §§ 3159(a)(2), 3162(a)(2), (3)*].

In relevant situations, the lender must furnish the claimant with notice of its election not to withhold funds within 30 days after it so elects; provided that, at the time it gives the lender the stop notice or bonded stop notice, the claimant includes a written request for notice of the election accompanied by a preaddressed, stamped envelope. The lender will not be liable for failing to furnish a copy of the bond if (1) the failure was not intentional and resulted from a bona fide error, (2) the lender maintains reasonable procedures to avoid such errors, and (3) the error was corrected not more than 20 days from the date the violation was discovered [*Civ. Code §§ 3159(a)(3), 3162(a)(3)*].

For further details related to the service of stop notices, see the procedural checklist in *§ 361.170*.

[6] Amount Withheld

When an owner or lender is required to withhold funds pursuant to a proper stop notice, the amount withheld must generally be one that is sufficient to answer the claim and any lien that may be recorded for the claim [*see Civ. Code §§ 3161, 3162(a)* (owners and construction lenders, respectively); *see also Idaco Lumber Co. v. Northwestern S. & L. Assn. (1968) 265 Cal. App. 2d 490, 500-501, 71 Cal. Rptr. 422]* . In the case of a stop notice or bonded stop notice filed by the original contractor or by a subcontractor, the recovery is limited to the net amount due the claimant after deducting the stop notice claims of all subcontractors or material suppliers who have filed bonded stop notices for work done on behalf of the original contractor or subcontractor [*Civ. Code §§ 3159(b), 3162(b)*]. In no event is a construction lender required to withhold more than this net amount in connection with a bonded stop notice. This amount represents the limit of the lender's liability [*Civ. Code §§ 3159(c), 3162(c)*]. Within the limits of this statutory liability, if the lender fails to withhold sufficient funds as directed in a stop notice, the lender will be personally liable for the full amount plus

interest at the legal rate accruing from the date the stop notice claimant should have been paid [*Idaco Lumber Co. v. Northwestern S. & L. Assn. (1968) 265 Cal. App. 2d 490, 499-500, 71 Cal. Rptr. 422* ; *see Westinghouse Electric Corp. v. County of Los Angeles (1982) 129 Cal. App. 3d 771, 777-778, 181 Cal. Rptr. 332]* .

Funds that the construction lender is required to withhold to answer stop notice claims must be from the actual funds furnished or to be furnished to pay construction costs. The lender's duty is not limited to amounts due and payable under the loan agreement at the time the stop notice is serviced, such as progress payments for work completed. Private arrangements between the borrower and lender of construction funds determining disbursement of such funds do not limit the rights of a stop notice claimant to garnish the fund itself to the extent necessary to cover its claim [*A-1 Door & Materials Co. v. Fresno Guar. Sav. & L. Ass'n (1964) 61 Cal. 2d 728, 733-734, 40 Cal. Rptr. 85, 394 P.2d 829]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensReal Property LawConstruction LawContractors & SubcontractorsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.44

§ 361.44 Priority Over Assignments

No assignment by the owner or contractor of contruction loan funds, whether made before or after a stop notice or bonded stop notice is given to a construction lender, is held to take priority over the stop notice or bonded stop notice, and any assignment has no effect insofar as the rights of the claimants who give the stop notice or bonded stop notice are concerned [*Civ. Code § 3166*].

By virtue of this code provision, an owner's default under a construction loan agreement, followed by the construction lender's charging back to itself the unexpended balance of the fund and recording notices of default under its deed of trust before receipt of a stop notice, cannot defeat the rights of the stop notice claimant [*Miller v. Mountain View Sav. & L. Ass'n (1965) 238 Cal. App. 2d 644, 657, 48 Cal. Rptr. 278]* . The assertion of the lender's right by virtue of his or her contract with the borrower must await the running of the period in which claims may be filed; it then must yield priority to such claims as are filed since the asserted right to continued possession of the funds depends entirely on the assignment made to it by the owner, which assignment is invalidated by the terms of former Code Civ. Proc. § 1190.1(h) (*now Civ. Code § 3166*) [*Miller v. Mountain View Sav. & L. Ass'n (1965) 238 Cal. App. 2d 644, 655, 48 Cal. Rptr. 278]* .

A lender's preallocation of construction loan funds and periodic disbursements to itself for interest, loan fees, and other expenses constitutes an assignment; thus the lender is not entitled to priority for those funds over stop notice claimants [*Familian Corp. v. Imperial Bank (1989) 213 Cal. App. 3d 681, 688, 262 Cal. Rptr. 101]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensLien PrioritiesReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.45

§ 361.45 Action on Stop Notice Claim

[1] In General

The stop notice claimants' right to payment does not arise simply on their giving notice of their claims. The claimant must commence an action against the owner or construction lender to enforce the payment of the claim within the time periods set forth in *Civ. Code § 3172* [*A-1 Door & Materials Co. v. Fresno Guar. Sav. & L. Ass'n (1964) 61 Cal. 2d 728, 736, 40 Cal. Rptr. 85, 394 P.2d 829* ; for a form of complaint to enforce a stop notice, *see § 361.223*].

In an action to effect recovery on the withheld funds, the person withholding must account for the full amount that is required to be withheld. If he or she fails to do so, a personal judgment may be entered against him or her for the difference between what was withheld and what was required to be withheld [*Calhoun v. Huntington Park First Sav. & L. Ass'n (1960) 186 Cal. App. 2d 451, 459-460, 9 Cal. Rptr. 479]* . If the holder of the funds pays out the money that was required to be withheld to other claimants on a pro rata basis, a claimant who did not share in the distribution is entitled to a personal judgment against the holder for the full amount of the claim [*Idaco Lumber Co. v. Northwestern S. & L. Assn. (1968) 265 Cal. App. 2d 490, 497, 71 Cal. Rptr. 422]* . Thus, the holder of construction funds may not invalidate the effect of a notice given by thereafter transferring those funds to creditors or by using them to advance his or her own interests [*Calhoun v. Huntington Park First Sav. & L. Ass'n (1960) 186 Cal. App. 2d 451, 459, 9 Cal. Rptr. 479]* , unless no action is commenced in the stop notice claim within the time period set forth in *Civ. Code § 3172* [*see Civ. Code § 3172*].

[2] Claim Coextensive With Owner's Obligation

The equitable garnishment effected through stop notice proceedings is as extensive as the claim that it is intended to protect. To the extent that construction loan funds are available, the fundholder must pay whatever the owners owe the stop notice claimants [*A-1 Door & Materials Co. v. Fresno Guar. Sav. & L. Ass'n (1964) 61 Cal. 2d 728, 737, 40 Cal. Rptr. 85, 394 P.2d 829* (awarding interest before judgment found due under *Civ. Code § 3287* authorizing such an award)].

[3] Insufficient Funds for Claims

If the money withheld or required to be withheld pursuant to any stop notice or bonded stop notice is insufficient to pay in full the valid claims of all persons by whom notices were given, it is to be distributed among these persons in the same ratio that their respective claims bear to the aggregate of all of the valid claims. This pro rata distribution is made among the persons entitled to share therein without regard to the order of time in which either their respective notices may have been given or their respective actions, if any, commenced [*Civ. Code § 3167*].

For further details relating to actions on stop notices, see the procedural checklist in *§ 361.171* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated §§ 361.46-361.59

[Reserved]

§§ 361.46[Reserved]

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32-361 California Forms of Pleading and Practice--Annotated § 361.60

§ 361.60 Governing Statutes

Payment bonds are defined in *Civ. Code § 3096*. Provisions relating to bonds in general are contained in *Civ. Code §§ 3225-3227*. Actions on payment bonds which may be demanded by an owner from an original contractor are governed by *Civ. Code §§ 3235-3242*. Provisions for payment bonds which may be recorded to ensure the priority of certain secured encumbrances are contained in *Civ. Code §§ 3138, 3139*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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§ 361.61 Payment Bonds

[1] Defined

A payment bond is a bond with good and sufficient sureties which is conditioned for the payment in full of any mechanics' lien claimant and which also by its terms is made to inure to the benefit of all such claimants so as to give these persons a right of action to recover on the bond in any suit brought to foreclose the liens provided for in *Civ. Code §§ 3110-3112* or in a separate suit brought on the bond. Either an owner, an original contractor, or a subcontractor may be the principal on any payment bond [*Civ. Code § 3096*].

[2] Performance Bond Distinguished

A performance bond is an undertaking furnished by a contractor for the faithful performance of the contract by the contractor guaranteeing that the work undertaken will be done according to the terms of the contract [*see Gordy v. United Pacific Ins. Group (1966) 243 Cal. App. 2d 445, 448, 52 Cal. Rptr. 438]* . In contract, the payment bond guarantees the satisfaction of the obligations of all lien claimants who have furnished labor or materials to a work of improvement or site improvement [*see Civ. Code § 3096*; *Gordy v. United Pacific Ins. Group (1966) 243 Cal. App. 2d 445, 448-449, 52 Cal. Rptr. 438]* . If the bond by its terms guarantees performance by the contractor and payment by the contractor of all obligations for material, equipment, and labor required in the work contracted for, the bond is both a performance and a payment bond [*Gordy v United Pacific Ins. Group (1966) 243 Cal. App. 2d 445, 448-449, 52 Cal. Rptr. 438]* .

[3] Construction

Any payment bond is construed most strongly against the surety and in favor of all persons for whose benefit the bond is given [*Civ. Code § 3226*].

[4] Sole Condition of Recovery

The sole condition of recovery on any payment bond for any lien claimant is that the claimant has not been paid the full

amount of his claim [*Civ. Code § 3226*]. In substance, the surety on a payment bond guarantees the integrity and solvency of the contractor. The inefficiency of the claimant, such as the failure to require a contractor to authorize the claimant to retain an owner's check in payment of the contractor's indebtedness to him or her, is considered a risk incident to the surety's undertaking and does not relieve him or her of liability [*Ferry v. Ohio Farmers Ins. Co. (1963) 211 Cal. App. 2d 651, 659, 27 Cal. Rptr. 471]* . Under no circumstances is a surety released from liability to a lien claimant by reason of a breach of contract between the owner and original contractor [*Civ. Code § 3226*].

[5] Exoneration or Release of Sureties

The surety or sureties on any payment bond may not be exonerated or released from the obligation of the bond by any of the following [*Civ. Code § 3225*]:

- Changes, alterations, or modifications in or of any contract, plans, specifications or agreement pertaining or relating to the furnishing of labor materials or equipment therefor.

- Changes or modifications of any terms of payment or extension of the time for any payment pertaining or relating to any scheme or work of improvement.

- A rescission or attempted rescission of any contract, agreement or bond.Conditions precedent or subsequent in the bond attempting to limit the right of recovery of claimants otherwise entitled to recover under any contract, agreement, or bond.

- Any fraud practiced by any person other than the claimant seeking to recover on the bond where the bond is given for the benefit of the claimants.

[6] Preference for Subordinated Secured Encumbrances

Payment bonds may be procured in order to have subordinated mortgages or deeds of trust preferred to mechanics' liens that have attached for labor and materials furnished to works of improvement and site improvements under *Civ. Code §§ 3134, 3137* [*Civ. Code §§ 3138, 3139*].

[7] Site Improvement Liens

Civ. Code § 3139 provides that any mortgage or deed of trust which is subordinate to any site improvement lien will be preferred to any such lien if the owner or holder of the mortgage or deed of trust procures a payment bond in an amount not less than 50 percent of the principal amount of the mortgage or deed of trust and records the bond in the office of the county recorder in the county where the site is located before completion of the improvement.

[8] Works of Improvement Liens

If a holder of a mortgage or deed of trust which is subordinate to any lien for labor or materials furnished to a work of improvement which has attached under *Civ. Code § 3110* procures a payment bond which refers to the mortgage or deed of trust, in an amount not less than 75 percent of the principal amount of the mortgage or deed of trust and records the bond in the office of the county recorder in the county where the site is located, then the mortgage or deed of trust will be preferred to all liens for labor, services, equipment, or materials furnished after the recording [Civ. Code § 3738].

[9] Limitation of Owner's Liability

An owner's liability for work and materials furnished to a work of improvement by a subcontractor, materialman, or laborer is ordinarily not limited by the original contract price unless such a claimant had actual or constructive notice of

the contract or any modification thereof before he or she furnished the labor or materials [*see Civ. Code § 3124*; *Union Supply Co. v. Morris (1934) 220 Cal. 331, 335, 30 P.2d 394]* . *Civ. Code §§ 3235-3241* provide a procedure whereby an owner may exact a payment bond from the original contractor in order to limit the owner's liability in all cases to the measure of the original contract price, thus protecting the owner from any failure of the contractor to perform his or her contract and make full payment to all claimants for all work done and materials furnished [*see Civ. Code § 3236*].

[10] Prerequisites for Limiting Recovery

To gain the benefits of a contractor's payment bond, the owner must have filed the original contract for the work of improvement before commencement of the work and have recorded the payment bond exacted from the original contractor in an amount not less than 50 percent of the contract price in the office of the county recorder of the county in which the property is situated [*Civ. Code § 3235*].

[11] Effect of Recording Bond and Contract

When the original contract has been filed and the payment bond recorded as required by *Civ. Code § 3235*, the court must, when it would be equitable to do so, restrict the recovery under lien claims to an aggregate amount equal to the amount found to be due from the owner to the original contractor. It must also render judgment against the original contractor and his or her sureties on the bond for any deficiency or difference that may remain between the amount found to be due and the whole amount found to be due the claimants [*Civ. Code § 3235*].

[12] Failure to Record Bond

If the payment or original contract has not been recorded as required by *Civ. Code § 3235*, the owner's property is subject to the full amount of the lien that the lien claimant is entitled to assert under *Civ. Code § 3123* [*see Culbertson v. Cizek (1964) 225 Cal. App. 2d 451, 467, 37 Cal. Rptr. 548* (decided under former Code Civ. Proc. § 1185.1)]. Furthermore, the surety remains equally liable since the bond is still valid as a common law bond furnished for the benefit of all persons named as beneficiaries, unless the bond provides that recording is a prerequisite to its validity [*Culbertson v. Cizek (1964) 225 Cal. App. 2d 451, 467, 468, 37 Cal. Rptr. 548]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsConditions PrecedentContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.62

§ 361.62 Suit on Bond

[1] Independent Remedy

The right to bring suit on a contractor's payment bond does not prevent mechanics' lien claimants from proceeding against the owner's property on their claims. The remedies of a foreclosure of the lien and a personal suit against the surety are independent and cumulative and may be pursued simultaneously, so long as any money collected on the personal judgment is credited on the amount of the lien [*Culbertson v. Cizek (1964) 225 Cal. App. 2d 451, 468, 37 Cal. Rptr. 548]* . Thus, the waiver of a right to assert a mechanics' lien against an owner's property in connection with a work of improvement does not in any way impair a lien claimant's right to proceed against a surety on a contractor's payment bond posted in connection with the work [*Ferry v. Ohio Farmers Ins. Co. (1963) 211 Cal. App. 2d 651, 655, 27 Cal. Rptr. 471* (decided under former *Code Civ. Proc. §§ 1181-1203.1, now Civ. Code §§ 3082-3267*)].

[2] Invalidity of "Pay If Paid" Provision

A surety's liability to pay a subcontractor's unsatisfied claim for work performed was not affected by the facts that (1) the owner had not paid the general contractor, and (2) the contract between the subcontractor and general contractor included a "pay if paid" provision that purported to make payment by the owner to the general contractor a condition precedent to the general contractor's obligation to pay the subcontractor. The California Supreme Court held that the "pay if paid" provision was void because it violated the public policy that underlies the anti-waiver provisions of the mechanics' lien laws. Once the subcontractor successfully performed the work, the general contractor became liable under the subcontract for payment and the surety was likewise liable on the payment bond [*Wm. R. Clarke Corp. v. Safeco Ins. Co. (1997) 15 Cal. 4th 882, 886, 896-897, 64 Cal. Rptr. 2d 578, 938 P.2d 372]* .

In response to the Supreme Court's decision in *Safeco*, the Legislature enacted *Civ. Code § 3110.5*, which requires an owner of property who contracts for a private work of improvement in an amount exceeding $5 million if the owner's interest is a fee simple absolute interest or $1 million if the owner's interest is less than a fee simple absolute interest, to provide one of three specified forms of security for the project to be used only when the owner defaults on his or her contractual obligations to the original contractor. The security requirement does not apply to single-family residences, public works projects, housing developments eligible for a density bonus, or certain publicly-traded and qualified

private companies [*Civ. Code § 3110.5*].

For further details of actions on payment bonds, see the procedural checklist in *§ 361.180*. For forms of complaints against surety on contractor's or subcontractor's payment bond, see *§§ 361.231, 361.232*.

[3] Performance Required by Claimant

No provision of *Civ. Code §§ 3082-3267* (mechanics' liens, stop notices, and payment bonds) may be construed to give to any person any right of action on any contractor's payment bond, unless the work forming the basis for his or her claim was performed by that person for the principal on the bond, or one of his or her subcontractors, pursuant to the contract between the original contractor and the owner [*Civ. Code § 3267*]. As long as the basic requirements for filing a claim against a payment bond are satisfied, it makes no difference how far down the ladder a potential claimant finds himself or herself. For example, in the face of an argument that claims should be limited to first tier material suppliers and second tier subcontractors, the Court of Appeal held that such an interpretation was in conflict with the mechanics' lien statutes, which give lien rights to all subcontractors, and that there is no basis in the statutes themselves, or in the legislative history to deny third-tier subcontractors the right to file a claim against a payment bond [*Union Asphalt, Inc. v. Planet Ins. Co. (1994) 21 Cal. App. 4th 1762, 1765-1767, 27 Cal. Rptr. 2d 371]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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§ 361.63 Payment Bond's Effect on Stop Notice

If a payment bond has been recorded along with the original contract as provided in *Civ. Code § 3235*, a construction lender has the option of not withholding on a bonded stop notice given by anyone other than the original contractor. If requested, the construction lender must furnish the claimant a copy of the bond within 30 days after electing not to withhold [*Civ. Code §§ 3159(a)(3), 3161, 3162(a)(3)*]. A form of election and notice of payment bond is set forth in *§ 361.222*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.64

§ 361.64 Subrogation of Surety

A surety who has paid the claims of valid lien claimants pursuant to the provisions of a contractor's payment bond has the right to be subrogated to the rights of the claimants as against the principal on the bond. However, the surety may not proceed against the property of the owner unless the owner has fraudulently conspired with the contractor to have the payment bond issued. Although the surety is not released or exonerated from liability to the claimants in case of an owner's fraud, the surety is subrogated to the lien rights of the claimant and thus may foreclose on the owner's property [*see Filippi v. McMartin (1960) 188 Cal. App. 2d 135, 139, 10 Cal. Rptr. 180]* .

To be entitled to the rights of subrogation, the surety must have paid the claimants to protect his or her own interest, must not have acted as a volunteer, must not have been primarily liable for the debt paid, and must have paid the entire debt. In addition, the subrogation must not work an injustice to other persons' rights [*Filippi v. McMartin (1960) 188 Cal. App. 2d 135, 140, 10 Cal. Rptr. 180]* .

For further discussion and forms relating to subrogation and sureties, see Ch. 536, *Subrogation* , and Ch. 538, *Suretyship, Bonds, and Undertakings* , respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawThird PartiesSubrogationReal Property LawConstruction LawContractsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated §§ 361.65-361.69

[Reserved]

§§ 361.65[Reserved]

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32-361 California Forms of Pleading and Practice--Annotated § 361.70

§ 361.70 Governing Statutes

Provisions for the forfeiture of mechanics' liens and the right to pro rata distribution of money withheld are contained in *Civ. Code §§ 3118, 3158, 3168*. Waiver of the provisions of the mechanics' lien law is governed by *Civ. Code §§ 3262, 3268*. Licensing of contractors is governed by *Bus. & Prof. Code § 7000 et seq.* Bonds for the release of property subject to mechanics' liens and for the release of funds required to be withheld to respond to stop notices or bonded stop notices are governed by *Civ. Code §§ 3143, 3171*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.71

§ 361.71 Forfeiture

[1] False Claim of Lien

A claimant forfeits his or her lien if he or she willfully includes in the claim of lien any labor, services, equipment, or materials not furnished to the property described in the claim [*Civ. Code § 3118*].

[2] False Stop Notice

Any person who willfully gives a false stop notice or bonded stop notice or willfully includes in his or her notice any labor, services, equipment, or materials not furnished for the property described in the notice forfeits all right to participate in the pro rata distribution of any money withheld [*see Civ. Code § 3167*] and all right to any mechanics' lien [*Civ. Code § 3168*].

[3] Refusal to Give Stop Notice

A mechanics' lien may be forfeited if the claimant has refused to give a stop notice on the owner's written demand therefor [*Civ. Code § 3158*]. For a form of owner's demand for stop notice, see *§ 361.240*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.72

§ 361.72 Laches

An action to foreclose a mechanics' lien and an action to enforce a stop notice are both considered equitable actions; hence, equitable defenses may be raised against these actions [*see A.A. Baxter Corp. v. Home Owners & Lenders (1970) 7 Cal. App. 3d 725, 734-735, 86 Cal. Rptr. 854* ; *A-1 Door& Materials Co. v. Fresno Guar. Sav. & L. Assn. (1964) 61 Cal. 2d 728, 732-733, 40 Cal. Rptr. 85, 394 P.2d 829* (stop notice effects equitable garnishment)]. Thus, despite the fact that a plaintiff commences an action to foreclose within the statutory time limits, when the plaintiff delays in order to advance his or her financial interests at the expense of innocent homeowners and lenders, the doctrine of laches is applicable as a basis for denying the equitable relief of foreclosing his or her lien [*A. A. Baxter Corp. v. Home Owners & Lenders (1970) 7 Cal. App. 3d 725, 734-735, 86 Cal. Rptr. 854]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.73

§ 361.73 Waiver

Neither the owner nor the original contractor, by any term of the contract between them, or otherwise, may waive, affect, or impair the claims and liens of other persons except by their written consent, and any term of the contract providing to the contrary will be null and void. Any written consent given by any claimant is null, void, and unenforceable unless and until the claimant executes and delivers a waiver and release. Such a waiver and release is binding and effective to release the owner, construction lender, and surety on a payment bond from claims and liens only if the waiver and release follows substantially one of the forms set forth in *Civ. Code § 3262* [for forms of waivers and releases, *see §§ 361.241 -361.244*] and is signed by the claimant or authorized agent, and in the case of a conditional release, there is evidence of payment to the claimant. Evidence of payment may be by the claimant's endorsement on a single or joint payee check that has been paid by the bank upon which it was drawn or by written acknowledgment of payment given by the claimant [*Civ. Code § 3262(a)*; for a form of endorsement on a joint check, *see § 361.245*].

No oral or written statement purporting to waive, release, impair or otherwise adversely affect a claim is enforceable or creates any estoppel or impairment of a claim unless (1) it is pursuant to a waiver and release prescribed in *Civ. Code § 3262* [for forms of waiver and release, *see §§ 361.241 -361.244*], or (2) the claimant had actually received payment in full for the claim [*Civ. Code § 3262(b)(1)*]. However, a stop notice claimant is not precluded from reducing the amount of, or releasing in its entirety, a stop notice that has been served on an owner. The reduction or release of a stop notice may be served in a form other than the statutory forms of release required for use in a mechanics' lien context [*Civ. Code § 3262(b)(2)*].

A "pay if paid" provision in a construction subcontract, which makes payment by the owner to the general contractor a condition precedent to the general contractor's obligation to pay the subcontractor for work the subcontractor has performed, is contrary to public policy and therefore unenforceable because it effects an impermissible indirect waiver or forfeiture of the subcontractor's constitutionally protected mechanic's lien rights in the event of nonpayment by the owner [*Wm. R. Clarke Corp. v. Safeco Ins. Co. (1997) 15 Cal. 4th 882, 885-886, 64 Cal. Rptr. 2d 578, 938 P.2d 372* ; *but see Civ. Code § 3110.5* (requiring owner of property who contracts for certain private work of improvement to provide security for project)].

The statutory provisions governing waiver, discussed above, do not affect the enforceability of either an accord and satisfaction regarding a bona fide dispute or any agreement made in settlement of an action pending in any court, provided the accord and satisfaction or agreement and settlement make specific reference to the mechanics' lien, stop notice, or bond claims [*Civ. Code § 3262(c)*]. Additionally, a contractor is not prohibited from releasing its own mechanics' lien claim by a written release that is recorded [*Santa Clara Land Title Co. v. Nowack & Associates, Inc. (1991) 226 Cal. App. 3d 1558, 1568-1569, 277 Cal. Rptr. 497]* . For forms of release of lien or a partial release, see *§§ 361.246, 361.247*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawDefensesGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.74

§ 361.74 Requirement of Contractor's License--Allegation of Licensure

No person who is in the business or acts in the capacity of a contractor may bring or maintain any action for compensation for performance for an act or contract for which a license is required under *Bus. & Prof. Code § 7000 et seq.*, except joint venture licenses, unless he or she alleges that at all times during the performance he or she was a duly licensed contractor [*Bus. & Prof. Code § 7031*]. This requirement that a contractor allege being licensed applies to contractors who bring actions under the mechanics' lien law [*see Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 145-148, 308 P.2d 713* (action by contractor to enforce stop notice claim); *Famous Builders v. Bolin, Inc. (1968) 264 Cal. App. 2d 37, 39-43, 70 Cal. Rptr. 17* (action to foreclose mechanics' lien)].

Who qualifies as a contractor is determined by *Bus. & Prof. Code § 7026*. Although the term includes subcontractors and specialty contractors [*Bus. & Prof. Code § 7026*], one may be a subcontractor for purposes of conferring mechanics' lien rights on those the subcontractor may employ or contract with [*see Theisen v. County of Los Angeles (1960) 54 Cal. 2d 170, 183-184, 5 Cal. Rptr. 161, 352 P.2d 529]* but nevertheless be exempt from the licensing requirements. This is true because the mechanics' lien law is designed in part to provide financial security for suppliers who do no installation work, but whose custom-made products have little economic value except as part of the improvements for which they were designed, whereas the contractors' licensing law has as its objective the protection of the public from incompetent and unreliable contractors [*Steinbrenner v. J. A. Waterbury Constr. Co. (1963) 212 Cal. App. 2d 661, 666, 28 Cal. Rptr. 204]* .

Persons who only furnish materials or supplies without fabricating them into, or consuming them in the performance of, the work of a contractor, and persons who engage in regulated licensing activities under *Bus. & Prof. Code § 7000 et seq.* as employees with wages as their sole compensation, but who do notcustomarily engage in an independently established business, and do not have the right to control or discretion as to the manner of performance so as to determine the final results of the work performed, are not required to have contractors' licenses in bringing and maintaining actions under the mechanics' lien law [*see Bus. & Prof. Code §§ 7052, 7053*]. A materialman or manufacturer who furnishes finished products, materials, or articles of merchandise and does not install or contract for the installation of these items is not required to be licensed under *Bus. & Prof. Code §§ 7000-7161* [*Bus. & Prof. Code § 7045*].

For complete discussion of the licensing and bond requirements for contractors, see Ch. 104, *Building Contracts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.75

§ 361.75 Release Bonds

[1] Release of Property Subject to Lien

An owner of property or of any interest in the property sought to be charged with a claim of lien, or any original contractor or subcontractor who disputes the correctness or validity of any claim of lien, may have the property released from the lien and from any action brought to foreclose the lien by recording a bond as prescribed in *Civ. Code § 3143*.

Any person who obtains a lien release bond that is recorded must give notice of the recording to the lienholder by mailing a copy of the bond to the lienholder at the address appearing on the lien. Service of the notice must be by certified or registered mail, return receipt requested. Failure to give the notice does not affect the validity of the lien release bond, but the statute of limitations on any action on the bond is tolled until the notice is given. Any action on the lien release bond must be commenced by the claimant within six months of the recording of the lien release bond [*Civ. Code § 3144.5*].

If, however, the release bond is recorded after a foreclosure action has been commenced, the six-month limitation period is not applicable, because there is only a single cause of action for recovery against either the property or the bond. The action is timely against the surety because it is in the position of a successor to the property. Therefore, the surety does not have to be served with a supplemental complaint within six months [*Hutnick v. United States Fidelity & Guaranty Co. (1988) 47 Cal. 3d 456, 463-466, 253 Cal. Rptr. 236, 763 P.2d 1326]* . Similarly, if the plaintiff obtains a judgment and then learns of the release bond, the six-month statute of limitations is not applicable to an action against the surety because the second action is pursuing the same cause of action [*Dennis Electric, Inc. v. United States Fidelity & Guaranty Co. (1990) 219 Cal. App. 3d 1228, 1232-1236, 269 Cal. Rptr. 26]* .

Because an action against the surety on a *Civ. Code § 3143* release bond and an action to foreclose a mechanics' lien are one and the same cause of action, the bar against recovery of attorneys' fees in a mechanics' lien foreclosure action also applies in a release bond recovery action [*Royster Construction Co. v. Urban West Communities (1995) 40 Cal. App. 4th 1158, 1164-1167, 47 Cal. Rptr. 2d 684]* .

[2] Landowner's Liability

If the landowner is a principal on the bond and is thus personally liable, he or she is not entitled to dismissal from the action after the release bond has been recorded [*Hutnick v. United States Fidelity & Guaranty Co. (1988) 47 Cal. 3d 456, 469, 253 Cal. Rptr. 236, 763 P.2d 1326]* . However, if the landowner is not a principal on the bond, he or she is entitled to dismissal after the recording of the bond because he or she is not personally liable [*Frank Curran Lbr. Co. v. Eleven Co. (1969) 271 Cal. App. 2d 175, 184-185, 76 Cal. Rptr. 753]* .

If the plaintiff in the foreclosure action does not serve the principal on the bond, the surety can notify the principal and offer an opportunity to join the defense. The principal will be personally liable even if he or she does not join the action [*Code Civ. Proc. § 1912*; *Hutnick v. United States Fidelity & Guaranty Co. (1988) 47 Cal. 3d 456, 469, 253 Cal. Rptr. 236, 763 P.2d 1326]* .

[3] Release of Withheld Funds

An owner, construction lender, or any original contractor or subcontractor who disputes the correctness or validity of any stop notice or bonded stop notice may have the funds required to be withheld to respond to the stop notice or bonded stop notice released by recording a bond prescribed in *Civ. Code § 3171*.

[4] Summary Enforcement

A mechanic's lien or stop notice release bond is considered to be "given in an action or proceeding" for purposes of *Code Civ. Proc. § 996.440(a)* (motion to enforce liability on bond without need for independent action) and thus may be enforced by the summary procedures set forth in the Bond and Undertaking Law [*Grade-Way Construction Co. v. Golden Eagle Ins. Co. (1993) 13 Cal. App. 4th 826, 830-835, 16 Cal. Rptr. 2d 649* ; *see Code Civ. Proc. § 995.010 et seq.*]. The summary enforcement procedure provides for a motion made after entry of final judgment in the action in which the bond is given. Judgment must be entered against the surety unless the surety files affidavits showing a triable issue of fact [*see Code Civ. Proc. § 996.440*]. A stop notice release bond issued before the commencement of litigation, however, is not "given in an action or proceeding." Therefore, the summary enforcement procedures of the Bond and Undertaking Lawdo not apply [*National Technical Systems v. Commercial Contractors, Inc. (2001) 89 Cal. App. 4th 1000, 1009-1010, 108 Cal. Rptr. 2d 67]* .

For a discussion and forms regarding the summary procedure, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-361 California Forms of Pleading and Practice--Annotated § 361.76

§ 361.76 Obligation to Make Timely Progress Payments

[1] 30-Day Limit

Unless the construction contract specifies otherwise, the owner must pay to the contractor, within 30 days following receipt of a demand for payment in accordance with the contract, any progress payment due as to which there is no good faith dispute between the parties. If there is such a dispute, the owner may withhold from the progress payment an amount equal to no more than 150 percent of the disputed amount. If any amount is wrongfully withheld, the contractor will be entitled to a specified penalty [*Civ. Code § 3260.1(b)*; *see Civ. Code § 3260(g)* (penalty)].

[2] 10-Day Stop Work Order

For private construction project contracts entered into on or after January 1, 1999, an original contractor who is not paid within 35 days from the date a payment is due, when there is no dispute as to the contractor's satisfactory performance, may serve the owner with a "10-day stop work order" stating that work will stop on the project unless all amounts then due the original contractor are paid within 10 days from the date notice is provided. At least five days before the notice is served on the owner, the contractor must post at the job site a notice that the original contractor intends to file a 10-day stop work order. At the same time the stop work order is served on the owner, a copy must also be served on all subcontractors with whom the original contractor has a direct contractual relationship on the project. Within five days of receiving the stop work notice, the owner must forward a copy to the construction lender by first class mail. If the dispute is resolved or the 10-day notice is canceled, the original contractor must post at the job site, and serve the subcontractors with, a notice of the resolution or cancellation [*Civ. Code § 3260.2(a)*; *see Civ. Code § 3260.2(g)* (service requirements)].

If payment is not made within 10 days from the date the notice is served, the original contractor or his or her surety may seek a judicial determination of liability for the unpaid amount in an expedited proceeding in the superior court in the county in which the work of improvement is located [*Civ. Code § 3260.2(d)*].

The original contractor's right to stop work by serving a 10-day notice is in addition to any and all other rights the contractor may have under the law [*Civ. Code § 3260.2(b)*]. Any contractual waiver of this right to stop work is against

public policy [*Civ. Code § 3260.2(e)*].

The original contractor or his or her surety, or a subcontractor or his or her surety, will not be liable for any delays or damages that the owner or contractor of a subcontractor may suffer as a result of the original contractor serving the owner with a 10-day stop work order, and subsequently stopping work for nonpayment if all of the posting and notice requirements have been met [*Civ. Code § 3260.2(c)*]. An original contractor's or original subcontractor's liability to a subcontractor or material supplier resulting from the cessation of work is not limited to the amount of monetary damages the subcontractor or material supplier could recover under the mechanics' lien law for goods and services provided up to the date the subcontractor ceases work, provided that [*Civ. Code § 3260.2(c)*]:

- Liability continues for work performed and materials supplied up to and including the 10-day notice period and not beyond; and

- There is no limitation on monetary damages for custom work, including materials that have been fabricated, manufactured, or ordered to unique specifications.

Legal Topics:

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

§§ 361.77[Reserved]

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§ 361.90 Related Matthew Bender Publications

For forms of interrogatories related to actions involving mechanics' liens, see Bender's Forms of Discovery, *Mechanics' Liens*

For legal forms related to forms in this chapter, see California Legal Forms, Ch. 30D, *Construction Contracts and Subcontracts;* Ch. 79, *Suretyship, Guaranty, and Indemnity*

For memoranda of points and authorities relating to actions involving mechanics' liens, see California Points and Authorities, Ch. 152, *Mechanics' Liens*

See generally California Real Estate Law & Practice, Div. 4, *Mechanics' Liens and Stop Notices*

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-361 California Forms of Pleading and Practice--Annotated § 361.91

§ 361.91 State Constitution

Constitutional guarantee of mechanics' lien. *Cal. Const., art. XIV, § 3*

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-361 California Forms of Pleading and Practice--Annotated § 361.92

§ 361.92 Federal Statutes

Payment bonds on federal public works projects. *40 U.S.C. §§ 270a-270e* (Miller Act)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 361.93 State Statutes

[1] Actions

Right of action to recover on payment bond in any suit to foreclose mechanics' lien. *Civ. Code § 3096*

Enforcement of mechanics' liens. *Civ. Code § 3143*

Personal action preserved. *Civ. Code § 3152*

Enforcement of stop notices. *Civ. Code §§ 3172-3175*

Actions on payment bonds. *Civ. Code §§ 3239-3242*

Applicability of civil procedure code provisions. *Civ. Code § 3259*

[2] Definitions

Claimant. *Civ. Code § 3085*

Construction lender. *Civ. Code § 3087*

Contract. *Civ. Code § 3088*

Laborer. *Civ. Code § 3089*

Materialman. *Civ. Code § 3090*

Owner defined for purposes of recording notices of completion and cessation. *Civ. Code §§ 3092(g), 3093*

Original contractor. *Civ. Code § 3095*

Site improvement. *Civ. Code § 3102*

Subcontractor. *Civ. Code § 3104*

Work of improvement. *Civ. Code § 3106*

Owner defined for purposes of duty to notify original contractor and claimants that notice of completion or cessation has been recorded. *Civ. Code § 3259.5(b)*

[3] Mechanics' Liens

Entitlement and conditions to enforcement of lien. *Civ. Code §§ 3110-3118*

Amount of and property subject to lien. *Civ. Code §§ 3123-3131*

Lien priorities. *Civ. Code §§ 3134-3140*

[4] Payment Bonds

Definition. *Civ. Code § 3096*

Effect of recording original contract and payment bond. *Civ. Code §§ 3235, 3236*

Provisions relating to actions on bonds. *Civ. Code §§ 3225-3228, 3263*

[5] Real Estate Contract Arbitration

Nothing in *Code Civ. Proc. § 1298* (governing arbitration provisions in real estate contracts) is to be construed to diminish authority of any court with respect to real property transactions involving court supervision or jurisdiction, including, but not limited to, foreclosure of liens. *Code Civ. Proc. § 1298(d)*

[6] Stop Notices

Bonded stop notice. *Civ. Code § 3083*

Contents and service of stop notice. *Civ. Code § 3103*

Persons entitled to serve and conditions of service of stop notice. *Civ. Code §§ 3158-3160*

Effect and priorities of stop notice. *Civ. Code §§ 3161-3168*

Exclusive remedy. *Civ. Code § 3264*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration ClausesContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensReal Property LawConstruction LawContractsReal Property LawNonmortgage LiensLien PrioritiesReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.94

§ 361.94 Decisions

[1] Mechanics' Lien Law

Mechanics' lien law [*Civ. Code §§ 3082-3267*] insures that both lien claimants have an immediate remedy for materials and labor furnished and unpaid for, and owners may clear titles to their property as soon as possible. *Borchers Bros. v. Buckeye Incubator Co. (1963) 59 Cal. 2d 234, 238, 28 Cal. Rptr. 697, 379 P.2d 1*

Mechanics' lien law is remedial in character, and must be liberally construed in its entirety with a view to effect its objects and to promote justice. *Hendrickson v. Bertelson (1934) 1 Cal. 2d 430, 432-433, 35 P.2d 318* ; *Nolte v. Smith (1961) 189 Cal. App. 2d 140, 144, 11 Cal. Rptr. 261*

Mechanics' lien law is based on theory that claimant has equitable right to follow labor and materials into building of which these have become component part. *Humboldt Lumber Mill Co. v. Crisp (1905) 146 Cal. 686, 687, 81 P. 30*

Former *Cal. Const., art. XX, § 15* (renumbered *Cal. Const., art. XIV, § 3,* in 1976), granting laborers and materialmen of every class a mechanics' lien for labor done and materials furnished is not self-executing and must be supplemented by *Legislature. Spinney v. Griffith (1893) 98 Cal. 149, 151-152, 32 P. 974*

Mechanics' lien law is based on theory that owner receives benefit that he or she is estopped to deny. *Nolte v. Smith (1961) 189 Cal. App. 2d 140, 147, 11 Cal. Rptr. 261*

[2] Mechanics' Liens

Mechanics' lien law protects property owners as well as lien claimants. *R.D. Reeder Lathing Co. v. Allen (1967) 66 Cal. 2d 373, 379, 57 Cal. Rptr. 841, 425 P.2d 785*

Duty of Legislature is to balance interests of lien claimants and property owners. *Borchers Bros. v. Buckeye*

Incubator Co. (1963) 59 Cal. 2d 234, 238-239, 28 Cal. Rptr. 697, 379 P.2d 1

Former *Cal. Const., art. XX, § 15* (renumbered *Cal. Const., art. XIV, § 3*, in 1976), empowers Legislature to adopt legislation that will relieve property owner of burden of lien and at same time afford lien claimant reasonable assurance that his or her claim, if valid, will be paid in full. *Frank Curran Lbr. Co. v. Eleven Co. (1969) 271 Cal. App. 2d 175, 183-184, 76 Cal. Rptr. 753*

Mechanics' lien itself is in nature of mortgage and is charge on land. *Mercantile Collection Bureau v. Roach (1961) 195 Cal. App. 2d 355, 357, 15 Cal. Rptr. 710*

[3] Stop Notices

Right to recover on stop notice claim is not dependent on establishment of mechanics' lien because remedies are independent and cumulative. *A-1 Door & Materials Co. v. Fresno Guar. Sav. & L. Ass'n (1964) 61 Cal. 2d 728, 732, 40 Cal. Rptr. 85, 394 P.2d 829*

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-361 California Forms of Pleading and Practice--Annotated § 361.95

§ 361.95 Law Reviews

Walsh, *A Mechanics' Lien Primer for the General Practioner*, 37(5) Prac. Law. 77 (1991)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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§ 361.96 Text References

California Construction Contracts and Disputes, §§ 3.81, 5.39 (Cal. CEB 1976)

California Mechanics' Liens and Related Construction Remedies (Cal. CEB 1999)

California Surety and Fidelity Bond Practice (Cal. CEB 1969), Ch. 8, *Private Work Payment Bond Under Mechanics' Lien Law*

California Land Security and Development (Cal. CEB 1960), Ch. 30, *Mechanics' Liens*

Legal Aspects of Real Estate Transaction (Cal. CEB 1956), Ch. 17, *Mechanics' Liens*

Marsh, California Mechanics' Lien Law and Construction Industry Practice (LEXIS Publishing 6th ed. 1998)

Miller and Starr, California Real Estate Second, Ch. 26

Powell on Real Property, §§ 483-490

Legal Topics:

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

§§ 361.97[Reserved]

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32-361 California Forms of Pleading and Practice--Annotated § 361.110

§ 361.110 Related Matthew Bender Publications

See generally California Real Estate Law & Practice, Ch. 451, *Mechanics' Liens*

See generally Marsh, California Mechanics' Lien Law and Construction Industry Practice (LEXIS Publishing 6th ed. 1998)

Legal Topics:

For related research and practice materials, see the following legal topics:
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B. Mechanics' Liens

32-361 California Forms of Pleading and Practice--Annotated § 361.111

§ 361.111 State Constitution

Mechanics, materialpersons, artisans, and laborers of every class bestowing labor or furnishing materials have lien on property on which the foregoing were bestowed or furnished. *Cal. Const., art. XIV, § 3*

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-361 California Forms of Pleading and Practice--Annotated § 361.112

§ 361.112 State Statutes

[1] Persons Entitled to Lien

Furnishers of materials or labor to works of improvement. *Civ. Code § 3110*

Furnishers of materials or labor to site improvements. *Civ. Code § 3112*

[2] Procedural Requirements

Notice and other requirements regarding mechanics' liens for pest control operators. *Bus. & Prof. Code § 8513*

[3] Property Subject to Lien

Homesteads are subject to execution or forced sale in satisfaction of judgments obtained on debts secured by mechanics' liens. *Civ. Code § 1241(2)*

Notice of nonresponsibility. *Civ. Code § 3094*

Work of improvement, land on which it is situated, and convenient space about improvement are subject to lien. *Civ. Code § 3128*

Interest of any noncontracting owner is subject to lien if such owner has knowledge of improvement. *Civ. Code § 3129*

[4] Amount of Lien

Value of lien is reasonable value or agreed-on price, whichever is less. *Civ. Code § 3123(a)*

Claimant is not precluded from including in lien any amount due for labor, services, equipment, or materials furnished based on written modification of contract or as result of rescission, abandonment, or breach of contract. *Civ. Code § 3123(b)*

Amount of lien for work not called for in original contract. *Civ. Code § 3124*

Amount of lien for contractor or subcontractor. *Civ. Code § 3140*

[5] Improvements

"Site" defined. *Civ. Code § 3101*

"Site improvement" defined. *Civ. Code § 3102*

"Subdivision" defined. *Civ. Code § 3105*

"Work of improvement" defined. *Civ. Code § 3106*

Designation of amounts due claimant on each improvement when claim recorded against multiple improvements. *Civ. Code § 3130*

Multiple residential units are separate works of improvement. *Civ. Code § 3131*

Site improvement performed under separate contract from erection of designated structures is separate work of improvement. *Civ. Code § 3135*

[6] Completion

"Completion" defined. *Civ. Code § 3086*

Notice of cessation. *Civ. Code § 3092*

Notice of completion. *Civ. Code § 3093*

[7] Perfection of Lien

[a] Preliminary Notice

Who must serve, contents, and service of preliminary 20-day notice (private work). *Civ. Code § 3097*

Written notice required to be given union trust fund by contractor or subcontractor. *Civ. Code § 3097(k)*

Prerequisite of preliminary 20-day notice. *Civ. Code § 3114*

[b] Recording Claim of Lien

Contents of claim of lien or mechanics' lien. *Civ. Code § 3084(a)*

Recording of claim of lien by original contractor. *Civ. Code § 3115*

Recording of claim of lien by claimant other than original contractor. *Civ. Code § 3116*

Recording of claim of lien when two or more original contracts. *Civ. Code § 3117*

Time for filing claims of lien if improvement consists of construction of multiple residential units. *Civ. Code § 3131*

[8] Priority

Loss of priority for failure to designate amount on each improvement when claim recorded against multiple improvements. *Civ. Code § 3130*

Priority of lien for labor or materials furnished to work of improvement. *Civ. Code § 3134*

Trust deed or mortgage retains priority if optional advances made after commencement of improvement work made in payment of costs of improvement. *Civ. Code § 3136*

Priority of lien for labor or materials furnished to site improvement. *Civ. Code § 3137*

Payment bond for holder of junior trust deed or mortgage on work of improvement. *Civ. Code § 3138*

Payment bond for owner, or holder of any junior trust deed or mortgage site improvement. *Civ. Code § 3139*

[9] Enforcement

Recording of bond to release property subject to mechanics' lien. *Civ. Code § 3143*

Action to foreclose must commence within 90 days from date of recording of claim of lien unless credit extended. *Civ. Code § 3144*

Effect on bona fide purchaser of unrecorded credit or other extension of lien. *Civ. Code § 3145*

Notice of lis pendens. *Civ. Code § 3146*

Dismissal of action. *Civ. Code §§ 3147, 3148*

Joinder of lien claimants. *Civ. Code § 3149*

Expenses of recording of claim of lien are recoverable costs. *Civ. Code § 3150*

Deficiency judgment. *Civ. Code § 3151*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

California Forms of Pleading and Practice--Annotated

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 361 MECHANICS' LIENS
PART III. RESEARCH GUIDE
B. Mechanics' Liens

32-361 California Forms of Pleading and Practice--Annotated § 361.113

§ 361.113 Decisions

[1] Mechanics' Lien

Mechanics' lien is creature of statute; hence, statute must be looked to, both for right to lien and mode by which it is enforced. *Reese v. Bald Mountain Consol. Gold Mining Co. (1901) 133 Cal. 285, 290, 65 P. 578*

Mechanics' lien itself is in nature of mortgage and is charge on land. *Mercantile Collection Bureau v. Roach (1961) 195 Cal. App. 2d 355, 357, 15 Cal. Rptr. 710*

[2] Bestowers of Labor and Materials

Former Code Civ. Proc. § 1183 (*now Civ. Code § 3110*) made no distinction between claimant who performed work personally and one who furnished persons to the work. *Myers v. Alta Constr. Co. (1951) 37 Cal. 2d 739, 742, 235 P.2d 1*

Mechanics' lien law did not extend lien rights to contractor who without personal liability advanced funds for furnishing of labor and materialspursuant to agreement with owner. *Glassco v. El Sereno Country Club, Inc. (1932) 217 Cal. 90, 94, 17 P.2d 703*

Complaint for enforcement of lien for materials furnished to work of improvement must contain substantial allegations to effect that materials were furnished for, to be used in, and were used in improvement. *Ensele v. Jolley (1922) 188 Cal. 297, 300, 204 P. 1085*

In claiming lien for materials to be used in work of improvement as provided in former Code Civ. Proc. § 1183 (*now Civ. Code § 3110*), materials furnished for or delivered to particular improvement must be actually used in the improvement. *Ensele v. Jolley (1922) 188 Cal. 297, 300, 204 P. 1085*

Right to mechanics' lien for materials furnished and used in improvement is not affected by contractor's failure to conform to requirements of agreement between contractor and owner. *Howe v. Schmidt (1907) 151 Cal. 436, 441, 90 P. 1056*

Lien for bestowers of skill and materials under *Civ. Code § 3110* attaches to whole structure and not part of structure. *Bringham v. Knox (1899) 127 Cal. 40, 43, 59 P. 198*

Transporter of materials to building site may assert mechanic's lien if transporter was hired by owner's agent, such as contractor or subcontractor. *Ivy Trucking Inc. v. Creston Brandon Corp. (2000) 84 Cal. App. 4th 85, 88-89, 100 Cal. Rptr. 2d 582*

Proof of delivery of materials to building site does not create presumption of their use in improvement; claimant must prove additionally that materials were actually used in improvement. *Consolidated Elec. Distributors, Inc. v. Kirkham, Chaon & Kirkham, Inc. (1971) 18 Cal. App. 3d 54, 58, 95 Cal. Rptr. 673*

No lienable work was performed when architect did "pre-preliminary" work intended principally as prospectus for corporation's public stock-selling campaign. *Design Associates, Inc. v. Welch (1964) 224 Cal. App. 2d 165, 173, 174, 36 Cal. Rptr. 341*

Category of persons entitled to mechanics' liens have liens if their services are bestowed on the structure or land in any phase of the scheme or improvement as a whole. *Nolte v. Smith (1961) 189 Cal. App. 2d 140, 147, 11 Cal. Rptr. 261*

Lien rights were not defeated for materials furnished to and actually used in improvement when at instance of owner's architect materials were installed defectively and had to be torn out. *Johnson v. Smith (1929) 97 Cal. App. 752, 754-755*

Suit to enforce materialman's lien must not only allege that material was actually used or consumed in work of improvement but also that material was furnished for particular work of improvement. *W.P. Fuller & Co. v. Fleisher (1923) 63 Cal. App. 78, 79-80, 218 P. 53*

[3] Improvements

The sentence at the end of *Civ. Code § 3106* regarding "the entire structure or scheme of improvement as a whole" does not mean that the removal or demolition of buildings is not a work of improvement unless it is part of a larger project leading to an outcome beyond mere removal or demolition. The sentence about a "scheme" only says that the term "work of improvement" refers to the entirety of a work of improvement. Since "work of improvement" is defined to include demolition and removal of buildings, the entirety of a work of improvement can consist of the demolition or removal of a building. There is no basis for the view that removal of a building--or anything else included in the definition--only counts if something else is done to the land in addition. *United Rentals Northwest, Inc. v. Snider Lumber Products, Inc. (2009) 174 Cal. App. 4th 1479, 1485, 95 Cal. Rptr. 3d 471*

Test applied in determining whether article is fixture is (1) manner of annexation, (2) adaptability to use and purpose of realty, and (3) intention of party annexing; intent is crucial and overriding factor, with remaining criteria considered only as subsidiary ingredients relevant to determination of intent. *Allstate Ins. Co. v. County of Los Angeles (1984) 161 Cal. App. 3d 877, 885-886, 207 Cal. Rptr. 888*

Structure on land does not become a fixture of the land when owner is held nonresponsible for improvement until all mechanic lien claimants are paid. *English v. Olympic Auditorium, Inc. (1933) 217 Cal. 631, 643, 20 P.2d 946* (decided under former Code Civ. Proc. §§ 1183, 1185, 3129, *now Civ. Code §§ 3110, 3112, 3129*)

Demolition of building does not defeat mechanics' lien rights when destruction of building is due to fault of owner. *McIntosh v. Funge (1930) 210 Cal. 592, 601, 292 P. 960*

No benefit is conferred on owner by placing labor or materials in his or her building if building is destroyed before completion and delivery to owner. *Humboldt Lumber Mill Co. v. Crisp (1905) 146 Cal. 686, 688, 81 P. 30*

Wood-drying kilns that were 68 and 120 feet long, made of steel frame, and bolted to concrete slabs were "buildings" whose removal constituted a work of improvement within meaning of *Civ. Code § 3106*. *United Rentals Northwest, Inc. v. Snider Lumber Products, Inc. (2009) 174 Cal. App. 4th 1479, 1484, 95 Cal. Rptr. 3d 471*

Test applied in determining whether article is fixture is (1) manner of annexation, (2) adaptability to use and purpose of realty, and (3) intention of party annexing; intent is crucial and overriding factor, with remaining criteria considered only as subsidiary ingredients relevant to determination of intent. *Allstate Ins. Co. v. County of Los Angeles (1984) 161 Cal. App. 3d 877, 885-886, 207 Cal. Rptr. 888*

Real property is subject to mechanics' lien for labor and materials only if chattels installed become fixtures attached to realty and labor performed results in permanent improvement to realty. *Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 131, 95 Cal. Rptr. 728*

Main factors used in determining if chattel has become fixture are (1) physical annexation, (2) adaptation to use with real property, and (3) intention to annex realty; other factors are relationship of claiming parties, relative difficulty of removal, nature of article annexed, and whether annexation is open and apparent. *Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 132, 95 Cal. Rptr. 728*

Necessity for determination of site improvement work, substantial in nature, being contemplated under original contract rather than separate contract for purposes of former Code Civ. Proc. § 1189.1 (*now Civ. Code § 3135*) when claim of lien not timely filed following completion of work. *Howard A. Deason & Co. v. Costa Tierra Ltd. (1969) 2 Cal. App. 3d 742, 757, 83 Cal. Rptr. 105*

Yard lights used to illuminate paths, walks, or plantings are integral part of landscaping scheme or design and under proper circumstances are both a site improvement under former Code Civ. Proc. § 1184.1 (*now Civ. Code § 3112*) and separate work of improvement under Code Civ. Proc. § 1189.1 (*now Civ. Code § 3135*). *Howard A. Deason & Co. v. Costa Tierra Ltd. (1969) 2 Cal. App. 3d 742, 755, 83 Cal. Rptr. 105*

Furnishing labor and material for installation of streets, curbs, gutters, and sidewalks in tract of land is separate work of improvement under former Code Civ. Proc. § 1189.1 (*now Civ. Code § 3135*). *Howard A. Deason & Co. v. Costa Tierra Ltd. (1969) 2 Cal. App. 3d 742, 752, 83 Cal. Rptr. 105*

[4] Permanency of Contribution to Improvement

Character of work done and materials furnished for which lien is sought to be established must be structural or permanent. *Ogden v. Byington (1926)198 Cal. 151, 157, 244 P. 332* ; *Howard A. Deason & Co. v. Costa Tierra Ltd. (1969) 2 Cal. App. 3d 742, 753, 83 Cal. Rptr. 105*

Maintenance work (such as mowing and watering lawn) when not necessary to ensure its permanence does not entitle laborer to mechanics' lien. *Howard A. Deason & Co. v. Costa Tierra Ltd. (1969) 2 Cal. App. 3d 742, 753, 83 Cal. Rptr. 105*

Landscaping and maintenance as necessary to ensure that planting is well established on ground is work of improvement. *Howard A. Deason & Co. v. Costa Tierra Ltd. (1969) 2 Cal. App. 3d 742, 753, 83 Cal. Rptr. 105*

No mechanics' lien attaches to land if project contemplated by employment agreement is abandoned by mutual agreement. *McDonald v. Filice (1967) 252 Cal. App. 2d 613, 620, 60 Cal. Rptr. 832*

Whether property is permanently attached to land or retains its identity as personalty is generally determined by controlling criterion of the intent of parties. *Kruse Metals Mfg. Co. v. Utility Trailer Mfg. Co. (1962) 206 Cal. App. 2d 176, 183, 23 Cal. Rptr. 514*

When rights of person unconnected to transaction are concerned, question of permanency of attachment of improvement is one of apparent intent as it would appear to third person. *Kruse Metals Mfg. Co. v. Utility Trailer Mfg. Co. (1962) 206 Cal. App. 2d 176, 183, 23 Cal. Rptr. 514*

Rights of innocent materialman are not defeated when material furnished is rendered useless by act of owner. *Nolte v. Smith (1961) 189 Cal. App. 2d 140, 146, 11 Cal. Rptr. 261*

Furnishing and planting of seeds, trees, and shrubs, and caring for them for such period of time to insure they are well settled on ground, constitute improvements for which lien may be had. *California P.C. Co. v. Wentworth Co. (1911) 16 Cal. App. 692, 707, 118 P. 103*

[5] Amount of Lien

Lien attaches for reasonable or contract value of all services that lien claimant has rendered, including services rendered before commencement if they contributed to construction. *Walker v. Lytton Sav. & L. Ass'n (1970) 2 Cal. 3d 152, 156 n.5, 84 Cal. Rptr. 521, 465 P.2d 497*

Lien claimant has burden of establishing validity of lien, including reasonable value of work and/or materials, but actual amount due on lien presents a question of fact for trial court. *Basic Modular Facilities, Inc. v. Ehsanipour (1999) 70 Cal. App. 4th 1480, 1485, 83 Cal. Rptr. 2d 462*

Reasonable value as used in *Civ. Code § 3123* (amount of lien) is limited to proportion of contract price reflecting amount of progress made toward completion of work. *University Casework Sys., Inc. v. Superior Court (1974) 41 Cal. App. 3d 263, 267, 115 Cal. Rptr. 836* (deciding value of stop notice claim for public work)

[6] Property Subject to Lien

Lien attaches primarily to superstructure on land and only to land itself as it is embraced in common ownership with superstructure. *English v. Olympic Auditorium, Inc. (1933) 217 Cal. 631, 639, 20 P.2d 946*

When purpose for which building is erected is so intimately connected with operation carried on in adjacent buildings as to constitute essential part and parcel of building, lien claimed for work done on building attaches to adjacent buildings. *Anselmo v. Sebastiani (1933) 219 Cal. 292, 299, 26 P.2d 1*

In determining area required for necessary and convenient use of erected building, intended use of building must be considered. *Anselmo v. Sebastiani (1933) 219 Cal. 292, 297-298, 26 P.2d 1*

Area required for necessary and convenient use varies from that area necessary for ingress and egress, in case of a separate and distinct unit, to all of larger tract of land if uses of building on land require whole tract. *Anselmo v.*

Sebastiani (1933) 219 Cal. 292, 298, 26 P.2d 1

Site improvement lien attaches to entire tract of land and not part of tract. *Warren v. Hopkins (1895) 110 Cal. 506, 42 P. 986*

Lien for work and materials furnished to work of structure may not be claimed on part of structure as distinct from whole improvement. *A. A. Baxter Corp. v. Home Owners & Lenders (1970) 7 Cal. App. 3d 725, 732, 86 Cal. Rptr. 854*

[7] Scope of Owner's Responsibility

Civ. Code § 3129, making owner responsible for ordered improvement if owner had knowledge of improvement, places noncontracting owner in position of party to contract by conclusive presumption that work was done at his or her instance and request. *M. Arthur Gensler, Jr., & Associates, Inc. v. Larry Barrett, Inc. (1972) 7 Cal. 3d 695, 707, 103 Cal. Rptr. 247, 499 P.2d 503*

Subcontractor has charge of construction for purposes of former Code Civ. Proc. § 1182(c) (*now Civ. Code § 3110*) if subcontractor agrees with original contractor to perform substantial, specified portion of work of improvement pursuant to original contract in accord with plans and specifications by which original contractor is bound. *Theisen v. Los Angeles County (1960) 54 Cal. 2d 170, 183, 5 Cal. Rptr. 161, 352 P.2d 529*

Commencement of work is some work or labor on ground, effects of which are apparent, i.e., easily seen by everybody. *English v. Olympic Auditorium, Inc. (1933) 217 Cal. 631, 637, 20 P.2d 946*

Notice of nonresponsibility posted and recorded by property owner did not insulate property from lien for construction work; undisputed evidence showed that contractor was likely to succeed in claim that property owner participated in construction work through lease provisions requiring tenant to make improvements on property. *Howard S. Wright Construction Co. v. Superior Court (2003) 106 Cal. App. 4th 314, 326, 130 Cal. Rptr. 2d 641*

In absence of contract between lien claimant and property owner, right to enforce mechanics' lien against real property owner does not give rise to personal liability of owner. *Halbert's Lumber, Inc. v. Burdett (1988) 202 Cal. App. 3d Supp. 14, 20 , 249 Cal. Rptr. 285*

Unpaid materialman was not able to recover from owner on theory of unjust enrichment without allegation of promise to pay on part of owner and allegation that contractor was not paid. *Truestone, Inc. v. Simi West Industrial Park II (1984) 163 Cal. App. 3d 715, 723-724, 209 Cal. Rptr. 757*

Owner was not liable for improvements made by tenant when owner posted notice of nonresponsibility and did not authorize construction, require construction, or contribute towards cost of construction. *Baker v. Hubbard (1980) 101 Cal. App. 3d 226, 234-237, 161 Cal. Rptr. 551*

Notice of nonresponsibility is effective even though not verified. *Baker v. Hubbard (1980) 101 Cal. App. 3d 226, 232-234, 161 Cal. Rptr. 551* ; *but see Los Banos Gravel Co. v. Freeman (1976) 58 Cal. App. 3d 785, 130 Cal. Rptr. 180* (notice is not effective if not verified)

Notice of nonresponsibility was not effective when owner caused work of improvement to be performed within meaning of *Civ. Code § 3090* in that its lease required construction of service station, and rents were based on percent of profits from business, and property was to be surrendered at end of three years. *Los Banos Gravel Co. v. Freeman (1976) 58 Cal. App. 3d 785, 791-798, 130 Cal. Rptr. 180*

Conclusive presumption that materials furnished with owner's knowledge are at owner's instance and request is applicable only when person originally contracting for materials has some interest in property less than fee simple. *Blakemore Equip. Co. v. Braddock, Logan & Valley (1969) 269 Cal. App. 2d 12, 16-17, 74 Cal. Rptr. 484*

Knowledge of owner that piece of equipment used on improvement was rented by claimant to materialman of owner did not entitle claimant to lien on improvement. *Blakemore Equip. Co. v. Braddock, Logan & Valley (1969) 269 Cal. App. 2d 12, 15, 74 Cal. Rptr. 484*

Subcontractor for purposes of mechanics' lien law distinguished from subcontractor for purposes of contractor licensing law. *Steinbrenner v. J. A. Waterbury Constr. Co. (1963) 212 Cal. App. 2d 661, 666, 28 Cal. Rptr. 204*

[8] Priority of Mechanics' Liens

General rule that liens have priority according to time of creation governs fixing of priorities under mechanics' lien law. *Walker v. Lytton Sav. & L. Ass'n (1970) 2 Cal. 3d 152, 158, 84 Cal. Rptr. 521, 465 P.2d 497*

Condition precedent for priority is commencement of construction. *Walker v. Lytton Sav. & L. Ass'n (1970) 2 Cal. 3d 152, 158, 84 Cal. Rptr. 521, 465 P.2d 497* (decided under former Code Civ. Proc. § 1188.1; *now see Civ. Code § 3134*)

Mechanics' lien does not attach to land unless and until construction has been undertaken by doing of actual work on or delivery of construction materials to the land. *Walker v. Lytton Sav. & L. Ass'n (1970) 2 Cal. 3d 152, 157, 84 Cal. Rptr. 521, 465 P.2d 497*

Deed of trust had priority over architect's mechanics' lien when no visible work had commenced on land when deed of trust was recorded. *Walker v. Lytton Sav. & L. Ass'n (1970) 2 Cal. 3d 152, 158-159, 84 Cal. Rptr. 521, 465 P.2d 497* (decided under former Code Civ. Proc. § 1188.1; *now see Civ. Code § 3134*)

One who records trust deed with knowledge that owner plans to construct improvements on land based on architect's plans does not waive priority rights under trust deed against architect's potential lien. *Walker v. Lytton Sav. & L. Ass'n (1970) 2 Cal. 3d 152, 158, 84 Cal. Rptr. 521, 465 P.2d 497* (decided under former Code Civ. Proc. § 1188.1; *now see Civ. Code § 3134*)

Lien for advances has priority over mechanics' liens even though advances are made after attachment of mechanics' liens if loan agreement secured by deed of trust makes payments obligatory and deed of trust is recorded before commencement of improvements. *Rheem Mfg. Co. v. United States (1962) 57 Cal. 2d 621, 625, 21 Cal. Rptr. 802, 371 P.2d 578*

Apportionment by court of amounts of liens when lien claimant failed to do so under former Code Civ. Proc. § 1188 (*now Civ. Code § 3130*) thereby preserving priority over liens of trust deeds was proper. *Hendrickson v. Bertelson (1934) 1 Cal. 2d 430, 434, 35 P.2d 318*

Encumbrance recorded prior to commencement of work of improvement is superior to mechanics' lien on improvement as well as on land on which improvement situated. *Barr Lbr. Co. v. Shaffer (1951) 108 Cal. App. 2d 14, 16, 23, 238 P.2d 99*

If advances made under loan agreement secured by mortgage or deed of trust are optional, lien of deed of trust or mortgage is postponed to dates on which advances actually made. *Hayward Lbr. & Inv. Co. v. Corbett (1934) 138 Cal. App. 644, 649, 33 P.2d 41*

[9] Preliminary 20-Day Notice

Claimant under direct contract with owner is not required to give preliminary notice if claimant has direct contract with owner's lessee and owner fails to post and record effective notice of nonresponsibility. *M. Arthur Gensler, Jr., & Associates, Inc. v. Larry Barrett, Inc. (1972) 7 Cal. 3d 695, 707, 103 Cal. Rptr. 247, 499 P.2d 503*

Estimate of total price of labor, service, equipment, or materials must be "a derived figure, arrived at by rational analysis;" preliminary notice giving estimate of $10,000 was fatally defective when contractor filed mechanic's lien for $159,898. *Rental Equipment, Inc. v. McDaniel Builders, Inc. (2001) 91 Cal. App. 4th 445, 449-450, 109 Cal. Rptr. 2d 922*

Failure of subcontractor to serve preliminary notice on contractor is not fatal to cause of action against owner when notice is properly served on owner. *Industrial Asphalt, Inc. v. Garrett Corp. (1986) 180 Cal. App. 3d 1001, 1005-1009, 226 Cal. Rptr. 17*

Owner is liable despite defective notice if materialman is known to owner and makes delivery in reliance on owner's promise to pay. *Truestone, Inc. v. Simi West Industrial Park II (1984) 163 Cal. App. 3d 715, 722-723, 209 Cal. Rptr. 757*

Notice that did not contain statutorily required notice to property owner in proper language or in bold face was insufficient and precluded enforcement of mechanic's lien. *Harold L. James, Inc. v. Five Points Ranch, Inc. (1984) 158 Cal. App. 3d 1, 6-7, 204 Cal. Rptr. 494*

Twenty-day notice requirement of *Civ. Code § 3097* does not specify initial date for serving preliminary notice or date before which notice may not be given; instead, it provides deadline after which notice may not be given. *Brown Co. v. Appellate Department (1983) 148 Cal. App. 3d 891, 897-898, 196 Cal. Rptr. 258*

Preliminary 20-day notice mailed by first-class mail but not registered or certified is insufficient. *IGA Aluminum Products, Inc. v. Manufacturers Bank (1982) 130 Cal. App. 3d 699, 702-705, 181 Cal. Rptr. 859*

Lien claimant contracted directly with owner for purposes of serving preliminary 20-day notice (private work) if claimant contracted directly with owner'sagent. *Frank Pisano & Associates v. Taggart (1972) 29 Cal. App. 3d 1, 17, 105 Cal. Rptr. 414*

Preliminary notice must be given to owner of property at time claimant is required to give notice, except when claimant has entered into direct contract with person who was owner of property at time contract was made for performance of work or furnishing of materials. *Schrader Iron Works, Inc. v. Lee (1972) 26 Cal. App. 3d 621, 630, 103 Cal. Rptr. 106*

Oral preliminary notice is insufficient. *Windsor Mills v. Richard B. Smith, Inc. (1969) 272 Cal. App. 2d 336, 77 Cal. Rptr. 300*

Purpose of preliminary notice is to advise owner before claim of lien is recorded that owner's property may be subjected to lien arising out of contract to which owner is not party. *Windsor Mills v. Richard B. Smith, Inc. (1969) 272 Cal. App. 2d 336, 340, 77 Cal. Rptr. 300*

[10] Recording of Claim of Lien

[a] Completion of Work of Improvement

Occupancy and use for purposes of *Civ. Code § 3086* (completion of work) signals an equivalent to completion of the job only if not co-existing with labor throughout or is not inconsistent with further work by mechanic. *M. Arthur Gensler, Jr., & Associates, Inc. v. Larry Barrett, Inc. (1972) 7 Cal. 3d 695, 706, 103 Cal. Rptr. 247, 499 P.2d 503*

Contractor's recording of mechanic's lien not premature because contract was "completed" within meaning of *Civ. Code § 3115* on anticipatory breach of other contracting party. *Howard S. Wright Construction Co. v. BBIC Investors LLC (2006) 136 Cal. App. 4th 228, 243, 38 Cal. Rptr. 3d 769*

Notice of completion not filed within 10-day period has no effect on statutory 90-day lien filing period. *Fontana Paving, Inc. v. Hedley Brothers, Inc. (1995) 38 Cal. App. 4th 146, 155-156, 45 Cal. Rptr. 2d 295*

When subcontractor had separate subcontracts for work on separate shops in shopping center, completion of work on individual shop started time period for that shop even though subcontractor was still working on other shops. *Insul-Acoustics, Inc. v. Lee (1982) 136 Cal. App. 3d 552, 555, 186 Cal. Rptr. 324*

Between owner and contractor, notice of completion is valid even though owner's name is inserted as original contractor. *Gary C. Tanko Well Drilling, Inc. v. Dodds (1981) 117 Cal. App. 3d 588, 594, 172 Cal. Rptr. 829*

Determination of date of completion of work of improvement is question of fact. *E. D. McGillicuddy Constr. Co. v. Knoll Recreation Assn., Inc. (1973) 31 Cal. App. 3d 891, 896, 107 Cal. Rptr. 899*

"Subject to acceptance" as that phrase is used in former Code Civ. Proc. § 1193.1(e) (*now see Civ. Code § 3086*) is not to be equated with inspection and approval or issuance of certificates of occupancy under building regulations. *Howard A. Deason & Co. v. Costa Tierra Ltd. (1969) 2 Cal. App. 3d 742, 751, 83 Cal. Rptr. 105*

Notice of completion filed before actual completion of work of improvement is premature and does not limit times within which claims of lien must be filed. *Scott, Blake, & Wynne v. Summit Ridge Estates, Inc. (1967) 251 Cal. App. 2d 347, 357, 59 Cal. Rptr. 587*

[b] Separate Residential Units

Time for filing claim of lien for completion of each residential unit is not applicable to units in condominium. *E. D. McGillicuddy Constr. Co. v. Knoll Recreation Assn., Inc. (1973) 31 Cal. App. 3d 891, 897-898, 107 Cal. Rptr. 899*

Filing of notices of completion of individual units, when contract was for integrated complex and entire work was far from completion, was premature and of no effect. *Scott, Blake & Wynne v. Summit Ridge Estates, Inc. (1967) 251 Cal. App. 2d 347, 357, 59 Cal. Rptr. 587*

[c] Conformity With Lien Claim Demand

Technical doctrine of variance has no application to claim of lien, when all that is required is that statement of terms of contract be substantially true. *Star Mill & Lbr. Co. v. Porter (1906) 4 Cal. App. 470, 474, 88 P. 497*

[d] Prerequisite Fees

Gov. Code § 27387, providing that county recorder collect fee from lienor for recordation of document creating involuntary lien (within meaning of *Gov. Code § 27297*) affecting title to real property, does not require lien claimants to pay additional fee as prerequisite to recording, when address of person against whom involuntary lien is recorded is

not contained in recording document. *Carpenters Health & Welfare Trust Fund v. Shafer (1983) 146 Cal. App. 3d 504, 507, 509, 194 Cal. Rptr. 266*

[11] Foreclosure of Lien

[a] Actions to Foreclose Lien

Complaint to foreclose mechanics' lien must show substantial compliance with *Civ. Code §§ 3115-3117* (former Code Civ. Proc. § 1193.1) as to contents of claim of lien, including by direct allegation or attached copy on allegations, that claim contains name of owner or reputed owner, sufficient description of property, due verification, and allegation that claim was filed within prescribed period. *M. Arthur Gensler, Jr., & Associates, Inc. v. Larry Barrett, Inc. (1972) 7 Cal. 3d 695, 703, 103 Cal. Rptr. 247, 499 P.2d 503* ; *Clements v. T.R. Bechtel Co. (1954) 43 Cal. 2d 227, 238, 273 P.2d 5*

Mechanics' lien is in nature of mortgage with same procedural and substantive principles for foreclosure of mortgages applying to foreclosure of lien. *Laubisch v. Roberdo (1954) 43 Cal. 2d 702, 709, 277 P.2d 9*

Action to foreclose mechanics' lien is in rem action and local in nature as plaintiff is resorting primarily to security for payment of indebtedness. *Central Bank v. Superior Court (1973) 30 Cal. App. 3d 913, 917, 106 Cal. Rptr. 696*

If main relief sought in complaint by lien claimant is personal, fact that title or possession of real property is incidentally involved in cause of action to foreclose mechanics' lien does not change character of complaint as transitory action. *Central Bank v. Superior Court (1973) 30 Cal. App. 3d 913, 917, 106 Cal. Rptr. 696*

Requirement that action to foreclose name and serve purchaser of property who records his or her title after lien attaches but before suit is filed. *Flintkote Co. v. Lisa Constr. Co. (1968) 268 Cal. App. 2d 606, 611, 74 Cal. Rptr. 136*

Claimant must observe and comply strictly, or at least substantially, with provisions of mechanics' lien law, none of which may be regarded as unessential, in action to foreclose lien. *Holm v. Bramwell (1937) 20 Cal. App. 2d 332, 334, 67 P.2d 114*

[b] Defenses

When contractor and subcontractor conspire to defraud owner, unclean hands is equitable defense to subcontractor's lien. *Burton v Sosinsky (1988) 203 Cal. App. 3d 562, 570-574, 250 Cal. Rptr. 33*

Owner's lack of knowledge is matter of defense. *Dixon v. Fredericks (1933) 129 Cal. App. 703, 706-707, 19 P.2d 272*

[c] Time Limitations

[i] Ninety-Day Statute of Limitations

Bankruptcy stay only operates to suspend 90-day statute of limitations for foreclosing mechanic's lien until property leaves estate; thus, action to foreclose mechanic's lien was barred when not timely brought after creditor obtained relief from stay and foreclosed on property under deed of trust; fact that claim based on mechanic's lien was filed in bankruptcy action without objection to it and was therefore prima facie evidence of its validity in that bankruptcy proceeding did not relieve plaintiff from necessity of instituting foreclosure action on lien. *Sawyer Nurseries v. Galardi (1986) 181 Cal. App. 3d 663, 670-672, 226 Cal. Rptr. 502*

Civ. Code § 3144, requiring lien claimant to foreclose his or her lien within 90 days of recording claim of lien, is a procedural statute of limitations, which may be waived and does not affect a substantive right. *Petersen v. W. T. Grant Co. (1974) 41 Cal. App. 3d 217, 221-222, 115 Cal. Rptr. 874*

Mechanics' lien expires within 90 days if recordation of lien suit is not filed against all persons owning or holding encumbrances on property. *Packard Bell Electronics Corp. v. Theseus, Inc., (1966) 244 Cal. App. 2d 355, 359, 53 Cal. Rptr. 300*

[ii] Indispensable Parties

Failure to join indispensable party within 90 days after recordation of claim of lien requires dismissal of mechanics' lien foreclosure action. *Frank Pisano & Associates v. Taggart (1972) 29 Cal. App. 3d 1, 23, 105 Cal. Rptr. 414*

Persons whose interest, rights, or duties will inevitably be affected by any decree that can be rendered in action are indispensable parties. *Frank Pisano & Associates v. Taggart (1972) 29 Cal. App. 3d 1, 22, 105 Cal. Rptr. 414*

Junior encumbrancer is indispensable party and must be afforded opportunity to defend interest within 90-day period for commencing foreclosure action or else be allowed to plead bar of statute of limitations. *Packard Bell Electronics Corp. v. Theseus, Inc. (1966) 244 Cal. App. 2d 355, 360, 53 Cal. Rptr. 300*

Persons who purchase property either before claim of lien is recorded or after recordation and before commencement of suit are indispensable parties. *Packard Bell Electronics Corp. v. Theseus, Inc. (1966) 244 Cal. App. 2d 355, 361, 364-365, 53 Cal. Rptr. 300*

Persons who purchase property subject to mechanics' lien after foreclosure proceedings have commenced are not indispensable parties because plaintiff in subsequent suit may prove their actual or constructive knowledge of pendency of foreclosure proceedings. *Packard Bell Electronics Corp. v. Theseus, Inc. (1966) 244 Cal. App. 2d 355, 363-364, 53 Cal. Rptr. 300*

[d] Lis Pendens

Actual knowledge takes place of constructive notice imparted by filing of notice of lis pendens. *Packard Bell Electronics Corp. v. Theseus, Inc. (1966) 244 Cal. App. 2d 355, 363, 53 Cal. Rptr. 300*

When no notice of lis pendens has been filed that would impart constructive knowledge to purchaser who acquired title after foreclosure action filed, only actual knowledge by such purchaser of pending action would bind him or her to foreclosure decree. *Packard Bell Electronics Corp. v. Theseus, Inc. (1966) 244 Cal. App. 2d 355, 363, 53 Cal. Rptr. 300*

[12] Extension of Credit

Extension of credit recorded after lien terminates for failure to commence enforcement proceedings revives right to foreclose. *Richards v. Hillside Dev. Co. (1960) 177 Cal. App. 2d 776, 781, 2 Cal. Rptr. 693*

Mutual agreement is requisite to extension of credit. *Richards v. Hillside Dev. Co. (1960) 177 Cal. App. 2d 776, 779, 2 Cal. Rptr. 693*

Multiple extensions of credit are permitted as long as extending beyond one year of recording of claim. *Richards v. Hillside Dev. Co. (1960) 177 Cal. App. 2d 776, 780-781, 2 Cal. Rptr. 693*

Computation of time following recording of claim of lien or extension of credit must exclude date of recording and commence with following day. *Ziganto v. Taylor (1961) 198 Cal. App. 2d 603, 609, 18 Cal. Rptr. 229*

Agreement to waive statutory limitation on time for commencement of foreclosure proceedings is valid. *Hill v. Hesse (1932) 126 Cal. App. 171, 173, 15 P.2d 526*

[13] Interest Before Judgment

Interest before judgment is recoverable on foreclosure of mechanics' lien when *Civ. Code § 3287* (providing for recovery of interest before judgment) applies. *Meda v. Lawton (1933) 217 Cal. 282, 285, 18 P.2d 665*

[14] Personal Actions

Lien claimant who furnishes material at instance of contractor is entitled to deficiency judgment against contractor but not owner unless implied or express contract found between owner and claimant. *Golden Gate Bldg. Materials Co. v. Fireman (1928) 205 Cal. 174, 177-178, 270 P. 214*

Right to enforce mechanics' lien against real property does not give rise to personal liability of owner in absence of contract between lien claimant and owner. *R.D. Reeder Lathing Co. v. Allen (1967) 66 Cal. 2d 373, 376, 57 Cal. Rptr. 841, 425 P.2d 785*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 361.114 Attorney General Opinions

Blanket improvement lien arises when materials are delivered or work commences affecting more than one lot of subdivision. *37 Ops. Cal. Att'y Gen. 180, 181-183*

Purpose of disciplining contractor for failure to give preliminary notice is to prevent economic pressure being put on subcontractor to waive his or her mechanics' lien rights by not giving notice. *51 Ops. Cal. Att'y Gen. 65, 69*

Legal Topics:

For related research and practice materials, see the following legal topics:
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Comment, *California Mechanics' Liens, 51 Cal. L. Rev. 331 (1963)*

Comment, *Mechanic's Lien on Building as Distinct from Lien on Land--Priority over Lessor, Vendor, Prior Encumbrancers, 22 Cal. L. Rev. 312 (1934)*

Comment, *Effect of Mistakes, Errors, and Omissions in Contents of Claim of Mechanic's Lien, 22 Cal. L. Rev. 193 (1934)*

Legal Topics:

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Ogden's Revised California Real Property Law (Cal. CEB 1975), Vol. II, Ch. 20, *Mechanics' Liens*, §§ 20.1-20.54

California Mechanics' Liens and Related Constrution Remedies (Cal. CEB 1999), Ch. 1, *Claimants' Rights and Remedies*; Ch. 2, *Time Limitations*; Ch. 3, *Claims on Private Works*; Ch. 5, *Complaint Form*: *Foreclosure of Mechanics' Lien*

California Land Security and Development (Cal. CEB 1960) Ch. 30, *Mechanics' Liens*, §§ 30.1-30.32, 30.41-30.82

Legal Aspects of Real Estate Transactions (Cal. CEB 1956) Ch. 17, *Mechanics' Liens*, §§ 1-15

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See generally *California Real Estate Law & Practice, Ch. 452, Stop Notices, §§ 452.01 -452.45*

See generally Marsh, California Mechanics' Lien Law and Construction Industry Practice (LEXIS Publishing 6th ed. 1998)

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§ 361.131 State Statutes

[1] Service of Stop Notice

Contents of stop notice. *Civ. Code § 3103*

Manner of service of stop notice. *Civ. Code § 3103*

Owner's right to demand stop notice. *Civ. Code § 3158*

When construction lender must withhold loan funds pursuant to stop notice. *Civ. Code § 3159(a)*

Stop notice served on lender effective for only materials or labor actually performed. *Civ. Code § 3159(a)(3)*

Construction lender's right to object to sufficiency of sureties. *Civ. Code § 3163*

[2] Persons Entitled to Serve

Persons entitled to serve owner. *Civ. Code § 3158*

Persons entitled to serve construction lender. *Civ. Code § 3159*

[3] Prerequisites for Effective Service

Requirement that preliminary notice be given if required. *Civ. Code § 3160(a)*

Time limitations for service. *Civ. Code § 3160(b)*

[4] Bonded Stop Notices

Bonded stop notice defined. *Civ. Code § 3083*

Prerequisite for effective service of bonded stop notice. *Civ. Code § 3083*

[5] Duty to Withhold

[a] In General

Duty of owner. *Civ. Code § 3161*

Duty of construction lender. *Civ. Code § 3162(a)*

Bond to release construction funds. *Civ. Code § 3171*

Statutory stop notice remedy is sole remedy for claims against fund held for payment of construction costs. *Civ. Code § 3264*

[b] Assignment of Loan Fund

Priority of stop notice over any assignment of loan fund. *Civ. Code § 3166*

[6] Action to Enforce Stop Notice

Time for commencement of action to enforce stop notice. *Civ. Code § 3172*

Notice of commencement of stop notice action. *Civ. Code § 3172*

Expiration of period within which action to enforce stop notice must be commenced. *Civ. Code § 3172*

Effect if action not commenced within statutory time period. *Civ. Code § 3172*

Time for commencement of trial. *Civ. Code § 3172*

Dismissal. *Civ. Code § 3173*

Effect of dismissal. *Civ. Code § 3174*

Joinder of claimants and consolidation of separate actions. *Civ. Code § 3175*

[7] Insufficient Funds to Meet Claims

Pro rata distribution of insufficient funds held pursuant to stop notice. *Civ. Code § 3167(a)*

Pro rata distribution of insufficient funds held pursuant to bonded stop notice. *Civ. Code § 3167(b)*

False notice forfeits right to pro rata distribution and any right to mechanics' lien. *Civ. Code § 3168*

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§ 361.132 Decisions

[1] Nature of Remedy

[a] In General

Stop notice provisions are remedial in nature and must be liberally construed to effect their objects and promote justice. *Miller v. Mountain View Sav. & L. Ass'n (1965) 238 Cal. App. 2d 644, 655, 48 Cal. Rptr. 278*

Stop notice provisions are designed to protect mechanics and materialmen who furnish labor and materials that go to enhance value of owner's property, an enhancement to be paid for out of building fund. *Miller v. Mountain View Sav. & L. Ass'n (1965) 238 Cal. App. 2d 644, 655, 48 Cal. Rptr. 278*

[b] Equitable Garnishment

Equitable garnishment effected through stop notice proceedings ias extensive as claim that it is intended to protect. *A-1 Door & Materials Co. v. Fresno Guar. Sav. & L. Ass'n (1964) 61 Cal. 2d 728, 737, 40 Cal. Rptr. 85, 394 P.2d 829*

Former Code Civ. Proc. § 1190.1(h) (*now see Civ. Code § 3162*) indicates that compliance with its provisions on receipt of bonded stop notice effects an equitable garnishment. *Calhoun v. Huntington Park First Sav. & L. Ass'n (1960) 186 Cal. App. 2d 451, 459, 9 Cal. Rptr. 479*

Equitable garnishment procedure of former Code Civ. Proc. § 1190.1(h) is enforceable through an action in equity. *Calhoun v. Huntington Park First Sav. & L. Ass'n (1960) 186 Cal. App. 2d 451, 459, 9 Cal. Rptr. 479*

[c] Compared to Mechanics' Lien

Remedies of mechanics' lien and stop notice are independent and cumulative. *A-1 Door & Materials Co. v. Fresno*

Guarantee Sav. & Loan Ass'n (1964) 61 Cal. 2d 728, 732, 40 Cal. Rptr. 85, 394 P.2d 829

Provisions for filing stop notice claims by those who furnish labor or materials reach construction fund directly while mechanics' lien is against property and extinguished by foreclosure of construction lender's first deed of trust, which has priority. *Idaco Lumber Co. v. Northwestern Sav. & Loan Assn. (1968) 265 Cal. App. 2d 490, 499, 71 Cal. Rptr. 422*

Construction loan fund substituted lender's promised money for real property that lender's prior deed of trust had rendered inadequate for any realistic relief for lien claimant. *Miller v. Mountain View Sav. & L. Ass'n (1965) 238 Cal. App. 2d 644, 658, 48 Cal. Rptr. 278*

[d] Abolition of Equitable Lien

Civ. Code § 3264, abolishing all theories of equitable liens or trusts against fund for payment of construction costs, does not apply to claims of personal liability against construction lenders on account of intentially wrongful diversion of construction loan funds. *Cal-West Nat. Bank v. Superior Court (1986) 185 Cal. App. 3d 96, 99-100, 229 Cal. Rptr. 431*

Civ. Code § 3264, making statutory stop notice remedy sole remedy for claimants with respect to construction funds, abolishes all theories of equitable liens and trust funds. *Boyd & Lovesee Lumber Co. v. Western Pacific Financial Corp. (1975) 44 Cal. App. 3d 460, 465, 118 Cal. Rptr. 699*

[2] Duty to Withhold

[a] In General

Fundholder must withhold from funds furnished to pay construction costs or arising out of construction loan sufficient money to answer bonded stop notice claims, regardless of terms of its contract with owner. *A-1 Door & Materials Co. v. Fresno Guarantee Sav. & Loan Ass'n (1964) 61 Cal. 2d 728, 734,40 Cal. Rptr. 85, 394 P.2d 829* (decided under former Code Civ. Proc. § 1190.1(h), *now Civ. Code § 3162*)

Construction lender is not permitted to defeat rights of stop notice claimant by transfer of fund to itself or by overpayment of fund. *Idaco Lumber Co. v. Northwestern Sav. & Loan Assn. (1968) 265 Cal. App. 2d 490, 496-497, 71 Cal. Rptr. 422*

Assertion of lender's rights by virtue of its contract with borrower-owner must await running of period in which claims may be filed, and then must yield priority to such claims as are filed. *Miller v. Mountain View Sav. & L. Ass'n (1965) 238 Cal. App. 2d 644, 657, 48 Cal. Rptr. 278*

Statutory remedy provided in former Code Civ. Proc. § 1190.1(h) (*now see Civ. Code § 3162*, duty of construction lender on receipt of stop or bonded stop notice) is in derogation of generally acknowledged right of lender to contract for lien superior to rights of lien claimants in property. *Miller v. Mountain View Sav. & L. Ass'n (1965) 238 Cal. App. 2d 644, 661, 48 Cal. Rptr. 278*

When there are building loan funds or construction funds within the meaning of former Code Civ. Proc. § 1190.1(h) (*now see Civ. Code § 3087*), against which notices to withhold could take effect, the fundholder has an unqualified duty to withhold if notices accompanied by bond. *H.O. Bragg Roofing, Inc. v. First Fed. Sav. & L. Ass'n (1964) 226 Cal. App. 2d 24, 27, 37 Cal. Rptr. 775*

[b] Estoppel

Construction lender was estopped to deny stop notice claim and had duty to withhold when it had assured claimant it would be paid, and claimant relied on assurances to its prejudice by not perfecting other available remedies. *H.O. Bragg Roofing, Inc. v. First Fed. Sav. & L. Ass'n (1964) 226 Cal. App. 2d 24, 26-27, 28, 37 Cal. Rptr. 775*

[c] Assignment

Language of *Civ. Code § 3166* (former Code Civ. Proc. § 1190.1(h)) is unequivocal; no exception is made when owner assigns borrowed fund back to lender. *Rossman Mill & Lbr. Co. v. Fullerton Sav. & L. Ass'n (1963) 221 Cal. App. 2d 705, 710, 34 Cal. Rptr. 644*

[d] Time for Service

Stop notice may be given to owner at any time after agreement is made for the furnishing of labor or materials. *Miller v. Mountain View Sav. & L. Ass'n (1965) 238 Cal. App. 2d 644, 653, 48 Cal. Rptr. 278*

[3] Actions to Enforce Claim

[a] In General

Stop notice claimant's right to payment does not arise simply on giving notice of claims but on compliance with *Civ. Code § 3172* providing for suit on claim. *A-1 Door & Materials Co. v. Fresno Guarantee Sav. & Loan Ass'n (1964) 61 Cal. 2d 728, 736, 40 Cal. Rptr. 85, 394 P.2d 829* (decided under former Code Civ. Proc. § 1197.1(a))

[b] Independent Remedy

Right to recover on stop notice claim is not dependent on establishing mechanics' lien. *A-1 Door & Materials Co. v. Fresno Guarantee Sav. & Loan Ass'n (1964) 61 Cal. 2d 728, 732, 40 Cal. Rptr. 85, 394 P.2d 829*

[c] Interest Before Judgment

Fundholder must pay whatever owners owe stop notice claimants including interest before judgment under *Civ. Code § 3287*, if allowed, to extent that construction loan funds are available. *A-1 Door & Materials Co. v. Fresno Guarantee Sav. & Loan Ass'n (1964) 61 Cal. 2d 728, 737, 40 Cal. Rptr. 85, 394 P.2d 829*

[d] Commencement

Premature commencement of stop notice action is a matter of abatement that must be pleaded in proper time or be waived. *Miller v Mountain View Sav. & L. Ass'n (1965) 238 Cal. App. 2d 644, 654, 48 Cal. Rptr. 278*

[e] Necessary Party

Owner is necessary party to proceeding to enforce stop notice claim, and is necessary party to complete settlement of entire controversy. *A-1 Door & Materials Co. v. Fresno Guarantee Sav. & Loan Ass'n (1964) 61 Cal. 2d 728, 736 n.3, 40 Cal. Rptr. 85, 394 P.2d 829*

Owner is necessary party if entitled to fund after payment of all claims or in event of failure of stop notice claimants to prove their claims by court adjudication. *Idaco Lumber Co. v. Northwestern S. & L. Assn. (1968) 265 Cal. App. 2d 490, 496, 71 Cal. Rptr. 422*

[f] Right to Personal Judgment

Personal judgment may be entered against holder of funds in action to effect recovery from funds subjected to stop notice claim if such holder does not account for amount of claim from funds in his or her possession. *Calhoun v. Huntington Park First Sav. & L. Ass'n (1960) 186 Cal. App. 2d 451, 460, 9 Cal. Rptr. 479*

[4] Preliminary Notice

Construction lender was not liable on stop notice if it was never given preliminary 20-day notice even though subcontractor did not have actual notice of construction lender and did give notice to owner. *Romak Iron Works v. Prudential Ins. Co. of America (1980) 104 Cal. App. 3d 767, 773-778, 163 Cal. Rptr. 869*

[5] Recovery on Bond

Subcontractor who is claimant on stop notice release bond entitled to recover attorneys' fees from surety based on attorneys' fee clause in subcontract, so long as total recovery against surety does not exceed penal sum of bond. *National Technical Systems v. Superior Court (2002) 97 Cal. App. 4th 415, 424-425, 118 Cal. Rptr. 2d 465* ; *T&R Painting Constr. v. St. Paul Fire & Marine Ins. Co. (1994) 23 Cal. App. 4th 738, 29 Cal. Rptr. 2d 199*

Damages recoverable on bond for improper filing of stop notice include costs and attorney's fees in defending action enforcing stop notice. *Flintkote Co. v. Presley of Northern California (1984) 154 Cal. App. 3d 458, 462-464, 201 Cal. Rptr. 262*

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Moss, *The Stop Notice Remedy in California-- Updated*, 47 L.A. Bar B. 299 (1972)

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California Land Security and Development (Cal. CEB 1960), Ch. 30, *Mechanics' Liens*, §§ 30.33-30.40

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§ 361.140 Related Matthew Bender Publications

For a legal form of a labor and material payment bond, see California Legal Forms, Ch. 79, *Suretyship, Guaranty & Indemnity*, Form No. 79.49A

See generally Marsh, California Mechanics' Lien Law and Construction Industry Practice (LEXIS Publishing 6th ed. 1998)

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 361 MECHANICS' LIENS
PART III. RESEARCH GUIDE
D. Payment Bonds

32-361 California Forms of Pleading and Practice--Annotated § 361.141

§ 361.141 State Statutes

[1] General Bond Provisions

Sufficiency of bond. *Code Civ. Proc. § 995.610*

Exoneration or release of sureties on obligations in bonds. *Civ. Code § 3225*

Sole condition of recovery on bond. *Civ. Code § 3226*

[2] Payment Bonds

"Payment bond" defined. *Civ. Code § 3096*

Priority over mechanics' lien of junior encumbrance if payment bond recorded. *Civ. Code §§ 3138* (works of improvement), 3139 (site improvements)

Effect of recording contractor's payment bond and original contract. *Civ. Code § 3235*

Right of owner to exact contractor's payment bond. *Civ. Code § 3236*

[3] Actions on Payment Bonds

Certified copy of bond is admissible. *Code Civ. Proc. § 995.260*

Effect of bond provision shortening time to sue. *Civ. Code § 3239*

Notices required. *Civ. Code § 3242*

Service of post-completion bond notice. *Civ. Code § 3241*

Service of preliminary 20-day notice. *Civ. Code § 3097*

Entitlement to action on contractor's bond requires furnishing of labor or materials. *Civ. Code § 3267*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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§ 361.142 Decisions

[1] Payment Bonds

[a] Nature of Remedy

Price limitation in agreement between owner and contractors is not binding on materialman and subcontractors if latter have in good faith and without notice of agreement furnished materials or labor. *Union Supply Co. v. Morris (1934) 220 Cal. 331, 335, 30 P.2d 394*

Suspension of contractor's corporate status resulting in inability to defend itself in action against it by subcontractor did not preclude bond surety from raising contractor's valid defenses and set-offs to defeat subcontractor's action on public works payment bond. *Kalfountzos v. Hartford Fire Ins. Co. (1995) 37 Cal. App. 4th 1655, 1660, 44 Cal. Rptr. 2d 714*

Third-tier subcontractors and material suppliers are not precluded from right of action on payment bond, provided work forming basis for claim was performed by claimants for bond principal pursuant to contract between original contractor and owner in accordance with *Civ. Code § 3267*. *Union Asphalt, Inc. v. Planet Ins. Co. (1994) 21 Cal. App. 4th 1762, 1765-1767, 27 Cal. Rptr. 2d 371*

Remedies of foreclosure of lien and personal suit against surety on payment bond are independent and cumulative and may be pursued simultaneously as long as money collected on personal judgment is credited to amount of lien. *Culbertson v. Cizek (1964) 225 Cal. App. 2d 451, 468, 37 Cal. Rptr. 548*

Materialman's waiver of lien against property that is subject of construction work for which he or she has furnished materials does not in any way impairmaterialman's right to proceed against surety on contractor's bond posted in connection with work pursuant to *Civ. Code §§ 3082-3267* (mechanics' liens law). *Ferry v. Ohio Farmers Ins. Co. (1963) 211 Cal. App. 2d 651, 655, 27 Cal. Rptr. 471* (decided under former *Code Civ. Proc. §§ 1181-1203.1*)

[b] Construction of Bonds

Surety's liability is primary obligation to materialmen and laborers and not true suretyship. *Bonded Prod. Co. v. R.C. Gallyon Constr. Co., Inc. (1964) 228 Cal. App. 2d 186, 190-191, 39 Cal. Rptr. 347*

Undertaking furnished to original contractor for faithful performance of contract with subcontractor for supply of labor and materials is not pledge for sole benefit of original contractor but inures to benefit of any person performing labor or furnishing materials. *Gordy v. United Pacific Ins. Group (1966) 243 Cal. App. 2d 445, 448-449, 52 Cal. Rptr. 438*

Bond for benefit of laborers and materialmen is not geared to specific terms of particular agreement that contractor has or may execute with any particular workman, supplier, or materialman. *Bonded Prod. Co. v. R. C. Gallyon Constr. Co., Inc. (1964) 228 Cal. App. 2d 186, 190-191, 39 Cal. Rptr. 347*

Repayment of money advanced to contractor by materialman is not secured by contractor's bond given pursuant to provisions of *Civ. Code §§ 3082-3267* (mechanics' liens law). *Peoples Nat'l Bank v. Southern Surety Co. (1930) 105 Cal. App. 731, 735, 288 P. 827* ; *Ferry v. Ohio Farmers Ins. Co. (1963) 211 Cal. App. 2d 651, 27 Cal. Rptr. 471*

[2] Recording of Contractor's Payment Bond

Provisions for recording payment bond and contract are for benefit of owner and not surety. *Meda v. Lawton (1933) 217 Cal. 282, 284-285, 18 P.2d 665*

Failure to record payment bond pursuant to *Civ. Code § 3235* (former Code Civ. Proc. § 1185.1) does not render bond wholly void but instead makes owners' property liable for full reasonable value of labor done or materials furnished. *Culbertson v. Cizek (1964) 225 Cal. App. 2d 451, 467, 37 Cal. Rptr. 548*

Surety on contractor's bond guarantees integrity and solvency of its principal, the contractor; probability that it might not be protected against loss because of inefficiency of materialman is risk incident to its undertaking. *Ferry v. Ohio Farmers Ins. Co. (1963) 211 Cal. App. 2d 651, 659, 27 Cal. Rptr. 471*

[3] Statute of Limitations

Bond required by owner to provide statutory protection was given pursuant to statute and therefore statute of limitations on bond was four years despite short statute of limitations contained in bond because it was not recorded. *Progress Glass Co. v. American Ins. Co. (1980) 100 Cal. App. 3d 720, 724-729, 161 Cal. Rptr. 243*

[4] Subrogation

Requisites of subrogation are: (1) payment must have been made by subrogee to protect his or her own interest; (2) subrogee must not have acted as volunteer; (3) subrogee must not have been primarily liable for debt paid; (4) entire debt must have been paid; and (5) subrogation must not work injustice to rights of others. *Filippi v. McMartin (1961) 188 Cal. App. 2d 135, 140, 10 Cal. Rptr. 180*

Absent owner's fraud in bringing about issuance of bond, surety who has paid claims of valid lien claimants is subrogated to lien claimants' rights against principal but not against property. *Filippi v. McMartin (1961) 188 Cal. App. 2d 135, 139, 10 Cal. Rptr. 180*

Surety has right to proceed against owner's property whose fraud gave rise to surety's liability to laborers or materialmen. *Filippi v. McMartin (1961) 188 Cal. App. 2d 135, 139, 10 Cal. Rptr. 180*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGuaranty ContractsReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.143

§ 361.143 Law Reviews

Mund, *Release of Mechanic's Lien Bonds: Taxable Costs or Not?* 10(4) Bev. Hills Bar Assoc. J. 26 (1976)

Moss, *Bond Practices*, 44 Cal. State B.J. 537 (1969) (relating to performance bonds)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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[Reserved]

§§ 361.144[Reserved]

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32-361 California Forms of Pleading and Practice--Annotated § 361.150

§ 361.150 State Statutes

[1] Contractor's Licensing Requirement

[a] Definitions

"Contractor" defined. *Bus. & Prof. Code § 7026*

"General building contractor" defined. *Bus. & Prof. Code § 7057*

[b] Exemptions

No license required for materialman or manufacturer who furnishes finished products and does not install them. *Bus. & Prof. Code § 7045*

Materialman or supplier exemption. *Bus. & Prof. Code § 7052*

Employee exemption. *Bus. & Prof. Code § 7053*

[c] Requirements

Contracting without license is misdemeanor. *Bus. & Prof. Code § 7028*

Statement required on all written contracts. *Bus. & Prof. Code § 7030(a)*

Discipline disclosure required in small residential contracts. *Bus. & Prof. Code § 7030.1*

Necessity of alleging license in bringing or maintaining action for work for which license required. *Bus. & Prof. Code*

§ 7031

[2] Forfeiture

Forfeiture of claim of lien for willfully including materials or labor not actually furnished. *Civ. Code § 3118*

Failure to serve stop notice on written demand of owner results in forfeiture of right to mechanics' lien. *Civ. Code § 3158*

False stop notice or bonded stop notice forfeits right to pro rata distribution and all right to mechanics' lien. *Civ. Code § 3168*

Mistakes or errors in claim of lien invalidates lien if made with intent to defraud. *Civ. Code § 3261*

[3] Progress Payments

Obligation to make progress payment within 30 days of demand. *Civ. Code § 3260.1*

Ten-day notice to stop work for nonpayment of progress payment. *Civ. Code § 3260.2*

[4] Release Bonds

Bond for release of property subject to mechanics' lien. *Civ. Code § 3143*

Bond for release of funds required to be withheld to respond to stop notice or bonded stop notice. *Civ. Code § 3171*

[5] Waiver

Waiver of mechanics' liens and required forms. *Civ. Code § 3262*

Waiver of provisions of mechanics' lien laws. *Civ. Code § 3268*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersContracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawTypes of ContractsReleasesReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.151

§ 361.151 Decisions

[1] Estoppel

Lien claimant has duty to speak; silence supported inference of guile when claimant made contract with contractor extending imprudent credit without bearing risk, counting on lien law to leave risk to innocent and unsuspecting owner and knowing that owner was relying on lien releases supplied by contractor in authorizing payments to contractor. *R.D. Reeder Lathing Co. v. Allen (1967) 66 Cal. 2d 373, 378, 57 Cal. Rptr. 841, 425 P.2d 785*

Materialman who gives contractor waiver of lien, false receipt of payment, or promise to look only to contractor for his or her money is estopped to assert mechanic's lien against owner. *R.D. Reeder Lathing Co. v. Allen (1967) 66 Cal. 2d 373, 378, 57 Cal. Rptr. 841, 425 P.2d 785*

Stop notice claimant is estopped from asserting or enforcing claim if circumstances of particular case give rise to doctrine of estoppel as applied to mechanics's liens claimants. *Ware Supply Co. v. Sacramento Sav. & Loan Asso. (1966) 246 Cal. App. 2d 398, 406, 54 Cal. Rptr. 674*

[2] Joint Checks

Materialman is not obliged to credit proceeds of check against possible future delivery of materials not yet made or contracted for. *J. S. Schirm Co. v. Rollingwood Homes Co. (1961) 56 Cal. 2d 789, 794-795, 17 Cal. Rptr. 1, 366 P.2d 444*

If materialman furnished materials at same time to contractor for construction of buildings on property of different owners, materialman is permitted, in absence of notice of source of funds, to accept funds from contractor and apply them on any agreed account. *Modesto Lumber Co. v. Wylde (1933) 217 Cal. 421, 425, 19 P.2d 238*

If materialman, by endorsement, has acknowledged payment for materials supplied and has waived mechanics' lien

rights, materialman then is not permitted to render nugatory protection provided to owner by endorsement and rely instead on lien rights. *Bohannan Bros., Inc. v. Lo Jean Dev. Co. (1969) 3 Cal. App. 3d 200, 203-204, 82 Cal. Rptr. 922*

Holding that materialman has waived lien rights is not dispositive of issue of whether materialman has waived stop notice rights because latter remedy is independent of and cumulative to lien rights. *Bohannan Bros., Inc. v. Lo Jean Dev. Co. (1969) 3 Cal. App. 3d 200, 205, 82 Cal. Rptr. 922*

Burden of proving particular application of payment by either debtor or creditor is on party claiming such application was made. *Ferry v. Ohio Farmers Ins. Co. (1963) 211 Cal. App. 2d 651, 656, 27 Cal. Rptr. 471*

Materialman is permitted to waive lien rights without impairing in any way his or her right to proceed against surety on contractor's payment bond. *Ferry v. Ohio Farmers Ins. Co. (1963) 211 Cal. App. 2d 651, 655, 27 Cal. Rptr. 471*

Owner's joint checks endorsed by materialman to subcontractor discharged owner's liability to materialman. *Westwood Bldg. Materials Co. v. Valdez (1958) 158 Cal. App. 2d 107, 108-109, 322 P.2d 79*

When payment by general contractor of subcontractor and materialman was made by joint checks, materialman was held to have been paid even though materialman diverted part of proceeds of joint checks to other purpose. *Edwards v. Curry (1956) 152 Cal. App. 2d 726, 730, 313 P.2d 613*

[3] Laches

Laches was applicable in claimant's action to foreclose on lien when claimant commenced an action within statutory period but delayed in order to advance its financial interests at expense of innocent homeowners and lenders. *A.A. Baxter Corp. v. Home Owners & Lenders (1970) 7 Cal. App. 3d 725, 735, 86 Cal. Rptr. 854*

[4] License Requirement

Bus. & Prof. Code § 7031, requiring contractor to allege that at all times of performance of contract he or she was licensed, applies to actions brought under mechanics' lien law. *Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 145-148, 308 P.2d 713* (stop notice action); *Famous Builders v. Bolin, Inc. (1968) 264 Cal. App. 2d 37, 39-43, 70 Cal. Rptr. 17* (foreclosure of mechanics' lien)

Bus. & Prof. Code § 7031 represents legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business outweighs any harshness between the parties, and applies even when a person for whom work was performed knew the contractor was unlicensed. *Goldstein v. Barak Construction (2008) 164 Cal. App. 4th 845, 854, 79 Cal. Rptr. 3d 603*

A subcontractor who is unlicensed cannot maintain an action against a general contractor for work performed under a construction service agreement. *Great West Construction, Inc. v. WSS Industrial Construction, Inc. (2008) 162 Cal. App. 4th 581, 587, 76 Cal. Rptr. 3d 8*

Lab. Code § 2750.5 is not applicable to determinations of whether one is employee or unlicensed contractor under *Bus. & Prof. Code §§ 7031* and *7053*. *Fillmore v. Irvine (1983) 146 Cal. App. 3d 649, 657, 194 Cal. Rptr. 319*

Necessity for determination of whether lien claimant is employee-materialman under *Bus. & Prof. Code §§ 7052, 7053* or independent contractor under *Bus. & Prof. Code § 7053* in landscaping work performed for owner when no license obtained by claimant. *Vaughn v. De Kreek (1969) 2 Cal. App. 3d 671, 677, 679, 83 Cal. Rptr. 144*

[4A] Progress Payments

When contract provided for "50% Deposit/Net upon Satisfactory Completion of Project" and homeowner did not pay total amount due, *Civ. Code § 3260.1* (imposing penalty for wrongful withholding of progress payments) was inapplicable because payment due when project is completed is final payment rather than "progress payment." *Murray's Iron Works Inc. v. Boyce (2008) 158 Cal. App. 4th 1279, 1299, 71 Cal. Rptr. 3d 317*

[5] Res Judicata

Plaintiff was barred by res judicata on second suit foreclosing mechanics' lien filed on two parcels after first suit had held parcels not subject to mechanics' lien, because mechanics' lien was filed only as to two other connected parcels. *Sukut Construction, Inc. v. Cabot, Cabot & Forbes Land Trust (1979) 95 Cal. App. 3d 527, 531-532, 157 Cal. Rptr. 289*

[6] Waiver

Waiver of or estoppel to assert mechanics' lien rights does not require formal contract, but is inferrable from circumsta nces and conduct of parties. *E. K. Wood Lbr. Co. v. Higgins (1960) 54 Cal. 2d 91, 94, 4 Cal. Rptr. 523, 351 P.2d 795*

Retention of note given by contractor and intended as substitute for mechanics' lien on owner's improved property constituted waiver of rights to file mechanics' lien against property. *E. K. Wood Lbr. Co v. Higgins (1960) 54 Cal. 2d 91, 97, 4 Cal. Rptr. 523, 351 P.2d 795*

Waiver by materialman of lien against property subject of construction work for which labor or materials furnished did not impair right to proceed against surety on payment bond. *Ferry v. Ohio Farmers Ins. Co. (1963) 211 Cal. App. 2d 651, 655, 27 Cal. Rptr. 471*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensLien PrioritiesReal Property LawNonmortgage LiensMechanics' Liens

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§ 361.152 Attorney General Opinions

Release of mechanics' lien must be acknowledged before it qualifies for recording by county recorder because it is instrument affecting title to real property. *69 Ops. Cal. Att'y Gen. 97, 102 (1986)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.153

§ 361.153 Law Reviews

Killeen, *Owner Liability for Construction Costs*, 52 Cal. St. B.J. 526 (1977)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsEnforcementJoint & Several InstrumentsReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated §§ 361.154-361.159

[Reserved]

§§ 361.154[Reserved]

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370

Chapter 361 MECHANICS' LIENS

PART IV. PROCEDURAL CHECKLISTS

A. Mechanics' Liens

32-361 California Forms of Pleading and Practice--Annotated

NOTE:

The following is a checklist of procedures required in enforcing rights under claims of liens. is not exhaustive and other procedures may be required. This checklist does, however, attempt to set forth those procedures most commonly utilized.

This checklist is designed to cover those procedures set forth in *Civ. Code §§ 3109-3153* which govern mechanics' liens generally. In addition to the procedures set forth in these provisions, the provisions of *Code Civ. Proc. § 307 et seq.* (governing procedure in civil actions), except as otherwise provided, are applicable to, and constitute the rules of practice in, the proceedings relating to the mechanics' lien law. The provisions of *Code Civ. Proc. §§ 307-1062a*, relative to new trials and appeals, except insofar as they are inconsistent with the provisions of the mechanics' lien law or with rules adopted by the Judicial Council, apply to the proceedings mentioned in the mechanics' lien law [Civ. Code § 3257].

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PART IV. PROCEDURAL CHECKLISTS
A. Mechanics' Liens

32-361 California Forms of Pleading and Practice--Annotated § 361.160

§ 361.160 Preliminary 20-Day Notice (Private Work)

[1] When Notice Is Required

NOTE:

The determination of to whom a preliminary notice must be given is normally made at the time the notice must be given [***Schrader Iron Works, Inc. v. Lee (1972) 26 Cal. App. 3d 621, 630, 103 Cal. Rptr. 106*** **;** ***see*** [3], ***below***]. However, if the claimant is under direct contract with the owner, he or she need not give a notice to the owner [***see*** Paragraph 4, ***below***]; the claimant is also not required to give a preliminary notice to the owner's successor in interest, even though at the time he or she is required to give the notice, the claimant is not under direct contract with the successor in interest [*Schrader Iron Works, Inc. v. Lee (1972) 26 Cal. App. 3d 621, 630, 103 Cal. Rptr. 106]* .

1. Actual laborers for wages are not required to give a preliminary notice [*Civ. Code § 3097(a), (b)*; *see Civ. Code 3089(a)* ("laborer" defined for these purposes)].

2. A person or entity to whom a portion of a laborer's compensation is paid by agreement with that laborer or the collective bargaining agent of that laborer is not required to give preliminary notice [*Civ. Code 3097(a), (b)*; *see Civ. Code 3089(b)* ("laborer" defined for these purposes)].

3. The original contractor is not required to give a preliminary notice [*Civ. Code § 3097(a), (b)*].

4. All persons under direct contract with the owner, except the original contractor, who furnish labor, service, equipment or materials for which a mechanics' lien can be claimed under *Civ. Code §§ 3110, 3112* must cause to be given to the construction lender, if any, or to the reputed construction lender, if any, a written preliminary notice [*Civ. Code § 3097(b)*]. Such persons are not required to give preliminary notices to either the owner or original contractor [*Civ. Code § 3097(a), (b)*].

NOTE:

A claimant is considered under direct contract with the owner and, hence, is not required to give a preliminary notice if the claimant has a direct contract with the owner's lessee and the owner fails to file and post a notice of nonresponsibility within 10 days after knowing of the construction taking place under the contract [*M. Arthur Gensler, Jr., & Associates, Inc. v. Larry Barrett, Inc. (1972) 7 Cal. 3d 695, 707, 103 Cal. Rptr. 247, 499 P.2d 503]* . When a noncontracting owner has actual knowledge of improvements being made to his or her property and fails to timely file a notice of nonresponsibility under *Civ. Code § 3129,* a lien claimant is excused from giving preliminary notice [*Kim v. JF Enterprises (1996) 42 Cal. App. 4th 849, 856, 50 Cal. Rptr. 2d 141]* .

The claimant is only on constructive notice of construction liens recorded when work is commenced. It does not have to give notice to a construction lender whose lien was recorded after work commenced but during the 20-day period [*Kodiak Industries, Inc. v. Ellis (1986) 185 Cal. App. 3d 75, 82-84, 229 Cal. Rptr. 418]* .

A reputed construction lender is a person or entity reasonably and in good faith believed by the claimant to be the construction lender. The fact that the claimant could have discovered that the lender made other construction loans to the owner does not make the lender a reputed lender [*Kodiak Industries, Inc. v. Ellis (1986) 185 Cal. App. 3d 75, 86-88, 229 Cal. Rptr. 418]* .

5. Any person not described in Paragraphs 1-4, *above*, who furnishes labor, service, equipment, or material for which a lien can be claimed under *Civ. Code §§ 3110-3112* must cause a written preliminary notice to be given to the owner or reputed owner; to the original contractor, or reputed contractor; and to the construction lender, if any, or reputed construction lender, if any [*Civ. Code § 3097(a)*].

NOTE:

The failure of a subcontractor who is licensed under *Bus. & Prof. Code § 7000 et seq.* to give a preliminary notice constitutes grounds for disciplinary action by the Registrar of Contractors if the contract price to be paid to the subcontractor exceeds $400 [*Civ. Code § 3097(h)*].

Service is proper on a reputed owner when service is made on a person represented by the contractor to the claimant as being the owner, even though that person is not actually the owner [*Brown Co. v. Appellate Department (1983) 148 Cal. App. 3d 891, 898-903, 196 Cal. Rptr. 258]* .

When property is owned by a limited partnership, a preliminary 20-day notice given to a general partner will not constitute noticeon the owner and a resulting judgment of foreclosure will not bind the limited partnership when the limited partnership is not a designated defendant [*see Barr Lumber Co. v. Old Ivy Homebuilders, Inc. (1995) 34 Cal. App. 4th Supp. 1, 40 Cal. Rptr. 2d 717]* .

NOTE:

A certified architect, registered engineer, or licensed land surveyor who has furnished services for the design of the work of improvement and who gives a preliminary notice that complies with the requirements of this form not later than 20 days after the work of improvement has commenced will be deemed to have complied with the preliminary notice requirements with respect to

architectural, engineering, or surveying services furnished, or to be furnished [*Civ. Code § 3097(c)*].

[2] Preparation of Notice

1. Contents.

See *§ 361.190* for preliminary 20-day notice; *Civ. Code § 3097(c)*.

2. Execution.

Although there is no express requirement that the notice be signed and dated, both are recommended to show that the claimant has given the notice within the required time period [*see Civ. Code § 3097(d)*].

3. Verification.

Not required.

4. Copies.

a. One for each person required to be notified under *Civ. Code § 3097(a)* or *(b)*.

NOTE:
Only one notice needs to be given to the owner, original contractor, any subcontractors, and/or construction lender with respect to all materials, service, labor, or equipment furnished for a work of improvement, meaning the entire structure or scheme of improvements as a whole. However, when such materials, services, labor, or equipment is furnished under contracts with more than one subcontractor, separate notices must be given to each subcontractor [*Civ. Code § 3097(g)*].

b. Three or more if the notice is to be used as an exhibit to a complaint for foreclosure or to enforce a stop notice claim.

c. One office copy.

[3] Time for Service

1. Furnishers of labor or materials generally.

Service of the preliminary notice must be made not later than 20 days after a claimant has furnished labor, services, equipment, or materials to the jobsite [*Civ. Code § 3097(c), (d)*].

NOTE:
Only if a claimant has served a notice not later than 20 days after he or she has first furnished labor, services, equipment, or materials may he or she then be entitled to a claim of lien or to a notice to withhold for all that he or she has furnished or will furnish to the jobsite. A notice given at any later time entitles the claimant only to a claim of lien or notice to withhold for such labor, equipment, services, or materials furnished within 20 days before the service of the notice and at

any time thereafter [*see Civ. Code § 3097(c), (d)*]. A notice is not premature and is valid if served before labor or materials are furnished [*Brown Co. v. Appellate Department (1983) 148 Cal. App. 3d 891, 896-898, 196 Cal. Rptr. 258]* .

2. Certified architects, registered engineers, or licensed land surveyors who have furnished services for the design of a work of improvement.

If a preliminary notice is served not later than 20 days after the work of improvement has commenced, these claimants are deemed to have complied with *Civ. Code § 3097(a), (b)* (who must give a preliminary notice) with respect to architectural, engineering, or surveying services furnished or to be furnished [*Civ. Code § 3097(c)*].

[4] Place and Manner of Service

1. Personal delivery.

Personal delivery may be made to a resident of California by delivery to the person to be notified, by leaving the notice at his or her residence, or by leaving it with some person in charge at his or her place of business [*Civ. Code § 3097(f)(1)*].

NOTE:
Every written contract entered into between a property owner and an original contractor must provide a space for the owner to enter his or her name, residence address, and place of business, if any. The original contractor must make available the name and residential address of the owner to any person seeking to serve notice as required by *Civ. Code § 3097* [*Civ. Code § 3097(l)*]. To facilitate service of preliminary notice, every contract entered into between an original contractor and subcontractor, and between subcontractors, must provide a space for the name and address of the owner, original contractor, and any construction lender [*see* *Civ. Code § 3097(m)*].

2. Delivery by mail.

Service may be made by mail to a resident of California by first class registered or certified mail, postage prepaid, addressed to any one of the following:

a. The residence of the person to be notified.

NOTE:
See NOTE to Paragraph 1, *above*.

b. The address of the place of business of the person to be notified.

NOTE:
See NOTE to Paragraph 1, *above*.

c. The address shown by the building permit on file with the authority issuing a building permit for the improvement work [*Civ. Code § 3097(f)(1)*].

NOTE:
Every city, county, city and county, or other governmental authority must, in its application form for a building permit, provide a space and designation for the applicant to enter the name, branch designation,

if any, and address of the construction lender and keep the information on file open for public inspection during the regular business hours of the authority. If there is no known construction lender, that fact must be noted in the designated space [*Civ. Code § 3097(i)*].

Any failure to indicate the name and address of the construction lender on the application, however, does not relieve any person from the obligation to give to the construction lender a preliminary notice if one is required [*Civ. Code § 3097(i)*].

d. The address of the construction lender or owner of real property described in any recorded instrument securing a loan, any of the proceeds of which may be used for the purpose of construction improvements on the property to which the lien claimant serving a preliminary notice has furnished or will furnish labor or materials [*Civ. Code § 3097(f)(1)*].

NOTE:

A mortgage, deed of trust, or other instrument securing a loan, any of the proceeds of which may be used for the purpose of constructing improvements on real property, must bear the designation "Construction Trust Deed" prominently on its face and state (1) the name and address of the lender and the name and address of the owner of the real property described in the instrument, and (2) a legal description of the property that secures the loan and, if known, the street address of the property. However, any failure to so designate the loan or provide the required information does not affect the validity of the instrument. Further, a failure to provide the above information on the instrument when it is recorded will not relieve persons subject to this requirement from the duty of serving a preliminary notice [*Civ. Code § 3097(j)*].

The county recorder of the county in which the instrument is recorded must indicate in the general index of the official records of the county that the instrument secures a construction loan [*Civ. Code § 3097(j)*].

Every written contract entered into between a property owner and an original contractor, except home improvement contracts and swimming pool contracts, must provide space for the owner to enter the name and address of the construction lender or lenders. The original contractor must make the name and address of the construction lender or lenders available to any person seeking to serve the preliminary notice [*Civ. Code § 3097(m)*]. When one or more construction loans are obtained after commencement of construction, the property owner must provide the name and address of the construction lender or lenders to each person who has given the property owner the preliminary notice [*Civ. Code § 3097(n)*].

3. Delivery to nonresident.

If the person to be notified does not reside in California, any of the methods that may be used to serve a resident may also be used to serve the nonresident. If the nonresident cannot be served by any of those methods, then notice may be given by first class certified or registered mail which is addressed to the construction lender or to the original contractor [*Civ. Code § 3097(f)(2)*].

NOTE:

If service is made by first class certified or registered mail, whether service is to a resident or nonresident, it is complete at the time of the deposit of the registered or certified mail [*Civ. Code § 3097(f)(3)*].

[5] Proof of Service

See *§ 361.191* for declaration of proof of service of preliminary 20-day notice.

[6] File With Recorder

The notice may be filed with the recorder. When a notice of completion or notice of cessation is recorded, the recorder will notify the claimant that the notice of completion or cessation has been filed within five days of its filing [*Civ. Code § 3097(o)*].

NOTE:

Filing the preliminary notice with the recorder does not give rise to actual or constructive notice of the existence or contents of the notice [*Civ. Code § 3097(o)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 361 MECHANICS' LIENS
PART IV. PROCEDURAL CHECKLISTS
A. Mechanics' Liens

32-361 California Forms of Pleading and Practice--Annotated § 361.161

§ 361.161 Preparation, Recording, and Service of Claim of Lien

[1] Preparation of Claim of Lien

1. Contents.

See *§§ 361.192 -361.194* for claim of lien [Civ. Code § 3984(a)].

2. Execution.

Must be signed by claimant or his or her agent [*Civ. Code § 3084(a)*].

3. Verification.

Must be verified by claimant or his or her agent [*Civ. Code § 3084(a)*].

4. Copies.

a. One for recording [*see Civ. Code §§ 3115-3117*; *see also* [3], *below*].

b. One for service on owner or reputed owner [*see Civ. Code § 3084(c)*; *see also* [4], *below*].

c. At least one copy if claim of lien is to be incorporated by reference into notice of extension of credit [*see Civ. Code § 3144*; for notice of extension of credit, *see § 361.195*].

d. At least three copies if claim of lien is to be used as exhibit to complaint for foreclosure of lien [*see §§ 361.201, 361.202* for complaints].

e. One office copy.

[2] Place of Recording

Claim of lien must be recorded with county recorder's office of county where property is located [*see Civ. Code § 3084(a)(6), (b)*].

[3] Time to Record

NOTE:
The code provisions governing the time limits for recording a claim of lien relate only to liens which attach to works of improvement and not to liens attaching to property on which site improvement work has been exclusively performed. No case has clarified the issue of when a claimant must record if his or her lien is for site improvement work.

1. Commencement of time within which claim must be recorded.

a. Original contractor: after he or she completes contract [*Civ. Code § 3115*].

NOTE:
An "original contractor" is defined as any contractor who has a direct contractual relationship with the owner [*Civ. Code § 3095*]. This means that if the owner contracts directly with one who would be normally considered a subcontractor, the subcontractor for purposes of recording his or her claim is an original contractor [*Benson Elec. Co. v. Hale Bros. Assoc., Inc. (1966) 246 Cal. App. 2d 686, 691, 55 Cal. Rptr. 73]* .

A contract is "complete" for purposes of commencing the recordation period under *Civ. Code § 3115* when all work under the contract has been performed, excused, or otherwise discharged [*Howard S. Wright Construction Co. v. BBIC Investors LLC (2006) 136 Cal. App. 4th 228, 241, 38 Cal. Rptr. 3d 769* (recording of mechanic's lien was not premature because contract was "completed" on anticipatory breach of other contracting party)].

b. All mechanics' liens claimants other than the original contractor: after they have ceased to furnish labor, services, equipment, or materials [*Civ. Code § 3116*].

NOTE:
A lien filed by a subcontractor after completion of its work but before completion of the project is not premature [*Century Superior Gunite, Inc. v. Rodriguez (1981) 118 Cal. App. 3d Supp. 12, 14-15*].

c. Any claimant filing a claim for a work of improvement consisting of two or more separate residential units.

On completion of each residential unit [*Civ. Code § 3131*].

NOTE:
A separate work of improvement is one residential structure, including a residential structure containing multiple condominium units, together with any common area, garage, or other appurtenant improvements [***Civ. Code § 3131***]. Individual units of a condominium are not separate residential units within the meaning of ***Civ. Code § 3131*** , since they are not self-contained but are merely areas within walls and under a roof now owned by the residents [***E. D. McGillicuddy Constr. Co. v. Knoll***

***Recreation Assn., Inc. (1973)**, 31 Cal. App. 3d 891* **; see also § 361.11[3][b]].**

Each separate residential unit is considered a separate work of improvement [*Civ. Code § 3131*]. Thus the expiration of the time within which any claimant other than the original contractor must record [***see** § 361.162[2]*] for the completion of such a residential unit is presumably controlled by this provision although no cases have so held.

2. Expiration of time for recording.

a. Original contractor.

(1) If no notice of completion or cessation has been recorded by the owner [*see § 361.200* for notice of completion]: 90 days after the completion of the work of improvement as defined in *Civ. Code § 3106* [*Civ. Code § 3115*].

NOTE:
For a discussion of the time a work of improvement is considered completed, see *§ 361.200[5]*.

(2) If a notice of completion or notice of cessation has been recorded: 60 days after the recording [*Civ. Code § 3115*].

NOTE:
If a site improvement is provided for in separate contract from any contract for the erection of residential units or other structures, the site improvement is considered a separate work of improvement [*Civ. Code § 3135*]; and a notice of completion may be recorded to effectively shorten the time a claim of lien must be recorded if the site improvement has been completed [*see Howard A. Deason & Co. v. Costa Tierra Ltd. (1969) 2 Cal. App. 3d 742, 754-755, 83 Cal. Rptr. 105]* .

(3) Works of improvement made pursuant to two or more original contracts each covering a particular portion of a work of improvement: 60 days after the owner has recorded a d a notice of completion following completion of any one of the original contracts [*Civ. Code § 3117*].

b. All mechanics' liens claimants other than original contractor.

(1) If no notice of completion or cessation has been recorded by the owner: 90 days after completion of the work of improvement [*Civ. Code § 3116*].

(2) If a notice of completion or notice of cessation has beenrecorded: 30 days after the recording of either notice [*Civ. Code § 3116*].

(3) Works of improvement made pursuant to two or more original contracts each covering a particular portion of a work of improvement: 30 days after the owner has recorded a notice of completion following completion of any one of the original contracts [*Civ. Code § 3117*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal

Property LawNonmortgage LiensMechanics' Liens

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A. Mechanics' Liens

32-361 California Forms of Pleading and Practice--Annotated § 361.162

§ 361.162 Action to Foreclose Lien

[1] Commencement of Time to File Action

An action may be commenced after the mechanics' lien claimant has recorded his or her claim of lien [*Civ. Code § 3144*].

[2] Expiration of Time to File Action

1. If no extension of lien by agreement or extension of credit.

Within 90 days after the recording of the mechanics' lien claimant's claim of lien [*see § 361.161*].

NOTE:

No mechanics' lien binds any property for a longer period of time than 90 days after the recording of the claim of lien unless within that time an action to foreclose the lien is commenced in a proper court [*Civ. Code § 3144*]. If the claimant fails to commence an action to foreclose the lien within the time limitation provided, the lien automatically is null and void and of no further force and effect [*Civ. Code § 3144(b)*]. However, if the period for recording a lien is still open, the inchoate right to the lien is not terminated and a subsequent claim of lien for the same work may be recorded and foreclosed [*Solit v. Tokai Bank (1999) 68 Cal. App. 4th 1435, 1447-1448, 81 Cal. Rptr. 2d 243* ; *Koudmani v. Ogle Enterprises, Inc. (1996) 47 Cal. App. 4th 1650, 1657-1658, 55 Cal. Rptr. 2d 330* ; *Coast Central Credit Union v. Superior Court (1989) 209 Cal. App. 3d 703, 711, 257 Cal. Rptr. 468]* .

Because of the shortness of the time period within which an action to foreclose must be commenced, counsel is advised to determine all indispensable parties to the action. A determination of indispensability after the 90-day period has expired prevents a claimant from foreclosing his or her lien, since the court is without jurisdiction [*see* *Frank Pisano & Associates v. Taggart (1972) 29 Cal. App. 3d 1, 23, 105 Cal. Rptr. 414]* .

All interested parties must be joined within the 90 days; however, if Doe defendants are named, the complaint may be amended after the 90 days to substitute a defendant that was unknown at the time the complaint was filed. The fact that the plaintiff had constructive knowledge of the interest of the defendant through the recording laws does not preclude the use of the Doe defendant procedure because the ignorance of a defendant's identity required for the use of the Doe procedure is actual ignorance [*Grinnell Fire Protection Systems Co. v. American Sav. & Loan Assn. (1986) 183 Cal. App. 3d 352, 357-362, 228 Cal. Rptr. 292]* . Designation as a Doe defendant after the expiration of 90 days is proper if the plaintiff did not have actual knowledge of the interest of the party when the complaint was filed. Mere knowledge of the existence of the party without knowledge of facts giving rise to the cause of action is not sufficient to preclude use of a Doe defendant. A plaintiff is not required to conduct a title search to determine a person's interest in the property before filing a complaint [*Westfour Corp. v. California First Bank (1992) 3 Cal. App. 4th 1554, 1558-1560, 5 Cal. Rptr. 2d 394]* . However, if the plaintiff had knowledge of the interest of a defendant when the complaint was filed, the complaint may not be amended to substitute the defendant for a Doe defendant [*John G. Goetten Consulting Civil Engineers, Inc. v. Crocker Nat. Bank (1987) 193 Cal. App. 3d 1184, 1188-1190, 240 Cal. Rptr. 17]* .

The limitation period of 90 days for bringing a mechanics' lien action is not applicable to amending the complaint to substitute for a Doe defendant; the amendment may be made more than 90 days after learning the identity of a previously designated Doe defendant [*Sobeck & Associates, Inc. v. B & R Investments No. 24 (1989) 215 Cal. App. 3d 861, 867-870, 264 Cal. Rptr. 156]* .

2. Extension of time by giving of credit.

If credit is given and if notice of the fact and terms of the credit are recorded in the office of the county recorder after the recording of the claim of lien and before the expiration of the 90-day period, then the lien continues in force until 90 days after the expiration of the credit; however, in no case does it continue in force longer than one year from the time of completion of the work of improvement [*Civ. Code § 3145*; *see §§ 361.195, 361.196* for notices of extension of credit].

NOTE:

An extension of credit given after the lien has terminated because foreclosure proceedings were not commenced within the statutory period revives the right to foreclose [*Richards v. Hillside Dev. Co. (1960) 177 Cal. App. 2d 776, 781, 2 Cal. Rptr. 693]* . Also, multiple extensions of credit may be given under *Civ. Code § 3144* (former Code Civ. Proc. § 1198.1) [*Richards v. Hillside Dev. Co. (1960) 177 Cal. App. 2d 776, 781, 2 Cal. Rptr. 693]* .

3. Extension of time by agreement.

An agreement between the owner and a lien claimant whereby the owner grants the claimant an extension of time within which an action to foreclose the lien may be commenced is valid despite the fact that there was no compliance with the requirements of *Civ. Code § 3144* providing for an extension of credit [*Hill v. Hesse (1932) 126 Cal. App. 171, 173, 15 P.2d 526* ; *see § 361.197* for waiver of statute of limitations by owner].

NOTE:

However, if the main relief sought in the complaint by the lien claimant is personal, that is, based on contract, the fact that title to or possession of real property is incidentally involved in the cause of action to foreclose the lien does not change the character of the complaint as essentially one of a

transitory action [*Central Bank v. Superior Court (1973) 30 Cal. App. 3d 913, 917, 106 Cal. Rptr. 696]* .

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(6)*]. In limited civil cases, the caption muststate whether the demand exceeds or does not exceed $10,000. The caption must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

When a foreclosure action was brought in an improper court, the transfer of the action to a proper court after the 90-day period had expired was considered fatal to the cause of action, because the property became "unbound" under *Civ. Code § 3144*. Future purchasers and encumbrancers could then rely on the record in the county where the land was located, even though no such third persons were in fact complaining [*States Shingle Co. v. Kaufman (1964) 227 Cal. App. 2d 830, 835* (action originally filed in improper county); *see* *Halbert's Lumber, Inc. v. Burdett (1988) 202 Cal. App. 3d Supp. 14, 18-19* (action originally filed in proper county but improper judicial district)].

[3] Preparation of Complaint

1. Essential allegations.
The essential allegations of a complaint for foreclosure of a mechanics' lien are:

a. Capacity or residence of plaintiff (generally optional, unless plaintiff is suing in a representative capacity or it is necessary to establish plaintiff's right to maintain the action). See complaint in *§ 361.201[1]*, First Cause of Action, Paragraph 1.

b. Name and capacity (and residence, when venue is to be based thereon) of defendant or each defendant when there is more than one. See *§ 361.201[1]*, First Cause of Action, Paragraph 3.

c. Fictitious name allegations, if appropriate. See *§ 361.201[1]*, First Cause of Action, Paragraph 4.

d. Agency allegations, if appropriate. See Ch. 20, *Allegations Commonly Used* .

e. Facts establishing the right of the plaintiff to foreclosure of a mechanics' lien. See *§ 361.201[1]*, Second Cause of Action, Paragraphs 1-4.
(1) If plaintiff is a contractor, that he or she is licensed as such.

(2) A definite description of the property.

(3) That defendant has a lienable interest in the property [*e.g.*, owner, lessee, etc.].

(4) That the owner or his or her agent entered into a contract for a work of improvement, or, in the case of a noncontracting owner, that the owner had knowledge of a work of improvement and did not post a notice of nonresponsibility [*see § 361.204* for allegation of noncontracting owner's responsibility].

(5) That material or labor were furnished for and actually used in the improvement.

(6) Dates in which material or labor were furnished.

(7) Full performance of the contract (or, if not entirely performed, the excuse provided therefor in the contract).

(8) Date of completion or cessation of work of improvement (to show claim of lien was filed on time).

(9) Amount due plaintiff on contract.

(10) That a preliminary 20-day notice (private work) was given if required by *Civ. Code § 3097(a)* or *(b)* [*see § 361.190* for preliminary 20-day notice].

(11) That a claim of lien was recorded in substantial compliance with *Civ. Code §§ 3115-3117*, including the fact that it was timely recorded [*see § 361.192* for claim of lien]. It is best to attach a copy of the claim of lien and to incorporate it by reference in the complaint.

2. Drafting.
The complaints in *§§ 361.201* and *361.202* are for use in actions for foreclosure of mechanics' liens brought either by an original contractor [*see § 361.201*] or by any lien claimant other than the original contractor [*see § 361.202*].

a. Form, typing, paper, and style requirements are set forth in the California Rules of Court [*see* Ch. 123, *Complaints and Cross Complaints*].

b. Copies to be prepared.

The following copies are required:

(1) Original for filing.

(2) One or more copies for services on each defendant.

NOTE:
When service is made under *Code Civ. Proc. § 415.20(a)* or *(b)* (leaving copy of summons at defendant's office or home), two copies are necessary to effect service on each defendant so served, except if defendant is a minor under 18 years of age and over 12, or an incompetent, in which case four copies are required. See also Ch. 518, *Service of Summons and Papers* .

(3) Copy for office file.

(4) Copy for client, if desired.

(5) Additional copies as desired.

3. Signing.

The complaint must be signed by at least one attorney of record in the attorney's individual name (or by the party if he or she is not represented). It must also state the signer's address and telephone number [*Code Civ. Proc. § 128.7(a)*].

4. Verification [*Code Civ. Proc. §§ 446, 2009, 2015.5*].

NOTE:

There is no requirement that a complaint for foreclosure of a mechanics' lien be verified [*see* *Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified)], and many attorneys prefer not to verify these complaints. If, however, the complaint is verified, the defendant is required to file a verified answer in superior court actions [***see*** *Code Civ. Proc. §§ 92(b), 446(a)*]. In addition, a verified complaint precludes a general denial in superior court [***see*** *Code Civ. Proc. § 431.30(d)*].

a. Prepare the verification by execution by:

(1) Plaintiff, if an individual.

(2) Counsel, if plaintiff is out of the county in which counsel has his or her office, or for some cause is unable to verify it, or when facts are within attorney's knowledge.

(3) If plaintiff is a corporation, by an officer thereof.

NOTE:

The code fails to state who is to verify a pleading filed by a partnership or other unincorporated association [*see* *Code Civ. Proc. § 388*]. It would seem nevertheless that such pleading may be verified in the case of a partnership by any partner and, in the case of an unincorporated association, by any officer thereof.

When the complaint is verified, verification may be by affidavit [*Code Civ. Proc. §§ 446, 2009*]. However, it is usually in the form of a declaration under penalty of perjury when it is executed in California [*Code Civ. Proc. §§ 446, 2009*]. For form of verification under penalty of perjury executed in California, see *§ 361.201*; for alternative forms of verification, see Ch. 572, *Verification* .

b. Have the verification executed (signed) by the person making it.

[4] Preparation and Service of Summons

Counsel must use the form of summons adopted by the California Judicial Council [*see Cal. Rules of Ct., Rule 1.30-1.35*; *Gov. Code § 68511*]. Copies may be obtained from the clerk of the court. For a further discussion of the procedures and forms for use in the preparation and service of the summons, see Ch. 518, *Service of Summons and Papers* .

[5] Joinder of Indispensable Parties

A court may not order foreclosure of the property subject to the mechanics' lien without giving the owners, including owners and encumbrancers who have acquired their rights after filing of the claim of lien and before the filing of the foreclosure suit, an opportunity to contest the amount, validity, and priority of the claimed lien [*see Packard Bell Electronics Corp. v. Theseus, Inc. (1966) 244 Cal. App. 2d 355, 358-361, 53 Cal. Rptr. 300]* . These parties are

indispensable parties, and failure to join them within the statutory time period is a jurisdictional defect that cannot be cured [*Frank Pisano & Associates v. Taggart (1972) 29 Cal. App. 3d 1, 22-23, 105 Cal. Rptr. 414]* .

NOTE:

If the rights of a purchaser or encumbrancer are acquired after the filing of the suit and no notice of lis pendens is recorded, a judgment may be entered against the former owner alone without joinder of either party. Such a party may be bound by the judgment if the holder of the judgment can later prove that the party had actual or constructive knowledge of the foreclosure proceedings [*Packard Bell Electronics Corp. v. Theseus, Inc. (1966) 244 Cal. App. 2d 355, 364, 53 Cal. Rptr. 300]* .

[6] Venue

The action must be filed in a proper court [*see Civ. Code § 3144*]. The proper court is the county in which the property is found [*Code Civ. Proc. § 392(a)(2),(b)*]. If the action was commenced in the wrong county or judicial district and transferred to the proper county or judicial district after the 90-day period, the action is barred [*Automatic Sprinkler Corp. v. Southern Cal. Edison (1989) 216 Cal. App. 3d 627, 634, 266 Cal. Rptr. 662* (county); *Douglas v. Donner Pines, Inc. (1977) 73 Cal. App. 3d 268, 271-272, 140 Cal. Rptr. 839* (county); *Halbert's Lumber, Inc. v. Burdett (1988) 202 Cal. App. 3d Supp. 14* , *249 Cal. Rptr. 285* (judicial district)].

[7] Claimant's Right to Join in Pending Action

Any number of persons claiming liens on the same property may join in the same action to foreclose their liens [*Civ. Code § 3149*].

[8] Consolidation of Action

When separate actions for foreclosure are commenced, the court may consolidate them [*Civ. Code § 3149*].

[9] Notice of Lis Pendens

After the filing of the complaint in the proper court, the plaintiff may record in the office of the county recorder of the county, or of the several counties in which the property is situated, a notice of the pendency of the proceedings (a lis pendens), as provided in *Code Civ. Proc. § 405.22* [*Civ. Code § 3146*]. For a form of lis pendens to be filed in a mechanics' lien foreclosure action, see Ch. 348, *Lis Pendens* .

NOTE:

Before recordation of the notice, the party recording the notice must cause a copy of the notice to be mailed, by registered or certified mail, return receipt requested, to all known addresses of the parties to whom the real property claim is adverse and to all owners of record of the real property affected by the real property claim as shown by the latest county assessment roll. If there is no known address for service on an adverse party or owner, then as to that party or owner a declaration under penalty of perjury to that effect may be recorded instead of the proof of service and service on that owner or party shall not be required. Immediately following recordation, a copy of the notice must also be filed with the court in which the action is pending. Service must also be made immediately and in the same manner on each adverse party later joined in the action [*Code Civ. Proc. § 405.22*].

Any notice of pendency of action is void and invalid as to any adverse party or owner of record unless mailing requirements are met for that party or owner and a proof of service in the form and content specified in *Code Civ. Proc. § 1013a* has been recorded with the notice of pendency of

action [*Code Civ. Proc. § 405.23*].

From the time of recording the notice of pendency of action, a purchaser, encumbrancer, or other transferee of the real property described in the notice is deemed to have constructive notice of the pendency of the noticed action as it relates to the real property and only of its pendency against parties not fictitiously named. The rights and interest of the claimant in the property, as ultimately determined in the pending noticed action, relate back to the date of the recording of the notice [*Code Civ. Proc. § 405.24*].

[10] Jury Trial

An action to foreclose a mechanics' lien is considered a suit in equity. A party to such action is not entitled to a jury trial [*Distefano v. Hall (1963) 218 Cal. App. 2d 657, 662 n.6, 32 Cal. Rptr. 770]* .

NOTE:

However, if a personal judgment is sought against the defendant as well as foreclosure of the defendant's property, a jury trial is proper [*see* *Distefano v. Hall (1963) 218 Cal. App. 2d 657, 662 n.6, 32 Cal. Rptr. 770]* .

[11] Defense of Action

In all cases in which a claim of lien is recorded for labor, services, equipment, or materials furnished to any contractor, the contractor must defend any action brought thereon at his or her own expense [*Civ. Code § 3153*].

NOTE:

During the pendency of the action, the owner has the right to withhold from the original contractor the amount of money for which the claim is recorded [*Civ. Code § 3153*].

[12] Dismissal

1. For want of prosecution.

The court may dismiss an action to foreclose if it is not brought to trial within two years after it was commenced [*Civ. Code § 3147*].

2. Effect of dismissal.

In all cases, the dismissal of an action to foreclose a mechanics' lien (unless it is expressly stated to be without prejudice) is equivalent to the cancellation and removal from the record of the lien [*Civ. Code § 3148*].

NOTE:

The general dismissal for lack of prosecution statutes (*Code Civ. Proc. § 583.110 et seq.*) are applicable to mechanics' lien proceedings except as they are inconsistent with the mechanics' lien statutes [*Civ. Code § 3259*]. Therefore, apparently all those general provisions are applicable except when they conflict with the specific two-year discretionary dismissal. Since the five-year mandatory dismissal provisions (*Code Civ. Proc. § 583.310 et seq.*) do not conflict, they should be applicable in mechanics' liens proceedings.

[13] Judgment

1. Effect of judgment rendered finding no lien exists.

Equivalent to the cancellation and removal from the record of the mechanics' lien [*Civ. Code § 3148*].

2. Deficiency judgment.

Whenever, on the sale of the property under a judgment of foreclosure of a mechanics' lien, there is a deficiency of proceeds, judgment for the deficiency may be entered against any party personally liable therefor in like manner and with like effect as in an action for the foreclosure of a mortgage [*Civ. Code § 3151*].

3. Requirements of judgment.

The judgment need only determine the amount of the debt, determine the defendant who is personally liable therefor, direct a sale of the liened lands, and apply the proceeds to satisfy the debt [*see Laubisch v. Roberdo (1954) 43 Cal. 2d 702, 711, 277 P.2d 9]* .

NOTE:

A provision in the judgment for foreclosure is ineffective to transfer title. A writ of enforcement, or an order of sale as it is often denominated, is the only process which may be used for the enforcement of a judgment directing the sale of the liened property [*see* *Code Civ. Proc. §§ 712.010, 716.010*; *Laubisch v. Roberdo (1954) 43 Cal. 2d 702, 711, 712, 277 P.2d 9]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensNoticesContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingLis Pendens

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 361 MECHANICS' LIENS
PART IV. PROCEDURAL CHECKLISTS
A. Mechanics' Liens

32-361 California Forms of Pleading and Practice--Annotated § 361.163

§ 361.163 Petition to Release Property From Lien

[1] Time to File Petition

If no action is brought to enforce a mechanic's lien, the owner of the property or the owner of any interest in it may, at any time after expirationof the time period specified by *Civ. Code § 3144* (period during which property is bound by a lien after recordation of a claim of lien), petition the court for a decree to release the property from the lien [*Civ. Code § 3154(a)*]. A petition to release a mechanics' lien is a limited civil case [*Code Civ. Proc. § 86(a)(6)*].

[2] Venue

Although no statute specifically prescribes the county in which a proceeding to have property released from a mechanic's lien must be brought, it would appear that, inasmuch as an action to foreclose a lien would have to be tried in the county in which the real property is situated, a special proceeding to have the property released from the lien when no action is brought to foreclose it, would, likewise, be in the county in which the real property is situated [*see Civ. Code § 3259*; *Code Civ. Proc. § 392*].

[3] Preparation of Petition

1. Essential allegations.

In addition to general allegations [*see § 361.162[3]*, Paragraphs 1a--d], a petition to have property released from a mechanic's lien must allege the matters specified in *Civ. Code § 3154(b)* [*see § 361.208[3]*].

NOTE:
The petition is deemed controverted by the lien claimant [*Civ. Code § 3154(b)(5)*].

2. Papers to Attach to Petition.

A certified copy of the claim of lien must be attached to the petition [*Civ. Code § 3154(b)(5)*; *see §§ 361.192 -361.194* for claims of lien].

3. Drafting.

For drafting requirements, see *§ 361.162[3]*, Paragraph 2.

4. Signing.

The petition must be subscribed by the petitioner or by the petitioner's attorney [*see Civ. Code § 3259*; *Code Civ. Proc. § 446*].

5. Verification.

The petition must be verified [*Civ. Code § 3154(b)*]. Verification may be by affidavit [*see Civ. Code § 3259*; *Code Civ. Proc. §§ 446, 2009*]. However, it is normally in the form of a declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]. For a form of verification under penalty of perjury, see *§ 361.208*. For alternative forms of verification and further discussion, see Ch. 572, *Verification* .

[4] Service of Petition and Order for Hearing

NOTE:

On the filing of the petition, and before any further proceedings are had, the clerk will set a hearing date, which must be not more than 30 days after the petition is filed. The court may continue the hearing beyond the 30-day period, but good cause must be shown for any continuance [*Civ. Code § 3154(c)*].

A copy of the petition and of the order fixing the date for hearing must be served on the lien claimant at least 10 days prior to the date set for the hearing [*see Civ. Code § 3154(d)*]. Service must be made either in the manner in which a summons is required to be served [*see* Ch. 518, *Service of Summons and Papers*], or by certified or registered mail, postage prepaid, return receipt requested, addressed to the lien claimant at the claimant's address as shown on or in any of the following: (1) the preliminary 20-day notice served by the claimant pursuant to *Civ. Code § 3097, (2)* the records of the registrar of contractors, (3) the contract on which the lien is based, or (4) the claim of lien itself [*Civ. Code § 3154(d)*]. When service is made by mail, service is complete on the fifth day following the day of mailing [*Civ. Code § 3154(e)*].

[5] Judgment

If judgment is rendered in favor of the petitioner, the decree must indicate the matters set forth in *Civ. Code § 3154(f)* [*see § 361.209[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsReleasesReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated §§ 361.164-361.169

[Reserved]

§§ 361.164[Reserved]

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B. Stop Notices

32-361 California Forms of Pleading and Practice--Annotated

NOTE:

The following checklist is illustrative only of the procedures commonly utilized by counsel in serving a stop notice and in actions to enforce a stop notice. Other procedures may be required. In addition, the provisions of *Code Civ. Proc. § 307 et seq.*, except as otherwise provided, are applicable to, and constitute the rules of practice in, the proceedings relating to the mechanics' lien law [*Civ. Code § 3259*].

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B. Stop Notices

32-361 California Forms of Pleading and Practice--Annotated § 361.170

§ 361.170 Service of Stop Notice and Bonded Stop Notice

[1] Preparation

1. Contents.

See § 361.220 for stop notice [*Civ. Code § 3103*].

2. Execution.

Must be signed by the claimant or his or her agent [*Civ. Code § 3103*].

3. Verification.

Must be verified by the claimant or his or her agent [*Civ. Code § 3103*].

4. Copies.

a. One for service on the owner [*Civ. Code § 3158*].

NOTE:
If only the construction lender is being served a stop notice, there is no additional requirement that the owner be notified as the preliminary 20-day notice (private work) is designed to serve this function [*see* *Civ. Code § 3097*; procedural checklist in Part A; *§ 361.190* for 20-day preliminary notice]. However, if desired, a courtesy copy may be mailed to the owner.

b. One for service on the construction lender [*Civ. Code § 3159*].

NOTE:

The construction lender may be given either a stop notice or a bonded stop notice [*see* *Civ. Code § 3159*; ***see also* discussion in *§ 361.43*].**

c. One courtesy copy to be mailed to the original contractor if desired.

NOTE:
The original contractor is not required to be notified of the giving of a stop notice as the preliminary 20-day notice is intended to serve this function [*see* *Civ. Code § 3097*].

d. Three or more additional copies if the notice is to be used as an exhibit to a complaint to enforce the stop notice under *Civ. Code § 3172*.

[2] Service

1. Prerequisite for effective service.

A stop notice claimant must have given a preliminary 20-day notice (private work) when required by *Civ. Code § 3097(a), (b)* [*Civ. Code § 3160(a)*; *see § 361.190* for preliminary 20-day notice]. For requirements relating to service of the preliminary notice, see *§ 361.160*.

2. Place of service.

a. On owner.
(1) At his or her residence;

(2) At his or her place of business left with some person in charge; or

(3) Delivered to his or her architect.

b. On construction lender.

(1) Stop notice.

At the office or a branch of the office holding the construction funds served or given to the manager or other responsible officer or person who is administering or holding the construction funds.

(2) Bonded stop notice.

On the manager or other responsible officer or person at the office of the construction lender. If the bonded stop notice is being given to any institution or organization maintaining branch offices, it is not effective unless delivered or sent to the office administering or holding the construction funds [*Civ. Code § 3083*].

3. Manner of service.

A stop notice or bonded stop notice may be served personally, or by registered or certified mail with the same effect as personal service [*Civ. Code §§ 3083, 3103*].

4. By whom made.

See Civ. Code §§ 3158, 3159; *see also* discussion in *§§ 361.42[1], 361.43[4]*.

5. Time limits.

a. Commencement of time within which notice must be served.

(1) Owner.

At any time after an agreement to perform labor for or furnish materials to a work of improvement or site improvement [*see Civ. Code §§ 3110, 3112* (liens for works of improvement and site improvements)] has been executed [*Miller v. Mountain View Sav. & L. Ass'n (1965) 238 Cal. App. 2d 644, 653, 48 Cal. Rptr. 278]* .

(2) Construction lender.

At any time after a stop notice claimant has furnished materials, equipment, or services to or performed labor for a work of improvement or site improvement [*Civ. Code § 3159*; *see Civ. Code §§ 3110, 3112* (liens for works of improvement and site improvements)].

b. Expiration of time.

Prior to the expiration of the period within which the stop notice claimant's claim of lien must be recorded under *Civ. Code §§ 3115, 3116*, or *3117* [*Civ. Code § 3160(b)*; *see § 361.161*].

NOTE:
This code provision does not imply that a stop notice claimant must first record a claim of lien. The right to recover on a stop notice claim does not depend on the establishment of a lien [*Idaco Lumber Co. v. Northwestern S. & L. Assn. (1968) 265 Cal. App. 2d 490, 498, 71 Cal. Rptr. 422]* .

6. Affidavit of service by mail.

Not required or recommended.

NOTE:
Service by certified or registered mail is sufficient proof of service if the fact of service should become an issue.

[3] Effect

See Civ. Code §§ 3161, 3162; *see also* discussion in *§§ 361.42[3], 361.43[5]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.171

§ 361.171 Enforcement of Payment of Claim in Stop Notice or Bonded Stop Notice

[1] Commencement of Time to File Action Against Owner or Construction Lender

At any time after 10 days from the date of the service of the notice on either the owner or construction lender [*Civ. Code § 3172*].

[2] Expiration of Time to File Action

Not later than 90 days following the expiration of the period within which claims of lien must be recorded under *Civ. Code §§ 3115-3117* [*Civ. Code § 3172*; *§ 361.162[2]*].

NOTE:

Civ. Code § 3172*, which provides for the limitations on bringing an action to enforce a stop notice claim, is a matter of abatement and must be pleaded in proper time or it is waived [*see *Miller v. Mountain View Sav. & L. Ass'n (1965) 238 Cal. App. 2d 644, 654-655, 48 Cal. Rptr. 278* (premature filing of stop notice action under former Code Civ. Proc. § 1190.1(h)].

No money can be withheld by reason of the stop notice claim longer than the expiration of the 90-day period unless an action to enforce the claim is commenced. If no such action is commenced, the notice ceases to be effective and all funds withheld are to be paid or delivered to the contractor or other person to whom they are due [*Civ. Code § 3172*].

[3] Preparation of Complaint

1. Essential allegations.

The essential allegations of a complaint for enforcement of a stop notice are:

a. Capacity or residence of plaintiff (generally optional, unless plaintiff is suing in a representative capacity or it is necessary to establish plaintiff's right to maintain the action). See *§ 361.201[1]*, First Cause of Action, Paragraph 1.

b. Name and capacity (and residence, where venue is based thereon) of defendant or each defendant where there is more than one. See *§ 361.201[1]*, First Cause of Action, Paragraph 3.

c. Fictitious name allegations, if appropriate. See *361.201[1]*, First Cause of Action, Paragraph 4.

d. Agency allegations, if appropriate. See Ch. 20, *Allegations Commonly Used* .

e. Facts establishing the right of the plaintiff to enforce a stop notice. See *§ 361.201*, Second Cause of Action, Paragraphs 1-4.

(1) If plaintiff is a contractor, that he or she is licensed as such.

(2) That materials were furnished for and actually used in a work of improvement.

(3) That the labor or materials were furnished at the instance of the owner or his or her agent.

(4) Dates on which materials or labor were furnished.

(5) Full performance of the contract (or, if not entirely performed, the excuse therefor accorded in the contract).

(6) Date of completion or cessation of work of improvement (to show stop notice claim was filed on time).

(7) Amount due plaintiff on the contract.

(8) That a preliminary 20-day notice (private work) was given if one was required by *Civ. Code § 3097* [*see § 361.190* for preliminary 20-day notice].

(9) That a stop notice or bonded stop notice was served on the owner or construction lender within the time for recording a claim of lien. (A copy of the stop notice or bonded stop notice should be attached to the complaint and incorporated by reference.) [*See § 361.220* for stop notice.]

2. Drafting, signing, verification.

See *§ 361.162[3]*, Paragraphs 2-4.

[4] Preparation and Service of Summons

See *§ 361.162[4]*.

[5] Indispensable Parties

The owner is a necessary party to a proceeding to enforce a stop notice claim and to the complete settlement of the entire controversy because he or she has an interest in the loan funds [*A-1 Door & Materials Co. v. Fresno Guarantee Sav. & Loan Ass'n (1964) 61 Cal. 2d 728, 736, 40 Cal. Rptr. 85, 394 P.2d 829]* .

[6] Venue

The action is to be filed in the county where the contract was performed, in which it was entered into, or in the county in which a defendant resides [*Code Civ. Proc. § 395*].

NOTE:

If the action to enforce the stop notice is joined with an action to foreclose a claimant's lien, then venue is governed by *Civ. Code § 3144* (action to foreclose lien) [*see* *§ 361.162[6]*].

[7] Notice of Commencement

Notice of the commencement of the action must be given to the same persons and in the same manner as provided for service of a stop notice or bonded stop notice within five days [*Civ. Code § 3172*; *see also § 361.224* for notice of commencement of action]. Personal service or service by registered or certified mail is recommended.

NOTE:

In *Sunlight Elec. Supply Co. v. McKee (1964) 226 Cal. App. 2d 47, 50, 37 Cal. Rptr. 782* , a notice filed 14 days after the commencement of an action to enforce a stop notice claim for a public work did not require a dismissal of the action since no showing was made that the defendant suffered any detriment because of the claimant's failure to give timely notice.

[8] Prosecution of Action

1. Commencement of time within which action must be brought to trial:

Not before the expiration of the 90-day period following the expiration of the period within which claims of lien must be recorded under *Civ. Code §§ 3115-3117* [*Civ. Code § 3172*; *see § 361.162[2]*, Paragraph 1].

NOTE:

A judgment may not be entered on the stop notice claim before the expiration of this same 90-day period [*Civ. Code § 3172*].

2. Dismissal of action for want of prosecution:

A court may dismiss an action in its discretion if the action is commenced as provided in *Civ. Code § 3172* but is not brought to trial within two years after commencement [*Civ. Code § 3173*].

[9] Claimants' Right to Join in Pending Action

Any number of persons who have given stop notices or bonded stop notices may join in the same action [*Civ. Code § 3175*].

[10] Consolidation of Actions

1. By court first acquiring jurisdiction.

When separate actions are commenced, the court may consolidate them [*Civ. Code §*

3175].

2. On motion of owner or construction lender.

The court must require all claimants to the monies withheld pursuant to stop notices or bonded stop notices to be impleaded in one action to the end that all parties may be adjudicated in the one action [*Civ. Code § 3175*; *see § 361.225* for complaint in interpleader].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated §§ 361.172-361.179

[Reserved]

§§ 361.172[Reserved]

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32-361 California Forms of Pleading and Practice--Annotated

NOTE:

The following checklist is illustrative only of the procedures commonly utilized by counsel in actions on payment bonds. Other procedures may be required. In addition, the provisions of *Code Civ. Proc. § 307 et seq.*, except as otherwise provided, are applicable to, and constitute the rules of practice in, the proceedings relating to the mechanics' lien law [*Civ. Code § 3259*].

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32-361 California Forms of Pleading and Practice--Annotated § 361.180

§ 361.180 Action on Payment Bond [Civ. Code §§ 3239-3242]

[1] Time Limitations

1. If payment bond is not recorded, action on obligation stated in bond must be brought within four years of completion of work [*Code Civ. Proc. § 337*].

2. Except as provided in Paragraph 3, *below*, payment bond provision limiting period for commencement of actions on bond is valid insofar as actions brought by claimants are concerned if, before work is commenced, bond is recorded with recorder of county in which subject property is situated [*Civ. Code § 3239*].

NOTE:
Regardless of whether a bond is recorded, any bond provision that purports to limit the four-year period prescribed by *Code Civ. Proc. § 337* to less than six months from the completion of work is invalid [*Civ. Code § 3239*].

3. Notwithstanding any bond provision purporting to otherwise limit period for commencement of actions on bond as specified in Paragraph 2, *above*, if payment bond is recorded by surety before completion of work of improvement, any action against surety or sureties must be commenced no later than six months after completion of work [*Civ. Code § 3240*].

NOTE:
For purposes of Paragraphs 2 and 3, *above,* a payment bond must be recorded with the recorder in the county in which the subject property is located [*Civ. Code §§ 3239, 3240*].

[2] Notice Requirements (Contracts Entered Into On or After January 1, 1995)

NOTE:

Bond enforcement related to contracts entered into before January 1, 1995, require compliance with former *Civ. Code § 3240* [repealed by Stats. 1994, ch. 974, § 5].

1. Claimant must give 20-day private work preliminary notice as provided in *Civ. Code § 3097* [*Civ. Code § 3242(a)*; *see § 361.190* for preliminary notice].

NOTE:
The preliminary notice must be given to the owner or reputed owner, the original contractor, or reputed contractor, and the construction lender or reputed construction lender, if any [*Civ. Code § 3097(a)*]. It is not required to be given to the surety.

2. If 20-day preliminary notice required by *Civ. Code § 3097* is not given [*Civ. Code § 3242(b)*; *see § 361.230* for post-completion bond notice]:

a. Claimant may enforce claim against bond by giving written notice to surety and bond principal as provided by *Civ. Code § 3227* within 15 days after notice of completion is recorded.

b. If no notice of completion is recorded, time for giving written notice to surety and bond principal is extended to 75 days after work of improvement is completed.

NOTE:
This seemingly inconsistent notice alternative was enacted, effective January 1, 1995 [*see* Stats. 1994, ch. 974, § 7], to protect the rights of "unsophisticated" laborers and materialmen who may not be aware of the 20-day preliminary notice requirement described in Paragraph 1, ***above.***

[3] Preparation of Complaint

1. Essential allegations.

The essential allegations of a complaint for recovery on a contractor's payment bond are:

a. Capacity or residence of plaintiff (generally optional, unless plaintiff is suing in a representative capacity or it is necessary to establish plaintiff's right to maintain the action).

b. Name and capacity (and residence, when venue is to be based thereon) of defendant or each defendant when there is more than one. See *§ 361.201[1]*, First Cause of Action, Paragraph 3.

c. Fictitious name allegations, if appropriate. See *§ 361.201[1]*, First Cause of Action, Paragraph 4.

d. Agency allegations, if appropriate. See Ch. 20, *Allegations Commonly Used* .

e. Facts establishing the right of the plaintiff to bring an action on a contractor's payment

bond. See *§ 361.231[1]*, Second Cause of Action, Paragraphs 7-11.

(1) If plaintiff is a contractor, that he or she is licensed as such.

(2) That the plaintiff performed labor or furnished material for and actually used in or consumed in a work of improvement.

(3) That the labor performed or materials furnished were at the instance of the owner.

(4) Dates on which labor or materials were furnished.

(5) Full performance of the contract (or, if not entirely performed, the excuse therefor accorded in the contract).

(6) Amount due plaintiff on contract.

(7) That the owner or original contractor, as principal, and a surety executed a bond that by its terms was made to inure to the benefit of the plaintiff, as a claimant, and gave him or her a right to recover on the bond.

(8) That the plaintiff had previously served on the sureties and bond principals a notice in compliance with the requirements of *Civ. Code § 3242*.

2. Drafting, signing, verification.

See *§ 361.162[3]*, Paragraphs 2-4.

[4] Preparation and Service of Summons

See *§ 361.162[4]*.

[5] Venue

A defendant surety corporation may be sued in the county where the contract is made or is to be performed or where the obligation or liability arises or the breach occurs; it may also be sued in the county where the principal place of business of the corporation is situated [*Code Civ. Proc. §§ 395, 395.5*].

NOTE:

If the action on the payment bond is joined with an action to foreclose a claimant's lien, then venue is governed by *Civ. Code § 3144* [*see* *§ 361.162[6]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesLiabilityContracts LawTypes of ContractsGuaranty ContractsReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated §§ 361.181-361.189

[Reserved]

§§ 361.181[Reserved]

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PART V. FORMS
A. Mechanics' Liens

32-361 California Forms of Pleading and Practice--Annotated § 361.190

§ 361.190 Preliminary 20-Day Notice (Private Work) [Civ. Code § 3097]

[1] FORM Preliminary 20-Day Notice (Private Work) [Civ. Code § 3097]

To: _____ [*name of owner or reputed owner, original contractor or reputed original contractor, or construction lender or reputed construction lender*].

NOTICE IS HEREBY GIVEN that the undersigned has furnished [and will furnish] _____ [*describe labor, service, equipment, or materials furnished or to be furnished to the job site; if person being notified is a construction lender, add:*, the estimated total price of which is $_____,] in connection with improvement work taking place at _____ [*describe job site sufficiently for identification*].

_____ [*Name and address of contractor*] contracted for the purchase of the above-mentioned _____ [labor, services, equipment *or* materials] on or about _____ [*date*].

[*add if appropriate (see Civ. Code § 3097(c)(6))*] Payments are also due to _____ [*identity and address of any laborer and any express trust fund to whom employer payments are due*].

NOTICE TO PROPERTY OWNER

If bills are not paid in full for the labor, services, equipment, or materials furnished or to be furnished, a mechanic's lien leading to the loss, through court foreclosure proceedings, of all or part of your property being so improved may be placed against the property even though you have paid your contractor in full. You may wish to protect yourself against this consequence by (1) requiring your contractor to furnish a signed release by the person or firm giving you this notice before making payment to your contractor, or (2) any other method or device that is appropriate under the circumstances. Other than residential homeowners of dwellings containing fewer than five units, private project owners must notify the original contractor and any lien claimant who has

provided the owner with a preliminary 20-day lien notice in accordance with *Section 3097 of the Civil Code* that a notice of completion or notice of cessation has been recorded within 10 days of its recordation. Notice shall be by registered mail, certified mail, or first-class mail, evidenced by a certificate of mailing. Failure to notify will extend the deadlines to record a lien.
Dated: _____.

_____ [*signature*]

_____ [*typed name and address*]

[2] Use of Form

The notice in [1], *above*, must be given when required by *Civ. Code § 3097(a)* or *(b)* before a claimant is entitled to enforce a mechanics' lien and in order that service of a stop notice be effective for any labor, service, equipment, or material furnished to a work of improvement or a site improvement [*Civ. Code §§ 3114* (mechanics' lien), *3160* (stop notice); *see Civ. Code §§ 3110* (work of improvement), *3112* (site improvement)]. The above notice also may be given when required by *Civ. Code § 3097(a)* or *(b)* before a claimant asserts a claim against a payment bond [*Civ. Code § 3242(a)*; *see Civ. Code §§ 3227, 3242(b)*, setting forth form and timing of alternative post-completion bond notice that may be given instead of a 20-day preliminary notice before asserting a claim against a payment bond; for a form of post-completion bond notice, *see § 361.230*]. Although the foregoing only describes the fact that the improved property may be subject to a mechanics' lien, it is sufficient to put the person to be notified on notice that a stop notice or claim on a payment bond may also be given in connection with the furnished labor or materials [*see Civ. Code § 3097(c)*]. For a complete outline describing when this notice must be given, to whom the notice is served, and the place and manner of service, see *§ 361.160* et seq.

A certified architect, registered engineer, or licensed land surveyor who has furnished services for the design of the work of improvement and who gives a preliminary notice that complies with the requirements of this form not later than 20 days after the work of improvement has commenced will be deemed to have complied with the preliminary notice requirements with respect to architectural, engineering, or surveying services furnished, or to be furnished [*Civ. Code § 3097(c)*].

[3] Contents of Notice

[a] General Requirements

Civ. Code § 3097(c) requires that the preliminary notice (private work) contain the following information:

- A general description and estimate of the total price of the labor, service, equipment, or materials furnished or to be furnished by the claimant. A construction lender must also be furnished an estimate of the total price of that which the claimant has or will furnish;

- The name and address of the person furnishing the labor, service, equipment, or materials;

- The name of the person who contracted for purchase of the labor, service, equipment, or materials;

- A description of the jobsite sufficient for identification;

- A statement in boldface type as prescribed in *Civ. Code § 3097(c)(5)*, which is incorporated in the form in [1], *above*, entitled NOTICE TO PROPERTY OWNER; and

- If the notice is given by a subcontractor who has failed to pay all compensation due to his or her laborers on the job, the identity and address of any laborer and any express trust fund to whom employer payments are due.

[b] Description of Labor or Materials

If a preliminary notice contains a general description of the materials, services, labor, or equipment furnished to the date of notice, it is not defective because, after this date, the person giving the notice furnishes materials, services, labor, or equipment not within the scope of the general description [*Civ. Code § 3097(g)*].

[c] Invoice as Substitute for Notice

If an invoice for materials that have been furnished by a claimant or certified payroll contains the information required in the preliminary notice [*see Civ. Code § 3097(c)*], a copy of the invoice, if served in the manner required by *Civ. Code § 3097(f)*, is sufficient notice [*Civ. Code § 3097(c)*].

[4] Waiver by Owner

Any agreement made or entered into by an owner whereby the owner agrees to waive the rights or privileges conferred on him or her with respect to preliminary notices is void and of no effect [*Civ. Code § 3097(e)*].

[5] Cross References

For a form for a preliminary 20-day notice (public work), see *Ch. 481, Public Works, § 481.40* et seq.

For a memorandum of points and authorities in support of a general demurrer to a complaint to foreclose a mechanics' lien on the ground that complaint fails to disclose that a preliminary notice was given, see California Points and Authorities, Ch. 152, *Mechanics' Liens* (Matthew Bender)

California Real Estate Law & Practice, Ch. 451, Mechanics' Liens, § 451.31 (Matthew Bender)

Marsh, California Mechanics' Lien Law and Construction Industry Practice (LEXIS Publishing 6th ed. 1998)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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A. Mechanics' Liens

32-361 California Forms of Pleading and Practice--Annotated § 361.191

§ 361.191 Declaration of Proof of Service of Preliminary 20-Day Notice [Civ. Code § 3097.1]

[1] FORM Declaration of Proof of Service of Preliminary 20-Day Notice [Civ. Code § 3097.1]

I, _____ [*name of person making the service*], declare that, in compliance with *Section 3097(f) of the Civil Code*:

[*Either, if notice was mailed*]

I served the Preliminary 20-Day Notice on _____ [*date*], by depositing the notice in the United States mail in _____, California, enclosed in a sealed envelope, with postage fully prepaid for first-class _____ [registered *or* certified] mail, addressed to _____ [*name of person to whom notice was given*], _____ [*if appropriate, state title or capacity in which person was served*], _____ [*state person's address; may be person's residence, business address, or address shown on filed building permit or recorded as provided in Civ. Code § 3097(j)*].

[*Or, if notice was personally delivered*]

I served the Preliminary 20-Day Notice on _____ [*date*], by personally delivering the notice to _____ [*name and capacity, if appropriate, of person to whom notice was given*] at _____ [*place or address where notice was personally delivered*].

[*Or, if notice was left at residence or business*]

I served the Preliminary 20-Day Notice on _____ [*date*], by leaving the notice at _____ [*address of residence or place of business*] of _____ [*name of person to be*

served] with _____ [*name of person in charge*], a person who was in charge and authorized to receive this notice on behalf of _____ [*name of person to be served*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form of declaration of proof of service in [1], *above*, must be completed after the claimant has served a preliminary 20-day notice (private work) on an owner, original contractor, or construction lender as a prerequisite to enforcement of the claim of lien [for a form of preliminary 20-day notice, *see § 361.190*]. An affidavit (or declaration [*see Code Civ. Proc. § 2015.5*]) must be completed by the person making the service, and it must show the time, place, and manner of service and facts showing thatthe service was made in accordance with *Civ. Code § 3097*. The affidavit shouldalso show the name and address of the person on whom a copy of the preliminary 20-day notice was served, and, if appropriate, the title or capacity in which he or she was served [*Civ. Code § 3097.1(c)*]. For a detailed outline of the alternative means of serving the preliminary 20-day notice provided for in *Civ. Code § 3097(f)*, see *§ 361.160[4]*.

If service was made by mail, the proof of service affidavit or declaration under penalty of perjury must be accompanied either by the return receipt of the certified or registered mail, or by a photocopy of the record of delivery and receipt maintained by the post office, showing the date of delivery and to whom delivered, or, in the event of nondelivery, by the returned envelope itself [*Civ. Code § 3097.1(a)*].

[3] Declaration Under Penalty of Perjury as Substitute for Affidavit

Although *Civ. Code § 3097.1* requires that proof that the preliminary 20-day notice was served be made by affidavit, any matter that is required under California law to be supported by affidavit may be supported by a declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]. For a discussion of the use of affidavits and declarations under penalty of perjury and for general forms of affidavits and declarations, see Ch. 15, *Affidavits, Certificates, and Declarations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-361 California Forms of Pleading and Practice--Annotated § 361.192

§ 361.192 Claim of Lien [Civ. Code § 3084]

[1] FORM Claim of Lien [Civ. Code § 3084]

[*EITHER*]

_____ [*Name*], a mechanics' lien claimant doing business as _____ [*specify*], claims for _____ [labor *or* services rendered in connection with *or* equipment *or* materials furnished for and _____ (used *or* consumed in)] a work of improvement consisting of _____ [*describe work of improvement, e.g.,* the construction of a residential unit], a lien on this improvement and on the real property on which the improvement is situated, as is required for the convenient use and occupation of the improvement. The real property is located in the City of _____, County of _____, and described specifically as follows: _____ [*describe property sufficiently for identification; a legal description is recommended*]. The owner or reputed owner of the improvement and property is _____ [*name*].

[*OR*]

_____ [*Name*], a mechanics' lien claimant doing business as _____ [*specify*], claims, for _____ [labor *or* services *or* equipment *or* materials] furnished to a site improvement consisting of _____ [*describe site improvement work e.g.,* the grading of real property in preparation for the construction of residential units], a lien on the real property. The real property is located in the City of _____, County of _____, and described specifically as follows: _____ [*describe property sufficiently for identification; a legal description is recommended*]. The owner or reputed owner of this property is _____ [*name*].

The contract price, which is the reasonable value of the _____ [labor *or* services *or* equipment *or* materials *or* use of the equipment *or* materials], consisting of _____ [*describe labor or services*

rendered or equipment or materials furnished], is $_____, of which sum $_____ has not been paid after deduction of all just credits and offsets.

_____ [*Name of claimant*] _____ [furnished the _____ (labor *or* services *or* equipment *or* materials) as described above, to _____ (*name of contractor*) *or* was employed by _____ (*name of contractor*) to furnish the _____ (labor *or* services *or* equipment *or* materials) as described above].

Therefore _____ [*name of claimant*] claims a lien on _____ [the entire work of improvement and the real property described above *or, in case of claim of lien for site improvement work,* on the real property described above] for $_____ under *Sections 3109-3153 of the Civil Code* relating to mechanics' liens.

_____ [*signature of claimant*]

I, _____ [*name*], declare that:

[*EITHER*]

I am the _____ [*title*] of _____ [*corporation*], named as claimant in the foregoing claim of lien; I am authorized to make this verification for the corporation.

[*OR*]

I am the person named as claimant in the foregoing claim of lien.

I have read it and know its contents; it is true to my own knowledge and contains, among other things, a correct statement of my demand after deducting all just credits and offsets.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

ACKNOWLEDGMENT

State of California,)
County of _____) ss.
_____)

On _____ [*date*], before me, _____ [*name and title of officer*], personally appeared

_____ [*name*], who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity on behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: _____ .....(Seal)

[2] Use of Form

The form in [1], *above*, must be recorded in the office of the county recorder in order to enforce any original contractor's, subcontractor's, laborer's, materialman's, or other claimant's lien in a subsequent foreclosure action [*see Civ. Code §§ 3115-3117*]. For a complete outline of the time limits within which the claim of lien must be recorded and the effect of recording see *§ 361.161*. The acknowledgment at the end of the form is no longer required by law [*Civ. Code § 3084*; *Gov. Code § 27287*].

[3] Contents of Claim of Lien

[a] In General

The claim of lien must contain the following information [*Civ. Code § 3084*]:

- A statement of the claimant's demand after deducting all just credits and offsets;
- The name of the owner or reputed owner, if known;
- A general statement of the kind of labor, services, equipment, or materials furnished by the claimant;
- The name of the person by whom the claimant was employed or to whom he or she furnished the labor, services, equipment, or materials; and
- A description of the site sufficient for identification.

[b] Errors in Claim

[i] Prohibition

No mistake or errors in the statement of the demand, in the statement of the amount of credits and offsets allowed, in the statement of the balance asserted to be due the claimant, or in the description of the property against which the lien is recorded invalidates the lien unless the court finds that the mistake or error in the statement of the demand, credits, and offsets or of the balance due was made with the intent to defraud or that an innocent third party, without notice, direct or constructive, has, since the claim was recorded, become the bona fide owner of the property and that the claim was so deficient that it did not put the party on further inquiry in any manner [*Civ. Code § 3261*; *Howard A. Deason & Co. v. Costa Tierra Ltd. (1969) 2 Cal. App. 3d 742, 754, 83 Cal. Rptr. 105]* .

[ii] Property Description Errors

The question of the sufficiency of the description of the property contained in a claim of lien is considered one of fact [*Borello v. Eichler Homes, Inc. (1963) 221 Cal. App. 2d 487, 494, 34 Cal. Rptr. 648]* . Generally, the description is considered sufficient if it enables a party familiar with the locality to identify the property with reasonable certainty to the exclusion of other properties, and extrinsic evidence may be admitted in order to determine that the property can be so identified when the description is otherwise vague or inaccurate [*Borello v. Eichler Homes, Inc. (1963) 221 Cal. App. 2d 487, 492, 493, 34 Cal. Rptr. 648]* . However, because *Civ. Code § 3261, above,* omits mistakes in the owner's namefrom listed mistakes which do not otherwise invalidate claims of liens, describing property that belongs to several owners is insufficient and invalidates the lien where the claimant does not insert the owner's name [*H & L Supply, Inc. v. Ewing (1967) 253 Cal. App. 2d 283, 285, 61 Cal. Rptr. 289* ; *but see Frank Pisano & Associates v. Taggart (1972) 29 Cal. App. 3d 1, 19, 105 Cal. Rptr. 414* (name of reputed owner in claim of lien as sufficient if such name included in good faith, and claimant does not lose claim of lien if it is subsequently determined some other individual is actual owner)].

[iii] Willful Errors

A person who willfully includes in his or her claim of lien labor, services, equipment, or materials not furnished for the property described in the claim forfeits the lien [*Civ. Code § 3118*].

[iv] Preliminary Notice or Complaint

If the owner has no actual notice of claim of lien, any imperfections in the recorded claim that otherwise invalidate the lien cannot be remedied by reference to the preliminary notice given by the claimant to the owner [*H & L Supply, Inc. v. Ewing (1967) 253 Cal. App. 2d 283, 287, 61 Cal. Rptr. 289]* . Similarly, an otherwise defective claim is not cured by an averment in a complaint for foreclosure of the lien correcting the errors [*see Madera Flume & Trading Co. v. Kendall (1898) 120 Cal. 182, 183, 52 P. 304]* .

[c] Variance in Complaint

While it was once held that a fatal variance, requiring dismissal of the complaint, was presented in cases where a claim of lien had stated an express contract to pay fixed amount but where the complaint set out a contract implied by law to pay the reasonable value of the work done [*Wagner v. Hansen (1894) 103 Cal. 104, 107, 37 P. 195]* , later decisions have held that if the owner has not been misled to his or her prejudice, a technical variance as expressed in the common law has no application to a claim of lien. This is true since all that is required is that the statement of the terms of the contract be substantially true [*Cargill v. Achziger (1958) 165 Cal. App. 2d 220, 224, 331 P.2d 774]* .

[4] Acknowledgment

The form contains a form of acknowledgment [*Civ. Code § 1189*] for use when counsel wishes to have the claim of lien acknowledged. However, acknowledgment is no longer a prerequisite to recording a claim of lien [*Civ. Code §§ 3084, 3093*; *Gov. Code § 27287*].

[5] Cross References

For alternative forms of acknowledgment, see Ch. 9, *Acknowledgments*

See generally *California Real Estate Law & Practice, Ch. 451, Mechanics' Liens, § 451.33* (Matthew Bender)

Marsh, California Mechanics' Lien Law and Construction Industry Practice (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-361 California Forms of Pleading and Practice--Annotated § 361.193

§ 361.193 Claim of Lien [Civ. Code § 3084]--Allegation of Segregated Amounts for Work or Materials Furnished to Multiple Works of Improvement

[1] FORM Claim of Lien [Civ. Code § 3084]--Allegation of Segregated Amounts for Work or Materials Furnished to Multiple Works of Improvement

[*EITHER*]

The contract price of the _____ [labor *or* services *or* equipment *or* materials *or* use of the equipment *or* materials], consisting of _____ [*describe labor or services rendered or equipment or materials furnished*], furnished to the _____ [*describe one of two or more works of improvement against which a lien is being claimed*] is $_____, of which $_____ has not been paid after deduction of all just credits and offsets. [*Repeat for each work of improvement as described in the claim of lien where the contract has designated the amount due on each improvement.*]

[*OR*]

The contract price for the _____ [labor *or* material *or* service *or* equipment *or* use of the equipment *or* material] is $_____, which sum represents the lump sum to be paid claimant for all the works of improvement as described and of which sum $_____ has not been paid after deduction of all just credits and offsets. Claimant has estimated an equitable distribution of this sum due him/her after deduction of all just credits and offsets over all the works of improvement based on the proportionate amount of _____ [labor *or* equipment *or* materials *or* services] furnished to each improvement as follows: _____ [*describe each work of improvement and the sum due on each work*].

[2] Use of Form

The form of allegation in [1], *above*, should be included in a claimant's claim of lien if the claim has been filed against

two or more buildings or other works of improvement owned or reputedly owned by the same person or, regardless of whether the works of improvement are owned by the same person, if the claimant has been employed by the same person to do the work or furnish the materials. For a form of claim of lien, see *§ 361.192*.

[3] When Claimant Must Segregate

[a] In General

In every case in which one claim is filed against two or more buildings or other works of improvement owned or reputed to be owned by the same person or on which the claimant has been employed by the same person to do the work or furnish the materials, whether the works of improvement are owned by one or more owners, the claimant must at the same time designate the amount due to him or her on each of the works [*Civ. Code § 3130*].

If the claimant has been employed to furnish labor or materials on the works as a whole, and the contract does not segregate the amount due for the work done and materials furnished on the works separately, then the claimant may estimate an equitable distribution of the sum due him or her over all the works based on the proportionate amount of work done or materials furnished on the respective works of improvement [*Civ. Code § 3130*].

[b] Separate Residential Units

Materials delivered to or on any portion of a work of improvement, consisting of the construction of two or more separate residential units, or furnished to be used in such a work of improvement and ultimately used or consumed in one of the separate residential units, are for all purposes of the provisions relating to mechanics' liens deemed to have been furnished to be used or consumed in the separate residential unit in which the same have actually been used or consumed. However, if the claimant is unable to segregate the amounts used or consumed in the separate unit, he or she is entitled to all the benefits of *Civ. Code § 3130, above* [*Civ. Code § 3131*].

[c] Failure to Segregate When Required

If the person filing a claim of lien fails to designate the amounts due to him or her on each work of improvement when such designation required, the lien of the claim is postponed to other liens [*Civ. Code § 3130*]. This is the only penalty a claimant must incur for the failure to designate the amount due to him or her on each building or improvement [*Flintkote Co. v. Lisa Constr. Co. (1968) 268 Cal. App. 2d 606, 609, 74 Cal. Rptr. 136]* .

In the context of a blanket lien [*see Civ. Code § 3130*] against an entire condominium project, when a blanket lien has been filed, the contractor must notify each owner of the fraction of the total sum secured by the lien that is attributable to his or her condominium. The information is statutorily required so that any owner may remove his or her unit from the lien by making payment to the lienholder of the owner's fractional share [*Civ. Code § 1369*]. In such a situation, the lienholder must notify each unit owner of his or her unit's apportioned share of a blanket lien, and the lienholder's failure or refusal to do so may render the entire lien unenforceable [*see ECC Construction v. Ganson (2000) 82 Cal. App. 4th 572, 578, 98 Cal. Rptr. 2d 292]* .

[4] Single Structure on Multiple Parcels

If there is a single structure on more than one parcel of land owned by one or more owners, the lien claimant is not required to segregate the proportion of materials or labor entering into the structure on any one of the parcels. However, in a foreclosure action on the lien, the court may,where it deems it equitable, distribute the lien equitably among the several parcels involved [*Civ. Code § 3130*].

[5] Binding Effect of Designated Amounts

The amount of the lien claimed against two or more works of improvement when they are owned or reputedly owned by the same person or on which a lien claimant was employed by the same person to furnish the work or materials does not extend beyond the amount designated as against other creditors having liens by judgment, mortgage, or otherwise either on the works of improvements or on the land on which the same are situated [*Civ. Code § 3130*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.194

§ 361.194 Claim of Design Professionals' Lien [Civ. Code §§ 3081.2, 3081.3]

[1] FORM Claim of Design Professionals' Lien [Civ. Code §§ 3081.2, 3081.3]

_____ [*Name*], a design professionals' lien claimant doing business as _____ [*specify*], claims for services rendered as a design professional _____ [*describe services, e.g.,* drawing architectural plans] in connection with a work of improvement planned to be constructed for real property located in the City of _____, County of _____, described specifically as follows: _____ [*legal description*].

The contract price, which is the reasonable value of the services, is $_____, of which sum $_____ has not been paid after deduction of all just credits and offsets.

_____ [*Name of claimant*] furnished the services based on a written contract to _____ [*name*], who is the current owner of record of the above-described property.

On _____ [*date at least 10 days prior to date of recording lien*], _____ [*name of claimant*] mailed by _____ [first-class registered *or* certified] mail, postage prepaid, addressed to _____ [*name of property owner*], a written demand for payment. A copy of this written demand is attached hereto as Exhibit A and made a part hereof.

A _____ [building permit *or other governmental approval*] was issued by _____ [*name of public entity*] to construct the improvement in the plans on the above-described property on _____ [*date*]. A copy of the _____ [building permit *or other governmental approval*] is attached hereto as Exhibit B and made a part hereof.

Actual construction of the planned work of improvement has not yet commenced.

Therefore _____ [*name of claimant*] claims a lien on the above-described property for

$_____ under *Sections 3081-3081.10 of the Civil Code* relating to design professionals' liens.

_____ [*signature of claimant*]

[*Acknowledgment. See § 361.192[1].*]

[2] Use of Form

The form in [1], *above*, must be recorded in the office of the county recorder for the county where the property is located [*Civ. Code § 3081-3081.10*]. A design professionals' lien is for use when the design professional provides services but actual construciton of the work of improvement has not commenced. For a complete discussion of the right to a lien, see *§ 361.24*.

[3] Acknowledgement

The lien must be acknowledged to be recorded [*see Gov. Code § 27287*].

[4] Time to Record

The lien must be recorded no later than 90 days after the design professional knows or has reason to know that the landowner is not commencing the work of improvement [*Civ. Code § 3081.7*].

[5] Contents of Claim of Lien

The notice of lien must specify that a lien is created in favor of the named design professional, specify the amount thereof, identify the current owner of record of the real property, provide a legal description of the real property to be improved, and specify the building permit or other governmental approval for the work of improvement required as a condition of the lien [*Civ. Code § 3081.3(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-361 California Forms of Pleading and Practice--Annotated § 361.195

§ 361.195 Extension of Credit and Notice Thereof [Civ. Code § 3144]--Between Claimant and Owner

[1] FORM Extension of Credit and Notice Thereof [Civ. Code § 3144]--Between Claimant and Owner

NOTICE IS HEREBY GIVEN that _____ [*name*], as a mechanics' lien claimant, claiming under a claim of lien recorded on _____ [*date*], in Book _____, page _____, of the Official Records in the office of the county recorder of _____ County, California, a lien against a work of improvement and real property of the following description, _____ [*give legal description*], has agreed and does hereby agree with _____ [*name*(*s*)], owner(s) of the above-described real property and improvement, that a credit of _____ [*number*] days from and after the date of this instrument shall be given and is hereby given.

Pursuant to *Section 3144 of the Civil Code*, the lien claimed in the claim of lien as described above shall continue in force for 90 days after expiration of the credit. The owners will not object to any action to foreclose the claimed lien which may be brought within this 90-day period on the ground that the action is barred by the limitation period specified in *Section 3144 of the Civil Code* for foreclosure of mechanics' liens.
Dated: _____.

_____ [*lien claimant's signature*]

_____ [*owner(s) signature(s)*]

[*Acknowledgment. See § 361.192[1].*]

[2] Use of Form

The form in [1], *above*, is to be recorded in the office of the county recorder whenever the owner of the property and improvement subject to the claim of lien and the lien claimant have agreed to an extension of credit whereby the time

within which a lien must be foreclosed may be extended [*see Civ. Code § 3144*].

[3] Extension of Credit

If credit is given and notice of the fact and terms of the credit recorded in the office of the county recorder subsequent to the recording of a claim of lien and prior to the expiration of the 90-day period which commences with the recording of the claim and limits the time within which a lien must be foreclosed, the lien continues in force until 90 days after the expiration of the credit. However, it never continues in force longer than one year from the time of the completion of the work of improvement [*Civ. Code § 3144*].

[4] Cross References

California Real Estate Law & Practice, Ch. 451, Mechanics' Liens, § 451.62 (Matthew Bender)

California Mechanics' Liens and Related Construction Remedies (Cal. CEB 1999) § 3.26

Marsh, California Mechanics' Lien Law and Construction Industry Practice (LEXIS Publishing 6th ed. 1998)

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsClaims By & AgainstReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.196

§ 361.196 Notice of Extension of Credit [Civ. Code § 3144]--Allegation of Agreement Between Claimant and Contractor

[1] FORM Notice of Extension of Credit [Civ. Code § 3144]--Allegation of Agreement Between Claimant and Contractor

NOTICE IS HEREBY GIVEN that _____ [*name*], doing business as _____ [*specify*], the mechanics' lien claimant as above-described has agreed with _____ [*name*], doing business as _____ [*name*], the contractor _____ [by whom (materials *or* labor *or* services *or* equipment) referred to in the above-described claim of lien, were furnished *or* who employed claimant to furnish the _____ (labor *or* services *or* materials *or* equipment)] to an extension of credit and does hereby extend the time for payment of the amount demanded in the claim of lien to and including _____ [*date*].

[2] Use of Form

The form in [1], *above*, is for use in a notice of extension of credit where the agreement to extend credit has been made by a mechanics' lien claimant and a contractor who is the principal debtor of the claimant [*see Dorer v. McKinzey (1961) 188 Cal. App. 2d 199, 200-201, 10 Cal. Rptr. 287]* .

For a form to use whenever the owner and the lien claimant have agreed to an extension of credit, see *§ 361.195*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 361.197 Waiver of Statute of Limitations by Owner and Notice Thereof

[1] FORM Waiver of Statute of Limitations by Owner and Notice Thereof

NOTICE IS HEREBY GIVEN that _____ [*name*], as a mechanics' lien claimant, claiming under a claim of lien recorded on _____ [*date*], in Book _____, page _____, Official Records in the office of the county recorder of _____ County, California, a lien against a work of improvement and the real property on which the improvement is situated of the following description, _____ [*give legal description*], has been granted and is granted _____ [*number*] days extension of time from and after the date of this instrument within which to foreclose his lien by _____ [*name*], the owner of the above-described premises. It is understood that this extension of time does not admit the validity of the claim of lien but is simply a privilege being granted to the above-described claimant of the capacity to foreclose his lien within the time which has been extended as provided herein.
Dated: _____.

_____ [*lien claimant's signature*]

_____ [*owner's signature*]

[*Acknowledgment. See § 361.192[1].*]

[2] Use of Form

The form in [1], *above*, is to be recorded in the office of the county recorder following an agreement between an owner of property subject to a mechanics' lien and a lien claimant whereby the owner agrees to waive the time limitation within which a lien must be foreclosed as provided in *Civ. Code § 3144*. While no code provision requires the recording of the waiver agreement or a notice thereof, *Civ. Code § 3145* provides that any extension of the time to enforce a

claimant's lien is ineffective against a purchaser or encumbrancer for value and in good faith whose rights are acquired subsequent to the 90-day period following the recording of the claim of lien and prior to the extension agreement unless the agreement is recorded in the office of the county recorder.

For a form to use whenever the owner and the lien claimant have agreed to an extension of credit, see *§ 361.195*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-361 California Forms of Pleading and Practice--Annotated § 361.198

§ 361.198 Assignment of Debt and Lien

[1] FORM Assignment of Debt and Lien

The undersigned, _____ [*name of claimant*], _____ [in consideration of the sum of $_____ *or* for a valuable consideration], receipt of which is hereby acknowledged, hereby sells and assigns to _____ [*name of assignee*] all rights and interests he/she may have arising out of that certain contract entered into between the undersigned and _____ [*name of contractor or owner*] by which the undersigned agreed to and did furnish _____ [*describe labor, services, equipment, or materials furnished*] to _____ [*describe work of improvement*] situated on real property located in _____ County, California and described as follows: _____ [*give legal description*]. It is understood by the undersigned that this assignment of all rights and interests arising out of the above-described obligation includes the mechanics' lien securing the payment of this obligation, the claim for which was recorded on _____ [*date*], in Book _____, page _____, Official Records in the office of the County Recorder of _____ County, California.
Dated: _____.

_____ [*signature of claimant*]

[*Acknowledgment. See § 361.192[1].*]

[2] Use of Form

The form in [1], *above*, is to be used by a mechanics' lien claimant who has recorded a claim of lien where the claimant has assigned the obligation owed him or her as demanded in the claim of lien.

[3] Assignment of Debt Secured by Mechanics' Lien

A mechanics' lien, like a mortgage or judgment lien, is a mere incident of the debt secured and cannot be transferred apart from the debt [*Union Supply Co. v. Morris (1934) 220 Cal. 331, 338, 30 P.2d 394]* . The lien, as an incident of the debt, passes with the debt by operation of law. Thus, an express assignment of the security is not required [*Union Supply Co. v. Morris (1934) 220 Cal. 331, 339, 30 P.2d 394]* .

However, while it is uniformly held that the assignment of the debt will carry with it the lien given for its security, in order that this result can accrue in favor of an assignee so that the assignee may enforce the lien, the lien must have been perfected prior to the time the assignment was made [*California P.C. Co. v. Wentworth Co. (1911) 16 Cal. App. 692, 711, 118 P. 103]* . That is, it must have been perfected by the recording of the claim of lien. Otherwise, the lien is an inchoate right having no tangible existence as property [*see Duncan v. Hawn (1894) 104 Cal. 10, 14, 37 P. 626]* .

[4] Cross References

For discussion and forms relating to assignments of contract obligations, see Ch. 60, *Assignments*

California Real Estate Law & Practice, Ch. 451, Mechanics' Liens, § 451.19 (Matthew Bender)

Marsh, California Mechanics' Lien Law and Construction Industry Practice (LEXIS Publishing 6th ed. 1998)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAssignmentGeneral OverviewReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
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A. Mechanics' Liens

32-361 California Forms of Pleading and Practice--Annotated § 361.199

§ 361.199 Notice of Nonresponsibility by Owner [Civ. Code § 3094]

[1] FORM Notice of Nonresponsibility by Owner [Civ. Code § 3094]

NOTICE IS HEREBY GIVEN that the undersigned, _____ [*name*], is the owner of _____ [*describe name and nature of title or interest in real property, e.g.*, a fee simple] in the real property located in _____ County, California, and described specifically as follows: _____ [*describe property sufficiently for identification; a legal description is recommended*].

That _____ [*name*] is _____ [the purchaser under contract *or if known* the lessee] of the above-described real property.

That on _____ [*date*], the undersigned first obtained knowledge that _____ [*describe work of improvement*] was being _____ [performed *or* constructed] on the above-described real property.

That the undersigned owner will not be responsible for _____ [*describe work or improvement*] or for any mechanics' lien that may be claimed for any labor or services rendered or to be rendered to, or any materials or equipment furnished or to be furnished for use or consumption in the _____ [*describe work of improvement*].
Dated: _____.

_____ [*signature*]

[*Verification. See § 361.192[1].*]

[*Acknowledgment. See § 361.192[1].*]

[2] Use of Form

The form in [1], *above*, must be posted in some conspicuous place on the land on which a work of improvement is being constructed or performed within 10 days after a person, owning or claiming an interest in the site, who has not caused the improvement to be constructed or performed, has obtained knowledge of the improvement [*see Civ. Code § 3094*]. Within the same 10-day period, this person must also record the notice in the office of the county recorder of the county on which the site or some part of it is located [*see Civ. Code § 3094*].

If the notice is posted and recorded in proper time, it is a bar to the enforcement of any lien on such person's property. Otherwise, it is not effective for any purpose [*Hayward Lbr. & Inv. Co. v. Orondo Mines (1939) 34 Cal. App. 2d 697, 699-700, 94 P.2d 380]* .

[3] Contents of Notice

The notice of nonresponsibility must contain all of the following:

- A description of the site sufficient for identification.
- The name and nature of the title or interest of the person giving the notice.
- The name of the purchaser under contract, if any, or lessee, if known.
- A statement that the person giving the notice will not be responsible for any claims arising from the work of improvement [*Civ. Code § 3094*].

[4] Requirements for Effective Posting

[a] Knowledge

A notice of nonresponsibility in order to be effective, can be recorded and posted only after knowledge of an actual, not an intended, construction has been obtained. A notice which is posted and recorded before a work of improvement commences is premature and ineffective to relieve the owner or person from liability [*Arthur B. Siri, Inc. v. Bridges (1961) 189 Cal. App. 2d 599, 601, 11 Cal. Rptr. 322* (decided under former Code Civ. Proc. § 1183.1, *now Civ. Code § 3094*], since a work of improvement has commenced only when actual work has begun on the ground. That is, some labor or work must be seen on the ground, the effects of which are apparent and easily seen by everybody [*English v. Olympic Auditorium, Inc. (1933) 217 Cal. 631, 637, 20 P.2d 946]* .

Knowledge need not be actual before the time period within which a notice must be recorded and posted commences to run. Constructive knowledge, that is, the notice of circumstances which would put a prudent man on inquiry, is enough to start the time period running [*Harmon Lbr. Co. v. Brown (1913) 165 Cal. 193, 197, 131 P. 368]* .

[b] When Notice May Be Given

A notice of nonresponsibility may only be given by an owner having or claiming an interest in property subject to a mechanics' lien before the completion of the work of improvement [*Schrader Iron Works, Inc. v. Lee (1972) 26 Cal. App. 3d 621, 632-634, 103 Cal. Rptr. 106]* . If a person becomes an owner of the property after the work of improvement is completed, and before a claim of lien is recorded, his interest will be subject to the mechanics' lien since the provisions relating to the notice of nonresponsibility are not for such an owner's benefit [*see Schrader Iron Works, Inc. v. Lee (1972) 26 Cal. App. 3d 621, 633-634, 103 Cal. Rptr. 106]* .

[5] Responsibility for Improvement

[a] Owner's Responsibility

Whether or not an owner posts and records a timely notice of nonresponsibility, if the person whose interest is otherwise subject to mechanics' liens is making the improvements as an agent of the owner, then the owner'sinterest will also be subject to the mechanics' liens claimed in connection with the improvements [*see Ott Hardware Co. v. Yost (1945) 69 Cal. App. 2d 593, 597-598, 159 P.2d 663]* . Thus, a lease obligating the lessee to make improvements and providing that the owner will pay for the cost of the improvements makes the owner a statutory agent of the lessee for the purposes of the mechanics' liens law [*Ott Hardware Co. v. Yost (1945) 69 Cal. App. 2d 593, 599, 159 P.2d 663]* .

However, a statutory agency relationship does not exist for the seller and buyer under a land purchase contract, even where the buyer is obligated to make improvements. Because this is true in such a situation the improvements vest in the buyer and the seller is benefited only insofar as his security interest is enhanced [*American Transit Mix Co. v. Weber (1951) 106 Cal. App. 2d 74, 78-79, 234 P.2d 732* ; see also *Rheem Mfg. Co. v. United States (1962) 57 Cal. 2d 621, 625, 21 Cal. Rptr. 802, 371 P.2d 578]* .

[b] Holder of Deed of Trust

A person is not an owner and does not have or claim any estate in property for the purpose of *Civ. Code § 3129* (former Code Civ. Proc. § 1183.1) where his only interest in the property is a security interest conveyed by a deed of trust [*Rheem Mfg. Co. v. United States (1962) 57 Cal. 2d 621, 625, 21 Cal. Rptr. 802, 371 P.2d 578]* .

[6] Cross References

California Real Estate Law & Practice, Ch. 451, Mechanics' Liens, § 451.82 (Matthew Bender)

California Mechanics' Liens and Related Construction Remedies (Cal. CEB 1999), §§ 1.60, 6.6-6.10

Marsh, California Mechanics' Lien Law and Construction Industry Practice (LEXIS Publishing 6th ed. 1998)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.200

§ 361.200 Notice of Completion [Civ. Code § 3093]

[1] FORM Notice of Completion [Civ. Code § 3093]

NOTICE IS HEREBY GIVEN that the undersigned _____ [is *or* are] the owner(s) of a work of improvement consisting of the _____ [performance *or* construction] of _____ [*describe work of improvement*] and of the real property on which the work of improvement is situated, which real property is located in _____ County, California and specifically described as follows: _____ [*describe site sufficiently for identification, including the street address, if any; a legal description is recommended*].

That the _____ [undersigned *or* predecessor in interest of the undersigned], as owner(s) of the above-described property, on _____ [*date*], entered into an original contract with _____ [*name of original contractor*] for the _____ [performance *or* construction] of _____ [the above-described work of improvement *or if work of improvement was contracted for pursuant to two or more original contracts each covering a particular portion of the improvement*, a particular portion of the above-described work of improvement consisting of _____ (*described portion completed pursuant to contract*)], [*if contract was recorded, add* which contract was recorded in Book _____, page _____ of the Official Records of the office of the County Recorder of _____ County, California, on _____ (*date*)].

[*If notice is being given for an original contract for a particular portion of improvement, add* That the following labor was actually performed and materials actually furnished pursuant to the terms of the above-described original contract: _____ (*state generally work done and materials furnished*).

That on or about _____ [*date*], the _____ [work of improvement *or* particular portion of the work of improvement] was actually completed by _____ [*name of original contractor*].

That the nature of the _____ [interest *or* estate] of the undersigned _____ [is *or* are]

_____ [*describe*] in the above-described real property.

That the name and address of the undersigned [*if this notice is being signed by fewer than all of the coowners or cotenants or their agents, add* and of all other _____ (coowners *or* cotenants *or both*) of the above-described property _____ (is *or* are)]: _____ [*list names and addresses*], [*if the owner or his agent signing is a successor in interest of the contracting owner, add* and the name(s) and address(es) of such owner's transferors _____ (is *or* are): _____].
Dated: _____.

_____ Owner

[*signature*]

[*Acknowledgment, if desired. See § 361.192[1].*]

[2] Use of Form

The notice of completion in [1], *above*, should be recorded in the office of the county recorder in the county in which the improvement site is located within 10 days of the completion of an original contract for a work of improvement or a particular portion of a work of improvement [*see Civ. Code § 3093*], thereby shortening the time within which a lien claimant must record his or her lien [*see Civ. Code §§ 3115-3117*; *§ 361.161[3]*, Paragraph 2]. However, some owners will lose this advantage if they do not follow up the recording of a notice of completion with a notice to the original contractor and other claimants informing them that the notice of completion has been recorded [*see Civ. Code § 3259.5*; *see also* [6], *below*].

[3] Contents of Notice

The notice of completion must be written, signed, and verified by the owner or his agent and contain all of the following:

- The date of completion (other than a cessation of labor). The recital of an erroneous date of completion does not, however, affect the validity of the notice if the true date of completion is within 10 days preceding the date of the recording of the notice.

- The name and address of the owner.

- The nature of the interest or estate of the owner.

- A description of the site sufficient for identification, containing the street address of the site, if any. If a sufficient legal description of the site is given, the validity of the notice is not affected by the fact that the street address recited is erroneous or that the street address is omitted.

- The name of the original contractor, if any, or, if the notice is given only of completion of a contract for a particular portion of the work of improvement, as provided in *Civ. Code § 3117* (recording of claim of lien where portion of work is completed for two or more original contracts), then the name of the original contractor under the contract, and a general statement of the kind of work done or materials furnished pursuant to the contract [*Civ. Code § 3093*].

If there is more than one owner, any notice of completion signed by fewer than all of the coowners must recite the

names and addresses of the coowners. If a notice of completion is signed by a successor in interest, he or she must also recite the names and addresses of his or her transferor or transferors [*Civ. Code § 3093*].

[4] Owner Defined

An owner, for the purposes of a recorded notice of completion or cessation, is the owner who causes a building, improvement, or structure to be constructed, altered, or repaired (or his or her successor in interest at the date of a notice of completion of or cessation from labor is filed for record) whether the interest or estate of the owner is in fee, is as vendee under a contract of purchase, is as lessee, or is as any other interest or estate less than the fee. When the interest or estate is held by two or more persons as joint tenants or tenants in common, any one or more of the cotenants may be deemed an owner. Any notice of completion or cessation signed by less than all the cotenants must recite the names and addresses of all of the cotenants [*Civ. Code §§ 3092(g), 3093*].

[5] Completion of Work

[a] Defined

Completion means, in the case of any work of improvement, actual completion of the work of improvement [*Civ. Code § 3086*].

[b] Use or Occupation

The use or occupation of a work of improvement by the owner, or his or her agent, accompanied by cessation of labor, is deemed equivalent to a completion [*Civ. Code § 3086(a)*]. Occupancy or use constitutes a completion only if it does not coexist with the labor throughout or is somehow inconsistent with further work by the laborer. If the occupancy does coexist with the performance of labor or is consistent with further work by the laborer, there is no constructive completion [*M. Arthur Gensler, Jr., & Associates, Inc. v. Larry Barrett, Inc. (1972) 7 Cal. 3d 695, 706, 103 Cal. Rptr. 247, 499 P.2d 503]* .

[c] Acceptance

The acceptance by the owner or his or her agent of the work of improvement is equivalent to a completion [*Civ. Code § 3086(b)*].

[d] By Public Entity

If the work of improvement is subject to acceptance by a public entity, completion of the work is deemed to be the date of acceptance [*Civ. Code § 3086*]. A work of improvement is subject to acceptance if it is required to be accepted by a public authority [*A.J. Raisch Paving Co. v. Mountain View Sav. & Loan Assn. (1972) 28 Cal. App. 3d 832, 837, 105 Cal. Rptr. 96]* . However, this is not to be equated with an inspection or the approval or issuance of certificates of occupancy under building regulations [*Howard A. Deason & Co. v. Costa Tierra Ltd. (1969) 2 Cal. App. 3d 742, 751, 83 Cal. Rptr. 105]* .

[e] Cessation of Labor

Under *Civ. Code § 3086(c)*, after a work of improvement has commenced, a cessation of labor thereon for a continuous period of 60 days or for 30days or more if the owner files a notice of cessation, is deemed equivalent to a completion. However, it should be noted that a notice of cessation has the same effect as a notice of completion for purposes of shortening the time period within which a claim of lien must be filed in all cases except that of cessation of work under an original contract for a particular portion of a work of improvement [*see Civ. Code §§ 3115-3117*]. Thus the important date for determining when a claim of lien must be recorded is the date that the notice of cessation was

recorded.

[6] Owner's Duty to Notify Claimants That Notice of Completion or Cessation Has Been Recorded

The owner of a private work of improvement has a duty to notify the original contractor, and any other claimant who has provided a preliminary 20-day notice [*see Civ. Code § 3097*], that a notice of completion or notice of cessation has been recorded. The notification must be sent by registered or certified mail, or first class mail evidenced by a certificate of mailing, within 10 days after the notice of completion or cessation was recorded [*Civ. Code § 3259.5(a)*]. If the owner fails to give the required notice within the specified 10-day period following the recording of the notice of completion or cessation, the contractor's or other claimant's period of time in which to file a mechanics' lien or stop notice is extended to 90 days beyond the date the notice of completion or cessation was recorded [*Civ. Code § 3259.5(a)*].

For these purposes, "owner" does not include a person who occupies the property as a personal residence and the dwelling contains not more than four residential units, nor does it include a person who has a security interest in the property or obtains an interest by virtue of a court order, a default on a mortgage, or a transfer by a fiduciary in the course of administering a decedent's estate, guardianship, conservatorship, or trust [*Civ. Code § 3259.5(b)*; *see Civ. Code § 1102.2(b)-(d)*].

[7] Cross References

For a form of an owner's notice of filing a notice of completion or cessation, see *California Legal Forms, Ch. 31, Mechanics' Liens, § 31.211A* (Matthew Bender)

California Real Estate Law & Practice, Ch. 451, Mechanics' Liens, § 451.33 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 361.201 Complaint for Damages [Civ. Code § 3300] for Breach of Written Contract--And to Foreclose Mechanics' Lien--By Original Contractor

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Written Contract--And to Foreclose Mechanics' Lien--By Original Contractor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AND TO FORE-
_____ [*name*], [and DOES I	)	CLOSE MECHANIC'S LIEN
through _____,]	)	(Breach of Contract)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION

(Breach of Contract)

1. Plaintiff _____ [*name*] is, and at all times herein mentioned was, a corporation, organized and existing under the laws of California.

2. At all times herein mentioned, plaintiff was a _____ [*specify type of contractor, e.g.*, general building contractor], and was duly licensed to do business as such in the State of California.

3. Defendant is, and at all times herein mentioned was, a corporation organized and existing under the laws of California [*or allege other capacity and residence of defendant*].

4. [Defendants DOES I-_____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When the true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants claims an interest or estate in the property herein mentioned)].

5. At all times herein mentioned, defendant was the owner or reputed owner of [all] the certain real property situated in _____ County, California, described as follows: _____ [*set forth legal description of parcel or parcels of property*].

6. On or about _____ [*date*], in [_____ (*city*),] _____ County, California, plaintiff entered into a written contract with defendant for the _____ [construction *or* performance] of a _____ [work of improvement *or* particular portion of a work of improvement] located on the above-mentioned property and consisting of _____ [*describe work of improvement, e.g.*, the erection of a residential unit *or particular portion of a work of improvement*]. Under this contract, plaintiff was to furnish all necessary labor, services, materials, and equipment to be used or consumed in the construction [performance] of the [particular portion of] work of improvement, for all of which defendant agreed to pay $_____. A copy of the contract is attached hereto as Exhibit _____ and made a part hereof.

7. Pursuant to this contract, plaintiff, between the date of the contract and its conclusion on _____ [*date*], performed the work and labor for, and furnished all necessary services, materials, and equipment to be used or consumed in and which were actually used or consumed in the work of improvement, and performed all other conditions, covenants, and promises under the contract, on his part to be performed [, except _____ (*condition not performed*), the performance of which was excused on the ground that _____ (*specify*)].

8. Plaintiff has paid the claims of all claimants who have furnished labor, services, equipment, and materials as required under the above-alleged original contract [*or allege the deduction of all unpaid claims from the original contract price or any other facts indicating that the defendant will not be subject to double liability for any labor, material, services, or equipment furnished pursuant to the original contract*]. Copies of receipts showing the receipt of payment by such claimants for all labor, services, equipment, or materials they furnished are attached hereto as Exhibits _____ and made a part hereof.

9. Plaintiff has performed all other conditions, covenants, and promises under the contract, on his part to be performed [, except _____ (*specify condition not performed*), the performance of which was excused on the ground that _____ (*specify*)].

10. The whole of the real property mentioned above on which the work of improvement is situated is required for the convenient use and occupation of the work of improvement.

11. Although demand therefor has been made since the work was performed and all necessary services, materials, and equipment were furnished, no part of the contract price has been paid [except the sum of $_____], and the sum of $_____ is still due and owing thereon to plaintiff.

SECOND CAUSE OF ACTION

(Foreclosure of Mechanics' Lien)

1. Plaintiff refers to and incorporates, as though fully set forth herein, Paragraphs 1-11, inclusive, of the First Cause of Action.

2. After plaintiff finished his contract, on or about _____ [*date*], plaintiff duly filed and recorded in Book _____, page _____ of the Official Records of _____ County, California, his claim of lien duly verified by the oath of _____, a full and correct copy of which is attached hereto, marked Exhibit _____, and made a part hereof by reference. This claim of lien was recorded within _____ days of _____ [*date*], this date being the date of _____ [the completion of the work of improvement *or* the recording of a notice of completion by the defendant].

3. In this claim of lien, plaintiff claimed a mechanics' lien on the work of improvement and real property for the amount of the unpaid contract price alleged above which price is the reasonable value of all labor, materials, services, and equipment plaintiff has furnished. Plaintiff has further incurred indebtedness in the sum of $_____, the necessary costs of recording and verifying the claim of lien.

4. Defendant(s) _____ [*name(s)*], [and each of them,] _____ [has *or* have] or claim(s) to have some right, title, or interest in the above-described real property, the exact nature of which claims is unknown to plaintiff, but which claims are subject and subordinate to the claim of lien of plaintiff.

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____ principal on the First Cause of Action, together with interest at the rate of _____ percent per day from _____ [*date*], to date of entry of judgment.

2. Adjudging on the Second Cause of Action that the rights, claims, ownership, liens, titles, and demands of defendants, and each of them, in the above-described real property are subsequent to and subject to the lien of plaintiff.

3. Adjudging on the Second Cause of Action that the mechanics' lien claimed in the claim of lien, referred to above as Exhibit _____, be foreclosed, and that the usual judgment be made for the sale of the property according to law by a commissioner to be appointed by the court; that the proceeds of the sale be applied in payment of the amounts including interest at the rate of _____ percent per day from _____ [*date*], to date of entry of judgment due to plaintiff; that each of the defendants and all persons claiming under any of them, subsequent to the mechanics' lien of the plaintiff, whether as lien claimants, judgment creditors, purchasers, encumbrancers, or otherwise, be barred and foreclosed from all rights, claims, interests, or equity of redemption in the property and every part of the property when time for redemption has passed.

4. Adjudging on the Second Cause of Action that if there is a deficiency of proceeds to satisfy the amounts due to the plaintiff, judgment for the deficiency be entered against the defendant following proceedings prescribed by law.

5. Permitting plaintiff to become a purchaser at the foreclosure sale.

6. For costs of suit herein incurred.

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form is a complaint by an original contractor for damages for breach of a written contract for performance or construction of a work of improvement or a portion of a work of improvement and for foreclosure of a mechanics' lien based on labor and materials furnished under the contract.

For a form of claim of lien, see *§ 361.192*.

[3] Essential Allegations

The complaint alleges in its First Cause of Action:

- That plaintiff was a contractor duly licensed under California law (Paragraph 2) [*Bus. & Prof. Code § 7031*].

- A definite description of the property (Paragraph 5).

- That defendant was the owner of property on which plaintiff constructed or performed a work of improvement or a portion of a work of improvement under the contract (Paragraphs 5, 6).

- The existence of a contract (Paragraph 6).

- The performance of all conditions on plaintiff's part including the furnishing of all labor and materials, or if not entirely performed, the excuse provided therefor in the contract (Paragraphs 7-9).

- That plaintiff furnished all labor and materials which were to be used or consumed in the work of improvement pursuant to the contract and which were actually used or consumed in such work

(Paragraphs 7-9) [*see Ensele v. Jolley (1922) 188 Cal. 297, 300, 204 P. 1085]* .

- That all of defendant's property is required for the convenient use and occupation of the work of improvement (Paragraph 10) [*see Civ. Code § 3128*].

- The nonpayment of the contract price (breach) by the defendant and the amount due (Paragraph 11).

In addition, the complaint alleges in the Second Cause of Action, in pertinent part,

- That plaintiff duly recorded his claim of lien within the statutory time periods (Paragraph 2) [*see Civ. Code §§ 3115-3117*; *Clements v. T.R. Bechtel Co. (1954) 43 Cal. 2d 227, 238, 273 P.2d 5]* .

- That plaintiff's claim of lien is superior and has priority over any of the defendants' rights or claims (Paragraph 4) [*see Clements v. T.R. Bechtel Co. (1954) 43 Cal. 2d 227, 238, 273 P.2d 5]* .

For an outline of the time within which a claim of lien must be recorded and procedural requirements for actions brought to enforce the lien, see *§§ 361.161, 361.162*.

[4] Defendants

All persons with an interest in the subject property at the time suit is brought must be made parties to the suit. If they are not, they are not bound by the judgment or proceedings [*Monterey S.P. Partnership v. W. L. Bangham, Inc. (1989) 49 Cal. 3d 454, 459, 261 Cal. Rptr. 587, 777 P.2d 623]* . Service on the trustee of a deed of trust does not constitute service on the beneficiaries of the deed of trust, and the beneficiaries must be named and served or the judgment will not be binding on them [*Civ. Code § 2937.7*; *Monterey S.P. Partnership v. W. L. Bangham, Inc. (1989) 49 Cal. 3d 454, 459-463, 261 Cal. Rptr. 587, 777 P.2d 623]* .

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case in the superior court [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. § 85, 86(a)(6)*]. In limited civil cases, the caption must state whether the demand exceedsor does not exceed $10,000. The caption must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*]. When an action to enforce the lien affects property that is also affected by a similar pending action that is not a limited civil case, or when the total amount of the liens sought to be foreclosed against the same property exceeds $25,000, the action is not a limited civil case [*Code Civ. Proc. § 86(a)(6)*].

The county in which all or part of the real property is located is the proper county for the trial of an action for the foreclosure of a lien on the property [*Code Civ. Proc. § 392(a)(2)*; *see § 361.162[6]*].

[7] Cross References

See generally Ch. 104, *Building Contracts* , and Ch. 140, *Contracts*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For a form of notice of pendency of action to foreclose mechanics' lien, see Ch. 348, *Lis Pendens*

For alternative forms of prayers and verification, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively

For memoranda in support of general demurrers to complaints to foreclose mechanics' liens, see California Points and Authorities, Ch. 152, *Mechanics' Liens* (Matthew Bender)

See generally *California Real Estate Law & Practice, Ch. 451, Mechanics' Liens, §§ 451.60 -451.70* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 361 MECHANICS' LIENS
PART V. FORMS
A. Mechanics' Liens

32-361 California Forms of Pleading and Practice--Annotated § 361.202

§ 361.202 Complaint for Damages [Civ. Code § 3300] for Breach of Written Contract--And to Foreclose Mechanics' Lien--By Persons Other Than Original Contractor

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Written Contract--And to Foreclose Mechanics' Lien--By Persons Other Than Original Contractor

[*Caption, introduction. See § 361.201[1].*]

1. [*If plaintiff is a subcontractor as described in Bus. & Prof. Code § 7026, allege that he or she is licensed, e.g.,* Plaintiff was at all times mentioned herein, and now is, a _____ (*e.g.*, electrical) contractor duly licensed by the State of California.]

2. [*Capacity and residence of plaintiff. See § 361.201[1], First Cause of Action, Paragraph 2.*]

3. [*Capacity and residence of defendant. See § 361.201[1], First Cause of Action, Paragraph 3.*]

4. [*Fictitious name allegation. See § 361.201[1], First Cause of Action, Paragraph 4.*]

5. At all times herein mentioned, defendant _____ [*name*] was the owner or reputed owner of [all] the certain real property situated in _____ County, California described as follows: _____ [*set forth legal description of parcel or parcels of property*].

6. On or about _____ [*date*], defendant _____ [*owner*] entered into an original contract with [defendant] _____ [*name*] as original contractor for the _____ [construction *or* performance] of a work of improvement consisting of _____ [*describe*]. [*Allege any other contracts in order to show the required authorization of the owner or the agency of the contractor with whom plaintiff contracted*].

7. On or about _____ [*date*], plaintiff entered into a written contract with defendant _____ [*name*] for _____ [*describe labor, materials, services, and/or equipment and show whether it was performed on, bestowed on, furnished to be used or consumed in, or contributed to*] a work of improvement consisting of _____ [*describe*]. The contract price of the _____ [labor *or* materials *or* services *or* equipment *or combination*] was the sum of $_____ to be _____ [sold *or* paid] _____ [*describe manner of payment, e.g.*, on an open account (book) basis, terms _____ percent _____ days, _____ days net, interest at the rate of _____ percent on all past due balances].

8. Pursuant to this contract, plaintiff, between the date of the contract and _____ [*date*], _____ [performed *or* furnished] _____ [*describe labor, materials, services, and/or equipment furnished or performed*]. [*Ifmaterials, services or equipment were furnished, add* These _____ (materials *or* services *or* equipment) were actually _____ (used *or* consumed) in the work of improvement].

9. [*If plaintiff is a subcontractor, allege payment of or deduction of claims of other claimants as set forth in § 361.201[1], First Cause of Action, Paragraph 8.*]

10. [*Allegation of performance of all other conditions, covenants, and promises. See § 361.201[1], First Cause of Action, Paragraph 9.*]

11. [*Allegation of necessity of property for use and occupation of work of improvement. See § 361.201[1], First Cause of Action, Paragraph 10.*]

12. Although demand therefor has been made since the _____ [*describe labor, materials, services, and/or equipment*] was performed [*or* furnished] as alleged above, no part of the contract price has been paid [except the sum of $_____], and the sum of $_____ is still due and owing thereon to plaintiff.

SECOND CAUSE OF ACTION

(Foreclosure of Mechanics' Lien)

1. Plaintiff refers to and incorporates, as though fully set forth herein, Paragraphs 1-12, inclusive, of the First Cause of Action.

2. On or about _____ [*date*], within 20 days after plaintiff first furnished _____ [labor, *or* materials, *or* services, *or* equipment *or combination*], plaintiff served a preliminary 20-day notice (private work) on defendant _____ [*name of owner*], on [defendant] _____ [*name of original contractor*] [*if there is a construction lender, add* and on _____ (*name*) as construction lender for the work of improvement,] in accordance with the provisions of *Civil Code Section 3097* by _____ [*specify method of service*]. [A copy of this notice is attached hereto, marked Exhibit _____, and made a part hereof.] Proof that the preliminary 20-day notice was served in accordance with the provisions of *Civil Code Section 3097* was made by _____ declaration *or* affidavit as specified in *Civil Code Section 3097.1* showing that service of the preliminary 20-day notice was made in accordance with *Civil Code Section 3097*]. [A copy of the _____ (declaration *or* affidavit) is attached hereto, marked Exhibit _____, and made a part hereof.]

3. After plaintiff ceased _____ [performance *or* furnishing] _____ [*describe labor, materials, services, and/or equipment*] to the work of improvement, plaintiff [*allege recording of claim of lien as set forth in § 361.201[1], Paragraph 2 of Second Cause of Action*].

4. [*Allege recording of contents and cost of recording of claim of lien. See § 361.201[1], Second Cause of Action, Paragraph 3.*]

5. [*Allegation of subordinancy of defendants rights or claims in real property. See § 361.201[1], Second Cause of Action, Pagragraph 4.*]

[*Prayer. See § 361.201[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 361.201[1].*]

[2] Use of Form

The complaint in [1], *above*, may be brought by any person other than the original contractor who has furnished labor, materials, services, or equipment to a work of improvement as described in *Civ. Code § 3110* (liens for works of improvement).

[3] Allegations

The complaint in [1], *above*, alleges in addition to the allegations contained in *§ 361.201[1]* for a personal cause of action to recover the plaintiff's debt and foreclosure of his or her mechanics' lien [*see § 361.201[3]*]:

- That the contractor with whom plaintiff contracted was authorized to enter into the contract by the owner or was his or her agent (Paragraph 6) [*see Civ. Code § 3110*].

- That plaintiff served his or her preliminary 20-day notice on the owner, original contractor, and the construction lender, if any (Paragraph 2 of the Second Cause of Action) [*see Civ. Code §§ 3097, 3114; Borchers Bros. v. Buckeye Incubator Co. (1963) 59 Cal. 2d 234, 236, 28 Cal. Rptr. 697, 379 P.2d 1* (decided under former Code Civ. Proc. § 1193, which required a preliminary notice to be given 15 days before recording of claim of lien)].

For a form of preliminary 20-day notice (private work), see *§ 361.190*. For an outline relating to the service of the preliminary 20-day notice (private work), see *§ 361.160*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal

Property LawNonmortgage LiensLien PrioritiesReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.203

§ 361.203 Allegation--Segregated Amounts for Labor or Materials Furnished to Separate Works of Improvement [Civ. Code § 3130]

[1] FORM Allegation--Segregated Amounts for Labor or Materials Furnished to Separate Works of Improvement [Civ. Code § 3130]

[*EITHER*]

Pursuant to the hereinbefore alleged contract, plaintiff furnished _____ [*describe labor, materials, services, and/or equipment*] to _____ [*describe one of two or more works of improvement against which plaintiff claimed a lien*] at the contract price of $_____, of which sum $_____ has not been paid after deduction of all just credits and offsets. [*Repeat for each work of improvement as described in complaint.*]

[*OR*]

Plaintiff estimates an equitable distribution of the above-alleged contract price based on the proportionate amount of _____ [*describe labor, materials, equipment, and/or services*] furnished to each work of improvement, that is due him/her after deduction of all just credits and offsets, as follows: _____ [*describe each work of improvement and the sum due on each work*].

[2] Use of Form

The form of allegation in [1], *above*, should be included in a complaint for foreclosure of a mechanics' lien based on labor or materials furnished to separate works of improvement if the works of improvement are owned by the same person or if the plaintiff has been employed by the same person to do his or her work or furnish his or her materials, whether or not the works of improvement are owned by one or more persons [*see Civ. Code § 3130*].

For an allegation of segregated amounts for work or materials in a claim of lien, see *§ 361.193*. For forms of complaint to foreclose mechanics' liens, see *§§ 361.201, 361.202*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.204

§ 361.204 Allegations--Noncontracting Owner-Lessor's Responsibility for Work of Improvement Constructed by Lessee [Civ. Code § 3129]

[1] FORM Allegations--Noncontracting Owner-Lessor's Responsibility for Work of Improvement Constructed by Lessee [Civ. Code § 3129]

1. On or about _____ [*date*], defendant _____ [*owner*] leased to defendant _____ [*name of person who has caused a work of improvement to be constructed or performed*] the above-described real property under a lease in writing [, a copy of which is attached hereto, marked Exhibit _____ and made a part hereof].

2. Subsequent to the commencement of the work of improvement pursuant to the terms of the above-alleged contract between defendant _____ [*name*] and _____ [plaintiff *or* defendant _____ (*name of original contractor*)], defendant _____ [*owner*] obtained actual knowledge that the work of improvement had commenced and failed [within 10 days after first obtaining such knowledge] to post and record a notice of nonresponsibility in accordance with *Civil Code Section 3094*. This knowledge was based on the following facts: _____ [*allege, e.g.,* that, under the terms of the lease between defendant _____ (*name*), as lessor, and defendant _____ (*name*), as lessee, the lessee had the right to erect improvements on the property and the lessor had a beneficial interest in any such improvement since the lessor became the owner of the improvement if it were not removed within a specified time after termination of the lease and, in addition, the improvement at once became security for the performance of all covenants of the lessee. Moreover, the lessor approved plans and specifications for the work of improvement submitted to it by lessee and personally monitored the progress of the work improvement by visiting the premises during the time work was in progress.

[2] Use of Form

The form in [1], *above*, consists of allegations that must be included in a complaint for foreclosure of both the lessor's and lessee's interest in real property on which a work of improvement is being constructed or performed if the lessor who has otherwise not caused the improvement to be constructed or performed has obtained actual knowledge of the

improvement and did not post a notice of nonresponsibility within 10 days of first obtaining such knowledge in accordance with *Civ. Code §§ 3094, 3129* [*see Civ. Code §§ 3094, 3129*; *Kim v. JF Enterprises (1996) 42 Cal. App. 4th 849, 856-859, 50 Cal. Rptr. 2d 141* ; *see also Truestone, Inc. v. Simi West Industrial Park II (1984) 163 Cal. App. 3d 715, 722, 209 Cal. Rptr. 757]* . Even though the contract for work of improvement is with a lessee, and not the owner, no preliminary notice is required because of the owner's knowledge. When a noncontracting owner has actual knowledge of theimprovement being made to his or her property and fails to exempt his or her interest from liability for the work provided by *Civ. Code § 3094*, the landlord is estopped to deny that the work was done at his or her instance and request [*Kim v. JF Enterprises (1996) 42 Cal. App. 4th 849, 856, 50 Cal. Rptr. 2d 141* ; *see Scott, Blake & Wynne v. Summit Ridge Estates, Inc. (1967) 251 Cal. App. 2d 347, 353, 59 Cal. Rptr. 587]* . When estoppel is an element of the action, it must be especially pleaded in the complaint with sufficient accuracy to disclose the facts relied on and the plaintiff must prove all of the essential elements constituting it [*Frank Pisano & Associates v. Taggart (1972) 29 Cal. App. 3d 1, 18, 105 Cal. Rptr. 414]* .

This form may be used in a situation in which either the owner has recorded a notice of nonresponsibility but has recorded or posted it more than 10 days after obtaining knowledge of the improvement or the owner has failed to post any notice after obtaining such knowledge.

For a form of notice of nonresponsibility, see *§ 361.199*. For complaints to foreclose mechanics' liens, see *§§ 361.201*, *361.202*.

[3] Cross References

For a form of memorandum in opposition to a motion for partial summary judgment on the grounds that the defendant noncontracting owner's notice on nonresponsibility was ineffective to insulate his or her property from mechanics' liens, see California Points and Authorities, Ch. 152, *Mechanics' Liens* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.205

§ 361.205 Allegation--Notice of Completion Ineffective to Shorten Time Period Required for Recording of Claim of Lien

[1] FORM Allegation--Notice of Completion Ineffective to Shorten Time Period Required for Recording of Claim of Lien

On or about _____ [*date*], defendant _____ [*name of owner*] recorded a notice of completion in Book _____, page _____, Official Records in the office of the county recorder of _____ County, California, reciting in part that the work of improvement was actually completed on _____ [*date*]. [A copy of this notice is attached hereto, marked as Exhibit _____ and made a part hereof.] This notice was invalid and ineffective and failed to impose the _____ [30 *or* 60]-day time limitation on the time period within which the plaintiff must record his claim of lien as prescribed in Section _____ [*3116 or 3115*] of the Civil Code in that _____ [*state facts showing invalidity, e.g.*, that the work of improvement was actually completed on _____ (*date*), more than 10 days preceding the date on which the notice of completion was recorded].

[2] Use of Form

The form of allegation in [1], *above*, should be included in a complaint to foreclose a mechanics' lien if the owner recorded a notice of completion which was ineffective to shorten the time period within which the plaintiff must record his claim of lien [*see Civ. Code § 3093*].

For a form of notice of completion, see *§ 361.200*. For complaints to foreclose mechanic's liens, see *§§ 361.201, 361.202*.

[3] Cross References

For a form of memorandum in opposition to a demurrer on the grounds that the defendant owner's notice of completion was ineffective to shorten the time period within which a claim of lien must be recorded, see California Points and

Authorities, Ch. 152, *Mechanics' Liens* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.206

§ 361.206 Statement of Decision

[1] FORM Statement of Decision

[*Caption. As on papers previously filed in action.*]

The action for foreclosure of a mechanics' lien on real property came on regularly for trial before the court this date. Plaintiff appeared by counsel _____; defendant appeared by counsel _____ [; *specify other appearances, if any*].

Evidence, both oral and documentary, was introduced on behalf of [all] parties and the cause was argued and submitted for decision. The court, having considered the evidence and heard the arguments of counsel, and being fully advised, issues the following Statement of Decision:

FACTUAL DETERMINATIONS

1. On _____ [*date*], defendant [*name*], as owner of real property in _____ County, California and described as follows: _____ [*legal description*], entered into a contract with _____ [plaintiff *or state name of original contractor*], as original contractor, for the _____ [construction *or* performance] of a [portion of a] work of improvement consisting of _____ [*describe*].

[2. *State other contracts to show defendant's authorization or agency and the terms of plaintiff's contract with defendant original contractor or subcontractor.*]

3. Under this contract, plaintiff was to furnish and perform between _____ [*date*], and _____ [*date*], and did so furnish and perform the following: _____ [*describe labor,*

materials, services, and/or equipment]. The contract price of the foregoing was $_____, which sum was the reasonable value of all that was _____ [performed *or* furnished *or both*], and of which sum, $_____ remains due and owing to plaintiff after deduction of just credits and offsets, except as may be mentioned hereafter.

[4. *If materials or equipment were furnished, add* The foregoing _____ (materials *or* equipment) which were to be furnished and _____ (used *or* consumed) in the work of improvement were so actually furnished and _____ (used *or* consumed) in the work of improvement.]

[5. *If plaintiff is original contractor or subcontractor, add* Plaintiff has paid, or caused to be discharged or released, all mechanics' liens and other claims arising out of the construction (performance) of defendant's work of improvement by plaintiff (, except the following: _____ (*describe outstanding claims*), which together amount to the sum of $_____).]

[6. Defendant is allowed a credit in the amount of $_____ against the sums found to be owing pursuant to the interlocutory judgment, that is, $_____, by reason of a payment by defendant in the sum of $_____ to a previous lien claimant.]

7. All of the above-described real property owned by the defendant _____ [*name*] is necessary for the convenient use and occupation of the work of improvement.

[8. Within 20 days after plaintiff first _____ (performed *or* furnished) the above-mentioned _____ (labor *or* materials *or* services *or* equipment *or combination*), plaintiff caused to be given to the defendant _____ (*name*), owner, (defendant) _____ (*name*), original contractor, and _____ (*name*), the construction lender for the work of improvement, a preliminary 20-day notice (private work) as described in and in accordance with *Section 3097 of the Civil Code*.]

9. On _____ [*date*], plaintiff recorded his claim of lien which date was within _____ days of _____ [*date*], the date on which _____ [the work of improvement was completed *or* defendant _____ (*name*), owner, recorded a notice of completion (cessation)]. This claim of lien was recorded in Book _____, page _____, of the Official Records of _____County, California, was duly verified, and contained all of the required information as prescribed by *Section 3084 of the Civil Code*.

10. Plaintiff incurred an indebtedness in the sum of $_____, the necessary costs of recording and verifying his claim of lien.

11. The rights, claims, ownership, liens, titles, and demands of defendants, and each of them, in the above-described real property are subsequent to and subject to the lien of plaintiff.

LEGAL CONCLUSIONS

From the foregoing factual determinations, the court concludes that:

1. Plaintiff is entitled to a final judgment against defendant _____ [owner *or* contractor] in the sum of $_____ [less the sum of $_____, heretofore paid by defendant for the benefit of plaintiff, or a net sum of $_____,] together with interest thereon at the rate of _____ percent per annum from _____ [*date*], until paid, together with all accruing costs, including $_____, the cost of recording and verifying plaintiff's claim of lien.

2. The plaintiff has a lien on the above-described work of improvement and on all the above-described real property in the amount of the sum found due and owing to plaintiff.

3. The real property and work of improvement of the defendant _____ [*name*] shall be sold forthwith by the sheriff of _____ County, according to law, and the proceeds of the sale shall be applied as follows: to the payment of the cost of the sale and, thereafter, to the payment of plaintiff's final judgment herein; and, if any deficiency shall remain after applying all of the proceeds of the sale applicable to the satisfaction of plaintiff's final judgment, plaintiff shall have judgment and execution against defendant _____ [*name of owner or contractor*] for the amount of such deficiency.

4. Any party to this action is permitted to be a purchaser at the sale.

5. A deed to the purchasers at the sale shall be executed after the time allowed for redemption has expired, and the purchasers shall be let into possession and in aid thereof may have the assistance of the sheriff of _____ County.

6. Each of the defendants and all persons claiming under any of them, subsequent to the lien of the plaintiff, whether as lien claimants, judgment creditors, purchasers, encumbrancers, or otherwise, are barred and foreclosed from all rights, claims, interests, or equity of redemption in the property and every part of the property when time for redemption has passed.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is a statement of decision explaining the bases for the court's decision in an action for foreclosure of a mechanic's lien. Under *Code Civ. Proc. § 632*, on the request of any party appearing at the trial, made within 10 days after the court announces a tentative decision, or if the trial has lasted less than one calendar day, or less than eight hours over more than one day, made prior to submission of the matter for decision, the court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial. The request for a statement of decision must specify those controverted issues as to which the party is requesting a statement of decision. After a party has requested such a statement, any party may make proposals as to the content of the statement of decision [*Code Civ. Proc. § 632*]. For further discussion and forms relating to statements of decision, see Ch. 529, *Statement of Decision* .

[3] Cross References

Marsh, California Mechanics' Lien Law and Construction Industry Practice (LEXIS Publishing 6th ed. 1998)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.207

§ 361.207 Judgment of Foreclosure of Mechanics' Lien and Order of Sale

[1] FORM Judgment of Foreclosure of Mechanics' Lien and Order of Sale

[*Caption. As on papers previously filed in action.*]

This action for foreclosure of a mechanics' lien came on regularly for trial before the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant _____ [*name*] appeared by counsel _____ [; *specify other appearances, if any*].

Evidence, both oral and ducumentary, was introduced on behalf of [all] parties and the cause was argued and submitted for decision. _____ _____ [The court having heretofore made and caused to be filed its written statement of decision *or* A statement of decision not having been requested],

IT IS ORDERED AND ADJUDGED as follows:

1. That the amount due plaintiff _____ from defendant _____ [*name of owner or contractor*] is the sum of $_____, with interest thereon at the rate of _____ percent per annum from _____ [*date*], amounting to the sum of $_____; for the additional sum of $_____ for certifying and recording plaintiff's claim of lien, also cost herein in the amount of $_____.

2. That the plaintiff has a lien on the hereinafter described real property owned by defendant _____ [*name*] for all of the total sum of $_____.

3. That the property mentioned in the complaint and hereinafter described, or so much thereof as may be necessary to sell, be sold at public auction in the manner prescribed by law by the sheriff of _____ County, California, where the property is situated, and that any party to this action may be a purchaser at such sale; the sheriff,

after the time allowed by law has expired, shall execute a deed to the purchaser or purchasers at the sale; and, if any of the parties to this action who may be in possession of said premises, or any part thereof, or any person who, since the commencement of this action has come into possession under them, or either of them, refuses to deliver possession thereof to such purchaser or purchasers on production of the deed for such premises, or any part thereof, a writ of assistance may, without further notice, be issued to compel such delivery to the purchaser or purchasers.

4. The proceeds of this sale shall be applied first, to the payment of sheriff's fees, disbursements and commissions on the sale; second, to the payment to plaintiff of the total sum of $_____, for principal, interest and costs of suit, with interest thereon from the date of this decree at the rate of _____ percent per annum; and if there be any surplus remaining after making these payments, he shall pay the same to defendant _____ [*name*], and if the proceeds of the sale be insufficient to pay the amountso found due to plaintiff, with interest, costs and expenses of sale, that plaintiff recover from defendant $_____, the amount of such deficiency, with interest thereon at the rate of _____ percent per annum from the date of such sale.

5. Defendant and all persons claiming under him/her, and all persons having liens subsequent to plaintiff's lien described in the complaint, by judgment, decree or otherwise, on the lands and property described in the complaint and hereinafter described, or their personal representatives, and all persons claiming under them, and all persons having any lien or claim by or under such subsequent judgment or decree, and their heirs and personal representatives, and all persons claiming under them, and all persons claiming to have acquired any estate, interest, or lien or mortgage on or in these premises subsequent to the lien of plaintiff, as found in the findings of fact herein, be forever barred and foreclosed of, and from, all equity of redemption and claim in, of and to the property, hereinafter described, and every part and parcel thereof, from and after the delivery of said sheriff's deed.

6. The lands and premises directed to be sold by this decree are situated in _____ County, California, and are more particularly described as follows: _____ [*set out description of property, e.g.,*

All those lands within the boundary lines of the subdivision as shown on the map entitled "Amended Map of _____, _____, _____ County, California," which map was filed in the office of the Recorder of _____ County, California, on _____ [*date*], in Book _____ of Maps at pages _____ and _____.

Except as to:

Lots _____ and _____ in Block _____].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The judgment in [1], *above*, is for use in an action brought by any mechanics' lien claimant when one or more defendants appear in the action.

[3] Order of Sale

After entry of judgment, an order of sale is prepared and issued by the clerk of the court [*see* California Land Security and Development (Cal. CEB 1960), Ch. 30, *Mechanics' Liens*, § 30.78]. Without a writ of enforcement, or order of sale

as it is often denominated, the sheriff or an appointed commissioner has no authority to execute the judgment [*Laubisch v. Roberdo (1954) 43 Cal. 2d 702, 713, 277 P.2d 9* ; *see Code Civ. Proc. §§ 712.010, 716.010*].

For a form of statement of decision, see *§ 361.206*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.208

§ 361.208 Petition to Release Property From Mechanic's Lien [Civ. Code § 3154]

[1] FORM Petition to Release Property From Mechanic's Lien [Civ. Code § 3154]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of _____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION TO RELEASE PROPERTY FROM
Respondent.	)	MECHANICS' LIEN
	)	
	)	

_____

Petitioner, _____ [*name*], alleges:

1. Petitioner is the _____ [owner of *or* owner of an interest in] the property, hereinafter "the property," described as follows: _____ [*set forth legal description*].

2. Respondent, hereinafter "the lien claimant," is, and at all times herein mentioned was, a corporation organized and existing under the laws of California [*or allege other capacity, and if an individual the county of residence, of respondent*].

3. On or about _____ [*date*], the lien claimant caused to be recorded in the Official Records of the County of _____, Book _____, page _____, a duly verified claim of lien against the property. A copy of the claim of lien is attached hereto as Exhibit A and made a part hereof.

4. No action has been filed to foreclose the lien, no extension of credit has been recorded, and the time period during which suit can be brought to foreclose the lien has expired.

5. The lien claimant _____ [is _____ (unable *or* unwilling) to execute a release of the lien in that _____ (*state facts establishing inability or unwillingness*) *or* cannot with reasonable diligence be found in that _____ (*specify facts so showing or steps taken by petitioner in exercise of reasonable diligence to locate lien claimant*)].

6. Petitioner has not filed for relief under any law governing bankrupts, and no other restraint exists to prevent the lien claimant from filing to foreclose his/her lien.

7. Petitioner has incurred and will incur attorney's fees in bringing and prosecuting this petition.

WHEREFORE, petitioner prays:

1. That the property be released from the lien claimant's claim of lien;

2. For attorney fees in the amount of $_____ [*amount not exceeding $500*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court deems proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the [attorney for the] petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The petition in [1], *above*, is for use to secure release of property from a mechanic's lien when no action to foreclose the lien has been filed. The proceeding may be filed at any time after expiration of the time period specified by *Civ. Code §*

3144 with regard to the period during which property is bound by a lien after the claim of lien is recorded [*Civ. Code § 3154(a)*].

For discussion, see *§ 361.32*.

[3] Allegations

The petition in [1], *above*, alleges all of the matters required by *Civ. Code § 3154(b)*. It describes the property subject to the claim of lien (Paragraph 1) [*Civ. Code § 3154(b)(2)*]. It alleges:

- The date the claim of lien was recorded (Paragraph 3) [*Civ. Code § 3154(b)(1)*].

- That no action has been filed to foreclose the lien, no extension of credit has been recorded, and the time period during which suit can be brought to foreclose the lien has expired (Paragraph 4) [*Civ. Code § 3154(b)(3)*].

- That the lien claimant is unable or unwilling to execute a release of the lien or cannot with reasonable diligence be found (Paragraph 5) [*Civ. Code § 3154(b)(4)*].

- That petitioner has not filed for relief under any law governing bankrupts and that there exists no other restraint to prevent the lien claimant from filing to foreclose the lien (Paragraph 6) [*see Civ. Code § 3154(b)(5)*].

In addition, it alleges the incurring of attorney's fees [*see Civ. Code § 3154(g)*].

[4] Verification

The petition must, as indicated in the form in [1], *above*, be verified [*Civ. Code § 3154(b)*].

[5] Petition as Deemed Controverted

The petition is deemed controverted by the lien claimant [*Civ. Code § 3154(b)(5)*]. Hence, the lien claimant is not required to file any response to the petition.

[6] Attorney's Fees

The prevailing party is entitled to attorney's fees not to exceed $2,000 [*Civ. Code § 3154(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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Chapter 361 MECHANICS' LIENS
PART V. FORMS
A. Mechanics' Liens

32-361 California Forms of Pleading and Practice--Annotated § 361.209

§ 361.209 Judgment Decreeing that Property Is Released From Mechanic's Lien [Civ. Code § 3154(e)]

[1] FORM Judgment Decreeing that Property Is Released From Mechanic's Lien [Civ. Code § 3154(e)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of _____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	JUDGMENT DECREEING PROPERTY RE-
Respondent.	)	LEASED FROM MECHANIC'S LIEN
	)	
	)	

_____

This proceeding came on regularly for hearing before the court _____ [this date *or* on _____ (*date*)], the Honorable _____ [*name*], presiding. Petitioner appeared by counsel _____ [*name*] [and respondent appeared by counsel _____ (*name*)].

Having considered the evidence introduced and the argument of counsel, the court finds as follows:

1. A copy of the petition and of the order fixing this hearing were served on respondent in compliance with law;

2. On _____ [*date*], a claim of lien was recorded in the office of the Recorder of [_____(*city*),] _____ County, California, in Book _____, page _____, of Official Records, against the following described property: _____ [*set forth legal description of property*]; and

3. No action to foreclose the lien has been filed and the time period during which the action can be brought has expired.

WHEREFORE, IT IS ADJUDGED AND DECREED that, on recordation of a certified copy of this decree, the above-described property is released from the claim of lien of respondent herein.

IT IS FURTHER ADJUDGED AND DECREED that petitioner have and recover from respondent the sum of $_____ [*specify sum not exceeding $2,000*] as attorney's fees incurred in this proceeding.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use when the judgment in a proceeding brought by the owner of property or of an interest in it to secure releaseof the property from a mechanic's lien when no action has been brought to foreclose the lien is rendered in favor of the petitioner [*see Civ. Code § 3154*].

[3] Contents of Judgment

A judgment in favor of the petitioner in a proceeding to secure release of property from a mechanic's lien when no action to foreclose the lien has been filed must indicate (1) the date the lien was recorded; (2) the county and city, if any, in which the lien was recorded; (3) the book and page of the place in the official records where the lien is recorded; and (4) the legal description of the property affected [*Civ. Code § 3154(f)*]. In addition, the prevailing party is entitled to attorney's fees not to exceed $2,000 [*Civ. Code § 3154(g)*].

[4] Proof of Service Required

No decree shall issue in favor of the petitioner unless the petitioner proves that service of the petition and the order fixing the date for hearing was made in compliance with the provisions of *Civ. Code § 3154(d)*. The issue of compliance is deemed controverted by the lien claimant [*Civ. Code § 3154(e)*].

For a form of petition to release property from mechanics' lien, see *§ 361.208*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated §§ 361.210-361.219

[Reserved]

§§ 361.210[Reserved]

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B. Stop Notices

32-361 California Forms of Pleading and Practice--Annotated § 361.220

§ 361.220 Stop Notice [Civ. Code §§ 3103, 3158, 3159]

[1] FORM Stop Notice [Civ. Code §§ 3103, 3158, 3159]

To: _____ [*name of construction lender or owner*]

YOU ARE HEREBY NOTIFIED that _____ [on _____ (*date*) *or* between the dates of _____, and _____], I _____ [*name*], the undersigned, _____ [performed *or* agreed to perform *or* furnished *or* agreed to furnish] _____ [labor *or* materials *or* services *or* equipment] _____ [to *or* for] _____ [*name of contractor to or for whom the labor, materials, services, or equipment was done or furnished*] _____ [to be used in *or* used in] the work of improvement consisting of the _____ [performance *or* construction] of _____ [*describe work of improvement*], which work of improvement is situated on real property, owned or reputedly owned by _____ [you *or state name of owner*], located in _____ County, California and described specifically as follows: _____ [*give address or legal description*].

The following _____ [labor *or* materials *or* services *or* equipment] _____ [has *or* have] been _____ [performed *or* funished]: _____ [*state in general terms*].

The _____ [contract price *or* reasonable value] of the _____ [labor *or* services *or* equipment *or* materials *or* use of the equipment], being the whole of the amount in value agreed to be _____ [performed *or* furnished], is $_____, of which sum $_____ plus interest at the rate of _____ percent per year from _____ [*date*], has not been paid after deduction of all just credits and offsets. The amount in value of that already _____ [performed *or* furnished] is $_____.

My name is _____ [*name*] and my address is _____ [*address*].

Therefore, the undersigned hereby requests [*if this notice is being given to the owner or is bonded, add:* and demands] that you withhold sufficient funds to satisfy this claim of the undersigned as _____ [permitted *or* required] under Section _____ [3161 *or* 3162] of the Civil Code relating to stop notices for private works of improvement.

[*If the person giving the notice to a construction lender wants (1) notice of the construction lender's election not to withhold because a payment bond was recorded and (2) a copy of the payment bond [Civ. Code §§ 3159(a)(3), 3162(a)(3)], add:*]

I request notice of an election not to withhold and a copy of the payment bond. A stamped, self-addressed envelope is attached.
Dated: _____.

_____ [*signature of claimant*]

[*Verification. See § 361.192.*]

[*Acknowledgment. See 361.192.*]

[2] Use of Form

The form of stop notice in [1], *above*, should be given by a stop notice claimant either to an owner or a construction lender holding funds with which the cost of a work of improvement is wholly or partly to be defrayed [*see Civ. Code §§ 3161, 3162*]. An owner who is served with a stop notice, whether or not it is bonded, has a mandatory duty to withhold funds unless a payment bond has been previously recorded [*Civ. Code § 3161*; *Civ. Code §§ 3159(a)(1), (2), 3161, 3162(a)(1), (2)*]. A construction lender's withholding responsibilities, that is, whether a lender has a duty to withhold funds or merely discretion to do so, depend on various factors, including whether or not the stop notice is bonded [*see Civ. Code § 3162(a)*, discussed in *§ 361.43[5]*]. The optional paragraph near the end of the form is for use in a stop notice against a construction lender to request notice of an election not to withhold. A stamped, preaddressed envelope must accompany such a request [*Civ. Code § 3159(a)(3)*; *see also § 361.222* (form of notice of election not to withhold)].

The claim made in the form in [1], *above*, if given to the owner, may be for both materials and labor that have been furnished and that will be furnished to the work of improvement [*Civ. Code § 3161*]. However, if given to a construction lender, the claim may be only for materials, equipment, or services furnished or labor performed [*Civ. Code § 3159(a)(3)*].

For a complete outline relating to the service of the stop notice, see *§ 361.170*.

[3] Contents of Notice

A stop notice must be in writing, signed and verified by the claimant or his or her agent, and state in general terms all of the following [*Civ. Code § 3103*]:

- The kind of labor, services, equipment, or materials furnished or agreed to be furnished by the claimant;

- The name of the person to or for whom the same was done or furnished;

- The amount in value, as near as may be determined, of that already done or furnished and of the whole agreed to be done or furnished; and

- The name and address of the claimant.

[4] Cross References

For a form for a stop notice for a public work, see Ch. 481, *Public Works*

California Real Estate Law & Practice, Ch. 452, Stop Notices, §§ 452.04, 452.12, 452.14 (Matthew Bender)

California Mechanics' Liens & Other Construction Remedies (Cal. CEB 1999) §§ 3.24-3.25

Marsh, California Mechanics' Lien Law and Construction Industry Practice (LEXIS Publishing 6th ed. 1998)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.221

§ 361.221 Notice of Exception to Sureties [Civ. Code § 3163]

[1] FORM Notice of Exception to Sureties [Civ. Code § 3163]

To: _____ [*name of stop notice claimant*]

PLEASE TAKE NOTICE that the undersigned, _____ [*name of construction lender*], herewith objects to the sufficiency of the sureties on the undertaking in your behalf accompanying the bonded stop notice served on the undersigned on _____ [*date*]. The undersigned hereby demands that you substitute for this undertaking an undertaking executed by a corporate surety licensed to write such bonds in the State of California as provided in *Section 3163 of the Civil Code*.
Dated: _____.

_____ [*signature of construction lender*]

[2] Use of Form

The form in [1], *above*, must be given to a stop notice claimant within 20 days after the service of the claimant's bonded stop notice by a construction lender who objects to the sufficiency of the sureties on the bond accompanying the notice. On receipt of the form, the claimant may within 10 days substitute for the initial bond a bond in like amount executed by a corporate surety licensed to write such bonds in California. If the claimant fails to do so, the construction lender may disregard the bonded stop notice and release all funds withheld in response to the notice [*see Civ. Code § 3163*].

For a form of stop notice, see *§ 361.220*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsObjectionsCivil ProcedureRemediesBondsSuretiesProceduresReal Property

LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.222

§ 361.222 Notice of Election Not to Withhold [Civ. Code §§ 3159, 3161, 3162]

[1] FORM Notice of Election Not to Withhold [Civ. Code §§ 3159, 3161, 3162]

To: _____ [*name of stop notice claimant*]

PLEASE TAKE NOTICE that the undersigned, _____ [*name of owner or construction lender*], elects not to withhold funds as requested in the stop notice of _____ [*name of person who gave stop notice*] dated _____. A payment bond has been recorded for this project. A copy of the bond is attached.
Dated: _____.

_____ [*signature of owner or construction lender*]

[2] Use of Form

The notice of election in [1], *above*, not to withhold is for use by an owner or construction lender (1) to notify a stop notice claimant that a payment bond has been recorded and (2) to furnish the claimant with a copy of the bond. When the owner elects not to withhold, this notice must be given within 30 days of receipt of the stop notice to the claimant at the address shown in the stop notice [*Civ. Code § 3161*]. A construction lender must give this notice within 30 days of electing not to withhold when it is requested in the stop notice and a stamped, preaddressed envelope is enclosed with the stop notice [*Civ. Code §§ 3159(a)(3), 3162(a)(3)*; for a form of stop notice, *see § 361.220*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.223

§ 361.223 Complaint for Damages [Civ. Code § 3300] for Breach of Written Contract--And to Enforce Stop Notice [Civ. Code §§ 3103, 3158-3162] Against Construction Lender

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Written Contract--And to Enforce Stop Notice [Civ. Code §§ 3103, 3158-3162] Against Construction Lender

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES TO ENFORCE
_____ [*name*], [and DOES I	)	STOP NOTICE
through_____,]	)	(Breach of Contract)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Allegation of license if plaintiff is subcontractor. See § 361.201[1], First Cause of Action, Paragraph 1.*]

2. [*Capacity and residence of plaintiff. See § 361.201[1], First Cause of Action, Paragraph 2.*]

3. [*Capacity and residence of defendant. See § 361.201[1], First Cause of Action, Paragraph 3.*]

4. [*Fictitious name allegations. See § 361.201[1], First Cause of Action, Paragraph 4.*]

5. [*Allegation of ownership of real property. See § 361.201[1], First Cause of Action, Paragraph 5.*]

6. Between _____ [*date*], and _____ [*date*], inclusive, at the special instance and request of defendant _____ [*name of contractor*], plaintiff _____ [furnished *or* performed] the following _____ [labor *or* materials *or* services *or* equipment *or combination*] consisting of _____ [*describe if appropriate, add* to be used and which were actually used] _____ [in *or* for] the _____ [construction *or* performance] of a work of improvement on the above-described real property, which work of improvement consisted of _____ [*describe*].

7. The total contract price of the _____ [labor *or* services *or* materials *or* equipment *or combination*] so _____ [furnished and used as aforesaid *or* performed], which price was the reasonable value of the same, amounts to the sum of $_____; although demand therefor has been made, no part of this sum has been paid except the sum of $_____, and the sum of $_____ remains due, owing and unpaid over and above all credit and offsets.

SECOND CAUSE OF ACTION
(Enforcement of Stop Notice)

1. Plaintiff refers to and incorporates, as though fully set forth herein, Paragraphs 1-7, inclusive, of the First Cause of Action.

2. Defendant _____ [*name of construction lender*] was at all times mentioned herein the holder of certain funds with which the cost of the work of improvement, as described above, was wholly or in part to be defrayed.

3. [*Allegation of service of preliminary 20-day notice. See § 361.202[1], Second Cause of Action, Paragraph 2.*]

4. On or about _____ [*date*], prior to the expiration of _____ days from _____ [*date*], which date is the date of _____ [the completion of the work of improvement *or* the recording of a notice of completion (notice of cessation) by the above named owner], plaintiff served on defendant _____ [*name of construction lender*] a verified stop notice accompanied by a bond with good and sufficient sureties in the amount of $_____ [*one and one-quarter times the amount of plaintiff's claim*] in accordance with the provisions of *Section 3083 of the Civil Code*. Service of the stop notice and bond was by _____ [*specify method*]. A copy of the stop notice and the bond is attached hereto, marked Exhibit _____ and made a part hereof.

5. In this stop notice plaintiff demanded that defendant withhold sufficient funds to answer the plaintiff's claim contained in the stop notice, which claim was for the sum of $_____, the sum that remains unpaid under plaintiff's contract with defendant _____ [*contractor*], as alleged above.

6. Plaintiff is informed and believes and thereon alleges that on the date that defendant _____ [*lender*] received the stop notice accompanied by the bond, as alleged above, he/she had in his possession sufficient funds from which he/she was obligated to make payment or advancements to defray the cost of the work of improvement.

7. Defendants, and each of them, claim an interest in or right to the construction fund from which defendant

_____ [*construction lender*] was obligated to make payments or advancements to defray the cost of the work of improvement. Such claims are subordinate and subject to plaintiff's right to so much of the fund as will satisfy his/her demand as set forth in the above-mentioned stop notice.

WHEREFORE plaintiff prays judgment as follows:

1. For the sum of $_____ principal on the First Cause of Action, together with interest at the rate of _____ percent per day from _____ [*date*], to date of judgment.

2. That the funds withheld by defendant _____ [*lender*] in accordance with the demand made in the stop notice be paid to the plaintiff on account of this judgment.

3. That in the event that defendant _____ [*lender*] disbursed funds in his/her possession at the time he/she received the stop notice which were to be used to defray the costs of the work of improvement so that insufficient funds remain to be paid plaintiff, personal judgment for any deficiency be entered against this defendant.

4. For costs of suit herein incurred.

5. For such other further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 361.201.*]

[2] Use of Form

This complaint is for use in an action brought by a person otherwise entitled to assert a mechanics' lien, other than the original contractor, for labor or materials furnished to a work of improvement against that person's contractor and the construction lender for the work of improvement who is holding funds with which the costs of the improvement are wholly or in part to be defrayed.

This form is not appropriate for use by someone other than the original contractor if a payment bond was recorded before the stop notice was served. Under those circumstances, the lender has no duty to withhold funds [*see Civ. Code §§ 3159(a)(2), 3162(a)(2)*].

For a form of complaint in interpleader, see *§ 361.225*.

[3] Allegations

This complaint alleges, in addition to the allegations for breach of plaintiff's contract by his or her contractor [*see § 361.201[3]*]:

- That there was a construction lender for the work of improvement (Second Cause of Action,

Paragraph 2) [*see Civ. Code § 3087*].

- That plaintiff gave to the owner, original contractor, and construction lender a preliminary 20-day notice (private work), which is a prerequisite for effective service of plaintiff's stop notice (Second Cause of Action, Paragraph 3) [*see Civ. Code §§ 3097, 3160*].

- That plaintiff, within the time period his or her claim of lien could have been recorded, served the construction lender a bonded stop notice (Second Cause of Action, Paragraphs 4, 5) [*see Civ. Code §§ 3083, 3159, 3160*].

- That on the date of service, the construction lender has within his or her possession sufficient construction funds to answer the bonded stop notice claim and that the plaintiff has priority over other claimants to the construction fund to the extent necessary to satisfy his or her stop notice demand (Second Cause of Action, Paragraph 7) [*see Idaco Lumber Co. v. Northwestern Sav. & Assn. (1968) 265 Cal. App. 2d 490, 496, 71 Cal. Rptr. 422]* .

It is not necessary to allege the refusal of the construction lender to pay the plaintiff in the complaint in [1], *above*, since the only obligation of the construction lender on receipt of the stop notice is to withhold sufficient funds; only in an action against the lender can the plaintiff enforce the payment of his or her claim stated in the notice [*see Civ. Code § 3162*; *A-1 Door & Materials Co. v. Fresno Guarantee Sav. & Loan Ass'n. (1964) 61 Cal. 2d 728, 736, 40 Cal. Rptr. 85, 394 P.2d 829]* . For discussion relating to the service of and actions on a stop notice, see *§§ 361.170, 361.171*.

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case in the superior court [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(6)*]. In limited civil cases, the caption must state whether the demand exceeds or does not exceed $10,000. The caption must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

The action must be filed in the county where the contract was performed, in the county in which the contract was entered into, or in the county in which a defendant resides [*Code Civ. Proc. § 395*; *see § 361.171[6]*].

[6] Cross References

For discussion and forms relating to stop notices on public works, see Ch. 481, *Public Works*

California Real Estate Law & Practice, Ch. 452, Stop Notices, § 452.16 (Matthew Bender)

Legal Topics:

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

Contracts LawBreachGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.224

§ 361.224 Notice of Commencement of Action [Civ. Code § 3172]

[1] FORM Notice of Commencement of Action [Civ. Code § 3172]

[*Caption, introduction. See § 361.223.*]

To: _____ [*name of owner or construction lender*]

YOU ARE HEREBY NOTIFIED that the above-named plaintiff has commenced an action [, as alleged in the complaint attached hereto,] against the above-named defendants to enforce a stop notice filed by the above-named plaintiff with you on _____ [*date*].

The action is to enforce the payment of a claim in the amount of $_____ for _____ [*describe labor or materials furnished*] furnished [to *or* for] _____ [*person to or for whom labor or materials were furnished*] for _____ [*describe work of improvement*] being _____ [constructed *or* performed] by a contract between you and _____ [*name of original contractor*], dated _____ [*date*].
Dated: _____.

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, must be given by a stop notice claimant within five days after commencement of an action to enforce the payment of the claim stated in the stop notice [*see Civ. Code § 3172*; *§ 361.171[7]*].

For a form of complaint, see *§ 361.223*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.225

§ 361.225 Complaint in Interpleader [Code Civ. Proc. §§ 386, 386.5]--By Construction Lender Where Total Amount of Stop Notice Claims Exceeds Amount Withheld

[1] FORM Complaint in Interpleader [Code Civ. Proc. §§ 386, 386.5]--By Construction Lender Where Total Amount of Stop Notice Claims Exceeds Amount Withheld

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT IN INTERPLEADER
_____ [*name*], [and DOES I	)	[Amount demanded _____
through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant.	)	[LIMITED CIVIL CASE]
	)	

_____

[Plaintiff *or* Cross complainant] alleges:

1. [*Allegation of capacity and residence of plaintiff. See § 361.201[1], First Cause of Action, Paragraph 1.*]

2. [*Allegation of capacity and residence of defendants. See § 361.201[1], First Cause of Action, Paragraph 3.*]

3. [*Fictitious name allegation. See § 361.201[1], First Cause of Action, Paragraph 4.*]

4. [*Allegation of ownership of real property. See § 361.201[1], First Cause of Action, Paragraph 5.*]

5. On or about _____ [*date*] plaintiff made, executed, and delivered a construction loan numbered

_____ to the defendant _____ [*name of owner*], which loan was secured by the real property described above.

6. Pursuant to the terms of the construction loan agreement, defendants assigned the proceeds of the loan to the plaintiffs from which disbursements were to be made to defray the costs of a work of improvement to be _____ [constructed *or* performed] on the real property described above.

7. On or about _____ [*date*], defendant _____ [*name of owner*] and _____ [*name*], as original contractor, entered into an original contract for the construction of a work of improvement consisting of _____ [*describe*]. A copy of the contract is attached hereto, marked Exhibit _____ and made a part hereof.

8. There remains due and owing to _____ [*original contractor*] from the plaintiff on the construction loan account for all work, services,materials and equipment performed and furnished under the original contract, the sum of $_____. This sum represents the full and complete indebtedness of the plaintiff to _____ [*name*] or to any other person or persons whether individual or corporate, arising out of this contract.

9. The defendants _____ [*names*] served the plaintiff with written stop notices pursuant to *Sections 3158-3162, 3172 of the Civil Code*, in the amounts and on the dates shown therein. The notices were verified, properly served, contained the statement required by law and were accompanied by bonds with good and sufficient sureties in accordance with *Section 3083 of the Civil Code*. Copies of these stop notices and bonds are attached hereto, marked as Exhibits _____ through _____, and made a part hereof. Plaintiff has released no funds whatsoever held to the account of _____ [*name*] under the contract described in Paragraph 7, since the date on which the first of these notices was filed with the plaintiff.

10. The total sum represented by the stop notices is $_____, which sum greatly exceeds the sum withheld. As _____ [among *or* between] the parties who filed stop notices, plaintiff is in doubt as to whom he/she should pay the funds withheld, or whether any of the parties are entitled to any of the funds withheld, or whether the parties are entitled under *Section 3167 of the Civil Code* to only a pro rata portion of the funds withheld.

11. _____ [*Name*(*s*)] _____ [has *or* have] brought suit against the plaintiff in the Superior Court of the _____ County to enforce payment of _____ [a *or* the] stop notice(s) filed with the plaintiff. The above-named suit(s) bear the following number(s): _____.

12. Plaintiff is holding the sum of $_____ under the construction loan agreement with _____ [*name*(*s*)]. Plaintiff is required to withhold this sum pursuant to *Section 3162 of the Civil Code*. Plaintiff does not know which of the defendants _____ [is *or* are] entitled to the funds withheld and cannot safely determine which claims are right and lawful or entitled to priority. [Plaintiff is ready and willing to deposit *or* On filing this complaint, plaintiffs have deposited] with the clerk of this court, the funds withheld in the amount of $_____.

13. This action is brought by the plaintiff without any collusion with any of the defendants.

WHEREFORE plaintiff prays judgment as follows:

1. That the defendants be required to interplead and litigate _____ [among *or* between] themselves their respective claims to the funds withheld by the plaintiffs.

2. That the court adjudge and declare the mutual and legal rights and liabilities of the parties with reference to the funds

in question.

3. That each defendant be enjoined from bringing any action or pursuing any action under *Section 3172 of the Civil Code*.

4. That the plaintiff be discharged from all liability to all of the defendants.

5. That the plaintiff be awarded his costs and reasonable attorney's fees.

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 361.208*]

[2] Use of Form

The complaint in [1], *above*, is for use by a construction lender in action to interplead the claims of bonded stop claimants who have served valid bonded stop notices under *Civ. Code §§ 3083, 3159, 3162*. Accompanying this complaint, the plaintiff should serve on the defendants notice of motions for a court order consolidating actions already filed, if appropriate, and for an interlocutory order in interpleader and for injunction. For a further discussion relating to distribution of withheld funds subject to stop notice claims, see *§ 361.45*. For a form of stop notice, see *§ 361.220*.

[3] Cross References

See generally Ch. 314, *Interpleader*

For a form of complaint of interpleader brought by a public entity, see Ch. 481, *Public Works*

California Mechanics' Liens and Other Remedies, §§ 9.48-9.53 (Cal. C.E.B. 1988)

Marsh, California Mechanics' Lien Law and Construction Industry Practice (LEXIS Publishing 6th ed. 1998)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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PART V. FORMS
B. Stop Notices

32-361 California Forms of Pleading and Practice--Annotated §§ 361.226-366.229

[Reserved]

§§ 361.226[Reserved]

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Chapter 361 MECHANICS' LIENS
PART V. FORMS
C. Payment Bonds

32-361 California Forms of Pleading and Practice--Annotated § 361.230

§ 361.230 Post-Completion Bond Notice (Private Work) [Civ. Code §§ 3227, 3242(b)]

[1] FORM Post-Completion Bond Notice (Private Work) [Civ. Code §§ 3227, 3242(b)]

To: _____ [*name of surety*] and _____ [*name of bond principal*]

YOU ARE HEREBY NOTIFIED that _____ [on _____ (*date*), *or* between the dates of _____ (*date*) and _____ (*date*)], I, _____ [*name*], the undersigned, _____ [performed *or* agreed to perform *or* furnished *or* agreed to furnish] _____ [to *or* for] _____ [*name of contractor to or for whom the labor, services, materials, or equipment was done or furnished*] _____ [to be used in *or* used in] the work of improvement consisting of _____ [*describe work of improvement*], which work of improvement is situated on real property, owned or reputedly owned by _____ [*name*(*s*)], located in _____ County, California and described specifically as follows: _____ [*give address or legal description*].

The following _____ [labor *or* materials *or* services *or* equipment] _____ [has *or* have] been _____ [performed *or* furnished]: _____ [*describe*].

The amount in value of the [labor *or* material *or* services *or* equipment] already furnished is $_____.
The amount in value of the [labor *or* materials *or* services *or* equipment] to be furnished is $_____.
Dated: _____.

_____

[*signature of claimant*]

[2] Use of Form

The form in [1], *above*, may be given to the surety and the bond principal within 15 days after recording a notice of completion, or if no notice of completion has been recorded, within 75 days after completing the work of improvement [*Civ. Code § 3242(b)*]. Alternatively, notice to a surety and bond principal may be given by using the preliminary 20-day notice procedure provided in *Civ. Code § 3097* [*Civ. Code § 3242(a)*; for a form of preliminary 20-day notice, *see § 361.190*]. Failure to give either this notice or a preliminary 20-day notice prevents any action from being maintained on a payment bond [*see Civ. Code § 3242*]. For further details relating to actions on payment bonds, see *§ 361.180*.

[3] Contents of Notice

The notice in [1], *above*, must be in writing and must contain all of the following:

- The kind of labor, services, equipment, or materials furnished or agreed to be furnished by the claimant.
- The name of the person to whom the labor, services, equipment, or materials were furnished.
- The amount in value, as near as may be determined, of any labor, services, equipment, or materials already furnished or to be furnished [*Civ. Code § 3227(b)*].

[4] Service of Written Notice

The post-completion bond notice (private work) may be served by personal delivery, or by depositing the notice in the mail, postage prepaid, certified or registered, and addressed in accordance with any of the following that may be applicable [*Civ. Code § 3227(a)*]:

- If to an individual surety, at his or her residence or place of business, if known.
- If to an individual surety whose residence is unknown, then in care of the clerk of the county in which the bond has been recorded.
- If to a corporate surety, at the office of or in care of the agent designated by the surety in the bond as the address to which notice shall be sent.
- At the office of or in care of any officer of the surety in California.
- At the office of or in care of the statutory agent of the surety in California.
- To the bond principal at the last known address.
- By service in the manner provided by law for the service of a summons in a civil action.

[5] Cross References

See generally *California Real Estate Law & Practice, Ch. 453, Payment Bonds, § 453.12* (Matthew Bender)

Marsh, California Mechanics' Lien Law and Construction Industry Pract Ice (LEXIS Publishing 6th ed. 1998)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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Chapter 361 MECHANICS' LIENS
PART V. FORMS
C. Payment Bonds

32-361 California Forms of Pleading and Practice--Annotated § 361.231

§ 361.231 Complaint--Against Original Contractor for Damages [Civ. Code § 3300] for Breach of Contract--And Against Surety on Contractor's Payment Bond [Civ. Code §§ 3096, 3097, 3235-3242]--By Subcontractor, Laborer, or Materialman

[1] FORM Complaint--Against Original Contractor for Damages [Civ. Code § 3300] for Breach of Contract--And Against Surety on Contractor's Payment Bond [Civ. Code §§ 3096, 3097, 3235-3242]--By Subcontractor, Laborer, or Materialman

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR BREACH OF
_____ [*name*], [and DOES I	)	CONTRACT AND RECOVERY ON CONTRACT-
through _____,]	)	OR'S PAYMENT BOND
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION (Breach of Contract)

[*1. Allegation of license if plaintiff is a subcontractor. See § 361.201[1], First Cause of Action, Paragraph 1.*]

[*2. Capacity and residence of plaintiff. See § 361.201[1], First Cause of Action, Paragraph 2.*]

[*3. Capacity and residence of defendant original contractor. See § 361.201[1], First Cause of Action, Paragraph 3.*]

4. On or about _____ [*date*], _____ [*name of original owner*], as owner of real property herein described, and defendant, _____ [*name*], made and entered into a contract in writing under the terms of which the defendant, hereinafter referred to as original contractor, convenanted and agreed to do all of the work and furnish all of the materials necessary to _____ [construct *or* perform] a work of improvement consisting of _____ [*describe work of improvement*], which work of improvement is located on real property situated in _____ County, California, and described specifically as follows: _____ [*give legal description*]. [A copy of this contract is attached hereto, marked Exhibit _____, and made a part hereof.]

5. After the execution of the contract referred to above, the original contractor then entered into a contract with the plaintiff herein for the _____ [*describe work or materials to be furnished for or to work of improvement e.g.*, delivery of materials and supplies to be used by the defendant in _____ (construction *or* performance) of the above-mentioned work of improvement].

6. Between _____ [*date*], and _____ [*date*], plaintiff _____ [furnished to *or* performed for] the original contractor the following _____ [*state and describe labor, materials, supplies and/or equipment performed or furnished; if materials, supplies or equipment were furnished, add* to be used, and which were actually used, in the _____ (construction *or* performance) of the work of improvement contracted to be done as aforesaid]. The total contract value of the _____ [labor *or* materials *or* supplies *or* equipment *or any combination*] so _____ [furnished *or* performed] [and used] as aforesaid, which sum is the reasonable value of the _____ [labor *or* materials *or* supplies *or* equipment *or combination*], amounts to the sum of $_____. No part of this sum has been paid and the whole amount remains due, owing, unpaid over and above all just credits and offsets.

SECOND CAUSE OF ACTION

(On Contractor's Payment Bond)

7. Plaintiff refers to and incorporates, as though fully set forth herein, Paragraphs 1-6, inclusive, of the First Cause of Action.

8. At all times mentioned herein, defendant _____ [*name*], hereinafter called surety, was, and now is, a corporation authorized to engage and is engaged under, and by virtue of the laws of the State of California, making, guaranteeing, and becoming a surety on bonds and undertakings required or authorized by law.

9. Contemporaneously with the making of the aforesaid contract between the owner of the real property and the original contractor, pursuant to the terms thereof, and before the original contractor entered into the performance of the work of improvement, the original contractor, as principal, and defendant, _____ [*name*], as surety, made and executed their bond and undertaking, designated as payment bond for the purpose of complying with *Civil Code Sections 3096, 3235-3242*. This bond was in the sum of $_____, was conditioned, and provided that if the original contractor or any of [his/her] subcontractors failed to pay for any materials, provisions, provender, or other supplies, used in, upon, for, or about the _____ [construction *or* performance] of the work of improvement, or for any work or labor done thereon of any kind, that the surety on the bond would pay the same. [A copy of the payment bond is attached hereto, marked as Exhibit _____, and made a part hereof.]

10. [As a further condition of the payment bond, the principal and surety promised and agreed to pay reasonable attorney's fees to be fixed by the court in case suit was brought on the bond and undertaking. The sum of $_____ constitutes reasonable attorney's fees to be allowed for plaintiff's attorney's fees herein.]

[*EITHER*]

11. On or about _____ [*date*], plaintiff gave to defendant _____ [*name of surety*] and _____ [*name of bond principal*] _____ [in person *or* by United States certified (registered) mail, postage prepaid, addressed to this defendant at _____ (*address*) and bond principal at _____ (*address*)] as provided in *Civil Code Section 3227*, the written notice as required by *Civil Code Section 3242(b)*, in the form prescribed by *Civil Code Section 3227(b)*. [A copy of this notice is attached to this complaint as Exhibit _____ and made a part of this complaint.]

[*OR*]

[11. *Allegation of service of preliminary 20-day notice. See § 361.202[1], Second Cause of Action, Paragraph 2*]

[*CONTINUE*]

WHEREFORE, plaintiff prays judgment against the defendants, and each of them, as follows:

1. The sum of $_____, together with interest at the rate of _____ percent from _____ [*date*], until paid;

2. Plaintiff's cost of suit, including a reasonable attorney's fee;

3. Such other and further relief as the court deems proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 361.201.*]

[2] Use of Form

This complaint is for use in an action brought by a subcontractor, materialman, or laborer against the original contractor on a work of improvement and the surety on a payment bond in situations where the original contractor, as principal, and the surety have made and executed the payment bond pursuant to the orginal contractor's promise in his or her original contract with the owner. The complaint may be used in a separate action on the payment bond or may be joined with the plaintiff's action to foreclose his or her mechanics' lien [*see Civ. Code § 3096*].

[3] Allegations

This form alleges as part of the plaintiff's cause of action against the surety on the contractor's payment bond:

- If plaintiff is a contractor, that he or she is licensed as such (Paragraph 1).
- The contract between the original contractor and plaintiff (Paragraph 5).
- Its performance (Paragraph 6).
- Dates on which labor or materials were furnished (Paragraph 6).
- Amount due plaintiff on contract (Paragraph 6).
- The execution of a payment bond, pursuant to the original contract (*see* Paragraph 4), designed to inure to the benefit of the plaintiff (Paragraph 9 of the Second Cause of Action) [*see Civ. Code §§ 3096, 3226* (owner as permitted to exact payment bond from original contractor)].
- That plaintiff has served on the sureties and bond principal a notice in compliance with *Civ. Code § 3242* (Paragraph 11).

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case in the superior court [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(6)*]. In limited civil cases, the caption must state whether the demand exceeds or does not exceed $10,000. The caption must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

A defendant surety corporation may be sued in the county where the contract is made or is to be performed or where the obligation or liability arises or the breach occurs. It may also be sued in the county where the principal place of business of the corporation is situated [*Code Civ. Proc. §§ 395, 395.5*; *see § 361.180[5]*].

For a form of post-completion bond notice, see *§ 361.230*.

[6] Cross References

For a form for complaint on a public works payment bond, see Ch. 481, *Public Works*

See generally Ch. 538, *Suretyship, Bonds, and Undertakings*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesGeneral OverviewContracts LawBreachGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensContracts LawTypes of ContractsGuaranty ContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.232

§ 361.232 Complaint--Against Subcontractor for Damages [Civ. Code § 3300] for Breach of Contract--And Against Surety on Subcontractor's Payment Bond [Civ. Code §§ 3096, 3097, 3235-3242]--By Subcontractor, Laborer, or Materialman

[1] FORM Complaint--Against Subcontractor for Damages [Civ. Code § 3300] for Breach of Contract--And Against Surety on Subcontractor's Payment Bond [Civ. Code §§ 3096, 3097, 3235-3242]--By Subcontractor, Laborer, or Materialman

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR BREACH OF
_____ [*name*], [and DOES I	)	CONTRACT AND RECOVERY ON CONTRACT-
through _____,]	)	OR'S PAYMENT BOND
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION (Breach of Contract)

[1. *Allegation of license if plaintff is a subcontractor. See § 361.201[1], First Cause of Action, Paragraph 1.*]

[2. *Capacity and residence of plaintiff. See § 361.201[1], First Cause of Action Paragraph 2.*]

[3. *Capacity and residence of defendant subcontractor. See § 361.201[1], First Cause of Action, Paragraph 3.*]

4. On or about _____ [*date*], _____ [*name of original contractor*] and defendant, _____ [*name*], made and entered into a contract in writing under the terms of which the defendant, referred to below as subcontractor, agreed to provide _____ [*describe labor, materials, services, and/or equipment*].

5. After the execution of the contract referred to above the subcontractor then entered into a contract with the plaintiff herein for the _____ [*describe work or materials to be furnished*].

6. Between _____ [*date*], and _____ [*date*], plaintiff _____ [furnished to *or* performed for] the subcontractor the following _____ [*state and describe labor, materials, supplies, and/or equipment performed or furnished; if materials, supplies, or equipment were furnished, add* to be used, and which were actually used, in the provision of _____ (*labor, materials, services, and/or equipment*) contracted for as stated above]. The total contract value of the _____ [labor *or* materials *or* supplies *or* equipment *or any combination*] so provided as stated above, which sum is the reasonable value of the [labor *or* materials *or* supplies *or* equipment *or any combination*] amounts to the sum of $_____. No part of this sum has been paid and the whole amount remains due, owing, unpaid over and above all just credits and offsets.

SECOND CAUSE OF ACTION

(On Contractor's Payment Bond)

7. Plaintiff refers to and incorporates, as though fully set forth below, Paragraphs 1-6, inclusive, of the First Cause of Action.

[8. *Capacity of defendant surety, See § 361.231[1], Paragraph 8*]

9. Contemporaneously with the making of the contract mentioned above between the original contractor and the subcontractor, under its terms, and before the subcontractor entered into the performance of the provision of _____ [*labor, materials, services, and/or equipment*], the subcontractor, as principal, and defendant _____ [*name*], as surety, made and executed their bond and undertaking designated as payment bond for the purpose of complying with *Civil Code Sections 3096*, and *3235 through 3242*. This bond was in the sum of $_____, was conditioned, and provided that if the subcontractor failed to pay for any materials, provisions, provender, or other supplies, used in, on, for, or about the provision of _____ [*labor, materials, services, and/or equipment*] that the surety on the bond would pay the same. [A copy of the payment bond is attached to this complaint, marked as Exhibit _____, and made a part of this complaint.]

[10. *Allegation of agreement to pay attorney's fees. See § 361.231[1], Paragraph 10*]

[*EITHER*]

[11. *Allegation of service of post-completion bond notice. See § 361.231[1], Paragraph 11*]

[*OR*]

[11. *Allegation of service of preliminary 20-day notice. See § 361.202[1], Second Cause of Action, Paragraph 2*]

WHEREFORE, plaintiff prays judgment against the defendants, and each of them, as follows:

1. The sum of $_____, together with interest at the rate of _____ percent from _____ [*date*], until paid;

2. Plaintiff's cost of suit, including reasonable attorney's fees;

3. Such other and further relief as the court deems proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification. See § 361.201.*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action brought by a subcontractor, materialman, or laborer against the subcontractor on a work of improvement and the surety on a payment bond in situations when the subcontractor, as principal, and the surety have made and executed the payment bond in accordance with the subcontractor's promise in his or her contract with the original contractor. The above may be used in a separate action on the payment bond or may be joined with the plaintiff's action to foreclose on a mechanics' lien [*see Civ. Code § 3096*].

For a form of complaint against the original contractor, see *§ 361.231*.

[3] Allegations

The complaint in [1], *above*, alleges as part of the plaintiff's cause of action against the surety on the subcontractor's payment bond:

- The execution of a payment bond, under the original contract (*see* Paragraph 4 of the First Cause of Action), designed to inure to the plaintiff's benefit (Paragraph 9 of the Second Cause of Action) [*see Civ. Code § 3096* (subcontractor as principal of payment bond)].

- The contract between the subcontractor and the plaintiff (Paragraph 5).

- Its performance (Paragraph 6 of the First Cause of Action).

[4] Cross References

For a form for complaint on a public works payment bond, see Ch. 481, *Public Works*

See generally Ch. 538, *Suretyship, Bonds, and Undertakings*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensContracts LawTypes of ContractsGuaranty ContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated §§ 361.233-361.239

[Reserved]

§§ 361.233[Reserved]

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Chapter 361 MECHANICS' LIENS
PART V. FORMS
D. Demands, Waivers, Releases, Demurrers, and Affirmative Defenses

32-361 California Forms of Pleading and Practice--Annotated § 361.240

§ 361.240 Owner's Demand for Stop Notice [Civ. Code § 3158]

[1] FORM Owner's Demand for Stop Notice [Civ. Code § 3158]

To: _____ [*name*]
_____ [*address*]

You are hereby notified that I, _____ [*name*], the undersigned, am the owner of the property located in _____ City, County of _____, and described specifically as follows: _____ [*give address or legal description*]. I have been informed that you have _____ [performed *or* promised to perform *or* furnished *or* promised to furnish _____ (materials *or* services *or* equipment)] _____ [used in *or* to be used in] a work of improvement consisting of _____ [*describe improvement*] which is in progress on the above-described property. Under *Civil Code Section 3158*, I have the right to demand, and do hereby demand, that you immediately furnish me, at the address set forth below, a stop notice which must contain the following information:

1. Kind of _____ [labor performed or to be performed *or* _____ (materials *or* services *or* equipment) furnished or to be furnished];

2. Amount in value of what you have _____ [done *or* furnished] and amount in value of the whole of what you have agreed to _____ [do *or* furnish]; and

3. Name of person _____ [for *or* to] whom the _____ [labor was performed *or* _____ (materials *or* service *or* equipment) _____(was *or* were) furnished].

Failure to comply with this demand will result in a forfeiture of all rights you may have to a mechanics' lien against the above-described property for all the labor, materials, services, or equipment you may have performed on or furnished to or will have performed on or furnished to the above-described work of improvement.
Dated: _____.

_____ [*signature of owner*]

_____ [*address*]

[2] Use of Form

The form of demand in [1], *above*, by an owner who holds funds being used for the purpose of the construction of a work of improvement on his or her property may be made on any claimant entititled to claim a mechanics' lien under *Civ. Code §§ 3110-3112*. Its apparent purpose is to make such a claimant aware of any stop notice rights he or she may have, and also to protect the owner's property from mechanics' lien foreclosure whenconstruction funds may provide sufficient security for any claims that may arise. Once the demand is made, a claimant's failure to serve a stop notice on the owner results in a forfeiture of the claimant's mechanics' lien rights under *Civ. Code §§ 3110-3112* [*Civ. Code § 3158*]. Under *Civ. Code § 3158*, it appears that no demand may be made by an owner on a lien claimant to serve a stop notice on a construction lender.

[3] Cross References

California Real Estate Law and Practice, Ch. 452, Stop Notices, § 452.08 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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D. Demands, Waivers, Releases, Demurrers, and Affirmative Defenses

32-361 California Forms of Pleading and Practice--Annotated § 361.241

§ 361.241 Conditional Waiver and Release on Progress Payment [Civ. Code § 3262(d)(1)]

[1] FORM Conditional Waiver and Release on Progress Payment [Civ. Code § 3262(d)(1)]

CONDITIONAL WAIVER AND RELEASE
UPON PROGRESS PAYMENT

Upon receipt by the undersigned of a check from _____ [*maker of check*] in the sum of $_____ payable to _____ [*payee or payees of check*], and when the check has been properly endorsed and has been paid by the bank upon which it is drawn, this document shall become effective to release pro tanto any mechanic's lien, stop notice, or bond right the undersigned has on the job of _____ [*name of owner*] located at _____ [*job description*] to the following extent. This release covers a progress payment for labor, services, equipment, or material furnished to _____ [*name of customer*] through _____ [*date*] only and does not cover any retentions retained before or after the release date; extras furnished before the release date for which payment has not been received; extras or items furnished after the release date. Rights based upon work performed or items furnished under a written change order which has been fully executed by the parties prior to the release date are covered by this release unless specifically reserved by the claimant in this release. This release of any mechanic's lien, stop notice, or bond right shall not otherwise affect the contract rights, including rights between parties to the contract based upon a rescission, abandonment, or breach of the contract, or the right of the undersigned to recover compensation for furnished labor, services, equipment, or material covered by this release if that furnished labor, services, equipment, or material was not compensated by the progress payment. Before any recipient of this document relies on it, said party should verify evidence of payment to the undersigned.
Dated: _____.

_____ [*company name*]

By _____ [*title*]

[2] Use of Form

The form of waiver in [1], *above*, is required by statute to be used when the claimant is required to execute a waiver and release in exchange for, or in order to induce the payment of, a progress payment, and the claimant is not, in fact, paid in exchange for the waiver and release or a single payee check or joint payee check is given in exchange for the waiver and release [*Civ. Code § 3262(d)(1)*]. If this form is not used, any such waiver or release is null, void, and unenforcable [*Civ. Code § 3261(d)*].

A conditional lien waiver and release under *Civ. Code § 3262(d)(1)* waives mechanic's lien rights, bond rights, and stop notice rights for servicesrendered and materials provided up to the date stated on the receipt, even if those services and materials were not compensated by the progress payment. However, waiver is limited only to those express lien rights. By executing the release, the subcontractor or materialman does not waive his or her rights to pursue compensation for unpaid services and materials under the terms of the contract or as otherwise provided by law or equity [*Tesco Controls, Inc. v. Monterey Mech. Co. (2004) 124 Cal. App. 4th 780, 797, 21 Cal. Rptr. 3d 751]* .

For a form of unconditional waiver and release on progress payment, see *§ 361.242*.

[3] Cross References

California Real Estate Law and Practice, Ch. 451, *Mechanics Liens* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensContracts LawTypes of ContractsReleasesReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.242

§ 361.242 Unconditional Waiver and Release on Progress Payment [Civ. Code § 3262(d)(2)]

[1] FORM Unconditional Waiver and Release on Progress Payment [Civ. Code § 3262(d)(2)]

UNCONDITIONAL WAIVER AND RELEASE UPON
PROGRESS PAYMENT

The undersigned has been paid and has received a progress payment in the sum of $_____ for labor, services, equipment, or material furnished to _____ [*name of customer*] on the job of _____ [*name of owner*] located at _____ [*description of job*] and does hereby release any mechanic's lien, stop notice, or bond right that the undersigned has on the above-referenced job to the following extent. This release covers a progress payment for labor, services, equipment, or materials furnished to _____ [*customer*] through _____ [*date*], only and does not cover any retentions retained before or after the release date; extras furnished before the release date for which payment has not been received; extras or items furnished after the release date. Rights based on work performed or items furnished under a written change order that has been fully executed by the parties prior to the release date are covered by this release unless specifically reserved by the claimant in this release. This release of any mechanic's lien, stop notice, or bond right shall not stherwise affect the contract rights, including rights between parties to the contract based upon a rescission, abandonment, or breach of the contract, or the right of the undersigned to recover compensation for furnished labor, services, equipment, or material covered by this release if that furnished labor, services, equipment, or material was not compensated by the progress payment.

NOTICE:
THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM.

Dated: _____.

_____ [*company name*]

By _____ [*title*]

[2] Use of Form

The form of waiver in [1], *above*, is required by statute to be used when the claimant is required to execute a waiver and release in exchange for, or in order to induce payment of, a progress payment and the claimant asserts in the waiver it has, in fact, been paid the progress payment [*Civ. Code § 3262(d)(2)*]. The notice must be in at least as large a type as the largest type otherwise in the document [*Civ. Code § 3262(d)(2)*]. If this formis not used, any such waiver or release is null, void, and unenforcable [*Civ. Code § 3261(d)*].

For a form of conditional waiver and release on progress payment, see *§ 361.241*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensContracts LawTypes of ContractsReleasesReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.243

§ 361.243 Conditional Waiver and Release on Final Payment [Civ. Code § 3262(d)(3)]

[1] FORM Conditional Waiver and Release on Final Payment [Civ. Code § 3262(d)(3)]

CONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT

On receipt by the undersigned of a check from _____ [*maker of check*] in the sum of $_____ payable to _____ [*payee or payees of check*] and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document shall become effective to release any mechanic's lien, stop notice, or bond right the undersigned has on the job of _____ [*owner*] located at _____ [*job description*]. This release covers the final payment to the undersigned for all labor, services, equipment, or material furnished on the job, except for disputed claims for additional work in the amount of $_____. Before any recipient of this document relies on it, the party should verify evidence of payment to the undersigned.
Dated: _____.

_____ [*company name*]

By _____ [*title*]

[2] Use of Form

The form of waiver in [1], *above*, is statutorily required for use when the claimant is required to execute a waiver and release in exchange for, or in order to induce the payment of, a final payment and the claimant is not, in fact, paid in exchange for the waiver and release or a single payee check or joint payee check is given in exchange for the waiver and release [*Civ. Code § 3262(d)(3)*]. If this form is not used, any such waiver or release is null, void, and unenforcable [*Civ. Code § 3261(d)*].

For a form of conditional waiver and release on progress payment, see *§ 361.241*. For a form of unconditional waiver and release on final payment, see *§ 361.244*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.244

§ 361.244 Unconditional Waiver and Release on Final Payment [Civ. Code § 3262(d)(4)]

[1] FORM Unconditional Waiver and Release on Final Payment [Civ. Code § 3262(d)(4)]

UNCONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT

The undersigned has been paid in full for all labor, services, equipment, or material furnished to _____ [*customer*] on the job of _____ [*name of owner*] located at _____ [*job description*] and does hereby waive and release any right to a mechanic's lien, stop notice, or any right against a labor and material bond on the job, except for disputed claims for extra work in the amount of $_____.

NOTICE:
THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL RELEASE FORM.

Dated: _____.

_____ [*company name*]

By _____ [*signature*]

_____ [*title*]

[2] Use of Form

The form of waiver in [1], *above*, is required by statute to be used when the claimant is required to execute a waiver and release in exchange for, or in order to induce payment of, a final payment and the claimant asserts in the waiver it has,

in fact, been paid the final payment [*Civ. Code § 3262(d)(4)*]. The notice must be in at least as large a type as the largest type otherwise in the document [*Civ. Code § 3262(d)(4)*]. If this form is not used, any such waiver or release is null, void, and unenforcable [*Civ. Code § 3261(d)*].

For a form of conditional waiver and release on progress payment, see *§ 361.241*. For a form of conditional waiver and release on final payment, see *§ 361.43*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.245

§ 361.245 Endorsement on Joint Check

[1] FORM Endorsement on Joint Check

By endorsement, the undersigned acknowledges receipt of full payment for all materials furnished or labor performed under the _____ [subcontract *or* original contract] prior to the billing attached as to property and buildings described on the billing. The undersigned further acknowledges the extinguishment of all liens and claims of liens, all rights to any stop notice or bonded stop notice, and any other rights under the provisions of the mechanics' lien law for the amount paid by this check, and that there are no bills for labor or material under the _____ [subcontract *or* original contract] unpaid as the date of the billing other than set forth on the billing.

_____ [*signature*]

[2] Use of Form

The endorsement in [1], *above*, may be used by an owner on joint checks made out to both the contractor and a subcontractor or materialman or to both a subcontractor and a materialman. Joint checks may be used to make sure that the contractor or subcontractor uses funds to pay the subcontractors and materialmen, who will have mechanics' lien rights if they are not paid, even though the prime contractor or subcontractor is paid. The billings of the subcontractor or materialman that are paid by the check should be attached to the check.

Issuance of a joint check with no further instructions is at least sufficient to require a subcontractor or materialman to inquire as to the intended application of the funds [*Westwood Bldg. Materials Co. v. Valdez (1958) 322 P.2d 79]* . Issuance of a joint check to a subcontractor and materialman only requires the materialman to obtain funds from the check to pay for sites specified in the check and does not require the materialman to obtain funds from the check for other sites [*Rodeffer Industries, Inc. v. Chambers Estates, Inc. (1968) 263 Cal. App. 2d 116, 118-119, 69 Cal. Rptr. 551]* .

[3] Effect of Endorsement

When a subcontractor or materialman endorses a joint check, he or she is deemed to have received the money due from the check. Inclusion of the subcontractor or materialman makes it clear that the maker of the check intends to discharge obligations owed to the subcontractor or materialman [*Post Bros. Constr. Co. v. Yoder (1977) 20 Cal. 3d 1, 5-6, 141 Cal. Rptr. 28, 569 P.2d 133* ; *Bohannan Bros. Inc. v. Lo Jean Dev. Co. (1969) 3 Cal. App. 3d 200, 204-205, 82 Cal. Rptr. 922]* . The joint check rule also applies when there are more than two payees or when the subcontractor or materialman is working for a contractor on several job sites. The burdenis on the subcontractor or materialman to determine for which project the joint check is payment. Endorsement of a joint check also precludes the subcontractor or materialman from proceeding against a surety because he or she is deemed to have been paid [*Post Bros. Constr. Co. v. Yoder (1977) 20 Cal. 3d 1, 7-8, 141 Cal. Rptr. 28, 569 P.2d 133]* .

[4] Cross References

For a discussion of joint checks, see California Real Estate Law and Practice, Ch. 451, § 451.20 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsDischarge & PaymentGeneral OverviewContracts LawNegotiable InstrumentsNegotiationIndorsementGeneral OverviewReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.246

§ 361.246 Release of Lien

[1] FORM Release of Lien

The claim of lien recorded by _____ [*name of claimant*] on _____ [*date*], in Book _____, page _____ of Official Records of _____ County, California, is hereby released and discharged. The property affected by the claim of lien is located in _____ County, California, and is described as follows: _____ [*give legal description*].

[*If this release is recorded, add* The name of the person whose interest in the above-described property is hereby relieved from the claim of lien is _____ (*name*).]
Dated: _____.

_____ [*signature of claimant*]

[*Acknowledgment. See § 361.192.*]

[2] Use of Form

The form of release in [1], *above*, may be demanded from a lien claimant by an owner or contractor under the same circumstances as a waiver may be demanded from a claimant after the claimant has recorded his claim of lien. Unlike a waiver, however, a release does not require a recital of the receipt of consideration [*see Civ. Code § 1541*].

For a form of claim of lien, see *§ 361.192*. For a form of partial release, see *§ 361.247*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.247

§ 361.247 Release of Lien--Partial Release

[1] FORM Release of Lien--Partial Release

NOTICE IS HEREBY GIVEN that _____ [*name*], as a mechanics' lien claimant, claiming a lien under a claim of lien recorded on _____ [*date*], in the office of the County Recorder of _____ County, California, in Book _____, page _____ of Official Records against a work of improvement and real property on which the improvement is situated, which property is of the following description: _____ [*give legal description*] has been requested to grant a partial release of the lien claimed, and does hereby release the following portion of the work of improvement and above-described real property from the lien claimed, to wit: _____ [*describe portion of improvement and/or property released*].

[*If this release is to be recorded, add* The name of the person whose interest in the above-described portion of the improvement and real property is hereby being relieved from the claim of lien is _____ (*name*)].
Dated: _____.

_____ [*signature of claimant*]

[*Acknowledgment. See § 361.192.*]

[2] Use of Form

The partial release in [1], *above*, is an alternative form to the release in § 361.246. It is for use in situations where the lien claimant has only released a portion of the property subject to his recorded claim of lien.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.248

§ 361.248 Demurrer [Code Civ. Proc. § 430.10(e)] to Complaint to Foreclose Mechanics' Lien--Failure to Show Substantial Compliance With Requirements Relating to Contents of Claim of Lien [Civ. Code § 3084]

[1] FORM Demurrer [Code Civ. Proc. § 430.10(e)] to Complaint to Foreclose Mechanics' Lien--Failure to Show Substantial Compliance With Requirements Relating to Contents of Claim of Lien [Civ. Code § 3084]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	DEMURRER TO COMPLAINT TO FORECLOSE
_____ [*name*],	)	MECHANICS' LIEN
Defendant.	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Defendant demurs to the complaint herein on the following ground:

The complaint herein does not state facts sufficient to constitute a cause of action in that it fails to contain allegations showing that the plaintiff has substantially complied with requirements of *Civil Code Section 3084* relating to the contents of the claim of lien. Specifically, the complaint fails to show that the claim of lien contains _____ [*describe specific objection, e.g.,* a sufficient description of the property subject to the

mechanics' lien and the name of the owner or reputed owner of this property].

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant

[2] Use of Form

The form in [1], *above*, is a demurrer is for use in a mechaincs' lien foreclosure action when the ground for objection is that the complaint fails to show substantial compliance with *Civ. Code § 3084* relating to the contents of the claim of lien recorded by the plaintiff [*see Clements v. T.R. Bechtel Co. (1954) 43 Cal. 2d 227, 238, 273 P.2d 5]* . This objection is limited to situations where the defect complained of either appears on the face of the complaint or is based on matters of which the court will take judicial notice [*see Evid. Code §§ 451, 452*]. If the defect does not appear either on the face of the complaint or from matters of which the court isrequired to or may take judicial notice, the objection may be raised by answer [*see Code Civ. Proc. § 430.30(b)*].

A notice of hearing on the demurrer and a supporting memorandum must be filed with this demurrer [*Cal. Rules of Ct., Rules 3.1103(c), 3.1113(a), 3.1320(c)*].

For discussion and forms, see Ch. 417, *Points and Authorities* . For a form of claim of lien, see *§ 361.192*. For a form of complaint to foreclose a mechanics' lien, see *§ 361.201*. For more demurrers, see *§§ 361.250 -361.252*.

[3] Cross References

See Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

For memoranda related to this form, see California Points and Authorities, Ch. 152, *Mechanics' Liens* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.249

§ 361.249 Demurrer [Code Civ. Proc. § 430.10(e)] to Complaint to Foreclose Mechanics' Lien--Failure to Allege Substantial Compliance With Requirements Relating to Recording of Claim of Lien [Civ. Code § 3115-3117]

[1] FORM Demurrer [Code Civ. Proc. § 430.10(e)] to Complaint to Foreclose Mechanics' Lien--Failure to Allege Substantial Compliance With Requirements Relating to Recording of Claim of Lien [Civ. Code § 3115-3117]

[*Caption, introduction. See § 361.248.*]

The complaint herein does not state facts sufficient to constitute a cause of action in that it fails to contain allegations showing the plaintiff's substantial compliance with the statutory requirements relating to the recording of the plaintiff's claim of lien. Specifically, _____ [*state facts showing that the plaintiff failed to record his/her claim of lien within the prescribed statutory time periods contained in Civ. Code §§ 3115-3117, e.g.*, the plaintiff alleges that he/she recorded his/her claim of lien on _____ [*date*], which date was more than 30 days after the defendant recorded a notice of completion. Under *Section 3116 of the Civil Code*, the plaintiff had only 30 days to record his/her claim of lien following the date that a notice of completion is recorded and, hence, the claim of lien was not recorded within the prescribed time].

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant

[2] Use of Form

The demurrer in [1], *above*, is for use in a mechanics' lien foreclosure action where the ground for objection is that the complaint fails to show substantial compliance with the statutory requirements relative to the recording of the plaintiff's

claim of lien [*see Civ. Code §§ 3115-3117*; *M. Arthur Gensler, Jr., & Associates, Inc. v. Larry Barrett, Inc. (1972) 7 Cal. 3d 695, 703, 103 Cal. Rptr. 247, 499 P.2d 503]* .

A notice of hearing on the demurrer and a supporting memorandum must be filed with this demurrer [*Cal. Rules of Ct., Rules 3.1103(c), 3.1113(a), 3.1320(c)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

For more forms of demurrer, see *§§ 361.248, 361.250 -361.252*.

[3] Cross References

For memoranda in support of and opposition to this form, see California Points and Authorities, Ch. 152, *Mechanics' Liens* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.250

§ 361.250 Demurrer [Code Civ. Proc. § 430.10(e)] to Complaint to Foreclose Mechanics' Lien--Failure to Allege That Preliminary Notice Was Given [Civ. Code § 3114]

[1] FORM Demurrer [Code Civ. Proc. § 430.10(e)] to Complaint to Foreclose Mechanics' Lien--Failure to Allege That Preliminary Notice Was Given [Civ. Code § 3114]

[*Caption, introduction. See § 361.248* .]

The complaint herein does not state facts sufficient to constitute a cause of action in that it fails to allege that a preliminary 20-day notice (private work) was given by the plaintiff to those persons to whom the plaintiff is required to give such notice under the provisions of *Section 3097(a)* and *(b) of the Civil Code*.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant

[2] Use of Form

The demurrer in [1], *above*, is for use in a mechanics' lien foreclosure action where the ground for objection is that the complaint fails to allege that a preliminary 20-day notice (private work) was given to those persons required to be served preliminary notices by mechanics' lien claimants under *Civ. Code § 3097(a), (b)* [*Borchers Bros. v. Buckeye Incubator Co. (1963) 59 Cal. 2d 234, 236-237, 28 Cal. Rptr. 697, 379 P.2d 1* ; *Windsor Mills v. Richard B. Smith, Inc. (1969) 272 Cal. App. 2d 336, 337-341, 77 Cal. Rptr. 300* (both cases decided under former Code Civ. Proc. § 1193 which required preliminary notices to be given 15 days prior to recording of claim of lien)].

With appropriate modifications, the demurrer may also be used by a defendant in an action to enforce a stop notice claim where the complaint fails to allege that a preliminary 20-day notice (private work) was given when required under *Civ. Code § 3097(a), (b)* [*see Civ. Code § 3160(a)*].

A notice of hearing on the demurrer and a supporting memorandum must be filed with this demurrer [*Cal. Rules of Ct., Rules 3.1103(c), 3.1113(a), 3.1320(c)*]. For discussion and forms, see Ch. 417, *Points and Authorities* . For a form of preliminary 20-day notice, see *§ 361.190*. For a complaint to enforce stop notice, see *§ 361.223*. For more demurrers, see *§§ 361.248 -361.249, 361.251 -361.252*.

[3] Cross References

For memoranda in support of and opposition to this form, see California Points and Authorities, Ch. 152, *Mechanics' Liens* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.251

§ 361.251 Demurrer [Code Civ. Proc. § 430.10(e)] to Complaint to Foreclose Mechanics' Lien--Failure to Allege That Plaintiff Was Duly Licensed [Bus. & Prof. Code § 7031]

[1] FORM Demurrer [Code Civ. Proc. § 430.10(e)] to Complaint to Foreclose Mechanics' Lien--Failure to Allege That Plaintiff Was Duly Licensed [Bus. & Prof. Code § 7031]

[*Caption, introduction. see § 361.248.*]

The complaint herein does not state facts sufficient to constitute a cause of action in that it contains no allegation that the plaintiff, who was allegedly engaged in the business or acting in the capacity of a contractor as stated in the complaint, was a duly licensed contractor at all times during the performance of his contract.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant

[2] Use of Form

The demurrer in [1], *above*, is for use in a mechanics' lien foreclosure action where the ground for objection is that the complaint fails to allege that the plaintiff was a duly licensed contractor at all times during the performance of his/her contract [*see Famous Builders v. Bolin, Inc. (1968) 264 Cal. App. 2d 37, 39-43, 70 Cal. Rptr. 17]* .

With appropriate modifications, the demurrer may also be used by a defendant in an action to enforce a stop notice or an action on a payment bond brought by a plaintiff contractor [*see Lewis & Queen v. N.M. Ball Sons (1957) 48 Cal. 2d 141, 145-148, 308 P.2d 713* (action by contractor to enforce stop notice claim)].

A notice of hearing on the demurrer and a supporting memorandum must be filed with this demurrer [*Cal. Rules of Ct., Rules 3.1103(c), 3.1113(a), 3.1320(c)*]. For discussion and forms, see Ch. 417, *Points and Authorities* . For a form of complaint to enforce stop notice, see *§ 361.223*. For a complaint on payment bond, see *§ 361.231*. For more demurrers, see *§§ 361.248 -361.250, 361.252*.

[3] Cross References

For memoranda in support of and opposition to this form, see California Points and Authorities, Ch. 152, *Mechanics' Liens* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 361 MECHANICS' LIENS
PART V. FORMS
D. Demands, Waivers, Releases, Demurrers, and Affirmative Defenses

32-361 California Forms of Pleading and Practice--Annotated § 361.252

§ 361.252 Demurrer [Code Civ. Proc. § 430.10(e)] to Complaint to Foreclose Mechanics' Lien--Brought by Materialman--Failure of Complaint to Contain Substantial Allegations That Materials Were Furnished to Be Used in, and Were Used in Work of Improvement

[1] FORM Demurrer [Code Civ. Proc. § 430.10(e)] to Complaint to Foreclose Mechanics' Lien--Brought by Materialman--Failure of Complaint to Contain Substantial Allegations That Materials Were Furnished to Be Used in, and Were Used in Work of Improvement

[*Caption, introduction. See § 361.248.*]

Defendant demurs to the complaint herein on the following ground:

The complaint herein does not state facts sufficient to constitute a cause of action in that there are no substantial allegations to the effect that the materials which the plaintiff allegedly furnished to the work of improvement, were actually furnished to be used in and were actually used in the work of improvement in question.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant

[2] Use of Form

The demurrer in [1], *above*, is for use in a mechanics' lien foreclosure action where the ground for objection is that the plaintiff materialman's complaint to foreclose a mechanics' lien for materials furnished to a work of improvement does not state facts sufficient to constitute a cause of action in that it does not contain substantial allegations to the effect that

the materials were furnished to be used in, and that they were actually used in, the work of improvement [*see Ensele v. Jolley (1922) 188 Cal. 297, 300, 204 P. 1085]* .

With appropriate modifications, this demurrer may be used by a defendant in an action to enforce a stop notice claim or an action on any bond which inures to the benefit of any claimant under the mechanics' lien law, since in either of these actions a claimant must show in order to recover that he or she is a person entitled to claim a lien under *Civ. Code §§ 3110-3112* [*see Civ. Code §§ 3158, 3159(a)* (stop notices), *3226* (bonds)].

For a form of complaint to enforce stop notice, see *§ 361.223*. For a complaint on payment bond, see *§ 361.231*. For more demurrers, see *§§ 361.248 -361.251*.

[3] Cross References

For memoranda of points and authorities in support of and opposition to this form, see California Points and Authorities, Ch. 152, *Mechanics' Liens* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.253

§ 361.253 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] in Action to Foreclose Mechanics' Lien--Chattel Installed Is Not Fixture Attached to Realty

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] in Action to Foreclose Mechanics' Lien--Chattel Installed Is Not Fixture Attached to Realty

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

The defendant owner's property against which the plaintiff is asserting a claim of mechanics' lien, as alleged in his complaint, is not subject to this lien because the chattel installed _____ [by the plaintiff *or* in connection with which the plaintiff furnished his materials and performed his labor] is not a fixture attached to the realty. This chattel consists of _____ [*describe chattel, and if appropriate state facts indicating it was not adapted for use with real property*]. Its installation involved _____ [*describe manner of annexation, showing, e.g., lack of physical annexation, relative ease of its removal, and/or that annexation was not open or apparent*]. [*If appropriate, add* The plaintiff and defendant (orally) agreed that the above-described chattel would remain personalty for all purposes, including any claims of mechanics' liens that the plaintiff might be entitled to. (A copy of this agreement is attached hereto, and made a part hereof.) (*Or allege other facts showing the intention of the parties that the chattel would would remain personalty*)].

[2] Use of Form

The affirmative defense in [1], *above*, is for use by a defendant owner in an action to foreclose a mechanics' lien for materials furnished and labor performed in connection with the installation of a chattel either by the plaintiff [*see Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 129-131, 95 Cal. Rptr. 728]* , or by a third party [*see R. Barcroft & Sons Co. v. Cullen (1933) 217 Cal. 708, 708-712, 20 P.2d 665]* . For discussion of the requirement that in order for real property to be subject to a mechanics' lien for labor and materials furnished, the chattel installed must be a fixture attached to the realty, see *§ 361.25[3]*. For other forms of affirmative defenses, see *§§ 361.254 -361.258*.

[3] Cross References

For memoranda of points and authorities related to this form, see California Points and Authorities, Ch. 152, *Mechanics' Liens* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawFixtures & ImprovementsFixture CharacteristicsReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.254

§ 361.254 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] in Action to Foreclose Mechanics' Lien--Labor Performed Did Not Result in Permanent Improvement to Realty

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] in Action to Foreclose Mechanics' Lien--Labor Performed Did Not Result in Permanent Improvement to Realty

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

The defendant owner's property against which the plaintiff is asserting a claim of mechanics' lien, as alleged in his complaint, is not subject to this lien because the labor performed by the plaintiff did not result in a permanent improvement to the property. The labor performed by the plaintiff consisted of _____ [*describe*]. No portion of this work consisted of a permanent improvement to the defendant's property, since _____ [*described impermanence of improvement, e.g.,* the plaintiff only performed labor which contributed to the maintenance of the improvement alleged in his complaint and was not labor necessary for the establishment of the permanence of the improvement].

[2] Use of Form

The affirmative defense in [1], *above*, is for use by a defendant owner in his answer to a complaint to foreclose a mechanics' lien for labor performed on a work of improvement where the labor did not result in a permanent improvement to the realty [*see Ogden v. Byington (1926) 198 Cal. 151, 157, 244 P. 332* ; *Howard A. Deason & Co. v. Costa Tierra, Ltd. (1969) 2 Cal. App. 3d 742, 753, 83 Cal. Rptr. 105]* . For discussion of the requirement that in order for real property to be subject to a mechanics' lien for labor performed, the labor must have resulted in a permanent improvement to the realty, see *§ 361.25[4]*. For other forms of affirmative defenses, see *§§ 361.253, 361.255 -361.258*.

[3] Cross References

For memoranda of points and authorities related to this form, see California Points and Authorities, Ch. 152, *Mechanics' Liens* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.255

§ 361.255 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Waiver of Mechanics' Lien--By Written Contract

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Waiver of Mechanics' Lien--By Written Contract

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that

On or about _____ [*date*], defendant _____ [*name of owner*] caused to be drawn on construction funds under its control a check in the sum of $_____, made payable to the plaintiff _____ [*name*], in consideration whereof plaintiff executed and delivered to defendant a written waiver of plaintiff's statutory mechanics' lien rights against the real property in question [*or allege other facts giving rise to a written waiver of plaintiff's mechanics' lien rights*].

[2] Source of Form

The facts on which the affirmative defense in [1], *above*, is based were adapted from *Ferry v. Ohio Farmers Ins. Co. (1963) 211 Cal. App. 2d 651, 653, 27 Cal. Rptr. 471* .

[3] Use of Form

The affirmative defense in [1], *above*, is for use in an answer to a complaint for foreclosure of the defendant's property in situations in which the plaintiff has waived in writing his lien rights.

For a form of affirmative defense when the labor performed did not result in a permanent improvement, see *§ 361.254*. For more affirmative defenses, see *§§ 361.253, 361.256 -361.258*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.256

§ 361.256 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Recordation of Notice of Nonresponsibility by Owner [Civ. Code §§ 3097, 3129]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Recordation of Notice of Nonresponsibility by Owner [Civ. Code §§ 3097, 3129]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that

1. On or about _____ [*date*], this defendant first obtained knowledge of the work of improvement alleged in plaintiff's complaint which was being _____ [constructed *or* performed] on the real property in which defendant _____ [has *or* claims] _____ [*describe interest or estate*]. Defendant did not by lease or contract or any other kind of agreement cause this work of improvement to be _____ [constructed *or* performed].

2. In accordance with the requirements set forth in *Section 3094 of the Civil Code*, within 10 days of the date on which defendant first obtained knowledge, defendant recorded a notice of nonresponsibility in Book _____, page _____, of the Official Records of _____County, California, in which defendant, in part, stated that he/she would not be responsible for any claims arising from the work of improvement. Within the same 10-day period, defendant posted this notice of nonresponsibility in a conspicuous place on the construction site as follows: _____ [*describe place of posting*]. Plaintiff thereby had actual or constructive knowledge of the fact that defendant was not responsible for any claims that may arise out of the work of improvement being _____ [constructed *or* performed].

[2] Use of Form

The affirmative defense in [1], *above*, is for use in an answer to a complaint for foreclosure of owner's property in situations in which the owner had or claims an interest or an estate in real property on which a work of improvement is being constructed or performed and who has not caused the work of improvement to be constructed or performed [*see*

Civ. Code §§ 3094, 3129].

For a form of notice of nonresponsibility, see *§ 361.199*. For complaints to foreclose mechanics' lien, see *§§ 361.201 -361.202*. For an allegation on noncontracting owner-lessor's responsibility for work of improvement constructed by lessee, see *§ 361.204*. For other affirmative defenses, see *§§ 361.253 -361.255*, *361.257*, *361.258*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensMechanics' Liens

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32-361 California Forms of Pleading and Practice--Annotated § 361.257

§ 361.257 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Senior Lien of Trust Deed Holder [Civ. Code § 1214]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Senior Lien of Trust Deed Holder [Civ. Code § 1214]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that

1. On or about _____ [*date*], defendant _____ [*name of owner*], for valuable consideration made, executed, and delivered to this defendant a written promissory note for the sum of $_____, plus interest. A copy of this note is attached hereto, marked Exhibit _____ and made a part hereof.

2. To secure payment of the principal sum and interest as provided in the promissory note and as part of the same transaction, defendant _____ [*name of owner*] executed and delivered for a valuable consideration to this defendant, as beneficiary, a deed of trust dated _____ [*date*], by the terms of which deed of trust defendant _____ [*name*], as trustor, conveyed to _____ [*name*], as trustee, the real property described in plaintiff's complaint.

3. On _____ [*date*], the deed of trust was duly acknowledged, so as to entitle it to be recorded, and on _____ [*date*], was duly recorded in Book _____, page _____, of the Official Records in the office of the county recorder of _____ County, California. A copy of the deed of trust is attached hereto, marked Exhibit _____ and made a part hereof.

4. This defendant's deed of trust attached to the real property prior to _____ [*date*], the date of the commencement of _____ [construction *or* performance] of the work of improvement on which plaintiff claims a mechanics' lien for labor and materials furnished to the work of improvement, and is prior and senior

to any mechanics' lien that the plaintiff may be adjudged to have on the real property.

[2] Use of Form

The affirmative defense in [1], *above*, is for use in an answer to a complaint to foreclose a mechanics' lien if the defendant holder of a deed of trust or mortgage has recorded his deed of trust or mortgage before the commencement of the work of improvement on which a mechanics' lien is being claimed [*see Civ. Code § 3134*].

For an allegation when the notice of completion was ineffective to shorten the time period required for recording the claim of lien, see *§ 361.205*. For other affirmative defenses, see *§§ 361.253 -361.256, 361.258*.

[3] Cross References

For memoranda of points and authorities related to this form, see California Points and Authorities, Ch. 152, *Mechanics' Liens* (Matthew Bender)

California Real Estate Law & Practice, Ch. 451, Mechanics' Liens, §§ 451.50 -451.53 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensReal Property LawConstruction LawContractors & SubcontractorsReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawNonmortgage LiensLien PrioritiesReal Property LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingGeneral Overview

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32-361 California Forms of Pleading and Practice--Annotated § 361.258

§ 361.258 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] in Action to Foreclose Mechanics' Lien--Execution by Original Contractor of Bond Releasing Property From Claim of Mechanics' Lien [Civ. Code § 3143]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] in Action to Foreclose Mechanics' Lien--Execution by Original Contractor of Bond Releasing Property From Claim of Mechanics' Lien [Civ. Code § 3143]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. Prior to _____ [*date*], the defendant herein entered into a written contract with defendant _____ [*name*], the original contractor, for the work of improvement as alleged in plaintiff's complaint. The latter agreed to construct the work of improvement and to keep the real property free from liens. Following the recording of the plaintiff's claim of lien on _____ [*date*], defendant _____ [*name of original contractor*] disputed the correctness and validity of the plaintiff's claim and lien, and in compliance with *Section 3143 of the Civil Code*, caused to be executed, delivered, and recorded in the county recorder's office of _____ County where the real property is located, a surety bond in the principal sum of $_____ dated _____, executed by the defendant _____ [*name of original contractor*], as principal, and the _____ [*name of surety company*], as surety. [A copy of this bond is attached hereto, marked Exhibit _____, and made a part hereof.]

2. By reason of the execution, delivery, and recording of this bond, the real property, described in the bond, in the plaintiff's complaint, as well as in the plaintiff's claim of lien, is freed from the effect of such claim of lien and any action brought to foreclose such lien, including the pending action.

[2] Use of Form

The affirmative defense in [1], *above*, is for use by a defendant owner in his answer to a complaint to foreclose a

mechanics' lien where the original contractor, pursuant to his obligation contained in the original contract, has had executed and recorded as prescribed in *Civ. Code § 3143* a bond releasing the property from the claim of mechanics' lien and from any action brought to foreclose such lien [*see Civ. Code § 3143*; *Frank Curran Lbr. Co. v. Eleven Co. (1969) 271 Cal. App. 2d 175, 179-182, 76 Cal. Rptr. 753]* .

With appropriate modifications, the affirmative defense in [1], *above*, may be used in an action to enforce a stop notice or bonded stop notice where the original contractor has disputed the correctness or validity of the stop notice or bonded stop notice and has had executed a bond releasing thefunds required to be withheld to respond to the stop notice or bonded stop notice [*see Civ. Code § 3171*].

For a form of complaint to enforce a stop notice, see *§ 361.223*. For other affirmative defenses, see *§§ 361.253 -361.257*.

[3] Bond Releasing Property Subject to Lien

If the owner of property, or the owner of any interest therein, sought to be charged with a claim of lien, or any original contractor or subcontractor disputes the correctness or validity of any claim of lien, he or she may record in the office of the county recorder in which such claim of lien was recorded, either before or after the commencement of an action to enforce such claim of lien, a bond executed by a corporation authorized to issue surety bonds in the State of California, in a penal sum equal to one and one-half times the amount of the claim or one and one-half times the amount allocated in the claim of lien to the parcel or parcels of real property sought to be released. This bond must be conditioned for payment of any sum which the claimant may recover on the claim together with his costs of suit in the action, if the claimant recovers therein. On the recording of such bond the real property is released from the lien and from any action brought to foreclose such lien. The principal on such bond may be either the owner of the property or the owner of any interest therein, or any original contractor, subcontractor, or sub-subcontractor affected by such claim of lien [*Civ. Code § 3143*].

[4] Bonds Releasing Funds Subject to Stop Notice

If the owner, construction lender or any original contractor or subcontractor disputes the correctness or validity of any stop notice or bonded stop notice, he or she may file with the person on whom such notice was served a bond executed by good and sufficient sureties in a penal sum equal to one and one-quarter times the amount stated in such notice. The bond must be conditioned for payment of any sum not exceeding the penal obligation of the bond which the claimant may recover on the claim, together with his costs of suit in the action, if the claimant recovers therein. On the filing of such bond, the funds withheld to respond to the stop notice or bonded stop notice must be forthwith released [*Civ. Code § 3171*].

[5] Cross References

For a form of memorandum of points and authorities in support of a motion for summary judgment on the grounds that a release bond was executed, see California Points and Authorities, Ch. 152, *Mechanics' Liens* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensGeneral Overview

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§ 362.syn Synopsis to Chapter 362: MENTAL SUFFERING AND EMOTIONAL DISTRESS

§ 362.01 Scope of Chapter

§ 362.02 Cross References

§§ 362.03through 362.09 [Reserved]

§ 362.10 Intentional Infliction of Emotional Distress

[1] In General

[2] Elements of Tort

[3] Outrageous Conduct

[a] Reasonable Bounds of Decency

[b] Relationship Between Parties

[c] Special Susceptibility

[d] Words Alone

[4] Intentional or Reckless Conduct

[5] Severe Emotional Distress

[6] Distress Without Physical Injury

[a] In General

[b] Resultant Physical Injury

[7] Proximate Cause

[8] Privilege

[9] Accrual of Cause of Action

[10] Punitive Damages

§ 362.11 Negligent Infliction of Emotional Distress

[1] In General

[2] Physical Impact or Injury Not Required

[3] Fear for Personal Well-Being

[a] In General

[b] Fear of Cancer

[c] Fear of Other Diseases

[4] Negligent Handling of Human Remains

[5] Professional Negligence

[6] Injuries to Third Persons

[a] Bystander and Direct-Victim Theories of Recovery

[b] Liability to Physically Injured Person Required

[c] Recovery by Percipient Witnesses

[i] In General

[ii] Close Relationship

[iii] Presence at Injury-Producing Event

[iv] Contemporaneous Awareness of Injury

[v] Special Susceptibility

[d] Recovery by Direct Victims

[i] Rule of Molien v. Kaiser Foundation Hospitals

[ii] Limitations on Duty and Foreseeability

[iii] Duty to Third Persons in Professional Negligence Cases

[iv] Duty to Third Persons Arising From Other Relationships

[7] Defense of Privilege

§ 362.12 Defenses to Intentional and Negligent Infliction of Emotional Distress

[1] Freedom of Religion

[2] Preemption Under Workers' Compensation Law

[3] Preemption Under Federal Labor Law

[4] Preemption Under Airline Deregulation Act

§ 362.13 Mental Suffering in Other Causes of Action

[1] In General

[2] Injury to Property Interest or Financial Injury

[3] Breach of Contract

[4] Defamation

[5] Products Liability

[6] Fraud or Deceit

[7] Breach of Statutory Duty

[8] Other Actions

[9] Pain and Suffering

[a] Unitary Concept

[b] Proof

[c] Amount

[d] Per Diem Measurement

[10] Particular Situations

§§ 362.14-362.29 [Reserved]

§ 362.30 California Points and Authorities

§ 362.31 State Statutes

[1] Damages

[2] Persons Liable

[3] Pleading

[4] Statute of Limitations

§ 362.32 Decisions

[1] Damages

[a] In General

[b] Emotions Included

[c] Mental Distress in Other Causes of Action

[d] Pain and Suffering

[e] Special Susceptibility

[f] Specific Situations

[g] Substantial Damages Test

[2] Intentional Infliction of Mental Distress

[a] In General

[b] Accrual of Cause of Action

[c] Causation

[d] Cause of Action Precluded by Other Remedy

[e] Federal Preemption

[f] Intent

[g] Outrageous Conduct

[h] Physical Injury

[i] Pleading

[j] Privilege

[k] Special Relationship

[l] Words Alone

[3] Negligent Infliction of Mental Distress

[a] In General

[b] Duty Owed Directly to Plaintiff

[c] Injury to Third Party

[d] Physical Injury

[e] Risk and Foreseeability

[4] Seduction

§ 362.33 Law Reviews

§ 362.34 Text References

§§ 362.35through 362.49 [Reserved]

§ 362.50 Plaintiff's Checklist

[1] Facts to Be Ascertained

[2] Documents to Be Obtained

[3] Additional Counts and Other Causes of Action

[4] Essential Allegations of Complaint

§ 362.51 Defendant's Checklist

§§ 362.52-362.69 [Reserved]

§ 362.70 Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12; Cal. Judicial Council Form PLD-PI-001(3)]--Allegation of Intentional Infliction of Emotional Distress

[1] FORM

[2] Use of Form

[3] Judicial Council Trial Court Forms

[4] Filling Out Intentional Tort Attachment

[a] Title of Case and Description of Paper

[b] Separate Cause of Action Form

[c] Allegations

[d] Facts Specifically Pleaded

[5] Exemplary Damages Attachment

§ 362.71 Complaint for Compensatory [Civ. Code § 3333] and Exemplary and Punitive [Civ. Code § 3294] Damages for Intentional Infliction of Emotional Distress--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Venue

[5] Specification of Damages

[6] Verification

[7] Pleading

[8] Cross References

[9] State Statutes

[10] Text References

§ 362.72 Complaint for Compensatory [Civ. Code § 3333] and Exemplary and Punitive [Civ. Code § 3294] Damages for Intentional Infliction of Emotional Distress--By Woman--Shock and Miscarriage Resulting From Menacing Conduct

[1] FORM

[2] Use of Form

[3] Cross References

§ 362.73 Complaint for Compensatory [Civ. Code § 3333] and Exemplary and Punitive [Civ. Code § 3294] Damages for Intentional Infliction of Emotional Distress--By Tenant Against Landlord Based on Unlawful Ejectment

[1] FORM

[2] Use of Form

[3] Cross References

[4] Text References

§ 362.74 Complaint for Compensatory [Civ. Code § 3333] and Exemplary and Punitive [Civ. Code § 3294] Damages for Intentional Infliction of Emotional Distress--By Customer Against Retailer--False Accusations of Nonpayment of Debt

[1] FORM

[2] Use of Form

[3] Text References

[4] Cross References

§ 362.75 Complaint for Damages [Civ. Code § 3333] for Negligently Caused Emotional Distress--Breach of Primary Duty Owed Directly to Plaintiff--Skeletal Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Specification of Damages

[5] Cross References

§ 362.76 Complaint for Damages [Civ. Code § 3333] for Negligently Caused Emotional Distress--By Patient Against Private Hospital--Delivery of Wrong Baby to Mother

[1] FORM

[2] Use of Form

[3] Allegations

[4] Physical Injury

[5] Cross References

[6] Text References

§ 362.77 Complaint for Damages for Wrongful Death [Code Civ. Proc. § 377.60] and for Negligently Caused Emotional Trauma [Civ. Code § 3333] From Witnessing Injury to Relative

[1] FORM

[2] Use of Form

[3] Cross References

[4] Text References

§ 362.78 Affirmative Defense--Privilege--Assertion of Legal Right

[1] FORM

[2] Use of Form

[3] Cross References

§ 362.79 Affirmative Defense--Privilege--Statement Made in Official Proceeding

[1] FORM

[2] Use of Form

[3] Cross References

California Forms of Pleading and Practice--Annotated

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 362 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART I. SCOPE

32-362 California Forms of Pleading and Practice--Annotated § 362.01

§ 362.01 Scope of Chapter

This chapter discusses and contains forms relating to mental suffering and emotional distress in the context of actions for intentional infliction of emotional distress and also as an aspect of damages in other causes of action, including negligence actions in which the only damages alleged are for emotional distress. Included are a Judicial Council intentional tort allegation form [*see § 362.70*], and forms of complaints for damages for the intentional infliction of emotional distress [*see §§ 362.71 -362.74*], complaints for damages for the negligent infliction of emotional distress [*see §§ 362.75 -362.77*], and affirmative defenses based on privilege [*see §§ 362.78, 362.79*].

For forms alleging general damages for pain and suffering arising from other tort causes of action, see Ch. 177, *Damages* . For discussion and forms regarding preemption by the exclusive-remedy principle of workers' compensation law of actions for intentional and negligent infliction of emotional distress against an employer, see Ch. 577, *Workers' Compensation* . For discussion and for forms relating to orders prohibiting harassment, see Ch. 293, *Harassment and Domestic Violence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsNegligenceActionsNegligent Infliction of Emotional DistressGeneral Overview

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Chapter 362 MENTAL SUFFERING AND EMOTIONAL DISTRESS
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32-362 California Forms of Pleading and Practice--Annotated § 362.02

§ 362.02 Cross References

For a form of complaint for use in an action for damages for negligent infliction of mental distress resulting from an airline's leading a passenger to believe that a plane is going to crash, see Ch. 16, *Airplanes and Airports* .

For a form of complaint for use in an action for damages for intentional infliction of mental distress by a wife whose husband was assaulted in her presence, see Ch. 58, *Assault and Battery* .

For a form of allegation of mental suffering caused by incivility of a conductor to a passenger, see Ch. 109, *Carriers* .

For forms for use in the recovery of damages in contract and tort actions, see Ch. 177, *Damages* .

For forms of complaints alleging mental anguish caused by negligent embalming and mutilation of dead bodies, see Ch. 180, *Dead Bodies and Cemeteries* .

For forms for use to restrain harassment and domestic violence, see Ch. 293, *Harassment and Domestic Violence* .

For a discussion of suicide as a result of infliction of mental distress, see Ch. 304, *Insane and Other Incompetent Persons* .

For forms of complaints against insurance companies seeking damages for mental suffering, see Ch. 308, *Insurance* .

For forms for use in actions based on negligence, see Ch. 380, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsNegligenceActionsNegligent Infliction of Emotional DistressGeneral Overview

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Chapter 362 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART I. SCOPE

32-362 California Forms of Pleading and Practice--Annotated §§ 362.03through 362.09

[Reserved]

§§ 362.03[Reserved]

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Chapter 362 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART II. LEGAL BACKGROUND

32-362 California Forms of Pleading and Practice--Annotated § 362.10

§ 362.10 Intentional Infliction of Emotional Distress

[1] In General

The intentional infliction of severe mental or emotional distress by willful and outrageous conduct, in the absence of privilege, constitutes an actionable tort for which the victim may recover damages [*State Rubbish Collectors Ass'n v. Siliznoff (1952) 38 Cal. 2d 330, 336-339, 240 P.2d 282* ; *Spackman v. Good (1966) 245 Cal. App. 2d 518, 528-529, 54 Cal. Rptr. 78]* .

Conduct that constitutes the tort of intentional infliction of emotional distress is often actionable under another theory of liability [*see, e.g.,* *Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 913-926, 162 Cal. Rptr. 194* (same conduct constituted breach of contract, nuisance, negligence, constructive eviction, and intentional infliction of emotional distress)]. A plaintiff, however, may recover only one measure of damages for emotional distress arising from particular conduct. If one recovers general damages for emotional distress pursuant to another tort cause of action (*see § 362.13*), he or she cannot also recover for the same damages under a theory of intentional infliction of emotional distress. Thus, one cannot recover for emotional distress caused by negligent conduct (*see § 362.11*) and also recover for the same distress a second time under the theory that it was intentionally caused [*see* *Holliday v. Jones (1989) 215 Cal. App. 3d 102, 121, 264 Cal. Rptr. 448]* . A properly pleaded cause of action for intentional infliction of emotional distress, however, will support a claim for punitive damages [*see, e.g.,* *Agarwal v. Johnson (1979) 25 Cal. 3d 932, 947, 160 Cal. Rptr. 141, 603 P.2d 58]* , which might not be recoverable under other causes of action such as negligence or breach of contract. Punitive damages issues are discussed under *§ 362.10[10]*.

[2] Elements of Tort

The elements of a prima facie case of intentional infliction of emotional distress are the following:

- Outrageous conduct by the defendant;

- The defendant's intention of causing, or reckless disregard of the probability of causing, emotional distress;

- The plaintiff's suffering severe or extreme emotional distress; and

- Actual and proximate causation of the emotional distress by the defendant's outrageous conduct [*Hernandez v. General Adjustment Bureau (1988) 199 Cal. App. 3d 999, 1007, 245 Cal. Rptr. 288* ; *Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 394, 89 Cal. Rptr. 78* ; *see Davidson v. City of Westminster (1982) 32 Cal.3d 197, 209, 185 Cal. Rptr. 252, 649 P.2d 894* ; *Agarwal v. Johnson (1979) 25 Cal. 3d 932, 946, 160 Cal. Rptr. 141, 603 P.2d 58* ; *Cervantez v. J. C. Penney Co. (1979) 24 Cal. 3d 579, 593, 156 Cal. Rptr. 198, 595 P.2d 975]* .

In addition, the conduct must be directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 903, 2 Cal. Rptr. 2d 79, 820 P.2d 181* ; *see § 362.10[4]*]. It is not sufficient that the defendant had to have realized that its misconduct was almost certain to cause severe emotional distress to any person who might foreseeably be affected by the misconduct; the defendant must have been aware of the particular plaintiffs [*see Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 1001-1003, 25 Cal. Rptr. 2d 550, 863 P.2d 795* (intentional infliction of emotional distress cause of action remanded because findings of trial court were ambiguous regarding defendant's awareness of particular plaintiffs)].

Whether treated as an element of the prima facie case or as a matter of defense, it must also appear that the defendant's conduct was unprivileged [*Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 394, 89 Cal. Rptr. 78* ; *see Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 209, 185 Cal. Rptr. 252, 649 P.2d 894* ; *Cervantez v. J.C. Penney Co. (1979) 24 Cal. 3d 579, 593, 156 Cal. Rptr. 198, 595 P.2d 975* ; *see also § 362.32[2][j]*].

The requirement that, to warrant recovery for mental distress, the conduct must be outrageous or that the mental distress must be severe is intended to apply only to the independent tort of intentional infliction of emotional distress. To be distinguished are those cases in which emotional distress may be an element of damages when other interests have been invaded, and tort liability has arisen apart from the emotional distress. The more exacting requirements of outrageousness and severity are applied to the independent tort (that is, intentional infliction of emotional distress) because of the fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up any satisfactory boundaries to liability [*Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 579-580, 108 Cal. Rptr. 480, 510 P.2d 1032]* .

[3] Outrageous Conduct

[a] Reasonable Bounds of Decency

Liability for intentional infliction of emotional distress exists only if the defendant's conduct has been so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community [*Trerice v. Blue Cross of Cal. (1989) 209 Cal. App. 3d 878, 883, 257 Cal. Rptr. 338* ; *see Agarwal v. Johnson (1979) 25 Cal. 3d 932, 946, 160 Cal. Rptr. 141, 603 P.2d 58* ; *Kraslawsky v. Upper Deck Co. (1997) 56 Cal. App. 4th 179, 182,194, 65 Cal. Rptr. 2d 297* (employer's request, that employee take urinalysis test that employee admitted was not overly intrusive, was not conduct that went beyond all bounds of decency)]. Behavior may be considered outrageous if a defendant: (1) abuses a relation or position that gives him or her power to damage the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress [*Agarwal v. Johnson (1979) 25 Cal. 3d 932, 946, 160 Cal. Rptr. 141, 603 P.2d 58* ; *Robinson v. Hewlett-Packard Corp. (1986) 183 Cal. App. 3d 1108, 1130, 228 Cal. Rptr. 591]* .

Whether any particular conduct is sufficiently outrageous to constitute the element of the tort is a mixed question of law and fact. It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous that recovery is permissible [*Tollefson v. Roman Catholic Bishop (1990) 219*

Cal. App. 3d 843, 858, 268 Cal. Rptr. 550] . If reasonable persons might differ, it is for the jury to determine whether the conduct was, in fact, outrageous [*Alcorn v. Anbro Eng'g, Inc. (1970) 2 Cal. 3d 493, 499, 86 Cal. Rptr. 88, 468 P.2d 216* ; *see Cross v. Bonded Adjustment Bureau (1996) 48 Cal. App. 4th 266, 284, 55 Cal. Rptr. 2d 801]* .

[b] Relationship Between Parties

The relationship between the parties is significant in determining whether liability should be imposed [*Alcorn v. Anbro Eng'g, Inc. (1970) 2 Cal. 3d 493, 498, 86 Cal. Rptr. 88, 468 P.2d 216]* . The extreme and outrageous character of the conduct may arise from the actor's abuse of a position or a relation that gives him or her actual or apparent authority over the other or power to affect his or her interests. Police officers, school authorities, collecting creditors [*Cross v. Bonded Adjustment Bureau (1996) 48 Cal. App. 4th 266, 276, 55 Cal. Rptr. 2d 801* ; *Golden v. Dungan (1971) 20 Cal. App. 3d 295, 303 n.5, 97 Cal. Rptr. 577]* , insurers [*Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 403, 89 Cal. Rptr. 78]* , hospitals [*Bundren v. Superior Court (1983) 145 Cal. App. 3d 784, 791-792, 193 Cal. Rptr. 671]* , attorneys [*McDaniel v. Gile (1991) 230 Cal. App. 3d 363, 372-375, 281 Cal. Rptr. 242]* , and landlords [*Aweeka v. Bonds (1971) 20 Cal. App. 3d 278, 281-282, 97 Cal. Rptr. 650]* have been liable for extreme abuse of their positions.

Such a relationship might exist if the immediate actor proceeds under color of process issued in a lawsuit [*see Golden v. Dungan (1971) 20 Cal. App. 3d 295, 303-305, 97 Cal. Rptr. 577]* . The necessary relationship may also arise between a religious organization and those persons whose lives it was promising to make more meaningful [*Molko v. Holy Spirit Ass'n (1988) 46 Cal. 3d 1092, 1122-1123, 252 Cal. Rptr. 122, 762 P.2d 46]* . The special obligation of public utilities and other enterprises affected with the public interest has been noted as significant in the imposition of liability on such defendants, even in the absence of outrageous conduct, apparently on a policy basis of encouraging fair treatment of the public whom the enterprises serve [*Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 403, 89 Cal. Rptr. 78]* .

An employee is entitled to a greater degree of protection from insult and outrage from an employer than if he or she were a stranger [*Alcorn v. Anbro Eng'g, Inc. (1970) 2 Cal. 3d 493, 498, 86 Cal. Rptr. 88, 468 P.2d 216* ; *Robinson v. Hewlett-Packard Corp. (1986) 183 Cal. App. 3d 1108, 1130, 228 Cal. Rptr. 591* ; *see Prevost v. First W. Bank (1987) 193 Cal. App. 3d 1492, 1503, 239 Cal. Rptr. 161]* . However, the particular conduct alleged to be outrageous must be in the context of an abuse of position as a superior in the workplace [*Yurick v. Superior Court (1989) 209 Cal. App. 3d 1116, 1129, 257 Cal. Rptr. 665]* . Further, the exclusive-remedy principle of workers' compensation law bars actions for intentional infliction of emotional distress by an employee against his or her employer in most cases [*see Cole v. Fair Oaks Fire Prot. Dist. (1987) 43 Cal. 3d 148, 159-161, 233 Cal. Rptr. 308, 729 P.2d 743* , discussed in *§ 362.12[2]*].

Although the relationship between insured and insurer may involve outrageous abuse, the insurer's failure to accept an offer of settlement or the violation of statutory duties under *Ins. Code § 790.03* does not, in itself, constitute the type of outrageous conduct that will support a cause of action for intentional infliction of emotional distress [*Lee v. Travelers Cos. (1988) 205 Cal. App. 3d 691, 694-695, 252 Cal. Rptr. 468]* . The plaintiff must allege specific acts of the insurer that are so extreme that they exceed all bounds of what is usually tolerated in a civilized society [*Schlauch v. Hartford Accident & Indem. Co. (1983) 146 Cal. App. 3d 926, 936, 194 Cal. Rptr. 658]* . In one case, for example, while a health insurance company may have been within its rights to seek rescission of a policy based on alleged misrepresentations in the policy application, the insurance company acted in an outrageous manner if it obtained the knowledge necessary to justify rescission but waited until after the insured had suffered a serious injury requiring substantial medical treatment before seeking to rescind [*Hailey v. California Physicians' Service (2007) 158 Cal. App. 4th 452, 475-476, 69 Cal. Rptr. 3d 789*].

[c] Special Susceptibility

A defendant's awareness of the plaintiff's susceptibility to emotional distress is a significant factor in determining

liability [*Alcorn v. Anbro Eng'g, Inc. (1970) 2 Cal. 3d 493, 498, 86 Cal. Rptr. 88, 468 P.2d 216]* . Thus, the extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity [*Golden v. Dungan (1971) 20 Cal. App. 3d 295, 303 n.6, 97 Cal. Rptr. 577* (dictum)]. For example, a minority group member may be particularly susceptible to emotional distress from discriminatory conduct or racial slurs [*see Alcorn v. Anbro Eng'g, Inc. (1970) 2 Cal. 3d 493, 498, 86 Cal. Rptr. 88, 468 P.2d 216* ; *Robinson v. Hewlett-Packard Corp. (1986) 183 Cal. App. 3d 1108, 1128-1130, 228 Cal. Rptr. 591]* . However, even if the other is particularly susceptible, the mere fact that the actor knows that the other will regard the conduct as insulting or will have his or her feelings hurt is not enough. Major outrage is essential to the tort [*Golden v. Dungan (1971) 20 Cal. App. 3d 295, 303 n.6, 97 Cal. Rptr. 577* (dictum)].

Although a pet owner may be emotionally involved in the pet's health and especially susceptible to emotional distress should the pet die, a veterinarian's medical care is directed solely at the pet and malpractice by a veterinarian will not support recovery by the pet owner for intentional infliction of emotional distress [*McMahon v. Craig (2009) 176 Cal. App. 4th 1502, 1516-1517, -- Cal. Rptr. 3d* --]. In addition, efforts on the part of the veterinarian to cover up the fact that the death of the pet may have been caused by malpractice will not be considered outrageous enough to support a cause of action for intentional infliction of emotional distress, at least when the fact that the pet has died while undergoing treatment is not concealed from the pet owner [*McMahon v. Craig (2009) 176 Cal. App. 4th 1502, 1517, -- Cal. Rptr. 3d* --].

[d] Words Alone

There is no remedy in the form of tort damages for all intended mental disturbance, and a plaintiff may not recover merely because of hurt feelings. Ordinarily, one is not liable for profanity, obscenity, or abuse, without circumstances of aggravation, or for insult, indignity, or threats that are considered to amount to nothing more than mere annoyance, because such conduct is not sufficiently "outrageous" [*Yurick v. Superior Court (1989) 209 Cal. App. 3d 1116, 1128-1129, 257 Cal. Rptr. 665]* . However, the existence of aggravating circumstances can make the use of language sufficiently outrageous to support a cause of action [*Alcorn v. Anbro Eng'g, Inc. (1970) 2 Cal. 3d 493, 499, 86 Cal. Rptr. 88, 468 P.2d 216]* . And if mere words, oral or written, result in physical injury to another, they are actionable under the tort of intentional infliction of emotional distress as long as the act is intentional and unreasonable and the actor should recognize it as likely to result in illness [*Golden v. Dungan (1971) 20 Cal. App. 3d 295, 305, 97 Cal. Rptr. 577* ; *Bowden v. Spiegel, Inc. (1950) 96 Cal. App. 2d 793, 794-795, 216 P.2d 571]* . However, if the actor was required by law to transmit a message, the actor's conduct is not unreasonable [*Mason v. Western Union Tel. Co. (1975) 52 Cal. App. 3d 429, 440, 125 Cal. Rptr. 53]* .

[4] Intentional or Reckless Conduct

Liability attaches only if the actor intentionally or recklessly causes severe emotional distress to another [*Spackman v. Good (1966) 245 Cal. App. 2d 518, 530, 54 Cal. Rptr. 78* ; *Taylor v. Vallelunga (1959) 171 Cal. App. 2d 107, 109, 339 P.2d 910]* . An actor's conduct is reckless if he or she knows that severe emotional distress is certain, or substantially certain, to result [*Golden v. Dungan (1971) 20 Cal. App. 3d 295, 311, 97 Cal. Rptr. 577]* . In other words, if the conduct was not undertaken for the purpose of causing the resulting harm, proof of the intent of the actor to cause such harm may be supplied by proof of circumstances showing that the conduct was of a nature that reasonably should have been recognized as likely to cause the harm sustained [*Spackman v. Good (1966) 245 Cal. App. 2d 518, 530, 54 Cal. Rptr. 78]* .

To justify recovery, the egregious conduct must be directed toward the plaintiff. The only exception to this rule is if the defendant is aware of, but acts with reckless disregard of, the plaintiff and the probability that the conduct will cause severe emotional distress to that plaintiff. If reckless disregard is the basis of recovery, the plaintiff is usually present at the time of the conduct, and the defendant knows the plaintiff is present. The presence of the plaintiff at the time of the outrageous conduct is the element that establishes a higher degree of culpability, which, in turn, justifies recovery of

greater damages by a broader group of plaintiffs than is allowed on a negligent infliction of emotional distress theory [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 905-906, 2 Cal. Rptr. 2d 79, 820 P.2d 181* (relying on Restatement (Second) of Torts § 868, cmt. g)].

[5] Severe Emotional Distress

The emotional distress required for liability for intentional infliction of emotional distress must in fact exist, and it must be severe. The intensity and duration of the distress are factors to be considered in determining its severity. Severe means, therefore, substantial or enduring as distinguished from trivial or transitory. Severe emotional distress denotes emotional distress of such substantial quantity or enduring quality that no reasonable person in a civilized society should be expected to endure it. It is for the court to determine whether on the evidence severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has in fact existed [*Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 397, 89 Cal. Rptr. 78* ; *see also Schild v. Rubin (1991) 232 Cal. App. 3d 755, 762-763, 283 Cal. Rptr. 533* ("severe emotional distress" means highly unpleasant mental suffering or anguish from socially unacceptable conduct that entails such intense, enduring, and nontrivial emotional distress that no reasonable person in a civilized society should be expected to endure it)]. Emotional distress includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea [*Golden v. Dungan (1971) 20 Cal. App. 3d 295, 311, 97 Cal. Rptr. 577* ; *Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 397, 89 Cal. Rptr. 78]* .

[6] Distress Without Physical Injury

[a] In General

One who has been wrongfully and intentionally subjected to embarrassment, humiliation, fear, or other forms of mental anguish may recover compensatory damages even though he or she has suffered no physical injury, and the right to compensation exists even though no monetary loss has been sustained [*Grimes v. Carter (1966) 241 Cal. App. 2d 694, 699, 50 Cal. Rptr. 808* ; *Leavy v. Cooney (1963) 214 Cal. App. 2d 496, 502, 29 Cal. Rptr. 580]* . However, if physical harm has not resulted from the emotional distress, the courts tend to look for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious [*Golden v. Dungan (1971) 20 Cal. App. 3d 295, 308, 97 Cal. Rptr. 577* ; *Grimes v. Carter (1966) 241 Cal. App. 2d 694, 699, 50 Cal. Rptr. 808* ; *Perati v. Atkinson (1963) 213 Cal. App. 2d 472, 474, 28 Cal. Rptr. 898]* .

[b] Resultant Physical Injury

One who, by extreme and outrageous conduct, intentionally or recklessly causes severe emotional distress to another is subject to liability not onlyfor such emotional distress but also for bodily harm of which the distress is a legal cause [*Golden v. Dungan (1971) 20 Cal. App. 3d 295, 302, 97 Cal. Rptr. 577]* . This is true although the person has no intention of inflicting such physical harm, and irrespective of whether the act is directed against the other or a third person. The important elements are that the act is intentional, that it is unreasonable, and that the actor should recognize it as likely to result in illness [*Bowden v. Spiegel, Inc. (1950) 96 Cal. App. 2d 793, 794-795, 216 P.2d 571]* . The physical consequences of shock or other disturbance to the nervous system are sufficient to show that the plaintiff has suffered physical injury from the defendant's conduct [*Alcorn v. Anbro Eng'g, Inc. (1970) 2 Cal. 3d 493, 498, 86 Cal. Rptr. 88, 468 P.2d 216]* .

[7] Proximate Cause

Proximate cause is a question of law in the first instance. It becomes a question of fact when conflicting inferences or conclusions can be drawn from the evidence within the area of proximate cause as legally defined [*Golden v. Dungan (1971) 20 Cal. App. 3d 295, 311, 97 Cal. Rptr. 577* ; *Tate v. Canonica (1960) 180 Cal. App. 2d 898, 901, 5 Cal. Rptr. 28]* . If the defendant intended by his or her conduct to cause serious emotional distress, and the resulting distress is

shown by the evidence to be a substantial factor in bringing about other injury, the defendant is liable for the additional injury [*Tate v. Canonica (1960) 180 Cal. App. 2d 898, 909, 5 Cal. Rptr. 28]* .

[8] Privilege

To impose liability for the intentional infliction of mental distress, it must appear that the defendant's conduct was unprivileged [*Kachig v. Boothe (1971) 22 Cal. App. 3d 626, 641, 99 Cal. Rptr. 393]* .

The privileges recognized in connection with the tort of intentional infliction of emotional distress include those recognized in defamation actions, as set out in *Civ. Code § 47* [*Kachig v. Boothe (1971) 22 Cal. App. 3d 626, 641, 99 Cal. Rptr. 393]* . The cause of action may not be based on communications made in the course of any official proceeding because these communications are absolutely privileged under *Civ. Code § 47(b)* [*Silberg v. Anderson (1990) 50 Cal. 3d 205, 215-216, 266 Cal. Rptr. 638, 786 P.2d 365* ; *Ribas v. Clark (1985) 38 Cal. 3d 355, 364, 212 Cal. Rptr. 143, 696 P.2d 637* (both cases decided under former *Civ. Code § 47(2)*)]. The privilege applies, however, only to torts arising from statements or publications. It does not apply to tortious noncommunicative conduct, even if it occurs in preparation for or in the course of a judicial proceeding [*Kimmel v. Goland (1990) 51 Cal. 3d 202, 211-212, 271 Cal. Rptr. 191, 793 P.2d 524]* . The privileges of *Civ. Code § 47* are discussed further in Ch. 340, *Libel and Slander* .

One is privileged in pursuing one's own economic interests, to assert in a permissible way his or her legal rights and to communicate his or her position in good faith to the other party, even though it is substantially certain that in so doing some emotional distress will be caused [*Cantu v. Resolution Trust Corp. (1992) 4 Cal. App. 4th 857, 888, 6 Cal. Rptr. 2d 151* ; *Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 395, 89 Cal. Rptr. 78]* . However, the exercise of this privilege must be done in a permissible way and with a good faith belief in the existence of the rights asserted. One who, in exercising the privilege of asserting his or her own economic interests, acts in an outrageous manner may be held liable for intentional infliction of emotional distress even if the interest is asserted in good faith [*Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 395, 89 Cal. Rptr. 78* ; *Vargas v. Ruggiero (1961) 197 Cal. App. 2d 709, 718-719, 17 Cal. Rptr. 568]* .

For example, a creditor possesses a qualified privilege to protect its economic interest by collecting a debt, but the privilege may be lost if the creditor uses outrageous and unreasonable means in seeking payment [*Symonds v. Mercury Savings & Loan Assn. (1990) 225 Cal. App. 3d 1458, 1469, 275 Cal. Rptr. 871* ; *Bowden v. Spiegel, Inc. (1950) 96 Cal. App. 2d 793, 795, 216 P.2d 571]* . The applicable test is whether or not the creditor goes beyond all reasonable bounds of decency in attempting to collect the debt. The creditor's knowledge that the debtor is susceptible to emotional distress because of some physical or mental condition is a relevant factor in the determination [*Symonds v. Mercury Savings & Loan Assn. (1990) 225 Cal. App. 3d 1458, 1469, 275 Cal. Rptr. 871* ; *see Bundren v. Superior Court (1983) 145 Cal. App. 3d 784, 789-792, 193 Cal. Rptr. 671* (20-30 minute telephone call from hospital business office to patient during visiting hours on day after surgery was performed)].

One may also be privileged to act on the advice of counsel. It is a complete defense to a claim of extreme and outrageous conduct if the evidence shows that (1) the defendant acted on the opinion and advice of counsel; (2) counsel's advice was based on full disclosure of all facts by the defendant, or the advice was initiated by counsel based on counsel's familiarity with the case; and (3) the defendant's reliance on the advice of counsel was in good faith [*Melorich Builders, Inc. v. Superior Court (1984) 160 Cal. App. 3d 931, 936-937, 207 Cal. Rptr. 47]* .

Constitutional privileges arising under *U.S. Const. amend. I* may also apply to actions for intentional infliction of emotional distress. For example, the constitutional requirement of "actual malice" must be satisfied before a claimant can prevail in an action for intentional infliction of emotional distress, at least when the offensive conduct at issue involved statements made in the context of a public debate about a public figure [*Hustler Magazine, Inc. v. Falwell (1988) 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41, 49-50]* .

[9] Accrual of Cause of Action

The tort of intentional infliction of emotional distress is not complete until the defendant's conduct causes the plaintiff severe emotional distress [*Cantu v. Resolution Trust Corp. (1992) 4 Cal. App. 4th 857, 889, 6 Cal. Rptr. 2d 151]* . Therefore, the two-year (one-year, prior to January 1, 2003) limitation period [*Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)*; Ch. 345, *Limitation of Actions*, § 345.14] does not begin to run until the plaintiff's distress reaches the requisite severity [*Holliday v. Jones (1989) 215 Cal. App. 3d 102, 120, 264 Cal. Rptr. 448* ; *Kiseskey v. Carpenters' Trust for S. Cal. (1983) 144 Cal. App. 3d 222, 232, 192 Cal. Rptr. 492* ; *see also § 362.10[5]*].

[10] Punitive Damages

The tort of intentional infliction of emotional distress requires outrageous conduct, and punitive damages awards under *Civ. Code § 3294* are often recovered based on that conduct [*see, e.g.,* *Agarwal v. Johnson (1979) 25 Cal. 3d 932, 947, 160 Cal. Rptr. 141, 603 P.2d 58]* . For discussion of punitive damages, see *Ch. 177, Damages, § 177.40* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressElementsTortsNegligenceActionsNegligent Infliction of Emotional DistressGeneral Overview

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Chapter 362 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART II. LEGAL BACKGROUND

32-362 California Forms of Pleading and Practice--Annotated § 362.11

§ 362.11 Negligent Infliction of Emotional Distress

[1] In General

California recognizes a right to recover damages for serious emotional distress in a negligence action [*Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 930, 167 Cal. Rptr. 831*]. A plaintiff who has suffered physical injury may recover general damages for emotional distress, pain, and suffering, along with other compensatory damages [*Merrill v. Los Angeles Gas & Elec. Co. (1910) 158 Cal. 499, 511-513, 111 P. 534* ; *Niles v. City of San Rafael (1974) 42 Cal. App. 3d 230, 244, 116 Cal. Rptr. 733* ; *see § 362.13*]. In contrast, negligent infliction of emotional distress refers to the recovery of damages by a plaintiff who has not otherwise suffered any physical or bodily injury, for emotional distress arising from a defendant's negligent conduct [*see* *Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 924-925, 167 Cal. Rptr. 831, 616 P.2d 813* (discussion of prior rule requiring physical injury)].

In 1980, the California Supreme Court abolished the "physical injury" requirement, thereby significantly expanding the potential right to recover for negligent infliction of emotional distress [*see* *Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 930-931, 167 Cal. Rptr. 831, 616 P.2d 813* ; *see also* *Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 986, 25 Cal. Rptr. 2d 550, 863 P.2d 795* (reiterating that physical injury is not required in either bystander or direct-victim actions); *see generally § 362.11[2]*]. Before that time, the right of recovery had been limited to a few special situations [*see* discussion *§ 362.11[3]*].

Negligent infliction of emotional distress is not a tort or a cause of action in and of itself. Instead, it is simply a recovery of damages under the tort of negligence. The traditional elements of a negligence cause of action--duty, breach of duty, causation, and damages--must be present [*Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989) 48 Cal. 3d 583, 588, 257 Cal. Rptr. 98, 770 P.2d 278]* .

[2] Physical Impact or Injury Not Required

Damages may be recovered for the negligent infliction of serious emotional distress if the sole damage is mental suffering. California has discarded the rule that damages for negligent infliction of emotional distress will not be awarded unless that distress resulted directly from, or manifested itself in, physical injury. The genuineness of claims, formerly ensured by the physical injury requirement, is to be safeguarded by the general standard of proof using the

jurors' own experience to determine whether or not and to what extent the defendant's conduct caused emotional distress, as well as by expert medical testimony if the emotional injury is objectively ascertainable [*Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 930-931, 167 Cal. Rptr. 831, 616 P.2d 813]* . Nevertheless, the emotional injury must be severe, that is, substantial or enduring, as distinguished from trivial or transitory [*Twaite v. Allstate Ins. Co. (1989) 216 Cal. App. 3d 239, 257-258, 264 Cal. Rptr. 598]* .

However, some courts have refused to apply this rule of *Molien* with regard to emotional distress suffered because of negligent injury to property [*see Sher v. Leiderman (1986) 181 Cal. App. 3d 867, 883-885, 226 Cal. Rptr. 698* ; *Cooper v. Superior Court (1984) 153 Cal. App. 3d 1008, 1012, 200 Cal. Rptr. 746]* . For further discussion, see *§ 362.13[2]*.

[3] Fear for Personal Well-Being

[a] In General

Under the modern rule of liability, one may recover for emotional distress suffered as the result of a negligent act that placed the plaintiff in fear for his or her personal well-being, regardless of whether there is any physical impact and regardless of whether the emotional distress is accompanied by any physical manifestations of injury [*Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 924-930, 167 Cal. Rptr. 831, 616 P.2d 813* ; *Webb v. Francis J. Lewald Coal Co. (1931) 214 Cal. 182, 184, 4 P.2d 532]* . All of the elements of the tort of negligence must be present, including a duty on the part of the defendant toward the plaintiff. Duty is analyzed under traditional negligence principles involving reasonable foreseeability of the risk toward the particular person who suffered the distress [*Carney v. Rotkin, Schmerin & McIntyre (1988) 206 Cal. App. 3d 1513, 1525, 254 Cal. Rptr. 478]* .

In one case, for example, the court of appeal applied the factors traditionally used to determine whether a duty of care existed and concluded that the operator of an airline did not have a legal duty to avoid the infliction of emotional trauma on physically untouched spectators of a plane crash, even those spectators who momentarily reasonably feared for their own safety [*Lawson v. Management Activities, Inc. (1999) 69 Cal. App. 4th 652, 655, 657-660, 81 Cal. Rptr. 2d 745* (disagreeing with Ninth Circuit holding in *In re Air Crash Disaster Near Cerritos, Cal. (9th Cir. 1992) 973 F.2d 1490*)]. The court distinguished earlier cases that had established a rule permitting recovery for emotional distress stemming from fear for one's own safety triggered in a bystander by a negligent automobile driver [*see, e.g., Wooden v. Raveling (1998) 61 Cal. App. 4th 1035, 1036, 71 Cal. Rptr. 2d 891]* . The court noted that unlike the constant concern with the safety of bystanders that may be associated with ground travel, the safety of bystanders in air travel is usually irrelevant and only arises when a crash is about to occur [*Lawson v. Management Activities, Inc. (1999) 69 Cal. App. 4th 652, 667-668, 81 Cal. Rptr. 2d 745]* . For further discussion of the elements of negligence causes of action generally, see Ch. 380, *Negligence* .

The extent to which recovery for negligently caused fear for safety extends to one not in a "zone of danger" or situation of imminent peril is not clear. Recovery has been allowed for emotional distress arising from fear of arrest due to a negligent misrepresentation that a bench warrant for the person was outstanding [*Carney v. Rotkin, Schmerin & McIntyre (1988) 206 Cal. App. 3d 1513, 1524-1525, 254 Cal. Rptr. 478]* . However, as discussed in *§ 362.11[3][b]*, the recovery of damages for emotional distress caused by a fear of cancer, resulting from an exposure to toxic or carcinogenic substances, has been limited. In addition, one court has denied recovery for fear of future injury to a plaintiff who had received an artificial heart-valve implant that had not yet malfunctioned, but was discovered to have a high statistical rate of failure [*Khan v. Shiley Inc. (1990) 217 Cal. App. 3d 848, 857 n.12, 266 Cal. Rptr. 106]* . However, the California Supreme Court has pointed out that this result was based on the plaintiff's failure to show that the defendant had breached any duty to the plaintiff, as the valve at issue had not been shown to be defective, and that therefore a legally cognizable injury under products liability law had not yet occurred [*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 986 n.11, 25 Cal. Rptr. 2d 550, 863 P.2d 795]* . Thus, *Khan* should be seen as dealing not with the recoverability of emotional distress damages based on fear for one's personal well-being, but with

the issues of duty and breach.

[b] Fear of Cancer

The California Supreme Court has established limits on recovery of emotional distress damages based on a fear that future cancer will result from an exposure to a toxic or carcinogenic substance that has not yet caused any present physical injury or illness [*see Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 977, 25 Cal. Rptr. 2d 550, 863 P.2d 795]* . The Court enunciated two standards, one as the general rule, and one specific exception to that general rule.

In the absence of a present physical injury or illness, damages for fear of cancer generally may be recovered in a negligence action only if the plaintiff pleads and proves the following [*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 997, 25 Cal. Rptr. 2d 550, 863 P.2d 795]* :

- As a result of the defendant's negligent breach of a duty owed to the plaintiff, the plaintiff was exposed to a toxic substance that threatens cancer; and

- The plaintiff's fear stems from a knowledge, corroborated by reliable medical and scientific opinion, that it is more likely than not that the plaintiff will develop the cancer in the future due to the toxic exposure.

Under this rule, a plaintiff must do more than simply establish knowledge of a toxic ingestion and a significant increased risk of cancer. The plaintiff must further show that, based on reliable scientific or medical opinion, the plaintiff harbors a serious fear that the toxic ingestion or exposure was of such magnitude and proportion as to likely result in the feared cancer [*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 997, 25 Cal. Rptr. 2d 550, 863 P.2d 795]* .

A plaintiff may recover damages for negligently inflicted emotional distress engendered by a fear of cancer without meeting the more likely than not threshold if the plaintiff pleads and proves the following [*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 999-1000, 25 Cal. Rptr. 2d 550, 863 P.2d 795]* :

- As a result of the defendant's negligent breach of a duty owed to the plaintiff, the plaintiff was exposed to a toxic substance that threatens cancer;

- The defendant, in breaching its duty to the plaintiff, acted with oppression, fraud, or malice as defined in *Civ. Code § 3294*; and

- The plaintiff's fear of cancer stems from a knowledge, corroborated by reliable medical or scientific opinion, that the toxic exposure caused by the defendant's breach of duty has significantly increased the plaintiff's risk of cancer and has resulted in an actual risk of cancer that is significant.

Even under this standard, the plaintiff must demonstrate that his or her fear of cancer is reasonable, genuine, and serious in order to recover damages [*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 999, 25 Cal. Rptr. 2d 550, 863 P.2d 795]* . It is not enough for a plaintiff to show simply an ingestion of a carcinogen or a significant increase in the risk of cancer. In addition, the plaintiff must show that his or her actual risk of cancer is significant before recovery will be allowed [*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 999, 25 Cal. Rptr. 2d 550, 863 P.2d 795]* .

The Court also noted that the definitions of "significant risk" and "no significant risk" in environmental statutes and regulations, such as 22 Cal. Code Reg. § 12701 et seq. (defining risk levels requiring notice of potential toxins in water

supplies), do not pertain to recovery of fear of cancer damages and are therefore not relevant on the issue of significant risk in this context [*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 999 n.19, 25 Cal. Rptr. 2d 550, 863 P.2d 795]* . A plaintiff's fear is not compensable if the risk of cancer is significantly increased, but remains a remote possibility [*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 999, 25 Cal. Rptr. 2d 550, 863 P.2d 795]* .

[c] Fear of Other Diseases

Courts of appeal have applied the reasoning of Potter v. Firestone Tire & Rubber Co. [*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 25 Cal. Rptr. 2d 550, 863 P.2d 795* , discussed in *§ 362.11[3][b]*]] to cases alleging that the defendants' conduct caused the plaintiffs emotional distress based on fear of contracting AIDS [*see Kerins v. Hartley (1994) 27 Cal. App. 4th 1062, 1073-1075, 33 Cal. Rptr. 2d 172* ; *Herbert v. Regents of Univ. of Cal. (1994) 26 Cal. App. 4th 782, 785-788, 31 Cal. Rptr. 2d 709]* . Thus, a failure to show that the plaintiff is likely to contract AIDS as a result of the plaintiff's alleged negligence precludes recovery of damages based on the fear of AIDS [*Kerins v. Hartley (1994) 27 Cal. App. 4th 1062, 1073-1075, 33 Cal. Rptr. 2d 172* ; *Herbert v. Regents of Univ. of Cal. (1994) 26 Cal. App. 4th 782, 785-788, 31 Cal. Rptr. 2d 709]* .

[4] Negligent Handling of Human Remains

Another category of cases in which recovery for negligent infliction of emotional distress has long been allowed involves the negligent handling of human remains. Before 1980, damages for emotional distress suffered because of negligently performed funeral-related services were allowed as an element of contract damages [*see Chelini v. Nieri (1948) 32 Cal. 2d 480, 196 P.2d 915* ; *see also § 362.13[3]*], and breach of contract remains a valid theory of recovery for a contracting party [*see Saari v. Jongordon Corp. (1992) 5 Cal. App. 4th 797, 802-804, 7 Cal. Rptr. 2d 82* (reaffirming right of recovery)]. However, other parties may now recover in tort under a negligence cause of action [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 882-884, 2 Cal. Rptr. 2d 79, 820 P.2d 181* ; *see Allen v. Jones (1980) 104 Cal. App. 3d 207, 163 Cal. Rptr. 445]* .

The negligent mishandling of human remains is not an independent tort; instead, it is simply an application of the tort of negligence to facts involving the disposition of remains [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 884, 2 Cal. Rptr. 2d 79, 820 P.2d 181]* . The elements of duty, breach of duty, causation, and damages must be pleaded and proved [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 882, 2 Cal. Rptr. 2d 79, 820 P.2d 181]* .

The mortuary or other provider assumes a duty with regard to the disposition of remains under the agreement to provide funeral or other related services. It thereby creates a special relationship, obligating it to perform those services properly and nonnegligently [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 886-888, 890-891, 2 Cal. Rptr. 2d 79, 820 P.2d 181]* .

Therefore, these services are performed for the benefit of the living family members. Thus, the duty extends to close family members who were aware that the services were being performed and on whose behalf or for whose benefit the services were rendered [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 890, 2 Cal. Rptr. 2d 79, 820 P.2d 181* ; *see also Quesada v. Oak Hill Improvement Co. (1989) 213 Cal. App. 3d 596, 610, 261 Cal. Rptr. 769]* . The duty is not limited to the contracting party or to the holder of the statutory right to control the disposition of the decedent's remains [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 887, 2 Cal. Rptr. 2d 79, 820 P.2d 181* ; *see Saari v. Jongordon Corp. (1992) 5 Cal. App. 4th 797, 804-807, 7 Cal. Rptr. 2d 82* (family members may recover even if contracting party was nonfamily member); *see also Health & Safety Code § 7100* (classes of persons with right to control disposition of remains)].

Close family members include relatives residing in the same household, or parents, siblings, children, and grandparents of the decedent. Exceptional circumstances may enlarge the group to include other relatives [*Quesada v. Oak Hill Improvement Co. (1989) 213 Cal. App. 3d 596, 610, 261 Cal. Rptr. 769* (allowing niece opportunity to prove that she

was within group); *see Christensen v. Superior Court (1991) 54 Cal. 3d 868, 882 n.12, 2 Cal. Rptr. 2d 79, 820 P.2d 181* ; *Thing v. La Chusa (1989) 48 Cal. 3d 644, 668 n.10, 257 Cal. Rptr. 865, 771 P.2d 814* ; *see also § 362.11[6][c][ii]*].

Health & Safety Code § 7104 imposes a duty of interment on the coroner if no other accommodations for interment of a decedent have been made and if the duty of interment has not devolved to another person who can be located with reasonable diligence within the state [*Health & Safety Code § 7104(a)*]. However, this statute does not impose a duty on the person having custody of the remains of a decedent that is enforceable in tort by persons who in fact have the right of interment of those remains [*Spates v. Dameron Hospital Assn. (2003) 114 Cal. App. 4th 208, 218, 7 Cal. Rptr. 3d 597]* . In one case, for example, a hospital that turned a decedent's body over to the coroner for cremation owed no duty under *Health & Safety Code § 7104* to contact the decedent's daughter and was not liable for failing to contact her. The hospital, which had taken custody of the decedent from a nursing home and had no preexisting relationship with the daughter, had tried unsuccessfully to locate the daughter before turning the decedent's body over to the coroner. The court of appeal held that *Health &Safety Code § 7104* creates a condition of last resort with respect to the expense of interment of an unclaimed decedent and was designed to protect the county treasury, not the family members of the decedent [*Spates v. Dameron Hospital Assn. (2003) 114 Cal. App. 4th 208, 219, 7 Cal. Rptr. 3d 597]* .

While a mortuary or crematorium may be liable for emotional distress for negligent mishandling of a corpse, a research institution that obtains willed bodies for medical dissection, research, and teaching purposes, and does not purport to provide funeral-related services, does not owe the same duties to the family members of donated corpses [*Melican v. Regents of University of California (2007) 151 Cal. App. 4th 168, 179, 59 Cal. Rptr. 3d 672]* . A research institution that contractually agrees only to dispose of a decedent's remains in accordance with state law has no duty to return any remains to the decedent's family [*see Conroy v. Regents of University of California (2009) 45 Cal. 4th 1244, 1253, 91 Cal. Rptr. 3d 532, 203 P.3d 1127]* . It may voluntarily undertake to do so, however, although such a voluntary undertaking will not support the imposition of liability if the remains returned have been commingled with the remains of another corpse [*Melican v. Regents of University of California (2007) 151 Cal. App. 4th 168, 180-181, 59 Cal. Rptr. 3d 672]* . Evidence of a general pattern of mishandling of donated bodies by a willed-body program will not support liability for negligence absent evidence demonstrating to a "well-founded substantial certainty" that the body of plaintiff's decedent was actually mishandled [*Conroy v. Regents of University of California (2009) 45 Cal. 4th 1244, 1251, 91 Cal. Rptr. 3d 532, 203 P.3d 1127]* .

[5] Professional Negligence

In *Molien v. Kaiser Foundation Hospitals*, the California Supreme Court held that the husband of a patient could recover damages for emotional distress resulting from the doctor's misdiagnosis that his wife had a venereal disease [*Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 928-930, 167 Cal. Rptr. 831, 616 P.2d 813* ; *see § 362.11[6][d]*]. Implicit in this holding is the right of the wife, the actual patient, to recover damages for emotional distress as well, even if she were not physically injured by the misdiagnosis. At least one court has assumed this to be the case [*see Holliday v. Jones (1989) 215 Cal. App. 3d 102, 114, 264 Cal. Rptr. 448* (noting that *Molien* would clearly permit one to recover damages for emotional distress caused by negligent psychiatric diagnosis)]. The recovery of emotional distress damages must be based on the defendant's liability in tort. If a physician has not breached his or her duty of care toward a patient, but has instead only breached a contract, the breach of contract cannot be the basis for recovery of emotional distress damages [*Selden v. Dinner (1993) 17 Cal. App. 4th 166, 174-176, 21 Cal. Rptr. 2d 153* (liability based on defendant's failure to perform operation on date required by contract)].

Before *Molien*, the rule with regard to legal malpractice precluded recovery of emotional distress damages in a legal malpractice action except on a showing of affirmative misconduct or bad faith [*Quezada v. Hart (1977) 67 Cal. App. 3d 754, 761, 136 Cal. Rptr. 815]* . In light of *Molien's* elimination of any physical-injury requirement, this limitation apparently no longer applies, and one court has so held on two occasions [*Holliday v. Jones (1989) 215 Cal. App. 3d 102, 112-114, 264 Cal. Rptr. 448* ; *Betts v. Allstate Ins. Co. (1984) 154 Cal. App. 3d 688, 717, 201 Cal. Rptr. 528]* .

Even if *Molien* is not construed to permit emotional distress damages in all professional negligence actions, one court has still rejected the *Quezada* rule to the extent that it focuses on the attorney's conduct rather than on the client's interest that is affected. The court stated that the recovery of damages for emotional distress in a legal malpractice action, if limited at all, should turn on the nature of the plaintiff's interest that is harmed and not merely on the reprehensibility of the defendant's conduct. If only a property interest is affected, recovery might be denied; if a fundamental and personal right is involved, such as the client's personal liberty, recovery should be allowed [*Holliday v. Jones (1989) 215 Cal. App. 3d 102, 264 Cal. Rptr. 448]* .

Following this line of reasoning further, another appellate court reaffirmed the result in *Quezada* in light of *Molien* and rejected emotional distress damages in a legal malpractice action. In the view of this court, the focus should be on the nature of the interest invaded and whether it naturally entails significant emotional distress [*see Merenda v. Superior Court (1992) 3 Cal. App. 4th 1, 7-8, 4 Cal. Rptr. 2d 87]* . Because legal malpractice typically involves only an invasion of the plaintiff's economic interest [*see § 362.13[2]*] in recovering damages in the underlying action, serious emotional distress is not an inevitable consequence of the tortious conduct. Therefore, damages for emotional distress should not ordinarily be allowed in a legal malpractice action [*Smith v. Superior Court (1992) 10 Cal. App. 4th 1033, 1037-1041, 13 Cal. Rptr. 2d 133* ; *Merenda v. Superior Court (1992) 3 Cal. App. 4th 1, 10-11, 4 Cal. Rptr. 2d 87* ; *see also Pleasant v. Celli (1993) 18 Cal. App. 4th 841, 854, 22 Cal. Rptr. 2d 663* (agreeing that *Quezada* is no longer good law, but that emotional distress damages were not recoverable in malpractice action based on attorney's negligence in permitting statute of limitations to expire on plaintiff's civil action)].

The Good-Samaritan statutes [*Bus. & Prof. Code §§ 2395, 2396*] preclude liability for any civil liability on account of emergency medical treatment rendered, including liability for negligent infliction of emotional distress [*Breazeal v. Henry Mayo Newhall Mem'l Hosp. (1991) 234 Cal. App. 3d 1329, 1342, 286 Cal. Rptr. 207]* .

For further discussion of professional medical negligence, see Ch. 415, *Physicians: Medical Malpractice* . For further discussion of professional legal negligence, see Ch. 76, *Attorney Professional Liability* .

[6] Injuries to Third Persons

[a] Bystander and Direct-Victim Theories of Recovery

Under certain circumstances, one person may recover damages for emotional distress suffered due to an injury to another person that is caused by the defendant's negligent conduct. Such a recovery is available to two categories of plaintiffs. Under the longer-established theory, recovery is available to personswho are percipient witnesses (bystanders) to injuries caused to third persons. Under a more recent theory, recovery is also available to persons who are considered to be "direct victims" of the defendant's negligence [*see Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 922-923, 167 Cal. Rptr. 831, 616 P.2d 813]* .

A direct victim is one who has a cause of action against the defendant based on the defendant's breach of a duty owed to him or her, and who also suffers emotional distress as a result of witnessing injuries suffered by another person in the same accident. The plaintiff in such a situation may recover all reasonably foreseeable damages, including damages for emotional distress caused by observing the negligently inflicted injury of the third person [*Long v. PKS, Inc. (1993) 12 Cal. App. 4th 1293, 1298-1300, 16 Cal. Rptr. 2d 103* (direct victim need not establish "close family relationship" with injured person; damages based on witnessing injuries to foster daughter affirmed)].

[b] Liability to Physically Injured Person Required

Under both bystander and direct-victim theories of liability, if the defendant's conduct is found not to be negligent with regard to the injured party, there can be no liability for negligent infliction of emotional distress on a noninjured party [

Osborn v. Irwin Memorial Blood Bank (1992) 7 Cal. Rptr. 2d 101] . For example, if there is no breach of duty to the physically injured person, there is also no breach of duty to a bystander [*Wynne v. Orcutt Union Sch. Dist. (1971) 17 Cal. App. 3d 1108, 1111, 95 Cal. Rptr. 458]* .

If the injured person is an employee who is injured by his or her employer in the course and scope of employment, any cause of action that a percipient witness would otherwise be able to maintain is barred by the exclusive remedy principle of workers' compensation law [*Williams v. Schwartz (1976) 61 Cal. App. 3d 628, 630-632, 131 Cal. Rptr. 200* ; *see Lab. Code § 3600(a)* (workers' compensation is in lieu of liability to any person for injury to employee in scope of employment); *see also Bell v. Macy's Cal. (1989) 212 Cal. App. 3d 1442, 1453, 261 Cal. Rptr. 447* (following *Williams* in case involving negligent medical treatment of industrial injury)]. For further discussion of the exclusive remedy principle, see Ch. 577, *Workers' Compensation* .

[c] Recovery by Percipient Witnesses

[i] In General

Percipient witnesses to negligent acts are within the class of persons to whom the defendant owes a general duty of care, subject to certain express limitations required by public policy. A plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury to a third person only if the plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury-producing event at the time when it occurs; (3) is then aware that it is causing injury to the victim; and (4) as a result, suffers serious emotional distress. Serious emotional distress is a reaction beyond the reaction that would be anticipated in a disinterested witness and that is not an abnormal response to the circumstances [*Thing v. La Chusa (1989) 48 Cal. 3d 644, 667-668, 257 Cal. Rptr. 865, 771 P.2d 814]* .

[ii] Close Relationship

In most cases, no justification exists for permitting recovery for negligent infliction of emotional distress by persons who are only distantly related to the injury victim. Absent exceptional circumstances, recovery should be limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim [*Thing v. La Chusa (1989) 48 Cal. 3d 644, 668 n.10, 257 Cal. Rptr. 865, 771 P.2d 814]* . A bystander who is not actually related to the injured person, such as by blood or marriage, cannot recover regardless of how close the relationship between the persons may be [*Rodriguez v. Kirchhoefel (2005) 128 Cal. App. 4th 427, 433, 26 Cal. Rptr. 3d 891]* .

One court of appeal opinion has concluded that this means that absent exceptional circumstances or same-household residency, only members of the immediate family may recover and that in-laws are not included even if a close, loving relationship with the victim is demonstrated [*Moon v. Guardian Postacute Servs., Inc. (2002) 95 Cal. App. 4th 1005, 1011-1013, 116 Cal. Rptr. 2d 218* (son-in-law not proper plaintiff, despite evidence of close, loving relationship with victim)]. Meeting the requirement of same-household residency requires residency for a substantial period of time, and an allegation that the victim resided in the plaintiff's household for an undisclosed period of time is insufficient [*Moon v. Guardian Postacute Servs., Inc. (2002) 95 Cal. App. 4th 1005, 1012-1013, 116 Cal. Rptr. 2d 218]* .

In *Elden v. Sheldon*, the California Supreme Court rejected the claim that an unmarried cohabitant in a "stable" relationship that allegedly had many attributes of a marriage could recover for negligent infliction of emotional distress [*Elden v. Sheldon (1988) 46 Cal. 3d 267, 274-277, 250 Cal. Rptr. 254, 758 P.2d 582]* . In reaching this conclusion, the Court noted that policy considerations--specifically, the need to limit the consequences of a negligent act in order to avoid an intolerable burden on society--can justify precluding liability even for foreseeable injuries [*Elden v. Sheldon (1988) 46 Cal. 3d 267, 274, 250 Cal. Rptr. 254, 758 P.2d 582]* .

However, there is at least one statutory exception to the holding in *Elden*. Beginning in 2002, members of unmarried couples meeting the statutory criteria of domestic partners may sue for negligent infliction of emotional distress to the

same extent as spouses [*Civ. Code § 1714.01*]. "Domestic partners" are defined as two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring. However, the definition is also limited to members of the same sex over the age of 18 and opposite-sex couples in which at least one person is over the age of 62 and meets the eligibility criteria for old-age social security benefits [*Fam. Code § 297(a), (b)(4), (5)*].

Although *Elden* dealt only with a plaintiff who had alleged that his relationship with the injured party was "parallel to a marital relationship," the Court disapproved the holdings of two cases to the extent that they were inconsistent with its holding [*Elden v. Sheldon (1988) 46 Cal. 3d 267, 277, 250 Cal. Rptr. 254, 758 P.2d 582* , *disapproving Ledger v. Tippitt (1985) 164 Cal. App. 3d 625, 210 Cal. Rptr. 814* , and *Mobaldi v. Regents of Univ. of Cal. (1976) 55 Cal. App. 3d 573, 127 Cal. Rptr. 720*)]. One of these cases permitted a cause of action for negligent infliction of emotional distress by afoster parent whose foster child died in her arms [*Mobaldi v. Regents of Univ. of Cal. (1976) 55 Cal. App. 3d 573, 582-583, 127 Cal. Rptr. 720]* . Although it appears clear that adoption would be sufficient to create a family relationship under the decision in *Elden* [*see Fam. Code § 8616* (adopted child and adopting parent have all rights and are subject to all duties of parent-child relationship)], it remains to be seen whether the Court's "exceptional circumstances" language in *Thing v. La Chusa* may encompass the foster parent relationship in future cases [*see Thing v. La Chusa (1989) 48 Cal. 3d 644, 668 n.10, 257 Cal. Rptr. 865, 771 P.2d 814]* .

[iii] Presence at Injury-Producing Event

Actual presence at the injury-producing event is required. It is insufficient if the plaintiff arrives after the event but in time to view the immediate consequences of the act [*Thing v. La Chusa (1989) 48 Cal. 3d 644, 666, 668, 257 Cal. Rptr. 865, 771 P.2d 814* (disapproving cases holding to contrary); *Johnson v. County of Ventura (1994) 29 Cal. App. 4th 1400, 1405, 35 Cal. Rptr. 2d 150* (witnessing result or effect of event, but not event itself is insufficient); *see Fife v. Astenius (1991) 232 Cal. App. 3d 1090, 1092-1093, 284 Cal. Rptr. 16]* .

The fact that the plaintiff was present voluntarily at the scene of the event does not preclude a recovery [*Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 170-171, 216 Cal. Rptr. 661, 703 P.2d 1]* . However, observation of the event electronically is not "presence," at least if the plaintiff does not see the actual injury to the person with whom he or she has the requisite close relationship [*see Scherr v. Hilton Hotels Corp. (1985) 168 Cal. App. 3d 908, 910-911, 214 Cal. Rptr. 393* (plaintiff's observation on television of hotel fire, in which husband was injured, was insufficient absent observation of husband's injury)].

It is not necessary that the injury have been the result of a brief or sudden occurrence. The injury-producing event may continue over a period of time, and in such a case, the plaintiff's presence at any time within the period is sufficient [*Ortiz v. HPM Corp. (1991) 234 Cal. App. 3d 178, 183-186, 285 Cal. Rptr. 728]* . The event may involve multiple acts or omissions occurring over an extended period of time, as long as the plaintiff is aware of and observing the conduct that constitutes the negligence [*Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 167-170, 216 Cal. Rptr. 661, 703 P.2d 1* (negligent refusal to provide medical treatment to critically ill child while parents were present and aware of gravity of situation, and aware of refusal of defendants to act); *see Thing v. La Chusa (1989) 48 Cal. 3d 644, 688, 257 Cal. Rptr. 865, 771 P.2d 814* (reaffirming all prior California Supreme Court decisions upholding recovery)].

[iv] Contemporaneous Awareness of Injury

The plaintiff must be aware at the time of the injury-producing event that the injury is occurring [*Thing v. La Chusa (1989) 48 Cal. 3d 644, 668, 257 Cal. Rptr. 865, 771 P.2d 814]* . If the plaintiff observes the event, but is not aware that an injury is being incurred until informed of the fact at a later time, no cause of action is stated [*Justus v. Atchison (1977) 19 Cal. 3d 564, 585, 139 Cal. Rptr. 97, 565 P.2d 122* ; *see Fife v. Astenius (1991) 232 Cal. App. 3d 1090, 1092-1093, 284 Cal. Rptr. 16* (even if parents who heard without seeing accident might be considered to be present at event, they did not contemporaneously perceive it because they were unaware at that time that daughter was involved); *see also Breazeal v. Henry Mayo Newhall Mem'l Hosp. (1991) 234 Cal. App. 3d 1329, 1342, 286 Cal. Rptr. 207* ;

Hurlbut v. Sonora Cmty. Hosp. (1989) 207 Cal. App. 3d 388, 400-401, 254 Cal. Rptr. 840] .

Visual perception of the impact causing the injury is not required. It is sufficient if the shock that the plaintiff suffered resulted from the sensory and contemporaneous observance of the accident [*Krouse v. Graham (1977) 19 Cal. 3d 59, 75-76, 137 Cal. Rptr. 863, 562 P.2d 1022* (wife was struck and killed while removing groceries from back seat, while husband was seated in driver's seat); *see Thing v. La Chusa (1989) 48 Cal. 3d 644, 668, 257 Cal. Rptr. 865, 771 P.2d 814* (reaffirming all prior Supreme Court decisions upholding recovery); *see also Wilks v. Hom (1992) 2 Cal. App. 4th 1264, 1271, 3 Cal. Rptr. 2d 803* (following *Krouse*; mother was in trailer when explosion occurred and then aware that children were also in trailer, although in different rooms)]. Plaintiff's contemporaneous awareness of injury must be reasonably certain, however, and a mere belief that it is more likely than not that a close relative has suffered an injury is not enough to support recovery as a bystander [*Ra v. Superior Court (2007) 154 Cal. App. 4th 142, 150-153, 64 Cal. Rptr. 3d 539* (recovery denied when wife heard loud crash emanating from nearby area of store, believed more likely than not that husband had been injured, but did not otherwise observe or contemporaneously perceive injury as it occurred)].

Although a plaintiff need not contemporaneously understand that a defendant's conduct constitutes legal negligence, the plaintiff must have a contemporaneous understanding that the conduct that is being observed is conduct that is actually causing harm [*Bird v. Saenz (2002) 28 Cal. 4th 910, 920, 123 Cal. Rptr. 2d 465, 51 P.3d 324* (rejecting holding of *Mobaldi v. Regents of Univ. of Cal. (1976) 55 Cal. App. 3d 573, 127 Cal. Rptr. 720*); *Golstein v. Superior Court (1990) 223 Cal. App. 3d 1415, 1423, 1427, 273 Cal. Rptr. 270]* . Therefore, in the context of medical malpractice cases, bystanders cannot sue for negligent infliction of emotional distress based on unperceived medical errors hidden within a course of treatment [*Bird v. Saenz (2002) 28 Cal. 4th 910, 921, 123 Cal. Rptr. 2d 465, 51 P.3d 324]* . Most misdiagnoses, unsuccessful treatments, or treatments that turn out to be inappropriate only in retrospect will not be contemporaneously observable by a lay person, and thus will usually be insufficient to support a bystander's claim for negligent infliction of emotional distress. However, under some extreme situations, even a lay person may contemporaneously perceive that incorrect medical treatment is causing an injury, such as if a patient's family member observes a surgeon amputate the wrong limb of the patient [*Bird v. Saenz (2002) 28 Cal. 4th 910, 918, 920-921, 123 Cal. Rptr. 2d 465, 51 P.3d 324]* .

[v] Special Susceptibility

A plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury to a third person only if the plaintiff suffers "serious emotional distress." Serious emotional distress is a reaction beyond the reaction that would be anticipated in a disinterested witness, and that is not an abnormal response to the circumstances [*Thing v. La Chusa (1989) 48 Cal. 3d 644, 668, 668 n.12, 257 Cal. Rptr. 865, 771 P.2d 814]* . Thus, the susceptibility of a particular plaintiff to emotional distress is not considered by the court in a bystander case.

[d] Recovery by Direct Victims

[i] Rule of *Molien v. Kaiser Foundation Hospitals*

One who cannot recover as a bystander for emotional distress suffered as a result of an injury to a third person [*see § 362.11[6][c]*], may be able to recover as a direct victim of the defendant's negligence. The direct-victim theory of recovery was set forth in *Molien v. Kaiser Foundation Hospitals* [*Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 923, 167 Cal. Rptr. 831, 616 P.2d 813]* . In that case, a husband sought recovery for mental suffering resulting from a physician's misdiagnosis that his wife had a venereal disease. Although the husband could not recover as a bystander [*see § 362.11[6][c][iii]*], the California Supreme Court held that he could nevertheless recover, because he was a direct victim of the defendant's negligence. The tortious conduct was directed at him, as well as at the wife, and the risk of harm to him was reasonably foreseeable. Therefore, the defendant owed him a duty of due care [*Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 923, 167 Cal. Rptr. 831, 616 P.2d 813]* .

[ii] Limitations on Duty and Foreseeability

Molien strongly suggested that a direct victim can be anyone to whom the risk of emotional distress would be reasonably foreseen by the defendant. However, in subsequent cases, the Court has rejected this view, holding that foreseeability of the injury alone is not a useful guideline or a meaningful restriction on the scope of an action for damages for negligently inflicted emotional distress [*Burgess v. Superior Court (1992) 2 Cal. 4th 1064, 1074, 9 Cal. Rptr. 2d 615, 831 P.2d 1197* ; *see also* *Huggins v. Longs Drug Stores Cal., Inc. (1993) 6 Cal. 4th 124, 130-132, 24 Cal. Rptr. 2d 587, 862 P.2d 148* ; *Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989) 48 Cal. 3d 583, 589-590, 257 Cal. Rptr. 98, 770 P.2d 278* (rejecting contention that foreseeability alone could serve as basis for recovery); *Krupnick v. Hartford Accident & Indem. Co. (1994) 28 Cal. App. 4th 185, 201, 34 Cal. Rptr. 2d 39* (calling foreseeability "essentially useless" in determining duty with regard to purely emotional injury)]. Therefore, later cases that relied on the expansive language of *Molien* are no longer controlling.

In *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*, two mothers sued for damages for negligently inflicted emotional distress arising from the sexual molestation of their sons by a therapist with whom the mothers and sons were being treated in family counseling. In finding the mothers to be direct victims of the therapist, the Court nevertheless stated that *Molien* did not purport to create a cause of action for the negligent infliction of emotional distress based solely on the foreseeability that serious emotional distress might result. Rather, damages for severe emotional distress are recoverable in a negligence action if they result from the breach of a duty owed to the plaintiff that is assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two [*Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989) 48 Cal. 3d 583, 590, 257 Cal. Rptr. 98, 770 P.2d 278* ; *see also* *Khan v. Shiley Inc. (1990) 217 Cal. App. 3d 848, 856, 266 Cal. Rptr. 106]* . This language suggests that there are three possible sources of a duty sufficient to constitute one as a direct victim.

Subsequently, in *Burgess v. Superior Court,* the Court reaffirmed certain principles from *Molien*, while rejecting the view that duty could arise from foreseeability alone. The court affirmed that (1) damages for negligently inflicted emotional distress may be recovered in the absence of physical injury or impact; and (2) a cause of action to recover damages for negligently inflicted emotional distress will lie in cases in which a duty arising from a preexisting relationship is negligently breached (emphasis added). It is this latter principle that defines the phrase "direct victim" [*Burgess v. Superior Court (1992) 2 Cal. 4th 1064, 1074, 9 Cal. Rptr. 2d 615, 831 P.2d 1197]* . One court views, as dicta, any references in *Burgess* or *Marlene F.* to alternatives beyond a preexisting relationship as characterizing the origin of a duty of care to one claiming damages for negligent infliction of emotional distress [*see* *Krupnick v. Hartford Accident & Indem. Co. (1994) 28 Cal. App. 4th 185, 206, 34 Cal. Rptr. 2d 39]* .

[iii] Duty to Third Persons in Professional Negligence Cases

In *Marlene F.v. Affiliated Psychiatric Medical Clinic, Inc.* [*see § 362.11[6][d][i],* all the justices agreed that the doctor-patient relationship between the mother and the therapist created a duty, the breach of which could be the basis for the mother's recovery of damages for the therapist's injury to the child [*Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989) 48 Cal. 3d 583, 599-601, 257 Cal. Rptr. 98, 770 P.2d 278* (Eagleson, J., concurring in result)]. In the absence of such a professional relationship, courts have generally not construed *Molien* to establish any duty on the part of a professional to one not in contractual privity, such as a nonclient or nonpatient [*see* *Huggins v. Longs Drug Stores Cal., Inc. (1993) 6 Cal. 4th 124, 132-133, 24 Cal. Rptr. 2d 587, 862 P.2d 148* (pharmacist not liable for emotional distress suffered by parents due to injury to child, caused by pharmacist's negligence); *Burger v. Pond (1990) 224 Cal. App. 3d 597, 606-607, 273 Cal. Rptr. 709* (attorney not liable to client's spouse for emotional distress suffered by spouse arising from negligently provided legal services to client); *Holliday v. Jones (1989) 215 Cal. App. 3d 102, 106-112, 264 Cal. Rptr. 448]* . For discussion of an attorney's duty to nonclients, see Ch. 76, *Attorney Professional Liability* . For discussion of the duty of a medical professional toward nonpatients, see Ch. 415, *Physicians: Medical Malpractice* .

To establish the existence of a professional relationship sufficient to impose a duty that can be the basis of liability, the

defendant must have assumed a duty to provide professional services to the plaintiff himself or herself [*see Huggins v. Longs Drug Stores Cal., Inc. (1993) 6 Cal. 4th 124, 131-132, 24 Cal. Rptr. 2d 587, 862 P.2d 148* ; *see also Burgess v. Superior Court (1992) 2 Cal. 4th 1064, 1074, 9 Cal. Rptr. 2d 615, 831 P.2d 1197* (characterizing direct-victim liability as based on defendant's breach of duty arising from preexisting relationship)]. The fact that a professional relationship existed with the child or spouse of the plaintiff, standing alone, is insufficient to support a cause of action [*see Huggins v. Longs Drug Stores Cal., Inc. (1993) 6 Cal. 4th 124, 131-132, 24 Cal. Rptr. 2d 587, 862 P.2d 148* ; *Schwarz v. Regents of Univ. of Cal. (1990) 226 Cal. App. 3d 149, 162-168, 276 Cal. Rptr. 470]* .

A professional relationship with a plaintiff that can give rise to liability for emotional distress based on negligent injury to another has been found to exist between a doctor and a pregnant woman, permitting the woman to recover damages for the emotional distress suffered as a result of the doctor's negligent injury of the child during the birth [*Burgess v. Superior Court (1992) 2 Cal. 4th 1064, 1075-1078, 9 Cal. Rptr. 2d 615, 831 P.2d 1197* (also citing prior court of appeal cases permitting recovery)]. A sufficient relationship has also been found between a psychotherapist and a parent of a patient, when the therapy was for the purpose of treating intrafamily dysfunction and the plaintiff was also being treated by the defendant, permitting the plaintiff to recover damages for the emotional distress suffered due to the therapist's sexual misconduct toward the child [*Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989) 48 Cal. 3d 583, 590-592, 257 Cal. Rptr. 98, 770 P.2d 278* ; *see also Jacoves v. United Merch. Corp. (1992) 9 Cal. App. 4th 88, 109, 11 Cal. Rptr. 2d 468* (triable issue of fact existed regarding existence of patient-therapist relationship between defendant and parents of psychiatric patient who committed suicide after release from defendant's care)].

The plaintiff's participation in the treatment of another is not sufficient to create a duty that can be the basis of direct-victim liability. Thus, the fact that a parent must administer prescription medicine to his or her child does not make the pharmacist liable to the parent for damages for emotional distress suffered when the child is injured due to a negligent mistake in the dosage instructions [*Huggins v. Longs Drug Stores Cal., Inc. (1993) 6 Cal. 4th 124, 132-133, 24 Cal. Rptr. 2d 587, 862 P.2d 148* (also refusing to base liability on plaintiff's foreseeable distress at being instrument of child's injury)]. Nor is the fact that a parent participates in therapy, intended to benefit the child sufficient to permit the parent to recover from the therapist if the treatment was solely for the benefit of the child [*Schwarz v. Regents of Univ. of Cal. (1990) 226 Cal. App. 3d 149, 162-168, 276 Cal. Rptr. 470]* . Using a similar rationale, the court of appeal held that a skilled nursing facility owed no duty of care to the sister of one of the facility's patients when the patient was sexually assaulted by an intruder, even though the sister had previously cared for the patient and the facility knew that injury to the patient would probably cause distress to the sister [*Ess v. Eskaton Props., Inc. (2002) 97 Cal. App. 4th 120, 128-129, 118 Cal. Rptr. 2d 240]* .

The California Supreme Court has also stated in dictum that a father is ordinarily not in a physician-patient relationship with a physician whose negligence in prenatal or birth care injures his child, and therefore can recover damages for emotional distress only under a bystander theory [*Burgess v. Superior Court (1992) 2 Cal. 4th 1064, 1078 n.8, 9 Cal. Rptr. 2d 615, 831 P.2d 1197* ; *see § 362.11[6][c]* regarding bystander liability].

One court of appeal has stated in dictum that there may be a distinction between negligent treatment of a child (for which a parent could recover emotional distress damages only under a bystander theory), and negligent diagnosis of a child, for which recovery could be possible because the diagnosis is necessarily directed at the parents [*see Schwarz v. Regents of Univ. of Cal. (1990) 226 Cal. App. 3d 149, 166, 276 Cal. Rptr. 470]* . However, this analysis should be considered suspect after *Huggins v. Longs Drug Stores California, Inc.* [*Huggins v. Longs Drug Stores Cal., Inc. (1993) 6 Cal. 4th 124, 24 Cal. Rptr. 2d 587, 862 P.2d 148]* , in which the California Supreme Court required the plaintiffs to establish that they were the patients of the defendant in order to recover, regardless of the parents' participation in the provision of care [*Huggins v. Longs Drug Stores Cal., Inc. (1993) 6 Cal. 4th 124, 132-133, 24 Cal. Rptr. 2d 587, 862 P.2d 148]* .

Although a veterinarian is hired by the owner of a pet and the pet owner may be emotionally involved in the pet's health, a veterinarian's medical care is directed solely at the pet. Thus, malpractice by a veterinarian does not directly

harm the pet owner and will not support recovery by the pet owner for negligent infliction of emotional distress [*McMahon v. Craig (2009) 176 Cal. App. 4th 1502, 1510, -- Cal. Rptr. 3d --*].

[iv] Duty to Third Persons Arising From Other Relationships

Although *Marlene F.* limited duty to third persons based on mere foreseeability, the Court stated that such a duty might arise from a special relationship between the tortfeasor and the third person [*Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989) 48 Cal. 3d 583, 590, 257 Cal. Rptr. 98, 770 P.2d 278* ; *see Burgess v. Superior Court (1992) 2 Cal. 4th 1064, 1074, 9 Cal. Rptr. 2d 615, 831 P.2d 1197* (referring to preexisting relationship rather than special relationship); *see also § 362.11[6][d][ii]*]. Therefore, the results of some earlier cases in which a duty to the third person was found may still be valid to the extent the result rests on the relationship and not simply on foreseeability.

In one such case, it was held that a public entity that voluntarily assumes a duty toward a certain member of the public and undertakesaction on behalf of that member, thereby inducing reliance, is held to the same standard of care as a private person or organization, and is liable for damages for severe mental and emotional distress resulting from a breach of that duty. In that case, the wife of a man killed in a hit-and-run accident sued a county for severe mental and emotional distress and consequent physical injury resulting from the county's negligent failure to identify the husband's body promptly and to notify the wife that her husband was dead, after county employees had undertaken to assist the wife in finding her husband and after they had received data from the State of California identifying the husband as a victim of an accident [*see Bock v. County of Los Angeles (1983) 150 Cal. App. 3d 65, 68, 72, 197 Cal. Rptr. 470]* .

In another case, the manufacturer of a defective product was held to owe a duty of care not only to a person who is injured by the product, but also to the user of the defective product who sustains emotional trauma through the sensory perception of the death of the person injured or killed [*Kately v. Wilkinson (1983) 148 Cal. App. 3d 576, 587-589, 195 Cal. Rptr. 902* ; *see § 362.13[5]*]. However, unlike the duty owed to a user, a manufacturer does not owe a duty of care to prevent causing emotional distress to a buyer of a defective product, if that buyer is not the party using the product at the time of the injury and if that buyer does not witness the injury-causing event [*Gu v. BMW of N. Am., LLC (2005) 132 Cal. App. 4th 195, 210, 33 Cal. Rptr. 3d 617]* .

A school district and school authorities had a special relationship with the pupils and their parents and therefore owed a duty to a pupil's mother to advise her that her daughter had been sexually molested by a fellow pupil both on and off the school grounds. In this particular case, the school authorities knew of the molestations, subjected the daughter to counseling by the school psychologist without the mother's knowledge or consent, and advised the molester that his parents would be notified if he continued to bother the victim [*Phyllis P. v. Superior Court (1986) 183 Cal. App. 3d 1193, 1196-1197, 228 Cal. Rptr. 776]* .

However, the key element supporting liability for the emotional distress suffered by the parents in that case was the deliberate attempt by the school to conceal the molestation from the child's parents, an act of concealment that was directly aimed at the parents [*see Steven F. v. Anaheim Union High Sch. Dist. (2003) 112 Cal. App. 4th 904, 915, 6 Cal. Rptr. 3d 105]* . In another case, by contrast, a school district was not liable for the emotional distress caused to a high school student's parents when the parents discovered, prior to the school district's doing so, that their daughter had engaged in a sexual relationship with a teacher. In that particular case, the student had gone to great lengths to conceal the relationship from her family and friends, there was no evidence that the district or any teacher or supervisory employee had knowledge of a sexual relationship, and there was nothing to warn the district of a propensity on the part of the teacher to engage in such a relationship with a student. Under those circumstances, even assuming that the district may have been negligent in supervising the teacher, there was no conduct by school officials that was aimed at the parents that would support holding the school liable for the emotional distress suffered by the parents [*Steven F. v. Anaheim Union High Sch. Dist. (2003) 112 Cal. App. 4th 904, 906, 910, 914-915, 6 Cal. Rptr. 3d 105]* .

Bad-faith insurance third-party claims practices do not fall within the scope of negligent infliction of emotional distress

direct-victim cases. There is no special or preexisting relationship between a tortfeasor's insurer and his or her victim that would impose a duty on the insurer toward the victim-claimant with regard to the insurer's conduct in handling the claim [*see Krupnick v. Hartford Accident & Indem. Co. (1994) 28 Cal. App. 4th 185, 198-210, 34 Cal. Rptr. 2d 39]* . The result is the same even if the tortfeasor's insurer is also the insurer for the third party. The claim is made under the tortfeasor's policy, and the insurer owes no duty to the third-party claimant under the tortfeasor's policy [*Coleman v. Republic Indem. Ins. Co. (2005) 132 Cal. App. 4th 403, 416, 33 Cal. Rptr. 3d 744]* .

[7] Defense of Privilege

The qualified privilege under *Civ. Code § 47(c)*, which applies in a defamation action to a communication made without malice to an interested person by one who is also interested, also applies in an action based on negligent infliction of emotional distress [*see Kelly v. General Tel. Co. (1982) 136 Cal. App. 3d 278, 286, 186 Cal. Rptr. 184* (construing former *Civ. Code § 47(3)*); *see generally* Ch. 340, *Libel and Slander*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 362 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART II. LEGAL BACKGROUND

32-362 California Forms of Pleading and Practice--Annotated § 362.12

§ 362.12 Defenses to Intentional and Negligent Infliction of Emotional Distress

[1] Freedom of Religion

A church or other religious organization is protected from tort liability by the *free exercise clause* of *U.S. Const. amend. I*, under some circumstances [*Molko v. Holy Spirit Ass'n (1988) 46 Cal. 3d 1092, 1112-1114, 252 Cal. Rptr. 122, 762 P.2d 46]* . Tort liability may not be imposed on conduct that qualifies as an expression of the religion unless the state has a compelling secular interest in discouraging the conduct [*Wollersheim v. Church of Scientology (1989) 212 Cal. App. 3d 872, 887, 260 Cal. Rptr. 331]* .

Counsel should note that the United States Supreme Court granted certiorari in *Wollershiem*, vacated the judgment, and remanded the case to the Court of Appeal of California, Second Appellate District, for further consideration in light of *Pacific Mutual Life Insurance Co. v. Haslip* [*see* Church of Scientology of California v. Wollersheim, *cert. granted*, March18, 1991, *499 U.S. 914, 111 S. Ct. 1298, 113 L. Ed. 2d 234* ; *see also* *Pacific Mut. Life Ins. Co. v. Haslip (1991) 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1]* . However, the issue in *Pacific Mutual Life Ins. Co. v. Haslip* was the constitutionality of a state's punitive damages law [*see* Ch. 177, *Damages*]. On remand, the appellate court reaffirmed its prior determination of the religious freedom issue and incorporated it into its second opinion [*see Wollersheim v. Church of Scientology (1992) 6 Cal. Rptr. 2d 532]* . The California Supreme Court then granted review in *Wollersheim II* without limiting issues (review granted July 23, 1992, S011790). Unless otherwise ordered by the Supreme Court, no opinion that is superseded by a grant of review may be published [*Cal. Rules of Ct., Rule 8.1105(e)(1)*]. An unpublished opinion may not be cited or relied on in any other action or proceeding [*Cal. Rules of Ct., Rule 8.1115(a)*]. Therefore, *Wollersheim II* is not citable as authority for *Wollersheim I*'s freedom of religion discussion. *Wollersheim I*, however, may be citable for its discussion of freedom of religion as a defense to tort liability; in any event, the arguments relied on by the court may be used in a similar case.

With regard to negligent conduct by a religious organization that causes emotional distress, one court has held that religious freedom considerations outweigh any interest that the state may have in imposing tort liability. Therefore, as a matter of law, there is no duty on behalf of religious leaders to exercise due care toward members or former members in the conduct of religious activities [*Wollersheim v. Church of Scientology (1989) 212 Cal. App. 3d 872, 900-901, 260 Cal. Rptr. 331* ; *see* *Nally v. Grace Cmty. Church (1988) 47 Cal. 3d 278, 292-300, 253 Cal. Rptr. 97, 763 P.2d 948*

(no duty on part of minister engaged in pastoral counseling to prevent member's suicide); *Jacqueline R. v. Household of Faith Family Church, Inc. (2002) 97 Cal. App. 4th 198, 207, 118 Cal. Rptr. 2d 264* (pastor providing unpaid marriage counseling to church members not liable for engaging in consensual sexual conduct with woman receiving counseling)].

Protected tortious conduct must qualify as an expression of the religion and not just as an activity that religious people happen to be doing [*Wollersheim v. Church of Scientology (1989) 212 Cal. App. 3d 872, 886-887, 260 Cal. Rptr. 331* ; *see Molko v. Holy Spirit Ass'n (1988) 46 Cal. 3d 1092, 1114, 252 Cal. Rptr. 122, 762 P.2d 46* (religious groups may be held liable in tort for secular acts)]. Thus, emotional distress that is caused by a religious leader's secular conduct, such as negligent driving, is actionable, subject to the same requirements and limitations applicable to any other defendant [*see Wollersheim v. Church of Scientology (1989) 212 Cal. App. 3d 872, 886-887, 260 Cal. Rptr. 331* ; *see, e.g., Malloy v. Fong (1951) 37 Cal. 2d 356, 372, 232 P.2d 241]* .

Intentional conduct that is alleged to be outrageous has less constitutional protection. For example, the intentional and improper disclosure of personal information obtained from a member in the course of religious activity is not protected religious expression [*Wollersheim v. Church of Scientology (1989) 212 Cal. App. 3d 872, 899-900, 260 Cal. Rptr. 331* ; *see Snyder v. Evangelical Orthodox Church (1989) 216 Cal. App. 3d 297, 309-310, 264 Cal. Rptr. 640]* .

Even if a particular intentional activity qualifies as religious expression, tort liability may still be imposed if the state has a compelling secular interest in discouraging the conduct [*Wollersheim v. Church of Scientology (1989) 212 Cal. App. 3d 872, 887-891, 260 Cal. Rptr. 331* ("fair game" policy of church to bring economic and possibly psychological ruin to persons who abandon religion is not entitled to constitutional protection)]. Religious activity that involves an element of coercing participation or of making continued participation involuntary is less likely to qualify for constitutional protection. The state has a compelling interest in allowing its citizens to recover from serious emotional injuries that they suffer through religious practices that they are coerced into accepting. This conduct is too outrageous to be protected under the Constitution and too unworthy to be privileged under the law of torts [*Wollersheim v. Church of Scientology (1989) 212 Cal. App. 3d 872, 892-897, 260 Cal. Rptr. 331]* .

A member of the clergy who causes emotional distress through sexually inappropriate conduct with a consenting adult parishioner may be subject to tort liability under the theory that the conduct has breached a fiduciary duty arising out of a confidential relationship, if the alleged injurious conduct was not dictated by a sincerely held religious belief or carried out in accordance with established beliefs and practices of the religion to which the pastor belongs and if no other reason exists to prevent the issues from being framed for the trier of fact in secular rather than sectarian terms [*Richelle L. v. Roman Catholic Archbishop (2003) 106 Cal. App. 4th 257, 279, 130 Cal. Rptr. 2d 601]* . However, to show that a confidential relationship existed that created a fiduciary duty on the part of the defendant, a plaintiff will normally need to show that the misconduct occurred while the defendant was providing counseling services to the plaintiff [*Richelle L. v. Roman Catholic Archbishop (2003) 106 Cal. App. 4th 257, 280, 130 Cal. Rptr. 2d 601]* . In addition, a claim by the plaintiff that the depth of his or her religious faith rendered the plaintiff vulnerable to the defendant's advances can be fatal to a tort claim, because such a claim cannot be adjudicated without reference to the nature of the plaintiff's religious beliefs and the doctrines of that particular religion [*Richelle L. v. Roman Catholic Archbishop (2003) 106 Cal. App. 4th 257, 280-281, 130 Cal. Rptr. 2d 601]* .

[2] Preemption Under Workers' Compensation Law

Claims for infliction of emotional distress against an employer or coworker aregenerally preempted by the exclusive remedy principle of workers' compensation law [*Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 755, 7 Cal. Rptr. 2d 808, 828 P.2d 1195* ; *see Lab. Code §§ 3600, 3601(a), 3602(a)*].

There are exceptions to this rule if the employer's conduct contravenes fundamental public policy or exceeds the inherent risks of the employment [*Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 755, 7 Cal. Rptr. 2d 808, 828 P.2d 1195]* . For example, an action to recover for emotional distress based on wrongful termination in violation of

public policy, or based on illegal discrimination or harassment, is not necessarily barred [*Murray v. Oceanside Unified Sch. Dist. (2000) 79 Cal. App. 4th 1338, 1362-1363, 95 Cal. Rptr. 2d 28* ; *Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1492, 82 Cal. Rptr. 2d 359* ; *Kovatch v. Cal. Cas. Mgmt. Co. (1998) 65 Cal. App. 4th 1256, 1277-1278, 77 Cal. Rptr. 2d 217]* .

For further discussion, see Ch. 577, *Workers' Compensation* , Part IV.

[3] Preemption Under Federal Labor Law

State tort law claims against an employer or a labor union by an employee or member whose employment is governed by a collective bargaining agreement may be preempted by federal labor law [*see* Dunton v. United Ass'n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. (1988) 206 Cal. App. 3d 44, 49, 131 L.R.R.M. (BNA) 2677, 253 Cal. Rptr. 374 ; *Friday v. Hughes Aircraft Co. (1986) 188 Cal. App. 3d 117, 236 Cal. Rptr. 291]* . However, where factual questions about an employer's conduct do not involve interpreting the collective bargaining agreement, an action for intentional infliction of emotional distress is not preempted [*Soldinger v. Northwest Airlines (1996) 51 Cal. App. 4th 345, 377, 58 Cal. Rptr. 2d 747* (factual dispute involving employer's motives for denying plaintiff's request to allow her to observe Jewish holiday of Passover did not involve interpretation of collective bargaining agreement, thus emotional distress claim was not preempted)].

[4] Preemption Under Airline Deregulation Act

Emotional injury claims against an airline stemming from the negligent rendition of services and conduct of the flight crew are preempted by Section 105 of the Federal Aviation Act [*49 U.S.C.S. § 41713(b)(1)*], commonly referred to as the Airline Deregulation Act (ADA). Safety related personal injury or death claims concerning airline operations or maintenance are not preempted by the ADA. A claim that may be fairly characterized as relating both to service and operations should not be preempted [*Gee v. Southwest Airlines (9th Cir. 1997) 110 F.3d 1400, 1406-1407* (preempting emotional distress claims related to the service of alcoholic beverages to passengers, the crew's in-flight conduct towards unruly passengers, and the conduct of employees who failed to provide a passenger assistance with her disability)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressDefensesTortsNegligenceActionsNegligent Infliction of Emotional DistressGeneral OverviewTortsNegligenceDefensesGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 362 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART II. LEGAL BACKGROUND

32-362 California Forms of Pleading and Practice--Annotated § 362.13

§ 362.13 Mental Suffering in Other Causes of Action

[1] In General

In a cause of action other than one for the infliction of mental distress, damages may be given for mental suffering naturally ensuing from the acts complained of [*Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 924, 167 Cal. Rptr. 831, 616 P.2d 813* ; *Capelouto v. Kaiser Found. Hosp. (1972) 7 Cal. 3d 889, 892, 103 Cal. Rptr. 856, 500 P.2d 880* ; *State Rubbish Collectors Ass'n v. Siliznoff (1952) 38 Cal. 2d 330, 338, 240 P.2d 282]* . Compensation for mental suffering is within the scope of general damages, which are the damages that are deemed to necessarily result from tortious conduct [*Beeman v. Burling (1990) 216 Cal. App. 3d 1586, 1599-1600, 265 Cal. Rptr. 719* ; *Niles v. City of San Rafael (1974) 42 Cal. App. 3d 230, 244, 116 Cal. Rptr. 733* ; *see Myers v. Stephens (1965) 233 Cal. App. 2d 104, 120-121, 43 Cal. Rptr. 420]* .

With regard to general damages for mental suffering, the general rule of damages in tort applies: the injured party may recover for all detriment proximately caused whether it could have been anticipated or not [*Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 579, 108 Cal. Rptr. 480, 510 P.2d 1032* ; *Crisci v. Security Ins. Co. (1967) 66 Cal. 2d 425, 433, 58 Cal. Rptr. 13, 426 P.2d 173* ; *Deevy v. Tassi (1942) 21 Cal. 2d 109, 130 P.2d 389]* . In this connection, mental suffering includes fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, and indignity, as well as physical pain [*Deevy v. Tassi (1942) 21 Cal. 2d 109, 130 P.2d 389]* . For example, fear for another, even in the absence of resulting physical injury, can be part of the damages in aggravation of an established tort [*Dillon v. Legg (1968) 68 Cal. 2d 728, 738, 69 Cal. Rptr. 72, 441 P.2d 912* ; *see Acadia Cal., Ltd. v. Herbert (1960) 54 Cal. 2d 328, 337, 5 Cal. Rptr. 686, 353 P.2d 294]* . And mental suffering occasioned by any reasonable apprehension of future disability or deformity resulting naturally and proximately from the plaintiff's injury is an element to be considered by the jury in assessing damages [Boa v. San Francisco-Oakland Terminal Ry. (1920) 182 Cal. 93, 106, 187 P. 2] .

Mental suffering frequently constitutes the principal element of tort damages and awards that fail to compensate for pain and suffering have been held inadequate as a matter of law [*Capelouto v. Kaiser Foundation Hosp. (1972) 7 Cal. 3d 889, 893, 103 Cal. Rptr. 856, 500 P.2d 880]* . The most common example of the award of damages for mental suffering in addition to other damages is probably when the plaintiff suffers personal injuries in addition to mental distress as a result of either negligent or intentional misconduct by the defendant [*see, e.g., Di Mare v. Cresci (1962)*

58 Cal. 2d 292, 300-301, 23 Cal. Rptr. 772, 373 P.2d 860] .

General damages for emotional distress are not confined to cases in which the award is an addition to an award for personal injuries or of other compensatory damages. Damages for mental suffering may be awarded as a consequence of intentional or negligent conduct even in the absence of physical injury [*Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 924-930, 167 Cal. Rptr. 831, 616 P.2d 813]* . One court has held, however, that, in order to recover general damages for emotional distress, a plaintiff must have substantial damages apart from the emotional distress [*Andersen v. Pacific Bell (1988) 204 Cal. App. 3d 277, 284-285, 251 Cal. Rptr. 66* (involving tort of "retaliatory employment discipline")]. This holding has been criticized by another court of appeal as clearly in conflict with California Supreme Court authority [*Pintor v. Ong (1989) 211 Cal. App. 3d 837, 845, 259 Cal. Rptr. 577* (citing *Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989) 48 Cal. 3d 583, 257 Cal. Rptr. 98, 770 P.2d 278* ,and *Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 167 Cal. Rptr. 831, 616 P.2d 813* , as examples of cases in which recovery was permitted for emotional distress alone)].

If recovery of damages for emotional distress, without any recovery for physical injury, is sought as a result of negligent conduct, it is often labeled as a separate tort or cause of action for "negligent infliction of emotional distress." However, this label is incorrect. Such a recovery is simply the application of the rule that, with regard to the tort of negligence, damages for emotional distress may be recovered even in the absence of physical injury [*Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989) 48 Cal. 3d 583, 588, 257 Cal. Rptr. 98, 770 P.2d 278]* . For further discussion, see *§ 362.11*.

Damages for mental distress may also be awarded in cases in which the tortious conduct is an interference with property rights without any personal injuries apart from the mental distress [*Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 579, 108 Cal. Rptr. 480, 510 P.2d 1032* ; *Crisci v. Security Ins. Co. (1967) 66 Cal. 2d 425, 433, 58 Cal. Rptr. 13, 426 P.2d 173]* . For discussion, see *§ 362.13[2]*.

For further discussion of general damages for mental suffering and for forms alleging general damages, see Ch. 177, *Damages* .

[2] Injury to Property Interest or Financial Injury

A plaintiff may recover damages for emotional distress caused by an intentional tortious interference with property rights, whether or not he or she suffered any personal injuries apart from the mental distress. Thus, a plaintiff who as a result of a defendant's intentional tortious conduct loses property and suffers mental distress may be able to recover damages not only for pecuniary loss, but also for mental distress [*Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 579, 108 Cal. Rptr. 480, 510 P.2d 1032* ; *Crisci v. Security Ins. Co. (1967) 66 Cal. 2d 425, 433-434, 58 Cal. Rptr. 13, 426 P.2d 173* ; *see Lacher v. Superior Court (1991) 230 Cal. App. 3d 1038, 1049-1050, 281 Cal. Rptr. 640]* . Damages for emotional distress may also be recoverable in connection with a financial loss or risk of financial loss [*Richardson v. Allstate Ins. Co. (1981) 117 Cal. App. 3d 8, 13, 172 Cal. Rptr. 423]* .

Thus, emotional distress is compensable if it results from a trespass or a nuisance [*Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 271-275, 288 P.2d 507* ; *Herzog v. Grosso (1953) 41 Cal. 2d 219, 225, 226, 259 P.2d 429* ; *Lew v. Superior Court (1993) 20 Cal. App. 4th 866, 871-874, 25 Cal. Rptr. 2d 42* (small claims actions for nuisance against owners of "drug house"); *Armitage v. Decker (1990) 218 Cal. App. 3d 887, 905, 267 Cal. Rptr. 399* (trespass); *Smith v. County of Los Angeles (1989) 214 Cal. App. 3d 266, 287-288, 262 Cal. Rptr. 754* (nuisance)]; from other tortious conduct that impairs the beneficial use and enjoyment of real property [*Acadia, Cal., Ltd. v. Herbert (1960) 54 Cal. 2d 328, 337-338, 5 Cal. Rptr. 686, 353 P.2d 294* (shutting off of water supply); *Tooke v. Allen (1948) 85 Cal. App. 2d 230, 237-238, 192 P.2d 804* (interfering with tenant's enjoyment of leased property)]; or from the conversion or damaging of personal property [*Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 921, 114 Cal. Rptr. 622, 523 P.2d 662* ; *Gonzales v. Personal Storage, Inc. (1997) 56 Cal. App. 4th 464, 477, 65 Cal. Rptr. 2d 473]* . Recovery

has also been allowed for emotional distress resulting from a breach of the implied covenant of good faith and fair dealing in an insurance contract [*Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 579, 108 Cal. Rptr. 480, 510 P.2d 1032* ; *Crisci v. Security Ins. Co. (1967) 66 Cal. 2d 425, 433-434, 58 Cal. Rptr. 13, 426 P.2d 173]* and from tortious interference with contractual relations [*Mouchette v. Board of Educ. (1990) 217 Cal. App. 3d 303, 315, 266 Cal. Rptr. 1] , disapproved on other grounds, Caldwell v. Montoya, 10 Cal. 4th 972, 42 Cal. Rptr. 2d 842, 897 P.2d 1320* .

Courts have generally limited the right to recover for emotional distress concurrent with property damage or economic loss if the damage or loss was caused only by negligent conduct [*see Sher v. Leiderman (1986) 181 Cal. App. 3d 867, 883-885, 226 Cal. Rptr. 698* ; *State of California ex rel. Dep't of Transp. v. Superior Court (1984) 159 Cal. App. 3d 331, 337-338, 205 Cal. Rptr. 518* ; *Cooper v. Superior Court (1984) 153 Cal. App. 3d 1008, 1012, 200 Cal. Rptr. 746* ; *see also Lee v. Bank of America (1990) 218 Cal. App. 3d 914, 920, 267 Cal. Rptr. 387* (stating that California courts have limited emotional suffering damages to cases involving either physical impact and injury to plaintiff, or intentional wrongdoing by defendant)]. Under this view, there can be no recovery for emotional distress arising solely from property damage, absent a threshold showing of some preexisting relationship or intentional tort [*Erlich v. Menezes (1999) 21 Cal. 4th 543, 554, 87 Cal. Rptr. 2d 886, 981 P.2d 978* ; *Cooper v. Superior Court (1984) 153 Cal. App. 3d 1008, 1012, 200 Cal. Rptr. 746]* . Another court has refused to allow emotional-distress damages resulting from insurance claims practices that were merely negligent, without rising to the level of bad faith [*see Soto v. Royal Globe Ins. Co. (1986) 184 Cal. App. 3d 420, 434, 229 Cal. Rptr. 192* ; *see also Andre v. Superior Court (1991) 2 Cal. App. 4th 11, 20 n.9, 2 Cal. Rptr. 2d 815]* . Yet another has refused damages for emotional distress with regard to negligent misrepresentation of conditions of employment [*Branch v. Homefed Bank (1992) 6 Cal. App. 4th 793, 797-801, 8 Cal. Rptr. 2d 182]* . The California Supreme Court has held that homeowners were not entitled to recover emotional distress damages for the negligent performance of a contract to build their home. The Court stressed that a contractual relationship, without more, is insufficient to support an award of damages for emotional distress if the negligent conduct resulted only in economic injury to the plaintiff [*Erlich v. Menezes (1999) 21 Cal. 4th 543, 554-557, 87 Cal. Rptr. 2d 886, 981 P.2d 978]* .

These holdings are arguably inconsistent with *Molien v. Kaiser Foundation Hospitals,* in which the California Supreme Court abolished physicalimpact or injury as a requirement for recovery of damages for emotional distress suffered because of negligent conduct [*Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 924-931, 167 Cal. Rptr. 831, 616 P.2d 813]* . However, one court has tried to harmonize *Molien* with standards that would not automatically allow damages for emotional distress arising from negligent injury to property or financial interests. In the view of this court, the focus should be on the nature of the interest invaded. If the interest invaded does not naturally entail significant emotional distress, and if precedent has not established the availability of damages for consequential emotional distress, the matter should be resolved as a question of policy [*Merenda v. Superior Court (1992) 3 Cal. App. 4th 1, 8, 4 Cal. Rptr. 2d 87]* . This approach would be consistent with the approach taken by the California Supreme Court in a case in which the Court held that homeowners were not entitled to recover emotional distress damages for the negligent performance of a contract to build their home. In that particular case, the Supreme Court concluded that public policy concerns, including a concern with promoting commercial stability, supported a rule that prohibited the recovery of emotional distress damages in that context [*Erlich v. Menezes (1999) 21 Cal. 4th 543, 554-558, 87 Cal. Rptr. 2d 886, 981 P.2d 978]* .

Therefore, emotional distress damages arising from invasions of property interests such as nuisance or trespass are appropriate because in these cases, the emotional distress could be said naturally to ensue from an act that invaded an interest protected by the established tort. In contrast, recovery should be denied if the interest protected is essentially economic, as is typically the case in legal malpractice [*Merenda v. Superior Court (1992) 3 Cal. App. 4th 1, 9-10, 4 Cal. Rptr. 2d 87* ; *see § 362.11[5]*].

For a discussion of, and forms for use in, actions for nuisance or trespass, see Ch. 380, *Nuisance* , and Ch. 550, *Trespass* .

[3] Breach of Contract

Damages for mental suffering resulting from a breach of contract are not normally recoverable. These damages may be recoverable, however, if the contract, by its nature, puts the defendant on notice that a breach would result in emotional and mental suffering by the plaintiff. Thus, it has been held that a husband's complaint stated a cause of action for damages for financial, physical, and emotional harm resulting from the destruction of his marriage proximately caused by the defendants' breach of their contract to exclude the plaintiff's wife, a compulsive gambler, from their gambling establishments and to deny her further check cashing privileges in consideration of the husband's reimbursement to them of the amounts of checks previously cashed for the wife that had been dishonored for insufficiency of funds [*Wynn v. Monterey Club (1980) 111 Cal. App. 3d 789, 801, 168 Cal. Rptr. 878* ; *see Windeler v. Scheers Jewelers (1970) 8 Cal. App.3d 844, 851-852, 88 Cal. Rptr. 39* (breach of bailment contract involving jewelry with great sentimental value)].

In addition, there are contracts that so affect the vital concerns of the individual that severe mental distress is a foreseeable result of the breach. For many years, the California courts have recognized that damages for mental distress may be recovered for a negligent breach of a contract of this nature [*Allen v. Jones (1980) 104 Cal. App. 3d 207, 211, 163 Cal. Rptr. 445* (mortuary's negligent loss of corpse); *see Cobler v. Stanley, Barber, Southard, Brown & Assocs. (1990) 217 Cal. App. 3d 518, 531, 265 Cal. Rptr. 868* (service contract for professional career consultation not within exception to general rule of nonrecovery)].

However, those cases arguably dealt with contracts that specifically contemplated that a breach would be accompanied by severe emotional distress. If still valid, those holdings should be seen as exceptions to the general rule that damages for emotional distress will generally not be permitted for what is essentially a breach of contract. Conduct amounting to a breach of contract becomes tortious only if it also violates a duty independent from the contract that arises from principles of tort law [*Erlich v. Menezes (1999) 21 Cal. 4th 543, 551, 87 Cal. Rptr. 2d 886, 981 P.2d 978]* . Moreover, a negligent breach of contract alone will generally be insufficient to support an award of tort damages, at least outside of the insurance context [*Erlich v. Menezes (1999) 21 Cal. 4th 543, 553-554, 87 Cal. Rptr. 2d 886, 981 P.2d 978]* .

For example, the California Supreme Court has made clear that emotional distress damages are not recoverable for a negligent breach of contract if the only injury to the plaintiff is economic and if policy concerns argue against allowing recovery for emotional distress. Therefore, even if it was foreseeable that breach of a contract to build a house would result in emotional distress to the homeowners, the Supreme Court held that, to promote commercial stability, the homeowners were not entitled to recover emotional distress damages for negligent performance of the contract [*Erlich v. Menezes (1999) 21 Cal. 4th 543, 552-557, 87 Cal. Rptr. 2d 886, 981 P.2d 978]* . However, a tortious breach of contract may be found if: (1) the breach is accompanied by a common law tort such as fraud or conversion; (2) the means used to breach the contract are tortious by use of deceit or undue coercion; or (3) one party intentionally breaches the contract, intending or knowing that such a breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages [*Erlich v. Menezes (1999) 21 Cal. 4th 543, 553-554, 87 Cal. Rptr. 2d 886, 981 P.2d 978]* .

For example, in an action founded on fraud by the buyer of a car against the dealer for intentionally, falsely, and fraudulently representing that it would make the proper repairs each of the numerous times the plaintiff returned the car for repairs under the warranty, the court of appeal held that the action sounded in deceit and the proper measure of damages wasthe measure for the tort of deceit as defined by *Civ. Code §§ 1709* and *3333* and included recovery for mental pain and suffering [*Sprague v. Frank J. Sanders Lincoln Mercury, Inc. (1981) 120 Cal. App. 3d 412, 417-418, 174 Cal. Rptr. 608* ; *see Rosener v. Sears, Roebuck & Co. (1980) 110 Cal. App. 3d 740, 754-755, 168 Cal. Rptr. 237* (action based on fraud for compensatory and punitive damages for financial losses and emotional distress against nationally known retail merchandiser by homeowners who had entered into home improvement contracts with contractor licensed by defendant, who defaulted in work)].

Although it may well be foreseeable that a physician's breach of a contract with a patient may result in emotional distress, the fact that the physician owes a general duty of care to his or her patient, and the possibility that this duty of care and the contractual obligations may conflict, precludes recovery of emotional distress damages for the breach of a contract in this situation [*Selden v. Dinner (1993) 17 Cal. App. 4th 166, 172-174, 21 Cal. Rptr. 2d 153* (doctor's breach of contract to perform surgery by specified date, without any breach of duty of professional care, cannot be basis for emotional distress damages award; court noted that doctor could have breached duty of care had he performed surgery when he did not feel he could do so properly)].

The tort of intentional infliction of emotional distress is frequently pleaded as an alternative cause of action in a complaint alleging torts arising directly from the contractual relationship. The two torts with which it is most frequently alleged are the breach of the implied covenant of good faith and fair dealing, and the tort arising out of a contract breach combined with one party's attempt to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists [*see, e.g.,* *Rulon-Miller v. International Bus. Machs. Corp. (1984) 162 Cal. App. 3d 241, 254-255, 208 Cal. Rptr. 524* (complaint alleged wrongful discharge based on employer's breach of covenant of good faith and fair dealing, and intentional infliction of emotional distress); *Wallis v. Superior Court (1984) 160 Cal. App. 3d 1109, 1115-1120, 207 Cal. Rptr. 123* (complaint alleged bad faith breach of contract, breach of covenant of fair dealing, and intentional infliction of emotional distress)].

If the same act is both a breach of contract and a tort, the plaintiff may elect to sue in tort, in which event general damages for mental pain and suffering may be recoverable [*Sprague v. Frank J. Sanders Lincoln Mercury, Inc. (1981) 120 Cal. App. 3d 412, 417-418, 174 Cal. Rptr. 608]* . Therefore, if the breach is tortious, damages for emotional distress may be recovered despite the fact that the conduct also involved a breach of contract [*Crisci v. Security Ins. Co. (1967) 66 Cal. 2d 425, 432-434, 58 Cal. Rptr. 13, 426 P.2d 173* ; *Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 400, 89 Cal. Rptr. 78]* .

[4] Defamation

Although the gravamen of a defamation action is injury to reputation, libel or slander also inflicts on a plaintiff humiliation, mortification, and emotional distress. In circumstances in which a plaintiff states a case of libel or slander, such personal distress is a matter that may be taken into account in determining the amount of damages to which the plaintiff is entitled, but it does not give rise to an independent cause of action on the theory of a separate tort [*Grimes v. Carter (1966) 241 Cal. App. 2d 694, 702, 50 Cal. Rptr. 808* ; *see also* *Behrendt v. Times-Mirror Co. (1938) 30 Cal. App. 2d 77, 84, 85 P.2d 949]* .

[5] Products Liability

The court of appeal has held that one who uses a product that proves to be defective, and injures a third person as a direct result of the use of the defective product, is a direct victim and may recover damages for the emotional distress caused by the injury from the manufacturer regardless of the relationship between the plaintiff and the injured party and regardless of whether the user suffers physical injury [*Kately v. Wilkinson (1983) 148 Cal. App. 3d 576, 587-588, 195 Cal. Rptr. 902]* . This case was decided on the ground that the manufacturer should have foreseen that the user of a defective product would suffer emotional distress if injury results from the defect [*Kately v. Wilkinson (1983) 148 Cal. App. 3d 576, 588-589, 195 Cal. Rptr. 902* ; *see* *Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 923, 167 Cal. Rptr. 831, 616 P.2d 813* (limited on issue of duty to direct victim versus bystander in *Burgess v. Superior Court (1992) 2 Cal. 4th 1064, 1074, 9 Cal. Rptr. 2d 615, 831 P.2d 1197*)]. However, this broad standard of duty has now been limited by the California Supreme Court, and foreseeability alone is no longer a sufficient basis for imposing a duty [*see Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989) 48 Cal. 3d 583, 589-590, 257 Cal. Rptr. 98, 770 P.2d 278]* , and it is not clear whether *Kately* has any continued viability. For further discussion of the prerequisites for recovery under the more restrictive rules for determining duty, see *§ 362.11[6][d]*.

In a subsequent case, the court suggested that under a products liability theory, a duty would arise that meets the standards of *Marlene F.*, but held that no cause of action arises until a defective product actually malfunctions. Emotional distress arising from the fear that the product will malfunction in the future is not a basis for recovery [*Khan v. Shiley Inc. (1990) 217 Cal. App. 3d 848, 856-857, 266 Cal. Rptr. 106]* .

Regardless of the precise scope of the duty owed to a user of a product, a manufacturer does not owe a duty of care to prevent causing emotional distress to the buyer of a defective product, if that buyer is not the party using the product at the time of the injury and if that buyer does not witness the injury-causing event [*Gu v. BMW of N. Am., LLC (2005) 132 Cal. App. 4th 195, 210, 33 Cal. Rptr. 3d 617]* .

[6] Fraud or Deceit

Damages for emotional distress may be recovered in a tort action for fraud, deceit, and breach of fiduciary relationship [*Branch v. Homefed Bank (1992) 6 Cal. App. 4th 793, 799, 8 Cal. Rptr. 2d 182* ; *Jahn v. Brickey (1985) 168 Cal. App. 3d 399, 406, 214 Cal. Rptr. 119* ; *Sprague v. Frank J. Sanders Lincoln Mercury, Inc. (1981) 120 Cal. App. 3d 412, 417, 174 Cal. Rptr. 608* ; *see Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 921, 114 Cal. Rptr. 622, 523 P.2d 662* ; *Lacher v. Superior Court (1991) 230 Cal. App. 3d 1038, 1049-1050, 281 Cal. Rptr. 640* ; *see also Civ. Code § 1709*]. However, one court has held that damages for emotional distress arising from fraudulent conduct may be allowed only as an aggravation of other damages [*Nagy v. Nagy (1989) 210 Cal. App. 3d 1262, 1269, 258 Cal. Rptr. 787* (husband may not recover for emotional distress suffered because of wife's fraud in misrepresenting that he was father of child)]. One judge dissented on this point [*Nagy v. Nagy (1989) 210 Cal. App. 3d 1262, 1273 n.1, 258 Cal. Rptr. 787* (Johnson, J., concurring in judgment)].

Damages for emotional distress are not allowed for fraud in the purchase, sale, or exchange of property, under *Civ. Code § 3343* [*Adriana Int'l Corp. v. Thoeren (9th Cir. 1990) 913 F.2d 1406* ; *O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 159, 119 Cal. Rptr. 245* ; *see Branch v. Homefed Bank (1992) 6 Cal. App. 4th 793, 798, 8 Cal. Rptr. 2d 182]* . Damages for emotional distress have also been denied in the case of negligent misrepresentation [*Branch v. Homefed Bank (1992) 6 Cal. App. 4th 793, 797-801, 8 Cal. Rptr. 2d 182* ; *see § 362.11*].

[7] Breach of Statutory Duty

All detriment proximately caused by the breach of a duty imposed by statute is compensable, including damages for emotional distress [*Pintor v. Ong (1989) 211 Cal. App. 3d 837, 841-842, 259 Cal. Rptr. 577]* . It is not necessary that the plaintiff suffer other injury in addition to the emotional distress. However, the emotional injury suffered must be severe, that is, substantial or enduring as distinguished from trivial or transitory [*Pintor v. Ong (1989) 211 Cal. App. 3d 837, 845-846, 259 Cal. Rptr. 577* ; *see Lee v. Bank of Am. (1990) 218 Cal. App. 3d 914, 920, 267 Cal. Rptr. 387]* .

Under this rule, damages for emotional distress have been awarded for a breach of the duty imposed by *Civ. Code § 2941*, requiring reconveyance of real property after a debt secured by a deed of trust has been satisfied [*Pintor v. Ong (1989) 211 Cal. App. 3d 837, 841-846, 259 Cal. Rptr. 577]* ; for a breach of duty imposed by the Credit Card Act [*Young v. Bank of Am. (1983) 141 Cal. App. 3d 108, 113-115, 190 Cal. Rptr. 122* ; *see Civ. Code § 1747 et seq.*]; for the breach of duties imposed on a notary public under Government Code and Civil Code provisions [*McComber v. Wells (1999) 72 Cal. App. 4th 512, 520, 85 Cal. Rptr. 2d 376* ; *see Gov. Code § 8205 et seq.*;*Civ. Code § 1185 et seq.*]; and for a breach of duty under *Com. Code § 4402*, which authorizes an award of damages proximately caused by the wrongful dishonor of a check [*Kendall Yacht Corp. v. United California Bank (1975) 50 Cal. App. 3d 949, 957-958, 123 Cal. Rptr. 848* ; *see Lee v. Bank of Am. (1990) 218 Cal. App. 3d 914, 920, 267 Cal. Rptr. 387]* .

[8] Other Actions

If a cause of action for assault, battery, or false imprisonment is otherwise established, damages may be given for mental suffering naturally ensuing therefrom [*State Rubbish Collectors Ass'n v. Siliznoff (1952) 38 Cal. 2d 330, 338, 240 P.2d 282* (dictum)]. One court has stated that it could not conceive of a circumstance under which a cause of action for sexual assault, battery, or harassment could accrue devoid of any consequential emotional distress [*see Mendez v. Superior Court (1988) 206 Cal. App. 3d 557, 573, 253 Cal. Rptr. 731]* . Emotional distress damages are also allowed for wrongful eviction [*Richardson v. Pridmore (1950) 97 Cal. App. 2d 124, 129, 217 P.2d 113* ; *see also Emden v. Vitz (1948) 88 Cal. App. 2d 313, 316-319, 198 P.2d 696]* , abuse of process [*Spellens v. Spellens (1957) 49 Cal. 2d 210, 233, 317 P.2d 613* ; *James v. Public Fin. Corp. (1975) 47 Cal. App. 3d 995, 1000, 121 Cal. Rptr. 670]* , invasion of privacy [*Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 137, 188 Cal. Rptr. 762]* , and the malicious prosecution of a criminal or civil proceeding [*Bertero v. National Gen. Corp. (1974) 13 Cal. 3d 43, 59-64, 118 Cal. Rptr. 184, 529 P.2d 608* ; *Allard v. Church of Scientology (1976) 58 Cal. App. 3d 439, 451, 129 Cal. Rptr. 797]* .

For a discussion of, and forms for use in, causes of action in which damages for mental distress and suffering may be recovered, see Ch. 58, *Assault and Battery* ; Ch. 257, *False Imprisonment* ; Ch. 340, *Libel and Slander* ; Ch. 357, *Malicious Prosecution and Abuse of Process* ; and Ch. 429, *Privacy* .

[9] Pain and Suffering

[a] Unitary Concept

In general, courts have not attempted to draw distinctions between the elements of pain on the one hand, and suffering on the other; rather, the unitary concept of pain and suffering has served as a convenient label under which a plaintiff may recover not only for physical pain but also for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror, or ordeal. Although these terms refer to subjective states, representing a detriment that can be translated into monetary loss only with great difficulty, the detriment is a genuine one that requires compensation [*Capelouto v. Kaiser Found. Hosp. (1972) 7 Cal. 3d 889, 893, 103 Cal. Rptr. 856, 500 P.2d 880]* .

[b] Proof

The absence of medical testimony does not foreclose recovery for pain and suffering; expert testimony is not a prerequisite to the framing of a question for the jury on this issue. Although the plaintiff's own testimony commonly establishes his or her damages for pain and suffering, the testimony of other persons, including that of lay witnesses relating observations of the sufferer's involuntary declarations and expressions of pain are admissible. Even in the absence of any explicit evidence showing pain, the jury may infer pain if the injury is such that the jury in its common experience knows it is normally accompanied by pain [*Capelouto v. Kaiser Found. Hosp. (1972) 7 Cal. 3d 889, 895-896, 103 Cal. Rptr. 856, 500 P.2d 880]* .

[c] Amount

No definite standard or method of calculation is prescribed by law by which to fix compensation for pain and suffering. It is required only that the award be just and reasonable in light of the evidence [*Garfoot v. Avila (1989) 213 Cal. App. 3d 1205, 1210-1213, 261 Cal. Rptr. 924* (verdict may not be impeached by evidence that jury reduced award for future pain and suffering to present value); *see Civ. Code § 3359*; *see also BAJI No. 14.13* (7th ed.)]. The chief guarantees of reaching reasonable results in attempting to value suffering in terms of money are the restraint and common sense of the jury [*Beagle v. Vasold (1966) 65 Cal. 2d 166, 172, 53 Cal. Rptr. 129, 417 P.2d 673]* .

A disproportionate ratio of special to general damages, alone, is not unreasonable [*see Damele v. Mack Trucks, Inc. (1990) 219 Cal. App. 3d 29, 37-38, 267 Cal. Rptr. 197* (ratio of general to special damages of nearly 7 to 1 so clearly reasonable that question of frivolous appeal was raised)]. An appellate court may not disturb an award of general damages for pain and suffering unless the amount is so disproportionate to the injuries suffered that the result reached

may be said to shock the conscience [*Daggett v. Atchison, Topeka & Santa Fe Ry. Co. (1957) 48 Cal. 2d 655, 666, 313 P.2d 557]* .

[d] Per Diem Measurement

An attorney may argue and the jury may compute pain and suffering damages by the per diem method by which damages are measured in terms of a stated number of dollars for specific period of time [*Beagle v. Vasold (1966) 65 Cal. 2d 166, 173-175, 53 Cal. Rptr. 129, 417 P.2d 673]* .

[10] Particular Situations

An infant plaintiff may recover for pain and suffering incurred as the result of negligently caused injury [*Capelouto v. Kaiser Found. Hosp. (1972) 7 Cal. 3d 889, 893, 103 Cal. Rptr. 856, 500 P.2d 880]* .

An award of damages for physical pain and mental suffering reasonably certain to be suffered in the future is proper [*Oliveira v. Warren (1938) 24 Cal. App. 2d 712, 713-714, 76 P.2d 113]* .

If a person having a cause of action dies before judgment, the damages recoverable by his or her personal representative do not include damages for pain or suffering [*Code Civ. Proc. § 377.34*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionVehicle WarrantiesGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityRemediesEmotional Distress DamagesInsurance LawClaims & ContractsGood Faith & Fair DealingGeneral OverviewLabor & Employment LawWrongful TerminationBreach of ContractExpress & Implied Conditions & CovenantsLabor & Employment LawWrongful TerminationRemediesCompensatory DamagesLabor & Employment LawWrongful TerminationRemediesPunitive DamagesReal Property LawTortsNuisanceRemediesDamagesGeneral OverviewTortsBusiness TortsCommercial InterferenceContractsGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudRemediesTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingAward CalculationsTortsDamagesCompensatory DamagesPain & SufferingFuture Pain & SufferingTortsDamagesPunitive DamagesAward CalculationsGeneral OverviewTortsIntentional TortsAbuse of ProcessElementsTortsIntentional TortsDefamationRemediesDamagesTortsIntentional TortsMalicious ProsecutionCivil Rights ActionsTortsIntentional TortsMalicious ProsecutionElementsGeneral OverviewTortsPremises Liability & PropertyTrespassRemediesDamagesGeneral Overview

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PART II. LEGAL BACKGROUND

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[Reserved]

§§ 362.14[Reserved]

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Chapter 362 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART III. RESEARCH GUIDE

32-362 California Forms of Pleading and Practice--Annotated § 362.30

§ 362.30 California Points and Authorities

For memoranda of points and authorities related to forms in this chapter, see California Points and Authorities, Vol. 5, *Damages*; Vol. 11, *Mental Suffering and Emotional Distress*; *Negligence*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsNegligenceActionsNegligent Infliction of Emotional DistressGeneral Overview

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Chapter 362 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART III. RESEARCH GUIDE

32-362 California Forms of Pleading and Practice--Annotated § 362.31

§ 362.31 State Statutes

[1] Damages

Exemplary and punitive damages. *Civ. Code § 3294*

Compensatory damages. *Civ. Code § 3333*

Damages for pain or suffering not recoverable by executor or administrator if person having cause of action dies before judgment. *Code Civ. Proc. § 377.34*

[2] Persons Liable

Liability for negligence. *Civ. Code § 1714*

Liability of parents for willful acts of minor children. *Civ. Code § 1714.1*

Liability of principals for acts of agents. *Civ. Code §§ 2338, 2339*

Liability of minors and persons of unsound mind. *Fam. Code § 6601*

Liability of public employers. *Gov. Code §§ 815.2, 815.4*

Liability of public employees. *Gov. Code §§ 820, 820.2*

[3] Pleading

Judicial Council trial court pleading forms. *Code Civ. Proc. § 425.12*

Answer as permitted to contain statement of new matter constituting defense. *Code Civ. Proc. § 431.30(b)(2)*

[4] Statute of Limitations

Statute of limitations for personal injury actions. *Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)* (statute prior to 2003)

Periods of disability not included in time limitations. *Code Civ. Proc. § 352*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesPunitive DamagesGovernmentsLegislationStatutes of LimitationsGeneral Overview

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§ 362.32 Decisions

[1] Damages

[a] In General

Injured party able to recover for all detriment caused, whether it could have been anticipated or not. *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 108 Cal. Rptr. 480, 510 P.2d 1032* ; *Crisci v. Security Ins. Co. (1967) 66 Cal. 2d 425, 433, 58 Cal. Rptr. 13, 426 P.2d 173*

Definite showing of willingness to vex, harass, annoy, or injure required for award of exemplary damages. *Wolfsen v. Hathaway (1948) 32 Cal. 2d 632, 650, 198 P.2d 1* ; *McAfee v. Ricker (1961) 195 Cal. App. 2d 630, 633, 15 Cal. Rptr. 920*

Mere spite or ill will or mere negligence, even gross negligence, insufficient to justify award of exemplary damages. *Ebaugh v. Rabkin (1972) 22 Cal. App. 3d 891, 894-895, 99 Cal. Rptr. 706*

Award of exemplary damages within discretion of trier of fact. *Sheward v. Magit (1951) 106 Cal. App. 2d 163, 167, 234 P.2d 708* ; *see also Warfield v. Krueger (1929) 96 Cal. App. 671, 673, 274 P. 764*

Civ. Code § 3333 is measure of damages for intentional infliction of emotional distress. *Vargas v. Ruggiero (1961) 197 Cal. App. 2d 709, 721, 17 Cal. Rptr. 568*

[b] Emotions Included

Damages for mental suffering include fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, and

indignity, as well as physical pain. *Deevy v. Tassi (1942) 21 Cal. 2d 109, 130 P.2d 389*

Mortification and chagrin at time of injury are recoverable. *Sandoval v. Southern Cal. Enters., Inc. (1950) 98 Cal. App. 2d 240, 256-257, 219 P.2d 928*

Apprehension of future disability or deformity is element of damages. Boa v. San Francisco-Oakland Terminal Ry. (1920) 182 Cal. 93, 106, 187 P. 2

Past and future humiliation, shame, and mental anguish are elements of damages. *Huggans v. Southern Pac. Co. (1949) 92 Cal. App. 2d 599, 615-616, 207 P.2d 864*

Worry over inability to pursue vocation is proper element of damages. *May v. Farrell (1928) 94 Cal. App. 703, 714, 271 P. 789*

Nervousness, if reasonable outcome of physical injuries, is element of damages. *Kimic v. San Jose-Los Gatos Interurban Ry. Co. (1909) 156 Cal. 273, 277-278, 104 P. 312* ; *Johnson v. Pearson (1929) 100 Cal. App. 503, 506, 280 P. 394*

[c] Mental Distress in Other Causes of Action

Emotional distress damages are not recoverable for negligent breach of contract if only injury to plaintiff is economic and policy concerns argue against allowing recovery for emotional distress. *Erlich v. Menezes (1999) 21 Cal. 4th 543, 552-557, 87 Cal. Rptr. 2d 886, 981 P.2d 978*

Damages for mental suffering resulting from injury to personal property are allowed. *Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 921, 114 Cal. Rptr. 622, 523 P.2d 662*

Mental suffering award was proper in case in which tortious conduct was interference with property rights. *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 579, 108 Cal. Rptr. 480, 510 P.2d 1032* ; *Crisci v. Security Ins. Co. (1967) 66 Cal. 2d 425, 433, 58 Cal. Rptr. 13, 426 P.2d 173*

Damages allowed for mental suffering naturally ensuing from acts complained of if cause of action is otherwise established. *Capelouto v. Kaiser Found. Hosp. (1972) 7 Cal. 3d 889, 892, 103 Cal. Rptr. 856, 500 P.2d 880* ; *State Rubbish Collectors Ass'n v. Siliznoff (1952) 38 Cal. 2d 330, 338, 240 P.2d 282*

Fear for another is part of damages in aggravation of established tort. *Dillon v. Legg (1968) 68 Cal. 2d 728, 738, 69 Cal. Rptr. 72, 441 P.2d 912* ; *see Acadia, Cal., Ltd. v. Herbert (1960) 54 Cal. 2d 328, 337, 5 Cal. Rptr. 686, 353 P.2d 294*

Damages for mental suffering caused by invasion of interest in real property are recoverable. *Acadia, Cal., Ltd. v. Herbert (1960) 54 Cal. 2d 328, 337, 5 Cal. Rptr. 686, 353 P.2d 294* ; *Kornoff v. Kingsburg Cotton Oil Co. (1955) 45*

Cal. 2d 265, 272-273, 288 P.2d 507

Emotional distress damages not recoverable for what was essentially negligent failure to fulfill obligations under commercial lease. *Butler-Rupp v. Lourdeaux (2005) 134 Cal. App. 4th 1220, 1229, 36 Cal. Rptr. 3d 685*

Amended complaint adding emotional distress causes of action to wrongful death causes of action relates back to date of original complaint, and therefore as avoiding bar of statute of limitations, because amended complaint seeks recovery for same accident (electrocution of decedent) and for same injury (loss of plaintiff's son). *Rowland v. Superior Court (1985) 171 Cal. App. 3d 1214, 1218, 217 Cal. Rptr. 786*

[d] Pain and Suffering

Expert testimony not prerequisite to recover for pain and suffering. *Capelouto v. Kaiser Found. Hosp. (1972) 7 Cal. 3d 889, 895-896, 103 Cal. Rptr. 856, 500 P.2d 880*

Per diem computation of damages for pain and suffering is allowed. *Beagle v. Vasold (1966) 65 Cal. 2d 166, 173-175, 53 Cal. Rptr. 129, 417 P.2d 673*

Award of damages for physical pain and mental suffering reasonably certain to be suffered in future is proper. *Oliveira v. Warren (1938) 24 Cal. App. 2d 712, 713-714, 76 P.2d 113*

[e] Special Susceptibility

Defendant's knowledge of plaintiff's special susceptibility to emotional distress is immaterial; plaintiff entitled to recovery for full extent of injury. *Sloane v. Southern Cal. Ry. Co. (1896) 111 Cal. 668, 683, 44 P. 320*

Defendant whose employee had killed plaintiff's dogs on defendant's property is potentially liable, based on defendant's knowledge of plaintiff's susceptibility, for intentional infliction of emotional distress for lying to plaintiff for 10 days about whereabouts of dogs, even though defendant not liable for actual killing of dogs because of statutory immunity. *Katsaris v. Cook (1986) 180 Cal. App. 3d 256, 266-267, 225 Cal. Rptr. 531*

Evidence of paraplegic condition and related medical problems is admissible to show plaintiff more susceptible than average person to suffering severe emotional distress when medical insurance coverage was denied. *Wayte v. Rollins Int'l, Inc. (1985) 169 Cal. App. 3d 1, 17, 215 Cal. Rptr. 59*

[f] Specific Situations

Damages for mental suffering, absent physical injury, are not recoverable under Article 17 of Warsaw Convention, governing conditions under which international air carrier may be liable for injuries to passengers. *Eastern Airlines, Inc. v. Floyd (1991) 499 U.S. 530, 534, 111 S. Ct. 1489, 113 L. Ed. 2d 569*

Even if foreseeable that breach of contract to build house would result in emotional distress to homeowners, to promote commercial stability, homeowners are not entitled to recover emotional distress damages for negligent performance of

contract if only injury caused is economic injury. *Erlich v. Menezes (1999) 21 Cal. 4th 543, 552-557, 87 Cal. Rptr. 2d 886, 981 P.2d 978*

Fair Employment and Housing Commission not authorized to award compensatory damages for emotional distress in administrative proceeding under Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*) for employment discrimination. *Peralta Cmty. Coll. Dist. v. Fair Employment & Hous. Comm'n (1990) 52 Cal. 3d 40, 56, 276 Cal. Rptr. 114, 801 P.2d 357*

Compensatory damages for emotional distress recoverable in judicial action under Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*) for employment discrimination. *Commodore Home Sys., Inc. v. Superior Court (1982) 32 Cal. 3d 211, 221, 185 Cal. Rptr. 270, 649 P.2d 912* ; *see Peralta Cmty. Coll. Dist. v. Fair Employment & Housing Com. (1990) 52 Cal. 3d 40, 48, 276 Cal. Rptr. 114, 801 P.2d 357*

Damages for mental suffering are result of trespass or nuisance. *Herzog v. Grosso (1953) 41 Cal. 2d 219, 225, 259 P.2d 429*

Jury's damage award was inadequate a matter of law when it compensated plaintiff for approximately half of his medical expenses, based on finding that plaintiff was himself 50 percent at fault, but awarded no damages for pain and suffering even though plaintiff had undergone back surgery and subsequent physical therapy. *Dodson v. J. Pacific, Inc. (2007) 154 Cal. App. 4th 931, 938, 64 Cal. Rptr. 3d 920*

Parents of minor child who was misdiagnosed with terminal cancer are not entitled to recover for negligent infliction of emotional distress, despite foreseeability of distress to parents and their necessary role in making treatment decisions. *Klein v. Children's Hosp. Med. Ctr. (1996) 46 Cal. App. 4th 889, 897-899, 54 Cal. Rptr. 2d 34*

Plaintiff entitled to recover for future pain and suffering in action for sexual harassment in workplace, based on expert medical opinion that considered plaintiff's particular circumstances, expert's experience with similar cases, and plaintiff's life expectancy. *Bihun v. AT&T Info. Sys., Inc. (1993) 13 Cal. App. 4th 976, 996, 16 Cal. Rptr. 2d 787*

Mere negligence that resulted only in economic harm to plaintiff does not support recovery for mental suffering. *Smith v. Superior Court (1992) 10 Cal. App. 4th 1033, 1037-1041, 13 Cal. Rptr. 2d 133*

Statutes or ordinances providing for mandatory trebling of damages for mental suffering possibly produce constitutionally excessive penalties. *Balmoral Hotel Tenants Assn. v. Lee (1990) 226 Cal. App. 3d 686, 691-696, 276 Cal. Rptr. 640*

Damages for emotional distress not recoverable in fraud action if claim for emotional distress is based on same conduct alleged to show fraud. *Kruse v. Bank of Am. (1988) 202 Cal. App. 3d 38, 67, 248 Cal. Rptr. 217*

Damages for emotional distress and mental suffering recoverable in breach of contract action if, from particular subject matter of contract and in contemplation of parties, mental suffering or emotional distress was foreseeable and contemplated result of breach. *Rogoff v. Grabowski (1988) 200 Cal. App. 3d 624, 633, 246 Cal. Rptr. 185* ; *Wynn v. Monterey Club (1980) 111 Cal. App. 3d 789, 799-801, 168 Cal. Rptr. 878*

Action for embracery and emotional distress due to defendant's and juror's misconduct resulting in inadequate damages award in former personal injury action was not stated because facts relied on were known to plaintiff before judgment in prior case became final and within time to move for a new trial. *Trudell v. Heilman (1984) 158 Cal. App. 3d 251, 254, 204 Cal. Rptr. 551*

Mental suffering compensable for cemetery's alleged negligent breach of contract regarding funeral services. *Ross v. Forest Lawn Memorial Park (1984) 153 Cal. App. 3d 988, 992-997, 203 Cal. Rptr. 468*

Personal tort aspect of bad faith cause of action for insurer's failure to settle claim not assignable in California; therefore, damages sought against insurer for emotional distress and punitive damages by injured party, who is not the insured, not predicated on assignment by insureds. *Schlauch v. Hartford Accident & Indem. Co. (1983) 146 Cal. App. 3d 926, 931, 194 Cal. Rptr. 658*

Damages for emotional distress allowed in action against insurer for tortious breach of covenant of good faith and fair dealing. *Pistorius v. Prudential Ins. Co. (1981) 123 Cal. App. 3d 541, 552, 176 Cal. Rptr. 660*

Damages for mental suffering recoverable for fraud or deceit of automobile seller and dealer who repeatedly falsely represented that car had been repaired. *Sprague v. Frank J. Sanders Lincoln Mercury, Inc. (1981) 120 Cal. App. 3d 412, 417, 419, 174 Cal. Rptr. 608*

Damages for mental suffering resulting from negligent breach of contract for mortician's services (losing decedent's cremated remains in transit) are recoverable. *Allen v. Jones (1980) 104 Cal. App. 3d 207, 214-215 163 Cal. Rptr. 445*

Damages for mental distress recoverable by husband of insured in action against insurer for bad faith refusal of uninsured motorist coverage. *Delos v. Farmers Group, Inc. (1979) 93 Cal. App. 3d 642, 658-659, 155 Cal. Rptr. 843*

Plaintiff who had miscarriage about one month after defendant made her dance by firing blanks at her feet was entitled to recover for emotional distress although she erroneously believed her miscarriage resulted from shooting incident. *Gutierrez v. Alvarado (1972) 24 Cal. App. 3d 327, 331, 101 Cal. Rptr. 1*

Damages for mental suffering resulting from breach of contract are allowed if failure to do thing contracted for may result in physical suffering or illness on part of other contracting party. *Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 851, 88 Cal. Rptr. 39* ; *but see Erlich v. Menezes (1999) 21 Cal. 4th 543, 552-557, 87 Cal. Rptr. 2d 886, 981 P.2d 978* (emotional distress damages not recoverable for negligent breach of contract if only injury to plaintiff is economic and policy concerns argue against allowing recovery for emotional distress)

Damages for mental distress resulting from violation of covenant of good faith and fair dealing implied in every insurance contract are recoverable. *Silberg v. California Life Ins. Co. (1974) 11 Cal. 3d 452, 460, 113 Cal. Rptr. 711, 521 P.2d 1103*

Wrongful refusal of insurer to settle within policy limits constitutes single and indivisible cause of action giving rise to

two forms of damages: (1) compensation for pecuniary loss, and (2) general damages for mental distress. *Purcell v. Colonial Ins. Co. (1971) 20 Cal. App. 3d 807, 812, 97 Cal. Rptr. 874*

Liability for intentional infliction of fright or emotional shock causing miscarriage. *Vargas v. Ruggiero (1961) 197 Cal. App. 2d 709, 718-719, 17 Cal. Rptr. 568*

Substantial damages for mental suffering alone permissibly recoverable in action for wrongful invasion of privacy. *Fairfield v. American Photocopy Equip. Co. (1955) 138 Cal. App. 2d 82, 89, 291 P.2d 194*

Damages for emotional distress in defamation action. *Grimes v. Carter (1966) 241 Cal. App. 2d 694, 702, 50 Cal. Rptr. 808* ; *see also Behrendt v. Times-Mirror Co. (1938) 30 Cal. App. 2d 77, 84, 85 P.2d 949*

Damages for mental suffering allowed in wrongful eviction cases. *Richardson v. Pridmore (1950) 97 Cal. App. 2d 124, 129, 217 P.2d 113* ; *see also Emden v. Vitz (1948) 88 Cal. App. 2d 313, 316-319, 198 P.2d 696*

Damages for mental distress not recoverable in action for fraud in scale or exchange of property. *Sierra Nat'l Bank v. Brown (1971) 18 Cal. App. 3d 98, 103, 95 Cal. Rptr. 742*

[g] Substantial Damages Test

If claim is actionable and resulted in substantial damages apart from those due to mental distress, damages for mental distress allowed. *Crisci v. Security Ins. Co. (1967) 66 Cal. 2d 425, 434, 58 Cal. Rptr. 13, 426 P.2d 173*

Substantial damages not required to be compensable; interference with legally protected interest sufficient to satisfy test of substantial damages. *Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 937, 122 Cal. Rptr. 470*

[2] Intentional Infliction of Mental Distress

[a] In General

If misconduct attributed to employer is normal part of employment relationship, employee suffering emotional distress causing disability is not able to avoid exclusivity provisions of workers' compensation remedies by characterizing actions as outrageous, unfair, or harassment. *Cole v. Fair Oaks Fire Prot. Dist. (1987) 43 Cal. 3d 148, 151, 162, 233 Cal. Rptr. 308, 729 P.2d 743*

Intentional infliction of emotional distress is actionable tort. *State Rubbish Collectors Ass'n v. Siliznoff (1952) 38 Cal. 2d 330, 336-339, 240 P.2d 282* ; *Guillory v. Godfrey (1955) 134 Cal. App. 2d 628, 633, 286 P.2d 474*

Fact that defendant's act caused plaintiff emotional distress, without evidence of defendant's wrongful intent, is insufficient to state cause of action for intentional infliction of emotional distress. *Cummings v. Farmers Ins. Exch. (1988) 202 Cal. App. 3d 1407, 1423, 249 Cal. Rptr. 568*

Demurrer to complaint for intentional infliction of emotional distress and fraud improperly overruled in action based on natural father's willful failure todisclose his paternity of children until plaintiffs (former husband and in-laws of mother) became emotionally attached to children; such wrongs not actionable in tort because no physical injuries to plaintiffs occurred, potential of harm to innocent children from maintenance of action was great, and action would frustrate strong public policy of having natural fathers acknowledge and support their children. *Richard P. v. Superior Court (1988) 202 Cal. App. 3d 1089, 1093-1094, 249 Cal. Rptr. 246*

Complete emotional tranquility as seldom attainable in this world; law intervenes only if distress inflicted is so severe that no reasonable person could be expected to endure it; intensity and duration of distress are factors to be considered in determining its severity. *Pitman v. City of Oakland (1988) 197 Cal. App. 3d 1037, 1047, 243 Cal. Rptr. 306*

Intentional infliction of mental distress predicated on showing of extreme and outrageous conduct intended to cause extreme mental suffering. *Slaughter v. Legal Process & Courier Serv. (1984) 162 Cal. App. 3d 1236, 1248, 209 Cal. Rptr. 189*

Cause of action for intentional infliction of mental distress not permissible if based on same acts that were held insufficient to support cause of action for defamation. *Flynn v. Higham (1983) 149 Cal. App. 3d 677, 680, 197 Cal. Rptr. 145*

If complaint alleges acts on job, by plaintiff's employer and fellow workers, that were intended to cause emotional distress, and also alleges such acts (or resulting emotional distress) made plaintiff "physically sick and ill" and caused "some permanent disability," plaintiff's remedy against employer is exclusively claim for worker's compensation; employer's general demurrer was properly sustained. *Ankeny v. Lockheed Missiles & Space Co. (1979) 88 Cal. App. 3d 531, 534-536, 151 Cal. Rptr. 828*

Elements of prima facie case of intentional infliction of mental distress. *Pitman v. City of Oakland (1988) 197 Cal. App. 3d 1037, 1046-1047, 243 Cal. Rptr. 306* ; *Wallis v. Superior Court (1984) 160 Cal. App. 3d 1109, 1119-1120, 207 Cal. Rptr. 123* ; *Kelly v. General Tel. Co. (1982) 136 Cal. App. 3d 278, 287, 186 Cal. Rptr. 184* ; *Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 394, 89 Cal. Rptr. 78*

Requirements of outrageous conduct and severe mental distress applicable only to tort of intentional infliction of emotional distress. *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 579-580, 108 Cal. Rptr. 480, 510 P.2d 1032*

[b] Accrual of Cause of Action

Cause of action for intentional infliction of emotional distress accrues only when plaintiff's distress becomes sufficiently severe. *Kiseskey v. Carpenters' Trust for S. Cal. (1983) 144 Cal. App. 3d 222, 232, 192 Cal. Rptr. 492*

[c] Causation

Bodily harm that is direct result of disturbing mental condition, without any intervening cause, was proximately caused by act that caused condition. *Vargas v. Ruggiero (1961) 197 Cal. App. 2d 709, 717-718, 17 Cal. Rptr. 568*

Proximate cause is question of fact if conflicting inferences can be drawn from evidence. *Tate v. Canonica (1960) 180 Cal. App. 2d 898, 901, 5 Cal. Rptr. 28*

[d] Cause of Action Precluded by Other Remedy

Family Law Act (former *Civ. Code §§ 4000-5317* (as of January 1, 1994, *see Family Code § 3100 et seq.*)), which provides exclusive remedies for visitation disputes, precluded cause of action for intentional infliction of emotional distress for refusal of former spouse to allow other spouse to visit child. *In re Marriage of Segel (1986) 179 Cal. App. 3d 602, 607-609, 224 Cal. Rptr. 591*

[e] Federal Preemption

Administrative remedies provided by *42 U.S.C.S. § 5851(a)* (federal Energy Reorganization Act of 1974) to employees who are retaliated against for reporting nuclear safety violations do not preempt state cause of action for intentional infliction of emotional distress arising from same employer conduct. *English v. General Elec. Co. (1990) 496 U.S. 72, 78-90, 110 S. Ct. 2270, 110 L. Ed. 2d 65*

State court tort actions brought by labor unions against employers arising from arguably unfair labor practices are within exclusive jurisdiction of National Labor Relations Board and therefore preempted. *Machinists Auto. Trades Dist. Lodge v. Peterbilt Motors Co. (1990) 220 Cal. App. 3d 1402, 1407, 269 Cal. Rptr. 911*

[f] Intent

Liability attaches only if actor intended or should have recognized his or her conduct was likely to cause resultant harm. *Spackman v. Good (1966) 245 Cal. App. 2d 518, 529, 54 Cal. Rptr. 78* ; *Taylor v. Vallelunga (1959) 171 Cal. App. 2d 107, 109, 339 P.2d 910*

[g] Outrageous Conduct

Comments associating plaintiff with Nazi war criminal not rising to level of conduct necessary to state claim for intentional infliction of emotional distress because comments did not exceed bounds of conduct tolerated in civilized community and because comments were also protected opinion, rather than actionable defamation. *Koch v. Goldway (9th Cir. 1987) 817 F.2d 507, 510*

Conduct of church, which had power to damage others' interests and breached their trust by misrepresenting and concealing its identity to induce them into highly structured environment where they were subjected, without their knowledge or consent, to coercive persuasion, was potentially outrageous for purpose of imposing liability for intentional infliction of emotional distress. *Molko v. Holy Spirit Ass'n (1988) 46 Cal. 3d 1092, 1122, 252 Cal. Rptr. 122, 762 P.2d 46*

Bank's conduct in misrepresenting to business customer that loans would be made if accounts receivable were assigned to bank, but refusing to loanmoney after such assignment was made and insisting on excessive guarantees for loans, was sufficiently outrageous to support jury award of compensatory and punitive damages for intentional infliction of emotional distress. *Sanchez-Corea v. Bank of Am. (1985) 38 Cal. 3d 892, 908-909, 215 Cal. Rptr. 679, 701 P.2d 826*

Police officers' plan to stake out area in which plaintiff was attacked to intervene after assailant had committed assault sufficiently to be subject to arrest, but before actually injuring plaintiff, was not extreme and outrageous conduct giving rise to liability for intentional infliction of emotional distress absent intent to injure plaintiff. *Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 209-210, 185 Cal. Rptr. 252, 649 P.2d 894*

Employee's action for intentional infliction of emotional distress arose from employer's knowing use of outrageous racial epithet. *Agarwal v. Johnson (1979) 25 Cal. 3d 932, 947, 160 Cal. Rptr. 141, 603 P.2d 58*

Health plan administrator's denial of coverage for investigational treatment, along with failure to advise insured of right to seek independent external review of denial, did not constitute outrageous conduct that would support action for intentional infliction of emotional distress. *Mintz v. Blue Cross of California (2009) 172 Cal. App. 4th 1594, 1609, 92 Cal. Rptr. 3d 422*

Termination of distributorship agreement is not type of outrageous conduct necessary to state cause of action for intentional infliction of emotional distress. *Unterberger v. Red Bull North America, Inc. (2008) 162 Cal. App. 4th 414, 423, 75 Cal. Rptr. 3d 368*

Insurer's unfair settlement actions, consisting of misleading third-party claimant as to applicable limitations period and directly advising claimant that attorney was not necessary, were not so outrageous as to support cause of action for intentional infliction of emotional distress. *Coleman v. Republic Indem. Ins. Co. (2005) 132 Cal. App. 4th 403, 416-417, 33 Cal. Rptr. 3d 744*

Attorney's violation of rule of professional conduct is insufficient to support finding that attorney's conduct was outrageous, because rules themselves now provide that violation does not create new civil cause of action; threatening criminal action in letter from attorney in effort to collect debt not outrageous conduct sufficient to support intentional infliction of emotional distress claim. *Ross v. Creel Printing & Publ'g Co. (2002) 100 Cal. App. 4th 736, 746-747, 122 Cal. Rptr. 2d 787*

Whether alleged workplace harassment based on sexual orientation was outrageous conduct sufficient to support intentional infliction of emotional distress action was triable issue of fact. *Kovatch v. California Cas. Mgmt. Co. (1998) 65 Cal. App. 4th 1256, 1278, 77 Cal. Rptr. 2d 217*

Message left on answering machine that defendant was delivering ticket for airliner that had recently suffered well-publicized crash, made during feud following break-up of intimate relationship, was not actionable death threat. *Cochran v. Cochran (1998) 65 Cal. App. 4th 488, 497-499, 76 Cal. Rptr. 2d 540*

Ages of children at time defendant revealed to them on camera that their mother had just murdered other neighborhood children was relevant to question of outrageous conduct. *KOVR-TV, Inc. v. Superior Court (Whittle) (1995) 31 Cal. App. 4th 1023, 1027, 37 Cal. Rptr. 2d 431*

Bank's foreclosure of property pledged to secure corporate loan and on which individual plaintiff (shareholder) lived was privileged; banker's remark questioning whether plaintiff's daughter had guts to act as real estate broker in liquidation sale of her mother's house as heartless, insensitive, and meriting opprobrium, but was not type of outrageous conduct necessary to support action for intentional infliction of emotional distress. *Kruse v. Bank of Am. (1988) 202*

Cal. App. 3d 38, 67-68, 248 Cal. Rptr. 217

In action by employee against agent of employer's workers' compensation carrier, allegations that agent knew of plaintiff's susceptibility to profound mental distress and of her repeated attempts at suicide resulting from incidents causing her disability, and allegation that agent intentionally delayed payments of approved benefits, stated cause of action for intentional infliction of emotional distress. *Hernandez v. General Adjustment Bureau (1988) 199 Cal. App. 3d 999, 1007, 245 Cal. Rptr. 288*

Behavior is outrageous if defendant: (1) abuses relation or position that gives defendant power to damage plaintiff's interest; (2) knows plaintiff is susceptible to injury through mental distress; or (3) acts intentionally or unreasonably with recognition that acts are likely to result in illness through mental distress. *Hernandez v. General Adjustment Bureau (1988) 199 Cal. App. 3d 999, 1007, 245 Cal. Rptr. 288* ; *Wallis v. Superior Court (1984) 160 Cal. App. 3d 1109, 1120, 207 Cal. Rptr. 123*

Automobile insurer's denial of wrongful death claim to one of deceased's heirs, after already paying full policy limit amount to another heir, did not amount to outrageous conduct for purposes of action for intentional infliction of emotional distress. *Spearman v. State Farm Fire & Cas. Co. (1986) 185 Cal. App. 3d 1105, 1113, 230 Cal. Rptr. 264*

Extreme, outrageous, and atrocious conduct in discharge of employee was evidenced by employer's deception, flagrant disregard of company policies, and denial of employee's right of free choice, resulting in humiliation and degradation of employee. *Rulon-Miller v. International Bus. Machs. Corp. (1984) 162 Cal. App. 3d 241, 254-255, 208 Cal. Rptr. 524*

Spreading deliberately false statements that former employee in effect committed forgery was extreme and outrageous conduct. *Kelly v. General Tel. Co. (1982) 136 Cal. App. 3d 278, 287, 186 Cal. Rptr. 184*

Award of damages to both wife and husband was proper in action for intentional infliction of mental distress arising out of battery/rape because defendant misused and manipulated his position as friend to violate and rape wife and after rape informed husband that wife had libeled and slandered defendant and that she needed psychiatric help. *Delia S. v. Torres (1982) 134 Cal. App. 3d 471, 482-484, 184 Cal. Rptr. 787* ; *overruled on other grounds, Christensen v. Superior Court (1991) 54 Cal. 3d 868, 2 Cal. Rptr. 2d 79, 820 P.2d 181*

Rental fee collection conducted in accordance with common business practices was not outrageous conduct or evidence of intent to inflict emotional distress. *Girard v. Ball (1981) 125 Cal. App. 3d 772, 787, 178 Cal. Rptr. 406*

Action for intentional infliction of emotional distress based on insurer's delay in paying benefits, change in amounts paid, and disobedience to subpoena duces tecum issued by Workers' Compensation Appeals Board was barred by exclusivity of worker's compensation remedy because acts alleged not so outrageous and extreme as to avoid exclusivity of remedy. *Everfield v. State Comp. Ins. Fund (1981) 115 Cal. App. 3d 15, 18-21, 171 Cal. Rptr. 164* ; *see also Fremont Indem. Co. v. Superior Court (1982) 133 Cal. App. 3d 879, 881, 184 Cal. Rptr. 184*

Complaint in action for intentional infliction of emotional distress alleging facts showing abuse of employer-employee relationship with intent to cause emotional distress to plaintiff sufficiently alleged facts from which trier of fact could conclude that defendants' conduct was extreme and outrageous. *Lagies v. Copley (1980) 110 Cal. App. 3d 958, 974,*

168 Cal. Rptr. 358

No liability for intentional infliction of emotional distress unless defendant's conduct is outrageous. *Cornblith v. First Maint. Supply Co. (1968) 268 Cal. App. 2d 564, 565, 74 Cal. Rptr. 216*

[h] Physical Injury

Right to compensation for emotional distress does not require physical injury. *Grimes v. Carter (1966) 241 Cal. App. 2d 694, 699, 50 Cal. Rptr. 808* ; *Leavy v. Cooney (1963) 214 Cal. App. 2d 496, 502, 29 Cal. Rptr. 580*

More in the way of extreme outrage required if no physical harm results from emotional distress. *Perati v. Atkinson (1963) 213 Cal. App. 2d 472, 474, 28 Cal. Rptr. 898*

[i] Pleading

Complaint in action for conspiracy to intentionally inflict emotional distress alleging that fellow employees acted outside course and scope of their agency relationship with corporate employer, that they acted in furtherance of conspiracy to their own individual advantages and in derogation of plaintiff's rights, and that they participated because of their feelings of ill will and hatred toward plaintiff alleged facts sufficient to overcome demurrer made on ground that workers' compensation was plaintiff's exclusive remedy. *Lagies v. Copley (1980) 110 Cal. App. 3d 958, 969-970, 168 Cal. Rptr. 368*

Facts giving rise to cause of action for injuries resulting from emotional distress as required to be specifically pleaded. *Deboe v. Horn (1971) 16 Cal. App. 3d 221, 224, 94 Cal. Rptr. 77*

[j] Privilege

Constitutional privileges arising under *U.S. Const. amend. I* applicable to actions for intentional infliction of emotional distress. *Hustler Magazine, Inc. v. Falwell (1988) 485 U.S. 46, 52-53, 108 S. Ct. 876, 99 L. Ed. 2d 41*

Privilege accorded to statements made in judicial proceedings [former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*)], although located in Civil Code chapter on defamation, is also applicable to cause of action for intentional infliction of emotional distress and related tort of outrage. *Ribas v. Clark (1985) 38 Cal. 3d 355, 364, 212 Cal. Rptr. 143, 696 P.2d 637*

Absolute privilege of former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*) precluded claim of intentional infliction of emotional distress resulting from filing of complaint. *Ribas v. Clark (1985) 38 Cal. 3d 355, 364, 212 Cal. Rptr. 143, 696 P.2d 637* ; *Williams v. Coombs (1986) 179 Cal. App. 3d 626, 645-646, 224 Cal. Rptr. 865 , overruled in part, Sheldon Appel Co. v. Albert & Oliker, 47 Cal. 3d 863, 254 Cal. Rptr. 336, 765 P.2d 498*

Constitutional *First Amendment* privilege does not protect newsperson from action for intentional infliction of emotional distress if conduct complained of was sufficiently outrageous to justify claim. *KOVR-TV, Inc. v. Superior Court (Whittle) (1995) 31 Cal. App. 4th 1023, 1027, 37 Cal. Rptr. 2d 431*

In action for abuse of process and emotional distress, publications made in document prepared by expert witness for use in settlement negotiations between plaintiff and plaintiff's former wife and in expert witness's false testimony at dissolution proceedings were covered by absolute privilege of former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*). *Carden v. Getzoff (1987) 190 Cal. App. 3d 907, 913, 235 Cal. Rptr. 698*

Privilege afforded by former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*) necessarily precluded cause of action for intentional infliction of emotional distress. *Wallin v. Vienna Sausage Mfg. Co. (1984) 156 Cal. App. 3d 1051, 1056, 203 Cal. Rptr. 375*

Good faith assertion of economic interest is privileged conduct precluding liability for intentional infliction of emotional distress. *Girard v. Ball (1981) 125 Cal. App. 3d 772, 786-787, 178 Cal. Rptr. 406*

Defendant's conduct required to be unprivileged to impose liability for intentional infliction of mental distress. *Kachig v. Boothe (1971) 22 Cal. App. 3d 626, 641, 99 Cal. Rptr. 393*

Privilege exists to protect witness in official proceeding from liability for intentional infliction of emotional distress. *Agostini v. Strycula (1965) 231 Cal. App. 2d 804, 808, 42 Cal. Rptr. 314*

[k] Special Relationship

Relationship of parties and actor's knowledge of special susceptibility are significant in determination of liability. *Alcorn v. Anbro Eng'g, Inc. (1970) 2 Cal. 3d 493, 498, 86 Cal. Rptr. 88, 468 P.2d 216*

As matter of law, shareholder not entitled to recover damages for emotional distress for injury done to corporation; corporation is distinct legal entity. *Tan Jay Int'l, Ltd. v. Canadian Indem. Co. (1988) 198 Cal. App. 3d 695, 706, 243 Cal. Rptr. 907*

Significant, stable, and exclusive homosexual relationship between two men, as matter of law, is not sufficiently close to warrant recovery of damages for intentional infliction of emotional distress based on one's witnessing intentional assault on other, because no abuse directed at plaintiff. *Coon v. Joseph (1987) 192 Cal. App. 3d 1269, 1272-1273, 237 Cal. Rptr. 873*

Defendant's knowledge of plaintiff's special susceptibility was possible ground for recovery for intentional infliction of emotional distress in case in which plaintiff, recovering in defendant's hospital from recent surgery, was aggressively questioned regarding payment of medical bill by defendant's hospital collections department. *Bundren v. Superior Court (1983) 145 Cal. App. 3d 784, 791-792, 193 Cal. Rptr. 671*

Recovery of damages for both battery and intentional infliction of emotional distress was not improper double recovery because jury could have found that defendant's abuse and manipulation of position of friendship, trust, and influence to place friend's wife in vulnerable position was so extreme and outrageous as to cause severe emotional distress beyond that resulting from rape of wife itself. *Delia S. v. Torres (1982) 134 Cal. App. 3d 471, 482-484, 184 Cal. Rptr. 787* ; *overruled on other grounds, Christensen v. Superior Court (1991) 54 Cal. 3d 868, 2 Cal. Rptr. 2d 79, 820 P.2d 181*

Landlord-tenant relationship significant in determination of liability. *Aweeka v. Bonds (1971) 20 Cal. App. 3d 278, 281-282, 97 Cal. Rptr. 650*

[l] Words Alone

Trustee's use of crude sexual language in attempt to extract sexual favors from mother of trust beneficiary, in return for favorable responses to trust disposition requests, was not so outrageous as to justify recovery for intentional infliction of emotional distress. *Hughes v. Pair (2009) 46 Cal. 4th 1035, 1051, 95 Cal. Rptr. 3d 636, 209 P.3d 963*

Message left on answering machine that defendant was delivering ticket for airliner that had recently suffered well-publicized crash, made during feud following break-up of intimate relationship, was not actionable death threat. *Cochran v. Cochran (1998) 65 Cal. App. 4th 488, 497-499, 76 Cal. Rptr. 2d 540*

Words alone that result in physical injury are actionable for intentional infliction of emotional distress if act is intentional and unreasonable and actor should recognize likelihood of injury. *Golden v. Dungan (1971) 20 Cal. App. 3d 295, 305, 97 Cal. Rptr. 577* ; *Bowden v. Spiegel, Inc. (1950) 96 Cal. App. 2d 793, 794-795, 216 P.2d 571*

Actor's conduct not unreasonable if required by law. *Mason v. Western Union Tel. Co. (1975) 52 Cal. App. 3d 429, 125 Cal. Rptr. 53*

[3] Negligent Infliction of Mental Distress

[a] In General

Allegation that plaintiff suffered emotional injuries and psychological trauma was adequate allegation of detriment in pleading negligent infliction of serious emotional distress. *Hedlund v. Superior Court (1983) 34 Cal. 3d 695, 706 n.8, 194 Cal. Rptr. 805, 669 P.2d 41*

Chief element in determining defendant's duty is foreseeability of risk. *Dillon v. Legg (1969) 68 Cal. 2d 728, 740, 69 Cal. Rptr. 72, 441 P.2d 912* ; *Goodwin v. Reilley (1985) 176 Cal. App. 3d 86, 93, 221 Cal. Rptr. 374*

Cause of action for negligent infliction of serious emotional distress may be stated. *Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 930, 167 Cal. Rptr. 831, 616 P.2d 813* (limited on duty issue in *Burgess v. Superior Court (1992) 2 Cal. 4th 1064, 1074, 9 Cal. Rptr. 2d 615, 831 P.2d 1197*).

Physical impact not required to recover for negligently inflicted mental distress. *Amaya v. Home Ice, Fuel & Supply Co. (1963) 59 Cal. 2d 295, 304-306, 29 Cal. Rptr. 33, 379 P.2d 513*

Direct-victim liability available only if: (1) preexisting relationship exists; and (2) defendant's conduct can be characterized as "outrageous." *Bro v. Glaser (1994) 22 Cal. App. 4th 1398, 1417-1437, 1440-1441, 27 Cal. Rptr. 2d 894*

No cause of action for negligent infliction of emotional distress against physician if physician presents plaintiff with favorable but erroneous diagnosis about spouse's physical condition and plaintiff then learns that misdiagnosed spouse has fatal illness. *Kossel v. Superior Court (1986) 186 Cal. App. 3d 1060, 1063-1068, 231 Cal. Rptr. 183*

Unmarried woman who lived with decedent for two years, had attempted to marry decedent, bore decedent's child, witnessed decedent's stabbing, and held decedent while he died, was able to state cause of action for negligent infliction of emotional distress. *Ledger v. Tippitt (1985) 164 Cal. App. 3d 625, 647-648, 210 Cal. Rptr. 814* , *overruled on other grounds, Elden v. Sheldon (1988) 46 Cal. 3d 267, 250 Cal. Rptr. 254, 758 P.2d 582*

Cause of action for negligent infliction of emotional distress exists against corporation if employee, acting within scope of employment, makes defamatory internal corporate communication concerning third party, without first conducting reasonable investigation as to truth of matter, and communication is motivated by malice. *Kelly v. General Tel. Co. (1982) 136 Cal. App. 3d 278, 286, 186 Cal. Rptr. 184*

Qualified privilege of *Civ. Code § 47(3)* (publication without malice between interested parties) as applying to negligent infliction of emotional distress. *Kelly v. General Telephone Co. (1982) 136 Cal. App. 3d 278, 286, 186 Cal. Rptr. 184* (former Civil Code section; *now see Civ. Code § 47(c)*)

[b] Duty Owed Directly to Plaintiff

Damages for negligently inflicted emotional distress recoverable by plaintiff other than physically injured party if they result from breach of duty owed to plaintiff that is assumed by defendant or imposed on defendant as matter of law, or that arises out of relationship between two. *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc. (1989) 48 Cal. 3d 583, 590, 257 Cal. Rptr. 98, 770 P.2d 278*

Doctor or hospital potentially liable to parents of psychiatric patient for negligent infliction of emotional distress damages caused by breach of duty to parents arising out of physician-patient relationship or assumed by hospital or doctor; assumed duty to parents possibly arises from using parents as active instrumentalities in patient's treatment. *Jacoves v. United Merch. Corp. (1992) 9 Cal. App. 4th 88, 109, 11 Cal. Rptr. 2d 468* ; *but see Huggins v. Longs Drug Stores California, Inc. (1993) 6 Cal. 4th 124, 131-133, 24 Cal. Rptr. 2d 587, 862 P.2d 148* (fact that pharmacist knew or should have known that parents of infant would administer prescription insufficient to impose duty toward parents)

Six-year-old girl not direct victim of alleged conduct by pastor who molested her 13-year-old brother, who, in turn, molested her; pastor's conduct not directed at girl, and she did not establish independent, preexisting relationship with pastor that would have imposed duty of care toward her. *Evan F. v. Hughson United Methodist Church (1992) 8 Cal. App. 4th 828, 840, 10 Cal. Rptr. 2d 748*

Spouse of terminated employee not direct victim of employer's conduct that allegedly constituted wrongful termination. *Anderson v. Northrop Corp. (1988) 203 Cal. App. 3d 772, 776-780, 250 Cal. Rptr. 189*

Duty owed by drunk driver does not extend to parents of injured victim; distress derived solely from child's injury is remediable only through bystander action. *Goodwin v. Reilley (1985) 176 Cal. App. 3d 86, 98, 221 Cal. Rptr. 374*

[c] Injury to Third Party

Plaintiff who knew sister was missing, but who witnessed neither abduction nor infliction of injury, was precluded from recovering emotional distress damages under bystander theory, due to lack of contemporaneous observance of injury. *Martin v. United States (9th Cir. 1992) 984 F.2d 1033, 1037-1038*

In context of medical malpractice cases, bystanders cannot sue for negligent infliction of emotional distress based on unperceived medical errors hidden within course of treatment; bystanders must perceive at time of injury that defendant's conduct is causing injury. *Bird v. Saenz (2002) 28 Cal. 4th 910, 921, 123 Cal. Rptr. 2d 465, 51 P.3d 324*

Damages for negligently inflicted emotional distress recoverable by percipient witness of injury to another only if plaintiff: (1) is closely related to injury victim; (2) is present at scene of injury-producing event at time when itoccurs and is then aware that it is causing injury to victim; and (3) suffers serious emotional distress as result. *Thing v. La Chusa (1989) 48 Cal. 3d 644, 667-668, 257 Cal. Rptr. 865, 771 P.2d 814*

Absent exceptional circumstances, recovery for negligently inflicted emotional distress as limited to bystanders who are relatives residing in same household, or parents, siblings, children, and grandparents of victim. *Thing v. La Chusa (1989) 48 Cal. 3d 644, 667-668, 668 n.10, 257 Cal. Rptr. 865, 771 P.2d 814*

Unmarried cohabitant as unable to state cause of action for negligent infliction of emotional distress based on perception of injury to another; plaintiff as required to be spouse, sibling, parent, grandparent, or child of injured party. *Elden v. Sheldon (1988) 46 Cal. 3d 267, 274-277, 250 Cal. Rptr. 254, 758 P.2d 582*

Cause of action for negligent infliction of emotional distress does not require that injury or death result from sudden occurrence. *Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 167-168, 216 Cal. Rptr. 661, 703 P.2d 1*

Cause of action for negligent infliction of emotional distress does not require distinction between voluntary and involuntary presence at scene of traumatic event. *Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 171, 216 Cal. Rptr. 661, 703 P.2d 1*

"Dangerous condition," as defined in *Gov. Code § 830*, relating to liability imposed on public entity by *Gov. Code § 835* for dangerous condition creating reasonably foreseeable risk of kind of injury incurred as broad enough to include condition that creates danger of injury to intangible interests, so long as injury is of a kind that law would redress if inflicted by private person, and hence includes emotional distress of close relatives who witnessed drownings of children in reservoir. *Delta Farms Reclamation Dist. v. Superior Court (1983) 33 Cal. 3d 699, 710-711, 190 Cal. Rptr. 494, 660 P.2d 1168*

Guidelines in determining liability for emotional distress caused by injury to third party. *Dillon v. Legg (1968) 68 Cal. 2d 728, 740-741, 69 Cal. Rptr. 72, 441 P.2d 912* ; *Powers v. Sissoev (1974) 39 Cal. App. 3d 865, 871, 114 Cal. Rptr. 868*

Plaintiffs, with knowledge that mother had suffered complications during surgery, witnessed mother being transferred

from operating room to critical care unit and back again, and observed her swollen and purple condition; triable issue of fact existed as to whether negligence extended to events witnessed by plaintiffs that occurred outside operating room such that plaintiffs might recover for emotional distress of witnessing injury to mother. *Bird v. Saenz (2001) 86 Cal. App. 4th 167, 182, 103 Cal. Rptr. 2d 131*

Close relationship not required for recovery by plaintiff, who was herself direct victim of defendant's negligence for damages caused by witnessing injury to third party injured in same event. *Long v. PKS, Inc. (1993) 12 Cal. App. 4th 1293, 1300 n.9, 16 Cal. Rptr. 2d 103* (dicta that foster parent/foster child relationship could be sufficiently close relationship for recovery under bystander theory)

Contemporary sensory awareness requirement not met by six-year old girl's claim of negligent infliction of emotional distress by church and its parent organization alleging that pastor molested her 13-year-old brother who, in turn, molested her; girl not present at scene of brother's injury and not then aware that he was being injured. *Evan F. v. Hughson United Methodist Church (1992) 8 Cal. App. 4th 828, 839, 10 Cal. Rptr. 2d 748*

Significant, stable, and exclusive homosexual relationship between two men, as matter of law, was not close relationship warranting recovery of damages for negligent infliction of emotional distress based on one's witnessing intentional assault on other. *Coon v. Joseph (1987) 192 Cal. App. 3d 1269, 1272, 1274-1277, 237 Cal. Rptr. 873*

No cause of action for negligent infliction of emotional distress accrues when infant suffers injuries at birth because of physicians' purportedly negligent prenatal treatment and parents fail to allege that physicians' conduct was directed at parents and that such conduct elicited serious emotional response; parents' mere allegations of general disruption of "normal" routine activities of their lives as inadequate basis for emotional distress damages *Martinez v. County of Los Angeles (1986) 186 Cal. App. 3d 884, 893-894, 231 Cal. Rptr. 96*

Failure to detect cancer or follow up on X-ray findings is not event that could be witnessed. *Budavari v. Barry (1986) 176 Cal. App. 3d 849, 852-853, 222 Cal. Rptr. 446*

Contemporaneous perception of injury to third party not necessary if plaintiffs (mother and father) are not bystanders, but direct victims of infliction of emotional distress, caused by physician's negligent prenatal care of mother resulting in unwanted birth of child with *Down Syndrome. Andalon v. Superior Court (1984) 162 Cal. App. 3d 600, 608, 611, 208 Cal. Rptr. 899*

Action for emotional distress derives solely from injuries to third person, which requires contemporaneous sensory observation, as distinguished from action based on tort directed at plaintiff as well as third person, which does not require contemporaneous sensory observation. *Wiggins v. Royale Convalescent Hosp. (1984) 158 Cal. App. 3d 914, 918, 206 Cal. Rptr. 2*

Negligent misdiagnosis of child by health professional possibly, as matter of law, caused foreseeable emotional distress to parent; but parent required to plead circumstances of knowledge of seriousness of improperly diagnosed condition. *Accounts Adjustment Bureau v. Cooperman (1984) 158 Cal. App. 3d 844, 848, 204 Cal. Rptr. 881*

Plaintiffs who witnessed drowning of first cousin did not have sufficiently close relationship to victim to permit

recovery for negligent infliction of emotional distress because defendant could not have known or foreseen quality of relationship or that plaintiffs would witness accident. *Trapp v. Schuyler Constr. (1983) 149 Cal. App. 3d 1140, 1143, 197 Cal. Rptr. 411*

Cause of action for emotional distress from witnessing injury to third person requires legally cognizable relationship between plaintiff and injured third party. *Kately v. Wilkinson (1983) 148 Cal. App. 3d 576, 585, 195 Cal. Rptr. 902*

Relationship of victim as friend of witness, in relationship "akin to family," is insufficient to state cause of action for negligent infliction of emotional distress. *Kately v. Wilkinson (1983) 148 Cal. App. 3d 576, 585, 195 Cal. Rptr. 902*

Because parents of accident victim killed by defendant arrived at scene 15 minutes after accident occurred, and therefore did not see or hear incidentbut only mentally visualized it after the fact, no cause of action for negligent infliction of mental suffering accrued. *Madigan v. City of Santa Ana (1983) 145 Cal. App. 3d 607, 610, 193 Cal. Rptr. 593*

Sensory observation requirement not met if plaintiffs only observed their child after injury occurred and did not see, hear, or sensorially perceive injury-causing event. *Hathaway v. Superior Court (1980) 112 Cal. App. 3d 728, 732-736, 169 Cal. Rptr. 435*

Event required to be subject of sensory perception. *Jansen v. Children's Hosp. Med. Ctr. (1973) 31 Cal. App. 3d 22, 24, 106 Cal. Rptr. 883*

Recovery not allowed if damages flow from knowledge of unobserved tort. *Hair v. County of Monterey (1975) 45 Cal. App. 3d 538, 543, 119 Cal. Rptr. 639 , disapproved on other grounds, Baxter v. Superior Court (1977) 19 Cal. 3d 461*

Observance factor satisfied if injury results from seeing injured relative immediately after tortious event. *Archibald v. Braverman (1969) 275 Cal. App. 2d 253, 256, 79 Cal. Rptr. 723*

Liability for emotional distress not resulting if plaintiff is only advised of accident by others. *Vanguard Ins. Co. v. Schabatka (1975) 46 Cal. App. 3d 887, 898, 120 Cal. Rptr. 614* ; *Deboe v. Horn (1971) 16 Cal. App. 3d 221, 223-224, 94 Cal. Rptr. 77*

No breach of duty to plaintiff if there is no breach of duty to third party. *Wynne v. Orcutt Union Sch. Dist. (1971) 17 Cal. App. 3d 1108, 1111, 95 Cal. Rptr. 458*

[d] Physical Injury

NOTE:

Physical injury is no longer required in an action for negligent infliction of serious emotional distress [*see* *Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 167 Cal. Rptr. 831, 616 P.2d 813* ; *Slaughter v. Legal Process & Courier Serv. (1984) 162 Cal. App. 3d 1236, 1250, 209 Cal. Rptr. 189]* .

Dillon v. Legg requires physical injury. *Capelouto v. Kaiser Found. Hosp. (1972) 7 Cal. 3d 889, 892 n. 1, 103 Cal. Rptr. 856, 500 P.2d 880* ; *Employers Cas. Ins. Co. v. Foust (1972) 29 Cal. App. 3d 382, 386, 105 Cal. Rptr. 505*

Shock to nervous system is physical injury. *Di Mare v. Cresci (1962) 58 Cal. 2d 292, 301, 23 Cal. Rptr. 772, 373 P.2d 860* ; *Taylor v. Pole (1940) 16 Cal. 2d 668, 671, 107 P.2d 614* ; *Leasman v. Beech Aircraft Corp. (1975) 48 Cal. App. 3d 376, 381, 121 Cal. Rptr. 768* ; *Cain v. State Farm Mut. Auto. Ins. Co. (1975) 47 Cal. App. 3d 783, 796, 121 Cal. Rptr. 200* ; *Espinosa v. Beverly Hosp. (1952) 114 Cal. App. 2d 232, 234, 249 P.2d 843*

Emotional distress, standing alone, is not "bodily injury" within meaning of liability insurance policy coverage clause. *Aim Ins. Co. v. Culcasi (1991) 229 Cal. App. 3d 209, 218-227, 280 Cal. Rptr. 766*

Negligently caused emotional distress not compensable unless accompanied by physical injury. *Leasman v. Beech Aircraft Corp. (1975) 48 Cal. App. 3d 376, 381, 121 Cal. Rptr. 768* ; *Gautier v. General Tel. Co. (1965) 234 Cal. App. 2d 302, 307, 44 Cal. Rptr. 404*

Physical injuries must be alleged with sufficient particularity so as to inform adverse parties of dimensions of injuries. *Hair v. County of Monterey (1975) 45 Cal. App. 3d 538, 542, 119 Cal. Rptr. 639 , disapproved on other grounds, Baxter v. Superior Court (1977) 19 Cal. 3d 461, 138 Cal. Rptr. 31*

Allegation that plaintiff suffered severe shock to nerves and nervous system was sufficient to plead physical injury. *Vanoni v. Western Airlines (1967) 247 Cal. App. 2d 793, 797, 56 Cal. Rptr. 115*

Expert testimony not required to prove injury to nervous system by sudden shock. *Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 853, 88 Cal. Rptr. 39*

Damages for physical injuries as result of nervous shock are permitted even in absence of impact. *Cook v. Maier (1939) 33 Cal. App. 2d 581, 584, 92 P.2d 434* ; see *Sloane v. Southern Cal. Ry. Co. (1896) 111 Cal. 668, 680, 44 P. 320*

[e] Risk and Foreseeability

Arrest and attendant emotional distress are foreseeable consequences of reporting transaction as illegal, and failure of police to make thorough investigation prior to arrest is not such unforeseeable superseding cause that would cut off liability. *Pool v. City of Oakland (1986) 42 Cal. 3d 1051, 1063-1065, 232 Cal. Rptr. 528, 728 P.2d 1163*

Whether or not party owes duty of care is dependent on foreseeability of risk and weighing of policy considerations; improper service of process, combined with subsequent falsification of affidavit to obtain default judgment against plaintiff, foreseeably resulted in emotional as well as financial injury; policy of encouraging process servers to perform their function responsibly justified imposition of legal duty of care toward individual served. *Slaughter v. Legal Process & Courier Serv. (1984) 162 Cal. App. 3d 1236, 1249-1250, 209 Cal. Rptr. 189*

[4] Seduction

Action for intentional infliction of emotional distress based on physician's initiating sexual relationship with female patient, if physician did not in any way represent that sexual relations were in furtherance of treatment, is barred by *Civ. Code § 43.5(c)*, which abolishes cause of action for seduction of person over age of legal consent. *Atienza v. Taub (1987) 194 Cal. App. 3d 388, 394, 239 Cal. Rptr. 454*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsNegligenceActionsNegligent Infliction of Emotional DistressGeneral Overview

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32-362 California Forms of Pleading and Practice--Annotated § 362.33

§ 362.33 Law Reviews

VanDeWeghe, *California Continues to Struggle with Bystander Claims for the Negligent Infliction of Emotional Distress: Thing v. La Chusa, 24 Loy. L.A. L. Rev. 89 (1990)*

Note, *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.: Negligent Infliction of Emotional Distress Bounces Out of Bounds, 22 Pac. L.J. 189 (1990)*

Note, *Elden v. Sheldon: Negligent Infliction of Emotional Distress and Loss of Consortium Denied to Unmarried Cohabitants, 26 Cal. W.L. Rev. 175 (1989-1990)*

Comment, *Dillon to Ochoa: The Elusive Foreseeability of Emotional Distress, 27 Santa Clara L. Rev. 91 (1987)*

Comment, *The Next Best Thing to Being There?: Foreseeability of Media-Assisted Bystanders, 17 Sw. U.L. Rev. 65 (1987)*

Note, *Ochoa v. Superior Court of Santa Clara County: New Grounds or Old Guidelines? 17 Pac. L.J. 1027 (1986)*

Horn, *The Handling of Plaintiffs' Personal Injury Cases Before Trial*, 30(2) Prac. Law. 29 (1984)

Lees-Haley, *Detecting the Psychological Malingerer*, 18 Bev. Hills B.J. 250 (1984)

Comment, *The Right of an Unmarried Cohabitant to an Action for Negligent Infliction of Emotional Distress in*

California, 15 Pac. L.J. 925 (1984)

Comment, *Application of Transferred Intent to Cases of Intentional Infliction of Emotional Distress, 15 Pac. L.J. 147 (1983)*

Comment, *Emotional Distress for Cancerphobia: A Case for the DES Daughter, 14 Pac. L.J. 1215 (1983)*

Comment, *Negligent Infliction of Emotional Distress: Reconciling the Bystander and Direct Victim Causes of Action, 18 U.S.F. L. Rev. 145 (1983)*

Note, *The Expectation of Peace of Mind: A Basis for Recovery of Damages for Mental Suffering Resulting from the Breach of First Party Insurance Contracts, 56 S. Cal. L. Rev. 1345 (1983)*

Nolan and Ursin, *Negligent Infliction of Emotional Distress: Coherence Emerging From Chaos, 33 Hastings L.J. 583 (1982)*

Comment, *Molien v. Kaiser Foundation Hospitals: California Expands Liability for Negligently Inflicted Emotional Distress, 33 Hastings L.J. 291 (1981)*

Comment, *Negligent Infliction of Emotional Distress: New Horizons After Molien v. Kaiser Foundation Hospitals, 13 Pac. L.J. 179 (1981)*

Note, *Limiting Liability for the Negligent Infliction of Emotional Distress: The "Bystander Recovery" Cases, 54 S. Cal. L. Rev. 847 (1981)*

Note, *Molien v. Kaiser Foundation Hospitals: California's New Tort of Negligent Infliction of Serious Emotional Distress, 18 Cal. W.L. Rev. 101 (1981)*

Note, *Molien v. Kaiser Foundation Hospitals: Negligence Actions for Emotional Distress and Loss of Consortium Without Physical Injury, 69 Calif. L. Rev. 1142 (1981)*

Recent Case, *Torts--A Wrongful Death Action Cannot Be Maintained for Death of an Unborn Fetus and Negligent Infliction of Emotional Harm Cannot Be Asserted When Death of Fetus is Hidden From Complainant's Sensory and Contemporaneous Perception--Justus v. Atchison, 18 Santa Clara L. Rev. 1083 (1978)*

Tuohey, *Negligent Infliction of Emotional Distress Arising From a Breach of Contract: Jarchow v. Transamerica Title Insurance Company, 8 Sw. U.L. Rev. 655 (1976)*

Note, *Emotional Distress and Substantial Damages: Jarchow v. Transamerica Title Insurance Co., 8 Sw. U.L. Rev.*

203 (1976)

Note, *Strict Liability: A Response to the Gruenberg-Silberg Conflict Regarding Insurance Litigation Awards, 7 Sw. U.L. Rev. 310 (1975)*

Note, *Applying the Bad Faith Doctrine to the Primary and Excess Insurance Carrier Relationship in California, 7 Loy. L. Rev. 277 (1974)*

Note, *Good Faith and Fair Dealing in Insurance Contracts: Gruenberg v. Aetna Insurance Co., 25 Hastings L.J. 699 (1974)*

Note, *Negligent Infliction of Mental Distress: Reaction to Dillon v. Legg in California and Other States, 25 Hastings L.J. 1248 (1974)*

Comment, *Dillon v. Legg: Extension of Tort Liability in the Field of Mental Distress, 4 U.S.F. L. Rev. 116 (1969)*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsNegligenceActionsNegligent Infliction of Emotional DistressGeneral Overview

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32-362 California Forms of Pleading and Practice--Annotated § 362.34

§ 362.34 Text References

Personal Injury: Actions, Defenses, Damages, Vol. 15, *Fright, Shock, and Infliction of Emotional Distress* (Matthew Bender)

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 884-887; vol. 2, *Insurance*, § 224; vol. 5, *Torts*, §§ 296-307; vol. 6, 1004-1022, 1671-1678 (10th ed. 2005)

Witkin, California Procedure (2d ed), vol. 3, *Pleading*, §§ 626-628

6 Cal. Jur. 3d, *Assault and Other Wilful Torts*, §§ 98-104

23 Cal. Jur. 3d, *Damages*, §§ 73-77

47 Cal. Jur. 2d, *Torts*, § 5

86 C.J.S., *Torts*, § 28(c)

22 Am. Jur. 2d, *Damages*, §§ 105-110

38 Am. Jur. 2d, *Fright, Shock, and Mental Disturbance*, §§ 1-57

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsNegligenceActionsNegligent Infliction of Emotional DistressGeneral Overview

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[Reserved]

§§ 362.35[Reserved]

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PART IV. PROCEDURAL CHECKLIST

32-362 California Forms of Pleading and Practice--Annotated § 362.50

§ 362.50 Plaintiff's Checklist

NOTE:
The following checklist is illustrative only of the basic points that counsel for a plaintiff in an action for intentional or negligent infliction of mental distress should cover.

[1] Facts to Be Ascertained

NOTE:
Not all of the following facts will be ascertainable from the client in the initial interview. Subsequent interviews may be required or it may be necessary to ascertain the facts from other persons, including the potential defendant, by use of discovery proceedings.

1. Facts relating to the plaintiff:

a. Name, address, and telephone number of the plaintiff.

b. Capacity of the plaintiff (such as minor, adult, corporation, unincorporated association, partner in partnership, public employee, etc.).

c. Additional facts, as desired, relating to the plaintiff's stability and financial solvency (such as employment status, prior residences, credit, bank, and personal references).

2. Facts relating to the defendant(s):

a. Name and address of each potential defendant.

b. Capacity of each potential defendant (such as corporation, unincorporated association, agent, employee, public entity).

3. Facts relating to intentional infliction of emotional distress:

a. Date and time of incident.

b. Place.

c. Description of what happened, including identification of all persons involved and their relationship to the plaintiff, and a description of what each person did as far as the plaintiff can recollect.

d. The plaintiff's statement as to the defendant's motivation for the outrageous conduct resulting in the infliction of severe emotional distress on the plaintiff.

e. Injuries sustained by the plaintiff [see Paragraph 5, infra].

4. Facts relating to negligent infliction of emotional distress:

a. Date and time of incident.

b. Place.

c. Description of what happened, including identification of all persons involved and their relationship to the plaintiff, and a description of what each person did so far as the plaintiff can recollect.

d. Property involved; if vehicles, the year, make, model, and license number of each vehicle, as well as the name and address of the operator and owner of each [for a procedural checklist for use in an automobile accident case, *see Ch. 83, Automobiles: Bringing the Action § 83.14*].

e. Injuries sustained by the plaintiff.

5. Injuries sustained by the plaintiff.

a. Personal injuries.

b. Name, address, and telephone number of each physician who treated, or is treating, the plaintiff for his or her injuries. Communication may thereafter be had with such doctors for more detailed information regarding the plaintiff's injuries.

c. Name and address of hospital in which treatment was rendered to the plaintiff as a result of the injuries sustained by the plaintiff.

d. Amount of medical, hospital, and ambulance bills resulting from the mental distress and emotional suffering; amount paid and amount owed.

e. Amount of time lost to the plaintiff as a result of the mental distress and emotional suffering, and the plaintiff's estimation of the reasonable value thereof including lost wages and lost fringe benefits, if any.

f. Name, address, and telephone number of each psychiatrist who treated, or is treating, or may be treating the plaintiff as a result of mental suffering and distress. Communication may thereafter be had with such psychiatrist(s), subject to the plaintiff's consent, for more detailed information regarding these injuries.

g. Amount of money paid for psychiatric services; amount paid and amount owed.

[2] Documents to Be Obtained

NOTE:
Not all of the following documents will be obtainable from the client in the initial interview. Subsequent interviews may be required, or, where circumstances will permit it, they might be mailed to the attorney. It might, however, be necessary to obtain the documents from someone other than the client. Notes following the documents listed indicate sources from which such documents may be obtained. If the contents of any such document must be proved at trial, the document itself must be presented [*Evid. Code § 1520*], unless secondary evidence is admissible [*see* *Evid. Code § 1521 et seq.*].

1. Letters, correspondence, or any other written documents reflecting intent on the part of the defendant to inflict mental and emotional suffering on the plaintiff. These documents may be obtainable from the plaintiff; however, where they are in the possessionof the defendant, they may have to be obtained through discovery [*see* Ch. 190, *Depositions and Discovery*].

2. Copy of an accident report, if any.

NOTE:
This may be obtained from the local police department or from the California Highway Patrol.

3. Traffic citations issued, if any.

4. Criminal conviction record ("rap sheet") of each party involved and of each possible witness.

NOTE:
This information may be obtained from local police departments or from retail credit bureaus; it may not be obtained from the Department of Justice [*see Penal Code § 11105*].

5. Written statements, if any, of parties or witnesses.

6. Medical histories and reports of the plaintiff's present injuries and of the plaintiff's past injuries and illnesses.

7. Receipts of expenses paid in connection with injuries sustained by the plaintiff in the incident [for example, medical and hospital bills, psychiatric bills, and similar items].

8. Relevant insurance policies of parties involved.

9. Copies of any written notices or correspondence to or from insurance carriers with respect to the incident and compensation.

[3] Additional Counts and Other Causes of Action

1. Facts that give rise to a cause of action for the infliction of mental distress, or that suggest mental distress as an element of damages, might give rise to one or more of the following actions that counsel will want to consider:

a. Assault and battery [for procedure and forms, *see* Ch. 58, *Assault and Battery*].

b. Breach of contract in which failure to do the thing contracted for may result in physical suffering or illness on the part of the other contracting party [for procedure and forms, *see* Ch. 140, *Contracts*].

c. Breach of covenant of good faith in an insurance contract [for procedure and forms, *see* Ch. 308, *Insurance*].

d. Strict liability in products liability cases [for procedure and forms, *see* Ch. 460, *Products Liability*].

e. False imprisonment [for procedure and forms, *see* Ch. 257, *False Imprisonment*].

f. Invasion of privacy [for procedure and forms, *see* Ch. 429, *Privacy*].

g. Libel and slander [for procedure and forms, *see* Ch. 340, *Libel and Slander (Defamation*)].

h. Malicious prosecution and abuse of process [for procedure and forms, *see* Ch. 357, *Malicious Prosecution and Abuse of Process*].

i. Nuisance [for procedure and forms, *see* Ch. 391, *Nuisance*].

j. Trespass [for procedure and forms, *see* Ch. 550, *Trespass*].

k. Wrongful death [for procedure and forms, *see* Ch. 181, *Death and Survival Actions*].

l. Wrongful eviction [for procedure and forms, *see* Ch. 333, *Landlord and Tenant: Eviction Actions*].

[4] Essential Allegations of Complaint

1. Intentional infliction of mental distress.

a. Outrageous conduct by the defendant directed at the plaintiff.

b. The defendant's intention of causing or reckless disregard of the probability of causing emotional distress.

c. The plaintiff's suffering severe or extreme emotional distress.

d. Actual and proximate causation of the emotional distress by the defendant's outrageous conduct.

2. Negligent infliction of serious mental distress.

a. The defendant's legal duty to use due care with regard to the plaintiff.

b. Breach of that duty.

c. Breach of the duty as the proximate cause of the resulting injury.

d. If the action involves mental distress caused by witnessing injury to a third party:
(1) The plaintiff's location in relation to the scene of the accident.

(2) The plaintiff's contemporaneous observance of the accident.

(3) Relationship of the plaintiff and the third party.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressElementsTortsNegligenceActionsNegligent Infliction of Emotional DistressGeneral OverviewTortsNegligenceActionsNegligent Infliction of Emotional DistressElements

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32-362 California Forms of Pleading and Practice--Annotated § 362.51

§ 362.51 Defendant's Checklist

NOTE:
The following checklist is illustrative only of the basic points that counsel for a defendant in an action for intentional or negligent infliction of mental distress should cover.

The following facts should be ascertained by counsel for the defendant.

NOTE:
Not all of the following facts will be ascertainable from the client in the initial interview. Subsequent interviews may be required or it may be necessary to ascertain the facts from others, including the plaintiff, by use of discovery proceedings.

1. Facts relating to the defendant:

a. Name, address, and telephone number of the defendant.

b. Capacity of the defendant (for example, corporation, unincorporated association, agent, employee, public entity, or public employer).

NOTE:
The defendant's capacity generally will be revealed by the complaint. Nevertheless, counsel will wish to confirm the allegation with his or her client. Of course, if the capacity is not disclosed by the complaint, counsel will wish to ascertain it.

c. Additional facts, as desired, relating to the defendant's stability and financial solvency (such as employment status, prior residences, credit, bank, and personal references).

2. Facts required for the answer.

NOTE:
Counsel should advise his or her client not to discuss the case with any third person.

a. Date, manner, and place of service of the complaint and summons.

b. Allegations of complaint. Ascertain which of the facts alleged in the complaint are true, which are false, and which facts the defendant does not know the truth or falsity of.

c. Affirmative defenses.

NOTE:
Affirmative defenses can be raised by demurrer, as well as by answer, if they appear on the face of the complaint or from matters of which the court must or may take judicial notice [*Code Civ. Proc. § 430.10, 430.30*].

(1) Privilege (assertion of economic interest or defamation privilege).

(2) Statute of limitations [*see Code Civ. Proc. § 335.1*; former *Code Civ. Proc. § 340(3)* (statute prior to 2003); *Hull v. Central Pathology Serv. Med. Clinic (1994) 28 Cal. App. 4th 1328, 1333, 34 Cal. Rptr. 2d 175]* .

3. Documents to be obtained [*see § 362.50[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressDefensesTortsNegligenceActionsNegligent Infliction of Emotional DistressGeneral OverviewTortsNegligenceDefensesGeneral Overview

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[Reserved]

§§ 362.52[Reserved]

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PART V. FORMS

32-362 California Forms of Pleading and Practice--Annotated § 362.70

§ 362.70 Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12; Cal. Judicial Council Form PLD-PI-001(3)]--Allegation of Intentional Infliction of Emotional Distress

[1] FORM Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12; Cal. Judicial Council Form PLD-PI-001(3)]--Allegation of Intentional Infliction of Emotional Distress

Click here to view image.

CAUTION:
This form of allegations may not be used alone but should be attached to the Judicial Council form of complaint or cross complaint for personal injury, property damage, or wrongful death [*see* *Cal. Rules of Ct., Rule 1.45*; Judicial Council Forms PLD-PI-001, PLD-PI-002].

[2] Use of Form

This allegation of intentional infliction of emotional distress is the Judicial Council approved form of cause of action for an intentional tort [*see Code Civ. Proc. § 425.12*; Cal. Judicial Council Form PLD-PI-001(3)].

This form must be used as an attachment to the approved Judicial Council form of complaint or cross complaint for personal injury, property damage, or wrongful death [*see Cal. Rules of Ct., Rule 1.45(b)*]. When filling in the approved complaint form for use with this form of attachment, the box labeled "OTHER" in the caption to the complaint should be checked, and the cause of action should be specified, as, for example, by inserting "INTENTIONAL TORT--INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS." Additionally, the box labeled "Intentional Tort" in Paragraph 11 of the approved complaint form must be checked.

For a filled-in example of the Judicial Council complaint for personal injury, property damage, and wrongful death, see Ch. 380, *Negligence* . For general information relating to the use of Judicial Council complaint forms, see Ch. 123, *Complaints and Cross Complaints* .

These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in

PDF format also is available at www.lexisone.com at no charge.

[3] Judicial Council Trial Court Forms

Code Civ. Proc. § 425.12 requires that the Judicial Council develop and approve official forms for use in California trial courts for any complaint, cross complaint, or answer in any action based on personal injury, property damage, wrongful death, unlawful detainer, breach of contract, or fraud. Use of the forms is optional [*see Code Civ. Proc. § 425.12*].

[4] Filling Out Intentional Tort Attachment

[a] Title of Case and Description of Paper

Insert the short title of the case as taken from the caption of the complaint in the box at the top, left corner of the form.

Insert the number of the cause of action in the space provided below the title. Check the box labeled "Complaint" or "Cross-Complaint" to indicate the document to which the form is attached, and insert the page number. The page number inserted in this form assumes that the three-page Judicial Council approved form of complaint for personal injury was used.

[b] Separate Cause of Action Form

The attachment states "Use a separate cause of action form for each cause of action." If there is more than one plaintiff in the action, each one has a separate cause of action. If this direction is strictly adhered to, a separate intentional tort attachment for each plaintiff would have to be attached to the complaint. It is not clear if this is what is intended by the direction at the top of the attachment, since the complaint form, while referring to "plaintiff" (singular) in the caption, seems intended for use by more than one plaintiff according to the wording of **Paragraph 2.** of the General Complaint form.

[c] Allegations

In **Paragraph IT-1.**, insert the name of the plaintiff alleged to have suffered emotional distress, and insert the name of the defendant alleged to have inflicted the emotional distress.

If the plaintiff is ignorant of the name of a defendant or defendants, check the box labeled "Does" and insert the number of fictitious defendants alleged to have caused the plaintiff damages [*see Code Civ. Proc. § 474*].

Insert the date on which the alleged infliction of emotional distress occurred in the space provided.

Insert the place where the alleged infliction of emotional distress occurred. This allegation relates to the proper venue for the action when there is physical injury or incapacity [*see Code Civ. Proc. § 395(a)*].

In describing the reasons for the defendant's alleged liability, plaintiff should allege (1) any special relationship between the parties (**Paragraph IT-1.a.**) [*see Alcorn v. Anbro Eng'g, Inc. (1970) 2 Cal. 3d 493, 498-499, 86 Cal. Rptr. 88, 468 P.2d 216* ; *see also § 362.10[3][b], [c]*]; (2) outrageous conduct by the defendant (**Paragraph IT-1.b.**); and (3) the extreme emotional distress and other injuries suffered by the plaintiff which were proximately caused by the defendant's conduct (**Paragraph IT-1.c.**) [*see Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 394, 89 Cal. Rptr. 78* ; *see also 362.10[2]*].

If fictitious "Doe" defendants are alleged to exist in line 3 of **Paragraph IT-1.**, then, in line 4 of the same paragraph, the word "was" should be changed to "were" and the word "defendant" should be changed to "defendants." Plaintiff

should also allege in a general way that the fictitiously named defendants were responsible for plaintiff's damages [*see* **Paragraph IT-1.d.** and Ch. 20, *Allegations Commonly Used*].

Allegations of injuries and a request for damages are inserted into the Judicial Council approved form of complaint [*see, e.g.,* Judicial Council complaint form in Ch. 380, *Negligence*].

[d] Facts Specifically Pleaded

Facts giving rise to a cause of action for injuries resulting from emotional distress must be specifically pleaded [*Deboe v. Horn (1971) 16 Cal. App. 3d 221, 224, 94 Cal. Rptr. 77]* . If physical injuries are claimed, they must be alleged with sufficient particularity so as to inform the adverse parties and the court of the physical dimensions of those injuries [*Hair v. County of Monterey (1975) 45 Cal. App. 3d 538, 542, 119 Cal. Rptr. 639 , disapproved on other grounds, Baxter v. Superior Court (1977) 19 Cal. 3d 461*].

[5] Exemplary Damages Attachment

If exemplary damages are sought under *Civ. Code § 3294*, the approved Judicial Council form of attachment for exemplary damages should be used [*see* Cal. Judicial Council Form PLD-PI-001(6); *see* Judicial Council form in Ch. 177, *Damages*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressElements

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§ 362.71 Complaint for Compensatory [Civ. Code § 3333] and Exemplary and Punitive [Civ. Code § 3294] Damages for Intentional Infliction of Emotional Distress--General Form

[1] FORM Complaint for Compensatory [Civ. Code § 3333] and Exemplary and Punitive [Civ. Code § 3294] Damages for Intentional Infliction of Emotional Distress--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	COMPLAINT FOR DAMAGES
[and DOES 1 through _____,]	)	(Intentional Infliction of Emotional Distress)
Defendant(s).	)	
	)	
	)	
_____		

Plaintiff alleges:

1. Defendant _____ [*name*] is and at all times herein mentioned was a resident of _____ County, California [*or allege other capacity and residence of defendant*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by their conduct.)]

[3. Defendants _____ (*names*) at all times herein mentioned were the agents and employees of their codefendants _____ (*names*) and in doing the things hereinafter alleged were acting within the course and scope of such agency and the permission and consent of their coedefendants.]

4. _____ [*If appropriate, allege any special relationship between the parties and/or defendant's knowledge of the plaintiff's particular susceptibility to emotional distress, e.g.,* On or about _____ [*date*], plaintiff was an employee of defendant _____ (*name*)].

5. _____ [*Allege defendant's outrageous conduct, e.g.,* On or about _____ [*date*], at _____ (*city*), California, the plaintiff informed defendant _____ (*name*), plaintiff's foreman, that plaintiff as shop steward for the _____ (*name*) Union had advised another employee that heshould not _____ (*describe activity*) since that would be a violation of a union agreement. Plaintiff's remarks were not rude or insubordinate. In response, defendant _____ (*name*) shouted at plaintiff in a rude, violent, and insolent manner as follows: _____ (*defendant's statement, including any references aimed at plaintiff's special susceptibility*). Defendant _____ (*name*) ratified these acts on behalf of defendant _____ (*name*) when plaintiff asked about them].

6. _____ [*Allege intent to cause emotional distress, e.g.,* Defendant _____ (*name*)'s conduct was intentional and malicious and done for the purpose of causing plaintiff to suffer humiliation, mental anguish, and emotional and physical distress. Defendant _____ (*name*)'s conduct in confirming and ratifying that conduct was done with knowledge that plaintiff's emotional and physical distress would thereby increase, and was done with a wanton and reckless disregard of the consequences to plaintiff].

7. As the proximate result of the acts alleged above, plaintiff suffered humiliation, mental anguish, and emotional and physical distress, and has been injured in mind [and body] as follows: _____ [*describe*], all to plaintiff's damage.

[8. As a further proximate result of the acts alleged above, plaintiff was required to and did employ physicians and surgeons to examine, treat, and care for plaintiff, and incurred additional medical expenses for hospital bills (and other incidental medical expenses). Plaintiff is informed and believes and thereon alleges that plaintiff will incur some additional medical expenses(, the exact amount of which is unknown).]

[9. By reason of the acts alleged above, plaintiff was prevented from attending to plaintiff's usual _____ (occupation *or* profession) as a _____ (*specify*) and thereby lost earnings. Plaintiff is informed and believes and thereon alleges, that plaintiff will thereby be prevented from attending to plaintiff's usual _____ (occupation *or* profession) for a period in the future which plaintiff cannot ascertain, and will thereby sustain further loss of earnings.]

10. The acts of defendants alleged above were willful, wanton, malicious, and oppressive, and justify the awarding of exemplary and punitive damages.

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages according to proof;

[2. For medical and related expenses according to proof;]

[3. For lost earnings, past and future, according to proof;]

4. For exemplary and punitive damages;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____[*date*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This complaint is for use to obtain damages for the intentional infliction of mental distress.

[3] Allegations

This form alleges:

- A special relationship between the parties and defendant's knowledge of the plaintiff's particular susceptibility to emotional distress (Paragraph 4) [*see Alcorn v. Anbro Eng'g, Inc. (1970) 2 Cal. 3d 493, 498-499, 86 Cal. Rptr. 88, 468 P.2d 216]* ;

- Outrageous conduct by the defendant (Paragraph 5),

- The defendant's intent to cause emotional distress (Paragraph 6);

- The extreme emotional distress and other injuries suffered by plaintiff which were proximately caused by the defendant's conduct (Paragraphs 7-9) [*see Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376, 394, 89 Cal. Rptr. 78]* ; and

- That defendant's acts were willful, despicable, malicious, and oppressive (Paragraph 10) [*see Civ. Code § 3294*]. Venue of the action may be based on the residence of the defendant (Paragraph 1) or the location of the defendant's outrageous conduct (Paragraph 5) [*see Code Civ. Proc. § 395(a)*].

Optional paragraphs which may be appropriate include a fictitious name allegation (Paragraph 2) [*see Code Civ. Proc. § 474*], an agency allegation (Paragraph 3) [*see Civ. Code § 2338*], an allegation of medical andincidental expenses (Paragraph 8), and an allegation of loss of earnings (Paragraph 9).

In Paragraph 7, physical injuries are not required in an intentional infliction of mental distress action [*Grimes v. Carter (1966) 241 Cal. App. 2d 694, 699, 50 Cal. Rptr. 808]* . However, where physical harm has not resulted, the courts tend to look for more in the way of extreme outrage as an assurance that the mental disturbance claimed is genuine [*Golden v. Dungan (1971) 20 Cal. App. 3d 295, 308, 97 Cal. Rptr. 577]* .

[4] Venue

Except as otherwise provided by law, and subject to the power of the court to transfer actions or proceedings as provided in *Code Civ. Proc. § 392 et seq.*, the county in which the defendants, or some of them, reside at the commencement of the action is the proper county for the trial of the action [*Code Civ. Proc. § 395(a)*; *see Cubic Corp. v. Superior Court (1986) 186 Cal. App. 3d 622, 625, 231 Cal. Rptr. 18* (*Code Civ. Proc. § 395(a)* "injury to a person" as not including emotional distress)]. A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of the corporation is situated, subject to the power of the court to change the place of trial as in other cases [*Code Civ. Proc. § 395.5*]. For forms and further discussion relating to venue, see Ch. 571, *Venue* .

[5] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see *Ch. 177, Damages, § 177.40* et seq., and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[7] Pleading

Facts giving rise to a cause of action for injuries resulting from emotional distress must be specifically pleaded [*Deboe v. Horn (1971) 16 Cal. App. 3d 221, 224, 94 Cal. Rptr. 77]* . If physical injuries are claimed, they must be alleged with sufficient particularity so as to inform the adverse parties and the court of the physical dimensions of those injuries [*Hair v. County of Monterey (1975) 45 Cal. App. 3d 538, 542, 119 Cal. Rptr. 639 , disapproved on other grounds, Baxter v. Superior Court (1977) 19 Cal. 3d 461*].

[8] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For forms for use in the recovery of damages in contract and tort actions, see Ch. 177, *Damages*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively

[9] State Statutes

Liability of principal for tort of agent. *Civ. Code § 2338*

Compensation for injury. *Civ. Code § 3281*

Exemplary and punitive damages. *Civ. Code § 3294*

Measure of damages for breach of obligation not arising from contract. *Civ. Code § 3333*

[10] Text References

Witkin, California Procedure, vol. 5, *Pleading*, §§ 724-726 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressElementsTortsIntentional TortsIntentional Infliction of Emotional DistressRemedies

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Chapter 362 MENTAL SUFFERING AND EMOTIONAL DISTRESS
PART V. FORMS

32-362 California Forms of Pleading and Practice--Annotated § 362.72

§ 362.72 Complaint for Compensatory [Civ. Code § 3333] and Exemplary and Punitive [Civ. Code § 3294] Damages for Intentional Infliction of Emotional Distress--By Woman--Shock and Miscarriage Resulting From Menacing Conduct

[1] FORM Complaint for Compensatory [Civ. Code § 3333] and Exemplary and Punitive [Civ. Code § 3294] Damages for Intentional Infliction of Emotional Distress--By Woman--Shock and Miscarriage Resulting From Menacing Conduct

[*Caption. See § 362.71.*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 362.71 , Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 362.71 , Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 362.71 , Paragraph 3.*]

4. _____ [*If appropriate, allege any special relationship between the parties and/or defendant's knowledge of the plaintiff's particular susceptibility to emotional distress, e.g.,* On or about _____ (*date*), plaintiff was the tenant of defendant _____ (*name*)].

5. At all times herein mentioned, plaintiff was, and is, residing in a house located at _____ [*street address and city*], _____ County, California.

6. On _____ [*date*], defendant intentionally, and without permit or license or the consent of plaintiff, entered her residence and without provocation, in a malicious, rude, violent, and insolent manner, yelled at, menaced, intimidated, maligned, and threatened to _____ [*e.g.*, evict plaintiff from the premises].

7. Plaintiff was then pregnant with child, by approximately _____ [*number*] months, and the menacing conduct of defendant greatly upset and disturbed her, causing her great mental suffering and emotional distress, with the result that she was rendered generally sick and sustained shock, nausea, and a miscarriage of her yet unborn child, all to her damage.

8. As a further proximate result of defendant's conduct, plaintiff was required to and did expend money and incur obligations for medical services, drugs, and sundries reasonably required in the treatment of plaintiff for the injuries sustained. [The exact amount of these medical expenses is not now known to plaintiff; when the same have been ascertained, plaintiff will request permission to amend this complaint so as to set forth the various items and the total of such charges and expenses.]

9. [*Loss of earnings. See § 362.71 , Paragraph 9.*]

10. [*Exemplary and punitive damages. See § 362.71 , Paragraph 10.*]

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

[3. For loss of earnings according to proof;]

4. For exemplary and punitive damages;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*date*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 362.71.*]

[2] Use of Form

This is a form of complaint for damages for intentional infliction of emotional distress for use by a woman against a party intentionally menacing her where the result of the conduct has been shock and a miscarriage.

[3] Cross References

See also Comments and References to *§ 362.71*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressElementsTortsIntentional TortsIntentional Infliction of Emotional DistressRemedies

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32-362 California Forms of Pleading and Practice--Annotated § 362.73

§ 362.73 Complaint for Compensatory [Civ. Code § 3333] and Exemplary and Punitive [Civ. Code § 3294] Damages for Intentional Infliction of Emotional Distress--By Tenant Against Landlord Based on Unlawful Ejectment

[1] FORM Complaint for Compensatory [Civ. Code § 3333] and Exemplary and Punitive [Civ. Code § 3294] Damages for Intentional Infliction of Emotional Distress--By Tenant Against Landlord Based on Unlawful Ejectment

[*Caption. See § 362.71.*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 362.71 , Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 362.71 , Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 362.71 , Paragraph 3.*]

4. At all times herein mentioned, defendant was the owner of the apartment house and premises located at _____ [*street address*], _____ [*city*], California.

5. At all times herein mentioned, plaintiff and her husband, _____ [*names*], were tenants from month to month for apartment _____ [*number*] in that apartment house and the term of the tenancy was paid in advance to and including _____ [*date*].

6. On _____ [*date*], while plaintiff was out of town, defendant entered plaintiff's apartment, removed plaintiff's clothes and all her belongings and stored them in the basement of the apartment house, and on the same date

defendant willfully, maliciously, and unlawfully changed the lock on the door of plaintiff's apartment, thereby preventing plaintiff from entering, occupying, and enjoying the premises.

7. On _____ [*date*], plaintiff returned to the premises and, not being able to enter her apartment, demanded from defendant the key to the new lock, but defendant refused, and ever since has refused, to give the key to plaintiff or to allow her into the apartment.

8. On _____ [*date*], defendant compelled plaintiff to carry and remove from the basement of the apartment house numerous items of clothing, household effects, and furniture belonging to plaintiff which had previously been removed from plaintiff's apartment by defendant.

9. Plaintiff was without shelter for several hours on that day, and was forced to make arrangements to seek shelter many miles distant.

10. By reason of this unlawful ejection of plaintiff by defendant, and as a proximate result of being ejected from the premises in the manner hereinabove mentioned, plaintiff suffered great mental distress and became nervous and ill, all to her damage.

11. Defendant's ejection of plaintiff from the premises was willful, malicious, deliberate, and without probable cause. Plaintiff, therefore, is entitled to exemplary or punitive damages.

[12. As a result of these acts of defendant, plaintiff was required to, and did, obtain necessary medical care and attention and will continue to require these services for an indefinite period. (Plaintiff does not know at this time the reasonable value of these services rendered and to be rendered, and asks leave to amend this complaint so as to set forth the same when ascertained.)]

[*Prayer. See § 362.71.*]

_____ [*date*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 362.71.*]

[2] Use of Form

This complaint for damages for intentional infliction of emotional distress is for use by a tenant against a landlord who has unlawfully ejected the tenant where the tenant has suffered emotional distress resulting in physical injury.

[3] Cross References

See also Comments and References to *§ 362.71*.

For discussion and forms relating to landlords and tenants generally, see Ch. 330, *Landlord and Tenant: General Introduction* , et seq.

For a discussion and forms relating to unlawful ejectment as abuse of process, see Ch. 357, *Malicious Prosecution and Abuse of Process*

[4] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, § 457 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressElementsTortsIntentional TortsIntentional Infliction of Emotional DistressRemedies

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32-362 California Forms of Pleading and Practice--Annotated § 362.74

§ 362.74 Complaint for Compensatory [Civ. Code § 3333] and Exemplary and Punitive [Civ. Code § 3294] Damages for Intentional Infliction of Emotional Distress--By Customer Against Retailer--False Accusations of Nonpayment of Debt

[1] FORM Complaint for Compensatory [Civ. Code § 3333] and Exemplary and Punitive [Civ. Code § 3294] Damages for Intentional Infliction of Emotional Distress--By Customer Against Retailer--False Accusations of Nonpayment of Debt

[*Caption. See § 362.71.*]

Plaintiff alleges:

1. At all times herein mentioned, defendant _____ [*name*] was and is a corporation organized and existing under and by virtue of the laws of the State of _____, and engaged in the business of operating retail stores under the name of _____ [*specify*] at _____ [*address*] and other places in the State of California.

[2. *Fictitious name allegation, if appropriate. See § 362.71 , Paragraph 2.*]

3. At all times herein mentioned, defendant _____ [*name of individual*] was the agent, servant, and employee of defendant _____ [*name*], and in doing the things hereinafter mentioned was acting in the scope of _____ [his *or* her] authority as such agent and employee, and with the permission and consent of _____ [his *or* her] employer.

4. On or about _____ [*date*], defendant _____ [*name of individual*] telephoned the home of plaintiff's neighbors at _____ [*time*], got plaintiff's neighbors out of bed, requested that plaintiff be called to the telephone, and told them that it was an emergency call. The neighbors went to plaintiff's home, awakened _____ [him *or* her] and told _____ [him *or* her] that

_____ [he *or* she] had an emergency telephone call.

5. Plaintiff had taken treatments for a nervous condition and had been warned by _____ [his *or* her] physician to get plenty of rest and to keep out of situations where _____ [he *or* she] might be startled or shocked.

6. On being told of the emergency telephone call, it instantaneously occurred to plaintiff that something had happened to _____ [his *or* her] children. _____ [He *or* She] proceeded to the neighbors' home in a state of semishock.

7. On answering the telephone plaintiff was told by defendant _____ [*name of individual*] that the forthcoming news was going to be a great shock. After causing plaintiff this added worry, _____ [he *or* she] then proceeded to identify _____ [himself *or* herself] as the _____ [*manager, employee, agent, etc.*] of _____ [*store*] and asked plaintiff why _____ [he *or* she] had not paid _____ [his *or* her] bill. Plaintiff then related that _____ [he *or* she] had paid cash for _____ [his *or* her] purchases at the store.

8. Defendant _____ [*name of individual*] threatened court action and to cause trouble for plaintiff if _____ [he *or* she] did not appear at the store the following morning, whereon the conversation was discontinued.

9. On the following day plaintiff consulted counsel who telephoned and spoke to one _____ [*name and position held*] at the store. _____ [*Name of person consulted*], when asked, referred to _____ [his *or* her] records and told counsel that plaintiff did not owe any money, and that it had all been a mistake.

10. The accusations by _____ [*name of individual employee*] were false and this employee acted as hereinafter alleged intentionally and maliciously without probable cause, for the purpose of harassing and annoying plaintiff in the presence of _____ [his *or* her] neighbors, who heard the telephone conversation.

11. As a result of the false and malicious statements of defendant, plaintiff has suffered great mental anguish, mortification, humiliation, and shame, and has become sick and ill and will remain so for an indefinite term, all to _____ [his *or* her] damage.

[12. *Exemplary and punitive damages. See § 362.71 , Paragraph 10.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages according to proof;

2. For exemplary and punitive damages;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*date*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 362.71.*]

CAUTION:

The extent, if any, to which the Robbins-Rosenthal Fair Debt Collection Practices Act (*Civ. Code § 1788 et seq.*) modifies the cause of action alleged in this form is uncertain. The term "debt collection," as used in the act, is defined as any act or practice in connection with the collection of consumer debts [*Civ. Code § 1788.2(b)*]. The term "debt collector" is defined as any person who, in the ordinary course of business, regularly, on behalf of himself or herself or others, engages in debt collection [*Civ. Code § 1788.2(c)*]. The act prohibits specified threats, harassment, communications with others regarding a debt, and misrepresentations, as well as other improper practices on the part of the debt collector [*Civ. Code §§ 1788.10-1788.16*]. For violation of any of these provisions, the act authorizes an "individual" action by the debtoragainst the debt collector for actual damages and a penalty in an amount not less than $100 or more than $1,000 [*Civ. Code § 1788.30(a), (b), (f)*]. The act further provides that the prevailing party is entitled to costs, that the prevailing debtor is entitled to a reasonable attorney fee based on time necessarily spent to enforce the liability, and that the court may award the prevailing creditor attorney's fees on a finding that the debtor's prosecution or defense of the action was not in good faith [*Civ. Code § 1788.30(c)*].

The act also provides, however, that the debt collector shall have no civil liability if (1) within 15 days either after discovering a violation which can be cured or after the receipt of a written notice of the violation, the debt collector notifies the debtor of the violation and makes whatever adjustments or corrections are necessary to cure the violation with respect to the debtor; or (2) the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted despite the maintenance of procedures reasonably adapted to avoid any such violation [*Civ. Code § 1788.30(d), (e)*]. The debt collector may also raise, as a defense against the debtor, any intentional violation by the debtor of his or her responsibilities under the act [*see* *Civ. Code §§ 1788.20-1788.22*] if the violation is pertinent or relevant to the claim or action brought against the debt collector by or on behalf of the debtor [*Civ. Code § 1788.30(d), (e), (g)*].

The act provides finally that the remedies it provides are cumulative and in addition to any other procedures, rights, or remedies under "any other provision of law" [*Civ. Code § 1788.32*]. It is not clear whether the quoted phrase refers only to statutory law or if it includes common law, such as that on which this form is based. If "any other provision of law," as used in Civ. Code § 1788.32, *above*, is construed to mean statutory or common law, then it would appear that ***see*** *§ 362.74* is still viable. If the quoted phrase is construed to mean statutory law only, then it would appear that the remedy provided by the act is exclusive in those situations to which it would apply and that ***see*** *§ 362.74* should no longer be used unless it is modified to conform with the requirements of the act. It is also unclear whether the penalty authorized by the act [***see*** *Civ. Code § 1788.30(b),* ***above***] is in lieu of or, by virtue of *Civ. Code § 1788.32*, cumulative, inasmuch as punitive damages are expressly authorized by statute in cases of malice, oppression, or fraud [*Civ. Code § 3294*].

[2] Use of Form

This complaint for damages for intentional infliction of emotional distress is for use by a customer against a retailer

where the retailer has falsely accused the customer of nonpayment of a debt.

The fact situation illustrated in this form is based on *Bowden v. Spiegel, Inc. (1950) 96 Cal. App. 2d 793, 793-794, 216 P.2d 571* .

[3] Text References

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 458 (10th ed. 2005)

[4] Cross References

See also Comments and References to *§ 362.71*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsDamagesPunitive DamagesConduct Supporting AwardsTortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressElementsTortsIntentional TortsIntentional Infliction of Emotional DistressRemedies

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32-362 California Forms of Pleading and Practice--Annotated § 362.75

§ 362.75 Complaint for Damages [Civ. Code § 3333] for Negligently Caused Emotional Distress--Breach of Primary Duty Owed Directly to Plaintiff--Skeletal Form

[1] FORM Complaint for Damages [Civ. Code § 3333] for Negligently Caused Emotional Distress--Breach of Primary Duty Owed Directly to Plaintiff--Skeletal Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES 1	)	(Negligent Infliction of Emotional Distress)
through _____,]	)	
Defendant(s).	)	
	)	

Plaintiff alleges:

1. _____ [*Allege defendant's status, if appropriate, capacity if other than a natural person, and residence or place of business if used to lay venue, e.g.,* Defendant is, and at all times herein mentioned was, a _____ (*e.g.,* physician licensed to practice medicine) in California with his/her principal place of business situated in _____ (*city*), _____ County, California *or* corporation organized and existing under the laws of California, authorized to transact, and transacting, business as a _____ (*specify*), with its principal place of business in this state situated in _____ (*city*), _____ County *or other allegation of capacity and authority as appropriate*].

[2. *Fictitious name allegation, if appropriate. See § 362.71, Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 362.71, Paragraph 3.*]

4. _____ [*Allege facts showing relationship of parties giving rise to defendant's duty to exercise due care towards plaintiff or, if action arises out of defendant's breach of contract with plaintiff, allege execution and relevant terms of contract*].

5. Defendant knew, or should have known, that his/her failure to exercise due care in the performance of _____ (*act to be done or* terms of the contract) would cause plaintiff severe emotional distress.

6. _____ [*Allege defendant's act or omission to act constituting breach of duty or breach of contract*].

7. As a proximate result of defendant's _____ [*act or omission constituting breach of duty or breach of contract*], _____ [*specify consequences of breach supporting claim of severe emotional distress or mental suffering*].

8. As a further proximate result of defendant's _____ [*specify act constituting breach of duty or breach of contract*] and the consequences proximately caused by it, as hereinabove alleged, plaintiff suffered severe emotional distress and mental suffering, all to his/her damage.

9. _____ [*Continue, alleging in this and subsequent paragraphs each item of special damages, if any, suffered by plaintiff, including any loss of wages and medical and related expenses incurred or paid*].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages for severe emotional distress and mental suffering according to proof;

[2. For medical and related expenses according to proof;]

[3. For lost wages according to proof;]

[4. For _____ (*continue, enumerating items of special damages*)];

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*date*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 362.71.*]

[2] Use of Form

This general form of complaint is for use in seeking damages for negligent infliction of severe emotional distress and mental suffering resulting from defendant's breach of a duty owed directly to plaintiff. Damages for severe emotional distress may be recovered in a negligence action when they result from the breach of a duty owed the plaintiff that is assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two [*Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989) 48 Cal. 3d 583, 590, 257 Cal. Rptr. 98, 770 P.2d 278]* .

For an additional form of complaint for damages for severe emotional distress and mental suffering resulting from the breach of a duty owed directly to plaintiff, *see § 362.76*. For a form of complaint containing a cause of action for use if defendant breached a derivative duty owed to plaintiff (a bystander), *see § 362.77*.

When damages for emotional distress or mental suffering are sought in conjunction with an action for damages for tortious conduct or for atortious breach of contract, the allegations in this form may be selectively incorporated into the statement of the tort cause of action.

[3] Allegations

This complaint alleges the following: (1) the status, capacity, residence or place of business, and business of the defendant (Paragraph 1); (2) the identification of any fictitiously named defendants (Paragraph 2); (3) the status of any of the fictitiously named defendants as agents or employees of the named defendant (Paragraph 3); (4) the facts showing the particular relationship of the parties, or the existence of a contract, or other facts establishing defendant's duty to exercise due care (Paragraph 4); (5) the facts establishing the foreseeability that plaintiff would suffer severe emotional distress and mental suffering if defendant breached its duty to plaintiff (Paragraph 5); (6) defendant's breach of duty (Paragraph 6); (7) the consequences proximately resulting from the breach (Paragraph 7); (8) plaintiff's detriment (severe emotional distress and mental suffering) proximately caused by the breach and consequences of the breach (Paragraph 8); (9) the general damages sustained by plaintiff (Paragraph 8); and (10) the special damages sustained by plaintiff as a proximate result of defendant's breach and plaintiff's detriment (Paragraph 9).

One court of appeal has stated that prior cases have permitted recovery on a direct-victim theory only if (1) a preexisting relationship exists, and (2) the defendant's conduct can be characterized as "outrageous" [*Bro v. Glaser (1994) 22 Cal. App. 4th 1398, 1440-1441, 27 Cal. Rptr. 2d 894]* . Counsel can allege that the breach of duty constituted (or was accompanied by) outrageous conduct in Paragraph 6 if the facts justify such an allegation.

[4] Specification of Damages

Normally, a complaint for money or damages must state the amount demanded. However, in an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see *Ch. 177, Damages, § 177.40* et seq., and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§*

425.11, *425.115*].

[5] Cross References

For forms of complaints for use in actions for damages for legal malpractice, see Ch. 76, *Attorney Professional Liability* .

For a form of complaint for damages for a tortious breach of contract relating to mortuary services, see Ch. 180, *Dead Bodies and Cemeteries* .

For forms of complaint for damages for a tortious breach of contract relating to insurance policies, see *Ch. 308, Insurance, § 308.10* et seq.

For discussion and forms relating to negligence actions generally, see Ch. 380, *Negligence* .

For forms of complaints for use in actions for damages for medical malpractice, see Ch. 414, *Physicians: Medical Malpractice* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesPain & SufferingGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsDamagesCompensatory DamagesProperty DamageAward CalculationsTortsNegligenceActionsNegligent Infliction of Emotional DistressGeneral OverviewTortsNegligenceActionsNegligent Infliction of Emotional DistressElements

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PART V. FORMS

32-362 California Forms of Pleading and Practice--Annotated § 362.76

§ 362.76 Complaint for Damages [Civ. Code § 3333] for Negligently Caused Emotional Distress--By Patient Against Private Hospital--Delivery of Wrong Baby to Mother

[1] FORM Complaint for Damages [Civ. Code § 3333] for Negligently Caused Emotional Distress--By Patient Against Private Hospital--Delivery of Wrong Baby to Mother

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____[*name(s)*],	)	COMPLAINT FOR DAMAGES
[and DOES 1 through _____,]	)	(Negligent Infliction of Emotional Distress)
Defendant(s).	)	
	)	
	)	

_____

Plaintiff alleges:

1. At all times herein mentioned, defendant _____ [*name of hospital*] was, and is, a corporation duly organized and existing under and by virtue of the laws of the State of _____, authorized to do business, and engaged in the business of maintaining, conducting, and supervising a private hospital in _____ [*city*], California.

[2. *Fictitious name allegation, if appropriate. See § 362.71 , Paragraph 2.*]

3. At all times herein mentioned, defendants _____ [*name*] were the agents, servants, and employees of defendant _____ [*name of hospital*] and in doing the things hereinafter mentioned were acting in the

scope of their authority as such agents, servants, and employees, and with the permission and consent of defendant _____ [*name of hospital*].

4. On _____ [*date*], plaintiff entered defendant hospital as a paying patient for the purpose of giving birth to a child, to receive for herself and her child the necessary care and attention during and following the birth of the child, and to be discharged therefrom with her child. Defendants agreed to provide all such services.

5. On _____ [*date*], plaintiff gave birth to a child, and from that time through _____ [*date*], when plaintiff was released and discharged from the hospital, defendants so negligently and carelessly performed their services that plaintiff was given a child which was stated to be her own child, but which was not her own child, and was discharged from the hospital with that child.

6. Thereafter plaintiff took the child home with her and undertook the care and feeding of the child as though it were her own true child. In truth and in fact, the child presented and given to plaintiff was not plaintiff's child.

7. On or about _____ [*date*], plaintiff discovered that the child given her by defendants was not her own child. Thereafter defendants presented another child to plaintiff, which defendants represented was the true and correct child. Plaintiff is uncertain at this time that the second child so presented is her own true child, the issue of the body of plaintiff.

[*EITHER*]

8. As a proximate result of this negligence and carelessness of defendants, plaintiff suffered profound shock to her nervous system, resulting in the following physical injuries, to wit: _____ [*specify injuries suffered*], all to her damage.

[*OR*]

8. As a proximate result of this negligence and carelessness of defendants, plaintiff suffered serious mental anguish and emotional distress as follows: _____ [*describe*], all to plaintiff's damage.

9. As a further proximate result of the negligence and carelessness of defendant, plaintiff has incurred, and will continue to incur, medical expense and costs of drugs and supplies. [The amount of these expenses has not yet been ascertained, but plaintiff will ask leave of this court to amend her complaint to insert the correct amount of such medical expenses when the same has been ascertained.]

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages according to proof;

2. For medical and related expenses;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*date*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 362.71.*]

[2] Use of Form

This complaint for damages for negligent infliction of emotional distress is for use by a patient against a private hospital if the hospital has negligently delivered the wrong baby to his or her mother.

[3] Allegations

The form alleges:

- The agency relationship of the hospital employees (Paragraph 3);
- The defendants' duty to the plaintiff (Paragraph 4);
- Breach of that duty (Paragraphs 5-7);
- Breach as the proximate cause of the plaintiff's injuries (Paragraph 8); and
- The plaintiff's injuries and damages (Paragraphs 8, 9).

[4] Physical Injury

It is no longer necessary to allege physical injury to state a cause of action for negligent infliction of serious mental distress. The purpose of the physical injury requirement was to ensure the genuineness of claims, a function now fulfilled as a matter of proof by medical testimony or the circumstances of the case [*Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 930, 931, 167 Cal. Rptr. 831, 616 P.2d 813* (limited on duty issue in *Burgess v. Superior Court (1992) 2 Cal. 4th 1064, 1074, 9 Cal. Rptr. 2d 615, 831 P.2d 1197*)].

[5] Cross References

See also Comments and References to *§ 362.71*.

For discussion and forms relating to hospitals generally, see Ch. 295, *Hospitals* .

For discussion and forms relating to negligent actions generally, see Ch. 380, *Negligence* .

[6] Text References

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 1004-1005, 1022-1030 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsNegligenceActionsNegligent Infliction of Emotional DistressGeneral OverviewTortsNegligenceActionsNegligent Infliction of Emotional DistressElementsTortsNegligenceActionsNegligent Infliction of Emotional DistressPotential Plaintiffs

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32-362 California Forms of Pleading and Practice--Annotated § 362.77

§ 362.77 Complaint for Damages for Wrongful Death [Code Civ. Proc. § 377.60] and for Negligently Caused Emotional Trauma [Civ. Code § 3333] From Witnessing Injury to Relative

[1] FORM Complaint for Damages for Wrongful Death [Code Civ. Proc. § 377.60] and for Negligently Caused Emotional Trauma [Civ. Code § 3333] From Witnessing Injury to Relative

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	(Wrongful Death and Negligent Infliction of Emo-
Defendant(s).	)	tional Distress)
	)	
	)	

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Wrongful Death)

1. Plaintiff is the _____ [*relationship to decedent*] of _____ [*name*], deceased, and as such is entitled to bring this action under _____ [*specify applicable code section, e.g., if plaintiff is decedent's spouse, domestic partner, or child, Code of Civil Procedure Section 377.60(a)*].

2. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence of each defendant*].

[3. *Fictitious name allegation. See § 362.71, Paragraph 2.*]

4. At all times herein mentioned, defendant _____ was the [owner and] operator of a certain _____ [*year, make, model*] automobile, [California] license No. _____.

5. Plaintiff is informed and believes, and thereon alleges, that, at all times herein mentioned, _____ [*allege agency status, e.g.*, each of the defendants was the agent and employee of each of the remaining defendants and was at all times acting within the scope of the agency and employment and that defendant _____ (*name*) was operating the _____ automobile with the consent and permission of each of the remaining defendants].

6. At all times herein mentioned, _____ Street and _____ Street were public streets [and highways] in _____ [*city*], _____ County, California.

7. On or about _____ [*date*], at or about the hour of _____ [*time*], defendant _____ [*name*] was operating the above-described automobile in a _____ [*describe, e.g.*, southerly] direction on _____ Street at or near the intersection thereof with _____ Street in the above-mentioned city, county, and state. At that time and place, the deceased, _____ [*name*], was lawfully crossing _____ Street.

8. At that time and place, defendant _____ [*name of driver*] negligently operated and controlled the above-described automobile so as to cause it to collide with the decedent _____ [*name*], resulting in injuries to decedent that proximately resulted in decedent's death.

[*CONTINUE as necessary with additional paragraphs alleging negligence, vicarious liability, or other theories of recovery against other defendants*]

9. As a proximate result of the negligence of defendants and the death of decedent, plaintiff has been deprived of the society, comfort, protection, services, and support of the decedent and has thereby sustained pecuniary loss.

10. As a further proximate result of the negligence of defendants in the death of the decedent, plaintiff has incurred funeral and burial expenses for the decedent.

SECOND CAUSE OF ACTION
(Negligent Infliction of Mental Distress)

11. Plaintiff incorporates herein each and every allegation contained in Paragraphs 1 through 8 of the First Cause of Action.

12. At all times herein mentioned, plaintiff was in close proximity to the hereinabove-described collision and personally witnessed the collision.

13. Because of the negligence of the defendants and as a proximate result thereof, plaintiff sustained severe emotional distress and mental suffering, all of which has caused, continues to cause, and will cause him/her great physical and mental pain and suffering, all to his/her damage.

[14. Plaintiff was reasonably required to and did incur medical and incidental expenses for the examination, treatment,

and care of these injuries (, the exact amount of which is unknown at this time). Plaintiff is informed and believes, and therefore alleges, that plaintiff will in the future be reasonably required to incur similar obligations.]

[15. Plaintiff has lost wage benefits and has sustained an injury to and an impairment of present and future earning capacity and the ability to engage in gainful occupation and has thereby suffered damages.]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

FIRST CAUSE OF ACTION:

1. For damages for wrongful death according to proof; and

2. For funeral and burial expenses according to proof.

SECOND CAUSE OF ACTION:

3. For damages for pain and suffering according to proof;

[4. For medical and incidental expenses according to proof;]

[5. For loss of wage benefits and impairment of earning capacity in an amount (as hereinafter determined);]

6. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*date*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 362.71*.]

[2] Use of Form

This complaint is for use in an action for wrongful death and for recovery of damages for emotional trauma and physical injury from witnessing the death of a relative. The complaint states two causes of action: (1) by the plaintiff in the capacity of a person entitled by statute to bring a wrongful death action [*see Code Civ. Proc. § 377.60*]; and (2) by the plaintiff for damages sustained by him or her in having witnessed the death. For discussion of the circumstances under which a bystander or percipient witness may recover damages for mental suffering incurred as a result of injuries negligently inflicted on another, see *§ 362.11[6][c][i]*.

[3] Cross References

See also Comments and References to §§ *362.75*, *362.76*.

For discussion and forms relating to automobiles, see from Ch. 80, *Automobiles: Overview* to Ch. 87A, *Automobiles: Post Trial* .

For discussion and forms relating to death actions, see Ch. 181, *Death and Survival Actions* .

[4] Text References

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 1007-1020 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesPain & SufferingEmotional & Mental DistressGeneral OverviewTortsNegligenceActionsNegligent Infliction of Emotional DistressGeneral OverviewTortsNegligenceActionsNegligent Infliction of Emotional DistressElementsTortsWrongful Death & Survival ActionsGeneral OverviewTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesPain & SufferingTortsWrongful Death & Survival ActionsSurvival Actions

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32-362 California Forms of Pleading and Practice--Annotated § 362.78

§ 362.78 Affirmative Defense--Privilege--Assertion of Legal Right

[1] FORM Affirmative Defense--Privilege--Assertion of Legal Right

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

At all times mentioned in plaintiff's complaint, defendant was asserting his or her legal right to _____ [*specify, e.g.,* collect a debt owed by plaintiff] with a good faith belief in the existence of that right.

[2] Use of Form

This form is for use as an affirmative defense when the defendant's conduct complained of was a good faith assertion of a legal right.

[3] Cross References

For forms of answers, see Ch. 26, *Answers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressDefensesTortsNegligenceDefensesGeneral Overview

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32-362 California Forms of Pleading and Practice--Annotated § 362.79

§ 362.79 Affirmative Defense--Privilege--Statement Made in Official Proceeding

[1] FORM Affirmative Defense--Privilege--Statement Made in Official Proceeding

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

The statements complained of by plaintiff were made in the course of an official proceeding authorized by law, to wit: _____ [*specify proceeding*].

[2] Use of Form

This form is for use as an affirmative defense when the defendant's statements complained of were made in the course of an official proceeding authorized by law [*see Civ. Code § 47(b)*]. Although case language suggests that other defamation privileges may be applicable in intentional infliction of mental distress cases [*see Kachig v. Boothe (1971) 22 Cal. App. 3d 626, 641, 99 Cal. Rptr. 393]* , the privilege given by *Civ. Code § 47(b)* has been the only such privilege specifically cited.

[3] Cross References

For forms of affirmative defenses in defamation actions, see Ch. 340, *Libel and Slander* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesGeneral OverviewTortsIntentional TortsDefamationDefensesPrivilegesStatutory PrivilegesTortsIntentional TortsIntentional Infliction of Emotional DistressDefensesTortsNegligenceDefensesGeneral Overview

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Chapter 363 MINING

32-363 California Forms of Pleading and Practice--Annotated 363.syn

§ 363.syn Synopsis to Chapter 363: MINING

§ 363.01 Scope of Chapter

§ 363.02 Cross References

§§ 363.03through 363.09 [Reserved]

§ 363.10 Governing Statutes

§ 363.11 Definitions

[1] "Mine" and "Placer Mine"

[2] "Mineral" and "Mineral Estate"

[3] "Royalty" and "Rent"

[4] "Vein," "Load," and "Ledge"

§ 363.12 Mining Claims

[1] Definition, Right to Possession, and Basic Requirements

[a] Defined

[b] Title and Right to Possession

[c] Land Subject to Mining Claims

[d] Citizenship Requirement

[2] Procedures for Establishing Claim ("Location")

[3] Property Rights in Claim

[a] Conveyance and Protection of Claim as a Property Right

[b] Discovery of Valuable Minerals as Prerequisite to Enforceable Property Right

[i] As Against Other Bona Fide Claimants

[ii] As Against Other Claimants Who Use Forcible, Fraudulent, or Clandestine Entry

[iii] As Against Federal Government

[4] Contesting Validity of Claim

[a] By Federal Government

[b] By Private Party in Federal Administrative Procedure

[5] Obtaining a Patent

§ 363.13 Mining Operations

§ 363.14 Surface and Subsurface Owners

[1] Distinction Between Owners of Surface and Subsurface Lands

[2] Excavation of Minerals; Notice Required

[3] Actions for Trespass

§ 363.15 Mining Partnerships

§ 363.16 Mining Leases

§ 363.17 Termination of Mineral Rights

§§ 363.18through 363.29 [Reserved]

§ 363.30 Related Matthew Bender Publications

[1] California Environmental Law and Land Use Practice

[2] California Legal Forms

[3] American Law of Mining

[4] Energy Law and Transactions

[5] Treatise on Environmental Law

[6] Oil and Gas Law

§ 363.31 State Statutes

[1] Regulation of Sellers of Mineral Interests and Machinery

[2] Mineral Rights

[3] Statutes of Limitation

[4] Damages

[5] Procedural Aspects of Trespass and Title Claims

[6] Mining Leases

[7] Mining Partnerships

[8] Liability for Taxes

[9] Mining Claims

[10] Mining Operations

§ 363.32 Federal Statutes

[1] Mining Claims

[2] Mining Leases

[3] Location of Mining Claims

§ 363.33 Federal Regulations

§ 363.34 Decisions

[1] Adjoining Landowners

[2] Contest of Validity of Mining Claims

[3] Definitions

[4] Discovery of Valuable Minerals

[5] Measure of Damages

[6] Geothermal Resources

[7] Mining Claims

[a] Generally

[b] Abandonment and Forfeiture

[c] Possessory Actions

[8] Mining Leases

[9] Mining Partnerships

[10] Possessory Rights of Prospector

[11] Power of States Over Claims

[12] Quiet Title Actions

[13] Surface and Subsurface Estates

[14] Trespass Actions

§ 363.35 Attorney General Opinions

§ 363.36 Law Reviews

§ 363.37 Text References

§§ 363.38through 363.49 [Reserved]

§ 363.50 Action for Vesting of Title [Code Civ. Proc. §§ 850-856] or for Contribution--Owner of Mine or Mining Claim Paying Taxes Against Delinquent Coowner--Notice of Nonpayment of Proportionate Shares of Taxes [Code Civ. Proc. § 850]

[1] FORM

[2] Use of Form

[3] Service of Notice

§ 363.51 Action for Vesting of Title [Code Civ. Proc. §§ 850-856] or for Contribution--Owner of Mine or Mining Claim Paying Taxes Against Delinquent Coowner--Petition to Vest Title in Petitioner [Code Civ. Proc. § 852] and Complaint [Code Civ. Proc. § 425.10] for Contribution of Taxes

[1] FORM

[2] Use of Form

[3] Allegations

[4] Procedure For Vesting Title

[5] Contribution

[6] Statute of Limitations

[7] Jurisdiction and Venue

[8] Verification

§ 363.52 Action for Vesting of Title [Code Civ. Proc. §§ 850-856] or for Contribution--Owner of Mine or Mining Claim Paying Taxes Against Delinquent Coowner--Judgment Vesting Title to Mine in Petitioner [Code Civ. Proc. § 855]

[1] FORM

[2] Use of Form

[3] Copies of Judgment

§ 363.53 Action Contesting Validity of Mining Claim--Initiated by the United States Against a Mining Claimant [43 C.F.R. §§ 4.451, 4.452]--Complaint [43 C.F.R. § 4.451-2]--United States Government Form

[1] FORM

[2] Use of Form

[3] Filing Complaint

[4] Service of Complaint

[5] Answering Complaint

[6] Disposition of Case

[7] Appeal

§ 363.54 Action Contesting Validity of Mining Claim--Initiated by the United States Against a Mining Claimant [43 C.F.R. §§ 4.451, 4.452]--Answer [43 C.F.R. § 4.450-6]

[1] FORM

[2] Use of Form

[3] Filing

[4] Proof of Service

§ 363.55 Complaint to Quiet Title [Code Civ. Proc. §§ 760.020(a), 761.020] to Mining Claim--By Owner in Possession Against Adverse Claimant Whose Identity Is Known

[1] FORM

[2] Use of Form

[3] Required Allegations

[4] Who Must Be Made Defendants

[5] Unknown Defendants

[6] Verification

[7] Jurisdiction and Venue

[8] Service of Summons

[9] Lis Pendens

§ 363.56 Complaint for Damages for Trespass--By Lessee of Mining Property Against Adjoining Claim Holder

[1] FORM

[2] Use of Form

[3] Statute of Limitations

[4] Standing

[5] Jurisdiction

[6] Cross References

§ 363.57 Complaint for Damages for Trespass and Conversion--By Owner of Mining Claim Against Trespasser Entering and Removing Minerals

[1] FORM

[2] Use of Form

[3] Allegations

[4] Damages

[5] Cross References

§ 363.58 Complaint for Damages--For Fraudulent Representation of Ownership of Mining Property [Civ. Code § 1710]--By Lessee Against Lessor

[1] FORM

[2] Use of Form

[3] Allegations

[4] Damages

[5] Statute of Limitations

[6] Verification

[7] Cross References

§ 363.59 Complaint to Recover Royalties--By Lessor of Mining Property Against Lessee--Under Mining Lease

[1] FORM

[2] Use of Form

[3] Allegations

[4] Landlord-Tenant Rights Under Mining Lease

[5] Cross References

§ 363.60 Complaint for Damages for Breach of Contract [Civ. Code § 3300] and for an Accounting--By Owner of Mining Property Against Mine Operator--Failure to Pay for Minerals Extracted

[1] FORM

[2] Use of Form

[3] Allegations

[4] Statute of Limitations

[5] Verification

[6] Jurisdiction

[7] Cross References

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32-363 California Forms of Pleading and Practice--Annotated § 363.01

§ 363.01 Scope of Chapter

This chapter discusses mining and mining operations. The chapter includes the following forms:

- Forms for use in a proceeding to vest title to a mining claim in one coowner who has paid taxes on the claim for five years [*see §§ 363.50 -363.52*];
- Forms for use in the contest of a mining claim by the federal government [*see §§ 363.53, 363.54*];
- A complaint to quiet title to a mining claim [*see § 363.55*];
- A complaint for damages for trespass to a mining leasehold [*see § 363.56*];
- A complaint for trespass and conversion [*see § 363.57*];
- A complaint for damages for fraudulent representation of ownership of a mining property [*see § 363.58*];
- A complaint to recover royalties [*see § 363.59*]; and
- A complaint for damages for breach of contract [*see § 363.60*].

This chapter does not include the specific procedures for the location of mining claims, for obtaining patents to claims, or for acquiring leases of mineral lands from the United States or California. It also does not include a discussion of the regulation of mine operations under federal or local police powers or a discussion of oil and gas law. For a listing of Matthew Bender publications that discuss these and additional relevant issues, see *§ 363.30*.

Legal Topics:

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

Real Property LawMiningGeneral OverviewReal Property LawMiningRegulation

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§ 363.02 Cross References

For coverage and forms applicable to environmental related topics, see the following chapters:

- Ch. 315, *Irrigation.*
- Ch. 350, *Logs and Timber* .
- Ch. 393, *Oil and Gas* .
- Ch. 418, *Pollution and Environmental Matters* .
- Ch. 575, *Waters* .
- Ch. 579, *Zoning and Planning* .

For coverage and forms dealing with topics that can be related to mining and mining operations, see the following chapters:

- Ch. 7, *Accounting, Action For* .
- Ch. 11, *Adjoining Landowners* .
- Ch. 13, *Adverse Possession* .
- Ch. 101, *Boundaries* .
- Ch. 140, *Contracts* .
- Ch. 184, *Deed* .

- Ch. 240, *Easements* .
- Ch. 241, *Ejectment* .
- Ch. 256, *Explosives* .
- Ch. 330, *Landlord and Tenant: General Introduction*, through Ch. 334, *Landlord and Tenant: Claims for Damages* .
- Ch. 361, *Mechanics' Liens* .
- Ch. 380, *Negligence* .
- Ch. 391, *Nuisance* .
- Ch. 397, *Partition* .
- Ch. 400, *Partnerships: Governing Statutes*, through Ch. 406, *Partnerships: Dissolution* .
- Ch. 421, *Premises Liability* .
- Ch. 482, *Quieting Title* .
- Ch. 550, *Trespass* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawOil, Gas & Mineral InterestsGeneral OverviewEnergy & Utilities LawTransportation & PipelinesEasements & Rights of WayReal Property LawAdjoining LandownersMines & MiningReal Property LawLimited Use RightsEasementsCreationEasement by PrescriptionReal Property LawLimited Use RightsEasementsMineral EasementsTortsPremises Liability & PropertyLessees & LessorsNuisance

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PART I. SCOPE

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[Reserved]

§§ 363.03[Reserved]

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32-363 California Forms of Pleading and Practice--Annotated § 363.10

§ 363.10 Governing Statutes

California statutes governing mining claims are set forth in *Pub. Res. Code §§ 3900-3924*. Mining partnerships are governed by the provisions of *Pub. Res. Code §§ 3940-3950*.

Federal rules governing mining claims are set forth in *30 U.S.C. §§ 21-54*, 501-541i. Procedures for federal administrative contests of the validity of mining claims are governed by *43 C.F.R. §§ 4.1-4.452-9*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawMining IndustryMining ClaimsGeneral OverviewReal Property LawMiningGeneral Overview

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32-363 California Forms of Pleading and Practice--Annotated § 363.11

§ 363.11 Definitions

[1] "Mine" and "Placer Mine"

The term "mine" includes all mineral bearing properties of whatever kind, whether underground, or in a quarry or pit, well spring, or other source from which any mineral substance is or may be obtained [*Pub. Res. Code § 2200*].

A "placer mine" is ground that contains mineral in its earth, sand, or gravel in a loose state that may in most cases be collected by washing without milling [*United States v. Iron Silver Mining Co. (1888) 128 U.S. 673, 679, 9 S. Ct. 195, 32 L. Ed. 571]* .

[2] "Mineral" and "Mineral Estate"

The term "mineral" includes all mineral products, both metallic and nonmetallic, solid, liquid, or gaseous, and mineral waters, of whatever kind or character [*Pub. Res. Code § 2200*].

A "mineral estate" is the entire bundle of rights a landowner has in the minerals in his or her land [*Keville v. Hollister Co. (1972) 43 O.&G.R. 311, 29 Cal. App. 3d 203, 205 n.1, 105 Cal. Rptr. 238]* .

[3] "Royalty" and "Rent"

The terms "royalty" and "rent" are used interchangeably in mining leases to mean the compensation paid by the occupier to the owner for occupancy and extraction of minerals as allowed in the lease or contract [*Denio v. Huntington Beach (1943) 22 Cal. 2d 580, 596, 140 P.2d 392 , disapproved on other grounds in Fracasse v. Brent (1972) 6 Cal. 3d 784, 789, 100 Cal. Rptr. 385, 494 P.2d 9]* .

[4] "Vein," "Load," and "Ledge"

The terms "vein," "load," and "ledge" can be used interchangeably to indicate a zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. A vein, load, or ledge includes all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed from the same forms, and

appearing to have been created by the same process. The rock in the vein must be in place in the ground [*Inyo Marble Co. v. Loundagin (1932) 120 Cal. App. 298, 301, 307-308, 7 P.2d 1067]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawMining IndustryCommon Variety MineralsEnergy & Utilities LawMining IndustryMineral LeasesGeneral OverviewReal Property LawMiningGeneral Overview

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§ 363.12 Mining Claims

[1] Definition, Right to Possession, and Basic Requirements

[a] Defined

A "mining claim" is a portion of land and the subjacent minerals to which the claimant has acquired the right to possession by compliance with the laws of the United States and the local rules and customs of miners [*Morse v. De Ardo (1895) 107 Cal. 622, 623-624, 40 P. 1018]* .

[b] Title and Right to Possession

Although paramount title to a mining claim remains in the United States until it has issued a patent transferring title to the land, as to everyone else, the estate acquired through a mining claim possesses all the attributes of a title in fee, so long as the statutory requirements for annual work and continued development are met [*Wetsel v. Superior Court (1953) 119 Cal. App. 2d 703, 708, 260 P.2d 242]* . To retain possession of a claim, the claimant or the claimant's agent must perform work or make improvements on the claim worth $100 annually [*30 U.S.C. § 28*; *Pub. Res. Code § 3912*].

[c] Land Subject to Mining Claims

Land on which a mining claim is established must meet the following three requirements [*Ikola v. Goff (1973) 31 Cal. App. 3d 872, 876, 107 Cal. Rptr. 663]* :

- It must contain valuable mineral deposits;
- It must belong to the United States and be in the public domain at the time of location; and
- It must be unoccupied and unappropriated by others under a claim of right.

In addition, the land must be open to appropriation under the provisions of the federal mining laws [*Mandel v. Great Lakes Oil Etc. (1957) 150 Cal. App. 2d 621, 627, 310 P.2d 498* ; *see § 363.10* (applicable federal mining laws)]. The

federal mining laws permit location of claims on federal lands in which most kinds of valuable minerals are found [*30 U.S.C. § 22*].Federal lands containing deposits of certain minerals, including coal, oil, and natural gas, are not subject to claim but must be leased [*30 U.S.C. §§ 181-541i*]. However, in some cases, deposits of minerals other than those subject to the leasing requirements may be claimed although they are found on leased lands [*see, e.g., 30 U.S.C. §§ 501-505, 521-531*].

[d] Citizenship Requirement

The claimant must be a citizen of the United States or declare his intention to become one [*30 U.S.C. § 22*; *Pub. Res. Code § 3900*].

[2] Procedures for Establishing Claim ("Location")

The statutory and customary process that creates a mining claim is known as "location," and the claimant is known as a "locator" [*see 30 U.S.C. § 28*; *Pub. Res. Code § 3900*]. The local customs of miners in the mining district and the laws of the state in which the claim is situated govern the procedure for location and recording as well as the amount of work necessary to maintain a claim, subject to certain federal requirements [*30 U.S.C. § 28*].

Generally, the requirements for establishing a valid claim to federal mining lands located in California are the following:

- The posting of a notice of location in or on a substantial monument erected at the point of discovery [*Pub. Res. Code § 3900*];

- The definition of boundaries and erection of substantial monuments at designated points [*Pub. Res. Code §§ 3901, 3902*]; and

- The recordation of a copy of the notice of location together with a statement of marking of boundaries and including the section, township, range, and meridian of the United States survey within which the claim is located [*Pub. Res. Code § 3911*].

[3] Property Rights in Claim

[a] Conveyance and Protection of Claim as a Property Right

Mining claims may be conveyed like other real property [*Del Giorgio v. Powers (1938) 27 Cal. App. 2d 668, 678, 81 P.2d 1006]* .

The owner of a mining claim is entitled to use all the remedies normally available for the protection of rights in real property to protect the claim [*Merced Mining Co. v. Fremont (1857) 7 Cal. 317, 320]* . Possessory actions concerning title to mining claims are not affected by the fact that paramount title is held by the United States [*30 U.S.C. § 53*].

[b] Discovery of Valuable Minerals as Prerequisite to Enforceable Property Right

[i] As Against Other Bona Fide Claimants

To obtain possessory rights to a claim that are enforceable against other bona fide claimants, a mining claimant must have discovered valuable mineral deposits. The test of whether a sufficient discovery of valuable minerals has been made is whether there are minerals sufficient to justify one of ordinary prudence, not necessarily a miner, in expending further effort on the property with a reasonable prospect of success in developing a valuable mine [*Best v. Humboldt Placer Mining Co. (1963) 371 U.S. 334, 336, 83 S. Ct. 379, 9 L. Ed. 2d 350* ; *Veale v. Piercy (1962) 206 Cal. App. 2d*

557, 564, 24 Cal. Rptr. 91] .

[ii] As Against Other Claimants Who Use Forcible, Fraudulent, or Clandestine Entry

The prospector of a mining claim has possessory rights enforceable in the claim against forcible, fraudulent, or clandestine entry by other claimants even before a discovery of valuable minerals has been made as long as he or she is diligently working towards discovery [*Duguid v. Best (9th Cir. 1961) 291 F.2d 235, 239 , cert. denied, 372 U.S. 906 (1963)]* .

[iii] As Against Federal Government

Mining claims are valid against the United States as long as there has been a discovery of valuable minerals, the land remains valuable for minerals, and the other statutory requirements for the creation of claims have been met [*Best v. Humboldt Placer Mining Co. (1963) 371 U.S. 334, 336, 83 S. Ct. 379, 9 L. Ed. 2d 350]* .

As long as legal title to a mining claim remains with the federal government, it has the power, after proper notice and on adequate hearing, to determine whether the claim is valid and to declare it null and void if invalid [*Cameron v. United States (1919) 252 U.S. 450, 460, 40 S. Ct. 410, 64 L. Ed. 659]* .

[4] Contesting Validity of Claim

[a] By Federal Government

The federal Bureau of Land Management has the power, as a subordinate of the Secretary of the Interior, to initiate a proceeding to see that valid claims on public lands are recognized and that invalid ones are eliminated [*Duguid v. Best (9th Cir. 1961) 291 F.2d 235, 241 , cert. denied, 372 U.S. 906 (1963)]* . This proceeding used by the federal government to test thevalidity of mining claims is known as a contest and is an administrative proceeding conducted in accordance with the provisions of Title 43 of the Code of Federal Regulations [*see 43 C.F.R. §§ 4.451-1-4.452-9*].

Once the United States initiates a contest of a mining claim's validity and makes a prima facie case of its invalidity, the burden of proof is on the locator to establish the requirements for a valid location [*United States v. Springer (9th Cir. 1974) 491 F.2d 239, 242* ; *see* [2], *above*, for discussion of "location"].

[b] By Private Party in Federal Administrative Procedure

A federal administrative procedure is also available to private parties to determine the rights of adverse claimants to mining claims. Like the administrative procedure that can be instituted by the federal government to determine the validity of a mining claim, the private procedure also is known as a contest and also is governed by the provisions of Title 43 of the Code of Federal Regulations [*see* 43 C.F.R. § 4.450 et seq.].

[5] Obtaining a Patent

After compliance with the requirements for the location of a mining claim [*see* [2], *above*], the locator of a mining claim may proceed to obtain a patent [*30 U.S.C. § 29*]. The patent will convey title to the land in fee simple [*United States v. Marshall Silver Mining Co. (1888) 129 U.S. 579, 587, 9 S. Ct. 343, 32 L. Ed. 734]* .

Although a locator is not required to proceed to patent the claim, by delaying, he or she takes the risk that the claim will no longer support the issuance of a patent at the time of application. At that time, the claim must still be valuable for minerals, and worked-out claims will not qualify [*Best v. Humboldt Placer Mining Co. (1963) 371 U.S. 334, 335-336, 83 S. Ct. 379, 9 L. Ed. 2d 350]* .

The Department of the Interior has authority over the determination of the validity of unpatented mining claims and has authority to issue regulations concerning public lands [*Best v. Humboldt Placer Mining Co. (1963) 371 U.S. 334, 336, 83 S. Ct. 379, 9 L. Ed. 2d 350* ; *see 30 U.S.C. § 22*; *43 U.S.C. § 1201*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawMining IndustryMining ClaimsPatentsEnergy & Utilities LawMining IndustryMining ClaimsPlacer ClaimsEnergy & Utilities LawMining IndustryMining ClaimsUnpatented ClaimsReal Property LawMiningClaims

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§ 363.13 Mining Operations

Mining operations generally must be conducted in such a way that they do not damage neighboring property [*Pacific Gas & Elec. Co. v. Scott (1938) 10 Cal. 2d 581, 585, 75 P.2d 1054]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMiningGeneral Overview

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§ 363.14 Surface and Subsurface Owners

[1] Distinction Between Owners of Surface and Subsurface Lands

Title to the surface of the land may be in one person and title to the subsurface in another [*Ames v. Empire Star Mines Co., Ltd. (1941) 17 Cal. 2d 213, 222, 110 P.2d 13]* .

The owner of real property may divide lands horizontally as well as vertically, and if he or she conveys the subsurface mineral deposits separately from the surface rights, or reserves them from a conveyance of the surface rights, two separate fee simple estates in the land are created, each of which has the same status and rank [*Nevada Irr. Dist. v. Keystone Copper Corp. (1964) 20 O.&G.R. 163, 224 Cal. App. 2d 523, 527, 36 Cal. Rptr. 775]* . The reservation of mineral rights from a grant of land also carries with it the right to remove the minerals by placer mining methods [*see § 363.11[1]*], even though the surface estate is destroyed as a result [*Trklja v. Keys (1942) 49 Cal. App. 2d 211, 213-214, 121 P.2d 54]* . However, wrongful use of the surface of the land by the owner of subsurface mineral rights will give rise to an action for trespass [*see Wright v. Tate (1956) 138 Cal. App. 2d 360, 361-362, 291 P.2d 984]* .

If one person owns the surface of the land and another owns the underlying land or minerals, the owner of the surface is entitled to have it remain in its natural condition, without any subsidence caused by withdrawal of the land or minerals from below by the subjacent tenant [*Empire Star Mines Co. v. Butler (1944) 62 Cal. App. 2d 466, 533-534, 145 P.2d 49]* . The provisions of *Civ. Code § 832*, which apply between coterminous surface owners as to their obligation of lateral support and limits liability, do not apply as between a surface owner and a subsurface owner. It therefore does not change the common law duty of subjacent support owed to the surface owner by the subsurface owner [*Marin Mun. Water Dist. v. Northwestern Pac. R.R. Co. (1967) 253 Cal. App. 2d 83, 91-96, 61 Cal. Rptr. 520* ; *see Civ. Code § 832*].

[2] Excavation of Minerals; Notice Required

If the owner of mineral rights in real property intends to excavate, written notice must be given before the first entry on the property [*Civ. Code § 848*; *see Civ. Code § 883.110*]. The notice must [*Civ. Code § 848*]:

- Be given to the owner or the owner's representative of the real property who is listed as the assessee

on the current local assessment roll or lessee, if different from the mineral rights owner, and to any public utility that has a recorded interest in the property.

- Be given by certified mail, or by personal delivery with written acknowledgment of receipt to the owner, the owner's representative, or lessee.

- State the extent and location of the prospecting, mining, or extracting operation, and the approximate times of entry and exit on the property.

If the mineral rights owner has not complied with the notice requirement, the owner of the property who is listed on the current assessment roll, or any public utility that has a recorded interest in the real property, may request a court to enjoin the prospecting, mining, or extracting operation until the mineral rights owner has complied. The absence of a known owner on the assessment roll or of a public utility that has a recorded interest in the property relieves the mineral rights owner of the obligation to give the written notice to the owner or public utility [*Civ. Code § 848*].

[3] Actions for Trespass

The title owner of the subsurface of land may bring an action for trespass against another subsurface owner who invades his or her possessory interest [*see Empire Star Mines Co. v. Butler (1944) 62 Cal. App. 2d 466, 527-530, 145 P.2d 49* ; for forms of complaints for damages for trespass, *see §§ 363.56, 363.57*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawConveyancesMineral InterestsGeneral OverviewEnergy & Utilities LawExploration, Discovery & RecoveryGeneral OverviewEnergy & Utilities LawOil, Gas & Mineral InterestsPersonalty & Realty InterestsEnergy & Utilities LawOil, Gas & Mineral InterestsSurface Use InterestsReal Property LawAdjoining LandownersMines & MiningReal Property LawMiningLocationReal Property LawMiningSurface Rights

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§ 363.15 Mining Partnerships

Mining partnerships are governed by the general laws of partnership except when those are inconsistent with the provisions of *Pub. Res. Code §§ 3940-3950* [*Pub. Res. Code § 3940*]. An express agreement is unnecessary for the formation of such a partnership [*Pub. Res. Code § 3941*].

A mining partnership arises if two or more persons own or acquire an interest in a mining claim for the purpose of working the claim and extracting minerals. All parties must actually engage in working the claim [*Pub. Res. Code § 3940*].

A member of a mining partnership shares in the profits and losses according to the proportion of the mine that he or she owns [*Pub. Res. Code § 3942*].

Each member of a mining partnership has a lien on the partnership property for the debts due to creditors of the partnership and for money that he or she advances, despite the agreement of the partners that no lien shall exist [*Pub. Res. Code § 3943*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsGeneral OverviewEnergy & Utilities LawOil, Gas & Mineral InterestsGeneral OverviewReal Property LawMiningGeneral Overview

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§ 363.16 Mining Leases

Mineral leases generally are in the same category as ordinary leases and are governed by the same rules. However, in ordinary leases the lessor is not concerned with the development or operation of the property by the lessee and the lessor's primary concern is the payment of rent as it becomes due. In a mineral lease, on the other hand, the lessor's main concern is in the development of the land into a mineral-producing property, and in the royalties to be received from the sale of the mineral produced. Thus, if the lease does not specify the method of mining the property, the lessee is obligated to mine the property in a reasonable manner compatible with the most expeditious removal of the mineral, taking into consideration the costs involved, the contemplation of the parties, and the nature and character of the property to be mined. Further, if the lease does not expressly obligate the lessee to engage in mining activities, and if the only consideration is the share the lessee will obtain in the mineral produced from payment of the royalty, the law implies an agreement on the lessee's part to proceed with mining operations with reasonable diligence [*Russell v. Johns Manville Co. (1971) 40 O.&G.R. 26, 20 Cal. App. 3d 405, 410, 97 Cal. Rptr. 634* ; *see Gold Min. & Water Co. v. Swinerton (1943) 23 Cal. 2d 19, 32, 37-38, 142 P.2d 22* ; for a form of complaint to recover royalties under a mining lease, *see § 363.59*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsLease AgreementsGeneral OverviewEnergy & Utilities LawGrants & ReservationsGeneral OverviewEnergy & Utilities LawLeases & LicensesRoyalty ClausesEnergy & Utilities LawMining IndustryMineral LeasesGeneral OverviewEnergy & Utilities LawRoyaltiesGeneral OverviewEnergy & Utilities LawRoyaltiesLeasehold Royalty ClausesReal Property LawMiningGeneral Overview

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§ 363.17 Termination of Mineral Rights

The owner of real property subject to a dormant mineral right may bring an action to terminate that right [*Civ. Code § 883.210*]. For discussion of dormant mineral rights, see Ch. 393, *Oil and Gas* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawOil, Gas & Mineral InterestsGeneral OverviewEnergy & Utilities LawOil, Gas & Mineral InterestsPersonalty & Realty InterestsReal Property LawMiningGeneral Overview

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[Reserved]

§§ 363.18[Reserved]

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§ 363.30 Related Matthew Bender Publications

[1] California Environmental Law and Land Use Practice

For coverage of mineral ownership generally, including the respective rights of surface owners and mineral owners, and the environmental protection laws applicable to mineral development, see Selmi & Manaster, CALIFORNIA Environmental Law and Land Use Practice, Ch. 82, *Mineral Development* (Matthew Bender)

[2] California Legal Forms

For discussion of the basic procedures that must be followed under state and federal law when staking a claim to a mine, see California Legal Forms, Ch. 36, *Oil and Gas and Other Natural Resources*, Pt. B (Matthew Bender)

[3] American Law of Mining

For in depth treatment of all aspects of mining law, including federal lands and mineral leases, mining claims, ancillary use, water rights, and more, see The Rocky Mountain Mineral Law Foundation, American Law of Mining (Matthew Bender)

Title I, *Overview of a Mining Project* (Chs. 1, 2)

Title II, *Federal Lands and Minerals* (Chs. 3-17)

Title III, *Federal Mineral Leases* (Chs. 20-27)

Title IV, *Mining Claims* (Chs. 30-32)

[4] Energy Law and Transactions

For all aspects of energy law, including state and federal regulations of energy transactions, see Muchow & Mogel, Energy Law and Transactions (Matthew Bender), including, for example, the following chapters:

Ch. 1, *The U.S. Energy Industry*

Ch. 3, *Federal Regulation of Energy Transactions*

Ch. 4, *State Utility Commission Regulation of Energy Transactions*

Ch. 5, *State Regulation of Oil and Gas Production*

Ch. 20, *Oil and Gas Contracts*

Ch. 21, *Leasing on Federal Lands: Onshore*

Ch. 23, *Coal Supply Contracts*

Ch. 55, *Coal*

Ch. 120, *Energy and the Environment*

[5] Treatise on Environmental Law

For discussion of the regulation of energy sources, see Grad, Treatise on Environmental Law, Ch. 11, *Regulation of Energy Generation and Transmission*

[6] Oil and Gas Law

For discussion of transactions relating to the transfer of interests in oil and gas, see Oil and Gas Law (Matthew Bender):

Chapter 3, *Oil and Gas Conveyancing*

Topic 1, *Mineral-Royalty Distinction*

Topic 3, *Mineral Interests*

Topic 4, *Royalty and Nonexecutive Mineral Interests*

Chapter 4, *Grants and Reservations Affecting Working Interest*

Topic 4, *Partnerships, Mining Partnerships, Grubstake Agreements, Joint Ventures, and Business Trusts*

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawMining IndustryMining ClaimsGeneral OverviewEnvironmental LawNatural Resources & Public LandsMineral Resources & MiningReal Property LawMiningGeneral Overview

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§ 363.31 State Statutes

[1] Regulation of Sellers of Mineral Interests and Machinery

Registration and penal provisions governing telephonic sellers, which include sellers of certain mineral interests. *Bus. & Prof. Code § 17511 et seq.*

Records of sale of mining machinery are required. *Civ. Code § 1631*

Contract for sale of minerals is contract for sale of goods when minerals are to be removed by seller. *Com. Code § 2107(1)*

[2] Mineral Rights

Right of taking minerals from land is attached to other land and called easements. *Civ. Code § 801*

Right of taking minerals from land is granted and held though not attached to land. *Civ. Code § 802*

Right of tenant for years or at will to work mines and quarries open at the commencement of the tenancy. *Civ. Code § 819*

Owner of land in fee is entitled to the surface and everything permanently situated beneath it. *Civ. Code § 829*

[3] Statutes of Limitation

Four-year statute of limitations on actions to recover rent under a written lease. *Code Civ. Proc. § 337(1)*

Statute of limitations for trespass to real property is three years. *Code Civ. Proc. § 338(b)*

Statute of limitations for conversion is three years. *Code Civ. Proc. § 338(c)*

Statute of limitations on actions based on fraud is three years but does not begin to run until aggrieved party discovers the fraud. *Code Civ. Proc. § 338(d)*

Two-year statute of limitations on action to recover rent under an oral lease. *Code Civ. Proc. § 339(1)*

[4] Damages

Exemplary damages are recoverable for fraud, malice, or oppression. *Civ. Code § 3294*

Damages for breach of non-contractual obligation. *Civ. Code § 3333*

Measure of damages for conversion of personalty. *Civ. Code § 3336*

Damages for fraud in purchase, sale, or exchange of real property. *Civ. Code § 3343*

[5] Procedural Aspects of Trespass and Title Claims

Joinder of causes of action. *Code Civ. Proc. § 427.10*

Postponement of trial of action involving title to or trespass on mining claims. *Code Civ. Proc. § 595.3*

In an action for recovery of real property or for damages or injury to real property, judge is authorized to order that a party may enter, survey, and measure the land, tunnels, shafts, and drifts in the property. *Code Civ. Proc. § 742*

Admissibility and weight of evidence of mining custom and usage in actions involving mining claims. *Code Civ. Proc. § 748*

Procedure for and effect of quiet title action. *Code Civ. Proc. § 760.010 et seq.*

Petition for vesting title in coowner. *Code Civ. Proc. § 852*

Mine in more than one county. *Code Civ. Proc. § 853*

Setting of petition for hearing. *Code Civ. Proc. § 854*

[6] Mining Leases

Property of a municipality not acquired for park purposes is permitted to be leased for the purpose of extraction of minerals for a period not exceeding 35 years. *Civ. Code § 718*

Lessee of mineral lease is required on lease's expiration or abandonment to execute quitclaim deed releasing all interest in minerals. *Civ. Code § 883.140(b)*

Mining leases of lands owned by the State of California. *Pub. Res. Code §§ 6801-6819*

Leases and prospecting permits on state lands for minerals other than oil and gas. *Pub. Res. Code §§ 6890-6900*

Leases by public agencies for oil, gas, and minerals. *Pub. Res. Code §§ 7051-7062*

[7] Mining Partnerships

Mining partnerships are governed by the general law of partnership unless inconsistent with the provisions of *Pub. Res. Code §§ 2351-2361*. *Corp. Code § 15006*

Definition of and special provisions governing mining partnerships. *Pub. Res. Code §§ 2351-2361*

[8] Liability for Taxes

Action by coowner of mine or mining claim for nonpayment of proportionate share of taxes. *Code Civ. Proc. § 850-856*

Notice to nonpaying coowner of failure to pay or contribute his or her proportionate share. *Code Civ. Proc. § 850*

Service of notice of failure to contribute share of taxes. *Code Civ. Proc. § 851*

Judgment on petition by coowner of mine or mining claim against another coowner for failure to contribute proportionate share of taxes. *Code Civ. Proc. § 855*

Recording of judgment on petition by coowner of mine or mining claim against nonpaying coowner in each county where mine is situated. *Code Civ. Proc. § 856*

Mining claim constitutes property subject to taxation. *Rev. & Tax Code § 104(b)*

[9] Mining Claims

State requirements for location of mining claims. *Pub. Res. Code §§ 2301-2326*

Minerals in public lands of the State of California are reserved to the state. *Pub. Res. Code §§ 6401-6407*

[10] Mining Operations

Liens on mines and equipment are acquired by one who furnishes labor or materials used or consumed in mining operations. *Civ. Code § 3060*

Drainage from abandoned mines. *Water Code § 13397 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawMining IndustryMining ClaimsGeneral OverviewReal Property LawMiningGeneral OverviewReal Property LawMiningRegulation

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§ 363.32 Federal Statutes

[1] Mining Claims

Valuable mineral deposits in lands of the United States are open to exploration and purchase by citizens of the United States. *30 U.S.C. § 22*

Mining custom and state law governs location of mining claims. *30 U.S.C. § 28*

Creation of and attributes of mining claims on federal lands. *30 U.S.C. §§ 21-54*

Possessory actions between persons for the recovery of mining title or for damages to title as not affected by fact that paramount title is held by the United States. *30 U.S.C. § 53*

Conveyances of public lands to occupants of unpatented mining claims. *30 U.S.C. §§ 701-709*

Authority of Secretary of the Interior over enforcement and execution of public land provisions. *43 U.S.C. § 1201*

[2] Mining Leases

Leases and prospecting permits for coal, phosphates, oil and gas, oil shale, sodium, sulphur, and potash. *30 U.S.C. §§ 181-287*

Leasing of mineral deposits within lands acquired by the federal government. *30 U.S.C. §§ 351-359*

Mining claims on lands subject to mineral leasing laws. *30 U.S.C. §§ 501-505*

[3] Location of Mining Claims

Claims extend downward following vein which has its apex within the claim boundaries, even when the vein extends downward outside the claim's surface boundaries. *30 U.S.C. § 26*

Lands containing coal, oil, gas, salts, asphalt, sodium, sulphur, and building stone. *30 U.S.C. §§ 71-172*

Multiple mineral development of the same tracts. *30 U.S.C. §§ 521-531*

Location of mining claims on coal lands. *30 U.S.C. §§ 541-541i*

Mining locations of surface resources and common varieties of sand, stone, gravel, pumice, pumicite, or cinders, and petrified wood. *30 U.S.C. §§ 611-615*

Location of mining claims on lands reserved for power development. *30 U.S.C. §§ 621-625*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 363.33 Federal Regulations

Rules relating to the Office of Hearings and Appeals. *43 C.F.R. § 4.1 et seq.*

Appeals to the Board of Land Appeals. *43 C.F.R. § 4.400 et seq.*

Hearing procedures before administrative law judge. *43 C.F.R. § 4.420 et seq.*

Administrative contest of adverse claims by private parties. 43 C.F.R. § 4.450 et seq.

Contest of mining claims initiated by the federal government. 43 C.F.R. § 4.450 et seq.

Legal Topics:

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

[1] Adjoining Landowners

Necessity that mining operations be conducted so as not to cause damage to adjoining property. *Pacific Gas & Elec. Co. v. Scott (1938) 10 Cal. 2d 581, 585, 75 P.2d 1054*

[2] Contest of Validity of Mining Claims

Department of the Interior has authority over determination of the validity of unpatented mining claims and public lands. *Best v. Humboldt Placer Mining Co. (1963) 371 U.S. 334, 336, 83 S. Ct. 379, 9 L. Ed. 2d 350*

United States must begin judicial condemnation proceedings against mining claims before an administrative determination has been completed. *Best v. Humboldt Placer Mining Co. (1963) 371 U.S. 334, 340, 83 S. Ct. 379, 9 L. Ed. 2d 350*

Continuing power of the federal government to determine validity of unpatented mining claims on notice and hearing. *Cameron v. United States (1919) 252 U.S. 450, 460, 40 S. Ct. 410, 64 L. Ed. 659*

Burden of proof of a valid location is on the locator in contest with the government. *United States v. Springer (9th Cir. 1974) 491 F.2d 239, 242 , cert. denied, 419 U.S. 834*

Power of the Bureau of Land Management to initiate contest of mining claims. *Duguid v. Best (9th Cir. 1961) 291 F.2d 235, 241 , cert. denied, 372 U.S. 906 (1963)*

Private contest of adverse claims to mining locations in administrative proceedings is authorized by the powers lawfully delegated to the *Bureau of Land Management. Duguid v. Best (9th Cir. 1961) 291 F.2d 235, 241-242 , cert. denied, 372 U.S. 906 (1963)*

[3] Definitions

"Gravel" is defined as a mineral for purposes of reserving mineral rights on lands patented under the Stock-Raising Homestead Act of 1916 (*43 U.S.C. § 291 et seq.*). *Watt v. Western Nuclear, Inc. (1983) 462 U.S. 36, 55-56, 103 S. Ct. 2218, 76 L. Ed. 2d 400, 79 O.&G.R. 596*

"Royalty" and "rent" are compensation paid to lessor by mine lessee. *Denio v. Huntington Beach (1943) 22 Cal. 2d 580, 596, 140 P.2d 392 , disapproved on other grounds in Fracasse v. Brent (1972) 6 Cal. 3d 784, 789, 100 Cal. Rptr. 385, 494 P.2d 9*

Royalty and rent are governed by the same rules. *Callahan v. Martin (1935) 3 Cal. 2d 110, 123-124, 43 P.2d 788*

"Grubstake agreement" defined. *Berry v. Woodburn (1895) 107 Cal. 504, 512, 40 P. 802*

Gold ore sales contract and refining contract constitutes a marketable commodity, not a security under *Corp. Code § 25019*, because there was no common enterprise; expected profits were to come not from efforts of others, but from fluctuations in price of gold; contracts involved no contribution of risk capital to business enterprise; and investor was adequately secured. *Moreland v. Department of Corporations (1987) 194 Cal. App. 3d 506, 518-519, 522-524, 239 Cal. Rptr. 558*

Agreement for participation in mining operation by purchase of units of 18 tons of ore constituted "security" within meaning of federal securities laws. *SEC v. Goldfield Deep Mines Co. of Nevada (9th Cir. 1985) 758 F.2d 459, 461-464*

"Mineral estate" is the entire bundle of rights that a landowner has in the minerals in his or her land. *Keville v. Hollister Co. (1972) 43 O.&G.R. 311, 29 Cal. App. 3d 203, 205, 105 Cal. Rptr. 238*

Discussion of royalty interest, mineral estate, executive interest, nonexecutive mineral interest. *Keville v. Hollister Co. (1972) 43 O.&G.R. 311, 29 Cal. App. 3d 203, 205-206 n. 1, 105 Cal. Rptr. 238*

Definition of "vein" and "lode." *Veale v. Piercy (1962) 206 Cal. App. 2d 557, 563-564, 24 Cal. Rptr. 91*

"Vein," "load," and "ledge" are used interchangeably to indicate a zone of mineralized rock lying within boundaries clearly separating it from neighboring rock beneath the surface. *Inyo Marble Co. v. Loundagin (1932) 120 Cal. App. 298, 301, 307-308, 7 P.2d 1067*

[4] Discovery of Valuable Minerals

Oil shale deposits, located before enactment of *30 U.S.C. § 181* (Mineral Leasing Act) are a valuable mineral deposits which are patentable under Act's saving clause. *Andrus v. Shell Oil Co. (1980) 446 U.S. 657, 659-665, 100 S. Ct. 1932, 64 L. Ed. 2d 593, 67 O.&G.R. 185*

Water is not a valuable mineral and therefore not locatable within meaning of *30 U.S.C. § 22*. *Andrus v. Charlestone Stone Prod. Co., Inc. (1978) 436 U.S. 604, 614-617, 98 S. Ct. 2002, 56 L. Ed. 2d 570, 575*

Profitability of producing minerals constitutes a further test for discovery. *United States v. Coleman (1968) 390 U.S. 599, 603, 88 S. Ct. 1327, 20 L. Ed. 2d 170*

Mining claims are valid against the United States if there is discovery of valuable minerals, land remains valuable for

minerals, and statutory requirements are met. *Best v. Humboldt Placer Mining Co. (1963) 371 U.S. 334, 336, 83 S. Ct. 379, 9 L. Ed. 2d 350*

Discovery of minerals is sufficient to justify a person of ordinary prudence in the further expenditure of labor with a reasonable prospect of developing a valuable mine. *Best v. Humboldt Placer Mining Co. (1963) 371 U.S. 334, 336, 83 S. Ct. 379, 9 L. Ed. 2d 350*

Claim is required to remain valuable for minerals at time of patent. *Best v. Humboldt Placer Mining Co. (1963) 371 U.S. 334, 335, 83 S. Ct. 379, 9 L. Ed. 2d 350*

Patent conveys title to the land in fee from the United States to the claimant of the mining claim. *United States v. Marshall Silver Mining Co. (1888) 129 U.S. 579, 587, 9 S. Ct. 343, 32 L. Ed. 734*

Test for discovering valuable minerals is more liberally construed in favor of first locator in a contest between first locator and second locator than in contests between a mineral locator and another party who questions the mineral nature of the land, including where the other party is in the *United States. Converse v. Udall (9th Cir. 1968) 399 F.2d 616, 619-620 , cert. denied, 393 U.S. 1025*

[5] Measure of Damages

Damages for conversion of minerals are governed by *Civ. Code § 3336* relating to conversion of personal property. *Lightner Mining Co. v. Lane (1911) 161 Cal. 689, 704-705, 120 P. 771*

Measure of damages for inadvertent and intentional taking of minerals from a mine. *Whittaker v. Otto (1967) 26 O.&G.R. 1, 248 Cal. App. 2d 666, 675-676, 56 Cal. Rptr. 836*

[6] Geothermal Resources

Geothermal resources are equivalent to mineral deposits and mineral water which were reserved to state by its patent reservations. *Pariani v. State of California (1980) 66 O.&G.R. 169, 105 Cal. App. 3d 923, 929, 930, 937, 164 Cal. Rptr. 683*

Pub. Res. Code § 6922 is not unconstitutional under *Cal. Const., art. I, § 7* (equal protection), or *Cal. Const., art. XVI, § 6* (gift of public property), in giving preemptive right to surface owner to bid on development contract for geothermal resources owned (under deed reservation) by state. *Post v. Prati (1979) 62 O.&G.R. 153, 90 Cal. App. 3d 626, 635-639, 153 Cal. Rptr. 511*

[7] Mining Claims

[a] Generally

"Mining claim" defined. *Morse v. De Ardo (1895) 107 Cal. 622, 623-624, 40 P. 1018*

Conveyance of mining claims constitutes transfer of all rights incident to claim in absence of language to the contrary. *McShane v. Carter (1889) 80 Cal. 310, 313, 22 P. 178*

Owner of mining claim is entitled to use all remedies normally available for the protection of rights in real property to protect owner's claim. *Merced Mining Co. v. Fremont (1857) 7 Cal. 317, 320*

Owner of unpatented mining claim has no right to exclude general public from use of surface of land for recreational purposes or access to other public lands absent material interference with prospecting, mining or processing operations under terms of Surface Resources and Multiple Use Act of 1955 [30 U.S.C. §§ 911, 912]. *United States v. Curtis-Nevada Mines, Inc. (9th Cir. 1980) 611 F.2d 1277, 1286, 65 O.&G.R. 1*

Establishment of valid mining claim requires valid mineral deposits, land in the public domain, and land unoccupied by others. *Ikola v. Goff (1973) 31 Cal. App. 3d 872, 876, 107 Cal. Rptr. 663*

Locator of mining claim is required to find sufficient valuable minerals to justify a person of ordinary prudence in continuing exploitation and development work. *Veale v. Piercy (1962) 206 Cal. App. 2d 557, 565-566, 24 Cal. Rptr. 91*

Land on which mining claim is established is required to be open for appropriation under federal law. *Mandel v. Great Lakes Oil Etc. (1957) 150 Cal. App. 2d 621, 627, 310 P.2d 498*

Mining claims possess all the attributes of a title in fee so long as annual work is performed. *Wetsel v. Superior Court (1953) 119 Cal. App. 2d 703, 708, 260 P.2d 242*

Mining claims are conveyed like other real property. *Del Giorgio v. Powers (1938) 27 Cal. App. 2d 668, 678, 81 P.2d 1006*

[b] Abandonment and Forfeiture

Failure to comply with claim recordation provisions of Federal Land Policy and Management Act of 1976 [*43 U.S.C. § 1744*] is deemed conclusively to constitute an abandonment of the mining claim by the owner; this provision is self-executing and may be enforced in a civil action brought by a private party in state court. *Crummett v. Miller (1997) 138 O.&G.R. 475, 53 Cal. App. 4th 897, 906-907, 62 Cal. Rptr. 2d 113*

General rule is that annual work on mining claims must be of such a character as directly tends to develop and protect the claim and facilitate the extraction of minerals. *Eveleigh v. Darneille (1969) 276 Cal. App. 2d 638, 640, 81 Cal. Rptr. 301*

Annual assessment work performed on any one or more contiguous mining claims benefits all claims in the group. *Daly v. Wallace (1965) 234 Cal. App. 2d 689, 691, 44 Cal. Rptr. 642*

Forfeiture of a mining claim to a second locator does not occurring when the prior locator resumes annual assessment work before the second location of a claim. *Pascoe v. Richards (1962) 201 Cal. App. 2d 680, 685-686, 20 Cal. Rptr. 416*

Abandonment of mining claim can be found from intention combined with failure to do annual work or desertion of the property. *Del Giorgio v. Powers (1938) 27 Cal. App. 2d 668, 679-681, 81 P.2d 1006*

[c] Possessory Actions

Action to quiet title to mining claim. *Van Ness v. Rooney (1911) 160 Cal. 131, 143, 116 P. 392*

Mining claims can be acquired by adverse possession. *Ikola v. Goff (1973) 31 Cal. App. 3d 872, 877, 107 Cal. Rptr. 663*

Courts are required to take judicial notice of the official acts of the Bureau of Land Management in adjudicating rights to mining claim. *Monolith Etc. Cement Co. v. Gillbergh (1954) 4 O.&G.R. 341, 129 Cal. App. 2d 413, 415, 277 P.2d 30*

California courts can stay proceedings in action for trespass on mining claim when administrative contest is pending before the Bureau of Land Management. *Wetsel v. Superior Court of County of El Dorado (1953) 119 Cal. App. 2d 703, 708, 260 P.2d 242*

State courts have jurisdiction to determine rights to mining claims despite existence of title in federal government. *Hunt v. Plavsa (1951) 103 Cal. App. 2d 222, 225-226, 229 P.2d 482*

[8] Mining Leases

Mining leases are subject to ordinary laws governing landlord and tenant, except for the implied obligation of the lessee to extract minerals. *Gold Min. & Water Co. v. Swinerton (1943) 23 Cal. 2d 19, 32, 142 P.2d 22*

Implied agreement on part of lessee to proceed with mining operations with reasonable diligence; forfeiture and abandonment of the lease occurs if this condition is broken. *Russell v. Johns Manville Co. (1971) 20 Cal. App. 3d 413, 410, 98 Cal. Rptr. 181*

Mining leases are distinguished from contracts for employment. *Von Goerlitz v. Turner (1944) 65 Cal. App. 2d 425, 429-430, 150 P.2d 278*

Mining lease is distinguished from license to work the land and remove minerals. *Von Goerlitz v. Turner (1944) 65 Cal. App. 2d 425, 429-430, 150 P.2d 278*

[9] Mining Partnerships

Mining partnership provisions do not prevent the formation of other types of partnerships. *Stowe v. Merrilees (1935) 6 Cal. App. 2d 217, 220-221, 44 P.2d 368*

[10] Possessory Rights of Prospector

Prospector has possessory rights in claim against forcible, fraudulent, or clandestine entry by other claimants even before discovery has been made. *Duguid v. Best (9th Cir. 1961) 291 F.2d 235, 239 , cert. denied, 372 U.S. 906 (1963)*

[11] Power of States Over Claims

States have power to regulate the location of mining claims, when these regulations do not conflict with federal law. *Butte City Water Co. v. Baker (1905) 196 U.S. 119, 124, 25 S. Ct. 211, 49 L. Ed. 409*

[12] Quiet Title Actions

Quiet title actions brought by plaintiff in possession involves no statute of limitation, although laches may apply. *Muktarian v. Barmby (1965) 63 Cal. 2d 558, 560-561, 47 Cal. Rptr. 483, 407 P.2d 659*

Locator of mining claim is entitled to maintain action to quiet title on locator's claim. *Van Ness v. Rooney (1911) 160 Cal. 131, 143, 116 P. 392*

Superior court has jurisdiction over action to quiet title to mining claims, but is required to stay proceedings in which title is being adjudicated by the federal government. *Potter v. Randolph (1899) 126 Cal. 458, 460-461, 58 P. 905*

Plaintiff is not entitled to recover costs if defendant disclaims all adverse interest. *Castro v. Barry (1889) 79 Cal. 443, 447, 21 P. 946*

Continued possession of the surface following a conveyance of mineral rights apart from the surface does not establish the possessor's rights against thelegal owner of the mineral rights unless there is sufficient activity with regard to the subsurface to place the owner of the mineral rights on notice of the adverse claim. *Klamath Land & Cattle Co. v. Roemer (1970) 37 O.&G.R. 194, 12 Cal. App. 3d 613, 619, 91 Cal. Rptr. 112*

[13] Surface and Subsurface Estates

Severance of subsurface estate from surface estate is possible. *Ames v. Empire Star Mines Co., Ltd. (1941) 17 Cal. 2d 213, 222, 110 P.2d 13*

Owner of mineral estate is entitled to remove minerals by reasonable methods even if the surface is destroyed as a result. *Yuba Inv. Co. v. Yuba Consol. G. Fields (1920) 184 Cal. 469, 482, 194 P. 19*

Right of surface entry is ordinarily transferred along with mineral rights, but right of entry may be totally eliminated by purchase of mineral rights or partially eliminated by purchase of part of surface rights. *Union Oil Co. of Cal. v. County of Ventura (1974) 48 O.&G.R. 571, 41 Cal. App. 3d 432, 435, 116 Cal. Rptr. 13*

Right to subjacent support is absolute. *Marin Mun. Water Dist. v. Northwestern Pac. R.R. Co. (1967) 253 Cal. App. 2d 83, 91-96, 61 Cal. Rptr. 520*

Owner of real property is able to divide the land horizontally as well as vertically; conveyance of subsurface or surface rights separately creates two separate fee simple estates, each with the same status and rank. *Nevada Irr. Dist. v. Keystone Copper Corp. (1964) 20 O.&G.R. 163, 224 Cal. App. 2d 523, 527, 36 Cal. Rptr. 775*

Wrongful use of the surface of the land by subsurface owner gives rise to action for trespass. *Wright v. Tate (1956) 138 Cal. App. 2d 360, 361-362, 291 P.2d 984*

Subsurface owners are entitled to bring actions for trespass for invasions occurring below the surface. *Empire Star Mines Co. v. Butler (1944) 62 Cal. App. 2d 466, 527-530, 145 P.2d 49*

Mine owner who has first opened up his mine to the limits of his boundary has no general right to require the adjoining owner to leave a natural barrier by stopping short of the common boundary to protect the first owner from only the damage which results from careful operations by the second owner. *Empire Star Mines Co. v. Butler (1944) 62 Cal. App. 2d 466, 534-536, 145 P.2d 49*

Owner of surface estate is entitled to have his or her estate remain in its natural condition without loss of adjacent support. *Empire Star Mines Co. v. Butler (1944) 62 Cal. App. 2d 466, 533-534, 145 P.2d 49*

A mineral owner is entitled to remove minerals by placer mining methods even though the surface is damaged as a result. *Trklja v. Keys (1942) 49 Cal. App. 2d 211, 213-214, 121 P.2d 54*

[14] Trespass Actions

Dumping of debris on mining claim gives rise to action for trespass. *Robinson v. Black Diamond Coal Co. (1875) 50 Cal. 460, 460-462*

Statute of limitations for damages for trespass by diversion of waters runs from date of injury to the land. *Polin v. Chung Cho (1970) 8 Cal. App. 3d 673, 677, 87 Cal. Rptr. 591*

Lessee or possessor of a mining claim has standing to maintain action for trespass. *Whittaker v. Otto (1967) 26 O.&G.R. 1, 248 Cal. App. 2d 666, 672-674, 56 Cal. Rptr. 836*

Taking of minerals in trespass is presumed to be in bad faith. *Whittaker v. Otto (1967) 26 O.&G.R. 1, 248 Cal. App. 2d 666, 676, 56 Cal. Rptr. 836*

Proceedings in action for trespass to mining claim is stayed pending determination of claim's validity by Bureau of Land Management. *Wetsel v. Superior Court of County of El Dorado (1953) 119 Cal. App. 2d 703, 708, 260 P.2d 242*

Damages and injunction of future trespass is proper when defendants caused water to flow into plaintiff's mining tunnels. *Empire Star Mines Co. v. Butler (1944) 62 Cal. App. 2d 466, 527-530, 145 P.2d 49*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 363.35 Attorney General Opinions

County recorder is permitted to reject mining claim affidavit for labor and improvements, without violating federal mining laws for annual recordation, if unsecured state tax levied against claim has not been paid (former Pub. Res. Code § 2315; *now see Pub. Res. Code § 3913*). *69 Ops. Cal. Att'y Gen. 1 (1986)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 363.36 Law Reviews

Coates and Grant, *Asserting Mineral Rights Against the United States Government in Federal Court, 20 Cal. W.L. Rev. 377 (1984)*

Comment, *Mineral Exploration on Section 8 Lands After FLPMA: From Prospector to Trespasser? 17 Cal. W.L. Rev. 95 (1980)*

Note, *Seamounts and Guyots: A Unique Resource, 10 San Diego L. Rev. 599 (1973)*

Hollick, *United States Ocean Politics, 10 San Diego L. Rev. 467 (1973)*

Knight, *The Deep Seabed Hard Mineral Resources Act--A Negative View, 10 San Diego L. Rev. 446 (1973)*

Laylin, *The Law To Cover Deepsea Mining Until Superseded by International Agreement, 10 San Diego L. Rev. 433 (1973)*

Note, *Problems and Policies of Oil Shale Development, 19 Stan. L. Rev. 190 (1966)*

Colby, *II. Mining Law In Recent Years, 36 Cal. L. Rev. 355 (1948)*

Campbell, *Annual Labor or Moratorium on Mining Claims-- Which*, 21 State B.J. 61 (1946)

Colby, *Mining Law in Recent Years, 33 Cal. L. Rev. 368 (1945)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawExploration, Discovery & RecoveryGeneral OverviewEnergy & Utilities LawExploration,

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§ 363.37 Text References

Witkin, Summary of California Law, vol. 9, *Partnership*, § 1 (10th ed. 2005)

58 C.J.S., *Mines and Minerals*, §§ 1-279

54 Am. Jur. 2d, *Mines and Minerals*, §§ 1-259

Legal Topics:

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[Reserved]

§§ 363.38[Reserved]

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32-363 California Forms of Pleading and Practice--Annotated § 363.50

§ 363.50 Action for Vesting of Title [Code Civ. Proc. §§ 850-856] or for Contribution--Owner of Mine or Mining Claim Paying Taxes Against Delinquent Coowner--Notice of Nonpayment of Proportionate Shares of Taxes [Code Civ. Proc. § 850]

[1] FORM Action for Vesting of Title [Code Civ. Proc. §§ 850-856] or for Contribution--Owner of Mine or Mining Claim Paying Taxes Against Delinquent Coowner--Notice of Nonpayment of Proportionate Shares of Taxes [Code Civ. Proc. § 850]

PLEASE TAKE NOTICE that _____ [*name of mine or mining claim*] located at _____ [*described location*] is owned by the undersigned _____ [*name of claimant*] and by _____ [*name of owner not paying taxes*] and that for a period of _____ [five *or more*] years all taxes assessed on this _____ [mine *or* mining claim] have been paid by _____ [*name of claimant*] in the total amount of $_____, and that _____ [*name of delinquent coowner*] has not paid or contributed his/her proportionate share of these taxes.

Demand is hereby made on _____ [*name of delinquent coowner*] to contribute to _____ [*name of coowner claimant*] the sum of $_____, his/her proportionate share of the taxes on this _____ [mine *or* mining claim], within 90 days of service on him/her of this notice. Dated: _____.

_____ [*signature of claimant*]

[2] Use of Form

The form in [1], *above*, is a notice for use by one coowner of a mine or mining claim before commencing a special action against another coowner who has failed to contribute his or her proportionate share of taxes on the mine for a period of five years [*Code Civ. Proc. § 850*]. For a petition to vest title by one coowner against another coowner and a complaint for contribution of taxes, see *§ 363.51*. For a sample judgment vesting title to a mine, see *§ 363.52*.

[3] Service of Notice

Before commencement of the action, the coowner who has paid the taxes must serve notice on the delinquent coowner of his or her failure to contribute his or her proportionate share. The notice is to be served in the manner provided by law for the service of a summons in a civil action, except that when the service is by publication, the publication must be in a newspaper of general circulation published in the county in which the mine or claim is situated or if there is no such newspaper, in such anewspaper in an adjoining county. The publication must be at least once a week for 90 days [*Code Civ. Proc. § 851*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-363 California Forms of Pleading and Practice--Annotated § 363.51

§ 363.51 Action for Vesting of Title [Code Civ. Proc. §§ 850-856] or for Contribution--Owner of Mine or Mining Claim Paying Taxes Against Delinquent Coowner--Petition to Vest Title in Petitioner [Code Civ. Proc. § 852] and Complaint [Code Civ. Proc. § 425.10] for Contribution of Taxes

[1] FORM Action for Vesting of Title [Code Civ. Proc. §§ 850-856] or for Contribution--Owner of Mine or Mining Claim Paying Taxes Against Delinquent Coowner--Petition to Vest Title in Petitioner [Code Civ. Proc. § 852] and Complaint [Code Civ. Proc. § 425.10] for Contribution of Taxes

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and Petitioner,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	PETITION TO VEST TITLE: COMPLAINT FOR
Defendant(s) and Respondent(s)	)	CONTRIBUTION
	)	
	)	

Plaintiff-petitioner alleges:

1. Defendant-respondent is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence of defendant*].

2. [Plaintiff-petitioner is ignorant of the true names and capacities of defendants-respondents sued herein as DOES I-, inclusive, and therefore sues these defendants-respondents by such fictitious names. Plaintiff-petitioner will amend this complaint and petition to allege their true names and capacities when ascertained.]

3. Plaintiff-petitioner _____ [*name*] and defendant-respondent _____ [*name*] are coowners of the _____ [*name*] _____ [mine *or* mining claim] located at _____, County, California, and more particularly described as follows: _____ [*set forth legal description*].

4. Plaintiff-petitioner at all times from _____ [*date*], to _____ [*date*], has had, and now has a _____ [one-half *or other*] interest in the mine in question. Defendant-respondent at all times from _____ [*date*], to _____ [*date*], has had, and now has, a _____ [one-half *or other*] interest in the mine.

5. For the period from _____ [*date*], to _____ [*date*], taxes have been assessed against the _____ [*name*] _____ [mine *or* mining claim] in question by the County of _____, California, in the total sum of $_____.

6. Plaintiff-petitioner has for a period of five years, namely from _____ [*date*], to _____ [*date*], paid all taxes assessed against the _____ [mine *or* mining claim] in question, in the total sum of $_____.

7. Defendant-respondent has paid no part of these taxes within the five-year period in question and has made no contribution to petitioner for such taxes.

8. On _____ [*date*], defendant-respondent was served with notice of nonpayment of taxes by _____ [*state facts of service, e.g.,* publication in the _____ newspaper, a newspaper of general circulation in _____ County, California, for the period of _____ days prescribed by statute]. Copies of this notice and proof of service of this notice are attached to this petition and complaint as Exhibit A and Exhibit B respectively and made a part of this petition and complaint.

9. More than 90 days have passed since notice of nonpayment was served on defendant-respondent. Defendant-respondent has failed and refused, and continues to fail and refuse, to contribute his/her proportionate share of the taxes in question, or any part of the taxes. Defendant-respondent is thereby indebted to plaintiff-petitioner in the sum of $_____, that sum being defendant-respondent's proportionate share of the taxes in question.

WHEREFORE, plaintiff-petitioner prays judgment against the defendant-respondent as follows:

1. For a judgment vesting the defendant and respondent's interest in the _____ [mine *or* mining claim] in the plaintiff and petitioner;

2. Or in the alternative, for the sum of $_____ with interest thereon at _____ percent per year from _____ [*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff-Petitioner

VERIFICATION

I, _____ [*name*], am the plaintiff-petitioner in the above-entitled action. I have read the foregoing complaint and petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a complaint and petition for use in an action by one coowner of a mine or mining claim against another coowner who has failed for five years to pay or contribute his or her share of the taxes on the property [*Code Civ. Proc. §§ 850-856*].

In this form, the paying coowner seeks title to the nonpaying coowner's interest in the mining claim or, in the alternative, contribution for a proportionate share of the taxes paid.

A petition for vesting of title in the coowner paying taxes to a mine or mining claim must be verified [*Code Civ. Proc. § 852*].

For the initial notice by one coowner of a mine or mining claim against another coowner who has failed to contribute his or her proportionate share of taxes as required under *Code Civ. Proc. § 850*, see *§ 363.50*. For a judgment vesting title, see *§ 363.52*.

[3] Allegations

The complaint and petition in [1], *above*, combines the allegations necessary for an action for contribution for a proportionate share of taxes with the necessary allegations for a petition to vest title in the paying coowner [*see Code Civ. Proc. §§ 850-856*].

The complaint and petition alleges:

- Ownership and particular description of the mine or mining claim (Paragraph 3) [*Code Civ. Proc. § 852*];
- The interest of each coowner in the property (Paragraph 4);
- The amount of taxes assessed against the property (Paragraph 5);
- Payment of taxes for five years by the plaintiff and petitioner (Paragraph 6);
- Nonpayment by the defendant and respondent (Paragraph 7);
- Service of notice of nonpayment on the defendant-respondent (Paragraph 8) [*Code Civ. Proc. § 851*];

and

- The fact that 90 days have passed since service without payment of the taxes (Paragraph 9) [*Code Civ. Proc. § 852*].

[4] Procedure For Vesting Title

When notice of nonpayment of taxes has been properly served on a coowner of a mine or mining claim and 90 days have elapsed since service without payment by the coowner, the paying coowner may file a verified petition setting forth the facts and particularly describing the mine or claim[*Code Civ. Proc. § 852*]. The clerk sets a date for hearing the petition and posts notice of the hearing at the county courthouse at least 10 days beforehand. The court may order further notice [*Code Civ. Proc. § 854*]. The court is authorized to hold a hearing on the petition and to order judgment vesting the interest of the nonpaying coowner in the petitioner [*Code Civ. Proc. § 855*].

[5] Contribution

A tenant in common who pays taxes assessed against the common property is, in the absence of an agreement to the contrary, entitled to a ratable contribution from his or her defaulting cotenant, although the payment may have been made without the latter's consent or even over his or her objection [*Marsh v. Edelstein (1970) 9 Cal. App. 3d 132, 141, 88 Cal. Rptr. 26]* .

[6] Statute of Limitations

When the petitioner has waited the necessary five years, during which his or her cotenant has not contributed their share of the taxes due on the mining claim, and has then filed his or her petition for vesting of title [*see Code Civ. Proc. § 852*], the two-year period of limitation under *Code Civ. Proc. § 339(1)* will act as a bar to the alternative relief of money contribution for any share of the taxes paid more than two years before the action's commencement. This is true because the right of one cotenant to recover payment from the other for his or her share of the payment which was in excess of his or her proportion of the taxes arises at the date when the expenditure is made [*Willmon v. Koyer (1914) 168 Cal. 369, 372-373, 143 P. 694]* . The applicable statute of limitations is *Code Civ. Proc. § 339(1)* which provides a two-year limit [*Willmon v. Koyer (1914) 168 Cal. 369, 371, 143 P. 694]* . However, when the petitioner has paid all of the taxes for the five-year period in the fifth year and within two years before the commencement of the action, it may be possible to recover the alternative relief of one-half of the total tax payment from the coowner if desired, without being barred by the statute.

[7] Jurisdiction and Venue

The petition for vesting of title in the paying coowner must be filed in the superior court of the county where the mine or mining claim is situated [*Code Civ. Proc. § 852*]. If the mine or claim is situated in more than one county, the petition may be filed in the superior court of either county [*Code Civ. Proc. § 853*]. The action is not a limited civil case [*Code Civ. Proc. § 580(b)(3)*].

[8] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified [*Code Civ. Proc. §§ 92(b), 446*], and will also preclude a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

Legal Topics:

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

Energy & Utilities LawMining IndustryMining ClaimsGeneral OverviewEnergy & Utilities LawOil, Gas & Mineral InterestsGeneral OverviewReal Property LawMiningClaims

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Chapter 363 MINING
PART IV. FORMS

32-363 California Forms of Pleading and Practice--Annotated § 363.52

§ 363.52 Action for Vesting of Title [Code Civ. Proc. §§ 850-856] or for Contribution--Owner of Mine or Mining Claim Paying Taxes Against Delinquent Coowner--Judgment Vesting Title to Mine in Petitioner [Code Civ. Proc. § 855]

[1] FORM Action for Vesting of Title [Code Civ. Proc. §§ 850-856] or for Contribution--Owner of Mine or Mining Claim Paying Taxes Against Delinquent Coowner--Judgment Vesting Title to Mine in Petitioner [Code Civ. Proc. § 855]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff and Petitioner,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	JUDGMENT
Defendant(s) and Respondent(s).	)	
	)	
	)	

The complaint and petition of _____ [*name of complaining coowner*] against _____ [*name of delinquent owner*] having come on for hearing before the above-entitled court before the Honorable _____ plaintiff-petitioner appearing by _____ [*name*], his attorney and defendant-respondent _____ [appearing by _____ (*name*), his/her attorney *or* having made no appearance], after having been duly served, and the court finding that all allegations of the petition are true and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the title of defendant-respondent herein to the _____ [*name and description of mine or mining claim*] be, and the same will hereby be, vested in plaintiff-petitioner, and that costs of suit herein be recovered by plaintiff-petitioner.

Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is a judgment for use in an action for vesting of the delinquent coowner's title in the coowner paying taxes on a mine or mining claim. When the statutory procedure set forth in *Code Civ. Proc. §§ 850-856* has been followed, the court may order judgment on the petition vesting the interest of the delinquent owner in the petitioner [*Code Civ. Proc. § 855*]. A certified copy of the decree may be recorded in the officeof the recorder of each county in which any part of the mine or claim is situated [*Code Civ. Proc. § 856*].

For the initial notice by one coowner of a mine or mining claim against another coowner who has failed to contribute his or her proportionate share of taxes as required under *Code Civ. Proc. § 850*, see *§ 363.50*. For the petition to vest title by one coowner against another coowner and the complaint for contribution of taxes, see *§ 363.51*.

[3] Copies of Judgment

The following copies of the judgment should be prepared:

- One copy to be filed with the court;
- One copy to be served with the summons on the defendant-respondent;
- One copy to be filed with the county recorder in each county in which any part of the mine or claim is situated;
- One office file copy; and
- Additional copies as desired.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMiningGeneral OverviewReal Property LawMiningClaims

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32-363 California Forms of Pleading and Practice--Annotated § 363.53

§ 363.53 Action Contesting Validity of Mining Claim--Initiated by the United States Against a Mining Claimant [43 C.F.R. §§ 4.451, 4.452]--Complaint [43 C.F.R. § 4.451-2]--United States Government Form

[1] FORM

Click here to view image.

[2] Use of Form

The complaint in [1], *above*, is a Bureau of Land Management form used by the federal government to initiate contests of the validity of mining claims [*43 C.F.R. § 4.451-1*]. It is a reproduction of Form 1850-7 (June 1979) obtained from the Office of the Solicitor, United States Department of the Interior, California State Office, 2135 Butano Dr., Sacramento, CA 95825-0451.

[3] Filing Complaint

A contest is initiated by the filing of a complaint with the proper land office [*43 C.F.R. §§ 4.451-2, 4.450-3*]. The proper office for the filing of a complaint involving a mining claim in California is the California State Office of the Bureau of Land Management, 2135 Butano Drive, Sacramento, California, 95825 [43 C.F.R. § 1821.2-1(d)].

[4] Service of Complaint

Within 30 days of the complaint's filing, the contestant must serve on the contestee a copy of the complaint [*43 C.F.R. § 4.450-3*]. Proof of service must be filed within 30 days after service [*43 C.F.R. § 4.450-3*].

[5] Answering Complaint

Within 30 days after service, the contestee must file an answer [*see § 363.54*] in the office where the contest is pending specifically meeting the allegations of the complaint, together with proof of service of the answer on the contestant [*43 C.F.R. §§ 4.450-6, 4.451-2*].

[6] Disposition of Case

If no answer is filed, the Manager of the Bureau of Land Management office will decide the case without a hearing [*43 C.F.R. § 4.450-7(a)*]. When there is an answer, the manager will refer the case to an administrative law judge for a hearing [*43 C.F.R. § 4.450-7(b)*]. The judge fixes the time and place of hearing and notifies the parties at least 30 days in advance [*43 C.F.R. § 4.452-2*]. He or she may order a prehearing conference [*43 C.F.R. § 4.452-1*]. The administrative law judge makes findings of fact and conclusions of law based on the evidence in the case and the findings requested by the parties [*43 C.F.R. § 4.452-8*].

[7] Appeal

Any party, including the government, adversely affected by the judge's decision may appeal to the Board of Land Appeals [*43 C.F.R. §§ 4.410-4.415, 4.421(d), 4.452-9*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawMining IndustryMining ClaimsGeneral OverviewReal Property LawMiningGeneral OverviewReal Property LawMiningClaims

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32-363 California Forms of Pleading and Practice--Annotated § 363.54

§ 363.54 Action Contesting Validity of Mining Claim--Initiated by the United States Against a Mining Claimant [43 C.F.R. §§ 4.451, 4.452]--Answer [43 C.F.R. § 4.450-6]

[1] FORM Action Contesting Validity of Mining Claim--Initiated by the United States Against a Mining Claimant [43 C.F.R. §§ 4.451, 4.452]--Answer [43 C.F.R. § 4.450-6]

UNITED STATES DEPARTMENT OF THE INTERIOR,
BUREAU OF LAND MANAGEMENT

United States of America,	)	
Contestant,	)	
vs.	)	Contest Number _____
_____ [*name*],	)	Involving:
Contestee.	)	
	)	
	)	

ANSWER
(Contest of Mining Claims)

Contestee alleges:

1. Contestee admits the allegations of Paragraph 1 of the complaint [*or other as appropriate*];

2. Contestee admits the allegations of Paragraph 2 of the complaint [*or allege other owners or interested parties];*

3. Contestee admits the allegations of Paragraphs 3 and 4 of the complaint [or allege other description of the claim or other contests pending];

4. Contestee denies each and every allegation of Paragraph 5 of the complaint;

5. The mining claim herein contested is valid in that a profitable _____ [*specify, e.g.*, gold mine] is being operated thereon and has been continuously operated thereon _____ [since _____ (*date*), *or allege other facts*].
Dated: _____.

_____ [*signature*]

Contestee [*or* Attorney for Contestee]

NOTICE

Any papers pertaining to this contest which are to be served on contestee herein shall be sent to:

[2] Use of Form

The form in [1], *above*, is an answer to a complaint for use by the contestee in a proceeding by the Interior Department to contest the validity of a mining claim held by the contestee. The answer should specifically meet and respond to the complaint's allegations [*43 C.F.R. § 4.450-6*]. For the form complaint, see *§ 363.53*.

[3] Filing

The answer must be filed with the local Land Office of the Bureau of Land Management, at the address indicated on the back of the complaint, within 30 days of service of the complaint.

[4] Proof of Service

The answer must be accompanied by a proof of service in accordance with the rules for service in *43 C.F.R. § 4.450-5(b)* and must contain or be accompanied by the address to which all papers must be sent for service on the contestee [*43 C.F.R. § 4.450-6*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawMining IndustryMining ClaimsGeneral OverviewReal Property LawMiningGeneral OverviewReal Property LawMiningClaims

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32-363 California Forms of Pleading and Practice--Annotated § 363.55

§ 363.55 Complaint to Quiet Title [Code Civ. Proc. §§ 760.020(a), 761.020] to Mining Claim--By Owner in Possession Against Adverse Claimant Whose Identity Is Known

[1] FORM Complaint to Quiet Title [Code Civ. Proc. §§ 760.020(a), 761.020] to Mining Claim--By Owner in Possession Against Adverse Claimant Whose Identity Is Known

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s), of known defendant(s)*], [*if unknown defendants are included, add:*; and all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud on plaintiff's title thereto] [; and DOES I-_____, inclusive],	)	COMPLAINT TO QUIET TITLE TO MINING CLAIM
Defendant(s).	)	

_____

Plaintiff alleges:

1. Plaintiff now is, and at all times herein mentioned was, the owner and in possession of the mining claim known as _____ [*name of mining claim*], located in _____ Mining District, _____ County, California, and more particularly described as follows: _____ [*legal description and street address or common designation, if any*].

2. At all times herein mentioned defendant _____ [*name*] was, and now is, _____ [

describe relevant aspects of named defendant's status, e.g., carrying on mining operations on property that is adjacent to the northern boundary of plaintiff's claim].

[3. Defendants DOES I-_____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. Plaintiff is informed and believes and thereon alleges that each of these fictitiouslynamed defendants claim some right, title, estate, lien, or interest in the above-described claim adverse to plaintiff's title; and that their claims, and each of them, constitute a cloud on plaintiff's title to that property.]

4. The basis of plaintiff's title is _____ [*describe plaintiff's possession of claim from particular date and annual work on the claim from that date*].

5. Plaintiff is seeking to quiet title against the claim(s) of defendant(s) as follows: defendant _____ [*name of the named defendant*], who _____ [*describe claim of named defendant, e.g.,* denies that plaintiff has properly located the above-described claim and denies that plaintiff has done the requisite work] [_____ (*continue with whichever are applicable:*; the claims of the successor defendants described in Paragraph _____; the claims of all unknown defendants described in Paragraph 6, whether or not the claim or cloud is known to plaintiff; and the unknown, uncertain, or contingent claim, if any, of _____ (*name*) more fully described in Paragraph 7)]. Defendant's/Defendants' claim(s) is/are without any right whatever and that/those defendant(s) has/have no right, title, estate, lien, or interest whatever in the above-described claim, or any part of that claim, except the following: _____ [*set forth any claims of which plaintiff admits the validity*].

[6. *If "all persons unknown" are named as defendants, allege:* The defendants herein named as "all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud on plaintiff's title thereto" (hereinafter sometimes referred to as "the unknown defendants") are unknown to plaintiff. These unknown defendants, and each of them, claim some right, title, estate, lien, or interest in the previously described property adverse to plaintiff's title; and their claims, and each of them, constitute a cloud on plaintiff's title to that property.]

[7. *If the claim of a named defendant is unknown, uncertain, or contingent, allege:* The claim of _____ (*name of defendant*) is _____ (unknown *or* uncertain *or* contingent). (*If the lack of knowledge, uncertainty, or contingency is caused by a transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, allege:* _____ (*Name*), age _____, is the person who would be entitled to an adverse claim if _____ (*describe contingency*) had occurred before the commencement of this action.) (*If this person is subject to a legal disability, allege:* This person is subject to _____ (*specify legal disability*).)]

8. Plaintiff seeks to quiet title as of _____ [*date*]. [*If the date is a date other than the date the complaint is filed, allege why a determination as of that date is sought.*]

WHEREFORE, plaintiff prays judgment as follows:

1. That the court adjudge plaintiff to be the owner and entitled to possession of this mining claim;

2. That defendant be adjudged to have no right, title, estate, lien, or interest in this mining claim;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 363.51[1].*]

[2] Use of Form

The form in [1], *above*, is a complaint for use in an action to quiet title to a mining claim by a plaintiff who is the owner and in possession against a known defendant who is asserting an adverse claim or interest. A plaintiff who intends to name unknown persons as defendants may wish to obtain a title report before commencing the action, because an examination of the record title and an inspection of the property will be necessary [*see Code Civ. Proc. § 762.060(b)*]. Also, the court may order plaintiff to obtain a title report and keep it available for inspection and copying by the parties [*Code Civ. Proc. § 762.040(b)*].

The complaint does not contain any allegations regarding defendants who are personal representatives [*Code Civ. Proc. § 762.030(a)*] or heirs and intestate or testate successors [*Code Civ. Proc. § 762.030(b)*] of persons known or believed by the plaintiff to be deceased. If those defendants are necessary in your particular situation [for discussion, *see* Who Must Be Made Defendants, *below*], use the appropriate allegations from Ch. 482, *Quieting Title*, Form 1.

[3] Required Allegations

By statute, a quiet title complaint must include the following allegations [*Code Civ. Proc. § 761.020*]:

- A description of the property that is the subject of the action (Paragraph 1). In the case of tangible personal property, the description must include its usual location. In the case of real property, the description must include both its legal description and its street address or common designation, if any [*Code Civ. Proc. § 761.020(a)*]. This requirement does not preclude the joinder of several propertiesor of real and personal property, if appropriate [15 Cal. L. Rev. Com. 1198 (1979].

- The title of the plaintiff as to which a determination is sought and the basis of the title (Paragraph 4). If the title is based on adverse possession, the complaint must allege the specific facts constituting the adverse possession [*Code Civ. Proc. § 761.020(b)*; *see* Ch. 13, *Adverse Possession*].

- The adverse claims to the plaintiff's title against which a determination is sought (Paragraphs 5-7). If the plaintiff admits the validity of any adverse claim, the complaint must state this [*Code Civ. Proc. § 762.060(c)*]. If the claim or the share or quantity of the claim of a person required to be named as a defendant is unknown, uncertain, or contingent, the plaintiff must also state this in the complaint. Further, if the lack of knowledge, uncertainty, or contingency is caused by a transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, the plaintiff must state this in the complaint, so far as is known to the plaintiff, in addition to the name, age, and legal disability, if any, of the person in being who would be entitled to the claim had the contingency on which the claim depends occurred before the action's commencement (Paragraph 7) [*Code Civ. Proc. § 762.020(b)*].

- The date as of which the determination is sought. If the determination is sought as of a date other

than the date the complaint is filed, the complaint must include a statement of the reasons why a determination as of that date is sought (Paragraph 8) [*Code Civ. Proc. § 761.020(d)*].

- A prayer for the determination of the plaintiff's title against the adverse claims [*Code Civ. Proc. § 761.020(e)*].

[4] Who Must Be Made Defendants

The plaintiff must name as defendants the persons having adverse claims to the title of the plaintiff against which a determination is sought [*Code Civ. Proc. § 762.010*]. If the name of a person required to be named as a defendant is not known to plaintiff, the plaintiff must state this in the complaint and must name as parties all persons unknown in the manner described in [5], *below* (Unknown Defendants) [*Code Civ. Proc. § 762.020(a)*]. The court on its own motion may, and on motion of any party must, make such orders as appear appropriate for joinder of the additional parties as are necessary or proper [*Code Civ. Proc. § 762.040(a)*].

If a person required to be named as a defendant is dead and the plaintiff knows of a personal representative, the plaintiff must join the personal representative [*Code Civ. Proc. § 762.030(a)*]. If a person required to be named as a defendant is dead, or is believed by the plaintiff to be dead, and the plaintiff knows of no personal representative, the plaintiff must state these facts in an affidavit filed with the complaint [*Code Civ. Proc. § 762.030(b)(1)*; *see generally* Ch. 15, *Affidavits, Certificates, and Declarations*]. If it is stated in the affidavit that such person is dead, the plaintiff may join as defendants "the testate and intestate successors of _____ (*name of deceased person*), deceased, and all persons claiming by, through, or under such decedent" naming them in that manner [*Code Civ. Proc. § 762.030(b)(2)*].

If a person required to be named as a defendant is believed by plaintiff to be deceased, the person believed to be deceased may be named as a defendant as may that person's successors. The successors must be denominated as follows: "the testate and intestate successors of _____ (*name of person believed to be deceased*), believed to be deceased, and all persons claiming by, through, or under such person" [*Code Civ. Proc. § 762.030(b)(3)*].

[5] Unknown Defendants

In addition to the persons required to be named as defendants in the action, the plaintiff may name as defendants "all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud upon plaintiff's title thereto" naming them in that manner [*Code Civ. Proc. § 762.060(a)*]. If unknown defendants are named, the plaintiff must name as defendants the persons having adverse claims that are of record or known to the plaintiff or reasonably apparent from an inspection of the property [*Code Civ. Proc. § 762.060(b)*]. Naming unknown defendants and serving them by publication [*see* [8], *below*] will entitle the plaintiff to an in rem judgment against all persons known and unknown who were parties to the action and all persons not parties to the action and unknown to plaintiff who had a claim that was not recorded when the lis pendens was filed [*Code Civ. Proc. § 764.030*; *see also Code Civ. Proc. § 764.045* (further limitation on judgment)]. However, a person who is in open and actual possession of the property cannot be named as an unknown defendant [*Code Civ. Proc. § 763.010(c)*].

Testate and intestate successors and "all persons unknown" can also be designated as DOES. This is not recommended, however, because it differs from the statutory language of *Code Civ. Proc. §§ 762.030(b)(2), (3)* and *762.060*, by which those defendants are to be designated, and because it may limit the in rem effect of the judgment by limiting the number of adverse claimants in those classes [*see Code Civ. Proc. § 763.030(b)*]. Fictitious defendants, however, may be named as DOES in accordance with *Code Civ. Proc. § 474* (Paragraph 3) [*see Code Civ. Proc. § 760.060* (rules governing civil actions generally are applicable in quiet title actions unless they are inconsistent with quiet title provisions)].

[6] Verification

The complaint must be verified [*Code Civ. Proc. § 761.020*].

[7] Jurisdiction and Venue

The superior court has jurisdiction over quiet title actions [*Code Civ. Proc. § 760.040(a)*]. It is not a limited civil case [*see Code Civ. Proc. §§ 85, 580(b)(3)*]. Subject to the court's power to transfer actions, the proper county for the trial of an action to quiet title to real property is the county in which the real property, or some of it, is located [*Code Civ. Proc. § 760.050(a)*].

[8] Service of Summons

The form, content, and manner of the service of summons in quiet title actions is the same as in civil actions generally [*Code Civ. Proc. § 763.010(a)*]. If unknown defendants are named [*see* [5], *above*], there must also be service by publication and posting [*Code Civ. Proc. § 763.010(b)*]. The requirements for service by publication and posting are discussed in Ch. 482, *Quieting Title* . The procedure for service of summons is set forth in Ch. 518, *Service of Summons and Papers* .

[9] Lis Pendens

Immediately on the commencement of a quiet title action by filing the complaint, the plaintiff must file a lis pendens in the office of the county recorder of each county in which any real property described in the complaint is located [*Code Civ. Proc. § 761.010(a)*]. The lis pendens gives constructive notice of the pendency of the action to subsequent purchasers or encumbrancers [*Code Civ. Proc. § 405.24*]. For forms of lis pendens, see Ch. 348, *Lis Pendens* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMiningGeneral OverviewReal Property LawMiningClaimsReal Property LawTitle QualityAdverse Claim ActionsGeneral Overview

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 363 MINING
PART IV. FORMS

32-363 California Forms of Pleading and Practice--Annotated § 363.56

§ 363.56 Complaint for Damages for Trespass--By Lessee of Mining Property Against Adjoining Claim Holder

[1] FORM Complaint for Damages for Trespass--By Lessee of Mining Property Against Adjoining Claim Holder

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*], Plaintiff, vs _____ [*name(s)*], Defendant(s).	))))))))))	NO. _____ COMPLAINT FOR DAMAGES (Trespass) [Amount demanded _____ (exceeds *or* does not exceed) $10,000] [LIMITED CIVIL CASE]

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, a resident of _____ County, California [*or other capacity and residence of defendant*].

2. [Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-V, inclusive and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible as hereinafter shown for the occurrences alleged in this complaint.)]

3. [At all times herein mentioned defendant _____ (*name*) was the agent and employee of defendant _____ (*name*) and in doing the acts alleged was acting within the scope of that agency.]

4. At all times mentioned herein, plaintiff was entitled to the possession of the mining property known as the _____ [*name*] mine under _____ [a written *or* an oral] lease whereby _____ [*name of owner*] leased the property to plaintiff for a period commencing on _____ [*date*], and continuing until _____ [*date*]. [*If a written lease is alleged:* A copy of this lease is attached to this complaint as Exhibit A and made a part of this complaint.]

5. The above-mentioned _____ [*name*] mine is located in _____ County, California, and is more particularly described as follows: _____ [*set forth legal description*].

6. At all times herein mentioned, plaintiff was, and now is, in possession of the above-described mining property and carrying on mining operations for _____ [*specify mineral*] thereon.

7. At all times herein mentioned, defendant was, and now is, carrying on mining operations on property which is adjacent to and situated _____ [*describe relative position of defendant's mine*] plaintiff's leasehold.

8. On _____ [*date*], defendant wrongfully and without plaintiff's consent placed on plaintiff's above-described leasehold _____ [large quantities of mining wastes and debris, *or allege other materials placed or caused to flow onto the property*], thereby rendering it impossible for plaintiff to carry on mining operations on that portion of his/her leasehold.

9. By reason of the acts of defendant herein alleged, plaintiff has been damaged in the sum of $_____.

10. In doing the aforementioned acts, defendant acted maliciously and willfully; therefore, punitive damages are justified.

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages in the sum of $_____;

2. For punitive damages;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 363.51[1].*]

[2] Use of Form

This form is a complaint for use in a trespass action for damages by the lessee of mining property against the operator of an adjoining mine. The action is one for trespass by causing materials to be deposited on plaintiff's property [*see § 363.14[3]*].

[3] Statute of Limitations

The statute of limitations for actions for trespass to real property is three years [*Code Civ. Proc. § 338(b)*]. In cases of trespass to real property caused by an act which later results in trespass and damage, the statute does not run from the time the act or diversion of minerals or waters is committed, but from the date the resulting injury is sustained [*Polin v. Chung Cho (1970) 8 Cal. App. 3d 673, 677, 87 Cal. Rptr. 591]* .

[4] Standing

The lessee or possessor of a mining claim has standing to maintain an action for trespass [*Whittaker v. Otto (1967) 26 O.&G.R. 1, 248 Cal. App. 2d 666, 672-674, 56 Cal. Rptr. 836]* .

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*].

If the action is a limited civil case, the caption must state whether the demand exceeds or does not exceed $10,000 and must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[6] Cross References

For a complaint for damages for trespass and conversion by the owner of a mining claim against a trespasser entering and removing minerals, see *§ 363.57*

For other complaints involving landlord and tenant, see *§ 363.58* (complaint by tenant for damages for fraudulent representation of ownership of mining claim) and § 363.59 (complaint by landlord of mining property to recover royalties against tenant under mining lease)

For discussion of trespass generally and additional forms that may be used in actions for trespass, see Ch. 550, *Trespass*

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawMining IndustryMineral LeasesGeneral OverviewEnergy & Utilities LawMining IndustryMining ClaimsGeneral OverviewReal Property LawMiningClaimsReal Property LawTortsTrespass to Real PropertyTortsPremises Liability & PropertyTrespassGeneral Overview

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32-363 California Forms of Pleading and Practice--Annotated § 363.57

§ 363.57 Complaint for Damages for Trespass and Conversion--By Owner of Mining Claim Against Trespasser Entering and Removing Minerals

[1] FORM Complaint for Damages for Trespass and Conversion--By Owner of Mining Claim Against Trespasser Entering and Removing Minerals

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. [*Capacity of defendant. See § 363.56[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 363.56, Paragraph 2.*]

3. At all times mentioned in this complaint, plaintiff was the owner, and in possession of, the _____ [*name*] _____ [mine *or* mining claim], located in _____ County, California, and the minerals located thereon. This _____ [mine *or* mining claim] is further described as follows: _____ [*set forth legal description*].

4. On _____ [*date*], defendant wrongfully and without plaintiff's consent entered the above-described

_____ [mine *or* mining claim] and removed portions of the _____ [*name of minerals removed*] and other valuable minerals therefrom and converted them to his/her own use.

5. The alleged acts of defendant were despicable, deliberate, voluntary, intentional, malicious, and willful; as a result thereof, plaintiff is entitled to punitive damages according to the market value of the minerals removed and converted by defendant, with no deduction of costs of extraction.

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages in the sum of $_____;

2. For punitive damages;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 363.51[1].*]

[2] Use of Form

This form is a complaint for use in an action for trespass when defendant has entered plaintiff's mine and removed valuable minerals without plaintiff's permission [for discussion, *see § 363.14[3]*].

[3] Allegations

This complaint combines causes of action for trespass and for conversion. It alleges:

- Ownership and possession of the real property involved and of the minerals on the property (Paragraph 3);
- Wrongful entry on the property and taking of minerals (Paragraph 4); and
- That the entry and taking were willful and malicious, entitling plaintiff to exemplary damages (Paragraph 5).

Although the causes of action in this complaint are combined, they may be stated in separate counts [*see Code Civ. Proc. § 427.10*].

[4] Damages

Damages for conversion of minerals are governed by the provisions of *Civ. Code § 3336* relating to conversion of

personal property [*Lightner Mining Co. v. Lane (1911) 161 Cal. 689, 704-705, 120 P. 771]* . The detriment caused by wrongful conversion of personal property is presumed two-fold [*Civ. Code § 3336*]:

- First, the property's value at the time of conversion, with the interest from that time, or an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable, and proximate result of the wrongful act complained of and which a proper degree of prudence on the injured party's part would not have averted; and

- Second, a fair compensation for the time and money properly expended in pursuit of the property.

In the case of unintentional trespass to mining property and taking of minerals, the measure of damages is the value of the ore in place, determined by the value of the ore extracted less the costs of extraction, smelting, and transportation. When the trespass and conversion of minerals is intentional and willful, exemplary damages may be awarded in the amount of the value of the ore without any deduction for the costs of producing it for market [*Whittaker v. Otto (1967) 26 O.&G.R. 1, 248 Cal. App. 2d 666, 675-676, 56 Cal. Rptr. 836]* .

[5] Cross References

For a complaint for damages for trespass by the lessee of mining property against an adjoining claim holder and for additional comments, see *§ 363.56*

For a complaint for damages for breach of contract and for an accounting by the owner of mining property against a mine operator for the failure to pay for minerals extracted, see *§ 363.60*

For discussion of trespass and additional forms that may be used in trespass actions, see Ch. 550, *Trespass* . For discussion and additional forms that may be used in actions for conversion of property, see Ch. 150, *Conversion*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMiningClaimsReal Property LawTortsTrespass to Real PropertyTortsPremises Liability & PropertyTrespassGeneral Overview

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32-363 California Forms of Pleading and Practice--Annotated § 363.58

§ 363.58 Complaint for Damages--For Fraudulent Representation of Ownership of Mining Property [Civ. Code § 1710]--By Lessee Against Lessor

[1] FORM Complaint for Damages--For Fraudulent Representation of Ownership of Mining Property [Civ. Code § 1710]--By Lessee Against Lessor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*],	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

1. [*Capacity and residence of defendant. See § 363.56[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 363.56[1], Paragraph 2.*]

3. On or about _____ [*date*], in _____ [*city*], _____ County, California, defendant represented to plaintiff that defendant was the owner of certain mining property situated in _____ County, California, and further described as follows: _____ [*set forth legal description*].

4. This representation by defendant was false. On the date in question, and at all times herein mentioned, this mining property was owned by _____ [*name of owner*]; and defendant had no right, title, interest, or estate in or to this mining property nor to any portion of the mining property.

5. At the time defendant made this false representation to plaintiff, defendant knew it to be false.

6. By making this false representation, defendant intended to induce plaintiff to enter into a written agreement whereby defendant as landlord purported to lease the mining property in question to plaintiff as tenant. A copy of this lease is attached to this complaint as Exhibit A and made a part of this complaint.

7. At the time defendant made the false representation to plaintiff, plaintiff justifiably believed his/her representation to be true and in reliance thereon, on _____ [*date*], at _____ [*city*], _____ County, California, entered into the attached lease agreement.

8. As a proximate result of the false representation made by defendant to plaintiff, and of plaintiff's reliance thereon, plaintiff sustained damages in the sum of $_____.

9. [As a further proximate result of this false representation made by defendant to plaintiff, and plaintiff's justifiable reliance thereon, plaintiff became the defendant in an action for damages for trespass to the mining property filed by _____ (*name*), the true owner of this mining property, in the _____ Court, _____ County, California, entitled _____ (*name of owner*), Plaintiff v. _____ (*name of plaintiff*), Defendant, numbered _____.]

10. [For the defense of this action, plaintiff was compelled to employ an attorney, and to expend attorney's fees in the sum of $_____, which sum is a reasonable sum for the services performed.]

11. Defendant made the false representation herein fraudulently, maliciously, and oppressively. Plaintiff, therefore, is entitled to punitive damages.

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages in the sum of $_____;

[2. For special damages incurred in defending an action for trespass in the sum of $_____;]

3. For punitive damages; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 363.51[1].*]

[2] Use of Form

This form is a complaint for use in an action for fraud by the lessee of mining property, when the lessor has fraudulently

represented that he or she owns the leased property and is entitled to make a valid lease of it to the lessee.

[3] Allegations

The complaint alleges:

- Fraudulent representation of ownership (Paragraph 3);
- False representation and the true situation (Paragraph 4);
- Knowledge of the statement's falsity (Paragraph 5);
- Intention to induce plaintiff to enter a lease (Paragraph 6);
- Justifiable reliance by plaintiff (Paragraph 7);
- General damages (Paragraph 8);
- Special damages (Paragraph 10) [*see Harazim v. Lynam (1968) 267 Cal. App. 2d 127, 130, 72 Cal. Rptr. 670]* ; and
- Fraudulent, malicious, and oppressive conduct by defendant (Paragraph 11) [*Civ. Code § 3294*].

For complaints and related forms for use generally in actions for fraud, see Ch. 269, *Fraud and Deceit* .

[4] Damages

In an action for fraud in the purchase, sale, or exchange of property, the defrauded party is entitled to recover as damages the difference between the actual value of the property received and the value of the consideration with which he or she parted (not the difference between the consideration and the value as represented) [*Civ. Code § 3343(a), (b)(1)*]. The defrauded party may also recover additional consequential damages, including amounts expended in reliance on the fraud, compensation for loss of use and enjoyment of the property, and lost profits under certain conditions [*Civ. Code § 3343(a)(1)-(4)*].

[5] Statute of Limitations

The statute of limitations applicable to actions based on fraud is three years, but the time does not begin to run until the defrauded party has discovered the fraud [*Code Civ. Proc. § 338(d)*]. When it appears on the face of the complaint that the statute has run, the plaintiff should plead facts showing the time and manner of discovery of the fraud and excusing the failure to discover the fraud sooner [*Holder v. Home Sav. & Loan Assn. (1968) 267 Cal. App. 2d 91, 110-111, 72 Cal. Rptr. 704]* . For detailed coverage, see Ch. 269, *Fraud and Deceit* .

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[7] Cross References

For discussion of the superior court's jurisdiction and of limited civil cases, see *§ 363.56[5]*

For complaints and related forms for use generally in actions for fraud, see Ch. 269, *Fraud and Deceit*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesFraud & MisrepresentationGeneral OverviewEnergy & Utilities LawMining IndustryMineral LeasesGeneral OverviewReal Property LawMiningClaims

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32-363 California Forms of Pleading and Practice--Annotated § 363.59

§ 363.59 Complaint to Recover Royalties--By Lessor of Mining Property Against Lessee--Under Mining Lease

[1] FORM Complaint to Recover Royalties--By Lessor of Mining Property Against Lessee--Under Mining Lease

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO RECOVER ROYALTIES
_____ [*name(s)*],	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant, if appropriate. See § 363.56[1], Paragraph 1*.]

2. [*Fictitious name allegation. See § 363.56[1], Paragraph 2*.]

3. On or about _____ [*date*], at _____ [*city*], _____ County, California, plaintiff, as lessor, and defendant, as lessee, entered into _____ [a written *or* an oral] lease agreement concerning certain mining claims located in _____ County, California. [*If written, allege:* This lease agreement is attached to this complaint as Exhibit A and made a part of this complaint.] The mining claims leased thereunder are known as _____ [*name, if any*], and further described as follows: _____ [*set forth legal description*].

4. Plaintiff has performed all conditions, covenants, and promises under this lease agreement to be performed on his/her

part.

5. Among other things, Paragraph _____ of the attached lease agreement provides that _____ [*set out provisions as to payment of rent and royalties, e.g.,* "Lessee agrees to pay lessor as rent and royalty for the use and depletion of the leased mining claims and the taking of _____ (*mineral*) therefrom, $_____ for each ton of _____ (*mineral*) extracted. Lessee further agrees that he/she shall bear the costs of extracting _____ (*mineral*) from the mining claims."]

6. Since _____ [*date*], defendant has extracted _____ [*number*] of _____ [tons *or other amount*] of _____ [*mineral*] from the leased mining claims.

7. Defendant has paid no royalties under the lease except the sum of $_____, and the sum of $_____ is now unpaid and due from defendant to plaintiff under the lease _____.

WHEREFORE, plaintiff prays judgment as follows:

1. For royalties in the sum of $_____;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 363.51[1].*]

[2] Use of Form

This form is a complaint for use in an action to recover unpaid royalties under a mining lease of mining claims, when defendant remains in possession and continues to extract minerals from the property [for discussion, *see § 363.16*].

[3] Allegations

The complaint alleges the following:

- The existence of a written or an oral lease (Paragraph 3);
- Performance of all covenants and conditions by plaintiff (Paragraph 4);
- The lease provision for payment of royalties (Paragraph 5);
- The extraction of a known amount of minerals by defendant (Paragraph 6); and

- Royalties due and owing (Paragraph 7).

Paragraph 3 contains the allegation that the lease was written or oral. The complaint is subject to objection by answer or demurrer if it cannot be ascertained from the complaint whether the contract sued on was written, oral, or implied by conduct [*Code Civ. Proc. § 430.10(g)*].

[4] Landlord-Tenant Rights Under Mining Lease

Mining leases are generally subject to the ordinary laws of landlord and tenant, with the exception that the tenant under a minimal lease has an obligation to extract minerals from the land [*Gold Min. & Water Co. v. Swinerton (1943) 23 Cal. 2d 19, 32, 142 P.2d 22]* . When a landlord of mining property sues for damages for breach of a contract to mine, the contract measure of damages is the amount of royalties the landlord lost by reason of his or her failure to mine [*Fisher v. Hampton (1975) 50 O.&G.R. 453, 44 Cal. App. 3d 741, 747-748, 118 Cal. Rptr. 811]* .

There is an implied condition that a tenant extract minerals from the land in a mining lease [*Russell v. Johns Manville Co. (1971) 40 O.&G.R. 26, 20 Cal. App. 3d 405, 410, 97 Cal. Rptr. 634]* . Further, a complaint that alleges all of the following properly states a cause of action [*Northern Light Co. v. Blue Goose Co. (1914) 25 Cal. App. 282, 284-286, 143 P. 540]* :

- Execution of a lease;
- Entry of the tenant into possession;
- Extraction of minerals under the lease;
- The amount due plaintiff under the lease; and
- Payment of all amounts due except a stated sum.

[5] Cross References

For discussion of the superior court's jurisdiction and of limited civil cases, see *§ 363.56[5]*

For a complaint for damages and for an accounting by the owner of mining property against a mine operator for the failure to pay for minerals extracted, see *§ 363.60*

For a complaint for an accounting against a cotenant for royalties from an oil and gas well, see *Ch. 393, Oil and Gas, § 393.65*

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawMining IndustryMineral LeasesGeneral OverviewEnergy & Utilities LawRoyaltiesGeneral OverviewReal Property LawMiningGeneral OverviewReal Property LawMiningClaimsTortsPremises Liability & PropertyLessees & LessorsGeneral Overview

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32-363 California Forms of Pleading and Practice--Annotated § 363.60

§ 363.60 Complaint for Damages for Breach of Contract [Civ. Code § 3300] and for an Accounting--By Owner of Mining Property Against Mine Operator--Failure to Pay for Minerals Extracted

[1] FORM Complaint for Damages for Breach of Contract [Civ. Code § 3300] and for an Accounting--By Owner of Mining Property Against Mine Operator--Failure to Pay for Minerals Extracted

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs _____ [*name(s)*], Defendant(s).	)	NO. _____ COMPLAINT FOR DAMAGES AND ACCOUNTING

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 363.56[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 363.56[1], Paragraph 2.*]

3. On _____ [*date*], plaintiff was, and now is, the owner of certain real property located at _____, _____ County, California, and further described as follows:

_____ [*set forth legal description*].

4. On the above date, in _____ [*city*], _____ County, California, plaintiff and defendant entered into _____ [a written *or* an oral] agreement whereby defendant was to extract _____ [*specify mineral*] from the above-described property and was to pay plaintiff _____ percent of the net proceeds realized from the sale of the _____ [*specify mineral*] extracted. This agreement further provided that defendant was to bear all cost of extracting the _____ [*specify mineral*] from the land. [*If written agreement, allege:* A copy of this agreement is attached to this complaint as Exhibit A and made a part of this complaint.]

5. On _____ [*date*], and at various times thereafter, defendant entered on the plaintiff's real property and extracted _____ [*specify mineral*] from the property, in an amount which is presently unknown to plaintiff. The amount of the net proceeds received by defendant for the sale of this _____ [*specify mineral*] is likewise unknown to plaintiff. Therefore the amount of money due from defendant to plaintiff is unknown to plaintiff and cannot be ascertained without an accounting.

6. Plaintiff has demanded an accounting of the above-mentioned extractions and sales of _____ [*specify mineral*] from defendant and paymentof the amount found due, but defendant has failed and refused, and continues to fail and refuse, to render such an accounting and to pay such sum [*or allege facts showing that a demand would be useless*].

7. Plaintiff has performed all conditions, covenants, and promises under the contract, on his/her part to be performed [, except _____ (*condition not performed*), the performance of which was excused on the ground that _____ (*specify*)].

8. Defendant has breached the agreement described above by his/her above stated failure to pay the sum due to plaintiff for the extraction of _____ [*specify mineral*] from the plaintiff's land.

9. By reason of defendant's failure and refusal to perform the above-described agreement, plaintiff has sustained damages in an amount unknown to him/her which cannot be ascertained without an accounting but which he/she is informed and believes, and on the basis of such information and belief alleges to be, in excess of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For an accounting between plaintiff and defendant;

2. For the amount found to be due from defendant to plaintiff as a result of the accounting;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 363.51[1].*]

[2] Use of Form

This form is a complaint for use when plaintiff seeks money due from defendant under a contract to extract minerals from plaintiff's land, and when the sum due cannot be ascertained by plaintiff because it depends on facts that are solely within the defendant's knowledge. The complaint combines an action for breach of contract with one for an accounting.

[3] Allegations

The essential allegations for an action for damages for breach of contract are the following:

- The date and place of making of the contract (Paragraph 4);
- The happening of any event that is a condition precedent to defendant's performance (Paragraph 5);
- Plaintiff's performance of all conditions on plaintiff's part or excuse for nonperformance (Paragraph 7);
- The breach by defendant (Paragraph 8); and
- Damages sustained (Paragraph 9).

A complaint is subject to objection by answer or demurrer if it cannot be ascertained from the complaint whether the contract sued on was written, oral, or implied by conduct [*Code Civ. Proc. § 430.10(g)*].

The essential allegations for an action for an accounting are the following:

- The existence of a relationship between plaintiff and defendant appropriate to an accounting (Paragraphs 4 and 5);
- That there is an unknown amount due from defendant to plaintiff that cannot be ascertained without an accounting (Paragraph 9); and
- That a demand for an accounting has been made by plaintiff and refused by defendant (Paragraph 6).

[4] Statute of Limitations

When an action for accounting is incidental or ancillary to the perfection of plaintiff's right under a contract, the accounting aspect of the action should not operate to avoid the effect of a statute prescribing a period of limitation with respect to the right basically in issue [*Jefferson v. J. E. French Co. (1960) 54 Cal. 2d 717, 718-719, 7 Cal. Rptr. 899, 355 P.2d 643]* . In the complaint in [1], *above*, the applicable period of limitation would be that applicable to an action on a written contract (four years) or on an oral contract (two years) [*see Code Civ. Proc. §§ 337, 339(1)*].

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. §*

431.30(d)]. For further discussion, see Ch. 26, *Answers* .

[6] Jurisdiction

Athough an accounting may be taken in a limited civil case where necessary to preserve the property or rights of any party to the case, an action for an accounting is in the jurisdiction of the superior court and is not a limited civil case [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*].

[7] Cross References

For discussion of the superior court's jurisdiction and of limited civil cases, see *§ 363.56[5]*

For a complaint for an accounting against a cotenant for royalties from an oil and gas well, see *Ch. 393, Oil and Gas, § 393.65*

For detailed coverage of accounting actions generally, see Ch. 7, *Accounting, Action for*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachGeneral OverviewEnergy & Utilities LawOil, Gas & Mineral InterestsPersonalty & Realty InterestsReal Property LawMiningClaims

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Chapter 364 MINORS: CLAIMS AND PROPERTY OF MINORS

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§ 364.02 Cross References

§§ 364.03-364.09 [Reserved]

§ 364.10 Governing Law

§ 364.11 Compromising Disputed Claim When No Action Pending

[1] By Parent

[2] Execution of Release

§ 364.12 Compromising Disputed Claim When Action Pending

[1] By Guardian

[2] Guardian ad Litem for Unascertained, Unborn, or Unknown Persons

§ 364.13 Disposition of Money or Property Received

[1] Order for Payment of Expenses

[2] Disposition of Balance of Funds if Guardianship of Estate

[3] Disposition of Balance of Funds if No Guardianship of Estate

[a] Court's Options

[b] Delivery of Property to Minor's Parent

[c] Continuing Jurisdiction

§§ 364.14-364.29 [Reserved]

§ 364.30 Governing Law

§ 364.31 Definitions

§ 364.32 Delivery of Property to Parent

§ 364.33 Disposition of Money Belonging to Minor

[1] Petition

[2] Guardian of Estate

[3] No Guardian of Estate

§§ 364.34-364.49 [Reserved]

§ 364.50 State Statutes

[1] Compromise of Claim When Action Pending

[2] Compromise of Claim When No Action Pending

[3] Definitions

[4] Disposition of Property Received

§ 364.51 California Rules of Court

§ 364.52 Local Rules of Court

§ 364.53 Decisions

§ 364.54 Text References

§§ 364.55-364.69 [Reserved]

§ 364.70 State Statutes

§ 364.71 Law Reviews

§ 364.72 Text References

§§ 364.73-364.89 [Reserved]

§ 364.90 Petition to Approve Compromise of Claim [Code of Civ. Proc. § 372; Prob. Code § 3500; Cal. Rules of Ct., Rules 3.1384, 7.950, and 7.951]--Judicial Council Forms MC-350, MC-350(A-13b(5)), MC-350EX

[1] FORM

[2] Use of Forms

[3] Required Disclosures in Petition

[4] Verification

[5] Venue and Hearing

[6] Cross References

§ 364.91 Order Approving Compromise of Claim [Code of Civ. Proc. § 372; Prob. Code § 3500; Cal. Rules of Ct., Rules 3.1384 and 7.953]--Judicial Council Form MC-351

[1] FORM

[2] Use of Form

[3] Cross References

§ 364.92 Order to Deposit Money into Blocked Account [Code of Civ. Proc. § 372; Prob. Code § 3600; Cal. Rules of Ct., Rules 3.1384 and 7.953]--Judicial Council Form MC-355

[1] FORM

[2] Use of Form

[3] Required Statements in Order

[4] Cross References

§ 364.93 Receipt and Acknowledgment of Order for the Deposit of Money into Blocked Account [Code of Civ. Proc. § 372; Prob. Code § 3600; Cal. Rules of Ct., Rules 3.1384 and 7.953]--Judicial Council Form MC-356

[1] FORM

[2] Use of Form

[3] Required Statements in Order

[4] Cross References

§ 364.94 Petition for Withdrawal of Funds from Blocked Account [Cal. Rules of Ct., Rules 3.1384 and 7.954]--Judicial Council Form MC-357

[1] FORM

[2] Use of Form

[3] Petition and Hearing

[4] Retention of Court's Jurisdiction

§ 364.95 Order for Withdrawal of Funds from Blocked Account [Cal. Rules of Ct., Rules 3.1384 and 7.954]--Judicial Council Form MC-358

[1] FORM

[2] Use of Form

[3] Cross References

§§ 364.96-364.109 [Reserved]

§ 364.110 Disposition of Minor's Estate Not Exceeding $5,000 [Prob. Code § 3401]--Parent's Declaration to Receive Minor's Money or Property

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 364.111 Petition to Dispose of Minor's Money [Prob. Code § 3413]

[1] FORM

[2] Use of Form

[3] Petitioners

[4] Jurisdiction and Venue

[5] Verification

[6] Cross References

§ 364.112 Order Disposing of Minor's Funds (Ex Parte) [Prob. Code § 3413(a)]--Los Angeles County Superior Court Form

[1] FORM

[2] Use of Form

[3] Authorized Dispositions

[4] Blocked Accounts

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I. SCOPE

32-364 California Forms of Pleading and Practice--Annotated § 364.01

§ 364.01 Scope of Chapter

This chapter discusses and contains forms for use in obtaining court approval of the compromise of disputed claims of minors. The following forms are included:

- A petition to compromise a minor's claim [*see § 364.90*].
- An illustrative court order approving a compromise [*see § 364.91*].
- An order to deposit money pursuant to a compromise [*see § 364.92*].
- A receipt and acknowledgment of an order to deposit money pursuant to a compromise [*see § 364.93*].
- A petition for withdrawal of a minor's fund [*see § 364.94*].
- An order for withdrawal of a minor's fund [*see § 364.95*].

For additional discussion of a guardian's power to compromise a minor's claim and dispose of property received pursuant to a compromise or judgment, see Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment* .

This chapter also discusses and contains forms for use in proceedings related to the disposition of property belonging to a minor. It includes the following forms:

- A declaration by a parent to receive a minor's property or money when the minor's total estate is less than $5,000 [*see § 364.110*].
- A petition to dispose of a minor's money when no guardian of the estate has been appointed [*see § 364.111*].

- A form of order disposing of a minor's funds [*see § 364.112*].

For a discussion and forms for use when the minor has a guardian of the estate and the sole asset of the guardianship estate is money, see the discussion of termination of guardianships in Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships* . For a discussion and forms for use when the money or other property belonging to the minor is or will be held as custodial property pursuant to the Uniform Transfers to Minors Act (*Prob. Code § 3900 et seq.*), see Ch. 278, *Gifts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGifts to MinorsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGifts to MinorsUniform ActsFamily LawGuardiansGeneral OverviewFamily LawGuardiansDuties & Rights

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32-364 California Forms of Pleading and Practice--Annotated § 364.02

§ 364.02 Cross References

For discussion and forms regarding minors and contracts actions, see Ch. 365, *Minors: Contract Actions* .

For discussion and forms regarding monors and medical care or enlistment in the armed servics, see Ch. 366, *Minors: Court Consent for Medical Care or Enlistment* .

For discussion and forms regarding minors disaffirmation of a judgment entered against a minor who was unrepresented by a guardian or grardian ad litem, see Ch. 367, *Minors: Disaffirmation of Judgments* .

For discussion and forms regarding minors and tort actions, see Ch. 367A, *Minors: Tort Actions* .

For a discussion and forms for use in proceedings involving gifts to minors, see Ch. 278, *Gifts* .

For a discussion of the disposition and management of property belonging in the guardianship estate of a minor, see Ch. 287, *Guardianship and Conservatorship: General Management Powers* .

For a discussion and forms relating to the appointment and powers of guardians for minors, including compromise of ward's claims, see Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee* , and Ch. 290C, *Guardianship and Conservatorship: Actions and Disputed Claims* .

See generally, Ch. 520, *Settlement and Release* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawPersonal GiftsGifts to MinorsGeneral OverviewFamily LawGuardiansGeneral OverviewFamily LawGuardiansAppointmentFamily LawGuardiansDuties & Rights

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32-364 California Forms of Pleading and Practice--Annotated §§ 364.03-364.09

[Reserved]

§§ 364.03[Reserved]

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32-364 California Forms of Pleading and Practice--Annotated § 364.10

§ 364.10 Governing Law

Compromise of disputed claims involving minors when no action is pending is governed by *Prob. Code § 3500*. Compromise of disputed claims involving a minor when an action or proceeding is pending is governed by *Code Civ. Proc. § 372*. The power of a guardian ad litem to compromise the claim of unascertained, unknown, or unborn persons is governed by *Code Civ. Proc. § 373.5*. The disposition of money or property paid or delivered pursuant to a compromise or judgment involving a minor is governed by *Prob. Code §§ 3600-3612*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewFamily LawGuardiansDuties & Rights

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32-364 California Forms of Pleading and Practice--Annotated § 364.11

§ 364.11 Compromising Disputed Claim When No Action Pending

[1] By Parent

When a minor has a disputed claim for damages, money, or other property and does not have a guardian of the estate, either parent or, if the minor's parents are living separate and apart, the parent having the care, custody, or control of the minor, has the right to compromise or to execute a covenant not to sue on or a covenant not to enforce judgment on the claim, except when the claim is against the parents or parent [*Prob. Code § 3500(a)*]. The compromise or covenant is valid on the filing of a petition, however, only after it has been approved by the superior court either of (1) the county in which the minor resides when the petition is filed or (2) any county where suit on the claim or matter properly could be brought [*Prob. Code § 3500(b)*].

For a form of petition for compromise of a disputed claim, see *§ 364.90*. For a form of order approving the compromise, see *§ 364.91*.

For discussion of the power of a guardian of the estate to compromise a minor's claim when no action is pending, see Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment* .

[2] Execution of Release

After the money or other property has been paid or delivered pursuant to the compromise or covenant in the manner specified in *Prob. Code § 3600 et seq.* [*Prob. Code § 3500(c)*], a parent having the right to compromise the disputed claim may execute a full release and satisfaction, or execute a covenant not to sue on or a covenant not to enforce judgment on the disputed claim. If the court orders that all or any part of the money to be paid under the compromise or covenant be deposited in an insured account in a California financial institution or in a single-premium deferred annuity, however, the release and satisfaction or covenant is not effective for any purpose until the money has been deposited as directed in the court's order [*Prob. Code § 3500(d)*; *see Prob. Code § 1446* ("single-premium deferred annuity" defined)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewFamily LawGuardiansGeneral OverviewFamily LawGuardiansDuties & RightsFamily LawParental Duties & RightsGeneral Overview

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32-364 California Forms of Pleading and Practice--Annotated § 364.12

§ 364.12 Compromising Disputed Claim When Action Pending

[1] By Guardian

When a minor is a party to an action or proceeding, he or she must appear either by a guardian of the estate or by a guardian ad litem appointed by the court in which the action or proceeding is pending. The guardian appearing for the minor has the power, with the approval of the court in which the action or proceeding is pending, to compromise the action or proceeding, to agree to the order or judgment to be entered in the action or proceeding, and to satisfy any judgment or order in favor of the ward or to release or discharge any claim of the ward pursuant to the compromise [*Code Civ. Proc. § 372*].

The compromise of a minor's action pending appeal must be done by petition filed in the appellate court. Once the petition is filed, the appellate court may do one of the following: (1) approve or disapprove the compromise, or (2) refer the matter to the trial court for a report, receive a report back from the trial court, and then approve or disapprove the compromise [*Anderson v. Latimer (1985) 166 Cal. App. 3d 667, 677, 212 Cal. Rptr. 544]* .

For discussion of the appointment and powers of guardians ad litem, see Ch. 291, *Guardians ad Litem* .

[2] Guardian ad Litem for Unascertained, Unborn, or Unknown Persons

If, under the terms of a written instrument or otherwise, a person or persons of a designated class who are not ascertained or who are not in being, or who are unknown, may be or may become legally or equitably interested in any real or personal property, the court in which any action, petition, or proceeding relating to or affecting the property is pending may appoint a suitable person to act as guardian ad litem of the unascertained, unborn, or unknown person or persons. The guardian ad litem in such a case has the power, with the court's approval, to compromise the matter, to agree to the order or judgment to be entered for or against the persons for whom the guardian ad litem was appointed, to satisfy any judgment or order in favor of the persons, or to release or discharge any claim of the persons pursuant to the compromise [*Code Civ. Proc. § 373.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for Missing & Undetermined HeirsEstate, Gift & Trust LawProbateGeneral OverviewFamily LawGuardiansGeneral OverviewFamily LawGuardiansAppointment

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32-364 California Forms of Pleading and Practice--Annotated § 364.13

§ 364.13 Disposition of Money or Property Received

[1] Order for Payment of Expenses

The court approving the compromise or covenant, or rendering judgment for the minor, also must make a further order authorizing and directing that the reasonable expenses, costs, and attorney's fees approved by the court be paid from the money or other property to be paid or delivered for the benefit of the minor. Payment of medical or other expenses, including reimbursement to a parent or guardian, is specifically authorized by statute [*Prob. Code § 3601(a)*]. The required order may be directed to a parent of the minor, the guardian ad litem, the guardian of the minor's estate, or that person who is to pay money pursuant to the compromise, covenant, or judgment [*Prob. Code § 3601(b)*].

[2] Disposition of Balance of Funds if Guardianship of Estate

If there is a guardianship of the estate of the minor, the remaining balance of the money and other property ordinarily must be paid or delivered to the guardian of the estate. On the guardian's application, the court approving the compromise or rendering the judgment, or the court in which the guardianship proceeding is pending, may order that all or part of any money that has been paid or that is to be paid to the guardian be deposited with an approved financial institution or trust company pursuant to the terms of *Prob. Code § 2456* [*Prob. Code § 3602(b)*; *see* discussion of *Prob. Code § 2456* in Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee*].

On ex parte petition of the guardian or of any person interested in the guardianship estate, however, the court approving the compromise or covenant or rendering the judgment, for good cause shown, may order that all or part of the remaining balance of the money not become a part of the guardianship estate, but instead be deposited in an insured account in a California financial institution or in a single-premium deferred annuity, subject to withdrawal only on the court's authorization [*Prob. Code § 3602(c)(1)*; *see Prob. Code § 1446* ("single-premium deferred annuity" defined)]. Alternatively or additionally, the court may order that all or part of the remaining balance of money and other property not become part of the guardianship estate, but instead be transferred to a custodian for the benefit of the minor under the California Uniform Transfers to Minors Act (*Prob. Code § 3900 et seq.*) [*Prob. Code § 3602(c)(2)*]. On the petition of the guardian or of any person interested in the guardianship estate, the court may also order that all or part of the remaining balance of money not become a part of the guardianship estate, but instead be paid to a special needs trust

established under *Prob. Code § 3604* for the benefit of the minor [*Prob. Code § 3602(d)*; *see Prob. Code § 3602(f)* (requirement that notice of hearing and copy of petition filed under *Prob. Code § 3604(d)* be mailed to State Director of Health Services, Director of Mental Health, and Director of Developmental Services, at least 15 days before hearing on petition)].

[3] Disposition of Balance of Funds if No Guardianship of Estate

[a] Court's Options

When there is no guardianship of the estate of the minor, the court has several options as to the disposition of the money or property remaining after payment of all expenses, costs, and fees [*Prob. Code §§ 3602(a), 3610, 3611*]:

- The court may order that a guardian of the estate be appointed and that the remaining balance of the money and other property be paid or delivered to the appointee [*Prob. Code § 3611(a)*]. Alternatively, or in addition, the court may order that the balance of any money paid or to be paid be deposited in an insured account in a California financial institution or invested in a single-premium deferred annuity, subject to withdrawal only on the court's authorization. In this case, the remaining balance of any other property must be held on the conditions determined by the court to be in the best interests of the minor [*Prob. Code § 3611(b)*; *see § 364.30* et seq.].

- After a hearing, the court may order that the remaining balance of any money be paid to a special needs trust established under *Prob. Code § 3604* for the benefit of the minor. At least 15 days before the hearing, notice of the time and place of the hearing and a copy of the petition for the hearing must be mailed to the State Director of Health Services, the Director of Mental Health, and the Director of Developmental Services at their Sacramento offices [*Prob. Code § 3611(c)*].

- If the remaining balance of the money and other property does not exceed $20,000 in value, the court may order that all or any part of the money and property be held on any other conditions that it, in its discretion, determines to be in the minor's best interest [*Prob. Code § 3611(d)*].

- If the remaining balance of the money and other property does not exceed $5,000 in value, the court may order that all or any part of it be paid or delivered to a parent of the minor, without bond, on the terms and under the conditions specified in *Prob. Code §§ 3400-3402* [*Prob. Code § 3611(e)*]. For further discussion, *see § 364.13[3][b]*.

- If the remaining balance of the money or other property to be paid or delivered is to be paid or delivered for the benefit of the minor, the court may order that all or any part of the money and other property be transferred to a custodian for the benefit of the minor under the California Uniform Transfers to Minors Act (*Prob. Code § 3900 et seq.*) [*Prob. Code § 3611(f)*].

The court may also order that the remaining balance of the money and other property be paid or delivered to the trustee of a trust, which is createdby or approved of in the order approving the compromise of the minor's claim or judgment in the minor's favor. This trust must be revocable by the minor on reaching age 18. It must also contain other terms and conditions, including terms and conditions concerning the trustee's account and bond, as the court determines to be necessary to protect the minor's interests [*Prob. Code § 3611(g)*]. Unless the court orders otherwise for good cause shown, the trust instrument must (1) not contain no-contest provisions, (2) prohibit modification or revocation without court approval, (3) clearly identify the trustee and any other person with authority to direct the trustee to make disbursements, (4) prohibit investments by the trustee other than those permitted under *Prob. Code § 2574, (5)* require the trustee and any other person with authority to direct the trustee to make disbursements to post bond in the amount required under *Prob. Code § 2320 et seq., (6)* require the trustee to file accounts and reports for court approval, (7)

require court approval of changes in trustees and a court order appointing any successor trustee, and (8) require compensation of the trustee or the trustee's attorney to be in just and reasonable amounts fixed and allowed by the court [*Cal. Rules of Ct., Rule 7.903(c)*]. The requirements of items (5)-(8) to not apply to trusts that will have total assets of $20,000 or less, unless the court orders otherwise for good cause shown [*Cal. Rules of Ct., Rule 7.903(d)*]. The order creating or approving the funding of the trust must provide that it is subject to the court's continuing jurisdiction over trust proceedings under *Prob. Code § 15000 et seq.* [*Cal. Rules of Ct., Rule 7.903(a)(2), (b)*]. The order may also provide that the trust is subject to court supervision under the Probate Code, i.e., the court may require prior court approval or subsequent confirmation of the trustee's actions [*Cal. Rules of Ct., Rule 7.903(a)(3), (b)*].

Alternatively, the court may order that the remaining balance of any money paid or to be paid be deposited with the county treasurer if all of the following conditions are met [*Prob. Code § 3611(h)*]:

- The county board of supervisors has authorized the county treasurer to handle the deposits.

- The county treasurer must receive and keep safely all money deposited with the county treasurer under this statute, and must pay the money out only on order of the court; it must also credit each estate with the interest earned by the deposited funds less its actual cost authorized to be recovered under *Gov. Code § 27013*.

- The county treasurer and the sureties on its official bond are responsible for the safekeeping and payment of the money.

- The county treasurer must ensure that the money deposited will earn interest or dividends, or both, at the highest rate the county can reasonably obtain as a prudent investor.

- Deposited funds may only be invested or deposited in compliance with the provisions governing the investment or deposit of state funds set forth in *Gov. Code § 16640 et seq.*, the investment or deposit of county funds set forth in *Gov. Code § 53600*, or as authorized under *Prob. Code § 2400 et seq.* (fiduciaries).

For a form of order to deposit money in proceedings to compromise a claim, *see § 364.92*. For a form of receipt and acknowledgment of an order to deposit money pursuant to a compromise, *see § 364.93*. For a form of petition for withdrawal of funds, *see § 364.94*, and for a form of order for withdrawal of funds, *see § 364.95*.

[b] Delivery of Property to Minor's Parent

In cases in which the minor does not have a guardian of the estate and the court orders the balance of the money and other property, not exceeding $5,000 in value, paid or delivered to a parent of the minor entitled to the minor's custody, it must be held in trust for the minor until he or she reaches majority. In addition, the minor's total estate, including the money and other property to be paid or delivered to the parent, cannot exceed $5,000 in value. The parent to whom the money or other property is to be paid or delivered is required to give the person making the payment or delivery written assurance, verified by oath, that the minor's total estate--including the money or other property to be paid or delivered to the parent--does not exceed $5,000 in value [*Prob. Code § 3401*; *see § 364.30 et seq. and § 364.110*]. The effect of the parent's written receipt is to acquit the person making the payment or delivery [*Prob. Code § 3402*].

[c] Continuing Jurisdiction

Except to the extent that the court orders otherwise, the court making an order under *Prob. Code § 3611* when the minor has no guardian of the estate has continuing jurisdiction of the money and other property paid, delivered, deposited, or invested until the minor reaches the age of 18 years [*Prob. Code § 3612(a)*]. However, the trust of an individual who

meets the definition of a person with a disability under *20 C.F.R. § 416.906* [*Prob. Code § 3603(b)(3)*], and who reaches the age of 18 years, continues and is under continuing court jurisdiction until terminated by the court [*Prob. Code § 3612(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGifts to MinorsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGifts to MinorsCustodial Duties & RightsEstate, Gift & Trust LawPersonal GiftsGifts to MinorsUniform ActsFamily LawGuardiansGeneral Overview

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32-364 California Forms of Pleading and Practice--Annotated §§ 364.14-364.29

[Reserved]

§§ 364.14[Reserved]

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32-364 California Forms of Pleading and Practice--Annotated § 364.30

§ 364.30 Governing Law

Disposition of property belonging to a minor when the minor's total estate is less than $5,000 is governed by *Prob. Code §§ 3400-3402*. Disposition of money belonging to a minor when (a) the minor has a guardian of the estate and the sole asset of the guardianship estate is money or (b) whenthe minor has no guardian of the estate is governed by *Prob. Code §§ 3410-3413*.

Legal Topics:

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

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32-364 California Forms of Pleading and Practice--Annotated § 364.31

§ 364.31 Definitions

The term "total estate of the minor" includes both the money and any other property belonging to the minor, as well as the money and any other property belonging to the minor's guardianship estate [*Prob. Code § 3400(a)*]. In computing the "total estate of the minor" and "money belonging to the minor," custodial property held pursuant to the California Uniform Transfers to Minors Act (*Prob. Code § 3900 et seq.*) and any money or property subject to a court order pursuant to *Prob. Code §§ 3602(c), 3610-3612* (*see § 364.10* et seq.) must be deducted [*Prob. Code §§ 3400(b), 3410(b)*]. In addition, an unemancipated minor's earnings are not considered to be his or her property [*see Fam. Code § 7500*; *In re Marriage of Imperato (1975) 45 Cal. App. 3d 432, 437, 119 Cal. Rptr. 590* ("earnings" broadly defined)], except a portion of gross earnings withheld from as entertainment, artistic, or sports contract, as required by *Fam. Code § 6752* [*see Fam Code § 7500(c)*]. Therefore, the minor's earnings also generally should be deducted in computing the total estate of the minor or money belonging to the minor.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPersonal GiftsGifts to MinorsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGifts to MinorsUniform Acts

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32-364 California Forms of Pleading and Practice--Annotated § 364.32

§ 364.32 Delivery of Property to Parent

Money or other property belonging to a minor who does not have a guardian of the estate may be paid or delivered to a parent of the minor entitled to the minor's custody to be held in trust for the minor until the minor reaches majority, provided that both of the following requirements are satisfied [*Prob. Code § 3401(a), (c)*]:

- The "total estate of the minor" [*see § 364.31*], including the money and other property to be paid or delivered to the parent, does not exceed $5,000 in value.

- The parent to whom the money or other property is to be paid or delivered gives the person making the payment or delivery written assurance, verified by the parent's oath, that the total estate of the minor, including the money or other property to be paid or delivered to the parent, does not exceed $5,000 in value.

The written receipt of the parent giving the written assurance under *Prob. Code § 3401* is an acquittance of the person making the payment of money or delivery of other property [*Prob. Code § 3402*].

For a form of a parent's declaration to receive a minor's money or property, see *§ 364.110*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawParental Duties & RightsDutiesGeneral Overview

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32-364 California Forms of Pleading and Practice--Annotated § 364.33

§ 364.33 Disposition of Money Belonging to Minor

[1] Petition

A parent entitled to the minor's custody, the guardian of the minor's estate, or the person holding the minor's money may file a petition for an order under *Prob. Code §§ 3410-3413* [*Prob. Code § 3411(a)*]. The petition must be filed in the superior court of the county (1) in which the minor resides, if he or she has no guardian of the estate, or (2) having jurisdiction of the guardianship estate, if the minor has a guardian of the estate [*Prob. Code § 3411(b)*]. *Prob. Code §§ 3410-3413*], the statutory sections governing property in the form of money, apply (1) if a minor has a guardian of his or her estate and the sole asset of the guardianship estate is money, or (2) if the minor has no guardian and there is money belonging to the minor [*Prob. Code § 3410(a)*].

[2] Guardian of Estate

If the minor has a guardian of the estate and the sole asset of the guardianship estate is money, the court may order that the guardianship of the estate be terminated. If it does so, the court in its discretion also may order one or more of the dispositions set forth under *§ 364.33[3]* [*see Prob. Code § 3412*]. For further discussion and a form of petition for use in such a case, see Ch. 290G, *Guardianship and Conservatorship Removal or Resignation of Guardians and Conservators* , and Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships* .

[3] No Guardian of Estate

If the minor has no guardian of the estate and there is money belonging to the minor, the court may order that a guardian of the estate be appointed and that the money be paid to the guardian [*Prob. Code § 3413*]. For discussion of appointment of a guardian, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* .

Alternatively, the court may order that the money belonging to the minor be disposed of in one or more of the following ways:

- That the money be deposited in an insured account in a California financial institution or in a

single-premium deferred annuity, subject to withdrawal only on authorization of the court [*Prob. Code § 3413(a)*].

- If the money belonging to the minor does not exceed $20,000, that the money be held on whatever other conditions the court in its discretion determines to be in the minor's best interests [*Prob. Code § 3413(c)*].

- If the money belonging to the minor does not exceed $5,000, that all or any part of the money be paid to a parent of the minor, withoutbond, on the terms and conditions specified in *Prob. Code §§ 3400-3402* (*discussed under § 364.32*) [*Prob. Code § 3413(d)*].

- That all or part of the money be transferred to a custodian for the benefit of the minor under the California Uniform Transfers to Minors Act (*Prob. Code § 3900 et seq.*) [*Prob. Code § 3413(b)*].

- That the remaining balance of any money paid or to be paid be deposited with the county treasurer, if all of the following conditions are met [*Prob. Code § 3413(e)*]:

(1) The county board of supervisors has authorized the county treasurer to handle the deposits.

(2) The county treasurer must receive and keep safely all money deposited with the county treasurer under this statute, and must pay the money out only on order of the court; it must also credit each estate with the interest earned by the deposited funds less its actual cost authorized to be recovered under *Gov. Code § 27013*.

(3) The county treasurer and the sureties on its official bond are responsible for the safekeeping and payment of the money.

(4) The county treasurer must ensure that the money deposited will earn interest or dividends, or both, at the highest rate the county can reasonably obtain as a prudent investor.

(5) Deposited funds may only be invested or deposited in compliance with the provisions governing the investment or deposit of state funds set forth in *Gov. Code § 16640 et seq.*, the investment or deposit of county funds set forth in *Gov. Code § 53600*, or as authorized under *Prob. Code § 2400 et seq.* (fiduciaries).

For a form of petition to dispose of a minor's money, see *§ 364.111*. For a form of order disposing of a minor's funds, see *§ 364.112*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGifts to MinorsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGifts to MinorsCustodial Duties & RightsEstate, Gift & Trust LawPersonal GiftsGifts to MinorsUniform ActsFamily LawGuardiansGeneral Overview

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[Reserved]

§§ 364.34[Reserved]

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32-364 California Forms of Pleading and Practice--Annotated § 364.50

§ 364.50 State Statutes

[1] Compromise of Claim When Action Pending

Power of guardian of estate or guardian ad litem of minor, with the court's approval, to compromise action or proceeding, agree to order or judgment to be entered, satisfy judgment in favor of ward, or release or discharge any claim of ward. *Code Civ. Proc. § 372*

Money or other property to be paid or delivered pursuant to order or judgment for benefit of minor is to be paid and delivered as provided in *Prob. Code § 3600 et seq. Code Civ. Proc. § 372*

Power of guardian ad litem to compromise or settle claims of person or persons of designated class who are not ascertained or in being. *Code Civ. Proc. § 373.5*

[2] Compromise of Claim When No Action Pending

Right of parent to compromise claim of minor child. *Prob. Code § 3500*

[3] Definitions

"Interested person" defined. *Prob. Code § 1424*

"Single-premium deferred annuity" defined. *Prob. Code § 1446*

[4] Disposition of Property Received

Court's power to direct deposit of proceeds of compromise made by parent in specified institutions. *Prob. Code § 3500*

Payment and disposition of money or other property paid or delivered pursuant to compromise or judgment for minor. *Prob. Code § 3600 et seq.*

Order for payment of expenses. *Prob. Code § 3601*

Disposition of balance of funds. *Prob. Code §§ 3602, 3610, 3611*

Uniform Transfers to Minors Act. *Prob. Code § 3900 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-364 California Forms of Pleading and Practice--Annotated § 364.51

§ 364.51 California Rules of Court

Petition for approval of compromise of claim. *Cal. Rules of Ct., Rule 7.950*

Disclosure of attorney's interest in petition to compromise claim. *Cal. Rules of Ct., Rule 7.951*

Attendance at hearing on petition to compromise claim. *Cal. Rules of Ct., Rule 7.952*

Order for deposit of funds of minor. *Cal. Rules of Ct., Rule 7.953*

Petition for withdrawal of funds deposited for minor. *Cal. Rules of Ct., Rule 7.954*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 364.52 Local Rules of Court

Alameda Co. Unified Super. Ct. Rules, Rule 7.5

Los Angeles Co. Super. Ct. Rules, Rule 10.187 et seq.

Orange Co. Super. Ct. Rules, Rule 613.02 et seq.

Sacramento Co. Super. Ct. Rules, Rules 10.01, 15.95

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGuardians for MinorsEstate, Gift & Trust LawPersonal GiftsGifts to MinorsGeneral OverviewFamily LawGuardiansGeneral OverviewFamily LawParental Duties & RightsDutiesGeneral Overview

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32-364 California Forms of Pleading and Practice--Annotated § 364.53

§ 364.53 Decisions

Proceedings under former *Prob. Code § 1431* (*now Prob. Code § 3500*) are entitled to presumption of regularity. *Burge v. City & County of San Francisco (1953) 41 Cal. 2d 608, 613, 262 P.2d 6*

Mother awarded physical custody of child has authority to compromise claim pursuant to former *Prob. Code § 1431*. *Burge v. City & County of San Francisco (1953) 41 Cal. 2d 608, 618, 262 P.2d 6*

Right of disaffirmance of judgment by unrepresented minor is barred by laches after minor reaches age of majority. *Gouanillou v. Industrial Acci. Com. (1920) 184 Cal. 418, 420, 193 P. 937* (minor defendant); *Johnston v. Southern Pacific Co. (1907) 150 Cal. 535, 538, 89 P. 348* (minor plaintiff); *Keane v. Penha (1946) 76 Cal. App. 2d 693, 696, 173 P.2d 835*

Court is required to consider all dispositions of funds permitted by *Prob. Code § 3611* and then select one best suited to individual case. *Christensen v. Superior Court (1987) 193 Cal. App. 3d 139, 144, 239 Cal. Rptr. 143*

Paternity suit settlement by mother without court approval of compromise of minor's claim pursuant to former *Prob. Code § 1431* is not res judicata as to minor's rights. *Everett v. Everett (1976) 57 Cal. App. 3d 65, 68-71, 129 Cal. Rptr. 8*

Former *Prob. Code § 1431* was part of general, comprehensive legislative scheme for regulation of minor's property rights and not unconstitutional as violative of due process. *Darlington v. Basalt Rock Co., Inc. (1958) 157 Cal. App. 2d 575, 581-582, 321 P.2d 490*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 364.54 Text References

Witkin, California Procedure, vol. 4, *Pleading*, §§ 69-70 (4th ed. 1997)

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[Reserved]

§§ 364.55[Reserved]

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§ 364.70 State Statutes

"Total estate of minor" defined. *Prob. Code § 3400*

Delivery of minor's property to parent when total estate less than $5,000. *Prob. Code § 3401*

Effect of parent's written receipt for minor's property. *Prob. Code § 3402*

Applicability of *Prob. Code §§ 3410-3413*, statutory provisions governing property in the form of money. *Prob. Code § 3410*

Standing to petition for order under *Prob. Code §§ 3412* and *3413*, statutory provisions governing petitions for court orders and termination of guardianship of estate in cases in which sole asset of estate is money. *Prob. Code § 3411(a)*

Jurisdiction and venue for petition for order under *Prob. Code §§ 3412* and *3413*, statutory provisions governing petitions for court orders and termination of guardianship of estate in cases in which sole asset of estate is money. *Prob. Code § 3411(b)*

Termination of guardianship of estate when sole asset of guardianship estate is money. *Prob. Code § 3412*

Disposition of money belonging to minor when minor has no guardian of estate. *Prob. Code § 3413*

Uniform Transfers to Minors Act. *Prob. Code § 3900 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-364 California Forms of Pleading and Practice--Annotated § 364.71

§ 364.71 Law Reviews

Barnett & Spradlin, *Enslavement in the Twentieth Century: The Right of Parents to Retain Their Childrens' Earnings, 5 Pepperdine L. Rev. 673 (1978)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-364 California Forms of Pleading and Practice--Annotated § 364.72

§ 364.72 Text References

Witkin, Summary of California Law, vol. 10, *Parent and Child*, § 164 (9th ed. 1989)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§§ 364.73[Reserved]

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32-364 California Forms of Pleading and Practice--Annotated § 364.90

§ 364.90 Petition to Approve Compromise of Claim [Code of Civ. Proc. § 372; Prob. Code § 3500; Cal. Rules of Ct., Rules 3.1384, 7.950, and 7.951]--Judicial Council Forms MC-350, MC-350(A-13b(5)), MC-350EX

[1] FORM Petition to Approve Compromise of Claim [Code of Civ. Proc. § 372; Prob. Code § 3500; Cal. Rules of Ct., Rules 3.1384, 7.950, and 7.951]--Judicial Council Form MC-350

Click here to view image.
Medical Service Provider Attachment to Petition to Approve Compromise of Claim--Judicial Council Form MC-350(A-13b(5))

Click here to view image.
Expedited Petition to Approve Compromise of Disputed Claim--Judicial Council Form MC-350EX

Click here to view image.

[2] Use of Forms

These forms are illustrations of Cal. Judicial Council Forms MC-350, MC-350(A-13b(5)) (optional medical service provider attachment), and MC-350EX (mandatory alternative for expedited use) for use in obtaining court approval of a disputed claim involving a minor. They may be used regardless of whether an action is pending by checking the appropriate box in The Caption [*see Code Civ. Proc. § 372* (action pending); *Prob. Code § 3500* (no action pending)].

Use of these forms is mandatory [*see Cal. Rules of Ct., Rule 1.31*]. These forms may be obtained from any superior court clerk.

These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Required Disclosures in Petition

A petition for court approval of a compromise of a minor's claim or covenant not to sue under *Prob. Code § 3500* or *Code Civ. Proc. § 372* must contain a full disclosure of all information that has any bearing on the reasonableness of the compromise or covenant [*Cal. Rules of Ct., Rule 7.950*]. Further, if the petitioner has been represented or assisted by an attorney in preparing the petition or in any other respect with regard to the claim, the petition must disclose specified information, as illustrated in Paragraph 11 of the foregoing form [*Cal. Rules of Ct., Rule 7.951*].

[4] Verification

A petition for compromise of a disputed claim of a minor must be verified [*see Prob. Code § 1021*; *Cal. Rules of Ct., Rule 7.950*].

[5] Venue and Hearing

The petition must be approved by the superior court either of the county in which the minor resides when the petition is filed, or of any county in which suit on the claim or matter properly could be brought [*Prob. Code § 3500(b)*].

On filing, the petition will be set for hearing in the probate court [*see* Los Angeles Co. Super. Ct. Rules, Rule 10.187(a)(1)].

The person compromising the claim on behalf of the minor and the minor must attend the hearing on the compromise of the claim unless the court for good cause dispenses with their personal appearance [*Cal. Rules of Ct., Rule 7.952(a)*]. At the hearing, the court may require the presence and testimony of witnesses, including the attending or examining physician [*Cal. Rules of Ct., Rule 7.952(b)*].

[6] Cross References

For forms for use as petitions by guardians for approval of claims by debtors, tortfeasors, and creditors, see Ch. 290, *Guardianship and Conservatorship: Maintenance of Ward or Conservatee*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 364.91 Order Approving Compromise of Claim [Code of Civ. Proc. § 372; Prob. Code § 3500; Cal. Rules of Ct., Rules 3.1384 and 7.953]--Judicial Council Form MC-351

[1] FORM Order Approving Compromise of Claim [Code of Civ. Proc. § 372; Prob. Code § 3500; Cal. Rules of Ct., Rules 3.1384 and 7.953]--Judicial Council Form MC-351

Click here to view image.

[2] Use of Form

This form is an illustration of Judicial Council Form MC-351, for use when an order is made approving the compromise of a disputed claim involving a minor.

Use of the Judicial Council Form is mandatory [*see Cal. Rules of Ct., Rule 1.31*]. This form may be obtained from any superior court clerk.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form provides for the manner of disbursement of the settlement proceeds, whether paid for attorney's fees (Paragraph 7b(1)(a)), reimbursement for medical and other expenses paid by the petitioner (Paragraph 7b(1)(b)), medical, hospital, ambulance, nursing, and other like expenses (Paragraph 7b(1)(c)), and other authorized expenses (Paragraph 7c(1)(d)). The form also specifies the method of payment of the balance of the settlement proceeds (Paragraph 7c(2)). If the settlement order provides for payment into a blocked account, the court requires the attorney submitting the proposed order to also submit an Order to Deposit Money into Blocked Account [*see § 364.92*] and a Receipt and Acknowledgment of Order for the Deposit of Money into Blocked Account [*see § 364.93*]. Three copies of each form are required to be delivered to each depository at the time of deposit, and the petitioner is required to file a copy of the Receipt within 15 days of the deposit (Paragraph 8b).

[3] Cross References

See also *§ 364.90*

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-364 California Forms of Pleading and Practice--Annotated § 364.92

§ 364.92 Order to Deposit Money into Blocked Account [Code of Civ. Proc. § 372; Prob. Code § 3600; Cal. Rules of Ct., Rules 3.1384 and 7.953]--Judicial Council Form MC-355

[1] FORM Order to Deposit Money into Blocked Account [Code of Civ. Proc. § 372; Prob. Code § 3600; Cal. Rules of Ct., Rules 378 and 7.953]--Judicial Council Form MC-355

Click here to view image.

[2] Use of Form

This form is an illustration of Judicial Council Form MC-355. The form is signed by the judge contemporaneously with the Order Approving Compromise of Claim [*see § 364.91*].

Use of the Judicial Council Form is mandatory [*see Cal. Rules of Ct., Rule 1.31*]. This form may be obtained from any superior court clerk.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Required Statements in Order

In any case in which the court orders that funds to be received by a minor must be deposited in a financial institution and not disbursed without further order of the court, the order must include a provision that a certified or filed endorsed copy of the order must be delivered to a manager at the financial institution where the funds are to be deposited, and that a receipt from the financial institution must be promptly filed with the court, acknowledging receipt of both the funds deposited and the order for deposit of funds [*Cal. Rules of Ct., Rule 7.953(a)*]. If, in the order approving the compromise of a minor's claim, there is a finding that the minor will attain the age of majority on a definite date, the order for deposit may require that the depository permit the withdrawal of funds by the former minor after that date, without further order of the court [*Cal. Rules of Ct., Rule 7.953(b)*].

[4] Cross References

See also *§ 364.91*

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-364 California Forms of Pleading and Practice--Annotated § 364.93

§ 364.93 Receipt and Acknowledgment of Order for the Deposit of Money into Blocked Account [Code of Civ. Proc. § 372; Prob. Code § 3600; Cal. Rules of Ct., Rules 3.1384 and 7.953]--Judicial Council Form MC-356

[1] FORM Receipt and Acknowledgment of Order for the Deposit of Money into Blocked Account [Code of Civ. Proc. § 372; Prob. Code § 3600; Cal. Rules of Ct., Rules 378 and 7.953]--Judicial Council Form MC-356

Click here to view image.

[2] Use of Form

The form is an illustration of Judicial Council Form MC-356. Use of this form is mandatory [*see Cal. Rules of Ct., Rule 1.31*]. This form may be obtained from any superior court clerk.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form must be attached to an Order to Deposit Money into Blocked Account [*see § 364.92*] and presented to each depository at the time of a deposit. The form specifies that no withdrawal of principal or interest from the blocked account is permitted without a signed court order under the specified case name and number, and under court seal.

[3] Required Statements in Order

In any case in which the court orders that funds to be received by a minor must be deposited in a financial institution and not disbursed without further order of the court, the order must include a provision that a certified or filed endorsed copy of the order must be delivered to a manager at the financial institution where the funds are to be deposited, and that a receipt from the financial institution must be promptly filed with the court, acknowledging receipt of both the funds deposited and the order for deposit of funds [*Cal. Rules of Ct., Rule 7.953(a)*]. If, in the order approving the compromise of a minor's claim, there is a finding that the minor will attain the age of majority on a definite date, the order for deposit may require that the depository permit the withdrawal of funds by the former minor after that date,

without further order of the court [*Cal. Rules of Ct., Rule 7.953(b)*].

[4] Cross References

See also *§ 364.91*

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-364 California Forms of Pleading and Practice--Annotated § 364.94

§ 364.94 Petition for Withdrawal of Funds from Blocked Account [Cal. Rules of Ct., Rules 3.1384 and 7.954]--Judicial Council Form MC-357

[1] FORM Petition for Withdrawal of Funds from Blocked Account [Cal. Rules of Ct., Rules 378 and 7.954]--Judicial Council Form MC-357

Click here to view image.

[2] Use of Form

This form is an illustration of Judicial Council Form MC-357, for use in withdrawing funds deposited in a financial institution pursuant to settlement of a disputed claim involving a minor.

Use of this form is mandatory [*see Cal. Rules of Ct., Rule 1.31*]. This form may be obtained from any superior court clerk.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Petition and Hearing

A petition for the withdrawal of funds deposited for a minor must be verified and must include the identity of the depository, a showing of the amounts previously withdrawn, a statement of the balance on deposit at the time of the filing of the petition, and a justification for the withdrawal [*Cal. Rules of Ct., Rule 7.954(a)*]. A petition for the withdrawal of funds may be considered ex parte or set for a hearing at the discretion of the court [*Cal. Rules of Ct., Rule 7.954(b)*].

[4] Retention of Court's Jurisdiction

In any case in which the court makes an order regarding the disposition of the balance of the money or property paid or delivered pursuant to a compromise or judgment for a minor after expenses, costs, and fees, the court making the order under *Prob. Code § 3611*, except to the extent the court orders otherwise, has continuing jurisdiction of the money and other property paid, delivered, deposited, or invested until the minor reaches the age of 18 years [*Prob. Code § 3612*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansGeneral OverviewFamily LawParental Duties & RightsGeneral Overview

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 364 MINORS: CLAIMS AND PROPERTY OF MINORS
IV. FORMS
A. Compromise of Minor's Claim and Disposition of Property Received Pursuant to Compromise or Judgment

32-364 California Forms of Pleading and Practice--Annotated § 364.95

§ 364.95 Order for Withdrawal of Funds from Blocked Account [Cal. Rules of Ct., Rules 3.1384 and 7.954]--Judicial Council Form MC-358

[1] FORM Order for Withdrawal of Funds from Blocked Account [Cal. Rules of Ct., Rules 378 and 7.954]--Judicial Council Form MC-358

Click here to view image.

[2] Use of Form

This form is an illustration of Judicial Council Form MC-358, for use in withdrawing funds deposited in a financial institution pursuant to settlement of a disputed claim involving a minor.

Use of this form is mandatory [*see Cal. Rules of Ct., Rule 1.31*]. This form may be obtained from any superior court clerk.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Form*s, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Cross References

See also *§ 364.94*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansGeneral OverviewFamily LawParental

Duties & RightsGeneral Overview

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IV. FORMS
A. Compromise of Minor's Claim and Disposition of Property Received Pursuant to Compromise or Judgment

32-364 California Forms of Pleading and Practice--Annotated §§ 364.96-364.109

[Reserved]

§§ 364.96[Reserved]

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IV. FORMS
B. Money and Property Belonging to Minor

32-364 California Forms of Pleading and Practice--Annotated § 364.110

§ 364.110 Disposition of Minor's Estate Not Exceeding $5,000 [Prob. Code § 3401]--Parent's Declaration to Receive Minor's Money or Property

[1] FORM Disposition of Minor's Estate Not Exceeding $5,000 [Prob. Code § 3401]--Parent's Declaration to Receive Minor's Money or Property

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
a minor, by _____ [*name*],	)	
his/her guardian [ad litem],	)	
Plaintiff,	)	
vs.	)	
_____ [*name*],	)	NO. _____
Defendant.	)	DECLARATION TO RECEIVE MINOR'S
[*OR*]	)	_____ [MONEY *and/or* PROP-
In the Matter of the _____	)	ERTY]
[claim *or* Estate] of _____	)	
[*name*],	)	
a Minor.	)	
	)	
	)	

_____

I, _____ [*name of parent*], state:

1. I am the _____ [mother *or* father] of _____ [*name*], a minor, and am entitled to the custody of this minor. [Pursuant to the order of this court, dated _____, approving a compromise of

_____ (a disputed claim of the minor *or* the above-entitled and numbered action), the minor is entitled to _____ (money in the amount *or* property with a value) of $_____ (*sum not exceeding $5,000*).]

[2. _____ (*Name*) is the guardian of the estate of the minor, appointed by order of the Superior Court of California, County of _____ on _____ (*date*). The value of the guardianship estate of the minor is $_____.]

[3. The minor has other _____ (money *and/or* property) _____ (in the sum *and/or* with a value) of $_____.]

4. The total estate of the minor, including the _____ [money *and/or* property] to which the minor is entitled pursuant to the compromise, does not exceed $5,000 [in value].

5. I hereby agree to hold in trust for this minor all of the _____[money *and/or* property] that I may receive on behalf of the minor untilthe minor attains the age of majority. I further agree to provide a receipt for the money or property due the minor, and to fully release and hold harmless _____ [*name of person from whom the money or property is to be received*] on _____ [payment *and/or* delivery] of any and all _____ [money *and/or* property] belonging to the minor.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form of declaration above is to be executed by the parent of a minor under penalty of perjury when the parent is to receive money or other property belonging to a minor whose total estate does not exceed $5,000 [*Prob. Code §§ 3400-3402, 3611(e)*].

[3] State Statutes

Definition of the term "total estate of minor." *Prob. Code § 3400*

Right of parent to receive money or property belonging to minor on execution of verified written assurance. *Prob. Code § 3401*

Parent's verified written assurance and receipt as acquittance of person making payment of money or delivery of other property. *Prob. Code § 3402*

Order for disposition of funds from compromise of minor's claim or pending action or proceeding. *Prob. Code § 3611*

[4] Cross References

For a discussion and skeletal forms of affidavits and declarations under penalty of perjury, see Ch. 15, *Affidavits, Certificates, and Declarations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansGeneral OverviewFamily LawParental Duties & RightsGeneral OverviewFamily LawParental Duties & RightsDutiesGeneral Overview

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Chapter 364 MINORS: CLAIMS AND PROPERTY OF MINORS
IV. FORMS
B. Money and Property Belonging to Minor

32-364 California Forms of Pleading and Practice--Annotated § 364.111

§ 364.111 Petition to Dispose of Minor's Money [Prob. Code § 3413]

[1] FORM Petition to Dispose of Minor's Money [Prob. Code § 3413]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Estate of_____ [*name*], a Minor.	)))))	NO. _____ PETITION FOR ORDER TO DISPOSE OF MINOR'S MONEY

_____

Petitioner alleges:

[*EITHER*]

1. _____ [*Name*], petitioner, is a parent of _____ (*name*), a minor, and entitled to custody of the minor.

[*OR*]

1. _____ [*Name*], petitioner, is holding money belonging to _____ [*name*], a minor[, as _____ (*allege capacity*, *e.g.*, the personal representative of the estate of _____ (*name*), deceased)].

[*CONTINUE*]

2. The minor resides in _____ County, California, and has no guardian of the estate.

3. Money in the amount of $_____ belonging to the minor is presently being held by _____ [*name person who or institution that is holding funds, e.g.,* petitioner].

WHEREFORE, petitioner requests that this court:

1. Take jurisdiction of the disposition of the money;

2. Order that the money be _____ [deposited in an insured account in *or* invested in a single-premium deferred annuity issued by *or* deposited with *or* paid to] _____ [*name*], _____ [a financial institution in this state *or* the Treasurer of _____ County *or* a parent of the minor entitled to custody of the minor], _____ [subject to withdrawal only on the court's authorization *or* to be held in trust for the minor until the minor reaches majority *or specify other conditions*]; and

3. Grant such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner_____ [*name*]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know its contents. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form above is for use in petitioning the court under *Prob. Code § 3413* for an order disposing of money belonging to a minor. For discussion of the types of orders permitted, see *§ 364.33[3]*.

[3] Petitioners

A petition requesting a court order under *Prob. Code § 3413* may be filed by a parent of a minor entitled to custody of the minor, the guardian of the estate of the minor, or the person holding the money belonging to the minor [*Prob. Code § 3411(a)*]. *Prob. Code § 3413* only applies, however, when the minor has no guardianship of the estate. If such a guardianship exists, the petition must be brought under *Prob. Code § 3412*, which authorizes basically the same relief as *Prob. Code § 3413*. For discussion and a form of petition for use in such cases, see Ch. 290G, *Guardianship and Conservatorship: Removal or Resignation of Guardians and Conservators* , and Ch. 290H, *Guardianships and Conservatorships: Termination of Guardianships and Conservatorships* .

[4] Jurisdiction and Venue

A petition for an order under *Prob. Code § 3413* must be filed in the superior court of the county in which the minor resides [*see Prob. Code §§ 3411(b), 3413*].

[5] Verification

A petition for an order disposing of money belonging to a minor pursuant to *Prob. Code § 3413* must be verified [*Prob. Code § 1021*].

[6] Cross References

For a related form, see *Ch. 367A, Minors: Tort Actions, § 367A.90*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansGeneral OverviewFamily LawParental Duties & RightsDutiesGeneral Overview

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Chapter 364 MINORS: CLAIMS AND PROPERTY OF MINORS
IV. FORMS
B. Money and Property Belonging to Minor

32-364 California Forms of Pleading and Practice--Annotated § 364.112

§ 364.112 Order Disposing of Minor's Funds (Ex Parte) [Prob. Code § 3413(a)]--Los Angeles County Superior Court Form

[1] FORM Order Disposing of Minor's Funds (Ex Parte) [Prob. Code § 3413(a)]--Los Angeles County Superior Court Form

Click here to view image.

[2] Use of Form

The form is designed for use in Los Angeles County as an order made after an ex parte petition to dispose of a minor's funds pursuant to *Prob. Code § 3413(a)*. The form is a reproduction of Los Angeles County Form No. 338, which is available at the offices of the county clerk. Counsel should ascertain whether equivalent forms are required for use in other counties.

[3] Authorized Dispositions

Prob. Code § 3413(a) provides, in part, that if a minor has no guardian of the estate (and the court does not appoint one) and there is money belonging to the minor, the court may order that the money be deposited in an insured account in a California financial institution, or in a single-premium deferred annuity, subject to withdrawal only on court authorization. The court may make other dispositions under *Prob. Code § 3413(b)-(e)*, however, in addition to or instead of those above, as discussed in *§ 364.33[3]*.

If the minor has a guardianship of the estate and the sole asset of the estate is money, the proceeding must be brought under *Prob. Code § 3412*, which authorizes the court to terminate the guardianship and order the same dispositions as are authorized by *Prob. Code § 3413*. For discussion of and forms for use in such cases, see Ch. 290G, *Guardianship and Conservatorship: Removal or Resignation of Guardians and Conservators* , and Ch. 290H, *Guardianships and Conservatorships: Termination of Guardianships and Conservatorships* .

[4] Blocked Accounts

The form reproduced here contemplates that the petitioner will deposit the balance of funds due to the minor in a blocked account, and that the petitioner could not make withdrawals from the account without prior court authorization. Because this type of disposition is not required in all cases [*see, e.g., Prob. Code § 3413(d)* (money or property not exceeding $5,000 as subject to disposition under *Prob. Code §§ 3400-3402*)], use of the form is limited to those situations in which use of a blocked account and court-sanctioned approval for withdrawals from that account are desirable or required by law.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsFamily LawGuardiansGeneral OverviewFamily LawParental Duties & RightsDutiesGeneral Overview

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 365 MINORS: CONTRACT ACTIONS

32-365 California Forms of Pleading and Practice--Annotated 365.syn

§ 365.syn Synopsis to Chapter 365: MINORS: CONTRACT ACTIONS

§ 365.01 Scope of Chapter

§ 365.02 Cross References

§§ 365.03-365.09 [Reserved]

§ 365.10 Governing Statutes

§ 365.11 Minor's Capacity to Contract

§ 365.12 Contracts for Necessaries

§ 365.13 Medical and Dental Care

[1] Blood Donations

[2] Married Minors

[3] Prevention or Treatment of Pregnancy

[4] Minors in Military

[5] Certain Minors Living Separate and Apart From Parent or Guardian

[6] Minors With Infectious Disease

[7] Minor Victim of Rape

[8] Minor Victim of Sexual Assault

[9] Minor Drug Addict or Alcoholic

[10] Mental Health Treatment

[11] Inspection of Medical Records

§§ 365.14through 365.29 [Reserved]

§ 365.30 Governing Statutes

§ 365.31 Minor's Right to Disaffirm Contracts

§ 365.32 Exceptions to Right to Disaffirm

[1] Statutory Authority

[2] Innocent Purchasers

[3] Contracts Expressly Authorized by Statute

§ 365.33 Filing of Action by Minor

§§ 365.34through 365.49 [Reserved]

§ 365.50 Governing Statutes

§ 365.51 Artistic or Creative Service Contracts

§ 365.52 Contracts for Literary, Musical, or Dramatic Properties or Use of Likeness

§ 365.53 Athletic Services Contracts

§ 365.54 Court Approval

§ 365.55 Withholding of Portion of Minor's Gross Earnings

§ 365.56 Fiduciary Relationship

§ 365.57 Forwarding Earnings to Actors' Fund of America In Event of Noncompliance by Parent, Guardian, or Trustee

§ 365.58 Contracts With Licensed Artists' Managers

§§ 365.59through 365.79 [Reserved]

§ 365.80 State Statutes

§ 365.81 Decisions

[1] Medical Care

[2] Necessaries

§ 365.82 Law Reviews

§ 365.83 Text References

§§ 365.84through 365.99 [Reserved]

§ 365.100 State Statutes

[1] Disaffirmance in General

[2] Obligations That Cannot Be Disaffirmed

§ 365.101 Decisions

§ 365.102 Text References

§§ 365.103through 365.119 [Reserved]

§ 365.120 State Statutes

§ 365.121 Decisions

§ 365.122 Law Reviews

§ 365.123 Text References

§§ 365.124through 365.139 [Reserved]

§ 365.140 Complaint for Damages for Breach of Contract--By Supplier of Necessaries to Minor [Fam. Code § 6712]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

§§ 365.141through 365.159 [Reserved]

§ 365.160 Notice of Disaffirmation of Agreement of Minor [Fam. Code § 6710]

[1] FORM

[2] Use of Form

§ 365.161 Affirmative Defense--Contract Disaffirmed by Minor Defendant [Fam. Code § 6710]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 365.162 Affirmative Defense--Defendant Was Innocent Purchaser Who Received Goods Before Disaffirmation [Fam. Code § 6713]

[1] FORM

[2] Use of Form

[3] Cross References

§§ 365.163through 365.179 [Reserved]

§ 365.180 Petition for Approval of Minor's Employment Contract [Fam. Code §§ 6751, 6752(b)]

[1] FORM

[2] Use of Form

[3] Venue and Filing

[4] State Statutes

[5] Cross References

§ 365.181 Order Approving Minor's Employment Contract [Fam. Code § 6751]

[1] FORM

[2] Use of Form

[3] Cross References

§ 365.182 Petition for Order Amending or Terminating Trust Established for Minor [Fam. Code § 6752]

[1] FORM

[2] Use of Form

[3] Termination of Trust for Minor

§ 365.183 Order Amending or Terminating Trust Established for Minor [Fam. Code § 6752]

[1] FORM

[2] Use of Form

[3] Cross References

§ 365.184 Complaint for Injunctive Relief by Motion Picture Corporation Against Actor and Competing Motion Picture Corporation to Enjoin Breach of Contract--Contract for Artistic Services Executed During Actor's Minority and Approved by Superior Court [Fam. Code §§ 6750(a)(1), 6751]

[1] FORM

[2] Use of Form

[3] Jurisdiction

[4] Verification

[5] Ex Parte Application

[6] State Statutes

[7] Decisions

[8] Cross References

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 365 MINORS: CONTRACT ACTIONS
PART I. SCOPE

32-365 California Forms of Pleading and Practice--Annotated § 365.01

§ 365.01 Scope of Chapter

This chapter includes a discussion of the validity of contracts for necessaries and for medical care entered into by minors. It includes a complaint against a minor by a supplier of necessaries [*see § 365.140*].

This chapter also discusses and presents forms for use in connection with the disaffirmation of a contract by a minor. It includes the following forms:

- A form for notice of disaffirmation [*see § 365.160*].
- A form for an affirmative defense by a minor who disaffirmed a contract [*see § 365.161*].
- An affirmative defense by an innocent purchaser who had no notice or knowledge of a minor's disaffirmation [*see § 365.162*].

For discussion and forms relating to contracts by minors for necessaries, see *§ 365.10* et seq. for a discussion and forms relating to contracts involving artistic or athletic services by minors, see *§ 365.50* et seq.

This chapter also discusses and contains forms for use in obtaining court approval of contracts by minors in the arts, entertainment, and sports, and for use in litigation involving contracts of this type. The chapter includes the following forms:

- A petition and order to obtain court approval of contracts for artistic services, for literary, musical, or dramatic properties, and for athletic services by a minor [*§§ 365.180, 365.181*].
- A petition and order to amend or terminate a trust plan established for a minor by the court [*§§ 365.182, 365.183*].
- A form for a complaint for an action to enjoin violation of a contract for artistic services involving a minor that had been approved by the superior court [*see § 365.184*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAge

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32-365 California Forms of Pleading and Practice--Annotated § 365.02

§ 365.02 Cross References

For a discussion and forms relating to breach of contract, see Ch. 140, *Contracts* .

For discussion and forms regarding minors and approval of the compromise of disputed claims of minors, see Ch. 364, *Minors: Claims and Property of Minors* .

For discussion and forms regarding minors and medical care or enlistment in the armed services, see Ch. 366, *Minors: Court Consent for Medical Care or Enlistment* .

For discussion and forms regarding minors disaffirmation of a judgment entered against a minor who was unrepresented by a guardian ad litem, see Ch. 367, *Minors: Disaffirmation of Judgments* .

For discussion and forms regarding minors and tort actions, see Ch. 367A, *Minors: Tort Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachGeneral OverviewContracts LawFormationCapacity of PartiesAge

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PART I. SCOPE

32-365 California Forms of Pleading and Practice--Annotated §§ 365.03-365.09

[Reserved]

§§ 365.03[Reserved]

California Forms of Pleading and Practice--Annotated

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 365 MINORS: CONTRACT ACTIONS
PART II. LEGAL BACKGROUND
A. Contracts for Necessaries and Medical Care

32-365 California Forms of Pleading and Practice--Annotated § 365.10

§ 365.10 Governing Statutes

Contracts by minors for necessaries are governed by *Fam. Code § 6712*.

Contracts by minors for enumerated medical and hospital services are governed by *Fam. Code §§ 6900-6929*, *7002*, and *7050(e)(1)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAge

California Forms of Pleading and Practice--Annotated

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 365 MINORS: CONTRACT ACTIONS
PART II. LEGAL BACKGROUND
A. Contracts for Necessaries and Medical Care

32-365 California Forms of Pleading and Practice--Annotated § 365.11

§ 365.11 Minor's Capacity to Contract

A minor cannot give a delegation of power, or make a contract relating to real property or any interest in real property, or relating to any personal property not in his or her immediate possession or control [*Fam. Code § 6701*]. A minor may make any other type of contract in the same manner as an adult, however, subject only to his or her power of disaffirmance [*Fam. Code § 6700*; *see Fam. Code §§ 6710-6713, 6750, 6751*].

For discussion and forms related to disaffirmation of contracts, *see § 365.30* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAgeContracts LawFormationCapacity of PartiesMental Capacity

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PART II. LEGAL BACKGROUND
A. Contracts for Necessaries and Medical Care

32-365 California Forms of Pleading and Practice--Annotated § 365.12

§ 365.12 Contracts for Necessaries

An otherwise valid contract entered into during minority may not be disaffirmed on that ground either during the actual minority of the person entering into the contract or at any time thereafter if all of the following requirements are satisfied [*Fam. Code § 6712*; *see, e.g., Burnand v. Irigoyen (1947) 30 Cal. 2d 861, 867, 186 P.2d 417* (lodging)]:

- The contract is to pay the reasonable value of things that are necessary for the support of the minor or the minor's family.

- The things that are necessary for the support of the minor or the minor's family actually have been furnished to the minor or to the minor's family.

- The contract was entered into by the minor when not under the care of a parent or guardian able to provide for the minor or the minor's family.

For a form of complaint for use against a minor by a supplier of necessaries, *see § 365.140*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAge

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A. Contracts for Necessaries and Medical Care

32-365 California Forms of Pleading and Practice--Annotated § 365.13

§ 365.13 Medical and Dental Care

[1] Blood Donations

Notwithstanding any other provision of law, a minor who has attained the age of 17 may consent to the donation of his or her blood and to the penetration of any tissue that is necessary to accomplish the donation. A minor who has attained the age of 15 may consent to the donation of his or her blood with the written consent of his or her parents or a guardian and the written authorization of a physician and surgeon [*Health & Safety Code § 1607.5*]. Once given, consent is not subject to disaffirmance because of minority [*Fam. Code § 6711* (obligation entered into under express statutory authority not subject to disaffirmance)].

[2] Married Minors

Notwithstanding any other provision of law, lawfully married minors--even if the marriage is subsequently dissolved--may consent to the furnishing to themselves of medical, dental, or psychiatric care without parental consent, knowledge, or liability. Once given, consent may not be disaffirmed because of minority [*see Fam. Code §§ 7002(a), 7050(e)(1)*].

[3] Prevention or Treatment of Pregnancy

Notwithstanding any other provision of law, a minor may consent to medical care related to the prevention or treatment of pregnancy. Once given, the minor's consent is not subject to disaffirmation because of minority. This statutory provision, however, does not authorize a minor to be sterilized without the consent of his or her parent or guardian [*Fam. Code §§ 6920, 6921, 6925(a), (b)(1)*]. In addition, *Fam. Code § 6925(b)(2)* provides that a minor may not receive an abortion without the consent of a parent or guardian, other than provided in *Health & Safety Code § 123450* (a judicial bypass procedure), but this restriction on abortion has been held unconstitutional as an unreasonable infringement on a pregnant minor's fundamental privacy interests [*American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 356, 66 Cal. Rptr. 2d 210, 940 P.2d 797]* . For further discussion of the abortion rights of a minor, see Ch. 4, *Abortion and Birth Control Methods* .

For discussion of consent to treatment for sexually transmitted diseases, see *§ 365.13[6]*. For discussion of treatment for minors who have been raped, see *§ 365.13[7]*. For discussion of medical treatment for minors who have been subjected to sexual assault, see *§ 365.13[8]*.

[4] Minors in Military

Notwithstanding any other provision of law, any minor on active duty with the armed services of the United States may consent to the furnishing to himself or herself of medical, dental, or psychiatric care without parental consent, knowledge, or liability. Once given, consent may not be disaffirmed because of minority [*Fam. Code §§ 7002(b), 7050(e)(1)*].

[5] Certain Minors Living Separate and Apart From Parent or Guardian

When a minor is 15 years of age or older, living separate and apart from a parent or guardian, and managing his or her own financial affairs, the minor may give consent for his or her own medical and dental care [*Fam. Code §§ 6920, 6922*; *see Fam. Code §§ 6901* ("dental care" defined), *6902* ("medical care" defined)]. The actual source of the minor's income is irrelevant for this purpose [*Fam. Code § 6922(a)(3)*]. To qualify to give consent, the minor need not be living separate and apart from his or her parents or guardian with their consent, nor is any durational requirement imposed on the minor's separate residence [*Fam. Code § 6922(a)(2)*].

Once entered, such a contract may not be disaffirmed because of minority, nor are the parents or guardian liable for any medical or dental care provided under this statutory provision [*Fam. Code §§ 6921, 6922(b)*]. The physician or dentist rendering treatment may inform the minor's parent or guardian of the treatment given or needed, however, regardless of whether the minor patient consents to the disclosure, if the physician and surgeon or dentist has reason to know on the basis of the information given by the minor the whereabouts of the parent or guardian [*Fam. Code § 6922(c)*].

[6] Minors With Infectious Disease

Notwithstanding any other provision of law, a minor 12 years of age or older who may have come into contact with any infectious, contagious, or communicable disease may consent to the furnishing of medical care related to the diagnosis and treatment of the disease, if the disease or condition is one required by law or regulation to be reported to the local health officer, or a related sexually transmitted disease, as may be determined by the State Director of Health Services [*Fam. Code § 6926(a)*]. A contract for the provision of such medical care may not be disaffirmed on the basis of minority, nor are the minor's parents or guardian liable for payment for any medical care provided [*Fam. Code § 6926(b)*].

For discussion of consent to medical care for the treatment or prevention of pregnancy, see *§ 365.13[3]*. For discussion of treatment for minors who have been raped, see *§ 365.13[7]*. For discussion of medical treatment for minors who have been subjected to sexual assault, see *§ 365.13[8]*.

[7] Minor Victim of Rape

Notwithstanding any other provisions of law, a minor 12 years of age or older who is alleged to have been raped may give consent to the furnishing of medical care related to the diagnosis or treatment of the condition, and to the collection of medical evidence with regard to the alleged rape [*Fam. Code § 6927*]. Once given, consent is not subject to disaffirmance because of minority [*Fam. Code § 6921*], nor is the consent of the parent, parents, or legal guardian of the minor necessary to authorize the diagnosis, treatment, or collection of evidence [*Fam. Code §§ 6920, 6927*].

For discussion of consent to medical care for the treatment or prevention of pregnancy, see *§ 365.13[3]*. For discussion of medical treatment for minors with sexually transmitted diseases, see *§ 365.13[6]*. For discussion of medical treatment for minors who have been subjected to sexual assault, see *§ 365.13[8]*.

[8] Minor Victim of Sexual Assault

Notwithstanding any other provision of law, a minor who is alleged to have been sexually assaulted [*Fam. Code § 6928(a)*; *see Penal Code §§ 261, 286, 288a*] may give consent to the furnishing of medical care related to the diagnosis and treatment of the condition, and to the collection of medical evidence with regard to the alleged sexual assault. Once given, consent is not subject to disaffirmance because of minority [*Fam. Code §§ 6921, 6928(b)*].

Although the consent of the parent, parents, or legal guardian of the minor is not necessary to authorize the diagnosis, treatment, or collection of evidence [*Fam. Code § 6920*], the professional providing the medical treatment must attempt to contact the minor's parent or guardian unless the professional person rendering the care reasonably believes that the minor's parent or guardian committed the sexual assault on the minor. Furthermore, the professional providing the care must note in the minor's treatment record the date and time when he or she attempted to contact the parent, parents, or legal guardian, and whether the attempt was successful or unsuccessful [*Fam. Code § 6928(c)*].

For discussion of consent to medical care for the treatment or prevention of pregnancy, see *§ 365.13[3]*. For discussion of medical treatment for minors with sexually transmitted diseases, see *§ 365.13[6]*. For discussion of treatment for minors who have been raped, see *§ 365.13[7]*.

[9] Minor Drug Addict or Alcoholic

Notwithstanding any other provision of law, a minor 12 years of age or older may give consent to medical care and counseling [*see Fam. Code § 6929(a)(1)* ("counseling" defined)] relating to the diagnosis and treatment of a drug- or alcohol-related problem [*Fam. Code § 6929(b)*; *see Fam. Code § 6929(a)(2)* ("drug or alcohol" defined)]. Once given, consent is not subject to disaffirmance because of minority [*Fam. Code § 6921*].

The consent of the parent or guardian of a minor is not necessary to authorize the medical care or counseling for the drug- or alcohol-related problem [*Fam. Code § 6920*]. Except as otherwise provided (*see below*), the parent or guardian of the minor ordinarily is not liable for paymentfor any drug-related or alcohol-related care or counseling rendered to a minor [*Fam. Code § 6929(d)*].

The authorized treatment plan must include the involvement of the minor's parent or guardian, if appropriate, as determined by the treatment facility or the physician, registered nurse, psychologist, clinical social worker, marriage and family therapist, or marriage and family therapist intern, psychological assistant, or associate clinical social worker under supervision ("professional person" [*Fam. Code § 6929(a)(4)*]) treating the minor. The "professional person" may also be a marriage and family therapist registered intern, psychological assistant, or associate clinical social worker, if appropriately employed and supervised [*Fam. Code § 6929(a)(4)*]. The professional person rendering medical treatment or counseling to the minor must state in the minor's treatment record whether and when he or she attempted to contact the parent or guardian of the minor and whether the attempts were successful, or the reason why, in his or her opinion, it was not appropriate to contact the minor's parent or guardian [*Fam. Code § 6929(c)*]. If the minor's parent or guardian participates in a drug-related or alcohol-related counseling program, however, the parent or guardian is liable for the cost of the services provided to the minor and the parent or guardian [*Fam. Code § 6929(d)*].

The statutory provisions governing the consent of a minor to a drug-related or alcohol-related treatment program do not authorize a minor to receive replacement narcotic abuse treatment, in a program licensed pursuant to *Health & Safety Code § 11875 et seq.* without the consent of his or her parent or guardian [*Fam. Code § 6929(e)*]. In addition, in cases in which a parent or guardian has sought medical care and counseling for a drug-related or alcohol-related problem of a minor, the physician must disclose medical information concerning that care to the minor's parents or legal guardian on their request, even if the minor does not consent to disclosure. The physician is exempt from liability for that disclosure [*Fam. Code § 6928(g)*].

[10] Mental Health Treatment

A minor who is 12 years of age or older may consent to mental health treatment or counseling on an outpatient basis, or to residential shelter services, if, in the opinion of an attending professional person, the minor is mature enough to participate intelligently in the treatment, counseling, or services, and (1) the minor would present a danger of serious physical or mental harm to himself or herself or to others without the mental health treatment or counseling, or (2) the minor is the alleged victim of incest or child abuse [*Fam. Code § 6924(b)*; *see Fam. Code § 6924(a)* ("mental health treatment or counseling services," "professional person," "residential shelter services" defined)]. Once entered, a contract to receive these services may not be disaffirmed because of minority [*Fam. Code § 6921*] and does not need the parent or guardian's consent [*Fam. Code § 6920*].

A professional person offering residential shelter services to a minor who has personally consented to the services, whether acting as an individual or as a representative of an agency or entity [*see Fam. Code § 6924(a)(3)*], must make his or her best efforts to notify the minor's parent or guardian of the provision of services [*Fam. Code § 6924(c)*]. Furthermore, any mental health treatment or counseling of a minor to which the minor has personally consented must include the involvement of the minor's parent or guardian unless, in the opinion of the professional treating or counseling the minor, the involvement would be inappropriate. The professional must state in the client record whether and when he or she attempted to contact the minor's parent or guardian and whether the attempt to contact was successful, or why, in his or her opinion, it would be inappropriate to contact the minor's parent or guardian [*Fam. Code § 6924(d)*].

The minor's parent or guardian is not liable for payment for mental health treatment or counseling services provided to the minor on the minor's own consent, unless the parent or guardian participates in the treatment or counseling. In this case, the parent or guardian is liable only for the services rendered with his or her participation. The parent or guardian is not liable for payment for any residential shelter services provided to the minor unless the parent or guardian consented to the provision of the services [*Fam. Code § 6924(e)*].

The statutory provisions that govern consent by a minor to mental health treatment or counseling do not authorize a minor to receive convulsive therapy or psychosurgery [*see Welf. & Inst. Code § 5325(f), (g)*], or psychotropic drugs, without the consent of the minor's parent or guardian [*Fam. Code § 6924(f)*].

[11] Inspection of Medical Records

Any minor patient authorized by law to consent to medical treatment is entitled to inspect patient records on presenting to the health care provider a written request for those records and on payment of reasonable clerical costs incurred in locating and making the records available. A patient who is a minor, however, is entitled to inspect patient records pertaining only to health care of a type to which the minor is lawfully authorized to consent [*Health & Safety Code § 123110(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAge

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32-365 California Forms of Pleading and Practice--Annotated §§ 365.14through 365.29

[Reserved]

§§ 365.14[Reserved]

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32-365 California Forms of Pleading and Practice--Annotated § 365.30

§ 365.30 Governing Statutes

The general right of a minor to disaffirm contracts appears in *Fam. Code § 6710*. The rights of an innocent purchaser for value and without notice of goods from one who bought from a minor are governed by*Fam. Code § 6713*. Obligations entered into by a minor that cannot be disaffirmed are covered in *Fam. Code § 6711*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAgeContracts LawSales of GoodsPerformanceBuyer's Rights

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32-365 California Forms of Pleading and Practice--Annotated § 365.31

§ 365.31 Minor's Right to Disaffirm Contracts

Except as otherwise provided by statute, a minor may disaffirm his or her contract before majority or within a reasonable time afterwards. In the case of the minor's death within that period, the minor's heirs or personal representative may disaffirm the contract [*Fam. Code § 6710*].

For a form for giving notice of disaffirmance, *see § 365.160*. For a form of affirmative defense based on disaffirmance by a minor defendant, *see § 365.161*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAge

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32-365 California Forms of Pleading and Practice--Annotated § 365.32

§ 365.32 Exceptions to Right to Disaffirm

[1] Statutory Authority

The following are the specific statutory exceptions to the minor's right of disaffirmance:

- Contracts made under express statutory authority [*Fam. Code § 6711*, discussed under *§ 365.32[3]*].
- Contracts for necessaries [*Fam. Code § 6712*, discussed in *§ 365.10* et seq.].
- Protection of good faith purchasers [*Fam. Code § 6713*, discussed under *§ 365.32[2]*].
- Contracts in arts, entertainment, or sports approved by the court [*Fam. Code § 6751*, discussed in *§ 365.50* et seq.].
- Consent given by a minor to medical or dental care [*Fam. Code § 6921*, discussed in *§ 365.10* et seq.].

[2] Innocent Purchasers

If goods originally sold by a minor have been transferred to another purchaser who bought them in good faith for value and without notice of the transferor's defect of title, before the contract of the minor has been disaffirmed, the minor cannot recover the goods from the innocent purchaser [*Fam. Code § 6713*].

For a form of affirmative defense when the defendant was an innocent purchaser, see *§ 365.162*.

[3] Contracts Expressly Authorized by Statute

A minor may not disaffirm an obligation, otherwise valid, entered into by him or her under the express authority or direction of a statute [*Fam. Code § 6711*]. Examples of obligations of this type are the giving up of a child by a minor to

a licensed adoption agency [*Fam. Code § 8700(b)*], contracts for disability or life insurance by minors [*Ins. Code § 10112*], and the purchase of certain property by minor veterans [*Mil. & Vet. Code § 986.10*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 365.33 Filing of Action by Minor

The filing of an action by a minor is sufficient notice to the other party to a contract that the minor is disaffirming the contract [*Celli v. Sports Car Club of America, Inc. (1972) 29 Cal. App. 3d 511, 517, 105 Cal. Rptr. 904* ; *Pereira v. Toscano (1927) 84 Cal. App. 526, 531, 258 P. 429]* .

Legal Topics:

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[Reserved]

§§ 365.34[Reserved]

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§ 365.50 Governing Statutes

Contracts for artistic and athletic services that may not be disaffirmed are governed by *Fam. Code § 6750(a)(1)* and *(3)*. Contracts involving literary, musical, or dramatic properties or use of likeness are governed by *Fam. Code § 6750(a)(2)*. Approval of these contracts by the superior court is governed by *Fam. Code § 6751*. Establishment of a mandatory trust fund for a minor entering into a contract described in *Fam. Code § 6750* is governed by *Fam. Code § 6752(b)* and *(d)* (trust with and without court approval of contract). Court approval of contracts between minors and duly licensed artists' managers is governed by *Lab. Code § 1700.37*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-365 California Forms of Pleading and Practice--Annotated § 365.51

§ 365.51 Artistic or Creative Service Contracts

A contract in which the minor agrees to be employed or to render artistic or creative services, assuming it is otherwise valid and approved by the superior court as discussed below, cannot be disaffirmed by the minor, either during minority or afterwards [*Fam. Code § 6751(a)*; *Warner Bros. Pictures, Inc. v. Brodel (1948) 31 Cal. 2d 766, 770-771, 192 P.2d 949 , cert. denied, 335 U.S. 844, 93 L. Ed. 394, 69 S. Ct. 67]* . For this purpose, the term "artistic or creative services" is defined as including, but is not limited to, services as an actor, dancer, musician, comedian, singer, stunt-person, voice-over artist, or other performer or entertainer, or as a songwriter, musical producer or arranger, writer, director, producer, production executive, choreographer, composer, conductor, or designer [*Fam. Code § 6750(a)(1)*].

Such a contract, otherwise valid, cannot be disaffirmed on the ground of minority either during the minority of the person entering into the contract or at any time thereafter, if the contract is approved by the superior court in any county in which the minor resides or is employed or in which any party to the contract has its principal office in California for the transaction of business [*Fam. Code § 6751(a)*].

For a form for a petition for approval of a minor's employment contract, *see § 365.180*. For a form for an order approving a minor's employment contract, *see § 365.181*.

Legal Topics:

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§ 365.52 Contracts for Literary, Musical, or Dramatic Properties or Use of Likeness

A contract in which the minor agrees to purchase or otherwise secure, sell, lease, license, or otherwise dispose of literary, musical, or dramatic properties, or use of a person's likeness, voice recording, performance, or story of or incidents in his or her life, either tangible or intangible, or any rights therein for use in motion pictures, television, the production of sound recordings, the legitimate or living stage, or otherwise in the entertainment field, assuming it is otherwise valid and approved by the superior court as discussed below, cannot be disaffirmed by the minor, either during minority or afterwards [*Fam. Code §§ 6750(a)(2), 6751(a)*].

Such a contract, otherwise valid, cannot be disaffirmed on the ground of minority either during the minority of the person entering into the contract or at any time thereafter, if the contract is approved by the superior court in any county in which the minor resides or is employed or in which any party to the contract has its principal office in California for the transaction of business [*Fam. Code § 6751(a)*].

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§ 365.53 Athletic Services Contracts

A closely analogous type of contract that cannot be disaffirmed during minority or afterwards, assuming it is otherwise valid, is one in which the minor is employed or agrees to render services as a participant or player in a sport [*Fam. Code §§ 6750(a)(3), 6751(a)*].

To be effective, the contract must be approved by the superior court in the county in which the minor resides or is employed, or the county in which any party to the contract has its principal office in California for the transaction of business [*Fam. Code § 6751(a)*].

Legal Topics:

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§ 365.54 Court Approval

Superior court approval of contracts by minors [*Fam. Code § 6751(a)*] for artistic services [*Fam. Code § 6750(a)(1)*], literary, musical, or dramatic properties [*Fam. Code § 6750(a)(2)*], or athletic services [*Fam. Code § 6750(a)(3)*] may be given on petition of any party to the contract or agreement after giving whatever reasonable notice to all other parties as may be fixed by the court, with opportunity to the other parties to appear and be heard [*Fam. Code § 6751(b)*]. A parent or legal guardian who is entitled to the physical custody, care, and control of the minor should be the minor's guardian ad litem for the proceeding, unless the court determines that appointment of a different individual as guardian ad litem is required in the best interests of the minor [*Fam. Code § 6751(d)*]. The court may make its approval conditional on the parties' acceptance of its modifications to the contract [*In re Loew's Inc. and Elmes (1948) 31 Cal. 2d 782, 783, 192 P.2d 958]* .

The court's approval extends to the entire the contract or agreement and all the terms and provisions of the contract including, but not limited to, any optional or conditional provisions contained in the contract for extension, prolongation, or termination of the term of the contract [*Fam. Code § 6751(c)*; *see Warner Bros. Pictures, Inc. v. Brodel (1948) 31 Cal. 2d 766, 774, 192 P.2d 949 , cert. denied, 335 U.S. 844, 93 L. Ed. 394, 69 S. Ct. 67]* .

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§ 365.55 Withholding of Portion of Minor's Gross Earnings

For any contract by a minor for artistic or athletic services, or involving literary, musical, or dramatic properties [*see Fam. Code §§ 6750, 6751*], 15 percent of the minor's gross earnings under the contract must be set aside in trust in an account or other savings plan, and preserved for the benefit of the minor [*Fam. Code §§ 6752(b)(1), (d)(1)*]. The minor's "gross earnings" means the total compensation payable to the minor under the contract or, if the minor's services are being rendered through a third-party individual or personal services corporation (loan-out company), the total compensation payable to that third party for the minor's services [*Fam. Code § 6750(c)(1)*]. With respect to contracts under which a minor is employed or agrees to render services as a musician, singer, songwriter, musical producer, or arranger only, the minor's "gross earnings" means the total amount paid to the minor under the contract, including the payment of any advances to the minor under the contract, but excluding deductions to offset those advances or other expenses incurred by the employer under the contract; if the minor's services are being rendered through a third-party individual or personal services corporation (loan-out company), the minor's "gross earnings" is the total amount payable to that third party for the minor's services [*Fam. Code § 6750(c)(2)*].

A parent or legal guardian entitled to physical care, custody and control of the minor must act as trustee, unless the court determines that the appointment of a different individual or entity is required in the best interests of the minor [*Fam. Code §§ 6752(b)(2), (d)(1)*]. Within seven business days after execution of the contract, the trustee must establish a trust account, known as a Coogan Trust Account, at a bank, savings and loan institution, credit union, brokerage firm or company registered under the Investment Company Act of 1940, that is located in California [*Fam. Code § 6753(a)*; *see Fam. Code § 6753(d)* (account must be insured)].

Within 10 business days after the execution of the contract, the trustee must provide the minor's employer with a written statement under penalty of perjury that includes the name, address, and telephone number of the financial institution, the name and number of the account, the name ofthe minor beneficiary, the trustee's name, and any additional information needed by the employer to deposit the set-aside funds into the account [*Fam. Code §§ 6752(b)(3), (d)(2), 6753(c)*]. The trustee must attach to the statement a copy of any information received from the financial institution confirming the creation of the account, such as an account agreement, account terms, passbook, or similar writings [*Fam. Code § 6753(c)*]. The employer must provide the trustee with a written acknowledgment of receipt of the statement [*Fam. Code*

§ 6752(b)(3), (d)(2)].

If the minor is employed or agrees to render services directly for a person or entity, this person or entity is considered to be the minor's employer [*Fam. Code § 6750(b)(1)*]. If the minor's services are being rendered through a third party individual or personal services corporation (loan-out company), the person to whom or entity to which this third party is providing the minor's services is considered to be the minor's employer [*Fam. Code § 6750(b)(2)*]. If the minor is rendering services as an extra, background performer, or in a similar capacity through an agency or service that provides one or more of those performers for a fee (casting agency), the agency or service is considered to be the minor's employer [*Fam. Code § 6750(b)(3)*].

The minor's employer must deposit 15 percent of the minor's gross earnings under the contract within 15 business days after receiving a true and accurate copy of the trustee's statement, a certified copy of the minor's birth certificate, and, in the case of a guardian, a certified copy of the court document appointing the person as the minor's guardian. Pending receipt of these documents, the employer must hold 15 percent of the minor's gross earnings under the contract for the minor's benefit [*Fam. Code § 6752(b)(4), (d)(3)*]. When making the initial deposit of funds, the employer must provide written notification to the financial institution or company that the funds are subject to *Fam. Code § 6753*. On receipt of the court order, the employer must provide the financial institution with a copy of the order [*Fam. Code § 6752(b)(5), (d)(3)*]. Once the employer deposits the set aside funds in trust, in an account or other savings plan, it has no further obligation or duty to monitor or account for the funds. The trustee has the obligation to monitor and account for the funds once they have been deposited by the employer, and must prepare an annual accounting of the funds in accordance with *Prob. Code §§ 16062* and *16063* [*Fam. Code § 6752(b)(6), (d)(4)*].

On petition of the parent or legal guardian, the minor (through a guardian ad litem), or the trustee, on good cause shown, the court may order the amendment or termination of the trust, notwithstanding the provisions of the declaration of trust. Such an order may be made only after reasonable notice to the beneficiary and, if the beneficiary is then a minor, to the parent or guardian, if any, and to the trustee of the funds, with an opportunity for all parties to appear and be heard [*Fam. Code § 6752(b)(7), (d)(5)*]. Until the minor becomes 18 or a declaration of emancipation of the minor is issued, no withdrawal of any funds on deposit in the trust may be made without written order of the court [*Fam. Code § 6753(b)*].

The trustee must promptly notify the employer, in writing, of any change in facts affecting the employer's obligation or ability to set aside the funds for the minor's benefit, including, but not limited to, a change of financial institution or account number, or the existence of a new or amended order amending or terminating the employer's obligations. The written notification must be accompanied by a true and accurate photocopy of the trustee's statement and, if applicable, a true and accurate photocopy of the new or amended order [*Fam. Code § 6752(b)(8), (d)(6)*].

On reaching the age of 18, the beneficiary may withdraw the funds on deposit in trust after providing a certified copy of the beneficiary's birth certificate to the financial institution where the trust is located [*Fam. Code § 6753(b)*].

Legal Topics:

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32-365 California Forms of Pleading and Practice--Annotated § 365.56

§ 365.56 Fiduciary Relationship

When a parent or guardian enters into a contract of a type described in *Fam. Code § 6750* [*see § 365.54*], the relationship between the parent or guardian and the minor is a fiduciary relationship that is governed by the law of trusts, whether or not a court has issued a formal order to that effect [*Fam. Code § 6752(e)*]. With the minor's earnings and accumulations under the contract, the parent or guardian, acting in his or her fiduciary relationship, must pay all liabilities the minor incurred under the contract, including, but not limited to, payments for taxes on all earnings, including taxes on the amounts set aside in trust, and payments for personal or professional services rendered to the minor or the business related to the contract [*Fam. Code § 6752(e)*]. This provision does not alter any other existing responsibilities of a parent or legal guardian to provide for the minor's support [*Fam. Code § 6752(e)*].

Legal Topics:

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 365 MINORS: CONTRACT ACTIONS
PART II. LEGAL BACKGROUND
C. Contracts in the Arts, Entertainment, and Sports

32-365 California Forms of Pleading and Practice--Annotated § 365.57

§ 365.57 Forwarding Earnings to Actors' Fund of America In Event of Noncompliance by Parent, Guardian, or Trustee

If a parent, guardian, or trustee fails to provide the minor's employer with an accurate photocopy of the trustee's statement, as required by *Fam. Code § 6753(c)* [*see § 365.55*], within 180 days after the commencement of employment, the employer must forward to the Actors' Fund of America (the Fund) 15 percent of the minor's gross earnings under the contract, together with the minor's name and, if known, the minor's social security number, birth date, last known address, telephone number, e-mail address, dates of employment, and title of the project on which the minor was employed [*Fam. Code § 6752(b)(9)(A), (d)(7)(A)*]. The employer must also notify the parent, guardian, or trustee of the transfer by certified mail to that individual's last known address. On receipt of the forwarded funds,the Fund becomes the trustee of those funds, and the minor's employer has no further obligation or duty to monitor or account for the funds [*Fam. Code § 6752(b)(9)(A), (d)(7)(A)*].

The Fund must make its best efforts to notify the parent, guardian, or trustee of that individual's responsibility to provide a true and accurate photocopy of the trustee's statement, and, in the case of a guardian, a certified copy of the court document appointing the person as the minor's legal guardian. Within 15 business days after receiving these documents, the Fund must deposit or disburse the funds as directed by the trustee's statement [*Fam. Code § 6752(b)(9)(B), (d)(7)(B)*]. When making the deposit or disbursal of the funds, the Fund must provide to the financial institution notice that the funds are subject to *Fam. Code § 6753* and a copy of each applicable order. Thereafter, the Fund has no further obligation or duty to monitor or account for the funds [*Fam. Code § 6752(b)(9)(B), (d)(7)(B)*].

The Fund must notify each beneficiary of his or her entitlement to the funds it holds for the beneficiary within 60 days after the date on which its records indicate that the beneficiary becomes 18 or the date on which it receives notice that the minor has been emancipated. The notice must be sent to the beneficiary's last known address or, if the Fund does not have a specific separate address for the beneficiary, to the beneficiary's parent or guardian [*Fam. Code § 6752(c), (d)(7)(C)*].

As trustee of unclaimed set-aside funds, the Fund must manage and administer those funds in the same manner as a trustee under the Probate Code [*Fam. Code § 6752(f)(1)*]. On receiving a certified copy of the beneficiary's birth

certificate, or United States passport, and an accurate photocopy of the trustee's statement, the Fund must transfer the beneficiary's balance to the trust account established for the beneficiary [*Fam. Code § 6752(f)(3)(A)*]. It must disburse the set-aside funds to a beneficiary who becomes 18, after receiving proof of the beneficiary's identity and a certified copy of the beneficiary's birth certificate or United States passport. It must also disburse the set-aside funds to a beneficiary who has been emancipated after receiving proof of the beneficiary's identity and appropriate documentation evidencing his or her emancipation [*Fam. Code § 6752(f)(3)(B)*]. It must disburse the set-aside funds to the estate of a deceased beneficiary after receiving appropriate documentation evidencing the beneficiary's death and the claimant's authority to collect those funds on the beneficiary's behalf [*Fam. Code § 6752(f)(3)(C)*].

The beneficiary of an account held by the Fund is entitled to receive imputed interest on the balance in his or her account for the entire period during which the account is held [*Fam. Code § 6752(g)(1)*]. The Fund may assess and deduct from the balance in a beneficiary's account reasonable management, administrative, and investment expenses, except that no fees may be charged during the first year the account is held by the Fund [*Fam. Code § 6752(g)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesGeneral OverviewFamily LawGuardiansGeneral OverviewFamily LawParental Duties & RightsGeneral Overview

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32-365 California Forms of Pleading and Practice--Annotated § 365.58

§ 365.58 Contracts With Licensed Artists' Managers

When a duly licensed artists' manager enters into an agreement with a minor to secure for the minor engagements in the entertainment field, and the contract is approved by the superior court of the county in which the minor resides or is employed, the contract, if otherwise valid, cannot be disaffirmed by the minor either during minority or at any time thereafter. Approval may be given by the court on the petition of either party to the contract after whatever reasonable notice to the other party as may be fixed by the court, and after giving the other party an opportunity to appear and be heard [*Lab. Code § 1700.37*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAge

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32-365 California Forms of Pleading and Practice--Annotated §§ 365.59through 365.79

[Reserved]

§§ 365.59[Reserved]

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PART III. RESEARCH GUIDE
A. Contracts for Necessaries and Medical Care

32-365 California Forms of Pleading and Practice--Annotated § 365.80

§ 365.80 State Statutes

Minor's contract for necessaries not subject to disaffirmance. *Fam. Code § 6712*

"Dental care" defined. *Fam. Code § 6901*

"Medical care" defined. *Fam. Code § 6902*

Court consent for minor's medical or dental care. *Fam. Code § 6911*

Minor's consent as not being subject to disaffirmance. *Fam. Code § 6921*

Consent to medical or dental care without consent of parent or guardian by 15-year-old living separate and apart from parents or guardian. *Fam. Code §§ 6920, 6922*

Consent to outpatient mental health treatment or counseling services or residential shelter services by minor 12 years of age or older. *Fam. Code § 6924*

Consent by minor to medical care related to prevention or treatment of pregnancy. *Fam. Code § 6925*

Consent to care for diagnosis and treatment of infectious disease by minor 12 years of age or older. *Fam. Code § 6926*

Consent to care for diagnosis and treatment of minor 12 years of age or older who has been raped, and to collection of medical evidence. *Fam. Code § 6927*

Consent to care for diagnosis and treatment of minor who has been sexually assaulted, and to collection of medical evidence. *Fam. Code § 6928*

Consent to care and counseling relating to diagnosis and treatment of minor 12 years of age or older having drug-related or alcohol-related problem. *Fam. Code § 6929*

Validity of consent by married minor to furnishing of medical, hospital, or surgical care. *Fam. Code §§ 7002(a), 7050(e)(1)*

Validity of consent by minor in military to furnishing of medical, dental, or psychiatric care. *Fam. Code §§ 7002(b), 7050(e)(1)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAge

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32-365 California Forms of Pleading and Practice--Annotated § 365.81

§ 365.81 Decisions

[1] Medical Care

Reasonable construction of former Civ. Code § 34.5 (*cf. now Fam. Code § 6925*) as being that minors may obtain therapeutic abortions without parental consent. *Ballard v. Anderson (1971) 4 Cal. 3d 873, 878, 95 Cal. Rptr. 1, 484 P.2d 1345*

Former Civ. Code § 34.6 (providing for situations in which minor may consent to medical treatment; *now see Fam. Code § 6900 et seq.*) as basis for summary judgment in physician's favor in action by parents of 17-year-old girl who had been living away from home and making her own financial decisions, when action was partially based on ground that daughter was incapable of giving consent to medical procedures. *Carter v. Cangello (1980) 105 Cal. App. 3d 348, 350, 164 Cal. Rptr. 361*

[2] Necessaries

Legislature's apparent determination in enacting *Fam. Code §§ 6920, 6921, 6925* as being that public interest in encouraging pregnant minors to seek medical care outweighs public policy protecting minors from own improvidence. *Ballard v. Anderson (1971) 4 Cal. 3d 873, 880, 95 Cal. Rptr. 1, 484 P.2d 1345*

Lodging as necessary for which minor is obligated to pay, unless statutory prohibitions apply. *Burnand v. Irigoyen (1947) 30 Cal. 2d 861, 867, 186 P.2d 417*

Services of attorney as necessary for minor, and attorney as permitted to recover fee from minor. *Leonard v. Alexander (1942) 50 Cal. App. 2d 385, 389, 122 P.2d 984*

Minor under care of parent unable to provide for him as allowed to authorize use of funds held for his benefit to buy necessaries, and as not permitted to disaffirm contract on reaching majority. *Morgan v. Morgan (1963) 220 Cal. App.*

2d 665, 679, 34 Cal. Rptr. 82

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAge

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32-365 California Forms of Pleading and Practice--Annotated § 365.82

§ 365.82 Law Reviews

Note, *"Nielsen v. The Regents": Children as Pawns or Persons? 2 Hastings Const. L.Q. 1151 (1975)*

Note, *The Minor's Right to Consent to Medical Treatment: A Corollary of the Constitutional Right of Privacy, 48 So. Cal. L. Rev. 1417 (1975)*

Jordan, *A Minor's Right to Contraceptives, 7 U.C.D. L. Rev. 270 (1974)*

Comment, *Medical Care and the Independent Minor, 10 Santa Clara Lawyer 334 (1970)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAge

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32-365 California Forms of Pleading and Practice--Annotated § 365.83

§ 365.83 Text References

Kirkland, Lervey & Richmond, CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, Ch. 30 (2d ed. Matthew Bender)

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 341, 345-349 (9th ed. 1987)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAge

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[Reserved]

§§ 365.84[Reserved]

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B. Disaffirmation of Contracts

32-365 California Forms of Pleading and Practice--Annotated § 365.100

§ 365.100 State Statutes

[1] Disaffirmance in General

Disaffirmance of contracts by minor, or by minor's heirs or personal representatives. *Fam. Code § 6710*

Rights of innocent purchaser for value and without notice from minor's vendee. *Fam. Code § 6713*

[2] Obligations That Cannot Be Disaffirmed

Obligation entered into by minor under express authority or direction of statute as not disaffirmable. *Fam. Code § 6711*

Contracts for necessaries. *Fam. Code § 6712*

Contracts in arts, entertainment, or sports approved by court. *Fam. Code § 6751*

Consent to medical or dental care. *Fam. Code § 6921*

Minor's relinquishment of child for adoption. *Fam. Code § 8700(b)*

Purchase of specified kinds of insurance. *Ins. Code § 10112*

Purchase of specified property, by a minor veteran. *Mil. & Vet. Code § 986.10*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAge

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32-365 California Forms of Pleading and Practice--Annotated § 365.101

§ 365.101 Decisions

Enlistment contract for military service not voidable by minor on grounds of minority. *United States v. Williams (1937) 302 U.S. 46, 49, 58 S. Ct. 81, 82 L. Ed. 39*

Former Civ. Code § 35 (*now see Fam. Code § 6710*) not applicable on question of parent's power to bind child to arbitrate by entering into contract of which child is third party beneficiary. *Doyle v. Giuliucci (1965) 62 Cal. 2d 606, 609, 43 Cal. Rptr. 697, 401 P.2d 1*

Policy of law allowing disaffirmation of contracts by minors is to discourage adults from contracting with minors; adults cannot complain if injured by exercise of disaffirmation by minor. *Burnand v. Irigoyen (1947) 30 Cal. 2d 861, 866, 186 P.2d 417*

Filing of action is sufficient notice by minor to other party to contract that minor is disaffirming contract. *Celli v. Sports Car Club of America, Inc. (1972) 29 Cal. App. 3d 511, 517, 105 Cal. Rptr. 904* ; *Pereira v. Toscano (1927) 84 Cal. App. 526, 531, 258 P. 429*

Minor not allowed to disaffirm waiver of uninsured motorist coverage in automobile insurance policy without disaffirming entire policy. *Holland v. Universal Underwriters Ins. Co. (1969) 270 Cal. App. 2d 417, 421-422, 75 Cal. Rptr. 669*

Minor's authorization of another to endorse minor's name on checks is delegation of power void under former Civ. Code § 33 (*now see Fam. Code § 6701*). *Morgan v. Morgan (1963) 220 Cal. App. 2d 665, 674, 34 Cal. Rptr. 82*

Minor is not estopped from asserting right to disaffirm given by former Civ. Code § 35 (*now see Fam. Code § 6710*). *Morgan v. Morgan (1963) 220 Cal. App. 2d 665, 675, 34 Cal. Rptr. 82*

Right of minor to avoid contracts is conferred by law for protection against a minor's own improvidence. *Niemann v.*

Deverich (1950) 98 Cal. App. 2d 787, 793, 221 P.2d 178

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAgeContracts LawNegotiable InstrumentsEnforcementDefensesInfancy of Obligor

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32-365 California Forms of Pleading and Practice--Annotated § 365.102

§ 365.102 Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 336-356 (9th ed. 1987)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAge

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[Reserved]

§§ 365.103[Reserved]

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32-365 California Forms of Pleading and Practice--Annotated § 365.120

§ 365.120 State Statutes

Contract for artistic or creative services by minor cannot be disaffirmed. *Fam. Code §§ 6750(a)(1), 6751(a)*

Contract for literary, musical, or dramatic properties by minor cannot be disaffirmed. *Fam. Code § 6750(a)(2), 6751(a)*

Contract for services by minor as participant or player in any sport cannot be disaffirmed. *Fam. Code §§ 6750(a)(3), 6751(a)*

Employer is entitled to certified copy of minor's birth certificate and court document appointing legal guardian. *Fam Code § 6752(a)*

Procedure for gaining court approval of minor's artistic or professional athletic services contract, or contract involving literary, musical, or dramatic properties. *Fam. Code § 6751*

Withholding of portion of minor's income from contract covered by *Fam. Code §§ 6750, 6751* in trust. *Fam. Code §§ 6752, 6753*

Court's continuing jurisdiction over and power to amend or terminate trust fund established pursuant to *Fam. Code § 6752. Fam. Code § 6752(b)(7), (d)(5)*

Contract by minor with licensed artists' manager for specified purposes is not to be disaffirmed. *Lab. Code § 1700.37*

Specific trust requirements. *Fam. Code § 6753*

Legal Topics:

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

Contracts LawFormationCapacity of PartiesAge

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32-365 California Forms of Pleading and Practice--Annotated § 365.121

§ 365.121 Decisions

Options included as part of contract employing minor for 52 weeks at $600 per week is approvable by court as part of contract of employment. *Warner Bros. Pictures, Inc. v. Brodel (1948) 31 Cal. 2d 766, 774, 192 P.2d 949*

Former Civ. Code § 36 (*now Fam. Code §§ 6750, 6751*) bars minor's disaffirmance of motion picture contract both during and after minority. *Warner Bros. Pictures, Inc. v. Brodel (1948) 31 Cal. 2d 766, 770-771, 192 P.2d 949*

Court is allowed to make its approval of contract pursuant to former Civ. Code § 36 as subject to acceptance by parties of modifications to contract proposed by court. *In re Loew's Inc. and Elmes (1948) 31 Cal. 2d 782, 783, 192 P.2d 958*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAge

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32-365 California Forms of Pleading and Practice--Annotated § 365.122

§ 365.122 Law Reviews

Rosenthal & Fisher, *Confirmation of Minors Employment Contracts (How to, What to and Why),* 17 Bev. Hills B.J. 263 (1983)

Legal Topics:

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Contracts LawFormationCapacity of PartiesAge

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32-365 California Forms of Pleading and Practice--Annotated § 365.123

§ 365.123 Text References

Kirkland, Lurvey & Richmond, CALIFORNIA FAMILY LAW PRACTICE AND PROCEDURE, Ch. 30, *The Parent-Child Relationship* (2d ed. Matthew Bender)

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 343, 344 (9th ed. 1987)

Legal Topics:

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Contracts LawFormationCapacity of PartiesAge

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32-365 California Forms of Pleading and Practice--Annotated §§ 365.124through 365.139

[Reserved]

§§ 365.124[Reserved]

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PART IV. FORMS
A. Contracts for Necessaries and Medical Care

32-365 California Forms of Pleading and Practice--Annotated § 365.140

§ 365.140 Complaint for Damages for Breach of Contract--By Supplier of Necessaries to Minor [Fam. Code § 6712]

[1] FORM Complaint for Damages for Breach of Contract--By Supplier of Necessaries to Minor [Fam. Code § 6712]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], a minor [and	)	(Breach of Contract)
DOES I through_____,]	)	[Amount demanded _____ (exceeds
Defendant(s).	)	or does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. At all times herein mentioned, defendant was a resident of _____ County, California.

2. [*Fictitious name allegations, if appropriate. See § 367A.90[1], Paragraph 3.*]

3. [*Agency allegations, if appropriate. See § 367A.90[1], Paragraph 4.*]

4. At all times relevant herein, plaintiff was a minor of the age of _____ years.

5. On _____ [*date*], at _____ [*city*], _____ County, California,

plaintiff and defendant entered into a written agreement, a copy of which is attached as Exhibit A and made a part hereof.

6. By this agreement, in consideration of the payment of $_____ to plaintiff by defendant, plaintiff agreed to furnish the following to defendant: _____ [*specify goods to be furnished pursuant to agreement, e.g.*, five pairs of men's trousers, two men's suits, two pairs of dress shoes, and one overcoat].

7. On _____ [*date*], plaintiff delivered the goods to defendant, who accepted them.

8. Plaintiff is informed and believes and thereon alleges that the goods were necessary for defendant's support.

9. Plaintiff is informed and believes and thereon alleges that defendant, on _____ [*date of contract*], and at all times thereafter, was not and is not under the care of a parent or guardian able to provide for him/her.

10. Defendant failed and refused, and continues to fail and refuse, to pay the sum of $_____ due plaintiff under the contract or any part of the sum due under the contract, and the sum of $_____ is now due and owing from defendant to plaintiff.

11. Plaintiff has performed all conditions, covenants, and promises under the contract, on his/her part to be performed.

12. As a result of defendant's breach of the contract, plaintiff has been damaged in the sum of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For compensatory damages in the sum of $_____;

2. For interest at _____ percent per annum on the sum of $_____, from and after _____ [*date of breach of agreement*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

[*Verification, if desired. See § 367.90A[1].*]

[2] Use of Form

This complaint may be used in an action for breach of contract by a supplier of necessaries to a minor, when the minor accepted the goods but refused to pay for them [*Fam. Code § 6712*].

[3] State Statutes

Recovery of interest. *Civ. Code § 3287*

[4] Decisions

Minor under care of parent who is unable to provide for minor is allowed to authorize use of funds held for minor's benefit to buy necessaries, and is not permitted to disaffirm the contract on reaching majority. *Morgan v. Morgan (1963) 220 Cal. App. 2d 665, 679, 34 Cal. Rptr. 82*

[5] Cross References

For a discussion and forms relating to actions for breach of contract, see Ch. 140, *Contracts* .

For forms for use in appointing a guardian ad litem, see Ch. 291, *Guardians ad Litem* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAge

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32-365 California Forms of Pleading and Practice--Annotated §§ 365.141through 365.159

[Reserved]

§§ 365.141[Reserved]

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PART IV. FORMS
B. Disaffirmation of Contracts

32-365 California Forms of Pleading and Practice--Annotated § 365.160

§ 365.160 Notice of Disaffirmation of Agreement of Minor [Fam. Code § 6710]

[1] FORM Notice of Disaffirmation of Agreement of Minor [Fam. Code § 6710]

NOTICE IS HEREBY GIVEN that _____ [*name*], the undersigned, pursuant to *Family Code Section 6710*, has disaffirmed that _____ [written *or* oral] contract made between him/her and _____ [*name*], at _____ [*city*], _____ County, California, on _____ [*date*], at which time the undersigned was a minor of the age of _____ years.

Demand is hereby made that _____ [*name*] return to the undersigned the consideration received under the contract[: that is, _____ (*describe consideration*)].
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form is a notice of disaffirmation that may be used by a minor to notify a party with whom he or she has entered into a contract that the minor is disaffirming the agreement. Contracts for necessaries and contracts in the arts, entertainment, or sports approved by the court, however, cannot be disaffirmed by a minor either during or after his or her minority [*Fam. Code §§ 6712, 6750, 6751*]. For discussion of contracts for necessaries, see *§ 365.10* et seq. For discussion of contracts in the arts, entertainment, or sports approved by the court, see *§ 365.50* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAge

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32-365 California Forms of Pleading and Practice--Annotated § 365.161

§ 365.161 Affirmative Defense--Contract Disaffirmed by Minor Defendant [Fam. Code § 6710]

[1] FORM Affirmative Defense--Contract Disaffirmed by Minor Defendant [Fam. Code § 6710]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. At the time defendant _____ [*name*] executed the contract alleged in _____'s [*name of plaintiff*] complaint, defendant was a minor who was _____ years of age.

2. The contract was not one subject to the provisions of *Family Code Section 6711, 6712, 6750,* or *6751*.

3. On or about _____ [*date*], defendant _____ [*describe means of disaffirmance, e.g.,* by letter to plaintiff], disaffirmed the contract. A copy of the _____ [*describe means, e.g.,* letter] is attached to this Answer as defendant's Exhibit A, and made a part hereof.

[2] Use of Form

This affirmative defense [*Code Civ. Proc. § 431.30(b)(2)*] is for use in an answer to an action for damages for breach of contract against a minor, when the contract was disaffirmed.

[3] State Statutes

Contract made under express statutory authority is not subject to disaffirmance. *Fam. Code § 6711*

Contracts for necessaries are not subject to disaffirmance. *Fam. Code § 6712*

Contracts in the arts, entertainment, and sports approved by court are not subject to disaffirmance. *Fam. Code §§ 6750,*

6751

[4] Cross References

For discussion and forms relating to affirmative defenses generally, see Ch. 26, *Answers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewContracts LawFormationCapacity of PartiesAge

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Chapter 365 MINORS: CONTRACT ACTIONS
PART IV. FORMS
B. Disaffirmation of Contracts

32-365 California Forms of Pleading and Practice--Annotated § 365.162

§ 365.162 Affirmative Defense--Defendant Was Innocent Purchaser Who Received Goods Before Disaffirmation [Fam. Code § 6713]

[1] FORM Affirmative Defense--Defendant Was Innocent Purchaser Who Received Goods Before Disaffirmation [Fam. Code § 6713]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. On or about _____ [*date*], _____ [*name of transferor*], in consideration of _____ [*state consideration for transfer, e.g.,* $500], agreed to transfer to defendant all right, title, and interest in those goods that are the subject of this action.

2. _____ [*Name of transferor*] represented to defendant that he/she had obtained all right, title, and interest to the subject goods through a valid contract with plaintiff.

3. Defendant had no notice that _____'s [*name of transferor*] title to the subject goods was defective [or that plaintiff was a minor].

4. On _____ [*date of plaintiff's attempted disaffirmation of contract*], _____ days after the goods were transferred to defendant, plaintiff demanded that defendant return the goods because plaintiff was disaffirming his/her contract with _____ [*name of transferor*] on the ground of plaintiff's minority at the time of entering into the contract.

[2] Use of Form

This affirmative defense [*Code Civ. Proc. § 431.30(b)(2)*] may be used in an answer to an action by a minor to disaffirm a contract to transfer goods when the transferee subsequently agreed to retransfer the goods to defendant, and defendant bought the goods in good faith, for value, and without notice of the defective title [*see Fam. Code § 6713*].

[3] Cross References

For a related form, see *§ 365.161*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewContracts LawFormationCapacity of PartiesAgeContracts LawTypes of ContractsBona Fide Purchasers

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32-365 California Forms of Pleading and Practice--Annotated §§ 365.163through 365.179

[Reserved]

§§ 365.163[Reserved]

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PART IV. FORMS
C. Contracts in the Arts, Entertainment, and Sports

32-365 California Forms of Pleading and Practice--Annotated § 365.180

§ 365.180 Petition for Approval of Minor's Employment Contract [Fam. Code §§ 6751, 6752(b)]

[1] FORM Petition for Approval of Minor's Employment Contract [Fam. Code §§ 6751, 6752(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Contract Between	)	
_____ [*name*],	)	NO. _____
[a Corporation,]	)	PETITION FOR APPROVAL OF MINOR'S EM-
Petitioner,	)	PLOYMENT CONTRACT
and	)	
_____ [*name*],	)	
a Minor.	)	

Petitioner alleges:

1. [At all times mentioned] petitioner _____ [*name*] is and was a corporation duly organized and existing under and by virtue of the laws of this state, authorized to do business, and engaging in the business of _____ [*specify*] in _____ County, California [*or allege other status*].

2. _____ [*Name*], hereinafter referred to as "the minor," was born on _____ [*date*], and is _____ years old. The minor has never been married.

3. The minor _____ [resides *or* is employed] in this County, at _____ Street, in _____ [*city*], _____ County, California.

4. On _____ [*date*], the minor entered into a written _____ [*describe agreement, e.g.*, contract of employment with petitioner under which, for a stated consideration, the minor agreed to render his/her personal services as a _____ (*describe nature of employment*) *or* contract with petitioner under which petitioner agreed, for a stated consideration, to secure for the minor an engagement as an actor, performer, or entertainer]. A copy of the contract is attached as Exhibit A and incorporated by reference.

5. *Family Code Section 7500(c)* exempts the services and earnings of an unemancipated minor child related to a contract of a type involved in this petition from the services and earnings to which a parent or guardian of a minor child is otherwise generally entitled. For the purposes of this petition, a parent or legal guardian entitled to the physical custody, care,and control of the minor at the time of the proceeding must be appointed the minor's guardian ad litem unless this court determines that appointment of a different individual as guardian ad litem is required in the best interests of the minor.

6. The contract of employment, attached to the petition as Exhibit A, is a fair, just, and equitable contract, and was entered into freely and voluntarily by both parties.

7. A court approving a minor's contract of a type involved in this petition is mandated by *Family Code Section 6752(b)(1)* to order that 15 percent of the minor's gross earnings pursuant to the contract be set aside by the minor's employer in trust and preserved for the benefit of the minor. This court must require that at least one parent or legal guardian who is entitled to the physical custody, care, and control of the minor at the time the order is issued be appointed as trustee of the funds ordered to be set aside in trust for the benefit of the minor, unless the court determines that appointment of a different individual, individuals, entity, or entities as trustee or trustees is required in the best interest of the minor.

WHEREFORE, petitioner prays that this court set a time and place for hearing this petition, that notice of the hearing be given to the minor and his/her _____ [parent(s) *or* guardian], that a parent or legal guardian entitled to physical custody, care, and control be appointed guardian ad litem for the minor, and that on the hearing of this petition the court approve the contract of employment attached to the petition as Exhibit A, appoint _____ [a trustee *or* the trustees], and order this petitioning employer to set aside in trust 15 percent of the minor's gross earnings pursuant to the contract.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

Petitioner

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am _____ [*corporate officer, e.g.*, president] of the petitioner in the

above-entitled proceeding. I have read the foregoing petition and know its contents. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

ORDER

IT IS ORDERED:

The time and place of hearing the above-entitled matter are fixed at _____ [*date*], at _____ [*time*], in Department _____ of the superior court, located at _____, in _____ [*city*], California.

Notice of the time and place of hearing, together with a copy of the petition, shall be served on the minor at least _____ days before the time of hearing.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is a petition for court approval of a contract for an unemancipated minor's artistic or athletic services entered into after 1999 [*Fam. Code § 6750*]. With appropriate modifications, it may be used as a petition to gain approval of a contract with a licensed artists' manager [*see Lab. Code § 1700.37*] or a contract to purchase or otherwise secure, sell, lease, license, or otherwise dispose of literary, musical, or dramatic properties, or use of a person's likeness, voice recording, performance, or story of or incidents in his or her life, either tangible or intangible, or any rights therein for use in motion pictures, television, the production of sound recordings, the legitimate or living stage, or otherwise in the entertainment field [*see Fam. Code § 6750(a)(2)*].

The court order fixing a time and place for hearing on a petition for approval of a minor's contract for rendition of professional artistic services customarily is added to the bottom of the petition, although it may be prepared as a separate document. If in doubt, counsel should check local practice.

[3] Venue and Filing

The petition must be filed in the superior court of the county in which the minor resides or is employed or in which any party to the contract has its principal office in California for the transaction of business [*Fam. Code §§ 200, 6751(a)*], and may be filed by either party [*Fam. Code § 6751*].

[4] State Statutes

Approval of minor's contract to render artistic or creative services after reasonable notice and opportunity to be heard. *Fam. Code § 6750(a)(1), 6751*

Approval of minor's contract involving literary, musical, or dramatic properties, or use of likeness, voice recording, performance, or story of or incidents in his or her life. *Fam. Code §§ 6750(a)(2), 6751*

Approval of service agreement under which minor agrees to participate or play in sport after reasonable notice and opportunity to be heard. *Fam. Code §§ 6750(a)(3), 6751*

Mandatory set-aside of 15 percent of gross earnings in trust. *Fam. Code §§ 6750(c), 6752(b)(1)*

Trust or savings plan for withheld earnings of minor. *Fam. Code § 6752(b)(7), (d)(5)*

[5] Cross References

For a related form, see *§ 367A.90*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAge

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PART IV. FORMS
C. Contracts in the Arts, Entertainment, and Sports

32-365 California Forms of Pleading and Practice--Annotated § 365.181

§ 365.181 Order Approving Minor's Employment Contract [Fam. Code § 6751]

[1] FORM Order Approving Minor's Employment Contract [Fam. Code § 6751]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the Contract Between	)	
_____ [*name*],	)	NO. _____
[a Corporation,]	)	ORDER
Petitioner,	)	
and	)	
_____ [*name*],	)	
a Minor.	)	

The petition of _____ [*name*] for approval of the employment contract, attached hereto as Exhibit A, between _____ [*minor*] and the petitioner, pursuant to *Family Code Section 6751*, came on regularly for hearing on _____ [*date*], before the above-entitled court. _____ [*Name*] appeared as attorney for petitioner. _____ [*Name*] appeared as attorney for the minor. The minor was present at the hearing, together with _____ [his/her parents, _____ (*names*) *or* _____ (*name*), his/her father *or* _____ (*name*), his/her mother *or* _____ (*name*), his/her guardian].

The court having heard the evidence and arguments, and being fully advised, now finds:

1. The allegations contained in the petition are true.

2. The terms of the employment contract are just, equitable, and in the best interests of the minor.

3. The employment contract was entered into freely and voluntarily both by the minor and petitioner.

4. It is in the best interest of the minor that _____ [the minor's parent *or* the guardian who is entitled to the physical custody, care, and control of the minor *or name and status of person other than parent or guardian*] be appointed as trustee of the funds ordered to be set aside in trust for the benefit of the minor.

Good cause appearing therefor,

IT IS HEREBY ORDERED that:

1. The employment contract submitted for approval in the petition, attached as Exhibit A to the petition between _____ [*name of petitioner*] and _____ [*name of minor*], a minor, is hereby approved.

2. _____ [*Name*] is appointed trustee of the funds ordered to be set aside in trust for the benefit of the minor. The trustee shall comply with the provisions of *Family Code Sections 6752* and *6753* regarding the timely creation of, notification regarding, and administration of the trust.

3. Petitioner is ordered to deduct 15 percent of the gross earnings of _____ [*name of minor*] under the employment contract and _____ [*provide instructions regarding manner of making deposits in trust of amounts deducted from minor's earnings, e.g.*, deposit those amounts in trust in accordance with written instructions from the trustee as mandated by *Family Code Section 6753(c)*].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This order is for use by a petitioner when the court has granted approval of a contract for employment of an unemancipated minor for professional artistic services or to play a sport [*Fam. Code § 6751*]. The findings and orders related to preserving 15 percent of the minor's gross earnings in trust, including those pertaining to appointing a trustee are mandatory [*Fam. Code §§ 6752(b), 6753*].

[3] Cross References

For a related form, see *§ 365.180*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAge

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32-365 California Forms of Pleading and Practice--Annotated § 365.182

§ 365.182 Petition for Order Amending or Terminating Trust Established for Minor [Fam. Code § 6752]

[1] FORM Petition for Order Amending or Terminating Trust Established for Minor [Fam. Code § 6752]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Contract Between _____ [*name*], a Minor, Petitioner, and _____ [*name*].	)))))))	NO. _____ PETITION TO _____ [AMEND *OR* TERMINATE] _____ TRUST PLAN FOR MINOR

Petitioner alleges:

1. Petitioner is the _____ [minor in these proceedings *or* _____ (mother *or* father *or* guardian *or* trustee) of the minor].

[*If court approval for the contract has been received, include Paragraphs 2, 3, and 4, below*]

2. This court made its order on _____ [*date*], approving the employment contract between _____, employer, and the minor executed on _____ [*date*], and attached as Exhibit A for approval.

3. In its order, the court, pursuant to *Family Code Section 6752*, ordered set aside and preserved for the minor 15

percent of the gross earnings of the minor under the contract, and directed that these sums be deducted by the employer from the gross earnings of the minor and placed in _____ [*identify trust account*].

4. Pursuant to that order, deductions from the salary of the minor were made as directed and placed by the employer in _____ [*identify trust account*], with the minor named as beneficiary. The total sum of $_____ is now on deposit in the account for the benefit of the minor [*or allege current value of other trust or savings plan ordered by the court*].

[*OR, if no court approval for the contract has been received, include Paragraphs 2 and 3, below*]

2. On _____ [*date*], the minor entered into an employment contract with _____ [*employer*]. [*If applicable:* A true and correct copy of this contract is attached as Exhibit A, and incorporated by reference.]

3. Pursuant to *Family Code Section 6752(d),*15percent of the minor's gross earnings under the contract have been set aside and held in trust, for the benefit of the minor.

[*CONTINUE*]

_____ [4 *or* 5]. _____ [*State reason for requesting termination or modification of trust, such as minor's emancipation, required purchase, expense, or debt, or breach of trust, e.g.,* The employment contract that gave rise to the trust that petitioner seeks to amend ended on _____ (*date),* and the minor, who is now _____ years of age, and the minor's _____ (parent *or* guardian), seek to apply amounts held in trust for the benefit of the minor to _____ (*specify purpose, e.g.,* a special program of education and training for the minor offered by _____)]. The facts and circumstances justifying this extraordinary expense are as follows: _____ (*specify).*]

Wherefore, petitioner prays:

[*EITHER, if termination is sought*]

1. That the court make an order terminating the trust and directing that the trust funds be paid to _____ [*indicate person or entity to whom funds should be disbursed, or that funds should be released to the trustee with instructions for their use*].

2. That the court make an order releasing _____ [*employer*] from the duty of making further deductions from petitioner's salary under the approved contract.

[*OR, if modification is sought*]

1. That the court make an order _____ [*indicate change to be made, such as change in trustee or partial disbursement of funds*].

[*CONTINUE*]

_____ [*signature*]

_____ [*typed name*]

Petitioner

[*Verification, if desired. See § 367A.90[1]*.]

[2] Use of Form

This form may be used to amend or terminate a trust for an unemancipated minor that contains a percentage of gross earnings under a contract of a type described in *Fam. Code § 6750* and entered into after 1999. Thus, this form may be used to amend or terminate a trust mandated on court approval of the contract [*Fam. Code § 6752(b)*] or a trust mandated under such a contract notwithstanding a failure to obtain approval or notwithstanding final disapproval [*Fam. Code § 6752(d)*]. Petitioners for amendment or termination are limited to the minor acting through a guardian ad litem, his or her parents, a guardian, or a trustee [*Fam. Code § 6752(b)(7), (d)(5)*].

[3] Termination of Trust for Minor

The superior court has continuing jurisdiction over any trust established pursuant to a court's order approving a minor's contract for employment, and may order revocation or modification of the trust at any time, upon a showing of good cause [*Fam. Code § 6752(b)(7)*]. The court may also make such an order for a trust established under *Fam. Code § 6752(d)(5)*, which requires withholding of funds for a minor's employment contract which has not received court approval. An order for revocation or modification may only be made after reasonable notice to the beneficiary, trustee, and parent or guardian, with opportunity to appear and be heard [*Fam. Code §§ 6752(b)(7), (d)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsModification & Termination

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32-365 California Forms of Pleading and Practice--Annotated § 365.183

§ 365.183 Order Amending or Terminating Trust Established for Minor [Fam. Code § 6752]

[1] FORM Order Amending or Terminating Trust Established for Minor [Fam. Code § 6752]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Contract Between	)	NO. _____
_____ [*name*], a Minor,	)	ORDER
Petitioner,	)	
and	)	
_____ [*name*].	)	

The petition of _____ [*name*], to _____ [amend *or* terminate] the trust established to hold a portion of the gross earnings under the employment contract between _____ [*name*], a minor, and _____ [*employer*], _____ [was heard ex parte by this court *or* came on regularly for hearing before this court] on _____ [*date*], in Department _____. _____ [*Name*] appeared as counsel for petitioner[, _____ (*name*) appeared as counsel for the minor, and _____ (*name*) appeared as counsel for the employer].

Proof was offered, and the court is fully advised in the matter. The court therefore finds that the allegations in the petition are true, and that petitioner is entitled to the relief prayed for in the petition.

IT IS THEREFORE ORDERED that:

[*EITHER, if trust is terminated*]

1. That the trust is hereby terminated, and the entire balance held in _____ [*identify financial institution and account number*] is ordered released to _____ [petitioner *or other person receiving funds*].

2. That _____ [*employer*] is released from the duty of making further deductions from petitioner's salary under the contract for payment into the trust.

[*OR, if trust is modified to change trustee*]

1. That _____ [*name of removed trustee*] is removed as trustee, and _____ [*name of successor trustee*] is appointed as successor trustee.

2. _____ [*name of financial institution*] shall transfer _____ [*identify account by name and/or number*] into the name of _____ [*name of successor trustee*], in trust for the benefit of _____ [*name of minor*].

[*OR, if trust is modified to allow disbursement*]

1. That the sum of _____ is ordered released from _____ *[identify financial institution and account number*] to be disbursed to _____ [petitioner *or other person receiving funds*].

[*CONTINUE*]

Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This order may be used when the court has terminated or amended a trust established to withhold a portion of the gross earnings under a minor's contract for artistic or athletic services. The order may only be made after reasonable notice to the beneficiary, trustee, and parent or guardian, with opportunity to appear and be heard [*Fam. Code §§ 6752(b)(7), (d)(5)*].

[3] Cross References

For a related form, see *§ 365.182*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsModification & Termination

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32-365 California Forms of Pleading and Practice--Annotated § 365.184

§ 365.184 Complaint for Injunctive Relief by Motion Picture Corporation Against Actor and Competing Motion Picture Corporation to Enjoin Breach of Contract--Contract for Artistic Services Executed During Actor's Minority and Approved by Superior Court [Fam. Code §§ 6750(a)(1), 6751]

[1] FORM Complaint for Injunctive Relief by Motion Picture Corporation Against Actor and Competing Motion Picture Corporation to Enjoin Breach of Contract--Contract for Artistic Services Executed During Actor's Minority and Approved by Superior Court [Fam. Code §§ 6750(a)(1), 6751]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
a Corporation, Plaintiff,	)	
vs.	)	
_____ [*name*],	)	
[a Minor,]	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR INJUNCTIVE RELIEF
a Corporation,	)	
[and DOES I through_____,]	)	
Defendant(s).	)	
	)	
	)	

_____

Plaintiff alleges:

1. [*Allegation of appointment of guardian ad litem, if appropriate. See § 367A.90[1], Paragraph 1.*]

2. [*Fictitious name allegations, if appropriate. See § 367A.90[1], Paragraph 3.*]

3. [*Agency allegations, if appropriate. See § 367A.90[1], Paragraph 4.*]

4. Plaintiff _____ [*name of motion picture corporation*] is and at all times herein mentioned was a corporation duly organized and existing under the laws of California, and engaged in the business of organizing, producing, and marketing motion pictures.

5. At all times herein mentioned, defendant _____ [*name of actor*] was and is a professional actor, and at the time of entering into the contract described below was a minor _____ years of age. Defendant is a resident of _____ County, California.

6. On or about _____ [*date*], in _____ County, California, plaintiff entered into a written contract of employment with defendant _____ [*name of actor*]. Under the terms of the contract, plaintiff, for the term of _____ years [*no more than seven years; see Lab. Code § 2855*], beginning on the date of the contract, employed defendant _____ [*name of actor*] as an actor, and defendant agreed to render to plaintiff exclusively his/her personal services as an actor for the term of the contract. A copy of the contract is attached as Exhibit A and incorporated by reference.

7. At all times mentioned in this complaint, defendant _____ [*name of competing motion picture corporation*] was a corporation duly organized and existing under the laws of California, doing business in _____ County, California, and engaged in the business of organizing, producing, and marketing motion pictures.

8. On its execution, the contract was submitted to the superior court for approval in accordance with the provisions of *Family Code Sections 6750* and *6751*. On _____ [*date*], the court entered its final order approving the contract, and finding it just, fair, and to the best interests of defendant. A copy of the order is attached as Exhibit B and incorporated by reference.

9. After submission to and approval of the contract by the superior court, defendant proceeded to render the services to plaintiff[, until he/she reached his/her majority on _____ (*date*)].

10. On _____ [*date*], defendant _____ [*name of actor*] attempted to disaffirm the contract, and gave plaintiff written notice of the attempted disaffirmation. A copy of the notice is attached as Exhibit C and incorporated by reference. The notice informed plaintiff that defendant would render plaintiff no further services under their agreement, or at all.

11. Plaintiff has at all times performed all the conditions and terms of the contract on its part to be performed.

12. Plaintiff is informed and believes and thereon alleges that shortly before _____ [*date when plaintiff disaffirmed contract*], defendant _____ [*name of actor*] entered into a contract with defendant _____ [*name of competing motion picture corporation*], a motion picture corporation, under the terms of which defendant _____ [*name of actor*] agreed to act in a motion picture to be produced by defendant motion picture corporation, in violation of the agreement between defendant _____ [*name of actor*] and plaintiff.

13. At the time of making the purported contract between defendants, they, and each of them, knew that defendant _____ [*name of actor*] was not free to enter into the agreement, or any agreement, concerning personal services, and that defendant _____ [*name of actor*] was under a contract to render his/her services exclusively to plaintiff. Notwithstanding this information, defendants, and each of them, conspired to circumvent plaintiff's contract (Exhibit A attached), and caused publicity to be given and widely circulated that

defendant _____ [*name of actor*] would act in motion pictures for others than plaintiff, all to plaintiff's irreparable injury and damage.

14. *Allege further damage, e.g.*, Defendant _____ (*name of actor*) has become an accomplished artist in his/her profession through the joint efforts of plaintiff and defendant; defendant's ability to act in motion pictures has been a result of the experience, instruction, and training he/she has received from plaintiff. During the past _____ years, plaintiff has expended large sums of money to advertise and publicize defendant as a motion picture actor and his/her present popularity as an actor has been greatly enhanced by these efforts. Defendant has thereby achieved the status of a "star." These sums were expended by plaintiff as an investment for the future success of defendant, and the return on this investment was expected to be the future popularity and success to be achieved by defendant during the term of the contract after he/she had achieved the reputation of a "star" actor. Plaintiff would not have expended these sums but for the expectation that plaintiff would be entitled to the services of defendant during the full term of their contract.

15. Plaintiff is able, ready, and willing to perform and fully comply with the terms of the contract (Exhibit A attached), during the entire life of the contract. Plaintiff has made elaborate plans for the use of defendant _____'s [*name of actor*] services in motion pictures throughout the life of the contract. The actions and threats of defendants, and each of them, especially if carried into execution, would disarrange and demoralize the production schedules of plaintiff for the making of future pictures. In casting a star actor in any photoplay production it is necessary to allocate a large number of other actors, directors, and employees far in advance of production. The action of defendants, and each of them, in breaching, conspiring, and contributing to the breach of the contract is causing and will continue to cause further irreparable harm to plaintiff.

16. The services that have been rendered by defendant _____ (*name of actor*) and the services to be rendered by him/her under the terms of the contract with plaintiff are of a special, unique, and intellectual character, which gives them peculiar value, the loss of which cannot be reasonably and adequately compensated in damages in an action at law. Defendant's breach of contract has caused, and will continue to cause, plaintiff great and irreparable injury for which there is no plain, speedy, or adequate remedy at law. Plaintiff therefore is entitled to an injunction against defendants, and each of them, restraining defendants from breaching, causing, or contributing to the breach of contract.

17. By the judgment and order of this court (Exhibit B attached), defendant _____ [*name of actor*] is now a party to a valid contract with plaintiff. His/Her attempted repudiation and disaffirmance of the contract, and the conduct of defendant _____ [*name of competing motion picture corporation*] now abiding and abetting in this attempted repudiation, disaffirmance, and conduct, is in violation and contempt of the order of this court.

WHEREFORE, plaintiff prays:

1. For a temporary restraining order enjoining and restraining defendant _____ [*name of actor*] from violating his/her contract and from rendering, offering to render, or agreeing to render services to any person, firm, or corporation other than plaintiff, and further enjoining and restraining defendants, and each of them, from causing or permitting defendant _____ [*name of actor*] to perform services for any person, firm, or corporation other than plaintiff, or from advertising or announcing publicly that defendant _____ [*name of actor*] will perform services for any person, firm, or corporation other than plaintiff;

2. For a preliminary injunction enjoining and restraining defendant _____ [*name of actor*] pendente lite from violating his/her contract and from rendering, offering to render, or agreeing to render services to any person, firm, or corporation other than plaintiff, and further enjoining and restraining defendants, and each of them, from causing or permitting defendant _____ [*name of actor*] to perform services for any person, firm, or corporation other than plaintiff, or from advertising or announcing publicly that defendant _____ [*name of actor*] will perform services for any person, firm, or corporation other than plaintiff;

3. For a permanent injunction enjoining and restraining defendant _____ [*name of actor*] from violating his/her contract and from rendering, offering to render, or agreeing to render services to any person, firm, or corporation other than plaintiff, and further enjoining and restraining defendants, and each of them, from causing or permitting defendant _____ [*name of actor*] to perform services for any person, firm, or corporation other than plaintiff, or from advertising or announcing publicly that defendant _____ [*name of actor*] will perform services for any person, firm, or corporation other than plaintiff, during the term of his/her contract with plaintiff;

4. For a declaration of the respective rights and duties of the parties under the contract set forth above;

5. For costs incurred; and

6. For such further relief as may be proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

[*Verification, if desired, or if no declarations are prepared. See § 367A.90[1].*]

CERTIFICATION RE NOTICE

I hereby certify that _____ [on _____ (*date*), I informed defendant _____ (*name of defendant*) of what time and where the foregoing application for a temporary restraining order would be made *or* in good faith I attempted to inform defendant of what time and where the foregoingapplication for a temporary restraining order would be made, by _____ (*specify efforts*), but I was unable to do so *or* notice to defendant of the foregoing application for a temporary restraining order should not be required because _____ (*specify reasons*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

This complaint may be used to obtain injunctive relief against a minor (or former minor) actor who attempted to

disaffirm a contract for artistic or creative services that was approved by the court [*see Fam. Code §§ 6750, 6751*]. With appropriate modifications, it also may be used to obtain injunctive relief when the minor had contracted to perform athletic services [*see Fam. Code §§ 6750(a)(3), 6751*].

[3] Jurisdiction

An action seeking permanent injunctive relief is in the jurisdiction of the superior court and is not a limited civil case [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*].

[4] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Ex Parte Application

When a party seeks a temporary restraining order ex parte, at least one of the following must appear by affidavit or declaration [*Code Civ. Proc. § 527(a)*; *Cal. Rules of Ct., Rule 3.1204(b)*]:

- That he or she informed the opposing party (or that party's attorney) when and where the application would be made no later than 10:00 a.m. the court day before the ex parte appearance, absent a showing of exceptional circumstances that justify a shorter time for notice.

- That the party in good faith attempted to inform the opposing party and the opposing party's attorney but was unable to do so, specifying the efforts made to inform them.

- That for reasons specified the party should not be required to inform the opposing party or the opposing party's attorney.

Absent a showing of exceptional circumstances, a party seeking an ex parte order must notify all parties no later than 10:00 a.m. the court day before the ex parte appearance [*Cal. Rules of Ct., Rule 3.1203*]. The notice must state with specificity the nature of the relief to be requested and the date, time, and place for the presentment of the application. The person giving notice must attempt to determine whether the opposing party and/or counsel will appear to oppose the application [*Cal. Rules of Ct., Rule 3.1204*].

A request for an ex parte order must state the name, address, and telephone number of any attorney known to the applicant to be an attorney for any party or, if no such attorney is known, the name, address, and telephone number of the party if known to the applicant [*Cal. Rules of Ct., Rule 3.1202*]. A declaration of notice, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected, or a declaration stating reasons why notice should not be required, must accompany every request for an ex parte order [*Cal. Rules of Ct., Rule 3.1204*].

For further discussion of the substantive and procedural requirements for ex parte applications for injunctive relief, and additional forms, see Ch. 303, *Injunctions* .

[6] State Statutes

Obtaining injunctions. *Civ. Code § 3422*; *Code Civ. Proc. §§ 525, 527*

Minor's contracts for artistic or creative services approved by superior court may not be disaffirmed. *Fam. Code §§ 200, 6750(a)(1), 6751*

Minor's contracts for literary, musical, or dramatic properties for use in motion pictures, television, production of sound recordings, legitimate or living stage, or otherwise in the entertainment field approved by superior court may not be disaffirmed. *Fam. Code §§ 200, 6750(a)(2), 6751*

Minor's contracts for athletic services approved by superior court may not be disaffirmed. *Fam. Code §§ 200, 6750(a)(3), 6751*

Limitation on personal service contracts to seven years' duration, and unenforceability of contracts extending beyond that time; special rules regarding contracts for producing phonorecords. *Lab. Code § 2855*

[7] Decisions

Contract to make record comedy material between comedian and record company was one calling for personal services by comedian and nonextendable beyond seven years under *Lab. Code § 2855*. *Foxx v. Williams (1966) 244 Cal. App. 2d 223, 240-243, 52 Cal. Rptr. 896* (not involving minor)

[8] Cross References

For a discussion and forms relating to injunctive relief generally, see Ch. 303, *Injunctions* .

For memoranda of points and authorities supporting and opposing the issuance of preliminary injunctions, see California Points and Authorities, Ch. 116, *Injunctions* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPermanent InjunctionsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsContracts LawRemediesEquitable ReliefInjunctive Relief

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370

Chapter 366 MINORS: COURT CONSENT FOR MEDICAL CARE OR ENLISTMENT

32-366 California Forms of Pleading and Practice--Annotated 366.syn

§ 366.syn Synopsis to Chapter 366: MINORS: COURT CONSENT FOR MEDICAL CARE OR ENLISTMENT

§ 366.01 Scope of Chapter

§ 366.02 Cross References

§§ 366.03through 366.09 [Reserved]

§ 366.10 Court Consent to Medical Care

§ 366.11 Court Consent to Enlistment in Armed Services

§§ 366.12through 366.29 [Reserved]

§ 366.30 State Statutes

§ 366.31 Decisions

§ 366.32 Law Reviews

§§ 366.33through 366.49 [Reserved]

§ 366.50 Application by Minor for Court Consent to Medical Care or Enlistment in Armed Services [Fam. Code §§ 6911, 6950]

[1] FORM

[2] Use of Form

[3] Verification

[4] Jurisdiction

[5] Fee

§ 366.51 Order Consenting to Medical Care or Enlistment in Armed Forces [Fam. Code §§ 6911, 6950]

[1] FORM

[2] Use of Form

[3] Cross References

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Chapter 366 MINORS: COURT CONSENT FOR MEDICAL CARE OR ENLISTMENT
PART I. SCOPE

32-366 California Forms of Pleading and Practice--Annotated § 366.01

§ 366.01 Scope of Chapter

This chapter contains forms for use by a minor to obtain court permission for medical care or enlistment in the armed services when the consent of a parent or guardian is necessary and the minor has no parent or guardian available to give the required consent. The following forms are included:

- A form of application for court consent to medical care or enlistment in the armed services [*see § 366.50*].

- A form of order consenting to medical care or enlistment in the armed forces [*see § 366.51*].

For forms for use in obtaining court permission for a minor to marry, see Ch. 359, *Marriage* . For discussion of the emancipation of minors, see Ch. 245, *Emancipation of Minors* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawGuardiansGeneral OverviewFamily LawParental Duties & RightsConsentGeneral OverviewFamily LawParental Duties & RightsEmancipation of Minors

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PART I. SCOPE

32-366 California Forms of Pleading and Practice--Annotated § 366.02

§ 366.02 Cross References

For discussion and forms regarding minors and approval of the compromise of disputed claims of minors, see Ch. 364, *Minors: Claims and Property of Minors* .

For discussion and forms regarding minors and contract actions, see Ch. 365, *Minors: Contract Actions* .

For discussion and forms regarding minors disaffirmation of a judgment entered against a minor who was unrepresented by a guardian or guardian ad litem, see Ch. 367, *Minors: Disaffirmation of Judgments* .

For discussion and forms regarding minors and tort actions, see Ch. 367A, *Minors: Tort Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesAgeFamily LawGuardiansGeneral Overview

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32-366 California Forms of Pleading and Practice--Annotated §§ 366.03through 366.09

[Reserved]

§§ 366.03[Reserved]

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Chapter 366 MINORS: COURT CONSENT FOR MEDICAL CARE OR ENLISTMENT
PART II. LEGAL BACKGROUND

32-366 California Forms of Pleading and Practice--Annotated § 366.10

§ 366.10 Court Consent to Medical Care

On application by a minor, a court may summarily grant consent for medical or dental care, or both, for any minor for which it determines all of the following [*Fam. Code § 6911(a)*]:

- The minor is at least 16 years of age and resides in California.

- The consent of a parent or guardian is necessary to permit the medical or dental care, or both, and the minor has no parent or guardian available to give the consent.

No fee may be charged for proceedings brought under *Fam. Code § 6911* [*Fam. Code § 6911(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawGuardiansGeneral OverviewFamily LawParental Duties & RightsConsentGeneral Overview

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Chapter 366 MINORS: COURT CONSENT FOR MEDICAL CARE OR ENLISTMENT
PART II. LEGAL BACKGROUND

32-366 California Forms of Pleading and Practice--Annotated § 366.11

§ 366.11 Court Consent to Enlistment in Armed Services

On application by a minor, a court may summarily grant consent for enlistment by the minor in the armed forces of the United States to any minor for which it determines all of the following [*Fam. Code § 6950(a)*].

- The minor is at least 16 years of age and resides in California.

- The consent of a parent or guardian is necessary to permit the enlistment and the minor has no parent or guardian available to give the consent.

No fee may be charged for proceedings brought under *Fam. Code § 6950* [*Fam. Code § 6950(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawGuardiansGeneral OverviewFamily LawGuardiansDuties & RightsFamily LawParental Duties & RightsConsentGeneral Overview

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[Reserved]

§§ 366.12[Reserved]

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32-366 California Forms of Pleading and Practice--Annotated § 366.30

§ 366.30 State Statutes

Court consent to medical care. *Fam. Code § 6911*

Court consent to enlistment in armed services. *Fam. Code § 6950*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawGuardiansDuties & RightsFamily LawParental Duties & RightsConsentGeneral OverviewFamily LawParental Duties & RightsConsentAbortionFamily LawParental Duties & RightsConsentMilitary Enlistment

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PART III. RESEARCH GUIDE

32-366 California Forms of Pleading and Practice--Annotated § 366.31

§ 366.31 Decisions

Actual commitment of mentally disordered minor who is also ward of juvenile court as accomplished only in accordance with LPS Act (*Welf. & Inst. Code § 5000 et seq.*). *In re Michael E. (1975) 15 Cal. 3d 183, 189, 123 Cal. Rptr. 103, 538 P.2d 231*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawDelinquency & DependencyWards of CourtFamily LawGuardiansDuties & RightsFamily LawParental Duties & RightsConsentGeneral OverviewHealthcare LawTreatmentIncompetent, Minor & Mentally Disabled PatientsInstitutionalizationPublic Health & Welfare LawHealthcareMental Health ServicesCommitmentChildren

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32-366 California Forms of Pleading and Practice--Annotated § 366.32

§ 366.32 Law Reviews

Comment, *Relief for the Neglected Child: Court-Ordered Medical Treatment in Non-Emergency Situations, 22 Santa Clara L. Rev. 471 (1982)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawGuardiansDuties & RightsFamily LawParental Duties & RightsConsentGeneral Overview

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32-366 California Forms of Pleading and Practice--Annotated §§ 366.33through 366.49

[Reserved]

§§ 366.33[Reserved]

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Chapter 366 MINORS: COURT CONSENT FOR MEDICAL CARE OR ENLISTMENT
PART IV. FORMS

32-366 California Forms of Pleading and Practice--Annotated § 366.50

§ 366.50 Application by Minor for Court Consent to Medical Care or Enlistment in Armed Services [Fam. Code §§ 6911, 6950]

[1] FORM Application by Minor for Court Consent to Medical Care or Enlistment in Armed Services [Fam. Code §§ 6911, 6950]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Application of _____ [*name*], a Minor.	))))))	NO. _____ APPLICATION FOR CONSENT TO _____ [MEDICAL CARE *or* ENLIST IN ARMED SERVICES]

Applicant _____ [*name of minor*] alleges:

1. Applicant is a minor of the age of _____ [*16 years or older*] and is a resident of _____ [*city*], _____ County, California.

[*EITHER*]

2. Applicant is in need of _____ [*specify medical care required*]. The consent of a parent or guardian is required for this medical care.

[*OR*]

2. Applicant desires to enlist in _____ [*specify branch of armed service*]. The consent of a parent or guardian is necessary for this enlistment.

[*CONTINUE*]

3. Applicant does not have a parent or guardian available to give the required consent because _____ [*specify, e.g.*, the whereabouts of his/her _____ (father *and/or* mother *and/or* parents) is unknown and no guardian has been appointed for him/her].

WHEREFORE, applicant requests that this court grant consent for him/her to _____ [receive the requested medical care *or* enlist in the _____ (*specify branch of armed services*)].

_____ [*signature*]

_____ [*typed name*]

Applicant

VERIFICATION

I, _____ [*name of minor*], am the applicant in the above-entitled proceeding. I have read the foregoing application and know its contents.The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form of petition above is for use by a minor of the age of 16 years or older who is a resident of California. If the minor requires medical care or wishes to enlist in the armed services, and the consent of a parent or guardian is required to do so, he or she may apply to the superior court for consent if the minor does not have a parent or guardian available to give consent [*Fam. Code §§ 200, 6911, 6950*].

[3] Verification

The application must be verified [*Prob. Code § 1021*].

[4] Jurisdiction

The application must be filed in the superior court [*Fam. Code §§ 200, 6911, 6950*].

[5] Fee

No fee is to be charged for a proceeding requesting the court for consent to medical care or to enlistment in the armed forces [*Fam. Code §§ 6911(b), 6950(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawGuardiansGeneral OverviewFamily LawGuardiansDuties & RightsFamily LawParental Duties & RightsConsentGeneral Overview

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PART IV. FORMS

32-366 California Forms of Pleading and Practice--Annotated § 366.51

§ 366.51 Order Consenting to Medical Care or Enlistment in Armed Forces [Fam. Code §§ 6911, 6950]

[1] FORM Order Consenting to Medical Care or Enlistment in Armed Forces [Fam. Code §§ 6911, 6950]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
Application of	)	ORDER
_____ [*name*],	)	
a Minor.	)	
	)	

_____

It appearing to the satisfaction of the court from the verified application of _____ [*name of minor*] [and other evidence produced] that _____ [*name of minor*] _____ [requires medical care *or* desires to enlist in the _____ (*identify branch of armed services*)] and that _____ [*name of minor*] has no parent or guardian available to consent to the _____ [care *or* enlistment],

IT IS ORDERED that consent of the superior court to _____ [medical care *or* enlistment in the _____ (*identify branch of armed services*)] is hereby given on behalf of _____ [*name of minor*].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form of order above is for use to grant consent to medical care or enlistment in the armed services [*Fam. Code §§ 6911, 6950*]. It is used in connection with the application set out in *see § 366.50*.

[3] Cross References

For a related form, see *§ 366.50*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawGuardiansGeneral OverviewFamily LawGuardiansDuties & RightsFamily LawParental Duties & RightsConsentGeneral OverviewFamily LawParental Duties & RightsConsentAbortionFamily LawParental Duties & RightsConsentMilitary Enlistment

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Chapter 367 MINORS: DISAFFIRMATION OF JUDGMENTS

32-367 California Forms of Pleading and Practice--Annotated 367.syn

§ 367.syn Synopsis to Chapter 367: MINORS: DISAFFIRMATION OF JUDGMENTS

§ 367.01 Scope of Chapter

§ 367.02 Cross References

§§ 367.03-367.09 [Reserved]

§ 367.10 Guardian of Estate or Guardian ad Litem Required

§ 367.11 Minor's Right to Disaffirm Judgment

§ 367.12 Waiver of Right to Disaffirm

§ 367.13 Procedure to Vacate Judgment

§ 367.14 Vacating Judgment After Majority

§§ 367.15-367.29 [Reserved]

§ 367.30 State Statutes

§ 367.31 Decisions

§ 367.32 Law Reviews

§ 367.33 Text References

§§ 367.34-367.49 [Reserved]

§ 367.50 Notice of Motion to Set Aside and Vacate Judgment--Defendant Was Minor Unrepresented by Guardian or Guardian ad Litem When Judgment Entered [Code Civ. Proc. § 372]

[1] FORM

[2] Use of Form

§ 367.51 Order Setting Aside and Vacating Judgment--Defendant Was Minor Unrepresented by Guardian or Guardian ad Litem When Judgment Entered [Code Civ. Proc. § 372]

[1] FORM

[2] Use of Form

[3] Cross References

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 367 MINORS: DISAFFIRMATION OF JUDGMENTS
PART I. SCOPE

32-367 California Forms of Pleading and Practice--Annotated § 367.01

§ 367.01 Scope of Chapter

This chapter discusses and presents forms for use in the disaffirmation of a judgment entered against a minor who was unrepresented by a guardian or guardian ad litem in the action. It includes the following forms:

- A form for notice of motion to have the judgment set aside [*see § 367.50*].
- An order vacating and setting aside the judgment [*see § 367.51*].

For discussion of the general principles involved in setting aside judgments, see Ch. 371, *Motions After Trial* , and Ch. 489, *Relief From Judgments and Orders* .

For discussion of the power of guardians of the estate and guardians ad litem appearing for minors in civil actions to compromise actions or proceedings, agree to orders or the entry of judgments, satisfy judgments or orders, or release or discharge claims, see Ch. 364, *Minors: Claims and Property of Minors* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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Chapter 367 MINORS: DISAFFIRMATION OF JUDGMENTS
PART I. SCOPE

32-367 California Forms of Pleading and Practice--Annotated § 367.02

§ 367.02 Cross References

For discussion and forms regarding minors and approval of the compromise of disputed claims of minors, see Ch. 364, *Minors: Claims and Property of Minors* .

For discussion and forms regarding minors and contract actions, see Ch. 365, *Minors: Contract Actions* .

For discussion and forms regarding minors and medical care or enlistment in the armed services, see Ch. 366, *Minors: Court Consent for Medical Care or Enlistment* .

For discussion and forms regarding minors and tort actions, see Ch. 367A, *Minors: Tort Actions* .

See generally Ch. 205, *Defaults and Default Judgments* , Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , through Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships* , Ch. 291, *Guardians ad Litem* , and Ch. 371, *Motions After Trial* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewFamily LawGuardiansGeneral OverviewFamily LawGuardiansDuties & Rights

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32-367 California Forms of Pleading and Practice--Annotated §§ 367.03-367.09

[Reserved]

§§ 367.03[Reserved]

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Chapter 367 MINORS: DISAFFIRMATION OF JUDGMENTS
PART II. LEGAL BACKGROUND

32-367 California Forms of Pleading and Practice--Annotated § 367.10

§ 367.10 Guardian of Estate or Guardian ad Litem Required

A minor who is a party to a civil action must appear either by a guardian of the estate or by a guardian ad litem appointed by the court in which the action is pending or a judge of that court [*see Code Civ. Proc. § 372* (with exceptions relating to harassment and threats of violence and situations where the minor is a parent of a child who is the subject of specified proceedings)].

Unless a minor is duly represented as provided by law at the time a judgment is entered against him his right to disaffirm such judgment continues until barred by laches after the minor has attained the age of majority, such a judgment is voidable and may be disaffirmed, the right of disaffirmance by a minor of a judgment rendered voidable by the fact that he was not represented by a guardian in the action is absolute, and such right continues throughout his minority [*Berg v. Traylor (148 Cal. App. 4th, 809, 821, 56 Cal. Rptr. 3d 140)]* .

For discussion of appointment of guardians of the estate and guardians ad litem, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , and Ch. 291, *Guardians ad Litem* , respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewFamily LawGuardiansGeneral OverviewFamily LawGuardiansAppointment

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PART II. LEGAL BACKGROUND

32-367 California Forms of Pleading and Practice--Annotated § 367.11

§ 367.11 Minor's Right to Disaffirm Judgment

A minor may disaffirm an adjudication of his or her rights by a judicial tribunal obtained in a proceeding in which the minor has not been represented as provided by law. The minor's right to disaffirm the adjudication is not specifically dependent on statute, but is a general rule of law enforced as a necessary incident to the status of minority [*Gouanillou v. Industrial Acci. Com. (1920) 184 Cal. 418, 420, 193 P. 937]* . This right continues until barred by laches after the minor has attained the age of majority [*Gouanillou v. Industrial Acci. Com. (1920) 184 Cal. 418, 420, 193 P. 937* ; *cf. Fam. Code § 6710* (except as otherwise provided by statute, minor may disaffirm contract before majority or within reasonable time afterwards or, in case of minor's death within that period, by minor's heirs or personal representative)]. See *§ 367.14*, for further discussion of disaffirming judgments after the minor reaches majority.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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32-367 California Forms of Pleading and Practice--Annotated § 367.12

§ 367.12 Waiver of Right to Disaffirm

Judgments entered when a minor has not been represented as provided by law have been characterized by the courts as voidable and apparently subject to waiver [*Keane v. Penha (1946) 76 Cal. App. 2d 693, 696, 173 P.2d 835* ; *Hughes v. Quackenbush (1934) 1 Cal. App. 2d 349, 362, 37 P.2d 99]* . They have been further characterized as merely irregular, rather than judgments that are void as jurisdictionally defective [*Hughes v. Quackenbush (1934) 1 Cal. App. 2d 349, 362, 37 P.2d 99]* .

Some courts have noted that despite the fact that a minor's attempted disaffirmance of a judgment is sometimes denied by a court, the virtue of the general rule is unimpaired because the exceptions have been due to the minor's conduct that was deemed to have been tantamount to a ratification after overcoming any infirmities or waiver of rights [*Garbutt v. Campbell (1955) 130 Cal. App. 2d 167, 168-169, 278 P.2d 508* ; *Keane v. Penha (1946) 76 Cal. App. 2d 693, 696, 173 P.2d 835]* . Thus, for example, in any case in which a minor comes of age during the pendency of proceedings in which he or she was unrepresented by a guardian or guardian ad litem but continues to participate in the proceedings, his or her subsequent disaffirmance will not be given effect [*Hughes v. Quackenbush (1934) 1 Cal. App. 2d 349, 362-363, 37 P.2d 99]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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32-367 California Forms of Pleading and Practice--Annotated § 367.13

§ 367.13 Procedure to Vacate Judgment

Although no statutory procedure has been spelled out to set aside a judgment after it has been disaffirmed by an unrepresented minor, the procedure generally employed is to file a noticed motion to set aside and vacate the judgment [*Garbutt v. Campbell (1955) 130 Cal. App. 2d 167, 168, 278 P.2d 508* ; *Keane v. Penha (1946) 76 Cal. App. 2d 693, 696, 173 P.2d 835* ; *see Carver v. Donin (1934) 139 Cal. App. 395, 396, 33 P.2d 84* ; for a form of notice of motion, *see § 367.50*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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32-367 California Forms of Pleading and Practice--Annotated § 367.14

§ 367.14 Vacating Judgment After Majority

The key criterion in the court's determination of whether to vacate a judgment entered against a defendant while a minor unrepresented by a guardian, in any case in which the defendant disaffirms and makes the motion after majority, is whether laches (i.e., unreasonable delay plus prejudice) has occurred [*Gouanillou v. Industrial Acci. Com. (1920) 184 Cal. 418, 420, 193 P. 937]* . This approach allows some degree of flexibility. Thus, for example, in *Garbutt v. Campbell (1955) 130 Cal. App. 2d 167, 168, 278 P.2d 508* , disaffirmance and vacation of a default was allowed nearly a year after the defendant attained majority, more than four years after entry of default, and more than a year and a half after judgment was made and entered.

Another important inquiry is whether the minor or former minor suffered a loss of substantial rights. If not, the court will not allow disaffirmance [*Carver v. Donin (1934) 139 Cal. App. 395, 397, 33 P.2d 841]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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[Reserved]

§§ 367.15[Reserved]

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32-367 California Forms of Pleading and Practice--Annotated § 367.30

§ 367.30 State Statutes

Requirement that minor be represented in civil action by guardian of estate or guardian ad litem. *Code Civ. Proc. § 372*

Legal Topics:

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

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32-367 California Forms of Pleading and Practice--Annotated § 367.31

§ 367.31 Decisions

Right of minor to disaffirm judgment when not represented by guardian as absolute and continuing throughout minority. *Johnston v. Southern Pacific Co. (1907) 150 Cal. 535, 538, 89 P. 348* ; *Keane v. Penha (1946) 76 Cal. App. 2d 693, 696, 173 P.2d 835*

Right of minor unrepresented by guardian to disaffirm judgment as not dependent on statute, but on general rule of law enforced as necessary incident to status of minority. *Gouanillou v. Industrial Acci. Com. (1920) 184 Cal. 418, 420, 193 P. 937*

Unless a minor is duly represented as provided by law at the time a judgment is entered against him his right to disaffirm such judgment continues until barred by laches after the minor has attained the age of majority, such a judgment is voidable and may be disaffirmed, the right of disaffirmance by a minor of a judgment rendered voidable by the fact that he was not represented by a guardian in the action is absolute, and such right continues throughout his minority. *Berg v. Traylor (2007) 148 Cal. App. 4th 809, 821, 56 Cal. Rptr. 3d 140*

Right of minor to disaffirm after reaching majority as dependent on whether minor suffered loss of substantial rights. *Carver v. Donin (1934) 139 Cal. App. 395, 397, 33 P.2d 841*

Notice of motion as proper vehicle to vacate judgment against defendant on ground that she was minor unrepresented by guardian ad litem at time of entry of judgment. *Carver v. Donin (1934) 139 Cal. App. 395, 396, 33 P.2d 841*

Failure to appoint guardian as mere irregularity rather than jurisdictional defect rendering judgment void. *Hughes v. Quackenbush (1934) 1 Cal. App. 2d 349, 362, 37 P.2d 99*

Minor coming of age during pendency of proceeding and continuing to participate in proceeding as not allowed to disaffirm later. *Hughes v. Quackenbush (1934) 1 Cal. App. 2d 349, 363, 37 P.2d 99*

Court's jurisdiction to set aside default judgment against minor unrepresented by guardian ad litem when minor so

moved slightly under a year after attaining majority, even though motion made four years after entry of default and a year and a half after judgment made and entered, as not barred by laches. *Garbutt v. Campbell (1955) 130 Cal. App. 2d 167, 168, 278 P.2d 508*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewFamily LawDelinquency & DependencyGeneral OverviewFamily LawGuardiansGeneral OverviewFamily LawGuardiansDuties & Rights

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§ 367.32 Law Reviews

Note, *Judgments: Right of Infant Defendant Without Guardian to Disaffirm, 22 Cal. L. Rev. 576 (1934)*

Legal Topics:

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

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32-367 California Forms of Pleading and Practice--Annotated § 367.33

§ 367.33 Text References

California Points and Authorities , Ch. 106, *Guardianship and Conservatorship* , Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum* , Ch. 155, *Motions After Trial* (Matthew Bender)

Witkin, California Procedure, vol. 4, *Pleading*, § 71 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsFamily LawGuardiansDuties & Rights

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32-367 California Forms of Pleading and Practice--Annotated §§ 367.34-367.49

[Reserved]

§§ 367.34[Reserved]

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PART IV. FORMS

32-367 California Forms of Pleading and Practice--Annotated § 367.50

§ 367.50 Notice of Motion to Set Aside and Vacate Judgment--Defendant Was Minor Unrepresented by Guardian or Guardian ad Litem When Judgment Entered [Code Civ. Proc. § 372]

[1] FORM Notice of Motion to Set Aside and Vacate Judgment--Defendant Was Minor Unrepresented by Guardian or Guardian ad Litem When Judgment Entered [Code Civ. Proc. § 372]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO VA-
vs.	)	CATE AND SET ASIDE JUDGMENT, SUPPORT-
_____ [*name*],	)	ING DECLARATION OF _____,
Defendant.	)	AND SUPPORTING MEMORANDUM
	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: None set

_____

To _____ [*identify party, e.g.,*] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant] will, and hereby does, move for an order to set aside and vacate the judgment entered herein on _____ [*date*]. The motion will be, and hereby is, made on the ground that defendant was a

minor at the time the judgment was entered, but was not represented by a guardian of the estate or guardian ad litem during the course of the action, and on the further ground that defendant disaffirmed the judgment on _____ [*date*], a date _____ [during defendant's minority *or* within a reasonable period of time after plaintiff achieved majority status].

The motion will be based on this notice of motion, on the declaration(s) of _____[*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for_____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name of minor*]

I, _____ [*name*], declare:

1. I am the defendant in this action, _____ [*title of case and case number*].

2. I was born on _____ [*date*].

3. When the judgment in this case was entered on _____ [*date*] I had not attained the age of majority.

4. I was not represented by a guardian of the estate or by a guardian ad litem during this action, and I hereby disaffirm the judgment rendered in the action.

[*SET FORTH any additional facts supporting motion, including reasons why the judgment was not disaffirmed earlier if it is made after the defendant attained majority, and if desired, the reasons why relief from the judgment is sought, and then continue*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion*]

CAUTION:
A supporting memorandum must be filed and a copy served with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*].

[2] Use of Form

This notice of motion is for use to set aside and vacate a judgment entered against a minor defendant who was not represented by a guardian of the estate or a guardian ad litem in the action [*see Garbutt v. Campbell (1955) 130 Cal. App. 2d 167, 168, 278 P.2d 508]* . For discussion, see *§ 367.11*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewFamily LawGuardiansAppointment

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32-367 California Forms of Pleading and Practice--Annotated § 367.51

§ 367.51 Order Setting Aside and Vacating Judgment--Defendant Was Minor Unrepresented by Guardian or Guardian ad Litem When Judgment Entered [Code Civ. Proc. § 372]

[1] FORM Order Setting Aside and Vacating Judgment--Defendant Was Minor Unrepresented by Guardian or Guardian ad Litem When Judgment Entered [Code Civ. Proc. § 372]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____
	)	Trial Date: None set
	)	

_____

The motion of _____ [*identify party, e.g.,* defendant] for an order setting aside and vacating the judgment entered in favor of _____ [*identify party, e.g.,* plaintiff] by this court on _____ [*date*], came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and the judgment entered in this action on _____ is vacated and set aside
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use to vacate and set aside a judgment in an action involving a minor, when it appears that the minor was unrepresented by a guardian or guardian ad litem at the time of entry of the judgment.

[3] Cross References

For a related form, see *§ 367.50*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewFamily LawGuardiansAppointment

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32-367A California Forms of Pleading and Practice--Annotated 367A.syn

§ 367A.syn Synopsis to Chapter 367A: MINORS: TORT ACTIONS

§ 367A.01 Scope of Chapter

§ 367A.02 Cross References

§§ 367A.03-367A.09 [Reserved]

§ 367A.10 Governing Statutes

§ 367A.11 Actions by Minors

[1] General Procedures

[2] Against Parents

[3] Injuries Before Birth

[a] Actions by Minor or Parent

[b] Prenatal Injuries

[c] Wrongful Life

[d] Damages Recoverable for Wrongful Life

[e] Other Injuries Before Birth

[4] Statute of Limitations

[a] In General

[b] Medical Malpractice

[c] Sexual Abuse

[d] Prenatal Injuries

§ 367A.12 Minors' Liability

[1] Imposition by Statute

[2] Intentional Torts

[3] Negligent Torts

[4] Defenses

[a] Negligence of Minor

[b] Negligence of Parent

[c] Assumption of Risk

[5] Service of Summons on Minor

§§ 367A.13-367A.29 [Reserved]

§ 367A.30 Governing Law

§ 367A.31 Actions Between Parent and Child

[1] By Child

[2] By Parent

§ 367A.32 Parents' Liability for Minor Child's Torts

[1] General Rule of No Vicarious Liability

[2] Negligent Control of Minor Child

[3] Willful Misconduct of Minor Child

[a] Scope of Liability in General

[b] Defacing Property

[c] Injury or Damage to Pupil or to School Employee or Property

[d] Destruction or Detention of Public Property

[e] Petty Theft From Store or Library

[f] Damage or Malicious Access to Computer System

[4] Discharge of Firearm by Minor Child

[5] Minor Driving Motor Vehicle

[6] Agency Relationship

§ 367A.33 Child's Liability for Parent's Torts

§ 367A.34 Parent's Actions for Personal Injuries to Minor Child

[1] By One or Both Parents

[2] Child of Unwed Parents

[3] By Guardian

[4] Service of Summons

[5] Persons Liable and Survivability of Action

[6] Damages Recoverable by Parents

[7] Defenses to Parent's Recovery of Damages

[a] Comparative Negligence

[b] Waiver or Estoppel

[c] Emancipation

[8] Wrongful Death of Child

[9] Consolidation of Injury and Wrongful Death Actions

[10] Workers' Compensation Benefits for Injury to Child

§ 367A.35 Parent's Action for Abduction of Child

§ 367A.36 Child's Actions Based on Parent-Child Relationship

[1] Interference With Parental Consortium

[2] Wrongful Death of Parent

[3] Workers' Compensation Benefits for Injury to Parent

§§ 367A.37-367A.49 [Reserved]

§ 367A.50 Related Matthew Bender Publications

§ 367A.51 State Statutes

§ 367A.51A California Rules of Court

§ 367A.52 Decisions

[1] Actions Against Parents

[2] Actions for Negligence

[3] Assumption of Risk

[4] Claims Against Public Entities

[5] Comparative Negligence

[6] Damages

[7] Liability for Torts

[8] Limitations

[9] Medical Malpractice

[10] Prenatal Injuries

[11] Wrongful Birth

[12] Wrongful Life

§ 367A.53 Law Reviews

§ 367A.54 Text References

§§ 367A.55-367A.69 [Reserved]

§ 367A.70 State Statutes

[1] Actions Between Parent and Child

[a] By Child

[b] By Parent

[2] Parent's Liability for Child's Acts

[a] Discharge of Firearm

[b] Driving Motor Vehicle

[c] Willful Misconduct

[3] Personal Injury Actions

[a] By Parent for Injury to Child

[b] Survival of Parent's Action

[c] Wrongful Death Action by Dependent Parents or Minors

[4] Workers' Compensation

§ 367A.71 Decisions

[1] Actions Between Parent and Child

[2] Child's Actions Based on Parent-Child Relationship

[3] Compromise of Minor's Claim

[4] Discipline of Child

[5] Parents' Actions for Injuries to Child

[a] Damages Resulting From Child's Personal Injuries

[b] Emotional Distress to Parent

[c] Loss of Filial Consortium

[d] Substitution of Attorneys

[e] Wrongful Death of Child

[6] Parent's Liability for Child's Torts

[a] Agency Relationship

[b] Motor Vehicle

[c] Negligent Control of Child

§ 367A.72 Attorney General Opinions

§ 367A.73 Law Reviews

§ 367A.74 Text References

§§ 367A.75-367A.89 [Reserved]

§ 367A.90 Complaint for Damages for Prenatal Injuries and Injuries at Birth [Civ. Code §§ 43.1, 3333; Code Civ. Proc. § 340.4]--By Minor Through Guardian ad Litem [Fam. Code § 6601] Against Doctor and Hospital

[1] FORM

[2] Use of Form

[3] Medical Expenses

[4] Specification of Damages

[5] Verification

[6] Statute of Limitations

[7] Cross References

§ 367A.91 Complaint for Damages for Wrongful Life and Wrongful Birth of Minor [Civ. Code §§ 1714(a), 3333]--Negligent Failure of Defendant to Inform Parents of Substantial Risk that Minor Would Be Born With Substantial Genetic Defect

[1] FORM

[2] Use of Form

[3] Allegations

[4] Damages

[a] In General

[b] Alleging Special Damages

[c] Punitive Damages

[5] Cross References

§ 367A.92 Complaint for Damages [Civ. Code § 3333] From Negligence [Civ. Code § 1714(a)]--By Minor Against Mobile Vendor and Other Driver

[1] FORM

[2] Use of Form

[3] Duty of Street Vendors to Minors

[4] Cross References

§§ 367A.93-367A.109 [Reserved]

§ 367A.110 Judicial Council Trial Court Pleading Form--Complaint for Damages for Personal Injury, Property

Damage, Wrongful Death With General Negligence Attachment [Cal. Judicial Council Forms PLD-PI-001, PLD-PI-001(2)]--By Child Through Guardian ad Litem [Code Civ. Proc. § 372; Fam. Code § 6601] Against Parent

[1] FORM

[2] Use of Form

[3] Filling Out Complaint Form

[a] General Instructions

[b] Caption

[c] Plaintiff's Capacity (Paragraph 3.)

[d] List of Causes of Action (Paragraph 10.)

[e] Damages (Paragraph 11.)

[f] Specification of Damages (Paragraph 14.)

[4] Filling Out General Negligence Attachment to Complaint Form

[a] General Instructions

[b] Statute of Limitations

[c] Fictitiously Named Defendants

[5] Preparing Verification Attachment

[6] Cross References

§ 367A.111 Allegation for Intentional Tort--By Child Through Guardian ad Litem Against Parent [Code Civ. Proc. § 372; Fam. Code § 6601]

[1] FORM

[2] Use of Form

[3] Judicial Council Pleading Forms

[4] Complaint Drafted by Counsel

[5] Intentional Tort Allegations

[6] Damages

[7] Cross References

§ 367A.112 Allegations for Personal Injuries Based on Negligence--By Injured Party Against Parents--Negligent Supervision of Child

[1] FORM

[2] Use of Form

[3] Judicial Council Pleading Forms

[4] Complaint Drafted by Counsel

[5] Parent-Child Relationship

[6] Statute of Limitations

[7] Parents' Breach of Duty to Supervise

[8] Cross References

§ 367A.113 Cause of Action for Attachment to Judicial Council Form of Complaint for Personal Injury, Property Damage, Wrongful Death [Cal. Rules of Ct., Rule 1.45(c)]--Parent's Vicarious Liability for Property Damage Caused by Willful Misconduct of Minor--By Property Owner Against Parent [Civ. Code § 1714.1]

[1] FORM

[2] Use of Form

[3] Contents of Form

[4] Damages

[5] Cross References

§ 367A.114 Allegations for Personal Injuries Based on Willful Misconduct of Minor--By Injured Person Against Parents [Civ. Code § 1714.1(a)]

[1] FORM

[2] Use of Form

[3] Judicial Council Pleading Forms

[4] Complaint Drafted by Counsel

[5] Contents of Allegations

[6] Damages

[7] Cross References

§ 367A.115 Allegation of Compensatory Damages for Personal Injury to Minor Child--By Parent--Loss of Minor's Services and Earnings During Minority [Code Civ. Proc. § 376]

[1] FORM

[2] Use of Form

[3] Judicial Council Pleading Forms

[4] Complaint Drafted by Counsel

[5] Jurisdiction

[6] Specification of Damages

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Chapter 367A MINORS: TORT ACTIONS
PART I. SCOPE

32-367A California Forms of Pleading and Practice--Annotated § 367A.01

§ 367A.01 Scope of Chapter

This chapter discusses tort actions by and against minors. It includes the following forms:

- A form of complaint for damages for prenatal injuries by a minor [*see § 367A.90*].

- A form of complaint in an action for damages for the wrongful life and wrongful birth of a minor when the defendant negligently failed to inform the minor's parents of the substantial risk that the minor would be born with a substantial genetic deformity [*see § 367A.91*].

- A form of complaint in an action by a minor against a street vendor and operator of an automobile when the minor is injured by the automobile while responding to the vendor's invitation to do business [*see § 367A.92*].

For discussion and forms regarding civil actions for damages based on childhood sexual abuse (brought by a minor or adult) under *Code Civ. Proc. § 340.1*, see Ch. 5, *Abuse of Minors and Elderly* .

This chapter also discusses and contains forms for use in actions involving injuries to a minor child or inflicted by a minor child. The parent-child relationship is integral to the discussion and forms contained in this chapter.

This chapter includes the following forms:

- A Judicial Council personal injury complaint and general negligence attachment for use by a child against a parent [*see § 367A.110*].

- Allegations of an intentional tort for use by a child against a parent [*see § 367A.111*].

- Allegations of negligence for use by an injured party against parents for negligent supervision of their child [*see § 367A.112*].

- Allegations of property damage based on willful misconduct of a minor for use against parents based on a minor's willful misconduct to recover for property damage [*see § 367A.113*] or personal injury [*see § 367A.114*].

- Allegations for the recovery of compensatory damages by a minor's parents for loss of the minor's services and earnings during minority due to personal injury of the minor [*see § 367A.115*].

For discussion and forms relating to wrongful death actions by adult or minor heirs, see Ch. 181, *Death and Survival Actions* .

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32-367A California Forms of Pleading and Practice--Annotated § 367A.02

§ 367A.02 Cross References

For discussion and forms regarding minors and approval of the compromise of disputed claims of minors, see Ch. 364, *Minors: Claims and Property of Minors* .

For discussion and forms regarding minors and contract actions, see Ch. 365, *Minors: Contract Actions* .

For discussion and forms regarding minors and medical care or enlistment in the armed services, see Ch. 366, *Minors: Court Consent for Medical Care or Enlistment* .

For discussion and forms regarding minors disaffirmation of a judgment entered against a minor who was unrepresented by a guardian or guardian ad litem, see Ch. 367, *Minors: Disaffirmation of Judgments* .

For discussion and forms regarding civil actions for damages based on childhood sexual abuse under *Code Civ. Proc. § 340.1*, see Ch. 5, *Abuse of Minors and Elderly* .

For discussion and a form for use in an injured minor's action against a department store for injuries resulting from failure of the store to take precautions to prevent injuries by its escalators, see Ch. 244, *Elevators and Escalators* .

For a form of complaint for use by a minor's representative to permit inspection and to obtain copies of the minor's health records, see Ch. 295, *Hospitals* .

For discussion and forms generally relating to negligence actions, see Ch. 380, *Negligence* .

For discussion and forms relating to a minor's capacity to sue, see Ch. 3, *Abatement of Actions* .

For discussion and forms relating to actions based on sexual abuse of minors, see Ch. 5, *Abuse of Minors and Elderly* .

For discussion and forms relating to the right of a parent or child to use any necessary force to protect the person or property of another from wrongful injury, see Ch. 58, *Assault and Battery* .

For discussion and forms relating to actions for personal injuries by a minor pedestrian and his or her parents, see Ch. 83, *Automobiles: Bringing the Action* .

For discussion and forms relating to actions for injuries to or wrongful death of a minor bicyclist, see Ch. 98, *Bicycles* .

For discussion and forms relating to damages that may be awarded in tort actions involving personal injuries, see Ch. 177, *Damages* .

For discussion and forms relating to the powers of a guardian of a minor's estate to submit or compromise the minor's disputed claims, see Ch. 290C, *Guardianship and Conservatorship: Actions and Disputed Claims* .

For discussion and forms relating to the appointment and powers of guardians ad litem, see Ch. 291, *Guardians ad Litem* .

For a form relating to an action for damages for a minor's prenatal injuries by the minor and his or her parents against a hospital, see Ch. 295, *Hospitals* .

For discussion and form relating to an action for wrongful death and negligent infliction of emotional distress from witnessing injury to a relative, see Ch. 362, *Mental Suffering and Emotional Distress* .

For general discussion and forms relating to actions for personal injuries based on negligence, see Ch. 380, *Negligence* .

For forms relating to a minor student's actions against a school district for injuries resulting from negligent supervision or dangerous conditions on school property that may be adapted for use in wrongful death actions by parents, see Ch. 514, *Schools: Injuries to Students* .

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[Reserved]

§§ 367A.03[Reserved]

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§ 367A.10 Governing Statutes

The civil liability of minors is governed by *Fam. Code § 6600*, and the civil enforcement of rights of minors by *Fam. Code § 6601*. The limitation of actions by minors for prenatal injuries is governed by *Civ. Code § 43.1* and *Code Civ. Proc. § 340.4*. Tolling statutes of limitation during minority and exceptions to the general rule are addressed in *Code Civ. Proc. § 352*.

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32-367A California Forms of Pleading and Practice--Annotated § 367A.11

§ 367A.11 Actions by Minors

[1] General Procedures

Generally, a minor may enforce his or her rights by legal action or other legal proceedings in the same manner as a person of full age, except that a guardian must conduct the action [*Fam. Code § 6601*].

An action to recover damages for wrongful death or personal injury is entitled to preference on the motion of any party who is under the age of 14 years unless the court finds that the party does not have a substantial interest in the case as a whole [*Code Civ. Proc. § 36(b)*; *see Peters v. Superior Court (1989) 212 Cal. App. 3d 218, 222-226, 260 Cal. Rptr. 426* (preference, which is mandatory, does not violate either separation of powers doctrine or equal protection); *see also Code Civ. Proc. § 36(g)* (trial calendar requirements for action for medical malpractice)]. Procedures for obtaining preference are discussed in Ch. 425, *Pretrial Proceedings* .

For a form of complaint by a minor for damages resulting from negligence, see *§ 367A.92*.

[2] Against Parents

Minors may sue their parents for willful or malicious torts [*Emery v. Emery (1955) 45 Cal. 2d 421, 429, 289 P.2d 218]* and negligent torts [*Gibson v. Gibson (1971) 3 Cal. 3d 914, 923, 92 Cal. Rptr. 288, 479 P.2d 648* ; *Martinez v. Southern Pac. Co. (1955) 45 Cal. 2d 244, 254, 288 P.2d 868]* . For further discussion and forms, see *§§ 367A.30* et seq. and 367.110 et seq.

No cause of action arises against a parent of a child based on the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive [*Civ. Code § 43.6(a)*].

[3] Injuries Before Birth

[a] Actions by Minor or Parent

Several tort causes of action arise from conduct that occurs before the birth of the child. A child who is born impaired either because of prenatal or preconception conduct may have a cause of action against the tortfeasor. "Wrongful life" is a title used in California that describes at least some claims brought by infants for negligence occurring prior to their conception [*see Turpin v. Sortini (1982) 31 Cal. 3d 220, 225, 182 Cal. Rptr. 337, 643 P.2d 954* ; *Hegyes v. Unjian Enters., Inc. (1991) 234 Cal. App. 3d 1103, 1112-1113, 286 Cal. Rptr. 85* ; *see also § 367A.11[3][c]*].

A parent may have a cause of action for wrongful birth if, due to tortious conduct, an unwanted or impaired child is born [*see Turpin v. Sortini (1982) 31 Cal. 3d 220, 225 n.4, 182 Cal. Rptr. 337, 643 P.2d 954* ; *Hegyes v. Unjian Enters., Inc. (1991) 234 Cal. App. 3d 1103, 1112-1113, 286 Cal. Rptr. 85]* . For example, a parent has a cause of action against a medical care provider whose negligence deprives the parents of the opportunity to choose not to conceive a hereditarily afflicted child [*Turpin v. Sortini (1982) 31 Cal. 3d 220, 223, 225, 182 Cal. Rptr. 337, 643 P.2d 954]* .

In addition, an action for wrongful birth lies from a negligently performed sterilization or abortion that fails to prevent the birth of an unwanted child [*see Stills v. Gratton (1976) 55 Cal. App. 3d 698, 127 Cal. Rptr. 652* (abortion); *Custodio v. Bauer (1967) 251 Cal. App. 2d 303, 318, 323-324, 59 Cal. Rptr. 463* (sterilization)]. A normal child who is born as a result of a failed birth-prevention procedure has no independent cause of action, however, as the child is deemed to have sustained no cognizable damage in simply being born [*Foy v. Greenblott (1983) 141 Cal. App. 3d 1, 14-15, 190 Cal. Rptr. 84* ; *Stills v. Gratton (1976) 55 Cal. App. 3d 698, 705-706, 127 Cal. Rptr. 652]* .

[b] Prenatal Injuries

A child conceived but not yet born is deemed an existing person to the extent necessary for its interests in the event of subsequent birth [*Civ. Code § 43.1*; *Code Civ. Proc. § 340.4*]. Among the interests of a child under *Civ. Code § 43.1* and *Code Civ. Proc. § 340.4* to be preserved is the right to compensation for personal injuries inflicted by the intentional or negligent conduct of another [*Justus v. Atchison (1977) 19 Cal. 3d 564, 578, 139 Cal. Rptr. 97, 565 P.2d 122* , *overruled on other grounds,* *Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 171, 216 Cal. Rptr. 661, 703 P.2d 1]* .

Thus, a tortfeasor owes the same duty to a fetus that is owed to a living person, and a child, if born alive, may maintain an action for injuries resulting from prenatal tortious conduct [*Hegyes v. Unjian Enters., Inc. (1991) 234 Cal. App. 3d 1103, 1122, 286 Cal. Rptr 85]* . No duty exists if the fetus is not later born alive [*Hegyes v. Unjian Enters., Inc. (1991) 286 Cal. Rptr 85* ; *see Justus v. Atchison (1977) 19 Cal. 3d 564, 577-578, 139 Cal. Rptr. 97, 565 P.2d 122* , overruled on another ground in *Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 171, 216 Cal. Rptr. 661, 703 P.2d 1* (fetus later stillborn is not person within meaning of wrongful death statute)]. Further, the child must be born with some impairment [*see Hegyes v. Unjian Enters., Inc. (1991) 234 Cal. App. 3d 1103, 1115, 286 Cal. Rptr 85* ; *see also § 367A.11[3]*].

For example, a child may maintain a cause of action for a condition caused by negligent treatment of the mother during pregnancy [*see Turpin v. Sortini (1982) 31 Cal. 3d 220, 230-231, 182 Cal. Rptr. 337, 643 P.2d 954]* . Similarly, the California Supreme Court has held that a child is entitled to bring a cause of action against his or her mother's employer for the prenatal injuries the child suffered as a result of the employer's negligence in exposing its pregnant employee to toxic fumes at her workplace [*Snyder v. Michael's Stores, Inc. (1997) 16 Cal. 4th 991, 994, 68 Cal. Rptr. 2d 476, 945 P.2d 781]* . The Court in *Snyder* rejected the defendant's argument that the exclusive remedy provisions of the workers' compensation law, *Lab. Code § 3600 et seq.*, barred the child's action because, as a matter of law, fetal injuries are derivative of injury to the pregnant mother. It reasoned that the exclusive remedy provisions barred personal injury actions against an employer only for injuries sustained by his or her employees arising out of and in the course of the employment. In the case of an action by a child of an employee based on prenatal injury, the action may be maintained. [*Snyder v. Michael's Stores, Inc. (1997) 16 Cal. 44th 991, 994, 68 Cal. Rptr. 2d 476, 945 P.2d 781]* .

For a form of complaint for prenatal injuries and wrongful birth, see *§ 367A.90*.

[c] Wrongful Life

Generally speaking, a "wrongful life" case must be brought by a genetically impaired child against a physician or other health care provider for preconception negligence in rendering medical counseling or testing. In a wrongful life case, the child does not assert that the negligence of the defendant caused the inherited or congenital abnormalities; rather, the essence of the child's claim is that the medical professional's breach of the applicable standard of care resulted in that child being born to experience the pain and suffering attributable to his or her affliction [*Hegyes v. Unjian Enters., Inc. (1991) 234 Cal. App. 3d 1103, 1112, 286 Cal. Rptr 85* ; *see also Alexandria S. v. Pacific Fertility Medical Center, Inc. (1997) 55 Cal. App. 4th 110, 64 Cal. Rptr. 2d 23* (tort cause of action by child conceived through artificial insemination, against fertility clinic and doctors for deprivation of legal parent, likened to wrongful life claim by a healthy child)]. It is a claim that due to the conduct of the defendant, a birth occurred that otherwise would not have occurred [*Curlender v. Bio-Science Labs. (1980) 106 Cal. App. 3d 811, 817-830, 165 Cal. Rptr. 477* (action against laboratory for negligently conducted genetic testing)].

"Wrongful life" essentially is a description of the harm for which damages are sought. The claim must be based on a recognized cause of action for which all of the elements are present. If the claim is based on medical malpractice--as is most common--all of the elements must be present, including the element of duty [*see Hegyes v. Unjian Enters., Inc. (1991) 234 Cal. App. 3d 1103, 1113, 286 Cal. Rptr 85* ; for discussion of physician's malpractice, *see generally* Ch. 41r, *Physicians: Medical Malpractice*]. Breach of duty must be established by showing that the defendant's conduct fell outside of the community standard of care [*see Munro v. Regents of Univ. of Cal. (1989) 215 Cal. App. 3d 977, 983-985, 263 Cal. Rptr. 878* (no breach in failing to order genetic testing for parents who gave no information indicating that they met profile characteristics of at-risk group)]. Causation also must be present, meaning that a claim based on professional medical negligence must show a reasonably probable causal connection between the medical defendant's conduct and the harm suffered [*Simmons v. West Covina Med. Clinic (1989) 212 Cal. App. 3d 696, 701-704, 260 Cal. Rptr 772* (failure to order test with only 20 percent chance of disclosing risk of Down syndrome insufficient to establish causation)].

Liability cannot be imposed for wrongful life just because the physician fails to advise the mother of the right to terminate a pregnancy, if the physician provides proper care and testing and, up to the time at which the fetus is considered viable, nothing indicates that the fetus is in danger of being born with a birth defect. A fetus is considered to be viable at 24 weeks or when fetal weight exceeds 500 grams [*Barragan v. Lopez (2007) 156 Cal. App. 4th 997, 1005-1008, 68 Cal. Rptr. 3d 73*].

The failure or refusal of a parent to prevent the live birth of his or her child is not a defense in any action against a third party [*Civ. Code § 43.6(b)*].

For a form of complaint for wrongful life and wrongful birth, see *§ 367A.91*.

[d] Damages Recoverable for Wrongful Life

Damages recoverable are limited, however, to medical and related expenses not recovered by the parents in their wrongful birth action [*Turpin v. Sortini (1982) 31 Cal. 3d 220, 237-239, 182 Cal. Rptr. 337, 643 P.2d 954]* . For discussion and forms related to actions brought by parents involving the parent-child relationship, see *§§ 367A.30* et seq., 367.110 et seq. General damages for pain and suffering are not allowed [*Turpin v. Sortini (1982) 31 Cal. 3d 220, 234-237, 182 Cal. Rptr. 337, 643 P.2d 954]* , and recovery of damages for lost earning capacity also has been denied [*see Andalon v. Superior Court (1984) 162 Cal. App. 3d 600, 612-614, 208 Cal. Rptr. 899* ; *see also Johnson v. Superior Court (2002) 101 Cal. App. 4th 869, 889, 124 Cal. Rptr. 2d 650* (neither general damages nor damages for lost earnings recoverable in wrongful life action against sperm bank and screening physicians)].

The failure or refusal of a parent to prevent the live birth of his or her child cannot be considered in awarding damages

in any such action [*Civ. Code § 43.6(b)*].

[e] Other Injuries Before Birth

Unlike actions based on a claim of wrongful life, in which the choice is between an impaired existence and no existence, other circumstances exist in which the choice is between normal life and impaired life. In such a case, the allegation is that but for the defendant's preconception conduct, the child would have been born to a normal life rather than to an impaired life [*see Hegyes v. Unjian Enters., Inc. (1991) 234 Cal. App. 3d 1103, 1137, 286 Cal. Rptr. 85* (Johnson, J., dissenting)].

If the cause of action is based on ordinary negligence that injured the mother before conception, policy reasons limit the potential scope of liability by creating limitations on the element of duty [*see Hegyes v. Unjian Enters., Inc. (1991) 234 Cal. App. 3d 1103, 1130-1133, 286 Cal. Rptr. 85]* . Thus, liability to a subsequently born child exists for preconception negligence only in cases of a special relationship between the defendant and the mother that gives rise to a duty to the child. Furthermore, the defendant's conduct must be inextricably related to the inevitable future pregnancy [*Hegyes v. Unjian Enters., Inc. (1991) 234 Cal. App. 3d 1103, 1113-1114, 286 Cal. Rptr. 85* (only claims arising from medical malpractice or products liability have been allowed by California courts); *but see Turpin v. Sortini (1982) 31 Cal. 3d 220, 230-231, 182 Cal. Rptr. 337, 643 P.2d 954* (plurality opinion; if child's condition resulted from tort committed on mother before conception, it is clear that child would be entitled to recover against negligent party)].

[4] Statute of Limitations

[a] In General

An action for injury or death caused by the wrongful act or neglect of another generally must be commenced within two years (one year, prior to January 1, 2003) after the cause of action accrues [*Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)*; Ch. 345, *Limitation of Actions*, § 345.14]. In cases in which the person entitled to bring such an action is a person under age of majority, however, the time of the disability is not a part of the time limited for the commencement of the action [*Code Civ. Proc. § 352(a)*].

Tolling based on minority as one of the disabilities recognized in *Code Civ. Proc. § 352*, however, does not apply to tort actions against public entities or public employees on causes of action for which a claim must be presented in accordance with *Gov. Code § 900 et seq.* or *950 et seq.* [*Code Civ. Proc. § 352(b)*]. Furthermore, tolling based on minority does not apply in cases in which a special statute of limitations applies to minors. Thus, for example, *Code Civ. Proc. § 340.5* imposes special limitation periods in actions by minors for professional negligence against a health care provider [*see § 367A.11[4][b]*]; *Civ. Code § 43.1* and *Code Civ. Proc. § 340.4* govern actions for prenatal injuries [*see § 367A.11[4][d]*]; and *Code Civ. Proc. § 340.1* governs civil actions based on the sexual abuse of a minor [*see* Ch. 5, *Abuse of Minors and Elderly*].

A minor emancipated by court order pursuant to the Emancipation of Minors Law [*see Fam. Code § 7000 et seq.*] is subject to all legal consequences that are set forth in *Fam. Code § 7050*, including the right to sue or be sued in the minor's own name [*Fam. Code § 7050(e)(4)*]. Therefore, a statute of limitations tolled because of minority begins to run when a minor is emancipated [*West Shield Investigations & Sec. Consultants v. Superior Court (2000) 82 Cal. App. 4th 935, 949-950, 98 Cal. Rptr. 2d 612]* . Moreover, because of the mandatory language used in the statute describing the consequences of emancipation, a court granting emancipation has no authority to specify that the emancipation does not extend to the minor's right to sue or be sued [*West Shield Investigations & Sec. Consultants v. Superior Court (2000) 82 Cal. App. 4th 935, 949-951, 98 Cal. Rptr. 2d 612]* .

[b] Medical Malpractice

Actions by a minor against a health care provider for professional negligence must be commenced within three years

from the date of the alleged wrongful act, except that actions by a minor under the full age of six years must be commenced within three years or prior to his or her eighth birthday, whichever provides a longer period [*Code Civ. Proc. § 340.5*; *but see Young v. Haines (1986) 41 Cal. 3d 883, 897-901, 226 Cal. Rptr. 547, 718 P.2d 909* (minors may have equal protection challenge to *Code Civ. Proc. § 340.5*)]. *Code Civ. Proc. § 340.5* also applies to an action for wrongful death arising from professional medical negligence brought by a minor as heir of the decedent [*Ferguson v. Dragul (1986) 187 Cal. App. 3d 702, 708-709, 232 Cal. Rptr. 79]* .

The phrase "actions by a minor" in *Code Civ. Proc. § 340.5* does not refer to the plaintiff's age at the time the action is filed, but to the plaintiff's age at the time the wrongful act occurred [*Steketee v. Lintz, Williams & Rothberg (1985) 38 Cal. 3d 46, 53, 57, 210 Cal. Rptr. 781, 694 P.2d 1153]* .

The time limitation also is tolled for minors for any period during which a parent or guardian and the defendant's insurer or health care provider have committed fraud or collusion in the failure to bring an action for professional negligence on behalf of the injured minor [*Code Civ. Proc. § 340.5*]. In addition, minors may invoke the general tolling provisions of *Code Civ. Proc. § 340.5* under which the three-year period may be tolled by proof of fraud, intentional concealment, or the presence of a foreign body that had no therapeutic or diagnostic purpose [*Young v. Haines (1986) 41 Cal. 3d 883, 897-901, 226 Cal. Rptr. 547, 718 P.2d 909]* . The service of an intent to sue notice under *Code Civ. Proc. § 364(a)* during the last 90 days of the three-year limitations period applicable to minors also tolls the statute of limitations for 90 days [*Newman v. Burnett (1997) 62 Cal. Rptr. 2d 175]* .

[c] Sexual Abuse

Civil actions by a plaintiff based on childhood sexual abuse, brought against a family or household member who committed the abuse, or against a person or entity who owed a duty of care to the plaintiff and whose wrongful or negligent act was a legal cause of the abuse, or against any person or entity whose intentional act was a legal cause of the abuse, must be brought within the time period set forth in *Code Civ. Proc. § 340.1*. For discussion and forms, see Ch. 5, *Abuse of Minors and Elderly* . For further discussion of *Civ. Code § 43.1* and *Code Civ. Proc. § 340.4*, statutory sections setting forth the special statute of limitations for prenatal injuries, see *§ 367A.11[4][d]*. For general discussion and forms related to statutes of limitations, see Ch. 345, *Limitation of Actions* .

[d] Prenatal Injuries

Any action brought by or on behalf of a minor for personal injuries sustained before or in the course of the minor's birth must be brought within six years from the minor's date of birth [*Code Civ. Proc. § 340.4*]. The disability on account of minority set forth in *Code Civ. Proc. § 352* is not excluded in computing the time limitation for commencement of the action [*Code Civ. Proc. § 340.4*]. The time limitation set forth in *Code Civ. Proc. § 340.4* has been construed to be a procedural statute of limitation subject to extension by any legal ground not specifically excluded in the section itself (for example, extension of the time to bring a malpractice action when the plaintiff remained under the defendant physician's care and was unaware that he or she had been injured by the defendant's carelessness) [*Myers v. Stevenson (1954) 125 Cal. App. 2d 399, 407 270 P.2d 885]* .

This time limitation only applies to injuries sustained before or during the course of birth. In cases in which the injuries are sustained after birth and during minority, the exclusion of the time of minority from the computation of the statute of limitations [*see Code Civ. Proc. § 352(a)*] still applies [*Code Civ. Proc. § 340.4*; *Fay v. Mundy (1966) 246 Cal. App. 2d 231, 236, 54 Cal. Rptr. 591]* .

Actions brought by minors for prenatal injuries based on medical malpractice are governed by *Code Civ. Proc. § 340.5* rather than *Code Civ. Proc. § 340.4* [*Young v. Haines (1986) 41 Cal. 3d 883, 894, 226 Cal. Rptr. 547, 718 P.2d 909* ; *see § 367A.11[4][b]*]. Nevertheless, because *Code Civ. Proc. § 340.5* clearly is inapplicable to drug manufacturers [*see Dillashaw v. Ayerst Labs., Inc. (1983) 141 Cal. App. 3d 35, 41-42, 190 Cal. Rptr. 68]* , *Code Civ. Proc. § 340.4* is the

applicable statute of limitations in any action against a drug manufacturer based on a prenatal injury allegedly caused by a defective drug taken by the plaintiff's mother during pregnancy.

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§ 367A.12 Minors' Liability

[1] Imposition by Statute

A minor is civilly liable for a wrong done by him or her. The minor is not liable for exemplary damages, however, unless at the time of the act he or she was capable of knowing it was wrongful [*Fam. Code § 6600*]. Liability is imposed as a mode of compensation rather than punishment, under the rationale that infancy should be in law a shield rather than a sword [*Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 313, 253 P.2d 675]* .

A minor generally is liable for his or her torts even though he or she lacks the mental development and capacity to recognize the wrongfulness of the conduct, so long as the minor has the mental capacity to have the state of mind necessary to the commission of the particular tort with which he or she is charged [*Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 315, 253 P.2d 675]* . Thus, as between a battery, an intentional tort, and some other negligent tort, a minor may have the capacity to intend the violent contact necessary to commit a battery but be incapable of realizing that his or her heedless conduct might foreseeably lead to injury to another; that is, to meet the requisite standards for negligence [*Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 315, 253 P.2d 675* ; *see Morningred v. Golden State Co. (1961) 196 Cal. App. 2d 130, 137, 16 Cal. Rptr. 219]* .

[2] Intentional Torts

A minor who forcibly invades the person of another is liable regardless of any intent to inflict injury--the only intent necessary is that of doing the particular act in question [*see Singer v. Marx (1956) 144 Cal. App. 2d 637, 641, 301 P.2d 440* (minor child throwing rock held liable for battery); *Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 317, 253 P.2d 675]* . Thus, for example, in an action by a five-year-old girl against a seven-year-old boy who inflicted injuries on her by shooting an arrow at her, the court ruled that the boy could be held liable on a theory of battery, an intentional tort, but not on a theory of negligence [*Weisbart v. Flohr (1968) 260 Cal. App. 2d 281, 290, 67 Cal. Rptr. 114]* .

[3] Negligent Torts

The negligence of a minor is determined on the basis of whether he or she used that degree of care ordinarily exercised

by children of like age, mental capacity, and experience--usually a question of fact for the jury [*Singer v. Marx (1956) 144 Cal. App. 2d 637, 642-643, 301 P.2d 440]* . For example, a four-year-old ordinarily should not be charged with negligence because he or she has not developed, at that age, the mental capacity for foreseeing the possibilities of his or her inadvertent conduct rationally necessary to support a finding of negligence [*Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 316, 253 P.2d 675]* .

[4] Defenses

[a] Negligence of Minor

Generally, a minor plaintiff's tender years may render him or her incapable of negligence [*Morningred v. Golden State Co. (1961) 196 Cal. App. 2d 130, 137, 16 Cal. Rptr. 219]* . A child of immature years is held only to the degree of care ordinarily exercised by children of like age, mental capacity, and experience, and the issue of whether a minor plaintiff actually was negligent is a question of fact for the trier of fact [*Olsen v. McGillicuddy (1971) 15 Cal. App. 3d 897, 903, 93 Cal. Rptr. 530]* .

Insofar as identifying the exact age that renders a child incapable of being negligent, it seems settled that a child of four or less is incapable of such conduct [*Walker v. Fresno Distrib. Co. (1965) 233 Cal. App. 2d 840, 848, 44 Cal. Rptr. 68]* . Various courts have found children incapable of negligence who were five [*Gonzales v. Davis (1925) 197 Cal. 256, 260, 240 P. 16*], 11 [*Olsen v. McGillicuddy (1971) 15 Cal. App. 3d 897, 903, 93 Cal. Rptr. 530]* , and 14years of age [*see Beard v. Atchison, Topeka & Santa Fe Ry. Co. (1970) 4 Cal. App. 3d 129, 140-141, 84 Cal. Rptr. 449* (question of fact)].

[b] Negligence of Parent

When a minor sues a third party for negligence through a guardian or guardian ad litem, any negligence of a parent in failing to exercise care and control over the minor does not diminish the minor's ability to recover general damages [*Zarzana v. Neve Drug Co. (1919) 180 Cal. 32, 37, 179 P. 203* ; *Morningred v. Golden State Co. (1961) 196 Cal. App. 2d 130, 138, 16 Cal. Rptr. 219]* . Insofar as the minor's action seeks to recover special damages for medical expenses paid by his or her parents for the minor's benefit, however, the action is subject to the defense of comparative negligence on the part of the minor's parents [*Mattox v. Isley (1952) 111 Cal. App. 2d 774, 779, 245 P.2d 664* ; *see Morningred v. Golden State Co. (1961) 196 Cal. App. 2d 130, 139, 16 Cal. Rptr. 219]* .

For related discussion and forms for use in actions involving the parent-child relationship, see *§§ 367A.30* et seq. and *367A.110* et seq.

[c] Assumption of Risk

The defense of assumption of risk depends on the actual or assumed mental capacity of the actor [*Greene v. Watts (1962) 210 Cal. App. 2d 103, 105, 26 Cal. Rptr. 334]* . The reasoning of one court, that a four-year-old is too young to be guilty of negligence [*Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 316-317, 253 P.2d 675]* , has been held equally applicable to support a conclusion that a child of the same age is incapable of knowing the danger and appreciating the risk of a course of conduct [*Greene v. Watts (1962) 210 Cal. App. 2d 103, 106, 26 Cal. Rptr. 334]* .

[5] Service of Summons on Minor

A summons may be served on a minor by delivering a copy of the summons and the complaint to the minor's parent, guardian, conservator, or similar fiduciary. In cases in which no such person can be found with reasonable diligence, a summons may be served on any person having the care or control of the minor, or with whom the minor resides or by whom he or she is employed, and on the minor if he or she is at least 12 years of age [*Code Civ. Proc. § 416.60*].

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§ 367A.30 Governing Law

The leading cases defining the right of minors to sue their parents for damages in tort are *Gibson v. Gibson (1971) 3 Cal. 3d 914, 923, 92 Cal. Rptr. 288, 479 P.2d 648* (action for negligence involving unemancipated minor), *Emery v. Emery (1955) 45 Cal. 2d 421, 429-430, 289 P.2d 218* (willful or malicious torts), and *Martinez v. Southern Pac. Co. (1955) 45 Cal. 2d 244, 253-254, 288 P.2d 868* (action for negligence involving emancipated minor).

Parental immunity from suit by their child based on a claim that the child should not have been conceived or allowed to have been born alive is provided by *Civ. Code § 43.6(a)*.

The liability of a minor child for his or her torts is governed by *Fam. Code § 6600*. The liability of an adult child for negligence is governed by *Civ. Code § 1714(a)*.

The liability of parents for a minor child's acts of willful misconduct is governed by *Civ. Code §§ 1714.1* and *1714.3*, *Educ. Code §§ 19910, 19911, 48904*, and *48905*, and *Gov. Code § 53069.5*. The leading case defining the liability of parents for the torts of their child is *Hagerty v. Powers (1885) 66 Cal. 368, 369, 5 P. 622* . The liability of parents for the negligent or wrongful acts or omissions of their minor child arising out of his or her driving a motor vehicle is governed by *Veh. Code §§ 17701, 17707-17712*, and *17714*.

The parents' right to recover for the death of or an injury to their minor child is governed by *Code Civ. Proc. §§ 376, 377.30*, and *377.60*.

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§ 367A.31 Actions Between Parent and Child

[1] By Child

A minor child may sue his or her parent for a willful or malicious tort [*Emery v. Emery (1955) 45 Cal. 2d 421, 429-430, 289 P.2d 218]* . Whether emancipated or unemancipated, a minor child also may maintain an action for negligence against his or her parent [*compare Gibson v. Gibson (1971) 3 Cal. 3d 914, 923, 92 Cal. Rptr. 288, 479 P.2d 648* (unemancipated); *with Martinez v. Southern Pac. Co. (1955) 45 Cal. 2d 244, 253-254, 288 P.2d 868* (emancipated)].

A child has no cause of action against his or her parent based on the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive [*Civ. Code § 43.6(a)*; *see Civ. Code § 43.6(c)* ("conceived" defined)].

For a discussion of *Code Civ. Proc. § 340.1*, the statute of limitations applicable to an action for sexual abuse of a minor by a household or family member, see Ch. 5, *Abuse of Minors and Elderly* .

[2] By Parent

A minor generally is liable for a wrong done by him or her to other persons, including his or her parents, but is not liable for exemplary damages unless, at the time of the act, he or she was capable of knowing that it was wrongful [*see Civ. Code § 41*; *Fam. Code § 6600*; *see also § 367A.12*]. Similarly, an adult child is responsible for an injury occasioned to another, including his or her parent, by a want of ordinary care or skill in the management of his or her property or person [*see Civ. Code § 1714(a)*; *Ledgerwood v. Ledgerwood (1931) 114 Cal. App. 538, 544, 300 P. 144]* .

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32-367A California Forms of Pleading and Practice--Annotated § 367A.32

§ 367A.32 Parents' Liability for Minor Child's Torts

[1] General Rule of No Vicarious Liability

The general rule is that a parent is not vicariously liable for the torts of a child [*see Hagerty v. Powers (1885) 66 Cal. 368, 369, 5 P. 622* ; *Robertson v. Wentz (1986) 187 Cal. App. 3d 1281, 1288, 232 Cal. Rptr. 634* ; *Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 317, 253 P.2d 675* ; *but see Penal Code § 272* (criminal prosecution of parents whose failure to exercise reasonable care, supervision, protection, and control of minor child results in child coming under juvenile court jurisdiction for habitual disobedience or truancy, criminal activity, or other reasons; *discussed under § 367A.32[2]*); *see also Welf. & Inst. Code §§ 300, 601, 602*]. The exceptions to the rule, which are discussed in *§ 367A.33[2] -[6]*, are based on the parent's duty to control his or her child, on statutory grounds, or on the existence of an agency relationship between a parent and his or her child.

[2] Negligent Control of Minor Child

A parent may become liable for an injury caused by a child when the parent's negligence made it possible for the child to cause an injury and probable that the child would do so [*Robertson v. Wentz (1986) 187 Cal. App. 3d 1281, 1288, 232 Cal. Rptr. 634* ; *Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 317, 253 P.2d 675]* . A parent is under a duty to exercise reasonable care to control his or her minor child so as to prevent the child from so conducting himself or herself as to create an unreasonable risk of bodily harm to others, if the parent knows or has reason to know that he or she has the ability to control his or her child and knows or should know of the necessity and opportunity for exercising this control [*Robertson v. Wentz (1986) 187 Cal. App. 3d 1281, 1288-1289, 232 Cal. Rptr. 634* ; *Costello v. Hart (1972) 23 Cal. App. 3d 898, 900, 100 Cal. Rptr. 554* ; *see* Restatement (Second) of Torts § 316].

A parent's potential liability is based on the rules of negligence rather than on the relation of parent and child [*Buelke v. Levenstadt (1923) 190 Cal. 684, 689, 214 P. 42]* . It is not necessary that a parent have knowledge of a child's dangerous tendencies for any particular length of time, provided the knowledge was acquired in time to give the parent an opportunity to exercise reasonable measures to restrain the child. Even in cases in which the parent did not observe the child's conduct that led to the injury, the parent is liable when he or she had been aware of the child's dangerous propensity or habit and negligently failed to exercise proper control or negligently failed to give appropriate warnings [

Costello v. Hart (1972) 23 Cal. App. 3d 898, 900-901, 100 Cal. Rptr. 554] .

In addition to being liable in tort, a parent may be criminally liable for failure to exercise reasonable care, supervision, protection, and control with regard to a minor child, if the parent's dereliction of duty results in the child coming under the jurisdiction of the juvenile court for habitual disobedience or truancy, involvement in criminal activities, or certain other reasons [*see Penal Code § 272*; *Welf. & Inst. Code §§ 300, 601, 602*; *see also Williams v. Garcetti (1993) 5 Cal. 4th 561, 572-575, 20 Cal. Rptr. 2d 341, 853 P.2d 507* (*Penal Code § 272* is constitutional)].

[3] Willful Misconduct of Minor Child

[a] Scope of Liability in General

Civ. Code § 1714.1(a) imposes civil liability on a parent or guardian who has custody and control of a minor for any act of willful misconduct of the minor that results in injury or death to another person or in any injury to the property of another. The parent or guardian is jointly and severally liable with the minor for any damages resulting from the willful misconduct. This liability may not exceed $37,100 for each tort of the minor and, in case of injury to a person, is further limited to medical, dental, and hospital expenses incurred by the injured person, not to exceed $37,100 [*Civ. Code § 1714.1(a)*; Cal. Rules of Ct., Appen. B]. However, insurer liability for conduct imputed to a parent or guardian is limited to $10,000 [*Civ. Code § 1714.1(e)*].

The Judicial Council must adjust the liability limits every two years beginning in 1997 to reflect any increases in the cost of living [*Civ. Code 1714.1(c)*; Cal. Rules of Ct., Appen. B (formula for adjustment and current calculation)]. The maximum liability imposed by § 1714.1 is the maximum liability authorized under that provision at the time that the act of willful misconduct by a minor was committed [*Civ. Code § 1714.1(d)*].

The liability is in addition to any other liability imposed by law [*Civ. Code § 1714.1(a)*]. *Civ. Code § 1714.1* is in derogation of common law and, therefore, must be strictly construed [*see Cynthia M. v. Rodney E. (1991) 228 Cal. App. 3d 1040, 1046, 279 Cal. Rptr. 94* (consensual sexual intercourse between minors is not willful misconduct within meaning of statute)].

The purpose of *Civ. Code § 1714.1(a)* is to provide a satisfactory remedy to innocent third parties injured by a minor because, for all practical purposes, none is available under the common law. The underlying public policy is that parents, not innocent third parties, should bear the burden of responsibility for a minor child causing damage through willful misconduct. Thus, *Civ. Code § 1714.1(a)* protects and compensates injured innocent third persons by expanding the common law scope of parental liability for willful acts of misconduct by children. At the same time, however, the amount of statutory liability is limited [*Robertson v. Wentz (1986) 187 Cal. App. 3d 1281, 1293, 232 Cal. Rptr. 634* ; *see Cynthia M. v. Rodney E. (1991) 228 Cal. App. 3d 1040, 1046-1047, 279 Cal. Rptr. 94* (plaintiff who consents to minor's conduct cannot recover as innocent victim)].

The "custody and control" requirement of *Civ. Code § 1714.1(a)* does not limit applicability of the statute to parents who have actual physical custody of the child at the time of the willful misconduct resulting in injury, death, or property damage. Thus, the nonresident parents of a minor child who allegedly attempted to break into an apartment while he was in California to attend college could be sued under *§ 1714.1*. The parents' act of sending the unsupervised minor to California to attend college caused a sufficient "effect" in California to provide a basis for personal jurisdiction over the parents [*Jamshid-Negad v. Kessler (1993) 15 Cal. App. 4th 1704, 1709-1710, 19 Cal. Rptr. 2d 621]* .

The statute inures not only to the benefit of an injured person, but also to the benefit of joint tortfeasors. If a plaintiff who is injured by a minor does not join the parents as defendants, other defendants may obtain a reduction of their liability up to the statutory amount by way of equitable indemnity [*Curry v. Superior Court (1993) 20 Cal. App. 4th 180, 183-189, 24 Cal. Rptr. 2d 495]* .

[b] Defacing Property

Any act of willful misconduct of a minor that results in the defacement of property of another with paint or a similar substance also is imputedto the parent or guardian having custody and control of the minor for purposes of awarding civil damages, including court costs and attorney's fees, to the prevailing party. The parent or guardian having custody and control is jointly and severally liable with the minor for any damages resulting from the willful misconduct in an amount not to exceed $37,100 for each of the minor's torts [*Civ. Code § 1714.1(b)*].

[c] Injury or Damage to Pupil or to School Employee or Property

Notwithstanding *Civ. Code § 1714.1*, the parent or guardian of any minor whose willful misconduct results in injury or death to any pupil or any person employed by or performing volunteer services for a school district or private school is liable for all the damages, not exceeding $10,000, caused by the minor. Additionally, the parent or guardian of any minor who willfully cuts, defaces, or otherwise injures in any way any property, real or personal, belonging to a school district or private school, or personal property of any school employee, also is liable for all the damages, not exceeding $10,000, caused by the minor. Further, the parent or guardian is liable for all property belonging to the school district or private school loaned to the minor and not returned on demand of an employee of the district or private school authorized to make the demand [*Educ. Code § 48904(a)*].

Any school district or private school whose real or personal property has been injured by a minor's willful misconduct, after affording the pupil his or her due process rights, and after giving the parent or guardian written notice of the pupil's alleged misconduct, may withhold the pupil's grades, diploma, and transcripts until the pupil or the pupil's parent or guardian has paid for the damages [*Educ. Code § 48904(b)*]. If the pupil transfers to another school district, that district must also withhold the minor's grades, diploma, or transcripts until it receives notice from the minor's former district that the decision has been rescinded under the terms of *Educ. Code § 48904* [*Educ. Code § 48904.3(a)*].

In cases in which the minor and parent are unable to pay for the damages to the real or personal property, the school district or private school must provide a program of voluntary work for the minor in lieu of the payment of monetary damages. On completion of the voluntary work, the grades, diploma, and transcripts of the pupil must be released [*Educ. Code § 48904(b)*].

The parent or guardian also is liable for the amount of any reward not exceeding $10,000 paid pursuant to *Gov. Code § 53069.5* by a local agency for information leading to the identification or apprehension of any minor guilty of the proscribed misconduct [*Educ. Code § 48904(a)*; *Gov. Code § 53069.5*; *see Gov. Code § 54951* ("local agency" defined)].

An employee of a school district whose person or property is injured or damaged by the willful misconduct of a pupil who attends school in the district may request the school district to pursue legal action against the pupil who caused the injury or damage, or against the pupil's parents or guardian, pursuant to *Educ. Code § 48904* [*Educ. Code § 48905*]. This provision applies if the injury or damage occurs when the employee or his or her property is (1) located on property owned by the district, (2) being transported to or from an activity sponsored by the district or a school within the district, (3) present at an activity sponsored by the district or a school within the district, or (4) otherwise injured or damaged in retaliation for acts lawfully undertaken by the employee in execution of his or her duties [*Educ. Code § 48905*].

[d] Destruction or Detention of Public Property

The parent or guardian of a minor who willfully and maliciously cuts, tears, defaces, breaks, or injures any book, map, chart, picture, engraving, statue, coin, model, apparatus, or other work of literature, art, mechanics, or object of curiosity, deposited in any public library, gallery, museum, collection, fair, or exhibition, is liable for all damages

caused by the minor [*see Educ. Code § 19910*].

Additionally, the parent or guardian of a minor who willfully and maliciously detains any book, newspaper, magazine, pamphlet, manuscript, or other property belonging to any public or incorporated library, reading room, museum, or other educational institution for 30 days after notice in writing to return the article or property, given after the expiration of the time for which, by the rules of the institution, the article or property may be kept, is liable for all damages so caused by the minor [*Educ. Code § 19911*].

[e] Petty Theft From Store or Library

When an unemancipated minor's willful conduct would constitute petty theft involving merchandise taken from a merchant's premises or a book or other library materials taken from a library facility, any merchant or library facility injured by the conduct may bring a civil action against the parent or legal guardian having control and custody of the minor [*Penal Code § 490.5(b)*]. The parent or legal guardian having control or custody of an unemancipated minor whose conduct violates *Penal Code § 490.5(b)* is jointly and severally liable with the minor to a merchant for the retail value of his or her merchandise, if not recovered in merchantable condition, or to a library facility for the fair market value of its book or other library materials, plus damages of no less than $50 nor more than $500 plus costs. Recovery of the damages may be had in addition to, and is not limited by, any other provision of law that limits the liability of a parent or legal guardian for the tortious conduct of a minor [*Penal Code § 490.5(b)*].

An action for recovery of damages pursuant to *Penal Code § 490.5(b)* may be brought in small claims court if the total damages do not exceed the jurisdictional limit of the court, or in any other appropriate court. Total damages, however, including the value of the merchandise or book or other library materials, must not exceed $500 for each action brought under *Penal Code § 490.5* [*Penal Code § 490.5(b)*; *see Penal Code § 490.5(g)* ("merchandise," "merchant," "book or other library materials," and "library facility" defined); *see also* Ch. 526, *Small Claims*]. The provisions of *Penal Code § 490.5(b)* are in addition to other civil remedies and do not limit merchants or other persons electing to pursue other civil remedies, except that the provisions of *Civ. Code § 1714.1* do not apply to those of *Penal Code § 490.5(b)* [*Penal Code § 490.5(b)*; *see § 367A.32[3][a]* regarding *Civ. Code § 1714.1*].

If an emancipated minor has unlawfully taken merchandise from a merchant's premises, or a book or other library materials from a library facility, he or she is liable to the merchant or library facility for damages of no less than $50 nor more than $500, in addition to the retail value of the merchandise if not recovered in merchantable condition, or the fair market value of the book or other library materials, if not recovered in undamaged condition, plus costs [*Penal Code § 490.5(c)*]. An action for recovery of damages pursuant to *Penal Code § 490.5(c)* may be brought in small claims court if the total damages do not exceed the jurisdictional limit of the court, or in any other appropriate court. The provisions of *Penal Code § 490.5(c)* are in addition to other civil remedies and do not prevent merchants or other persons from electing to pursue other civil remedies [*Penal Code § 490.5(c)*].

[f] Damage or Malicious Access to Computer System

In addition to any other civil remedy available, the owner or lessee of a computer, computer system, computer network, computer program, or computer data may bring a civil action against any person convicted pursuant to *Penal Code § 502* (malicious access or damage to computer system) for injunctive or other equitable relief, or compensatory damages, including any expenditure reasonably and necessarily incurred by the owner or lessee to verify that the system, network, program, or data was not altered, damaged, or deleted by the access. Malicious access or damage to a computer system by an unemancipated minor is imputed to the parent or legal guardian having control or custody of the minor [*Penal Code § 502(e)*; *see Civ. Code § 1714.1* (liability for torts of minor)].

[4] Discharge of Firearm by Minor Child

For purposes of awarding civil damages, civil liability for any injury to the person or property of another proximately caused by the discharge of a firearm by a minor under the age of 18 years is imputed to a parent or guardian having custody and control of the minor. The parent or guardian is jointly and severally liable with the minor for any damages resulting from the discharge if the parent or guardian either permitted the minor to have the firearm or left it in a place accessible to the minor [*Civ. Code § 1714.3*; *see Robertson v. Wentz (1986) 187 Cal. App. 3d 1281, 1295, 232 Cal. Rptr. 634]* .

The liability imposed by *Civ. Code § 1714.3* is in addition to any other liability imposed by law. The liability of any person or group of persons collectively under *Civ. Code § 1714.3*, however, cannot exceed $30,000 for injury to or death of one person as a result of any one occurrence or, subject to the limit as to one person, $60,000 for injury to or death of all persons as a result of any one such occurrence [*Civ. Code § 1714.3*].

[5] Minor Driving Motor Vehicle

The liability of a minor and his or her parent or guardian arising out of the minor driving a motor vehicle is generally governed by *Veh. Code § 17700 et seq.*, as follows:

- A parent, guardian, or person who has custody of a minor may be held jointly and severally liable for any damages proximately resulting from the negligent or wrongful act or omission of the minor in driving a motor vehicle if he or she (1) signed or verified the minor's application for a license [*see Veh. Code §§ 17701, 17707*] or (2) gave the minor express or implied permission to drive the motor vehicle [*see Veh. Code § 17708*].

- A parent or guardian may be held liable as the owner of the motor vehicle negligently driven by a minor with the parent's express or implied permission [*see Veh. Code § 17150*].

- A parent or guardian may be held liable for the negligent operation of a motor vehicle by a minor child if it is determined that the minor was acting as an agent of the parent or guardian at the time the injury occurred [*Johnson v. Peterson (1974) 38 Cal. App. 3d 619, 622-624, 113 Cal. Rptr. 445* ; *see § 367A.32[6]*].

Liability under *Veh. Code §§ 17707* and *17708* cannot exceed $15,000 for any injury to or death of one person as a result of any one accident or, subject to the limit as to one person, $30,000 for injury to or death of all persons as a result of any one accident, or $5,000 for damages to property of others as a result of any one accident [*see Veh. Code § 17709(a)*]. This statutory limitation on damages does not limit a parent's liability, however, for his or her own negligence in supervising a child with a learner's permit [*Kostecky v. Henry (1980) 113 Cal. App. 3d 362, 370-371, 170 Cal. Rptr. 197]* .

No liability may be imposed under *Veh. Code § 17707* or *17708* on the state or county, or on a probation officer or child protective services worker acting as an officer of the court, for damages caused solely by the negligence or willful misconduct of a minor driver whose application for a driver's license was signed by the child protective services worker or probation officer while the minor was a dependent or ward of the court [*Veh. Code § 17707*].

For further discussion and forms relating to a parent's vicarious liability for a minor's negligent operation of a motor vehicle, see *Ch. 82, Automobiles: Causes of Action, § 82.16[2]*.

[6] Agency Relationship

A parent may be liable as a principal for the negligence of his or her child if the child acted as his or her agent in transacting the business of the agency [*see Civ. Code § 2338*]. Thus, a parent may be liable for the negligent operation

of a motor vehicle by his or her child if the child was acting as the parent's agent at the time an injury occurred [*Johnson v. Peterson (1974) 38 Cal. App. 3d 619, 622-624, 113 Cal. Rptr. 445]* .

For further discussion and forms relating to actions among principals, agents, and third persons affected by the agency relationship, see Ch. 427, *Principal and Agent* .

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§ 367A.33 Child's Liability for Parent's Torts

A child must have actual custodial ability over a parent before a duty arises to control the parent's conduct. The natural relationship between a child and parent alone is insufficient to create an inference that the child has this control. No duty arises if the child does not occupy a position of legal authority over the parent and lacks the opportunity to physically observe and exercise control over the parent's conduct [*Megeff v. Doland (1981) 123 Cal. App. 3d 251, 260-261, 176 Cal. Rptr. 467]* .

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§ 367A.34 Parent's Actions for Personal Injuries to Minor Child

[1] By One or Both Parents

The parents of an unmarried minor child, acting jointly, may maintain an action for injury to the child caused by the wrongful act or neglect of another. If either parent, on demand, fails to join as plaintiff in the action or is dead or cannot be found, the other parent may maintain the action and the parent who does not join as plaintiff, if living, must be joined as a defendant and served with summons before trial or hearing of any question of fact. The court determines the respective rights of the parents to any award [*Code Civ. Proc. § 376(a)*].

[2] Child of Unwed Parents

If the parents of an unmarried minor child were not married at the time of his or her birth, either parent may maintain an action for injury to the child caused by the wrongful act or neglect of another if a guardian has not been appointed. If the parent who does not have care, custody, or control of the child brings the action, the parent who has care, custody, or control must be served with the summons [*Code Civ. Proc. § 376(b)*]. The father of such a child who maintains such an action must have acknowledged in writing prior to the child's injury, in the presence of a competent witness, that he is the father of the child or, prior to the child's injury, must have been judicially determined to be the father of the child [*Code Civ. Proc. § 376(c)*]. For discussion of the Uniform Parentage Act (*Fam. Code § 7600 et seq.*), see Ch. 412, *Paternity* .

A parent who does not maintain the action may be joined as a party [*Code Civ. Proc. § 376(d)*]. The respective rights of the parents to any award must be determined by the court [*Code Civ. Proc. § 376(b)*].

[3] By Guardian

A guardian may maintain an action for an injury to his or her ward caused by the wrongful act or neglect of another [*Code Civ. Proc. § 376(e)*].

[4] Service of Summons

If a parent must be joined as a party [*see § 367A.34[1], [2]*], summons must be served on the parent either in the manner provided by law for the service of a summons in a civil action, or by sending a copy of the summons and complaint by registered mail, with proper postage prepaid, addressed to the parent's last known address, return receipt requested. If service is made by registered mail, the production of a return receipt purporting to be signed by the addressee creates a rebuttable presumption affecting the burden of producing evidence that the summons and complaint have been duly served [*Code Civ. Proc. § 376(a), (b)*; *see* Ch. 518, *Service of Summons and Papers*].

[5] Persons Liable and Survivability of Action

A parental action for injury to an unmarried minor child caused by the wrongful act or neglect of another may be maintained against the person causing the injury. If any other person is responsible for the wrongful act or neglect, the action also may be maintained against that other person. The death of the child or ward does not abate the parents' or guardian's cause of action for the child's injury as to damages accruing before the child's death [*Code Civ. Proc. § 376(f)*].

[6] Damages Recoverable by Parents

In a parental action under *Code Civ. Proc. § 376* for injuries to their unmarried minor child, damages may be awarded that, under all of the circumstances of the case, may be just. If the action is maintained after the death of the child, however, damages are limited to those recoverable in a survival action under *Code Civ. Proc. § 377.34* [*Code Civ. Proc. § 376(g)(1)*]. If the person causing the injury is deceased, the damages recoverable in an action against the decedent's personal representative are as provided in *Code Civ. Proc. § 377.42* [*Code Civ. Proc. § 376(g)(2)*]. For further discussion of damages recoverable in a survival action, see Ch. 181, *Death and Survival Actions* .

Parents generally may recover medical expenses incurred up to trial, as well as for the loss of the child's earning capacity during the child's minority, and for the loss of services and earnings [*Bauman v. San Francisco (1940) 42 Cal. App. 2d 144, 161-162, 108 P.2d 989* (medical expenses); *Richmond v. Moore (1930) 103 Cal. App. 173, 182, 284 P. 681* (earnings and services)]. It appears that a parent may now recover future medical expenses likely to be incurred on behalf of a child, both before and after the child attains the age of majority [*see Laughner v. Bryne (1993) 18 Cal. App. 4th 904, 909-912, 22 Cal. Rptr. 2d 671* ; *see also Turpin v. Sortini (1982) 31 Cal. 3d 220, 237 n.11, 238 n.12, 182 Cal. Rptr. 337, 643 P.2d 954* ; *Fam. Code § 3910* (parental duty to support adult child incapacitated from earning a living and without sufficient means); *but see Apodaca v. Haworth (1962) 206 Cal. App. 2d 209, 217, 23 Cal. Rptr. 461* ; *Rockwood v. Lansburgh (1930) 109 Cal. App. 581, 585, 293 P. 792* (right to recover future medical expenses rests solely with child)]. For further discussion, see Ch. 177, *Damages* .

For a discussion of the manner in which a parent may waive his or her right to recover damages or may be estopped from recovering them, see *§ 367A.34[7][b]*.

A parent has no cause of action in negligence to recover damages for loss of filial consortium [*Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 522, 150 Cal. Rptr. 1, 585 P.2d 851* ; *Baxter v. Superior Court (1977) 19 Cal. 3d 461, 464-466, 138 Cal. Rptr. 315, 563 P.2d 871]* .

For an allegation for compensatory damages, see *§ 367A.115*.

[7] Defenses to Parent's Recovery of Damages

[a] Comparative Negligence

A parent's action to recover medical expenses paid as a result of injuries to his or her minor child is subject to the defense of comparative negligence on the part of the parent in caring for the child [*Randles v. Lowry (1970) 4 Cal.*

App. 3d 68, 73, 84 Cal. Rptr. 321 ; *see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226]* . The negligence of one parent also may be imputed to the other parent who is maintaining an action on behalf of the community to recover for injuries to their child [*Crane v. Smith (1943) 23 Cal. 2d 288, 301, 144 P.2d 356]* .

A child's negligence contributing to his or her injuries is also a defense to the parent's action for loss or expense incurred as a consequence of those injuries [*Hasson v. Ford Motor Co. (1977) 19 Cal. 3d 530, 551* , *564 P.2d 857* (questioning imputed negligence doctrine, but applying it because doctrine's validity not raised or briefed)].

For a general discussion of comparative negligence, see Ch. 380, *Negligence* .

[b] Waiver or Estoppel

Parents may waive the right to recover unpaid past medical expenses incurred on behalf of a child by bringing an action as guardian ad litem for the child. The child may recover these items of damages in the action, and the parents are estopped from recovering them on their own behalf [*White v. Moreno Valley Unified Sch. Dist. (1986) 181 Cal. App. 3d 1024, 1030, 226 Cal. Rptr. 742* ; *see Girard v. Irvine (1929) 97 Cal. App. 377, 386, 275 P. 840* (similar result regarding minor's claim for loss of earnings)].

A parent's action to recover for medical expenses is barred if the expenses were part of a settlement in a previous action brought by the minor through the other parent as guardian ad litem [*Faitz v. Ruegg (1981) 114 Cal. App. 3d 967, 971-972, 171 Cal. Rptr. 149* ; *see Laughner v. Bryne (1993) 18 Cal. App. 4th 904, 910-912, 22 Cal. Rptr. 2d 671* (release pursuant to minor's compromise of all child's damages estopped parent from recovering future medical expenses in separate cause of action)].

[c] Emancipation

Apparently, a parent's right to recover for medical expenses and the loss of services and earnings of a minor child is barred by the emancipation of the child [*see Faitz v. Ruegg (1981) 114 Cal. App. 3d 967, 971, 171 Cal. Rptr. 149* ; *Finnerty v. Cummings (1933) 132 Cal. App. 48, 50, 22 P.2d 37]* . For discussion of emancipation under *Fam. Code § 7000 et seq.*, see Ch. 245, *Emancipation of Minors* .

[8] Wrongful Death of Child

A parent has a cause of action for the wrongful death of an unmarried child who has no issue [*see Code Civ. Proc. § 377.60(a), (d)* (*Code Civ. Proc. § 377.60* applicable to cause of action arising after 1992), (e) (standing of parties under prior law unaffected by Stats. 1992, Ch. 178); *Prob. Code § 6402(b)* (rules of intestacy determine right to bring action if decedent has no spouse, domestic partner, or children)]. The parent's affirmative case must show that the decedent has no issue [*Coats v. K-Mart Corp. (1989) 215 Cal. App. 3d 961, 969, 264 Cal. Rptr. 12]* .

A parent who is dependent on a decedent child may bring a wrongful death action for the death of the child, even if the child has a spouse or issue otherwise entitled to bring the action [*Code Civ. Proc. § 377.60(b), (d)* (*Code Civ. Proc. § 377.60* applicable to cause of action arising on or after Jan. 1, 1993), (e) (standing of parties under prior law unaffected by Stats. 1992, Ch. 178)]. "Dependency" in this context refers to financial dependency for shelter, clothing, food, and medical treatment [*Coats v. K-Mart Corp. (1989) 215 Cal. App. 3d 961, 969, 264 Cal. Rptr. 12* ; *Perry v. Medina (1987) 192 Cal. App. 3d 603, 610, 237 Cal. Rptr. 532]* .

For further discussion of and forms for use in wrongful death actions, see Ch. 181, *Death and Survival Actions* . For discussion relating to whether the parent-child relationship exists, see Ch. 12, *Adoptions: Nature and Effect* , Ch. 12A, *Adoptions: Termination of Parental Rights* , and Ch. 412, *Paternity* .

[9] Consolidation of Injury and Wrongful Death Actions

If an action arising out of the same wrongful act or neglect may be maintained both by the parents under *Code Civ. Proc. § 376* and as a wrongful death action under *Code Civ. Proc. § 377.60*, the actions may be consolidated for trial [*Code Civ. Proc. § 376(h)*; *see Code Civ. Proc. § 1048*].

For forms for use in consolidating actions, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* , and Ch. 181, *Death and Survival Actions* .

[10] Workers' Compensation Benefits for Injury to Child

The exclusive remedy of a parent against an employer for the injury or death of a minor child arising out of and in the course of the child's employment is provided under the workers' compensation law, regardless of whether the parent was dependent on the minor or the minor was unlawfully employed [*see Lab. Code §§ 3351, 3601*; *Leong v. Postal Tel.-Cable Co. (1944) 66 Cal. App. 2d 849, 850-851, 153 P.2d 204]* .

For forms for use in obtaining workers' compensation benefits, see Ch. 577, *Workers' Compensation* .

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§ 367A.35 Parent's Action for Abduction of Child

A parent, or a guardian entitled to custody of a child, may bring a civil action for damages against a third person for abducting or participating in the abduction of a child [*Civ. Code § 49(a)*; *Surina v. Lucey (1985) 168 Cal. App. 3d 539, 542-543, 214 Cal. Rptr. 509* ; *Rosefield v. Rosefield (1963) 221 Cal. App. 2d 431, 433, 34 Cal. Rptr. 479* ; *see Baxter v. Superior Court (1977) 19 Cal. 3d 461, 466 n.3, 138 Cal. Rptr. 315, 563 P.2d 871]* . An action may be brought against an abducting parent even if that parent was exercising valid custody or visitation rights at the time of abduction. In this situation, both the child and the other custodial parent have a cause of action for damages [*see Rosefield v. Rosefield (1963) 221 Cal. App. 2d 431, 433-437, 34 Cal. Rptr. 479]* . However, the defendant's conduct is privileged if it is based on a reasonable apprehension that the child could suffer immediate harm if returned to the parents, or if his or her whereabouts is disclosed [*Robbins v Hamburger Home for Girls (1995) 32 Cal. App. 4th 671, 682, 38 Cal. Rptr. 2d 534]* .

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§ 367A.36 Child's Actions Based on Parent-Child Relationship

[1] Interference With Parental Consortium

A child may not maintain a cause of action for loss of parental consortium caused by the negligent injury of the parent by a third party [*Borer v. American Airlines, Inc. (1977) 19 Cal. 3d 441, 444, 451 138 Cal. Rptr. 302, 563 P.2d 858* ; *see Nix v. Preformed Line Prods. Co. (1985) 170 Cal. App. 3d 975, 977-986, 216 Cal. Rptr. 581* (following *Borer,* but criticizing its mandated result)]. A child abducted from his or her parents, however, may maintain an action for intentional interference with parental consortium [*Borer v. American Airlines, Inc. (1977) 19 Cal. 3d 441, 451 n.3, 138 Cal. Rptr. 302, 563 P.2d 858* ; *Rosefield v. Rosefield (1963) 221 Cal. App. 2d 431, 436-437, 34 Cal. Rptr. 479]* .

A child has no cause of action for alienation of his or her parent's affection [*see Civ. Code § 43.5(a)*]. Additionally, a child may not maintain an action for the enticement of a parent away from the family [*Rudley v. Tobias (1948) 84 Cal. App. 2d 454, 457, 190 P.2d 984]* .

[2] Wrongful Death of Parent

A child has a cause of action for the death of his or her parent caused by the wrongful act or neglect of another [*Code Civ. Proc. § 377.60(a), (d)* (*Code Civ. Proc. § 377.60* applicable to cause of action arising after 1992), (e) (standing of parties under prior law unaffected by Stats. 1992, Ch. 178)]. Under prior law, all intestacy statutes were incorporated into the wrongful death statute for purposes of determining "heirs" entitled to bring a wrongful death action [*see* former *Code Civ. Proc. § 377(b)(1)*]. Under current law, despite somewhat ambiguous statutory language, the laws of intestate succession still determine whether a child has standing to bring a wrongful death action [*Cheyanna M. v. A.C. Nielsen Co. (1998) 66 Cal. App. 4th 855, 864-865, 78 Cal. Rptr. 2d 335]* . The purpose of amendments effective on January 1, 1993, was to clarify that a decedent's children and issue of deceased children may maintain a wrongful death action even if the decedent's entire estate passes to a surviving spouse under community property laws [*Cheyanna M. v. A.C. Nielsen Co. (1998) 66 Cal. App. 4th 855, 864-865, 78 Cal. Rptr. 2d 335]* . For discussion of the laws of intestate succession, see Ch. 458, *Probate: Determination of Heirship* . For additional discussion of the parent-child relationship, see Ch. 12, *Adoptions: Nature and Effect* , and Ch. 412, *Paternity* .

Stepchildren of a decedent and children of a decedent's putative spouse are entitled to bring a wrongful death action if they were dependent on the decedent [*Code Civ. Proc. § 377.60(b), (d)* (*Code Civ. Proc. § 377.60* applicable to cause of action arising after 1992), (e) (standing of parties under prior law unaffected by Stats. 1992, Ch. 178)]. "Dependency" in this context refers to financial dependency for shelter, clothing, food, and medical treatment [*Coats v. K-Mart Corp. (1989) 215 Cal. App. 3d 961, 969, 264 Cal. Rptr. 12* ; *Perry v. Medina (1987) 192 Cal. App. 3d 603, 610, 237 Cal. Rptr. 532]* . Any other minor may bring a wrongful death action if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one half or more of his or her support [*Code Civ. Proc. § 377.60(c), (d)* (*Code Civ. Proc. § 377.60* applicable to cause of action arising on or after Jan. 1, 1993), (e) (standing of parties under prior law unaffected by Stats. 1992, Ch. 178)].

An action to recover damages for wrongful death is entitled to preference on the motion of any party who is under the age of 14 years unless the court finds that the party does not have a substantial interest in the case as a whole [*Code Civ. Proc. § 36(b)*; *see Code Civ. Proc. § 36(g)* (time requirements for action for medical malpractice)].

For further discussion and forms relating generally to actions for wrongful death, see Ch. 181, *Death and Survival Actions* .

[3] Workers' Compensation Benefits for Injury to Parent

A child who was wholly dependent on a parent may receive death benefits under the workers' compensation law when the parent's death results from an injury that arose out of the parent's employment [*see Lab. Code §§ 3208, 3501-3503, 4700-4709*].

For forms for use in proceedings to obtain death benefits for dependent children, see Ch. 577, *Workers' Compensation* .

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§§ 367A.37[Reserved]

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§ 367A.50 Related Matthew Bender Publications

For discussion and forms relating to the rights and obligations of parents and children, see California Family Law Practice and Procedure, Ch. 30, *The Parent-Child Relationship* (Matthew Bender)

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§ 367A.51 State Statutes

Personal liability for negligent acts. *Civ. Code § 1714(a)*

Limitation period applicable to actions for specified childhood sexual abuse by household or family member, and against persons or entities whose acts were a legal cause of the abuse. *Code Civ. Proc. § 340.1*

Action by or on behalf of minor for personal injuries sustained before or in course of minor's birth may be commenced within six years from date of minor's birth. *Code Civ. Proc. § 340.4*; *see also Civ. Code § 43.1*

Tolling of statute of limitations during period of minority; tolling provision inapplicable when claim must be presented in action against public entity or public employee. *Code Civ. Proc. § 352*

Service of summons on minor. *Code Civ. Proc. § 416.60*

Minors civilly liable for wrong done by them. *Fam. Code § 6600*

Minor not liable for exemplary damages unless at time of act minor was capable of knowing that act was wrongful. *Fam. Code § 6600*

Minor allowed to enforce rights by civil action or other legal proceedings through guardian. *Fam. Code § 6601*

Right of minor and minor's representative to inspect minor's health records. *Health & Safety Code § 123100 et seq.*

Liability of emancipated minor for shoplifting from merchant or unlawfully taking library material. *Penal Code § 490.5*

Parent or guardian's liability for minor's willful misconduct. *Civ. Code § 1714.1*

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§ 367A.51A California Rules of Court

Cal. Rules of Ct., Appen. B (Liability Limits of a Parent or Guardian Having Custody and Control of a Minor for the Torts of a Minor).

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§ 367A.52 Decisions

[1] Actions Against Parents

Minor allowed to sue parents for negligent torts. *Gibson v. Gibson (1971) 3 Cal. 3d 914, 923, 92 Cal. Rptr. 288, 479 P.2d 648* ; *Martinez v. Southern Pac. Co. (1955) 45 Cal. 2d 244, 254, 288 P.2d 868*

Minor allowed to sue parents for willful or malicious torts. *Emery v. Emery (1955) 45 Cal. 2d 421, 429, 289 P.2d 218*

[2] Actions for Negligence

Negligence of parents, although not imputable to child in action by latter for injuries, is nevertheless relevant in determining whether third person is liable for such injuries. *Akins v. County of Sonoma (1967) 67 Cal. 2d 185, 198, 60 Cal. Rptr. 499, 430 P.2d 57*

Exercise of greater caution required in dealing with young child than in dealing with adult. *Schwartz v. Helms Bakery Ltd. (1967) 67 Cal. 2d 232, 240, 60 Cal. Rptr. 510, 430 P.2d 68*

Duty of care owed by itinerant vendor selling products from truck in residential neighborhood to child purchasers and liability of vendor for personal injuries sustained by child when struck by an automobile while crossing street to defendant's vending truck. *Ellis v. Trowen Frozen Prods., Inc. (1968) 264 Cal. App. 2d 499, 502-503, 70 Cal. Rptr. 487*

[3] Assumption of Risk

Three-and-a-half year-old plaintiff incapable of assuming risk of playing with vicious dog, and therefore not barred from suing dog's owner for negligence. *Greene v. Watts (1962) 210 Cal. App. 2d 103, 106, 26 Cal. Rptr. 334*

[4] Claims Against Public Entities

Provision of *Gov. Code § 911.4*, which tolls period for filing tort claim against public entity while person is mentally incapacitated and without guardian or conservator, is inapplicable to mentally incapacitated minor with parents capable of acting on minor's behalf. *Hernandez v. County of Los Angeles (1986) 42 Cal. 3d 1020, 1025-1026, 232 Cal. Rptr. 519, 728 P.2d 1154*

Public entity (county) required under *Gov. Code § 911.6* to accept minor's late-filed tort claim on showing that minor's late-claim application was filed within one year of accrual of cause of action, he was a minor for entire 100-day claim period, and any delay in filing application was not attributable to his lack of diligence. *Hernandez v. County of Los Angeles (1986) 42 Cal. 3d 1020, 1030-1031, 232 Cal. Rptr. 519, 728 P.2d 1154*

Date of accrual of cause of action for purpose of computing time limit of Government Code claims is same as for statute of limitations that otherwise would be applicable [*Gov. Code § 901*]. *Wozniak v. Peninsula Hosp. (1969) 1 Cal. App. 3d 716, 722, 82 Cal. Rptr. 84*

Demurrer to complaint in action by minor against municipality on ground of statute of limitations is considered by court keeping in mind protection accorded to minor's cause of action until his majority, no matter what statutory limitations apply to litigants other than minors. *City of Los Angeles v. Superior Court (1968) 264 Cal. App. 2d 766, 773, 70 Cal. Rptr. 826*

State was not liable for injuries sustained by minor burned by sitting in hot coals concealed by sand on a public beach, although state, through its agents, had knowledge that people had been burned a number of times by hot coals on the beach, but had neither actual nor constructive notice of the existence of the particular hot coals in which the minor sat. *State v. Superior Court of San Mateo County (1968) 263 Cal. App. 2d 396, 399-401, 69 Cal. Rptr. 683*

[5] Comparative Negligence

Eleven-year-old looking down barrel of BB gun was not negligent as matter of law. *Olsen v. McGillicuddy (1971) 15 Cal. App. 3d 897, 903, 93 Cal. Rptr. 530*

Child under four is incapable of negligence. *Walker v. Fresno Distrib. Co. (1965) 233 Cal. App. 2d 840, 848, 44 Cal. Rptr. 68*

Four-year-old infant does not have sufficient capacity to be guilty of negligence. *Morningred v. Golden State Co. (1961) 196 Cal. App. 2d 130, 137, 16 Cal. Rptr. 219* ; *Christian v. Goodwin (1961) 188 Cal. App. 2d 650, 655, 10 Cal. Rptr. 507*

[6] Damages

Minor is allowed to recover damages for pain and suffering on same basis as adult; lay testimony, as well as expert testimony, is allowed to support such award; trier of fact, when appropriate, is allowed to infer pain and suffering from nature of injury alone. *Capelouto v. Kaiser Found. Hosps. (1972) 7 Cal. 3d 889, 895-896, 103 Cal. Rptr. 856, 500 P.2d 880*

[7] Liability for Torts

Question of minor's negligence depends on whether, in jury's opinion, minor acted as reasonably prudent and careful person of his or her age in circumstances proven in record. *Weisbart v. Flohr (1968) 260 Cal. App. 2d 281, 286, 67 Cal. Rptr. 114*

Liability of minor for battery in case in which minor shot arrow at another child when evidence showed shooter knew wrongfulness of act and had been warned by father not to point arrow at another person. *Weisbart v. Flohr (1968) 260 Cal. App. 2d 281, 290, 67 Cal. Rptr. 114*

General proposition of liability of infants for torts is established by statute. *Singer v. Marx (1956) 144 Cal. App. 2d 637, 641, 301 P.2d 440*

Only intent needed to establish infant's liability for battery is that of doing the particular act in question; e.g., throwing a rock at somebody. *Singer v. Marx (1956) 144 Cal. App. 2d 637, 641, 301 P.2d 440*

Negligence of minor is determinable on basis of whether minor used that degree of care ordinarily exercised by children of like age, mental capacity, and experience. *Singer v. Marx (1956) 144 Cal. App. 2d 637, 642-643, 301 P.2d 440*

Four-year-old does not have mental capacity that would support a finding of negligence. *Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 316-317, 253 P.2d 675*

Count charging battery against four year old stated a cause of action. *Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 317, 253 P.2d 675*

[8] Limitations

Minor under *Code Civ. Proc. § 340.5* has at least three years from date of wrongful act to bring action, regardless of when he or she attains majority or discovers injury. *Steketee v. Lintz, Williams & Rothberg (1985) 38 Cal. 3d 46, 57, 210 Cal. Rptr. 781, 694 P.2d 1153*

Whether plaintiff is minor or adult under *Code Civ. Proc. § 340.5* is determined by his or her age at time of wrongful act. *Steketee v. Lintz, Williams & Rothberg (1985) 38 Cal. 3d 46, 52-53, 210 Cal. Rptr. 781, 694 P.2d 1153*

Minor has a minimum of three years within which to bring wrongful death action against health care provider based on professional negligence under *Code Civ. Proc. § 340.5*. *Ferguson v. Dragul (1986) 187 Cal. App. 3d 702, 707, 232*

Cal. Rptr. 79

Time of "wrongful act" under *Code Civ. Proc. § 340.5*, for purpose of wrongful death action by minor based on health care provider's professional negligence, commences with death of minor's parent rather than with date of alleged negligence. *Ferguson v. Dragul (1986) 187 Cal. App. 3d 702, 708-709, 232 Cal. Rptr. 79*

Malpractice action brought within one year of plaintiff reaching majority was reasonable and not barred by *Code Civ. Proc. § 340.5*--which only allows tolling of limitations period for minors if fraud or collusion exists against minor in failure to bring suit on minor's behalf--because at time of amendment of statute, although minor's parents did not commit fraud or collusion, they refused to institute suit on his behalf and minor had no choice but to wait until he reached majority. *Whiteside v. Regents of Univ. of Cal. (1983) 147 Cal. App. 3d 854, 856-857, 195 Cal. Rptr. 349*

Statute of limitations was tolled in prenatal malpractice suit when, although parents knew baby was born with defect, they did not know it could have been predicted by standard test. *Call v. Kezirian (1982) 135 Cal. App. 3d 189, 198-199, 185 Cal. Rptr. 103*

Five-year limitation period for bringing action to trial [*see Code Civ. Proc. § 583.310*] was not tolled during 200-day hiatus during which minor was unrepresented by guardian ad litem. *White v. Renck (1980) 108 Cal. App. 3d 835, 841, 166 Cal. Rptr. 701*

Mandatory dismissal under former *Code Civ. Proc. § 583* (*now see Code Civ. Proc. § 583.310 et seq.*) of minor's action did not bar subsequent suit before running of statute of limitations. *Billups v. Tiernan (1970) 11 Cal. App. 3d 372, 375-376, 90 Cal. Rptr. 246*

[9] Medical Malpractice

Physician is under duty to test pregnant middle-aged woman for Down syndrome and to tell parents results, but physician properly left to parents any decision of abortion. *Call v. Kezirian (1982) 135 Cal. App. 3d 189, 193, 185 Cal. Rptr. 103*

Statute of limitations in medical malpractice actions commenced to run when plaintiff discovers injury and its negligent cause, or through exercise of reasonable diligence should have discovered it. *Wozniak v. Peninsula Hosp. (1969) 1 Cal. App. 3d 716, 722, 82 Cal. Rptr. 84*

Question of when there has been belated discovery of cause of action, especially in malpractice cases, is essentially a question of fact. *Wozniak v. Peninsula Hosp. (1969) 1 Cal. App. 3d 716, 725, 82 Cal. Rptr. 84*

[10] Prenatal Injuries

Statute of limitations on action for injury to person at or before his or her birth is six years [*Code Civ. Proc. § 340.4*], but does not commence to run until he or she attains majority when injury was received immediately after birth [*Code Civ. Proc. § 352(a)*; former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 335.1* (two-year statute of limitations))]. *Fay v. Mundy (1966) 246 Cal. App. 2d 231, 236, 54 Cal. Rptr. 591*

Action by minor under *Code Civ. Proc. § 340.4* for injuries sustained prior to birth is authorized. *Myers v. Stevenson (1954) 125 Cal. App. 2d 399, 401, 270 P.2d 885* ; *Scott v. McPheeters (1939) 33 Cal. App. 2d 629, 639, 92 P.2d 678*

[11] Wrongful Birth

Wrongful life or birth was not proximately caused by failure of medical professional to administer AFP test, which has only 20-percent chance of detecting Down syndrome. *Simmons v. West Covina Med. Clinic (1989) 212 Cal. App. 3d 696, 701-704, 260 Cal. Rptr. 772*

Award only of special damages for medical expenses at birth of child is not inadequate as matter of law in wrongful birth case involving healthy child. *Morris v. Frudenfeld (1982) 135 Cal. App. 3d 23, 36-37, 185 Cal. Rptr. 76*

[12] Wrongful Life

Minor plaintiff's recovery of general damages is not permitted in wrongful life action; damages is limited to medical or related expenses. *Turpin v. Sortini (1982) 31 Cal. 3d 220, 234-235, 238-239, 182 Cal. Rptr. 337, 643 P.2d 954*

Wrongful life or birth was not proximately caused by failure of medical professional to administer AFP test, which has only 20-percent chance of detecting Down syndrome. *Simmons v. West Covina Med. Clinic (1989) 212 Cal. App. 3d 696, 701-704, 260 Cal. Rptr. 772*

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Note, *Turpin v. Sortini: Recognizing the Unsupportable Cause of Action for Wrongful Life, 71 Cal. L. Rev. 1278 (1983)*

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Trotzig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth*, 14 Fam. L.Q. 15 (1980)

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§ 367A.70 State Statutes

[1] Actions Between Parent and Child

[a] By Child

Parents immune from suit by child based on claim that child should not have been conceived or allowed to have been born alive. *Civ. Code § 43.6*

Applicable statute of limitations for bringing civil action for injury or illness based on sexual acts between household or family member and child. *Code Civ. Proc. § 340.1*

Abuse of parental authority as subject of civil action. *Fam. Code § 7507*

[b] By Parent

Civil liability of minor for wrong done by him or her. *Civ. Code § 41*; *Fam. Code § 6600*

Liability of adult child for own negligence. *Civ. Code § 1714(a)*

[2] Parent's Liability for Child's Acts

[a] Discharge of Firearm

Civil liability of parent for discharge of firearm by minor. *Civ. Code § 1714.3*

[b] Driving Motor Vehicle

Liability of parents for negligent or wrongful act or omission of minor child in operation of motor vehicle. *Veh. Code §§ 17701, 17707 et seq.*

[c] Willful Misconduct

Liability of parents for minor's willful misconduct that injures person or property of another. *Civ. Code § 1714.1*

Liability of parent for minor's willful and malicious destruction of public property. *Educ. Code § 19910*

Liability of parent for minor's willful and malicious detention of library material. *Educ. Code § 19911*

Liability of parent for minor's willful misconduct resulting in injury or death to pupil, volunteer, or employee of school district, and for willful cutting, defacing, or other injuries to school district's real or personal property. *Educ. Code §§ 48904, 48905*

Power of school district or county school superintendent to withhold student's grades, diploma, or transcripts until he or she pays damages for destroyed or improperly retained school property. *Educ. Code §§ 48904(b), 48904.3*

Liability of parent for petty theft by minor from store or library. *Penal Code § 490.5*

Liability of parent for minor's access or damage to computer system or program. *Penal Code § 502(e)*

[3] Personal Injury Actions

[a] By Parent for Injury to Child

Parent's right to maintain action for injury to minor child caused by wrongful act or neglect of another. *Code Civ. Proc. § 376*

Minor child's statement is admissible against plaintiff parent in *Code Civ. Proc. § 376* action for injury to child despite hearsay rule. *Evid. Code § 1226*

[b] Survival of Parent's Action

Death of child does not abate parent's cause of action for injury to child. *Code Civ. Proc. § 376(f)*

Damages recoverable by parent in action for injury to child maintained after child's death or against executor or administrator of tortfeasor are limited to damages recoverable in survival action under *Code Civ. Proc. § 377.34. Code Civ. Proc. § 376(g)(1)*

Consolidation of parent's *Code Civ. Proc. § 376* action for injuries to minor child with *Code Civ. Proc. § 377.60* wrongful death action. *Code Civ. Proc. § 376(h)*

[c] Wrongful Death Action by Dependent Parents or Minors

Right of decedent's heirs or personal representative, in action arising on or after January 1, 1993, to maintain wrongful death action against person causing death. *Code Civ. Proc. § 377.60(a), (d), (e)*

Right of dependent parents or minors, in action arising on or after January 1, 1993, to maintain wrongful death action for death of child or parent who provided support. *Code Civ. Proc. § 377.60(b), (c), (d), (e)*

[4] Workers' Compensation

Remedy of parent against minor child's employer for injury or death of child arising out of and in course of child's employment. *Lab. Code §§ 3351, 3601*

Right of dependent child to receive death benefits from parent's employer when parent's death arose out of and in course of his or her employment. *Lab. Code §§ 3501-3503, 4700-4709*

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§ 367A.71 Decisions

[1] Actions Between Parent and Child

Unemancipated minor has cause of action to sue parent for willful or malicious tort, such as excessive punishment. *Gillett v. Gillett (1959) 168 Cal. App. 2d 102, 105, 335 P.2d 736*

[2] Child's Actions Based on Parent-Child Relationship

Father-child relationship exists, if presumed and not rebutted pursuant to Uniform Parentage Act, when facts occur that give rise to presumption, even if presumption is not raised until after deceased parent's death. *Gabehart v. Simonsen (1986) 176 Cal. App. 3d 672, 677, 222 Cal. Rptr. 336*

[3] Compromise of Minor's Claim

Compromise of a minor's action pending on appeal pursuant to *Code Civ. Proc. § 372* must be accomplished by petition filed in appellate court; appellate court, not trial court, is required to approve or disapprove compromise. *Anderson v. Latimer (1985) 166 Cal. App. 3d 667, 677, 212 Cal. Rptr. 544*

[4] Discipline of Child

Foster parents stated no cause of action under *42 U.S.C.S. § 1983* against state social workers for violation of civil rights when social workers removed foster child from foster parents' home after they refused on religious grounds to cease using corporal punishment. *Backlund v. Barnhart (9th Cir. 1985) 778 F.2d 1386, 1388-1390*

[5] Parents' Actions for Injuries to Child

[a] Damages Resulting From Child's Personal Injuries

Parents' cause of action to recover indemnity for financial loss sustained on account of injuries to child is separate from child's action for injuries. *Edgar v. Citraro (1931) 112 Cal. App. 183, 185-186, 297 P. 653*

[b] Emotional Distress to Parent

Foster mother who was herself injured in traffic accident was "direct victim" of driver's negligence and therefore had claim against driver for emotional distress suffered from witnessing fatal injuries to foster daughter. *Long v. PKS, Inc. (1993) 12 Cal. App. 4th 1293, 1297-1300, 16 Cal. Rptr. 2d 103*

[c] Loss of Filial Consortium

Trial court properly dismissed parent's claim based on other parent's alleged interference with visitation rights because primary cause of action is loss of filial consortium, which is not recognized in California, but aggrieved parent has remedy for violation of visitation rights. *In re Marriage of Segel (1986) 179 Cal. App. 3d 602, 607-609, 224 Cal. Rptr. 591* ("Segel II")

[d] Substitution of Attorneys

Attorney representing minor through guardian ad litem is not permitted to withdraw as counsel of record without prior court approval. *Torres v. Friedman (1985) 169 Cal. App. 3d 880, 887-888, 215 Cal. Rptr. 604*

[e] Wrongful Death of Child

Right to maintain wrongful death action under former *Code Civ. Proc. § 377* does not extend to persons who become heirs because of disclaimer in decedent's estate by those otherwise entitled to estate, because action is wholly statutory, cannot be expanded without legislative action, and wrongful death and disclaimer statutes were enacted for different purposes. *Lewis v. Regional Ctr. of E. Bay (1985) 174 Cal. App. 3d 350, 353-355, 220 Cal. Rptr. 89*

[6] Parent's Liability for Child's Torts

[a] Agency Relationship

Negligence of child driving car is not imputed to parent passenger if parent lacked right of control sufficient to establish agency relationship. *Edwards v. Freeman (1949) 34 Cal. 2d 589, 592-594, 212 P.2d 883*

[b] Motor Vehicle

Veh. Code § 17707 created limited agency between parent signing license application and child applicant; parent is vicariously liable both to residents and nonresidents for damages caused by minor's operation of vehicle. *Indiana Ins. Co. v. Pettigrew (1981) 115 Cal. App. 3d 862, 865-866, 171 Cal. Rptr. 770*

Legislative intent in enacting *Veh. Code §§ 17150, 17707, 17708,* imposing vicarious liability on owners, parents, and signers of driver's license applications, was simply to protect innocent third parties from careless use of automobiles;

joint tortfeasor is not permitted to obtain contribution from person whose liability is imputed by statutes. *Southern Pac. Transp. Co. v. Dolan (1972) 27 Cal. App. 3d 534, 540-542, 104 Cal. Rptr. 131*

[c] Negligent Control of Child

Parent's knowledge of child's dangerous habits and ability to control child are prerequisites to imposition of liability for child's intentional conduct that endangers others; mother, who lacked physical custody and care of minor at critical time and lacked notice of his propensity to commit violent crimes, was not liable to husband of woman shot and killed by minor son in course of robbing bookstore; mother's mere legal custody of minor at time of crime was insufficient basis for common law liability. *Robertson v. Wentz (1986) 187 Cal. App. 3d 1281, 1290, 232 Cal. Rptr. 634*

Parents aare not liable for child's torts if as reasonable persons they were not previously aware of habits or tendencies forewarning them of child's future misbehavior. *Reida v. Lund (1971) 18 Cal. App. 3d 698, 702, 96 Cal. Rptr. 102*

Duty of parent is not only to refrain from leaving dangerous weapon in place accessible to child but also to adequately safeguard weapon. *Reida v. Lund (1971) 18 Cal. App. 3d 698, 704-705, 707, 96 Cal. Rptr. 102*

Parents' previous knowledge of child's habits or tendencies to misbehave so that they could have restrained child is necessary for parents to be held liable for damages caused by child. *Weisbart v. Flohr (1968) 260 Cal. App. 2d 281, 291, 67 Cal. Rptr. 114*

Allegations required to sufficiently plead negligent control of minor against persons standing in loco parentis. *Poncher v. Brackett (1966) 246 Cal. App. 2d 769, 773, 55 Cal. Rptr. 59*

Parents liable for injury caused by child if parents' negligent failure to warn of child's habit of assaulting others made it possible for child to cause injury and made it probable child would do so. *Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 317, 253 P.2d 675*

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§ 367A.72 Attorney General Opinions

Civ. Code § 1714.1, which imputes liability to parent for willful misconduct of minor, does not extend to foster parent or public entity for willful misconduct of minor placed in foster home by juvenile court. *59 Ops. Cal. Att'y Gen. 142 (1976)*

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§ 367A.73 Law Reviews

Comment, *Loss of Parental Consortium: Why Children Should Be Compensated, 18 Pac. L.J. 233 (1986)*

Comment, *Negligent Parental Supervision as Grounds for Contribution in Tort: The Case for Minimal Parental Liability, 12 U.C.D. L. Rev. 828 (1979)*

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Comment, *Parent and Child: Parental Immunity in Tort Abolished, 11 Santa Clara Lawyer 478 (1971)*

Note, *"Gibson v. Gibson": California Abrogates Parental Tort Immunity, 7 Cal. W. L. Rev. 466 (1971)*

Comments, *Torts: Parent and Child: Liability of Parent for Torts of Child: Civil Code Section 1714.1 , 43* Cal. L. Rev. 874 (1955)

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§ 367A.74 Text References

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[Reserved]

§§ 367A.75[Reserved]

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§ 367A.90 Complaint for Damages for Prenatal Injuries and Injuries at Birth [Civ. Code §§ 43.1, 3333; Code Civ. Proc. § 340.4]--By Minor Through Guardian ad Litem [Fam. Code § 6601] Against Doctor and Hospital

[1] FORM Complaint for Damages for Prenatal Injuries and Injuries at Birth [Civ. Code §§ 43.1, 3333; Code Civ. Proc. § 340.4]--By Minor Through Guardian ad Litem [Fam. Code § 6601] Against Doctor and Hospital

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], a minor by	)	
_____ [*name*], his/her guardian	)	NO. _____
ad litem,	)	COMPLAINT FOR DAMAGES
Plaintiff,	)	[Amount demanded _____ (exceeds
vs.	)	or does not exceed) $10,000]
_____ [*names*], [and DOES 1	)	[LIMITED CIVIL CASE]
through _____,]	)	
Defendants.		

_____

Plaintiff _____ [*name*], a minor, through his/her guardian ad litem, alleges:

1. For purposes of this action, _____ [*name*] was appointed by the above-entitled court, and now is, guardian ad litem of plaintiff _____ [*name*], a minor.

2. Defendants _____ [*names*] are, and at all times herein mentioned were, residents of _____ County, California.

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as Does 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names

and capacities when ascertained. Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by that negligence.]

[4. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned each of the defendants, including all defendants sued under fictitious names, was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of this agency and employment.]

5. Defendant _____ [*name of doctor*] is, and at all times herein mentioned was, a physician and surgeon duly licensed under the laws of California, practicing his/her profession in _____ [*city*], _____ County, California.

6. Defendant _____ [*hospital*] at all times herein mentioned was and is a corporation existing under the laws of California with its principal place of business in _____ [*city*], _____ County, California.

7. Plaintiff was born on _____ [*date*], and is at the time of filing this complaint a minor of the age of _____ years.

8. The natural parents of plaintiff are _____ [*name*], mother, and _____ [*name*], father.

9. On or about _____ [*date*], in _____ [*city*], _____ County, California, plaintiff's mother was pregnant with plaintiff. On that date and place plaintiff's mother employed defendant _____ [*name of doctor*] to attend her before, during, and after the delivery of plaintiff for a compensation to be paid for such services. For that purpose defendant undertook to, and did, attend and care for plaintiff's mother before, during, and after delivery of plaintiff.

10. On or about _____ [*date*], plaintiff's mother began labor, and was directed by defendant to go to defendant _____ [*name of hospital*]. While she was in the hospital for delivery of plaintiff, defendants, and each of them, so carelessly and negligently treated and cared for plaintiff's mother, and so carelessly and negligently delivered plaintiff, that as a proximate result thereof plaintiff was caused to, and did sustain serious personal injuries, among which were _____ [*set forth specific injuries*], and other personal injuries, the exact nature of which plaintiff does not know at this time, and will ask leave to amend this complaint to so state when they have been fully ascertained. Plaintiff is informed and believes and thereon alleges that the injuries are of a permanent nature, and will result in his/her permanent and total disability, all to plaintiff's general damage.

11. As a further proximate result of the carelessness and negligence of defendants, and each of them, and of the resulting injuries, plaintiff has been obliged to incur expenses for medical care, hospitalization, and treatment, and will be obliged to secure medical care and treatment for the rest of his/her life.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages according to proof;

2. For damages for past and future medical expenses [according to proof];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form is a complaint for use in an action by or on behalf of a minor to recover damages for injuries sustained before or in the course of the minor's birth [*Civ. Code § 43.1*; *Code Civ. Proc. § 340.4*].

[3] Medical Expenses

Parents of a minor are entitled to recover medical expenses incurred when the minor is injured, because it is the parents who are legally obligated to pay for the expenses. When a parent is the guardian ad litem of the minor in the minor's action arising from personal injuries, however, the minor's cause of action may include an allegation to recover whatever medical expenses that have not been paid [*Morningred v. Golden State Co. (1961) 196 Cal. App. 2d 130, 138-139, 16 Cal. Rptr. 219* ; *Mattox v. Isley (1952) 111 Cal. App. 2d 774, 779-780, 245 P.2d 664]* .

[4] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(a)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Statute of Limitations

For discussion of the appropriate statute of limitations for injuries sustained before or at birth, see *§ 367A.11[3][b]*.

[7] Cross References

For alternative allegations with respect to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers*

For discussion and forms for use in actions for professional negligence against a hospital, including an alternative form of complaint by parents and a minor, and for use in inspecting and obtaining copies of patient records, see Ch. 295, *Hospitals*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For discussion and forms relating to negligence actions generally, see Ch. 380, *Negligence*

For discussion and forms relating to actions for professional negligence against physicians, see Ch. 415, *Physicians: Medical Malpractice*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms for verification, see Ch. 572, *Verification*

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§ 367A.91 Complaint for Damages for Wrongful Life and Wrongful Birth of Minor [Civ. Code §§ 1714(a), 3333]--Negligent Failure of Defendant to Inform Parents of Substantial Risk that Minor Would Be Born With Substantial Genetic Defect

[1] FORM Complaint for Damages for Wrongful Life and Wrongful Birth of Minor [Civ. Code §§ 1714(a), 3333]--Negligent Failure of Defendant to Inform Parents of Substantial Risk that Minor Would Be Born With Substantial Genetic Defect

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], a minor by	)	
_____ [*name*],	)	NO. _____
his/her guardian ad litem, and	)	COMPLAINT FOR DAMAGES
_____ [*names of parents*],	)	(Wrongful Life/Wrongful Birth)
Plaintiffs,	)	[Amount demanded _____ (exceeds
vs.	)	or does not exceed) $10,000]
_____ [*names*], [and DOES 1	)	[LIMITED CIVIL CASE]
through _____,]	)	
Defendants.	)	
_____		

Plaintiff _____ [*name*], a minor, through his/her guardian ad litem, alleges:

1. Plaintiff _____ [*name of mother*] is the mother and plaintiff _____ [*name of father*] is the father of plaintiff _____ [*name of minor*], a minor born on _____ [*date*].

2. [*Name of guardian ad litem. See § 367A.90[1], Paragraph 1.*]

3. [*Allegations regarding residence. See § 367A.90[1], Paragraph 2.*]

4. [*Fictitious name allegation, if appropriate. See § 367A.90[1], Paragraph 3.*]

5. [*Agency delegation, if appropriate. See § 367A.90[1], Paragraph 4.*]

6. _____ [*Allege occupation(s) of defendant(s). See § 367A.90[1], Paragraphs 5, 6*].

7. _____ [*Allege additional defendant's occupation and agency, if appropriate; e.g.*, Defendant _____ (*name of doctor*), is, and at all times herein mentioned was, a physician duly licensed to practice medicine in the State of California, employed by defendant _____ (*name of hospital*) to evaluate and treat patients at the hospital and acting within the course and scope of such employment with the permission and consent of his/her codefendant].

FIRST CAUSE OF ACTION
(Wrongful Life)

8. _____ [*Allege basis of defendants' duty to inform parents of potential genetic defects in minor; e.g.*, On or about _____ (*date*), _____ (*names of parents*) retained defendant on the advice of their pediatrician, _____ (*name of pediatrician*), to evaluate a possible hearing defect of plaintiffs _____'s (*name of parents*) minor child, _____ (*name*), the older _____ (brother *or* sister) of the minor plaintiff in this action].

9. _____ [*Allege defendants' negligent performance of duty, e.g.*, On or about _____ (*date*), defendant _____ (*name of doctor*) examined _____ (*name of minor plaintiff's older sibling*) and administered tests to evaluate his/her condition. Due to the negligence of defendants _____ (*names of hospital and doctor*) in the examination, administration of the tests, and communication of their results to _____ (*names of parents*) and to their pediatrician on or about _____ (*date*), plaintiffs _____ (*names of parents*) were informed that _____'s (*name of sibling*) hearing was within normal limits when in fact he/she was completely deaf as the result of a hereditary ailment. The nature of the ailment is such that a reasonable degree of medical probability existed that the hearing defect would be inherited by any offspring of plaintiffs _____ (*names of parents*)].

[10. In reliance on the diagnosis made by defendant(s), plaintiffs _____ (*names of parents*) did not avail themselves of any further tests or evaluation of _____'s (*name of minor sibling*) condition until on or about _____ (*date*), when they learned of his/her true condition. Also in reliance on defendants' diagnosis, and before learning of _____'s (*name of minor sibling*) true condition, plaintiffs _____ (*names of parents*) conceived minor plaintiff, on or about _____ (*date*).]

11. On or about _____ [*date*], minor plaintiff was born with _____ [*specify defect or disease, e.g.*, total hereditary deafness]. If plaintiffs _____ [*names of parents*] had been correctly informed that _____ [*specify, e.g.*, a reasonable degree of medical probability existed that any of their offspring would inherit the defect and be born totally deaf], they would have _____ [*specify, e.g.*, chosen not to conceive minor plaintiff].

12. As a proximate result of _____ [*specify defect or disease, e.g.*, the total hereditary deafness] and the negligence of defendant(s) alleged above, plaintiff _____ [*name of minor*] is informed and believes

and thereon alleges that he/she will be obliged to incur extraordinary expenses for _____ [*specify, e.g.*, medical treatment, specialized teaching, training, and hearing equipment as a result of his/her deafness] for an indefinite period in the future and to pay other expenses in the treatment of his/her condition.

SECOND CAUSE OF ACTION
(Wrongful Birth)

Plaintiffs _____ [*names of parents*] allege:

13. Plaintiffs _____ [*names of parents*] refer to Paragraphs 1 and 3 through 11 of the First Cause of Action and make them a part of the Second Cause of Action by reference.

14. As a proximate result of the negligence of defendant(s), plaintiffs _____ [*names of parents*] were compelled to, and did, incur expenses for _____ [*specify, e.g.*, medical treatment, specialized teaching, training, and hearing equipment] for plaintiff _____ [*name of minor*].

15. As a further proximate result of the negligence of defendant(s), plaintiffs _____ [*names of parents*] are informed and believe and thereon allege that they will be obliged to incur expenses for medical care, treatment, training, and equipment for plaintiff _____ [*name of minor*] during the minority of plaintiff _____ [*name of minor*] through _____ [*date*].

WHEREFORE, plaintiffs pray judgment against defendants [and each of them], as follows:

On the FIRST CAUSE OF ACTION:

1. For future medical and related expenses according to proof;

On the SECOND CAUSE OF ACTION:

2. For medical and related expenses incurred as a result of plaintiff _____'s [*name of minor*] condition according to proof;

3. For future medical and related expenses incurred during plaintiff _____'s [*name of minor*] minority according to proof;

On ALL CAUSES OF ACTION:

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiffs _____ [*names*]

[*Verification. See § 367A.90[1].*]

[2] Use of Form

This complaint is for use in an action seeking damages for wrongful life brought on behalf of a minor who was born with a severe defect, consolidated with an action for wrongful birth by the minor's parents to recover medical and related expenses as a result of the minor's defect. The form may be modified for use by only one parent, if appropriate. The basis for the action is a medical care provider's negligence that has proximately caused the birth of a hereditarily afflicted or otherwise defective child.

The facts used to illustrate allegations in the complaint are adapted from those found in *Turpin v. Sortini (1982) 31 Cal. 3d 220, 182 Cal. Rptr. 337, 643 P.2d 954* .

[3] Allegations

This complaint contains two causes of action as a basis for recovery of damages caused by the negligence of defendant or defendants. The first cause of action includes allegations of:

- The name of the minor plaintiff's guardian ad litem (Paragraph 2) [*see Fam. Code § 6601*];

- The occupation of defendant as a medical care provider (Paragraphs 6, 7), and, if appropriate, agency allegations (Paragraph 7);

- The duty of defendant to inform plaintiff parents of the potential defect of minor plaintiff or of any child plaintiff parents might conceive (Paragraph 8);

- The negligence of defendant in performing that duty (Paragraph 9);

- Plaintiff parents' reliance on the negligent diagnosis or representation of defendant (Paragraphs 10, 11);

- Minor plaintiff's being born with a severe defect as a result of that negligence (Paragraph 11); and

- The damages that will accrue to the minor in the future as a result of medical expenses that he or she will have to pay because of his or her defective condition (Paragraph 12) [*see Turpin v. Sortini (1982) 31 Cal. 3d 220, 223-224, 239, 182 Cal. Rptr. 337, 643 P.2d 954]* .

The second cause of action, brought by the parents for the wrongful birth of the minor plaintiff, incorporates by reference Paragraphs 1 and 3 through 11 of the first cause of action (Paragraph 13). It then alleges:

- The special damages of medical and related expenses already paid by the parents in treatment of the minor plaintiff's condition (Paragraph 14); and

- The special damages of medical and related expenses that the parents will pay in the future for treatment of the minor plaintiff's condition (Paragraph 15) [*see Turpin v. Sortini (1982) 31 Cal. 3d 220, 226, 182 Cal. Rptr. 337, 643 P.2d 954]* .

[4] Damages

[a] In General

The minor plaintiff in a wrongful life action may not recover general damages for being born impaired. Both the minor

and the parents, however, may recover special damages for the extraordinary expenses necessary to treat the minor's condition, although they may not both recover for the same medical expenses [*Turpin v. Sortini (1982) 31 Cal. 3d 220, 238, 239, 182 Cal. Rptr. 337, 643 P.2d 954]* .

No California decisions have expressly permitted the parents to recover general damages for mental suffering for the "wrongful birth" of a defective child [*see Turpin v. Sortini (1982) 31 Cal. 3d 220, 225-228, 182 Cal. Rptr. 337, 643 P.2d 954]* . Nevertheless, courts have held that when a medical care provider's negligence in performing sterilization or abortion procedures results in the birth of a healthy child, the parents may recover all the usual damages allowable under general tort principles [*Stills v. Gratton (1976) 55 Cal. App. 3d 698, 709, 127 Cal. Rptr. 652* ; *Custodio v. Bauer (1967) 251 Cal. App. 2d 303, 325, 59 Cal. Rptr. 463]* . Under general tort principles, damages are allowed for the mental suffering that naturally ensues from a tortious act when a cause of action is otherwise established [*Capelouto v. Kaiser Found. Hosps. (1972) 7 Cal. 3d 889, 892, 103 Cal. Rptr. 856, 500 P.2d 880]* . Therefore, the plaintiffs in a wrongful birth action involving a defective child may wish to allege general damages in addition to seeking recovery for medical and related expenses.

[b] Alleging Special Damages

The damages alleged in the complaint are special damages, and therefore must be specifically set forth in the complaint to give evidence of them at trial [*Shook v. Pearson (1950) 99 Cal. App. 2d 348, 351-352, 221 P.2d 757* ; *Stoltz v. Converse (1946) 75 Cal. App. 2d 909, 914-915, 172 P.2d 78]* .

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(a)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[c] Punitive Damages

The court of appeal has held that punitive damages are recoverable in a wrongful life action [*Curlender v. Bio-Science Labs. (1980) 106 Cal. App. 3d 811, 831-832, 165 Cal. Rptr. 477]* . Although the California Supreme Court overruled this court's holding that general damages are recoverable in a wrongful life action, it did not address the question of punitive damages [*Turpin v. Sortini (1982) 31 Cal. 3d 220, 223, 234-235, 239, 182 Cal. Rptr. 337, 643 P.2d 954]* . Therefore, it would appear that under established tort principles, punitive damages may be alleged in a wrongful life or wrongful birth action when it can be pr oven by clear and convincing evidence that the defendant was guilty of oppression, fraud, or malice [*Civ. Code § 3294*].

If punitive damages are alleged, the amount sought must not be stated in the complaint [*Civ. Code § 3295(e)*]. For sample allegations of punitive damages, see Ch. 177, *Damages* .

[5] Cross References

For a related form, see *§ 367A.90*

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A. Actions By and Against Minors

32-367A California Forms of Pleading and Practice--Annotated § 367A.92

§ 367A.92 Complaint for Damages [Civ. Code § 3333] From Negligence [Civ. Code § 1714(a)]--By Minor Against Mobile Vendor and Other Driver

[1] FORM Complaint for Damages [Civ. Code § 3333] From Negligence [Civ. Code § 1714(a)]--By Minor Against Mobile Vendor and Other Driver

[*Caption. See § 367A.90[1]*.]

Plaintiff _____ [*name*], through his/her guardian ad litem, alleges:

1. [*Allegation of appointment of guardian ad litem. See § 367A.90[1], Paragraph 1*.]

2. [*Allegations regarding residence. See § 367A.90[1], Paragraph 2*.]

3. [*Fictitious name allegations, if appropriate. See § 367A.90[1], Paragraph 3*.]

4. [*Agency allegations, if appropriate. See § 367A.90[1], Paragraph 4*.]

5. Defendant _____ [*owner of truck*] is and at all times herein mentioned was a corporation existing under the laws of California, with its principal place of business in _____ County, California, and authorized to operate its trucks and sell its wares on the streets of _____ [*city*], California.

6. Defendant _____ [*driver of truck*] at all times herein mentioned was the agent and employee of _____ [*owner of truck*] and was acting within the course and scope of his/her employment and authority.

7. Defendant _____ [*operator of automobile*] at all times herein mentioned was the owner of a certain _____ [*year, make, and model, e.g.*, 1991 Pontiac 6000 STE] automobile bearing California License

No. _____.

8. At all times herein mentioned, _____ [*name of street where injuries were sustained*] was a public street and highway in _____ [*city*], _____ County, California.

9. On or about _____ [*date of accident*], _____ [*driver of truck*] was driving his/her truck in an _____ [*describe direction, e.g.*, easterly] direction down _____ Street at or about _____ [*time*], and ringing a bell attached to his/her truck to attract the attention of potential purchasers of his/her wares.

10. Defendant _____ [*driver of truck*] knew that children of tender years would be attracted to his/her truck by the sound of the bell to purchase defendant's wares.

11. Plaintiff, who at all times mentioned herein, was _____ years of age, was at the above-mentioned date and time playing in the yard in front of _____ [*address*].

12. When plaintiff heard the sound of defendant _____'s [*driver of truck*] bell, he looked at the defendant, who beckoned and directed him with his/her hand to cross _____ Street to purchase his/her wares and enter into a business relationship with defendant.

13. At or about _____ [*time of accident*], on _____ [*date*], defendant _____ [*operator of automobile*] was driving his/her _____ [*year, make, model of automobile*] on _____ Street in a _____ [*describe direction, e.g.*, westerly] direction.

14. As a proximate result of the negligence of defendants, and each of them, the automobile driven by defendant _____ [*operator of automobile*] struck plaintiff, who was responding to the direction and invitation to do business by defendants _____ [*names of owner and driver of truck*], causing plaintiff to be thrown violently to the pavement and dragged a distance of _____ feet and thereby proximately causing the injuries and damages alleged below.

15. As a proximate result of the negligence of defendants, and each of them, plaintiff was greatly and seriously injured in his/her health, strength, and activity; and plaintiff is informed and believes, and thereon alleges that the injuries will result in some permanent disability to him/her, all to plaintiff's general damage.

16. [*Allegation of special damages. See § 367A.90[1], Paragraph 11.*]

[*Prayer. See § 367A.90[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 367A.90[1].*]

[2] Use of Form

This complaint may be used in the specific situation set forth, that is, when a minor is injured by an automobile while responding to an invitation by a street vendor to do business. With appropriate modifications, it may be used when the

injury was caused by the actual street vendor, for example, for failure to look while parking or backing the truck.

The form was adapted from the fact situation in *Schwartz v. Helms Bakery Ltd. (1967) 67 Cal. 2d 232, 235-236, 60 Cal. Rptr. 510, 430 P.2d 68* .

[3] Duty of Street Vendors to Minors

The following principles control situations involving a mobile vendor's sales of goods to minors [*Schwartz v. Helms Bakery Ltd. (1967) 67 Cal. 2d 232, 238, 60 Cal. Rptr. 510, 430 P.2d 68]* :

- One who undertakes to direct the actions of another must do so with due care;

- One who invites another to do business must exercise due care for the customer's safety on all premises;

- In dealing with a young child, one must exercise greater caution than in dealing with an adult; and

- Foreseeable intervening acts (for example, passing cars that might strike youngsters darting into the street to buy something from the truck) constitute no excuse from liability for negligence.

[4] Cross References

For a related form, see *§ 367A.90*

For discussion and forms relating to personal injury and damage actions involving motor vehicles generally, see Ch. 82, *Automobiles: Causes of Action*

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[Reserved]

§§ 367A.93[Reserved]

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32-367A California Forms of Pleading and Practice--Annotated § 367A.110

§ 367A.110 Judicial Council Trial Court Pleading Form--Complaint for Damages for Personal Injury, Property Damage, Wrongful Death With General Negligence Attachment [Cal. Judicial Council Forms PLD-PI-001, PLD-PI-001(2)]--By Child Through Guardian ad Litem [Code Civ. Proc. § 372; Fam. Code § 6601] Against Parent

[1] FORM Judicial Council Trial Court Pleading Form--Complaint for Damages for Personal Injury, Property Damage, Wrongful Death With General Negligence Attachment [Cal. Judicial Council Forms PLD-PI-001, PLD-PI-001(2)]--By Child Through Guardian ad Litem [Code Civ. Proc. § 372; Fam. Code § 6601] Against Parent

Click here to view image.

[2] Use of Form

This complaint is for use by a child seeking damages from a parent based on the parent's negligence. It consists of the optional Judicial Council complaint form for personal injury, property damage, and wrongful death (official form number PLD-PI-001), along with the cause of action form for general negligence and a verification attachment (official form number PLD-PI-001(2)) [*see Code Civ. Proc. § 425.12*].

This three-page Judicial Council complaint form must always be filed with one or more cause of action attachments. For example, the Judicial Council has approved cause of action attachments based on general negligence as illustrated above [*see* Ch. 380, *Negligence*] and intentional tort [*see* Ch. 58, *Assault and Battery* , and Ch. 362, *Mental Suffering and Emotional Distress*]. When counsel seeks exemplary damages in addition to compensatory damages, the exemplary damages attachment also must be included [*see* Ch. 177, *Damages*].

For general information for filling out this complaint in a wrongful death action, see Ch. 181, *Death and Survival Actions* . For general information relating to use of Judicial Council complaint forms, see Ch. 123, *Complaints and Cross Complaints* .

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in

PDF format also is available at *www.lexisone.com* at no charge.

If the Judicial Council complaint and attachment forms are not used, the allegations in these forms may be adapted for use in a complaint drafted by counsel. For general forms alleging negligence, see Ch. 380, *Negligence* .

[3] Filling Out Complaint Form

[a] General Instructions

For general instructions on how to fill out this complaint form, see Ch. 380, *Negligence* . Those matters affecting the use of the Judicial Council complaint form that are unique to an action based on negligence by a minor against his or her parent are discussed below.

[b] Caption

The name of the minor's guardian ad litem or guardian of the estate who is appearing in the action for the minor should be inserted into the third box from the top of the page [*see Code Civ. Proc. § 372*].

[c] Plaintiff's Capacity (Paragraph 3.)

The capacity of the plaintiff to institute the action through a guardian of the estate or guardian ad litem is alleged by checking the first box in **Paragraph 3.a,** and inserting the name of the minor plaintiff, by checking box 3.a(4) "a minor," and by checking box 3.a(4)(a) "for whom a guardian or conservator of the estate or a guardian ad litem has been appointed" [*see Code Civ. Proc. § 372*; *Fam. Code § 6601*]. For discussion and forms relating to the appointment of a guardian of the estate or a guardian ad litem for a minor, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , and Ch. 291, *Guardians ad Litem* , respectively.

[d] List of Causes of Action (Paragraph 10.)

This Judicial Council complaint form, in and of itself, does not state any cause of action. Each complaint form must have one or more causes of action attached. Box 10.b., "General Negligence," should be checked to indicate the illustrative cause of action attached to the complaint. The Judicial Council has approved five separate cause of action attachments, as discussed in the Comments to the Judicial Council complaint form in Ch. 380, *Negligence* .

[e] Damages (Paragraph 11.)

A minor may enforce his or her rights by civil action in the same manner as an adult [*Fam. Code § 6601*]. The measure of damages generally is the amount that will compensate for all the detriment proximately caused by the injury [*see Civ. Code § 3333*; *see generally* Ch. 177, *Damages*]. Box 11.d., "general damage," should be checked if the minor seeks to recover for, among other damages, pain and suffering [*see Capelouto v. Kaiser Found. Hosps. (1972) 7 Cal. 3d 889, 895, 103 Cal. Rptr. 856, 500 P.2d 880* ; *Niles v. City of San Rafael (1974) 42 Cal. App. 3d 230, 244, 116 Cal. Rptr. 733]* , or physical disabilities resulting from the negligent act.

Other appropriate boxes should be checked to allege special damages recoverable by a minor. For example, box 11.f., "loss of earning capacity," should be checked to allege loss of future earning capacity during majority [*see Girard v. Irvine (1929) 97 Cal. App. 377, 386, 275 P. 840]* . Box 11.c., "hospital and medical expenses," should be checked to allege future medical expenses that will be incurred after the date of trial [*see Niles v. City of San Rafael (1974) 42 Cal. App. 3d 230, 241-243, 116 Cal. Rptr. 733* ; *Apodaca v. Haworth (1962) 206 Cal. App. 2d 209, 217, 23 Cal. Rptr. 461]* . When the minor seeks to recover for these future damages, it is suggested that the words "and/or will suffer" be typed to the right of the words "Plaintiff has suffered."

[f] Specification of Damages (Paragraph 14.)

Paragraph 14. of the form is the prayer for damages, filled out to indicate that compensatory damages are being sought, in whatever amount isjustified by proof. No dollar amount may be alleged in an action to recover damages for personal injury or wrongful death [*see Code Civ. Proc. § 425.10(b)*].

[4] Filling Out General Negligence Attachment to Complaint Form

[a] General Instructions

For general instructions on how to fill out the general negligence attachment, see Ch. 380, *Negligence* . Those matters affecting the use of the general negligence attachment form that are unique to an action based on negligence by a minor against his or her parent are discussed below.

[b] Statute of Limitations

Insert the date on which the alleged injury occurred on line 6 of **Paragraph GN-1.** An action for injury caused by the neglect of another must be commenced within two years (one year, prior to January 1, 2003) after the cause of action accrues [*Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)*; Ch. 345, *Limitation of Actions*, § 345.14]. If the person entitled to bring such an action is under the age of majority at the time the cause of action accrues, however, the time of the disability is not a part of the time limited for the commencement of the action [*Code Civ. Proc. § 352(a)*]. For a discussion of and forms relating to the suspension of the period of limitation due to minority, see Ch. 345, *Limitation of Actions* .

[c] Fictitiously Named Defendants

If any fictitiously named defendants are alleged to have caused damages, then the fourth line in **Paragraph GN-1.** should be modified by striking "was" and inserting "were," and by inserting "s" at the end of "defendant." Plaintiff then should allege that a specific number of the fictitious defendants (for example, "Does 1-5") were negligent in performing acts or failing to act in the same manner as the defendant, thereby causing damage to the plaintiff (**Paragraph GN-1.a.**). Plaintiff also should allege, in a general way, that all of the fictitiously named defendants were responsible for the plaintiff's damage (**Paragraph GN-1.b.**) [*see Breceda v. Gamsby (1968) 267 Cal. App. 2d 167, 171-172, 72 Cal. Rptr. 832* ; *see also* Ch. 20, *Allegations Commonly Used*].

[5] Preparing Verification Attachment

Verification of the complaint is not required, nor is there any official provision or form for the verification. In negligence actions, many attorneys prefer not to verify their complaints. Nevertheless, because verification of the complaint requires that defendant file a verified answer in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446(a)*] and precludes a general denial in an unlimited civil case and will preclude a general denial even in alimited civil case when the action is a claim assigned to a third party for collection [*see Code Civ. Proc. § 431.30(d)*; *see also* Ch. 26, *Answers*], counsel may wish to prepare a verification as an attachment. If a verification attachment is prepared, the format for size of papers, pagination, etc., required by Cal. Rules of Ct., Title 2, Div. 2, Ch. 1, should be followed [*see Cal. Rules of Ct., Rule 1.45(c)*].

If the complaint is verified and some allegations are on information and belief, the box in **Paragraph 15.** of the complaint should be checked, and the paragraphs alleged on information and belief should be specified.

For additional forms and further discussion relating to verifications, see Ch. 572, *Verification* .

[6] Cross References

For a related form, see *§ 367A.90*

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32-367A California Forms of Pleading and Practice--Annotated § 367A.111

§ 367A.111 Allegation for Intentional Tort--By Child Through Guardian ad Litem Against Parent [Code Civ. Proc. § 372; Fam. Code § 6601]

[1] FORM Allegation for Intentional Tort--By Child Through Guardian ad Litem Against Parent [Code Civ. Proc. § 372; Fam. Code § 6601]

On or about _____ [*date*], at _____ [*specify place, e.g.*, plaintiff's and defendant's place of residence] in _____ County, California, defendant _____ [*allege intentional acts, e.g.*, assaulted and battered plaintiff by threatening to strike plaintiff and by violently striking plaintiff in and about the face and on and about the body; by reason of the acts of defendant, plaintiff was placed in great fear for his/her life and physical well being].

[2] Use of Form

This allegation may be used in a complaint by a minor child who is suing his or her parent through a guardian ad litem for damages resulting from an intentional tort.

[3] Judicial Council Pleading Forms

This allegation may be adapted for use in the Judicial Council complaint form for personal injury, property damage, or death, together with the Judicial Council cause of action attachment for an intentional tort [*Code Civ. Proc. § 425.12*; Cal. Judicial Council Forms 982.1(1), (4), (13)]. For a filled--in example of the intentional tort attachment based on an action for assault and battery, see Ch. 58, *Assault and Battery* . The allegation in this form would be adapted for use in the Judicial Council intentional tort attachment form. For a discussion of allegations concerning plaintiff's capacity, see § 367.110[3][c]. For a discussion of allegations concerning venue and fictitiously named defendants, see Ch. 380, *Negligence* .

[4] Complaint Drafted by Counsel

If the Judicial Council complaint and intentional tort attachment forms are not used, the allegation in this form may be

adapted for use in a complaint drafted by counsel.

For general complaint forms alleging intentional torts, see the chapter discussing the particular intentional tort involved as, for example, Ch. 58, *Assault and Battery*. For allegations relating to plaintiff's capacity and fictitiously named defendants, see Ch. 20, *Allegations Commonly Used* . For allegations relating to venue, see Ch. 571, *Venue* . For appropriate captions and introductions, see Ch. 108, *Captions and Introductions* . For forms of prayers, see Ch. 420, *Prayers* .

[5] Intentional Tort Allegations

The complaint must contain a statement in ordinary and concise language of the facts constituting a cause of action for the intentional tort being alleged [*see Code Civ. Proc. § 425.10(a)*]. For example, this form contains allegations for assault and battery [*see* Ch. 58, *Assault and Battery*].

[6] Damages

For a discussion relating to a minor's ability to recover damages for pain and suffering, future loss of earning capacity, and future medical expenses, see *§ 367A.110[3][e]*. A parent is primarily liable to pay medical expenses, and thus usually has the right to recover these expenses [*see Fam. Code § 3900*; *Bauman v. San Francisco (1940) 42 Cal. App. 2d 144, 162, 108 P.2d 989]* . In cases in which a minor incurs medical expenses as a result of the parent's conduct, however, it appears the expenses can be recovered by the minor [*see Civ. Code § 3333*]. For damage allegations that may be adapted for use with this form, see Ch. 177, *Damages* .

A minor may seek exemplary damages if it is proven by clear and convincing evidence that the parent was guilty of oppression, fraud, or malice [*see Civ. Code § 3294(a)*]. If the Judicial Council form of complaint for personal injury is used, the Judicial Council exemplary damages attachment should be appended [*see* Cal. Judicial Council Form 982.1(13)]. For a discussion and forms relating to exemplary damages, including the Judicial Council exemplary damages attachment form, see Ch. 177, *Damages* .

[7] Cross References

For related forms, see *§§ 367A.90* and *367A.110*

For discussion and forms relating to the format of complaints and to the use of Judicial Council complaint forms, see Ch. 123, *Complaints and Cross Complaints*

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32-367A California Forms of Pleading and Practice--Annotated § 367A.112

§ 367A.112 Allegations for Personal Injuries Based on Negligence--By Injured Party Against Parents--Negligent Supervision of Child

[1] FORM Allegations for Personal Injuries Based on Negligence--By Injured Party Against Parents--Negligent Supervision of Child

[*EITHER, if action against parent(s)*]

1. Defendant(s) _____ [*name(s)*] is/are the _____ [father *or* mother *or* parents] of _____ [*name of child*], age _____, and, at all times herein mentioned, had the custody and control and supervised the activities of _____ [*name of child*].

[*OR, if action against person(s) standing in loco parentis to child*]

1. Defendant(s) has/have assumed the parental status and duties toward _____ [*name of child*], age _____, and at all times herein mentioned, had the custody and control and supervised the activities of _____ [*name of child*].

[*CONTINUE*]

2. On or about _____ [*date*], plaintiff was _____ [*describe plaintiff's location at time of injury, e.g.*, walking down _____ (*street*) in the vicinity of the home and residence of defendant(s) in _____ (*city*), _____ County, California]. At this time and place, _____ [*name of child*], who was then and there under the supervision and control of defendant(s), _____ [*describe tortious acts of child, e.g.*, intentionally threw a rock toward plaintiff, which rock struck plaintiff in the face, thereby causing physical injury on and about plaintiff's face and head].

[*EITHER, if parent(s) knew of child's dangerous tendencies*]

3. At all times herein mentioned, defendant[s, and each of them,] negligently supervised the activity of _____ [*name of child*] in that defendant(s) knew of the dangerous propensity or habit of _____ [*name of child*] to _____ [*describe dangerous tendencies of child, e.g.*, throw rocks at pedestrians], but failed to exercise proper control or to give appropriate warnings to prevent this conduct. Defendant[s, and each of them,] had the ability to control the conduct of _____ [*name of child*], but refused to do so and ignored their duty.

[*OR, if parent(s) observed and failed to control child's dangerous behavior*]

3. At all times herein mentioned, defendant[s, and each of them,] negligently supervised the activity of _____ [*name of child*] in that defendant(s) observed the dangerous behavior of _____ [*name of child*] in _____ [*describe child's dangerous behavior, e.g.*, throwing rocks at pedestrians and at plaintiff in particular] and defendant(s) had an opportunity and the ability to control this conduct, but failed to exercise measures to restrain _____ [*name of child*].

[2] Use of Form

These allegations may be used in a complaint by a person suing the parents of a child for damages resulting from the parents' negligent supervision of the child.

[3] Judicial Council Pleading Forms

These allegations may be adapted for use in the Judicial Council form of complaint for damages resulting from personal injury, property damage, or wrongful death, together with the Judicial Council cause of action attachment form for general negligence [*see Code Civ. Proc. § 425.12*; Cal. Judicial Council Form 982.1(3)]. For filled-in examples of these Judicial Council forms, see *§ 367A.110*, and Ch. 380, *Negligence* . The allegations would be adapted for use in the Judicial Council general negligence attachment form. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. Noninteractive versions in PDF format are available at *www.lexisone.com* at no charge.

[4] Complaint Drafted by Counsel

If the Judicial Council complaint and general negligence attachment forms are not used, the allegations in this form may be adapted for use in a complaint drafted by counsel. For general complaint forms alleging negligence, see Ch. 380, *Negligence* .

The allegations in this form also may be combined with any causes of action brought against the child for damages caused by his or her conduct [*see Civ. Code § 41*; *Fam. Code § 6600*; *see, e.g., Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 317, 253 P.2d 675]* .

[5] Parent-Child Relationship

The plaintiff should allege that the defendants had custody and control and supervised the activities of the child as parents or as persons standing in loco parentis to the child (Paragraph 1) [for discussion of in loco parentis, *see Ch. 394, Parent and Child, § 394.15*].

[6] Statute of Limitations

The date on which the injury to the plaintiff occurred should be alleged (Paragraph 2). The period of limitation for personal injury caused by negligence ordinarily is two years (one year, prior to January 1, 2003) [*Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)*; Ch. 345, *Limitation of Actions*, § 345.14].

[7] Parents' Breach of Duty to Supervise

A parent is under a duty to exercise reasonable care to control his or her minor child so as to prevent the child from intentionally harming others or from so conducting himself or herself as to create an unreasonable risk of bodily harm to others, if the parent (1) knows or has reason to know that he or she has the ability to control his or her child, and (2) knows or should know of the necessity and opportunity for exercising this control [Rest. 2d Torts, § 316; *e.g., Costello v. Hart (1972) 23 Cal. App. 3d 898, 900, 100 Cal. Rptr. 554]* . Paragraph 2 alleges the dangerous conduct of the child while under the supervision of the parents. The first alternative Paragraph 3 alleges that the parents negligently failed to control the conduct of their child despite having the opportunity to do so after becoming aware of the dangerous habits or tendencies of the child [*see, e.g., Singer v. Marx (1956) 144 Cal. App. 2d 637, 644-646, 301 P.2d 440]* . The second alternative Paragraph 3 alleges that the parents observed the dangerous behavior of their child, not necessarily involving a habit or tendency, and had an opportunity to exercise control to prevent the child from injuring the plaintiff but negligently failed to do so [*see, e.g., Costello v. Hart (1972) 23 Cal. App. 3d 898, 900-901, 100 Cal. Rptr. 554]* .

[8] Cross References

For related forms, see *§§ 367A.90* and *367A.110*

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§ 367A.113 Cause of Action for Attachment to Judicial Council Form of Complaint for Personal Injury, Property Damage, Wrongful Death [Cal. Rules of Ct., Rule 1.45(c)]--Parent's Vicarious Liability for Property Damage Caused by Willful Misconduct of Minor--By Property Owner Against Parent [Civ. Code § 1714.1]

[1] FORM Cause of Action for Attachment to Judicial Council Form of Complaint for Personal Injury, Property Damage, Wrongful Death [Cal. Rules of Ct., Rule 1.45(c)]--Parent's Vicarious Liability for Property Damage Caused by Willful Misconduct of Minor--By Property Owner Against Parent [Civ. Code § 1714.1]

SHORT TITLE: CASE NUMBER:

_____ _____

_____ [*Specify number; e.g.*, FIRST] CAUSE OF ACTION--Vicarious Liability

ATTACHMENT TO Complaint

Plaintiff _____ [*name*] alleges that:

VL-1. Defendant(s) _____ [*name(s)*] is/are vicariously liable under _____ [*Civil Code Section 1714.1(a) or Civil Code Section 1714.1(a), (b)*] for the damages to plaintiff's property as alleged below.

VL-2. At all times herein mentioned, plaintiff was the owner of the following property: _____ [*give description and location of real and/or personal property, e.g.*, a residence located at 100 Parker Street, Paradise City, Paradise County, California, and a restored 1966 Chevrolet Impala convertible that was parked in front of plaintiff's residence].

[*EITHER, if action is against parent(s)*]

VL-3. Defendant(s) is/are the _____ [father *or* mother *or* parents] of _____ [*name of*

minor], age _____, and, at all times herein mentioned, had the custody and control of _____ [*name of minor*].

[*OR, if action is against person(s) standing in loco parentis to minor*]

VL-3. Defendant(s) _____ has/have assumed the parental status and duties toward _____ [*name of minor*], age _____, and, at all times herein mentioned, had the custody and control of _____ [*name of minor*].

[*CONTINUE*]

VL-4. On or about _____ [*date*], the minor willfully damaged plaintiff's above--described property by _____ [*specify acts of minor, e.g.*, slashing the convertible top on the Chevrolet and by defacing the side of the residence with spray paint].

Page _____

[2] Use of Form

This cause of action attachment is for use in an action by a property owner against the parents of a minor to allege the parents' vicarious liability for damages caused by the minor's willful misconduct resulting in injury to property or in the defacement of property with paint or a similar substance [*see Civ. Code § 1714.1*].

The form is designed as a cause of action to be attached to Cal. Judicial Council Form 982.1(1), a complaint for damages resulting from property damage [*see Cal. Rules of Ct., Rule 1.45(c)*]. For a filled-in example of the Judicial Council complaint form, see *§ 367A.110*. The paragraphs of this form must be numbered consecutively beginning with "1," and must be preceded with one or more identifying letters derived from the title of the cause of action [*Cal. Rules of Ct., Rule 1.45(c)*]. The paragraphs in this form are lettered "VL" as derived from the title "Vicarious Liability." The form is prepared in the format prescribed by Cal. Rules of Ct., Title 2, Div. 2, Ch. 1 [*Cal. Rules of Ct., Rule 1.45(c)*].

For additional discussion of format requirements under *Cal. Rules of Ct., Rule 2.100*, see Ch. 123, *Complaints and Cross Complaints* . These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. Noninteractive versions in PDF format are available at *www.lexisone.com* at no charge.

If the Judicial Council complaint for property damage is not used, the allegations in this form may be adapted for use in a complaint drafted by counsel.

[3] Contents of Form

In an action against parents for property damage caused by the willful misconduct of the parents' minor child, the plaintiff should allege [*see Civ. Code § 1714.1(a), (b)*]:

- The parents' vicarious liability under *Civ. Code § 1714.1(a)* and/*or 1714.1(b)* (Paragraph VL-1.);
- Ownership of the damaged property (Paragraph VL-2.);
- Custody and control of the parents over the minor child (Paragraph VL-3.); and

- The minor's willful misconduct that resulted in injury to the plaintiff's property or in the defacement of property with paint or a similar substance (Paragraph VL-4.).

This liability also may be imputed to a guardian having custody and control of the minor [*see Civ. Code § 1714.1(a), (b)*]. The parent or guardian having custody and control is jointly and severally liable with the minor for any damages resulting from the willful misconduct [*see Civ. Code § 1714.1(a), (b)*; *see also* Ch. 300, *Indemnity and Contribution*].

[4] Damages

A parent's joint and several liability, with a minor, under *Civ. Code § 1714.1(a)* and*/or 1714.1(b)* cannot exceed $37,100 for each tort of the minor [*Civ. Code § 1714.1(a)-(c)*, Cal. Rules of Ct., Appen. B]. At least for injury to property under *Civ. Code § 1714.1(a)*, however, the liability is in addition to any other liability imposed by law [*see Civ. Code § 1714.1(a)*]. In an action for defacement of property with paint or a similar substance, damages imputed to the parent include court costs and attorney's fees [*Civ. Code § 1714.1(b)*]. For allegations of damage to personal property, see Ch.177, *Damages* .

[5] Cross References

For related forms, see *§§ 367A.90* and *367A.110*

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Chapter 367A MINORS: TORT ACTIONS
PART IV. FORMS
B. Actions Involving Parent-Child Relationship

32-367A California Forms of Pleading and Practice--Annotated § 367A.114

§ 367A.114 Allegations for Personal Injuries Based on Willful Misconduct of Minor--By Injured Person Against Parents [Civ. Code § 1714.1(a)]

[1] FORM Allegations for Personal Injuries Based on Willful Misconduct of Minor--By Injured Person Against Parents [Civ. Code § 1714.1(a)]

1. [*Allegation of custody and control. See § 367A.113[1], Paragraph VL-3.*]

2. On or about _____ [*date*], while plaintiff was walking past the residence of defendant(s) in _____ County, California, _____ [*name of minor child*] willfully _____ [*describe willful misconduct of minor child, e.g.,* threw a rock at plaintiff, which rock struck plaintiff in the face, thereby causing physical injury on and about plaintiff's face and head].

[2] Use of Form

These allegations are for use in a complaint against the parents of a minor for damages caused by the minor's willful misconduct resulting in personal injuries [*see Civ. Code § 1714.1(a)*].

[3] Judicial Council Pleading Forms

These allegations may be adapted for use in a cause of action form prepared by counsel for attachment to Cal. Judicial Council Form 982.1(1) or 982.1(14), the Judicial Council forms for a complaint or cross complaint for damages resulting from personal injury [*see Code Civ. Proc. § 425.12*; *Cal. Rules of Ct., Rule 1.45(c)*]. For a filled-in example of the Judicial Council form, see *§ 367A.110*. For an example of a cause of action form prepared by counsel for attachment to the Judicial Council complaint, see *§ 367A.113*. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. Noninteractive versions in PDF format are available at *www.lexisone.com* at no charge.

[4] Complaint Drafted by Counsel

If the Judicial Council complaint for personal injury is not used, these allegations may be adapted for use in a complaint drafted by counsel.

[5] Contents of Allegations

The plaintiff should allege:

- Custody and control of the parents over the minor child (Paragraph 1); and
- The minor's willful misconduct that resulted in personal injury to the plaintiff (Paragraph 2).

The liability also may be imputed to a guardian having custody and control of the minor [*see Civ. Code § 1714.1(a)*]. The parent or guardian having custody and control is jointly and severally liable with the minor for any damages resulting from the willful misconduct [*see Civ. Code § 1714.1(a)*; *see also* Ch. 300, *Indemnity and Contribution*].

[6] Damages

A parent's joint and several liability under *Civ. Code § 1714.1(a)* cannot exceed $10,000 for each tort of the minor and, in the case of personal injury, is further limited to medical, dental, and hospital expenses incurred by the injured person not in excess of $37,100. This liability is in addition to any other liability imposed by law [*Civ. Code § 1714.1(a), (c),* Cal. Rules of Ct., Appen. B]. For forms of allegations of damages for personal injuries, see Ch. 177, *Damages* .

[7] Cross References

For related forms, see *§§ 367A.90* and *367A.113*

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PART IV. FORMS
B. Actions Involving Parent-Child Relationship

32-367A California Forms of Pleading and Practice--Annotated § 367A.115

§ 367A.115 Allegation of Compensatory Damages for Personal Injury to Minor Child--By Parent--Loss of Minor's Services and Earnings During Minority [Code Civ. Proc. § 376]

[1] FORM Allegation of Compensatory Damages for Personal Injury to Minor Child--By Parent--Loss of Minor's Services and Earnings During Minority [Code Civ. Proc. § 376]

Prior to the injuries alleged, _____ [*name of minor*] was a strong and able-bodied person able to earn money and perform services for plaintiff(s) _____ [*name(s) of parent(s)*] according to the minor's age, experience, and capacities. The services and earnings were of great value to plaintiff(s). As a further proximate result of the _____ [*describe tortious conduct, e.g.*, negligence] of defendant[s, and each of them], plaintiff(s) have lost the services and earnings of their minor child and will continue to do so in the future, and thereafter those services and earnings will be greatly diminished and impaired.

[2] Use of Form

This allegation is for use by a parent in an action for personal injury to his or her minor child in alleging the loss of the minor's services and earnings during minority. Parents may maintain an action for injury to a legitimate or illegitimate unmarried minor child caused by the wrongful act or neglect of another [*see Code Civ. Proc. § 376*]. Parents may recover for the loss of the minor's earnings and services during minority, or the impairment of the minor's earning capacity or ability to provide services during minority [*Richmond v. Moore (1930) 103 Cal. App. 173, 182, 284 P. 681* ; *Girard v. Irvine (1929) 97 Cal. App. 377, 385-386, 275 P. 840* ; *see Fam. Code § 7500* (entitlement of parents to services and earnings of unemancipated minor)]. For further discussion of damages recoverable by parents for injuries to their minor child, see *§ 367A.34[6]*.

[3] Judicial Council Pleading Forms

If the Judicial Council complaint form for personal injury is used, the damages sought in the above allegation must be alleged by checking the box labeled "other damage" in **Paragraph 8.** and by specifying the damages by inserting, for example, "Loss and/or impairment of services and earnings of plaintiff's minor child." For a filled-in example of the Judicial Council personal injury complaint form, see *§ 367A.110*. These forms are available in an interactive, electronic

format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. Noninteractive versions in PDF format are available at *www.lexisone.com* at no charge.

[4] Complaint Drafted by Counsel

If the Judicial Council personal injury complaint form is not used, the allegation in this form may be adapted for use in a complaint drafted by counsel. For complaints for injuries caused by the wrongful act or neglect of another, see the chapters in this set that discuss the particular action involved.

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*]. If the parent's claim is below the superior court's jurisdictional amount for unlimited civil cases, but is joined with a minor's claim above that amount, the superior court has jurisdiction over both claims as an unlimited civil case [*see Emery v. Pacific Employers Ins. Co. (1937) 8 Cal. 2d 663, 667, 67 P.2d 1046]* .

In limited civil cases, the caption must state whether the demand exceeds or does not exceed $10,000 and must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[6] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(a)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

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Chapter 368 MISSING PERSONS

32-368 California Forms of Pleading and Practice--Annotated 368.syn

§ 368.syn Synopsis to Chapter 368: MISSING PERSONS

§ 368.01 Scope of Chapter

§ 368.02 Cross References

§§ 368.03-368.09 [Reserved]

§ 368.10 Governing Statutes

§ 368.11 "Missing Person" Defined

§ 368.12 When Missing Person Presumed Dead

§ 368.13 Administration of Estate Generally

§ 368.14 Jurisdiction

§ 368.15 Petition for Administration

[1] Where Filed

[2] Who May File

[3] Contents and Verification of Petition

§ 368.16 Hearing on Petition

[1] Clerk Sets Matter for Hearing

[2] Service and Publication of Notice

[3] Evidence Considered and Determination

[4] Orders When No Diligent Search or Inquiry Made

§ 368.17 Orders When Court Finds That Missing Person Presumed Dead

§ 368.18 Reappearance of Missing Person

[1] Remedies Available to Missing Person

[2] Effect of Decree of Final Distribution

[3] Dispute as to Identity of Person Reappearing

§§ 368.19-368.29 [Reserved]

§ 368.30 Governing Statutes

§ 368.31 Definitions

[1] Absentee

[2] Certificate of Missing Status

[3] Eligible Spouse

[4] Family of Absentee

[5] Secretary Concerned

§ 368.32 Proceeding to Set Aside Absentee's Personal Property

[1] When Property May Be Set Aside

[2] Who May File Petition

[3] Contents and Verification of and Attachment to Petition

[4] Notice of Hearing on Petition

[5] Hearing and Determination of Petition

[6] Court Not Deprived of Jurisdiction by Size or Character of Estate

[7] Joint Tenancy Property

[8] Motion for Accounting on Return or Death of Absentee

§ 368.33 Management and Disposition of Absentee's Personal Property Without Court Proceeding

[1] When Allowed

[2] Transfer of Absentee's Property

[3] Time Limit on Action by Absentee

§ 368.34 Absentee's Power of Attorney

§§ 368.35-368.39 [Reserved]

§ 368.40 State Statutes

§ 368.41 Law Reviews

§§ 368.42-368.49 [Reserved]

§ 368.50 State Statutes

§ 368.51 Decisions

§ 368.52 Law Reviews

§ 368.53 Text References

§§ 368.54-368.59 [Reserved]

§ 368.60 Federal Statutes

§ 368.61 State Statutes

[1] Generally

[2] Court Proceeding Setting Aside Absentee's Personal Property

[3] Management and Disposition of Absentee's Property Without Court Proceeding

§§ 368.62-368.69 [Reserved]

§ 368.70 Appointment of Administrator and Issuance of Letters of Administration [Prob. Code § 8460 et seq.]--Estate of Intestate Missing Person--Petition [Prob. Code § 8002(a)]

[1] FORM

[2] Use of Form

[3] Contents

[4] Notice of Hearing

[5] Verification

[6] Hearing

[7] Cross References

§ 368.71 Appointment of Administrator and Issuance of Letters of Administration [Prob. Code § 8460 et seq.]--Estate of Intestate Missing Person--Allegation Regarding Heirs of Predeceased Spouse [former Prob. Code § 229; Prob. Code § 6402.5]

[1] FORM

[2] Use of Form

[3] Cross References

§ 368.72 Appointment of Administrator and Issuance of Letters of Administration [Prob. Code § 8002(a)]--Estate of Intestate Missing Person--Order [Code Civ. Proc. § 1003; Prob. Code § 12407(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 368.73 Probate of Will and Issuance of Letters Testamentary [Prob. Code §§ 8200-8202, 8400-8402]--Estate of Missing Person Who Left Will--Petition [Prob. Code §§ 8002(a), 12404]

[1] FORM

[2] Use of Form

[3] Contents

[4] Verification

[5] Cross References

§ 368.74 Probate of Will and Issuance of Letters Testamentary [Prob. Code §§ 8200-8202, 8400-8402]--Estate of Missing Person Who Left Will--Order [Code Civ. Proc. § 1003; Prob. Code § 12407(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 368.75 Petition for Determination of Identity of Person Claiming to Be Reappearing Missing Person [Prob. Code §§ 11700, 12408(d)]

[1] FORM

[2] Use of Form

[3] Contents

[4] Verification

[5] Cross References

§§ 368.76-368.89 [Reserved]

§ 368.90 Petition to Set Aside Personal Property of Absentee to Absentee's Family [Prob. Code § 3701]

[1] FORM

[2] Use of Form

[3] Contents

[4] Verification

[5] Cross References

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Chapter 368 MISSING PERSONS
PART I. SCOPE

32-368 California Forms of Pleading and Practice--Annotated § 368.01

§ 368.01 Scope of Chapter

This chapter discusses and contains forms relating to missing persons. In the Legal Background, Part A [*see § 368.10* et seq.] discusses the administration of estates of persons missing and presumed dead. It discusses when a missing person is presumed dead, the procedure for petitioning for probate or administration of the estate of a missing person, and the remedies of a missing person on reappearance. Part B [*see § 368.30* et seq.] discusses the procedure for setting aside personal property of absent federal personnel as well as the management and disposition of personal property of absent federal personnel without court proceeding.

The following forms for the administration of the estates of missing persons who are presumed dead are included:

- A petition for appointment of an administrator and for issuance of letters of administration [*see § 368.70*].
- An allegation regarding the heirs of a predeceased spouse [*see § 368.71*].
- An order appointing an administrator and issuing letters of administration [*see § 368.72*].
- A petition for probate of a will and for issuance of letters testamentary [*see § 368.73*].
- An order admitting a will to probate and issuing letters testamentary [*see § 368.74*].
- A petition to determine the identity of a person claiming to be a reappearing missing person [*see § 368.75*].

In addition, this chapter includes a petition for use in proceedings to set aside personal property of absent federal personnel, referred to as absentees, to a member of the absentee's family [*see § 368.90*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral Overview

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32-368 California Forms of Pleading and Practice--Annotated § 368.02

§ 368.02 Cross References

- For a discussion and forms relating to the appointment of a conservator of the estate of an absentee, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* .

- For a discussion and forms relating to the appointment of a conservator of the estate of a person who is missing and whose whereabouts is unknown, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* .

- For a discussion and forms relating generally to the appointment of an executor or administrator of the estate of a deceased person, see Ch. 442, *Probate: Initiating Probate Administration* .

- For a discussion and forms related to notice provisions generally, see Ch. 447, *Probate: Statutory Notice Requirements* .

- For a discussion and forms relating generally to the administration of an estate of a deceased person by the executor or administrator, see Ch. 447, *Probate: Statutory Notice Requirements* , through Ch. 458E, *Probate: Discharge* .

- For a discussion and forms relating to the distribution and settlement of an estate of a deceased person, see Ch. 458C, *Probate: Preliminary Distribution and Partial Allowance of Compensation* , through Ch. 458D, *Probate: Discharge* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral Overview

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32-368 California Forms of Pleading and Practice--Annotated §§ 368.03-368.09

[Reserved]

§§ 368.03[Reserved]

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 368 MISSING PERSONS
PART II. LEGAL BACKGROUND
A. Administration of Estates of Missing Persons Presumed Dead

32-368 California Forms of Pleading and Practice--Annotated § 368.10

§ 368.10 Governing Statutes

The provisions governing the administration of estates of missing persons presumed dead are contained in *Prob. Code §§ 12400-12409*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral Overview

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PART II. LEGAL BACKGROUND
A. Administration of Estates of Missing Persons Presumed Dead

32-368 California Forms of Pleading and Practice--Annotated § 368.11

§ 368.11 "Missing Person" Defined

As used in *Prob. Code §§ 12400-12409* (governing administration of estates of missing persons presumed dead), unless the provision or context otherwise requires, a missing person is one who is presumed dead under *Prob. Code § 12401* [*Prob. Code § 12400*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral Overview

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A. Administration of Estates of Missing Persons Presumed Dead

32-368 California Forms of Pleading and Practice--Annotated § 368.12

§ 368.12 When Missing Person Presumed Dead

In proceedings under *Prob. Code §§ 12400-12409*, a person who has not been seen or heard from for a continuous period of five years by those who are likely to have seen or heard from that person, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. The person's death is presumed to have occurred at the end of the period unless there is sufficient evidence to establish that death occurred earlier [*Prob. Code § 12401*; *see Evid. Code § 1282* (finding of death by federal employee as evidence of death)].

The party asserting the statutory presumption of death has the burden of producing evidence to show that the presumption applies [*Starr v. Old Line Life Ins. Co. (2002) 104 Cal. App. 4th 487, 495, 128 Cal. Rptr. 2d 282]* . The presumption does not apply if there is a satisfactory explanation for the person's absence other than death, for example, if the person may have fled to avoid possible criminal prosecution [*Starr v. Old Line Life Ins. Co. (2002) 104 Cal. App. 4th 487, 496, 128 Cal. Rptr. 2d 282]* . The test for the applicability of the presumption is not whether it is more likely that the person is dead than alive, but whether the missing person's absence is *capable* of a satisfactory explanation other than by death and not whether death is the *most* satisfactory explanation for the absence [*Starr v. Old Line Life Ins. Co. (2002) 104 Cal. App. 4th 487, 496, 128 Cal. Rptr. 2d 282]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEvidenceInferences & PresumptionsExceptionsGeneral OverviewEvidenceInferences & PresumptionsExceptionsStatutory Presumptions

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A. Administration of Estates of Missing Persons Presumed Dead

32-368 California Forms of Pleading and Practice--Annotated § 368.13

§ 368.13 Administration of Estate Generally

The estate of a missing person may be administered in the manner provided generally for the administration of estates of deceased persons, subject to the provisions of *Prob. Code §§ 12400-12409* [*Prob. Code § 12402*].

The personal representative must administer the estate of the missing person in the same general manner, using the same method of procedure, and with the same force and effect, as provided for the administration of the estates of deceased persons, except as otherwise provided in *Prob. Code §§ 12400-12409* [*Prob. Code § 12407(b)*]. For a discussion and forms relating to the appointment of a personal representative of a decedent's estate generally, see Ch. 442, *Probate: Initiating Probate Administration* . For a discussion and forms relating to the administration of a decedent's estate by a personal representative, see Ch. 447, *Probate: Statutory Notice Requirements* , through Ch. 458B, *Probate: Suspension, Removal, and Resignation* . For a discussion and forms relating to the distribution and settlement of a decedent's estate, see Ch. 458C, *Probate: Preliminary Distribution and Partial Allowance of Compensation* , through Ch. 458E, *Probate: Discharge* .

One important consequence of the provisions of *Prob. Code §§ 12402, 12407(b)* specifying that the estates of missing persons are to be administered in the same general manner, and with the same procedure and force and effect, as the estates of deceased persons is that the forms for petitions and notices used in special proceedings for the administration of decedents' estates can be adapted with minor modifications for use in administering the estates of missing persons. Of course, counsel must take care to modify the caption, allegations, and timing of proposed forms to meet the special requirements of *Prob. Code §§ 12400-12409*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral Overview

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A. Administration of Estates of Missing Persons Presumed Dead

32-368 California Forms of Pleading and Practice--Annotated § 368.14

§ 368.14 Jurisdiction

If the missing person was a resident of California when last seen or heard from, the superior court of the county of the person's last known place of residence has jurisdiction for the purposes of *Prob. Code §§ 12400-12409* [*Prob. Code § 12403(a)*].

If the missing person was a nonresident of California when last seen or heard from, the superior court of a county where real property of the missing person is located, or of a county where personal property is located if the missing person has no real property in California, has jurisdiction for the purposes of *Prob. Code §§ 12400-12409* [*Prob. Code § 12403(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-368 California Forms of Pleading and Practice--Annotated § 368.15

§ 368.15 Petition for Administration

[1] Where Filed

A petition may be filed in the court having jurisdiction under *Prob. Code § 12403* for the administration of the estate of a missing person [*Prob. Code § 12404(a)*; *see §§ 368.70, 368.71* (petition for administration and additional allegations), and *§ 368.73* (petition for probate)].

[2] Who May File

The petition may be filed by any person who may be appointed as a personal representative [*Prob. Code § 12404(b)*; *see Prob. Code §§ 8400-8577* (appointment of personal representative)]. However, a petition may not be filed by a person who qualifies for appointment as a personal representative under *Prob. Code § 8461(r)* ("any other person") [*see Prob. Code § 12404(b)*]. *Prob. Code § 12404(b)* does not affect the order of priority of appointment of an administrator, which is controlled by provisions governing administration generally [*see Prob. Code § 8461* (rank and priority of entitled persons) (referring to former Prob. Code § 422, *now Prob. Code § 8461*); *see* Cal. Law Revision Comm'n Comment to *Prob. Code § 12404*].

[3] Contents and Verification of Petition

In addition to the matters otherwise required in a petition for administration of the estate, the petition must state all of the following [*Prob. Code § 12404(c)*; *see Prob. Code §§ 8000, 8002(a)* (contents of petition for appointment of personal representative and for probate of will)]:

- The last known place of residence and the last known address of the missing person.

- The time and circumstances when the missing person was last seen or heard from.

- That the missing person has not been seen or heard from for a continuous period of five years by the persons likely to have seen or heard from the missing person, naming them and their relationship to the

missing person, and that the whereabouts of the missing person are unknown to those persons and to the petitioner.

- A description of the search or the inquiry made concerning the whereabouts of the missing person.

If the missing person left a will, the petition must also state whether the person named as executor in the will consents to act or waives the right to appointment [*Prob. Code § 8002(b)(3)*; *see Prob. Code § 12404(c)* (contents include matters otherwise required in petition for administration)]. In addition, a photographic copy of the will must be attached to the petition. A typed copy of the will must be provided if material provisions of the will are handwritten; a translation must be provided if the will is in a foreign language [*Prob. Code § 8002(b)(1), (2)*].

The petition must be verified by the petitioner or, if there are two or more petitioners, by any of them [*Prob. Code § 1021(b)(1)*].

For a discussion and forms relating to petitions for probate of a will or administration of an estate generally, see Ch. 442, *Probate: Initiating Probate Administration* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral Overview

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A. Administration of Estates of Missing Persons Presumed Dead

32-368 California Forms of Pleading and Practice--Annotated § 368.16

§ 368.16 Hearing on Petition

[1] Clerk Sets Matter for Hearing

When a petition is filed with the clerk of the court, the clerk must set the matter for hearing [*Prob. Code § 1041*].

[2] Service and Publication of Notice

Notice of hearing must be served and published, and proof made, in the same manner as in proceedings for administration of the estate of a decedent, except that notice of hearing on the petition must also be sent by registered mail to the missing person at his or her last known address [*Prob. Code § 12405*]. The mailing of the notice by certified mail is the equivalent of mailing by registered mail [*Prob. Code § 5*].

For discussion and forms relating to notice provisions regarding the administration of a decedent's estate, see Ch. 447, *Probate: Statutory Notice Requirements* .

[3] Evidence Considered and Determination

At the hearing, the court must determine whether the alleged missing person is a person who is presumed to be dead under *Prob. Code § 12401*. The court may receive evidence and consider the affidavits and depositions of persons likely to have seen or heard from or know the whereabouts of the alleged missing person [*Prob. Code § 12406(a)*].

[4] Orders When No Diligent Search or Inquiry Made

If the court is not satisfied that a diligent search or inquiry has been made for the missing person, the court may order the petitioner to conduct a diligent search or inquiry and to report the results. The court may order the search or inquiry to be made in any manner that the court determines to be advisable, including any or all of the following methods [*Prob. Code § 12406(b)*]:

- Inserting in one or more suitable newspapers or other periodicals a notice requesting information

from any person having knowledge of the whereabouts of the missing person.

- Notifying law enforcement officials and public welfare agencies in appropriate locations of the disappearance of the missing person.

- Engaging the services of an investigator.

The costs of a search ordered by the court pursuant to *Prob. Code § 12406(b)* must be paid by the estate of the missing person, but if there is no administration, the court in its discretion may order the petitioner to pay the costs [*Prob. Code § 12406(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-368 California Forms of Pleading and Practice--Annotated § 368.17

§ 368.17 Orders When Court Finds That Missing Person Presumed Dead

If the court finds that the alleged missing person is a person presumed to be dead under *Prob. Code § 12401*, the court must do both of the following [*Prob. Code § 12407(a)*]:

- Appoint a personal representative for the estate of the missing person in the manner provided for the estates of deceased persons [*see Prob. Code § 58* (definition of "personal representative" includes executor, administrator)].

- Determine the date of the missing person's death.

For forms of orders appointing an executor or an administrator of the estate of a missing person and for issuance of letters, see *§§ 368.72* and *368.74*. For discussion of the administrator's or executor's duties under *Prob. Code § 12407*, see *§ 368.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral Overview

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32-368 California Forms of Pleading and Practice--Annotated § 368.18

§ 368.18 Reappearance of Missing Person

[1] Remedies Available to Missing Person

If the missing person reappears, he or she may do the following [*Prob. Code § 12408(a)*]:

- Recover property of his or her estate in the possession of the personal representative, less fees, costs, and expenses thus far incurred.

- Recover from distributees any property of the missing person's estate that is in their possession, or the value of distributions received by them, to the extent that recovery from distributees is equitable in view of all the circumstances. However, that action is forever barred five years after the time the distribution was made.

The remedies available to the missing person under *Prob. Code § 12408(a)* are exclusive, except for any remedy the missing person may have by reason of fraud or intentional wrongdoing [*Prob. Code § 12408(b)*].

[2] Effect of Decree of Final Distribution

The order for final distribution, when it becomes final, is conclusive with regard to the rights of the missing person, the rights of the beneficiaries of the missing person, and the rights of all other persons interested in the estate, except as provided in *Prob. Code § 12408(a), (b)* (remedies available to missing person) [*Prob. Code § 12408(c)*].

Consequently, a distributee of estate property may convey good title to the property before the time an action by the missing person against the distributee would be barred under *Prob. Code § 12408(a)(2)*, because the order for final distribution, when it becomes final, is conclusive with regard to the rights of the missing person. The exception under *Prob. Code § 12408(a)* applies only to property or proceeds in the possession of the distributee. If a distributee has encumbered property of the missing person, the lender would also be protected under *Prob. Code § 12408(c)*. However, if the action by the missing person is not barred under *Prob. Code § 12408(a)(2)*, the reappearing missing person might recover the property from the distributee, subject to the encumbrance [*see* Cal. Law Revision Comm'n Comment to

Prob. Code § 12408].

[3] Dispute as to Identity of Person Reappearing

If a dispute arises as to the identity of a person claiming to be a reappearing missing person, the person making the claim or any other interested person may file a petition under *Prob. Code § 11700* (determination of persons entitled to distribution of estate) for determination of the identity of the person claiming to be the reappearing person, notwithstanding the time limitations prescribed in *Prob. Code § 11700* [*Prob. Code § 12408(d)*; *see Prob. Code § 48* (definition of "interested person"); *see also § 368.75* for petition to determine identity of person claiming to be missing person]. For a discussion and forms relating to a proceeding for determination of heirship under *Prob. Code § 11700*, see Ch. 458, *Probate: Determination of Heirship* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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[Reserved]

§§ 368.19[Reserved]

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32-368 California Forms of Pleading and Practice--Annotated § 368.30

§ 368.30 Governing Statutes

Proceedings to set aside personal property to the families of absent federal personnel are governed by *Prob. Code §§ 3700-3708*. The management and disposition of personal property of absent federal personnel without court proceeding is governed by *Prob. Code §§ 3710-3712*. The effect of a power of attorney executed by an absentee that expires during period that occasions absentee status is governed by *Prob. Code § 3720*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-368 California Forms of Pleading and Practice--Annotated § 368.31

§ 368.31 Definitions

[1] Absentee

The term "absentee" means either of the following:

- A member of the uniformed service covered by *37 U.S.C. §§ 551-559*, who is determined by the secretary of the service concerned, or by the secretary's authorized delegate, to be in missing status as defined therein [*Prob. Code §§ 1403(a), 3700(a)*; *see 37 U.S.C. §§ 101(3)* ("uniformed service" defined as Army, Navy, Air Force, Marine Corps, Coast Guard, Environmental Science Services Administration, or Public Health Service), 101(5) ("Secretary concerned" defined), 551(2) ("missing status" defined)].

- An employee of the United States government or an agency thereof covered by *5 U.S.C. §§ 5561-5568*, who is determined by the head of the department or agency concerned, or by his or her authorized delegate, to be in missing status as defined therein [*Prob. Code §§ 1403(b), 3700(a)*; *see 5 U.S.C. § 5561(2)* ("employee" defined), *5561(5)* ("missing status" defined)].

[2] Certificate of Missing Status

The term "certificate of missing status" means the official written report complying with *Evid. Code § 1283* and showing the determination of the secretary of the military department or head of the department or agency concerned or the delegate of the secretary or head that the absentee is in missing status [*Prob. Code § 3700(b)*].

[3] Eligible Spouse

The term "eligible spouse" means the spouse of an absentee who has not commenced an action or proceeding for judicial or legal separation, annulment, adjudication of nullity, or dissolution of the marriage of the spouse and the absentee [*Prob. Code § 3700(c)*].

[4] Family of Absentee

The term "family of an absentee" means an eligible spouse, if any, or if no eligible spouse, the child or children of an absentee, equally, or if no child or children, the parent or parents of an absentee, equally, provided these persons are dependents of the absentee as defined in *37 U.S.C. § 401*, and the guardian of the estate or conservator of the estate of any person bearing such relationship to the absentee [*Prob. Code § 3700(d)*].

[5] Secretary Concerned

The term "secretary concerned" means the secretary of the particular military department concerned as defined in *37 U.S.C. § 101(5)* [*see Prob. Code §§ 1440, 3700(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 368.32 Proceeding to Set Aside Absentee's Personal Property

[1] When Property May Be Set Aside

On petition as provided in *Prob. Code §§ 3700-3720*, the court may set aside to an absentee's family personal property of the absentee, for the purpose of managing, controlling, encumbering, selling, or conveying, or otherwise engaging in any transaction with respect to the property. The property may be set aside to the absentee's family if the court determines that to do so will be in the absentee's best interest, including the absentee's interest in providing for shelter, food, health care, education, transportation, or maintenance of a reasonable and adequate standard of living for his or her family. The absentee's interest in the property set aside cannot exceed $20,000 [*Prob. Code § 3701*; *see Prob. Code §§ 3705(b), 3706*]. For a petition to set aside an absentee's personal property, see *§ 368.90*.

[2] Who May File Petition

A petition to set aside an absentee's personal property may be filed by any of the following persons [*Prob. Code § 3702*]:

- Any person in whose favor the absentee's personal property may be set aside.

- A person to whom the absentee issued a general power of attorney while serving in the United States armed forces or while an employee of any agency or department of the United States, provided the power of attorney was valid and effective at the time issued, regardless of whether it has expired or terminated [*see § 368.34*].

[3] Contents and Verification of and Attachment to Petition

The required contents of the petition are set forth in *Prob. Code § 3703(a)* [*see § 368.90*]. A petition to set aside an absentee's personal property must be verified [*Prob. Code § 1021(a)(1)*].

A certificate of missing status must be attached to the petition. The certificate must be received as evidence of that fact

and the court may not determine the status of the absentee inconsistent with the status shown in the certificate [*Prob. Code § 3703(b)*; *see § 368.31[2]*].

[4] Notice of Hearing on Petition

Notice of the nature of the proceedings and of the time and place of the hearing must be given by the petitioner at least 15 days before the hearing date by all of the following means [*Prob. Code § 3704(a)*]:

- By mail, together with a copy of the petition, to all persons comprising the absentee's family;

- By delivery by a method that would be sufficient for service of summons in a civil action [*see Code Civ. Proc. §§ 415.10-415.40*], together with a copy of the petition, to the secretary concerned or to the head of the United States department or agency concerned.

- By publication pursuant to *Gov. Code § 6061* (publication once) in a newspaper of general circulation in the county in which the proceedings will be held.

In addition, if the absentee is or has been during the proceeding a patient in or on leave from a state hospital under the jurisdiction of the State Department of Mental Health or of Developmental Services, notice of the hearing and a copy of the petition must be mailed at least 15 days before the hearing to the office of the Director of Mental Health or the Director of Developmental Services in Sacramento [*see Prob. Code §§ 1461, 3704(b)*]. If the petition states that the absentee is receiving or is entitled to receive benefits from the Veterans Administration, notice and a copy of the petition must also be mailed at least 15 days before the hearing to the office of the Veterans Administration with jurisdiction over the area in which the court is located [*see Prob. Code §§ 1822, 3704(b)*]. If the absentee is a person with developmental disabilities, the petitioner must, at least 30 days before the day of the hearing on the petition, mail a notice of the hearing and a copy of the petition to a regional center of the state Department of Developmental Services [*see Prob. Code §§ 1822(e), 1827.5, 3704(b)*; *see also Welf. & Inst. Code § 4620 et seq.* (regional centers for assessment and training of developmentally disabled persons)].

[5] Hearing and Determination of Petition

At the hearing on the petition, any officer or agency of California or the United States, or the authorized delegate of the officer or agency, or any relative or friend of the absentee, may appear and support or oppose the petition [*Prob. Code § 3705(a)*].

If the court determines that the allegations of the petition are true and correct, the court may order set aside to the family of the absentee personal property of the absentee situated in California, excluding any sums due the absentee from the United States, in which the absentee's interest does not exceed $20,000. The property set aside must be specified in the order [*Prob. Code § 3705(b)*].

No bond may be required of any person to whom property of the absentee has been set aside by order of the court pursuant to *Prob. Code §§ 3700-3720* [*Prob. Code § 3705(c)*].

[6] Court Not Deprived of Jurisdiction by Size or Character of Estate

A determination by the court that the value of all of the absentee's property, wherever situated, exceeds $20,000 or that the absentee owns or has an interest in real property, wherever situated, does not deprive the court of jurisdiction to set aside to the family of the absentee personal property of the absentee situated in California in which the absentee's interest does not exceed $20,000. The court must order that personal property set aside to the family of the absentee if the court finds that all of the other provisions of *Prob. Code § 3700 et seq.* have been complied with. The property set

aside must be specified in the order [*Prob. Code § 3706*].

[7] Joint Tenancy Property

For the purposes of *Prob. Code §§ 3700-3720*, any property or interest therein or lien thereon that the absentee holds as joint tenant must be included in determining the property of the absentee and its value. The joint tenancy interest may be set aside to the family of the absentee as provided in *Prob. Code §§ 3700-3720* but may only be set aside to a member of the absentee's family who was a joint tenant with the absentee in the property [*Prob. Code § 3707*].

[8] Motion for Accounting on Return or Death of Absentee

Within 6 months after the absentee has returned to the controllable jurisdiction of the military department or civilian agency or department concerned, or within 6 months after the determination of death of the absentee by the secretary concerned or the head of the department or agency concerned or the delegate of the secretary or head, the former absentee or the personal representative of the deceased absentee may, by motion in the same proceeding, require the person or persons to whom the property of the absentee was set aside to account for the property and the proceeds, if any. The time of return to the controllable jurisdiction of the military department or the civilian department or agency concerned or the determination of the time of death of the absentee must be determined by the court under *37 U.S.C. § 556* (secretary's determinations), or *5 U.S.C. § 5566* (agency's determinations). An official written report or record of the military department or civilian department or agency that the absentee has returned to controllable jurisdiction or is deceased must be received as evidence of that fact [*Prob. Code § 3708(a)*]. However, *Prob. Code § 3708* does not in any manner derogate the finality and conclusiveness of any order, judgment, or decree previously entered in the proceeding [*Prob. Code § 3708(b)*].

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§ 368.33 Management and Disposition of Absentee's Personal Property Without Court Proceeding

[1] When Allowed

The family of an absentee may collect, receive, dispose of, or engage in any transaction relating to the absentee's personal property situated in California without any judicial proceeding if all of the following conditions are satisfied [*Prob. Code § 3710*]:

- The absentee owns no real property situated in California.

- The aggregate value of all of the absentee's personal property situated in California is $5,000 or less, excluding any money owed the absentee by the United States.

- The family of the absentee needs to dispose of such personal property to provide for shelter, food, health care, education, transportation, or the maintenance of a reasonable and adequate standard of living for the family of the absentee.

[2] Transfer of Absentee's Property

If the conditions set forth in *Prob. Code § 3710* are satisfied, the family of the absentee may have any evidence of interest, indebtedness, or right attributable to the absentee's personal property transferred to the family of the absentee, or transferred to the person whom the property is to be sold or transferred by the family of the absentee, on furnishing the person, including any governmental body, having custody of the property both of the following [*Prob. Code § 3711(a)*]:

- A certificate of missing status.

- An affidavit stating under oath that the provisions of *Prob. Code §§ 3710-3712* are applicable and that the aggregate value of all property received pursuant to this affidavit, together with all otherproperty previously received under *Prob. Code §§ 3710-3712*, does not exceed $5,000.

The receipt of the certificate of missing status and affidavit under *Prob. Code § 3711(a)* constitutes sufficient acquittance for any payment of money or delivery of property made pursuant to *Prob. Code §§ 3710-3712* and fully discharges the recipient from any further liability concerning the money or property without the necessity of inquiring into the truth of any of the facts stated in the affidavit [*Prob. Code § 3711(b)*].

[3] Time Limit on Action by Absentee

The time within which an absentee may commence an action against any person who executes an affidavit and receives property pursuant to *Prob. Code §§ 3710-3712* commences to run on the earlier of the following dates [*Prob. Code § 3712*]:

- Ninety days after the absentee returns to the continental United States after the termination of the condition that caused the classification of an absentee.

- Two years after the termination of the condition that caused the classification of an absentee.

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32-368 California Forms of Pleading and Practice--Annotated § 368.34

§ 368.34 Absentee's Power of Attorney

If an absentee executed a power of attorney that expires during the period that occasions absentee status, the power of attorney continues in full force and effect until 30 days after the absentee status is terminated. Any person who acts in reliance on the power of attorney when accompanied by a copy of a certificate of missing status is not liable for relying or acting on the power of attorney [*Prob. Code § 3720*].

Legal Topics:

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

§§ 368.35[Reserved]

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A. Definitions and General Matters

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§ 368.40 State Statutes

Special provisions for appointment of conservator of estate of missing person whose whereabouts unknown. *Prob. Code §§ 1845-1849.5*

Setting aside personal property of absent federal personnel. *Prob. Code §§ 3700-3708*

Management and disposition of personal property of absent federal personnel without court proceeding. *Prob. Code §§ 3710-3712*

Administration of estate of missing person presumed dead. *Prob. Code §§ 12400-12409*

Legal Topics:

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32-368 California Forms of Pleading and Practice--Annotated § 368.41

§ 368.41 Law Reviews

Healey, *Real Property Problems in Insuring Titles: Missing Persons*, 37 L.A. Bar B. 151 (1962)

Legal Topics:

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[Reserved]

§§ 368.42[Reserved]

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32-368 California Forms of Pleading and Practice--Annotated § 368.50

§ 368.50 State Statutes

"Interested person" defined. *Prob. Code § 48*

"Personal representative" defined. *Prob. Code § 58*

Contents of petition to administer estate of missing person. *Prob. Code §§ 8002(a), 12404(c)*

Appointment of executors generally. *Prob. Code § 8420 et seq.*

Appointment of administrators generally. *Prob. Code § 8460 et seq.*

Requirement of filing of bond or waiver of bond prior to receipt of letters of administration. *Prob. Code §§ 8480, 8481*

Verification of petition. *Prob. Code § 1021*

Finding of giving or waiver of notice required. *Prob. Code § 1260(b)*

"Missing person" defined. *Prob. Code § 12400*

Requirements for presumption of death, and date of presumed death. *Prob. Code § 12401*

Administration of estate. *Prob. Code §§ 12402, 12407(b)*

Jurisdiction and venue for petition for administration of estate. *Prob. Code §§ 12403, 12404(a)*

Standing to file petition. *Prob. Code § 12404(b)*

Notice and service of petition. *Prob. Code § 12405*

Evidence considered and determination at hearing. *Prob. Code § 12406(a)*

Orders when no diligent search or inquiry made. *Prob. Code § 12406(b)*

Orders when court finds presumption of death. *Prob. Code § 12407(a)*

Remedies available to missing person on reappearance. *Prob. Code § 12408(a), (b)*

Effect of decree of final distribution. *Prob. Code § 12408(c)*

Petition under *Prob. Code § 11700* to determine identity of allegedly reappearing missing person. *Prob. Code § 12408(d)*

Legal Topics:

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§ 368.51 Decisions

State procedure for administering estates of missing persons under statutes specifically for that purpose is constitutional. *Cunnius v. Reading School Dist. (1905) 198 U.S. 458, 474-476, 49 L. Ed. 1125, 25 S. Ct. 721*

Attempt to administer estate of missing person under general laws providing for administration of estates of decedents is void if the missing person is found to be alive. *Scott v. McNeal (1894) 154 U.S. 34, 50, 38 L. Ed. 896, 14 S. Ct. 1108*

Administration of estate of missing person under laws providing for administration of decedents' estates is void should missing person later appear to be alive. *Stevenson v. Superior Court (1882) 62 Cal. 60, 61-64*

Statutory presumption of death [*Prob. Code § 12401*] does not apply if there is a satisfactory explanation for missing person's absence other than death, for example, if he or she may have fled to avoid possible criminal prosecution. *Starr v. Old Line Life Ins. Co. (2002) 104 Cal. App. 4th 487, 496, 128 Cal. Rptr. 2d 282*

Abandoned boat with wallet and spatters of human blood, possibly from fishing injury two weeks before, is insufficient showing under *Prob. Code § 12401* to declare death of convicted drug trafficker who disappeared day before his sentencing to federal prison. *Conservatorship of Geiger (1992) 3 Cal. App. 4th 127, 136, 4 Cal. Rptr. 2d 252*

Letter meeting requirements of holographic will written by missing person was properly admitted to probate as will. *Estate of Wolfe (1968) 260 Cal. App. 2d 587, 591-594, 67 Cal. Rptr. 297*

California's former statutory scheme for administration of the estates of persons missing for seven years or more (former Prob. Code §§ 280-294) is constitutional with regard to both due process and adequate notice. *Sevier v. Bank of America (1950) 101 Cal. App. 2d 184, 187-190, 225 P.2d 3*

Legal Topics:

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 368 MISSING PERSONS
PART III. RESEARCH GUIDE
B. Administration of Estates of Missing Persons Presumed Dead

32-368 California Forms of Pleading and Practice--Annotated § 368.52

§ 368.52 Law Reviews

Note, *Absentees--Statutory Proceedings for Administration of Missing Persons' Estates--Due Process, 25 S. Cal. L. Rev. 447 (1952)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral Overview

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32-368 California Forms of Pleading and Practice--Annotated § 368.53

§ 368.53 Text References

Witkin, Summary of California Law, Vol. 12, *Wills and Probate*, § 350 et seq. (9th ed.)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral Overview

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32-368 California Forms of Pleading and Practice--Annotated §§ 368.54-368.59

[Reserved]

§§ 368.54[Reserved]

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
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PART III. RESEARCH GUIDE
C. Personal Property of Absent Federal Personnel

32-368 California Forms of Pleading and Practice--Annotated § 368.60

§ 368.60 Federal Statutes

"Employee" defined. *5 U.S.C. § 5561(2)*

"Missing status" defined. *5 U.S.C. § 5561(5)*; *37 U.S.C. § 551(2)*

"Uniformed services" defined. *37 U.S.C. § 101(3)*

"Secretary concerned" defined. *37 U.S.C. § 101(5)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral Overview

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 368 MISSING PERSONS
PART III. RESEARCH GUIDE
C. Personal Property of Absent Federal Personnel

32-368 California Forms of Pleading and Practice--Annotated § 368.61

§ 368.61 State Statutes

[1] Generally

Admissibility of official written report of missing status. *Evid. Code § 1283*

Verification. *Prob. Code § 1021*

"Absentee" defined. *Prob. Code § 1403*

"Secretary concerned" defined. *Prob. Code §§ 1440, 3700(e)*

"Certificate of missing status" defined. *Prob. Code § 3700(b)*

"Eligible spouse" defined. *Prob. Code § 3700(c)*

"Family of absentee" defined. *Prob. Code § 3700(d)*

[2] Court Proceeding Setting Aside Absentee's Personal Property

Verification of petition. Prob. Code § 1450

When property may be set aside. *Prob. Code § 3701*

Who may petition. *Prob. Code § 3702*

Contents of petition and attached certificate. *Prob. Code § 3703(a)*

Certificate of missing status required. *Prob. Code § 3703(b)*

Notice of hearing. *Prob. Code § 3704*

Participation in hearing by United States official. *Prob. Code § 3705(a)*

Court order setting aside property. *Prob. Code §§ 3705(b), 3706*

Bond not required. *Prob. Code § 3705(c)*

Size or character of estate does not deprive court of jurisdiction. *Prob. Code § 3706*

Joint tenancy interest of absentee. *Prob. Code § 3707*

Motion for accounting on return or determination of death of absentee. *Prob. Code § 3708*

Absentee's power of attorney. *Prob. Code § 3720*

[3] Management and Disposition of Absentee's Property Without Court Proceeding

When allowed. *Prob. Code § 3710*

Transfer of personal property. *Prob. Code § 3711*

Time limitation for action by absentee. *Prob. Code § 3712*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral Overview

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 368 MISSING PERSONS
PART III. RESEARCH GUIDE
C. Personal Property of Absent Federal Personnel

32-368 California Forms of Pleading and Practice--Annotated §§ 368.62-368.69

[Reserved]

§§ 368.62[Reserved]

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PART IV. FORMS
A. Administration of Estates of Missing Persons Presumed Dead

32-368 California Forms of Pleading and Practice--Annotated § 368.70

§ 368.70 Appointment of Administrator and Issuance of Letters of Administration [Prob. Code § 8460 et seq.]--Estate of Intestate Missing Person--Petition [Prob. Code § 8002(a)]

[1] FORM Appointment of Administrator and Issuance of Letters of Administration [Prob. Code § 8460 et seq.]--Estate of Intestate Missing Person--Petition [Prob. Code § 8002(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
In the Matter of the Estate of	)	PETITION FOR APPOINTMENT OF ADMINIS-
_____ [*name*], a Missing Person.	)	TRATOR AND ISSUANCE OF LETTERS OF AD-
		MINISTRATION

_____

Petitioner, _____[*name*], respectfully represents:

1. Petitioner is _____ [*specify relationship to missing person, e.g.,* the spouse] of _____[*name of missing person*], is over the age of 18, a resident of California, and is otherwise qualified to serve as administrator of the estate.

2. On or about _____[*date*], _____[*name of missing person*] _____ [*describe time and circumstances when missing person was last seen or heard from, e.g.,* went to the store at approximately 6:00 p.m. to buy cigarettes and failed to return].

3. _____[*Name of missing person*] has not been seen or heard from for a continuous period of _____[*specify five or more*] years by any of the persons likely to have seen or heard from him/her. Those persons and their relationships to _____[*name of missing person*] are as follows:

NAME	RELATIONSHIP
_____	_____
_____	_____
_____	_____

The whereabouts of _____[*name of missing person*] are unknown to the above-named persons and to petitioner.

4. The last known residence [and address] of _____[*name of missing person*] is _____[*street and number*], _____[*city*], _____[*county*], _____[*state*]. [*If last known address is different than last known residence, add:* The last known address of _____ (*name of missing person*) is _____ (*street and number*), _____ (*city*), _____ (*state*).] [*If missing person was nonresident of California at time of disappearance, add:* _____ (*Name of missing person*) _____ (owns real property located in _____ County, California *or* does not own real property in California but owns personal property located in _____ County, California).]

5. _____ [*Describe any search or inquiry made concerning the whereabouts of missing person, e.g.,* Between _____ (*date*), and _____ (*date*), petitioner made a diligent effort to contact _____ (*name of missing person*) by placing advertisements in the following local, state, and national newspapers: _____ (*specify newspapers and dates during which ads were run*); by contacting the following state and local law enforcement officials and public welfare agencies: _____ (*specify officials and agencies contacted*); and by contacting the following persons with whom _____ (*name of missing person*) would be likely to initiate contact: _____ (*list names*)].

6. The names, ages, addresses, and relation to the missing person of the heirs of the missing person _____[*name*], so far as known to petitioner, are as follows: _____[*list in as many subparagraphs as necessary, e.g.:*]

a. _____[*Name*] of _____[*address*], _____[*age*], _____ [*relationship, e.g.,* grandchild of the missing person].

b. _____[*Name*] of _____[*address*], _____[*age*], _____ [*relationship, e.g.,* sister of the missing person].

7. The character and estimated value of the property in the estate are as follows:

CHARACTER OF PROPERTY	ESTIMATED VALUE
Real property	$_____
Personal property	$_____

[The probable annual gross income of all the property belonging to the estate is $_____.]

[*EITHER*]

8. Bond for petitioner should be fixed at $_____ if executed by an authorized corporate surety, or in twice that sum if executed by individual sureties. [A deposit receipt for assets having a value of $_____ will be filed with the court prior to the hearing on the petition.]

[*OR*]

8. All the beneficiaries of _____[*name of missing person*] have waived in writing the filing of a bond. The waivers are attached as Exhibits _____, and incorporated by reference. Petitioner therefore requests that no bond be required.

WHEREFORE, petitioner prays for the following:

1. Petitioner be appointed administrator of the estate of the missing person _____[*name*];

2. _____ [Bond be fixed in the sum of $ _____ *or* No bond be required];

3. Letters of administration issue to petitioner on qualification;

4. Such other and further orders as the court may deem proper.
Dated: _____.

_____ [*signature*]

Petitioner

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

[2] Use of Form

The petition in [1], *above*, is for use in seeking appointment of an administrator and issuance of letters of administration of an estate of a person who has been missing for a continuous period of five years or more and thus is presumed dead [*see Prob. Code §§ 12401, 12404*; *see § 368.15*].

[3] Contents

The petition in [1], *above*, contains the information required to seek appointment of an administrator and issuance of letters of administration for the estate of an intestate missing person presumed dead [*see* Prob. Code §§ 8002(a) (contents of petition), *8400(a)* (appointment and issuance of letters), *12404(c)* (additional requirements for missing person)]. The petition states:

- The relationship of petitioner to the missing person, and qualification to become an administrator (Paragraph 1) [*see Prob. Code §§ 8460-8468* (requirements of administrator), *12404(b)* (standing to file petition); *see also Prob. Code § 8461* (rank and priority)].

- The time and circumstances when the missing person was last seen or heard from (Paragraph 2) [*see Prob. Code § 12404(c)(2)*].

- That the missing person has not been seen or heard from for a continuous period of at least five years by persons likely to have had contact with the missing person, their names and relationships to the missing person, and a statement that neither those persons nor the petitioner know of his or her whereabouts (Paragraph 3) [*see Prob. Code § 12404(c)(3)*].

- The last known place of residence and the last known address of the missing person, and if that person was a nonresident of California, the county in which the estate's real property or, if there is no real property, personal property is located (Paragraph 4) [*see Prob. Code §§ 12403* (jurisdiction requirements), *12404(c)(1)* (petition must state last residence and address)].

- A description of any search or inquiry made to locate the missing person (Paragraph 5) [*see Prob. Code § 12404(c)(4)*].

- The names, addresses, ages, and relationships to the missing person of the missing person's heirs, so far as known to the petitioner (Paragraph 6) [*see Prob. Code § 8002(a)(3), 12404(c)*; for an allegation to include heirs of predeceased spouse, if appropriate, *see § 368.71*].

- The character and estimated value of the estate's property, and if a bond is necessary, the probable annual gross income of all the property (Paragraph 7) [*see Prob. Code § 8002(a)(4), 12404(c)* (character and value of property must be stated in petition); *see also Prob. Code § 8482(a)* (probable annual gross income, regarding bond)].

- The amount of the bond, or a statement that all the missing person's heirs have waived the bond requirement in writing, and that the waivers are attached (Paragraph 8) [*see Prob. Code §§ 8482(a), (b)* (amount of bond), *8481(a)(2)* (waiver)].

For a petition for use with respect to a missing person who left a will, see *§ 368.73*.

[4] Notice of Hearing

Notice of hearing must be served and published, and proof made, in the same manner as in proceedings for

administration of the estate of a decedent, except that notice of hearing on the petition must also be sent by registered mail to the missing person at his or her last address [*Prob. Code § 12405*]. The mailing of the notice by certified mail is the equivalent of mailing by registered mail [*Prob. Code § 5*]. For discussion and forms regarding notices of hearing, see Ch. 447, *Probate: Statutory Notice Requirements* .

[5] Verification

The petition must be verified by the petitioner, or if there are two or more petitioners, by any of them [*Prob. Code § 1021(a)(1), (b)(1)*; *see Code Civ. Proc. §§ 446* (verification generally), *2015.5* (form for declaration under penalty of perjury)].

[6] Hearing

The court may receive evidence and consider the affidavits and depositions of persons likely to have seen or have heard from or to know the whereabouts of the alleged missing person [*Prob. Code § 12406(a)*]. If the court is not satisfied that a diligent search or inquiry has been made for the missing person, it may order the petitioner to conduct a diligent search or inquiry and to report the results [*Prob. Code § 12406(b)*]. For further discussion of the type of search that may be ordered, and imposition of costs for the search, see *§ 368.16[4]*.

[7] Cross References

For a discussion and forms relating to the appointment of an administrator of the estate of a decedent generally, see Ch. 442, *Probate: Initiating Probate Administration*

For a discussion and forms relating to bond requirements in probate proceedings, see Ch. 446, *Probate: Bonds--Increase and Decrease During Administration*

For a discussion and forms related to notice provisions generally, see Ch. 447, *Probate: Statutory Notice Requirements*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawIntestacyGeneral Overview

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 368 MISSING PERSONS
PART IV. FORMS
A. Administration of Estates of Missing Persons Presumed Dead

32-368 California Forms of Pleading and Practice--Annotated § 368.71

§ 368.71 Appointment of Administrator and Issuance of Letters of Administration [Prob. Code § 8460 et seq.]--Estate of Intestate Missing Person--Allegation Regarding Heirs of Predeceased Spouse [former Prob. Code § 229; Prob. Code § 6402.5]

[1] FORM Appointment of Administrator and Issuance of Letters of Administration [Prob. Code § 8460 et seq.]--Estate of Intestate Missing Person--Allegation Regarding Heirs of Predeceased Spouse [former Prob. Code § 229; Prob. Code § 6402.5]

[*EITHER, if the missing person will be presumed to have died on or after January 1, 1985*]

There is no surviving spouse or issue of the missing person. The missing person had a predeceased spouse, _____[*name of predeceased spouse*], who died not more than _____ [15 *or* 5] years before _____[*date of presumed death of missing person*]. The names, ages, residences, and relationships of the heirs of the predeceased spouse are as follows: [*list in as many subparagraphs as necessary, e.g.:*]

a. _____[*Name*] of _____[*address*], _____[*age*], _____ [*relationship, e.g.,* brother of predeceased spouse].

b. _____[*Name*] of _____[*address*], _____[*age*], _____ [*relationship, e.g.,* sister of predeceased spouse].

[*OR, if the missing person will be presumed to have died prior to January 1, 1985*]

There is no surviving spouse or issue of the missing person. The missing person had a predeceased spouse, _____[*name of predeceased spouse*]. The names, ages, residences, and relationships of the heirs of the predeceased spouse are as follows: [*list in as many subparagraphs as necessary, e.g.:*]

a. _____[*Name*] of _____[*address*], _____[*age*], _____ [*relationship, e.g.,* brother of predeceased spouse].

b. _____[*Name*] of _____[*address*], _____[*age*], _____ [*relationship, e.g.,* sister of predeceased spouse].

[2] Use of Form

The allegation in [1], *above*, is for use in a petition to seek appointment of an administrator and issuance of letters of administration for the estate of an intestate missing person presumed dead [*see* Form 1] if the heirs of a predeceased spouse are potentially entitled to a share of the estate [*see* former Prob. Code § 229; *Prob. Code §§ 6402.5* (heirs of predeceased spouse may be heirs of deceased), 12404(c) (petition for administration of estate of missing person); *see also Prob. Code § 44* (definition of "heirs")]. Heirs of a predeceased spouse may be entitled to a share of the estate only if the missing person was survived by neither a spouse nor an issue [*see* former Prob. Code § 229; *Prob. Code § 6402.5(a)*]. If that is the case, entitlement further depends on the presumed date of death of the missing person.

If the missing person is presumed to have died on or after January 1, 1985, *Prob. Code § 6402.5* applies and provides for possible entitlement of a predeceased spouse's heirs to a share of the estate property only if (a) the spouse died not more than 15 years prior to the missing person's presumed death for purposes of distributing real property, or (b) the spouse died not more than five years prior to the missing person's presumed death for purposes of distributing personal property [*see Prob. Code § 6402.5(a), (b)*]. For purposes of such a disposition of personal property, the term "personal property" means personal property for which there is a written record of title or ownership and the aggregate value of which is $10,000 or more [*Prob. Code § 6402.5(e)*]. The first alternative paragraph of the form in [1], *above*, is for use if *Prob. Code § 6402.5* applies.

If the missing person is presumed to have died prior to January 1, 1985, former Prob. Code § 229 applies, and provides for possible entitlement of a predeceased spouse's heirs to a share of the estate property regardless of when that spouse died, and regardless of the character of the estate property. The second alternative allegation is for use if former Prob. Code § 229 applies.

Either alternative of the allegation in [1], *above*, may be inserted in the petition in *§ 368.70* as Paragraph 7, in which case the subsequent paragraphs in that form must be renumbered.

For further discussion of the right of a predeceased spouse's heirs to a decedent's estate, see Ch. 442, *Probate: Initiating Probate Administration* .

[3] Cross References

See also discussion in *§ 368.70*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawIntestacyGeneral OverviewEstate, Gift & Trust LawWillsLost Wills

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32-368 California Forms of Pleading and Practice--Annotated § 368.72

§ 368.72 Appointment of Administrator and Issuance of Letters of Administration [Prob. Code § 8002(a)]--Estate of Intestate Missing Person--Order [Code Civ. Proc. § 1003; Prob. Code § 12407(a)]

[1] FORM Appointment of Administrator and Issuance of Letters of Administration [Prob. Code § 8002(a)]--Estate of Intestate Missing Person--Order [Code Civ. Proc. § 1003; Prob. Code § 12407(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
In the Matter of the Estate of _____	)	ORDER APPOINTING ADMINISTRATOR AND
[*name*], a Missing Person.	)	ISSUING LETTERS OF ADMINISTRATION

_____

The verified petition of _____[*name*] for letters of administration of the estate of the missing person in the above-entitled proceeding came on regularly for hearing this day. Petitioner appeared by counsel, _____[*name*]. _____ [No person appeared to contest the petition *or* _____ (*name*) appeared by counsel, _____ (*name*), to contest the petition.] On proof made to the satisfaction of the court, the court finds that notice of the time and place of the hearing was given as required by *Probate Code Section 12405*. [Special notice was _____ (given to _____ (*name*(*s*)), as requested *or* requested and waived by _____ (*names*(*s*)).] The court also finds that the facts alleged in the petition are true, and that _____[*name*] is a person presumed dead under *Section 12401 of the Probate Code*. The court grants the petition as follows:

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. _____[*Name of missing person*] is presumed dead under *Section 12401 of the Probate Code*, in that he/she has not been seen or heard from for a continuous period of _____[*specify five or more*] years by

those who are likely to have seen or have heard from him/her, and his/her absence has not satisfactorily been explained after diligent search or inquiry.

2. The date of death of the above-named missing person is _____[*specify date after five-year period*].

3. _____[*Name*] is appointed administrator of the estate of the above-named missing person, and letters of administration are to issue to the appointee on his/her taking the oath required by law _____ [and giving a bond in the sum of $_____ *or* without having to file a bond, the requirement of a bond having been waived in writing b the heirs at law of the missing person].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use in a proceeding for appointment of an administrator of an estate of an intestate missing person presumed dead pursuant to *Prob. Code § 12401* [*see Prob. Code § 12407(a)*]. If the court finds that the missing person is presumed dead under *Prob. Code § 12401*, the court must appoint a personal representative for the estate of the missing person in the manner provided for the estates of deceased persons, and determine the date of the missing person's death [*Prob. Code § 12407(a)*; *see § 368.17*]. The date of death of a missing person is presumed to have occurred at the end of the five-year period during which the person has been continuously missing unless there is sufficient evidence to establish that death occurred earlier [*see Prob. Code § 12401*]. For an order for probate and issuance of letters testamentary for use with respect to a missing person who left a will, see *§ 368.74*.

[3] Cross References

See also discussion in *§ 368.70*

For a discussion and forms relating to the appointment of an administrator of an estate of a deceased person generally, see Ch. 442, *Probate: Initiating Probate Administration*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawIntestacyGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral Overview

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32-368 California Forms of Pleading and Practice--Annotated § 368.73

§ 368.73 Probate of Will and Issuance of Letters Testamentary [Prob. Code §§ 8200-8202, 8400-8402]--Estate of Missing Person Who Left Will--Petition [Prob. Code §§ 8002(a), 12404]

[1] FORM Probate of Will and Issuance of Letters Testamentary [Prob. Code §§ 8200-8202, 8400-8402]--Estate of Missing Person Who Left Will--Petition [Prob. Code §§ 8002(a), 12404]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
In the Matter of the Estate of _____	)	PETITION FOR PROBATE OF WILL AND ISSU-
[*name*], a Missing Person.	)	ANCE OF LETTERS TESTAMENTARY

_____

Petitioner, _____[*name*], respectfully represents:

1. Petitioner is _____ [*specify relationship to missing person, e.g.*, the spouse] of _____[*name of missing person*]. _____ [Petitioner *or* _____ (*Name of person designated as executor*)] is over the age of 18, a resident of California, and otherwise qualified to serve as executor of the estate.

2. [*Time and circumstance when the missing person was last seen or heard from. See § 368.70[1], Paragraph 2.*]

3. [*Description of missing person's lack of communication with persons likely to have heard from him or her, and statement of lack of knowledge of whereabouts. See § 368.70[1], Paragraph 3.*]

4. [*Missing person's last known residence and address, and if nonresident, the county in which he or she owns real or personal property. See § 368.70[1], Paragraph 4.*]

5. [*Description of any search or inquiry concerning whereabouts of missing person. See § 368.70[1], Paragraph 5.*]

6. _____[*Name of missing person*] left a will dated _____, which petitioner alleges is the last will and testament of the missing person, a photocopy of which is attached as Exhibit "A," and incorporated by reference.

7. _____ [Petitioner *or* _____ (*Name*)], named in the last will and testament of _____[*name of missing person*] as executor of his/her estate, consents to act as executor and prays for issuance of letters testamentary.

8. The names, ages, addresses, and relation to the missing person of the heirs, legatees, and devisees of the missing person, so far as known to petitioner, are as follows: _____[*list in as many subparagraphs as necessary, e.g.:*]

a. _____[*Name*] of _____[*address*], _____[*age*], _____ [*relationship, e.g.,* grandchild of the decedent].

b. _____[*Name*] of _____[*address*], _____[*age*], _____ [*relationship, e.g.,* legatee of the decedent and stranger].

[9. *Representation regarding heirs of predeceased spouse, if appropriate. See § 368.71[1].*]

10. [*Representation of character and value of estate property. See § 368.70[1], Paragraph 7.*]

[*EITHER*]

11. Bond for petitioner should be fixed at $_____ if executed by an authorized corporate surety, or in twice that sum if executed by individual sureties. [A deposit receipt for assets having a value of $_____ will be filed with the court prior to the hearing on the petition.]

[*OR*]

11. All of the beneficiaries under the last will and testament of _____[*name of missing person*] have waived in writing the filing of a bond. The waivers are attached as Exhibits _____, and incorporated by reference. Petitioner therefore requests that no bond be required.

WHEREFORE, petitioner prays for the following:

1. The will attached hereto be admitted to probate;

2. _____ [Petitioner *or* _____ (*Name*)] be appointed executor;

3. Letters testamentary be issued to _____ [petitioner *or* _____ (*name*)] on qualification;

4. A time be appointed for hearing this petition and for proving the will;

5. All persons interested be duly notified according to the law to appear at the time appointed for the hearing and for proving the will;

6. _____ [Bond be fixed in the sum of $_____ *or* No bond be required];

7. Such other and further orders may be made as the court may deem proper.
Dated: _____.

_____ [*signature*]

Petitioner

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

[*Verification. See § 368.70[1].*]

[2] Use of Form

The petition in [1], *above*, is for use to seek to admit to probate the last will and testament of a person who has been missing for a continuous period of five years or more, and thus is presumed dead [*see Prob. Code §§ 12401, 12404*]. The petition is also for use to seek issuance of letters testamentary [*see Prob. Code §§ 8002(a)* (contents of petition), *8400-8402* (issuance of letters), *12404*; *see also § 368.15*].

[3] Contents

The petition includes the matters required by *Prob. Code § 12404(c)* to be included in a petition for probate of a will and for issuance of letters testamentary when a missing person is presumed dead. The petition also includes matters otherwise required in a petition for probate [*see Prob. Code §§ 8002(a), 12404(c)*]. The petition states:

- The relationship of petitioner to the missing person that entitles petitioner to file the petition and the qualifications of the petitioner or other person for appointment as executor (Paragraph 1) [*see Prob. Code § 12404(b)*.

- That the missing person left a last will and testament, and the terms thereof (Paragraph 6) [*see Prob. Code § 8002(b)(1)*].

- That the person named in the will as executor consents to act, and the name of the person for whom letters testamentary are prayed (Paragraph 7) [*see Prob. Code § 8002(a)(5), (b)(3), 12404(c)*].

- The names, ages, addresses, and relationships to the missing person of the heirs, devisees, and legatees, so far as known to the petitioner (Paragraph 8) [*Prob. Code §§ 8002(a)(3), 12404(c)*].

- The amount of the bond, or a statement that all the beneficiaries under the will have waived the bond requirement in writing, and that the waivers are attached (Paragraph 11) [*Prob. Code §§ 8481, 8482*].

In addition, a photographic copy of the missing person's will, if any, must be attached to the petition [*Prob. Code § 8002(b)(1), (2)*; for further discussion, *see § 368.15[3]*].

For a discussion of the paragraphs incorporated from § 368.70[1], see *§ 368.70[2] -[6]*.

[4] Verification

The petition must be verified [*Prob. Code § 1021(a)(1)*].

[5] Cross References

See also discussion in *§ 368.70*

For a discussion and forms relating to a petition for probate of the last will and testament of a decedent and issuance of letters of testamentary generally, see Ch. 442, *Probate: Initiating Probate Administration*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesAppointmentEstate, Gift & Trust LawWillsIncorporation by ReferenceGeneral Overview

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 368 MISSING PERSONS
PART IV. FORMS
A. Administration of Estates of Missing Persons Presumed Dead

32-368 California Forms of Pleading and Practice--Annotated § 368.74

§ 368.74 Probate of Will and Issuance of Letters Testamentary [Prob. Code §§ 8200-8202, 8400-8402]--Estate of Missing Person Who Left Will--Order [Code Civ. Proc. § 1003; Prob. Code § 12407(a)]

[1] FORM Probate of Will and Issuance of Letters Testamentary [Prob. Code §§ 8200-8202, 8400-8402]--Estate of Missing Person Who Left Will--Order [Code Civ. Proc. § 1003; Prob. Code § 12407(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
In the Matter of the Estate of _____	)	ORDER ADMITTING WILL TO PROBATE AND
[*name*], a Missing Person.	)	ISSUING LETTERS TESTAMENTARY
_____		

The verified petition of _____[*name*] for the probate of the will of the above-named missing person and for issuance of letters testamentary came on regularly for hearing this day. Petitioner appeared by counsel _____[*name*]. _____ [No person appeared to contest the petition *or* _____ (*name*) appeared by counsel, _____ (*name*), to contest the petition.] On proof made to the satisfaction of the court, the court finds that notice of the time and place of the hearing was given as required by *Probate Code Section 12405*. [Special notice was _____ (given to _____ (*name*(*s*)), as requested *or* requested and waived by _____ (*names*(*s*)).] The court also finds that the facts alleged in the petition are true, and that _____[*name*] is a person presumed dead under *Section 12401 of the Probate Code*. The court grants the petition as follows:

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. _____[*Name of missing person*] is presumed dead under *Section 12401 of the Probate Code*, in that he/she has not been seen or heard from for a continuous period of _____[*specify five or more*] years by

those who are likely to have seen or heard from him/her, and his/her absence has not satisfactorily been explained after diligent search or inquiry.

2. The date of death of the above-named missing person is _____[*specify date after five-year period*].

3. The document filed herein, marked and admitted into evidence as Exhibit "A," and dated _____, is admitted to probate as the above-named missing person's last will and testament.

4. _____[*Name*] is appointed executor of the estate of the above-named missing person, and letters of testamentary are to issue to the appointee on his/her taking the oath required by law _____ [and giving a bond in the sum of $_____ *or* without having to file a bond, the requirement of a bond having been waived in writing by all beneficiaries under the last will and testament of the missing person].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use in a proceeding for probate of the will of a missing person presumed dead and for issuance of letters testamentary [*see Prob. Code § 12407(a)*; *see § 368.17*].

[3] Cross References

See also discussion in *§§ 368.72*, *368.73*

For forms of an order for probate and letters testamentary approved by the Judicial Council, see Ch. 442, Probate: Initiating Probate Administration

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawWill ContestsGeneral OverviewEstate, Gift & Trust LawWill ContestsTestamentary FormalitiesGeneral OverviewEstate, Gift & Trust LawWillsLost Wills

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 368 MISSING PERSONS
PART IV. FORMS
A. Administration of Estates of Missing Persons Presumed Dead

32-368 California Forms of Pleading and Practice--Annotated § 368.75

§ 368.75 Petition for Determination of Identity of Person Claiming to Be Reappearing Missing Person [Prob. Code §§ 11700, 12408(d)]

[1] FORM Petition for Determination of Identity of Person Claiming to Be Reappearing Missing Person [Prob. Code §§ 11700, 12408(d)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
In the Matter of the Estate of _____	)	PETITION FOR DETERMINATION OF IDEN-
[*name*], a Missing Person.	)	TITY OF PERSON CLAIMING TO BE RE-
		APPEARING MISSING PERSON

_____

Petitioner, _____[*name*] respectfully represents:

1. Petitioner, _____[*name*] _____ [claims to be the above-named reappearing missing person *or* is an interested person in the above-entitled matter in that petitioner _____ (*specify interest, e.g.*, is a distributee under the estate of the missing person)].

2. On _____[*date*], the court in the above-entitled matter entered an order granting the petition of _____[*name of original petitioner for administration of estate*] for administration of the estate of the above-named missing person and for issuance of letters _____ [of administration *or* testamentary] on a finding that the above-named missing person was presumed dead under *Section 12401 of the Probate Code*.

3. A dispute has arisen as to the identity of the person claiming to be the reappearing person, in that _____ [petitioner *or* _____ (*name*)] claims to be the reappearing missing person

_____[*name*] and _____ [petitioner *or* _____ (*name of person disputing identity*)] denies that _____ [petitioner *or* _____ (*name*)] is the reappearing missing person _____[*name*].

4. Petitioner _____ [claims that he/she is the reappearing missing person *or* disputes the identity of the person claiming to be the missing person _____ (*name*)] because _____ [*specify basis of claim or dispute, e.g.*, he/she has valid identification and snapshots showing that he/she is the missing person _____ (*name*)].

WHEREFORE, petitioner prays for the following:

1. A determination of the identity of _____ [petitioner *or* _____ (*name*)], who claims to be the reappearing missing person _____[*name*];

2. Such other and further relief as the court may deem proper.
Dated: _____.

_____ [*signature*]

Petitioner

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

[*Verification. See § 368.70[1].*]

[2] Use of Form

The petition in [1], *above*, is for use in a proceeding to determine the identity of a person claiming to be a reappearing missing person. If a dispute exists as to the identity of a person claiming to be a reappearing missing person, the person making the claim or any other interested person may file a petition under *Prob. Code § 11700* (procedure to determine persons entitled to distribution of estate) for determination of the identity of the person claiming to be a reappearing missing person [*see Prob. Code § 12408(d)*; *§ 368.18[3]*].

For discussion of the remedies of a missing person on reappearance, see *§ 368.18[1]*. For discussion of the effect of a decree of final distribution on the rights of the missing person, see *§ 368.18[2]*.

[3] Contents

The petition states:

- The identity and capacity of the petitioner (Paragraph 1) [*see Prob. Code §§ 48, 12408(d)*].

- The entry of an order granting the petition for administration of the missing person's estate and issuing letters (Paragraph 2) [*see Prob. Code § 12407*].

- The existence of a dispute over the identity of the person claiming to be the reappearing person (Paragraph 3) [*see Prob. Code § 12408(d)*].

- The basis of petitioner's claim that he or she is the reappearing missing person or the basis of petitioner's dispute of the identity of the person making the claim, as appropriate (Paragraph 4) [*Prob. Code §§ 11700, 12408(d)*].

[4] Verification

The petition must be verified [*Prob. Code § 1021(a)(1)*].

[5] Cross References

For a discussion and forms relating to the procedure under *Prob. Code § 11700* for determining heirship, see Ch. 458, *Probate: Determination of Heirship*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral Overview

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32-368 California Forms of Pleading and Practice--Annotated §§ 368.76-368.89

[Reserved]

§§ 368.76[Reserved]

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 368 MISSING PERSONS
PART IV. FORMS
B. Personal Property of Absent Federal Personnel

32-368 California Forms of Pleading and Practice--Annotated § 368.90

§ 368.90 Petition to Set Aside Personal Property of Absentee to Absentee's Family [Prob. Code § 3701]

[1] FORM Petition to Set Aside Personal Property of Absentee to Absentee's Family [Prob. Code § 3701]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Estate of _____ [*name*], a _____ [*state military rank or grade and branch of service or agency, e.g.*, Sergeant in the United States Army], Social Security No. _____, and a Missing Person.	))))	NO. _____ PETITION TO SET ASIDE PERSONAL PROPERTY OF ABSENTEE

Petitioner respectfully represents:

1. Petitioner, _____[*name*], is _____ [*state relationship to absentee e.g.*, the spouse] of _____[*name*], the absentee [*add if petitioner is absentee's spouse:* and is an eligible spouse within the meaning of *Section 3700(c) of the Probate Code*].

2. This petition is filed under Chapter 5 of Part 8 of Division 4, *Sections 3700 through 3720, of the Probate Code*.

3. A certificate showing the determination of _____[*name*], _____ [*title, e.g.*, Secretary of the Army], that the absentee _____[*name*] is in missing status is attached as Exhibit A and incorporated by reference.

4. The following constitutes all of the absentee's property:

Property Description	Estimated Value	Location
_____	_____	_____
_____	_____	_____

5. The following personal property of the absentee should be set aside to petitioner for the purpose of managing, controlling, encumbering, selling, conveying, or otherwise engaging in any transaction with respect to the property: _____[*specify*].

6. It is necessary and in the absentee's best interest that the foregoing property specified in Paragraph 5, having a total value of $_____, be set aside to petitioner because _____ [*set forth facts establishing thatsetting aside property is necessary and in absentee's best interest, e.g.,* petitioner needs the property to provide adequate food, clothing, and shelter for his/her family and the absentee's interest in maintaining a reasonable and adequate standard of living for his/her family would be served by setting aside the property to petitioner].

7. The names and residences of all person's comprising the absentee's family, so far as known to petitioner, are as follows:

Name	Address	Relationship
_____	_____	_____
_____	_____	_____

8. A _____ [guardian *or* conservator] has [not] been appointed for the estate of _____ [any member of the absentee's family *or* _____ (*name(s)*)].
[_____ (*If appropriate, specify name(s) and address(es) of guardian(s) and/or conservator(s)*).]

WHEREFORE, petitioner prays for the following:

1. That the personal property of the absentee specified in Paragraph 5 of the petition be set aside to petitioner; and

2. For such other and further orders as the court may deem proper.
Dated: _____.

_____ [*signature*]

Petitioner

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

[2] Use of Form

The petition in [1], *above*, is for use by a member of an absentee's family in seeking to have certain personal property of the absentee set aside to the family of the absentee [*see Prob. Code § 3701*; *§ 368.32*].

[3] Contents

The petition must contain all of the following [*Prob. Code § 3703(a)*]:

- In the caption, the absentee's last known military rank or grade and social security account number [*Prob. Code § 3703(a)(2)*].

- The identity and relationship of petitioner to the absentee and if the property is to be set aside for the benefit of the absentee's spouse, a representation that the spouse is an eligible spouse (Paragraph 1) [*see Prob. Code §§ 3700(c), 3702, 3703(a)(5)*].

- A statement that the petition is filed under Chapter 5 of Part 8 of Division 4 of the *Probate Code, Sections 3700-3720* (Paragraph 2) [*Prob. Code § 3703(a)(1)*].

- A specific description and estimate of the value of all of the absentee's property, wherever situated, including all sums due the absentee from the United States (Paragraph 4) [*Prob. Code § 3703(a)(3)*].

- A designation of the property to be set aside (Paragraph 5) [*Prob. Code § 3703(a)(4)*].

- Facts establishing that setting aside the property is necessary and in the absentee's best interest (Paragraph 6) [*Prob. Code § 3703(a)(4)*].

- So far as known to petitioner, the names and addresses of all persons comprising the absentee's family (Paragraph 7) [*Prob. Code § 3703(a)(6)*].

- An allegation whether a guardian or conservator of the estate of any member of the absentee's family has been appointed (Paragraph 8) [*Prob. Code § 3703(a)(6)*].

In addition, a certificate of missing status must be attached to the petition (*see* Paragraph 3). The certificate must be

received as evidence of that fact, and the court may not determine the status of the absentee inconsistent with the status shown in the certificate [*Prob. Code § 3703(b)*; *see Prob. Code § 3700(b)*].

[4] Verification

The petition must be verified [*Prob. Code § 1021(a)(1)*].

[5] Cross References

For a general form for an order, see Ch. 372, *Motions and Orders*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawWillsIncorporation by ReferenceGeneral Overview

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 369 MOBILEHOMES AND MOBILEHOME PARKS

32-369 California Forms of Pleading and Practice--Annotated 369.syn

§ 369.syn Synopsis to Chapter 369: MOBILEHOMES AND MOBILEHOME PARKS

§ 369.01 Scope of Chapter

§ 369.02 Cross References

§§ 369.03-369.09 [Reserved]

§ 369.10 Governing Laws

§ 369.11 Definitions

[1] Mobilehome

[a] Common Usage

[b] National Manufactured Home Construction and Safety Standards Act of 1974

[c] Manufactured Housing Act of 1980; Mobilehome Parks Act; Miscellaneous Laws

[d] Mobilehome Warranties Law

[e] Mobilehome Residency Law

[f] Real Estate Law

[g] Vehicle Code

[h] Veterans Farm and Home Purchase Act of 1943

[2] Mobilehome Park

[a] Mobilehome Parks Act

[b] Mobilehome Residency Law

[3] Mobilehome Accessory Building or Structure

[4] Enforcement Agency

[5] Legal Owner

[6] Registered Owner

[7] Mobilehome Owner

§ 369.12 Actions and Proceedings

[1] Availability of Actions, Generally

[2] Manufactured Home Recovery Fund

[3] Negligence Actions

[4] Products Liability Actions

[5] Breach of Warranty Actions

[a] Types of Warranties

[b] Implied Warranty of Merchantability

[c] Implied Warranty of Fitness for Purpose

[d] Statutory Warranty

[6] Attorney's Fees and Costs

[7] Penalties and Assured Minimum Damages

[8] Notice of Intent to Commence Action Against Mobilehome Park

§§ 369.13-369.19 [Reserved]

§ 369.20 Standards for Manufacturing Mobilehomes

[1] Prescribed Standards

[2] Alternatives to Prescribed Standards

[3] Enforcement Powers

[4] Complaint of Violation

§ 369.21 Insignia of Approval

[1] General Requirement

[2] Manufacture Before September 1, 1958

[3] Manufacture From September 1, 1958, to June 15, 1976

[4] Manufacture After June 15, 1976

[5] Inspection

[a] Requests for Inspection

[b] Issuance of Insignia of Approval

[c] Notice of Violations

[d] Removal for Violation

[6] Federal Standards Applicable After September 22, 1976

[7] HUD Label

[8] State Label

§ 369.22 Administrative Proceedings

[1] Application of Procedural Regulations

[2] DAPIAs and PIPIAs in Addition to Department of Housing and Community Development in California

§§ 369.23-369.29 [Reserved]

§ 369.30 Mobilehomes Considered "Goods" for Purposes of Sale

§ 369.31 Sales in Mobilehome Parks

[1] Signs Displaying Sale

[2] Management Must Obtain Owner's Authorization to Show Mobilehome

[3] Management Restricted from Charging Fees

[4] Management's Rights in Event of Sale, Including Requiring Removal of Mobilehome

[5] Management's Obligations in Event of Sale

[6] Management May Not Prohibit or Require Certain Acts

[7] Purchaser's Rights of Tenancy and Unlawful Occupancies

[8] Written Disclosure Form

[9] Age Requirements for Purchase

[10] Waiver Prohibited

[11] Sale by Heir, Joint Tenant, or Personal Representative of Estate

[12] Rights After Homeowner's Default

[a] Right to Sell; Conditions

[b] Notice Requirements

[13] Transfer Disclosure Statement

§ 369.32 Sale of Mobilehome in Subdivision, Cooperative, Condominium, or Resident-Owned Park

[1] Sale Depends on Ownership Interest

[2] Advertising Sale

[3] Owner's Written Authorization Required

[4] Management May Not Require Removal

[5] Management's Right to Prior Approval of Purchaser

[6] Age Requirements

[7] Waiver Prohibited

§ 369.33 Dealer Sales

[1] Prohibition Applies in Certain Circumstances

[2] Sales and Escrow Requirements Applicable to Dealers

[a] Application of Health & Safety Code Regulations

[b] Receipt for Deposit

[c] Standard of Care

[d] Establishment of Escrow Account

[e] Award of Damages, Attorney's Fees, and Costs

[3] Visual Inspection and Disclosures Required By Dealer

[4] Mobilehome Warranties Applicable to Dealer Sales

[5] Dealer Sales Off Premises

[6] Dealer Cooperative Arrangements

§ 369.34 Sales By or Through Real Estate Brokers

[1] Registration Requirement

[2] Prohibited Acts

§ 369.35 Documentary Transfer Tax

§ 369.36 Sales and Use Taxes

§ 369.37 Installation

[1] Standards and Permits

[2] Tardy Performance by Contractor

[3] Noncompliance With Standards

[4] Correction of Defects

§ 369.38 Hiring Out (Renting and Leasing)

[1] Mobilehomes Considered to be Motor Vehicles

[2] Permit Requirement

[3] Mobilehome in Mobilehome Park

[4] Mobilehome in Subdivision, Cooperative, Condominium, or Resident-Owned Mobilehome Park

§ 369.39 Maintenance, Use, and Occupancy

[1] Unlawful Mobilehome Occupancies

[2] Sewage and Wastewater Disposal

[3] Abatement of Substandard Mobilehome Condition

[4] Disabled Access and Accommodations

§ 369.40 Moving

§ 369.41 Local Regulation

[1] State Law Supersedes Local Ordinances

[2] Zoning and Land Use

[a] Installation of Manufactured Housing

[b] Requirement of Filing Impact Report

[c] Option to Purchase, Survey, and Waiver of Tentative and Final Subdivision Map

[d] Density of New Mobilehome Park

[e] Clubhouses and Recreational Facilities

[3] Equipment and Facilities

[4] Use and Occupancy

[5] Accessory Buildings and Structures

§ 369.42 Property Interests

[1] Real or Personal

[2] Provisional Remedy of Claim and Delivery

[3] Local Property Taxation

§ 369.43 Registration and Titling

§ 369.44 Creditors' Claims

[1] Mechanics' Liens

[2] Other Liens for Services and Materials

[3] Judgment Creditors

[a] Exemption from Execution

[b] Levy on a Mobilehome

[4] Security Interests

[5] Foreclosure Under Security Agreement

[a] Required Procedures

[b] Notice of Default

[c] Curing Default

[d] Private or Public Sale

[e] Abandonment

[f] Application of Proceeds

[6] Deficiency After Forced Sale

§ 369.45 Payment for Contractor's Work: Defense of No License

[1] General Prohibition

[2] "Contractor" Defined

[3] When License Is Not Required

§ 369.46 Undercarriage

§ 369.47 Mobilehome Accessory Buildings and Structures and Building Components

[1] Definitions and Standards

[2] In Mobilehome Parks

[3] Abatement

§§ 369.48-369.59 [Reserved]

§ 369.60 Standards

[1] Standards Should Guarantee Residents Protection of Their Investment and Decent Living Environment

[2] Standards for Protection of Life and Property, Generally

[3] Standards for Protection of Health and Safety

[4] Standards for Protection of Life and Property Against Fire

[5] Standards for Installation

[6] Other Standards

[7] Alternatives to Prescribed Standards

[8] Enforcement Powers

[9] Abatement of Violation

§ 369.61 Location

§ 369.62 Construction

[1] Requirement to Obtain Construction Permit

[2] Refusal to Issue Permit

[3] Refusal to Extend Permit Period

§ 369.63 Operation

[1] Requirement to Obtain Operating Permit

[2] Refusal to Issue Permit

[3] Suspension of Permit

[a] Grounds for Suspension

[b] Notice of Violation

[c] Hearing

[d] Action by Enforcement Agency

[4] Operation of Mobilehome Park Is Business Activity

[a] Acts of Unfair Competition

[b] Discrimination Is Unlawful

§ 369.64 Maintenance of Acceptable Conditions

[1] Responsible Persons

[2] Abatement of Nuisance

[3] Abatement of Substandard Building

[4] Animal Control

[5] Artificial Lighting

[6] Debris Removal

[7] Fire Prevention and Suppression

[8] Trees and Driveways

[9] Utility Service Equipment and Connections

[a] Operation and Maintenance Responsibilities

[b] Drains and Sewers

[c] Electricity

[d] Natural Gas

[e] Water

[10] Interruption in Utility Service

[11] Vehicular Traffic Control

[12] Emergency Preparedness Plan

§ 369.65 Entry Into Mobilehomes and Onto Mobilehome Lots

§ 369.66 Rent, Fees, and Charges

[1] Limitations

[2] Rent

[3] Rent Control

[4] Rental Agreements Exempt From Rent Control

[5] Separate Charge for Rent Control Fees

[6] Separate Billing for Utilities

[7] Security Deposit

[8] Installation and Landscaping Fees

[9] Pet Fees

[10] Guest Fees

[11] Utility Charges

[12] Liens Prohibited

[13] Notice of Zoning

[14] Notice of School Facilities Fee

§ 369.67 Recreational Vehicles

§ 369.68 Rules and Regulations

[1] Amendments

[2] Applicability

[3] Injunction Against Violation

§ 369.69 Hours of Common Area Facilities

§ 369.70 Space Rental Agreement

[1] Definitions

[2] Required Contents of Rental Agreement

[3] Requirement to Offer Rental Agreement for Specified Time

[4] Copy of Lease or Rental Agreement

[5] Waiver Prohibited

[6] Membership in Restricted Club as Condition for Tenancy Is Prohibited

§ 369.71 Tenant Meetings

[1] Rights of Homeowner

[2] When Management Must Meet and Consult with Homeowners

§ 369.72 Termination of Tenancy by Homeowner

§ 369.73 Termination of Tenancy by Management

[1] Written Notice

[2] Permissible Reasons

[3] Impermissible Reasons

§ 369.74 Delivery of Required Notices

§ 369.75 Local Regulation: Zoning

§ 369.76 State Employee Housing

§ 369.77 Renting or Subletting Home or Space

§§ 369.78-369.89 [Reserved]

§ 369.90 Related Matthew Bender Publications

[1] California Legal Forms

[2] California Real Estate Law and Practice

§ 369.91 State Statutes

[1] Acts and Laws Generally

[2] Legal Actions and Proceedings

[3] Mobilehome as Vehicle

[4] Ombudsman

[5] Property Interests in Mobilehomes

[6] Sales of Mobilehomes

[7] Sale of Mobilehome Park

[8] Taxation of Mobilehomes

[9] Warranties on Mobilehomes

§ 369.92 State Regulations

[1] Mobilehome Parks Act

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§ 369.93 Federal Statutes

§ 369.94 Federal Regulations

§ 369.95 Decisions

[1] Mobilehomes

[a] In General

[b] Security Interests

[2] Mobilehome Parks

[a] Construction

[b] Fees and Charges

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[f] Seizure

[3] Mobilehome Residence Law--Attorneys' Fees and Costs

§ 369.96 Attorney General Opinions

§ 369.97 Law Reviews

§§ 369.98-369.109 [Reserved]

§ 369.110 Letter of Complaint to Department of Housing and Community Development That Mobilehome Is Not Complying With Applicable Lubell, Legal Aspects of Mobile Home Lending by Institutional Lenders, 45 LA Bar. B. 408 (1970) Lubell, Legal Aspects of Mobile Home Lending by Institutional Lenders, 45 LA Bar. B. 408 (1970)Regulations [25 Cal. Code Reg. § 4013.5]

[1] FORM

[2] Use of Form

[3] Complaint Investigation

[a] Initial Procedures

[b] Inspections and Legal and/or Administrative Proceedings

§ 369.111 [Reserved]

§ 369.112 Request for Hearing Regarding Abatement of Substandard Mobilehome [25 Cal. Code Reg. § 1613]

[1] FORM

[2] Use of Form

[3] Inspection and Notice of Violation

[4] Commencement of Proceeding

[a] Final Notice to Abate

[b] Proof of Notice

[5] Request for Hearing

[a] Request Must Be Made to Enforcement Agency Within 10 Days of Receiving Notice

[b] Automatic Delay of Abatement Proceedings

[c] Notice and Time of Hearing

[d] Violation Constituting Imminent Hazard

[6] Hearing

[a] Testimony and Evidence

[b] Written Decision

[7] Judicial Review

§ 369.113 Notice of Default Under Agreement Secured by Interest in Mobilehome [Health & Safety Code § 18037.5(a)(1)]

[1] FORM

[2] Use of Form

§ 369.114 Notice of Belief of Abandonment of Mobilehome [Health & Safety Code § 18037.5(a)(6)]

[1] FORM

[2] Use of Form

§ 369.115 Letter to Enforcement Agency Requesting Hearing on Suspension of Mobilehome Park Operating Permit [Health & Safety Code § 18513]

[1] FORM

[2] Use of Form

§ 369.116 Notice of Intention to Commence Action for Failure to Maintain Physical Facilities or for Reduction in Services in Mobilehome Park [Civ. Code § 798.84]

[1] FORM

[2] Use of Form

[3] Contents of Form

[4] Service

[5] Statute of Limitations

§§ 369.117-369.129 [Reserved]

§ 369.130 Petition for Hearing [25 Cal. Code Reg. § 4045]--Mobilehome Law Enforcement [25 Cal. Code Reg. § 4000 et seq.]

[1] FORM

[2] Use of Form

[3] Petition for Hearing

[a] Contents and Form of Petition

[b] Time for Filing

[4] Notice of Hearing

[5] Hearing

[6] Decision

§ 369.131 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] By Mobilehome Park Developer Against Local Enforcement Agency for Refusal to Grant Extension of Construction Permit [Health & Safety Code § 18509]

[1] FORM

[2] Use of Form

[3] Extension of Mobilehome Park Construction Permits

[4] When Refusal to Grant Extension Is Improper

[5] Permit to Operate on Completion of Construction

[6] Cross References

§ 369.132 Petition and Supporting Declaration [Civ. Code § 798.88] for Temporary Restraining Order [Code Civ. Proc. § 527(a)] and Permanent Injunction [Civ. Code § 3422] By Mobilehome Park Management Against Resident of Mobilehome Park for Violation of Mobilehome Park Rule

[1] FORM

[2] Use of Form

[3] Verification and Notice

[4] Certification re Notice

[5] Jurisdiction and Venue

[6] Allegations

[7] Service of Temporary Restraining Order

[8] Hearing on Injunction

[9] Duration of Injunction

[10] Declaration

[11] Cross References

§§ 369.133-369.139 [Reserved]

§ 369.140 Complaint for Damages [Civ. Code § 1780(a)] By Mobilehome Buyer Against Dealer for Breach of Statutory Warranty Against Substantial Defects [Civ. Code §§ 1770(a)(7), 1797.3]

[1] FORM

[2] Use of Form

[3] Cause of Action

[a] Representations of Seller

[b] Applicability of "Residence" Exception

[4] Breach of Statutory Warranty

[5] Commencement of Action

[6] Venue and Affidavit

[7] Cross References

§ 369.141 Complaint for Damages By Mobilehome Buyer Against Dealer or Other Seller for Improper Escrow [Health & Safety Code § 18035(n)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Damages

[5] Cross References

§ 369.142 Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. §§ 526, 731] and Damages [Civ. Code § 3333] By Resident of Mobilehome Park Against Mobilehome Park Management for Failure to Maintain Common Facilities in Good Working Order [Civ. Code § 798.87]

[1] FORM

[2] Use of Form

[3] Who May Bring Action

[4] Allegations

[5] Injunctive Relief in Limited Civil Cases

[6] Notice

[7] Damages

[8] Verification

[9] Statute of Limitations

[10] Attorney's Fees

[11] Cross References

§ 369.143 Complaint for Restitution and Injunction [Bus. & Prof. Code § 17203]--Class Action [Code Civ. Proc. § 382] by Mobilehome Park Tenant Against Management for Unfair Competition by Violating Mobilehome Residency Law [Civ. Code § 798 et seq.]

[1] FORM

[2] Use of Form

[3] Standing

[4] Statutory Violations as Unfair Competition

[5] Limitation Period

[6] Required Notice

[7] Cross References

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Chapter 369 MOBILEHOMES AND MOBILEHOME PARKS
PART I. SCOPE

32-369 California Forms of Pleading and Practice--Annotated § 369.01

§ 369.01 Scope of Chapter

This chapter discusses the law in California regarding mobilehomes and mobilehome parks. Applicable federal laws are referred to but not discussed in detail.

The chapter contains the following forms for use in administrative proceedings:

- A letter of complaint to the Department of Housing and Community Development that a mobilehome does not comply with applicable regulations [*§ 369.110*].

- A petition for hearing on any issue arising in enforcement of the Manufactured Housing Act of 1980 (*Health & Safety Code § 18000 et seq.*) [*§ 369.130*].

- A request for a hearing on a proposal to abate a mobilehome as substandard [*§ 369.112*].

- A letter to an enforcement agency requesting a hearing on a proposal to suspend a mobilehome park operating permit [*§ 369.115*].

This chapter also contains the following litigation forms:

- A complaint for damages by a mobilehome buyer against the dealer alleging breach of the statutory warranty against substantial defects [*§ 369.140*].

- A complaint for damages by a mobilehome buyer against a dealer or other seller based on improper escrow practices [*§ 369.141*].

- A notice of default under a security agreement that provides a security interest in a mobilehome [*§ 369.113*].

- A notice of belief of abandonment of a mobilehome for use by a secured creditor [*§ 369.114*].

- A petition for writ of mandate by a mobilehome park developer based on refusal of a local enforcement agency to grant an extension of a construction permit [*§ 369.131*].

- A petition and supporting declaration for a temporary restraining order and permanent injunction by mobilehome park management against a resident for violating a mobilehome park rule [*§ 369.132*].

- A notice of intention to commence an action for failure to maintain physical facilities or for reduction in services in a mobilehome park [*§ 369.116*].

- A complaint for a preliminary and permanent injunction and damages by a mobilehome park resident against the mobilehome park management for failure to maintain the common facilities of the park in good working order [*§ 369.142*].

- A complaint for restitution and injunction, in a class action, by a mobilehome park tenant against the management alleging unfair competition in violating the Mobilehome Residency Law (*Civ. Code § 798 et seq.*) [§ 369.143].

This chapter does not cover the law regarding recreational vehicles as such. Standards and requirements for the construction and maintenance of special occupancy parks such as recreational vehicle parks are set forth in the Special Occupancy Park Act [*Health & Safety Code § 18860 et seq.*; *25 Cal. Code Reg. § 2000 et seq.* (implementing regulations)]. The Legislature has found that because owners of recreational vehicles are highly mobile and use various facilities throughout the state, there is a need for consistent and uniform statewide regulations for special occupancy parks [*Health & Safety Code § 18863*]. Accordingly, the Legislature removed provisions addressing special occupancy parks from the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*]. Those amendments to the Mobilehome Parks Act and the adoption of the Special Occupancy Parks Act are operative on January 1, 2004 [*see* 2002 Stats., ch. 1038, § 6].

The Special Occupancy Park Act imposes substantially similar requirements as the Mobilehome Parks Act. Tenancies in recreational vehicle parks are addressed in the Recreational Vehicle Park Occupancy Law [*Civ. Code § 799.20 et seq.*].

This chapter also does not cover the law regarding factory-built housing, also called modular housing. Such housing units may sometimes be physically indistinguishable (except for lacking an undercarriage of axles and wheels) from mobilehomes; indeed, some manufacturers produce both products from the same factory, and units that are mounted on running gear become mobilehomes. The essential difference is that factory-built housing is designed for installation on a permanent foundation, not to be moved once installed; and the Legislature's recognition of this difference is manifest in the existence of separate laws [*Health & Safety Code §§ 18000 et seq.* (Manufactured Housing Act of 1980), *18200 et seq.* (Mobilehome Parks Law), *19960 et seq.* (California Factory-Built Housing Law)] that are mutually exclusive [*see Health & Safety Code §§ 18008, 18211, 19971*; *see also 42 U.S.C. § 5403(f)* (excluding modular housing from coverage of National Mobile Home Construction and Safety Standards Act of 1974)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksInstallation & TransportationReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use

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§ 369.02 Cross References

For discussion of, and forms for use in, actions and proceedings arising from administrative acts, see Ch. 358, *Mandate and Prohibition* , and Ch. 470, *Overview of Public Administrative Law* through Ch. 474C, *Procedures in Reviewing Agency Decisions* .

For discussion of, and forms for use in, actions and proceedings arising from credit transactions, see Ch. 8, *Accounts Stated and Open Accounts* , Ch. 60, *Assignments* , Ch. 62, *Attachment* , Ch. 107, *Cancellation of Instruments* , Ch. 127, *Consumer Contracts and Loans* , Ch. 140, *Contracts* , Ch. 213, *Documents of Title* , Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* , Ch. 270, *Fraudulent Conveyances* , Ch. 276, *Garnishment* , Ch. 307, *Insolvency* , Ch. 342, *Liens and Wage Preferences* , Ch. 361, *Mechanics' Liens* , Ch. 385, *Negotiable Instruments* , Ch. 490, *Rescission and Restitution* , Ch. 500, *Sales: Sales Under the Commercial Code* , Ch. 555, *Trust Deeds and Real Property Mortgages* , and Ch. 568, *Usury* .

For discussion of, and forms for use in, actions and proceedings arising from the exercise of civil rights, see Ch. 59, *Assemblies, Meetings, and Demonstrations* , Chs. 112- 117A, *Civil Rights* , Ch. 126, *Conspiracy* , and *Ch. 184, Deeds, § 184.60* et seq.

For discussion of, and forms for use in, actions and proceedings arising from improvement of land, see Ch. 11, *Adjoining Landowners* , Ch. 56, *Architects* , Ch. 104, *Building Contracts* , and Ch. 361, *Mechanics' Liens* .

For discussion of, and forms for use in, actions and proceedings arising from interests in land, see Ch. 13, *Adverse Possession* , Ch. 183, *Dedication* , Ch. 184, *Deeds* , Ch. 240, *Easements* , Ch. 241, *Ejectment* , Ch. 247, *Eminent Domain* , Ch. 253, *Escrows* , Ch. 331, *Landlord and Tenant: Creating the Tenancy* , Ch. 333, *Landlord and Tenant: Eviction Actions* , Ch. 441, *Probate: Disposition Without Administration* , Ch. 482, *Quieting Title* , Ch. 528, *Specific Performance* , Ch. 530, *Statute of Frauds* , Ch. 540, *Taxes and Assessments* , Ch. 548, *Title Insurance* , and Ch. 569, *Vendor and Purchaser* .

For discussion of, and forms for use in, actions and proceedings arising from liability to pay money, see Ch. 254, *Executions and Enforcement of Judgments* , Ch. 276, *Garnishment* , Ch. 300, *Indemnity and Contribution* , Ch. 307,

Insolvency , Ch. 314, *Interpleader* , Ch. 427, *Principal and Agent* , Ch. 486, *Receivers* , Ch. 520, *Settlement and Release* , Ch. 536, *Subrogation* , and Ch. 538, *Suretyship, Bonds, and Undertakings* .

For discussion of, and forms for use in, actions and proceedings arising from loss of injury to personal property, see Ch. 10, *Act of God* , Ch. 93, *Bailments* , Ch. 109, *Carriers* , Ch. 119, *Claim and Delivery* , Ch. 150, *Conversion* , Ch. 267, *Fires* , and Ch. 308, *Insurance* .

For discussion of, and forms for use in, actions and proceedings arising from personal injury or wrongful death, see Ch. 10, *Act of God* , Ch. 23, *Animals: Civil Liability* , Ch. 58, *Assault and Battery* , Ch. 181, *Death and Survival Actions* , Ch. 334, *Landlord and Tenant: Claims for Damages* , Ch. 362, *Mental Suffering and Emotional Distress* , Ch. 380, *Negligence* , and Ch. 460, *Products Liability* .

For discussion of, and forms for use in, actions and proceedings arising from sales of goods, see Ch. 14, *Advertising* , Ch. 77, *Auctions and Auctioneers* , Ch. 103, *Brokers* , Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* , Ch. 253, *Escrows* , Ch. 490, *Rescission and Restitution* , Ch. 500, *Sales: Sales Under the Commercial Code* , Ch. 530, *Statute of Frauds* , and Ch. 565, *Unfair Competition* .

For discussion and forms relating to the termination of tenancies in mobilehome parks and recreational vehicle parks, see Ch. 332, *Landlord and Tenant: The Tenancy* . Unlawful detainer actions are covered in Ch. 333, *Landlord and Tenant: Eviction Actions* , and claims for damages in the landlord-tenant context are covered in Ch. 334, *Landlord and Tenant: Claims for Damages* . Rent control is discussed in Ch. 335, *Landlord and Tenant: Rent Control* .

For discussion of, and forms for use in, actions and proceedings arising from the use of land, see Ch. 11, *Adjoining Landowners* , Ch. 101, *Boundaries* , Ch. 266, *Fences* , Ch. 332, *Landlord and Tenant: The Tenancy* , Ch. 391, *Nuisance* , Ch. 418, *Pollution and Environmental Matters* , Ch. 421, *Premises Liability* , Ch. 464, *Public Entities and Officers: California Tort Claims Act* , Ch. 525, *Slip and Fall* , Ch. 550, *Trespass* , and Ch. 579, *Zoning and Planning* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral Overview

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[Reserved]

§§ 369.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Governing Laws, Definitions, and Actions and Proceedings

32-369 California Forms of Pleading and Practice--Annotated § 369.10

§ 369.10 Governing Laws

Principal laws regarding mobilehomes and mobilehome parks include the following:

- The National Manufactured Home Construction and Safety Standards Act of 1974 [*42 U.S.C. § 5401 et seq.*] and implementing regulations [24 C.F.R. Parts 3280, 3282];

- The Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*] and implementing regulations [*25 Cal. Code Reg. § 4000 et seq.*];

- The Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*] and implementing regulations [*25 Cal. Code Reg. § 1000 et seq.*];

- The Mobilehome Residency Law [*Civ. Code § 798 et seq.*]; and

- Provisions regarding mobilehome warranties [*Civ. Code § 1797 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & Development

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32-369 California Forms of Pleading and Practice--Annotated § 369.11

§ 369.11 Definitions

[1] Mobilehome

[a] Common Usage

"Mobilehome" has any of several meanings, depending on what law is being cited [*see* [b]-[h], *below*]. In common usage it means a trailer that is used as a permanent dwelling, is usually connected to utilities, and is designed without a permanent foundation [Webster's (8th ed.) New Collegiate Dictionary (1977)].

[b] National Manufactured Home Construction and Safety Standards Act of 1974

In the National Manufactured Home Construction and Safety Standards Act of 1974 [*42 U.S.C. § 5401 et seq.*] and implementing regulations [24 C.F.R. Parts 3280, 3282], "mobilehome" (spelled "mobile home") means a structure, transportable in one or more sections, which is eight body feet or more in width and is 32 body feet or more in length, and which is built on a permanent chassis and designed to be used as a dwelling unit, with or without a permanent foundation, when connected to the required utilities, and includes the plumbing, heating, air conditioning, and electrical systems contained therein [*42 U.S.C. § 5402*]. "Dwelling unit" means one or more habitable rooms that are designed to be occupied by one family with facilities for living, sleeping, cooking, and eating [*24 C.F.R. § 3280.2*].

"Mobilehome" does not include a structure (commonly called a modular house) (1) designed only for erection or installation on a site-built permanent foundation; (2) designed not to be moved once so erected or installed; (3) designed and manufactured to comply with appropriate national, state, or local standards; (4) not intended, to the manufacturer's knowledge, to be used other than on a site-built permanent foundation [*see 42 U.S.C. § 5403(h)*].

[c] Manufactured Housing Act of 1980; Mobilehome Parks Act; Miscellaneous Laws

The Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*] and its implementing regulations [*25 Cal. Code. Reg. § 1000 et seq.*] apply the definitions of "manufactured housing" and "mobilehomes" set forth in the Manufactured Housing Act [*Health & Safety Code § 18000 et seq.*]. In 2007, the Legislature amended the Manufactured Housing Act

to clarify the distinctions between mobilehomes and manufactured housing [*see Health & Safety Code § 18000(b)(4)* (changes to Act clarifying meaning of terms "mobilehomes" and "manufactured homes" not intended to effect any substantive change with respect to the treatment of those housing products or to the consumer protections provided for those housing products)]. The Legislature declared that all single-family factory-constructed housing built on or after June 15, 1976, that is in compliance with the standards of the United States Department of Housing and Urban Development promulgated under the Federal National Manufactured Housing Construction and Safety Standards Act of 1974 [*42 U.S.C.§ 5401 et seq.*] is manufactured housing or manufactured homes, not "mobilehomes" [*Health & Safety Code § 18000(b)*]. However, if any codified provision of state law, by its context, requires that the term "mobilehome" applies to mobilehomes or manufactured homes without regard to the date of construction, the codified provision will apply to both mobilehomes, as defined under *Health & Safety Code § 18008(a)*, and manufactured homes, as defined under *Health & Safety Code § 18007* [*Health & Safety Code § 18008(b)*].

Under the Manufactured Housing Act, "mobilehome" means a structure that was constructed prior to June 15, 1976 [*Health & Safety Code § 18008*] and meets the requirements for a "manufactured home" set forth in *Health & Safety Code § 18007*. "Mobilehome" does not include a commercial modular [*see Health & Safety Code § 18001.8*], factory-built housing [*see Health & Safety Code § 19971*], a manufactured home [*see Health & Safety Code § 18007*], a multifamily manufactured home [*see Health & Safety Code § 18008.7*], or a recreational vehicle [*see Health & Safety Code § 18010*; *Health & Safety Code § 18008(a)*].

"Manufactured home" means a structure that was constructed on or after June 15, 1976, is transportable in one or more sections, is eight body feet or more in width, or 40 body feet or more in length, in the traveling mode, or, when erected on site, is 320 or more square feet, is built on a permanent chassis and designed to be used as a single-family dwelling with or without a foundation when connected to the required utilities, and includes the plumbing, heating, air conditioning, and electrical systems contained therein [*Health & Safety Code § 18007*]. "Manufactured home" includes any structure that meets all of the requirements except the size requirements and with respect to which the manufacturer voluntarily files a certification and complies with the standards established under the National Manufactured Housing Construction and Safety Act of 1974 [*Health & Safety Code § 18007*; *see* [b], *above*].

For the most part, provisions of law applicable to manufactured homes also apply equally to multiunit manufactured homes [*see Health & Safety Code § 18008.7(c)*; *see also Health & Safety Code § 18008.7(a)* ("multiunit manufactured home" defined); *Health & Safety Code § 18008.7(d)(3)* ("multiunit manufactured housing" has the same meaning as "multifamily manufactured home")].

"Recreational vehicle" means a motorhome, travel trailer, truck camper, or camping trailer, with or without motive power, designed for human habitation for recreational or emergency occupancy, that meets designated criteria for size, chassis, and other characteristics [*see Health & Safety Code §§ 18010* (Manufactured Housing Act of 1980), 18285.5 (Mobilehome Parks Act)]. "Recreational vehicle" also means a "park trailer," which is a trailer designed for human habitation for recreational or seasonal use only that meets designated criteria for size, chassis, and other characteristics [*Health & Safety Code §§ 18009.3, 18010*]. Standards and requirements for the construction and maintenance of special occupancy parks such as recreational vehicle parks are set forth in the Special Occupancy Park Act [*Health & Safety Code § 18860 et seq.*; *25 Cal. Code Reg. § 2000 et seq.* (implementing regulations)]. A "commercial coach" or "commercial modular" means a structure transportable in one or more sections, designed and equipped for human occupancy for industrial, professional, or commercial purposes and includes a trailer coach [*Health & Safety Code §§ 18001.8, 18012.5, 18218*].

This also is the meaning of "mobilehome" in the following laws (and implementing regulations, if any):

- The Contractors' State License Law, *Bus. & Prof. Code § 7000 et seq.* [*Bus. & Prof. Code § 7027*];
- *Rev. & Tax. Code §§ 5800-5842*, concerning local property taxation of mobilehomes;

- *Rev. & Tax. Code §§ 6012.8(b), 6012.9(b)*, and *6379*, concerning sales and use taxes; and
- *Rev. & Tax. Code §§ 10759.5* and *10785*, concerning vehicle license fees.

[d] Mobilehome Warranties Law

In the mobilehome warranties law [*Civ. Code § 1797 et seq.*], "mobilehome" and "manufactured home" are defined in accordance with *Health & Safety Code §§ 18007* and *18008*, which are discussed in [c], *above*.

[e] Mobilehome Residency Law

In the Mobilehome Residency Law [*Civ. Code § 798 et seq.*], "mobilehome" means a structure designed for human habitation and for being moved on a street or highway under a permit [*Civ. Code § 798.3*; *see § 369.40*]. "Mobilehome" includes a manufactured home, as defined in *Health & Safety Code § 18007*, and a mobilehome as defined in *Health & Safety Code § 18008*. "Mobilehome" generally does not include a recreational vehicle as defined in *Health & Safety Code § 18010* or a commercial coach as defined in *Health & Safety Code § 18218* [*Civ. Code § 798.3(a)*]. "Mobilehome" does include any trailer or other recreational vehicle of any type defined in *Health & Safety Code § 18010* (except a motor home, truck camper, or camping trailer) that is used for human habitation, if the trailer or other recreational vehicle occupied a mobilehome site in a mobilehome park either (1) on November 15, 1992, under a rental agreement with a term of one month or longer, and before 1991 [*Civ. Code § 798.3(b)(1)*], or (2) for nine or more months continuously beginning on or after November 15, 1992 [*Civ. Code § 798.3(b)(2)*]. However, "mobilehome" does not include a trailer or other recreational vehicle located in a recreational vehicle park subject to the Recreational Vehicle Park Occupancy Law [*Civ. Code § 799.20 et seq.*].

[f] Real Estate Law

In *Bus. & Prof. Code § 10130 et seq.* (real estate regulations), "mobilehome" means a structure transportable in one or more sections, designed and equipped to contain not more than two dwelling units to be used with or without a foundation system. Mobilehome in this sense does not include a recreational vehicle as defined in *Health & Safety Code § 18010*, a commercial modular as defined in *Health & Safety Code § 18001.8*, or factory-built housing as defined in *Health & Safety Code § 19971* [*Bus. & Prof. Code § 10131.6(c)*].

[g] Vehicle Code

As used in the Vehicle Code, a mobilehome is a structure as defined in *Health & Safety Code § 18008* [*see § 369.11[1][c]*]. For the purposes of enforcing highway safety laws and regulations, a mobilehome is a trailer coach that is in excess of 102 inches in width, or in excess of 40 feet in overall length measured from the foremost point of the trailer hitch to the rear extremity of the trailer [*Veh. Code § 396*].

"Trailer coach" means a vehicle, other than a motor vehicle, designed for human habitation, or human occupancy for industrial, professional, or commercial purposes, for carrying property on its own structure, and for being drawn by a motor vehicle, and includes a "park trailer" [*Veh. Code § 635*]; "vehicle" means a device by which any person or property may be propelled, moved, or drawn on a highway, excepting a device moved exclusively by human power or used exclusively on stationary rails or tracks [*Veh. Code § 670*]; and "motor vehicle" means a vehicle that is self-propelled and that is not a self-propelled wheelchair, motorized tricycle, or motorized quadricycle operated by a person who, by reason of physical disability, is otherwise unable to move about as a pedestrian [*Veh. Code § 415*].

[h] Veterans Farm and Home Purchase Act of 1943

In the Veterans Farm and Home Purchase Act of 1943 [*Mil. & Vet. Code § 985 et seq.*], "mobilehome" means a parcel

of real estate, or an undivided interest in common in a portion of a parcel of real estate, on which is situated a mobilehome that will, in the opinion of the Department of Veterans Affairs, suit the needs of the purchaser and his or her dependents as a place of abode and meet all requirements of local governmental jurisdictions [*Mil. & Vet. Code § 985(k)*].

[2] Mobilehome Park

[a] Mobilehome Parks Act

In the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*] and implementing regulations [*25 Cal. Code Reg. § 1000 et seq.*], "mobilehome park" means an area or tract of land where two or more mobilehome lots are rented or leased, or were formerly held out for rent or lease and later converted to a subdivision, cooperative, condominium, or other form of resident ownership, to accommodate manufactured homes, mobilehomes, or recreational vehicles used for human habitation [*Health & Safety Code § 18214(a)*].

[b] Mobilehome Residency Law

In the Mobilehome Residency Law [*Civ. Code § 798 et seq.*], "mobilehome park" means an area of land where two or more mobilehome sites are rented, or held out for rent, to accommodate mobilehomes [*see* [1][e], *above*] used for human habitation [*Civ. Code § 798.4*].

[3] Mobilehome Accessory Building or Structure

In the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*] and implementing regulations [*25 Cal. Code Reg. § 1000 et seq.*], "mobilehome accessory building or structure" means any awning, cabana, ramada, storage cabinet, storage building, garage, carport, fence, windbreak or porch, or any residential building or structures established for the use of the occupant of a manufactured home, mobilehome, or recreational vehicle on a lot [*Health & Safety Code § 18213*; *see 25 Cal. Code Reg. § 1002* (definitions of awning, cabana, ramada, storage cabinet, storage building, garage, carport, fence, windbreak, and porch)].

[4] Enforcement Agency

"Enforcement agency" is used in the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*] and implementing regulations [*25 Cal. Code Reg. § 1000 et seq.*] to mean the following:

- Regarding mobilehomes [*see* [1], *above*] and mobilehome accessory buildings and structures located outside a mobilehome park [*see* [3], *above*], either the city or county having jurisdiction over the area where the mobilehome or accessory building or structure is located, or the Department of Housing and Community Development (DHCD) if the city or county fails to act [*see Health & Safety Code §§ 18207, 18300(d), (f)*]; and

- Regarding mobilehome parks and the mobilehomes, accessory buildings and structures, and other buildings and structures in mobilehome parks, either (1) the city or county where the mobilehome park is located, if it has assumed enforcement responsibility under *Health & Safety Code § 18300*, or the DHCD if the city or county fails to act; or (2) the DHCD, if the city or county where the mobilehome park is located has not assumed or has canceled its assumption of enforcement responsibility [*see Health & Safety Code §§ 18207, 18300*].

The Department may delegate its enforcement authority to a local building department or health department of any city, county, or city and county, if (1) the delegation is necessary to provide prompt and effective recovery assistance or services during or immediately following a disaster declared by the Governor, (2) the local building or health

department requests the authority and that request is approved by the governing body having jurisdiction over the local building or health department, and (3) the Department has determined that the local building department or health department possesses the knowledge and expertise necessary to administer the delegated responsibilities [*Health & Safety Code § 18307(a)*]. The delegation of authority may be limited to specific geographic areas or specific mobilehome parks or recreational vehicle parks at the Department's sole discretion [*Health & Safety Code § 18307(b)*]. The delegation is limited to a time period to be established by the Department, not to exceed 60 days [*Health & Safety Code § 18307(b)*].

[5] Legal Owner

The term "legal owner" as used in the Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*] means a person holding a security interest in a manufactured home, mobilehome, commercial coach, floating home, or truck camper perfected by filing the appropriate documents with the Department of Housing and Community Development in accordance with *Health & Safety Code § 18080.7* if the person is entitled to the designation, as provided in *Health & Safety Code §§ 18085-18093.5*, relating to applications for original registration and title, or *Health & Safety Code §§ 18098-18106*, relating to amendments, transfers, and transactions [*Health & Safety Code § 18005.8*].

A lien created under *Health & Safety Code § 18080.9* (lien of mobilehome park owner for unpaid rent) is not a security interest for purposes of the definition of "legal owner" [*Health & Safety Code § 18005.8*].

[6] Registered Owner

The term "registered owner" as used in the Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*] means a person registered by the Department of Housing and Community Development as the owner of a manufactured home, mobilehome, commercial coach, or truck camper [*Health & Safety Code § 18009.5*].

[7] Mobilehome Owner

The term "mobilehome owner" or "mobilehome owners" as used in the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*] means the occupant of the manufactured home or mobilehome, or the registered owner of the manufactured home or mobilehome, if different from the occupant [*Health & Safety Code § 18400.4*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingTax LawState & Local TaxesReal Property TaxMobilehomes & Mobilehome Parks

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§ 369.12 Actions and Proceedings

[1] Availability of Actions, Generally

Using trailers as permanent residences instead of alternatives to hotels and motels did not begin to gain wide acceptance until the 1950's, when manufacturers started producing mobilehomes. The concept of a mobilehome was introduced in California law in 1961 when statutes governing trailer coaches and auto trailer camps were replaced with statutes governing mobilehomes and mobilehome parks [*see* 1955 Stats., ch. 91, § 2; 1961 Stats., ch. 2176, § 2]. The things that formerly were called trailers are now called recreational vehicles [*see Health & Safety Code § 18010*].

Many of the possible kinds of actions and proceedings involving mobilehomes and mobilehome parks are not fully represented in reported California cases. These include the following:

- Actions for damages for personal injury or wrongful death;
- Actions for damages and/or restitution based on breach of warranty;
- Actions for damages based on products liability; and
- Actions for abatement of nuisance, and administrative mandate proceedings for review of regulatory law enforcement by responsible agencies.

This chapter contains a form of complaint for damages based on breach of the warranty prescribed by the mobilehome warranties law [*Civ. Code §§ 1797-1797.7*; *see § 369.140*]. As for the other actions and proceedings mentioned, the fact that a mobilehome or mobilehome park is involved would not make the action or proceeding specially different from one involving any other item of personal property or type of real property. Forms for general use illustrated in other chapters in this set [*see § 369.02*] may be used.

[2] Manufactured Home Recovery Fund

The Manufactured Home Recovery Fund provides for reimbursement of the actual and direct loss of persons who purchased or sold a manufactured home and obtained a final judgment against a manufactured home manufacturer or dealer, or a salesperson or other seller or purchaser, or an administrative determination against a bankrupt person or entity on the grounds of failure to honor a warranty, fraud, willful misrepresentation, conversion, willful violation of any provision of the Manufactured Housing Act [*Health & Safety Code § 18000 et seq.*], or regulations adopted pursuant to the Act, or the provisions governing mobilehome warranties set forth in *Civ. Code § 1797 et seq.* [*Health & Safety Code § 18070.3(a), (b)*]. The total claim may not exceed the unreimbursed actual loss, and the total payment relating to a single transaction may not exceed $75,000 [*Health & Safety Code § 18070.3(c)*].

Before making a claim, the claimant must have diligently pursued collection efforts against all assets of the judgment debtor, established that he or she is judgment proof, or have provided evidence that the costs of collection are likely to be in excess of the amounts that could be collected. This evidence may include (1) a description of the searches and inquiries conducted by or on behalf of the claimant with regard to the judgment debtor's assets liable to be sold or applied to the judgment's satisfaction, (2) an itemized valuation of the assets discovered, and (3) the results of actions by the claimant to have assets applied to satisfy the judgment [*Health & Safety Code § 18070.3(d)(1)*]. If the claim is not based on a final judgment, the claimant must present evidence that either (1) the licensee is or has been the subject of bankruptcy proceedings and has assigned to the department any interest in the actual and direct loss in the amount that the claimant recovers from the fund, or (2) the claim is consistent with the Act and the claimant had presented evidence that the debtor is judgment proof or that the costs of collection are likely to be in excess of the amounts that could be collected [*Health & Safety Code § 18070.3(d)(2)*]. If the claim is based on a violation of a provision within a warranty [*see Civ. Code § 1797 et seq.*], the claimant must provide evidence that he or she has been denied full compensation or correction under the warranty [*Health & Safety Code § 18070.3(d)(3)*].

A claim based on a final judgment must be filed with the Department of Housing and Community Development within two years of the date of the judgment [*Health & Safety Code § 18070.3(e)(1)*]. If the claim is not based on a final judgment, the claim must be filed within two years from the termination of bankruptcy proceedings or two years from the date of sale [*see Health & Safety Code § 18070.2(a)* (determining sale date)], or within two years of discovery of the violations causing actual and direct losses pursuant to the Act, but no longer than five years after the date of sale, whichever event occurs later [*Health & Safety Code § 18070.3(e)(2)*].

[3] Negligence Actions

Laws governing mobilehomes and mobilehome parks [*see § 369.10*] establish numerous standards and permit requirements for manufacturing, selling, renting, installing, using, and occupying mobilehomes, for locating, constructing, and operating mobilehome parks, and for locating, constructing, and using mobilehome accessory buildings and structures, and for moving large mobilehomes on streets and highways.

These standards and permit requirements are significant in any case involving negligence, because the failure of a person to exercise due care is presumed if the following requirements are met [*Evid. Code § 669(a)*]:

- The person violated a statute, ordinance, or regulation of a public entity;
- The violation proximately caused death or injury to person or property;
- The death or injury resulted from an occurrence the nature of which the statute, ordinance, or regulation was designed to prevent; and
- The person suffering the death or the injury to person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

This presumption affects the burden of proof [*Evid. Code § 660*]. It is a rebuttable presumption [*Evid. Code § 601*; *see Evid. Code § 669(b)*, discussed *below*]. The effect of the presumption is to impose on the party against whom it operates--the person who violated the statute, ordinance, or regulation--the burden of proof as to the nonexistence of the presumed fact (that is, the burden of proving no failure to exercise due care) [*Evid. Code § 606*].

The presumption of failure to exercise due care may be rebutted (that is, the burden of proving no failure to exercise due care insofar as the violation is concerned may be carried) by proof that the person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law [*Evid. Code § 669(b)(1)*]. (There is also a prescribed method of rebuttal when the violator is a child--that is, a minor--which is not applicable here [*see Evid. Code § 669(b)(2)*].)

If the plaintiff proves the four facts listed in *Evid. Code § 669(a)*, *above*, the defendant's negligence is established, as a matter of law, until and unless the defendant makes the proof required by *Evid. Code § 669(b)(1)*, *above*. If the defendant does make that proof, the effect is not exculpation of the defendant but restoration of the plaintiff's original burden to prove that the defendant was negligent. This must be done, if at all, in the usual way of persuading the trier of fact, on evidence, that the defendant departed from the "reasonable person" standard.

Compliance with a prescribed standard is not a defense in a negligence action. The defendant may have complied with an applicable standard but still may have departed from the conduct of a reasonable person in the circumstances. Therefore, pleading compliance with a standard, in the form of an affirmative defense, would be ineffective and improper. Evidence of compliance is properly admissible in support of a denial of negligence (that is, to rebut the plaintiff's case-in-chief), since the trier of fact may consider to what extent compliance with an applicable standard is the measure of the conduct of a reasonable person in the circumstances.

Accordingly, some statutes prescribing standards expressly state that compliance does not relieve a person from liability at common law or under statute (for negligence) [*see, e.g., 42 U.S.C. § 5401 et seq.* (National Manufactured Home Construction and Safety Standards Act of 1974); *42 U.S.C. § 5409(c)*; *15 U.S.C. § 2051 et seq.* (Consumer Product Safety Act of 1972); *15 U.S.C. § 2074(a)*].

For detailed coverage of negligence actions, including numerous complaints setting forth causes of action in negligence, see Ch. 380, *Negligence* .

[4] Products Liability Actions

The theory of products liability is that the distributor of a thing in the marketplace is liable (without any consideration of negligence or the conduct of a reasonable person in the circumstances) if the thing is dangerously defective--that is, designed and/or made so as to be dangerous to human beings--and the defect proximately causes injury or death.

In a products liability action the principal issue is whether the thing in question was dangerously defective. If the thing is the subject of statutes or regulations prescribing standards of quality and workmanship, such as a mobilehome [*see § 369.20*], those standards define conditions that are dangerously defective regarding aspects of the thing that are covered by the standard. For example, a mobilehome electrical wiring system that does not meet or exceed applicable standards [*see 24 C.F.R. §§ 3280.801-3280.816*] will probably be considered "dangerously defective" if the condition of the system proximately causes injury or death [*see* Frumer & Friedman, Products Liability, § 16A[4][i] (Matthew Bender)].

For detailed coverage of products liability generally, see Ch. 460, *Products Liability* .

[5] Breach of Warranty Actions

[a] Types of Warranties

Standards of quality and workmanship for mobilehomes prescribed by law [*see § 369.20*] may define the scope of a warranty by the manufacturer or seller, other than express warranties made at the option of the manufacturer or seller. There are three types of warranties that may cover a mobilehome:

- The implied warranty of mechantability [*see* [b], *below*];
- The implied warranty of fitness for purpose [*see* [c], *below*]; and
- Certain statutory warranties [*see* [d], *below*].

[b] Implied Warranty of Merchantability

Unless excluded or modified pursuant to *Com. Code § 2316*, a warranty that the mobilehome is "merchantable" is implied in a contract of sale if the seller is a merchant with regard to mobilehomes [*Com. Code § 2314(1)*]. The minimum tests of merchantability are listed in *Com. Code § 2314(2)*. By inference from some of the tests listed--pass without objection in the trade under the contract description" and "fit for the ordinary purposes for which such goods are used" for instance--as well as by deduction from the fact that nonconforming mobilehomes are legally unsaleable, it is clear that a mobilehome not meeting or exceeding prescribed standards is not "merchantable." A manufacturer sells as a "merchant" [*see Com. Code § 2104(1)*]; therefore, this warranty may exist in a sale by a manufacturer to a dealer. It also may exist in a sale by a dealer, whether the buyer is another dealer or a consumer. The warranty does not exist when the seller is not a merchant with regard to mobilehomes.

[c] Implied Warranty of Fitness for Purpose

When the seller at the time of contracting has reason to know any particular purpose for which the mobilehome is required and that the buyer is relying on the seller's skill or judgment to select or furnish a suitable mobilehome, there is unless excluded or modified under *Com. Code § 2316* an implied warranty that the mobilehome must be fit for such purpose [*see Com. Code § 2315*]. "Fitness" for the buyer's purpose may be measured by reference to standards of quality and workmanship prescribed by law, in the same way that a "dangerous defect" may be discovered for purposes of products liability. That is, a mobilehome not meeting or exceeding prescribed standards is not lawfully saleable [*see generally §§ 369.30 -369.34*], and so is not "fit" for the purpose of a buyer who buys for resale (such as, a dealer). Also a mobilehome not meeting or exceeding prescribed standards is not lawfully useable as a place of habitation [*see § 369.39*], hence it is not "fit" for the purpose of a buyer who intends to live in it (such as, a "consumer").

[d] Statutory Warranty

Manufacturers and dealers of mobilehomes [*see § 369.11[1][c]*] are required by law to give buyers a one-year warranty that the mobilehome is "free from any substantial defects in materials or workmanship" [*Civ. Code § 1797.3(a)*; *see § 369.33[4]*]. There is no applicable special definition of "substantial defects." Probably a mobilehome not meeting or exceeding prescribed standards would not conform to this warranty. On the other hand, since only minimum standards are prescribed, a mobilehome conforming to those standards is not necessarily free from substantial defects.

In retail sales of mobilehomes--that is, sales by dealers--to individuals who buy primarily for personal, family, or household purposes, the foregoing warranties of merchantability and fitness for purpose arise under, and the buyer's rights are governed by, the Song-Beverly Consumer Warranty Act [*Civ. Code §§ 1790-1795.7*]. The warranties under this Act are the same as those that arise under the Commercial Code [*see Civ. Code §§ 1791.1, 1792-1792.2*], although the method of exclusion or modification is different [*see Civ. Code § 1792.4*], and the buyer has the same rights and remedies under the Act as under the Commercial Code [*see Civ. Code § 1791.1(d)*; *Com. Code §§ 2601-2616* (breach, repudiation, and excuse), *2701-2725* (remedies)]. In addition, a prevailing buyer is entitled to recover reasonable costs

and attorney's fees and may recover a civil penalty equal to two times actual damages for willful breach of an express warranty [*Civ. Code § 1794(c)* (penalty), (d) (costs and attorney's fees); *see Troensegaard v. Silvercrest Industries, Inc. (1985) 175 Cal. App. 3d 218, 221, 226-228, 220 Cal. Rptr. 712* (plaintiff may not recover both civil penalty under *Civ. Code § 1794(c)* and punitive damages under *Civ. Code § 3294*)]. Moreover, under the Song-Beverly Consumer Warranty Act the implied warranty of merchantability also goes from the manufacturer directly to the retail buyer notwithstanding intermediate sales from manufacturer to dealer and/or from wholesaler to retailer [*see Civ. Code § 1792*].

For discussions of, and forms for use in, actions based on breach of warranty under the Commercial Code and the Song-Beverly Consumer Warranty Act, see Ch. 500, *Sales: Sales Under the Commercial Code* . For a form of complaint for damages based on breach of the statutory warranty against substantial defects, see *§ 369.140*.

It should be noted that motorhomes meeting the definition of a "recreational vehicle" are specifically excluded from coverage by the Manufactured Housing Act and the Mobilehome Parks Act [*see Health & Safety Code §§ 18008, 18010* (Manufactured Housing Act), *18211*, 18285.5 (Mobilehome Parks Act); *see also § 369.11[1][c]*]. Nevertheless, the so-called "Lemon Law" relating to manufacturers' obligations to conform new motor vehicles to express warranties [*see Civ. Code § 1793.22*] does apply to the chassis, chassis cab, and that portion of a motorhome devoted to its propulsion, but not to any portion designed, used, or maintained primarily for human habitation [*Civ. Code § 1793.22(e)(2)*; *see Civ. Code § 1793.22(e)(3)* (defining "motorhome")]. The Lemon Law is discussed in Ch. 91, *Automobiles: Actions Involving Defects and Repairs* , and in Ch. 502, *Sales: Warranties* .

[6] Attorney's Fees and Costs

In any action arising out of the provisions of the Mobilehome Residency Law [*Civ. Code § 798 et seq.*], the prevailing party is entitled to reasonable attorney's fees and costs. A party is a "prevailing party" in this context if the judgment is rendered in his or her favor or when the litigation is dismissed in his or her favor before or during the trial, unless the parties otherwise agree in the settlement or compromise [*Civ. Code § 798.85*].

Attorney's fees and costs are recoverable by a prevailing buyer in actions under the Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*; *see Civ. Code § 1794(b)*], and *Health & Safety Code § 18035(m)* imposing an escrow requirement for dealer sales of mobilehomes [*see § 369.33[2]*].

[7] Penalties and Assured Minimum Damages

In the event a homeowner or former homeowner of a mobilehome park [*see § 369.11[2][b]*] is the prevailing party in a civil action, including a small claims court action, against the owner of a mobilehome park to enforce his or her rights under the Mobilehome Residency Law [*Civ. Code § 798 et seq.*], the homeowner, in addition to damages afforded by law, may, in the court's discretion, be awarded an amount not to exceed $2,000 for each willful violation by the management [*Civ. Code § 798.86(a)*]. The term "willful" refers to intentional conduct undertaken with knowledge or consciousness of its probable results. For purposes of imposing a penalty under *§ 798.86*, "willful" conduct does not require a purpose or specific intent to bring about a result, but does require more than negligence or accidental conduct [*Patarak v. Williams (2001) 91 Cal. App. 4th 826, 830, 111 Cal. Rptr. 2d 381* (penalty properly imposed on finding that landlord willfully failed to maintain septic system with knowledge or consciousness that it would probably fail with malodorous and unsanitary consequences)].

A prevailing homeowner may be awarded either the statutory penalty under *Civ. Code § 798.86* or punitive damages under *Civ. Code § 3294* [*Civ. Code § 798.86(b)*]. *Civ. Code § 798.86* was amended by 2003 Stats., ch. 98 (AB 693) to effectively abrogate the holding in *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates (2001) 94 Cal. App. 4th 890, 114 Cal. Rptr. 2d 708* that punitive damages could not be recovered in addition to damages for willful violations under *Civ. Code § 798.86*.

A penalty payable to the injured party or assured minimum damages may also be recoverable in actions under the Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*; *see Civ. Code § 1780(a)(1)* (minimum total award of damages in class action as not to be less than $1,000)], the Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*; *see Civ. Code § 1794* (civil penalty equal to two times actual damages, plus reasonable costs and attorney's fees, for willful violations)], and *Health & Safety Code § 18035(i)* imposing an escrow requirement for dealer sales of mobilehomes [*see § 369.33[2]*].

A civil penalty may be exacted for violation of *42 U.S.C. § 5409* (part of the National Manufactured Home Construction and Safety Standards Act of 1974 [*42 U.S.C. § 5401 et seq.*]) [*Health & Safety Code § 18021(a)*] or for violation of the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*; *Health & Safety Code § 18700*].

[8] Notice of Intent to Commence Action Against Mobilehome Park

No action based on the alleged failure of the management of a mobilehome park to maintain the physical improvements in the common facilities in good working order or condition, or alleged reduction in service, may be commenced by a homeowner unless the management has been given at least 30 days prior notice of the intention to commence the action [*Civ. Code § 798.84(a)*].

The notice must be in writing, signed by the homeowner or homeowners making the allegations, and must notify the management of the basis of the claim, the specific allegations, and the remedies requested. A notice by one homeowner is deemed to be sufficient notice of the specific allegation to the management of the park by all of the homeowners in the park [*Civ. Code § 798.84(b)*]. For a form on notice of intention to commence an action by homeowners, see *§ 369.116*.

Management is deemed to be on notice of an alleged failure to maintain the physical improvements in the common facilities in good working order or condition or of an alleged reduction in services on substantial compliance by the homeowner or homeowners with the above provisions, or when management has been notified of the alleged failure to maintain or the alleged reduction in service by a state or local agency [*Civ. Code § 798.84(d)*].

If the notice is served within 30 days of the expiration of the applicable statute of limitations, the time for the commencement of the action is extended 30 days from the service of the notice [*Civ. Code § 798.84(e)*]. The notice provision does not apply to actions for personal injury or wrongful death [*Civ. Code § 798.84(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksMaintenance & UseReal Property LawMobilehomes & Mobilehome ParksPurchase & SaleTortsProcedureCommencement & ProsecutionSurvivalParticular Causes of Action

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[Reserved]

§§ 369.13[Reserved]

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32-369 California Forms of Pleading and Practice--Annotated § 369.20

§ 369.20 Standards for Manufacturing Mobilehomes

[1] Prescribed Standards

The Legislature has directed the Department of Housing and Community Development to prescribe standards for materials and methods used in manufacturing mobilehomes [*see § 369.11[1][c]*] for sale, rent, or lease in California, for the following purposes:

- To protect the health and safety of the occupants and the public [*Health & Safety Code § 18028*];

- For the protection of life and property against fire in mobilehomes [*Health & Safety Code § 18029.5*]; and

- To protect the health and safety of the people of California from dangers inherent in the use of substandard and unsafe plumbing, heat-producing, and electrical equipment and installations in mobilehomes [*Health & Safety Code § 18025*].

Moreover, the Legislature has mandated that all mobilehomes manufactured on or after September 22, 1976, must comply with the National Manufactured Home Construction and Safety Standards Act of 1974 [*42 U.S.C. § 5401 et seq.*; *see* 1976 Stats., ch. 1194]. Accordingly, the Department has provided as follows [*25 Cal. Code Reg. § 4050*]:

- Federal standards [*see* 24 C.F.R. Part 3280] relating to construction and fire safety apply to all mobilehomes manufactured on or after June 15, 1976, as well as to those bearing or required to bear a Department of Housing and Urban Development (HUD) label [*see § 369.21[7]*].

- Certain standards of the National Fire Protection Association and the American National Standards Institute relating to construction and fire safety apply to all mobilehomes manufactured between September 15, 1971, and June 14, 1976, and sold or offered for sale, rent, or lease in California.

- Federal standards relating to construction and fire safety are applicable to the alteration or conversion of any construction or fire safety equipment or installations in any mobilehome manufactured after September 15, 1971, bearing or required to bear a HUD insignia [*see § 369.21*] or HUD label.

- Federal standards relating to construction and fire safety are applicable to any addition to a mobilehome manufactured after September 1, 1958, bearing or required to bear a HUD insignia or HUD label.

- Federal standards relating to plumbing, heating, cooling, fuel-burning, and electrical equipment and installations apply to any mobilehome manufactured after September 1, 1958, bearing or required to bear a HUD insignia or HUD label.

- Federal standards relating to plumbing, heating, cooling, fuel-burning, and electrical equipment and installations are applicable to the alteration, conversion, or addition of any such equipment or installations in any mobilehome manufactured after September 1, 1958, bearing or required to bear a HUD insignia or HUD label.

[2] Alternatives to Prescribed Standards

Materials, appliances, installations, devices, arrangements, and methods of construction (manufacture) not specifically prescribed by the Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*] and implementing regulations [*25 Cal. Code Reg. § 4000 et seq.*] may be used if the Department of Housing and Community Development determines that they are equivalent in quality, strength, effectiveness, fire resistance, durability, safety, and protection of life and health to those which are prescribed [*Health & Safety Code § 18016(a), (b)*].

[3] Enforcement Powers

The Department of Housing and Community Development may conduct such inspections and investigations as may be necessary to secure enforcement of the provisions of the Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*] and implementing regulations [*25 Cal. Code Reg. § 4000 et seq.*]. For the purposes of enforcement, persons duly designated by the director of the Department, on presenting appropriate credentials to the owner, operator, or agent in charge, may (1) enter, at any reasonable time and without advance notice, any factory, warehouse, sales lot, or establishment in which mobilehomes are manufactured, stored, held for sale, sold, or offered for sale, rent, or lease, and (2) inspect, at any reasonable time and within reasonable limits and in a reasonable manner, any factory, warehouse, sales lot, or establishment, and may inspect such books, papers, records, and documents as are necessary to ensure compliance with the provisions of the mobilehomes law [*Health & Safety Code § 18025.5(d)*].

Any officer, agent, or employee of the Department (1) is authorized to enter any premises where mobilehomes are manufactured, sold, or offered for sale, rent, or lease, (2) may examine any records, and (3) may inspect any mobilehomes, equipment, or installations to ensure compliance with the provisions of 25 Cal. Code Reg. § 3100 et seq. and 24 C.F.R. Part 3280. When it becomes necessary to determine compliance, he or she may require that a portion or portions of the mobilehome be removed or exposed in order that an inspection or required tests be made [*25 Cal. Code Reg. § 4005*].

[4] Complaint of Violation

Any owner of a mobilehome bearing or required to bear a Department of Housing and Community Development insignia [*see § 369.21*] or HUD label [*see § 369.21[7]*] may file a written complaint with the Department setting forth the items that the owner believes do not comply with the (applicable) provisions of *25 Cal. Code Reg. § 4000 et seq.* [*25 Cal. Code Reg. § 4013.5*]. The investigation of the complaint should be conducted with the aim of correcting the

violations [*see § 369.110[2], [3]*].

The provisions of *24 C.F.R. § 3282.401 et seq.* set forth an elaborate procedure to deal with consumer's complaints about those mobilehomes which are subject to the provisions of federal law [*see § 369.21[6]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral Overview

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§ 369.21 Insignia of Approval

[1] General Requirement

The mobilehomes law provides that all mobilehomes [*see § 369.11[1][c]*] which are sold, offered for sale, rented, or leased within this state must bear an insignia of approval issued by the Department of Housing and Community Development to indicate compliance with the regulations (prescribing standards) of the Commission of Housing and Community Development (prescribing standards), adopted pursuant to the Manufactured Housing Act of 1980, which were in effect on the date of manufacture of the mobilehome [*Health & Safety Code § 18026*]. This requirement does not, however, apply to mobilehomes manufactured on or after June 15, 1976, which bear HUD labels [*see* [7], *below*]. Violation is a misdemeanor [*Health & Safety Code § 18020.5(a)*].

[2] Manufacture Before September 1, 1958

Mobilehomes manufactured in California before September 1, 1958, were not subject to any standards prescribed by law. Regulations prescribing standards and for an insignia of approval were first required by 1957 Stats., ch. 2093, applicable to mobilehomes manufactured after July 1, 1958. This date was later changed to September 1, 1958 [1958 Stats., 1st Ex Sess, Ch. 89].

[3] Manufacture From September 1, 1958, to June 15, 1976

Any person selling, offering for sale, renting, or leasing any mobilehome manufactured between September 2, 1958, and June 15, 1976, must obtain an insignia of approval for the mobilehome from the Department of Housing and Community Development before selling, offering for sale, renting, or leasing the mobilehome [*25 Cal. Code Reg. § 4034.5(a)*; *see* [5][b], *below*].

[4] Manufacture After June 15, 1976

Mobilehomes manufactured on and after June 15, 1976, bearing HUD labels [*see* [7], *below*] are not required to bear Department insignia of approval [*25 Cal. Code Reg. § 4033(a)(4)*].

[5] Inspection

[a] Requests for Inspection

Any person manufacturing, owning, selling, offering for sale, renting, leasing, altering, or converting any mobilehome may request that the Department of Housing and Community Development make an inspection of the mobilehome for approval pursuant to 25 Cal. Code Reg. § 3100 et seq. [*25 Cal. Code Reg. § 4011(a)*; *see 25 Cal. Code Reg. § 4011(b)-(i)* (procedure)].

Any person selling, offering for sale, renting, leasing, altering, or converting any mobilehome manufactured after September 1, 1958, must request an inspection by the Department in any of the following circumstances [*25 Cal. Code Reg. § 4010*]:

- If the mobilehome does not bear a Department insignia or HUD label [*see* [7], *below*];

- When the mobilehome bearing or required to bear a Department insignia or HUD label is to be altered or converted; or

- When a notice requiring corrections [*see* [c], *below*] has been given and a reinspection is necessary to determine compliance.

[b] Issuance of Insignia of Approval

If, after a requested or required inspection under *25 Cal. Code Reg. § 4010* or *4011* [*see* [a], *above*], the mobilehome inspected meets the requirements of *25 Cal. Code Reg. § 4000 et seq.* [*see 25 Cal. Code Reg. §§ 4050-4070* (mobilehomes)] and the applicant submits insignia fees pursuant to *25 Cal. Code Reg. § 4044*, an insignia of approval must be issued for the mobilehome [*25 Cal. Code Reg. § 4012*].

[c] Notice of Violations

When an inspection reveals that a mobilehome bearing or required to bear a Department insignia is in violation of any of the provisions of *25 Cal. Code Reg. § 4000 et seq.*, the Department must serve on the owner, person responsible for violation, or his or her agents, a notice of violations setting forth in what regard the provisions of *25 Cal. Code Reg. § 3000 et seq.* have been violated. The Department may also post the mobilehome with a Prohibited Sales Notice. Violations must be corrected within 20 days or such other period of time as may be allowed by the Department, and an inspection must be requested by the person served with the notice of violations (pursuant to *25 Cal. Code Reg. § 4010*). Should the violations not be corrected within the allotted time, the Department must institute legal and/or administrative actions as necessary to secure compliance and reappropriate the Department's insignia [*25 Cal. Code Reg. § 4013*].

Any person served with a notice of violations must, within 20 days of receipt, notify the Department in writing of the action taken to correct the violations, and may file a request for a hearing pursuant to *25 Cal. Code Reg. § 4045* [*see § 369.130*]. No person served with a notice of violations may move or cause to be moved the mobilehome which is in violation until the Department has been furnished with written notification of the mobilehome's destination and disposition. No person may remove or cause to be removed a Prohibited Sales Notice until authorized to do so by the Department [*25 Cal. Code Reg. § 4013*].

[d] Removal for Violation

In the event that a mobilehome bearing a Department insignia of approval is found in violation of *25 Cal. Code Reg. § 3000 et seq.* and a notice of violations has been served pursuant to *25 Cal. Code Reg. § 4013* [*see* [c], *above*] or *25 Cal. Code Reg. § 4013.5* [*see § 369.20[4]*], the Department may remove the insignia. The Department may not issue a new

insignia until the following requirements have been satisfied [*25 Cal. Code Reg. § 4036*]:

- Corrections have been made;
- An inspection has been requested in accordance with *25 Cal. Code Reg. § 4010* [*see* [a], *above*];
- Inspection and insignia fees have been paid in accordance with *25 Cal. Code Reg. § 4044*; and
- The mobilehome has been inspected and found in compliance with applicable regulations.

[6] Federal Standards Applicable After September 22, 1976

Manufacturers of mobilehomes as defined in the National Manufacturer Home Construction and Safety Standards Act of 1974 [*42 U.S.C. § 5401 et seq.*; *see § 369.11[1][b]*] are governed by the Act and implementing regulations [24 C.F.R. Parts 3280, 3282]. California manufacturers of mobilehomes as defined in the Mobilehomes-Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*; *see § 369.11[1][c]*], excluding mobilehomes within the federal definition, are governed by the state law and implementing regulations [*25 Cal. Code Reg. § 4000 et seq.*]. Basically, state law regulates manufacturers of mobilehomes that are less than eight body feet wide or less than 32 body feet long but otherwise would be within the federal definition.

State regulation is actually negligible, however. In 1976 the Legislature amended certain provisions of former *Health & Safety Code §§ 18055-18064* [*now see Health & Safety Code §§ 18025-18032*] by adding the following sentence: "All mobilehomes"--meaning such mobilehomes as would be subject to state regulation--"manufactured on or after [September 22, 1976,] the effective date of the amendments to this section enacted by the Statutes of 1976 shall comply with the National Manufacturer Home Construction and Safety Standards Act of 1974 (*42 U.S.C. § 5401 et seq.*)" [1976 Stats., ch. 1194]. The language "shall comply with [the federal law]" is a vague expression of legislative intent but means, at least, that mobilehomes subject to state regulation must be manufactured to meet or exceed federally prescribed standards [24 C.F.R. Part 3280]. Consequently, the Department of Housing and Community Development has repealed its regulations prescribing standards and now provides simply that federal standards apply [*see 25 Cal. Code Reg. §§ 4050-4070*].

The Department of Housing and Community Development appears to adopt the view that the Legislature's intent, although not clearly stated, is to apply federal procedural and enforcement regulations to the manufacture of state-regulated mobilehomes, since the Department has adopted regulations applicable to manufacturers of "mobilehomes subject to Title VI (24 C.F.R.) requirements" (the phrasing varies slightly in some regulations). These regulations apply to mobilehomes subject to the National Mobile Home Construction and Safety Act of 1974, which was enacted as Title VI of the Housing and Community Development Act of 1974 [Public Law 93-383], and implementing regulations, which are published in Title 24 of the Code of Federal Regulations. In turn, these implementing regulations of the federal Act generally require compliance with federal procedural and enforcement regulations [24 C.F.R. Part 3282].

Therefore, it appears that California manufacturers of mobilehomes that do not fit the federal definition of mobilehome are nevertheless governed by the provisions of the federal law, made applicable by state statute and regulations of the Department of Housing and Community Development.

[7] HUD Label

Manufacturers are required to affix labels to their mobilehomes certifying compliance with federally prescribed standards [*24 C.F.R. §§ 3282.205, 3282.362*; *25 Cal. Code Reg. §§ 4009(b), 4031(e), 4032(f), 4034.3*]. The label is referred to in state regulations as a "HUD label" (because the federal Department of Housing and Urban Development is

charged with enforcement of the federal law) or a "Title VI (24 C.F.R.) label." A dealer may not lawfully sell a mobilehome that is required to bear, but does not bear, a HUD label [*see § 369.33*].

HUD labels are supplied by enforcement agencies, including the state Department of Housing and Community Development. Manufacturers get small supplies of labels at intervals of two to four weeks. Labels may be withheld, and labels in the manufacturer's hands may be confiscated, if the enforcement agency finds violations of federally prescribed standards in the manufacturing process [*see 24 C.F.R. § 3282.362*]. Since obtaining labels for its mobilehomes is a vital part of a manufacturer's business, the manufacturer must take immediate steps to reverse an agency's decision to withhold or confiscate labels as provided in federal procedural and enforcement regulations [*see 24 C.F.R. §§ 3282.151-3282.156*; *25 Cal. Code Reg. § 4046.7*; *see also § 369.22*].

[8] State Label

A new mobilehome [*see § 369.11[1][c]*] manufactured on or after January 1, 1977, which is required to be moved under a permit [*see § 369.40*] and which is displayed for retail sale in California must bear a manufacturer's label stating all of the following [*Health & Safety Code § 18032(a)*]:

- The make, model, and serial or identification number of the mobilehome;
- The final assembly plant;
- The name and location of the dealer to whom the mobilehome was delivered; and
- The manufacturer's suggested retail price, showing the base price, the price of extra construction features and materials, and whether the price includes the towbar, wheels, wheel hubs, and axles.

The retail purchaser may remove this label, but removal or alteration of it by a dealer is a misdemeanor [*Health & Safety Code § 18032(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksInstallation & TransportationReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale

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§ 369.22 Administrative Proceedings

[1] Application of Procedural Regulations

Administrative proceedings involving manufacturers of mobilehomes and agencies participating in enforcement of standards are governed by *24 C.F.R. §§ 3282.151-3282.156* [*see 25 Cal. Code Reg. § 4046.7*]. Those procedural regulations apply in numerous specified situations [*see 24 C.F.R. § 3282.151*], including the following:

- Whenever the Secretary of Housing and Urban Development contemplates injunctive action under *42 U.S.C. § 5410(a)*;

- Whenever the secretary contemplates making an administrative determination of imminent safety hazard, serious defect, or noncompliance under *42 U.S.C. § 5414(e)*;

- Whenever there is a question as to who should bear responsibility for correction under *42 U.S.C. § 5414(g)*;

- When a manufacturer disagrees with a determination of a Design Approval Primary Inspection Agency (DAPIA)--an enforcement agency; the state Department of Housing and Community Development is one of the DAPIAs operating in California--under *24 C.F.R. § 3282.361* that a mobilehome design does not conform to applicable standards or that a quality assurance manual (a manufacturer's plan for quality control, which must be approved) is not adequate; and

- When a manufacturer disagrees with a decision of a Production Inspection Primary Inspection Agency (PIPIA)--another enforcement agency; the state Department of Housing and Community Development is also an PIPIA in California--to red tag a mobilehome, that is, to affix a notice that it contains an imminent safety hazard or otherwise does not conform to standards, or a decision not to provide HUD labels for mobilehomes under *24 C.F.R. § 3282.362* [*see § 369.21[7]*] when the PIPIA believes the mobilehome does not conform to standards [*24 C.F.R. § 3282.151(a), (b)*].

[2] DAPIAs and PIPIAs in Addition to Department of Housing and Community Development in California

There may be DAPIAs and PIPIAs in addition to the Department of Housing and Community Development in California. When another California DAPIA determines that a mobilehome design does conform to applicable standards or a quality assurance manual is adequate, or when another California PIPIA decides not to red tag a mobilehome or decides to provide HUD labels because the PIPIA believes the mobilehome(s) in question do conform to applicable standards, the Department of Housing and Community Development in its capacity as the State Administrative Agency (SAA) under the federal law may take the opposite position and obtain resolution of the dispute pursuant to the procedures provided for in *24 C.F.R. §§ 3282.151-3282.156* [*24 C.F.R. § 3282.151(b)*]. Those procedural regulations also apply to hearings held by the Department of Housing and Community Development in its capacity as the California SAA [*24 C.F.R. § 3282.151(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & Development

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[Reserved]

§§ 369.23[Reserved]

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32-369 California Forms of Pleading and Practice--Annotated § 369.30

§ 369.30 Mobilehomes Considered "Goods" for Purposes of Sale

Mobilehomes that are not affixed to land so as to become real property [*see § 369.42[1]*] are goods the sale of which would be governed by Division 2 (Sales) of the Commercial Code [*Com. Code § 2101 et seq.*; *see Com. Code § 2105* (definition of "goods")]. In sales that qualify as consumer transactions (purchase by an individual primarily for personal, family, or household purposes), such mobilehomes are also consumer goods subject to the Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*; *see Civ. Code § 1791* (definition of "consumer goods"); *see also Civ. Code § 1795.5* (applicability of Act to sales of used goods)]. However, the basic regulation of mobilehome sales by dealers [*see Health & Safety Code § 18002.6* (definition)] is set forth in *Health & Safety Code §§ 18035-18039.5* and is discussed in *§ 369.33*. The disclosure requirements applicable to the sale of residential real property also apply to the resale on or after January 1, 2000, of a manufactured home or a mobilehome, which manufactured home or mobilehome is classified as personal property intended for use as a residence [*Civ. Code § 1102(b)*; *see § 369.42*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & UseReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale

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32-369 California Forms of Pleading and Practice--Annotated § 369.31

§ 369.31 Sales in Mobilehome Parks

[1] Signs Displaying Sale

A mobilehome park [*see § 369.11[2]*] homeowner, heir, joint tenant, or personal representative of the estate who gains ownership of a mobilehome through the death of the owner of the mobilehome who was a homeowner at the time of his or her death may advertise the sale or exchange of his or her mobilehome [*see § 369.11[1][e]*] by displaying a sign in the window of the mobilehome, posted on the side of the mobilehome facing the street, or by a sign in front of the mobilehome facing the street, stating that the mobilehome is for sale or exchange. The homeowner may also display a sign indicating that the mobilehome is on display for an "open house," unless the park rules prohibit this type of display. The sign must state the name, address, and telephone number of the mobilehome's owner, or his or her agent, and the sign face may not exceed 24 inches in width and 36 inches in height [*Civ. Code § 798.70*]. Signs posted in front of a mobilehome may be of H-frame or A-frame design with the sign face perpendicular to, but not extending into, the street. Homeowners may attach to the sign or their mobilehome tubes or holders for leaflets that provide information on the mobilehome for sale or exchange [*Civ. Code § 798.70*].

[2] Management Must Obtain Owner's Authorization to Show Mobilehome

The mobilehome park management must not show or list for sale a mobilehome without first obtaining the owner's written authorization. The authorization must specify the terms and conditions regarding the showing or listing [*Civ. Code § 798.71(a)*]. Management may also require that the homeowner advise management in writing that his or her mobilehome is for sale. However, failure to comply with this requirement does not invalidate a transfer [*Civ. Code § 798.71(a)(2)*].

"Management" means the owner of the mobilehome park or an agent or representative authorized to act on the owner's behalf in connection with matters relating to a tenancy in the park [*Civ. Code § 798.2*].

[3] Management Restricted from Charging Fees

The management may not charge a homeowner, an heir, joint tenant, or personal representative of the estate who gains

ownership of a mobilehome through the death of an owner who owned the mobilehome at the time of his or her death, or the agent of any of them, a transfer or selling fee as a condition of a sale of his or her mobilehome in the park unless the management performs a service in the sale. The management may not perform any such service in connection with the sale unless so requested, in writing, by the homeowner or his or her agent [*Civ. Code § 798.72(a)*; *see People v. Mel Mack Co. (1975) 53 Cal. App. 3d 621, 126 Cal. Rptr. 505* (fact situation and construction of prior law leading to enactment of this section)]. Similarly, management may not charge a prospective homeowner or agent a fee as a condition of approval for residency in a park unless management performs a specific service for the sale. Management also may not impose a fee, other than for a credit check, for an interview of a prospective homeowner [*Civ. Code § 798.72(b)*].

A rent increase imposed on new tenants at the time of the sale or transfer of a mobilehome (excluding any transfer to a transferor's spouse, children, or parents) is *not* a prohibited fee within the meaning of *Civ. Code § 798.72* nor within the restrictive scope of the *Mel Mack* case cited above [*Vance v. Villa Park Mobilehome Estates (1995) 36 Cal. App. 4th 698, 707, 42 Cal. Rptr. 2d 723]* . A local rent control ordinance may, however, prohibit rent increases at the termination of a tenancy [*see Carson Harbor Village Ltd. v. City of Carson (9th Cir. 1994) 37 F.3d 468, 472-473]* .

[4] Management's Rights in Event of Sale, Including Requiring Removal of Mobilehome

The management may not require the removal of a mobilehome from the park in the event of its sale to a third party during the term of the homeowner's rental agreement or in the 60 days following the notice of termination of tenancy required by *Civ. Code § 798.55(b)(1)* [*Civ. Code § 798.73*; for discussion of the notice required by *Civ. Code § 798.55(b)*, see *§ 369.73[1]*]. However, in the event of a sale to a third party, to upgrade the quality of the park, the management may require that the mobilehome be removed from the park in the following circumstances [*Civ. Code § 798.73(a)-(d)*]:

- When it is not a mobilehome within the meaning of *Civ. Code § 798.3*;

- When the mobilehome is more than 20 years old, or more than 25 years old if manufactured after September 15, 1971, and is 20 feet wide or more and the mobilehome does not comply with the health and safety standards provided in *Health & Safety Code §§ 18550, 18552*, and *18605* and the regulations established thereunder;

- When the mobilehome is more than 17 years old, or more than 25 years old if manufactured after September 15, 1971, and is less than 20 feet wide and the mobilehome does not comply with the health and safety standards provided in *Health & Safety Code §§ 18550, 18552*, and *18605* and the regulations established thereunder; or

- When the mobilehome is in a significantly rundown condition or in disrepair, as determined by its general condition and its acceptability to the health and safety of the occupants and to the public, exclusive of its age.

Management may not require the removal of a mobilehome unless it has provided notice to the homeowner specifying the condition that permits removal [*Civ. Code § 798.73(e)*].

Management must use reasonable discretion in determining the general condition of the mobilehome and its accessory structures, and it also bears the burden of demonstrating that the mobilehome is in a significantly rundown condition or in disrepair. Management may not require repairs and improvements to the park space or property owned by the management, except for damage caused by the actions or negligence of the homeowner or the homeowner's agent [*Civ. Code § 798.73(d)*].

In the case of a sale or transfer of a mobilehome that will remain in the park, the park management may not require repairs or improvements to the park space or property owned by the management, except for damage caused by the actions or negligence of the homeowner or the homeowner's agent [*Civ. Code § 798.83*]. In addition, the park management may require repairs or improvements to the mobilehome, its appurtenances, or an accessory structure that is not owned and installed by the management, if the repair or improvement is based on or is required by a local ordinance or state statute or regulation relating to mobilehomes, or a rule or regulation of the mobilehome park that implements or enforces a local ordinance, state statute, or regulation relating to mobilehomes, and the repair or improvement relates to the exterior of the mobilehome, its appurtenances, or accessory structure not owned and installed by the management [*Civ. Code § 798.73.5(a)*]. The management must provide a homeowner with a written summary of required repairs and improvements no later than 10 business days following receipt of a request for this information made by the homeowner as part of the 60-day notice of termination of tenancy pursuant to *Civ. Code § 798.59* [*Civ. Code § 798.73.5(b)*]. The summary must include specific references to the park rules and regulations, local ordinances, or state statutes and regulations relating to mobilehomes on which the request for repair or improvement is based [*Civ. Code § 798.73.5(b)*].

The management may require the right of prior approval of a purchaser of mobilehome that will remain in the park and that the selling homeowner or his or her agent give notice of the sale to the management before the close of the sale. Approval may not be withheld if the purchaser has the financial ability to pay the rent and charges of the park unless the management reasonably determines that, based on the purchaser's prior tenancies, he or she will not comply with the rules and regulations of the park [*Civ. Code § 798.74(a)*].

In determining whether a purchaser has the financial ability to pay the rent and charges of the park, the management may not require the purchaser to submit copies of personal income tax returns to obtain approval for the residency in the park. Management may require, however, the purchaser to document the amount and source of his or her gross monthly income or means of financial support [*Civ. Code § 798.74(a)*].

Rental agreements entered into or renewed on and after January 1, 2006, may not include a clause, rule, regulation, or any other provision that grants management the right of first refusal to purchase a homeowner's mobilehome that is in the park and offered for sale to a third party [*Civ. Code § 798.19.5*]. However, this does not preclude a separate agreement for separate consideration granting the park owner or management a right of first refusal to purchase the homeowner's mobilehome [*Civ. Code § 798.19.5*].

[5] Management's Obligations in Event of Sale

On request of any prospective homeowner who proposes to purchase a mobilehome that will remain in the park, management must inform that person of the information management will require in order to determine if the person will be acceptable as a homeowner in the park. Within 15 business days of receiving all of the information requested from the prospective homeowner, the management must notify the seller and the prospective homeowner, in writing, of either acceptance or rejection of the application and the reason if rejected. During the 15-day period, the prospective homeowner must comply with any request by the management for a personal interview [*Civ. Code § 798.74(a)*]. If the approval of a purchaser is withheld for any reason other than those stated above, the management or owner may be held liable for all damages proximately resulting therefrom [*Civ. Code § 798.74(a)*].

Within two business days of receiving a request from a prospective homeowner for an application for residency for a specific space within a mobilehome park, if the management has been advised that the mobilehome occupying that space is for sale, the management must give the prospective homeowner a separate document in at least 12-point type entitled "INFORMATION FOR PROSPECTIVE HOMEOWNERS" that includes specified statements concerning home ownership in a mobilehome park [*Civ. Code § 798.74.5(a)*]. On request of the prospective homeowner, management must also provide a copy of park rules and regulations and a copy of the Mobilehome Residency Law [*Civ. Code § 798.74.5(b)*]. For a form setting forth the statutorily required information for prospective homeowners, see

California Legal Forms, Ch. 39, *Mobilehome Parks* (Matthew Bender).

If the management collects a fee or charge from a prospective purchaser of a mobilehome to obtain a financial report or credit rating, the full amount of the fee or charge must be credited toward payment of the first month's rent for that mobilehome purchaser. If, for whatever reason, the prospective purchaser is rejected by the management, the management must refund to the prospective purchaser the full amount of that fee or charge within 30 days from the date of rejection. If the prospective purchaser is approved by the management, but, for whatever reason, the prospective purchaser elects not to purchase the mobilehome, the management may retain the fee, or a portion thereof, to defray its administrative costs [*Civ. Code § 798.74(b)*].

[6] Management May Not Prohibit or Require Certain Acts

The management may not prohibit the listing or the sale of a mobilehome or a manufactured home within the park by the homeowner, an heir, joint tenant, or personal representative of the estate who gains ownership of a mobilehome through the death of the owner who owned the mobilehome at the time of his or her death, or an agent of any of those persons other than the management [*Civ. Code § 798.71(b)*]. The management also may not require the homeowner, an heir, joint tenant, or personal representative of the estate who gains ownership of a mobilehome through the death of the owner to authorize management or any other specified broker, dealer, or person to act as agent for sale as a condition of management's approval of the buyer or prospective homeowner for residency [*Civ. Code §§ 798.71(c), 798.81*].

Management may not require a homeowner who is replacing a mobilehome or manufactured home on a space in the park in which he or she resides to use a specific broker, dealer, or other person as an agent in the purchase of or installation of the replacement home [*Civ. Code § 798.71(d)*].

[7] Purchaser's Rights of Tenancy and Unlawful Occupancies

An escrow, sale, or transfer agreement involving a mobilehome located in a park at the time of the sale must contain a copy of either a fully executed rental agreement or a statement signed by the park's management and the prospective homeowner that the parties have agreed to the terms and conditions of a rental agreement [*Civ. Code § 798.75(a)*]. If the purchaser fails to execute the rental agreement, the purchaser has no rights of tenancy [*Civ. Code § 798.75(b)*]. If an occupant of a mobilehome has no rights of tenancy and is not otherwise entitled to occupy the mobilehome, the occupant is considered an unlawful occupant if, after a demand is made for surrender of the mobilehome park site, for a period of five days, the occupant refuses to surrender the site to the mobilehome park management. If the unlawful occupant fails to comply with the demand, the unlawful occupant is subject to unlawful detainer proceedings [*Civ. Code § 798.75(c)*]. The occupant of the mobilehome is not considered an unlawful occupant and is not subject to unlawful detainer proceedings if all of the following conditions are present [*Civ. Code § 798.75(d)*]:

- The occupant is the registered owner of the mobilehome;

- The management has determined that the occupant has the financial ability to pay the rent and charges of the park, will comply with the rules and regulations of the park based on the occupant's prior tenancies, and will comply with *Civ. Code §§ 798.70-798.83*; and

- The management failed or refused to offer the occupant a rental agreement.

[8] Written Disclosure Form

The management must provide a prospective homeowner with a completed written disclosure form concerning the park in the format required by *Civ. Code § 798.75.5(b)* at least three days before execution of either (1) a rental agreement or (2) a statement signed by the park management and the prospective homeowner that the parties have agreed to the terms

and conditions of the rental agreement. The management must update the information on the disclosure form annually, or, in the event of a material change in the condition of the mobilehome park, at the time of the material change in that condition [*Civ. Code § 798.75.5(a)*].

[9] Age Requirements for Purchase

The management may require that a prospective purchaser comply with any rule or regulation limiting residency based on age requirements for housing for older persons, provided that the rule or regulation complies with the federal Fair Housing Act, as amended by Public Law 104-76, and implementing regulations [*Civ. Code § 798.76*]. Under the Act, *42 U.S.C. §§ 3602(k)* and *3605* prohibit exclusion of families with children under 18 years of age except in housing that qualifies as "housing for older persons" under *42 U.S.C. § 3607(b)(2)(B), (C)* [*see Schmidt v. Superior Court (1989) 48 Cal. 3d 370, 376, 391, 256 Cal. Rptr. 750, 769 P.2d 932* (flexibility allowed under California law as allowing mobilehome park to impose restrictions that allow it to qualify as senior citizen housing under federal law)]. For further discussion, see Ch. 117, *Civil Rights: Housing Discrimination* .

[10] Waiver Prohibited

No rental or sale agreement may contain a provision by which the purchaser or tenant waives his or her rights under *Civ. Code § 798 et seq.* Any such waiver is deemed contrary to public policy and is void and unenforceable [*Civ. Code § 798.77*].

[11] Sale by Heir, Joint Tenant, or Personal Representative of Estate

An heir, joint tenant, or personal representative who gains ownership of a mobilehome in a mobilehome park through the death of the owner of the mobilehome who is a tenant has the right to sell the mobilehome to a third party in accordance with the provisions of *Civ. Code §§ 798.70-798.83*, but only if all the homeowner's responsibilities and liabilities to the management regarding rent, utilities, and reasonable maintenance of the mobilehome and its premises that have arisen after the transfer of ownership to the heir or joint tenant have been satisfied up until the date the mobilehome is resold [*Civ. Code § 798.78*]. If the heir, joint tenant, or personal representative does not satisfy the homeowner's responsibilities, the management may require the removal of the mobilehome [*Civ. Code § 798.78(b)*; *see Simandle v. Vista de Santa Barbara Associates, LP (2009) 178 Cal. App. 4th 1317, 1322, 101 Cal. Rptr. 3d 129* (management properly removed mobilehome when heirs failed to perform maintenance)].

Before the sale, the heir, joint tenant, or personal representative may replace the mobilehome or repair it [*Civ. Code § 798.78(c)*]. A replacement mobilehome must meet current standards of the park as contained in the park's most recent written requirements issued to prospective homeowners [*Civ. Code § 798.78(c)*; *see Hoffman v. Smithwoods RV Park LLC (2009) 179 Cal. App. 4th 390, 405, 102 Cal. Rptr. 3d 72* (mobilehome park not required to satisfy procedural requirements in *Civ. Code § 798.25* for amending rules and regulations when considering whether replacement mobilehome meets current standards under § 798.78)]. If the heir, joint tenant, or personal representative establishes a tenancy in the park, he or she must comply with the provisions for a prospective purchaser [*Civ. Code § 798.78(d)*].

[12] Rights After Homeowner's Default

[a] Right to Sell; Conditions

Any legal owner or junior lienholder who forecloses on a security interest in a mobilehome located in mobilehome park has the right to sell the mobilehome within the park to a third party in accordance with the procedures of *Civ. Code §§ 798.70-798.83*, but only if all of the homeowner's responsibilities and liabilities to the management regarding rent, utilities, and reasonable maintenance of the mobilehome and its premises are satisfied by the foreclosing creditor as they accrue through the date the mobilehome is resold [*Civ. Code § 798.79(a)*]. For a general discussion of foreclosure of mobilehome security interests, see *§ 369.44[5]*.

[b] Notice Requirements

If the legal owner or junior lienholder has received from the management a copy of a notice of termination of tenancy for nonpayment of rent or other charges, prior to selling the mobilehome, within 60 days following receipt or no later that 65 days after the mailing of the notice of termination, the legal owner and each junior lienholder must notify the management in writing of at least one of the following [*Civ. Code §§ 798.56a(a), 798.79(b)*]:

(1) Its offer to sell the obligation secured by the mobilehome to the management for the amount specified in its written offer, in which event management has 15 days following receipt of the offer to accept or reject it in writing. If the offer is rejected, the person or entity has 10 days in which to exercise options (2) or (3), *below*;

(2) Its intention to foreclose on its security interest in the mobilehome; or

(3) Its request that the management pursue the termination of tenancy against the homeowner and its offer to reimburse management for the reasonable attorney's fees and court costs incurred by the management in that action.

If the legal owner or junior lienholder exercises options (2) or (3), *above*, and has the right to sell the mobilehome, that person has the right to keep the mobilehome on the site within the park until it is resold as long as he or she performs all of the following acts [*Civ. Code §§ 798.56a(b), 798.79(b)*]:

- Satisfies within the time period specified in *Civ. Code § 798.56a(a)* (discussed *above*) all of the homeowner's responsibilities and liabilities owing to the management for the 90 days preceding the mailing of notice of termination of tenancy and continues to satisfy them as they accrue from the date of the mailing of that notice until the date the mobilehome is resold;

- Within the time period specified in *Civ. Code § 798.56a(a)* (discussed *above*), commences all repairs and necessary corrective actions so that the mobilehome complies with park rules in existence at the time the notice of termination was given as well as applicable statutory health and safety standards, and completes these repairs within 90 calendar days of that notice or before the resale, whichever occurs first;

- Complies with the requirements of *Civ. Code § 798.70 et seq.* as they relate to the transfer of the mobilehome to a third party; and

- Reimburses the management for the amount of reasonable attorney's fees and court costs, as agreed on by the management and the legal owner or junior lienholder, incurred by the management in an action to terminate the homeowner's tenancy, when there is a request to terminate the tenancy. The reimbursement must be paid to the management on or before the earlier of the 60th calendar day following receipt of written notice from the management of the aggregate amount of the reasonable attorney's fees and costs or the date the mobilehome is resold.

If the legal owner or junior lienholder does not respond to the notice by making a written election or does not satisfy the requirements set forth above, he or she does not have the right to sell the mobilehome within the park [*see Civ. Code § 798.56a(b)*]. If the homeowner files for bankruptcy, the time periods are tolled until the mobilehome is released from bankruptcy [*Civ. Code § 798.56a(d)*].

Notwithstanding any other provision of law, if neither the legal owner nor a junior lienholder timely notifies the management pursuant to *Civ. Code § 798.56a(a)*, or performs as agreed within 30 days, or if a registered owner of a mobilehome that is not encumbered by a lien held by a legal owner or a junior lienholder, fails to comply with a notice

of termination and is either legally evicted or vacates the premises, the management may either remove the mobilehome from the premises and place it in storage or store it on its site. Management will have a warehouseman's lien against the mobilehome for the costs of dismantling, moving, and storage that is superior to all liens, except the lien provided for in *Health & Safety Code § 18116.1* (lien for nonpayment of fees). The lien may be enforced pursuant to *Com. Code § 7210* [*Civ. Code § 798.56a(e)*].

All written notices must be sent to the other party by certified or registered mail with return receipt requested [*Civ. Code § 798.56a(f)*].

[13] Transfer Disclosure Statement

The transfer or sale of a manufactured home or mobilehome in a mobilehome park is subject to the real estate transfer disclosure requirements and provisions set forth in *Civ. Code § 1102 et seq.* [*Civ. Code § 798.74*.4]. Those requirements include, but are not limited to, the use of the Manufactured Home and Mobilehome Transfer Disclosure Statement set forth in *Civ. Code § 1102.6d* [*Civ. Code § 798.74*.4]. For discussion of residential vendors' duty of disclosure, see Ch. 569, *Vendor and Purchaser* . For a real estate transfer disclosure form, see California Legal Forms, Ch. 23, *Real Property Sales Agreements* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 369.32 Sale of Mobilehome in Subdivision, Cooperative, Condominium, or Resident-Owned Park

[1] Sale Depends on Ownership Interest

Different statutory provisions apply to the sale of a mobilehome in a subdivision, cooperative, or condominium for mobilehomes, or in a resident-owned mobilehome park [*see Civ. Code § 799(c)* (definition)], depending on whether a resident has an ownership interest in one of those facilities in which his or her mobilehome is located or installed or whether the resident rents or leases a space on which his or her mobilehome is located or installed [*see Civ. Code § 799.1*]. For residents with no ownership interest, general provisions of the Mobilehome Residency Law govern the resident's rights with regard to sale and other matters. For those residents with an ownership interest, the separate provisions in *Civ. Code §§ 799-799.10* apply [*Civ. Code § 799.1*].

[2] Advertising Sale

A homeowner or resident [*see Civ. Code § 799(b)* ("resident" defined)] of a subdivision, cooperative, condominium for mobilehomes, or resident-owned mobilehome park may advertise the sale or exchange of the mobilehome, or, if not prohibited by the terms of an agreement with management or ownership, the mobilehome's rental, by (1) displaying a sign in the window of the mobilehome, (2) posting a sign on the side of the mobilehome facing the street, or (3) placing a sign in front of the mobilehome facing the street, stating that the mobilehome is for sale or exchange [*Civ. Code § 799.1.5*]. If not prohibited by park rules, the homeowner or resident may also post a sign indicating that the mobilehome is on display for an "open house" [*Civ. Code § 799.1.5*].

The sign must state the name, address, and telephone number of the mobilehome's owner or his or her agent. The sign face may not exceed 24 inches in width and 36 inches in height. Signs posted in front of a mobilehome may be of an H-frame or A-frame design with the sign face perpendicular to, but not extending into, the street. Tubes or holders for leaflets that provide information on the mobilehome for sale, exchange, or rent may be attached to the sign or the mobilehome [*Civ. Code § 799.1.5*].

These provisions also apply to an heir, joint tenant, or personal representative of the estate who gains ownership of a mobilehome through the death of the mobilehome's resident who was a resident at the time of his or her death, or the

agent of any of those persons [*Civ. Code § 799.1.5*].

[3] Owner's Written Authorization Required

The ownership or management of a subdivision, cooperative, or condominium for mobilehomes may not show or list for sale a mobilehome owned by a resident without first obtaining the owner's written authorization. The authorization must specify the terms and conditions regarding the showing or listing [*Civ. Code § 799.2*].

[4] Management May Not Require Removal

The ownership or management may not require the removal of a mobilehome from the subdivision, cooperative, or condominium for mobilehomes, or resident-owned mobilehome park in the event of its sale to a third party [*Civ. Code § 799.3*].

[5] Management's Right to Prior Approval of Purchaser

The ownership or management may require the right of prior approval of the purchase of a mobilehome that will remain in the subdivision, cooperative, or condominium for mobilehomes or resident-owned mobilehome park and that the selling resident or his or her agent give notice of the sale to the ownership or management before the close of the sale. Approval cannot be withheld if the purchaser has the financial ability to pay the fees and charges of the facility unless the ownership or management reasonably determines that, based on the purchaser's prior residences, he or she will not comply with the rules and regulations of the subdivision, cooperative, or condominium for mobilehomes, or resident-owned mobilehome park [*Civ. Code § 799.4*].

[6] Age Requirements

The ownership or management may require that the purchaser of a mobilehome that will remain in the subdivision, cooperative, or condominium for mobilehomes, or resident-owned mobilehome park must comply with any rule or regulation limiting residency based on age requirements for housing for older persons (provided the rule or regulation complies with the federal Fair Housing Act and its implementing regulations) [*Civ. Code § 799.5*].

[7] Waiver Prohibited

No agreement may contain any provision by which the purchaser waives his or her rights under the provision of *Civ. Code §§ 799-799.10*. Any such waiver will be deemed contrary to public policy and void and unenforceable [*Civ. Code § 799.6*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 369.33 Dealer Sales

[1] Prohibition Applies in Certain Circumstances

Dealer sales of mobilehomes subject to the provisions of the National Manufactured Home Construction and Safety Standards Act of 1974 [*42 U.S.C. § 5401 et seq.*; *see § 369.21[6]*] are unlawful unless (1) there is a HUD label affixed to the mobilehome [*see § 369.21[7]*] and (2) the dealer, acting as a responsible dealer, does not know that the mobilehome does not conform to applicable standards. This prohibition applies to any affected mobilehomes until the completion of the entire sales transaction. A sales transaction with a purchaser is considered completed when all the goods and services that the dealer agreed to provide at the time the contract was entered into have been provided. Completion of a retail sale will be at the time the dealer completes set-up of the mobilehome if the dealer has agreed to provide the set-up, or at the time the dealer delivers the mobilehome to the site if the dealer has not agreed to provide set-up, or at the time the dealer delivers the mobilehome to the transporter if the dealer has not agreed to transport or set up the mobilehome. This prohibition of sale does not apply to mobilehomes that are placed in production before the effective date of the standards, and it does not apply to used mobilehomes that are being sold or offered for sale after the first purchase in good faith for purposes other than resale [*24 C.F.R. § 3282.252*].

[2] Sales and Escrow Requirements Applicable to Dealers

[a] Application of Health & Safety Code Regulations

Certain aspects of mobilehome sales by dealers [*see Health & Safety Code § 18002.6* (definition)] are regulated by the Health and Safety Code. There are provisions for (1) rescission if the buyer cannot obtain financing in 30 days [*see Health & Safety Code § 18036*], (2) application of the Truth in Lending regulation [12 C.F.R. § 226 (Regulation Z)] to all mobilehome sales [*see Health & Safety Code §§ 18036.5, 18037*], and (3) notice requirements applicable to foreclosure [*see Health & Safety Code § 18037.5*].

[b] Receipt for Deposit

As part of the documents executed for the purchase and sale of a new or used mobilehome subject to registration from a

dealer, the dealer and the buyer must execute a receipt for the deposit. The contents of the receipt for deposit are prescribed by statute [*Health & Safety Code § 18035.1*].

[c] Standard of Care

The standard of care owed by a dealer to a mobilehome purchaser is the degree of care that a reasonably prudent dealer would exercise and is measured by the degree of knowledge through education, experience, and examination required to obtain a dealer's license [*Health & Safety Code § 18046.1*].

[d] Establishment of Escrow Account

Every mobilehome dealer must, on the buyer's signing of a purchase order or conditional sale contract or security agreement for a new or used mobilehome, establish with an escrow agent (in whose business the dealer has no more than a 5 percent ownership interest) an escrow account into which must be deposited any cash or cash equivalent received from the buyer at any time before delivery as whole or partial payment for the mobilehome [*Health & Safety Code § 18035(a)*]. There are further statutory requirements regarding when money can be released from the escrow and when the money must be returned to the buyer [*see Health & Safety Code § 18035(b)-(h)*].

[e] Award of Damages, Attorney's Fees, and Costs

In the event of a violation leading to a judgment for damages, the plaintiff is entitled, in addition to damages, to an amount not exceeding $2,000 and to attorney's fees and costs [*Health & Safety Code § 18035(n)*]. For a form of complaint for damages by a mobilehome buyer against a dealer or other seller for an improper escrow, see *§ 369.141*.

[3] Visual Inspection and Disclosures Required By Dealer

If a dealer or salesperson, licensed under *Health & Safety Code § 18045 et seq.*, has a written contract with the seller of a used manufactured home or mobilehome to find or obtain a buyer or is a dealer or salesperson who acts in cooperation with others to find and obtain a buyer for a used manufactured home or mobilehome, that dealer or salesperson has a duty to the prospective buyer to conduct a reasonably competent and diligent visual inspection of the home offered for sale. The dealer or salesperson must also disclose to the prospective buyer all facts materially affecting the value or desirability of the home that an investigation would reveal. When a transfer disclosure statement is required under *Civ. Code § 1102(b)*, a dealer or salesperson must discharge that duty by completing the agent's portion of the transfer disclosure statement that a seller prepares and delivers to a prospective buyer under *Civ. Code §§ 1102(b)* and *1102.6d*. If no transfer disclosure statement is required, but the transaction is not exempt under *Civ. Code § 1102.2*, a dealer must discharge that duty by completing and delivering to the prospective buyer an exact reproduction of Sections III, IV, and V of the transfer disclosure statement required under *Civ. Code §§ 1102(b)* and *1102.6d* [*Health & Safety Code § 18046(d)*].

[4] Mobilehome Warranties Applicable to Dealer Sales

All new mobilehomes [*see § 369.11[1][d]*] sold to a buyer after March 4, 1972, by a dealer licensed by the Department of Motor Vehicles are covered by the warranty set forth in *Civ. Code § 1797.3* [*Civ. Code § 1797*]. The warranty applies to the manufacturer of the mobilehome as well as to the dealer or contractor who sells the mobilehome to the buyer [*Civ. Code § 1797.2(a)*]. The warranty is in addition to and not in derogation of all other rights and privileges that the buyer may have under any other law or instrument. The manufacturer or dealer may not require the buyer to waive his or her rights under *Civ. Code §§ 1797-1797.7*, and any such waiver is deemed contrary to public policy and is unenforceable and void [*Civ. Code § 1797.4*].

The mobilehome warranty from the contractor, manufacturer, or dealer to the buyer must be set forth in a separate written document delivered to the buyer by the contractor or dealer at the time the contract of sale is signed, and

contain, but not be limited to, the following terms [*Civ. Code § 1797.3*]:

- That the mobilehome is free from any substantial defects in materials or workmanship;

- That the contractor, manufacturer, or dealer must take appropriate corrective action at the site of the mobilehome in instances of substantial defects in materials or workmanship that become evident within one year from the date of delivery of the mobilehome to the buyer, provided the buyer or his or her transferee gives written notice of those defects to the contractor, manufacturer, or dealer at their business address not later than one year and 10 days after the date of delivery;

- That the manufacturer and contractor or dealer will be jointly and severally liable to the buyer for the fulfillment of the terms of the warranty, and that the buyer may notify either one or both of the need for appropriate corrective action in instances of substantial defects in materials or workmanship;

- That the address and the phone number of where to mail or deliver written notice of defects must be set forth in the document;

- That the one-year warranty period applies to the plumbing, heating, electrical, cooling, fire safety, and structural systems and all appliances of the mobilehome or manufactured home;

- That while the manufacturers of any or all appliances may also issue their own warranties, the primary responsibility for appropriate corrective action under the warranty rests with the contractor or dealer and manufacturer, and the buyer is to report all complaints to the contractor or dealer and manufacturer initially; and

- That if corrective action taken by the contractor, manufacturer or dealer fails to eliminate a substantial defect, then the material, system, appliance, or component must be replaced in kind. "Replaced in kind" means replacement with the identical material, system, appliance, or component, and, if not available, replacement with a comparable or better material, system, appliance, or component.

The address and telephone number of the place to which written notices of defects may be mailed or delivered must be set forth in the "Mobilehome Warranty" [*Civ. Code § 1797.3(d)*].

Each dealer must display a copy of all of the required warranty provisions. The warranty provisions must be posted in each area where purchase orders and conditional sales contracts are written [*Civ. Code § 1797.5*].

There is no definition in the mobilehome warranties law of "substantial defects in materials or workmanship." In a related context, the Legislature has said that the phrase means defects objectively manifested by broken, ripped, cracked, stained, or missing parts or components and does not include alleged defects concerning color combinations or grade of materials used [*Health & Safety Code § 18613(d)*].

[5] Dealer Sales Off Premises

Generally, it is unlawful for a licensed dealer to advertise or offer for sale or exchange in any manner any vehicle not actually for sale at the premises of the dealer or available to the dealer through a listing agreement from the seller or from the manufacturer or distributor at the time of the advertisement or offer. This policy does not apply, however, to advertising or offering for sale or exchange any used mobilehome as defined by *Health & Safety Code § 18008* [*see § 369.11[1][c]*] when the advertising or offering for sale is not contrary to any terms of a contract between the seller of the mobilehome and the owner of the mobilehome park, if the mobilehome is in place on a lot rented or leased for human habitation within an established mobilehome park; or if the used mobilehome is located, pursuant to a local

zoning ordinance or permit, on a lot where its presence has been authorized or its continued presence would be authorized, for a total and uninterrupted period of at least one year [*Health & Safety Code § 18061*].

[6] Dealer Cooperative Arrangements

With regard to the sale of any mobilehome that has not been previously installed on a foundation system pursuant to *Health & Safety Code § 18551*, a licensed dealer may solicit or obtain listings, engage in the multiple listing only with other dealers, or engage in payments only to other dealers or groups of dealers, pursuant to cooperative brokering and referral arrangements or agreements on the sale of only a mobilehome which has been titled by the Department of Housing and Community Development [*Health & Safety Code § 18040(a)*]. For the *resale* of mobilehomes that have not been previously installed on a foundation, a dealer may solicit or obtain listings, engage in multiple listings, or engage in payments not only with other dealers or groups of dealers, but also with real estate licensees [*Health & Safety Code § 18040(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 369.34 Sales By or Through Real Estate Brokers

[1] Registration Requirement

Notwithstanding any other provision of law, a person licensed as a real estate broker may sell or offer to sell, buy or offer to buy, solicit prospective purchasers of, solicit or obtain listings of, or negotiate the purchase, sale, or exchange of, any mobilehome [*see § 369.11[1][f]*] if the mobilehome has been registered under applicable provisions of *Health & Safety Code § 18000 et seq.* [*Bus. & Prof. Code § 10131.6(b)*].

[2] Prohibited Acts

No real estate broker who engages in the activities in [1], *above*, may maintain any place of business where two or more mobilehomes are displayed and offered for sale by such person, unless the broker is also licensed as a mobilehome dealer [*Bus. & Prof. Code § 10131.6(b)*].

Among other prohibited actions, a real estate licensee may not do any of the following with regard to a mobilehome [*Bus. & Prof. Code § 10131.7*]:

- Advertise or offer for sale in any manner any mobilehome unless (1) the mobilehome is either in place on a lot rented or leased for human habitation within an established mobilehome park [*see § 369.11[2][a]*] and the advertising or offering for sale is not contrary to any terms of a contract between the seller of the mobilehome and the owner of the mobilehome park; or (2) the mobilehome is otherwise located, pursuant to a local zoning ordinance or permit, on a lot where its presence has been authorized or its continued presence and such use would be authorized for a total and uninterrupted period of at least one year;

- Fail to withdraw any advertisement of a mobilehome for sale, lease, or exchange within 48 hours after his or her receipt of notice that the mobilehome is no longer available for sale, lease, or exchange; and

- Advertise or represent a mobilehome as a new mobilehome.

Legal Topics:

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§ 369.35 Documentary Transfer Tax

The transfer of any mobilehome installed on a foundation system as a fixture or improvement to real property [*see Health & Safety Code § 18551(a)*; *see also § 369.37*] and subject to local property taxation [*see § 369.42[3]*] is subject to the Documentary Transfer Tax Act (*Rev. & Tax. Code § 11901 et seq.*) [*Rev. & Tax. Code § 11913*].

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§ 369.36 Sales and Use Taxes

The Sales and Use Tax Law [*Rev. & Tax. Code § 6001 et seq.*] imposes the following two types of taxes [*Rev. & Tax. Code § 6201*]:

- A sales tax on the privilege of selling tangible personal property at retail, measured by the gross receipts of the retailer from sales [*see Rev. & Tax. Code § 6051*]; and

- A use tax on the storage, use, or other consumption in California of tangible personal property purchased from any retailer, measured by the sale price of the property.

These taxes are mutually exclusive, not cumulative. A transaction resulting in liability for the sales tax exempts the purchaser from liability for the use tax [*see Rev. & Tax. Code § 6401*].

The gross receipts from the sale of and the storage, use, or other consumption in California of used mobilehomes [*see § 369.11[1][c]*] which were originally sold new on or after July 1, 1980 are exempted from the taxes imposed by the Sales and Use Tax Law [*Rev. & Tax. Code § 6379*; *see Rev. & Tax. Code § 6351* (definition of "exempted from the taxes imposed by this part" (Sales and Use Tax Law) as used in *Rev. & Tax. Code §§ 6351-6379*)].

For purposes of the sales and use tax, "gross receipt" from the sale of a used mobilehome as defined in *Health & Safety Code § 18014* and the "sales price" of a used mobilehome are based on the current value of the used mobilehome as determined by a recognized value guide, when a registered or legal owner sells a used mobilehome through a person licensed under the Health and Safety Code as a dealer and not on the dealer's own account or though a licensed real estate broker acting under *Bus. & Prof. Code § 10131.6*. Also, the gross receipts from the sale of a mobilehome, whether new or used, and the sale price of a mobilehome, whether new or used, must exclude the amount of separately stated escrow fees on the sale of such mobilehome [*Rev. & Tax. Code § 6012.2*; *see § 369.33[2]*].

For the purposes of the Sales and Use Tax Law, the gross receipts from the sale of a mobilehome [*see § 369.11[1][c]*] and the sale price of a mobilehome sold or stored, used, or otherwise consumed in California must be a specified

percentage of the sale price to the consumer or the retailer, varying according to the following [*see Rev. & Tax. Code §§ 6012.8, 6012.9*] (applicable to mobilehomes sold on or after July 1, 1980); *see also § 369.42[3]*:

- Whether the mobilehome is sold before July 1, 1980, or on or after that date;

- Whether it is sold for installation on a foundation system pursuant to *Health & Safety Code § 18551* for occupancy as a residence or is sold for installation for occupancy as a residence pursuant to *Health & Safety Code § 18613* [*see § 369.37*]; and

- Whether it is or is not subject to local property taxation.

Any sale of a mobilehome after the initial sale, for which the provisions of *Rev. & Tax. Code § 6012.8* or *6012.9* apply, will be exempt from the taxes imposed by the Sales and Use Tax Law [*Rev. & Tax. Code §§ 6012.8(d), 6012.9(d)*].

Legal Topics:

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

[1] Standards and Permits

A mobilehome may be installed as either a fixture or improvement to real property [*see Health & Safety Code § 18551(a)*] or as a chattel [*see Health & Safety Code §§ 18551(b), 18613*].

Standards for locating and installing a mobilehome which is required to be moved under a permit [*see § 369.40*], on any site for the purpose of human habitation or occupancy as a dwelling, are prescribed by the Department of Housing and Community Development [*see 25 Cal. Code Reg. §§ 1320-1368*] pursuant to legislative mandate "for the protection of life and property" [*Health & Safety Code § 18613*].

The contractor engaged to install such a mobilehome, or the owner, if the owner of the mobilehome proposes to perform the installation, is required to obtain an installation permit from the enforcement agency [*Health & Safety Code § 18613*; *see 25 Cal. Code Reg. §§ 1020* (procedure), *1320* (exceptions to permit requirement); *see also § 369.11[4]*]. Issuance of an installation permit probably is, like issuance of a mobilehome park construction permit [*see § 369.62*], partly a ministerial function and partly a discretionary function. The procedure, however, does not involve a hearing for presentation of evidence; therefore, refusal to issue a permit is a cause for action for a writ of mandate directing issuance, under *Code Civ. Proc. § 1085*, and not an administrative decision reviewable in an administrative mandate proceeding under *Code Civ. Proc. § 1094.5*. If the applicant qualifies for the permit and there has been abuse of discretion in refusing to issue it, the writ must be issued, because damages are not recoverable [*see Code Civ. Proc. § 1086*; *Gov. Code §§ 818.4, 820.2, 820.4, 821.2* (governmental immunities from liability for damages)].

For discussion of, and forms for use in, a proceeding for writ of mandate under *Code Civ. Proc. § 1085*, see Ch. 358, *Mandate and Prohibition* .

[2] Tardy Performance by Contractor

A contractor engaged to install a mobilehome pursuant to a permit has a reasonable time in which to complete installation [*Health & Safety Code § 18613*]. Installation is "complete" when standards prescribed by the Department of

Housing and Community Development, and other applicable regulations [*see 25 Cal. Code Reg. §§ 1320-1368*], have been complied with [*Health & Safety Code § 18613*].

If the mobilehome being installed does not comply with the standards for materials, systems, workmanship, or equipment, and for that reason cannot be approved for occupancy, the contractor has a reasonable time to complete installation after the defects have been corrected [*Health & Safety Code § 18613*].

The contractor is liable for damages for any injury proximately caused by the contractor's failure to complete installation within a reasonable time. For discussion of, and forms for use in, actions for damages based on a contractor's tardy performance, see Ch. 104, *Building Contracts* . Regarding a requirement that a contractor who undertakes installation of a mobilehome must be licensed, see *§ 369.45*.

[3] Noncompliance With Standards

A mobilehome installed pursuant to a permit must be inspected by the enforcement agency [*see § 369.11[4]*] to assure compliance with applicable standards. If there is an immediate hazard to the health or safety of the occupant, the mobilehome may not be occupied. If there is noncompliance with applicable standards but no immediate hazard to the health or safety of the occupant, the mobilehome may be occupied notwithstanding the noncompliance [*Health & Safety Code § 18613*].

[4] Correction of Defects

In the event of substandard installation of a mobilehome pursuant to a permit, the installer must perform any necessary corrective work and request reinspection within 10 days after notice from the enforcement agency specifying in what respects the installation does not comply with applicable standards [*25 Cal. Code Reg. § 1326(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 369.38 Hiring Out (Renting and Leasing)

[1] Mobilehomes Considered to be Motor Vehicles

Although not self-propelled, a mobilehome may be considered a motor vehicle subject to the Vehicle Leasing Act [*Civ. Code §§ 2985.7-2990*], formerly the Moscone Automobile Leasing Act of 1969, which governs the hiring out (leasing) of any vehicle required to be registered under the Vehicle Code [*Civ. Code § 2985.7(a)* (definition of "motor vehicle" in context of Act)] for the use of the vehicle by a natural person for a term exceeding four months, primarily for personal, family, or household purposes, whether or not it is agreed that the lessee bear the risk of depreciation [*Civ. Code § 2985.7(d)* (definition of "lease contract" in context of Act)].

Mobilehomes that are rented or leased in California must comply with the provisions of the mobilehomes law relating to insignia of approval [*see § 369.21*].

[2] Permit Requirement

Notwithstanding *Health & Safety Code § 18500* requiring a permit to operate a mobilehome park [*see § 369.63[1]*], (1) the owner of one mobilehome [*see § 369.11[1][c]*] who is also the owner of the land on which the mobilehome is located may rent, lease, sublease, let out, or hire out for occupancy the mobilehome and the land on which it is located without obtaining a permit [*Health & Safety Code § 18500.5*], and (2) the owner of a mobilehome who is not a mobilehome park operator [*see § 369.11[2][a]*] and who rents or leases the land on which the mobilehome is located may rent, lease, sublease, let out, or hire out for occupancy the mobilehome and the land on which it is located without obtaining a permit, subject to lawful covenants and conditions of the lease or rental agreement governing the underlying ground [*Health & Safety Code § 18500.6*].

[3] Mobilehome in Mobilehome Park

A mobilehome park homeowner [*see § 369.11[2][b]*], if not prohibited by the terms of an agreement with the management of the park, may advertise the rental of his or her mobilehome [*see § 369.11[1][e]*] by displaying a sign in the window of the mobilehome, or posted on the side of the mobilehome facing the street, stating that the mobilehome

is for rent by the owner of the mobilehome or his agent. The sign must state the name, address, and telephone number of the owner of the mobilehome or his or her agent and may be at least 12 inches in width and 12 inches in length [*Civ. Code § 798.70*].

No mobilehome within a mobilehome park [*see § 369.11[1][c], [2][a]*] may be rented or leased unless it bears an insignia of approval issued by the Department of Housing and Community Development in accordance with *Health & Safety Code § 18026* [*Health & Safety Code § 18604*].

[4] Mobilehome in Subdivision, Cooperative, Condominium, or Resident-Owned Mobilehome Park

A homeowner or resident [*see Civ. Code § 799(b)* ("resident" defined)] of a subdivision, cooperative, condominium for mobilehomes, or resident-owned mobilehome park may advertise the sale or exchange of the mobilehome, or, if not prohibited by the terms of an agreement with management or ownership, the mobilehome's rental, by (1) displaying a sign in the window of the mobilehome, (2) posting a sign on the side of the mobilehome facing the street, or (3) placing a sign in front of the mobilehome facing the street, stating that the mobilehome is for sale or exchange [*Civ. Code § 799.1.5*]. If not prohibited by park rules, the homeowner or resident may also post a sign indicating that the mobilehome is on display for an "open house" [*Civ. Code § 799.1.5*].

The sign must state the name, address, and telephone number of the mobilehome's owner or his or her agent. The sign face may not exceed 24 inches in width and 36 inches in height. Signs posted in front of a mobilehome may be of an H-frame or A-frame design with the sign face perpendicular to, but not extending into, the street. Tubes or holders for leaflets that provide information on the mobilehome for sale, exchange, or rent may be attached to the sign or the mobilehome [*Civ. Code § 799.1.5*].

These provisions also apply to an heir, joint tenant, or personal representative of the estate who gains ownership of a mobilehome through the death of the mobilehome's resident who was a resident at the time of his or her death, or the agent of any of those persons [*Civ. Code § 799.1.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral Overview

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§ 369.39 Maintenance, Use, and Occupancy

[1] Unlawful Mobilehome Occupancies

It is unlawful for any person to use or cause or permit to be used for occupancy any mobilehome [*see § 369.11[1][c]*], wherever the mobilehome is located, if any of the following conditions exist [*Health & Safety Code § 18550*]:

- The mobilehome is supplied with fuel gas, water, electricity, or sewage connections and installations not conforming to standards prescribed by the Department of Housing and Community Development;

- The mobilehome is permanently attached with underpinning or foundation to the ground, unless the mobilehome bears an insignia of approval issued by the Department of Housing and Community Development [*see § 369.21*] or a HUD label [*see § 369.21[7]*] and is installed on a foundation system, in accordance with *Health & Safety Code § 18551* [*see § 369.42[1]*];

- The mobilehome does not conform to the registration requirements of the Department of Housing and Community Development;

- The mobilehome is in an unsanitary condition; or

- The mobilehome is structurally unsound and does not protect its occupants against the elements.

The Department of Housing and Community Development, pursuant to legislative mandate, has prescribed standards that "establish minimum requirements to protect the health and safety of the occupants [of mobilehomes] and the public," including provisions "for the repair or abatement of any unsafe or unsanitary condition of the [mobilehome] or of the electrical, mechanical, or plumbing installations therein" [*Health & Safety Code § 18605*; *see 25 Cal. Code Reg. §§ 1130-1284, 1600-1619*].

[2] Sewage and Wastewater Disposal

It is unlawful to permit any wastewater, sewage, or waste material from any plumbing fixtures in a park, any park sewage or waste disposal system, or any plumbing fixtures in a manufactured home, mobilehome, recreational vehicle, accessory structure, or permanent building in the park, to be discharged onto or deposited upon the surface of the ground [*Health & Safety Code § 18554(a)*]. The enforcement agency may order the removal, sanitation, or both, of any wastewater, sewage, or waste material discharged onto or deposited upon the surface of the ground, or may require the removal, sanitation, or both, of the wastewater, sewage, or waste material, in a manner consistent with the requirements of, and in consultation with, the local health department or agency [*Health & Safety Code § 18554(b)*]. The registered owner of a mobilehome, manufactured home, or recreational vehicle is responsible for complying with an order, or the correction of a citation, issued by the enforcement agency, and the costs of that order, whenever wastewater, sewage, or waste material is discharged onto or deposited upon the surface of the ground as a result of leaks from plumbing fixtures in a manufactured home, mobilehome, or recreational vehicle, or accessory structure, or whenever those leaks come from plumbing on the space or lot that connects the home or recreational vehicle or accessory structure to the park's sewer, septic, or drain system on the home or vehicle registered owner's side of the connection, if the discharge or deposit is determined by the enforcement agency to be the fault of the registered owner of the home or recreational vehicle [*Health & Safety Code § 18554(c)*].

[3] Abatement of Substandard Mobilehome Condition

Any unsafe or unsanitary condition of a mobilehome [*see § 369.11[1][c]*] or of the electrical, mechanical, or plumbing installations in a mobilehome, which threatens the health or safety of the occupants or the public, may be abated [*see Health & Safety Code § 18605*].

In addition, any mobilehome in which there exists any of the conditions listed in *25 Cal. Code Reg. § 1606(a)-(k)* (such as inadequate sanitation, structural hazards, faulty weather protection) to an extent that endangers the life, limb, health, property, safety, or welfare of the public or the occupants of the mobilehome is substandard [*25 Cal. Code Reg. § 1606*]. Any mobilehome that has become substandard is a nuisance and may be abated [*25 Cal. Code Reg. § 1606*; *see 25 Cal. Code Reg. §§ 1610-1619* (abatement proceedings); *see also § 369.112[3]*].

The registered owner of a mobilehome that is constructed, altered, converted, used, or maintained in a manner that constitutes a violation of the regulations or other applicable law is required to abate the violation [*25 Cal. Code Reg. § 1610(a)*; *see 25 Cal. Code Reg. § 1606* (substandard units)]. The person or entity responsible for correction of the violation must cause it to be corrected within five days or within such longer period of time as may be allowed by the enforcement agency [*25 Cal. Code Reg. § 1611(a)*; *see §§ 369.11[4], 369.64[2]*].

[4] Disabled Access and Accommodations

Ownership or management of a mobilehome park cannot prevent a homeowner or resident from installing disabled accommodations on a mobilehome or on the site, lot, or space on which the mobilehome is located. This includes, but is not limited to, ramps or handrails on the outside of the home as long as the installation complies with code and the facilities are installed pursuant to a permit, if required for the installation. The management may require that the accommodations be removed by the homeowner at the time the mobilehome is removed from the park or pursuant to a written agreement between the homeowner and the management before the completion of the resale of the mobilehome in place in the park [*Civ. Code §§ 798.29*.6, 799.11].

Legal Topics:

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

A mobilehome [*see § 369.11[1][g]*] that exceeds a prescribed size or weight may not be moved on any street or highway without a permit from the Department of Transportation or the city or county having jurisdiction over the street or highway [*see Veh. Code § 35780*]. A permit is required for moving a mobilehome wider than eight and a half feet, longer than 40 feet, taller than 14 feet [*see Veh. Code §§ 35100, 35250, 35400*], or heavier than the maximum allowable weight [*see Veh. Code § 35550*]. A mobilehome wider than eight feet may not be moved without a permit which is issuable only to licensed manufacturers, dealers, and transporters (haulers) [*see Veh. Code § 35790*], and then only if the mobilehome is not overweight [*Veh. Code § 35790(e)(1)*]. A permit issued under *Veh. Code § 35790* may authorize an exemption from length limitations otherwise applicable to vehicles and combinations of vehicles for the transportation of more than one unit of a manufactured home if conditions specified in *Veh. Code § 35790.5* are met. Applications for permits must specifically describe the manufactured home units to be moved and include a written statement of good cause. The permits issued must describe the particular highways over which the permit is valid and may impose additional conditions [*Veh. Code § 35790.5*].

A "pilot car," which may be required to obtain a permit under *Veh. Code § 35790* to aid in the moving of a mobilehome, may operate a vertical-clearance measuring device with a height in excess of 14 feet when escorting a permitted overheight load, and may also operate the device when surveying a route for a permitted overheight load [*Veh. Code § 35252(a)*; *see Veh. Code §§ 25270* (warning lamps), *27904.5* (signs), *28100-28103* (flags, equipment, compliance of pilot cars with other Vehicle Code sections)].

No person served with a notice of violations under *25 Cal. Code Reg. § 4013* [*see § 369.21[5][c]*] is permitted to move the mobilehome in question or to cause it to be moved without first giving the Department of Housing and Community Development written notification of the destination and intended disposition of the mobilehome [*25 Cal. Code Reg. § 4013*].

Legal Topics:

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

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§ 369.41 Local Regulation

[1] State Law Supersedes Local Ordinances

The provisions of the Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*] and implementing regulations of the Department of Housing and Community Development [*25 Cal. Code Reg. § 4000 et seq.*] supersede any ordinance adopted by a city or county on the same subject [*see Health & Safety Code §§ 18015, 18030.5*].

The Mobilehome Parks Act [*Health & Safety Code § 18300 et seq.*] occupies the field of mobilehome regulation in California, and therefore preempts local regulation of mobilehome construction and installation [*Health & Safety Code § 18300(a)*; *County of Santa Cruz v. Waterhouse (2005) 127 Cal. App. 4th 1483, 1491, 26 Cal. Rptr. 3d 543* (preemption of county ordinance regulating permissible height of mobilehomes)]. The Act contains exceptions providing for local regulation of certain matters, including zoning and setback requirements for mobilehome parks [*Health & Safety Code § 18300(g)*].

[2] Zoning and Land Use

[a] Installation of Manufactured Housing

Cities and counties may not subject the installation of manufactured housing on single-family lots to any regulation or process different than those applied to the construction of conventional housing. Nevertheless, certain architectural controls may be imposed [*Gov. Code §§ 65852.3, 65852.4*].

[b] Requirement of Filing Impact Report

Before a mobilehome park can be converted to another use except under the Subdivision Map Act [*Gov. Code § 66410 et seq.*], or before it can be closed or the use ceased except if it results from the entry of an order for relief in bankruptcy, the person or entity proposing the change in use must file with the appropriate advisory agency or legislative body a report on the impact of the conversion, closure, or cessation of use on the displaced residents of the park and provide a resident of each mobilehome in the park with a copy. In determining the impact, the report must

address the availability of adequate replacement housing in mobilehome parks and relocation costs [*Gov. Code § 65863.7(a)-(c), (f)*]. The legislative body, or its delegated advisory agency, must review the report before any change of use and may require, as a condition of the change, the person or entity to take steps to mitigate any adverse impact of the conversion, closure, or cessation of use on the ability of the displaced residents to find adequate housing in a mobilehome park. However, the steps required to be taken to mitigate must not exceed the reasonable costs of relocation [*Gov. Code § 65863.7(e)*]. This provision applies to charter cities [*Gov. Code § 65863.7(h)*]. The required impact report and the procedure to be followed when conversion is in accordance with the Subdivision Map Act, is covered in *Gov. Code § 66427.4. Civ. Code §§ 798.27(b)* and *798.56(g)* discuss the notice of any change in the zoning or termination resulting from a change of use of the park required to be given to the tenants.

The requirement of filing an impact report is also applicable when the closure, cessation, or change of use is the result of a decision by a local governmental entity or planning agency not to renew a conditional use permit or zoning variance under which the mobilehome park has operated, or is the result of any other zoning or planning decision, action, or inaction. In this case, the local governmental agency is the person proposing the change in use for the purposes of preparing the impact report, and the agency is required to take steps to mitigate the adverse impact [*Gov. Code § 65863.7(i)*].

In addition, the requirement of filing an impact report is applicable when the closure, cessation, or change of use is the result of a decision by an enforcement agency [*see Health & Safety Code § 18207* ("enforcement agency" defined)] to suspend the permit to operate the mobilehome park. In that case, the mobilehome park owner is the person proposing the change in use for purposes of preparing the impact report and is required to take steps to mitigate the adverse impact of the change [*Gov. Code § 65863.7(j)*].

[c] Option to Purchase, Survey, and Waiver of Tentative and Final Subdivision Map

When a mobilehome park is converted to condominium units for mobilehomes, an existing tenant must be offered the option to purchase his or her unit or to continue residency as a tenant [*Gov. Code § 66427.5(a)*]. The subdivider must obtain a survey of the support of residents in the mobilehome park for the proposed conversion, conducted pursuant to written ballot, and the results of the survey must be submitted to the local agency on the filing of the tentative or parcel map [*Gov. Code § 66427.5(d)*]. The purpose of this requirement is to ensure that conversions in accordance with *Gov. Code § 66427.5* are bona fide resident conversions [*see* Stats. 2002, ch. 1143, § 2]. It does not apply to any application for parcel map approval for conversion of a rental mobilehome park to resident ownership approved by the local agency before January 1, 2003 [*see* Stats. 2002, ch. 1143, § 3].

On petition of two thirds of the tenants of a mobilehome park, the requirement of a tentative and final subdivision map may be waived [*Gov. Code § 66428.1*].

[d] Density of New Mobilehome Park

A city or county may not require the average density in a new mobilehome park to be less than that permitted by the applicable zoning ordinance, plus any density bonus, as defined in *Gov. Code § 65915* for other affordable housing forms [*Health & Safety Code § 18300(h)(1)*].

[e] Clubhouses and Recreational Facilities

A city or county cannot require a new mobilehome park to include a clubhouse. Recreational facilities, recreational areas, accessory structures, or improvements may be required only to the extent that such facilities or improvements are required in other types of residential developments containing a like number of residential dwelling units [*Health & Safety Code § 18300(h)(2)*].

[3] Equipment and Facilities

A city or county, within the reasonable exercise of its police power, may regulate the construction and use of equipment and facilities used to supply gas, water, or electricity to a mobilehome (except facilities owned, operated, and maintained by a public utility), or to dispose of sewage or other waste therefrom, when such facilities are located outside a mobilehome park [*see § 369.11[2][a]*] for which a permit is required by the Mobilehome Parks Act and implementing regulations [*Health & Safety Code § 18300(g)(2)*; *25 Cal. Code Reg. § 1000 et seq.*].

[4] Use and Occupancy

A city or county, within the reasonable exercise of its police power, may require a permit to use a mobilehome outside a mobilehome park for which a permit is required by the Mobilehome Parks Act and implementing regulations [*Health & Safety Code § 18200 et seq.*; *25 Cal. Code Reg. § 1000 et seq.*], and may require a fee therefor, by local ordinance, commensurate with the cost of enforcing the Mobilehome Parks Act and the local ordinance with reference to the use of the mobilehome. The use permit may be refused or revoked if the mobilehome's use violates any provisions of the Mobilehome Parks Act and implementing regulations, or the Manufactured Housing Act of 1980 and implementing regulations [*Health & Safety Code § 18000 et seq.*; *25 Cal. Code Reg. § 4000 et seq.*], or any local ordinance applicable to such use [*Health & Safety Code § 18300(g)(3)*].

A fee commensurate with enforcement cost is one that approximately covers the cost. A newly adopted ordinance is not unlawful merely because it fixes a fee slightly higher than reasonably projected enforcement costs [*Watson v. County of Merced (1969) 274 Cal. App. 2d 263, 265-268, 78 Cal. Rptr. 807]* . However, continuing to collect a higher fee after experience shows that costs are and will remain lower probably is unlawful, since as time passes the gap between projected enforcement costs and the fixed fee becomes less and less reasonable [*see Watson v. County of Merced (1969) 274 Cal. App. 2d 263, 268, 78 Cal. Rptr. 807* (approving trial court's memorandum of opinion stating, "[a]fter a period of operation the Board of Supervisors may want to review the fee charged to be certain that work experience and actual costs in fact do justify the fees levied. If experience shows them to be unreasonable and they are not adjusted plaintiffs may feel they should return to Court")].

[5] Accessory Buildings and Structures

A city or county, within the reasonable exercise of its police power, may require a building permit to construct an accessory structure for a mobilehome located outside a mobilehome park, under circumstances in which the Mobilehome Parks Act and implementing regulations [*Health & Safety Code § 18200 et seq.*; *25 Cal. Code Reg. § 1000 et seq.*] or the Manufactured Housing Act of 1980 and implementing regulations [*Health & Safety Code § 18000 et seq.*; *25 Cal. Code Reg. § 4000 et seq.*] do not require the issuance of a permit by the Department of Housing and Community Development [*Health & Safety Code § 18300(g)(4)*].

Legal Topics:

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§ 369.42 Property Interests

[1] Real or Personal

A mobilehome that is not affixed to land is personal property [*see Civ. Code §§ 658, 663*]. A mobilehome may be installed on a foundation system as either a fixture or improvement to real property or as a chattel (personal property) [*Health & Safety Code § 18551*]. Installation by either method must comply with statutory requirements [*see Health & Safety Code §§ 18551(a)* (real property), *18551(b), 18613* (personal property)]. The registered owner of a mobilehome in a mobilehome park converted or proposed to be converted to a resident-owned subdivision, cooperative, condominium, or nonprofit corporation [*see Bus. & Prof. Code § 11010.8*] may, if he or she is also a participant in the resident ownership, apply for voluntary conversion of the mobilehome to a fixture and improvement to the underlying real property without complying with the statutory requirements otherwise applicable to installation on a foundation system [*see Health & Safety Code § 18555(a)*]. To be considered a fixture or improvement to real property, a mobilehome must either be installed as such in accordance with statutory requirements [*see Health & Safety Code § 18551(a)*] or be legally converted to that status by compliance with the statutory conversion requirements outlined in *Health & Safety Code § 18555* [*Health & Safety Code § 18555(i)*].

Once installed on a foundation system, a mobilehome is subject to state-enforced health and safety standards for mobilehomes [*Health & Safety Code § 18551(c)*; *see Health & Safety Code § 18555(j)* (same standards applicable to mobilehome converted to fixture and improvement to real property)]. These standards are enforced in accordance with *Health & Safety Code § 18020* (enforcement of mobilehomes law [*Health & Safety Code § 18000 et seq.*] and implementing regulations [*25 Cal. Code Reg. § 4000 et seq.*] by the Department of Housing and Community Development) [*Health & Safety Code §§ 18551(c), 18555(j)*].

[2] Provisional Remedy of Claim and Delivery

For purposes of the provisional remedy of claim and delivery [*see Code Civ. Proc. §§ 511.010-516.050*], a mobilehome not so affixed to land as to be real property is inventory in the hands of a person who holds it for sale or lease or to be furnished under a contract of service [*see Code Civ. Proc. § 511.050*]. Consequently, if a claimant applies for a temporary restraining order in accordance with *Code Civ. Proc. § 513.010*, the court may not prohibit such a holder

from transferring the mobilehome in the ordinary course of business [*Code Civ. Proc. § 513.020(a)*]. However, the court may prohibit concealing it or otherwise removing it in a manner likely to make it less available to seizure by the levying officer [*Code Civ. Proc. § 513.020(b)*] and may prohibit impairing the value of it either by acts of destruction or by failure to care for the mobilehome in a reasonable manner [*Code Civ. Proc. § 513.020(c)*].

In addition, if a mobilehome that is to be levied on under a writ of possession is being used as a dwelling, levy must be made by placing a keeper in charge of the mobilehome for two days, at the claimant's expense, after which period the levying officer may remove the occupants and any contents not specified in the writ and take exclusive possession of the mobilehome [*Code Civ. Proc. § 514.010(b)*].

For further discussion of the provisional remedy of claim and delivery, and forms for use in related proceedings, see Ch. 119, *Claim and Delivery* .

[3] Local Property Taxation

A mobilehome that has become real property by being affixed to land on a permanent foundation system, or otherwise, is taxed as all other real property is taxed [*see Rev. & Tax. Code § 5801(b)*; *see also* 1980 Stats., ch. 285]. Otherwise, the mobilehome is taxed as provided in the Manufactured Home Property Tax Law [*Rev. & Tax. Code § 5800 et seq.*] if it (1) is not taxed as all other real property is taxed, (2) is defined as provided in *Health & Safety Code §§ 18008* and *18211* [*see § 369.11[1][c]*], and (3) was first sold new on or after July 1, 1980 [*see Rev. & Tax. Code §§ 5800, 5801*]. A mobilehome is also taxed under the Manufactured Home Property Tax Law if the owner so requests [*Rev. & Tax. Code § 5801(a)(2)*]. Except as provided in the Manufactured Home Property Tax Law, setting out special rules for determining the base year value of a mobilehome and defining a change in ownership of a mobilehome and the new construction of a mobilehome, mobilehomes are subject to property taxation, as well as subject to the other provisions of the Revenue and Taxation Code governing property taxation, in the same manner and to the same extent as any other personal property on the roll as defined in *Rev. & Tax. Code § 109* [*Rev. & Tax. Code § 5810*].

Transfer of a mobilehome park to a nonprofit corporation or other entity formed by tenants of the park to purchase the park does not trigger reassessment if the transfer is to tenants renting at least 51 percent of the park [*Rev. & Tax. Code § 62.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 369.43 Registration and Titling

Registration and titling of mobilehomes is under the jurisdiction of the Department of Housing and Community Development [*Health & Safety Code § 18075 et seq.*; *see 25 Cal. Code Reg. §§ 5510-5668*]. However, mobilehomes subject to local property taxation under *Rev. & Tax. Code § 5800 et seq.* and not installed on foundations [*see § 369.42[3]*] are only subject to registration at the time of sale, resale, or transfer of title [*Health & Safety Code § 18075.5(a)*]. In addition, mobilehomes installed or to be installed on foundations in accordance with *Health & Safety Code § 18551(a)* [*see § 369.37*] are exempt from the registration requirement as long as they remain affixed to the foundation system [*Health & Safety Code § 18075.5(b)*].

Legal Topics:

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§ 369.44 Creditors' Claims

[1] Mechanics' Liens

If a mobilehome is installed as an improvement to real property in accordance with *Health & Safety Code § 18551(a)*, it is considered to be real property [*see Civ. Code § 658*; *Health & Safety Code § 18551*; *see also § 369.42[1]*]. The mechanics' liens law [*Civ. Code § 3109 et seq.*] gives a lien "upon the property," for the value of their services and goods, to persons who have "bestowed labor or furnished materials or appliances or leased equipment ... contributing to a work of improvement" [*Civ. Code § 3110* (phrases juxtaposed)]. "Work of improvement" is not defined in the law, although examples are given [*see Civ. Code § 3106*]. Installing a mobilehome and doing work on an installed mobilehome are not listed among those examples. However, there can be no doubt that a contractor who installs a mobilehome or works on an installed mobilehome, in the case of an installation pursuant to *Health & Safety Code § 18551(a)* at least, is contributing to a work of improvement in the context of the mechanics' liens law, since improvement in this sense can only mean improvement of real property. For further discussion, see Ch. 361, *Mechanics' Liens* .

[2] Other Liens for Services and Materials

If a mobilehome is not so affixed to land as to be real property [*see § 369.42[1]*], it is a "vehicle" as that term is defined in the Vehicle Code [*see § 369.11[1][g]*]. Therefore, it could be subject to a lien for services and materials under the liens-on-vehicles law [*Civ. Code §§ 3067-3074*], which provides, "[e]very person has a lien dependent upon possession for the compensation to which he is legally entitled for making repairs or performing labor upon, and furnishing supplies or materials for, and for the storage, repair or safekeeping of, and for the rental of parking space for, any vehicle of a type subject to registration under the Vehicle Code, subject to the limitations set forth in [*Civ. Code §§ 3067-3074*]" [*Civ. Code § 3068(a)*; *see § 369.43*]. For discussion of, and forms for use in enforcing, such liens, see Ch. 342, *Liens and Wage Preferences* .

Since a mobilehome not affixed to land is a "vehicle" as that term is defined in the Vehicle Code, no lien on a mobilehome could arise under *Civ. Code § 3051* [*see Civ. Code § 3051* (second paragraph)].

[3] Judgment Creditors

[a] Exemption from Execution

A mobilehome that serves as the principal dwelling for a judgment debtor or the judgment debtor's spouse, together with the outbuildings and land on which they are situated, may be exempt from execution under *Code Civ. Proc. §§ 704.710 et seq., 704.965* (homesteads). The amount of the homestead exemption varies depending on whether or not the judgment debtor or the judgment debtor's spouse who resides in the mobilehome is any of the following [*see Code Civ. Proc. § 704.730*]:

- 65 years of age or older;
- Physically or mentally disabled and as a result of that disability is unable to engage in substantial gainful employment; or
- 55 years old or older with a gross annual income of not more than $15,000, or if married, a gross annual income, including the gross annual income of his or her spouse, of not more than $20,000, and the sale is an involuntary sale.

The mobilehome will be exempt from sale completely if no bid is received at an execution sale that exceeds the amount of homestead exemption plus any additional amount necessary to satisfy all liens and encumbrances on the property, or if no bid is received that is 90 percent or more of the fair market value of the mobilehome unless the court grants permission to accept a lower bid or makes a new order for sale [*see Code Civ. Proc. § 704.800*]. For forms for claiming homestead exemptions, see Ch. 294, *Homesteads* .

[b] Levy on a Mobilehome

To levy on a mobilehome that is personal property used as a dwelling, the levying officer must serve a copy of the writ of execution and notice of levy on one occupant of the property in accordance with *Code Civ. Proc. § 700.080*. If the judgment creditor so instructs, the levying officer will also place a keeper in charge of the property for the period requested by the judgment creditor [*Code Civ. Proc. § 700.080(b)*]. If a mobilehome is levied on and a certificate of title has been issued by the Department of Housing and Community Development for that mobilehome and the certificate is still in effect, the levying officer must determine the name and address of the legal owner and serve the copy of the writ of execution and notice of levy on that person [*Code Civ. Proc. § 700.090*]. For discussion and forms relating to execution of judgments, see Ch. 254, *Executions and Enforcement of Judgments* .

[4] Security Interests

Security interests in mobilehomes are perfected by filing with the Department of Housing and Community Development [*Health & Safety Code § 18080.7*]. Priority is determined by order of filing [*Health & Safety Code §§ 18105, 18106*].

[5] Foreclosure Under Security Agreement

[a] Required Procedures

In the event of default under the provisions of a security agreement relating to a loan or conditional sale contract that gives the secured party the right to foreclose its security interest in a mobilehome subject to registration under *Health & Safety Code § 18000 et seq.* that is not inventory of a dealer, including the right to repossess the property, the secured party may foreclose its security interest only by satisfying certain requirements, as discussed below, notwithstanding any contrary provisions in the security agreement, conditional sale contract, or any other agreement entered into before

default [*Health & Safety Code § 18037.5(a)*].

In the event of default under the provisions of a security agreement relating to a loan or conditional sale contract in which the collateral is a mobilehome subject to registration that is inventory of a dealer or a commercial coach, the secured party may repossess and dispose of the collateral in accordance with the provisions of the security agreement or conditional sale contract and applicable law, including the provisions of *Com. Code § 9101 et seq.* On repossession, the secured creditor must prepare and forward to the Department of Housing and Community Development a notice of repossession on the form prescribed by that Department [*Health & Safety Code § 18037.5(b)*].

[b] Notice of Default

Unless the registered owner of the mobilehome has abandoned the property or voluntarily surrendered possession of the property to the foreclosing creditor, the foreclosing creditor must deposit or cause to be deposited in the United States mail an envelope addressed to each registered owner as shown on the current registration of the mobilehome, registered or certified with postage prepaid, containing a notice in at least 10-point type, signed by the foreclosing creditor, in substantially the form set forth in *Health & Safety Code § 18037.5(a)(1)* [*Health & Safety Code § 18037.5(a)(1)*; *see § 369.113*]. For the definitions of "legal owner" and "registered owner," see *§§ 369.11[5], [6]*.

Within five days after mailing the notice of default, the foreclosing creditor must forward a copy of the notice to (1) the legal owner shown on the current registration card, if different than the foreclosing creditor, (2) each junior lienholder shown on the current registration card, if different than the foreclosing creditor, and (3) the Department of Housing and Community Development. The notice must be forwarded to each party in the same manner as provided for mailing the original notice to the registered owner [*Health & Safety Code § 18037.5(a)(2)*].

[c] Curing Default

Each registered owner and each junior lienholder having a security interest subordinate to the security interest of the foreclosing creditor has the right to cure the default by the methods and in the manner prescribed in the notice of default within 45 days after mailing of the notice to the registered owner [*Health & Safety Code § 18037.5(a)(3)*].

[d] Private or Public Sale

If the default is not cured within the time indicated on the notice of default, or if the property has been abandoned or voluntarily surrendered to the foreclosing creditor by the registered owner, the creditor may proceed to sell the property at a private or public sale in accordance with the provisions of *Com. Code § 9504* and *Health & Safety Code § 18037.5(c)*. The notice of sale required by *Com. Code § 9504* may not be mailed or delivered before expiration of the period for the right to cure the default, as stated in the notice of default, unless the property has been abandoned or voluntarily surrendered to the foreclosing creditor by the registered owner [*Health & Safety Code § 18037.5(a)(4)*; *see* [e], *below*]. Additionally, notwithstanding any contrary provisions of *Com. Code § 9504*, the foreclosing creditor must deposit or cause to be deposited in the United States mail, registered or certified with postage prepaid, an envelope containing the notice of sale addressed to each party to whom the notice of default was mailed. The notice of sale must be given at least 10 days before the date fixed for a public sale or on or after which any private sale is to be made [*Health & Safety Code § 18037.5(a)(5)*].

[e] Abandonment

For purposes of foreclosure, a mobilehome will be deemed abandoned if (1) the foreclosing creditor gives written notice of his or her belief of abandonment to the registered owner, and (2) the owner fails to give the foreclosing creditor written notice, before the appropriate date specified in the foreclosing creditor's notice, stating that he or she has not abandoned and does not intend to abandon the mobilehome, and stating an address at which he or she may be served by certified mail with a summons in connection with any legal action that the foreclosing creditor may appropriately

initiate. The foreclosing creditor may give a notice of belief of abandonment only if he or she reasonably believes that the registered owner has abandoned the mobilehome. The notice of belief of abandonment must be personally delivered to the registered owner or sent to him or her at his or her last known address by registered or certified mail, with postage prepaid. If there is reason to believe that the notice sent to the registered owner's last known address will not be received by the owner, the foreclosing creditor must also send the notice to any other address known to the foreclosing creditor where the registered owner may reasonably be expected to receive the notice [*Health & Safety Code § 18037.5(a)(6)*]. The notice of belief of abandonment must be in at least 10-point type, in substantially the form set forth in *Health & Safety Code § 18037.5(a)(6)* [*see § 369.114*].

[f] Application of Proceeds

The proceeds of the sale of a mobilehome must be applied, in the following order, to the following items:

- First, to the reasonable and necessary expenses incurred for preparing for and conducting the sale, and, if the foreclosing creditor has obtained possession of the collateral prior to the disposition, the reasonable and necessary expenses for the retaking and holding of the collateral, and to the extent provided for in the agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the foreclosing creditor in retaking the property from any person not a party to the credit contract [*Health & Safety Code § 18037.5(c)(1)*];

- Second, to the satisfaction of the indebtedness secured by the security interest of the foreclosing creditor under which the disposition is made [*Health & Safety Code § 18037.5(c)(2)*];

- Third, to the satisfaction of indebtedness secured by any subordinate liens or encumbrances on the property in the order of their priority as provided in *Health & Safety Code § 18105*, if with regard to a junior creditor written notification of demand therefor is received before distribution of the proceeds is completed, and to the satisfaction of any subordinate attachment lien or execution lien pursuant to *Code Civ. Proc. § 701.040(b)* if notice of the levy of attachment or execution is received before distribution of the proceeds is completed. If requested by the foreclosing creditor, the holder of a subordinate lien or encumbrance must furnish reasonable proof of his or her interest, and unless he or she does so, the foreclosing creditor need not comply with the demand [*Health & Safety Code § 18037.5(c)(3)*];

- Fourth, to the satisfaction of indebtedness secured by all senior liens or encumbrances in the order of their priority as provided in *Health & Safety Code § 18105*, if with regard to a senior creditor written demand therefor is received by the foreclosing creditor before distribution of the proceeds is completed. If requested by the foreclosing creditor, the holder of a senior lien or encumbrance must furnish reasonable proof of his or her interest, and unless he or she does so, the foreclosing creditor need not comply with the demand [*Health & Safety Code § 18037.5(c)(4)*]; and

- Lastly, to the registered owner within 45 days after the sale is conducted if a surplus remains [*Health & Safety Code § 18037.5(c)(5)*].

If a request for an accounting is made within one year of the sale, and an accounting was not automatically provided to the registered owner within 45 days after the sale of a mobilehome, the foreclosing creditor must provide the registered owner with a written accounting containing the gross sales proceeds and its allocation in accordance with *Health & Safety Code § 18037.5(c)*. In the event any surplus is paid to the registered owner under *Health & Safety Code § 18037.5(c)(5)*, the foreclosing creditor must furnish such an accounting whether or not requested by the registered owner [*Health & Safety Code § 18037.5(d)*].

[6] Deficiency After Forced Sale

No deficiency judgment lies in any event after the sale of any mobilehome subject to registration under *Health & Safety Code § 18000 et seq.* for failure of the purchaser to complete his or her sale contract given to the seller to secure payment of the balance of the purchase price of the mobilehome. However, this provision does not apply if there is substantial damage to the mobilehome other than wear and tear from normal usage [*Health & Safety Code § 18038.7*].

There may be a split in authority regarding whether *Health & Safety Code § 18038.7* applies to a lender who is not a seller. The predecessor to *Health & Safety Code § 18038.7*, former *Civil Code § 2983.8*, which had identical language, was held sufficiently similar to *Code Civ. Proc. § 580b*, which applies to lenders and sellers of real property, to prohibit a deficiency judgment after the sale of a mobilehome for failure to complete the conditional sales contracts. Its effect was to prohibit the lender from waiving the security and suing for the balance due on the contract. The lender's sole remedy was to repossess the mobilehome [*Bank of Sonoma County v. Dorries (1986) 185 Cal. App. 3d 1291, 1293-1294, 230 Cal. Rptr. 459]* . In 1988, *Health & Safety Code § 18038.7* was held not to apply to lenders because it specifically refers to a sales contract given to the seller and not to lenders, whereas *Code Civ. Proc. § 580b* refers to both sellers and lenders [*Security Pacific Nat. Bank v. Casavant (1988) 205 Cal. App. 3d 127, 130-132, 252 Cal. Rptr. 175]* . This court noted, however, that *Bank of Sonoma* might be distinguishable because it appeared that the bank enforcing the loan in that case may have been the assignee of a conditional seller [*Security Pacific Nat. Bank v. Casavant (1988) 205 Cal. App. 3d 127, 131 n.3, 252 Cal. Rptr. 175]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & UseReal Property LawMobilehomes & Mobilehome ParksSecurity InterestsReal Property LawNonmortgage LiensLien PrioritiesReal Property LawNonmortgage LiensMechanics' Liens

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§ 369.45 Payment for Contractor's Work: Defense of No License

[1] General Prohibition

A claim against a mobilehome owner for payment for on-site construction, installation, alteration, repair, or preparation for moving, of a residential mobilehome [*see § 369.11[1]*] or an accessory building or structure, may be subject to the defense allowed by *Bus. & Prof. Code § 7031*: that no person engaged in the business or acting in the capacity of a contractor may bring or maintain any action in any California court for the collection of compensation for the performance of any act or contract for which a license is required by the Contractors State License Law [*Bus. & Prof. Code § 7000 et seq.*] without alleging that he or she was a duly licensed contractor at all times during the performance of such act or contract. This prohibition does not apply to contractors who are each individually licensed under the Contractors State License Law but who jointly submit a bid or otherwise act in the capacity of a contractor within California without first having secured an additional license for acting in the capacity of such a joint venture or combination [*Bus. & Prof. Code §§ 7029, 7031*].

[2] "Contractor" Defined

In this context "contractor" includes any person engaged in the business of the construction, installation, alteration, repair, or preparation for moving, of a mobilehome or its accessory buildings and structures, as defined in the mobilehomes law [*see § 369.11[1], [3]*], on a site for the purpose of occupancy as a dwelling [*Bus. & Prof. Code § 7027*]. "Contractor" also includes the manufacturer when engaged in on-site construction, alteration, or repair, of a mobilehome or mobilehome accessory building or structure, pursuant to specialized plans, specifications, or models, or any work other than in compliance with the manufacturer's warranty [*Bus. & Prof. Code § 7027*]. "Contractor" does not include the manufacturer or the seller under certain circumstances [*Bus. & Prof. Code § 7027(b), (c)*].

[3] When License Is Not Required

A license is not required by the Contractors State License Law for the following kinds of work:

- Installation of any finished products, materials, or articles of merchandise, which do not become a

fixed part of the mobilehome or mobilehome accessory building or structure [*see Bus. & Prof. Code § 7045(a)* (also providing that the term "finished products" does not include installed carpets)];

- Any construction, alteration, improvement, or repair of personal property not within the definition of mobilehome or mobilehome accessory building or structure under the mobilehomes law [*see Bus. & Prof. Code § 7046*]; and

- Any work or operation on one undertaking or project by one or more contracts when (1) the aggregate contract price for labor, materials, and all other items, is less than $500, (2) the work is not merely a part of a larger or major operation undertaken by the same or a different contractor, (3) the work was not divided into contracts for amounts less than $500 for the purpose of qualifying for this exemption, and (4) the person performing the work has not advertised or otherwise indicated to the public that he or she is a contractor or that he or she is qualified to engage in the business of a contractor [*see Bus. & Prof. Code § 7048*].

Legal Topics:

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

The owner of a mobilehome [*see § 369.11[1][c]*] may remove or cause to be removed the towbar, wheels, wheel hubs, or axles [*Health & Safety Code § 18550.5(a)*]. A dealer may remove these items only if removal is in accordance with the purchase document and the statutory requirements of *Health & Safety Code § 18035.3* pertaining to a purchase document [*Health & Safety Code § 18550.5(b)*]. A manufacturer may deliver a mobilehome to a dealer without these items if the manufacturer complies with the provisions of *Health & Safety Code § 18032* (requiring a label on the mobilehome [*see § 369.21[8]*]) [*Health & Safety Code § 18550.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-369 California Forms of Pleading and Practice--Annotated § 369.47

§ 369.47 Mobilehome Accessory Buildings and Structures and Building Components

[1] Definitions and Standards

A mobilehome accessory building or structure is an awning, cabana, ramada, storage cabinet, storage building, private garage, carport, fence, windbreak or porch, or any residential building or structures established for the use of the occupant of a manufactured home, mobilehome, or recreational vehicle on a lot [*Health & Safety Code § 18213*; *see 25 Cal. Code Reg. § 1002* (definitions of awning, cabana, ramada, storage cabinet, storage building, garage, carport, fence, windbreak, and porch); *see also § 369.11[3]*]. A mobilehome "building component" is any subsystem, subassembly, or other system designated for use in, or as part of, a structure, including structural, electrical, mechanical, plumbing, and fire-protection systems and other systems affecting health and safety [*25 Cal. Code Reg. § 1002*].

Pursuant to legislative mandate in the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*] to provide for the construction, location, and use of mobilehome accessory buildings or structures to protect the health and safety of the occupants and the public [*Health & Safety Code § 18552*], the Department of Housing and Community Development has prescribed standards for the construction, use, maintenance, and occupancy of mobilehome accessory buildings or structures and building components located on a lot accommodating a mobilehome. These standards [*see 25 Cal. Code Reg. §§ 1422-1520*] purportedly apply to mobilehome accessory buildings and structures and building components whether in or outside a mobilehome park [*see 25 Cal. Code Reg. § 1422*]. However, the governing statute [*Health & Safety Code § 18552*] is part of an enactment generally limited to policies regarding mobilehome parks and, unlike other statutes in that Act [*see, e.g., Health & Safety Code § 18550*], does not show a legislative intent to reach outside mobilehome parks.

[2] In Mobilehome Parks

The operator of a mobilehome park [*see § 369.11[2]*] may not permit a mobilehome accessory building or structure or building component to be constructed, installed, used, or maintained in the mobilehome park unless it is constructed, installed, used, or maintained in accordance with the requirements of applicable regulations [*25 Cal. Code Reg. §§ 1102(d), 1424(a)*; *see 25 Cal. Code Reg. §§ 1422-1520*].

No person may erect, construct, reconstruct, install, relocate, or alter any accessory building or structure or building component within a mobilehome park without first obtaining a written construction permit from the enforcement agency [*25 Cal. Code Reg. § 1018(d)* (excepting certain non-major kinds of work); *see § 369.11[4]*].

Park operator approval is required on all applications for permits to construct, reconstruct, install, or alter a mobilehome accessory structure (or miscellaneous structure) located or proposed to be located within a mobilehome park [*25 Cal. Code Reg. § 1032(e)*]. The park operator has complete discretion to withhold approval but would be liable for damages or subject to a judgment for other appropriate relief if withholding approval unreasonably constitutes breach of an agreement with the tenant [*see 52 Ops. Cal. Att'y Gen. 153 (l969)* (construing predecessor of *25 Cal. Code Reg. § 1032(e)*)].

[3] Abatement

Any mobilehome accessory structure or building, or building component, or portion thereof, or the premises on which it is located, in which there exists any of the conditions listed in *25 Cal. Code Reg. § 1608(a)-(n)* (e.g., inadequate sanitation, structural hazards, any nuisance, faulty weather protection) to an extent that endangers the life, limb, health, property, safety, or welfare of the occupants or the public is deemed to be substandard and a nuisance [*25 Cal. Code Reg. § 1608*]. The registered owner of an accessory building or structure or building component that is constructed, altered, converted, used, or maintained in a manner that constitutes a violation of the regulations [*25 Cal. Code Reg. § 1000 et seq.*] or any other applicable provision of law is required to abate the violation [*25 Cal. Code Reg. § 1610(a)*].

Legal Topics:

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

§§ 369.48[Reserved]

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§ 369.60 Standards

[1] Standards Should Guarantee Residents Protection of Their Investment and Decent Living Environment

Because of the relatively permanent nature of residence in mobilehome parks [*see § 369.11[2][a]*] and the substantial investment which a mobilehome represents, residents of mobilehome parks are entitled to live in conditions which assure their health, safety, general welfare, and a decent living environment, and which protect the investment of their mobilehomes [*Health & Safety Code § 18250*]. Standards and requirements established for construction, maintenance, occupancy, use, and design of mobilehome parks should guarantee mobilehome park residents maximum protection of their investment and a decent living environment [*Health & Safety Code § 18251*]. It is the purpose of the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*] to assure protection of the health, safety, and general welfare of mobilehome park residents [*Health & Safety Code § 18254*].

[2] Standards for Protection of Life and Property, Generally

Standards prescribed by the Department of Housing and Community Development, pursuant to legislative mandate "for the protection of life and property and to carry out the purposes of this part [Mobilehome Parks Act]" cover construction, installation, alteration, repair, use and maintenance of electrical equipment and electrical wiring systems [*Health & Safety Code § 18670*; *25 Cal. Code Reg. §§ 1130-1190*], fuel gas piping equipment and systems [*Health & Safety Code § 18690*; *25 Cal. Code Reg. §§ 1200-1236*], and plumbing equipment and installations [*Health & Safety Code § 18630*; *25 Cal. Code Reg. §§ 1240-1284*] within mobilehome parks.

[3] Standards for Protection of Health and Safety

Standards prescribed by the Department pursuant to legislative mandate "to protect the health and safety of the occupants and the public" cover construction, use, maintenance, and occupancy of mobilehome accessory buildings and structures in mobilehome parks [*Health & Safety Code § 18552*; *25 Cal. Code Reg. §§ 1422-1520*].

[4] Standards for Protection of Life and Property Against Fire

Standards prescribed "for the protection of life and property against fire in mobilehome parks" [*Health & Safety Code § 18691(a)*] cover hose connections for lots and a hydrant system for the park [*25 Cal. Code Reg. §§ 1300-1319*] but do not apply to mobilehome parks constructed or approved for construction before January 1, 1966 [*Health & Safety Code § 18691(a), (c)*]. Those standards include regular maintenance and periodic inspection and testing of fire hydrants [*Health & Safety Code § 18691(a)*]. Other fire-prevention standards cover mobilehome accessory buildings and structures [*25 Cal. Code Reg. § 1442*] in mobilehome parks.

[5] Standards for Installation

Standards are prescribed for the installation of mobilehomes on lots in mobilehome parks [*25 Cal. Code Reg. §§ 1320-1368*] "for the protection of life and property" [*Health & Safety Code § 18613*; *see § 369.37*].

[6] Other Standards

Other standards prescribed by the Department pursuant to authority given by the Mobilehome Parks Act cover the following:

- Construction and maintenance of swimming pools for public use [*25 Cal. Code Reg. § 1042* (incorporating standards set forth in California Building Code)];
- Excavation and grading [*25 Cal. Code Reg. §§ 1045, 1116*];
- Lot identification [*25 Cal. Code Reg. § 1104*];
- Roadways and access to lots [*25 Cal. Code Reg. § 1106*; *see Health & Safety Code § 18612*];
- Park lighting [*25 Cal. Code Reg. § 1108*; *see Health & Safety Code § 18602*]; and
- Providing toilets, lavatories, and showers for public use [*25 Cal. Code Reg. § 1112*; *see Health & Safety Code § 18640*].

[7] Alternatives to Prescribed Standards

Materials, appliances, installations, devices, arrangements, and methods of construction not specifically prescribed by the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*] and implementing regulations [*25 Cal. Code Reg. § 1000 et seq.*] may be used if the Department of Housing and Community Development determines that they are equivalent in quality, strength, effectiveness, fire resistance, durability, safety, and protection of life and health to those which are prescribed [*Health & Safety Code § 18305(a), (b)*].

[8] Enforcement Powers

The officers or agents of the enforcement agency [*see § 369.11[4]*] may (1) enter public or private property to determine whether there exists any mobilehome park to which the Mobilehome Parks Act applies, and (2) enter and inspect all mobilehome parks, wherever situated, and inspect all accommodations, equipment, or paraphernalia used in connection therewith, and examine any registers of occupants maintained therein, to secure enforcement of the provisions of the Mobilehome Parks Act, building standards published in the State Building Standards Code relating to mobilehome parks, and other regulations promulgated pursuant to the Mobilehome Parks Act [*Health & Safety Code § 18400*; *see 25 Cal. Code Reg. § 1000 et seq.* (regulations)].

[9] Abatement of Violation

If any mobilehome park is constructed, altered, converted, used, occupied, or maintained in violation of any provision of the Mobilehome Parks Act, or a building standard published in the State Building Standards Code relating to mobilehome parks, or other regulations adopted by the Department of Housing and Community Development pursuant to Mobilehome Parks Act [*see 25 Cal. Code Reg. § 1000 et seq.*], or any order or notice issued by the enforcement agency [*see § 369.11[4]*] which allows a reasonable time to correct such violation, the enforcement agency may institute any appropriate action or proceeding to prevent, restrain, correct, or abate the violation [*Health & Safety Code § 18404(a)*].

The superior court may make any order for which application is made pursuant to the Mobilehome Parks Act [*Health & Safety Code § 18404(b)*].

Legal Topics:

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§ 369.61 Location

No enforcement agency may approve any mobilehome park [*see § 369.11[4]*] fronting on any coastline, shoreline, river, or waterway, or on any lake or reservoir owned in whole or in part by any public agency, including the state, unless the city or county having jurisdiction over the property has determined that reasonable public access by fee or easement from public highways exists to such coastline, shoreline, river, waterway, lake, or reservoir [*Health & Safety Code § 18406*; *see also § 369.75*].

Legal Topics:

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§ 369.62 Construction

[1] Requirement to Obtain Construction Permit

A permit issued by the enforcement agency [*see § 369.11[4]*] is required for construction of a mobilehome park [*see § 369.11[2][a]*] or for construction of additional buildings or lots or alteration of buildings, lots, or other installations in an existing mobilehome park [*Health & Safety Code § 18500*]. However, a permit is not required for certain minor construction work [*see 25 Cal. Code Reg. § 1018(d)*].

A permit may not be issued without evidence of compliance with the California Environmental Quality Act (CEQA) [*Pub. Res. Code § 21000 et seq.*; *25 Cal. Code Reg. §§ 1030, 1032(b)*; *People v. Department of Housing & Community Dev. (1975) 45 Cal. App. 3d 185, 194, 119 Cal. Rptr. 266]* . For detailed coverage of CEQA, see Ch. 418, *Pollution and Environmental Matters* , and California Environmental Law and Land Use Practice, Chs. 20-23 (Matthew Bender).

[2] Refusal to Issue Permit

Issuance of a construction permit for a mobilehome park is discretionary in part and ministerial in part. To the extent that grant or denial for the construction permit is governed by fixed design and construction specifications in statute or regulation, the official decision of conformity or nonconformity is ministerial. Conformity with the more generalized standards of the Mobilehome Parks Act, such as, whether or not the water supply is adequate and potable, the sewage disposal is satisfactory, the site is well-drained and graded, the lighting is sufficient, the suboptimum features call for use and occupancy restrictions are relatively personal decisions addressed to the sound judgment of the administrator. Because such decisions have great environmental significance relative to one physical site, and negligible significance in another, they require a large amount of discretion [*People v. Department of Housing & Community Dev. (1975) 45 Cal. App. 3d 185, 193, 119 Cal. Rptr. 266* (distinguishing ministerial from discretionary permit decisions for purpose of environmental impact report requirements)].

However, the enforcement agency [*see § 369.11[4]*] is not required by law to hold a hearing for presentation of evidence on which to base discretionary decisions in the permit process. Therefore, refusal of an application for a construction permit would not be reviewable under *Code Civ. Proc.§ 1094.5* in an administrative mandate proceeding.

Refusal to issue a permit is a cause of action for a writ of mandate under *Code Civ. Proc. § 1085*. If the refusal is based solely on alleged noncompliance with prescribed standards not involving agency discretion, the writ may direct issuance of the permit; that is, the court may override the agency's decision that standards have not been met. To the extent that the refusal to issue a permit is based on alleged noncompliance with standards involving agency discretion, the writ may direct issuance of the permit only on a showing of no substantial evidence to support a decision against the applicant (assuming compliance with non-discretionary standards). If the agency has failed or refused to complete the permit process (e.g., has denied an application without considering the evidence), a writ of mandate may direct the agency to act.

If there is a ground for issuing it, the writ must be issued, because damages are not recoverable [*see Code Civ. Proc. § 1086*; *Gov. Code §§ 818.4, 820.2, 820.4, 821.2* (governmental immunities from liability for damages)]. For discussion of, and forms for use in, proceedings for writs of mandate, see Ch. 358, *Mandate and Prohibition* .

[3] Refusal to Extend Permit Period

A construction permit is good for six months, excluding any time when the holder is prevented by law from proceeding with the work [*see People v. Department of Housing & Community Dev. (1975) 45 Cal. App. 3d 185, 200, 119 Cal. Rptr. 266]* ; but that period may be extended by the enforcement agency [*see § 369.11[4]*] for a reasonable time [*Health & Safety Code § 18509*], provided work has actually been started [*25 Cal. Code Reg. § 1038(a)*]. The Commission of Housing and Community Development has provided that extensions may be for six months at a time and that all construction permits expire two years from the date of issuance [*25 Cal. Code Reg. § 1038(a)*].

The purpose of a statute providing an expiration date for a construction permit when work has not commenced is to prevent one from reserving land for future purposes when that person does not intend in good faith to presently commence the proposed use [*Morgan v. County of San Diego (1971) 19 Cal. App. 3d 636, 641, 97 Cal. Rptr. 180* ; *Upton v. Gray (1969) 269 Cal. App. 2d 352, 357, 74 Cal. Rptr. 783* (source of quoted words)].

Refusal to grant an extension must be based on this policy. If such a refusal exceeds the bounds of reason (in light of the policy), all circumstances being considered, it is arbitrary and may be reversed by a writ of mandate directing the enforcement agency to grant the requested extension [*see Morgan v. County of San Diego (1971) 19 Cal. App. 3d 636, 640-642, 97 Cal. Rptr. 180* (judgment granting petition for writ, affirmed); *see also § 369.131*].

If a permit is allowed to expire before construction is completed, permit fees (which may be substantial) are forfeited, and all work on the project must stop until a new permit is obtained [*25 Cal. Code Reg. § 1038(b), (c)*]. In some cases the developer's penalty might go beyond forfeiture of fees. If applicable standards or local zoning laws have been changed since the first permit was issued, the developer might find it very costly, or might be unable to qualify for another permit. (If the developer completes the project without a permit, it is doubtful that an operating permit would be issued [*see 25 Cal. Code Reg. § 1010*; *see also § 369.63*].)

Legal Topics:

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California Forms of Pleading and Practice--Annotated

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§ 369.63 Operation

[1] Requirement to Obtain Operating Permit

A permit issued by the enforcement agency [*see § 369.11[4]*] is required for operating a mobilehome park [*see § 369.11[2][a]*] or any portion of a mobilehome park [*Health & Safety Code § 18500*].

An operating permit is issuable on completion of construction in compliance with applicable standards, and annually thereafter provided the existing permit is not suspended [*Health & Safety Code §§ 18505, 18506*]. In the event of a change in ownership, an amended operating permit must be issued on proper application [*Health & Safety Code § 18507(a)*].

[2] Refusal to Issue Permit

Issuance of a mobilehome park operating permit probably is, like issuance of a construction permit, partly a ministerial function and partly a discretionary function [*see § 369.62[2]*]. The procedure, however, does not involve a hearing for presentation of evidence; therefore, refusal to issue a permit is a cause of action for a writ of mandate directing issuance, under *Code Civ. Proc. § 1085*, and not an administrative decision reviewable in an administrative mandate proceeding under *Code Civ. Proc. § 1094.5*. If the applicant qualifies for the permit and there has been abuse of discretion in refusing to issue it, the writ must be issued, because damages are not recoverable [*see Code Civ. Proc. § 1086*; *Gov. Code §§ 818.4, 820.2, 820.4, 821.2* (governmental immunities from liability for damages)].

[3] Suspension of Permit

[a] Grounds for Suspension

Violation of any provision of the Mobilehome Parks Act or of the permit is a ground for suspending the operating permit [*Health & Safety Code § 18510*]. Willful violation of any provision of the Mobilehome Parks Act, any implementing regulation, or any building standard published in the State Building Standards Code relating to mobilehome parks is a ground for suspending or revoking the operating permit [*Health & Safety Code § 18700*].

[b] Notice of Violation

The suspension process begins with a notice of violation from the enforcement agency stating both the violation and that the permit will be subject to suspension unless the violation is corrected within 30 days [*Health & Safety Code § 18511*]. The notice must be served by posting a copy in a conspicuous place on the premises described in the permit and sending a copy, by registered mail with return receipt requested, to the person named in the permit at the address shown in the permit [*Health & Safety Code § 18512*]. Usually the notice is a letter.

[c] Hearing

The permit holder is entitled to a hearing on filing a written notice request [*see § 369.115*] within 10 days after the day of mailing of the notice of violation [*Health & Safety Code § 18513*]. The hearing must commence within 10 days after the filing of the request for hearing, unless the enforcement agency grants the permit holder's request for a postponement for a good and sufficient reason [*Health & Safety Code § 18515*]. At the hearing the permit holder is entitled to be heard and to show cause why the notice of violation should be modified or withdrawn [*Health & Safety Code § 18514*].

[d] Action by Enforcement Agency

After the hearing the enforcement agency must sustain, modify, or withdraw the notice of violation, depending on the agency's finding as to whether or not the provisions of the Mobilehome Parks Act have been complied with [*Health & Safety Code § 18516*]. If the violation cited in the notice persists more than 30 days after the mailing and posting of the notice, the agency may suspend the operating permit [*Health & Safety Code § 18517*]. A suspended permit must be reinstated, or a new permit must be issued, on proof that the provisions of the Mobilehome Parks Act and of the suspended permit have been complied with [*Health & Safety Code § 18518*].

The agency's decision to suspend an operating permit and the proceedings leading to that decision are reviewable in an administrative mandate proceeding pursuant to *Code Civ. Proc. § 1094.5*. For discussion of, and forms for use in, such a proceeding, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[4] Operation of Mobilehome Park Is Business Activity

[a] Acts of Unfair Competition

Operation of a mobilehome park is a business activity for the purpose of enforcing state laws on unfair competition [*see Bus. & Prof. Code § 16600 et seq.* (preservation and regulation of competition)]. Violations of the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*] and related sections of the Administrative Code [*25 Cal. Code Reg. § 1000* et seq.] constitute acts of unfair competition [*People v. McKale (1979) 25 Cal. 3d 626, 632, 159 Cal. Rptr. 811, 602 P.2d 731]* . When an interested person commences an action within four years after the cause of action accrues [*see Bus. & Prof. Code § 17208*], acts of unfair competition may be enjoined, and restitution of money or property acquired through acts of unfair competition may be compelled [*Bus. & Prof. Code § 17203*], in addition to any other relief that may appropriately be given [*see Bus. & Prof. Code § 17205*]. The defendant in an action by the attorney general, a district attorney, a city attorney, or a city prosecutor in addition to being enjoined, may be held liable for a civil penalty [*see Bus. & Prof. Code §§ 17204* (authorization for suit by public attorney), *17206, 17207*; *see Bus. & Prof. Code §§ 17204.5, 17206.5* (authorizing San Jose city attorney to bring action, with consent of Santa Clara County District Attorney, until city's population reaches 750,000; then repealed)]. An additional penalty, which may be trebled, applies to actions brought by, on behalf of, or for the benefit of senior citizens or disabled persons to redress acts of unfair competition perpetrated against them [*Bus. & Prof. Code § 17206.1*; *Civ. Code § 3345*; *see Ch. 565, Unfair Competition, § 565.10* et seq.].

The fact that enforcement of the Mobilehome Parks Act is the responsibility of the Department of Housing and Community Development or an analogous local agency [*see § 369.11[4]*] does not preclude the attorney general, a district attorney, or a city attorney from alleging violations of the Act as acts of unfair competition in an action for injunction and civil penalty [*People v. McKale (1979) 25 Cal. 3d 626, 632-634, 159 Cal. Rptr. 811, 602 P.2d 731]* .

Violations of the Mobilehome Residency Law [*Civ. Code § 798 et seq.*] also constitute acts of unfair competition [*see People v. McKale (1979) 25 Cal. 3d 626, 635, 159 Cal. Rptr. 811, 602 P.2d 731]* .

For a form of class action complaint by a mobilehome park tenant against the management, an injunction against future violations, and for restitution of moneys collected in violation of the Mobilehome Residency Law (such as, pet fees in violation of *Civ. Code § 798.33* or guest fees in violation of *Civ. Code § 798.34*), see *§ 369.143*.

A mobilehome park is also a business for purposes of local business license laws, which actually are tax laws (designed to raise revenue) rather than regulatory laws [*see Gov. Code § 37101* (authority for local taxation of businesses); *40 Ops. Cal. Att'y Gen. 241 (1962)]* .

[b] Discrimination Is Unlawful

A mobilehome park is undoubtedly a business establishment under the Unruh Civil Rights Act and related statutes [*Civ. Code §§ 51-53*; *see People v. McKale (1979) 25 Cal. 3d 626, 637, 159 Cal. Rptr. 811, 602 P.2d 731]* . A lot in a mobilehome park is probably a housing accommodation under the former Fair Housing Law [*People v. McKale (1979) 25 Cal. 3d 626, 637,159 Cal. Rptr. 811, 602 P.2d 731* ; *see* former *Health & Safety Code § 35700 et seq.*; *see also* former Health & Safety Code § 35710(f); *see now Gov. Code § 12900 et seq.* (California's Fair Employment and Housing Act)].

Mobilehome parks are specifically excepted from *Civ. Code §§ 51.2, 51.3*, the age discrimination provisions of the Unruh Civil Rights Act [*Schmidt v. Superior Court (1989) 48 Cal. 3d 370, 385-388, 256 Cal. Rptr. 750, 769 P.2d 932* ; *see Civ. Code § 51.3(c)(5)* ("dwelling" does not include mobilehome)]. Other provisions of the Unruh Civil Rights Act, however, such as those prohibiting discrimination on the basis of religion or ancestry, presumably do apply to mobilehome parks [*see People v. McKale (1975) 25 Cal. 3d 626, 637, 159 Cal. Rptr. 811, 602 P.2d 731* (decided before enactment of *Civ. Code § 51.3(c)(5)*)]. In addition, *42 U.S.C. §§ 3602(k), 3605* prohibit exclusion of families with children under 18 years of age except in housing that qualifies as "housing for older persons" under *42 U.S.C. § 3607(b)(2)(B), (C)* [*see Schmidt v. Superior Court (1989) 48 Cal. 3d 370, 376, 391, 256 Cal. Rptr. 750, 769 P.2d 932]* .

Unlawful discrimination by management in the operation of a mobilehome park would constitute unfair competition under *Bus. & Prof. Code § 17200* [*People v. McKale (1979) 25 Cal. 3d 626, 637, 159 Cal. Rptr. 811, 602 P.2d 731* ; *see* [a], *above*].

For discussion of, and forms for use in, actions based on violations of civil rights by business establishments and violations of the Fair Employment and Housing Act, see Chs. 116, *Civil Rights: Discrimination in Business Establishments* , and 117, *Civil Rights: Housing Discrimination* , respectively.

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§ 369.64 Maintenance of Acceptable Conditions

[1] Responsible Persons

A person who is responsible must be available for the operation and maintenance of the mobilehome park [*see § 369.11[2][a]*]. In every mobilehome park with 50 or more units, this person or his or her designee must reside in the mobilehome park and have knowledge of emergency procedures relative to utility systems and common facilities under the ownership and control of the owner of the park [*Health & Safety Code § 18603*].

The owner or operator of, or designated agent for, the mobilehome park is responsible for the safe operation and maintenance of all common areas, park-owned electrical, gas, and plumbing equipment and their installations, and all park-owned permanent buildings or structures, within the mobilehome park [*25 Cal. Code Reg. § 1102(a)*].

The legal owner of the property, or the park owner or operator for properties or permanent buildings under their ownership or control, that is maintained in a manner that constitutes a violation of law, must abate the violation [*25 Cal. Code Reg. § 1610(b)*]. The person responsible for the violation must cause it to be corrected within five days or within such longer period of time as may be allowed by the enforcement agency [*25 Cal. Code Reg. § 1611(a)*; *see § 369.11[4]*].

[2] Abatement of Nuisance

The owner or operator of a mobilehome park must abate any nuisance in the mobilehome park within five days, or within such longer period of time as may be allowed by the enforcement agency [*see § 369.11[4]*], after the owner or operator has been given written notice to remove the nuisance. If the owner or operator fails to do so within that time, the district attorney of the county in which the mobilehome park, or the greater portion of the mobilehome park, is situated must bring a civil action to abate the nuisance in the superior court of the county in the name of the people of the State of California [*Health & Safety Code § 18402*]. The action may also be brought by the attorney general, the county counsel of the jurisdiction in which the park, or the greater portion of the park, is located, or a city attorney or city prosecutor if the park is located within the city's jurisdiction [*Health & Safety Code § 18402*].

In any action or proceeding to abate a nuisance in a mobilehome park, proof of either one of the following facts is sufficient for a judgment or order for the abatement of the operation of the mobile home park [*Health & Safety Code § 18403*]:

- A previous conviction of the owner or operator of a violation of the Mobilehome Parks Act or a building standard published in the State Building Standards Code relating mobilehome parks which constitutes a nuisance or failure on the part of the owner or operator to correct the violation after the conviction; or

- The violation is the basis for the proceeding.

The substantial failure of the management to provide and maintain physical improvements in the common facilities in good working order and condition is a public nuisance. Also, the substantial violation of a mobilehome park rule is a public nuisance. Notwithstanding the provisions of *Civ. Code § 3491*, such nuisances only may be remedied by a civil action or abatement [*Civ. Code § 798.87*]. A civil action may be brought by a park resident, the park management, or in the name of the people of California by the district attorney or county counsel of the jurisdiction in which the park, or the greater portion of the park, is located, the city attorney or city prosecutor if the park is located within the city's jurisdiction, or the attorney general [*Civ. Code § 798.87(c)*].

[3] Abatement of Substandard Building

Any building, structure, or portion thereof, or the premises on which it is located, in which there exists any of the conditions listed in *25 Cal. Code Reg. § 1605(a)-(n)* (e.g., inadequate sanitation, structural hazards, any nuisance, faulty weather protection) to an extent that endangers the life, limb, health, property, safety, or welfare of the public or the occupants thereof is substandard [*25 Cal. Code Reg. § 1605*].

When a permanent building is maintained in a manner that constitutes a violation of law, the legal owner of the property, or the park owner or operator who has ownership or control over the building, must abate the violation [*25 Cal. Code Reg. § 1610(b)*]. The person responsible for the violation must cause it to be corrected within five days or within such longer period of time as may be allowed by the enforcement agency [*25 Cal. Code Reg. § 1611(a)*; *see § 369.11[4]*].

[4] Animal Control

Dogs and other domestic animals are not permitted to run at large in the mobilehome park [*25 Cal. Code Reg. § 1608*; *see Health & Safety Code § 18601*].

[5] Artificial Lighting

In every mobilehome park there must be kept burning from sunset to sunrise sufficient artificial light to adequately illuminate every building containing public toilets and public showers, and the area or tract of land containing the mobilehome park [*Health & Safety Code § 18602*; *see 25 Cal. Code Reg. § 1108*].

[6] Debris Removal

The park owner or operator may not permit waste paper, hay, grass, straw, weeds, litter, or combustible flammable waste, or rubbish of any kind, to remain on any roof or in any vacant lot, open space, or common area. Provisions must be made for the collection and safe disposal of such materials [*25 Cal. Code Reg. § 1120(b), (d)*].

[7] Fire Prevention and Suppression

In areas where fire department services are not available, the mobilehome park operator is responsible for instructing the park staff in the use of the park's fire protection equipment and the staff's specific duties in the event of fire [*25 Cal. Code Reg. § 1305*].

A notice must be posted in a conspicuous place in the park showing all of the following:

- Telephone numbers of the fire department, police or sheriff's department, mobilehome park office, the person responsible for operation and maintenance of the park, and the enforcement agency [*see § 369.11[4]*];

- Locations of the nearest fire alarm box, if any, and the nearest public telephone; and

- The park's street or highway address [*25 Cal. Code Reg. § 1122*].

All fire protection or suppression equipment must be protected against freezing in any areas subject to freezing [*25 Cal. Code Reg. § 1314*].

Tenants must keep the area under and around their mobilehomes free from an accumulation of refuse, rubbish, paper, leaves, brush, or other combustible material [*25 Cal. Code Reg. § 1120(a)*].

[8] Trees and Driveways

Park management is solely responsible for the trimming, pruning, or removal of any tree in the common areas of a mobilehome park [*Civ. Code § 798.37.5(b)*]. With regard to trees on rental spaces in a mobilehome park, park management is solely responsible for trimming, pruning, or removing a tree on written notice by a homeowner or a determination by park management that the tree poses a specific hazard or health and safety violation [*Civ. Code § 798.37.5(a)*]. In the case of a dispute over that assertion, the park management or a homeowner may request an inspection by the Department of Housing and Community Development or a local agency responsible for the enforcement of the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*] to determine whether there is a violation of that Act [*Civ. Code § 798.37.5(a)*]. No homeowner may plant a tree within a mobilehome park without first obtaining written permission from the management [*Civ. Code § 798.37.5(d)*].

Park management is also solely responsible for the maintenance, repair, replacement, paving, sealing, and the expenses related to the maintenance of all driveways installed by park management, including repair of root damage to driveways and foundation systems [*Civ. Code § 798.37.5(c)*]. However, homeowners are responsible for the maintenance, repair, replacement, paving, sealing, and the expenses related to the maintenance of a homeowner-installed driveway [*Civ. Code § 798.37.5(c)*]. A homeowner may be charged for the cost of any damage to the driveway caused by an act of the homeowner or a breach of the homeowner's responsibilities under the mobilehome park rules and regulations, so long as those rules and regulations are not inconsistent with the statutory requirements [*Civ. Code § 798.37.5(c)*].

These provisions applicable to trees and driveways apply only to rental agreements entered into, renewed, or extended on or after January 1, 2001 [*Civ. Code § 798.37.5(f)*].

[9] Utility Service Equipment and Connections

[a] Operation and Maintenance Responsibilities

The owner of the mobilehome park or the owner's agent is responsible for the safe operation and maintenance of all electrical, gas, and plumbing equipment and installations in the mobilehome park, which are under the owner's or agent's ownership or control [*25 Cal. Code Reg. § 1604(a)*]. Connections and installations used to supply gas, water, or

electricity, and sewage connections, for mobilehomes must be maintained in accordance with the requirements for material, size, location, and capacity provided in applicable regulations [*see 25 Cal. Code Reg. § 1000 et seq.*]. Connections and installations made before the effective date of any such requirement may continue in use if they are in compliance with requirements in effect at the date of being installed and if they are not found to be unsafe or unsanitary. If they are subject to damage by vehicles or other causes, all mobilehome lot utilities must be protected by posts, fences, or other permanent barriers [*25 Cal. Code Reg. § 1634*].

[b] Drains and Sewers

A mobilehome lot drain inlet must be gas-tight when not in use [*25 Cal. Code Reg. § 1254(b)*] and must be provided with a trap if a unit is installed, or proposed to be installed, on the lot and its plumbing fixtures are not protected by approved traps and vents [*25 Cal. Code Reg. § 1258*].

[c] Electricity

Electrical equipment and installations must be maintained in safe operating condition, and calculated connected loads must not exceed the rated ampacity of such equipment and installations [*see 25 Cal. Code Reg. § 1188(a)*]. In addition, all park or lot service equipment must be accessible by an unobstructed entrance or passageway and must have a working space in front of and centered on the service equipment [*25 Cal. Code Reg. § 1183*]. Electrical installations or equipment disconnected by order of the enforcement agency [*see § 369.11[4]*] pursuant to regulation [*see 25 Cal. Code Reg. § 1190(a)*] must not be reenergized until a permit has been obtained to repair the installation or equipment and the work has been inspected and approved by the enforcement agency [*25 Cal. Code Reg. § 1190(b)*].

[d] Natural Gas

The operator of a mobilehome park natural gas piping system is responsible for complying with federal regulations [49 C.F.R. Parts 191, 192] implementing the Pipeline Safety Law of 1994 (49 U.S.C. § 1971) [*25 Cal. Code Reg. § 1206*]. Whenever a mobilehome lot gas riser outlet is not in use, it must be closed with an approved cap or plug to prevent accidental discharge of gas [*25 Cal. Code Reg. § 1220(d)*]. Gas piping or equipment that has been disconnected by order of the enforcement agency [*see 25 Cal. Code Reg. § 1236(a)*] must not be reconnected to a gas supply until a permit has been obtained to alter, repair, or reconstruct the gas piping and the completed work has been inspected and approved by the enforcement agency [*25 Cal. Code Reg. § 1236(b)*].

[e] Water

Each mobilehome lot must be provided with a potable water lot service outlet [*25 Cal. Code Reg. § 1274(a)*]. A separate water service shutoff valve must be installed in each lot water service outlet at each lot [*25 Cal. Code Reg. § 1274(c)*].

[10] Interruption in Utility Service

The management must provide, by posting notice on the mobilehomes of all affected homeowners and residents, at least 72 hours written advance notice of an interruption in utility service of more than two hours for the maintenance, repair, or replacement of facilities of utility systems over which the management has control within the park, provided the interruption is not due to an emergency. "Emergency" means the interruption of utility service resulting from an accident or act of nature, or cessation of service caused by other than the management's regular or planned maintenance, repair, or replacement of utility facilities [*Civ. Code § 798.42*]. The management is liable only for actual damages sustained by a homeowner or resident for a violation of the notice requirement [*Civ. Code § 798.42*].

This notice requirement also applies to the management of a mobilehome subdivision, cooperative, or condominium and of a resident-owned mobilehome park [*Civ. Code § 799.7*].

[11] Vehicular Traffic Control

Regulations governing the parking of vehicles vary according to when the mobilehome park was constructed. For parks constructed before September 15, 1961, no vehicle parking may be allowed on roadways less than 22 feet in width. If vehicle parking is permitted on one side of the roadway, the roadway must be at least 22 feet wide. If vehicle parking is permitted on both sides of the roadway, the roadway must be no less than 30 feet in width [*25 Cal. Code Reg. § 1106(a)(2)*].

For mobilehome parks constructed on or after September 15, 1961, no vehicle parking may be allowed on one-way, one-lane roadways less than 22 feet in width. If vehicle parking is permitted on one side of a one-lane roadway, that roadway must be a minimum of 22 feet in width. If vehicle parking is permitted on both sides of a one-lane roadway, the roadway must be at least 30 feet in width [*25 Cal. Code Reg. § 1106(b)(2)*]. No vehicle parking may be allowed on two-lane, two-way roadways less than 32 feet in width. If vehicle parking is permitted on one side of a two-way roadway, the roadway must be at least 32 feet in width. If vehicle parking is permitted on both sides of a two-way roadway, the roadway must be at least 40 feet in width [*25 Cal. Code Reg. § 1106(b)(3)*].

[12] Emergency Preparedness Plan

Owners and operators of existing parks must adopt emergency preparedness plans by September 1, 2010 [*Health & Safety Code § 18603(b)(1)*]. For parks constructed after September 1, 2010, the park owner or operator must adopt an emergency preparedness plan before the issuance of the permit to operate [*Health & Safety Code § 18603(b)(2)*]. This requirement may be met by either (1) adopting the emergency procedures and plans approved by the Standardized Emergency Management System Advisory Board on November 21, 1997, entitled "Emergency Plans for Mobilehome Parks," and compiled by the former Office of Emergency Services in compliance with the Governor's Executive Order W-156-97, or any subsequent version; or (2) adopting a plan that is developed by the park management and is comparable to the procedures and plans set forth in item (1) [*Health & Safety Code § 18603(b)(3)*].

For an existing park and for a new park constructed after September 10, 2010, before the issuance of the permit to operate, an owner or operator of a park must post notice of the emergency preparedness plan in the park clubhouse or in another conspicuous area within the mobilehome park, and provide to all existing residents and, on approval of tenancy, for all new residents thereafter, notice of how to access the plan as well as information on individual emergency preparedness from appropriate state or local agencies, including the California Emergency Management Agency [*Health & Safety Code § 18603(c)*]. This may be accomplished in a manner that includes distribution of materials and posting notice of the plan or information on how to access the plan via the internet [*Health & Safety Code § 18603(c)(2)*].

The enforcement agency must determine whether park management is in compliance with the emergency preparedness requirements [*Health & Safety Code § 18603(d)*]. A violation of *Health & Safety Code § 18603* constitutes an unreasonable risk to life, health, or safety and must be corrected by park management within 60 days of notice of the violation [*Health & Safety Code § 18603(e)*].

Every park must have a person who is familiar with the emergency preparedness plans for the park [*Health & Safety Code § 18603(a)*].

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§ 369.65 Entry Into Mobilehomes and Onto Mobilehome Lots

The ownership or management of a mobilehome park [*see § 369.11[2]*] may enter a mobilehome without the prior written consent of the occupant in case of emergency or when the occupant has abandoned the mobilehome [*Civ. Code § 798.26(b)*; *see Civ. Code § 799.2.5* (applicable to resident-owned mobilehome parks)]. Additionally, the ownership or management has a right of entry on the land on which a mobilehome is situated (1) for maintenance of utilities, driveways, and trees; (2) for maintenance of the premises in accordance with the rules and regulations of the park when the homeowner or resident fails to so maintain the premises; and (3) for protection of the park at any reasonable time, but not in a manner or at a time that would interfere with the occupant's quiet enjoyment [*Civ. Code § 798.26(a)*; *see Civ. Code § 799.2.5* (applicable to resident-owned mobilehome parks)].

In any other case, the ownership or management of a mobilehome park has no right of entry into a mobilehome without the prior written consent of the occupant. Such consent may be revoked in writing by the occupant at any time [*Civ. Code § 798.26(a)*; *see Civ. Code § 799.2.5* (applicable to resident-owned mobilehome parks)].

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§ 369.66 Rent, Fees, and Charges

[1] Limitations

A tenant in a mobilehome park [*see § 369.11[2][b]*] may not be charged a fee for other than rent, utilities, and incidental reasonable charges for services actually rendered [*Civ. Code § 798.31*]. However, property taxes imposed on park land may be charged to residents [*Cacho v. Boudreau (2007) 40 Cal. 4th 341, 345*]. There was a split of authority on the question of whether an assessment or rent "pass-through" for capital improvements is a prohibited fee under *Civ. Code § 798.31* or is a permitted form of "rent." Interpretation of local rent control ordinances has been determinative in some of these cases [*see Robinson v. City of Yucaipa (1994) 28 Cal. App. 4th 1506, 1512-1513, 34 Cal. Rptr. 2d 291* (permitted form of rent); *Karrin v. Ocean-Aire Mobile Home Estates (1991) 1 Cal. App. 4th 1066, 1070-1073, 2 Cal. Rptr. 2d 581 , overruled in part by Cacho v. Boudreau (2007) 40 Cal. 4th 341, 358, 53 Cal. Rptr. 3d 43* (prohibited fee)]. In other areas with no applicable rent control ordinance, the language of the lease itself has been determinative [*see Vance v. Villa Park Mobilehome Estates (1995) 36 Cal. App. 4th 698, 705-706, 42 Cal. Rptr. 2d 723* (permitted form of rent); *Dills v. Redwoods Associates, Ltd. (1994) 28 Cal. App. 4th 888, 893, 33 Cal. Rptr. 2d 838* (permitted form of rent)].

A homeowner may not be charged a fee for services actually rendered that are not listed in the rental agreement unless the homeowner has been given written notice thereof by the management at least 60 days before imposition of the charge. Those fees and charges must be separately stated on any monthly or other periodic billing to the homeowner. If the fee or charge has a limited duration or is amortized for a specified period, the expiration date must be stated on the initial notice and each subsequent billing to the homeowner while the fee or charge is billed to the homeowner [*Civ. Code § 798.32*]. A homeowner must not be charged a fee for obtaining a lease on a mobilehome lot for a term of 12 months or less, as the homeowner may request. A fee may be charged for a lease of more than one year if the fee is mutually agreed on by both the homeowner and management [*Civ. Code § 798.32*]. A homeowner may not be charged a fee based on the number of members in his or her immediate family consisting of the homeowner, the homeowner's spouse, their parents, their children, and their grandchildren under 18 years of age [*Civ. Code § 798.35*]. A homeowner may not be charged a fee for the enforcement of any of the rules and regulations of the park [*Civ. Code § 798.36*]. However, a reasonable fee may be charged by management for the maintenance of the land and premises on which the

mobilehome is situated in the event the homeowner fails to do so in accordance with the rules and regulations of the park after written notification to the homeowner and the failure of the homeowner to comply within 14 days. The written notice must state the specific condition to be corrected and an estimate of the charges to be imposed by management if the services are performed by management or its agent [*Civ. Code § 798.36(a)*].

The management may not charge or impose on a homeowner any fee or increase in rent that reflects the cost to the management of any fine, forfeiture, penalty, money damages, or fee assessed by a court of law against the management for violation of the Mobilehome Residency Law, including any related attorney's fees and costs incurred by the management [*Civ. Code § 798.39.5(a)*]. In determining whether a homeowner has met the burden of proof in demonstrating that a fee or rent increase is in violation of *Civ. Code § 798.39.5*, a court must consider the remoteness in time of the assessment against the management [*Civ. Code § 798.39.5(b)*]. Any provision in a rental agreement entered into, renewed, or modified on or after January 1, 1995, that permits a fee or increase in rent that reflects the cost to the management of any money damages awarded against the management for a violation of the Mobilehome Residency Law is void [*Civ. Code § 798.39.5(c)*].

Management may also charge a reasonable fee if, in good faith, it has removed and stored a homeowner's or resident's personal property in order to bring the premises into compliance with park rules and regulations or with the Mobilehome Parks Act or its implementing regulations [*Civ. Code § 798.36(a), (b)*]. Management must provide at least 14 days' written notice of its intent to remove the personal property. The notice must (1) include a description of the property to be removed; (2) specify the rule, regulation, or code justifying the removal; and (3) provide an estimate of the charges to be imposed by management. The property to be removed may not include the mobilehome or its appurtenances or accessory structures [*Civ. Code § 798.36(b)(1)*]. The homeowner or resident is responsible for reimbursing management the actual, reasonable costs of removing and storing the property [*Civ. Code § 798.36(b)(2)*]. In addition, costs incurred by management in correcting the rules violation associated with the removal and storage of the property are deemed to be reasonable incidental service charges and may be collected pursuant to *Civ. Code § 798.56(e)* if a notice of nonpayment of the removal and storage fees is personally served on the homeowner [*Civ. Code§ 798.36(b)(2), (3)*].

If the homeowner or resident does not claim the property within 60 days, the property is deemed abandoned and management may dispose of it in any manner. If the homeowner or resident claims the property but has not reimbursed management for storage costs, management may bill those costs in a monthly statement that constitutes notice of nonpayment, and the costs will become the obligation of the homeowner or resident. If a resident or homeowner communicates in writing his or her intent to abandon the property before 60 days has expired, management may dispose of the property immediately and no further storage charges may accrue [*Civ. Code § 798.36(b)(3)*]. If management elects to dispose of the property by way of sale or auction and the funds received by management exceed the amount owed, it must refund the difference to the homeowner or resident within 15 days from the date of receipt [*Civ. Code § 798.36(b)(4)*]. The refund must be delivered to the homeowner or resident by first-class mail postage prepaid to his or her address in the park or by personal delivery, and must include an accounting specifying the costs of removal and storage of the property incurred by management in correcting the rules violation and the amount of proceeds realized from the sale or auction [*Civ. Code § 798.36(b)(4)*]. If a sale or auction of the property yields less than the costs incurred by management, the homeowner or resident is responsible for the difference. This amount will be deemed a reasonable incidental service charge and may be collected pursuant to *Civ. Code § 798.56(e)* if a notice of nonpayment of the removal and storage fees is personally served on the homeowner [*Civ. Code§ 798.36(b)(4)*]. If management elects to proceed under § 798.36, it may not also terminate the tenancy pursuant to *Civ. Code § 798.56(d)* [*see* § 369.78[2]] based on the same specific violations. Management has the burden of proof that enforcement was undertaken in a nondiscriminatory, nonselective fashion [*Civ. Code§ 798.36(b)(4)*].

[2] Rent

The management must give a homeowner written notice of any increase in the tenant's rent at least 90 days before the

date of the increase [*Civ. Code § 798.30*]. Notice of a rent increase to begin in less than 90 days is totally void; it is not effective to raise rent 90 days after the notice [*Rich v. Schwab (1984) 162 Cal. App. 3d 739, 742-743, 209 Cal. Rptr. 417]* .

[3] Rent Control

Local mobilehome park rent control ordinances coupled with state statutory restrictions on eviction of mobilehome park residents do not constitute a physical taking of the property of the mobilehome park owner. The effect of the ordinance that tenants have the right to occupy the site at below market rents indefinitely does not constitute a physical taking because the government does not require the landowner to submit to physical occupation of its property. The mobilehome park owner voluntarily rents the property to the tenants and has the right to get out of the mobilehome park business. The rent control laws merely regulate the use of the land by regulating the landlord-tenant relationship. Thus, the rent control ordinances are not invalid on the basis that they are a physical taking of the property. In reaching this holding, the United States Supreme Court expressly did not rule on the issue of whether there is a regulatory taking of the property [*Yee v. City of Escondido (1992) 503 U.S. 519, 527-532, 112 S. Ct. 1522, 118 L. Ed. 2d 153]* . Physical takings and regulatory takings are further discussed in Ch. 247, *Eminent Domain and Inverse Condemnation* . Rent control in the landlord-tenant context generally, is covered in Ch. 335, *Landlord and Tenant: Rent Control* .

[4] Rental Agreements Exempt From Rent Control

Newly constructed spaces initially held out for rent after January 1, 1990, are exempt from any ordinance, rule, regulation, or initiative measure adopted by any city or county, that establishes a maximum amount that a landlord may charge a tenant for rent [*Civ. Code § 798.45*; *see Civ. Code § 798.7* (definition of "new construction"); for discussion of rent control regulations generally, see Ch. 335, *Landlord and Tenant: Rent Control*]. In addition, rental agreements on existing spaces are exempt from any ordinance, rule, regulation, or initiative measure adopted by any local governmental entity that establishes a maximum amount that a landlord may charge a tenant for rent if the criteria of *Civ. Code § 798.17(b)* are met. The terms of an exempt rental agreement prevail over conflicting provisions of any ordinance, rule, regulation, or initiative measure limiting or restricting rents in mobilehome parks only during the term of the rental agreement or one or more uninterrupted, continuous extensions of the rental agreement. If the rental agreement is not extended and no new rental agreement in excess of 12 months' duration is entered into, then the last rental rate charged for the space under the previous rental agreement is the base rent for purposes of applicable provisions of law concerning rent regulation [*Civ. Code § 798.17(a)(1)*].

Provisions of a local rent control ordinance regulating the renewal by existing tenants of rent control-exempt leases have been held to be preempted by *Civ. Code § 798.17* of the Mobilehome Residency Law [*Mobilepark West Homeowners Assn. v. Escondido Mobilepark West (1995) 35 Cal. App. 4th 32, 46-47, 41 Cal. Rptr. 2d 393]* .

The first sentence of the first paragraph of a rental agreement entered into under *Civ. Code § 798.17* must contain a provision notifying the homeowner that the agreement will be exempt from any ordinance, rule, regulation, or initiative measure adopted by any local governmental entity that establishes a maximum amount that a landlord may charge a tenant for rent [*Civ. Code § 798.17(a)(2)*].

Rental agreements subject to *Civ. Code § 798.17(a)* must meet all of the following criteria [*Civ. Code § 798.17(b)*]:

- The rental agreement must be in excess of 12 months' duration;

- The rental agreement must be entered into between the management and a homeowner for the latter's personal and actual residence;

- The homeowner must have at least 30 days from the date the rental agreement is first offered to

accept or reject it; and

- A homeowner who executes a rental agreement offered pursuant to *Civ. Code § 798.17* may void the agreement by notifying management in writing within 72 hours of the homeowner's execution of the agreement.

A rental agreement entered into on or after January 1, 1993, must not have a provision that authorizes automatic extension or renewal of, or automatically extends or renews, the rental agreement for a period beyond the initial stated term at the sole option of either management or the homeowner [*Civ. Code § 798.17(g)*].

At the time the rental agreement is first offered to the homeowner, the management must provide written notice to the homeowner of the homeowner's right (1) to have at least 30 days to inspect the rental agreement, and (2) to void the rental agreement by notifying management in writing within 72 hours of the acceptance of a rental agreement. Management's failure to provide the written notice makes the rental agreement voidable at the homeowner's option on the homeowner's discovery of the failure. The receipt of any written notice provided pursuant to *Civ. Code § 798.17(f)* must be acknowledged in writing by the homeowner [*Civ. Code § 798.17(f)*].

The homeowner may reject the offered rental agreement and, instead, accept a rental agreement for a term of 12 months or less from the date the offered agreement begins [*Civ. Code § 798.17(c)*; *see also Civ. Code § 798.18* (rental agreements for 12 months or less)]. For discussion of rental agreements for 12 months or less, see *§ 369.70* (Space Rental Agreement). If the homeowner elects to have a rental agreement for 12 months or less, including a month-to-month tenancy, the rental agreement must provide the same rental charges, terms, and conditions as a rental agreement offered under *Civ. Code § 798.17(b)* (discussed *above*), during the first 12 months, except for options contained in the offered rental agreement to extend or renew the agreement [*Civ. Code § 798.17(c)*].

Civ. Code § 798.17(c) does not prohibit the park management from offering gifts of value, other than rental rate reductions, to homeowners who execute a rental agreement subject to *Civ. Code § 798.17* [*Civ. Code § 798.17(d)*].

With regard to any space in a mobilehome park that is exempt from rent control under *Civ. Code § 798.17(a)*, and notwithstanding any ordinance, rule, regulation, or initiative measure, a mobilehome park may not be assessed any fee or other exaction for a park space that is exempt under *Civ. Code § 798.17(a)* imposed in accordance with any ordinance, rule, regulation, or initiative measure. No other fee or other exaction may be imposed for an exempt park space for the purpose of defraying the cost of administration thereof [*Civ. Code § 798.17(e)*].

Civ. Code § 798.17 does not apply to or supersede other provisions of Part Two of the Civil Code (*Civ. Code § 755 et seq.*) or other state law [*Civ. Code § 798.17(n)*].

Notwithstanding the provisions of *Civ. Code § 798.17*, and subject to certain statutory exceptions [*see Civ. Code § 798.21(f)*], if a mobilehome space within a mobilehome park is not the principal residence of the homeowner and the homeowner has not rented the mobilehome to another party, it is exempt from any ordinance, rule, regulation, or initiative measure adopted by any city, county, or city and county, which establishes a maximum amount that the landlord may charge a tenant for rent [*Civ. Code § 798.21(a)*].

[5] Separate Charge for Rent Control Fees

A city or county that administers an ordinance, rule, regulation, or initiative measure that establishes a maximum amount that management may charge a tenant for rent must permit the management to separately charge a homeowner for any of the following [*Civ. Code § 798.49(a)*]:

- The amount of any fee, assessment, or other charge first imposed by any local, state, or federal

government on or after January 1, l995, on the space rented by the homeowner;

- The amount of any increase on or after January 1, 1995, in an existing fee, assessment, or other charged imposed by any governmental entity on the space rented by the homeowner; and

- The amount of any fee, assessment, or other charge imposed or increased on or after January 1, 1993, pursuant to any state or locally mandated program relating to housing in the Health and Safety Code.

The amount of any of the authorized fees, assessments, or other charges listed above must be separately stated on any billing to the homeowner [*Civ. Code § 798.49(c)*].

If management has charged the homeowner for a fee, assessment, or other charge that was increased or first imposed on or after January 1, 1993, and the fee, assessment, or other charge is decreased or eliminated thereafter, the charge to the homeowner must be decreased or eliminated accordingly [*Civ. Code § 798.49(b)*]. Any change in the amount of a fee, assessment, or other charge listed above must be considered when determining any rental adjustment under the local ordinance [*Civ. Code § 798.49(c)*].

The right to charge for rent control fees does not apply to the following [*Civ. Code § 798.49(d)*]:

- Fees, assessments, or charges imposed under the Mobilehome Parks Act unless specifically authorized by *Health & Safety Code § 18502*;

- Those costs that are imposed on management by a court in accordance with *Civ. Code § 798.39.5*;

- Any fee or other exaction imposed on management for the specific purpose of defraying the cost or administration of any ordinance, rule, regulation, or initiative measure that establishes a maximum amount that management may charge for rent; and

- Any tax imposed on the property by a city or county.

Those fees and charges must be separately stated on any monthly or other periodic billing to the homeowner. If the fee or charge has a limited duration or is amortized for a specified period, the expiration date must be stated on the initial notice and each subsequent billing to the homeowner while the fee or charge is billed to the homeowner [*Civ. Code § 798.49(e)*].

The Mobilehome Residency Law does not preempt local rent control ordinances insofar as they allow mobilehome park owners to separately charge park residents for property taxes imposed on mobilehome park land [*Cacho v. Boudreau (2007) 40 Cal. 4th 341, 345, 53 Cal. Rptr. 3d 43, 149 P.3d 473]* . *Civ. Code § 798.49(a)* (rent control ordinance must allow park owners to pass through government fees and assessments) can be harmonized with *Civ. Code § 798.31* (mobilehome park owner may not charge park residents for anything other than rent, utilities, or reasonable service charges) by construing the separate charges for governmental assessments and fees under § 798.49(a) as a permissible component of the total rent. This conclusion is not inconsistent with *Civ. Code § 798.49(d)* (*Civ. Code § 798.49* "shall not apply" to property taxes) because § 798.49(d) means only that local rent control agencies are not required to allow park owners to separately charge park residents for property taxes, not that they are prohibited from doing so. The effect of the exclusion is to preserve the authority of local rent control agencies to deal with property taxes as a pass-through item, like the assessments and fees listed in *Civ. Code § 798.49(a)*, as a factor to be considered in periodic discretionary adjustments of base rent, or as both [*Cacho v. Boudreau (2007) 40 Cal. 4th 341, 354, 53 Cal. Rptr. 3d 43, 149 P.3d 473]* .

[6] Separate Billing for Utilities

If the park management elects to bill a homeowner separately for utilities [*see § 369.66[11]*], the separately billed utility fees and charges are not deemed to be included in the rent charged under the rental agreement and are not deemed to be rent or a rent increase for purposes of any ordinance, rule, regulation, or initiative measure that establishes a maximum amount that a landlord may charge a tenant for rent, provided that, at the time of the initial separate billing of the utility fees and charges, the rent chargeable under the rental agreement or the base rent chargeable under the terms of a local rent control provision is simultaneously reduced by an amount equal to the fees and charges separately billed. The amount of this reduction must be equal to the average amount charged to the park management for that utility service for that space during the 12 months immediately preceding notice of the commencement of the separate billing for that utility service [*Civ. Code § 798.41(a)*]. *Civ. Code § 798.41* does not apply to rental agreements entered into before January 1, 1991, until extended or renewed on or after that date [*Civ. Code § 798.41(b)*].

Those fees and charges must be separately stated on any monthly or other periodic billing to the homeowner. If the fee or charge has a limited duration or is amortized for a specified period, the expiration date must be stated on the initial notice and each subsequent billing to the homeowner while the fee or charge is billed to the homeowner [*Civ. Code § 798.41(d)*].

[7] Security Deposit

A security deposit may be required only on or before the initial occupancy. The deposit may not be in an amount or value in excess of two months' rent that is charged at the inception of the occupancy, in addition to the first month's rent [*Civ. Code § 798.39(a)*].

Any security deposit collected on or after January 1, 1989, must be refunded to the homeowner if he or she has promptly paid, within five days of the date the amount is due, all rent, utilities, and reasonable service charges for any consecutive 12-month period after the collection of the deposit or resale of the mobilehome, whichever occurs first. The homeowner must make a written request for the refund, and it must be made within 30 days of the end of the 12-month period or the date of the mobilehome's resale [*Civ. Code § 798.39(b)*]. Management is not required to place any security deposit in an interest-bearing account or to provide a homeowner with any interest on the security deposit [*Civ. Code § 798.39(f)*].

For security deposits collected before January 1, 1989, the deposit must be refunded to the homeowner on the extension or renewal of the rental agreement or lease between the homeowner and the management, and on receipt of a written request from the homeowner. To be eligible for the refund, the homeowner must have paid, within five days of the due date, all of the rent, utilities, and reasonable service charges for the 12-consecutive-month period preceding the receipt of the written request. The management must refund the security deposit within 60 days [*Civ. Code § 798.39(c)*]. With regard to any security deposits collected before January 1, 1989, and not otherwise disbursed, in the event the mobilehome park is sold or transferred to any other party or entity, the selling park owner must deposit in escrow an amount equal to all security deposits held by the park owner. Also, the seller's escrow instructions must direct that on the close of escrow the security deposits deposited in escrow that were held by the selling park owner (including the escrow period) for 12 months or more, must be disbursed to the persons who paid the deposits to the selling park owner and promptly paid (within five days of their due date) all rent, utilities, and reasonable service charges for the 12-month period preceding the close of escrow [*Civ. Code § 798.39(d)*].

Security deposits in escrow that were held by the selling park owner and were not required to be disbursed to the homeowner must be disbursed to the selling park owner's buyer or other successor in interest. The buyer or other successor in interest then has the same legal obligations with regard to the security deposits as did the original, selling park owner. The required disbursement of security deposits may be made in escrow by a debit to the seller and a credit to the buyer or other successor in interest [*Civ. Code § 798.39(e)*].

[8] Installation and Landscaping Fees

A homeowner may not be charged a fee for entry, installation, hookup, or landscaping as a condition of tenancy, but reasonable landscaping and maintenance requirements may be included in the park rules and regulations [*Civ. Code § 798.37*]. Additionally, an actual fee or cost imposed by a local governmental ordinance or requirement directly related to the occupancy of the specific site on which the mobilehome is located and not incurred as a portion of the development of the mobilehome park as a whole may be charged [*Civ. Code § 798.37*]. The management may not require a homeowner or prospective homeowner to purchase, rent, or lease goods or services for landscaping, remodeling, or maintenance from any person, company, or corporation [*Civ. Code § 798.37*].

[9] Pet Fees

No lease agreement entered into, modified, or renewed on or after January 1, 2001, may prohibit a homeowner from keeping at least one pet within the mobilehome park, subject to reasonable park rules and regulations [*Civ. Code § 798.33(a)*]. For these purposes, "pet" means any domesticated bird, cat, dog, aquatic animal kept within an aquarium, or other animal as agreed to between the management and the homeowner [*Civ. Code § 798.33(c)*]. A homeowner may not be charged a fee for keeping a pet in the park unless the management actually provides special facilities or services for pets. If special pet facilities are maintained by the management, the fee charged must reasonably relate to the cost of maintaining the facilities or services and the number of pets kept in the park [*Civ. Code § 798.33(b)*].

[10] Guest Fees

A homeowner may not be charged a fee for a guest who does not stay with the tenant for more than a total of 20 consecutive days or a total of 30 days in a calendar year. Such a guest will not be required to register with the management [*Civ. Code § 798.34(a)*].

A homeowner who is living alone and who wishes to share his or her mobilehome with one person may do so, and a fee may not be imposed by management for that person. That person must be considered a guest of the homeowner, and any agreement between the homeowner and that person will not change the terms and conditions of the rental agreement between management and the homeowner. The guest must comply with the rules and regulations of the mobilehome park [*Civ. Code § 798.34(b)*].

A homeowner in a park may share his or her mobilehome with any person over 18 years of age if that person is providing live-in health care, live-in supportive care, or supervision to the homeowner under a written treatment plan prepared by a physician or surgeon. A fee may not be charged by management for that person. That person has no rights of tenancy in the park, but must comply with all park rules and regulations [*Civ. Code §§ 798.34(c), 799.9(a)*].

A senior homeowner (a homeowner or resident who is 55 years of age or older) who resides in a mobilehome park that has implemented rules or regulations limiting residency based on age requirements for older persons [*see Civ. Code §§ 798.76, 799.5*] may share his or her mobilehome with any person over 18 years of age if the person is a parent, sibling, child, or grandchild of the senior homeowner and requires live-in health care, live-in-supportive care, or supervision under a written treatment plan prepared by a physician or surgeon. Management may not charge a fee for this person, and the person has no rights of tenancy in the park. However, the person must comply with park rules and regulations. Unless otherwise agreed on, park management is not required to manage, supervise, or provide for the person's care during his or her stay in the mobilehome park [*Civ. Code §§ 798.34(d), 799.9(b)*].

[11] Utility Charges

When the management provides both master-meter and submeter service of utilities to a tenant, for each billing period, the cost of the charges for the period must be separately stated along with the opening and closing readings for the

meter. The management must post in a conspicuous place the prevailing residential utilities rate schedule as published by the serving utility [*Civ. Code § 798.40(a)*]. If a third-party billing agent or company prepares utility billing for the park, management must disclose the name, address, and telephone number of the billing agent or company on each resident's billing [*Civ. Code § 798.40(b)*].

The management of a master-meter mobilehome park must give written notice to homeowners and residents in their utility billing statements by February 1 of each year about assistance to low-income persons for utility costs under the California Alternate Rates for Energy (CARE) program [*Civ. Code § 798.43.1(a)*]. The full amount of the CARE program discount must be passed through to the qualified homeowners and residents in monthly utility billings. The discount must be noticed on the billing statement as either an itemized amount of the discount or as a notation on the statement that the homeowner or resident is receiving the CARE discount on the electric bill, the gas bill, or both the electric and gas bills [*Civ. Code § 798.43.1(c)*].

When a rental agreement, including a rental agreement specified in *Civ. Code § 798.17* [*see* [4], *above*], does not specifically provide otherwise, management may elect to bill a homeowner separately for utility service fees and charges assessed by the utility for services provided to or for spaces in the park [*Civ. Code § 798.41(a)*]. *Civ. Code § 798.41* applies to natural or liquid propane gas, electricity, water, cable television, garbage or refuse service, and sewer service [*Civ. Code § 798.41(a)*]. Rental agreements, are not, however, required to provide for separate billings, and *Civ. Code § 798.41* does not apply to rental agreements entered into before January 1, 1991, until extended or renewed on or after that date [*Civ. Code § 798.41(b), (c)*]. For discussion of the effect of separate utilities billing on rental agreements, particularly rental agreements exempt from rent control, see [6], *above*.

Whenever a homeowner is responsible for paying gas, water, or electric utility service, management must disclose to the homeowner any condition by which a gas, water, or electric meter on the homeowner's site measures the service for common area facilities or equipment, including lighting, provided that management has knowledge of the condition [*Civ. Code § 798.43(a)*]. Management must make this disclosure before the inception of the tenancy or on discovery, and must do either of the following [*Civ. Code § 798.43(a)*]:

- Enter into a mutual written agreement with the homeowner for compensation by management for the cost of the portion of the service measured by the homeowner's meter for the common area facilities to the extent that this cost accrues on or after January 1, 1991; or

- Discontinue using the meter on the homeowner's site for the utility service to the common area facilities and equipment.

If the meter measures electricity for required lighting and the lighting provides lighting for the homeowner's site, management must comply with the above requirement [*Civ. Code § 798.43(b)*; *see Health & Safety Code § 18602* (mandated lighting within mobilehome parks)].

The management of a park that does not permit mobilehome owners or park residents to purchase liquified petroleum gas for use in the mobilehome park from someone other than the management may not sell liquified petroleum gas to homeowners and residents at a cost which exceeds 110 percent of the actual price paid by the management for liquified petroleum gas [*Civ. Code § 798.44(a)*]. If the management sells liquified petroleum gas to homeowners and tenants under these circumstances, it must post in a visible location the actual price paid by the management for the liquified petroleum gas [*Civ. Code § 798.44(b)*]. These requirements also apply when federal, state, or local laws or regulations, including requirements for setbacks between mobilehomes, prohibit homeowners or residents from installing their own liquefied petroleum gas supply tanks, even though the management of the mobilehome park permits mobilehome owners and park residents to buy their own liquefied petroleum gas [*Civ. Code § 798.44(e)*]. However, in no way are the management's rights under *Civ. Code § 798.31* [*see* [1], *above*] abrogated by the requirements set forth in this paragraph [*Civ. Code § 798.44(d)*].

Owners of parks with mastered meters and submeters are prohibited from recovering utility expenses through rent increases [*see Hillsboro Properties v. Public Utilities Commission (2003) 108 Cal. App. 4th 246, 256--257, 133 Cal. Rptr. 2d 343* (Public Utilities Commission exercised its ratemaking authority and did not exceed its jurisdiction in ordering-mobilehome park owner to recalculate its net operating income to exclude income and expenses from tenant gas and electricity usage and rent increases to exclude certain utility improvement costs); *Rainbow Disposal Co. v. Escondido Mobilehome Rent Review Bd. (1998) 64 Cal. App. 4th 1159, 1168-1169, 75 Cal. Rptr. 2d 746]* .

[12] Liens Prohibited

Management may not acquire a lien or security interest, other than an interest arising by reason of process issued to enforce a judgment of any court, in a mobilehome located in the park unless it is mutually agreed on by both the homeowner and management. Any billing and payment on the obligation must be kept separate from current rent [*Civ. Code § 798.38*].

[13] Notice of Zoning

Management of a mobilehome park must give prospective tenants notice before the inception of the tenancy of both of the following [*Civ. Code § 798.27(a)*]:

- The nature of the zoning permit under which the mobilehome park operates. If the mobilehome park is operating under a permit subject to a renewal or expiration date, the relevant information and dates must be included in the notice; and

- The duration of any lease of the mobilehome park, or any portion of any lease, in which the management is the lessee.

If a change occurs concerning the zoning permit under which the park operates or a lease in which the management is a lessee, all tenants must be given written notice within 30 days of such change. Notification regarding the change of use of the park, or any portion of the park, is governed by *Civ. Code § 798.56(g)* [*Civ. Code § 798.27(b)*; *see § 369.73[2]*].

[14] Notice of School Facilities Fee

Under certain circumstances, management of a mobilehome park and management of a subdivision, cooperative, or condominium for mobilehomes must disclose in writing to prospective residents that their manufactured home or mobilehome may be subject to a school facilities fee. The disclosure must be made at the time of the prospective resident's application for residency. The disclosure requirement extends to any person who proposes to purchase or install a manufactured home or mobilehome on a space, on which the construction of the pad or foundation system commenced after September 1, 1986, and no other manufactured home or mobilehome was previously located, installed, or occupied [*Civ. Code §§ 798.82, 799.8*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use

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§ 369.67 Recreational Vehicles

In any new mobilehome park that is developed after January 1, 1982, mobilehome spaces may not be rented for the accommodation of recreational vehicles as defined by *Civ. Code § 799.29* unless the mobilehome park has a specifically designated area within the park for such vehicles that is separate and apart from the area designated for mobilehomes. Recreational vehicles may be located only in the specifically designated area [*Civ. Code § 798.22(a)*]. The restriction does not apply until 75 percent of the spaces in the parks have been rented for the first time [*Civ. Code § 798.22(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 369.68 Rules and Regulations

[1] Amendments

When management proposes an amendment to the park's rules and regulations, the management must meet and consult with the homeowners in the park, their representatives, or both. Written notice setting forth the proposed amendment to the park rules and the date, time, and location of the meeting must be given to all the homeowners in the park 10 days or more before the meeting [*Civ. Code § 798.25(a)*]. Following the meeting and consultation with the homeowners, the noticed amendment to the park rules and regulations may be implemented, as to any homeowner, with the consent of that homeowner, or without the homeowner's consent on written notice of not less than six months. However, regulations applicable to recreational facilities may be amended without homeowner consent on written notice of not less than 60 days [*Civ. Code § 798.25(b)*]. Written notice to a homeowner whose tenancy commences within the required period of notice of a proposed amendment to the park's rules and regulations constitutes compliance when the notice is given before the inception of the tenancy [*Civ. Code § 798.25(c)*]. Any amendment to the park's rules and regulations that creates a new fee payable by the homeowner and that has not been expressly agreed on by the homeowner and management in the written rental agreement or lease is void and unenforceable [*Civ. Code § 798.25(e)*].

When management proposes an amendment to the park's rules and regulations that is mandated by a change in the law, including a change in a statute, ordinance, or governmental regulation, it may implement the amendment to the park rules and regulations, as to any homeowner, with the consent of that homeowner or without the homeowner's consent on written notice of not less than 60 days [*Civ. Code § 798.25(d)*]. The notice must include a citation to the statute, ordinance, or regulation, including the section number, that necessitates the proposed amendment to the park's rules and regulations [*Civ. Code § 798.25(d)*].

[2] Applicability

The park's owner and any park employee is subject to and must comply with all park rules and regulations to the same extent as residents and guests [*Civ. Code § 798.23(a)*]. This requirement does not apply to any rule or regulation that governs the age of any resident or guest or to acts of an owner or employee that are undertaken to fulfill a park owner's maintenance, management, and business operation responsibilities [*Civ. Code § 798.23(b)*].

Any rule or regulation of a mobilehome park that (1) is unilaterally adopted by the management, (2) is implemented without the consent of the homeowners, and (3) by its terms purports to deny homeowners their right to a trial by jury or which would mandate binding arbitration of any dispute between management and homeowners is void and unenforceable [*Civ. Code § 798.25.5*].

[3] Injunction Against Violation

A continuing violation of a rule or regulation of a mobilehome park may be enjoined by the management [*see Civ. Code § 798.88*]. For a form of petition for obtaining a temporary restraining order and permanent injunction and discussion of the procedure to obtain it, see *§ 369.132*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use

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§ 369.69 Hours of Common Area Facilities

Each common area facility must be open or available to residents at all reasonable hours, and the hours of the common area facilities must be posted at the facility [*Civ. Code § 798.24*]. A homeowner may not be required to pay a cleaning deposit or obtain liability insurance to use common area facilities for the purposes specified in *Civ. Code §§ 798.50* (homeowners' right to assemble and meet) and 798.51 (homeowners' right to assemble and meet in park) [*Civ. Code § 798.51(b), (d)*]. However, a liability insurance binder may be required if alcoholic beverages are to be served at any meeting or private function [*Civ. Code § 798.51(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 369.70 Space Rental Agreement

[1] Definitions

"Rental agreement" means an agreement between the management of a mobilehome park [*see § 369.11[2][b]*] and the homeowner that establishes the terms and conditions of a tenancy. A lease is a rental agreement [*Civ. Code § 798.8*]. "Tenancy" means the right of a homeowner to the use of a site within a mobilehome park on which to locate, maintain, and occupy a mobilehome [*see § 369.11[1][e]*], site improvements, and accessory structures for human habitation, including the use of the services and facilities of the park [*Civ. Code § 798.12*].

[2] Required Contents of Rental Agreement

The rental agreement must be in writing and contain, in addition to the provisions otherwise required by law, certain specified provisions [*see Civ. Code § 798.15*]. The rental agreement may include such other provisions permitted by law [*Civ. Code § 798.16*].

[3] Requirement to Offer Rental Agreement for Specified Time

A homeowner must be offered a rental agreement for one of the following [*Civ. Code § 798.18(a)*]:

- A term of 12 months;
- A lesser period as the homeowner may request; or
- A longer period as mutually agreed on by both the homeowner and the management.

The agreement may not contain any terms or conditions with regard to charges for rent, utilities, or incidental reasonable service charges that would be different during the first 12 months of the agreement from the corresponding terms or conditions that would be offered to the prospective homeowner or homeowners on a month-to-month basis [*Civ. Code § 798.18(b)*]. A rental agreement entered for a term of 12 months or less must not have a provision that

authorizes automatic extension or renewal of, or automatically extends or renews, the rental agreement beyond the initial term for a term longer than 12 months at the sole option of either management or the homeowner [*Civ. Code § 798.18(c)*].

[4] Copy of Lease or Rental Agreement

Management must return an executed copy of the lease or rental agreement to the homeowner within 15 business days after management has received the lease or rental agreement signed by the homeowner [*Civ. Code § 798.16(b)*].

[5] Waiver Prohibited

No rental agreement for a mobilehome may contain a provision by which the homeowner waives his or her rights under *Civ. Code §§ 798-798.88*. Any such waiver is deemed contrary to public policy and void [*Civ. Code § 798.19*].

[6] Membership in Restricted Club as Condition for Tenancy Is Prohibited

Membership in any private club or organization that is a condition for tenancy in a park must not be denied on the basis of race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, disability, or source of income [*Civ. Code § 798.20*; *see Gov. Code § 12955(a), (d)*; *see also Gov. Code §§ 12926, 12926.1(m), 12955(p)(1), 12955.2* (definitions)]. With regard to familial status, *Civ. Code § 798.20(a)* may not be construed to apply to housing for older persons, as defined in *Gov. Code § 12955*. Also with regard to familial status, nothing in § 798.20(a) may be construed to affect *Civ. Code §§ 51.2, 51.3, 51.4, 51.10, 51.11*, and *799.5*, relating to housing for senior citizens. However, *Civ. Code §§ 51(d)* and *1360* (concerning requirements for building construction and alterations) and *Gov. Code § 12955(n), (o)*, and *(p)* (concerning financial status) do apply to § 798.20(a) [*Civ. Code § 798.20(b)*].

For discussion of, and forms for use in, actions based on violations of civil rights, see Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 369.71 Tenant Meetings

[1] Rights of Homeowner

No provision in any mobilehome park rental agreement, rule, or regulation may deny or prohibit the right of any homeowner or resident to do any of the following [*Civ. Code § 798.51*]:

- Peacefully assemble or meet in the park, at reasonable hours and in a reasonable manner, for any lawful purpose. Meetings may be held in the park community or recreation hall or clubhouse when the facility is not otherwise in use, and, with the consent of the homeowner, in any mobilehome in the park;

- Invite public officials, candidates for public office, or representatives of mobilehome owner organizations to meet with homeowners and speak on matters of public interest;

- Canvass and petition homeowners and residents for noncommercial purposes relating to mobilehome living, election to public office, or the initiative, referendum, or recall processes, at reasonable hours and in a reasonable manner, including the distribution or circulation of information; and

- Display a political campaign sign relating to a candidate for election to public office or to the initiative, referendum, or recall process. The sign may not exceed six square feet and may not be displayed for a period longer than 90 days before the election to 15 days following the election, unless a local ordinance within the jurisdiction where the mobilehome park is located imposes a more restrictive time period [*Civ. Code §§ 798.51(e), 799.10*].

It was the Legislature's intent in enacting the above provision to ensure that homeowners and residents of mobilehome parks have the right to peacefully assemble and freely communicate with one another and with others with regard to mobilehome living or for social or educational purposes [*Civ. Code § 798.50*].

Any homeowner or resident who is prevented by management from exercising the rights provided above may bring an

action in a court of law to enjoin enforcement of any rule, regulation, or other policy that unreasonably deprives a homeowner or resident of those rights [*Civ. Code § 798.52*].

A park rule that management may close a park recreation hall at any time and exclude any park resident from the hall probably violates *Civ. Code § 798.51* [*see People v. McKale (1979) 25 Cal. 3d 626, 636-637, 159 Cal. Rptr. 811, 602 P.2d 731* (construing prior statute, former *Civ. Code § 789.5(e)*, which provided tenant meetings "shall not be subject to prohibition by park management")]. Merely having (not to mention enforcing) such a rule is an act of unfair competition enjoinable under *Bus. & Prof. Code § 17203* [*People v. McKale (1979) 25 Cal. 3d 626, 634-637, 159 Cal. Rptr. 811, 602 P.2d 731]* .

[2] When Management Must Meet and Consult with Homeowners

The management must meet and consult with the homeowners, on written request within 30 days of the request, either individually, collectively, or with representatives of a group of homeowners who have signed a request to be so represented on the following matters [*Civ. Code § 798.53*]:

- Resident concerns regarding existing park rules that are not subject to *Civ. Code § 798.25* (notice requirement for amending park rules);
- Standards for maintenance of physical improvements in the park;
- Addition, alteration, or deletion of service, equipment, or physical improvements; and
- Rental agreements exempt from rent control offered in accordance with *Civ. Code § 798.17*.

Any collective meeting may be conducted only after notice of the meeting has been given to all the requesting homeowners 10 days or more before the meeting [*Civ. Code § 798.53*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantRent RegulationGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use

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§ 369.72 Termination of Tenancy by Homeowner

A homeowner in a mobilehome park [*see § 369.11[2][b]*] must give written notice to the management of not less than 60 days before vacating the tenancy [*Civ. Code § 798.59*].

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For related research and practice materials, see the following legal topics:
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§ 369.73 Termination of Tenancy by Management

[1] Written Notice

The management of a mobilehome park [*see § 369.11[2][b]*] may not terminate or refuse to renew a tenancy except as permitted by the Mobilehome Residency Law [*see* [2], *below*] and on the giving of written notice to the homeowner in the manner prescribed by *Code Civ. Proc. § 1162* (three-day notice in unlawful detainer case and like notices) to remove the mobilehome from the park within a period of not less than 60 days, which period must be specified in the notice [*Civ. Code § 798.55(b)*]. A copy of the notice must be sent to the legal owner, as defined in *Health & Safety Code § 18005.8*, each junior lienholder as defined in *Health & Safety Code § 18005.3*, and the registered owner of the mobilehome if other than the homeowner, by United States mail within 10 days after notice to the homeowner. The copy may be sent by regular mail or by certified or registered mail with return receipt requested. If the homeowner has not paid the rent due within three days after notice to the homeowner and the first notice was not sent by certified or registered mail, a copy of the notice must again be sent to the legal owner, junior lienholder, and registered owner, by certified or registered mail with return receipt requested within 10 days after notice to the homeowner. Copies of the notice must be addressed to the legal owner, each junior lienholder, and the registered owner at their addresses, as set forth in the registration card specified in *Health & Safety Code § 18091.5* [*Civ. Code § 798.55(b)*].

The provisions of the Mobilehome Residency Law relating to termination of tenancy may not affect any rights or proceedings set forth in the forcible entry and detainer law [*Code Civ. Proc. §§ 1159-1179a*] except as otherwise provided in *Civ. Code §§ 798.55-798.61* [*Civ. Code § 798.60*].

For forms of notice, and for additional discussion and forms relating to the termination of tenancies in mobilehome parks, see Ch. 333, *Landlord and Tenant: Eviction Actions* , and California Legal Forms, Ch. 39, *Mobilehome Parks* (Matthew Bender).

[2] Permissible Reasons

A mobilehome park tenancy may be terminated by the management only for one or more of the following reasons:

(1) *Violation of Law*. The homeowner or resident has failed to comply with a local ordinance or state law or regulation relating to mobilehomes within a reasonable time after the homeowner receives a notice of noncompliance from the appropriate governmental agency [*Civ. Code § 798.56(a)*].

(2) *Annoying Conduct*. The homeowner or resident has engaged in conduct, on park premises, that constitutes a substantial annoyance to other homeowners or residents [*Civ. Code § 798.56(b)*]. A mobilehome park was held to owe tenants both an implied and a contractual duty to preserve their quiet enjoyment of the premises, and was required to make a reasonable response to conduct by the plaintiffs' neighbor that constituted a substantial annoyance. The Mobilehome Residency Law expressly preserves park owners' ability to secure the quiet enjoyment of mobilehome park tenants by authorizing owners to pursue eviction or injunctive relief against offending tenants [*Civ. Code §§ 798.56(b), (d), 798.88*; *Andrews v. Mobile Aire Estates (2005) 125 Cal. App. 4th 578, 591-592, 22 Cal. Rptr. 3d 832]* .

(3) *Criminal Conduct*. The homeowner or resident has been convicted of prostitution, an assault with a firearm on another person or on a peace officer or firefighter engaged in the performance of his or her duties [*Pen. Code §§ 243(d), 245(a)(2), (b)*], lewd or lascivious acts involving children [*Pen. Code § 288*], arson [*Pen. Code § 451*], or a felony controlled substance offense, and the act resulting in the conviction was committed on the premises of the mobilehome park, including but not limited to within the homeowner's mobilehome. The tenancy may not be terminated for such conduct, however, if the person convicted of the offense has permanently vacated, and does not subsequently reoccupy, the mobilehome [*Civ. Code § 798.56(c)*].

(4) *Violation of Park Rules*. The homeowner or resident has failed to comply with a reasonable rule or regulation of the park as set forth in the rental agreement or any amendment thereto. No act or omission of the homeowner or resident may constitute such a failure to comply unless and until the management has given the homeowner written notice of the alleged violation and the homeowner or resident has failed to adhere to the rule or regulation within seven days [*Civ. Code § 798.56(d)*]. If, however, a homeowner has been given a written notice of an alleged violation of the same rule or regulation on three or more occasions within a 12-month period after the homeowner has violated that rule or regulation, no written notice is required for a subsequent violation of the same rule or regulation. The management has the obligation to demonstrate that a rule or regulation has in fact been violated [*Civ. Code § 798.56(d)*].

Assuming compliance with statutory notice requirements, a guest's violation of park rules and regulations may be attributed to the host homeowner or resident [*see People v. McKale (1979) 25 Cal. 3d 626, 636, 159 Cal. Rptr. 811, 602 P.2d 731* (construing former Civ. Code § 789.56(d)(3))].

(5) *Default*. The homeowner has not paid rent, utility charges, or reasonable incidental service charges, provided that the amount due has been unpaid for at least five days from its due date, and provided that the homeowner must be given a three-day written notice to pay the amount due or to vacate the tenancy. The five-day period does not include the date payment is due. The three-day written notice must be given to the homeowner in the manner prescribed by *Code Civ. Proc. § 1162* (as in unlawful detainer cases). A copy of the notice must be sent to the persons or entities described in *Civ. Code § 798.55(b)* within 10 days after notice is delivered to the homeowner. If the homeowner cures the default, the notice need not be sent. Such notice may be given at the same time as the 60-day notice required for termination of the tenancy [*Civ. Code § 798.56(e)(1)*].

Payment by the homeowner before the expiration of the three-day notice period cures the default with regard to such payment. In the event the homeowner does not pay prior to the expiration of the three-day period, the homeowner remains liable for all payments due up to the time the tenancy is vacated [*Civ. Code § 798.56(e)(2)*]. Additionally, payment by the legal owner as defined in *Health & Safety Code § 18005.8*, by any junior lienholder as defined in *Health & Safety Code § 18005.3*, or by the registered owner as defined in *Health & Safety Code § 18009.5*, if other than the homeowner, on behalf of the homeowner before the expiration of 30 calendar days following the mailing of the notice to the legal owner, each junior lienholder, and the registered owner will cure a default with regard to such payment [*Civ. Code § 798.56(e)(3)*]. Cure of a default of rent, utility charges, or reasonable incidental service charges

by the legal owner, any junior lienholder, or the registered owner, if other than the homeowner, may not be exercised more than twice during a 12-month period [*Civ. Code § 798.56(e)(4)*]. If the homeowner has been given a three-day notice to pay the amount due or to vacate the tenancy on three or more occasions during the preceding 12-month period, no written three-day notice is required in the case of a subsequent nonpayment of rent, utility charges, or reasonable incidental service charges [*Civ. Code § 798.56(e)(5)*]. Under these circumstances, the homeowner must still be given a 60-day notice to remove his or her mobilehome from the park, with copies sent to the legal owner, any junior lienholder and the registered owner of the mobilehome [*Civ. Code § 798.56(e)(5)*]. Provided certain conditions are satisfied, any of these parties may have the right to cure the homeowner's default [*see Civ. Code § 798.56(e)(6)*].

(6) *Condemnation*. The park is condemned [*Civ. Code § 798.56(f)*].

(7) *Change of Use*. There is a change of use of the park or the portion of the park where the tenant's lot is located. "Change of use" means a use of the park for a purpose other than the rental, or the holding out for rent, of two or more mobilehome sites to accommodate mobilehomes used for human habitation. It does not mean the adoption, amendment, or repeal of a park rule or regulation. A change of use may affect an entire park or any portion thereof. Change of use includes, but is not limited to, a change of the park or any portion thereof to a condominium, stock cooperative, planned unit development, or any form of ownership wherein spaces within the park are to be sold [*Civ. Code § 798.10*].

Change of use is not a permissible reason for terminating a tenancy unless all of the following conditions are met [*Civ. Code § 798.56(g)*]:

- The management gives the tenants at least 15 days' written notice that the management will be appearing before a local governmental board, commission, or body to request permits for a change of use for the mobilehome park;

- After all required permits requesting a change of use have been approved by the local governmental board, commission, or body, the park's management gives the homeowners six months or more written notice of termination of tenancy;

- If the change of use requires no local governmental permits, then notice must have been given 12 months or more before the management's determination that a change of use will occur. The management in the notice must disclose and describe in detail the nature of the change of use;

- The management has given written notice to each proposed tenant, before the inception of his or her tenancy, that the management is requesting a change of use before local governmental bodies or that a change of use request has been granted; and

- If the proposed change of use actually occurs, notice of termination of tenancy must have been given as in other cases of termination of tenancy.

The required report on the impact of the closure described in § 369.41[2], must be given at the same time that notice is required under *Civ. Code § 798.56(g)*, as described above [*Civ. Code § 798.56(h)*].

[3] Impermissible Reasons

No tenancy may be terminated for the purpose of making a tenant's site available for a person who purchased or proposes to purchase, or rents or proposes to rent, a mobilehome from the owner of the park or the owner's agent [*Civ. Code § 798.58*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantTenant's Remedies & RightsGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral Overview

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§ 369.74 Delivery of Required Notices

Unless otherwise specifically provided, all notices required by the Mobilehome Residency Law [*Civ. Code § 798 et seq.*] must be either delivered personally to the homeowner or deposited in the United States mail, postage prepaid, addressed to the homeowner at his or her site within the mobilehome park [*Civ. Code § 798.14*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 369.75 Local Regulation: Zoning

A city or county, within the reasonable exercise of its police power, may establish certain zones for mobilehome parks [*see § 369.11[2][a]*] or may establish types of uses and locations, including family mobilehome parks and adult mobilehome parks as defined in the zoning ordinance, or may adopt rules and regulations by ordinance or resolution prescribing standards for park perimeter walls or enclosures on public street frontage, signs, access, and vehicle parking, or may prohibit certain uses of mobilehome parks [*Health & Safety Code § 18300(g)(1)*; *see, e.g., McKie v. Ventura County (1974) 38 Cal. App. 3d 555, 556-557, 113 Cal. Rptr. 143* (county ordinance restricting uses of mobilehomes upheld); *Jones v. City Council (1971) 17 Cal. App. 3d 724, 727-730, 94 Cal. Rptr. 897* (granting of use permit to construct mobilehome park upheld); *see also § 369.41*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use

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§ 369.76 State Employee Housing

The provisions of the Mobilehome Residency Law (*Civ. Code § 798 et seq.*) do not apply to any area owned, operated, or maintained by the state for the purpose of providing employee housing or space for a mobilehome owned or occupied by an employee of the state [*Civ. Code § 798.13(a)*]. However, a state employer must provide the occupant of a privately owned mobilehome that is situated in an employee housing area owned, operated, or maintained by the state, and that is occupied by a state employee under an agreement with his or her state employer and subject to the terms and conditions of that state employment, with a minimum of 60-days' notice before terminating the tenancy for any reason [*Civ. Code § 798.13(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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32-369 California Forms of Pleading and Practice--Annotated § 369.77

§ 369.77 Renting or Subletting Home or Space

Park management must permit a homeowner to rent his or her home, if it is the homeowner's primary residence, or to sublet his or her space, if a medical emergency or medical treatment requires the homeowner to be absent from his or her home and this is confirmed in writing by an attending physician [*Civ. Code § 798.23.5(a), (b)*]. The minimum term of the rental or sublease must be six months and the maximum term may not exceed 12 months, unless management approves a shorter or longer term [*Civ. Code § 798.23.5(b)(1)*]. A homeowner may not charge a renter or sublessee more than an amount necessary to cover the cost of space rent, utilities, and scheduled loan payments on the mobilehome, if any [*Civ. Code § 798.23.5(c)*]. The homeowner remains liable for the mobilehome park rent and other park charges [*Civ. Code § 798.23.5(b)(4)*].

The management may require approval of a prospective renter or sublessee, subject to the process and restrictions applicable to prospective purchasers of mobilehomes under *Civ. Code § 798.74(a)* [*Civ. Code § 798.23.5(b)(2)*]. A prospective sublessee must comply with any rule or regulation limiting residency based on age requirements [*Civ. Code § 798.23.5(b)(2)*; *see Civ. Code § 798.76*; *see also § 369.31[9]*]. In addition, the management may charge a prospective sublessee a credit screening fee for the actual cost of any personal reference check or consumer credit report [*Civ. Code § 798.23.5(b)(2)*].

The renter or sublessee must comply with all park rules and regulations. Failure to comply with the rules and regulations may result in the termination of the homeowner's tenancy in the mobilehome park, in accordance with *Civ. Code § 798.56* [*Civ. Code § 798.23.5(b)(3)*; *see § 369.73[2]*]. A homeowner's tenancy may not be terminated if the homeowner completes an action for unlawful detainer or executes a judgement for possession within 60 days of the homeowner receiving notice of termination of tenancy [*Civ. Code § 798.23.5(b)(3)*; *see Ch. 332, Landlord and Tenant: The Tenancy, § 333.12* (unlawful detainer proceedings)].

Park management may require the homeowner to reside in the mobilehome park for a term of one year before management permits the renting or subletting of a mobilehome or mobilehome space [*Civ. Code § 798.23.5(b)(5)*]. If a security deposit has been refunded to the homeowner in accordance with *Civ. Code § 798.39(b)* or *(c)*, the management may require the homeowner to resubmit a security deposit in an amount or value not to exceed two months' rent in

addition to the first month's rent. Management may retain this security deposit for the duration of the term of the rental or sublease [*Civ. Code § 798.23.5(b)(6)*]. The homeowner must keep his or her current address and telephone number on file with the management during the term of rental or sublease. If applicable, the homeowner may provide the name, address, and telephone number of his or her legal representative [*Civ. Code § 798.23*.5(b)(7)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLease AgreementsSubleasesReal Property LawMobilehomes & Mobilehome ParksGeneral Overview

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[Reserved]

§§ 369.78[Reserved]

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32-369 California Forms of Pleading and Practice--Annotated § 369.90

§ 369.90 Related Matthew Bender Publications

[1] California Legal Forms

Ch. 39, *Mobilehomes*

Ch. 40, *Mobilehome Parks*

[2] California Real Estate Law and Practice

Ch. 77, *Mobilehome Dealer Sales and Security Requirements*

Ch. 174, *The Mobilehome Residency Law*

Ch. 472, *Mobilehome Parks*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale

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§ 369.91 State Statutes

[1] Acts and Laws Generally

Contractors' State License Law. *Bus. & Prof. Code § 7000 et seq.*

Unfair competition law. *Bus. & Prof. Code § 16600 et seq.*

Unruh Civil Rights Act. *Civ. Code § 51*

Mobilehome Residency Law. *Civ. Code § 798 et seq.*

Recreational Vehicle Park Occupancy Law. *Civ. Code § 799.20 et seq.*

Recreational Vehicle and Trailer Law. *Civ. Code § 800 et seq.*

California Fair Employment and Housing Act. *Gov. Code § 12900 et seq.*

Manufactured Housing Act of 1980. *Health & Safety Code § 18000 et seq.*

Mobilehome Parks Act. *Health & Safety Code § 18200 et seq.*

Special Occupancy Park Act. *Health & Safety Code § 18860 et seq.*

California Factory-Built Housing Law. *Health & Safety Code § 19960 et seq.*

California Environmental Quality Act. *Pub. Res. Code § 21000 et seq.*

[2] Legal Actions and Proceedings

Consumers Legal Remedies Act. *Civ. Code § 1750 et seq.*

Presumption of negligence from violation of statute, ordinance, or regulation. *Evid. Code §§ 601, 606, 660, 669*

Proceedings for writ of mandate. *Code Civ. Proc. § 1084 et seq.*

Unlawful detainer, forcible entry, and forcible detainer proceedings. *Code Civ. Proc. § 1159 et seq.*

[3] Mobilehome as Vehicle

Definitions in Vehicle Code: mobilehome, motor vehicle, trailer coach, used vehicle, vehicle. *Veh. Code §§ 396, 415, 635, 665, 670*

Pilot car requirements. *Veh. Code §§ 25270, 27904, 27904.5, 28100-28103*, 35262

Moving mobilehomes under permit. *Veh. Code §§ 35780, 35790, 35790.5*

[4] Ombudsman

Requirement that management post name, address, and phone number of ombudsman. *Civ. Code § 798.29*

Mobilehome ombudsman. *Health & Safety Code § 18151*

[5] Property Interests in Mobilehomes

Definitions of real and personal property. *Civ. Code §§ 658, 663*

Execution of judgments: special provisions for execution against mobilehome. *Code Civ. Proc. §§ 699.080, 700.080*

Foreclosure of security interest in mobilehome; notice requirements. *Health & Safety Code § 18037.5*

Application of proceeds of foreclosure sale of mobilehome. *Health & Safety Code § 18037.5(c), (d)*

Prohibition against deficiency judgment after forced sale of mobilehome. *Health & Safety Code § 18038.7*

Registration and transfer of interests in mobilehomes. *Health & Safety Code §§ 18080-18106*

Lien of mobilehome park owner who obtains final money judgment for unpaid rent against registered owner of mobilehome. *Health & Safety Code § 18080.9*

Request for current registration and title status. *Health & Safety Code § 18081*

Security interests in mobilehomes. *Health & Safety Code §§ 18105, 18106*

Provisional remedy of claim and delivery: special provisions when property is mobilehome. *Code Civ. Proc. §§ 511.050, 513.020, 514.010*

Security interests in goods: Commercial Code Division 9--Secured Transactions. *Com. Code § 9101 et seq.*

Security interests in vehicles (including some mobilehomes). *Veh. Code §§ 5905, 5907, 5908, 6300-6303*

[6] Sales of Mobilehomes

Procedure for selling abandoned mobilehome. *Civ. Code § 798.61*

Recordation of change of ownership statement as required prerequisite to action to enforce sale agreement for mobilehome. Civ. Code § 1062.10

Unlawful advertising and sales practices of mobilehome dealers, manufacturers, distributors, and salespersons. *Health & Safety Code §§ 18061-18063*

Unlawful advertising and sales practices of licensed vehicle dealers. *Veh. Code §§ 11713-11713.11*

Escrow requirement in dealer sales. *Health & Safety Code § 18035*

Sale by or through real estate broker. *Bus. & Prof. Code §§ 10131.6, 10131.7*

Sales of goods: Commerical Code Division 2--Sales. *Com. Code § 2101 et seq.*

[7] Sale of Mobilehome Park

Sale of mobilehome park to nonprofit corporation owned by residents as exempt from Subdivided Lands Act. *Bus. & Prof. Code § 11010.8*

Requirement of notice to resident association when mobilehome park is listed for sale with broker. *Civ. Code § 798.80*

Conversion of existing rental mobilehome park to resident-initiated subdivision, cooperative, or condominium for mobilehomes as exempt from California Environmental Quality Act requirements if conversion will not result in expansion of or change in existing use of property. *Pub. Res. Code § 21080.8*

[8] Taxation of Mobilehomes

Disaster relief from property taxation for manufactured homes. *Rev. & Tax. Code §§ 172, 172.1*

Documentary transfer tax. *Rev. & Tax. Code § 11913*

Local property taxation. *Rev. & Tax. Code § 5800 et seq.*

Sales and use taxes. *Rev. & Tax. Code §§ 6012.2, 6012.8, 6012.9, 6379*; *Veh. Code § 11951*

Vehicle license fees. *Rev. & Tax. Code §§ 10758, 10784, 10785*

[9] Warranties on Mobilehomes

Commercial Code implied warranties of merchantability and fitness for purpose. *Com. Code §§ 2314-2316*

Song-Beverly Consumer Warranty Act. *Civ. Code §§ 1790-1795.7*

Mobilehome warranties. *Civ. Code §§ 1797-1797.7*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksPurchase & SaleReal Property LawMobilehomes & Mobilehome ParksSecurity Interests

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§ 369.92 State Regulations

[1] Mobilehome Parks Act

Mobilehome parks. *25 Cal. Code Reg. § 1000 et seq.*

Special occupancy parks. *25 Cal. Code Reg. § 2000 et seq.*

[2] Mobilehomes Law

Administration. *25 Cal. Code Reg. § 4000 et seq.*

Commercial coaches. *25 Cal. Code Reg. § 4350 et seq.*

Mobile/factory-built housing. *25 Cal. Code Reg. §§ 3000 et seq., 4049.50 et seq.*

Mobilehomes. *25 Cal. Code Reg. §§ 4050-4070*

Recreational vehicles. *25 Cal. Code Reg. § 4550 et seq.*

Sale of mobilehomes. *25 Cal. Code Reg. § 4049.1 et seq.*

Third party approval and enforcement. *25 Cal. Code Reg. § 4850 et seq.*

Registration and *titling. 25 Cal. Code Reg. § 5510 et seq.*

Legal Topics:

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

Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use

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§ 369.93 Federal Statutes

Consumer Product Safety Act of 1972. *15 U.S.C. § 2051 et seq.*

National Manufactured Home Construction and Safety Standards Act of 1974. *42 U.S.C. § 5401 et seq.*

Pipeline Safety Act. *49 U.S.C. § 60101 et seq.*

Truth in Lending Act. *15 U.S.C. § 1601 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionTruth in LendingGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale

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§ 369.94 Federal Regulations

Truth in Lending Act--Regulation Z. 12 C.F.R. Part 226

Mobilehome construction and safety standards. 24 C.F.R. Part 3280

Procedural and enforcement regulations. 24 C.F.R. Part 3282

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionTruth in LendingGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale

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§ 369.95 Decisions

[1] Mobilehomes

[a] In General

County ordinance restricting use of mobilehomes outside mobilehome parks, when read in conjunction with ordinance permitting zoning for mobilehome subdivision (where mobilehome owner also owns land on which mobilehome is located) is not unconstitutional. *McKie v. Ventura County (1974) 38 Cal. App. 3d 555, 556-557, 113 Cal. Rptr. 143*

County ordinance fixing "mobilehome license" fee (for use of mobilehome outside mobilehome park) pursuant to *Health & Safety Code § 18300(g)(3)* is not prospectively unlawful merely because fee is slightly higher than reasonably projected cost of enforcing regulatory laws; continued collection of higher fees after costs become known is probably unlawful. *Watson v. County of Merced (1969) 274 Cal. App. 2d 263, 265-268, 78 Cal. Rptr. 807*

Conditional sale of mobilehome is governed by Rees-Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 2981 et seq.*]. *Hughes v. Nashua Mfg. Co. (1968) 257 Cal. App. 2d 778, 783, 65 Cal. Rptr. 380*

Contract for purchase of mobilehome with down payment and balance to be paid on delivery is not conditional sale contract and hence not subject to *Rees-Levering Motor Vehicle Sales and Finance Act. Shapiro v. Ogle (1972) 28 Cal. App. 3d 261, 265-267, 104 Cal. Rptr. 553*

[b] Security Interests

Interest of bona fide purchaser of mobilehome purchased before July 1, 1981, prevailed over technically perfected security interest that was not disclosed on vehicle certificate of ownership. *T & O Mobile Homes, Inc. v. United California Bank (1985) 40 Cal. 3d 441, 454, 455, 220 Cal. Rptr. 627, 709 P.2d 430* (decided under *Veh. Code § 4451*; *see now Health & Safety Code § 18091*, governing contents of certificate of title of mobilehomes)

[2] Mobilehome Parks

[a] Construction

Mobilehome park construction permit application requires environmental impact report or negative declaration. *People v. Department of Housing & Community Dev. (1975) 45 Cal. App. 3d 185, 192-194, 119 Cal. Rptr. 266*

Local enforcement agency's refusal to grant extension of mobilehome park construction permit pursuant to *Health & Safety Code § 18509* is abuse of discretion where standard for passing on such requests was unreasonable and such standard was arbitrarily and capriciously applied; agency is estopped to deny request for extension where permit holder's failure to meet agency's standard was based on agency's advice. *Morgan v. County of San Diego (1971) 19 Cal. App. 3d 636, 640-642, 97 Cal. Rptr. 180*

Application for use permit to construct mobilehome park in area of city zoned for such use was properly granted. *Jones v. City Council (1971) 17 Cal. App. 3d724, 727-730, 94 Cal. Rptr. 897*

Application for special use permit to construct mobilehome park in area of city not zoned for such use was properly denied. *Lagrutta v. City Council (1970) 9 Cal. App. 3d 890, 893-897, 96 Cal. Rptr. 627*

[b] Fees and Charges

Fact that cable television is listed in *Civ. Code § 798.41* as utility that may be billed for separately does not mean mobilehome park owner may unilaterally procure and charge its tenants for cable television as "utility" even if tenants did not accept service; *Civ. Code § 798.31* (permissible utility charges) does not contemplate charges for nonessential services not requested or used, even if services can be characterized as "utilities" for purposes of separate billing under *Civ. Code § 798.41*. *Greening v. Johnson (1997) 53 Cal. App. 4th 1223, 1229-1230, 62 Cal. Rptr. 2d 214*

Rent increase imposed on new tenants at time of sale or transfer of mobilehome (excluding transfer to transferor's spouse, children, or parents) is not prohibited fee within meaning of *Civ. Code § 798.72*. *Vance v. Villa Park Mobilehome Estates (1995) 36 Cal. App. 4th 698, 707, 42 Cal. Rptr. 2d 723*

[c] Land Use

City lacked authority under *Gov. Code § 66427.4* to impose conditions on conversion of mobilehome park to resident ownership; that section applies only when mobilehome park is converted to other land uses, requiring residents and their mobilehomes to be relocated; *Gov. Code § 66427.5*, which applies to conversions to resident ownership, does not authorize imposition of additional conditions. *El Dorado Palm Springs, Ltd. v. City of Palm Springs (2002) 96 Cal. App. 4th 1153, 1163-1164, 118 Cal. Rptr. 2d 15*

[d] Operation

Violations of Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*] implementing regulations [*25 Cal. Code Reg. § 1000 et seq.*], and Mobilehome Residency Law [*Civ. Code § 798 et seq.*] constitute acts of unfair competition and causes of action for injunction and/or restitution under *Bus. & Prof. Code § 17203*; district attorney has standing to sue for injunction and civil penalty for such acts notwithstanding that other agency is responsible for enforcing Mobilehome Parks Act and regulations. *People v. McKale (1979) 25 Cal. 3d 626, 631-638, 159 Cal. Rptr. 811, 602 P.2d 731*

Mobilehome park residency rule limiting occupancy to at least one registered owner of home constituted effective prohibition of subleasing by owner of home; retroactive application of rule against homeowner who purchased space in park before rule was made, whose lease did not contain rule, and who had not agreed to rule, was contrary to stated purpose of Mobilehome Residency Law (*Civ. Code § 798.55(a)*) and unreasonable. *Rancho Santa Paula Mobilehome Park, Ltd. v. Evans (1994) 26 Cal. App. 4th 1139, 1147, 32 Cal. Rptr. 2d 464*

Park rule prohibiting "any commercial activity ... and leasing, subleasing, sale or exchange of mobilehomes ..." was interpreted by court as not applying to any subleasing of mobilehome space, but rather to carrying on business of subleasing on mobilehome premises. *Rancho Santa Paula Mobilehome Park, Ltd. v. Evans (1994) 26 Cal. App. 4th 1139, 1149, 32 Cal. Rptr. 2d 464*

Under predecessor to present Mobilehome Residency Law [*Civ. Code § 798 et seq.*; *see former Civ. Code §§ 789.4-789.15*], mobilehome park owner was prohibited from charging "transfer" fee payable by broker when broker effects sale of mobilehome within park, where park owner performs no service in connection with sale [*now see Civ. Code § 798.72*]. *People v. Mel Mack Co. (1975) 53 Cal. App. 3d 621, 626-630, 126 Cal. Rptr. 505*

County ordinance fixing mobilehome park operating permit fees higher than *Health & Safety Code § 18502* prescribes is valid, under *Health & Safety Code § 510*, where county health officer is local enforcement agency under *Health & Safety Code § 18300*. *Western Mobilehome Assn. v. County of San Diego (1971) 16 Cal. App. 3d 941, 944-951, 94 Cal. Rptr. 504*

[e] Rent Control

Local mobilehome park rent control ordinance coupled with state statutory restriction on eviction of mobilehome park residents did not constitute physical taking of property of mobilehome park owner because it did not require owner to submit to government's physical occupation of park property. *Yee v. City of Escondido (1992) 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153*

Local rent control ordinance prohibiting rent increases at termination of tenancy does not violate substantive due process. *Carson Harbor Village Ltd. v. City of Carson (9th Cir. 1994) 37 F.3d 468, 472-473*

District court's dismissal of substantive due process claim challenging city's rent control and vacancy control ordinance as taking without just compensation was proper, but court's failure to explain its reasons for denying leave to amend complaint (where none were apparent on record) constituted abuse of discretion. *Levald, Inc. v. City of Palm Desert (9th Cir. 1993) 998 F.2d 680, 690, 692*

Property owner's facial taking challenge to local mobilehome park rent control ordinance was ripe for judicial review even though property owner had not sought remedies in state court since at time alleged taking occurred, California did not recognize actions for inverse condemnation based on regulatory takings, rendering it futile to seek state court relief at that time. *Levald, Inc. v. City of Palm Desert (9th Cir. 1993) 998 F.2d 680, 686*

Sanctions and penalties properly imposed under Unfair Business Practices Law [*Bus. & Prof. Code § 17200 et seq.*] against mobilehome park owners who forced tenants to accept long-term leases to avoid rent control. *People v. Beaumont Investment Ltd. (2003) 111 Cal. App. 4th 102, 124-126, 3 Cal. Rptr. 3d 429*

In determining "just, fair and reasonable" rent increase, substantial evidence supported Rent Board's allocation of wetlands remediation expenses over three years where remediation costs were paid from proceeds of a loan repayable over a 28-month period; although rent control ordinance and implementation guidelines did not specifically provide for

allocation of operating expenses over an extended period of time, rent control scheme was sufficiently flexible to allow such an allocation. *Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Bd. (1999) 70 Cal. App. 4th 281, 293, 82 Cal. Rptr. 2d 569*

In calculating permissible rent increase, Rent Board properly disallowed attorneys' fees incurred for investigation, research, and preparation of lawsuit to recover costs of wetlands remediation from other responsible parties, and attorneys' fees incurred in attempting to recover cleanup costs from insurers. *Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Bd. (1999) 70 Cal. App. 4th 281, 294, 82 Cal. Rptr. 2d 569*

Loss of "all beneficial use" of profits during period mobilehome park owners were permitted only inadequate rent increase did not constitute a taking; loss of profits was measure of damages, not property subject to a taking. *Yee v. Mobilehome Park Rental Review Bd. (1998) 62 Cal. App. 4th 1409, 1422, 73 Cal. Rptr. 2d 227*

County ordinance and agreement entered into by county and mobilehome park owners imposing 15-year moratorium on enactment of rent control legislation affecting mobilehome parks was unconstitutional limitation on power of future county boards of supervisors to make and enforce ordinances under their police power. *County Mobilehome Positive Action Com., Inc. v. County of San Diego (1998) 62 Cal. App. 4th 727, 740-741, 73 Cal. Rptr. 2d 409*

Method used by rent control board to support determination that rent increase was adequate to provide "fair return on owner's investment" was not supported by substantial evidence. *Westwinds Mobile Home Park v. Mobilehome Park Rental Review Bd. (1994) 35 Cal. Rptr. 2d 315*

City Mobilehome Rental Review Board decision that authorized only limited rent increase in owners' mobilehome parks was reversed and remanded to Board for reconsideration where Board, in determining owners' claim for increased rents, committed serious error by failing to account for interest payments on owners' encumbering loans in determining income (or loss) resulting from operation of parks. *Yee v. Mobilehome Park Rental Review Bd. (1993) 17 Cal. App. 4th 1097, 1100, 23 Cal. Rptr. 2d 1*

Ordinance requiring binding arbitration for rent control disputes that did not provide for meaningful trial de novo or judicial review was unconstitutional violation of due process. *Bayscene Resident Negotiators v. Bayscene Mobilehome Park (1993) 15 Cal. App. 4th 119, 131-134, 18 Cal. Rptr. 2d 626*

Mobilehome park rent control ordinance with vacancy control does not effect physical taking; it serves legitimate governmental purpose and thus does not constitute an unconstitutional taking of property. *Sandpiper Mobile Village v. City of Carpinteria (1992) 10 Cal. App. 4th 542, 546-550, 12 Cal. Rptr. 2d 623* (*overruled on other grounds in Travis v. County of Santa Cruz (2004) 33 Cal. 4th 757*)

Mobilehome rent control with vacancy control is not unconstitutional taking of property. *Casella v. City of Morgan Hill (1991) 230 Cal. App. 3d 43, 52-58, 280 Cal. Rptr. 876* ; *Yee v. City of Escondido (1990) 224 Cal. App. 3d 1349, 1354-1358, 274 Cal. Rptr. 551*

[f] Seizure

Removal of mobilehome from park by management in conspiracy with local police without legal authority was unlawful search and seizure under *Fourth Amendment of United States Constitution*. *Soldal v. Cook County (1992) 506 U.S. 56, 113 S. Ct. 538, 121 L. Ed. 2d 450*

[3] Mobilehome Residence Law--Attorneys' Fees and Costs

Action by retail dealer of mobilehomes alleging that other dealers and mobilehome parks participated in conspiracy by which dealers paid kickbacks to park owners and operators for exclusive right and privilege of marketing and selling mobilehomes did not "arise out of" MRL for purposes of attorneys' fees. *SC Manufactured Homes, Inc. v. Canyon View Estates, Inc. (2007) 148 Cal. App. 4th 663, 680, 56 Cal. Rptr. 3d 79*

Mobilehome park tenant was prevailing party entitled to attorneys' fees under *Civ. Code § 798.85* when park owner voluntarily dismissed action for abatement of nuisance under *Mobilehome Residency Law. Del Cerro Mobile Estates v. Proffer (2001) 87 Cal. App. 4th 943, 948, 105 Cal. Rptr. 2d 5*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral Overview

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§ 369.96 Attorney General Opinions

Mobilehome park owner is unable, by means of rental agreement, rule, or regulation, to prohibit display by tenants of political signs in windows of mobilehomes. *74 Ops. Cal. Atty. Gen. 122 (1991)*

County, charter city, or general law city is not allowed to require mobilehome park owner to grant park residents right of first refusal before accepting offer to sell park. *73 Ops. Cal. Atty. Gen. 431 (1990)*

General city law is not authorized to enact ordinance prohibiting management of mobilehome park from enforcing park rule restricting residents to "adults only." *65 Ops. Cal. Atty. Gen. 559, 562 (1982)*

State or local standard regarding construction or safety applicable to same aspect of performance as existing federal standard under National Mobile Home Construction and Safety Standards Act of 1974 is preempted by federal standard with regard to mobilehome as defined by federal law, including mobilehome designed to be used with and placed on permanent foundation, but state and local standards control in certain cases. *61 Ops. Cal. Att'y Gen. 309 (1978)*

Installation of mobilehome on permanent foundation in compliance with applicable building and land use laws transforms it into a building (no longer a vehicle). *58 Ops. Cal. Att'y Gen. 660 (1975)*

Prohibition of former *Health & Safety Code § 18055* (*now see Health & Safety Code § 18025*) against selling or offering for sale certain mobilehomes not conforming to standards as applicable to agents selling or offering for sale mobilehomes on behalf of principal-owners. *58 Ops. Cal. Att'y Gen. 435 (1975)*

Manufacturer or dealer who sells mobilehome not meeting requirements of former *Health & Safety Code § 18055* (*now see Health & Safety Code § 18025*) as subject to prosecution (under former *Health & Safety Code § 18080* (*now see Health & Safety Code § 18020.5*)) for one year after such sale. *57 Ops. Cal. Att'y Gen. 140 (1974)*

Site used for recreational housing in mobilehomes (hunting club preserve) but otherwise meeting definition of mobilehome park as subject to state regulation under Mobilehome Parks Act notwithstanding tenants do not

permanently reside there. *53 Ops. Cal. Att'y Gen. 38 (1970)*

Mobilehome park operator as having complete discretion to withhold approval for mobilehome accessory building or structure proposed to be erected or altered within park, subject to potential liability for breach of tenancy agreement in unreasonably withholding approval. *52 Ops. Cal. Att'y Gen. 153 (1969)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksMaintenance & UseReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale

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§ 369.97 Law Reviews

Annual Reviews of Selected California Legislation:
Property, Housing--Mobilehomes. *27 Pac. L.J. 921 (1996)*
Family; Mobilehomes--Immediate Family. 27 Pac. L.J. 803 (1996)
Mobilehomes--Final Money Judgment. *27 Pac. L.J. 487 (1996)*
Mobilehome Residency Law. *10 Pac. L.J. 562 (1979)*
Mobilehomes--Licensing of Commerical Activities. *7 Pac. L.J. 300 (1976)*
Mobilehome Sales. *6 Pac. L.J. 180 (1975)*
Mobilehome Warranties. *5 Pac. L.J. 308 (1974)*
Mobilehomes--Conditional Use Permits. *4 Pac. L.J. 596 (1973)*
Mobilehome Parks--Shoreline Property. *4 Pac. L.J. 596 (1973)*
Mobilehome Parks--Tenancy, Deficiency Judgment. *4 Pac. L.J. 597 (1973)*

Castillo, *How California Can Harmonize a Tenant's State Rights and a Landlord's Right to Go Out of Business Pursuant to the Ellis Act, 31 Golden Gate U.L. Rev. 251 (2001)*

Gallagher, *Yee v. City of Escondido: Will Mobile Homes Provide an Open Road for the Nollan Analysis? 67 Notre Dame L. Rev. 821 (1992)*

Hirsch and Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol, 35 UCLA L. Rev. 399 (1988)*

Comment, *California Government Code Section 65852.3: Legislature Prohibits Exclusion of Mobile Homes on Single-Family Lots, 16 U.C. Davis L. Rev. 167 (1982)*

Anderson, *Regulation and Accommodation of Mobile Homes*, 1975 Planning, Zoning & Eminent Domain Institute (Southwestern Legal Foundation) 152 (1975)

Lytle, *Mobile Home Construction and Safety Standards--Title VII of the Housing and Community Development Act of 1974 [42 U.S.C. §§ 5401-5426]*, 8 Clearinghouse Review (Supplement) 660 (1975)

Note, *Mobilehomes: Present Regulation and Needed Reforms, 27 Stan. L. Rev. 159 (1974)*

Lubell, *Legal Aspects of Mobile Home Lending by Institutional Lenders*, 45 LA Bar. B. 408 (1970)

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For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use

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PART IV. FORMS
A. Letters and Notices

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§ 369.110 Letter of Complaint to Department of Housing and Community Development That Mobilehome Is Not Complying With Applicable Lubell, *Legal Aspects of Mobile Home Lending by Institutional Lenders*, 45 LA Bar. B. 408 (1970) Lubell, *Legal Aspects of Mobile Home Lending by Institutional Lenders*, 45 LA Bar. B. 408 (1970)Regulations [25 Cal. Code Reg. § 4013.5]

[1] FORM Letter of Complaint to Department of Housing and Community Development That Mobilehome Is Not Complying With Applicable Regulations [25 Cal. Code Reg. § 4013.5]

Department of Housing and Community Development
Mobilehome Section
P.O. Box 31
Sacramento, California 95801

To Whom It May Concern:

In accordance with *25 California Code of Regulations Section 4013.5*, _____ [*name of mobilehome owner*] requests appropriate action for correction of violations, hereinafter specified, regarding the following mobilehome:

Make and Model: _____

Serial Number: _____

Manufacturer: _____

Manufacturer's Address: _____

_____ [Insignia *or* HUD Label] Number: _____

Seller: _____

Seller's Address: _____

Date of Sale: _____

[Registration Number: _____]

Owner: _____

Owner's Address: _____

_____ [*Name of owner*] believes that this mobilehome does not comply with applicable provisions of 25 of California Code of Regulations, Chapter 3, Subchapter 2 (Sections 4000-4800), in that _____ [*specify violations*].

Sincerely,

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a letter for making a written complaint to the Department of Housing and Community Development in accordance with a regulation providing that any owner of a mobilehome bearing or required to bear a departmental insignia or Housing and Urban Development (HUD) label [*see § 369.21*] may file a written complaint with the Department setting forth the items that the owner believes do not comply with the (applicable) provisions of *25 Cal. Code Reg. § 4000 et seq.* [*25 Cal. Code Reg. § 4013.5*]. No particular form is prescribed, and no printed form is supplied by the Department. A letter is sufficient and appropriate.

The regulations applicable to mobilehomes are set forth in *25 Cal. Code Reg. §§ 4000 et seq.*, and *4050 et seq.*

[3] Complaint Investigation

[a] Initial Procedures

On receiving a complaint indicating the possible existence of a violation of applicable regulations, the Department of Housing and Community Development must forward a copy of the complaint and other information to the manufacturer, seller, or person responsible for the violations, or their agents [*25 Cal. Code Reg. § 4013.5(a)*]. Any person served with a complaint or other information must, as soon as possible but not later than 20 days after receiving the complaint or other information, make an investigation, and any necessary inspections, and determine if there are violations of those regulations for which the person is responsible. If the person served with a complaint or other information determines responsibility for correcting the violations, such person must notify the Department in writing of the action proposed to correct the violations. Violations must be corrected within 20 days or such other time specified by the Department. On request, the Department may grant an extension of time for correction of violations [*25 Cal. Code Reg. § 4013.5(b)*].

[b] Inspections and Legal and/or Administrative Proceedings

When the person served with a complaint or other information fails to take action within the specified time, the Department may inspect the mobilehome and institute legal and/or administrative proceedings as necessary to secure compliance with applicable regulations [*25 Cal. Code Reg. § 4013.5(c)*].

If a reinspection is required to determine compliance with any order requiring corrective action, the person responsible for taking corrective action must request inspection in accordance with *25 Cal. Code Reg. § 4010* and submit fees for such inspection pursuant to *25 Cal. Code Reg. § 4044* [*25 Cal. Code Reg. § 4013.5(d)*].

If the Department determines that an imminent safety hazard or serious defect may exist, the Department must notify the manufacturer, seller, or person responsible for the violations and may require that immediate action be taken by the responsible person to correct such violations. The Department may make necessary inspections to determine if violations exist and to secure compliance [*25 Cal. Code Reg. § 4013.5(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & DevelopmentReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale

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A. Letters and Notices

32-369 California Forms of Pleading and Practice--Annotated § 369.111

[Reserved]

§ 369.111[Reserved]

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32-369 California Forms of Pleading and Practice--Annotated § 369.112

§ 369.112 Request for Hearing Regarding Abatement of Substandard Mobilehome [25 Cal. Code Reg. § 1613]

[1] FORM Mobilehome Owner's Request for Hearing Regarding Abatement of Substandard Mobilehome [25 Cal. Code Reg. § 1714]

[*Caption. Refer to notice of intention to abate received from enforcement agency.*]

In accordance with *25 California Code of Regulations Section 1613*, _____ [*name of person or entity requesting hearing*] hereby requests a hearing on the matter of the proposed abatement of the mobilehome described in the Notice of Intention to Abate heretofore received by him/her/it.

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a request for a hearing by a person or entity who has received a final notice of intention to abate a substandard mobilehome. To be effective, the request for hearing must be received by the enforcement agency within 10 days after personal service or acknowledgment of receipt by mail of the final notice of intention to abate [*25 Cal. Code Reg. § 1613(a)*].

[3] Inspection and Notice of Violation

Whenever any mobilehome has been inspected by the enforcement agency and has been found to be substandard, the enforcement agency must give written notice to the person or entity responsible for correcting the violation [*25 Cal. Code Reg. § 1611(a)(1)*]. If the mobilehome is in such condition that identification numbers are not available to determine ownership, the notice must be given to the owner of the real property or the owner or operator of the park in which the mobilehome is located [*25 Cal. Code Reg. § 1611(a)(3)*]. The notice must state the conditions that constitute the violation, include a reference to the law or regulation being violated, and order abatement of the conditions within five days after the date of the notice or a longer period of time as allowed by the enforcement agency [*25 Cal. Code*

Reg. § 1611(a)(2)].

[4] Commencement of Proceeding

[a] Final Notice to Abate

If the initial notice of the enforcement agency has not been complied with on or before the date specified in the notice, the enforcement agency may institute proceedings against the cited person or entity [*25 Cal. Code Reg. § 1612(a)*]. The enforcement agency must issue to the cited person, the last registered owner of a cited mobilehome, and the park owner or operator or the legal owner of the property where the cited mobilehome is located, a final notice to abate containing at least the following [*25 Cal. Code Reg. § 1612(a)(1)*]:

- The date the notice was prepared;
- The name or names of the responsible person or entity;
- A list of the uncorrected violations cited;
- The final compliance date;
- Notification of the right to request an informal conference under *25 Cal. Code Reg. § 1752*;
- Notification of the right to request a hearing pursuant to *25 Cal. Code Reg. § 1613*; and
- A statement that any willful violation is a misdemeanor under *Health & Safety Code § 18700*.

The final notice must be sent by registered or certified mail, return receipt requested, to the cited person, the legal owner of the property as shown on the last equalized assessment roll, and to the last known address of the last registered or legal owner of record of the cited mobilehome, unless the mobilehome is in such condition that identification numbers are not available to determine ownership. The final notice may also be served by personal service, at the enforcement agency's discretion [*25 Cal. Code Reg. § 1612(a)(2)*].

[b] Proof of Notice

The officer or employee of the enforcement agency must file an affidavit certifying to the time and the manner in which the final notice was given. In addition, the officer or employee must file any receipt card that may have been returned in acknowledgment of the receipt of the notice by registered or certified mail [*25 Cal. Code Reg. § 1612(a)(3)*].

[5] Request for Hearing

[a] Request Must Be Made to Enforcement Agency Within 10 Days of Receiving Notice

The cited person or entity receiving a final notice of intention to abate a violation must be granted a hearing on the matter before an authorized representative of the enforcement agency or official authorized to conduct the hearing, if the cited person or entity makes a request to the enforcement agency within 10 days after personal service or acknowledgment of receipt by mail of the final notice to abate [*25 Cal. Code Reg. § 1613(a)*; *see* [4], *above*]. If the request for hearing is not received within 10 days from the date of personal service or acknowledgment of receipt by mail of the notice, the enforcement agency has the discretion to continue abatement proceedings [*25 Cal. Code Reg. § 1613(e)*].

[b] Automatic Delay of Abatement Proceedings

Receipt of the request for hearing from the cited person or entity postpones any judicial or administrative action by the enforcement agency until after the hearing [*25 Cal. Code Reg. § 1613(b)*].

[c] Notice and Time of Hearing

The enforcement agency must provide the time and place of the hearing in a written notice to the petitioner within 20 days of receiving the request, and must hold the hearing within 60 days of receiving the request [*25 Cal. Code Reg. § 1613(b)*].

[d] Violation Constituting Imminent Hazard

When a cited violation constitutes an imminent hazard representing an immediate risk to life, health, and safety of persons or property that requires immediate correction, a hearing may not be permitted and a request for a hearing will not extend the time for the correction of the violation [*25 Cal. Code Reg. § 1613(d)*].

[6] Hearing

[a] Testimony and Evidence

At the time and place of the hearing, the hearing officer must hear the testimony of and accept evidence from the property's legal owner or the park owner or operator, the cited person, or their respective representatives and any other person with information or testimony relevant to the final notice to abate. The testimony must be limited to the condition of the cited unit, structure, or property. Before the hearing, the enforcement agency must provide all evidence supporting the abatement action to the hearing officer [*25 Cal. Code Reg. § 1615(a)*].

If the petitioner does not appear at the hearing, the enforcement agency has the authority to proceed immediately with abatement procedures [*25 Cal. Code Reg. § 1615(b)*].

[b] Written Decision

Within 10 days after conclusion of the hearing, the hearing officer must render a written decision sustaining, modifying, or overruling the final notice to abate. The decision must be mailed by first class mail to all parties to the hearing. If the decision sustains or modifies the final notice to abate, the hearing officer may establish new dates and schedules for compliance [*25 Cal. Code Reg. § 1615(c)*]. At the discretion of the hearing officer, the enforcement agency must post a copy of the written decision in a conspicuous place on the property or unit [*25 Cal. Code Reg. § 1615(d)*].

[7] Judicial Review

Any cited person, owner, or other interested person having any objections, or feeling aggrieved at any proceedings taken by the hearing officer conducting the hearing, or the enforcement agency in ordering abatement of any violation, may bring an action in any court of competent jurisdiction within 30 days after receipt of the decision [*25 Cal. Code Reg. § 1616*].

Both the proceedings and the order are reviewable by the superior court in an administrative mandate proceeding under *Code Civ. Proc. § 1094.5* [*see* Ch. 474, *Availability of Judicial Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions*].

Legal Topics:

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

Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksLicensing, Registration & TitlingReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use

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32-369 California Forms of Pleading and Practice--Annotated § 369.113

§ 369.113 Notice of Default Under Agreement Secured by Interest in Mobilehome [Health & Safety Code § 18037.5(a)(1)]

[1] FORM Notice of Default Under Agreement Secured by Interest in Mobilehome [Health & Safety Code § 18037.5(a)(1)]

NOTICE OF DEFAULT

To: _____ [*Names of all registered owners*]

_____ [You *or if the registered owner is not the person who is in default, substitute name of defaulting person(s)*] are in default under the terms of the _____ [*identify security agreement by title or caption and date*] in that _____ [*describe default*]. This default gives the creditor named below the right to sell your manufactured home, mobilehome, truck camper, or floating home which is registered with the Department of Housing and Community Development under registration number(s) _____, located at _____ [*give location of property as shown on current registration*], unless the default is promptly cured.

You may cure the default by _____ [*describe conditions precedent to reinstatement required to cure default*] or by entirely repaying the outstanding secured indebtedness on or before _____ [*state final date available for cure, which date must be no earlier than 45 days after mailing of the notice*]. To cure the default you may also be required to reimburse the creditor for its reasonable attorney's fees and legal expenses and for any other sums to which the creditor may have become entitled under the terms of your credit agreement after the date of this notice. You may entirely repay the outstanding obligation by paying the creditor $_____ [*state dollar amount required to obtain release of security interest, and if the amount may increase due to passage of time, state that fact*], plus any amount necessary to reimburse the creditor for its reasonable attorney's fees and legal expenses and any other sums to which the creditor may have become entitled after the date of this notice under the terms of your agreement.

_____
[*Name of foreclosing creditor*]

_____
[*Signature of foreclosing creditor*]

[2] Use of Form

The form in [1], *above*, is an illustration of a form of notice of default that a foreclosing creditor must use in the event of default under the provisions of a security agreement relating to a loan or conditional sale contract that gives the secured party the right to foreclose its security interest in a mobilehome subject to registration under *Health & Safety Code § 18000 et seq.* [*Health & Safety Code § 18037.5(a)*]. The notice must be in at least 10-point type, signed by the foreclosing creditor, in substantially the form set forth in [1], *above*, and must be deposited in the United States mail in an envelope addressed to each registered owner as shown on the current registration of the mobilehome, registered or certified with postage prepaid [*Health & Safety Code § 18037.5(a)(1)*]. For further discussion, see *§ 369.44[5][b]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)Security AgreementsRequirementsReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale

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32-369 California Forms of Pleading and Practice--Annotated § 369.114

§ 369.114 Notice of Belief of Abandonment of Mobilehome [Health & Safety Code § 18037.5(a)(6)]

[1] FORM Notice of Belief of Abandonment of Mobilehome [Health & Safety Code § 18037.5(a)(6)]

NOTICE OF BELIEF OF ABANDONMENT

To: _____ [*Names of all registered owners*]

This notice is given in accordance with *Health & Safety Section 18037.5* concerning your manufactured home, mobilehome, truck camper, or floating home located at _____ [*address of manufactured home, mobilehome, truck camper, or floating home as shown on current registration*]. _____ [You *or if the registered owner is not the person who is in default, substitute name of defaulting person(s)*] are in default under the terms of the _____ [*identify security agreement or conditional sale contract by title or caption and date*] in that _____ [*describe default*]. This default gives the foreclosing creditor named below the right to sell your manufactured home, mobilehome, truck camper, or floating home which is registered with the Department of Housing and Community Development under number(s) _____ [*give registration numbers(s)*] unless the default is promptly cured. Unless the foreclosing creditor receives a written notice from you to the contrary by _____ [*insert a date not less than 15 days after this notice is served personally or, if mailed, not less than 18 days after this notice is deposited in the mail*], your manufactured home, mobilehome, truck camper, or floating home will be deemed abandoned, which means that the foreclosing creditor may sell your manufactured home, mobilehome, truck camper, or floating home sooner than would otherwise be permitted by law. The written notice you must send to the foreclosing creditor must be sent to _____ [*address of foreclosing creditor*] and must state both of the following:

1. Your intent not to abandon the manufactured home, mobilehome, truck camper, or floating home; and

2. An address at which you may be served by certified mail with a summons in connection with any legal action which the foreclosing creditor may appropriately initiate.

_____
[*Name of foreclosing creditor*]

_____
[*Signature of foreclosing creditor*]

[2] Use of Form

The form in [1], *above*, is a notice of belief of abandonment that a foreclosing creditor may use if he or she reasonably believes that a registered owner has abandoned a mobilehome in which the foreclosing party has a secured interest. A mobilehome will be deemed abandoned if the foreclosing creditor gives written notice of his or her belief of abandonment to the registered owner, and the owner fails to give the foreclosing creditor written notice, before the appropriate date specified in the foreclosing creditor's notice, stating that he or she has not abandoned and does not intend to abandon the mobilehome, and stating an address at which he or she may be served by certified mail with a summons in connection with any legal action that the foreclosing creditor may appropriately initiate [*Health & Safety Code § 18037.5(a)(6)*].

The notice of belief of abandonment must be in at least 10-point type, in substantially the form set forth in [1], *above*. The notice of belief of abandonment must be personally delivered to the registered owner or sent to him or her at his or her last known address by registered or certified mail, with postage prepaid. If there is reason to believe that the notice sent to the registered owner's last known address will not be received by the owner, the foreclosing creditor must also send the notice to any other address known to the foreclosing creditor where the registered owner may reasonably be expected to receive the notice [*Health & Safety Code § 18037.5(a)(6)*].

For further discussion, see *§ 369.44[5][e]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use

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A. Letters and Notices

32-369 California Forms of Pleading and Practice--Annotated § 369.115

§ 369.115 Letter to Enforcement Agency Requesting Hearing on Suspension of Mobilehome Park Operating Permit [Health & Safety Code § 18513]

[1] FORM Letter to Enforcement Agency Requesting Hearing on Suspension of Mobilehome Park Operating Permit [Health & Safety Code § 18513]

_____ [*address of enforcement agency*]

To Whom It May concern:

Please take notice that _____ [*name of permit holder*] requests a hearing, in accordance with *Health and Safety Code Section 18513*, on the notice of violation dated _____ [*date*], and the proposed suspension of his/her/its permit, No. _____, to operate the mobilehome park known as _____ [*name of mobilehome park*] located at _____ [*street address*] in _____ [*name of city or county*].

Sincerely,

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a letter that may be used to request a hearing if the holder of a mobilehome park operating permit has received a notice of violation from the enforcement agency [*see § 369.11[4]*] pursuant to *Health & Safety Code § 18511*. The notice begins the administrative process that may result in suspension of the operating permit [*see § 369.63[3]*]. The permit holder is entitled to a hearing on filing a written request within 10 days after the date of mailing of the notice of violation [*Health & Safety Code § 18513*], which usually is a letter from the enforcement agency.

PRACTICE TIP:

Letter Is Appropriate. No particular form of request for a hearing is prescribed. A letter is sufficient

and appropriate, since the enforcement agency uses letters (rather than printed forms) for its communications to permit holders.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use

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32-369 California Forms of Pleading and Practice--Annotated § 369.116

§ 369.116 Notice of Intention to Commence Action for Failure to Maintain Physical Facilities or for Reduction in Services in Mobilehome Park [Civ. Code § 798.84]

[1] FORM Notice of Intention to Commence Action for Failure to Maintain Physical Facilities or for Reduction in Services in Mobilehome Park [Civ. Code § 798.84]

To _____ [*person or entity managing mobilehome park*]:

PLEASE TAKE NOTICE that the undersigned _____ [*name of homeowner or homeowners*] _____ [intends *or* intend] to commence an action against you and _____ [*name of mobilehome park*] for failure to maintain the physical improvements in the common facilities of the park in good working order or condition and for reduction in services in the park.

The basis of the claim is _____ [*specify*].

The specific allegations are _____ [*specify*].

The remedies sought will be _____ [*describe*].
Dated: _____.

_____
[*signature of homeowner or homeowners*]

[2] Use of Form

The form in [1], *above*, is for use by a homeowner or homeowners to provide notice of intention to commence an action against a mobilehome park and its management for failure to maintain the physical improvements or for reduction in services. The notice must be given 30 days before the action's commencement. A notice by one homeowner is deemed sufficient notice by all homeowners [*see Civ. Code § 798.84(a), (b)*; *see also Code Civ. Proc. § 350* (action commenced when complaint is filed)]. The notice requirement does not apply to actions for personal injury or wrongful death [*Civ.*

Code § 798.84(f)]. For further discussion, see *§ 369.12[8]*.

[3] Contents of Form

The notice must be in writing, signed by the homeowner or homeowners making the allegations, and must notify the management of the basis of the claim, the specific allegations, and the remedies requested [*Civ. Code § 798.84(b)*].

[4] Service

The notice may be served in the manner of notices in legal proceedings set forth in *Code Civ. Proc. §§ 1010-1020* [*Civ. Code § 798.84(c)*]. The procedures for such service are discussed in Ch. 518, *Service of Summons and Papers* .

[5] Statute of Limitations

If the notice is served within 30 days of the expiration of the applicable statute of limitations, the time for commencing the action is extended 30 days from the service of the notice [*Civ. Code § 798.84(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use

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[Reserved]

§§ 369.117[Reserved]

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B. Petitions

32-369 California Forms of Pleading and Practice--Annotated § 369.130

§ 369.130 Petition for Hearing [25 Cal. Code Reg. § 4045]--Mobilehome Law Enforcement [25 Cal. Code Reg. § 4000 et seq.]

[1] FORM Petition for Hearing [25 Cal. Code Reg. § 4045]--Mobilehome Law Enforcement [25 Cal. Code Reg. § 4000 et seq.]

STATE OF CALIFORNIA
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

In the Matter of _____ [*name*]	))))	PETITION FOR HEARING

Pursuant to *25 California Code of Regulations Section 4045*, _____ [*name of petitioner*] states as follows:

_____ [*Brief statement of grounds for hearing, e.g.,* Petitioner has been served with a notice of violations regarding certain mobilehomes inspected at petitioner's factory on _____ [*date*], a copy of which notice is attached to this petition. Petitioner denies that any of the alleged violations cited in the notice exist].

WHEREFORE, petitioner requests a hearing on the issue of _____ [*specify, e.g.,* whether the alleged violations exist] and any other related issues that may arise before or at the hearing [, and an order to withdraw the notice of violations].

Dated: _____

_____ [*signature*]
Attorney for Petitioner

[2] Use of Form

The form in [1], *above*, is a petition to request a hearing under *25 Cal. Code Reg. § 4045*, providing that any person refused an approval (of anything subject to approval) by the Department of Housing and Community Development, or receiving a notice of violation, or who feels aggrieved by application of the regulations [*25 Cal. Code Reg. § 4000 et seq.*] implementing the Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*] may request and must be granted a hearing on the matter before the director of the Department or the director's duly authorized representative.

[3] Petition for Hearing

[a] Contents and Form of Petition

The person must file with the Department a written petition requesting the hearing. The petition must set forth a brief statement of the grounds for the petition [*25 Cal. Code Reg. § 4045*]. The petition may be in any suitable form; the form in [1], *above*, is an example. An affidavit is not required. (The Department has no printed forms and uses letters in enforcement proceedings.)

[b] Time for Filing

The procedural regulations [*25 Cal. Code Reg. § 4045 et seq.*] do not require the petition to be filed within any specified time. If some other regulation, such as *25 Cal. Code Reg. § 4013* (discussed *below*), expressly or implicitly requires filing the petition within a certain time, the petition should be filed within that time; otherwise, the petition should be filed within a reasonable time.

When the petition requests a hearing regarding a notice of violations and/or a "Prohibited Sales Notice" given under *25 Cal. Code Reg. § 4013* [*see § 369.21[5]* (inspection)], the petition should be filed within 20 days after receipt of the notice [*see 25 Cal. Code Reg. § 4013*].

[4] Notice of Hearing

On receiving a petition, the Department must set a time and place for the hearing and give the petitioner written notice of the hearing [*25 Cal. Code Reg. § 4046*].

[5] Hearing

The hearing must commence no later than 30 days after the day on which the petition was filed provided that, on application of the petitioner, the Department may postpone the date of the hearing for a reasonable time beyond such 30-day period, if in its judgment the petitioner has submitted a good and sufficient reason for such postponement [*25 Cal. Code Reg. § 4046*]. A request for postponement may be in the form of a letter.

Should petitioner fail to appear at the scheduled time and place of the hearing, the Department may dismiss the petition without further action [*25 Cal. Code Reg. § 4046*].

[6] Decision

On the hearing's conclusion, the director of the Department or the director's duly authorized representative must notify the petitioner in writing of the decision in the matter [*25 Cal. Code Reg. § 4046.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & Development

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B. Petitions

32-369 California Forms of Pleading and Practice--Annotated § 369.131

§ 369.131 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] By Mobilehome Park Developer Against Local Enforcement Agency for Refusal to Grant Extension of Construction Permit [Health & Safety Code § 18509]

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] By Mobilehome Park Developer Against Local Enforcement Agency for Refusal to Grant Extension of Construction Permit [Health & Safety Code § 18509]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Petitioner,	)	PETITION FOR WRIT OF MANDATE
vs.	)	[*Code Civ. Proc. §§ 1085, 1086*]
_____ [*name*],	)	
Respondent.	)	
	)	

1. Petitioner is _____ [*identify petitioner and describe capacity, if other than an individual, in which the proceeding is being brought, e.g.,* a partnership with its principal place of business in _____ County, California (*if appropriate, add:* and it has filed and published the fictitious business name statement as required by *Business and Professions Code Sections 17910-17917*)].

2. Respondent _____ [*name, e.g.,* Director of Building Inspection for the County of San Diego] is, and at all times herein mentioned was, the "enforcement agency" as that term is used in the Mobilehome Parks Act, *Health and Safety Code Sections 18200-18700,* and regulations promulgated thereunder (*25 California Code of Regulations Sections 1000-1758*).

3. Respondent is authorized and empowered to grant extensions of construction permits for mobilehome parks "for a reasonable time" pursuant to *Health and Safety Code Section 18509*, provided work has actually been commenced within six months under the permit as issued.

4. On _____ [*date*], petitioner obtained a construction permit for a mobilehome park. On _____ [*date*], work on the mobilehome park was actually commenced. On _____ [*date*], petitioner requested that respondent extend the permit for six months, that is, to _____ [*date*], for the reason that _____ [*specify, e.g.,* unanticipated delays in obtaining approval from the Federal Housing Administration made it impossible to complete construction before the original expiration date of the permit].

5. Respondent refused to grant petitioner's request for an extension. This refusal was an abuse of respondent's discretion in that _____ [*specify, e.g.,* respondent's standard for passing on such requests was unreasonable. Respondent's sole criterion was whether or not, in respondent's judgment based on a field inspection of the project, work was being pursued diligently. This standard, which petitioner was unable to meet for the reason mentioned above, failed to take into account other evidence showing petitioner's good faith intent to complete construction expeditiously, such as the extent of petitioner's preparation for the project, petitioner's expenditure of substantial sums on the project, and petitioner's ability, when the extension was requested, to complete the project within six months].

[6. *Allege other abuse of discretion, if any, e.g.,* Not only was respondent's standard unreasonable, but respondent applied it capriciously and arbitrarily. In at least _____ other cases, respondent granted requests for extension solely on the basis of respondent's personal satisfaction that the permit holders were ready to proceed with the project in question, without making any field inspection and without considering the amount of construction actually done when the extension was requested.]

[7. *Allege other basis for relief, if any, e.g.,* Two months before petitioner's permit would have expired, petitioner informed respondent of the difficulty petitioner was having in getting FHA approval and of petitioner's probable need for an extension. At that time respondent advised petitioner "not to spend any more money on the project until I [respondent] hear from the County Counsel." Relying on respondent's advice, petitioner made no effort to proceed with construction which might otherwise have been undertaken so as to meet respondent's standard of diligent construction work.]

8. On _____ [*date*], petitioner was ready, willing, and able to proceed with construction and to complete the project within six months.

WHEREFORE, petitioner prays:

1. For an alternative writ of mandate commanding respondent to grant an extension of petitioner's construction permit for six months or to show cause before this court at a time specified by court order why respondent has not done so and why a peremptory writ should not issue;

2. On the hearing, for a peremptory writ of mandate commanding respondent forthwith to grant an extension of petitioner's construction permit for six months;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*signature*]
Attorney for petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on _____ [*date*], at _____, California.

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a petition for use by the holder of a mobilehome park construction permit, for a writ of mandate directing a local enforcement agency [*see § 369.11[4]*] to grant an extension request which had previously been refused. The form is based on the facts reported in *Morgan v. County of San Diego (1971) 19 Cal. App. 3d 636, 97 Cal. Rptr. 180* [*see* [4], *below*].

Proceedings for writ of mandate are governed by *Code Civ. Proc. §§ 1085-1097*.

[3] Extension of Mobilehome Park Construction Permits

All permits as required under the permits and fees chapter in the Mobilehome Parks Act for construction or reconstruction must automatically expire within six months from the date of the permit's issuance in those cases when the construction or reconstruction has not been completed within this period. However, the enforcement agency may extend the permit's expiration date for a reasonable time [*Health & Safety Code § 18509*].

[4] When Refusal to Grant Extension Is Improper

A local enforcement agency's refusal to grant an extension for a mobilehome park construction permit was an abuse of discretion when the standard for passing on these requests was unreasonable and this standard was arbitrarily and capriciously applied. The enforcement agency was estopped to deny the request for extension when the permit holder's failure to meet the agency's standard was based on the agency's advice [*Morgan v. County of San Diego (1971) 19 Cal. App. 3d 636, 640-642, 97 Cal. Rptr. 180]* .

[5] Permit to Operate on Completion of Construction

On final approval by the enforcement agency of the construction of lots and facilities, the applicant must submit an application for a permit to operate or amended permit to operate on a form designated by the Department of Housing and Community Development, together with appropriate fees, to the enforcement agency [*25 Cal. Code Reg. § 1010(a)*]. The applicant must submit the application to the Department when the Department is the enforcement agency. On approval by the Department, an annual permit to operate will be issued to the applicant [*25 Cal. Code Reg. § 1010(a)(1)*]. When a local enforcement agency has enforcement responsibilities, the application must be submitted to that agency. On approval by the enforcement agency, one copy of the approved application must be provided to the applicant and one copy of the approved application together with the required state fees must immediately be forwarded to the Division of Codes and Standards by the enforcement agency. Within 10 working days of receiving the approved application, the Division of Codes and Standards must issue the initial permit to operate, with copies to the applicant and local enforcement agency. Subsequent years' annual permits must be issued by the enforcement agency [*25 Cal. Code Reg. § 1010(a)(2)*].

[6] Cross References

For discussion of, and forms for use in, mandate actions other than administrative mandate proceedings, see Ch. 358, *Mandate and Prohibition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksConstruction & Development

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 369 MOBILEHOMES AND MOBILEHOME PARKS
PART IV. FORMS
B. Petitions

32-369 California Forms of Pleading and Practice--Annotated § 369.132

§ 369.132 Petition and Supporting Declaration [Civ. Code § 798.88] for Temporary Restraining Order [Code Civ. Proc. § 527(a)] and Permanent Injunction [Civ. Code § 3422] By Mobilehome Park Management Against Resident of Mobilehome Park for Violation of Mobilehome Park Rule

[1] FORM Petition and Supporting Declaration [Civ. Code § 798.88] for Temporary Restraining Order [Code Civ. Proc. § 527(a)] and Permanent Injunction [Civ. Code § 3422] By Mobilehome Park Management Against Resident of Mobilehome Park for Violation of Mobilehome Park Rule

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION FOR TEMPORARY RESTRAINING
_____ [*name*],	)	ORDER AND PERMANENT INJUNCTION AND
[and DOES I through _____,]	)	SUPPORTING DECLARATION OF
Respondent[s].	)	_____ [*name*]
	)	

Petitioner alleges:

1. Petitioner is, and at all times herein mentioned was, _____ [*specify proprietary interest or other capacity, e.g.,* owner and operator] of a mobilehome park, as defined in *Civil Code Section 798.4*, commonly referred to as _____ [*specify name and street address of mobilehome park*], _____ County, California (hereinafter "the mobilehome park").

2. Respondent _____ [*name*] is, and at all times mentioned herein was, a _____

[homeowner *or* resident *or* homeowner and resident] of the mobilehome park.

[3. Respondents Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to petitioner. When their true names and capacities are ascertained, petitioner will amend this complaint by inserting their true names and capacities herein. (Petitioner is informed and believes and thereon alleges that each of the fictitiously named respondents is responsible in some manner for the occurrences herein alleged.)]

4. Beginning on or about _____ [*date*], [and continuing to the present time,] respondent [repeatedly,] wrongfully and unlawfully violated the rules of the mobilehome park by _____ [*specify violation, e.g.,* maintaining pets in violation of mobilehome park rule _____ (hereinafter "the mobilehome park rule") prohibiting more than one pet].

[5. On _____ (*date*), petitioner served written notice on respondent to cease violating the mobilehome park rule. A copy of this notice is attached to this petition as Exhibit A and made a part of this petition. Nevertheless, respondent has continued to violate the mobilehome park rule.]

6. Respondent's violation of the mobilehome park rule, unless and until enjoined and restrained by order of this court, will cause great and irreparable harm to petitioner and other mobilehome park homeowners and residents in that _____ [*specify particular facts indicating how respondents' actions will constitute great and irreparable injury, e.g.,* the pets on defendant's premises and in the mobilehome park cause noise and disruption to all the other residents of the park].

[7. Petitioner has incurred and will incur attorney's fees in prosecuting this action.]

WHEREFORE, petitioner prays judgment against respondent, as follows:

1. For an order requiring respondent to show cause, if any he/she has, why he/she should not be enjoined as hereinafter set forth, during the pendency of this action;

2. For a temporary restraining order, and a permanent injunction, enjoining respondent, and his/her agents, servants, and employees, and all persons acting under, in concert with, or for him/her:

a. From _____ [*specify each of the acts, courses of conduct, and conditions respondent is to be prohibited from doing, commencing, continuing, maintaining, failing to do, etc., e.g.,* violating mobilehome park rule _____ by allowing more than one pet on his/her premises];

b. To _____ [*specify each of the acts, courses of conduct, and conditions respondents are to be commanded to do, undertake, etc., e.g.,* remove permanently all pets in excess of one from his/her premises];

[3. For attorney's fees in the sum of $_____;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court deems proper.

_____ [*signature*]
Attorney for Petitioner

[*Verification. See § 369.140.*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am the petitioner in this action and make this declaration in support of my application for a temporary restraining order.

2. I am the _____ [*specify proprietary interest or other capacity, e.g.,* owner and operator] of the _____ [*specify name of mobilehome park*], mobilehome park (hereinafter "the mobilehome park").

3. Respondent _____ [*name*] is a _____ [homeowner *or* resident *or* homeowner and resident] of the mobilehome park.

4. Rule _____ of the mobilehome park provides _____ [*describe violated rule, e.g.,* that there must be no more than one pet per residence]. A copy of the mobilehome park rules is attached to this Declaration as Exhibit _____. Respondent has repeatedly violated this rule.

[5. On _____ (*date*), (and a number of times since then,) I demanded in writing that respondents stop their violation of the rules. A copy of the demand is attached to this Declaration as Exhibit _____. Respondents have refused, and still refuse, to refrain from their rule violations.]

6. Unless a temporary restraining order is granted, great and irreparable harm will result to me and other homeowners and residents of the mobilehome park in that _____ [*describe injury, e.g.,* the pets on defendant's premises and in the mobilehome park cause noise and disruption to all the other residents of the park].

7. The above facts are within my personal knowledge and I am competent to testify to their truth if called as a witness.

I declare under penalty of perjury that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a petition and supporting declaration for use by mobilehome park management to obtain a temporary restraining order and injunction against violation of mobilehome park rules. It is authorized by *Civ. Code § 798.88*.

[3] Verification and Notice

Verification [*see Code Civ. Proc. § 446*] is required if petitioner is seeking a temporary restraining order and/or preliminary injunction based on facts alleged in the petition alone without the use of affidavits (or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*]) [*Code Civ. Proc. § 527(a), (c)(1)*]. Otherwise, verification is not required. If the petition is verified, however, the answer must be verified [*Code Civ. Proc. § 446*]. Moreover, a verified complaint precludes a general denial in the answer in superior court [*see Code Civ. Proc. § 431.30(d)*].

A preliminary injunction may not be granted without notice to the opposing party [*Code Civ. Proc. § 527(a)*].

[4] Certification re Notice

When a temporary restraining order is sought without formal notice, the applicant or the applicant's attorney is required to certify to the court under oath that (1) within a reasonable time before the application, he or she informed the opposing party, or his or her attorney if any, at what time and where the application would be made, (2) he or she in good faith attempted to inform the opposing party or attorney but was unable to do so, specifying the efforts made to do so, or (3) for reasons specified, he or she should not be required to inform the opposing party or attorney [*Code Civ. Proc. § 527(c)(2)*; *Cal. Rules of Ct., Rule 3.1204(b)*]. The certification is normally appended to the application for the temporary restraining order. For a certification of notice, see Ch. 303, *Injunctions* .

In addition to the certification, a temporary restraining order may not be granted without notice to the opposing party unless it appears from facts shown by affidavit or by verified complaint that great or irreparable injury will result to the applicant before the matter can be heard on notice [*Code Civ. Proc. § 527(c)(1)*].

[5] Jurisdiction and Venue

The petition must be filed in the superior court for the county in which the mobilehome park is located [*Civ. Code § 798.88(b)*].

The granting of either a provisional or final injunction requires personal jurisdiction over the person enjoined [*see Comfort v. Comfort (1941) 17 Cal. 2d 736, 741, 112 P.2d 259* (permanent); *Rothschild v. Erda (1968) 258 Cal. App. 2d 750, 753, 66 Cal. Rptr. 209* (preliminary); *see generally* Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances*].

[6] Allegations

The form of petition in [1], *above*, alleges all of the following:

- Petitioner's capacity as management of the mobilehome park (Paragraph 1);
- Respondent's capacity as a homeowner and/or resident of the mobilehome park (Paragraph 2);
- An optional allegation alleging fictitious respondents (Paragraph 3) [*see Code Civ. Proc. § 474*];
- The nature of respondent's violation of the mobilehome park rules (Paragraph 4);
- Petitioner's written notice of the violation to Respondents (Paragraph 5);
- Facts showing how respondent's conduct will constitute great and irreparable injury (Paragraph 6) [*Civ. Code § 798.88(b)*; *see Code Civ. Proc. § 527(c)(1)*]; and
- An optional allegation relating to attorney's fees (Paragraph 7) [*Civ. Code § 798.85*].

[7] Service of Temporary Restraining Order

If a temporary restraining order is granted, it must be personally served on the respondent homeowner or resident with the petition for injunction and notice of hearing. The restraining order remains in effect for a period not to exceed 15 days, except as modified or sooner terminated by the court [*Civ. Code § 798.88(c)*].

[8] Hearing on Injunction

Within 15 days of filing the petition for an injunction, a hearing must be held. If the court, by clear and convincing evidence, finds the existence of a continuing or recurring violation of a reasonable rule or regulation of the mobilehome park, it will issue an injunction prohibiting the violation [*Civ. Code § 798.88(d)*].

A party to the action may appear through legal counsel or in propria persona [*Civ. Code § 798.88(f)*].

[9] Duration of Injunction

The injunction's duration may not exceed three years [*Civ. Code § 798.88(d)*]. Not more than three months before the expiration of the injunction, however, management may petition for a new injunction if there has been recurring or continuous violation of the injunction or there is a threat of future violation of the mobilehome park's rules on termination of the injunction [*Civ. Code § 798.88(e)*].

[10] Declaration

A supporting declaration is required for a temporary restraining order under *Civ. Code § 798.88* [*Civ. Code § 798.88(b)*; *see Code Civ. Proc. § 527(c)(1)*].

[11] Cross References

For discussion, a procedural checklist, and additional forms necessary to obtain a preliminary or permanent injunction, see Ch. 303, *Injunctions* .

For memoranda supporting and opposing the issuance of preliminary injunctions, see Californi Points and Authorities, Ch. 116, *Injunctions* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersReal Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use

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[Reserved]

§§ 369.133[Reserved]

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Chapter 369 MOBILEHOMES AND MOBILEHOME PARKS
PART IV. FORMS
C. Complaints

32-369 California Forms of Pleading and Practice--Annotated § 369.140

§ 369.140 Complaint for Damages [Civ. Code § 1780(a)] By Mobilehome Buyer Against Dealer for Breach of Statutory Warranty Against Substantial Defects [Civ. Code §§ 1770(a)(7), 1797.3]

[1] FORM Complaint for Damages [Civ. Code § 1780(a)] By Mobilehome Buyer Against Dealer for Breach of Statutory Warranty Against Substantial Defects [Civ. Code §§ 1770(a)(7), 1797.3]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Breach of Warranty)
_____ [*name*],	)	[Amount demanded _____ (exceeds
Defendant.	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff is, and at all times mentioned in this complaint was, a resident of _____ County, California.

2. _____ [Defendant _____ (*name*) is, and at all times mentioned in this complaint was, a corporation, organized and existing under the laws of California, with its principal office for the transaction of business in _____ County *or alleged other capacity of defendant*], _____ [authorized *or* licensed] to engage, and engaging, in business as a seller of mobilehomes.

3. On or about _____ [*date*], at _____ [*street address and city*], in _____ County, California, defendant sold to plaintiff a mobilehome _____ [*describe,*

e.g., Model 123-4, called "Sunset," manufactured by the California Mobilehome Manufacturing Company, Inc., bearing the identification number 123-4-567890].

4. The mobilehome was bought by plaintiff primarily for personal, family, or household purposes.

5. At the time of the sale, defendant represented to plaintiff, in a writing entitled "Mobilehome Warranty," that the mobilehome was "free from any substantial defects in materials or workmanship." In fact the mobilehome was substantially defective in that _____ [*specify defects in materials and/or workmanship, e.g.,* none of the windows were sealed in their openings, with the result that water could and did seep to the insides of the walls and the interior of the mobilehome during rainstorms]. This defect became evident on _____ [*date*].

6. [Plaintiff is informed and believes and thereon alleges that] [T]he above-mentioned misrepresentation was intended by defendant to result in the above-mentioned sale of the mobilehome to plaintiff, and [plaintiff alleges that] the above-mentioned purchase of the mobilehome was made in reliance on, and as a result of, the representation of defendant that such mobilehome was free from any substantial defects in materials or workmanship.

7. Plaintiff is informed and believes and thereon alleges that the above-mentioned misrepresentation was a willful and intentional violation of the provisions of *Civil Code Section 1770(a)(7)* and that such violation was not the result of a bona fide error notwithstanding the use of reasonable procedures adopted to avoid any such error.

8. On or about _____ [*date not later than one year and 10 days after date of delivery*], plaintiff sent to defendant a written Notice and Demand, attached to this complaint as Exhibit B and made a part of this complaint, by _____ [certified *or* registered] mail, return receipt requested, to defendant's business address set forth in the "Mobilehome Warranty" _____ [*if that is not the place where the transaction occurred, or is not defendant's principal place of business within California, add* and to _____ (the place where the transaction occurred or defendant's principal place of business within California)], which Notice and Demand notified defendant of the above-mentioned violation of *Civil Code Section 1770(a)(7)* that resulted in the sale of the mobilehome to plaintiff and demanded that defendant correct, repair, replace, or otherwise rectify the mobilehome purchased by plaintiff and sold in violation of this section.

9. Within 30 days of the receipt of the Notice and Demand, attached to this complaint as Exhibit B, defendant failed to correct, repair, replace, or otherwise rectify, and failed to agree to correct, repair, replace, or otherwise rectify within a reasonable time, the above-mentioned mobilehome.

10. By reason of the above-mentioned violation of *Civil Code Section 1770(a)(7)*, plaintiff has been injured in that _____ [*specify, e.g.,* plaintiff was obliged to and did incur expenses totaling $_____ for having the defective condition of the windows rectified and damage to the walls and floor of the mobilehome repaired].

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____;

2. For punitive damages in the sum of $_____;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a complaint for use by a mobilehome buyer, who buys for personal, family, or household purposes from a dealer, to claim damages under the Consumers Legal Remedies Act [*Civ. Code §§ 1750-1784*] for breach of the statutory warranty against substantial defects in materials and workmanship [*see Civ. Code §§ 1797-1797.7* (mobilehome warranties law)].

In some cases, the civil penalty equal to two times actual damages, plus reasonable costs and attorney's fees, available under *Civ. Code § 1794(c), (d)*, discussed in Ch. 500, *Sales: Sales Under the Commercial Code* . will exceed punitive damages [*see, e.g., Troensegaard v. Silvercrest Industries, Inc. (1985) 175 Cal. App. 3d 218, 221, 226-228, 220 Cal. Rptr. 712* (plaintiff may not recover both civil penalty under *Civ. Code § 1794(c)* and punitive damages under *Civ. Code § 3294*)].

For discussion of, and additional forms for use in, actions under the Consumers Legal Remedies Act, see Ch. 500, *Sales: Sales Under the Commercial Code* .'

[3] Cause of Action

[a] Representations of Seller

The seller's representation that "goods" sold to a "consumer" are of a particular standard or quality, where the goods are of another standard or quality, is unlawful [*Civ. Code § 1770(a)(7)*], and any resulting injury to the consumer is a cause of action for damages, including punitive damages, or other appropriate relief [*Civ. Code § 1780(a)*]. If the requisite findings of fact are made, any senior or disabled plaintiff in an action under *Civ. Code § 1780* may receive an additional award of up to $5,000 [*Civ. Code §§ 1780(b), 3345*]. The criteria for the additional award and a form of allegations for use in seeking such an award are contained in Ch. 500, *Sales: Sales Under the Commercial Code*.'

Mobilehomes bought for use primarily for personal, family, or household purposes, including mobilehomes which, at the time of sale or subsequently thereafter are to be so affixed to real property as to become a part of such real property, are "goods" in this context [*see Civ. Code § 1761(a)*], and any individual who buys such a mobilehome for personal, family, or household purposes is a "consumer" [*see Civ. Code § 1761(d)*]. A dealer who, in selling a mobilehome to a "consumer," makes the warranty required by *Civ. Code § 1797.3*, that the mobilehome "is free from any substantial defects in materials or workmanship," thereby "[r]epresent[s] that goods ... are of a particular standard, quality, or grade" [*Civ. Code § 1770(a)(7)*]. If in fact the mobilehome is not free from substantial defects in materials or

workmanship--if the goods are of another standard, quality, or grade--the warranty is breached, and in the breach the dealer is guilty of one of the many acts declared in *Civ. Code § 1770* to be unlawful. The buyer is entitled to damages, or other appropriate relief, for resulting injury, if any [*see Civ. Code § 1780(a)*].

[b] Applicability of "Residence" Exception

The Consumers Legal Remedies Act [*Civ. Code §§ 1750-1784*] does not apply to any transaction that provides for the construction, sale, or construction and sale of "an entire residence" or all or part of a structure designed for commercial or industrial occupancy, with or without a parcel of real property or an interest therein, or for the sale of a lot or parcel of real property, including any site preparation incidental to the sale [*Civ. Code § 1754*]. Although a mobilehome may be considered "an entire residence," the intent of *Civ. Code § 1754* appears to create an exception to the Consumers Legal Remedies Act only for sales of ordinary houses or units in multi-family buildings.

[4] Breach of Statutory Warranty

The statutory warranty against substantial defects is breached only when substantial defects (not defined in the mobilehome warranties law) become evident within one year from the date of delivery of the mobilehome to the buyer (also not defined), and the buyer gives written notice of the defects to the dealer at the dealer's business address not later than one year and 10 days after the date of delivery, and within a reasonable time thereafter the dealer does not fulfill the terms of the warranty [*see Civ. Code § 1797.3(b)*].

The manufacturer is jointly and severally liable with the dealer for fulfillment of the terms of the warranty [*Civ. Code § 1797.3(c)*].

Breach of the statutory warranty may not be cited as a cause of action under the Consumers Legal Remedies Act, *Civ. Code § 1770(g)* (misrepresentation of quality), unless the buyer demanded correction, repair, replacement, or other rectification of the defective mobilehome, and within 30 days thereafter the dealer did not, and made no agreement with the buyer to, correct, repair, replace, or otherwise rectify it [*see Civ. Code § 1782(a), (b)*].

[5] Commencement of Action

An action under the Consumers Legal Remedies Act may not be commenced within 30 days after giving notice of the defects and demand for corrective action [*Civ. Code § 1782(a)*] or more than three years after the date of the misrepresentation [*Civ. Code § 1783*].

[6] Venue and Affidavit

Venue for an action under the Consumers Legal Remedies Act is prescribed in *Civ. Code § 1780(c)*. The complaint must be accompanied by an affidavit showing the action has been commenced in the proper county [*Civ. Code § 1780(c)*]. For a form of affidavit, see Ch. 500, *Sales: Sales Under the Commercial Code* .

[7] Cross References

For discussion of, and forms for use in, actions based on breach of warranty in sales of goods, including actions under the Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*] and the Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*], see Ch. 500, *Sales: Sales Under the Commercial Code* .'

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionBreach of WarrantyReal Property LawMobilehomes & Mobilehome

ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale

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32-369 California Forms of Pleading and Practice--Annotated § 369.141

§ 369.141 Complaint for Damages By Mobilehome Buyer Against Dealer or Other Seller for Improper Escrow [Health & Safety Code § 18035(n)]

[1] FORM Complaint for Damages By Mobilehome Buyer Against Dealer or Other Seller for Improper Escrow [Health & Safety Code § 18035(n)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Improper Mobilehome Escrow)
_____ [*name*],	)	[Amount demanded _____ (exceeds
[and DOES I through _____,]	)	*or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. Defendant is _____ [*specify defendant's status as dealer or other seller of mobilehomes, e.g.,* a person engaged in the business of selling mobilehomes, and a dealer of mobilehomes within the meaning of *Health & Safety Code Section 18002.6*].

2. On _____ [*date*], _____ [*allege facts showing agreement to purchase new or used mobilehome, e.g.,* plaintiff and defendant entered into an agreement, by the terms of which plaintiff would purchase from defendant a new mobilehome, Model 123-4, called "Sunset," manufactured by the California Mobilehome Manufacturing Company, Inc., bearing the identification number 123-4-567890 (referred to below as "the agreement").

Defendant executed and plaintiff signed a written purchase order evidencing the agreement. (A copy of the purchase order is attached to this complaint as Exhibit A and made a part of this complaint.)]

3. _____ [*Allege facts showing violation by defendant of Health & Safety Code § 18035, e.g.,* Pursuant to the terms of the agreement, plaintiff paid defendant a downpayment in the amount of $_____ (referred to below as "the downpayment"). Defendant subsequently retained the downpayment and failed to deposit it in an escrow account, in violation of *Health & Safety Code Section 18035(a)*.]

4. _____ [*Allege damages, e.g.,* A dispute has arisen between plaintiff and defendant with regard to the agreement, and on _____ (*date*), plaintiff demanded that defendant refund the downpayment. Defendant has refused and continues to refuse to refund the downpayment. As a result of defendant's failure to deposit the downpayment in an escrow account, plaintiff is unable to recover the downpayment as authorized under *Health & Safety Code Section 18035(f)*, and has been damaged in the amount of $_____].

5. As a result of defendant's violation of *Health & Safety Code Section 18035*, plaintiff is entitled to additional statutory damages in the amount of $_____ [*specify amount not in excess of $2,000 pursuant to Health & Safety Code § 18035(n)*].

[6. Plaintiff has incurred and will incur attorney's fees in prosecuting this action.]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For actual damages in the sum of $_____;

2. For statutory damages in the sum of $_____ [*specify amount not in excess of $2,000*];

[3. For attorney's fees in the sum of $_____;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*date*]
_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 369.140.*]

[2] Use of Form

The form in [1], *above*, is a complaint for use in an action by a buyer of a mobilehome against a dealer or other seller based on improper escrow practice. With appropriate modifications, this form may also be used in an action for improper escrow practice by a dealer or other seller of mobilehomes against a buyer [*Health & Safety Code § 18035(n)*].

[3] Allegations

The form of complaint in [1], *above*, alleges all of the following:

- Defendant's status as a dealer or other seller of mobilehomes (Paragraph 1) [*Health & Safety Code §*

18035(n)];

- The agreement between plaintiff and defendant for the purchase of a new or used mobilehome (Paragraph 2) [*Health & Safety Code § 18035(a), (n)*];

- Defendant's violation of *Health & Safety Code § 18035* (Paragraph 3) [*Health & Safety Code § 18035(n)*; *see also Health & Safety Code § 18035(a)*];

- Plaintiff's actual damages (Paragraph 4) [*Health & Safety Code § 18035(n)*];

- That plaintiff is entitled to statutory damages in an amount not in excess of $2,000 as a result of defendant's violation of *Health & Safety Code § 18035* (Paragraph 5) [*Health & Safety Code § 18035(n)*]; and

- An optional allegation relating to attorney's fees (optional Paragraph 6) [*Health & Safety Code § 18035(n)*].

[4] Damages

A plaintiff who prevails in an action under *Health & Safety Code § 18035(n)* will be awarded actual damages plus an amount not in excess of $2,000. Additionally, a prevailing plaintiff will be awarded attorney's fees and court costs [*Health & Safety Code § 18035(n)*].

[5] Cross References

For discussion of escrows generally, see Ch. 253, *Escrows* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & UseReal Property LawMobilehomes & Mobilehome ParksPurchase & Sale

California Forms of Pleading and Practice--Annotated

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 369 MOBILEHOMES AND MOBILEHOME PARKS
PART IV. FORMS
C. Complaints

32-369 California Forms of Pleading and Practice--Annotated § 369.142

§ 369.142 Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. §§ 526, 731] and Damages [Civ. Code § 3333] By Resident of Mobilehome Park Against Mobilehome Park Management for Failure to Maintain Common Facilities in Good Working Order [Civ. Code § 798.87]

[1] FORM Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. §§ 526, 731] and Damages [Civ. Code § 3333] By Resident of Mobilehome Park Against Mobilehome Park Management for Failure to Maintain Common Facilities in Good Working Order [Civ. Code § 798.87]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [name],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES AND PRELIMIN-
vs.	)	ARY AND PERMANENT INJUNCTION (Failure to
_____ [*name*],	)	Maintain Common Areas of Mobilehome Park)
[and DOES I through _____,]	)	[Amount demanded _____ (exceeds
Defendant(s).	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant(s) is/are the _____ [*specify proprietary interest or other capacity, i.e.,* owners and operators] of a mobilehome park, as defined in *Civil Code Section 798.4*, commonly referred to as _____ [*specify name and street address of mobilehome park*], _____ County, California (hereinafter "the mobilehome park").

2. Plaintiff is, and at all times herein mentioned was, a resident of the mobilehome park.

[3. Plaintiff is, and at all times herein mentioned was, a tenant of the mobilehome park under a rental agreement dated _____, between plaintiff and _____ (*specify landlord, e.g.,* defendant), and is a homeowner within the meaning of *Civil Code Section 798.9*. (A copy of the rental agreement is attached to this complaint as Exhibit A and made a part of this complaint.)]

[4. Defendants Does I-_____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.)]

[5. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of such agency and employment.]

6. At all times herein mentioned, and since _____ [*date*], defendants, and each of them, have substantially failed to _____ [provide *or* maintain *or* provide and maintain] physical improvements to the common areas of the mobilehome park [that are] in good working order and condition in that _____ [*describe nature of defendants' failure, e.g.,* they have failed to provide lighting in the common areas of the mobilehome park and maintain the fence surrounding the mobilehome park, rendering the mobilehome park unprotected from and vulnerable to criminal activity].

7. Defendants' substantial failure to _____ [provide *or* maintain *or* provide and maintain] physical improvements to the common areas of the mobilehome park [that are] in good working order and condition constitutes a public nuisance under *Civil Code Section 798.87(a)*. At the same time, it causes special injury to plaintiff in that _____ [*specify injury to plaintiff different in kind from that suffered by others, e.g.,* the fence surrounding the mobilehome park has partially collapsed and has damaged plaintiff's mobilehome].

[*EITHER*]

8. On _____ [*specify date at least 30 days before filing of complaint*], in accordance with *Civil Code Section 798.84(b)-(d)*, plaintiff served defendants with written notice of the basis of his/her claim, and the specific allegations set forth and remedies requested herein. A copy of this notice is attached to this complaint as Exhibit B and made a part of this complaint. However, defendants have refused, and continue to refuse to abate the nuisance resulting from their failure to _____ [*specify, e.g.,* maintain the common areas of the mobilehome park].

[*OR*]

8. On _____ [*specify date at least 30 days before filing of complaint*], _____ [*specify state or local agency*] notified defendants [in writing] that defendants had failed to _____ [*specify, e.g.,* maintain in good working order the lighting in the common areas of the mobilehome park and the fence surrounding the mobilehome park]. [A copy of this notice is attached to this complaint as Exhibit B and made a part of this complaint.] However, defendants have refused, and continue to refuse to abate the nuisance resulting from their failure to _____ [*specify, e.g.,* maintain the common areas of the mobilehome park].

[*CONTINUE*]

9. Defendants, and each of them, have threatened to and will, unless restrained by this court, continue to maintain the nuisance complained of, and each and every act and failure to act has been, and will be, without the consent, against the will, and in violation of the rights of plaintiff.

10. As a proximate result of the nuisance created by defendants, and each of them, plaintiff has been, and will be, damaged in the sum of $_____, which sum is necessary to _____ [*specify damage to be corrected, e.g.,* repair damage to his/her mobilehome caused by the partial collapse of the fence surrounding the mobilehome park].

11. Unless defendants, and each of them, are restrained by order of this court, it will be necessary for plaintiff to commence many successive actions against defendants, and each of them, to secure compensation for damages sustained, thus requiring a multiplicity of suits, and plaintiff will be daily threatened by defendants' failure to _____ [*specify, e.g.,* maintain the common areas of the mobilehome park].

12. Unless defendants, and each of them, are enjoined from continuing their course of conduct, plaintiff will suffer irreparable injury in that _____ [*specify irreparable injury, e.g.,* plaintiff will be deprived of the comfortable enjoyment of his/her mobilehome].

13. Plaintiff has no plain, speedy, or adequate remedy at law, and injunctive relief is expressly authorized by *Code of Civil Procedure Sections 526* and *731*.

[14. Plaintiff has incurred and will incur attorney's fees in prosecuting this action.]

[15. In maintaining the nuisance, defendants, and each of them, are acting with full knowledge of the consequences and damage being caused to plaintiff, and their conduct is a willful violation of *Civil Code Section 798.87(a)*. Accordingly, plaintiff is entitled to an award under _____ (*Civil Code § 798.86 or Civil Code § 3294*).]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For a preliminary and a permanent injunction enjoining defendants, and each of them, and their agents, servants, and employees, and all persons acting under, in concert with, or for them from _____ [*specify each act, course of conduct, and condition defendants are to be prohibited from doing, commencing, continuing, maintaining, failing to provide or maintain, etc., e.g.,* failing to provide lighting in the common areas of the mobilehome park and maintain the fence surrounding the mobilehome park];

2. For damages in the sum of $_____;

[3. For damages under _____ (*Civil Code § 798.86 or Civil Code § 3294*) for defendant's willful violation of *Civil Code Section 798.87*];

[4. For attorney's fees in the sum of $_____;]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*date*]
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification. See § 369.140.*]

[2] Use of Form

The form in [1], *above*, is a complaint for use in an action by a mobilehome park resident against the mobilehome park management for a preliminary and permanent injunction and damages based on the management's substantial failure to provide or maintain physical improvements to the common areas of the mobilehome park that are in good working order and condition [*Civ. Code § 798.87(a)*]. With appropriate modifications, this form may also be used in an action against a mobilehome park resident for a preliminary and permanent injunction and damages based on the resident's substantial violation of a mobilehome park rule [*see Civ. Code § 798.87(b)*].

The substantial failure of mobilehome park management to provide and maintain physical improvements in the common facilities in good working order and condition and the substantial violation of a mobilehome park rule are deemed public nuisances. However, notwithstanding the provisions of *Civ. Code § 3491*, these nuisances may only be remedied by a civil action or abatement [*Civ. Code § 798.87*].

[3] Who May Bring Action

A civil action under *Civ. Code § 798.87* may be brought by a mobilehome park resident, the park management, or in the name of the people of California by the district attorney or county counsel of the jurisdiction in which the park, or the greater portion of the park, is located, the city attorney or city prosecutor if the park is located within the city's jurisdiction, or the attorney general [*Civ. Code § 798.87(c)*].

[4] Allegations

The form of complaint in [1], *above*, alleges all of the following:

- Defendants' proprietary interests and capacities (Paragraph 1) [*Civ. Code § 798.87*];
- Plaintiff's proprietary interest and capacity (Paragraph 2) [*Civ. Code § 798.87*];
- An optional allegation for use when plaintiff is a homeowner within the meaning of *Civ. Code § 798.9* (optional Paragraph 3) [*Civ. Code § 798.86*];
- An optional allegation as to fictitiously named defendant(s) (optional Paragraph 4) [*Code Civ. Proc. § 474*];
- An optional allegation for use when agents are being sued (optional Paragraph 5);
- Defendants' substantial failure to provide or maintain physical improvements to the common areas of the mobilehome park that are in good working order and condition (Paragraph 6) [*Civ. Code § 798.87(a)*];
- That defendants' substantial failure is a public nuisance under *Civ. Code § 798.87* (Paragraph 7) [*Civ. Code § 798.87(a)*];
- That the public nuisance resulting from defendants' conduct is specially injurious to plaintiff

(Paragraph 7) [*Civ. Code § 3493*];

- Allegations for use in the alternative depending on whether notice was provided to defendants by plaintiff under *Civ. Code § 798.84(b), (d)*, or defendants were notified of their failure to maintain the property by a state or local agency (alternative Paragraphs 8) [*Civ. Code § 798.84(d)*];

- Defendants' continued maintenance of the nuisance against plaintiff's will (alternative Paragraphs 8 and Paragraph 9);

- The nature and amount of damages (Paragraph 10);

- The necessity for a multiplicity of suits unless an injunction is granted (Paragraph 11) [*Code Civ. Proc. § 526(a)(6)*];

- That plaintiff will suffer irreparable injury unless an injunction is granted (Paragraph 12) [*Code Civ. Proc. § 527(a)*];

- The lack of a plain, speedy, or adequate remedy at law and the express authority for an injunction (Paragraph 13) [*Civ. Code §§ 3491, 3493*; *Code Civ. Proc. §§ 526, 731*];

- An optional allegation relating to attorney's fees (optional Paragraph 14) [*Civ. Code § 798.85*]; and

- An optional allegation for statutory damages for use when the plaintiff is a homeowner or former homeowner of the mobilehome park, and defendants' violation is willful (optional Paragraph 15) [*Civ. Code §§ 798.9, 798.86*].

[5] Injunctive Relief in Limited Civil Cases

In a limited civil case, the court may issue temporary restraining orders and preliminary injunctions, but not permanent injunctive relief except as otherwise provided by statute. Thus, if permanent injunctive relief is sought, the action generally may not be brought as a limited civil case and must be brought in superior court [*see Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*]. For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* . Limited civil cases are specifically covered in Ch. 323, *Jurisdiction, Inconvenient Forum, and Appearances* .

[6] Notice

Generally, a preliminary injunction may not be granted without notice to the opposing party [*Code Civ. Proc. § 527(a)*]. Specifically, an action based on the failure of mobilehome park management to maintain the common facilities may not be commenced by a homeowner unless the management has been given at least 30 days' prior notice of the intention to commence the action [*Civ. Code § 798.84(a)*]. For further discussion of notice requirements, see *§§ 369.12[8]* (Notice of Intent to Commence Action Against Mobilehome Park) and 369.116 (sample form of notice of intent to commence actions).

[7] Damages

If a homeowner or former homeowner of a mobilehome park is the prevailing party in a civil action, including a small claims court action, against the management to enforce his or her rights under the Mobilehome Residency Law [*Civ. Code § 798 et seq.*], the homeowner, in addition to damages afforded by law, may, in the court's discretion, be awarded an amount not to exceed $2,000 for each willful violation of those provisions by the management [*Civ. Code § 798.86*].

The term "homeowner" means a person who has a tenancy in a mobilehome park under a rental agreement [*Civ. Code § 798.9*]. The term "willful" refers to intentional conduct undertaken with knowledge or consciousness of its probable results. For purposes of imposing a penalty under *§ 798.86*, "willful" conduct does not require a purpose or specific intent to bring about a result, but does require more than negligence or accidental conduct [*Patarak v. Williams (2001) 91 Cal. App. 4th 826, 830, 111 Cal. Rptr. 2d 381* (penalty properly imposed on finding that landlord willfully failed to maintain septic system with knowledge or consciousness that it would probably fail with malodorous and unsanitary consequences)].

A prevailing homeowner may be awarded either the statutory penalty under *Civ. Code § 798.86* or punitive damages under *Civ. Code § 3294* [*Civ. Code § 798.86(b)*]. *Civ. Code § 798.86* was amended by 2003 Stats., ch. 98 (AB 693) to effectively abrogate the holding in *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates (2001) 94 Cal. App. 4th 890, 114 Cal. Rptr. 2d 708* that punitive damages could not be recovered in addition to damages for willful violations under *Civ. Code § 798.86*.

[8] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[9] Statute of Limitations

If notice of an action based on the failure of mobilehome park management to maintain the common facilities of a mobilehome park is served within 30 days of expiration of the applicable statute of limitations, the time for commencing the action will be extended 30 days from the service of the notice [*Civ. Code § 798.84(e)*].

[10] Attorney's Fees

The prevailing party is entitled to reasonable attorney's fees and costs. A party will be deemed a prevailing party if the judgment is rendered in his or her favor or the litigation is dismissed in his or her favor before or during the trial, unless the parties otherwise agree in the settlement or compromise [*Civ. Code § 798.85*].

[11] Cross References

For discussion of and forms relating to nuisance generally, see Ch. 391, *Nuisance* .

For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes &

Mobilehome ParksMaintenance & UseReal Property LawTortsNuisanceRemediesInjunctionsTemporary Injunctions

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 369 MOBILEHOMES AND MOBILEHOME PARKS
PART IV. FORMS
C. Complaints

32-369 California Forms of Pleading and Practice--Annotated § 369.143

§ 369.143 Complaint for Restitution and Injunction [Bus. & Prof. Code § 17203]--Class Action [Code Civ. Proc. § 382] by Mobilehome Park Tenant Against Management for Unfair Competition by Violating Mobilehome Residency Law [Civ. Code § 798 et seq.]

[1] FORM Complaint for Restitution and Injunction [Bus. & Prof. Code § 17203]--Class Action [Code Civ. Proc. § 382] by Mobilehome Park Tenant Against Management for Unfair Competition by Violating Mobilehome Residency Law [Civ. Code § 798 et seq.]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] individually and on behalf of all others similarly situated,	)	NO. _____
Plaintiff,	)	CLASS ACTION FOR COMPLAINT FOR RESTITUTION AND INJUNCTION
vs.	)	(Unfair Competition)
_____ [*name*],	)	
Defendant.	)	

Plaintiff alleges:

1. Plaintiff is, and at all times mentioned in this complaint was, a resident of _____ County, California [*or allege other capacity and residence*].

2. Defendant is, and at all times mentioned in this complaint was, a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ [*city*], _____ County, California [*or allege other capacity of defendant and basis of venue as appropriate*].

3. Plaintiff brings this action on his/her own behalf and on behalf of all persons similarly situated. The class which plaintiff represents is composed of all persons who, at any time since the date four years before the filing of this complaint, have been tenants in [any of] the mobilehome park[s] identified in this complaint. The persons in the class are so numerous [, consisting of approximately _____ individuals,] that the joinder of all such persons is impracticable and that the disposition of their claims in a class action is a benefit to the parties and to the court.

4. There is a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented in that each member of the class is or has been in the same legal relation to the defendant (that is, as a tenant) in the same factual circumstances, hereinafter alleged, as plaintiff. Proof of a common or single state of facts will establish the right of each member of the class to recover. The claims of the plaintiff are typical of those of the class and plaintiff will fairly and adequately represent the interests of the class.

[5. There is no plain, speedy, or adequate remedy other than by maintenance of this class action since plaintiff is informed and believes that each class member is entitled to restitution of a relatively small amount of money, amounting at most to $_____ each, making it economically infeasible to pursue remedies other than a class action. Consequently there would be a failure of justice but for the maintenance of the present class action.]

6. Defendant is the owner [and operator] of a mobilehome park, as defined in *Civil Code Section 798.4*, which is known as _____ [*common name, if any, and street address*] and is located in _____ County, California. Plaintiff is, and since _____ [*date*], plaintiff has continuously been, a tenant in the mobilehome park (hereinafter "the mobilehome park").

[7. Defendant is also the owner (and operator) of a mobilehome park, as defined in the above-cited code sections, which is known as _____ and is located in _____ County, California.]

8. [*Repeat for each other mobilehome park in California, owned by defendant, where violations alleged below on which action is based have occurred.*]

[9. Plaintiff is informed and believes and thereon alleges that the violations hereinafter alleged regarding the mobilehome park in which plaintiff is a tenant have also occurred in and regarding the other mobilehome park(s) herein referred to.]

[10. *In this paragraph and subsequent paragraphs if necessary, allege violations of Mobilehome Residency Law (Civ. Code § 798 et seq.), e.g.,* Since _____ [*date*], defendant has required that those tenants having pets within the mobilehome park, including plaintiff, must pay a "pet fee" of $_____ per month although defendant has not actually provided special facilities or services for pets (other than _____ (*specify*), for which a reasonable charge for cost and maintenance would not exceed $_____ per month). Such charges (in excess of $_____ per month) have been collected by defendant in violation of *Civil Code Section 798.33*.]

[11. *Continue, e.g.,* Since _____ [*date*], defendant has required that those tenants having overnight guests within the mobilehome park, including plaintiff, must pay a "guest fee" of $_____ per month per guest regardless of the duration of the guest's stay. Such charges for guests staying not more than a total of 20 consecutive days or a total of 30 days in a calendar year have been collected by defendant in violation of *Civil Code Section 798.34*.]

12. Defendant's acts hereinabove alleged are acts [of unfair competition within the meaning of *Business and Professions Code Section 17203*.] Plaintiff is informed and believes that defendant will continue to do those acts unless the court orders defendant to cease and desist.

13. Plaintiff has incurred and, during the pendency of this action, will incur expenses for attorney's fees and costs herein. Such attorney's fees and costs are necessary for the prosecution of this action and will result in a benefit to each of the members of the class. The sum of $_____ is a reasonable amount for attorney's fees herein.

WHEREFORE, plaintiff prays for judgment as follows:

1. For restitution to plaintiff and each other member of the class, as his or her interest may appear, of all sums unlawfully collected by defendant from plaintiff and the other members of the class since _____ [*date*], amounting in the aggregate to at least $_____;

2. For interest on these sums at the legal rate from the date of each unlawful collection [*or other prayer for interest*];

3. For a permanent injunction enjoining defendant, and defendant's agents, servants, and employees, and all persons acting under or in concert with them, to cease and desist from the following acts:

a. _____ [*Specify according to allegations, e.g.,* Charging or collecting from any tenant in (any of) the mobilehome park(s) herein referred to, any "pet fee" other than a fee reasonably related to the cost and maintenance of special facilities or services for pets actually provided by defendant];

b. _____ [*Continue as appropriate*];

4. For the payment of plaintiff's attorney's fees out of the moneys recovered for the joint benefit of the members of the class;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 369.140.*]

[2] Use of Form

The form in [1], *above*, is a complaint for use by a mobilehome park tenant to obtain an injunction against violations of the Mobilehome Residency Law [*Civ. Code § 798 et seq.*] constituting acts of unfair competition, plus restitution of sums acquired by the defendant through such unfair competition, on behalf of the plaintiff and all others similarly situated (i.e., by a class action).

For discussions of, and forms for use in, class actions, actions for injunctions, and actions based on unfair competition, see Chs. 120, *Class Actions* , 303, *Injunctions* , and 565, *Unfair Competition* .

[3] Standing

In 2004, the electorate approved Proposition 64, which imposed standing requirements on private plaintiffs seeking injunctive relief in class actions under the unfair competition laws. Proposition 64 stated that its intent was to prohibit private attorneys from filing lawsuits for unfair competition when they do not have clients who have been injured in fact under the standing requirements of the United States Constitution [Proposition 64, § 1(h) (2004)]. As a result, a person

may now pursue representative claims or relief on behalf of others only if the claimant has suffered injury in fact and has lost money or property as a result of such unfair competition [*see Bus. & Prof. Code §§ 17203, 17204, 17535*]. Thus, all allegations in the complaint of violations of the Mobilehome Residency Law must indicate that the plaintiff and other tenants suffered financial loss or injury to property as a result of the violation.

[4] Statutory Violations as Unfair Competition

In *People v. McKale (1979) 25 Cal. 3d 626, 159 Cal. Rptr. 811, 602 P.2d 731* , the Supreme Court held that violations of the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*] and implementing regulations [*25 Cal. Code Reg. § 1000 et seq.*], as well as violations of the Mobilehome Residency Law [*Civ. Code § 798 et seq.*], could be alleged as constituting acts of unfair competition in an action by the district attorney under *Bus. & Prof. Code § 17200 et seq.* to enforce the state laws on preservation and regulation of competition [*Bus. & Prof. Code § 16600 et seq.*] and advertising [*Bus. & Prof. Code § 17500 et seq.*; *People v. McKale (1979) 25 Cal. 3d 626, 632, 635, 159 Cal. Rptr. 811, 602 P.2d 731]* .

Although the district attorney was the plaintiff in that case, and one of the issues was whether the district atorney had standing, the fact that the plaintiff was a public officer had no bearing on the court's conclusion that such violations constituted acts of unfair competition. Any "person in interest" may sue for the relief allowed under *Bus. & Prof. Code § 17203*. *Bus. & Prof. Code § 17203* provides, in addition, that the court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice that constitutes unfair competition, as defined in *Bus. & Prof. Code § 17200*, or as may be necessary to restore to any person in interest any money or property, real or personal, that may have been acquired by means of such unfair competition. In this context, "unfair competition" means unlawful, unfair, or fraudulent business practice and unfair, deceptive, untrue, or misleading advertising and any act prohibited by *Bus. & Prof. Code § 17500 et seq.* (advertising) [*Bus. & Prof. Code § 17200*].

In 2004, the electorate approved Proposition 64, which imposed standing requirements for private persons seeking injunctive relief in class actions under the unfair competition laws [*see* [3], *above*]. A private plaintiff may now pursue representative claims or relief on behalf of others only if he or she has suffered injury in fact and has lost money or property as a result of such unfair competition [*see Bus. & Prof. Code §§ 17203, 17204, 17535*]. In light of Proposition 64, certain conduct recognized in *People v. McKale* as constituting unfair competition, such as violation of maintenance requirements in the Mobilehome Parks Act [*Health & Safety Code § 18200 et seq.*] or deceptive, untrue, and misleading advertising by the park as being available to "adults only" [*People v. McKale (1979) 25 Cal. 3d 626, 634, 637, 159 Cal. Rptr. 811, 602 P.2d 731]* will no longer form the basis for an unfair competition class action claim, if the plaintiff cannot allege out-of-pocket loss arising from such violations.

[5] Limitation Period

An action for the relief allowed under *Bus. & Prof. Code § 17203* must be commenced within four years after the cause of action accrued [*Bus. & Prof. Code § 17208*].

[6] Required Notice

If the action is based on the alleged failure of the mobilehome park's management to maintain the physical improvements in the common facilities in good working order or condition or on the alleged reduction of service, it must be preceded by 30 days' written notice of the intent to bring the action [*Civ. Code § 798.84*]. This requirement is discussed in *§ 369.12[8]*. A form of notice of intent to commence such an action is *set forth in § 369.116*.

[7] Cross References

For discussion of, and forms for use in, class actions, see Ch. 120, *Class Actions* .

For discussion of, and forms of allegations and prayers concerning, recoverable interest, see Ch. 177, *Damages* , and Ch. 420, *Prayers* .

For discussion of, and forms for use in, actions for injunctions, see Ch. 303, *Injunctions* .

For discussion of, and forms for use in, actions based on unfair competition, see Ch. 565, *Unfair Competition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawMobilehomes & Mobilehome ParksGeneral OverviewReal Property LawMobilehomes & Mobilehome ParksMaintenance & Use

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Chapter 370 MOTION PICTURES

32-370 California Forms of Pleading and Practice--Annotated 370.syn

§ 370.syn Synopsis to Chapter 370: MOTION PICTURES

§ 370.01 Scope of Chapter

§ 370.02 Cross References

§§ 370.03-370.09 [Reserved]

§ 370.10 Contractual Relationships

[1] General Contract Principles Apply

[2] Actors and Actresses

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[b] Enforceability Limited to Seven Year Term

[3] Talent Agencies

[a] License Requirement

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[i] Jurisdiction of Labor Commissioner

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[b] Unlawful Talent Services

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[d] Contract Requirements

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[f] Additional Regulation of Talent Services

[g] Prohibited Acts

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§ 370.11 Rights in the Picture

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§ 370.30 Federal Statutes

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[1] Definitions

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California Forms of Pleading and Practice--Annotated

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 370 MOTION PICTURES
PART I. SCOPE

32-370 California Forms of Pleading and Practice--Annotated § 370.01

§ 370.01 Scope of Chapter

This chapter discusses the production and distribution of motion pictures. It includes the following forms:

- Complaint for specific performance of a contract requiring the producer to provide a print of a motion picture to a director [*see § 370.50*].

- Complaint for damages for breach of contract by an actor or actress against the producer [*see § 370.51*].

- Complaint for damages for breach of contract by the owner of a screenplay against the producer for failure to produce a film [*see § 370.52*].

- Complaint for the return of a film left to be processed [*see § 370.53*].

- Complaint for damages by an entertainment artist, based on violation of statutory requirements applicable to entertainment talent services that are regulated by *Lab. Code § 1701 et seq.* [*see § 370.54*].

- Affirmative defense by an entertainment artist, based on noncompliance with statutory requirements by the plaintiff in an action by an entertainment talent service to recover amounts alleged to be due under a contract with an artist [*see § 370.55*].

- Petition for an order confirming an award by the Labor Commissioner in a controversy involving a talent agency under the Talent Agencies Act (*Lab. Code §§ 1700 et seq.*) [*see § 370.60*].

Legal Topics:

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

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32-370 California Forms of Pleading and Practice--Annotated § 370.02

§ 370.02 Cross References

For discussion and forms relating to the operation of movie theaters, see Ch. 547, *Theaters, Shows, and Amusement Places* .

Infringement of property rights in motion pictures is covered in Ch. 349, *Literary Property and Copyright* .

Employment contracts relating to the production of motion pictures are covered mainly in this chapter; but employment contracts for the services of minors as actors and actresses are covered in Ch. 365, *Minors: Contract Actions* .

Other related information in this publication includes:

- For a form of complaint for an accounting by a copyright owner against a motion picture producer, see Ch. 7, *Accounting, Action for*.

- For forms for use in contract actions generally, see Ch. 140, *Contracts* .

- For a form of complaint for invasion of privacy through public disclosure of facts about plaintiff's private life, see Ch. 429, *Privacy* .

- For forms for use in an action for specific performance generally, see Ch. 528, *Specific Performance* .

- For forms and discussion relating to unfair trade practices and restraints on trade, see *Ch. 565, Unfair Competition, § 564.30* et seq. and *564.70* et seq., respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesGeneral OverviewContracts LawRemediesSpecific PerformanceCopyright LawSubject

MatterAudiovisual Works & Motion PicturesGeneral OverviewTortsIntentional TortsInvasion of PrivacyPublic Disclosure of Private FactsGeneral Overview

California Forms of Pleading and Practice--Annotated

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32-370 California Forms of Pleading and Practice--Annotated §§ 370.03-370.09

[Reserved]

§§ 370.03[Reserved]

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 370 MOTION PICTURES
PART II. LEGAL BACKGROUND

32-370 California Forms of Pleading and Practice--Annotated § 370.10

§ 370.10 Contractual Relationships

[1] General Contract Principles Apply

The production and distribution of motion pictures generally involves a structure of contractual relationships, with the producer as the keystone. Basically, although the relationships may become exceedingly complex, a producer acquires a story line, which may range from a bare idea to a complete photoplay, from an author, obtains actors to perform under a director, arranges for technicians and equipment to record the performance on film, and contracts with distributors for the exhibition of prints of the film in theaters.

General contract principles are, of course, applicable to these contracts [*see Waverly Prod., Inc. v. RKO Gen., Inc. (1963) 217 Cal. App. 2d 721, 729, 32 Cal. Rptr. 73* (parol evidence exclusionary rule); *Skirball v. RKO Radio Pictures, Inc. (1955) 134 Cal. App. 2d 843, 862-864, 286 P.2d 954* (statute of frauds); *Aumont v. Nebenzal (1952) 111 Cal. App. 2d 277, 279, 244 P.2d 461* (contract provision to be construed in conjunction with other provisions)]. However, the literary nature of the materials on which motion pictures are usually based, the professional and artistic status of the persons who participate in making them, and the manner in which they are exhibited may all contribute to differences between the law that prevails with regard to the production and distribution of motion pictures and the law generally applicable to the manufacture and sale of other products.

[2] Actors and Actresses

[a] Injunctive Relief to Prevent Breach of Contract

Generally, an injunction cannot be granted to prevent the breach of a contract. However, an injunction can be granted to prevent the breach of a contract in writing for the rendition of personal services when the minimum compensation is not less than $6,000 for contracts entered into on or before December 31, 1993, and at higher rates in successive years for contracts entered into on or after January 1, 1994, per annum and when the promised service is of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value the loss of which cannot be reasonably or adequately compensated in damages, the performance of which would not be specifically enforced [*Civ. Code § 3423(e)*]. This right to injunctive relief apparently extends to the contract rights of the employers of motion picture artists [*see De Haviland v. Warner Bros. Pictures, Inc. (1944) 67 Cal. App. 2d 225, 233-234, 153 P.2d 983* ; *but see*

Warner Bros. Pictures, Inc. v. Brodel (1948) 31 Cal. 2d 766, 778, 192 P.2d 949 (court as not ruling on whether plaintiff entitled to injunctive relief)].

[b] Enforceability Limited to Seven Year Term

In any case, such a contract to render service of a special, unique, unusual, extraordinary, or intellectual character may not be enforced for a term exceeding seven years from the commencement of service under it [*see Lab. Code § 2855*]. Under *Lab. Code § 2855*, a contract for exceptional services cannot be enforced against an employee for seven years of actual service but only for a period of seven calendar years [*De Haviland v. Warner Bros. Pictures, Inc. (1944) 67 Cal. App. 2d 225, 230, 234, 153 P.2d 983]* . The seven-year limitation is not waivable [*De Haviland v. Warner Bros. Pictures, Inc. (1944) 67 Cal. App. 2d 225, 237, 153 P.2d 983]* .

[3] Talent Agencies

[a] License Requirement

A talent agency (or talent agent) is a person or corporation engaged in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring, offering, or promising to procure recording contracts for an artist or artists will not of itself subject a person or corporation to regulation and licensing under *Lab. Code § 1700 et seq.*, the Talent Agencies Act [*Lab. Code § 1700.4(a)*]. In this context, "artists" are actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists, and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises [*Lab. Code § 1700.4(b)*].

No person may engage in or carry on the occupation of a talent agency without first obtaining a license from the Labor Commissioner [*Lab. Code § 1700.5*].

The Talent Agencies Act is completely silent on the subject of the proper remedy for illegal procurement [*Marathon Entertainment, Inc. v. Blasi (2008) 42 Cal. 4th 974, 990, 70 Cal. Rptr. 3d 727, 174 P.3d 741*]. Courts have concluded that a contract is void insofar as it would otherwise obligate an artist to pay an unlicensed person for procuring, offering, promising, or attempting to procure employment or engagements for the artist [*e.g.,* *Park v. Deftones (1999) 71 Cal. App. 4th 1465, 1472, 84 Cal. Rptr. 2d 616* ; *Waisbren v. Peppercorn Productions, Inc. (1995) 41 Cal. App. 4th 246, 252-253, 48 Cal. Rptr. 2d 437* ; *Buchwald v. Superior Court (1967) 254 Cal. App. 2d 347, 351, 62 Cal. Rptr. 364* ; *see Styne v. Stevens (2001) 26 Cal. 4th 42, 51, 109 Cal. Rptr. 2d 14, 26 P.3d 343* (dictum that unlicensed person's contract with artist to provide services of talent agency "is illegal and void")].

In practice, artists and the persons they deal with as artists have tended to distinguish talent agents from personal managers. Talent agents act as intermediaries between the buyers and sellers of talent. In contrast, an artist's personal manager primarily advises, counsels, directs, and coordinates the development of the artist's career. The personal manager usually advises in both business and personal matters, frequently lends money to young artists, and serves as a spokesperson for the artist. This difference between talent agents and personal managers is informally recognized by the various guilds that cover most of the talent available in the entertainment industry. However, "[t]he line dividing the functions of agents, who must be licensed, and of managers, who need not be, is often blurred and sometimes crossed. Agents sometimes counsel and advise; managers sometimes procure work. Indeed, the occasional procurement of employment opportunities may be standard operating procedure for many managers and an understood goal when not-yet-established talents, lacking access to the few licensed agents in Hollywood, hire managers to promote their careers" [*Marathon Entertainment, Inc. v. Blasi (2008) 42 Cal. 4th 974, 980, 983-984, 70 Cal. Rptr. 3d 727, 174 P.3d 741*]. Talent agencies may, in addition to procuring employment, counsel or direct artists in the development of their

professional careers [*Lab. Code § 1700.4(a)*]. But to the extent that a personal manager procures, offers, promises, or attempts to procure employment or engagements for an artist--whether regularly or only occasionally; just once is enough--the personal manager is subject to the Talent Agencies Act [*Marathon Entertainment, Inc. v. Blasi (2008) 42 Cal. 4th 974, 986-989, 70 Cal. Rptr. 3d 727, 174 P.3d 741* (personal managers "remain exempt from regulation insofar as they do those things that personal managers do, but they are regulated under the Act to the extent they stray into doing the things that make one a talent agency under the Act")].

Unfortunately, the Talent Agencies Act contains no definition of what constitutes "procurement" under the Act, and the Labor Commissioner has struggled over time to better delineate which activities involve mere general assistance to an artist's career and which "stray across the line to illicit procurement" [*Marathon Entertainment, Inc. v. Blasi (2008) 42 Cal. 4th 974, 990, 70 Cal. Rptr. 3d 727, 174 P.3d 741*].

If a contract between an artist and a person not licensed under the Talent Agencies Act covers several distinct promises or obligations by the unlicensed person, relating to lawful activities exempt from regulation under the Act as well as to the illicit procurement of employment, then a court may determine whether "the contract is void as to the latter and valid as to the rest" [*Civ. Code § 1599*]. That is, "the full voiding of the parties' contract is available, but not mandatory; likewise, severance is available, but not mandatory" [*Marathon Entertainment, Inc. v. Blasi (2008) 42 Cal. 4th 974, 996, 70 Cal. Rptr. 3d 727, 174 P.3d 741*].

[b] Reference of Disputes to Labor Commissioner

[i] Jurisdiction of Labor Commissioner

If a controversy arises under *Lab. Code § 1700 et seq.*, and there is no applicable contractual arbitration provision [*see § 370.10[3][b][ii]*], then the parties involved must refer the matters in dispute to the Labor Commissioner, who is required to hear and determine the matters, subject to an appeal within 10 days after determination to the superior court, where the matters shall be heard de novo [*Lab. Code § 1700.44(a)*]. An omission to refer the matters in dispute to the Labor Commissioner, within the applicable one-year limitation period [*see Lab. Code § 1700.44(c)*], absolutely bars any action or proceeding in a court (including the assertion of a defense) based on a violation of the Talent Agencies Act [*Blanks v. Seyfarth Shaw LLP (2009) 171 Cal. App. 4th 336, 365-367, 89 Cal. Rptr. 3d 710* ; *Humes v. MarGil Ventures, Inc. (1985) 174 Cal. App. 3d 486, 494, 220 Cal. Rptr. 186* (Labor Commissioner has original jurisdiction to exclusion of superior court)]. However, if there is an apparently applicable agreement to arbitrate, then it takes precedence over *Lab. Code § 1700.44(a)*, and the parties must resort to arbitration, bypassing the Labor Commissioner [*Preston v. Ferrer (2008) 552 U.S. 346, 128 S. Ct. 978, 169 L. Ed. 2d 917* , ("When parties agree to arbitrate all questions arising under a contract, the ... [Federal Arbitration Act] supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative."), *reversing Ferrer v. Preston (2006) 145 Cal. App. 4th 440, 51 Cal. Rptr. 3d 628*].

The 10-day time limit for bringing an appeal from a decision of the Commissioner is mandatory and jurisdictional [*REO Broadcasting Consultants v. Martin (1999) 69 Cal. App. 4th 489, 495, 81 Cal. Rptr. 2d 639]* . This period is subject to extension when service is by mail [*REO Broadcasting Consultants v. Martin (1999) 69 Cal. App. 4th 489, 495 n.5, 81 Cal. Rptr. 2d 639* (applying provisions of *Code Civ. Proc. § 1013* to calculate time for appeal based on *Lab. Code §§ 5, 98.2*)]. The superior court cannot consider an appeal taken after the expiration of the statutory time period even in the case of mistake, inadvertence, or other excuse [*REO Broadcasting Consultants v. Martin (1999) 69 Cal. App. 4th 489, 495-498, 81 Cal. Rptr. 2d 639]* .

For a form for a petition to confirm an award of the Labor Commissioner, see *§ 370.60*.

[ii] Arbitration Agreements

The Talent Agencies Act [*Lab. Code § 1700 et seq.*] imposes specified conditions for the validity of an arbitration agreement between a talent agency and an artist. The contract must provide (1) for reasonable notice to the Labor Commissioner of the time and place of all arbitration hearings, and (2) that the Labor Commissioner's authorized representative has the right to attend all arbitration hearings [*Lab. Code § 1700.45*]. However, the Federal Arbitration Act provides that "[a] written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" [*9 U.S.C. § 2*]. Therefore, the U.S. Supreme Court has held that the procedural prescriptions of the Talent Agencies act conflict with the Federal Arbitration Act in two basic respects: (1) *Lab. Code § 1700.44(a)* [*see § 370.10[3][b][i]*] grants the Labor Commissioner exclusive jurisdiction to decide an issue that the parties agreed to arbitrate; and (2) *Lab. Code § 1700.45* imposes prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally [*Preston v. Ferrer (2008) 552 U.S. 346, 128 S. Ct. 978, 985, 169 L. Ed. 2d 917*].

Since *Lab. Code § 1700.45* is preempted by federal law, the usual rules apply regarding the effect of an arbitration agreement (or an arbitration clause in an employment contract) between a talent agency and an artist. A party may attack the arbitration agreement (or clause) in court on any ground "exist[ing] at law or in equity for the revocation of any contract" [*9 U.S.C. § 2*]. Otherwise, any issue covered by the arbitration agreement must be submitted to an arbitrator, and only an issue not within the ambit of the arbitration agreement may be determined in a court. For further discussion, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

[4] Entertainment Talent Services

[a] Artists, Employment Opportunities, and Auditions

An artist, in this context, is a person who is, or seeks to become, an actor, actress, model, extra, radio artist, musical artist, musical organization, director, musical director, writer, cinematographer, composer, lyricist, arranger, or other person rendering professional services in motion picture, theatrical, radio, television, Internet, print media, or other entertainment enterprises or technologies [*Lab. Code § 1701(a)*].

Talent services are subject to regulation when undertaking to act in the interest of an artist seeking employment opportunities (among other regulated activities), for a fee to be paid by or on behalf of the artist [*see § 370.10[4][c]*]. An "employment opportunity" is the opportunity to obtain work as an artist, whether compensated or not [*Lab. Code § 1701(c)*].

An "audition" is any activity for the purpose of obtaining employment, compensated or not, as an artist whereby an artist meets with, interviews or performs before, or displays his or her talent before, any person, including a producer, a director, or a casting director, or an associate, representative, or designee of a producer, director, or casting director, who has, or is represented to have, input into the decision to select an artist for an employment opportunity. An audition may be in person or through electronic means, live or recorded, and may include a performance or other display of the artist's promotional materials [*Lab. Code § 1701(b)*].

"Fee" means any money or other valuable consideration paid or promised to be paid by or on behalf of an artist for services rendered or to be rendered by a talent service, with specified exceptions [*Lab. Code § 1701(d)*].

[b] Unlawful Talent Services

No person may own, operate, or act in the capacity of, an advance fee talent representation service (see below), and no person may advertise, solicit for, or knowingly refer a person to, an advance fee talent representation service [*Lab. Code § 1702*; *see Lab. Code § 1702.3* (remedial provisions in *Lab. Code § 1704 et seq.*, discussed in *§ 370.10[4][h]*, apply to violation of this prohibition); *see also Lab. Code § 1702.4* (persons exempt from this prohibition, such as educational

institutions, regular employment agencies, professional and labor organizations, and general-circulation periodicals)]. Talent services not in the category of advance fee talent representation services may operate but are regulated [*see § 370.10[4][c]* et seq.].

An "advance-fee talent representation service" provides, or offers to provide, or advertises or represents itself as providing, the services listed below, to an artist, directly or by referral to another person, and charges or receives a fee from or on behalf of the artist for photographs, websites, or other reproductions or other promotional materials, as an artist; for lessons, coaching, seminars, workshops, or similar training for the artist; or for one or more of the following services [*Lab. Code § 1702.1(a)*]:

- Procuring or attempting to procure an employment opportunity or an engagement as an artist;
- Procuring or attempting to procure an audition for the artist;
- Managing or directing the development of the artist's career; or
- Procuring or attempting to procure a talent agent or talent manager, including an associate, representative, or designee of a talent agent or talent manager.

An advance-fee talent representation service subject to the statutory prohibition could also be one that charges or receives a fee from, or on behalf of, an artist for any product or service required for the artist to obtain, from or through the advance-fee talent representation service, any of the services listed above [*Lab. Code § 1702.1(b)*].

[c] Talent Services Subject to Regulation

Talent services not in the category of advance-fee talent representation services [*see § 370.10[4][b]*] are subject to regulation. Such a talent service is one that provides, or offers to provide, or advertises or represents itself as providing, certain services to an artist (see below), directly or by referral to another person, for a fee from, or on behalf of, the artist; and there are three kinds denoted, according to the services being offered, as [*see Lab. Code § 1701(I)*]:

- "Talent listing service" if the services are [*Lab. Code § 1701(g)*]:
  - Furnishing lists of, or searching databases to find, auditions or employment opportunities, or talent agents or talent managers and associates, representatives, and designees of agents and managers;
  - Enabling the artist to perform self-directed searches of databases for such purposes; or
  - Storing or maintaining, for distribution or disclosure to any person represented as offering an audition or employment opportunity, or to a talent agent, talent manager, or associate, representative, or designee of a talent agent or talent manager, both or either of the following: (a) the artist's name, photograph, website, filmstrip, videotape, audition tape, demonstration reel, resume, portfolio, or other reproduction or promotional material of the artist; (b) the artist's schedule of availability for an audition or employment opportunity;
- "Talent counseling service" if the services are career counseling, vocational guidance, aptitude testing, or career evaluation as an artist (but not managing or directing the development of an artist's career) [*Lab. Code § 1701(f)*];

- "Talent training service" if the services are lessons, coaching, seminars, workshops, or similar training as an artist [*Lab. Code § 1701(j)*].

No talent listing service, or any owner, director, officer, agent, or employee of a talent listing service, may own, operate, or have any direct or indirect financial interest in, a talent counseling service or a talent training service [*Lab. Code § 1703.4(c)(1)*]. No talent counseling service or talent training service, or any owner, director, officer, agent, or employee of a talent counseling service or a talent training service, may own, operate, or have any direct or indirect financial interest in, a talent listing service [*Lab. Code § 1703.4(b)*].

A "talent scout" is an individual employed, appointed, or authorized by a talent service, who solicits or attempts to solicit an artist for the purpose of becoming a client of the service. The principals of a service are themselves talent scouts if they solicit on behalf of the service [*Lab. Code § 1701(h)*]. No talent scout may use the same name as used by any other talent scout soliciting for the same talent service, and no talent service may permit a talent scout to use the same name as used by any other talent scout soliciting for the talent service [*Lab. Code § 1703.5*].

[d] Contract Requirements

Every contract and agreement between an artist and a talent service must be contained in a single written document, in at least 10-point type, that conforms to the requirements of *Lab. Code § 1703* [*Lab. Code § 1703(d)*]. The contract term must be not more than one year and must not be renewable automatically [*Lab. Code § 1703(f)*]. The contract must contain all of the following provisions [*Lab. Code § 1703(a)*]:

- The name, address, telephone number, fax number (if any), e-mail address (if any), and website address (if any), of the talent service, of the artist to whom services are to be provided, and of the representative executing the contract on behalf of the talent service;

- A description of the services to be performed [*see § 370.10[4][c]*], a statement when those services are to be provided, and the duration of the contract;

- Evidence of compliance with applicable bonding requirements [*see § 370.10[4][f]*], including the name of the bonding company and the bond number, if any, and a statement that a bond in the amount of $50,000 must be posted with the Labor Commissioner; and

- The amount of any fees to be charged to or collected from, or on behalf of, the artist receiving the services, and the dates when those fees are required to be paid.

The contract also must contain a specified disclosure statement, in boldface type and in close proximity to the artist's signature [*see Lab. Code § 1703(a)(5)*], and a statement conspicuously disclosing whether the artist may obtain a refund after the 10-day cancellation period described in the disclosure statement has expired [*Lab. Code § 1703(a)(5),(6)*]. The artist's statutory right to cancel is discussed in *§ 370.10[4][e]*.

The contract must be dated and signed by the artist and the representative executing the contract on behalf of the talent service; or, if the contract is executed over the Internet, the talent service must give the artist clear and conspicuous notice of the contract terms and provide to the artist the ability to acknowledge receipt of the terms before acknowledging agreement. In any dispute regarding compliance with this requirement, the talent service has the burden of proving that the artist received the terms and acknowledged agreement [*Lab. Code § 1703(b)*].

If the talent service offers to list or display information about an artist, including a photograph, on any website that the talent service has authority to design or alter, the contract must contain a notice that the talent service will remove the

listing and content within 10 days of a request by the artist or by a minor artist's parent or guardian. The contract must include a valid telephone number, mailing address, and e-mail address for the talent service to which a request for removal may be made [*Lab. Code § 1703(c)*].

The talent service must maintain the address set forth in the contract for removal of a website or other listing, unless it furnishes the artist with written notice of a change of address. Written notice of a change of address may be given by e-mail if the artist designates an e-mail address in the contract for purposes of receiving written notice [*Lab. Code § 1703(g)*].

Before the artist signs the contract, and before the artist or any person acting on the artist's behalf becomes obligated to pay or pays any fee, the talent service must provide a copy of the contract to the artist, for the artist to keep. If the contract was executed through the Internet, the talent service may provide a copy of the contract to the artist by making it available to be downloaded and printed through the Internet [*Lab. Code § 1703(i)*].

[e] Artist's Right to Cancel Contract

A contract not conforming to the requirements of *Lab. Code § 1703(a)-(f)* [*see § 370.10[4][d]*] is voidable at the election of the artist and may be canceled by the artist at any time without any penalty or obligation [*Lab. Code § 1703(d)*]. For a form of affirmative defense based on this right to cancel, see *§ 370.55*.

The artist may cancel a conforming contract within 10 business days from the date the artist begins to use services under the contract. The artist must notify the talent service of the cancellation within 10 business days of the date the artist executed the contract, by mailing, delivering, or sending by fax, to the talent service, a signed and dated copy of the cancellation notice or any other written notice of cancellation, or by sending a notice of cancellation via the Internet if the contract was executed in part or in whole through the Internet. The talent service must refund all fees paid by, or on behalf of, the artist within 10 business days after delivery of the cancellation notice [*Lab. Code § 1703(e)(1)*].

Unless the talent service conspicuously discloses in the contract that cancellation is prohibited after the 10-day cancellation period described above, the artist may cancel a conforming contract at any time after the 10-day cancellation period, by mailing, delivering, or sending by fax, to the talent service, a signed and dated copy of the cancellation notice or any other written notice of cancellation, or by sending a notice of cancellation via the Internet if the contract was executed in part or in whole through the Internet. Within 10 business days after delivery of the cancellation notice, the talent service must refund to the artist, on a pro rata basis, all fees paid by, or on behalf of, the artist [*Lab. Code § 1703(e)(2)*].

The talent service must maintain the address set forth in the contract for receipt of cancellation, unless it furnishes the artist with written notice of a change of address. Written notice of a change of address may be given by e-mail if the artist designates an e-mail address in the contract for purposes of receiving written notice [*Lab. Code § 1703(g)*].

The talent service must advise a person inquiring about canceling a contract to follow the written procedures for cancellation set forth in the contract [*Lab. Code § 1703(h)*].

[f] Additional Regulation of Talent Services

Every person engaging in the business of a talent service must keep and maintain specified business records [*Lab. Code § 1703.1(a)*], which are open to inspection by the Labor Commissioner and public attorneys [*Lab. Code § 1703.1(b)*].

Any written or oral solicitation or advertisement for an artist to perform or demonstrate any talent for a talent service, or to appear for an interview with a talent service, must include the following clear and conspicuous statement: "This is not an audition for employment or for obtaining a talent agent or talent management" [*Lab. Code § 1703.1(b)*].

Before advertising or engaging in business, a talent service must provide security for its compliance with *Lab. Code § 1701 et seq.*, in the form of either a $50,000 bond filed with the Labor Commissioner or a deposit in lieu of a bond [*Lab. Code § 1703.3(a)*]. The bond is to be payable to the people of the State of California for the benefit of any person injured by any unlawful act, omission, or failure to provide the services of the talent service [*Lab. Code § 1703.3(b)*]. Whenever a deposit is made in lieu of the bond, a person asserting a claim against the deposit must establish the claim by furnishing to the Labor Commissioner evidence of injury resulting from an unlawful act, omission, or failure to provide the services of the talent service, or evidence of a money judgment entered by a court [*Lab. Code § 1703.3(d)(1)*].

[g] Prohibited Acts

A waiver by an artist of the provisions of *Lab. Code § 1701 et seq.* is deemed contrary to public policy and void and unenforceable. An attempt by any person or talent service to have an artist waive rights under *Lab. Code § 1701 et seq.* is a violation of *Lab. Code § 1701 et seq.* [*Lab. Code § 1705.2*].

Every talent service (including the owners, directors, officers, agents, and employees) must not do any of the following [*Lab. Code § 1703.4(a)*; *see Lab. Code § 1703.6* (persons who are exempt from these prohibitions)]:

- Make, or cause to be made, any advertisement or representation explicitly or implicitly offering the opportunity for an artist to meet with or audition before any producer, director, casting director, or any associate of a producer, director, casting director, or any other person who makes, or is represented to make, decisions for the process of hiring artists for employment as an artist, or any talent agent or talent manager, or any associate, representative, or designee of an agent or a manager, unless the talent service maintains, for inspection and copying, written evidence of the supporting facts, including the name, business address, and job title of each person conducting the meeting or audition, and the title of the production and the name of the production company.

- Make, or cause to be made, any advertisement or representation that any artist, whether identified or not, has obtained an audition, employment opportunity, or employment as an artist in whole or in part by use of the talent service, unless the talent service maintains, for inspection, written evidence of the supporting facts on which the claim is based, including the name of the artist and the approximate dates the talent service was used by the artist.

- Charge or attempt to charge an artist for an audition or employment opportunity.

- Require an artist, as a condition for using the talent service or for obtaining an additional benefit or preferential treatment from the talent service, to pay a fee for creating or providing photographs, filmstrips, videotapes, audition tapes, demonstration reels, or other reproductions of the artist, or for creating or providing websites, casting or talent brochures, or other promotional materials for the artist.

- Charge or attempt to charge an artist any fee not disclosed in the contract pursuant to *Lab. Code § 1703(a)(4)* [*see § 370.10[4][d]*].

- Refer an artist to a person who charges the artist a fee for any service or any product in which the talent service, or any owner, director, officer, agent, or employee of the talent service, has a direct or indirect financial interest, unless the fee and the financial interest are conspicuously disclosed in a separate writing provided to the artist, to keep, before the artist executes a contract with the talent service.

- Require an artist, as a condition for using the talent service or for obtaining any additional benefit or preferential treatment from the talent service, to pay a fee to any other talent service in which the requiring talent service, or any owner, director, officer, agent, or employee of the requiring talent service, has a direct or indirect financial interest.

- Accept any compensation or other consideration for referring an artist to any person charging the artist a fee.

- Fail to remove information about, or photographs of, the artist displayed on any website that the service has the authority to design or alter, within 10 days of delivery of a request made by telephone, mail, fax, or e-mail, from the artist or from a minor artist's parent or guardian.

In addition, no talent listing service [*see § 370.10[4][c]*; *but see Lab. Code § 1703.6(e)* (talent listing services that are exempt from these prohibitions)], or any owner, director, officer, agent, and employee, may do any of the following:

- Make, or cause to be made, an advertisement or representation that includes the trademark, logo, name, word, or phrase of a company or organization, including a studio, production company, network, broadcaster, talent agency licensed pursuant to *Lab. Code § 1700.5*, labor union, or labor organization defined in *Lab. Code § 1117*, in any manner that falsely or misleadingly suggests the endorsement, sponsorship, approval, or affiliation of a talent service [*Lab. Code § 1703.4(c)(3)*].

- Provide a listing of an audition, job, or employment opportunity without written permission for the listing [*Lab. Code § 1703.4(c)(2)*].

The talent listing service must keep and maintain a copy of every original listing, the name, business address, and business telephone number of the person granting permission to the talent listing service to use the listing, and the date the permission was granted [*Lab. Code § 1703.4(c)(2)*].

[h] Remedies

A person who is injured by a violation of *Lab. Code § 1701 et seq.* or by the breach of a contract subject to *Lab. Code § 1701 et seq.* may bring an action for recovery of damages, or to restrain and enjoin a violation, or both. The amount awarded for damages must be not less than three times the amount paid by the artist, or on behalf of the artist, to the talent service or the advance-fee talent representation service. The court must award reasonable attorney's fees and costs to a prevailing plaintiff [*Lab. Code § 1704.2*]. For a form of complaint by an artist against a talent service, see *§ 370.54*.

The Labor Commissioner must use the proceeds of a bond or deposit provided pursuant to *Lab. Code § 1703.3* [*see § 370.10[4][f]*] to satisfy a judgment or restitution order resulting from a violation of *Lab. Code § 1701 et seq.*, if the person obligated on the judgment or order fails to pay all amounts required by the judgment or order [*Lab. Code § 1704.3*].

The remedies provided in *Lab. Code § 1704 et seq.* are not exclusive but are in addition to any other remedies or procedures provided in any other law, including *Bus. & Prof. Code § 17500*, the false advertising law [*Lab. Code § 1705.1*].

A willful violation of *Lab. Code § 1701 et seq.* is a misdemeanor [*Lab. Code § 1704*].

[5] Distribution

Precedence in the matter of "runs" and "clearances" in the exhibition of any picture in an area gives it a favored position

and thus affords a competitive advantage [*Chorak v. RKO Radio Pictures, Inc. (9th Cir. 1952) 196 F.2d 225, 226]* . Runs are successive exhibitions of a feature in a given area, and include successive exhibitions in different theaters even though under a common ownership or management [*Chorak v. RKO Radio Pictures, Inc. (9th Cir. 1952) 196 F.2d 225, 228*]. Clearances are agreements by a distributor not to exhibit a film or to license others to do so within a given area and for a stated period after the last date of the showing of the film by the licensee with whom the agreement is made [*Schine Chain Theatres v. United States (1948) 334 U.S. 110, 121, 68 S. Ct. 947, 92 L. Ed. 1245]* .

An exhibitor does not have the right to compel a motion picture producer to give him a preferred run, because as a very practical matter the motion picture industry could not operate under a system of simultaneous releases. This obvious fact underlies the doctrine that clearances and runs are not illegal per se [*Chorak v. RKO Radio Pictures, Inc. (9th Cir. 1952) 196 F.2d 225, 228]* .

However, there have been actions brought under the Sherman and Clayton Anti-Trust Acts [*15 U.S.C. §§ 1-7, 12-27, 44*; *29 U.S.C. §§ 52, 53*] to restrain such distribution agreements [*see United States v. Paramount Pictures, Inc. (1948) 334 U.S. 131, 68 S. Ct. 915, 92 L. Ed. 1260* ; *Schine Chain Theatres v. United States (1948) 334 U.S. 110, 68 S. Ct. 947, 92 L. Ed. 1245* ; *Chorak v. RKO Radio Pictures, Inc. (9th Cir. 1952) 196 F.2d 225]* . There have also been actions brought to prohibit exclusive dealing agreements between a distributor and an exhibitor for first-run films [*Redwood Theatres, Inc. v. Festival Enterprises, Inc. (1988) 200 Cal. App. 3d 687, 702-703, 248 Cal. Rptr. 189* (also discussing evolution of marketing practices in the industry since *Paramount*)]. The right of recovery depends on whether or not clearance restrictions are the result of a concerted course of action and whether or not the clearancerestrictions are unreasonable [*Chorak v. RKO Radio Pictures, Inc. (9th Cir. 1952) 196 F.2d 225, 228]* .

Restraints on trade are discussed in *Ch. 565, Unfair Competition, § 564.70* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsCauses of Action & RemediesGeneral OverviewBusiness & Corporate LawAgency RelationshipsCauses of Action & RemediesBreach of ContractContracts LawBreachGeneral OverviewContracts LawRemediesGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentEmployeesLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsDuration of EmploymentFixed Term

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§ 370.11 Rights in the Picture

The producer is usually the person with the basic rights in the motion picture, from its inception through, and after, completion [*see Lille v. Warner Bros. Pictures, Inc. (1934) 139 Cal. App. 724, 728, 34 P.2d 835]* . Thus, the producer may determine who will appear in, work on, and receive credit for the picture, how it will be edited, and how advertised and distributed. Of course, any person who contracts to participate in making or distributing the film may, by the terms of his contract, gain rights that ordinarily would belong to the producer [*see Stevens v. National Broadcasting Co. (1969) 270 Cal. App. 2d 886, 889-890, 76 Cal. Rptr. 106]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawSubject MatterAudiovisual Works & Motion PicturesMotion Pictures

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[Reserved]

§§ 370.12[Reserved]

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§ 370.30 Federal Statutes

Sherman Anti-Trust Act. *15 U.S.C. § 1 et seq.*

Clayton Anti-Trust Act. *15 U.S.C. §§ 12-27, 44*; *29 U.S.C. §§ 52, 53*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 370.31 State Statutes

[1] Definitions

Artists defined to include actors, actresses, directors, musical directors, writers, cinematographers, and other artists and persons rendering professional services in motion picture enterprises. *Lab. Code § 1700.4*

Motion picture engagement defined as any engagement or employment of person as actor, actress, director, scenario or continuity writer, camera man, or in any capacity concerned with the making of motion pictures. *Lab. Code § 1700.1(b)*

[2] Employment Contracts

Injunction to prevent breach of contract in writing for rendition of personal services of special, unique, unusual, extraordinary, or intellectual character. *Civ. Code § 3423(e)*

Contract, otherwise valid, for performance or rendition of service of special, unique, unusual, extraordinary, or intellectual character is enforceable for term not to exceed seven years from commencement of service under it. *Lab. Code § 2855*

Employment of minors in motion pictures. *Fam. Code § 6750 et seq.*; *Lab. Code § 1700.37*

[3] Motion Picture Museums

County motion picture museums. *Gov. Code § 25351.3 et seq.*

[4] Talent Agencies

Regulation and licensing of talent agencies. *Lab. Code § 1700 et seq.*

[5] Tax Provisions

Cash value of motion picture under Rev. & Tax Code defined. *Rev. & Tax Code § 988*

Motion picture exclusions from sales and use tax. *Rev. & Tax Code §§ 6006, 6010, 6010.4*

[6] Unfair Practices Act

Motion picture films licensed for exhibition to motion picture houses are not articles or products under Unfair Practices Act [*Bus. & Prof. Code §§ 17000-17101*]. *Bus. & Prof. Code § 17024*

[7] Uniform Film Permit Act

Use of approved uniform application form as permit for film production within jurisdiction of city or county. *Gov. Code § 14999.20 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsLicensesLabor & Employment LawEmployment RelationshipsEmployment ContractsBreach

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§ 370.32 Decisions

[1] Actors and Actresses

Counterfeiting of actor's role gives rise to right of action based on fraud and deception and exists independently of law regulating trademarks. *Chaplin v. Amador (1928) 93 Cal. App. 358, 363, 269 P. 544*

Contract for services of motion picture actress is enforceable under *Lab. Code § 2855* for seven-year period from commencement of service rather than for seven years of actual service; seven-year period is not waivable. *De Haviland v. Warner Bros. Pictures, Inc. (1944) 67 Cal. App. 2d 225, 230, 234, 237, 153 P.2d 983*

Breach of employment contract with actress by employer. *Aumont v. Nebenzal (1952) 111 Cal. App. 2d 277, 244 P.2d 461*

Liability of assignee of actor's employment contract. *Fanning v. Yoland Prod., Inc. (1957) 150 Cal. App. 2d 444, 450-452, 310 P.2d 85*

Contracts violative of former Artists' Managers Act [*Lab. Code §§ 1700-1700.46*] (*now see Lab. Code § 1700 et seq.*) were void. *Buchwald v. Superior Court (1967) 254 Cal. App. 2d 347, 351, 62 Cal. Rptr. 364* (contract with professional musical group)

Actress' rejection of different and inferior kind of employment in dramatic "western type" motion picture was not to be resorted to in order to mitigate damages arising from defendant's refusal to employ actress under contract to do musical motion picture. *Parker v. Twentieth Century-Fox Film Corp. (1970) 3 Cal. 3d 176, 182-184, 89 Cal. Rptr. 737, 474 P.2d 689*

[2] Composers

By virtue of series of licenses to perform musical compositions that were part of motion picture sound track, right to

broadcast motion picture with incidental music was vested in television station. *Zahler v. Columbia Pictures Corp. (1960) 180 Cal. App. 2d 582, 589, 4 Cal. Rptr. 612*

[3] Distribution

Even though hotel's rental of movie videodiscs to lodgers was held not to be public performance and thus, not to infringe studios' copyrights in movies, studios' action to enforce their copyrights was not attempt to monopolize under guise of "sham" litigation. *Real Est. Investors v. Columbia (1993) 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed.2d 611, 619, 625-626*

Factors to be considered in determining whether clearance unreasonable. *United States v. Paramount Pictures, Inc. (1948) 334 U.S. 131, 145-146, 68 S. Ct. 915, 92 L. Ed. 1260* ; *Schine Chain Theatres v. United States (1948) 334 U.S. 110, 121, 68 S. Ct. 947, 92 L. Ed. 1245*

General practice of "blind bidding" (bidding for right to exhibit movie without first viewing it) is not prohibited in California; "blind bidding" of movie that was in stage of production unsuitable for screening was not unfair trade practice under *Bus. & Prof. Code § 17200*. *Orion Pictures Distribution v. Syufy Enterprises (9th Cir. 1987) 829 F.2d 946, 949*

Movie distributor that placed film in inferior theaters after defendant theater repudiated guaranteed rental fees, based on low opinion of film at trade screening following "blind bidding," was unable to claim antitrust damages in amount of difference between actual rentals and repudiated guarantees; defendant's alleged monopolization did not affect competition to license particular movie at time of bidding. *Orion Pictures Distribution v. Syufy Enterprises (9th Cir. 1987) 829 F.2d 946, 949*

"Clearances," which preclude movie distributors from licensing other movie theaters from showing movie while exhibited by theater whose bid is accepted, were vertical nonprice restraint of trade. *Theee Movies of Tarzana v. Pacific Theatres, Inc. (9th Cir. 1987) 828 F.2d 1395, 1397-1398* (restraint upheld as reasonable, supporting summary judgment for defendant)

Clearance and run preferences in distribution of motion pictures are not illegal per se; right to recover under anti-trust laws is dependent on whether restriction imposed as result of concerted course of action and whether restriction unreasonable. *Chorak v. RKO Radio Pictures, Inc. (9th Cir. 1952) 196 F.2d 225, 228*

Subdistributor, having agreed to pay 50 percent of net receipts to distributor without knowledge of distributor's agreement with producer, was not bound by distributor's obligation to require subdistributor to pay 70 percent of gross receipts directly to producer; *Civ. Code § 1589* (voluntary acceptance of benefit of transaction is equivalent to consent to all obligations arising from it, insofar as material facts are known, or ought to be known, to person accepting) did not apply because subdistributor, who did not know about producer-distributor agreement and was not assignee of benefits under it, did not accept any benefit of that transaction; neither UCC-1 financing statement recorded with California Secretary of State nor copyright mortgage filed with United States Copyright Office could have put subdistributor on constructive notice of that transaction because neither document described payment terms of producer-distributor agreement. Recorded Picture Company [Productions] *LTD v. Nelson Entertainment, Inc. (1997) 53 Cal. App. 4th 350, 362, 366, 61 Cal. Rptr. 2d 742*

Marketing practices in motion picture industry have changed since decision in *United States v. Paramount Pictures (1948) 334 U.S. 131, 68 S. Ct. 915, 92 L. Ed. 1260* , required fundamental restructuring of motion picture industry. *Redwood Theatres, Inc. v. Festival Enterprises, Inc. (1988) 200 Cal. App. 3d 687, 694-699, 248 Cal. Rptr. 189*

In determining whether alleged exclusive dealing agreements of competing exhibitor with each of three distributors are boycotts that tended to cut off plaintiff's access to first-run films of those distributors, evidence of predatory intent is necessary for boycott to be illegal per se. *Redwood Theatres, Inc. v. Festival Enterprises, Inc. (1988) 200 Cal. App. 3d 687, 702-703, 248 Cal. Rptr. 189*

Although interchangeability of products is usually considered in defining market subject to alleged restraint of trade, some products, such as popular first-run movies, are not substitutable. *Redwood Theatres, Inc. v. Festival Enterprises, Inc. (1988) 200 Cal. App. 3d 687, 705-707, 248 Cal. Rptr. 189*

Minimum guaranteed royalty was advance; when contract was silent as to time for payment to producer by distributor of minimum guaranteed royalty, judgment that payment was required within four years of inception of contract, rather that at end of 10-year contract, was supported by evidence. *Fineberg v. Niekerk (1985) 175 Cal. App. 3d 935, 942, 221 Cal. Rptr. 106*

Distributor of motion picture was not fiduciary except with respect to accounting for rentals received from sublicensees. *Waverly Prod., Inc. v. RKO Gen., Inc. (1963) 217 Cal. App. 2d 721, 731, 32 Cal. Rptr. 73*

Wrongful interference with distribution of motion picture. *Warner v. Roadshow Attractions Co. (1942) 56 Cal. App. 2d 1, 132 P.2d 35*

[4] Financing Agreements

Producer's financing agreement with investors. *Spector v. National Pictures Corp. (1962) 201 Cal. App. 2d 217, 20 Cal. Rptr. 307*

[5] General Contract Principles

Writing intended by parties to be mere memorandum of intention to negotiate contract for production of motion picture and not purporting to state essentials of proposed agreement is unenforceable. *Carter v. Milestone (1959) 170 Cal. App. 2d 189, 193, 338 P.2d 569*

Parol evidence exclusionary rule is applicable where intention of parties clearly stated and parol evidence of contrary intention offered. *Waverly Prod., Inc. v. RKO Gen., Inc. (1963) 217 Cal. App. 2d 721, 729, 32 Cal. Rptr. 73*

Distribution contract contains implied covenant that neither party shall do anything which will have effect of destroying or injuring right of other party to receive fruits of contract. *Waverly Prod., Inc. v. RKO Gen., Inc. (1963) 217 Cal. App. 2d 721, 735, 32 Cal. Rptr. 73*

Sufficiency of written memorandum of production contract for satisfying statute of frauds. *Skirball v. RKO Radio Pictures, Inc. (1955) 134 Cal. App. 2d 843, 862-864, 286 P.2d 954*

Admissibility of evidence of custom and usage in motion picture industry in construing contracts involving motion pictures. *Ermolieff v. RKO Radio Pictures, Inc. (1942) 19 Cal. 2d 543, 549, 122 P.2d 3* ; *Alperson v. Mirisch Co. (1967) 250 Cal. App. 2d 84, 91-92, 58 Cal. Rptr. 178*

[6] Obscenity

Pandering instructions authorized by California statute [*Penal Code § 311.2*] after occurrence of part of defendant's

conduct were not violation of U.S *Const., amends. I* or *XIV*, or of ex post facto clause. *Splawn v. California (1977) 431 U.S. 595, 601, 97 S. Ct. 1987, 52 L. Ed.2d 606*

Action to recover film from processor; obscenity of film is defense. *Eastman Kodak Co. v. Hendricks (9th Cir. 1958) 262 F.2d 392, 397* (decided under former *Penal Code § 311*; *now see Penal Code §§ 311-312.5*)

Filmmaker who pays actors in nonobscene film to engage in sexual acts that are not independently unlawful is not committing prostitution or procurement of prostitution, because payment of acting fees is not for purpose of sexual arousal or gratification of either filmmaker or actors; further, filmmaker's *First Amendment* rights are unconstitutionally impinged by application of prostitution or pandering statute. *People v. Freeman (1988) 46 Cal. 3d 419, 425-430, 250 Cal. Rptr. 598, 758 P.2d 1128*

Officer's affidavit describing scenes in film with candid and direct frankness was adequate to establish probable cause for search warrant, even where film also available for magistrate's viewing. *People v. P. P. G., Inc. (1978) 88 Cal. App. 3d Supp. 12, 151 Cal. Rptr. 531*

Power of court to entertain and grant nonstatutory motion for return of seized materials alleged to be obscene is derived from *Penal Code § 1536* as well as from its inherent power to control and prevent abuse of its process. *People v. Superior Court (1972) 28 Cal. App. 3d 600, 607, 621, 104 Cal. Rptr. 876* (court ordered return of motion picture film not introduced into evidence in possession of chief of police after acquittal of criminal charge)

[7] Privacy

Use of incidents from life of plaintiff in motion picture was not in itself actionable where incidents part of public record. *Melvin v. Reid (1931) 112 Cal. App. 285, 290, 297 P. 91*

Publication in motion picture of unsavory incidents in past life of plaintiff after she had reformed, coupled with her true name, were facts sufficient to constitute cause of action. *Melvin v. Reid (1931) 112 Cal. App. 285, 292, 297 P. 91*

Ownership of picture includes right to use picture publicly in any form except as limited by terms of contract; exhibition of scene as short, if wrong, was breach of contract and not tortious invasion of actress's right of privacy. *Lille v. Warner Bros. Pictures, Inc. (1934) 139 Cal. App. 724, 728, 34 P.2d 835*

[8] Production

No civil RICO (Racketeer Influenced and Corrupt Organizations Act; *18 U.S.C. §§ 1961-1968*) action based on mail and wire fraud was stated against intermediary who arranged production financing when allegations were general and gave no specifics of time, place, or nature of alleged communication. *Alan Neuman Productions, Inc. v. Albright (9th Cir. 1988) 862 F.2d 1388, 1392-1393*

Agreement between initial producer of television series and subsequent producer and production company, which required investment by initial producer who was granted share of profits, was not security under federalsecurities law. *Mace Neufeld Productions v. Orion Pictures Corp. (9th Cir. 1988) 860 F.2d 944, 946-947*

Construction of employment agreement for exclusive services as producer-director of motion pictures and employee's rights thereunder with respect to editing and cutting of pictures. *Stevens v. National Broadcasting Co. (1969) 270 Cal. App. 2d 886, 888-893, 76 Cal. Rptr. 106*

Measure of damages for breach of production contract. *Skirball v. RKO Radio Pictures, Inc. (1955) 134 Cal. App. 2d*

843, 866-871, 286 P.2d 954

Sufficiency of evidence to show picture rights and screenplay rendered valueless by production company which advertised extensively that it would produce picture, and thereafter did not produce it. *Skirball v. RKO Radio Pictures, Inc. (1955) 134 Cal. App. 2d 843, 866, 286 P.2d 954*

Associate producer was not damaged by lack of screen credit in picture realizing no profits. *Zorich v. Petroff (1957) 152 Cal. App. 2d 806, 811, 313 P.2d 118*

Person who can and does convey valuable idea to producer who commercially solicits the service or who voluntarily accepts it knowing that it is tendered for a price is entitled to recover based on contract either express or implied. *Blaustein v. Burton (1970) 9 Cal. App. 3d 161, 178, 88 Cal. Rptr. 319*

[9] Responsibility to Movie-Viewing Public

Film producers were not negligent in failing to warn movie theater patrons that allegedly violent movie would attract weapon-carrying persons who were prone to violence. *Bill v. Superior Court (1982) 137 Cal. App. 3d 1002, 1011-1014, 187 Cal. Rptr. 625*

[10] Talent Agencies

Since personal manager was not licensed as talent agency under Talent Agencies Act [*Lab. Code § 1700 et seq.*], management agreements between singing group and manager were properly declared void by Labor Commissioner without payment of commission, even though manager obtained recording contract and over 80 performance engagements for group. *Park v. Deftones (1999) 71 Cal. App. 4th 1465, 1472, 84 Cal. Rptr. 2d 616*

Contracts between artist and unlicensed talent agent were void even if the agent's efforts to procure employment for his or her clients are only incidental to other artist management duties. *Waisbren v. Peppercorn Productions, Inc. (1995) 41 Cal. App. 4th 246, 250* ; *48 Cal. Rptr. 2d 437* .

Licensing provisions under Talent Agencies Act (*Lab. Code §§ 1700-1700.47*) was facially constitutional. *Wachs v. Curry (1993) 13 Cal. App. 4th 616, 626-629, 16 Cal. Rptr. 2d 496* (affirming summary judgment for defendant labor commission)

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawPrice Fixing & Restraints of TradeVertical RestraintsNonprice RestraintsLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsBreachTortsBusiness TortsUnfair Business PracticesRemediesTortsDamagesCompensatory DamagesGeneral Overview

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Comment, *Regulation of Attorneys Under California's Talent Agencies Act: A Tautological Approach to Protecting Artists, 80 Cal. L. Rev. 471 (1992)*

Landau, *The Colorization of Black-and-White Motion Pictures: A Grey Area in the Law, 22 Loy. L.A. L Rev. 1161 (1989)*

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Jaszi, *When Works Collide: Derivative Motion Pictures, Underlying Rights, and the Public Interest, 28 UCLA L. Rev. 715 (1981)*

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Note, *Blind Bidding and the Motion Picture Industry, 92 Harv. L. Rev. 1128 (1979)*

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Note, *The Scienter Element in California's Obscenity Laws: Is There a Way to Know? 24 Hastings L.J. 1303 (1973)*

Concoff, *Motion Picture Secured Transactions Under the Uniform Commercial Code: Problems in Perfection, 13 UCLA L. Rev. 1214 (1966)*

Cassady, *Impact of the Paramount Decision on Motion Picture Distribution and Price Making, 31 So. Cal. L. Rev. 150 (1958)*

Horowitz, *Loyalty Tests for Employment in the Motion Picture Industry, 6 Stan. L. Rev. 438 (1954)*

Tannenbaum, *Enforcement of Personal Service Contracts in the Entertainment Industry, 42 Cal. L. Rev. 18 (1954)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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§ 370.34 Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, § 555; vol. 7, *Constitutional Law*, § 371; vol. 13, *Equity*, §§ 25, 30, 36, 51 (10th ed. 2005)

Witkin, California Evidence (2d ed.), Ch. VIII, *Demonstrative, Experimental and Scientific Evidence, §§ 638-640*; Ch. X, *Witnesses*, § 815

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, §§ 484 et seq. (4th ed. 1997)

Legal Topics:

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

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California Forms of Pleading and Practice--Annotated

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Chapter 370 MOTION PICTURES
PART III. RESEARCH GUIDE

32-370 California Forms of Pleading and Practice--Annotated §§ 370.35-370.49

[Reserved]

§§ 370.35[Reserved]

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 370 MOTION PICTURES
PART IV. FORMS

32-370 California Forms of Pleading and Practice--Annotated § 370.50

§ 370.50 Complaint for Specific Performance [Civ. Code § 3384]--Contract for Delivery of Print of Motion Picture--By Director Against Producer

[1] FORM Complaint for Specific Performance [Civ. Code § 3384]--Contract for Delivery of Print of Motion Picture--By Director Against Producer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR SPECIFIC PERFORMANCE
_____ [*name*],	)	
Defendant.	)	
	)	
	)	

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, a corporation organized and existing under the laws of _____ [*name of state*], engaged in the business of producing, distributing, and exploiting motion pictures in _____ County, California, and elsewhere.

2. Defendant corporation acted through its agents and employees in performing the acts alleged in this complaint.

3. On or about _____ [*date*], at _____ [*city*], _____ County, California, plaintiff and defendant entered into a written agreement wherein plaintiff agreed to perform certain personal services as a director of a motion picture entitled _____ [*title*], and defendant agreed to pay plaintiff certain specified sums. A copy of the contract is attached as Exhibit A and made a part hereof.

4. Plaintiff has fully performed all terms and conditions of the written contract by him to be performed, and there remains nothing further for plaintiff to perform under the contract.

5. The written contract further requires that defendant, promptly after the completion of the production of the motion picture, deliver to plaintiff, without cost or expense to plaintiff, at such place as plaintiff might designate in _____ [*city*], California, _____ [*e.g.*, one first-class positive composite print of the motion picture, fully scored, cut, and edited, mounted on 2,000-foot reels and in a can, including all sound and talkingscenes or sequences]. Plaintiff is informed and believes and thereon alleges that the production of the motion picture has now been completed and that the motion picture has been scored, cut, and edited.

6. On _____ [*date*], plaintiff sent a letter to defendant, in conformity with the provisions of the written contract, demanding that defendant comply with the provisions of the contract, to wit: Deliver to plaintiff _____[*e.g.*, a composite print of the motion picture _____(*title*), fully scored, cut, and edited, mounted on 2,000-foot reels and in a can, including all sound and talking scenes or sequences].

7. Defendant has failed and refused, and still fails and refuses, to comply with plaintiff's request to deliver to plaintiff a print of the motion picture as required by the written contract.

8. Defendant has in his possession, or under his control, the negative or negatives and the sound track or sound tracks of the motion picture, and defendant is fully able to comply with the provisions of the written contract.

9. The motion picture _____ [*title*] is unique and of great artistic value. The motion picture gives plaintiff screen credit as director thereof. Positive prints of the motion picture cannot be obtained except with the consent and aid of defendant. Such positive prints have no determinable market value if they cannot be sold or exhibited commercially, and plaintiff is forbidden to do so by the written contract. The promise of defendant that it would deliver to plaintiff a positive print of the motion picture, as provided in the written contract, was a material consideration and inducement to plaintiff to enter into the written contract. For these reasons, the failure of defendant to comply with the provisions of the contract cannot be adequately compensated for in money, or money's worth, and plaintiff therefore has no adequate remedy at law for the breach by defendant of its promises set forth in the contract.

10. Plaintiff has at all times been ready and willing, and now is ready and willing, to comply with the promises set forth in the written contract that he will not sell the positive prints referred to therein or exhibit the prints commercially.

11. [By the terms and provisions of the written contract, defendant agreed to pay plaintiff a reasonable attorney's fee if he should institute any action or proceeding against defendant. The sum of $_____ is a reasonable attorney's fee for the institution and prosecution of this action.]

WHEREFORE, plaintiff prays judgment as follows:

1. That defendant be ordered to specifically perform the agreement and promises as set forth in the written contract between plaintiff and defendant;

[2. For reasonable attorney's fees herein incurred in the amount of $_____;]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature*]

[2] Use of Form

The form in [1], *above,* is for use as a complaint for specific performance of a contract provision requiring the producer of a motion picture to deliver a print of the picture to the director.

[3] Cross References

For forms for use in an action for specific performance generally, see Ch. 528, *Specific Performance*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesGeneral OverviewContracts LawRemediesSpecific Performance

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Chapter 370 MOTION PICTURES
PART IV. FORMS

32-370 California Forms of Pleading and Practice--Annotated § 370.51

§ 370.51 Complaint for Damages [Civ. Code § 3300] for Breach of Employment Contract--By Actor or Actress Against Producer--Failure to Pay Salary and Agreed Share of Gross Proceeds

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Employment Contract--By Actor or Actress Against Producer--Failure to Pay Salary and Agreed Share of Gross Proceeds

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Breach of Contract)
Defendant.	)	Amount demanded _____ (exceeds
	)	or does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

1. [*Allegation of capacity of defendant. See § 370.50[1], Paragraph 1.*]

2. [*Agency allegation. See § 370.50[1], Paragraph 2.*]

3. On or about _____ [*date*], at _____ [*city*], _____ County, California, plaintiff entered into an agreement in writing with defendant, under the terms of which defendant employed plaintiff to render his/her services as a motion picture _____ [actor *or* actress] in a motion picture

entitled _____ [*title*], to be produced by defendant. Defendant agreed to pay plaintiff for his/her services in the motion picture the sum of $_____ per _____ [*pay period*] for a period of _____ [*specify*] as a guaranteed salary, plus a sum equal to _____ percent of the gross proceeds resulting from the distribution of the motion picture [until the gross proceeds equaled the sum of $_____, and _____ percent of the gross proceeds thereafter]. A copy of the agreement is attached as Exhibit A and made a part hereof.

4. On or about _____ [*date*], defendant commenced the principal photography of the motion picture, and plaintiff commenced the rendition of his/her services under the contract. Plaintiff continued to render and perform his/her services, and all the terms and conditions of the contract on his/her part to be performed, until the completion of the motion picture on or about _____ [*date*].

5. The motion picture was placed in general release on or about _____ [*date*], under a distributor's contract with _____ [*name*], and has been exhibited in the United States at all times since.

6. Plaintiff is informed and believes and thereon alleges that defendant has collected and received gross proceeds from the distribution of the motion picture exceeding the sum of $_____. The precise amount of the gross proceeds cannot be determined by plaintiff until defendant accounts for those proceeds.

7. Plaintiff has received no payment of any kind from defendant [except the sum of $_____] on account of the agreed salary or the agreed percentage of gross proceeds for the rendition of his/her services.

8. Defendant has failed and refused, and continues to fail and refuse, to pay plaintiff the sums due under their agreement of _____ [*date*], or to account for these sums, notwithstanding that plaintiff has demanded payment and accounting.

WHEREFORE, plaintiff prays judgment as follows:

1. That plaintiff has judgment against defendant for the sum of $_____, representing the unpaid guaranteed salary;

2. That defendant account to plaintiff for the unpaid percentages of the gross proceeds resulting from the distribution of the motion picture entitled _____[*title*] due plaintiff, and for judgment against defendant in the amount of those percentages [after crediting the sum of $_____ already paid plaintiff] when and as the dollar amount shall be ascertained;

3. For interest on the sum of $_____ from and after _____ [*date*].

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 370.50[1].*]

[2] Use of Form

The form in [1], *above,* is for use as a complaint for damages for breach of an employment contract by an actor or actress against a producer [*see Fanning v. Yoland Prod., Inc. (1957) 150 Cal. App. 2d 444, 310 P.2d 85* (action by actor for salary and percentage of gross proceeds)].

[3] Cross References

For discussion and forms relating to actions for an accounting, see Ch. 7, *Accounting, Action for*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawTypes of ContractsPersonal Service AgreementsLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsBreach

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32-370 California Forms of Pleading and Practice--Annotated § 370.52

§ 370.52 Complaint for Damages [Civ. Code § 3300] for Breach of Production Contract--By Owner of Screenplay Against Producer--Failure to Produce

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Production Contract--By Owner of Screenplay Against Producer--Failure to Produce

[*Caption, introduction. See § 370.51[1].*]

1. [At all times herein mentioned, plaintiff is and was an individual engaged in the business of purchasing and selling motion picture rights in and to novels, plays, photoplays, screenplays, and other literary compositions under the fictitious business name of _____[*name*], and has filed the statement and published the notice as required by *Business and Professions Code Sections 17910 through 17918*.]

2. [*Allegation of capacity of defendant. See § 370.50[1], Paragraph 1.*]

3. [*Agency allegation. See § 370.50[1], Paragraph 2.*]

4. At all times mentioned herein, plaintiff was the owner of the motion picture rights in and to a novel entitled _____ [*title*], and a screenplay written by _____ [*name*], based on the novel. The plot of the novel and screenplay made them a suitable property for the production of a successful motion picture based thereon. At all times prior to _____[*date*], the motion picture rights in and to the novel and screenplay were a valuable property right.

5. At all times mentioned herein, defendant had, and still has, a staff of highly qualified technical experts and the necessary equipment, facilities, and financial means for the production, distribution, and exploitation of successful motion pictures. The use of these technical experts, facilities, and financial means in the production, distribution, and exploitation of a proposed motion picture would greatly enhance the value thereof and the returns therefrom.

6. On or about _____ [*date*], plaintiff and defendant entered into _____ [an oral *or* a

written] contract for the production and distribution of a motion picture based on the novel and screenplay. In and by the terms of the contract, plaintiff and defendant agreed, among other matters hereinafter more fully set forth, that plaintiff would produce a motion picture based on the novel and screenplay and would deliver the motion picture to defendant for distribution, and that defendant would pay plaintiff the sum of $_____ in cash and _____percent of the net profits derived from the distribution of the motion picture. _____ [A copy of the written contract *or* A written memorial of the oral contract prepared by _____ (*name*) and submitted to defendant on _____ [*date*], is attached as Exhibit A and made a part hereof.

7. During the month of _____ [*date*], defendant, pursuant to the contract between the parties and in part performance thereof, openly and publicly announced, advertised, and declared in writing and through the press that defendant would release the motion picture _____[*title*], starring _____ [*name of actor or actress*], during the year _____ [*year*]. _____ [*Title of proposed motion picture*] was and is the motion picture referred to in the contract between the parties. As a result of that announcement and advertisement, defendant and _____ [*name of actor or actress*] became associated with the proposed motion picture in the motion picture industry and with patrons of motion pictures.

8. By these acts and declarations defendant intentionally and deliberately caused and led plaintiff to believe that the parties had an existing, valid, and enforceable contract for the production and distribution of a motion picture based on the novel _____[*title*]. Plaintiff relied thereon and so believed, and on that reliance and belief, plaintiff _____ [*show acts done in reliance, e.g.*, commenced the revision of the screenplay based on the novel, *etc.*].

9. In further reliance thereon, plaintiff refrained from investigating, contracting, or approaching other motion picture producers and distributors with reference to a sale of the motion picture rights, and a screenplay based thereon, of the novel, or the production or distribution of a motion picture based on the novel.

10. On or about _____ [*date*], defendant, without cause, repudiated the contract and failed and refused, and continues to fail and refuse, to proceed or to perform the contract, although plaintiff has frequently demanded performance. On or about that date, defendant advised plaintiff that it would not go forward with the performance of the contract, or the production or distribution of the motion picture provided for in the contract.

11. Plaintiff, at all times, has been ready, willing, and able to perform the contract, and has duly performed all the conditions on its part to be performed, except as performance has been prevented or excused by defendant's repudiation of the contract and refusal to proceed thereunder.

12. By reason of the announcement and advertisement by defendant, and the breach of the contract, defendant destroyed the market for, and the value of, the motion picture rights in and to the novel _____ [*title*], and the screenplay based thereon, all to plaintiff's damage in the sum of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____;

2. For interest on the sum of $_____ from and after _____ [*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 370.50[1].*]

[2] Use of Form

The form in [1], *above,* is a complaint for damages for the breach of a production contract causing the destruction of the market for and value of the motion picture rights in a novel and screenplay.

[3] Measure of Damages

There is a potential double recovery problem when the plaintiff seeks damages for the destruction of the value of motion picture rights in a novel and screenplay. For example, when the owner of a screenplay was awarded the entire reasonable market value of the motion picture rights whose value had been destroyed, the owner was not also permitted to recover the percentage of the amount to be paid under the contract which represented consideration for the motion picture rights and script [*see Skirball v. RKO Radio Pictures, Inc. (1955) 134 Cal. App. 2d 843, 869-870, 286 P.2d 954]* .

[4] Cross References

For discussion and forms relating to actions for breach of contract, see Ch. 140, *Contracts*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachGeneral OverviewContracts LawBreachNonperformanceContracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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32-370 California Forms of Pleading and Practice--Annotated § 370.53

§ 370.53 Complaint to Recover Possession of Motion Picture Film [Civ. Code § 3379; Code Civ. Proc. § 667]--By Producer Against Processor

[1] FORM Complaint to Recover Possession of Motion Picture Film [Civ. Code § 3379; Code Civ. Proc. § 667]--By Producer Against Processor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO RECOVER POSSESSION OF
_____ [*name*],	)	PERSONAL PROPERTY
Defendant.	)	[Amount demanded _____ (exceeds
	)	or does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [At all times herein mentioned, plaintiff is and was an individual engaged in the business of taking and producing motion picture films in a professional capacity under the fictitious business name of _____ [*name*], and has filed the statement and published the notice as required by *Sections 17910 through 17918 of the Business and Professions Code*.]

2. Defendant is, and all times herein mentioned was, a corporation organized and existing under the laws of _____ [*name of state*], engaged in the business of developing and processing motion picture film in _____ County, California, and elsewhere.

3. [*Agency allegation. See § 370.50[1], Paragraph 2.*]

4. At all times herein mentioned plaintiff was the owner and entitled to possession of a certain _____ [*specify*] feet of exposed motion picture film.

5. On or about _____ [*date*], plaintiff delivered to defendant the film for the purpose of having it developed by defendant. Thereafter, defendant delivered to plaintiff _____ [*specify*] feet of the film, receipt of which has been, and now is, acknowledged by plaintiff.

6. On or about _____ [*date*], defendant informed and advised plaintiff that it was holding, and would refuse to return and deliver to plaintiff, the remaining _____ [*specify*] feet of film left with defendant for development purposes.

7. The _____ [*specify*] feet of unreturned film, deposited with defendant for development purposes, bears identification Nos. _____, and is being held by defendant under its receipt No. _____.

8. No cost for development of the film is required to be paid by plaintiff to defendant, such cost being included in the original price of the film.

9. On or about _____ [*date*], plaintiff demanded from defendant the return of the film, but defendant failed and refused, and continues to fail and refuse, to deliver it to plaintiff.

10. The value of the _____ [*specify*] feet of unreturned film is $_____. The value was well known to defendant, or should have been known by defendant, due to the fact that plaintiff was known to be a professional maker and producer of motion pictures.

11. Defendant still wrongfully and unlawfully withholds and detains the film from the possession of plaintiff, and, as a result of defendant's wrongful acts, other film that is useful only in conjunction with the unreturned film has become, and is now, valueless and, as a result, plaintiff has been damaged in the sum of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For recovery of the possession of the _____[*specify*] feet of unreturned film;

2. For the sum of $_____, the value of the unreturned film and the value of the film made worthless by its retention, in case delivery of the _____ [*specify*] feet of unreturned film cannot be had;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 370.50[1].*]

[2] Use of Form

The form in [1], *above,* is for use as a complaint to recover possession of motion picture film, or if possession cannot be recovered, for the value of the film, from the developer of the film [*see Eastman Kodak, Co. v. Hendricks (9th Cir. 1958) 262 F.2d 392* (obscenity as a defense; remanding for determination of whether film was obscene)].

[3] Cross References

For forms for use in an action to recover possession of personal property generally, see Ch. 119, *Claim and Delivery*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesRestitutionContracts LawRemediesSpecific Performance

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32-370 California Forms of Pleading and Practice--Annotated § 370.54

§ 370.54 Complaint by Artist Against Talent Listing Service for Return of Fees Following Cancellation of Contract [Lab. Code § 1704.2]

[1] FORM Complaint by Artist Against Advance-Fee Talent Service for Return of Advance Fees Following Cancellation of Contract [Lab. Code § 1701.4(e)(2)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	(Refund of Advance Fees)
Defendants.	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. Plaintiff is and at all times mentioned was a resident of _____ County, California, and is an "artist" within the meaning of *Labor Code Section 1701(a)*.

2. Defendant _____ [*name*] is _____ [*form in which defendant does business, e.g.,* an individual doing business under his own name], whose principal place of business is at _____ [*location address*], California.

3. At all times mentioned in this complaint, Defendant was doing business as a "talent listing service" within the meaning of *Labor Code Section 1701(g)*.

4. On or about _____ [*date*], at _____ [*city*], in _____ County, California, Plaintiff entered into written agreement (the Agreement) with Defendant by which Defendant promised to _____ [*state services that defendant was to provide, e.g.,* furnish, for Plaintiff's use, lists of auditions and employment opportunities as an artist]. Plaintiff agreed to pay Defendant a fee of $_____ .

5. On or about _____ [*date*], Defendant furnished a list of auditions, and Plaintiff thereafter paid $_____ to Defendant.

6. On or about _____ [*date within 10 business days from date plaintiff began to use services under contract*], Plaintiff _____ [*e.g.,* mailed] to Defendant, at Defendant's place of business, a signed and dated notice of cancellation of the Agreement.

7. Defendant [refunded $_____ but otherwise has] failed to refund the fee that Plaintiff paid.

8. To date, Plaintiff has incurred costs and attorney's fees amounting to $_____ in attempting to recover the amount due to Plaintiff.

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____ [*three times amount of unrefunded fee*].

2. For reasonable attorney's fees according to proof.

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

[*Verification. See § 370.50[1].*]

[2] Use of Form

This complaint is for use in an action by an entertainment industry artist against a talent listing service that has failed or refused to refund all fees paid by the artist, after the artist has exercised the statutory right to cancel a contract between the artist and the talent listing service. For discussion of the regulation of talent listing services and other kinds of entertainment talent services [*see Lab. Code § 1701 et seq.*], see *§ 370.10[4].*

A person who is injured by a violation of *Lab. Code § 1701 et seq.* or by the breach of a contract subject to *Lab. Code § 1701 et seq.* may bring an action for recovery of damages, or to restrain and enjoin a violation, or both. The amount awarded for damages must be not less than three times the amount paid by the artist, or on behalf of the artist, to the talent service. The court must award reasonable attorney's fees and costs to a prevailing plaintiff [*Lab. Code § 1704.2*].

[3] Artist's Statutory Right to Cancel Contract

The artist may cancel a talent services contract within 10 business days from the date the artists began to use services

under the contract. The artist must notify the talent service of the cancellation within 10 business days of the date the artist executed the contract, by mailing, delivering, or sending by fax, to the talent service, a signed and dated copy of the cancellation notice or any other written notice of cancellation, or by sending a notice of cancellation via the Internet if the contract was executed in part or in whole through the Internet. The talent service must refund all fees paid by, or on behalf of, the artist within 10 business days after delivery of the cancellation notice [*Lab. Code § 1703(e)(1)*].

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[5] Allegations in Complaint

This complaint alleges the following:

- The plaintiff's residence and status as an "artist" [*see Lab. Code § 1701(a)*] (Paragraph 1).
- The defendant's legal status and principal place of business (Paragraph 2).
- The defendant's status as a "talent listing service" [*see Lab. Code § 1701(g)*] (Paragraph 3).
- The making of a written agreement by the parties, for services to be provided by the defendant as a talent listing service (Paragraph 4).
- The performance of that agreement by the plaintiff (Paragraph 5).
- The plaintiff's exercise of the statutory right to cancel the contract (Paragraph 6).
- The defendant's failure to refund the fee paid by the plaintiff, within 10 days after delivery of the notice of cancellation (Paragraph 7).
- The fact that the plaintiff has incurred costs and attorney's fees in attempting to recover the amounts due to the plaintiff (Paragraph 8).

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms for verification, see Ch. 572, *Verification*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesRestitutionContracts LawTypes of ContractsPersonal Service Agreements

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32-370 California Forms of Pleading and Practice--Annotated § 370.55

§ 370.55 Affirmative Defense--Action by Talent Listing Service for Amount Due Under Contract With Artist--Contract Unenforceable for Noncompliance With Statutory Requirements [Lab. Code § 1703(d)]

[1] FORM

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], Defendant alleges that the agreement between Plaintiff and Defendant is voidable at Plaintiff's election because _____ [*specify statutory requirements as to which agreement is nonconforming, e.g.,* the agreement described the services that Defendant would provide in vague terms not conforming to the statutory definition of the services of a talent listing service; the contract failed to state when those services were to be provided; the contract failed to state the duration of the contract; and the contract provided that it would be automatically renewable unless canceled by one of the parties].

[2] Use of Form

This affirmative defense is for use by an entertainment industry artist, in an action by a talent listing service against the artist, for amounts allegedly due under a contract between the talent listing service and the artist. The affirmative defense alleges that the contract is voidable at the option of the artist because the contract fails to comply with the statutory requirements applicable to talent service contracts. For discussion of the regulation of talent listing services and other kinds of entertainment talent services [*see Lab. Code § 1701 et seq.*], see *§ 370.10[4]*. A contract not conforming to the requirements of *Lab. Code § 1703(a)-(f)* [*see § 370.10[4][d]*] is voidable at the election of the artist and may be canceled by the artist at any time without any penalty or obligation [*Lab. Code § 1703(d)*].

If the contract in question is attached to the complaint, and it appears clear from the face of the contract that the contract does not meet the statutory requirements, then it may be appropriate to raise this issue by demurrer instead of as an affirmative defense. For discussion of the use of demurrers and general forms, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Cross References

For discussion of answers generally, and general forms in which this affirmative defense may be used, see Ch. 26, *Answers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesPunitive DamagesContracts LawRemediesRestitutionContracts LawTypes of ContractsPersonal Service Agreements

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 370 MOTION PICTURES
PART IV. FORMS

32-370 California Forms of Pleading and Practice--Annotated §§ 370.56-370.59

[Reserved]

§§ 370.56[Reserved]

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California Forms of Pleading and Practice--Annotated

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Volume 32: Marriage thru Motion Pictures-Chs. 359-370
Chapter 370 MOTION PICTURES
PART IV. FORMS

32-370 California Forms of Pleading and Practice--Annotated § 370.60

§ 370.60 Petition to Confirm Award of Labor Commissioner in Talent Agency Dispute [Code Civ. Proc. § 1290; Lab. Code § 1700.44] and for Entry of Judgment

[1] FORM Petition to Confirm Award of Labor Commissioner in Talent Agency Dispute [Code Civ. Proc. § 1290; Lab. Code § 1700.44] and for Entry of Judgment

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION TO CONFIRM AWARD OF LABOR
_____ [*name*],	)	COMMISSIONER
Respondent.	)	
	)	
	)	

Petitioner alleges:

1. On or about _____ [*date*], petitioner and respondent entered into a written agreement whereby _____ [petitioner *or* respondent] employed _____[respondent *or* petitioner] to act as a talent agency and render the services of a talent agency to _____ [petitioner *or* respondent]. Paragraph _____ [*number*] of the agreement provides for the reference to the Labor Commissioner, as provided in *Section 1700.44(a) of the Labor Code*, of controversies arising between petitioner and respondent under the provisions of the Labor Code relating to talent agencies and under the rules and regulations for the enforcement of those provisions promulgated by the Labor Commissioner. A copy of the agreement is attached as Exhibit A and incorporated by reference.

2. On or about _____ [*date*], _____ [petitioner *or* respondent *or both*] referred to

the Labor Commissioner a controversy that arose subsequent to the execution of the aforementioned agreement and was subject to reference under the reference clause therein, namely _____ [*set forth relevant issues of controversy*].

3. On or about _____ [*date*], a hearing was held in _____ [*city*], _____ County, California, before _____[*name(s)*], duly authorized by the Labor Commissioner as his/her representative(s) to conduct the hearing, after notice was duly given to all parties to the proceeding, whereat _____ [petitioner *or* respondent *or both*] appeared and presented proofs.

4. On or about _____ [*date*], the Labor Commissioner made his/her award, determining all issues referred to him/her, and awarded petitioner the sum of $_____. A signed copy of the award was served on petitioner on _____ [*date*]. A copy of the award [and opinion of the Labor Commissioner] is/are attached as Exhibit B and made a part hereof.

WHEREFORE, petitioner prays for judgment as follows:

1. For an order confirming the award;

2. For judgment against respondent in conformity with the award in the sum of $_____;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court deems proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

[2] Use of Form

The petition in [1], *above*, may be used to obtain an order confirming an award by the Labor Commissioner in a controversy arising under Chapter 4 of Part 6 of Division 2 of the Labor Code [*Lab. Code § 1700 et seq.*, once popularly known as the Artists' Managers Act (*see, e.g., Buchwald v. Katz (1972) 8 Cal. 3d 493, 496, 105 Cal. Rptr. 368, 503 P.2d 1376*)] and the entry of a judgment in conformity with the award.

[3] Notice of Hearing and Service of Papers

A notice of hearing and any other papers on which the petition is based are to be served with the petition in the manner specified in *Code Civ. Proc. § 1290.4*.

For discussion of the procedure and a notice of hearing that may be adapted for use with this petition, see Ch. 34, *Contractual Arbitration: Judicial Review* .

[4] Labor Commissioner's Jurisdiction

The Labor Commissioner has original jurisdiction to hear and determine controversies arising under *Lab. Code § 1700 et seq.*, to the exclusion of the superior court. However, the Labor Commissioner's determination is subject to an "appeal" to the superior court where the controversy is to be heard de novo [*Lab. Code § 1700.44(a)*; *Buchwald v. Superior Court (1967) 254 Cal. App. 2d 347, 359, 62 Cal. Rptr. 364]* .

[5] Enforcement of Award

The proper procedure for enforcing a money award by the Labor Commissioner in a controversy submitted under *Lab. Code § 1700.44(a)* is to apply to the superior court for judicial confirmation of the award in the same manner as in the case of an award by a private arbitrator under *Code Civ. Proc. § 1285 et seq.* [*Buchwald v. Katz (1972) 8 Cal. 3d 493, 499, 105 Cal. Rptr. 368, 503 P.2d 1376* ; *see* Ch. 34, *Contractual Arbitration: Judicial Review*].

If an award is confirmed, judgment is to be entered in conformity with the award. The judgment so entered has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action of the same jurisdictional classification, and it may be enforced like any other judgment of the court in which it is entered, in an action of the same jurisdictional classification [*Code Civ. Proc. § 1287.4*; *Buchwald v. Katz (1972) 8 Cal. 3d 493, 499, 105 Cal. Rptr. 368, 503 P.2d 1376* ; *Code Civ. Proc. § 32.5*(jurisdictional classification is classification as limited civil case or otherwise)].

[6] Appeal

[a] Time for Notice of Appeal

The Labor Commissioner's decision is subject to an "appeal" to the superior court within 10 days after service of notice of the determination [*Lab. Code § 1700.44(a)*; *Sinnamon v. McKay (1983) 142 Cal. App. 3d 847, 852-853, 191 Cal. Rptr. 295]* . The 10-day time limit for taking an appeal is mandatory and jurisdictional, and the superior court cannot consider an appeal taken after expiration of the statutory period even if the appeal is late because of mistake, inadvertence, or other excuse [*REO Broadcasting Consultants v. Martin (1999) 69 Cal. App. 4th 489, 495]* .

The notice must be filed within 10 days of service of notice of the determination of the Labor Commissioner, despite the language of *Lab. Code § 1700.44(a)* measuring the time from the date of the determination itself without any notice requirement [*Sinnamon v. McKay (1983) 142 Cal. App. 3d 847, 852-853, 191 Cal. Rptr. 295]* . The Division of Labor Standards Enforcement takes the view that it is improper to file a notice of appeal with the division. Therefore, to avoid the possibility of a fatal delay, the notice should be filed directly with the superior court. The clerk will probably demand a filing fee as for a first paper in an action.

[b] Form of Notice of Appeal

It is not clear whether a "notice of appeal" is the proper form by which to take the appeal authorized by *Lab. Code § 1700.44(a)*. Such a paper was used in the leading case, *Buchwald v. Katz (1972) 8 Cal. 3d 493, 502 n.7, 105 Cal. Rptr. 368, 503 P.2d 1376* , and apparently was adequate [*see also Sinnamon v. McKay (1983) 142 Cal. App. 3d 847, 850, 191 Cal. Rptr. 295]* .

[c] Stay of Labor Commissioner's Award

To stay any award for money, the aggrieved party must execute a bond approved by the superior court in a sum not exceeding twice the amount of the judgment; in all other cases, the bond must be in a sum of not less than $1,000 and approved by the superior court [*Lab. Code § 1700.44(a)*].

The word "judgment" means the decision of the Labor Commissioner awarding the money [*see Buchwald v. Katz (1972) 8 Cal. 3d 493, 500, 105 Cal. Rptr. 368, 503 P.2d 1376]* . Thus, the amount of the bond to stay an award for

money is twice the amount awarded.

[d] De Novo Review

On appeal, the controversy is heard de novo by the superior court [*Lab. Code § 1700.44(a)*]. The appealing party is entitled to a complete new hearing--a complete new trial--that is in no way a review of the prior proceeding before the Labor Commissioner [*Buchwald v. Katz (1972) 8 Cal. 3d 493, 502, 105 Cal. Rptr. 368, 503 P.2d 1376]* .

[7] Cross References

For related discussions and forms, see Ch. 34, *Contractual Arbitration: Judicial Review* , and Ch. 518, *Service of Summons and Papers*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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Chapter 371 MOTIONS AFTER TRIAL

33-371 California Forms of Pleading and Practice--Annotated 371.syn

§ 371.syn Synopsis to Chapter 371: MOTIONS AFTER TRIAL

§ 371.01 Scope of Chapter

§ 371.02 Cross References

§§ 371.03-371.09 [Reserved]

§ 371.10 Governing Statutes

§ 371.11 Comparison of Motions

§ 371.12 Court Has Discretion to Determine Relief Requested

§§ 371.13-371.29 [Reserved]

§ 371.30 Governing Statutes

§ 371.31 Description

§ 371.32 Who May Bring Motion

§ 371.33 Effect of Motion for Directed Verdict

§ 371.34 No Automatic Stay of Entry of Judgment

§ 371.35 Valid Jury Verdict Required

§ 371.36 General or Special Verdicts

§ 371.37 Power of Trial Judge

§ 371.38 Partial Judgment Notwithstanding the Verdict

[1] In General

[2] Effect of Order for Partial New Trial

§ 371.39 Lack of Substantial Evidence

§ 371.40 Standard

[1] Motion by Defendant

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§ 371.41 Procedure on Court's Own Motion

§ 371.42 Procedure for Motion by Party

[1] Oral or Written Notice of Motion

[2] Time for Making Motion

[a] In General

[b] Effect on Time for New Trial Motion

§ 371.43 Ruling on Motion

[1] When Court May Rule on Motion

[2] With Motion for New Trial

§ 371.44 Effect of Judgment N.O.V. on Issue of Damages

§ 371.45 Notice of Court's Order

§ 371.46 Review

[1] Reconsideration and Appeal

[2] Standard on Review

[3] Effect of Reversal

[4] Alternative Motions

[a] Motion for Judgment Notwithstanding Verdict Denied, Motion for New Trial Denied

[b] Judgment Notwithstanding Verdict Denied, New Trial Granted

[c] Both Motions Granted

§§ 371.47-371.59 [Reserved]

§ 371.60 Governing Statutes

§ 371.61 Purpose of Motion

§ 371.62 Motion for New Trial When There Has Been No Trial on Merits

§ 371.63 Grounds for Granting New Trial

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[b] Attorney Misconduct

[3] Jury Misconduct

[a] General Rule

[b] Types of Jury Misconduct

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[ii] Prejudicial Communication by or to Juror

[iii] Experimentation Producing New Evidence

[iv] Chance Verdict

[c] Presumption of Prejudice

[d] "No Knowledge" Declaration

[4] Accident or Surprise

[5] Newly Discovered Evidence

[6] Excessive or Inadequate Damages Awarded

[7] Insufficient Evidence to Justify Verdict or Other Decision

[8] Verdict or Decision Against Law

[9] Error in Law Occurring at Trial

[10] Lack of Phonographic Report of Trial

[11] Loss or Destruction of Bill of Exceptions or Statement of Case

§ 371.64 Procedure

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[3] Affidavits and Counteraffidavits

[a] When Required

[b] Service and Filing

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[4] Use of Reporter's Notes, Pleadings, and Files

[5] Supporting Memorandum

[6] With Motion for Judgment Notwithstanding Verdict

§ 371.65 Stay of Execution of Judgment Pending Determination of Motion

§ 371.66 Hearing and Determination of Motion

[1] Proper Judge

[2] Time For Hearing

§ 371.67 Ruling on Motion

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[2] When Motion Determined

[3] Discretion of Court

§ 371.68 Alternative Relief in Lieu of Granting New Trial

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§ 371.69 New Trial on Particular Issues

§ 371.70 Conditional Granting or Denial of Motion

§ 371.71 Order Denying Motion

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§ 371.90 Governing Statutes

§ 371.91 Statutory Basis for Motion

§ 371.92 Statement of Decision Versus Findings of Fact

§ 371.93 When Motion Proper

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§ 371.94 Alternative Relief in Lieu of New Trial Contrasted

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§ 371.120 Related Matthew Bender Publications

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§ 371.122 California Rules of Court

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§§ 371.146-371.159 [Reserved]

§ 371.160 State Statutes

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§§ 371.165-371.179 [Reserved]

§ 371.180 Preliminary Determinations

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§ 371.202 Service and Filing

§§ 371.203-371.219 [Reserved]

§ 371.220 Preliminary Determinations

§ 371.221 Preparation of Papers

§ 371.222 Service and Filing

§§ 371.223-371.239 [Reserved]

§ 371.240 Preliminary Determinations

§ 371.241 Preparation of Papers

§ 371.242 Service and Filing

§§ 371.243-371.259 [Reserved]

§ 371.260 Preliminary Determinations

§ 371.261 Preparation of Papers

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§ 371.280 Notice of Motion for Judgment Notwithstanding the Verdict [Code Civ. Proc. § 629]

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[3] Time and Place of Hearing

[4] Papers on Which Motion is Based

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[6] Trial Court May Grant Relief Not Requested

[7] State Statutes

[8] Decisions

[9] Cross References

§ 371.281 Order Denying Motion for Judgment Notwithstanding the Verdict [Code Civ. Proc. § 629]

[1] FORM

[2] Use of Form

[3] Appealability of Order Denying Motion

[4] Decisions

[5] Cross References

§ 371.282 Order for and Judgment Notwithstanding the Verdict [Code Civ. Proc. § 629]

[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

§§ 371.283-371.299 [Reserved]

§ 371.300 Notice of Intention to Move for New Trial [Code Civ. Proc. § 659]

[1] FORM

[2] Use of Form

[3] Time For Hearing

[4] Filing Fee

[5] Trial Court May Grant Relief Not Requested

[6] State Statutes

[7] California Rules of Court

[8] Decisions

[a] In General

[b] Grounds

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[9] Cross References

§ 371.301 Allegation in Notice of Intention to Move for New Trial [Code Civ. Proc. § 659]--Alternative Relief in Nonjury Trial [Code Civ. Proc. § 662]

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[2] Use of Form

[3] Relief to Nonmoving Party

[4] State Statutes

[5] Decisions

§ 371.302 Declaration [Code Civ. Proc. § 2015.5] Supportive of Motion for New Trial [Code Civ. Proc. § 658]

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[2] Use of Form

[3] Irregularity in the Proceedings of the Jury

[4] Newly Discovered Evidence

[5] State Statutes

[6] Decisions

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[b] Hearsay Unacceptable

[c] Irregularity in Proceedings of Court, Jury, or Adverse Party

[d] Newly Discovered Evidence

[7] Cross References

§ 371.303 Declaration by Juror [Code Civ. Proc. §§ 658, 659a, 2015.5] Supporting Motion for New Trial [Code Civ. Proc. § 657(1), (2)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[a] Bias or Disqualification

[b] Facts Required

[c] Use of Affidavits Generally

[5] Cross References

§ 371.304 Allegation in Juror Declaration of Chance Verdict [Code Civ. Proc. § 657(2)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

§ 371.305 Declaration [Code Civ. Proc. §§ 658, 659a, 2015.5] Supporting Motion for New Trial Showing "No Knowledge" of Jury Misconduct

[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

§ 371.306 Stipulation and Order Extending Time to File Affidavits or Declarations [Code Civ. Proc. § 659a]

[1] FORM

[2] Use of Form

[3] Limitation on Extension of Time

[4] State Statutes

[5] Decisions

§ 371.307 Order Denying New Trial [Code Civ. Proc. § 660]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

§ 371.308 Order Granting New Trial [Code Civ. Proc. §§ 657, 660]

[1] FORM

[2] Use of Form

[3] Statement of Grounds and Specification of Reasons

[4] State Statutes

[5] Decisions

§§ 371.309-371.319 [Reserved]

§ 371.320 Notice of Intention to Move to Set Aside and Vacate Judgment and Enter Another and Different Judgment [Code Civ. Proc. §§ 663, 663a]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] California Rules of Court

[5] Decisions

[6] Cross References

§ 371.321 Order Setting Aside and Vacating Judgment and Directing Entry of Another and Different Judgment [Code Civ. Proc. §§ 663, 663a]

[1] FORM

[2] Use of Form

[3] Decisions

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 371 MOTIONS AFTER TRIAL
PART I. SCOPE

33-371 California Forms of Pleading and Practice--Annotated § 371.01

§ 371.01 Scope of Chapter

This chapter discusses the motion for judgment notwithstanding the verdict. It includes a written notice of motion [*see § 371.280*], an order denying the motion [*see § 371.281*], and a combined order granting and entering judgment notwithstanding the verdict [*see § 371.282*]. For an order staying execution of judgment pending the hearing on a motion for new trial that may be adapted for use in staying execution of judgment pending determination of a motion for judgment notwithstanding the verdict, see Ch. 254, *Executions and Enforcement of Judgments* .

This chapter also discusses the motion for new trial. It includes a notice of intention to move for new trial [*see § 371.300*], an allegation for alternative relief [*see § 371.301*], a declaration in support of the motion [*see § 371.302*], a stipulation and order extending time to file affidavits or declarations [*see § 371.306*], an order denying a new trial [*see § 371.307*], and an order granting a new trial [*see § 371.308*].

This chapter also discusses the motion to set aside and vacate a judgment and to enter another and different judgment under *Code Civ. Proc. §§ 663* and *663a*. It includes a form of notice of motion [*see § 371.320*] and an order granting the motion [*see § 371.321*].

For discussion, procedures, and forms for use in correcting clerical error as distinguished from judicial error, see Ch. 318, *Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts

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Chapter 371 MOTIONS AFTER TRIAL
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33-371 California Forms of Pleading and Practice--Annotated § 371.02

§ 371.02 Cross References

For examples of noticed motions generally, see Ch. 372, *Motions and Orders* .

For discussion of procedure and forms regarding service of papers, see Ch. 518, *Service of Summons and Papers* .

For an application and order shortening time, see Ch. 524, *Shortening and Extension of Time* .

For a form of notice of intention to move for new trial based on the ground of excessive or inadequate damages, see Ch. 177, *Damages* .

For a form of notice of motion and judgment dismissing an action under *Code Civ. Proc. §§ 583.320, 583.360* for a failure to bring it to trial within three years after a new trial was granted, see Ch. 212, *Dismissal* .

For a form of notice of intention to move for new trial following rendition of report of referee made pursuant to general reference [*Code Civ. Proc. § 638*], see Ch. 38, *Reference* .

For discussion of procedures and grounds for seeking mistrial generally, including grounds of juror misconduct, see *Ch. 551, Trial, § 551.150* et seq.

For vacation of an adoption decree, see Ch. 12E, *Adoptions: Attack on Decree* .

For proceedings to set aside judgments, including default judgments, see Ch. 489, *Relief From Judgments and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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33-371 California Forms of Pleading and Practice--Annotated §§ 371.03-371.09

[Reserved]

§§ 371.03[Reserved]

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Chapter 371 MOTIONS AFTER TRIAL
PART II. LEGAL BACKGROUND
A. In General

33-371 California Forms of Pleading and Practice--Annotated § 371.10

§ 371.10 Governing Statutes

Motions for judgment notwithstanding the verdict are governed generally by *Code Civ. Proc. § 629*. *Code Civ. Proc. §§ 629* and *659* govern the time within which the motion must be made. *Code Civ. Proc. § 664* governs when judgment on the verdict must be entered.

Motions for new trial are governed by *Code Civ. Proc. §§ 655-663.2* and *914*. A stay of execution of the judgment pending determination of a motion for a new trial is governed by *Code Civ. Proc. § 918*.

Motions to set aside and vacate a judgment and enter another and different judgment are governed by *Code Civ. Proc. §§ 663, 663a*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts

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PART II. LEGAL BACKGROUND
A. In General

33-371 California Forms of Pleading and Practice--Annotated § 371.11

§ 371.11 Comparison of Motions

The motion for judgment notwithstanding the verdict allows the court to enter a judgment that is different from the verdict rendered by the jury if a motion for directed verdict for the aggrieved party should have been granted had a previous motion been made [*see Code Civ. Proc. § 629*]. The granting of this motion obviates the need for a new trial, but the court cannot weigh the evidence or judge the credibility of witnesses as it can on motion for new trial. The court may only determine whether or not there is any evidence of sufficient substantiality to support the verdict [*Hale v. Farmers Ins. Exch. (1974) 42 Cal. App. 3d 681, 690, 117 Cal. Rptr. 146*].

The motion for new trial allows the court to reexamine an issue of fact or law after a trial and decision by a jury, the court, or a referee. When grounds exist, the verdict or decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues [*Code Civ. Proc. § 657*]. In nonjury trials, the court has the power to reopen the case and modify the statement of decision while denying the motion for new trial [*see Code Civ. Proc. § 662*].

The motion to set aside and vacate a judgment and enter another and different judgment allows the court to correct judicial error if its legal bases for the decision are not consistent with or supported by the facts, or if the judgment or decree is not consistent with the special verdict [*see Code Civ. Proc. § 663*]. On granting the motion, the court cannot reexamine factual issues as it can on a motion for alternative relief in lieu of granting a new trial under *Code Civ. Proc. § 662* [*Dolan v. Superior Court of San Francisco (1920) 47 Cal. App. 235, 241*]. In a case where judgment is set aside, the court must amend and correct the statement of decision [*see Code Civ. Proc. § 663*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawDirected VerdictsCivil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts

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§ 371.12 Court Has Discretion to Determine Relief Requested

When a party brings a timely post-trial motion, the trial court has broad discretion to determine the relief being requested, regardless of formal title of the motion [*Shapiro v. Prudential Prop. and Cas. Co. (1997) 52 Cal. App. 4th 722, 727, 60 Cal. Rptr. 2d 698*].

ILLUSTRATION:

Party Requested Corrected Judgment and Received New Trial on Damages. A jury rendered a special verdict finding a homeowner's insurance carrier liable for negligent misrepresentation of the insured's gun collection and awarded the insured $180,000 in damages. The homeowner had listed $379,000 as the amount lost for his firearms inventory when his home burned in the Oakland-Berkeley fire. Following entry of judgment, the homeowner moved to set aside the judgment and enter a different judgment. The trial court granted a limited new trial on the issue of damages, and the insurance carrier appealed. Did the trial court's order stand? Yes. The court of appeal held that when a party brings a timely post-trial motion, the trial court has broad discretion to determine the relief being requested. In this case, the homeowner did not move for a new trial but did request relief consistent with new trial on damages [*Shapiro v. Prudential Prop. and Cas. Co. (1997) 52 Cal. App. 4th 722, 727, 60 Cal. Rptr. 2d 698*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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[Reserved]

§§ 371.13[Reserved]

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§ 371.30 Governing Statutes

Motions for judgment notwithstanding the verdict are governed generally by *Code Civ. Proc. § 629*. *Code Civ. Proc. §§ 629* and *659* govern the time within which such motions must be made. *Code Civ. Proc. § 664* governs when judgment on the verdict must be entered.

Legal Topics:

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

A motion for judgment notwithstanding the verdict, often referred to as a motion JNOV (*i.e.*, a motion for judgment *non obstante veredicto*), is governed by *Code Civ. Proc. § 629*. The statute provides that the court, on its own motion or on motion of a party against whom a verdict has been rendered, must render judgment in favor of an aggrieved party notwithstanding the verdict whenever a motion for a directed verdict for the aggrieved party should have been granted had a previous motion been made [*see Code Civ. Proc. § 629*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 371.32 Who May Bring Motion

A judgment notwithstanding the verdict is usually sought by the defendant who thereby interposes a demurrer to the evidence. However, *Code Civ. Proc. § 629* permits a motion by an unsuccessful plaintiff [*Moore v. City & County of San Francisco (1970) 5 Cal. App. 3d 728, 734, 85 Cal. Rptr. 281*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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33-371 California Forms of Pleading and Practice--Annotated § 371.33

§ 371.33 Effect of Motion for Directed Verdict

There is no longer a condition that a motion for a directed verdict be made before a judge can consider a motion for judgment notwithstanding the verdict [*see* amendment of *Code Civ. Proc. § 629* by Stats. 1963, ch. 205; *Rollenhagen v. City of Orange (1981) 116 Cal. App. 3d 414, 417, 172 Cal. Rptr. 49*]. Furthermore, a prior denial of a motion for a directed verdict will not prevent a subsequent granting of a motion for judgment notwithstanding the verdict [*Teich v. General Mills, Inc. (1959) 170 Cal. App. 2d 791, 794, 339 P.2d 627*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 371.34 No Automatic Stay of Entry of Judgment

The motion for judgment notwithstanding the verdict no longer automatically stays entry of judgment until the motion is heard and decided [*see* amendment of *Code Civ. Proc. § 664* by Stats. 1961, ch. 604]. Judgment must be entered within 24 hours after the rendition of the verdict, whether or not a motion for judgment notwithstanding the verdict is pending, unless the court orders the case to be reserved for argument or further consideration, or grants a stay of proceedings [*Code Civ. Proc. § 664*].

Subject to *Code Civ. Proc. § 918(b)*, the trial court may stay the enforcement of any judgment or order whether or not an appeal will be taken from it and whether or not a notice of appeal has been filed [*Code Civ. Proc. § 918(a), (c)*]. *Code Civ. Proc. § 918(b)* provides that if the enforcement of the judgment or order would be stayed on appeal only by the giving of an undertaking, a trial court does not have power without the consent of the adverse party to stay the enforcement of the judgment or order pursuant to *Code Civ. Proc. § 918* for a period which exceeds for more than 10 days beyond the last date on which a notice of appeal could be filed. For forms for use in staying the execution of judgment, see Ch. 254, *Executions and Enforcement of Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic Stays

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33-371 California Forms of Pleading and Practice--Annotated § 371.35

§ 371.35 Valid Jury Verdict Required

For the court to grant a motion for judgment notwithstanding the verdict, the jury must have reached a verdict that is valid. A motion for judgment notwithstanding the verdict will not be granted if the jury has rendered a verdict that is so contradictory and unintelligible that the jury's intent is not ascertainable [*Mish v. Brockus (1950) 97 Cal. App. 2d 770, 776, 218 P.2d 849*].

The JNOV procedure, by definition, applies only to claims as to which a jury reached a verdict. It does not apply to claims decided by the court [*Herr v. Nestle U.S.A., Inc. (2003) 109 Cal. App. 4th 779, 788, 135 Cal. Rptr. 2d 477*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 371.36 General or Special Verdicts

Code Civ. Proc. § 629 mentions only a "verdict" and it is not clear whether or not the motion for judgment notwithstanding the verdict is appropriate when the jury renders a special verdict and not a general verdict [*see Code Civ. Proc. § 629*, first paragraph]. A special verdict is one in which the jury finds the conclusions of fact, leaving the conclusions of law to the court, which then enters judgment accordingly [*see Code Civ. Proc. § 624*]. Therefore, a special verdict may be inherently consistent with the evidence presented, thus obviating the need to correct a verdict that is erroneous as a matter of law by use of the motion for judgment notwithstanding the verdict.

However, despite this uncertainty, counsel may consider making the motion with respect to a special verdict when the grounds for a judgment notwithstanding the verdict exist, since it may be the only way to save the client the delay and expense of a new trial [*see § 371.39*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureTrialsJury TrialsVerdictsGeneral VerdictsCivil ProcedureTrialsJury TrialsVerdictsSpecial Verdicts

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33-371 California Forms of Pleading and Practice--Annotated § 371.37

§ 371.37 Power of Trial Judge

The power of a trial judge to grant a motion for judgment notwithstanding the verdict is identical to his or her power to grant a directed verdict [*Sweatman v. Department of Veterans Affairs (2001) 25 Cal. 4th 62, 68, 104 Cal. Rptr. 2d 602, 18 P.3d 29* ; *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 110, 120 Cal. Rptr. 681, 534 P.2d 377* ; *Tognazzini v. San Luis Coastal Unified School Dist. (2001) 86 Cal. App. 4th 1053, 1057-1058, 103 Cal. Rptr. 2d 790* ; *Alexander v. State of California (1984) 159 Cal. App. 3d 890, 896, 205 Cal. Rptr. 758*]. In other words, the judge cannot weigh the evidence or judge the credibility of witnesses, as he or she can do on a motion for new trial, but must accept the evidence tending to support the verdict as true, unless on its face it is inherently incredible [*Begnal v. Canfield & Associates, Inc. (2000) 78 Cal. App. 4th 66, 72, 92 Cal. Rptr. 2d 611* ; *Hale v. Farmers Ins. Exch. (1974) 42 Cal. App. 3d 681, 690, 117 Cal. Rptr. 146* , *disapproved on other grounds in Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822 n.5, 169 Cal. Rptr. 691, 620 P.2d 141* ; *see Stevenson v. Oceanic Bank (1990) 223 Cal. App. 3d 306, 314, 272 Cal. Rptr. 757*]. The court must disregard all conflicting evidence and indulge in every legitimate inference that may be drawn in support of the judgment, and may grant the motion only if there is no substantial evidence to support the verdict [*Tognazzini v. San Luis Coastal Unified School Dist.(2001) 86 Cal. App. 4th 1053, 1057-1058, 103 Cal. Rptr. 2d 790* ; *see § 371.39*].

Legal Topics:

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33-371 California Forms of Pleading and Practice--Annotated § 371.38

§ 371.38 Partial Judgment Notwithstanding the Verdict

[1] In General

As with a directed verdict, a trial court may grant judgment notwithstanding the verdict as to some but not all issues [*Beavers v. Allstate Ins. Co. (1990) 225 Cal. App. 3d 310, 323, 274 Cal. Rptr. 766*]. This procedure is derived from the requirement of *Code Civ. Proc. § 629* that a court grant judgment notwithstanding the verdict when a motion for directed verdict should have been granted had one been made [*Beavers v. Allstate Ins. Co. (1990) 225 Cal. App. 3d 310, 328-329, 274 Cal. Rptr. 766* (both procedural devices are different aspects of same judicial function and, for them to mesh together appropriately, it is necessary that standards be same for each procedure)].

An order granting partial judgment notwithstanding the verdict has the effect of modifying the judgment on the verdict. If the trial court otherwise upholds the verdict, then the judgment, as modified by the partial judgment notwithstanding the verdict, is immediately appealable [*Beavers v. Allstate Ins. Co. (1990) 225 Cal. App. 3d 310, 330, 274 Cal. Rptr. 766*].

[2] Effect of Order for Partial New Trial

When the trial court grants a new trial as to issues that are not affected by the partial judgment notwithstanding the verdict, then the new trial order has the effect of vacating and holding in abeyance the entire judgment, as modified by the order granting judgment notwithstanding the verdict, until one final judgment can be entered [*Beavers v. Allstate Ins. Co. (1990) 225 Cal. App. 3d 310, 330, 274 Cal. Rptr. 766*].

An exception to the rule that a partial new trial order vacates and holds in abeyance the entire judgment applies when the judgment retains sufficient vitality to support appellate review if the matter is otherwise properly brought before the appellate court [*Beavers v. Allstate Ins. Co. (1990) 225 Cal. App. 3d 310, 330, 274 Cal. Rptr. 766*]. For example, if the trial court has granted defendants a partial judgment notwithstanding the verdict on a cause of action for intentional infliction of emotional distress and a new trial based on jury misconduct on the remaining cause of action of negligence, the entire judgment is subject to review, including the portion affected by the judgment notwithstanding the verdict [*see Beavers v. Allstate Ins. Co. (1990) 225 Cal. App. 3d 310, 330, 274 Cal. Rptr. 766*].

Legal Topics:

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§ 371.39 Lack of Substantial Evidence

The grounds for granting a motion for judgment notwithstanding the verdict are the same as for granting a motion for directed verdict or nonsuit [*see Code Civ. Proc. § 629*; *Reynolds v. Willson (1958) 51 Cal. 2d 94, 99, 331 P.2d 48*].

The primary requirement for judgment notwithstanding the verdict is that there be no substantial conflict in the evidence [*Begnal v. Canfield & Associates, Inc. (2000) 78 Cal. App. 4th 66, 72, 92 Cal. Rptr. 2d 611* ; *Alexander v. State of California (1984) 159 Cal. App. 3d 890, 896, 205 Cal. Rptr. 758* ; *Robinson v. North American Life & Cas. Co. (1963) 215 Cal. App. 2d 111, 118, 30 Cal. Rptr. 57*]. Thus, the court will grant a motion for judgment notwithstanding the verdict only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion will be denied [*Hauter v. Zogarts (1975) 14 Cal. 3d 104, 110, 120 Cal. Rptr. 681, 534 P.2d 377* ; *Begnal v. Canfield & Associates, Inc. (2000) 78 Cal. App. 4th 66, 72, 92 Cal. Rptr. 2d 611* ; *California Shoppers, Inc. v. Royal Globe Insurance Co. (1985) 175 Cal. App. 3d 1, 30, 221 Cal. Rptr. 171* ; *Sprigg v. Garcin (1980) 105 Cal. App. 3d 869, 873, 164 Cal. Rptr. 677*].

Legal Topics:

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33-371 California Forms of Pleading and Practice--Annotated § 371.40

§ 371.40 Standard

[1] Motion by Defendant

The court will grant the verdict when and only when, disregarding conflicting evidence on behalf of defendant and giving plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from that evidence, no evidence of sufficient substantiality supports a verdict in plaintiff's favor [*Reynolds v. Willson (1958) 51 Cal. 2d 94, 99, 331 P.2d 48* ; *Musgrove v. Ambrose Properties (1978) 87 Cal. App. 3d 44, 51, 150 Cal. Rptr. 722*].

[2] Motion by Plaintiff

The court will grant judgment notwithstanding the verdict in favor of the plaintiff if the evidence, as a matter of law, dictates a determination of all the issues in the case in his or her favor [*Jach v. Edson (1967) 255 Cal. App. 2d 96, 99, 62 Cal. Rptr. 925*].

Legal Topics:

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§ 371.41 Procedure on Court's Own Motion

The court may grant judgment notwithstanding the verdict on its own motion after return of the verdict if it decides that the verdict is not supported by substantial evidence [*Code Civ. Proc. § 629*; *see also § 371.39*]. It must act before the expiration of its power to rule on a motion for new trial and after five days' notice to the parties [*Code Civ. Proc. §§ 629, 659*].

One court of appeal has held that the requirement of *Code Civ. Proc. § 629* that a motion for judgment notwithstanding the verdict be madewithin the time limits for filing and serving notice of a motion for new trial does not apply to the court acting on its own motion [*see Sturgeon v. Leavitt (1979) 94 Cal. App. 3d 957, 963-964, 156 Cal. Rptr. 687*]. This time limitation would only apply to motions made by parties. Therefore, there would be no time restrictions on the court as long as it gives 5 days notice to the parties and acts on the motion after the time for serving and filing a motion for new trial has expired and before the time for ruling on a motion for new trial expires [*see Sturgeon v. Leavitt (1979) 94 Cal. App. 3d 957, 963-964, 156 Cal. Rptr. 687* ; *see also Code Civ. Proc. §§ 629, 659, 664*].

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§ 371.42 Procedure for Motion by Party

[1] Oral or Written Notice of Motion

Code Civ. Proc. § 629, the statute authorizing judgments notwithstanding the verdict, does not state how the party against whom the verdict is rendered is to proceed. However, it appears that the motion may be made either orally, that is, in court immediately after the rendition of the verdict, or at a later hearing pursuant to a written notice of motion [*see Abreu v. Svenhard's Swedish Bakery (1989) 208 Cal. App. 3d 1446, 1452 n.2, 257 Cal. Rptr. 26*].

[2] Time for Making Motion

[a] In General

A party must make the motion within the time specified by *Code Civ. Proc. § 659* for filing and serving notice of intention to move for a new trial [*Code Civ. Proc. § 629*].

Under *Code Civ. Proc. § 659*, a notice of intention to move for a new trial may be filed before the entry of judgment, but after the jury, court, or referee has rendered a decision. It may alternatively be filed after judgment is entered, within the earliest of the following times [*Code Civ. Proc. § 659*]:

- 15 days after the court clerk mailed notice of entry of judgment under *Code Civ. Proc. § 664.5*.
- 15 days after any party served a written notice of entry of judgment on the moving party.
- 180 days after judgment is entered.

The statutory requirement of giving written notice of entry of judgment is satisfied by serving a copy of the file-stamped judgment in a county that no longer maintains a judgment book. To start the statutory time period for bringing a motion for judgment notwithstanding the verdict, it is not necessary to serve on the opposing party a separate document entitled notice of entry of judgment and to file in the trial court that document, as well as a copy of the judgment and proof of its

service [*Palmer v. GTE (2003) 30 Cal. 4th 1265, 1267-1268, 135 Cal. Rptr. 2d 654, 70 P.3d 1067*].

Under the express terms of *Code Civ. Proc. §§ 629, 659*, the time limits for bringing a motion for judgment notwithstanding the verdict start to run either on the date of the court clerk's mailing or on the date of service on the moving party of notice of entry of judgment. To be service pursuant to *Code Civ. Proc. § 664.5* as required by section 659, the notice of entry of judgment mailed by the clerk must affirmatively state it is given "upon order by the court" or "under section 664.5" [*Palmer v. GTE (2003) 30 Cal. 4th 1265, 1277, 135 Cal. Rptr. 2d 654, 70 P.3d 1067* ; *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc. (1997) 15 Cal. 4th 51, 64, 61 Cal. Rptr. 2d 166, 931 P.2d 344*]. Otherwise, the time limits for motions for a new trial are triggered by service on the moving party of "written notice" of the "entry of judgment" [*Palmer v. GTE (2003) 30 Cal. 4th 1265, 1277, 135 Cal. Rptr. 2d 654, 70 P.3d 1067* ; *Code Civ. Proc. § 659*]. When the moving party is served by mail, service is complete at the time the notice of entry of judgment is deposited in the mailbox [*Code Civ. Proc. § 1013(a)*; *Palmer v. GTE (2003) 30 Cal. 4th 1265, 1277, 135 Cal. Rptr. 2d 654, 70 P.3d 1067* ; *Westrec Marina Management, Inc. v. Jardine Ins. Brokers Orange County, Inc. (2000) 85 Cal. App. 4th 1042, 1048, 102 Cal. Rptr. 2d 673*].

The written notice of entry of judgment served on the party who moves for judgment notwithstanding the verdict need not be a separate document entitled notice of entry of judgment. No particular form of notice is required, and in counties that do not maintain a judgment book, a file-stamped copy of the judgment suffices as "written notice" [*Palmer v. GTE (2003) 30 Cal. 4th 1265, 1277, 135 Cal. Rptr. 2d 654, 70 P.3d 1067* ; *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc. (1997) 15 Cal. 4th 51, 57 n.2, 61 Cal. Rptr. 2d 166, 931 P.2d 344* ; *McCordic v. Crawford (1943) 23 Cal. 2d 1, 5, 142 P.2d 7*].

Nothing in sections 629, 659 expressly requires the party serving written notice of entry of judgment to file any document with the trial court. If a prevailing party, consistent with section 664.5, serves written notice of the entry of judgment on the party moving for judgment notwithstanding the verdict and files the original notice of entry and a proof of service, the prevailing party necessarily will have complied with section 659 by "serving written notice." The posttrial motion statutes do not, however, require filing of the original notice of entry (or of a file-stamped copy of the judgment) accompanied by proof of service in order to start the time limits for bringing the posttrial motions [*Palmer v. GTE (2003) 30 Cal. 4th 1265, 1277-1278, 135 Cal. Rptr. 2d 654, 70 P.3d 1067* (*Van Beurden's* suggestion that more is required by party to trigger time limits for new trial is dictum because it was unnecessary to its holding)].

This time limit is not lengthened by *Code Civ. Proc. § 1013*, which generally extends the time for exercising a right or doing an act when service is by mail, Express Mail or other method of overnight delivery, or fax [*Code Civ. Proc. §§ 659, 1013*]. *Code Civ. Proc. § 1010.6*, whichextends the time for exercising a right or doing an act after electronic service, as authorized by *section 1010.6*, also provides that it does not operate to extend the time for filing notice of intention to move for new trial [*Code Civ. Proc. § 1010.6(a)(6)*].

If a party fails to make a motion for judgment notwithstanding the verdict within the applicable deadline, the court lacks jurisdiction to hear the motion [*Younesi v. Lane (1991) 228 Cal. App. 3d 967, 972-973, 279 Cal. Rptr. 89* , *disapproved on other grounds in Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc. (1997) 15 Cal. 4th 51, 63, 61 Cal. Rptr. 2d 166, 931 P.2d 344* (disapproving *Younesi* to the extent it held that appellate courts must "presume" that a notice of entry of judgment mailed by clerk was "ordered" by the court, and thus constituted proper notice under *Code Civ. Proc. § 664.5* sufficient to trigger the 15-day deadline under *Code Civ. Proc. § 659*)].

[b] Effect on Time for New Trial Motion

The making of a motion for judgment notwithstanding the verdict will not extend the time within which a party may file and serve notice of intention to move for a new trial [*Code Civ. Proc. § 629*].

Legal Topics:

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§ 371.43 Ruling on Motion

[1] When Court May Rule on Motion

The court will not rule on the motion for judgment notwithstanding the verdict until expiration of the time within which a notice of intention to move for a new trial must be served and filed [*Code Civ. Proc. § 629*; for time period, *see § 371.42[2]*].

Pursuant to *Code Civ. Proc. §§ 629, 660*, where there is no new trial motion filed, the latest date for ruling on a motion for JNOV is either of the following, whichever is earlier [*Pratt v. Vencor (2003) 105 Cal. App. 4th 905, 907, 129 Cal. Rptr. 2d 741*]:

- Sixty days from and after the mailing of notice of entry of judgment by the clerk of the court pursuant to *Code Civ. Proc. § 664.5*.

- Sixty days from and after service on the moving party by any party of written notice of the entry of the judgment.

The power of the court to rule on the motion for judgment notwithstanding the verdict does not extend beyond the last date on which the court can rule on a motion for new trial [*Code Civ. Proc. § 629*; for time period, *see § 371.181*]. If this time passes without a determination on the motion, the motion is, in effect, denied [*Code Civ. Proc. § 629*].

[2] With Motion for New Trial

If a notice of intention to move for a new trial is also filed, the court must rule on both motions at the same time [*Code Civ. Proc. § 629*]. The statutory language is directory and not mandatory; substantial compliance is sufficient provided rulings on both motions are made within the requisite time period [*Espinoza v. Rossini (1966) 247 Cal. App. 2d 40, 46, 55 Cal. Rptr. 205*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts

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§ 371.44 Effect of Judgment N.O.V. on Issue of Damages

If the court sets aside the judgment for defendants, notwithstanding the verdict, and proceeds to assess damages, it deprives defendants of their consitutional right to jury trial on that question [*Spillman v. City etc. of San Francisco (1967) 252 Cal. App. 2d 782, 787, 60 Cal. Rptr. 809*]. However, there is a split of authority over the propriety of the court's granting of plaintiff's motion for judgment notwithstanding the verdict with a concurrent order for a new trial on the sole issue of damages.

One line of authority holds that it is error for the court to declare liability, notwithstanding the verdict, and to grant a new trial as to damages. This would violate the established rule of no multiple final judgments in a single action [*see Moore v. City & County of San Francisco (1970) 5 Cal. App. 3d 728, 734, 85 Cal. Rptr. 281* ; *see Jach v. Edson (1967) 255 Cal. App. 2d 96, 101, 62 Cal. Rptr. 925*].

Another line of cases holds that the grant of a new trial on all issues would involve a costly repetition of testimony, and therefore, the granting of the motion for judgment notwithstanding the verdict and for a new trial on the issue of damages is within the discretion of the trial court [*see Gordon v. Strawther Enterprises, Inc. (1969) 273 Cal. App. 2d 504, 517-518, 78 Cal. Rptr. 417* ; *see Hauter v. Zogarts (1975) 14 Cal. 3d 104, 110, 121, 120 Cal. Rptr. 681, 534 P.2d 377* (judgment notwithstanding verdict affirmed and case remanded to trial court to ascertain damages; although not entirely clear from the opinion, the effect of the decision appears to be an affirmance of the holding in *Gordon*, which would result in a disapproval by implication of contrary holdings in *Moore* and *Jach*)].

Legal Topics:

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§ 371.45 Notice of Court's Order

When a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order must be given by the prevailing party to all other parties or their attorneys, in the manner provided in *Code Civ. Proc. §§ 1010-1020* [*see* Ch. 518, *Service of Summons and Papers*], unless notice is waived by all parties in open court and is entered in the minutes [*Code Civ. Proc. § 1019.5(a)*]. In the case of a signed appealable order entered in a contested action or proceeding, other than a proceeding for voidable marriage or for dissolution of marriage, legal separation, and summary dissolution, or small claims action, notice of entry of the order must be given in accordance with *Code Civ. Proc. § 664.5* [*see* Ch. 372, *Motions and Orders*].

Legal Topics:

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

[1] Reconsideration and Appeal

Generally, an order granting a judgment notwithstanding the verdict is neither a final judgment nor an appealable order [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 602, 12 Cal. Rptr. 488, 361 P.2d 20* ; *Herman v. Shandor (1970) 8 Cal. App. 3d 476, 479, 87 Cal. Rptr. 443*]. However, the court may reconsider an order granting a motion for judgment notwithstanding the verdict at any time before judgment is entered on the order [*Jach v. Edson (1968) 255 Cal. App. 2d 96, 99, 62 Cal. Rptr. 925*].

An appeal will lie from an order denying a motion for judgment notwithstanding the verdict [*Code Civ. Proc. § 904.1(a)(4)*; *Sweatman v. Department of Veterans Affairs (2001) 25 Cal. 4th 62, 68, 104 Cal. Rptr. 2d 602, 18 P.3d 29* ; *Elisalda v. Welch's Sand & Gravel Co. (1968) 260 Cal. App. 2d 46, 50, 67 Cal. Rptr. 57*]. Also, if judgment is entered pursuant to the court's granting of the motion, that judgment is appealable [*Sweatman v. Department of Veterans Affairs (2001) 25 Cal. 4th 62, 68, 104 Cal. Rptr. 2d 602, 18 P.3d 29* ; *Quintal v. Laurel Grove Hospital (1964) 62 Cal. 2d 154, 159, 41 Cal. Rptr. 577, 397 P.2d 161*]. For discussion of appeals of postjudgment orders, including judgments notwithstanding the verdict, and protective or precautionary cross appeals of the original judgment in the event the postjudgment order is reversed on appeal, see Ch. 42, *Appeal: Notice of Appeal, § 42.12[4A]*.

[2] Standard on Review

The reviewing court follows the trial court's method of consideration of the evidence. When reviewing the validity of a judgment notwithstanding the verdict, the appellate court must resolve any conflict in the evidence and draw all reasonable inferences from the evidence in favor of the jury's verdict [*Henrioulle v. Marin Ventures, Inc. (1978) 20 Cal. 3d 512, 515, 143 Cal. Rptr. 247, 573 P.2d 465*]. The appellate court will affirm a judgment entered on an order granting judgment notwithstanding the verdict only if, reviewing all the evidence in the light most favorable to the party in whose favor the jury rendered the verdict, resolving all conflicts, and drawing all inferences in favor of that party, and deferring to the implicit credibility determinations of the trier of fact, there is no substantial evidence to support the jury's verdict [*Begnal v. Canfield & Associates, Inc. (2000) 78 Cal. App. 4th 66, 72, 92 Cal. Rptr. 2d 611*]. The scope of appellate review of a trial court's denial of a motion for judgment notwithstanding the verdict is to determine whether

there is any substantial evidence, contradicted or uncontradicted, supporting the jury's conclusion, and when so found to uphold the trial court's denial of the motion [*Romo v. Ford Motor Co. (2002) 99 Cal. App. 4th 1115, 1138, 122 Cal. Rptr. 2d 139* ; *Wright v. Beverly Fabrics, Inc. (2002) 95 Cal. App. 4th 346, 351, 115 Cal. Rptr. 2d 503* ; *Begnal v. Canfield & Associates, Inc. (2000) 92 Cal. Rptr. 2d 611* ; *Pusateri v. E.F. Hutton & Co. (1986) 180 Cal. App. 3d 247, 250, 225 Cal. Rptr. 526*]. However, if the issues deal solely with statutory interpretation and application of a statute to undisputed facts, review takes place de novo [*Wright v. Beverly Fabrics, Inc. (2002) 95 Cal. App. 4th 346, 352, 115 Cal. Rptr. 2d 503*].

However, where the issues deal solely with the application of a statute to the facts supporting the verdict, which is a question of law, the appellate court will review the issues de novo [*Gunnell v. Metrocolor Laboratories, Inc. (2001) 92 Cal. App. 4th 710, 718-719, 112 Cal. Rptr. 2d 195*].

The appellate court's function is to review the discretion exercised by the trial court in light of the evidence but not to replace that discretion unless it was arbitrarily exercised [*Gordon v. Strawther Enterprises, Inc. (1969) 273 Cal. App. 2d 504, 511, 78 Cal. Rptr. 417*].

[3] Effect of Reversal

Although a reversal usually remands a case for a new trial, the effect of a reversal on a judgment notwithstanding the verdict is to restore the proceeding to the state of the record before the erroneous judgment was entered. In other words, appellant will have a recorded verdict in his or her favor, but will have no judgment entered. Appellant is then entitled under *Code Civ. Proc. § 664* to have judgment entered in his or her favor in conformity with the verdict [*Ferran v. Mulcrevy (1935) 9 Cal. App. 2d 129, 131, 48 P.2d 984* ; for discussion of procedure for entry of judgments under *Code Civ. Proc. § 664, see* Ch. 318, *Judgments*].

When a judgment notwithstanding the verdict is reversed on appeal, the reinstated judgment on the verdict is a new judgment for purposes of appeal, and the time for filing a notice of appeal from the reinstated judgment commences to run on the issuance of remittitur from the appellate court [*Lippert v. AVCO Community Developers, Inc. (1976) 60 Cal. App. 3d 775, 779, 131 Cal. Rptr. 730*]. For further discussion of *Lippert*, see *Ch. 42, Appeal: Notice of Appeal, § 42.12[4A]*.

[4] Alternative Motions

[a] Motion for Judgment Notwithstanding Verdict Denied, Motion for New Trial Denied

The trial judge may decide, for example, that the evidence substantially supports the verdict, and, on examining the weight of the evidence, that the judgment rendered should stand. If the motions for judgment notwithstanding the verdict and for new trial are both denied and it appears on appeal that the motion for judgment notwithstanding the verdict should have been granted, the appellate court may order judgment to be so entered [*Code Civ. Proc. § 629*].

[b] Judgment Notwithstanding Verdict Denied, New Trial Granted

If a new trial is granted, but a motion for judgment notwithstanding the verdict is denied, the order denying the motion for judgment notwithstanding the verdict is reviewable on appeal by the aggrieved party [*Code Civ. Proc. § 629*].

[c] Both Motions Granted

If the court grants both motions, the order granting a new trial becomes effective only if the judgment notwithstanding the verdict is reversed on appeal and the order granting a new trial is either not appealed or is confirmed on appeal [*Code Civ. Proc. § 629*]. Thus, the motion for judgment notwithstanding the verdict will determine the outcome of the case in favor of the movant and a new trial will not proceed. However, if the opposing party appeals and the judgment

notwithstanding the verdict is reversed, the motion for new trial becomes effective [*see Dietrich v. Litton Industries, Inc. (1970) 12 Cal. App. 3d 704, 719, 90 Cal. Rptr. 856* (order granting new trial confirmed on appeal); *but see Jach v. Edson (1967) 255 Cal. App. 2d 96, 100, 62 Cal. Rptr. 925* (order granting new trial remanded for reconsideration)].

If the court grants a partial judgment notwithstanding the verdict, the new trial order is contingent on reversal of the judgment notwithstanding the verdict to the extent the orders overlap, and is otherwise effective [*Beavers v. Allstate Ins. Co. (1990) 225 Cal. App. 3d 310, 332 n.7, 274 Cal. Rptr. 766*].

Legal Topics:

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[Reserved]

§§ 371.47[Reserved]

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§ 371.60 Governing Statutes

The motion for new trial is governed by *Code Civ. Proc. §§ 655-663.2*, and *914*. Stay of execution of judgment pending determination of a motion for new trial is governed by *Code Civ. Proc. § 918* [*see Ch. 43, Appeal: Stay of Proceedings, § 43.19*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 371.61 Purpose of Motion

A new trial is a reexamination of an issue of fact in the same court after a trial and decision by a jury, court, or referee [*Code Civ. Proc. § 656*]. If the required grounds exist, the verdict and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on application of the party aggrieved [*Code Civ. Proc. § 657*].

Legal Topics:

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§ 371.62 Motion for New Trial When There Has Been No Trial on Merits

A trial court may reexamine issues of law when there has been no trial on the merits [*Carney v. Simmonds (1957) 49 Cal. 2d 84, 90, 315 P.2d 305*], and a new trial may be appropriate after any of the following:

- A judgment of dismissal after a demurrer is sustained [*Carney v. Simmonds (1957) 49 Cal. 2d 84, 88, 315 P.2d 305*].

- A judgment of dismissal generally [*Carney v. Simmonds (1957) 49 Cal. 2d 84, 88, 315 P.2d 305*].

- A judgment on the pleadings [*Carney v. Simmonds (1957) 49 Cal. 2d 84, 88, 315 P.2d 305*].

- A judgment on an agreed statement of ultimate facts [*Carney v. Simmonds (1957) 49 Cal. 2d 84, 88, 315 P.2d 305*].

- A judgment of nonsuit either on plaintiff's opening statement or after his or her evidence is presented [*Carney v. Simmonds (1957) 49 Cal. 2d 84, 89, 315 P.2d 305*].

- A judgment on a directed verdict [*Carney v. Simmonds (1957) 49 Cal. 2d 84, 89, 315 P.2d 305*].

- A summary judgment [*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 858, 107 Cal. Rptr. 2d 841, 24 P.3d 493* ; *Sole Energy Co. v. Petrominerals Corp. (2005) 128 Cal. App. 4th 187, 192-194, 26 Cal. Rptr. 3d 790* ; *Green v. Del-Camp Investments (1961) 193 Cal. App. 2d 479, 481, 14 Cal. Rptr. 420*].

- A default judgment granted as a sanction for defendants' failure to comply with discovery orders [*Jacuzzi v. Jacuzzi Bros. (1966) 243 Cal. App. 2d 1, 24, 52 Cal. Rptr. 147*].

- An order granting a motion to quash a writ of execution [*In re Marriage of Beilock (1978) 81 Cal.*

App. 3d 713, 719, 146 Cal. Rptr. 675].

- A judgment entered when an appellate court vacated a previous judgment with instructions for entry of a new judgment for a greater amount of damages [*Woodcock v. Fontana Scaffolding & Equip. Co. (1968) 69 Cal. 2d 452, 459-460, 72 Cal. Rptr. 217, 445 P.2d 881*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 371.63 Grounds for Granting New Trial

[1] Summary of Grounds

The following causes, when they materially affect the substantial rights of the moving party, are grounds for an order vacating a verdict, or vacating or modifying any other decision, and granting a new or further trial on some or all of the issues [*Code Civ. Proc. § 657*]:

- An irregularity in the proceedings of the court, the jury, or the adverse party, or any court order or abuse of discretion that prevented a party from having a fair trial [*Code Civ. Proc. § 657(1)*; *§ 371.63[2]*].

- Jury misconduct [*Code Civ. Proc. § 657(2)*; *§ 371.63[3]*].

- Accident or surprise, which ordinary prudence could not have guarded against [*Code Civ. Proc. § 657(3)*; *§ 371.63[4]*].

- Newly discovered evidence that is material for the party making the application and that the party, with reasonable diligence, could not have discovered and produced at trial [*Code Civ. Proc. § 657(4)*; *§ 371.63[5]*].

- Excessive or inadequate damages [*Code Civ. Proc. § 657(5)*; *§ 371.63[6]*].

- Insufficiency of the evidence to justify the verdict, or the verdict or other decision is against the law [*Code Civ. Proc. § 657(6)*; *§ 371.63[7], [8]*].

- An error in law occurring at the trial and excepted to by the party moving for new trial [*Code Civ. Proc. § 657(7)*; *§ 371.63[9]*].

Whenever an application to vacate a verdict and for a new trial is made on any of the first four grounds under *Code Civ. Proc. § 657*, set out above, the application must be made with affidavits, whereas an application based on any of the other grounds stated in that section are to be made on the minutes of the court [*Code Civ. Proc. § 658*; *see* further discussion in *§ 371.64[3], [4]*].

A new trial may also be granted on these additional grounds:

- Lack of phonographic report of trial due to death or disability of the reporter or due to loss or destruction of reporter's notes in whole or in substantial part [*Code Civ. Proc. §§ 657.1, 914*; *§ 371.63[10]*].

- Loss or destruction of bill of exceptions or statement of case due to public calamity [*Code Civ. Proc. § 663.1*; *§ 371.63[11]*].

[2] Irregularity in Proceedings

[a] General Rule

A motion for new trial may be granted if there is an irregularity in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion by which a party was prevented from having a fair trial [*Code Civ. Proc. § 657(1)*]. An irregularity is any overt act of the trial court, jury, or adverse party that violates the right to a fair and impartial trial and amounts to misconduct [*Gray v. Robinson (1939) 91 P.2d 194]* . The irregularity must materially affect the substantial rights of a party [*Code Civ. Proc. § 657(1)*; *Gay v. Torrance (1904) 145 Cal. 144, 148, 78 P. 540]* .

Irregularity in the proceedings must be shown by affidavit or declaration [*see Code Civ. Proc. § 658*]. For further discussion of this requirement, see *§ 371.64[3]*.

[b] Attorney Misconduct

When misconduct by the attorney for an adverse party is alleged as grounds for new trial, prejudicial error is committed only when the attorney's conduct consists of a willful or persistent effort to place before a jury clearly incompetent evidence, or the statements or remarks of counsel are of such a character as to manifest a design on his or her part to arouse the jury's resentment, prejudices, or passions against the moving party, or to enlist the jury's sympathy in favor of his or her client and against the moving party, and any jury instructions to disregard such offered evidence or objectionable remarks cannot be deemed to have cured the evil or ill effect [*Tingley v. Times Mirror (1907) 151 Cal. 1, 23, 89 P. 1097* ; *Dominguez v. Pantalone (1989) 212 Cal. App. 3d 201, 210-211, 260 Cal. Rptr. 431]* . In assessing that prejudice, each case ultimately must rest on the court's view of the overall record, taking into account such factors, among others, as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control, of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances [*Dominguez v. Pantalone (1989) 212 Cal. App. 3d 201, 211, 260 Cal. Rptr. 431]* .

[3] Jury Misconduct

[a] General Rule

A motion for a new trial may be brought on the ground of jury misconduct [*see Code Civ. Proc. § 657(1), (2)*]. The right to an unbiased and unprejudiced jury is an inseparable and inalienable part of the right to trial by jury guaranteed in the federal constitution [*Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 110, 95 Cal. Rptr. 516, 485 P.2d 1132]* . Thus, this ground is functionally equilavent to the ground of irregularity in the jury proceedings preventing a fair trial [*see Code Civ. Proc. § 657(1)* and discussion in *§ 371.63[2]*]. For discussion of the principle types of jury

misconduct, see *§ 371.63[3][b]*.

Jury misconduct must be shown by affidavit or declaration [*see Code Civ. Proc. § 658* and *§§ 371.303, 371.304*; for further discussion of this requirement, see *§ 371.64[3]*]. Once established, jury misconduct gives rise to a rebuttable presumption of prejudice [*see § 371.63[3][c]*].

If a party or that party's counsel becomes aware of facts constituting jury misconduct at any time during trial, the party must promptly bring the matter to the court's attention; failure to do so in a timely manner results in the point being deemed waived as a basis for a motion for a new trial [*Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 103, 95 Cal. Rptr. 516, 485 P.2d 1132* ; *see also People v. Adame (1973) 36 Cal. App. 3d 402, 409-410, 111 Cal. Rptr. 462]* . Thus, a party seeking a new trial on the grounds of jury impropriety must usually present, in addition toother affidavits showing jury misconduct, a "no knowledge" affidavit showing that neither the moving party nor that party's counsel knew of that misconduct before the verdict was returned [*Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 103, 95 Cal. Rptr. 516, 485 P.2d 1132* ; *see § 371.305* and for further discussion of this requirement, see *§ 371.63[3][d]*].

Note that a single act may show not only jury misconduct, or bias, but may also help show another ground for vacating the jury's verdict and granting a new trial. For example, jury misconduct may be included as a reason for the conclusion that the excessive damages were awarded [*Tramell v. McDonnell Douglas Corp. (1984) 163 Cal. App. 3d 157, 166, 171, 209 Cal. Rptr. 427* (jury in wrongful death action improperly considered income taxes on verdict and attorney's fees and discussed public benefit from taxes levied on verdict)].

[b] Types of Jury Misconduct

[i] Concealment of Bias on Voir Dire

It is jury misconduct for which a new trial may be granted if a juror has concealed during voir dire examination a state of mind that prevents his or her acting impartially. The concealment need not be intentional [*City of Pleasant Hill v. First Baptist Church (1969) 1 Cal. App. 3d 384, 431, 82 Cal. Rptr. 1]* . Thus, a juror's statement during recess that the jury could bring in a verdict at that time rather than waiting until conclusion of the trial showed misconduct on voir dire because that juror had stated on voir dire examination that he could keep an open mind until all the evidence and applicable law were presented [*Deward v. Clough (1966) 245 Cal. App. 2d 439, 443-445, 54 Cal. Rptr. 68]* .

Juror affidavits may be used to show occurrences during the trial and deliberations that tend to prove the existence of prejudice in the mind of a juror that would prevent that juror from acting impartially and to show that bias or disqualification was concealed by false answers on voir dire. For example, affidavits were accepted to impeach a verdict when a juror had knowledge as to the qualifications of an expert appraisal witness as a result of a real estate course he was taking at the time of trial and failed to state that special knowledge on voir dire [*People ex rel. Dept. Pub. Wks. v. Curtis (1967) 255 Cal. App. 2d 378, 389, 63 Cal. Rptr. 138]* .

[ii] Prejudicial Communication by or to Juror

It is misconduct for a juror during trial to discuss the matter under investigation outside the court or receive any information on the subject of the litigation except in open court and in the manner provided by law [*People v. Cissna (2010) 182 Cal. App. 4th 475, 486-487, -- Cal. Rptr. 3d --* ; *City of Pleasant Hill v. First Baptist Church (1969) 1 Cal. App. 3d 384, 431, 82 Cal. Rptr. 1*].

The following are examples of juror communications held to constitute misconduct under this rule:

- A juror speaks on a daily basis about the merits of the case with a nonjuror friend [*People v. Cissna*

(2010) 182 Cal. App. 4th 475, 485-486, -- Cal. Rptr. 3d --] .

- A juror reads newspaper accounts of the case and the subject matter of the accounts are likely to influence the juror [*Province v. Center for Women's Health & Family Birth (1993) 20 Cal. App. 4th 1673, 1679, 25 Cal. Rptr. 2d 667]* .

- A juror communicates to the rest of jury information outside the evidence that is relevant to important issues in the case [*People v. Southern Cal. Edison Co. (1976) 56 Cal. App. 3d 593, 598, 128 Cal. Rptr. 697* (juror questioned non-juror acquaintance who was employed by a party to the case, concerning the likelihood of alleged injuries, and communicated the employee's answers during deliberations); *People ex rel. Dept. Pub. Wks. v. Curtis (1967) 255 Cal. App. 2d 378, 390, 63 Cal. Rptr. 138* (juror conveyed during deliberation information the juror had previously learned in a class concerning methods of appraisal and the appraiser qualifications, which bore directly on controlling issues in the case)].

- A juror communicates to the rest of jury a statement of law not contained in the court's instructions [*Young v. Brunicardi (1986) 187 Cal. App. 3d 1344, 1349-1350, 232 Cal. Rptr. 588]* .

- A juror refers to a dictionary for the definition of the term "preponderance," and discussing the definition during deliberations in relation to a jury instruction concerning "preponderance of the evidence" [*Glage v. Hawes Firearms Co. (1990) 226 Cal. App. 3d 314, 323, 276 Cal. Rptr. 430* (variance between legal meaning and dictionary meaning created clear and substantial risk that jury might misapply burden of proof)].

- A juror communicates to other jurors an opinion on the merits of the case before it has been submitted for consideration [*City of Pleasant Hill v. First Baptist Church (1969) 1 Cal. App. 3d 384, 434, 82 Cal. Rptr. 1 ; § 371.63[3][b][i]*].

- A juror solicits a personal physician's opinion concerning an issue in a malpractice case and communicates the response to other jurors [*Weathers v. Kaiser Foundation Hosps. (1971) 5 Cal. 3d 98, 106-107, 95 Cal. Rptr. 516, 485 P.2d 1132]* .

Instances in which a juror communication has been held not to justify a new trial include the following:

- A mere communication between a witness and a juror on matters unrelated to the case, without any showing that the juror was influenced by the communication to the prejudice of the moving party [*City of Pleasant Hill v. First Baptist Church (1969) 1 Cal. App. 3d 384, 427-428, 82 Cal. Rptr. 1* (social greeting between juror and appraisal witness on courthouse steps recollecting a previous business transaction but not involving discussion of the case)].

- A juror communicates with a witness, seeking information concerning the case, but the witness specifically refuses to answer the questions or converse with the juror [*City of Los Angeles v. Lowensohn (1976) 54 Cal. App. 3d 625, 636-638, 127 Cal. Rptr. 417]* .

[iii] Experimentation Producing New Evidence

It is misconduct for a juror to engage in an experiment that produces new evidence [*Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co. (1991) 234 Cal. App. 3d 1724, 1746, 286 Cal. Rptr. 435]* . For example, it is improper for a juror to compare turnstiles in markets and communicate the results of this investigation to other jurors in a case involving an injury allegely the result of a market turnstile [*Lankster v. Alpha Beta Co. (1993) 15 Cal. App. 4th 678,*

682, 18 Cal. Rptr. 2d 923 (juror's comparing turnstiles in other markets to one that injured plaintiff and communicating investigation to other jurors)].

The entire jury, however, may carry out experiments that are within the lines of offered evidence [*Higgins v. L.A. Gas & Electric Co. (1911) 159 Cal. 651, 657, 115 P. 313]* . Nothing requires that the jury's deliberations be entirely verbal. A court would expect a conscientious jury to examine the testimony of the witnesses closely, no less so when that testimony takes the form of a physical act [*People v. Cooper (1979) 95 Cal. App. 3d 844, 853-854, 157 Cal. Rptr. 348]* . There is no misconduct if the jurors merely duplicate a demonstration presented at trial [*see Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co. (1991) 234 Cal. App. 3d 1724, 1746-1747, 286 Cal. Rptr. 435* (citing *Cooper, above*)].

[iv] Chance Verdict

Jury misconduct expressly includes the jury's arriving at a verdict or finding "by a resort to a determination by chance" [*see Code Civ. Proc. § 657(2)*]. Thus, verdicts reached by tossing a coin, casting a die, drawing lots or other forms of gambling are improper chance verdicts [*Dixon v. Pluns (1893) 98 Cal. 384, 387, 33 P. 268* ; *Chronakis v. Windsor (1993) 14 Cal. App. 4th 1058, 1064, 18 Cal. Rptr. 2d 106]* .

A "quotient verdict" may also constitute an improper "chance" verdict. An improper quotient verdict is one the jury has reached by simply adding the damages favored by each juror and dividing by the number of jurors, after previously agreeing to be bound by such a verdict without further deliberation [*Dixon v. Pluns (1893) 98 Cal. 384, 387, 33 P. 268* ; *Chronakis v. Windsor (1993) 14 Cal. App. 4th 1058, 1064, 18 Cal. Rptr. 2d 106]* . A quotient verdict is not an improper chance verdict, however, when it does not result from a prior agreement to be bound without further consideration. If the jurors discuss and ballot on the adoption or rejection of a average sum, it is conclusive evidence they were not bound by a previous agreement to accept it without further consideration [*Bardessono v. Michels (1970) 3 Cal. 3d 780, 794-795, 91 Cal. Rptr. 760, 478 P.2d 480* ; *Diamond Springs Lime Co. v. American River Constructors (1971) 16 Cal. App. 3d 581, 605, 94 Cal. Rptr. 200]* . Evidence that jurors rounded off an average sum before reaching a final verdict is also proof that they had no agreement to adopt the average [*Will v. Southern Pacific Co. (1941) 18 Cal. 2d 468, 477-478, 116 P.2d 44* ; *Glass v. Gulf Oil Corp. (1970) 12 Cal. App. 3d 412, 436, 96 Cal. Rptr. 902]* .

Jury misconduct consisting of a chance verdict may be proved the affidavit of any one of the jurors [*Code Civ. Proc. § 657(2)*; *see also § 371.64[3]*]. The only evidence sufficient to rebut juror affidavits showing that jurors reached a chance verdict is credible counteraffidavits showing that the verdict was proper, affirmative statements or evidence of subsequent deliberation by the jury, or evidence of rounding off the average figure that is apparent on the face of the affidavits [*see e.g. Bardessono v. Michels (1970) 3 Cal. 3d 780, 794, 91 Cal. Rptr. 760, 478 P.2d 480* (counteraffidavits show average figure served as basis for further deliberation); *Will v. Southern Pacific Co. (1941) 18 Cal. 2d 468, 477, 116 P.2d 44* (no counteraffidavits rebut evidence of improper verdict); *Glass v. Gulf Oil Corp. (1970) 12 Cal. App. 3d 412, 435, 96 Cal. Rptr. 902* (evidence of rounding off appeared on face of affidavits)]. When there are conflicting jurors' affidavits on the issue of a chance verdict, the trial court may make its determination on the issue, and that decision will not be disturbed on appeal [*Diamond Springs Lime Co. v. American River Constructors (1971) 16 Cal. App. 3d 581, 605, 94 Cal. Rptr. 200* ; *see also Chronakis v. Windsor (1993) 14 Cal. App. 4th 1058, 1067, 18 Cal. Rptr. 2d 106* (appellate court will not draw inferences from jury affidavits to rebut prima facie evidence of quotient verdict)].

[c] Presumption of Prejudice

Jurors ordinarily are presumed to have followed the court's instructions [*People v. Sanchez (2001) 26 Cal. 4th 834, 852, 111 Cal. Rptr. 2d 129, 29 P.3d 209* ; *Craddock v. Kmart Corp. (2001) 89 Cal. App. 4th 1300, 1308, 107 Cal. Rptr. 2d 881* ; *see also People v. Chavez (1958) 50 Cal. 2d 778, 790, 329 P.2d 907* (on appeal, reviewing court must

presume jury followed trial court's instructions)]. In the absence of evidence to the contrary, the presumption that the jury adhered to the limiting instructions will control [*People v. Beach (1983) 147 Cal. App. 3d 612, 625, 195 Cal. Rptr. 381* ; *People v. Zack (1986) 184 Cal. App. 3d 409, 416, 229 Cal. Rptr. 317]* . However, juror misconduct, such as the receipt of information about a party or the case that was not part of the evidence received at trial, leads to a presumption that a party was prejudiced and may establish juror bias [*People v. Cissna (2010) 182 Cal. App. 4th 475, 487, -- Cal. Rptr. 3d --* ; *Romo v. Ford Motor Co. (2002) 99 Cal. App. 4th 1115, 1131, 122 Cal. Rptr. 2d 139]* . This presumption may be rebutted only by an affirmative evidentiary showing that prejudice does not exist [*Glage v. Hawes Firearms Co. (1990) 226 Cal. App. 3d 314, 321, 276 Cal. Rptr. 430* ; *Young v. Brunicardi (1986) 187 Cal. App. 3d 1344, 1348, 232 Cal. Rptr. 588* ; *see Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 417, 185 Cal. Rptr. 654, 650 P.2d 1171* (although presumption applied in criminal cases, no principled distinction may be drawn between civil and criminal cases for purposes of presumption of prejudice arising from juror misconduct)]. The presumption of prejudice in a civil case is rebutted if the reviewing court reaches one of the following three conclusions [*Romo v. Ford Motor Co. (2002) 99 Cal. App. 4th 1115, 1131-1132, 122 Cal. Rptr. 2d 139]* :

> (1) The record establishes the absence of prejudice.
>
> (2) A review of the entire record shows there is no reasonable probability of actual harm to the complaining party under the constitutional standard of *People v. Watson (1956) 46 Cal. 2d 818, 836, 299 P.2d 243* [*see Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 416-417, 185 Cal. Rptr. 654, 650 P.2d 1171* ; *McDonald v. Southern Pacific Transportation Co. (1999) 71 Cal. App. 4th 256, 265, 83 Cal. Rptr. 2d 734]* .
>
> (3) In the case of possible "actual bias" of a juror whose vote may have been determinative of the verdict, there is no substantial likelihood that at least one juror was impermissibly influenced [*see Province v. Center for Women's Health & Family Birth (1993) 20 Cal. App. 4th 1673, 1679-1680, 25 Cal. Rptr. 2d 667* , *disapproved on other grounds* in *Heller v. Norcal Mutual Ins. Co. (1994) 8 Cal. 4th 30, 41, 32 Cal. Rptr. 2d 200, 876 P.2d 999* ; *see also Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 110, 95 Cal. Rptr. 516, 485 P.2d 1132]* .

Prejudice exists when there is a substantial likelihood that enough jurors were impermissibly influenced by the misconduct such that it affected the verdict to the detriment of the moving party. Because only three fourths of a civil jury is required to render a verdict, the number of tainted jurors necessary to permit a finding of substantial likelihood of impermissible influence will vary depending on the circumstances of the case. For example, conclusive evidence of only one tainted juror would be sufficient to preclude rebuttal of the presumption of prejudice when the jury's verdict is nine to three and the tainted juror voted with the majority. By contrast, the record itself rebuts the presumption when the evidence indicates that only juror is tainted and the jury's verdict was unanimous; the remaining untainted jurors are sufficiently numerous to render a proper and fair verdict [*see Glage v. Hawes Firearms Co. (1990) 226 Cal. App. 3d 314, 321-323 n.5, 276 Cal. Rptr. 430]* .

On the other hand, other courts have held that if the record shows a substantial likelihood that even one juror was impermissibly influenced to the defendant's detriment, reversal is required regardless of whether the court is convinced an unbiased jury would have reached the same result [*see People v. Cissna (2010) 182 Cal. App. 4th 475, 488, -- Cal. Rptr. 3d --]* .

[d] "No Knowledge" Declaration

A party who requests the court to grant a new trial on the ground of jury misconduct must usually file a "no-knowledge" declaration, stating that neither the attorney nor the client was aware of the alleged misconduct of the juror prior to the verdict [*Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 103, 95 Cal. Rptr. 516, 485 P.2d 1132* ; *see also Wiley v. Southern Pacific Transportation Co., (1990) 220 Cal. App. 3d 177, 188, 269 Cal. Rptr. 240* ; for

discussion of procedure for filing and service of affidavits for use on a motion for new trial based on misconduct of the jury, see *§ 371.64[3]*].

The policy behind this requirement is to prevent a party from remaining silent after becoming aware of misconduct, in the hope of a successful verdict, while secretly preserving the error in the event of an unfavorable one [*Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 103, 95 Cal. Rptr. 516, 485 P.2d 1132]* .

The "no knowledge" affidavit may be submitted by one person, but it must affirmatively establish that neither the attorney nor the client had knowledge before the verdict of jury misconduct [*People v. Southern Cal. Edison Co. (1976) 56 Cal. App. 3d 593, 599, 128 Cal. Rptr. 697* (attorney's declaration established lack of knowledge only as to attorney and did not establish client's lack of knowledge)]. The "no knowledge" declaration is not required when the alleged jury misconduct is of such a nature that it could not have been known to a party until after a verdict was rendered [*Krouse v. Graham (1977) 19 Cal. 3d 59, 82, 137 Cal. Rptr. 863, 562 P.2d 1022* (comments made by several jurors during deliberations)]. Failure to file a "no-knowledge" declaration is a curable procedural defect; a party who does not object in the trial court to the absence of this declaration waives his or her right to raise the issue for the first time on appeal [*Wiley v. Southern Pacific Transportation Co. (1990) 220 Cal. App. 3d 177, 186-188, 269 Cal. Rptr. 240]* .

For a form of "no knowledge" affidavit, *see § 371.305*.

[4] Accident or Surprise

The motion for new trial may be granted on the ground of accident or surprise, which ordinary prudence could not have guarded against [*Code Civ. Proc. § 657(3)*]. The terms "accident" and "surprise," although not strictly synonymous, have substantially the same meaning, as each is used to denote some condition or situation in which a party to a cause is unexpectedly placed to that party's injury and without any negligence of his or her own [*Kauffman v. De Mutiis (1948) 31 Cal. 2d 429, 432, 189 P.2d 271* ; *see In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 154-155, 242 Cal. Rptr. 649* (negligence of party's counsel is not a grou nd on which a new trial may be granted under *Code Civ. Proc. § 657(3)*)].

Accident or surprise must be shown by affidavit or declaration [*see Code Civ. Proc. § 658*; for further discussion of this requirement, see *§ 371.64[3]*].

[5] Newly Discovered Evidence

Under *Code Civ. Proc. § 657(4)*, a motion for new trial may be granted on the grounds of newly discovered evidence, material for the party makingthe application, that he or she could not with reasonable diligence have discovered and produced at trial [*Code Civ. Proc. § 657(4)*]. All of the followings element must be established [*Wood v. Jamison (2008) 167 Cal. App. 4th 156, 161, 83 Cal. Rptr. 3d 877* ; *Elysium Institute, Inc. v. County of Los Angeles (1991) 232 Cal. App. 3d 408, 438, 283 Cal. Rptr. 688*]:

- The evidence is newly discovered.
- There was reasonable diligence in discovering and producing the evidence.
- The evidence is material to the moving party's case.

Since a litigant should exhaust every reasonable effort to produce all existing evidence at trial, the claim of newly discovered evidence as a basis for a new trial is looked on with suspicion and disfavor by the courts [*Hicks v. Ocean Shore Railroad, Inc. (1941) 18 Cal. 2d 773, 789, 117 P.2d 850]* .

Newly discovered evidence must be established by affidavit or declaration [*see Code Civ. Proc. § 658*; *see also § 371.64[3]*].

[6] Excessive or Inadequate Damages Awarded

A motion for new trial is not granted on the ground of excessive or inadequate damages unless, after weighing the evidence, the court is convinced from the entire record, including reasonable inferences drawn from it, that the court or jury clearly should have reached a different verdict or decision [*Code Civ. Proc. § 657*]. The judge is not permitted to substitute his or her judgment for that of the jury on the question of damages unless it appears from the record that the jury verdict was improper. For example, a trial judge's personal opinion based on the ranges of awards in other cases is not a lawful basis for granting a new trial for excessive damages [*Bigboy v. County of San Diego (1984) 154 Cal. App. 3d 397, 406-407, 201 Cal. Rptr. 226]* .

The court may grant a new trial subject to the condition that the motion is denied if the court obtains consent from the appropriate party for the addition or reduction of damages [*Code Civ. Proc. § 662.5*; *see also § 371.70*].

Excessive or inadequate damages must be established by the minutes of the court [*see Code Civ. Proc. § 658*; for further discussion of this requirement, see *§ 371.64[4]*].

For further discussion, see Ch. 177, *Damages* .

[7] Insufficient Evidence to Justify Verdict or Other Decision

Under *Code Civ. Proc. § 657(6)*, a motion for new trial may be granted on the ground of insufficiency of the evidence to justify the verdict or other decision. A new trial may not be granted on this ground unless the court is convinced from the entire record, including inferences from it, that the court or jury should have reached a different verdict or decision [*Code Civ. Proc. § 657(6)*].

If a trial court rules on a motion for a new trial made on the ground of insufficiency of the evidence, the trial judge is required to weigh the evidence and judge the credibility of witnesses. Whereas it is the exclusive province of the jury to find the facts, it is the duty of the trial court to see that this function is intelligently and justly performed, and, in the exercise of its supervisory power over the verdict, the court, on motion for a new trial, should consider the probative force of the evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict. Insufficiency of the evidence in this context means an absence of evidence or that the evidence received, in the individual judgment of the trial judge, is lacking in probative force to establish the proposition of fact to which it is addressed [*Dominguez v. Pantalone (1989) 212 Cal. App. 3d 201, 215, 260 Cal. Rptr. 431]* .

The ground that the evidence was insufficient to justify the verdict must be established by the minutes of the court [*see Code Civ. Proc. § 658*; *see also § 371.64[4]*].

[8] Verdict or Decision Against Law

Another ground for granting a motion for new trial is that the verdict or decision is against law [*Code Civ. Proc. § 657(6)*]. This ground is limited to situations that are not covered by the other subdivisions of *Code Civ. Proc. § 657*, such as error in law occurring at trial [*see McCown v. Spencer (1970) 8 Cal. App. 3d 216, 229 n.3, 87 Cal. Rptr. 213]* or insufficiency of evidence [*see Brooks v. Harootunian (1968) 261 Cal. App. 2d 680, 686, 68 Cal. Rptr. 374]* .

A verdict is against law when it is contrary to correct jury instructions [*Kaiser Cement & Gypsum Corp. v. Allis-Chalmers Mfg. Co. (1973) 35 Cal. App. 3d 948, 958, 111 Cal. Rptr. 210]* . A decision or verdict is also against law

(1) when there is a failure to find on a material issue; (2) when the findings are irreconcilable; and (3) when the evidence is insufficient in law and without conflict on any material point. If a general verdict is returned, it is against law only when it is unsupported by any substantial evidence. The court cannot merely weigh conflicting evidence and find a balance against the judgment [*Kralyevich v. Magrini (1959) 172 Cal. App. 2d 784, 789, 342 P.2d 903]* . Inconsistent general and special verdicts are also against the law and require a new trial [*Oxford v. Foster Wheeler LLC (2009) 177 Cal. App. 4th 700, 721-722, 99 Cal. Rptr. 3d 418*].

1981 legislation amended *Code Civ. Proc. § 632*, eliminating findings of fact and conclusions of law. Nevertheless, it appears that a decision may be against law when the court has failed to resolve a specified controverted issue in its statement of decision or if the statement of decision is inconsistent, ambiguous, or uncertain [*see Code Civ. Proc. §§ 632, 634*; *Renfer v. Skaggs (1950) 96 Cal. App. 2d 380, 383, 215 P.2d 487]* . But these errors must materially affect the substantial rights of the aggrieved party in order for a new trial to be granted [*see Code Civ. Proc. § 657*].

The ground that the verdict or decision is against the law must be established by the minutes of the court [*see Code Civ. Proc. § 658*; for further discussion of this requirement, see *§ 371.64[4]*].

[9] Error in Law Occurring at Trial

A motion for a new trial may be granted for an error in law occurring at trial and excepted to by the party making the application [*Code Civ. Proc. § 657(7)*]. Errors of law occurring at trial may include erroneous rulings on evidence [*Richard v. Scott (1978) 79 Cal. App. 3d 57, 63, 144 Cal. Rptr. 672]* ; erroneous or misleading jury instructions [*Bruck v. Adams (1968) 259 Cal. App. 2d 585, 587, 66 Cal. Rptr. 395]* ; erroneous denial of a jury trial [*Johnson v. Superior Court (1932) 121 Cal. App. 288, 292, 8 P.2d 1047]* ; erroneous grant of nonsuit [*Castillo v. Warren (1941) 44 Cal. App. 2d 903, 907, 113 P.2d 232]* ; or the erroneous denial of a motion for directed verdict [*Steele v. Werner (1938) 28 Cal. App. 2d 554, 556, 83 P.2d 56]* .

This ground differs from *Code Civ. Proc. § 657(1)*, irregularity in proceedings of court, jury, or adverse party, in that this motion must be made on the minutes of the court, as opposed to the affidavits or declarations of *Code Civ. Proc. § 657(1)*, and the moving party must have ex cepted to the error of law occurring at trial [*see Code Civ. Proc. §§ 657(7), 658*]. Many orders and rulings, however, are deemed excepted to without formal objection at trial [*see Code Civ. Proc. § 647*].

The ground that there was an error in law must be established by the minutes of the court [*see Code Civ. Proc. § 658*; for further discussion of this requirement, see *§ 371.64[4]*].

[10] Lack of Phonographic Report of Trial

A motion for new trial may be granted if the right to a phonographic report has not been waived and when it is impossible to have a phonographic report of trial due to death or disability of the reporter or loss or destruction of the reporter's notes in substantial part [*Code Civ. Proc. §§ 657.1, 914*]. The moving party must show that the transcript is necessary to present substantial issues, that it cannot be procured for one of the reasons in the statute, and that proper diligence has been exercised [*Rambo v. Rambo (1948) 84 Cal. App. 2d 632, 634, 191 P.2d 480* ; *see In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 151-152, 242 Cal. Rptr. 649]* .

When determining whether the reporter's transcript is necessary to present substantial issues, a reasonable test of substantiality is whether questions the moving party desires to raise on appeal could be properly considered without the lost portion of the transcript. If they could, then the loss would not be considered substantial [*Santa Cruz County Redevelopment Agency v. Izant (1995) 37 Cal. App. 4th 141, 147, 43 Cal. Rptr. 2d 366]* .

If a court orders a new trial, it must order a complete, and not a partial, new trial. For example, if reporter's notes for the

first day of a three-day trial are lost, a court may not order that a witness who previously testified on that first day testify again, and that a transcript of the new testimony be added to the transcript of the second and third days of trial to "complete" a record for appeal. Other than a complete new trial, the permissible solutions to the problem of the missing reporter's notes are limited to stipulations, agreed statement, or settled statement [*Weinstein v. E.F. Hutton & Co. (1990) 220 Cal. App. 3d 364, 369, 269 Cal. Rptr. 443]* . For further discussion of these procedures, see Ch. 44, *Appeal: Preparing and Filing the Record* , and Ch. 533, *Stipulations* .

[11] Loss or Destruction of Bill of Exceptions or Statement of Case

The court may grant a new trial of any action or proceeding when all of the following conditions exist [*Code Civ. Proc. § 663.1*]:

(a) Any proposed bill of exceptions or statement of the case on motion for new trial is lost or destroyed by reason of conflagration or other public calamity;

(b) No other record of the proceedings of the trial can be obtained;

(c) The action or proceeding is subject to review by motion for new trial pending at the time of the destruction;

(d) The court in which the action or proceeding is pending deems it impossible or impracticable to restore those proceedings and to settle a bill of exceptions or statement of the case containing those proceedings, so as to enable the court to review the judgment or order by motion for new trial; and

(e) At the time of the loss or destruction, a motion for new trial was pending.

In order to grant a new trial on these grounds, it is unnecessary to have any bill of exceptions or statement of the case settled, but on the facts required by *Code Civ. Proc. § 663.1* being shown to the satisfaction of the court by affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]), or otherwise, the court may grant a new trial [*Code Civ. Proc. § 663.1*].

Pending the hearing on a motion pursuant to *Code Civ. Proc. § 663.1* to grant a new trial, the time within which a bill of exceptions may be prepared, served, or presented for settlement is extended and does not commence to run until the decision on the motion. The motion must be made within 30 days after the loss or destruction of the records [*Code Civ. Proc. § 663.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

California Forms of Pleading and Practice--Annotated

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C. Motion for New Trial

33-371 California Forms of Pleading and Practice--Annotated § 371.64

§ 371.64 Procedure

[1] Motion Must Be Made by Party

The aggrieved party must apply for a new trial since the court has no inherent power to grant a new trial on its own motion [*see Code Civ. Proc. § 657*; *Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 919, 114 Cal. Rptr. 622* ; *Marriage of Herr (2009) 174 Cal. App. 4th 1463, 1470-1471, 95 Cal. Rptr. 3d 464* ; *see also Donovan v. Poway Unified School District (2008) 167 Cal. App. 4th 567, 620-621, 84 Cal. Rptr. 3d 285* (when only one defendant served notice of intention to move for new trial, court lacked jurisdiction to grant new trial to other defendants)].

[2] Notice of Intention

[a] In General

The party must file with the court clerk and serve on each adverse party a notice of intention to move for a new trial [*Code Civ. Proc. § 659*]. The notice must be accompanied by a filing fee in an amount prescribed by *Gov. Code § 70617(a)(5)*. The notice must designate the ground or grounds on which the motion will be made and should designate whether the motion will be made on affidavits (or declarations [*Code Civ. Proc. § 2015.5*]) or the court minutes or both [*see Code Civ. Proc. § 659*; *see also § 371.64[3], [4]*]. However, since it is implicit in the statement of grounds whether the motion will be made on affidavits or the minutes of the court, it is not necessary, though it is advisable, to specify [*Nichols v. Hast (1965) 62 Cal. 2d 598, 601, 43 Cal. Rptr. 641, 400 P.2d 753]* .

[b] Time for Filing

A notice of intention to move for a new trial may be filed before the entry of judgment, but after the jury, court, or referee has rendered a decision [*Code Civ. Proc. §§ 656, 659*]. It may also be filed after judgment is entered and within the earliest of the following times [*Code Civ. Proc. § 659*]:

(1) 15 days after the court clerk mailed notice of entry of judgment under *Code Civ. Proc. § 664.5*;

(2) 15 days after any party served a written notice of entry of judgment on the moving party; or

(3) 180 days after judgment is entered.

The statutory requirement of giving written notice of entry of judgment is satisfied by serving a copy of the file-stamped judgment in a county that no longer maintains a judgment book. To start the statutory time period for bringing and ruling on a motion for a new trial, it is not necessary to serve on the opposing party a separate document entitled notice of entry of judgment and to file in the trial court that document, as well as a copy of the judgment and proof of its service [*Palmer v. GTE (2003) 30 Cal. 4th 1265, 1267-1268, 135 Cal. Rptr. 2d 654, 70 P.3d 1067]* .

Under the express terms of *Code Civ. Proc. § 659*, the time limits for filing a motion of intention to move for a new trial start to run either on the date of the court clerk's mailing or on the date of service on the moving party of notice of entry of judgment. To be service pursuant to *Code Civ. Proc. § 664.5* as required by *section 659*, the notice of entry of judgment mailed by the clerk must affirmatively state it is given "upon order by the court" or "under section *664.5*" [*Palmer v. GTE (2003) 30 Cal. 4th 1265, 1277, 135 Cal. Rptr. 2d 654, 70 P.3d 1067* ; *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc. (1997) 15 Cal. 4th 51, 64, 61 Cal. Rptr. 2d 166, 931 P.2d 344]* . Otherwise, the time limits for the notice of intention to move for a new trial are triggered by service on the moving party of "written notice" of the "entry of judgment" [*Palmer v. GTE (2003) 30 Cal. 4th 1265, 1277, 135 Cal. Rptr. 2d 654, 70 P.3d 1067* ; *Code Civ. Proc. § 659*]. When the moving party is served by mail, service is complete at the time the notice of entry of judgment is deposited in the mailbox [*Code Civ. Proc. § 1013(a)*; *Palmer v. GTE (2003) 30 Cal. 4th 1265, 1277, 135 Cal. Rptr. 2d 654, 70 P.3d 1067* ; *Westrec Marina Management, Inc. v. Jardine Ins. Brokers Orange County, Inc. (2000) 85 Cal. App. 4th 1042, 1048, 102 Cal. Rptr. 2d 673]* . The time limits set forth in *Code Civ. Proc. § 659* are jurisdictional [*In re Marriage of Herr (2009) 174 Cal. App. 4th 1463, 1468-1469, 95 Cal. Rptr. 3d 464*].

The written notice of entry of judgment served on the party who serves notice of intention to move for a new trial need not be a separate document entitled notice of entry of judgment. No particular form of notice is required, and in counties that do not maintain a judgment book a file-stamped copy of the judgment suffices as "written notice" [*Palmer v. GTE (2003) 30 Cal. 4th 1265, 1277, 135 Cal. Rptr. 2d 654, 70 P.3d 1067* ; *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc. (1997) 15 Cal. 4th 51, 57 n.2, 61 Cal. Rptr. 2d 166, 931 P.2d 344* ; *McCordic v. Crawford (1943) 23 Cal. 2d 1, 5, 142 P.2d 7]* .

Nothing in *Code Civ. Proc. § 659* expressly requires the party serving written notice of entry of judgment to file any document with the trial court. If a prevailing party, consistent with *Code Civ. Proc. § 664.5*, serves written notice of the entry of judgment on the party intending to move for new trial and files the original notice of entry and a proof of service, the prevailing party necessarily will have complied with *Code Civ. Proc. § 659* by "serving written notice" on a party that intends to move for a new trial. The posttrial motion statutes do not, however, require filing of the original notice of entry (or of a file-stamped copy of the judgment) accompanied by proof of service in order to start the time limits for bringing posttrial motions [*Palmer v. GTE (2003) 30 Cal. 4th 1265, 1277-1278, 135 Cal. Rptr. 2d 654, 70 P.3d 1067* (*Van Beurden's* suggestion that more is required by party to trigger time limits for new trial is dictum because it was unnecessary to its holding)].

In computing time, the first day is excluded and the last day is included unless it is a holiday [*Code Civ. Proc. §§ 12, 12a*]. A notice of intention to move cannot be filed until all issues in the case are decided, and if filed prematurely, the notice is void [*City of Santa Barbara v. Superior Court (1966) 240 Cal. App. 2d 612, 614, 49 Cal. Rptr. 798]* . Once a party files a notice of motion for a new trial, each other party has 15 days after serviceto file a notice of motion for new trial. The time limit for filing and serving the notice cannot be extended by the court or by stipulation of the parties. This time limit is also not lengthened by *Code Civ. Proc. § 1013*, which extends the time for exercising a right or doing an act when service is by mail [*Code Civ. Proc. § 659*].

[3] Affidavits and Counteraffidavits

[a] When Required

A motion made on the grounds set out in *Code Civ. Proc. § 657(1)-(4)*, that is, irregularity of the proceedings, misconduct of the jury, accident or surprise, or newly discovered evidence must be made on affidavits (or declarations [*Code Civ. Proc. § 2015.5*]) [*Code Civ. Proc. § 658*]. A motion made on any other ground must be made on the court minutes [*Code Civ. Proc. § 658*; *see § 371.64[4]*].

The requirement that affidavits or declarations be used is mandatory. Thus, for example, it is proper for the trial court to refuse to allow oral testimony from subpoenaed jurors. Allowing subpoenaed testimony as distinguished from a voluntary affidavit or declaration would stifle independent thought in the jury room and undermine the integrity of the jury process [*Linhart v. Nelson (1976) 18 Cal. 3d 641, 644-645, 134 Cal. Rptr. 813, 557 P.2d 104]* .

[b] Service and Filing

Within 10 days of filing the notice of intention to move for a new trial, the moving party is required to serve on all other parties and file any affidavits intended to be used on the motion. The other parties have 10 days after the service within which to serve on the moving party and file counteraffidavits. These times may, for good cause shown by affidavit or by written stipulation of the parties, be extended by any judge for an additional period not to exceed 20 days [*Code Civ. Proc. § 659a*].

The provision under *Code Civ. Proc. § 659a* permitting the trial court to extend the period within which to file an affidavit supporting a new trial is mandatory. Therefore, a court may not consider a party's affidavit's filed after the expiration of that period [*Erikson v. Weiner (1996) 48 Cal. App. 4th 1663, 1666, 1672, 56 Cal. Rptr. 2d 362]* .

[c] Juror Affidavits

The affidavit of any juror may be used to show jury misconduct by reason of a chance verdict [*see Code Civ. Proc. § 657(2)* and discussion in *§ 371.63[3][b][iv]*]. Jurors' affidavits may also be used to show jury misconduct generally [*see City of Pleasant Hill v. First Baptist Church (1969) 1 Cal. App. 3d 384, 428, 82 Cal. Rptr. 1* (juror affidavit to show preducial communication by or to juror); *Campbell v. Zokelt (1969) 272 Cal. App.2d 315, 319, 77 Cal. Rptr. 561* (juror affidavit to show juror had concealed bias during voir dire)]. For further discussion, see *§ 371.63[3]*].

Juror affidavits used to impeach a verdict may show statements made, or conduct, conditions, or events, when these are of a character that is likely to have influenced the verdict improperly. They may not be used to show that a juror was actually influenced or to show mental processes of jurors in reaching the verdict [*Evid. Code § 1150(a)*]. In other words, a juror affidavit must provide overt facts that can be objectively corroborated, rather than subjective thoughts that cannot [*People v. Cissna (2010) 182 Cal. App. 4th 475, 486-487, -- Cal. Rptr. 3d --* ; *Bell v. Bayerische Motoren Werke Aktiengesellschaft (2010) 181 Cal. App. 4th 1108, 1127-1128, 105 Cal. Rptr. 3d 485* ; *Province v. Center for Women's Health & Family Birth (1993) 20 Cal. App. 4th 1673, 1678, 25 Cal. Rptr. 2d 667* ; *Chronakis v. Windsor (1993) 14 Cal. App. 4th 1058, 1068-1069, 18 Cal. Rptr. 2d 106* ; *see also Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co. (1991) 234 Cal. App. 3d 1724, 1745, 286 Cal. Rptr. 435* (trial judge may not review replay of particular language used by various jurors during deliberations and make subjective determination as to its propriety; this would intrude on traditional inviolate nature of jury proceedings)].

A juror's affidavit may not be used for the purpose of construing or interpreting the verdict [*Telles v. Title Ins. & Trust Co. (1969) 3 Cal. App. 3d 179, 187, 83 Cal. Rptr. 444]* .

[4] Use of Reporter's Notes, Pleadings, and Files

At the hearing on the motion, counsel may refer in all cases to pleadings and court orders on file. When the motion is made on the court minutes, counsel may refer to depositions, documentary evidence offered at trial, and to the reporter's report of the trial proceedings or a certified transcript of this report. If there is no report or certified transcript, counsel may refer to proceedings occurring at trial that are within the recollection of the judge. If the proceedings have been phonographically reported, but the reporter's notes have not been transcribed, the court or either party may request that the reporter attend the hearing and read the notes or any portion of the notes that the court or either party require [*Code Civ. Proc. § 660*].

[5] Supporting Memorandum

Within 10 days after filing notice of intention to move for a new trial, the moving party must serve and file a memorandum in support of the motion [*Cal. Rules of Ct., Rule 3.1600(a)*]. If the moving party fails to serve and file the prescribed memorandum, the court may deny the motion without a hearing on the merits [*Cal. Rules of Ct., Rule 3.1600(b)*].

Within 10 days after the moving party files its memorandum, any adverse party may serve and file a memorandum in reply [*Cal. Rules of Ct., Rule 3.1600(a)*].

For general discussion and forms, see Ch. 417, *Points and Authorities* .

[6] With Motion for Judgment Notwithstanding Verdict

A motion for new trial is frequently made with a motion for judgment notwithstanding the verdict [*see Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 919, 114 Cal. Rptr. 622]* . The making of a motion for judgment notwithstanding the verdict will not extend the time within which a party may file and serve notice of intention to move for a new trial [*Code Civ. Proc. § 629*]. If both motions are filed, the court must rule on them at the same time [*Code Civ. Proc. § 629*]. The court, however, cannot grant the motion for judgment notwithstanding the verdict with a conditional order granting the motion for new trial if for any reason the judgment notwithstanding the verdict is reversed on appeal [*Widener v. Pacific Gas & Electric Co. (1977) 75 Cal. App. 3d 415, 436, 142 Cal. Rptr. 304]* . For a discussion of the granting and denial of alternative motions, see *§ 371.46*.

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§ 371.65 Stay of Execution of Judgment Pending Determination of Motion

Subject to *Code Civ. Proc. § 918(b)*, the trial court may stay the enforcement of any judgment or order, whether or not an appeal will be taken from it and whether or not a notice of appeal has been filed [*Code Civ. Proc. § 918(a), (c)*]. If the enforcement of the judgment or order would be stayed on appeal only by the giving of an undertaking, a trial court does not have power, without the consent of the adverse party, to stay the enforcement pursuant to *Code Civ. Proc. § 918* for a period that extends for more than 10 days beyond the last date on which a notice of appeal could be filed [*Code Civ. Proc. § 918(b)*]. For forms for use in staying the execution of a judgment pending determination of a motion for new trial, see Ch. 254, *Executions and Enforcement of Judgments* .

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§ 371.66 Hearing and Determination of Motion

[1] Proper Judge

The judge who presided at trial will hear the motion unless that judge is unable to do so or is absent from the county at the time [*Code Civ. Proc. § 661*]. If that is the case, any other judge of the same court may hear the motion [*Code Civ. Proc. § 661*]. If a judge other than the trial judge hears the motion, it must be argued or submitted without oral argument 10 days before expiration of the court's power to act on the motion [*Code Civ. Proc. § 661*]. In a bifurcated trial in superior court, in which different judges heard the issues, each judge must hear and determine the motion with respect to the issues that he or she tried [*Cal. Rules of Ct., Rule 3.1591*].

If the parties consent, the motion may be heard by the judge who tried the case at any location in the state [*Gov. Code § 69741.1*].

The parties may agree to a procedure by which the judge who presided at trial can hear arguments on a motion for new trial telephonically if the judge is out of state at the time. If that judge remains unable to sign the order because he or she remains out of state, that judge may appoint another judge to sign the order regarding the motion for new trial [*see Dell'Oca v. The Bank of New York Trust Co., N.A. (2008) 159 Cal. App. 4th 531, 542-546, 71 Cal. Rptr. 3d 737*].

[2] Time For Hearing

When the time for filing counteraffidavits expires, the clerk must immediately call the motion to the attention of the judge who then designates the time for oral argument [*Code Civ. Proc. § 661*]. The hearing and disposition of the motion takes precedence over all other matters except criminal cases, probate matters, and cases actually on trial [*Code Civ. Proc. § 660*]. The clerk then gives the parties five days notice by mail [*Code Civ. Proc. § 661*]. The notice of hearing and the hearing are mandatory unless waived by the parties [*Avery v. Associated Seed Growers, Inc. (1963) 211 Cal. App. 2d 613, 627, 27 Cal. Rptr. 625]* . Although the court cannot dispense with the hearing, it is not required to hear oral argument [*Code Civ. Proc. § 661*]. The motion may be heard and determined in the judge's chambers [*Code Civ. Proc. § 166(a)(2)*].

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§ 371.67 Ruling on Motion

[1] Time Limitation

Except as otherwise provided in *Code Civ. Proc. § 12a* (extension for holiday), the power of the court to rule on the motion expires 60 days after the court clerk mails notice of the entry of judgment under *Code Civ. Proc. § 664.5*, or 60 days after any party serves a written notice of entry of judgment on the moving party, whichever is earlier [*Code Civ. Proc. § 660*]. The statutory requirement of giving written notice of entry of judgment is satisfied by serving a copy of the file-stamped judgment in a county that no longer maintains a judgment book [*Palmer v. GTE (2003) 30 Cal. 4th 1265, 1277-1278, 135 Cal. Rptr. 2d 654, 70 P.3d 1067]* .

A motion for a new trial is not determined until an order ruling on the motion is entered in the permanent minutes of the court or is signed by the judge and filed with the clerk. The entry of a new trial order in the permanent minutes of the court constitutes a determination of the motion when a minute order as entered expressly directs that a written order be prepared, signed and filed [*Code Civ. Proc. § 660*; *see* *Fergus v. Songer (2007) 150 Cal. App. 4th 552, 564, 59 Cal. Rptr. 3d 273* (minute order expressly directed defendant to prepare order and submit it to court with approval as to form; minute order was order ruling on motion because it stated motion for new trial was granted as to amount of damages only and denied as to issue of malpractice)].

To start the statutory time period for ruling on a motion for a new trial, it is not necessary to serve on the opposing party a separate document entitled notice of entry of judgment and to file in the trial court that document, as well as a copy of the judgment and proof of its service [*Palmer v. GTE (2003) 30 Cal. 4th 1265, 1277-1278, 135 Cal. Rptr. 2d 654, 70 P.3d 1067]* . *Code Civ. Proc. § 1013(a)*, which extends certain deadlines when service is made by mail, does not extend the deadline for the court to act under *Code Civ. Proc. § 660* [*Westrec Marina Management, Inc. v. Jardine Ins. Brokers Orange County, Inc. (2000) 85 Cal. App. 4th 1042, 1047-1049, 102 Cal. Rptr. 2d 673]* . If notice of entry of judgment has not been given, then the court's power to rule expires 60 days after the first notice of intention to move for a new trial was filed [*Code Civ. Proc. § 660*; *see* *Westrec Marina Management, Inc. v. Jardine Ins. Brokers Orange County, Inc. (2000) 85 Cal. App. 4th 1042, 1048, 102 Cal. Rptr. 2d673* (once 60 days ran after plaintiffs served notice of entry of judgment on defendants by mail, motion was denied by operation of law and court lacked jurisdiction to act

on it)]. If the motion is not determined within these time limits, the effect is a denial of the motion without further court order [*Code Civ. Proc. § 660*].

The 60-day time limit of *Code Civ. Proc. § 660* is jurisdictional. It cannot be evaded by stipulation or *nunc pro tunc* order [*see Fischer v. First Int'l. Bank(2003) 109 Cal. App. 4th 1433, 1450-1451, 1 Cal. Rptr. 3d 162* (where there was no notice of entry of judgment, order granting motion for new trial more than 60 days after filing of notice of intention to move for new trial was void for lack of jurisdiction)].

If there has been no entry of judgment, the trial court is not bound by the 60-day time limitation. For example, when only a "Ruling After Court Trial" has been entered, the court may treat the motion for new trial as a motion to reconsider, reopen, or reargue and enter a judgment different from that first announced, even though the time to rule on new trial motion has expired [*In re Marriage of Micalizio (1988) 199 Cal. App. 3d 662, 672, 245 Cal. Rptr. 673]* .

[2] When Motion Determined

A motion for new trial is not determined by the court within the meaning of *Code Civ. Proc. § 660* until an order ruling on the motion is (1) entered in the permanent minutes of the court, or (2) signed by the judge and filed with the clerk. The entry of the new trial order in the permanent minutes of the court constitutes a determination of the motion even though the minute order expressly directs that a written order is to be prepared, signed, and filed [*Code Civ. Proc. § 660*]. The minute entry must show the date that it was actually entered in the permanent minutes, but failure to do so will not impair the order's validity or effectiveness [*Code Civ. Proc. § 660*].

[3] Discretion of Court

The court has wide discretion in ruling on a motion for new trial [*City of Los Angeles v. Decker (1977) 18 Cal. 3d 860, 871-872, 135 Cal. Rptr. 647, 558 P.2d 545]* . However, the court must exercise discriminating judgment within the bounds of reason [*Johns v. City of Los Angeles (1978) 78 Cal. App. 3d 983, 987, 144 Cal. Rptr. 629]* .

In considering the motion, the court is entitled to reweigh evidence, consider the credibility of witnesses, and draw reasonable inferences contrary to those accepted by the jury [*Mercer v. Perez (1968) 68 Cal. 2d 104, 112, 65 Cal. Rptr. 315, 436 P.2d 315]* . If the judge is unsatisfied with the verdict or decision and the statutory grounds for granting a new trial exist, he or she has a duty to grant the motion [*Pollitz v. Wickersham (1907) 150 Cal. 238, 244, 88 P. 911]* .

On the other hand, the trial court may not misuse a motion for new trial, in which the trial court is allowed to draw inferences contrary to the verdict, as a de facto motion for judgment notwithstanding the verdict by granting a new trial under circumstances in which the trial court has determined it will never allow the verdict to stand despite evidence supporting the verdict [*Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs (1998) 67 Cal. App. 4th 743, 752-753, 79 Cal. Rptr. 2d 248]* . If the record reveals that an order granting a new trial was a de facto judgment notwithstanding the verdict, the appellate court will apply the independent review standard associated with judgment notwithstanding the verdict rather than the abuse of discretion standard associated with an order granting a new trial [*Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs (1998) 67 Cal. App. 4th 743, 753, 79 Cal. Rptr. 2d 248]* .

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§ 371.68 Alternative Relief in Lieu of Granting New Trial

[1] In Nonjury Case

In a nonjury case, the court may, on such terms as may be just, change or add to the statement of decision, modify the judgment in whole or in part, or grant a new trial on all or part of the issues. In lieu of granting a new trial, the court may vacate and set aside the statement of decision and judgment and reopen the case for further proceedings and introduction of additional evidence [*Code Civ. Proc. § 662*]. *Code Civ. Proc. § 662* does not provide authority to reopen to allow presentation of additional evidence if the motion to reopen is made before judgment. If made before judgment, such a motion invokes the court's fundamental authority under *Code Civ. Proc. § 128(a)(3)* and *Evid. Code § 320* to control the order of proof and the conduct of proceedings before it [*Rosenfeld, Meyer & Susman v. Cohen (1987) 191 Cal. App. 3d 1035, 1052 n.7, 237 Cal. Rptr. 14]* .

The purpose of allowing the trial court to change or amend its statement of decision is to give the court, on denying the motion for new trial, broad power to change its statement of decision and to modify the judgment, thereby avoiding the necessity of a new trial [*see Spier v. Lang (1935) 4 Cal. 2d 711, 714, 53 P.2d 138* (decided when findings existed under *Code Civ. Proc. § 632*)]. For a form concerning alternative relief to be used in a notice of intention to move for new trial, *see § 371.301*.

[2] Jurisdictional Requirements Under Code Civ. Proc. § 662

If the trial court does not have jurisdiction to grant a new trial, it has no jurisdiction to act under *Code Civ. Proc. § 662*. For example, a notice of intention to move for a new trial that is prematurely filed confers no jurisdiction to the court to grant a new trial under *Code Civ. Proc. § 657*, and it necessarily follows that the trial court has no power to vacate a judgment and to enter a new and different judgment under *Code Civ. Proc. § 662* [*see Fong Chuck v. Chin Po Foon (1947) 29 Cal. 2d 552, 553-554, 176 P.2d 705]* . The exercise by the court of powers vested in it by Code *Civ. Proc. § 662* is an integral part of the proceedings for a new trial; such powers are to be exercised only in conjunction with a ruling on a motion for new trial [*Avery v. Associated Seed Growers, Inc. (1963) 211 Cal. App. 2d 613, 622-623, 27 Cal. Rptr. 625]* .

[3] Modified Judgment Supersedes Prior Judgment

The proper procedure in granting relief under *Code Civ. Proc. § 662* is for the trial court to deny the motion for new trial and grant the alternative relief. However, even if the court's order does not expressly dispose of the new trial motion, when the court vacates the prior judgment and enters a new judgment within the 60-day period prescribed in *Code Civ. Proc. § 660*, the new judgment supersedes the prior judgment [*Medak v. Cox (1970) 12 Cal. App. 3d 70, 74, 90 Cal. Rptr. 452]* . Once the court enters a modified judgment, the superseded judgment can no longer be appealed [*Neff v. Ernst (1957) 48 Cal. 2d 628, 634, 311 P.2d 849]* .

However, if the modified judgment is subsequently vacated for lack of jurisdiction, the earlier judgment is reinstated [*see In re Marriage of Micalizio (1988) 199 Cal. App. 3d 662, 670, 245 Cal. Rptr. 673* (trial court vacated its modified judgment, which was not entered within required 60 days, but failed to specify time for reentry of prior judgment)]. The reinstated judgment is a new judgment for purposes of appeal and the time for filing a notice of appeal from that judgment begins to run from the date that the second judgment is declared void by the trial court [*In re Marriage of Micalizio (1988) 199 Cal. App. 3d 662, 671-672, 245 Cal. Rptr. 673.]*

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§ 371.69 New Trial on Particular Issues

The court may grant a new trial only on certain issues raised in the case if these issues are distinct and separable [*see Code Civ. Proc. § 657*; *Cruz v. HomeBase (2000) 83 Cal. App. 4th 160, 165, 99 Cal. Rptr. 2d 435* ; *Karallis v. Shenas (1950) 97 Cal. App. 2d 280, 283, 217 P.2d 436]* . However, when a limited new trial might be prejudicial to either party, the court must grant a complete new trial [*Liodas v. Sahadi (1977) 19 Cal. 3d 278, 286, 137 Cal. Rptr. 635, 562 P.2d 316* ; *see also Pelletier v. Eisenberg (1986) 177 Cal. App. 3d 558, 565-566, 223 Cal. Rptr. 84* (grant of retrial limited to particular issue as error if it would prejudice party to exclude another related issue for which retrial was not requested)].

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§ 371.70 Conditional Granting or Denial of Motion

The court's decision may be conditioned on the performance of certain actions by the parties. If the parties perform the condition within the alloted time, the motion for new trial will be either granted or denied [*see Engle v. Farrell (1946) 75 Cal. App. 2d 612, 620, 171 P.2d 588]* . For instance, the court might grant the motion for new trial if the parties do not agree to a greater or lesser amount of damages [*Code Civ. Proc. § 662.5*; *Jehl v. Southern Pac. Co. (1967) 66 Cal. 2d 821, 832, 59 Cal. Rptr. 276, 427 P.2d 988* (additur); *Hughes v. Hearst Publications, Inc. (1947) 79 Cal. App. 2d 703, 704, 180 P.2d 419* (remittitur)]. The court might also grant a new trial if the moving party agrees to pay the other party's costs [*Chodos v. Superior Court (1964) 226 Cal. App. 2d 703, 707, 38 Cal. Rptr. 301]* .

As long as the trial court issues its order on the new trial motion within the 60-day period prescribed by *Code Civ. Proc. § 660*, it may exercise discretion in setting reasonable time limits extending beyond the 60-day period for plaintiffs to perform conditions set by the order [*see Schelbauer v. Butler Manufacturing Co. (1984) 35 Cal. 3d 442, 454 n.6, 198 Cal. Rptr. 155, 673 P.2d 743]* .

A void condition has no effect on an otherwise valid order. In such a case, the condition is disregarded but the order stands [*see Schelbauer v. Butler Manufacturing Co. (1984) 35 Cal. 3d 442, 455, 198 Cal. Rptr. 155, 673 P.2d 743]* .

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§ 371.71 Order Denying Motion

The court can deny the motion for new trial by entering a minute order to that effect [*Code Civ. Proc. § 660*]. A statement of reasons for the denial is not required [*see Code Civ. Proc. § 657*]. No appeal will lie from the trial court's denial of the motion; the ruling may be reviewed only through an appeal of the judgment [*Rodriguez v. Barnett (1959) 52 Cal. 2d 154, 156, 338 P.2d 907* ; *Hamasaki v. Flotho (1952) 39 Cal. 2d 602, 608, 248 P.2d 910]* .

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§ 371.72 Order Granting Motion

[1] In General

An order granting a motion for new trial vacates the verdict or decision and returns the case to its exact state before trial [*Bloomquist v. Haley (1928) 204 Cal. 258, 261, 268 P. 364]* . A general order granting the motion will open the case to all parties, even though some of the parties may not have joined on the motion [*Bishop v. Superior Court (1922) 59 Cal. App. 46, 48, 209 P. 1012]* . If, however, there are several parties and the rights and interests of these parties are distinct, the resulting order may not affect the judgment as to some of the parties [*Fearon v. Fodera (1915) 169 Cal. 370, 376, 148 P. 200]* .

[2] Statement of Grounds

If the motion is granted, the order must state the ground or grounds on which the court relied [*Code Civ. Proc. § 657*]. The statutory language of *Code Civ. Proc. § 657* or a reasonable approximation should be used [*Mercer v. Perez (1968) 68 Cal. 2d 104, 111, 65 Cal. Rptr. 315, 436 P.2d 315]* . A court's statement that there has been a miscarriage of justice is insufficient grounds for the order [*Mercer v. Perez (1968) 68 Cal. 2d 104, 110, 65 Cal. Rptr. 315, 436 P.2d 315]* .

The statement of the ground or grounds on which the court relies must be made before the expiration of the 60-day period permitted by *Code Civ. Proc. § 660* [*Sanchez-Corea v. Bank of America (1985) 38 Cal. 3d 892, 903-905, 215 Cal. Rptr. 679, 701 P.2d 826* ; *Steinhart v. South Coast Area Transit (1986) 183 Cal. App. 3d 770, 772-773, 228 Cal. Rptr. 283]* . The additional 10-day period permitted by *Code Civ. Proc. § 657* for the filing of a statement specifying the reasons for granting the motion does not apply to the statement of the grounds for granting the motion [*Sanchez-Corea v. Bank of America (1985) 38 Cal. 3d 892, 905, 215 Cal. Rptr. 679, 701 P.2d 826* ; *Steinhart v. South Coast Area Transit (1986) 183 Cal. App. 3d 770, 773, 228 Cal. Rptr. 283]* . See the discussion of the separate requirement for a specification of the reasons for granting the motion in *§ 371.72[3]*.

[3] Specification of Reasons

The court must specify the reasons for granting the new trial for each of the grounds stated in the order [*Code Civ. Proc. § 657*; *see Twedt v. Franklin (2003) 109 Cal. App. 4th 413, 418-420, 134 Cal. Rptr. 2d 740* (requirement of written statement of reasons for granting new trial satisfied by written order attaching and incorporating hearing transcript in which trial judge stated evidence did not support jury's finding of no negligence because testimony of defendant driver showed her negligence at least partially caused collision with plaintiff's vehicle)]. The statement of reasons should be specific enough to facilitate appellate review and avoid any need for the appellate court to rely on inference or speculation [*Oakland Raiders v. National Football League (2007) 41 Cal. 4th 624, 634, 61 Cal. Rptr. 3d 634]* . If the order fails to state the court's reasons for granting a new trial on a particular ground, the order is defective and must be reversed [*Stewart v. Truck Ins. Exchange (1993) 17 Cal. App. 4th 468, 484-485, 21 Cal. Rptr. 2d 338* (order for new trial on punitive damages reversed because judge failed to state reasons; irrelevant that judge also gave reasons for ordering new trial on portion of compensatory damages); *Wright v. City of Los Angeles (1990) 219 Cal. App. 3d 318, 354, 268 Cal. Rptr. 309]* .

The court may state the reasons in the order or may prepare a separate document filed 10 days after the filing of the order [*Code Civ. Proc. § 657*]. The 10-day period runs from the determination of the motion rather than from the filing of the order [*Swanson v. Western Greyhound Lines, Inc. (1969) 268 Cal. App. 2d 758, 759-760, 74 Cal. Rptr. 383]* . The 10-day period within the court must specify its reasons for granting a new trial under *Code Civ. Proc. § 657* is not included in the 60-day period of *Code Civ. Proc. § 660, discussed under § 371.67[1]* [*Resort Video, Ltd. v. Laser Video, Inc. (1995) 35 Cal. App. 4th 1679, 1692]* .

The purpose of the specification of reasons is to promote careful deliberation by the trial court and afford the parties the right of meaningful appellate review [*Mercer v. Perez (1968) 68 Cal. 2d 104, 113, 115, 436 P.2d 315* ; *Resort Video, Ltd. v. Laser Video, Inc. (1995) 35 Cal. App. 4th 1679, 1695]* . The reasons must be in writing. An oral recital by the court during the hearing is insufficient [*La Manna v. Stewart (1975) 13 Cal. 3d 413, 423, 118 Cal. Rptr. 761, 530 P.2d 1073]* . A reference in a written order to a transcription of an oral statement of reasons made at a prior hearing is also insufficient [*Steinhart v. South Coast Area Transit (1986) 183 Cal. App. 3d 770, 773-774, 228 Cal. Rptr. 283]* . The specifications will be sufficient if the judge who grants a new trial furnishes a concise but clear statement of the reasons why he or she finds one or more of the grounds of the motion to be applicable to the case before him or her. No hard and fast rule can be laid down as to the content of such a specification, and it will necessarily vary according to the facts and circumstances of each case [*Mercer v. Perez (1968) 68 Cal. 2d 104, 113, 115, 436 P.2d 315* ; *Resort Video, Ltd. v. Laser Video, Inc. (1995) 35 Cal. App. 4th 1679, 1695]* . While the judge need not cite page and line, nor discuss testimony of particular witnesses, nor the weight to be given each item of testimony, he or she must do more than state the reasons in terms of conclusions, issues, or ultimate facts [*Scala v. Jerry Witt & Sons, Inc. (1970) 3 Cal. 3d 359, 370, 90 Cal. Rptr. 592, 475 P.2d 864]* .

When the order is granted on the ground of excessive damages, the judge must specify some aspect of the record which would have misled or prejudiced the jury and which convinces the judge that the jury clearly should have reached a different decision [*Bigboy v. County of San Diego (1984) 154 Cal. App. 3d 397, 406, 201 Cal. Rptr. 226]* . On the other hand, *Code Civ. Proc. § 657* does not require that the court state the reasons why it considers any portion of the jury's award to be supported by the evidence [*Martinides v. Mayer (1989) 208 Cal. App. 3d 1185, 1197, 256 Cal. Rptr. 679]* .

A trial court's specification of reasons may cross refer to findings located in a different part of the order. The trial court need not unnecessarily burden a new trial order by reiterating what it has already said at length with respect to another issue before it, so long as it makes clear to a reviewing court the basis for its decision [*Lane v. Hughes Aircraft Co. (2000) 22 Cal. 4th 405, 413, 93 Cal. Rptr. 2d 60, 993 P.2d 388]* .

Similarly, while *Code Civ. Proc. § 657* provides that a trial court may not direct counsel to prepare a new trial order or specification of reasons, this does not also bar a trial court from adopting material in a party's trial brief or memorandum. If a trial court could not rely on reasons advanced in such briefs, their utility would be undermined and

they would serve little purpose. The critical factor is the reasoning process, not whose language is being employed [*Lane v. Hughes Aircraft Co. (2000) 22 Cal. 4th 405, 415, 93 Cal. Rptr. 2d 60, 993 P.2d 388]* .

[4] Counsel Prohibited From Preparation of Grounds and Reasons

The court cannot direct the attorney for a party to prepare an order granting new trial or the specification of reasons [*Code Civ. Proc. § 657*]. The trial court is alsoprecluded from adopting a specification of reasons voluntarily drafted by counsel for the moving party [*Tramell v. McDonnell Douglas Corp. (1984) 163 Cal. App. 3d 157, 168-170, 209 Cal. Rptr. 427* ; *Oberstein v. Bisset (1976) 55 Cal. App. 3d184, 189, 127 Cal. Rptr. 413]* . Counsel may, however, assist the court by calling any deficiency to its attention within the 10-day period for filing the specification of reasons so that the court may correct the order [*Mercer v. Perez (1968) 68 Cal. 2d 104, 123 n.8, 65 Cal. Rptr. 315, 436 P.2d 315]* . The *Mercer* and *Oberstein* cases do not, however, require the court to eliminate from its order all language that appeared in a brief by counsel; all that is required is that the mental processes employed in the specification of reasons be those of the court rather than those of counsel [*Eltolad Music, Inc. v. April Music, Inc. (1983) 139 Cal. App. 3d 697, 706-708, 188 Cal. Rptr. 858]* .

[5] Nunc Pro Tunc Correction of Order

If the court did not state the ground or grounds for granting the motion in the order, as required by *Code Civ. Proc. § 657*, the court cannot correct its order by filing a statement of the ground or grounds after the expiration of the 60-day period provided by *Code Civ. Proc. § 660* [*Sanchez-Corea v. Bank of America (1985) 38 Cal. 3d 892, 903-904, 215 Cal. Rptr. 679, 701 P.2d 826]* .

The court cannot correct its order or specification of reasons nunc pro tunc after the expiration of the 10-day period for filing a separate specification of reasons. If the court does so, it is acting in excess of its jurisdiction [*Mercer v. Perez (1968) 68 Cal. 2d 104, 121, 65 Cal. Rptr. 315, 436 P.2d 315]* .

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§ 371.73 Notice of Court's Order

When a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order must be given by the prevailing party to all other parties or their attorneys, in the manner provided in *Code Civ. Proc. §§ 1010-1020* [*see* Ch. 518, *Service of Summons and Papers*], unless notice is waived by all parties in open court and is entered in the minutes [*Code Civ. Proc. § 1019.5(a)*].

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§ 371.74 Review

[1] In General

An appeal will lie from an order granting a new trial; an order denying a new trial is reviewable on appeal from the judgment [*Code Civ. Proc.§§ 904.1(a)(4), 904.2(e)*; *see also § 371.71*]. If a party moves for a new trial on all issues and is granted one only on certain issues, that party has a right of appeal from the order [*Cobb v. University of So. California (1995) 32 Cal. App. 4th 798, 802, 38 Cal. Rptr. 2d 543* ; *Ferraro v. Pacific Fin. Corp. (1970) 8 Cal. App. 3d 339, 355, 87 Cal. Rptr. 226]* . However, an order under *Code Civ. Proc. § 662* vacating a judgment and reopening the case for further proceedings is not appealable [*Concerned Citizens Coalition of Stockton v. City of Stockton (2005) 128 Cal. App. 4th 70, 77-84, 26 Cal. Rptr. 3d 735]* .

When a motion is denied by operation of law, it may be reviewed on appeal as if it were expressly denied by the court [*In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 152-153, 242 Cal. Rptr. 649* (reviewing court may consider merits of motion even when appellant was at fault for failing to ensure that court heard motion within statutory time period or when motion is based on affidavits that trial court did not pass on)].

Cal. Const., art. VI, § 13, requires that before granting a new trial on grounds of misdirection of the jury, improper admission or rejection of evidence, errors as to any matter of pleading, or any error as to procedure, the court must examine the entire cause, including the evidence. On appeal from an order granting a new trial, the reviewing court will presume that the trial court considered the whole record [*Maher v. Saad (2000) 82 Cal. App. 4th 1317, 1324, 99 Cal. Rptr. 2d 213]* .

[2] Scope of Review

The order granting a new trial will be affirmed if it should have been granted on any ground stated in the motion, even if that ground was not specified in the order or specification of reasons [*see* *Tortorella v. Castro (2006) 140 Cal. App. 4th 1, 9-10, 43 Cal. Rptr. 3d 853* (trial court's rationale for granting new trial motion did not bind appellate court, and, under *Code Civ. Proc § 657*, order granting new trial would be upheld if it should have been granted on any ground raised in motion)], except that (1) the order will not be affirmed on the ground of insufficiency of the evidence to justify

the verdict or other decision, or the ground of excessive or inadequate damages, unless that ground is stated in the order granting the motion; and (2) on appeal from an order granting a new trial on the ground of insufficiency of the evidence or excessive or inadequate damages, it is conclusively presumed that the order was made only for the reasons specified in it or in the specification of reasons, and the order will be reversed if there is no substantial basis in the record for any of these reasons [*Code Civ. Proc. § 657*; *Jordy v. County of Humboldt (1992) 11 Cal. App. 4th 735, 741, 14 Cal. Rptr. 2d 553]* .

[3] Standard of Review

As a general matter, orders granting a new trial are reviewed for abuse of discretion; however, any determination underlying any order is scrutinized under the test appropriate to that determination [*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 859, 107 Cal. Rptr. 2d 841, 24 P.3d 493* (order granting summary judgment on pure question of law, leading to order granting new trial, is entitled to independent review)]. However, the trial court's failure to set out the required specification of reasons for granting a new trial based on jury misconduct willresult in independent review, under which the reviewing court gives no deference to the trial court's ruling. The reviewing court should not defer to the trial court's resolution of conflicts in the evidence, or draw all inferences favorably to the trial court's decision, because in the absence of a statement of reasons, the record does not show whether the trial court resolved those conflicts or drew those inferences [*Oakland Raiders v. National Football League (2007) 41 Cal. 4th 624, 635-640, 61 Cal. Rptr. 3d 634* , *161 P.3d 151]* .

The determination of a motion for a new trial rests so completely witin the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears. This is particularly true when the discretion is exercised in favor of awarding a new trial, for this action does not finally dispose of the matter [*Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 387, 93 Cal. Rptr. 769, 482 P.2d 681]* . This "highly deferential" standard applies because the trial court, in ruling on a motion for new trial, sits as an independent trier of fact, and its factual determinations, as reflected in its order granting a new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations. Because the trial court is in the best position to assess the reliability of a jury's verdict, the Legislature has granted them broad discretion to order new trials, the only relevant limitations on which are the requirement that trial courts state their reasons for granting a new trial, and the requirement that there must be some evidence in the record to support those reasons [*Lane v. Hughes Aircraft Co. (2000) 22 Cal. 4th 405, 412, 93 Cal. Rptr. 2d 60, 993 P.2d 388]* .

Thus, an order granting a new trial under *Code Civ. Proc. § 657* on the ground of insufficient evidence or excessive damages must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on the trial court's theory, and an abuse of discretion cannot be found in cases in which the evidence is in conflict and a verdict for the moving party could have been reached. In other words, when reviewing such an order granting a new trial, the presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the new trial order [*Lane v. Hughes Aircraft Co. (2000) 22 Cal. 4th 405, 412, 93 Cal. Rptr. 2d 60, 993 P.2d 388* (citing *Neal v. Farmers Ins. Exchange (1978) 21 Cal. 3d 910, 932, 148 Cal. Rptr. 389, 582 P.2d 980* and *Jones v. Citrus Motors Ontario, Inc. (1973) 8 Cal. 3d 706, 710, 711, 106 Cal. Rptr. 28, 505 P.2d 220*); *Romo v. Ford Motor Co. (2002) 99 Cal. App. 4th 1115, 1125, 122 Cal. Rptr. 2d 139* ; *see also* *Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 387, 93 Cal. Rptr. 769, 482 P.2d 681* (as long as a reasonable or even fairly debatable justification under the law is shown for order granting new trial, it may not be set aside); *Martin v. U-Haul Co. of Fresno (1988) 204 Cal. App. 3d 396, 406, 251 Cal. Rptr. 17* (with respect to order granting new trial on ground of excessive damages, whether or not conditioned on a reduction, the presumption of correctness normally accorded to jury verdict is replaced by presumption in favor of order granting new trial)].

However, when the trial court grants a new trial based on a finding of juror misconduct, the reviewing court's deference to the trial court's order is more limited. The reviewing court accepts the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence [*Donovan v. Poway Unified School*

District (2008) 167 Cal. App. 4th 567, 623-624, 84 Cal. Rptr. 3d 285], but whether prejudice arose from the juror misconduct is a mixed question of law and fact subject to the reviewing court's independent determination [*Romo v. Ford Motor Co. (2002) 99 Cal. App. 4th 1115, 1125, 122 Cal. Rptr. 2d 139* ; *see also* *In re Hamilton (1999) 20 Cal. 4th 273, 296, 84 Cal. Rptr. 2d 403, 975 P.2d 600* (in case of juror misconduct occurring outside presence of trial court, reviewing court must independently apply objective standard to determine whether misconduct was prejudicial)].

When the court is reviewing whether or not the granting of a new trial was supported by the ground that the verdict was "against the law," however, the appellate court's task is not to defer to the trial court's balancing of the relative weight of the evidence but to affirm the order only if the verdict was unsupported by any substantial evidence and was such as would justify a directed verdict against the party in whose favor the verdict is returned [*Berge v. International Harvester Co. (1983) 142 Cal. App. 3d 152, 160, 190 Cal. Rptr. 815]* .

For detailed discussion of appellate standards of review generally, see Ch. 41, *Appeal: Review Standards and Appellate Rules of Law* .

[4] Effect of Reversal

The original judgment will be reinstated when the order granting a new trial is reversed on appeal [*La Manna v. Stewart (1975) 13 Cal. 3d 413, 425, 118 Cal. Rptr. 761, 530 P.2d 1073]* . If the party who moved for new trial failed to make a protective cross appeal from the judgment, the judgment automatically becomes final on reinstatement [*Miller v. Los Angeles County Flood Control Dist. (1973) 8 Cal. 3d 689, 699, 106 Cal. Rptr. 1, 505 P.2d 193]* .

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[Reserved]

§§ 371.75[Reserved]

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§ 371.90 Governing Statutes

The motion to set aside, vacate, and enter another and different judgment is governed by *Code Civ. Proc. §§ 663* and *663a*.

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§ 371.91 Statutory Basis for Motion

A judgment or decree, when based on a decision by the court, or the special verdict of a jury, may, on motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of the party and entitling the party to a different judgment:

- Incorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts, and in such a case when the judgment is set aside, the statement of decision must be amended and corrected; or

- A judgment or decree not consistent with or not supported by the special verdict [*Code Civ. Proc. § 663*].

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§ 371.92 Statement of Decision Versus Findings of Fact

Before January 1, 1982, *Code Civ. Proc. § 663* stated that grounds for granting a motion to vacate the judgment and to enter another and different judgment were incorrect or erroneous conclusions of law, not consistent with or supported by the findings of fact, and that in cases where the judgment is set aside, the conclusions of law must be amended and corrected.

Under Stats. 1981, ch. 900, operative January 1, 1982, the Legislature amended *Code Civ. Proc. § 663* to conform to its amendment of *Code Civ. Proc. § 632*, which blended the former conclusions of law and findings of fact into the newly entitled statement of decision explaining the factual and legal bases for the decision. Thus, *Code Civ. Proc. § 663* states that grounds for granting the motion are incorrect or erroneous legal bases for the decision that are not consistent with or supported by the facts, and in cases where the judgment is set aside, the statement of decision must be amended and corrected.

Since the 1981 amendment appears to have been made only to conform *Code Civ. Proc. § 663* to *Code Civ. Proc. § 632*, in which the Legislature more exhaustively altered the former findings of fact and conclusions of law, it appears that the change of terminology in *Code Civ. Proc. § 663* only minimally affects the import of the statute. Therefore, case law that deals primarily with the old terms, "findings of fact" and "conclusions of law," can probably be used to interpret the amended version of *Code Civ. Proc. § 663* in the absence of cases under the new law. The situations that will arise under the amended statute will probably be reasonably analogous to those situations that occurred under the prior version of the statute.

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§ 371.93 When Motion Proper

[1] Nonjury Trials

A motion to set aside and vacate a judgment and enter another and different judgment may be made whenever a court draws an incorrect legal conclusion or renders as erroneous judgment of the facts found by it to exist [*see Code Civ. Proc. § 663*; *see also County of Alameda v. Carleson (1971) 5 Cal. 3d 730, 738, 97 Cal. Rptr. 385, 488 P.2d 953]* . Thus, the motion may be granted if the court comes to a legal conclusion that is contrary to an express statutory provision [*Gibson v. Hammang (1904) 145 Cal. 454, 456, 78 P. 953]* , if the court's legal conclusions are inconsistent with uncontroverted facts showing the intention of the parties [*Swanson v. Wheeler (1952) 112 Cal. App. 2d 43, 44-45, 245 P.2d 699]* , and if the court wrongly maintains that an element is part of a settled doctrine when, in fact, it is not [*Crook v. Leinenweaver (1950) 100 Cal. App. 2d 790, 792-794, 224 P.2d 891* ; *see Payne v. Rader (2008) 167 Cal. App. 4th 1569, 1574-1575, 85 Cal. Rptr. 3d 174* (motion to vacate judgment does not lie to vacate judgment following erroneous ruling on demurrer)]. However, the motion will only be granted if the substantial rights of a party are materially affected [*Code Civ. Proc. § 663*].

[2] Jury Trials

The court may correct its judgment when that judgment is not consistent with or supported by the special verdict [*see Code Civ. Proc. § 663*; *see San Francisco v. Superior Court (1928) 94 Cal. App. 318, 322, 271 P. 121]* . A special verdict is one in which the jury finds the facts only, leaving the judgment to the court, whereas a general verdict is one in which the jury pronounces generally on all or any of the issues, either in favor of the plaintiff or defendant [*Code Civ. Proc. § 624*]. If the jury's findings on particular questions of fact are inconsistent with its general verdict, a motion to set aside and vacate under *Code Civ. Proc. § 663* will not be applicable. This is because *Code Civ. Proc. § 625* provides that the jury's inconsistent findings control the general verdict, and the court must give judgment accordingly [*see Code Civ. Proc. § 625*].

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§ 371.94 Alternative Relief in Lieu of New Trial Contrasted

Code Civ. Proc. § 662 now provides that the court may grant certain alternative relief in lieu of granting a new trial. The court may change or add to the statement of decision and grant a partial new trial or vacate and set aside the statement of decision and judgment and reopen the case for further proceedings [*Code Civ. Proc. § 662*; *see also § 371.60* et seq.]. Formerly, the statute read "findings" in place of the term "statement of decision" [*see* Stats. 1929, ch. 843].

A closely related statute, *Code Civ. Proc. § 663*, now provides that the court may set aside, vacate, and enter another and different judgment if incorrect or erronous legal bases for the decision are not consistent with or supported by the facts [*Code Civ. Proc. § 663(1)*]. Formerly, this statute provided that conclusions of law that were incorrect or erroneous and were not consistent with or supported by the findings of fact could be amended and corrected [*see* Stats. 1933, ch. 744].

The statutes were designed to apply to different situations. If counsel desired a correction of erroneous legal conclusions, he or she could proceed under *Code Civ. Proc. § 663(1)* [*Gardner v. Rich Mfg. Co. (1945) 68 Cal. App. 2d 725, 739-740, 158 P.2d 23]* . If counsel desired a reexamination of both legal and factual matters, he or she could proceed under *Code Civ. Proc. § 662*.

Even though *Code Civ. Proc. §§ 662* and *663(1)* have been amended effective January 1, 1982, it appears that the major distinctions between the two statutes still remain. Thus, in granting alternative relief in lieu of a new trial under *Code Civ. Proc. § 662*, the court may reweigh the evidence and reexamine the legal and factual bases for its decision [*see Warren Southwest, Inc. v. Wicks (1969) 276 Cal. App. 2d 152, 155, 80 Cal. Rptr. 723]* . However, under *Code Civ. Proc. § 663*, the court may only correct erroneous legal bases for its decision; it cannot reexamine the facts [*Code Civ. Proc. § 663*; *see* *Gardner v. Rich Mfg. Co. (1945) 68 Cal. App. 2d 725, 739-740, 158 P.2d 23]* . The motion under *Code Civ. Proc. § 663* is to be used when the court has used incorrect legal bases for its decision on the basis of uncontroverted evidence. It appears that it is still not proper to use the motion to challenge the sufficiency of the evidence [*see* *Simac Design, Inc. v. Alciati (1979) 92 Cal. App. 3d 146, 153, 154 Cal. Rptr. 676]* .

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§ 371.95 Judicial Error Compared to Clerical Error

The trial court may correct its own inadvertence or clerical error on motion of the injured party, or on its own motion under *Code Civ. Proc. § 473* so that the judgmentor order as entered will conform to the judgment or order directed [*Code Civ. Proc. § 473(d)*; *In re Candelario (1970) 3 Cal. 3d 702, 705, 91 Cal. Rptr. 497, 477 P.2d 729* ; *see* Ch. 489, *Relief From Judgments and Orders*]. However, it may correct judicial error only on a motion for new trial or on a motion under *Code Civ. Proc. § 663* to vacate the order or judgment and enter a different one [*Greene v. Superior Court (1961) 55 Cal. 2d 403, 405-406, 10 Cal. Rptr. 817, 359 P.2d 249]* . The difference between a clerical error and a judicial error is whether the error was made in rendering the judgment or in recording the judgment rendered [*People v. Anderson (1976) 59 Cal. App. 3d 831, 839, 131 Cal. Rptr. 104]* .

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§ 371.96 Procedure

[1] Contents of Notice

The procedure is initiated by a notice of intention to move for an order setting aside and vacating a judgment or decree. The notice must designate the grounds on which the motion will be made and specify the particulars showing that the legal basis for the decision is not consistent with or supported by the facts or the ways in which the judgment or decree is not consistent with the special verdict [*Code Civ. Proc. § 663a*].

Although under *Cal. Rules of Ct., Rules 3.1100, 3.1103,* a memorandum is not specifically required to be submitted in support of the motion, it is better practice to submit a memorandum as is generally required in law and motion proceedings [*see Code Civ. Proc. §§ 1005(b), 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For general discussion and forms, *see* Ch. 417, *Points and Authorities* .

[2] Time for Serving and Filing

The motion to vacate a judgment and enter another and different judgment is proper only after final judgments and not after interlocutory judgments or orders [*Remington v. Davis (1951) 108 Cal. App. 2d 251, 253, 238 P.2d 662]* . The party intending to make the motion must file with the clerk and serve on the adverse party a notice of his or her intention either (1) before entry of judgment; or (2) within the earliest of the following times: (a) within 15 days after the clerk mails notice of entry of judgment under *Code Civ. Proc. § 664.5*; (b) within 15 days of service of written notice of entry of judgment by any party; or (c) within 180 days after judgment is entered [*Code Civ. Proc. § 663a*].

The provisions of *Code Civ. Proc. § 1013*, which extends time for exercising a right or doing an act when service is by mail, do not lengthen the time for service under *Code Civ. Proc. § 663a* [*Code Civ. Proc. § 663a*]. This time period is also not extended if the moving party's attorney is a legislator [*Code Civ. Proc. § 1054.1*].

Legal Topics:

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

Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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§ 371.97 Hearing

[1] Time of Hearing

The date of the hearing is generally set forth in the notice. *Code Civ. Proc. § 1005(b)* requires that a notice of motion be given at least 16 court days before the time appointed for hearing plus additional time for service by mail, unless the court prescribes a shorter time [*Code Civ. Proc. § 1005(b)*].

Neither a motion for judgment notwithstanding the verdict [*Code Civ. Proc. § 629*] nor a motion for new trial [*Code Civ. Proc. § 657*] is required to be heard at the same time as a motion to vacate judgment and to enter a different judgment [*see Code Civ. Proc. §§ 663, 663a*]. This is true even though a motion for judgment notwithstanding the verdict must be heard at the same time as a motion for new trial [*see Code Civ. Proc. § 629*]. In practice, however, a motion to vacate a judgment and enter a different judgment is often made concurrently with these other motions. Therefore, the motion to vacate a judgment and enter a different judgment is often heard at the same time as a motion for judgment notwithstanding the verdict and a motion for new trial.

[2] Proper Judge

The judge who presided at trial must hear the motion to vacate a judgment and enter another and different judgment under *Code Civ. Proc. § 663* unless that judge is dead, unable to hear the motion, or absent from the county on the date set for hearing. In that case, the motion may be heard and determined by another judge of the same court [*Cal. Rules of Ct., Rule 3.1602*]. Furthermore, if the parties agree, the motion may be heard anywhere in the state by the judge who presided at trial [*Code Civ. Proc. § 166(a)(2)*; *Gov. Code § 69741.1*].

[3] Discretion of Court

On hearing the motion, the court has no power to consider or determine any matter except what judgment should be entered on the facts as found [*Dolan v. Superior Court (1920) 47 Cal. App. 235, 241, 190 P. 469]* . The court cannot reopen the case and receive further evidence or reexamine the evidence before it [*see Gossman v. Gossman (1942) 52 Cal. App. 2d 184, 196, 126 P.2d 178* ; *see also § 371.94*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 371.98 Form of Order

Since *Code Civ. Proc. § 663* specifically provides for the vacation of the judgment and the entry of another judgment, if the court grants the motion, but fails to enter a new judgment, the order granting the motion will be void [*Dolan v. Superior Court (1920) 47 Cal. App. 235, 241, 190 P. 469]* . However, it appears that it will be of no consequence if the court fails to correct the legal basis for the decision, and enters only a different judgment. The judgment will supersede the erroneous legal basis embraced in the statement of decision [*see Howard A. Deason & Co. v. Costa Tierra Ltd. (1969) 2 Cal. App. 3d 742, 760, 83 Cal. Rptr. 105]* .

Legal Topics:

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

An order granting the motion may be reviewed on appeal in the same manner as a special order made after a final judgment [*Code Civ. Proc. § 663a*; *Reeves v. Hutson (1956) 144 Cal. App. 2d 445, 450, 301 P.2d 264]* . In reviewing the grant of the motion, the presumption is in favor of the court's action [*Moklofsky v. Moklofsky (1947) 79 Cal. App. 2d 259, 264, 179 P.2d 628]* .

Generally, an order denying a motion to vacate a judgment is nonappealable. The rationale for this rule is that, if the underlying judgment or order is appealable, two appeals from the same judgment should not be permitted. If the underlying judgment or order is nonappealable, allowing an appeal from the denial of a motion to vacatejudgment would in practical effect make the nonappealable judgment or order appealable [*Howard v. Lufkin (1988) 206 Cal. App. 3d 297, 300-301, 253 Cal. Rptr. 422* ; *see Payne v. Rader (2008) 167 Cal. App. 4th 1569, 1574-1575, 85 Cal. Rptr. 3d 174* (motion to vacate judgment does not lie to vacate judgment following erroneous ruling on demurrer)]. Nevertheless, under a long line of cases, courts have created an exception to this rule on nonappealability for motions to vacate a judgment pursuant to *Code Civ. Proc. § 663*, termed a "statutory motion" [*see Socol v. King (1949) 34 Cal. 2d 292, 296-297, 209 P.2d 577* ; *Howard v. Lufkin (1988) 206 Cal. App. 3d 297, 301, 253 Cal. Rptr. 422* (citing additional following opinions)].

In 1978, however, without discussion or explanation, the Supreme Court contradicted this long-standing, judicially created rule of civil procedure and stated that orders denying a motion to set aside and vacate a judgment and enter a new and different judgment are nonappealable [*Clemmer v. Hartford Ins. Co. (1978) 22 Cal. 3d 865, 890, 151 Cal. Rptr. 285*]. The court of appeal in *Howard* characterized the *Clemmer* pronouncement as dicta, and held that the denial of a statutory motion under *Code Civ. Proc. § 663* is an appealable order [*Howard v. Lufkin (1988) 206 Cal. App. 3d 297, 302-303, 253 Cal. Rptr. 422* (citing opinions critical of *Clemmer*)].

Whatever the rule is concerning the appealability of a denial of a *Code Civ. Proc. § 663* motion, the court of appeal has held that when a postjudgment order resolves constitutional issues concerning the judgment involved, it is appealable [*County of Los Angeles v. Thompson (1985) 172 Cal. App. 3d 18, 20, 218 Cal. Rptr. 101* (vacation of stipulated paternity judgment order)].

Legal Topics:

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

§§ 371.100[Reserved]

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§ 371.120 Related Matthew Bender Publications

For memoranda of points and authorities relating to judgments notwithstanding the verdict, see California Points and Authorities, Ch. 155, *Motions After Trial* , pt. I (Matthew Bender)

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§ 371.121 State Statutes

Requirements and procedures for judgment notwithstanding verdict. *Code Civ. Proc. § 629*

Time for making motion for judgment notwithstanding verdict. *Code Civ. Proc. §§ 629, 659*

Time for entry of judgment on verdict. *Code Civ. Proc. § 664*

Appeal from order denying motion for judgment notwithstanding verdict. *Code Civ. Proc. §§ 904.1(a)(4), 904.2(e)*

Consent of parties for judge to hear motion anywhere in state. *Gov. Code § 69741.1*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 371.122 California Rules of Court

Filing of appeal from judgment or order denying judgment notwithstanding verdict. *Cal. Rules of Ct., Rules 8.108, 8.752(c)*

Legal Topics:

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§ 371.123 Decisions

[1] Appeal

[a] Effect on Trial Court's Power to Grant Motion

Motion for judgment notwithstanding verdict, like motion for new trial, is collateral matter and does not divest trial court of jurisdiction to grant judgment notwithstanding verdict after notice of appeal has been filed. *Foggy v. Ralph F. Clark & Associates, Inc. (1987) 192 Cal. App. 3d 1204, 1210-1213, 238 Cal. Rptr. 130* (declining to follow contrary holding in *Weisenburg v. Molina (1976) 58 Cal. App. 3d 478, 486, 129 Cal. Rptr. 813*)

[b] Standard of Review

On appeal from judgment for defendant notwithstanding verdict, appellate court will ordinarily use same standard trial court uses to rule on motion, i.e., will determine whether record, viewed most favorably to party securing verdict contains substantial evidence supporting verdict. However, where issues deal solely with application of statute to facts supporting verdict, which is question of law, appellate court will review de novo. *Gunnell v. Metrocolor Laboratories, Inc. (2001) 92 Cal. App. 4th 710, 718-719, 112 Cal. Rptr. 2d 195*

[2] Bifurcated Trials

In bifurcated trial pursuant to *Code Civ. Proc. § 598*, if verdict in liability phase is for defendant, plaintiff then properly moves for judgment notwithstanding the verdict; if liability verdict for plaintiff, defendant required to wait until conclusion of damages phase of trial to make motion. *Meyser v. American Bldg. Maintenance, Inc. (1978) 85 Cal. App. 3d 933, 936-937, 149 Cal. Rptr. 808*

[3] Court's Own Motion

Trial judge on own motion may grant judgment notwithstanding verdict if verdict, as to liability, is not supported by substantial evidence, but may not grant judgment on own motion on ground that damages were excessive or inadequate. *Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 919, 114 Cal. Rptr. 622, 523 P.2d 662*

Court may grant judgment notwithstanding verdict on own motion if it gives 5 days notice to parties, and acts on motion after time for serving and filing a motion for new trial has expired and before time for ruling on motion for new trial expires. *Sturgeon v. Leavitt (1979) 94 Cal. App. 3d 957, 963-964, 156 Cal. Rptr. 687*

[4] Damages

Court errs when it declares liability notwithstanding verdict and grants new trial as to damages. *Moore v. City & County of San Francisco (1970) 5 Cal. App. 3d 728, 734, 85 Cal. Rptr. 281* ; *Jach v. Edson (1967) 255 Cal. App. 2d 96, 101, 62 Cal. Rptr. 925* ; *but see Gordon v. Strawther Enterprises, Inc. (1969) 273 Cal. App. 2d 504, 517-518, 78 Cal. Rptr. 417 , contra*

When court sets aside judgment for defendants notwithstanding verdict and proceeds to assess damages, court deprives defendants of constitutional right to jury trial on that question. *Spillman v. City etc. of San Francisco (1967) 252 Cal. App. 2d 782, 787, 60 Cal. Rptr. 809*

In action for personal injuries sustained by plaintiff in rear end automobile collision, when considerable conflict regarding amount of damages sustained by plaintiff since her credibility was impeached, trial court abused its discretion in granting judgment notwithstanding verdict for plaintiff and fixing amount of damages at $10,000. *Spillman v. City etc. of San Francisco (1967) 252 Cal. App. 2d 782, 786-787, 60 Cal. Rptr. 809*

[5] Denial of Motion

Court properly denies motion for judgment notwithstanding the verdict when several reasonable inferences supporting verdict are deducible from the evidence. *Clemmer v. Hartford Insurance Co. (1978) 22 Cal. 3d 865, 877-878, 151 Cal. Rptr. 285, 587 P.2d 1098*

Judgment notwithstanding verdict properly denied when evidence is conflicting or several reasonable inferences supporting verdict may be drawn. *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 110, 120 Cal. Rptr. 681, 534 P.2d 377*

In legal malpractice action based on attorneys' negligently negotiating and drafting agreements for sale of plaintiffs' ownership interest in company they had founded and termination of their employment with company, trial court erred in denying attorneys' motion for judgment notwithstanding verdict, where as to attorney's malpractice regarding scope of nonsolicitation, noncompetition and indemnity clauses and absence of provisions for attorney fees and for retention of their rights to stock dividends, plaintiffs presented no evidence at all, substantial or otherwise, indicating that but for attorney's negligence, it was more likely than not they would have obtained more favorable result in their negotiations. *Viner v. Sweet (2004) 117 Cal. App. 4th 1218, 1226-1233, 12 Cal. Rptr. 3d 533*

In products liability action, trial court properly denied defendant's motion for JNOV regarding compensatory and punitive damages, where evidence was sufficient to prove defendant acted with malice in designing and manufacturing 1978 Bronco that rolled over and killed plaintiffs' decedents and injured plaintiffs or in failing to warn consumers about absence of rollover protection. *Romo v. Ford Motor Co. (2002) 99 Cal. App. 4th 1115, 1137-1147, 122 Cal. Rptr. 2d 139*

Party is entitled to judgment notwithstanding verdict only if there is no substantial evidence to support verdict and

evidence compels judgment for moving party as matter of law; trial court must view evidence in light most favorable to verdict, disregard conflicting evidence, and indulge in every legitimate inference to support verdict; appellate court will determine de novo whether there is substantial evidence to support verdict and whether moving party is entitled to judgment in its favor as matter of law. Paykar v. *Construction, Inc. v. Spilat Construction Corp. (2001) 92 Cal. App. 4th 488, 493-494, 111 Cal. Rptr. 2d 863*

Defendant's motion for judgment notwithstanding verdict properly denied when even though most of evidence was circumstantial, substantial evidence existed from which jury could reasonably find corporate malice when defendant's management allegedly proceeded to manufacture automobile with knowledge of test results revealing design defects in *Ford Pinto. Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 812-813, 174 Cal. Rptr. 348*

In action by decedent's widow to determine if decedent had coverage under group life insurance policy at time of death, plaintiff's motion for judgment notwithstanding verdict properly denied when substantial conflict in evidence existed regarding whether decedent had returned to work after effective date of policy. *Robinson v. North American Life & Cas. Co. (1963) 215 Cal. App. 2d 111, 118, 30 Cal. Rptr. 57*

[6] Effect of Motion for Directed Verdict

Judge may consider motion for judgment notwithstanding verdict even though motion for directed verdict not previously made. *Rollenhagen v. City of Orange (1981) 116 Cal. App. 3d 414, 417, 172 Cal. Rptr. 49 , disapproved on other grounds in Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 738, 257 Cal. Rptr. 708, 771 P.2d 406*

Prior denial of motion for directed verdict does not prevent subsequent granting of motion for judgment notwithstanding verdict. *Teich v. General Mills, Inc. (1959) 170 Cal. App. 2d 791, 794, 339 P.2d 627*

[7] Extent of Trial Court's Discretion

When post-trial motions attacking judgment have been made, trial court is not limited to order granting or denying relief requested in moving party's papers. *Shapoff v. Scull (1990) 222 Cal. App. 3d 1457, 1473, 272 Cal. Rptr. 480* (dictum; court amended judgment to delete finding on motion for new trial and judgment notwithstanding verdict), disapproved on other grounds in *Applied Equip. Corp. v. Litton Saudi Arabia (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454*

Court not required to disregard internally inconsistent testimony of witness or to make finding that testimony insufficient to support verdict, but must consider inconsistencies, resolve them if possible, and determine what weight to give testimony. *Clemmer v. Hartford Insurance Co. (1978) 22 Cal. 3d 865, 878, 151 Cal. Rptr. 285, 587 P.2d 1098*

Trial judge does not weigh evidence or judge credibility of witnesses. *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 110, 120 Cal. Rptr. 681, 534 P.2d 377*

Trial judge's power to grant judgment notwithstanding verdict is identical to power to grant directed verdict. *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 110, 120 Cal. Rptr. 681, 534 P.2d 377*

Trial court may grant judgment notwithstanding verdict only if verdict is not supported by substantial evidence; trial court may not weigh evidence, draw inferences contrary to verdict, or assess credibility of witnesses. *Begnal v. Canfield & Associates, Inc. (2000) 78 Cal. App. 4th 66, 72, 92 Cal. Rptr. 2d 611*

Trial judge does not weigh evidence or judge credibility of witnesses, but must accept evidence tending to support verdict as true, unless on its face it is inherently incredible. *Hale v. Farmers Ins. Exch. (1974) 42 Cal. App. 3d 681,*

690, 117 Cal. Rptr. 146 , disapproved on other grounds in *Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822 n.5, 169 Cal. Rptr. 691, 620 P.2d 141*

If trial court admitted improper evidence at trial, court may not ignore that evidence and grant motion for judgment notwithstanding verdict on ground that party offering evidence did not prove his or her case by legally competent evidence. *Donahue v. Ziv Television Programs, Inc. (1966) 245 Cal. App. 2d 593, 609-610, 54 Cal. Rptr. 130*

In relation to motion for judgment notwithstanding verdict, court considers incompetent evidence, if relevant and not objected to, as it would consider any other relevant testimony. *Estate of Lekos (1952) 109 Cal. App. 2d 42, 53 240 P.2d 387*

[8] Grant of Motion

Motion for judgment notwithstanding verdict may be granted only if it appears from evidence, viewed in light most favorable to party securing verdict, that there is no substantial evidence in support. *Sweatman v. Department ofVeterans Affairs, (2001) 25 Cal. 4th 62, 68, 104 Cal. Rptr. 2d 602, 18 P.3d 29*

Judgment notwithstanding verdict properly granted only if it appears from evidence, viewed in light of party securing verdict, that there is no substantial evidence to support verdict. *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 110, 120 Cal. Rptr. 681, 534 P.2d 377* ; *Begnal v. Canfield & Associates, Inc. (2000) 78 Cal. App. 4th 66, 72, 92 Cal. Rptr. 2d 611* ; *Castro v. State of California (1981) 114 Cal. App. 3d 503, 512, 170 Cal. Rptr. 734*

Defendant's motion for judgment notwithstanding verdict granted only when, disregarding conflicting evidence on behalf of defendants and giving plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from that evidence, no evidence of sufficient substantiality supports verdict in plaintiff's favor. *Reynolds v. Willson (1958) 51 Cal. 2d 94, 99, 331 P.2d 48* ; *Musgrove v. Ambrose Properties (1978) 87 Cal. App. 3d 44, 51, 150 Cal. Rptr. 722*

Motion for judgment notwithstanding verdict properly granted only if it appears from evidence, viewed in light most favorable to party securing verdict, that there is no substantial evidence to support verdict; if there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of verdict, motion is to be denied. *Foggy v. Ralph F. Clark & Associates, Inc. (1987) 192 Cal. App. 3d 1204, 1213, 238 Cal. Rptr. 130*

To be substantial, evidence must be of ponderable legal significance; term "substantial evidence" is not synonymous with "any evidence"; to be substantial, evidence must be reasonable in nature, credible, and of solid value; hence, trial court, in ruling on motion for judgment notwithstanding verdict, may disregard evidence in support of verdict that is inherently incredible. *Foggy v. Ralph F. Clark & Associates, Inc. (1987) 192 Cal. App. 3d 1204, 1214-1215, 238 Cal. Rptr. 130*

In action in which auto mechanic brought defamation action against broadcasting company and former customer who gave television interview, court affirmed judgment for defendants notwithstanding verdict, stating that absent evidence of malice, the privilege of fair comment governed and defendants were entitled to judgment as matter of law. *Rollenhagen v. City of Orange (1981) 116 Cal. App. 3d 414, 428-429, 172 Cal. Rptr. 49 , disapproved on other grounds in Brown v. Kelly Broadcasting Co. (1989) 48 Cal. 3d 711, 738, 257 Cal. Rptr. 708, 771 P.2d 406*

In legal malpractice action, where evidence existed from which defendant's negligence in representing plaintiffs could be inferred but record devoid of evidence that showed defendant's negligence proximately caused injury to plaintiffs, judgment notwithstanding the verdict for plaintiffs proper and trial court's denial of motion reversed. *Sprigg v. Garcin (1980) 105 Cal. App. 3d 869, 873, 164 Cal. Rptr. 677*

Motion for judgment notwithstanding verdict properly granted despite prior denial or motion for nonsuit. *Walters v. Marler (1978) 83 Cal. App. 3d 1, 34, 147 Cal. Rptr. 655*

Because seller of land indicated to purchaser that Bureau of Reclamation approval for purchase price would be easily obtained, court affirmed judgment for defendant notwithstanding verdict since defendant, as matter of law, made no misrepresentation of fact, only a nonactionable expression of opinion. *Borba v. Thomas (1977) 70 Cal. App. 3d 144, 155, 138 Cal. Rptr. 565*

In action in which addressee of telegram sued telegraph company for negligent nondelivery of telegram, defendant's motion for judgment notwithstanding the verdict properly granted on issue of punitive damages where record failed to show substantial evidence that company employee acted with malice or oppression in not providing information to correct or show mistake at earlier date. *Trammell v. Western Union Tel. Co. (1976) 57 Cal. App. 3d 538, 556-558, 129 Cal. Rptr. 361*

Court grants plaintiff's motion for judgment notwithstanding verdict if evidence, as matter of law, dictates a determination of all issues of case in his or her favor. *Jach v. Edson (1967) 255 Cal. App. 2d 96, 99, 62 Cal. Rptr. 925*

Primary requirement for judgment notwithstanding verdict is lack of substantial conflict in evidence. *Robinson v. North American Life & Cas. Co. (1963) 215 Cal. App. 2d 111, 118, 30 Cal. Rptr. 57*

In action in which former bank employee sued bank for libel and slander, judgment for defendant bank notwithstanding verdict proper because reasonable minds could draw but one inference and that inference pointed to the truth of the statements made by bank. *Washer v. Bank of America (1948) 87 Cal. App. 2d 501, 507, 197 P.2d 202*

In action in which plaintiff sought to recover damages from apartment building manager for injuries suffered when she slipped on lobby floor, judgment for defendants notwithstanding verdict proper because plaintiff failed to prove causal connection between alleged negligence and resulting injury. *McKellar v. Pendergast (1945) 68 Cal. App. 2d 485, 156 P.2d 950*

[9] Improper Grant of Motion

In action for personal injuries, when substantial evidence justified imposition of liability of defendants, court of appeal properly reversed lower court's granting of defendants' motion for judgment notwithstanding verdict. *Hergenrether v. East (1964) 61 Cal. 2d 440, 445, 39 Cal. Rptr. 4, 393 P.2d 164*

In action for medical malpractice, granting of defendants' motion for judgment notwithstanding verdict improper because trial court not permitted to weigh evidence and evidence was sufficient to go to jury on issue of negligence. *Quintal v. Laurel Grove Hospital (1964) 62 Cal. 2d 154, 159-163, 41 Cal. Rptr. 577, 397 P.2d 161*

Granting of defendant's motion for judgment notwithstanding verdict improper where inference drawn by jury that defendant was negligent was supported by evidence. *Gray v. Southern Pacific Co. (1944) 23 Cal. 2d 632, 646, 145 P.2d 561*

In age discrimination action under Fair Employment and Housing Act [*Gov. Code § 12900 et seq.*], trial court erred in granting judgment notwithstanding verdict, where evidence that former employee was replaced by older person within protected class did not preclude any inference that employee was terminated based on age and that evidence, while it weighed against inference that employee was terminated based on age, did not conclusively establish absence of age discrimination or preclude jury from drawing otherinferences; and where employee presented evidence that charges on

which termination was alleged based were false and resolution of conflict depended entirely on whether jury chose to credit former employee or current employee, and former employee offered circumstantial evidence that decision was based on age that constituted substantial evidence. *Begnal v. Canfield & Associates, Inc. (2000) 78 Cal. App. 4th 66, 73-78, 92 Cal. Rptr. 2d 611*

Motion for judgment notwithstanding verdict was improperly granted in legal malpractice action when evidence of malpractice was insufficient as matter of law. *Sukoff v. Lemkin (1988) 202 Cal. App. 3d 740, 743, 249 Cal. Rptr. 42*

Motion for judgment notwithstanding verdict was improperly granted when court's stated reasons for granting motion were legally insufficient; court's motion as requiring reversal when it did not apply test of *Gov. Code § 830.2* in reaching its conclusion in action under Tort Claims Act alleging dangerous condition of public property. *Alexander v. State of California (1984) 159 Cal. App. 3d 890, 898-902, 205 Cal. Rptr. 758*

Grant of motion for judgment notwithstanding verdict was erroneous when, viewing evidence most favorable to verdict, it could not be reasonably concluded as matter of law that there was no substantial evidence to support verdict. *Arthur v. Avon Inflatables Ltd. (1984) 156 Cal. App. 3d 401, 405-408, 203 Cal. Rptr. 1*

If different conclusions can be rationally drawn from evidence presented, then case presents question for jury and judgment notwithstanding verdict is improperly granted. *Meyser v. American Bldg. Maintenance, Inc. (1978) 85 Cal. App. 3d 933, 940, 149 Cal. Rptr. 808*

Motion for judgment notwithstanding verdict improperly granted where plaintiff's expert witness, a fire chief, testified on cause of fire, and although testimony was internally inconsistent and inherently weak, credibility of witness presented question for jury to resolve. *Meyser v. American Bldg. Maintenance, Inc. (1978) 85 Cal. App. 3d 933, 938-941, 149 Cal. Rptr. 808*

In action by plaintiff for damages for breach of escrow agreement, court's granting of defendant's motion for judgment notwithstanding verdict improper since evidence in conflict on points foundational to court's ruling. *McCown v. Spencer (1970) 8 Cal. App. 3d 216, 226, 87 Cal. Rptr. 213*

In action to recover value of merchandise allegedly sold by plaintiffs to defendants on open book account, lower court's granting of plaintiff's motion for judgment notwithstanding verdict improper where it was apparent from evidence that jury could have returned various verdicts, all supported by substantial evidence. *Hozz v. Felder (1959) 167 Cal. App. 2d 197, 200, 334 P.2d 159*

[10] Improper Denial of Motion

Where owner of automobile polishing company sued insurer on claims connected with theft of two automobiles, denial of insurer's motion for judgment notwithstanding verdict improper where no substantial evidence that failure to reimburse plaintiff was breach of contract. *Clark v. Bellefonte Ins. Co. (1980) 113 Cal. App. 3d 326, 335, 169 Cal. Rptr. 832*

[11] Jury Verdict

Defendant's contention it was entitled to JNOV on unfair competition claim was groundless, where court, not jury, decided unfair competition claim. *Herr v. Nestle U.S.A., Inc. (2003) 109 Cal. App. 4th 779, 788, 135 Cal. Rptr. 2d 477*

Motion for judgment notwithstanding verdict denied where jury has rendered verdict that is so contradictory and unintelligible that intent is not ascertainable. *Mish v. Brockus (1950) 97 Cal. App. 2d 770, 776, 218 P.2d 849*

[12] Review

[a] Appealable Judgments

Moving party may appeal from judgment or from order denying motion for judgment notwithstanding verdict, or both. *Sweatman v. Department of Veterans Affairs (2001) 25 Cal. 4th 62, 68, 104 Cal. Rptr. 2d 602, 18 P.3d 29*

Judgment entered pursuant to court's granting of motion appealable judgment. *Quintal v. Laurel Grove Hospital (1964) 62 Cal. 2d 154, 159, 41 Cal. Rptr. 577, 397 P.2d 161*

Order granting judgment notwithstanding verdict not final judgment, therefore not appealable order. *Jordan v. Talbot (1961) 55 Cal. 2d 597, 602, 12 Cal. Rptr. 488, 361 P.2d 20* .

Although defendant could not have appealed granting of its new trial motion, it could, however, properly appeal denial of its JNOV motion despite grant of new trial motion. *Gober v. Ralphs Grocery Co. (2006) 137 Cal. App. 4th 204, 211, 40 Cal. Rptr. 3d 92*

Judgment notwithstanding verdict sustained when, as matter of law, no other reasonable conclusion is legally deducible from the evidence and any other holding would be so lacking in evidentiary support that the reviewing court would be compelled to reverse it. *Enis v. Specialty Auto Sales (1978) 83 Cal. App. 3d 928, 941, 148 Cal. Rptr. 255*

Because defendants were granted judgment notwithstanding verdict, defendants not allowed to take precautionary direct appeal since judgment notwithstanding verdict vacated earlier judgment on verdict for plaintiffs and no appeal lies from vacated judgment. *Lippert v. AVCO Community Developers, Inc. (1976) 60 Cal. App. 3d 775, 777-778, 131 Cal. Rptr. 730*

If a judgment notwithstanding the verdict is reversed on appeal, reinstated judgment on verdict is new judgment for purposes of appeal and time for filing notice of appeal commences to run on issuance of remittitur from appellate court. *Lippert v. AVCO Community Developers, Inc. (1976) 60 Cal. App. 3d 775, 779, 131 Cal. Rptr. 730*

Appeal lies from order denying motion for judgment notwithstanding verdict. *Elisalda v. Welch's Sand and Gravel Co. (1968) 260 Cal. App. 2d 46, 50, 67 Cal. Rptr. 57*

Reversal on judgment notwithstanding verdict restores proceeding to state of record before erroneous judgment entered with appellant having recorded verdict in his or her favor, but with no judgment entered. *Ferran v. Mulcrevy (1935) 9 Cal. App. 2d 129, 131, 48 P.2d 984*

[b] Standard on Review

Standard of review of order denying motion for JNOV or judgment is whether any substantial evidence, contradicted or uncontradicted, supports jury's conclusion. *Sweatman v. Department of Veterans Affairs (2001) 25 Cal. 4th 62, 68, 104 Cal. Rptr. 2d 602, 18 P.3d 29*

When reviewing validity of judgment notwithstanding verdict, appellate court resolves any conflict in evidence and draws all reasonable inferences from it in favor of jury's verdict. *Henrioulle v. Marin Ventures, Inc. (1978) 20 Cal. 3d 512, 515, 143 Cal. Rptr. 247, 573 P.2d 465*

Appellate court may uphold order granting judgment notwithstanding verdict and affirm judgment based on it, only if, reviewing all evidence in light most favorable to party for whom verdict was rendered, resolving all conflicts, and

drawing all inferences in that party's favor, and deferring to implicit credibility determinations of trier of fact, there is no substantial evidence to support verdict in that party's favor. *Begnal v. Canfield & Associates, Inc. (2000) 78 Cal. App. 4th 66, 72, 92 Cal. Rptr. 2d 611*

Scope of appellate review of motion for judgment notwithstanding verdict requires determination of whether any substantial evidence, contradicted or uncontradicted, supports jury's conclusions. *Sukoff v. Lemkin (1988) 202 Cal. App. 3d 740, 743, 249 Cal. Rptr. 42*

Judgment notwithstanding the verdict sustained only when it can be said as a matter of law that no other reasonable conclusion is deducible from evidence. *Kaiser Cement & Gypsum Corp. v. Allis-Chalmers Mfg. Co. (1973) 35 Cal. App. 3d 948, 962, 111 Cal. Rptr. 210*

Appellate court reviews discretion exercised by trial court in light of evidence but not replacing it unless arbitrarily exercised. *Gordon v. Strawther Enterprises, Inc. (1969) 273 Cal. App. 2d 504, 511, 78 Cal. Rptr. 417*

[13] Time for Ruling on Motion

In employment action resulting in verdict for plaintiff, in which defendants filed no notice of intention to move for new trial, but only filed motion for JNOV, trial court properly court issued its decision on JNOV motion within 60 days from service of notice of entry of judgment and properly denied plaintiff's motion to strike court's order granting partial JNOV as untimely, where filing of JNOV motion is not statutory event under *Code Civ. Proc. § 660* triggering time for court's ruling. *Pratt v. Vencor (2003) 105 Cal. App. 4th 905, 907-911, 129 Cal. Rptr. 2d 741*

Defendant's motion for judgment notwithstanding verdict was timely granted where court's signed memorandum of opinion and minute order granting motion were filed with clerk 17 days after notice of entry of judgment was mailed, even though formal judgment not signed and filed until after expiration of 60-day period for court to rule on motion [*Code Civ. Proc. §§ 629, 660*]. *Catania v. Halcyon Steamship Co. (1975) 44 Cal. App. 3d 348, 350, 118 Cal. Rptr. 513*

Requirement of *Code Civ. Proc. § 629* that court rule both on motion for judgment notwithstanding verdict and on motion for new trial at same time when both motions are made, as directory and not mandatory and substantial compliance was sufficient, provided both motions made within requisite time period. *Espinoza v. Rossini (1966) 247 Cal. App. 2d 40, 45-46, 55 Cal. Rptr. 205*

[14] Time for Serving Motion

Prevailing party's attorney's mailing to opposing counsel of photocopy of file-stamped and dated judgment started time limit for serving motion for judgment notwithstanding the verdict under *Code Civ. Proc. §§ 629, 659*, so that service of motion 26 days later was untimely, where service of written notice of entry of judgment and filing of original notice of entry and proof of service complied with section 659, and posttrial motion statutes do not require filing of original notice of entry or file-stamped copy of judgment accompanied by proof of service to start time limits for bringing posttrial motions. *Palmer v. GTE (2003) 30 Cal. 4th 1265, 1277-1278, 135 Cal. Rptr. 2d 654, 70 P.3d 1067*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 371.124 Law Reviews

Christie, *Lawful Departures From Legal Rules: "Jury Nullification" and Legitimated Disobedience, 62 Cal. L. Rev. 1289 (1974)*

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33-371 California Forms of Pleading and Practice--Annotated § 371.125

§ 371.125 Text References

California Trial Practice: Civil Procedure During Trial, Ch. 25, *Motions After Trial* (Cal. C.E.B. 3d ed. 1995)

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[Reserved]

§§ 371.126[Reserved]

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§ 371.140 State Constitution

Miscarriage of justice as basis for granting of new trial. *Cal. Const., art. VI, § 13*

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New trial defined. *Code Civ. Proc. § 656*

Grounds for new trial. *Code Civ. Proc. §§ 657, 914*

New trial when phonographic report of trial cannot be transcribed. *Code Civ. Proc. §§ 657.1, 914*

Necessity of filing affidavits to support application for new trial. *Code Civ. Proc. § 658*

Time for filing notice of intention to move for new trial. *Code Civ. Proc. § 659*

Time for filing affidavits and counteraffidavits. *Code Civ. Proc. § 659a*

Hearing and disposition of motion for new trial. *Code Civ. Proc. §§ 660-662*

Conditional denial of new trial where consent to addition or reduction of damages. *Code Civ. Proc. § 662.5*

New trial after loss or destruction of bill of exceptions or statement of case. *Code Civ. Proc. §§ 663.1, 663.2*

Stay of execution of judgment pending determination of motion for new trial. *Code Civ. Proc. § 918*

Appeal from order granting new trial. *Code Civ. Proc. §§ 904.1(a)(4), 904.2(e)*

New trial where court reporter dies or becomes disabled before report of trial transcribed and report not waived. *Code Civ. Proc. § 914*

Prevailing party as required to give notice of court's decision or order granting or denying motion unless waived. *Code*

Civ. Proc. § 1019.5(a)

Declarations under penalty of perjury in lieu of affidavits. *Code Civ. Proc. § 2015.5*

Evidence allowed to impeach verdict. *Evid. Code § 1150*

Filing fee for new trial. *Gov. Code § 70617(a)(5)*

Consent to hearing motion anywhere in state. *Gov. Code § 69741.1*

Grounds for new trial in criminal proceedings. *Penal Code § 1181*

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§ 371.142 California Rules of Court

Extension of time to appeal when notice of intention to move for new trial is filed. *Cal. Rules of Ct., Rules 8.108, 8.752(a)*

Statement of decision, judgment, and motion for new trial following bifurcated trial. *Cal. Rules of Ct., Rule 3.1591*

Memorandum of in support of motion for new trial. *Cal. Rules of Ct., Rule 3.1600*

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§ 371.143 Decisions

[1] Affidavits or Declarations

Questioning of jurors by judge in connection with motion for new trial on grounds of juror misconduct was error because *Code Civ. Proc. § 658* specifically provides that application for new trial must be based on affidavits; trial court erred in considering untimely filed affidavits in support of motion. *Maple v. Cincinnati, Inc. (1985) 163 Cal. App. 3d 387, 391-392, 209 Cal. Rptr. 451*

Evid. Code § 1150 permits juror misconduct to be established by juror affidavit if declaration consists of proof of overt acts, objectively ascertainable. *Tramell v. McDonnell Douglas Corp. (1984) 163 Cal. App. 3d 157, 171-172, 209 Cal. Rptr. 427*

Motion for new trial on grounds enumerated in first four subdivisions of *Code Civ. Proc. § 657* is required to be presented solely by affidavit. *Linhart v. Nelson (1976) 18 Cal. 3d 641, 645, 134 Cal. Rptr. 813, 557 P.2d 104*

Evidence presented by affidavit in connection with motion for new trial is required to be given from personal knowledge and cannot contain hearsay. *Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 105, 95 Cal. Rptr. 516, 485 P.2d 1132*

Since it is implicit in statement of grounds whether motion for new trial will be made on affidavits or minutes of court, denial of motion on ground that it did not state if it would be made on affidavits or minutes was abuse of discretion. *Nichols v. Hast (1965) 62 Cal. 2d 598, 601, 43 Cal. Rptr. 641, 400 P.2d 753*

Although motion for new trial required to be supported by affidavit if motion made on certain grounds, if moving party relies wholly on facts appearing on face of record, lack of affidavit is not fatal to motion. *Webber v. Webber (1948) 33 Cal. 2d 153, 164, 199 P.2d 934*

Extension of time for filing affidavits. *Terry v. Lesem (1928) 89 Cal. App. 682, 685-686, 265 P. 523*

[2] Alternative Relief Under Code Civ. Proc. § 662

Order that proceedings be reopened as constitutes a ruling on motion for new trial within meaning of *Code Civ. Proc. §§ 660* and *662*, and order made pursuant to *Code Civ. Proc. § 662*, directing that case be reopened, has effect of vacating findings and judgment. *Taormino v. Denny (1970) 1 Cal. 3d 679, 683-684, 83 Cal. Rptr. 359, 463 P.2d 711*

Order under *Code Civ. Proc. § 662* vacating judgment and reopening case for further proceedings is not appealable. *Concerned Citizens Coalition of Stockton v. City of Stockton (2005) 128 Cal. App. 4th 70, 77-84, 26 Cal. Rptr. 3d 735*

Rule that failure of court to act within 60-day limitation deprives it of jurisdiction to take any further action and that any purported action thereafter taken by trial court is void as applicable to court action under *Code Civ. Proc. § 662*. *Tuck v. Tuck (1966) 245 Cal. App. 2d 260, 263, 53 Cal. Rptr. 872*

[3] Conditional Granting or Denial of Motion

Conditional new trial order under *Code Civ. Proc. § 662.5*, granting or denying new trial subject to plaintiff's acceptance of remittitur, is subject to specification requirement of *Code Civ. Proc. § 657*, requiring court to specify reasons for granting of new trial. *Hasson v. Ford Motor Co (1982) 32 Cal. 3d 388, 420, 185 Cal. Rptr. 654, 650 P.2d 1171* ; *Neal v. Farmers Ins. Exchange (1978) 21 Cal. 3d 910, 931, 148 Cal. Rptr. 389, 582 P.2d 980*

Where error of excluding relevant evidence at trial goes only to measure of damages and appropriate amount can be ascertained from evidence, remittitur is proper remedy to cure defect and avoid necessity of new trial. *Sabella v. Southern Pac. Co. (1969) 70 Cal. 2d 311, 316, 74 Cal. Rptr. 534, 449 P.2d 750*

When trial court grants defendant's motion for new trial unless plaintiff consents to remittitur, plantiff's consent does not preclude plaintiff from raising issue of court's erroneous failure to instruct jury on exemplary damages on later appeal from judgment. *Templeton Feed & Grain v. Ralston Purina Co. (1968) 69 Cal. 2d 461, 468-469, 72 Cal. Rptr. 344, 446 P.2d 152*

Denial of motion for new trial, conditional on consent to reduction of punitive damages award, is proper when trial court independently reviewed evidence and based its action on complete specification of reasons, which was based on recognized factors for determining proper amount of punitive damages. *Sprague v. Equifax (1985) 166 Cal. App. 3d 1012, 1052-1055, 213 Cal. Rptr. 69*

Court grants motion for new trial where parties do not agree on greater or lesser amount of damages. *Jehl v. Southern Pac. Co. (1967) 66 Cal. 2d 821, 832, 59 Cal. Rptr. 276, 427 P.2d 988* (additur); *Hughes v. Hearst Publications, Inc. (1947) 79 Cal. App. 2d 703, 705, 180 P.2d 419* (remittitur)

On conditional granting or denial of motion, time for performing condition extends past 60-day period that court has to determine the motion. *Alberton v. Superior Court of San Francisco (1968) 265 Cal. App. 2d 812, 825, 71 Cal. Rptr. 553* ; *but see dictum in Jehl v. Southern Pac. Co. (1967) 66 Cal. 2d 821, 832, 59 Cal. Rptr. 276 , contra*

Court grants motion for new trial where moving party agrees to pay other party's costs. *Chodos v. Superior Court (1964) 226 Cal. App. 2d 703, 707, 38 Cal. Rptr. 301*

[4] Default Judgments

Motion for new trial is proper in case of default judgment to secure reexamination of questions of law or fact or both.

Jacuzzi v. Jacuzzi Bros., Inc. (1966) 243 Cal. App. 2d 1, 22, 52 Cal. Rptr. 147

[5] Discretion of Trial Court

Trial court is not permitted to grant new trial on its own motion. *Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 919, 114 Cal. Rptr. 622, 523 P.2d 662*

In considering motion, court is entitled to reweigh evidence, consider credibility of witnesses, and draw reasonable inferences contrary to those accepted by jury. *Mercer v. Perez (1968) 68 Cal. 2d 104, 112, 65 Cal. Rptr. 315, 436 P.2d 315*

Trial court, like appellate court, is enjoined by *Cal. Const., Art VI, § 13* from granting motion for new trial for errors unless errors are prejudicial. *Adkins v. Lear, Inc. (1967) 67 Cal. 2d 882, 920-921, 64 Cal. Rptr. 545, 435 P.2d 321* ; *Mosesian v. Pennwalt Corp. (1987) 191 Cal. App. 3d 851, 858, 236 Cal. Rptr. 778*

In contrast to grants of reconsideration, courts have no inherent power to grant a new trial. *Marriage of Herr (2009) 174 Cal. App. 4th 1463, 1471, 95 Cal. Rptr. 3d 464*

Orders granting new trial generally are reviewed for abuse of discretion. Broad discretion is accorded trial court when stated grounds are irregularity in proceedings and surprise. When error on another ground is established, discretion in granting new trial is seldom reversed. Appellate court does not independently redetermine question whether error was prejudicial or some other ground was compelling. Review is limited to inquiry whether there was any support for trial judge's ruling and will be reversed only on strong affirmative showing of abuse of discretion. *Priebe v. Nelson (2004) 119 Cal. App. 4th 235, 242-243, 14 Cal. Rptr. 3d 173*

When post-trial motions attacking judgment have been made trial court is not limited to order granting or denying relief requested in moving party's papers. *Shapoff v. Scull (1990) 222 Cal. App. 3d 1457, 1473, 272 Cal. Rptr.480* (dicta; court amended judgment to delete finding on motion for new trial and judgment notwithstanding the verdict) (disapproved on other grounds in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454*)

Granting of motion for new trial rests so completely within discretion of trial judge that appellate court will not interfere with judge's action unless manifest and unmistakable abuse of discretion clearly appears. *Jutzi v. County of Los Angeles (1987) 196 Cal. App. 3d 637, 656, 242 Cal. Rptr. 74*

Trial court does not have power to grant new trial unless, after weighing evidence, court is convinced from entire record, including reasonable inferences therefrom, that court or jury clearly should have reached different verdict or decision. *Locksley v. Ungureanu (1986) 178 Cal. App. 3d 457, 463, 223 Cal. Rptr. 737*

Cal. Const., art. VI, § 13, requires prejudicial error as basis for new trial; granting of new trial for harmless error as abuse of discretion. *Garcia v. County of Los Angeles (1986) 177 Cal. App. 3d 633, 641, 223 Cal. Rptr. 100*

Although court accorded wide discretion in ruling on motion, court must exercise discriminating judgment within the bounds of reason. *Johns v. City of Los Angeles (1978) 78 Cal. App. 3d 983, 987, 144 Cal. Rptr. 629*

Error of court in granting oral motion for new trial in violation of *Code Civ. Proc. § 659*, requiring written motion, was corrected by subsequent compliance with the statute. *Herman v. Shandor (1970) 8 Cal. App. 3d 476, 480-481, 87 Cal. Rptr. 443*

Trial judge has power to grant new trial even though evidence might justify verdict and duty to set aside jury's verdict whenever judge's conscience is impressed with injustice thereof. *Moore v. City & County of San Francisco (1970) 5 Cal. App. 3d 728, 738, 85 Cal. Rptr. 281*

1965 and 1967 amendments to *Code Civ. Proc. § 657* do not curb discretion vested in trial judge to grant new trial. *Thompson v. John Strona & Sons (1970) 5 Cal. App. 3d 705, 709, 85 Cal. Rptr. 350*

Trial court is not only authorized but also has under duty to grant new trial whenever in its opinion evidence on which former decision rests is insufficient to justify decision, and its action in granting new trial on this ground is discretionary to extent that if any appreciable conflict exists in evidence, court's action may not be disturbed on appeal. *Roseboro v. Rawlings Mfg. Co. (1969) 275 Cal. App. 2d 43, 47, 79 Cal. Rptr. 567*

[6] Effect Of Order Granting Motion

Effect of order granting new trial is to leave case at large and to place parties in same position as if case had never been tried. *Gordon v. Nissan Motor Co., Ltd. (2009) 170 Cal. App. 4th 1103, 1111, 88 Cal. Rptr. 3d 778*

Otherwise proper order entered in permanent minutes of court granting new trial need not vacated bear signature of judge. *Kolar v. County of Los Angeles (1976) 54 Cal. App. 3d 873, 877, 127 Cal. Rptr. 15*

Order granting motion vacates verdict or decision and returns case to exact state before trial. *Bloomquist v. Haley (1928) 204 Cal. 258, 261, 268 P. 364*

New trial order affords parties right to introduce any additional or new evidence, thus entitling them to designate new expert witnesses. *Guzman v. Superior Court (1993) 19 Cal. App. 4th 705, 707-708, 23 Cal. Rptr. 2d 585*

General order granting motion for new trial as opens case to all parties, even though some of parties may not have joined on motion. *Bishop v. Superior Court (1922) 59 Cal. App. 46, 48, 209 P. 1012*

Where there are several parties and rights and interests of parties are distinct, resulting order does not effect judgment as to some parties. *Fearon v. Fodera (1915) 169 Cal. 370, 376, 148 P. 200*

[7] Grounds

[a] Accident or Surprise

Terms "accident" and "surprise," although not strictly synonymous, have substantially same meaning; each is used to denote some condition or situation in which party to cause is unexpectedly placed to that party's injury without any negligence of his or her own. *Kauffman v. De Mutiis (1948) 31 Cal. 2d 429, 432, 189 P.2d 271*

Right to new trial on ground of surprise is waived if, when surprise discovered, it is not made known to court and no motion is made for mistrial or continuance. *Kauffman v. De Mutiis (1948) 31 Cal. 2d 429, 432, 189 P.2d 271* ; *Garcia v. County of Los Angeles (1986) 177 Cal. App. 3d 633, 638-639, 223 Cal. Rptr. 100*

Trial court properly granted new trial on grounds of accident or surprise, after trial court in pretrial ruling regarding use of strict liability dog-bite statute [*Civ. Code § 3342*] set tone and content of evidence to be allowed at trial and then at end of trial court changed its mind and disallowed use of strict liability, on which plaintiff's counsel had reasonably relied and defense counsel in streak of zealousness argued to jury that plaintiff's counsel had misled jury regarding strict liability issue, where plaintiff's counsel was unfairly required to try case on one theory, which was then disallowed by

court at close of evidence; where transcripts and minute order both reflected that trial court accepted plaintiff's position on applicability of strict liability statute and trial court itself expressed its own understanding that plaintiff reasonably relied on pretrial ruling. *Priebe v. Nelson (2004) 119 Cal. App. 4th 235, 242-244, 14 Cal. Rptr. 3d 173*

Motion for new trial is properly denied when based on claim that negligence of moving party's own attorney created accident or surprise that she could not have guarded against; trial counsel's negligence as not ground on which new trial may be granted. *In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 154-155, 242 Cal. Rptr. 649*

Failure to disclose testimony is required by former Code Civ. Proc. §§ 2037.3 and 2037.5 (*now see Code Civ. Proc. § 2034* [*Code Civ. Proc. § 2034.210 et seq.* effective July 1, 2005]) is not sufficient to grant motion for new trial on ground of surprise when counsel refuses to accept offer to recess trial in order for counsel to depose witness and possibly obtain rebuttal evidence. *Whitehill v. United States Lines, Inc. (1986) 177 Cal. App. 3d 1201, 1210, 223 Cal. Rptr. 452*

Granting of motion for new trial pursuant to *Code Civ. Proc. § 657(3)*, relating to accident or surprise, was not supported where based on court's conclusion that it instructed jury on issue not raised by pleadings and therefore committed error of law. *McCown v. Spencer (1970) 8 Cal. App. 3d 216, 228, 87 Cal. Rptr. 213*

Party must show that he or she was diligent in seeking to protect against event that constituted accident or surprise and if ordinary prudence would have avoided surprise, motion for new trial is denied. *Wade v. De Bernardi (1970) 4 Cal. App. 3d 967, 971, 84 Cal. Rptr. 817*

Order granting plaintiff's motion for new trial on ground of accident or surprise which ordinary prudence could not have guarded against was not in excess of jurisdiction where, although court did not specify reasons for ruling, order was timely made, on proper ground, on motion served on adverse parties, and was timely decided. *Grant v. Hall (1969) 274 Cal. App. 2d 624, 628, 79 Cal. Rptr. 219*

Party moving for new trial on ground of accident or surprise must show that surprise had material effect on case so that different result might be reached on retrial. *Whitfield v. Debrincat (1937) 18 Cal. App. 2d 730, 738, 64 P.2d 960*

[b] Error in Law

Extraneous instruction that never came into play in deliberative process is not basis for which a new trial may be granted. *Caldwell v. Paramount Unified School Dist. (1995) 41 Cal. App. 4th 189, 206, 48 Cal. Rptr. 2d 448*

Erroneous evidentiary rulings can be error in law for which new trial may be granted under *Code Civ. Proc. § 657(7). Richard v. Scott (1978) 79 Cal. App. 3d 57, 63, 144 Cal. Rptr. 672*

Erroneous or misleading jury instruction is error in law for which new trial may be granted under *Code Civ. Proc. § 657(7). Bruck v. Adams (1968) 259 Cal. App. 2d 585, 587, 66 Cal. Rptr. 395*

Erroneous grant of nonsuit is error in law for which new trial may be granted under *Code Civ. Proc. § 657(7). Castillo v. Warren (1941) 44 Cal. App. 2d 903, 907, 113 P.2d 232*

Erroneous denial of directed verdict is error in law for which new trial may be granted under *Code Civ. Proc. § 657(7). Steele v. Werner (1938) 28 Cal. App. 2d 554, 556, 83 P.2d 56*

Erroneous denial of jury trial is error in law for which new trial may be granted under *Code Civ. Proc. § 657(7). Johnson v. Superior Court (1932) 121 Cal. App. 288, 292, 8 P.2d 1047*

[c] Excessive or Inadequate Damages

Use of remittitur under *Code Civ. Proc. § 662.5* is strictly limited to those cases where jury error is confined to the issue of damages. *Schelbauer v. Butler Manufacturing Co. (1984) 35 Cal. 3d 442, 453, 198 Cal. Rptr. 155, 673 P.2d 743*

Trial court did not abuse discretion in granting motion for new trial on ground of excessive damages, conditioned on plaintiffs' acceptance of reduced damages award, where order was not in nature of directed verdict or JNOV because it did not dispose of litigation but court ruled only that evidence plaintiffs had produced on theory was too speculative to permit recovery, and where court's explanation of its ruling provided adequate notice to parties and to reviewing court that trial court found evidence did not support plaintiffs' theory of damages and reviewing court found support for order in record. *Dell'Oca v. The Bank of New York Trust Co., N.A. (2008) 159 Cal. App. 4th 531, 546-552, 71 Cal. Rptr. 3d 737*

U.S. Const., amend. VIII, protection against imposition of excessive fines, is applicable only to criminal actions, not to purely civil penalties, and therefore is not proper ground to assert excessiveness of civil damages award. *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co. (1987) 189 Cal. App. 3d 1072, 1100-1101, 234 Cal. Rptr. 835*

Order conditionally granting motion for new trial on ground that damages awarded were excessive is presumed correct and will not be disturbed when material conflict of evidence as to extent of damages exists. *Wayte v. Rollins Int'l., Inc. (1985) 169 Cal. App. 3d 1, 22, 215 Cal. Rptr. 59*

Allegation that inadequate damage award resulted from defendant's and juror's misconduct must be raised by motion for new trial if facts were known to plaintiff before judgment became final and within time to move for new trial. *Trudell v. Heilman (1984) 158 Cal. App. 3d 251, 254, 204 Cal. Rptr. 551*

Granting of motion for new trial is improper when based on judge's opinion that damages were excessive, based on ranges of awards judge has seen in other cases, or based on fact that paraplegic plaintiff was very likeable or attractive. *Bigboy v. County of San Diego (1984) 154 Cal. App. 3d 397, 406-407, 201 Cal. Rptr. 226*

Trial court properly granted motion for new trial on issue of damages when jury improperly apportioned nondivisible damages between codefendants. *Marshall v. Brown (1983) 141 Cal. App. 3d 408, 415, 190 Cal. Rptr. 392*

Pursuant to *Code Civ. Proc. § 662.5*, on motion for new trial for excessive damages, trial court uses its independent judgment to determine revised award of damages, and such award is undisturbed on appeal, absent showing of manifest abuse of discretion such as lack of substantial basis for award. *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 823, 174 Cal. Rptr. 348*

Trial court's judgment against defaulting defendant which is less than jury verdict against nondefaulting defendant does not require granting of new trial on grounds of excessive damages. *Charles D. Warner & Sons, Inc. v. Seilon, Inc. (1974) 37 Cal. App. 3d 612, 616, 112 Cal. Rptr. 425*

Defendant is entitled to move for new trial after entry of new judgment where appellate court vacates first judgment for plaintiff with directions to enter a new judgment in a greater or lesser amount for plaintiff. *Woodcock v. Fontana Scaffolding & Equip. Co. (1968) 69 Cal. 2d 452, 459-460, 72 Cal. Rptr. 217, 445 P.2d 881*

Prob. Code § 573 (repealed and replaced by *Code Civ. Proc. § 377.34*), limiting damages recoverable in actions that survive injured party's death where party dies before judgment, is applicable where order made granting new trial on issue of damages alone and plaintiff dies after order made. *Love v. Wolf (1967) 249 Cal. App. 2d 822, 839-842, 58*

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[d] Insufficiency of Evidence

Power of court to grant new trial on ground of insufficiency of evidence pursuant to *Code Civ. Proc. § 657(6)* is not violation of right to jury trial. *Clemmer v. Hartford Insurance Co. (1978) 22 Cal. 3d 865, 889, 151 Cal. Rptr. 285, 587 P.2d 1098*

Trial court did not abuse its discretion in granting plaintiffs' motion for new trial on ground of insufficiency of evidence where record supported trial court's conclusion that jury should have returned verdict for plaintiffs on theory that automobile collision was caused by defendant's negligent failure to replace locking cotter key when reassembling steering apparatus. *Jones v. Citrus Motors Ontario, Inc. (1973) 8 Cal. 3d 706, 708-711, 106 Cal. Rptr. 28, 505 P.2d 220*

Juror declarations did not conclusively disprove compromise verdict so as to require reversal of trial court's grant of new trial under *Code Civ. Proc. § 657(6)* based on insufficiency of evidence to support jury's verdict, where rule according primacy to unopposed affidavits is confined to new trial motions based on irregularity in proceedings, jury misconduct, accident or surprise, and newly discovered evidence, because governing statute, *Code Civ. Proc. § 658*, directs that motions on these grounds must be made on affidavits, and motion on ground of insufficient evidence must be made on "minutes of the court," so that "minutes of the court" will support new trial order based on § 657(6). Trial court's decision that new trial should not be restricted to damages and should encompass liability was supported by substantial evidence, where record contained abundant evidence of compromise verdict, and where given conflicting evidence of liability, jury's mishandling of damages and presence of signs of placatory verdict, decision to order complete new trial was not manifest abuse of discretion. *Lauren H. v. Kannappan (2002) 96 Cal. App. 4th 834, 838-839, 117 Cal. Rptr. 2d 484*

Court's determination that weight of evidence is against verdict enables it to order new trial even if there is sufficient evidence to sustain verdict on appeal. *Candido v. Huitt (1984) 151 Cal. App. 3d 918, 923, 199 Cal. Rptr. 41*

No impropriety in trial court's denial of motion for new trial when trial court found that some evidence lacked credibility but decided that jury's verdict should nevertheless not be reversed. *Kolling v. Dow Jones & Co. (1982) 137 Cal. App. 3d 709, 725, 187 Cal. Rptr. 797*

Propriety of order granting new trial entered in current volume of minutes within 60-day period provided by *Code Civ. Proc. § 660*, though specification of reasons required by *Code Civ. Proc. § 657* filed within 10 days thereafter; substantial basis in record to support order where trial court, in stating belief that jury clearly should have reached different verdict, implicitly stated belief that there was insufficient evidence to support verdict where court specified evidence it thought was lacking. *Fortenberry v. Weber (1971) 18 Cal. App. 3d 213, 219-224, 95 Cal. Rptr. 834*

Court's reasons for granting motion for new trial under *Code Civ. Proc. § 657(6)* on grounds of insufficiency of evidence were insufficiently supported where reasons given were erroneous legal conclusions and it was apparent trial court granted motion on this ground because it believed there was a total lack of any material evidence to support verdict rather than because, after weighing evidence, the court believed that it failed to preponderate and jury should have reached a different verdict. *McCown v. Spencer (1970) 8 Cal. App. 3d 216, 226-228, 87 Cal. Rptr. 213*

Order granting new trial on specified grounds of insufficiency of evidence and judgment as against law in mandate proceeding to compel State Board of Pharmacy to vacate decision suspending permit and licenses is not binding on judge who presides over new trial and does not preclude subsequent retrial and reexamination of all issues of fact, even though no additional evidence is offered, where motion was granted for sole purpose of according appellants a new trial

which consists of reexamination of all issues of fact in same court, and reexamination of all issues contemplated independentdetermination of cause. *Arenstein v. California State Bd. of Pharmacy (1968) 265 Cal. App. 2d 179, 187-188, 71 Cal. Rptr. 357*

Order granting motion for new trial on ground of insufficiency of evidence is not an abuse of discretion where evidence would support judgment in favor of moving party. *McFarland v. Booker (1967) 250 Cal. App. 2d 402, 414, 58 Cal. Rptr. 417* ; *Martin v. Culver Enterprises, Inc. (1966) 239 Cal. App. 2d 925, 930, 49 Cal. Rptr. 149*

[e] Irregularity in Proceedings in Court, Jury, or Adverse Party

Motion for new trial on grounds of irregularity in conduct of adverse party was improperly denied where counsel improperly argued to jury by urging facts not justified by record or suggesting jury resort to speculation. *City of Los Angeles v. Decker (1977) 18 Cal. 3d 860, 870-871, 135 Cal. Rptr. 647, 558 P.2d 545*

Declaration on grounds of jury irregularity must show lack of knowledge of jury misconduct by moving party or counsel prior to rendition of verdict and separate declarations are desirable, although failure to do so is not fatal to motion for new trial. *Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 103-104, 95 Cal. Rptr. 516, 485 P.2d 1132*

Motion for new trial based on irregularity in proceedings of court was improperly denied where judge made prejudicial comments during conduct of trial. *Delzell v. Day (1950) 36 Cal. 2d 349, 351-352, 223 P.2d 625*

Where court expresses prejudice against use of particular witness, notwithstanding competency of testimony and prejudice is reflected in actions of court against the aggrieved party, new trial is granted on ground of irregular ity in the proceedings of the court. *Pratt v. Pratt (1903) 141 Cal. 247, 251-252, 74 P. 742*

Existence of compromise verdict becomes procedural question relevant to proper scope of new trial order, rather than furnishing substantive basis for new trial motion under *Code Civ. Proc. § 657(1)* for procedural irregularity or *Code Civ. Proc. § 657(2)* for jury misconduct, when new trial is granted under *Code Civ. Proc. § 657(6)* for insufficiency of evidence; question is whether new trial may be limited to issue as to which evidentiary problem was found or must encompass all litigated issues. Many factors beyond adequacy of damage award are relevant to decision about whether verdict is product of compromise, and would be immaterial if deficiency furnishing basis for new trial order was alone enough to mandate comprehensive new trial. *Lauren H. v. Kannappan (2002) 96 Cal. App. 4th 834, 839-840, 117 Cal. Rptr. 2d 484*

Motion by plaintiff for new trial on grounds of irregularity was improperly denied when defense counsel interjected issue of his own client's perjury and collusion, resulting in verdict for defendant. *Price v. Giles (1987) 196 Cal. App. 3d 1469, 1474, 242 Cal. Rptr. 559*

Motion for new trial on ground of misconduct of counsel for adverse party was properly denied when alleged instances of misconduct were cured by admonition, were waived by failure to object, were invited by conduct of complaining party, or had no prejudicial effect in view of evidence supporting verdict. *Curcio v. Svanevik (1984) 155 Cal. App. 3d 955, 961-966, 202 Cal. Rptr. 499*

Defendant in civil action for punitive damages is not entitled to new trial on basis that trial counsel was incompetent, ignorant of law and procedure, and lacking in knowledge of facts. *Chevalier v. Dubin (1980) 104 Cal. App. 3d 975, 979, 164 Cal. Rptr. 118*

Ineligibility to practice of other party's counsel is not ground for new trial sought by unsuccessful litigant. *Gomes v.*

Roney (1979) 88 Cal. App. 3d 274, 275, 151 Cal. Rptr. 756

Bias or prejudice of trial judge is not irregularity of court, but evidence of judge's conduct may be shown as irregularity of court preventing fair trial. *Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal. App. 3d 143, 150-151, 91 Cal. Rptr. 193*

Motion for new trial on ground of irregularity of proceedings, based on alleged misconduct of attorney for adverse party was improperly granted where alleged misconduct consisted of counsel's commenting on and reading jury instructions not decided on by court, court thus correctly admonished jury, and no motion for mistrial was made. *Gotcher v. Metcalf (1970) 6 Cal. App. 3d 96, 100-101, 85 Cal. Rptr. 566*

Motion for new trial based on ground of irregularity in proceedings of court is properly granted where judge fails to make finding on material allegation. *Halperin v. Guzzardi (1949) 95 Cal. App. 2d 31, 35, 212 P.2d 9*

An irregularity is any overt act of the trial court, jury, or adverse party that violates the right to a fair and impartial trial and amounts to misconduct. *Gray v. Robinson (1939) 33 Cal. App. 2d 177, 182, 91 P.2d 194*

Where juror falsely denied having personal knowledge of accident in question on voir dire and during jury deliberations stated that she had personal knowledge of material facts in case and had formed and expressed an opinion in case, new trial was granted on ground of irregularity in proceedings of jury. *Williams v. Bridges (1934) 140 Cal. App. 537, 540, 35 P.2d 407*

[f] Lack of Phonographic Report of Trial

When transcript notes are no longer in existence, attempt to reconstruct trial testimony in settled statement is proper procedure; notes taken during trial by attorneys and trial judge and memories of attorneys, witnesses, and jurors as additional sources for satisfactory record; when transcript notes are unavailable, criminal defendant as required to show it is impossible to secure adequate substitute, before new trial will be ordered. *People v. Everett (1990) 224 Cal. App. 3d 932, 937, 274 Cal. Rptr. 429*

[g] Misconduct of Jury

[i] Generally

Right to unbiased and unprejudiced jury is constitutionally guaranteed. *Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 110, 95 Cal. Rptr. 516, 485 P.2d 1132*

History of rule that juries may not impeach their verdicts and exceptions to rule; jurors are competent witnesses to prove objective facts to impeach verdict under *Evid. Code § 1150* on motion for new trial. *People v. Hutchinson (1969) 71 Cal. 2d 342, 346-351, 78 Cal. Rptr. 196, 455 P.2d 132*

In personal injury action resulting from plaintiff's service in Navy, trial court did not abuse its discretion by finding misconduct due to juror's comments, where juror interjected matters outside scope of trial when he presented evidence to jury about Navy's practice of wholesale replacement of parts whenever any repair was carried out, despite manufacturers' recommendations or guidelines to contrary, and Navy's practice of cleaning so thoroughly such that no asbestos could have been present after plaintiff came aboard ship; and where trial court specifically instructed jurors not to inject their specialized knowledge into deliberations; misconduct was prejudicial, because comments bore directly on hotly contested issue of whether plaintiff was exposed to defendant's asbestos aboard ship and tended to buttress defendant's position, thus relating directly to defendant's fault in causing plaintiff's mesothelioma, and it could be fairly

assumed opinions held by juror certainly influenced his vote on crucial jury question of whether plaintiff was exposed to defendant's asbestos, and, according to juror affidavits, improper opinion evidence he presented to jury potentially influenced votes of as many as four other jurors, including decisive ninth vote in favor of defense verdict. *Whitlock v. Foster Wheeler, LLC (2008) 160 Cal. App. 4th 149, 160-163, 72 Cal. Rptr. 3d 369*

Existence of compromise verdict becomes procedural question relevant to proper scope of new trial order, rather than furnishing substantive basis for new trial motion under *Code Civ. Proc. § 657(1)* for procedural irregularity or *Code Civ. Proc. § 657(2)* for jury misconduct, when new trial is granted under *Code Civ. Proc. § 657(6)* for insufficiency of evidence; question is whether new trial may be limited to issue as to which evidentiary problem was found or must encompass all litigated issues. Many factors beyond adequacy of damage award are relevant to decision about whether verdict is product of compromise, and would be immaterial if deficiency furnishing basis for new trial order was alone enough to mandate comprehensive new trial. *Lauren H. v. Kannappan (2002) 96 Cal. App. 4th 834, 839-840, 117 Cal. Rptr. 2d 484*

There was no juror misconduct in jury turning on radio scanner during deliberations to check condition of battery, when by turning on scanner and observing its operation, jury merely used it according to its nature to aid them in weighing evidence and reaching conclusion on controverted matter. *People v. Baldine (2001) 94 Cal. App. 4th 773, 778, 114 Cal. Rptr. 2d 570*

Party's constitutional right to have case decided by jury does not include right to compel jurors to discuss issues which they have chosen to decide without discussion. *Vomaska v. City of San Diego (1997) 55 Cal. App. 4th 905, 911, 64 Cal. Rptr. 2d 492*

While verdict should be result of sound judgment, dispassionate consideration, and conscientious reflection, and jury should, if necessary, deliberate patiently and long on issues which have been submitted to them, yet, when law does not positively prescribe length of time jury must consider their verdict, they may render valid verdict without retiring, or on very brief deliberation after retiring, although trial court may, in its discretion, cause jury to reconsider case if their decision is so hasty as to indicate flippant disregard of their duties. *Vomaska v. City of San Diego (1997) 55 Cal. App. 4th 905, 913, 64 Cal. Rptr. 2d 492*

[ii] Juror Affidavits

When trial court failed to specify reasons for granting new trial on juror misconduct grounds, testimonial evidence submitted by parties in form of juror declarations was sharply conflicting on every material issue, and party supporting grant of new trial submitted no other evidence to support motion, upon independent review of record, court concluded that moving party failed to discharge its burden to persuade court of jury misconduct warranting grant of new trial. *Oakland Raiders v. National Football League (2007) 41 Cal. 4th 624, 635-642, 61 Cal. Rptr. 3d 634*

Juror declarations are admissible to extent they describe overt acts constituting jury misconduct, but not to extent they describe effect of any event on juror's subjective reasoning process; juror declarations are inadmissible to extent that they purport to describe jurors' understanding of instructions or how they arrived at their verdict. *Bell v. Bayerische Motoren Werke Aktiengesellschaft (2010) 181 Cal. App. 4th 1108, 1124-1125, 105 Cal. Rptr. 3d 485*

Although jurors may testify to overt acts to impeach jury verdict (that is, statements, conduct, conditions, or events open to sight, hearing, and other senses and thus subject to corroboration), jurors are not permitted to testify to subjective reasoning processes of individual jurors; deliberative error in jury's collective mental process consist of confusion, misunderstanding, and misinterpretation of the law. *Mesecher v. County of San Diego (1992) 9 Cal. App. 4th 1677, 1683, 12 Cal. Rptr. 2d 279*

New trial is properly denied if attempted impeachment of verdict rests solely on attack on jury's subjective mental processes in reaching verdict. *Ford v. Bennacka (1990) 226 Cal. App. 3d 330, 336, 276 Cal. Rptr. 513*

Affidavits showing that jurors may have relied on BAJI instruction that judge admonished jurors not to apply to particular defendant does not create grounds for new trial because affidavits delved into subjective concerns of jurors during their deliberations and, furthermore, affidavits did not support contention that jury collectively and intentionally disregarded instructionsas given. *DiRosario v. Havens (1987) 196 Cal. App. 3d 1224, 1233-1235, 242 Cal. Rptr. 423*

Juror's affidavits must state overt facts that can be objectively proved and not subjective mental processes that cannot be corroborated. *De Vera v. Long Beach Pub. Transportation Co. (1986) 180 Cal. App. 3d 782, 792-795, 225 Cal. Rptr. 789* ; *People v. Turner (1971) 22 Cal. App. 3d 174, 183-184, 99 Cal. Rptr. 186* ; *Continental Dairy Equip. Co. v. Lawrence (1971) 17 Cal. App. 3d 378, 383, 94 Cal. Rptr. 887* ; *see also Bly-Magee v. Budget Rent-A-Car Corp. (1994) 24 Cal. App. 4th 318, 325-326, 29 Cal. Rptr. 2d 330* , citing *Ford v. Bennacka (1990) 226 Cal. App. 3d 330, 336, 276 Cal. Rptr. 513* ; *Maxwell v. Powers (1994) 22 Cal. App. 4th 1596, 1605, 28 Cal. Rptr. 2d 62* , citing *Ford v. Bennacka (1990) 226 Cal. App. 3d 330, 336* ; *276 Cal. Rptr. 513*

Questioning of jurors by judge in connection with motion for new trial on grounds of juror misconduct is error because application for new trial must be on basis of affidavits; *Evid. Code § 1150*, dealing with inquiry into validity of verdict, does not alter traditional rule against juror impeachment of verdict; trial judge's inquiry into jurors' thought process in connection with motion for new trial on grounds of juror misconduct is reversible error. *Maple v. Cincinnati, Inc. (1985) 163 Cal. App. 3d 387, 392, 396, 209 Cal. Rptr. 451*

Affidavit of involved juror denying prejudice is sufficient to support negative finding as to jury misconduct. *Tillery v. Richland (1984) 158 Cal. App. 3d 957, 205 Cal. Rptr. 191*

Transient comments made in heat of discussion during deliberations without evidence of context in which comments were made is not proper subject of attack on verdict; affidavits relating to lack of analysis of evidence by jury, individual jurors' true intent as to what verdict should be, and foreperson's restriction of discussion during deliberation involved jury's mental processes and therefore was prohibited under *Evid. Code § 1150*. *Tillery v. Richland (1984) 158 Cal. App. 3d 957, 205 Cal. Rptr. 191*

Conclusionary declaration of one juror, not offered by plaintiff to demonstrate improper influence on verdict under *Evid. Code § 1150(a)*, but to attack validity of jury poll and to show mental processes of jurors, is not sufficient to impeach verdict. *Bossi v. State of California (1981) 119 Cal. App. 3d 313, 318, 174 Cal. Rptr. 93*

Use of jurors' declarations to impeach verdict is improper unless used to disclose objectively ascertainable overt acts by jury. *Drust v. Drust (1980) 113 Cal. App. 3d 1, 9, 169 Cal. Rptr. 750*

Affidavits mandatory and testimony of subpoenaed jurors insufficient. *Linhart v. Nelson(1976) 18 Cal. 3d 641, 644-645, 134 Cal. Rptr. 813, 557 P.2d 104*

Trial court's determination based on conflicting affidavits will not be disturbed on appeal. *Diamond Springs Lime Co. v. American River Constructors (1971) 16 Cal. App. 3d 581, 605, 94 Cal. Rptr. 200*

Jurors' affidavits are admissible to show whether or not jurors agreed to be bound by chance or quotient verdict. *Bardessono v. Michels (1970) 3 Cal. 3d 780, 794, 91 Cal. Rptr. 760, 478 P.2d 480* ; *Will v. Southern Pac. Co. (1941) 18 Cal. 2d 468, 477, 116 P.2d 44*

Affidavits of jurors are permitted in only two situations to impeach verdicts: (1) where jury has resorted to chance [*Code Civ. Proc. § 657(2)*]; and (2) bias or disqualification of juror that has been concealed by false answers on voir

dire; affidavits are not permitted to explain or interpret verdicts. *Campbell v. Zokelt (1969) 272 Cal. App. 2d 315, 319, 77 Cal. Rptr. 561*

Affidavits accepted as to occurrences during trial and deliberations showing prejudice in mind of juror which prevent that juror from acting impartially where bias was concealed on voir dire. *People ex rel. Dept. of Pub. Wks v. Curtis (1967) 255 Cal. App. 2d 378, 389, 63 Cal. Rptr. 138*

[iii] Concealment of Bias

Failure of jurors to affirmatively respond to generalized voir dire questions asked of assembled group of potential jurors does not amount to concealment of bias when jurors' silence was only evidence of actual bias presented. *Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 408, 185 Cal. Rptr. 654, 650 P.2d 1171*

Trial court did not abuse its discretion in granting motion for new trial based on juror misconduct after finding that juror intentionally concealed knowledge of scandal that was part of action and that her knowledge was substantial, where trial court reasonably concluded that juror's explanation that she had merely heard of scandal before was false and evidence supported reasonable inference she had substantial knowledge of scandal and she intentionally concealed her knowledge; and where record failed to rebut presumption of prejudice, given that scandal was volatile subject that provoked strong feelings of revulsion in some members of public toward tainted police officers and toward police department in general, disappointment with criminal justice system that produced so many false convictions, and sympathy for victims, of which plaintiff was one. *Ovando v. County of Los Angeles (2008) 159 Cal. App. 4th 42, 57-60, 71 Cal. Rptr. 3d 415*

Juror's intentionally lying about bias on voir dire constitutes misconduct, but to find misconduct when concealment of bias is unintentional and result of misunderstanding or forgetfulness is clearly excessive. *Jutzi v. County of Los Angeles (1987) 196 Cal. App. 3d 637, 655, 242 Cal. Rptr. 74* (declining to follow rule promulgated in *People v. Diaz (1984) 152 Cal. App. 3d 926, 932, 200 Cal. Rptr. 77* , that even inadvertent failure to reveal strong potential of juror bias constitutes misconduct)

Misconduct for juror to state, in presence of other jurors during field trip, that whole thing was farce, and to discuss matters not in evidence during deliberation, and to refuse to deliberate in same room as other jurors because of altercation with forewoman. *Andrews v. County of Orange (1982) 130 Cal. App. 3d 944, 955-960, 182 Cal. Rptr. 176* (disapproved on other grounds in *People v. Nesler 16 Cal. 4th 561, 582 n.5, 66 Cal. Rptr. 2d 454, 941 P.2d 87*)

Bias existing at time of voir dire is inferable from utterances in jury room; negative answer is capable of being indicated by silence, thus concealing bias. *Smith v. Covell (1980) 100 Cal. App. 3d 947, 955, 161 Cal. Rptr. 377* (concealed intent to disregard instructions regarding husband's cause of action for loss of consortium as misconduct warranting reversal of verdict and new trial)

Misconduct of jury includes improper remarks or suggestions of jurors in expressing opinion on issue of case before it was submitted to them. *City of Pleasant Hill v. First Baptist Church (1969) 1 Cal. App. 3d 384, 434, 82 Cal. Rptr. 1*

Juror's statement at recess showing lack of impartiality is misconduct when juror stated ability to keep open mind during voir dire. *Deward v. Clough (1966) 245 Cal. App. 2d 439, 443-445, 54 Cal. Rptr. 68*

[iv] Prejudicial Communication

Misconduct of jury includes improper communication with parties. *Wright v. Eastlick (1899) 125 Cal. 517, 520, 58 P. 87*

Not improper for juror to think about case outside presence of other jurors or to write down those thoughts and read them to other jurors when they resume deliberations. *Bormann v. Chevron USA, Inc. (1997) 56 Cal. App. 4th 260, 262-263, 65 Cal. Rptr. 2d 321*

Misconduct is nonprejudicial when witness improperly questioned by juror refuses to answer or converse. *City of Los Angeles v. Lowensohn (1976) 54 Cal. App. 3d 625, 636-638, 127 Cal. Rptr. 417*

Communication between witness and juror is not grounds for grant of new trial in absence of showing that juror was influenced by the communication to prejudice of moving party. *City of Pleasant Hill v. First Baptist Church (1969) 1 Cal. App. 3d 384, 427-428, 82 Cal. Rptr. 1*

Mere communciation, such as social greeting, between witness and juror is not ground for setting aside verdict in absence of showing that juror influenced by communication. *City of Pleasant Hill v. First Baptist Church (1969) 1 Cal. App. 3d 384, 427-428, 82 Cal. Rptr. 1*

Prejudging case by juror constitutes misconduct warranting new trial. *Deward v. Clough (1966) 245 Cal. App. 2d 439, 444, 54 Cal. Rptr. 68*

[v] New Evidence

Expression by juror of opinion on technical subject, in form of juror's own claim to expertise or specialized knowledge of matter at issue, is misconduct when explicitly based on specialized information obtained from outside sources, although not when opinion is based on evidence received at trial. *In re Malone (1996) 12 Cal. 4th 935, 963, 50 Cal. Rptr. 2d 281, 911 P.2d 468* (opinion about polygraph evidence based on juror's own study of subject)

Pursuit of nighttime paralegal studies by juror does not constituting misconduct, even though juror inadvertently attended one class in which subject of arguably related piece of litigation was mentioned. *Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 409, 185 Cal. Rptr. 654, 650 P.2d 1171*

Misconduct of jury in wrongful death action is evidenced by its consideration of improper matters, such as income taxes on verdict, attorney's fees to be taken out of verdict, and the general benefit to government and public, the jurors included, through taxes levied on verdict; such may support motion for new trial not only based on jury misconduct but also on excessive damages. *Tramell v. McDonnell Douglas Corp. (1984) 163 Cal. App. 3d 157, 166, 171, 209 Cal. Rptr. 427*

It is not jury misconduct when one juror prepares diagram in jury room based solely onevidence received in court. *Wagner v. Doulton (1980) 112 Cal. App. 3d 945, 950, 169 Cal. Rptr. 550*

Juror misconduct invalidates verdict when medical testimony was in conflict and juror interjected evidence based on his own experience concerning medical aspects of case. *Smith v. Covell (1980) 100 Cal. App. 3d 947, 954, 161 Cal. Rptr. 377*

Misconduct of jury includes consideration of matters not in evidence and discussion outside court of matters under investigation. *Kritzer v. Citron (1950) 101 Cal. App. 2d 33, 36, 224 P.2d 808*

[vi] Chance Verdict

Chance verdict described. *Bardessono v. Michels (1970) 3 Cal. 3d 780, 794, 91 Cal. Rptr. 760, 478 P.2d 480*

Trial court properly denied plaintiff's motion for new trial on ground plaintiff did not demonstrate that jury reached chance or quotient verdict, where jury agreed on high and low figure and, before calculating average, further agreed to adjust downward high figure and to adjust upward low figure, and there was no evidence average was adopted without further consideration or that jury agreed at any time to adopt average and abide by agreement without further discussion or deliberation. Two jurors who submitted affidavits declared that all 12 jury members agreed on award, but when polled in open court, three jurors said that was not their verdict, suggesting there was no agreement to adopt average and be bound by it. *Lara v. Nevitt (2004) 123 Cal. App. 4th 454, 461-463, 19 Cal. Rptr. 3d 865*

Quotient verdict is chance verdict if jurors agree that the damages will be determined by taking average of each juror's estimate, provided that jurors present quotient as their verdict without further discussion. *Fredrics v. Paige (1994) 29 Cal. App. 4th 1642, 1646, 35 Cal. Rptr. 2d 246*

Verdict is not chance verdict if jurors averaged their preliminary damages figures and then either discussed quotient or took a vote on whether it should be their verdict. *Fredrics v. Paige (1994) 29 Cal. App. 4th 1642, 1646-1647, 35 Cal. Rptr. 2d 246* ; *Diamond Springs Lime Co. v. American River Constructors (1971) 16 Cal. App. 3d 581, 605, 94 Cal. Rptr. 200*

Quotient verdict distinguished from chance verdict. *Diamond Springs Lime Co. v. American River Constructors (1971) 16 Cal. App. 3d 581, 605, 94 Cal. Rptr. 200*

No inference of agreement regarding chance verdict when sum agreed upon is not average of damages favored by each juror. *Glass v. Gulf Oil Corp. (1970) 12 Cal. App. 3d 412, 436, 96 Cal. Rptr. 902*

[vii] Presumption of Prejudice

Even if jurors committed misconduct by watching television show relating to aircraft safety during recess from deliberations in wrongful death case against aircraft manufacturer, and even if presumption of prejudice thereby arose, presumption is rebutted when evidence of misconduct was not convincing, nature of misconduct was not serious because it did not reveal deliberate act by jurors violating court's instructions to confine consideration of case to evidence heard in court, and probability of actual prejudice to moving party was highly unlikely. *Elsworth v. Beech Aircraft Corp. (1984) 37 Cal. 3d 540, 557-558, 208 Cal. Rptr. 874, 691 P.2d 630*

Presumption of prejudice arising from juror misconduct is rebutted by affirmative evidentiary showing that prejudice does not exist or by examination of entire record to determine whether there is reasonable probability of actual harm to complaining party resulting from misconduct. *Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 416-417, 185 Cal. Rptr. 654, 650 P.2d 1171*

In products liability action based on rollover of Ford Bronco, trial court erred in granting new trial on issue of punitive damages, in which one juror commented to others about segment of television news magazine show concerning defendant's conduct with regard to other types of Fords and another juror commented on a dream she had in which Ford Bronco killed her children and children of other jurors, where trial court applied only presumption that jury misconduct is prejudicial and, without any evidentiary basis for doing so, failed to consider and apply presumption jurors have followed instructions they were given, and where in reviewing court's independent review of issues of prejudice and rebuttal of presumption of prejudice, reviewing court concluded record provided no basis to reject normal presumption jury followed instructions. *Romo v. Ford Motor Co. (2002) 99 Cal. App. 4th 1115, 1127-1137, 122 Cal. Rptr. 2d 139*

Presumption of prejudice from juror reading newspaper article about case and discussing it with other jurors as not rebutted because final tally of vote was nine to three and, further, previous trial had resulted in hung jury. *Province v.*

Center for Women's Health & Family Birth (1993) 20 Cal. App. 4th 1673, 1680, 25 Cal. Rptr. 2d 667

Presumption of prejudice arising from juror's communication of information from sources outside the evidence is not rebutted when uncontroverted in close case. *Lankster v. Alpha Beta Co. (1993) 15 Cal. App. 4th 678, 683, 18 Cal. Rptr. 2d 923*

Not every minor infraction of rules by juror mandates new trial; if conduct is of such nonprobative nature that it could not in nature of things have prevented party from having fair trial, verdict should not be set aside. *Locksley v. Ungureanu (1986) 178 Cal. App. 3d 457, 461, 223 Cal. Rptr. 737*

Occurrence of jury misconduct raises rebuttable presumption of prejudice. *Tapia v. Barker (1984) 160 Cal. App. 3d 761, 765-767, 206 Cal. Rptr. 803*

[viii] "No Knowledge" Affidavits

"No knowledge" affidavits showing neither moving party nor counsel aware of jury misbehavior until after verdict returned establishes nonreliance on errors known before jury's verdict. *Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 103, 95 Cal. Rptr. 516, 485 P.2d 1132*

"No knowledge" affidavits is not required when alleged jury misconduct of such nature that it could not have been known to party until after verdict rendered. *Krouse v. Graham (1977) 19 Cal. 3d 59, 82, 137 Cal. Rptr. 863, 562 P.2d 1022*

Although submitted by one person, "no knowledge" affidavits must establish nonreliance on known errors by both moving party and attorney. *People v. Southern Cal. Edison Co. (1976) 56 Cal. App. 3d 593, 599, 128 Cal. Rptr. 697*

[h] Newly Discovered Evidence

Trial court may grant new trial on basis of newly discovered evidence where moving party shows the evidence is newly discovered, reasonable diligence has been exercised in its discovery, and the evidence is material to the moving party's case. *Wood v. Jamison (2008) 167 Cal. App. 4th 156, 161, 83 Cal. Rptr. 3d 877*

In action against airlines based on alleged sexual assault against passenger, trial court erred in granting new trial to plaintiff after granting summary judgment to defendant, based on declaration by clinical psychologist constituting newly discovered evidence that plaintiff suffered bodily injury, where plaintiff did not display reasonable diligence in tendering new evidence, because evidence was neither newly discovered nor producedwith reasonable diligence; and where declaration was not material to ruling on summary judgment motion. *Doe v. United Airlines, Inc. (2008) 160 Cal. App. 4th 1500, 1504-1513, 73 Cal. Rptr. 3d 541*

Trial court did not abuse its discretion in denying plaintiff's motion for new trial based on newly discovered evidence to contend that defendant-employer paid for employee's defense and in so doing ratified employee's conduct because it knew he had pled nolo contendere to misdemeanor sexual battery by time he answered civil complaint, where the proffered evidence was inadmissible hearsay and employer's payment of employee's attorney's fees did not logically constitute its ratification of his wrongful acts. *Plancarte v. Guardsmark (2004) 118 Cal. App. 4th 640, 645-650, 13 Cal. Rptr. 3d 315*

On motion for new trial on ground of newly discovered evidence, moving party is required to show that he or she exercised reasonable diligence to discover and produce evidence at trial; motion is properly denied on moving party's failure to show that purported "newly discovered" evidence could not have been produced at trial with reasonable

diligence. *In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 153-154, 242 Cal. Rptr. 649*

When party knows of an important witness and materiality of his or her testimony, but is unable to produce witness at time of trial, due diligence normally requires party to move for continuance, and failure to do so justifies denial of subsequent new trial based on discovery of new evidence; but if continuance would not have been granted because of party's inability to show nature or materiality of absent witness's possible testimony, failure to ask for continuance does not constitute lack of due diligence. *Andersen v. Howland (1970) 3 Cal. App. 3d 380, 383, 83 Cal. Rptr. 308*

Essential elements for grant of new trial on ground of newly discovered evidence are (1) evidence newly discovered, (2) reasonable diligence exercised in discovery and production, and (3) evidence material to movant's case. *National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal. App. 3d 131, 137, 186 Cal. Rptr. 165* ; *Horowitz v. Noble (1978) 79 Cal. App. 3d 120, 137, 144 Cal. Rptr. 710*

In medical malpractice wrongful death action, discovery of autopsy addendum which significantly contradicted defense experts, after denial of motion for new trial following defense verdict, was ground for writ of error coram nobis remanding case to trial court to reconsider motion for new trial in light of newly discovered evidence. *Rollins v. City & County of San Francisco (1947) 37 Cal. App. 3d 145, 149, 112 Cal. Rptr. 168*

Party moving for new trial on ground of newly discovered evidence must show by affidavit that he or she did not know of evidence and could not by diligence have obtained it. *Bennett v. Pacific Greyhound Lines (1956) 147 Cal. App. 2d 74, 75, 304 P.2d 721*

[i] Verdict Against Law

Proper remedy for inconsistent verdicts is new trial. *Oxford v. Foster Wheeler LLC (2009) 177 Cal. App. 4th 700, 721-722, 99 Cal. Rptr. 3d 418*

In attorney's action to recover fee from client, trial court erroneously granted motion for new trial on grounds that verdict was against law, when, considering materials in 24 banker's boxes, 123-page summary of attorney's work based on those materials, computer printout of attorney's time records, trial testimony, and nine factors set forth in trial court's instructions, jury could have reasonably concluded attorney was entitled to attorney's fee of $1.2 million. *Fergus v. Songer (2007) 150 Cal. App. 4th 552, 567-569, 59 Cal. Rptr. 3d 273*

Trial court is empowered under *Code Civ. Proc. § 657(6)* to consider new legal challenges not previously raised before verdict or judgment when court is ruling on motion for new trial. *Hoffman-Haag v. Transamerica Ins. Co. (1991) 1 Cal. App. 4th 10, 15-16, 1 Cal. Rptr. 2d 805*

In case of inconsistent verdicts, court of appeal is required to set aside both verdicts on reviewing order granting limited new trial. *Manor Investment Co. v. F. W. Woolworth Co. (1984) 159 Cal. App. 3d 586, 597, 206 Cal. Rptr. 37* (disapproved on other grounds in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454*)

Granting new trial on ground that verdict against law is authorized only if there is no substantial evidence to sustain the verdict. *Sanchez-Corea v. Bank of America (1985) 38 Cal. 3d 892, 906-907, 215 Cal. Rptr. 679, 701 P.2d 826* ; *Musgrove v. Ambrose Properties (1978) 87 Cal. App. 3d 44, 56, 150 Cal. Rptr. 722*

Verdict is against law when it is contrary to correct jury instructions. *Kaiser Cement & Gypsum Corp. v. Allis-Chalmers Mfg. Co. (1973) 35 Cal. App. 3d 948, 958, 111 Cal. Rptr. 210*

When new trial is granted because of instruction that really was correct, there is no legal ground on which new trial could have been ordered. *Fakhoury v. Magner (1972) 25 Cal. App. 3d 58, 64, 101 Cal. Rptr. 473*

Granting of motion for new trial pursuant to *Code Civ. Proc. § 657(6)*, relating to verdict against law, was not supported by court's erroneous conclusion that special verdict was in conflict with general verdict. *McCown v. Spencer (1970) 8 Cal. App. 3d 216, 228-230, 87 Cal. Rptr. 213*

Verdict or decisions are against law when there is a failure to find on a material issue, when the findings are irreconcilable, and when the evidence is insufficient in law and without conflict on any material point. *Kralyevich v. Magrini (1959) 172 Cal. App. 2d 784, 789, 342 P.2d 903* (decided when findings existed under *Code Civ. Proc. § 632*)

[8] Hearing of Motion

Referee is appropriate decisionmaker to determine motion for new trial under *Code Civ. Proc. §§ 656, 661* (determination of motion by judge who presided at trial, if available) when trial was heard by referee pursuant to stipulation for general reference. *Clark v. Rancho Santa Fe Assn. (1989) 216 Cal. App. 3d. 606, 625, 265 Cal. Rptr. 41*

Although entitled to a hearing, one does not have right to orally argue motion for new trial. *Kimmel v. Keefe (1970) 9 Cal. App. 3d 402, 408, 88 Cal. Rptr. 47*

Notice of hearing and hearing is mandatory unless waived by parties. *Avery v. Associated Seed Growers, Inc. (1963) 211 Cal. App. 2d 613, 627, 27 Cal. Rptr. 625*

[9] Jurisdiction

Judge other than judge who presided at trial and heard arguments on new trial motion telephonically while out of state pursuant to agreement of parties could appoint another judge to sign order conditionally granting new trial, where superior court had territorial jurisdiction over post-trial motions irrespective of original judge's location and judge's presence in or absence from California had no effect on superior court's subject matter jurisdiction; where, although presiding judge's absence from California rendered her physically unable to sign and file order in superior court, it did not deprive her of power to hear and determine merits of post-trial motions; where superior court had subject matter jurisdiction over motions at time order was signed and entered and legally effective judicial act of filing order took place in California; and where appointing another judge to sign for presiding judge in her absence was proper exercise of presiding judge's authority. *Dell'Oca v. The Bank of New York Trust Co., N.A. (2008) 159 Cal. App. 4th 531, 542-546, 71 Cal. Rptr. 3d 737*

Court is without jurisdiction to hear second motion for new trial after issuing minute order denying original motion for new trial. *Wenzoski v. Central Banking System, Inc. (1987) 43 Cal. 3d 539, 542, 237 Cal. Rptr. 167, 736 P.2d 753*

[10] Memorandum of Points and Authorities

In marital dissolution action, trial court did not abuse its discretion by denying wife's motion for new trial for being untimely because she did comply with 15-day deadline of *Code Civ. Proc. § 659* to submit notice of intention to move for new trial, when wife failed to comply with 10-day requirement to file memorandum of points and authorities in support of motion under former Cal. Rules of Ct., Rule 236.5 [*now see Cal. Rules of Ct., Rule 3.1600*]. *In re Marriage of Steiner (2004) 117 Cal. App. 4th 519, 529, 11 Cal. Rptr. 3d 671*

[11] Mistrial and New Trial Distinguished

Distinction between mistrial and new trial. *Estate of Bartholomae (1968) 261 Cal. App. 2d 839, 842, 68 Cal. Rptr. 332*

[12] New Trial on Particular Issues

When trial court has reviewed jury's special verdicts and properly concluded that damage award is incorrect only as it reflects improper apportionment of liability, order is improper if it grants new trial on all issues; order must limit new trial to issue of apportionment of liability. *Schelbauer v. Butler Manufacturing Co. (1984) 35 Cal. 3d 442, 457, 198 Cal. Rptr. 155, 673 P.2d 743*

If limited new trial might be prejudicial to either party, court must grant complete new trial. *Liodas v. Sahadi (1977) 19 Cal. 3d 278, 286, 137 Cal. Rptr. 635, 562 P.2d 316*

In action by store patron for battery, false imprisonment and malicious prosecution, trial court properly granted retrial on false imprisonment and malicious prosecution claims, when first jury found for patron on battery claim but was unable to agree on verdict on false imprisonment and malicious prosecution claims, and when false imprisonment and malicious prosecution claims raised issues separate and distinct from battery claim. *Cruz v. HomeBase (2000) 83 Cal. App. 4th 160, 165-166, 99 Cal. Rptr. 2d 435*

Although retrial may be limited to issue of damages when evidence of liability is overwhelming, new trial on all issues is required when evidence on liability is in sharp conflict, and award is manifestly so inadequate as to suggest compromise verdict. *Wilson v. R.D. Werner Co. (1980) 108 Cal. App. 3d 878, 883, 166 Cal. Rptr. 797*

Rules governing new trials on limited issues. *Baxter v. Phillips (1970) 4 Cal. App. 3d 610, 616-617, 84 Cal. Rptr. 609*

Court properly grants new trial on certain issues raised in case when issues are distinct and separable. *Karallis v. Shenas (1950) 97 Cal. App. 2d 280, 283, 217 P.2d 436*

[13] Notice of Intention to Move

Prevailing party's attorney's mailing to opposing counsel of photocopy of file-stamped and dated judgment started time limit for serving notice of intention to move for new trial under *Code Civ. Proc. § 659*, so that service of notice of intention to move for a new trial 26 days later was untimely, when service of written notice of entry of judgment and filing of original notice of entry and proof of service complied with *Code Civ. Proc. § 659*, and posttrial motion statutes do not require filing of original notice of entry or file-stamped copy of judgment accompanied by proof of service to start time limits for bringing posttrial motions. *Palmer v. GTE (2003) 30 Cal. 4th 1265, 1277-1278, 135 Cal. Rptr. 2d 654, 70 P.3d 1067*

Purpose of notice of intention to move for new trial is to give adverse party reasonable opportunity to oppose motion on its merits. *Nichols v. Hast (1965) 62 Cal. 2d 598, 600, 43 Cal. Rptr. 641, 400 P.2d 753*

Mailing of entered judgment to adverse party, with accompanying dated cover letter stating that conformed copy of judgment was enclosed, is sufficient to trigger 15-day time limit of *Code Civ. Proc. § 659*, even though proof of service of copy of judgment was never mailed or filed. *Ramirez v. Moran (1988) 201 Cal. App. 3d 431, 436-437, 247 Cal. Rptr. 117*

Notice of intention filed after 15-day period provided by *Code Civ. Proc. § 659* is invalid and does not extending time for filing notice of appeal from judgment beyond normal 60 days. *In re Marriage of Patscheck (1986) 180 Cal. App. 3d 800, 802, 225 Cal. Rptr. 787*

Mailing conformed copy of judgment showing date it was filed with clerk (or in counties using judgment book rather than file of actions and microfilm copy, date it was entered) starts 15-day period for giving notice of intention to move for new trial; *Code Civ. Proc. § 664.5* procedures for prevailing party to give notice of entry of judgment do not govern sufficiency of notice for purposes of *Code Civ. Proc. § 659*. *Tri-County Elevator Co. v. Superior Court (1982) 135 Cal. App. 3d 271, 276-277, 185 Cal. Rptr. 208*

Trial court has no power to grant motion for new trial on ground not specified in notice of intention to move, and movant's subsequently filed memorandum of points and authorities in support of motion are ineffective to raise additional ground, because memorandum was not filed within statutory time limit for filing notice, and amendments to defective notice must be filed within statutory period. *Wagner v. Singleton (1982) 133 Cal. App. 3d 69, 72-74, 183 Cal. Rptr. 631*

Requirements of motion for new trial. *Gaskill v. Pacific Hosp. of Long Beach (1969) 272 Cal. App. 2d 128, 130, 77 Cal. Rptr. 373*

Form of motion for new trial has some relevance in construction of order made in response to it. *Butler v. Schefers (1966) 245 Cal. App. 2d 330, 331, 53 Cal. Rptr. 869*

The court, in ruling on motion for new trial, is confined to grounds specified in the notice. *Van Ostrum v. State of California (1957) 148 Cal. App. 2d 1, 4, 306 P.2d 44*

[14] Premature Motion

Motion for reconsideration of grant of summary judgment to defendants, deemed by trial court to be motion for new trial, was not premature, when, in context of motion for summary judgment, rendition of judgment occurs when written order granting summary judgment is entered, and motion was filed on same day as order granting summary judgment and judgment were entered. *Sole Energy Co. v. Petrominerals Corp. (2005) 128 Cal. App. 4th 187, 195-196, 26 Cal. Rptr. 3d 790*

Litigants are without power to vest court with jurisdiction to hear and determine premature motion for new trial. *City of Santa Barbara v. Superior Court (1966) 240 Cal. App. 2d 612, 614, 49 Cal. Rptr. 798*

[15] Review

[a] Appealable Orders

No appeal from trial court's denial of motion for new trial; ruling is reviewable only through appeal of judgment. *Hamasaki v. Flotho (1952) 39 Cal. 2d 602, 608, 248 P.2d 910*

Although trial court did not grant all relief defendant requested, which was requested maximum of 3 to 1 for punitive damages award rather than awarded 15 to 1 ratio, defendant could not appeal new trial order, whenj defendant was not aggrieved because it received new trial order it requested and appellate court could only set lower remittitur amount, which plaintiffs would have again rejected. *Gober v. Ralphs Grocery Co. (2006) 137 Cal. App. 4th 204, 211, 40 Cal. Rptr. 3d 92*

An order for a new trial is not proper until the action has been prosecuted to a point where all the issues have been determined. *Cobb v. University of So. California (1996) 45 Cal. App. 4th 1140, 1144, 53 Cal. Rptr. 2d 71*

Denial of motion for new trial is nonappealable order. *Jutzi v. County of Los Angeles (1987) 196 Cal. App. 3d 637, 643 n.2, 242 Cal. Rptr. 74*

Order granting new trial is appealable pursuant to *Code Civ. Proc. §§ 657, 904.1*. *Herman v. Shandor (1970) 8 Cal. App. 3d 476, 480, 87 Cal. Rptr. 443*

[b] Discretion of Reviewing Court

Reviewing court is not authorized to modify order granting new trial on all issues to one granting limited new trial unless such an order should have been made as matter of law. *Schelbauer v. Butler Manufacturing Co. (1984) 35 Cal. 3d 442, 455, 198 Cal. Rptr. 155, 673 P.2d 743*

Determination of motion for new trial is so completely within court's determination that action will not be disturbed unless manifest and unmistakable abuse of discretion clearly appears. *Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 387, 93 Cal. Rptr. 769, 482 P.2d 681* ; *Mosesian v. Pennwalt Corp. (1987) 191 Cal. App. 3d 851, 858, 236 Cal. Rptr. 778* ; *Candido v. Huitt (1984) 151 Cal. App. 3d 918, 923-924, 199 Cal. Rptr. 41*

In reviewing denial of motion for new trial based on jury misconduct, appellate court is constitutionally obligated to review entire record, including evidence, and to determine independently whether act of misconduct, if it occurred, prevented complaining party from having fair trial. *Smoketree-Lake Murray, Ltd. v. Mills Concrete Construction Co. (1991) 234 Cal. App. 3d 1724, 1745, 286 Cal. Rptr. 435*

Conditional order under *Code Civ. Proc. § 662.5* for new trial on ground of excessive damages is reversible only if there is no substantial basis in record for any of reasons stated by trial court. *Gerard v. Ross (1988) 204 Cal. App. 3d 968, 979, 251 Cal. Rptr. 604*

Reviewing court is able to consider merits of motion for new trial that was denied by operation of law in same manner as motion expressly denied by trial court, even if appellant caused failure to have motion heard within statutory time period or motion is based on affidavits that trial court did not pass on. *In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 152-153, 242 Cal. Rptr. 649*

In reviewing ruling on motion for new trial on ground of insufficiency of evidence, appellate court does not reweigh evidence, but confines its review to determination of whether or not there is substantial evidence, contradicted or uncontradicted, that supports jury's conclusion. *Kolling v. Dow Jones & Co. (1982) 137 Cal. App. 3d 709, 725-726, 187 Cal. Rptr. 797*

On reviewing trial court's denial of motion for new trial, appellate court's scope of inquiry is limited to whether or not clear abuse of trial court's discretion occurred. *Byrne v. City & County of San Francisco (1980) 113 Cal. App. 3d 731, 739, 170 Cal. Rptr. 302*

In reviewing trial court's order granting motion for new trial based on failure to give jury instruction, question is not whether failure to give instruction was prejudicial error but whether it was sufficiently misleading so that trial court, having seen and heard witnesses, could find that instructions were improper. *Kimball v. Whetzel (1970) 10 Cal. App. 3d 836, 842, 89 Cal. Rptr. 373*

Appellate court is without power to revive trial court's jurisdiction to rule on motion for new trial that has lapsed on

expiration of statutory period and when denial of motion for new trial was erroneous reversal of judgment as required. *Lippold v. Hart (1969) 274 Cal. App. 2d 24, 26-27, 78 Cal. Rptr. 833*

Trial court's order denying motion for new trial on ground of insufficiency of evidence is not subject to being disturbed on appeal in absence of abuse of discretion. *Sherwood v. Rossini (1968) 264 Cal. App. 2d 926, 932, 71 Cal. Rptr. 1*

Appellate court is powerless to order new trial on ground of insufficiency of evidence because written order granting new trial does not specify that ground although record discloses that trial judge would have granted motion on that ground. *Espinoza v. Rossini (1966) 247 Cal. App. 2d 40, 51, 55 Cal. Rptr. 205*

[c] Motion Granted on Erroneous Ground

Trial court's rationale for granting new trial motion did not bind appellate court, and, under *Code Civ. Proc § 657*, order granting new trial would be upheld if it should have been granted on any ground raised in motion. Thus, in medical malpractice action, although trial court erred in granting summary judgment to defendant, error was cured by order granting new trial on plaintiff's motion on ground of error in law, when plaintiff's expert's declaration to effect that surgery was premature and unnecessary was sufficient to raise triable issue of material fact not only as to whether performing surgery was deviation from standard of care, but also as to presence of causal connection between negligent conduct and injury to patient. *Tortorella v. Castro (2006) 140 Cal. App. 4th 1, 9-13, 43 Cal. Rptr. 3d 853*

Fact that trial court granted motion for new trial on erroneous ground does not preclude appellate court from affirming order if order can be sustained on other grounds set forth in motion. *Foggy v. Ralph F. Clark & Associates, Inc. (1987) 192 Cal. App. 3d 1204, 1217-1218, 238 Cal. Rptr. 130*

[d] Partial New Trial

When parties appeal from partial grant of new trial, but judgment resulting from denial of new trial on remaining cause of action has become final, appellate court may order new trial as to all causes of action when verdicts are illegal and trial court could have granted new trial as to all causes. *Manor Investment Co. v. F. W. Woolworth Co. (1984) 159 Cal. App. 3d 586, 597, 206 Cal. Rptr. 37* (disapproved on other grounds in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454*)

If party moves for new trial on all issues and is granted new trial only on certain issues, that party has a right of appeal from the order. *Ferraro v. Pacific Fin. Corp. (1970) 8 Cal. App. 3d 339, 355, 87 Cal. Rptr. 226*

[e] Rehearing of Motion

Remand to trial court for rehearing of motion for new trial is required when pending appeal, former case law, which might have led to different result, is reversed. *Clemens v. Regents of the University of California (1970) 8 Cal. App. 3d 1, 18-19, 87 Cal. Rptr. 108*

[f] Reversal on Appeal

If order granting new trial reversed on appeal, original judgment is reinstated. *Sanchez-Corea v. Bank of America (1985) 38 Cal. 3d 892, 910, 215 Cal. Rptr. 679, 701 P.2d 826* ; *La Manna v. Stewart (1975) 13 Cal. 3d 413, 425, 118 Cal. Rptr. 761, 530 P.2d 1073*

When order granting new trial reversed on appeal, if moving party did not make a protective cross appeal from judgment, judgment becomes final on reinstatement. *Sanchez-Corea v. Bank of America (1985) 38 Cal. 3d 892, 910, 215 Cal. Rptr. 679, 701 P.2d 826* ; *Miller v. Los Angeles County Flood Control Dist. (1973) 8 Cal. 3d 689, 699, 106 Cal. Rptr. 1, 505 P.2d 193*

If question presented in motion for new trial is purely one of law and there is any substantial evidence to support judgment, new trial order must be reversed unless some error of law is actually demonstrated; rule that on appeal every intendment is in favor of order granting new trial is inapplicable. *Kaiser Cement & Gypsum Corp. v. Allis-Chalmers Mfg. Co. (1973) 35 Cal. App. 3d 948, 951, 111 Cal. Rptr. 210*

[g] Review of Entire Cause

On appeal from order granting new trial, reviewing court could not conclude as matter of law that trial court failed to conduct examination of entire cause as required by *Cal. Const., art. VI, § 13*, because, although trial judge may not have been able to read entire transcript, he presided over entire eight-day trial and ruled on motion less than two months after entry of judgment. *Maher v. Saad (2000) 82 Cal. App. 4th 1317, 1324, 99 Cal. Rptr. 2d 213*

[h] Waiver

Claim of attorney misconduct are entitled to no consideration on appeal unless record shows timely and proper objection and request that jury be admonished; right of review of order denying new trial is not waived even though request for admonition made only after last instance of alleged misconduct, if objection was made to all improper questions and claim is made that cumulative effect of repeated instances of misconduct was prejudicial. *Dominguez v. Pantalone (1989) 212 Cal. App. 3d 201, 211-212, 260 Cal. Rptr. 431*

[16] Service and Filing

Notice of intention to move for new trial is served and filed after jury verdict. *Estate of Green (1944) 25 Cal. 2d 535, 541, 154 P.2d 692*

If order granting new trial issued more than 60 days after filing of notice, court's power to grant new trial lapsed and motion was effectively denied; result is not avoided by entry of nunc pro tunc order purporting to grant new trial after court had lost jurisdiction. *Worth v. Asiatic Transpacific, Inc. (1979) 93 Cal. App. 3d 849, 853-854, 156 Cal. Rptr. 110*

General rule of *Code Civ. Proc. § 12a*, providing that time in which any act provided by law is to be done is computed by including the last day, applies to notices of intention to move for new trial, and notice filed on the 15th day from date that notice of entry of judgment mailed was timely. *LaBorne v. Mulvany (1974) 43 Cal. App. 3d 905, 909-911, 119 Cal. Rptr. 596*

Clerk properly refused to file notice of intention to move for new trial until receipt of filing fee. *Kientz v. Harris (1953) 117 Cal. App. 2d 787, 790, 257 P.2d 41*

[17] Specification of Grounds and Reasons in Order

[a] Assistance of Counsel Forbidden

Although court cannot direct attorney to prepare an order granting new trial or specification of reasons, counsel may

assist court by calling any deficiency to its attention within 10-day period for filing specification of reasons so that court may correct order. *Mercer v. Perez (1968) 68 Cal. 2d 104, 123-124 n. 8, 65 Cal. Rptr. 315, 436 P.2d 315*

Amended order for new trial is not in compliance with *Code Civ. Proc. § 657* when one of specifications was adopted verbatim from defense counsel's specification of reasons. *Tramell v. McDonnell Douglas Corp. (1984) 163 Cal. App. 3d 157, 168-170, 209 Cal. Rptr. 427*

New trial order is not vitiated by court's use of some language used by counsel in brief supporting new trial motion. *Eltolad Music, Inc. v. April Music, Inc. (1983) 139 Cal. App. 3d 697, 706-708, 188 Cal. Rptr. 858*

Order adopting specification of reasons voluntarily drafted by counsel is insufficient, since court is required personally to prepare specification of reasons under *Code Civ. Proc. § 657*. *Oberstein v. Bisset (1976) 55 Cal. App. 3d 184, 189, 127 Cal. Rptr. 413*

Court did not comply with *Code Civ. Proc. § 657* when trial court's minute order referred to its oral statement of reasons made during hearing and order was prepared by counsel. *Worden v. Gentry (1975) 50 Cal. App. 3d 600, 605, 123 Cal. Rptr. 496*

Judge must personally prepare specification of reasons; order incorporating by reference written argument of counsel for moving party is insufficient. *Devine v. Murrieta (1975) 49 Cal. App. 3d 855, 860, 122 Cal. Rptr. 847*

Penalty was imposed when order for new trial and supporting reasons were prepared by attorney for prevailing party rather than by court as expressly required by *Code Civ. Proc. § 657*. *S.F. Bay Area Rapid Transit Dist. v. McKeegan (1968) 265 Cal. App. 2d 263, 267-271, 71 Cal. Rptr. 204*

[b] Correction of Specification of Reasons

Court as in excess of jurisdiction if attempting to correct its order or specification of reasons nunc pro tunc after the expiration of the 10-day period for filing a separate specification of reasons. *Mercer v. Perez (1968) 68 Cal. 2d 104, 121, 65 Cal. Rptr. 315, 436 P.2d 315*

[c] Excessive or Inadequate Damages

When motion for new trial granted on ground of excessive damages, specification of reasons indicated respect in which evidence dictated less sizable verdict, but different concern applies when primary concern is amount of punitive damages awarded; in that case, specification are adequate when it makes reference to those aspects of trial proceedings that the court viewed as having improperly led jury to inflate its award. *Neal v. Farmers Ins. Exchange (1978) 21 Cal. 3d 910, 932, 148 Cal. Rptr. 389, 582 P.2d 980* ; *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 822, 174 Cal. Rptr. 348*

Same rules that apply to specification of reasons with respect to ground of insufficiency of evidence as apply to ground of excessive damages, and court is required to state reasons and not ultimate facts to support grant of motion. *Stevens v. Parke, Davis & Co. (1973) 9 Cal. 3d 51, 63, 107 Cal. Rptr. 45, 507 P.2d 653*

Trial court has wider latitude in specifying reasons for granting new trial when issue is punitive damages rather than compensatory damages; order stating that punitive damages award does not bear reasonable relationship to value of total assets of defendant and does not bear reasonable relationship to defendant's annual income is adequate specification of reasons for granting new trial on grounds of excessive punitive damages. *Gerard v. Ross (1988) 204 Cal. App. 3d 968, 978 n.6, 979, 251 Cal. Rptr. 604*

New trial limited to damages is proper remedy when jury improperly apportioned nondivisible damages between codefendants. *Marshall v. Brown (1983) 141 Cal. App. 3d 408, 415, 190 Cal. Rptr. 392*

Specification of reasons is adequate when punitive damages were court's primary concern, and reasons included ratio of punitive damages to compensatory damages, amount punitive damages exceeded compensatory damages, and defendant's wealth and profit-generating capacity. *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 822, 174 Cal. Rptr. 348*

Reasons for order granting new trial on ground of inadequate damages were adequately specified when court referred to portions of record containing testimony of extent of plaintiff's medical expense, lost earnings, impairment of earning capacity, and pain and suffering. *Sanchez v. Hasencamp (1980) 107 Cal. App. 3d 935, 940-942, 166 Cal. Rptr. 118*

In specification of reasons in order granting motion for new trial on ground of insufficiency of evidence where judge disbelieves witness or testimony, judge must state that he or she disbelieved witness because of demeanor or testimony, but is not required to attempt description of extra-record impressions such as bearing or expression of witness. *Meiner v. Ford Motor Co. (1971) 17 Cal. App. 3d 127, 141, 94 Cal. Rptr. 702*

[d] Insufficiency of Evidence

When judge carefully and clearly set forth reasons why evidence was insufficient but failed to explicitly state ground of insufficiency of evidence, order granting new trial was affirmed, since ground was implied in stated reasons and court's intention was made clear by order. *Jones v. Citrus Motors Ontario, Inc. (1973) 8 Cal. 3d 706, 709-710, 106 Cal. Rptr. 28, 505 P.2d 220*

Trial court's specification of reasons for granting motion on ground of insufficiency of evidence did not comply with requirements of *Code Civ. Proc. § 657* where without identifying deficiencies in terms of evidence, record, or proof, specification simply reiterates statutory ground or is phrased as terms or issues or ultimate fact. *Scala v Jerry Witt & Sons, Inc. (1970) 3 Cal. 3d 359, 367-370, 90 Cal. Rptr. 592, 475 P.2d 864*

When stating reasons for grant of motion on ground of insufficient evidence, trial judge must briefly recite the respects in which he or she finds the evidence to be legally inadequate and must briefly identify the portion of the record that convinces the judge that the court or jury clearly should have reached a different decision. *Mercer v. Perez (1968) 68 Cal. 2d 104, 116, 65 Cal. Rptr. 315, 436 P.2d 315*

Written order granting motion for new trial but failing to specify insufficiency of evidence as ground for granting motion was not sustainable on that ground, although intent of trial court to grant motion on that ground was clear. *Malkasian v. Irwin (1964) 61 Cal. 2d 738, 744, 40 Cal. Rptr. 78, 394 P.2d 822*

Provisions of *Code Civ. Proc. § 657* requiring written statement of reasons for granting new trial were satisfied by written order attaching and incorporating hearing transcript in which trial judge stated that evidence did not support jury's finding of no negligence because testimony of defendant driver showed her negligence at least partially caused collision with plaintiff's vehicle. *Twedt v. Franklin (2003) 109 Cal. App. 4th 413, 418-420, 134 Cal. Rptr. 2d 740*

When ground for relief relied on is insufficiency of evidence, order granting new trial must briefly identify portion of record that convinces judge that court or jury clearly should have reached different verdict or decision. *Candido v. Huitt (1984) 151 Cal. App. 3d 918, 923, 199 Cal. Rptr. 41*

Trial court's statement that its ruling and reasons were directed solely to proximate cause is specific enough to meet

requirement of *Code Civ. Proc. § 657*; it need not state why it found evidence insufficent in that area. *Candido v. Huitt (1984) 151 Cal. App. 3d 918, 923-924, 199 Cal. Rptr. 41*

Where there are two or more issues on which evidence exists to support jury verdict, order must specify reasons why evidence on each is insufficient. *Previte v. Lincolnwood, Inc. (1975) 48 Cal. App. 3d 976, 987, 122 Cal. Rptr. 194*

Order granting new trial on ground of insufficiency of evidence and excessive damages after jury verdict for plaintiffs in action for breach of contract of distribution agreement does not satisfy *Code Civ. Proc. § 657* when reasons stated are insufficient. *Aronowicz v. Nalley's, Inc. (1972) 30 Cal. App. 3d 27, 39-40, 106 Cal. Rptr. 424*

Failure to specify reasons for granting new trial on ground of insufficiency of evidence [*Code Civ. Proc. § 657*] requires reversal of order. *McLaughlin v. City etc. of San Francisco (1968) 264 Cal. App. 2d 310, 314, 70 Cal. Rptr. 782*

[e] Mandamus to Compel

If judge fails to specify reasons for granting motion within 10 days after motion granted, party's remedy is writ of mandate ordering judge to specify reasons for granting motion within the 10-day period. *LaBorne v. Mulvany (1974) 43 Cal. App. 3d 905, 916-917, 119 Cal. Rptr. 596*

[f] Minute Order

Minute order constituted determination of motion for new trial within meaning of *Code Civ. Proc. § 660*, when minute order expressly directed defendant to prepare order and submit it to court with approval as to form, and minute order was order ruling on motion because it stated motion for new trial was granted as to amount of damages only and denied as to issue of malpractice. *Fergus v. Songer (2007) 150 Cal. App. 4th 552, 564, 59 Cal. Rptr. 3d 273*

Initial minute order entered in permanent minutes was determination of motion for new trial; written order subsequently prepared, signed, and filed was sufficient compliance with statutory requirements of *Code Civ. Proc. § 657*. *San Francisco Bay Area Rapid Transit Dist. v. Fremont Meadows, Inc. (1971) 20 Cal. App. 3d 797, 801-803, 97 Cal. Rptr. 898*

[g] No Ground or Reason Specified

If no ground or reasons are specified in order granting new trial, burden on appeal is on movant to advance any grounds on which order should be affirmed. *People ex rel. Dept. Pub. Wks. v. Hunt (1969) 2 Cal. App. 3d 158, 162, 82 Cal. Rptr. 546*

[h] Oral Recital

Oral recital by court of reasons for granting motion for new trial is insufficient specification of reasons; court must state reasons in writing. *La Manna v. Stewart (1975) 13 Cal. 3d 413, 422, 118 Cal. Rptr. 761, 530 P.2d 1073*

[i] Specification of Reasons

New trial order was not deficient in its statement of reasons, as it adequately referred to evidence both to guide appellate court's review and to supply substantial basis for order. *Romero v. Riggs (1994) 24 Cal. App. 4th 117, 124,*

29 Cal. Rptr. 2d 219

Order for new trial on punitive damages was reversed because judge failed to state reasons; irrelevant that judge also gave reasons for ordering new trial on portion of compensatory damages. *Stewart v. Truck Ins. Exchange (1993) 17 Cal. App. 4th 468, 484-485, 21 Cal. Rptr. 2d 338*

Specification of reasons for granting new trial is sufficent if it makes record sufficiently precise to permit meaningful review; specifications are insufficient if they are simply couched in form of conclusions or statements of ultimate facts. *Tramell v. McDonnell Douglas Corp. (1984) 163 Cal. App. 3d 157, 170, 209 Cal. Rptr. 427*

When four out of five specified reasons for new trial are not adequately specified or supported by evidence, remaining reason is determinative, and order for new trial will be upheld. *Tramell v. McDonnell Douglas Corp. (1984) 163 Cal. App. 3d 157, 173-174, 209 Cal. Rptr. 427* (jury misconduct alone as sufficient reason)

[j] Statement of Grounds

Failure of trial court to comply with statutory mandate that court must specify ground or grounds on which new trial is granted and court's reason or reasons for granting new trial on each ground stated [*Code Civ. Proc. § 657*] does not prevent successful move on appeal to show that order should be affirmed on any one of the grounds presented to the trial court other than insufficiency of evidence to justify verdict. *People ex rel. Dept. Pub. Wks. v. Hunt (1969) 2 Cal. App. 3d 158, 161-162, 82 Cal. Rptr. 546*

Order granting new trial which does not specify unambiguously ground on which it is based is reversible. *Hilts v. County of Solano (1968) 265 Cal. App. 2d 161, 177-178, 71 Cal. Rptr. 275*

[k] Timeliness

Minute order granting defendant's motion for new trial constituted determination of motion within meaning of *Code Civ. Proc. § 660*; order was defective because it did not state grounds for granting motion and specification of reasons for granting motion was nullity because it was filed more than 10 days after entry of order granting new trial in permanent minutes. *Fergus v. Songer (2007) 150 Cal. App. 4th 552, 564-566, 59 Cal. Rptr. 3d 273*

Order granting motion for new trial more than 60 days after filing of notice of intention to move for new trial was void for lack of jurisdiction, when plaintiffs filed and served notice of motion and motion for new trial, court issued tentative ruling granting motion within 60 days but, after hearing oral argument, court issued final written decision confirming tentative ruling more than 74 days after filing. However, because trial court never entered final judgment and retained inherent authority to reconsider, correct, and change its interim orders, appellate court would direct trial court on remand to exercise its inherent constitutional authority to reconsider summary judgment order. *Fischer v. First Int'l. Bank (2003) 109 Cal. App. 4th 1433, 1451-1452, 1 Cal. Rptr. 3d 162*

Trial court properly denied motion for new trial on ground of lack of jurisdiction when motion was not heard within 60-day time period specified in *Code Civ. Proc. § 660*. *In re Marriage of Liu (1987) 197 Cal. App. 3d 143, 151-152, 242 Cal. Rptr. 649*

Time to file statement of reasons runs from date of conditional grant of new trial; failure to timely file requires reversal of grant of new trial and reinstatement of judgment. Ballou v. Master Properties No. 6 *(1987) 189 Cal. App. 3d 65, 71-72, 234 Cal. Rptr. 264*

If order granting new trial is made on 60th day, and 10 days thereafter specification of reasons filed by court,

specification is timely since it must be filed 10 days after order but need not be filed within jurisdictional 60-day period for determination of the motion under *Code Civ. Proc. § 660*. *Fortenberry v. Weber (1971) 18 Cal. App. 3d 213, 221, 95 Cal. Rptr. 834*

Court is required to state reasons for granting motion in order or in separate document filed 10 days after filing of the order; 10-day period runs from determination of motion rather than from filing of order. *Swanson v. Western Greyhound Lines, Inc. (1969) 268 Cal. App. 2d 758, 759-760, 74 Cal. Rptr. 383*

[18] Time for Determination of Motion

Prevailing party's attorney's mailing to opposing counsel of photocopy of file-stamped and dated judgment started time limit for determining motion for new trial under *Code Civ. Proc. § 660*, so that determination of motion 66 days later was untimely, when service of written notice of entry of judgment and filing of original notice of entry and proof of service complied with *Code Civ. Proc. § 660*, and posttrial motion statutes do not require filing of original notice of entry or file-stamped copy of judgment accompanied by proof of service to start time limits for bringing posttrial motions. *Palmer v. GTE (2003) 30 Cal. 4th 1265, 1277-1278, 135 Cal. Rptr. 2d 654, 70 P.3d 1067*

Trial court erroneously granted new trial 61 days after plaintiffs served notice of entry of judgment on defendants by mail; *Code Civ. Proc. § 1013(a)* does not extend deadline for court to act under *Code Civ. Proc. § 660*, so that once 60 days had run, motion was denied by operation of law and court lacked jurisdiction to act on it. *Westrec Marina Management, Inc. v. Jardine Ins. Brokers Orange County, Inc. (2000) 85 Cal. App. 4th 1042, 1047-1049, 102 Cal. Rptr. 2d 673*

Court's ruling on motion for new trial is invalid under *Code Civ. Proc. § 660* when made 63 days after defendant's filing of first notice of intention to move for new trial; fact that ruling was made within 60 days after clerk mailed notice of entry of judgment is not determinative since mailing of notice does not commence new 60-day period. *Bunton v. Arizona Pacific Tanklines (1983) 141 Cal. App. 3d 210, 215-216, 190 Cal. Rptr. 295*

Time limits set by *Code Civ. Proc. § 660* are mandatory and jurisdictional; limits are not susceptible to change by consent, waiver, agreement, or acquiescence. *Meskell v. Culver City Unified School Dist. (1970) 12 Cal. App. 3d 815*

Trial court has discretion to delay determination of new trial motion to any date within 60-day period and further discretion to permit motion to be denied by operation of law if 60-day period expires without determination being made. *Meskell v. Culver City Unified School Dist. (1970) 12 Cal. App. 3d 815, 823, 96 Cal. Rptr. 773*

In determining whether 60-day jurisdictional period under *Code Civ. Proc. § 660* within which trial court can rule on motions for new trial had run, permanent minutes, not rough minutes, fixed date on which order granting new trial was entered. *Meskell v. Culver City Unified School Dist. (1970) 12 Cal. App. 3d 815, 821, 96 Cal. Rptr. 773*

Sixty-day period within which trial court can rule on motions for new trial pursuant to *Code Civ. Proc. § 660* is not extended under *Code Civ. Proc. § 1013(a)* by service of notice of entry of judgment by mail. *Meskell v. Culver City Unified School Dist. (1970) 12 Cal. App. 3d 815, 822-824, 96 Cal. Rptr. 773*

Sixty-day period within which trial court can rule on motions for new trial pursuant to *Code Civ. Proc. § 660* runs from date notice of entry of judgment was filed and served by adverse party, not from date notice of entry of judgment was given by clerk. *Meskell v. Culver City Unified School Dist. (1970) 12 Cal. App. 3d 815, 824, 96 Cal. Rptr. 773*

Code Civ. Proc. § 660, imposing time limitation on when judge must pass on motion for new trial, does not prevent judge from making conditional order within time specified and specifying additional time for performance of condition,

although additional time must be reasonable. *Alberton v. Superior Court of San Francisco (1968) 265 Cal. App. 2d 812, 814-815, 71 Cal. Rptr. 553*

Sixty-day period within which trial court retains jurisdiction under *Code Civ. Proc. § 660* to rule on motion for new trial begins from date that notice of entry of judgment is given by clerk; order made after 60-day period purporting to rule on motion for new trial is in excess of court's jurisdiction and void. *Brennan v. Spanach (1968) 266 Cal. App. 2d 350, 353, 72 Cal. Rptr. 211*

Judicial function of granting new trial must be completed within 60-day period (or period as enlarged by holidays under *Code Civ. Proc. § 12a*); matter is jurisdictional and attempt by court to act later is futile, motion being denied by operation of law. *Alberton v. Superior Court (1968) 265 Cal. App. 2d 812, 814, 71 Cal. Rptr. 553*

Nunc pro tunc additions either of reasons or grounds for ordering new trial--even for clerical error--as prohibited more than 10 days after motion is determined in manner prescribed by *Code Civ. Proc. § 660*. *Fry v. Young (1968) 267 Cal. App. 2d 340, 347, 73 Cal. Rptr. 62*

[19] With Motion for Judgment Notwithstanding the Verdict

Motion for new trial is frequently made with motion for judgment notwithstanding verdict. *Schroeder v. Auto Driveaway Co. (1974) 11 Cal. 3d 908, 919, 114 Cal. Rptr. 622*

Court is unable to grant motion for judgment notwithstanding verdict with conditional order granting motion for new trial if for any reason judgment notwithstanding verdict is reversed on appeal. *Widener v. Pacific Gas & Electric Co. (1977) 75 Cal. App. 3d 415, 436, 142 Cal. Rptr. 304*

Trial judge who erroneously grants motion for judgment notwithstanding verdict is capable of determining sufficiency of evidence on motion for new trial, since two motions decided on different standard and *Code Civ. Proc. § 629* clearly contemplates that both motions should be decided by judge who presided at trial. *Zambrana v. Standard Oil Co. (1972) 26 Cal. App. 3d 209, 215, 102 Cal. Rptr. 699*

Order from which no appeal taken will not be reversed; motion for judgment notwithstanding verdict granted and motion for new trial granted only in event order granting judgment notwithstanding verdict reversed on appeal; where appeal confined to motion for judgment N.O.V. motion granting new trial will not be reversed. *Aguirre v. Reno (1971) 19 Cal. App. 3d 284, 286, 96 Cal. Rptr. 924*

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Note, *Pre-Deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility, 98 Yale L.J. 187 (1988)*

Adams, *Written Specification of Reasons for New Trial Orders, 64 Cal. L. Rev. 286 (1976)*

Comment, *Jurors' Impeachment of Verdict, 58 Cal. L. Rev. 259 (1970)*

Leedy, *New Trial: Demise of the Thirteenth Juror*, 44 Cal. St. B.J. 380 (1969)

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Witkin, California Procedure, vol. 8, *Attack on Judgment in Trial Court*, § 18 et seq. (4th ed. 1997)

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Court's correction of clerical errors in judgment or order. *Code Civ. Proc. § 473(d)*

General and special verdicts. *Code Civ. Proc. § 624*

Conflict of jury's special finding with general verdict. *Code Civ. Proc. § 625*

Alternative relief in lieu of granting new trial. *Code Civ. Proc. § 662*

Motion to set aside and vacate judgment and enter another and different judgment. *Code Civ. Proc. § 663*

Grounds for motion to set aside and vacate a judgment and to enter another and different judgment. *Code Civ. Proc. § 663(1), (2)*

Notice of intention to set aside and vacate judgment--contents and time limit for filing. *Code Civ. Proc. § 663a*

Motion heard anywhere in state by trial judge if all parties consent. *Gov. Code § 69741.1*

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§ 371.161 California Rules of Court

Judge who will hear and determine motion is judge who presided at trial. *Cal. Rules of Ct., Rule 3.1602*

Extension of time to appeal when notice of intention to move for order vacating judgment is filed. *Cal. Rules of Ct., Rule 8.108*

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§ 371.162 Decisions

Denial of *Code Civ. Proc. § 663* motion is not appealable order. *Clemmer v. Hartford Ins. Co. (1978) 22 Cal. 3d 865, 871, 873, 890, 151 Cal. Rptr. 285* P.2d 1098; *but see Howard v. Lufkin (1988) 206 Cal. App. 3d 297, 302-303, 253 Cal. Rptr. 422* (characterizing statement in *Clemmer* as dictum and reaffirming prior rule that order denying motion under *Code Civ. Proc. § 663* is appealable); *see also Hollister Convalescent Hosp., Inc. v. Rico (1975) 15 Cal. 3d 660, 663-664, 125 Cal. Rptr. 757, 542 P.2d 1349* (citing with approval Witkin's recitation of rule of *Socol v. King (1949) 34 Cal. 2d 292, 296-297, 209 P.2d 577* , that order denying *Code Civ. Proc. § 663* motion is appealable)

Motion is proper to set aside judgment and enter different judgment whenever court draws incorrect legal conclusion or renders erroneous judgment upon facts found by it to exist. *County of Alameda v. Carleson (1971) 5 Cal. 3d 730, 738, 97 Cal. Rptr. 385, 488 P.2d 953*

A person not party to the action as it was originally commenced or tried may intervene even after judgment by moving to vacate under *Code Civ. Proc. § 663*; person thereby gains right to appeal order denying motion to vacate. *County of Alameda v. Carleson (1971) 5 Cal. 3d 730, 736-737, 97 Cal. Rptr. 385, 488 P.2d 953* ; *Simac Design, Inc. v. Alciati (1979) 92 Cal. App. 3d 146, 152, 154 Cal. Rptr. 676*

Order denying motion to vacate judgment and enter different judgment under *Code Civ. Proc. §§ 663* and *663a* is appealable. *Socol v. King (1949) 34 Cal. 2d 292, 296, 209 P.2d 577*

Motion to vacate judgment does not lie to vacate judgment following erroneous ruling on demurrer. *Payne v. Rader (2008) 167 Cal. App. 4th 1569, 1574-1575, 85 Cal. Rptr. 3d 174*

"Aggrieved party" under *Code Civ. Proc. § 663* is one whose rights or interests are injuriously affected by judgment, and interest must be immediate, pecuniary, and substantial, and not nominal or remote consequence of judgment. Thus, insurer lacked standing and trial court properly denied insurer's motion to vacate judgment obtained against insured, when possibility that insurer would be bound by judgment did not satisfy "aggrieved party" standard; when insurer's

incurring litigation costs as result of insured's coverage action was not substantial right or interest affected by judgment and was at most nominal consequence of judgment; when insurer's rights would only be injuriously affected if coverage were found; and when insurer would not be bound by finding that insured was liable if insurer could show fraud or collusion in coverage action. *Tomassi v. Scarff (2000) 85 Cal. App. 4th 1053, 102 Cal. Rptr. 2d 750*

Court has power under *Code Civ. Proc. § 663* to set aside judgment granting writ of mandate when indispensable party to mandate proceedings was not made party. *Inland Counties Regional Center, Inc. v. Office of Administrative Hearings (1987) 193 Cal. App. 3d 700, 703-707, 238 Cal. Rptr. 422*

Parties' consent to vacate judgment does not enable court to vacate judgment; power to vacate judgment is strictly statutory. *Southern Cal. White Trucks v. Teresinski (1987) 190 Cal. App. 3d 1393, 1407-1408, 236 Cal. Rptr. 159*

Discussion of conflict among Supreme Court's opinions regarding appealability of order denying *Code Civ. Proc. § 663* motion. *Forman v. Knapp Press (1985) 173 Cal. App. 3d 200, 202-203* , 218 Cal. Rtpr. 815 (dictum)

Motion to vacate order on stipulated paternity judgment was brought with due diligence although filed six years after entry of judgment, because motion filed shortly after Supreme Court declared that type of judgment unconstitutional, and various pertinent Supreme Court cases were decided during six years' time. *County of Los Angeles v. Thompson (1985) 172 Cal. App. 3d 18, 27-28, 218 Cal. Rptr. 101*

Code Civ. Proc. § 663a imposes strict time limits, and court lacks power under *Code Civ. Proc. § 663a* to vacate judgment after time has elapsed within which proceedings by motion could be instituted, even when parties consent that motion be granted. *County of Inyo v. City of Los Angeles (1984) 160 Cal. App. 3d 1178, 1183, 207 Cal. Rptr. 425*

Code Civ. Proc. § 663, regarding motions to set aside and vacate a judgment and enter a different judgment is not intended to affect remedy of appeal, but to provide remedy in addition to appeal. *Delta Farms v. Chinese American Farms (1927) 201 Cal. 201, 204, 255 P. 1097* ; *Fitzsimmons v. Jones (1960) 179 Cal. App. 2d 5, 11, 3 Cal. Rptr. 373*

Motion to vacate judgment and enter different judgment under *Code Civ. Proc. § 663* properly granted where court improperly disallowed costs to plaintiff when statute expressly authorized costs. *Gibson v. Hammang (1904) 145 Cal. 454, 456, 78 P. 953*

Requirement of *Code Civ. Proc. § 663* regarding correction of conclusions of law when judgment is set aside is merely directory; failure to correct does not require reversal of judgment. *Howard A. Deason & Co. v. Costa Tierra Ltd. (1969) 2 Cal. App. 3d 742, 760, 83 Cal. Rptr. 105*

Trial court making new findings and ordering counsel to prepare new findings, conclusions, and judgment is deemed to be acting pursuant to *Code Civ. Proc. § 662*, even though it mistakenly purports to act under *Code Civ. Proc. § 663*. *Warren Southwest, Inc. v. Wicks (1969) 276 Cal. App. 2d 152, 155, 80 Cal. Rptr. 723*

Order granting motion to vacate judgment and enter different judgment under *Code Civ. Proc. §§ 663* and *663a* is reviewable on appeal in same manner as special order made after final judgment. *Reeves v. Hutson (1956) 144 Cal. App. 2d 445, 450, 301 P.2d 264*

Because facts indicated that parties wished to terminate sale and purchase agreement and court concluded that agreement should be completed, thereby ordering the completion, motion to vacate judgment and enter different judgment was properly granted. *Swanson v. Wheeler (1952) 112 Cal. App. 2d 43, 44-45, 245 P.2d 699*

Motion to vacate judgment and enter different judgment under *Code Civ. Proc. §§ 663, 663a* are proper only after final judgments and not after interlocutory judgments or orders. *Remington v. Davis (1951) 108 Cal. App. 2d 251, 253, 238*

P.2d 662

If court wrongly concluded that dispute or argument was element of agreed boundary line doctrine and doctrine in fact did not contain that element, motion to vacate judgment and enter different judgment is properly granted. *Crook v. Leinenweaver (1950) 100 Cal. App. 2d 790, 792-794, 224 P.2d 891*

On motion to vacate judgment and enter different judgment, court is not permitted to reopen case and receive further evidence or reexamine evidence before it. *Gossman v. Gossman (1942) 52 Cal. App. 2d 184, 196, 126 P.2d 178*

Motion to vacate judgment and enter different judgment is proper when judgment is not consistent with or supported by special verdict. *San Francisco v. Superior Court (1928) 94 Cal. App. 318, 271 P. 121*

Order that vacates judgment and does not enter different judgment is void and therefore nonappealable. *Dolan v. Superior Court (1920) 47 Cal. App. 235, 241, 190 P. 469*

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Rahl, *Civil Procedure: Recent Amendments Affecting Motions for New Trial and Motions to Vacate and Set Aside Judgments, 47 Cal. L. Rev. 919 (1959)*

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1. Moving Party

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§ 371.180 Preliminary Determinations

1. Ascertain whether or not grounds for a motion for judgment notwithstanding the verdict exist. The grounds are as follows:

a. No substantial evidence to support verdict; and

b. A motion for directed verdict should have been granted had a previous motion been made [*Code Civ. Proc. § 629*; *see § 371.39*].

2. Decide whether you will make oral or written motion.

An oral motion for judgment notwithstanding the verdict is available in addition to the written motion and may be made in court immediately after rendition of the verdict. For a discussion of procedures for a written motion, see *§ 371.181*.

3. Determine whether or not stay in execution of judgment under *Code Civ. Proc. § 918* is desired. For forms for use in staying execution, see Ch. 254, *Executions and Enforcement of Judgments* .

4. Assess availability of alternative procedures by which the aggrieved party may obtain a judgment in his or her favor. Alternative procedures are as follows:

a. Motion for new trial [*Code Civ. Proc. § 657*; *see § 371.220* et seq.].

b. Motion for judgment on special finding [*Code Civ. Proc. § 625*; Ch. 326A, *Jury Verdicts*].

c. Motion to vacate [*Code Civ. Proc. § 663*; *see § 371.260* et seq.].

d. Motion to correct clerical error or set aside void judgment [*Code Civ. Proc. § 473(d)*; *see* Ch. 489, *Relief From Judgments and Orders*].

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1. Moving Party

33-371 California Forms of Pleading and Practice--Annotated § 371.181

§ 371.181 Preparation of Papers

1. Prepare the notice of motion for judgment notwithstanding the verdict [*see § 371.280*] in the following number of copies:

a. Original for filing.

b. One copy for the opposing party's attorney of record, or if none, for the opposing party.

c. One copy for client, if desired.

d. One office copy.

e. Additional copies as desired.

2. Date and sign the notice of motion.

3. Prepare the accompanying memorandum of points and authorities in the same number of copies as the notice of motion and attach a copy to each copy of the notice.

For a memorandum of points and authorities in support of a motion for judgment notwithstanding the verdict, see Calfornia Points and Authorities, Ch. 155, *Motions After Trial* (Matthew Bender).

4. Prepare the proof of service in same number of copies as the notice of motion and attach the original to the original notice of motion and a copy to each copy of the notice.

a. If notice is to be mailed by counsel, prepare certificate of service [*Code Civ. Proc. § 1013a(2)*].

b. If notice is to be mailed by someone other than counsel, prepare affidavit of service [*Code Civ. Proc. § 1013a(1)*] or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*].

For forms of proof of service, see Ch. 518, Service of Summons and Papers .

5. Contact court clerk to determine local practice regarding setting of time for hearing.

a. In some jurisdictions, counsel sets own time for hearing, taking care to give opposing parties adequate notice of hearing under *Code Civ. Proc. § 1005(b)*. If counsel is to set time, determine time period during which motion can be heard.

NOTE:
Compute time by excluding first day and including last, unless the last day is a holiday, then it is also excluded [*Code Civ. Proc. §§ 12, 12a*; *see Gov. Code §§ 6700, 6701* (list of holidays)].

(1) Calculate last day court can rule on motion.

The last day the court can rule on a motion for judgment notwithstanding the verdict is the same as the last day it can rule on a motion for new trial, or, whichever of the following is earliest:
(a) If notice of entry of judgment given,
(i) 60 days after clerk or prevailing party mails notice of entry of judgment under *Code Civ. Proc. § 664.5*, or

(ii) 60 days after any party serves written notice of entry of judgment of the moving party [*Code Civ. Proc. § 660*; *see also Code Civ. Proc. § 629*].

(b) If notice of entry of judgment not given,

60 days after intention to move for judgment notwithstanding the verdict was filed [*Code Civ. Proc. § 660*; *see also Code Civ. Proc. § 629*].

(2) Calculate first day court can rule on motion.

NOTE:
The court cannot rule on the motion until the expiration of the time in which motion for new trial must be served and filed [*see § 371.182*].

(3) Determine length of notice of hearing to be given to opposing parties--16 court days plus additional time for service by mail, overnight delivery, or fax [*Code Civ. Proc. § 1005(b)*]. An extension may apply in case of electronic service made pursuant to a local rule adopted under *Code Civ. Proc. § 1010.6* [*see Code Civ. Proc. § 1010.6(a)(6)*; *see also Ch. 518, Service of Summons and Papers, § 518.41[8]*].

(4) With these relevant dates in mind, counsel is advised to contact the judge who presided at trial and who will now hear the motion to arrange a convenient time between the times set out in Paragraphs (1) and (2), *above*. Counsel then should fill in the time and place of hearing in the notice of motion.

b. In other jurisdictions, the court will appoint a time for the hearing and the clerk will notify the parties of the appointed time. In this case, counsel should not fill in the time and place of hearing on the notice of motion.

6. Determine local court practice regarding preparation of judgments notwithstanding the verdict and orders denying the motion [*see § 371.281*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts

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A. Motion for Judgment Notwithstanding Verdict
1. Moving Party

33-371 California Forms of Pleading and Practice--Annotated § 371.182

§ 371.182 Service and Filing

1. Determine time limits within which motion for judgment notwithstanding verdict must be made.

NOTE:
The motion must be served and filed within the period prescribed for serving and filing notice of intention to move for a new trial [*Code Civ. Proc. § 629 , 659*]. That period is as follows [*Code Civ. Proc. § 659*]:

a. Before entry of judgment, but after jury has rendered a decision [*Code Civ. Proc. §§ 659, 664*],

b. Or the earliest of the following:
(1) 15 days after the court clerk or moving party mails notice of entry of judgment under *Code Civ. Proc. § 664.5*,

(2) 15 days after any party serves written notice of entry of judgment on the moving party, or

(3) 180 days after judgment is entered.

2. Serve notice of motion and accompanying papers on each opposing party's attorney, or if none, on each opposing party [*Code Civ. Proc. §§ 1011, 1012, 1015*; *see also* Ch. 518, *Service of Summons and Papers*].

3. Deliver original notice of motion and attached originals of accompanying papers to court clerk for filing.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts

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A. Motion for Judgment Notwithstanding Verdict
1. Moving Party

33-371 California Forms of Pleading and Practice--Annotated §§ 371.183-371.199

[Reserved]

§§ 371.183[Reserved]

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A. Motion for Judgment Notwithstanding Verdict
2. Opposing Party

33-371 California Forms of Pleading and Practice--Annotated § 371.200

§ 371.200 Preliminary Determinations

1. Examine notice of motion to determine if it is timely given.

2. Examine supporting memorandum of points and authorities.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresTrialsJudgment as Matter of LawGeneral OverviewCivil ProceduresTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts

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A. Motion for Judgment Notwithstanding Verdict
2. Opposing Party

33-371 California Forms of Pleading and Practice--Annotated § 371.201

§ 371.201 Preparation of Papers

1. Prepare opposing memorandum of points and authorities and make copies [same number as for notice of motion, *see § 371.181*].

NOTE:
For a memorandum of points and authorities in opposition to a motion for judgment notwithstanding the verdict, see California Points and Authorities , Ch. 155, *Motions After Trial* (Matthew Bender).

2. Determine local practice regarding preparation of orders denying motions for judgment notwithstanding the verdict [*see § 371.281*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts

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A. Motion for Judgment Notwithstanding Verdict
2. Opposing Party

33-371 California Forms of Pleading and Practice--Annotated § 371.202

§ 371.202 Service and Filing

Serve and file memorandum of points and authorities at least 16 court days before the hearing [*see Code Civ. Proc. § 1005(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts

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A. Motion for Judgment Notwithstanding Verdict
2. Opposing Party

33-371 California Forms of Pleading and Practice--Annotated §§ 371.203-371.219

[Reserved]

§§ 371.203[Reserved]

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PART IV. PROCEDURAL CHECKLIST
B. Motion for New Trial
1. Moving Party

33-371 California Forms of Pleading and Practice--Annotated § 371.220

§ 371.220 Preliminary Determinations

1. Ascertain whether any of the grounds for a motion for new trial exist [*see also § 371.63*]. The grounds are as follows:

a. Irregularity in proceedings of the court, the jury, or the adverse party [*Code Civ. Proc. § 657(1)*].

b. Any court order or abuse of discretion that prevented fair trial [*Code Civ. Proc. § 657(1)*].

c. Jury misconduct [*Code Civ. Proc. § 657(2)*].

d. Accident or surprise [*Code Civ. Proc. § 657(3)*].

e. Newly discovered evidence [*Code Civ. Proc. § 657(4)*].

f. Excessive or inadequate damages [*Code Civ. Proc. § 657(5)*].

g. Insufficient evidence to justify verdict [*Code Civ. Proc. § 657(6)*].

h. Verdict or decision against law [*Code Civ. Proc. § 657(5)*].

i. Error in law occurring at trial [*Code Civ. Proc. § 657(6)*].

j. Lack of phonographic report of trial [*Code Civ. Proc. § 657.1*].

k. Loss or destruction of bill of exceptions or statement of case due to public calamity [

Code Civ. Proc. § 663.1].

2. In nonjury trials, determine the desirability of requesting alternative relief under *Code Civ. Proc. § 662* [*see § 371.68*].

3. Decide whether or not stay in execution of judgment under Code Civ. Proc. § 918a is desired. For a form for use in staying execution see Ch. 254, *Executions and Enforcement of Judgments* .

4. Determine the availability of other alternative procedures by which the aggrieved party may obtain a judgment in his or her favor. Alternative procedures are as follows:

a. Judgment notwithstanding the verdict [*Code Civ. Proc. § 629*; *see § 371.180* et seq.; *see also § 371.64[6]*].

b. Motion for judgment on special finding [*Code Civ. Proc. § 625*; see Ch. 326A, *Jury Verdicts*].

c. Motion to vacate [*Code Civ. Proc. § 663*; *see § 371.260* et seq.].

d. Motion to correct clerical error or set aside void judgment [*Code Civ. Proc. § 473*; *see* Ch. 318, *Judgments* ; Ch. 489, *Relief From Judgements*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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B. Motion for New Trial
1. Moving Party

33-371 California Forms of Pleading and Practice--Annotated § 371.221

§ 371.221 Preparation of Papers

1. Prepare notice of intention to move for new trial [*see § 371.300*] in the following number of copies:

a. Original for filing.

b. One copy for opposing party's attorney of record, or if none, for opposing party.

c. One copy for client, if desired.

d. One office copy.

e. Additional copies as desired.

2. Date and sign the notice of intention to move for new trial.

3. Prepare memorandum of points and authorities in the same number of copies as the notice of intention to move for new trial and attach a copy to each copy of the notice.

NOTE:
For a memorandum in support of a notice of intention to move for new trial, see California Points and Authorities , Ch. 155, *Motions After Trial* (Matthew Bender).

4. If required, prepare the affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) in support of the motion for new trial [*see § 371.302*]. For a form for an affidavit that may be prepared in support of the motion, see Ch. 15, *Affidavits, Certificates, and Declarations* . Affidavits or declarations are required when the motion is made on the following grounds [*Code Civ. Proc. § 658*]:

a. Irregularity in the proceedings of the court, jury, or adverse party [*Code Civ. Proc. § 657(1)*].

b. Court order or abuse of discretion that prevented either party from having a fair trial [*Code Civ. Proc. § 657(1)*].

c. Jury misconduct [*Code Civ. Proc. § 657(2)*].

d. Accident or surprise, which ordinary prudence could not have guarded against [*Code Civ. Proc. § 657(3)*]. or

e. Newly discovered evidence [*Code Civ. Proc. § 657(4)*].

5. If the motion is to be made on the minutes of the court, excerpt pertinent parts of the trial record and attach them as exhibits to the memorandum of points and authorities. The body of the memorandum should also incorporate these pertinent facts to show why, for example, the evidence at trial was insufficient to justify the verdict or other decision [*see Code Civ. Proc. § 657(6)*; *see also* California Points and Authorities , Ch. 155 *Motions After Trial* , (Matthew Bender)].

6. Prepare proof of service in same number of copies as notice of intention to move for new trial and attach original to original of the notice and a copy to each copy of the notice.

a. If notice is to be mailed by counsel, prepare certificate of service [*Code Civ. Proc. § 1013a(2)*].

b. If notice is to be mailed by someone other than counsel, prepare affidavit of service [*Code Civ. Proc. § 1013a(1)*] or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*].

NOTE:

For forms for proof of service, see Ch. 518, *Service of Summons and Papers* .

c. If notice is to be served separately from the supporting declarations and memorandum of points and authorities, separate proofs of service are required [*see § 371.222*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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B. Motion for New Trial
1. Moving Party

33-371 California Forms of Pleading and Practice--Annotated § 371.222

§ 371.222 Service and Filing

1. Determine time limits within which motion for new trial must be made. The notice of motion must be filed as follows:

a. Before entry of judgment, but after the jury, court, or referee has rendered a decision [*Code Civ. Proc. §§ 656, 659*]; or

b. The earliest of the following [*Code Civ. Proc. § 659*]:
(1) 15 days after the court clerk mails notice of entry of judgment under *Code Civ. Proc. § 664.5*,

(2) 15 days after any party serves written notice of entry of judgment on the moving party, or

(3) 180 days after judgment is entered.

2. Serve the notice on each opposing party's attorney, or if none, on each opposing party [*see Code Civ. Proc. §§ 1011, 1012, 1015*].

NOTE:
Time for serving and filing notice is not extended by *Code Civ. Proc. § 1013* which extends the time when service is by mail [*Code Civ. Proc. § 1013*].

3. Serve accompanying memorandum at the same time or within 10 days after filing notice of intention to move for new trial [*Cal. Rules of Ct., Rule 3.1600(a)*].

NOTE:
On failure of moving party to timely serve and file memorandum, the court may deny the motion

without a hearing on the merits [*Cal. Rules of Ct., Rule 3.1600(b)*].

4. Serve any affidavits or declarations at the same time or within 10 days of fifing the notice of intention to move for a new trial [*Code Civ. Proc. § 659a*].

NOTE:
Time can be extended for additional period not to exceed 20 days for good cause shown upon affidavit or written stipulation of the parties [*Code Civ. Proc. § 659a* ; for stipulation and order extending time, *see § 371.306*].

5. Deliver original notice of motion and attached originals of accompanying papers, if filing concurrently, to court clerk and pay filing fee.

NOTE:
Amount of filing fee is prescribed by *Gov. Code § 70617(a)(5)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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B. Motion for New Trial
1. Moving Party

33-371 California Forms of Pleading and Practice--Annotated §§ 371.223-371.239

[Reserved]

§§ 371.223[Reserved]

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B. Motion for New Trial
2. Opposing Party

33-371 California Forms of Pleading and Practice--Annotated § 371.240

§ 371.240 Preliminary Determinations

1. Examine notice of motion to determine if timely filed and served under *Code Civ. Proc. § 659* [*see § 371.222*].

2. Examine supporting memorandum and affidavit or declaration, if any.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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B. Motion for New Trial
2. Opposing Party

33-371 California Forms of Pleading and Practice--Annotated § 371.241

§ 371.241 Preparation of Papers

Prepare opposing memorandum and counteraffidavits, if necessary, and make copies in same number as notice of motion [*see § 371.181*]. For an opposing memorandum, see California Points and Authorities , Ch. 155, *Motions After Trial* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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B. Motion for New Trial
2. Opposing Party

33-371 California Forms of Pleading and Practice--Annotated § 371.242

§ 371.242 Service and Filing

1. Serve and file memorandum within 10 days after moving party's memorandum is served and filed [*Cal. Rules of Ct., Rule 3.1600(a)*].

2. Serve and file counteraffidavits or declarations within 10 days after moving party's affidavits or declarations are served and filed [*Code Civ. Proc. § 659a*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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2. Opposing Party

33-371 California Forms of Pleading and Practice--Annotated §§ 371.243-371.259

[Reserved]

§§ 371.243[Reserved]

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C. Motion to Set Aside and Vacate a Judgment and to Enter Another and Different Judgment
1. Moving Party's Checklist

33-371 California Forms of Pleading and Practice--Annotated § 371.260

§ 371.260 Preliminary Determinations

1. Ascertain whether or not either of the grounds for a motion to set aside and vacate a judgment and to enter another and different judgment exist. The grounds are as follows [*Code Civ. Proc. § 663*]:

a. Nonjury trial--There is an incorrect or erroneous legal basis for the decision not consistent with or supported by the facts.

b. Jury trial--The judgment or decree is not consistent with or not supported by the special verdict.

2. Determine the availability of other alternative procedures by which the aggrieved party may obtain a judgment in his or her favor. Possible alternative procedures are as follows:

a. A motion for new trial [*Code Civ. Proc. § 657*; *see § 371.220* et seq.].

b. A motion for judgment notwithstanding the verdict under *Code Civ. Proc. § 629* [*see § 371.180* et seq.].

c. A motion for judgment on a jury's special finding if that finding is inconsistent with the general verdict [*see Code Civ. Proc. § 625*; *see also* Ch. 326A, *Jury Verdicts*].

NOTE:
A motion for judgment on a special finding must be made before judgment is entered on the general verdict [*Napa Valley Packing Co. v. San Francisco Relief & Red Cross Funds (1911) 16 Cal. App. 461, 471, 118 P. 469]* .

d. A motion to correct clerical mistakes in judgments and to set aside void judgments [*Code Civ. Proc. §*

473(d); *see also* Ch. 318, *Judgments* ; Ch. 489, *Relief From Judgments and Orders*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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C. Motion to Set Aside and Vacate a Judgment and to Enter Another and Different Judgment
1. Moving Party's Checklist

33-371 California Forms of Pleading and Practice--Annotated § 371.261

§ 371.261 Preparation of Papers

1. Prepare the notice of intention to move to set aside and vacate the judgment and to enter another and different judgment in the following number of copies:

a. Original for filing.

b. One copy for service on the opposing party's attorney of record, or if no attorney, on the opposing party.

c. One copy for client, if desired.

d. One office copy.

e. Additional copies as desired.

2. Date and sign the notice of intention to move under *Code Civ. Proc. § 663*.

3. Prepare the accompanying memorandum in the same number of copies as the notice of motion. Attach the original memorandum to the original of the notice and a copy to each copy of the notice.

For memoranda in support of and in opposition to a motion and to vacate a judgment and to enter another and different judgment, see California Points and Authorities, Ch. 155, *Motions After Trial* (Matthew Bender).

CAUTION:
Although, under *Cal. Rules of Ct., Rules 3.1100, 3.1103(a)*, a memorandum is not specifically required to be submitted in support of the motion, it is better practice to submit a memorandum as is generally required in law and motion proceedings [*see Code Civ. Proc. §§ 1005(b), 1010*; *Cal.*

***Rules of Ct., Rule 3.1113(a)*]**.

4. Contact court clerk to determine local practice regarding setting of time for the hearing.

a. In some jurisdictions, counsel sets time for the hearing, taking care to give the opposing party adequate notice under *Code Civ. Proc. § 1005(b)*. Since the judge who presided at trial will hear the motion [*Cal. Rules of Ct., Rule 3.1602*], counsel is advised to contact the judge to arrange a convenient time. Counsel should then fill in the time and place of hearing in the notice of motion.

b. In other jurisdictions, the court will appoint a time for the hearing and the clerk will notify the parties of the appointed time. In this case, counsel should leave blank the time for hearing on the notice of motion.

5. Prepare the proof of service in the same number of copies as the notice of motion and attach the original to the original of the notice and a copy to each copy of the notice.

a. If notice is to be mailed by counsel, prepare a certificate of service [*Code Civ. Proc. § 1013a(2)*].

b. If notice is to be mailed by someone other than counsel, prepare affidavit of service [*Code Civ. Proc. § 1013a(1)*] or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*].

For forms of proof of service, see Ch. 518, *Service of Summons and Papers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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33-371 California Forms of Pleading and Practice--Annotated § 371.262

§ 371.262 Service and Filing

1. Determine the time within which the motion must be made. The moving party must file with the clerk and serve on the adverse party a notice of his or her intention to move under *Code Civ. Proc. § 663* either [*Code Civ. Proc. § 663a*]:

a. Before entry of judgment, or

b. Within the earliest of the following times:
(1) Within 15 days after the clerk mails notice of entry of judgment under *Code Civ. Proc. § 664.5*,

(2) Within 15 days after any party serves written notice of entry of judgment, or

(3) Within 180 days after judgment is entered.

2. Serve the notice of intention to set aside and vacate the judgment and to enter another and different judgment on the opposing party's attorney, or if none, on the opposing party [*Code Civ. Proc. §§ 1011, 1012, 1015*].

NOTE:
The provisions of *Code Civ. Proc. § 1013* extending the time for excercising a right or doing an act where service is by mail, Express Mail or other overnight delivery, or fax do not apply to the time specified in *Code Civ. Proc. § 663a* for the filing and serving of the notice of intention to set asideand vacate the judgment and to enter another and different judgment [*Code Civ. Proc. §§ 663a, 1013*]. The extension provided for in *Code Civ. Proc. § 1010.6* in case of electronic service also does not apply [*Code Civ. Proc. § 1010.6(a)(6)*]. However, the provisions of *Code Civ. Proc. § 1005(b)*, extending the time for notice of hearing when service is by mail, do apply [*see Code Civ. Proc. § 1005(a)(13)*].

3. Deliver original notice of motion and attached originals of accompanying papers to court clerk for filing.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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33-371 California Forms of Pleading and Practice--Annotated §§ 371.263-371.279

[Reserved]

§§ 371.263[Reserved]

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PART V. FORMS
A. Motion for Judgment Notwithstanding Verdict

33-371 California Forms of Pleading and Practice--Annotated § 371.280

§ 371.280 Notice of Motion for Judgment Notwithstanding the Verdict [Code Civ. Proc. § 629]

[1] FORM Notice of Motion for Judgment Notwithstanding the Verdict [Code Civ. Proc. § 629]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR JUDG-
Defendant.	)	MENT NOTWITHSTANDING THE VERDICT
	)	
	)	

To _____ [*specify party, e.g.*, plaintiff] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [*specify party, e.g.*, defendant] _____ [*name*] will, and hereby does, move for an order for judgment in his/her favor, notwithstanding the verdict. The motion will be made on the following grounds:

1. After viewing the evidence in the light most favorable to _____ [*specify party securing verdict, e.g.,* plaintiff], there is no substantial evidence to support the jury's verdict in that party's favor and a directed verdict for _____ [*specify moving party, e.g.,* defendant] should have been granted had a previous motion been made.

[2. On each and all of the grounds on which the motion for a directed verdict was made.]

The motion will be based on this notice of motion and the memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

CAUTION:

Although under *Cal. Rules of Ct., Rules 3.1100, 3.1103(a),* a memorandum is not specifically required to be submitted in support of the motion, it is better practice to submit a memorandum as is generally required in law and motion proceedings [*see Code Civ. Proc. §§ 1005(b), 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, *see* Ch. 417, *Points and Authorities* .

[2] Use of Form

This notice of motion is for use by a plaintiff or defendant to secure an order for judgment notwithstanding the verdict pursuant to *Code Civ. Proc. § 629*.

[3] Time and Place of Hearing

The notice must state the date, hour, address, and department or room number where the motion will be heard. To determine the date and time to be inserted, counsel must know the minimum notice period allowable. Generally, the minimum notice period is 16 court days plus additional time for service by mail, overnight delivery, or fax [*Code Civ. Proc. § 1005(b)*], unless time is shortened by order of the court [*see Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300*; Ch. 524, *Shortening and Extension of Time*]. An extension may also apply in case of electronic service made pursuant to a local rule adopted under *Code Civ. Proc. § 1010.6* [*see Code Civ. Proc. § 1010.6(a)(6)*; for discussion, *see Ch. 518, Service of Summons and Papers, § 518.41[8]*]. The period is calculated by excluding the first day and including the last, unless the last day is a holiday [*Code Civ. Proc. § 12*].

In some jurisdictions, counsel chooses the date for hearing of the motion for judgment N.O.V. taking into account the minimum required notice period. Since the motion will be heard and determined by the judge who presided at trial, counsel is advised to first contact the court to arrange a convenient time for the trial judge.

In other jurisdictions, the court appoints a time for the hearing of the motion and the clerk notifies the parties of the appointed time. In this case, the notice of motion does not set forth the time.

Since local practice varies on the determination of date and time of hearing, counsel should first check with the court clerk to determine local rules.

[4] Papers on Which Motion is Based

The notice must state the papers on which the motion is based [*Code Civ. Proc. § 1010*]. It may not be necessary to file an affidavit or declaration since the court must rely on the record of the case to make a judgment. However, a declaration or affidavit may be necessary in an alternative motion for judgment notwithstanding the verdict and new trial [*see Code Civ. Proc. § 658*].

[5] Combined Motion for Judgment Notwithstanding the Verdict With Notice of Intention to Move for New Trial

The motion for judgment notwithstanding the verdict is frequently combined with a notice of intention to move for a new trial. For a form of notice of intention to move for new trial, see *§ 371.300*. Since the court must rule on both motions at the same time [*Code Civ. Proc. § 629*], it will appoint the time for hearing and the clerk will notify the parties of the designated time [*Code Civ. Proc. § 661*]. For this reason, the combined notice of motion should not set forth the time for hearing [*see Code Civ. Proc. § 661*; *see also § 371.66[2]*].

[6] Trial Court May Grant Relief Not Requested

When posttrial motions attacking the judgment have been made, the trial court is not limited to an order granting or denying the relief requested in the moving party's papers [*see Hamasaki v. Flotho (1952) 39 Cal. 2d 602, 609-612, 248 P.2d 910* (court may grant new trial on all issues when motion was limited to fewer issues); *Shapoff v. Scull (1990) 222 Cal. App. 3d 1457, 1473* (dicta; court amended judgment on combined motion for new trial and judgment notwithstanding the verdict), *disapproved on other grounds in Applied Equip. Corp. v. Litton Saudi Arabia (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454]* . For further discussion, *see § 371.300*.

[7] State Statutes

Motions for judgment notwithstanding the verdict. *Code Civ. Proc. § 629*

Time within which motion must be made. *Code Civ. Proc. §§ 629, 659*

When judgment on verdict must be entered. *Code Civ. Proc. § 664*

[8] Decisions

Mailing to opposing counsel of photocopy of file-stamped and dated judgment starts 15-day time limit for serving motion for judgment notwithstanding verdict under *Code Civ. Proc. §§ 629, 659*. Service of written notice of entry of judgment and filing of original notice of entry and proof of service complies with section 659, and posttrial motion statutes do not require filing of original notice of entry or file-stamped copy of judgment accompanied by proof of service to start time limits for bringing posttrial motions. *Palmer v. GTE (2003) 30 Cal. 4th 1265, 1277-1278, 135 Cal. Rptr. 2d 654, 70 P.3d 1067*

Cardinal requirement for judgment notwithstanding the verdict is lack of substantial conflict in evidence; trial court is not to weigh evidence or judge credibility ofwitnesses in ruling on motion. *Alexander v. State of California (1984) 159 Cal. App. 3d 890, 896, 205 Cal. Rptr. 758*

Primary requirement for judgment notwithstanding verdict as lack of substantial conflict in evidence. *Robinson v. North American Life & Cas. Co. (1963) 215 Cal. App. 2d 111, 118, 30 Cal. Rptr. 57*

Judgment notwithstanding verdict is properly granted only if it appears from evidence, viewed in light of party securing

verdict, that there is no substantial evidence to support verdict. *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 110, 120 Cal. Rptr. 681, 534 P.2d 377* ; *Castro v. State of California (1981) 114 Cal. App. 3d 503, 512, 170 Cal. Rptr. 734*

Defendant's motion for judgment notwithstanding verdict was granted only when, disregarding conflicting evidence on behalf of defendants and giving plaintiff's evidence all the value to which it is legally entitled, and indulging in every legitmate inference which may drawn from that evidence, no evidence of sufficient substantiality supports verdict in plaintiff's favor. *Reynolds v. Willson (1958) 51 Cal. 2d 94, 99, 331 P.2d 48* ; *Musgrove v. Ambrose Properties (1978) 87 Cal. App. 3d 44, 51, 150 Cal. Rptr. 722*

[9] Cross References

For alternative forms of captions, see Ch. 108, *Captions and Introductions*

For examples of noticed motions generally, see Ch. 372, *Motions and Orders*

For an application for shortening time, see Ch. 524, *Shortening and Extension of Time*

For memoranda of points and authorities in support of and in opposition to a motion for judgment notwithstanding the verdict, see California Points and Authorities, Ch. 155, *Motions After Trial* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 371 MOTIONS AFTER TRIAL
PART V. FORMS
A. Motion for Judgment Notwithstanding Verdict

33-371 California Forms of Pleading and Practice--Annotated § 371.281

§ 371.281 Order Denying Motion for Judgment Notwithstanding the Verdict [Code Civ. Proc. § 629]

[1] FORM Order Denying Motion for Judgment Notwithstanding the Verdict [Code Civ. Proc. § 629]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER DENYING JUDGMENT NOTWITH-
_____ [*name*],	)	STANDING THE VERDICT
Defendant.	)	[*Code Civ. Proc. § 629*]
	)	
	)	

The motion of _____ [*specify moving party, e.g.,* defendant] _____ [*name*] for an order for judgment notwithstanding the verdict came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion, be and it hereby is, denied on the following grounds:

[*specify grounds such as the following*]

1. The evidence is conflicting.

2. Several reasonable inferences are deducible from the evidence.

3. The verdict is sustained by sufficient or substantial evidence.

4. The evidence presents a question for the jury's determination.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The foregoing order is for use when the court denies a motion for judgment notwithstanding the verdict.

Orders and judgments are not ordinarily prepared until after the court has ruled on the motion. The court frequently takes the motion under submission after the hearing and notifies the parties at that time or at a later time as to the preparationof the judgments and orders. Counsel should check with the court clerk to determine local practice.

[3] Appealability of Order Denying Motion

An order denying a motion for judgment notwithstanding the verdict is appealable [*Code Civ. Proc. § 904.1(a)(4), 904.2(e)*; *see also § 371.74*].

[4] Decisions

Judgment notwithstanding verdict is improper where several reasonable inferences are deducible from evidence. *Clemmer v. Hartford (1978) 22 Cal. 3d 865, 877-878, 151 Cal. Rptr. 285, 587 P.2d 1098*

Judgment notwithstanding verdict is denied where evidence is conflicting or several reasonable inferences may be drawn. *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 110, 120 Cal. Rptr. 681, 534 P.2d 377*

Where different conclusions can be rationally drawn from evidence presented, then case presents question for jury and judgment notwithstanding verdict is improper. *Meyser v. American Bldg. Maintenance, Inc. (1978) 85 Cal. App. 3d 933, 940, 149 Cal. Rptr. 808*

Where substantial evidence supports jury's finding, judgment notwithstanding verdict is improper. *Estate of Franco (1975) 50 Cal. App. 3d 374, 381, 123 Cal. Rptr. 458*

Where evidence in conflict on points foundational to trial court ruling, judgment ordered for defendant notwithstanding verdict for plaintiff, was improper. *McCown v. Spencer (1970) 8 Cal. App. 3d 216, 226, 87 Cal. Rptr. 213*

Appeal lies from order denying motion for judgment notwithstanding the verdict. *Elisalda v. Welch's Sand and Gravel Co. (1968) 260 Cal. App. 2d 46, 50, 67 Cal. Rptr. 57*

[5] Cross References

For a related form, see *§ 371.280*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 371 MOTIONS AFTER TRIAL
PART V. FORMS
A. Motion for Judgment Notwithstanding Verdict

33-371 California Forms of Pleading and Practice--Annotated § 371.282

§ 371.282 Order for and Judgment Notwithstanding the Verdict [Code Civ. Proc. § 629]

[1] FORM Order for and Judgment Notwithstanding the Verdict [Code Civ. Proc. § 629]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER FOR AND JUDGMENT NOTWITH-
_____ [*name*],	)	STANDING THE VERDICT
Defendant.	)	[*Code Civ. Proc. § 629*]
	)	
	)	

This cause came on regularly for trial on _____ [*date*], in [_____ (Department *or* Division) _____ of] the above-entitled court, the Honorable _____ [*name*], Judge, presiding. Plaintiff appeared by his/her attorney _____ [*name*] and defendant appeared by his/her attorney _____ [*name*].

A jury of _____ [*number*] persons was regularly impaneled and sworn to try the action. Witnesses on the part of both plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider their verdict, subsequently returned to court, and being called,

answered to their names and duly rendered their verdict in words and figures as follows: _____ [*set forth verdict and date judgment was entered*].

Thereafter, _____ [*specify moving party, e.g.,* defendant] _____ [*name*] moved the court for judgment in his/her favor, notwithstanding the verdict, and this motion came on regularly to be heard before this court on _____ [*date*], _____ [*name*] appearing as counsel for plaintiff _____ [*name*] and _____ [*name*] as counsel for defendant _____ [*name*].

The motion was argued and submitted for decision, and the court being fully advised in the matter, and good cause appearing therefor:

IT IS HEREBY ORDERED AND ADJUDGED:

1. That the motion of _____ [*specify moving party, e.g.,* defendant] _____ [*name*] for judgment in his/her favor, notwithstanding the verdict of the jury, is hereby granted.

2. That the judgment entered on _____ [*date*], on the verdict is vacated and set aside.

3. That _____ [*specify moving party, e.g.,* defendant] _____ [*name*] have judgment _____ [*set forth terms of judgment in favor of moving party*].

4. That _____ [*specify moving party, e.g.,* defendant] _____ [*name*] have and recover from _____ [*specify opposing party, e.g.,* plaintiff] _____ [*name*] costs and disbursements in the sum of $_____.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The foregoing form is an order granting a motion for judgment notwithstanding the verdict.

[3] Decisions

Where evidence leads to conclusion that plaintiff should recover as matter of law under each cause of action, trial court as properly granting plaintiff's motion for judgment notwithstanding verdict. *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 111, 120 Cal. Rptr. 681, 534 P.2d 377* ; *Jach v. Edson (1967) 255 Cal. App. 2d 96, 99, 62 Cal. Rptr. 925*

Defendant's motion for judgment notwithstanding the verdict as properly granted where there is no substantial evidence tending to prove any fact necessary to support plaintiff's verdict. *Hamakawa v. Crescent Wharf, etc., Co. (1935) 4 Cal. 2d 499, 501, 50 P.2d 803*

[4] Cross References

For related forms, see *§§ 371.280* and *371.281*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding Verdicts

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33-371 California Forms of Pleading and Practice--Annotated §§ 371.283-371.299

[Reserved]

§§ 371.283[Reserved]

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
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PART V. FORMS
B. Motion for New Trial

33-371 California Forms of Pleading and Practice--Annotated § 371.300

§ 371.300 Notice of Intention to Move for New Trial [Code Civ. Proc. § 659]

[1] FORM Notice of Intention to Move for New Trial [Code Civ. Proc. § 659]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF INTENTION TO MOVE FOR NEW
Defendant.	)	TRIAL
	)	
	)	

_____

To _____ [*specify party, e.g.,* defendant] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that _____ [*specify moving party, e.g.,* plaintiff] _____ [*name*] intends to move this court, at a time to be set by the court, to vacate and set aside _____ [the verdict of the jury *or* the decision of the court] rendered in favor of _____ [*specify adverse party, e.g.,* defendant] _____ [*name*] and against _____ [*specify moving party, e.g.,* plaintiff] _____ [*name*], and the judgment entered on that _____

[verdict *or* decision] and to grant _____ [*specify moving party, e.g.*, plaintiff] _____ [*name*] a new trial on _____ [all of the issues *or* the following issues only: _____ (*specify*)].

[*Allege alternative relief under Code Civ. Proc. § 662*, if desired; *see § 371.301*.]

The motion will be made on the following grounds:

[*Choose appropriate statutory ground or grounds from the following and list separately*.]

1. Irregularity in the proceedings of the court prevented _____ [*specify party, e.g.*, plaintiff] _____ [*name*] from having a fair trial as shown by the declaration(s) of _____ [*name(s)*].

2. Irregularity in the proceedings of the jury prevented _____ [*specify party, e.g.*, plaintiff] _____ [*name*] from having a fair trial as shown by the declaration(s) of _____ [*name(s)*].

3. Irregularity in the proceedings of the adverse party prevented _____ [*specify party*, e.g., plaintiff] _____ [*name*] from having a fair trial as shown by the declaration(s) of _____ [*name(s)*].

4. An order of the court prevented _____ [*specify party, e.g.*, plaintiff] _____ [*name*] from having a fair trial as shown by the declaration(s) of _____ [*name(s)*].

5. An abuse of discretion prevented _____ [*specify party, e.g.*, plaintiff] _____ [*name*] from having a fair trial as shown by the declaration(s) of _____ [*name(s)*].

6. There was misconduct of the jury as shown by the declaration(s) of _____ [*name(s)*].

7. There was _____ [accident *or* surprise *or both*] at trial which ordinary prudence could not have guarded against as shown by the declaration(s) of _____ [*name(s)*].

8. There is newly discovered evidence, material for the moving party, _____ [*name*], which could not with reasonable diligence have been discovered and produced at trial as shown by the declaration(s) of _____ [*name(s)*].

9. _____ [Excessive *or* Inadequate] damages appear to have been awarded as shown by the minutes of the court.

10. The evidence is insufficient to justify the _____ [verdict *or* decision] as shown by the minutes of the court.

11. The _____ [verdict *or* decision] is against law as shown by the minutes of the court.

12. There was an error in law, occurring at trial and excepted to by the moving party, as shown by the minutes of the court.

13. There is a lack of a phonographic report of the trial due to _____ [death of the reporter *or* disability of the reporter *or* loss or destruction of the reporter's notes in whole or substantial part] as shown by the declaration(s) of _____ [*name(s)*].

14. There was a _____ [loss *or* destruction] of the _____ [bill of exceptions *or* statement of the case] due to public calamity as shown by the declaration(s) of _____ [*name(s)*].

[*EITHER*]

With respect to the grounds specified in Paragraphs _____ [*specify numbers*], above, this motion will be made on _____ [affidavits *or* declarations].

[*AND/OR*]

With respect to the grounds specified in Paragraphs _____ [*specify numbers*], above, this motion will be made on the minutes of the court.

[*CONTINUE*]

This motion is also based on a memorandum to be served and filed _____ [herewith *or* hereafter].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party's status*]

CAUTION:
A memorandum is required to be served and filed within 10 days after filing this notice of intention to move for a new trial [*Cal. Rules of Ct., Rule 3.1600(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form is for use in initiating a motion for new trial under *Code Civ. Proc. § 659*.

[3] Time For Hearing

The court appoints the time for hearing of the motion for new trial and the clerk notifies both parties of the appointed time. For this reason, the notice of intention does not set forth the time for hearing [*see Code Civ. Proc. § 661*; discussion in *§ 371.66[2]*].

[4] Filing Fee

A filing fee, in an amount prescribed by *Gov. Code § 70617(a)(5)*, is required to be paid when the notice of intention is filed with the clerk.

[5] Trial Court May Grant Relief Not Requested

When posttrial motions attacking the judgment have been made, the trial court is not limited to an order granting or denying the relief requested in the moving party's papers [*Shapoff v. Scull (1990) 222 Cal. App. 3d 1457, 1473* (dicta) (disapproved on other grounds in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454*); *see* *Hamasaki v. Flotho (1952) 39 Cal. 2d 602, 609-612, 248 P.2d 910* ; *Manor Investment Co. v. F. W. Woolworth Co. (1984) 159 Cal. App. 3d 586, 590-592, 206 Cal. Rptr. 37* (disapproved on other grounds in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454*)]. For example, even though a party has moved for new trial on limited issues, the trial court has power to grant new trial on all issues [*Hamasaki v. Flotho (1952) 39 Cal. 2d 602, 608-612, 248 P.2d 910]* . Similarly, on appeal from an order granting a party's motion for new trial on one issue, the appellate court has power to order new trial on an additional issue or on the all issues [*Hamasaki v. Flotho (1952) 39 Cal. 2d 602, 608-612, 248 P.2d 910* ; *Manor Investment Co. v. F. W. Woolworth Co. (1984) 159 Cal. App. 3d 586, 598, 206 Cal. Rptr. 37* (disapproved on other grounds in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454*)]. In addition to granting new trial on more issues than requested, the trial court may be able to amend its judgment when the motion was for new trial and judgment N.O.V. [*Shapoff v. Scull (1990) 222 Cal. App. 3d 1457, 1473* (dicta approving trial court's amendment of judgment to eliminate a finding) (disapproved on other grounds in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454*)].

[6] State Statutes

Grounds for new trial. *Code Civ. Proc. § 657*

Notice of intention to move for new trial. *Code Civ. Proc. § 659*

Altering statement of decision, or modifying or vacating judgment, and granting new trial, or in lieu of granting new trial, vacating and setting aside judgment and reopening case. *Code Civ. Proc. § 662*

[7] California Rules of Court

Requirements for memorandum supporting or opposing notice of intention to move for new trial. *Cal. Rules of Ct., Rule 3.1600*

[8] Decisions

[a] In General

New trial is proper to reexamine issues of law where there has been no trial on the merits. *Carney v. Simmonds (1957) 49 Cal. 2d 84, 90, 315 P.2d 305*

[b] Grounds

Court, in ruling on motion for new trial, is confined to grounds specified in notice. *Van Ostrum v. State of California (1957) 148 Cal. App. 2d 1, 4, 306 P.2d 44*

[c] Purpose of Notice

Purpose of notice of intention to move for new trial is to give adverse party reasonable opportunity to oppose motion on its merits. *Nichols v. Hast (1965) 62 Cal. 2d 598, 600, 43 Cal. Rptr. 641, 400 P.2d 753*

[d] Service and Filing

Mailing to opposing counsel of photocopy of file-stamped and dated judgment starts 15-day time limit for serving notice of intention to move for new trial under *Code Civ. Proc. § 659*. Service of written notice of entry of judgment and filing of original notice of entry and proof of service complies with *section 659*, and posttrial motion statutes do not require filing of original notice of entry or file-stamped copy of judgment accompanied by proof of service to start time limits for bringing posttrial motions. *Palmer v. GTE (2003) 30 Cal. 4th 1265, 1277-1278, 135 Cal. Rptr. 2d 654, 70 P.3d 1067*

Mailing conformed copy of judgment showing date it was filed with clerk (or in counties using judgment book rather than file of actions and microfilm copy, date it was entered) starts the 15-day period for giving notice of intention to move for new trial; *Code Civ. Proc. § 664.5* (as amended in 1981) procedures for prevailing party to give notice of entry of judgment do not govern sufficiency of notice for purposes of *Code Civ. Proc. § 659*. *Tri-County Elevator Co. v. Superior Court (1982) 135 Cal. App. 3d 271, 276-277, 185 Cal. Rptr. 208*

Notice of intention to move for new trial is served and filed after jury verdict. *Estate of Green (1944) 25 Cal. 2d 535, 541, 154 P.2d 692*

[9] Cross References

For an additional form of notice of intention to move for new trial, on the ground of excessive or indequate damages in a tort action, see Ch. 177, *Damages* .

For memoranda in support of and in opposition to a notice of intention to move for a new trial, see California Points and Authorities, Ch. 155, *Motions After Trial* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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33-371 California Forms of Pleading and Practice--Annotated § 371.301

§ 371.301 Allegation in Notice of Intention to Move for New Trial [Code Civ. Proc. § 659]--Alternative Relief in Nonjury Trial [Code Civ. Proc. § 662]

[1] FORM Allegation in Notice of Intention to Move for New Trial [Code Civ. Proc. § 659]--Alternative Relief in Nonjury Trial [Code Civ. Proc. § 662]

[*Insert as directed after first paragraph in § 371.300[1].*]

If, in ruling on this motion, the court grants alternative relief under *Section 662 of the Code of Civil Procedure*, _____ [*specify moving party, e.g.,* plaintiff] _____ [*name*] requests the court to

[*EITHER*]

_____ [change *or* add to] the statement of decision and _____ [modify *or* vacate] the judgment in the following respects: _____ [*describe changes in statement of decision and judgment*] and grant a new trial on _____ [all *or* the following] issues: _____ [*specify issues*].

[*OR*]

vacate and set aside the statement of decision and judgment and, in lieu of granting a new trial on the grounds of _____ [*specify grounds, e.g.,* insufficiency of the evidence to justify verdict *or* error in law], to reopen the case for further proceedings and the introduction of additional evidence as described in _____ [*specify, e.g.,* the declaration of _____ (*name*) in support of the motion for new trial *or* the memorandum of points and authorities filed in support of this motion] because _____ [*specify reason, e.g.,* the evidence regarding _____ (*describe*) was held inadmissable into evidence by the court

although it constituted an exception to the hearsay rule under *Section 1230 of the Evidence Code or state other reason*]. These further proceedings would have the same effect as if the case had been reopened after the submission thereof and before a decision had been filed or judgment rendered.

[2] Use of Form

This form is to be used to specify appropriate alternative relief in nonjury causes under *Code Civ. Proc. § 662* [*see § 371.68*]. It is to be inserted after the first paragraph of as indicated in that form.

[3] Relief to Nonmoving Party

The court is authorized under *Code Civ. Proc. § 662* to amend its statement of decision and judgment on denying a motion for new trial in favor of a party who did not make the motion for new trial [*see Avery v. Associated Seed Growers, Inc. (1963) 211 Cal. App. 2d 613, 625, 27 Cal. Rptr. 625* (decided when findings existed under *Code Civ. Proc. § 632*)]. For this reason, the party in whose favor judgment was rendered might in his or her memorandum of points and authorities seek alternative relief under *Code Civ. Proc. § 662*.

[4] State Statutes

Request for alternative relief in nonjury trials. *Code Civ. Proc. § 662*

[5] Decisions

New judgment entered pursuant to *Code Civ. Proc. § 662* on denial of motion for new trial as superseding first judgment; appeal from superseded judgment as nullity and subject to dismissal. *Medak v. Cox (1970) 12 Cal. App. 3d 70, 74, 90 Cal. Rptr. 452*

Sixty-day limitation for determination of new trial motion as applying to alternative relief under *Code Civ. Proc. § 662* and any purported action taken by court on motion after that period as void. *Tuck v. Tuck (1966) 245 Cal. App. 2d 260, 263, 53 Cal. Rptr. 872*

Request for relief under *Code Civ. Proc. § 662* as required to be made in time prescribed for motion for new trial. *Lewith v. Rehmke (1935) 10 Cal. App. 2d 97, 104, 51 P.2d 476*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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Chapter 371 MOTIONS AFTER TRIAL
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B. Motion for New Trial

33-371 California Forms of Pleading and Practice--Annotated § 371.302

§ 371.302 Declaration [Code Civ. Proc. § 2015.5] Supportive of Motion for New Trial [Code Civ. Proc. § 658]

[1] FORM Declaration [Code Civ. Proc. § 2015.5] Supportive of Motion for New Trial [Code Civ. Proc. § 658]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	DECLARATION OF _____
_____ [*name*],	)	[*name*]
Defendant.	)	IN SUPPORT OF MOTION FOR NEW TRIAL
	)	
	)	

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*specify moving party, e.g.,* plaintiff) *or* a party in the above-entitled action *or any other person with personal knowledge of the facts*].

[*In separate, consecutively numbered paragraphs state the grounds for the motion in the statutory language of Code Civ. Proc. § 657, 657.1, or 663.1, specifying facts that support the grounds, e.g., if the ground is irregularity of the*

court, jury, or adverse party, use Paragraph 2.]

2. There was irregularity in the proceedings of the _____ [court *and/or* jury *and/or* adverse party] by which _____ [*specify moving party, e.g.,* plaintiff] _____ [*name*] was prevented from having a fair trial in that _____ [*specify misconduct of court, jury, or adverse party, e.g.,* the court expressed prejudice against the use by plaintiff of his daughter as a witness to testify against the defendant, his wife, notwithstanding the competency of the testimony *or* a juror, _____ (*name*), witnessed the accident in question and had formed an opinion that plaintiff was contributorily negligent but on voir dire examination, he/she falsely denied having any knowledge of the accident or other misconduct]. This occurred on _____ [*date*], and was a departure from the orderly method of disposition of an action, materially affecting the substantial rights of _____ [*specify moving party, e.g.,* plaintiff] _____ [*name*] in that _____ [*specify moving party, e.g.,* plaintiff] did not receive a fair trial since _____ [*specify reasons, e.g.,* the court prejudged the testimony of the witness and intimated that unless the witness were withdrawn, the use of the witness would arouse a prejudice in the court's mind against the plaintiff *or* the juror who had personal knowledge of the accident told the other jurors during deliberations that she knew the fence was poorly maintained and was not surprised that it fell and that this expression of opinion improperly influenced the jury's verdict *or specify other reason*]. A different result is likely on retrial in that _____ [*specify how verdict may differ, e.g.,* the verdict may be rendered in favor of the moving party if the testimony of the witness is considered without prejudice since it is competent testimony to prove that defendant received the money in question *or* the amount of damages may be reduced if the jurors are guided solely by evidence produced at trial *or specify other difference*]. [*If ground is irregularity of the jury add:* _____ (*specify, e.g.,* Counsel *and/or* Moving parties) had no knowledge of the facts constituting misconduct or irregularity in the proceedings of the jury prior to the rendition of the verdict.] Because of the nature and the effect of this irregularity, this declaration in support of a motion for new trial was prepared.

[*If ground is accident or surprise*]

3. There was _____ [accident *and/or* surprise] occurring at trial which ordinary prudence could not have guarded against in that _____ [*specify party, e.g.,* plaintiff] _____ [*name*] was _____ [surprised *and/or* accident occurred] when _____ [*specify incident, e.g.,* a witness for plaintiff gave testimony at trial that was entirely different from testimony that he/she had earlier stated would be given *or specify other incident*]. This incident materially affected the substantial rights of _____ [*moving party, e.g.,* plaintiff] _____ [*name*], prejudicing the outcome of the case in that _____ [*state reasons, e.g.,* plaintiff's case would have been stronger if the witness had testified as expected *or* if the witness were not called, plaintiff's case would have been stronger than it was after the witness had testified against him/her *or state other reasons*]. A different result is likely on retrial in that _____ [*state how verdict or decision may differ, e.g.,* damages may be reduced *or* a verdict may be rendered in favor of plaintiff *or specify other difference*] since _____ [*state reasons, e.g.,* counsel has procured a witness to testify to the facts as stated to counsel by the first witness *or* counsel has procured a witness to impeach the testimony of the first witness *or state other reasons*]. Due to the _____ [accident *and/or* surprise], counsel was unable to take these measures at trial. _____ [*Specify person, e.g.,* Moving party *or* Counsel] exercised due diligence and prudence to guard against this _____ [accident *and/or* surprise] when _____ [*state facts to show diligence, e.g.,* counsel diligently questioned the witness and investigated the facts of the case and it was impossible to foresee that the witness would testify differently from the facts previously stated to counsel *and other facts*]. This declaration in support of a motion for new trial has been prepared because of the prejudicial nature of the _____ [accident *and/or* surprise].

[*If the ground is newly discovered evidence*]

4. There is newly discovered evidence, material for _____ [*specify moving party, e.g.,* plaintiff] _____ [*name*] which he/she could not,with reasonable diligence, have discovered and produced at trial in that after the trial of the above-entitled action, _____ [*specify moving party, e.g.,* plaintiff] _____ [*name*] learned for the first time, on or about _____ [*date*], that _____ [*state evidence on which reliance is placed, e.g.,* a new witness, _____ (*name*), occupied a house near the scene of the accident and saw the accident in question *or state other evidence*]. Lack of this evidence at trial, materially affected the substantial rights of _____ [*specify moving party, e.g.,* plaintiff] in that _____ [*specify reasons, e.g.,* there were no eyewitnesses produced at trial *or state other reasons*]. A different result is likely on retrial since _____ [*state how verdict or decision may differ., e.g.,* the amount of damages may be increased *or* the decision may be rendered in favor of plaintiff *or state other difference*]. This evidence is not merely cumulative or impeaching but is material in that _____ [*explain probable effect of evidence, e.g.,* the newly discovered evidence furnishes a plausible and probable explanation of what, in its absence, had seemed to present the impossible situation of two cars parked in the same place *or state other effect*]. _____ [*Specify moving party, e.g.,* Plaintiff] _____ [*name*] exercised due diligence to discover and produce this evidence for trial when _____ [*specify person who exercised due diligence, e.g.,* his/her attorney] _____ [*state facts to show due diligence, e.g.,* interviewed all neighbors near the scene of the accident, went twice to the house of the newly discovered witness only to find it closed and unoccupied, was never told that the witness was present at the accident *and additional facts*]. After trial, this evidence was discovered and this declaration was prepared in support of a motion for new trial.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This declaration is for use in support of a motion for new trial. It may be used in lieu of an affidavit [*see Code Civ. Proc. § 2015.5*].

[3] Irregularity in the Proceedings of the Jury

If the motion is based on irregularity in the proceedings of the jury, it is necessary to file declarations by the individual jurors to show, for example, that another juror may have concealed bias on voir dire. Furthermore, it is preferable for all of the moving parties and their attorneys to file individual supporting declarations indicating their lack of knowledge of the misconduct prior to the rendition of the verdict. However, the failure to file separate declarations is not a fatal error [*Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 105, 95 Cal. Rptr. 516, 485 P.2d 1132]* . For a form of juror declaration, *see § 371.303*. For a separate, more detailed form of "no knowledge" declaration, to indicate lack of knowledge of jury misconduct before the verdict, *see § 371.305*.

[4] Newly Discovered Evidence

If the newly discovered evidence is testimony of a recently located witness, counsel should include a declaration of that witness stating what he or she knows and how he or she will testify if a new trial is granted. An affidavit or declaration that states counsel's or moving party's belief that a witness will testify in a certain manner is hearsay and will not be received by the court unless, for good cause shown, the affidavit or declaration of the witness cannot be received in time [*Smith v. Schwartz (1936) 14 Cal. App. 2d 160, 167, 57 P.2d 1386]* .

[5] State Statutes

Grounds for new trial requiring application to be made on affidavits. *Code Civ. Proc. § 658*

Time for filing affidavits and counteraffidavits. *Code Civ. Proc. § 659a*

[6] Decisions

[a] Accident or Surprise

Where defendant's attorney interviewed witness before trial, had no intimation that witness would testify differently at trial, and witness explained that he testified differently out of confusion, new trial as granted on ground of accident or surprise since different result probable on retrial and ordinary prudence could not have guarded against surprise. *Whitfield v. Debrincat (1937) 18 Cal. App. 2d 730, 738-739, 64 P.2d 960*

[b] Hearsay Unacceptable

Evidence presented by affidavit in connection with motion for new trial as required to be given from personal knowledge and cannot contain hearsay. *Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 105, 95 Cal. Rptr. 516, 485 P.2d 1132*

[c] Irregularity in Proceedings of Court, Jury, or Adverse Party

Where court expresses prejudice against use of particular witness, notwithstanding the competency of the testimony, and this prejudice is reflected in the actions of the court against the aggrieved party, new trial as granted on the ground of irregularity in the proceedings of the court. *Pratt v. Pratt (1903) 141 Cal. 247, 251-252, 74 P. 742*

Where juror falsely denied having knowledge of accident on voir dire but during jury deliberations stated that she had personal knowledge of material factsin the case and had formed and expressed an opinion on the case, new trial as granted on ground of irregularity in the proceedings of the jury. *Williams v. Bridges (1934) 140 Cal. App. 537, 540, 35 P.2d 407*

[d] Newly Discovered Evidence

General averment of diligence as insufficient to support motion for new trial on ground of newly discovered evidence and particular circumstances or acts as required to be stated. *Pierce v. Nash (1954) 126 Cal. App. 2d 606, 620, 272 P.2d 938*

After trial, where newly discovered witness's testimony may affect outcome of case and proponent of evidence has fulfilled requirement of due diligence, new trial as granted on ground of newly discovered evidence. *Celli v. French (1951) 107 Cal. App. 2d 599, 602, 237 P.2d 536*

[7] Cross References

For general forms of affidavits and declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

For memoranda in support of and in opposition to a notice of intention to move for new trial, see California Points and Authorities , Ch. 155, *Motions After Trial* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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33-371 California Forms of Pleading and Practice--Annotated § 371.303

§ 371.303 Declaration by Juror [Code Civ. Proc. §§ 658, 659a, 2015.5] Supporting Motion for New Trial [Code Civ. Proc. § 657(1), (2)]

[1] FORM Declaration by Juror [Code Civ. Proc. §§ 658, 659a, 2015.5] Supporting Motion for New Trial [Code Civ. Proc. § 657(1), (2)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	DECLARATION OF _____
_____ [*name* (*s*),	)	[*name*]
Defendant(s).	)	IN SUPPORT OF MOTION FOR NEW TRIAL
	)	
	)	

_____

I, _____ [*name*], declare:

1. I served as a juror in the above-captioned action.

2. _____ [*Specify facts indicating irregularities in jury proceedings or jury misconduct, e.g.,* On the _____ (*e.g.*, third day of trial), _____ (*name of juror*) approached me in the jury

room during a recess. He/She stated that we should be sent to the jury room immediately because we could all arrive at a verdict without hearing any additional testimony. This statement was made prior to the close of the case and prior to submission of the case to the jury].

3. _____ [*Specify any additional facts indicating irregularities in jury proceedings or jury misconduct, e.g.*, During deliberations _____ (*name of juror*) expressed the opinion that he/she opposed a city's right to condemn property for a public purpose. The _____ (plaintiff *or* defendant) in this action is a municipality seeking to condemn private property for a public purpose].

4. _____ [*Specify any additional facts indicating irregularities in jury proceedings or jury misconduct, e.g.*, _____ (*name of juror*) stated to all jurors during deliberations that the moving party's expert witness was unqualified; _____ (*name of juror*) then stated that he/she was enrolled in a class on the subject matter of the controversy and had solicited and received information from his/her instructor with respect to the qualifications of expert witnesses in that subject area].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of declaration is for use by a juror in impeaching a jury verdict by showing jury misconduct or irregularities in the jury's proceedings. The juror's declaration is for use in support of a motion for a new trial under *Code Civ. Proc. § 659* [*see § 371.300*]. For an additional allegation of misconduct that may be included in this form, *see § 371.304*.

A juror declaration must show misconduct by overts facts that can be objectively corroborated, not subjective mental processes [*see Evid. Code § 1150(a)*; *Province v. Center for Women's Health & Family Birth (1993) 20 Cal. App. 4th 1673, 1678, 25 Cal. Rptr. 2d 667]* . For further discussion of this requirement, see *§ 371.64[3][c]*. For discussion of the types of misconduct that may be shown, see *§ 371.63[3][b]*.

[3] State Statutes

Affidavits required where application to vacate verdict and for new trial based on irregularity or chance verdict. *Code Civ. Proc. § 658*

Declaration under penalty of perjury in lieu of affidavit. *Code Civ. Proc. § 2015.5*

Evidence allowed to show improper influence on jury. *Evid. Code § 1150(a)*

Inadmissible evidence to impeach verdict. *Evid. Code § 1150(b)*

[4] Decisions

[a] Bias or Disqualification

Affidavit accepted as to occurrences during trial and deliberations showing prejudice in mind of juror which prevents

that juror from acting impartially where bias was concealed on voir dire. *People ex rel. Dept. of Pub. Wks v. Curtis (1967) 255 Cal. App. 2d 378, 389, 63 Cal. Rptr. 138*

[b] Facts Required

Jurors' affidavits required to state overt facts that can be objectively proved and not subjective mental processes that cannot be proved. *People v. Turner (1971) 22 Cal. App. 3d 174, 183-184, 99 Cal. Rptr. 186*

Jurors' affidavits is inadmissible when dealing with and having effect of proving mental processes or reasons and subjective considerations which influenced verdict. *Continental Dairy Equip. Co. v. Lawrence (1971) 17 Cal. App. 3d 378, 383, 94 Cal. Rptr. 887*

[c] Use of Affidavits Generally

Use of affidavits is mandatory, oral testimony of subpoenaed jurors is insufficient. *Linhart v. Nelson (1976) 18 Cal. 3d 641, 644-645, 134 Cal. Rptr. 813, 557 P.2d 104*

Jurors' affidavits are inadmissible to construe or interpret verdict. *Telles v. Title Ins. & Trust Co. (1969) 3 Cal. App. 3d 179, 187, 83 Cal. Rptr. 444*

When affidavits used to impeach verdicts. *Campbell v. Zokelt (1969) 272 Cal. App. 2d 315, 319, 77 Cal. Rptr. 561*

[5] Cross References

For a related form, see *§ 371.302*.

For discussion and forms for use in declarations and affidavits, see Ch. 15, *Affidavits, Certificates, and Declarations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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33-371 California Forms of Pleading and Practice--Annotated § 371.304

§ 371.304 Allegation in Juror Declaration of Chance Verdict [Code Civ. Proc. § 657(2)]

[1] FORM Allegation in Juror Declaration of Chance Verdict [Code Civ. Proc. § 657(2)]

During deliberations, all jurors agreed to be bound by the average of their individual estimates of the damages owing to _____ [*name of moving party*]. Thereafter, each juror wrote his/her estimate of _____'s [*name of moving party*] damages on a slip of paper; the slips were collected and the figures on each slip added; the total figure thus obtained was divided by the number of jurors. There was no discussion of the rationale for the final figure obtained. This figure was presented to the court as the jury's verdict.

[2] Use of Form

This form of allegation is for use in a juror's declaration offered to show jury misconduct. The allegation is in support of a motion for new trial on the ground of a chance verdict [*see Code Civ. Proc. § 657(2)*]. This allegation may be used in addition to or as a replacement for Paragraphs 2-4 of *see § 371.303*. For further discussion of chance verdicts, see § 271.63[3][b][iv].

[3] State Statutes

Chance verdict proved by juror's affidavits. *Code Civ. Proc. §§ 657(2), 658*

[4] Decisions

Affidavits accepted as to juror's not agreeing to quotient verdict. *Bardessono v. Michels (1970) 3 Cal. 3d 780, 794-795, 91 Cal. Rptr. 760, 478 P.2d 480*

Trial court's determination based on conflicting affidavits not disturbed on appeal. *Diamond Springs Lime Co. v. American River Constructors (1971) 16 Cal. App. 3d 581, 605, 94 Cal. Rptr. 200*

[5] Cross References

For related forms, see *§§ 371.302* and *371.303*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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33-371 California Forms of Pleading and Practice--Annotated § 371.305

§ 371.305 Declaration [Code Civ. Proc. §§ 658, 659a, 2015.5] Supporting Motion for New Trial Showing "No Knowledge" of Jury Misconduct

[1] FORM Declaration [Code Civ. Proc. §§ 658, 659a, 2015.5] Supporting Motion for New Trial Showing "No Knowledge" of Jury Misconduct

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	DECLARATION OF _____
_____ [*name*(*s*)],	)	[*name*]
Defendant(s).	)	IN SUPPORT OF MOTION FOR
	)	NEW TRIAL
	)	

_____

I, _____ [*name*], declare:

1. I am _____ [attorney of record for the moving party herein *or* the moving party herein].

[*EITHER*]

2. There were irregularities in the proceedings of the jury which prevented _____ [*name of moving party*] from having a fair trial in that: _____ [*specify acts taking place at trial which constituted the irregularities*].

[*OR*]

2. There was misconduct of the jury in that: _____ [*specify matters constituting instances of misconduct*].

3. I had no knowledge of the jury _____ [irregularities *or* misconduct] alleged prior to the rendering of the verdict in the above-captioned matter. Thereafter, I learned of the _____ [irregularities *or* misconduct] alleged.

4. To the best of my information and belief, _____ [my client *or* my attorney] had no knowledge of the jury _____ [irregularities *or* misconduct] prior to the rendering of the verdict in the above-captioned matter.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]
Attorney for _____
[Plaintiff *or* Defendant *or moving party*]

[2] Use of Form

This form of declaration is for use by counsel for a moving party or by the moving party to show no prior knowledge of the jury irregularities or misconduct complained of in the motion for new trial. This declaration should be filed with the jurors' declarations attesting to jury irregularities and/or misconduct [*see §§ 371.303, 371.304*].

[3] Decisions

"No knowledge" affidavits as showing neither party nor counsel aware of jury misbehavior until after verdict returned and as establishing nonreliance on errors known prior to jury's verdict. *Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal. 3d 98, 103, 95 Cal. Rptr. 516, 485 P.2d 1132*

"No knowledge" affidavits as not required where alleged jury misconduct was of such a nature that it could not have been known to party until after verdict rendered. *Krouse v. Graham (1977) 19 Cal. 3d 59, 82, 137 Cal. Rptr. 863, 562 P.2d 1022*

Although submitted by one person, "no knowledge" affidavit as establishing nonreliance on known errors by both party and attorney. *People v. Southern Cal. Edison Co. (1976) 56 Cal. App. 3d 593, 599, 128 Cal. Rptr. 697*

[4] Cross References

For related forms, see §§ 371.302-371.304.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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33-371 California Forms of Pleading and Practice--Annotated § 371.306

§ 371.306 Stipulation and Order Extending Time to File Affidavits or Declarations [Code Civ. Proc. § 659a]

[1] FORM Stipulation and Order Extending Time to File Affidavits or Declarations [Code Civ. Proc. § 659a]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	STIPULATION AND ORDER EXTENDING TIME
Defendant.	)	TO FILE AFFIDAVITS OR DECLARATIONS
	)	
	)	

IT IS HEREBY STIPULATED by the parties and their respective undersigned attorneys that _____ [*specify moving party, e.g.,* plaintiff] _____ [*name*] may have an additional _____ [*number not exceeding 20*] days, up to and including the _____ day of _____ [*date*], in which to serve and file his/her _____ [affidavits *or* declarations] in support of his/her motion for new trial [*continue if appropriate :* and that _____ (*specify adverse party, e.g.,* defendant)_____ (*name*) will have _____ (*number not exceeding 20*) additional days to serve and file his/her _____ (affidavits *or* declarations)].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff
Dated: _____.
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff
IT IS SO ORDERED:
_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The foregoing form is for use in stipulating to an extension of time to file affidavits or declarations under *Code Civ. Proc. § 659a*.

[3] Limitation on Extension of Time

The moving party is required to serve on all other parties and to file any affidavits intended to be used on the motion for new trial within 10 days of filing the notice of intention to move for new trial [*Code Civ. Proc. § 659a*]. The other parties have 10 days after this service within which to serve on the moving party and file counteraffidavits. The time specified by *Code Civ. Proc. § 659a* may, for good cause shown by affidavit or by written stipulation of the parties, be extended by any judge for an additional period not exceeding 20 days [*Code Civ. Proc. § 659a*].

[4] State Statutes

Extension of time for filing affidavits and counteraffidavits. *Code Civ. Proc. § 659a*

[5] Decisions

When affidavits in support of new trial motion are not filed within time required by *Code Civ. Proc. § 659a*, court as justified in disregarding them. *Peterson v. Peterson (1953) 121 Cal. App. 2d 1, 8-9, 262 P.2d 613* ; *Terry v. Lesem (1928) 89 Cal. App. 682, 685-686, 265 P. 523*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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33-371 California Forms of Pleading and Practice--Annotated § 371.307

§ 371.307 Order Denying New Trial [Code Civ. Proc. § 660]

[1] FORM Order Denying New Trial [Code Civ. Proc. § 660]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER DENYING NEW TRIAL
Defendant.	)	
	)	
	)	

The motion of _____ [*specify moving party, e.g.,* plaintiff] _____ [*name*] for a new trial in the above-entitled action came on regularly for hearing by the court on this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be denied,

IT IS ORDERED that the motion for a new trial be, and hereby is, denied.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This order is for use when the court denies a motion for new trial.

[3] State Statutes

Time for ruling on new trial motion. *Code Civ. Proc. § 660*

Proper judge for hearing motion. *Code Civ. Proc. § 661*

[4] Decisions

No appeal as lying from order denying new trial; ruling as reviewed only through appeal of judgment. *Hamasaki v. Flotho (1952) 39 Cal. 2d 602, 608, 248 P.2d 910*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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33-371 California Forms of Pleading and Practice--Annotated § 371.308

§ 371.308 Order Granting New Trial [Code Civ. Proc. §§ 657, 660]

[1] FORM Order Granting New Trial [Code Civ. Proc. §§ 657, 660]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER GRANTING NEW TRIAL
Defendant.	)	
	)	
	)	

The motion of _____ [*specify moving party, e.g.,* plaintiff] _____ [*name*] for a new trial came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted and that the _____ [verdict *or* decision] rendered on _____ [*date*], [and the judgment entered on that _____ (verdict *or*

decision)] be _____ [modified *or* set aside and vacated] and that a new trial is ordered _____ [on all issues *or* on the following issues: _____ (*specify*)].

SPECIFICATION OF REASONS

The court's reasons for granting the new trial on _____ [the *or if more than one,* each] ground stated are as follows: _____ [*state reasons for each ground*].
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The foregoing order and specification of reasons are for use when the court grants a new trial. The order and reasons are prepared by the court which may not request counsel to prepare them [*Code Civ. Proc. § 657*].

[3] Statement of Grounds and Specification of Reasons

The court is required to state the ground or grounds for granting the motion in the order; moreover, the court does not have jurisdiction to correct the order nunc pro tunc by adding any ground or grounds after the expiration of the 60-day period allowed for making the order under *Code Civ. Proc. § 660* because the 10-day extended period for filing the specification of reasons does not apply to the statement of grounds [*see Code Civ. Proc. § 657*; *Sanchez-Corea v. Bank of America (1985) 38 Cal. 3d 892, 901-905, 215 Cal. Rptr. 679, 701 P.2d 826]* . The order may contain the court's specification of reasons, or the specification may be separately prepared, but the court must, in that case, prepare, sign, and file the specification with the clerk within 10 days after the order is filed [*Code Civ. Proc. § 657*].

[4] State Statutes

Court as not permitted to direct attorney to prepare order and specification of reasons. *Code Civ. Proc. § 657*

Order granting new trial on ground of insufficiency of evidence as required to be specified in writing, otherwise, presumed that motion not granted on that ground. *Code Civ. Proc. § 657*

Court as having 60 days to determine motion; signed entry in minutes and filing with clerk as requisites to determination. *Code Civ. Proc. § 660*

[5] Decisions

Mailing to opposing counsel of photocopy of file-stamped and dated judgment starts 60-day time limit for determining motion for new trial under *Code Civ. Proc. § 660*. Service of written notice of entry of judgment and filing of original notice of entry and proof of service complies with section 660, and posttrial motion statutes do not require filing of original notice of entry or file-stamped copy of judgment accompanied by proof of service to start time limits for bringing posttrial motions. *Palmer v. GTE (2003) 30 Cal. 4th 1265, 1277-1278, 135 Cal. Rptr. 2d 654, 70 P.3d 1067*

Trial court's specification of reasons for granting motion on ground of insufficiency of evidence as not complying with requirements of *Code Civ. Proc. § 657* where without identifying deficiencies in terms of evidence, record, or proof, specification simply reiterates statutory ground or is phrased in terms or issues or ultimate fact. *Scala v. Jerry Witt &*

Sons, Inc. (1970) 3 Cal. 3d 359, 367-370, 90 Cal. Rptr. 592, 475 P.2d 864

Although court cannot direct attorney to prepare order granting new trial or specification of reasons, counsel may assist court by calling any deficiency to its attention within 10-day period for filing specification of reasons so that court may correct order. *Mercer v. Perez (1968) 68 Cal. 2d 104, 123-124 n. 8, 65 Cal. Rptr. 315, 436 P.2d 315*

Order for new trial on punitive damages as reversed because judge failed to state reasons; irrelevant that judge also gave reasons for ordering new trial on portion of compensatory damages. *Stewart v. Truck Ins. Exchange (1993) 17 Cal. App. 4th 468, 484-485, 21 Cal. Rptr. 2d 338*

When four out of five specified reasons for new trial are not adequately specified or supported by evidence, remaining reason as determinative, and order for new trial will be upheld. *Tramell v. McDonnell Douglas Corp. (1984)163 Cal. App. 3d 157, 173-174, 209 Cal. Rptr. 427* (jury misconduct alone as sufficient reason)

Requirement of specification of reasons as mandatory; mandate as remedy to compel judge to specify reasons. *LaBorne v. Mulvany (1974) 43 Cal. App. 3d 905, 916-917, 119 Cal. Rptr. 596*

Court as required to state reasons for granting motion in order or as separate document filed 10 days after filing of order; ten-day period as running from determination of motion rather than from filing of order. *Swanson v. Western Greyhound Lines, Inc. (1969) 268 Cal. App. 2d 758, 759-760, 74 Cal. Rptr. 383*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 371 MOTIONS AFTER TRIAL
PART V. FORMS
B. Motion for New Trial

33-371 California Forms of Pleading and Practice--Annotated §§ 371.309-371.319

[Reserved]

§§ 371.309[Reserved]

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Chapter 371 MOTIONS AFTER TRIAL
PART V. FORMS
C. Motion to Set Aside and Vacate a Judgment and to Enter Another and Different Judgment

33-371 California Forms of Pleading and Practice--Annotated § 371.320

§ 371.320 Notice of Intention to Move to Set Aside and Vacate Judgment and Enter Another and Different Judgment [Code Civ. Proc. §§ 663, 663a]

[1] FORM Notice of Intention to Move to Set Aside and Vacate Judgment and Enter Another and Different Judgment [Code Civ. Proc. §§ 663, 663a]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF INTENTION TO MOVE TO SET
Defendant.	)	ASIDE AND VACATE JUDGMENT AND ENTER
	)	ANOTHER AND DIFFERENT JUDGMENT
	)	

_____

To _____ [*specify party, e.g.,* defendant] _____ [*name*] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [

specify party, e.g., plaintiff] will move for an order:

1. To set aside and vacate the judgment entered on _____ [*date*];

[*EITHER*]

2. To amend and correct the statement of decision filed in this action on _____ [*date*]; and

[*OR*]

2. To correct the judgment or decree of the court that is not consistent with the special verdict, rendered by the jury on _____ [*date*]; and

[*CONTINUE*]

3. To enter another and different judgment.

[*EITHER, for the ground of incorrect or erroneous legal basis for the decision*]

The motion will be made on the ground that the legal basis for the decision filed by the court is _____ [incorrect *and/or* erroneous] inthat it is not _____ [consistent with *and/or* supported by] the facts. These errors have materially affected the substantial rights of _____ [*specify, e.g.*, plaintiff] entitling him/her to a different judgment in that _____ [*state facts showing how party was deprived of fair trial*].

The following legal bases for the decision, for the reasons specified, are _____ [incorrect *and/or* erroneous] and not _____ [consistent with *and/or* supported by] the facts:

1. [*Set out erroneous or incorrect legal bases, identifying them by paragraph, page, and line number in statement of decision, and specify reasons why they are erroneous or incorrect*.]

The statement of decision should be amended and corrected as follows:

1. [*Specify changes desired in statement of decision*.]

[*OR, if judgment or decree is neither consistent with nor supported by the special verdict*]

The motion will be made on the ground that the _____ [judgment *or* decree] is not _____ [consistent with *or* supported by] the special verdict of the jury. This error materially affected the substantial rights of _____ [*specify, e.g.*, plaintiff] entitling him/her to a different judgment in that _____ [*state facts showing how party was deprived of fair trial*].

The _____ [judgment *or* decree] of the court that _____ [*specify contents of judgment or decree*] is not _____ [consistent with *or* supported by] the special verdict of the jury that stated the following: "_____" [*incorporate verbatim copy of jury's special verdict*]. The

_____ [judgment *or* decree] is _____ [inconsistent with *or* unsupported by the verdict] because:

1. [*Set out reasons why judgment or decree is neither consistent with nor supported by the special verdict*.]

[*CONTINUE*]

The following _____ [judgment *or* decree] should be entered:

1. [*Specify desired judgment or decree*.]

This motion will be based on this notice and on the memorandum served and filed herewith, and on all the papers and records of this action.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____
[*moving party's status and name*]

CAUTION:

Although under *Cal. Rules of Ct., Rules 3.1100, 3.1103(a)* a memorandum is not specifically required to be submitted in support of the motion, it is better practice to submit a memorandum as is generally required in law and motion proceedings [*see Code Civ. Proc. §§ 1005(b), 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form is for use as a notice of intention to set aside and vacate a judgment and to enter another and different judgment. Before using the form, however, counsel should determine local court practice regarding whether the notice should set forth the time and place of hearing or whether the time and place of hearing are to be appointed by the court.

[3] State Statutes

Grounds of motion to vacate judgment. *Code Civ. Proc. § 663*

Notice of intention to move to vacate judgment. *Code Civ. Proc. § 663a*

[4] California Rules of Court

Extension of time to appeal when notice of intention to move for order vacating judgment is filed. *Cal. Rules of Ct., Rule 8.108(c)*

Judge who will hear and determine motion is judge who presided at trial. *Cal. Rules of Ct., Rule 3.1602*

[5] Decisions

Motion is proper to set aside judgment and enter another and different judgment whenever court draws incorrect legal conclusion or renders erroneous judgment upon facts found by it to exist. *County of Alameda v. Carleson (1971) 5 Cal. 3d 730, 738, 97 Cal. Rptr. 385, 488 P.2d 953*

Motion to vacate and set aside judgment and enter another and different judgment was proper only after final judgments and not after interlocutory judgments or orders. *Remington v. Davis (1951) 108 Cal. App. 2d 251, 253, 238 P.2d 662*

On hearing motion to vacate and set aside judgment and enter different judgment, court has no power to consider or determine any matter except what judgment should be entered on facts as found. *Dolan v. Superior Court (1920) 47 Cal. App. 235, 241, 190 P. 469*

[6] Cross References

For memoranda of points and authorities in support of and in opposition to a motionto vacate a judgment and enter a different judgment, see California Points and Authorities, Ch. 155, *Motions After Trial* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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PART V. FORMS
C. Motion to Set Aside and Vacate a Judgment and to Enter Another and Different Judgment

33-371 California Forms of Pleading and Practice--Annotated § 371.321

§ 371.321 Order Setting Aside and Vacating Judgment and Directing Entry of Another and Different Judgment [Code Civ. Proc. §§ 663, 663a]

[1] FORM Order Setting Aside and Vacating Judgment and Directing Entry of Another and Different Judgment [Code Civ. Proc. §§ 663, 663a]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER SETTING ASIDE AND VACATING
Defendant.	)	JUDGMENT AND DIRECTING ENTRY OF AN-
	)	OTHER AND DIFFERENT JUDGMENT
	)	

The motion of _____ [*specify moving party, e.g.,* plaintiff] _____ [*name*] for an order setting aside and vacating the judgment entered in favor of _____ [*specify adverse party, e.g.,* defendant] _____ [*name*] on _____ [*date*], by this court and directing the entry of another and different judgment, on the ground _____ [*specify, e.g.,* that the legal basis for the decision filed by the court is incorrect and erroneous in that it is not _____ (consistent with *or* supported by) the facts of the case *or* that the judgment made by the court, entered on _____ [*date*], is not

_____ (consistent with *or* supported by) the special verdict rendered], came on regularly for hearing before the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted and the judgment entered is vacated and set aside.

[*Where the statement of the decision is to be amended and corrected add* IT IS FURTHER ORDERED that the statement of decision which read "_____," is hereby changed to read "_____," (*specify changes*)].

IT IS FURTHER ORDERED that the following judgment be entered: _____ [*recite other and different judgment*].
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form is for use as an order setting aside and vacating a judgment and directing the entry of another and different judgment. However, before using the form, counsel should check to determine local court practice regarding whether or not the new judgment is to be incorporated as a part of the order setting aside and vacating the judgment and directing the entry of another and different judgment.

[3] Decisions

Where court fails to correct conclusions of law and only enters different judgment, judgment as superseding incorrect conclusion of law and failure to correct as not requiring reversal of judgment. *Howard A. Deason & Co. v. Costa Tierra Ltd. (1969) 2 Cal. App. 3d 742, 760, 83 Cal. Rptr. 105* (decided when conclusions of law existed under *Code Civ. Proc. § 632*)

Order that vacates judgment, but fails to enter new judgment, as void since *Code Civ. Proc. § 663* specifically provides for vacation of judgment and entry of another judgment. *Dolan v. Superior Court (1920) 47 Cal. App. 235, 241, 190 P. 469*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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Chapter 372 MOTIONS AND ORDERS

33-372 California Forms of Pleading and Practice--Annotated 372.syn

§ 372.syn Synopsis to Chapter 372: MOTIONS AND ORDERS

§ 372.01 Scope of Chapter

§ 372.02 Cross References

§§ 372.03-372.09 [Reserved]

§ 372.10 Governing Law

§ 372.11 Applicability of Civil Law and Motion Rules

§ 372.12 "Order" and "Motion" Defined

§ 372.13 Nature of Motion; When Motions May Be Made

§ 372.14 Who May Make Motion

§ 372.15 Court in Which Motion Is to Be Made

§ 372.16 Kinds of Motions and Terminology

§ 372.17 Orders to Show Cause

§ 372.18 Filing Fee

§ 372.19 Procedure on Ex Parte Motions

[1] Who May Grant

[2] Form and Contents of Application

[3] Showing Basis for Proceeding Ex Parte

[4] Presenting Application

[5] Notice to Opposing Party

[a] Notice Requirement

[b] Proof of Giving Notice

[c] Service of Papers

[6] Motion Granted

[7] Notice of Court's Decision or Order

[8] Service of Motion and Order

[9] Proof of Service

§ 372.20 Determining Whether Written Notice Is Required

§ 372.21 Procedure on Noticed Motions

[1] Waiver of Defective Notice

[a] By Appearance Without Objection

[b] Preserving Objection for Record

[2] Written Notice Required; Length of Notice

[a] Notice to Be in Writing

[b] When Notice Must Be Given Pursuant to Code Civ. Proc. § 1005

[c] Length of Notice Under Code Civ. Proc. § 1005

[i] Sixteen Court Days

[ii] Extension of Period if Served by Mail, Fax, or Overnight Delivery

[d] Length of Notice Under Other Provisions

[e] Maximum Lengths of Notice

[3] Shortening Time

[4] Proof of Service

[5] Supporting Papers

[a] Required to Accompany Notice

[b] Affidavits and Declarations

[c] Supporting Memorandum

[d] Other Documents

[e] Proposed Order and Other Lodged Materials

[6] Where Papers Are to Be Filed

[7] Timely or Late Filed Papers

[8] Motion as Deemed Made on Service and Filing

[9] Opposition to Motion

[10] Reply Papers

[11] Decision Without Hearing

[12] Scheduling Hearing

[13] Notice of Nonappearance

[14] Tentative Rulings in Law and Motion Matters

[15] Failure of Counsel to Appear at Hearing

[16] Telephone Appearance by Counsel

[a] General Civil Cases

[b] Exceptions at Court's Discretion

[c] Required Personal Appearances

[d] Service Provider and Fees for Conference Call

[e] Audibility

[f] Recording of Proceedings

[g] Local Procedure

[h] Notice of Telephone Appearance

[i] Retraction of Notice of Telephone Appearance

[j] Court Order for Appearance in Person After Notice of Telephone Appearance Has Been Given

[k] Standard of Judicial Administration

[17] Evidence Considered at Hearing

[a] Generally by Affidavit, Declaration, or Judicial Notice

[b] Oral Evidence

[c] Restrictions on Evidence on Particular Motions

[d] Judicial Notice

[18] Ruling on Motion and Preparation of Order

[19] Entry of Order on Motion

[20] Notification of Court's Ruling in Matter Taken Under Submission

[21] Effect of Clerk's Notification

[22] Required Notice of Ruling

[23] Notice of Ruling on Court's Own Motion

[24] Electronic Judicial Signatures

§ 372.22 Procedures on Orders to Show Cause

§ 372.23 Inability of Judge to Hear Parties

§ 372.24 Service of Papers

[1] On Adverse Party or Attorney

[2] Exception in Case of Nonappearing or Defaulting Party

[3] Manners of Service

§ 372.25 Sanctions Relating to Motions and Orders

[1] Frivolous Motions, Harassment, and Delaying Tactics

[2] For Violation of Order

[3] In Relation to Discovery

§§ 372.26-372.39 [Reserved]

§ 372.40 Related Matthew Bender Publications

§ 372.41 State Statutes

[1] Appearance and Default

[2] Ex Parte Motions

[3] Motions

[4] Orders

[a] Amendment, Correction, and Setting Aside

[b] Definitions

[c] Exceptions to Orders

[d] Judgment Roll

[e] Notice of Order

[f] Obedience and Disobedience

[g] Probate Proceedings

[5] Local Court Rules

[6] Service of Notices and Orders

§ 372.42 California Rules of Court

[1] Civil Law and Motion Rules

[a] Applicability

[b] General Provisions

[c] Particular Motions and Proceedings

[2] Superior Courts

[3] Appellate Departments

[4] Supreme Court and Courts of Appeal

§ 372.43 Local Court Rules

[1] Alameda County

[2] Contra Costa County

[3] Los Angeles County

[4] Marin County

[5] Orange County

[6] Riverside County

[7] Sacramento County

[8] [Reserved]

[9] San Francisco, City & County of

[10] San Mateo County

[11] Santa Barbara County

[12] Ventura County

§ 372.44 Decisions

[1] Appearance at Hearing

[2] Local Court Rules

[3] Notice as Process

[4] Notice Generally

[5] Notice of Motion

[6] Orders

[a] Appealability of Order

[b] Construction of Order

[c] Entry and Effective Date of Order

[d] Form and Content of Order

[e] Nunc Pro Tunc Orders

[f] Vacating Order

[7] Specifying Grounds on Which Motion Is Based

§ 372.45 Law Reviews

§ 372.46 Text References

§§ 372.47-372.49 [Reserved]

§ 372.50 Noticed Motion--Moving Party

[1] Facts to Be Ascertained

[2] Preparation of Papers

[3] Hearing and Order

§ 372.51 Noticed Motion--Opposing Party

[1] Preliminary Determinations

[2] Preparation of Papers

[3] Hearing and Order

§ 372.52 Ex Parte Motion--Moving Party

[1] Facts to Be Ascertained

[2] Preparation of Papers

[3] Notice

[4] Presentation of Motion

[5] Filing and Service

[6] Proof of Service

[7] Filing Proof of Service

§ 372.53 Ex Parte Motion--Opposing Party

§ 372.54 Written Motion Requiring Hearing--Moving Party

[1] Facts to Be Ascertained

[2] Preparation and Filing of Motion

[3] Preparation of Notice of Hearing

[4] Service and Filing

[5] Hearing and Order

§ 372.55 Written Motion Requiring Hearing--Opposing Party

§§ 372.56-372.59 [Reserved]

§ 372.60 Notice of Motion [Code Civ. Proc. § 1010; Cal. Rules of Ct., Rule 3.1110]

[1] FORM

[2] Use of Form

[3] Contents

[a] Caption

[i] Information Required Under Case Number

[ii] Telephone Appearance

[iii] Multiple Parties

[iv] Reclassified Cases

[v] Additional Requirements

[b] Body

[i] Required Elements

[ii] Hearing Date and Time

[iii] Department or Division

[iv] Grounds and Bases Distinguished

[v] Records and File

[c] Signing Notice of Motion

[4] Papers on Which Motion Is Based

[a] Supporting Memorandum

[b] Affidavits and Declarations

[c] Exhibits and Other Papers

[d] Combining or Attaching Papers; Pagination; Defective Title

[e] Use of Supporting Papers to Amplify Grounds

[5] When Motion Deemed Made

[6] Service and Proof of Service

[a] Notice of Motion

[b] Supporting Papers

[7] Duty of Counsel if Hearing Rescheduled

[8] Nonappearance of Counsel

[9] Cross References

§ 372.61 Declaration Under Penalty of Perjury in Support of Motion [Cal. Rules of Ct., Rules 3.1110(b), 3.1115(a)]

[1] FORM

[2] Use of Form

[3] Format of Caption

[4] Content of Declaration

[5] Evidence

[6] Cross References

§ 372.62 Written Statement of Oral Evidence to Be Introduced at Law and Motion Hearing [Cal. Rules of Ct., Rule 3.1306]

[1] FORM

[2] Use of Form

[3] Service of Statement

§ 372.63 Notice of Intent to Appear by Telephone [Judicial Council Form CIV-020]

[1] FORM

[2] Use of Form

§ 372.64 Order [Code Civ. Proc. § 1003] Granting or Denying Motion--Without Findings

[1] FORM

[2] Use of Form

[3] Content

[4] Cross References

§ 372.65 Order [Code Civ. Proc. § 1003] Granting or Denying Motion--Order With Findings

[1] FORM

[2] Use of Form

§ 372.66 Notice of Entry of Order [Code Civ. Proc. § 664.5] Granting or Denying Motion

[1] FORM

[2] Use of Form

[3] Multiple Parties

[4] Who Is Entitled to Notice

[5] Cross References

§ 372.67 Notice of Court's Decision or Order Granting or Denying Motion [Code Civ. Proc. § 1019.5(a)]

[1] FORM

[2] Use of Form

[3] When Notice Is Required

§ 372.67A Notice of Entry of Judgment or Order [Judicial Council Form CIV-130]

[1] FORM

[2] Use of Form

[3] Cross References

§ 372.68 Ex Parte Motion or Application for Order--Skeletal Form

[1] FORM

[2] Use of Form

[3] Contents of Application

[4] Notice Requirement

[5] Accompanying Papers

[6] Local Court Rules

[7] Cross References

§ 372.69 Order Granting Ex Parte Motion [Code Civ. Proc. § 1003]--Skeletal Form

[1] FORM

[2] Use of Form

[3] Cross References

§ 372.70 Order [Code Civ. Proc. § 1003] Granting Ex Parte Motion--Short Form

[1] FORM

[2] Use of Form

§ 372.71 Order to Show Cause--Skeletal Form

[1] FORM

[2] Use of Form

[3] Application for Order

[4] Cross References

§ 372.72 Written Motion or Application or Request or Petition for Order [Code Civ. Proc. § 1003]--Skeletal Form

[1] FORM

[2] Use of Form

[3] Accompanying Papers

§ 372.73 Notice of Hearing on Written Motion or Application or Request or Petition for Order

[1] FORM

[2] Use of Form

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Chapter 372 MOTIONS AND ORDERS
PART I. SCOPE

33-372 California Forms of Pleading and Practice--Annotated § 372.01

§ 372.01 Scope of Chapter

This chapter discusses original motions and orders, as opposed to renewed motions and motions to reconsider, which are discussed in Ch. 374, *Motions to Reconsider and Renewed Motions* .

This chapter includes forms of:

- Notice of motion [*see § 372.60*].
- Supporting declaration [*see § 372.61*].
- Written statement of oral evidence sought to be introduced at the hearing [*see § 372.62*].
- Separate notice of intent to appear by telephone at a hearing on a motion [*see § 372.63*].
- Orders on a motion [*see §§ 372.64, 372.65*].
- Notice of entry of order [*see § 372.66*], notice of the court's decision [*see § 372.67*], and notice of entry of judgment or order [*see § 372.67A*].
- Ex parte motion [*see § 372.68*].
- Orders on an ex parte motion [*see §§ 372.69, 372.70*].

The chapter also includes a skeletal form of order to show cause [*see § 372.71*], and forms of written motion [*see § 372.72*] and notice of hearing on written motion [*see § 372.73*].

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PART I. SCOPE

33-372 California Forms of Pleading and Practice--Annotated § 372.02

§ 372.02 Cross References

For discussion and a skeletal form of memorandum of points and authorities, see Ch. 417, *Points and Authorities* .

Motions are far too numerous to list or classify with respect to the relief sought, and many have their own procedures prescribed by statutes which must be complied with. Consequently, for procedures governing specific motions and for forms for use with respect to those motions, counsel should consult specific titles in this publication. For example, for procedures and forms for use on a motion for summary judgment, a motion to dismiss an action, or a motion for new trial, see Ch. 537, *Summary Judgment* , Ch. 212, *Dismissal* , and Ch. 371, *Motions After Trial* , respectively. For forms for use on motions on appeal, see Ch. 45, *Appeal: Motion Procedure* .

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33-372 California Forms of Pleading and Practice--Annotated §§ 372.03-372.09

[Reserved]

§§ 372.03[Reserved]

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 372 MOTIONS AND ORDERS
PART II. LEGAL BACKGROUND

33-372 California Forms of Pleading and Practice--Annotated § 372.10

§ 372.10 Governing Law

Motions and orders are governed generally by *Code Civ. Proc. §§ 1003-1008, 1064*, notices of motion by *Code Civ. Proc. §§ 1005, 1010*, and service of notices and papers by *Code Civ. Proc. §§ 1010-1020*. The filing fee required to be paid and exceptions to the requirement are covered by *Gov. Code § 70617*.

A comprehensive set of rules governing civil law and motion proceedings in superior court is set forth as *Cal. Rules of Ct., Rule 3.1110 et seq.* "Law and motion" is defined in *Cal. Rules of Ct., Rules 3.1103(a)*. The rules also apply to discovery proceedings in family law and in probate [*Cal. Rules of Ct., Rule 3.1110*]. In addition, unless the context or subject matter otherwise requires, the rules apply to demurrers [*Cal. Rules of Ct., Rule 3.1103(c)*].

Appearance at hearings on motions is governed by *Cal. Rules of Ct., Rule 3.670* and by Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.1.

In addition to the statutes and California Rules of Court, local court rules often impose specific and precise requirements on motion practice. Some of these rules are referred to in this chapter. However, as of July 1, 2000, *Cal. Rules of Ct., Rule 3.20*, declares that the Judicial Council preempts local rules relating to pleadings, demurrers, ex parte applications, motions, discovery, provisional remedies, and the form and format of papers, and that no trial court,or any division or branch of a trial court is to enact or enforce any local rule concerning those fields. All local rules concerning these fields are declared to be null and void as of July 1, 2000, unless otherwise permitted or required by statute or a rule in the CA Rules of Ct. [*Cal. Rules of Ct., Rule 3.20(a)*]. There are some exceptions, most significantly for local rules enacted under the Trial Court Delay Reduction Act [*Cal. Rules of Ct., Rule 3.20(b), (c)*].

For discussion of motions in the Supreme Court and courts of appeal, see Ch. 45, *Appeal: Motion Procedure* . For discussion of motions in the superior court appellate divisions, see Ch. 345A, *Limited Civil Cases* .

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§ 372.11 Applicability of Civil Law and Motion Rules

For the purposes of *Cal. Rules of Ct., Rule 3.1110 et seq.*, "law and motion" is defined as including any of the following proceedings [*Cal. Rules of Ct., Rule 3.1103(a)*]:

(1) On application before trial for an order, except for causes arising under the Welfare and Institutions Code, Probate Code, Family Code, or *Code of Civil Procedure § 527.6* (injunctions relating to harassment), *Code of Civil Procedure § 527.7* (injunctions relating to gang activity), or *Codeof Civil Procedure § 527.8* (injunctions relating to threats of violence against an employee).

(2) On application for an order regarding the enforcement of judgment, attachment of property, appointment of a receiver, obtaining or setting aside a judgment by default, writs of review, mandate, and prohibition, a petition to compel arbitration, and enforcement of an award by arbitration.

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§ 372.12 "Order" and "Motion" Defined

An "order" is a direction of a court or judge, made or entered in writing, and not included in a judgment. A "motion" is an application for an order [*Code Civ. Proc. § 1003*]. These definitions, which by their placement in the code apply to civil actions, are applicable to similar acts in a special proceeding [*Code Civ. Proc. § 1064*].

An order must be either entered in the court's permanent minutes or signed by the judge and stamped "filed" [*Shpiller v. Harry C.'s Redlands (1993) 13 Cal. App. 4th 1177, 1179, 16 Cal. Rptr. 2d 814* ; *Michael v. Aetna Life & Cas. Ins. Co. (2001) 88 Cal. App. 4th 925, 932, 106 Cal. Rptr. 2d 240* ; *see Cal. Rules of Ct., Rule 8.104*].

A motion is not an independent right or remedy, but, rather, is confined to incidental matters in the progress of a cause. A motion relates to some question that is collateral to the main object of the action and is connected with and dependent on the principal remedy. Hence, it is not proper to raise by motion wholly distinct and independent matters that generally should be the subject of a formal petition or complaint [*Killian v. Millard (1991) 228 Cal. App. 3d 1601, 1606, 279 Cal. Rptr. 877]* .

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§ 372.13 Nature of Motion; When Motions May Be Made

The nature of a motion is determined by the nature of the relief sought and not by the label attached to it [City & County of S. F. v. Muller (1960) 177 Cal. App. 2d 600, 603, 2 Cal. Rptr. 383] .

Motions are not independent rights or remedies, but imply a pendency of suits between the parties and are confined to matters collateral, or incidental, to the main objects of the actions [*People v. Burks (1961) 189 Cal. App. 2d 313, 317, 11 Cal. Rptr. 200 , cert. denied, 368 U.S. 898* ; *People v. Sparks (1952) 112 Cal. App. 2d 120, 121, 246 P.2d 64 , cert. denied, 345 U.S. 959 (1953)]* . As the rule is sometimes expressed, a motion relates to some question collateral to the main object of the action and is connected with, and dependent on, the principal remedy [*People v. Sparks (1952) 112 Cal. App. 2d 120, 121, 246 P.2d 64 , cert. denied, 345 U.S. 959 (1953)* ; *see also Donald J. v. Evna M. (1978) 81 Cal. App. 3d 929, 934, 147 Cal. Rptr. 15]* .

Although incidental to an action or special proceeding, motions may be made throughout the pendency of a cause [*see Code Civ. Proc. § 1049, below*, defining pendency of action]. Thus, motions may be made:

- Before trial, such as motions for summary judgment pursuant to *Code Civ. Proc. § 437c*.
- During trial, such as motions for nonsuit pursuant to *Code Civ. Proc. § 581c*.
- After trial, such as nonstatutory motions for directed verdict or motions for judgment notwithstanding the verdict pursuant to *Code Civ. Proc. § 629*.
- After judgment, such as motions to set aside or vacate judgment pursuant to *Code Civ. Proc. §§ 473(b), (d), 473.5*, and *663*.
- During an appeal, such as a motion to strike a defective brief pursuant to *Cal. Rules of Ct., Rule 8.204(e)(2)*.

Moreover, there are no general rules governing the time for making motions, although a number of statutes relating to

specific motions impose time limitations on when the motion can be made [*see, e.g., Code Civ. Proc. § 435* (motion to strike all or part of pleading)]. Except as limited by statute, a motion may normally be made at any time when the relief sought would be appropriate, provided of course, that the action or proceeding is still pending. An action is deemed to be pending from the time of its commencement until its final determination on appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied [*Code Civ. Proc. § 1049*].

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§ 372.14 Who May Make Motion

Normally, a motion may be made only by a person who is a party to the pending action or proceeding [*Difani v. Riverside County Oil Co. (1927) 201 Cal. 210, 214, 256 P. 210* ; *Chase v. Superior Court of Los Angeles County (1962) 210 Cal. App. 2d 872, 876, 27 Cal. Rptr. 383* ; *Marshank v. Superior Court (1960) 180 Cal. App. 2d 602, 605, 4 Cal. Rptr. 593* ; *see also* *Roski v. Superior Court (1971) 17 Cal. App. 3d 841, 845-846, 95 Cal. Rptr. 312* (motion by nonparty to action under *Code Civ. Proc. § 473* to vacate plaintiff's voluntary dismissal of action and for leave to intervene held unauthorized and granting of motion improper)]. An exception exists in the case of a void judgment or order. A person who is not a party to the action or proceeding may move to vacate the void judgment or order if he or she has a right or interest which would be affected by its enforcement [*People v. Silva (1981) 114 Cal. App. 3d 538, 547, 170 Cal. Rptr. 713]* . Also, an attorney to whom an award of fees has properly been ordered paid, although not a party to the action or proceeding, may move the court to enforce the award[*Sorell v. Superior Court of San Francisco (1967) 248 Cal. App. 2d 157, 159, 56 Cal. Rptr. 222]* .

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§ 372.15 Court in Which Motion Is to Be Made

Code Civ. Proc. § 1004 provides that except as provided in *Code Civ. Proc. § 166* (relating to power of trial court judges to act in chambers and powers of judges as opposed to powers of court), motions must be made in the court in which the action is pending. Notwithstanding this provision, other statutes may authorize the making of a motion in a court other than the one in which the action is pending [*see, e.g., Code Civ. Proc. § 708.160*, relating to examination of third persons with information about a judgment debtor's assets under *Code Civ. Proc. § 708.120 et seq.*, discussed in Ch. 254, *Executions and Enforcement of Judgments*].

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§ 372.16 Kinds of Motions and Terminology

All motions are either oral or written and are made in one of the following manners:

- By making the motion orally in open court during a hearing or trial or in the judge's chambers in the presence of adverse counsel. Examples of oral motions during trial are motions to strike testimony, motions for nonsuit [*Code Civ. Proc. § 581c*] or judgment [*Code Civ. Proc. § 631.8*], motions for directed verdict, and motions for mistrial;

- By presenting an ex parte motion, or application, and order to a judge or commissioner in chambers, followed, if the judge or commissioner signs the order, by the filing and service of the motion and order [*see* discussion under *§ 372.19*; for a form, *see § 372.68*];

- By filing a written motion, application, or petition, followed by the serving and filing of a notice of hearing. Examples of written motions are the application for a right to attach order and writ of attachment [*Code Civ. Proc. § 484.010*; *see also* Ch. 62, *Attachment*] and petitions for orders in probate proceedings [*Prob. Code § 1200 et seq.*]; or

- By serving and filing a notice of motion with its supporting papers followed by a hearing on the motion and the ruling of the judge granting or denying it [*see discussion under § 372.21*, for forms, *see §§ 372.60*-372.67A].

In describing a written motion, counsel should use the terminology ("motion" or "application" or "petition") of the statute governing the particular motion unless a written form employing other terminology is provided by the court in which the cause is pending. Use of the word "petition" in a statute as a substitute for the term "written motion" [*see, e.g., Prob. Code § 1201*] should not, however, be confused with the word "petition" used to describe the pleading that initiates a special proceeding of a civil or criminal nature. For example, all proceedings for a prerogative writ are initiated by the filing of a petition [*see Code Civ. Proc. §§ 1069* (certiorari), *1086* (mandate), *1103* (prohibition); *Penal Code § 1474* (habeas corpus)].

Which of the four procedures listed above is to be followed in a given case will depend on when the motion is made and the particular order sought. For example, motions before trial are ordinarily made on notice to the adverse party or ex parte, or by written motion followed by the service and filing of a notice of hearing. Motions made during trial are usually made orally. Motions after trial are typically made on notice to the adverse party.

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§ 372.17 Orders to Show Cause

An order to show cause is made by the court or judge on ex parte application [*Kenney v. Kelleher (1883) 63 Cal. 442, 444* ; for a form, *see § 372.71*]. It is in the nature of a citation to a party to appear at a stated time and place to show cause why the relief sought should not be granted [*Green v. Gordon (1952) 39 Cal. 2d 230, 232, 246 P.2d 38]* . It substitutes for a notice of motion [*Donald J. v. Evna M. (1978) 81 Cal. App. 3d 929, 933, 147 Cal. Rptr. 15* ; *Marshank v. Superior Court (1960) 180 Cal. App. 2d 602, 605, 4 Cal. Rptr. 593]* ; that is, it operates both as a notice of motion for an order and as a citation to a party to appear at a stated time and place to show cause why the motion should not be granted [*Difani v. Riverside County Oil Co. (1927) 201 Cal. 210, 213-214, 256 P. 210* ; *see also Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 8 n.6, 118 Cal. Rptr. 21, 529 P.2d 53* ; *Reifler v. Superior Court (1974) 39 Cal. App. 3d 479, 483, 114 Cal. Rptr. 356]* .

Orders to show cause are commonly used in family law proceedings to secure pendente lite or other relief [*see* Cal. Judicial Council Form 1285; *see also* Ch. 221, *Dissolution of Marriage: Procedure*], in actions and proceedings to secure issuance of a preliminary injunction when a temporary restraining order is granted without notice [*Code Civ. Proc. § 527(a)*; *Fam. Code § 6300 et seq.*; *see also* Cal. Judicial Council Form 1296.10; Ch. 303, *Injunctions;* , Ch. 293 *Harassment and Domestic Violence*], and in indirect contempt proceedings to secure the presence in court of alleged contemner [*see Code Civ. Proc. § 1212*; *see also* Ch. 135, *Contempt ;* for form of order to show cause and declaration for contempt in family law proceeding, *see* Cal. Judicial Council Form 1285.60 and *Ch. 258, Family Law Enforcement: General Enforcement Principles and Remedies, § 258.130*].

The order to show cause proceeding is also used to secure an order against a party who has not yet appeared in the action or proceeding [*see Code Civ. Proc. §§ 1010, 1014*], although jurisdiction over the party has already been obtained byservice of summons or will be obtained by such service concurrently with the service of the order to show cause.

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§ 372.18 Filing Fee

Except for motions for summary judgment or adjudication [*see Gov. Code § 70617(d)*], the fee for filing any notice of motion or any other paper requiring a hearing subsequent to the first paper is $40 [*Gov. Code § 70617(a)*]. However, no filing fee may be charged for an amended notice of motion [*Gov. Code § 70617(b)(2)*].

Other papers for which no filing fee may be charged are the following:

- A motion, application, demurrer, request, notice, or stipulation and order that is the first paper filed in an action and on which a first paper filing fee is paid [*Gov. Code § 70617(b)(1)*].

- A civil case management statement [*Gov. Code § 70617(b)(3)*].

- A request for trial de novo after judicial arbitration [*Gov. Code § 70617(b)(4)*].

- A stipulation that does not require an order [*Gov. Code § 70617(b)(5)*].

- A request for an order to prevent civil harassment [*Gov. Code § 70617(b)(6)*].

- A request for an order to prevent domestic violence [*Gov. Code § 70617(b)(7)*].

- A request for entry of default or default judgment [*Gov. Code § 70617(b)(8)*].

- A paper requiring a hearing on a petition for emancipation of a minor [*Gov. Code § 70617(b)(9)*].

- A paper requiring a hearing on a petition for an order to prevent abuse of an elder or dependent adult [*Gov. Code § 70617(b)(10)*].

- A paper requiring a hearing on a petition for a writ of review, mandate, or prohibition [*Gov. Code § 70617(b)(11)*].

- A paper requiring a hearing on a petition for a decree of change of name or gender [*Gov. Code § 70617(b)(12)*].

- A paper requiring a hearing on a petition to approve the compromise of a claim of a minor [*Gov. Code § 70617(b)(13)*].

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§ 372.19 Procedure on Ex Parte Motions

[1] Who May Grant

Ex parte motions may be granted by a judge and may be granted at chambers [*Code Civ. Proc. § 166(a)(1)*; *see also Code Civ. Proc. § 1003*]. They may also be granted by court commissioners [*Code Civ. Proc. § 259(a)*; *Gov. Code § 72190*].

[2] Form and Contents of Application

Ex parte applications must be in writing [*Cal. Rules of Ct., Rule 3.1201*]. The application must include all the following [*Cal. Rules of Ct., Rule 3.1201*]:

- An application containing the case caption and stating the relief requested.
- A declaration in support of the application.
- A competent declaration based on personal knowledge regarding notice of the application as required by *Cal. Rules of Ct., Rule 3.1204(b)* [*see* [4], *below*].
- Supporting memorandum.
- A proposed order.

An ex parte application must state the name, address, and telephone number of any attorney known to the applicant to be the attorney for any party or, if no such attorney is known, the name, address, and telephone number of such party if known to the applicant [*Cal. Rules of Ct., Rule 3.1202(a)*].

If an ex parte application for an order has been made to the court and has been refused in whole or in part, any subsequent application of the same character or for the same relief, although made upon an alleged different state of facts, must include a full disclosure of any previous applications and the court's actions [*Cal. Rules of Ct., Rule*

3.1202(b)].

An ex parte application for an order must be accompanied by a declaration showing either [*Cal. Rules of Ct., Rule 3.1204(b)*]:

- That, within the applicable time period under *Cal. Rules of Ct., Rule 3.1203*, the applicant informed the opposing party when and where the application would be made; or

- That the applicant in good faith attempted to inform the opposing party but was unable to do so, specifying the efforts made to inform the opposing party; or

- That for reasons specified, the applicant should not be required to inform the opposing party.

For a form of application that includes the Rule 3.1204(b) declaration, *see § 372.68*]. For forms of proposed orders, see *§§ 372.69* and *372.70*. For forms of declarations to support the substantive basis of the application, see specific subject matter titles throughout this publication. For forms of points and authorities, see the chapter in California Points And Authorities that relates to the particular subject matter of the application.

[3] Showing Basis for Proceeding Ex Parte

An applicant for an ex parte order must make an affirmative factual showing in a declaration containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte [*Cal. Rules of Ct., Rule 3.1202(c)*].

[4] Presenting Application

An ex parte motion [for a form, *see § 372.68*] is made, in the case of a court with a single judge, to the judge of the court, and in the case of a multiple judge court, to the judge or commissioner to whom the case has been assigned [*see, e.g., Cal. Rulesof Ct., Rule 2.20(a)* (ex parte application for order extending time)] or, if the case has not yet been assigned to a judge or department, to the presiding judge of the court or to the law and motion judge, depending on local court requirements. Precise procedure varies widely among the courts and, if in doubt as to the requirements of the court in which the case is pending, counsel should check the local court rules for that court.

The court will not consider an ex parte application unless the applicant personally appears, except in the case of the following matters, for which an appearance is not required [*Cal. Rules of Ct., Rule 3.1207*]:

- Applications to file a memorandum in excess of the applicable page limit.

- Applications for extensions of time to serve pleadings.

- Setting of hearing dates on alternative writs and orders to show cause.

- Stipulations by the parties or other orders of the court.

The clerk cannot reject an ex parte application for filing and must promptly present the application to the appropriate judicial officer for consideration, notwithstanding the failure of the applicant to comply with the notification requirements of *Cal. Rules of Ct., Rule 3.1203* [*Cal. Rules of Ct., Rule 3.1205*].

[5] Notice to Opposing Party

[a] Notice Requirement

A party seeking an ex parte order must notify all parties no later than 10:00 a.m. the court day before the ex parte appearance, absent a showing of exceptional circumstances that justify a shorter time for notice; and a party seeking an ex parte order in a lawful detainer proceeding may provide shorter notice provided that the notice given is reasonable [*Cal. Rules of Ct., Rule 3.1203(a)*]. The person giving notice must state with specificity the nature of the relief to be requested and the date, time, and place for the presentation of the application. The person giving notice must also attempt to determine whether the opposing party and/or counsel will appear to oppose the application [*Cal. Rules of Ct., Rule 3.1204(a)(1), (2)*].

[b] Proof of Giving Notice

Every ex parte application must be accompanied by a declaration regarding notice that states either [*Cal. Rules of Ct., Rule 3.1204(b)*]:

- The notice given, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected; or
- Why notice should not be required.

If notice was provided later than 10:00 a.m. the court day before the ex parte appearance, the declaration regarding notice must explain either [*Cal. Rules of Ct., Rule 3.1204(c)*]:

- The exceptional circumstances that justify the shorter notice; or
- In unlawful detainer proceedings, why the notice given is reasonable.

For a form of application for an ex parte order that includes such a declaration, see *§ 372.68*.

[c] Service of Papers

Parties appearing at the ex parte hearing must serve the ex parte application or any written opposition on all other appearing parties at the first reasonable opportunity. Absent exceptional circumstances, no hearing may be conducted unless service has been made [*Cal. Rules of Ct., Rules 3.1206*].

[6] Motion Granted

If the ex parte motion is granted, the judge or commissioner will sign the original of the order granting it. Counsel should then have the copies conformed by the courtroom clerk or by a deputy clerk in the court clerk's office and have the originals of the motion, if written, and the order filed if they have not been taken by the courtroom clerk for filing already.

[7] Notice of Court's Decision or Order

When a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order must be given by the prevailing party to all other parties or their attorneys in the manner provided in *Code Civ. Proc. §§ 1010-1020* (for further discussion, *see § 372.24*; Ch. 518, *Service of Summons and Papers*), unless notice is waived by all parties in open court and is entered in the minutes [*Code Civ. Proc. § 1019.5(a)*; for a form, *see § 372.67*].

[8] Service of Motion and Order

Counsel should serve, or cause to be served, a conformed copy of the order, together with a copy of the written ex parte

motion, if any, on opposing counsel or on the opposing party if not represented by counsel [*see Code Civ. Proc. § 1015*]. In the case of an order shortening time for service of a notice of motion [*Code Civ. Proc. § 1005(b), Cal. Rules of Ct., Rule 3.1300(b)*; *see* Ch. 524, *Shortening and Extension of Time*], the court may require that the notice of motion, supporting papers, and order shortening time be served on opposing counsel personally [*see Code Civ. Proc. §§ 1011, 1015*] within a stated period. Otherwise, if time is not a problem, a conformed copy of the order granting the ex parte motion, and a copy of the motion, if written, may be served by mail pursuant to *Code Civ. Proc. §§ 1012, 1013*. For further discussion, see *§ 372.24*.

[9] Proof of Service

Regardless of how service is effected, the better practice is to prepare and file a proof of service setting forth the exact titles of the papers served [*see Code Civ. Proc. § 1013a*]. Although this practice is not required by statute, it may be required by local court rule.

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§ 372.20 Determining Whether Written Notice Is Required

The term "noticed motion," as already indicated, is used to describe a motion made on written notice to the adverse party. The majority of motions made other than during trial are of this kind.

There is no express statutory provision generally requiring that notice of all motions be given. A number of statutes do require that a particular motion by a party be made on notice [*see, e.g., Code Civ. Proc. § 437c(a)* (motion for summary judgment), *Code Civ. Proc. § 473(d)* (motion to set aside void judgment or order), *Code Civ. Proc. §§ 583.250(a)(2), 583.360(a)* (motion to dismiss action for failure to prosecute)]. In addition, *Code Civ. Proc. § 1005(a)* lists numerous motions for which notice must be given in accordance with *Code Civ. Proc. § 1005(b)*. However, other statutes are silent on this point [*see, e.g., Code Civ. Proc. § 464* (motion to file supplemental pleading), *Code Civ. Proc. § 473(a)* (motion to amend pleading), *Code Civ. Proc. § 473(b)* (motion for relief based on surprise, etc.)].

If the governing statute fails to indicate whether or not the particular motion is to be made on notice, it has been left to the courts to determine whether or not written notice to the adverse party is required [*Arata v. Tellurium G. & S. M. Co. (1884) 65 Cal. 340, 342, 4 P. 195]* . Generally, it may be said that when the order granting the motion will affect the rights of the adverse party, the motion must be made on notice to such party [*McDonald v. Severy (1936) 6 Cal. 2d 629, 631, 59 P.2d 98* ; *Bohn v. Bohn (1913) 164 Cal. 532, 536, 129 P. 981]* to satisfy the procedural due process requirements of *U.S. Const., amend. XIV*, and of *Cal. Const., art. I, § 7(a).*

Conversely stated, a motion may be made ex parte, that is without notice to the adverse party, if the order granting the motion will not affect the rights of the adverse party and there is no statutory requirement or court rule that the motion be made on notice.

Ex parte motions are permitted primarily in two situations. One is when the adverse party does not have a right to be heard in opposition, for example, when the court can act on its own motion. The other situation is when there is a pressing need for immediate relief and great or irreparable harm [*see Cal. Rules of Ct., Rules 3.1200 et seq.*] could result from any delay, for example, if it is imperative that a temporary restraining order [*see Code Civ. Proc. § 527(a)*] be granted or a receiver appointed [*see Cal. Rules of Ct., Rule 3.1175*].

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§ 372.21 Procedure on Noticed Motions

[1] Waiver of Defective Notice

[a] By Appearance Without Objection

Defects and irregularities in a notice of motion, and failure to give notice at all, are normally waived by the adverse party's appearance at the hearing of the motion and opposition to it on its merits [*Vlahovich v. Cruz (1989) 213 Cal. App. 3d 317, 320, 261 Cal. Rptr. 565* ; *Tate v. Superior Court (1975) 45 Cal. App. 3d 925, 930, 119 Cal. Rptr. 835]* . However, this rule does not apply where the appearance in opposition to the motion is for the limited purpose of objecting to a consideration of the motion by the court on the ground of insufficiency of the notice. Such an appearance does not constitute a waiver of proper notice [*Bohn v. Bohn (1913) 164 Cal. 532, 538-539, 129 P. 981]* .

[b] Preserving Objection for Record

An attorney that claims that his or her client was not properly served with motion papers or that inadequate notice of hearing was received or both is faced with a dilemma. According to *Carlton v. Quint (2000) 77 Cal. App. 4th 690, 697-698, 91 Cal. Rptr. 2d 844* , the appropriate procedure to pursue under these circumstances is as follows:

- If counsel is convinced his or her legal position is correct, counsel may appear at the hearing without filing a response to the motion and request a continuance for the purpose of preparing a proper response. If counsel makes a complete record relating to both the defective service or inadequate notice, or both, and the inability to prepare a proper response, and the court denies the continuance, the record will be well preserved for any future writ proceeding or appeal.

- If counsel is unwilling to take the chance that a continuance will be granted, counsel should file the best opposition possible under the circumstances. The opposition should include counsel's position on the defective service or inadequate notice issue, or both, as well as the merits. The opposition fully discuss counsel's position as to why a more complete opposition was not able to be filed (for example, because defective notice did not give counsel adequate time to prepare a response). Counsel should then appear at the hearing, object to the hearing taking place because the service was defective or inadequate notice of

the hearing was received, or both. Again explain to the court the prejudice that has been suffered by reason of the defective service and/or inadequate notice, and request a continuance so that a proper response to the motion may be filed. Counsel should be prepared to argue the motion on the merits if the court denies a continuance. If, however, these steps are taken, the record will be well preserved for any future writ proceeding or appeal.

[2] Written Notice Required; Length of Notice

[a] Notice to Be in Writing

Notices must be in writing [*Code Civ. Proc. § 1010*].

[b] When Notice Must Be Given Pursuant to Code Civ. Proc. § 1005

In the following instances, written notice must be given pursuant to *Code Civ. Proc. § 1005(b)* [*Code Civ. Proc. § 1005(a)*]:

(1) Notice of application and hearing for a writ of attachment under *Code Civ. Proc. § 484.040*.

(2) Notice of application and hearing for claim and delivery under *Code Civ. Proc. § 512.030*.

(3) Notice of hearing for claim of exemption under *Code Civ. Proc. § 706.105*.

(4) Motion to quash summons under *Code Civ. Proc. § 418.10(b)*.

(5) Motion for determination of a good faith settlement under *Code Civ. Proc.§ 877.6*.

(6) Hearing for discovery of a peace or custodial officer's personnel records under *Evid. Code § 1043*.

(7) Notice of hearing of a third-party claim under *Code Civ. Proc. § 720.320*.

(8) Motion for an order to attend a deposition more than 150 miles from deponent's residence under *Code Civ. Proc. § 2025(c)(3)* [*Code Civ. Proc.§ 2025.260* operative July 1, 2005].

(9) Notice of hearing of application for relief under *Gov. Code § 946.6*.

(10) Motion to set aside default or default judgment and for leave to defend actions pursuant to *Code Civ. Proc. § 473.5*.

(11) Motion to expunge notice of pendency of action pursuant to *Code Civ. Proc. § 405.30*.

(12) Motion to set aside default and for leave to amend [sic, defend] pursuant to *Code Civ. Proc. § 585.5*.

(13) Any other proceeding under the Code of Civil Procedure in which notice is required and no other time or method is prescribed by law or by court or judge.

The fact that an opposing party has actual knowledge of a pending court proceeding does not excuse the moving party from the requirement of giving the written notice required by statute [*County of Santa Clara v. Perry (1998) 18 Cal. 4th 435, 442, 75 Cal. Rptr. 2d 738, 956 P.2d 1191]* .

However, failure to give notice of a motion usually requiring advance notice may be excused if the motion is made orally in open court in the presence of counsel for the adverse party [*see Thieme v. Commercial Lighting etc. Co. (1960) 177 Cal. App. 2d 575, 576, 2 Cal. Rptr. 382]* .

[c] Length of Notice Under Code Civ. Proc. § 1005

[i] Sixteen Court Days

Unless otherwise ordered or specifically provided by law, all moving and supporting papers must be served and filed at least 16 court days before the hearing [*Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(a)*]. The papers served must be a copy of the papers filed or to be filed with the court [*Code Civ. Proc. § 1005(b)*].

[ii] Extension of Period if Served by Mail, Fax, or Overnight Delivery

The 16-court-day period may be extended depending on the method of service used [*Code Civ. Proc. § 1005(b)*].

If the notice is served by mail, the 16-day period is increased as follow [*Code Civ. Proc. § 1005(b)*]:

- By five calendar days if the place of mailing and place of address are in California;

- By 10 calendar days if either the place of mailing or place of address is outside California but within the United States;

- By 20 calendar days if either the place of mailing or place of address is outside the United States.

If the notice is served by express mail, or another method of overnight delivery, the 16-day period is increased by two calendar days [*Code Civ. Proc. § 1005(b)*].

If the notice is served by facsimile transmission, the 16-day period is increased by two calendar days [*Code Civ. Proc. § 1005(b)*].

The *Code Civ. Proc. § 1013* extensions of time within which a right may be exercised or an act may be done do not apply to a notice of motion, opposition papers, or reply papers governed by section 1005 [*Code Civ. Proc. § 1005(b)*].

If the notice is served by electronic service, the two court day extension provided for in *Code Civ. Proc. § 1010.6(a)(6)* may apply, because section 1005 does not exclude extension under that statute. For discussion of electronic service, see *Ch. 518, Service of Summons and Papers, § 518.40* et seq.

For a discussion of the persons to be served, exceptions, and the manner of service, see *§ 372.24*.

[d] Length of Notice Under Other Provisions

Statutes governing a particular motion in various civil actions or special proceedings may vary the amount of time required. For example, *Code Civ. Proc. § 1167.4(a)* requires that a notice of motion under *Code Civ. Proc. § 418.10(a)* (motion to quash service of summons or stay or dismiss action for inconvenient forum or dismiss for delay in prosecution) designate as the time for making the motion in a special proceeding in unlawful detainer, forcible entry, or forcible detainer a date not less than three or more than seven days after the filing of the notice.

[e] Maximum Lengths of Notice

Code Civ. Proc. § 1005(b), as indicated, imposes a minimum, but not a maximum, limitation on the amount of notice to

be given. Nevertheless, statutes governing particular motions may impose a maximum time limitation on the motion. For example, *Code Civ. Proc. § 418.10(b)*, relating to a motion to quash service of summons for lack of jurisdiction or to stay or dismiss an action for inconvenient form or dismiss for delay in prosecution, is required to designate as the time for making the motion a date not more than 30 days after the filing of the notice of motion.

[3] Shortening Time

Notwithstanding the minimum time limitations, the court, on its own motion or on application for an order shortening time supported by a declaration showing good cause, may prescribe shorter times for the filing and services of papers than the times specified in *Code Civ. Proc. § 1005* [*Cal. Rules of Ct., Rule 3.1300(b)*; *see Code Civ. Proc. § 1005(b)*; for discussion and form, *see* Ch. 524, *Shortening and Extension of Time*].

[4] Proof of Service

Proof of service of the moving papers must be filed no later than five calendar days before the time appointed for the hearing [*Cal. Rules of Ct., Rule 3.1300(c)*].

The court may consider a motion, petition, or opposition to the motion or petition that is filed without a proof of service as incomplete, and therefore may reject it for filing or refuse it consideration [*see* Orange Co. Super. Ct. Rules, Rule 512].

[5] Supporting Papers

[a] Required to Accompany Notice

A copy of any paper on which the motion is based, which has not previously been served on the party to be notified and was not filed by that party, must accompany the notice of motion [*Code Civ. Proc. § 1010*; *see also Code Civ. Proc. § 1005(b)* and *§ 372.60[4]*]. Such papers will include any supporting affidavits or declarations, requests for judicial notice, a memorandum, and exhibits, appendices, or pleadings [*see Cal. Rules of Ct., Rules 3.1112(a), 3.1113*].

[b] Affidavits and Declarations

Unless the motion is one that may not be supported by extrinsic evidence other than that of which the court may take judicial notice under *Evid. Code § 450 et seq.* (*see, e.g.,* a motion to strike under *Code Civ. Proc. § 435 et seq.*), a notice of motion is normally accompanied by one or more affidavits or declarations under penalty of perjury setting forth the evidentiary facts required to establish the grounds of the motion [*see* discussion under [17], *below; see also § 372.61[2]* et seq.].

An affidavit is (1) a written declaration under oath made without notice to the adverse party [*Code Civ. Proc. § 2003*]; (2) one of the three modes of taking the testimony of a witness [*see Code Civ. Proc. § 2002(1)*]; and (3) expressly authorized for use "on a motion" [*Code of Civ. Proc. § 2009*; *see* Ch. 15, *Affidavits, Certificates, and Declarations*].

A declaration under penalty of perjury may be used in lieu of an affidavit [*Code Civ. Proc. § 2015.5*; *see* Ch. 15, *Affidavits, Certificates, and Declarations*]. To a large extent, declarations under penalty of perjury have replaced affidavits as the mode of presenting the evidence of a witness on a motion. For a skeletal form of declaration under penalty of perjury, see *§ 372.61*.

Other evidentiary documents on which the motion is based, such as contracts or deeds of trust, may be attached as exhibits to the declarations that authenticate them.

[c] Supporting Memorandum

A party filing a notice of motion, except for a new trial, must generally serve and file with it a supporting memorandum [*see Cal. Rules of Ct., Rules 3.1112(a), 3.1113*]. The absence of the memorandum may be construed by the court as an admission that the motion is not meritorious and cause for its denial [*Cal. Rules of Ct., Rule 3.1113(a)*; for discussion of the applicability of the law and motion rules, *see § 372.11*].

Certain motions, applications and petitions do not require a memorandum when the motion, application, or petition is filed on a Judicial Council Form [*Cal. Rules of Ct., Rule 3.1114(a)*]. These are:

- Application for appointment of a guardian ad litem in a civil case [*Cal. Rules of Ct., Rule 3.1114(a)(1)*].
- Application for an order extending time to serve pleading [*Cal. Rules of Ct., Rule 3.1114(a)(2)*].
- Motion to be relieved as counsel [*Cal. Rules of Ct., Rule 3.1114(a)(3)*].
- Motion filed in small claims case [*Cal. Rules of Ct., Rule 3.1114(a)(4)*)].
- Petition for change of name or gender [*Cal. Rules of Ct., Rule 3.1114(a)(5)*].
- Petition for declaration of emancipation of minor [*Cal. Rules of Ct., Rule 3.1114(a)(6)*].
- Petition for injunction prohibiting harassment [*Cal. Rules of Ct., Rule 3.1114(a)(7)*].
- Petition for protective order to prevent elder or dependent adult abuse [*Cal. Rules of Ct., Rule 3.1114(a)(8)*].
- Petition of employer for injunction prohibiting workplace violence [*Cal. Rules of Ct., Rule 3.1114(a)(9)*].
- Petition for order prohibiting abuse [*Cal. Rules of Ct., Rule 3.1114(a)(10)*].
- Petition to approve compromise of claim of a minor or a person with a disability [*Cal. Rules of Ct., Rule 3.1114(a)(11)*].
- Petition for withdrawal of funds from blocked account [*Cal. Rules of Ct., Rule 3.1114(a)(12)*].

While not required, a memorandum of points and authorities may be submitted if it would further the interests of justice. The court may also order the submission of a memorandum in support of the foregoing motions, applications or petitions. Any memorandum submitted must comply with *Cal. Rules of Ct., Rule 3.1113* [*Cal. Rules of Ct., Rule 3.1114(b)*].

The filing of a memorandum supporting and opposing a notice of intention to move for a new trial is covered by *Cal. Rules of Ct., Rule 3.1600*.

For discussion and a skeletal form of a memorandum, see Ch. 417, *Points and Authorities* . For forms of memoranda in opposition to motions, see specific titles in California Points And Authorities (Matthew Bender).

[d] Other Documents

A party may wish to submit additional documents, such as the following:

- A request to introduce oral evidence at hearing [*Cal. Rules of Ct., Rule 3.1306(b)*; *see* [17][b], *below*]; or

- Evidentiary objections to evidence submitted in the opponent's papers [*see generally* California Trial Guide (Matthew Bender)].

[e] Proposed Order and Other Lodged Materials

If a proposed order or judgment is submitted, it must be lodged and served with the moving papers but must not be attached to them [*Cal. Rules of Ct., Rule 3.1113(m)*]. Material lodged with the clerk must be accompanied by an addressed envelope with sufficient postage for mailing the material. After determination of the matter, the clerk may mail the material to the party lodging it [*Cal. Rules of Ct., Rule 3.1302(b)*].

Lodged materials include, among others:

- Proposed orders or judgments [*Cal. Rules of Ct., Rule 3.1113(m)*].

- Non-California cases, statutes, constitutional provisions, or state or local rules [*Cal. Rules of Ct., Rule 3.1112(j)*].

- Administrative records in mandate cases [*Cal. Rules of Ct., Rule 3.1140*].

- Sealed records [*Cal. Rules of Ct., Rule 2.551*].

For certain motions, petitions, and applications, a proposed order must be lodged with the court when the other papers are filed, including:

- Motion for good faith settlement [*Code Civ. Proc. § 877.6*].

- Request for media coverage of court proceedings [*Cal. Rules of Ct., Rule 1.150(e)*].

- Motion to unseal records [*Cal. Rules of Ct., Rule 1.150*].

- Request for media coverage of court proceedings [*Cal. Rules of Ct., Rule 2.573*].

- Motion to be relieved of counsel [*Cal. Rules of Ct., Rule 3.1362*] and to be relieved from limited representation [*Cal. Rules of Ct., Rule 3.36*].

- Petition for coordination of complex actions [*Cal. Rules of Ct., Rule 3.520*].

- Motion to settle class action [*Cal. Rules of Ct., Rule 3.769*].

- Motion to appoint referee [*Cal. Rules of Ct., Rule 3.901*].

- Application for preliminary injunction [*Cal. Rules of Ct., Rule 3.1150*].

- Written objection to evidence in summary judgment motion [*Cal. Rules of Ct., Rule 3.1354*].

- Application for preliminary injunction [*Cal. Rules of Ct., Rule 3.1150*].

[6] Where Papers Are to Be Filed

All papers relating to a law and motion proceeding, unless otherwise provided by local court rule, must be filed in the clerk's office [*Cal. Rules of Ct., Rule 3.1302(a)*].

[7] Timely or Late Filed Papers

A paper submitted before the close of the clerk's office to the public on the day the paper is due is deemed timely filed [*Cal. Rules of Ct., Rule 3.1300*]. Nonetheless, no paper shall be rejected for filing on the ground that it was untimely submitted for filing. If the court, in its discretion, refuses to consider a late filed paper, the minutes or order must so indicate [*Cal. Rules of Ct., Rule 3.1300(d)*].

A court may designate one or more departments to remain open on a judicial holiday or at any hours of the day or night [*Code Civ. Proc. § 134(c)*]; however, these courts are still judicial holidays for purposes of computing the time required for the conduct of any proceeding or for the performance of any act [*Code Civ. Proc. § 134(d)*], and any paper lodged with the court during that time must be filed by the court on the next non-judicial holiday if the document meets the filing criteria [*Code Civ. Proc. § 134(d)*].

For additional discussion of judicial holidays, see *§ 345.17[1]*.

[8] Motion as Deemed Made on Service and Filing

Historically, motions other than written motions had to be made viva voce, that is, orally, to a judge or court [*see Williams v. Hawley (1904) 144 Cal. 97, 99-100, 77 P. 762* ; *People v. Ah Sam (1871) 41 Cal. 645, 650]* . Consequently, the notice of motion would state that on a specified date and time, at a specified place, the moving party "will move" the court for an order, that the motion "will be made" on specified grounds, and that the motion "will be based" on specified matters. At the hearing, the moving party would then orally make the motion.

Because hearings were frequently postponed, it became not uncommon for the moving party, by the time of the postponed hearing, to have lost the right to the order sought, since the time within which the motion had to be made had expired. To correct this problem, the Legislature, in 1953, enacted *Code Civ. Proc. § 1005.5*. This section provides that a motion on all the grounds stated in the written notice of motion is deemed to have been made and to be pending before the court, for all purposes, on the due service and filing of the notice of motion [*see also Sweat v. Hollister (1995) 37 Cal. App. 4th 603, 613, 43 Cal. Rptr. 2d 399* ; *Estate of Parks (1962) 206 Cal. App. 2d 623, 629, 24 Cal. Rptr. 250* ; *Gray v. Laufenberger (1961) 195 Cal. App. 2d Supp. 875, 15 Cal. Rptr. 813]* . To assure that the result of this provision would not result in depriving the parties of a hearing, the statute further states that a party will not be deprived of a hearing of the motion to which he or she is otherwise entitled [*see Code Civ. Proc. § 1005.5*]. Section 1005.5 excludes motions for new trial, the procedure for which is provided for elsewhere [*see Code Civ. Proc. §§ 659, 1005.5*; for discussion, *see* Ch. 371, *Motions After Trial*].

The enactment of *Code Civ. Proc. § 1005.5*, of course, did not convert an oral motion to a written motion or affect the contents of the notice of motion; it merely stopped the running of any time period on the motion and, incidentally, dispensed with the necessity of making the motion orally at the hearing by providing that the motion is deemed to have been made on the due service and filing of the notice of motion.

[9] Opposition to Motion

Although not expressly authorized by statute or by the California Rules of Court, practice permits counsel for the adverse party to oppose the motion by filing a memorandum in opposition to it [for memoranda in opposition to

motions, see specific titles in California Points And Authorities (Matthew Bender)]. More importantly,however, failure to oppose a motion results in a waiver on appeal of any objection to the resulting order [*see Bell v. American Title Ins. Co. (1991) 226 Cal. App. 3d 1589, 1602, 277 Cal. Rptr. 583* (party neither filed opposition nor objected at hearing)].

Moreover, unless prohibited with respect to a specific motion, for example, a nonstatutory motion for judgment on the pleadings or a statutory motion to strike [*see Code Civ. Proc. §§ 435-437*], counsel may also file counter affidavits and counter declarations [*see Code Civ. Proc. §§ 2002(1), 2003, 2009, 2015.5*] in opposition to the motion.

All papers opposing a noticed motion must be filed with the court and a copy served on each party at least nine court days before the hearing [*Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(a)*]. Although *Code Civ. Proc. § 1005 (b), (c)* expressly provides that *Code Civ. Proc. § 1013* does not apply to papers governed by section 1005, it does not exclude application of *Code Civ. Proc. § 1010.6(a)(6)*, which would give the opposing party a two court day extension if the moving papers were served electronically under *Code Civ. Proc. § 1010.6*.

[10] Reply Papers

All reply papers must be filed with the court and a copy served at least five court days before the hearing [*Code Civ. Proc. § 1005 (b), (c)*; *Cal. Rules of Ct., Rule 3.1300(a)*]. Although *Code Civ. Proc. § 1005(b)* expressly provides that *Code Civ. Proc. § 1013* does not apply to papers governed by section 1005, it does not exclude application of *Code Civ. Proc. § 1010.6(a)(6)*, which would give the replying party a two court day extension if the opposition papers were served electronically under *Code Civ. Proc. § 1010.6*.

Reply papers on specific motions may, however, be subject to a different filing period [*see, e.g., Cal. Rules of Ct., Rule 3.1342(c)* (15-day period to file response to opposition to motion for discretionary dismissal under *Code Civ. Proc. § 583.410 et seq.*); *see also Bergman v. Rifkind & Sterling, Inc. (1991) 227 Cal. App. 3d 1380, 1384, 1386-1387, 278 Cal. Rptr. 583* (distinguishing between reply to opposition and document that merely provided procedural update)].

[11] Decision Without Hearing

The court may determine a motion without permitting oral argument [*Sweat v. Hollister (1995) 37 Cal. App. 4th 603, 613, 43 Cal. Rptr. 2d 399* (disapproved on another point in *Santisas v. Goodin (1998) 17 Cal. 4th 599, 609 n.5, 71 Cal. Rptr. 2d 830, 951 P.2d 399*); *but see Mediterranean Construction Co. v. State Farm Fire & Casualty Co. (1998) 66 Cal. App. 4th 257, 260, 262, 265-266, 77 Cal. Rptr. 2d 781* (construing "hearing" in summary judgment statute (*Code Civ. Proc. 437c*) to require opportunity for oral argument where litigants may address judge who will rule on motion; hearing on summary judgment involves contemporaneous presence, whether in person or electronically, of parties and judge; characterizing language in *Sweat* as dicta and refusing to follow it)]. Thus, a telephonic ruling may be the final ruling if the court so intends [*see Sweat v. Hollister (1995) 37 Cal. App. 4th 603, 614, 43 Cal. Rptr. 2d 399* (court's telephonic ruling granting summary judgment was intended to be final, so plaintiff could not request oral argument and then voluntarily dismiss prior to the hearing; right to dismiss was cut off by final ruling on the motion even though the court retained power to amend that ruling); *but see Mediterranean Construction Co. v. State Farm Fire & Casualty Co. (1998) 66 Cal. App. 4th 257, 260, 262, 265-266, 77 Cal. Rptr. 2d 781]* .

For discussion of tentative rulings, see [14], *below*.

[12] Scheduling Hearing

The clerk is required to post a general schedule showing the days and departments for holding each type of law and motion hearing [*Cal. Rules of Ct., Rule 3.1304(a)*]. If a matter will not be heard on the date scheduled, the moving party must immediately so notify the court [*Cal. Rules of Ct., Rule 3.1304(b)*].

[13] Notice of Nonappearance

A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless the court orders otherwise [*Cal. Rules of Ct., Rule 3.1304(c)*]. The court must rule on the motion as if the party had appeared [*Cal. Rules of Ct., Rule 3.1304(c)*].

[14] Tentative Rulings in Law and Motion Matters

A court that offers a tentative ruling procedure must follow one of two procedures [*Cal. Rules of Ct., Rule 3.1308(a)*].

The first procedure [*Cal. Rules of Ct., Rule 3.1308(a)(1)*], requires the court to make its tentative ruling available by telephone, and, at the court's option, by any other method the court designates, by no later than 3:00 p.m. on the court day before the scheduled hearing. If the court desires oral argument, its tentative ruling must so direct. The ruling also may note any issues on which the court wishes the parties to provide further argument. Under this first procedure, if the court has not directed argument, then oral argument is permitted only if a party notifies all other parties and the court of its intention to appear by 4:00 p.m. on the court day before the hearing. This notice must be given by telephone or in person. The court shall accept telephone notice, and also has discretion to designate alternative methods by which a party intending to appear may give notice to the court. Under this first tentative ruling procedure, the tentative ruling becomes the court's ruling if the court has not directed oral argument and notice of intent to appear has not been given [*Cal. Rules of Ct., Rule 3.1308(a)(1)*].

Under the second tentative ruling procedure [*Cal. Rules of Ct., Rule 3.1308(a)(2)*], the court makes its tentative ruling available by telephone, and, at the court's option, by any other method the court designates, by a specified time before the hearing. The tentative ruling may note any issues on which the court wishes the parties to provide further argument at the hearing. Unlike the first procedure, this alternative procedure does not require the parties to give notice of intent to appear, and the tentative ruling does not automatically become the court's ruling if no such notice is given. The tentative ruling, or such other ruling as the court may render, will not become the court's final ruling until the hearing [*Cal. Rules of Ct., Rule 3.1308(a)(2)*]. In addition, this procedure allows the court to establish the time at which a tentative ruling will bemade available rather than requiring the ruling to be made available by 3:00 p.m. the court day before the scheduled hearing.

Other than following one of these two tentative ruling procedures, courts shall not issue tentative rulings except (1) by posting a calendar note containing tentative rulings on the hearing day, or (2) by announcing the tentative ruling at the time of oral argument [*Cal. Rules of Ct., Rule 3.1308(b)*].

A court that follows one of the procedures prescribed in Rule 3.1308(a) must so state in its local rules. The local rule must specify the telephone number for obtaining tentative rulings, as well as the time by which rulings will be available [*Cal. Rules of Ct., Rule 3.1308(c)*].

If a court, or a branch of a court, adopts a tentative ruling procedure, then that procedure must be used by all judges in the court or branch who issue tentative rulings [*Cal. Rules of Ct., Rule 3.1308(d)*].

Rule 1308 does not require any judge to issue tentative rulings [*Cal. Rules of Ct., Rule 3.1308(e)*].

[15] Failure of Counsel to Appear at Hearing

If a party fails to appear at the law and motion hearing without having given a notice of nonappearance as required under *Cal. Rules of Ct., Rule 3.1304(c)*, the court may take the matter off calendar, to be reset only on motion, or the court may rule on the matter [*Cal. Rules of Ct., Rule 3.1304(d)*].

[16] Telephone Appearance by Counsel

[a] General Civil Cases

Effective January 1, 2008, the Legislature added section 367.5 to the Code of Civil Procedure in order to promote uniformity in the procedures and practices relating to telephone appearances. In all general civil cases, as defined in *California Rules of Court, Rule 1.6(4)*, a party that has provided notice may appear by telephone at the following conferences, hearings, and proceedings:

(1) A case management conferences, provided the party has made a good faith effort to meet and confer before the conference as required by law and has timely served and filed a case management statement;

(2) A trial setting conference;

(3) A hearing on law and motion, except motions in limine;

(4) A hearing on a discovery motion;

(5) A conference to review the status of an arbitration or mediation;

(6) A hearing to review the dismissal of an action;

(7) Any other hearing, conference, or proceeding if the court determines that a telephone appearance is appropriate

[*Code Civ. Proc. § 367.5(b)*; *see also Cal. Rules of Ct., Rule 3.670(c)*, which applies to unlawful detainer and probate proceedings as well as general civil cases].

If, at any time during a hearing, conference, or proceeding conducted by telephone, the court determines that a personal appearance is necessary, the court may continue the matter and require a personal appearance [*Cal. Rules of Ct., Rule 3.670(f)*].

[b] Exceptions at Court's Discretion

The court may require a party to appear in person at a hearing, conference or proceeding listed above if the court determines on a hearing-by-hearing basis that a personal appearance would materially assist in the determination of the proceedings or in the effective management or resolution of the particular case [*Code Civ. Proc. § 367.5(c)*; see also *Cal. Rules of Ct., Rule 3.670(e)(2)*].

[c] Required Personal Appearances

A personal appearance is required for hearings, conferences, and proceedings not listed in [a], above, including the following:

(1) Trials and hearings at which witnesses are expected to testify;

(2) Hearings on temporary restraining orders;

(3) Settlement conferences;

(4) Trial management conferences;

(5) Hearings on motions in limine;

(6) Hearings on petitions to confirm the sale of property under the Probate Code

[*Cal. Rules of Ct., Rule 3.670(d)*]. The court may permit a party to appear by telephone at a proceeding listed above if the court determines that a telephone appearance is appropriate [*Cal. Rules of Ct., Rule 3.670(e)(3)*].

A personal appearance is also required for applicants seeking an ex parte order, except when the applicant is seeking an order for permission to file a memorandum in excess of the applicable page limits, for an extension of time to serve pleadings, to set hearing dates on alternative writs and orders to show cause, or by stipulation of the parties [*Cal. Rules of Ct., Rule 3.670(d)(7)*]. A personal appearance is also required for persons ordered to appear to show cause why sanctions should not be imposed for violation of a court order or rule and persons ordered to appear in an order or citation issued under the Probate Code [*Cal. Rules of Ct., Rule 3.670(d)(8), (9)*].

[d] Service Provider and Fees for Conference Call

A court may provide teleconferencing for court appearances by entering into a contract with a private vendor. The contract may provide that the vendor may charge the party appearing by telephone a reasonable fee, specified in the contract, for its services [*Cal. Rules of Ct., Rule 3.670(d)*]. A court may designate by local rule a particular conference call provider that must be used for telephone appearances [*Cal. Rules of Ct., Rule 3.670(l)*].

[e] Audibility

The court must ensure that the statements of participants are audible to all other participants and the court staff and that the statements made by a participant areidentified as being made by that participant [*Cal. Rules of Ct., Rule 3.670(j)*].

[f] Recording of Proceedings

All proceedings involving telephone appearances must be reported to the same extent and in the same manner as if the participants had appeared in person [*Cal. Rules of Ct., Rule 3.670(k)*].

[g] Local Procedure

Each court is required to publish notice providing parties with the particular information necessary for them to appear by telephone at conferences and proceedings in that court under Rule 3.670 [*Cal. Rules of Ct., Rule 3.670(m)*].

[h] Notice of Telephone Appearance

A party choosing to appear by telephone at a hearing, conference, or proceeding must either [*Cal. Rules of Ct., Rule 3.670(g)(1)(A), (B)*]:

- Place the phrase "Telephone Appearance" below the title of the moving, opposing, or reply papers;

or

- At least three court days before the appearance, notify the court and all other parties of the party's intent to appear by telephone. If the notice is oral, it must be given either in person or by telephone. If the notice is in writing, it must be given by filing a "Notice of Intent to Appear by Telephone" with the court at least three court days before the appearance and by serving the notice at the same time on all other parties by personal delivery, fax transmission, express mail, or other means reasonably calculated to ensure delivery to the parties no later than the close of the next business day.

If after receiving notice from another party as provided above a party that has not given notice also decides to appear by

telephone, the party may do so by notifying the court and all other parties that have appeared in the action, no later than noon on the court day before the appearance, of its intent to appear by telephone [*Cal. Rules of Ct., Rule 3.670(g)(2)*].

The court, on a showing of good cause, may permit a party to appear by telephone at a conference, hearing, or proceeding even if the party has not given the notice required [*Cal. Rules of Ct., Rule 3.670(g)(4)*].

For a form of separate notice of intent to appear by telephone at a hearing on a motion or other matter, see *§ 372.63*. For a form that includes the alternative method of notice of telephone appearance in the caption of the first filed moving or opposing paper, see *§ 372.60*.

[i] Retraction of Notice of Telephone Appearance

If a party that has given notice that it intends to appear by telephone subsequently chooses to appear in person, the party must so notify the court and all other parties that have appeared in the action, by telephone, at least two court days before the appearance [*Cal. Rules of Ct., Rule 3.670(g)(3)*]. The court, on a showing of good cause, may permit a party to appear in person even if the party has not given the retraction of notice required [*Cal. Rules of Ct., Rule 3.670(g)(4)*].

[j] Court Order for Appearance in Person After Notice of Telephone Appearance Has Been Given

After a party has requested a telephone appearance, if the court requires the personal appearance of the party, the court must give reasonable notice to all parties before the hearing and may continue the hearing if necessary to accommodate the personal appearance. The court may direct the court clerk, a court-appointed vendor, a party, or an attorney to provide the notification. In courts using a telephonic tentative ruling system for law and motion matters, court notification that parties must appear in person may be given as part of the court's tentative ruling on a specific law and motion matter if that notification is given one court day before the hearing [*Cal. Rules of Ct., Rule 3.670(h)*].

[k] Standard of Judicial Administration

The Judicial Council has adopted a Standard of Judicial Administration for teleconferencing [*see* Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.1]. The minimum telephone equipment and optional features that the courts should provide are set out in Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.1(a), (b). The Standard recommends that each court specify, by local rule or uniform local written policy, the types of motions and hearings it considers particularly suitable for hearing by telephone appearance, as well as whether the court or the attorney initiates the telephone call for a telephone appearance, whether the court sets a specified time for a telephone appearance or a time range, and how the parties are notified, in advance of the hearing, of the time or time range of the telephone appearance [Cal. Rules of Ct., Stds. Jud. Adming Std. 3.1(d)]. In those courts using a tentative ruling recording system, the notice of telephone appearance should be part of the tentative ruling recording [Cal. Rules of Ct., Stds. Jud. Adming Std. 3.1(d)].

The standard also recommends that each court's rule or policy encourage appearance by telephone in nonevidentiary civil matters if appearance of counsel in person would not materially assist in a determination of the proceeding or in settlement of the case [Cal. Rules of Ct., Stds. Jud. Adming Std. 3.1(c)].

[17] Evidence Considered at Hearing

[a] Generally by Affidavit, Declaration, or Judicial Notice

Evidence received at a law and motion hearing must be by declaration and affidavit and by request for judicial notice without testimony or cross examination, except as allowed in the court's discretion for good cause shown [*Cal. Rules of Ct., Rule 3.1306(a)*; *see also Smith, Smith & Kring v. Superior Court (1997) 60 Cal. App. 4th 573, 578, 70 Cal. Rptr. 2d 507* (only evidence trial court should have considered is that contained in declarations filed in support of and in opposition to motion)].

Thus, the moving party is not required to attend the hearing for the purpose of testifying and allowing himself or herself to be cross examined [*McLellan v. McLellan (1972) 23 Cal. App. 3d 343, 359, 100 Cal. Rptr. 258]* . The sufficiency of the affidavit or declaration is tested by the same rules as those applicable to oral testimony. Byanalogy to *Evid. Code §§ 700* (providing that except as otherwise provided by statute, every person, irrespective of age, is qualified to be a witness)and 702 (requiring that a witness have personal knowledge of the matter to which he or she is testifying and providing that against the objection of a party, personal knowledge must be shown before the witness may testify concerning the matter), any person is qualified to make an affidavit in support of a motion, and the person's affidavit or declaration is competent evidence unless an objection is interposed on the ground that the affiant or declarant has no personal knowledge of the matters stated [*McLellan v. McLellan (1972) 23 Cal. App. 3d 343, 359-360, 100 Cal. Rptr. 258]* .

Hearsay or other incompetent evidence in an affidavit received without a proper objection or motion to strike, is, however, to be regarded as competent evidence in support of the subsequent order [*Flood v. Simpson (1975) 45 Cal. App. 3d 644, 649, 119 Cal. Rptr. 675]* .

A court must, however, disregard facts contained in an unverified statement. Matters set forth in unverified Statements of Facts and in memoranda of points and authorities are not evidence and cannot provide the basis for the granting of the motion [*Smith, Smith & Kring v. Superior Court (1997) 60 Cal. App. 4th 573, 578, 70 Cal. Rptr. 2d 507]* .

For further discussion of the form and contents of affidavits and declarations under penalty of perjury, see Ch. 15, *Affidavits, Certificates, and Declarations* .

[b] Oral Evidence

A party seeking permission to introduce oral evidence, except for oral evidence in rebuttal to oral evidence presented by the other party, must file no later than three court days before the hearing a written statement setting forth the nature and extent of the evidence proposed to be introduced and a reasonable time estimate for the hearing; and when the statement is filed less than five court days before the hearing, the filing party must serve a copy on the other parties in a manner to assure delivery to the other parties no later than two days before the hearing [*Cal. Rules of Ct., Rule 3.1306(b)*; *see § 372.62*].

[c] Restrictions on Evidence on Particular Motions

On the other hand, the trial court, while empowered to exclude oral testimony, is also vested with discretion to receive it, and there are situations in which the trial judge, in the exercise of that discretion, properly should hear testimony or permit cross examination of a declarant. A refusal by the trial court to exercise its discretion in the matter, for example, by relying on an unwritten court "policy" purportedly precluding the use of oral testimony in family law matters estimated to consume more than one day in hearing, is error, and may result in reversal of the order [*Reifler v. Superior Court (1974) 39 Cal. App. 3d 479, 485, 114 Cal. Rptr. 356]* . Also, evidence other than affidavits and declarations is admissible when an issue of fact is to be determined at the hearing on the motion [*Ascherman v. Superior Court (1967) 254 Cal. App. 2d 506, 510, 62 Cal. Rptr. 547]* .

There are, however, as already indicated, some exceptions to the rule authorizing use of affidavits on a motion. For example, in ruling on a motion to strike a pleading or matter from a pleading [*see Code Civ. Proc. § 435 et seq.*], the court is normally limited to examining the face of the challenged pleading and other matters appearing from the court's records, for example, the date of filing and rulings made on prior challenges to the pleading [*see* Ch. 375, *Motions to Strike: Pleadings*].

Also, oral testimony is not permitted on a motion for summary judgment. That motion is required to be determined on

the affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice must or may be taken submitted in support of and in opposition to the motion [*see Code Civ. Proc. § 437c(b)*; *see also* Ch. 537, *Summary Judgment*].

[d] Judicial Notice

The court is required to take judicial notice of the matters specified in *Evid. Code § 451*. It may take judicial notice of the matters specified in *Evid. Code § 452* and is required to do so if a party so requests and (1) gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable the adverse party to prepare to meet the request; and (2) furnishes the court with sufficient information to enable it to take judicial notice of the matter [*Evid. Code § 453*].

The California Rules of Court require that a request that the court at a hearing on a motion take judicial notice must be made in a separate document listing the specific items for which notice is requested [*Cal. Rules of Ct., Rule 3.1113(l)*; *but see Code Civ. Proc. § 430.70* (matter of which court is requested to take judicial notice in ruling on a demurrer to be specified in the demurrer or in the supporting points and authorities except as court may otherwise permit)].

A party requesting judicial notice of material under *Evid. Code § 452* or *453* must provide the court and each party with a copy of the material and if it is part of a file in the court in which the matter is being heard, the party must (1) specify in writing the part of the file sought to be judicially noticed, and (2) make arrangements with the clerk to have the file in the courtroom at the time of the hearing [Cal. Rules of Ct., Rule 3.1301(c); *see Cal. Rules of Ct., Rule 3.1113(l)* (requiring compliance with Rule 3.1306)].

For discussion and forms relating to judicial notice, see Ch. 321, *Judicial Notice* .

[18] Ruling on Motion and Preparation of Order

The court will normally rule on the motion at the hearing. If the court grants the motion, a formal order is normally required. Local rules in some courts require that proposed orders be lodged before the hearing [*see, e.g.,* Alameda Co. Super. Ct. Rules, Rule 5.1]. Certain motions, petitions, and applications require a proposed order to be lodged with the court when the motion, petition, or application is filed [for sample list, see *§ 372.21*]. The moving party may have prepared the formal order in advance of the hearing and, if it correctly reflects the court's ruling, both the order and copies may be handed to the courtroom clerk for the judge's signature and for conforming the copies. Otherwise, counsel will prepare the order after the hearing, secure opposing counsel's approval as to form, and submit it to the judge for his or her signature.Counsel will then have the copies conformed and serve a conformed copy on the adverse party's attorney or, if none, on the adverse party [*see Code Civ. Proc. § 1015*; for further discussion, *see § 372.24*].

Unless the parties waive notice or the court orders otherwise, the party prevailing on any motion must, within five days of the ruling, mail or deliver a proposed order to the other party for approval as conforming to the court's order. Within five days after the mailing or delivery, the other party must notify the prevailing party as to whether or not the proposed order is approved. The opposing party must state any reasons for disapproval. Failure to notify the prevailing party within the time required must be deemed an approval. *Code Civ. Proc. § 1013*, relating to service of papers by mail, does not apply to these requirements [*Cal. Rules of Ct., Rule 3.1312(a)*]. The prevailing party must, upon expiration of the five-day period provided for approval, promptly transmit the proposed order to the court together with a summary of any responses of the other parties or a statement that no responses were received [*Cal. Rules of Ct., Rule 3.1312(b)*]. If the prevailing party fails to prepare and submit a proposed order as required above, any other party may do so [*Cal. Rules of Ct., Rule 3.1312(c)*]. These requirements do not apply if the motion was unopposed and a proposed order was submitted with the moving papers, unless otherwise ordered by the court [*Cal. Rules of Ct., Rule 3.1312(d)*].

Unless the court is required by statute or case law to make a specific finding as a basis for a particular order, findings of

fact are not required. The general rule in this regard is that findings of fact are not required, and, in fact, have no place in the court's ruling on a motion [*Waller v. Weston (1899) 125 Cal. 201, 204, 57 P. 892* ; *see* *Allstate Ins. Co. v. Orlando (1968) 262 Cal. App. 2d 858, 867, 69 Cal. Rptr. 702* ; *Skouland v. Skouland (1962) 201 Cal. App. 2d 677, 679, 20 Cal. Rptr. 185]* .

If the motion is denied, a formal order is not normally prepared. Whether the motion is granted or denied, however, a minute order is made which is entered in the court's permanent minutes. Rough minutes are not official court records, but if the only minutes kept by the court are the longhand minutes prepared during the course of the day, these constitute the permanent minutes [*see* *Fortenberry v. Weber (1971) 18 Cal. App. 3d 213, 220, 95 Cal. Rptr. 834* . (California courts as not having adopted any uniform method of keeping minutes and recording entry of minute orders in their records)]

[19] Entry of Order on Motion

Orders are entered by either of two methods: (1) the court may order the clerk to enter a minute order, which when entered in the minutes is a written order of the court, or (2) the court may make a formal order, the entry of which consists of filing the signed order with the clerk [*Eldridge v. Superior Court (1989) 208 Cal. App. 3d 1350, 1354, 256 Cal. Rptr. 724]* .

[20] Notification of Court's Ruling in Matter Taken Under Submission

If the court, instead of ruling on the motion at the hearing, takes the matter under submission, the court clerk is required to give the parties notification of the ruling or order. The notification, which must specifically identify the matter ruled on, may be given by mailing the parties a copy of the ruling or order. In a case having multiple parties, the notification, or any notice of a ruling or order served by a party, must name the moving party, the party against whom relief was requested, and must specifically identify the particular motion ruled on [*Cal. Rules of Ct., Rules 1.5(b), 3.1110, 3.1103(b), 3.1109*].

[21] Effect of Clerk's Notification

Cal. Rules of Ct., Rule 3.1109 provides that the clerk's notification constitutes service of notice only if the clerk is required to give notice pursuant to *Code Civ. Proc. § 664.5* [*see* [22], *below*] and that failure of the clerk to give the notification does not extend the time provided by law for performing any act, except as provided in *Cal. Rules of Ct., Rules 8.104(a)* and *8.751(a)*, respectively (relating to notice of appeal).

Notwithstanding the foregoing rule, notification given by the court clerk, although not required by *Code Civ. Proc. § 664.5*, may constitute notice that will commence the running of certain periods. For example, notice given by the clerk of the court's order denying a motion for summary adjudication of issues begins the running of the period within which a party must petition for review by writ under *Code Civ. Proc. § 437c(m)* [*see* *Eldridge v. Superior Court (1989) 208 Cal. App. 3d 1350, 1353-1355, 256 Cal. Rptr. 724* (service by mail of file-stamped copy); *Schmidt v. Superior Court (1989) 207 Cal. App. 3d 56, 60, 254 Cal. Rptr. 827* (service by mail of minute order)].

[22] Required Notice of Ruling

In any contested action or special proceeding in which a prevailing party is represented by counsel, the party submitting an order or judgment for entry must prepare and mail a copy of the notice of entry of judgment to all parties who have appeared in the action or proceeding and file with the court the original notice of entry of judgment together with the proof of service by mail [*Code Civ. Proc. § 664.5(a)*]. This requirement does not apply to proceedings for voidable marriage, dissolution of marriage, legal separation, or to small claims actions [*Code Civ. Proc. § 664.5(a)*].

If a prevailing party is not represented by counsel in a contested action or special proceeding, the clerk of the court,

promptly upon entry of judgment, is required to mail notice of entry of judgment to all parties who have appeared in the action or special proceeding and to execute a certificate of mailing and place it in the court's file in the cause [*Code Civ. Proc. § 664.5(b)*].

For purposes of *Code Civ. Proc. § 664.5*, "judgment" includes any judgment, decree, or signed order from which an appeal lies [*Code Civ. Proc. § 664.5(c)*].

In any action or special proceeding, the court may order the clerk to mail notice of entry of any judgment or ruling, whether or not appealable [*Code Civ. Proc. § 664.5(d)*].

Although the word "judgment," as used in *Code Civ. Proc. § 664.5*, is defined in *Code Civ. Proc. § 664.5(c)*, the word "order" as used in *Code Civ. Proc. § 664.5(a)* is not. But because of its juxtaposition with the word "judgment" and the term "entry of judgment," it would appear that the order referred to is one from which an appeal lies, whether or not it is signed. This construction appears to be strengthened by *CodeCiv. Proc. § 664.5(d)*, which uses the word "ruling" instead of "order," and which refers to nonappealability, providing that on order of the court in any action or special proceeding, the clerk shall mail notice of entry of any judgment or ruling, whether or not appealable.

Whether or not the order is one of which the clerk is required to give notice under *Code Civ. Proc. § 664.5*, and whether or not it is written or appealable, counsel for the prevailing party must give notice of the court's decision or order granting or denying a motion to all other parties or their attorneys, in the manner provided in *Code Civ. Proc. § 1010 et seq.* (*see* discussion under *§ 372.24* and Ch. 518, *Service of Summons and Papers*), unless notice is waived by all parties in open court and is entered in the minutes [*Code Civ. Proc. § 1019.5(a)*; for forms of notice, *see §§ 372.66 -372.67A*].

[23] Notice of Ruling on Court's Own Motion

When motion is granted or denied on the court's own motion, the court must give notice of its order in the manner provided in *Code Civ. Proc. § 1010 et seq.* unless notice is waived by all parties in open court and is entered in the minutes [*Code Civ. Proc. § 1019.5(b)*].

[24] Electronic Judicial Signatures

If a document requires a signature by a court or a judicial officer, the document may be electronically signed in any manner permitted by law [*Cal. Rules of Ct., Rule 2.257(e)*].

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§ 372.22 Procedures on Orders to Show Cause

An order to show cause is secured on ex parte application. The procedure to be followed for securing its issuance is the same as for securing an order on ex parte application [*see* discussion under *§ 372.19*]. The subsequent hearing on the order to show cause is conducted in substantially the same way as a hearing on a noticed motion and the court is vested with power to admit or reject oral testimony in its discretion [*Reifler v. Superior Court (1974) 39 Cal. App. 3d 479, 485, 114 Cal. Rptr. 356* ; *see discussion under § 372.21[17]* and *[18]*].

An order to show cause re contempt, however, is of a different character. *Code Civ. Proc. § 1217* specifically provides that in matters of indirect contempt, the court may examine witnesses for and against the alleged contemner [*Reifler v. Superior Court (1974) 39 Cal. App. 3d 479, 484-485, 114 Cal. Rptr. 356]* . For procedures relating to contempt proceedings, see Ch. 135, *Contempt* .

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§ 372.23 Inability of Judge to Hear Parties

When a notice of motion is given, or an order to show cause is made returnable before a judge out of court, and at the time fixed for the motion, or the return day of the order, the judge is unable to hear the parties, the matter may be transferred by his or her order to some other judge before whom it might originally have been brought [*Code Civ. Proc. § 1006*].

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§ 372.24 Service of Papers

[1] On Adverse Party or Attorney

Notices and other papers may be served on the party or attorney in the manner prescribed in *Code Civ. Proc. §§ 1010-1020* when not otherwise provided by the Code of Civil Procedure [*Code Civ. Proc. § 1010*].

If the party to be served resides outside California and has no attorney in the action or proceeding, service may be made on the court clerk for the party. But in all cases where a party has an attorney in the action or proceeding, notices and papers must be served on the attorney instead of on the party. If the party's sole attorney is removed or suspended from practice, the party has no attorney within the meaning of the foregoing provisions. If the party's sole attorney has no known office in this state, notices and papers may be served by leaving a copy of them with the court clerk unless the attorney has filed in the cause an address at which notices and papers may be served on him or her, in which event they may be served at that address [*Code Civ. Proc. § 1015*].

[2] Exception in Case of Nonappearing or Defaulting Party

A notice of motion need not be served on any party whose default has been duly entered or who has not appeared in the action or proceeding [*Code Civ. Proc. § 1010*]. Common acts constituting an appearance are enumerated in *Code Civ. Proc. § 1014*, which also provides that where a defendant has not appeared, service of notice or papers need not be made on him or her.

[3] Manners of Service

The manners in which papers may be served are set forth in *Code Civ. Proc. §§ 1011-1013, 1015, 1017, 1020*, and proof of service by mail is covered by *Code Civ. Proc. § 1013a*. For further discussion of service of papers, time requirements, a procedural guide, and forms for use in making proof of service, see Ch. 518, *Service of Summons and Papers* . For discussion of modifying time requirements for service of papers, see Ch. 524, *Shortening and Extension of Time* .

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§ 372.25 Sanctions Relating to Motions and Orders

[1] Frivolous Motions, Harassment, and Delaying Tactics

In actions commenced after January 1, 1995 sanctions for frivolous motions, harassment, and delaying tactics are governed by *Code Civ. Proc. § 128.7* [*see Code Civ. Proc. § 128.7(b), (i), (j)*]. *Section 128.7* requires the attorney of record, if any, to sign every written notice of motion or other similar paper [*Code Civ. Proc. § 128.7(a)*]. Presenting the paper to the court acts as a certification that the paper is not presented for an improper purpose and that it is not frivolous [*Code Civ. Proc. § 128.7(b)*]. Violation of this provision may be the basis of sanctions [*Code Civ. Proc. § 128.7(c)*]. For detailed discussion of the grounds and procedure for imposing sanctions, and what sanctions may be imposed, see Ch. 510, *Sanctions* .

In actions commenced prior to 1995, *Code Civ. Proc. § 128.5* authorizes the court to order a party, his or her attorney, or both, to pay any reasonable expenses, includingattorney's fees, that are incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay [*Code Civ. Proc. § 128.5(a)*]. "Actions or tactics" expressly include the making or opposing of motions [*see Code Civ. Proc. § 128.5(b)(1)*]. The imposition of expenses under *Code Civ. Proc. § 128.5* is subject to notice and other procedural requirements [*see Code Civ. Proc. § 128.5(c)*], and is in addition to any other liability for the same acts or omissions [*see Code Civ. Proc. § 128.5(e)*]. For further discussion of Section 128.5 sanctions, see Ch. 510, *Sanctions* .

[2] For Violation of Order

A judicial officer has the power to impose reasonable money sanctions, not exceeding $1,500, for a violation of a lawful court order that is without good cause or substantial justification, either by a witness, a party, his or her attorney, or both. This power does not apply to advocacy of counsel before the court [*Code Civ. Proc. § 177.5*]. For further discussion of *Section 177.5* sanctions, see Ch. 510, *Sanctions* .

[3] In Relation to Discovery

For discussion and forms relating to the imposition of monetary and other sanctions in connection with discovery motions and orders under the Civil Discovery Act [*Code Civ. Proc. § 2016 et seq.* (*Code Civ. Proc. § 2016.010 et seq.*

operative July 1, 2005)] see Ch. 192, *Discovery: Sanctions for Discovery Abuse* .

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[Reserved]

§§ 372.26[Reserved]

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§ 372.40 Related Matthew Bender Publications

For memoranda of points and authorities in support of and in opposition to the various motions, see specific titles in California Points And Authorities and the *General Index* to that publication

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§ 372.41 State Statutes

[1] Appearance and Default

Service of notice on party whose default has been entered or who has not appeared in action or proceeding as not required. *Code Civ. Proc. §§ 1010, 1014*

Right of defendant after appearance, or defendant's attorney, to receive notice of all subsequent proceedings of which notice is required to be given. *Code Civ. Proc. § 1014*

[2] Ex Parte Motions

Power of judges of Supreme Court and courts of appeal to grant certain orders on ex parte application at chambers. *Code Civ. Proc. § 165*

Power of superior court judges to grant certain orders on ex parte application at chambers. *Code Civ. Proc. § 166(a)(1)*

Power of court commissioners to hear and determine ex parte motions. *Code Civ. Proc. § 259(a)*; *Gov. Code § 72190*

[3] Motions

Power of court at chambers to hear and determine motions made pursuant to *Code Civ. Proc. § 657* (for new trial) or 663 (to vacate judgment) and uncontested motions. *Code Civ. Proc. § 166(a)(2)*

Motion in civil action defined. *Code Civ. Proc. § 1003*

Court in which motion is to be made. *Code Civ. Proc. § 1004*

Motions for which notice must be given as prescribed in *Code Civ. Proc. § 1005(b)*. *Code Civ. Proc. § 1005(a)*

Time required for notice of motion; extensions of time when service is by mail, facsimile transmission, or overnight delivery; filing opposition. *Code Civ. Proc. § 1005(b)*

Supporting papers. *Code Civ. Proc. §§ 1005(b), 1010*

Extension of time in case of electronic service. *Code Civ. Proc. § 1010.6(a)(6)*

Motion as deemed made on serving and filing notice. *Code Civ. Proc. § 1005.5*

Transfer to another judge of hearing of motion or order to show cause. *Code Civ. Proc. § 1006*

Requisites of notice of motion. *Code Civ. Proc. § 1010*

Motion, in special proceeding of civil nature, defined. *Code Civ. Proc. § 1064*

[4] Orders

[a] Amendment, Correction, and Setting Aside

Power of court to amend its orders to make them conform to law and justice. *Code Civ.Proc. § 128(a)(8)*

Relief from order taken through mistake, inadvertence, surprise, or excusable neglect. *Code Civ. Proc. § 473(b)*

Power of court to correct clerical mistakes in orders as entered. *Code Civ. Proc. § 473(d)*

Power of court on motion of party to set aside void order. *Code Civ. Proc. § 473(d)*

[b] Definitions

Order in civil action defined. *Code Civ. Proc. § 1003*

Order in special proceeding of civil nature defined. *Code Civ. Proc. § 1064*

[c] Exceptions to Orders

Orders deemed excepted to. *Code Civ. Proc. § 647*

[d] Judgment Roll

Orders included in judgment roll. *Code Civ. Proc. § 670*

[e] Notice of Order

Prevailing party in motion proceeding as required to give notice of court's decision or order unless otherwise ordered. *Code Civ. Proc. § 1019.5(a)*

[f] Obedience and Disobedience

Willful disobedience or violation by attorney of court order as cause for disbarment or suspension. *Bus. & Prof. Code § 6103*

Power of court to compel obedience to its orders. *Code Civ. Proc. § 128(a)(4)*

Judicial officer as authorized, on proper notice, to impose monetary sanction, payable to the court for violation of lawful court order. *Code Civ. Proc. § 177.5*

Disobedience of lawful court order as contempt of court. *Code Civ. Proc. § 1209(a)(5)*

Willful disobedience of order lawfully issued by court as misdemeanor. *Penal Code § 166(a)(4)*

Willful resistance to lawful court order as misdemeanor. *Penal Code § 166(a)(5)*

[g] Probate Proceedings

Form of probate orders. *Prob. Code § 1047*

[5] Local Court Rules

Superior court judges empowered to adopt local court rules to expedite and facilitate business of court. *Code Civ. Proc. § 575.1*

Sanctions for failure to comply with local rules promulgated pursuant to *Code Civ. Proc. § 575.1*. *Code Civ. Proc. § 575.2*

[6] Service of Notices and Orders

Extension of time when service is by mail, facsimile transmission, or overnight delivery. *Code Civ. Proc. § 1005(b)*

Service required. *Code Civ. Proc. § 1010*

Fax filing and service. *Code Civ. Proc. § 1010.5*

Electronic filing and service; extension of time. *Code Civ. Proc. § 1010.6*

Method and place of service on attorney or party. *Code Civ. Proc. § 1011*

Service by mail. *Code Civ. Proc. § 1012*

Method of service by mail. *Code Civ. Proc. § 1013*

Proof of service by mail. *Code Civ. Proc. § 1013a*

Service when party resides out of state. *Code Civ. Proc. § 1015*

Service of papers by telegraph. *Code Civ. Proc. § 1017*

Service by registered mail and exceptions. *Code Civ. Proc. § 1020*

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§ 372.42 California Rules of Court

[1] Civil Law and Motion Rules

[a] Applicability

Civil law and motion rules applicable in all trial courts. *Cal. Rules of Ct., Rule 2.20*

"Law and motion" defined. *Cal. Rules of Ct., Rule 3.1103(a)*

Application of *Cal. Rules of Ct., Rules 2.20* (order extending time) and 1.10 (holidays, extensions of time) to proceedings under civil law and motion rules. *Cal. Rules of Ct., Rule 3.1103(b)*

Preemption of local rules. *Cal. Rules of Ct., Rules 3.20*

[b] General Provisions

Notice of determination of submitted matters. *Cal. Rules of Ct., Rule 3.1109*

General format of papers. *Cal. Rules of Ct., Rule 3.1110*

General filing requirements for motions and demurrers. *Cal. Rules of Ct., Rule 3.1112*

Memoranda of points and authorities. *Cal. Rules of Ct., Rules 3.1113, 3.1114*

Caption of declarations and affidavits. *Cal. Rules of Ct., Rule 3.1115(a)*

Time for filing papers. *Cal. Rules of Ct., Rule 3.1300*

Application for order shortening time. *Cal. Rules of Ct., Rule 3.1300(b)*

Place and manner of filing. *Cal. Rules of Ct., Rule 3.1302*

Time of hearing. *Cal. Rules of Ct., Rule 3.1304*

Evidence at hearing. *Cal. Rules of Ct., Rule 3.1306*

Ex parte applications and orders. *Cal. Rules of Ct., Rules 3.1200-3.1207*

[c] Particular Motions and Proceedings

Change of venue. *Cal. Rules of Ct., Rule 3.1326*

Amended pleadings and amendments to pleadings. *Cal. Rules of Ct., Rule 3.1326*

Motions to strike. *Cal. Rules of Ct., Rule 3.1322*

Discovery and discovery motions. *Cal. Rules of Ct., Rules 3.1000-3.1030*

Motions for summary judgment or summary adjudication. *Cal. Rules of Ct., Rules 3.1350-3.1354*

Receivers. *Cal. Rules of Ct., Rules 3.1175-3.1184*

Injunctions. *Cal. Rules of Ct., Rules 3.1150-3.1152*

Consolidation. Cal. Rules of Ct., Rules 3.3350

Motion to grant lien on cause of action. *Cal. Rules of Ct., Rule 3.1360*

Arbitration. *Cal. Rules of Ct., Rule 3.1330*

Dismissal for failure to prosecute. *Cal. Rules of Ct., Rules 3.1342*

Continuance of civil cases set for trial. *Cal. Rules of Ct., Rule 3.1332(b)*

Advance or reset cases for trial. *Cal. Rules of Ct., Rule 3.1335*

Petition for approval of the compromise of a claim of a minor or incompetent person; order for deposit of funds; and petition for withdrawal. *Cal. Rules of Ct., Rule 3.1384*

Bonds and undertakings. *Cal. Rules of Ct., Rule 3.1130*

Service and filing of notice of entry of dismissal. *Cal. Rules of Ct., Rule 3.1390*

Service and filing of notice of change of address of party or attorney. *Cal. Rules of Ct., Rule 2.200*

[2] Superior Courts

Requirement that notices of motion for new trial be supported by memorandum of points and authorities. *Cal. Rules of Ct., Rule 3.1600*

Contents of notice of motion to tax costs. *Cal. Rules of Ct., Rule 3.1700*

Applications for an order extending time. *Cal. Rules of Ct., Rule 2.20*

Hearing of motion to vacate judgment pursuant to *Code Civ. Proc. § 663. Cal. Rules of Ct., Rule 3.1602*

[3] Appellate Departments

Applications on routine matters. *Cal. Rules of Ct., Rule 8.766*

Applications for orders extending or shortening time. *Cal. Rules of Ct., Rule 8.767(b)-(d)*

[4] Supreme Court and Courts of Appeal

Motion requirements. *Cal. Rules of Ct., Rules 8.54, 8.57*

Application. *Cal. Rules of Ct., Rule 8.50*

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§ 372.43 Local Court Rules

NOTE:
Preemption of Local Rules. Local rules relating to ex parte applications, motions, and the form and format of papers are now preempted. Exceptions to the rule of preemption include local rules adopted under the Trial Court Delay Reduction Act [*Cal. Rules of Ct., Rule 3.20*].

[1] Alameda County

Filing papers. Alameda Co. Super. Ct. Rules, Rule 5.1

[2] Contra Costa County

Law and motion. Contra Costa Co. Local Ct. Rules, Rule 7

[3] Los Angeles County

Assignments to departments. Los Angeles Co. Super. Ct. Rules, Rules 7.3, 7.4

Application for ex parte orders. Los Angeles Co. Super. Ct. Rules, Rules 9.9

Law and motion matters. Los Angeles Co. Super. Ct. Rules, Rule 9.0 et seq.

[4] Marin County

General provisions of applications for ex parte orders. Marin Co. Rules, Civil 1.8

[5] Orange County

Tentative ruling procedure. Orange Co. Super. Ct. Rules, Rule 382

[6] Riverside County

Law and motion matters. Riverside Co. Super. Ct. Rules, Rule 2.0010 et seq.

[7] Sacramento County

Law and motion matters. Sacramento Co. Super. Ct. Rules, Rule 3.00 et seq.

[8] [Reserved]

[9] San Francisco, City & County of

Law and motion matters generally. San Francisco Uniform Local Ct. Rules, Rule 8.0 et seq.

Filing papers. San Francisco Uniform Local Ct. Rules, Rule 2.8

[10] San Mateo County

Law and motion matters generally. San Mateo Co. Super Ct. Rules, 3.1 et seq.

[11] Santa Barbara County

Telephone appearance. Santa Barbara Co. Super. Ct. Rules, Rule 1005

Ex parte orders. Santa Barbara Co. Super. Ct. Rules, Rule 1009

Law and motion calendaring. Santa Barbara Co. Super. Ct. Rules, Rule 1301

[12] Ventura County

Telephone appearance. Ventura Co. Super. Ct. Rules, Rule 7.0 et seq.

Law and motion calendar. Ventura Co. Super. Ct. Rules, Rule 8.04 et seq.

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§ 372.44 Decisions

[1] Appearance at Hearing

Code Civ. Proc. § 1005.5, providing that motion on all grounds stated in written notice thereof as deemed to have been made and to be pending before court for all purposes on due service and filing of notice of motion, but that this shall not deprive party of hearing of motion to which he or she is otherwise entitled, as modernizing procedure by abolishing absolute requirement of appearance in court but as protecting right of either party to appear and be heard. *Ensher, Alexander & Barsoom v. Ensher (1964) 225 Cal. App. 2d 318, 324-325, 37 Cal. Rptr. 327*

[2] Local Court Rules

Sanctions may be imposed for violation of local rules. *Bergman v. Rifkind & Sterling, Inc. (1991) 227 Cal. App. 3d 1380, 1386, 278 Cal. Rptr. 583* (dicta; case imposed no sanction)

Local court rule that is inconsistent with statute is unenforceable and void. *Wells Fargo Bank v. Superior Court (1988) 206 Cal. App. 3d 918, 922-923, 254 Cal. Rptr. 68* (holding local rule void due to conflict with *Code Civ. Proc. § 437c*, relating to motions for summary judgments, in that it required increased notice periods for certain motions)

Local court rule requiring noticed motion when statute and Judicial Council rule authorized ex parte motion conflicts with statute and Judicial Council rule and is void. *Lang v. Superior Court (1984) 153 Cal. App. 3d 510, 513-516, 200 Cal. Rptr. 526*

[3] Notice as Process

Notice as "process" when it is given by authority of law for purpose of acquiring jurisdiction over defendant. *Frey & Horgan Corp. v. Superior Court (1936) 5 Cal. 2d 401, 404, 55 P.2d 203*

[4] Notice Generally

When statute prescribes certain kind of notice, court is not justified in saying that some other kind of notice would be equally effective. *Smith v. Board of Supervisors (1989) 216 Cal. App. 3d 862, 876, 265 Cal. Rptr. 466*

[5] Notice of Motion

General rule as being that notice of motion must be given whenever order sought may affect rights of adverse party. *McDonald v. Severy (1936) 6 Cal. 2d 629, 631, 59 P.2d 98* ; *Bohn v. Bohn (1913) 164 Cal. 532, 536, 129 P. 981* ; *People ex rel. Dept. Public Wks. v. Loop (1958) 161 Cal. App. 2d 466, 474, 326 P.2d 902* ; *Caledonian Ins. Co. v. Superior Court (1956) 140 Cal. App. 2d 458, 461, 295 P.2d 49*

[6] Orders

[a] Appealability of Order

Appealability of void orders. *Ivory v. Superior Court (1938) 12 Cal. 2d 455, 460-461, 85 P.2d 894*

Legal effect of order as determinative of appealability. *Nevada Constructors, Inc. v. Mariposa Pub. Utility Dist. (1952) 114 Cal. App. 2d 816, 818, 251 P.2d 53*

[b] Construction of Order

Resort to notice of motion in construing order. *Western Greyhound Lines v. Superior Court (1958) 165 Cal. App. 2d 216, 219, 331 P.2d 793*

Effect of order as determinative of its character. *Sager v. O'Connell (1951) 107 Cal. App. 2d 391, 394, 237 P.2d 59*

[c] Entry and Effective Date of Order

When order becomes effective. *Jablon v. Henneberger (1949) 33 Cal. 2d 773, 775-776, 205 P.2d 1* ; *Miller v. Stein (1956) 145 Cal. App. 2d 381, 383-384, 302 P.2d 403*

Essential elements for, and steps taken in, entry of order in court's permanent minutes. *Desherow v. Rhodes (1969) 1 Cal. App. 3d 733, 741, 82 Cal. Rptr. 138* (disapproved on another point in *Hollister Convalescent Hosp., Inc. v. Rico (1975) 15 Cal. 3d 660, 670-671, 125 Cal. Rptr. 757, 542 P.2d 1349*)

[d] Form and Content of Order

Form and requisites of orders. *Waller v. Weston (1899) 125 Cal. 201, 204, 57 P. 892* ; *Cox v. Tyrone Power Enterprises (1942) 49 Cal. App. 2d 383, 389, 121 P.2d 829* ; *Application of Gilreath (1959) 167 Cal. App. 2d 655, 656-657, 335 P.2d 203*

[e] Nunc Pro Tunc Orders

Function of nunc pro tunc is not to make order now for then, but to enter now for then order previously made. *Siegal v. Superior Court (1968) 68 Cal. 2d 97, 101, 65 Cal. Rptr. 311, 436 P.2d 311*

Perfection of appeal does not deprive court of its inherent power to remedy clerical error by entering omitted order nunc pro tunc. *Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners (1997) 52 Cal. App. 4th 867, 883-884, 60 Cal. Rptr. 2d 830*

Office of nunc pro tunc order is to cause record to show something done which was actually done but which by misprision or neglect was not at time entered in record and is not for purpose of declaring that something was done which was not done. *City of Los Angeles v. Superior Court (1968) 264 Cal. App. 2d 766, 771, 70 Cal. Rptr. 826*

Order directing clerk to enter defendant's default was proper, but its nunc pro tunc feature antedating order by eight months was invalid and ineffective to prevent defendant's motion for relief under *Code Civ. Proc. § 473*, relating to relief for mistake, inadvertence, surprise, or excusable neglect. *Jonson v. Weinstein (1967) 249 Cal. App. 2d 954, 959, 58 Cal. Rptr. 32*

[f] Vacating Order

Order as not subject to being vacated except on direct attack unless inadvertently made, incorrectly entered, or void on its face. *Thompson v. Thompson (1966) 247 Cal. App. 2d 339, 342, 55 Cal. Rptr. 518*

[7] Specifying Grounds on Which Motion Is Based

Failure to specify additional ground in notice of motion was properly disregarded when notice stated motion was based on accompanying papers and record and supplemental memorandum in support of motion addressed additional ground. *Carrasco v. Craft (1985) 164 Cal. App. 3d 796, 808, 210 Cal. Rptr. 599*

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§ 372.45 Law Reviews

Chance, *Some Practical Suggestions on Defense Motions and Other Procedures Before Trial, 40 Cal. L. Rev. 192 (1952)* (use of motions in pretrial procedure to facilitate disposition of case)

Proposals for legislation: making and presentation of motions, 27 Cal. St. B.J. 192

Legislation, *The 1935 Changes in the Code of Civil Procedure, 9 S. Cal. L. Rev. 335 (1936)* (distance, service by mail, purpose of 1935 amendment)

Comment, *Interstate Recognition of Alimony Decrees, 41 Cal. L. Rev. 692 (1953)*

Note, *Practice: Appearance; Effect of a Motion to Dismiss Plaintiff's Action for Failure to Prosecute, 31 Cal. L. Rev. 342 (1943)*

Background and effect of 1959 amendment of Code Civ. Proc. § 1013a, service by mail, proof, 34 Cal. St. B.J. 657

Note, *Family Law: Appellate Contempt Jurisdiction Pending Custody Appeal: Continuing Jurisdiction of Trial Court Custody Orders Before the Appellate Court. Contempt: Requirement of Notice for Constructive Contempt: Contempt for Violation of a Statutory Stay, 42 Cal. L. Rev. 885 (1954)*

Goodman, *The Power of the Trial Judge to Change a Prior Ruling on a Motion,* 45 Cal. St. B.J. 483 (1970)

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§ 372.46 Text References

Witkin, California Procedure, vol. 2, *Jurisdiction,* § 116; vol. 6, *Proceedings Without Trial,* § 1 et seq.; vol. 7, *Judgment,* § 8 (4th ed 1997)

California Civil Procedure Before Trial, vol. 1 (Cal. C.E.B. 3d ed. 1993)

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[Reserved]

§§ 372.47[Reserved]

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§ 372.50 Noticed Motion--Moving Party

NOTE:

The following checklists are illustrative only of procedures commonly utilized and are not exhaustive. For procedures for motions seeking specific orders in particular actions or proceedings, see specific chapters in this set, such as Ch. 174, *Costs and Attorney's Fees,* Ch. 205, ***Defaults and Default Judgments,*** Ch. 212, ***Dismissal,*** and Ch. 537, ***Summary Judgment***.

[1] Facts to Be Ascertained

1. The facts which will establish the grounds of the motion and the evidence on which the motion will be based.

2. The names of the parties who have appeared in the action or proceeding [*see Code Civ. Proc. §§ 1010, 1014*] in which the motion is to be made and, if they appeared in propria persona, their addresses or, if represented by counsel, the names and addresses of their attorneys of record [*see Code Civ. Proc. § 1015*].

3. The practice or rules of the court in which the action or proceeding is pending governing motion procedure generally and specifically the manner of securing a hearing date and time, the dates and times available, and the department or room number in which the motion will be heard.

NOTE:

Procedure varies widely among courts and is usually covered by local court rule or policy. Statewide rule does, however, require that the court clerk post a general schedule showing the days and departments for holding each type of law and motion hearing [*Cal. Rules of Ct., Rule 3.1304(a)*].

[2] Preparation of Papers

1. Prepare the notice of motion [for a form, *see § 372.60*] in the following number of copies:

a. Original for filing.

b. One copy for delivery to court clerk with original where filing in duplicate is required by local court rule.

c. One copy for each other party's attorney or for the party if appearing in propria persona.

NOTE:
Many attorneys, as a matter of courtesy, will send two copies to the adverse party's attorney, one for the attorney, and one for the attorney's client.

d. One office copy.

e. One copy for client, if desired.

f. Other copies as desired.

2. Prepare the affidavit or declaration under penalty of perjury in support of the motion [for a form, *see § 372.61*] in the same number of copies as the notice [*see* Paragraph (1), *above*].

3. If oral evidence is to be introduced, prepare a written statement setting forth the nature and extent of any oral evidence proposed to be introduced and a reasonable time estimate for the hearing [for a form, *see § 372.62*].

NOTE:
At the hearing, evidence will be received only by declaration, affidavit, and request for judicial notice, without testimony or cross examination, except as allowed in the court's discretion for good cause shown [*Cal. Rules of Ct., Rule 3.1306(a)*].

The statement relating to oral evidence must be filed no later than three court days before the hearing, and if it is filed less than five court days before the hearing, counsel must serve a copy on the moving party in a manner to assure delivery to the moving party no later than two days before the hearing [*Cal. Rules of Ct., Rule 3.1306(b)*].

4. Prepare the memorandum in support of the motion [*Cal. Rules of Ct., Rules 3.1110, 3.1113*] in the same number of copies as the notice [*see* Paragraph (1), *above*]. For a skeletal form of memorandum and form, content, and style requirements, see Ch. 417, *Points and Authorities* . For memoranda supporting specific motions, see the appropriate title in California Points And Authorities (Matthew Bender).

NOTE:
A memorandum of points and authorities is not always required [*Cal. Rules of Ct., Rule 3.1114, see* *§ 327.21[5][c]*].

5. Prepare proof of service [*see Code Civ. Proc. § 1013a*; for forms of proof of service of papers, *see* Ch. 518, *Service of Summons and Papers*].

NOTE:
Proof of service by mail by counsel is made by a certificate signed by counsel [*Code Civ. Proc. § 1013a(2)*]. Proof of service by mail by a person other than counsel is made by affidavit, or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*], of the person making the service [

***Code Civ. Proc. § 1013a(1)*]**.

The code fails to specify how proof of service pursuant to *Code Civ. Proc. § 1011* is to be made, but compliance with *Code Civ. Proc. § 1013a,* or with *Code Civ. Proc. § 417.10(d)* or *417.20(d)* (written admission of party as, for example, by acknowledgment of receipt), would appear sufficient.

6. Sign the notice of motion. Although not required by statute or the California Rules of Court, counsel also normally signs the memorandum. Counsel has the person who made the declaration execute it, or, in the case of an affidavit, has the person subscribe and swear to its contents before an officer authorized to administer oaths [*Code Civ. Proc. §§ 2012, 2093*].

7. Attach an unsigned copy of the proof of service to the papers to be served or:

a. If service is to be by mail or overnight service, note the date and place of mailing or deposit with the delivery service on the papers served [*see Code Civ. Proc. § 1013(b), (d)*].

b. If service is by facsimile transmission, note the date and place of transmission and the facsimile telephone number to which transmitted on the papers served [*see Code Civ. Proc. § 1013(f)*].

8. Serve, or cause to be served, a copy of the notice of motion and supporting papers, if any [*Code Civ. Proc. § 1005(b)*; *see also Code Civ. Proc. § 1005(a)* (listing motions for which notice must be provided under *Code Civ. Proc. § 1005(b)*)], on counsel for each party who has appeared in the action or proceeding or, if a party has appeared in propria persona, on the party [*Code Civ. Proc. § 1015*], by one of the following methods [*see Code Civ. Proc. §§ 1005(b), 1010*]:

a. Delivery in person or as otherwise provided in *Code Civ. Proc. § 1011*.

NOTE:
Serve and file at least 16 court days before hearing date [*Code Civ. Proc. § 1005(b)*].

b. Mail.

NOTE:
Extends 16-day period by five calendar days if place of mailing and address are both in California; by 10 calendar days if either place of mailing or address is outside California, but in the United States; or by 20 calendar days if either place of mailing or address is outside the United States [*Code Civ. Proc. § 1005(b)*]. Service by mail is complete on the date of mailing [*Code Civ. Proc. § 1013(a)*].

c. Facsimile transmission.

NOTE:
Extends 16-day period by two calendar days [*Code Civ. Proc. § 1005(b)*].

d. Express Mail or other overnight delivery.

NOTE:
Extends 16-day period by two calendar days [*Code Civ. Proc. § 1005(b)*].

e. Electronic service.

NOTE:
Extension of 16-day period by two court days [*Code Civ. Proc. § 1010.6(a)(6)* (unclear whether notice period or period to respond is extended, or both)].

9. Prepare the certificate, affidavit, or declaration of service setting forth the exact titles of the papers served [*see Code Civ. Proc. § 1013a*; for aprocedural guide and forms for proof of service, *see* Ch. 518, *Service of Summons and Papers*], execute it or have it executed by the person who made service, or, in the case of an affidavit, before a person authorized by law to administer oaths, and attach the original to the original of the papers which were served.

10. Present the original notice and attached affidavit or declaration and memorandum to the clerk of the court for filing [*Code Civ. Proc. §§ 1005(b), 1010*] and request the clerk to fill in the date and time if that has not already been done by counsel and to place the motion on calendar.

NOTE:
"Serve and file" means that a document filed in a court must be accompanied by a proof of service, in a manner permitted by law, of one copy of the document on the attorney for each party separately represented and on each self-represented party [*Cal. Rules of Ct., Rule 1.21(b)*]. This procedure, however, may be varied by local court rule, and the rules of the court in which the cause is pending should be checked if counsel is unfamiliar with them. The same time limits apply to filing the moving and supporting papers as apply to serving them [*Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(a)*; *see* Paragraph (8), *above*]. Proof of service of the moving papers must be filed no later than five calendar days before the time appointed for the hearing [*Cal. Rules of Ct., Rules 1.5(b), 3.1100, 3.1300(c)*; for discussion of apparent conflict between *Cal. Rules of Ct., Rules 3.1300* and *1.21(b), see § 372.60[6][a]*. Unless otherwise provided by local court rule, all papers relating to a law and motion proceeding must be filed in the clerk's office [*Cal. Rules Ct., Rules 3.1100, 3.1300(c), 3.1302(a)*] by the close of business on the day the paper is due [*Cal. Rules of Ct., Rule 3.1300(e)*; for discussion of late papers, *see § 372.21[7]*.

The papers may be presented to the court clerk in person or by mail at the convenience of counsel. If presented personally, counsel's office copy is file-stamped at that time and if the papers are presented by mail, a request is usually included, with a self-addressed stamped envelope, to return a file-stamped copy to counsel.

11. Pay the filing fee when the papers are presented for filing.

NOTE:
The fee is $40 [*Gov. Code § 70617*; for exceptions, *see* discussion under *§ 372.18*].

12. If the motion is opposed, examine any affidavits, declarations, or memoranda filed by the opposing party and, if time permits, prepare in the same number of copies as the original and serve and file a reply memorandum of points and authorities, if permitted, with proof of service, in reply to the opposing party's memorandum. Local practice may vary, but usually a reply memorandum should be filed directly with the clerk of the law and motion department or division, rather than in the office of the court clerk, so that the court will have sufficient time to consider the memorandum prior to the hearing on the motion. For a skeletal form of memorandum and form, content, and style requirements, see Ch. 417, *Points and Authorities* .

NOTE:
Generally, reply papers must be filed and a copy served at least five court days before the hearing [*Code Civ. Proc. § 1005 (b), (c)*; *Cal. Rules of Ct., Rule 3.1300(a)*; *but see* *Code Civ. Proc. § 1010.6(a)(6)* (two court day extension if opposition papers were electronically served)].

13. If counsel does not intend to appear at the hearing, draft the notice of nonappearance in the same number of copies as the notice of motion and serve and file it, if this has not yet been done.

NOTE:

A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless the court orders otherwise [*Cal. Rules of Ct., Rule 3.1304(c)*]. The court must rule on the motion as if the party had appeared [*Cal. Rules of Ct., Rule 3.1304(c)*].

[3] Hearing and Order

1. Ascertain the court's tentative ruling, if available, prior to the hearing.

NOTE:

In many courts, the court's tentative ruling may be obtained by counsel prior to the time scheduled for the hearing. [*see* *Cal. Rules of Ct., Rule 3.1308*; repealed].

2. If the matter is pending in a court that does not advise counsel of tentative rulings before the hearing, and the motion is unopposed, prepare the order granting the motion [*see* Paragraph (5), *below*] and present it to the court at the time of hearing for the judge's signature and for filing.

NOTE:

Counsel may also consider preparing the order in advance of the hearing, if the desired order will contain particular or detailed wording, so that counsel can recommend to the court the exact wording of the order if the court grants the motion. This procedure may avoid later disputes with opposing counsel as to the wording of the court order which may require an additional hearing to resolve.

If the order is prepared in advance and if the court grants the motion and adopts the recommended wording, the order may be presented to the court for signing and filing at the hearing.

3. Unless counsel has given notice of nonappearance [*see* [2], Paragraph (13), *above*], counsel for the moving party attends the hearing, briefly advises the court of the order requested, and presents oral argument in support of the motion. Counsel for the moving party may also present argument in opposition to any affidavit or declaration or memorandum served and filed by the opposing party.

NOTE:

If a party has requested the court to take judicial notice under *Evid. Code § 452* or *453* of material that is a part of a file in the court in which the matter is being heard, the party must specify in writing the part of the file sought to be judicially noticed and make arrangements with the clerk to havethe file in the courtroom at the time of the hearing [*Cal. Rules of Ct., Rule 3.1306(c)*].

Statute provides that counsel have the option of appearing by telephone in nonevidentiary law and motion hearings and conferences and requires every court to provide for appearances of counsel in those hearings and conferences by telephone [*Code Civ. Proc. § 367.5*]. If counsel wishes to make a telephone appearance, he or she should consult the court's local rules or check with the clerk of that court to ascertain the procedure and costs. For further discussion, see *§ 372.21[16]*.

4. After argument by opposing counsel, counsel for the moving party may rebut that argument and submit the matter to the court.

5. If the motion is granted and counsel for the moving party has not already done so, he or she prepares the order granting the motion [for forms, *see §§ 372.64, 372.65*] in the same number of copies as the notice of motion [*see* [2], Paragraph (1), *above*].

NOTE:
Some courts may require counsel preparing the order to submit it to opposing counsel for approval as to form before the order is presented to the court for signature. In such case, the notation "Approved as to form" appears at the bottom of the order and under it, the date and a place for counsel's signature appear. The order is then mailed to opposing counsel with a request that he or she sign the original and return it to counsel for the moving party.

6. Present the original and copies of the order to the clerk of the court or a deputy clerk, or to the judge's courtroom clerk, depending on local practice, with the request that he or she obtain the judge's signature, conform the copies, and file the original.

7. Deliver or send a conformed copy of the order to opposing counsel. Counsel for the prevailing party must also send or deliver notice of the court's decision or order to all other parties or their attorneys [*Code Civ. Proc. § 1019.5(a)*; for a form, *see § 372.67*].

NOTE:
Local court rules or practice should be consulted to determine if additional notice may be required.

8. If order is appealable, the action or proceeding is contested, and the prevailing party is represented by counsel, prepare a notice of entry of order granting motion [*Code Civ. Proc. § 664.5*; for forms, *see §§ 372.66, 372.67A*], mail a copy to all parties who have appeared, and present the original with proof of service to the court clerk, or a deputy court clerk, for filing. For procedure for serving and filing, see [2], Paragraphs (7)-(10), *above.*

NOTE:
If the order is intended to be used subsequently as the basis for the contempt proceedings for noncompliance therewith, personal service of the order on the party may be necessary. For discussion of the requirements relating to the mailing of notice of entry of a signed appealable order under *Code Civ. Proc. § 664.5*, see *§ 372.21[22]*.

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§ 372.51 Noticed Motion--Opposing Party

[1] Preliminary Determinations

1. Examine the notice of motion to determine whether or not it has been timely given and the precise nature of the order sought.

NOTE:
For discussion of the time requirements of notices of motion, see *§ 372.21[2]* and *[3]*. For discussion of opposition procedure when motion papers are not properly served or inadequate notice of hearing is received, see *§ 372.21[1]*.

2. Examine the supporting affidavit or declaration to determine whether or not it sets forth evidentiary facts to which the affiant or declarant is competent to testify and whether or not such facts would support the order sought. Also, compare the statements made in the affidavit or declaration with other statements, if any, made by the affiant or declarant in verified pleadings or in a deposition or other document in which the statements were made on oath or under penalty of perjury, to see if there are any inconsistencies.

3. Examine the supporting memorandum to determine (1) whether or not the points made would support the order sought and (2) whether or not the authorities cited support the point made. If the answer to both is affirmative, counsel will shepardize the cases cited to determine if they are still the law and will check any statutes cited to see if they have been amended or repealed.

NOTE:
Points may be inaccurately stated or not supported by the authorities cited. Moreover, a case cited may superficially support the point in that it makes an identical or similar statement but actually holds that the statement is not applicable to the facts of that case, or that the case presents an exception to the rule. In such situation, the case is not authority for the statement made, but rather, an authority in opposition to it.

4. If counsel determines that the points stated are inaccurate or that the authorities cited do not support them, counsel should so note and include such contentions in the memorandum in opposition to the motion.

5. If the motion is well taken, counsel will determine the advisability of not opposing it or of stipulating that the motion be granted and in such case may so advise counsel for the moving party.

[2] Preparation of Papers

NOTE:
Any opposition to a motion in a case having multiple parties must specifically identify the moving party and the motion being opposed [*Cal. Rules of Ct., Rule 2.111(6)*].

1. Prepare a memorandum in opposition to the motion in the following number of copies:

a. Original for filing.

b. One copy to be filed with original if required by local court rule.

c. One copy for the moving party's attorney of record or for the moving party if appearing in propria persona.

d. One copy for the attorney of record of each other party who has appeared in the action or for the party if appearing in propria persona.

e. One office copy.

f. One copy for client, if desired.

g. Other copies as desired.

NOTE:
For a skeletal form of memorandum and form, content, and style requirements, see Ch. 417, *Points and Authorities* . For memoranda opposing specific motions, see the appropriate title in California Points And Authorities (Matthew Bender).

2. If evidence in opposition to the motion is required, prepare the affidavit (or declaration under *Code Civ. Proc. § 2015.5*), setting forth the evidence in opposition to the motion in the same number of copies as the memorandum, *above.*

3. If counsel for the opposing party wishes to introduce oral evidence, other than in rebuttal to any oral evidence presented by the moving party, prepare a written statement setting forth the nature and extent of the evidence proposed to be introduced and a reasonable time estimate for the hearing [for a form, *see § 372.62*].

NOTE:
At the hearing, evidence will only be received by declaration, affidavit, and request for judicial notice without testimony or cross examination, except as allowed in the court's discretion for good cause shown [*Cal. Rules of Ct., Rule 3.1306(a)*].

4. Sign the memorandum and have the person making the declaration and who is competent to testify as to its contents

sign it, or, in the case of an affidavit, have the person subscribe and swear to its contents before an officer authorized to administer oaths [*Code Civ. Proc. §§ 2012, 2093*].

5. Serve and file the memorandum of points and authorities and, if any, affidavit, declaration, and/or statement relating to oral evidence. On serving and filing the papers, see *§ 372.50[2]*, Paragraphs 7-10.

NOTE:

All papers opposing a noticed motion be filed with the court and a copy served on each party at least nine court days before the time appointed for the hearing [*Code Civ. Proc. § 1005 (b), (c)*; *Cal. Rules of Ct., Rule 3.1300(a)*; *but see Code Civ. Proc. § 1010.6(a)(6)* (two court day extension if moving papers were electronically served)]. The statement relating to oral evidence must be filed no later than three court days before the hearing, and if it is filed less than five court days before the hearing, counsel must serve a copy on the moving party in a manner to assure delivery to the moving party no later than two days before the hearing [*Cal. Rules of Ct., Rule 3.1306(b)*]. The latest that a paper may be filed is at the close of business of the clerk's office on the day the paper is due [*Cal. Rules of Ct., Rule 3.1300(e)*]. On the filing of late papers, see *Cal. Rules of Ct., Rule 3.1300(d)* (*discussed under § 372.21[7]*).

6. If counsel does not intend to appear at the hearing, draft the notice of nonappearance in the same number of copies as the opposition papers and serve and file it.

NOTE:

A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless the court orders otherwise [*Cal. Rules of Ct., Rule 3.1304(c)*]. The court must rule on the motion as if the party had appeared [*Cal. Rules of Ct., Rule 3.1304(c)*].

[3] Hearing and Order

1. Unless counsel has given notice of nonappearance [*see* [2], Paragraph 6, *above*], counsel for the opposing party attends the hearing and presents oral argument to the court as to why the motion should not be granted or why it should be granted in a limited or conditional manner.

NOTE:

If a party has requested the court to take judicial notice of material under *Evid. Code § 452* or *453* that is a part of a file in the court in which the matter is being heard, the party must specify in writing the part of the file sought to be judicially noticed and make arrangements with the clerk to have the file in the courtroom at the time of the hearing [*Cal. Rules of Ct., Rule 3.1306(c)*].

Every court must provide counsel the option of appearing by telephone in nonevidentiary law and motion and probate hearings and conferences [*Code Civ. Proc. § 367.5*]. Counsel should contact the clerk of the superior court in which an action is brought to ascertain whether a rule allowing telephone appearances has been adopted [*see, e.g.,* San Francisco Uniform Local Ct. Rules, Rule 8.2(A)(3)]. For discussion of requirements and standards relating to teleconferencing, see *§ 372.21[16]*.

2. If the court denies the motion and a formal written order is required by the court, prepare the order denying the motion [for forms, *see §§ 372.64, 372.65*] in the same number of copies as the memorandum [*see* [2], *above*].

NOTE:

For the procedure for obtaining the judge's signature to the order, filing it, conforming the copies, and

notifying opposing counsel of the entry of the order, see *§ 372.50[3]*, Paragraphs 6-8, *above*.

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33-372 California Forms of Pleading and Practice--Annotated § 372.52

§ 372.52 Ex Parte Motion--Moving Party

[1] Facts to Be Ascertained

NOTE:
The facts to be ascertained are the same as those required for a noticed motion. See *§ 372.50[1]*.

[2] Preparation of Papers

1. Prepare the application, including the declaration relating to notice [for a form, *see § 372.68*], in the following number of copies:

a. Original for filing

b. One copy for filing with original if required by local court rule.

c. One copy for each other party's attorney of record or for the party if appearing in propria persona.

d. One office copy.

e. One copy for client, if desired.

f. Other copies as desired.

2. Prepare the order granting the motion [for a form, *see § 372.69*] in the same number of copies for the same distribution as the ex parte motion.

NOTE:
Unless the order is required by local court rule or practice to be set forth in a separate paper, it is normally appended at the end of the ex parte motion [for a form, *see § 372.70*].

3. Prepare the memorandum in the same number of copies and for the same distribution as the ex parte motion.

4. Sign the ex parte motion. Although not required by statute or the California Rules of Court, counsel also normally will sign the memorandum, if any.

[3] Notice

Notify opposing counsel, or the opposing party if not represented by counsel, not later than 10:00 a.m. the court day before the ex parte appearance, of the time and place the ex parte motion will be presented to the court and of the order sought [*see Cal. Rules of Ct., Rule 3.1203*; for discussion, *see § 372.19[5]*].

[4] Presentation of Motion

Practice varies among the courts with respect to the judge or department to which the application must be presented; counsel should consult local court rules or practice, if counsel is unfamiliar with them. For general discussion, see *§ 372.19[4]*. In any case, appear personally unless the application is one of the following *Cal. Rules of Ct., Rule 3.1207*]:

1. Applications to file memoranda in excess of the applicable page limit.

2. Setting of hearing dates on alternative writs and orders to show cause.

3. Stipulations by the parties or other orders of the court.

4. Applications for extensions of time to serve pleadings.

[5] Filing and Service

1. If the court signs the order, the originals of the ex parte motion, any supporting papers, and the order itself will be retained for filing. Counsel should have the court or courtroom clerk, as the case may be, file-stamp the copies of the ex parte motion and conform the copies of the order by stamping the judge's name on them.

2. Counsel will serve, or cause to be served, a file-stamped copy of the ex parte motion and supporting papers, if any, and a conformed copy of the order on counsel for each party who has appeared in the action or proceeding, or on the party if he or she has appeared in propria persona. If representing the prevailing party, counsel must also give notice of the court's decision or order [for a form, *see § 372.67*] to all other parties or their attorneys [*Code Civ. Proc. § 1019.5(a)*].

NOTE:

Service may be made by mail [*see* Code Civ. Proc. §§ 1012, 1013] unless the local court rules require personal service, or the judge or commissioner in his or her order directs personal service, or the nature of the order is such as to require its prompt personal service, for example, an order shortening time for service of a notice of motion under *Code Civ. Proc. § 1005*.

[6] Proof of Service

NOTE:

The manner of making proof of service is the same as for making proof of service of a notice of motion. See *§ 372.50[2]*, Paragraph 9.

[7] Filing Proof of Service

Deliver the original of the proof of service to the court clerk for filing and have any retained copies file-stamped.

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33-372 California Forms of Pleading and Practice--Annotated § 372.53

§ 372.53 Ex Parte Motion--Opposing Party

If counsel for the opposing party, or the opposing party appearing in propria persona, has any grounds of objection to the order sought, he or she may appear at the time and place where the ex parte motion is to be presented and present the objections. As is the case with the moving party, opposing counsel should, if unfamiliar with local practice, check the rules and practice of the court in which the motion will be made to ascertain any requirements or limitations imposed on the manner in which the objections are to be made.

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33-372 California Forms of Pleading and Practice--Annotated § 372.54

§ 372.54 Written Motion Requiring Hearing--Moving Party

NOTE:
The following applies when a written motion, as opposed to a notice of motion, is used [for discussion, *see* *§ 372.16*]. For procedures for use when a notice of motion is filed pursuant to *Code Civ. Proc. § 1010*, see *§ 372.50*.

[1] Facts to Be Ascertained

NOTE:
The facts to be ascertained are the same as those required for a noticed motion. See *§ 372.50[1]*.

[2] Preparation and Filing of Motion

1. Prepare the motion [for a form, *see § 372.72*] in the following number of copies:

a. Original for filing.

b. One copy for filing with original if required by local court rule.

c. One copy for each other party's attorney of record or for the party if appearing in propria persona.

d. One office copy.

e. One copy for client, if desired.

f. Other copies as desired.

2. Sign the motion.

3. Present the original, and extra copy if required by local court rule, of the motion to the court clerk or a deputy court clerk for filing and have the clerk file-stamp the copies.

4. Pay the filing fee.

NOTE:

The fee is $40 [*Gov. Code § 70617*; for exceptions, *see* *§ 372.18*].

[3] Preparation of Notice of Hearing

Counsel will secure a hearing date from the court clerk, or deputy court clerk, or, depending on local court practice, will be notified of the hearing date by the court clerk, and will then prepare the notice of hearing [for a form, *see § 372.73*] in the same number of copies as the motion.

NOTE:

Statutes governing the particular motion or order sought may impose specific requirements. For example, *Code Civ. Proc. § 484.330*, relating to an application for a writ of attachment after a right to attach order has been issuedrequires that at least 15 days prior to the hearing on the application, a "notice of application and hearing" and a copy of the application must be served on the defendant. For the procedure to follow in applying for specified orders in probate proceedings, see *Prob. Code § 1200 et seq.*

[4] Service and Filing

1. Counsel will serve, or cause to be served, a copy of the notice of hearing, together with a file-stamped copy of the motion, on counsel for each party who has appeared in the action or proceeding, or if a party has appeared in propria persona, on the party [*Code Civ. Proc. § 1015*] by mail, facsimile transmission, or overnight delivery [*Code Civ. Proc. §§ 1012, 1013*], or by delivery in person, or as otherwise provided in *Code Civ. Proc. § 1011*. Papers served by mail, facsimile transmission, or overnight delivery should either bear a notation of the date and place of mailing or be accompanied by an unsigned copy of the affidavit, declaration [*see Code Civ. Proc. § 2015.5*], or certificate of mailing, deposit, or transmission [*see* Paragraph 2, *below*], but this requirement is directory, not mandatory [*Code Civ. Proc. § 1013(b), (d), (f), (g)*].

2. Prepare the affidavit, or declaration, or certificate of service setting forth the exact titles of the papers served [*see Code Civ. Proc. § 1013a*; for a procedural guide and forms of proof of service, *see* Ch. 518, *Service of Summons and Papers*], and execute it, or have it executed by the person who made service, or, in the case of an affidavit, before a person authorized by law to administer oaths.

3. Present the original of the notice of hearing, and a copy if required by local court rule, together with the original of the proof of service to the court clerk or a deputy court clerk for filing and have the clerk file-stamp the copies.

[5] Hearing and Order

1. Attend, briefly advise the court of the order requested, and present any evidence supporting the granting of the motion in addition to that set forth in the application by affidavit or under penalty of perjury.

2. If the motion is granted, prepare the order granting the motion in the same number of copies as the motion [*see* [2] Paragraph 1, *above*].

NOTE:

Some courts may require counsel preparing the order to submit it to opposing counsel for approval as to form before the order is presented to the court for signature. In such case, the notation "Approved as to form" appears at the bottom of the order and, under it, the date and a place for counsel's signature appear. The order is then mailed to opposing counsel with a request that he or she sign the original and return it to counsel for the moving party.

3. Present the original and copies of the order to the clerk, a deputy clerk of the court, or to the judge's courtroom clerk, depending on local practice, with the request that he or she obtain the judge's signature, conform the copies, and file the original.

4. Deliver or send a conformed copy of the order to opposing counsel with the notice set forth in Paragraph 5, *below*.

NOTE:

Local court rules or practice should be consulted to determine if additional notice may be required. For example, local court rules or practice may require that notice of the court's ruling be given by the prevailing party to all counsel of record and litigants appearing in propria persona unless otherwise ordered or unless notice is waived by all parties in open court.

5. Prepare a notice of entry of order granting the motion and serve a copy of it on opposing counsel and deliver the original with proof of service to the court clerk or a deputy clerk. For procedure for serving and filing, see [4], *above.*

NOTE:

For the requirements relating to notice of the court's decision or order under *Code Civ. Proc. § 1019.5(a)* and to mailing of notice of entry of a signed appealable order under *Code Civ. Proc. § 664.5* see discussion under *§ 372.21[22]*.

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§ 372.55 Written Motion Requiring Hearing--Opposing Party

Counsel for the opposing party should check the local court rules and practice of the court in which the motion has been filed to determine if there are any requirements imposed on the manner of presenting opposition. If there are, counsel must, of course, comply with them. If there are none, counsel will present his or her opposition to the motion at the hearing where he or she will also have the opportunity to cross examine any witnesses produced by the moving party [*see, e.g., § 372.51[3]*].

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[Reserved]

§§ 372.56[Reserved]

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PART V. FORMS

33-372 California Forms of Pleading and Practice--Annotated § 372.60

§ 372.60 Notice of Motion [Code Civ. Proc. § 1010; Cal. Rules of Ct., Rule 3.1110]

[1] FORM Notice of Motion [Code Civ. Proc. § 1010; Cal. Rules of Ct., Rule 3.1110]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR OR-
vs.	)	DER _____ [*specify order sought*] [,
_____ [*name*],	)	SUPPORTING _____ (AFFIDAVIT
Defendant.	)	*or* DECLARATION) OF _____
	)	(*name*), AND SUPPORTING MEMORANDUM]
	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

[*EITHER*]

To _____ [*identify party, e.g.,* plaintiff _____ (*name*)] and to _____ [*name*] his/her attorney of record:

[*OR*]

To each _____ [*identify party, e.g.*, plaintiff] named above, and to the attorney of record for each such party:

[*CONTINUE*]

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.*, defendant] _____ [*name*] will, and hereby does, move for an order _____ [*specify, e.g.*, dismissing the complaint on file in this action]. The motion will be made on the grounds that _____ [*specify legal grounds, e.g.*, the complaint was filed on _____ (*date*), and the action has not been brought to trial within five years from that date].

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party*]

[2] Use of Form

The form of notice of motion set out in [1], *above*, is for use in giving notice that a motion for a specified order will be made on the date and at the time set forth in the form. As an illustration, the foregoing form gives notice of a motion to dismiss an action for failure to bring it to trial within five years [*see Code Civ. Proc. §§ 583.310, 583.360(a)*; *see also* Ch. 212, *Dismissal*].

However, if the court in which the cause is pending provides a printed form for use in making a specific motion, that form must be used.

[3] Contents

[a] Caption

[i] Information Required Under Case Number

This form contains a caption complying with the requirements of *Cal. Rules of Ct., Rule 2.111*. In addition, it meets the requirements of *Cal. Rules of Ct., Rule 3.1110(b)*, which applies in all trial courts [*Cal. Rules of Ct., Rule 3.1110*].

Rule 3.1110(b) requires that the first page specify the following information immediately below the number of the case:

- The date, time, and location, if ascertainable, of any scheduled hearing and the name of the hearing

judge, if ascertainable.

- The nature or title of any attached document other than an exhibit.
- The date of filing of the action.
- The trial date, if set.

If the paper is being filed in an action pending before a referee appointed pursuant to *Code Civ. Proc. § 638* or *639*, the word "Referee:" followed by the name of the referee must be noted below the case number [*Cal. Rules of Ct., Rule 2.111(8)*].

For a discussion of the manner of designating, in the caption, the nature of the papers [*Cal. Rules of Ct., Rule 2.111(6)*], see [4], *below*.

[ii] Telephone Appearance

A party that has provided notice generally may appear by telephone at a law and motion hearing if no witnesses will be called; or if witnesses will be called, the court determines a telephone appearance is appropriate [*Code Civ. Proc. § 367.5(b)*;*Cal.Rules of Ct., Rule 3.670(c), (d), (e)(3)*]. A party who wishes to appear by telephone must notice that intention by placing the phrase "Telephone Appearance" below the title of the moving, opposing, or reply papers (as illustrated in the caption to the above form), or, at least three court days before the appearance, notify the court and all other parties of the party's intent to appear by telephone. If the notice is oral, it must be given either in person or by telephone. If the notice is in writing, it must be given by filing a "Notice of Intent to Appear by Telephone" with the court at least three court days before the hearing and by serving the notice at the same time on all other parties by personal delivery, facsimile transmission, express mail, or other means reasonably calculated to ensure delivery to the parties no later than the close of the next business day [*Cal. Rules of Ct., Rule 3.670(g)(1)(A)*, (B)]. If a party has given notice that it intends to appear by telephone subsequently chooses to appear in person, the party must so notify the court and all other parties that have appeared in the action, by telephone, at least two court days before the hearing [*Cal. Rules of Ct., Rule 3.670(g)(3)*].

Counsel should check the local rules for the court in which an action is brought to ascertain the court's rules and policies governing telephone appearances. For discussion of teleconferencing procedures, see *§ 372.21[16]*.

For an alternative form of notice of intent to appear by telephone at a hearing on a motion or other matter, that is, by a separate notice, see *§ 372.63*.

[iii] Multiple Parties

The California Rules of Court require only that any opposition in a case having multiple parties must specifically identify the moving party and the motion being opposed [*Cal. Rules of Ct., Rule 2.111(6)*].

[iv] Reclassified Cases

Cal. Rules of Ct., Rule 2.111(10) specifies that if a case is reclassified by an amended complaint, cross-complaint, amended cross-complaint, or other pleading under *Code Civ. Proc. § 403.020* or *403.030*, the caption must indicate that the action or proceeding is reclassified by this pleading. If a case is reclassified by stipulation under *Code Civ. Proc. § 403.050*, the title of the stipulation must state that the action or proceeding is reclassified by this stipulation. The caption or title must state that the case is a limited civil case reclassified as an unlimited civil case, or an unlimited civil case reclassified as a limited civil case, or other words to that effect [Cal. Rules of Ct., Rule 2.1110(10)].

[v] Additional Requirements

Local court rules have often contained additional requirements relating to the caption of papers, but the form and format of papers are governed exclusively by the California Rules of Court and to the extent local rules impose any conflicting or additional requirements regarding form or format, they should be considered null and void. Preemption extends generally to local rules relating to ex parte applications and motions as well as the form and format of papers, and is subject to several exceptions including rules adopted under the Trial Court Reduction Act [*see Cal. Rules of Ct., Rule 3.20*].

[b] Body

[i] Required Elements

A motion and notice of motion, other than for a new trial, must identify the following:

- When it will be made [*Code Civ. Proc. § 1010*].
- The grounds on which it will be made [*Code Civ. Proc. § 1010*; *Cal. Rules of Ct., Rules 3.1110(a), 3.1112(d)(3)*].
- The papers, if any, on which it is to be based [*Code Civ. Proc. § 1010*].
- The party or parties bringing the motion [*Cal. Rules of Ct., Rule 3.1112(d)(1)*].
- The names of the parties to whom it is addressed [*Cal. Rules of Ct., Rule 3.1112(d)(2)*].
- If a pleading is challenged, the specific portion challenged [*Cal. Rules of Ct., Rule 3.1112(d)(4)*].

Cal. Rules of Ct., Rule 3.1110(a) requires that a notice of motion state in the opening paragraph the nature of the order being sought and the grounds for issuance of the order. The form complies with this requirement. Any papers on which the motion is based [*see Code Civ. Proc. § 1010*] are identified in the second paragraph.

Formerly, a motion was made orally at the hearing. Technically this is no longer required, because *Code Civ. Proc. § 1005.5* now provides that a motion is deemed to be made when its notice is served and filed. *Code Civ. Proc. § 1005.5*, however, is designed to stop the running of any applicable time limit on making the motion; it does not convert the oral motion into a written motion or affect the contents of the notice required under *Code Civ. Proc. § 1010* [for further discussion, *see § 372.21[8]*]. Thus, the notice of motion continues to use the future tense in stating when the moving party "will move" for the order, on what grounds it "will be made," and on what papers it "will be based."

Any previously filed paper that might be referred to in the notice of motion or supporting papers must be referred to by date of execution and title [*Cal. Rules of Ct., Rule 3.1110(d)*].

[ii] Hearing Date and Time

The local court rules and policies of the court in which the action is pending should, if counsel is unfamiliar with them, be checked to determine any local requirements with respect to the hearing. Some courts, for example, allow counsel to select the date and time of hearing of the motion from the dates and times the law and motion calendar is held. Other courts require that a hearing date and time be obtained from a court or courtroom clerk, or other designated clerk [*see, e.g.*, Orange Co. Super. Ct. Rules, Rule 520]. In selecting a hearing date, counsel will want to keep in mind that the general statute, unless otherwise ordered or specifically required by law, requiresat least 16 court days notice before the

hearing, with extended periods when service is by mail, facsimile transmission, or overnight delivery [*Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(a)*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (extension for electronic service); for discussion of Section 1005 notice, *see § 372.21[2], [3]*]. For discussion and forms for use in shortening the time to file and serve papers [*see Code Civ. Proc. § 1005, Cal. Rules of Ct., Rule 3.1300(b)*], see Ch. 524, *Shortening and Extension of Time* .

A maximum time limit in which to bring a motion may be imposed by statute [*see, e.g., Code Civ. Proc. § 473.5* (motion to vacate and set aside default and default judgment and for leave to answer)] or by local court rule or policy. The effect of such a local court rule or policy, however, is questionable in light of *Cal. Rules of Ct., Rule 3.20*, under which all local court rules concerning pleadings, demurrers, ex parte applications, motions, discovery, provisional remedies, and form and format of papers are null and void unless otherwise permitted or required by statute or Judicial Council rule.

[iii] Department or Division

The clerk is required to post a general schedule showing the days and departments for holding each type of law and motion hearing [*Cal. Rules of Ct., Rule 3.1304(a)*]. In multiple judge courts, motions before trial are normally heard in the law and motion department or division, if any, or if the case has been assigned, in the department or division to which it has been assigned. This practice may be varied by local court rule or policy either generally or with respect to motions seeking particular orders or motions in specified actions or proceedings.

[iv] Grounds and Bases Distinguished

The grounds on which the motion is to be made are distinguished from the documentary and evidentiary bases for the motion. The grounds are the legal grounds authorizing the order sought [*see also* [4][e], *below*], whereas the bases of the motion are the papers and other evidence which will establish the grounds [*see* [4], *below*]. The grounds and bases should always be stated in separate paragraphs, as shown, to avoid confusing the two.

Only the grounds specified in the notice of motion may be considered by the court when hearing a noticed motion [*Gonzales v. Superior Court (1987) 189 Cal. App. 3d 1542, 1545, 235 Cal. Rptr. 106* ; *see also* [4][e], *below*].

[v] Records and File

With respect to the phrase "records and file herein" as used in the last paragraph of the body of the form, the word "file" refers to the court's file of the case (there is but a single file for each case, regardless of how many manila folders might be required to contain it, in which all papers submitted for filing in the case are placed) and the term "records" refers to the court's various records in which entries relating to the case are made (*e.g.*, the court's register of actions, the minute book, the judgment book).

[c] Signing Notice of Motion

If the action or proceeding was commenced after January, 1995 and the party is represented by an attorney of record, at least one attorney of record must sign the notice of motion in the attorney's individual name [*Code Civ. Proc. § 128.7(a),(i), (j)*; *see also § 372.25*]. If the party is not represented by an attorney, the party must sign. The notice must state the signer's address and telephone number, if any [*Code Civ. Proc. § 128.7(a)*].

An unsigned paper will be stricken unless the omission is corrected promptly after being called to the attention of the attorney or party [*Code Civ. Proc. § 128.7(a)*].

Presenting the motion to the court, whether by signing, filing, submitting, or later advocating it constitutes a certification that the motion is not filed for an improper purpose or frivolous [*Code Civ. Proc. § 128.7(b)*]. For

discussion of the grounds and procedure for imposing sanctions, and what sanctions may be imposed, see Ch. 510, *Sanctions* .

Apart from this statutory requirement, case law requires notices of motion to be signed by the attorney of record (or by a person authorized to sign the attorney's name) [*Caldwell v. Geldreich (1955) 137 Cal. App. 2d 78, 82, 289 P.2d 832]* , and not by the party unless the party is appearing in propria persona [*see Cowee v. Marsh (1958) 50 Cal. 2d 240, 244, 324 P.2d 553* ; *McMahon v. Thomas (1896) 114 Cal. 588, 591, 46 P. 732* ; *Harris v. Minnesota Inv. Co. (1928) 89 Cal. App. 396, 401, 265 P. 306* ; *Jansson v. National Steamship Co. (1917) 34 Cal. App. 483, 486, 168 P. 151]* .

[4] Papers on Which Motion Is Based

[a] Supporting Memorandum

A party filing a notice of motion, except for a new trial, is generally required to serve and file with it a supporting memorandum to be relied on [*Cal. Rules of Ct., Rules 3.1112(a), 3.1113(a)*; *see Cal. Rules of Ct., Rule 3.1600(a)* (timing for memorandum on motions for new trial)]. The absence of the memorandum may be construed by the court as an admission that the motion is not meritorious and cause for its denial [*Cal. Rules of Ct., Rule 3.1113(a)*]. Certain motions, applications and petitions do not require a memorandum when filed on a Judicial Council Form [*Cal. Rules of Ct., Rule 3.1114*]. For discussion of when a memorandum of points and authorities is required, see *§ 327.21[5][c]*.

For a skeletal form of memorandum, requirements governing the form, content, and style of the memorandum, and local court rules, see Ch. 417, *Points and Authorities* . For memoranda supporting various motions, see specific titles in California Points And Authorities (Matthew Bender).

[b] Affidavits and Declarations

A notice of motion may be supported by affidavits [*see Code Civ. Proc. §§ 2002(1), 2003, 2009*] or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*; *Cal. Rules of Ct., Rules 3.1112(a), 3.1306(a)*; *see § 372.61*]. By analogy to *Evid. Code § 700* (relating to qualification of witnesses), any person is qualified to make an affidavit or declaration in support of a motion [*Flood v. Simpson (1975) 45 Cal. App. 3d 644, 649, 119 Cal. Rptr. 675* ; *McLellan v. McLellan (1972) 23 Cal. App. 3d 343, 359-360, 100 Cal. Rptr. 258* ; *see § 372.21[17]*]. For illustrative forms of declarationssupporting specific motions, see the appropriate titles in this publication.

[c] Exhibits and Other Papers

Other papers, in addition to the memorandum and declarations may be submitted in support of a motion, including exhibits, appendices, or other documents or pleadings [*Cal. Rules of Ct., Rules 3.1112(a)*] and requests for judicial notice [*see Cal. Rules of Ct., Rules 3.1113(l)*].

Each exhibit must be separated by a hard 81/2-by-11 sheet with hard paper or plastic tabs extending below the bottom of the page, bearing the exhibit designation. An index to exhibits must be provided [*Cal. Rules of Ct., Rules 3.1110(f)*].

Pages from a single deposition and associated exhibits must be designated as a single exhibit [*Cal. Rules of Ct., Rules 3.1110(f)*].

If an exhibit is written in a foreign language, it must be accompanied by an English translation, certified under oath by a qualified interpreter [*Cal. Rules of Ct., Rules 3.1110(g)*].

[d] Combining or Attaching Papers; Pagination; Defective Title

The papers filed in support of a motion, including the notice of motion, the declaration, and the memorandum, may be

filed as separate documents or may be combined in one or more documents if they are identified in the caption of the combined pleading [*Cal Rules of Ct., Rule 3.1112(c)*]. If the papers are combined, the declaration normally follows immediately at the end of the notice of motion, and the memorandum follows the declaration. Documents bound together must be consecutively paginated [*Rules of Ct., Rule 3.1110(c)*]. When the three papers are combined, only the notice of motion carries a caption, designating as the nature of the document all of these papers [*Cal. Rules of Ct., Rule 2.111(6)*]. The purpose of this requirement is, of course, to assure that the filing of each paper is properly entered in the court's register of actions. If each paper carried its own caption, but was physically attached to the notice of motion, it is possible that only the filing of the notice of motion would be entered in the court's register.

If the papers are not combined or attached, each will carry its own caption.

An affidavit, declaration, notice, or other paper without the title of the action or proceeding in which it is made, or with a defective title, is, however, as valid and effectual for any purpose as if duly entitled if it intelligibly refers to the action or proceeding [*Code Civ. Proc. § 1046*].

All pages of each document and exhibit must be attached together at the top by a method that permits pages to be easily turned and the entire content of each page to be read [*Cal. Rules of Ct., Rules 3.1110(e)*].

[e] Use of Supporting Papers to Amplify Grounds

It has been held that matters stated in the affidavits (declarations) or argument in support of the motion may not expand the nature and grounds of the motion itself; that, unless leave of court is obtained, the motion may not be made on any grounds other than those enumerated in the notice of the motion; that if new matter were permitted in the actual motion, a notice of motion would be reduced to little purpose other than to advise of the time and place of hearing; and that, actually, the notice of motion must also sufficiently define the issues for the information and attention of the adverse party and the court [*Josephson v. Superior Court (1963) 219 Cal. App. 2d 354, 362, 33 Cal. Rptr. 196]* .

On the other hand, it has been held that a notice is adequate if it fairly advises opposing counsel of the issues to be raised and that documents referred to in, and attached to the notice, may be considered in determining the adequacy of the notice of motion [*Tarman v. Sherwin (1961) 189 Cal. App. 2d 49, 52, 10 Cal. Rptr. 787]* . The court in *Tarman* acknowledged the rule stated in several cases that the notice of motion itself must set out the grounds, but pointed out that a long line of authority has held that affidavits accompanying a notice of motion, other documents in the court file, or affidavits and the memorandum filed with the notice, at least when specifically referred to in the notice, may be considered in amplification of the grounds stated in the notice and that it inclined to this rule [*Tarman v. Sherwin (1961) 189 Cal. App. 2d 49, 51-52, 10 Cal. Rptr. 787]* .

Given the requirements of *Code Civ. Proc. § 1010* and *Cal. Rules of Ct., Rules 3.1110(a)* and *3.1112(d)*, that the grounds of the motion be stated in the motion and notice of motion, clearly counsel should state specifically all the grounds on which the motion is to be based in the notice of motion and should not rely on the court to consider supporting papers to broaden the motion.

[5] When Motion Deemed Made

The motion is deemed to have been made and to be pending before the court on the due service and filing of the notice of motion [*Code Civ. Proc. § 1005.5*]. For further discussion, see *§ 372.21[8]*.

[6] Service and Proof of Service

[a] Notice of Motion

A notice of motion must be served and filed [*see Code Civ. Proc. §§ 1005(b), 1005.5*; *Cal. Rules of Ct., Rules 3.1112(a)*

, *3.1300(a)*]. "Serve and file" means that a document filed in a court must be accompanied by a proof of service, in a manner permitted by law, of one copy of the document on the attorney for each party separately represented and on each self-represented party [*Cal. Rules of Ct., Rule 1.21(b)*].

On the other hand, although *Cal. Rules of Ct., Rule 3.1300(a)* requires that all moving and supporting papers be *served and filed* in accordance with *Code Civ. Proc. § 1005* (i.e., at least 16 court days before the hearing), *Cal. Rules of Ct., Rule 3.1300(c)* requires that proof of service of the moving papers be filed no later than five calendar days before the time appointed for the hearing. That is, the proof of service need not accompany the papers presented for filing. (It must, however, be kept in mind that under *Code Civ. Proc. § 1005(b)*, written notice of the motion must be given, i.e., served, at least 16 court days before the hearing,plus extended periods when service is by mail, facsimile transmission, or overnight delivery.) *Cal. Rules of Ct., Rule3.1300(c)*, therefore, seems to contemplate the following sequence: (1) the papers are filed; (2) the papers are served; and (3) the proof of service is filed. If this is so, there appears to be a conflict between *Cal. Rules of Ct., Rule 3.1300* and *Cal. Rules of Ct., Rule 1.21(b)*.

[b] Supporting Papers

A copy of any paper on which the motion will be based that was not previously served on the party to be notified, and was not filed by that party, must accompany the notice of motion [*Code Civ. Proc. § 1010*]. In addition, *Code Civ. Proc. § 1005(b)* requires that the notice of motion be accompanied by all supporting papers [*see also Cal. Rules of Ct., Rules 3.1113(a), 3.1300(a)*].

[7] Duty of Counsel if Hearing Rescheduled

The moving party must promptly notify the court if a matter will not be heard on the scheduled date [*Cal. Rules of Ct., Rule 3.1304(b)*].

[8] Nonappearance of Counsel

A party may give notice that he or she will not appear at a law and motion hearing and submit the matter without an appearance unless the court orders otherwise. The court shall rule on the motion as if the party had appeared [*Cal. Rules of Ct., Rule 3.1304(c)*]. If a party fails to appear at the law and motion hearing without having given a notice of nonappearance as required under *Cal. Rules of Ct., Rule 3.1304(c)*, the court may take the matter off calendar, to be reset only on motion, or the court may rule on the matter [*Cal. Rules of Ct., Rule 3.1304(d)*].

[9] Cross References

For alternative forms of motions seeking specific orders, see the chapter in this publication relating to the specific procedure

For memoranda supporting and opposing noticed motions, see specific titles and the index in California Points And Authorities (Matthew Bender)

Witkin, California Procedure, vol. 2, *Jurisdiction*, § 116; vol. 6, *Proceedings Without Trial*, §§ 1-43; vol. 7, *Judgment*, § 8 (4th ed. 1996, 1997)

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33-372 California Forms of Pleading and Practice--Annotated § 372.61

§ 372.61 Declaration Under Penalty of Perjury in Support of Motion [Cal. Rules of Ct., Rules 3.1110(b), 3.1115(a)]

[1] FORM Declaration Under Penalty of Perjury in Support of Motion [Cal. Rules of Ct., Rules 3.1110(b), 3.1115(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____
vs.	)	[*name*] IN SUPPORT OF _____
_____ [*name*],	)	[*party, e.g.,* DEFENDANT'S] MOTION FOR
Defendant.	)	_____ [*specify*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of California and the attorney of record herein for _____ (*identify moving party, e.g.,* defendant) *or other statement as appropriate*] and hereby make this declaration in support of _____ [*identify moving party, e.g.,* defendant's] motion for _____ [*specify*].

2. _____ [*Here, and in subsequent paragraphs, set forth applicable facts to which declarant is competent to testify, or of which court must take judicial notice, or of which court may take judicial notice with request that it do so. If additional facts not within declarant's personal knowledge and not subject to judicial notice are required, secure from persons competent to testify to those facts additional declarations setting forth those facts, and attach those declarations to this declaration.*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form of declaration set out in [1], *above*, outlines the format requirements of a declaration in support of a noticed motion [*see Code Civ. Proc. §§ 2003* (affidavit defined), *2009*, (use of affidavit in support of motion), *2015.5* (use of declaration in lieu of affidavit)].

[3] Format of Caption

The caption of an affidavit or declaration must state the name of the affiant or declarant and specifically identify the motion or other proceeding which it supports or opposes [*Cal. Rules of Ct., Rule 3.1115(a)*].

In addition, the first page of each paper filed must specify immediately below the number of the case (1) the date, time, and location, if ascertainable, of any scheduled hearing and the name of the hearing judge, if ascertainable; (2) the nature or title of any attached document other than an exhibit; (3) the date of filing of the action; and (4) the trial date, if set [*Cal. Rules of Ct., Rule 3.1110(b)*; for further discussion, *see § 372.60[4]*].

[4] Content of Declaration

For discussion of the requirements of an affidavit or declaration, see *§ 372.60[4]*. Any previously filed paper that might be referred to in the affidavit or declaration must be referred to by date of execution and title [*Cal. Rules of Ct., Rule 3.1110(d)*].

[5] Evidence

Evidence received at a law and motion hearing must be by declaration or by request for judicial notice without testimony or cross-examination, unless the court orders otherwise for good cause shown [*Cal. Rules of Ct., Rule 3.1306(a)*]. A party seeking permission to introduce oral evidence, except for oral evidence in rebuttal to oral evidence presented by the other party, must file, no later than three court days before the hearing, a written statement setting forth the nature and extent of the evidence proposed to be introduced and a reasonable time estimate for the hearing. When the statement is filed less than five court days before the hearing, the filing party must serve a copy on the other parties in a manner to assure delivery to the other parties no later than two days before the hearing [*Cal. Rules of Ct., Rule 3.1306(b)*]. For a form of statement, see *§ 372.62*.

A party requesting judicial notice of material under *Evid. Code § 452* or *453* must provide the court and each party with a copy of the material. If the material is part of a file in the court in which the matter is being heard, the party must specify in writing the part of the file sought to be judicially noticed and make arrangements with the clerk to have the file in the courtroom at the time of the hearing [*Cal. Rules of Ct., Rule 3.1306(c)*]. The request for judicial notice must in a separate document [*Cal. Rules of Ct., Rule 3.1113(l)*]. For discussion and forms relating to judicial notice, see Ch.

321, *Judicial Notice* .

[6] Cross References

For additional discussion of moving papers, see *§ 372.60[2]* et seq.

For a form of affidavit, see Ch. 15, *Affidavits, Certificates, and Declarations*

For illustrative forms of declarations in support of specific motions, see the chapter in this publication relating to the specific topic

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33-372 California Forms of Pleading and Practice--Annotated § 372.62

§ 372.62 Written Statement of Oral Evidence to Be Introduced at Law and Motion Hearing [Cal. Rules of Ct., Rule 3.1306]

[1] FORM Written Statement of Oral Evidence to Be Introduced at Law and Motion Hearing [Cal. Rules of Ct., Rule 3.1306]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	STATEMENT OF EVIDENCE TO BE INTRO-
_____ [*name*],	)	DUCED IN _____ [SUPPORT OF
Defendant.	)	*or* OPPOSITION TO] _____
	)	[*party, e.g.,* DEFENDANT'S] MOTION FOR
	)	_____ [*specify*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

Pursuant to *Rule 3.1306 of the California Rules of Court,* _____ [*specify party seeking to introduce oral evidence*] requests permission to introduce oral evidence and submits the following written statement of the nature and extent of the oral evidence to be introduced at the hearing:

NATURE OF THE EVIDENCE:

The evidence to be introduced at the law and motion hearing is _____ [*specify nature of evidence*].

EXTENT OF THE EVIDENCE:

The evidence to be introduced at the law and motion hearing is _____ [*set forth extent of evidence*].

The hearing shall take approximately _____ [*specify a reasonable time estimate for the hearing*].
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party*]

[2] Use of Form

The form in [1], *above*, is for use by a party seeking permission to introduce oralevidence, except for oral evidence in rebuttal to oral evidence presented by the other party, at a law and motion hearing. The statement must be filed no later than three court days before the hearing [Cal. Rules of Ct., Rule 3.1306(b)].

[3] Service of Statement

When the statement is filed less than five court days before the hearing, the filing party shall serve a copy on the other parties in a manner to assure delivery to the other parties no later than two days before the hearing [Cal. Rules of Ct., Rule 3.1306(b)].

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33-372 California Forms of Pleading and Practice--Annotated § 372.63

§ 372.63 Notice of Intent to Appear by Telephone [Judicial Council Form CIV-020]

[1] FORM Notice of Intent to Appear by Telephone [Judicial Council Form CIV-020]

Click here to view image.

[2] Use of Form

The form in [1], *above*, Cal. Judicial Council Form CIV-020, Notice of Intent to Appear by Telephone, is an optional form available for use as of July 1, 2010. A party choosing to appear at a hearing, conference or proceeding must provide notice to the other parties pursuant to *Cal. Rules of Court, Rule 3.670(g)*. For a fillable version of this form in electronic format, see LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexis.com/forms.

The notice must be served and filed at least three court days before the hearing [*Cal. Rules of Ct., Rule 3.670(g)(1)(B)*].

As an alternative to a separate notice, a party may place the phrase "Telephone Appearance" below the title of the moving or opposing papers [*Cal. Rules of Ct., Rule 3.670(g)(1)(A)*; *see § 372.60*].

If a party who notices a telephone appearance subsequently chooses to appear in person, that party must notify the court and the other parties by telephone at least two court days before the hearing [*Cal. Rules of Ct., Rule 3.670(g)(3)*].

For further discussion regarding appearance by telephone, see *§ 372.21[16]*.

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33-372 California Forms of Pleading and Practice--Annotated § 372.64

§ 372.64 Order [Code Civ. Proc. § 1003] Granting or Denying Motion--Without Findings

[1] FORM Order [Code Civ. Proc. § 1003] Granting or Denying Motion--Without Findings

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER _____ [*specify subject of order*]
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

The motion of _____ [*identify party, e.g.,* defendant] _____ [*name*] for an order _____ [*specify nature as in form in § 372.60[1]*] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be _____ [granted *or* denied],

[*EITHER*]

IT IS ORDERED that the motion be, and hereby is, granted and _____ [*set out the particular order*

sought].

[*OR*]

IT IS ORDERED that the motion be, and hereby is, denied.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of order set out in [1], *above*, outlines the format requirements of an order granting or denying a motion [*see Code Civ. Proc. §§ 1003, 1064* (order defined)]. Written formal orders are ordinarily required if the motion is granted, but not if the motion is denied [*see § 372.21[18], [20] -[22]*]. If the court in which the cause is pending provides a printed form for use in granting a particular motion, that form must, of course, be used.

[3] Content

The form contains a caption [*see Cal. Rules of Ct., Rule 2.111*]. It identifies the moving party, the order sought, the date of the hearing, and the names of counsel for the appearing parties, and sets forth the particular order granted or the court's ruling denying the motion. The order is also dated and contains the judge's signature.

The order does not include findings in accordance with the general rule that, unless required by statute or case law with respect to a specific order, findings have no place in an order granting or denying a motion [*see § 372.21[18]*]. For a form of order with findings, see *§ 372.65*.

[4] Cross References

For illustrative forms of orders granting or denying specific motions, see appropriate chapters in this publication

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§ 372.65 Order [Code Civ. Proc. § 1003] Granting or Denying Motion--Order With Findings

[1] FORM Order [Code Civ. Proc. § 1003] Granting or Denying Motion--Order With Findings

[*Caption. See § 372.64[1].*]

The motion of _____ [*identify party, e.g.*, defendant] _____ [*name*] for an order _____ [*specify*] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

The Court, having considered the _____ [affidavit *or* declaration] and other documents in support of and in opposition to the motion, having heard the arguments of counsel, and being fully advised in the matter, finds as follows: _____ [*set out specific finding or findings required*].

IT IS, THEREFORE, ORDERED that the motion be, and hereby is, granted and that _____ [*set out particular order sought*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of order set out in [1], *above*, illustrates the manner in which findings are set forth in an order that, by statute or case law, may be granted only on the finding by the court of a specific fact or facts.

For example, *Code Civ. Proc. § 473.5* authorizes the court to set aside a default or default judgment on such terms as may be just and to allow the defendant to defend the action only on a finding that the defendant's motion to set aside the

default or default judgment was made within the period permitted by *Code Civ. Proc. § 473.5(a)*, and that defendant's lack of actual notice of the action in time to defend was not caused by his or her avoidance of service of summons or inexcusable neglect [*Code Civ. Proc. § 473.5(c)*].

Another example is *Fam. Code § 3020 et seq.*, relating to child custody. That section provides that before the court makes any order awarding custody to a person other than a parent, without the parents' consent, it must make a finding that an award of custody to a parent would be detrimental to the child and that the award to a nonparent is required to serve the child's best interests [*Fam. Code § 3041*].

For further discussion of orders, see *§ 372.64[2]* et seq.

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§ 372.66 Notice of Entry of Order [Code Civ. Proc. § 664.5] Granting or Denying Motion

[1] FORM Notice of Entry of Order [Code Civ. Proc. § 664.5] Granting or Denying Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF ENTRY OF ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	
_____		

To the above-named _____ [*identify party, e.g.,* defendant] and to _____ [*name*], his/her/its attorney:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], the above-entitled court duly entered an order _____ [granting *or* denying] the motion of _____ [*party*] for an order _____ [*specify nature*].
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Use of Form

The form of notice in [1], *above*, is for use by the party prevailing on a motion to give notice of the court's ruling or order to all other parties who have appeared in the action or proceeding [*Code Civ. Proc. § 664.5*; *see also Code Civ. Proc. § 1010* (notices in general)]. For discussion of when the notice is required, see *§ 372.21[22]*.

[3] Multiple Parties

In a case having multiple parties, any notice of a court's ruling or order on a motion served by a party must name the moving party, the party against whom relief was requested, and specifically identify the particular motion ruled on [*Cal. Rules of Ct., Rules 1.5(b), 3.1103(b), 3.1109*].

[4] Who Is Entitled to Notice

No notice or other paper, other than amendments to the pleadings or an amended pleading, need be served on any party whose default has been duly entered or who has not appeared in the action or proceeding [*Code Civ. Proc. § 1010*; *see also Code Civ. Proc. § 1014* (service of notice and papers need not be made on a defendant who has not appeared)]. But a defendant, after appearance, or his or her attorney [*see Code Civ. Proc. § 1015*], is entitled to notice of all subsequent proceedings of which notice is required to be given [*Code Civ. Proc. § 1014*].

[5] Cross References

For an optional California Judicial Council Form, CIV-130 Notice of Entry of Judgment or Order, see *§ 372.67A*.

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33-372 California Forms of Pleading and Practice--Annotated § 372.67

§ 372.67 Notice of Court's Decision or Order Granting or Denying Motion [Code Civ. Proc. § 1019.5(a)]

[1] FORM Notice of Court's Decision or Order Granting or Denying Motion [Code Civ. Proc. § 1019.5(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF _____
vs.	)	[DECISION *or* ORDER]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	
_____		

To the above-named _____ [*identify nonprevailing party, e.g.*, defendant] and to _____ [*name*], his/her/its attorney:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], the above-entitled court duly entered _____ [an order *or* a decision] _____ [granting *or* denying] the motion of _____ [*party*] for _____ [*specify nature of requested decision or order*].
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Use of Form

The form of notice in [1], *above*, may be used by the prevailing party to give notice to the adverse party of the court's decision or order granting or denying a motion [*Code Civ. Proc. § 1019.5(a)*; for discussion of this requirement, *see § 372.21[22]*]. The notice is in writing, as required by *Code Civ. Proc. § 1010*.

[3] When Notice Is Required

When a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order must be given by the prevailing party to all other parties or their attorneys, in the manner provided in *Code Civ. Proc. § 1010 et seq.* [*see § 372.24*; Ch. 518, *Service of Summons and Papers*], unless notice is waived by all parties in open court and is entered in the minutes [*Code Civ. Proc. § 1019.5(a)*].

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33-372 California Forms of Pleading and Practice--Annotated § 372.67A

§ 372.67A Notice of Entry of Judgment or Order [Judicial Council Form CIV-130]

[1] FORM Notice of Entry of Judgment or Order [Judicial Council Form CIV-130]

Click here to view image.

[2] Use of Form

The form of notice in [1], *above*, is for use by the party prevailing on a motion to give notice of the court's ruling or order to all other parties who have appeared in the action or proceeding [*Code Civ. Proc. § 664.5*; *see also Code Civ. Proc. § 1010* (notices in general)]. For discussion of when the notice is required, see *§ 372.21[22]*. This form also is for use for notice of entry of judgment; for discussion of notice of entry of judgment, see *Ch. 318, Judgments, §§ 318.55, 318.336*.

This form is an illustrative reproduction of Cal. Judicial Council Form CIV-130, adopted by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.35*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Cross References

For a text form for notice of entry of order, see *§ 372.66*.

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33-372 California Forms of Pleading and Practice--Annotated § 372.68

§ 372.68 Ex Parte Motion or Application for Order--Skeletal Form

[1] FORM Ex Parte Motion or Application for Order--Skeletal Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	EX PARTE _____ [MOTION *or* APPLICATION] FOR ORDER
vs.	)	_____ [*specify order sought*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

[*EITHER*]

_____ [*Identify party, e.g.*, Defendant] _____ [*name*] hereby _____ [moves *or* applies] for an order _____ [*specify order sought*]. This _____ [motion *or* application] is made on the ground that _____ [*specify*]. [A prior application was made on _____ (*date*) for an ex parte order _____ (*describe prior application*). The court refused that application _____ (in whole *or* in part). This application _____ (*state why this application is being made, e.g., a different state of facts*).] In support of this _____ [motion *or* application], I, the undersigned, declare:

[*OR*]

_____ [MOTION *or* APPLICATION]

_____ [*Identify party, e.g.*, Defendant] _____ [*name*] hereby _____ [moves *or* applies] for an order _____ [*specify order sought*]. This _____ [motion *or* application] is made on the ground that _____ [*specify*]. [A prior application was made on _____ (*date*) for an ex parte order _____ (*describe prior application*). The court refused that application _____ (in whole *or* in part). This application _____ (*state why this application is being made, e.g., a different state of facts*).]
Dated: _____.

_____ [*signature*]

Attorney for _____ [*moving party*]

DECLARATION

I, _____ [*name*], declare:

[*IN EITHER CASE CONTINUE*]

1. I am the _____ [attorney of record herein for _____ (*moving party*) *or* _____ moving party].

2. The name, address and telephone number of the _____ [attorney for the opposing party *or* opposing party], as known to me, is _____ [*set out name, address, and telephone number*].

[*EITHER*]

3. On _____ [*date*], at _____ [*time*], I informed _____ [*name*], _____ [*name of opposing party or attorney person to whom notice was given*], the opposing _____ [party *or* party's attorney], of the date, time and place that the above application for an order _____ [*specify relief sought*] would be made.

4. _____ [*name of opposing party or attorney person to whom notice was given*] informed me that _____ [*describe response to notice, including whether or not opposition is expected*].

[*OR*]

3. I attempted, in good faith, to inform _____ [*name*], the opposing _____ [party *or* party's attorney], of the time and place that the above application for an order _____ [*specify order*

sought] would be made. I was unable to do so even though _____ [*describe efforts made*].

[*OR*]

3. Notice to the _____ [*name*], the opposing _____ [party *or* party's attorney], of the above application for an order _____ [*specify order sought*] should not be required because _____ [*specify reason*].

[*CONTINUE*]

5. _____ [*Set forth, in as many separately numbered paragraphs as necessary, facts within personal knowledge of applicant establishing irreparable harm, immediate danger, or any other statutory basis for granting ex parte relief rather than setting the matter for hearing on noticed motion*].

6. _____ [*Set forth, in as many separately numbered paragraphs as necessary, facts within personal knowledge of applicant establishing right to order sought; if facts are not within applicant's personal knowledge, have person with knowledge make an affidavit or execute a declaration under penalty of perjury, attach affidavit or declaration to this application, and incorporate it by reference. Attach as many affidavits or declarations as are necessary to establish the required facts.*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, outlines the format and content of a written ex parte motion or application. Whether it should be referred to as a motion or an application depends on the language used in the statute or rule authorizing the particular motion or the relief sought.

If the court in which the action is pending provides a printed form for use in making the particular ex parte motion, that form must be used.

For a form of ex parte motion for an order revoking a prior order, see Ch. 374, *Motions to Reconsider and Renewed Motions* .

For forms of orders granting an ex parte motion, see *§§ 372.69* and *372.70*. For a form of order to show cause that may be issued in response to an ex parte motion or application, see *§ 372.71*.

[3] Contents of Application

Although the declaration in support of the motion [*see Code Civ. Proc. §§ 2009, 2015.5*] may be set forth separately, when the application and declaration are made by the same person, they are sometimes combined into a single paper. The form illustrates both alternatives.

The application must include a full disclosure of any prior applications of the same character or for the same relief that

have been refused by the court in whole or in part, even if the current application is made on an alleged different state of facts. Both the prior applications and the courts actions must be disclosed [Cal. Rules of Ct., Rule 3.120(b)]. The three optional sentences enclosed in brackets in unnumbered paragraph at the beginning of the form should be used if there have been prior applications that must be disclosed.

The application must state the name, address, and telephone number of any attorney known to the applicant to be an attorney for any party or, if no such attorney is known, the name, address, and telephone number of any unrepresented parties, if known to the applicant [*Cal. Rules of Ct., Rule 3.1202(a)*]. Paragraph 2 of the declaration includes this information. Paragraph 2 reflects only one party. The form should be modified to list this information with respect to all parties where there is more than one that must be listed.

The application must include a declaration of notice [*see* [4], *below*], including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected, or a declaration stating reasons why notice should not be required [*Cal. Rules of Ct., Rule 3.1204(b)*; *see Cal. Rules of Ct., Rule 3.1204(a)* (requiring declaration of notice, attempted notice, or reasons for not being required to give notice)]. The form includes this information in the alternative Paragraphs 3 (Paragraphs 3 and 4, in the case of the first alternative).

The application must make an affirmative factual showing in a declaration containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte [*Cal. Rules of Ct., Rule 3.1202(c)*]. Paragraph 5 of the form provides a place for this information.This paragraph may need to be renumbered depending on which prior alternative paragraphs of the form are used.

Paragraph 6 of the form indicates where to begin the paragraphs setting forth the factual support for the substantive relief sought. This paragraph may need to be renumbered depending on which prior alternative paragraphs of the form are used. The information may be set out in as paragraphs as need, and may be set out in a completely separate declaration, if desired. This would often be done separately, particularly when this part of the declaration is being made by someone other than the attorney for the moving party. For forms of declarations to support the substantive basis of the application, see specific subject matter titles throughout this publication.

[4] Notice Requirement

A party seeking an ex parte order must notify all parties no later than 10:00 a.m. the court day before the ex parte appearance [*Cal. Rules of Ct., Rule 3.1203(a)*].

An application for an order shall not be made ex parte unless it appears by affidavit or declaration (1) that, within a reasonable time before the application, the party informed the opposing party or the opposing party's attorney when and where the application would be made; or (2) that the party in good faith attempted to inform the opposing party and the opposing party's attorney but was unable to do so, specifying the efforts made to inform them; or (3) that, for reasons specified, the party should not be required to inform the opposing party or the opposing party's attorney [*Cal. Rules of Ct., Rule 3.1204(b)*; *see also* [3], *above*].

[5] Accompanying Papers

Ex parte applications must be supported by a memorandum [*Cal. Rules of Ct., Rule 3.1201*]. For forms of memoranda, see the chapter in California Points And Authorities that relates to the particular subject matter of the application.

The application must include a proposed order [*Cal. Rules of Ct., Rule 3.1201*]. For forms of proposed order, see *§§ 372.69* and *372.70*.

[6] Local Court Rules

Local court rules have often imposed requirements on the manner of presenting ex parte motions and should be checked if counsel is unfamiliar with them. Many local rules relating to ex parte applications and to the form or format of papers, however, are preempted by the California Rules of Court [*Cal. Rules of Ct., Rule 3.20*].

[7] Cross References

For forms of ex parte applications for orders in attachment proceedings, see Ch. 62, *Attachment*

For a form of ex parte application in a claim and delivery proceeding, see Ch. 119, *Claim and Delivery*

For forms of ex parte applications for orders and orders to show cause in proceedings under the Family Code or in a harassment proceeding, see Ch. 221, *Dissolution of Marriage: Procedure* and Ch. 293, *Harassment and Domestic Violence*

For a form of declaration supporting an ex parte application for a temporary restraining order and order to show cause, see Ch. 303, *Injunctions*

For forms for use in applying ex parte for orders shortening or extending time, see Ch. 524, *Shortening and Extension of Time*

For a form of declaration supporting an ex parte application for appointment of a receiver, see Ch. 486, *Receivers*

For memoranda in support of ex parte applications for orders, and for orders to show cause, see appropriate chapter in California Points And Authorities (Matthew Bender)

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33-372 California Forms of Pleading and Practice--Annotated § 372.69

§ 372.69 Order Granting Ex Parte Motion [Code Civ. Proc. § 1003]--Skeletal Form

[1] FORM Order Granting Ex Parte Motion [Code Civ. Proc. § 1003]--Skeletal Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER _____ [*specify*]
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	
_____		

Application having been made _____ [by *or* on behalf of] _____ [*moving party*], and good cause appearing therefor,

IT IS ORDERED that _____ [*specify, including any limitations on order, conditions, or terms*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, outlines the format and content of an order granting an ex parte motion or application when a separate formal order is required [*see Code Civ. Proc. § 1003* ("order" defined); *see also Code Civ. Proc. § 166(a)(1)* (power of court to grant ex parte motions)].

If the court in which the action is pending provides a printed form of order for use in granting the particular ex parte application, that form must be used.

[3] Cross References

For the related form of ex parte application, see *§ 372.68*

For an alternative short form of order that may be appended at the end of the ex parte motion or application, see *§ 372.70*

For a skeletal form of order to show cause granted in response to an ex parte motion or application, see *§ 372.71*

For a form of order granting an ex parte motion to revoke a prior order, see *Ch. 374, Motions to Reconsider and Renewed Motions, §§ 374.64, 374.65*

For forms of orders extending or shortening time on ex parte application, see Ch. 221, *Dissolution of Marriage: Procedure* and Ch. 524, *Shortening and Extension of Time*

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33-372 California Forms of Pleading and Practice--Annotated § 372.70

§ 372.70 Order [Code Civ. Proc. § 1003] Granting Ex Parte Motion--Short Form

[1] FORM Order [Code Civ. Proc. § 1003] Granting Ex Parte Motion--Short Form

[*Attach to ex parte motion or application. See e.g., § 372.68[1]*]

ORDER

Good cause appearing therefor, it is ordered that _____ [*specify order, including any limitations on order, conditions, or terms*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of order in [1], *above*, is for use to grant an ex parte motion and is appended, without a separate caption, at the end of the application. For discussion of orders, see *§ 372.69[2]* et seq.

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33-372 California Forms of Pleading and Practice--Annotated § 372.71

§ 372.71 Order to Show Cause--Skeletal Form

[1] FORM Order to Show Cause--Skeletal Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER TO SHOW CAUSE
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

To _____ [*identify party, e.g.*, defendant] _____ [*name*]:

The ex parte application for an order _____ [*specify, e.g.*, appointing a receiver] being before this court, and good cause appearing therefor, [and _____ (*specify, e.g.*, plaintiff) having on _____ [*date*], filed an undertaking in the amount of $_____ as provided by *Section 566 of the Code of Civil Procedure*, and this court having appointed _____ (*name*) of _____ (*city*), California, a receiver for the following described property: _____ (*describe*)],

IT IS HEREBY ORDERED that _____ [*specify, e.g.*, defendant] _____ [*name*] appear on _____ [*date*], at _____ [*time*] in [_____ (Department

or Division) _____ of] this court, located at _____ [*address and room number, if any*], _____ [*city*], then and there to show cause, if any he/she/it has, why the _____ [appointment of the receiver should not be confirmed *or* order(s) sought by the attached application should not be granted].

[This order shall be served on _____ (*specify, e.g.*, defendant) _____ (*name*) by delivering a copy of it, together with a copy of the application attached, at least _____ days prior to _____ (*date of hearing*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, outlines the requirements of an order to show cause and is for use where the order to show cause, in lieu of a notice of motion, is authorized or required, or where the party against whom it is directed has not yet appeared in the action or proceeding [*see discussion under §§ 372.17* and *372.22*].

[3] Application for Order

An order to show cause is secured on ex parte application [for a form of application, *see § 372.68*]. The application, like the affidavit or declaration submitted in support of a noticed motion, must set forth evidentiary facts that would justify issuance of the order. Since the order to show cause is a form of notice of motion, the application should, except where the facts are simple and the right to the order clear, be supported by a memorandum of points and authorities [*see Cal. Rules of Ct., Rules 3.1110, 3.1113(a)*], and this is sometimes expressly required [*see, e.g., Code Civ. Proc. § 527* (order to show cause in re preliminary injunction); *Cal. Rules of Ct., Rules 3.1176* (order to show cause why ex parte appointment of receiver should not be confirmed)].

[4] Cross References

For an alternative form of order to show cause why an appointment of a receiver on ex parte application should not be confirmed, see Ch. 486, *Receivers*

For the Judicial Council approved forms of orders to show cause in attachment proceedings, see Ch. 62, *Attachment*

For forms of ex parte applications for orders and orders to show cause in proceedings under the Family Code or in a harassment proceeding, see Ch. 221, *Dissolution of Marriage: Procedure* and Ch. 293, *Harassment and Domestic Violence*

For a form of order to show cause in re a preliminary injunction, see Ch. 303, *Injunctions*

For additional forms of orders to show cause relating to specific relief, see the appropriate titles in this publication

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33-372 California Forms of Pleading and Practice--Annotated § 372.72

§ 372.72 Written Motion or Application or Request or Petition for Order [Code Civ. Proc. § 1003]--Skeletal Form

[1] FORM Written Motion or Application or Request or Petition for Order [Code Civ. Proc. § 1003]--Skeletal Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	_____ [MOTION *or* APPLICA-
Plaintiff,	)	TION *or* REQUEST *or* PETITION] FOR ORDER
vs.	)	_____ [*specify*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

_____ [*Identify party, e.g.*, Plaintiff] _____ [*name*] hereby _____ [moves for *or* applies for *or* requests *or* petitions for] an order, to be made after hearing, directing _____ [*specify order sought*]. This _____ [motion *or* application *or* request *or* petition] is made on the ground that _____ [*specify*] and is based on the following facts:

_____ [*specify facts*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____.

_____ [*signature*]

Attorney for _____ [*moving party*]

[2] Use of Form

The form in [1], *above*, illustrates the format of a written motion [for forms of written ex parte motions, *see § 372.68*]. Unlike a notice of motion [for a form, *see § 372.60*], but like ex parte motions, a written motion may, as a matter of practice, combine the application for the order with the affidavit [*Code Civ. Proc. § 2009*] or declaration [*Code Civ. Proc. § 2015.5*] establishing the ground or grounds of the motion. For the format to follow when the facts supporting the granting of the motion are set forth in a declaration separate from the motion, see *§ 372.68*.

The titling of the paper as a motion, application, request, or petition follows the language of the statute authorizing either it or the relief sought.

The motion must identify the party or parties bringing the motion, name the parties to whom it is addressed, and if it challenges a pleading, identify the specific portion challenged [*see Cal. Rules of Ct., Rule 3.1112(d)*].

[3] Accompanying Papers

The motion generally must be accompanied by a notice of hearing on the motion [*see § 372.73*] and a memorandum. Certain motions, applications and petitions do not require a memorandum of when filed on a Judicial Council Form [*Cal. Rules of Ct., Rule 3.1114*]. For discussion of when a memorandum of points and authorities is required, see *§ 327.21[5][c]*. It may also be accompanied by other papers, including declarations, exhibits, or appendices [*see Cal. Rules of Ct., Rule 3.1112(b)*].

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33-372 California Forms of Pleading and Practice--Annotated § 372.73

§ 372.73 Notice of Hearing on Written Motion or Application or Request or Petition for Order

[1] FORM Notice of Hearing on Written Motion or Application or Request or Petition for Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF HEARING ON
Plaintiff,	)	_____ [MOTION *or* APPLICA-
vs.	)	TION *or* REQUEST *or* PETITION] FOR ORDER
_____ [*name*],	)	_____ [*specify*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to _____ [*name*], his/her/its attorney:

NOTICE IS HEREBY GIVEN that _____ [*moving party*] has filed _____ [a motion *or* an application *or* a request *or* a petition] for an order _____ [*specify order sought*], a copy of which is attached hereto and made a part hereof, and that a hearing on the _____ [motion *or* application *or* request *or* petition] _____ [has been set *or* will be held] in [_____ (Department *or* Division) _____ of] the above-entitled court, located at _____ [*address*], _____ [*city*], on _____ [*date*], at _____ [*time*].

Dated: _____.

_____ [*signature*]

Attorney for _____ [*moving party*]

[2] Use of Form

The form in [1], *above*, is for use by counsel for the moving party to give notice to the adverse party and his or her attorney that a motion has been filed and that it will be heard on the date and at the time specified [*see Code Civ. Proc. § 1010* (requirement that notice be in writing); *see also Code Civ. Proc. § 1011 et seq.* (service of notices)]. The statutes governing the particular motion or the relief sought may, however, require inclusion in the notice of additional statements [*see, e.g., Code Civ. Proc. § 484.050* (notice of application and hearing in attachment proceeding)] and counsel should, if unfamiliar with them, check them before the notice is drafted.

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Chapter 373 MOTIONS IN LIMINE

33-373 California Forms of Pleading and Practice--Annotated 373.syn

AUTHOR: Patrick A. Cathcart

§ 373.syn Synopsis to Chapter 373: MOTIONS IN LIMINE

§ 373.01 Scope of Chapter

§ 373.02 Cross References

§§ 373.03-373.09 [Reserved]

§ 373.10 Governing Law; No Statute or Rule Specifically Authorizes Motion in Limine

§ 373.11 Definition of "Motion in Limine"

§ 373.12 Overview and Purposes of Motion in Limine

[1] Primary Purpose Is to Prohibit Presentation of Particular Items or Categories of Evidence

[a] Common Use of Motion in Limine Is to Consider Evidentiary Issues

[b] No Limitation on Subject Matter of Motion in Limine

[2] Strategic Purposes of Motions in Limine

[3] Inappropriate Uses of Motions in Limine

[a] Motion in Limine May Not Be Used to Bind Party or Witness to Particular Testimony or View of Evidence

[b] Motion in Limine Should Not Address Legal Consequences of Evidentiary Exclusion Unless Dispositive of Claim, Defense, or Entire Action

[c] Motion in Limine May Not Be Used to Control Conduct of Trial Proceedings

§ 373.13 Power of Court to Grant or Deny Motion in Limine

[1] Source of Power Is Court's Inherent Authority

[2] Court's Discretion in Regard to Motion in Limine

[a] Court Has Discretion to Rule Immediately or Defer Ruling Until Trial

[b] Court May Not Simply Refuse to Hear Motion in Limine

[3] Court May Reconsider Evidentiary Issues at Trial

[4] Mislabeling of Motion in Limine Does Not Affect Court's Power to Act

§ 373.14 Examples of Evidentiary Exclusions Through Use of Motion in Limine

[1] General Rule: Any Objection to Admissibility That Could Be Raised at Trial Can Be Raised Through Pretrial Motion in Limine

[2] Specific Grounds for Excluding Evidence Under Motion in Limine

[a] Evidence Is Irrelevant

[b] Evidence Is Unduly Prejudicial or Otherwise Precluded Under Evidence Code

[c] Evidence Is Not Properly Considered in Determining Damages; Collateral Source Rule

[d] Evidence of Character of Party or Witness

[e] Evidence Is Inadmissible Due to Party's Violation of Disclosure or Discovery Obligations

[f] Proposed Expert Testimony Is Inadmissible

§ 373.15 Conditional Grant of Motion Subject to Offer of Proof at Trial

§ 373.16 Procedure for Motion in Limine

[1] Procedure for Movant

[a] Proper Timing of Motion in Limine Governed by Rules of Court, Pretrial Orders, and Scheduling Orders

[b] Noticing Motion in Limine; Ex Parte Motion Prohibited

[2] Procedure for Opponent of Motion in Limine

§ 373.17 Sanctions for Violation of In Limine Order; Possibility of New Trial

§ 373.18 Appellate Review of Order on Motion in Limine

[1] Order Not Subject to Review by Extraordinary Writ; Exceptions

[2] Appeal After Judgment

[a] Appeal Raises Issue of Propriety of Admission or Exclusion of Evidence, Not Validity of in Limine Order Itself

[b] When Motion in Limine Preserves Objection to Admission of Evidence

[c] When Motion in Limine Preserves Objection to Exclusion of Evidence

§§ 373.19-373.29 [Reserved]

§ 373.30 Cross References

§ 373.31 State Constitution

§ 373.32 State Statutes

[1] Contempt

[2] Evidence

[3] Motions and Orders

[4] Powers of Courts

[5] Appellate Review

§ 373.33 Local Court Rules

§ 373.34 Decisions

[1] Purpose of Motion in Limine

[2] Objection to All Evidence

[3] Offer of Proof

[4] Out of Jury's Presence

[5] Pretrial Discussions

[6] Proper Denial

[7] Proper Grant

[8] Appellate Review of Order

§ 373.35 Law Reviews

§ 373.36 Text References

§§ 373.37-373.39 [Reserved]

§ 373.40 Checklist for Obtaining Motion in Limine

[1] Preliminary Determinations

[2] Prepare Papers

[3] Present Motion

[4] Order in Limine

§§ 373.41-373.49 [Reserved]

§ 373.50 Motion in Limine

[1] FORM

[2] Use of Form

§ 373.51 Order Granting Motion in Limine--With Findings

[1] FORM

[2] Use of Form

Patrick A. Cathcart n*

Editorial Consultant

FOOTNOTES:
(n83)Footnote *. This chapter was reviewed by Patrick A. Cathcart, a partner with the firm of Adorno, Yoss, Alvarado & Smith, in its Los Angeles office. His practice emphasizes complex business trials and appeals, including multi-party insurance coverage litigation and professional liability matters. Mr. Cathcart is a member of the LexisNexis California Advisory Board.

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PART I. SCOPE

33-373 California Forms of Pleading and Practice--Annotated § 373.01

AUTHOR: Patrick A. Cathcart

§ 373.01 Scope of Chapter

This chapter discusses the pretrial motion in limine and its use in civil actions. In addition to legal and strategic back ground discussion, the chapter contains a form of motion [*see § 373.50*] and a form of order granting a motion in limine [*see § 373.51*].

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 373 MOTIONS IN LIMINE
PART I. SCOPE

33-373 California Forms of Pleading and Practice--Annotated § 373.02

AUTHOR: Patrick A. Cathcart

§ 373.02 Cross References

For discussion and forms relating to motions in general, see Ch. 372, *Motions and Orders* .

For discussion of pretrial conferences, during which motions in limine are often considered, see Ch. 425, *Pretrial Proceedings* .

For discussion of pretrial motions to suppress prejudicial matter in criminal proceedings, such as motions under *Penal Code § 1538.5*, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 23 (Matthew Bender).

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Chapter 373 MOTIONS IN LIMINE
PART I. SCOPE

33-373 California Forms of Pleading and Practice--Annotated §§ 373.03-373.09

AUTHOR: Patrick A. Cathcart

[Reserved]

§§ 373.03[Reserved]

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Chapter 373 MOTIONS IN LIMINE
PART II. LEGAL BACKGROUND

33-373 California Forms of Pleading and Practice--Annotated § 373.10

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§ 373.10 Governing Law; No Statute or Rule Specifically Authorizes Motion in Limine

Motions in limine are commonly used in California state courts. It is not unusual for each party to an action to submit multiple motions in limine [*e.g., Kelly v. New W. Fed. Sav. (1996) 49 Cal. App. 4th 659, 669, 56 Cal. Rptr. 2d 803* (one party filed 28 motions in limine)]. Considering the frequent use of motions in limine, it is surprising that the motion in limine is not specifically authorized or governed by any California statute or rule of court. However, a trial court's consideration of a motion in limine is implicitly authorized by several such sources, including *Code Civ. Proc. § 128(a)(3), (8)*, which states that every court has the power to provide for the orderly conduct of proceedings before it, and to amend and control its process and orders to make them conform to law and justice. Additional support for a motion in limine is provided by:

(1) *Evid. Code § 350*, which allows the admission of relevant evidence only.

(2) *Evid. Code § 352*, which authorizes the exclusion of unduly prejudicial evidence.

(3) *Evid. Code § 402(b)*, which authorizes the hearing and determination of the admissibility of evidence out of the presence or hearing of the jury.

California appellate courts have acknowledged the propriety of the use of motions in limine by trial courts [*see People v. Morris (1991) 53 Cal. 3d 152, 188, 279 Cal. Rptr. 720, 807 P.2d 949* ; *Ulloa v. McMillin Real Estate & Mortg. (2007) 149 Cal. App. 4th 333, 338, 57 Cal. Rptr. 3d 1* ; *Greer v. Buzgheia (2006) 141 Cal. App. 4th 1150, 1156, 46 Cal. Rptr. 3d 780* ; *Clemens v. American Warranty Corp. (1987) 193 Cal. App. 3d 444, 451, 238 Cal. Rptr. 339* ; *Lemer v. Boise Cascade, Inc. (1980) 107 Cal. App. 3d 1, 9-12, 165 Cal. Rptr. 555]* . Although there is no reported decision outlining procedural guidelines for a motion in limine, numerous cases discuss the use of pretrial motions to exclude prejudicial evidence from the jury [*see, e.g., Cherrigan v. City etc. of San Francisco (1968) 262 Cal. App. 2d 643, 646, 69 Cal. Rptr. 42* ; *Sacramento, etc. Drainage Dist. ex rel. State Reclamation Bd. v. Reed (1963) 215 Cal. App. 2d 60, 66-68, 29 Cal. Rptr. 847 , modified, 217 Cal. App. 2d 611, 31 Cal. Rptr. 754]* .

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Chapter 373 MOTIONS IN LIMINE
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33-373 California Forms of Pleading and Practice--Annotated § 373.11

AUTHOR: Patrick A. Cathcart

§ 373.11 Definition of "Motion in Limine"

A motion is an oral or written request to a court for entry of an order [*see Code Civ. Proc. § 1003*; *see generally* Ch. 372, *Motions and Orders*]. In limine is defined as "on or at the threshold; at the very beginning; preliminarily" [Black's Law Dictionary (5th ed. 1978)]. Accordingly, a motion in limine is a motion directed to the judge, outside the presence of the jury, to limit or exclude certain evidence or testimony in anticipation of such references by adverse counsel or witnesses [*see* Cotchett & Cartwright, *California Products Liability Actions, Ch. 10, Trial, § 10.01[6]* (2d ed. Matthew Bender)].

A motion in limine is generally brought before or at the beginning of trial, although it also may be brought during trial [*People v. Morris (1991) 53 Cal. 3d 152, 188, 279 Cal. Rptr. 720, 807 P.2d 949* ; *Mardirossian & Assocs. v. Ersoff (2007) 153 Cal. App. 4th 257, 269, 62 Cal. Rptr. 3d 665* ; *Kelly v. New W. Fed. Sav. (1996) 49 Cal. App. 4th 659, 669, 56 Cal. Rptr. 2d 803]* .

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33-373 California Forms of Pleading and Practice--Annotated § 373.12

AUTHOR: Patrick A. Cathcart

§ 373.12 Overview and Purposes of Motion in Limine

[1] Primary Purpose Is to Prohibit Presentation of Particular Items or Categories of Evidence

[a] Common Use of Motion in Limine Is to Consider Evidentiary Issues

In limine motions are designed to facilitate the management of a case, generally by deciding difficult evidentiary issues in advance of trial. The usual purpose of a motion in limine is to preclude the presentation of evidence deemed inadmissible and prejudicial by the moving party [*People v. Morris (1991) 53 Cal. 3d 152, 188, 279 Cal. Rptr. 720, 807 P.2d 949* ; *Mardirossian & Assocs. v. Ersoff (2007) 153 Cal. App. 4th 257, 268, 62 Cal. Rptr. 3d 665* ; *Kelly v. New W. Fed. Sav. (1996) 49 Cal. App. 4th 659, 669, 56 Cal. Rptr. 2d 803]* .

Normally, a motion in limine is considered a procedural mechanism that permits pretrial consideration of evidentiary issues that are expected to arise at trial. Because the motion merely transfers the evidentiary issues to the pretrial phase of the case, a motion in limine may seek to exclude an item or category of evidence on any ground that could be raised at trial [*see § 373.14[1]*], such as that the evidence is irrelevant, or is subject to discretionary exclusion as unduly prejudicial [*Clemens v. American Warranty Corp. (1987) 193 Cal. App. 3d 444, 451, 238 Cal. Rptr. 339]* . If the motion is granted, an order in limine [*see § 373.51* (form of order)] typically excludes the challenged evidence and directs parties, counsel, and witnesses not to refer to the excluded matters during trial [*People v. Morris (1991) 53 Cal. 3d 152, 188, 279 Cal. Rptr. 720, 807 P.2d 949* ; *Kelly v. New W. Fed. Sav. (1996) 49 Cal. App. 4th 659, 669, 56 Cal. Rptr. 2d 803]* .

Although preventing the actual admission of prejudicial evidence is the paramount consideration, another purpose of a motion in limine is to prevent opposing counsel or witnesses from even *referring* to matters that may be prejudicial and thus create a negative inference in the jurors' minds, even though they are subsequently instructed to disregard them [*see* Cotchett & Cartwright, *California Products Liability Actions, Ch. 10, Trial, § 10.01[6]* (2d ed. Matthew Bender)]. This is why an order in limine may bar counsel and witnesses from mentioning the excluded evidence in any manner.

It is the prejudicial effect of the questions asked or statements made in connection with the offer of the evidence, rather

than the prejudicial effect of the evidence itself, that a motion in limine is intended to reach [*Bridges v. City of Richardson (1962) 163 Tex. 292, 354 S.W.2d 366, 367]* . The purpose of the motion is to avoid the obviously futile attempt to "unring the bell" in the event a motion to strike is granted in the proceedings before the jury [*Kelly v. New West Federal Savings (1996) 49 Cal. App. 4th 659, 669, 56 Cal. Rptr. 2d 803* ; *Hyatt v. Sierra Boat Co. (1978) 79 Cal. App. 3d 325, 337, 145 Cal. Rptr. 47]* . Accordingly, if counsel anticipates that opposing counsel may make some effort to introduce evidence or facts that are likely to create an adverse inference in the jurors' minds, a motion in limine is advisable.

[b] No Limitation on Subject Matter of Motion in Limine

There is nothing in the notion of a "motion in limine" that connotes any limitation on the subject matter, and no statute that limits its use to simply precluding certain evidence. Counsel may want to consider all motions that are appropriate "at the threshold" (to more directly translate from the Latin, "at the preliminary") of the trial, motions that could not only limit the evidence on a certain issue, but seek to *admit* evidence before trial so it can be shown to the jury during opening statements. A motion in limine might deem evidentiary statements in pretrial submissions "admitted." There is a reasonable basis to use motions in limine as raising issues under *Evid. Code § 402* that would, before the commencement of trial, require a hearing on the existence of "preliminary facts."

Although generally used for exclusion of evidence, motions in limine may request favorable pretrial rulings on admissibility of evidence for other purposes than using the evidence in an opening statement. In some cases, for example, a party intends to rely on a particular piece of evidence, but is uncertain whether the evidence will be admitted at trial. Although an opposing party will often bring a motion in limine to exclude that evidence so that the proponent of the evidence will have a chance to obtain a pretrial ruling on admissibility, for tactical reasons a party might not bring such a motion relying on the power of an objection when the evidence is offered. In the event that certain evidence is crucial, and subject to a possible exclusionary objection, the party who needs to rely on that evidence might consider a motion in limine to deem the evidence admitted. Such a motion would, necessarily, involve a hearing with evidence to support the admissibility of the evidence. Courts that might be reluctant to decide on the admissibility of evidence without the foundation laid at the "trial" might respond favorably to the concept of a hearing under *Evid. Code § 402*, in which the admissibility or inadmissibility of proffered evidence depends on the existence of a preliminary fact is then put to the court for determination of admissibility outside of the present of the jury [*Evid. Code §§ 401, 402*].

On the other hand, if the evidence is excluded, the pretrial ruling allows the proponent of the evidence to: (1) find another way to get that evidence in at the trial, (2) obtain substitute evidence, or (3) adjust its trial strategy in light of the exclusion.

For a form of motion in limine, see *§ 373.50*.

[2] Strategic Purposes of Motions in Limine

In addition to establishing that certain evidence will be excluded at trial, motions in limine serve other purposes. They permit more careful consideration of evidentiary issues than would take place during trial. And they minimize side-bar conferences and disruptions during trial, allowing an uninterrupted flow of evidence. By resolving potentially critical issues at the outset, they enhance the efficiency of trials and promote settlements [*People v. Morris (1991) 53 Cal. 3d 152, 188, 279 Cal. Rptr. 720, 807 P.2d 949* ; *Kelly v. New W. Fed. Sav. (1996) 49 Cal. App. 4th 659, 669-670, 56 Cal. Rptr. 2d 803]* . For example, if particular evidence vital to an opponent's case can be excluded in limine, this will often change the parties' perceptions of their chances of success at trial, leading to renewed settlement negotiations.

Unlike an objection to all evidence, which may be used to end the trial and obtain judgment on the pleadings without the introduction of evidence, motions in limine are usually directed at particular items or categories of evidence, rather than at a plaintiff's entire case [*Clemens v. American Warranty Corp. (1987) 193 Cal. App. 3d 444, 451, 238 Cal.*

Rptr. 339] . As discussed in greater detail in § 373.12[3][b], when the net effect of one or more motions in limine is to exclude all evidence, the court has the power to dismiss the action without requiring a separate motion for nonsuit or for judgment on the pleadings [*Clemens v. American Warranty Corp. (1987) 193 Cal. App. 3d 444, 451, 238 Cal. Rptr. 339* (although unorthodox, irregularity was nonprejudicial)].

Practice Tip:

In some cases the mere fact the motion in limine is made will alert opposing counsel to a problem area, allowing him or her to undertake additional investigation during the trial to ensure proof is in order on the point. It can also alert opposing counsel to a possible area of proof that had not occurred to him or her. For these reasons, counsel should gauge the adversary and the prejudicial nature of the evidence. Normally, a motion should be made only when counsel deems it necessary to protect the integrity of the lawsuit [*Kelly v. New West Federal Savings (1996) 49 Cal. App. 4th 659, 672, 56 Cal. Rptr. 2d 803]* . However, there are situations in which a specific issue is critical and damaging to one side, and is so important that, even though the other side might be unaware of the issue, the motion in limine is essential. This is increasingly an important consideration with the advent of Internet searches and research that can make an opponent aware of many issues, facts, and adverse details that in the past would not have been available. On a vetting, the information might not be admissible. In a trial, fast-moving and multi-faceted, the attorney might want to avoid the prospect of a surprise on the issue. A motion in limine can deflect that surprise. *By Patrick A. Cathcart*.

From a strategic standpoint, a motion in limine is one option available to determine evidentiary questions before trial. A party that plans to object to evidence need not bring a motion in limine, but may instead defer any objection until the evidence is offered at trial [*e.g.,* *Rufo v. Simpson (2001) 86 Cal. App. 4th 573, 608-609, 103 Cal. Rptr. 2d 492* (plaintiff did not waive objection to use of witness's prior testimony by failing to move in limine to exclude that testimony)]. Nevertheless, making the motion can be advisable because it removes uncertainty as to the admission or exclusion of the evidence. In addition, deferring the objection until trial can be risky because it requires diligence in objecting to the evidence. If a party does not move in limine and does not promptly object the first time the evidence is mentioned or offered, the objection may be waived [*e.g.,* *Las Palmas Associates v. Las Palmas Center. Associates (1991) 235 Cal. App. 3d 1220, 1241-1242, 1 Cal. Rptr. 2d 301* (although statute precluded evidence of fraud defendant's wealth, when defendant failed to move in limine to exclude evidence and likewise failed to object when issue was mentioned in opening statements, trial court did not abuse discretion in permitting evidence based on conclusion that plaintiff would be prejudiced by granting delayed motion)].

Practice Tip:

The above discussion notwithstanding, a properly prepared and resolved matter on a motion in limine can dispose of a lawsuit. Every counsel knows the number of cases he or she must tentatively evaluate until the court rules on a key question of law or fact. An able court can dispose of a lengthy trial in a few hours by simply cutting to the key point of law or fact, requesting research when necessary, and after preliminary offers of proof, giving tentative rulings. Settlements in jury trials as well can be a frequent result of early disposition of the critical evidentiary issue. *By Patrick A. Cathcart*.

[3] Inappropriate Uses of Motions in Limine

[a] Motion in Limine May Not Be Used to Bind Party or Witness to Particular Testimony or View of Evidence

It is not proper to use a motion in limine to attempt to compel a witness or party to conform trial testimony to a preconceived factual scenario based on testimony given during pretrial discovery. Instead, when trial testimony is different from what was given in discovery, the trial testimony can be impeached by the earlier testimony given in discovery [*Mardirossian & Assocs. v. Ersoff (2007) 153 Cal. App. 4th 257, 269-271, 62 Cal. Rptr. 3d 665* (trial court properly overruled motion in limine to preclude attorneys from testifying as to hours worked because trial testimony

was based on personal knowledge of attorneys and was not inconsistent with discovery testimony that no time records were kept); *Fatica v. Superior Court (2002) 99 Cal. App. 4th 350, 352-353, 120 Cal. Rptr. 2d 904* (trial court erred in ordering in limine that treating physician could testify as fact witness only based on physician's failure to review plaintiff's medical records before discovery deposition); *Kelly v. New W. Fed. Sav. (1996) 49 Cal. App. 4th 659, 672-675, 56 Cal. Rptr. 2d 803* (improper to exclude evidence regarding one of two elevators that could have been site of accident when plaintiff who initially identified elevator as one involved later suggested she was uncertain which was involved)].

Practice Tip:

A motion in limine may be used to require the opponent to provide the "rest of the story" when the opponent offers testimony of part of a witness recollection. If counsel believes that a witness might testify to some but not all of the facts or evidence produced at a deposition, a motion in limine can draw attention the "incomplete" testimony likely to be offered, and request that the court require, if that testimony is offered, that the rest of the testimony be adduced on direct, thus weakening the effect, rather than waiting for cross-examination. Counsel should consider whether the cross-examination that draws out the incomplete testimony would help the party doing the cross-examination more than the deleterious effect of limiting direct examination. *By Patrick A. Cathcart.*

[b] Motion in Limine Should Not Address Legal Consequences of Evidentiary Exclusion Unless Dispositive of Claim, Defense, or Entire Action

A motion in limine seeks to exclude certain evidence, while a resulting order in limine precludes any use or mention of the excluded evidence [*see § 373.12[1]*]. However, neither the motion nor the order is concerned with the legal effect of the exclusion. When evidence is excluded, it may be more difficult (or impossible) for a party to prove a necessary element of a claim or defense. But that issue is generally to be resolved through subsequent motions for judgment on the pleadings, for summary judgment, or for nonsuit, not through the in limine motion itself. For this reason, some courts have noted that in limine motions are not designed to replace the dispositive motions prescribed by the Code of Civil Procedure [*Blanks v. Shaw (2009) 171 Cal. App. 4th 336, 89 Cal. Rptr. 3d 710* ; *Amtower v. Photon Dynamics, Inc. (2008) 158 Cal. App. 4th 1582, 1593, 71 Cal. Rptr. 3d 361* ; *see R & B Auto Ctr., Inc. v. Farmers Group, Inc. (2006) 140 Cal. App. 4th 327, 350, 44 Cal. Rptr. 3d 426* (noting that use of in limine motions to obtain summary adjudication is "discourage[d]")].

Accordingly, the trial judge generally should not weigh the evidence on a motion in limine, and should not make a wholesale disposition of a case through a ruling on a motion in limine. The judge may address the movant's concerns that the opposing party may be trying to use evidence for an improper purpose or in a way that may be unduly prejudicial by limiting instructions, without taking away the other party's right to a jury trial [*see R & B Auto Ctr., Inc. v. Farmers Group, Inc. (2006) 140 Cal. App. 4th 327, 359, 44 Cal. Rptr. 3d 426* (trial court erred in causing wholesale disposition of unfair competition cause of action through granting motions in limine without tailoring ruling to balance competing concerns of moving parties against right of opposing party to present evidence to establish its cause of action)].

In some cases, a party opposing a motion in limine will admit that if the motion is granted, it can no longer prevail on one or more claims or defenses. Even in the absence of such a concession, it is often clear that a particular evidentiary exclusion is fatal to a claim, defense, or an entire case. In that event, the court need not ignore the practical effect of the in limine motion; instead, the court may order judgment on the claims or defenses that are effectively decided by the evidentiary ruling. For example, if all evidence is excluded, the court has the power to dismiss the action without requiring a separate motion for nonsuit or for judgment on the pleadings [*Clemens v. American Warranty Corp. (1987) 193 Cal. App. 3d 444, 451, 238 Cal. Rptr. 339]* . If an exclusion or other evidentiary ruling on a motion in limine effectively decides an issue, claim, or defense, the court may enter an appropriate order [*Amtower v. Photon Dynamics, Inc. (2008) 158 Cal. App. 4th 1582, 1596-1597, 71 Cal. Rptr. 3d 361* (trial court properly decided statute of

limitations defense based on evidence established through motion in limine); *see also K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc. (2009) 171 Cal. App. 4th 939, 90 Cal. Rptr. 3d 247* (trial court did not err in deciding in conjunction with motion in limine that statute preempted common-law remedies for misappropriation of trade secrets)]. The court must be careful to confine the order to the matters effectively decided by the evidentiary ruling [*e.g., Blanks v. Shaw (2009) 171 Cal. App. 4th 336, 89 Cal. Rptr. 3d 710, 739-743* (when motion in limine excluded all evidence as to delayed accrual of cause of action, court properly entered order that discovery rule was inapplicable to toll limitations period, but court erred in deciding issue of defendant's negligence)].

Trial courts may therefore use the in limine process to examine the sufficiency of the evidence [*see K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc. (2009) 171 Cal. App. 4th 939, 90 Cal. Rptr. 3d 247* (use of motion in limine to test whether complaint states cause of action is proper); *Michelson v. Camp (1999) 72 Cal. App. 4th 955, 960-961, 85 Cal. Rptr. 2d 539* (in response to allegations in defendant's trial brief, trial court instructed plaintiffs to make offer of proof as to existence of damages, concluded that, as matter of law, plaintiffs could not show recoverable damages and granted nonsuit for defense); *Stein-Brief Group, Inc. v. Home Indemnity Co. (1998) 65 Cal. App. 4th 364, 76 Cal. Rptr. 2d 3* (trial court ordered plaintiff to file pretrial motion in limine setting forth its best case scenario in favor of insurance coverage, concluded that there was no potential for coverage and entered judgment for defense)]. Trial courts have the inherent power to use motions in limine in this way to control the litigation and to adopt any suitable method of practice, even if not specified by statute or court rules [*Amtower v. Photon Dynamics, Inc. (2008) 158 Cal. App. 4th 1582, 1594-1595, 71 Cal. Rptr. 3d 361]* .

When the trial court uses the in limine process to dispose of a case or cause of action for evidentiary reasons, the reviewing court will review the result as it would the grant of a motion for nonsuit after opening statement, keeping in mind that the grant of such a motion is not favored, that a key consideration is that the nonmoving party has had a full and fair opportunity to state all the facts in its favor, and that all inferences and conflicts in the evidence must be viewed most favorably to the nonmoving party [*Amtower v. Photon Dynamics, Inc. (2008) 158 Cal. App. 4th 1582, 1595, 71 Cal. Rptr. 3d 361* ; *Fergus v. Songer (2007) 150 Cal. App. 4th 552, 570, 59 Cal. Rptr. 3d 273]* .

If a purported motion in limine actually seeks a dispositive ruling on the merits rather than an evidentiary decision [*see § 373.13[4]*], the court may disregard the party's label and decide the motion as if it had been properly denominated [*e.g., Coshow v. City of Escondido (2005) 132 Cal. App. 4th 687, 701-702, 34 Cal. Rptr. 3d 19* (trial court construed motion in limine as motion for judgment on pleadings and dismissed)].

[c] Motion in Limine May Not Be Used to Control Conduct of Trial Proceedings

Matters of day-to-day trial logistics and common professional courtesy should not be the subject of motions in limine. For example, the manner in which witnesses are to be called and exhibits presented to the jury are matters to be addressed at trial, not through a motion in limine [*Kelly v. New W. Fed. Sav. (1996) 49 Cal. App. 4th 659, 671, 56 Cal. Rptr. 2d 803* (requiring prior notification of which witnesses will be called and that exhibits be shown to jury only after being seen by counsel and court were not proper subjects of motion in limine)].

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33-373 California Forms of Pleading and Practice--Annotated § 373.13

AUTHOR: Patrick A. Cathcart

§ 373.13 Power of Court to Grant or Deny Motion in Limine

[1] Source of Power Is Court's Inherent Authority

Although motions in limine are not specifically provided for by statute or court rule, it is in a California court's inherent power to grant a motion in limine to provide for the orderly conduct of proceedings before it, to control its process and orders to make them conform to law and justice, and to exclude either wholly irrelevant evidence, or relevant evidence when its probative value is outweighed by the probability that its admission will create undue prejudice, confuse the issues, or mislead the jury [*see Code Civ. Proc. § 128(a)(3), (8)*; *Evid. Code §§ 350, 352*; *Clemens v. American Warranty Corp. (1987) 193 Cal. App. 3d 444, 451, 238 Cal. Rptr. 339* ; *see also K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc. (2009) 171 Cal. App. 4th 939, 90 Cal. Rptr. 3d 247* (trial court acted within bounds of inherent power in deciding in conjunction with motion in limine that statute preempted common-law remedies for misappropriation of trade secrets)].

Cases in which the use of a motion in limine has been recognized as within a court's inherent powers include the following:

- In *Helfend v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 1, 16-18, 84 Cal. Rptr. 173, 465 P.2d 61* , a personal injury case, defendant sought to ask about payments made to plaintiff by his insurer for the limited purpose of questioning the reasonableness of medical costs or showing that plaintiff was a malingerer. The California Supreme Court found that the trial court did not abuse its discretion in excluding the evidence. The court also indicated that the initial inquiry on this subject by counsel should have been made out of the presence of the jury, i.e., by motion in limine.

- In *Amtower v. Photon Dynamics, Inc. (2008) 158 Cal. App. 4th 1582, 1593-1595, 71 Cal. Rptr. 3d 361* , an action alleging numerous claims arising from a corporate merger, the trial court granted a motion in limine to exclude all evidence relating to a particular claim under federal securities laws, concluding that the undisputed evidence showed that the claim was barred by limitations. The appellate

court affirmed, despite its reservations that the in limine process had been used to dispose of a *claim* rather than merely decide evidentiary issues. The court noted that disposition of a claim is normally accomplished through the dispositive motions prescribed by the Code of Civil Procedure, and that those motions contain procedural protections and requirements not applicable to in limine proceedings. Nevertheless, the court held that despite "the obvious drawbacks to the use of in limine motions to dispose of a claim, trial courts do have the inherent power to use them in this way" [*Amtower v. Photon Dynamics, Inc. (2008) 158 Cal. App. 4th 1582, 1595, 71 Cal. Rptr. 3d 361* , *citing* *Lucas v. County of Los Angeles (1996) 47 Cal. App. 4th 277, 284-285, 54 Cal. Rptr. 2d 655]* . The appellate court then concluded that because the facts as established at the in limine hearing showed that the plaintiff could not avoid the limitations bar, the dismissal of the claim was proper.

- In *Sacramento, etc. Drainage Dist. ex rel. State Reclamation Bd. v. Reed (1963) 215 Cal. App. 2d 60, 66-68, 29 Cal. Rptr. 847* , *modified,* *217 Cal. App. 2d 611, 31 Cal. Rptr. 754* , an appellate court affirmed the trial court's granting of a pretrial motion to exclude evidence of damage from increased flooding that might be caused by levee construction adjacent to the defendant's property. The appellate court stated that although the motion was not a conventional procedure, it was well conceived under the circumstances and was a proper mode of objection.

- In *Pierce v. J.C. Penney Co. (1959) 167 Cal. App. 2d 3, 5 n.1, 13, 334 P.2d 117* , counsel for plaintiff, in a pretrial discussion in chambers, sought permission to introduce evidence of subsequent repairs. An objection at trial that a question about subsequent repairs was immaterial was held sufficient to preserve the issue on appeal, on the rationale that the positions of the parties had been fully stated in chambers. The court thereby indicated that pretrial discussions on the admissibility of evidence are permissible [*see* *Delta Dynamics, Inc. v. Arioto (1968) 69 Cal. 2d 525, 527 n.1, 72 Cal. Rptr. 785, 446 P.2d 785* (approving use of pretrial conference to frame issues to be decided at trial); *see also § 373.18[2]* (preservation of evidentiary issue through in limine motion)].

The court's inherent powers, as well as its power to control litigation and conserve judicial resources, permit it to entertain a motion in limine to dismiss the entire action when the court determines that the plaintiff has failed to state a cause of action [*Lucas v. County of Los Angeles (1996) 47 Cal. App. 4th 277, 284-285, 54 Cal. Rptr. 2d 655* (irregular but not improper procedure); *see* *Clemens v. American Warranty Corp. (1987) 193 Cal. App. 3d 444, 451-452, 238 Cal. Rptr. 339]* . This is not precluded by the *Code Civ. Proc. § 438(g)(1)* requirement for a motion for judgment on the pleadings that there be a material change in law or statute or by the *Code Civ. Proc. § 1008* requirements for a motion for reconsideration when an earlier motion for summary judgment has previously been denied [*Lucas v. County of Los Angeles (1996) 47 Cal. App. 4th 277, 284, 54 Cal. Rptr. 2d 655]* .

[2] Court's Discretion in Regard to Motion in Limine

[a] Court Has Discretion to Rule Immediately or Defer Ruling Until Trial

A motion in limine is a procedural mechanism that permits pretrial consideration of evidentiary issues expected to arise at trial [*see § 373.12[1]*]. Just because the parties have requested pretrial consideration does not mean that the court has to provide it. In many cases, evidence challenged through a motion in limine may be inadmissible as irrelevant, or relevant but unduly prejudicial. In those cases, the court should rule immediately and enter an in limine order [*e.g.*, *Fairfax v. Lords (2006) 138 Cal. App. 4th 1019, 1025-1028, 41 Cal. Rptr. 3d 850* (when defendant missed deadline for designating expert witness, trial court should have granted plaintiff's motion in limine to exclude that witness)]. The issues of relevance and prejudice, however, are often contextual because they depend on the legal theories and other evidence offered at trial. In that instance, the trial court should exercise its discretion to refuse to rule in limine, and instead defer any decision as to whether the challenged evidence will be excluded until it is offered at trial [*see, e.g.*, *Silva v. Union Pacific Railroad Co. (2000) 85 Cal. App. 4th 1024, 1030, 102 Cal. Rptr. 668* (trial court erred in finding

that railroad had no duty to fence right-of-way through in limine proceedings because issues of duty and foreseeability are fact-intensive and court had insufficient evidentiary basis for decision)].

A court intending to defer an evidentiary ruling may do so by (1) expressly denying the motion in limine without prejudice to its reassertion if and when the evidence is offered at trial, or (2) taking the motion in limine under advisement.

[b] Court May Not Simply Refuse to Hear Motion in Limine

Although a trial court is not obliged to rule immediately on a motion in limine and may instead defer any decision until trial, the court may not simply ignore the motion and do nothing. When the court refuses to entertain a motion in limine on the ground that it is without power to do so, a writ of mandate may issue to compel the court to hear the motion. The writ has been held proper to compel an exercise of discretion when a trial court has refused to act on the mistaken belief that it is without such authority [*e.g.*, *Nadler v. Superior Court (1967) 255 Cal. App. 2d 523, 525, 63 Cal. Rptr. 352* ; *see § 373.18* (appellate review of in limine orders)].

[3] Court May Reconsider Evidentiary Issues at Trial

Regardless of whether a motion in limine is granted or denied, the ruling is necessarily tentative because subsequent developments in the case may change the context and require a different outcome in later proceedings or at trial [*People v. Rodrigues (1994) 8 Cal. 4th 1060, 1174, 36 Cal. Rptr. 2d 235, 885 P.2d 1* ; *Rufo v. Simpson (2001) 86 Cal. App. 4th 573, 608-609, 103 Cal. Rptr. 2d 492* ; *see* *Cristler v. Express Messenger Systems, Inc. (2009) 171 Cal. App. 4th 72, 89 Cal. Rptr. 34* (in limine order is not binding but rather subject to reconsideration on more complete record at trial).

[4] Mislabeling of Motion in Limine Does Not Affect Court's Power to Act

In some cases, a motion is labeled by the movant as a motion in limine, but actually seeks not an evidentiary ruling but instead a disposition on the merits of one or more issues or claims. In that event, the court may disregard the party's label and decide the motion as if it had been properly denominated, provided that the appropriate procedural protections for the dispositive motion were provided [*e.g.*, *Coshow v. City of Escondido (2005) 132 Cal. App. 4th 687, 701-702, 34 Cal. Rptr. 3d 19* (trial court properly construed motion in limine as motion for judgment on pleadings and dismissed)].

Conversely, if a party submits a motion for summary adjudication of an issue or claim but the motion actually challenges the admissibility of evidentiary matters, the court may treat the motion as a motion in limine and make an appropriate evidentiary order [*Macy's California, Inc. v. Superior Court (1995) 41 Cal. App. 4th 744, 748 n.2, 48 Cal. Rptr. 2d 496* (objection to evidence relating to negligent infliction of emotional distress should have been raised by motion in limine, not motion for summary adjudication); *Merenda v. Superior Court (1992) 3 Cal. App. 4th 1, 4 Cal. Rptr. 2d 87* (although defendant moved for summary adjudication, motion actually sought to exclude evidence of particular elements of damages, so court treated it as motion in limine)].

Practice Tip:

The 2005 amendments to *Code Civ. Proc. § 437c* requiring 75 days' notice and more than 30 days before trial to be heard for summary judgment motions may impinge on the trial court's treating of a motion for summary judgment disguised as a motion in limine [*see Code Civ. Proc. § 437c(a)*]. However, if the motion in limine is simply a motion to determine that the "statement of uncontroverted facts" is, in fact, legally uncontroverted, a motion for judgment at the end of plaintiff's opening statement or at the end of the defendant's reply might be facilitated by such a motion. *By Patrick A. Cathcart*.

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33-373 California Forms of Pleading and Practice--Annotated § 373.14

AUTHOR: Patrick A. Cathcart

§ 373.14 Examples of Evidentiary Exclusions Through Use of Motion in Limine

[1] General Rule: Any Objection to Admissibility That Could Be Raised at Trial Can Be Raised Through Pretrial Motion in Limine

A motion in limine permits pretrial consideration of evidentiary issues expected to arise at trial. Because a motion in limine merely changes the time at which the evidentiary issues are to be considered, the general rule is that any objection to evidence that could be raised at trial can also be raised through a pretrial motion in limine [*Condon-Johnson & Assocs. Inc. v. Sacramento Mun. Utility Dist. (2007) 149 Cal. App. 4th 1384, 57 Cal. Rptr. 3d 849* (motion in limine can be premised on any ground sufficient to object to or move to strike same evidence when offered at trial); *Greer v. Buzgheia (2006) 141 Cal. App. 4th 1150, 1156, 46 Cal. Rptr. 3d 780* (scope of motion in limine is any kind of evidence that could be objected to at trial)].

Of course, evidence may be inadmissible on one or more of numerous grounds. The following subsections provide a nonexclusive list of types and categories of evidence that may be excluded through the use of a motion in limine [*see* Davis, *Pre-Trial Motions to Suppress Prejudicial Matters*, 4 Trial Lawyers Q. 43, 45-50 (1967)].

[2] Specific Grounds for Excluding Evidence Under Motion in Limine

[a] Evidence Is Irrelevant

Only relevant evidence is admissible [*Evid. Code § 350*]. A motion in limine may seek to exclude irrelevant evidence [*e.g.*, *Ulloa v. McMillin Real Estate & Mortg. (2007) 149 Cal. App. 4th 333, 338, 57 Cal. Rptr. 3d 1* (although broker may have violated professional ethics by signing contract for client, issue of who signed was irrelevant to claims presented, so trial court properly granted motion in limine to exclude evidence that broker signed)]. For example, evidence that relates solely to an issue not raised in the pleadings or otherwise implicated in the action is irrelevant and may be excluded through a motion in limine [*e.g.*, *Schweitzer v. Westminster Investments (2007) 157 Cal. App. 4th 1195, 1214, 69 Cal. Rptr. 3d 472]* .

[b] Evidence Is Unduly Prejudicial or Otherwise Precluded Under Evidence Code

Even when evidence is relevant, it may nevertheless be excluded when its probative value is outweighed by the potential for undue prejudice [*Evid. Code § 352*]. A motion in limine may seek to exclude evidence as unduly prejudicial [*see, e.g.,* *Ulloa v. McMillin Real Estate & Mortg. (2007) 149 Cal. App. 4th 333, 338, 57 Cal. Rptr. 3d 1* (recognizing rule)].

In some instances, the Evidence Code expressly precludes the introduction of obviously relevant evidence based on a policy determination that the evidence is prejudicial. If a party anticipates that evidence might be mentioned or offered in violation of one of these express prohibitions, it may file a motion in limine to exclude the evidence. For example, an offer to settle a claim is not admissible to show liability on the claim [*Evid. Code § 1152*], so a defendant may file a motion in limine to preclude evidence of such an offer [*Lemer v. Boise Cascade, Inc. (1980) 107 Cal. App. 3d 1, 9-12, 165 Cal. Rptr. 555]* .

[c] Evidence Is Not Properly Considered in Determining Damages; Collateral Source Rule

Certain causes of action permit the recovery of only limited damages. For example, a claimant may be restricted to economic damages only, and cannot recover noneconomic damages or punitive damages. When the claimant's damages are limited, a motion in limine may be brought to exclude evidence that relates only to prohibited elements of damages [*e.g.,* *Garcia v. Superior Court (2006) 137 Cal. App. 4th 342, 347-348, 39 Cal. Rptr. 902* (motion in limine was proper to raise issue of whether plaintiff could recover noneconomic damages); *Merenda v. Superior Court (1992) 3 Cal. App. 4th 1, 4 Cal. Rptr. 2d 87* (issue of whether plaintiff could recover emotional distress damages was properly addressed by motion in limine)].

The claimant may also bring a motion in limine to exclude improper evidence that the defendant intends to offer on damages. For example, the common-law collateral source rule provides that a tortfeasor is not entitled to a credit or offset for any recovery that the plaintiff may have obtained from an insurer or other source independent of the tortfeasor. The plaintiff may therefore move in limine to exclude evidence of any such payments [*Helfend v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 1, 14, 84 Cal. Rptr. 173, 465 P.2d 61* (payment for medical expenses); *Anheuser-Busch, Inc. v. Starley (1946) 28 Cal. 2d 347, 349-350, 170 P.2d 448* (payment for property damage)].

Although a claimant's recovery of medical expenses is limited, this limitation applies to the *recovery* of damages, not to *evidence* of those damages. Accordingly, granting a motion in limine to exclude evidence of the amount of medical expenses originally incurred merely because the expenses were subsequently discounted or written off is improper [*Katiuzhinsky v. Perry (2007) 152 Cal. App. 4th 1288, 1297-1298, 62 Cal. Rptr. 3d 309* ; *Greer v. Buzgheia (2006) 141 Cal. App. 4th 1150, 1156-1157, 46 Cal. Rptr. 3d 780]* .

[d] Evidence of Character of Party or Witness

Under the Evidence Code, the character of a party or witness may be raised as an issue only in limited circumstances [*see Evid. Code §§ 785-791, 1100-1109*]. If a party anticipates that prohibited character evidence may be used by an adverse party, it may seek to exclude that evidence by a motion in limine [*e.g., Evid. Code § 788* (evidence of prior felony conviction may not be used to impeach credibility of witness who was pardoned or otherwise rehabilitated or exonerated)].

[e] Evidence Is Inadmissible Due to Party's Violation of Disclosure or Discovery Obligations

If a party failed to make mandatory disclosures or to cooperate in discovery, that party may be prohibited from using the evidence not disclosed in any subsequent proceedings [*e.g., Code Civ. Proc. § 2034.300* (expert witness was barred when not disclosed)]. If such a bar is applicable, the party that should have received the disclosure or discovery may file

a motion in limine to exclude the prohibited evidence [*e.g.,* *Fairfax v. Lords (2006) 138 Cal. App. 4th 1019, 1025-1028, 41 Cal. Rptr. 3d 850* (when defendant missed deadline for designating expert witness, trial court should have granted plaintiff's motion in limine to exclude witness)].

[f] Proposed Expert Testimony Is Inadmissible

To testify as an expert witness, a person must meet certain qualification requirements [*Evid. Code § 720*]. If such a witness offers an expert opinion, that testimony must be properly supported [*Evid. Code § 801*]. A motion in limine may be brought to exclude the testimony of an expert witness on the ground that the witness does not qualify as an expert or on the ground that the expert's proposed opinion testimony lacks an adequate foundation [*see, e.g.,* *Miranda v. National Emer. Servs., Inc. (1995) 35 Cal. App. 4th 894, 41 Cal. Rptr. 2d 593* (whether proposed expert met statutory requirements to provide testimony in medical malpractice action relating to emergency services was proper subject of in limine motion)].

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AUTHOR: Patrick A. Cathcart

§ 373.15 Conditional Grant of Motion Subject to Offer of Proof at Trial

A trial court may reconsider the issues resolved by a motion in limine at a later time in the proceedings, including at trial [*see § 373.13[3]*]. Accordingly, the court may conditionally grant a motion in limine to prevent mention of prejudicial matter subject to offers of proof at trial. If facts adduced at trial have probative value that may outweigh their prejudicial impact, the trial court may reconsider its ruling on the motion in limine and change it, if appropriate [*see, e.g., Lemer v. Boise Cascade, Inc. (1980) 107 Cal. App. 3d 1, 9-12, 165 Cal. Rptr. 555]* .

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33-373 California Forms of Pleading and Practice--Annotated § 373.16

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§ 373.16 Procedure for Motion in Limine

[1] Procedure for Movant

[a] Proper Timing of Motion in Limine Governed by Rules of Court, Pretrial Orders, and Scheduling Orders

A motion in limine is not specifically authorized or governed by any California statute or court rule [*see § 373.10*]. Accordingly, there is generally no specific time period within which the motion must be brought. Instead, the appropriate time for pretrial motions, including a motion in limine, is governed by local rules and standing orders of the trial court, as well as any pretrial orders or scheduling orders entered in the particular case.

The Trial Court Delay Reduction Act requires all superior and municipal courts to implement delay reduction programs [*Gov. Code §§ 68605.5, 68620*; *see generally* Ch. 552, *Trial Court Delay Reduction*]. Some courts have adopted local rules to govern the procedures and timing of motions in limine. For example, in Los Angeles County, with respect to individual calendar cases, parties must file motions in limine with timely statutory notice so as to be heard on the day of the final status conference; with respect to master calendar cases, parties must file and serve motions in limine at least five days before the final status conference, for hearing on the first day of trial [Los Angeles Co. Super. Ct. Rules, Rule 1106.5].

If a party submits a motion in limine after the deadline established by one of these rules, the court may deny the motion on that basis alone [*see, e.g.,* *O'Mary v. Mitsubishi Electronics America, Inc. (1997) 59 Cal. App. 4th 563, 578, 69 Cal. Rptr. 2d 389* (noting that motion was untimely under superior court local rule, but declining to consider effect of untimeliness because action had to be remanded in any event)]. That denial does not defeat the claim for exclusion of the evidence; instead, it merely requires that the objection be raised at trial.

[b] Noticing Motion in Limine; Ex Parte Motion Prohibited

Motions in limine generally are directed to the judge of the department to which the case has been assigned for trial, on

the day trial is scheduled to begin, preferably before jury selection. They may be made orally or in writing, and should be made on the record with counsel present. Motions in limine must be made outside the hearing of the jury, or in chambers [*see* Cotchett & Cartwright, *California Products Liability Actions, Ch. 10, Trial, § 10.01[6]* (2d ed. Matthew Bender)].

Generally, when a motion seeks to affect the rights of an adverse party, notice to that party is required [*see Code Civ. Proc. § 1005*; *McDonald v. Severy (1936) 6 Cal. 2d 629, 631, 59 P.2d 98]* . In rare instances, such as a motion for a continuance, an ex parte motion is appropriate [*see Cal. Rules of Ct., Rule 3.1332(b)*]. However, an order based on an ex parte motion will be entered only in the plainest and most certain of cases when it appears that the rights of the adverse party will not be affected [*Consolidated Const. Co. v. Pacific E. Ry. Co. (1920) 184 Cal. 244, 246, 193 P. 238]* .

Because a motion in limine affects the rights of the adverse party, it should not be made on an ex parte basis, but should instead be a noticed motion that complies with the statutory and rule-based requirements for motions [*see Code Civ. Proc. § 1005*; *Cal. Rules of Ct., Rules 3.1300-3.1312*], which require that the motion be served and filed at least 16 days before the hearing [*Code Civ. Proc. § 1005(b)*]. For discussion and checklists for noticed motion procedure, as well as forms for use in giving notice, see Ch. 372, *Motions and Orders* . On making a noticed motion, an order shortening time for notice may be appropriate [*see* Ch. 524, *Shortening and Extension of Time*].

A recommended practice is to give the judge and opposing counsel a written motion in limine accompanied by a supporting memorandum and a proposed order. If the judge signs the order, it should then be filed and served on all parties. For forms of a notice and an order, see *§§ 373.50* and *373.51*, respectively.

[2] Procedure for Opponent of Motion in Limine

A party opposing a motion in limine may do so on procedural or substantive grounds. As to procedural grounds, the opponent may argue that the motion should not be granted because it was made after the time provided in a court order or rule, or because it was made without proper notice. As to substantive grounds, the opponent may simply argue the merits of the evidentiary questions involved, i.e., that the evidence is relevant, not unduly prejudicial, and not otherwise objectionable under the Evidence Code [*see § 373.12[3]* (inappropriate uses of motion in limine)]. Any opposing papers must be served and filed at least nine days before the hearing date [*Code Civ. Proc. § 1005(b)*].

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AUTHOR: Patrick A. Cathcart

§ 373.17 Sanctions for Violation of In Limine Order; Possibility of New Trial

An attorney who violates an in limine order by, for example, mentioning prohibited matter within the hearing of the jury, is subject to sanctions, including a citation for contempt [*see Code Civ. Proc. § 1209(a)(5)*; *Charbonneau v. Superior Court (1974) 42 Cal. App. 3d 505, 507, 116 Cal. Rptr. 153]* . Because such a violation occur in the presence of the court, a contempt citation may be enforced summarily [*see Code Civ. Proc. § 1211(a)*].

In addition, a motion for a new trial may be granted on the ground that violation of the in limine order constituted an irregularity in the proceedings [*see Code Civ. Proc. § 657(1)*]. A mistrial may be declared when the attorney's misconduct seriously prejudices an adverse party's claim or defense [*see Code Civ. Proc. § 616*; *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 793-795, 174 Cal. Rptr. 348* (declining to reverse trial court's denial of motion for mistrial, which found that misconduct did not result in prejudice)].

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AUTHOR: Patrick A. Cathcart

§ 373.18 Appellate Review of Order on Motion in Limine

[1] Order Not Subject to Review by Extraordinary Writ; Exceptions

An order granting or denying a motion in limine is an interlocutory order and therefore unappealable [*see Code Civ. Proc. §§ 904.1, 904.2*]. In addition, review of an in limine order by extraordinary writ is generally improper. However, in exceptional circumstances, an in limine order may be reviewable by a writ of mandate or prohibition [*see Code Civ. Proc. §§ 1084-1086* (mandate); *Code Civ. Proc. §§ 1102, 1103* (prohibition); *cf. Penal Code § 1538.5(i), (o)* (authorizing use of these writs to review order granting or denying motion to suppress under *Penal Code § 1538.5*)]. A writ of mandate is available to correct an error at law [*see Code Civ. Proc. § 1085*; *Nadler v. Superior Court (1967) 255 Cal. App. 2d 523, 525, 63 Cal. Rptr. 352* (writ of mandate may issue to compel court to hear and rule on motion in limine)]. A writ of prohibition may be used to arrest proceedings that are without or in excess of jurisdiction, or involve an error of constitutional dimension [*see Code Civ. Proc. § 1102*]. Both writs require a showing that there is no plain, speedy, and adequate remedy in the ordinary course of law [*see Code Civ. Proc. §§ 1086, 1103(a)*].

For detailed discussions of these procedures, see Ch. 358, *Mandate and Prohibition* .

[2] Appeal After Judgment

[a] Appeal Raises Issue of Propriety of Admission or Exclusion of Evidence, Not Validity of in Limine Order Itself

An order in limine is not subject to review on an interlocutory basis [*see § 373.18[1]*, and review is available only after final judgment. On appeal from the final judgment, an erroneous in limine order does not, in itself, constitute reversible error. Instead, the issue on appeal is whether the evidentiary ruling embodied in the order constitutes reversible error, i.e., whether the evidence was improperly excluded or admitted at trial [*Hartford Accident & Indem. Co. v. McCardell (Tex. 1963) 369 S.W.2d 331, 335]* . In short, the appeal is taken from the rejection or admission of the evidence, not from the in limine order itself [*e.g.*, *Palmer v. Ted Stevens Honda, Inc. (1987) 193 Cal. App. 3d 530, 542, 238 Cal. Rptr. 363* (exclusion of evidence based on undue prejudice through motion in limine is reversible error when exclusion

results in miscarriage of justice)].

[b] When Motion in Limine Preserves Objection to Admission of Evidence

When an appellant alleges that evidence was erroneously admitted, the judgment of the trial court may not be set aside unless a timely objection or motion to exclude the evidence stated the specific grounds for excluding the evidence [*Evid. Code § 353*]. The Evidence Code does not specify when the objection is to be made. Under appropriate circumstances, a motion in limine can serve the function of a motion to exclude under the Evidence Code by allowing the trial court to rule on a specific objection to particular evidence.

A motion in limine to exclude evidence is sufficient to preserve error in the admission of evidence when it satisfies the basic requirements of *Evid. Code § 353*:

(1) A specific legal ground for exclusion is advanced and subsequently raised on appeal;

(2) The motion is directed to a particular, identifiable body of evidence; and

(3) The motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context.

When such a motion is made and denied, the issue is preserved for appeal.

On the other hand, if a motion in limine does not satisfy each of these requirements, a proper objection satisfying *Evid. Code § 353* must be made when the evidence is offered at trial to preserve the evidentiary issue for appeal [*People v. Morris (1991) 53 Cal. 3d 152, 189-190, 279 Cal. Rptr. 720, 807 P. 2d 949* ; *see Boeken v. Philip Morris, Inc. (2005) 127 Cal. App. 4th 1640, 1675, 26 Cal. Rptr. 638* (motion in limine to exclude evidence is not sufficient to preserve error unless directed at particular, identifiable body of evidence, and made at time when trial court could determine evidentiary issues in proper context); *Kelly v. New W. Fed. Sav. (1996) 49 Cal. App. 4th 659, 671, 56 Cal. Rptr. 2d 803* (renewed objection required when context or substance of testimony or evidence at trial differs from that contemplated by in limine motion)].

To avoid controversy over whether error is preserved, the better practice in handling motions in limine is for the parties to stipulate to the effect of the court's rulings, or for the trial judge to make it clear to counsel at the end of in limine arguments not only what the ruling on the motion is, but whether further objection or argument is desired when the evidence is presented. If this is done, the stipulation or order of the trial court will be respected in the appellate court's determination whether error has been properly preserved [*People v. Morris (1991) 53 Cal. 3d 152, 190-191, 279 Cal. Rptr. 720, 807 P. 2d 949]* .

[c] When Motion in Limine Preserves Objection to Exclusion of Evidence

Before a judgment will be reversed on appeal because of the erroneous exclusion of evidence, an offer of proof is usually necessary unless the rulings of the court make compliance with this requirement futile [*see Evid. Code § 354(a), (b)*]. When the trial court has ruled or indicated that it will receive no evidence of a particular type or class or on a particular issue, the prejudicial nature of the exclusion of that evidence may be argued on appeal regardless of whether an offer of proof was made [*see Lawless v. Calaway (1944) 24 Cal. 2d 81, 91, 147 P.2d 604]* . Therefore, an offer of proof is not necessary when a trial court grants a motion in limine to exclude evidence and the in limine order makes it clear that the evidentiary exclusion will not be reconsidered at trial.

Further, it is arguable that an offer of proof may be made at a pretrial hearing on the motion by presenting the substance, purpose, and relevance of the evidence in question to the court by means of counter-affidavits or declarations [*see Evid.*

Code § 354 (offers of proof); *Code Civ. Proc. §§ 2009* (affidavits), 2015.5 (declarations)]. The Evidence Code does not specify when an offer of proof is to be made. Although such offers are routinely made at trial, an offer of proof at a pretrial hearing should be sufficient when both parties are present and prepared to argue the evidentiary questions. In *Delta Dynamics, Inc. v. Arioto (1968) 69 Cal. 2d 525, 527 n.1, 72 Cal. Rptr. 785, 446 P.2d 785* , an appeal was allowed when the attempted offer of proof at trial, taken alone, was too general to provide a ground for appeal, but the court had been sufficiently apprised of the substance, purpose, and relevance of the evidence at the pretrial conference.

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[Reserved]

§§ 373.19[Reserved]

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§ 373.30 Cross References

For motion practice generally, see Ch. 372, *Motions and Orders*

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AUTHOR: Patrick A. Cathcart

§ 373.31 State Constitution

Harmless error rule. *Cal. Const., art. VI, § 13*

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33-373 California Forms of Pleading and Practice--Annotated § 373.32

AUTHOR: Patrick A. Cathcart

§ 373.32 State Statutes

[1] Contempt

Disobedience of any lawful judgment, order, or process of court is contempt. *Code Civ. Proc. § 1209(a)(5)*

[2] Evidence

Only relevant evidence is admissible. *Evid. Code § 350*

Exclusion of time-consuming, prejudicial, confusing, and misleading evidence. *Evid. Code § 352*

Error in admitting evidence. *Evid. Code § 353*

Error in excluding evidence. *Evid. Code § 354*

Admissibility of evidence considered out of presence or hearing of jury. *Evid. Code 402(b)*

[3] Motions and Orders

Application for order is motion. *Code Civ. Proc. § 1003*

Motions requiring written notice; time for filing and service. *Code Civ. Proc. § 1005*

Motion on all grounds stated in written notice thereof is deemed to have been made and to be pending before court for all purposes on service and filing of notice. *Code Civ. Proc. § 1005.5*

[4] Powers of Courts

Power of court to provide for orderly conduct of proceedings. *Code Civ. Proc. § 128(a)(3)*

Power of court to amend and control processes and orders to conform them to law and justice. *Code Civ. Proc. § 128(a)(8)*

[5] Appellate Review

Appealability of orders. *Code Civ. Proc. §§ 904.1, 904.2*

Writ of mandate. *Code Civ. Proc. §§ 1084-1086*

Writ of prohibition. *Code Civ. Proc. §§ 1102-1105*

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AUTHOR: Patrick A. Cathcart

§ 373.33 Local Court Rules

Procedure for filing motion in limine. Los Angeles Co. Super. Ct. Rules, Rule 1106.5

Procedure for filing motion in limine. San Diego Co. Super. Ct. Rules, Rule 10.11

Time for making motion in limine. San Francisco Co. Super. Ct. Rules, Rule 2.8(B)

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AUTHOR: Patrick A. Cathcart

§ 373.34 Decisions

[1] Purpose of Motion in Limine

Normal use of motion in limine is to preclude presentation of evidence deemed inadmissible and prejudicial by moving party. *People v. Morris (1991) 53 Cal. 3d 152, 188, 279 Cal. Rptr. 720, 807 P. 2d 949* ; *Mardirossian & Assocs. v. Ersoff (2007) 153 Cal. App. 4th 257, 268, 62 Cal. Rptr. 3d 665* ; *Kelly v. New W. Fed. Sav. (1996) 49 Cal. App. 4th 659, 669, 56 Cal. Rptr. 2d 803*

Courts routinely conduct hearings in limine to determine scope of admissible evidence; court may exclude incompetent evidence or evidence not relevant to issues presented to jury. *Redevelopment Agency v. Tobriner (1989) 215 Cal. App. 3d 1087, 1097 n.5, 264 Cal. Rptr. 481*

Motion in limine is intended to reach prejudicial effect of questions asked or statements made in connection with offer of evidence, not prejudicial effect of evidence itself. *Bridges v. City of Richardson (1962) 163 Tex. 292, 354 S.W.2d 366, 367*

[2] Objection to All Evidence

Judge should not weigh evidence on motion in limine and should not make wholesale disposition of case through ruling on motion; appellate court disapproved of trial court having eliminated bulk of party's evidence through rulings on motions in limine, then granting motion for nonsuit before party had opportunity to make opening statement or present evidence to trier of fact. *R & B Auto Ctr., Inc. v. Farmers Group, Inc. (2006) 140 Cal. App. 4th 327, 333, 44 Cal. Rptr. 3d 426*

In limine motions are not intended to replace dispositive motions prescribed by Code of Civil Procedure. *Blanks v. Seyfarth Shaw LLP (2009) 171 Cal. App. 4th 336, 89 Cal. Rptr. 3d 710* ; *Amtower v. Photon Dynamics, Inc. (2008)*

158 Cal. App. 4th 1582, 1593, 71 Cal. Rptr. 3d 361

Objection to all of party's evidence through motion in limine is available when party's pleading is fatally defective; dismissal is not inappropriate or prejudicial following granting of motion. *Clemens v. American Warranty Corp (1987) 193 Cal. App. 3d 444, 452, 238 Cal. Rptr. 339*

[3] Offer of Proof

Offer of proof is not prerequisite for arguing on appeal prejudicial nature of exclusion of evidence when entire class of evidence is declared inadmissible by trial court. *Lawless v. Calaway (1944) 24 Cal. 2d 81, 91, 147 P.2d 604*

[4] Out of Jury's Presence

In personal injury case when defendant sought to ask about payments made to plaintiff by insurer, initial inquiry was improperly made in presence of jury. *Helfend v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 1, 16-18, 84 Cal. Rptr. 173, 465 P.2d 61*

[5] Pretrial Discussions

Appeal is allowed when attempted offer of proof at trial, taken alone, was too general to provide ground for appeal but court was sufficiently apprised of substance, purpose, and relevance of evidence at pretrial conference. *Delta Dynamics, Inc. v. Arioto (1968) 69 Cal. 2d 525, 527 n.1, 72 Cal. Rptr. 785, 446 P.2d 785*

Objection at trial to question about subsequent repairs was sufficient to preserve issue on appeal, although specific ground of objection was not stated at trial because parties had stated their positions at pretrial meeting in chambers. *Pierce v. J.C. Penney Co. (1959) 167 Cal. App. 2d 3, 5 n.1, 13, 334 P.2d 117*

[6] Proper Denial

Trial court's discretion in denying *Evid. Code § 352* motion in limine is properly exercised when record contains affirmative indications that trial court fully understood and executed its duty to weigh probative value against prejudicial effect of evidence. *Ramona Manor Convalescent Hospital v. Care Enterprises (1986) 177 Cal. App. 3d 1120, 1137, 225 Cal. Rptr. 120*

[7] Proper Grant

Although broker may have violated professional ethics by signing contract for client, issue of who signed was irrelevant to claims presented, so trial court properly granted motion in limine to exclude evidence that broker signed. *Ulloa v. McMillin Real Estate & Mortg. (2007) 149 Cal. App. 4th 333, 338, 57 Cal. Rptr. 3d 1*

[8] Appellate Review of Order

Motion in limine to exclude evidence is not sufficient to preserve error for appellate review unless it was directed at particular, identifiable body of evidence and was made at time when trial court could determine evidentiary issues in proper context. *Boeken v. Philip Morris, Inc. (2005) 127 Cal. App. 4th 1640, 1675, 26 Cal. Rptr. 638*

Defendant failed to properly raise issue of trial court's exercise of discretion in denying defendant's motion in limine on retrial to exclude plaintiff's evidence of trust deeds and liens recorded after sale of property at issue, testimony by plaintiff's expert, and testimony relating to compensatory damages not awarded in first trial, when, on appeal, defendant failed to identify exhibits or refer to page numbers where appellate court could find evidence defendant claimed was admitted over its objection, failed to refer to trial court's ruling on its objections, failed to refer to or discuss any testimony or other evidence to show how it was prejudiced by unidentified trust deed and liens and unidentified testimony; and failed to support its contention with applicable authority. *Simon v. San Paolo United States Holding Co., Inc. (2003) 113 Cal. App. 4th 1137, 1153, 7 Cal. Rptr. 3d 367*

Writ of mandate is proper to compel decision on motion in limine when trial court refuses to hear motion on mistaken belief that it is without authority. *Nadler v. Superior Court (1967) 255 Cal. App. 2d 523, 525, 63 Cal. Rptr. 352*

Improper granting of *Evid. Code § 352* motion in limine is reversible error when granting motion results in miscarriage of justice. *Palmer v. Ted Stevens Honda, Inc. (1987) 193 Cal. App. 3d 530, 542, 238 Cal. Rptr. 363*

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Chapter 373 MOTIONS IN LIMINE
PART III. RESEARCH GUIDE

33-373 California Forms of Pleading and Practice--Annotated § 373.35

AUTHOR: Patrick A. Cathcart

§ 373.35 Law Reviews

Lerach, *Invoking the Motion in Limine*, 8(10) Cal. Law. 94 (1988)

McGinn, *Constitutional Law: Zal v. Steppe: Ninth Circuit Approval of an In Limine Ban of Specific Words, 23 Golden Gate U.L. Rev. 35 (1993)*

Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial, 39 Stan. L. Rev. 1271 (1987)*

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33-373 California Forms of Pleading and Practice--Annotated § 373.36

AUTHOR: Patrick A. Cathcart

§ 373.36 Text References

California Forms of Pleading and Practice, Ch. 372, *Motions and Orders* , Ch. 425, *Pretrial Proceedings* (Matthew Bender)

Cotchett, California Courtroom Evidence, Ch. 29, *Motions in Limine* (Matthew Bender)

Cotchett & Cartwright, *California Products Liability Actions, Ch. 10, Trial, § 10.01[6]* (2d ed. Matthew Bender)

Witkin, California Procedure, Vol. 6, *Proceedings Without Trial*, § 2 (5th ed. 2008)

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33-373 California Forms of Pleading and Practice--Annotated §§ 373.37-373.39

AUTHOR: Patrick A. Cathcart

[Reserved]

§§ 373.37[Reserved]

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Chapter 373 MOTIONS IN LIMINE
PART IV. PROCEDURAL CHECKLIST

33-373 California Forms of Pleading and Practice--Annotated § 373.40

AUTHOR: Patrick A. Cathcart

§ 373.40 Checklist for Obtaining Motion in Limine

NOTE:

Scope of Checklist. This checklist sets forth the procedure to be followed in moving to obtain an order in limine. For procedure on noticed motions generally, see Ch. 372, *Motions and Orders* .

[1] Preliminary Determinations

- Identify facts that are inadmissible in evidence and potentially prejudicial to your client's case if referred to at trial [*see §§ 373.12, 373.14*].

- Consider facts opposing counsel may refer to in question as well as facts counsel may seek to put in evidence.

- Consider whether motion should address facts even though opposing counsel has not indicated any knowledge of or interest in these facts; opposing counsel may later learn of them or decide, on reevaluation of case, that they would be helpful to case.

- Determine if there is any other factual evidence, documentary or otherwise, for which pretrial ruling on admissibility would be desirable.

- Determine when and how to raise issue, including whether or not to proceed by written motion, and what local rules may require regarding addressing the issue in pretrial conference [*see § 373.16*].

[2] Prepare Papers

- Prepare sufficient copies of following papers for presentation to court and all counsel:

  - Motion in limine stating grounds for inclusion or exclusion of subject evidence or

reference [*see § 373.50* (form)].

○ Supporting memorandum.

○ Proposed order in limine [*see § 373.51* (form)].

[3] Present Motion

- Present motion orally or give copies of papers to court and counsel at trial, preferably before jury selection. This should be done on the record, in chambers, with all counsel present.

[4] Order in Limine

- If not familiar with local procedure, check with court clerk before trial to determine procedure for presentation and service of order in limine.

- Judge may sign proposed order, with or without modification, or may issue order orally on the record [*see* Ch. 372, *Motions and Orders* (procedures and orders generally)].

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33-373 California Forms of Pleading and Practice--Annotated §§ 373.41-373.49

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[Reserved]

§§ 373.41[Reserved]

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Chapter 373 MOTIONS IN LIMINE
PART V. FORMS

33-373 California Forms of Pleading and Practice--Annotated § 373.50

AUTHOR: Patrick A. Cathcart

§ 373.50 Motion in Limine

[1] FORM Motion in Limine

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

	)	
	)	NO. _____
_____ [*name*],	)	MOTION IN LIMINE
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Dept.: _____
Defendant.	)	Trial Date: _____
	)	

_____

_____ [*Specify moving party, e.g.*, Plaintiff] _____ [*name*] hereby moves this court for an order _____ [*specify, e.g.*, instructing defendant and his/her counsel not to refer to, interrogate any witness concerning, comment on, or attempt to suggest to the jury in any way the fact that plaintiff received compensation for his/her medical expenses from a collateral source, and to inform his/her witnesses of these instructions and direct them not to make any reference to collateral source payments].

This motion is made on the grounds that _____ [*specify, e.g.*, plaintiff's having received compensation for his/her medical expenses from a collateral source is irrelevant and any attempt to convey this information to the jury would be highly improper and prejudicial to plaintiff, even if the court were to sustain an objection and instruct the jury not to consider such facts].

The motion is based on [the declarations of _____ (*name*) and] the supporting memorandum accompanying this motion, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of this motion.
Dated: _____ .

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This form of motion in limine should be presented to the judge, with copies to all counsel, when making a motion in limine on the record, before jury selection, in chambers with all counsel present. It should be accompanied by a supporting memorandum and a proposed order [*see § 373.51*].

For grounds for the motion, any objection to evidence that could be raised at trial may also be raised through a pretrial motion in limine [*see Condon-Johnson & Assocs. Inc. v. Sacramento Mun. Utility Dist. (2007) 149 Cal. App. 4th 1384, 57 Cal. Rptr. 3d 849* (motion in limine may be premised on any ground sufficient to object to or move to strike same evidence when offered at trial); *see §§ 373.12 -373.14*]. For discussion of the procedure on the motion, see *§ 373.16*.

Local rules of court or local court practice may require service of a written motion within a certain number of days before trial. A pretrial order or scheduling order entered in the case may also govern the proper timing of a motion in limine. Counsel should consult local rules or other guidelines for the appropriate procedures.

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33-373 California Forms of Pleading and Practice--Annotated § 373.51

AUTHOR: Patrick A. Cathcart

§ 373.51 Order Granting Motion in Limine--With Findings

[1] FORM Order Granting Motion in Limine--With Findings

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

	)	
	)	NO. _____
_____ [*name*],	)	ORDER IN LIMINE
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Dept.: _____
Defendant.	)	Trial Date: _____
	)	

_____

The motion of _____ [*specify moving party, e.g.,* plaintiff] _____ [*name*] for an order _____ [*specify nature of order, e.g.,* instructing defendant and his/her attorney not to mention in the hearing of the jury that plaintiff _____ (*name*) received compensation for his/her medical expenses from a collateral source] was heard by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

The court, having considered the documents before it, having heard the arguments of counsel, and being fully advised, finds as follows: _____ [*specify findings, e.g.,* that plaintiff _____ (*name*) having received compensation for his/her medical expenses from a collateral source is irrelevant to the action pending before this court, and any mention of it would be highly improper and prejudicial to plaintiff].

IT IS ORDERED that the motion be and it hereby is granted and _____ [*specify, e.g.*, defendant and his/her attorney are instructed not to refer to, interrogate concerning, comment on, or attempt to suggest to the jury in any way the fact that plaintiff _____ (*name*) received compensation for his/her medical expenses from a collateral source and to inform his/her witnesses of these instructions and direct them not to make any reference to collateral source payments].
Dated: _____ .

_____ [*signature*]
_____ Judge of the _____ Court

[2] Use of Form

This form of order granting a motion in limine is for submission to the trial judge, with copies to all counsel, along with the motion in limine [*see § 373.50*] and supporting memorandum. Counsel should check with the judge's clerk to determine whether a written order is appropriate and the procedure for filing and serving any signed order.

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Chapter 374 MOTIONS TO RECONSIDER AND RENEWED MOTIONS

33-374 California Forms of Pleading and Practice--Annotated 374.syn

§ 374.syn Synopsis to Chapter 374: MOTIONS TO RECONSIDER AND RENEWED MOTIONS

§ 374.01 Scope of Chapter

§§ 374.02-374.09 [Reserved]

§ 374.10 Governing Law

§ 374.11 "Motion to Reconsider" and "Renewed Motion" Distinguished

§ 374.12 Jurisdiction Limited to Code Civ. Proc. § 1008 Motions

§ 374.13 Sanctions for Failure to Comply With Code Civ. Proc. § 1008

§ 374.14 Availability of Motion

[1] Motion to Reconsider

[2] Renewed Motion

§ 374.15 Time Limitations on Motions

[1] Motion to Reconsider

[2] Renewed Motion

[3] Appealable Orders

[4] Orders Granting Judgment

[a] Limitation on Reconsideration After Judgment Is Entered

[b] Limitations Regarding Specific Orders

§ 374.16 Grounds for Motion

[1] New or Different Facts, Circumstances, or Law

[2] No New or Different Facts, Circumstances, or Law

§ 374.17 Ruling on Demurrer

§ 374.18 Res Judicata

§ 374.19 Motion to Be Made Before Same Judge or Court

[1] Requirement

[2] Order by Court Commissioner

§ 374.20 Opposition to Motion

§ 374.21 Ruling on Motion

§ 374.22 Review of Order on Motion to Reconsider

§ 374.23 Effect of Filing Valid Motion to Reconsider on Time to Appeal Original Order

[1] When Time Is Extended

[2] "Orders" and "Judgments" Distinguished

§ 374.24 Effect of Motion to Reconsider on Review by Extraordinary Writ

§§ 374.25-374.39 [Reserved]

§ 374.40 State Statutes

§ 374.41 California Rules of Court

§ 374.42 Local Court Rules

§ 374.43 Decisions

[1] Appeal

[a] Appealability

[b] Time for Filing

[2] Applicability

[3] Discretion of Court

[4] Jurisdiction to Reconsider

[4A] Jurisdiction Over Renewed Motions

[5] Oral Argument on Motion to Reconsider

[6] Requirements

[a] New Facts

[b] New Circumstances

[c] Prior Ruling Erroneous

[d] Refusal of Application for Order

[7] Timing of Motion to Reconsider

§ 374.44 Text References

§§ 374.45-374.59 [Reserved]

§ 374.60 Renewed Motion for Order After Prior Motion Was Denied in Whole or in Part, Granted Conditionally, or Granted on Terms [Code Civ. Proc. § 1008(b)]--Notice of Motion

[1] FORM

[2] Use of Form

[3] Accompanying Papers

[4] Time of Motion

[5] Cross References

§ 374.61 Renewed Motion for Order After Prior Motion Was Denied in Whole or in Part, Granted Conditionally, or Granted on Terms [Code Civ. Proc. § 1008(b)]--Supporting Declaration [Code Civ. Proc. §§ 1008(b); Cal. Rules of Ct., Rule 3.1115]

[1] FORM

[2] Use of Form

[3] Content of Declaration

[4] Cross References

§ 374.62 Notice of Motion for Reconsideration [Code Civ. Proc. § 1008(a)] of Order Granting Adverse Party's Prior Motion

[1] FORM

[2] Use of Form

[3] Accompanying Papers

[4] Motion Made to Same Judge or Court

[5] Time of Motion

§ 374.63 Order Granting or Denying Renewed Motion or Motion for Reconsideration

[1] FORM

[2] Use of Form

[3] Content

§ 374.64 Ex Parte Motion for Order and Order Revoking or Setting Aside Prior Order--Prior Order Obtained on Reapplication of Party Failing to Comply With Statutory Requirements [Code Civ. Proc. § 1008(a), (b), (d)]

[1] FORM

[2] Use of Form

[3] Power to Revoke, Set Aside, or Vacate Order for Noncompliance

[4] Cross References

§ 374.65 Order Granting Ex Parte Motion to Revoke or Set Aside Prior Order Obtained on Reapplication of Party Failing to Comply With Statutory Requirements [Code Civ. Proc. § 1008(d)]

[1] FORM

[2] Use of Form

[3] Filing and Service

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Chapter 374 MOTIONS TO RECONSIDER AND RENEWED MOTIONS
PART I. SCOPE

33-374 California Forms of Pleading and Practice--Annotated § 374.01

§ 374.01 Scope of Chapter

This part discusses renewed motions and motions to reconsider orders granting or denying a prior motion. For a discussion of notices of motion generally and procedure, see Ch. 372, *Motions and Orders* .

The chapter includes the following forms:

- Notices of motion for a renewed motion [*see § 374.60*] and for a motion to reconsider [*see § 374.62*].

- A supporting declaration for a renewed motion that may be adapted for use with a motion to reconsider [*see § 374.61*].

- An order granting or denying either type of motion [*see § 374.63*].

- Ex parte motion to set aside order obtained in violation of the requirements of *Code Civ. Proc. § 1008* [*see § 374.64*] and an order granting that motion [*see § 374.65*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeContent & Form

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PART I. SCOPE

33-374 California Forms of Pleading and Practice--Annotated §§ 374.02-374.09

[Reserved]

§§ 374.02[Reserved]

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PART II. LEGAL BACKGROUND

33-374 California Forms of Pleading and Practice--Annotated § 374.10

§ 374.10 Governing Law

Renewed motions and motions to reconsider are governed by *Code Civ. Proc. § 1008*, case law, and local court rules.

The original *Code Civ. Proc. § 1008*, which was based on prior law, was added to the code in 1933 [Stats. 1933, ch. 744, § 177] and repealed in 1978 [Stats. 1978, ch. 631], at which time a new *Code Civ. Proc. § 1008*, operative January 1, 1979, was concurrently added. The 1978 version had wider applications, and broadened somewhat the case law on the subject [*see George Ball Pacific, Inc. v. Coldwell Banker & Co. (1981) 117 Cal. App. 3d 248, 253, 172 Cal. Rptr. 597]* . In 1992, the Legislature further amended *Code Civ. Proc. § 1008*, and, among other things, explicitly overturned case law that found that the section did not apply to interim orders [Stats. 1992, ch. 460, § 1(b)-(d)]. In 1998, the Legislature again amended Section 1008 to add subsection (g) to state expressly that the section applies to all applications for interim orders [Stats. 1998, ch. 200, § 2],

Legal Topics:

For related research and practice materials, see the following legal topics:
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PART II. LEGAL BACKGROUND

33-374 California Forms of Pleading and Practice--Annotated § 374.11

§ 374.11 "Motion to Reconsider" and "Renewed Motion" Distinguished

The term "motion to reconsider" is ordinarily used to describe a motion seeking to reopen consideration of a previous motion that the court either granted or denied [*see Code Civ. Proc. § 1008(a)*]. The purpose of this motion appears to be to allow the trial court to correct an erroneous ruling.

The term "renewed motion" is used to describe a new motion by the same party who made the prior motion, based on new or different facts, circumstances, or law, but seeking the same relief sought by the prior motion, which the trial court denied [*see Code Civ. Proc. § 1008(b)*]. Nevertheless, the term "motion to reconsider" is often applied collectively to both kinds of motions [*see, e.g., Stewart v. Superior Court (1985) 163 Cal. App. 3d 915, 916, 209 Cal. Rptr. 870* (court describing motion under *Code Civ. Proc. § 1008(b)*, which governs renewed motions, as motion for reconsideration); *Graham v. Hansen (1982) 128 Cal. App. 3d 965, 969-970, 180 Cal. Rptr. 604* (renewed motion entitled motion for reconsideration)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeContent & Form

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33-374 California Forms of Pleading and Practice--Annotated § 374.12

§ 374.12 Jurisdiction Limited to Code Civ. Proc. § 1008 Motions

Code Civ. Proc. § 1008 curtails the availability of applications for reconsideration of orders and renewals of previous motions. The section explicitly limits the courts' jurisdiction regarding motions for reconsideration and renewed motions to those made in accordance with *Code Civ. Proc. § 1008* [*Code Civ. Proc. § 1008(e)* (overturning holding of *Ziller Electronics Lab GmbH v. Superior Court (1988) 206 Cal. App. 3d 1222, 1231, 254 Cal. Rptr. 410* (motion toreconsider may not be subject to 10-day limit of *section 1008(a)* if made under court's inherent jurisdiction)].

This limitation expressly applies to all applications for reconsideration of orders or renewal of motions, whether the order is interim or final [*Code Civ. Proc. § 1008(e), (g)*].

Until the California Supreme Court addressed the issue in *Le Francois v. Goel (2005) 35 Cal. 4th 1094, 29 Cal. Rptr. 3d 249* , the appellate courts were split as to the implications of *Code Civ. Proc. § 1008(e)*. Early cases interpreting the new code section generally held that a court acts in excess of its jurisdiction when it grants a motion to reconsider that is not based on "new or different facts, circumstances, or law" [*see Gilberd v. AC Transit (1995) 32 Cal. App. 4th 1494, 1499, 38 Cal. Rptr. 2d 626* (distinguished, but not disapproved by, *Le Francois v. Goel (2005) 35 Cal. 4th 1094, 1107, 29 Cal. Rptr. 3d 249*); *accord Pazderka v. Caballeros Dimas Alang, Inc. (1998) 62 Cal. App. 4th 658, 669-670, 73 Cal. Rptr. 2d 242* ; *see also Garcia v. Hejmadi (1997) 58 Cal. App. 4th 674, 685, 691* n.*, *68 Cal. Rptr. 2d 228]* .

Later appellate court cases considered the issue of whether *Code Civ. Proc. § 1008(e)*, as initially interpreted, violated separation of powers principles. One line of cases held that *Code Civ. Proc. § 1008(e)* does not govern the court's ability, on its own motion, to reevaluate its own interim rulings and that, at any time prior to the entry of judgment, the court retains the inherent authority to change its decision [*Darling, Hall & Rae v. Kritt (1999) 75 Cal. App. 4th 1148, 1156-1157, 89 Cal. Rptr. 2d 676* ; *see also Schachter v. Citigroup, Inc. (2005) 126 Cal. App. 4th 726, 738, 23 Cal. Rptr. 3d 920* ; *Kerns v. CSE Ins. Group (2003) 106 Cal. App. 4th 368, 388-390, 130 Cal. Rptr. 2d 754]* . A second line of cases stated that *Code Civ. Proc. § 1008(e)* constituted an "impermissible interference with the core functions of the judiciary" and held that a trial court has inherent power to reconsider interim orders, either on its own motion or on the motion of a party [*Scott Co. v. U.S. Fid. & Guar. Ins. Co. (2003) 107 Cal. App. 4th 197, 206-212, 132 Cal. Rptr. 2d 89* (disapproved by *Le Francois v. Goel (2005) 35 Cal. 4th 1094, 1107 n.5, 29 Cal. Rptr. 3d 249*); *see also Wozniak v. Lucutz (2002) 102 Cal. App. 4th 1031, 1041-1042, 126 Cal. Rptr. 2d 310* (disapproved by *Le Francois v. Goel*

(2005) 35 Cal. 4th 1094, 1107 n.5, 29 Cal. Rptr. 3d 249); *Remsen v. Lavacot (2001) 87 Cal. App. 4th 421, 427, 104 Cal. Rptr. 2d 612* (disapproved by *Le Francois v. Goel (2005) 35 Cal. 4th 1094, 1107 n.5, 29 Cal. Rptr. 3d 249*)].

The court granted review in *Le Francois v. Goel (2005) 35 Cal. 4th 1094, 29 Cal. Rptr. 3d 249* to decide whether a trial court may ever, either on its own motion or on the motion of a party, reconsider its interim orders in the absence of new facts of new law. The court noted that separation of powers principles were applicable in this instance: "The Legislature may regulate the courts' inherent power to resolve specific controversies between parties, but it may not defeat or materially impair the courts' exercise of that power" [*Le Francois v. Goel (2005) 35 Cal. 4th 1094, 1103, 29 Cal. Rptr. 3d 249]* . After examining the legislative history, the court concluded that the Legislature did not want to hinder the courts' ability to act, but rather to protect the courts from repetitive motions. The legislature purpose of conserving judicial resources is advanced by an interpretation of *Code Civ. Proc. § 1008(e)* consistent with the line of cases limiting the parties' power to file repetitive motions but not a court's authority to reconsider interim rulings on its own motion, even in the absence of new facts or law [*Le Francois v. Goel (2005) 35 Cal. 4th 1094, 1107, 29 Cal. Rptr. 3d 249]* . Addressing concerns that this would be a "distinction without a difference," the court made clear that the distinction between a party filing a motion to reconsider and the court acting on its own motion is not a meaningless distinction. While a party may ask the court to reconsider a prior ruling, for example, at a status conference, a party may not file a written motion to reconsider that has procedural significance if it does not satisfy the requirements of *Code Civ. Proc. § 1008*. The court did suggest that proper procedure would be for a court that had a concern about an erroneous prior ruling to inform the parties, solicit briefing, and hold a hearing [*Le Francois v. Goel (2005) 35 Cal. 4th 1094, 1107-1108, 29 Cal. Rptr. 3d 249]* .

Code Civ. Proc. § 1008 is not the exclusive vehicle by which a court can reconsider issues previously decided by demurrer and summary judgment; a trial court may revisit its prior rulings on its own initiative and use a party's motions in limine as a basis for granting judgment on the pleadings [*Coshow v. City of Escondido (2005) 132 Cal. App. 4th 687, 702, 34 Cal. Rptr. 3d 19]* .

Section 1008 itself does not by its terms purport to govern all repetitive motions, but instead describes itself as circumscribing the trial courts' "jurisdiction" over "applications to reconsider any order of a judge or court," and applications "for the renewal of a previous motion" [*Code Civ. Proc. § 1008(e)*; *see Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 885, 102 Cal. Rptr. 3d 140*]. Section 1008 does not, by its terms or by any principled application of them, apply to motions not described in it [*Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 890, 102 Cal. Rptr. 3d 140]* . A motion for reconsideration explicitly directs the court's attention to a previous order and seeks to "modify, amend, or revoke [that] order" [*Code Civ. Proc. § 1008(a)*; *see Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 889, 102 Cal. Rptr. 3d 140]* . Merely asking the court to grant relief that is inconsistent with a prior order, whether by the same or a different judge, is not a "motion for reconsideration." It may be barred by other, court-made rules of law, but it is not barred by section 1008 [*Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 890, 102 Cal. Rptr. 3d 140]* .

Under *Code Civ. Proc. § 1008(b)*, which governs a second application for "the same order" the court has already declined to make, two motions seek the "same order" when they ask the court to issue the same "direction." However, a motion seeking a previously denied order in addition to newly requested relief is not entirely barred, as if its repetitive aspect somehow tainted the whole [*Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 891-893, 102 Cal. Rptr. 3d 140]* .

A court has jurisdiction to reconsider an order denying relief from default under *Code Civ. Proc. § 473(b)*, which the court is specifically authorized to make in the first instance after judgment has been entered, after entry of judgment, as long it does so in accordance with the requirements of *Code Civ. Proc. § 1008*. Nothing in the language of *Code Civ. Proc. § 1008* limits the court's reconsideration authority to pretrial, i.e., "interim," orders. To the contrary, *Code Civ. Proc. § 1008(e)* applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous

motion, whether the order deciding the previous matter or motion is interim or final [*D.R.S. Trading Co., Inc. v. Barnes (2009) 180 Cal. App. 4th 815, 819-821,103 Cal. Rptr. 3d 329* ; *see* *In re Marriage of Barthold (2008) 158 Cal. App. 4th 1301, 1308, 70 Cal. Rptr. 3d 691* (expressly rejecting appellant's assertion that trial court had authority to reconsider only "interim" decisions and could not grant reconsideration of postjudgment motion)].

Even if *Code Civ. Proc. § 1008* applies by its terms to a second motion for relief from default, there is no legislative intention to bar the operation of *Code Civ. Proc. § 473(b)* [*Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 893-896, 102 Cal. Rptr. 3d 140* ; for discussion of *Code Civ. Proc. § 473(b)* generally, *see* Ch. 489, *Relief from Judgments and Orders*]. When a defendant makes the required prima facie showing for mandatory relief under § 473(b) by submitting the affidavit of the original attorney detailing the erroneous opinions, advice, and fundamental procedural misconceptions and missteps that produced the original default, as well as the ensuing judgment, under § 473(b), the court is required to vacate the resulting default and judgment. Insofar as a conflict exists between *Code Civ. Proc. §§ 473(b)* and *1008*, it is resolved in favor of allowing relief under section 473(b), not denying it under section 1008 [*Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 894-895, 102 Cal. Rptr. 3d 140]* . On the other hand, when a party invokes the mandatory provisions of § 473(b) unsuccessfully and then seeks to invoke them again, no categorical rule governs, for in some cases the second motion may be only a rehash of the first, while in others it might assert attorney mistakes directly involved in bringing about the first denial [*Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 895, 102 Cal. Rptr. 3d 140]* .

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§ 374.13 Sanctions for Failure to Comply With Code Civ. Proc. § 1008

A violation of *Code Civ. Proc. § 1008* may be punished as a contempt and with sanctions as allowed under *Code Civ. Proc. § 128.7* [*Code Civ. Proc. § 1008(d)*; for discussion of *Section 128.7* sanctions, see Ch. 510, *Sanctions*]. In addition, an order made contrary to Section 1008 may be revoked by the judge or commissioner who made it, or vacated by a judge of the court in which the action or proceeding is pending [*Code Civ. Proc. § 1008(d)*; *see also People v. Silva (1981) 114 Cal. App. 3d 538, 554-555, 170 Cal. Rptr. 713* (discretion of trial court to impose contempt sanctions for noncompliance with *Section 1008*)].

If an original moving party fails to comply with the affidavit requirement for renewed motions under *Code Civ. Proc. § 1008(b)*, any order made on the subsequent application may be revoked or set aside on ex parte motion [*Code Civ. Proc. § 1008(b)*].

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§ 374.14 Availability of Motion

[1] Motion to Reconsider

When an application for an order has been made to a judge or to the court and refused in whole or in part, or granted, or granted conditionally or on terms, any party affected by the order may, within 10 days after service on the party of written notice of entry of the order and based on new or different facts, circumstances, or law, apply to the same judge who made the order, to reconsider the matter and to modify, amend, or revoke the prior order [*see Code Civ. Proc. § 1008(a)*; for a form of notice of motion, *see § 374.62*].

The applying party must state by affidavit (or declaration under *Code Civ. Proc. § 2015.5*) what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown [*Code Civ. Proc. § 1008(a)*; for a form of declaration, see *§ 374.61*].

The facts asserted on the motion for reconsideration need not be newly discovered; they need only be different from those asserted on the original motion [*Careau & Co. v. Security Pacific Business Credit, Inc. (1990) 222 Cal. App. 3d 1371, 1386-1387 n.9, 272 Cal. Rptr. 387* (applying *Section 1008(a)* as enacted, Stats. 1978, ch. 631)]. To be entitled to reconsideration, however, in addition to showing that evidence of new or different facts exist, the applying party should show that the party has a satisfactory explanation for failing to produce such evidence at the original hearing [*New York Times Co. v. Superior Court (2005) 135 Cal. App. 4th 206, 213, 37 Cal. Rptr. 3d 338* ; *McPherson v. City of Manhattan Beach (2000) 78 Cal. App. 4th 1252, 1265, 93 Cal. Rptr. 2d 725* ; *Kalivas v. Barry Controls Corp. (1996) 49 Cal. App. 4th 1152, 1160-1161, 57 Cal. Rptr. 2d 200* ; *see Pazderka v. Caballeros Dimas Alang, Inc. (1998) 62 Cal. App. 4th 658, 670, 73 Cal. Rptr. 2d 242* (must not only provide new evidence, but also satisfactory explanation for failure to produce at earlier time); *Lucas v. Santa Maria Public Airport Dist. (1995) 39 Cal. App. 4th 1017, 1027-1028, 46 Cal. Rptr. 2d 177* (moving party must provide trial court with satisfactory explanation why he or she failed to produce evidence at earlier time); *accord, Mink v. Superior Court (1992) 2 Cal. App. 4th 1338, 1342, 4 Cal. Rptr. 2d 195]* .

In addition, the court may, on its own motion, reconsider a prior order it entered and enter a different order any time it determines that there has been a change of law, not including a later enacted statute without retroactive application, that

warrants reconsideration of the prior order [*Code Civ. Proc. § 1008(c)*; *Valdez v. Himmelfarb (2006) 144 Cal. App. 4th 1261, 1275, 51 Cal. Rptr. 3d 195* ; *see Code Civ. Proc. § 1008(f)*].

[2] Renewed Motion

When a party whose original application for an order was refused in whole or in part, or granted conditionally or on terms, subsequently applies for the same order on new or different facts, circumstances, or law, it shall be shown by affidavit (or declaration under *Code Civ. Proc. § 2015.5*) what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown [*Code Civ. Proc. § 1008(b)*; for a form of notice of motion, *see § 374.60*, and for the supporting declaration, *see § 374.61*].

Whether the "new" facts alleged are sufficient to satisfy the requirements of *Code Civ. Proc. § 1008(b)* is a question confided to the sound discretion of the trial court, with which the appellate court will not interfere absent an obvious showing of abuse [*Graham v. Hansen (1982) 128 Cal. App. 3d 965, 971, 180 Cal. Rptr. 604* (prior law)]. *Code Civ. Proc. § 1008(b)* does not, however, permit a party to relitigate as a special defense a law and order motion that was previously denied [*Stewart v. Superior Court (1985) 163 Cal. App. 3d 915, 916, 209 Cal. Rptr. 870]* .

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§ 374.15 Time Limitations on Motions

[1] Motion to Reconsider

An application to reconsider must be made within 10 days after the party making the application is served written notice of entry of the order [*Code Civ. Proc. § 1008(a)*; *see Advanced Building Maintenance v. State Comp. Ins. Fund (1996) 49 Cal. App. 4th 1388, 1392, 57 Cal. Rptr. 2d 310* (motion untimely when filed on October 31, 1994, because amended notice of ruling on demurrer and motion to strike was served on October 12, 1994, and motion for reconsideration should have been filed by October 22, 1994)]. This time limit is jurisdictional [*see Code Civ. Proc. § 1008(e)*]. However, the statute sets no time limit for ruling on the motion.

The 1992 addition of subsection (e) to Section 1008, abrogates prior case law that held that the 10-day limit was not jurisdictional [*see* Stats. 1992, ch. 460, § 1(b); *see also, e.g., Ziller Electronics Lab GmbH v. Superior Court (1988) 206 Cal. App. 3d 1222, 1231, 254 Cal. Rptr. 410]* .

Under prior law, the time limitations on a motion to reconsider were affected by whether the motion involved an interim order, a final order, or an order granting judgment [*see Blue Mountain Development Co. v. Carville (1982) 132 Cal. App. 3d 1005, 1012-1013, 183 Cal. Rptr. 594* (disapproved on another ground in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1607-1608 n.5, 275 Cal. Rptr. 887*)]. In amending *Section 1008* in 1992, the Legislature noted that some California courts had found that the section does not apply to interim orders, expressly stated its intent that *Section 1008* applies to both interim and final orders, and stated that inclusion of interim orders within the application of the section is desirable in order to reduce the number of motions to reconsider and renewals of previous motions heard by judges in California [Stats. 1992, ch. 460, § 1]. In view of this express intent, counsel should use prior case law construing various provisions of *Code Civ. Proc. § 1008* with caution.

[2] Renewed Motion

Code Civ. Proc. § 1008(b) sets no time limit on either the making of a renewed motion or for ruling on it. However, the motion must be based upon new or different facts, circumstances, or law, and supported by a declaration showing what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown [*Code Civ. Proc. § 1008(b)*]. Thus, presumably the motion should

be made as soon as reasonable after the new or different information becomes available.

[3] Appealable Orders

A second motion, decided after an appealable order denying the first motion has become final, cannot be considered as a renewal of, or as an amendment to, the first motion [*Rambush v. Rambush (1968) 267 Cal. App. 2d 734, 741, 73 Cal. Rptr. 268]* . It would be error to grant a motion for reconsideration of a final order absent a showing of newly discovered evidence because a trial court has no jurisdiction to correct judicial error in the making of a final order except as provided by statute [*Blue Mountain Development Co. v. Carville (1982) 132 Cal. App. 3d 1005, 1013, 183 Cal. Rptr. 594* (disapproved on another ground in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1607-1608 n.5, 275 Cal. Rptr. 887*); *see also* [4], *below*]. Thus, for example, an order denying a motion for class certification is an appealable order and is not subject to renewal after the time to appeal has expired [*Stephen v. Enterprise Rent-A-Car (1991) 235 Cal. App. 3d 806, 811, 816-818, 1 Cal. Rptr. 2d 130]* .

Recourse in this situation might be, for example, to a motion for relief from the order on the basis of mistake, inadvertence, surprise, or excusable neglect under *Code Civ. Proc. § 473(b)*, if the more rigorous requirements of that section can be established [*see* *Stephen v. Enterprise Rent-A-Car (1991) 235 Cal. App. 3d 806, 818, 1 Cal. Rptr. 2d 130* ; *Rambush v. Rambush (1968) 267 Cal. App. 2d 734, 742, 73 Cal. Rptr. 268]* . For discussion and forms of that and other methods of seeking relief from orders, see Ch. 489, *Relief From Judgments and Orders* .

[4] Orders Granting Judgment

[a] Limitation on Reconsideration After Judgment Is Entered

Some final appealable orders are actually judgments [*see* [3], *above*] and may not be reconsidered by the court after they are entered. Although a court may reconsider its order granting or denying a motion and may even reconsider or alter its judgment so long as the judgment has not yet been entered, once judgment has been entered, the court may not reconsider it and loses its unrestricted power to change the judgment. The court may correct judicial error only certain limited procedures such as motions for new trial and motions to vacate the judgment [*Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1605-1606, 275 Cal. Rptr. 887* (prior law; involving motion to reconsider order granting summary judgment after judgment had been entered); *see* *Ramon v. Aerospace Corp. (1996) 50 Cal. App. 4th 1233, 1236-1238, 58 Cal. Rptr. 2d 217* (*Passavanti* followed; after entry of judgment, trial court loses its power to rule on reconsideration motion)]. Once a trial court has entered judgment, the court is without jurisdiction to grant a motion for reconsideration even if the motion was brought before the judgment was entered and is still pending at the time of entry of judgment [*APRI Ins. Co. v. Superior Court (1999) 76 Cal. App. 4th 176, 180-182, 90 Cal. Rptr. 2d 171]* .

Nonetheless, a minute order granting a motion for summary judgment is an interim order subject to a motion to reconsider [*see* *George Ball Pacific, Inc. v. Coldwell Banker & Co. (1981) 117 Cal. App. 3d 248, 252-253, 172 Cal. Rptr. 597* (prior law); *see also* *Stratton v. First Nat. Life Ins. Co. (1989) 210 Cal. App. 3d 1071, 1081-1082, 258 Cal. Rptr. 721* (prior law; criticized on another ground in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1608 n.5, 275 Cal. Rptr. 887*)].

Also, an order granting a motion for discretionary dismissal of an action for failure to effect service within two years after the action was commenced is subject to reconsideration on motion [*Ladd v. Dart Equipment Corp. (1991) 230 Cal. App. 3d 1088, 1091-1092, 281 Cal. Rptr. 813* (prior law; motion based on *Code Civ. Proc. § 1008(a)*)].

[b] Limitations Regarding Specific Orders

Additional time limits may be imposed because of the nature of the order sought on the motion to reconsider or renewed motion. For example, the Court of Appeal of the First Appellate District, Division Two, citing cases, has pointed out that a timely motion to reconsider an appealable order granting a new trial, to be consistent with the jurisdictional

60-day limit for acting on new trial motions [*see Code Civ. Proc. § 660*], must be ruled on within the 60 days or is deemed denied by operation of law, and that, by parallel reasoning, an order denying a timely motion to reconsider an appealable dismissal order must be entered within the jurisdictional 60 days following entry of judgment or it will not extend the time under *Cal. Rules of Ct., Rule 8.108(b)* in which to file a notice of appeal from the dismissal order [*Stephen v. Enterprise Rent-A-Car (1991) 235 Cal. App. 3d 806, 818, 1 Cal. Rptr. 2d 130]* . To the extent *Stephen* may suggest that a motion to reconsider a properly entered written order of dismissal, which constitutes the judgment [*see Code Civ. Proc. § 581d*], is permissible, it appears to beinconsistent with the holding in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 275 Cal. Rptr. 887* , that a court cannot reconsider an order granting a judgment after the judgment has been entered [*Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1606, 275 Cal. Rptr. 887]* .

The *Stephen* court further pointed out that if jurisdictional considerations compel implying time limits on motions under *Code Civ. Proc. § 1008(a)*, they must in some cases also limit *Code Civ. Proc. § 1008(b)*. Thus, for example, an open ended time for "renewed" motions is incompatible with California law deeming death-knell class certification denials final and binding when not timely appealed. The onus is thus on a plaintiff to bring such motion within whatever time limit applies for fixing the finality of the order [*Stephen v. Enterprise Rent-A-Car (1991) 235 Cal. App. 3d 806, 818, 1 Cal. Rptr. 2d 130]* .

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§ 374.16 Grounds for Motion

[1] New or Different Facts, Circumstances, or Law

Both motions to reconsider and renewed motions are required to be based on new or different facts, circumstances, or law [*Code Civ. Proc. § 1008(a), (b)*]. In both cases, a moving party must provide a supporting affidavit (or declaration under *Code Civ. Proc. § 2015.5*) setting forth what new or different facts, circumstances, or law are claimed to be shown. [*Code Civ. Proc. § 1008(a), (b)*; *see, e.g.,* *Pazderka v. Caballeros Dimas Alang, Inc. (1998) 62 Cal. App. 4th 658, 670, 73 Cal. Rptr. 2d 242* (counsel's declaration that counsel mistakenly believed *Code Civ. Proc. § 998* offer included issue of attorney's fees and costs did not disclose new facts but merely counsel's mistake; mistake based on ignorance of law or imprecision in drafting offer is not proper basis for reconsideration)].

In addition to showing that evidence of new or different facts, circumstances, or law exist, the party moving for reconsideration must show that the party has a satisfactory explanation for failing to produce the evidence at an earlier time [*New York Times Co. v. Superior Court (2005) 135 Cal. App. 4th 206, 213, 37 Cal. Rptr. 3d 338* ; *McPherson v. City of Manhattan Beach (2000) 78 Cal. App. 4th 1252, 1265, 93 Cal. Rptr. 2d 725* ; *Pazderka v. Caballeros Dimas Alang, Inc. (1998) 62 Cal. App. 4th 658, 670, 73 Cal. Rptr. 2d 242* ; *Garcia v. Hejmadi (1997) 58 Cal. App. 4th 674, 685-691, 68 Cal. Rptr. 2d 228* (threshold showing of diligence required, i.e., an explanation is required of why the newly discovered matter was not presented earlier); *Lucas v. Santa Maria Public Airport Dist. (1995) 39 Cal. App. 4th 1017, 1027-1028, 46 Cal. Rptr. 2d 177* (moving party must provide trial court with satisfactory explanation why he or she failed to produce evidence at earlier time); *accord* *Mink v. Superior Court (1992) 2 Cal. App. 4th 1338, 1342, 4 Cal. Rptr. 2d 195* ; *see also* *Kalivas v. Barry Controls Corp. (1996) 49 Cal. App. 4th 1152, 1160-1161, 57 Cal. Rptr. 2d 200* (party should show that new or different facts exist, and party has satisfactory explanation for failure to produce such evidence at an earlier time)]. Moreover, when the basis for a motion for reconsideration is "different law," a showing must be made that there is a satisfactory explanation for failing to provide this information earlier [*Baldwin v. Home Savings of America (1997) 59 Cal. App. 4th 1192, 1193, 1198-1200, 69 Cal. Rptr. 2d 592]* .

A similar showing under former *Code Civ. Proc. § 1008(a)* and *(b)*, a motion to reconsider was to be based on an alleged "different state of facts" and a renewed motion was to be based on "new" facts. Therefore, cases distinguishing between the two standards should be used with caution [*see, e.g.,* *Rains v. Superior Court (1984) 150 Cal. App. 3d*

933, 944, 198 Cal. Rptr. 249 (prior law; involving a motion to reconsider a ruling sustaining a demurrer to the complaint without leave to amend); *Blue Mountain Development Co. v. Carville (1982) 132 Cal. App. 3d 1005, 1013, 183 Cal. Rptr. 594* (prior law; involving a motion to reconsider a denial of an application for a writ of execution; disapproved on another ground in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1607-1608 n.5, 275 Cal. Rptr. 887*)].

One court has stated that it could comfortably assume that the (current) language "new or different facts, circumstances, or law," was designed to approve generally, the case law relaxation of what constitutes new or different facts justifying reconsideration. This does not mean, however, that all facts not previously presented to a court now suffice [*Garcia v. Hejmadi (1997) 58 Cal. App. 4th 674, 690, 68 Cal. Rptr. 2d 228]* .

A court's failure to consider properly submitted points and authorities may constitute "new circumstances" such that the trial court has jurisdiction to grant reconsideration under *Code Civ. Proc. § 1008(a)* [*Johnston v. Corrigan (2005) 127 Cal. App. 4th 553, 556, 25 Cal. Rptr. 3d 657]* .

An alleged new or different law does not include a later enacted statute without a retroactive application [*Code Civ. Proc. § 1008(f)*].

If the court at any time determines that there has been a change of law that warrants the court to reconsider a prior order it entered, it may do so on its own motion and enter a different order [*Code Civ. Proc. § 1008(c)*]. *Section 1008(c)* means exactly what it says. When a trial court concludes that there has been a change of law that warrants reconsideration of a prior order, it has jurisdiction to reconsider and change its order [*Valdez v. Himmelfarb (2006) 144 Cal. App. 4th 1261, 1275, 51 Cal. Rptr. 3d 195* (appellate court's decision regarding statute of limitations issue constituted a "change of law"); *International Ins. Co. v. Superior Court (1998) 62 Cal. App. 4th 784, 788, 72 Cal. Rptr. 2d 849* (based on two recently decided appellate opinions, judge reconsidered and vacated earlier ruling granting summary adjudication of issues)].

Moreover, *Code Civ. Proc. § 1008* does not govern the court's ability, on itsown motion, to reevaluate its own interim rulings. The trial court retains inherent authority to change its decision at any time before entry of judgment and thus in exercising its inherent authority is not bound by the new fact or law requirement in *Code Civ. Proc. § 1008* [*Le Francois v. Goel (2005) 35 Cal. 4th 1094, 1107, 29 Cal. Rptr. 3d 249* ; *Darling, Hall & Rae v. Kritt (1999) 75 Cal. App. 4th 1148, 1155-1157, 89 Cal. Rptr. 2d 676* ; for further discussion, *see § 374.12*].

[2] No New or Different Facts, Circumstances, or Law

If no new or different facts, circumstances, or law exist, counsel should ascertain whether the order made is one that is subject to attack by a statutory procedure, for example, a motion for relief from mistake, inadvertence, surprise, excusable neglect under *Code Civ. Proc. § 473(b)* [for discussion and forms, *see* Ch. 489, *Relief From Judgments and Orders*], or for correction of clerical error under *Code Civ. Proc. § 473(d)* [for discussion and forms, *see* Ch. 489, *Relief From Judgments and Orders*], a motion for new trial on the ground of error in law under *Code Civ. Proc. § 657(7)* [*see* *Blue Mountain Development Co. v. Carville (1982) 132 Cal. App. 3d 1005, 1013, 183 Cal. Rptr. 594* (dictum; disapproved on another ground in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1607-1608 n.5, 275 Cal. Rptr. 887*); for discussion and forms, *see Ch. 371, Motions After Trial, § 371.60* et seq.], or subject to attack by an established nonstatutory motion to vacate the prior order on the ground of extrinsic fraud or mistake [for discussion and forms, *see* Ch. 489, *Relief From Judgments and Orders*]. If it is, counsel should proceed by such a motion. However, motions brought under these statutes cannot be used to circumvent the provisions of *Code Civ. Proc. § 1008* by merely raising the same issues on which the court previously ruled [*see* *Gilberd v. AC Transit (1995) 32 Cal. App. 4th 1494, 1502, 38 Cal. Rptr. 2d 626* (rejecting general relief mechanism of *Code Civ. Proc. § 473* and motion for new trial under *Code Civ. Proc. § 657* used merely to circumvent jurisdictional effect of motion for reconsideration); *but see Community Memorial Hospital v. County of Ventura (1996) 50 Cal. App. 4th 199, 204-205, 56 Cal. Rptr. 2d 732*

(declining to follow *Gilbert* to extent it might be read to preclude a motion for summary judgment based on issues similar to those argued and lost on demurrer)].

If no alternative motion is available, counsel should determine whether the renewed motion or motion to reconsider is authorized under, or recognized by, case law. If the prior order was an appealable order, or subject to review by extraordinary writ, counsel should determine what impact the granting or denial of the motion for reconsideration will have on the time to appeal, or to seek review by extraordinary writ [*see §§ 374.23, 374.24*].

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§ 374.17 Ruling on Demurrer

For the purposes of *Code Civ. Proc. § 1008(a)*, a demurrer, in addition to being a pleading, is "an application for an order" and will support an application to reconsider the court's ruling sustaining a demurrer without leave to amend when supported by a proposed pleading containing new allegations of different facts not previously included by the pleader, and it is not necessary that the different facts be "newly discovered" or that the proposed pleading be verified [*Rains v. Superior Court (1984) 150 Cal. App. 3d 933, 943-944, 198 Cal. Rptr. 249* (prior law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeContent & FormCivil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProceduresPleading & PracticePleadingsAmended PleadingsLeave of Court

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§ 374.18 Res Judicata

The plea of res judicata does not deprive a court of jurisdiction to pass on and decide a motion after it has previously decided a like motion. Although its action on the second motion may be erroneous, it is not in excess of jurisdiction [*Imperial Beverage Co. v. Superior Court (1944) 24 Cal. 2d 627, 634, 150 P.2d 881* (prior law); *see also Curtin v. Koskey (1991)231 Cal. App. 3d 873, 876-877, 282 Cal. Rptr. 706* ; *Hennigan v. United Pacific Ins. Co. (1975) 53 Cal. App. 3d 1, 7, 125 Cal. Rptr. 408* (prior law)]. However, failure to appeal from two prior orders, each denying a motion to vacate a summary judgment of bail forfeiture [*see Penal Code § 1308*], has been held to bar, on the ground of res judicata, a third motion seeking the same relief [*see People v. Silva (1981) 114 Cal. App. 3d 538, 549-552, 170 Cal. Rptr. 713]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeContent & FormCivil ProceduresJudgmentsPreclusion & Effect of JudgmentsRes Judicata

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33-374 California Forms of Pleading and Practice--Annotated § 374.19

§ 374.19 Motion to Be Made Before Same Judge or Court

[1] Requirement

A motion to reconsider an order must be made to the same judge or court that made the order [*Code Civ. Proc. § 1008(a)*]. Formerly, a motion to reconsider had to be made before the same judge who made the prior order [*see* former *Code Civ. Proc. § 1008(a)*; *see also* *Curtin v. Koskey (1991) 231 Cal. App. 3d 873, 877, 282 Cal. Rptr 706* (applying *Section 1008(a)* as enacted by Stats. 1978, ch. 631)].

No express limitation is made on who may hear a renewed motion [*see Code Civ. Proc. § 1008(b)*].

When either type of motion is directed to a judge other than the one who decided the original motion, the proper procedure is for the second judge to direct the moving party to the judge who ruled on the first motion. If the original judge is unavailable, the second judge may hear the reconsideration motion [*Scott Co. v. United States Fidelity & Guaranty Ins. Co. (2003) 107 Cal. App. 4th 197, 132 Cal. Rptr. 2d 89* (different judge authorized to entertain reconsideration motion when original judge was unavailable); *Ziller Electronics Lab GmbH v. Superior Court (1988) 206 Cal. App. 3d 1222, 1232, 254 Cal. Rptr. 410* (abrogated on other grounds by 1992 amendment of *Code Civ. Proc. § 1008*)]. Unavailability of thefirst judge that authorizes a new judge to entertain the reconsideration motion, includes unavailability due to retirement [*see* *International Ins. Co. v. Superior Court (1998) 62 Cal. App. 4th 784, 786 n.2, 72 Cal. Rptr. 2d 849]* .

Even though Section 1008 now allows the motion to be made to the court, rather than just the judge, that made the prior order, this preferred procedure is not inconsistent with the statute, and may continue to be preferred. The attorney may wish to verify local practice.

[2] Order by Court Commissioner

If the prior order was made by a court commissioner sitting as a temporary judge under the parties' stipulation, the stipulation allowing the commissioner to hear the matter in which the order was made confers authority on the commissioner to rule on the motion to reconsider the ruling, and a second stipulation is not required [*McCartney v. Superior Court (1990) 223 Cal. App. 3d 1334, 1339, 273 Cal. Rptr. 250* (prior law)].

Legal Topics:

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§ 374.20 Opposition to Motion

Because the nature of a motion is determined by the nature of the relief sought and not by the label attached to it [*San Francisco v. Muller (1960) 177 Cal. App. 2d 600, 603, 2 Cal. Rptr. 383]* , in opposing a renewed motion or motion to reconsider, counsel should not necessarily limit his or her opposition to the propriety of that motion. Rather, counsel should carefully examine both the grounds stated in the notice of motion and the supporting papers to determine if the gravamen of the motion is something other than what it purports to be. For example, the motion might in reality be one seeking relief under *Code Civ. Proc. § 473(b)* or *(d)*, or under some other statute [*see, e.g.,* *Robinson v. Varela (1977) 67 Cal. App. 3d 611, 617, 136 Cal. Rptr. 783* (gravamen of motion to reconsider was a motion for relief under former *Code Civ. Proc. § 556*, relating to writ of attachment, and so treated by appellate court)].

If the gravamen is something other than simply a renewed motion or motion to reconsider, counsel, in his or her opposing memorandum of points and authorities, should include any points and authorities in opposition to the motion actually made.

Legal Topics:

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§ 374.21 Ruling on Motion

If it is apparent to the court that a subsequent motion, after denial of the first, is based on substantially the same grounds and seeks substantially the same relief as the preceding motion, the court may summarily deny it without further reconsideration. The court may also reconsider the prior matter and deny the motion to reconsider or it may reconsider the prior matter and reverse the prior decisions but it should not ignore the notice of motion for reconsideration [*see Muller v. Tanner (1969) 2 Cal. App. 3d 445, 460-461, 82 Cal. Rptr. 738]* .

On reconsideration, the court's power to weigh the conflicts is the same as on its first consideration of the motion. In other words, the power of the court to resolve the conflicts is not exhausted by its conclusions of the first order. Rather, it has power to reexamine the evidence on reconsideration and arrive at a different conclusion if it thinks the ends of justice will be served thereby [*see Harth v. Ten Eyck (1941) 16 Cal. 2d 829, 833-834, 108 P.2d 675* ; *Lopez v. Larson (1979) 91 Cal. App. 3d 383, 393, 153 Cal. Rptr. 912]* . There is no impropriety or error by the judge in reversing the prior order on later concluding it was wrong [*Hover v. MacKenzie (1954) 122 Cal. App. 2d 852, 857, 266 P.2d 60* ; *see also Rambush v. Rambush (1968) 267 Cal. App. 2d 734, 740 n.3, 73 Cal. Rptr. 268]* .

Also, care should be taken to distinguish a court's decision for or against reconsideration from its decision after reconsideration. If a litigant seeks reconsideration of an order denying a motion, such as a motion to intervene, the trial court may sometimes enter an order "denying reconsideration" when it is plain from the record that the first motion was denied without prejudice and the second ruling was intended to be a ruling on the merits of the motion for intervention rather than simply a denial of reconsideration [*Blue Mountain Development Co. v. Carville (1982) 132 Cal. App. 3d 1005, 1011, 183 Cal. Rptr. 594* (disapproved on another ground in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1607-1608 n.5, 275 Cal. Rptr. 887*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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33-374 California Forms of Pleading and Practice--Annotated § 374.22

§ 374.22 Review of Order on Motion to Reconsider

Appealable orders in civil actions and proceedings are listed in *Code Civ. Proc. § 904.1* and *904.2*, and these statutes do not include an order granting or denying a motion to reconsider [*see Code Civ. Proc. §§ 904.1* and *904.2*]. If the order being reconsidered is nonappealable, then the order denying reconsideration is also nonappealable [*Ghanooni v. Super Shuttle (1992) 2 Cal. App. 4th 380, 381 n.2, 3 Cal. Rptr. 2d 43* (criticized on other grounds in *Greene v. Amante (1992) 3 Cal. App. 4th 684, 689, 4 Cal. Rptr. 2d 571*)]. However, if the original order is appealable, the courts of appeal are in conflict as to whether, or under what circumstances, the denial of a motion to reconsider is appealable.

In *Gill v. Hughes (1991) 227 Cal. App. 3d 1299, 1310 n.3, 278 Cal. Rptr. 306* , the court noted that when a motion for reconsideration raises new facts, the appellate courts have reached different conclusions regarding the appealability of the denial of that motion. The *Gill* court cited a comparison of *Santee v. Santa Clara County Office of Education (1990) 220 Cal. App. 3d 702, 269 Cal. Rptr. 605* (Sixth Appellate District; order denying motion for reconsideration that raises new facts is appealable), with *Rojes v. Riverside General Hospital (1988) 203 Cal. App. 3d 1151, 250 Cal. Rptr. 435* (Fourth Appellate District; order denying motion for reconsideration is always nonappealable; overruled on another ground by the same district and division in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1605, 275 Cal. Rptr. 887*) [*Gill v. Hughes (1991) 227 Cal. App. 3d 1299, 1310 n.3, 278 Cal. Rptr. 306* ; *see* *Crotty v. Trader (1996) 50 Cal. App. 4th 765, 768-769, 57 Cal. Rptr. 2d 818* (First Dist., Div. Two; court followed *Rojes* in holding reconsideration order nonappealable even if court granted reconsideration and subsequently denied motion on its merits)].

Denial of a motion to reconsider may be challenged by peremptory writ [*Mink v. Superior Court (1992) 2 Cal. App. 4th 1338, 1344, 4 Cal. Rptr. 2d 195* (ordering reconsideration of grant of summary adjudication dismissing claims as untimely after discovering that complaint was timely filed because of an intervening weekend and court holiday); *cf. International Ins. Co. v. Superior Court (1998) 62 Cal. App. 4th 784, 786 n.2, 72 Cal. Rptr. 2d 849* (order denying summary adjudication is reviewable on appeal from final judgment; appellate court saw no reason why, absent other compelling facts, it ought to use writ procedure to review orders to grant or deny reconsideration of a summary adjudication order and denied petition for writ of mandate)].

Legal Topics:

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33-374 California Forms of Pleading and Practice--Annotated § 374.23

§ 374.23 Effect of Filing Valid Motion to Reconsider on Time to Appeal Original Order

[1] When Time Is Extended

The time for filing a notice of appeal from a superior court judgment or appealable order is set forth in *Cal. Rules of Ct., Rule 8.104*.

Cal. Rules of Ct., Rule 8.108 provides for an extension of time when a motion for reconsideration of an appealable order is made. Specifically, Rule 8.108 provides that if a "valid" motion to reconsider an appealable order is made, the time to appeal that order is the earliest of: (1) 30 days after the clerk or a party served an order denying the motion or a notice of entry of that order; (2) 90 days after the first motion to reconsider is filed; or (3) 180 days after entry of the appealable order [*California Rules of Ct., Rule 8.108(d)*].

The Fourth Appellate District held that while a motion for reconsideration of an appealable order will extend the time to file a notice of appeal from the order, a motion for reconsideration (of the order granting or constituting the judgment) filed after judgment has been entered will not extend the time to appeal from the judgment [*Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1605-1608, 275 Cal. Rptr. 887]* . That is because a trial court loses its power to rule on a reconsideration motion after entry of judgment and thus a reconsideration motion made after entry of judgment cannot extend the time to file a notice of appeal under *Cal. Rules of Ct., 8.104* [*Ramon v. Aerospace Corp. (1996) 50 Cal. App. 4th 1233, 1236-1238, 58 Cal. Rptr. 2d 217 (Second Dist., Div. Three; Passavanti followed)* ; *see Crotty v. Trader (1996) 50 Cal. App. 4th 765, 771, 57 Cal. Rptr. 2d 818* (First Dist., Div. Two; *Cal. Rules of Ct., Rule 8.108*, which extends time to file a notice of appeal when a motion for new trial is served, filed and denied, does not apply to a postjudgment motion for reconsideration); *but see Fryer v. Kaiser Foundation Health Plan, Inc. (1963) 221 Cal. App. 2d 674, 676-677, 34 Cal. Rptr. 688* (Second Dist., Div. Four; reconsideration motion made after entry of judgment of dismissal which was granted and thereafter trial court reaffirmed its judgment of dismissal construed as new judgment which began period for filing notice of appeal under *Cal. Rules of Ct., Rule 8.104*)].

Thus, to determine whether the time for appeal is extended by a motion to reconsider, orders must first of all be distinguished from judgments, and, secondly, it must be determined whether the order for which reconsideration is sought is appealable [*see Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1605, 275 Cal. Rptr. 887]* .

When a reconsideration motion has been made before entry of judgment and thereafter judgment is entered without a ruling on the motion, it has been held that the entry of the judgment has the effect of denying the motion by implication. A motion for reconsideration refiled thereafter is an invalid motion. Rather, the judgment may be attacked in one of three ways, that is, by a motion for a new trial, by a motion to vacate, or by filing a timely notice of appeal [*Ramon v. Aerospace Corp. (1996) 50 Cal. App. 4th 1233, 1238, 58 Cal. Rptr. 2d 217]* .

[2] "Orders" and "Judgments" Distinguished

Orders may be made before trial, during trial, after trial, or after entry of a final judgment. An order is any "direction of a court or judge made or entered in writing and not included in a judgment" [*Code Civ. Proc. § 1003*]. Despite the use of the word "direction" in this statutory definition, not every order need include a direction to do anything but may, for example, simply deny a motion and yet be an appealable order [*see Code Civ. Proc. §§ 904.1(a)(2), (4)-(6),* (13), *904.2(b), (c), (e)-(g)*; *see also Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1605 n.3, 275 Cal. Rptr. 887]* .

A judgment, on the other hand, is the final determination of the rights of the parties in an action [*Code Civ. Proc. § 577*] or proceeding [*Code Civ. Proc. § 1064*]. Although there may be numerous orders made throughout an action or proceeding, there is only one judgment [*Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1605, 275 Cal. Rptr. 887]* .

Nevertheless, some determinations, though characterized as orders, are in effect final judgments for purposes of appeal, and orders of dismissal are considered judgments under *Code Civ. Proc. § 581d* [*Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1607-1608 n.5, 275 Cal. Rptr. 887* ; *see also APRI Ins. Co. v. Superior Court (1999) 76 Cal. App. 4th 176, 181, 90 Cal. Rptr. 2d 171* (entry of order in "Civil Register Report" satisfies requirement of *Code Civ. Proc. § 581d* so as to constitute entry of judgment).] Moreover, judgments are sometimes mislabeled as orders. Nevertheless, a judgment, no matter how designated, is the final determination of the rights of the parties in an action, and an order, which is the final determination in the action, is the judgment [*Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1606, 275 Cal. Rptr. 887]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 374.24 Effect of Motion to Reconsider on Review by Extraordinary Writ

The delay resulting from the making of a motion to reconsider might also result in loss of a right to review by extraordinary writ. For example, *Code Civ. Proc. § 400* authorizes review by mandate of a superior court order granting or denying a motion for change of venue, provided the petition for the writ is filed within 20 days after service of a written notice of the order, or within up to 30 days if the superior court grants an extension for good cause prior to expiration of the initial 20-day period. (Although a superior court order, other than in a limited civil case, granting or denying a motion for change of venue is not appealable [*see Code Civ. Proc. § 904.1*], a superior court order in a limited civil case granting or denying such a motion is [*Code Civ. Proc. § 904.2(c)*].) In *Dunas v. Superior Court (1970) 9 Cal. App. 3d 236, 87 Cal. Rptr. 719* , the trial court granted defendants' motion for change of venue on December 9, 1969, and notice of the ruling was mailed to plaintiff's counsel on December 19, 1969. On December 30, 1969, plaintiff filed a notice of motion for reconsideration. The trial court granted the motion to reconsider on February 20, 1970, and, on reconsideration, again ruled that the case be transferred. Notice of the ruling was mailed to plaintiff's counsel on February 27, 1970, and plaintiff filed a petition for writ of mandate under *Code Civ. Proc. § 400* on March 6, 1970. The court of appeal held, under the circumstances of the case, that there was no recognized procedure for plaintiff's motion to reconsider and, accordingly, the trial court acted in excess of its jurisdiction in entertaining and ruling on the motion. It denied the petition for writ of mandate on the ground that, since plaintiff did not seek appropriate and timely relief from the only effective order made, that is, the order of December 9, granting the motion for change of venue, he lost the right to a review on the merits [*Dunas v. Superior Court (1970) 9 Cal. App. 3d 236, 239, 240, 87 Cal. Rptr. 719* (prior law)].

On the other hand, it has been held that an order denying a renewed motion to quash service of summons on the ground of lack of personal jurisdiction after denial of the original motion [former *Code Civ. Proc. § 416.1* (*now see Code Civ. Proc. § 418.10(a)(1)*)] is reviewable by mandate under former Code Civ. Proc. § 416.3 [*now see Code Civ. Proc. § 418.10(c)*] if the petition was filed within 10 days after service on the petitioning party of a written notice of entry of the order denying the second motion although filed more than 10 days after service of written notice of entry of the order denying the first motion [*Josephson v. Superior Court (1963) 219 Cal. App. 2d 354, 360, 33 Cal. Rptr. 196* (prior law; issuing a peremptory writ of mandate to the superior court requiring it to enter its order quashing service of summons on petitioner); *see also Amparan v. Superior Court (1966) 246 Cal. App. 2d 41, 43, 54 Cal. Rptr. 501]* .

Legal Topics:

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

§§ 374.25[Reserved]

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33-374 California Forms of Pleading and Practice--Annotated § 374.40

§ 374.40 State Statutes

Renewed motions and motions to reconsider. *Code Civ. Proc. § 1008*

Legal Topics:

For related research and practice materials, see the following legal topics:
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33-374 California Forms of Pleading and Practice--Annotated § 374.41

§ 374.41 California Rules of Court

Civil law and motion rules. *Cal. Rules of Ct., Rule 3.1100 et seq.*

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33-374 California Forms of Pleading and Practice--Annotated § 374.42

§ 374.42 Local Court Rules

Requirement that motion for reconsideration be presented to judge who made order; alternatives if judge is not available. Los Angeles Co. Super. Ct. Rules, Rule 3.3

Legal Topics:

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33-374 California Forms of Pleading and Practice--Annotated § 374.43

§ 374.43 Decisions

CAUTION:

***Code Civ. Proc. § 1008* was amended in 1992, effective January 1, 1993, for the following purposes, among other things:**

(1) To apply to interim orders [*Code Civ. Proc. § 1008(e)*],

(2) To provide that the 10-day limitation period for motions to reconsider runs from receipt of the written notice of entry of order [*Code Civ. Proc. § 1008(a)*],

(3) To provide that a motion to reconsider should be made to the same judge or court that made the order [*Code Civ. Proc. § 1008(a)*],

(4) To make the grounds for a motion to reconsider the same as for a renewed motion (*i.e.*, based on new or different facts, circumstances, or law) [*Code Civ. Proc. § 1008(a), (b)*], and

(5) To limit jurisdiction to hear motions to reconsider and renewed motions to the provisions of the section [*Code Civ. Proc. § 1008(f)*].

An additional amendment in 1998 further clarified that Seciton 1008 applies to all applications for interim orders [*Code Civ. Proc. § 1008(g)*].

The decisions discussed below, many of which were decided under prior law, are cited as persuasive rather than controlling authority on points of law that are arguably still valid under *Code Civ. Proc. § 1008*.

[1] Appeal

[a] Appealability

Reconsideration order nonappealable even if court granted reconsideration and subsequently denied motion on its merits. *Crotty v. Trader (1996) 50 Cal. App. 4th 765, 768-769, 57 Cal. Rptr. 2d 818*

Order denying reconsideration of nonappealable order as itself nonappealable. *Ghanooni v. Super Shuttle (1992) 2 Cal. App. 4th 380, 381, 3 Cal. Rptr. 2d 43* (criticized on other grounds in *Greene v. Amante (1992) 3 Cal. App. 4th 684, 689, 4 Cal. Rptr. 2d 571*)

When order for which reconsideration is sought is not final and appealable in its own right, order denying reconsideration as not appealable. *Jade K. v. Viguri (1989) 210 Cal. App. 3d 1459, 1466, 258 Cal. Rptr. 907*

Order denying reconsideration as appealable as order made after judgment if order as to which reconsideration is sought is appealable. *Rabbitt v. Vincente (1987) 195 Cal. App. 3d 170, 174, 240 Cal. Rptr. 524*

Court's ruling on motion for reconsideration of summary judgment based on new facts [*Code Civ. Proc. § 1008*] as appealable order. *Bartschi v. Chico Community Memorial Hospital (1982) 137 Cal. App. 3d 502, 508, 187 Cal. Rptr. 61* (prior law)

Appealability of order denying reconsideration. *Blue Mountain Development Co. v. Carville (1982) 132 Cal. App. 3d 1005, 1010-1012, 183 Cal. Rptr. 594* (prior law)

[b] Time for Filing

Trial court loses its power to rule on reconsideration motion after entry of judgment; thus a motion for reconsideration made after entry of judgment cannot extend time to file notice of appeal under Cal. Rules of Ct., Rule 2 (renumbered 8.104 in 2007). *Ramon v. Aerospace Corp. (1996) 50 Cal. App. 4th 1233, 1236-1238, 58 Cal. Rptr. 2d 217* ; *Fryer v. Kaiser Foundation Health Plan, Inc. (1963) 221 Cal. App. 2d 674, 676-677, 34 Cal. Rptr. 688* (reconsideration motion made after entry of judgment of dismissal which was granted and thereafter trial court reaffirmed its judgment of dismissal construed as new judgment which began period for filing notice of appeal under Cal. Rules of Ct., Rule 2 (renumbered 8.104 in 2007))

Cal. Rules of Ct., Rule 3 (renumbered 8.108 in 2007), which extends time to file notice of appeal when motion for new trial is served, filed and denied, does not apply to postjudgment motion for reconsideration. *Crotty v. Trader (1996) 50 Cal. App. 4th 765, 771, 57 Cal. Rptr. 2d 818*

For purposes of Cal. Rules of Ct., Rule 3 (renumbered 8.108 in 2007) (extension of time to appeal), motion for reconsideration under *Code Civ. Proc. § 1008* as treated in same manner as motion for new trial or motion to vacate; timely filing of motion to reconsider as generally extending time for filing notice of appeal until 30 days after entry of order denying reconsideration. *Jade K. v. Viguri (1989) 210 Cal. App. 3d 1459, 1467, 258 Cal. Rptr. 907* (prior law)

[2] Applicability

Code Civ. Proc. § 1008 limits parties' ability to file a motion to reconsider in the absence of new facts or law. However, it does not restrict the court's ability, on its own motion, to reconsider its own prior interim rulings, even in the absence of new facts or law [*Le Francois v. Goel (2005) 35 Cal. 4th 1094, 1107, 29 Cal. Rptr. 3d 249]* .

Although the trial had authority under *Le Francois v. Goel (2005) 35 Cal. 4th 1094, 29 Cal. Rptr. 3d 249* to act sua sponte to reconsider its order granting summary judgment, in a case where the court acted only in response to plaintiff's motion for reconsideration and because plaintiff's motion was not based on new or different facts, circumstances, or

law, the grant of reconsideration was error. *New York Times Co. v. Superior Court (2005) 135 Cal. App. 4th 206, 215, 37 Cal. Rptr. 3d 338*

Code Civ. Proc. § 1008 is not the exclusive vehicle by which a court can reconsider issues previously decided by demurrer and summary judgment; a trial court may revisit its prior rulings on its own initiative and use a party's motions in limine as a basis for granting judgment on the pleadings. *Coshow v. City of Escondido (2005) 132 Cal. App. 4th 687, 702, 34 Cal. Rptr. 3d 19*

Code Civ. Proc. § 1008 only operates to regulate the actions of the parties to civil litigation rather than the inherent powers of the trial court itself; the procedural prerequisites set forth for reconsideration of orders and renewal of motions previously denied are jurisdictional only as applied to the actions of parties to litigation and not to the actions of the trial courts themselves. *Kerns v. CSE Insurance Group (2003) 106 Cal. App. 4th 368, 389-391, 130 Cal. Rptr. 2d 754* (reconciling *Garcia v. Hejmadi (1997) 58 Cal. App. 4th 674, 68 Cal. Rptr. 2d 228* , *Gilberd v. AC Transit (1995) 32 Cal. App. 4th 1494, 38 Cal. Rptr. 2d 626* , and *Morite of California v. Superior Court (1993) 19 Cal. App. 4th 485, 23 Cal. Rptr. 2d 666*)

Code Civ. Proc. § 1008 does not govern court's ability, on its own motion, to reevaluate its own interim rulings; cases holding section 1008 to be jurisdictional do not apply in this situation; instead, trial court retains inherent authority to change its decision at any time before entry of judgment; only requirement is that court exercise "due consideration" before modifying, amending, or revoking its prior orders. *Darling, Hall & Rae v. Kritt (1999) 75 Cal. App. 4th 1148, 1156-1157, 89 Cal. Rptr. 2d 676* (distinguishing *Garcia v. Hejmadi (1997) 58 Cal. App. 4th 674, 685, 68 Cal. Rptr. 2d 228* and *Gilberd v. AC Transit (1995) 32 Cal. App. 4th 1494, 38 Cal. Rptr. 2d 626*)

Code Civ. Proc. § 1008 not applicable to motion for summary adjudication by insurer seeking to terminate earlier summary adjudication that insurers had a duty to defend; because insurer's duty to defend endures only so long as possibility of duty to indemnify remains alive, trial court must evaluate duty to defend based on showing before it at time of a particular motion; thus, although subsequent motion by insurer might theoretically constitute impermissible motion for reconsideration if supporting facts were precisely same as presented on earlier motion, in instant case insurer had presented argument about trigger of coverage in earlier motion, while on present motion insurer contended that New York law applied and precluded existence of duty to defend. *Liberty Mutual Ins. Co. v. Superior Court (1997) 58 Cal. App. 4th 617, 619, 623, 68 Cal. Rptr. 2d 219*

Code Civ. Proc. § 1008 as not applying to criminal cases. *Smith v. Superior Court (1981) 115 Cal. App. 3d 285, 291 n.2, 171 Cal. Rptr. 387*

[3] Discretion of Court

It would be an abuse of discretion for trial court not to reconsider, pursuant to *Code Civ. Proc. § 1008(c)*, its sanction order against plaintiff in case where appellate court decided that plaintiff's action was not barred by applicable statute of limitations and therefore plaintiff did not bring case in bad faith; appellate court's decision regarding statute of limitations issue constituted a "change of law" for purposes of *Code Civ. Proc. § 1008(c)*. *Valdez v. Himmelfarb (2006) 144 Cal. App. 4th 1261, 1275, 51 Cal. Rptr. 3d 195*

Leave to renew motion as addressed to sound discretion of court. *Josephson v. Superior Court (1963) 219 Cal. App. 2d 354, 358, 33 Cal. Rptr. 196*

One of court's rights as not to have administration of justice impeded and burdened by repeated motions raising questions on which court has already ruled. *City & County of San Francisco v. Muller (1960) 177 Cal. App. 2d 600, 604, 2 Cal. Rptr. 383*

[4] Jurisdiction to Reconsider

After plaintiff obtained default judgment against defendants, trial court, after initially denying defendants' motion for relief from default, properly reconsidered its decision under *Code Civ. Proc. § 1008* and granted motion, where trial court had jurisdiction to reconsider its order under circumstances, because § 1008 allowed trial court to reconsider interim orders that could later be incorporated into judgment and orders made after judgment, in accordance with requirements of § 1008. *D.R.S. Trading Co., Inc. v. Barnes (2009) 180 Cal. App. 4th 815, 819-821, 103 Cal. Rptr. 3d 329*

To extent defendants' second motion for relief from default relied upon mandatory provisions of *Code Civ. Proc. § 473(b)*, it did not ask trial court to reconsider its previous order under *Code Civ. Proc. § 1008(a)*, where first order was entirely correct when made; and where second motion rested on entirely different legal theory, invoked different statutory ground, and relied in very substantial part on markedly different facts, and neither asked for, nor sought by sly evasion, determination contrary to any determination made in first order, but, rather, cited first order as part of series of events entitling defendants to relief from judgment. *Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 884-891, 102 Cal. Rptr. 3d 140*

Once trial court has entered judgment it is without power to grant reconsideration; thus, court is without jurisdiction to grant motion for reconsideration even if motion was brought before judgment was entered and is still pending at time of entry of judgment. *APRI Ins. Co. v. Superior Court (1999) 76 Cal. App. 4th 176, 180-182, 90 Cal. Rptr. 2d 171*

Court acts in excess of jurisdiction when it grants motion to reconsider that is not based on new or different facts, circumstances, or law. *Pazderka v. Caballeros Dimas Alang, Inc. (1998) 62 Cal. App. 4th 658, 670, 73 Cal. Rptr. 2d 242*

Trial court loses its power to rule on motion for reconsideration after entry of judgment; final judgment terminates litigation and leaves nothing in nature of judicial action to be done other than questions of enforcement or compliance; after judgment, trial court can only correct judicial error in accordance with statutory proceedings, and motion for reconsideration is not such a motion. *Ramon v. Aerospace Corp. (1996) 50 Cal. App. 4th 1233, 1237-1238, 58 Cal. Rptr. 2d 217*

By making *Code Civ. Proc. § 1008(e)* expressly jurisdictional, legislature intended to prevent courts from modifying, amending or revoking prior orders without due reconsideration. *Morite of California v. Superior Court (1993) 19 Cal. App. 4th 485, 492-493, 23 Cal. Rptr. 2d 666*

Although decision on motion is not res judicata and trial court has jurisdiction to reconsider prior ruling or to entertain renewal of previous motion, one trial court judge as not permitted to reconsider and overrule ruling of another judge, absent showing that first judge is unavailable. *Curtin v. Koskey (1991) 231 Cal. App. 3d 873, 876-878, 282 Cal. Rptr. 706* (prior law)

[4A] Jurisdiction Over Renewed Motions

Under *Code Civ. Proc. § 1008(b)*, two motions seek "same order" when they ask court to issue same "direction," so, in this view, defendants' second motion to vacate default judgment sought "same order" as first insofar as both asked trial court to direct that default have no further effect, so to that extent, second motion arguably constituted renewal of first. However, assuming second motion was renewal of first motion insofar as it sought relief from underlying default, it was not barred, in whole or part, where relief sought was ancillary to, and would be necessary to carry into effect, order vacating judgment, which was subject to no such constraint. *Standard Microsystems Corp. v. Winbond Electronics*

Corp. (2009) 179 Cal. App. 4th 868, 891-893, 102 Cal. Rptr. 3d 140

[5] Oral Argument on Motion to Reconsider

Court's denial of motion for reconsideration without oral argument as harmless error, if error at all, when moving papers did not set forth different facts as required under *Code Civ. Proc. § 1008*, and, on appeal, no statement was made of what evidence or argument not raised in moving papers would have been asserted at argument. *M.E. Gray Co. v. Gray (1985) 163 Cal. App. 3d 1025, 1036-1037, 210 Cal. Rptr. 285*

[6] Requirements

[a] New Facts

Where defendants had opportunity at original hearing to present evidence concerning defendant city's interpretation of municipal code provision involved in land use decision, declaration of city planning employee setting forth that interpretation submitted after hearing was not "new" evidence; motion for reconsideration was properly denied because defendants were not able to give satisfactory explanation of why they were unable to present the evidence at original hearing. *McPherson v. City of Manhattan Beach (2000) 93 Cal. Rptr. 2d 725* (also noting evidence would have been irrelevant)

When one defendant failed to comply with discovery request for documents and court granted another defendant's petition to compel arbitration although plaintiff asked court to delay ruling on petition until documents were received, and court also tentatively ruled to stay remainder of lawsuit pending completion of arbitration, plaintiff's motion for reconsideration did not fail to set forth any new or different facts, circumstances, or law as required by *Code Civ. Proc. § 1008* when discovery documents were not produced until hearing of plaintiff's reconsideration motion; court did not exceed its jurisdiction in granting plaintiff's motion to reconsider as it had authority to consider motion and correctly realized this new evidence warranted second look at its previous ruling. *Hollister v. Benzl (1999) 71 Cal. App. 4th 582, 584-585, 83 Cal. Rptr. 2d 903*

Counsel's declaration that counsel mistakenly believed *Code Civ. Proc. § 998* offer included issue of attorney fees and costs did not disclose new facts but merely counsel's mistake; mistake based on ignorance of law or imprecision in drafting the offer is not proper basis for reconsideration. *Pazderka v. Caballeros Dimas Alang, Inc. (1998) 62 Cal. App. 4th 658, 670, 73 Cal. Rptr. 2d 242*

1992 amendment to *Code Civ. Proc. § 1008(a)*, requiring "new or different facts, circumstances, or law" does not mean that any facts not previously presented to a court now qualify as "different" (if not "new") facts or circumstances justifying reconsideration; amendment's reference to "new or different" facts did not make prerequisites less restrictive; threshold showing of diligence is required, i.e., explanation of why newly discovered matter was not presented earlier; although court could comfortably assume that amended language "new or different facts, circumstances, or law" was designed to approve generally, case law relaxation of what constitutes new or different acts justifying reconsideration, that does not mean that all facts not previously presented now suffice. *Garcia v. Hejmadi (1997) 58 Cal. App. 4th 674, 685-691, 68 Cal. Rptr. 2d 228*

To be entitled to reconsideration, party should show that (1) evidence of new or different facts exist and (2) party has satisfactory explanation for failing to produce such evidence at earlier time. *Kalivas v. Barry Controls Corp. (1996) 49 Cal. App. 4th 1152, 1160-1161, 57 Cal. Rptr. 2d 200*

Error to deny motion to reconsider interim order on ground of no new facts since requirement only applies to final order; error as not, however, warranting reversal in absence of showing of injury. *Robbins v. Los Angeles Unified*

School Dist. (1992) 3 Cal. App. 4th 313, 318, 4 Cal. Rptr. 2d 649 (prior law)

Discovery of timely filing of complaint due to intervening weekend and court holiday as sufficient to warrant reconsideration of grant of summary adjudication dismissing claims as untimely; relief under *Code Civ. Proc. § 473(b)*, also appropriate. *Mink v. Superior Court (1992) 2 Cal. App. 4th 1338, 4 Cal. Rptr. 2d 195*

Party seeking reconsideration under *Code Civ. Proc. § 1008* as required to provide not only new evidence but also satisfactory explanation for failure to produce that evidence at an earlier time; moving party's burden as same as that of party seeking new trial on ground of newly discovered evidence, material for party making application that he or she could not, with reasonable diligence, have discovered and produced at trial (*see Code Civ. Proc. § 657(4)*). *Jade K. v. Viguri (1989) 210 Cal. App. 3d 1459, 1467, 258 Cal. Rptr. 907* (prior law)

Code Civ. Proc. § 1008(a) as permitting any affected party to seek reconsideration of court's order, regardless of how court rules on motion, provided motion is based on alleged "different" set of facts and is made within 10 days of knowledge of court's order. *Graham v. Hansen (1982) 128 Cal. App. 3d 965, 970, 180 Cal. Rptr. 604*

Code Civ. Proc. § 1008(b) as applying to renewed motions based on "new" facts and as imposing no time limitations on such motions. *Graham v. Hansen (1982) 128 Cal. App. 3d 965, 970-971, 180 Cal. Rptr. 604*

[b] New Circumstances

Evidence that the trial court had failed to consider cross-defendants' timely filed memorandum of points and authorities in support of its special motion to strike was a sufficient showing of "new circumstances" such that the trial court had jurisdiction to grant reconsideration under *Code Civ. Proc. § 1008(a)*. *Johnston v. Corrigan (2005) 127 Cal. App. 4th 553, 556, 25 Cal. Rptr. 3d 657*

[c] Prior Ruling Erroneous

Order denying motion for reconsideration as determination that requirements of *Code Civ. Proc. § 1008* are not met; if requirements are met to reviewing court's satisfaction but it is unconvinced that earlier ruling was erroneous, proper course as granting reconsideration and reaffirming earlier ruling. *Corns v. Miller (1986) 181 Cal. App. 3d 195, 202, 226 Cal. Rptr. 247*

[d] Refusal of Application for Order

Compliance with *Code Civ. Proc. § 1008*, relating to renewal of application for order, on filing of second motion to compel satisfaction of judgment as required only if first motion is refused and not if first motion is denied without prejudice with permission to refile motion to be heard by judge before whom stipulation for judgment was made. *Chambreau v. Coughlan (1968) 263 Cal. App. 2d 712, 717-718, 69 Cal. Rptr. 783*

[7] Timing of Motion to Reconsider

Court is without jurisdiction to grant motion for reconsideration brought beforejudgment was entered if motion is still pending at time of entry of judgment. *APRI Ins. Co. v. Superior Court (1999) 76 Cal. App. 4th 176, 180-182, 90 Cal. Rptr. 2d 171*

Trial court loses its power to rule on reconsideration motion after entry of judgment. *Ramon v. Aerospace Corp.*

(1996) 50 Cal. App. 4th 1233, 1236-1238, 58 Cal. Rptr. 2d 217

Motion for reconsideration under *Code Civ. Proc. § 1008(a)* must be made within 10 days after service of written notice of entry of order; motion for reconsideration filed on October 31, 1994, held untimely because amended notice of ruling on demurrer and motion to strike served on October 12, 1994, and motion for reconsideration should have been filed by October 22, 1994. *Advanced Building Maintenance v. State Comp. Ins. Fund (1996) 49 Cal. App. 4th 1388, 1392, 57 Cal. Rptr. 2d 310*

Practical time limitation on motion to reconsider an appealable order as within 60-day jurisdictional time frame for court to rule on motion. *Stephen v. Enterprise Rent-A-Car (1991) 235 Cal. App. 3d 806, 818, 1 Cal. Rptr. 2d 130*

Motion for reconsideration as properly considered only before entry of judgment; after summary judgment, proper method of attacking judgment as motion for new trial and appeal, and not motion for reconsideration; but court as free to consider motion regardless of label put on it by moving party. *Eddy v. Sharp (1988) 199 Cal. App. 3d 858, 863 n.3, 245 Cal. Rptr. 211* (prior law)

Ten-day period for seeking reconsideration of order under *Code Civ. Proc. § 1008* as not terminating court's jurisdiction to vacate its declaration of mistrial, provided relief from mistrial order is sought within reasonable time not to exceed six months pursuant to *Code Civ. Proc. § 473(b)*. *Phelps v. Superior Court (1982) 136 Cal. App. 3d 802, 815-816, 186 Cal. Rptr. 626* (prior law)

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33-374 California Forms of Pleading and Practice--Annotated § 374.44

§ 374.44 Text References

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, §§ 44-50 (4th ed. 1997)

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[Reserved]

§§ 374.45[Reserved]

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PART IV. FORMS

33-374 California Forms of Pleading and Practice--Annotated § 374.60

§ 374.60 Renewed Motion for Order After Prior Motion Was Denied in Whole or in Part, Granted Conditionally, or Granted on Terms [Code Civ. Proc. § 1008(b)]--Notice of Motion

[1] FORM Renewed Motion for Order After Prior Motion Was Denied in Whole or in Part, Granted Conditionally, or Granted on Terms [Code Civ. Proc. § 1008(b)]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF RENEWED MOTION AND RE-
vs.	)	NEWED MOTION _____ [*e.g.*,
_____ [*name*],	)	FOR SUMMARY JUDGMENT][, SUPPORTING
Defendant.	)	DECLARATION OF _____
	)	(*name*), AND SUPPORTING MEMORANDUM
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*specify party, e.g.*, plaintiff] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____[*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in the courtroom of [_____(Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*],

_____ [*party, e.g.,* defendant] will, and hereby does, move the court for _____ [*specify, e.g.,* summary judgment]. The motion is made on the grounds that _____ [new _____(facts *or* circumstances *or* law) exist than did *or* different _____ (facts *or* circumstances *or* law) are presented than were] at the time _____ [*party, e.g.,* defendant's] prior motion for _____ [*specify, e.g.,* summary judgment] was _____ [refused in _____ (whole *or* part) *or* granted conditionally *or* granted on terms] by this court, and that _____ [*specify, e.g.,* the action is without merit in that it is barred by the statute of limitations].

The motion is based on this notice of motion, on the declaration(s) of _____ [*name(s)*], [*refer to any additional papers, e.g.,* the attached statement of undisputed material facts,] the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

SUPPORTING DECLARATION OF _____[*name*]
[*Add declaration supporting motion.*]

SUPPORTING MEMORANDUM
[*Add memorandum supporting motion.*]

[2] Use of Form

The form of notice of motion in [1], *above*, is for use by a party to renew a prior motion refused in whole or in part or granted conditionally or on terms when new or different facts, circumstances, or law exist to support the renewed motion [*Code Civ. Proc. § 1008(b)*].

[3] Accompanying Papers

A form of supporting declaration must accompany the notice of motion [*see Code Civ. Proc. §§ 1008(b), 1010*; for a form, *see § 374.61*].

A memorandum must be filed and a copy served with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*; *see* Ch. 417, *Points and Authorities*].

[4] Time of Motion

No time limit is specified for bringing a renewed motion [*see Code Civ. Proc. § 1008(b)*]. A renewed motion on the ground of newly discovered evidence after denial of a motion under *Code Civ. Proc. § 473(b)*, to vacate and set aside a default and default judgment is authorized by *Code Civ. Proc. § 1008(b)*, providing for renewal of an earlier motion based on "new facts," and the motion is not subject to the 10-day limitation governing applications under *Code Civ. Proc. § 1008(a)* [*Monsan Homes, Inc. v. Pogrebneak (1989) 210 Cal. App. 3d 826, 831, 258 Cal. Rptr. 676* (criticized on other grounds in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1606 n.5, 275 Cal. Rptr. 887]* .

[5] Cross References

For a forms of order that may be used in granting or denying the motion, see *§ 374.63*

For discussion of the format requirements for law and motion papers, see Ch. 372, *Motions and Orders*

Witkin, California Procedure, vol. 6, *Proceedings Without Trial,* § 44; vol. 7, *Trial,* § 208 (4th ed. 1997)

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33-374 California Forms of Pleading and Practice--Annotated § 374.61

§ 374.61 Renewed Motion for Order After Prior Motion Was Denied in Whole or in Part, Granted Conditionally, or Granted on Terms [Code Civ. Proc. § 1008(b)]--Supporting Declaration [Code Civ. Proc. §§ 1008(b); Cal. Rules of Ct., Rule 3.1115]

[1] FORM Renewed Motion for Order After Prior Motion Was Denied in Whole or in Part, Granted Conditionally, or Granted on Terms [Code Civ. Proc. § 1008(b)]--Supporting Declaration [Code Civ. Proc. §§ 1008(b); Cal. Rules of Ct., Rule 3.1115]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____
vs.	)	[*name*] IN SUPPORT OF RENEWED MOTION
_____ [*name*],	)	_____ [*e.g.*, FOR SUMMARY
Defendant.	)	JUDGMENT]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of California and the attorney of record herein for _____ (*specify moving party, e.g.,* defendant) *or other statement as appropriate*] and make this declaration in support of _____ [*specify moving*

party, e.g., defendant's] renewed motion _____ [*specify, e.g.,* for summary judgment].

2. On _____ [*date*], _____ [I *or*, on behalf of _____ (*specify party, e.g.,* defendant) I], filed in this court a notice of motion _____ [*specify relief sought by prior motion, e.g.,* for summary judgment]. The motion was heard on _____[*date*], by the Honorable _____ [*name*]. By [minute] order made [and entered] on _____ [the same date *or specify date*], the motion was _____ [denied in _____ (whole *or* part) *or* granted conditionally *or* granted on terms]. _____ [A conformed copy of the order is attached hereto as Exhibit A and made a part hereof *or* The court is requested to take judicial notice of its order].

3. As shown by the papers submitted in support of and in opposition to the prior motion _____ [*specify, e.g.,* for summary judgment], which are in the court's file of this case, the court's order was based on the following _____ [facts *or* circumstances *or* law]: _____ [*specify, e.g.,* The action, based on medical malpractice, was filed within three years as required by the *Code of Civil Procedure Section 340.5*, and there was no showing that plaintiff had not discovered his/her injury and its cause more than one year before the complaint was filed].

4. A _____ [new *or* different] state of _____ [facts *or* circumstances *or* law] is now presented than was presented at the time the prior motion was heard and ruled on in that _____ [*Set forth new facts, circumstances or law within personal knowledge of declarant or facts or circumstances of which court must take judicial notice, or facts or circumstances of which court may take judicial notice with request that it do so, e.g.,* subsequent to the ruling on the prior motion, plaintiff answered defendant's interrogatories. In reply to the question When did you first become aware of your injury and its cause?, plaintiff replied "On _____" (*specify date*). Thereafter, on _____ (*date*), defendant caused plaintiff's deposition to be taken at which plaintiff testified that on _____ (*same date as given in answer to interrogatories*) he/she discovered the nature and extent of his/her injury and "knew at that time that it was caused by defendant." As shown by the record herein, the complaint was filed _____ (*date*), which is more than one year after plaintiff's admitted discovery. The action is, therefore, barred under the provisions of *Code of Civil Procedure Section 340.5*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

The form of declaration in [1], *above*, is for use in support of a renewed motion by a party whose prior motion for an order was refused in whole or in part or granted conditionally or on terms where the subsequent motion is based on new or different facts, circumstances, or law [*Code Civ. Proc. § 1008(b)*].

When the party who originally made an application for an order which was refused in whole or in part, or granted conditionally or on terms, makes a subsequent application for the same order based on new or different facts, circumstances, or law, the application must be supported by an affidavit [*Code Civ. Proc. § 1008(b)*]. A declaration under penalty of perjury may be submitted in lieu of an affidavit [*Code Civ. Proc. § 2015.5*].

[3] Content of Declaration

The supporting affidavit or declaration must show what application was madebefore, when and to what judge, what order or decisions were made on it, and what new different facts, circumstances, or law are claimed to be shown [*Code Civ. Proc. § 1008(b)*].

[4] Cross References

For the related form of notice of motion, and discussion of renewed motions, see *§ 372.60*

For a declaration in support of a motion for new trial on the ground of newly discovered evidence, see *Ch. 371, Motions After Trial, § 371.60* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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33-374 California Forms of Pleading and Practice--Annotated § 374.62

§ 374.62 Notice of Motion for Reconsideration [Code Civ. Proc. § 1008(a)] of Order Granting Adverse Party's Prior Motion

[1] FORM Notice of Motion for Reconsideration [Code Civ. Proc. § 1008(a)] of Order Granting Adverse Party's Prior Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR RE-
vs.	)	CONSIDERATION OF ORDER
_____ [*name*],	)	_____ [*specify, e.g.,* DENYING]
Defendant.	)	MOTION _____ [*e.g.,* FOR SUM-
	)	MARY JUDGMENT][, SUPPORTING DECLARA-
	)	TION OF _____ (*name*), AND
	)	SUPPORTING MEMORANDUM]
	)	Date: _____
		Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*specify party, e.g.,* Plaintiff] _____ [*name*] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in the courtroom of [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [*specify party, e.g.,* defendant] will, and hereby does, move for reconsideration of _____ [his/her motion *or* the motion of _____ (specify party, e.g., *plaintiff*)], which the court by [minute] order made [and entered] on _____ [*date*] _____ [denied *or* denied in part *or* granted *or* granted conditionally *or* granted on terms], and for _____ [modification *or* amendment *or* revocation] of that order. The motion is made on the ground that a state of _____ [new *or* different] _____ [facts *or* circumstances *or* law] exists.

The motion is based on this notice of motion, on the declaration(s) of_____ [*name(s)*], the supporting memorandum served and filed herewith, on the records and file herein, [on such supplemental affidavits or declarations and memoranda as may subsequently be filed herein,] and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

SUPPORTING DECLARATION OF _____[*name*]
[*Add declaration supporting motion.*]

SUPPORTING MEMORANDUM
[*Add memorandum supporting motion.*]

[2] Use of Form

The form of notice of motion in [1], *above*, is for use by any party affected by an order that was refused in whole or in part, or granted, or granted conditionally, or on terms, who seeks reconsideration of the order. The motion must be based upon new or different facts, circumstances, or law [*see Code Civ. Proc. § 1008(a)*].

[3] Accompanying Papers

For a form of declaration that may be adapted for use to support the motion for reconsideration, see *§ 374.61*.

A supporting memorandum must be filed and a copy served with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*; for discussion and forms, see Ch. 417, *Points and Authorities*].

[4] Motion Made to Same Judge or Court

The application to reconsider may be made by a party to the same judge or court that made the order [*Code Civ. Proc. § 1008(a)*, as amended by Stats. 1992, ch. 460, § 4 (formerly requiring application to the same judge)]. For further discussion, see *§ 374.19*.

[5] Time of Motion

The motion for reconsideration must be made within 10 days after the moving party has been served with written notice of entry of the prior order [*Code Civ. Proc. § 1008(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 374 MOTIONS TO RECONSIDER AND RENEWED MOTIONS
PART IV. FORMS

33-374 California Forms of Pleading and Practice--Annotated § 374.63

§ 374.63 Order Granting or Denying Renewed Motion or Motion for Reconsideration

[1] FORM Order Granting or Denying Renewed Motion or Motion for Reconsideration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER ON _____ [RENEWED
Plaintiff,	)	MOTION *or* MOTION TO RECONSIDER]
vs.	)	_____ [*specify subject of order*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

The _____ [renewed motion *or* motion to reconsider] brought by _____ [*identify party, e.g.,* defendant] _____ [*name*] for an order _____ [*specify nature of underlying motion*] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be _____ [granted *or* denied],

[*EITHER*]

IT IS ORDERED that the motion be, and hereby is, granted and _____ [*set out the particular order sought*].

[*OR*]

IT IS ORDERED that the motion be, and hereby is, denied.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order set out in [1], *above*, outlines the format requirements of anorder granting or denying a renewed motion or motion for reconsideration [*see Code Civ. Proc. §§ 1003, 1064* (order defined)].

[3] Content

The form contains a caption [*see Cal. Rules of Ct., Rules 2.111*]. It identifies the moving party, the order sought, the date of the hearing, and the names of counsel for the appearing parties, and sets forth the particular order granted or the court's ruling denying the motion. The order is also dated and contains the judge's signature.

The order does not include findings in accordance with the general rule that, unless required by statute or case law with respect to a specific order, findings have no place in an order granting or denying a motion [*see Ch. 372, Motions and Orders, § 372.21[18]*].

Depending on the underlying motion, there may be particular requirements for the order. For illustrative forms of orders granting or denying specific motions, see appropriate chapters in this publication.

Legal Topics:

For related research and practice materials, see the following legal topics:
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33-374 California Forms of Pleading and Practice--Annotated § 374.64

§ 374.64 Ex Parte Motion for Order and Order Revoking or Setting Aside Prior Order--Prior Order Obtained on Reapplication of Party Failing to Comply With Statutory Requirements [Code Civ. Proc. § 1008(a), (b), (d)]

[1] FORM Ex Parte Motion for Order and Order Revoking or Setting Aside Prior Order--Prior Order Obtained on Reapplication of Party Failing to Comply With Statutory Requirements [Code Civ. Proc. § 1008(a), (b), (d)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	EX PARTE MOTION FOR ORDER REVOKING
vs.	)	OR SETTING ASIDE PRIOR ORDER ON A
_____ [*name*],	)	_____ [RENEWED MOTION *or*
Defendant.	)	MOTION TO RECONSIDER] AND ORDER
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

_____ [*Specify party, e.g.,* Defendant] in this matter hereby moves for an order revoking or setting aside the order of this court made herein by the Honorable _____ [*name*] on _____ [*date*]. This motion is made on the ground that _____ [*specify adverse party, e.g.,* plaintiff] in moving for the prior order failed to comply with the provisions of _____ [*Code of Civil Procedure Section 1008(a) or Code of Civil Procedure Section 1008(b)*] and that, therefore, the order may, under the provisions of that section, be revoked or set aside. This motion is based on the following facts:

1. On _____ [*date*], after hearing, the Honorable _____ presiding, this court made an order _____ [denying *or* denying in part *or* granting *or* granting conditionally *or* granting on terms] the motion of _____ [*specify adverse party, e.g.,* plaintiff] for an order _____ [*specify*].

2. Thereafter, on or about _____ [*date*], _____ [*specify adverse party, e.g.,* plaintiff] made a subsequent motion in this court for the same order sought by the prior motion based on an alleged _____ [new *or* different] _____ [facts *or* circumstances *or* law]. This motion was _____ [*e.g.,* granted] by the Honorable _____, who ordered _____ [*specify*]. It is this order which is sought to be revoked or set aside.

3. In making the subsequent motion for the same order, _____ [*specify adverse party, e.g.,* plaintiff] failed to comply with the requirements of _____ [*Code of Civil Procedure Section 1008(a) or Code of Civil Procedure Section 1008(b)*] in that _____ [*specify, e.g.,* he/she/it failed to show by affidavit, declaration, or otherwise what application was made before, or when the application was made and to what judge, or what order or decisions were made on the application, or what new or different facts, circumstances, or law were claimed to be shown *or all or any combination of these*].

4. _____ [*Set forth, in as many separately numbered paragraphs as necessary, facts within personal knowledge of applicant establishing irreparable harm, immediate danger, or any other statutory basis for granting ex parte relief rather than setting the matter for hearing on noticed motion*.]

5. The name, address and telephone number of the _____ [attorney for the opposing party *or* opposing party], as known to me, is _____ [*set out name, address, and telephone number*].

[*EITHER*]

6. On _____ [*date*], at _____ [*time*], I informed _____ [*name*], _____ [*name of opposing party or attorney person to whom notice was given*], the opposing _____ [party *or* party's attorney], of the date, time and place that the above application for an order _____ [*specify order sought*] would be made.

6. _____ [*Name of opposing party or attorney person to whom notice was given*] informed me that _____ [*describe response to notice, including whether or not opposition is expected*].

[*OR*]

6. I attempted, in good faith, to inform _____[*name*], the opposing _____ [party *or* party's attorney], of the time and place that the above application for an order _____ [*specify order sought*] would be made. I was unable to do so even though _____ [*describe efforts made*].

[*OR*]

6. Notice to the _____ [*name*], the opposing _____ [party *or* party's attorney], of the above application for an order _____ [*specify order sought*] should not be required because _____ [*specify reason*].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

[*Add, if separate written order* (*see § 374.65*) *is not required by local court rule*]

ORDER

On proof made to the satisfaction of the court, it is hereby ordered that the order of this court made by the undersigned on _____ [*date*], _____ [*e.g.*, granting] the motion of _____ [*specify adverse party, e.g.*, plaintiff], and ordering that _____ [*specify*], be, and hereby is, revoked and set aside.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of ex parte motion in [1], *above*, is for use to secure an order revoking or setting aside a prior order secured by the adverse party on a renewed motion or motion for reconsideration that failed to comply with the requirements of *Code Civ. Proc. § 1008* [*Code Civ. Proc. § 1008(d)*].

For the format to follow when the facts supporting the granting of the order revoking or setting aside are set forth in a declaration separate from the motion itself, see *Ch. 372, Motions and Orders, § 372.68*. For a form of order granting the ex parte motion for use where local court rules require a separate written formal order, see *§ 374.65*.

The moving party must generally give notify all parties no later than 10:00 a.m. the court day before to the ex parte appearance, and the application for the ex parte order must be accompanied by a declaration regarding notice [*see Cal. Rules of Ct., Rule 3.1204(b)*]. For discussion of the notice requirements and contents of an application for an ex parte order, see *Ch. 372, Motions and Orders, § 372.19*.

[3] Power to Revoke, Set Aside, or Vacate Order for Noncompliance

The failure of a party who made a renewed motion based on an alleged different state of facts to make the showing by affidavit (or declaration) required by *Code Civ. Proc. § 1008(b)* is declared by that section to be a ground for revoking or setting aside, on ex parte motion, the order made on the renewed motion.

An order made contrary to any of the requirements of *Code Civ. Proc. § 1008* may be revoked by the judge or commissioner who made it or vacated by a judge of the court in which the action or proceeding is pending [*Code Civ. Proc. § 1008(d)*].

[4] Cross References

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, §§ 44-50 (4th ed. 1997)

Legal Topics:

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§ 374.65 Order Granting Ex Parte Motion to Revoke or Set Aside Prior Order Obtained on Reapplication of Party Failing to Comply With Statutory Requirements [Code Civ. Proc. § 1008(d)]

[1] FORM Order Granting Ex Parte Motion to Revoke or Set Aside Prior Order Obtained on Reapplication of Party Failing to Comply With Statutory Requirements [Code Civ. Proc. § 1008(d)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER _____ [REVOKING *or* SETTING ASIDE] PRIOR ORDER ON A _____[RENEWED MOTION *or* MOTION TO RECONSIDER]
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

Application having been made by _____[*specify moving party, e.g.,* plaintiff], and good cause appearing therefor,

IT IS ORDERED that the order of this court made by the undersigned on _____ [*date*], _____ [*e.g.,* granting] the motion of _____ [*adverse party, e.g.,* defendant], and ordering _____ [*specify*], be, and hereby is, revoked and set aside.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form of order in [1], *above*, is for use when the court grants the ex parte motion to revoke and set aside a prior order made on the reapplication of a party who failed to comply with the requirements of *Code Civ. Proc. § 1008* [*see Code Civ. Proc. § 1008(d)*].

Unless a separate written order is required by local court rule, the order will normally appear at the end of the ex parte motion, as indicated in the *form in § 374.64*.

[3] Filing and Service

If the judge signs the order, the originals of the ex parte motion and order will be filed. Counsel should have a clerk conform the copies, serve a copy of each on the adverse party, and prepare and file a proof of service.

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For related research and practice materials, see the following legal topics:
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33-375 California Forms of Pleading and Practice--Annotated 375.syn

§ 375.syn Synopsis to Chapter 375: MOTIONS TO STRIKE: PLEADINGS

§ 375.01 Scope of Chapter

§ 375.02 Cross References

§§ 375.03-375.09 [Reserved]

§ 375.10 Governing Statutes

§ 375.11 Grounds for Motion to Strike

[1] In Unlimited Civil Cases

[2] Specific Types of Actions

[a] Actions Against Architects, Engineers, and Land Surveyors

[b] Actions Chilling Free Speech--Strategic Lawsuit Against Public Participation (SLAPP Suits)

[3] In Limited Civil Cases

§ 375.12 Grounds for Motion Must Appear on Pleading

§ 375.13 Motion to Strike Compared to Demurrer

§ 375.14 Inappropriate Motion to Strike

[1] Summary Judgment Motion

[2] Judgment on Pleadings

§ 375.15 Time Limitations

§ 375.16 Notice Requirement

[1] Motion to Strike Answer, Complaint, or Cross Complaint

[2] Motion to Strike Demurrer

§ 375.17 Time to File Demurrer Not Extended

§ 375.18 Time to Answer Extended if Demurrer Not Filed

§ 375.19 Motion Constitutes General Appearance

§ 375.20 Ruling on Motion

§ 375.21 Hearing

§ 375.22 Order and Judgment

[1] Motion Granted Without Leave to Amend Complaint

[2] Motion Granted With Leave to Amend Complaint

[3] Time to Answer if Demurrer Is Stricken

[4] Default After Answer Is Stricken

[5] Time to Answer if Motion Denied

§ 375.23 Review of Order

[1] By Appeal

[2] By Extraordinary Writ

§§ 375.24-375.39 [Reserved]

§ 375.40 Related Matthew Bender Publications

§ 375.41 State Statutes

§ 375.42 California Rules of Court

§ 375.43 Local Court Rules

[1] Los Angeles County

§ 375.44 Decisions

[1] Appealability of Order

[2] Demurrer Distinguished

[3] Grounds for Motion to Strike

[a] Proper Grounds

[b] Improper Grounds

[4] Mandate

[5] Ruling on Motion

[6] Timeliness of Motion to Strike

§ 375.45 Text References

§§ 375.46-375.49 [Reserved]

§ 375.50 Moving Party's Checklist

[1] Preliminary Determinations

[2] Preparation of Papers

[3] Service and Filing

[4] Response to Opposing Party's Memorandum

§ 375.51 Opposing Party's Checklist

[1] Preliminary Determinations

[2] Preparation of Papers

[3] Service and Filing

§§ 375.52-375.59 [Reserved]

§ 375.60 Notice of Motion and Motion for Order to Strike Entire Pleading [Code Civ. Proc. §§ 435, 436]

[1] FORM

[2] Use of Form

[3] Accompanying Papers

[4] Limited Civil Cases

[5] Service and Filing

[6] Cross References

§ 375.61 Notice of Motion and Motion for Order Striking Portion of Pleading [Code Civ. Proc. §§ 435, 436]

[1] FORM

[2] Use of Form

[3] Accompanying Papers

§ 375.62 Order Granting or Denying Motion to Strike Pleading [Code Civ. Proc. §§ 435, 436]

[1] FORM

[2] Use of Form

[3] Procedure on Concurrent Demurrer and Motion to Strike

[4] Order

[5] Judgment of Dismissal

[6] Default on Judgment After Ruling on Motion

[7] Cross References

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PART I. SCOPE

9-375 California Forms of Pleading and Practice--Annotated § 375.01

§ 375.01 Scope of Chapter

This chapter discusses motions to strike the whole or parts of pleadings in civil actions. Treatise analysis of this topic is covered in the Legal Background part of this chapter [*see § 375.10* et seq.]. This chapter also contains the following forms:

- Notice of motion and motion to strike the entire pleading [*see § 375.60*].
- Notice of motion and motion to strike a portion of a pleading [*see § 375.61*].
- Order on the motion [*see § 375.62*].

The chapter also includes Procedural Checklists for the moving and opposing parties on a motion to strike [*see §§ 375.50, 375.51*], as well as a Research Guide [*see § 375.40* et seq.].

For special motions to strike under the California anti-SLAPP statutes [*Code Civ. Proc. § 425.16 et seq.*], see Ch. 376, *Motions to Strike: Anti -SLAPP*.

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9-375 California Forms of Pleading and Practice--Annotated § 375.02

§ 375.02 Cross References

For special motions to strike under the California anti-SLAPP statutes [*Code Civ. Proc. § 425.16 et seq.*], see Ch. 376, *Motions to Strike: Anti -SLAPP*.

For orders striking the whole or parts of pleadings as a sanction under *Code Civ. Proc. § 2023(b)(4)(A)* [*Code Civ. Proc. § 2023.030(d)(1)* operative July 1, 2005] for failure to obey a discovery order, see Ch. 190, *Discovery: Scope, Regulation, and Timing* .

For discussion of motion practice generally, see Ch. 372, *Motions and Orders* .

For procedure and forms for use in securing a summary judgment under *Code Civ. Proc. § 437c* if it is contended the action has no merit or there is no defense to the action, see Ch. 537, *Summary Judgment* . For discussion of motions to strike in proceedings under the Family Code [*see Fam. Code § 210*;], see Ch. 221, *Dissolution of Marriage: Procedure* .

For discussion and forms for use in having the court take judicial notice, see Ch. 321, *Judicial Notice* .

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[Reserved]

§§ 375.03[Reserved]

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§ 375.10 Governing Statutes

Definitions and procedure regarding motions to strike are governed by *Code Civ. Proc. § 435*. Grounds for those motions are governed by *Code Civ. Proc. § 436*, and requirements for setting forth the grounds by *Code Civ. Proc. § 437*.

Other statutory provisions authorizing the use of a motion to strike under *Code Civ. Proc. § 435* in specific actions [*see, e.g., Code Civ. Proc. § 340.1(i)* (failure to file certificates in accordance with *Code Civ. Proc. § 340.1* in action by plaintiff 26 years of age or older to recover damages suffered as a result of childhood sexual abuse)].

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9-375 California Forms of Pleading and Practice--Annotated § 375.11

§ 375.11 Grounds for Motion to Strike

[1] In Unlimited Civil Cases

The court may, on a motion to strike made pursuant to *Code Civ. Proc. § 435* or at any time in its discretion and on terms it deems proper, take the following action [*Code Civ. Proc. § 436*]:

(a) Strike out any irrelevant, false, or improper matter inserted in any pleading [*see Code Civ. Proc. § 431.10* (immaterial allegation and irrelevant matter)]; or

(b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of California, a court rule, or an order of the court.

"Pleading" means a demurrer, answer, complaint, or cross complaint [*Code Civ. Proc. § 435(a)(2)*].

The term "false" in *Code Civ. Proc. § 436(a),* replaces "sham" in the predecessor statute (former *Code Civ. Proc. § 453*), which was repealed on enactment of Section 436. One court has noted that a legislative intent to change the law is presumed when one statute is repealed and another statute with different phraseology is enacted on the same subject [*Garcia v. Sterling (1985) 176 Cal. App. 3d 17, 21, 221 Cal. Rptr. 349]* . Consequently, in determining a proper ground under Section 436, the term "false" cannot be construed according to any historical meaning of "sham" that is not synonymous with the current term "false" [*Garcia v. Sterling (1985) 176 Cal. App. 3d 17, 21, 221 Cal. Rptr. 349]* .

The trial court has inherent power apart from statute to strike a pleading filed in disregard of established procedural requirements or that is otherwise violative of orderly judicial administration [*Kronsberg v. Milton J. Wershow Co. (1965) 238 Cal. App. 2d 170, 173, 47 Cal. Rptr. 592* ; *Tostevin v. Douglas (1958) 160 Cal. App. 2d 321, 331, 325 P.2d 130* ; *see also Williams v. International Longshoremen's & Warehousemen's Union (1959) 172 Cal. App. 2d 84, 87, 341 P.2d 729]* .Thus, a court has inherent power to strike, for example, an amended complaint that does not in fact or spirit conform to the previous rulings of the court [*Kronsberg v. Milton J. Wershow Co. (1965) 238 Cal. App. 2d 170, 172, 47 Cal. Rptr. 592* ; *see also Janis v. California State Lottery Com. (1998) 68 Cal. App. 4th 824, 829, 80 Cal. Rptr. 2d 549* (amended complaint not in conformity with court's previous ruling stricken)]. The motion should be made within

the time limits prescribed by *Cal. Rules of Ct., Rules 3.1100, 3.1322*.

Some examples of pleadings subject to a motion to strike are the following:

- An unverified pleading if verification is required [*see Code Civ. Proc. § 446*; *Hearst v. Hart (1900) 128 Cal. 327, 328, 60 P. 846* ; *Henderson v. Palmer Union Oil Co. (1923) 64 Cal. App. 81, 84, 220 P. 672]* ;

- An unauthorized pleading, such as one filed by a corporation in propria persona [*see Himmel v. City Council (1959) 169 Cal. App. 2d 97, 100, 336 P.2d 996]* or by a person who is not a party to the lawsuit [*see, e.g., Milstein v. Turner (1951) 107 Cal. App. 2d 184, 185-186, 236 P.2d 606* ; *Estate of Walters (1949) 89 Cal. App. 2d 797, 799-800, 202 P.2d 89]* ;

- An original, amended, or supplemental pleading filed without leave of court if leave is required [*see, e.g., Williams v. International Longshoremen's & Warehousemen's Union (1959) 172 Cal. App. 2d 84, 87-88, 341 P.2d 729* ; *Himmel v. City Council (1959) 169 Cal. App. 2d 97, 101, 336 P.2d 996]* ;

- An original or amended pleading that is not timely filed [*see, e.g., Buck v. Morrossis (1952) 114 Cal. App. 2d 461, 464-465, 250 P.2d 270* (demurrer); *Lincoln Holding Corp. v. Union Indem. Co. (1933) 129 Cal. App. 399, 401, 18 P.2d 744* (amended complaint)];

- An amended complaint that fails to amend a previous complaint to which a demurrer was sustained [*see, e.g., Kronsberg v. Milton J. Wershow Co. (1965) 238 Cal. App. 2d 170, 173, 47 Cal. Rptr. 592* ; *Neal v. Bank of America (1949) 93 Cal. App. 2d 678, 683, 209 P.2d 825]* ;

- Punitive damages allegations when punitive damages are not available for that cause of action [*Grieves v. Superior Court (1984) 157 Cal. App. 3d 159, 164, 203 Cal. Rptr. 556]* ;

- An amended pleading filed after a motion for judgment on the pleadings that was granted with leave to amend if the time for filing an amended pleading has expired or the pleading violates the court's order [*Code Civ. Proc § 438(i)(1)(A)*]. In this situation the time limit specified in *Code Civ. Proc. § 435(b)(1)* does not apply [*Code Civ. Proc. § 435(b)(1), (e)*].

[2] Specific Types of Actions

[a] Actions Against Architects, Engineers, and Land Surveyors

A motion to strike may properly be based on the plaintiff's failure to file the required professional consultation certificate in actions arising out of the professional negligence of a person holding a valid architect's, engineer's, or land surveyor's certificate [*Code Civ. Proc. § 411.35*]. For further discussion, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*, § 206.114[9], and see Ch. 56, *Architects* .

[b] Actions Chilling Free Speech--Strategic Lawsuit Against Public Participation (SLAPP Suits)

A cause of action against a person arising from any act of that person in furtherance of his or her constitutional right of petition or free speech in connection with a public issue (Strategic Lawsuit Against Public Participation--SLAPP suit) is subject to a special motion to strike, absent plaintiff's showing that plaintiff will probably prevail on the claim [*see Code Civ. Proc. § 425.16*]. This special motion to strike was provided to encourage participation in matters of public significance and to reduce the increase in lawsuits brought primarily to chill the valid exercise of free speech and the right to petition for redress of grievances, commonly know as SLAPP (that is, strategic litigation against public

participation) suits [*see Code Civ. Proc. § 425.16(a)*]. For discussion of anti-SLAPP motions to strike, see Ch. 376, *Motions to Strike: Anti -SLAPP*.

[3] In Limited Civil Cases

Motions to strike are not allowed in limited civil cases, except on the ground that the damages or relief sought are not supported by the allegations of the complaint [*see Code Civ. Proc. §§ 91, 92(d)*].

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§ 375.12 Grounds for Motion Must Appear on Pleading

Grounds for a motion to strike must appear on the face of the challenged pleading or from any matter of which the court is required to take judicial notice [*Code Civ. Proc. § 437(a)*]. If the motion to strike is based on matter of which the court may take judicial notice pursuant to *Evid. Code § 452* or *453*, the matter must be specified in the notice of motion or in the supporting points and authorities, except as the court may otherwise permit [*Code Civ. Proc. § 437(b)*].

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§ 375.13 Motion to Strike Compared to Demurrer

A motion to strike the whole or part of a pleading is a counterpart to a demurrer. The function of both a demurrer and a motion to strike is to raise objections topleadings on grounds that appear on the face of the pleading or from matters of which the court is required to take judicial notice [*see Code Civ. Proc. §§ 430.30(a), 430.70* (demurrers), 437 (motions to strike)]. The function of a demurrer is to raise certain statutory objections [*see Code Civ. Proc. §§ 430.10, 430.20*]. That is, a demurrer tests whether sufficient facts have been stated with requisite clarity and not, for example, to challenge the presence of surplusage or other objectionable matter in a pleading [*Henke v. Eureka Endowment Asso. (1893) 100 Cal. 429, 433, 34 P. 1089* ; *Mitchell v. Steelman (1857) 8 Cal. 363, 369]* . A motion to strike, on the other hand, is used to raise objections that do not constitute a ground of demurrer [*see, e.g.,* *White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 353, 66 Cal. Rptr. 697, 438 P.2d 345* ; *Warren v. Atchison, T. & S.F. Ry. Co. (1971) 19 Cal. App. 3d 24, 41, 96 Cal. Rptr. 317]* .

A motion to strike is not a proper substitute for a special demurrer to attack a pleading that is uncertain or otherwise formally defective if the objection may be reached by demurrer [*Allerton v. King (1929) 96 Cal. App. 230, 233-234, 274 P. 90* (motion to strike allegations in answer; decided before enactment of *Code Civ. Proc. §§ 435, 436*)].

For discussion of demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

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§ 375.14 Inappropriate Motion to Strike

[1] Summary Judgment Motion

A motion to strike that is supported by facts outside the pleadings, ordinarily set forth in affidavits, that is, a "speaking motion," will ordinarily be treated as a motion for summary judgment under *Code Civ. Proc. § 437c* [*City and County of San Francisco v. Strahlendorf (1992) 7 Cal. App. 4th 1911, 1914, 9 Cal. Rptr. 2d 817]* . A motion so treated must therefore comply with the specific provisions of *Code Civ. Proc. § 437c* [*see, e.g.,* *Vesely v. Sager (1971) 5 Cal. 3d 153, 167, 95 Cal. Rptr. 623, 486 P.2d 151]* . Thus, such a motion to strike will be granted only if the affidavits filed in support of the motion are sufficient to sustain a judgment in favor of the moving party and the affidavits filed in opposition are insufficient to raise a triable issue of fact [*see* *Mediterranean Exports, Inc. v. Superior Court (1981) 119 Cal. App. 3d 605, 616, 174 Cal. Rptr. 169* ; *see also* Ch. 537, *Summary Judgment*].

[2] Judgment on Pleadings

A "motion to strike" that attacks a complaint on the ground that a claim fails to state facts sufficient to constitute a cause of action effectively seeks a judgment on pleadings and may be treated accordingly by the court [*Pierson v. Sharp Memorial Hospital, Inc. (1989) 216 Cal. App. 3d 340, 342-343, 264 Cal. Rptr. 673]* .

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§ 375.15 Time Limitations

Any party, within the time allowed to respond to a pleading, may serve and file a notice of motion to strike the whole or any part of the pleading [*Code Civ. Proc. §§ 435(b)(1), 585(f)*].

Filing a motion to strike does not extend the time in which to demur [*Code Civ. Proc. § 585(f)*].

A motion to strike may also be made without regard to these time limitations if it is made to strike an untimely or otherwise improper amended pleading filed after a motion for judgment on the pleadings has been granted with leave to amend [*see Code Civ. Proc. §§ 435(b)(1), (e), 438(i)(1)(A)*; for discussion, *see* Ch. 389, *Nonsuit and Motions for Judgment*].

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§ 375.16 Notice Requirement

[1] Motion to Strike Answer, Complaint, or Cross Complaint

A notice of motion to strike the answer or the complaint or cross complaint, or a portion of it, must specify a hearing date set in accordance with *Code Civ. Proc. § 1005* [*Code Civ. Proc. §§ 435(b)(2), 585(f)*; *see Code Civ. Proc. § 435(a)(1)* ("complaint" includes cross complaint)]. A notice of motion to strike a demurrer, or a portion of it, must set the hearing concurrently with the hearing on the demurrer [*Code Civ. Proc. § 435(b)(3)*].

Notice of a motion to strike the answer or the complaint (or cross complaint; *see Code Civ. Proc. § 435(a)*), or a portion of it, must be given at least 16 court days before the hearing. However, if the notice is served by mail, the 16-day period must be increased by five calendar days if the place of mailing and address are within California, 10 calendar days if either the place of mailing or address is outside California but within the United States, and 20 calendar days if either the place of mailing or address is outside the United States. If the notice is served by facsimile transmission, express mail, or another method of overnight delivery, the required 16-day period of notice before the hearing is increased by two calendar days [*Code Civ. Proc. §§ 435(b)(2), 1005(b)*]. An extension period of two court days may apply in the case of electronic service [*see Code Civ. Proc. § 1010.6(a)(6)*; for discussion, *see Ch. 518, Service of Summons and Papers, § 518.41[8]*].

[2] Motion to Strike Demurrer

A notice of motion to strike a demurrer or portion of a demurrer must set the hearing thereon concurrently with the hearing on the demurrer [*Code Civ. Proc. § 435(b)(3)*].

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§ 375.17 Time to File Demurrer Not Extended

The filing of a notice of motion to strike an answer, complaint, or cross complaint, or portion of it, does not extend the time within which to demur [*Code Civ. Proc. § 435(d)*; *see Code Civ. Proc. § 435(a)(1)* ("complaint" includes cross complaint)].

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§ 375.18 Time to Answer Extended if Demurrer Not Filed

If a party serves and files a notice of motion to strike without demurring to the complaint, the time to answer is extended, and no default may be entered against that defendant, except as provided in *Code Civ. Proc. §§ 585* and *586* [*Code Civ. Proc. § 435(c)*; *see Code Civ. Proc. § 472a(d)* (court to allow party to answer if motion to strike complaint is denied)].

Code Civ. Proc. § 585 allows the plaintiff to take the defendant's default if the defendant fails to respond to the complaint. The responses that preclude the taking of default include timely service of a notice of motion to strike a pleading [*Code Civ. Proc. § 585(c), (f)*; *see Code Civ. Proc. § 585(e)* (application to cross complaints)], so that an untimely notice of motion to strike, if no other response has been made to the pleading, exposes the defendant to default. *Code Civ. Proc. § 586* contains a comparable provision relating to the defendant's failure to respond to an amended complaint [*Code Civ. Proc. § 586(a)(1)*]. *Code Civ. Proc. § 586* also governs the taking of defaults after the court has ruled on a demurrer or motion to strike [*Code Civ. Proc. § 586(a)(2), (3), (7)*].

For discussion and forms relating to defaults, see Ch. 205, *Defaults and Default Judgments* .

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§ 375.19 Motion Constitutes General Appearance

A motion to strike constitutes a general appearance in the case [*see Code Civ. Proc. § 1014*; *Davenport v. Superior Court (1920) 183 Cal. 506, 511, 191 P. 911]* . For discussion of the effect of a general appearance versus a special appearance, see *Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances, § 323.61* et seq.

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§ 375.20 Ruling on Motion

In ruling on a motion to strike, courts do not read allegations in isolation. In passing on the correctness of a ruling on a motion to strike, judges read allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth [*Clauson v. Superior Court (1998) 67 Cal. App. 4th 1253, 1255, 79 Cal. Rptr. 2d 747]* .

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§ 375.21 Hearing

For discussion of tentative rulings and appearance by telephone, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* . For further general discussion of hearings on motions, see Ch. 372, *Motions and Orders* .

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§ 375.22 Order and Judgment

[1] Motion Granted Without Leave to Amend Complaint

A judgment of dismissal may be entered if a motion to strike the whole of a complaint is granted without leave to amend and either party moves for dismissal [*Code Civ. Proc. § 581(f)(3), (4)*].

[2] Motion Granted With Leave to Amend Complaint

When a motion to strike is granted pursuant to *Code Civ. Proc. § 436*, the court may order that an amendment or amended pleading be filed on terms it deems proper [*Code Civ. Proc. § 472a(d)*]. If a motion to strike all or part of a complaint is granted with leave to amend and the plaintiff fails to amend within the time allowed by the court, either party may move for dismissal. On that motion, the court may enter a judgment of dismissal [*Code Civ. Proc. § 581(f)(4)*].

[3] Time to Answer if Demurrer Is Stricken

If a demurrer is stricken pursuant to *Code Civ. Proc. § 436* and there is no answer filed, the court must allow an answer to be filed on terms that are just [*Code Civ. Proc. § 472a(c)*].

[4] Default After Answer Is Stricken

A default judgment may be taken when a motion to strike the entire answer is granted without leave to amend or when a motion to strike all or part of the answer is granted with leave to amend and the defendant fails to amend within the time allowed by the court [*Code Civ. Proc. § 586(a)(7)*].

[5] Time to Answer if Motion Denied

If a motion to strike a complaint or cross complaint, or a portion of it, is denied, the court must allow the party filing the motion to strike to file an answer [*Code Civ. Proc. § 472a(d)*; *see Code Civ. Proc. § 435(c)* (extension of time to answer)].

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§ 375.23 Review of Order

[1] By Appeal

An order granting or denying a motion to strike the whole or any part of a pleading is usually not appealable, although the ruling may be reviewed on appealfrom the final judgment in the action. If the order operates to remove from the case the only cause of action or defense or leaves no further issue to be determined, the order is appealable [*see Wilson v. Sharp (1954) 42 Cal. 2d 675, 677, 268 P.2d 1062* ; *Timberidge Enterprises, Inc. v. City of Santa Rosa (1978) 86 Cal. App. 3d 873, 878, 150 Cal. Rptr. 606* (exception applicable to order striking complaint in intervention)].

If, for example, the parties to a complaint and cross complaint are the same, an order granting or denying a motion to strike the cross complaint is not appealable. If the parties are not the same, the order striking the cross complaint is appealable [*Lerner v. Ehrlich (1963) 222 Cal. App. 2d 168, 170, 35 Cal. Rptr. 106]* .

[2] By Extraordinary Writ

In appropriate cases, the ruling on a motion to strike may be subject to review by a higher court by extraordinary writ [*see, e.g.,* *Clauson v. Superior Court (1998) 67 Cal. App. 4th 1253, 1255, 79 Cal. Rptr. 2d 747* (mandate directing trial court to issue new order denying motion to strike punitive damage allegations in complaint); *Evans v. Superior Court (1977) 67 Cal. App. 3d 162, 170-171, 136 Cal. Rptr. 596* (mandate directing trial court to enter order striking cross complaint); *Ford Motor Co. v. Superior Court (1971) 16 Cal. App. 3d 442, 449, 94 Cal. Rptr. 127* (mandate directing trial court to reinstate affirmative defenses of collateral estoppel in answers that had been stricken on motion)].

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[Reserved]

§§ 375.24[Reserved]

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§ 375.40 Related Matthew Bender Publications

For memoranda of points and authorities in support of and in opposition to motions to strike, see California Points and Authorities, Ch. 160, *Motions to Strike* (Matthew Bender)

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§ 375.41 State Statutes

Motion to strike in limited civil case. *Code Civ. Proc. §§ 91, 92(d)*

Motion to strike action chilling exercise of free speech or right to petition for redress of grievances. *Code Civ. Proc. § 425.16*

Notice of motion to strike. *Code Civ. Proc. § 435*

Grounds for motion to strike. *Code Civ. Proc. § 436*

Motion to strike after motion for judgment on the pleadings has been granted with leave to file amended pleading, and pleading is not filed within time allowed or otherwise in violation of court order. *Code Civ. Proc. § 438(i)(1)(A)*

Motions to strike as limited to defects appearing on face of pleading or from matter subject to judicial notice. *Code Civ. Proc. § 437*

Time for answer if demurrer is stricken. *Code Civ. Proc. § 472a(c)*

Time for answer if motion to strike complaint is denied. *Code Civ. Proc. § 472a(d)*

Allowance of amendment of pleading when motion to strike is granted. *Code Civ. Proc. § 472a(d)*

Dismissal of action after motion to strike granted. *Code Civ. Proc. § 581(f)(3), (4)*

Default judgment after motion to strike is granted or denied and defendant fails to answer complaint or unstricken portion. *Code Civ. Proc. § 586(a)(2), (3)*

Default judgment after motion to strike answer is granted. *Code Civ. Proc. § 586(a)(7)*

Motion to strike pursuant to *Code Civ. Proc. § 435, 436,* or *473* as raising issue of law. *Code Civ. Proc. § 589(b)*

Motion to strike as appearance. *Code Civ. Proc. § 1014*

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§ 375.42 California Rules of Court

Requirements of motions to strike. *Cal. Rules of Ct., Rules 3.1100, 3.1112(a), 3.1113, 3.1322*

Notice of motion to strike. *Cal. Rules of Ct., Rule 3.1322*

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§ 375.43 Local Court Rules

[1] Los Angeles County

Assignment of judge for law and motion matters. Los Angeles Co. Super. Ct. Rules, Rules 7.3(i), 7.4

Time; trial court delay reduction standards. Los Angeles Co. Super. Ct. Rules, Rule 7.5(a)

Judicial notice. Los Angeles Co. Super. Ct. Rules, Rule 9.2

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§ 375.44 Decisions

[1] Appealability of Order

Order granting motion to strike third amended complaint, which removed particular defendant from case and left no issues to be determined between that defendant and plaintiff, as appealable as final judgment within meaning of *Code Civ. Proc. § 904.1*. *Kuperman v. Great Republic Life Ins. Co. (1987) 195 Cal. App. 3d 943, 946-947, 241 Cal. Rptr. 187*

Appealability of order on motion to strike that operates to leave no issues to be determined between pleader and moving party. *Warren v. Atchison, T. & S.F. Ry. Co. (1971) 19 Cal. App. 3d 24, 40 n.11, 96 Cal. Rptr. 317* ; *Lerner v. Ehrlich (1963) 222 Cal. App. 2d 168, 170, 35 Cal. Rptr. 106*

Order granting motion to strike complaint that would operate to remove from case only cause of action alleged against defendants and to leave no issues to be determined between opposing parties as appealable, even if it is void. *Adohr Milk Farms, Inc. v. Love (1967) 255 Cal. App. 2d 366, 370-371, 63 Cal. Rptr. 123*

Order striking demurrer on motion as not independently appealable, but as reviewable, if at all, on appeal from judgment. *Buck v. Morrossis (1952) 114 Cal. App. 2d 461, 462, 250 P.2d 270* ; *see also* *Cuddahy v. Gragg (1920) 46 Cal. App. 578, 580, 189 P. 721*

[2] Demurrer Distinguished

Motion to strike as generally used to reach defects in pleading that are not subject to demurrer; motion to strike as not lying to attack complaint for insufficiency of allegations to justify relief, which is ground for general demurrer. *Pierson v. Sharp Memorial Hospital, Inc. (1989) 216 Cal. App. 3d 340, 342, 264 Cal. Rptr 673*

[3] Grounds for Motion to Strike

[a] Proper Grounds

Trial court has authority to strike sham pleadings, or those not in conformity with its prior ruling. *Janis v. California State Lottery Com. (1998) 68 Cal. App. 4th 824, 829, 80 Cal. Rptr. 2d 549*

Motion to strike is appropriate vehicle for attacking allegations in complaint requesting improper relief. *Satz v. Superior Court (1990) 225 Cal. App. 3d 1525, 1533 n.9, 275 Cal. Rptr. 710* ; *Saberi v. Bakhtiari (1985) 169 Cal. App. 3d 509, 517, 215 Cal. Rptr. 359*

Under *Code Civ. Proc. § 436(a)*, trial court has discretion to strike from pleading any irrelevant, false, or improper matter. *La Jolla Village Homeowners' Assn. v. Superior Court (1989) 212 Cal. App. 3d 1131, 1141, 261 Cal. Rptr. 146 , disapproved on other grounds in Jimenez v. Superior Court (2002) 29 Cal. 4th 473, 127 Cal. Rptr. 2d 614, 58 P.3d 450*

In action by hospital patient for, among other things, battery and violation of constitutional rights, based on defendant's life-sustaining measures in light of patient's wish to die, motion to strike allegations that defendant's conduct was extreme, malicious, and outrageous and related allegations, was properly granted because patient's right to have treatment withdrawn was not established at that time and allegations were not supported by fact. *Bartling v. Glendale Adventist Medical Center (1986) 184 Cal. App. 3d 961, 969-971, 229 Cal. Rptr. 360*

Trial court may dismiss complaint sua sponte pursuant to *Code Civ. Proc. § 436(b)* because complaint failed to state cause of action and was therefore not drawn in conformity with *Code Civ. Proc. § 425.10*. *Lodi v. Lodi (1985) 173 Cal. App. 3d 628, 630-631, 219 Cal. Rptr. 116*

Cross complaint filed without leave of court after trial date had been set and vacated by stipulation of parties was properly stricken. *Loney v. Superior Court (1984) 160 Cal. App. 3d 719, 721-724, 206 Cal. Rptr. 769*

[b] Improper Grounds

Motion to strike entire complaint arising out of denied probate claim was improper under *Code Civ. Proc. § 436(b)*; moving party failed to identify any court rule or order that was violated by the filing of the complaint and instead generically asserted the complaint was "illegally filed without leave of court." *Ferraro v. Camarlinghi (2008) 161 Cal. App. 4th 509, 529, 75 Cal. Rptr. 3d 19*

In civil action under Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*), all relief generally available in noncontractual actions, including punitive damages, is available; defendant's motion to strike prayers for punitive damages was properly denied. *Commodore Home Systems, Inc. v. Superior Court (1982) 32 Cal. 3d 211, 221, 185 Cal. Rptr. 270, 649 P.2d 912*

In action by workers' compensation carrier against State Compensation Insurance Fund stating causes of action for breach of covenant of good faith and constructive fraud based on alleged improper calculation of premiums, punitive damages allegations were improperly stricken because complaint alleged specific intent sufficient as matter of pleading to show malice, and conduct properly characterized as despicable. *Courtesy Ambulance Service v. Superior Court (1992) 8 Cal. App. 4th 1504, 1519, 11 Cal. Rptr. 2d 161*

Trial court abused its discretion by granting motion to strike allegations and references in complaint that adequately pleaded cause of action for punitive damages when language at issue could be determined to be ultimate facts rather than conclusions of law, and granting motion would have deprived plaintiff of opportunity to plead action and possibly

would have required retrial or reversal. *Perkins v. Superior Court (1981) 117 Cal. App. 3d 1, 5, 6-7, 172 Cal. Rptr. 427*

Right to have pleading (demurrer) stricken for lack of timeliness is not absolute and within trial court's discretion if no question of jurisdiction is involved and if late filing is mere irregularity. *Tuck v. Thuesen (1970) 10 Cal. App. 3d 193, 196, 88 Cal. Rptr. 759* (disapproved on other grounds in *Neel v. Magana, Olney, Levy,Cathcart & Gelfand (1971) 6 Cal. 3d 176, 190 n.29, 98 Cal. Rptr. 837, 491 P.2d 421*)

[4] Mandate

In mandate proceeding challenging order striking punitive damage allegations in second amended complaint, appellate court reviews order de novo; in passing on correctness of ruling on motion to strike, judges read allegations of pleading subject to motion to strike as a whole, all parts in their context, and assume their truth; in ruling on motion to strike, courts do not read allegations in isolation. *Clauson v. Superior Court (1998) 67 Cal. App. 4th 1253, 1255, 79 Cal. Rptr. 2d 747*

In mandate proceeding reviewing trial court's order striking causes of action and granting motions for judgment on pleadings without leave to amend, reviewing court as considering de novo whether trial court's ruling deprived party of opportunity to plead cause of action, which would be abuse of discretion. *La Jolla Village Homeowners' Assn. v. Superior Court (1989) 212 Cal. App. 3d 1131, 1140, 261 Cal. Rptr. 146 , disapproved on other grounds in Jimenez v. Superior Court (2002) 29 Cal 4th 473, 127 Cal. Rptr. 2d 614, 158 P.3d 480*

[5] Ruling on Motion

In ruling on motion to strike, courts do not read allegations in isolation; in passing on correctness of ruling on motion to strike, judges read allegations of pleading subject to motion to strike as a whole, all parts in their context, and assume their truth. *Clauson v. Superior Court (1998) 67 Cal. App. 4th 1253, 1255, 79 Cal. Rptr. 2d 747*

[6] Timeliness of Motion to Strike

Defendant as permitted under *Code Civ. Proc. § 435* to move to strike complaint only prior to answer. *Adohr Milk Farms, Inc. v. Love (1967) 255 Cal. App. 2d 366, 370-371, 63 Cal. Rptr. 123*

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§ 375.45 Text References

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 960-971, 984-985 (4th ed. 1997)

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§§ 375.46[Reserved]

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§ 375.50 Moving Party's Checklist

[1] Preliminary Determinations

1. Examine the adverse pleading to determine whether the whole or part is subject to a motion to strike, as opposed, for example, to a demurrer or to a motion for summary judgment.

NOTE:

Motions to strike are not allowed in limited civil cases except on the ground that the damages or relief sought are not supported by the allegations of the complaint [*Code Civ. Proc. §§ 91, 92(d)*].

2. Determine the date the notice of motion must be filed.

NOTE:

A notice of motion to strike must be given within the time to plead and, if a demurrer is interposed, concurrently with the demurrer [*Cal. Rules of Ct., Rule 3.1322*].

[2] Preparation of Papers

1. Notice of Motion and Motion to Strike.

a. Draft notice of motion and motion to strike [FORMS: §§ 375.60 and 375.61].

b. Sign the notice of motion and motion.

2. Draft supporting memorandum [*see Cal. Rules of Ct., Rule 3.1113*]. For forms of memoranda, see California Points and Authorities, Ch. 160, *Motions to Strike* (Matthew Bender), and the General Index

to that publication. See also Ch. 417, *Points and Authorities* , in this publication.

3. Prepare any supporting declaration.

NOTE:

Although *Code Civ. Proc. § 2009* generally authorizes the use of affidavits to support motions, *Code Civ. Proc. § 437(a)* provides that the grounds for a motion to strike must appear on the face of the challenged pleadings or from matters of which the court is required to take judicial notice. The grounds for these motions most often appear in the court's file, to which sufficient reference may usually be made in the notice of motion or in the accompanying points and authorities [*see* ***Code Civ. Proc. § 437(b)*****].**

Should counsel determine that sworn statements are needed in support of the motion, he or she should consider whether the motion is not, in reality, one for summary judgment [*Code Civ. Proc. § 437c*], rather than a motion to strike.

4. Prepare declaration or certificate regarding proof of service [*see Code Civ. Proc. § 1013a* and Ch. 518, *Service of Summons and Papers*].

5. Prepare proposed order [FORM: § 375.62].

6. Demurrer or other responsive paper, if desired.

If counsel is interposing both a demurrer and a motion to strike, they must be made concurrently and be noticed for hearing and heard on the same date [*Cal. Rules of Ct., Rule 3.1322*].

NOTE:

Filing of the notice of motion does not extend the time in which to demur [*Code Civ. Proc. § 435(d)*]; for discussion and forms relating to demurrers, *see* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* . Although a motion to strike extends the time to answer [*Code Civ. Proc. §§ 435(c), 585(f)*], counsel may wish to consider going ahead and preparing an answer as well, particularly if the motion to strike goes only to part of a complaint.

[3] Service and Filing

1. Serve copies of the notice of motion, motion and memorandum on the attorney for the party whose pleading is challenged or, if the party has no attorney, on the other party [*Code Civ. Proc. §§ 1005, 1011, 1012, 1015*; *Cal. Rules of Ct., Rules 1.6(19), 3.1100, 3.1103(b), 3.1322*].

a. Service is commonly made in person or by mail [*Code Civ. Proc. §§ 1011, 1012*].

b. Service in person must be completed at least 16 court days before the selected hearing date [*see Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1322*].

(1) When service is by mail, this 16-day period for completing service before the hearing date is extended by five calendar days if the place of mailing and the place of address are within California, by 10 calendar days if either of these places is outside California but within the United States, or by 20 calendar days if either of these places is outside the United States [*see Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1322*].

(2) When service is by fax transmission, express mail, or another form of overnight delivery, this 16-day period is extended by two calendar days [*see Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1322*]. An extension period of two court days may apply in the case of electronic service [*see Code Civ. Proc. § 1010.6(a)(6)*; for discussion, *see Ch. 518, Service of Summons and Papers, § 518.41[8]*].

2. File the originals of the notice of motion and motion to strike and accompanying papers with the clerk of the court in which the action is pending [*Code Civ. Proc. §§ 1005(b), 1013a*; *Cal. Rules of Ct., Rule 3.1322*].

NOTE:

A motion on all the grounds stated in the written notice is deemed to have been made and to be pending before the court for all purposes on the due service and filing of the notice of motion [*Code Civ. Proc. § 1005.5*].

a. Pay filing fee.

b. Generally, it is good practice to submit the office copy to the clerk to be stamped together with the original, to serve as a check on the contents of the original.

c. File proof of service no later than five calendar days before the hearing date [*see Cal. Rules of Ct., Rule 3.1300(c)*].

[4] Response to Opposing Party's Memorandum

1. File response if appropriate.

a. Examine the memorandum, if any, filed in response to the motion to strike.

b. If time permits, counsel may wish to file a supplemental memorandum, with proof of service, in opposition to the opposing party's memorandum. Local practice may vary, but usually this supplemental memorandum should be filed directly with the clerk of the law and motion department or division, rather than in the office of the court clerk, so that the court will have sufficient time to consider the memorandum prior to the hearing on the motion.

NOTE:

Local court rules may, however, impose limitations on when and with whom the supplemental memorandum may be filed and should be checked if counsel is unfamiliar with them.

2. Serve and file any response papers.

All reply papers must be filed and a copy served at least five court days before the time appointed for the hearing. All reply papers must be served by personal delivery, facsimile transmission, express mail, or other means consistent with the provisions of *Code Civ. Proc. §§ 1010, 1011, 1012,* and *1013,* and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the reply papers are filed [*Code Civ. Proc. § 1005(b), (c)*; *Cal. Rules of Ct., Rule 3.1300(a)*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in

case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to section 1010.6)]. Unless otherwise provided by local court rule, all papers relating to a law and motion proceeding must be filed in the clerk's office [*Cal. Rules of Ct., Rule 3.1302(a)*].

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PART IV. PROCEDURAL CHECKLISTS

9-375 California Forms of Pleading and Practice--Annotated § 375.51

§ 375.51 Opposing Party's Checklist

[1] Preliminary Determinations

1. On receipt of the notice of motion, motion and supporting memorandum, ascertain if it was timely served. Read the notice of motion and motion to ascertain the alleged defects in the pleading and what is sought to be stricken.

2. Read the supporting memorandum and verify the citations to determine whether they support the points or statements for which they are cited.

NOTE:

Points may be inaccurately stated or not supported by the authorities cited. Moreover, a case cited may superficially support the point in that it makes an identical or similar statement, but may actually hold that the statement is not applicable to the facts of that case or that the case presents an exception to the rule. In that situation, the case is usually not authority for the statement made but, rather, an authority in opposition to it.

3. If the motion is well taken, determine the advisability of not opposing it or of stipulating that the motion be granted with leave to amend the pleading.

[2] Preparation of Papers

1. If counsel intends to oppose the motion, prepare an opposing memorandum. For forms of memoranda, see California Points and Authorities, Ch. 160, *Motions to Strike* (Matthew Bender), and the General Index to that publication. See also Ch. 417, *Points and Authorities* , in this publication.

2. Prepare the certificate, affidavit, or declaration, as the case may be, of service [*Code Civ. Proc. §§ 1013(b), 1013a, 2009, 2015.5*].

[3] Service and Filing

1. Serve copies of the opposing memorandum on the moving party's attorney or, if none, on the moving party [*Code Civ. Proc. §§ 1005(b), (c), 1011, 1012, 1015*; *Cal. Rules of Ct., Rules 1.6(19), 3.1100, 3.1103*].

NOTE:

Service is commonly by mail or in person, although alternative methods are authorized. Unless otherwise ordered or specifically provided by law, all papers opposing a motion must be served at least nine court days before the hearing. All papers opposing a motion must be served by personal delivery, facsimile transmission, express mail, or other means consistent with the provisions of *Code Civ. Proc. §§ 1010, 1011, 1012,* and *1013,* and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers are filed [*Code Civ. Proc. § 1005(b), (c)*; *Cal. Rules of Ct., Rule 3.1300*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013,* it is silent as to *Code Civ. Proc. § 1010.6*)].

2. File the original opposing papers with the clerk of the court in which the action is pending. The papers may be delivered in person or by mail.

a. Unless otherwise ordered or specifically provided by law, all papers opposing a motion must be filed at least nine court days before the hearing [*Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to *Code Civ. Proc. § 1010.6*)].

b. Unless otherwise provided by local rule, all papers relating to a law and motion proceeding must be filed in the clerk's office [*Cal. Rules of Ct., Rule 3.1302(a)*]. If the court has a law and motion department or division, local court rule may require that the memorandum be filed with the clerk thereof, rather than with the court clerk, to ensure that the judge has an opportunity to consider it before the hearing.

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[Reserved]

§§ 375.52[Reserved]

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9-375 California Forms of Pleading and Practice--Annotated § 375.60

§ 375.60 Notice of Motion and Motion for Order to Strike Entire Pleading [Code Civ. Proc. §§ 435, 436]

[1] FORM Notice of Motion and Motion for Order to Strike Entire Pleading [Code Civ. Proc. §§ 435, 436]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MOTION AND NOTICE OF MOTION TO STRIKE
	)	_____
_____ [*name*],	)	_____ [*specify*
Plaintiff, vs. _____ [*name*],	)	*pleading*]
Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location:_____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.*, plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.*, defendant] will, and hereby does, move pursuant to *Code of Civil Procedure sections 435* and *436* for an order striking the _____ [complaint *or* answer to the complaint] on file herein. The motion will be made on the ground(s) that _____ [*specify, e.g.*, _____ (the complaint is

unverified and is required to be verified]. The motion will be made on the ground(s) that _____ [*specify, e.g.*, the portions of the paragraphs sought to be stricken are irrelevant and redundant].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated:_____.

_____ [*firm name, if any*
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The notice of motion in [1], *above*, is for use by a plaintiff or defendant to secure an order striking the entirety of the adverse party's pleading pursuant to *Code Civ. Proc. § 435* on the grounds set out in *Code Civ. Proc. § 436* or pursuant to the court's inherent power. With appropriate modifications, it may also be used by a cross complainant or cross defendant to secure an order striking all or a portion of the cross complaint or answer to the cross complaint or by any party to secure an order striking a belatedly filed demurrer to the party's pleading. For discussion of the time within which the motion must be made, *see § 375.15*.

[3] Accompanying Papers

A supporting memorandum must be filed and a copy served with the notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rules 3.1112(a), 3.1113(a)*].

[4] Limited Civil Cases

Motions to strike are not allowed in limited civil cases, except on the ground that the damages or relief sought are not supported by the allegations of the complaint [*Code Civ. Proc. §§ 91, 92(d)*].

[5] Service and Filing

Sixteen court days notice of a motion to strike a complaint or answer is required, in accordance with *Code Civ. Proc. § 1005(b)*, with extensions for service by mail, overnight delivery, facsimile transmission, or electronic service [*Code Civ. Proc. §§ 435(b)(2), 1005(b), 1010.6*].

Notice of a motion to strike a demurrer is to set the hearing concurrently with the demurrer [*Code Civ. Proc. § 435(b)(3)*].

For further discussion of notice requirements, see *§ 375.16[1]*.

[6] Cross References

See generally Ch. 372, *Motions and Orders* , and Ch. 537, *Summary Judgment*

For discussion and forms relating to service, see Ch. 518, *Service of Summons and Papers*

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9-375 California Forms of Pleading and Practice--Annotated § 375.61

§ 375.61 Notice of Motion and Motion for Order Striking Portion of Pleading [Code Civ. Proc. §§ 435, 436]

[1] FORM Notice of Motion and Motion for Order Striking Portion of Pleading [Code Civ. Proc. §§ 435, 436]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MOTION AND NOTICE OF
	)	MOTION TO STRIKE
_____ [*name*],	)	PORTION[S] OF _____
Plaintiff, vs. _____ [*name*],	)	_____ [*specify*
[and DOES I through _____,]	)	*pleading*]
Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location:_____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

To_____ [*identify party, e.g.*, plaintiff] _____ [*name*] and to his/her attorney of record:

EITHER, if motion concerns entire count, cause of action, or defense

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.*, defendant] will, and hereby does, move pursuant to *Code of Civil Procedure sections 435* and *436* for an order striking _____ [*specify count, cause of action, or defense to be stricken, e.g.*, the Second Cause of Action] appearing on page _____ [*number*], line _____ [*number*], through page _____ [*number*], line _____ [*number*], of the _____ [*specify, e.g.*, complaint *or* answer to the complaint] on file herein. The motion will be made on the ground(s) that _____ [*specify, e.g.*, the allegations in it are false].

[OR, if motion concerns whole paragraph(s)]

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.*, defendant] will, and hereby does, move pursuant to *Code of Civil Procedure sections 435* and *436* for an order striking paragraph(s) _____ [*number(s)*] _____ [appearing on page _____ (*number*), lines _____ (*numbers*), respectively, *or* commencing on page _____ (*number*), line _____ (*number*), through page _____ (*number*), line _____ (*number*),] of [*specify subdivision, if any, of paper in which the paragraphs appear, e.g.*, the First Cause of Action of] the _____ [complaint *or* answer to the complaint] on file herein. The motion will be made on the ground(s) that _____ [*specify, e.g.*, the paragraph contains allegations in support of punitive damages, which are unavailable].

[OR, if motion concerns part of paragraph]

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.*, defendant] will, and hereby does, move pursuant to *Code of Civil Procedure sections 435* and *436* for an order striking that portion of [*specify subdivision, if any, of paper in which the paragraphs appear, e.g.*, the Third Affirmative Defense of] the _____ [complaint *or* answer to the complaint] on file herein, _____ [appearing on page _____ (*number*), lines _____ (*numbers*), inclusive, *or* commencing on page _____ (*number*), line _____ (*number*), through page _____ (*number*), line _____ (*number*),] reading as follows: "_____" [*specify*]. The motion will be made on the ground(s) that _____ [*specify, e.g.*, the portion of the paragraphs sought to be stricken is irrelevant].

[*OR, if motion concerns parts of paragraph*]

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.*, defendant] will, and hereby does, move pursuant to *Code of Civil Procedure sections 435* and *436* for an order striking the following portions of [*specify subdivision, if any, of paper in which the paragraphs appear, e.g.*, the Sixth Count of] the _____ [complaint *or* answer to the complaint] on file herein:

1. That portion of paragraph _____ [*number*] on page _____ [*number*], line _____ [*number*], through page _____ [*number*], line _____ [*number*], reading as follows: "_____" [*specify*].

2. [*Repeat for each item to be striken*].

The motion will be made on the ground(s) that _____ [*specify, e.g.*, theportions of the paragraph sought to be stricken are irrelevant].

[*OR, if motion concerns matter set forth in attached exhibit*]

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.*, defendant] will, and hereby does, move pursuant to *Code of Civil Procedure sections 435* and *436* for an order striking those portions of the _____ [complaint *or* answer to the complaint] on file herein that are described and set forth verbatim in Exhibit A, which is attached hereto and made a part hereof. The motion will be made on the ground(s) that _____ [*specify, e.g.*, the portions of the paragraphs sought to be stricken are false].

[*CONTINUE*]

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated:_____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The notice of motion in [1], *above*, is for use by a plaintiff or defendant to secure an order striking a portion of the adverse party's pleading pursuant to *Code Civ. Proc. § 435* on the grounds set out in *Code Civ. Proc. § 436* or pursuant to the court's inherent power. With appropriate modifications, it may also be used by a cross complainant or cross defendant to secure an order striking all or a portion of the cross complaint or answer to the cross complaint or by any party to secure an order striking a belatedly filed demurrer to the party's pleading.

[3] Accompanying Papers

A supporting memorandum is required to be served and filed with the foregoing notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rules 3.1112(a), 3.1113(a)*].

For further discussion of a notice of motion to strike, see *§ 375.60[2]* et seq.

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9-375 California Forms of Pleading and Practice--Annotated § 375.62

§ 375.62 Order Granting or Denying Motion to Strike Pleading [Code Civ. Proc. §§ 435, 436]

[1] FORM Order Granting or Denying Motion to Strike Pleading [Code Civ. Proc. §§ 435, 436]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER _____ [GRANTING *or*
vs.	)	DENYING] MOTION TO STRIKE PLEADING
_____ [*name*],	)	Date: _____
[and DOES I through _____,]	)	Time: _____
Defendant(s).	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

The motion of _____ [*identify moving party*] for an order striking [portions of] the _____ [*specify challenged pleading*] herein came on regularly for hearing by the court on _____ [*date*]. _____ [*Name*] appeared as counsel for plaintiff, and _____ [*name*] appeared as counsel for defendant. The matter having been argued and submitted, and good cause appearing therefor,

[*EITHER if denied*]

IT IS ORDERED that the motion be, and it hereby is, denied[, and _____ (*identify moving party, e.g.,* defendant) is hereby granted _____ days, after notice, in which to serve and file _____ [*designate*

pleading, e.g., an answer to the complaint].

[*OR if granted in whole without leave to amend*]

IT IS ORDERED that the motion be, and is hereby, granted and that the _____ [*designate pleading, e.g.*, complaint] be, and hereby is, stricken.

[*OR if granted in whole with leave to amend*]

IT IS ORDERED that the motion be, and is hereby, granted and that the _____ [*designate pleading, e.g.*, complaint] be, and hereby is, stricken.

IT IS FURTHER ORDERED that the plaintiff be, and is hereby, granted_____days, after notice of this order, in which to serve and file a _____ [*designate pleading, e.g.*, first amended] complaint.

[*OR if granted in part*]

IT IS ORDERED that the motion be, and is hereby, granted as to _____ [*designate portion or portions to be stricken*] and that the same be, and hereby is/are, stricken.

[IT IS FURTHER ORDERED that the plaintiff be, and is hereby, granted _____ days, after notice, in which to serve and file a _____ (*designate pleading, e.g.*, first amended) complaint.]

[*ADD if order strikes a demurrer in whole or part and no answer has been filed*]

IT IS FURTHER ORDERED that the defendant be, and hereby is, granted _____ days, after notice of this order, in which to serve and file an answer to the _____ [*specify the pleading a demurrer to which has been denied, e.g.*, second amended complaint].

[*CONTINUE*]

Dated:_____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The order in [1], *above*, is for use when a formal order denying or granting the motion is required by the court. The general rule is that an order is ineffective unless it is filed with the clerk or entered in the minutes [*Jablon v. Henneberger (1949) 33 Cal. 2d 773, 775, 205 P.2d 1]* . Under this rule, the order granting the motion must be entered in the official minutes and not merely in the rough minutes of the department clerk, in order that it be effective [*Jablon v. Henneberger (1949) 205 P.2d 1]* .

[3] Procedure on Concurrent Demurrer and Motion to Strike

If both a general demurrer to a pleading and a motion to strike the pleading are filed concurrently, the court may, if it sustains the demurrer, place the motion off calendar, and, conversely, if it grants the motion, it may place the demurrer off calendar [*see B. F. G. Builders v. Weisner & Coover Co. (1962) 206 Cal. App. 2d 752, 758-759, 23 Cal. Rptr. 815* (trial court should not both sustain demurrer and grant motion to strike)].

The court's ruling on both the notice of motion and demurrer may be contained in the same order [for a form of ruling on demurrer, *see § 206.139*].

[4] Order

If a motion to strike is granted pursuant to *Code Civ. Proc. § 436*, the court may order that an amendment or amended pleading be filed on terms it deems proper. If a motion to strike a complaint or cross complaint, or a portion of it, is denied, the court must allow the party filing the motion to strike to file an answer [*Code Civ. Proc. § 472a(d)*].

If a demurrer is stricken pursuant to *Code Civ. Proc. § 436* and there is no answer filed, the court must allow an answer to be filed on terms that are just [*Code Civ. Proc. § 472a(c)*].

[5] Judgment of Dismissal

An action may be dismissed by the court if a motion to strike the whole of a complaint is granted without leave to amend, or if a motion to strike all or part of a complaint is granted with leave to amend and the plaintiff fails to amend within the time allowed by the court and either party moves for dismissal [*Code Civ. Proc. § 581(f)(3), (4)*]. A dismissal ordered by the court must be in the form of a written order signed by the court and filed in the action. The dismissal constitutes a judgment and is effective for all purposes [*Code Civ. Proc. § 581d*].

[6] Default on Judgment After Ruling on Motion

A default judgment may be entered against the defendant in the following circumstances]:

- When defendant fails to answer the complaint within the time allowed by the court after denying defendant's motion to strike the complaint and overruling defendant's demurrer, if any [*Code Civ. Proc. § 586(a)(2)*].

- When defendant fails to answer the unstricken portion of the complaint within the time allowed after defendant's motion to strike has been granted in whole or in part and no demurrer has been sustained or is then pending [*Code Civ. Proc. § 586(a)(3)*].

- When a motion to strike the entire answer is granted without leave to amend [*Code Civ. Proc. § 586(a)(7)*].

- When a motion to strike all or part of the answer is granted with leave to amend and the defendant fails to amend within the time allowed by the court [*Code Civ. Proc. § 586(a)(7)*].

[7] Cross References

For discussion and forms relating to orders, including giving notice of orders, see Ch. 372, *Motions and Orders* .

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Chapter 376 MOTIONS TO STRIKE: ANTI-SLAPP

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§ 376.syn Synopsis to Chapter 376: MOTIONS TO STRIKE: ANTI-SLAPP

§ 376.01 Scope of Chapter

§ 376.02 Cross References

§§ 376.03-376.09 [Reserved]

§ 376.10 Governing Statutes, Types of Motions, Historical Development, and Legislative Findings of SLAPP Statutes

[1] Anti-SLAPP Motions to Strike

[2] Exceptions to Anti-SLAPP Motions to Strike

[3] SLAPPback Motions to Strike

§ 376.11 Definition of SLAPP (Strategic Lawsuit Against Public Participation) and Purpose of Anti-SLAPP Motion to Strike

§ 376.12 Nature of a SLAPP Suit Generally

§ 376.13 Construction of Code Civ. Proc. § 425.16--Anti-SLAPP Motion to Strike

[1] Statute to Be Construed Broadly

[2] Complaint, Plaintiff, and Defendant Defined For Purpose of Statute

[3] Availability of Injunctive Relief and Other Provisional Remedies

[4] Two-Part Test for Whether Action Is Subject to Protection of Statute

§ 376.14 What Constitutes a SLAPP Suit

[1] Four Types of Speech or Conduct

[2] Statements or Writings Before or in Connection With Official Proceeding

[3] Statements or Writings Made in Public Forum in Connection with Issue of Public Interest

[a] Private Conversations Regarding Public Issues

[b] Commercial Conduct and Speech

[c] Issue of Public Interest

[d] Definition of Public Forum

[4] "Mixed" Causes of Action

§ 376.15 Persons Protected by Code Civ. Proc. § 425.16

[1] Persons Who Engage in or Support Protected Activity

[2] Governmental Entities and Employees

[3] Persons Engaged in Illegal Acts Involving Constitutional Rights

§ 376.16 Statutory Exceptions to Anti-SLAPP Motion to Strike Code Civ. Proc. § 425.17

[1] Legislative Findings and Declarations

[2] Actions Brought Solely in the Public Interest or on Behalf of General Public

[3] Actions Brought Against a Person Primarily Engaged in the Business of Selling Goods or Services

[4] Circumstances Under Which Statutory Exceptions Are Inapplicable

[5] Effective Date of Statute and Application to Pending Cases

§ 376.17 Malicious Prosecution Actions and Anti-SLAPPback Motions to Strike

[1] Case Law Applying Anti-SLAPP Statute to Malicious Prosecution Actions

[2] SLAPPback Motions to Strike--Code Civ. Proc. § 425.18

[a] SLAPPback Action Defined

[b] Procedure for Anti-SLAPPback Motion to Strike

[c] Discovery

[d] Attorney's Fees and Costs

§ 376.18 Procedural Requirements for Special Motion to Strike

[1] Time Limitation for Motion and Hearing Date

[2] Notification to Judicial Council

[3] Amending Pleadings and Cross-Complaints

§ 376.19 Stay of Discovery Proceedings

§ 376.20 Required Prima Facie Showing

[1] Defendant

[2] Defendant Not Required to Demonstrate Intent to Chill First Amendment Rights

[3] Plaintiff

[a] Probability That Plaintiff Will Prevail

§ 376.21 Appeal of Anti-SLAPP Motion

§ 376.22 Attorney Fees, Costs, and Sanctions

[1] Recovery by Defendant

[a] Prevailing Defendant Entitled to Recover Fees and Costs

[b] Limited Exceptions to Prevailing Defendant's Recovery of Fees

[c] Effect of Voluntary Dismissal of Suit

[d] Recoverable Fees

[e] Stay of Enforcement of Judgment Awarding Attorney Fees Pending Appeal

[2] Recovery by Plaintiff

§ 376.23 Application of Anti-SLAPP Statute to Causes of Action That Accrued Prior to Its Enactment

§ 376.24 Application of Anti-SLAPP Statute in Federal Court Actions

§ 376.25-376.39 [Reserved]

§ 376.40 Related Matthew Bender Publications

§ 376.41 State Statutes

§ 376.42 California Rules of Court

§ 376.43 Decisions

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[1] Preliminary Determinations

[2] Preparation of Papers

[3] Service and Filing

[4] Response to Plaintiff's Declarations and Memorandum

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[1] Preliminary Determinations

[2] Preparation of Papers

[3] Service and Filing

§ 376.52 SLAPPback Motion to Strike Checklist

[1] Moving Party's Checklist

[a] Preliminary Determinations

[b] Preparation of Papers

[c] Service and Filing

[d] Response to Plaintiff's Declarations and Memorandum

[2] Opposing Party's Checklist

[a] Preliminary Determinations

[2] Preparation of Papers

[3] Service and Filing

§ 376.53-376.59 [Reserved]

§ 376.60 Special Motion to Strike All or Portion of Complaint Alleging Cause of Action Brought to Chill the Valid Exercise of the Constitutional Rights of Freedom of Speech or Petition for the Redress of Grievances [Code Civ. Proc. § 425.16]--Anti-SLAPP Special Motion to Strike and Notice of Hearing on Motion

[1] FORM

[2] Use of Form

[3] Time for Filing and Hearing Motion

[4] Accompanying Papers

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[7] Attorney's Fees

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§ 376.61 Special Motion to Strike All or Portion of Complaint Alleging Cause of Action Brought to Chill the Valid Exercise of the Constitutional Rights of Freedom of Speech or Petition for the Redress of Grievances [Code Civ. Proc. § 425.16]--Declaration in Support of Anti-SLAPP Special Motion to Strike

[1] FORM

[2] Use of Form

§ 376.62 Special Motion to Strike All or Portion of SLAPPback Complaint [Code Civ. Proc. § 425.18]

[1] FORM

[2] Use of Form

[3] Time for Filing and Hearing Motion

[4] Accompanying Papers

[5] Attorney's Fees

[6] No Stay of Discovery in SLAPPback Action

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§ 376.01 Scope of Chapter

This chapter discusses special motions to strike SLAPP suits, that is, Strategic Lawsuits Against Public Participation. It provides a history of the statute, relevant definitions, and an explanation of California courts' construction of the statute [*see § 376.10* et seq.] as well as an explanation of the parties' burdens [*see § 376.20* et seq.] and procedural requirements [*see § 376.18* et seq.]. The chapter also discusses statutory exceptions to the anti-SLAPP statute [*see § 376.16* et seq.] and the statute's application to malicious prosecution lawsuits [*see § 376.17* et seq.]. It contains the following forms:

- Notice of special motion to strike a SLAPP suit [*see § 376.60*].
- Supporting declaration for motion to strike a SLAPP suit [*see § 376.61*].
- Notice of special motion to strike a SLAPPback Complaint [*see § 376.62*].

The chapter also includes Procedural Checklists for the moving and opposing parties on a special motion to strike [*see §§ 376.50, 376.51*] and on a special motion to strike a SLAPPback [*see §§ 376.52*], as well as a Research Guide [*see § 376.40* et seq.].

For discussion of non-special motions to strike all or a portion of a pleading pursuant to *Code Civ. Proc. § 435 et seq.*, see Ch. 375, *Motions to Strike: Pleadings* .

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§ 376.02 Cross References

For discussion of motions to strike pursuant to *Code Civ. Proc. § 435 et seq.*, see Ch. 375, *Motions to Strike: Pleadings* .

For discussion of motion practice generally, see Ch. 372, *Motions and Orders* .

For discussion and forms for use in having the court take judicial notice, see Ch. 321, *Judicial Notice* .

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[Reserved]

§§ 376.03[Reserved]

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§ 376.10 Governing Statutes, Types of Motions, Historical Development, and Legislative Findings of SLAPP Statutes

[1] Anti-SLAPP Motions to Strike

Authority for a special motion to strike a SLAPP suit is pursuant to *Code Civ. Proc. § 425.16*.

Code Civ. Proc. § 425.16 was passed by the legislature in 1992 and enacted on January 1, 1993 [1992 Stats. ch. 726]. In passing the l992 statute, the legislature specifically found: "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly" [*Code Civ. Proc. § 425.16(a)*].

The enactment of this statute created a new type of motion to strike, and resulted in a large body of case law interpreting the statute. In both refining the statute and responding to case law developments, *Code Civ. Proc. § 425.16* has been amended in 1993 [1993 Stats. ch. 1293], 1997 [1997 Stats. ch. 271], 1999 [1999 Stats. ch. 260; effective October 10, 1999], and 2005 [2005 Stats. ch. 535; effective October 5, 2005]. The 2005 amendments included a Legislative finding: "It is the intent of the Legislature, in amending *subdivision (f) of Section 425.16 of the Code of Civil Procedure* [time limits for bringing and scheduling motion], to overrule the decisions in *Decker v. U.D. Registry, Inc. (2003) 105 Cal. App. 4th 1382, 1387-1390* and *Fair Political Practices Commission v. American Civil Rights Coalition, Inc. (2004) 121 Cal. App. 4th 1171, 1174-1178* " [2005 Stats. ch. 535, § 3]. The 2005 amendment also included the addition of the new SLAPPback statute of *Code Civ. Proc. § 425.18* [2005 Stats. ch. 535, § 2].

For analysis of *Code Civ. Proc. § 425.16* and case authority interpreting the statute, see *§ 376.11* et seq.

[2] Exceptions to Anti-SLAPP Motions to Strike

Statutory exceptions to the anti-SLAPP statute are found in *Code Civ. Proc. § 425.17*.

Code Civ. Proc. § 425.17 was passed by the legislature in 2003 and enacted on January 1, 2004 [2003 Stats. ch. 338]. The enactment of the anti-SLAPP statute [*Code Civ. Proc. § 425.16*] resulted in a large body of case law as a result of litigation exploring the reach of the new statue. As a response, and in passing the 2003 statute, the legislature specifically found: "The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process or Section 425.16" [*Code Civ. Proc. § 425.17(a)*].

For analysis of *Code Civ. Proc. § 425.17* and case authority interpreting the statute, see *§ 376.16*.

[3] SLAPPback Motions to Strike

Provisions relating to SLAPPback actions are pursuant to *Code Civ. Proc. § 425.18*.

Code Civ. Proc. § 425.18 was passed by the legislature in 2005 and enacted on October 5, 2005 [2005 Stats. ch. 535]. The enactment of the anti-SLAPP statute [*Code Civ. Proc. § 425.16*] resulted in a body of case law regarding malicious prosecution actions that were brought after an anti-SLAPP motion to strike was granted. As a response, and in passing the 2005 statute, the legislature specifically found: "The Legislature finds and declares that a SLAPPback is distinguishable in character and origin from the ordinary malicious prosecution action. The Legislature further finds and declares that a SLAPPback cause of action should be treated differently, as provided in this section, from an ordinary malicious prosecution action because a SLAPPback is consistent with the Legislature's intent to protect the valid exercise of the constitutional rights of free speech and petition by its deterrent effect on SLAPP (strategic lawsuit against public participation) litigation and by its restoration of public confidence in participatory democracy" [*Code Civ. Proc. § 425.18(a)*].

For analysis of *Code Civ. Proc. § 425.18* and case authority interpreting the statute, see *§ 376.17*.

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§ 376.11 Definition of SLAPP (Strategic Lawsuit Against Public Participation) and Purpose of Anti-SLAPP Motion to Strike

A cause of action against a person arising from any act of that person in furtherance of his or her right of petition or free speech under the United States or California Constitution in connection with a public issue is subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim [*Code Civ. Proc. § 425.16(b)(1)*].

In enacting this special motion to strike, the Legislature noted that there had been a disturbing increase in lawsuits brought primarily to chill the valid exerciseof the constitutional rights of freedom of speech and petition for the redress of grievances, commonly known as SLAPP suits (i.e. Strategic Lawsuit Against Public Participation) [*see Code Civ. Proc. § 425.16(a)*]. The purpose of this legislation is to encourage continued participation in matters of public significance without this participation being chilled through abuse of the judicial process [*see Code Civ. Proc. § 425.16(a)*] and to eliminate meritless litigation at an early stage [*Macias v. Hartwell (1997) 55 Cal. App. 4th 669, 672, 64 Cal. Rptr. 2d 222* ; *Bradbury v. Superior Court (1996) 49 Cal. App. 4th 1108, 1113, 57 Cal. Rptr. 2d 207]* . Thus, *Code Civ. Proc. § 425.16* was enacted to curtail SLAPP suits [*Rusheen v. Cohen (2006) 37 Cal. 4th 1048, 1055-1056, 39 Cal. Rptr. 3d 516* ; *128 P.3d 713* ; *see Bradbury v. Superior Court (1996) 49 Cal. App. 4th 1108, 1111, 57 Cal. Rptr. 2d 207]* by providing an economical and expeditious remedy to SLAPP suits [*Church of Scientology v. Wollersheim (1996) 42 Cal. App. 4th 628, 647 n.3, 49 Cal. Rptr. 2d 620]* . Because the motion may be filed within 60 days of the service of complaint and all discovery motions must be stayed upon the filing of the motion [*see Code Civ. Proc. § 425.16(f), (g)*], a successful anti-SLAPP motion to strike quickly disposes of the litigation and obviates the expense of discovery and further litigation.

The anti-SLAPP suit statute is designed to protect the speech interests of private citizens, the public, and governmental speakers. The identity of the speaker is not a decisive factor in determining whether the speech activity is protected under the *First Amendment* [*Schaffer v. City and County of San Francisco (2008) 168 Cal. App. 4th 992, 1003, 85 Cal. Rptr. 3d 880* ; *Bradbury v. Superior Court (1996) 49 Cal. App. 4th 1108, 1117, 57 Cal. Rptr. 2d 207* ; *see Mission Oaks Ranch, Ltd. v. County of Santa Barbara (1998) 65 Cal. App. 4th 713, 730, 77 Cal. Rptr. 2d 1* (county; disapproved on other grounds in *Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1123 n.10, 81 Cal. Rptr. 2d 471, 969 P.2d 564*)]. At the same time, the protection of the statute is not limited to activities that

go to the heart of self-government [*Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1116, 81 Cal. Rptr. 2d 471, 969 P.2d 564]* .

Code Civ. Proc. § 425.16 does not apply to any enforcement action brought in the name of the people of the state of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor [*Code Civ. Proc. § 425.16(d)*]. It also does not apply to any illegal act on the part of defendant, even if that act is in furtherance of defendant's right of petition or free speech within the meaning of *Code Civ. Proc. § 425.16* [*see, e.g.,* *Paul for Council v. Hanyecz (2001) 85 Cal. App. 4th 1356, 1367, 102 Cal. Rptr. 2d 864* (money laundering), *overruled in part by Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 67, 124 Cal. Rptr. 2d 507* ; *People ex. rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc. (2000) 86 Cal. App. 4th 280, 285, 103 Cal. Rptr. 2d 71* (insurance fraud)]. This statute has been held to not violate the *equal protection clause of the constitution* [*People v. Health Laboratories of North America, Inc. (2001) 87 Cal. App. 4th 442, 451, 104 Cal. Rptr. 2d 618]* .

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§ 376.12 Nature of a SLAPP Suit Generally

In very general terms, a SLAPP suit has been described as a meritless suit filed primarily to chill the defendant's exercise of *First Amendment* rights [*Macias v. Hartwell (1997) 55 Cal. App. 4th 669, 672, 64 Cal. Rptr. 2d 222* ; *Wilcox v. Superior Court (1994) 27 Cal. App. 4th 809, 815-816, 33 Cal. Rptr. 2d 446]* . The actions falling within this category have been generally recognized as civil lawsuits aimed at preventing citizens from exercising their political rights or at punishing those who have done so. The paradigm SLAPP is brought to obtain an *economic* advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff, such as a suit filed by a large land developer against environmental activists or a neighborhood association intended to chill political or legal opposition to the developer's plans (but SLAPP suits are not limited to environmental issues or to defendants who are local organizations with limited resources), and where plaintiffs typically ask for damages which would be ruinous to the defendants [*Wilcox v. Superior Court (1994) 27 Cal. App. 4th 809, 815-816, 33 Cal. Rptr. 2d 446 , overruled in part by Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 67, 124 Cal. Rptr. 2d 507* ; *see Conroy v. Spitzer (1999) 70 Cal. App. 4th 1446, 1448, 83 Cal. Rptr. 2d 443* (SLAPP suits by definition are aimed at chilling valid exercise of political rights, particularly right of freedom of speech and right to petition government for redress of grievances); *see also Sipple v. Foundation for Nat. Progress (1999) 71 Cal. App. 4th 226, 240, 83 Cal. Rptr. 2d 677* (*Code Civ. Proc. § 425.16* is not limited to paradigm SLAPP suits filed by powerful and wealthy developers against impecunious protestors, and applies to media defendants in libel actions)].

SLAPP suits are likely to involve alleged causes of action for defamation, various business torts (such as interference with prospective economic advantage), nuisance, and intentional infliction of emotional distress [*Church of Scientology v. Wollersheim (1996) 42 Cal. App. 4th 628, 652, 49 Cal. Rptr. 2d 620* ; *Wilcox v. Superior Court (1994) 27 Cal. App. 4th 809, 816, 33 Cal. Rptr. 2d 446 , overruled in part by Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 67, 124 Cal. Rptr. 2d 507]* . The Legislature, however, did not limit application of the provision to such actions, recognizing that all kinds of claims could achieve the objective of a SLAPP suit, that is, to interfere with and burden the defendant's exercise of his or her rights [*Church of Scientology v. Wollersheim (1996) 42 Cal. App. 4th 628, 652, 49 Cal. Rptr. 2d 620* ; *see also Navellier v. Sletten (2002) 29 Cal. 4th 82, 92-93, 124 Cal. Rptr. 2d 530* ; *Midland Pacific Building Corp. v. King (2007) 157 Cal. App. 4th 264, 273, 68 Cal. Rptr. 3d 499* (breach of contract cause of action arose out of defendant's submissions to planning commission and city council and therefore was subject to anti-SLAPP motion); *Foothills Townhome Assn. v. Christiansen (1998) 65 Cal. App. 4th 688, 696, 76 Cal.*

Rptr. 2d 516 (SLAPP suits can conceivably be pleaded in terms of breach of contract or other valid actions)].

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§ 376.13 Construction of Code Civ. Proc. § 425.16--Anti-SLAPP Motion to Strike

[1] Statute to Be Construed Broadly

In *Code Civ. Proc. § 425.16(a)* the Legislature has declared that it is in the public interest to encourage continued participation in matters of public significance, and thatthis participation should not be chilled through abuse of the judicial process. To this end, the section shall construed broadly [*Code Civ. Proc. § 425.16(a)* (last sentence added by Stats. 1997, ch. 271 § 1); *see Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1119, 81 Cal. Rptr. 2d 471, 969 P.2d 564* (1997 amendment to section 425.16 mandates broad construction of that section); *accord Sipple v. Foundation for Nat. Progress (1999) 71 Cal. App. 4th 226, 236-240, 83 Cal. Rptr. 2d 677]* .

[2] Complaint, Plaintiff, and Defendant Defined For Purpose of Statute

For the purpose of *Code Civ. Proc. § 425.16*, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent" [*Code Civ. Proc. § 425.16(h)*].

[3] Availability of Injunctive Relief and Other Provisional Remedies

Based on the definitions provided in *Code Civ. Proc. § 425.16(h)*, one court of appeals has held that petitions for injunctive relief filed under California's civil harassment statute [*Code Civ. Proc. § 527.6*] are subject to the anti-SLAPP statute, with the exception of a request for a temporary restraining order under *Code Civ. Proc. § 527.6(c)* [*Thomas v. Quintero (2005) 126 Cal. App. 4th 635, 652, 24 Cal. Rptr. 3d 619* ("complaint" includes a "petition" and Legislature therefore intended to include petitions for injunctive relief)]. Similarly, petitions for workplace violence restraining orders under *Code Civ. Proc. § 527.8* are subject to the anti-SLAPP statute [*City of Los Angeles v. Animal Defense League (2006) 135 Cal. App. 4th 606, 617, 37 Cal. Rptr. 3d 632]* . However, the anti-SLAPP statute does not apply to claims pending in such nonjudicial forums as private arbitration proceedings [*Sheppard v. Lightpost Museum Fund (2006) 146 Cal. App. 4th 315, 323-324, 52 Cal. Rptr. 3d 821]* , and the anti-SLAPP statute does not apply to a mere request for a subpoena unaccompanied by any actual pleading [*Tendler v. www.jewishsurvivors.blogspot.com (2008) 164 Cal. App. 4th 802, 808, 79 Cal. Rptr. 3d 407* (a civil case cover sheet does not on its own initiate a lawsuit, nor does an affidavit and request for endorsement of subpoenas)].

[4] Two-Part Test for Whether Action Is Subject to Protection of Statute

Code Civ. Proc. § 425.16(b)(1) contains a two-part test to determine whether an action is a SLAPP suit subject to a special motion to strike. The first part tests whether the action is a SLAPP suit; the second part decides whether, if it is a SLAPP suit, it may nonetheless survive the motion to strike because the plaintiff has established a probability of prevailing on the complaint. The second part need not be addressed if the action is determined not to be a SLAPP suit [*Ericsson GE Mobile Communications, Inc. v. C.S.I. Telecommunications Engineers (1996) 49 Cal. App. 4th 1591, 1601, 1603, 57 Cal. Rptr. 2d 491* , *disapproved on other grounds* in *Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1123 n.10, 81 Cal. Rptr. 2d 471, 969 P.2d 564]* . On the other hand, once the court determines the first prong of the statute has been met, a plaintiff must provide the court with sufficient evidence to permit the court to determine whether there is a probability that the plaintiff will prevail on the claim [*Zamos v. Stroud (2004) 32 Cal. 4th 958, 965, 12 Cal. Rptr. 3d 54, 87 P.3d 802* ; *DuPont Merck Pharmaceutical Co. v. Superior Court (2000) 78 Cal. App. 4th 562, 568, 92 Cal. Rptr. 2d 755]* .

For discussion of the prima facie showings for both plaintiffs and defendants, and case authority reviewing various fact patterns, see *§ 376.20*.

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§ 376.14 What Constitutes a SLAPP Suit

[1] Four Types of Speech or Conduct

A SLAPP suit is a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue [*Code Civ. Proc. § 425.16(b)(1)*].

As used in *Code Civ. Proc. § 425.16*, an act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue includes [*Code Civ. Proc. § 425.16(e)*]:

> (1) Any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;
>
> (2) Any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;
>
> (3) Any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; or
>
> (4) Any other conduct in furtherance of the exercise of the constitutional right of free speech in connection with a public issue or an issue of public interest.

These four clauses operate independently [*Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1117, 81 Cal. Rptr. 2d 471, 969 P.2d 564]* .

In addition, even if statements are not expressly covered under *Code Civ. Proc. § 425.16(e)*, the categories enumerated there are not all-inclusive. The acts in furtherance of a person's right to free speech specified by the statute is preceded by the word "includes" which is ordinarily a term of enlargement rather than limitation. The use of "includes" implies that other acts which are not mentioned are also protected under the statute [*Averill v. Superior Court (1996) 42 Cal.*

App. 4th 1170, 1175, 50 Cal. Rptr. 2d 62] .

[2] Statements or Writings Before or in Connection With Official Proceeding

The first two subdivisions of *Code Civ. Proc. § 425.16(e)* define an act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue to include the following:

> (1) Any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law.
>
> (2) Any written or oral statement or writing made in connection with an issueunder consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.

Under the plain and unambiguous language of the statute, an action may be a SLAPP suit under clauses (1) and (2) without any separate demonstration by the defendant that the statement concerned an issue of public significance [*Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1113, 81 Cal. Rptr. 2d 471, 969 P.2d 564* ; *Sipple v. Foundation for Nat. Progress (1999) 71 Cal. App. 4th 226, 236-237, 83 Cal. Rptr. 2d 677* ; *see DuPont Merck Pharmaceutical Co. v. Superior Court (2000) 78 Cal. App. 4th 562, 566-567, 92 Cal. Rptr. 2d 755]* . Clauses (3) and (4) include an express limitation to "issue[s] of public interest" and that limitation is not to be read into clauses (1) and (2) [*Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1117-1118, 81 Cal. Rptr. 2d 471, 969 P.2d 564* ; *see DuPont Merck Pharmaceutical Co. v. Superior Court (2000) 78 Cal. App. 4th 562, 566-567, 92 Cal. Rptr. 2d 755* ; for the language of clause (3) and (4), *see § 376.14[3]*.

Earlier cases that more narrowly construed *Code Civ. Proc. § 425.16* have been disapproved [*Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1123 n.10, 81 Cal. Rptr. 2d 471, 969 P.2d 564]* .

Thus, as to acts covered by the first two clauses of *Code Civ. Proc. § 425.16(e)*, the statute requires simply any writing or statement made in, or in connection with an issue under consideration or review by, the specified proceeding or body [*Kibler v. N. Inyo County Local Hospital Dist. (2006) 39 Cal. 4th 192, 196-198, 46 Cal. Rptr. 3d 41, 139 P.3d 193* (hospital's peer review procedure qualified as an "official proceeding authorized by law" under section 425.16(e)(2) because the procedure is required under *Bus. & Prof. Code section 805 et seq.*; not only is the peer review process an important tool in protecting the public, but a hospital's decisions resulting from peer review are also subject to judicial review by administrative mandate; therefore, peer review committees are involved in "matters of public significance" pursuant to section 425.16(a) and therefore statements made in connection with issues under consideration by a hospital peer review committee are subject to anti-SLAPP protection); *Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1116-1117, 81 Cal. Rptr. 2d 471, 969 P.2d 564* ; *Dible v. Haight Ashbury Free Clinics (2008) 170 Cal. App. 4th 843, 88 Cal. Rptr. 3d 464* ; *Miller v. Filter (2007) 150 Cal. App. 4th 652, 665, 58 Cal. Rptr. 3d 671* ; *Braun v. Chronicle Publishing Co. (1997) 52 Cal. App. 4th 1036, 1046-1047, 61 Cal. Rptr. 2d 58* ; *but see Century 21 Chamberlain & Associates v. Haberman (2009) 173 Cal. App. 4th 1, 6-10, 92 Cal. Rptr. 3d 249* (demand commencing private, contractual arbitration is not a judicial proceeding or an official proceeding authorized by law and therefore does not trigger anti-SLAPP protection)].

Nothing in *Code Civ. Proc. § 425.16(e)* confines free speech to speech which furthers the exercise of petition rights [*Braun v. Chronicle Publishing Co. (1997) 52 Cal. App. 4th 1036, 1046, 61 Cal. Rptr. 2d 58]* . Under the statute's plain terms it is the context or setting itself that makes the issue a public issue; all that matters is that the *First Amendment* activity take place in an official proceeding, or be made in connection with an issue being reviewed by an official proceeding [*Braun v. Chronicle Publishing Co. (1997) 52 Cal. App. 4th 1036, 1047, 61 Cal. Rptr. 2d 58]* . Thus, news reports published by media defendants made in connection with an issue under consideration or review by an authorized official proceeding fall within the scope of *Code Civ. Proc. § 425.16(e)(2)* [*Braun v. Chronicle Publishing Co. (1997) 52 Cal. App. 4th 1036, 1046, 61 Cal. Rptr. 2d 58* ; *see Lafayette Morehouse, Inc. v. Chronicle Publishing Co. (1995)*

37 Cal. App. 4th 855, 862-864, 44 Cal. Rptr. 2d 46 ; *see also Sipple v. Foundation for Nat. Progress (1999) 71 Cal. App. 4th 226, 237-238, 83 Cal. Rptr. 2d 677* (article, insofar as it discussed statements made during deposition or at hearing at child custody trial, was within *Code Civ. Proc. § 425.16(e)(1)*)].

Petitioning activity undertaken in a foreign country, such as the filing of a lawsuit in a foreign country, is not protected by the anti-SLAPP statute. The express language of the anti-SLAPP statute limits motions to strike to causes of action arising from any act "in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue" [*Code Civ. Proc. § 425.16(b)(1)*]. This language is plain and unambiguous and clearly limits the petitioning or free speech activity to that made pursuant to rights granted by the United States or California Constitutions. Neither Constitution grants a United States citizen the right to petition a foreign government [*Guessous v. Chrome Hearts, LLC (2009) 179 Cal. App. 4th 1177, 1185-1187, 102 Cal. Rptr. 3d 214]* .

The anti-SLAPP statute makes "[a] cause of action against a person arising from any act of that person in furtherance of the person's [constitutional] right of petition or free speech ... in connection with a public issue ... subject to a special motion to strike" [*PrediWave Corp. v. Simpson Thacher & Bartlett LLP (2009) 179 Cal. App. 4th 1204, 1227, 102 Cal. Rptr. 3d 245* ; *see Code Civ. Proc. § 425.16(b)(1)*]. Although this statutory language has been interpreted broadly to protect qualifying statements made or conduct undertaken by a person on another person's behalf against a cause of action by a third person, in actions against attorneys based on their litigation activities, in determining the applicability of the anti-SLAPP statute, a distinction must be drawn between (1) clients' causes of action against attorneys based upon the attorneys' acts on behalf of those clients, (2) clients' causes of action against attorneys based upon statements or conduct solely on behalf of different clients, and (3) nonclients' causes of action against attorneys. In the first class, the alleged speech and petitioning activity was carried out by attorneys on behalf of the plaintiffs in the lawsuits now being attacked as SLAPPs, although the attorneys may have allegedly acted incompetently or in violation of the Professional Rules of Conduct. The causes of action in this first class categorically are not being brought "primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition" [*PrediWave Corp. v. Simpson Thacher & Bartlett LLP (2009) 179 Cal. App. 4th 1204, 1227-1228, 102 Cal. Rptr. 3d 245]* .

[3] Statements or Writings Made in Public Forum in Connection with Issue of Public Interest

[a] Private Conversations Regarding Public Issues

Because the categories enumerated in *Code Civ. Proc. § 425.16(e)* are not all-inclusive, private conversations regarding a public issue are protected under the statute [*Hailstone v. Martinez (2008) 169 Cal. App. 4th 728, 736, 87 Cal. Rptr. 3d 347* ; *Averill v. Superior Court (1996) 42 Cal. App. 4th 1170, 1175-1176, 50 Cal. Rptr. 2d 62* ; *see also Terry v. Davis Community Church (2005) 131 Cal. App. 4th 1534, 1546, 33 Cal. Rptr. 3d 145* ("public interest" in a defamation context does not equate with mere curiosity)], as are private letters concerning matters of public interest [*Ruiz v. Harbor View Community Assn. (2006) 134 Cal. App. 4th 1456, 1468, 37 Cal. Rptr. 3d 133]* .

For example, in *Averill*, the appellate court issued a writ of mandate directing the trial court to strike the complaint when the defendant homeowner, a critic of the plaintiff's plan to convert a house in defendant's neighborhood into a shelter, opposed the plan before the city council and in a letter to the local newspaper, and on discovering that defendant's employer intended to support plaintiff as a charity, opposed the employer's support for the project through internal channels. Although the plaintiff's only cause of action against the defendant was based on the comments defendant made in private to defendant's employer, the court indicated that they might be considered within the enumerated protected acts of section 425.16(e), and that given the "includes" language, private conversations could not be excluded from protection. The court noted that even though the plaintiff carefully crafted the lawsuit to exclude the public comments and limit it to the private comments to the defendant's employer, the suit appeared to have been filed solely to punish the defendant for criticizing the project and to impose litigation costs on plaintiff for having exercised the right of free speech and to petition the government [*Averill v. Superior Court (1996) 42 Cal. App. 4th 1170,*

1172-1173, 1176, 50 Cal. Rptr. 2d 62 ; *see also Dove Audio v. Rosenfeld, Meyer & Susman (1996) 47 Cal. App. 4th 777, 784, 54 Cal. Rptr. 2d 830* (fact communications were made to other private citizens rather than to official agency does not exclude it from protection of anti-SLAPP suit statute)].

In *Terry*, the court discussed the definition of "an issue of public interest" within the meaning of *Code Civ. Proc. § 425.16(e)(4)*. In that case, plaintiffs were former church youth group leaders accused by the church of having an inappropriate sexual relationship with a child. Plaintiffs sued the church for libel, slander, and other tortsbased on a report about their conduct published by the church as well as statements made during a church meeting. The court noted that the statute requires there be some attributes to the speech in question which make it one of public, rather than merely private, interest. The court stated that a matter of public interest must be something of concern to a substantial number of people. Additionally, the focus of the speaker's conduct should be the public interest rather than a mere effort to fuel a private controversy. In this particular case, the court held that the societal interest in protecting children from child molesters was clearly a public interest such that the speech in question was protected under the anti-SLAPP statute [*Terry v. Davis Community Church (2005) 131 Cal. App. 4th 1534, 1546-1551, 33 Cal. Rptr. 3d 145* ; *see also Integrated Healthcare Holdings, Inc. v. Fitzgibbons (2006) 140 Cal. App. 4th 515, 44 Cal. Rptr. 3d 517* (doctor's e-mail to a small number of people articulating his concerns about struggling company's acquisition and operation of four hospitals in county concerned an issue of widespread public interest; acquisition was the subject of numerous public hearings as well as newspaper and periodical articles; therefore e-mail was subject to protection under anti-SLAPP statute)].

In contrast, a lawsuit by two city council members seeking declaratory relief against the City of Santa Monica, based on the fact that the city council meetings frequently run late into the night, was not in the public interest within the meaning of *Code Civ. Proc. § 425.17(b)*; action concerned members' preference for particular working hours, not public interest and, if successful, would not confer a significant benefit on the public as a whole [*Holbrook v. City of Santa Monica (2006) 144 Cal. App. 4th 1242, 1249, 51 Cal. Rptr. 3d 181* ; *see also Kurwa v. Harrington, Foxx, Dubrow & Canter, LLP (2007) 146 Cal. App. 4th 841, 53 Cal. Rptr. 3d 256* (ophthalmologist's letter to HMO requesting HMO contract only with him and not his former partner, whose medical license had been suspended, did not involve an issue of public issue, but rather a private matter between the HMO and the two doctors)].

[b] Commercial Conduct and Speech

Commercial conduct and speech made in connection with an issue of public concern under consideration by a legislative body are subject to the SLAPP statute. Thus, protection may apply in an action by a developer against a paid environmental consultant that had been hired by a county to evaluate the developer's proposed project in connection with an environmental impact report [*Mission Oaks Ranch, Ltd. v. County of Santa Barbara (1998) 65 Cal. App. 4th 713, 728, 77 Cal. Rptr. 2d 1* (disapproved by *Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1123 n.10, 81 Cal. Rptr. 2d 471, 969 P.2d 564* to extent it suggests statement must concern issue of public significance to be protected under *Code Civ. Proc. § 425.16(e)(1)* or *(2)*); *see DuPont Merck Pharmaceutical Co. v. Superior Court (2000) 78 Cal. App. 4th 562, 566-567, 92 Cal. Rptr. 2d 755* (applying *Briggs*; lobbying and other activities seeking to influence decisions of regulatory and legislative bodies)].

[c] Issue of Public Interest

The courts of appeal have identified two categories of speech or conduct protected by *Code Civ. Proc. § 425.16(e)(3)* and *(4)*: conduct in connection with an issue of "widespread public interest" and conduct in connection with an issue of interest to a limited, but definable, portion of the public and occurring in the context of an ongoing controversy, dispute, or discussion. When the issue is a matter of widespread public interest, there is no requirement of an ongoing controversy, dispute, or discussion [*see Integrated Healthcare Holdings, Inc. v. Fitzgibbons (2006) 140 Cal. App. 4th 515, 44 Cal. Rptr. 3d 517* (financial survival of four hospitals in the county was a matter of widespread public interest)]. On the other hand, when the issue is of interest to a limited, but definable, segment of the population, the conduct must

occur in the context of an ongoing controversy, dispute, or discussion such that it warrants protection by a statute that embodies the public policy of "encouraging *participation* in matters of public significance" in order to be protected under the statute [*Du Charme v. International Brotherhood of Electrical Workers, Local 45 (2003) 110 Cal. App. 4th 107, 118-119, 1 Cal. Rptr. 3d 501* (emphasis in original) (statement posted by union trustee on web site was unconnected to any discussion, debate, or controversy and therefore not protected); *Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO (2003) 105 Cal. App. 4th 913, 130 Cal. Rptr. 2d 81* (union's allegedly defamatory statements concerned supervision of a staff of eight people and were not of interest to others; mere fact the statements were published did not render the statements protected by the anti-SLAPP statute); *Kurwa v. Harrington, Foxx, Dubrow & Canter, LLP (2007) 146 Cal. App. 4th 841, 53 Cal. Rptr. 3d 256* (ophthalmologist's letter to HMO requesting HMO contract only with him and not his former partner, whose medical license had been suspended, did not involve an issue of public issue, but rather a private matter between the HMO and the two doctors); *see also Ruiz v. Harbor View Community Association (2005) 134 Cal. App. 4th 1456, 37 Cal. Rptr. 3d 133* (dispute between homeowner and association was of interest to residents of 523 lots, a group large enough for the communications to warrant protection under *Code Civ. Proc. § 425.16(e)(4)*); *Macias v. Hartwell (1997) 55 Cal. App. 4th 669, 64 Cal. Rptr. 2d 222* (political flyer distributed to 10,000 union members prior to union election concerned an issue of public interest and was therefore protected); *Hailstone v. Martinez (2008) 169 Cal. App. 4th 728, 87 Cal. Rptr. 3d 347* (plaintiff's alleged misappropriation of union funds was of interest to the more than 10,000 members of the union and allegedly defamatory comments were made in connection with the controversy surrounding the investigation into that alleged misappropriation; therefore comments were entitled to protection under the anti-SLAPP statute)].

In *Taus v. Loftus (2007) 40 Cal. 4th 683, 712-713, 54 Cal. Rptr. 3d 775, 151 P.3d 1185* , the California Supreme Court held that two articles published in a scientific journal responding to an article published in a different journal regarding suppressed memories of childhood abuse were protected speech under *Code Civ. Proc. § 425.16(e)(3)* and *(4)*. The subject of the initial article, referred to as "Jane Doe" in the article, sued the authors of the subsequent articles for defamation, invasion of privacy, and other torts. The court noted that at the time the articles were published, there was a "substantial controversy in the mental health field regarding whether, and under what circumstances, a victim of child abuse might forget or suppress thememory of the abuse over a long period of time and later recover that memory in response to questioning or other actions by a therapist." Defendants therefore satisfied their burden of showing that the conduct fell within the protections of the anti-SLAPP statute.

One court of appeal has adopted a much more expansive interpretation of the phrase "issue of public interest" as "any issue in which the public is interested," and that the issue need not be significant as long as the public has taken an interest [*Nygard, Inc. v. Uusi-Kerttula (2007) 159 Cal. App. 4th 1027, 1037, 72 Cal. Rptr. 3d 210*]. In *Nygard*, the court found an employer's defamation action against a former employee based on an interview the employee gave to a magazine, fell within the statute because there was extensive interest in the plaintiff among the Finnish public. The court cited two other cases in which courts held so-called "tabloids" involved issues of public interest [*see Seelig v. Infinity Broadcasting Corp. (2002) 97 Cal. App. 4th 798, 119 Cal. Rptr. 2d 108 , and Sipple v. Foundation for Nat. Progress (1999) 71 Cal. App. 4th 226, 83 Cal. Rptr. 2d 677*].

Not every mundane communication between a homeowners association and a homeowner gives rise to a freedom of speech issue, even homeowners association conduct with regard to design review matters and architectural guidelines. *Code of Civil Procedure Section 425.16(e)(4)* does not come into play unless the right of free speech or the right to petition is involved. The cause of action itself must be based on the speech or petitioning activity. If neither of those rights is at stake, § 425.16(e)(4) is inapplicable, irrespective of whether the subject of the dispute may otherwise be a matter of public interest [*Turner v. Vista Pointe Ridge Homeowners Assn. (2009) 180 Cal. App. 4th 676, 681-688, 102 Cal. Rptr. 3d 750]* .

[d] Definition of Public Forum

A "public forum" traditionally has been defined as a place that is open to the public where information is freely

exchanged [*Clark v. Burleigh (1992) 4 Cal. 4th 474, 482, 14 Cal. Rptr. 2d 455, 841 P.2d 975* ; *Nygard, Inc. v. Uusi-Kerttula (2007) 159 Cal. App. 4th 1027, 1036, 72 Cal. Rptr. 3d 210* ; *Damon v. Ocean Hills Journalism Club (2000) 85 Cal. App. 4th 468, 475, 102 Cal. Rptr. 2d 205*].

There is a split of authority regarding whether a newspaper or magazine is a public forum within the meaning of *Code Civ. Proc. § 425.16(e)(3)* [*see* *Nygard, Inc. v. Uusi-Kerttula (2007) 159 Cal. App. 4th 1027, 72 Cal. Rptr. 3d 210*]. One line of cases holds newspapers are not public fora because members of the public cannot freely publish their opinions in them [*see* *Lafayette Morehouse, Inc. v. Chronicle Publishing Co. (1995) 37 Cal. App. 4th 855, 44 Cal.Rptr. 2d 46*]. The other line of cases hold that newspapers and magazines are public fora because the opinions expressed in them are open to the public and their contents contribute to the public debate [*see* *Nygard, Inc. v. Uusi-Kerttula (2007) 159 Cal. App. 4th 1027, 72 Cal. Rptr. 3d 210* ; *Damon v. Ocean Hills Journalism Club (2000) 85 Cal. App. 4th 468, 102 Cal.Rptr. 2d 205*]. In *Nygard*, the court noted that *Code Civ. Proc. § 425.16(e)(3)* refers to a statement or writing made either in a place open to the public *or* a public forum, suggesting that a public forum is not synonymous with a place open to the public. Additionally, the California Supreme Court has held that public access, not the right to public comment is the hallmark of a public forum [*see* *Barrett v. Rosenthal (2006) 40 Cal. 4th 33, 41 n.4, 51 Cal. Rptr. 3d 55, 146 P.3d 510*]. The *Nygard* court therefore concluded that a magazine was a public forum within the meaning of the statute [*Nygard, Inc. v. Uusi-Kerttula (2007) 159 Cal. App. 4th 1027, 1039, 72 Cal. Rptr. 3d 210*].

[4] "Mixed" Causes of Action

In certain cases, a complaint may allege causes of action arising from both activity protected by the anti-SLAPP statute and activity not protected by the anti-SLAPP statute. Such "mixed" causes of action are subject to an anti-SLAPP motion to strike "unless the protected conduct is merely incidental to the unprotected conduct" [*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP (2005) 133 Cal. App. 4th 658, 672, 35 Cal. Rptr. 3d 31* ; *see also Raining Data Corp. v. Barrenechea (2009) 175 Cal. App. 4th 1363, 1368-1372, 97 Cal. Rptr. 3d 196* (gravamen of defendants' cross-complaint was directed at plaintiff's filing of the complaint; the one allegation of a communication that may have been unprotected did not exempt the cross-complaint from an anti-SLAPP motion); *Salma v. Capon (2008) 161 Cal. App. 4th 1275, 1289,74 Cal. Rptr. 3d 873* (allegations of protected conduct were not merely incidental to allegations of unprotected conduct in intentional interference with prospective economic advantage claim; additionally, harm allegedly caused by protected conduct was distinct from that allegedly caused by unprotected conduct); *Gallanis-Politis v. Medina (2007) 152 Cal. App. 4th 600, 614-615, 61 Cal. Rptr. 3d 701* (supervisor's investigation in response to county counsel's inquiry stemming from discovery requests was at heart of plaintiff's retaliation claim and therefore claim was subject to anti-SLAPP motion to strike); *Mann v. Quality Old Time Service, Inc. (2004) 120 Cal. App. 4th 90, 15 Cal. Rptr. 3d 215* (defendants' reports to government agencies formed a substantial part of the factual basis for defamation and trade libel claims, and thus the anti-SLAPP statute applied)]. Although the California Supreme Court has yet to address the issue of the application of the anti-SLAPP statute to "mixed" causes of action, the published appellate court cases on the issue all conclude that a cause of action alleging both protected and unprotected activity is subject to the anti-SLAPP statute unless the protected conduct is merely incident to the unprotected conduct.

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§ 376.15 Persons Protected by Code Civ. Proc. § 425.16

[1] Persons Who Engage in or Support Protected Activity

By its terms, *Code Civ. Proc. § 425.16* applies to persons who act in furtherance of their own right of petition or free speech [*see Code Civ. Proc. § 425.16(a), (b)(1)*].

A defendant moving to strike a SLAPP suit need not, however, demonstrate that its protected statements or writings were made on its own behalf, as opposed to on behalf of its clients or the general public [*see Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1116, 81 Cal. Rptr. 2d 471, 969 P.2d 564]* .

Code Civ. Proc. § 425.16 expressly applies to any writing or speech made in connection with an issue under consideration or review by a legislative,executive, or judicial proceeding, or any other official proceeding authorized by law, but there is no requirement that the writing or speech be promulgated directly to the official body [*Ludwig v. Superior Court (1995) 37 Cal. App. 4th 8, 17, 43 Cal. Rptr. 2d 350]* . A person can exercise his or her own rights by supporting the forceful activities of others. Thus, both a confident opponent who takes the public podium and a shy opponent who prefers to lend moral support by standing silently in the audience are protected under the statute. Furthermore, there is no meaningful difference between a person who supports and encourages the filing of a lawsuit, and one who supports and encourages a third party to speak out publicly at a public hearing on a matter of public interest [*Ludwig v. Superior Court (1995) 37 Cal. App. 4th 8, 18, 43 Cal. Rptr. 2d 350]* .

Examples include the following:

- A defendant who has instigated and funded litigation involving a colorable claim brought by others, for example, antidevelopment, environmentally based litigation, or has encouraged others to speak out publicly at a public hearing on a matter of public interest, may be protected [*Ludwig v. Superior Court (1995) 37 Cal. App. 4th 8, 17-18, 43 Cal. Rptr. 2d 350]* .

- A defendant that counseled a tenant in a dispute with a landlord in anticipation of litigation may be protected [*Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1115, 81 Cal.*

Rptr. 2d 471, 969 P.2d 564] .

[2] Governmental Entities and Employees

The word "person" as used in *Code Civ. Proc. § 425.16* includes a governmental entity and Section 425.16 extends to public employees who issue reports and comment on issues of public interest relating to their official duties. Thus, as with private parties, *Code Civ. Proc. § 425.16* also protects governmental entities and their employees and if they are sued as a result of written and verbal comments on issues of public interest relating to their official duties, both may move to specially strike under Section 425.16 [*Vargas v. City of Salinas (2009) 46 Cal. 4th 1, 16-19, 92 Cal. Rptr. 3d 286, 205 P.3d 207* ; *Schaffer v. City and County of San Francisco (2008) 168 Cal. App. 4th 992, 1003, 85 Cal. Rptr. 3d 880* ; *Santa Barbara County Coalition Against Auto Subsidies v. Santa Barbara County Association of Governments (2008) 167 Cal. App. 4th 1229, 1237, 84 Cal. Rptr. 3d 714* ; *Bradbury v. Superior Court (1996) 49 Cal. App. 4th 1108, 1113-1117, 57 Cal. Rptr. 2d 207* ; *see Mission Oaks Ranch, Ltd. v. County of Santa Barbara (1998) 65 Cal. App. 4th 713, 727, 730, 77 Cal. Rptr. 2d 1* , *disapproved on other grounds* in *Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1123 n.10, 81 Cal. Rptr. 2d 471, 969 P.2d 564]* .

[3] Persons Engaged in Illegal Acts Involving Constitutional Rights

Even if the acts alleged in the complaint are done in furtherance of the constitutional rights of free speech or petition for redress of grievances in connection with a public issue, if those acts are themselves illegal, defendant is not entitled to protection under *Code Civ. Proc. § 425.16* because the plaintiff's lawsuit must be brought primarily to chill a *valid* exercise of defendant's constitutional rights [*Paul for Council v. Hanyecz (2001) 85 Cal. App. 4th 1356, 1363-1367, 102 Cal. Rptr. 2d 864]* . In *Paul for Council*, a political candidate who unsuccessfully ran for city council filed an action against several defendants who had illegally laundered campaign contributions to plaintiff's opponent. The defendants filed an anti-SLAPP motion to strike, arguing that their campaign activities were covered by *Code Civ. Proc. § 425.16*. The trial court ruled in favor of the defendants and dismissed the action after the plaintiff failed to establish a probability of success on his claims. The court of appeal reversed the trial court's ruling and reinstated the action, concluding that the making of a political campaign contribution is a type of political speech, and "[a] contribution serves as a general expression of support for the candidate and his views... ." However, the court next addressed the preamble of *Code Civ. Proc. § 425.16(a)*, which states that the statute was enacted to combat suits brought primarily to chill the *valid* exercise of a defendant's constitutional rights of speech and petition. The probability that the Legislature intended to give defendants protection from a lawsuit based on injuries they are alleged to have caused by their *illegal* campaign money laundering scheme "is as unlikely as the probability that such protection would exist for them if they injured plaintiff while robbing a bank to obtain the money for the campaign contributions or while hijacking a car to drive the campaign contributions to the post office for mailing." Under the facts demonstrated by this record, the court could not permit the defendants to wrap themselves in this vital legislation. While it is technically true that laundering campaign contributions is an act in furtherance of the giving of such contributions, that is, in furtherance of an act of free speech, the court rejected the notion that the statute exists to protect such illegal activity. Because the defendants did not show that plaintiff's suit was brought primarily to chill a *valid* exercise of their constitutional rights of free speech or petition for redress of grievances in connection with a public issue, plaintiff had no obligation to establish a probability that he would prevail on his causes of action, and the trial court was therefore required to deny defendants' motion to strike plaintiff's causes of action [*Paul for Council v. Hanyecz (2001) 85 Cal. App. 4th 1356, 1364-1367, 102 Cal. Rptr. 2d 864]* .

The California Supreme Court validated the *Paul* holding in *Flatley v. Mauro (2006) 39 Cal. 4th 299, 46 Cal. Rptr. 3d 606* . In *Flatley*, plaintiff was a professional performer who sued defendant attorney for civil extortion, defamation, fraud, intentional infliction of emotional distress, and wrongful interference with prospective economic advantage. Defendant and his client had alleged that plaintiff raped the client in a hotel suite in Las Vegas. Defendant sent plaintiff a letter demanding a settlement or else they would file suit and disseminate the allegations to the media and thereafter made phone calls to plaintiff with the same threats. Plaintiff never paid defendant or his client, but defendant and his

client did file a lawsuit against plaintiff. The lawsuit against plaintiff was eventually dismissed voluntarily, and there was no evidence that the encounter between plaintiff and defendant's client was anything but consensual. In response to plaintiff's complaint, defendant filed an anti-SLAPP motion, arguing that his letter was a pre-litigation settlement offer in furtherance of his constitutional right of petition and that therefore it was protected by section 425.16(e)(1) and (4). The trial court denied the motion and the court of appeal affirmed, holding that defendant's communications constituted extortion and therefore were not protected activity. The California Supreme Court agreed, citing the *Paul* case with approval. In a factual context in which either the defendant concedes the illegality of his conduct or the illegality is conclusively shown by the evidence, defendant's anti-SLAPP motion must be denied because section 425.16 protects only the *valid* exercise of the constitutional right of freedom of speech and petition. The court emphasized that the question of whether defendant's conduct leading to the lawsuit was illegal as a matter of law is preliminary and unrelated to the second prong of the anti-SLAPP determination. Defendant then argued that section 425.16 protected all pre-litigation communications, even those that constitute extortion. The court disagreed, stating that litigation-related activity which is privileged under the litigation privilege is *not* necessarily protected by the anti-SLAPP statute. The attorney's threats to publicly accuse plaintiff of rape unless he paid money was clearly criminal extortion as a matter of law, and because those actions formed the basis of defendant's special motion to strike, the motion was properly denied [*Flatley v. Mauro (2006) 39 Cal. 4th 299, 316-332, 46 Cal. Rptr. 3d606* ; *see also* *Cohen v. Brown (2009) 173 Cal. App. 4th 302, 317, 93 Cal. Rptr. 3d 24* (defendant's filing of a false State Bar complaint against plaintiff constituted extortion, which is not constitutionally protected speech entitled to the protections of the anti-SLAPP statute); *Novartis Vaccines and Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc. (2006) 143 Cal. App. 4th 1284, 1296, 50 Cal. Rptr. 3d 27* (gravamen of complaint was not speech, but rather acts of harassment, infliction of emotional distress, intrusion and trespass, and because defendant conspired to commit these acts, its conduct was illegal and therefore not protected under anti-SLAPP statute)].

However, conduct that is merely alleged to have been unlawful or unethical does not lose its protection under the anti-SLAPP statute. The exception only applies in cases in which the illegality of defendant's actions is established either through defendant's concession or through the evidence presented in connection with the motion [*Cabral v. Martins (2009) 177 Cal. App. 4th 471, 482, 99 Cal. Rptr. 3d 394* (defendant attorneys who represented clients in action brought by plaintiff for alleged child support evasion were entitled to anti-SLAPP protection despite plaintiff's claim that their actions were unethical and illegal); *see also* *Birkner v. Lam (2007) 156 Cal. App. 4th 275, 285, 67 Cal. Rptr. 3d 190* (trial court found that defendant's conduct in serving eviction notice on plaintiff was not illegal)].

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§ 376.16 Statutory Exceptions to Anti-SLAPP Motion to Strike Code Civ. Proc. § 425.17

[1] Legislative Findings and Declarations

In 2003, the Legislature determined that there had been a "disturbing abuse" of California's anti-SLAPP laws codified in *Code Civ. Proc. § 425.16* which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16 [*Code Civ. Proc. § 425.17(a)*]. Consumer groups argued that large corporations were invoking the anti-SLAPP statute to delay and discourage litigation against them by filing SLAPP motions, using the statute as a litigation weapon [Senate Rules Committee Analysis to SB515, 8/22/03]. The Legislature enacted *Code Civ. Proc. § 425.17* which provides that certain actions, as specified *below*, are not subject to a special motion to strike, and further found that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process or Section 425.16 [*Code Civ. Proc. § 425.17(a)*].

[2] Actions Brought Solely in the Public Interest or on Behalf of General Public

The special motion to strike procedure of *Code Civ. Proc. § 425.16* does not apply to any action brought solely in the public interest or on behalf of the general public provided that all of the following conditions exist [*Code Civ. Proc. § 425.17(b)*]:

- The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. Claims for attorney's fees, costs, or other penalties do not count as seeking "greater" or "different" relief.

- The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons.

- Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

The California Supreme Court has held that the exception found in *CCP § 425.17(b)* does not apply to an action that seeks any advantage, no matter how narrow, for a particular plaintiff. The "principal thrust or gravamen" test used in interpretation of *CCP § 425.16* is inappropriate in determining whether the statutory exception applies; *CCP § 425.17(b)* specifically applies to an "action," not a "cause of action," and requires that the action be brought solely in the public interest [Club Members for an *Honest Election v. Sierra Club (2008) 45 Cal. 4th 309, 319, 86 Cal. Rptr. 3d 288, 196 P.3d 1094* (plaintiffs, a group challenging the Sierra Club's election procedures and an unsuccessful candidate, sought to install one of the plaintiffs on the board of directors and other forms of relief constituting personal advantage)].

The exception of *Code Civ. Proc. § 425.17(b)* applies only to actions brought "solely" in the public interest or on behalf of the general public; use of the term "solely" expressly conveys the Legislative intent that section 425.17(b) not apply to an action that seeks a more narrow advantage for a particular plaintiff. Such an action would not be brought "solely" in the public's interest. The statutory language of 425.17(b) is unambiguous and bars a litigant seeking "any" personal relief from relying on the section 425.17(b) exception [Club Members for an *Honest Election v. Sierra Club (2008) 45 Cal. 4th 309, 316-317, 86 Cal. Rptr. 3d 288, 196 P.3d 1094*]. The "principal thrust or gravamen" test for *Code Civ. Proc. § 425.16* is broadly interpreted; thus, a plaintiff could not deprive a defendant of anti-SLAPP protection by bringing a complaint based upon both protected and unprotected conduct because the anti-SLAPP statute specifically permits the striking of a "cause of action." The exception provided for in *Code Civ. Proc. § 425.17* operates in the opposite manner. As an exception, it is to be narrowly interpreted, lest it swallow the rule found in the anti-SLAPP statute. The Legislature also made this general rule of construction explicit in the language it chose. It requires that, under section 425.17(b) an *action*, as opposed to a cause of action, must be brought *"solely"* in the public interest [Club Members for an *Honest Election v. Sierra Club (2008) 45 Cal. 4th 309, 319-320, 86 Cal. Rptr. 3d 288, 196 P.3d 1094]* .

[3] Actions Brought Against a Person Primarily Engaged in the Business of Selling Goods or Services

The special motion to strike procedure of *Code Civ. Proc. § 425.16* does not apply to any action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person. Both of the following conditions must exist [*Code Civ. Proc. § 425.17(c)*]:

- The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services.

- The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding or investigation notwithstanding that the conduct or statement concerns an important public issue.

- The exception found in this provision does not apply where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor.

The defendant has the burden of proving that plaintiff's cause of action is outside the statutory exceptions of *Code Civ. Proc. § 425.17*; if defendant cannot do so, the burden does not shifts to plaintiff to prove a probability of success [*Brill Media Co. v. TCW Group, Inc. (2005) 132 Cal. App. 4th 324, 330, 341, 33 Cal. Rptr. 3d 371* (defendant's large financial management and services conglomerates were primarily engaged in the business of selling goods and services within the meaning of *Code Civ. Proc. § 425.17(c)*; furthermore, the statements made by defendants constituted

commercial speech directed at an actual or potential buyer or consumer within the meaning of the exception to the anti-SLAPP statute)].

For the action to involve statements regarding either party's business operations, goods or services, a mere e-mail sent to "set the record straight" with regard to the allegations of the lawsuit and not to obtain approval for, promote, or secure business for the event staffing company is insufficient to fall within the *Code Civ. Proc. § 425.17(c)* exception to the anti-SLAPP statute [*Contemporary Services Corp. v. Staff Pro Inc. (2007) 152 Cal. App. 4th 1043, 1054, 61 Cal. Rptr. 3d 434* ; *see also* *Sunset Millennium Associates v. LHO Grafton Hotel (2006) 146 Cal. App. 4th 300, 313, 52 Cal. Rptr. 3d 828* (statements made by defendant during environmental impact report review process objecting to competitor hotel's proposed expansion were not made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, defendant's goods or services); *Navarro v. IHOP Properties, Inc. (2005) 134 Cal. App. 4th 834, 841, 36 Cal. Rptr. 3d 385* ; *Blanchard v. DIRECTV, Inc. (2004) 123 Cal. App. 4th 903, 914, 20 Cal. Rptr. 3d 385* (an unfair competition law claim by plaintiffs who received demand letters from satellite television provider DIRECTV ordering the plaintiffs to stop using decryption devices was not entitled to protection against defendant's anti-SLAPP motion under *Code Civ. Proc. § 425.17(b)* because the claim would not "enforce an important right affecting the public interest" (second prong of exception) and there was no disproportionate financial burden on the plaintiffs (third prong of exception))].

The legislature intended to exempt purely commercial disputes under *Code Civ. Proc. § 425.17*, and a cause of action arising from lawyer's advice to prospective clients regarding pending litigation does not fall within statutory exemption to anti-SLAPP statute [*Taheri Law Group v. Evans (2008) 160 Cal. App. 4th 482, 491, 72 Cal. Rptr. 3d 847*].

[4] Circumstances Under Which Statutory Exceptions Are Inapplicable

There are circumstances when the foregoing statutory prohibitions against bringing a special motion to strike do not apply. An anti-SLAPP motion is permitted as an exception to the foregoing prohibitions as follows [*Code Civ. Proc. § 425.17(d)*]:

- The anti-SLAPP motion can be employed against claims arising from gathering, receiving, or processing information for communication to the publisher, editor, reporter, or other person connected or employed upon a newspaper, magazine, or other periodical publication, press association, or wire service, or a person engaged in the dissemination of ideas or expression in any book or academic journal [*Code Civ. Proc. § 425.17(d)(1)*].

- The anti-SLAPP motion can be employed against claims against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other promotion of any dramatic, literary, musical, political, or artistic work [*Code Civ. Proc. § 425.17(d)(2)*].

- The anti-SLAPP motion can be employed against claims against any non-profit organization that receives more than 50 percent of its annual revenue from federal, state, or local government grants, awards, programs, or reimbursements for services rendered [*Code Civ. Proc. § 425.17(d)(3)*].

[5] Effective Date of Statute and Application to Pending Cases

Code Civ. Proc. § 425.17 took effect on January 1, 2004 [2003 Stats. ch. 338]. Appellate court decisions have uniformly held that cases on review following the effective date of the statute are to be decided under the new statutory framework [*Physicians Com. for Responsible Medicine v. Tyson Foods, Inc. (2004) 119 Cal. App. 4th 120, 127, 13 Cal. Rptr. 3d 926* (trial court had granted defendant's SLAPP motion prior to the effective date of *Code Civ. Proc. § 425.17*; on appellate review after the effective date of the statute appellate court reversed decision based on new statute); *Brenton v. Metabolife Internat., Inc. (2004) 116 Cal. App. 4th 679, 10 Cal. Rptr. 3d 702* (*Code Civ. Proc. §*

425.17 provided an independent basis for trial court's order denying defendant's SLAPP motion); *Metcalf v. U-Haul Int'l, Inc. (2004) 118 Cal. App. 4th 1261, 1265, 13 Cal. Rptr. 3d 686* (same)].

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§ 376.17 Malicious Prosecution Actions and Anti-SLAPPback Motions to Strike

[1] Case Law Applying Anti-SLAPP Statute to Malicious Prosecution Actions

Because *Code Civ. Proc. § 425.16(e)* defines "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" to include both "any written or oral statement or writing made before a ... judicial proceeding" and "any written or oral statement or writing made in connection with an issue under consideration or review by a ... judicial body," the anti-SLAPP statute potentially applies to every malicious prosecution lawsuit [*see Jarrow Formulas, Inc. v. LaMarche (2003) 31 Cal. 4th 728, 732, 3 Cal. Rptr. 3d 636, 74 P.3d 737]* . In *Jarrow Formula*, plaintiff argued that there was no indication the Legislature intended for malicious prosecution suits to be subject to anti-SLAPP scrutiny and asked the court to create a categorical exemption from the anti-SLAPP statute for malicious prosecution actions. The California Supreme Court declined to do so, holding that the language of the statute was clear and unambiguous and did not exclude any particular action from its operation [*Jarrow Formulas, Inc. v. LaMarche (2003) 31 Cal. 4th 728, 735, 3 Cal. Rptr. 3d 636, 74 P.3d 737]* . The court also noted that in *Code Civ. Proc. § 425.16(d)* the court did create categorical exemptions for certain types of actions, and did not do so for malicious prosecution claims [*Jarrow Formulas, Inc. v. LaMarche (2003) 31 Cal. 4th 728, 741, 3 Cal. Rptr. 3d 636, 74 P.3d 737]* . The court rejected the argument that the anti-SLAPP statute effectively bars malicious prosecution claims, stating that the statute merely " 'subjects to potential dismissal only those actions in which the plaintiff cannot state[] and substantiate[] a legally sufficient claim.' " [*Jarrow Formulas, Inc. v. LaMarche (2003) 31 Cal. 4th 728, 734, 3 Cal. Rptr. 3d 636, 74 P.3d 737* , quoting *Navellier v. Sletten (2002) 29 Cal. 4th 82, 124 Cal. Rptr. 2d 530, 52 P.3d 703]* .

Subsequent malicious prosecution claims have survived scrutiny under the anti-SLAPP statute. In *Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal. 4th 260, 46 Cal. Rptr. 3d 638* , plaintiff was able to establish a probability of prevailing on her malicious prosecution claim and therefore met her burden under the second prong of the anti-SLAPP statute. To meet this burden, a malicious prosecution plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited" [*Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal. 4th 260, 291, 46 Cal. Rptr. 3d 638* , quoting *Matson v. Dvorak (1995) 40 Cal. App.4th 539, 548, 46 Cal. Rptr. 2d 880]* . In *Soukup*, the plaintiff succeeded in making a prima facie showing that the prior action (1) was commenced by or at the direction of

the defendant and was pursued to a legal termination favorable to the plaintiff; (2) was brought without probable cause; and (3) was initiated with malice [*Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal. 4th 260, 292, 297, 46 Cal. Rptr. 3d 638]* .

Defendant's anti-SLAPP motion in a malicious prosecution case was similarly denied in *Slaney v. Ranger Ins. Co. (2004) 115 Cal. App. 4th 306, 321, 8 Cal. Rptr. 3d 915* (plaintiff was able to make prima facie showing of termination of prior suit in its favor, lack of probable cause, and malice and therefore survived anti-SLAPP motion); *see also Ross v. Kish (2006) 145 Cal. App.4th 188, 197-198 , 51 Cal. Rptr. 3d 484* (denial of anti-SLAPP motion upheld where plaintiff showed a probability of prevailing on malicious prosecution claim); *HMS Capital, Inc. v. Lawyers Title Co. (2004) 118 Cal. App. 4th 204, 214-219, 12 Cal. Rptr. 3d 786* (plaintiff established probability of prevailing on malicious prosecution claim and therefore defendant's anti-SLAPP motion was denied).

As in other types of anti-SLAPP motions, the two-pronged analysis applies in malicious prosecution actions. First the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The plain language of the anti-SLAPP statute dictates that every claim of malicious prosecution is a cause of action arising from protected activity because every such claim necessarily depends upon written and oral statements in a prior judicial proceeding. Second, if the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim [*Daniels v. Robbins (2010) 182 Cal. App. 4th 204, 214-215, 105 Cal. Rptr. 3d 683]* .

With regard to the probability of prevailing on a claim of malicious prosecution, the first element of a malicious prosecution cause of action is that the underlying case must have been terminated in favor of the malicious prosecution plaintiff. The basis of the favorable termination element is that the resolution of the underlying case must have tended to indicate the malicious prosecution plaintiff's innocence. When prior proceedings are terminated by means other than a trial, the termination must reflect on the merits of the case and the malicious prosecution plaintiff's innocence of the misconduct alleged in the underlying lawsuit [*Daniels v. Robbins (2010) 182 Cal. App. 4th 204, 217, 105 Cal. Rptr. 3d 683]* . In some circumstances, the dismissal of an underlying action as a result of discovery sanctions will satisfy the favorable termination element of a malicious prosecution claim [*Daniels v. Robbins (2010) 182 Cal. App. 4th 204, 217, 105 Cal. Rptr. 3d 683]* . Not every case in which a terminating sanctions motion is granted necessarily results in a "favorable termination." But when the record from the underlying action is devoid of any attempt during discovery to substantiate allegations in the complaint, and the court's dismissal is justified by the plaintiff's lack of evidence to submit the case to a jury at trial, a prima facie showing of facts sufficient to satisfy the "favorable termination" element of a malicious prosecution claim is established for purposes of an anti-SLAPP motion [*Daniels v. Robbins (2010) 182 Cal. App. 4th 204, 219, 105 Cal. Rptr. 3d 683]* . Similar types of dismissals are also favorable terminations in appropriate circumstances. For example, a voluntary dismissal is presumed to be a favorable termination on the merits, unless otherwise proved to a jury [*Daniels v. Robbins (2010) 182 Cal. App. 4th 204, 218, 105 Cal. Rptr. 3d 683]* . Likewise, a dismissal of an action for failure to prosecute raises a factual issue of favorable termination in an ensuing malicious prosecution action [*Daniels v. Robbins (2010) 182 Cal. App. 4th 204, 218, 105 Cal. Rptr. 3d 683]* . A final judgment after trial is a favorable termination even if the plaintiff is precluded by evidentiary sanctions from presenting evidence at the trial [*Daniels v. Robbins (2010) 182 Cal. App. 4th 204, 218, 105 Cal. Rptr. 3d 683* ; *Lumpkin v. Friedman (1982) 131 Cal. App. 3d 450, 452-456, 182 Cal. Rptr. 378]* .

The second element of the malicious prosecution action on which plaintiff must show a probability of prevailing is whether there was probable cause to institute that action. Probable cause is lacking when a prospective plaintiff and counsel do not have evidence sufficient to uphold a favorable judgment or information affording an inference that such evidence can be obtained for trial. In general, a lawyer is entitled to rely on information provided by the client. However, if the lawyer discovers the client's statements are false, the lawyer cannot rely on the client's statements in prosecuting an action. A letter from a litigation adversary merely suggesting it disagrees with the verity of the allegations in the lawsuit is not sufficient to put the lawyer on notice of the falsity of the client's allegations [*Daniels v. Robbins (2010) 182 Cal. App. 4th 204, 222, 105 Cal. Rptr. 3d 683]* .

The "malice" element of a cause of action for malicious prosecution relates to the subjective intent or purpose with which the defendant acted in initiating the prior action. The motive of the defendant must have been something other than that of the satisfaction in a civil action of some personal or financial purpose. The plaintiff must plead and prove actual ill will or some improper ulterior motive. Improper purposes can be established in cases in which, for instance the person bringing the suit does not believe that the claim may be held valid, the proceeding is initiated primarily because of hostility or ill will, the proceeding is initiated solely for the purpose of depriving the opponent of a beneficial use of property, or the proceeding is initiated for the purpose of forcing a settlement bearing no relation to the merits of the claim [*Daniels v. Robbins (2010) 182 Cal. App. 4th 204, 224, 105 Cal. Rptr. 3d 683]* . If the prior action was not objectively tenable, the extent of a defendant's attorney's investigation and research may be relevant to the further question of whether or not the attorney acted with malice [*Daniels v. Robbins (2010) 182 Cal. App. 4th 204, 224-225, 105 Cal. Rptr. 3d 683]* . Since parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inferences drawn from the evidence [*Daniels v. Robbins (2010) 182 Cal. App. 4th 204, 225, 105 Cal. Rptr. 3d 683]* . Additional proof of malice can consist of evidence a party knowingly brings an action without probable cause, and malice can be inferred when a party continues to prosecute an action after becoming aware that the action lacks probable cause [*Daniels v. Robbins (2010) 182 Cal. App. 4th 204, 226, 105 Cal. Rptr. 3d 683]* .

[2] SLAPPback Motions to Strike--Code Civ. Proc. § 425.18

[a] SLAPPback Action Defined

In 2005, and effective January 1, 2006, the Legislature added *Code Civ. Proc. § 425.18* to the anti-SLAPP provisions, and, in doing so, created the term "SLAPPback" [2005 Stats. ch. 535]. A SLAPPback is any cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to an anti-SLAPP motion under *Code Civ. Proc. § 425.16* [*Code Civ. Proc. § 425.18(b)(1)*]. The Legislature found that a SLAPPback is distinguishable in character and origin from an ordinary malicious prosecution action, and, in fact, is consistent with the Legislature's intent to protect the valid exercise of the constitutional rights of free speech and petition by its deterrent effect on SLAPP litigation [*Code Civ. Proc. § 425.18(a)*]. Therefore, a SLAPPback should be treated differently from an ordinary malicious prosecution action in terms of the application of the anti-SLAPP statute [*Code Civ. Proc. § 425.18(a)*]. The California Supreme Court explained that the purpose of a SLAPPback is to "seek compensation for damages beyond the attorney fees and costs awarded to the defendant who prevails on the special motion to strike under the anti-SLAPP statute" [*Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal. 4th 260, 280, 46 Cal. Rptr. 3d 638]* .

A special motion to strike may not be filed against a SLAPPback by a party whose filing or maintenance of the prior cause of action was illegal as a matter of law [*Code Civ. Proc. § 425.18(h)*]. *Code Civ. Proc. § 425.18(h)* provides a narrow exception to the general rule that malicious prosecution actions are subject to the anti-SLAPP statute in cases where the filing and maintenance of the underlying action was illegal as a matter of law. In practical terms, as with all anti-SLAPP motions, defendant must first make the required threshold showing that the challenged action arises from protected activity. Plaintiff then carries the burden of demonstrating that the underlying action was illegal as a matter of law and in doing so must identify with particularity the statute or statutes violated [*Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal. 4th 260, 286-287, 46 Cal. Rptr. 3d 638* (plaintiff former employee failed to show that the filing and maintenance of defendant former employer's underlying action was illegal as a matter of law under two different federal statutes requiring the existence of employer-employee relationship at the time of the filing of the underlying action; mere allegation that underlying lawsuit was a "sham suit" was not sufficient under section 425.18(h)); *see also Hutton v. Hafif (2007) 150 Cal. App. 4th 527, 545, 59 Cal. Rptr. 3d 109* (prior action was not illegal as a matter of law when part of the action constituted conduct forbidden by law but the remainder of the action was not illegal)].

Code Civ. Proc. § 425.18 does not apply to a SLAPPback filed by a public entity [*Code Civ. Proc. § 425.18(i)*].

Because it is procedural in character, the SLAPPback statute applies retroactively to pending actions that originated prior to section 425.18's effective date of January 1, 2006 [*Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal. 4th 260, 280, 46 Cal. Rptr. 3d 638]* .

[b] Procedure for Anti-SLAPPback Motion to Strike

A special motion to strike a SLAPPback suit must be filed within any one of the following periods of time: (1) within 120 days of the service of the complaint, (2) at the court's discretion, but within six months of the service of the complaint, or (3) at the court's discretion, at any later time in extraordinary cases due to no fault of the defendant and upon written findings of the court stating the extraordinary case and circumstance [*Code Civ. Proc. § 425.18(d)*]. Additionally, a party opposing a special motion to strike a SLAPPback suit may file an ex parte application for a continuance to obtain necessary discovery [*Code Civ. Proc. § 425.18(e)*]. Upon entry of an order denying a special motion to strike a SLAPPback, or an order granting the motion as to some but less than all causes of action alleged, the aggrieved party may, within 20days after service of a written notice of the entry of the order, petition an appropriate reviewing court for a peremptory writ [*Code Civ. Proc. § 425.18(g)*]. Orders relating to a special motions to strike a SLAPPback suit are not appealable under *Code Civ. Proc. § 904.1* [*Code Civ. Proc. § 425.18(c)*]. The purpose of these provisions is "to stack the procedural deck in favor of the SLAPPback plaintiff confronted with a special motion to strike"; however, the Legislature did create a categorical rule exempting SLAPPbacks from the anti-SLAPP statute [*Soukup v. Law Offices of Herbert Hafif (2006) 39 Cal. 4th 260, 282, 283, 46 Cal. Rptr. 3d 638]* .

[c] Discovery

Discovery proceedings in SLAPPback actions are not stayed upon the filing of a special motion to strike [*Code Civ. Proc. § 425.18(c)*]. A party opposing a special motion to strike a SLAPPback may file an ex parte application for a continuance to obtain necessary discovery [*Code Civ. Proc. § 425.18(e)*].

[d] Attorney's Fees and Costs

Prevailing defendants in SLAPPback suits are not entitled to recover attorney's fees and costs [*Code Civ. Proc. § 425.18(c)*; *see also Hutton v. Hafif (2007) 150 Cal. App. 4th 527, 545, 59 Cal. Rptr. 3d 109* (attorney fees not recoverable by defendant in SLAPPback action)]. If the court finds that a special motion to strike a SLAPPback is frivolous or solely intended to cause unnecessary delay, the court must award costs and reasonable attorney's fees to a plaintiff prevailing on the motion [*Code Civ. Proc. § 425.18(f)*].

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§ 376.18 Procedural Requirements for Special Motion to Strike

[1] Time Limitation for Motion and Hearing Date

A special motion to strike under *Code Civ. Proc. § 425.16* may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time on terms the court deems proper [*Code Civ. Proc. § 425.16(f)*]. The motion must be scheduled by the clerk of the court for a hearing not more than 30 days after service unless the docket conditions of the court require a later hearing [*Code Civ. Proc. § 425.16(f)*; *see Hall v. Time Warner, Inc. (2007) 153 Cal. App. 4th 1337, 1349, 63 Cal. Rptr. 3d 798]* .

In 2005, the Legislature amended *Code Civ. Proc. § 425.16(f)* to require the clerk to schedule the hearing not more than 30 days after the service of an anti-SLAPP motion. This amendment was specifically in response to, and for the purposes of overruling, cases holding that a defendant who files an anti-SLAPP motion and does not obtain a hearing within 30 days of filing bears the burden of demonstrating that the delay was due to the court's docket conditions rather than other factors such as the convenience of the defense attorney's calendar [*see, e.g., Fair Political Practices Comm'n v. American Civil Rights Coalition, Inc. (2004) 121 Cal. App. 4th 1171, 1175, 18 Cal. Rptr. 3d 157* (overruled by the Legislature in 2005 Stats. ch. 535, § 3)]. When a reasonable exercise of judicial discretion dictates, the court may continue the hearing date to allow completion of discovery that the court may have authorized [*Lafayette Morehouse, Inc. v. Chronicle Publishing Co. (1995) 37 Cal. App. 4th 855, 868, 44 Cal. Rptr. 2d 46]* .

A party who expressly consents to an untimely hearing date waives the right to later object to the hearing as not timely [*Greka Integrated, Inc. v. Lowrey (2005) 133 Cal. App. 4th 1572, 1578, 35 Cal. Rptr. 3d 684]* .

The 60-day requirement in *Code Civ. Proc. § 425.16(f)* for filing an anti-SLAPP motion runs from the service of the complaint *or* an amended complaint, and if the amended complaint is served by mail, defendant has an extra five days in which to file the motion [*Lam v. Ngo (2001) 91 Cal. App. 4th 832, 840-842]* .

[2] Notification to Judicial Council

Any party who files a special motion to strike under *Code Civ. Proc. § 425.16*, and any party that files opposition to a special motion to strike must, promptly on so filing, transmit to the Judicial Council, by e-mail or fax, the following [

Code Civ. Proc. § 425.16(j)(1)]:

- A copy of the endorsed-filed caption page of the motion or opposition,
- A copy of any related notice of appeal or petition for a writ, and
- A conformed copy of any order issued pursuant to *Code Civ. Proc. § 425.16*, including any order granting or denying any a special motion to strike, discovery or fees.

Transmission by fax should be sent to 415-865-4332. A clearly addressed cover sheet should direct the fax to:

Judicial Council of California

Council and Legal Services Division

RE: SLAPP Documents Per *CCP 425.16*

Attn: Office of Court Research

If documents are transmitted by e-mail, the documents should be in Word 97 or higher. The e-mail message, with the documents in an attachment, must include the date the documents were filed with the court. The message should be addressed to SLAPP@jud.ca.gov [*see* Judicial Council website release: http://www.courtinfo.ca.gov/reference/documents/transmit.pdf].

The Judicial Council must maintain a public record of the information transmitted under *Code Civ. Proc. § 425.16(j)* for at least three years, and may store the information on microfilm or other appropriate electronic media [*Code Civ. Proc. § 425.16(j)(2)*]. The Judicial Council is posting the log on the California Courts Web site (www.courtinfo.ca.gov). The log is an Excel 97 file, and will be updated by the fifth business day of every month.

[3] Amending Pleadings and Cross-Complaints

There is no express or implied right for the plaintiff to amend a SLAPP complaint, once the motion to strike has been granted [*Simmons v. Allstate Ins. Co. (2001) 92 Cal. App. 4th 1068, 1074, 112 Cal. Rptr. 2d 397* ; *but see Nguyen-Lam v. Cao (2009) 171Cal. App. 4th 858, 90 Cal. Rptr. 3d 205* (court of appeals upheld trial court's ruling granting defendant's anti-SLAPP motion based on plaintiff's failure to show a probability of prevailing, but allowing plaintiff to amend complaint)]. Additionally, a plaintiff may not amend his or her pleadings after an anti-SLAPP motion has been filed and before the court has ruled on it [*Salma v. Capon (2008) 161 Cal. App. 4th 1275, 1294, 74 Cal. Rptr. 3d 873*].

The plaintiff cannot amend the pleading if the motion to strike is denied and the defendant has appealed the decision. Rather, there is an implied stay in the proceedings, so that the plaintiff cannot deprive the defendant of the right to the appellate review granted by the Legislature so that the appellate court can determine if the defendant had made a prima facie showing [*Roberts v. Los Angeles County Bar Assn. (2003) 105 Cal. App. 4th 604, 613, 129 Cal. Rptr. 2d 546]* .

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§ 376.19 Stay of Discovery Proceedings

All discovery proceedings in the action must be stayed on the filing of a notice of motion made pursuant to *Code Civ. Proc. § 425.16* [*Code Civ. Proc. § 425.16(g)*]. This includes any discovery motions pending at the time the special motion to strike is filed [*Britts v. Superior Court (2006) 145 Cal. App. 4th 1112, 1127, 52 Cal. Rptr. 3d 185]* . The stay of discovery must remain in effect until notice of entry of the order ruling on the motion. The court, however, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this stay requirement [*Code Civ. Proc. § 425.16(g)*; *Contemporary Services Corp. v. Staff Pro Inc. (2007) 152 Cal. App. 4th 1043, 1061, 61 Cal. Rptr. 3d 434* (requests to conduct limited discovery pending a hearing on a special motion to strike must be in the form of a noticed motion)].

Discovery proceedings in SLAPPback actions are not stayed upon the filing of a special motion to strike [*Code Civ. Proc. § 425.18(c)*]. A party opposing a special motion to strike a SLAPPback may file an ex parte application for a continuance to obtain necessary discovery [*Code Civ. Proc. § 425.18(e)*].

Code Civ. Proc. § 425.16 motions to strike will commonly be filed early in the legal proceedings before the plaintiff has the opportunity to conduct or complete significant and necessary discovery. For example, in a libel action against a media defendant, the media defendant will generally be the principal, if not the only source, of evidence concerning such matters as whether the defendant knew the published statement was false, or published the statement in reckless disregard of whether the matter was false and defamatory, or acted negligently in failing to ascertain whether the published matter was false and defamatory. Accordingly, if a plaintiff makes a timely and proper showing in response to a motion to strike, that a defendant or witness possesses evidence that the plaintiff needs to establish a prima facie case, the plaintiff must be given the reasonable opportunity to obtain that evidence through discovery before the motion is adjudicated. The trial court must liberally exercise its discretion to authorize reasonable and specified discovery timely requested by a plaintiff, when evidence to establish a prima facie case is reasonably shown to be held, or known, by defendant or its agents and employees [*Lafayette Morehouse, Inc. v. Chronicle Publishing Co. (1995) 37 Cal. App. 4th 855, 868, 44 Cal. Rptr. 2d 46* ; *see also* *Evans v. Unkow (1995) 38 Cal. App. 4th 1490, 1499, 45 Cal. Rptr. 2d 624* (failure to comply with statute by not making a timely and proper showing in the trial court for discovery made discovery request on appeal meritless)]. While good cause to lift an anti-SLAPP statute discovery ban may exist when the defendant or a witness possesses evidence needed by plaintiff to make a prima facie case, other relevant factors may

weigh against lifting the ban, including whether the information plaintiff seeks to obtain through discovery proceedings is readily available from other sources or can be obtained through informal discovery, the plaintiff's need for the discovery requested, and if the complaint is legally deficient and no amount of discovery will cure the defect [*Garment Workers Ctr. v. Superior Court (2004) 117 Cal App. 4th 1156, 1162, 12 Cal. Rptr. 3d 506]* .

However, a plaintiff fails to show good cause for discovery in a defamation action if the plaintiff fails to identify additional facts plaintiff expects to discover or facts necessary to establish the absence of privilege or the existence of actual malice [*Sipple v. Foundation for Nat. Progress (1999) 71 Cal. App. 4th 226, 231, 83 Cal. Rptr. 2d 677* ; *see also Paterno v. Superior Court (2008) 163 Cal. App. 4th 1342, 1349, 78 Cal. Rptr. 3d 244* (holding plaintiffs who bring defamation actions involving constitutional malice standard cannot show good cause for discovery on question of actual malice unless they have first made a prima facie showing that defendant's published statements contain provably false factual assertions)]. The trial court does not abuse its discretion in denying discovery when it does not appear that further discovery could result in disclosure of information that would permit the plaintiff to demonstrate a prima facie case on any of plaintiff's claims [*Sipple v. Foundation for Nat. Progress (1999) 71 Cal. App. 4th 226, 247, 83 Cal. Rptr. 2d 677* ; *see also Carver v. Bonds (2005) 135 Cal. App. 4th 328, 359]* .

For discussion of the continuance of the hearing date when such a request has been granted, see *§ 376.18[1]*.

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§ 376.20 Required Prima Facie Showing

[1] Defendant

A defendant pursuing an anti-SLAPP motion must make an initial prima facie showing that plaintiff's suit arose from an act in furtherance of defendant's right of petition or free speech [*Rusheen v. Cohen (2006) 37 Cal. 4th 1048, 1056, 39 Cal. Rptr. 3d 516* ; *128 P.3d 713* ; *Zamos v. Stroud (2004) 32 Cal. 4th 958, 965, 12 Cal. Rptr. 3d 54, 87 P.3d 802* ; *Equillon Enterprises, LLC v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 67]* . A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in *Code Civ. Proc. § 425.16(e)* [*Freeman v. Schack (2007) 154 Cal. App. 4th 719, 726-727, 64 Cal. Rptr. 3d 867* ; *Braun v. Chronicle Publishing Co. (1997) 52 Cal. App. 4th 1036, 1043, 61 Cal. Rptr. 2d 58* ; *Wilcox v. Superior Court (1994) 27 Cal. App. 4th 809, 820, 33 Cal. Rptr. 2d 446* ; *see DuPont Merck Pharmaceutical Co. v. Superior Court (2000) 78 Cal. App. 4th 562, 565-567, 92 Cal. Rptr. 2d 755* and discussion in *§ 376.14, above*, and *Equilon Enterprises, LLC v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 58, 124 Cal. Rptr. 2d 507* , and discussion in *§ 376.20[2], below*].

The fact of a prior grant of a preliminary injunction in favor of plaintiff does not have a preclusive, res judicata effect on the later filing by defendant of an anti-SLAPP motion [*Lam v. Ngo (2001) 91 Cal. App. 4th 832, 843-844, 111 Cal. Rptr. 2d 582]* .

[2] Defendant Not Required to Demonstrate Intent to Chill First Amendment Rights

Prior to 2002, California appellate courts had divided over the question whether a defendant who moves under the SLAPP statute must, in order to prevail, demonstrate that the cause of action was brought with the intent of chilling the defendant's exercise of constitutional speech or petition rights [*compare, e.g., Damon v. Ocean Hills Journalism Club (2000) 85 Cal. App. 4th 468, 480, 102 Cal. Rptr. 2d 205 with Foothills Townhome Assn. v. Christiansen (1998) 65 Cal. App. 4th 688, 696, 76 Cal. Rptr. 2d 516]* . In *Equilon Enterprises, LLC v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 124 Cal. Rptr. 2d 507* , the California Supreme Court resolved this issue by holding that the defendant has no such burden. [*Equilon Enterprises, LLC v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 58-59, 124 Cal. Rptr. 2d 507]* .

The court in *Equilon Enterprises* relied heavily on the fact that the statute's plain language did not require an inquiry as

to the plaintiff's subjective motivations. *Code Civ. Proc. § 425.16*, the court stated, merely makes subject to a special motion to strike any "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue" as to which the plaintiff has not "established that there is a probability that [he or she] will prevail on the claim" [*Equilon Enterprises, LLC v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 58-59, 124 Cal. Rptr. 2d 507* , quoting *Code Civ. Proc. § 425.16*]. Looking toward legislative intent as well, the court pointed out that judicial imposition of an intent-to-chill proof requirement would undermine the Legislature's expressed aim that public participation not be chilled, because of the possibility that a defendant's speech could be chilled without plaintiff intending to do so [*Equilon Enterprises, LLC v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 59-62, 124 Cal. Rptr. 2d 507]* . The court clarified that the only element the defendant needs to establish to invoke the protection of the SLAPP statute is that the plaintiff's lawsuit arose from an act on the part of defendant in furtherance of defendant's right of petition or free speech. From that fact the court may "presume" the purpose of the action was to chill the defendant's exercise of *First Amendment* Rights. It is then up to plaintiff to rebut the presumption by showing a reasonable probability of success on the merits [*Equilon Enterprises, LLC v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 61, 124 Cal. Rptr. 2d 507* , quoting *Fox Searchlight Pictures, Inc. v. Paladino (2001) 89 Cal. App. 4th 294, 307, 106 Cal. Rptr. 2d 906]* .

In *City of Cotati v. Cashman (2002) 29 Cal. 4th 69, 124 Cal. Rptr. 2d 519, 52 P.3d 695* , a companion case to *Equilon Enterprises*, the California Supreme Court reiterated that the anti-SLAPP statute in *Code Civ. Proc. § 425.16* does not contain an intent-to-chill pleading or proof requirement [*City of Cotati v. Cashman (2002) 29 Cal. 4th 69, 75, 124 Cal. Rptr. 2d 519, 52 P.3d 695* , *see also Navellier v. Sletten (2002) 29 Cal. 4th 82, 87-88, 124 Cal. Rptr. 2d 530]* . The *Cotati* court also explained that the anti-SLAPP statute's requirement that the cause of action is one "arising from" protected activity is not synonymous with "in response to" protected activity. In *Cotati*, plaintiff City of Cotati adopted a mobile home park rent stabilization program, and subsequent owners of mobile home parks sued the City in federal court. City then sued the owners in state court, outlining a cause of action for declaratory relief. The owners responded to the state court lawsuit with a SLAPP motion to strike, alleging that the City's state court action arose from the owners' filing of their earlier federal action. The court held that simply because City filed its state court action after owners had filed their federal lawsuit did not mean the state court action was "arising from" the federal court action within the meaning of the anti-SLAPP statute. The court pointed out that to construe "arising from" as meaning "in response to" would in effect render all cross-actions potential SLAPP suits [*City of Cotati v. Cashman (2002) 29 Cal. 4th 69, 77, 124 Cal. Rptr. 2d 519, 52 P.3d 695]* . The court held that City's state court cause of action arose from the actual controversy giving rise to both the federal and state actions--the City's rent stabilization program--and not the owners' federal lawsuit. Therefore, City's state court action was not subject to a special motion to strike [*City of Cotati v. Gene Cashman (2002) 29 Cal. 4th 69, 78, 124 Cal. Rptr. 2d 519, 52 P.3d 695* ; *see also In re Episcopal Church Cases (2009) 45 Cal. 4th 467, 87 Cal. Rptr. 3d 275, 198 P.3d 66* (action arose out of property dispute between Los Angeles Diocese and local church after local church disaffiliated from diocese; fact that protected activity led to rift between parties did not make the action a SLAPP suit); *City of Riverside v. Stansbury (2007) 155 Cal. App. 4th 1582, 1590-1591, 66 Cal. Rptr. 3d 862* (city's declaratory relief action requesting court's input on constitutionality of proposed initiative was not subject to a special motion to strike; although the action followed the initiative proponents' constitutionally protected activity, the action did not arise out of that activity); *Visher v. City of Malibu (2005) 126 Cal. App. 4th 364, 370, 23 Cal. Rptr. 3d 816* (action arose from Malibu's refusal to process plaintiffs' Coastal Development Permit, not from Malibu's litigation against the Coastal Commission and therefore plaintiff's petition for writ of mandate was not a SLAPP suit)].

[3] Plaintiff

[a] Probability That Plaintiff Will Prevail

If the defendant establishes a prima facie showing that plaintiff's suit arose from an act in furtherance of defendant's right of petition or free speech, then the burden shifts to the plaintiff to establish a probability that plaintiff will prevail on the claim [*Rusheen v. Cohen (2006) 37 Cal. 4th 1048, 1056, 39 Cal. Rptr. 3d 516* ; *128 P.3d 713* ; *Soukup v. Law*

Offices of Herbert Hafif (2006) 39 Cal. 4th 260, 291, 46 Cal. Rptr. 3d 638 ; *Equilon Enterprises, LLC v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 63, 124 Cal. Rptr. 2d 507, 52 P.3d 685* ; *Church of Scientology v. Wollersheim (1996) 42 Cal. App. 4th 628, 646, 49 Cal. Rptr. 2d 620* ; *see DuPont Merck Pharmaceutical Co. v. Superior Court (2000) 78 Cal. App. 4th 562, 567, 92 Cal. Rptr. 2d 755* ; *Kyle v. Carmon (1999) 71 Cal. App. 4th 901, 907, 84 Cal. Rptr. 2d 303]* . The burden on the plaintiff is similar to the standard used in determining a motion for nonsuit, directed verdict, or summary judgment [*Slauson Partnership v. Ochoa (2003) 112 Cal. App. 4th 1005, 1020, 5 Cal. Rptr. 3d 668* ; *Kyle v. Carmon (1999) 71 Cal. App. 4th 901, 907, 84 Cal.Rptr. 2d 303* ; *Church of Scientology v. Wollersheim (1996) 42 Cal. App. 4th 628, 653-654, 49 Cal. Rptr. 2d 620]* .

In order to preserve the plaintiff's right to a jury trial the court's determination of the motion cannot involve a weighing of the evidence [*Zamos v. Stroud (2004) 32 Cal. 4th 958, 965, 12 Cal. Rptr. 3d 54, 87 P.3d 802* ; *Kyle v. Carmon (1999) 71 Cal. App. 4th 901, 907-908, 84 Cal. Rptr. 2d 303* ; *Church of Scientology v. Wollersheim (1996) 42 Cal. App. 4th 628, 654, 49 Cal. Rptr. 2d 620* ; *Wilcox v. Superior Court (1994) 27 Cal. App. 4th 809, 825, 33 Cal. Rptr. 2d 446]* . Rather, to establish a probability of success on the merits, the plaintiff must make a prima facie showing of facts that would, if proved at trial, support a judgment in the plaintiff's favor [*Wilcox v. Superior Court (1994) 27 Cal. App. 4th 809, 824, 33 Cal. Rptr. 2d 446* ; *see Dixon v. Superior Court (1994) 30 Cal. App. 4th 733, 744, 36 Cal. Rptr. 2d 687]* . Whether or not plaintiff has established a prima facie case is a question of law [*Zamos v. Stroud (2004) 32 Cal. 4th 958, 965, 12 Cal. Rptr. 3d 54, 87 P.3d 802]* . To establish a probability of success, the plaintiff must demonstrate the complaint is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited [*Equillon Enterprises, LLC v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 61, 124 Cal. Rptr. 2d 507, 52 P.3d 685* ; *Rohde v. Wolf (2007) 154 Cal. App. 4th 28, 37-38, 64 Cal. Rptr. 3d 348* ; *Wilcox v. Superior Court (1994) 27 Cal. App. 4th 809, 823, 33 Cal. Rptr. 2d 446]* . To accomplish this, the burden is on the plaintiff to meet the defendant's constitutional defenses. This burden is met in the same manner the plaintiff meets the burden of demonstrating the merits of the cause of action, that is, by showing the defendant's purported constitutional defenses are not applicable to the case as a matter of law or by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses [*Wilcox v. Superior Court (1994) 27 Cal. App. 4th 809, 824, 33 Cal. Rptr. 2d 446]* .

To satisfy plaintiff's burden, it is not sufficient that plaintiff's complaint had survived a demurrer. Plaintiff must also substantiate the legal sufficiency of its claims. Substantiation requires something more than mere allegations of an unverified complaint. Once the court determines the first prong of the statute has been met, a plaintiff must provide the court with sufficient evidence to permit the court to determine whether there is a probability that the plaintiff will prevail on the claim [*DuPont Merck Pharmaceutical Co. v. Superior Court (2000) 78 Cal. App. 4th 562, 568, 92 Cal. Rptr. 2d 755]* .

However, an anti-SLAPP motion may not be used like a motion to strike under *Code Civ. Proc. § 436*, eliminating parts of a cause of action that plaintiff cannot substantiate. When a cause of action refers to both protected and unprotected activity, it is sufficient for purposes of the anti-SLAPP motion that plaintiff can show a probability of prevailing on any part of its cause of action [*Mann v. Quality Old Time Service, Inc. (2004) 120 Cal. App. 4th 90, 100, 15 Cal. Rptr. 3d 215]* .

The court, in making its determination that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim, must consider the pleadings, and supporting and opposing affidavits stating the facts on which the liability or defense is based [*Code Civ. Proc. § 425.16(b)(2)*; *see Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees (1999) 69 Cal. App. 4th 1057, 1063-1064, 82 Cal. Rptr. 2d 10]* . The court will accept as true all evidence favorable to the plaintiff [*Dixon v. Superior Court (1994) 30 Cal. App. 4th 733, 746, 36 Cal. Rptr. 2d 687]* . The plaintiff, however, must base his or her prima facie showing on admissible evidence [*Morrow v. Los Angeles Unified School Dist. (2007) 149 Cal. App. 4th 1424, 1444* ; *57 Cal. Rptr. 3d 885* ; *Wilcox v. Superior Court (1994) 27 Cal. App. 4th 809, 830, 33 Cal. Rptr. 2d 446* ; *see Church of Scientology v. Wollersheim (1996) 42 Cal. App. 4th 628, 654-655, 49 Cal. Rptr. 2d 620* ; *see also Macias v. Hartwell (1997) 55 Cal. App. 4th 669, 675, 64 Cal. Rptr. 2d 222]* .

However, one court has held that a plaintiff may meet the requirement of showing a probability of success on the merits if the plaintiff bases the probability of success on evidence which is inadmissible but was not properly objected to [*Gallagher v. Connell (2004) 123 Cal. App. 4th 1260, 1266, 20 Cal. Rptr. 3d 673]* .

A defendant who interposes objections to plaintiff's evidence but does not seek or obtain rulings on them at the hearing on the motion to strike waives those objections on appeal [*Gallant v. City of Carson (2005) 128 Cal. App. 4th 705, 713, 27 Cal. Rptr. 3d 318* ; *see also Slauson Partnership v. Ochoa (2003) 112 Cal. App. 4th 1005, 1014 n.4, 5 Cal. Rptr. 3d 668]* .

A showing to support a cause of action must be made by competent evidence within the personal knowledge of the declarant [*Church of Scientology v. Wollersheim (1996) 42 Cal. App. 4th 628, 654, 49 Cal. Rptr. 2d 620]* . Averments on information and belief are insufficient [*Church of Scientology v. Wollersheim (1996) 42 Cal. App. 4th 628, 654, 49 Cal. Rptr. 2d 620* ; *Evans v. Unkow (1995) 38 Cal. App. 4th 1490, 1493, 1497-1498, 45 Cal. Rptr. 2d 624]* . Moreover, a party cannot simply rely on allegations in its own pleadings, even if verified, to make the required evidentiary showing. The pleadings merely frame the issues to be decided [*Church of Scientology v. Wollersheim (1996) 42 Cal. App. 4th 628, 656, 49 Cal. Rptr. 2d 620]* . However, at least one court has held that the opposing party's verified pleadings and the moving party's declaration were sufficient for the court to conclude that the opposing party had shown a probability of success on the merits even though the opposing party failed to submit any evidence of his own [*Salma v. Capon (2008) 161 Cal. App. 4th 1275, 1289, 74 Cal. Rptr. 3d 873*].

If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination is admissible in evidence at any later stage of the case or in any subsequent action [*Code Civ. Proc. § 425.16(b)(3)*]. Furthermore, no burden of proof or degree of proof otherwise applicable is affected by that determination in any later stage of the case or in any subsequent proceeding [*Code Civ. Proc. § 425.16(b)(3)*]. Nevertheless, at least one court has held that its prior holding stating plaintiff had established a prima facie case in the context of anti-SLAPP proceedings precluded a subsequent summary judgment in defendant's favor [*Bergman v. Drum (2005) 129 Cal. App. 4th 11, 20-21, 28 Cal. Rptr. 3d 112* (applying doctrine of law of the case].

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§ 376.21 Appeal of Anti-SLAPP Motion

An order granting or denying a special motion to strike under *Code Civ. Proc. § 425.16* is appealable under *Code Civ. Proc. § 904.1* and is subject to immediate appeal [*Code Civ. Proc. § 425.16(i)*; *see Haneline Pacific Properties, LLC v. May (2008) 167 Cal. App. 4th 311, 317, 83 Cal. Rptr. 3d 919]* . However, if the special motion to strike was denied on the grounds that the action or cause of action is exempt from the special motion to strike rules under *Code Civ. Proc. § 425.17*, the appeal provisions do not apply [*Code Civ. Proc. § 425.17(e)*; *Goldstein v. Ralphs Grocery Co. (2004) 122 Cal. App. 4th 229, 232, 19 Cal. Rptr. 3d 292]* .

A defendant's appeal of the denial of an anti-SLAPP motion operates to automatically stay all further trial court proceedings on the merits pursuant to *Code Civ. Proc. § 916(a)* [*Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal. 4th 180, 193-197, 25 Cal. Rptr. 3d 298, 106 P.3d 958]* . However, further proceedings on matters not subject to the anti-SLAPP motion are not stayed by the appeal, nor is the appeal of the denial of a motion to strike on the grounds that a cause of action is exempt under *Code Civ. Proc. § 425.17* subject to the automatic stay [*Varian Medical Systems, Inc. v. Delfino (2005) 35 Cal. 4th 180, 195, 25 Cal. Rptr. 3d 298, 106 P.3d 958* (new trial ordered)].

The appellate court may dismiss the appeal of the denial of an anti-SLAPP motion if the appeal is brought solely for purposes of delay [*People ex rel. Lockyer v. Brar (2004) 115 Cal. App. 4th 1315, 1318, 9 Cal. Rptr. 3d 844]* .

In reviewing a judgment of dismissal after the trial court grants a special motion to strike pursuant to *Code Civ. Proc. § 425.16*, the appellate court uses its independent judgment to determine whether defendant acted in furtherance of its right of petition or free speech in connection with a public issue. Defendant bears the burden to make this prima facie case. If the defendant bears its burden, the appellate court then considers whether the plaintiff has produced sufficient admissible evidence to establish the probability of prevailing on the merits on every cause of action asserted [*Mission Oaks Ranch, Ltd. v. County of Santa Barbara (1998) 65 Cal. App. 4th 713, 721, 77 Cal. Rptr. 2d 1* (disapproved on other grounds in *Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1123 n.10, 81 Cal. Rptr. 2d 471, 969 P.2d 564*); *see Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees (1999) 69 Cal. App. 4th 1057, 1064, 82 Cal. Rptr. 2d 10* (appellate court independently reviews entire record to determine if plaintiff made sufficient prima facie case that plaintiff would prevail in light of applicable law regarding complaint); *Church of Scientology v. Wollersheim (1996) 42 Cal. App. 4th 628, 653, 49 Cal. Rptr. 2d 620* (same)]. At least one court of

appeals has declined to hold that the trial court is required to issue a statement of decision when granting an anti-SLAPP motion [*Lien v. Lucky United Properties Inv., Inc. (2008) 163 Cal. App. 4th 620, 624, 77 Cal. Rptr. 3d 707]* .

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§ 376.22 Attorney Fees, Costs, and Sanctions

[1] Recovery by Defendant

[a] Prevailing Defendant Entitled to Recover Fees and Costs

In any action subject to *Code Civ. Proc. § 425.16(b)*, except as provided in [b], below, a prevailing defendant on a special motion to strike is entitled to recover his or her attorney's fees and costs [*Code Civ. Proc. § 425.16(c)*; *City of Los Angeles v. Animal Defense League (2006) 135 Cal. App. 4th 606, 627, 37 Cal. Rptr. 3d 632* (award of fees mandatory); *see Mission Oaks Ranch, Ltd. v. County of Santa Barbara (1998) 65 Cal. App. 4th 713, 729-731, 77 Cal. Rptr. 2d 1* (county may be a prevailing defendant entitled to reasonable attorney's fees; disapproved on other grounds in *Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1123 n.10, 81 Cal. Rptr. 2d 471, 969 P.2d 564*)]. Courts have held that the phrase "prevailing party" should be interpreted broadly and applied to partially successful defendants [*see Mann v. Quality Old Time Service, Inc. (2006) 139 Cal. App. 4th 328, 340, 42 Cal. Rptr. 3d 607* (defendant was successful in striking trade libel cause of action and therefore was a prevailing party despite losing anti-SLAPP motion on three other causes of action); *ComputerXpress, Inc. v. Jackson (2001) 93 Cal. App. 4th 993, 1018, 113 Cal. Rptr. 2d 625* (defendants were prevailing parties as they were successful in striking five of nine causes of action alleged in complaint)]. However, a moving defendant cannot be said to have prevailed and therefore recover attorney's fees when his or her anti-SLAPP motion is only granted as to one of numerous causes of action [*Endres v. Moran (2006) 135 Cal. App. 4th 952, 956, 37 Cal. Rptr. 3d 786* ; *see Lin v. City of Pleasanton (2009) 175 Cal. App. 4th 1143, 1159* (remanded for determination of prevailing party)].

A prevailing defendant is entitled to recover fees even if they were paid by a third party [*Macias v. Hartwell (1997) 55 Cal. App. 4th 669, 675-676, 64 Cal. Rptr. 2d 222]* . A prevailing defendant who represents himself or herself may not recover attorney fees under the provisions of *Code Civ. Proc. § 425.16(c)* unless he or she secured assistance from another lawyer, in which case the other lawyer's fees are recoverable [*Witte v. Kaufman (2006) 141 Cal. App. 4th 1201, 1211-1212, 46 Cal. Rptr. 3d 845* (defendant attorney and defendant law firm did not incur attorney fees in bringing special motion to strike because the attorney and the law firm's members did all legal work themselves; if one attorney enlisted the help of outside counsel, he may be entitled to an attorney fee award for the money spent on that outside counsel); *Taheri Law Group v. Evans (2008) 160 Cal. App. 4th 482, 494, 72 Cal. Rptr. 3d 847* ; *but see Dowling v. Zimmerman (2001) 85 Cal.App. 4th 1400, 1423, 103 Cal. Rptr. 2d 174* (SLAPP defendant who initially

appears pro se and later retains counsel who successfully brings motion to strike complaint under section 425.16, is entitled to award of reasonable attorney fees under mandatory attorney fees provision of *Code Civ. Proc. § 425.16(c)*)].

[b] Limited Exceptions to Prevailing Defendant's Recovery of Fees

Effective January 1, 2010, prevailing defendants are not entitled to an award of attorney's fees and costs if plaintiff's cause of action is brought pursuant to any of the following Gov. Code sections [*Code Civ. Proc. § 425.16(c)*]:

- *Gov. Code § 6259* (verified petition alleging public records improperly withheld from member of public).

- *Gov. Code §§ 11130* or *11130.3* (involving meeting provisions of the legislative body of a local agency or a state body).

- *Gov. Code §§ 54960* or *54960.1* (actions to obtain a judicial determination that an action taken by a legislative body of a local agency or a state body is null and void).

Nothing in *Code Civ. Proc. § 425.16(c)* shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs in the above actions if the actions are clearly frivolous, pursuant to those sections of the Government Code.

[c] Effect of Voluntary Dismissal of Suit

A plaintiff may have a voluntary dismissal entered by the clerk after a *Code Civ. Proc. § 425.16* motion is filed by the defendant and a hearing is held, but before the court rules on the motion [*Kyle v. Carmon (1999) 71 Cal. App. 4th 901, 908 n.4, 84 Cal. Rptr. 2d 303* (voluntary dismissal with prejudice; court expressly did not decide whether tentative ruling cuts off plaintiff's right to dismiss); *see also Law Offices of Andrew L. Ellis v. Yang (2009) 178 Cal. App. 4th 869, 100 Cal. Rptr. 3d 771* (trial court had no jurisdiction to rule on anti-SLAPP motion when plaintiff filed dismissal of complaint, without prejudice, one day prior to scheduled anti-SLAPP hearing)].

The court retains jurisdiction to determine whether to award defendant attorney's fees pursuant to a Section 425.16 motion filed before the voluntary dismissal [*Coltrain v. Shewalter (1998) 66 Cal. App. 4th 94, 107* ; *see Major v. Silna (2006) 134 Cal. App. 4th 1485, 1491, 36 Cal. Rptr. 3d 875* ; *Liu v. Moore (1999) 69 Cal. App. 4th 745, 753, 81 Cal. Rptr. 2d 807]* . However, the California Supreme Court has held that if a defendant does not get its anti-SLAPP motion on file prior to a plaintiff's voluntary dismissal of an action, defendant is not entitled to fees or costs under section 425.16(c); although defendant may incur fees in preparing such a motion prior to plaintiff's dismissal of the action, the court reasoned that allowing recovery of fees in such a situation would run counter to the purpose of section 425.16, which is to discourage prolonged litigation [*S.B. Beach Props. v. Berti (2006) 39 Cal. 4th 374, 382-383, 46 Cal. Rptr. 3d 380, 138 P.3d 713]* .

The courts of appeal differ, however, as to the method for determining whether to award attorney's fees under Section 425.16 when the case has been voluntarily dismissed after defendant files the section 425.16 motion.

One court has held that when the plaintiff voluntarily dismisses an alleged SLAPP suit while a special motion to strike is pending under *Code Civ. Proc § 425.16*, the trial court has discretion to determine whether the defendant is the prevailing party for purposes of attorney's fees under *Code Civ. Proc § 425.16(c)*. In making that determination, the critical issue is which party realized its objectives in the litigation. Since the defendant's goal is to make the plaintiff go away, ordinarily the defendant will be the prevailing party. Thus, a presumption arises that the defendant is the prevailing party. The plaintiff, however, may try to show it actually dismissed because it had substantially achieved its goals through settlement or other means, because the defendant was insolvent, or for other reasons unrelated to the

probability of success on the merits so as to rebut the presumption [*Coltrain v. Shewalter (1998) 66 Cal. App. 4th 94, 107, 77 Cal. Rptr. 2d 600 (Fourth Dist., Div. Two; case involved voluntary dismissal without prejudice)]* .

Another court, disagreeing with the reasoning in *Coltrain*, has held that a defendant who is voluntarily dismissed, with or without prejudice, after filing a Section 425.16 motion to strike, is entitled to have the merits of the motion heard as a predicate to a determination of the defendant's motion for attorney's fees and cost under *Code Civ. Proc. § 425.16(c)* [*Liu v. Moore (1999) 69 Cal. App. 4th 745, 751, 81 Cal. Rptr. 2d 807 (Second Dist., Div. Three)]* . The Moore court criticized *Coltrain's* rationale that the plaintiff might have good-faith reasons for dismissing a SLAPP suit that have nothing to do with oppressing the defendant or avoiding liability for attorney fees, because, for example, if the plaintiff in a SLAPP suit substantially achieved its goals through a settlement or other means, then the plaintiff succeeded in chilling the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances since that is the purpose of a SLAPP suit. Also, it is quite possible that a plaintiff in a SLAPP suit is not worried that a defendant might be insolvent, since the focus of the SLAPP suit is to chill speech and/or the petitioning of government, not necessarily to line the plaintiff's pockets with money. Thus, the *Moore* court viewed adjudication of a defendant's motion to strike as an essential predicate to ruling on the defendant's request for an award of fees and costs. If judicial determination of the motion were not first required, and a fair procedural opportunity to obtain it allowed, then a plaintiff's voluntary dismissal of the action could have the effect of (1) depriving a true SLAPP defendant of statutory authorized fees or (2) entitling a defendant to such relief in a non-SLAPP action which was dismissed by the plaintiff for entirely legitimate reasons. The purpose of the statute's remedial provisions would be frustrated in either situation [*Liu v. Moore (1999) 69 Cal. App. 4th 745, 752-753, 81 Cal. Rptr. 2d 807]* .

Code Civ. Proc. § 128.7 is not a viable alternative to the attorney's fees and costs relief afforded by *Code Civ. Proc. § 425.16* when there has been a voluntary dismissal while a motion to strike under *Code Civ. Proc. § 425.16* is pending [*Liu v. Moore (1999) 69 Cal. App. 4th 745, 750-751, 81 Cal. Rptr. 2d 807]* .

A trial court has jurisdiction to award attorney fees to a prevailing defendant whose SLAPP motion was not heard solely because the matter was dismissed by the court before defendants obtained a ruling on the SLAPP motion. [*Pfeiffer Venice Properties v. Bernard (2002) 101 Cal. App. 4th 211, 218-219, 123 Cal. Rptr. 2d 647]* . Similarly, a plaintiff may not avoid an award of attorney fees to defendant by amending the complaint after the filing of an anti-SLAPP motion but before the hearing [*Sylmar Air Conditioning v. Pueblo Contracting Servs., Inc. (2004) 122 Cal. App. 4th 1049, 1055, 18 Cal. Rptr. 3d 882]* . Additionally, a grant of judgment on the pleadings does not render an anti-SLAPP motion moot; therefore, a defendant prevailing on both a motion for judgment on the pleadings and an anti-SLAPP motion is entitled to its attorney fees as provided by *Code Civ. Proc. § 425.16* [*ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc. (2006) 138 Cal. App. 4th 1307, 1323, 42 Cal. Rptr. 3d 256]* .

Attorney fees are not automatically available under *Code Civ. Proc. §§ 1032* and *1033.5(a)(10)(B)* (recovery as costs of attorney's fees authorized by statute) if a defendant is dismissed from what defendant contends is a SLAPP suit because *Code Civ. Proc. § 425.16* authorizes attorney fees only if the defendant prevails on the motion to strike [*Liu v. Moore (1999) 69 Cal. App. 4th 745, 753-754, 81 Cal. Rptr. 2d 807]* .

[d] Recoverable Fees

By its terms, *Code Civ. Proc. § 425.16* permits the use of the lodestar adjustment method whereby the lodestar is the number of hours reasonably expended multiplied by the reasonable hourly rate, and that figure may be adjusted based on consideration of factors specific to the case, in order to fix the fee at the market rate for legal services provided [*Ketchum v. Moses (2001) 24 Cal. 4th 1122, 1136, 104 Cal. Rptr. 2d 377* ; *see also Christian Research Institute v. Alnor (2008) 165 Cal. App. 4th 1315, 1321-1330, 81 Cal. Rptr. 3d 866]* . The Supreme Court noted that because the anti-SLAPP provisions referred to attorney fees and costs without indicating any restrictions on how they are to be calculated, the Legislature presumably intended courts to use the prevailing lodestar method [*Ketchum v. Moses (2001) 24 Cal. 4th 1122, 1135-1136, 104 Cal. Rptr. 2d 377]* . The trial court is not required to include a fee

enhancement to the basic lodestar figure for contingent risk, exceptional skill or other factors, but retains discretion to do so [*Ketchum v. Moses (2001) 24 Cal. 4th 1122, 1138, 104 Cal. Rptr. 2d 377]* . In remanding the case in *Ketchum* to redetermine the amount of the fee enhancement, the Court found that it was improper to impose an enhancement for contingent risk as to the attorney fees on fees accrued after the motion to strike was granted. The Court also directed that any disapproval on the part of the trial court as to the plaintiff's litigation strategy (to keep the defendant in court) could not be a basis of imposing an enhancement for contingent risk or quality of representation merely for the purpose of punishing the plaintiff [*Ketchum v. Moses (2001) 24 Cal. 4th 1122, 1142, 104 Cal. Rptr. 2d 377, 17 P.3d 735]* .

With regard to the extent of recoverable attorney fees and costs, one court has held that a prevailing defendant on a motion to strike is allowed to recover attorney fees and costs on the motion to strike, not the entire suit [*Lafayette Morehouse, Inc. v. Chronicle Publishing Co. (1995) 39 Cal. App. 4th 1379, 1383, 46 Cal. Rptr. 2d 542 (First Dist., Div. Five)* ; *see also Christian Research Institute v. Alnor (2008) 165 Cal. App. 4th 1315, 1321-1330, 81 Cal. Rptr. 3d 866* (court noted counsel had inflated fee claim with numerous entries unrelated to special motion to strike)]. Other courts, however, have awarded attorney fees and cost without addressing this specific point [*see, e.g., Dove Audio, Inc. v. Rosenfeld, Meyer & Susman (1996) 47 Cal. App. 4th 777, 785, 54 Cal. Rptr. 2d 830* (Second Dist., Div. Four; section authorizes court to make award of reasonable attorney's fees to prevailing defendant which will adequately compensate defendant for expense of responding to baseless lawsuit); *accord Robertson v. Rodriguez (1995) 36 Cal. App. 4th 347, 360-362, 42 Cal. Rptr. 2d 464 (Second Dist., Div. Three)* ; *see also Church of Scientology v. Wollersheim (1996) 42 Cal. App. 4th 628, 658-659, 49 Cal. Rptr. 2d 620 (Second Dist., Div. Three)]* .

When awarding fees to a defendant who prevails in anti-SLAPP proceedings on some, but not all, causes of action, a court must consider the significance of the overall relief obtained by the prevailing party in relation to the hours expended. The court will first determine the lodestar amount for the hours expended on the successful claims. If work expended on the successful and unsuccessful claims overlapped, the court will then consider the defendant's relative success in achieving his or her objective and may reduce the amount accordingly [*Mann v. Quality Old Time Service, Inc. (2006) 139 Cal. App. 4th 328, 345-346, 42 Cal. Rptr. 3d 607]* .

In addition, because *Code Civ. Proc. § 425.16(c)* provides for an award of attorney fees and costs to a prevailing defendant on a special motion to strike, and does not preclude recovery of appellate attorney fees and costs by a prevailing defendant-respondent, those fees are recoverable [*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman (1996) 47 Cal. App. 4th 777, 785, 54 Cal. Rptr. 2d 830* ; *Church of Scientology v. Wollersheim (1996) 42 Cal. App. 4th 628, 659, 49 Cal. Rptr. 2d 620* ; *see Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi (2006) 141 Cal. App. 4th 15, 20* (prevailing defendants entitled to costs and fees incurred in challenging undertaking submitted by plaintiff to obtain stay of enforcement of judgment pending appeal of anti-SLAPP ruling); *Sipple v. Foundation for Nat. Progress (1999) 71 Cal. App. 4th 226, 250, 83 Cal. Rptr. 2d 677* (defendants entitled to attorney fees and costs on appeal; *Evans v. Unkow (1995) 38 Cal. App. 4th 1490, 1493, 1499-1500, 45 Cal. Rptr. 2d 624* (appellate attorney fees recoverable)].

[e] Stay of Enforcement of Judgment Awarding Attorney Fees Pending Appeal

A SLAPP plaintiff's perfecting of an appeal from a judgment awarding attorney fees and costs to a prevailing defendant under *Code Civ. Proc. § 425.16* does not automatically stay enforcement of the judgment. To stay enforcement of such a judgment, the SLAPP plaintiff must give an appropriate appeal bond or undertaking under the money judgment exception to the automatic stay rule *Code Civ. Proc. § 916(a)* [*Dowling v. Zimmerman (2001) 85 Cal.App. 4th 1400, 1427-1433, 103 Cal. Rptr. 2d 174]* .

For general discussion and forms, see Ch. 43, *Appeal: Stay of Proceedings* .

[2] Recovery by Plaintiff

If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court

must award costs and reasonable attorney's fees pursuant to *Code Civ. Proc. § 128.5* to a plaintiff prevailing on the motion [*Code Civ. Proc. § 425.16(c)*; *Moore v. Shaw (2004) 116 Cal. App. 4th 182, 198-200, 10 Cal. Rptr. 3d 154* ; *see also California Back Specialists Medical Group v. Rand (2008) 160 Cal. App. 4th 1032, 1038, 73 Cal. Rptr. 3d 268]* . A plaintiff prevailing on a special motion to strike may seek attorney's fees as a part of the motion to strike, by a subsequent noticed motion filed at any time prior to the conclusion of the lawsuit, or as part of a cost memorandum at the conclusion of the lawsuit [Carpenter v. Jack In *The Box Corp. (2007) 151 Cal. App. 4th 454, 461, 59 Cal. Rptr. 3d 839]* .

An order denying a prevailing plaintiff attorney fees is not immediately appealable under *Code Civ. Proc. § 425.16(i)* [*Doe v. Luster (2006 145 Cal. App. 4th 139, 146, 51 Cal. Rptr. 3d 403]* .

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§ 376.23 Application of Anti-SLAPP Statute to Causes of Action That Accrued Prior to Its Enactment

Code Civ. Proc. § 425.16 is a procedural statute which applies prospectively to an existing cause of action even though the cause of action may have accrued before the statute's effective date [*Robertson v. Rodriguez (1995) 36 Cal. App. 4th 347, 356-357]* .

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9-376 California Forms of Pleading and Practice--Annotated § 376.24

§ 376.24 Application of Anti-SLAPP Statute in Federal Court Actions

Code Civ. Proc. § 425.16 can be used by a litigant in a federal court action because there is no "direct collision" with Federal Rules of Civil Procedure and the anti-SLAPP statute serves important, substantive state interests [*United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc. (9th Cir. 1999) 190 F.3d 963, 972 , cert. denied, (2000) 530 U.S. 1203]* . Additionally, the "twin purposes" of the *Erie* doctrine--discouragement of forum shopping and avoidance inequitable administration of law--are served by the application of the anti-SLAPP law in federal court [*United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc. (9th Cir. 1999) 190 F.3d 963, 973 , cert. denied, (2000) 530 U. S. 1203* ; *see generally Erie R.R. Co. v. Tompkins (1938) 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188]* . However, the discovery-limiting sections of *Code Civ. Proc. §§ 425.16(f)* and *(g)* collide with *Fed. R. Civ. P., Rule 56* and therefore do not apply in federal court [*Metabolife Int'l v. Wornick (9th Cir. 2001) 264 F.3d 832, 846]* .

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[Reserved]

§ 376.25[Reserved]

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§ 376.40 Related Matthew Bender Publications

For memoranda of points and authorities in support of and in opposition to anti-SLAPP motions to strike, see California Points and Authorities, Ch. 160, *Motions to Strike* (Matthew Bender)

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§ 376.41 State Statutes

Motion to strike action chilling exercise of free speech or right to petition for redress of grievances. *Code Civ. Proc. § 425.16*

Statutory exceptions to anti-SLAPP statute. *Code Civ. Proc. § 425.17*

Anti-SLAPPback motions to strike. *Code Civ. Proc. § 425.18*

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§ 376.42 California Rules of Court

Format of motion papers. *Cal. Rules of Ct., Rules 3.1110-3.1116*

Rules relating to noticed motions. *Cal. Rules of Ct., Rules 3.1300-3.1312*

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9-376 California Forms of Pleading and Practice--Annotated § 376.43

§ 376.43 Decisions

[1] Activity Protected Under Anti-SLAPP Statute

[a] Statement or Writing Made in Connection With Issue Under Consideration by Legislative, Executive, or Judicial Body

In action by condominium owner against attorney arising from negotiation of settlement agreement in prior case, alleging fraud and intentional infliction of emotional distress, trial court erred in denying defendant's anti-SLAPP motion, where settlement negotiations were exercise of right to petition and statements made as part of negotiations were in connection with underlying lawsuit for purposes of *Code Civ. Proc. § 425.16(e)(2)*, and where, although plaintiff's contentions that substance of settlement negotiations allegedly on plaintiff's behalf raised questions about propriety of how settlement negotiations were conducted, attorney was not obligated to show his actions were constitutionally protected as matter of law. Moreover, because attorney could not be held liable for alleged conduct under litigation privilege [*Civ. Code § 47(b)*], plaintiff failed to demonstrate probability of prevailing on her causes of action. *Seltzer v. Barnes (2010) 182 Cal. App. 4th 953, 960-972*

In action stemming from arrest of plaintiff on bench warrant arising from her alleged failure to appear as subpoenaed witness, trial court properly granted defendants' motion to strike second amended complaint upon granting of anti-SLAPP motion, after concluding that anti-SLAPP statute was applicable to second amended complaint and that plaintiff had not established probability she would prevail on merits of her causes of action, where, although some portion of conduct may have been illegal, defendants' conduct in filing allegedly false proof of service and declaration to obtain bench warrant that resulted in plaintiff's arrest was not illegal conduct as matter of law, and where absolute privilege from tort liability, except for claims of malicious prosecution, established by *Civ. Code § 47(b)*, applied to statements made to authorities in order to obtain arrest of person, even when that person had no connection whatsoever to any pending litigation, so that plaintiff would not be apply to show probability of success on merits. *Kemps v. Beshwate (2009) 180 Cal. App. 4th 1012, 1016-1019, 103 Cal. Rptr. 3d 480*

In an action between business competitors, plaintiffs asserted claims for breach of contract and declaratory judgment and sought injunctive relief, alleging that defendant filed trademark actions in France in violation of covenant not to sue

resulting from defendant's prior suits, trial court properly denied defendant's motion to strike, where petitioning activity undertaken in foreign country by filing lawsuits in France was not protected by anti-SLAPP statute, because neither United States nor California Constitution granted United States citizen right to petition foreign government; and where plaintiffs' causes of action for breach of contract and declaratory relief were not subject to special motion to strike under *Code Civ. Proc. § 425.16* because both arose from filing of trademark infringement lawsuits in France as plaintiffs sought judicial determination of extent to which defendant could proceed with French actions or any other lawsuit filed elsewhere in world in light of covenant not to sue. *Guessous v. Chrome Hearts, LLC (2009) 179 Cal. App. 4th 1177, 1185-1187, 102 Cal. Rptr. 3d 214*

Filing of a notice of lis pendens in connection with an arbitration claim concerning real property constitutes protected activity within the meaning of *Code Civ. Proc. § 425.16(e)(1), (2).* *Manhattan Loft, LLC v. Mercury Liquors, Inc. (2009) 173 Cal. App. 4th 1040, 1050, 93 Cal. Rptr. 3d 457*

Cross-complaint arising out of service of three-day notice to quit and subsequent unlawful detainer action was subject to special motion to strike; service of three-day notice to quit was protected activity, as it was a legally required prerequisite to the filing of the unlawful detainer action and statements made in connection with the threatened unlawful detainer action were similarly protected activity. *1100 Park Lane Associates v. Feldman (2008) 160 Cal. App. 4th 1467, 1483, 74 Cal. Rptr. 3d 1*

Plaintiff's declaratory relief action arose from defendant's protected activity of filing a Proposition 65 notice and thus was subject to a special motion to strike; because plaintiff could not demonstrate a probability of prevailing on its declaratory relief action, the court granted defendant's special motion to strike. *CKE Restaurants, Inc. v. Moore (2008) 159 Cal. App. 4th 262, 272, 70 Cal. Rptr. 3d 921*

Matter under consideration by one of the three branches of government need not be the subject of official proceedings to qualify for protection under *Code Civ. Proc. § 425.16(e)(2)*; the section protects any written or oral statement or writing made in connection with an issue under review by a legislative, executive, or judicial body and therefore dispute between the California Department of Corrections and Rehabilitation and entity providing housing and other services for inmates regarding commissions from telephone revenue was properly the subject of protected activity even though there was no official proceeding pending. *Maranatha Corrections, LLC v. Department of Corrections and Rehabilitation (2008) 158 Cal. App. 4th 1075, 1085, 70 Cal. Rptr. 3d 614*

Cross-defendant's allegedly defamatory letter to employee who was accused of secretly soliciting employer's customer lists was protected under *Code Civ. Proc. § 425.16(e)(2)* despite the fact that letter was sent four months before employer filed suit against employee; it was sufficient that letter was sent in connection with anticipated litigation between the two parties. *Neville v. Chudacoff (2008) 160 Cal. App. 4th 1255, 1268, 73 Cal. Rptr. 3d 383*

Defendant and cross-complainant's cause of action for abuse of process fell squarely within protection of anti-SLAPP statute; indeed, court stated it was difficult to imagine an abuse of process claim that would not fall within the protection of the statute. *Booker v. Rountree (2007) 155 Cal. App. 4th 1366, 1370, 66 Cal. Rptr. 3d 733*

Defendant attorney's allegedly defamatory voicemail messages to plaintiff's real estate broker were made in connection with a piece of real property, which was an asset that was the subject of a dispute over which all involved parties threatened litigation; therefore, the statements were made in connection with an issue under review by a judicial body within the meaning of *Code Civ. Proc. § 425.16(b)(1)(2).* *Rohde v. Wolf (2007) 154 Cal. App. 4th 28, 37-38, 64 Cal. Rptr. 3d 348*

Defendant's conduct in initiating State Bar sponsored fee arbitration proceeding and later filing civil complaint were protected activity under *Code Civ. Proc. § 425.16(e)(2)*; plaintiff law firm therefore had to show a probability of success on the merits regarding its claims of breach of contract, breach of implied covenant of good faith, fraud, and

misrepresentation claims against defendant. *Philipson & Simon v. Gulsvig (2007) 154 Cal. App. 4th 347, 362-364, 64 Cal. Rptr. 3d 504*

Defendant, a University of California manager and hearing officer who denied plaintiff's sexual harassment claim and other workplace grievances, was protected by *Code Civ. Proc. § 425.16(e)(2)* when plaintiff sued her for violating his civil rights; her conduct in hearing, deciding, and processing plaintiff's grievances was in furtherance of her right of petition and because plaintiff could not show a probability of prevailing on the merits, her anti-SLAPP motion was granted. *Vergos v. McNeal (2007) 146 Cal. App. 4th 1387, 1400, 53 Cal. Rptr. 3d 647*

When defendant city official's allegedly defamatory statements fell within official duty privilege of *Civ. Code § 47(a)*, plaintiff could not demonstrate a probability of prevailing on the merits for purposes of defendant's anti-SLAPP motion; defendant made statements at a dinner he attended in his capacity as city attorney and therefore a motion to strike was properly granted. *Tutor-Saliba Corp. v. Herrera (2006) 136 Cal. App. 4th 604, 619, 39 Cal. Rptr. 3d 21*

Defendant's reports of child abuse to persons bound by law to investigate the allegations and transmit a report to authorities constituted protected activity pursuant to *Code Civ. Proc. § 425.16(e)(2)*. *Siam v. Kizilbash (2005) 130 Cal. App. 4th 1563, 31 Cal. Rptr. 3d 368*

Court of appeals reversed trial court's denial of defendant's anti-SLAPP motion in case based on defendant's submission of a required statement to the National Association of Securities Dealers (NASD) following plaintiff's termination; NASD, although not publicly funded, is an "official body" for purposes of the anti-SLAPP statute because it has been delegated regulatory authority by federal securities laws; additionally, the communications to the NASD were of "public interest" in that the actions of plaintiff could potentially affect a large number of people; plaintiff was unable to show a probability of success on his claims due to the litigation privilege and therefore the motion was granted. *Fontani v. Wells Fargo Investments, LLC (2005) 129 Cal. App. 4th 719, 737, 28 Cal. Rptr. 3d 833*

Appellate court affirmed the trial court's granting of defendant's motion to strike under the anti-SLAPP statute in a case in which plaintiff, a discount seller of contact lenses, sued defendant, an optometrist and lawyer, for inducing breach of fiduciary duties and breach of contract; suit arose out of defendant's communications with other optometrists and optometric agency representatives inviting pursuit of prospective legislation concerning mail order contact lens sales, particularly with plaintiff's former in-house lawyer, against whom breaches of fiduciary duty and contract were alleged in a separate suit. Defendant's communications were found to be statements made in connection with an issue under consideration by a legislative body, statements on an issue of public interest made in a place open to the public, or any other conduct in furtherance of the exercise of the constitutional right of petition or free speech in connection with a public issue or an issue of public interest under *Code Civ. Proc. § 425.16(e)*; the question of whether the communications were unlawful was irrelevant in the determination of the first prong of the anti-SLAPP statute test and was properly considered in the secondary inquiry as to whether plaintiff had established a probability of success. 1-*800 Contacts, Inc. v. Steinberg (2003) 107 Cal. App. 4th 568, 583-584, 132 Cal. Rptr. 2d 789*

News reports made in connection with issue under consideration or review by an authorized official proceeding and published by media defendants fall within scope of *Code Civ. Proc. § 425.16(e)(2)*; moreover, news reporting activity is free speech; fact that investigative audit on which report was based was confidential did not bar application of *Code Civ. Proc. § 425.16* in that investigative audit was authorized official proceeding and newspaper articles were made in connection with this proceeding; while investigative audit itself was confidential, topics and events were not. *Braun v. Chronicle Publishing Co. (1997) 52 Cal. App. 4th 1036, 1045, 1048-1049, 61 Cal. Rptr. 2d 58*

Communications preparatory to or in anticipation of bringing action or other official proceeding fall within protection of litigation privilege of *Civ Code § 47(b)* and such statements are equally entitled to benefit of *Code Civ. Proc. § 425.16*; law firm's letter to private individuals confirming their endorsement of filing of complaint to Attorney General with regard to plaintiff's alleged underpayment of royalties to individuals' designated charities was communication that

(1) raised question of public interest, that is, whether money designated for charities was being received by those charities, and (2) was made in connection with official proceeding authorized by law, that is, proposed complaint to Attorney General seeking investigation. *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman (1996) 47 Cal. App. 4th 777, 783-785, 54 Cal. Rptr. 2d 830*

Cause of action arising from defendant's litigation activity may appropriately be the subject of a *Code Civ. Proc. § 425.16* motion to strike. *Church of Scientology v. Wollersheim (1996) 42 Cal. App. 4th 628, 647-648, 49 Cal. Rptr. 2d 620*

[b] Statement or Writing Made in Public Forum in Connection With Issue of Public Interest

In action by municipal contractor after city terminated contract as permitted and, without inviting competitive bids, entered into a new contract with one of plaintiff's competitors, seeking writ of mandate and declaratory relief to invalidate new contract and to compel city to award contract through competitive bidding, trial court erred in granting city's anti-SLAPP motion, reasoning that maintenance of city's bus stops was issue of public interest and plaintiff was not likely to prevail on merits of its claims, where even if plaintiff's claims involved public issue, they were not based on any statement, writing, or conduct by city in furtherance of its right of free speech or its right to petition government for redress of grievances, but, rather, plaintiff's claims were based on state and municipal laws requiring city to award certain contracts through competitive bidding and were not subject to anti-SLAPP statute. *Graffiti Protective Coatings, Inc. v. City of Pico Rivera (2010) 181 Cal. App. 4th 1207, 1214-1225, 104 Cal. Rptr. 3d 692*

In class action by indie rock musicians against publishers of magazine and tobacco company, based on editorial feature that included band names, alleging unauthorized use of name in violation of *Civ. Code § 3344*, unauthorized use of name for commercial advantage (right of publicity), and unfair business practice in violation of *Bus. & Prof. Code § 17200 et seq.*, with gravamen of complaint that publishers and tobacco company used artist names of plaintiffs and members of class knowingly and deliberately for commercial purpose of advertising cigarettes without their prior authorization, feature was protected activity under *Code Civ. Proc. § 425.16* and not unprotected commercial speech, where act from which complaint arose, publication of bands' names within graphic design of feature, constituted conduct in furtherance of defendants' right of free speech in connection with public issue or issue of public interest. Further, trial court properly granted anti-SLAPP motion based on plaintiffs' inability to show probability of success, where defendants invoked their *First Amendment* right to freedom of speech as defense and assert causes of action failed because plaintiffs had not established that defendants acted with "actual malice," where feature was noncommercial speech as matter of law, and where there was no evidence of actual malice. Further, defendants' *First Amendment* right of free press also served as bar to plaintiffs' causes of action. *Stewart v. Rolling Stone LLC (2010) 181 Cal. App. 4th 664, 677-692, 105 Cal. Rptr. 3d 98*

Trial court erred in granting homeowners association's anti-SLAPP motion brought under *Code Civ. Proc. § 425.16(e)(4)* on ground that each cause of action alleged by homeowners against association arose out of dispute over architectural guidelines and related to communications from association pertaining to purported noncompliance with guidelines and dispute about architectural guidelines was public issue, where there was no indication that association's actions giving rise to dispute, and upon which homeowners' causes of action were based, were undertaken in furtherance of right of petition or free speech, because causes of action as described in complaint arose out of association's purported unwillingness to grant variance, demand that money be paid in exchange for variance, demand that various disputed improvements be removed, levy of reimbursement assessment, failure to comply with CC&Rs, and demand that homeowners pay to remove tree located in common area; mere fact that certain association demands were put in writing did not convert association's acts in connection with CC&R's enforcement into acts in furtherance of right of free speech, because act of putting demands concerning CC&R's compliance in writing gave rise to breach of contract and other causes of action that did not raise free speech concerns. *Turner v. Vista Pointe Ridge Homeowners Assn. (2009) 180 Cal. App. 4th 676, 681-688, 102 Cal. Rptr. 3d 750*

Plaintiff sued defendant law firm for intentional interference with contractual relations based on defendant's representation of an adverse party in underlying litigation; defendant's communication of a settlement offer in the underlying action constituted protected activity in that it was connected with an issue under consideration or review by a judicial body. *Genethera, Inc. v. Troy & Gould Professional Corporation (2009) 171 Cal. App. 4th 901, 908, 90 Cal. Rptr. 3d 218*

Statements made by Los Angeles Unified School District's local superintendent and Superintendent of Schools regarding principal's inability to properly handle Jefferson High School violence concerned an issue of public interest under *Code Civ. Proc. § 425.16(e)*; superintendents' special motion to strike principal's causes of action for invasion of privacy and defamation based on those statements was therefore granted. *Morrow v. Los Angeles Unified School Dist. (2007) 149 Cal. App. 4th 1424, 1436-1437, 57 Cal. Rptr. 3d 885*

Plaintiff and cross-complainant's website warning the public about her negative experience with a well-known plastic surgeon was protected under the anti-SLAPP statute; plastic surgery is a topic of widespread public interest and discussion and the website contributed toward the public debate on the topic. *Gilbert v. Sykes (2007) 147 Cal. App. 4th 13, 23, 53 Cal. Rptr. 3d 752*

Websites that are free of charge and accessible to members of the public are public forums for purposes of *Code Civ. Proc. § 425.16*, and Internet postings regarding a publicly traded company with 59 million shares are considered postings made in connection with a matter of public interest within the meaning of the statute; because plaintiff did not demonstrate a probability of success on its libel claim, defendant's anti-SLAPP motion was granted. *Ampex Corp. v. Cargle (2005) 128 Cal. App. 4th 1569, 1576-1577, 27 Cal. Rptr. 3d 863*

In defamation action by former manager of homeowners association against several association members, board of director members, and private homeowners association club, court of appeal affirmed trial court's granting of defendants' motion to strike under *Code Civ. Proc. § 425.16* where allegedly defamatory statement made concerning plaintiff's services as manager of homeowners association at board meetings and in newsletter fell within category of any written or oral statement or writing made in place open to public or public forum in connection with issue of public interest under *Code Civ. Proc. § 425.16(e)(3)*; newsletter was public forum since stated purpose of newsletter was to communicate information of interest and/or concern to residents, it was distributed to residents of community and neighboring businesses, and, while most of articles and letters were critical of plaintiff's management, newsletter also printed letters reflecting contrary viewpoints; "public forum" requirement should be construed in keeping with 1997 amendment to section 425.16 requiring broad interpretation of that section; each of allegedly defamatory statements involved issues of public interest in that they concerned (1) decision whether to continue to be self-governed or to switch to professional management company, and (2) plaintiff's competency to manage association; although homeowners association was private, statements concerned issues of critical importance to large segment of local population; plaintiff's subjective intent in bringing suit was irrelevant. *Damon v. Ocean Hills Journalism Club (2000) 85 Cal. App. 4th 468, 474-480, 102 Cal. Rptr. 2d 205*

Court of appeal affirmed trial court's granting of defendant's motion to strike under *Code Civ. Proc. § 425.16* when (1) plaintiff had been California State Assemblyman whose former assistant had filed sexual harassment charges against him, and had been investigated by Assembly and reprimanded for violating Assembly's sexual harassment policy and various newspapers reported on the sexual harassment suit, plaintiff's reprimand and cost of the defense; (2) plaintiff brought action against defendant, a political rival in 1996 elections for Orange County Board of Supervisors, for libel, slander per se, intentional infliction of emotional distress and negligent infliction of emotional distress, based on numerous comments made about the sexual harassment suit contained in a letter sent by defendant to absentee voters; and (3) once defendant showed that his statements were acts in furtherance of his right of free speech and made in connection with a public issue, plaintiff failed in his burden to show a probability of prevailing on his defamation claim; Section 425.16 applies to suits involving statements made during political campaigns; to establish probability of

plaintiff prevailing on his defamation claim against defendant, plaintiff had to make prima facie showing of facts which would, if credited, support judgment in plaintiff's favor; as public official, plaintiff could not recover damages for defendant's statements about plaintiff's fitness for office unless plaintiff proved by clear and convincing evidence that statements were made with actual malice; factual statements made during campaign by defendant were true or based on reliable evidence, that is, Assembly investigation report and reprimand letter, newspaper articles and plaintiff's own statements, and thus defendant did not make them with actual malice; moreover, defendant's expressions of personal opinion about plaintiff's fitness for office are not actionable. *Conroy v. Spitzer (1999) 70 Cal. App. 4th 1446, 1448-1455, 83 Cal. Rptr. 2d 443*

In defamation action against labor union and its research analyst based on statement made by analyst during television newscast concerning firing by plaintiff of two of plaintiff's employees, court of appeal affirmed trial court's granting of defendants' motion to strike under *Code Civ. Proc. § 425.16* when defendants carried initial burden of establishing prima facie showing that plaintiff's complaint arose from defendants' free speech activity and plaintiff failed to establish prima facie case of slander in its pleadings and supporting declarations that defendants made false statement with malice; constitutional protection extended to statements relating to labor disputes provided statements are not made maliciously; as with statements regarding public officials, standard requires determination whether statement was made with knowledge that it was false or with reckless disregard whether or not statement false. *Monterey Plaza Hotel v. Hotel Employees & Restaurant Employees (1999) 69 Cal. App. 4th 1057, 1063-1066, 82 Cal. Rptr. 2d 10*

When developer, who was disgruntled with findings of draft environmental impact report (DEIR) prepared by consultant county hired to evaluate developer's proposed project, sued county, consultant and others after county board of supervisors denied proposed project, *Code Civ. Proc. § 425.16* held to apply to defendants, and trial court's granting of special motion to strike under Section 425.16 upheld; commercial conduct and speech made in connection with issue of public concern under consideration by a legislature body are subject to SLAPP; Section 425.16 is to be broadly construed to be applicable to any statement, writing or conduct made in connection with issue of public concern which is under consideration or review by legislative body or which is made in preparation for such review. *Mission Oaks Ranch, Ltd. v. County of Santa Barbara (1998) 65 Cal. App. 4th 713, 729, 77 Cal. Rptr. 2d 1 , disapproved by, Briggs v. Eden Council for Hope and Opportunity (1999) 19 Cal. 4th 1106, 1123* to extent it suggests statement must concern issue of public significance to be protected under *Code Civ. Proc. § 425.16(e)(1)* or *(2)*

Anti-SLAPP law applies to defamation actions arising out of statements made in a union election; public issue was union election affecting 10,000 members and plaintiff's qualifications to serve as president; speech by mail, that is, mailing of campaign flyer, is a recognized public forum under the SLAPP statute; private conversations concerning the campaign flyer also protected under anti-SLAPP statute. *Macias v. Hartwell (1997) 55 Cal. App. 4th 669, 672-675, 64 Cal. Rptr. 2d 222*

Code Civ. Proc. § 425.16 applies to and protects governmental entity and its representatives who are sued for their written and verbal comments concerning an official investigation; when both are sued both may move under Section 425.16; private conversations concerning report also protected under anti-SLAPP statute. *Bradbury v. Superior Court (1996) 49 Cal. App. 4th 1108, 1111, 1114-1115, 57 Cal. Rptr. 2d 207*

Anti-SLAPP law protects statements made by candidate for public office and the candidate's supporters concerning alleged libelous campaign literature. *Beilenson v. Superior Court (1996) 44 Cal. App. 4th 944, 946-950*

Private conversations, regarding public issue are protected under statute. *Averill v. Superior Court (1996) 42 Cal. App. 4th 1170, 1174-1176, 50 Cal. Rptr. 2d 62*

Alleged defamatory statements in notice of intention to circulate a petition to recall an elected official fell within scope of statute. *Evans v. Unkow (1995) 38 Cal. App. 4th 1490*

In action by plaintiffs who were certified shorthand reporters against defendants, also certified shorthand reporters, in which plaintiffs alleged that direct contracting as practiced by defendants constituted unfair business practice, intentional interference with plaintiffs' prospective economic advantage and interference with existing contracts, cross-defendant who was not a party to original action who was sued for, among other things, defamation, based on memorandum cross defendant circulated to other shorthand reporters supporting plaintiffs in underlying action and soliciting financial contributions for the cost of that litigation was subject to protection of statute. *Wilcox v. Superior Court (1994) 27 Cal. App. 4th 809, 819-827, 33 Cal. Rptr. 2d 446*

Allegedly slanderous and libelous comments made during public review period contemplated by CEQA (California Environmental Quality Act) were comments made in connection with public issue and fall within statutory definition of *Code Civ. Proc. § 425.16*. *Dixon v. Superior Court (1994) 30 Cal. App. 4th 733, 742-744, 36 Cal. Rptr. 2d 687*

[c] Other Conduct in Furtherance of Exercise of Free Speech or Petition in Connection With Issue of Public Interest

Defendant's interview of Marlon Brando's former housekeeper at her nursing home regarding Brando's will constituted conduct in connection with an issue of public interest; distribution of Brando's assets was an issue of public interest and television interview contributed to public discussion of the issue. *Hall v. Time Warner Inc. (2007) 153 Cal. App. 4th 1337, 1347, 63 Cal. Rptr. 3d 798*

Controversy surrounding university football coach's termination was of concern to a substantial number of people such that university officials' statements to newspaper and statements to parents during meeting constituted protected speech in connection with a public issue within the meaning of the anti-SLAPP statute. *McGarry v. University of San Diego (2007) 154 Cal. App. 4th 97, 117, 64 Cal. Rptr. 3d 467*

Issue of whether defendants' communications were made in connection with an issue under consideration or review by a legislative, executive, or judicial body was irrelevant for purposes of determination under first prong of anti-SLAPP statute because there appeared to be no dispute that the subject of the communications, the commercial development of the Crystal Bay area of the city of Chula Vista, was a matter of public interest because the anti-SLAPP statute has been broadly construed to involve not only governmental matters but also private conduct that impacts a broad segment of society and/or affects a community in a manner similar to that of a governmental entity (quoting *Damon v. Ocean Hills Journalism Club (2000) 85 Cal. App. 4th 468, 479, 102 Cal. Rptr. 2d 205*). Plaintiff's argument that it did not intend to chill free speech rights by its lawsuit was irrelevant. Plaintiff was unable to demonstrate a probability of prevailing on the merits, and therefore the trial court's granting of the motion was affirmed. *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist. (2003) 106 Cal. App. 4th 1219, 1231-1235, 132 Cal. Rptr. 2d 57*

County bar association's evaluation of candidates for judicial office is constitutionally protected free speech, and lawsuit against it for giving "not qualified" rating to judicial candidate is a SLAPP suit subject to motion to strike under *Code Civ. Proc. § 425.16* if candidate does not show likelihood of prevailing. *Roberts v. Los Angeles County Bar Assn. (2003) 105 Cal. App. 4th 604, 614-615, 129 Cal. Rptr. 2d 546*

In action by nationally known political consultant for libel, intentional interference with contract, and intentional interference with prospective economic advantage concerning article that focused on custody dispute between plaintiff and his first wife, court of appeal affirmed trial court's granting of defendants' motion to strike under *Code Civ. Proc. § 425.16* when lawsuit fell under ambit of Section 425.16, and plaintiff failed to show probability of prevailing on claim because article was privileged under *Civ. Code § 47(d)*, article was a fair and true report, and plaintiff, as public figure, failed to show by clear and convincing evidence that article was published with malice. *Sipple v. Foundation for Nat. Progress (1999) 71 Cal. App. 4th 226, 230-250, 83 Cal. Rptr. 2d 677*

[2] Activity Not Protected Under Anti-SLAPP Statute

In action by family of man who died when wheelchair in which he was sitting ignited, against expert witness alleging negligence based on allegedly false testimony and conspiracy to commit fraud based on settlement negotiations in underlying wrongful death action, trial court properly denied defendant's anti-SLAPP motion on ground that defendant's conduct did not arise from protected speech or petitioning activity, where in first cause of action, expert was accused of negligence by (1) falsely testifying in his deposition regarding his presence at product testing session, and (2) failing to continue to act as independent expert and/or disrupting prosecution of wrongful death case by entering into business relationship, agreement, and/or proposal with other defendants to design, develop and/or market device or devices to improve safety of wheelchair in which plaintiffs' decedent was killed, while still obligated to act as plaintiffs' expert in wrongful death case, and conduct described in second allegation did not fall into any of four categories of § 425.16(e); where, although false deposition testimony was statement made in course of judicial proceeding, anti-SLAPP statute could not be used to insulate those statements from recourse by very client on whose behalf statement was made; where gravamen of cause of action for conspiracy to commit fraud was not litigation-related speech or petitioning activity on clients' behalf, but was conduct outside litigation, specifically, suppression of information about defendants' business relationship, which deprived plaintiffs of representation for which they had retained defendants, and to extent cause of action could be said to have arisen from right of free speech or petition, that right clearly was not being exercised in litigation on plaintiffs' behalf. *Robles v. Chalilpoyil (2010) 181 Cal. App. 4th 566, 572-582, 104 Cal. Rptr. 3d 628*

Trial court erred in granting anti-SLAPP motion of law firm and lawyers that had previously represented plaintiff-company, which sued law firm for breach of fiduciary duty by defendants, constructive fraud by defendants, legal malpractice by defendants, and violation of *Bus. & Prof. Code § 17200 et seq.* by defendant law firm, and represented its former president and CEO, where, although cause of action "arising from" defendant's litigation activity could appropriately be subject of anti-SLAPP motion, principal thrust of company's causes of action was that defendants simultaneously represented both company and former president in matters in which they had irreconcilable conflict of interest that allegedly adversely affected defendants' choice of legal strategy and caused defendants' repeated failures to take action to safeguard company against former president's misconduct; where company, as former client, did not bring lawsuit to deter speech and petitioning activities done by their own attorneys on their behalf but rather to complain about quality of their former attorneys' performance. *PrediWave Corp. v. Simpson Thacher & Bartlett LLP (2009) 179 Cal. App. 4th 1204, 1220-1228, 102 Cal. Rptr. 3d 245*

In action by former client against his attorney, gravamen of plaintiff's complaint was that defendant attorney violated his fiduciary duties to his client and induced his client to pay him an excessive fee; this alleged conduct did not constitute protected activity and any protected petitioning activity was merely incidental. *Hylton v. Frank E. Rogozienski, Inc. (2009) 177 Cal. App. 4th 1264, 1274, 99 Cal. Rptr. 3d 805*

Talent agents' retaliation and wrongful termination claims arose out of defendant's conduct in preventing plaintiffs from performing their job duties, which was not protected activity; the mere fact that defendant's conduct occurred after plaintiffs filed their original complaint seeking a declaration that their employment contracts with defendant were illegal did not transform unprotected activity to protected activity within the meaning of the anti-SLAPP statute. *McConnell v. Innovative Artists Talent and Literary Agency, Inc. (2009) 175 Cal. App. 4th 169, 176-177, 96 Cal. Rptr. 3d 1*

Defendant brought anti-SLAPP motion to strike in case where plaintiff, his former tenant, alleged he fraudulently evicted her in order to evade the rent control ordinance by claiming he was removing the unit from the rental market in order to free it for occupancy by a member of his immediate family; court of appeals held the action did not arise out of protected activity because the complaint was premised not on the prosecution of the unlawful detainer action but the allegedly fraudulent eviction, as evidenced by the fact that the family member never moved in. *Clark v. Mazgani (2009) 170 Cal. App. 4th 1281, 1286-1287, 89 Cal. Rptr. 3d 24*

Where plaintiff sued defendant law firm for breach of the duties of confidentiality and loyalty based on defendant's acceptance of representation of a third party allegedly giving rise to a conflict of interest, principal thrust or gravamen of plaintiff's complaint was the acceptance of allegedly adverse employment, which was not protected activity; protected litigation-related activities were only incidental to principal thrust of complaint. *United States Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton (2009) 171 Cal. App. 4th 1617, 1629, 90 Cal. Rptr. 3d 669*

Communications forming the "principle thrust" or "gravamen" of plaintiff's complaint for interference with contract and prospective economic advantage were not within the litigation privilege; tone of communications was cooperative and not in "serious consideration" of litigation. *Haneline Pacific Properties, LLC v. May (2008) 167 Cal. App. 4th 311, 319-320, 83 Cal. Rptr. 3d 919*

City's declaratory relief action against proponents of an initiative to amend the city's charter was not subject to anti-SLAPP motion; city was simply asking court for guidance regarding constitutionality of initiative and did nothing to impact proponents' *First Amendment* rights. *City of Riverside v. Stansbury (2007) 155 Cal. App. 4th 1582, 1590-1591, 66 Cal. Rptr. 3d 862*

Defendant's alleged failures to cease using plaintiff's software and provide certification regarding the deletion of the software pursuant to a settlement agreement reached in a federal copyright and breach of contract case did not constitute protected activity within the meaning of *Code Civ. Proc. § 425.16(e)*; the case was a breach of contract action arising from defendant's failure to comply with the settlement agreement, which was not protected activity. *Applied Business Software, Inc. v. Pacific Mort. Exchange, Inc. (2008) 164 Cal. App. 4th 1108, 1117, 79 Cal. Rptr. 3d 849*

Defendant's act of noticing and initiating a nonjudicial foreclosure sale after plaintiff defaulted on loan was not subject to anti-SLAPP protection; nonjudicial foreclosure is a private, contractual proceeding, not a proceeding that is closely linked to any governmental, administrative, or judicial proceedings or regulation. *Garretson v. Post (2007) 156 Cal. App. 4th 1508, 1523, 68 Cal. Rptr. 3d 230*

Gravamen of plaintiff Department of Fair Employment and Housing's complaint against landlord was disability discrimination, not landlord's actions in connection with rental control removal proceeding and filing of unlawful detainer action; mere fact that plaintiff filed complaint after protected activity took place does not mean complaint arose from protected activity. *Department of Fair Employment and Housing v. 1105 Alta Loma Road Apartments, LLC (2007) 154 Cal. App. 4th 1273, 1282-1288, 65 Cal. Rptr. 3d 469*

In action by class action litigants against their attorney for breach of contract, negligence, and breach of fiduciary duty, principal thrust of complaint was not attorney's filing or settlement of litigation, but rather was his unethical conduct in representing a party with interests adverse to his clients; because protected activity was merely incidental to unprotected activity, action was not a SLAPP suit. *Freeman v. Schack (2007) 154 Cal. App. 4th 719, 726-727, 64 Cal. Rptr. 3d 867*

Complaint for breach of contract, fraud, and conspiracy to defraud did not arise out of protected activity under the anti-SLAPP statute in case where landowner sued Wal-Mart and others on the basis of a contract to sell land for a Wal-Mart store; the alleged improper conduct on defendants' part did not arise from petitioning activity in pursuing the necessary permits, but rather from conduct and practices involved in carrying out contractual duties, and the thrust of the complaint challenged the manner in which the parties dealt with each other rather than the activity of pursuing governmental approvals for development. *Wang v. Wal-Mart Real Estate Business Trust (2007) 153 Cal. App. 4th 790, 804-810, 63 Cal. Rptr. 3d 575*

Defendants' actions in terminating plaintiffs' tenancy and removing plaintiffs' apartment from the rental market under the Ellis Act were not activities undertaken in furtherance of defendants' constitutional rights of petition or free speech; although filing and serving the Ellis Act notice and notice to vacate may have constituted protected activity, plaintiffs'

complaint requesting declaratory relief did not arise out of the filing and serving of the notice, but rather out of the termination of the tenancy, which was not protected activity under the anti-SLAPP statute. *Marlin v. Aimco Venezia, LLC (2007) 154 Cal. App. 4th 154, 160-162, 64 Cal. Rptr. 3d 488*

Because the anti-SLAPP statute does not extend to claims arising out of free exercise of religion, the statute was not available in a lawsuit arising out of defendants' religious ceremonial outdoor fires and the trial court properly denied defendants' special motion to strike. *Castillo v. Pacheco (2007) 150 Cal. App. 4th 242, 252, 58 Cal. Rptr. 3d 305*

An anti-SLAPP motion will not be sustained in a lawsuit for invasion of privacy where a newspaper's publication of information is gathered from public sources. *Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 696, 21 Cal. Rptr. 3d 663, 101 P. 3d 552*

Court of appeal affirmed trial court's denial of defendant's anti-SLAPP motion in case where screenplay writer named character in movie "Reality Bites" after plaintiff, who was a former classmate of the writer's; the specific dispute leading to the lawsuit was the alleged misuse of plaintiff's persona, which was not an issue of public interest within the meaning of *Code Civ. Proc. § 425.16*. *Dyer v. Childress (2007) 147 Cal. App. 4th 1273, 1283, 55 Cal. Rptr. 3d 544*

"Garden variety" legal malpractice action does not arise from activity protected under the anti-SLAPP statute; case arose from defendants' allegedly negligent legal representation, not petitioning activity protected under the statute. *Kolar v. Donahue, McIntosh & Hammerton (2006) 145 Cal. App.4th 1532, 1540, 52 Cal. Rptr. 3d 712*

Auto dealer's speech in protesting manufacturer's notice of intent to establish a new dealership was entitled to anti-SLAPP scrutiny regardless of the fact that the protected speech was in violation of an agreement not to protest; fact that dealer may have violated this agreement was properly addressed by the court under the second prong of the anti-SLAPP analysis. *Daimler Chrysler Motors Co. v. Lew Williams, Inc. (2006) 142 Cal. App. 4th 344, 351, 48 Cal. Rptr. 3d 233*

A lawsuit by two city council members seeking declaratory relief against the City of Santa Monica based on the fact that the city council meetings frequently run late into the night was not in the public interest within the meaning of *Code Civ. Proc. § 425.17(b)*; action concerned members' preference for particular working hours, not a public interest and, if successful, would not confer a significant benefit on the public as a whole. *Holbrook v. City of Santa Monica (2006) 144 Cal. App. 4th 1242, 1249, 51 Cal. Rptr. 3d 181*

Private company's actions in connection with sexual harassment procedure were not protected conduct under *Code Civ. Proc. § 425.16(e)(1)* or *(2)*; a sexual harassment procedure is not an "official proceeding authorized by law" within the meaning of the statute; legislature intended statute to apply to governmental forums. *Olaes v. Nationwide Mutual Ins. Co. (2006) 135 Cal. App. 4th 1501, 1509, 38 Cal. Rptr. 3d 467*

Court of appeal affirmed trial court's denial of anti-SLAPP motion in action where plaintiff fire protection district sued Contra Costa County's retirement association and the retirement association's board of directors as a result of a decision requiring the district to fund increased retirement benefits for the district's employees. The court held that mere acts of governance mandated by law are not exercises of free speech or petition within the meaning of the anti-SLAPP statute. *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assoc. (2004) 125 Cal. App. 4th 343, 349-352, 22 Cal. Rptr. 3d 724*

Court of appeal affirmed trial court's denial of Metabolife's motion to strike plaintiff's complaint in action where plaintiff sued Metabolife for product liability, negligence, breach of implied warranty, breach of express warranty, and fraud. The court held that because the bulk of the complaint alleged garden-variety personal injury claims for physical injuries proximately caused by activity distinct and apart from any protected conduct (i.e., Metabolife's advertising of its products), the complaint was not based on protected activity as defined under the anti-SLAPP statute. It was therefore

distinguishable from cases in which the core of the wrongful, injury-producing conduct was the false advertising. *Martinez v. Metabolife Int'l, Inc. (2003) 113 Cal. App. 4th 181, 193, 6 Cal. Rptr. 3d 494*

California Supreme Court affirmed the appellate court's reversal of a trial court's granting of an anti-SLAPP motion in a case where a municipality filed a state court action for declaratory relief against mobile home park owners following the owners' filing of a federal court declaratory relief action against the City regarding a mobile home park rent stabilization ordinance. The court emphasized that the fact the City filed the state court lawsuit in response to the owners' federal court lawsuit did not automatically mean the City's state court lawsuit "arose from" the federal court suit within the meaning of *Code Civ. Proc. § 425.16*. The court noted such a meaning would render all cross-actions potential SLAPPs. Instead, the state court action arose out of a dispute between the owners and the City regarding the rent stabilization ordinance. Thus, the plaintiff City's cause of action was not based on an act in furtherance of the defendant's right of petition or free speech, as required by the statute. The City's lawsuit was therefore not subject to a motion to strike under the anti-SLAPP statute. *City of Cotati v. Gene Cashman (2002) 29 Cal. 4th 69, 73-81, 124 Cal. Rptr. 2d 519*

Defendants were unable to satisfy the first prong of the anti-SLAPP statute because the commercial speech involved did not implicate a matter of public interest within the meaning of *Code Civ. Proc. § 425.16(e)*; defendant's claims of an "herbal product that provides a 100 percent natural alternative to breast implants" was commercial speech about the specific properties and efficacies of a particular product and not a matter of public interest; if the court were to find a matter of public interest in this case, nearly any product could claim its speech was about a topic of public interest. *Consumer Justice Center v. Trimedica International, Inc. (2003) 107 Cal. App. 4th 595, 599-605, 132 Cal. Rptr. 2d 191*

Classification created by *Code Civ. Proc. § 425.16(d)* exempting public prosecutors' enforcement actions from anti-SLAPP motions bears directly on furthering state's legitimate interest of allowing prosecutors, who did not create the SLAPP problem, to pursue actions to enforce laws, unencumbered by delay, intimidation, or distraction, and therefore, statute does not violate the *equal protection clause* of either United States or California Constitutions; court affirmed trial court's order denying special motion to strike by manufacturer of weight loss product in action for false or misleading advertising and unfair competition brought by district attorneys of two counties. *People v. Health Laboratories of North America, Inc. (2001) 87 Cal. App. 4th 442, 450-451, 104 Cal. Rptr. 2d 618*

In action by insurance company alleging that company that assisted individuals in preparing repair estimates for earthquake damage to their homes violated *Ins. Code § 1871.7(a)*, which makes it unlawful to procure clients to perform services or benefits under contract of insurance or that will be basis for claim against insurer, trial court properly denied defendants' special motion to strike complaint under *Code Civ. Proc. § 425.16*, where defendants failed to make prima facie showing that causes of action in lawsuit arose from free speech or petition activity under *Code Civ. Proc. § 425.16(b)(1)*; there was no issue under consideration pending before any official proceeding at time damage reports prepared by defendants were sent to plaintiff insurer; to protect reports and claims under *Code Civ. Proc. § 425.16* because they eventually could be used in connection with official proceeding would be to provide immunity for any kind of criminal fraud so long as defrauding party was willing to litigate its cause. *People ex rel. 20th Century Insurance Co. v. Building Permit Consultants, Inc. (2000) 86 Cal. App. 4th 280, 283-285, 103 Cal. Rptr. 2d 71*

Complaint alleging that defendants interfered with plaintiff's reelection campaign to city council by influencing election with illegal campaign contributions did not constitute SLAPP suit; when defendants effectively conceded that activities were illegal, the activities, as a matter of law, were not a valid exercise of constitutional rights protected by *Code Civ. Proc. § 425.16*; since defendants had not shown that plaintiff's suit was brought primarily to chill valid exercise of their constitutional rights of free speech or petition for redress of grievances in connection with public issue, plaintiff had no obligation to establish probability that he would prevail on merits. *Paul for Council v. Hanyecz (2001) 85 Cal. App. 4th 1356, 1363, 1367, 102 Cal. Rptr. 2d 864*

[3] Parties' Burdens in Anti-SLAPP Proceedings

California Supreme Court affirmed the trial court's granting of defendant's motion to strike under *Code Civ. Proc. § 425.16* in a case where plaintiff Equilon Enterprises, LLC (formerly Shell Pipe Line Corp. and Texaco, Inc.) filed suit against Consumer Cause, Inc. after Consumer Cause had served plaintiff with a notice of its intent to sue for alleged violations of Proposition 65. Following the service of this intent to sue notice, Equilon filed its suit against Consumer Cause for declaratory and injunctive relief. Consumer Cause then moved under the anti-SLAPP statute to strike Equilon's complaint. The trial court granted the motion, and the Court of Appeal and California Supreme Court both affirmed that ruling. The court noted that the California courts of appeal had divided over the question of whether a defendant must prove a plaintiff had an intent to chill defendant's exercise of speech in order to prevail on an anti-SLAPPmotion to strike. The court held there is no such requirement based on the plain language of the statute and on legislative intent. In this particular case, the court held that the pleadings and affidavits submitted established that Equilon's action was one arising from Consumer Cause's activity in furtherance of its constitutional rights of speech, i.e., the filing of the intent to sue notices. The trial court had found that Equilon had not established a probability of prevailing on is claim, so the granting of the motion was affirmed. Equilon's intent in suing Consumer Cause was deemed irrelevant. *Equilon Enterprises, LLC v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 58-65, 124 Cal. Rptr. 2d 507*

The key question in the first prong of a *Code Civ. Proc. § 425.16* anti-SLAPP determination is whether the plaintiff's cause of action is based on the defendant's protected free speech or petitioning activity, not whether plaintiff intended to chill defendant's rights in filing the lawsuit. Once the first prong is satisfied, the plaintiff has the opportunity to overcome the anti-SLAPP motion to strike by demonstrating that they have a probability of prevailing on their claim. Plaintiffs in this case filed a lawsuit against defendant for fraud and breach of contract in connection with a prior federal lawsuit in which defendants had filed counterclaims against plaintiffs. The court held that in as much as the plaintiffs' lawsuit arose from defendant's counterclaims in the federal court suit, defendant had satisfied the first prong of the statute. The case was remanded to the trial court for a determination regarding the second prong of the statute's test. *Navellier v. Sletten (2002) 29 Cal. 4th 82, 87-104, 124 Cal. Rptr. 2d 530*

A plaintiff opposing an anti-SLAPP motion filed after the 60-day deadline imposed by *Code Civ. Proc. § 425.16(f)* need not demonstrate prejudice in opposing motion on the grounds that it was not timely filed; appellate court reviews trial court's decision to deny late motion under abuse of discretion standard. *Olsen v. Harbison (2005) 134 Cal. App. 4th 278, 286-287, 35 Cal. Rptr. 3d 909*

The fact that the plaintiff prevailed in a subsequently filed timely action is irrelevant to whether the plaintiff could prevail in an earlier untimely action on the same cause. *City of Santa Monica v. Stewart (2005) 126 Cal. App. 4th 43, 75-76, 24 Cal. Rptr. 3d 72*

[4] Malicious Prosecution Actions and SLAPPback Motions to Strike

In *Jarrow Formulas, Inc. v. LaMarche (2003) 31 Cal. 4th 728, 741, 3 Cal. Rptr. 3d 636, 74 P.3d 737* , California Supreme Court declined to create categorical exemption from anti-SLAPP statute for malicious prosecution actions. *Zamos v. Stroud (2004) 32 Cal. 4th 958, 965, 12 Cal. Rptr. 3d 54*

In action against attorneys representing plaintiff in underlying slander litigation, which was dismissed as result of terminating sanctions imposed for plaintiff's refusal to follow court orders and comply with his discovery obligations, alleging malicious prosecution and other causes of action, trial court properly granted defendants' anti-SLAPP motion, where, as to malicious prosecution cause of action, although plaintiff established prima facie showing that underlying action was terminated in her favor based on dismissal of underlying as result of discovery sanctions and that underlying action was brought without probable cause, plaintiff failed to establish prima facie showing that defendants acted with malice, and where plaintiff had not attempted to meet her burden to show she would prevail on her other three causes of

action, essentially conceding those causes of action were inappropriate in context of facts alleged and litigation privilege [*Civ. Code § 47(b)*] foreclosed pursuit of causes of action against defendants. *Daniels v. Robbins (2010) 182 Cal. App. 4th 204, 214-227, 105 Cal. Rptr. 3d 683*

Defendant who prevails on special motion to strike, recovering fees pursuant to *Code Civ. Proc. § 425.16(c)*, and subsequently prosecutes successful malicious prosecution action against plaintiff in underlying suit may not enjoy a double recovery of fees; relitigation of amount of fees incurred relating to successful motion to strike is precluded by collateral estoppel doctrine. *Jackson v. Yarbray (2009) 179 Cal. App. 4th 75, 93, 101 Cal. Rptr. 3d 303*

Apartment complex owner plaintiff was able to show a probability of prevailing on malicious prosecution claim against all defendants: The litigation was terminated in its favor, defendants lacked probable cause to prosecute some or all of their causes of action, plaintiff presented evidence demonstrating a probability of prevailing on the malicious intent element, and plaintiff established it was damaged by defendants' conduct. *Sycamore Ridge Apartments v. Naumann (2007) 157 Cal. App. 4th 1385, 1412, 69 Cal. Rptr. 3d 561*

Trial court's denial of defendants' anti-SLAPP motion was reversed in case where painting subcontractor sued general contractor and its attorneys for malicious prosecution; although a malicious prosecution case is a proper basis for an anti-SLAPP motion, plaintiff was unable to demonstrate a probability of success on the element of probable cause; there was no evidence of the painter's limited scope of work other than his own counsel's assertion and therefore it could not be said that pursuing a cross-complaint against the painter was objectively unreasonable. *Marijanovic v. Gray, York & Duffy (2006) 137 Cal. App. 4th 1262, 1271-1272, 40 Cal. Rptr. 3d 867*

In order to establish a probability of prevailing on a malicious prosecution action, plaintiff must show favorable termination on all causes of action as the causes of action are not severable; additionally, favorable termination element cannot be established by reference to parties' earlier settlement positions. *Staffpro, Inc. v. Elite Show Services, Inc. (2006) 136 Cal. App. 4th 1392, 1401, 39 Cal. Rptr. 3d 682*

[5] Statutory Exceptions of Code Civ. Proc. § 425.17

The statutory exception found in *CCP § 425.17(b)* does not apply to an action that seeks any advantage, no matter how narrow, for a particular plaintiff, as opposed to an action that is brought solely in the public interest. Club Members for an *Honest Election v. Sierra Club (2008) 45 Cal. 4th 309, 316-317, 86 Cal. Rptr. 3d 288, 196 P.3d 1094*

In class action by indie rock musicians against publishers of magazine and tobacco company, based on editorial feature that included band names, alleging unauthorized use of name in violation of *Civ. Code § 3344*, unauthorized use of name for commercial advantage (right of publicity), and unfair business practice in violation of *Bus. & Prof. Code § 17200 et seq.*, with gravamen of complaint that publishers and tobacco company used artist names of plaintiffs and members of class knowingly and deliberately for commercial purpose of advertising cigarettes without their prior authorization, *Code Civ. Proc. § 425.17(c)* did not apply to preclude anti-SLAPP motion under *Code Civ. Proc. § 425.16*, where, although publishers were primarily engaged in the business of selling goods, goods they sold were copies magazine, not cigarettes, and where statement or conduct at issue did not consist of representations of fact about business operations, goods or services of magazine or of any of defendants' business competitors, but, instead, representation at center of lawsuit was representation that plaintiffs and their fellow musicians endorsed sale and use of cigarettes. *Stewart v. Rolling Stone LLC (2010) 181 Cal. App. 4th 664, 675-677, 105 Cal. Rptr. 3d 98*

Cause of action arising from lawyer's advice to prospective client regarding pending litigation does not fall within statutory exemption to anti-SLAPP statute found in *Code Civ. Proc. § 425.17*; legislature intended to exempt purely commercial disputes and client's right to receive legal advice would be thwarted if courts construed exemption as applying to lawyers providing legal advice. *Taheri Law Group v. Evans (2008) 160 Cal. App. 4th 482, 491, 72 Cal.*

Rptr. 3d 847

In lawsuit between two competitors in event-staffing business, e-mail describing status of ongoing litigation between the two companies to customers did not contain statements regarding either party's business operations, goods or services such that it would fall within the *Code Civ. Proc. § 425.17(c)* exception to the anti-SLAPP statute; record showed e-mail was sent to "set the record straight" with regard to the allegations of the lawsuit and not to obtain approval for, promote, or secure business for the event staffing company. *Contemporary Services Corp. v. Staff Pro Inc. (2007) 152 Cal. App. 4th 1043, 1054, 61 Cal. Rptr. 3d 434*

Statements made by defendant during environmental impact report review process objecting to competitor hotel's proposed expansion were not made for the purpose of "obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, [defendant's] goods or services" as required by *Code Civ. Proc. § 425.17(c)(1)*; instead, they were made in an effort to forestall environmental approval of plaintiff's project; therefore, the exception to the anti-SLAPP statute did not apply. *Sunset Millennium Associates v. LHO Grafton Hotel (2006) 146 Cal. App. 4th 300, 313, 52 Cal. Rptr. 3d 828*

Code Civ. Proc. § 425.17(d)(2) applied in case in which plaintiff sued defendant seeking an injunction to prevent defendant from mailing political letters on behalf of plaintiff's opponents; defendant's letters constituted "political ... work" within the meaning of *Code Civ. Proc. § 425.17(d)(2)*'s exception to *Code Civ. Proc. § 425.17(b)* and therefore defendant's conduct fell within the ambit of the anti-SLAPP statute. *Major v. Silna (2006) 134 Cal. App. 4th 1485, 1497, 36 Cal. Rptr. 3d 875*

Breach of contract and fraud lawsuit filed by franchisee as a result of franchisor's allegedly false promises to process potential buyers of franchise rights without undue delay was not entitled to protection from anti-SLAPP motion under *Code Civ. Proc. § 425.17(c)*; statute requires that the statement of conduct that is the subject of the lawsuit be a representation of fact and a promise is not a representation of fact. Furthermore, franchisor's promises were not made in the course of delivering goods or services but rather in the process of settlement of a lawsuit. *Navarro v. IHOP Properties, Inc. (2005) 134 Cal. App. 4th 834, 841, 36 Cal. Rptr. 3d 385*

The defendant has the burden of proving that plaintiff's cause of action is outside the statutory exceptions of *Code Civ. Proc. § 425.17*; if defendant cannot do so, the burden never shifts to plaintiff to prove a probability of success; defendant's large financialmanagement and services conglomerates were primarily engaged in the business of selling goods and services within the meaning of *Code Civ. Proc. § 425.17(c)*; furthermore, the statements made by defendants constituted commercial speech directed at an actual or potential buyer or consumer within the meaning of the exception to the anti-SLAPP statute. *Brill Media Co. v. TCW Group, Inc. (2005) 132 Cal. App. 4th 324, 330, 341, 33 Cal. Rptr. 3d 371*

Plaintiff sued radio call-in show on the basis of age discrimination and unfair competition when he was told he was too old to call and weigh in on various topics; defendant radio call-in show fell within the exception to *Code Civ. Proc. § 425.17* as stated in *Code Civ. Proc. § 425.17(d)(2)* and therefore the trial court's granting of defendant's anti-SLAPP motion was affirmed. *Ingels v. Westwood One Broadcasting Services, Inc. (2005) 129 Cal. App. 4th 1050, 1068, 28 Cal. Rptr. 3d 933*

An Unfair Competition Law claim filed by plaintiffs who received demand letters from satellite television provider DIRECTV ordering the plaintiffs to stop using decryption devices was not entitled to protection against defendant's anti-SLAPP motion under *Code Civ. Proc. § 425.17(b)* because the claim would not "enforce an important rightaffecting the public interest" (second prong of exception) and there was no disproportionate financial burden on the plaintiffs (third prong of exception). *Blanchard v. DIRECTV, Inc. (2004) 123 Cal. App. 4th 903, 914, 20 Cal. Rptr. 3d 385*

[6] Attorney's Fees and Costs

The party challenging the attorney fee award on appeal has the burden of pointing to the specific items challenged, with sufficient argument and citation to the evidence; general claims that fees are excessive, duplicative, or unrelated to the work will not suffice. *Premier Medical Management Systems, Inc. v. California Ins. Guarantee (2008) 163 Cal. App. 4th 550, 564, 77 Cal. Rptr. 3d 695*

Trial court abused its discretion in permitting defendant to file anti-SLAPP motion two years after filing of complaint; while trial court has considerable discretion in deciding whether to allow a party to file an anti-SLAPP motion more than 60 days after the filing of the complaint, in the instant case the delay was extreme, defendant did not offer compelling reasons for the delay and plaintiff was prejudiced by the lengthy delay. *Platypus Wear, Inc. v. Goldberg (2008) 166 Cal. App. 4th 772, 83Cal. Rptr. 3d 95*

On appeal, court reviews attorney fee award under abuse of discretion standard; fact that attorney charged $300 per hour, was a relatively new attorney, and practiced in the area of family law did not establish an abuse of discretion in trial court's fee award. *Russell v. Foglio (2008) 160 Cal. App. 4th 653, 661-662, 73 Cal. Rptr. 3d 87*

Party who represents himself and litigates an anti-SLAPP motion on his own behalf is not entitled to attorney fees under *Code Civ. Proc. § 425.16(c)*. *Taheri Law Group v. Evans (2008) 160 Cal. App. 4th 482, 494, 72 Cal. Rptr. 3d 847*

A party prevailing on an anti-SLAPP motion may seek an attorney fee award by three different avenues: as a part of the motion to strike itself, by a subsequent noticed motion, or as part of a cost memorandum. *Carpenter v. Jack in the Box Corp. (2007) 151 Cal. App. 4th 454, 461, 59 Cal. Rptr. 3d 839*

Plaintiff prevailing on anti-SLAPP motion is not subject to the timelines of *Cal. Rules of Ct., Rules 3.1702* and *8.104* in seeking attorney fees; plaintiff may seek attorney fees by noticed motion or as part of cost memorandum at any time prior to entry of judgment in the lawsuit. *Carpenter v. Jack in the Box Corp. (2007) 151 Cal. App. 4th 454, 468, 59 Cal. Rptr. 3d 839*

Trial court did not abuse its discretion in reducing attorney fees and costs sought by prevailing defendant from $112,000 to $23,000; trial court determined that attorneys experienced in anti-SLAPP litigation would not have needed to spend 200 hours preparing a motion and that 50 hours was a more reasonable figure. *Maughan v. Google Technology Inc. (2006) 143 Cal. App. 4th 1242, 1253, 49 Cal. Rptr. 3d 861*

Court may not award attorney fees under *Code Civ. Proc. § 425.16(c)* where plaintiff dismissed claims against defendants before defendants filed anti-SLAPP motion. *Chambers v. Miller (2006) 140 Cal. App. 4th 821, 825, 44 Cal. Rptr. 3d 777*

[7] Time for Filing Special Motion to Strike

Counsel may not leverage *Code Civ. Proc. § 425.16* to obtain an unjust award of attorney fees, and where the trial court severely curtails the number of compensable hours in a fee award, it is presumed the trial court concluded the fee request was padded. *Christian Research Institute v. Alnor (2008) 165 Cal. App. 4th 1315, 1321-1330, 81 Cal. Rptr. 3d 866*

Award of attorney's fees to defendant prevailing on anti-SLAPP motion is appealable under *Code Civ. Proc. § 904.1(a)(2)* as an order made after a judgment; plaintiff's failure to appeal fee award within 60 days of service of notice

of entry of order rendered his appeal of the fee award untimely. *Melbostad v. Fisher (2008) 165 Cal. App. 4th 987, 81 Cal. Rptr. 3d 354*

Motion for reconsideration of denial of prior motion to strike under *Code Civ. Proc. § 425.16* and new motion to strike under *Code Civ. Proc. § 425.16* were properly denied where more than 60 days had elapsed since the service of the complaint and defendant had not sought leave of court to file motion outside the time limits prescribed by statute. *Kunysz IV v. Sandler (2007) 146 Cal. App. 4th 1540, 1543, 53 Cal. Rptr. 3d 779*

[8] Application to Federal and Non-Civil Causes of Action

Trial court erred in granting defendant-city's anti-SLAPP motion in § 1983 action by attorney against city council for retaliation for attorney's exercise of constitutional rights, where, although action was based on acts by city that would qualify for protection under anti-SLAPP statute because his claims were based on investigative reports by council's surveillance subcommittee, council's hearing, and subsequent resolution adopted by council condemning him, plaintiff showed probability of success of succeeding on merits, because acts underlying his § 1983 claim were performed under color of state law; attorney made prima facie showing that his prelitigation investigation of alleged inappropriate romantic relationship between city council member and city attorney was protected by right to petition, because investigation was incidental and reasonably related to potential claim that city attorney had conflict of interest, which was claim he would have made to council or incorporated into lawsuit against city had investigation produced evidence of inappropriate romantic relationship to support it, and evidence did not conclusively establish that alleged romantic relationship and claim of conflict of interest attorney purported to investigate were sham; because, although attorney asserted separate causes of action based on violations of his right to petition and right of free speech, claims were identical insofar as both alleged that hiring investigator was protected conduct, and hiring investigator could also be considered protected under right of free speech; because city's alleged permissible intent to protect the privacy of public officials and impermissible intent to retaliate against attorney were inseparably intertwined since condemning attorney's protected conduct to deter future similar conduct was very means city chose to protect privacy of public officials, and because city's actions were motivated, at least in part, by his protected conduct. *Tichinin v. City of Morgan Hill (2009) 177 Cal. App. 4th 1049, 1061-1088, 99 Cal. Rptr. 3d 661*

Petition for workplace violence restraining order under *Code Civ. Proc. § 527.8* did not fall within exception to anti-SLAPP statute found in *Code Civ. Proc. § 425.16(d)*; workplace violence petition is a tool to protect city employees and not the citizenry at large as required by exception; defendants' protests constituted protected activity and city failed to show a probability of success on the merits. *City of Los Angeles v. Animal Defense League (2006) 135 Cal. App. 4th 606, 617, 37 Cal. Rptr. 3d 632*

Code Civ. Proc. § 425.16 applied to cause of action brought in state court alleging violation of federal civil rights under *42 U.S.C. § 1983*; state procedure controls when action founded on federal statute is brought in state court unless federal statute provides otherwise. *Bradbury v. Superior Court (1996) 49 Cal. App. 4th 1108, 1111, 1117-1118, 57 Cal. Rptr. 2d 207*

[9] Standing to Bring Anti-SLAPP Motion to Strike

Intervenor in lawsuit had no standing to bring anti-SLAPP motion; plaintiffs did not name insurance company intervenor as a defendant in the complaint, nor did they seek any relief against the intervenor and therefore intervenor's motion was frivolous. *Foundation for Taxpayer & Consumer Rights v. Garamendi (2005) 132 Cal. App. 4th 1375, 1392, 34 Cal. Rptr. 3d 368*

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[Reserved]

§ 376.44[Reserved]

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PART IV. PROCEDURAL CHECKLISTS

9-376 California Forms of Pleading and Practice--Annotated § 376.50

§ 376.50 Moving Defendant's Checklist--Anti-SLAPP Motion to Strike

[1] Preliminary Determinations

1. Examine complaint or cross-complaint to determine whether all or any causes of action are subject to a special motion to strike under *Code Civ. Proc. § 425.16*. Also determine if there is a bar to bringing a special motion to strike under *Code Civ. Proc. § 425.17*, or if the suit involves a malicious prosecution action and the related SLAPPback provisions under *Code Civ. Proc. § 425.18* [for checklist, *see § 376.52*].

2 Determine the date the notice of motion must be filed and the hearing date.

NOTE:

The motion may be filed within 60 days of the service of the complaint, or in the court's discretion, at any later time on terms it deems proper [*Code Civ. Proc. § 425.16(f)*].

3. The clerk of the court must schedule the motion for a hearing not more than 30 days after service of the motion unless the court's docket conditions require a later hearing [*Code Civ. Proc. § 425.16(f)*].

4. If not already done, consider other responsive pleadings, as appropriate.

NOTE:

An ordinary motion to strike extends the time to answer, but not the time to demur [*see Code Civ. Proc. § 435(c), (d)*]. Because this special motion to strike can be made up to 60 days after service of the complaint and *Code Civ. Proc. § 425.16* makes no mention of extending time to plead, although discovery is stayed [*Code Civ. Proc. § 425.16(f), (g)*], even though it can be argued that such a special motion made within 30 days after service of the complaint extends the time to answer (*see Code Civ.*

***Proc. §§ 435(c), 585(f)*, a defendant who desires to make such a motion within 30 days after service of the complaint should probably also file an answer, or should file the motion and a demurrer, unless plaintiff is willing to stipulate to an extension**.

[2] Preparation of Papers

1. Motion and Notice of Motion on Special Motion to Strike.

a. Draft motion and notice of hearing on special motion to strike [FORM: *see § 376.60*].

b. Sign special motion and notice of hearing on special motion.

2. Prepare Supporting Declaration(s) [FORM: *see § 376.61*].

3. Draft supporting memorandum [*see Cal. Rules of Ct., Rule 3.1113*]. For forms of memoranda, see California Points and Authorities, Ch. 160, *Motions to Strike* (Matthew Bender), and the General Index to that publication. See also Ch. 417, *Points and Authorities* , in this publication.

4. Prepare declaration or certificate regarding proof of service [*see Code Civ. Proc. § 1013a*; *see also* Ch. 518, *Service of Summons and Papers*].

5. Prepare proposed order [FORM: *see § 376.62*].

[3] Service and Filing

1. Serve copies of the special motion and notice of hearing and memorandum on the attorney for the party whose pleading is challenged or, if the party has no attorney, on the other party [*Code Civ. Proc. § 1005, 1011, 1012, 1015*; *Cal. Rules of Ct., Rules 1.6(19), 3.1100, 3.1103(b)*].

a. Service is usually made in person or by mail [*see Code Civ. Proc. §§ 1011, 1012*].

b. Service in person must be completed at least 16 court days before the selected hearing date [*see Code Civ. Proc. § 1005(b)*].
(1) When service is by mail, this 16-day period for completing service before the hearing date is extended by five calendar days if the place of mailing and the place of address are within California, by 10 calendar days if either of these places is outside California but within the United States, or by 20 calendar days if either of these places is outside the United States [*see Code Civ. Proc. § 1005(b)*].

(2) When service is by fax transmission, express mail, or another form of overnight delivery, this 16-day period is extended by two calendar days [*see Code Civ. Proc. § 1005(b)*]. An extension period of two court days may apply in the case of electronic service [*see Code Civ. Proc. § 1010.6(a)(6)*; for discussion, *see Ch. 518, Service of Summons and Papers, § 518.41[8]*].

2. File the originals of the special motion and notice of hearing on the special motion to strike and accompanying papers with the clerk of the court in which the action is pending [*see Code Civ. Proc. §§ 1005(b), 1013a*].

NOTE:

A motion on all the grounds stated in the written notice is deemed to have been made and to be pending before the court for all purposes on the due service and filing of the notice of motion [*Code Civ. Proc. § 1005.5*].

a. Pay filing fee.

b. Generally, it is good practice to submit the office copy to the clerk to be stamped together with the original, to serve as a check on the contents of the original.

c. File proof of service no later than five calendar days before the hearing date [*see Cal. Rules of Ct., Rule 3.1300(c)*].

3. Transmit to the Judicial Council, by e-mail or fax, a copy of the endorsed-filed caption page of the motion [*see Code Civ. Proc. § 425.16(j)(1)*].

[4] Response to Plaintiff's Declarations and Memorandum

1. File response if appropriate.

a. Examine declarations submitted by plaintiff to establish a probability that plaintiff would prevail on the claim to determine if any evidentiary objections exist to the declarations.

b. If evidentiary objections exist, consider preparing written objections to the evidence to be submitted to the court in a separate document, reply memorandum or both, similar to the manner for objecting to evidence in papers submitted on a summary judgment motion [*see Cal. Rules of Ct., Rule 3.1352* (party desiring to object in summary judgment motion must either submit written objections pursuant to Rule 3.1354, or arrange for court reporter to be present at hearing); *Cal. Rules of Ct., Rule 3.1354* (written objections to evidence in support of motion for summary judgment must be (a) served and filed separately from the other papers in opposition to the motion, (b) identify the name of the document in which the specific material objected to is located, (c) state the exhibit, title, page, and line number of the material objected to, (d) quote or set forth the objectionable statement or material, (e) state the grounds for each objection to that statement or material, and (f) be served and filed at the same time as the objecting party's opposition papers are served and filed)].

c. Examine the memorandum of points and authorities, if any, filed in response to the motion to strike.

d. Counsel may wish to file a reply memorandum, with proof of service, in opposition to plaintiff's opposing memorandum. Local practice may vary, but usually this reply memorandum should be filed directly with the clerk of the law and motion department or division, rather than in the office of the court clerk, so that the court will have sufficient time to consider the memorandum prior to the hearing on the motion. Counsel should check local court rules and practices to determine if there are any local filing or other requirements concerning the reply memorandum. For example, local court rules may impose limitations on when and with whom a reply memorandum may be filed.

2. Serve and file any response papers.

All reply papers must be filed and a copy served at least five court days before the time appointed for the hearing. All reply papers must be served by personal delivery, facsimile transmission, express mail, or other means consistent with the provisions of *Code Civ. Proc. §§ 1010, 1011, 1012*, and *1013*, and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the reply papers are filed [*Code Civ. Proc. § 1005(b), (c)*; *Cal. Rules of Ct., Rule 3.1300(a)*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to *Code Civ. Proc. § 1010.6*)]. Unless otherwise provided by local court rule, all papers relating to a law and motion proceeding must be filed in the clerk's office [*Cal. Rules of Ct., Rule 3.1302(a)*].

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§ 376.51 Opposing Party's Checklist--Anti-SLAPP Motion to Strike

[1] Preliminary Determinations

1. On receipt of the special motion and notice of hearing on the special motion to strike, supporting declaration(s) and supporting memorandum, ascertain if it was timely served and if the motion and notice is in any way defective.

2. Read the supporting papers to determine if the defendant has met defendant's initial burden of making a prima facie showing that the plaintiff's cause(s) of action arose from defendant's acts in furtherance of defendant's rights of petition or free speech under the United States or California Constitution in connection with a public issue. For discussion of defendant's required showing, see *§ 376.20[1], above*. Verify the citations to determine whether they support the points or statements for which they are cited. For discussion of making evidentiary objections, see *discussion under § 376.50[4]*.

NOTE:

Points may be inaccurately stated or not supported by the authorities cited. Moreover, a case cited may superficially support the point in that it makes an identical or similar statement, but may actually hold that the statement is not applicable to the facts of that case or that the case presents an exception to the rule. In that situation, the case is usually not authority for the statement made but, rather, an authority in opposition to it.

3. If the motion is well taken, determine the advisability of not opposing it or of stipulating that the motion be granted with leave to amend the pleading.

[2] Preparation of Papers

1. Prepare opposing declarations to establish a probability that plaintiff will prevail on the claim supported by admissible evidence. For prima facie showing that the plaintiff must make to prevail

concerning a special motion to strike under *Code Civ. Proc. § 425.16* and evidentiary rules, see *discussion under § 376.20[3][a]*.

2. Prepare an opposing memorandum of points and authorities. For forms of memoranda, see California Points and Authorities, Ch. 160, *Motions to Strike* (Matthew Bender), and the General Index to that publication. See also Ch. 417, *Points and Authorities* , in this publication.

3. Prepare the certificate, affidavit, or declaration, as the case may be, of service [*Code Civ. Proc. §§ 1013(b), 1013a, 2009, 2015.5*].

[3] Service and Filing

1. Serve copies of the opposing declarations and memorandum on the moving party's attorney or, if none, on the moving party [*Code Civ. Proc. §§ 1005(b), 1011, 1012, 1015*; *Cal. Rules of Ct., Rules 1.6(19), 3.1100, 3.1103*].

NOTE:

Unless otherwise ordered or specifically provided by law, copies of all papers opposing a motion must be served at least nine court days before the hearing. All papers opposing a motion must be served by personal delivery, facsimile transmission, express mail, or other means consistent with the provisions of *Code Civ. Proc. §§ 1010, 1011, 1012,* and *1013,* and reasonably calculated toensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers are filed [*Code Civ. Proc. § 1005(b), (c)*; *Cal. Rules of Ct., Rule 3.1300*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013,* it is silent as to *Code Civ. Proc. § 1010.6*)].

2. File the original opposing papers with the clerk of the court in which the action is pending. The papers may be delivered in person or by mail.

a. Unless otherwise ordered or specifically provided by law, all papers opposing a motion must be filed at least nine court days before the time appointed for the hearing [*Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to *Code Civ. Proc. § 1010.6*)].

b. Unless otherwise provided by local rule, all papers relating to a law and motion proceeding must be filed in the clerk's office [*Cal. Rules of Ct., Rule 3.1302(a)*]. If the court has a law and motion department or division, local court rule may require that the declarations and memorandum be filed with the clerk thereof, rather than with the court clerk, to ensure that the judge has an opportunity to consider it before the hearing.

3. Transmit to the Judicial Council, by e-mail or fax, a copy of the endorsed-filed caption page of the opposition [*see Code Civ. Proc. § 425.16(j)(1)*].

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§ 376.52 SLAPPback Motion to Strike Checklist

[1] Moving Party's Checklist

[a] Preliminary Determinations

1. Examine complaint or cross-complaint to determine whether it qualifies as a "SLAPPback" under *Code Civ. Proc. § 425.18*. The complaint or cross-complaint must contain a cause of action for malicious prosecution or abuse of process arising from the filing or maintenance of a prior cause of action that was dismissed pursuant to a special motion to strike [*Code Civ. Proc. § 425.18(b)(1)*].

2. If action is a "SLAPPback," examine complaint or cross-complaint to determine whether all or any causes of action are subject to a special motion to strike under *Code Civ. Proc. § 425.16*.

3. Determine the date the notice of motion must be filed and the hearing date.

NOTE:

The motion may be filed within 120 days of the service of the complaint, or in the court's discretion, within six months of the service of the complaint or in the court's discretion, at any later time in extraordinary cases due to no fault of the defendant and upon written findings of the court stating the extraordinary case and circumstance [*Code Civ. Proc. § 425.18(d)(1)*].

4. The clerk of the court must schedule the motion for a hearing not more than 30 days after service of the motion unless the court's docket conditions require a later hearing [*Code Civ. Proc. § 425.18(d)(2)*].

5. If not already done, consider other responsive pleadings, as appropriate.

NOTE:

An ordinary motion to strike extends the time to answer, but not the time to demur [*see Code Civ. Proc. § 435(c), (d)*]. Because this special motion to strike can be made up to 120 days after service of the complaint and *Code Civ. Proc. § 425.18* makes no mention of extending time to plead, even though it can be argued that such a special motion made within 30 days after service of the complaint extends the time to answer (*see Code Civ. Proc. §§ 435(c), 585(f),* a defendant who desires to make such a motion within 30 days after service of the complaint should probably also file an answer, or should file the motion and a demurrer, unless plaintiff is willing to stipulate to an extension.

[b] Preparation of Papers

1. Motion and Notice of Motion on Special Motion to Strike SLAPPback.

a. Draft motion and notice of hearing on special motion to strike [FORM: *see § 376.62*].

b. Sign special motion and notice of hearing on special motion.

2. Prepare Supporting Declaration(s) [FORM: *see § 376.61*]. If applicable, include in declaration facts demonstrating action is not a SLAPPback. For discussion of SLAPPback actions, see *§ 376.17*.

3. Draft supporting memorandum [*see Cal. Rules of Ct., Rule 3.1113*]. For forms of memoranda, see California Points and Authorities, Ch. 160, *Motions to Strike* (Matthew Bender), and the General Index to that publication. See also Ch. 417, *Points and Authorities* , in this publication.

4. Prepare declaration or certificate regarding proof of service [*see Code Civ. Proc. § 1013a*; *see also* Ch. 518, *Service of Summons and Papers*].

5. Prepare proposed order.

[c] Service and Filing

1. Serve copies of the special motion and notice of hearing and memorandum on the attorney for the party whose pleading is challenged or, if the party has no attorney, on the other party [*Code Civ. Proc. § 1005, 1011, 1012, 1015*; *Cal. Rules of Ct., Rules 1.6(19), 3.1100, 3.1103(b)*].

a. Service is usually made in person or by mail [*see Code Civ. Proc. §§ 1011, 1012*].

b. Service in person must be completed at least 16 court days before the selected hearing date [*see Code Civ. Proc. § 1005(b)*].
(1) When service is by mail, this 16-day period for completing service before the hearing date is extended by five calendar days if the place of mailing and the place of address are within California, by 10 calendar days if either of these places is outsideCalifornia but within the United States, or by 20 calendar days if either of these places is outside the United States [*see Code Civ. Proc. § 1005(b)*].

(2) When service is by fax transmission, express mail, or another form of overnight delivery, this 16-day period is extended by two calendar days [*see Code Civ. Proc. § 1005(b)*]. An extension period of two court days may apply in the case of electronic service [*see Code Civ. Proc. § 1010.6(a)(6)*; for discussion, *see Ch. 518, Service of*

Summons and Papers, § 518.41[8]].

2. File the originals of the special motion and notice of hearing on the special motion to strike and accompanying papers with the clerk of the court in which the action is pending [*see Code Civ. Proc. §§ 1005(b), 1013a*].

NOTE:

Unless otherwise ordered or specifically provided by law, copies of all papers opposing a motion must be served at least nine court days before the hearing. All papers opposing a motion must be served by personal delivery, facsimile transmission, express mail, or other means consistent with the provisions of *Code Civ. Proc. §§ 1010, 1011, 1012,* and *1013,* and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers are filed [*Code Civ. Proc. § 1005(b), (c)*; *Cal. Rules of Ct., Rule 3.1300*; *cf. Code Civ. Proc. § 1010.6(a)(6)* two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013,* it is silent as to *Code Civ. Proc. § 1010.6*).].

3. Transmit to the Judicial Council, by e-mail or fax, a copy of the endorsed-filed caption page of the opposition [*see Code Civ. Proc. § 425.16(j)(1)*].

[d] Response to Plaintiff's Declarations and Memorandum

1. File response if appropriate.

a. Examine declarations submitted by plaintiff to establish a probability that plaintiff would prevail on the claim to determine if any evidentiary objections exist to the declarations.

b. If evidentiary objections exist, consider preparing written objections to the evidence to be submitted to the court in a separate document, reply memorandum or both, similar to the manner for objecting to evidence in papers submitted on a summary judgment motion [*see Cal. Rules of Ct., Rule 3.1352* (party desiring to object in summary judgment motion must either submit written objections pursuant to Rule 3.1354, or arrange for court reporter to be present at hearing); *Cal. Rules of Ct., Rule 3.1354* (written objections to evidence in support of motion for summary judgment must be (a) served and filed separately from the other papers in opposition to the motion; (b) identify the name of the document in which the specific material objected to is located; (c) state the exhibit, title, page, and line number of the material objected to; (d) quote or setforth the objectionable statement or material; (e) state the grounds for each objection to that statement or material; and (f) be served and filed at the same time as the objecting party's opposition papers are served and filed)].

c. Examine the memorandum, if any, filed in response to the special motion to strike.

d. Counsel may wish to file a reply memorandum, with proof of service, in opposition to plaintiff's opposing memorandum. Local practice may vary, but usually this reply memorandum should be filed directly with the clerk of the law and motion department or division, rather than in the office of the court clerk, so that the court will have sufficient time to consider the memorandum prior to the hearing on the motion. Counsel should check local court rules and practices to determine if there are any local filing or other

requirements concerning the reply memorandum. For example, local court rules may impose limitations on when and with whom a reply memorandum may be filed.

2. Serve and file any response papers.

All reply papers must be filed and a copy served at least five court days before the time appointed for the hearing. All reply papers must be served by personal delivery, facsimile transmission, express mail, or other means consistent with the provisions of *Code Civ. Proc. §§ 1010*, *1011*, *1012*, and *1013*, and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the reply papers are filed [*Code Civ. Proc. § 1005(b), (c)*; *Cal. Rules of Ct., Rule 3.1300(a)*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to *Code Civ. Proc. § 1010.6*)]. Unless otherwise provided by local court rule, all papers relating to a law and motion proceeding must be filed in the clerk's office [*Cal. Rules of Ct., Rule 3.1302(a)*].

[2] Opposing Party's Checklist

[a] Preliminary Determinations

1. On receipt of the special motion and notice of hearing on the special motion to strike, supporting declaration(s) and supporting memorandum, ascertain if it was timely served and if the motion and notice is in any way defective.

2. Determine whether facts essential to justify opposition to the motion exist, but cannot be presented due to a lack of discovery. If so, consider filing an ex parte application for a continuance to obtain necessary discovery.

3. Read the supporting papers to determine if the defendant has met defendant's initial burden of making a prima facie showing that the plaintiff's cause(s) of action arose from defendant's acts in furtherance of defendant's rights of petition or free speech under the United States or California Constitution in connection with a public issue. For discussion of defendant's required showing, see *§ 376.20, above*. Verify the citations to determine whether they support the points or statements for which they are cited. For discussion of making evidentiary objections, see *discussion under § 376.50[4]*.

NOTE:

Points may be inaccurately stated or not supported by the authorities cited. Moreover, a case cited may superficially support the point in that it makes an identical or similar statement, but may actually hold that the statement is not applicable to the facts of that case or that the case presents an exception to the rule. In that situation, the case is usually not authority for the statement made but, rather, an authority in opposition to it.

4. If the motion is well taken, determine the advisability of not opposing it or of stipulating that the motion be granted with leave to amend the pleading.

[2] Preparation of Papers

1. Prepare opposing declarations to establish a probability that plaintiff will prevail on the claim supported by admissible evidence. For prima facie showing that the plaintiff must make to prevail concerning a special motion to strike under *Code Civ. Proc. § 425.16* and evidentiary rules, see

discussion under § 376.20[3][a].

2. If moving party claims action is not a SLAPPback, include in declaration facts demonstrating action is a SLAPPback. For discussion of SLAPPback actions, see *§ 376.17*.

3. Prepare an opposing memorandum. For forms of memoranda, see California Points and Authorities, Ch. 160, *Motions to Strike* (Matthew Bender), and the General Index to that publication. See also Ch. 417, *Points and Authorities* , in this publication.

4. Prepare the certificate, affidavit, or declaration, as the case may be, of service [*Code Civ. Proc. §§ 1013(b), 1013a, 2009, 2015.5*].

5. If it appears that facts essential to justify opposition to the motion exist, but cannot then be reasonably presented, file an ex parte application for a continuance to obtain necessary discovery.

[3] Service and Filing

1. Serve copies of the opposing declarations and memorandum on the moving party's attorney or, if none, on the moving party [*Code Civ. Proc. §§ 1005(b), 1011, 1012, 1015*; *Cal. Rules of Ct., Rules 1.6(19), 3.1100, 3.1103*].

NOTE:

Unless otherwise ordered or specifically provided by law, copies of all papers opposing a motion must be served at least nine court days before the hearing. All papers opposing a motion must be served by personal delivery, facsimile transmission, express mail, or other means consistent with the provisions of *Code Civ. Proc. §§ 1010, 1011, 1012,* and *1013,* and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers are filed [*Code Civ. Proc. § 1005(b), (c)*; *Cal. Rules of Ct., Rule 3.1300*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013,* it is silent as to *Code Civ. Proc. § 1010.6*)].

2. File the original opposing papers with the clerk of the court in which the action is pending. The papers may be delivered in person or by mail.

a. Unless otherwise ordered or specifically provided by law, all papers opposing a motion must be filed at least nine court days before the time appointed for the hearing [*Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service; although *Code Civ. Proc. § 1005(b)* expressly excludes extensions under *Code Civ. Proc. § 1013*, it is silent as to *Code Civ. Proc. § 1010.6*)].

b. Unless otherwise provided by local rule, all papers relating to a law and motion proceeding must be filed in the clerk's office [*Cal. Rules of Ct., Rule 3.1302(a)*]. If the court has a law and motion department or division, local court rule may require that the declarations and memorandum be filed with the clerk thereof, rather than with the court clerk, to ensure that the judge has an opportunity to consider it before the hearing.

3. Transmit to the Judicial Council, by e-mail or fax, a copy of the endorsed-filed caption page of the opposition [*see Code Civ. Proc. § 425.16(j)(1)*].

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Chapter 376 MOTIONS TO STRIKE: ANTI-SLAPP
PART IV. PROCEDURAL CHECKLISTS

9-376 California Forms of Pleading and Practice--Annotated § 376.53-376.59

[Reserved]

§ 376.53[Reserved]

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9-376 California Forms of Pleading and Practice--Annotated § 376.60

§ 376.60 Special Motion to Strike All or Portion of Complaint Alleging Cause of Action Brought to Chill the Valid Exercise of the Constitutional Rights of Freedom of Speech or Petition for the Redress of Grievances [Code Civ. Proc. § 425.16]--Anti-SLAPP Special Motion to Strike and Notice of Hearing on Motion

[1] FORM Notice of Motion and Motion for Order to Strike Entire Pleading [Code Civ. Proc. §§ 435, 436]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	NO. _____
Plaintiff, vs. _____ [*name*],	)	MOTION AND NOTICE OF HEARING ON MOTION FOR CODE CIV. PROC. § 425.16 SPECIAL MOTION TO STRIKE (ANTI-SLAPP)
Defendant(s).	)	_____ [*specify, e.g.*, COMPLAINT FOR INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE][, SUPPORTING _____ (AFFIDAVIT *or* DECLARATION) OF _____ _____ (*name*), AND SUPPORTING MEMORANDUM]
	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____(Department *or* Division) _____] of this court, located at _____ [*street address*], _____ [*city*],_____ [*specify party, e.g.,* defendant, _____ (*name*)], will, and hereby does, move for an order pursuant to *Code of Civil Procedure Section 425.16* striking _____ [all *or specify portions*] of the_____[*specify, e.g.,* complaint *or* second cause of action], denominated as an action for _____ [*specify, e.g.,* interference with prospective economic advantage]. The motion will be made on the ground that the cause(s) of action alleged against the defendant arise(s) from an act of the defendant in furtherance of the defendant's right of _____ [*specify, e.g.,* free speech] under the United States or California Constitution in connection with a public issue and that such right will be chilled if the _____ [*specify, e.g.,* complaint *or* second cause of action] is allowed to stand and plaintiff is allowed to continue prosecuting it.

The motion will be based on this motion and notice of hearing, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated:_____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

SUPPORTING DECLARATION OF _____ [*name*]
[*Add declaration supporting motion.*]

SUPPORTING MEMORANDUM
[*Add memorandum supporting motion.*]

[2] Use of Form

The form of motion and notice of hearing on a special motion to strike in [1], *above*, is for use by a defendant seeking to have a SLAPP suit (that is, strategic lawsuit against public participation) stricken. A special motion to strike under *Code Civ. Proc. § 425.16* is available to a defendant when an alleged cause of action against the defendant arises from an act of the defendant in furtherance of the defendant's right of petition or free speech under the United States or California Constitution in connection with a public issue [*see Code Civ. Proc. § 425.16(b), (h)*]. For the purpose of the statute, act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue is defined in *Code Civ. Proc. § 425.16(e)*.

With appropriate modifications, this form may also be used by a cross-defendant or respondent seeking to have a SLAPP suit stricken [*see Code Civ. Proc. § 425.16(h)*].

For discussion of SLAPP suits (Strategic Lawsuit Against Public Participation), see *§ 376.12*.

An ordinary motion to strike extends the time to answer, but not the time to demur [*see Code Civ. Proc. § 435(c), (d)*]. Because this special motion to strike can be made up to 60 days after service of the complaint and *Code Civ. Proc. § 425.16* makes no mention of extending time to plead, although discovery is stayed [*Code Civ. Proc. § 425.16(f), (g)*], even though it can be argued that such a special motion made within 30 days after service of the complaint extends the time to answer [*see Code Civ. Proc. §§ 435(c), 585(f)*], a defendant who desires to make such a motion within 30 days after service of the complaint should probably also file an answer, or should file the motion and a demurrer, unless plaintiff is willing to stipulate to an extension.

[3] Time for Filing and Hearing Motion

The special motion to strike may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time on terms it deems proper [*Code Civ. Proc. § 425.16(f)*].

The clerk of the court must schedule the motion for a hearing not more than 30 days after service of the motion unless the docket conditions of the court require a later hearing [*Code Civ. Proc. § 425.16(f)*].

[4] Accompanying Papers

A supporting memorandum must be filed and a copy served with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[5] Notification to Judicial Council

When a party files a special motion to strike under *Code Civ. Proc. § 425.16*, the party must promptly transmit a copy of the endorsed-filed caption page of the motion to the Judicial Council by e-mail or fax [*Code Civ. Proc. § 425.16(j)(1)*]. For further discussion, *see § 376.18[2]*.

[6] Required Prima Facie Showing by Defendant

The defendant pursuing an anti-SLAPP motion must make an initial prima facie showing that plaintiff's suit arose from an act in furtherance of defendant's right of petition or free speech. A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in *Code Civ. Proc. § 425.16(e)* [*Braun v. Chronicle Publishing Co. (1997) 52 Cal. App. 4th 1036, 1042-1043, 61 Cal. Rptr. 2d 58]* . For further discussion of defendant's required showing, see *§ 376.20*.

[7] Attorney's Fees

In any action subject to *Code Civ. Proc. § 425.16(b)*, a prevailing defendant is entitled to recover his or her attorney's fees and costs. If the court finds that the motion to strike is frivolous or is solely intended to cause unnecessary delay, the court must award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to *Code Civ. Proc. § 128.5* [*Code Civ. Proc. § 425.16(c)*]. For further discussion of attorney fees, see *§ 376.22*.

[8] Stay of Discovery While Motion Is Pending

All discovery proceedings in the action are stayed on the filing of a notice of motion made pursuant to *Code Civ. Proc. § 425.16*. The stay of discovery remains in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may, however, order that specified discovery be conducteddespite this requirement [*Code Civ. Proc. § 425.16(g)*]. For further discussion of discovery, see *§ 376.19*.

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9-376 California Forms of Pleading and Practice--Annotated § 376.61

§ 376.61 Special Motion to Strike All or Portion of Complaint Alleging Cause of Action Brought to Chill the Valid Exercise of the Constitutional Rights of Freedom of Speech or Petition for the Redress of Grievances [Code Civ. Proc. § 425.16]--Declaration in Support of Anti-SLAPP Special Motion to Strike

[1] FORM Notice of Motion and Motion for Order Striking Portion of Pleading [Code Civ. Proc. §§ 435, 436]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	NO. _____
Plaintiff, vs. _____ [*name*],	)	DECLARATION OF _____
[and DOES I through _____,]	)	_____ [*name*] IN SUPPORT OF
Defendant(s).	)	DEFENDANT'S CODE CIV. PROC. § 425.16 SPE-
	)	CIAL MOTION TO STRIKE (ANTI-SLAPP)
	)	_____
	)	_____ [*specify, e.g.*, COMPLAINT
	)	FOR INTERFERENCE WITH PROSPECTIVE
	)	ECONOMIC ADVANTAGE]
	)	Date: _____
		Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the

courts of California and the attorney of record herein for defendant _____ [*name*] and hereby make this declaration in support of defendant's special motion to strike _____ [*specify, e.g.*, complaint for interference with prospective economic advantage].

2. _____ [*Here, and in subsequent paragraphs, set forth applicable facts to which declarant is competent to testify, or of which court must take judicial notice, or of which court may take judicial notice with request that it do so. If additional facts not within declarant's personal knowledge and not subject tojudicial notice are required, secure from persons competent to testify to those facts additional declarations setting forth those facts, and attach those declarations to this declaration.*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form of declaration in [1], *above*, is for use to support a special motion to strike a SLAPP suit (that is, strategic litigation against public participation) [*see Code Civ. Proc. § 425.16*; *Code Civ. Proc. §§ 2003* ("affidavit defined"), 2009, (use of affidavit in support of motion), 2015.5 (use of declaration in lieu of affidavit)]. For the related form of motion and notice of hearing on the motion, see *§ 376.60*. This form may be modified for use as a declaration in opposition to a special motion to strike.

For discussion of the prima facie showing that the defendant must make to prevail on a special motion to strike under *Code Civ. Proc. § 425.16*, see *discussion under § 376.20[3][a]*.

For discussion of declarations in support of motions generally, see Ch. 372, *Motions and Orders* .

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9-376 California Forms of Pleading and Practice--Annotated § 376.62

§ 376.62 Special Motion to Strike All or Portion of SLAPPback Complaint [Code Civ. Proc. § 425.18]

[1] FORM Order Granting or Denying Motion to Strike Pleading [Code Civ. Proc. §§ 435, 436]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	NO. _____
Plaintiff,	)	MOTION AND NOTICE OF HEARING ON MO-
vs.	)	TION FOR CODE CIV. PROC. § 425.18 SLAPP-
_____ [*name*],	)	BACK SPECIAL MOTION TO STRIKE
[and DOES I through _____,]	)	_____ [*specify, e.g.*, COMPLAINT
Defendant(s).	)	FOR MALICIOUS PROSECUTION]
	)	[SUPPORTING _____
	)	_____ (AFFIDAVIT *or* DECLAR-
	)	ATION) OF _____
	)	_____ (*name*), AND SUPPORTING
	)	MEMORANDUM]
		[Telephone Appearance]
		Date: _____
		Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.*, plaintiff] _____ [*name*] and to his/her attorney of

record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____] of this court, located at _____ [*street address*], _____ [*city*],_____ [*specify party, e.g.*, defendant, _____ (*name*)], will, and hereby does, move for an order pursuant to *Code of Civil Procedure Section 425.18* striking _____ [all *or specify portions*] of the _____ [*specify, e.g.*, complaint *or* second cause of action], denominated as an action for _____ [*specify, e.g.*, maliciousprosecution *or* abuse of process]. The motion will be made on the ground that the cause(s) of action alleged against the defendant arise(s) from the filing or maintenance or a prior cause of action identified as _____ [*specify prior cause of action, e.g.*, Smith v. Jones, File # 12345, filed on January 1, 2007] that has been dismissed pursuant to *Code of Civil Procedure Section 425.16*.

The motion will be based on this motion and notice of hearing, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated:_____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant_____ [*name*]

SUPPORTING DECLARATION OF _____ [*name*]
[*Add declaration supporting motion.*]

SUPPORTING MEMORANDUM
[*Add memorandum supporting motion.*]

[2] Use of Form

The form of motion and notice of hearing on a special motion to strike in [1], *above*, is for use by a defendant seeking to have a SLAPPback suit stricken (that is, strategic litigation against public participation, containing a cause of action for malicious prosecution or abuse of process, arising from the filing or maintenance of a prior cause of action dismissed pursuant to the anti-SLAPP statute). A special motion to strike under *Code Civ. Proc. § 425.16* is available to a defendant when an alleged cause of action against the defendant arises from an act of the defendant in furtherance of the defendant's right of petition or free speech under the United States or California Constitution in connection with a public issue [*see Code Civ. Proc. § 425.16(b), (h)*]. SLAPPback suits are defined in *Code Civ. Proc. § 425.18(b)(1)*.

For discussion of SLAPPback suits, see *§ 376.17[2]*.

An ordinary motion to strike extends the time to answer, but not the time to demur [*see Code Civ. Proc. § 435(c), (d)*]. Because this special motion to strike can be made up to 120 days after service of the complaint and *Code Civ. Proc. § 425.16* makes no mention of extending time to plead, even though it can be argued that such a special motion made within 30 days after service of the complaint extends the time to answer [*see Code Civ. Proc. §§ 435(c), 585(f)*], a defendant who desires to make such a motion within 30 days after service of the complaint should probably also file an answer, or should file the motion and a demurrer, unless plaintiff is willing to stipulate to an extension.

[3] Time for Filing and Hearing Motion

A motion to strike a SLAPPback can be made at any time within 120 days of the service of the complaint. At the court's discretion, the motion may be made within six months of the service of the complaint or, in extraordinary cases due to no fault of the defendant, the motion may be made at any later time at the court's discretion [*Code Civ. Proc. § 425.18(d)(1)*].

The clerk of the court must schedule the motion for a hearing not more than 30 days after service of the motion unless the docket conditions of the court require a later hearing [*Code Civ. Proc. § 425.18(d)(2)*].

[4] Accompanying Papers

A supporting memorandum must be filed and a copy served with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[5] Attorney's Fees

The attorney's fees provision of *Code Civ. Proc. § 425.16(c)* does not apply to a special motion to strike a SLAPPback, and therefore a prevailing defendant is not entitled to attorney's fees [*Code Civ. Proc. § 425.18(c)*]. However, if the court finds that a special motion to strike a SLAPPback is frivolous or solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a prevailing plaintiff [*Code Civ. Proc. § 425.18(f)*.

[6] No Stay of Discovery in SLAPPback Action

The discovery stay imposed by the filing of an anti-SLAPP motion to strike does not apply to anti-SLAPPback motions to strike [*Code Civ. Proc. § 425.18(c)*]. Additionally, a party opposing a special motion to strike a SLAPPback may file an ex parte application for a continuance to obtain necessary discovery if it appears that facts essential to justify opposition to the motion may exist, but cannot then be presented [*Code Civ. Proc. § 425.18(e)*].

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§ 377.12 Common Law Right

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[2] Statutory Exceptions for State Prisoners, Parolees, Probationers, and Sex Offenders

§ 377.13 Purpose of Statutory Procedure

§ 377.14 Statutory Procedure

[1] Jurisdiction and Venue of Petition to Change Name

[2] Contents of Petition

[3] Order to Show Cause

[4] Publication

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§ 377.15 Minors

[1] Common Law Right of Parent to Change Name on Minor's Behalf

[2] Petition

[a] Special Petition Requirements Apply

[b] Who May Sign Petition on Behalf of Minor

[c] Information Relating to Parents, Relatives, or Guardian,

[d] Minor Relinquished To Adoption Agency

[e] Venue When Petitioner Is Guardian Appointed by Juvenile or Probate Court

[3] Notice to Nonpetitioning Parent

[a] When Petition Is Filed by Other Parent

[b] When Petition Is Filed by Guardian

[4] Petition by Nonrelative

[5] Parental Disputes

[6] Required Findings by Court When Application Filed by Guardian

§ 377.16 Action Under Uniform Parentage Act

[1] Applicable Procedure

[2] Service of Application

[3] Notice of Hearing

[4] Conduct of Hearing

§ 377.17 Objections

[1] In General

[2] Sufficient Objections

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§ 377.18 Writ of Mandate to Compel Hearing

§ 377.19 Appeal

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[1] Fraud

[2] Minor Applicant's Nonpetitioning Parent in or Just Discharged From Military

§ 377.21 Restoration of Party's Former Name

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§ 377.24 Sex Change

[1] Petition to Change Name and Issue New Birth Cerificate

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§ 377.25 Naturalization

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§ 377.28 Corporate Name Change

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[1] Proceeding to Change Name

[a] Individual

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§ 377.43 Local Court Rules

[1] Los Angeles County

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§ 377.44 Decisions

[1] Legal Definition of Name

[2] Right to Name Change

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§ 377.71 Attachment to Petition--Name and Information About Person Whose Name Is to Be Changed [Code Civ. Proc. § 1276; Cal. Judicial Council Form NC-110]

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§ 377.71A Attachment to Petition--Declaration of Physician Documenting Change of Gender Through Surgical Treatment [Health & Safety Code §§ 103425, 103430; Cal. Judicial Council Form NC-210/NC-310]

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[1] FORM

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[1] FORM

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103425-103440; Cal. Judicial Council Form NC-300]

[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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[1] FORM

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[1] FORM

[2] Use of Form

§ 377.83 Address Confidentiality Program--Declaration in Support of Application to File Documents Under Seal in Name Change Proceeding Under Address Confidentiality Program [Code Civ. Proc. § 1277; Gov. Code § 6205 et seq.; Cal. Judicial Council Form NC-420]

[1] FORM

[2] Use of Form

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Proceeding Under Address Confidentiality Program [Code Civ. Proc. § 1277; Gov. Code § 6205 et seq.; Cal. Judicial Council Form NC-425]

[1] FORM

[2] Use of Form

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§ 377.01 Scope of Chapter

This chapter discusses methods of changing the names of individuals, corporations, and unincorporated associations. The chapter contains the following forms relating to changing the names of individuals:

- Mandatory Judicial Council forms of petitions for change of name, and for change of name combined with gender change [*§§ 377.70, 377.70A*].

- Mandatory Judicial Council forms of attachment to the petition, for providing information about the person whose name is to be changed [*§ 377.71*] and information about the petitioner when he or she is the guardian of the person whose name is to be changed [*§ 377.72*].

- An optional Judicial Council form for a physician's declaration documenting the petitioner's gender change, for use with a petition for a change of name or a petition for the issuance of a new birth certificate [§ 377.71A].

- Mandatory Judicial Council forms of orders to show cause why a change of name should not be granted [*§§ 377.73, 377.73A*].

- A mandatory Judicial Council form of proof of service of the order to show cause [*§ 377.74*].

- Mandatory Judicial Council forms of decrees changing a person's name [*§§ 377.75, 377.75A, 377.76*].

- Optional Judicial Council forms for obtaining a change of gender and the issuance of a new birth certificate apart from a name-change proceeding [§§ 377.77-377.79].

- Forms for use in obtaining a confidential name change under the "Safe at Home" address confidentiality program for victims of domestic violence, sexual assault, and stalking [§§ 377.80-377.84].

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§ 377.02 Cross References

For discussion of trade names and forms for use in actions for infringement on trade names, see Ch. 549, *Trademarks and Trade Names* .

For forms for use in establishing the fact of birth and obtaining delayed birth records, see Ch. 99, *Birth and Death, Establishing Fact of.*

For discussion and forms relating to establishing the identity of a person in a recorded chain of title when the person's name changed between their receipt and transfer of the property, see Ch. 299, *Identity, Establishment of.*

Restoration of a woman's former or birth name under *Fam. Code § 2080 et seq.* in the course of a dissolution of marriage proceeding is discussed in Ch. 221, *Dissolution of Marriage: Procedure.*

Changes of name and the issuance of new birth certificates for adopted children are discussed in Ch. 12, *Adoptions: Nature and Effect* .

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[Reserved]

§§ 377.03[Reserved]

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§ 377.10 Governing Law

The statutory procedure for changing the name of an individual is generally governed by *Code Civ. Proc. § 1275 et seq.*, with certain exceptions applying to applications to change a name under the Uniform Parentage Act (*Fam. Code § 7600 et seq.*) [*see Fam. Code § 7638*, and discussion under *§ 377.16*].

An individual also has a common law right to change his or her name without legal proceedings, and this right has not been abrogated beyond certain statutory exceptions that apply to state prisoners, persons under the jurisdiction of the Department of Corrections, and persons required to register as sex offenders [*Code Civ. Proc. § 1279.5*; *see § 377.12[2]*]. The statutory procedure exists merely to make the change a matter of public record [*In re Ross (1937) 8 Cal. 2d 608, 609, 67 P.2d 94]* .

Changes of name and the issuance of new birth certificates for individuals born in California who have undergone a sex change are governed by *Health & Safety Code § 103425 et seq.*

Changes of name as part of naturalization proceedings are governed by *8 U.S.C. §§ 1447(f)* and *1454(c)* and *Gov. Code § 69847*.

The effect of name changes on elections is governed by *Elec. Code §§ 2115, 13104, 14218*.

Penal provisions for the misuse of another's name or false personation include *Penal Code §§ 528, 529, 529.5, 529a*, and *530*.

Changes in articles of incorporation, including corporate name changes, are governed by *Corp. Code §§ 900-911*. Restrictions on corporate names and provisions for injunction against the use of improper names by corporations are set forth in *Corp. Code §§ 201(a), (b)* and *202(a)*. Limited partnerships' name changes are governed by *Corp. Code §§ 15622* (eff. until January 1, 2010), 15902.02 (eff. January 1, 2008). Unincorporated associations' name changes are governed by *Corp. Code § 18200(d)*.

The Name Equality Act of 2007 [*see* 2007 Stats., ch. 567] allows persons entering into a marriage or a domestic

partnership to change their middle or last names by making an appropriate election in the marriage license application or Declaration of Domestic Partnership form, without the need to petition the superior court for a change of name [*Fam. Code §§ 298.6, 306.5*]. For further discussion, see *§ 377.31*.

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§ 377.11 Definitions

An individual's name is the designation by which he or she is known, whether or not he or she was given another name at birth [*People v. Leong Quong (1882) 60 Cal. 107, 107-108]* . Common law defines a name as consisting of one given name and one surname; middle names or initials are immaterial in civil or criminal proceedings [*People v. Smith (1894) 103 Cal. 563, 567, 37 P. 516]* .

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§ 377.12 Common Law Right

[1] No Statutory Abrogation in General

The statutory procedures for changing an individual's name (*see § 377.14*) generally do not abrogate the preexisting common law right of a person to change his or her name [*Code Civ. Proc. § 1279.5(a)*; *see Fam. Code § 2082*; *In re McGehee (1945) 147 Cal. App. 2d 25, 26, 304 P.2d 167* ; *see also 83 Ops. Cal. Att'y Gen. 136 (2000)* (common law change of name is valid in California)]. There are, however, several statutory exceptions set out in *Code Civ. Proc. § 1279.5(b)-(e)*, as discussed in [2], *below* [*see Code Civ. Proc. § 1279.5(a)*].

Under common law rules, any person is allowed to change his or her name at any time, without legal proceedings [*In re Ross (1937) 8 Cal. 2d 608, 609, 67 P.2d 94* ; *In re Marriage of Banks (1974) 42 Cal. App. 3d 631, 637, 117 Cal. Rptr. 37]* . Furthermore, without abandoning his or her real name, a person is permitted to adopt a different name or signature with which to transact business, execute contracts, and sue or be sued [*California Packing Corp. v. Kandarian (1923) 62 Cal. App. 729, 731, 217 P. 805]* .

A person's common law right to choose a name is broad. Essentially, a person is "free to call himself what he will" [*see Lee v. Superior Court (1992) 9 Cal. App. 4th 510, 519, 11 Cal. Rptr. 2d 763* (*quoting In re Ritchie (1984) 159 Cal. App. 3d 1070, 1074, 206 Cal. Rptr. 239*)]. The state is not required to give judicial recognition, however, to a name that has been universally recognized as offensive [*see Lee v. Superior Court (1992) 9 Cal. App. 4th 510, 514, 11 Cal. Rptr. 2d 763* ; *see also § 377.17[2]*].

[2] Statutory Exceptions for State Prisoners, Parolees, Probationers, and Sex Offenders

Code Civ. Proc. § 1279.5(a) provides that the common law right of a person to change his or her name is not to be construed as abrogated, *except* as provided in *Code Civ. Proc. § 1279.5(b), (c), (d)*, or *(e)* [*see also* [1], *above*]. These exceptions are as follows:

- No person imprisoned in state prison and under the jurisdiction of the Director of Corrections is allowed to file an application for change of name under *Code Civ. Proc. § 1276*, except as permitted by the Director at his or her discretion [*Code Civ. Proc. § 1279.5(b)*].

- A court is required to deny an application for a name change under *Code Civ. Proc. § 1276* made a person under the jurisdiction of the Department of Corrections, absent the prior written approval of that person's parole agent or probation officer. The agent or officer, before granting such approval, must determine that the name change will not pose a security risk to the community [*Code Civ. Proc. § 1279.5(c)*].

- A court is required to deny an application for a name change under *Code Civ. Proc. § 1276* made a person who is required to register as a sex offender under the Sex Offender Registration Act [*Penal Code § 290 et seq.*], unless the court determines that it is in the best interest of justice to grant the application and that doing so will not adversely affect public safety. If an application for a name change is granted for an individual required to register as a sex offender, that individual must, within five working days, notify the chief of police of the city in which he or she is domiciled, or the sheriff of the county if he or she is domiciled in an unincorporated area, and additionally, with the chief of police of a campus of a University of California or California State University if he or she is domiciled on the campus or in any of its facilities [*Code Civ. Proc. § 1279.5(d)*].

In ruling on an application for name change under *Code Civ. Proc. § 1276*, the court is required to determine whether the applicant is under the jurisdiction of the Department of Corrections or is required to register as a sex offender under the Sex Offender Registration Act [*Penal Code § 290 et seq.*], either by using the California Law Enforcement Telecommunications System (CLETS) and Criminal Justice Information System (CJIS), or, if the court is not equipped with these systems, by having the court clerk contact an appropriate local law enforcement agency [*Code Civ. Proc. § 1279.5(e)*].

Additionally, each applicant for a name change is required to declare under penalty of perjury that he or she is not under the jurisdiction of the Department of Corrections and is not required to register as a sex offender [*Code Civ. Proc. § 1279.5(e)*]. For a declaration under *Code Civ. Proc. § 1279.5(e)*, see *§ 377.70[1], [5]*.

The statutory exceptions set out in *Code Civ. Proc. § 1279.5(b), (c), (d),* and *(e)* impose restrictions only on the statutory proceeding for a name change under *Code Civ. Proc. § 1276*, and do not expressly mention any restriction or abrogation of common law rights. A reasonable construction of these provisions, however, necessarily implies that common law rights to a name change are in fact abrogated with respect to persons subject to *Code Civ. Proc. § 1279.5(b), (c),* or *(d),* and that such persons may effect a name change, if at all, only by proceeding under *Code Civ. Proc. § 1276* and satisfying the applicable restrictions under *Code Civ. Proc. § 1279.5(b)-(e)*.

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§ 377.13 Purpose of Statutory Procedure

The statutory procedure to change an individual's name, set forth in *Code Civ. Proc. § 1275 et seq.*, was enacted in affirmation of the common law right, for the purpose of establishing the change as a matter of record [*In re Ross (1937) 8 Cal. 2d 608, 609, 67 P.2d 94* ; *In re Marriage of Banks (1974) 42 Cal. App. 3d 631, 637,117 Cal. Rptr. 37]* . Accordingly, the court's authority is limited to ordering the name change or denying or dismissingthe application; the court may not permanently enjoin the use of the proposed name [*In re Weingand (1964) 231 Cal. App. 2d 289, 294, 41 Cal. Rptr. 778]* . Courts should encourage the filing of petitions for change of name, because the changes then become a matter of public record [*In re Useldinger (1939) 35 Cal. App. 2d 723, 727, 96 P.2d 958]* .

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§ 377.14 Statutory Procedure

[1] Jurisdiction and Venue of Petition to Change Name

An application for a change of name generally must be made by a petition [*Code Civ. Proc. § 1276(a)(1)*; *see § 377.70*]. Alternatively, it may be made in an action under the Uniform Parentage Act under *Fam. Code § 7638* [*see Code Civ. Proc. § 1276(a)(2)* and discussion in *§ 377.16[1]*].

The statutory procedure for change of name by petition is a special proceeding [*see Code Civ. Proc. §§ 22, 23*], the jurisdiction for which is in the superior court [*Code Civ. Proc. § 1275*; *see also Cal. Const., art. VI, § 10*].

A petitioner seeking a change of name is required to initiate the proceeding in the county of residence of the person whose name is to be changed [*Code Civ. Proc. § 1276(a)*; *but see Code Civ. Proc. § 1276(e) Code Civ. Proc. § 1276(c)*, discussed in *§ 377.15[2][e]* (exception when petitioner is guardian of minor appointed by probate or juvenile court)].

[2] Contents of Petition

The petition or pleading to change the name of an adult must contain the following [*Code Civ. Proc. § 1276(a)*]:

- Place of birth.
- Residence.
- Present name.
- Proposed name.
- Reason for change.

When the petitioner is a participant in the address confidentiality program created under *Gov. Code § 6205, et seq.*, and

the petition alleges that the reason for the petition is to avoid domestic violence (as defined in *Fam. Code § 6211*) or stalking (as defined in *Penal Code § 646.9*), or that the petitioner is (or is filing on behalf of) a victim of sexual assault (as defined in *Evid. Code § 1036.2*), the petition must indicate that the proposed name is confidential and will be on file with the Secretary of State under the provisions of the address confidentiality program [*Code Civ. Proc. § 1277(b)*]. This requirement is in lieu of reciting the proposed name in the petition [*Code Civ. Proc. § 1277(b)*]. For any petition subject to this requirement, the current legal name of the petitioner must be kept confidential by the court and must not be published or posted in the court's calendars, indexes, or register of actions [*see Gov. Code § 69840 et seq.*], or by any means or in any public forum, including a hard copy or an electronic copy, or any other type of public media or display [*Code Civ. Proc. § 1277(b)(3)*]. The petitioner may also request that the court file the petition and any other papers associated with the proceeding under seal. The court may consider the request at the same time as the petition for name change, and may grant the request in any case in which the court finds that all of the following factors apply [*Code Civ. Proc. § 1277(b)(4)*]:

- There exists an overriding interest that overcomes the right of public access to the record.
- The overriding interest supports sealing the record.
- A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed.
- The proposed order to seal the records is narrowly tailored.
- No less restrictive means exist to achieve the overriding interest.

For forms for use in seeking a confidential name change under the address confidentiality program, see *§§ 377.80 -377.84*.

A name-change petition generally must be signed by the person whose name is to be changed [*Code Civ. Proc. § 1276(a)*; for discussion of exceptions to this requirement applicable when the person is a minor, *see § 377.15[2][b]*].

For a mandatory Judicial Council form of petition, see *§ 377.70*. For a mandatory form of attachment, to provide the information listed above that is required under *Code Civ. Proc. § 1276(a)*, see *§ 377.71*.

For discussion of additional or alternate contents of a petition to change a minor's name, see *§ 377.15[2]*.

[3] Order to Show Cause

When the petition is filed, the court makes an order to show cause why the application should not be granted. The order is to be directed to all persons interested in the matter [*Code Civ. Proc. § 1277(a)*].

Generally, the order is required to recite the following [*Code Civ. Proc. § 1277(a)*]:

- The filing of the petition.
- The name of the person filing the petition.
- The name proposed.

The order must direct all persons interested in the matter to make known any objections they have to the granting of the petition by filing a written objection, including the reasons for the objection, at least two court days before the matter is

scheduled to be heard, and by appearing at the hearing to show cause why the petition should not be granted. The order must state that, if no written objection is timely filed, the court may grant the petition without a hearing [*Code Civ. Proc. § 1277(a)*].

When the petitioner is a participant in the address confidentiality program, and the petition alleges that the reason for the petition is to avoid domestic violence (as defined in *Fam. Code § 6211*) or stalking (as defined in *Penal Code § 646.9*), or that the petitioner is (or is filing on behalf of) a victim of sexual assault (as defined in *Evid. Code § 1036.2*), the order of the court must indicate that the proposed name is confidential and will be on file with the Secretary of State under the provisions of the address confidentiality program [*Code Civ. Proc. § 1277(b)*]. This requirement is in lieu of reciting the proposed name in the order to show cause, and the order to show cause is not required to be published under *Code Civ. Proc. § 1277(a)* [*Code Civ. Proc. § 1277(b)*; *see* [4], *below*]. In addition, the current legal name of the petitioner must be kept confidential by the court and must not be published or posted in the court's calendars, indexes, or register of actions [*see Gov. Code § 69840 et seq.*], or byany means or in any public forum, including a hard copy or an electronic copy, or any other type of public media or display [*Code Civ. Proc. § 1277(b)(3)*].

The order to show cause is required to specify a date for hearing the matter no less than six nor more than 12 weeks from the time the order is made [*Code Civ. Proc. § 1277(a)*].

For mandatory Judicial Council forms of orders to show cause, see *§§ 377.73* and *377.73A*.

[4] Publication

A copy of the order to show cause must be published in accordance with *Gov. Code § 6064* in a newspaper of general circulation that is designated in the order, if a newspaper is printed in the county in which the court is located. If no newspaper is printed in the county, a copy of the order must be posted by the clerk of the court in three of the most public places in that county [*Code Civ. Proc. § 1277(a)*].

Four weekly publications of the order are sufficient. If publication is in a daily newspaper, publication once a week for four successive weeks is sufficient [*Code Civ. Proc. § 1277(a)*].

Proof of this publication or posting must be made to the satifaction of the court at the time of the hearing on the petition [*Code Civ. Proc. § 1277(a)*].

If the proceeding for change of name is for a witness participating in the state Witness Relocation and Assistance Program (*see Penal Code § 14020 et seq.*), and the name change has been approved under that program, the action is exempt from the publication requirement [*Code Civ. Proc. § 1277(c)*]. Also, if the petitioner is a participant in the address confidentiality program, and the petition alleges that the reason for the petition is to avoid domestic violence (as defined in *Fam. Code § 6211*) or stalking (as defined in *Penal Code § 646.9*), or that the petitioner is (or is filing on behalf of) a victim of sexual assault (as defined in *Evid. Code § 1036.2*), the action is exempt from the publication requirement [*Code Civ. Proc. § 1277(b)*]. In such a case, the current legal name of the petitioner must also be kept confidential by the court and must not be published or posted in the court's calendars, indexes, or register of actions [*see Gov. Code § 69840 et seq.*], or by any means or in any public forum, including a hard copy or an electronic copy, or any other type of public media or display [*Code Civ. Proc. § 1277(b)(3)*]. The petitioner may also request that the court file the petition and any other papers associated with the proceeding under seal [*Code Civ. Proc. § 1277(b)(4)*; *see* [2], *above*].

[5] Hearing and Order

The court will hear the application at the time designated by the court, only if objections are filed by a person who, in those objections, shows good reason for denying the change [*Code Civ. Proc. § 1278(a)*]. If no objection is filed at least

two court days before the date set for hearing, the court may, without hearing, enter the order that the change of name is granted [*Code Civ. Proc. § 1278(a)*]. For further discussion of objections, see *§ 377.17*.

At the hearing, the court may examine, on oath, any petitioners, remonstrants, or others, regarding the application, and may either order the change or dismiss the application, according to what may seem right and proper [*Code Civ. Proc. § 1278(a)*].

At the time of hearing proof of proper publication or posting of the order to show cause must also be made to the satisfaction of the court [*Code Civ. Proc. § 1277(a)*; *see* [4], *above*].

When the petitioner is a participant in the address confidentiality program and the petition alleges that the reason for the petition is to avoid domestic violence (as defined in *Fam. Code § 6211*) or stalking (as defined in *Penal Code § 646.9*), or that the petitioner is (or is filing on behalf of) a victim of sexual assault (as defined in *Evid. Code § 1036.2*), the court may not disclose the proposed name unless the court finds by clear and convincing evidence that the allegations of domestic violence or stalking (or presumably--although not mentioned in *Code Civ. Proc. § 1278(b)*--the allegations of sexual assault) in the petition are false [*Code Civ. Proc. § 1278(b)*; *see also Code Civ. Proc. § 1277(b)* and discussion in [2] and [3], *above*].

For discussion of hearing requirements applicable under *Code Civ. Proc. § 1278(c)*, when the petition is brought as part of an action under the Uniform Parentage Act (*Fam. Code § 7600 et seq.*), see *§ 377.16[4]*. For discussion of additional findings required under *Code Civ. Proc. § 1278(d)* before granting a petition filed on behalf of a minor ward, see *§ 377.15[6]*.

[6] Amendment of Birth Record

When a person born in California has his or her name changed by a court order, an application including an affidavit of that fact may be filed with the office of the State Registrar on the form provided for that purpose. The court order may be from a court in California, another state, the District of Columbia, or any territory of the United States. A certified copy of the court order and the fee required by *Health & Safety Code § 103720* must accompany the application and affidavit [*Health & Safety Code § 103400*].

If the State Registrar accepts the amendment, it is filed and the fact of the amendment is noted on the otherwise unaltered original birth certificate [*Health & Safety Code § 103405*].

The State Registrar will furnish a certified copy of the amended record of birth to the registrant without any cost beyond the required filing fee [*Health & Safety Code § 103410*].

An application for amendment of a birth record must be submitted on an original form VS 23, printed on special bond paper, provided by the California Office of Vital Records; photocopies will not be accepted. The form may be obtained from the county recorder's office or county health department in any California county, and it may be ordered directly from the Office of Vital Records (916/445-2684 or <www.dhs.ca.gov/hisp/chs/ovr/ovrformsreq.asp>).

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§ 377.15 Minors

[1] Common Law Right of Parent to Change Name on Minor's Behalf

A minor has no common law right to change his or her name, but a parent may apply for a change of name on the minor's behalf [*In re Trower (1968) 260 Cal. App. 2d 75, 77, 66 Cal. Rptr. 873]* .

[2] Petition

[a] Special Petition Requirements Apply

If a name change is sought on behalf of a minor, the requirements for a petition for change of name is the same as that discussed generally in*§ 377.14[2]*, except for the additional or different requirements discussed in [b]-[e], *below* [*see also* discussion in [3]-[6], *below*.]

[b] Who May Sign Petition on Behalf of Minor

When the person whose name is to be changed is under 18 years of age, the petition for change of name must be signed by one of the following [*Code Civ. Proc. § 1276(a)*]:

- One of the minor's parents.
- By any guardian of the person.
- If both parents are dead and there is no guardian of the person, by some near relative or friend of the person.

[c] Information Relating to Parents, Relatives, or Guardian,

If the petition is signed by only one parent, and the other parent is living, the petition must specify the other parent's address, if known [*Code Civ. Proc. § 1276(b)(1)*].

If the petition is signed by a guardian, the petition must specify the following:

- The name and address, if known, of the parent or parents, if living. If the addresses of both parents are unknown or if both parents are deceased, the name and address of the grandparents [*Code Civ. Proc. § 1276(c)*; *but see Code Civ. Proc. § 1276(d)*, discussed in [d], *below*].

- Relevant information regarding the guardianship [*Code Civ. Proc. § 1276(f)*].

- Relevant information regarding the likelihood that the child will remain under the guardian's care until the child reaches the age of majority [*Code Civ. Proc. § 1276(f)*].

- Relevant information suggesting that the child will not likely be returned to the custody of his or her parents [*Code Civ. Proc. § 1276(f)*].

Information concerning to the duration of the guardian's care and likelihood that the child will not return to his or her parents' custody is relevant to findings that are a prerequisite to considering a petition for name change filed by the guardian of a minor ward [*see Code Civ. Proc. § 1278(f)* and discussion in [6], *below*]. For a mandatory Judicial Council form of declaration to be completed by the guardian and attachment to a petition for name change, see *§ 377.72*.

If the petition is not signed by either parent, the petition must name, so far as is known to the person proposing the name change, the parents and their place of residence if living, or, if neither parent is living, near relatives and their place of residence [*Code Civ. Proc. § 1276(a)*; *but see Code Civ. Proc. § 1276(d)*, discussed in [d], *below*].

[d] Minor Relinquished To Adoption Agency

If the minor is 12 years of age or over, has been relinquished to an adoption agency by his or her parents, and has not been legally adopted, the petition must be signed by the minor and the adoption agency. In that case, the names and addresses of near relatives of the relinquished minor are not to be included in the petition unless they are known to the minor [*Code Civ. Proc. § 1276(d)*].

[e] Venue When Petitioner Is Guardian Appointed by Juvenile or Probate Court

All applications for the change of the name of a minor submitted by a guardian appointed by the juvenile court or the probate court must be made in the appointing court [*Code Civ. Proc. § 1276(e)*].

[3] Notice to Nonpetitioning Parent

[a] When Petition Is Filed by Other Parent

If the nonpetitioning parent is living and does not join in consenting to the petition, the petitioning parent must cause the nonpetitioning parent to be served notice of the time and place of the hearing or a copy of the order to show cause, not less than 30 days prior to the hearing, pursuant to *Code Civ. Proc. § 413.10*, *414.10*, *415.10*, or *415.40* (general provisions governing service of persons within the state and outside the state) [*Code Civ. Proc. § 1277(a)*]. For discussion and forms relating to such service, see Ch. 518, *Service of Summons and Papers* . For a mandatory Judicial Council form of proof of such service, see *§ 377.74*.

If notice of the hearing cannot reasonably be accomplished pursuant to *Code Civ. Proc. § 415.10* or *415.40*, the court may order that notice be given in a manner that the court determines is reasonably calculated to give actual notice to the nonconsenting parent. In that case, if the court determines that notice bypublication is reasonably calculated to give

actual notice to the nonconsenting parent, the court may determine that publication of the order to show cause is sufficient notice to the nonconsenting parent [*Code Civ. Proc. § 1277(a)*].

If the nonpetitioning parent does not receive actual notice of the hearing, he or she may, as an interested party, make a motion to the court to set aside the decree changing the minor's name [*see In re Malloy (1960) 185 Cal. App. 2d 135, 137, 8 Cal. Rptr. 143]* .

The nonpetitioning parent may also move to set aside the decree if he or she was in military service at the time of the decree, or was discharged less than 60 days before the date of the decree, and was materially affected in defending against the petition by reason of his or her military service [*see In re Larson (1947) 81 Cal. App. 2d 258, 262-263, 183 P.2d 688* (applying former *50 U.S.C. App. § 520, now see 50 U.S.C. App. § 521*; *see also § 377.20[2]*).

[b] When Petition Is Filed by Guardian

When a guardian files a petition to change the name of his or her minor ward under *Code Civ. Proc. § 1276*, the guardian must provide notice of the hearing to any living parent of the minor by personal service at least 30 days prior to the hearing [*Code Civ. Proc. § 1277(e)(1)*].

If either or both parents are deceased or cannot be located, and the child's grandparents are living, the guardian must cause to be served on the child's grandparents a notice of the time and place of the hearing, or a copy of the order to show cause. The service must be made not less than 30 days prior to the hearing and must be made pursuant to *Code Civ. Proc. §§ 413.10, 414.10, 415.10*, or *415.40* [*Code Civ. Proc. § 1277(e)(2)*].

For discussion and forms relating to such service, see Ch. 518, *Service of Summons and Papers* . For a mandatory Judicial Council form of proof of such service, see *§ 377.74*.

[4] Petition by Nonrelative

A petitioner who is unrelated to the minor has no right to change the minor's name unless the name is being used for a fraudulent purpose, in a way detrimental to the petitioner's interests [*Donald J. v. Evna M. (1978) 81 Cal. App. 3d 929, 936, 147 Cal. Rptr. 15]* .

[5] Parental Disputes

A parent has some legal rights to control a minor's use of a surname, but a parent's sex or marital status does not create any primary right or protectible interest in the minor's surname [*Donald J. v. Evna M. (1978) 81 Cal. App. 3d 929, 936, 937, 147 Cal. Rptr. 15]* . In resolving parental disputes over a child's surname, the court's sole consideration is the child's best interest, and a father does not have any primary right to have a child bear his name [*In re Marriage of Schiffman (1980) 28 Cal. 3d 640, 645, 647, 169 Cal. Rptr. 918, 620 P.2d 579]* .

[6] Required Findings by Court When Application Filed by Guardian

When the application for a change of name is filed by a guardian on behalf of a minor ward, the court must first find both of the following [*Code Civ. Proc. § 1278[d]*]:

- The ward is likely to remain in the guardian's care until the age of majority.
- The ward is not likely to be returned to the custody of his or her parents.

Only on making these findings is the court required to consider the petition for name change. It may further grant the petition only if it finds that the proposed name change is in the best interest of the child [*Code Civ. Proc. § 1278(d)*].

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§ 377.16 Action Under Uniform Parentage Act

[1] Applicable Procedure

An application to change the name of a minor or adult child for whom a parent and child relationship is established by a judgment or order under the Uniform Parentage Act (*Fam. Code § 7600 et seq.*) may be included with a petition filed under the Uniform Parentage Act [*Fam. Code § 7638*; *see also Code Civ. Proc. 1276(a)(2)* and discussion in *§ 377.14[1]*]. Otherwise, the procedure for such a change of name is required to conform to the provisions of *Code Civ. Proc. § 1275 et seq.*, governing change of names generally [*Fam. Code § 7638*; for discussion of those procedures, *see § 377.14*]. Within *Code Civ. Proc. § 1275 et seq.*, *Sections 1277* and *1278* provide some particular rules that apply to applications for a change of name under the Uniform Parentage Act. These rules are discussed under [2] et seq., *below*.

For general discussion and forms relating to the Uniform Parentage Act, see Ch. 12A, *Adoptions: Termination of Parental Rights* (relating to termination of an alleged natural father's rights), and Ch. 412, *Paternity*.

[2] Service of Application

When an application for change of name is brought as a part of an action under the Uniform Parentage Act, whether as part of a petition or a cross complaint or as a separate order to show cause in a pending action thereunder, the application must be served on all other parties to the action in a like manner as prescribed for the service of a summons as set forthin *Code Civ. Proc. § 415.10 et seq.* [*Code Civ. Proc. § 1277(d)*; for discussion of requirements for service of summons, *see* Ch. 518, *Service of Summons and Papers*].

[3] Notice of Hearing

On the setting of a hearing on the issue, notice of the hearing must be given to all parties in the action in a like manner and within the time limits prescribed generally for the type of hearing, whether a trial or an order to show cause, at which the issue of the change of name is to be decided [*Code Civ. Proc. § 1277(d)*].

[4] Conduct of Hearing

The hearing on the issue of a change of name must be conducted pursuant to the statutes and rules of court governing the proceeding under the Uniform Parentage Act, whether the hearing is conducted on an order to show cause or a trial [*Code Civ. Proc. § 1278(c)*]. For discussion, a procedural guide, and forms relating to proceedings under the Uniform Parentage Act, see Ch. 412, *Paternity* .

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§ 377.17 Objections

[1] In General

The court will grant the petition if, in its discretion, the change seems proper [*In re Marriage of Banks (1974) 42 Cal. App. 3d 631, 637-638, 117 Cal. Rptr. 37* ; *see also Code Civ. Proc. § 1278(a)*]. Any person who can show the court good reason against the name change may file objections to the change [*Code Civ. Proc. § 1278(a)*]. Some substantial reason is necessary for the court to deny the petition [*In re Ross (1937) 8 Cal. 2d 608, 610, 67 P.2d 94* ; *In re McGehee (1956) 147 Cal. App. 2d 25, 26, 304 P.2d 167]* . The burden of proof rests on the party who opposes the change [*In re Marriage of Banks (1974) 42 Cal. App. 3d 631, 638, 117 Cal. Rptr. 37]* .

[2] Sufficient Objections

No specific grounds for denial of the petition are set forth in *Code Civ. Proc. § 1275 et seq.*, other than the grounds set out in *Code Civ. Proc. § 1279.5(b)-(d)*, under which a court is required to deny a petition [*see 377.12[2]*]. Courts have, however, also held that the following objections are sufficient to warrant denial:

- A showing of fraud or invasion of another's legal rights [*In re Useldinger (1939) 35 Cal. App. 2d 723, 727, 96 P.2d 958]* .

- A showing that the change would confuse the public and constitutes an attempt to "cash in" on a famous person's reputation [*In re Weingand (1964) 231 Cal. App. 2d 289, 293-294, 41 Cal. Rptr. 778]* .

- A showing of the repulsiveness, obscenity, or embarrassing character of the proposed name [*In re Worms (1967) 252 Cal. App. 2d 130, 133, 60 Cal. Rptr. 88* (disapproved on other grounds in *In re Marriage of Schiffman (1980) 28 Cal. 3d 640, 169 Cal. Rptr. 918, 620 P.2d 579* , to the extent the opinion is inconsistent with the proposition that in a parental dispute over a minor's name change, welfare of minor is sole consideration)].

- A showing that the proposed name has the potential of being a "fighting word," such as a racial epithet [*Lee v. Superior Court (1992) 9 Cal. App. 4th 510, 518, 11 Cal. Rptr. 2d 763]* .

[3] Insufficient Objections

Courts have held that the following objections are insufficient to warrant a denial of the petition:

- An objection that the applicant became a bankrupt under his or her original name [*In re Ross (1937) 8 Cal. 2d 608, 610, 67 P.2d 94]* .

- An objection involving sentimental reasons that are peculiar to the objecting party and do not contravene reasons given for the change [*In re McGehee (1956) 147 Cal. App. 2d 25, 26, 304 P.2d 167]* .

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§ 377.18 Writ of Mandate to Compel Hearing

Because the statutory procedure generally does not abrogate the common law right to change one's name and is intended merely to establish a record of the change, the superior court may be compelled by writ of mandate to conduct a hearing on the petition [*Turesky v. Superior Court (1950) 97 Cal. App. 2d 838, 839-840, 218 P.2d 784* ; *see generally* Ch. 358, *Mandate and Prohibition*].

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§ 377.19 Appeal

A court's decision to deny an application for name change is subject to appeal if that decision was an abuse of the court's discretion [*In re Ross (1937) 8 Cal. 2d 608, 609, 67 P.2d 94* ; *see also* Ch. 41, *Appeal: Review Standards and Appellate Rules of Law*].

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§ 377.20 Setting Aside Decree

[1] Fraud

A motion to set aside the decree of name change may be made on the ground that the decree was obtained by fraud. In such a case, the court is authorized to set aside the decree both by its inherent power to do so and by the terms of *Code Civ. Proc. § 473* [*see In re Malloy (1960) 185 Cal. App. 2d 135, 137-138, 8 Cal. Rptr. 143* ; *see generally* Ch. 489, *Relief From Judgments and Orders*].

[2] Minor Applicant's Nonpetitioning Parent in or Just Discharged From Military

When a parent of a minor whose name was changed by court decree was in military service at the time of the decree, or was discharged less than 60 days before the date of the decree, and was materially affected in defending against the petition by reason of his or her military service, that parent may move to set aside the decree under the Servicemembers Civil Relief Act [*see In re Larson (1947) 81 Cal. App. 2d 258, 262-263, 183 P.2d 688* (applying predecessor of *50 U.S.C. App. § 521(g)*); *see also 50 U.S.C. App. § 501 et seq.*]. The petition to set aside the decree must be filed not later than 90 days after the parent's termination of or release from military service [*50 U.S.C. App. § 521(g)(2)*].

For discussion and forms for setting aside judgments and orders under the Servicemembers Civil Relief Act, see Ch. 489, *Relief From Judgments and Orders* .

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§ 377.21 Restoration of Party's Former Name

In any action or proceeding to terminate a marriage or to have a marriage adjudged void or voidable, the court is required, on a party's request, to restore that party's birth name or former name, whether or not such request was made in the petition [*Fam. Code § 2080*]. Restoration may not be denied on the basis that the party has custody of a minor with a different name or for any other reason exclusive of fraud [*Fam. Code § 2081*]. For discussion of dissolution of marriage generally, see Ch. 221, *Dissolution of Marriage: Procedure* , and for discussion of nullity of marriage, see Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights* .

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§ 377.22 Prohibition of Discrimination Based on Choice of Name

No person engaged in a trade or business of any kind, or in the provision of a service of any kind, may refuse to do business with a person, or provide service to a person, regardless of the person's marital status, because he or she has chosen to use or regularly uses his or her birth name, former name, or name adopted on solemnization of marriage or registration of domestic partnership [*Code Civ. Proc. § 1279.6(a)*]. Similarly, no person engaged in a trade or business of any kind, or in the provision of a service of any kind, may impose, as a condition of doing business with a person, or as a condition of providing the service to a person, a requirement that the person, regardless of his or her marital status, use a name other than his or her birth name, former name, or name adopted upon solemnization of marriage or registration of domestic partnership, if the person has chosen to use or regularly uses that name [*Code Civ. Proc. § 1279.6(b)*].

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§ 377.23 Maintaining Action Under Chosen Name

A married woman may choose to use either her husband's surname or her birth name or former name and may maintain an action in court under the name she has chosen. She may also maintain a marriage dissolution action and obtain a decree of dissolution under her chosen name, whetheror not it is the name appearing on the marriage license [*Weathers v. Superior Court (1976) 54 Cal. App. 3d 286, 288-289, 126 Cal. Rptr. 547]* .

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§ 377.24 Sex Change

[1] Petition to Change Name and Issue New Birth Cerificate

A person born in California who has undergone surgical treatment for a change of sex may file a single petition in superior court for both a change of name and an issuance of a new birth certificate reflecting the change of name and gender. The court is required to follow the normal name change procedure set forth in *Code Civ. Proc. § 1275 et seq.* in granting the change of name [*Health & Safety Code § 103435*; for discussion of that procedure, *see § 377.14*]. In addition, the petition must be accompanied by a physician's affidavit documenting the sex change [*Health & Safety Code § 103430(a)*].

For a mandatory Judicial Council form of a combined petition for name change and gender change, see *§ 377.70A*. For mandatory Judicial Council forms of an order to show cause and a decree changing name and gender, see *§§ 377.73A* and *377.75A*.

A certified copy of the court's decree changing the name and birth certificate must be filed with both the Secretary of State and the State Registrar within 30 days [*Health & Safety Code § 103435*]. The fee payable to the State Registrar is set out in *Health & Safety Code § 103725*. The State Registrar will furnish a certified copy of the new birth certificate to the registrant without additional cost [*Health & Safety Code § 103445*].

[2] Separate Petitions to Change Name and Issue New Birth Certificate

Alternatively, the applicant may file separate petitions, one under *Code Civ. Proc. § 1275 et seq.* for a change of name and one under *Health & Safety Code §§ 103425, 103430* and *103440, 103445* for a new birth certificate [*see Health & Safety Code § 103435*]. When the petitions are filed separately, the court order changing theapplicant's name should accompany the petition for a new birth certificate, if applicable [*Health & Safety Code § 103430(a)*]. In either case, the court must appoint a time for hearing. At the hearing, the court may examine on oath the petitioner or any other person having knowledge of facts relevant to the petitioner or to the petition [*Health & Safety Code §§ 103430(b), 103435*]. As with name changes, objections to a new birth certificate may be filed by any person who can show good reason against the change, and the court must either order a new birth certificate or deny the petition, as the court finds right and proper [*Health & Safety Code § 103430(b)*].

A certified copy of the decree changing the birth certificate must be filed withthe State Registrar within 30 days, together with the fee prescribedin *Health & Safety Code § 103725* [*Health & Safety Code § 103430(c)*]. The State Registrar will furnish a certified copy of the new birth certificate to the registrant without additional cost [*Health & Safety Code § 103445*].

For a form of petition requesting the issuance of a new birth certificate apart from a change-of-name proceeding, see *§ 377.77*. For further discussion and an alternative form, see Ch. 99, *Birth and Death, Establishing Fact of*, § 99.35.

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§ 377.25 Naturalization

State courts of record having jurisdiction in actions at law or in equity in which the amount in controversy is unlimited have jurisdiction to naturalize persons as citizens of the United States [*8 U.S.C. § 1421*]. In naturalization proceedings, on prayer by petitioner, the court may decree a change of petitioner's name and issue a certificate of naturalization to reflect the decree [*8 U.S.C. § 1447(f)*]. Naturalization records are maintained by the superior court clerk [*Gov. Code § 69847*].

Subsequent to naturalization, if the citizen's name is changed, he or she may apply to the United States Attorney General for a new certificate of naturalization bearing the new name. If the Attorney General finds that the name was changed, he or she must issue a new certificate to the applicant and notify the naturalization court [*8 U.S.C. § 1454(c)*].

For discussion of naturalization, see 4 Gordon, Mailman, and Yale-Loehr, Immigration Law And Procedure, Ch. 94 et seq. (Matthew Bender).

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§ 377.26 Effect of Name Change on Elections and Voting

When a voter, between the time of his or her last registration and the time for closing the registration for any given election in the same county, has lawfully changed his or her surname, he or she may reregister under the new name. The voter must state the previous name under which he or she was registered in that county in the prior registration portion of the affidavit of registration. The additional statement must be made before signing the affidavit and is deemed part of the affidavit. On reregistration, the last previous registration of the voter must be canceled [*Elec. Code § 2115*].

If the surname of any person offering to vote has been changed since he or she registered, he or she must sign his or her name both as it was before the change and as it is at the time of voting. The voter must indicate on the roster on the same line, either by brackets or by other means, that the two names identify one person [*Elec. Code § 14218*].

If a candidate changes his or her name within one year before any election, the new name may not appear on the ballot unless the change was made by marriage or by decree of a court of competent jurisdiction [*Elec. Code § 13104*].

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§ 377.27 Penal Provisions for Misuse of Name

Any person who falsely personates another, and in such assumed character marries or pretends to marry or to sustain the marriage relation towards another, with or without the connivance of the other, is guilty of a felony [*Penal Code § 528*].

Any person who falsely personates another in his or her private or official capacity, and in such assumed character does any of the following may be fined up to $10,000 or imprisoned in state prison or county jail for up to one year, or both [*Penal Code § 529*]:

- Becomes bail or surety for any party in any proceeding whatever before any court or officer authorized to take such bail or surety.

- Verifies, publishes, acknowledges, or proves, in another's name, any written instrument with intent that it be recorded, delivered, or used as true.

- Does any other act, whereby, if done by the person falsely personated, he or she might become liable to any suit or prosecution, or to pay money or incur charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person.

Any person who falsely personates another, in either his or her private or official capacity, and in such assumed character receives any money or property, knowing that it is intended to be delivered to the personated individual, and with intent to convert the money or property to his or her own use, or to another's use, or with the intent to deprive the true owner thereof, is punishable in the same manner and to the same extent as for larceny of the money or property so received [*Penal Code § 530*].

Any person who signs any letter addressed to a newspaper with the name of a person other than himself or herself, and sends such letter to the newspaper, or causes it to be sent, with the intent to lead the newspaper to believe that it was written by the person whose name is signed, is guilty of a misdemeanor [*Penal Code § 538a*].

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§ 377.28 Corporate Name Change

By complying with the procedure set forth in Corp. Code § 900et seq., a corporation formed in California may amend its articles of incorporation to reflect a change of name [*see Corp. Code § 900(a)*; *see also* California Legal Forms, Ch. 3, *Articles of Incorporation*, Ch. 10, *Amendment of Articles* (MatthewBender)]. The name may not include the words "bank," "trust," "trustee," or related words, unless the certificate of approval of the Commissioner of Financial Institutions is attached to the new articles to be filed [*Corp. Code § 201(a)*]. In addition, the Secretary of State will not file articles setting forth a name that is likely to mislead the public or that so closely resembles the name of a domestic corporation or a foreign corporation either authorized to do business in the state or with a name registered in the state that it would tend to deceive the public. The Secretary may, however, file articles if there is proofof consent by the other corporation or if the Secretary finds that the public is not likely to be misled. A corporation's use of a name in violation of this rule may be enjoined, whether or not the Secretary of State has filed the articles [*Corp. Code § 201(b)*].

An applicant for a corporate name change may, on payment of the appropriate fee, reserve a name not prohibited by *Corp. Code § 201(b)* for 60 days with the Secretary of State. The Secretary of State will not reserve the same name for two or more consecutive 60-day periods to the same applicant or for the use or benefit of the same person, partnership, firm or corporation [*Corp. Code § 201(c)*].

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§ 377.29 Unincorporated Association's Name Change

An unincorporated association that has filed a statement registering its name under *Corp. Code § 21301* may, after changing its name, file a new statement with the Secretary of State, and the new statement will supersede the original statement [*see Corp. Code § 18200(d)*].

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33-377 California Forms of Pleading and Practice--Annotated § 377.30

§ 377.30 Limited Partnership's Name Change

A change of name of a limited partnership is made by an amendment to the certificate of limited partnership, using form prescribed by the Secretary of State [*Corp. Code §§ 15622* (eff. until January 1, 2010), 15902.02 (eff. January 1, 2008)].

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33-377 California Forms of Pleading and Practice--Annotated § 377.31

§ 377.31 Change of Name on Entering Marriage or Domestic Partnership

The Name Equality Act of 2007 [*see* 2007 Stats., ch. 567] allows persons entering into a marriage or a domestic partnership to change their middle or last names, or both, by making an appropriate election in the marriage license application or Declaration of Domestic Partnership form, without the need to petition the superior court for a change of name [*Fam. Code §§ 298.6, 306.5*].

Parties to a marriage or registered domestic partnership are not required to have the same name, and neither party is required to change his or her name. A person's name does not change upon marriage or registration as a domestic partner unless that person elects to change his or her name as follows [*Fam. Code §§ 298.6(a), 306.5(a)*].

If there is no intent to defraud, any party to a marriage or registered domestic partnership may elect to change the middle or last names, or both, by which he or she wishes to be known after solemnization of the marriage or registration of the domestic partnership, by entering the new name in the space provided on the marriage license or on the official Declaration of Domestic Partnership form [*Fam. Code §§ 298.6(b)(1), 306.5(b)(1)*]. The party may adopt any of the following last names [*Fam. Code §§ 298.6(b)(2), 306.5(b)(2)*]:

- The current last name of the other spouse or domestic partner.
- The last name of either spouse or domestic partner given at birth.
- A name combining into a single last name all or a segment of the current last name or the last name of either spouse or domestic partner given at birth.
- A hyphenated combination of last names.

The Name Equality Act also provides that these permissible last names are also permissible choices for a domestic partner's middle name [*Fam. Code § 298.6(b)(2)*]. However, the Act was amended, effective January 1, 2010, to modify the permissible middle names for a married person; under the amendment, a person entering a marriage may adopt any of the following middle names [*Fam. Code § 306.5(b)(3)* (as amended by 2009 Stats., ch. 512)]:

- The current last name of either spouse.
- The last name of either spouse given at birth.
- A hyphenated combination of the current middle name and the current last name of the person or spouse.
- A hyphenated combination of the current middle name and the last name given at the birth of the person or spouse.

An election by a person to change his or her name on marriage or registration of a domestic partnership will serve as a record of the name change. A certified copy of the marriage certificate or Certificate of Registered Domestic Partnership containing the new name, or retaining the former name, constitutes proof that the use of the new name or retention of the former name is lawful [*Fam. Code §§ 298.6(b)(3)(A), 306.5(b)(4)(A)*]. Thus, a certified copy of a marriage certificate or Certificate of Registered Domestic Partnership must be accepted as identification establishing a true, full name for purposes of obtaining a driver's license [*Fam. Code § 298.6(b)(3)(B)*; *see Veh. Code § 12800.7* (verification of name and address for purposes of issuance of driver's license); *see also Fam. Code §§ 298.6(b)(3)(C), 306.5(b)(4)(C)* (true, full name for purposes of *Veh. Code § 12800.7* may also be established by other documents, such as marriage certificate issued by other state, or substantial equivalent of Certificate of Domestic Partnership issued by other state or by local jurisdiction)].

The adoption of a new name, or the choice not to adopt a new name, by means of a marriage license application may be made only at the time the marriage license is issued; after the marriage certificate is registered by the local registrar, the certificate may not be amended to add a new name or change the name adopted [*Fam. Code § 306.5(b)(5)*]. An amendment may be issued to correct a clerical error in the "new name" fields on the marriage license; the amendment must be signed by one of the parties to the marriage and by the county clerk or his or her deputy, and the reason for the amendment must be stated as correcting a clerical error [*Fam. Code § 306.5(b)(5)* (for this purpose, "clerical error" is error made by county clerk, his or her deputy, or notary authorized to issue confidential marriage licenses, whereby information shown in "new name" field does not match information shown on marriage license application)].

The adoption of a new name, or the choice not to adopt a new name, by means of a marriage license application or Declaration of Domestic Partnership does not, however, abrogate either party's common-law right to change his or her name, to adopt a different name through usage at a future date, or to petition the superior court for a change of name [*Fam. Code §§ 298.6(b)(4),(c), 306.5(b)(5), (c)*; *see Code Civ. Proc. § 1275 et seq.* (superior court proceedings for change of name)].

For complete coverage of Domestic Partnerships, including forms, see Ch. 387, *Nonmarital Cohabitation* , and California Legal Forms, Ch. 110, *Nonmarital Cohabitation Agreements and Related Transactions* (Matthew Bender).

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[Reserved]

§§ 377.32[Reserved]

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§ 377.40 Related Matthew Bender Publications

For forms for use in amending the name of a business, see generally California Legal Forms, Ch. 3, *Articles of Incorporation*; Ch. 10, *Amendment of Articles*; Ch. 13, *Nonprofit Corporations*; Ch. 15, *General Partnerships* (Matthew Bender)

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§ 377.41 Federal Statutes

Decree for name change in naturalization proceedings. *8 U.S.C. § 1447(e)*

New certificate of naturalization after name change. *8 U.S.C. § 1454(c)*

Application to set aside default decree by parent in military service. *50 U.S.C. App. § 521(g)*

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§ 377.42 State Statutes

[1] Proceeding to Change Name

[a] Individual

Civil actions and special proceedings distinguished. *Code Civ. Proc. § 22, 23*

Jurisdiction of proceeding. *Code Civ. Proc. § 1275*

Venue. *Code Civ. Proc. § 1276(a),(e)*

Required contents of petition. *Code Civ. Proc. § 1276(a)-(d), (f)*

Order to show cause; publication requirements. *Code Civ. Proc. § 1277(a)*; *Gov. Code §§ 6000, 6064*

Prohibition on state prisoners' use of statutory procedures to change name without permission of Director of Corrections. *Code Civ. Proc. § 1279.5(b)*

Denial of name change application required when made by person under jurisdiction of Department of Corrections, unless parole agent or probation officer grants prior written approval after determining that name change will not pose security risk to community. *Code Civ. Proc. § 1279.5(c)*

Denial of name change application required when made by person required to register as sex offender under Sex Offender Registration Act, *Penal Code § 290 et seq.*, unless court determines it is in best interest of justice to grant application and that doing so will not adversely affect public safety; notice requirements when application granted. *Code Civ. Proc. § 1279.5(d)*

Court's duty to determine whether applicant is subject to jurisdiction of Department of Corrections or is required to register as sex offender under Sex Offender Registration Act, *Penal Code § 290 et seq.*; applicant required to declare

under penalty of perjury that he or she is not such person. *Code Civ. Proc. § 1279.5(e)*

Proof of publication in newspaper. *Code Civ. Proc. § 2010*

Newspaper of general circulation defined. *Gov. Code § 6000 et seq.*

[b] Minor

Petition on behalf of minor not signed by either parent. *Code Civ. Proc. § 1276(b)*

Petition on behalf of minor signed by one parent or by guardian. *Code Civ. Proc. § 1276(c), (f)*

Petition by adoption agency on behalf of minor over 12 who has not been legally adopted. *Code Civ. Proc. § 1276(d)*

Notice of hearing on name change to nonpetitioning parent of minor by petitioning parent. *Code Civ. Proc. § 1277(a)*

[c] Uniform Parentage Act

Jurisdiction as in superior court in action under Uniform Parentage Act (*Fam. Code § 7600 et seq.*) to change name of minor or adult child for whom parent and child relationship established; applicable procedure. *Fam. Code § 7638*

Service of application to change name and notice of hearing requirements. *Code Civ. Proc. § 1277(d)*

Conduct of hearing. *Code Civ. Proc. § 1277(d)*

[2] Common Law Right

No general abrogation of common law right to change name. *Code Civ. Proc. § 1279.5(a)*; *Fam. Code § 2082*

Exceptions applicable to state prisoners, parolees, probationers, and sex offenders. *Code Civ. Proc. § 1279.5(b)-(e)*

[3] Birth Records

Supplemental report form to birth certificate for name of previously unnamed child. *Health & Safety Code § 103325*

Procedure for completing and filing supplemental report form for previously unnamed child. *Health & Safety Code §§ 103330, 103335*

New birth certificate for minor after adjudication of facts of parentage. *Health & Safety Code § 102725*

New birth certificate for minor after acknowledgment of paternity. *Health & Safety Code § 102755*

Amendment of birth certificate to reflect change of name. *Health & Safety Code § 103400 et seq.*

Petition for new birth certificate. *Health & Safety Code §§ 103425, 103430*

New birth certificate to reflect sex change. *Health & Safety Code § 103425 et seq.*

Single petition for name change and new birth certificate after sex change. *Health & Safety Code § 103435*

Fees for amending records after name change. *Health & Safety Code § 103720*

Fee for new birth certificate following sex change. *Health & Safety Code § 103725*

[4] Party's Former Name

Protection against discrimination based on party's choice of name. *Code Civ. Proc. § 1279.6*

Restoration of party's former or birth name in proceedings for dissolution or nullity of marriage. *Fam. Code §§ 2080, 2081*

[5] Penal Provisions

Marriage or pretended marriage under false personation as felony. *Penal Code § 528*

Becoming bail or surety by false personation as punishable by fine, imprisonment, or both. *Penal Code § 529*

Exposing personated party to liability or conferring benefit on party personating or on another as punishable by fine, imprisonment, or both. *Penal Code § 529*

Verification, publication, or acknowledgment of written instrument in name of another as punishable by fine, imprisonment, or both. *Penal Code § 529*

Manufacture, sale, or transfer of document falsely purporting to be government identification or driver's license as misdemeanor. *Penal Code § 529.5*

Manufacture, production, sale, offer, or transfer of false or counterfeit birth or baptismal certificate as either misdemeanor or felony. *Penal Code § 529a*

Offer, display, or possession of false or counterfeit birth or baptismal certificate, or birth or baptismal certificate of another, as misdemeanor. *Penal Code § 529a*

Obtaining money or property by false personation as punishable in same manner and to same extent as larceny. *Penal Code § 530*

Sending letter to newspaper with name of person other than sender as misdemeanor. *Penal Code § 538a*

[6] Elections

Reregistration if voter changes name. *Elec. Code § 2115*

Candidate's name change. *Elec. Code § 13104*

Voting after name change as requiring designation of both names on ballot. *Elec. Code § 14218*

[7] Naturalization

Naturalization records maintained by superior court clerk. *Gov. Code § 69847*

[8] Corporations

Restrictions on corporate names. *Corp. Code § 201(a), (b)*

Name in articles of incorporation. *Corp. Code §§ 201(a), 202(a)*

Corporation as able to be enjoined for using improper name. *Corp. Code § 201(b)*

Amending articles of incorporation. *Corp. Code § 900(a)*

[9] Unincorporated Associations

Partnership or any unincorporated association as permitted to sue or be sued in name it has assumed or name by which it is known. *Code Civ. Proc. § 369.5(a)*

Changing limited partnership's name. *Corp. Code §§ 15622* (eff. until January 1, 2010), 15902.02 (eff. January 1, 2008)

Unincorporated association as permitted to file new statement with Secretary of State. *Corp. Code § 18200(d)*

[10] Fictitious Business Name

Filing of fictitious business name statement as not authorizing use of name in violation of another's rights. *Bus. & Prof. Code § 14418*

Fictitious business name statement requirements. *Bus. & Prof. Code §§ 17900-17930*

[11] Trade Names

Trade names, business rights to names, and registered names. *Bus. & Prof. Code § 14401 et seq.*

[12] Real Estate Conveyance

Conveyance of real estate by owner with changed name. *Civ. Code § 1096*

[13] Professionals

Duty of dentist changing name to notify executive officer of Board of Dental Examiners. *Bus. & Prof. Code § 1654*

Duty of pharmacist changing name to notify executive officer of Board of Pharmacy. *Bus. & Prof. Code § 4100*

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§ 377.43 Local Court Rules

[1] Los Angeles County

Proceeding to change name as assignable to Supplemental Proceedings Department. Los Angeles Co. Super. Ct. Rules, Rule 2.5(d)

[2] Sacramento County

Petition for change of name as heard in law and motion department. Sacramento Co. Super. Ct. Rules, Rule 3.00(A)

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§ 377.44 Decisions

[1] Legal Definition of Name

Name as word by which person is known and distinguished from others; purported name consisting solely of numbers or symbols is not within statutory or common law meaning of name. *In re Ritchie (1984) 159 Cal. App. 3d 1070, 1073, 206 Cal. Rptr. 239*

Court's refusal to grant name change application is justifiable when based solely on failure of purported name to come within legal meaning of "name." *In re Ritchie (1984) 159 Cal. App. 3d 1070, 1073, 206 Cal. Rptr. 239*

[2] Right to Name Change

Common law right of alien to adopt any name, absent fraud or interference with rights of others. *Application of Chan (S.D.N.Y. 1976) 426 F. Supp. 680, 681*

Common law right to change personal name without legal proceedings. *In re Ross (1937) 8 Cal. 2d 608, 609, 67 P.2d 94* ; *In re Ritchie (1984) 159 Cal. App. 3d 1070, 1072, 206 Cal. Rptr. 239*

One-year residence in county is not necessary in name change proceedings. *Turesky v. Superior Court (1950) 97 Cal. App. 2d 838, 840, 218 P.2d 784*

Because one has a common law right to change name, courts' policy should be to encourage filing of petitions for name change for purposes of public record. *In re Useldinger (1939) 35 Cal. App. 2d 723, 727, 96 P.2d 958*

[3] Purpose of Statutory Procedure

Purpose of statutory procedure is merely to provide record of change. *In re Ross (1937) 8 Cal. 2d 608, 609, 67 P.2d*

94 ; *In re Marriage of Banks (1974) 42 Cal. App. 3d 631, 637, 117 Cal. Rptr. 37*

Court's authority as limited to ordering name change or denying or dismissing application; court lacks authority to permanently enjoin use of proposed name. *In re Weingand (1964) 231 Cal. App. 2d 289, 294, 41 Cal. Rptr. 778*

[4] Effect of Name Change

Real property conveyance by owner using changed name is valid and transfers title. *Emery v. Kipp (1908) 154 Cal. 83, 86, 97 P. 17*

Holder of promissory note who changes name has cause of action to collect on note. *Cumberland College v. Ish (1863) 22 Cal. 641, 644*

Person signing contract by different name as nevertheless bound by contract. *California Packing Corp. v. Kandarian (1923) 62 Cal. App. 729, 731, 217 P. 805*

[5] Granting or Denying Petition

Applicant becoming bankrupt under original name as insufficient reason to deny application for name change. *In re Ross (1937) 8 Cal. 2d 608, 610, 67 P.2d 94*

Some substantial reason is necessary for court's denial of application. *In re Ross (1937) 8 Cal. 2d 608, 610, 67 P.2d 94* ; *In re McGehee (1956) 147 Cal. App. 2d 25, 26, 304 P.2d 167*

Denial of petition to change name to "III" as proper, even though there was no intent to defraud, or to profit by someone else's reputation; "III" fails to qualify as name within either statutory or common law. *In re Ritchie (1984) 159 Cal. App. 3d 1070, 1073, 206 Cal. Rptr. 239*

Burden of proof rests on party who would deny change. *In re Marriage of Banks (1974) 42 Cal. App. 3d 631, 638, 117 Cal. Rptr. 37*

Change is ordered if in court's discretion it seems proper. *In re Marriage of Banks (1974) 42 Cal. App. 3d 631, 637-638, 117 Cal. Rptr. 37* ; *see Code Civ. Proc. § 1278*

Denial of petition is not abuse of discretion when change would be confusing to public and is attempt to "cash in" on famous actor's reputation. *In re Weingand (1964) 231 Cal. App. 2d 289, 293-294, 41 Cal. Rptr. 778*

Sentimental reasons peculiar to objecting party that are not contravening reasons for change are insufficient grounds for denial. *In re McGehee (1956) 147 Cal. App. 2d 25, 26, 304 P.2d 167*

Denial of petition is proper on showing of fraud or invasion of another's legal rights. *In re Useldinger (1939) 35 Cal. App. 2d 723, 727, 96 P.2d 958*

[6] Setting Aside Decree

Court has inherent jurisdiction to set aside decree changing name on ground of fraud. *In re Malloy (1960) 185 Cal. App. 2d 135, 138, 8 Cal. Rptr. 143*

Court is authorized to set aside decree changing name pursuant to *Code Civ. Proc. § 473*, within six months from decree, when party's failure to appear resulted from mistake, inadvertence, surprise, or excusable neglect. *In re Malloy (1960) 185 Cal. App. 2d 135, 138, 8 Cal. Rptr. 143*

Parent in military entitled under specified circumstances to have decree changing minor child's name set aside under former *50 U.S.C. App. § 520* (*now see 50 U.S.C. App. § 521(g)*) (formerly *50 U.S.C. App. § 520(4)*). *In re Larson (1947) 81 Cal. App. 2d 258, 262-263, 183 P.2d 688*

[7] Appeal

Court's decision to deny application is subject to appeal if abuse of discretion. *In re Ross (1937) 8 Cal. 2d 608, 609, 67 P.2d 94*

[8] Mandate

Writ of mandate is proper to compel superior court to proceed with hearing and determination on petition for name change. *Turesky v. Superior Court (1950) 97 Cal. App. 2d 838, 840, 218 P.2d 784*

[9] Woman's Former Name

Whether married woman's legal surname is her birth name or her husband's is dictated by her choice. *Weathers v. Superior Court (1976) 54 Cal. App. 3d 286, 289, 126 Cal. Rptr. 547*

[10] Corporation Name

Corporation must sue and be sued by its corporate name. *Curtiss v. Murry (1864) 26 Cal. 633, 634*

[11] Disputes Over Minor's Name

In parental disputes over child's surname, sole consideration is child's best interest; father no longer has primary right to have child bear his surname. *In re Marriage of Schiffman (1980) 28 Cal. 3d 640, 645, 647, 169 Cal. Rptr. 918, 620 P.2d 579*

Pursuant to California Uniform Parentage Act (former *Civ. Code § 7000 et seq.*; *now see Fam. Code § 7600 et seq.*), parent's sex or marital status does not create any primary right or protectible interest in having child bear his or her name. *Donald J. v. Evna M. (1978) 81 Cal. App. 3d 929, 937, 147 Cal. Rptr. 15*

Natural parent seeking to change minor's surname as having some legal rights to control minor's use of surname. *Donald J. v. Evna M. (1978) 81 Cal. App. 3d 929, 936, 147 Cal. Rptr. 15*

Nonparent petitioner seeking to change minor's name has no right to do so unless, for fraudulent purpose, minor was using a name detrimental to petitoner's interests. *Donald J. v. Evna M. (1978) 81 Cal. App. 3d 929, 936, 147 Cal. Rptr. 15*

When child has used one surname for some time without objection, court grants one parent's petition for change over other parent's objection reluctantly and only if substantial welfare of child requires it. *Donald J. v. Evna M. (1978) 81 Cal. App. 3d 929, 937, 147 Cal. Rptr. 15*

[12] Repulsive, Obscene, or Embarrassing Name

Repulsiveness, obscenity, or embarrassing character of proposed name is significant factor for court to consider on petition. *In re Worms (1967) 252 Cal. App. 2d 130, 133, 60 Cal. Rptr. 88*

[13] Residency Requirement

Court's adoption of one-year residency requirement before hearing name change petition was arbitrary and abuse of court's rulemaking power. *Turesky v. Superior Court (1950) 97 Cal. App. 2d 838, 840, 218 P.2d 784*

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§ 377.45 Law Reviews

Wein & Remmers, *Employment Protection and Gender Dysphoria; Legal Definitions of Unequal Treatment on the Basis of Sex and Disability, 30 Hastings L.J. 1075 (1979)*

Review of Selected 1975 California Legislation, *Domestic Relations; Use of Names by Women, 7 Pac. L.J. 422 (1976)*

Discharge in Bankruptcy as Affecting Individual's Right to Change Name, 27 Cal. L. Rev. 268 (1938)

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§ 377.46 Text References

Witkin, Summary of California Law, vol. 9, *Corporations*, §§ 26-28, 39, 57, 63, 64; vol. 10, *Parent and Child*, §§ 106, 109, 110, 118, 292, 294, 295; vol. 11, *Husband and Wife*, § 19; vol. 12, *Real Property*, §§ 263, 264, 267; vol. 13, *Personal Property*, §§ 23-25 (10th ed. 2005)

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§§ 377.47[Reserved]

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PART IV. PROCEDURAL CHECKLIST

33-377 California Forms of Pleading and Practice--Annotated § 377.60

§ 377.60 Petitioner's Checklist

NOTE:

Illustrative Checklist. The following checklist is illustrative only of procedures commonly utilized in a change of name proceeding to change the name of an individual.

The term "petitioner," as used in this checklist, refers to the person who brings the proceeding to change a name, whether he or she is acting on his or her own behalf or on behalf of another. The term "applicant," refers to the person whose name is sought to be changed, whether or not he or she is the petitioner.

[1] Application for Name Change

[a] Facts to Be Ascertained

[i] Petitioner Applying on Own Behalf

- ☐ Present name, address, telephone number, and age.
- ☐ Place of birth.
- ☐ Proposed name.
- ☐ Reasons for change of name.
- ☐ Name and address of parent, or if neither parent is living, names and addresses of near relatives.

NOTE:

Requirement Regarding Relatives Is Not Specific. *Code Civ. Proc. § 1276* does not require a specific number of near relatives to be listed on the petition in such a situation.

☐ Prior use, if any, of proposed name.

☐ If the applicant is in prison, whether the Director of Corrections will permit the prisoner to file an application [*Code Civ. Proc. § 1279.5(b)*].

☐ If the applicant is within jurisdiction of Department of Corrections, whether parole agent or probation officer will grant prior written approval after determining that name change will not pose security risk to community [*Code Civ. Proc. § 1279.5(c)*].

☐ If the applicant is required to register as sex offender under Sex Offender Registration Act [*Penal Code § 290 et seq.*], whether facts will allow court to determine that it is in best interest of justice to grant application and that doing so will not adversely affect public safety [*Code Civ. Proc. § 1279.5(d)*].

[ii] Petitioner Applying on Behalf of Minor

☐ Minor's present name, address, telephone number, and age.

☐ Capacity and status of petitioner (parent, guardian, near relative, or friend).

☐ Proposed name for minor.

☐ Reasons for change of name.

☐ Names and addresses of minor's parents, or, if neither is living, names and addresses of near relatives, if known to petitioner.

☐ If petitioner is minor's parent, name and address of nonpetitioning parent, if living.

☐ If the petition is signed by guardian, petition must specify name and address of parents (or grandparents, if both parents are deceased) [*Code Civ. Proc. § 1276(c)*]; relevant information regarding guardianship; likelihood that child will remain under guardian's care until child reaches age of majority; and information suggesting that child will not likely be returned to custody of his or her parents [*Code Civ. Proc. § 1276(c)*].

☐ If minor is over 12 and parents have relinquished him or her relinquished to an adoption agency, whether legal adoption has taken place or is about to take place.

☐ Minor's prior use, if any, of proposed name.

[b] Documents to Be Obtained

[i] Petitioner Applying on Own Behalf

Code Civ. Proc. § 1275 et seq. do not require the following documents, but they may be useful in establishing necessary facts:

☐ Birth certificate.

☐ Documentary proof, if any, of prior use of proposed name, such as correspondence, newspaper articles, or advertisements.

☐ If petitioner is in state prison, written permission to file the petition from the Director of Corrections [*see Code Civ. Proc. § 1279.5*].

☐ If seeking name change and new birth certificate (or new birth certificate without name change) after sex change, physician's affidavit documenting the sex change [*see Health & Safety Code §§ 103430(a), 103435*].

[ii] Petitioner Applying on Behalf of Minor

Code Civ. Proc. § 1275 et seq. do not require the following documents, but they may be useful in establishing necessary facts:

☐ Minor's birth certificate.

☐ If petitioner is guardian, proof of status as guardian.

☐ If petitioner is adoption agency, proof, if available, that applicant was relinquished to agency and has not been legally adopted.

[c] Preliminary Determinations

☐ Applicant's capacity.

☐ Determine whether applicant is 18 years of age or over.

☐ If so, he or she may bring the proceeding.

☐ If not, application must be made by one of minor's parents or guardian of person. If both parents are dead and there is no guardian of person, application must be made by some near relative or friend of person. *Code Civ. Proc. § 1276(a)(1)*

☐ Potential opposition.

☐ Determine whether:

☐ The proposed name is close to that of a celebrity or other person whose name has commercial and professional value.

☐ Any facts exist that might indicate that petitioner is trying to confuse the public or pass himself or herself off as that person or that person's relative.

☐ If petitioner is a parent applying on minor's behalf, determine whether:

☐ The other parent is alive.

☐ If so, whether the other parent opposes the change of name.

☐ Jurisdiction and venue.

☐ Determine county of residence of person whose name is to be changed [*see Code Civ. Proc. §§ 1275, 1276*].

☐ Newspaper to publish notice.

☐ Determine name of newspaper of general circulation in the county, if any, and costs of publication [*Code Civ. Proc. § 1277(a)*].

NOTE:
No Publication of Name Change of Participants in Address Confidentiality or Witness Protection Programs. Special protections against disclosure of petitioner's current legal name and proposed name apply when name change is related to participation in the address confidentiality program (to avoid domestic violence or stalking, or if the name change is for a victim of sexual assault) or participation in the state Witness Protection Program [*see Code Civ. Proc. § 1277(b), (c),* discussed in *§ 377.14[3], [4]*].

☐ Seeking new birth certificate after sex change.

☐ If petitioner is applying for a name change following a sex change, determine whether or not to file a single petition for both change of name and issuance of a new birth certificate [*see Health & Safety Code § 103435*].

NOTE:
New Birth Certificate Without Name Change. A person who has had a surgical change of gender may obtain a new birth certificate to reflect the gender change, without seeking a change of name [*see Health & Safety Code §§ 103425, 103435*; *see also §§ 377.77 -377.79* (Cal. Judicial Council forms for obtaining order for new birth certificate to reflect change of gender, without change of name)].

[d] Drafting Petition and Order to Show Cause

NOTE:

Inclusion in Petition Under Uniform Parentage Act. An application tochange the name of a minor or adult child for whom a parent and child relationship is established under the Uniform Parentage Act (*Fam. Code § 7600 et seq.*), may be included with a petition filed under the Act [*see Fam. Code § 7638*].

☐ Prepare petition [for forms, *see* §§ 377.70-377.72].

☐ Make the following number of copies of petition:

☐ Original for filing.

☐ Copy for client, if desired.

☐ Office copy.

☐ Any additional copies desired.

☐ Obtain signatures [*Code Civ. Proc. § 1276*].

☐ Petitioner's signature.

☐ If name change is sought on behalf of minor, petition must be signed by either one of minor's parents or any guardian of the person (or some near relative or friend of the person, if both parents are dead and there is no guardian of person) [*Code Civ. Proc. § 1276(a)(1)*].

☐ If applicant is a minor 12 years of age or older and has been relinquished to an adoption agency but not legally adopted, both the minor's and the adoption agency's signatures.

☐ Draft order to show cause [*see Code Civ. Proc. § 1277(a)*; for a form, *see §§ 377.73, 377.73A*].

☐ Make the following number of copies order to show cause:

☐ Original for signature by the court and for filing.

☐ Either one copy for publication in a newspaper or, if there is no newspaper of general circulation in the county, three copies for posting.

☐ If petitioner is parent seeking name change on minor's behalf, one copy for service on parent not joining in consent [*Code Civ. Proc. § 1277(a)*].

☐ Any additional copies desired.

[e] Filing

☐ Deliver original and all copies of petition and order to show cause to the court clerk:

☐ Originals for filing after judge has signed the order to show cause.

☐ Copies for court clerk to conform.

☐ Pay required fees.

NOTE:

Payment at Time of Filing; Amount. Petitioner must pay the filing fee at the time of filing the first paper. Filing fees are fixed by statute [*Gov. Code § 70611* (effective January 1, 2006, uniform filing fee for first filing in superior courts other than in limited civil case, adoption proceeding, proceeding under Probate Code, or proceeding under Family Code)]. However, a given county may have authority to impose additional fees for particular purposes [*see, e.g., Gov. Code §§ 70622* (surcharge for courthouse repairs in Riverside County), 70624 (surcharge for courthouse repairs in San Bernardino County)]. Therefore, counsel should refer to local rules and check with the court clerk to determine the exact amount of fees to be paid when the petition is filed.

[f] Notice

☐ Publication.

NOTE:

Uniform Parentage Act. If the application for change of name is brought as part of an action under the Uniform Parentage Act (*Fam. Code § 7600 et seq.*), whether as part of a petition or cross complaint or as a separate order to show cause in a pending action thereunder, service of the application must be made on all other parties to the action in a like manner as prescribed for the service of a summons as set forth in *Code Civ. Proc. §§ 415.10-417.40* [*Code Civ. Proc. § 1277(d)*; for discussion and forms relating to service, *see* Ch. 518, *Service of Summons and Papers*].

On the setting of a hearing on the issue of a change of name, notice of the hearing must be given to all parties within the time limits prescribed generally for the type of hearing (whether trial or order to show cause) at which the issue of the change of name is to be decided [*Code Civ. Proc. § 1277(d)*].

☐ Deliver conformed copy of the order to show cause to the newspaper designated in the order and obtain [*Code Civ. Proc. § 1277(a)*]:

☐ Four weekly publications.

☐ If a daily newspaper, publication once a week for four successive weeks.

NOTE:
No Publication of Name Change of Participants in Address Confidentiality or Witness Protection Programs. Special protections against disclosure of petitioner's current legal name and proposed name apply when name change is related to participation in the address confidentiality program (to avoid domestic violence or stalking, or if the name change is for a victim of sexual assault) or participation in the state Witness Protection Program [*see Code Civ. Proc. § 1277(b), (c)*, discussed in *§ 377.14[3], [4]*].

☐ Obtain affidavit of publication from printer.

NOTE:
Proof of Publication. Proof of publication is required at the hearing [*see Code Civ. Proc. § 1277(a)*]. The proof may be given by the affidavit or declaration of the printer of the newspaper or by his or her foreman or principal clerk and annexed to the copy of the order to show cause. It must specify the newspaper and the times when publication was made [*Code Civ. Proc. §§ 2010, 2015.5*].

☐ File proof of publication, or if part of newspaper's service, verify that newspaper has done so.

☐ Posting.

☐ If there is no newspaper of general circulation in the county in which the proceeding is brought, deliver three conformed copies of the order to show cause to the court clerk for posting. Pursuant to *Code Civ. Proc. § 1277(a)*, the order must be posted in three of the most public places in the county, and proof of such posting is required at the hearing.

☐ Notice to nonsigning parent.

☐ If the petition is filed by one parent on behalf of a minor, and the other parent is living and does not join in consenting to the petition, serve the other parent with notice of the time and place of the hearing or a copy of the order to show cause, not less than 30 days prior to the hearing, pursuant to the service provisions of *Code Civ. Proc. § 413.10, 414.10, 415.10*, or *415.40* [*Code Civ. Proc. § 1277(a)*; for discussion and forms relating to service generally, *see* Ch. 518, *Service of Summons and Papers* ; for a form of proof of service, *see § 377.74*].

NOTE:
Court May Order Different Manner of Giving Notice. If notice of the hearing cannot reasonably be accomplished pursuant to *Code Civ. Proc. § 415.10* or *415.40*, the court may order that notice be given in a manner that the court determines is reasonably calculated to give actual notice to the nonconsenting parent. In that case, if the court determines that notice by publication is reasonably calculated to give actual notice to the nonconsenting parent, the court may determine that publication of the order to show cause is sufficient notice to the nonconsenting parent [*Code Civ. Proc. § 1277(a)*].

☐ If guardian files a petition to change the name of his or her minor ward under *Code Civ. Proc. § 1276*, the guardian must provide notice of hearing to any living parent of minor bypersonal service at least 30 days prior to the hearing [*Code Civ. Proc. § 1277(e)(1)*]. If either or both parents are deceased or cannot be located, and child's grandparents are living, guardian must cause to be served on child's grandparents notice of time and place of hearing, or copy of order to show cause. Service must be made not less than 30 days prior to hearing, pursuant to *Code Civ. Proc. §§ 413.10, 414.10, 415.10*, or *415.40* [*Code Civ. Proc. § 1277(e)(2)* for discussion and forms relating to such service, *see* Ch. 518, *Service of Summons and Papers* ; for a form of proof of service, *see § 377.74*].

[2] If Court Refuses to Hear Petition

☐ Prepare petition for writ of mandate to compel the superior court to hear the petition for change of name [*see Turesky v. Superior Court (1950) 97 Cal. App. 2d 838, 840, 218 P.2d 784]* . For discussion, a procedural checklist, and forms relating to mandate, see Ch. 358, *Mandate and Prohibition* .

[3] If Court Grants Petition for Name Change

[a] Preparation of Decree

☐ Prepare the decree changing name [for a form, *see §§ 377.75, 377.75A, 377.76*].

☐ Make the following number of copies:

☐ Original for filing with court.

☐ A copy for certification by court clerk, for filing with Secretary of State.

☐ If amendment of birth records is desired, an additional copy for certification by court clerk for filing with State Registrar.

☐ If petitioner changed name following a sex change, an additional copy for certification by court clerk for applying for new birthcertificate.

☐ One copy for service on each remonstrant, if he or she appeared in propria persona to oppose the petition, or two copies for service on his or her attorney, if remonstrant opposed the petition by attorney.

☐ Copy for client, if desired.

☐ Office copy.

☐ Any additional copies desired.

[b] Presentation of Decree to Court Clerk

☐ Present the original and copies of the decree changing name to the court clerk or judge's clerk for signature.

☐ Have the clerk certify one of the copies for forwarding to the Secretary of State, and pay the fee designated by *Gov. Code § 26833*.

☐ Have the clerk certify an additional copy if amendment of the birth record is desired or if a new birth certificate is desired when petitioner obtained the name change following a sex change.

☐ Have the clerk file the original, conform the copies, and return all copies to counsel.

[c] Notice of Entry of Judgment (Decree)

☐ Prepare a notice of entry of judgment (decree) [for forms, *see* Ch. 318, *Judgments*] unless court orders clerk to do so or petitioner is not represented by counsel [*see Code Civ. Proc. § 664.5*].

☐ Make the following number of copies:

- ☐ Original for filing.
- ☐ Copy for service on each remonstrant, if he or she appeared in propria persona, or two copies for service on his or her attorney if he or she was represented by counsel in the proceeding.
- ☐ Office copy.
- ☐ Any additional copies desired.

☐ Prepare proof of service of notice of entry of judgment [for forms, *see* Ch. 518, *Service of Summons and Papers*].

☐ Make same number of copies as the notice of entry of judgment.

☐ Service and Filing

- ☐ Attach the original of the proof of service to the original of the notice of entry of judgment and attach a copy of the proof of service to each copy of the notice of entry of judgment.
- ☐ Serve one copy of the papers on remonstrant, if he or she appeared in propria

persona, or two copies on his or her attorney, if remonstrant appeared by counsel [*see Code Civ. Proc. § 1015*].

☐ Deliver the original of the notice of entry of judgment and the proof of service to the court for filing.

[d] Amendment of Birth Record

☐ Obtain application form (VS 23) from one of following:

☐ County recorder's office.

☐ County health department.

☐ California Office of Vital Records (916/445-2684; <www.dhs.ca.gov/hisp/chs/ovr/ovrformsreq.asp>).

☐ Prepare application using original form.

NOTE:

Original Form Required. An application for amendment of a birth record must be submitted on an original form VS 23, printed on special bond paper, provided by the California Office of Vital Records; photocopies will not be accepted. For more information, including an online pamphlet with detailed instructions for completion and submission of the application, visit <www.dhs.ca.gov>.

☐ Make the following number of copies:

☐ Original for delivery to State Registrar.

☐ Copy for client, if desired.

☐ Office copy.

☐ Any additional copies desired.

☐ Attach a certified copy of the decree changing name to the original application.

☐ Deliver the application plus the fee designated in *Health & Safety Code § 103720* to the State Registrar.

[e] Obtaining New Birth Certificate After Sex Change

☐ After entry of court order for name change and issuance of new birth certificate, obtain application form (VS 24(S)) from one of following:

☐ County recorder's office.

☐ County health department.

☐ California Office of Vital Records (916/445-2684; <www.dhs.ca.gov/hisp/chs/ovr/ovrformsreq.asp>).

☐ Prepare application using original form.

NOTE:

Original Form Required. An application for amendment of a birth record must be submitted on an original form VS 24(S), printed on special bond paper, provided by the California Office of Vital Records; photocopies will not be accepted. For more information, including an online pamphlet with detailed instructions for completion and submission of the application, visit <www.dhs.ca.gov>.

☐ If the petitioner applied for a name change, but not for a new birth certificate, or if a new birth certificate is desired without a change of name, a separate petition may be filed in court for the issuance of a new birth certificate, pursuant to *Health & Safety Code §§ 103425, 103430* [see *§§ 377.77 -377.79*; *see also* Ch. 99, *Birth and Death, Establishing Fact of*, § 99.35].

[4] If Court Denies Petition for Name Change

☐ File notice of appeal [*see Code Civ. Proc. § 904.1*; *In re Ross (1937) 8 Cal. 2d 608, 609, 67 P.2d 94* ; for discussion, *see § 377.17*].

☐ For discussion and forms relating to appeals, see Ch. 40, *Appeal: An Overview* , et seq.

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Chapter 377 NAME, CHANGE OF
PART IV. PROCEDURAL CHECKLIST

33-377 California Forms of Pleading and Practice--Annotated § 377.61

§ 377.61 Remonstrant's Checklist

NOTE:
Illustrative Checklist. The following checklist is illustrative only of procedures commonly utilized.

[1] Objecting to Name Change

[a] Determining Objections

☐ Determine whether remonstrant has good reason to object to the change of name [*Code Civ. Proc. § 1278(a)*].

☐ Possible grounds include:

☐ Change would result in fraud or the invasion of another's legal rights [*see In re Useldinger (1939) 35 Cal. App. 2d 723, 727, 96 P.2d 958]* .

☐ Change would confuse the public and is an attempt by petitioner to "cash in" on a famous person's reputation [*see In re Weingand (1964) 231 Cal. App. 2d 289, 293-294, 41 Cal. Rptr. 778]* .

☐ Proposed name is repulsive, obscene, or embarassing [*see In re Worms (1967) 252 Cal. App. 2d 130, 133, 60 Cal. Rptr. 88* (disapproved on other grounds, in *In re Marriage of Schiffman (1980) 28 Cal. 3d 640, 647, 169 Cal. Rptr. 918, 620 P.2d 579* to extent it is inconsistent with rule that minor's welfare is sole consideration in parental dispute over minor's surname)]; and

☐ In a parental dispute over proposed name change of minor, the change would be

contrary to the minor's best interests [*see In re Marriage of Schiffman (1980) 28 Cal. 3d 640, 647, 169 Cal. Rptr. 918, 620 P.2d 579]* .

☐ Grounds for denial exist under *Code Civ. Proc. § 1279.5(b)-(e)* [*see § 377.12[2]*].

[b] Facts to Be Ascertained

☐ If name change constitutes fraud or invasion of another's legal rights.

☐ Remonstrant's name, address, and telephone number;

☐ Reasons why petitioner's use of the proposed name would constitute fraud or the invasion of another's legal rights;

☐ The nature and extent of petitioner's prior use of proposed name, if known to remonstrant; and

☐ Date and place of hearing on application for name change, as designated on the order to show cause.

☐ If name change is for purpose of "cashing in" on remonstrant's name.

☐ Remonstrant's name, address, and telephone number.

☐ Remonstrant's occupation.

☐ Remonstrant's professional standing and the professional or commercial value of his or her name.

☐ Length of time either that remonstrant has been known by the general public, or members of a particular class, by his or her own name, or that he or she has used and been known by the name in question.

☐ Date and place of hearing on application for change of name, as designated on the order to show cause.

☐ If minor's name was changed without remonstrant parent's consent.

☐ Remonstrant's name, address, and telephone number.

☐ Whether petitioning parent knows remonstrant's address, if remonstrant has not been served with order to show cause [*Code Civ. Proc. § 1277(a)*].

☐ Reasons why remonstrant objects to change of minor's name, and how those reasons relate to the minor's welfare.

☐ Date and place of hearing on name change, as designated by the order to show cause.

[c] Documents to Be Obtained

☐ If change of petitioner's name would result in fraud or the invasion of another's legal rights:

☐ Documents, if any, supporting an assertion of fraud on petitioner's part; or

☐ Documents, if any, supporting a showing of another's legal right or rights, which would be invaded by the name change.

☐ If petitioner is attempting to "cash in" on remonstrant's name:

☐ Documents, if any, proving commercial value of remonstrant's name and knowledge and acceptance of the name by the community or by members of a particular class in the community; and

☐ Documents, if any, proving length of time the name used by remonstrant has been known and accepted in the community or the length of time that the name has had commercial value.

☐ If remonstrant is the parent of a minor objecting to the other parent's petition to change the minor's name.

☐ Minor's birth certificate.

☐ Any documentary evidence tending to show that a change of name is contrary to the minor's welfare.

☐ Documentary proof that petitioning parent knew remonstrant's address, if applicable.

[d] Drafting Objections

☐ Prepare the objections in the following number of copies:

☐ Original for filing.

☐ Copy for service on petitioner, if desired [*see* [e], *below*].

☐ Copy for client, if desired.

☐ Office copy.

☐ Any additional copies desired.

☐ Have remonstrant sign the objections.

[e] Service

NOTE:

No Notice Prescribed by Code. *Code Civ. Proc. § 1278* does not specifically require that the objections be served on petitioner. The provisions of Part Two of the Code of Civil Procecure, which include sections governing service of summons and papers [*see Code Civ. Proc. §§ 413.10 et seq., 1010 et seq.*], are not specifically incorporated into proceedings for change of name. Nevertheless, it would seem that if petitioner were not served, questions of fairness might arise. If counsel serves petitioner, it appears that proof of service made as provided in *Code Civ. Proc. § 1011 et seq.* would be proper. For a discussion and forms relating to service, see Ch. 518, *Service of Summons and Papers* .

[f] Filing

☐ Deliver the original of the objections and proof of service, if made, to the court clerk for filing at least two court days before date set for hearing [*Code Civ. Proc. §§ 1277(a), 1278(a)*].

☐ Pay required fees.

NOTE:

Payment at Time of Filing; Amount. The adverse party must pays a filing fee at the time of filing that party's first paper. The amount of the fee is fixed by statute [*Gov. Code § 70612* (effective January 1, 2006, uniform filing fee for adverse party's first filing in superior court)]. However, a given county may have authority to impose additional fees for particular purposes [*see, e.g., Gov. Code §§ 70622* (surcharge for courthouse repairs in Riverside County), 70624 (surcharge for courthouse repairs in San Bernardino County)]. Therefore, counsel should refer to local rules and check with the court clerk to determine the exact amount of fees to be paid when the objections are filed.

[2] Motion to Set Aside Decree Changing Name

[a] Determine Grounds for Motion

☐ Failure to appear at the original hearing due to mistake, inadvertence, surprise, or excusable neglect, or fraud [*see Code Civ. Proc. § 473*; *In re Malloy (1960) 185 Cal. App. 2d 135, 137-138, 8 Cal. Rptr. 143]* .

☐ Failure of parent petitioning for minor's name change give notice of the hearing on the petition to the parent who does not join in consenting to the petition [*see Code Civ. Proc. § 1277(a)*; *see also Code Civ. Proc. § 1276*; *In re Malloy (1960) 185 Cal. App. 2d 135, 137-138, 8 Cal. Rptr. 143* (decision made prior to statutoryrequirement of notice to nonconsenting parent set forth in *Code Civ. Proc. § 1277*)].

☐ Failure to comply with requirements of the Servicemembers Civil ReliefAct (*50 U.S.C. App. § 521*) [*see In re Larson (1947) 81 Cal. App. 2d 258, 262, 183 P.2d 688* (disapproved on other grounds in *In re Marriage of Schiffman (1980) 28 Cal. 3d 640, 647, 169 Cal. Rptr. 918, 620 P.2d 579*)].

[b] Facts to Be Ascertained

☐ Remonstrant's name, address, and telephone number.

☐ Facts establishing remonstrant as an interested party.

☐ Date and place of hearing of name change.

☐ In case of fraud or mistake, inadvertence, surprise, or excusable neglect:

☐ Facts establishing fraud by petitioner in obtaining name change or facts establishing mistake, inadvertence, surprise, or excusable neglect of remonstrant.

☐ In case of failure to give notice to nonconsenting parent:

☐ Name, address, telephone number, and age of minor whose name was changed.

☐ Name, address, and telephone number of petitioning parent.

☐ Dates of parents' marriage.

☐ Dates of parents' divorce and any remarriages, if applicable.

[c] Documents to Be Obtained

☐ Copy of decree changing name, showing court, case number, and date of decree.

☐ Documents, if any, supporting an assertion of fraud on petitioner's part, or mistake, inadvertence, surprise, or excusable neglect on remonstrant's part.

☐ If moving party is nonconsenting parent, minor's birth certificate.

☐ Documentary proof, if any, that petitioning parent knew nonconsenting parent's address at time

notice of hearing should have been served.

NOTE:
Detailed Checklist and Forms: See Ch. 489, *Relief From Judgments and Orders* , for forms and a detailed checklist regarding the procedure for setting aside a judgment.

[3] Appeal

[a] If Court Grants Decree Changing Name

☐ File notice of appeal [*see Code Civ. Proc. § 904.1*].

☐ For discussion and forms relating to appeals, see Ch. 40, *Appeal: An Overview* , et seq.

[b] If Court Denies Motion to Set Aside Decree

☐ File notice of appeal [*see Code Civ. Proc. § 904.1(a)(2)*].

☐ For a discussion and forms relating to appeals generally, see Ch. 40, *Appeal: An Overview* , et seq.

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[Reserved]

§§ 377.62[Reserved]

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33-377 California Forms of Pleading and Practice--Annotated § 377.70

§ 377.70 Petition for Change of Name [Code Civ. Proc. § 1276; Cal. Judicial Council Form NC-100]

[1] FORM Petition for Change of Name [Code Civ. Proc. § 1276; Cal. Judicial Council Form NC-100]

Click here to view image.

[2] Use of Form

This form of petition for change of name is an illustrative reproduction of Cal. Judicial Council Form NC-100, adopted by the Judicial Council for mandatoryuse [*see Cal. Rules of Ct., Rule 1.31*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The petition is for use in initiating a proceeding to change an individual's name under *Code Civ. Proc. § 1275 et seq.* [*see Code Civ. Proc. § 1276* and discussion in *§ 377.14*]. It may be submitted by the person whose name is to be changed, or if that person is a minor, by the person's parent, guardian, near relative, or friend [*Code Civ. Proc. § 1276(a)*].

The petition is completed by attaching mandatory Cal. Judicial Council Form NC-110, for use in providing additional information relating to the petition and the petitioner's signature [*§ 377.71*]. If the petitioner is the guardian of a minor whose name is to be changed, the petition must also be completed by attaching mandatory Cal. Judicial Council Form NC-110G, for use in providing information concerning the guardianship [*§ 377.72*].

Page Two of the form of petition sets out detailed instructions for completing the petition and other necessary forms, filing the petition together with related attachments, requesting a hearing date, publishing or posting the order to show once it has been completed and filed, and preparing for the hearing. For further discussion and a checklist relating to these requirements, see respectively §§ 377.14-377.16 and *377.60*.

For a mandatory Judicial Council form to be used instead of this form when the petitioner seeks both a name change and the issuance of a birth certificate reflecting a change of gender [*see Health & Safety Code §§ 103430, 103435*], see

§ 377.70A. For a form approved by the Judicial Council for optional used in petitioning for a change of gender and issuance of a new birth certificate for someone who has already obtained, or who does not desire, a name change [*see Health & Safety Code §§ 103425, 103430*, 10340], see *§ 377.77*.

If the petitioner seeks a confidential name change under the "Safe at Home" address confidentiality program for victims of domestic violence, sexual assault, and stalking [*see Gov. Code § 6205 et seq.*; *see also § 377.14[1]*], a Confidential Cover Sheet (Judicial Council Form NC-400) must be attached to the front of the petition for name change and every other document filed in the proceedings [*Cal. Rules of Ct., Rule 2.575(d)*; *see Code Civ. Proc. § 1277(b)(3)*]. The petitioner may also apply for an order to file records under seal in the name-change proceeding [*see Code Civ. Proc. § 1277(b)(4)*]. For forms for the Confidential Cover Sheet and application to file under seal, see *§§ 377.80 -377.84*.

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33-377 California Forms of Pleading and Practice--Annotated § 377.70A

§ 377.70A Petition for Change of Name and Gender [Code Civ. Proc. § 1276; Health & Safety Code §§ 103430, 103435; Judicial Council Form NC-200]

[1] FORM Petition for Change of Name and Gender [Code Civ. Proc. § 1276; Health & Safety Code §§ 103430, 103435; Judicial Council Form NC-200]

Click here to view image.

[2] Use of Form

This form of petition for change of name and gender is an illustrative reproduction of Cal. Judicial Council Form NC-200, adopted by the Judicial Council for mandatory use [*see Cal. Rules of Ct., Rule 1.31*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is to be used instead of the form illustrated in *§ 377.70* when the petitioner seeks both a change of name and the issuance of a birth certificate reflecting a change of gender [*see Health & Safety Code §§ 103430, 103435*]. This petition is completed by attaching mandatory Cal. Judicial Council Form NC-110, for use in providing additional information relating to the petitioner and to the petitioner's signature [*see § 377.71*]. Also required is a physician's affidavit or declaration documenting the change of gender [*Health & Safety Code § 103430(a)*], which may be submitted using optional Cal. Judicial Council Form NC-210/NC-310 [*see § 377.71A*]. Page Two of this form sets out detailed instructions for completing the petition and other necessary forms, filing the petition together with related attachments, requesting a hearing date, publishing or posting the order to show once it has been completed and filed, and preparing for the hearing. For further discussion and a checklist relating to these requirements, see §§ 377.14-377.16, *377.24[1]*, and *377.60*.

For a form approved by the Judicial Council for optional used in petitioning for a change of gender and issuance of a new birth certificate for someone who has already obtained, or who does not desire, a name change [*see Health & Safety Code §§ 103425, 103430*, 10340], see *§ 377.77*.

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33-377 California Forms of Pleading and Practice--Annotated § 377.71

§ 377.71 Attachment to Petition--Name and Information About Person Whose Name Is to Be Changed [Code Civ. Proc. § 1276; Cal. Judicial Council Form NC-110]

[1] FORM Attachment to Petition--Name and Information About Person Whose Name Is to Be Changed [Code Civ. Proc. § 1276; Cal. Judicial Council Form NC-110]

Click here to view image.

[2] Use of Form

This form of attachment to the mandatory Judicial Council form of petition for change of name is an illustrative reproduction of Cal. Judicial Council Form NC-110, adopted by the Judicial Council for mandatory use [*see Cal. Rules of Ct., Rule 1.31*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This attachment is for use in completing the petition for name change. It provides for additional information and signatures required under *Code Civ. Proc. § 1276(a),(d)* [*see* discussion in *§§ 377.14[2], 377.15*]. It also includes a declaration required to be completed by each adult individual seeking a name change, regarding whether he or she is under the jurisdiction of the Department of Corrections or is required to register as a sex offender [*see Code Civ. Proc. § 1279.5(e)* and discussion in *§ 377.12[2]*].

An additional attachment, mandatory Cal. Judicial Council Form NC-110G, must be completed and attached to the petition when the petition is brought on behalf of a minor by a guardian [*see § 377.72*].

For illustrative copies of the petitions to which this form must be attached, see *§§ 377.70* and *377.70A*.

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33-377 California Forms of Pleading and Practice--Annotated § 377.71A

§ 377.71A Attachment to Petition--Declaration of Physician Documenting Change of Gender Through Surgical Treatment [Health & Safety Code §§ 103425, 103430; Cal. Judicial Council Form NC-210/NC-310]

[1] FORM Attachment to Petition--Declaration of Physician Documenting Change of Gender Through Surgical Treatment [Health & Safety Code §§ 103425, 103430; Cal. Judicial Council Form NC-210/NC-310]

Click here to view image.

[2] Use of Form

This is an illustrative reproduction of Cal. Judicial Council Form NC-210/NC-310, adopted by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.35*; *see also* Cal. Rules of Ct., Appen. A] as an attachment to the mandatory Judicial Council form of petition for change of name and gender. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

A physician's affidavit or declaration documenting the petitioner's change of gender must accompany any petition for change of name and gender [*Health & Safety Code §§ 103425, 103430(a)*]. Similarly, if the petition seeks only a change of gender and issuance of a new birth certificate, without a change of name, a physician's affidavit or declaration documenting the gender change must be attached [*Health & Safety Code §§ 103425, 103430(a)*]. The physician's declaration may be prepared using this form, or a different form of physician's affidavit or declaration may be used [*see Cal. Rules of Ct., Rule 1.35*; *see also* Cal. Rules of Ct., Appen. A].

For illustrative copies of the petitions to which this form must be attached, see *§§ 377.70A* [Cal. Judicial Council Form NC-200] and 377.77 [Cal. Judicial Council Form NC-200].

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33-377 California Forms of Pleading and Practice--Annotated § 377.72

§ 377.72 Supplemental Attachment to Petition--Declaration of Guardian [Code Civ. Proc. § 1276; Cal. Judicial Council Form NC-110G]

[1] FORM Supplemental Attachment to Petition--Declaration of Guardian [Code Civ. Proc. § 1276; Cal. Judicial Council Form NC-110G]

Click here to view image.

[2] Use of Form

This form of supplemental attachment to the mandatory Judicial Council form of petition for change of name is an illustrative reproduction of Cal. Judicial Council Form NC-110G, adopted by the Judicial Council for mandatory use [*see Cal. Rules of Ct., Rule 1.31*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This supplemental attachment is for use in completing the petition for name change when it has been brought on behalf of a minor by a guardian. It provides the additional information regarding the guardianship, in the form of a declaration by the guardian, which is required under *Code Civ. Proc. § 1276(f)* [*see* discussion in *§ 377.15[1][c]*]. A separate supplemental attachment, or declaration by the guardian, must be completed for each minor whose name is to be changed, when the petition seeks a name change for more than one minor.

For an illustrative form of the petition to which this form must be attached, see *§ 377.70*.

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33-377 California Forms of Pleading and Practice--Annotated § 377.73

§ 377.73 Order to Show Cause for Change of Name [Code Civ. Proc. § 1277; Cal. Judicial Council Form NC-120]

[1] FORM Order to Show Cause for Change of Name [Code Civ. Proc. § 1277; Cal. Judicial Council Form NC-120]

Click here to view image.

[2] Use of Form

This form of order to show cause is an illustrative reproduction of Cal. Judicial Council Form NC-120, adopted by the Judicial Council for mandatory use [*see Cal. Rules of Ct., Rule 1.31*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form of order to show cause is required to be completed by a petitioner for a change of name under *Code Civ. Proc. § 1275 et seq.* The petitioner must request from the clerk of the court a hearing date on the matter not less than six nor more than 12 weeks from the time the order is made [*Code Civ. Proc. § 1277(a)*]. The instructions to the underlying petition, Cal. Judicial Council Form NC-100 [*see § 377.70*], recommend requesting a hearing date at least six weeks in the future. After obtaining a hearing date, the petitioner must obtain the judge's signature on the order, and arrange for the publication or posting of the order pursuant to *Code Civ. Proc. § 1277* [*see* discussion in *§ 377.14[4]*].

Paragraph 2 of this form requires that any person objecting to the name change (1) file a written objection that includes the reasons for the objection at least two court days before the matter is scheduled to be heard, and (2) appear at the hearing to show cause why the petition should not be granted. If no written objection is timely filed, the court may grant the petition without a hearing [*Code Civ. Proc. § 1277(a)*].

When the change of name relates to a minor, a copy of order to show cause or other notice of the hearing must be served on nonpetitioning parents or, if none, on nonpetitioning grandparents [*see Code Civ. Proc. § 1277(a), (e)* and discussion in *§ 377.15[3]*]. For a mandatory form of proof of such service, see *§ 377.74*.

For a mandatory Judicial Council form to be used instead of this form when the petitioner seeks both a name change and the issuance of a birth certificate reflecting a change of gender [*see Health & Safety Code §§ 103430, 103435*], see *§ 377.73A*.

For further discussion regarding the order to show cause, see *§ 377.14[3]*.

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33-377 California Forms of Pleading and Practice--Annotated § 377.73A

§ 377.73A Order to Show Cause for Change of Name and Gender [Code Civ. Proc. § 1277; Health & Safety Code §§ 103430, 103435; Judicial Council Form NC-220]

[1] FORM Order to Show Cause for Change of Name and Gender [Code Civ. Proc. § 1277; Health & Safety Code §§ 103430, 103435; Judicial Council Form NC-220]

Click here to view image.

[2] Use of Form

This form of order to show cause for change of name and gender is an illustrative reproduction of Cal. Judicial Council Form NC-220, adopted by the Judicial Council for mandatory use [*see Cal. Rules of Ct., Rule 1.31*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is to be used instead of the form illustrated in *§ 377.73* when the petitioner seeks both a change of name and the issuance of a birth certificate reflecting a change of gender [*see Health & Safety Code §§ 103430, 103435*]. The show-cause procedures under a combined petition for a name change and gender change are the same as those that apply when the petition is for a name change only [*see Code Civ. Proc. § 1277*]. For detailed discussion of those procedures, see *§ 377.14[3], [4]*, and *§ 377.73[2]*.

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33-377 California Forms of Pleading and Practice--Annotated § 377.74

§ 377.74 Proof of Service of Order to Show Cause [Code Civ. Proc. § 1277; Cal. Judicial Council Form NC-121]

[1] FORM Proof of Service of Order to Show Cause [Code Civ. Proc. § 1277; Cal. Judicial Council Form NC-121]

Click here to view image.

[2] Use of Form

This form of proof of service of the order to show cause re change of name is an illustrative reproduction of Cal. Judicial Council Form NC-121, adopted by the Judicial Council for mandatory use [*see Cal. Rules of Ct., Rule 1.31*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form must be used when service of the order to show cause, or other notice of the hearing on a petition for name change, is required to be served on a nonpetitioning parent or grandparent [*see Code Civ. Proc. § 1277(a), (e)* and discussion in *§ 377.15[3]*]. For detailed discussion and forms relating to service and proof of service generally, see Ch. 518, *Service of Summons and Papers* .

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33-377 California Forms of Pleading and Practice--Annotated § 377.75

§ 377.75 Decree Changing Name [Code Civ. Proc. § 1278; Cal. Judicial Council Form NC-130]

[1] FORM Decree Changing Name [Code Civ. Proc. § 1278; Cal. Judicial Council Form NC-130]

Click here to view image.

[2] Use of Form

This form of decree granting a petition for change of name is an illustrative reproduction of Cal. Judicial Council Form NC-130, adopted by the Judicial Council for mandatory use [*see Cal. Rules of Ct., Rule 1.31*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is for use as a proposed decree granting a petition for change of name, to be completed by the petitioner and submitted for the judge's signature [*see Code Civ. Proc. § 1278(a)*]. For further discussion, see *§ 377.14[5]*.

Once the court enters the decree, the petitioner may apply for an amended birth certificate reflecting the name change. An application for amendment of a birth record must be submitted on an original form VS 23, printed on special bond paper, provided by the California Office of Vital Records; photocopies will not be accepted. The form may be obtained from the county recorder's office or county health department in any California county, and it may be ordered directly from the Office of Vital Records (916/445-2684 or <www.dhs.ca.gov/hisp/chs/ovr/ovrformsreq.asp>). For more information, including an online pamphlet with detailed instructions for completion and submission of the application, visit <www.dhs.ca.gov>.

For a form of proposed decree for use when the change of name relates to a minor, see *§ 377.76*.

For a mandatory Judicial Council form to be used instead of this form when the petitioner seeks both a name change and the issuance of a birth certificate reflecting a change of gender [*see Health & Safety Code §§ 103430, 103435*], see *§ 377.75A*.

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33-377 California Forms of Pleading and Practice--Annotated § 377.75A

§ 377.75A Decree Changing Name and Gender [Code Civ. Proc. §§ 1278, 1279; Health & Safety Code §§ 103430, 103435; Judicial Council Form NC-230]

[1] FORM Decree Changing Name and Gender [Code Civ. Proc. §§ 1278, 1279; Health & Safety Code §§ 103430, 103435; Judicial Council Form NC-230]

Click here to view image.

[2] Use of Form

This form of decree changing name and gender is an illustrative reproduction of Cal. Judicial Council Form NC-230, adopted by the Judicial Council for mandatory use [*see Cal. Rules of Ct., Rule 1.31*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is to be used instead of the form illustrated in *§ 377.75* when the petitioner seeks both a change of name and the issuance of a birth certificate reflecting a change of gender [*see Health & Safety Code §§ 103430, 103435*]. The form should be completed by the petitioner and submitted for the judge's signature [*see Code Civ. Proc. § 1278(a), (d)*]. For further discussion, see *§ 377.14[5]*.

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33-377 California Forms of Pleading and Practice--Annotated § 377.76

§ 377.76 Decree Changing Name of Minor [Code Civ. Proc. § 1278; Cal. Judicial Council Form NC-130G]

[1] FORM Decree Changing Name of Minor [Code Civ. Proc. § 1278; Cal. Judicial Council Form NC-130G]

Click here to view image.

[2] Use of Form

This form of decree granting a petition for change of name of a minor is an illustrative reproduction of Cal. Judicial Council Form NC-130G, adopted by the Judicial Council for mandatory use [*see Cal. Rules of Ct., Rule 1.31*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is for use as a proposed decree granting a petition for change of name of a minor, to be completed by the petitioner and submitted for the judge's signature [*see Code Civ. Proc. § 1278(a), (d)*]. For further discussion, see *§§ 377.14[5], 377.15[6]*.

For forms of proposed decrees for use when the change of name relates to an adult, see *§§ 377.75* and *377.75A*.

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33-377 California Forms of Pleading and Practice--Annotated § 377.77

§ 377.77 Petition for Change of Gender and Issuance of New Birth Certificate [Health & Safety Code §§ 103425-103440; Cal. Judicial Council Form NC-300]

[1] FORM Petition for Change of Gender and Issuance of New Birth Certificate [Health & Safety Code §§ 103425-103440; Cal. Judicial Council Form NC-300]

Click here to view image.

[2] Use of Form

This form of petition for a change of gender and issuance of a new birth certificate is an illustrative reproduction of Cal. Judicial Council Form NC-300, adopted for optional use by the Judicial Council [*see Cal. Rules of Ct., Rule 1.35*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form may be used when the petitioner seeks a change of gender and the issuance of a new birth certificate, but not a change of name. A physician's affidavit or declaration documenting the petitioner's change of gender must be attached to the petition [*Health & Safety Code § 103430(a)*; *see § 377.71A* (Cal. Judicial Council Form NC-210/NC-310)]. If the petitioner has already obtained a change of name, a certified copy of the decree should be attached to this petition [*see § 377.75* (Cal. Judicial Council Form NC-130)]. Page Two of this form sets forth instructions for completing this form and other necessary forms and procedures. For further discussion, see *§ 377.24[2]* and Ch. 99, *Birth and Death, Establishing Fact of*, § 99.35.

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33-377 California Forms of Pleading and Practice--Annotated § 377.78

§ 377.78 Notice of Hearing on Petition for Change of Gender and Issuance of New Birth Certificate [Health & Safety Code §§ 103425-103440; Cal. Judicial Council Form NC-320]

[1] FORM Notice of Hearing on Petition for Change of Gender and Issuance of New Birth Certificate [Health & Safety Code §§ 103425-103440; Cal. Judicial Council Form NC-320]

Click here to view image.

[2] Use of Form

This form of petition for a notice of hearing is an illustrative reproduction of Cal. Judicial Council Form NC-320, adopted for optional use by the Judicial Council [*see Cal. Rules of Ct., Rule 1.35*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form may be used to provide notice of a hearing on a petition that seeks a change of gender and the issuance of a new birth certificate, but not a change of name [*see Health & Safety Code §§ 103425-103440*]. For further discussion, see *§ 377.24[2]* and Ch. 99, *Birth and Death, Establishing Fact of*, § 99.35.

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33-377 California Forms of Pleading and Practice--Annotated § 377.79

§ 377.79 Order for Change of Gender and Issuance of New Birth Certificate [Health & Safety Code §§ 103425-103440; Cal. Judicial Council Form NC-330]

[1] FORM Order for Change of Gender and Issuance of New Birth Certificate [Health & Safety Code §§ 103425-103440; Cal. Judicial Council Form NC-330]

Click here to view image.

[2] Use of Form

This form of order is an illustrative reproduction of Cal. Judicial Council Form NC-320, adopted for optional use by the Judicial Council [*see Cal. Rules of Ct., Rule 1.35*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form may be used as a proposed order granting a petition that seeks a change of gender and the issuance of a new birth certificate, but not a change of name [*see Health & Safety Code §§ 103425-103440*]. For further discussion, see *§§ 377.24[2]* and Ch. 99, *Birth and Death, Establishing Fact of*, § 99.35.

Once the court enters the decree, the petitioner may apply for an amended birth certificate reflecting the gender change [*see Health & Safety Code § 103430(c)* (certified copy of court decree ordering new birth certificate must be filed with State Registrar of Vital Records within 30 days from date of decree)]. An application for amendment of a birth record must be submitted on an original form VS 24(S), printed on special bond paper, provided by the California Office of Vital Records; photocopies will not be accepted. The form may be obtained from the county recorder's office or county health department in any California county, and it may be ordered directly from the Office of Vital Records (916/445-2684 or <www.dhs.ca.gov/hisp/chs/ovr/ovrformsreq.asp>). For more information, including an online pamphlet with detailed instructions for completion and submission of the application, visit <www.dhs.ca.gov>.

For a mandatory Judicial Council form to be used instead of this form when the petitioner seeks both a name change and the issuance of a birth certificate reflecting a change of gender [*see Health & Safety Code §§ 103430, 103435*], see

§ 377.75A (Cal. Judicial Council Form NC-230).

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33-377 California Forms of Pleading and Practice--Annotated § 377.80

§ 377.80 Address Confidentiality Program--Information Sheet for Name Change Proceedings Under Address Confidentiality Program [Code Civ. Proc. § 1277; Gov. Code § 6205 et seq.; Cal. Judicial Council Form NC-400-INFO]

[1] FORM Address Confidentiality Program--Information Sheet for Name Change Proceedings Under Address Confidentiality Program [Code Civ. Proc. § 1277; Gov. Code § 6205 et seq.; Cal. Judicial Council Form NC-400-INFO]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Cal. Judicial Council Form NC-400-INFO [*see* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The purpose of this form is to explain to a nonlawyer the procedures for obtaining a confidential name change for a participant in the "Safe at Home" address confidentiality program for victims of domestic violence, sexual assault, and stalking [*see Gov. Code § 6205 et seq.*]. For further discussion of the program requirements, see *§ 377.14[1] -[5]*. Additional Judicial Council Forms for use in applying for a confidential name change under the program are reproduced at §§ 377.81-377.84.

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33-377 California Forms of Pleading and Practice--Annotated § 377.81

§ 377.81 Address Confidentiality Program--Confidential Cover Sheet--Name Change Proceeding Under Address Confidentiality Program [Code Civ. Proc. § 1277; Gov. Code § 6205 et seq.; Cal. Judicial Council Form NC-400]

[1] FORM Address Confidentiality Program--Confidential Cover Sheet--Name Change Proceeding Under Address Confidentiality Program [Code Civ. Proc. § 1277; Gov. Code § 6205 et seq.; Cal. Judicial Council Form NC-400]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Cal. Judicial Council Form NC-400, adopted by the Judicial Council for mandatory use [*see Cal. Rules of Ct., Rule 1.31*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is for use in obtaining a confidential name change for a participant in the "Safe at Home" address confidentiality program for victims of domestic violence, sexual assault, and stalking [*see Gov. Code § 6205 et seq.*]. To maintain the confidentiality the petitioner's current name [*see Code Civ. Proc. § 1277(b)(3)*], the petitioner must complete this form and attach it to the front of the petition for name change (see *§ 377.70*) and every other document filed in the proceedings [*Cal. Rules of Ct., Rule 2.575(d)*]. The name of the petitioner must not appear on that cover sheet [*Cal. Rules of Ct., Rule 2.575(c),(d)*]. Also, the petitioner's proposed name must not be included in the petition or any other record in the proceedings; rather, it will be on file with the Secretary of State [*Code Civ. Proc. § 1277(b)(1)*; *Cal. Rules of Ct., Rule 2.575(e)*].

For related forms for use in confidential name-change proceedings, see *§ 377.80* (Information Sheet), § 377.82 (Application to File Documents Under Seal), § 377.83 (Declaration in Support of Application to File Documents Under Seal), and § 377.84 (Order on Application to File Documents Under Seal).

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33-377 California Forms of Pleading and Practice--Annotated § 377.82

§ 377.82 Address Confidentiality Program--Application to File Documents Under Seal in Name Change Proceeding Under Address Confidentiality Program [Code Civ. Proc. § 1277; Gov. Code § 6205 et seq.; Cal. Judicial Council Form NC-410]

[1] FORM Address Confidentiality Program--Application to File Documents Under Seal in Name Change Proceeding Under Address Confidentiality Program [Code Civ. Proc. § 1277; Gov. Code § 6205 et seq.; Cal. Judicial Council Form NC-410]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Cal. Judicial Council Form NC-410, adopted by the Judicial Council for mandatory use [*see Cal. Rules of Ct., Rule 1.31*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is for use in applying for an order to file records under seal in a confidential name-change proceeding for a participant in the "Safe at Home" address confidentiality program for victims of domestic violence, sexual assault, and stalking [*Code Civ. Proc. § 1277(b)(4)*; *see Gov. Code § 6205 et seq.*]. This application to file records under seal must be filed at the time the petition for a name change [*see § 377.70*] is submitted to the court [*Cal. Rules of Ct., Rule 2.577(a),(b)*]. The application must be accompanied by a declaration containing facts sufficient to justify the sealing [*Cal. Rules of Ct., Rule 2.577(b)*]. The records that may be filed under seal must be lodged with the court in a sealed envelope; affixed to the envelope must be a confidential cover sheet [Judicial Council Form NC-400; *see § 377.81*] that includes the notation "CONDITIONALLY UNDER SEAL" under the title and case number [*Cal. Rules of Ct., Rule 2.577(d)*].

For related forms for use in confidential name-change proceedings, see *§ 377.80* (Information Sheet), § 377.81 (Confidential Cover Sheet), § 377.83 (Declaration in Support of Application to File Documents Under Seal), and § 377.84 (Order on Application to File Documents Under Seal).

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33-377 California Forms of Pleading and Practice--Annotated § 377.83

§ 377.83 Address Confidentiality Program--Declaration in Support of Application to File Documents Under Seal in Name Change Proceeding Under Address Confidentiality Program [Code Civ. Proc. § 1277; Gov. Code § 6205 et seq.; Cal. Judicial Council Form NC-420]

[1] FORM Address Confidentiality Program--Declaration in Support of Application to File Documents Under Seal in Name Change Proceeding Under Address Confidentiality Program [Code Civ. Proc. § 1277; Gov. Code § 6205 et seq.; Cal. Judicial Council Form NC-420]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Cal. Judicial Council Form NC-420, adopted by the Judicial Council for mandatory use [*see Cal. Rules of Ct., Rule 1.31*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form must accompany an application for an order to file records under seal in a confidential name-change proceeding for a participant in the "Safe at Home" address confidentiality program for victims of domestic violence, sexual assault, and stalking [*Cal. Rules of Ct., Rule 2.577(b)*; *see Code Civ. Proc. § 1277(b)(4)*; *Gov. Code § 6205 et seq.*]. For the form for an application to file under seal, see *§ 377.82*. For related forms for use in confidential name-change proceedings, see *§ 377.80* (Information Sheet), § 377.81 (Confidential Cover Sheet), and § 377.84 (Order on Application to File Documents Under Seal).

California Forms of Pleading and Practice--Annotated

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 377 NAME, CHANGE OF
PART V. FORMS

33-377 California Forms of Pleading and Practice--Annotated § 377.84

§ 377.84 Address Confidentiality Program--Order on Application to File Documents Under Seal in Name Change Proceeding Under Address Confidentiality Program [Code Civ. Proc. § 1277; Gov. Code § 6205 et seq.; Cal. Judicial Council Form NC-425]

[1] FORM Address Confidentiality Program--Order on Application to File Documents Under Seal in Name Change Proceeding Under Address Confidentiality Program [Code Civ. Proc. § 1277; Gov. Code § 6205 et seq.; Cal. Judicial Council Form NC-425]

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[2] Use of Form

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This form may be used as a proposed order granting or denying an application for an order to file records under seal in a confidential name-change proceeding for a participant in the "Safe at Home" address confidentiality program for victims of domestic violence, sexual assault, and stalking [*Cal. Rules of Ct., Rule 2.577(f)*; *see Code Civ. Proc. § 1277(b)(4)*; *Gov. Code § 6205 et seq.*]. For related forms for use in confidential name-change proceedings, see *§ 377.80* (Information Sheet), § 377.81 (Confidential Cover Sheet), § 377.82 (Application to File Documents Under Seal), and § 377.83 (Declaration in Support of Application to File Documents Under Seal).

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California Forms of Pleading and Practice--Annotated

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 380 NEGLIGENCE

33-380 California Forms of Pleading and Practice--Annotated 380.syn

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

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FOOTNOTES:
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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 380 NEGLIGENCE
PART I. SCOPE

33-380 California Forms of Pleading and Practice--Annotated § 380.01

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§ 380.01 Scope of Chapter

This chapter discusses and contains forms for use in negligence actions.

This chapter begins with a discussion of the general elements of negligence [*see § 380.10* et seq.]. It then discusses in detail the required elements of a cause of action for negligence in four parts. The first analysis covers the element of duty, including the statutory definition of duty and various factors considered by the courts in determining whether or not a duty exists; it also covers various types of special relationships pursuant to which a duty may be found to exist [*see § 380.30* et seq.]. The second analysis covers the element of breach of duty, including the general standard of care and various other standards of care that the courts have imposed with respect to certain types of persons [*see § 380.50* et seq.]. The third analysis covers the element of causation, including actual cause or cause in fact and legal (proximate) cause [*see § 380.70* et seq.]. The fourth analysis covers the element of injury and damages, including the plaintiff's duty to mitigate damages [*see § 380.90* et seq.]. Forms related to these elements, including complaints for negligence, answers, and other pleadings are provided [*see § 380.290* et seq.].

This chapter also discusses various doctrines affecting proof of negligence, including the presumption of negligence arising from a violation of statute and the doctrine of res ipsa loquitur [*see § 380.110* et seq.]. Included are forms of complaints to be used in cases based on these doctrines [*see § 380.310* et seq.].

This chapter also discusses various doctrines affecting liability, including the doctrines of strict and vicarious liability, and joint and several liability [*see § 380.130* et seq.]. Forms of complaints to be used in cases based on these doctrines are included in this chapter [*see § 380.330* et seq.].

This chapter also discusses various procedural matters in negligence actions, including statutes of limitations, venue and pleading requirements, and motions for summary adjudication [*see § 380.150* et seq.]. Relevant forms are included in this chapter [*see § 380.350* et seq.].

This chapter also discusses various affirmative defenses available in negligence actions, including comparative negligence, express assumption of the risk, implied assumption of the risk, the firefighter's rule, and the exclusive remedy of the Workers' Compensation Act [*see § 380.170* et seq.]. Relevant forms are included in this chapter [*see § 380.370* et seq.].

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 380 NEGLIGENCE
PART I. SCOPE

33-380 California Forms of Pleading and Practice--Annotated § 380.02

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§ 380.02 Cross References

For forms for and discussions of negligence and closely related issues in specific contexts, see the following chapters:

Ch. 10, *Act of God*

Ch. 16, *Airplanes and Airports*

Ch. 23, *Animals: Civil Liability*

Ch. 76, *Attorney Professional Liability*

Ch. 82, *Automobiles: Causes of Action*

Ch. 93, *Bailments*

Ch. 97, *Barbering and Cosmetology*

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Ch. 100, *Boats and Boating*

Ch. 104, *Building Contracts*

Ch. 106, *Buses and Streetcars*

Ch. 109, *Carriers*

Ch. 110, *Churches and Religious Organizations*

Ch. 177; *Damages*

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Ch. 209, *Dentists*

Ch. 214, *Drugs and Pharmacists*

Ch. 244, *Elevators and Escalators*

Ch. 246, *Emergency Vehicles*

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Ch. 273, *Games, Sports, and Athletics*

Ch. 274, *Garages and Gas Stations*

Ch. 277, *Gas and Electricity*

Ch. 295, *Hospitals*

Ch. 297, *Hotels and Motels*

Ch. 300, *Indemnity and Contribution*

Ch. 308, *Insurance*

Ch. 334, *Landlord and Tenant: Claims for Damages*

Ch. 345, *Limitations of Actions*

Ch. 359, *Marriage*

Ch. 362, *Mental Suffering and Emotional Distress*

Ch. 367A, *Minors: Tort Actions*

Ch. 369, *Mobilehomes and Mobilehome Parks*

Ch. 391, *Nuisance*

Ch. 415, *Physicians: Medical Malpractice*

Ch. 421, *Premises Liability*

Ch. 427, *Principal and Agent*

Ch. 460, *Products Liability*

Ch. 462, *Public Accountants*

Ch. 464, *Public Entities and Officers: California Tort Claims Act*

Ch. 485, *Railroads*

Ch. 513, *Schools: Student Rights and Responsibilities*

Ch. 522, *Ships and Shipping*

Ch. 525, *Slip and Fall*

Ch. 544, *Taxicabs;*

Ch. 547, *Theaters, Shows, and Amusement Places*

Ch. 553, *Trucks*

Ch. 577, *Workers' Compensation*

California Forms of Pleading and Practice--Annotated

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 380 NEGLIGENCE
PART I. SCOPE

33-380 California Forms of Pleading and Practice--Annotated §§ 380.03-380.09

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[Reserved]

§§ 380.03[Reserved]

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 380 NEGLIGENCE
PART II. LEGAL BACKGROUND
A. In General

33-380 California Forms of Pleading and Practice--Annotated § 380.10

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§ 380.10 Elements of Negligence

Most courts summarize the elements of actionable negligence as a legal duty of care owed by defendant either to plaintiff or to the class of which plaintiff is a member, an act or omission by defendant that is a breach of the duty owed to plaintiff, injury and damages to plaintiff, and defendant's breach as an actual (or direct) and legal (or proximate) cause of plaintiff's injury and damages; generally, the courts consolidate these separate elements of actionable negligence, which the plaintiff has the burden of pleading and proving, into either three or four separate elements [*see Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 513-514, 150 Cal. Rptr. 1, 585 P.2d 851* ; *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc. (1970) 1 Cal. 3d 586, 594, 83 Cal. Rptr. 418, 463 P.2d 770* ; *Koepke v. Loo (1993) 18 Cal. App. 4th 1444, 1448-1449, 23 Cal. Rptr. 2d 34]* . However, applicable statutes indicate that the following five distinct elements are essential to a tort cause of action, including an action based on negligence:

- Duty on the party of defendant to use due care [*see Civ. Code §§ 1714(a), 3333*].
- Breach of that duty [*see Civ. Code § 3333*].
- Detriment to the plaintiff (plaintiff's loss or harm suffered in person or property) [*see Civ. Code §§ 3281, 3282, 3333*].
- Plaintiff's detriment being a proximate result of defendant's breach of duty [*see Civ. Code § 3333*].
- Damages (the measure of the detriment in terms of money) [*see Civ. Code §§ 3281, 3333*].

NOTE:

Both courts and commentators have observed the misunderstanding and confusion created by the use of the term "proximate cause" [*see, e.g., Mitchell v. Gonzales (1991) 54 Cal. 3d 1041, 1050-1051, 1 Cal.*

Rptr. 2d 913, 819 P.2d 872] . Most practicing trial lawyers no longer use the term "proximate cause," preferring instead the term "legal cause."

As one commentator has observed, "[n]egligence as it is commonly understood is conduct [that] involves undue risk of harm to others" [Prosser and Keeton on the Law of Torts (5th ed. 1984), ch. 5, *Negligence: Standard of Conduct,* § 31, p. 169 ("negligence ... is ... behavior [that] should be recognized as involving unreasonable danger to others")].

Although negligence has historically been categorized by distinct "degrees" of legal fault, corresponding to required degrees of care (such as slight, ordinary, and gross negligence), the development of the doctrine ofcomparative negligence under *Li v. Yellow Cab Co.* [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226* ; *see § 380.170[1]*] makes these distinctions unnecessary [*Continental Ins. Co. v. American Prot. Indus. (1987) 197 Cal. App. 3d 322, 329 n.7, 329-330, 242 Cal. Rptr. 784]* .

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 380 NEGLIGENCE
PART II. LEGAL BACKGROUND
A. In General

33-380 California Forms of Pleading and Practice--Annotated §§ 380.11-380.29

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[Reserved]

§§ 380.11[Reserved]

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 380 NEGLIGENCE
PART II. LEGAL BACKGROUND
B. Negligence Cause of Action
1. Duty

33-380 California Forms of Pleading and Practice--Annotated § 380.30

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§ 380.30 Duty

[1] Existence as Essential Element

The cause of action for negligence requires a showing that the defendant breached a duty of care owed to the plaintiff or to a class of persons of which the plaintiff is a member. This is an indispensable prerequisite to the imposition of liability based on negligence [*see, e.g., Richards v. Stanley (1954) 43 Cal. 2d 60, 63, 271 P.2d 23* ; *Valdez v. J.D. Diffenbaugh Co. (1975) 51 Cal. App. 3d 494, 505, 124 Cal. Rptr. 467]* . The requirement of duty is an "obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks" [Prosser and Keeton on the Law of Torts (5th ed. 1984) ch. 5, § 30, p. 164; *see Hilyar v. Union Ice Co. (1955) 45 Cal. 2d 30, 36-37, 286 P.2d 21* ; *Peter W. v. San Francisco Unified Sch. Dist. (1976) 60 Cal. App. 3d 814, 822, 131 Cal. Rptr. 854]* .

"Duty" in our legal system refers to the judicial determination that one person should be required to compensate another who has been injured, based on a number of policy considerations involving the interests of both parties as well as society [*Dillon v. Legg (1968) 68 Cal. 2d 728, 734, 69 Cal. Rptr. 72, 441 P.2d 912]* . The question of duty may involve two separate issues: (1) whether or not there is any legally recognized obligation to exercise care to avoid or minimize risks of harm, and (2) the degree of care required to satisfy that obligation.

[2] Case-by-Case Determination

Duty is an ephemeral concept whose ascertainment and definition in any specific factual context is an imprecise task [*Valdez v. J.D. Diffenbaugh Co. (1975) 51 Cal. App. 3d 494, 505, 124 Cal. Rptr. 467]* . Legal duties are merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done [*Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 434, 131 Cal. Rptr. 14, 551 P.2d 334]* .

The common law rule of general application accepted by the courts is that all persons are required to use ordinary care to prevent others from being injured as the result of their conduct [*Hilyar v. Union Ice Co. (1955) 45 Cal. 2d 30, 36, 286 P.2d 21]* . Beyond this general statement, there seems to be no universal principle to apply to determine whether or not a defendant owes a duty to a plaintiff. "Duty" is only an expression of the sum total of those considerations of policy that lead the law to say that a particular plaintiff is entitled to protection [*Dillon v. Legg (1968) 68 Cal. 2d 728, 734, 69 Cal. Rptr. 72, 441 P.2d 912* ; *De Lima v. Magnesite Waterproofing & Refinishing (1987) 191 Cal. App. 3d 776, 781, 236 Cal. Rptr. 519]* . Courts invoke the concept of duty to limit the otherwise potentially infinite liability that would follow from every negligent act [*Dillon v. Legg (1968) 68 Cal. 2d 728, 739, 69 Cal. Rptr. 72, 441 P.2d 912]* .

The California Supreme Court has repeatedly resisted overly rigid common law formulations of duty [*J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 805, 157 Cal. Rptr. 407, 598 P.2d 60* ; *see, e.g.,* *Rowland v. Christian (1968) 69 Cal. 2d 108, 116-120, 70 Cal. Rptr. 97, 443 P.2d 561* (abolishing common law limitations on duty of possessors of real property to protect entrants from injury)]. Specific duties are thus determined on a case-by-case analysis.

[3] Statutory Definition

Civ. Code § 1714(a) provides that every person is responsible, not only for the results of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the other person has, willfully or by want of ordinary care, brought the injury on himself or herself. By its terms, this provision imposes the obligation to exercise ordinary care and skill to avoid injury to others.

The California Supreme Court has held that unless a statutory provision provides an exception to the fundamental principle enunciated by *Civ. Code § 1714*, no such exception should be made unless clearly supported by public policy [*Rowland v. Christian (1968) 69 Cal. 2d 108, 112, 70 Cal. Rptr. 97, 443 P.2d 561]* . The Court has also stated that Section 1714 incorporates a broad principle of responsibility based on civil law, as opposed to the more restricted common law [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 818-823, 119 Cal. Rptr. 858, 532 P.2d 1226* ; *see Rowland v. Christian (1968) 69 Cal. 2d 108, 112, 70 Cal. Rptr. 97, 443 P.2d 561]* .

[4] Determining Whether Duty Imposed

[a] Balancing of Factors

In *Rowland v. Christian*, the California Supreme Court observed that the general rule in California, as codified in *Civ. Code § 1714*, is that every person is liable for injuries caused by his or her failure to exercise reasonable care under the circumstances. The Court held that this generalprinciple should not be departed from in the absence of a statutory exception, unless such a departure is clearly supported by public policy [*Rowland v. Christian (1968) 69 Cal. 2d 108, 112, 70 Cal. Rptr. 97, 443 P.2d 561]* . The Court identified a number of factors that courts should consider in determining whether or not an exception to the general duty to exercise ordinary care should be made. These factors include [*Rowland v. Christian (1968) 69 Cal. 2d 108, 112-113, 70 Cal. Rptr. 97, 443 P.2d 561]* :

- The foreseeability of harm to the plaintiff;
- The degree of certainty that the plaintiff has been injured;
- The connection between the defendant's conduct and the injury suffered;
- The moral blame attached to the defendant's conduct;
- The policy of preventing future harm;

- The extent of the burden on the defendant caused by the imposition of a duty to exercise care;
- The consequences to the community of imposing such a duty; and
- The availability, cost, and prevalence of insurance for the risk involved.

[b] Public Policy Limitations

The courts recognize that there may be situations in which a defendant is not subject to a duty of reasonable care because a public policy clearly supports an exception to the general rule [*see Rowland v. Christian (1968) 69 Cal. 2d 108, 112, 70 Cal. Rptr. 97, 443 P.2d 561* ; *see, e.g., Parsons v. Crown Disposal Co. (1997) 15 Cal. 4th 456, 474, 63 Cal. Rptr. 2d 291, 936 P.2d 70* (consequences to community of imposing duty on garbage company to guard against possibility of frightening horse with loud noises from its garbage truck, as well as high social utility of defendant's garbage collection activity, militated against imposing duty)]. In many cases, the public policy limitation may involve application and balancing of some of the factors set forth in *Rowland v. Christian* [*Rowland v. Christian (1968) 69 Cal. 2d 108, 112-113, 70 Cal. Rptr. 97, 443 P.2d 561* ; *see Monreal v. Tobin (1998) 61 Cal. App. 4th 1337, 1351, 72 Cal. Rptr. 2d 168* (applying *Rowland* balancing test and concluding that a reasonably prudent driver of a vehicle traveling at the posted maximum speed limit in the middle lane of a four-lane freeway, owes no common law or statutory duty to move his or her vehicle to the right into the next slower lane even if other traffic is traveling in excess of the posted speed limit); *Krawitz v. Rusch (1989) 209 Cal. App. 3d 957, 963-965, 257 Cal. Rptr. 610* ; *see § 380.30[4]*]. In other cases, the public policy limitation may involve considerations that are separate from or in addition to the specific factors listed in *Rowland* [*see Borer v. American Airlines, Inc. (1977) 19 Cal. 3d 441, 446-450, 138 Cal. Rptr. 302, 563 P.2d 858* (denying cause of action for loss of consortium to children whose parent was injured based on several policy reasons including intangible nature of loss, fact that loss was essentially noncompensable, and fact that unrealistic social burden of providing damages would be created)].

A court is most likely to closely analyze public policy considerations if the plaintiff seeks tort recovery for conduct that was not previously considered actionable. For example, general considerations of public policy were central to a decision of the California Supreme Court in a case involving a child's "wrongful life" claim for general damages resulting from an alleged negligent failure of a health care provider to advise the child's parents of a possible hereditary condition of deafness, depriving them of the right to decide not to conceive the child. The Court denied the child's "wrongful life" claim for general damages, relying on the public policy against compensating intangible losses of a problematic or speculative nature [*Turpin v. Sortini (1982) 31 Cal. 3d 220, 236-237, 182 Cal. Rptr. 337, 643 P.2d 954]* . For similar reasons, a plaintiff's claim against a school district for "negligent education" was rejected on the grounds that there could be no reasonable degree of certainty of the plaintiff's injury and no certain connection between the defendant's conduct and the injury suffered [*Peter W. v. San Francisco Unified Sch. Dist. (1976) 60 Cal. App. 3d 814, 824-825, 131 Cal. Rptr. 854]* . The court of appeal also has refused to expand the duties of insurers, on the basis of public policy, by imposing a duty on them to affirmatively volunteer advice to insureds regarding the availability of additional or different insurance coverage. Neither the long term relationship between insureds and their agent, the generally superior knowledge of the agent regarding coverage, nor the agent's review of the policies issued gives rise to such a duty [*Fitzpatrick v. Hayes (1997) 57 Cal. App. 4th 916, 928, 67 Cal. Rptr. 2d 445]* .

[c] Mixed Question of Law and Fact

Generally, the existence of a duty of care is a question of law to be determined by the court, because the concept of duty is not based on easily determined, natural rules that particular persons are obligated to act in certain ways towards certain persons [*Ramirez v. Plough, Inc. (1993) 6 Cal. 4th 539, 546, 25 Cal. Rptr. 2d 97, 863 P.2d 167* ; *Ballard v. Uribe (1986) 41 Cal. 3d 564, 572 n. 6, 224 Cal. Rptr. 664, 715 P.2d 624* ; *Thompson v. County of Alameda (1980) 27 Cal. 3d 741, 750, 167 Cal. Rptr. 70, 614 P.2d 728]* . Prior to the California Supreme Court's decision in *Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 25 Cal. Rptr. 2d 137, 863 P.2d 207* , it was somewhat misleading to

state flatly that duty was a question of law, because a primary consideration in a court's determination of duty is the foreseeability of the plaintiff's injury, and the Court had held that foreseeability was generally a question of fact for the jury [*Palma v. U.S. Indus. Fasteners, Inc. (1984) 36 Cal. 3d 171, 186, 203 Cal. Rptr. 626, 681 P.2d 893* ; *Weirum v. RKO Gen., Inc. (1975) 15 Cal. 3d 40, 46,123 Cal. Rptr. 468, 539 P.2d 36]* . This led some courts to hold that duty was "primarily" a question of law [*see, e.g., Weirum v. RKO Gen., Inc. (1975) 15 Cal. 3d 40, 46, 123 Cal. Rptr. 468, 539 P.2d 36]* or that it was a "mixed question" of law and fact [*see, e.g., Barker v. Wah Low (1971) 19 Cal. App. 3d 710, 721-722, 97 Cal. Rptr. 85]* . In *Ann M. v. Pacific Plaza Shopping Center*, the Court rejected the view that foreseeability in the context of determining duty is normally a question of fact reserved for the jury. It held that foreseeability, when analyzed to determine the existence of scope of a duty, is a question of law to be decided by the court [*Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 678, 25 Cal. Rptr. 2d 137, 863 P.2d 207]* .

In some cases, a court may decide that even if the defendant could have foreseen the plaintiff's injury, the defendant had no duty to prevent it. Such a determination may result if other facts considered in the duty question, such as the burden to the defendant of preventing harm, lead the court to conclude that a duty should not be imposed, notwithstanding the foreseeability of the plaintiff's injury [*see Baldwin v. Zoradi (1981) 123 Cal. App. 3d 275, 286-287, 176 Cal. Rptr. 809* (college trustees had no duty to prevent plaintiff's injury that resulted from on-campus drinking)]. If a court decides in such a case that the defendant owed no duty to the plaintiff, it may be said that duty is entirely a question of law.

Courts have also decided the duty question purely as a matter of law when they determine that there are overriding public policy reasons compelling a determination that the defendant owed no duty to the plaintiff to guard against the injuries of which the plaintiff complains [*see, e.g., Turpin v. Sortini (1982) 31 Cal. 3d 220, 237, 182 Cal. Rptr. 337, 643 P.2d 954* (health care providers had no duty to infant plaintiff to have advised her parents not to conceive her)].

However, issues of fact may require resolution before the issue of duty can be determined. In one case, for example, the court of appeal, recognizing that a utility company can be held liable for the negligent placement of utility poles along a roadway, concluded that there was an unresolved issue of fact as to whether the defendant power company exercised sufficient control over the placement of the light pole hit by plaintiff's vehicle to impose a duty on the power company to place the pole in such a way as to minimize the risk of injury caused by collisions. Thus, even though the court recognized that the question of whether a duty of care existed was a question of law, the court also recognized that unresolved and disputed factual issues could prevent a court from deciding the question without first disposing of unresolved factual disputes [*Laabs v. Southern California Edison Co. (2009) 175 Cal. App. 4th 1260, 1277-1279, 97 Cal. Rptr. 3d 241*].

[5] Foreseeability

[a] Most Important Factor in Determining Whether Duty Imposed

The existence of a duty is determined by weighing a number of factors set forth by the California Supreme Court [*see Rowland v. Christian (1968) 69 Cal. 2d 108, 112-113, 70 Cal. Rptr. 97, 443 P.2d 561* ; *see also § 380.30[4]*]. The courts have consistently held that one of the factors, foreseeability of harm, is a primary consideration in determining the existence of a duty [*see, e.g., Hedlund v. Superior Court (1983) 34 Cal. 3d 695, 705, 194 Cal. Rptr. 805, 669 P.2d 41* ; *Weirum v. RKO Gen., Inc. (1975) 15 Cal. 3d 40, 46, 123 Cal. Rptr. 468, 539 P.2d 36* ; *De Lima v. Magnesite Waterproofing & Refinishing (1987) 191 Cal. App. 3d 776, 782, 236 Cal. Rptr. 519]* . The California Supreme Court has stated that, as a general principle, a defendant owes a duty of care to all persons who are foreseeably endangered by the defendant's conduct [*Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 434-435, 131 Cal. Rptr. 14, 551 P.2d 334]* .

While reasonable foreseeability of injury is only one factor to consider, it is essential to a finding that a duty of care existed, and a finding that injury was not reasonably foreseeable precludes a finding that a legal duty existed, regardless of whether the other factors may weigh in favor of imposing a duty [*Ludwig v. City of San Diego (1998) 65 Cal. App.*

4th 1105, 1111-1112, 76 Cal. Rptr. 2d 809 (summary judgment for defendant was proper based only on finding that injury was not reasonably foreseeable)].

A court's task in determining duty is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party [*Ballard v. Uribe (1986) 41 Cal. 3d 564, 572 n.6, 224 Cal. Rptr. 664, 715 P.2d 624* ; *Brooks v. Eugene Burger Mgmt. Corp. (1989) 215 Cal. App. 3d 1611, 1620, 264 Cal. Rptr. 756]* . The foreseeability of harm must be decided on a case-by-case basis [*see Dillon v. Legg (1968) 68 Cal. 2d 728, 740, 69 Cal. Rptr. 72, 441 P.2d 912]* .

[b] Not Always Determinative of Duty

Although the foreseeability of a risk is the primary consideration in deciding whether or not the defendant had a duty to protect against the risk, the existence of a duty does not automatically follow from a finding that the risk was foreseeable [*Parsons v. Crown Disposal Co. (1997) 15 Cal. 4th 456, 476, 63 Cal. Rptr. 2d 291, 936 P.2d 70* ; *Baldwin v. Zoradi (1981) 123 Cal. App. 3d 275, 286, 176 Cal. Rptr. 809* ; *see, e.g., Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 203-209, 185 Cal. Rptr. 252, 649 P.2d 894* (police officers had no duty to warn plaintiff of potential assault absent special relationship, notwithstanding foreseeability of attack)]. A court must consider the factors other than foreseeability enumerated in *Rowland v. Christian* [*Rowland v. Christian (1968) 69 Cal. 2d 108, 112-113, 70 Cal. Rptr. 97, 443 P.2d 561* ; *see § 380.30[4]*] in determining whether or not to impose a duty of care in a particular case [*Jamison v. Mark C. Bloome Co. (1980) 112 Cal. App. 3d 570, 580, 169 Cal. Rptr. 399]* . Consideration of these other factors may lead a court to conclude that the defendant should not be held liable even though the plaintiff's injury was foreseeable [*see, e.g., Elden v. Sheldon (1988) 46 Cal. 3d 267, 274-277, 250 Cal. Rptr. 254, 758 P.2d 582* (public policy reasons for denying negligent infliction of emotional distress recovery to persons not in immediate family of injured person, despite foreseeability of harm to unmarried cohabitant of injured person)].

Social policy considerations, such as the social utility of the defendant's conduct and the consequences to the community of imposing a duty on the defendant, may limit liability even for foreseeable injury. For example, a plaintiff who was thrown from a horse when the horse was frightened by loud noises from a nearby garbage truck was denied recovery for hisinjuries despite the fact that the defendant's employee knew that a bridle path abutted the garbage bin, and that the collection procedure might frighten a horse. The California Supreme Court held that the social utility of the defendant's conduct, and the consequences to the community of imposing a duty on the defendant to guard against frightening a horse, overrode the foreseeability factor [*Parsons v. Crown Disposal Co. (1997) 15 Cal. 4th 456, 476, 63 Cal. Rptr. 2d 291, 936 P.2d 70* ; *see also Burns v. Neiman Marcus Group, Inc. (2009) 173 Cal. App. 4th 479, 489-490, 93 Cal. Rptr. 3d 130* (regardless of foreseeability of possibility of injury caused by merchant's acceptance of third-party checks in payment of credit card bill, other *Rowland* factors militated against imposition of duty to inquire of drawer as to holder's authority to tender check as payment)].

If foreseeability is minimal and the other factors are also weak, a court must determine that no duty exists [*Forrand v. Foodmaker, Inc. (1986) 182 Cal. App. 3d 196, 200, 227 Cal. Rptr. 74]* . For example, an automotive repair shop had no duty to protect the public from vandals breaking into a shed and overturning drums of recycled oil that spilled onto the sidewalk; the harm was only minimally foreseeable, and this factor was outweighed by the "morality" of recyling oil and the heavy burden that would be imposed on the defendant if it were required to guard the oil drums more closely [*Jamison v. Mark C. Bloome Co. (1980) 112 Cal. App. 3d 570, 580-581, 169 Cal. Rptr. 399]* .

[c] "Elasticity"

Because the courts must weigh the foreseeability of any harm along with a number of other factors [*see § 380.30[4]*], the degree of foreseeability necessary to support the imposition of a duty varies from case to case; foreseeability is an "elastic factor" in the balancing process used to determine the existence of a duty [*Isaacs v. Huntington Mem'l Hosp.*

(1985) 38 Cal. 3d 112, 125, 211 Cal. Rptr. 356, 695 P.2d 653] . If the burden of preventing future harm is great, a high degree of foreseeability may be required before a duty will be imposed [*Rogers v. Jones (1976) 56 Cal. App. 3d 346, 352, 128 Cal. Rptr. 404* (no duty imposed on parking lot operator because of near impossibility of completely controlling stadium crowds)]. If there are strong policy reasons for preventing harm such as that suffered by the plaintiff, or if the harm can be prevented by simple means, a lesser degree of foreseeability may be required [*Doe v. Roe (1990) 218 Cal. App. 3d 1538, 1544, 267 Cal. Rptr. 564* (strong public policy of preventing venereal disease and ease of warning prospective sex partner made slight degree of foreseeability sufficient to impose duty of care on defendant who knew he had genital herpes but nonetheless had sexual relations with plaintiff without revealing fact of disease to her); *Musgrove v. Ambrose Props. (1978) 87 Cal. App. 3d 44, 52-53, 150 Cal. Rptr. 722* (shopping center could easily post signs forbidding bicycles on walkways or post security guards to prevent persons from riding bicycles on walkways and thereby prevent bicyclists from running into pedestrians)].

[d] Question of Law Decided by Court

Prior to the California Supreme Court's opinion in *Ann M. v. Pacific Plaza Shopping Center* [*Ann M. v. Pacific Plaza Shopping Ctr. (1993) 25 Cal. Rptr. 2d 137, 863 P.2d 207]* , language in *Isaacs v. Huntington Memorial Hospital Isaacs v. Huntington Mem'l Hosp. (1985) 38 Cal. 3d 112, 126, 127, 130, 211 Cal. Rptr. 356, 695 P.2d 653]* was read as holding that whether a particular risk of harm was foreseeable by defendant was generally a question of fact to be decided by a jury. The Court has rejected this view, and now holds that foreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court [*Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 678, 25 Cal. Rptr. 2d 137, 863 P.2d 207]* .

[e] Reasonableness Requirement

[i] Actual Foreseeability Not Required

In analyzing whether a particular risk of harm was foreseeable by the defendant, the question is not whether the defendant actually foresaw the risk, but whether the risk was reasonably foreseeable [*Dillon v. Legg (1968) 68 Cal. 2d 728, 741, 69 Cal. Rptr. 72, 441 P.2d 912]* . For example, if a defendant contractor failed to complete portions of a dam as scheduled, and a very heavy rainfall caused the dam to give way, flooding plaintiff's quarry operation, the proper inquiry was whether or not such a rainfall and the resulting damage was reasonably foreseeable. The plaintiff was not required to show that the contractor had actually foreseen what would happen [*Diamond Springs Lime Co. v. American River Constructors (1971) 16 Cal. App. 3d 581, 598, 94 Cal. Rptr. 200]* .

[ii] Precise Circumstances Need Not Be Foreseeable

In proving that a defendant could reasonably have foreseen the risk of harm, a plaintiff is not required to show that the precise circumstances under which he or she was harmed were foreseeable. For example, where a plaintiff's factory suffered a power surge, damaging equipment and idling workers for two hours because the defendant negligently ran into a nearby utility pole, the jury's decision that the plaintiff's damages were foreseeable by the defendant was not improper. By driving negligently, the defendant could reasonably have foreseen that his actions could damage another's property, and it was not necessary to show that he could have foreseen the precise circumstances under which the damage occurred [*George A. Hormel & Co. v. Maez (1979) 92 Cal. App. 3d 963, 968-969, 155 Cal. Rptr. 337]* .

Although the precise circumstances of harm need not be foreseeable, the courts have imposed some limits on what a defendant will be reasonably required to foresee. In a case involving a tow truck driver who was killed by a third party while attempting to remove an intoxicated motorist's car from the side of a freeway after she had been arrested, the court held that the intoxicated motorist was not liable for the tow truck driver's death. The motorist had a duty to avoid driving under the influence of alcohol, andmight have foreseen that doing so would result in her being stopped by the side of the road, but her negligent conduct was not sufficiently likely to result in the harm experienced (a third party's striking and killing the tow truck driver) to impose liability [*Bryant v. Glastetter (1995) 32 Cal. App. 4th 770, 780, 38*

Cal. Rptr. 2d 291] .

[iii] "Likely Enough in Setting of Modern Life" Standard

The California Supreme Court has held that foreseeability is not to be measured by what is more probable than not, but "includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct" [*Bigbee v. Pacific Tel. & Tel. Co. (1983) 34 Cal. 3d 49, 57, 192 Cal. Rptr. 857, 665 P.2d 947]* .

Although this "setting of modern life" test for determining whether or not a risk is "reasonably foreseeable" is somewhat amorphous, several courts have used it in determing the foreseeability of risks [*see, e.g.,* *Sturgeon v. Curnutt (1994) 29 Cal. App. 4th 301, 307, 34 Cal. Rptr. 2d 498* ; *Cohen v. Southland Corp. (1984) 157 Cal. App. 3d 130, 141, 203 Cal. Rptr. 572* (risk that late-night convenience store customer will be injured in attempted robbery of store may be foreseeable); *Gomez v. Ticor (1983) 145 Cal. App. 3d 622, 629, 193 Cal. Rptr. 600* (violent criminal attack in large, unattended parking facility may be foreseeable)]. For example, it was not reasonably foreseeable that a visitor to a house would be accidentally shot by a resident of the house who was known to possess firearms and to have a drinking problem, because there was no evidence that the resident had ever harmed anyone due to either his drinking problem or his possession of firearms, and no evidence that he handled firearms unsafely while drunk [*Sturgeon v. Curnutt (1994) 29 Cal. App. 4th 301, 307-308, 34 Cal. Rptr. 2d 498]* .

[iv] Prior Similar Incidents

In some cases, especially those involving liability for criminal acts of third parties, the plaintiff may be able to prove that the defendant could reasonably have foreseen the risk of harm the plaintiff suffered because of the previous occurrence of similar incidents. However, the degree of foreseeability needed to impose a particular duty to prevent harm varies, depending on the burden of imposing the preventative measures suggested by the plaintiff in the particular case [*Delgado v. Trax Bar & Grill (2005) 36 Cal. 4th 224, 243-244*]. A heightened degree of foreseeability is necessary before a duty will be imposed on a defendant to take great or onerous preventative security measures. To establish this heightened degree of foreseeability, a plaintiff must provide evidence of prior similar criminal incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location [*Delgado v. Trax Bar & Grill (2005) 36 Cal. 4th 224, 243-244*]. By contrast, a lesser degree of foreseeability, one not requiring evidence of prior similar incidents on or near the premises, is all that is required if the plaintiff seeks to impose a duty to take preventative measures that are simple or create only a minimal burden on the defendant [*Delgado v. Trax Bar & Grill (2005) 36 Cal. 4th 224, 243-244*].

For example, the owner of a shopping mall where the plaintiff was raped did not have a duty to provide security guards in the mall's common areas because the owner had no notice of any prior similar incidents. Evidence of the presence of transients on the premises and of a high statistical crime rate in the surrounding area did not qualify as evidence of prior similar incidents [*Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 679-680, 25 Cal. Rptr. 2d 137, 863 P.2d 207]* . The California Supreme Court has also held that neither the owner of a commercial building nor the parking services company owed a legal duty of care to prevent a sexual assault on the plaintiff in the building's underground parking garage. In that particular case, no assaults had occurred in the parking garage in the preceding ten years, and although numerous bank robberies had occurred in the bank on the ground floor of the building, the Court concluded that these incidents were not sufficiently similar to the sexual assault to establish the requisite foreseeability [*Sharon P. v. Arman, Ltd. (1999) 21 Cal. 4th 1181, 1197, 91 Cal. Rptr. 2d 35, 989 P.2d 121]* . In addition, although the plaintiff provided police statistics of criminal activity, including sexual assaults, in the surrounding 50-block area for the 15 months prior to the attack in question, she provided no evidence showing the proximity of these crimes to the parking garage [*Sharon P. v. Arman, Ltd. (1999) 21 Cal. 4th 1181, 1198, 91 Cal. Rptr. 2d 35, 989 P.2d 121]* . Similarly, previous crimes near and at a defendant's restaurant did not support a finding that the defendant could foresee a mass murderous assault [*see* *Lopez v. McDonald's Corp. (1987) 193 Cal. App. 3d 495, 510-512, 238 Cal. Rptr. 436]* .

By contrast, the court of appeal, in reversing a grant of nonsuit, held that a patron assaulted at a gas station had provided substantial evidence of prior violent crime on the premises, even though his assault was racially motivated and the earlier criminal activity may not have been. The evidence showed that the station had been the site of many recent robberies and attacks and that violent gang activity was rampant on the premises and in the neighborhood. Despite the lack of evidence showing that the earlier crimes were specifically racially motivated, the court noted that all that is required is proof of prior similar incidents, not proof of prior identical incidents [*Claxton v. Atlantic Richfield Co. (2003) 108 Cal. App. 4th 327, 338-339, 133 Cal. Rptr. 2d 425]* .

The high degree of foreseeability provided by prior similar incidents and required to impose a duty of care to take expensive precautions may also apply in cases involving noncriminal acts of third persons, such as so-called "curb jumping" cases in which a patron of a business is struck andinjured by a car that jumps a curb and comes onto the sidewalk. In these cases, the owner of the business premises generally is not liable because such accidents are insufficiently likely, as a matter of law, if all of the following conditions are met: the business has provided both curbs and wheelstops, the parking lot design is typical of most businesses and meets local standards and regulations, there were no prior similar incidents, and nothing required customers to remain in a fixed location adjacent to the parking area [*Jefferson v. Qwik Korner Mkt., Inc. (1994) 28 Cal. App. 4th 990, 994-995, 34 Cal. Rptr. 2d 171]* . Thus, a convenience store whose parking lot had a raised curb and concrete wheelstops did not have a duty to install metal posts at the end of each parking space; imposing such a duty would be unreasonably burdensome given the absence of any prior similar incidents [*Jefferson v. Qwik Korner Mkt., Inc. (1994) 28 Cal. App. 4th 990, 995-996, 34 Cal. Rptr. 2d 171]* .

In another case, the California Supreme Court held that neither a child care facility nor the owner of the premises owed a duty of care to protect against the criminal actions of a man who intentionally drove his car through a four-feet-high chain link fence that surrounded a playground, killing two children [*Wiener v. Southcoast Childcare Ctrs., Inc. (2004) 32 Cal. 4th 1138, 1141-1142, 12 Cal. Rptr. 3d 615, 88 P.3d 517]* . The Court in that case held that the foreseeability of the injury-causing conduct had to be analyzed under the *Ann M.* test for determining the foreseeability of third-party criminal conduct, and not under the less stringent test for foreseeability that would be used in a case of ordinary negligence involving a "curb-jumping" accident. Under the *Ann M.* standard, the Court concluded, the criminal assault that occurred was unforeseeable, given the absence of any prior acts of violence at the child care center or at any other similar business in the area, and the complete impossibility of anticipating the driver's outrageous conduct [*Wiener v. Southcoast Childcare Ctrs., Inc. (2004) 32 Cal. 4th 1138, 1150, 12 Cal. Rptr. 3d 615, 88 P.3d 517]* .

[v] Foreseeability of Injury to Rescuers

If one person acts negligently so that another is injured, the first person will be held to foresee that a third person may come to the injured person's aid, and the first person will be liable for injuries the third person sustains in a rescue attempt unless the rescuer acted recklessly [*see* *Solgaard v. Guy F. Atkinson Co. (1971) 6 Cal. 3d 361, 368-369, 99 Cal. Rptr. 29, 491 P.2d 821]* . For example, a dam builder that failed to follow municipal safety orders, thereby causing a worker to fall down a steep slope, was liable to the physician who was injured while going to the worker's aid [*Solgaard v. Guy F. Atkinson Co. (1971) 6 Cal. 3d 361, 368-369, 99 Cal. Rptr. 29, 491 P.2d 821]* . However, an intoxicated motorist was not liable to a tow truck driver who was killed by a third party while attempting to remove the motorist's car from the side of a freeway after she had been arrested; the tow truck driver was not rescuing the motorist, but was performing the job he had been hired to do [*Bryant v. Glastetter (1995) 32 Cal. App. 4th 770, 784, 38 Cal. Rptr. 2d 291]* .

Although the rescue doctrine has traditionally been applied to allow recovery to a plaintiff who rescues a third party from a peril created by the defendant's negligence, the doctrine may also be applied if the rescued party is the defendant whose negligence created the peril [*Sears v. Morrison (1999) 76 Cal. App. 4th 577, 579, 90 Cal. Rptr. 2d 528]* . In so holding, the court of appeal concluded that most of the policy considerations that justify the doctrine in third-party cases

apply equally if the party being rescued is the original negligent party [*Sears v. Morrison (1999) 76 Cal. App. 4th 577, 581, 90 Cal. Rptr. 2d 528]* . Although the court noted one distinction--that the negligent party does not owe a legal duty to avoid inflicting self-injury--the court dismissed the relevance of this distinction on the grounds that the rescue doctrine is based on a duty to avoid creating a situation that results in injury to the rescuer, not to the party being rescued [*Sears v. Morrison (1999) 76 Cal. App. 4th 577, 581-582, 90 Cal. Rptr. 2d 528]* .

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 380 NEGLIGENCE
PART II. LEGAL BACKGROUND
B. Negligence Cause of Action
1. Duty

33-380 California Forms of Pleading and Practice--Annotated § 380.31

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§ 380.31 Duty Arising From Contract

[1] Same Act as Both Tort and Breach of Contract

If two parties have a contractual relationship, the obligation allegedly breached may not be purely contractual, but may also be an obligation imposed by law, the breach of which constitutes a tort [*see Civ. Code § 1427*]. The distinction between actions based on tort and those based on breach of contract is significant for a number of reasons. First, certain items of recovery that are available in tort actions, such as punitive damages [*see Civ. Code § 3294(a)*] and compensatory damages for emotional distress, are generally not available in actions for breach of contract [*see Erlich v. Menezes (1999) 21 Cal. 4th 543, 558, 87 Cal. Rptr. 2d 886, 981 P.2d 978* ; *Quigley v. Pet, Inc. (1984) 162 Cal. App. 3d 877, 887-888, 208 Cal. Rptr. 394]* . Secondly, the applicable statute of limitations and various procedural issues may differ depending on whether the action is based on contract or tort [*see, e.g., Voth v. Wasco Pub. Util. Dist. (1976) 56 Cal. App. 3d 353, 356-357, 128 Cal. Rptr. 608* (applicability of claims requirement in action against public entity); *Allred v. Bekins Wide World Van Servs. (1975) 45 Cal. App. 3d 984, 988-990, 120 Cal. Rptr. 312* (applicable limitations period)].

The same act may constitute both a tort and a breach of contract [*see, e.g., Crisci v. Security Ins. Co. (1967) 66 Cal. 2d 425, 432-433, 58 Cal. Rptr. 13, 426 P.2d 173* (breach by insurer of implied covenant of good faith and fair dealing owed to insured)]. In this situation, the injured party generally may elect to waive the contract and sue in tort or waive the tort and base his or her action on contract [*Eads v. Marks (1952) 39 Cal. 2d 807, 811, 249 P.2d 257]* . However, not every breach of contract will subjectthe breaching party to liability in tort [*see Quigley v. Pet, Inc. (1984) 162 Cal. App. 3d 877, 889, 208 Cal. Rptr. 394]* .

Outside of the insurance contract context, tort recovery for breach of contract is precluded absent the violation of an independent duty arising from principles of tort law. More specifically, mere bad-faith denial of the existence of a

contract or denial of liability under the contract are insufficient to justify tort liability [*Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal. 4th 85, 102, 44 Cal. Rptr. 2d 420, 900 P.2d 669]* . A negligent breach of contract alone will generally be insufficient to support an award of tort damages, at least outside of the insurance context [*Erlich v. Menezes (1999) 21 Cal. 4th 543, 553-554, 87 Cal. Rptr. 2d 886, 981 P.2d 978]* .

For example, the Supreme Court refused to allow homeowners or a homeowners association to recover in negligence from housing developers and contractors for deviations from applicable building codes and industry standards that had not yet caused property damage or personal injury or ripened into involuntary out-of-pocket repair costs [*Aas v. Superior Court (2000) 101 Cal. Rptr. 2d 718, 12 P.3d 1125]* . In that opinion, the Supreme Court rejected an argument for allowing recovery of tort damages for economic loss that was based on the court of appeal's holding in *North American Chemical Co. v. Superior Court,* which had held that the negligent performance of a services contract may support a tort recovery for foreseeable economic loss even in the absence of injury to person or property [*see North Am. Chem. Co. v. Superior Court (1997) 59 Cal. App. 4th 764, 774, 69 Cal. Rptr. 2d 466]* . In the homeowners' case, however, the Supreme Court reiterated that the negligent performance of a construction contract, without more, does not justify an award of tort damages [*Aas v. Superior Court (2000) 101 Cal. Rptr. 2d 718, 12 P.3d 1125]* .

It should be noted that while the general principles enunciated by the Supreme Court in that opinion are still valid, their application in the context of defects arising from new residential construction has subsequently been abrogated by the Right to Repair Act, codified at *Civ. Code § 895 et seq.* [*see Greystone Homes, Inc. v. Midtec, Inc. (2008) 168 Cal. App. 4th 1194, 1202, 86 Cal. Rptr. 3d 196*]. Under that Act, a homeowner may recover for economic loss from a builder or other parties if the defendant violates building standards provided in the Act, without having to show that the violation caused property damage or personal injury [*see Civ. Code §§ 896, 942*]. For further discussion of the Right to Repair Act, see Ch. 104, *Building Contracts* .

As a general rule, however, it appears that a tortious breach of contract may occur if [*Erlich v. Menezes (1999) 21 Cal. 4th 543, 553-554, 87 Cal. Rptr. 2d 886, 981 P.2d 978]* :

- The breach is accompanied by a common law tort, such as fraud or conversion;
- The means used to breach the contract are tortious by use of deceit or undue coercion; or
- One party intentionally breaches the contract, intending or knowing that the breach will cause severe, unmitigable harm in the form of mental anguish, personal hardship, or substantial consequential damages.

In one case, for example, the California Supreme Court held that a helicopter manufacturer could recover tort damages, including punitive damages, from a parts manufacturer that provided vital parts knowing that they were not in conformity with manufacturing specifications as detailed in the contract between the parties. The Court concluded that the parts manufacturer committed the intentional tort of fraud by providing certificates of compliance with the parts, despite knowing that the parts were not in compliance, and that the helicopter manufacturer relied on these affirmative misrepresentations to its detriment when it accepted the nonconforming parts. Under these circumstances, the fraudulent act of providing the false certificates of compliance was an independent tort separate from the breach of contract itself, which was the provision of the nonconforming parts [*Robinson Helicopter Co., Inc. v. Dana Corp. (2004) 34 Cal. 4th 979, 990-991, 22 Cal. Rptr. 3d 352, 102 P.3d 268]* . Although it is unclear to what extent the Court predicated its decision on these concerns, the Court also noted that the defendant's act of providing critical helicopter parts that were not in compliance with specifications placed the lives of people flying in the helicopters at risk and exposed the helicopter manufacturer to liability for personal damages beyond any damage to the helicopters, even though the defective parts were discovered before any accidents actually occurred [*Robinson Helicopter Co., Inc. v. Dana Corp. (2004) 34 Cal. 4th 979, 991 n.7, 993, 22 Cal. Rptr. 3d 352, 102 P.3d 268]* .

[2] Contractual Relationship as Creating Independent Legal Duty

If the defendant owes a duty to exercise due care under general negligence principles, the defendant may be liable in tort even if the failure to exercise due care also constitutes a breach of contract [*see, e.g., Eads v. Marks (1952) 39 Cal. 2d 807, 810-811, 249 P.2d 257* ; *Voth v. Wasco Pub. Util. Dist. (1976) 56 Cal. App. 3d 353, 356-357, 128 Cal. Rptr. 608]* . The existence of a contractual relationship may, in some instances, create an independent legal duty to exercise due care, the breach of which will give rise to a cause of action in tort [*J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 803, 157 Cal. Rptr. 407, 598 P.2d 60* ; *Eads v. Marks (1952) 39 Cal. 2d 807, 810-811, 249 P.2d 257* ; *see Marois v. Royal Investigation & Patrol, Inc. (1984) 162 Cal. App. 3d 193, 200, 208 Cal. Rptr. 384* (private security guard who contracted with business to provide security services thereby created special relationship with business's customers that imposed an affirmative duty to protect them from acts of third persons)]. In this situation, the defendant's contractual duties are not conclusive as to the extent of any legal duty of care owed to third parties; that duty is measured by legal standards of reasonableness [*Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 412 n.11, 22 Cal. Rptr. 2d 514]* .

[3] Claim by Person Not Party to Contract

Assuming that a particular contract creates a legal duty of care between the parties, a question may arise as to the circumstances under which this duty may be owed to persons who are not parties to the contract. If a third party sues in tort, the existence of a duty of care to that party is not determined solely by the presence or absence of contractual privity; instead, the court must examine and balance a number of policyfactors in determining whether or not a duty of care extends to that party. Those factors include the following [*Lucas v. Hamm (1961) 56 Cal. 2d 583, 588, 15 Cal. Rptr. 821, 364 P.2d 685* (attorney owes duty of care to those who are intended to be beneficiaries of will); *Sumitomo Bank v. Taurus Developers, Inc. (1986) 185 Cal. App. 3d 211, 223-226, 229 Cal. Rptr. 719* (builder must exercise reasonable care towards those who purchase houses even if no privity of contract exists); *Ales-Peratis Foods Int'l, Inc. v. American Can Co. (1985) 164 Cal. App. 3d 277, 289-290, 209 Cal. Rptr. 917* (packager of seafood had cause of action in tort against can manufacturer for economic losses sustained as result of negligently manufactured cans, notwithstanding packager's lack of privity of contract with manufacturer)]:

- The extent to which the transaction was intended to affect the person not party to the contract;
- The foreseeability of harm to that person;
- The degree of certainty that the person suffered injury;
- The closeness of the connection between the defendant's conduct and the injury suffered;
- The moral blame attached to the defendant's conduct; and
- The policy of preventing future harm.

However, the mere presence of a foreseeable risk of injury to third persons is not sufficient, standing alone, to impose liability for negligent conduct; other factors must be considered. For example, the California Supreme Court has held that an auditor's liability for general negligence in conducting an audit of a client's financial statements is confined to the person who contracts for or engages the audit services. The Court considered such factors as liability being out of proportion to fault, the effective use of contract rather than tort liability to adjust risks among a sophisticated class of plaintiffs, and the increased expense and decreased availability of auditing services that would result from expanded liability [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 398-406, 11 Cal. Rptr. 2d 51, 834 P.2d 745]* . Similarly, absent extraordinary and specific facts, a bank does not owe a duty of care to a noncustomer [*Software Design & Application, Ltd. v. Hoefer & Arnett, Inc. (1996) 49 Cal. App. 4th 472, 479, 56 Cal. Rptr. 2d 756]* , even if a third party

illegally opens an account at the bank under the name of the noncustomer [*Rodriguez v. Bank of the West (2008) 16 Cal. App. 4th 454, 466, 75 Cal. Rptr. 3d 543*], or to third parties who were unknown to the bank and were not parties to the bank's deposit contract [*Chazen v. Centennial Bank (1998) 61 Cal. App. 4th 532, 545, 71 Cal. Rptr. 2d 462]* . Nor does an environmental consultant hired pursuant to a contract with a county to prepare an environmental impact report owe a duty to the developer whose project is being evaluated [*Mission Oaks Ranch, Ltd. v. County of Santa Barbara (1998) 65 Cal. App. 4th 713, 725-726, 77 Cal. Rptr. 2d 1 , disapproved on other grounds, Briggs v. Eden Council for Hope & Opportunity (1999) 19 Cal. 4th 1106, 1123 n.10, 81 Cal. Rptr. 2d 471, 969 P.2d 564]* .

An independent adjustor retained by an insurance company owes no duty of care to the insured, with whom the adjustor has no contract, and cannot be held liable for negligently handling a claim if the only loss is economic [*Sanchez v. Lindsey Morden Claims Servs., Inc. (1999) 72 Cal. App. 4th 249, 250-251, 84 Cal. Rptr. 2d 799]* . However, a duty may be found if physical harm is involved. For example, the court of appeal in another case held that a corporation under contract to a health plan to administer claims owes a duty to health plan members to exercise due care to protect those members from physical injury caused by negligence in denying benefits under the plan [*Mintz v. Blue Cross of California (2009) 172 Cal. App. 4th 1594, 1611, 92 Cal. Rptr. 3d 422]* .

Despite the lack of privity of contract, it is clearly established that a subcontractor on a construction project can be held liable in negligence to the party who hires the general contractor if the subcontractor's work is below the applicable standard of care in the industry [*see, e.g., Stonegate Homeowners Assn. v. Staben (2006) 144 Cal. App. 4th 740, 748-749, 50 Cal. Rptr. 3d 709]* . In addition, a workers' compensation claims administrator hired to provide claim services for a self-insured employer owes a duty of care when handling claims to the employer's excess insurer liable for paying claims that exceed a specified amount [*National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group, Inc. (2009) 171 Cal. App. 4th 35, 46-47, 89 Cal. Rptr. 3d 473*].

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B. Negligence Cause of Action
1. Duty

33-380 California Forms of Pleading and Practice--Annotated § 380.32

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§ 380.32 Affirmative Duty to Protect, Warn, or Aid Others

[1] Traditional Rule of Nonliability for "Nonfeasance"

A person generally is not liable for his or her mere nonfeasance, i.e., his or her failure to act to protect or assist others who are imperiled by circumstances, by their own actions, or by the actions of a third party [*Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 435, n.5, 131 Cal. Rptr. 14, 551 P.2d 334* ; *Weirum v. RKO Gen., Inc. (1975) 15 Cal. 3d 40, 48-49, 123 Cal. Rptr. 468, 539 P.2d 36* ; *Todd v. Dow (1993) 19 Cal. App. 4th 253, 258, 23 Cal. Rptr. 2d 490]* . Thus, a person generally will not be liable for failing to take affirmative action that would have benefited another unless the person was obligated to act pursuant to a preexisting legal duty [*Stout v. City of Porterville (1983) 148 Cal. App. 3d 937, 942, 196 Cal. Rptr. 301]* .

[2] Voluntary Assumption of Duty

[a] Liability for Negligent Performance

[i] Reliance or Increased Risk of Harm

Even in those instances in which the relationship between two persons would not ordinarily give rise to a duty of care on the part of one person to aid or protect the other, one who voluntarily undertakes to do so is under a duty to exercise due care in the performance and will be liable if (1) the failure to exercise due care increases the risk of harm to the other, or (2) harm is suffered because of the other's reliance on the undertaking [*Williams v. State of California (1983) 34 Cal. 3d 18, 23, 192 Cal. Rptr. 233, 664 P.2d 137]* . For example, when a defendant employer gave the plaintiff a physical examination as a condition of employment, and the company doctor failed to diagnose a disease, which later worsened without medical treatment, the defendant was held liable for failing to exercise ordinary care because it had undertaken to render medical advice, even though the defendant otherwise would have had no duty to do

so [*Coffee v. McDonnell-Douglas Corp. (1972) 8 Cal. 3d 551, 557-560, 105 Cal. Rptr. 358, 503 P.2d 1366]* .

[ii] Duty to Third Parties

A defendant who voluntarily undertakes to render services to another person that the defendant should recognize as necessary for the protection of a third party or a third party's property has a duty to the third party to exercise reasonable care in the undertaking. Defendant is liable to the third party for breach of this duty if (1) defendant's failure to exercise reasonable care increases the risk of harm to the thirdparty, (2) defendant has undertaken to perform a duty owed by the other person to the third party, or (3) the third party suffers harm because either the third party or the person to whom defendant rendered the services relied on defendant's undertaking [*FNS Mortgage Serv. Corp. v. Pacific Gen. Group, Inc. (1994) 24 Cal. App. 4th 1564, 1572, 29 Cal. Rptr. 2d 916* ; Restatement (Second) of Torts § 324A].

For example, a nonprofit association that promoted uniformity in the plumbing trade through its uniform plumbing code and its listing of plumbing products that met code standards was liable to plaintiff for continuing to list a manufacturer's pipe that defendant knew did not meet its standards; the pipe prematurely deteriorated and caused substantial damage to the apartment complex being constructed by plaintiff. Virtually all public entities had adopted defendant's code, and building inspectors would not sanction the use of pipe not listed by defendant; because defendant had undertaken to render the services of inspecting pipe manufacturers and delisting those who did not adhere to its standards, defendant should have recognized that its services were necessary for the protection of consumers such as plaintiff who acquired and installed pipe. Furthermore, defendant had undertaken to perform a duty owed by local building officials to consumers, and defendant's failure to exercise reasonable care in its activities increased the risk of harm to consumers such as plaintiff because of the reliance by local building officials on defendant's undertaking [*FNS Mortgage Serv. Corp. v. Pacific Gen. Group, Inc. (1994) 24 Cal. App. 4th 1564, 1572-1573, 29 Cal. Rptr. 2d 916]* .

By contrast, the California Supreme Court held in one case that the parent corporation for a manufacturer of silicone breast implants did not owe a duty under these rules to plaintiffs who had been injured by the breast implants. Plaintiffs had sued the parent corporation for allegedly negligently undertaking to provide toxicological research on silicone products to the subsidiary manufacturer. However, the toxicological research provided by the parent corporation to the subsidiary was provided between 1948 and the early 1960s, the use of silicone in breast implants was not conceived until 1961 or clinically tested until 1962, and by 1964 the subsidiary corporation had its own research department. It was undisputed that the parent corporation never tested, made, or sold silicone breast implants. On these facts, the Court held that while the voluntary undertaking of providing toxicological research to a medical manufacturer theoretically implicates the well-being of third parties, the parent corporation's undertaking was not a sufficient basis for liability, especially in light of the fact that plaintiffs' injuries occurred many years after the parent corporation had ceased providing toxicological research to the subsidiary [*Artiglio v. Corning Inc. (1998) 18 Cal. 4th 604, 615-618, 76 Cal. Rptr. 2d 479, 957 P.2d 1313* (not reasonable to conclude that defendant should have recognized that own toxicology research was necessary for protection of plaintiffs)].

The California Supreme Court has also refused to find that private contractors who undertook to provide traffic lights at an intersection as a condition for obtaining a condominium building permit from a city owed a duty of care to a third-party driver to install the lights within a certain time frame [*Paz v. State of California (2000) 22 Cal. 4th 550, 553-554, 93 Cal. Rptr. 2d 703, 994 P.2d 975]* . In that particular case, the third party alleged that the intersection was a dangerous condition of public property because of limited lines of sight, that the city knew this, and that even though the condominium project had not been completed at the time of the accident, the contractors had negligently failed to install the lights required by their agreement with the city within a reasonable time period. However, the Court concluded that under the facts of the case, the plaintiff could not satisfy any of the three conditions for imposing liability under Restatement (Second) of Torts § 324A. First, the failure to install the lights by a certain time period did not increase the existing risk to drivers. Second, the contractors had not undertaken to perform a duty owed by the city, because cities generally have no affirmative duty to install traffic control signals. Finally, the plaintiff could provide no evidence that he was harmed because he or the city relied on the installation of the traffic lights by any particular time

prior to the completion of the condominium project [*Paz v. State of California (2000) 22 Cal. 4th 550, 559-562, 93 Cal. Rptr. 2d 703, 994 P.2d 975]* .

In another case, the court of appeal rejected the argument that a professional medical association that voluntarily recommends standards for blood banks should be held liable to a surgery patient who developed AIDS as a result of a blood transfusion in 1984. In that case, the plaintiff argued that the association had been negligent in the months prior to the surgery for failing to recommend that blood banks (1) question donors about their sexual preferences and activities, (2) make available to recipients directed blood donations from family and friends, and (3) offer surrogate testing of the blood supply by screening for a hepatitis B antigen that was prevalent in the same populations that were at risk for AIDS. The court of appeal held, however, that the association owed no duty of care to the patient, because in light of the knowledge and conflicting medical and scientific opinions available during the relevant period, it was not reasonably foreseeable then that any of these measures would have reduced the risk of AIDS contamination of the blood supply [*N.N.V. v. American Assn. of Blood Banks (1999) 75 Cal. App. 4th 1358, 1377-1380, 89 Cal. Rptr. 2d 885]* . In addition, policy concerns led the court to state more generally that, absent fraud or bad faith, a professional medical association such as the defendant in this case should not face liability for making a choice among competing scientific and medical opinions, if the medical and scientific community has reached no consensus on the proper approach to a medical situation [*N.N.V. v. American Assn. of Blood Banks (1999) 75 Cal. App. 4th 1358, 1392, 89 Cal. Rptr. 2d 885]* .

The court of appeal has also rejected a plaintiff's claim that a not-for-profit engineering corporation, which tested small appliances for compliance with engineering standards designed to reduce the risk of fire and electrical shock, had undertaken any duty to protect consumers from health hazards associated with exposure to asbestos that may have been used in insulation in the products [*Dekens v. Underwriters Labs. Inc. (2003) 107 Cal. App. 4th 1177, 1185, 132 Cal. Rptr. 2d 699]* .

There appears to be some confusion in the courts regarding the rule of liability to third parties provided by *Restatement (Second) of Torts § 324A*. Section 324A states that "One who undertakes ... to render services to another [that he or she] should recognize as necessary for the protection of a third person ..., is subject to liabilityto the third person for physical harm resulting from [his or her] failure to exercise reasonable care ..., if harm is suffered because of reliance of the other or the third person upon the undertaking." However, one court has inaccurately quoted language from an earlier decision [*Williams v. Saga Enters., Inc. (1990) 225 Cal. App. 3d 142, 152, 274 Cal. Rptr. 901]* as holding that *Section 324A* applies to situations in which a defendant has undertaken to render services to another for the protection of that other person, rather than a third person [*Johnson v. County of Ventura (1994) 29 Cal. App. 4th 1400, 1406, 35 Cal. Rptr. 2d 150]* . Based, presumably, on this interpretation of the *Section 324A* language, the court ruled that a city was not liable for the stabbing death of an elderly woman by a patient of a county hospital. The patient left a county hospital while being treated for psychiatric problems and was not taken into custody and returned to the hospital by city police after they found him breaking into homes near the hospital, despite the hospital's request that the police not only find him but bring him back [*Johnson v. County of Ventura (1994) 29 Cal. App. 4th 1400, 1406, 35 Cal. Rptr. 2d 150]* . The court held that the city had undertaken to provide a service to the county (the "other"), not the decedent (the "third person"), and its undertaking created no duty of care to the decedent or the general public. Aside from its apparent misinterpretation of the third person language of *Section 324A*, the court also held that *Section 324A* did not apply because the police had not induced the decedent's reliance on a promise to protect her, and that the police's release of the patient did not increase the harm to the decedent but merely left her as she was [*Johnson v. County of Ventura (1994) 29 Cal. App. 4th 1400, 1406, 35 Cal. Rptr. 2d 150]* .

[b] Liability for Reliance on Unfulfilled Promise

A person may incur liability by making a promise to do something without ever performing that promise, with the result that the promisee has relied on the promise to his or her detriment [*Williams v. State of California (1983) 34 Cal. 3d 18, 23-24, 192 Cal. Rptr. 233, 664 P.2d 137]* . For example, an automobile club that undertook to provide emergency road service to its members could be held liable for injuries suffered by a stranded motorist who was struck and killed

by a drunk driver on the freeway while waiting for a tow truck that never arrived. The club, by promising to render assistance to the motorist, was under a duty to do so with due care [*Bloomberg v. Interinsurance Exch. (1984) 162 Cal. App. 3d 571, 575-576, 207 Cal. Rptr. 853]* .

Such a voluntarily undertaken protective duty may be limited in duration and scope, however. For example, in a wrongful death action by the heirs of a district attorney who was killed by a man he had successfully prosecuted 30 years earlier, a promise by police officials to alert the decedent of any threatening behavior by the man did not obligate them to contact the decedent eight years after the promise was made, and the voluntary conduct of one officer did not impose a duty of care on all other officers in the department [*Weissich v. County of Marin (1990) 224 Cal. App. 3d 1069, 1077-1078, 1080, 274 Cal. Rptr. 342]* .

[c] Liability for Negligent Misrepresentation Involving Risk of Physical Harm

[i] Elements

A person who negligently gives false information to another is liable for physical harm suffered by the other person that was caused by action taken by the other person in reasonable reliance on the information [*Garcia v. Superior Court (1990) 50 Cal. 3d 728, 734, 268 Cal. Rptr. 779, 789 P.2d 960]* . The plaintiff must allege all of the following [*Garcia v. Superior Court (1990) 50 Cal. 3d 728, 735-737, 268 Cal. Rptr. 779, 789 P.2d 960* (parole officer, having chosen to communicate information about killer to potential victim, had duty to use reasonable care in doing so)]:

- The defendant had a duty to exercise reasonable care in giving the information to the plaintiff;
- The defendant gave false information to the plaintiff with a degree of culpability at least equal to negligence;
- The plaintiff actually and reasonably relied on the alleged misrepresentations; and
- The plaintiff's reliance on the defendant's misrepresentations proximately caused the plaintiff's physical injury or death.

Physical injury that stems entirely from emotional distress caused by a negligent misrepresentation is not sufficient to support a cause of action for negligent misrepresentation, at least if there was no reason for the defendant to believe that the plaintiff's physical safety might depend on the accuracy of the information provided [*Friedman v. Merck & Co. (2003) 107 Cal. App. 4th 454, 480-481, 487, 131 Cal. Rptr. 2d 885]* .

Alternatively, a cause of action for negligent misrepresentation involving physical harm may be brought under the statute [*Civ. Code § 1710(2)*] governing deceit [*see Garcia v. Superior Court (1990) 50 Cal. 3d 728, 737 n.7, 268 Cal. Rptr. 779, 789 P.2d 960]* . For a discussion of the requirements for a cause of action for deceit under *Civ. Code § 1710(2)*, see Ch. 269, *Fraud and Deceit* .

Liability for a negligent misrepresentation resulting in physical harm must be based on an affirmative or positive assertion of fact, not on an implied misrepresentation [*Weissich v. County of Marin (1990) 224 Cal. App. 3d 1069, 1082-1083, 274 Cal. Rptr. 342]* . Evidence that the plaintiff took independent precautionary action may support a conclusion that the plaintiff did not rely on defendant's representations [*see M.B. v. City of San Diego (1991) 233 Cal. App. 3d 699, 708, 284 Cal. Rptr. 555]* . As is true for proximate cause generally, the time span betwen a negligent misrepresentation and occurrence of the harm is a factor that the court will consider in determining whether plaintiff's reliance on the misrepresentation proximately caused his or her injury [*see Weissich v. County of Marin (1990) 224 Cal. App. 3d 1069, 1083-1084, 274 Cal. Rptr. 342* ; *see also § 380.73[1]*].

[ii] Exception to Business Purposes Rule

Misrepresentations involving a risk of physical harm constitute an exception to theordinary rule that liability for negligent misrepresentation is imposed only on those who supply information for business purposes in the course of a business or profession [*Garcia v. Superior Court (1990) 50 Cal. 3d 728, 735, 268 Cal. Rptr. 779, 789 P.2d 960]* . If the resulting harm is bodily harm or physical harm to property, a defendant may be liable for negligence even though the defendant gave the information gratuitously and derived no benefit from giving it [*Garcia v. Superior Court (1990) 50 Cal. 3d 728, 735, 268 Cal. Rptr. 779, 789 P.2d 960]* .

[d] Statutory Protections for "Good Samaritans"

If one who has no legal duty to aid another nevertheless undertakes to render assistance as a "good Samaritan," he or she generally has a duty to act with reasonable care [*Colby v. Schwartz (1978) 78 Cal. App. 3d 885, 889-890, 144 Cal. Rptr. 624]* . The conduct of one who renders aid in an emergency setting will be measured by the care that the ordinary person could reasonably be expected to exercise under similar circumstances [*Colby v. Schwartz (1978) 78 Cal. App. 3d 885, 890, 144 Cal. Rptr. 624]* .

Several statutes protect rescuers and others from liability for certain types of aid rendered in emergency situations. For example, *Health and Safety Code § 1799.102*, as amended effective for actions filed on or after August 6, 2009, provides that medical, law enforcement, and emergency personnel providing emergency medical or nonmedical care in good faith and not for compensation at the scene of an emergency are not liable for any civil damages resulting from any act or omission. The scene of an emergency for these purposes does not include emergency departments and other places where medical care is usually offered [*Health & Safety Code § 1799.102(a)*]. Under that statute, persons other than medical, law enforcement, and emergency personnel who render emergency medical or nonmedical care or assistance at the scene of an emergency are not to be held liable for civil damages for any act or omission other than an act or omission that constitutes gross negligence or willful or wanton misconduct [*Health & Safety Code § 1799.102(b)(2)*]. Prior to the 2009 amendment, this statute provided a single, more general immunity for all persons volunteering aid at the scene of an emergency [*see* former *Health & Safety Code § 1799.102*], although the California Supreme Court in 2008 had interpreted the protection to apply only to persons rendering *medical* aid at the scene of a medical emergency [*Van Horn v. Watson (2008) 45 Cal. 4th 322, 329-331, 86 Cal. Rptr. 3d 350, 197 P.3d 164* (pulling injured friend from car involved in accident out of fear that car might explode was not emergency medical care)].

Other statutes providing immunity govern particular individuals rendering emergency aid under specified circumstances [*see, e.g., Bus. & Prof. Code §§ 2395* (physician, surgeon, or podiatrist rendering aid at scene of emergency), *2727.5* (nurse rendering aid at scene of emergency); *Civ. Code § 1714.2(a), (e)* (anyone trained in CPR who renders emergency CPR at scene of emergency in good faith and not for compensation)].

[3] Special Relationships Imposing Duty to Protect, Warn, or Aid Others

[a] Creation and Effect

Under general common law rules, one person owes no duty to control the conduct of another or to warn those endangered by that conduct [*Todd v. Dow (1993) 19 Cal. App. 4th 253, 258, 23 Cal. Rptr. 2d 490* ; *see also Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 203, 185 Cal. Rptr. 252, 649 P.2d 894]* . However, California courts have recognized that "special relationships" may create special duties, including the duty to protect against the harmful acts of third persons [*see Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 435, 131 Cal. Rptr. 14, 551 P.2d 334* ; *Marois v. Royal Investigation & Patrol, Inc. (1984) 162 Cal. App. 3d 193, 199, 208 Cal. Rptr. 384]* . A duty is imposed on a defendant to control the conduct of others if the defendant has some special relationship either with the person whose conduct needs to be controlled or with the person who is the foreseeable victim of that conduct [

see Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 435-436, 131 Cal. Rptr. 14, 551 P.2d 334 ; *Todd v. Dow (1993) 19 Cal. App. 4th 253, 258, 23 Cal. Rptr. 2d 490]* . A duty arising from a special relationship may encompass a duty to warn, a duty to control the dangerous conduct of a third person, or both [*see Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 436, 131 Cal. Rptr. 14, 551 P.2d 334]* .

However, even if a special relationship is found to exist between the defendant and either the active wrongdoer or the victim, the defendant does not have a duty to protect the victim unless the risk of harm incurred was foreseeable [*see Romero v. Superior Court (2001) 89 Cal. App. 4th 1068, 1081, 107 Cal. Rptr. 2d 801* ; *Megeff v. Doland (1981) 123 Cal. App. 3d 251, 257, 176 Cal. Rptr. 467]* . For example, in one case, a 13-year-old girl was sexually assaulted by a 16-year-old boy in the home of the defendants, who were the parents of another boy. The girl's mother had agreed to leave the girl there with a group of teenagers after the defendants had indicated that they would be at home working in the garden while the teenagers were there, although the assault took place while the defendants were away from the house for about an hour. The court of appeal held that although a special relationship existed, the defendants did not owe a duty of care to prevent the sexual assault, because unless they had actual knowledge that the assailant had any propensities to commit a sexual assault, the assault was not reasonably foreseeable [*Romero v. Superior Court (2001) 89 Cal. App. 4th 1068, 1081, 107 Cal. Rptr. 2d 801* ; *see also J.L. v. Children's Institute, Inc. (2009) 177 Cal. App. 4th 388, 398, 99 Cal. Rptr. 3d 5* (home daycare referral organization did not owe duty to prevent sexual assault committed at daycare provider to whom victim's mother had been referred, in absence of history of sexual misconduct by assailant or knowledge of same by organization)].

In determining whether the requisite foreseeability of harm was present, foreseeability must be measured by what the defendant actually knew, not by constructive knowledge or information that the defendant arguably should have known, but did not [*Margaret W. v. Kelley R. (2006) 139 Cal. App. 4th 141, 156-161, 42 Cal. Rptr. 3d 519* (mother who invited daughter's teenage friend to spend night at her home was not liable when friend was raped after leaving house while mother was out; mother had no actual knowledge to suggest danger of rape)].

The issues of duty to control or warn are generally treated as parallel [*Brenneman v. State of California (1989) 208 Cal. App. 3d 812, 819, 256 Cal. Rptr. 363]* , although one court has stated that a duty to control may well be broader than a duty to warn a potential victim [*see Duffy v. City of Oceanside (1986) 179 Cal. App. 3d 666, 671, 224 Cal. Rptr. 879]* .

[b] Existence of Special Relationship as Question of Law

[i] Balancing of Public Policy Considerations and Other Interests

The existence of a duty based on the existence of a special relationship is entirely a question of law that must be determined only by the court [*Reid v. State Farm Mut. Auto. Ins. Co. (1985) 173 Cal. App. 3d 557, 572, 218 Cal. Rptr. 913]* . In determining whether or not a special relationship exists, the courts have balanced policy considerations and competing interests. For example, the California Supreme Court has held that a therapist who has predicted that a patient poses a serious danger of violence to a foreseeable victim has a duty to exercise reasonable care to protect the victim. The Court balanced the public interest in supporting effective treatment of mental illness and the privacy rights of patients, on the one hand, against the publicinterest in safety from violent assault, on the other [*Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d. 425, 435-442, 131 Cal. Rptr. 14, 551 P.2d 334* ; *see § 380.32[3][c][ii]*].

Public policy may also weigh against imposing a special relationship in a particular case. For example, public entities and employees have no affirmative duty to warn of the release of an inmate with a violent history who has made nonspecific threats of harm directed at nonspecific victims [*Thompson v. County of Alameda (1980) 27 Cal. 3d 741, 754, 167 Cal. Rptr. 70, 614 P.2d 728* ; *see Brenneman v. State of California (1989) 208 Cal. App. 3d 812, 820, 256 Cal. Rptr. 363* ; *see also § 380.32[3][c][ii]*]. In *Thompson*, the Supreme Court cited the legislature's choosing as a matter of public policy to continue parole and probation programs even though risks may be borne by the public, and

the Court also noted its skepticism concerning any net benefit that might flow from a duty to issue a generalized warning of the probationary release of offenders [*Thompson v. County of Alameda (1980) 27 Cal. 3d 741, 754, 167 Cal. Rptr. 70, 614 P.2d 728]* .

Similarly, a residential substance abuse treatment facility housing inmates from the Department of Corrections owes no legal duty to neighborhood residents who are injured by escaped inmates, even if the treatment facility is negligent in allowing inmates to escape with a kitchen knife stolen from the facility. According to the court of appeal, imposition of a duty in such circumstances is outweighed by the public policy of encouraging rehabilitation of criminal offenders, the lack or foreseeability of injury to any specifically identifiable individual, and the fact that the risk of injury is shared by all members of the general public [*Rice v. Center Point, Inc. (2007) 154 Cal. App. 4th 949, 958, 65 Cal. Rptr. 3d 312* ; *see also Beauchene v. Synanon Foundation, Inc. (2007) 88 Cal. App. 3d 342, 345-348, 151 Cal. Rptr. 796]* .

[ii] Ability to Control as Essential

In general, a defendant is not liable because of a "special relationship" unless the defendant had the ability to control the wrongdoer's conduct and to protect the plaintiff effectively [*Todd v. Dow (1993) 19 Cal. App. 4th 253, 259, 23 Cal. Rptr. 2d 490]* . If the natural relationship between the parties creates no inference of an ability to control, the complaint must specifically allege the actual custodial ability [*see Wise v. Superior Court (1990) 222 Cal. App. 3d 1008, 1013, 272 Cal. Rptr. 222* ; *Megeff v. Doland (1981) 123 Cal. App. 3d 251, 261, 176 Cal. Rptr. 467]* .

[c] Types of Special Relationships

[i] General Requirements for Finding Special Relationship

Numerous types of special relationships may result in specialty. A court may determine that under any given fact situation a special relationship arose between two parties that created a duty in one towards the other. The essential question is whether A's conduct brings A into a relationship with B such that social policy required A to take affirmative action or precaution to avoid harm to B [*see Draper Mortuary v. Superior Court (1982) 135 Cal. App. 3d 533, 537, 185 Cal. Rptr. 396]* . Special relationships generally involve some kind of dependency or reliance on the defendant [*Olson v. Children's Home Soc'y (1988) 204 Cal. App. 3d 1362, 1366, 252 Cal. Rptr. 11]* .

However, not every situation of dependency or reliance creates a special relationship. For example, in a case involving two women and a man they had both been romantically involved with, one woman was not liable for the man's attack on the other woman, because there was no special relationship between the first woman and the attacker or between the two women. The first woman, who was also the attacker's employer, had no duty to warn the other woman, even though the first woman had undertaken significant efforts to assist the attacker with alcoholism rehabilitation. As a nonprofessional volunteer, she did not assume a duty of continued assistance with respect either to the man or to the other woman, even after she became aware that the attacker had retaken possession of a gun that might cause peril to the other woman. The fact that she had previously told the other woman that she had taken the gun from the attacker did not impose a duty on her to advise the other woman of the change in the gun's possession [*Koepke v. Loo (1993) 18 Cal. App. 4th 1444, 1450-1458, 23 Cal. Rptr. 2d 34]* .

[ii] Persons Responsible for Dangerous or Mentally Disturbed Persons

Because of the special relationship between the therapist and the patient, a psychotherapists or other psychiatric caretaker may be liable for injuries inflicted by a psychiatric patient on a foreseeable and readily identifiable victim [*Thompson v. County of Alameda (1980) 27 Cal. 3d 741, 753-755, 167 Cal. Rptr. 70, 614 P.2d 728* ; *Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 431, 131 Cal. Rptr. 14, 551 P.2d 334]* . The imposition of a duty is not limited to those instances in which the defendant stands in a special relationship to both the victim and to the patient [*Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 436, 131 Cal. Rptr. 14, 551 P.2d 334]* . The therapist's duty probably includes at least a warning to any identified potential victim; the precise conduct required will vary from case

to case and must be measured against the traditional negligence standard of reasonable care under the circumstances [*see Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 439, 131 Cal. Rptr. 14, 551 P.2d 334]* . A therapist may be liable for failure to protect the victim if the plaintiff alleges and proves that the therapist determined, or should have determined, that the patient presented a serious danger of harm to the victim [*Tarasoff v. Regents of Univ. of Cal. (1976) 131 Cal. Rptr. 14, 551 P.2d 334]* . A psychotherapist has no duty to disclose a patient's confidences if the risk of harm is self-inflicted injury or mere property damage [*Bellah v. Greenson (1978) 81 Cal. App. 3d 614, 622, 146 Cal. Rptr. 535]* , but a caretaker does have a duty to warn plaintiffs of the release of a family member who is clearly schizophrenic and suicidal [*Johnson v. County of Los Angeles (1983) 143 Cal. App. 3d 298, 311, 191 Cal. Rptr. 704]* .

The legislature has limited the liability of psychotherapists for the violent acts of patients by providing in *Civ. Code § 43.92* that a psychotherapist may not be held liable for failing to warn of and protect from a patient's threatened violent behavior, or for failing to predict, warn of, and protect from a patient's threatened violent behavior, unless the patient has communicated to the psychotherapist a serious threatof physical violence against a reasonably identifiable victim [*see Calderon v. Glick (2005) 131 Cal. App. 4th 224, 232, 31 Cal. Rptr. 3d 707* (no duty to warn if patient consistently denied to psychotherapists that patient intended to harm anyone); *Barry v. Turek (1990) 218 Cal. App. 3d 1241, 1246, 267 Cal. Rptr. 553* (mental patient's prior conduct of following nurses in inappropriately close ways but without violence did not constitute serious threat of physical violence for purposes of establishing exception to *Civ. Code § 43.92* immunity)]. There is no monetary liability on the part of, and no cause of action against, a psychotherapist who discharges his or her duty to warn and protect under these limited circumstances by making reasonable efforts to communicate the threat to the victims and to a law enforcement agency [*Civ. Code § 43.92(b)*].

Although the statute states that the communication must come from the patient to trigger a duty to warn, the court of appeal has held that the duty to warn is also triggered under the statute if the threat of harm is communicated to the psychotherapist by a member of the patient's immediate family for the purpose of facilitating and furthering the patient's treatment [*Ewing v. Goldstein (2004) 120 Cal. App. 4th 807, 817, 15 Cal. Rptr. 3d 864* (triable issue of fact existed as to whether duty was triggered by information known to therapist)]. Expert medical testimony is not required to prove that the psychotherapist actually believed or predicted that the patient posed a serious threat of physical violence to another person [*Ewing v. Northridge Hosp. Med. Ctr. (2004) 120 Cal. App. 4th 1289, 1302-1304, 16 Cal. Rptr. 3d 591]* .

For purposes of the statute, a "psychotherapist" includes licensed psychologists, certain licensed clinical social workers and school psychologists, licensed family or marriage counselors, authorized medical practitioners who devote a substantial amount of time to the practice of psychiatry, registered psychological assistants, registered marriage or family counselor interns, associate clinical social workers, persons rendering mental health treatment or counseling services as authorized by *Fam. Code § 6924*, and persons reasonably believed by the patient to be any of these professionals [see *Evid. Code § 1010*]. For discussion regarding a psychotherapist's duty of care to suicidal patients, see Ch. 304, *Insane and Other Incompetent Persons* .

A special relationship does not exist if a defendant provides nonprofessional guidance to another person seeking advice and the defendant has no control over the environment of the person being counseled [*Nally v. Grace Cmty. Church (1988) 47 Cal. 3d 278, 294, 253 Cal. Rptr. 97, 763 P.2d 948* (religious nontherapist counselor); *see also Adams v. City of Fremont (1998) 68 Cal. App. 4th 243, 248, 278-279, 80 Cal. Rptr. 2d 196* (applying *Nally* standard, police officers responding to crisis involving person threatening suicide with loaded firearm do not have special relationship with person)]. However, nontherapist counselors may be liable for injuries related to their counseling activities, if they hold themselves out as professionals [*Nally v. Grace Community Church (1988) 47 Cal. 3d 278, 300 n. 8, 253 Cal. Rptr. 97, 763 P.2d 948]* .

[iii] Law Enforcement Officials

Although no special relationship exists between law enforcement officers and the public generally, the California

Supreme Court has identified several circumstances in which an officer has a duty to exercise reasonable care to protect another and may be liable for breach of that duty. These circumstances include all of the following [*see Williams v. State of California (1983) 34 Cal. 3d 18, 24-25, 192 Cal. Rptr. 233, 664 P.2d 137]* :

- An act by an officer that places a person in peril or increases the risk of harm [*see, e.g., Lugtu v. California Hwy. Patrol (2001) 26 Cal. 4th 703, 718, 724, 110 Cal. Rptr. 2d 528, 28 P.3d 249* (officer had duty to exercise reasonable care for safety of persons stopped for speeding on center median of highway); *McCorkle v. City of Los Angeles (1969) 70 Cal. 2d 252, 262-263, 74 Cal. Rptr. 389, 449 P.2d 453* (officer investigating accident directed plaintiff to follow him into intersection where plaintiff was hit by another car)].

- An omission or failure to act after the officer has promised to act [*see Morgan v. County of Yuba (1964) 230 Cal. App. 2d 938, 945, 41 Cal. Rptr. 508* (sheriff's promise to warn woman of release from custody of man who had threatened to kill her)].

- A special relationship in which the plaintiff relied to his or her detriment on official conduct in a situation of dependency [*see Carpenter v. City of Los Angeles (1991) 230 Cal. App. 3d 923, 931, 281 Cal. Rptr. 500* (city's duty to warn witness in criminal prosecution because police officer assured witness that accused posed no real danger to him and witness relied on this assurance)].

An affirmative duty to protect may be imposed on law enforcement only in the context of an explicit and well-defined commitment to provide police protection, and an offer of special protection on one occasion does not, by itself, give rise to a continuing special relationship applicable at a later date or with other officers [*Zelig v. County of Los Angeles (2002) 27 Cal. 4th 1112, 1129-1131, 119 Cal. Rptr. 2d 709, 45 P.3d 1171* ; *Hernandez v. City of Pomona (1996) 49 Cal. App. 4th 1492, 1501-1503, 57 Cal. Rptr. 2d 406]* .

Despite the general rule that an act increasing the risk of harm to a person may support imposing a tort duty of care on an officer, a tort duty may nonetheless be denied if application of the traditional *Rowland* factors weighs against imposing a duty under the circumstances [*Adams v. City of Fremont (1998) 68 Cal. App. 4th 243, 285, 80 Cal. Rptr. 2d 196* ; *see generally § 380.30[4][a]*]. In one case, for example, the court of appeal held that police officers responding to a crisis involving a person threatening suicide with a loaded firearm had no duty actionable in tort to prevent the threatened suicide from being carried out. Although the actions of the police arguably heightened tensions at an already tense situation, the court noted that this is often the case when the police are called to respond to a volatile situation, and the social utility of involving police in suicidal standoffs weighed against the imposition of liability [*Adams v. City of Fremont (1998) 68 Cal. App. 4th 243, 248, 284-285, 80 Cal. Rptr. 2d 196* (police actions eventually resulting in suicide included surrounding suicidal person in his backyard, brandishing weapons, using police dog, shouting orders, and attempting to talk person into disarming)].

This rationale has subsequently been applied more generally, outside the context of a suicide, to deny liability for negligence if a plaintiff argues that bad tactical decisions by police responding to a tense situation proved to be ineffective in preventing harm [*Munoz v. City of Union City (2004) 120 Cal. App. 4th 1077, 1097-1098, 16 Cal. Rptr. 3d 521]* . However, police may still be liable for the unreasonable use of deadly force in a crisis situation [*Munoz v. City of Union City (2004) 120 Cal. App. 4th 1077, 1099-1107, 16 Cal. Rptr. 3d 521]* .

Law enforcement officers generally do not have a duty to conduct an investigation of circumstances causing an accident, but once an officer undertakes an investigation, he or she may have a duty to use due care in conducting the investigation. If a person is dependent on the officer and relies to his or her detriment on the officer, liability may result if the officer's conduct prevents other assistance [*see Clemente v. State of California (1985) 40 Cal. 3d 202, 213, 219 Cal. Rptr. 445, 707 P.2d 818]* .

In certain situations, a statute may also impose a mandatory duty to investigate, and tort liability may then be predicated on a failure to investigate. For example, *Pen. Code § 11166(a)* imposes a mandatory duty on a police officer to investigate child abuse or neglect allegations that the officer receives and, if a reasonable person would have suspected child abuse or neglect, to report to the appropriate agency [*Alejo v. City of Alhambra (1999) 75 Cal. App. 4th 1180, 1186, 89 Cal. Rptr. 2d 768]* . The failure to perform these mandatory statutory duties may support a tort action for negligence per se against the officer and the employing entity if the child is subsequently injured through further abuse [*Alejo v. City of Alhambra (1999) 75 Cal. App. 4th 1180, 1184-1190, 89 Cal. Rptr. 2d 768]* . For a discussion of the negligence per se doctrine, see *§ 380.50[3]*.

In one case, the court of appeal held that a special relationship was not established between officers of the California Highway Patrol and members of the family of an 18-year-old girl who died in an automobile accident merely because the officers investigated the accident, took control of the decedent's remains, and took photographs of the scene and the decedent. In that particular case, the plaintiffs had argued that a special relationship could support an action for negligence after officers e-mailed nine gruesome photographs of the decedent taken at the accident scene to the officers' friends and family members as a Halloween prank, starting a chain reaction that resulted in thousands of Internet sites picking up the images and some of the plaintiffs receiving personal e-mails from strangers taunting them with the gruesome photographs [*Catsouras v. Department of California Highway Patrol (2010) 181 Cal. App. 4th 856, 877-881, 104 Cal. Rptr. 3d 352]* . The court went on to hold, however, that a duty of care sufficient to support a negligence action could be established under those facts through application of the general factors articulated in *Rowland v. Christian*, which are described in § 380.30[4][a] [*Catsouras v. Department of California Highway Patrol (2010) 181 Cal. App. 4th 856, 881-886, 104 Cal. Rptr. 3d 352]* .

Even if a special relationship exists that imposes a duty on a law enforcement officer to protect another, the officer and his or her employer may be immune from liability for breach of that duty under one or more statutory immunities [*see, e.g., Gov. Code §§ 846* (immunity for injuries resulting from failure to arrest person or keep him or her in custody), *845.8* (immunity for injuries resulting from discretionary acts concerning parole or escape of prisoner), *845* (immunity for injuries resulting from failure to provide adequate police protection)].

[iv] Parents and Children

A parent has a duty to exercise reasonable care to control his or her minor children so as to prevent them from intentionally harming others or from conducting themselves in a manner that creates an unreasonable risk of harm to others, if the parent (1) knows or has reason to know that he or she has control of the children, and (2) knows or has reason to know of the necessity and opportunity for exercising control [*Costello v. Hart (1972) 23 Cal. App. 3d 898, 900, 100 Cal. Rptr. 554* ; *see Robertson v. Wentz (1986) 187 Cal. App. 3d 1281, 1288-1290, 232 Cal. Rptr. 634* (no duty if noncustodial parent had no control over child)]. Even if the parent is not present and has no opportunity to control the child's conduct, the parent may be liable for injuries to third persons if the parent knows or should have known of the child's dangerous habits or propensities and negligently fails to warn other persons imperilled by this conduct [*see Ellis v. D'Angelo (1953) 116 Cal. App. 2d 310, 317, 253 P.2d 675* (negligent failure by parents to warn babysitter of child's habit of violently attacking others)].

The parent need not have known of the child's dangerous propensities for any particular length of time, if the parent knew in sufficient time to avoid the harm [*Costello v. Hart (1972) 23 Cal. App. 3d 898, 900, 100 Cal. Rptr. 554]* . Furthermore, if the parent is present and has an opportunity to control the child's dangerous behavior, but neglects to do so, he or she may be liable even though he or she had no prior knowledge of any dangerous propensity [*Costello v. Hart (1972) 23 Cal. App. 3d 898, 901, 100 Cal. Rptr. 554]* . However, the parent-child relationship does not create a duty of care with respect to acts of a "child" over the age of 18 if the parents had no ability to control the child and the child has not threatened anyone or exhibited any violent conduct [*Todd v. Dow (1993) 19 Cal. App. 4th 253, 259-261, 23 Cal. Rptr. 2d 490* (parents of 24-year-old son who stored rifle at parents' house did not owe duty to plaintiff accidently shot by son elsewhere)].

Parents generally are not vicariously liable for their children's negligent conduct [*Reida v. Lund (1971) 18 Cal. App. 3d 698, 702, 96 Cal. Rptr. 102]* . This general rule is subject to certain limited statutory exceptions [*see, e.g., Civ. Code §§ 1714.1* (limited vicarious liability for child's willful misconduct), *1714.3* (limited vicarious liability for discharge of firearm by minor); *Veh. Code § 17708* (limited vicarious liability for negligent or wrongful acts or omissions in operation of motor vehicle)].

Parents are not immune from liability for negligently injuring their children [*Gibson v. Gibson (1971) 3 Cal. 3d 914, 922-923, 92 Cal. Rptr. 288, 479 P.2d 648]* . However, the parent-child relationship is unique in some aspects (particularly those relating to parental authority and discipline), and thus not all traditional concepts of tort liability can be applied to suits by children against their parents [*Gibson v. Gibson (1971) 3 Cal. 3d 914, 921, 92 Cal. Rptr. 288, 479 P.2d 648]* . The standard that must be applied to parental conduct is the traditional one of reasonableness, but viewed in light of the parental role [*Gibson v. Gibson (1971) 3 Cal. 3d 914, 921, 92 Cal. Rptr. 288, 479 P.2d 648]* . The proper test of a parent's conduct is what an ordinarily reasonable and prudent parent would have done in similar circumstances [*Gibson v. Gibson (1971) 3 Cal. 3d 914, 921, 92 Cal. Rptr. 288, 479 P.2d 648]* . Although parents are not immune from liability for negligently injuring their children, a child has no cause of action against his or her parent based on the claim that the child should not have been conceived or, if conceived, should not have been allowed to be born alive [*Civ. Code § 43.6*].

For further discussion, see Ch. 367A, *Minors: Tort Actions* , and Ch. 394, *Parent and Child* .

[v] Spouses

Fam. Code § 1000 provides that a married person is not liable for injury or damage caused by the other spouse unless the married person would be liable for the injury or damage if the marriage did not exist [*Fam. Code § 1000(a)*]. The spouses' community property may, however, be used to satisfy the liability of the spouse who caused the injury [*see Fam. Code § 1000(b)*]. The language of this statute makes it reasonablyclear that the existence of a marital relationship does not, in itself, create a "special relationship" requiring a married person to protect third persons against negligent or wrongful acts by his or her spouse, or to warn them of such acts. For example, a wife was not liable to victims shot by her husband, where there was no evidence that she had the ability to control her husband's conduct [*Wise v. Superior Court (1990) 222 Cal. App. 3d 1008, 1013-1014, 272 Cal. Rptr. 222]* .

However, a married person may in some circumstances have a duty to warn of the foreseeable harmful acts of his or her spouse if there is a special relationship between the married person and the plaintiff, or if the married person is partially responsible for putting the plaintiff into a risk of danger from the spouse [*see Pamela L. v. Farmer (1980) 112 Cal. App. 3d 206, 209-212, 169 Cal. Rptr. 282]* .

For further discussion, see Ch. 359, *Marriage* .

[vi] Schools

A school district and its personnel owe a legal duty to exercise reasonable care in supervising students in their charge on the school premises, and may be held liable for injuries proximately caused by the failure to exercise this care [*Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 513, 150 Cal. Rptr. 1, 585 P.2d 851* ; *see Lucas v. Fresno Unified Sch. Dist. (1993) 14 Cal. App. 4th 866, 872-873, 18 Cal. Rptr. 2d 79]* . The standard of care that school authorities must exercise is the degree of care that a person of ordinary prudence, charged with comparable duties, would exercise under the same circumstances [*Dailey v. Los Angeles Unified Sch. Dist. (1970) 2 Cal. 3d 741, 747, 87 Cal. Rptr. 376, 470 P.2d 360]* . The amount of care that the school must exercise towards its students varies with their age and maturity [compare *Dailey v. Los Angeles Unified Sch. Dist. (1970) 2 Cal. 3d 741, 748-751, 87 Cal. Rptr. 376, 470 P.2d 360* (16 year-old killed while engaged in "slap-boxing" match at secondary school), *with Crow v. State of*

California (1990) 222 Cal. App. 3d 192, 209, 271 Cal. Rptr. 349 (university student assaulted by other student during dormitory party); *Tanja H. v. Regents of Univ. of Cal. (1991) 228 Cal. App. 3d 434, 441, 278 Cal. Rptr. 918* (university student sexually assaulted by fellow students in dormitory)], and the required degree of caution increases with the immaturity of the child [*Raymond v. Paradise Unified Sch. Dist. (1963) 218 Cal. App. 2d 1, 10, 31 Cal. Rptr. 847]* . The same considerations that apply when determining the duty owed by colleges to their students should apply to school districts that offer adult education classes [*see Patterson v. Sacramento City Unified School Dist. (2007) 155 Cal. App. 4th 821, 831-832, 66 Cal. Rptr. 3d 337]* .

A school should also consider the special vulnerability of special-needs students when monitoring the school grounds, as these students are more susceptible to victimization by other students. For example, if a school district allows a hidden area to be maintained on campus without taking adequate steps to prevent access by students, the foreseeability of that area being used to inflict injury on a special-needs student may be imputed to the district even without proof of prior incidents of victimization taking place in that hidden area [*Jennifer C. v. Los Angeles Unified School Dist. (2008) 168 Cal. App. 4th 1320, 1328-1329, 86 Cal. Rptr. 3d 274*].

A school's staff has a duty to adequately supervise persons attending school functions, and may be liable for even intentional injuries inflicted by other participants [*Beck v. San Francisco Unified Sch. Dist. (1964) 225 Cal. App. 2d 503, 508-509, 37 Cal. Rptr. 471]* . A school does not have a special relationship to children not attending classes or school functions, however, and has no general duty to supervise its facilities to guard against all injuries that may occur there [*Bartell v. Palos Verdes Peninsula Sch. Dist (1978) 83 Cal. App. 3d 492, 500, 147 Cal. Rptr. 898]* . For example, a school district was not liable for injuries to children who, when school was not in session, entered school grounds through an unlocked gate or a hole in the fence and played a dangerous game on the school's open concrete area [*Bartell v. Palos Verdes Peninsula Sch. Dist. (1978) 83 Cal. App. 3d 492, 500, 147 Cal. Rptr. 898]* . However, a school district may be liable for a failure to supervise in the morning hours prior to the start of classes if the campus is open to students and the district knows that students are present then [*see, e.g., M. W. v. Panama Buena Vista Union Sch. Dist. (2003) 110 Cal. App. 4th 508, 520-521, 1 Cal. Rptr. 3d 673* (district liable for sexual assault of special education student by another student in unsupervised restroom before start of classes)].

Generally, a school district does not have a duty to protect against injuries incurred by students off school premises, such as when they travel between their homes and school [*see Kerwin v. County of San Mateo (1959) 176 Cal. App. 2d 304, 307, 1 Cal. Rptr. 437* ; *Educ. Code § 44808*; *see also Educ. Code § 35330*; *Castro v. Los Angeles Bd. of Educ. (1976) 54 Cal. App. 3d 232, 235-236, 126 Cal. Rptr. 537* (participants in field trips or excursions conducted by a school district deemed to have waived all claims against district unless participation in trip required)]. The school district may be liable, however, if the area in which the injury occurred is held to be an extension of the school premises [*Satariano v. Sleight (1942) 54 Cal. App. 2d 278, 284-285, 129 P.2d 35* ; *but see Wright v. Arcade Sch. Dist. (1964) 230 Cal. App. 2d 272, 280, 40 Cal. Rptr. 812]* .

Similarly, if a school district provides transportation to and from school, it has a duty to exercise reasonable care for the safety of students using the system [*Raymond v. Paradise Unified Sch. Dist. (1963) 218 Cal. App. 2d 1, 9-11, 31 Cal. Rptr. 847* ; *see Farley v. El Tejon Unified Sch. Dist. (1990) 225 Cal. App. 3d 371, 376, 274 Cal. Rptr. 780]* . Moreover, if a member of the school staff breaches a duty to students while on school premises, the school may be liable for injuries resulting from that breach, even if they occur off the premises [*Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 514-520, 150 Cal. Rptr. 1, 585 P.2d 851* (school staff negligently supervised lunch break, allowing student to leave school grounds and be struck by car); *Eric M. v. Cajon Valley Union School Dist. (2009) 174 Cal. App. 4th 285, 299, 95 Cal. Rptr. 3d 428* (triable issue of fact as to whether school violated duty to supervise 6-year-old child who boarded then disembarked from school bus unattended and was struck by car off school property while walking home); *Perna v. Conejo Valley Unified Sch. Dist. (1983) 143 Cal. App. 3d 292, 295-296, 192 Cal. Rptr. 10* (student kept after school to help teacher grade papers struck by car on way home because crossing guard no longer on duty)].

The duty to supervise students under a school's care is primarily designed to protect the students themselves from injury and does not extend to nonstudents who are injured by a student off school premises, at least when the school neither knew nor had reason to know that the particular student posed a danger [*Hoff v. Vacaville Unified Sch. Dist. (1998) 19 Cal. 4th 925, 934-937, 80 Cal. Rptr. 2d 811, 968 P.2d 522]* . Thus, in one case a school district owed no duty to a third party who was injured across the street from a school parking lot when struck by a student driving in a reckless manner away from an unsupervised school parking lot. In that particular case, the school considered the student to be responsible and had no reason to know that he would drive his car away from the lot in a reckless manner [*Hoff v. Vacaville Unified Sch. Dist. (1998) 19 Cal. 4th 925, 934-937, 80 Cal. Rptr. 2d 811, 968 P.2d 522]* . In that case, the Supreme Court also rejected the argument that liability could be predicated on *Educ. Code § 44807*, because that statute was designed to protect students rather than members of the general public who were not on school property. The Court also rejected an argument based on *Educ. Code § 44808*, finding that the school had not specifically assumed responsibility for the student's off-campus conduct at the parking lot at issue merely by providing supervision at another parking lot [*Hoff v. Vacaville Unified Sch. Dist. (1998) 19 Cal. 4th 925, 938-940, 80 Cal. Rptr. 2d 811, 968 P.2d 522]* .

A school district's duty to protect students from off-campus criminal acts by third persons only requires it to exercise reasonable care to protect against known or reasonably foreseeable risks [*Brownell v. Los Angeles Unified Sch. Dist. (1992) 4 Cal. App. 4th 787, 798, 5 Cal. Rptr. 2d 756* ; *see Educ. Code § 44808*]. Foreseeability is determined in light of all the circumstances and does not require prior identical, or even similar, events. The facts must demonstrate, however, that the school district was aware of the need for the precautions it did not take, and that these precautions could have aided in deterring criminal conduct [*Brownell v. Los Angeles Unified Sch. Dist. (1992) 4 Cal. App. 4th 787, 797, 5 Cal. Rptr. 2d 756* (school had no duty to scout neighborhood for presence of gang members before releasing students)].

School districts are not liable for failure to exercise reasonable care to provide an adequate education [*Peter W. v. San Francisco Unified Sch. Dist. (1976) 60 Cal. App. 3d 814, 817-825, 131 Cal. Rptr. 854]* . Similarly, statutory provisions requiring that public schools provide free appropriate special education for handicapped students and follow certain procedures for ensuring that students receive such an education (*20 U.S.C.S. §§ 1401-1485*; *Educ. Code §§ 56000-56885*) do not impose a duty of care on school officials towards parents and students with respect to the discharge of those procedures, and a school district is not liable on a negligence theory for injuries resulting from delays occurring during the statutory procedures [*see* *Keech v. Berkeley Unified Sch. Dist. (1984) 162 Cal. App. 3d 464, 469-471, 210 Cal. Rptr. 7]* .

For further discussion, see Ch. 513, *Schools: Student Rights and Responsibilities* .

[vii] Possessors of Premises

One who owns, occupies, or otherwise controls real property has a duty to exercise reasonable care in the management of the premises to avoid exposing persons on the premises to an unreasonable risk of harm [*Civ. Code § 1714(a)*; *Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 674, 25 Cal. Rptr. 2d 137, 863 P.2d 207]* . An occupier of land who is aware of a concealed condition involving an unreasonable risk of harm to those coming in contact with it and who knows that a person on the premises is about to come in contact with it has a duty to warn of or repair the condition [*Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561* ; *Sprecher v. Adamson Companies (1981) 30 Cal. 3d 358, 362, 367, 371, 178 Cal. Rptr. 783, 636 P.2d 1121* (no immunity from liability for harm caused by natural condition of land)]. The basic premises liability created by *Civ. Code § 1714(a)* may be affected by other, more specific statutes [*see, e.g., Civ. Code §§ 846* (limiting duty of property owner toward recreational users), *847* (limiting liability of property owners toward persons injured while committing specified crimes)].

Liability of a premises owner no longer depends on whether the plaintiff is an invitee, licensee, or trespasser [*Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561]* . Instead, the existence of aduty of care in a particular case is determined according to the policy factors generally applicable to negligence cases [*see*

Rowland v. Christian (1968) 69 Cal. 2d 108, 112-113, 70 Cal. Rptr. 97, 443 P.2d 561 ; *see § 380.30[4]*]. The plaintiff's status as invitee, licensee, or trespasser may still be relevant, however, in considering the foreseeability of a particular injury or the plaintiff's presence on the premises [*Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 674-675, 25 Cal. Rptr. 2d 137, 863 P.2d 207* ; *Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561]* .

A possessor's duty to protect persons on the premises may in some cases include a duty to protect those persons from negligent or even criminal third-party conduct that is reasonably foreseeable [*see, e.g.,* *Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 806-809, 205 Cal. Rptr. 842, 685 P.2d 1193* (duty of college to protect students from reasonably foreseeable assaults on campus); *Cohen v. Southland Corp. (1984) 157 Cal. App. 3d 130, 141, 203 Cal. Rptr. 572* (convenience store operator who could reasonably foresee injuries from armed robberies on premises had minimal duty to protect customers from injuries)]. This duty may also be imposed on private security guards hired by the possessor to protect patrons [*Marois v. Royal Investigation & Patrol, Inc. (1984) 162 Cal. App. 3d 193, 199-200, 208 Cal. Rptr. 384]* , but the duty owed by the security service is no greater than that of the landowner [*Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 413, 22 Cal. Rptr. 2d 514]* . Landlords owe this duty to both their tenants and the employees and patrons of their tenants [*Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 674, 25 Cal. Rptr. 2d 137, 863 P.2d 207]* . However, to establish a duty to provide security guards to protect against third-party criminal acts, a plaintiff must prove that prior similar incidents of violent crime occurring on the defendant's premises made those acts highly foreseeable [*Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 679, 25 Cal. Rptr. 2d 137, 863 P.2d 207]* .

To protect invitees, including customers and potential customers, from criminal conduct as it is occurring, store or restaurant employees may have a duty to take minimally burdensome measures such as issuing a warning or calling 911, if those measures can be undertaken without increasing the risk of harm to the employees [*Morris v. De La Torre (2005) 36 Cal. 4th 260, 277-278, 30 Cal. Rptr. 3d 173,113 P.3d1182]* .

For further discussion, see Ch. 421, *Premises Liability* .

[viii] Possessors of Personal Property

Another recognized special relationship exists between the possessor of a chattel and a licensee. The relationship imposes a duty on the possessor to control an incompetent licensee's conduct. The duty is established when the possessor supplies the chattel to a person whom the supplier knows, or has reason to know, to be likely, because of his or her youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself or herself and others whom the supplier should expect to share in or be endangered by its use [*see* *Jacoves v. United Merch. Corp. (1992) 9 Cal. App. 4th 88, 115, 11 Cal. Rptr. 2d 468]* . A supplier is not entitled to assume that the other person will use the chattel safely if the supplier has reason to know that the other person has a propensity or fixed purpose to misuse it [*see* *Jacoves v. United Merch. Corp. (1992) 9 Cal. App. 4th 88, 115, 11 Cal. Rptr. 2d 468* ; Restatement (Second) of Torts § 390, cmt. b]. The supplier may be liable not only for harm sustained by a third party who is injured by the incompetent person, but also for harm sustained by the incompetent person [*Jacoves v. United Merch. Corp. (1992) 9 Cal. App. 4th 88, 115, 11 Cal. Rptr. 2d 468]* .

Those who may be liable as suppliers of chattels include sellers as well as lenders and donors [*see* *Jacoves v. United Merch. Corp. (1992) 9 Cal. App. 4th 88, 115, 11 Cal. Rptr. 2d 468* (dictum); *see also* *Knighten v. Sam's Parking Valet (1988) 206 Cal. App. 3d 69, 75, 253 Cal. Rptr. 365]* .

This type of special relationship usually occurs in cases involving the negligent entrustment of a motor vehicle [*see, e.g.,* *Allen v. Toledo (1980) 109 Cal. App. 3d 415, 422, 167 Cal. Rptr. 270]* , or the failure to safeguard a firearm [*see Reida v. Lund (1971) 18 Cal. App. 3d 698, 704, 96 Cal. Rptr. 102]* . This "negligent entrustment" doctrine may also apply to the rental of an aircraft [*see* *White v. Inbound Aviation (1999) 69 Cal. App. 4th 910, 920-923, 82 Cal. Rptr. 2d*

71] .

[ix] Health Care Providers

A physician or other health care provider generally has a duty to exercise the degree of knowledge, care, and skill ordinarily possessed by other members of the medical profession when diagnosing and treating patients [*see Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 975, 95 Cal. Rptr. 381]* . In addition to the physician's duty to exercise the requisite degree of skill when rendering medical treatment, the confidential relationship that arises between a physician and a patient may give rise to special affirmative duties on the part of the physician to protect or warn the patient; a breach of this duty may make the physician liable for nonfeasance [*see Tresemer v. Barke (1978) 86 Cal. App. 3d 656, 672, 150 Cal. Rptr. 384]* . These duties include a duty to warn former patients of hazards created by prior treatment [*see Tresemer v. Barke (1978) 86 Cal. App. 3d 656, 669-672, 150 Cal. Rptr. 384* (physician's failure to warn former patient of subsequently discovered hazards of intrauterine device)]. Furthermore, a physician who is negligent in carrying out his or her duties to a patient may also be liable to third persons who are foreseeably injured by the patient's conduct [*see Myers v. Quesenberry (1983) 144 Cal. App. 3d 888, 892, 193 Cal. Rptr. 733* (physician who failed to warn patient aboutconsequences of her medical condition could be liable for injuries suffered by third person in accident caused by that condition)].

For further discussion, see Ch. 295, *Hospitals* , and Ch. 415, *Physicians: Medical Malpractice* .

[x] Relationships of Dependency

A special relationship imposing a duty to act may exist if the defendant places the plaintiff in circumstances that make the plaintiff dependent on the defendant for protection [*Williams v. State of California (1983) 34 Cal. 3d 18, 25, 192 Cal. Rptr. 233, 664 P.2d 137]* . For example, a special relationship exists between a county and a child that it places in an abusive foster home and eventually allows to be adopted by the abusive foster parents, because the child is wholly dependent on the county to supervise his or her placement [*see Ronald S. v. County of San Diego (1993) 16 Cal. App. 4th 887, 895, 20 Cal. Rptr. 2d 418]* . Similarly, a special relationship may also exist between an adult and a minor who is not the adult's child if the adult invites the minor into the adult's home while the child's parents are not present, because in that situation the minor is vulnerable to third-party misconduct and dependent on the adult for protection form risks of harm while in the adult's home [*see, e.g., Romero v. Superior Court (2001) 89 Cal. App. 4th 1068, 1081, 107 Cal. Rptr. 2d 801]* .

A city and its police department had a special relationship with two female minors, who were participants in a police department program designed to encourage teenagers to consider careers in law enforcement, to protect the minors from sexual abuse committed by a police officer during the course of program activities. Even though the sexual activities were consensual, the defendants had a duty of care to protect the minors in the program from the officer's conduct [*Doe 1 v. City of Murrieta (2002) 102 Cal. App. 4th 899, 917-918, 126 Cal. Rptr. 2d 213]* . This duty of care could be imposed under the circumstances through application of the traditional, policy-driven *Rowland* factors, especially because of available indications that the minors, who were spending excessive time with the officer, were infatuated with him and the foreseeability that sexual activities might occur [*Doe 1 v. City of Murrieta (2002) 102 Cal. App. 4th 899, 913-916, 126 Cal. Rptr. 2d 213]* .

Because a prisoner is dependent and vulnerable, there is a special relationship between a jailer and a prisoner such that the jailer owes a duty of care to the prisoner to take steps to protect the prisoner from foreseeable harm [*Giraldo v. Department of Corrections & Rehabilitation (2008) 168 Cal. App. 4th 231, 250-251, 85 Cal. Rptr. 3d 371*]. A child residing with his or her incarcerated mother under the Pregnant and Parenting Women's Alternative Sentencing Program Act [*see Pen. Code § 1174 et seq.*] is similarly dependent on the personnel running the housing facility when he or she needs medical care [*Lawson v. Superior Court (2010) 180 Cal. App. 4th 1372, 1390, 103 Cal. Rptr. 3d 834]* .

[xi] Business Establishments and Their Customers or Invitees

A special relationship exists between a business establishment and its customers or invitees. Pursuant to this relationship, the establishment has a duty to take reasonable precautions to protect its patrons from criminal conduct by third parties [*Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 412, 22 Cal. Rptr. 2d 514* ; *see § 380.74*]. Similarly, commercial operators of sports and recreational facilities owe a duty of care to their patrons to ensure that the facilities and related services that are provided, such as equipment rentals, do not increase the risk of injury above the level inherent in the sport or recreational activity itself. A commercial operator violates this duty if it sells or rents defective equipment to its patrons that aggravates the patrons' risk of injury [*Harrold v. Rolling J Ranch (1993) 19 Cal. App. 4th 578, 586-587, 23 Cal. Rptr. 2d 671* (duty of commercial riding stable to supply horses that are not unduly dangerous and to warn patrons of particular horse's predisposition to behave in ways that add to the ordinary risk of horse riding)]. The inherent danger of participating in or watching certain sports does not mean that the commercial operators of facilities offering these activities owe no duty of care to participants or spectators [*Harrold v. Rolling J Ranch (1993) 19 Cal. App. 4th 578, 588, 23 Cal. Rptr. 2d 671]* .

A mortuary was held to have a special relationship to a bereaved family and thus could be liable for failing to lock the door to the chapel in which the remains lay, which allowed a person to enter the room and assault the corpse [*Draper Mortuary v. Superior Court (1982) 135 Cal. App. 3d 533, 538, 185 Cal. Rptr. 396]* . By undertaking to accept the care and custody of the corpse, the mortuary incurred a duty of care towards the family members, and they could recover for the emotional distress they suffered, if a jury found that the duty was breached [*Draper Mortuary v. Superior Court (1982) 135 Cal. App. 3d 533, 538, 185 Cal. Rptr. 396* ; *see also* Ch. 180, *Dead Bodies and Cemeteries*].

[xii] Common Carriers

The California Supreme Court has held that there is a special relationship between a common carrier and its passengers requiring the carrier to protect passengers from assaults by third persons [*Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal. 3d 780, 789-791, 221 Cal. Rptr. 840, 710 P.2d 907* (passengers have no control over who is admitted on bus and wholly dependent on bus driver to summon help or provide means of escape); *see also Civ. Code § 2100*)]. A common carrier also has a duty, following an accident between its vehicle and a third person, to collect and preserve information concerning the other vehicle and its driver for use by the carrier's passengers in future civil litigation [*De Vera v. Long Beach Pub. Transp. Co. (1986) 180 Cal. App. 3d 782, 795, 225 Cal. Rptr. 789]* . For further discussion, see Ch. 106, *Buses and Streetcars* , Ch. 109, *Carriers* , and Ch. 485, *Railroads* .

[xiii] Contractors Hired to Repair Equipment

A special relationship sufficient to support tort liability for nonfeasance may arise out of a contract in which a repair company agrees for a fee to keep a piece of equipment in repair, perform all work necessary for the safety and maintenance of the equipment, and make periodic inspections of the equipment, or if the repairer has otherwise voluntarily assumed the owner's duty to inspect and maintain the safety of the equipment or undertaken a systematic inspection of the equipment and fails to do so properly [*Seo v. All-Makes Overhead Doors (2002) 97 Cal. App. 4th 1193, 1204-1206, 119 Cal. Rptr. 2d 160]* . In addition, a negligent repair or failure to make a requested repair can support tort liability if it causes an injury to a third party [*Seo v. All-Makes Overhead Doors (2002) 97 Cal. App. 4th 1193, 1206, 119 Cal. Rptr. 2d 160]* .

However, in the absence of a special relationship derived from a contract or voluntary undertaking, a repair company hired to repair equipment that it did not manufacture does not owe a duty of care to third parties to warn the equipment owner of design defects in the equipment being repaired, at least if the defect is unrelated to the repairs being made [*Seo v. All-Makes Overhead Doors (2002) 97 Cal. App. 4th 1193, 1205-1206, 119 Cal. Rptr. 2d 160]* .

[xiv] Fiduciary Relationships

A fiduciary relationship (such as that between principal and agent) may give rise to a special duty on the fiduciary's part to take affirmative action to discover and inform the principal of reasonably obtainable material information [*see McCollum v. Friendly Hills Travel Ctr. (1985) 172 Cal. App. 3d 83, 91-94, 217 Cal. Rptr. 919]* . For example, a travel agent is under a duty to disclose reasonable obtainable information to the traveler concerning the safety of travel arrangements unless the danger is so clearly obvious and apparent to the traveler that, as a matter of law, the agent would not be negligent in failing to disclose it [*see McCollum v. Friendly Hills Travel Ctr. (1985) 172 Cal. App. 3d 83, 94, 217 Cal. Rptr. 919]* . For further discussion, see Ch. 427, *Principal and Agent* .

[4] Creation of Foreseeable Peril

Persons who create a foreseeable peril, not readily discoverable by endangered persons, or who increase the risk of harm of this peril, have a duty to exercise reasonable care to protect against, or at least give adequate warning of, the potential peril [*see Johnson v. State of California (1968) 69 Cal. 2d 782, 785-786, 73 Cal. Rptr. 240, 447 P.2d 352* (creating foreseeable peril); *Pamela L. v. Farmer (1980) 112 Cal. App. 3d 206, 209-210, 169 Cal. Rptr. 282* (increasing risk of harm from foreseeable peril)]. For example, a state agency that placed a juvenile with a history of violence and cruelty in a foster home should have warned the foster parents of the boy's history and could be held liable for injuries he inflicted on them [*Johnson v. State of California (1968) 69 Cal. 2d 782, 786, 73 Cal. Rptr. 240, 447 P.2d 352]* .

The California Supreme Court has held that a plaintiff who contracted HIV from a sexual partner may state a cause of action for negligent transmission of HIV. Moreover, this cause of action does not require actual knowledge on the part of the defendant that he or she was infected at the time of transmission. It is sufficient that the defendant, under the totality of the circumstances, had reason to know that he or she was infected [*John B. v. Superior Court (2006) 38 Cal. 4th 1177, 1191, 45 Cal. Rptr. 3d 316, 137 P.3d 153]* . A person would have "reason to know" of infection if there is sufficient information to cause a reasonably intelligent person to infer that he or she is infected with HIV or that infection is so highly probable that his or her conduct would be predicated on that assumption [*John B. v. Superior Court (2006) 38 Cal. 4th 1177, 1191, 45 Cal. Rptr. 3d 316, 137 P.3d 153]* .

In recognizing a cause of action for negligent transmission of HIV, the Supreme Court cautioned that its holding should be understood in the context of the facts of the case before it. In that case, the plaintiff and the defendant were engaged and eventually married, the defendant (the husband) falsely represented himself as monogamous and disease-free and insisted that the couple stop using condoms, and the plaintiff (the wife) stopped using condoms in reliance on those representations, even though she subsequently learned that her husband had engaged in unprotected sexual relations with other men both before and after they were married. The Court did not consider the scope of any duty that might be owed by a person if the relationship does not extend beyond the sexual encounter itself or does not contemplate sexual exclusivity, or if the defendant has not made representations of being disease-free or has not insisted on having sex without the use of condoms [*see John B. v. Superior Court (2006) 38 Cal. 4th 1177, 1193, 45 Cal. Rptr. 3d 316, 137 P.3d 153]* .

A woman who invited and encouraged young girls to come swim in her pool, knowing that the girls would be left alone with her husband and knowing that he had a history of molesting women and children, could be liable for damages the girls suffered when her husband sexually molested them. By encouraging and inviting the children to play in her swimming pool under the circumstances and telling them it would be safe for them to do so, she had increased the risk of harm to them by giving her husband peculiar opportunity and temptation to commit such misconduct [*Pamela L. v. Farmer (1980) 112 Cal. App. 3d 206, 209-210, 169 Cal. Rptr. 282]* .

In contrast, the producers of a violent movie had not committed an affirmative act that created an undue risk of harm and thus were not under a duty to protect or warn against potential violent acts by third persons who allegedly were attracted to the vicinity of the theatre by the showing of the film [*see Bill v. Superior Court (1982) 137 Cal. App. 3d*

1002, 1006-1009, 1011, 1014, 187 Cal. Rptr. 625 (court did not decide case on constitutional grounds despite concern about potential *First Amendment* difficulties with imposing liability)].

In another case, the court of appeal held that the Internet social networking site MySpace.com could not be held liable in negligence, gross negligence, or products liability for failing to implement controls on its site to prevent sexual predators from communicating with minors. The court held that the federal Communications Decency Act of 1996 provided a broad immunity from liability to the website operators for communications that they did not create, as well as for failing to implement the safety measures sought by plaintiffs [*Doe II v. MySpace Inc. (2009) 175 Cal. App. 4th 561, 572-573, 96 Cal. Rptr. 3d 148* ; *see 47 U.S.C.S. § 230*].

[5] Duty to Aid Others in Peril in Absence of Special Relationship

[a] No Duty Imposed

As a general rule, one who has not created a peril and who does not stand ina special relationship to a person in danger has no duty to come to the aid of that person [*see Williams v. State of California (1983) 34 Cal. 3d 18, 23, 192 Cal. Rptr. 233, 664 P.2d 137]* . This rule derives from the traditional common law notion that a person should not be liable for nonfeasance or inaction [*Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 435 n. 5, 131 Cal. Rptr. 14, 551 P.2d 334* ; *Restatement (Second) of Torts § 314, cmt. c*; *see § 380.32[1]*]. Thus, for example, under the traditional view, one who sits on a dock and sees another person drowning has no duty to come to that person's rescue and will not be liable for injury or death resulting from the failure to aid the drowning person [*Restatement (Second) of Torts § 314, cmt. c*].

[b] Statutory Provisions Imposing Duty

Despite the traditional rule imposing no duty to aid others in peril in absence of a special relationship, several statutes have created such a duty. For example, a driver of a motor vehicle who is involved in an accident that results in injury to a person other than the driver must immediately stop the vehicle to identify himself or herself and to render reasonable assistance to any person injured in the accident [*Veh. Code §§ 20001, 20003, 20004*]. The assistance required includes making arrangements for carrying the injured person to a medical treatment facility, if treatment appears necessary or if such help is requested [*see Veh. Code § 20003(a)*]. Because these code sections impose a specific duty to stop and aid, the failure to do so constitutes negligence as a matter of law, absent a legally sufficient excuse or justification [*Brooks v. E.J. Willig Truck Transp. Co. (1953) 40 Cal. 2d 669, 679, 255 P.2d 802]* . The failure to stop and render aid is an independent wrong, and does not depend on legal responsibility for the original injury [*Karl v. C.A. Reed Lumber Co. (1969) 275 Cal. App. 2d 358, 361, 79 Cal. Rptr. 852]* . For further discussion, see Ch. 82, *Automobiles: Causes of Action* .

Vessel operators involved in boating accidents have a similar statutory duty to stop and render aid. If involved in a collision, accident, or other casualty, the vessel operator must render whatever assistance is practicable and necessary to save persons affected by the occurrence or to minimize any danger caused by the occurrence [*Harb. & Nav. Code § 656(a)*]. However, the operator need only take such action as will not cause serious damage to his or her own vessel, crew, and passengers [*Harb. & Nav. Code § 656(a)*]. For further discussion, see Ch. 100, *Boats and Boating* .

Cal-OSHA statutes and regulations may be used to impose a duty of care on employers that, if breached, may be the basis of a tort suit brought by an injured employee [*see Elsner v. Uveges (2004) 34 Cal. 4th 915, 935-936, 22 Cal. Rptr. 3d 530, 102 P.3d 915]* . Consistent with that principle, the court of appeal held that two Cal-OSHA provisions, *Lab. Code § 6400(b)* and *8* Cal. Code Regs. § 336.11, impose a duty of care on each employer engaged at a multi-employer work site, both construction and non-construction, to report all non-obvious hazards about which the employer learns because its own employees were exposed to the hazard during the course of their work, even if that employer did not create the hazard. A breach of this duty is actionable in tort by any worker at the site who is

subsequently injured by the hazard if it is not reported [*Suarez v. Pacific Northstar Mechanical, Inc. (2009) 180 Cal. App. 4th 430, 445, 103 Cal. Rptr. 3d 168]* . The duty to report is fulfilled under these provisions if the employer reports the hazard to the employer responsible for creating the hazard, to the employer responsible for safety and health conditions at the worksite, or to the employer actually responsible for correcting the hazard [*Suarez v. Pacific Northstar Mechanical, Inc. (2009) 180 Cal. App. 4th 430, 440-441, 103 Cal. Rptr. 3d 168* ; *see 8 Cal. Code Regs. § 336.11*]. The language of *Lab. Code § 6400(b)* would also support the imposition of liability under the appropriate circumstances on the employer who actually created the hazard, on the employer responsible for safety and health conditions at the worksite, and on the employer with responsibility for actually correcting the hazard [*see Lab. Code § 6400(b)(2)-(4)*].

[c] Liability for Preventing Another From Rendering Assistance

Another exception to the general rule of no duty to aid others in the absence of a special relationship is an appellate court's holding that a business establishment may be liable for denying use of its telephone to a "good Samaritan" who seeks to call the police for an emergency occurring nearby [*Soldano v. O'Daniels (1983) 141 Cal. App. 3d 443, 453, 190 Cal. Rptr. 310]* . Although the court did not find a special relationship between the defendant and either the plaintiff's decedent or the good Samaritan [*Soldano v. O'Daniels (1983) 141 Cal. App. 3d 443, 449, 190 Cal. Rptr. 310]* , the court nevertheless imposed a duty on the defendant not to interfere with the good Samaritan's attempt to aid the plaintiff's decedent [*Soldano v. O'Daniels (1983) 141 Cal. App. 3d 443, 450-453, 453, 190 Cal. Rptr. 310]* . The court explained that its decision was both "a slight departure" from the "morally questionable" rule of nonliability for inaction absent a special relationship, as set forth in the *Restatement (Second) of Torts § 314*, and a "logical extension" of *Restatement (Second) of Torts § 327*, which imposes liability for negligent interference with a third person who defendant knows is trying to render necessary aid [*Soldano v. O'Daniels (1983) 141 Cal. App. 3d 443, 455, 190 Cal. Rptr. 310]* .

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1. Duty

33-380 California Forms of Pleading and Practice--Annotated §§ 380.33-380.49

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[Reserved]

§§ 380.33[Reserved]

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33-380 California Forms of Pleading and Practice--Annotated § 380.50

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§ 380.50 Standard of Care

[1] Reasonable or Ordinary Care

Assuming that a defendant owed a duty of care to the plaintiff in a particular case, the next issue is whether the defendant breached that duty. To determine whether the duty owed was breached, it is also necessary to determine what standard or degree of care was owed by the defendant to the plaintiff. Under the general rule of *Civ. Code § 1714(a)* [*see § 380.50[1]*], a defendant is liable for the failure to exercise "ordinary care." The California Supreme Court has defined ordinary care as that degree of care that ordinarily prudent people can be reasonably expected to exercise under similar circumstances [*Hilyar v. Union Ice Co. (1955) 45 Cal. 2d 30, 36, 286 P.2d 21]* . The degree of care required will vary depending on the circumstances of the case [*DeMartini v. Alexander Sanitarium, Inc. (1961) 192 Cal. App. 2d 442, 448-449, 13 Cal. Rptr. 564* (hospital must take into account known physical or mental condition of patients when acting with due care)]. The greater the danger and the seriousness of the reasonably anticipated consequences, the higher the degree of care that must be exercised [*Hilyar v. Union Ice Co. (1955) 45 Cal. 2d 30, 36, 286 P.2d 21]* . For example, those who deal with firearms, which are inherently dangerous, are required to exercise a very high degree of care [*Warner v. Santa Catalina Island Co. (1955) 44 Cal. 2d 310, 317, 282 P.2d 12]* .

What constitutes due care in any particular case is overwhelmingly a question of fact for the jury [*Brummett v. County of Sacramento (1978) 21 Cal. 3d 880, 887, 148 Cal. Rptr. 361, 582 P.2d 952]* . This means that the jury will determine how a reasonably prudent person would have acted under the circumstances presented, and then will decide whether the defendant's conduct conformed to that standard [*Laird v. T. W. Mather, Inc. (1958) 51 Cal. 2d 210, 215-216, 331 P.2d 617]* .

[2] Effect of Custom

Customary standards or usage in a particular industry or community may be relevant evidence in determining whether

due care was exercised in a particular case [*Bullis v. Security Pac. Nat'l Bank (1978) 21 Cal. 3d 801, 809, 148 Cal. Rptr. 22, 582 P.2d 109]* . For example, a court approved the admission of expert testimony for the purpose of establishing customary practices of diverting traffic during highway construction, explaining that the standard "is always due care," and that evidence of custom simply aids the jury in its determination of the specific case [*Bouse v. Madonna Constr. Co. (1962) 201 Cal. App. 2d 26, 29-30, 19 Cal. Rptr. 823]* .

Although what others do is some evidence of what should be done, custom is never a substitute for due care [*Diamond v. Grow (1966) 243 Cal. App. 2d 396, 401, 52 Cal. Rptr. 265]* . Conformity to general practice or custom will not insulate a defendant from liability unless the custom itself is consistent with due care [*Reagh v. San Francisco Unified Sch. Dist. (1953) 119 Cal. App. 2d 65, 70, 259 P.2d 43]* . For example, the fact that the general practice in the medical community was not to count instruments following surgery did not exonerate a hospital and nurses from liability for failing to count instruments and leaving a large metal clamp in the plaintiff's body [*Leonard v. Watsonville Cmty. Hosp. (1956) 47 Cal. 2d 509, 519-520, 305 P.2d 36]* .

[3] Violation of Statute, Ordinance, or Regulation (Negligence Per Se or Presumed Negligence)

Evid. Code § 669 provides that a person will be presumed to have failed to exercise due care if (1) he or she violated a statute, ordinance, or regulation of a public entity, (2) the violation was the proximate cause of injury or death, (3) the injury or death resulted from an occurrence the nature of which the statute was designed to prevent, and (4) the injured person was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted [*Evid. Code § 669(a)*]. The presumption of negligence may be rebutted by proof that the violator acted as would a person of ordinary prudence under similar circumstances who desired to comply with the law [*Evid. Code § 669(b)(1)*]. The presumption may also be rebutted by proof that the violator was a child who exercised the degree of care ordinarily exercised by persons of his or her maturity, intelligence, and capacity under similar circumstances [*Evid. Code § 669(b)(2)*]. However, rebuttal of the presumption based on the violator's status as a child is not available if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications [*Evid. Code § 669(b)(2)*].

[4] Imminent Peril (Sudden Peril or Emergency)

The two basic and indispensable elements of the doctrine of "imminent peril" are (1) the sudden and unexpected appearance of danger, and (2) the necessity of making an immediate choice between two or more alternative courses of action [*Givens v. Southern Pac. Co. (1961) 194 Cal. App. 2d 39, 45-46, 14 Cal. Rptr. 736]* . If these two elements are present, a person is not necessarily negligent if he or she makes a choice that ultimately proves to have been the wrong one, provided that he or she chose one of the courses of action a person of ordinary prudence would have chosen under the circumstances [*Balthrop v. Atchison, Topeka & Santa Fe Ry. Co. (1959) 167 Cal. App. 2d 437, 446, 334 P.2d 1041]* . A defendant will not be liable even if some alternative course of action would have avoided the injury [*Schultz v. Mathias (1970) 3 Cal. App. 3d 904, 912-913, 83 Cal. Rptr. 888]* . Whether or not the defendant was confronted with imminent peril before acting is generally a question of fact for the jury [*Leo v. Dunham (1953) 41 Cal. 2d 712, 715, 264 P.2d 1]* .

The doctrine of imminent peril does not apply in favor of a person who placed himself or herself in the critical situation [*see Wright v. Sniffin (1947) 80 Cal. App. 2d 358, 364, 365-366, 181 P.2d 675]* . Reliance on the doctrine will thus be denied if the party's negligence causes or contributes to the creation of the perilous situation [*Pittman v. Boiven (1967) 249 Cal. App. 2d 207, 216, 57 Cal. Rptr. 319]* .

Although by its terms the imminent peril doctrine is a defensive doctrine used to determine whether a defendant exercised appropriate care, at least one court of appeal opinion has held that it was reversible error for a trial court to refuse to instruct the jury on the doctrine when requested by a plaintiff who was attempting to establish that he acted prudently and had a right to recover for an injury sustained when he was attempting a rescue [*Harris v. Oaks*

Shopping Ctr. (1999) 70 Cal. App. 4th 206, 208-210, 82 Cal. Rptr. 2d 523] . Allowing a plaintiff to use the doctrine offensively under those circumstances would effectively allow recovery under the rescue doctrine if the imminent threat is merely perceived, rather than real. For discussion of the rescue doctrine generally, see *§ 380.30[5][e][v]*.

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33-380 California Forms of Pleading and Practice--Annotated § 380.51

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§ 380.51 Degree of Care Owed by or to Certain Persons

[1] Professionals and Those With Special Skills

A person who undertakes to render services in the practice of a trade or profession is required to have and use the skill and knowledge ordinarily possessed by other practitioners of that trade or profession under similar circumstances [*Estate of Beach (1975) 15 Cal. 3d 623, 635, 125 Cal. Rptr. 570, 542 P.2d 994]* . More generally, persons who possess knowledge, skill, or intelligence superior to that of the ordinarily prudent person are under a duty to exercise a degree of care that is consistent with that knowledge, skill, or intelligence [*see* Prosser and Keeton on the Law of Torts (5th ed. 1984) ch. 5, *Negligence: Standard of Conduct*, § 32, p. 185]. Thus, the degree of care to be exercised by professionals and others with special skills is judged not by that of the ordinary, reasonable person but by that of others who possess those skills [*see Estate of Beach (1975) 15 Cal. 3d 623, 635, 125 Cal. Rptr. 570, 542 P.2d 994]* .

In a case holding that the same breach of duty could not give rise to distinct causes of action for both "ordinary" and "professional" negligence, the California Supreme Court rejected the concept of "degrees" of care, holding that there are only different amounts of care [*Flowers v. Torrance Mem'l Hosp. Med. Ctr. (1994) 8 Cal. 4th 992, 995, 997, 35 Cal. Rptr. 2d 685, 884 P.2d 142* ; *see also Donnelly v. Southern Pac. Co. (1941) 18 Cal. 2d 863, 871, 118 P.2d 465]* . The standard of care required of all persons is the care a person of ordinary person would exercise under the circumstances, unless a statutory or judicially-created exception requires a higher standard [*Flowers v. Torrance Mem'l Hosp. Med. Ctr. (1994) 8 Cal. 4th 992, 997, 35 Cal. Rptr. 2d 685, 884 P.2d 142]* . Thus, although the standard remains constant, the amount of care considered reasonable will vary according to such factors as the risk involved or, in the case of professionals, the defendant's skill, training, and knowledge [*Flowers v. Torrance Mem'l Hosp. Med. Ctr. (1994) 8 Cal. 4th 992, 997-998, 35 Cal. Rptr. 2d 685, 884 P.2d 142]* .

Heightened standards of care have been most commonly imposed on physicians [*see, e.g., Finn v. G.D. Searle & Co.*

(1984) 35 Cal. 3d 691, 704, 200 Cal. Rptr. 870, 677 P.2d 1147] and attorneys [*see, e.g., Heyer v. Flaig(1969) 70 Cal. 2d 223, 229, 74 Cal. Rptr. 225, 449 P.2d 161]* . Other professionals who have been held to special standards of care include nurses [*see, e.g., Fraijo v. Hartland Hosp. (1979) 99 Cal. App. 3d 331, 342, 160 Cal. Rptr. 246]* , architects [*see, e.g., Cooper v. Jevne (1976) 56 Cal. App. 3d 860, 868, 128 Cal. Rptr. 724]* , engineers [*see, e.g., Huang v. Garner (1984) 157 Cal. App. 3d 404, 413, 203 Cal. Rptr. 800]* , accountants [*see, e.g., Lindner v. Barlow, Davis & Wood (1962) 210 Cal. App. 2d 660, 665, 27 Cal. Rptr. 101]* , and persons holding themselves out as expert investment advisors [*see Civ. Code § 3372*].

For further discussion, see Ch. 56, *Architects* , Ch. 76, *Attorney Professional Liability* , and Ch. 415, *Physicians: Medical Malpractice* .

[2] Common Carriers

Common carriers have a statutory duty to exercise the utmost care and diligence for their passengers' safe carriage and must provide safe vehicles [*see Civ. Code §§ 2100, 2101*; *see also McBride v. Atchison, Topeka & Santa Fe Ry. Co. (1955) 44 Cal. 2d 113, 116, 279 P.2d 966]* . However, a carrier is not an insurer of the safety of its passengers; the plaintiff passenger must still establish that the carrier was negligent [*see Civ. Code § 2100*; *McBride v. Atchison, Topeka & Santa Fe Ry. Co. (1955) 44 Cal. 2d 113, 117, 279 P.2d 966]* .

For further discussion, see Ch. 106, *Buses and Streetcars* , Ch. 109, *Carriers* , and Ch. 485, *Railroads* .

[3] Children

[a] Standard of Care Owed to Them by Parents and Others

Persons dealing with children must exercise a greater degree of care towards them than they are required to exercise towards adults [*Pamela L. v. Farmer (1980) 112 Cal. App. 3d 206, 211, 169 Cal. Rptr. 282]* . Thus, businesses that know that children are likely to be present have a duty to keep the premises reasonably safe for children [*Crane v. Smith (1943) 23 Cal. 2d 288, 297, 144 P.2d 356]* . Similarly, a person who drives in an area where he or she knows children are frequently present must exercise greater care for their safety than would a driver under ordinary circumstances [*Hilyar v. Union Ice Co. (1955) 45 Cal. 2d 30, 36-37, 286 P.2d 21]* .

The degree of care that must be exercised towards a minor varies according to the minor's age; the amount of care required increases with the minor's immaturity and consequent heedlessness of danger [*Satariano v. Sleight (1942) 54 Cal. App. 2d 278, 283, 129 P.2d 35]* .

[b] Standard of Care Owed by Them

[i] Different Than Adult Standard

Fam. Code § 6600 restates the provisions of former *Civ. Code § 41* that a minor "is civilly liable for a wrong done by the minor, but is not liable in exemplary damages unless at the time of the act the minor was capable of knowing that the act was wrongful." This provision has been interpreted to mean that a minor is liable for his or her torts if the minor had the state of mind necessary to commit the particular wrong with which he or she is charged [*see People v. Lara (1967) 67 Cal. 2d 365, 380, 62 Cal. Rptr. 586, 432 P.2d 202]* .

A child is not required to exercise the same degree of care as an adult would, but must only exercise that degree ordinarily used by children of the same age, intelligence, and experience under similar circumstances [*Pittman v. Pedro Petroleum Corp. (1974) 42 Cal. App. 3d 859, 864, 117 Cal. Rptr. 220]* . The issue of a child's standard of care commonly arises in determining whether or not a child has been contributorily negligent for purposes of applying the comparative negligence doctrine [*see, e.g., Cummings v. County of Los Angeles (1961) 56 Cal. 2d 258, 263, 14 Cal.*

Rptr. 668, 363 P.2d 900] .

Although the question of a child's negligence is normally a question of fact [*see Christian v. Goodwin (1961) 188 Cal. App. 2d 650, 652, 10 Cal. Rptr. 507]* , cases decided before the adoption of comparative negligence held that a child under the age of five years is incapable of contributory negligence as a matter of law [*see Morris v. McCauley's Quality Transmission Serv. (1976) 60 Cal. App. 3d 964, 970 n. 4, 132 Cal. Rptr. 37]* .

For further discussion, see Ch. 367A, *Minors: Tort Actions* .

[ii] Exception for Children Engaging in Adult Activities

If a minor engages in adult activities, he or she is required to exercise the same degree of care as would a reasonable adult [*Prichard v. Veterans Cab Co. (1965) 63 Cal. 2d 727, 732, 47 Cal. Rptr. 904, 408 P.2d 360]* . This rule is most commonly imposed when minors operate motor vehicles requiring adult qualifications. Thus, no special instruction on the standard of care owed by children is appropriate in cases involving a minor driving a motorcycle [*Prichard v. Veterans Cab Co. (1965) 63 Cal. 2d 727, 732, 47 Cal. Rptr. 904, 408 P.2d 360]* or an automobile [*Neudeck v. Bransten (1965) 233 Cal. App. 2d 17, 21, 43 Cal. Rptr. 250]* .

[4] Mentally Disabled Persons

Civ. Code § 41 provides that "a person of unsound mind, of whatever degree, is civilly liable for a wrong done by the person, but is not liable in exemplary damages unless at the time of the act the person was capableof knowing that the act was wrongful." California follows the general rule that although physical capabilities may be taken into account as variable circumstances in the application of the reasonable person standard, mental capacity remains an invariable; a defendant is held to the objective standard of reasonableness without regard for his or her actual mental disability [*Mullen v. Bruce (1959) 168 Cal. App. 2d 494, 496-497, 335 P.2d 945]* .

However, in certain limited circumstances, the subjective mental incapacity of a person may be taken into account if he or she is the plaintiff and the issue is his or her comparative fault [*see De Martini v. Alexander Sanitarium, Inc. (1961) 192 Cal. App. 2d 442, 448, 13 Cal. Rptr. 564]* , but this rule does not apply if the defendant has not been shown to have knowledge of the plaintiff's condition [*Fox v. City & County of San Francisco (1975) 47 Cal. App. 3d 164, 170, 120 Cal. Rptr. 779]* . Moreover, this subjective standard is not available in cases in which a plaintiff's act is intentional, albeit irrational [*Fox v. City & County of San Francisco (1975) 47 Cal. App. 3d 164, 172, 120 Cal. Rptr. 779]* .

For further discussion, see Ch. 304, *Insane and Other Incompetent Persons* .

[5] Physically Disabled Persons

A person who has a physical disability is held to the same standard of care as other persons, except that his or her physical impairment is taken into account as a circumstance [*Jones v. Bayley (1942) 49 Cal. App. 2d 647, 654, 122 P.2d 293]* . Thus, it is appropriate to instruct the jury that the amount of care required of one with a physical disability is that which an ordinarily prudent person with the same disability would use under similar circumstances [*CACI No. 403*; *see Conjorsky v. Murray (1955) 135 Cal. App. 2d 478, 482, 287 P.2d 505]* .

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[Reserved]

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§ 380.70 "Actual Cause" or "Cause in Fact" Distinguished From "Legal" ("Proximate") Cause

To establish a cause of action based on negligent conduct, the plaintiff usually must establish that the defendant's conduct caused the plaintiff's damages [*Hutchison v. Southern Cal. First Nat'l Bank (1972) 27 Cal. App. 3d 572, 578, 103 Cal. Rptr. 816]* . Thus, except in those cases in which the law holds the defendant vicariously liable for the tortious conduct of a third person [*see § 380.131[1]*], the plaintiff must show "a reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered" [Prosser and Keeton on the Law of Torts (5th ed. 1984) ch. 7, *Proximate Cause*, § 41, p. 263]. This element is often expressed by courts as a requirement that the defendant's conduct be the "proximate cause" or "legal cause" of the plaintiff's damages [*see, e.g., Valdez v. J.D. Diffenbaugh Co. (1975) 51 Cal. App. 3d 494, 509, 124 Cal. Rptr. 467]* .

The use of the terms "legal cause" and "proximate cause" has led to considerable confusion because courts and other authorities have often used these terms in referring to two very separate issues: (1) whether there is any factual relationship between the defendant's conduct and the plaintiff's claimed injuries (an issue often referred to as "actual causation" or "direct causation" or "cause-in-fact") [*see § 380.71*]; and (2) whether, assuming such a factual relationship is shown, the defendant should be held legally responsible for the plaintiff's injuries [*see § 380.73[1]*].

Many California decisions have used the terms "proximate cause" and "legal cause" synonymously to refer to the second issue--whether the defendant should, as a matter of policy, be held legally responsible for the consequences of his or her acts--rather than the issue of actual causation [*see, e.g., Akins v. County of Sonoma (1967) 67 Cal. 2d 185, 199, 60 Cal. Rptr. 499, 430 P.2d 57* ; *Beauchene v. Synanon Found., Inc. (1979) 88 Cal. App. 3d 342, 346-347, 151 Cal. Rptr. 796]* . Other decisions, although purporting to recognize a conceptual difference between actual and proximate cause, nevertheless use the term "proximate cause" when discussing the question of actual causation [*see, e.g., Valdez v. J.D. Diffenbaugh Co. (1975) 51 Cal. App. 3d 494, 508-509, 124 Cal. Rptr. 467]* . Some opinions have used the term "proximate cause" to refer to both issues [*see Banville v. Schmidt (1974) 37 Cal. App. 3d 92, 107, 112*

Cal. Rptr. 126] . Prior official jury instructions on the subject of causation, BAJI Nos. 3.75 and *3.76*, contributed to the confusion by using the terms "proximate cause" and "legal cause" to refer to what is essentially the issue of actual causation or cause-in-fact. Subsequent to the California Supreme Court's disapproval of BAJI No. 3.75 and suggestion that *BAJI No. 3.76* be modified [*Mitchell v. Gonzales (1991) 54 Cal. 3d 1041, 1053 n.9, 1054, 1 Cal. Rptr. 2d 913, 819 P.2d 872]* , the Committee on Standard Jury Instructions withdrew BAJI No. 3.75 and modiied *BAJI No. 3.76* to eliminate all reference to the term "proximate cause." Because of the confusion created by the use of the term "proximate cause," most attorneys prefer to use the term "actual cause" or "direct cause" when referring to the existence of a factual relationship between the defendant's conduct and the plaintiff's claimed injuries and the term "legal cause" when referring to whether, assuming the factual relationship is shown, the defendant should be held legally responsible.

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 380 NEGLIGENCE
PART II. LEGAL BACKGROUND
B. Negligence Cause of Action
3. Causation

33-380 California Forms of Pleading and Practice--Annotated § 380.71

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§ 380.71 Establishing Actual Cause

[1] Question of Fact

The issue of actual or direct causation or cause-in-fact involves an inquiry into whether the defendant's conduct brought about or contributed in some way to the plaintiff's injury [*see Akins v. County of Sonoma (1967) 67 Cal. 2d 185, 198-199, 60 Cal. Rptr. 499, 430 P.2d 57]* . Actual cause is ordinarily a question of fact for the jury to decide [*see, e.g., Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 520 n. 5, 150 Cal. Rptr. 1, 585 P.2d 851]* . Only in the relatively rare case in which only one conclusion may reasonably be drawn from the evidence will the issue be decided by the court as a matter of law [*see Banville v. Schmidt (1974) 37 Cal. App. 3d 92, 106, 112 Cal. Rptr. 126]* . Because the issue of actual cause is ordinarily a jury determination, the drafting of appropriate jury instructions on the issue of causation is critical [*see Vahey v. Sacia (1981) 126 Cal. App. 3d 171, 174-179, 178 Cal. Rptr. 559]* .

As a general rule, the plaintiff bears the burden of proving that his or her injuries were actually caused by the defendant [*see Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 597, 163 Cal. Rptr. 132, 607 P.2d 924* ; *see also Cottle v. Superior Court (1992) 3 Cal. App. 4th 1367, 1384-1385, 5 Cal. Rptr. 2d 882* (causation must be proven within reasonable medical probability based on competent expert testimony; mere possibility that injury was caused by exposure to chemicals was insufficient basis for submission of issue to jury); *see also § 380.72[3]*]. However, the burden of proof as to causation may, in some instances, be shifted to the defendant [*see, e.g., Summers v. Tice (1948) 33 Cal. 2d 80, 88, 199 P.2d 1* ; *see also § 380.72[4][a]*].

[2] Test for Determining Actual Cause

California has adopted the "substantial factor" test for proving cause-in-fact, or actual cause, in negligence cases [*Viner v. Sweet (2003) 30 Cal. 4th 1232, 1238, 135 Cal. Rptr. 2d 629, 70 P.3d 1046* ; *Rutherford v. Owens-Ill., Inc. (1997) 16 Cal. 4th 953, 968, 67 Cal. Rptr. 2d 16, 941 P.2d 1203* ; *Mitchell v. Gonzales (1991) 54 Cal. 3d 1041,*

1052-1053, 1 Cal. Rptr. 2d 913, 819 P.2d 872] . As defined by the Judicial Council of California in *Civil Jury Instruction No. 430*, a "substantial factor" is a factor that a reasonable person would consider to have contributed to the harm suffered by the plaintiff. That factor must be more than a remote or trivial factor, but it does not have to be the only cause of the harm [*CACI No. 430*]. One court of appeal opinion predating this CACI instruction stated that conduct is a substantial factor in bringing about harm if it has created a force or series of forces that are in active operation up to the time of the harm, or if the effects of the negligent conduct actively operate to bring about harm to another [*Osborn v. Irwin Memorial Blood Bank (1992) 5 Cal. App. 4th 234, 253, 7 Cal. Rptr. 2d 101]* . If a defendant's conduct was a substantial factorin causing the harm, that defendant may be liable even if some other person, condition, or event was also a substantial factor in causing the harm [*CACI No. 431*].

Prior to adoption of the substantial factor test, the most commonly used test for determining whether or not the defendant's conduct was the actual cause of the plaintiff's injury was the "but for" test--that is, the plaintiff was required to show that but for the defendant's act or omission, the plaintiff would not have been harmed [*see, e.g.,* *Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 520 n.5, 150 Cal. Rptr. 1, 585 P.2d 851* ; *Vecchione v. Carlin (1980) 111 Cal. App. 3d 351, 359, 168 Cal. Rptr. 571]* . Although the substantial factor test is now considered the primary test for causation, conceptually the "but for" test is actually subsumed within the substantial factor test. In *Viner v. Sweet*, the California Supreme Court, citing *Section 432 of the Restatement (Second) of Torts*, explained that a defendant's negligent conduct is not a substantial factor in bringing about harm if the harm would have occurred even without the defendant's conduct [*Viner v. Sweet (2003) 30 Cal. 4th 1232, 1239, 135 Cal. Rptr. 2d 629, 70 P.3d 1046]* . Thus, failing the "but for" test will generally result in a finding that the defendant's conduct is not a substantial factor in bringing about the harm.

However, satisfying the "but for" test is not always necessary to satisfy the substantial factor test. If two forces are actively operating independently of one another, and if each is sufficient by itself to bring about the harm, the conduct of each actor may be a substantial factor in causing the harm even though the "but for" test is not satisfied [*Viner v. Sweet (2003) 30 Cal. 4th 1232, 1239, 135 Cal. Rptr. 2d 629, 70 P.3d 1046]* . Therefore, in cases in which there are multiple causes, the substantial factor test should not be confused by adding a "but for" test. Even in cases that do not involve multiple independent causes, a "but for" instruction is not generally required if a "substantial factor" instruction is given, because the additional instruction is generally considered redundant [*Mayes v. Bryan (2006) 139 Cal. App. 4th 1075, 1094-1095, 44 Cal. Rptr. 3d 14]* .

If there is no issue of concurrent independent causes that might confuse a jury, however, there are situations in which instructing the jury specifically on the "but for" test may be desirable or even necessary. For example, the California Supreme Court continues to recognize that a "but for" standard for actual causation is appropriate in professional malpractice cases. To protect against speculative and conjectural claims, the plaintiff in an attorney malpractice case involving litigation negligence must prove as an element of the claim against the attorney that but for the attorney's alleged negligence, the plaintiff would have obtained a more favorable judgment or settlement in the underlying action [*Viner v. Sweet (2003) 30 Cal. 4th 1232, 1240, 135 Cal. Rptr. 2d 629, 70 P.3d 1046* ; *see also* *Mattco Forge, Inc. v. Arthur Young & Co. (1997) 52 Cal. App. 4th 820, 832-834, 60 Cal. Rptr. 2d 780]* . Similarly, if the alleged malpractice occurs while advice is givenregarding, or documents are being prepared for, a business transaction, a plaintiff complaining of malpractice in a transactional setting is required to prove that but for the malpractice, the plaintiffwould more likely than not have obtained a more favorable result [*Viner v. Sweet (2003) 30 Cal. 4th 1232, 1243, 135 Cal. Rptr. 2d 629, 70 P.3d 1046]* . The test for causation in attorney malpractice cases is discussed in greater detail in Ch. 76, *Attorney Professional Liability*.

The substantial factor test is used to determine cause-in-fact, rather than to assess legal or policy considerations that may limit liability. For discussion of "proximate cause" as a policy determination regarding whether a defendant is liable, see *§ 380.73*. For further discussion of the rules that govern if there are multiple causes of harm, see *§ 380.74*.

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33-380 California Forms of Pleading and Practice--Annotated § 380.72

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§ 380.72 Proof of Actual Cause

[1] Absolute Certainty of Proof Not Required

The plaintiff is not required to establish the fact of causation with absolute certainty; it is sufficient if there is evidence from which reasonable persons could conclude that it is more probable than not that the defendant's act was a cause of the plaintiff's injury [*Simmons v. West Covina Med. Clinic (1989) 212 Cal. App. 3d 696, 702, 260 Cal. Rptr. 772]* . A wide range of proof is available to establish cause. For example, a plaintiff was allowed to rely on experimental test results to show that the probable cause of an automobile's rolling over was a defective design [*Culpepper v. Volkswagen of Am., Inc. (1973) 33 Cal. App. 3d 510, 515, 521-522, 109 Cal. Rptr. 110]* . In another case, the question of whether the plaintiff had in fact been poisoned by a chemical in the defendant's manufacturing plant was contested, and the plaintiff was unable to offer direct evidence that the poisonous substance was in fact present in the atmosphere at the defendant's manufacturing plant. Instead, the plaintiff was permitted to offer evidence, such as expert testimony on the effects of glue sniffing and the toxicology of a related chemical, from which an inference might be drawn [*Ruiz v. Minnesota Mining & Mfg. Co. (1971) 15 Cal. App. 3d 462, 467-469, 93 Cal. Rptr. 270]* , because this evidence had "a rational tendency to prove or disprove" the disputed fact of causation [*Ruiz v. Minnesota Mining & Mfg. Co. (1971) 15 Cal. App. 3d 462, 467, 93 Cal. Rptr. 270]* .

A plaintiff is not required to rule out all possible alternatives to the causal mechanism shown by the evidence. The plaintiff is only required to show that a particular mechanism was more probably than not a cause-in-fact of his or her injuries. For example, a plaintiff alleged that the collapse of a defectively welded pillar supporting the roof of plaintiff's vehicle caused the plaintiff's injury when the vehicle rolled over after plunging down an embankment. The plaintiff was not required to rule out the possibility that the roof would have collapsed even if the supporting pillar had been flawlessly welded [*Doupnik v. General Motors Corp. (1990) 225 Cal. App. 3d 849, 863-865, 275 Cal. Rptr. 715]* .

Although absolute certainty of proof may not be required, courts have also held that conjectural evidence indicating only a mere "possible" causal relationship between the defendant's act and the plaintiff's injury is insufficient to establish a prima facie case of causation [*Jones v. Ortho Pharm. Corp. (1985) 163 Cal. App. 3d 396, 402-403, 209 Cal. Rptr. 456]* .

[2] Abstract Negligence

In many cases involving victims of assaultive crimes, such as rape or robbery, committed by a third party, plaintiffs allege that the defendant (generally the owner or operator of the premises on which the assault occurred) is negligent for having failed to take adequate security measures to deter the assault. In attempting to prove that the inadequacy of the defendant's security measures was the legal cause of the plaintiff's injury, plaintiffs have offered expert testimony that compares the defendant's security measures to some abstract standard that allegedly would have prevented the crime against the plaintiff, finds those measures wanting, but does not actually prove that the crime would not have occurred had the defendant adhered to this abstract standard. The courts have criticized and rejected this type of testimony as establishing only abstract negligence [*see* *Nola M. v. University of S. Cal. (1993) 16 Cal. App. 4th 421, 435, 20 Cal. Rptr. 2d 97* ; *Noble v. Los Angeles Dodgers, Inc. (1985) 168 Cal. App. 3d 912, 916-918, 214 Cal. Rptr. 395]* .

In a case involving a daytime assault and attempted rape by unknown assailants at a large apartment complex, for example, the California Supreme Court upheld summary judgment for the owners of the apartment complex. The owners provided nighttime security personnel and daytime inspections to ensure that security gates were operating properly, but the gates were not all secured properly. The plaintiff, who had been making a delivery at the apartment complex, argued that daytime security guards would have prevented the assault. Assuming for the sake of analysis that the owners may have breached a duty to provide reasonable security measures, the Court concluded that the plaintiff could not prove that this breach was the actual cause of the assault and attempted rape. The plaintiff admitted that she could not prove the identity or background of the three men who assaulted her nor how they got on the apartment complex premises. Absent any evidence that the attackers were unauthorized intruders, rather than authorized residents, or that it was more probable than not the attack would not have occurred if there had been an increased security presence, the Court held that the plaintiff could not prove that any breach of duty on the part of the defendants actually caused the harm [*Saelzler v. Advanced Group 400 (2001) 25 Cal. 4th 763, 775-776, 107 Cal. Rptr. 2d 617, 23 P.3d 1143* ; *see also* *Sandoval v. Bank of Am. (2002) 94 Cal. App. 4th 1378, 1387, 115 Cal. Rptr. 2d 128* (plaintiff need only show that proposed security measures would more likely than not have prevented attack, not that they would have absolutely prevented attack)].

According to the Court, the opinion testimony of the plaintiff's expert--that the attack would not have occurred if the defendants had provided daytime security guards and made a better effort to maintain the security gates in proper working condition--was speculation and did not raise a triable issue of fact on causation [*Saelzler v. Advanced Group 400 (2001) 25 Cal. 4th 763, 781, 107 Cal. Rptr. 2d 617, 23 P.3d 1143]* .

Similarly, the owners of a baseball stadium were held not liable for the injuries of a patron who was attacked by two drunks in the stadium parking lot, despite testimony by plaintiff's expert witness that the stadium security force should have been larger and should have been deployed differently. The court noted that no one could reasonably conclude that any number of police, in whatever deployment, could prevent all crime or any particular crime, and that the evidence was insufficient to support a causative link between the alleged negligence and plaintiff's injuries [*Noble v. Los Angeles Dodgers, Inc. (1985) 168 Cal. App. 3d 912, 916-918, 214 Cal. Rptr. 395]* .

Another court applied this concept of abstract negligence to deny recovery to a woman who was raped on a university campus, and who offered expert testimony that sharply criticized both the university's security department and the university's failure to reduce foliage and increase lighting in the vicinity of the crime. The court found that this testimony was merely setting up an abstract standard that was purportedly better than that adhered to by the university, but that the testimony was not proof that the university's adherence to this abstract standard would have prevented the

rape [*Nola M. v. University of S. Cal. (1993) 16 Cal. App. 4th 421, 435, 20 Cal. Rptr. 2d 97]* .

Conversely, the court of appeal held that a trial court erred in granting summary judgment in favor of a security company that failed to provide an armed security guard at a convenience store one night as the company was under contract to do. After a clerk at the store was hit in the face by a woman who was attempting to leave the store without paying for her goods, the clerk sued the security company and argued that the injury would not have occurred if the armed guard had been present. The court of appeal held that the issue of causation should have gone to the jury. The court noted undisputed evidence that the security guard was normally positioned about a foot from the door where the altercation occurred and concluded that it was more likely than not that the woman would not have struck the clerk if an armed guard had been standing right there [*Mukthar v. Latin Am. Sec. Serv. (2006) 139 Cal. App. 4th 284, 291, 42 Cal. Rptr. 3d 563]* .

[3] Burden of Proof on Plaintiff

The plaintiff generally bears the burden of proving that the defendant actually caused his or her injuries [*see Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 597, 163 Cal. Rptr. 132, 607 P.2d 924]* . There are, however, exceptional circumstances in which the burden of proof regarding causation shifts to the defendant [*see § 380.72[4]*].

[4] Circumstances Shifting Burden of Proof to Defendant

[a] Multiple Defendants and Single Cause of Harm (*Summers v. Tice*)

[i] Application of Rule of Alternate Liability

One important exception to the general rule that a plaintiff bears the burden of proving causation was set forth by the California Supreme Court in *Summers v. Tice* [*Summers v. Tice (1948) 33 Cal. 2d 80, 199 P.2d 1]* . The plaintiff in *Summers* had been bird hunting with the two defendants. The plaintiff established that each of the defendants had negligently fired his gun in the plaintiff's direction at the same time. The plaintiff was hit by two birdshot pellets--one in the eye, the other in the lip [*Summers v. Tice (1948) 33 Cal. 2d 80, 82, 199 P.2d 1]* . The shot in the eye could only have been caused by one of the two defendants. The plaintiff was completely unable to show which defendant caused the injury and, under the general rule, would have been subject to a nonsuit motion by each defendant [*Summers v. Tice (1948) 33 Cal. 2d 80, 84, 87, 199 P.2d 1]* . Nevertheless, the Court affirmed the judgment against both defendants, noting that both defendants were wrongdoers in that each had been negligent toward the plaintiff, and that they had brought about a situation in which the negligence of one of them injured the plaintiff. The injured party was placed in the unfair position of having to point to which defendant caused the injury. If one of them escaped liability, so would the other, leaving the plaintiff without a remedy. The Court held instead that each defendant should be required to absolve himself if he can [*Summers v. Tice (1948) 33 Cal. 2d 80, 86, 88 199 P.2d 1]* . If the defendants failed to do so, they could be held jointly liable for the injury to the plaintiff [*Summers v. Tice (1948) 33 Cal. 2d 80, 88, 199 P.2d 1]* .

The *Summers* rule of alternate liability apparently applies only if the plaintiff establishes that each of the defendants against whom the rule is invoked has engaged in tortious conduct [*see Summers v. Tice (1948) 33 Cal. 2d 80, 86, 88, 199 P.2d 1* ; *see also Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 602* ; *Restatement (Second) of Torts § 433B(3) & cmt. g*]. The defendant need not, however, be in a better position to explain causation for the *Summers* rule to apply [*Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 600-602, 163 Cal. Rptr. 132, 607 P.2d 924]* . The burden of proof regarding causation may be shifted to the defendants under the *Summers* rule even if the plaintiff may have been comparatively negligent [*see Vahey v. Sacia (1981) 126 Cal. App. 3d 171, 177, 178 Cal. Rptr. 559]* .

[ii] Limitations on Application

The alternative liability doctrine of *Summers v. Tice* [*Summers v. Tice (1948) 33 Cal. 2d 80, 199 P.2d 1*] does not apply to actions in which the plaintiff cannot identify which of several alleged defendants has harmed him or her and

has not joined all potential tortfeasors, or cannot identify the specific source of harm involved in his or her injury [*Setliff v. E.I. Du Pont De Nemours & Co. (1995) 32 Cal. App. 4th 1525, 1536, 38 Cal. Rptr. 2d 763]* . For example, a paint store employee brought suit against 40 manufacturers of paint, solvents, strippers, and glue, claiming that exposure to these products had injured him [*Setliff v. E.I. Du Pont De Nemours & Co. (1995) 32 Cal. App. 4th 1525, 1535-1536, 38 Cal. Rptr. 2d 763]* . The plaintiff's complaint alleged that he could not identify which defendant manufactured the product(s) responsible for his injuries, but that all the products contained volatile organic compounds (VOCs) that pollute the environment. Observing that VOCs are present in products not manufactured by the defendants, the court concluded that simply tying his injury to VOCs and alleging that all of defendants' products contained VOCs was not sufficient to allege that defendants caused his injury [*Setliff v. E.I. Du Pont De Nemours & Co. (1995) 32 Cal. App. 4th 1525, 1536, 38 Cal. Rptr. 2d 763* ; *see also Klein v. Council of Chem. Ass'ns (E.D. Pa. 1984) 587 F. Supp. 213, 221]* .

The California Supreme Court has refused to apply the doctrine of alternative liability and its burden-shifting rule to asbestos-related latent personal injury actions, and has defined the proper standards for jury instructions in these cases [*Rutherford v. Owens-Ill., Inc. (1997) 16 Cal. 4th 953, 982, 67 Cal. Rptr. 2d 16, 941 P.2d 1203]* . The Court held that in the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold exposure to the defendant's defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a "legal cause" of the plaintiff's injury, or in other words, a substantial factor in bringing about the injury. In an asbestos-related cancer case, the plaintiff need not prove that fibers from the defendant's product were the actual fibers, or among the actual fibers, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to the defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it contributed to the plaintiff's (or decedent's) risk of developing cancer [*Rutherford v. Owens-Ill., Inc. (1997) 16 Cal. 4th 953, 982, 67 Cal. Rptr. 2d 16, 941 P.2d 1203* (use of jury instruction shifting burden of proof to asbestos defendants on element of causation constituted nonprejudicial error)].

Although not limited to cases with multiple defendants and not involving the shifting of the burden of proof, courts have more generally rejected attempts by plaintiffs to hold defendants liable for toxic exposures in the absence of allegations specifying the particular chemicals or products responsible for the injury, explaining how the toxins entered the body, and explaining how that exposure caused the alleged injury [*Bockrath v. Aldrich Chemical Co. (1999) 21 Cal. 4th 71, 80, 86 Cal. Rptr. 2d 846, 980 P.2d 398* ; *Oddone v. Superior Court (2009) 179 Cal. App. 4th 813, 821, 101 Cal. Rptr. 3d 867]* .

[b] Producer of Substantial Share of Market for Defective Product (*Sindell v. Abbott Laboratories*)

[i] Application of Rule

In *Sindell v. Abbott Laboratories* [*Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924]* , the plaintiff sued a group of five manufacturers of the drug DES, a medicine intended to reduce miscarriages that had a disastrous side effect of causing rapidly growing adenocarcinoma in the daughters of mothers who had taken the drug. The plaintiff was unable to identify which company had manufactured the particular batch of DES that her mother ingested, so she sued a group of the larger manufacturers of the drug, alleging that they marketed the drug without giving adequate warning of its potential danger [*Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 594, 163 Cal. Rptr. 132, 607 P.2d 924]* . The five named defendants, together with five or six other companies, were apparently responsible for producing 90 percent of the DES that had been marketed; approximately 200 companies manufactured DES. The DES itself did not vary in quality from manufacturer to manufacturer, but was produced from a common formula [*Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 611-612, 163 Cal. Rptr. 132, 607 P.2d 924]* .

The trial court sustained the defendants' demurrers to the complaint on the ground that the plaintiff had admitted that she could not identify the manufacturer that produced the drug responsible for her injuries, but the California Supreme

Court reversed. Although the Court found the *Summers* rationale for shifting the burden of proof regarding causation to be inapplicable to this case [*see § 380.72[4]*], the Court nevertheless agreed that a modification or extension of the *Summers* rule was warranted. Although the Court acknowledged that the number of manufacturers that produced DES created the likelihood that none of the defendants had produced the DES that caused the injury and that the responsible manufacturer, not named in the action, would escape liability [*Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 611, 163 Cal. Rptr. 132, 607 P.2d 924]* , the Court ruled that in this case the likelihood that any of the defendants supplied the DES that injured the plaintiff should instead be measured by the percentage that the DES produced by each of them bears to the entire production of the drug sold by all manufacturers [*Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 612, 163 Cal. Rptr. 132, 607 P.2d 924]* .

The Court therefore held that if a plaintiff joined in the action the manufacturers of a "substantial share" of the product that caused the plaintiff's injury, the burden of proof would shift to the defendants to demonstrate that they could not have produced the substance that injured the plaintiff [*see* *Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 598, 612, 163 Cal. Rptr. 132, 607 P.2d 924* ; *see* *Miles Labs., Inc. v. Superior Court (1982) 133 Cal. App. 3d 587, 594-595, 184 Cal. Rptr. 98* (defendant failed to establish, as matter of law, that it could not have produced particular drug that injured plaintiff)]. The Court further held that each defendant in the case would be liable "for the proportion of the judgment represented by its share of the market unless it demonstrates that it could not have made the product that caused plaintiff's injuries" [*see* *Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 612, 163 Cal. Rptr. 132, 607 P.2d 924]* .

The opinion did not clearly indicate whether a plaintiff in this situation is entitled to compensation for 100 percent of his or her damages or is limited to the proportion of his or her damages represented by the named defendants' combined share of the total market for the product. The former interpretation seems more likely in light of the Court's suggestion that the named defendants could cross-complaint against other manufacturers, not joined in the original complaint, who might have produced the drug that caused the injury [*see* *Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 612, 163 Cal. Rptr. 132, 607 P.2d 924]* .

[ii] Cases to Which Rule Does Not Apply

The California Supreme Court has subsequently clarified the market share theory of *Sindell*, holding that the theory cannot be used to prove a cause of action based on fraud or breach of warranty, because these causes of action depend on proof of the state of mind of the party that made the representation [*Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1070-1072, 245 Cal. Rptr. 412, 751 P.2d 470]* . The Court also held that manufacturers of prescription drugs could not be held liable for design defects on a strict products liability theory, and noted that a cause of action for breach of warranty could not be maintained against a prescription drug manufacturer whether or not it was based on the market share theory [*Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1072 n. 14, 245 Cal. Rptr. 412, 751 P.2d 470]* .

In another case relying on *Sindell*, the plaintiff, who had been infected by a defective Salk polio vaccine, attempted to shift the burden of proof to several defendant manufacturers to show that they had not produced the defective vaccine [*Sheffield v. Eli Lilly & Co. (1983) 144 Cal. App. 3d 583, 593-594, 192 Cal. Rptr. 870]* . The court of appeal ruled that the *Sindell* theory does not extend to a product that is "not intrinsically defective for the purpose for which it was used" [*Sheffield v. Eli Lilly & Co. (1983) 144 Cal. App. 3d 583, 593, 192 Cal. Rptr. 870]* . The defect of which the plaintiff had complained was specific to some identified batch of vaccine, not to the product itself [*Sheffield v. Eli Lilly & Co. (1983) 144 Cal. App. 3d 583, 594, 192 Cal. Rptr. 870]* . However, the fact that the plaintiff's injury is caused by the product being used for a purpose other than that for which it was originally manufactured will not preclude the application of the *Sindell* rule if the manufacturers knew of and acquiesced in the product's use for that unintended purpose [*see* *Miles Labs., Inc. v. Superior Court (1982) 133 Cal. App. 3d 587, 595-596, 184 Cal. Rptr. 98]* .

Because the market share rule applies only to fungible goods, such as the drug produced from an identical formula that was involved in *Sindell* [*Setliff v. E.I. Du Pont de Nemours & Co. (1995) 32 Cal. App. 4th 1525, 1537, 38 Cal. Rptr.*

2d 763 ; *see Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 611, 163 Cal. Rptr. 132, 607 P.2d 924]* , courts have refused to apply it to asbestos, which is a generic designation for diverse products put to numerous different uses [*Setliff v. E.I. Du Pont de Nemours & Co. (1995) 32 Cal. App. 4th 1525, 1537, 38 Cal. Rptr. 2d 763* ; *see also Mullen v. Armstrong World Indus., Inc. (1988) 200 Cal. App. 3d 250, 255-257, 246 Cal. Rptr. 32* ; *cf. Wheeler v. Raybestos-Manhattan (1992) 8 Cal. App. 4th 1152, 1157-1158, 11 Cal. Rptr. 2d 109* (permitting use of market-share theory in case involving asbestos brake pads); *but see Ferris v. Gatke Corp. (2003) 107 Cal. App. 4th 1211, 1222, 132 Cal. Rptr. 2d 819* (failure to show defendant's share of brake pad market precluded application of market-share theory)]. A court of appeal has also refused to apply the rule in an action by a paint store employee against 40 manufacturers of paint, solvents, strippers, and glue, that claimed that exposure to these products had injured him, because plaintiff's response to defendants' demurrers admitted that he did not know if there was a fungible agent common to all of the products [*Setliff v. E.I. Du Pont de Nemours & Co. (1995) 32 Cal. App. 4th 1525, 1537, 38 Cal. Rptr. 2d 763]* .

[5] Identification of Cause Prevented by Defendant's Negligence

The defendant's negligent action may itself constitute an obstacle to the plaintiff's ability to prove the critical element of causation. The California Supreme Court has held that in that situation, the plaintiff should not be precluded from recovery for failure to prove causation with certainty [*Haft v. Lone Palm Hotel (1970) 3 Cal. 3d 756, 772, 91 Cal. Rptr. 745, 478 P.2d 465]* . In that particular case, the plaintiff's husband and five-year-old son drowned in defendant hotel's swimming pool. The plaintiff was able to establish a number of violations of regulations and statutes, including a failure to post warnings that no lifeguard was on duty and that children should not use the pool without adult supervision [*Haft v. Lone Palm Hotel (1970) 3 Cal. 3d 756, 763, 91 Cal. Rptr. 745, 478 P.2d 465]* . The plaintiff was unable to establish the exact circumstance of the drowning, and there was no direct evidence that the presence of a lifeguard would have prevented the drowning. In holding that the burden of proving causation should be shifted to the defendants, the Court noted that lifeguards served two functions: the primary one of saving lives and a secondary one of "witnessing those accidents that do occur" [*Haft v. Lone Palm Hotel (1970) 3 Cal. 3d 756, 771, 91 Cal. Rptr. 745, 478 P.2d 465]* . The defendant's failure to provide a lifeguard greatly enhanced the chances the drownings would occur, and the available facts suggested, at the very least, that a competent lifeguard, exercising reasonable care, would have prevented the deaths [*Haft v. Lone Palm Hotel (1970) 3 Cal. 3d 756, 772 n. 18, 91 Cal. Rptr. 745, 478 P.2d 465]* . Because the defendant's actions prevented the plaintiff from proving her case, the Court reasoned that "[u]nder these circumstances the burden of proof of causation should be shifted to defendants to absolve themselves if they can" [*Haft v. Lone Palm Hotel (1970) 3 Cal. 3d 756, 772, 91 Cal. Rptr. 745, 478 P.2d 465* ; *cf. Fagerquist v. Western Sun Aviation, Inc. (1987) 191 Cal. App. 3d 709, 723-726, 236 Cal. Rptr. 633* (facts did not support finding that defendant's failure of compliance prevented plaintiff's ability to prove causation)].

Thus, if the defendant's acts can be shown to deprive the plaintiff "of a means of definitively establishing the facts" of causation, the burden of proof may be shifted to the defendant, at least if there is some prima facie showing that the defendant's negligence may have caused the injury [*see Haft v. Lone Palm Hotel (1970) 3 Cal. 3d 756, 771-772, 91 Cal. Rptr. 745, 478 P.2d 465* ; *see also McGee v. Cessna Aircraft Co. (1983) 139 Cal. App. 3d 179, 187-190, 188 Cal. Rptr. 542* ; *Vahey v. Sacia (1981) 126 Cal. App. 3d 171, 177-178, 178 Cal. Rptr. 559]* .

The burden of proof will not be shifted, however, unless there is some causal link between the defendant and the injury alleged. For example, the court refused to shift the burden of proof of causation to the defendant in a case in which the plaintiff sought damages for a cancerous condition allegedly caused by ingestion of a contraceptive drug. The plaintiff claimed that the defendant manufacturer's failure to comply with federal regulations requiring a premarketing study of whether or not the drug could cause cancer made it impossible for her to prove causation. The court held that before a failure to comply with regulations can shift the burden of proof to the defendant, it must be shown that the instrumentality that caused the injury was under the defendant's control [*Jones v. Ortho Pharm. Corp. (1985) 163 Cal. App. 3d 396, 405-406, 209 Cal. Rptr. 456]* .

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33-380 California Forms of Pleading and Practice--Annotated § 380.73

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§ 380.73 Legal (Proximate) Cause

[1] Policy Considerations and Relationship to Issue of Duty

The fact that the defendant's conduct was an actual cause of the plaintiff's harm is not sufficient in itself to impose liability on the defendant for that harm. A defendant's conduct must also be the "proximate cause" or "legal cause" of the plaintiff's harm [*Akins v. County of Sonoma (1967) 67 Cal. 2d 185, 199, 60 Cal. Rptr. 499, 430 P.2d 57* ; *Hardison v. Bushnell (1993) 18 Cal. App. 4th 22, 26, 22 Cal. Rptr. 2d 106]* . "Legal cause" or "proximate cause" is not really a matter of causation at all, but involves a policy determination as to whether the defendant should be held legally responsible for the consequences of his or her acts [*see* *Mosley v. Arden Farms Co. (1945) 26 Cal. 2d 213, 220-221, 157 P.2d 372]* . The doctrine of legal or proximate cause limits a defendant's liability; that is, in certain situations in which the defendant's conduct is an actual cause of the plaintiff's harm, the defendant will, nevertheless, be absolved of liability because of the manner in which the injury occurred [*Hardison v. Bushnell (1993) 18 Cal. App. 4th 22, 26, 22 Cal. Rptr. 2d 106]* .

A number of commentators have suggested that the issues of policy that frequently underlie the determination of "proximate cause" should be addressed in terms of whether or not the defendant owed a duty to the plaintiff [*see* Prosser and Keeton on the Law of Torts (5th ed. 1984) ch. 7, *Proximate Cause*, § 42, pp. 274-275]. The California courts, at least since the Supreme Court's decision in *Rowland v. Christian* [*Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561]* , generally appear to have followed this analytical approach [*see* *Isaacs v. Huntington Mem'l Hosp. (1985) 38 Cal. 3d 112, 123-129, 211 Cal. Rptr. 356, 695 P.2d 653* ; *Rowland v. Christian (1968) 69 Cal. 2d 108, 112-113, 70 Cal. Rptr. 97, 443 P.2d 561* ; *Beauchene v. Synanon Found., Inc. (1979) 88 Cal. App. 3d 342, 347, 151 Cal. Rptr. 796* ; *see also § 380.30[4][a]*].

NOTE:

Both courts and commentators have observed the misunderstanding and confusion created by the use of

the term "proximate cause" [*see, e.g., Mitchell v. Gonzales (1991) 54 Cal. 3d 1041, 1050-1051, 1 Cal. Rptr. 2d 913, 819 P.2d 872]* . Most practicing trial lawyers no longer use the term "proximate cause," preferring instead the term "legal cause."

[2] As Question of Law or Fact

To the extent that proximate cause or legal cause involves a policy determination that the defendant should be held responsible for a plaintiff's injury, it is, in the first instance, a question of law for the court [*see Mosley v. Arden Farms Co. (1945) 26 Cal. 2d 213, 222-223, 157 P.2d 372* ; *Golden v. Dungan (1971) 20 Cal. App. 3d 295, 311, 97 Cal. Rptr. 577]* . Certain subissues involved in the determination of legal (proximate) cause are, however, questions of fact. For example, the issue of legal (proximate) cause most often arises if a third party's conduct (or some other force) coincided with or intervened after the act of the defendant that allegedly caused the plaintiff's harm. Whether or not the defendant's conduct is deemed the legal (proximate) cause of the plaintiff's harm in such cases often turns on whether or not the intervening act or the harm to the plaintiff was reasonably foreseeable. Foreseeability is a question of fact that must be decided by the jury unless the undisputed facts leave no room for a reasonable difference of opinion [*Bigbee v. Pacific Tel. & Tel. Co. (1983) 34 Cal. 3d 49, 56, 192 Cal. Rptr. 857, 665 P.2d 947* ; *see Constance B. v. State of California (1986) 178 Cal. App. 3d 200, 211, 223 Cal. Rptr. 645* (no factual question regarding causation exisited because undisputed facts showed that alleged improper lighting, patrolling, and maintenance, and insufficient visibility, were not proximate cause of assault on plaintiff at state-owned rest stop)].

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§ 380.74 Multiple Causes of Harm

[1] Liability of Defendant If Not Sole Legal (Proximate) Cause

A plaintiff is not required to prove that the defendant's conduct was the sole legal (proximate) cause of his or her injury, but only that such negligence was one legal (proximate) cause [*American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 586, 146 Cal. Rptr. 182, 578 P.2d 899]* . In other words, there may be more than one legal (proximate) cause of an injury [*Muffett v. Royster (1983) 147 Cal. App. 3d 289, 307, 195 Cal. Rptr. 73]* .

Under Proposition 51, the Fair Responsibility Act of 1986, if a defendant's act is not the sole legal (proximate) cause of plaintiff's harm, the defendant is jointly liable with all other defendants for that proportion of the plaintiff's economic damages not attributable to the fault of plaintiff, but is only liable for his or her proportionate share of plaintiff's noneconomic damages [*see Civ. Code § 1431.2(a)*; *see also § 380.132[3][a]*].

[2] Concurring Causes

If two separate wrongful acts occur together and injury to a plaintiff results, each of those acts may be a legal (proximate) cause of the harm [*Fennessey v. Pacific Gas & Elec. Co. (1942) 20 Cal. 2d 141, 145, 124 P.2d 51]* . The central question presented in cases of concurrent negligence is often a factual one: whether the negligence of one or both of the defendants actually caused a plaintiff's harm. A party may be held liable for negligence that was a material element and substantial factor in bringing about the plaintiff's injury, even if another party's concurrent negligence would have produced identical harm without it [*Thomsen v. Rexall Drug & Chem. Co. (1965) 235 Cal. App. 2d 775, 783, 45 Cal. Rptr. 642]* .

Assuming that both wrongful acts are found to be a substantial factor in causing the plaintiff's harm, this fact alone will not relieve either tortfeasor from liability, because there can be more than one legal or (proximate) cause of an injury [

Muffett v. Royster (1983) 147 Cal. App. 3d 289, 307, 195 Cal. Rptr. 73] . As a general rule, an actor will be liable if his or her negligence contributed to the plaintiff's injury, even if another party's concurrent negligence also contributed to the injury [*Taylor v. Oakland Scavenger Co. (1941) 17 Cal. 2d 594, 602, 110 P.2d 1044* ; *Johnston v. Key Sys. Transit Lines (1959) 167 Cal. App. 2d 383, 385, 334 P.2d 243]* .

[3] Intervening Causes

[a] Relieving Defendant of Liability

An act or condition that occurs after the defendant's negligent act or omission and is causally related to the plaintiff's injury is often called an "independent intervening act" [Prosser and Keeton on the Law of Torts (5th ed. 1984) ch. 7, *Proximate Cause*, § 44, p. 301; *Restatement (Second) of Torts § 441(1)*]. Whether such independent intervening acts relieve a defendant from liability for the consequences of his or her negligence is a question that is commonly discussed under the doctrine of legal (proximate) cause [*see, e.g.,* *Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 520-522, 150 Cal. Rptr. 1, 585 P.2d 851]* . The question of a defendant's legal responsibility for the consequences of such intervening acts can also be, and frequently is, addressed in terms of whether or not the defendant owed the plaintiff a duty to protect him or her from those acts [*see, e.g.,* *Isaacs v. Huntington Mem'l Hosp. (1985) 38 Cal. 3d 112, 123-129, 211 Cal. Rptr. 356, 695 P.2d 653* ; *Weirum v. RKO Gen., Inc. (1975) 15 Cal. 3d 40, 45-49, 123 Cal. Rptr. 468, 539 P.2d 36]* . The courts have held that if the likelihood of such an intervening act is one of the risks that makes the defendant's conduct negligent, the occurrence of such an act does not prevent the defendant from being liable for harm caused by it [*see* *Bigbee v. Pacific Tel. & Tel. Co. (1983) 34 Cal. 3d 49, 58, 192 Cal. Rptr. 857, 665 P.2d 947]* .

Whether the court addresses the issue of liability in such cases in terms of duty or legal (proximate) cause, the crucial question is generally whether or not the defendant could have reasonably foreseen either the intervening act [*see Bigbee v. Pacific Tel. & Tel. Co. (1983) 34 Cal. 3d 49, 55-56, 192 Cal. Rptr. 857, 665 P.2d 947]* or a risk of harm of the type suffered by the plaintiff [*see* *Akins v. County of Sonoma (1967) 67 Cal. 2d 185, 199, 60 Cal. Rptr. 499, 430 P.2d 57* ; *Pappert v. San Diego Gas & Elec. Co. (1982) 137 Cal. App. 3d 205, 210-211, 186 Cal. Rptr. 847* ; *see also United Pacific Co. v. Southern Cal. Edison Co. (1985) 163 Cal. App. 3d 700, 710-712, 209 Cal. Rptr. 819* (no prejudicial error for trial court to state rule of foreseeability of harm in instruction on negligence rather than in instruction on causation)]. Thus, if an independent intervening act is not reasonably foreseeable and the results that it caused were not foreseeable, the defendant's conduct is not deemed the legal (proximate) cause of the plaintiff's injuries [*Hardison v. Bushnell (1993) 18 Cal. App. 4th 22, 26-29, 22 Cal. Rptr. 2d 106]* . Foreseeability in such cases is a question of fact for the jury unless the undisputed facts leave no room for a reasonable difference of opinion [*Bigbee v. Pacific Tel. & Tel. Co. (1983) 34 Cal. 3d 49, 56, 192 Cal. Rptr. 857, 665 P.2d 947* ; *see* *Blecker v. Wolbart (1985) 167 Cal. App. 3d 1195, 1200-1203, 213 Cal. Rptr. 781* (if defendant's negligence causes a personal injury that is aggravated by subsequent medical treatment, injury caused by medical treatment is foreseeable as matter of law); *see also* *Maxwell v. Powers (1994) 22 Cal. App. 4th 1596, 1606-1607, 28 Cal. Rptr. 2d 62* (first treating physician's negligence makes that physician liable for aggravation of plaintiff's condition by subsequent negligent treatment of other physicians)]. The issue of foreseeability of result merely looks to the likelihood of injury. Neither the particular injuries sustained by the plaintiff, the manner in which they were inflicted, nor the circumstances in which they were received are factors included within the test of foreseeability [*Hardison v. Bushnell (1993) 18 Cal. App. 4th 22, 27-28, 22 Cal. Rptr. 2d 106]* .

[b] Innocent or Negligent Acts by Third Parties

A defendant is not relieved of liability for his or her own negligence by the intervening negligent act of a third person if such an act was reasonably foreseeable [*see, e.g.,* *Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 520-522, 150 Cal. Rptr. 1, 585 P.2d 851* ; *Willis v. Gordon (1978) 20 Cal. 3d 629, 635, 143 Cal. Rptr. 723, 574 P.2d 794]* . If a risk of injury is foreseeable by a defendant, intervening negligent acts causing such an injury do not break the

chain of causation unless thay are highly extraordinary or done in an extraordinarily negligent manner [*see Stewart v. Cox (1961) 55 Cal. 2d 857, 864, 13 Cal. Rptr. 521, 362 P.2d 345]* . For example, a drunk driver's actions in losing control and running into decedent's car, which was stranded on side of freeway, was not so uncommon as to be unforeseeable as a matter of law. Therefore, the defendant,an auto club that negligently failed to aid the stranded decedent, was not entitled to demur on the grounds that its negligence was not a legal (proximate) cause of the death [*see Bloomberg v. Interinsurance Exch. (1984) 162 Cal. App. 3d 571, 576-577, 207 Cal. Rptr. 853]* . Similarly, a former truck owner's negligent failure to replace a fan blade in response to a manufacturer's recall notice was not a superseding cause of an accident in which a truck mechanic's arm was severed when the blade broke off from the engine and struck his shoulder, and therefore did not relieve either the truck or fan's manufacturers from liability for the defective design of the fan. Evidence at trial indicated that there was nothing highly extraordinary about the former owner's failure to respond to the truck manufacturer's recall notice, nor was there anything unusual about the low success rate for the fan recall [*Springmeyer v. Ford Motor Co. (1998) 60 Cal. App. 4th 1541, 1558-1559, 71 Cal. Rptr. 2d 190* (mere failure to prevent harm threatened by defendant's conduct is not ordinarily viewed as superseding cause)].

If the defendant has negligently created or increased a risk of harm to the plaintiff, a third party's failure to prevent the harm will not relieve the defendant from liability for resulting injuries [*Stewart v. Cox (1961) 55 Cal. 2d 857, 864, 13 Cal. Rptr. 521, 362 P.2d 345* ; *see Cline v. Watkins (1977) 66 Cal. App. 3d 174, 179, 180, 135 Cal. Rptr. 838* (lawyer's negligence not superseded by second lawyer's similar negligence)].

If the defendant could foresee neither the negligent act that caused the plaintiff's injury nor a risk of the type of harm that the plaintiff suffered, the defendant will not be liable to the plaintiff [*Schrimscher v. Bryson (1976) 58 Cal. App. 3d 660, 664, 130 Cal. Rptr. 125]* . For example, a seventeen year old was not liable for the damage caused by a fire which began when his fifteen year old friend dropped a lit cigarette on a wood pile; the connection between the defendant's initial act of giving his friend a pack of cigarettes and the later fire was too attenuated to show the fire was reasonably within the scope of the risk created by the initial act [*Wawanesa Mut. Ins. Co. v. Matlock (1997) 60 Cal. App. 4th 583, 588, 70 Cal. Rptr. 2d 512]* .

[c] Intentionally Tortious or Criminal Acts by Third Parties

If a reasonable person in the defendant's position could foresee an intentionally tortious or criminal act, that act will not supersede the defendant's original negligence as the legal (proximate) cause of the resulting damage [*see, e.g., Pool v. City of Oakland (1986) 42 Cal. 3d 1051, 1064, 232 Cal. Rptr. 528, 728 P.2d 1163* (defendant liable for wrongful acts of police that were foreseeable consequence of defendant's acts); *Michael R. v. Jeffrey B. (1984) 158 Cal. App. 3d 1059, 1068, 205 Cal. Rptr. 312* (when defendant minor verbally encouraged other minor to shoot plaintiff with slingshot, other minor's intentional act was reasonably foreseeable and therefore not a superseding cause of plaintiff's injury)]. In particular, if the likelihood that a third person may act in a particular manner is the hazard or one of the hazards that makes the defendant negligent, such an act, even if it is intentionally tortious or criminal, does not prevent the defendant from being liable for the harm it causes [*Landeros v. Flood (1976) 17 Cal. 3d 399, 411, 131 Cal. Rptr. 69, 551 P.2d 389* (defendant doctor's failure to diagnose battered-child syndrome was proximate cause of child's injuries)].

A defendant is not liable, however, for injuries resulting from a third party's intentionally tortious act that was not reasonably foreseeable [*see, e.g., Kane v. Hartford Accident & Indem. Co. (1979) 98 Cal. App. 3d 350, 360-361, 159 Cal. Rptr. 446* (company that provided bond for hospital employee not liable for employee's assault on plaintiff despite company's failure to investigate employee's background and discover record of property-related crimes)].

Even if third-party criminal conduct was foreseeable by the defendant, courts have in some cases refused to hold defendants liable for allegedly providing inadequate security measures and therefore causing the plaintiff's injuries by negligently failing to deter crime [*Noble v. Los Angeles Dodgers, Inc. (1985) 168 Cal. App. 3d 912, 916-919, 214 Cal. Rptr. 395]* . For example, in a case involving a heavily-armed man who entered a restaurant in an area plagued with

robberies and killed or wounded dozens of people, the restaurant's failure to install security cameras or employ licensed security guards was held not to be the cause of the injuries and deaths. These measures could not possibly have deterred this particular criminal or prevented the massacre [*Lopez v. McDonald's Corp. (1987) 193 Cal. App. 3d 495, 502, 514-517, 238 Cal. Rptr. 436* ; *see Thai v. Stang (1989) 214 Cal. App. 3d 1264, 1274, 263 Cal. Rptr. 202* (skating rink owners' failure to hire security guard was not cause of plaintiff's injuries from drive-by shooting in front of rink)].

In cases involving intentionally tortious or criminal acts by third parties, particularly the failure to anticipate or protect against criminal acts, the defendant often is the owner or possessor of the premises where those acts have occurred. For further discussion of this issue, see Ch. 421, *Premises Liability* .

[d] "Acts of God"

Unusual conditions that may be termed "acts of God" do not break the chain of causation emanating from the defendant's negligence if the "act of God" was foreseeable [*American Motorcyle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 586, 146 Cal. Rptr. 182, 578 P.2d 899* ; *see Southern Pac. Co. v. City of Los Angeles (1936) 5 Cal. 2d 545, 549, 55 P.2d 847* (unusually heavy rainfall was not so unforeseeable as to break chain of causation stemming from defendant's negligent construction of aqueduct)]. If the defendant's negligence combines with an "act of God" to cause injury, thedefendant will be liable [*Dufour v. Henry J. Kaiser Co. (1963) 215 Cal. App. 2d 26, 29, 29 Cal. Rptr. 871]* .

However, implicit in the term "foreseeability" is the conclusion that the natural event could have been anticipated or prepared for if only the defendant had acted reasonably. Therefore, if the consequences of the natural event, no matter how foreseeable, could not have been prevented or mitigated, the defendant is not liable. In this situation, there is no legal (proximate) causation [*Mancuso v. Southern Cal. Edison Co. (1991) 232 Cal. App. 3d 88, 103-104, 283 Cal. Rptr. 300]* .

[e] Intervening Acts of Plaintiff

The rule that foreseeable intervening negligent acts by others will not relieve a defendant from liability for injuries caused by his or her negligence applies to the plaintiff's own intervening negligent acts [*see, e.g., Bilyeu v. Standard Freight Lines (1960) 182 Cal. App. 2d 536, 542-543, 6 Cal. Rptr. 65* (plaintiff highway patrolman's voluntarily attempting to remove obstructions from highway caused by defendant's negligence was reasonably foreseeable and therefore not superseding cause of injury plaintiff suffered while trying to remove obstructions)]. If the plaintiff's negligence is not so unforeseeable as to constitute a superseding cause of the injury, which would preclude recovery entirely, his or her negligence merely serves to reduce the amount of damages otherwise recoverable from the defendant [*see § 380.170[1]*].

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[Reserved]

§§ 380.75[Reserved]

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§ 380.90 Sufficiency of Injury or Damages

The final element of a cause of action in negligence that the plaintiff has the burden of pleading and proving is injury or damages. A negligent act in and of itself is not actionable unless it results in an injury to the plaintiff [*Fields v. Napa Milling Co. (1958) 164 Cal. App. 2d 442, 447, 330 P.2d 459]* . A defendant's mere breach of duty causing only nominal damages, speculative harm, or the threat of future harm not yet realized, is not sufficient to create a cause of action [*Budd v. Nixen (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433]* . However, once a plaintiff has suffered actual and appreciable harm, the tort of negligence is complete, and the fact that the amount of damages may be speculative, uncertain, or difficult to prove will not toll the limitations period [*Davies v. Krasna (1975) 14 Cal. 3d 502, 514, 121 Cal. Rptr. 705, 535 P.2d 1161]* . Punitive damages may be awarded in unintentional tort actions under *Civ. Code § 3294*, if actual substantial damages have been awarded [*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 1004, 25 Cal. Rptr. 2d 550, 863 P.2d 795]* .

The injury required as an element of actionable negligence means an act causing harm in the sense of detrimental physical changes to the body. A physical injury may be actionable whether or not it gives rise to emotional distress. However, an invasion of the legally protected interest in bodily security that causes no detrimental change is not sufficient because it causes no harm and therefore no actual damage. For example, the impairment of a plaintiff's bone marrow resulting from an overdose of anticancer drugs was a detrimental change in the physical condition of plaintiff's body because it was an appreciable functional impairment of her immune system; it was, therefore, an actionable injury for which damages were recoverable [*Duarte v. Zachariah (1994) 22 Cal. App. 4th 1652, 1661-1663, 28 Cal. Rptr. 2d 88]* .

For further discussion, see Ch. 177 *Damages* .

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§ 380.91 Duty to Mitigate Damages

A person injured by the wrongful act of another must exercise reasonable care and diligence to avoid loss or minimize the resulting damages, and cannot recover for any losses that might have been prevented by reasonable efforts and expenditures on his or her part [*Valencia v. Shell Oil Co. (1944) 23 Cal. 2d 840, 844, 147 P.2d 558]* .

For further discussion, see Ch. 177, *Damages* .

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§ 380.92 Restrictions of Code Civ. Proc. § 425.10(b) on Pleading Damages

Code Civ. Proc. § 425.10(b) provides that a complaint filed in an action for personal injury or wrongful death may not state a demand for damages. Instead, the amount of the demand must be set forth in a statement of damages [*Code Civ. Proc. § 425.11*].

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33-380 California Forms of Pleading and Practice--Annotated §§ 380.93-380.109

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§§ 380.93[Reserved]

California Forms of Pleading and Practice--Annotated

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 380 NEGLIGENCE
PART II. LEGAL BACKGROUND
C. Doctrines Affecting Proof of Negligence

33-380 California Forms of Pleading and Practice--Annotated § 380.110

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§ 380.110 Presumption of Negligence Arising From Statutory Violation

[1] Elements Necessary to Establish Presumption

The failure of a person to exercise due care is presumed if all of the following conditions are met [*Evid. Code § 669(a)*]:

- The person violated a statute, ordinance, or regulation of a public entity;
- The violation directly and legally (proximately) caused death or injury to person or property;
- The death or injury resulted from an occurrence of the nature that the statute, ordinance, or regulation was designed to prevent; and
- The person suffering the death or injury to his or her person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

Evid. Code § 669 creates a presumption of negligence only when a viable underlying claim for negligence exists, that is, only when an independent negligence duty of care is first proven to exist under the circumstances [*California Serv. Station & Auto. Repair Ass'n v. American Home Assurance Co. (1998) 62 Cal. App. 4th 1166, 1177-1180, 73 Cal. Rptr. 2d 182]* . Further, if the statute, ordinance, or regulation allegedly violated creates a duty that is not a *negligence* duty of care, a violation of that statute, ordinance, or regulation does not create a presumption of negligence [*see California Serv. Station & Auto. Repair Ass'n v. American Home Assurance Co. (1998) 62 Cal. App. 4th 1166, 1176-1180, 73 Cal. Rptr. 2d 182]* .

[2] Violation of Statute, Ordinance, or Regulation

[a] As Establishing Breach of Duty

Plaintiffs commonly invoke statutory standards in negligence actions to establish a defendant's breach of duty. In these cases, proof of the defendant's violation of a statutory standard of conduct raises a presumption of negligence that may be rebutted only by evidence establishing a justification or excuse for the statutory violation [*Ramirez v. Plough, Inc. (1993) 6 Cal. 4th 539, 547, 25 Cal. Rptr. 2d 97, 863 P.2d 167]* . The significance of a statute in a civil suit for negligence lies in the statute's formulation of a standard of conduct that the court adopts in the determination of the defendant's liability. The decision as to what the standard should be rests with the court, and the standard formulated by a legislative body in a statute or regulation becomes the standard to determine liability only because the court accepts it. If a legislative body has generalized a standard of care from the experience of the community and prohibits conduct that is likely to cause harm, the court accepts the formulated standards and applies them, except if they would serve to impose liability without fault [*Ramirez v. Plough, Inc. (1993) 6 Cal. 4th 539, 547, 25 Cal. Rptr. 2d 97, 863 P.2d 167]* .

[b] Statutory Compliance as Establishing No Breach of Duty

A defendant may raise statutory compliance as a defense in a negligence action to establish that no breach of duty occurred. Courts have generally not looked with favor on the use of statutory compliance as a defense to tort liability. However, if the evidence shows no unusual circumstances, but only the ordinary situation contemplated by the statute or regulation, then the trier of fact or the court, as a matter of law, may accept the minimum standard prescribed by the statute or regulation as sufficient for the occasion [*Ramirez v. Plough, Inc. (1993) 6 Cal. 4th 539, 547-548, 25 Cal. Rptr. 2d 97, 863 P.2d 167]* . Thus, for example, it has been held that a defendant manufacturer of nonprescription drugs complied with the applicable statutory standard of care with respect to package warnings on its drugs by including these warnings in English, as required by former *Health & Safety Code § 25900* (*now see Health & Safety Code § 108800*), and did not have a duty to include foreign-language warnings with its packaging materials [*see* *Ramirez v. Plough, Inc. (1993) 6 Cal. 4th 539, 548-556, 25 Cal. Rptr. 2d 97, 863 P.2d 167]* .

[c] What Constitutes Statute, Ordinance, or Regulation

Evid. Code § 669.1 provides that a rule, policy, manual, or guideline of state or local government setting forth standards of conduct or guidelines for its employees in the conduct of their public employment is not considered a "statute, ordinance, or regulation" of the public entity within the meaning of *Evid. Code § 669*, unless the rule, manual, policy, or guideline has been formally adopted as a statute, as an ordinance of a local government entity in California empowered to adopt ordinances, or as a regulation by an agency of the state pursuant to the Administrative Procedure Act [*Gov. Code § 11340 et seq.*], or by an agency of the United States government pursuant to the federal Administrative Procedure Act [*5 U.S.C.S. § 501 et seq.*]. This provision only applies to causes of action arising out of facts occurring after 1987, regardless of the date the action is commenced or tried [*see* 1987 Stats., ch. 1207, § 4].

[3] Violation as Direct and Legal (Proximate) Cause of Harm

A presumption of negligence under *Evid. Code § 669* does not arise if the injury or damage would have resulted even if there were no statutory violation [*Nunneley v. Edgar Hotel (1950) 36 Cal. 2d 493, 498-499, 225 P.2d 497* ; *see also Roth v. Parker (1997) 57 Cal. App. 4th. 542, 550, 67 Cal. Rptr. 2d 250* (plaintiff passenger failed to establish that accident would not have occurred if driver of car in which she was a passenger had stopped at stop sign rather than rolling slowly through it)]. The issue of direct and legal (proximate) causation is a question of fact for the jury [*see Cade v. Mid-City Hosp. Corp. (1975) 45 Cal. App. 3d 589, 597, 119 Cal. Rptr. 571]* .

[4] Harm Resulting From Type of Occurrence Statute Designed to Prevent

Courts determining whether the harm resulted from an occurrence of the nature that the statute, ordinance, or regulation was designed to prevent have examined the intent behind the statute and compared that intent to the injury involved [*see, e.g.,* *Peterson v. City of Long Beach (1979) 24 Cal. 3d 238, 246, 155 Cal. Rptr. 360, 594 P.2d 477* (presumption

ofnegligence applied to police officer's shooting person from behind because departmental regulation prohibited discharge of an officer's firearm under those circumstances)]. Courts have refused to interpret the intent of a statute more narrowly than necessary [*see, e.g., Courtell v. McEachen (1959) 51 Cal. 2d 448, 459, 334 P.2d 870* (ordinance regulating open fires not intended solely to prevent danger of fires spreading to other property but also to protect against all perils that may arise from fires not properly started, controlled, or extinguished)].

However, courts have also refused to expand the intent of statutes without limit [*see, e.g., Mark v. Pacific Gas & Elec. Co. (1972) 7 Cal. 3d 170, 183, 101 Cal. Rptr. 908, 496 P.2d 1276* (ordinance prohibiting extinguishment of any public light not intended to guard against electrocution of one who attempts to extinguish light); *Wawanesa Mut. Ins. Co. v. Matlock (1997) 60 Cal. App. 4th 583, 587, 70 Cal. Rptr. 2d 512* (statute making it illegal to furnish tobacco to minors intended to prevent early addiction to tobacco, not fires); *Cade v. Mid-City Hosp. Corp. (1975) 45 Cal. App. 3d 589, 598, 119 Cal. Rptr. 571* (regulation prohibiting unauthorized medical treatment by hospital employees as not protecting against failure of hospital employees to perform test as ordered)].

The determination of the nature of the occurrences that a particular statute, ordinance, or regulation was designed to prevent involves statutory interpretation and is, therefore, a question of law [*Cade v. Mid-City Hosp. Corp. (1975) 45 Cal. App. 3d 589, 597, 119 Cal. Rptr. 571]* .

[5] Person Harmed as Member of Class Statute Designed to Protect

The determination of the class of persons for whose protection a statute, ordinance, or regulation was adopted must be made on a case-by-case basis. In some cases, the issue will be clear, as in the case of a safety regulation [*see, e.g., Haft v. Lone Palm Hotel (1970) 3 Cal. 3d 756, 763, 91 Cal. Rptr. 745, 478 P.2d 465* (regulations regarding safety measures required of swimming pool owners as clearly designed to protect hotel guests who drowned in pool)]. In other cases, the court will examine the legislative history of the statute to determine if it was intended to protect the general public [*see, e.g., Vesely v. Sager (1971) 5 Cal. 3d 153, 165, 95 Cal. Rptr. 623, 486 P.2d 151* (statute prohibiting sale of alcoholic beverages to obviously intoxicated person as intended to protect members of general public)].

In some cases, the determination that a person is not one of the class of persons for whose benefit a statute was adopted will follow from the court's determination regarding the occurrences that the statute was designed to prevent [*see, e.g., Ramirez v. Nelson (2008) 44 Cal. 4th 908, 919, 80 Cal. Rptr. 3d 728, 188 P.3d 659* (criminal statute prohibiting equipment from being operated within 6 feet of power lines intended to protect public from severed lines and not intended to protect workers who violate statute from electrocution); *Mark v. Pacific Gas & Elec. Co. (1972) 7 Cal. 3d 170, 183, 101 Cal. Rptr. 908, 496 P.2d 1276* (decedent electrocuted while attempting to unscrew streetlight bulb was not member of class of persons for whose benefit ordinance was enacted because purpose of ordinance prohibiting extinguishment of any public light was to assure adequate street lighting); *Andres v. Young Men's Christian Assn. (1998) 64 Cal. App. 4th 85, 92, 74 Cal. Rptr. 2d 788* (user of small spa pool killed when suffering seizure in unsupervised pool was not member of class of persons intended to be protected by regulation requiring supervision for purposes of sanitation and hygiene)].

If a statute is found not to protect a particular class of persons, the basis for the finding is usually that the statute imposed only a limited duty on the violator [*see, e.g., Randi W. v. Muroc Joint Unified Sch. Dist. (1997) 14 Cal. 4th 1066, 1087, 60 Cal. Rptr. 2d 263* (Child Abuse Reporting Act protects children in the custodial care of the person charged with reporting the abuse, not a child from another school district who is molested by a former school district employee); *Stafford v. United Farm Workers (1983) 33 Cal. 3d 319, 324, 188 Cal. Rptr. 600, 656 P.2d 564* (temporary restraining order limiting picketing was for benefit of employers, not motorists passing site of violation of order); *Routh v. Quinn (1942) 20 Cal. 2d 488, 491-492, 127 P.2d 1* (statute imposing duty of care on tax assessor in computing amount of property tax due as owed only to public as entity, not to purchaser at tax delinquency sale)].

Whether or not the person injured was a member of the class of person for whose protection the statute, ordinance, or

regulation was adopted is a question of law [*Cade v. Mid-City Hosp. Corp. (1975) 45 Cal. App. 3d 589, 597, 119 Cal. Rptr. 571]* .

[6] Effect of Presumption

Application of the presumption of negligence arising from a statutory violation means that the court has adopted the conduct prescribed by the statute as the standard of care for a reasonable person under the circumstances. Therefore, a violation of the statute is presumed to be negligence [*Casey v. Russell (1982) 138 Cal. App. 3d 379, 383, 188 Cal. Rptr. 18]* . Once the presumption is established, the party against whom it operates has the burden of proving the nonexistence of the presumed negligence [*see Evid. Code § 606*].

[7] Rebutting Presumption

[a] Violator Acted Reasonably With Intent to Obey Law

Once established, the presumption of negligence may be rebutted by proof that the person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law [*Evid. Code § 669(b)(1)*]. The defendant must show that he or she was desirous of complying with the statute in question, but was faced with other circumstances that prevented compliance or that justified noncompliance [*Casey v. Russell (1982) 138 Cal. App. 3d 379, 384-385, 188 Cal. Rptr. 18* ; *see Byrne v. City & County of San Francisco (1980) 113 Cal. App. 3d 731, 741-742, 170 Cal. Rptr. 302* (violation of statute requiring driver to yield right-of-way to pedestrian in crosswalk as excused because of obstructions to driver's view of crosswalk and pedestrian's action incrossing when unsafe to do so); *cf. La Manna v. Stewart (1975) 13 Cal. 3d 413, 427, 118 Cal. Rptr. 761, 530 P.2d 1073* (violation of statute requiring driver to yield right-of-way to pedestrian in crosswalk cannot be excused on ground that driver was watching another potential hazard)].

The question of justification or excuse for the violation is ordinarily one of fact [*see Alarid v. Vanier (1958) 50 Cal. 2d 617, 624, 327 P.2d 897]* , although there must be evidence in the record sufficient to support a finding of justification or excuse before the issue may be submitted to the jury [*see Grant v. Petronella (1975) 50 Cal. App. 3d 281, 289 n. 1, 123 Cal. Rptr. 399]* .

[b] Violator Was Child

Once established, the presumption of negligence may also be rebutted by proof that the person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his or her maturity, intelligence, and capacity under similar circumstances [*Evid. Code § 669(b)(2)*]. The presumption may not be rebutted by this proof, however, if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications [*Evid. Code § 669(b)(2)*; *see Prichard v. Veterans Cab Co. (1965) 63 Cal. 2d 727, 731-732, 47 Cal. Rptr. 904, 408 P.2d 360* (minor driving motor vehicle)].

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33-380 California Forms of Pleading and Practice--Annotated § 380.111

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§ 380.111 Res Ipsa Loquitur

[1] Nature and Effect of Doctrine

In negligence actions, the doctrine of res ipsa loquitur applies if the occurrence of an injury is of such a nature that it can be said, in light of past experience, that it probably was the result of negligence by someone and that the defendant probably is the person responsible [*Gannon v. Elliot (1993) 19 Cal. App. 4th 1, 6, 23 Cal. Rptr. 2d 86]* . In determining whether these probabilities exist with respect to a particular occurrence, the courts have relied on both expert testimony and common knowledge [*see Gannon v. Elliot (1993) 19 Cal. App. 4th 1, 6, 23 Cal. Rptr. 2d 86]* .

The general conditions for the application of the doctrine are [*Newing v. Cheatham (1975) 15 Cal. 3d 351, 359, 124 Cal. Rptr. 193, 540 P.2d 33]* :

- The accident must be of a kind that ordinarily does not occur in the absence of someone's negligence;
- It must be caused by an agency or instrumentality within the defendant's exclusive control; and
- It must not have been due to any voluntary action or contribution on the plaintiff's part.

Once these conditions have been met, a presumption affecting the burden of producing evidence is created [*Evid. Code § 646(b)*], requiring a finding of negligence unless the defendant introduces sufficient evidence to sustain a finding that either (1) the accident resulted from some cause other than the defendant's negligence, or (2) the defendant exercised due care in all possible respects in which he or she might have been negligent [*Newing v. Cheatham (1975) 15 Cal. 3d 351, 364-365, 124 Cal. Rptr. 193, 540 P.2d 33* (doctrine establishes defendant's negligence as matter of law if defendant fails to produce evidence supporting such a finding)]. Even if the defendant introduces evidence sufficient to support a finding that he or she was not negligent or that any negligence on his or her part was not a proximate cause of

the occurrence, the trier of fact may still find the defendant liable based on the facts that gave rise to the res ipsa presumption as well as the other evidence in the case [*see Evid. Code §§ 604, 646(c)*]. Moreover, even if the doctrine has established that the defendant was negligent, the defendant may still assert defenses on grounds other than a lack of negligence, such as the plaintiff's contributory negligence or assumption of the risk [*see Newing v. Cheatham (1975) 15 Cal. 3d 351, 365, 124 Cal. Rptr. 193, 540 P.2d 33]* .

[2] Prerequisites for Application

[a] Type of Accident or Injury Not Occurring in Absence of Negligence

For the doctrine of res ipsa loquitur to apply, the accident must be of a kind that ordinarily does not occur in the absence of someone's negligence [*Newing v. Cheatham (1975) 15 Cal. 3d 351, 359, 124 Cal. Rptr. 193, 540 P.2d 33]* . Because the doctrine permits the jury to infer negligence from the happening of the accident alone, there must be a basis, either in common experience or expert testimony, for concluding that the occurrence of such an accident is more probably than not the result of negligence [*Tomei v. Henning (1967) 67 Cal. 2d 319, 322, 62 Cal. Rptr. 9, 431 P.2d 633* ; *Hale v. Venuto (1982) 137 Cal. App. 3d 910, 918, 187 Cal. Rptr. 357]* . Although there are many situations in which a lay person, without expert testimony, may infer as a matter of common knowledge that the injury would not have occurred unless someone was negligent [*see, e.g. Meier v. Ross Gen. Hosp. (1968) 69 Cal. 2d 420, 429, 71 Cal. Rptr. 903, 445 P.2d 519* (hospital left patient in second story room with unlocked window after suicide attempt; patient jumped out of window)], often the plaintiff must produce some expert testimony that would support an inference of negligence from the fact of the accident itself [*Hale v. Venuto (1982) 137 Cal. App. 3d 910, 918, 187 Cal. Rptr. 357]* . Res ipsa loquitur often applies to an injury whose cause is a mystery, if there is a reasonable and logical inference that the defendant was negligent and that this negligence caused the injury [*Clark v. Gibbons (1967) 66 Cal. 2d 399, 409, 58 Cal. Rptr. 125, 426 P.2d 525]* .

The doctrine of res ipsa loquitur does not apply in a strict products liability action [*Barrett v. Atlas Powder Co. (1978) 86 Cal. App. 3d 560, 565,150 Cal. Rptr. 339]* . However, res ipsa loquitur may be applied in a products liability action based on negligence, rather than on strict liability in tort [*see Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 383-386, 93 Cal. Rptr. 769, 482 P.2d 681]* .

[b] Instrumentality in Defendant's Exclusive Control

[i] Requirement Not Absolute

For the doctrine of res ipsa loquitur to apply, the agency or instrumentality causing the accident must have been within the defendant's exclusive management and control. The purpose of this requirement is to link the defendant with the probability, established under the first element [*see § 380.111[2]*], that the accident was negligently caused [*Newing v. Cheatham (1975) 15 Cal. 3d 351, 362, 124 Cal. Rptr. 193, 540 P.2d 33]* . The phrase "exclusive control" does not mean that the plaintiff must exclude all other persons who might possibly have been responsible, if the defendant's negligence appears to be the more probable explanation of the accident [*Bedford v. Re (1973) 9 Cal. 3d 593, 597, 108 Cal. Rptr. 364, 510 P.2d 724* ; *Emerick v. Raleigh Hills Hosp. (1982) 133 Cal. App. 3d 575, 584, 184 Cal. Rptr. 92]* . For example, if the accident occurs some time after the defendant relinquished control of the instrumentality that caused the accident, the doctrine may still apply if there is evidence that the plaintiff or some third person had not improperly handled or otherwise changed the condition of the instrumentality after the defendant relinquished control [*see, e.g. Bedford v. Re (1973) 9 Cal. 3d 593, 597-598, 108 Cal. Rptr. 364, 510 P.2d 724* (wall that collapsed had not been misused or changed after defendant relinquished control)]. The condition is satisfied if there is evidence, conflicting or otherwise, that supports a reasonable inference that the instrumentality was not mishandled or changed in condition [*see Bedford v. Re (1973) 9 Cal. 3d 593, 597-598, 108 Cal. Rptr. 364, 510 P.2d 724]* .

The defendant's control over some, but not all, of the instrumentalities that caused the plaintiff's injury will preclude the application of the doctrine only if (1) the plaintiff had control of one of the possible instrumentalities [*see, e.g.*

Anderson v. Jones (1968) 266 Cal. App. 2d 284, 288-290, 72 Cal. Rptr. 187 (plaintiff running down median strip of freeway was struck by car; doctrine inapplicable because of lack of exclusive control by defendant driver of path followed by plaintiff)], or (2) the instrumentality allegedly in the control of the defendant was altered by another after it left the defendant's control in a manner that would appear to preclude the defendant's responsibility for the plaintiff's injury [*see, e.g.* *Putensen v. Clay Adams, Inc. (1970) 12 Cal. App. 3d 1062, 1075-1076, 91 Cal. Rptr. 319* (plastic tube, inserted in plaintiff's heart, that "kinked" and stopped blood flow was altered by another before insertion and after defendant relinquished control)].

The doctrine of res ipsa loquitur may also be applied if the plaintiff is an innocent bystander and it is not clear whether the negligence of the defendant or a third party, or both, caused the plaintiff's injuries [*see* *Tobler v. Chapman (1973) 31 Cal. App. 3d 568, 582-585, 107 Cal. Rptr. 614* (application of doctrine not affected by fact that not all potentially negligent parties are defendants in action)].

[ii] More Than One Defendant

The doctrine of res ipsa loquitur is applicable against more than one defendant if circumstances show a probability that all defendants were negligent [*Zentz v. Coca Cola Bottling Co. (1952) 39 Cal. 2d 436, 446, 247 P.2d 344]* .

The doctrine may be applied even though any one defendant could argue that it is more likely that the negligence of the other defendants was responsible for the plaintiff's injuries [*see* *Ybarra v. Spangard (1944) 25 Cal. 2d 486, 489-490, 154 P.2d 687* (doctrine applied to hospital patient injured while under general anesthesia who could not determine which medical personnel were negligent); *Martinides v. Mayer (1989) 208 Cal. App. 3d 1185, 1195-1196, 256 Cal. Rptr. 679* (doctrine applied in case of plaintiff injured by hit-and-run vehicle where jury found that two individuals were driving vehicle when it collided with plaintiff)]. If multiple defendants at one time or another had control of one or more of the agencies or instrumentalities that might have harmed the plaintiff, the defendants have the burden of initial explanation [*Ybarra v. Spangard (1944) 25 Cal. 2d 486, 492, 154 P.2d 687]* .

[c] No Contribution by Plaintiff

For the doctrine of res ipsa loquitur to apply, the accident must not have been due to any voluntary action or contribution by the plaintiff [*Newing v. Cheatham (1975) 15 Cal. 3d 351, 363, 124 Cal. Rptr. 193, 540 P.2d 33]* . This requirement is related to the condition of control by the defendant of the instrumentality causing the accident, and has been employed as a means of showing that the defendant, rather than the plaintiff, had control and was responsible for the injury [*Zentz v. Coca Cola Bottling Co. (1952) 39 Cal. 2d 436, 444, 247 P.2d 344]* . A plaintiff may properly rely on the doctrine even if he or she participated in the events leading to the accident if the evidence excludes his or her conduct as the responsible cause [*Zentz v. Coca Cola Bottling Co. (1952) 39 Cal. 2d 436, 444-445, 247 P.2d 344* ; *Emerick v. Raleigh Hills Hosp. (1982) 133 Cal. App. 3d 575, 584, 184 Cal. Rptr. 92]* . Thus, even if the plaintiff was negligent, that fact does not preclude the application of the doctrine if the plaintiff's negligence was not the proximate cause of the accident [*Shahinian v. McCormick (1963) 59 Cal. 2d 554, 561, 30 Cal. Rptr. 521, 381 P.2d 377]* . Moreover, even if the plaintiff's conduct may be viewed as a proximate cause of the accident, the doctrine may still be applicable if the plaintiff's conduct was foreseeableand was one of the risks that would render the defendant's conduct negligent [*see* *Emerick v. Raleigh Hills Hosp. (1982) 133 Cal. App. 3d 575, 585, 184 Cal. Rptr. 92* (doctrine applied to sink that collapsed while plaintiff was leaning against it, because properly installed sink should not ordinarily collapse under these circumstances and plaintiff's conduct was to be expected and should have been foreseen by defendant)].

[3] Scope of Evidence of Specific Acts of Negligence

Ordinarily, the introduction of evidence of specific acts of negligence does not deprive a plaintiff of use of the doctrine of res ipsa loquitur [*Bedford v. Re (1973) 9 Cal. 3d 593, 599, 108 Cal. Rptr. 364, 510 P.2d 724]* . The doctrine does not apply, however, if the facts regarding the accident and the care exercised by the defendant are shown as a matter of

law, thus eliminating any justification for resort to the doctrine [*see Akins v. County of Sonoma (1967) 67 Cal. 2d 185, 195, 60 Cal. Rptr. 499, 430 P.2d 57* (doctrine inapplicable because plaintiff injured in fall from bleachers maintained by defendant introduced uncontradicted evidence regarding condition of bleachers, how accident happened, and care exercised by defendant)].

[4] Rebuttal of Presumption

A defendant may attempt to avoid the presumption raised by the res ipsa loquitur doctrine by introducing evidence tending to show the nonexistence of one of the three conditions of the doctrine [*see § 380.111[1]*]. The introduction of evidence sufficient to sustain a finding of the nonexistence of the presumed fact--the defendant's negligence--causes the presumption to "disappear" as a matter of law [*Evid. Code § 604*; *see Evid. Code § 646(b)*].

Once the defendant has introduced evidence sufficient to support a finding that he or she was not negligent, or that any negligence was not a proximate cause of the plaintiff's injuries, the court must instruct the jury that it may not find that a proximate cause of the occurrence was some negligent conduct by the defendant unless the jury believes, after weighing all the evidence and drawing such inferences therefrom as the jury believes are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct by the defendant [*Evid. Code § 646(c)(2)*]. The determination of the sufficiency of the rebuttal evidence must be made by the trial judge; if the judge finds there is evidence that, if believed, would rebut the presumption, the judge cannot give an unqualified res ipsa loquitur instruction to the jury [*Slater v. Kehoe (1974) 38 Cal. App. 3d 819, 833, 113 Cal. Rptr. 790]* . However, the jury may still be able to draw an inference, from the facts that gave rise to the presumption, that the accident was caused by the defendant's lack of due care [*Evid. Code § 646(c)(1)*], unless the defendant's evidence is so clear that his or her lack of negligence is established as a matter of law [*see Leonard v. WatsonvilleCmty. Hosp. (1956) 47 Cal. 2d 509, 515, 305 P.2d 36]* . Even if the defendant has introduced sufficient rebuttal evidence, the facts supporting the res ipsa loquitur conditions may still support an inference that a proximate cause of the occurrence was some negligent conduct by the defendant [*Frantz v. San Luis Med. Clinic (1978) 81 Cal. App. 3d 34, 43-44, 146 Cal. Rptr. 146]* . However, this permissive inference does not alter the plaintiff's burden of proving, by a preponderance of the evidence, that the plaintiff's injury was proximately caused by the defendant's negligence [*Frantz v. San Luis Med. Clinic (1978) 81 Cal. App. 3d 34, 44, 146 Cal. Rptr. 146]* .

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§ 380.130 Strict Liability

[1] Ultrahazardous Activities

Certain activities under certain conditions are so hazardous to the public generally and occur so infrequently that liability is imposed on persons who carry on these activities even in the absence of negligence. A person who carries on an ultrahazardous activity is liable for all damages that he or she should recognize as likely to be caused by any unpreventable miscarriage of the activity, although the utmost care is exercised to prevent the harm and the defendant has not been negligent [*Luthringer v. Moore (1948) 31 Cal. 2d 489, 498-500, 190 P.2d 1]* .

An activity is ultrahazardous if it (1) necessarily involves a risk of serious harm to the person or property of another that cannot be eliminated by the exercise of the utmost care and (2) is not a matter of common usage [*Luthringer v. Moore (1948) 31 Cal. 2d 489, 498, 190 P.2d 1* ; *but see Travelers Indemnity Co. v. City of Redondo Beach (1994) 28 Cal. App. 4th 1432, 1444, 34 Cal. Rptr. 2d 337* (applying more restrictive definition set out in *Restatement (Second) of Torts § 520*)].

An activity is a matter of common usage if it is customarily carried on by the great mass of mankind or by many people in the community; it does not cease to be so because it is carried on for a purpose peculiar to the individual who carries it on. Certain activities may be so generally carried on as to be regarded as customary, such as the driving of an automobile, and so are considered a matter of customary usage and not ultrahazardous [*Luthringer v. Moore (1948) 31 Cal. 2d 489, 498, 190 P.2d 1]* . Moreover, the act of driving a motor vehicle under the influence of alcohol, although unquestionably dangerous and hazardous-in-fact, does not come within the rubric of an ultrahazardous or abnormally dangerous activity for purposes of imposing strict liability in tort [*Goodwin v. Reilley (1985) 176 Cal. App. 3d 86, 92, 221 Cal. Rptr. 374]* .

Although some cases involving the application of the doctrine of strict liability have been decided by way of demurrer [

see, e.g., Marin Mun. Water Dist. v. Northwestern Pac. R.R. Co. (1967) 253 Cal. App. 2d 83, 87, 98, 99, 61 Cal. Rptr. 520] , other cases indicate that it is improper for the court to determine the question at the pleading stage [*see, e.g., Travelers Indem. Co. v. City of Redondo Beach (1994) 28 Cal. App. 4th 1432, 1444, 34 Cal. Rptr. 2d 337* ; *SKF Farms v. Superior Court (1984) 153 Cal. App. 3d 902, 906, 200 Cal. Rptr. 497]* .

[2] Dangerous Animals

The keeper of an animal of a species that is dangerous by nature, or of any animal that the keeper knows, or has reason to know, to have dangerous propensities, is liable, without wrongful intent or negligence, for damage to others resulting from this propensity. In this situation, the keeper is an insurer against the acts of the animal to anyone who is injured without fault, irrespective of the keeper's negligence [*Hillman v. Garcia-Ruby (1955) 44 Cal. 2d 625, 626, 283 P.2d 1033* (dangerous dog); *Talizin v. Oak Creek Riding Club (1959) 176 Cal. App. 2d 429, 437, 1 Cal. Rptr. 514* (dangerous horse); *Baugh v. Beatty (1949) 91 Cal. App. 2d 786, 791-792, 205 P.2d 671* (chimpanzee; wild animals presumed to be vicious)].

For further discussion, see Ch. 23, *Animals: Civil Liability* .

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33-380 California Forms of Pleading and Practice--Annotated § 380.131

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§ 380.131 Vicarious Liability

[1] Based on Relationships

Under certain circumstances, one person may be vicariously liable for injuries and damages caused by another person in the absence of any negligence attributable to the first person. Vicarious liability is a departure from the normal tort principle that liability follows fault. It is usually imposed for policy reasons by either common law or statute, and is based on the relationship between the parties [*see* Restatement (Second) of Torts § 315; *see also Matthias v. United Pac. Ins. Co. (1968) 260 Cal. App. 2d 752, 755, 67 Cal. Rptr. 511]* .

[2] Parent and Child

Under certain circumstances, a parent may be liable for the negligent and/or intentional torts of his or her child [*see* Ch. 394, *Parent and Child* ; *see also Civ. Code §§ 1714.1* (parents' liability for acts of willful misconduct of minor), *1714.3* (parents' liability for injury caused by discharge of firearm by minor)]. For a discussion of parents' potential liability created by a child's use of an automobile, see Ch. 82, *Automobiles: Causes of Action* . For a general discussion of the rights of minors, see Ch. 367A, *Minors: Tort Actions* .

[3] Automobile Owner and Driver

The owner of an automobile is liable for an injury caused by the negligent operation of the automobile by any person driving with the owner's permission [*see Veh. Code § 17150*]. The parents or guardian or a minor may be held liable for any damages proximately resulting from the minor's negligent driving of an automobile [*see* generally *Veh. Code §§ 17706-17714*]. For a complete discussion of vicarious liability based on the use of an automobile, see *Ch. 82, Automobiles: Causes of Action, § 82.16.*

[4] Employer and Employee

[a] Doctrine of Respondeat Superior

Under the doctrine of respondeat superior, an employer may be held vicariously liable for torts committed by an employee within the scope of his or her employment [*Henriksen v. City of Rialto (1993) 20 Cal. App. 4th 1612, 1618, 25 Cal. Rptr. 2d 308]* . This doctrine is codified in *Civ. Code § 2338,* which provides that, unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his or her agent in the transaction of the business of the agency, including wrongful acts committed by the agent in and as a part of the transaction of the business, and for the agent's willful omission to fulfill the obligations of the principal [*see Spradlin v. Cox (1988) 201 Cal. App. 3d 799, 808-809, 247 Cal. Rptr. 347]* .

For a complete discussion of the doctrine of respondeat superior in the employer-employee relationship, see Ch. 248, *Employer's Liability for Employee's Torts* .

[b] Policy Reasons for Imposing Liability

Liability based on respondeat superior is founded on policy rather than on any misconduct on the employer's part. The rationale for the doctrine is that an employer's liability should extend beyond the employer's actual or possible control over its employees to include risks inherent in or created by the enterprise, because the employer, rather than the innocent injured party, is best able to spread the risk through prices, rates, or liability insurance [*Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 967, 227 Cal. Rptr. 106, 719 P.2d 676* ; *Hinman v. Westinghouse Elec. Co. (1970) 2 Cal. 3d 956, 959-960, 88 Cal. Rptr. 188, 471 P.2d 988]* . The following three policy reasons underlie imposition of liability under respondeat superior [*Henriksen v. City of Rialto (1993) 20 Cal. App. 4th 1612, 1618, 25 Cal. Rptr. 2d 308]* :

- Preventing recurrence of the tortious conduct;
- Giving greater assurance of compensation for the victim; and
- Ensuring that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury.

[c] Proving Respondeat Superior

For the doctrine of respondeat superior to apply, thus exposing the employer to liability for an employee's tort, the plaintiff must prove that the employee's tortious conduct was committed within the scope of employment [*Spradlin v. Cox (1988) 201 Cal. App. 3d 799, 809, 247 Cal. Rptr. 347]* . A risk arises out of the employment if, in the context of the particular enterprise, an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business [*Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 968, 227 Cal. Rptr. 106, 719 P.2d 676]* . The inquiry should be whether the risk was one that may fairly be regarded as typical or broadly identical to the enterprise undertaken by the employer [*Henriksen v. City of Rialto (1993) 20 Cal. App. 4th 1612, 1618, 25 Cal. Rptr. 2d 308]* . If the plaintiff is injured when the employee has substantially deviated from his or her employment duties, the employer is not liable [*Le Elder v. Rice (1994) 21 Cal. App. 4th 1604, 1607, 26 Cal. Rptr. 2d 749]* . Thus, it is necessary to determine the main purpose of the employee's activity that caused injury to the plaintiff [*Le Elder v. Rice (1994) 21 Cal. App. 4th 1604, 1607, 26 Cal. Rptr. 2d 749]* . However, proof of the employer's authorization of the employee's act is not necessary to show that the act was within the scope of employment [*Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 966 n.1, 227 Cal. Rptr. 106, 719 P.2d 676]* .

Whether an employee's tort was committed within the scope of employment, exposing the employer to tort liability under the doctrine of respondeat superior, is ordinarily a question of fact. It becomes a question of law, however, if the

undisputed facts would not support an inference that the employee was acting within the scope of his or her employment [*Henriksen v. City of Rialto (1993) 20 Cal. App. 4th 1612, 1617, 25 Cal. Rptr. 2d 308]* .

[5] Employer and Independent Contractor

In general, an employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the independent contractor or the contractor's servants [*Walker v. Capistrano Saddle Club (1970) 12 Cal. App. 3d 894, 898, 90 Cal. Rptr. 912* ; *see also* Restatement (Second) of Torts § 409]. There are, however, many exceptions to this rule, such as the "peculiar risk" doctrine. Under this well-established doctrine, a person who engages an independent contractor may be liable for any injuries to others resulting from the contractor's negligence [*see Griesel v. Dart Indus., Inc. (1979) 23 Cal. 3d 578, 585-587, 153 Cal. Rptr. 213, 591 P.2d 503* ; *Torres v. Reardon (1992) 3 Cal. App. 4th 831, 838-839, 5 Cal. Rptr. 2d 52* . The person who employs an independent contractor to do work that the principal should recognize as likely to create, during its progress, a peculiar risk of harm to others unless special precautions are taken, is subject to liability for physical harm caused by the contractor's failure to exercise reasonable care to take these precautions, regardless of whether the principal has provided for these precautions in the contract or otherwise [*Griesel v. Dart Indus., Inc. (1979) 23 Cal. 3d 578, 585, 153 Cal. Rptr. 213, 591 P.2d 503* ; *Torres v. Reardon (1992) 3 Cal. App. 4th 831, 839, 5 Cal. Rptr. 2d 52* ; Restatement (Second) of Torts §§ 413, 416].

California was one of a minority of jurisdictions that expanded the traditional peculiar risk doctrine to permit an employee of an independent contractor to seek recovery from the nonnegligent hirer for injuries caused by the negligence of the contractor [*Privette v. Superior Court (1993) 5 Cal. 4th 689, 696, 21 Cal. Rptr. 2d 72, 854 P.2d 721* ; *see also Woolen v. Aerojet Gen. Corp. (1962) 57 Cal. 2d 407, 410-411, 20 Cal. Rptr. 12, 369 P.2d 708 , overruled, Privette v. Superior Court (1993) 5 Cal. 4th 689* (case that initially expanded doctrine)]. However, the California Supreme Court has reexamined this extension of the doctrine in light of policies advanced by the workers' compensation laws, and concluded that those policies supported precluding employees of negligent independent contractors from recovering damages from the hirer under the peculiar risk doctrine [*Privette v. Superior Court (1993) 5 Cal. 4th 689, 701-702, 21 Cal. Rptr. 2d 72, 854 P.2d 721]* . For further discussion of the peculiar risk doctrine, see Ch. 248, *Employer's Liability for Employee's Torts* .

[6] Principal and Agent

A principal is vicariously liable for the torts of his or her agent in the transaction of the business of the agency [*Civ. Code §§ 2330, 2338*]. An agent is one who represents another person (the principal) in dealings with third persons [*Civ. Code § 2295*]. Agency may encompass an employment relationship and thus an employee may also be an agent [*Estate of Levinthal (1980) 105 Cal. App. 3d 691, 699, 164 Cal. Rptr. 628]* . However, agency and employment are conceptually distinct relationships. An agent works not only for, but in the place of, the principal [*see Civ. Code § 2330*], but an employee remains entirely under the employer's control and direction [*Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d 190, 205-206, 30 Cal. Rptr. 253]* . For further discussion of the liability of a principal for the acts of an agent outside of the employer-employee context, see Ch. 427, *Principal and Agent* .

[7] Partners and Partnerships

All members of a general partnership are jointly and severally liable for the wrongful acts or omissions of a partner [*Corp. Code § 15014*]. General partners in a limited partnership are similarly liable [*Corp. Code § 15643* (repealed effective Jan. 1, 2010); *Corp. Code §§ 15904.03(a), 15904.04(a)* (effective for limited partnerships formed after 2007, for pre-existing limited partnerships electing to be governed by 2008 Act, and for all other limited partnerships on Jan. 1, 2010)]. Limited partners, in contrast, generally are not liable for the wrongs of the partnership beyond their capital contributions [*see Corp. Code § 15632*(repealed effective Jan. 1, 2010); *Corp. Code § 15903.03(a)* (effective for limited partnerships formed after 2007, for pre-existing limited partnerships electing to be governed by 2008 Act, and for all other limited partnerships on Jan. 1, 2010)]. The statutes governing limited partnership liability however, may not be

construed to affect the liability of a limited partner to third parties for the limited partner's participation in tortious conduct [*Corp. Code § 15632(a)* (repealed effective Jan. 1, 2010); *Corp. Code § 15903.03(a)* (effective for limited partnerships formed after 2007, for pre-existing limited partnerships electing to be governed by 2008 Act, and for all other limited partnerships on Jan. 1, 2010)]. For further discussion of tort liability of partners and partnerships, see Ch. 402,*Partnerships: Actions Between General Partners or Partnership and Third Parties* , and Ch. 405, *Partnerships: Actions Between Limited Partners or Partnerships and Third Parties*.

[8] Corporate Officers and Directors

Corporate officers and directors cannot be held vicariously liable for the acts or obligations of their corporation. However, they may be individually liable if they directly authorize or actively participate in wrongful or tortious conduct [*Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 503-504, 229 Cal. Rptr. 456, 723 P.2d 573* ; *Seagate Tech. v. A.J. Kogyo Co. (1990) 219 Cal. App. 3d 696, 701-702, 268 Cal. Rptr. 586* ; *Taylor-Rush v. Multitech Corp. (1990) 217 Cal. App. 3d 103, 113, 265 Cal. Rptr. 672]* , if they breached a duty to a third party as opposed to the corporation, or if they caused physical as opposed to pecuniary harm to a third party's person or property [*Michaelis v. Benavides (1998) 61 Cal. App. 4th 681, 686, 71 Cal. Rptr. 2d 776* (the legal fiction of the corporation was never intended to insulate officers from liability for their own tortious conduct)]. Individual liability has its roots in the law of agency. Directors are considered to be agents of the corporate principal, and, under agency law, an agent is always liable for his or her own torts, regardless of the principal's liability. Director status, therefore, neither immunizes a person from individual liability nor subjects him or her to vicarious liability [*Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 503-505, 229 Cal. Rptr. 456, 723 P.2d 573* ; *Seagate Tech. v. A.J. Kogyo Co. (1990) 219 Cal. App. 3d 696, 702, 268 Cal. Rptr. 586]* .

[9] Trusts and Trustees

A trust is liable for authorized actions of the trustee [*see Prob. Code § 18004*]. A claim based on a tort committed in the course of administration of the trust may be asserted against the trust by proceeding against the trustee in the trustee's representative capacity, whether or not the trustee is personally liable on the claim [*Prob. Code § 18004*]. For further discussion of the liability of trusts and trustees to third parties, see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

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§ 380.132 Joint and Several Liability

[1] Types of Joint Liability

If more than one tortfeasor has proximately caused the plaintiff's indivisible injury, the rule of joint and several liability makes each tortfeasor liablefor the entire amount of the plaintiff's damages [*see American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 586-587, 146 Cal. Rptr. 182, 578 P.2d 899]* . Each tortfeasor is personally liable for the damage sustained, and the injured person may sue one or all of the tortfeasors to obtain recovery for his or her injuries. The fact that one of the tortfeasors is judgment proof does not relieve another tortfeasor from liability for damage that he or she caused [*see American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 587, 146 Cal. Rptr. 182, 578 P.2d 899]* .

Independent tortfeasors not acting in concert are not jointly liable even if their actions unite to produce one injury. Each independent tortfeasor is responsible only for the part of the damage resulting from his or her own acts [*Alhino v. Starr (1980) 112 Cal. App. 3d 158, 175, 169 Cal. Rptr. 136]* .

[2] Effect of Joint Liability

The doctrine of joint and several liability did not change when California adopted the rule of comparative negligence [*see American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 588-590, 146 Cal. Rptr. 182, 578 P.2d 899]* . Thus, a defendant whose negligence is the proximate cause of the plaintiff's injuries is liable to the plaintiff for the full amount of the plaintiff's damages, diminished only in proportion to the amount of negligence attributable to the plaintiff [*American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 590, 146 Cal. Rptr. 182, 578 P.2d 899]* .

However, under Proposition 51 (the Fair Responsibility Act of 1986), in actions for personal injury, property damage, or wrongful death, based on principles of comparative fault, joint tortfeasors are no longer jointly liable for an injured

party's noneconomic damages, such as pain and suffering, but are liable only for their proportionate share of those damages according to their percentage of fault [*see Civ. Code §§ 1431-1431.5*]. Proposition 51 is constitutional [*Evangelatos v. Superior Court (1988) 44 Cal. 3d 1188, 1200-1205, 246 Cal. Rptr. 629, 753 P.2d 585]* , but it does not apply retroactively; that is, it does not apply to causes of action accruing prior to its effective date (June 4, 1986) [*Evangelatos v. Superior Court (1988) 44 Cal. 3d 1188, 1205-1225, 246 Cal. Rptr. 629, 753 P.2d 585]* . For further discussion of Proposition 51 (the Fair Responsibility Act of 1986), see Ch. 300, *Indemnity and Contribution* .

[3] Liability for Damages

[a] Economic Damages

In a negligence action involving multiple tortfeasors each of whom has proximately caused indivisible injury to the plaintiff, each tortfeasor is jointly and severally liable for all of the plaintiff's economic damages that flow from the injury [*see American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 586-588, 146 Cal. Rptr. 182, 578 P.2d 899* ; *see also Civ. Code§ 1431.2(b)(1)*]. The term "economic damages," in this context, means objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, costs of repair or replacement, costs of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities [*Civ. Code § 1431.2(b)(1)*].

[b] Noneconomic Damages

In a negligence action involving multiple tortfeasors each of whom has proximately caused indivisible damage to the plaintiff, the liability of each defendant for noneconomic damages is several only and is not joint [*Civ. Code § 1431.2(a)*]. Each tortfeasor is liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and judgments for noneconomic losses must be made separately [*Civ. Code § 1431.2(a)*]. The term "noneconomic damages," in this context, means subjective, nonmonetary losses, including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation [*Civ. Code § 1431.2(b)(2)*].

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[Reserved]

§§ 380.133[Reserved]

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§ 380.150 Statutes of Limitations

[1] Classified by Nature of Damages

For purposes of statutes of limitations, actions in tort for negligence are classified by the nature of the damage. An action for injury or death founded on ordinary negligence must generally be commenced within two years (one year, prior to January 1, 2003) after the commission of the negligent act [*Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)*; Ch. 345, *Limitation of Actions,*]. A three-year statute of limitations applies to the commencement of an action based on negligent damage to real property or to tangible personal property [*Code Civ. Proc. § 338(b), (c)*]. For further discussion of statutes of limitation, see Ch. 345, *Limitation of Actions* .

Special limitations periods apply to suits brought against a public entity after presenting the required claim to the entity [*Gov. Code § 945.6*; *see also Gov. Code § 945.8* (limitations period for suits against public entities not requiring presentation of claims); *see § 380.151*].

[2] Running and Tolling of Statute

The applicable statute of limitations begins to run when the plaintiff both sustains damage and discovers, or should discover, his or her cause of action [*Budd v. Nixen (1971) 6 Cal. 3d 195, 201-203, 98 Cal. Rptr. 849, 491 P.2d 433* ; *see Kleefeld v. Superior Court (1994) 25 Cal. App. 4th 1680, 1684-1685, 31 Cal. Rptr. 2d 12* (limitations period for action for personal injury and wrongful death as beginning to run when plaintiff suspects wrongdoing on part of defendant)]. The damage must be appreciable and actual harm consisting of more than nominal damages [*Davies v. Krasna (1975) 14 Cal. 3d 502, 514, 121 Cal. Rptr. 705, 535 P.2d 1161* ; *City of San Diego v. United States Gypsum Co. (1994) 30 Cal. App. 4th 575, 582, 35 Cal. Rptr. 2d 876]* . When the plaintiff first suffered damages is a question of fact [*Budd v. Nixen (1971) 6 Cal. 3d 195, 201-203, 98 Cal. Rptr. 849, 491 P.2d 433]* . Counsel drafting a complaint should be careful not to include allegations that a defendant could use to establish that some appreciable and actual harm occurred early enough to start the limitations period running and thus bar plaintiff's action because it was not filed

during that period [*see, e.g., City of San Diego v. United States Gypsum Co. (1994) 30 Cal. App. 4th 575, 583-584, 35 Cal. Rptr. 2d 876]* .

The plaintiff's ignorance of the cause of action or of the identity of the wrongdoer does not toll the statute of limitations [*Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 187, 98 Cal. Rptr. 837, 491 P.2d 421]* , nor does uncertainty as to the amount of damages or the difficulty of proving damages [*Davies v. Krasna (1975) 14 Cal. 3d 502, 514, 121 Cal. Rptr. 705, 535 P.2d 1161]* .

For further discussion of statutes of limitation, see Ch. 345, *Limitation of Actions* .

[3] Special Limitations Periods for Actions Involving Professional Negligence

A plaintiff must commence an action for injury or death against a health care provider that is based on that person's alleged professional negligence by the earlier of either (1) three years after the date of injury or (2) one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury [*Code Civ. Proc. § 340.5*]. However, this statute of limitations has been held unconstitutional as a denial of equal protection to the extent that it provides different accrual dates for minors and adults in medical malpractice actions [*see Torres v. County of Los Angeles (1989) 209 Cal. App. 3d 325, 334, 257 Cal. Rptr. 211]* .

A plaintiff must commence an action against an attorney for a wrongful act or omission (other than actual fraud) arising in the performance of professional services by the earlier of either (1) one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or (2) four years from the date of the wrongful act or omission [*Code Civ. Proc. § 340.6*].

For further discussion of statutes of limitations applicable to actions involving professional negligence, see Ch. 76, *Attorney Professional Liability*, Ch. 345, *Limitation of Actions*, and Ch. 415, *Physicians: Medical Malpractice*.

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§ 380.151 Prerequisite of Submitting Claim to Public Entity Defendant

A plaintiff may not bring a suit for money or damages on certain causes of action against a defendant that is a public entity, unless the plaintiff has first presented a written claim to the entity as required by *Gov. Code § 900 et seq.* and *Gov. Code § 910 et seq.*, and the public entity's board has either acted on the claim or has been deemed to have rejected it [*Gov. Code § 945.4*]. For further discussion of these requirements, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

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§ 380.152 Venue

[1] Type of Injury

In a negligence action for personal injuries, property damage, or wrongful death, venue is appropriate either in the county where the injury occurs or in the county in which any of the defendants resides at the commencement of the action [*Code Civ. Proc. § 395(a)*; *Paesano v. Superior Court (1988) 204 Cal. App. 3d 17, 20, 250 Cal. Rptr. 842]* . This venue rule applies only to negligence actions involving physical injury, and is inapplicable to actions for severe humiliation, anguish, emotional distress, and trauma [*Cubic Corp. v. Superior Court (1986) 186 Cal. App. 3d 622, 625, 231 Cal. Rptr. 18]* . Actions for nonphysical injury must be commenced in the county in which the defendant resides, and the defendant is entitled to a change of venue to this county if the action is commenced elsewhere [*Carruth v. Superior Court (1978) 80 Cal. App. 3d 215, 220, 145 Cal. Rptr. 344* (action for malicious prosecution that also included prayer for damages for emotional distress)].

For further discussion of venue, see Ch. 571, *Venue* .

[2] Corporations

A corporation may be sued in the county where its principal place of business is located or in the county in which liability arises [*Code Civ. Proc. § 395.5*]. In a tort action, liability arises where the injury occurs [*see Mission Imps., Inc. v. Superior Court (1982) 31 Cal. 3d 921, 928-929, 184 Cal. Rptr. 296, 647 P.2d 1075]* . In an action against both corporate and individual defendants, venue is proper for the action as a whole if venue is correct as to any defendant. Thus, a plaintiff may properly choose an individual defendant's residence as the venue for the action even if the corporate defendant is located elsewhere. An individual defendant may compel transfer of the action to the county in which he or she resides if the action is not originally filed there, because venue at the residence of any individual defendant is controlling at the option of that defendant [*Buran Equip. Co. v. Superior Court (1987) 190 Cal. App. 3d 1662, 1666-1667, 236 Cal. Rptr. 171]* . In addition, a defendant may have the action removed from the California courts

to the appropriate federal district court if the action arises under federal law or involves diversity jurisdiction [*28 U.S.C.S. § 1441*; *see* Ch. 265, *Federal Courts: Jurisdiction and Removal*].

[3] Partnerships and Associations

A partnership or association may be sued in the county in which liability arises [*Code Civ. Proc. § 395.5*; *Mosby v. Superior Court (1974) 43 Cal. App. 3d 219, 225, 117 Cal. Rptr. 588]* . In a tort action, liability arises where the injury occurs [*see Mission Imps., Inc. v. Superior Court (1982) 31 Cal. 3d 921, 928-929, 184 Cal. Rptr. 296, 647 P.2d 1075]* . A partnership or association may also be sued in the county of its principal place of business if it has filed the statement provided by statute with the Secretary of State. After filing this statement, a partnership or association must be treated as a corporation for venue purposes [*Code Civ. Proc. § 395.2*; *San Francisco Found. v. Superior Court (1984) 37 Cal. 3d 285, 296, 208 Cal. Rptr. 31, 690 P.2d 1* ; *see § 380.152[2]*].

[4] Actions Against Government Entities

The proper county for trial of an action against the state for death or for injury to persons or personal property is the county in which the death or injury occurred [*Gov. Code § 955.2*; *State of California v. Superior Court (1987) 193 Cal. App. 3d 328, 329-330, 238 Cal. Rptr. 315]* . An action against a city, county, city and county, or local agency for negligent injury to persons or property occurring within that city, county, or city and county, or within the county where the local agency is located, must be tried in that county or city and county, or in the county where that city or local agency is located [*Code Civ. Proc. § 394(a)*; *Delgado v. Superior Court (1977) 74 Cal. App. 3d 560, 562-564, 141 Cal. Rptr. 528]* .

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§ 380.153 Pleading

The essential elements of a cause of action based on negligence may be generally alleged in the complaint [*see Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 513-514, 150 Cal. Rptr. 1, 585 P.2d 851]* . The facts giving rise to the existence of a duty must be pleaded in the complaint; a complaint that does not contain these facts is fatally defective [*see Jacoves v. United Merch. Corp. (1992) 9 Cal. App. 4th 88, 113, 11 Cal. Rptr. 2d 468]* .

The elements of actionable negligence that the plaintiff has the burden of pleading and proving are the following: (1) facts showing a legal duty of care owed by the defendant to the plaintiff or to the class of which the plaintiff is a member, (2) an act or omission by the defendant constitutinga breach of the duty owed the plaintiff, (3) injury and damages to the plaintiff, and (4) the defendant's breach as a proximate cause of the plaintiff's injury and damages [*see Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 513-514, 150 Cal. Rptr. 1, 585 P.2d 851]* .

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33-380 California Forms of Pleading and Practice--Annotated § 380.154

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.154 Prejudgment Interest in Personal Injury Actions

Civ. Code § 3291 permits the plaintiff in an action brought to recover damages for negligently or willfully inflicted personal injuries to claim in the complaint interest on the damages alleged. If the plaintiff makes an offer pursuant to *Code Civ. Proc. § 998*, which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a judgment more favorable than the offer, the judgment must bear interest at the legal rate of 10 percent per annum calculated from the date of the plaintiff's first offer pursuant to *Code Civ. Proc. § 998* that was less than the judgment. The interest accrues until the satisfaction of the judgment [*Civ. Code § 3291*]. *Civ. Code § 3291* does not apply to a public entity, or to a public employee for an act or omission within the scope of employment [*Civ. Code § 3291*].

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33-380 California Forms of Pleading and Practice--Annotated § 380.155

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§ 380.155 Motions for Summary Adjudication Under Code Civ. Proc. § 437c(f)

[1] Matters to Which Motion Applies

A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if that party contends that [*Code Civ. Proc. § 437c(f)(1)*]:

- The cause of action has no merit;
- There is no affirmative defense as to that cause of action;
- There is no merit to an affirmative defense as to any cause of action;
- There is no merit to a claim for punitive damages; or
- One or more defendants either owed or did not owe a duty to the plaintiff.

For purposes of a summary adjudication motion, a cause of action has no merit if one or more of the elements of the cause of action cannot be separately pleaded, or if the defendant establishes an affirmative defense as to that cause of action [*Code Civ. Proc. § 437c(o)*].

A motion for summary adjudication may be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty [*Code Civ. Proc. § 437c(f)(1)*; *see, e.g., Catalano v. Superior Court (2000) 82 Cal. App. 4th 91, 97-98, 97 Cal. Rptr. 2d 842* (summary adjudication not properly granted if adjudication only disposed of some facts relating to punitive damages claim, but did not dispose of entire punitive damages claim)].

If a motion for summary adjudication is granted, at the trial of the action, the cause or causes of action within the action, affirmative defense or defenses, claim for damages, or issue or issues of duty as to which the motion was granted shall be deemed established, and the action must proceed as to the remaining cause or causes of action, affirmative defense or defenses, claim for damages, or issue or issues of duty [*Code Civ. Proc. § 437c(n)(1)*].

In the trial of the action, the fact that a motion for summary adjudication was granted as to one or more causes of action, affirmative defenses, claims for damages, or issues of duty within the action does not bar any cause of action, affirmative defense, claim for damages, or issue of duty as to which summary adjudication either was not sought or was denied [*Code Civ. Proc. § 437c(n)(2)*]. Parties, witnesses, and the court are not permitted to comment to the jury about the grant or denial of a motion for summary adjudication [*Code Civ. Proc. § 437c(n)(3)*].

[2] As Alternative to Motion for Summary Judgment

A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment, and the same procedure applies to a motion for summary adjudication as applies to a motion for summary judgment [*Code Civ. Proc. § 437c(f)(2)*]. A party may not move for summary judgment based on issues asserted in a prior motion for summary adjudication, unless that party establishes to the satisfaction of the court newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion [*Code Civ. Proc. § 437c(f)(2)*]. A "change of law" does not include a later enacted statute without retroactive application [*Code Civ. Proc. § 437c(s)*].

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33-380 California Forms of Pleading and Practice--Annotated §§ 380.156-380.169

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[Reserved]

§§ 380.156[Reserved]

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33-380 California Forms of Pleading and Practice--Annotated § 380.170

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.170 Comparative Negligence (Comparative Fault)

[1] Adoption by *Li* as Replacement for Contributory Negligence

The California Supreme Court established the rule of comparative negligence in this state in the case of *Li v. Yellow Cab* [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226]* . Under the defense of contributory negligence in effect prior to *Li*, a defendant was released from all obligation to compensate an injured plaintiff, even though the defendant's act was also a cause of the injury, if the plaintiff's own negligence or misconduct was a proximate cause of his or her own injury [*see, e.g., Straten v. Spencer (1921) 52 Cal. App. 98, 106-107, 197 P. 540]* . The change to a comparative negligence system did not affect the generalduty to exercise reasonable care for one's own safety, but merely changed the effect of a failure to exercise such care on one's ability to recover from another for the latter's negligence [*see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

[2] Abolition of "Last Clear Chance" Doctrine

The adoption of the doctrine of comparative negligence has abolished the "last clear chance" doctrine in California [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824, 829, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

[3] Willful Misconduct

[a] Before *Li*

Prior to the decision in *Li*, the defense of the plaintiff's contributory negligence was unavailable if the defendant's act was intentional [*Bartosh v. Banning (1967) 251 Cal. App. 2d 378, 385, 59 Cal. Rptr. 382* ; *Lovett v. Hitchcock (1961) 192 Cal. App. 2d 806, 810, 14 Cal. Rptr. 117]* .

[b] Viability After *Li*

Although there is no longer a distinction between "mere" negligence and wanton or reckless misconduct [*see Zavala v. Regents of Univ. of Cal. (1981) 125 Cal. App. 3d 646, 650, 178 Cal. Rptr. 185* ; *Sorensen v. Allred (1980) 112 Cal. App. 3d 717, 725, 169 Cal. Rptr. 441]* , it appears that, under the doctrine of comparative negligence, a defendant who has committed an intentional tort is not entitled to have the plaintiff's recovery reduced because of the plaintiff's negligence [*see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 825-826, 119 Cal. Rptr. 858, 532 P.2d 1226* ; *Allen v. Sundean (1982) 137 Cal. App. 3d 216, 226, 186 Cal. Rptr. 863]* .

[4] Application to Specific Types of Actions

[a] Strict Products Liability

The California Supreme Court has extended the principles of comparative fault to actions based on a theory of strict products liability. In these cases, a plaintiff is entitled to recover damages if he or she has proven that a product defect was a proximate cause of his or her injury, but the recovery must be reduced in proportion to the plaintiff's own contributory negligence [*Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 742, 144 Cal. Rptr. 380, 575 P.2d 1162]* . The comparative fault concept also requires the apportionment of liability if one tortfeasor's liability is based on negligence and the other tortfeasor's liability is based on the strict products liability doctrine [*Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 327-332, 146 Cal. Rptr. 550, 579 P.2d 441]* .

For further discussion of the effect of applying comparative fault principles to strict products liability actions, see Ch. 460, *Products Liability* , and Cotchett & Cartwright, California Products Liability Actions, Chs. 2 and 8 (Matthew Bender).

[b] Insurance Bad Faith

If an insurer raises the affirmative defense of comparative fault, the negligent conduct of the plaintiff can be compared with the bad faith conduct of the insurer [*Patrick v. Maryland Cas. Co. (1990) 217 Cal. App. 3d 1566, 1575, 267 Cal. Rptr. 24]* .

For further discussion of an insurer's duty to act in good faith and related issues, including the defense of comparative fault, see Ch. 308, *Insurance* , and California Torts, Ch. 82 (Matthew Bender).

[5] Computation of Award

[a] "Pure" Form of Comparative Negligence Adopted

Under the "pure" form of comparative negligence adopted by the *California Supreme Court in Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226* , there is no threshold level of fault that a plaintiff must remain below in order to recover damages [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 827-829, 119 Cal. Rptr. 858, 532 P.2d 1226]* . The formula for awarding damages under a pure comparative fault system requires the trier of fact to ascertain whether or not the plaintiff was partially responsible for the injury. If so, the trier of fact must then reduce the total amount of the plaintiff's damages by the proportion or percentage of negligence attributable to the plaintiff [*see Drust v. Drust (1980) 113 Cal. App. 3d 1, 6 n. 1, 169 Cal. Rptr. 750]* , as compared with the fault of all other persons whose conduct contributed to the injury [*see American Motorcyle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 589 n. 2, 146 Cal. Rptr. 182, 578 P.2d 899]* . However, where there is no duty, there can be no comparative liability. For example, a reasonably prudent driver of a vehicle traveling at the posted maximum speed limit in the middle lane of a freeway, at night, and in light traffic during clear weather, has no common law or statutory duty to other drivers and passengers to move his or her vehicle to the right into the next slower lane if another driver approaches from behind in the same lane at a speed in excess of the posted maximum speed limit. Accordingly, such a driver cannot be held comparatively liable for any resulting damage if the speeding vehicle approaching from behind in the same lane collides

into the rear of the law-abiding driver's vehicle [*Monreal v Tobin (1998) 61 Cal. App. 4th 1337, 1351, 72 Cal. Rptr. 2d 168* (five percent comparative fault share reversed because referee erred in finding prudent driver comparatively negligent)].

In a wrongful death action, any award to the plaintiff is properly reduced by the percentage of negligence attributable to the decedent [*Munoz v. Olin(1979) 24 Cal. 3d 629, 631, 156 Cal. Rptr. 727, 596 P.2d 1143]* . Any award to a plaintiff who is a minor must be reduced by the percentage of negligence attributable to the minor [*Wiley v. Southern Pac. Transp. Co. (1990) 220 Cal. App. 3d 177, 194, 269 Cal. Rptr. 240]* . Under *Civ. Code § 3333.2* of the Medical Injury Compensation Reform Act of 1975 (MICRA), the trial court must factor in the plaintiff's comparative fault before, not after, reducing the plaintiff's noneconomic damage award to the $250,000 cap [*McAdory v. Rogers (1989) 215 Cal. App. 3d 1273, 1281, 264 Cal. Rptr. 71]* .

[b] Setoffs

Under the comparative negligence rule, a plaintiff's award is the difference between his or her damages and the portion of those damages caused by the plaintiff's own negligence [*see* *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858, 532 P.2d 1226]* . If the plaintiff has already obtained a settlement from fewer than all defendants, the amount of the settlement is subtracted from the plaintiff's damages after they have been discounted for the plaintiff's negligence [*Lemos v. Eichel (1978) 83 Cal. App. 3d 110, 118, 147 Cal. Rptr. 603]* . Payments under uninsured motorist policies are also subtracted from the plaintiff's damages after the total has been discounted by the plaintiff's negligence [*see* *Waite v. Godfrey (1980) 106 Cal. App. 3d 760, 771-775, 163 Cal. Rptr. 881* ; *see also Ins. Code § 11580.2(e)* (payments under automobile medical payments coverage may be offset against amounts due under uninsured motorist coverage if policy so provides)], as are any payments received from the plaintiff's insurer that are not within the collateral source rule [*Helfend v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 1, 6-14, 84 Cal. Rptr. 173, 465 P.2d 61]* and workers' compensation benefits to the extent that they do not exceed the amount of the employer's proportionate negligence [*see* *Curtis v. State of California ex rel. Dept. of Transportation (Cal App. 5th Dist. 1982) 128 Cal. App. 3d 668, 683*].

An individual plaintiff's award may not be reduced by the fault of a coplaintiff in the absence of pleading and proof of a legal relationship requiring this fault to be imputed to the individual plaintiff [*Lemos v. Eichel (1978) 83 Cal. App. 3d 110, 118, 147 Cal. Rptr. 603]* .

[6] Pleading and Proof

To assert the affirmative defense of comparative negligence, the defendant must plead and prove that the plaintiff was negligent and that the plaintiff's negligence was a proximate cause of the accident and resulting injuries [*see* *Simmons v. Wexler (1979) 94 Cal. App. 3d 1007, 1014, 156 Cal. Rptr. 810]* . The defendant must establish a causal link between the plaintiff's actions and the harm suffered by the plaintiff [*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 1011, 25 Cal. Rptr. 2d 550, 863 P.2d 795* (comparative fault principles not properly invoked if defendant failed to establish causal link between plaintiffs' smoking and their fear of significantly increased risk of cancer)].

Before the advent of comparative negligence, the burden of proof was on the defendant to demonstrate contributory negligence by the plaintiff [*Gyerman v. United States Lines Co. (1972) 7 Cal. 3d 488, 503, 102 Cal. Rptr. 795, 498 P.2d 1043]* . This burden has not changed with the introduction of comparative fault [*Drust v. Drust (1980) 113 Cal. App. 3d 1, 6, 169 Cal. Rptr. 750]* .

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33-380 California Forms of Pleading and Practice--Annotated § 380.171

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§ 380.171 Express Assumption of Risk

[1] Defined

Express assumption of the risk involves an agreement by the plaintiff to assume the risks of a particular activity and to relieve the defendant from liability [*Ferrell v. Southern Nev. Off-Road Enthusiasts, Ltd. (1983) 147 Cal. App. 3d 309, 318, 195 Cal. Rptr. 90]* .

Express assumption of the risk is distinct from implied assumption of the risk, and the special rules regarding a distinction between primary and secondary assumption of the risk do not affect the rules relating to express assumption of the risk [*Allan v. Snow Summit, Inc. (1996) 51 Cal. App. 4th 1358, 1374-1375, 59 Cal. Rptr. 2d 813]* .

[2] Requirements of Release

[a] Clear, Unambiguous, and Explicit Language

Courts will not give effect to a plaintiff's express waiver of a defendant's liability unless the waiver is sufficiently clear, explicit, and comprehensible in each of its essential details [*Ferrell v. Southern Nev. Off-Road Enthusiasts, Ltd. (1983) 147 Cal. App. 3d 309, 318, 195 Cal. Rptr. 90]* . For example, courts will not enforce a release that fails to include in the text exculpatory language that explicitly sets forth to a person untrained in the law the full nature and force of the release [*Hohe v. San Diego Unified Sch. Dist. (1990) 224 Cal. App. 3d 1559, 1565-1566, 274 Cal. Rptr. 647* ; *Ferrell v. Southern Nev. Off-Road Enthusiasts, Ltd. (1983) 147 Cal. App. 3d 309, 319, 195 Cal. Rptr. 90]* . Courts will not generally release a defendant from liability for his or her own negligence unless the release clearly, explicitly, and unambiguously states that the defendant will not be held liable for negligent conduct [*see, e.g.,* *Cohen v. Five Brooks Stable (2008) 159 Cal. App. 4th 1476, 1486-1490, 72 Cal. Rptr. 3d 471* ; *see* [b], *below*].

On the other hand, if a release from liability clearly notifies the prospective releasor, in clear and unambiguous language

understandable to any lay person, of the effect of signing the agreement, it will effectively preclude liability unless the release is against public policy [*see Madison v. Superior Court (1988) 203 Cal. App. 3d 589, 597-600, 250 Cal. Rptr. 299* ; *McAtee v. Newhall Land & Farming Co. (1985) 169 Cal. App. 3d 1031, 1033-1034, 216 Cal. Rptr. 465* ; *see § 380.171[3]*].

Whether a contract provision is clear and unambiguous is a question of law, not of fact [*Madison v. Superior Court (1988) 203 Cal. App. 3d 589, 598, 250 Cal. Rptr. 299]* .

[b] Scope of Release

Whether or not a release bars recovery against a negligent party turns primarily on contractual interpretation; the intent of the parties as expressed in the agreement controls [*Hohe v. San Diego Unified Sch. Dist. (1990) 224 Cal. App. 3d 1559, 1567, 274 Cal. Rptr. 647* ; *see also Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 633, 119 Cal. Rptr. 449, 532 P.2d 97]* . The express terms of the agreement must apply to the particular misconduct of the defendant that is alleged to have caused the injury. Even a document purporting to release the defendant from "all liability" may, in fact, release the defendant only from liability for injuries that arose from risks particular to the activity involved that are obvious, or that might reasonably be foreseen by the party who executed the release [*Bennett v. United States Cycling Fed'n (1987) 193 Cal. App. 3d 1485, 1490-1491, 239 Cal. Rptr. 55]* . Negligence that creates a risk that would not realistically be appreciated by the releasor is not within the scope of the release; whether a given risk is of such a nature is a triable issue of fact [*Bennett v. United States Cycling Fed'n (1987) 193 Cal. App. 3d 1485, 1491, 239 Cal. Rptr. 55]* . However, failure expressly to include the word "negligence" in the release from liability will not render the release unenforceable when it is clear from the language and context of the release that the parties intended that the release cover the defendant's negligence [*Sanchez v. Bally's Total Fitness Corp. (1998) 68 Cal. App. 4th 62, 66-69, 79 Cal. Rptr. 2d 902]* .

It has also been held that if a plaintiff has given a defendant a clear, unambiguous release of all liability for any act of negligence, the release is, by definition, applicable to the defendant's negligent act, whatever that act may have been, and that it is only necessary that the act of negligence that results in injury to the releasor be reasonably related to the object or purpose for which the release was given [*National & Int'l Bhd. of Street Racers, Inc. v. Superior Court (1989) 215 Cal. App. 3d 934, 938, 264 Cal. Rptr. 44* ; *see, e.g., Benedek v. PLC Santa Monica (2002) 104 Cal. App. 4th 1351, 1358, 129 Cal. Rptr. 2d 197* (clear, unambiguous, explicit health club membership provision releasing club from liability for all injuries to member on premises, whether sustained while using exercise equipment or not, applied to member injured while trying to support falling television)]. For example, the release signed by a skydiver who was killed in a jump over the ocean was a sufficiently unequivocal waiver of the liability of defendant skydiving company for two reasons, even though it had been signed several years before, when the skydiving company was operating at an inland location, and it did not refer to jumps over water. First, the passage of time alone after the signing of a release is not dispositive. Second, the release was broad enough in scope to cover the fatal jump because it contained no limitations on time or place, made no reference to exceptions for bodies of water or particular weather conditions, and included in the risks assumed any defects in the dropzone [*Paralift, Inc.v. Superior Court (1994) 23 Cal. App. 4th 748, 755-757, 29 Cal. Rptr. 2d 177]* .

Even if an agreement purporting to excuse a potential defendant from liability for negligence is valid and enforceable, the same release will not generally excuse the defendant from liability for gross negligence. "Gross negligence" includes the failure to exercise even slight care, or an extreme departure from the ordinary standard of conduct [*City of Santa Barbara v. Superior Court (2007) 41 Cal. 4th 747, 766, 62 Cal. Rptr. 3d 527, 161 P.3d 1095]* . While allowing a party to shield itself from liability for negligence may be justified in order to create an incentive for that party to provide a valuable service for the public, exculpation from liability for gross negligence exceeds the protection necessary to create such an incentive and instead removes any obligation to adhere to even a minimal standard of care [*City of Santa Barbara v. Superior Court (2007) 41 Cal. 4th 747, 776-777, 62 Cal. Rptr. 3d 527, 161 P.3d 1095]* . In one case, for example, the California Supreme Court held that an agreement releasing a city from liability for negligence committed

against a developmentally disabled child who was participating in a recreational camp designed for the needs of such children violated public policy and was unenforceable to the extent that it could be used to release the city from liability for gross negligence [*City of Santa Barbara v. Superior Court (2007) 41 Cal. 4th 747, 777, 62 Cal. Rptr. 3d 527, 161 P.3d 1095]* .

[3] Public Policy Limitations of Civ. Code § 1668

Civ. Code § 1668 provides that all contracts that have for their object, directly or indirectly, exempting anyone from responsibility for his or her own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law. A broad release purporting to release a person "from and against any and all liability whatsoever, at common law or otherwise," includes a release from liability for fraud and intentional acts, and thus on its face violates the public policy stated in *Civ. Code § 1668* [*Baker Pac. Corp. v. Suttles (1990) 220 Cal. App. 3d 1148, 1154, 269 Cal. Rptr. 709]* . Based on its plain language, *Civ. Code § 1668* prevents parties from releasing themselves from liability for violations of statutory or regulatory law [*Health Net of Cal., Inc. v. Department of Health Servs. (2003) 113 Cal. App. 4th 224, 227, 6 Cal. Rptr. 3d 235]* .

The California Supreme Court has interpreted *Civ. Code § 1668* to invalidate exculpatory clauses in certain types of agreements as contrary to public policy [*see, e.g.,* *Henrioulle v. Marin Ventures, Inc. (1978) 20 Cal. 3d 512, 518-519, 143 Cal. Rptr. 247, 573 P.2d 465* (exculpatory clause in residential lease); *Tunkl v. Regents of Univ. of Cal. (1963) 60 Cal. 2d 92, 98-101, 32 Cal. Rptr. 33, 383 P.2d 441* (exculpatory clause in hospital admission form)]. The Court has identified the following six criteria for identifying the type of agreement in which an exculpatory clause is invalid as contrary to public policy [*Henrioulle v. MarinVentures, Inc. (1978) 20 Cal. 3d 512, 518, 143 Cal. Rptr. 247, 573 P.2d 465* ; see also *Tunkl v. Regents of Univ. of Cal. (1963) 60 Cal. 2d 92, 98-101, 32 Cal. Rptr. 33, 383 P.2d 441]* :

- The agreement concerns a business of a type generally thought suitable for public regulation.

- The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.

- The party seeking exculpation holds himself or herself out as willing to perform this service for any member of the public who seeks it, or at least any member coming within certain established standards.

- As a result of the essential nature of the service, the party invoking exculpation possesses, in the economic setting of the transaction, a decisive advantage of bargaining strength against any member of the public who seeks his or her services.

- In exercising a superior bargaining power, the party invoking exculpation confronts the public with a standardized adhesion contract of exculpation and makes no provision whereby a purchaser may pay additional fees and obtain protection against negligence.

- As a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his or her agents.

If the agreement meets some or all of these six criteria, the exculpatory clause may be held invalid as contrary to public policy [*see* *Gavin W. v. YMCA of Metro. L.A. (2003) 106 Cal. App. 4th 662, 671-676, 131 Cal. Rptr. 2d 168* (exculpatory clause in contract to provide child care services); *Baker Pac. Corp. v. Suttles (1990) 220 Cal. App. 3d 1148, 1157, 269 Cal. Rptr. 709* (exculpatory clause in employment agreement); *Gardner v. Downtown Porsche Audi (1986) 180 Cal. App. 3d 713, 716-717, 225 Cal. Rptr. 757* (exculpatory clause in automobile repair order form)]. A court is not required to apply these criteria to invalidate a contract purporting to avoid liability for fraud, willful injury, or a violation of law. Such a contract is in violation of the express language of *Civ. Code § 1668* [*Capri v. L.A. Fitness*

International, LLC (2006) 136 Cal. App. 4th 1078, 1084-1085, 39 Cal. Rptr. 3d 425 (negligence per se action based on fitness club's alleged violation of statutes governing swimming pool maintenance was not barred by written release)].

However, if the contract is not invalid under the express language of Section 1668, and does not meet the "public policy" criteria listed above, it is likely that it will be enforced if it is sufficiently clear [*see, e.g., Platzer v. Mammoth Mountain Ski Area (2002) 104 Cal. App. 4th 1253, 1259-1260, 128 Cal. Rptr. 2d 885* (contractual provision releasing ski lift operator from liability for ordinary negligence was valid); *Hulsey v. Elsinore Parachute Ctr. (1985) 168 Cal. App. 3d 333, 339-345, 214 Cal. Rptr. 194* (release from liability signed to participate in high-risk sports activities, such as parachute jumping, is not invalid as contrary to public policy); *see also § 380.171[2]*]. As noted under [2], *above*, however, even if an agreement purporting to excuse a potential defendant from liability for negligence is valid and enforceable, the same release will not generally excuse the defendant from liability for gross negligence [*City of Santa Barbara v. Superior Court (2007) 41 Cal. 4th 747, 777, 62 Cal. Rptr. 3d 527, 161 P.3d 1095]* .

[4] Applicability in Wrongful Death Action

In a wrongful death action, the fact that the decedent signed a release that would otherwise be enforceable will ordinarily preclude any liability to the decedent's heirs. Courts have held, however, that the release as such cannot preclude an action by the heirs; because a wrongful death action belongs not to the decedent but to his or her heirs, a preinjury release or waiver of a right of action executed by the decedent during his or her lifetime is ineffective to bar the action [*Madison v. Superior Court (1988) 203 Cal. App. 3d 589, 596-597, 250 Cal. Rptr. 299* ; *Scroggs v. Coast Cmty. Coll. Dist. (1987) 193 Cal. App. 3d 1399, 1402-1403, 239 Cal. Rptr. 916]* . A wrongful death action is, nevertheless, subject to any defense that could have been maintained against the decedent had he or she lived, including express assumption of the risk through preinjury release [*Saenz v. Whitewater Voyages, Inc. (1990) 226 Cal. App. 3d 758, 763-764, 276 Cal. Rptr. 672]* .

For further discussion, see Ch. 181, *Death and Survival Actions* .

[5] Sales Contracts

Commercial entities are entitled to contract to limit the liability of one to the other, or otherwise allocate the risk of doing business [*Philippine Airlines, Inc. v. McDonnell Douglas Corp. (1987) 189 Cal. App. 3d 234, 237, 234 Cal. Rptr. 423* ; *see also Com. Code §§ 2316(2), (4), 2719*]. Contractual clauses seeking to limit liability are strictly construed, and any ambiguities are resolved against the party seeking to limit its liability for negligence [*Philippine Airlines, Inc. v. McDonnell Douglas Corp. (1987) 189 Cal. App. 3d 234, 237, 234 Cal. Rptr. 423* ; *see Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co. (1988) 200 Cal. App. 3d 1518, 1538-1539, 246 Cal. Rptr. 823* (limitations on liability in commercial contracts as tested under *Com. Code § 2719(3)* rather than under *Civ. Code § 1668*)].

[6] Challenging Validity of Release

[a] Before Acceptance

Prospective parties to a release may test its validity in a declaratory relief action prior to the parties' acceptance of the release and their entry into the underlying transaction [*see, e.g., Baker Pac. Corp. v. Suttles (1990) 220 Cal. App. 3d 1148, 1154-1157, 269 Cal. Rptr. 709]* .

[b] After Acceptance

A preinjury release may be subjected to judicial review in litigation arising after the complaining party has signed and accepted the release, entered into the underlying transaction or service contemplated in the contract, suffered injury, and brought an action for damages against the releasee. The exculpatory language is raised as an affirmative defense and resolved in summary proceedings or at a bifurcated trial [*see, e.g., Madison v. Superior Court (1988) 203 Cal. App. 3d*

589, 250 Cal. Rptr. 299 ; *see also Baker Pac. Corp. v. Suttles (1990) 220 Cal. App. 3d 1148, 269 Cal. Rptr. 709]* .

[7] Agreements By or on Behalf of Minors

Fam. Code § 6710 permits a minor to disaffirm his or her contract, including a release from liability, with certain limited exceptions [*Celli v. Sports Car Club of Am., Inc. (1972) 29 Cal. App. 3d 511, 517, 105 Cal. Rptr. 904* ; *see Fam. Code §§ 6711, 6712, 6750, 6751*]. A minor may disaffirm a release from liability by any act or declaration, and express notice to the other party is unnecessary [*Celli v. Sports Car Club of Am., Inc. (1972) 29 Cal. App. 3d 511, 517, 105 Cal. Rptr. 904* (filing of action is sufficient)].

A minor cannot, however, disaffirm on the basis of his or her minority a release signed by a parent on the minor's behalf [*Hohe v. San Diego Unified Sch. Dist. (1990) 224 Cal. App. 3d 1559, 1564-1565, 274 Cal. Rptr. 647* ; *see Doyle v. Giuliucci (1965) 62 Cal. 2d 606, 609, 43 Cal. Rptr. 697, 401 P.2d 1* (minor couldnot disaffirm parent's agreement to arbitrate disputes arising from contract to provide health care services)].

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 380 NEGLIGENCE
PART II. LEGAL BACKGROUND
F. Affirmative Defenses

33-380 California Forms of Pleading and Practice--Annotated § 380.172

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§ 380.172 Implied Assumption of Risk

[1] Reasonable Versus Unreasonable Criteria Before *Knight v. Jewett*

In *Li v. Yellow Cab Co.* [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226]* , the California Supreme Court stated in dicta that the doctrine of assumption of risk would be merged into the comparative fault scheme in instances in which a plaintiff "unreasonably undertakes to encounter a specific known risk imposed by a defendant's negligence" [*Li v. Yellow Cab. Co. (1975) 13 Cal. 3d 804, 824, 119 Cal. Rptr. 858, 532 P.2d 1226]* . After *Li*, but before the Court's decision in *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* , various court of appeal decisions considered application of the assumption of risk doctrine in light of comparative fault principles but reached conflicting results [*see, e.g.,* *Ordway v. Superior Court (1988) 198 Cal. App. 3d 98, 104, 243 Cal. Rptr. 536* (plaintiff who knowingly and voluntarily assumed risk for any purpose deemed to have agreed to reduce defendant's duty of care); *Segoviano v. Housing Auth. (1983) 143 Cal. App. 3d 162, 164, 169-170, 191 Cal. Rptr. 578* (doctrine of reasonable implied assumption of risk abolished by absolute foreclosure of any right by defendant to contend that plaintiff's reasonable implied assumption of risk can be asserted either as total defense arising from implied waiver by plaintiff or partial defense based on lack of due care by plaintiff)].

In those cases that held that reasonable implied assumption of the risk continued to be a viable defense, the defense extended only to the danger that the injured person knowingly assumed [*Von Beltz v. Stuntman, Inc. (1989) 207 Cal. App. 3d 1467, 1479-1480, 255 Cal. Rptr. 755]* . Hence, the defense did not bar recovery by a plaintiff who was not aware of the dangers that the defendant knew the plaintiff would confront. For example, a defendant who changed the nature of the activity or otherwise altered the risk without the plaintiff's acquiescence was liable for any resulting injuries [*Von Beltz v. Stuntman, Inc. (1989) 207 Cal. App. 3d 1467, 1479-1480, 255 Cal. Rptr. 755]* .

[2] Primary Versus Secondary Assumption of Risk Under *Knight v. Jewett*

[a] Adoption of Duty-Based Approach by Lead Opinion

In *Knight v. Jewett* [*Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* , the California Supreme Court considered the proper application of the doctrine of assumption of risk in light of the adoption of comparative fault principles. In the Court's lead opinion, three justices embraced an approach based on the defendant's duty (using the terminology of "primary" versus "secondary" assumption of risk) [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 314, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (George, J., with Lucas, C.J., and Arabian, J., concurring)]. The Court did not reach a clear majority opinion with regard to the exact rationale behind its decision in the case [*see Tan v. Goddard (1993) 13 Cal. App. 4th 1528, 1534, 17 Cal. Rptr. 2d 89* (concluding that lead opinion was plurality opinion)], and the justices themselves disagree regarding the character of the lead opinion [*compare Knight v. Jewett (1992) 3 Cal. 4th 296, 314 n.6, 321, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (lead opinion reflects "view of the majority"); *with Ford v. Gouin (1992) 3 Cal. 4th 339, 351* (Kennard, J., concurring and dissenting; stating that no single view in *Knight* garnered majority)].

However, according to the lead opinion, appellate decisions misinterpreted the statement in *Li* that assumption of risk is in reality a form of contributory negligence in which "a plaintiff unreasonably undertakes to encounter a specific known risk imposed by a defendant's negligence" [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824, 119 Cal. Rptr. 858, 532 P.2d 1226]* , by suggesting that *Li* contemplated less favorable legal treatment for a plaintiff who reasonably encounters a known risk than for a plaintiff who unreasonably encounters such a risk [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 307, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . The Court observed that nothing in this passage suggests that the assumption of risk doctrine should survive as a total bar to a plaintiff's recovery if that plaintiff acts reasonably in encountering such a risk [*Knight v. Jewett (1992) 3 Cal. 4th 296, 307, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . The Court concluded that terminology distinguishing between reasonable and unreasonable assumption of risk, as a means of differentiating between the cases in which a plaintiff is barred from bringing an action and cases in which a plaintiff is not barred, is more misleading than helpful [*Knight v. Jewett (1992) 3 Cal. 4th 296, 309, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . Instead, the lead opinion interpreted *Li* as drawing a distinction between assumption of risk cases in which the defendant has not breached any legal duty to the plaintiff and those in which the defendant has breached a legal duty [*Knight v. Jewett (1992) 3 Cal. 4th 296, 310, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

According to the lead opinion, the question of the existence and scope of a defendant's duty of care, as affected by the plaintiff's assumption of risk, is a legal question that depends on the nature of the activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court not by the jury [*Knight v. Jewett (1992) 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . However, if a case presents an issue of secondary assumption of risk, or a factual issue of whether the defendant increased the risks inherent in the sport, the jury must be properly instructed as to the scope of the defendant's duty under the assumption of risk doctrine, and the jury must allocate responsibility for the injury by weighing that duty against the plaintiff's acceptance of the risks of thesport [*Vine v. Bear Valley Ski Co. (2004) 118 Cal. App. 4th 577, 582-583, 13 Cal. Rptr. 3d 370* (error to fail to instruct jury on assumption of risk in case involving snowboarding accident); *see also Luna v. Vela (2008) 169 Cal. App. 4th 102, 112, 86 Cal. Rptr. 3d 588* (jury to determine whether homeowner increased risks inherent in volleyball when failing to mark net tie-down lines)].

[b] Primary Assumption of Risk Precludes Liability if No Duty Exists

According to the lead opinion in *Knight v. Jewett* [*Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* , the doctrine of assumption of risk, in light of the adoption of comparative fault principles, consists of two separate defenses: "primary assumption of risk" and "secondary assumption of risk" [*Knight v. Jewett (1992) 3 Cal. 4th 296, 309, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . Primary assumption of risk describes the situation in which the defendant, by virtue of the nature of the activity and the parties' relationship to the activity, owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury; the doctrine operates as a complete bar to the plaintiff's recovery [*Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . In primary assumption of risk cases, a total bar to the plaintiff's cause of action is consistent with comparative fault principles,

because if the defendant has not breached a legal duty of care to the plaintiff, the defendant has not committed any conduct that would warrant the imposition of any liability whatsoever, and thus there is no occasion for invoking comparative fault principles [*Knight v. Jewett (1992) 3 Cal. 4th 296, 310, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

Thus, under this analysis, assumption of risk is an absolute defense only if public policy dictates that the class of which the defendant is a member should owe no duty of care to the class of which the plaintiff is a member in relation to the activity in which they are involved. The inquiry does not begin with the question of whether or not the plaintiff assumed the risk; rather, the inquiry begins and ends with an analysis of whether the defendant owed a duty to the plaintiff, after assessing factors such as those listed in *Rowland v. Christian* [*Harrold v. Rolling J Ranch (1993) 19 Cal. App. 4th 578, 584, 23 Cal. Rptr. 2d 671* ; *see Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* ; *see § 380.30[4][a]*].

[c] Secondary Assumption of Risk Merged Into Comparative Fault Scheme if Duty Exists

"Secondary assumption of risk" involves the situation in which the defendant owes a duty of care to the plaintiff but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty. In this situation, the doctrine is merged into the comparative fault scheme and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties [*Knight v. Jewett (1992) 3 Cal. 4th 296, 315, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . Comparative fault principles preclude automatically placing all of the loss on the plaintiff in such cases because the injury may have been caused by the combined effect of the defendant's and the plaintiff's culpable conduct. To retain assumption of risk as a complete defense in such a case "would fly in the face" of the basic holding of *Li* that a rule placing all of the loss on one of two parties, both of whom are partially at fault for an injury, is inherently inequitable. In the assumption of risk context, it is improper to impose all responsibility on a plaintiff who is aware of a risk of harm created by the defendant's duty but fails to avoid the harm; in such instances, comparative fault principles call for a sharing of the burden of liability [*Knight v. Jewett (1992) 3 Cal. 4th 296, 310-311, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

[3] Consent-Based Analysis by Dissent in *Knight v. Jewett*

In *Knight v. Jewett* [*Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* , three justices declined to adopt the lead opinion's primary/secondary or duty-based assumption of risk analysis, advocating instead a plaintiff's subjective consent approach (referred to variously as a "consent-based" approach or "implied consent" approach), under which the affirmative defense of implied assumption of risk bars an action only if the plaintiff voluntarily accepted a risk with knowledge and appreciation of that risk [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 322-323, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (Panelli, J., concurring and dissenting, with Baxter, J., concurring; adopting and applying analysis set forth by Kennard, J., dissenting)]. This approach, like the lead opinion, rejects the reasonable/unreasonable terminology. The essential distinction under the consent-based analysis is between conduct by the plaintiff that is deliberate, which would bar recovery, and conduct that is merely careless, which would be apportioned under the comparative fault system [*Knight v. Jewett (1992) 3 Cal. 4th 296, 332-333, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (Kennard, J., dissenting)].

[4] Application of Primary Assumption of Risk

[a] Sports Participants

[i] No Duty Unless Intentional Injury, Recklessness, or Increase of Risk Beyond Risk Inherent in Sport

Knight v. Jewett [*Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* involved a plaintiff who was injured by another player during a game of touch football. The lead opinion concluded that the defendant was entitled to summary judgment under "primary assumption of risk" because the defendant did not breach any legal duty owed to the plaintiff. The Court stated that a participant in an active sport breaches a legal duty of care to other

participants only if the participant intentionally injures another player, engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in thesport, or fails to use due care not to increase the risks to a participant over and above those inherent in the sport [*Knight v. Jewett (1992) 3 Cal. 4th 296, 315-316, 320-321, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *Freeman v. Hale(1994) 30 Cal. App. 4th 1388, 1393, 36 Cal. Rptr. 2d 418]* . By eliminating liability for unintended accidents, the primary assumption of risk doctrine ensures that "the fervor of athletic competition will not be chilled by the constant threat of litigation from every misstep, sharp turn and sudden stop" [*Stimson v. Carlson (1992) 11 Cal. App. 4th 1201, 1206, 14 Cal. Rptr. 2d 670]* .

In *Ford v. Gouin* [*Ford v. Gouin (1992) 3 Cal. 4th 339, 11 Cal. Rptr. 2d 30, 834 P.2d 724]* , the companion case to *Knight*, the Court applied these principles to a noncompetitive sport (waterskiing) and refused to hold the defendant ski boat driver liable in the absence of intentional injury or reckless conduct; the Court reasoned that imposition of liability for ordinary negligence (for example, making too sharp a turn) would inhibit the nature of noncompetitive sports that are active and potentially risky [*Ford v. Gouin (1992) 3 Cal. 4th 339, 344-345, 11 Cal. Rptr. 2d 30, 834 P.2d 724]* .

Although a sports participant has a duty not to engage in intentional or reckless conduct that is outside the range of ordinary activity inherent in the sport, this does not mean that all intentional conduct, even if accompanied by an increased risk of injury, is actionable. For example, the California Supreme Court held that the primary assumption of risk doctrine protected a community college from liability to an intercollegiate baseball player who was struck by a pitch, even if the pitch was thrown at the player intentionally. The Court determined that the risk of being hit with a pitch was inherent in the game of baseball, and despite the fact that the conduct was in violation of the official rules of the game, intentionally throwing a pitch at or near a batter was a recognized strategy that was part of the game [*Avila v. Citrus Cmty. Coll. Dist. (2006) 38 Cal. 4th 148, 163-165, 41 Cal. Rptr. 3d 299, 131 P.3d 383]* .

In *Cheong v. Antablin*, the Supreme Court applied the principles of duty and assumption of risk enunciated in *Knight v. Jewett* to collisions between recreational skiers. The Court restated the basic principles of *Knight's* lead opinion as the controlling law, and concluded that the principles of primary assumption of risk barred the action. In response to the plaintiff's argument that a local ordinance imposed a higher duty on the defendant than *Knight* established, the majority refused to consider whether a local ordinance can even modify the duty established by *Knight*, but held that in any event, the local ordinance in question did not modify that duty [*Cheong v. Antablin (1997) 16 Cal. 4th 1063, 1068-1070, 68 Cal. Rptr. 2d 859, 862-863, 946 P.2d 817* ; *see also* *Domenghini v. Evans (1997) 61 Cal. App. 4th 118, 121-122, 70 Cal. Rptr. 2d 917* (classifying cattle roundup as sporting event and barring participant's negligence action on the basis of primary assumption of the risk)].

The primary assumption of risk doctrine protects a party who is pursuing a sport in an appropriate venue from liability for an injury to another party who is engaged in a different activity in the same venue. A plaintiff who knowingly engages in his or her own activity in a particular venue assumes the risk of injury caused by a party who is vigorously engaged in a different activity in the same venue [*Mastro v. Petrick (2001) 93 Cal. App. 4th 83, 90, 112 Cal. Rptr. 2d 185]* . Therefore, the question of whether a defendant in such a case is liable hinges on whether the defendant's conduct was so reckless as to fall outside the range of ordinary activity involved in the defendant's sport [*Mastro v. Petrick (2001) 93 Cal. App. 4th 83, 89-91, 112 Cal. Rptr. 2d 185* (primary assumption of risk protected snowboarder from liability for injury to skier); *but see* *Lackner v. North (2006) 135 Cal. App. 4th 1188, 1200-1201, 37 Cal. Rptr. 3d 863* (triable issue existed as to whether snowboarder acted recklessly by boarding at high rate of speed into flat area used for resting between runs without looking ahead for skiers who were resting)].

The rule that defendants generally have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport, also applies in instances involving spectators. Thus, while foul balls may represent an inherent, and under *Knight*, an assumed risk to spectators attending baseball games, the owners of the team have a duty not to increase those risks [*Lowe v. California League of Prof'l Baseball (1997) 56 Cal. App. 4th 112, 119, 123, 65 Cal. Rptr. 2d 105* (triable issue of fact whether team's mascot cavorting in stands and distracting spectator's attention while baseball game was in progress constituted negligence by increasing inherent risk of spectator being struck by foul

ball)]. Another court of appeal opinion applied the same standard, but concluded that a professional hockey club, the league, and the owners and operators of the hockey arena owed no duty to a spectator to protect her from being hit in the face by a flying puck during pregame warm-ups, because such a risk was inherent in attending a game [*Nemarnik v. Los Angeles Kings Hockey Club (2002) 103 Cal. App. 4th 631, 643, 127 Cal. Rptr. 2d 10]* . The court in that case also concluded that obstructions of view caused by the unpredictable movements of other fans are an inherent and unavoidable part of attending a sporting event [*Nemarnik v. Los Angeles Kings Hockey Club (2002) 103 Cal. App. 4th 631, 638, 127 Cal. Rptr. 2d 10]* .

Under the doctrine of primary assumption of risk, the defendant has a duty not to increase the risks inherent in a sport, not to decrease the risks that are inherently present. For example, a Little League Baseball association had no duty to reduce the risk of injury from being struck by a baseball, a risk inherent in the sport, by providing helmets with face guards, if the face guard was not a part of the normal safety equipment used by the League [*Balthazor v. Little League Baseball, Inc. (1998) 62 Cal. App. 4th 47, 52, 72 Cal. Rptr. 2d 337]* . Similarly, the League had no duty to provide safety glasses to help reduce the risk of players getting hit bya fly ball that they have lost sight of in the glare of the sun, the risk of which is an inherent part of the game of baseball [*West v. Sundown Little League of Stockton, Inc. (2002) 96 Cal. App. 4th 351, 359, 116 Cal. Rptr. 2d 849]* .

[ii] Non-Contact and "Teamless" Sports

The doctrine of primary assumption of the risk is not limited to situations involving contact sports or other sports where the defendant is an opponent. For example, the doctrine is applicable to "teamless" endeavors such as golf or sportfishing, where one participates in close proximity with others similarly engaged [*Shin v. Ahn (2007) 42 Cal. 4th 482, 486, 64 Cal. Rptr. 3d 803, 165 P.3d 581* ; *Mosca v. Lichtenwalter (1997) 58 Cal. App. 4th 551, 554, 68 Cal. Rptr. 2d 58* ; *see also Shelly v. Stepp (1998) 62 Cal. App. 4th 1288, 1294, 73 Cal. Rptr. 2d 323* (primary assumption of risk applied to injury sustained by rider of racehorse at track); *Staten v. Superior Court (1996) 45 Cal. App. 4th 1628, 1634, 53 Cal. Rptr. 2d 657* (applying primary assumption of risk to sport of figure skating)].

The court of appeal has defined a "sport" for primary assumption of risk purposes as an activity done for enjoyment or thrill, requiring physical exertion as well as elements of skill and involving a challenge containing a potential risk of injury [*Record v. Reason (1999) 73 Cal. App. 4th 472, 482, 86 Cal. Rptr. 2d 547* (water "tubing" was sport for primary assumption of risk purposes); *see also Moser v. Ratinoff (2003) 105 Cal. App. 4th 1211, 1220-1221, 130 Cal. Rptr. 2d 198* (noncompetitive, organized bicycle ride on public highway was sport subject to primary assumption of risk analysis)]. Applying this definition, one court of appeal opinion held that taking passengers for a ride around a lake on a boat was not a sport covered by the primary assumption of risk doctrine [*Shannon v. Rhodes (2001) 92 Cal. App. 4th 792, 800-801, 112 Cal. Rptr. 2d 217*]. Similarly, the court of appeal held in another case that primary assumption of risk was not a defense in an action brought against a yacht club by a boat passenger who broke his leg when he jumped off of the boat in an attempt to help in tying off the boat as it was returning to the dock. The court concluded that plaintiff passenger was not engaged in an active sport and any comparison of the negligence of the respective parties was a question of fact still to be resolved [*Kindrich v. Long Beach Yacht Club (2008) 167 Cal. App. 4th 1252, 1255, 1262-1263, 84 Cal. Rptr. 3d 824*].

In another case, by contrast, the court of appeal held that the primary assumption of risk doctrine applies to the activity of riding a personal watercraft, even if the rider is merely a passenger and the watercraft is being operated at a modest speed. The court noted that a personal watercraft is open to the elements, with no hull or cabin, and is designed for high performance, speed, and quick turning maneuvers. In addition, unlike the benign activity of riding in a boat, riding a personal watercraft requires some physical exertion and balance by the passenger to hold onto the operator, or grips or handles, to avoid being thrown off the vessel [*Truong v. Nguyen (2007) 156 Cal. App. 4th 865, 887-891, 67 Cal. Rptr. 3d 675*].

Some activities that could be a "sport" covered by the primary assumption of risk doctrine are not always considered a

covered sport under all circumstances. In one case, for example, the court of appeal held that the act of riding a "scooter" on a residential sidewalk was not necessarily a recreational activity covered by the primary assumption of risk doctrine. The evidence in that case showed only that the plaintiff, an 11-year-old girl, was riding her scooter on a residential sidewalk and fell over a three-inch-high sidewalk separation. In the absence of any evidence that the plaintiff was attempting a tricky maneuver, racing, or riding at any particular speed, the court held that the defendant was not entitled to summary judgment on the grounds of primary assumption of risk [*Childs v. County of Santa Barbara (2004) 115 Cal. App. 4th 64, 70-71, 8 Cal. Rptr. 3d 823]* .

[iii] Injuries Sustained During Practice

For participation to fall within the primary assumption of risk category, the sporting activity need not be part of a competition, but may instead involve practice for the sport [*Shelly v. Stepp (1998) 62 Cal. App. 4th 1288, 1294, 73 Cal. Rptr. 2d 323* (primary assumption of risk applied to injury sustained by exercise rider of racehorse at track); *see also Aaris v. Las Virgenes Unified Sch. Dist. (1998) 64 Cal. App. 4th 1112, 1117-1118, 75 Cal. Rptr. 2d 801* (defense applied to injury sustained during cheerleader practice)]. For discussion of the effect of the primary assumption of risk doctrine on coaches, trainers, or instructors, see *§ 380.172[4][d]*.

[iv] Restricting Nature of Activity in Advance

The extent to which a plaintiff can unilaterally change the nature of a sport in advance through agreeing to participate in a less vigorous activity is not entirely settled. The Supreme Court in *Knight* concluded that a defendant's liability must be based on the nature of the sport itself, rather than on the particular plaintiff's subjective knowledge and expectations [*Knight v. Jewett (1992) 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . Although that approach may be justified in the context of a competitive sport, one court of appeal opinion concluded that a plaintiff's admonition to the defendant to go slow or "take it easy" prior to the plaintiff's riding on a water tube being towed behind a motorboat could not be used to change the inherent nature of the sport of water "tubing." That particular activity, according to the court, is inherently about trying to stay on the tube as it whips quickly through the water [*Record v. Reason (1999) 73 Cal. App. 4th 472, 483-484, 86 Cal. Rptr. 2d 547]* . As noted by the dissent in that case, however, this particular result is subject to criticism on the grounds that these words should have created a factual dispute as to exactly what risk the plaintiff assumed [*Record v. Reason (1999) 73 Cal. App. 4th 472, 490-491, 86 Cal. Rptr. 2d 547]* . The majority's approach in this particular case would carry more weight in the context of a competitive sport, in which there are multiple participants at once. However, in the context of water tubing, the only participant is arguably the person riding the tube, and that person should have been able to define the nature of the activity in advance.

[v] Effect of Violation of Statute or Local Ordinance

In *Cheong v. Antablin* [*Cheong v. Antablin (1997) 16 Cal. 4th 1063, 1066, 68 Cal. Rptr. 2d 859, 946 P.2d 817]* , the Supreme Court determined that a local ordinance, placing a duty on skiers to ski in a safe and reasonable manner, neither altered the rule that a skier owed a duty to fellow skiers not to injure them intentionally or to actrecklessly, nor abrogated the assumption of risk defense. The Court rejected plaintiff's argument that the ordinance imposed a higher duty of care on defendant than that established in *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; although it recognized that *Knight* was a development of the common law of torts, and that the legislature could, within constitutional limits, choose to modify the common law by statute. Whether a local ordinance such as the instant one could modify *Knight* was, according to the Court, less clear. The Court did not decide this question here because it concluded that the ordinance did not modify the *Knight* standard even if it could. According to the Court, the ordinance evinced no clear intent to modify common law assumption of risk principles. The Court rejected plaintiff's argument that the assumption of the risk provisions of the ordinance were intended to protect ski area operators, not skiers, from liability for injuries due to negligent skiing, saying that nothing in the language of the ordinance limited the scope of those provisions in this fashion. Accordingly, it concluded that the ordinance by itself, did not give plaintiff a cause of action [*Cheong v. Antablin (1997) 16 Cal. 4th 1063, 1066-1070, 68 Cal. Rptr. 2d 859, 946 P.2d 817]* .

Plaintiff's second argument was that *Evid. Code § 669(a)* provided him with a cause of action in that (1) defendant violated an ordinance, (2) the violation caused his injury, (3) the ordinance was designed to prevent his injury, and (4) he was one of the class the ordinance was intended to protect. Relying heavily on *Ford v. Gouin* [*Ford v. Gouin (1992) 3 Cal. 4th 339, 11 Cal. Rptr. 2d 30, 834 P.2d 724]* , the plaintiff argued that if a plaintiff who is a participant in an active sport is also a member of the class of persons intended to be protected by a statute, then *Evid. Code § 669* will in turn transform the statute into a legal duty of due care on the defendant, thus abrogating the assumption of risk defense. In response, the Court determined that there was no legal duty in this case because the elements of *Evid. Code § 669(a)* had not been met, specifically, plaintiff had not demonstrated that he was one of the class of persons the ordinance was intended to protect. By stating that skiers assumed the inherent risks of skiing, including the risk of collision and the risk that others would fail to ski within their own ability, the ordinance made clear that petitioner, who was injured in a collision with a fellow skier, was not one of the class of persons for whose protection the ordinance was adopted [*Cheong v. Antablin (1997) 16 Cal. 4th 1063, 1071, 68 Cal. Rptr. 2d 859, 946 P.2d 817]* .

NOTE:

In *Cheong v. Antablin* [*Cheong v. Antablin (1997) 16 Cal. 4th 1063, 68 Cal. Rptr. 2d 859, 946 P.2d 817]* , the California Supreme Court raised two issues of potential significance to an assumption of risk case involving an ordinance or statute, but declined to decide either. The first involved the question of whether an ordinance or statute could impose a higher duty of care on defendant than *Knight* established. The Court acknowledged that *Knight* was a development of the common law of torts, and that the legislature could, within constitutional limits, choose to modify the common law by statute. Whether a local ordinance such as the instant one could modify *Knight* was, according to the Court, less clear. However, the Court did not decide this question here because it concluded that the ordinance did not modify the *Knight* standard even if it could.

The second issue left open by the Court's opinion in *Cheong* was whether the breach of a statutory duty under *Evid. Code § 669(a)* would create tort liability between coparticipants in an active sport despite the *Knight* doctrine of primary assumption of risk. According to the Court, Justice Arabian's opinion in *Ford* implicitly assumed, and the opinions of Justice George, joined by Chief Justice Lucas, and Justice Mosk expressly concluded that, if the four elements of *Evid. Code § 669(a)* were satisfied, the statute created tort liability between coparticipants in an active sport, despite the *Knight* doctrine of primary assumption of risk. A number of the justices who signed the majority opinion in *Cheong* questioned whether this conclusion was correct. Three justices were of the opinion that *Evid. Code § 669(a)* only creates an evidentiary presumption of negligence, while the *Knight* doctrine, when applicable, provides that negligence alone is insufficient to impose tort liability. However, the Court did not resolve the issue because it determined that even if the conclusion was correct, the elements of *Evid. Code § 669(a)* had not been met in this case.

One court of appeal decision adopted the approach that a presumption of negligence under *Evid. Code § 669(a)* could not overcome the primary assumption of risk defense, because the primary assumption of risk defense protects against liability for conduct that is merely negligent [*see* *Distefano v. Forester (2001) 85 Cal. App. 4th 1249, 1272-1274, 102 Cal. Rptr. 2d 813* (violation of standard of care provided by statutes governing off-road driving did not overcome primary assumption of risk defense, because negligence was insufficient basis for tort liability between participants in sport of off-roading)]. However, the court's analysis of the issue was dicta because the court had already held that the plaintiff failed to plead the issue at trial and could not amend his pleading on appeal [*Distefano v. Forester (2001) 85 Cal. App. 4th 1249, 1266, 102 Cal. Rptr. 2d 813]* .

At least one subsequent court of appeal opinion has adopted the conclusion of the *Distefano* court, based primarily on the fact that a majority of the California Supreme Court appeared to agree with that conclusion [*Moser v. Ratinoff (2003) 105 Cal. App. 4th 1211, 1226, 130 Cal. Rptr. 2d 198]* .

Another court of appeal opinion has subsequently held that provisions of the Harbors and Navigation Code governing the use of jet skis did not abrogate the primary assumption of risk doctrine, because the language of the statutes did not demonstrate a clear intent to do so [*Whelihan v. Espinoza (2003) 110 Cal. App. 4th 1566, 1575, 2 Cal. Rptr. 3d 883* ; *see Harb. & Nav. Code §§ 655(a), 655.7(c)*]. The plaintiff in that case was driving a jet ski that collided with another driven by her friend. Although the statutes at issue in that case criminalize reckless or negligent operation of watercraft and were enacted after the Supreme Court's decision in *Knight v. Jewett,* the court concluded that the statutes did not prevent application of the primary assumption of risk doctrine to the active sport of jet skiing, which by its very nature involves skill and challenges that pose a significant risk of injury [*Whelihan v. Espinoza (2003) 110 Cal. App. 4th 1566, 1573-1575, 2 Cal. Rptr. 3d 883]* .

Because the plaintiff specifically pleaded only negligent conduct on the part of the defendant, the court rejected the plaintiff's argument that triable issues remained as to whether the defendant's conduct was so reckless as to be outside the range of the ordinary activity involved in jet skiing [*Whelihan v. Espinoza (2003) 110 Cal. App. 4th 1566, 1575-1576, 2 Cal. Rptr. 3d 883* ; *but see Huff v. Wilkins (2006) 138 Cal. App. 4th 732, 740-743, 746, 41 Cal. Rptr. 3d 754* (although plaintiff did not plead recklessness, summary judgment was inappropriate because defendants did not establish that their violation of statutory requirements governing operation of all-terrain vehicles (ATVs) by minors did not increase risk inherent in off-road ATV activity)]. A subsequent court of appeal opinion has reached the same result under similar facts [*Peart v. Ferro (2004) 119 Cal. App. 4th 60, 78-82, 13 Cal. Rptr. 3d 885* (personal watercraft used by parties was not technically jet ski because it was equipped with seat)].

[vi] Relationship Between Parties

In *Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696* , the Supreme Court held that a participant in an active sport owes only a limited duty of care to coparticipants; a duty to avoid intentional injury or conduct so reckless as to be totally outside the range of ordinary activity involved in the sport. In a case decidedsince *Knight,* the California Supreme Court clarified that the statement in *Knight* that "defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport" did not impose a general duty on defendants not to increase the risk inherent in whatever sporting or recreational activity a plaintiff happens to be pursuing, regardless of the lack of relationship between the parties. On the contrary, *Knight* simply requires courts in each instance to examine the question of duty in light of the nature of the defendant's activities and the relationship of the parties to that activity. Thus, when parties have no relationship, and instead are independent actors separately pursuing their own activities, and there is no policy reason for imposing a duty, a defendant generally has no duty to avoid the risks inherent in a plaintiff's activity [*Parsons v. Crown Disposal Co. (1997) 15 Cal. 4th 456, 482-483, 63 Cal. Rptr. 2d 291, 936 P.2d 70* (garbage company owed no duty to horseback rider to avoid increasing risks inherent in recreational horseback riding)].

The court of appeal applied these principles in a subsequent case in which the plaintiff was skateboarding in the driveway of the defendants' home when he tripped and impaled himself on a pipe inside a planter located in the driveway. Although the plaintiff argued that the defendants increased the risk of his injury by concealing a pipe in the planter, the court of appeal held that the defendants did not owe a duty to the plaintiff not to increase the risks to the plaintiff while he was skateboarding. Unlike a commercial facility that might provide a course for skateboarding, the defendants did not hold out their driveway as an appropriate or safe place to skateboard and did not otherwise have any organized relationship with the plaintiff's skateboarding [*Calhoon v. Lewis (2000) 81 Cal. App. 4th 108, 116-117, 96 Cal. Rptr. 2d 394]* .

[vii] Defining Conduct Outside Range of Ordinary Activity and Risks Inherent in Sport

Conduct that is totally outside the range of ordinary activity involved in a sport, or conduct that increases the risks to a participant beyond those inherent in the sport, does not bar recovery for injuries under the doctrine of primary

assumption of risk [*see § 380.172[4][a][i]*]. Conduct is totally outside the range of ordinary activity involved in a sport, and any risks resulting from that conduct are not inherent to the sport, if the prohibition of the conduct would neither deter vigorous participation in the sport nor otherwise fundamentally alter the nature of the sport [*Freeman v. Hale (1994) 30 Cal. App. 4th 1388, 1394, 36 Cal. Rptr. 2d 418]* .

For example, in a case involving a defendant who collided with plaintiff on the ski slopes, the court held that defendant's consumption of alcohol while skiing was not an activity ordinarily involved in skiing; although collisions are an inherent risk of skiing and therefore defendant did not have a duty to avoid an inadvertent collision with plaintiff, defendant did have a duty to avoid increasing the risk of collision [*Freeman v. Hale (1994) 30 Cal. App. 4th 1388, 1395, 36 Cal. Rptr. 2d 418]* . Furthermore, the court noted that consumption of alcohol could be prohibited during or shortly before skiing without fundamentally altering the nature of the sport; such a prohibition would instead promote vigorous participation in the sport by permitting skiers to ski to the best of their physical abilities [*Freeman v. Hale (1994) 30 Cal. App. 4th 1388, 1396, 36 Cal. Rptr. 2d 418]* . Similarly, the court of appeal in another case held that requiring a snowboarder to watch where he or she is going and not engage in a snowball fight while snowboarding at a high rate of speed would not deter vigorous participation in the sport or otherwise fundamentally alter the nature of snowboarding [*Mammoth Mountain Ski Area v. Graham (2006) 135 Cal. App. 4th 1367, 1373-1374, 38 Cal. Rptr. 3d 422* ; *see also Yancey v. Superior Court (1994) 28 Cal. App. 4th 558, 565-566, 33 Cal. Rptr. 2d 777* (requiring discus throwers to ensure field was clear before throwing would not change nature of sport)]. Another court of appeal decision held that the operation of an all-terrain vehicle by a minor without first complying with reasonable safety regulations governing that operation increased the risks of injury to other operators beyond those inherent in the activity, and that imposing liability for this conduct would not chill vigorous participation in off-road, recreational all-terrain vehicle use [*Huff v. Wilkins (2006) 138 Cal. App. 4th 732, 740-743, 41 Cal. Rptr. 3d 754]* .

In contrast, an owner and operator of a ski resort had no duty to protect plaintiff, an intermediate to advanced level skier, from such risks inherent in the sport as encountering rough terrain, trees, rocks, and ravines. The defendant's general duty not to increase risks to skiers on its property over and above those inherent in the sport did not impose a duty on defendant to change the entire mountain to ensure plaintiff's safety [*O'Donoghue v. Bear Mountain Ski Resort (1994) 30 Cal. App. 4th 188, 192-193, 35 Cal. Rptr. 2d 467* ; *see also Harrold v. Rolling J Ranch (1993) 19 Cal. App. 4th 578, 588, 23 Cal. Rptr. 2d 671* (stable operator as having no duty to provide "ideal" horses that never made sudden movements because imposing duty would put all such facilities out of business); and *Domenghini v. Evans (1997) 61 Cal. App. 4th 118, 121-122, 70 Cal. Rptr. 2d 917* (owners of calf have no duty to protect participant in cattle roundup from injury because kicking and head butting are inherent risks of participation in this activity); *but see Van Dyke v. S.K.I. Ltd. (1998) 67 Cal. App. 4th 1310, 1317, 79 Cal. Rptr. 2d 775* (summary judgment for ski resort operator reversed when plaintiff's evidence supported argument that risk of harm to skiers was increased through dangerous placement of signpost in ski run)].

A golfer who injures another golfer with an an errant golf shot may defend against liability on the basis of the primary assumption of risk doctrine, so long as the defendant golfer did not intend to injure the other golfer or engage in conduct so reckless as to be totally outside the range of ordinary activity involved in the sport [*Shin v. Ahn (2007) 42 Cal. 4th 482, 497, 64 Cal. Rptr. 3d 803, 165 P.3d 581]* . The violation of a golfing rule of etiquette by the defendant does not in and of itself establish a basis for liability [*Shin v. Ahn (2007) 42 Cal. 4th 482, 497, 64 Cal. Rptr. 3d 803, 165 P.3d 581]* . For example, the failure to yell "fore" before hitting a shot, while possibly negligent, is not reckless nor does it alter the inherent risk of being struck by an errant shot [*Dilger v. Moyles (1997) 54 Cal. App. 4th 1452, 1456]* . Similarly, while rules of golfing etiquette state that a player should ensure that no one is standing close by or in a position to be hit when making a shot, the risk of being hit with an errant ball is inherent in the sport and whether the defendant acted recklessly when injuring another golfer with an errant shot depends on the totality of circumstances. While a golfer cannot just ignore other players whenmaking a shot, once having checked to see if others are reasonably likely to be struck and having concluded that it is safe to hit, a golfer who then concentrates on the ball in order to make the shot is not required to break his or her concentration in order to check the field again [*Shin v. Ahn (2007) 42 Cal. 4th 482, 497-500, 64 Cal. Rptr. 3d 803, 165 P.3d 581]* . Factors that may bear on whether a golfer's conduct was

reasonable, negligent, or reckless may include the golfer's skill level, whether topographical conditions obscure the golfer's view, what steps the golfer took to determine whether anyone was within range, and the distance and angle between plaintiff and defendant when the shot was made [*Shin v. Ahn (2007) 42 Cal. 4th 482, 500, 64 Cal. Rptr. 3d 803, 165 P.3d 581]* .

An inherent risk of harm may exist despite the presence of safety measures. The question whether a sport can be made safer if certain techniques are used bears on the standard of care, and is a question that is reached only if the threshold question of duty is resolved against the defendant. For example, a sportfisherman whose fishing line became entangled in kelp and slingshotted over the boat rail injuring plaintiff, owed no duty to plaintiff even though the danger could have been minimized if specific techniques were used to free the line [*Mosca v. Lichtenwalter (1997) 58 Cal. App. 4th 551, 554, 68 Cal. Rptr. 2d 58]* .

[b] Coaches, Trainers, Instructors, or Persons in Control of Activity

Similar to the duty owed by participants in competitive sports, coaches, trainers, and instructors owe a limited duty of care to those they instruct not to increase the risks inherent in learning the particular sport [*Rodrigo v. Koryo Martial Arts (2002) 100 Cal. App. 4th 946, 956, 961, 122 Cal. Rptr. 2d 832* (tae kwon do instructor did not increase risk of sport by having students wait in line to perform kick, even if inadequate supervision allowed one student to accidentally kick another while waiting in line)]. Generally, determining liability based on the defendant's status as an instructor hinges on the facts surrounding the participants' levels of experience and/or their relationships to one another in the activity undertaken, rather than merely the labels given to the participants [*Regents of Univ. of Cal. v. Superior Court (1996) 41 Cal. App. 4th 1040, 1046, 48 Cal. Rptr. 2d 922]* . Moreover, a student's subjective expectation that he or she would not be injured during the activity is irrelevant to application of the primary assumption of risk doctrine in this context. Instead, the scope of the instructor's duty is determined by the nature of the sport and the parties' relationship to the sport and to each other [*Rodrigo v. Koryo Martial Arts (2002) 100 Cal. App. 4th 946, 957-959, 122 Cal. Rptr. 2d 832]* .

Therefore, the primary assumption of risk doctrine was successfully invoked in a case in which a student in a rock climbing class was killed in a fall when his supporting ropes came free during a rock climbing exercise. In that particular case, the court concluded that the student had not been taken beyond his level of experience or capability during the activity that lead to the fall, and that the risk of such a fall was inherent in the sport [*Regents of Univ. of Cal. v. Superior Court (1996) 41 Cal. App. 4th 1040, 1046-1047, 48 Cal. Rptr. 2d 922]* . In another case, primary assumption of risk was a bar to recovery against the employer of the instructors of a noncontact football class when a participant was injured in an unintentional collision with another player, since the instructors did nothing to increase the dangers inherent in the game [*Fortier v. Los Rios Cmty. Coll. Dist. (1996) 45 Cal. App. 4th 430, 436-439, 52 Cal. Rptr. 2d 812]* .

The mere fact that a student participant may have, in hindsight, been pushed beyond his or her capabilities, or required to perform without adequate instruction, will not preclude application of the primary assumption of risk doctrine, at least absent reckless conduct that is totally outside the range of ordinary activity involved in teaching or coaching or an intent to injure by the instructor [*Kahn v. East Side Union High Sch. Dist. (2003) 31 Cal. 4th 990, 1011, 4 Cal. Rptr. 3d 103, 75 P.3d 30* ; *Hamilton v. Martinelli & Assocs. (2003) 110 Cal. App. 4th 1012, 1022-1024, 2 Cal. Rptr. 3d 168* (trainer at required self-defense training course for probation officer employed at youth detention facility not liable for injuring officer during training maneuver); *Bushnell v. Japanese-Am. Religious & Cultural Ctr. (1996) 43 Cal. App. 4th 525, 531-532, 50 Cal. Rptr. 2d 671* (primary assumption of risk precluded liability to student injured during judo instruction); *see also Lupash v. City of Seal Beach (1999) 75 Cal. App. 4th 1428, 1439-1441, 89 Cal. Rptr. 2d 920* (coach's urging tired lifeguard student to continue was normal in youth sports and did not constitute recklessness or show intent to cause injury)]. In one case, for example, the California Supreme Court held that a high school swimming coach and a school district were not entitled to summary judgment because there were triable issues of fact as to whether the coach was reckless in requiring the plaintiff, a 14-year-old swimmer, to dive into a shallow racing pool

without adequate instruction. The plaintiff, who hit the bottom of the pool while performing the dive, presented evidence that she had not received any instruction from her coach on how to perform the dive safely, even though the dive was considered one of the riskiest maneuvers in the sport. She also presented evidence that the coach knew that she had a deep-seated fear of performing the dive, had previously promised her she would not have to make the dive, and had waited until the beginning of a competitive meet to inform her that she had the choice of either making the dive or not competing with the team [*Kahn v. East Side Union High Sch. Dist. (2003) 31 Cal. 4th 990, 1011-1013, 4 Cal. Rptr. 3d 103, 75 P.3d 30]* .

In another case, by contrast, primary assumption of risk was successfully invoked by a school district to defend against liability for an arm injury sustained by a student during supervised wrestling practice while engaged in a maneuver with the instructor. The court held that the risk of such an injury was inherent in the sport of wrestling, and the fact that the injury was sustained while practicing a maneuver with the instructor, who may have pushed the student beyond his capabilities, did not remove the risk from that which was to be normally anticipated in the activity [*Lilley v. Elk Grove Unified Sch. Dist. (1998) 68 Cal. App. 4th 939, 943-944, 80 Cal. Rptr. 2d 638* ; *see also Kane v. National Ski Patrol Sys., Inc. (2001) 88 Cal. App. 4th 204, 214, 105 Cal. Rptr. 2d 600* (ski instructor's assessment errors in evaluating skill level of students or difficulty of conditions of terrain did not rise to level of recklessness sufficient to overcome primary assumption of risk doctrine)].

However, if imposition of a duty of care would not fundamentally alter the nature of the sporting activity, the primary assumption of risk defense does not apply. In onecase, for example, a seventh-grade student in a physical education golf class was inadvertently hit in the face by a golf club swung by another student. The student sued the instructor and the school district, alleging negligent supervision, and the court of appeal held that the primary assumption of risk doctrine did not apply. The court concluded that being hit in the head by a golf club was not an inherent risk of the game of golf and that imposing a prudent person duty of care on the defendants would not fundamentally alter the game of golf, chill vigorous participation in the sport, or chill a coach's ability to challenge student athletes to push themselves [*Hemady v. Long Beach Unified School Dist. (2006) 143 Cal. App. 4th 566, 576-579, 49 Cal. Rptr. 3d 464]* .

A coach, trainer, or instructor is not an insurer, and a student must exercise due care for his or her own safety by noticing that which is obvious, and by asking appropriate questions [*Tan v. Goddard (1993) 13 Cal. App. 4th 1528, 1534-1535, 17 Cal. Rptr. 2d 89* ; *see also Ferrari v. Grand Canyon Dories (1995) 32 Cal. App. 4th 248, 253-257, 38 Cal. Rptr. 2d 65* (summary judgment for defendant river rafting company upheld on basis of primary assumption of risk in suit brought by customer injured while rafting with guide)]. Thus, even when primary assumption of risk may not apply, secondary assumption of risk may apply if the student's voluntary action in encountering a danger caused by the coach's, trainer's, or instructor's breach of duty is a cause of the student's injury [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 310, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* .

Application of secondary assumption of risk principles to determine the liability of instructors and coaches is proper when the instructor or coach fails to provide a safe environment in which to perform the activity without unnecessary risk [*see Bushnell v. Japanese-Am. Religious & Cultural Ctr. (1996) 43 Cal. App. 4th 525, 532-534, 50 Cal. Rptr. 2d 671]* . For example, a student at a jockey training school who was injured when the horse he was riding fell was not barred from recovering from the school and one of its trainers. The trainer knew that the horse had injured its foot and was not walking normally, but nevertheless instructed the student to ride the horse on a rocky track. Summary judgment for the school and the trainer was reversed because there was a triable issue regarding whether the trainer had breached his duty to ensure that the horses he assigned the student to ride were reasonably safe to ride under the conditions the trainer prescribed [*Tan v. Goddard (1993) 13 Cal. App. 4th 1528, 1531, 1534-1535, 17 Cal. Rptr. 2d 89* ; *see also Giardino v. Brown (2002) 98 Cal. App. 4th 820, 834, 120 Cal. Rptr. 2d 77* (company that provided riding horses to Girl Scout camp owed duty not to knowingly or without due care provide horses inappropriate for beginning riders at children's camp, and triable issue existed as to whether defendant breached duty)].

Similarly, secondary assumption of risk applied in a case involving an experienced horse show competitor who was

injured while practicing jumps at a riding club. An instructor at the club raised the height of the jumps without lengthening the distance between obstacles; when the plaintiff followed the instructor's directions to ride through the course in a reverse direction, her horse landed too close to an obstacle, knocked it down, and popped up into the air, causing her to lose her balance and fall. The plaintiff was entitled to have the trier of fact consider comparative fault principles, because the instructor (and the riding club that employed her) had breached their duty to plaintiff to ensure that the jumps were not beyond the capacity of horse and rider [*Galardi v. Seahorse Riding Club (1993) 16 Cal. App. 4th 817, 820, 822-823, 20 Cal. Rptr. 2d 270]* .

A duty of care to participants similar to that imposed on a coach, trainer, or instructor also applies to others who are not participants or proprietors, but who are in control of an athletic or sporting activity. These persons have a duty to the participants not to increase the risks inherent in the activity; for example, they have a duty not to supply faulty equipment [*Bjork v. Mason (2000) 77 Cal. App. 4th 544, 552-556, 92 Cal. Rptr. 2d 49* (general negligence rules apply to providing equipment and triable issue of fact existed as to whether defendant owed duty not to provide defective rope used in water tubing); *see Saffro v. Elite Racing, Inc. (2002) 98 Cal. App. 4th 173, 179, 119 Cal. Rptr. 2d 497* (organizers of marathon have duty to runners to provide adequate water and electrolyte fluids along 26-mile course)], as well as a duty not to provide equipment designed in such a way as to increase the risks inherent in the sport [*Sanchez v. Hillerich & Bradsby Co. (2002) 104 Cal. App. 4th 703, 715, 128 Cal. Rptr. 2d 529* (particular baseball bat design substantially increased risk that pitcher would be hit by line drive)]. Similarly, the primary assumption of risk doctrine will not insulate an equipment manufacturer from liability for supplying defective equipment [*Ford v. Polaris Indus., Inc. (2006) 139 Cal. App. 4th 755, 770-775, 43 Cal. Rptr. 3d 215* (jet ski manufacturer could be liable for defective design); *Bunch v. Hoffinger Indus., Inc. (2004) 123 Cal. App. 4th 1278, 1300, 20 Cal. Rptr. 3d 780* (manufacturer of swimming pool liner not shielded from liability for failing to warn of hazards of diving into shallow pool)].

A person is not a coparticipant if he or she is merely observing and not actively engaged in the activity [*Wattenbarger v. Cincinnati Reds, Inc. (1994) 28 Cal. App. 4th 746, 754 & n.6 , cf. Parsons v. Crown Disposal Co. (1997) 15 Cal. 4th 456, 481-483, 63 Cal. Rptr. 2d 291, 936 P.2d 70* (absent relationship between parties or other policy reason for imposing duty, opinion in *Knight* does not impose on defendant general duty to avoid increasing risksinherent in plaintiff's activity when defendant is not participating in activity in which plaintiff is engaging)]. Thus, employees of a major-league baseball team ata tryout camp did not become coparticipants by deciding what would be done and when, determining who would play what positions and for how long, supplying the equipment, and eliminating players with injuries from participating further in the tryout [*Wattenbarger v. Cincinnati Reds, Inc. (1994) 28 Cal. App. 4th 746, 754, 33 Cal. Rptr. 2d 732]* .

The primary assumption of risk doctrine has been applied to injuries sustained by minors participating in sports activities under the supervision of adult instructors. [*see, e.g., Aaris v. Las Virgenes Unified Sch. Dist. (1998) 64 Cal. App. 4th 1112, 1115-1118, 75 Cal. Rptr. 2d 801]* . It would seem anomalous to apply the primary assumption of risk doctrine to preclude a plaintiff who is a minor from recovering for an injury, when the same minor would have the right to disaffirm an express release from liability signed before the injury [*see Fam. Code § 6710*]. However, since parents are oftenrequired to sign a release on behalf of a child who is a minor before the child may engage in many organized sports activities, it should be noted that a minor may not disaffirm on the grounds of minority an express assumption of risk signed by a parent [*see Aaris v. Las Virgenes Unified Sch. Dist. (1998) 64 Cal. App. 4th 1112, 1120, 75 Cal. Rptr. 2d 801* (release signed by parent barred recovery for injury to minor sustained during cheerleader practice when, under particular facts, application of primary assumption of risk doctrine resulted in conclusion that school had violated no duty of care); *Hohe v. San Diego Unified Sch. Dist. (1990) 224 Cal. App. 3d 1559, 1565, 274 Cal. Rptr. 647* ; *see also § 380.171[7]*].

A coach or other person in charge of an activity does not necessarily owe a duty of care to protect third parties from injury caused by sporting participants under the instruction of that coach. In one case, for example, the coach of a high school snowboarding team had no duty to protect an unaffiliated skier from the inherent risk of a collision with a member of the coach's team. The coach had told his team members to warm up "slow and easy" and meet him at a

specified part of the ski run, and he did nothing to increase the risks inherent in the activity. The snowboarding team member who had the collision was an experienced snowboarder with no history of reckless snowboarding. The mere fact that the coach was not personally supervising the students at the time of the collision did not support a finding that the coach owed that skier a duty of care [*Lackner v. North (2006) 135 Cal. App. 4th 1188, 1205-1207, 37 Cal. Rptr. 3d 863]* .

[c] Application to Non-Sporting Activities

The primary assumption of risk doctrine, as articulated in *Knight* and subsequent cases, is not limited in its application to cases involving sporting activities. The doctrine may be applied, on a case-by-case basis, to other activities in which conditions or conduct that otherwise might be viewed as dangerous are an integral part of the activity [*Saville v. Sierra Coll. (2005) 133 Cal. App. 4th 857, 867, 871, 36 Cal. Rptr. 3d 515]* . For example, the firefighter's rule discussed in *§ 380.173* is one application of the assumption of risk doctrine outside of the sports context.

As another example, the primary assumption of risk doctrine was applied in a case in which a student in a community college police officer training class was injured while participating in training exercises demonstrating police officer arrest and control maneuvers. The court of appeal noted that the risk of injury was inherent in the physically demanding maneuvers and that the instructors had no duty to eliminate all risk of injury to the students, because doing so would invariably chill vigorous participation in the training exercises [*Saville v. Sierra Coll. (2005) 133 Cal. App. 4th 857, 868-869*].

Similarly, fitness training under the guidance of a personal trainer is a physical activity involving an element of risk or danger to which the primary assumption of risk doctrine may be applied [*Rostai v. Neste Enters. (2006) 138 Cal. App. 4th 326, 333, 41 Cal. Rptr. 3d 411]* . The risks of injury inherent in fitness training may include injury to the obvious muscles, such as those in the legs and arms, but also to less obvious areas, such as the heart. For example, a personal trainer successfully defended on the basis of primary assumption of risk in a case in which a client suffered a heart attack due to overexertion during his first workout with the trainer. Although the client argued that the primary assumption of risk doctrine did not apply to the activity, the court disagreed, and the court concluded that the trainer did nothing more than push the client beyond his comfort level, which was inherent in the training regimen and consistent with the goals of the activity [*Rostai v. Neste Enters. (2006) 138 Cal. App. 4th 326, 333-334, 41 Cal. Rptr. 3d 411]* .

In another case, primary assumption of risk was a defense when plaintiff was injured by co-participants in a "product toss" at a skateboarding competition sponsored by a skateboard store. In this particular product toss, professional skateboarders who had been performing at the event in the store's parking lot threw a skateboard deck (a skateboard without wheels or other hardware) into a crowd of fans located in a designated area, who were to compete with each other to gain possession of the board. Plaintiff, who was a willing participant, initially caught the board, but eventually fell to the ground and was injured by other participants, some of whom fell on top of him. Concluding that primary assumption of risk was a complete defense to plaintiff's negligence suit against the store, the court of appeal noted that the product toss had aspects of a competitive sporting activity and the inherent risk of injury from participating was self-evident, despite plaintiff's claim that he personally did not appreciate the risk of injury [*McGarry v. Sax (2008) 158 Cal. App. 4th 983, 1000, 70 Cal. Rptr. 3d 519*].

Conversely, in another case, the court of appeal held that the primary assumption of risk doctrine provided a complete defense to the possessors of land upon which a "Burning Man" festival was held when a participant tripped and fell after voluntarily entering the aftermath of a large, man-shaped bonfire. An experienced participant in the festival, plaintiff walked into the remnants of the large fire in order to ceremoniously burn a photograph of a recently deceased friend. The court held that plaintiff was aware of the risks inherent in walking into the remnants of the fire, which was still actively burning in spots, and that the risk of falling and being burned was inherent, obvious, and necessary to the event [*Beninati v. Black Rock City, LLC (2009) 175 Cal. App. 4th 650, 658-659, 96 Cal. Rptr. 3d 105*]. The fact that plaintiff could not see beneath the flames and ash that covered the ground did not render the risk of tripping less

obvious. The court also concluded that plaintiff had failed to provide any evidence that defendant had done anything to increase the risk of harm inherent in the activity [*Beninati v. Black Rock City, LLC (2009) 175 Cal. App. 4th 650, 660-661, 96 Cal. Rptr. 3d 105*].

By comparison, the court of appeal held that the primary assumption of risk defense did not apply to an injury sustained by an adult education student taking a truck driving training course who was injured when loading a flatbed truck without supervision by an instructor. The court of appeal first rejected the school district's contention that the activity was inherently dangerous as a matter of law, then concluded that imposing a duty of care to supervise would not impermissibly chill participation in that particular activity. To the contrary, the court concluded that public policy favored requiring proper instruction and supervision when inexperienced students are asked to load flatbed trucks [*Patterson v. Sacramento City Unified School Dist. (2007) 155 Cal. App. 4th 821, 840-842, 66 Cal. Rptr. 3d 337]* .

[5] Application of Secondary Assumption of Risk if Duty of Care Exists

In a case in which the plaintiff, a tenant in the defendant's apartment complex, slipped and fell on a sloping lawn near his apartment that both he and thedefendant knew was hazardous because other people had previously slipped and fallen there, the court applied the duty analysis of the lead opinion in *Knight v. Jewett (1992) 3 Cal. 4th 296, 309, 11 Cal. Rptr. 2d 2, 834 P.2d 696* and held that the case fell into the "secondary assumption of risk" category in which comparative negligence principlesdetermine the relative fault of the parties. The court observed that the evidence showed, and the jury found, that the defendant had a duty of care to the plaintiff to eliminate dangerous conditions on its property, that the defendant breached that duty by maintaining the sloping lawn despite reports of earlier accidents, and that by walking across the lawn the plaintiff knowingly proceeded to encounter the risk created by the defendant [*Curties v. Hill Top Developers, Inc. (1993) 14 Cal. App. 4th 1651, 1656, 18 Cal. Rptr. 2d 445]* .

Similarly, a case in which a firefighter fell on wet steps while conducting a fire safety inspection of a public housing authority's apartment building was held to be a "secondary assumption of risk" case. The court held that the housing authority had a duty to tenants and visitors to maintain its premises in reasonably safe condition, and therefore a jury must decide whether the authority had breached that duty by not installing skid-resistant treads and by leaving the stairs wet and slippery. The plaintiff was not automatically barred from recovering because he chose to traverse the wet steps, but this fact could be considered by the jury in determining comparative fault [*Donohue v. San Francisco Hous. Auth. (1993) 16 Cal. App. 4th 658, 665-666, 20 Cal. Rptr. 2d 148]* .

Although the owner of a golf course has a duty to provide a reasonably safe course and not increase the risk inherent in golfing, the owner may be entitled to summary judgment on the basis of primary assumption of risk in an action alleging negligent course design, if the court finds as a matter of law that the design of the course did not increase the risks inherent in the sport [*see* *American Golf Corp. v. Superior Court (2000) 79 Cal. App. 4th 30, 38-39, 93 Cal. Rptr. 2d 683* (no triable issue of fact as to whether construction and placement of yardage markers increased risk of getting struck with errant shot)]. However, if a triable issue of fact exists as to whether the design of the course violated the duty to provide a reasonably safe golf course, secondary assumption of risk principles may govern the action, and summary judgment would be inappropriate [*see* *Morgan v. FUJI Country USA, Inc. (1995) 34 Cal. App. 4th 127, 134, 40 Cal. Rptr. 2d 249* (plaintiff alleged that golf course owner had breached duty of care by not reasonably protecting golfers teeing off on one hole from being hit by golf balls from adjacent hole)].

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 380 NEGLIGENCE
PART II. LEGAL BACKGROUND
F. Affirmative Defenses

33-380 California Forms of Pleading and Practice--Annotated § 380.173

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.173 Firefighter's Rule

[1] No Recovery by Firefighter or Public Safety Officer for Negligence Necessitating Presence

The firefighter's rule provides that a person who has started a fire is not liable for injuries sustained by a firefighter who is summoned to fight the fire [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 309-310 n.5, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . The firefighter's rule also is applicable to police officers and bars their recovery for injuries incurred as a result of conduct thatnecessitated their presence at the scene [*Walters v. Sloan (1977) 20 Cal. 3d 199, 202, 142 Cal. Rptr. 152, 571 P.2d 609* ; *Gibb v. Stetson (1988) 199 Cal. App. 3d 1008, 1010 n.2, 245 Cal. Rptr. 283]* .

Courts have extended application of the firefighter's rule to public safety officers other than firefighters and police officers. For example, the rule has been applied to publicly-employed lifeguards, because the only discernible difference between firefighters and lifeguards is that they respond to different types of hazards and emergencies [*City of Oceanside v. Superior Court (2000) 81 Cal. App. 4th 269, 279-280, 96 Cal. Rptr. 2d 621]* . In addition, the firefighter's rule applies not only to the risk of injury while responding to an emergency situation, but extends to apply to the risk of injury while training to respond to emergency situations [*Hamilton v. Martinelli & Assocs. (2003) 110 Cal. App. 4th 1012, 1026, 2 Cal. Rptr. 3d 168* (trainer at required self-defense training course for probation officer employed at youth detention facility not liable for injuring officer during training maneuver)].

The rule has also been extended to veterinarians and their assistants who are attacked or bitten by animals receiving care and treatment while under their control [*Cohen v. McIntyre (1993) 16 Cal. App. 4th 650, 655, 20 Cal. Rptr. 2d 143* ; *Nelson v. Hall (1985) 165 Cal. App. 3d 709, 714, 211 Cal. Rptr. 668]* . However, the California Supreme Court has noted that cases applying the rule to veterinarians and their assistants are on shaky ground if they are based on the plaintiff's subjective acceptance of the foreseeable occupational hazard of dog bites. Such an application of the rule may be sound only if it is based on defendant's relationship with plaintiff, and defendant's conduct in entrusting an animal to plaintiff's professional care and control [*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 545, 34 Cal. Rptr.*

2d 630, 882 P.2d 347 ; *see also Davis v. Gaschler (1992) 11 Cal. App. 4th 1392, 1401, 14 Cal. Rptr. 2d 679* ("veterinarian's rule" not applicable to professional dog breeder and handler bitten while acting as "Good Samaritan" in helping injured dog)].

In one case, for example, the California Supreme Court held that the assumption of risk doctrine is a defense to the imposition of strict liability under the dog bite statute if a kennel worker is bitten by a dog under the kennel's care. The Court recognized that the kennel was hired by the dog's owner to take careof the dog while the owner was away, which included taking the necessary steps and precautions to avoid being bitten or otherwise injured by the dog [*Priebe v. Nelson (2006) 39 Cal. 4th 1112, 1130-1132, 47 Cal. Rptr. 3d 553, 140 P.3d 848* ; *see Civ. Code § 3342* (dog bite statute)].

At least one court of appeal opinion has applied this general rule in a case involving, not a veterinarian, but the assistant of a professional shark handler who was bitten by defendant's shark while being employed to move the shark. The court of appeal analogized the situation to that of the veterinarian and concluded that defendant owed no duty to protect a professional shark handler or his or her crew from the very danger defendant employed the handler to confront [*Rosenbloom v. Hanour Corp. (1998) 66 Cal. App. 4th 1477, 1480-1481 & n.4* , (noting that plaintiff's subjective appreciation of risk was irrelevant)].

Similarly, the firefighter's rule has been applied to private tow truck drivers whose duty it is to help motorists in cases of mechanical breakdown. An auto club tow truck driver's contract-based obligation, through amotorists' auto club membership, to help the motorist in case of mechanical breakdown, along with compelling policy considerations, warranted the conclusion, in at least one case, that a motorist owed no duty to a tow truck driver to keep his or her car in good mechanical condition [*Dyer v. Superior Court (1997) 56 Cal. App. 4th 61, 69, 65 Cal. Rptr. 2d 85]* .

The firefighter's rule is not actually a separate concept, but rather is an example of the application of the primary versus secondary assumption of risk doctrine set forth in *Knight v. Jewett (1992) 3 Cal. 4th 296, 313-314, 11 Cal. Rptr. 2d 2, 834 P.2d 696* : a legal determination of whether, based on the nature of the activity involved and the relationship of the parties to that activity, defendant owed plaintiff a duty of care [*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 538, 34 Cal. Rptr. 2d 630, 882 P.2d 347* ; *see § 380.172[2][b]*]. The proper basis for the rule is not, as had been held before *Knight,* plaintiff's voluntary acceptance of a known risk of injury in the course of employment. Rather, the rule is based on a public policy determination that a person who negligently starts a fire does not owe a duty of care to protect the responding firefighter from the very danger that requires the firefighter's presence [*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 541, 34 Cal. Rptr. 2d 630, 882 P.2d 347]* .

The rule recognizes that most fires, and perhaps most crimes, are due at least in part to negligence. The policy bases of the rule preclude imposing tort liability on the average citizen who is compelled to call on police or fire personnel, who are experts retained with public funds to deal with inevitable, although negligently created, occurrences. This freedom from liability permits individuals who require police or fire department assistance to summon help without pausing to consider whether they will be held liable for consequences that, in most cases, are beyond their control [*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 540, 34 Cal. Rptr. 2d 630, 882 P.2d 347* ; *Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 406, 22 Cal. Rptr. 2d 514]* .

The firefighter's rule applies to intentional acts, as well as to negligent and reckless acts, if they could reasonably have been foreseen by the firefighter or police officer when he or she embarked on a course of action [*see City of Los Angeles v. O'Brian (1984) 154 Cal. App. 3d 904, 906-907, 201 Cal. Rptr. 561]* . However, statutory exceptions now significantly limit the applicability of the rule in cases involving intentional misconduct [*see Civ. Code § 1714.9*; *see § 380.173[4]*].

[2] Applicability of Rule to Private Employees

The California Supreme Court has distinguished between publicly employed firefighters and private safety employees, and held that the firefighter's rule does not preclude a private safety employee from stating a cause of action against a third party who is not his or her employer for injuries caused by that third party's negligence in starting a fire [*Neighbarger v. Irwin Industries, Inc. (1994) 8 Cal. 4th 532, 534-535, 34 Cal. Rptr. 2d 630, 882 P.2d 347*]. The Court reasoned that by establishing public fire departments and taxing themselves to pay for their services, the public in effect has purchased exoneration from the duty of care and does not have to pay twice, through taxation and individual liability, for those services [*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 542-543, 34 Cal. Rptr. 2d 630, 882 P.2d 347]* . In contrast, a defendant whose negligence injures private safety employees employed by another does not have the same relationship with those private safety employees as a member of the public has with publicly employed firefighters, because the defendant has not paid in any way to be relieved of the duty of care owed toward the private employees. Another consideration supporting the distinction between publicly employed firefighters and private safety employees is that actions by publicly employed firefighters would involve costly litigation over subrogation that would ultimately be financed by the public and that would not benefit the firefighter, who receives retirement or workers' compensation benefits, whereas actions by private safety employees shift the loss from the innocent employees and their employer to the third party whose negligence caused the injuries [*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 543, 34 Cal. Rptr. 2d 630, 882 P.2d 347]* . A third distinction is that the public good is best served by a quick response to fires without questions about the fire's cause, which warrants eliminating the public's duty of care to publicly employed firefighters, but no similar concern justifies eliminating the duty of care owed by third parties to private safety employees [*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 544, 34 Cal. Rptr. 2d 630, 882 P.2d 347]* .

In drawing this distinction, the Court rejected the reasoning of a court of appeal decision [*Holland v. Crumb (1994) 26 Cal. App. 4th 1844, 1852, 32 Cal. Rptr. 2d 366]* applying the firefighter's rule to preclude recovery by a privately-employed tow truck driver who was struck by traffic while preparing to tow a disabled vehicle. The Court observed that the court of appeal had based its decision on the theory that the driver had assumed the foreseeable risk of his hazardous employment; noting that private employees do not assume all the foreseeable risks of their employment, the Court held that application of the firefighter's rule requires a closer analysis focusing on the relationship of the parties and defendant's duty of care [*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 545 n.4, 34 Cal. Rptr. 2d 630, 882 P.2d 347* ; *see also Knight v. Jewett (1992) 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *but see Bryant v. Glastetter (1995) 32 Cal. App. 4th 770, 784, 38 Cal. Rptr. 2d 291* (noting that *Holland v. Crumb* arrived at correct result, but declining to follow its reasoning and ruling intoxicated motorist not liable for death of tow truck driver because not reasonably foreseeable that driver would be killed by third party while attempting to remove motorist's car from side of freeway)].

Another, later court of appeal opinion stated that the footnote in *Neighbarger v. Irwin Industries, Inc.* [*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal 4th 532, 34 Cal. Rptr. 2d 630, 882 P.2d 347]* , in which the Supreme Court rejected the reasoning by which the court of appeal in *Holland v. Crumb* applied the firefighter's rule to claims by private tow truck operators, viewed in context, did not overrule the holding in *Holland*, nor was the footnote persuasive dictum that *Holland* was wrongly decided. However, the court declined to treat *Holland* as persuasive precedent, and instead analyzed the issue under general assumption of risk principles (noting that the firefighter's rule is only a specific application of the assumption of risk doctrine) [*Dyer v. Superior Court (1997) 56 Cal. App. 4th 61, 67-68, 70, 65 Cal. Rptr. 2d 85]* . The court concluded that, on the facts of the case, a motorist owed no duty to an auto club tow truck driver to maintain his car in running order, and that the assumption of risk doctrine barred plaintiff's claim for negligence against defendant. Plaintiff contended that this doctrine was inapplicable to him because he was not a public safety employee, and thus he did not receive the "special public compensation for confronting the dangers posed by the defendant's negligence" that the *Neighbarger* court identified as one of the policy bases for the firefighter's rule. The court of appeal ruled that *Neighbarger* did not support plaintiff's contention. According to the court, *Neighbarger* discussed in dicta applications of the assumption of risk doctrine to private workers, but did not decide the viability of these applications. Moreover, the Court in *Neighbarger* acknowledged that the firefighter's rule had been applied to some safety workers despite the absence of "special public compensation," and stated that in these cases, the crucial

question was the relationship between the public and the safety workers. The court in *Dyer* held that the nature of defendant's relationship with plaintiff, together with compelling policy considerations, warranted the conclusion that defendant owed no duty to plaintiff [*Dyer v. Superior Court (1997) 56 Cal. App. 4th 61, 73, 65 Cal. Rptr. 2d 85* ; *see also Herrle v. Estate of Marshall (1996) 45 Cal. App. 4th 1761, 53 Cal. Rptr. 2d 713* (applying firefighter's rule to certified nurse's aides)].

[3] Exception for Injuries Resulting From Independent Act of Misconduct or Unrelated Risk

[a] Scope of Exception

The firefighter's rule is not applicable to an injury that is caused by a risk not normally associated with the police officer's or firefighter's presence on the defendant's premises [*Lipson v. Superior Court (1982) 31 Cal. 3d 362, 369, 182 Cal. Rptr. 629, 644 P.2d 822* ; *Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 407, 22 Cal. Rptr. 2d 514* (rule does not apply to police officer pursuing suspect who is injured due to dangerous condition on real property or to firefighter who falls through defectively maintained roof while fighting fire)]. Thus, recovery is proper if the officer's or firefighter's injury resulted from the defendant's separate and independent act that was not the original circumstance for which the officer or firefighter was called [*Rose v. City of Los Angeles (1984) 159 Cal. App. 3d 883, 889, 206 Cal. Rptr. 49]* .

For example, the firefighter's rule was not a defense to an action brought by a police officer against the wife of a man who shot the officer after he arrived on the scene. The wife had affirmatively misrepresented to the officer that her husband was not violent when she knew otherwise, and absent those misrepresentations, the officer would have responded differently [*Boon v. Rivera (2000) 80 Cal. App. 4th 1322, 1329-1330, 96 Cal. Rptr. 2d 276]* .

In another example, a police officer who was hit by an automobile driven by a prostitute's customer while he was arresting the prostitute was not precluded by the firefighter's rule from recovering for his injuries, because these injuries were not proximately caused by the conduct that necessitated his presence [*Shaw v. Plunkett (1982) 135 Cal. App. 3d 756, 760, 185 Cal. Rptr. 571]* .

Similarly, the rule did not bar a firefighter's recovery for injuries from slipping and falling on wet steps while inspecting a building for fire code violations, because the condition of the steps was not the risk that caused the firefighter's presence in the building [*Donohue v. San Francisco Hous. Auth. (1993) 16 Cal. App. 4th 658, 663, 20 Cal. Rptr. 2d 148]* .

Finally, the firefighter's rule did not apply to a claim against the manufacturer of an automatic garage door brought by a firefighter who was injured when the door failed to open, trapping the firefighter inside the garage while fighting a fire in the house. In that particular case, the garage door had nothing to do with creating the fire, and the plaintiff did not allege that the fire caused the garage door to malfunction [*Stapper v. GMI Holdings, Inc. (1999) 73 Cal. App. 4th 787, 791-793, 86 Cal. Rptr. 2d 688* (policies supporting firefighter's rule did not apply to injury caused by allegedly defective door mechanism)].

Although the firefighter's rule generally applies only to conduct that necessitates the public safety officer's presence on the scene, and does not apply to independent acts of misconduct that occur after the officer arrives on the scene, the rule does apply if one public safety officer is negligently injured by another public safety officer employed by a different public entity while the two officers were jointly engaged in the discharge of their responsibilities [*see Calatayud v. State of California (1998) 18 Cal. 4th 1057, 1068-1072, 77 Cal. Rptr. 2d 202, 959 P.2d 360* ; *City of Oceanside v. Superior Court (2000) 81 Cal. App. 4th 269, 280-284, 96 Cal. Rptr. 2d 621]* .

Although application of the rule in those circumstances seems to extend the rule beyond its normal parameters, this extension should be construed narrowly. Application of the rule under those circumstances is probably properly viewed

as a policy decision that public safety employees, whoreceive compensation and workers' compensation coverage for confronting the hazards of their employment, should not be able to bring suit against other negligent public safety employees or their employers for injuries sustained while engaging in their hazardous duties, merely because the negligent officer happens to be employed by a different public agency [*see Calatayud v. State of California (1998) 18 Cal. 4th 1057, 1068-1072, 77 Cal. Rptr. 2d 202, 959 P.2d 360* ; *City of Oceanside v. Superior Court (2000) 81 Cal. App. 4th 269, 280-283, 96 Cal. Rptr. 2d 621]* . For public safety employees employed by the same public agency, suit is barred by the exclusive remedy doctrine of the workers' compensation laws [*see City of Oceanside v. Superior Court (2000) 81 Cal. App. 4th 269, 282, 96 Cal. Rptr. 2d 621]* .

[b] Exception Not Applicable to Firefighters or Police Officers Encountering Hazards by Chance

Firefighters and police officers who have not been called to the scene of a fire or other emergency, but who have been injured while responding to an hazard that they encounter by chance in the course of their duties, have claimed that the independent act exception to the firefighter's rule applies to them because they were at a particular location for reasons unrelated to the hazard to which they responded. However, the courts have ruled that the exception does not apply in this situation; firefighters and police officers who respond to perceived risks in their professional capacity in order to protect the public cannot claim, simply because their presence at the scene was fortuitous rather than the result of a radio call or other summons, that their presence was independent of or unrelated to the cause of their injuries [*Kelhi v. Fitzpatrick (1994) 25 Cal. App. 4th 1149, 1158-1159, 31 Cal. Rptr. 2d 182* ; *Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 411, 22 Cal. Rptr. 2d 514]* .

For example, a highway patrol officer in uniform who was driving to work on his official motorcycle was barred by the firefighter's rule from recovering for injuries caused by tires that broke off a pickup truck on the highway ahead of him. When the officer saw the truck lose its tires, he responded by turning on his flashers, checking traffic behind him to ensure that no vehicles ran into the tires, and asking the truck's driver to move onto the shoulder; after he moved around the truck to look for the tires, which were rolling down the highway, they veered, bounced off a retaining wall, and hit him. The risk that caused his injuries, the runaway tires, was not the conduct that brought him to that highway at that moment, but it was the risk that prompted his response as a police officer. His actions were the same as those he would have taken had he been summoned to the scene, and an officer called to the scene would have been barred from recovery by the firefighter's rule for a similar injury; therefore, the exception for unrelated or independent acts did not apply to allow his recovery for any negligence on the part of the truck's owner, driver, or manufacturer, that caused the tires to come off the truck [*Kelhi v. Fitzpatrick (1994) 25 Cal. App. 4th 1149, 1152, 1158-1159, 31 Cal. Rptr. 2d 182]* .

Similarly, the firefighter's rule barred recovery by a police officer who brought a suspect into a hospital for examination, was doing paperwork when he heard a cry for help from a private security guard being attacked by a mental patient, and was injured when he went to the guard's assistance. The guard's negligence in failing to restrain the mental patient was independent of and unrelated to the conduct that brought the officer to the hospital, but it was the immediate cause of his presence in the holding cell where the patient was attacking the guard [*Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 411, 22 Cal. Rptr. 2d 514]* .

[4] Statutory Exceptions Under Civ. Code § 1714.9

Civ. Code § 1714.9 provides that notwithstanding statutory or decisional law to the contrary, any person is responsible not only for the results of that person's willful acts causing injury to a peace officer, firefighter, or any emergency medical personnel employed by a public entity, but is also responsible for any injury occasioned to that person by the want of ordinary care or skill in the management of the person's property or person, in any of the following situations [*Civ. Code § 1714.9(a)*]:

- The conduct causing injury occurs after the person knows or should have known of the presence of

the peace officer, firefighter, or emergency medical personnel [*see Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 408-410, 22 Cal. Rptr. 2d 514* (exception can reasonably be applied to new conduct committed by person after officer has been summoned, but cannot be reasonably applied to conduct occurring while officer is present but before he or she has undertaken duties of protection or crime prevention)].

- The conduct causing injury violates a statute, ordinance, or regulation, and the conduct causing injury was itself not the event that precipitated either the response or presence of the peace officer, firefighter, or emergency medical personnel.

- The conduct causing injury was intended to injure the peace officer, firefighter, or emergency medical personnel.

- The conduct causing the injury is arson as defined by *Penal Code § 451*.

Although *Civ. Code § 1714.9* uses the phrase "that person" to refer both to the person willfully injuring a peace officer, a firefighter, or emergency medical personnel, as well as to the person injured by negligence, it was intended to create, and has been applied as creating, an exception to the firefighter's rule for both willful and negligent acts that fell into any of its four categories [*see, e.g., Gibb v. Stetson (1988) 199 Cal. App. 3d 1008, 1014-1016, 245 Cal. Rptr. 283* ; *City of Redlands v. Sorensen (1985) 176 Cal. App. 3d 202, 208-211, 221 Cal. Rptr. 728]* .

The exceptions contained in *Civ. Code § 1714.9* are not exclusive; other judicially-created exceptions may also be applicable [*Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 406, n.7, 22 Cal. Rptr. 2d 514* ; *see § 380.173[3]*].

The liability provided in *Civ. Code § 1714.9(a)(1)*, described in the first paragraph listed above does not apply when a peace officer, firefighter, or emergency medical personnel is negligently injured by a fellow public safety member employed by a different public safety agency when the public safety personnel were jointly engaged in the discharge of their responsibilities [*Calatayud v. State of California (1998) 18 Cal. 4th 1057, 1064, 1072, 77 Cal. Rptr. 2d 202, 959 P.2d 360]* . The court of appeal has extended this rationale to preclude application under those circumstances of the common law independent acts exception as well [*City of Oceanside v. Superior Court (2000) 81 Cal. App. 4th 269, 280-283, 96 Cal. Rptr. 2d 621* ; *see § 380.173[3]*]. For these purposes, joint engagement between public service agencies does not require formal coordination between the agencies. It is sufficient that the officers from one agency were trying to assist officers from the other in their official duties [*McElroy v. State of California (2002) 100 Cal. App. 4th 546, 548-549, 122 Cal. Rptr. 2d 612]* .

The statutory exception for injury-causing conduct that occurs after the defendant knows or should know of the officer's presence at the scene applies only if the officer is injured by a separate, subsequent act of negligence other than the act that necessitated the officer's presence at the scene [*Hamilton v. Martinelli & Assocs. (2003) 110 Cal. App. 4th 1012, 1027, 2 Cal. Rptr. 3d 168]* . In one case, for example, the court of appeal held that a trainer at a self-defense training course required for a probation officer who worked at a youth detention facility was not liable for injuring the officer during a training maneuver. The court concluded that because the training necessitated the officer's presence at the scene, and because the alleged negligence occurred during the training, the alleged negligence was not a separate, subsequent act as required to impose liability under the statute [*Hamilton v. Martinelli & Assocs. (2003) 110 Cal. App. 4th 1012, 1028, 2 Cal. Rptr. 3d 168]* .

The additional liability created by *Civ. Code § 1714.9* does not preclude reduction of an award of damages because of the comparative fault of the peace officer, the firefighter, or emergency medical personnel in causing the injury [*Civ. Code § 1714.9(b)*]. In addition, the liability imposed by *Civ. Code § 1714.9* does not apply to an employer of a peace officer, a firefighter, or emergency service personnel [*Civ. Code § 1714.9(d)*]. The employer of a firefighter, a peace

officer, or emergency medical personnel may, however, be subrogated to the rights granted by *Civ. Code § 1714.9* to the extent of the workers' compensation benefits and other liabilities of the employer, including all salary, wage, pension, or other emolument paid to the employee or the employee's dependents [*Civ. Code § 1714.9(c)*].

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§ 380.174 Workers' Compensation Act

A defendant in a negligence action may claim as an affirmative defense that he or she is one of the class of persons protected from an action at law by the provisions of the Workers' Compensation Act. Anyone asserting this affirmative defense bears the burden of pleading and proving the existence of the conditions of compensation set forth in the Act that are necessary to its application [*Doney v. Tambouratgis (1979) 23 Cal. 3d 91, 96-97, 151 Cal. Rptr. 347, 587 P.2d 1160* ; *see Lab. Code § 3600*].

For further discussion, see Ch. 577, *Workers' Compensation* .

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[Reserved]

§§ 380.175[Reserved]

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§ 380.190 California Torts

For discussion of duty and breach in a negligence action, see California Torts, Ch. 1 (Matthew Bender)

For discussion of causation in a negligence action, see California Torts, Ch. 2 (Matthew Bender)

For discussion of premises liability, see California Torts, Ch. 15 (Matthew Bender)

For discussion of negligence liability of carriers, see California Torts, Ch. 23 (Matthew Bender)

For discussion of negligence liability of professionals in general, see California Torts, Ch. 30 (Matthew Bender)

For discussion of negligence liability of physicians and other medical practitioners, see California Torts, Ch. 31 (Matthew Bender)

For discussion of damages in negligence actions, see California Torts, Ch. 50 (Matthew Bender)

For discussion of mitigation of damages in negligence actions, see California Torts, Ch. 53 (Matthew Bender)

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§ 380.191 State Statutes

[1] Actions Involving Children

Actions based on negligent injury to unborn persons. *Code Civ. Proc. § 340.4*

Nonliability of parent to child for conception or birth of child. *Civ. Code § 43.6*

Refusal of parent to prevent birth of child is no defense in third-party action. *Civ. Code § 43.6*

Liability of parent for injury caused by discharge of firearm by minor under 18 years. *Civ. Code § 1714.3*

[2] Contractual Provisions Regarding Negligence

Contractual limitation on liability for negligence. *Civ. Code § 1668*

Certain contractual provisions for indemnity for negligence are void. *Civ. Code §§ 2782-2784.5*

[3] Damages

Measure of damages for negligence. *Civ. Code §§ 3333-3333.2*

Request for statement of damages in personal injury or wrongful death action. *Code Civ. Proc. § 425.11*

Recovery of treble damages, and costs and attorney's fees at discretion of court, if unlicensed person causes injury or damage to another while providing goods or performing services for which specified licenses are required. *Code Civ. Proc. § 1029.8*

[4] Duties and Liabilities

Duty to avoid injuring persons or property. *Civ. Code § 1708*

Liability for negligence. *Civ. Code § 1714(a)*

Liability for injuries resulting from furnishing of alcoholic beverages. *Civ. Code § 1714(b), (c)*

Liability of person rendering emergency cardiopulmonary resuscitation. *Civ. Code § 1714.2*

Liability for injuries sustained in emergency facilities. *Civ. Code § 1714.5*

Prohibition against recovery of damages for injuries sustained while riding or getting on or off moving locomotive without authority. *Civ. Code § 1714.7*

Principal responsible to third persons for negligence of agent in transaction of business of agency, including wrongful acts committed by agent in and as part of transaction of business, and for willful omission to fulfill obligations of principal. *Civ. Code § 2338*

Liability of owner for dog bite. *Civ. Code § 3342*

Nonliability of lender to third persons for loss or damage to real or personal property. *Civ. Code § 3434*

Married person not liable for injury or damage caused by spouse. *Fam. Code § 1000*

Third-party liability to Director of Health Services [*Welf. & Inst. Code § 14061*] for injury to Medi-Cal recipient. *Welf. & Inst. Code § 14124.70 et seq.*

Immunity applicable to poison control centers and their personnel. *Health & Safety Code § 1799.105*

Duty of county hospital to warn ambulance personnel of instability and potential assaultiveness of mental health patient. *Health & Safety Code § 1444.6*

Duties to peace officers, firefighters, and emergency medical personnel. *Civ. Code § 1714.9*

Qualified immunity of persons rendering emergency medical care at scene of emergency. *Health & Safety Code §§ 1799.102, 1799.104, 1799.106-1799.108*

[5] Multiple Defendants

In personal injury or property damage case, defendants precluded from referring at trial to fault, absence from action, or involvement of defendant whose motion for summary judgment or nonsuit has been granted. *Code Civ. Proc. §§ 437c(k), 581c(d)*

[6] Pleading

Prohibition on demand for specific amount of damages in complaint for personal injuries or wrongful death. *Code Civ. Proc. § 425.10(b)*

Judicial Council forms for complaint, cross complaint and answer. *Code Civ. Proc. § 425.12*

When objections made by demurrer or answer. *Code Civ. Proc. § 430.30*

Waiver of objection to complaint by failure to object by answer or demurrer. *Code Civ. Proc. § 430.80*

Admission of material allegation by failure to deny. *Code Civ. Proc. § 431.20(a)*

Affirmative defenses are deemed denied by plaintiff without replication. *Code Civ. Proc. § 431.20(b)*

Form and content of answer. *Code Civ. Proc. § 431.30*

Affirmative defenses contained in answer. *Code Civ. Proc. § 431.30(b)(2)*

General denial if complaint is not verified. *Code Civ. Proc. § 431.30(d)*

Affirmative defenses must be separately stated and must refer to cause of action they are intended to answer. *Code Civ. Proc. § 431.30(g)*

General denial if demand does not exceed $1,000. *Code Civ. Proc. § 431.40(a)*

Subscription and verification of answer. *Code Civ. Proc. § 446*

Pleading statute of limitations as bar. *Code Civ. Proc. § 458*

Using fictitious name for unknown defendants. *Code Civ. Proc. § 474*

[7] Presumptions and Burden of Proof

Violation of statutes does not establish negligence on compliance with orders of certain federal officials or Governor. *Civ. Code § 1714.6*

Party claiming person failed to exercise requisite degree of care has burden of proof on that issue. *Evid. Code § 521*

Presumption of negligence resulting from violation of statute, ordinance, or regulation of public entity. *Evid. Code § 669*

California Forms of Pleading and Practice--Annotated

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 380 NEGLIGENCE
PART III. RESEARCH GUIDE
A. Negligence Cause of Action

33-380 California Forms of Pleading and Practice--Annotated § 380.192

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§ 380.192 Decisions

[1] Breach of Duty

[a] Effect of Custom

Custom in community does not necessarily establish how reasonable person must act, but is evidence to be considered in determining proper standard of care. *Bullis v. Security Pac. Nat'l Bank (1978) 21 Cal. 3d 801, 809, 148 Cal. Rptr. 22, 582 P.2d 109*

Rules, practices, and customs involved in activity in which defendant was participating at time of injury have direct bearing on question of negligence, although they do not of themselves establish standard of prudent conduct. *Tucker v. Lombardo (1956) 47 Cal. 2d 457, 464, 303 P.2d 1041*

Conformity with industry custom is no excuse for negligence unless industry practice is consistent with due care. *Irelan-Yuba Gold Quartz Mining Co. v. Pacific Gas & Elec. Co. (1941) 18 Cal. 2d 557, 567, 116 P.2d 611*

Evidence of custom in same trade or occupation admissible but not conclusive on question of ordinary care; conformity to general practice or custom is no excuse unless it is consistent with due care. *Reagh v. San Francisco Unified Sch. Dist. (1953) 119 Cal. App. 2d 65, 70, 259 P.2d 43*

[b] Professional Negligence

Degree of care and skill required to fulfill professional duty is ordinarily question of fact that may require testimony by professionals in field if matter is within knowledge of experts only. *Carleton v. Tortosa (1993) 14 Cal. App. 4th 745,*

754-755, 17 Cal. Rptr. 2d 734

[c] Standard of Care Owed by Children

Minor who was passenger in back seat of automobile involved in two-car collision not contributorily negligent, because she did not have driver's license, was not conversing with driver at time of accident, and was under no duty to observe traffic conditions on highway. *Casey v. Russell (1982) 138 Cal. App. 3d 379, 386-387, 188 Cal. Rptr. 18*

[d] Violation of Statute

Plaintiff thrown from horse after horse was frightened by loud noises from nearby garbage truck was not entitled to recover for negligence per se, because th ere was no evidence suggesting that defendant violated *Veh. Code § 21759,* right of way statute that imposed duty on driver of vehicle approaching ridden animal to exercise proper control of vehicle, and to reduce speed or stop as necessary or as requested by any person riding the animal; defendant's employee was not "driving" truck at time of accident, and truck was not "approaching" plaintiff; moreover, plaintiff neither signaled nor otherwise requested that defendant's employee cease operation of truck's lifting mechanism. *Parsons v. Crown Disposal Co. (1997) 15 Cal. 4th 456, 484, 63 Cal. Rptr. 2d 291, 936 P.2d 70*

Regulation permitting exercise of discretion and phrased in nonmandatory language may nevertheless form basis of negligence per se instruction, if defendant would be exposed to disciplinary action for ignoring suggestions of regulation. *Clemente v. State of California (1985) 40 Cal. 3d 202, 215-216, 219 Cal. Rptr. 445, 707 P.2d 818* (guidelines concerning investigation of accidents by Highway Patrol officers)

Police officer called to enforce criminal statute was not within class of persons for whose protection statute was adopted. *Hubbard v. Boelt (1980) 28 Cal. 3d 480, 486, 169 Cal. Rptr. 706, 620 P.2d 156*

Presumption of negligence arises from violation of statute. *Alarid v. Vanier (1958) 50 Cal. 2d 617, 621, 327 P.2d 897*

Statute prohibiting parking vehicle on sidewalk was not designed to protect party from being struck by different vehicle, which jumped curb for reason unrelated to presence on sidewalk of illegally parked vehicle. *Victor v. Hedges (1999) 77 Cal. App. 4th 229, 238, 91 Cal. Rptr. 2d 466*

Property owners not entitled to judgment on negligence per se theory under *Evid. Code § 669* on their cross-complaint against contractor for costs they incurred to repair work contractor had undertaken; building code provision on which they relied was designed to ensure safety and not to prevent owners from incurring costs associated with remedying building code violations. *Morris v. Horton (1994) 22 Cal. App. 4th 968, 972-973, 27 Cal. Rptr. 2d 585*

Court required to instruct jury on principles of negligence per se in case in which plaintiff was injured by run-away dog and sued dog's owners for violation of local ordinance forbidding dog owners to allow their dogs to wander loose on public streets; plaintiff not required to prove that dog's owners acted willfully and with mens rea. *Delfino v. Sloan (1993) 20 Cal. App. 4th 1429, 1438-1440, 25 Cal. Rptr. 2d 265*

Ordinance requiring abutting landowners to maintain public sidewalk creates duty to city, not to pedestrians; trial court instruction on negligence per se doctrine was error. *Selger v. Steven Bros., Inc. (1990) 222 Cal. App. 3d 1585, 1590-1591, 272 Cal. Rptr. 544*

If ordinance or statute is intended to protect certain class from particular risk of harm, violation of that statute or ordinance is per se breach of duty in absence of any excuse or justification for violation. *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1021, 244 Cal. Rptr. 507*

Presumption of negligence applicable only if injury was proximately caused by hazardous condition or violation of statute; proximate causation exists if there is reason to believe absence of condition or compliance with statute would have prevented or lessened likelihood of injury. *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1021, 244 Cal. Rptr. 507*

Instruction providing that violation of statute is not negligence if the usual reasonable person standard of care has been satisfied was error; instruction required to convey necessity for some special circumstances that justify violation of statute despite desire to comply with particular statute. *Casey v. Russell (1982) 138 Cal. App. 3d 379, 385, 188 Cal. Rptr. 18*

Burden on plaintiff to prove injury resulted from occurrence statute was designed to prevent; issue is one of law. *Ronald M. v. White (1980) 112 Cal. App. 3d 473, 477, 169 Cal. Rptr. 370*

Prerequisites to application of *Evid. Code § 669*, creating presumption of negligence from violation of statute or ordinance: (1) violation, (2) violation is proximate cause of injury, (3) injury resulted from occurrence that statute designed to prevent, and (4) injured party is member of class of persons for whose protection statute was adopted. *Salinero v. Pon (1981) 124 Cal. App. 3d 120, 134, 177 Cal. Rptr. 204*

Presumption of negligence raised by violation of statute rebutted if violator proves he or she did what might reasonably be expected of person of ordinary prudence, who desired to comply with law, acting under similar circumstances. *Byrne v. City & County of San Francisco (1980) 113 Cal. App. 3d 731, 740, 170 Cal. Rptr. 302*

Violation of statute or safety regulation does not expose one to liability for negligence unless violation proximately causes injury in question. *Valdez v. J.D. Diffenbaugh Co. (1975) 51 Cal. App. 3d 494, 510, 124 Cal. Rptr. 467*

Violation of statute does not impose strict or absolute tort liability, but creates rebuttable presumption of negligence. *Beard v. Atchison, Topeka & Santa Fe Ry. Co. (1970) 4 Cal. App. 3d 129, 142, 84 Cal. Rptr. 449*

[2] Causation

[a] Burden of Proof

Alternative liability doctrine of *Summers v. Tice* inapplicable when plaintiff cannot identify specific source of harm involved in injury. *Setliff v. E.I. Du Pont de Nemours & Co. (1995) 32 Cal. App. 4th 1525, 1536, 38 Cal. Rptr. 2d 763* ; *see also Klein v. Council of Chem. Ass'ns (E.D. Pa. 1984) 587 F. Supp. 213, 221* .

Market share theory of liability applicable only to fungible goods, such as drugs produced from identical formula. *Setliff v. E.I. Du Pont de Nemours & Co. (1995) 32 Cal. App. 4th 1525, 1537, 38 Cal. Rptr. 2d 763* ; *see Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 611, 163 Cal. Rptr. 132, 607 P.2d 924*

Courts reluctant to shift burden of proof to defendants under alternate liability rule of *Summers v. Tice* in asbestos litigation. *Lineaweaver v. Plant Insulation Co. (1995) 31 Cal. App. 4th 1409, 1418, 37 Cal. Rptr. 2d 902*

Burden of proof regarding causation does not shift to defendant unless defendant's failure to comply with mandatory requirement of statute or regulation prevents plaintiff from conclusively proving that injuries were proximately caused by that failure. *Fagerquist v. Western Sun Aviation, Inc. (1987) 191 Cal. App. 3d 709, 723-726, 236 Cal. Rptr. 633*

Plaintiff not required to establish causation with absolute certainty; sufficient to introduce evidence from which

reasonable persons could conclude that it is more probable than not that defendant's conduct was cause. *Valdez v. J.D. Diffenbaugh Co. (1975) 51 Cal. App. 3d 494, 509, 124 Cal. Rptr. 467*

[b] "But For" Test

BAJI No. 3.75 (so-called proximate cause instruction containing "but for" test) disapproved for use in any negligence action because grammatically confusing and conceptually misleading; *BAJI No. 3.76*, which employs substantial factor test, is approved for use in lieu of BAJI No. 3.75. *Mitchell v. Gonzales (1991) 54 Cal.3d 1041, 1049, 1054, 1 Cal. Rptr. 2d 913, 819 P.2d 872*

Plaintiff entitled to recover when plaintiff proves that injury would not have occurred "but for" defendant's negligence. *Akins v. County of Sonoma (1967) 67 Cal. 2d 185, 198-199, 60 Cal. Rptr. 499, 430 P.2d 57*

To establish proximate, or legal, cause, plaintiff need only show that defendant's negligent act in some way contributed to plaintiff's injury, that is, but for defendant's negligence injury would not have occurred. *Valdez v. J.D. Diffenbaugh Co. (1975) 51 Cal. App. 3d 494, 508, 124 Cal. Rptr. 467*

[c] Concurrent Causation

Concurrent tortfeasor liable for whole of indivisible injury if his or her negligence is proximate cause of injury; tortfeasor is entitled to escape responsibility simply because another act, either "innocent" occurrence, such as act of God, or other negligent conduct, may also have been cause of injury. *American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 586-588, 146 Cal. Rptr. 182, 578 P.2d 899*

Defendant's inability reasonably to anticipate occurrence of other concurrent cause does not shield defendant from liability if his or her own negligence was one of causes of injury. *Taylor v. Oakland Scavenger Co. (1941) 17 Cal. 2d 594, 602, 110 P.2d 1044*

Refusing to instruct jury on concurrent causation as defined in *BAJI No. 3.77* is error if physician's negligence may have been additional proximate cause of patient's death. *Logacz v. Limansky (1999) 71 Cal. App. 4th 1149, 1157-1159, 84 Cal. Rptr. 2d 257*

[d] Direct Causation

Defendant liable for all damages flowing directly, without intervening force, from his or her negligence, regardless whether or not harm was foreseeable. *Gibson v. Garcia (1950) 96 Cal. App. 2d 681, 685, 216 P.2d 119*

[e] Intervening Causes

Navy employee's precarious stowing of briefcase in airplane's overhead luggage bin was proximate cause of injury to other passenger who was struck on head by briefcase when flight attendant opened overhead bin; flight attendant's acts not so unforeseeable as to be superseding cause that cut off Navy employee's liability. *USAir Inc. v. United States Dep't of Navy (9th Cir. 1994) 14 F.3d 1410, 1413*

Defendant liable for injury proximately or substantially caused by his or her negligent conduct, even if third person's conduct directly precipitates injury; fact that third person's act was innocent, negligent, intentionally tortious, or criminal does not insulate defendant from liability. *Bullis v. Security Pac. Nat'l Bank (1978) 21 Cal. 3d 801, 812, 148*

Cal. Rptr. 22, 582 P.2d 109

Bank liable for loss resulting when plaintiff lost money because bank negligently failed to require signature of both estate's coexecutors, even though third person's criminal conduct directly precipitated plaintiff's injury; defendant bank breached its duty to act reasonably to prevent third party from embezzling plaintiff's money. *Bullis v. Security Pac. Nat'l Bank (1978) 21 Cal. 3d 801, 812-813, 148 Cal. Rptr. 22, 582 P.2d 109*

In action against owner and lessee of bleachers on behalf of three-year old for injuries received when child fell from top of bleachers, alleged negligent supervision of child by parents was not intervening cause cutting off liability of defendants unless jury determined that parents' negligence was not foreseeable and that results it caused were not foreseeable. *Akins v. County of Sonoma (1967) 67 Cal. 2d 185, 199, 60 Cal. Rptr. 499, 430 P.2d 57*

Rest. Torts §§ 442-453 (rules for determining whether intervening act of third person constitutes superseding cause) accepted in *California. Stewart v. Cox (1961) 55 Cal. 2d 857, 863-864, 13 Cal. Rptr. 521, 362 P.2d 345*

Fact that intervening act of third person is negligent is not superseding cause if reasonable person is not aware of situation would not regard it as highly extraordinary that third person so acted, or if act is normal response to situation created by defendant's conduct, and manner in which intervening act is done is not extraordinarily negligent. *Stewart v. Cox (1961) 55 Cal. 2d 857, 864, 13 Cal. Rptr. 521, 362 P.2d 345* ; *see also* Restatement of Torts § 447

Owner of bulldozer, who left it unattended and unlocked, liable to plaintiff injured when bulldozer was started by three juveniles; fact that intervening act was intentionally tortious and criminal did not preclude owner's liability, because this precise foreseeable risk made owner's leaving bulldozer unlocked and unattended negligent. *Richardson v. Ham (1955) 44 Cal. 2d 772, 776-777, 285 P.2d 269*

Owner of automobile who left keys in car not liable to third person injured as result of negligent driving of a thief; in absence of statute to contrary, owner is under no duty to persons who may be injured by automobile's use to keep it out of hands of third persons in absence of facts putting owner on notice that third person is incompetent to handle it. *Richards v. Stanley (1954) 43 Cal. 2d 60, 63, 271 P.2d 23*

Tow truck stolen from lot of truck service center located in high-crime area when key was left in ignition and lot's gate was left open implicated special circumstances rule; close temporal connection between theft and injuries to third parties precluded court from concluding as matter of law that conduct of service center was not legal cause of harm. *Carrera v. Maurice J. Sopp & Son (2009) 177 Cal. App. 4th 366, 381-385, 99 Cal. Rptr. 3d 268*

Tortfeasors allegedly liable for original automobile accident that necessitated transportation of victim to hospital could be held liable for further injury or death suffered by victim on way to hospital; error to sustain demurrer for original tortfeasors when victim was killed in crash of helicopter transporting victim to hospital. *Anaya v. Superior Court (2000) 78 Cal. App. 4th 971, 976, 93 Cal. Rptr. 2d 228*

Operator of oil field, even if negligent, was not liable to employee of independent contractor hired to work in field who was injured by exploding pipe, even though risk of exploding pipe was foreseeable, when intervening action of co-workers who used torch to cut pipe that may have contained pressurized gas was extraordinarily negligent and dangerous. *Martinez v. Vintage Petroleum, Inc. (1998) 68 Cal. App. 4th 695, 700-701, 80 Cal. Rptr. 2d 449*

Physician who negligently treated plaintiff was liable for aggravation of plaintiff's condition caused by negligence of physicians who subsequently treated plaintiff, because original physician's negligence was proximate cause of damages resulting from subsequent negligent treatment; thus, physician who did not read radiologist's report revealing serious injury to plaintiff's kidney before transferring patient to another hospital was liable for patient's losing kidney due to other hospital's failure to conduct additional tests to assure that kidney was undamaged. *Maxwell v. Powers (1994) 22*

Cal. App. 4th 1596, 1600, 1606-1607, 28 Cal. Rptr. 2d 62

In personal injury action by passenger in truck who was injured when semitractor turned left across lane in which truck was traveling and collided with truck, defendant semitractor driver's negligence was proximate cause of passenger's injuries; dusty weather conditions, plaintiff's failure to wear seat belt and alcohol consumption prior to accident, and truck driver's excessive speed did not supersede defendant's negligence. *Hardison v. Bushnell (1993) 18 Cal. App. 4th 22, 28-29, 22 Cal. Rptr. 2d 106*

Speeding car that killed truck driver who was standing on highway shoulder in darkness because his truck had broken down was not intervening or superseding cause cutting off liability of defendants that had negligently maintained the truck, unless jury determined that defendants could not have foreseen possibility of this sort of accident. *Jackson v. Ryder Truck Rental, Inc. (1993) 16 Cal. App. 4th 1830, 1840, 1848, 20 Cal. Rptr. 2d 913*

In negligence action based on employee's injury by defective machine, in which issue remained as to whether employer's failure to prevent harm was superseding cause precluding manufacturer's liability, trial court's failureto give any instruction on that issue constituted reversible error; court required to modify faulty instructions submitted by parties instead of rejecting them outright; liability of manufacturer not precluded as matter of law, even though 35 years had elapsed since machine was manufactured. *Paverud v. Niagara Mach. & Tool Works (1987) 189 Cal. App. 3d 858, 863-864, 234 Cal. Rptr. 585*

Act of original wrongdoer who has caused personal injury is normally proximate cause of subsequent injury caused by negligent medical treatment of original injury; negligent treatment reasonably foreseeable. *Blecker v. Wolbart (1985) 167 Cal. App. 3d 1195, 1200-1203, 213 Cal. Rptr. 781*

Statement of rule relating to foreseeability of intervening conduct in instruction on negligence instead of in instruction on causation was not prejudicial error, if error at all, because duty and causation aspects of issue of intervening acts are interrelated. *United Pac. Co. v. Southern Cal. Edison Co. (1985) 163 Cal. App. 3d 700, 710-712, 209 Cal. Rptr. 819*

Generally, if risk of injury by intervening act might have been reasonably foreseen, defendant liable; but independent, intervening act that is highly unusual or extraordinary, not reasonably likely to happen, and hence not foreseeable, is superseding cause precluding liability. *Bloomberg v. Interinsurance Exch. (1984) 162 Cal. App. 3d 571, 576, 207 Cal. Rptr. 853*

Act of third party not reasonably foreseeable and not normal consequence in situation is superseding cause. *Commercial Standard Title Co. v. Superior Court (1979) 92 Cal. App. 3d 934, 944, 155 Cal. Rptr. 393*

Independent intervening act is superseding cause relieving actor of liability for negligence only if intervening act is highly unusual or extraordinary and hence not reasonably foreseeable. *Cline v. Watkins (1977) 66 Cal. App. 3d 174, 178, 135 Cal. Rptr. 838* ; *see also Restatement (Second) of Torts §§ 435, 447*

Negligent lawyer not relieved of consequences of lack of care because subsequently hired attorney could have avoided injury had he or she not been negligent also. *Cline v. Watkins (1977) 66 Cal. App. 3d 174, 180, 135 Cal. Rptr. 838*

Reasonable foreseeability of independent intervening cause is question of fact unless under undisputed facts there is no room for reasonable difference of opinion. *Cline v. Watkins (1977) 66 Cal. App. 3d 174, 178, 135 Cal. Rptr. 838* ; *Schrimscher v. Bryson (1976) 58 Cal. App. 3d 660, 664, 130 Cal. Rptr. 125*

When young boy attending baseball game was hit in head by baseball, negligently treated and diagnosed by physician at ballpark first aid station, and subsequently negligently treated at hospital, physician not relieved of liability by subsequent negligent conduct of hospital. *Fish v. Los Angeles Dodgers Baseball Club (1976) 56 Cal. App. 3d 620,*

634-641, 128 Cal. Rptr. 807

Negligent act totally unrelated causatively to accident at issue is not possibly intervening cause. *Valdez v. J.D. Diffenbaugh Co. (1975) 51 Cal. App. 3d 494, 510, 124 Cal. Rptr. 467*

Issue of superseding cause not reached until finding of negligence on defendant's part and further finding that but for defendant's negligence, accident would not have occurred. *Ewart v. Southern Cal. Gas Co. (1965) 237 Cal. App. 2d 163, 169, 46 Cal. Rptr. 631*

Nonculpable intervening conduct of third person less likely to be superseding cause than negligent or criminal conduct. *Ewart v. Southern Cal. Gas Co. (1965) 237 Cal. App. 2d 163, 169, 46 Cal. Rptr. 631*

[f] Proximate Cause

Plaintiff required to prove that defendant's breach of duty was proximate cause of plaintiff's injury; court will not reach issue of proximate cause until plaintiff has proved existence of duty and its breach; defendant not liable for damages proximately caused to plaintiff by defendant's conduct unless defendant breached duty to plaintiff. *Richards v. Stanley (1954) 43 Cal. 2d 60, 63, 69, 271 P.2d 23*

To establish proximate cause in any case other than one of direct causation, consequences of defendant's actions must reasonably have been foreseen by prudent person. *Mosley v. Arden Farms Co. (1945) 26 Cal. 2d 213, 216, 157 P.2d 372*

Plaintiff in negligence action bears burden of showing that defendant's negligence was proximate cause of injury; proximate cause generally question of fact. *Stangle v. Fireman's Fund Ins. Co. (1988) 198 Cal. App. 3d 971, 975, 244 Cal. Rptr. 103*

Foreseeability for purposes of proximate cause analysis, is not measured by what is more probable than not, but includes whatever is likely enough in setting of modern life that reasonably thoughtful person would take account of it in guiding practical conduct; general character of event or harm, not its precise nature or manner of occurrence, is what may be foreseeable and therefore potential basis of liability, including conduct by third person that may be innocent, negligent, intentionally tortious, or criminal. *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1022, 244 Cal. Rptr. 507*

Proximate causation, or foreseeability of injury, decided as question of law only if undisputed facts leave no room for reasonable difference of opinion. *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1021-1022, 244 Cal. Rptr. 507*

Proximate cause is not always cause in fact but encompasses questions of policy of whether law will extend responsibility for conduct to consequences that have occurred. *Jackson v. City of San Diego (1981) 121 Cal. App. 3d 579, 588, 175 Cal. Rptr. 395* ; *but see Asgari v. City of Los Angeles (1997) 15 Cal. 4th 744, 758 n.10, 63 Cal. Rptr. 2d 842, 937 P.2d 273* (disapproving *Jackson* to extent it permits recovery of damages for postarraignment confinement)

Although ordinarily question of fact if conflicting inferences can be drawn, proximate cause is issue of law if facts are undisputed and only one conclusion can be drawn. *Hooks v. Southern Cal. Permanente Med. Group (1980) 107 Cal. App. 3d 435, 447, 165 Cal. Rptr. 741*

Negligent tortfeasor liable for all damage proximately caused by his or her negligence; he or she may not escape liability merely because another cause,whether innocent or not, contributes to injury. *Stone v. Foster (1980) 106 Cal.*

App. 3d 334, 348, 164 Cal. Rptr. 901

If plaintiff's injury results from combination of defendant's negligence and innocent cause, defendant liable for entire loss unless defendant can prove extent of loss resulting from own conduct. *Stone v. Foster (1980) 106 Cal. App. 3d 334, 347-348, 164 Cal. Rptr. 901*

Proximate cause is cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produced injury or damage complained of and without which result would not have occurred. *Whitcombe v. County of Yolo (1977) 73 Cal. App. 3d 698, 708, 141 Cal. Rptr. 189*

Issue of proximate cause is not question of causation as much as policy determination of whether or not defendant should be held responsible for his or her acts. *Valdez v. J.D. Diffenbaugh Co. (1975) 51 Cal. App. 3d 494, 509, 124 Cal. Rptr. 467*

Proximate cause is always, in first instance, question of law, which becomes question of fact if conflicting inferences or conclusions can be drawn from evidence. *Golden v. Dungan (1971) 20 Cal. App. 3d 295, 311, 97 Cal. Rptr. 577*

Proximate or legal cause is separate and distinct from actual cause. *Beaupre v. Nave (1970) 13 Cal. App. 3d 402, 405-406, 91 Cal. Rptr. 473*

Each proximate cause decision turns on own facts and has little value as precedent. *Beck v. San Francisco Unified Sch. Dist. (1964) 225 Cal. App. 2d 503, 508, 37 Cal. Rptr. 471*

[g] "Substantial Factor" Test

BAJI No. 3.75 (so-called proximate cause instruction containing "but for" test) disapproved for use in any negligence action because grammatically confusing and conceptually misleading; *BAJI No. 3.76*, which employs substantial factor test, is approved for use in lieu of BAJI No. 3.75. *Mitchell v. Gonzales (1991) 54 Cal.3d 1041, 1049, 1054, 1 Cal. Rptr. 2d 913, 819 P.2d 872*

Plaintiff entitled to recover if defendant's conduct is "substantial factor" in causing plaintiff's injury. *Willis v. Gordon (1978) 20 Cal. 3d 629, 635, 143 Cal. Rptr. 723, 574 P.2d 794*

Serologist's failure to provide accurate analysis of crime scene evidence to plaintiff's attorneys before plaintiff's criminal trial was not substantial factor in plaintiff's conviction; no credible evidence indicated reasonable probability that test results would have resulted in judgment of acquittal, because results did not exonerate plaintiff and other evidence established plaintiff's guilt. *Williams v. Wraxall (1995) 33 Cal. App. 4th 120, 133-134, 39 Cal. Rptr. 2d 658*

Substantial factor applicable in case involving child born with brain damage resulting from three separate causes. *Espinosa v. Little Co. of Mary Hosp. (1995) 31 Cal. App. 4th 1304, 1316, 37 Cal. Rptr. 2d 541*

Defendant liable for shooting of plaintiff on employer's premises by fired employee, because conduct of security guards employed by defendant was "substantial factor" in bringing about shooting; security guards' failure to prevent fired employee from entering employer's premises three times in two days demonstrated to fired employee that security was lax enough to allow him to come back and injure plaintiff. *Rosh v. Cave Imaging Sys., Inc. (1994) 26 Cal. App. 4th 1225, 1235-1236, 32 Cal. Rptr. 2d 136*

[3] Damages

In ordinary negligence actions for physical injury, recovery for emotional distress caused by that injury is available as item of parasitic damages; if plaintiff can demonstrate physical injury caused by defendant's negligence, anxiety specifically due to reasonable fear of future harm attributable to injury may also constitute proper element of damages; absent present physical injury or illness, fear of cancer damages recoverable only if plaintiff pleads and proves that due to defendant's negligent breach of duty owed to plaintiff, he or she was exposed to toxic substance that threatens cancer, and fear stems from knowing it is more likely than not plaintiff will develop cancer due to exposure. *Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 981, 997, 25 Cal. Rptr. 2d 550, 863 P.2d 795*

In action for damages regarding accident during which law enforcement officer failed to ascertain identity of tortfeasor, plaintiff not required to prove that but for officer's negligence, suit would have resulted in collectible judgment in plaintiff's favor. *Clemente v. State of California (1985) 40 Cal. 3d 202, 218-220, 219 Cal. Rptr. 445, 707 P.2d 818*

Allegations of willful, reckless, and wanton misconduct insufficient to warrant exemplary damages, but allegations of conscious disregard of safety justify exemplary damages if nondeliberate injury is alleged. *Taylor v. Superior Court (1979) 24 Cal. 3d 890, 895-896, 157 Cal. Rptr. 693, 598 P.2d 854*

Once plaintiff has suffered actual and appreciable harm, neither speculative nor uncertain character of damages, nor difficulty of proof tolls period of limitation. *Davies v. Krasna (1975) 14 Cal. 3d 502, 514, 121 Cal. Rptr. 705, 535 P.2d 1161*

Mere breach of duty causing only nominal damages, speculative harm, or threat of future harm not yet realized insufficient to create cause of action. *Budd v. Nixen (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433*

Person injured by wrongful act of another must exercise reasonable care and diligence to avoid loss or minimize resulting damages, and is precluded from recovery for losses that might have been prevented by reasonable efforts and expenditures on his or her part. *Valencia v. Shell Oil Co. (1944) 23 Cal. 2d 840, 844, 147 P.2d 558*

Plaintiff has duty to minimize damages in every reasonable way; failure to return to work when reasonably able to do so terminates damage for loss of wages at that time. *Pretzer v. California Transit Co. (1930) 211 Cal. 202, 208, 294 P. 382*

Injury element of actionable negligence requires act causing harm, i.e., detrimental physical changes to plaintiff's body; physical injury actionable whether or not it gives rise to emotional distress; impairment of bone marrow resulting from overdose of anticancer drugs was actionable injury, in that it constituted detrimental change to immune system. *Duarte v. Zachariah (1994) 22 Cal. App. 4th 1652, 1661-1663, 28 Cal. Rptr. 2d 88*

Plaintiff whose property was damaged by defendant's negligence is not limited to recovery of costs of repairs, but may recover for all injury to propertyproximately caused by defendant's negligence, including recovery for inconvenience caused by injury or loss of use. *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1023, 244 Cal. Rptr. 507*

Defendant bears burden of producing evidence of plaintiff's failure to mitigate damages. *Blake v. E. Thompson Petroleum Repair Co. (1985) 170 Cal. App. 3d 823, 831, 832, 216 Cal. Rptr. 568*

Damages for economic losses recoverable from manufacturer of defective cans if manufacturer knew that single customer had ordered large quantity for specific purpose, manufacturer shipped negligently manufactured products not suitable for that purpose, and economic injury was reasonably foreseeable if product proved defective. *Ales-Peratis Foods Int'l, Inc. v. American Can Co. (1985) 164 Cal. App. 3d 277, 289-291, 209 Cal. Rptr. 917*

Damages for economic losses recoverable in negligence action against manufacturer and lessor of defective sander if

necessary business relationship with defendants is proven. *Pisano v. American Leasing (1983) 146 Cal. App. 3d 194, 197, 194 Cal. Rptr. 77*

Party injured by tortious act has active duty to use reasonable care and diligence to minimize loss; plaintiff was not entitled to compensation for damages he or she could have avoided by reasonable effort or expense. *Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 949, 122 Cal. Rptr. 470*

No cause of action for negligence without compensable damage. *Oakes v. McCarthy Co. (1968) 267 Cal. App. 2d 231, 254, 73 Cal. Rptr. 127*

Nominal damages to vindicate technical right not recoverable in negligence action if no actual loss has occurred. *Fields v. Napa Milling Co. (1958) 164 Cal. App. 2d 442, 448, 330 P.2d 459*

[4] Duty

[a] Duty to Control Conduct of Another

Except in certain special circumstances, person owes no duty to control conduct of another or to warn those endangered by that conduct; person's mere proximity to assailant, even with knowledge of assailant's assaultive tendencies, does not establish relation imposing duty to control assailant's conduct. *Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 203, 205, 185 Cal. Rptr. 252, 649 P.2d 894*

As general rule, no duty to control conduct of another person; exceptions when defendant stands in special relationship either to person whose conduct needs to be controlled or to foreseeable victim of that conduct. *Robertson v. Wentz (1986) 187 Cal. App. 3d 1281, 1288, 232 Cal. Rptr. 634*

[b] Foreseeability

Degree of foreseeability necessary to warrant finding of duty varies from case to case, with high degree of foreseeability likely to be required if burden of preventing future harm is great, and lesser degree required if there are strong policy reasons for preventing harm or harm can be prevented by simple means. *Isaacs v. Huntington Mem'l Hosp. (1985) 38 Cal. 3d 112, 125, 211 Cal. Rptr. 356, 695 P.2d 653*

Neither intoxicated drivers nor swift traffic on major thoroughfare were unforeseeable as matter of law in plaintiff's action against telephone company for injuries sustained when plaintiff was using company's telephone booth and was struck by intoxicated driver; foreseeability of risk that phone booth user might be injured by car veering off street and crashing into phone booth having defective door was question of fact for jury. *Bigbee v. Pacific Tel. & Tel. Co. (1983) 34 Cal. 3d 49, 58-60, 192 Cal. Rptr. 857, 665 P.2d 947*

Mere fact that particular kind of accident has not happened before not evidence that accident is one that might not reasonably have been anticipated. *Weirum v. RKO Gen., Inc. (1975) 15 Cal. 3d 40, 47, 123 Cal. Rptr. 468, 539 P.2d 36*

Radio station that sponsored contest directing contestants to drive to various locations liable to plaintiff who was injured when his car was forced off highway by speeding contestant; contestants' actions foreseeable; if likelihood that person may react in particular manner is risk that makes defendant negligent, reaction does not prevent defendant from being liable for harm caused. *Weirum v. RKO Gen., Inc. (1975) 15 Cal. 3d 40, 47, 123 Cal. Rptr. 468, 539 P.2d 36*

Concept of foreseability relevant to analysis of several aspects of negligence; persons's duty extends to all persons

foreseeably endangered by his or her conduct. *Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 399, 115 Cal. Rptr. 765, 525 P.2d 669*

Foreseeability of risk is chief element in determining whether defendant owes duty; because duty and foreseeability are inherently intertwined, duty adjudicated on case-by-case basis. *Dillon v. Legg (1968) 68 Cal. 2d 728, 740, 69 Cal. Rptr. 72, 441 P.2d 912*

In absence of overriding policy consideration, foreseeability of risk of primary importance in establishing element of duty. *Dillon v. Legg (1968) 68 Cal. 2d 728, 739, 69 Cal. Rptr. 72, 441 P.2d 912*

In order to limit otherwise potentially infinite liability that would follow every negligent act, defendant liable only for injuries that were reasonably foreseeable to defendant at time. *Dillon v. Legg (1968) 68 Cal. 2d 728, 739, 69 Cal. Rptr. 72, 441 P.2d 912*

Despite foreseeability of potential injury, business that rented skating facility out for use as all-night "rave" party site had no duty to prevent teenage girls from ingesting drugs at party and then driving away. *Sakiyama v. AMF Bowling Ctrs., Inc. (2003) 110 Cal. App. 4th 398, 407-412, 1 Cal. Rptr. 3d 762*

Not reasonably foreseeable that defendant's action in taking plaintiff to public sidewalk adjacent to road undergoing construction would subject plaintiff to unreasonable risk of harm from driver who lost control of automobile, jumped curb, and struck plaintiff. *Victor v. Hedges (1999) 77 Cal. App. 4th 229, 243-244, 91 Cal. Rptr. 2d 466*

Intoxicated motorist not liable for death of tow truck driver because she could not have foreseen that her driving under influence would result in third party's striking and killing tow truck driver while he was trying to remove her car from side of freeway. *Bryant v. Glastetter (1995) 32 Cal. App. 4th 770, 780, 38 Cal. Rptr. 2d 291*

"Open range" law (*Food & Agric. Code § 17123*), which provides that persons grazing cattle in counties devoted chiefly to grazing are not required to fence in their cattle, does not absolve cattle owners of duty under *Civ. Code § 1714* to exercise reasonable care in management of animals; that duty includes keeping them off well-traveled highways, especially at night, to avoid reasonably foreseeable collisions with automobiles. *Shively v. Dye Creek Cattle Co. (1994) 29 Cal. App. 4th 1620, 1629-1631, 35 Cal. Rptr. 2d 238*

Dog owner not liable to visitor claiming to have contracted Lyme disease from tick carried by dog, because evidence showed that owner did not know, and could not reasonably be expected to have known, that ticks carrying disease were present in area; owner had no duty to warn visitor not to allow dog to sit on her lap. *Butcher v. Gay (1994) 29 Cal. App. 4th 388, 405-406, 34 Cal. Rptr. 2d 771*

Landlords not liable to visitor shot accidentally by tenant despite their knowledge that tenant had drinking problem and owned firearms; shooting was not foreseeable risk absent evidence that tenant had ever harmed anyone due to either his drinking problem or his possession of firearms or evidence that tenant handled firearms unsafely while drunk. *Sturgeon v. Curnutt (1994) 29 Cal. App. 4th 301, 307, 34 Cal. Rptr. 2d 498*

Act foreseeable only if it is sufficiently likely and not simply imaginable or conceivable; owner of convenience store not liable to customer struck by curb-jumping automobile in absence of prior similar incidents. *Jefferson v. Qwik Korner Mkt., Inc. (1994) 28 Cal. App. 4th 990, 995-996, 34 Cal. Rptr. 2d 171*

Jury able reasonably to find that defendant, who had contracted with decedent's employer to maintain its trucks, was liable for decedent's death, because defendant's negligent maintenance of trucks had placed decedent in position in which he was exposed to reasonably foreseeable risk of injury from intoxicated or otherwise out-of-control drivers; truck in which decedent was driving broke down on highway due to defective electrical system, and decedent was hit by

speeding car as he stood on shoulder of highway in dark. *Jackson v. Ryder Truck Rental, Inc. (1993) 16 Cal. App. 4th 1830, 1840, 20 Cal. Rptr. 2d 913*

Liability not imposed against record company for teenager's committing suicide after listening to rock music album expressing view that suicide is acceptable alternative to life; music was not directed and intended toward goal of bringing about imminent suicide of its listeners, nor was it likely to produce that result; suicide not foreseeable risk, because music had been recorded and produced years before, there was no "real time" urging of listeners to act in particular manner, and no dynamic interaction with or live importuning of particular listeners. *McCollum v. CBS, Inc. (1988) 202 Cal. App. 3d 989, 1000-1001, 249 Cal. Rptr. 187*

One who creates foreseeable danger not readily discoverable by endangered persons has duty to warn them of potential peril, whether or not special relationship existed between parties; police officer has duty to warn newspaper photographer that accident scene was contrived by officer, irrespective of status as police officer. *Bastian v. County of San Luis Obispo (1988) 199 Cal. App. 3d 520, 529-530, 245 Cal. Rptr. 78*

Shooting in hotel of one resident by another was unforeseeable to hotel proprietor as matter of law if there was no evidence that assailant had any history of violence or assaultive behavior, that proprietor or anyone else knew or should have known that assailant possessed gun, that proprietor knew or should have known of risk to other hotel guests, and that proprietor failed to exercise reasonable care to protect victims or other residents. *Gray v. Kircher (1987) 193 Cal. App. 3d 1069, 1074-1075, 236 Cal. Rptr. 891*

Risk of maniacal, mass-murderous assault on patrons of restaurant not foreseeable to restaurant as matter of law; negligence cause of action not stated against restaurant; restaurant's general duty to take reasonable precautions to protect patrons from reasonably foreseeable criminal conduct of unknown third parties does not include burden to prevent once-in-a-lifetime massacres. *Lopez v. McDonald's Corp. (1987) 193 Cal. App. 3d 495, 504-512, 238 Cal. Rptr. 436*

After independent contractor weatherproofed stairs with adequate friction to avoid slickness of surface, plaintiff's slipping on stairs due to second contractor's resealing of stairs with dangerously slick compound was not reasonably foreseeable; as matter of law, contractor does not owe duty to warn customer or subsequently hired contractors of proper resealing method. *Lima v. Magnesite Waterproofing & Refinishing (1987) 191 Cal. App. 3d 776, 782-783, 236 Cal. Rptr. 519*

Primary aspect of duty is foreseeability of risk; defendant owes duty of care to all persons foreseeably endangered by his or her conduct, with respect to all risks that make conduct unreasonably dangerous; foreseeability is question of fact unless decisional law has established that there could be no foreseeability of risk under same or similar factual situation. *Robertson v. Wentz (1986) 187 Cal. App. 3d 1281, 1288, 232 Cal. Rptr. 634*

Risk that glass fragments in unmarked paper bag on attorney's desk may constitute evidence that should not be thrown away was not foreseeable to maintenance person as matter o0f law; negligent spoliation of evidence cause of action not stated against maintenance company. *Velasco v. Commercial Bldg. Maint. Co. (1985) 169 Cal. App. 3d 874, 878-879, 215 Cal. Rptr. 504*

Foreseeability of risk is usually question of fact; and is question of law only if under undisputed facts there is no room for reasonable difference of opinion. *Twohig v. Briner (1985) 168 Cal. App. 3d 1102, 1106, 214 Cal. Rptr. 729*

Conduct of intoxicated or speeding drivers in losing control and colliding with poles, buildings, or other objects standing alongside roads is not uncommon and therefore foreseeable because injury or death caused by other drivers is among possible dangers awaiting stranded motorists; foreseeability of drunk driver losing control of vehicle and running into car is question of fact that cannot be decided on demurrer. *Bloomberg v. Interinsurance Exch. (1984) 162*

Cal. App. 3d 571, 576-577, 207 Cal. Rptr. 853

Ordinary care requires avoidance of "unreasonable risk" turning on basic question of whether foreseeable risk of danger outweighs utility of act or manner in which it is done. *Chaplis v. County of Monterey (1979) 97 Cal. App. 3d 249, 265, 158 Cal. Rptr. 395*

[c] General Requirement of Duty

Liability founded on negligence requires existence of duty of care owed by alleged wrongdoer to plaintiff, or to class of which plaintiff is member. *Spearman v. State Farm Fire & Cas. Co. (1986) 185 Cal. App. 3d 1105, 1110, 230 Cal. Rptr. 264*

[d] Imminent Peril

Instruction on imminent peril is error if peril created by defendant's own negligence, or in absence of evidence that some other course of action was available to defendant at time peril was perceived. *Casey v. Russell (1982) 138 Cal. App. 3d 379, 386, 188 Cal. Rptr. 18*

[e] Negligent Misrepresentation

Plaintiff's independent precautionary action supported conclusion that plaintiff did not rely on representations; cause of action for negligent misrepresentation therefore precluded even assuming duty based on voluntary undertaking existed. *M.B. v. City of San Diego (1991) 233 Cal. App. 3d 699, 708, 284 Cal. Rptr. 555*

[f] Nonliability for Nonfeasance

Gas company owed no duty to family (plaintiffs) who rented apartment for failing to take action to prevent plaintiffs from being exposed to excessive amount of carbon monoxide emitted from defective wall furnace, even if company representative walked past furnace on way to inspect water heater and should have noticed by discoloration of furnace that furnace could have posed danger to plaintiffs; gas company had no responsibility for furnace, as it neither installed nor inspected it, nor did company sell or lease it to apartment owners. *Williams v. Southern California Gas Co. (2009) 176 Cal. App. 4th 591, 603-604, 98 Cal. Rptr. 3d 258*

Relatives of convicted child molester who was out on parole had no duty to inform parolee's girlfriend about his past convictions when she and her young son accompanied parolee to residences of relatives; relatives had no knowledge that parolee was molesting girlfriend's son, and even though some molestations took place at their residences when parolee was alone with child, relatives did nothing to facilitate molestations and made no representations as to safety of child if left alone with parolee. *Eric J. v. Betty M. (1999) 76 Cal. App. 4th 715, 727-730, 90 Cal. Rptr. 2d 549*

Paramedic team employed by city owed no duty to render medical attention or otherwise assist gunshot victim if emergency personnel involved did not create peril, voluntarily assume special duty to assist, make promise or statement to induce reliance, or increase risk that otherwise would have existed; *Health & Safety Code § 1799.107* (providing for nonliability of emergency rescue personnel unless action performed in grossly negligent manner) imposes no general duty on emergency personnel to provide assistance whenever and wherever summoned, but rather limits public entity's liability exposure. *Zepeda v. City of Los Angeles (1990) 223 Cal. App. 3d 232, 236, 272 Cal. Rptr. 635*

Absent special relationship giving rise to duty to act, no duty to take affirmative action to assist or protect another, no

matter how great danger in which other is placed, or how easily he or she could be rescued. *Stangle v. Fireman's Fund Ins. Co. (1988) 198 Cal. App. 3d 971, 974, 244 Cal. Rptr. 103*

[g] Physicians

No special relationship exists between physician acting as proctor during surgery and either surgeons performing operation or patient who suffers injuries; no duty on proctor to take affirmative action to assist or to protect patient. *Clarke v. Hoek (1985) 174 Cal. App. 3d 208, 211-220, 219 Cal. Rptr. 845*

Physicians are in special relationship with patient and have duty to warn patient not to engage in conduct, such as driving, that is foreseeably dangerous in patient's condition; duty extends to benefit of third persons. *Myers v. Quesenberry (1983) 144 Cal. App. 3d 888, 893-894, 193 Cal. Rptr. 733*

[h] Police Officers

Police officers conducting surveillance of dangerous site not in special relationship with assailant or with victim assaulted at site during surveillance. *Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 206-209, 185 Cal. Rptr. 252, 649 P.2d 894*

CHP officers owed no duty to tow truck driver who had completed extraction of car from road-side ditch and was returning to tow truck to get receipt book; tow truck driver was not in position of dependency on officers, nor did officers create risk of harm. *Minch v. Department of Cal. Highway Patrol (2006) 140 Cal. App. 4th 895, 904-907, 44 Cal. Rptr. 3d 846*

Police investigation of prior assault in apartment complex did nto create special relationship between police and resident of apartment complex. *Denton v. City of Fullerton (1991) 233 Cal. App. 3d 1636, 1643, 285 Cal. Rptr. 297*

Jury instruction regarding standard of care of specialists (*BAJI No. 6.37.1*) inapplicable to conduct of police officer. *Miller v. Kennedy (1987) 196 Cal. App. 3d 141, 147-148, 241 Cal. Rptr. 472*

Special relationship created by police conduct that causes victim to rely detrimentally on police to such extent that risk of harm as result of police negligence is greater than that to which victim was already exposed. *Lopez v. City of San Diego (1987) 190 Cal. App. 3d 678, 681, 235 Cal. Rptr. 583*

No detrimental reliance supporting claim of special relationship between highway patrol and motorist if officer's warning could not, as matter of law, be reasonably interpreted to mean smoke-obscured highway ahead was suitable for travel at high speeds. *Foremost Dairies, Inc. v. State of California (1986) 190 Cal. App. 3d 361, 366, 232 Cal. Rptr. 70*

Absent special relationship creating special duty, victim of crime that police might have prevented cannot recover; officers responding to investigate do not create special relationship, especially if they in no way induced reliance that they would provide protection. *Von Batsch v. American Dist. Tel. Co. (1985) 175 Cal. App. 3d 1111, 1121-1125, 222 Cal. Rptr. 239*

Police under duty to exercise due care during chase of suspect; failure to sound siren is potential basis for liability although suspect being chased, rather than police, actually collided with plaintiff. *Stark v. City of Los Angeles (1985) 168 Cal. App. 3d 276, 283-284, 214 Cal. Rptr. 216*

Highway patrol officer's act in stopping and releasing motorist after motorist passed sobriety tests did not create

relationship requiring affirmative duty to other motorists when officer did not perform affirmative act that placed person in peril or increase risk of harm. *Harris v. Smith (1984) 157 Cal. App. 3d 100, 104-107, 203 Cal. Rptr. 541*

Police officer owed no duty under special relationship theory to intoxicated man for injuries incurred after officer failed to take him into custody. *Stout v. City of Porterville (1983) 148 Cal. App. 3d 937, 942-945, 196 Cal. Rptr. 301*

Police officers who undertook to investigate party and observed intoxicated condition of minors had no duty to prevent minor defendants from driving or to protect minor victim from accepting ride with intoxicated minor; specialrelationship not created by observation of conduct that might foreseeably create risk of harm. *Jackson v. Clements (1983) 146 Cal. App. 3d 983, 987-988, 194 Cal. Rptr. 553*

[i] Psychotherapists

Therapist has duty, once he or she determines or should determine that patient presents serious danger of violence to another, to use reasonable care to protect intended victim against that danger. *Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 431, 131 Cal. Rptr. 14, 551 P.2d 334*

Allegations of existence of psychiatrist-patient relationship, knowledge on part of psychiatrist that patient was likely to attempt suicide, and failure by psychiatrist to take preventive measures, were sufficient to state cause of action for breach of psychiatrist's duty of care towards patient. *Bellah v. Greenson (1978) 81 Cal. App. 3d 614, 620, 146 Cal. Rptr. 535*

[j] Public Agencies

Additional factors that may be considered in determining whether or not to impose duty on public agency include (1) extent of agency's powers, (2) role imposed on agency by law, and (3) limitations imposed by agency's budget. *Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 203, 185 Cal. Rptr. 252, 649 P.2d 894*

Governmental agencies have no duty to public as whole to warn that particular person is threat to public's well-being, but have duty to warn specific foreseeable victim, if government's actions create foreseeable peril to that specific foreseeable victim and victim cannot readily discover danger. *Wallace v. City of Los Angeles (1993) 12 Cal. App. 4th 1385, 1396, 16 Cal. Rptr. 2d 113*

Special relationship created if public employee asks private citizen to assist employee in performance of public function that involves foreseeable risk of injury. *Wallace v. City of Los Angeles (1993) 12 Cal. App. 4th 1385, 1400, 16 Cal. Rptr. 2d 113*

State has no duty to supervise or control convicted child-molester out on parole, or to warn victim or victim's parents of danger posed, absent direct or continuing relationship between state and plaintiff (or plaintiff's decedent) or prior threat to specific identifiable victim. *Brenneman v. State of California (1989) 208 Cal. App. 3d 812, 820, 256 Cal. Rptr. 363*

[k] Public Policy Limitations

State has no duty to permit decedent security guard to take firearm test that would have allowed him to carry weapon and therefore to defend himself against violent attack. *Nunn v. State of California (1984) 35 Cal. 3d 616, 627-628, 200 Cal. Rptr. 440, 677 P.2d 846*

Many considerations, including guidance of history, continually refined concepts of morals and justice, convenience of

rule, and social judgment allocating loss, justify imposition of duty in particular circumstances. *Weirum v. RKO Gen., Inc. (1975) 15 Cal. 3d 40, 46, 123 Cal. Rptr. 468, 539 P.2d 36*

Intoxicated motorist not liable for death of tow truck driver killed by third party while attempting to remove motorist's car from freeway after her arrest; public policy encourages drivers whose cars are disabled to seek assistance rather than attempt self-help. *Bryant v. Glastetter (1995) 32 Cal. App. 4th 770, 782-783, 38 Cal. Rptr. 2d 291*

Any departure from fundamental principles stated in *Civ. Code § 1714* involves balancing of considerations, including those set forth in *Rowland v. Christian (1968) 69 Cal. 2d 108, 112-113, 70 Cal. Rptr. 97, 443 P.2d 561* , and public policy; nondealer who sold vehicle owed no duty to install seatbelts prior to sale. *Krawitz v. Rusch (1989) 209 Cal. App. 3d 957, 963-965, 257 Cal. Rptr. 610*

Strong public policy considerations militate against imposition of duty on landlord to enforce insurance clause in lease agreement for benefit of tenant's business invitees. *Morales v. Fansler (1989) 209 Cal. App. 3d 1581, 1584-1589, 1589, 258 Cal. Rptr. 96*

Absent endorsement or sponsorship for economic gain, publisher of advertisement has no duty to investigate safety of advertised product; thus, publisher that neither endorsed nor sponsored product is not liable for injuries sustained from use of product. *Walters v. Seventeen Magazine (1987) 195 Cal. App. 3d 1119, 1121-1122, 241 Cal. Rptr. 101*

Private rehabilitation facility owes no duty of care toward community members for criminal conduct of its residents. *Cardenas v. Eggleston Youth Ctr. (1987) 193 Cal. App. 3d 331, 335, 238 Cal. Rptr. 251*

Weight of public policy applied in determining existence of duty measured by balancing of (1) foreseeability of harm to plaintiff; (2) degree of certainty that plaintiff suffered injury; (3) closeness of connection between defendant's conduct and injury suffered; (4) moral blame attached to defendant's conduct; (5) policy of preventing future harm; (6) extent of burden to defendant and consequences to community of imposing duty to exercise care with resulting liability for breach; and (7) availability, cost, and prevalence of insurance for risk involved. *Wylie v. Gresch (1987) 191 Cal. App. 3d 412, 416-417, 236 Cal. Rptr. 552*

Whether and extent to which new duty is recognized is ultimately question of public policy. *Jones v. Grewe (1987) 189 Cal. App. 3d 950, 954, 234 Cal. Rptr. 717*

Public policy precludes imposition of liability on peace officers and public entities for negligent infliction of emotional distress caused by officers' conduct in bringing plaintiff to scene of police standoff to aid in surrender of armed and suicidal relative. *Allen v. Toten (1985) 172 Cal. App. 3d 1079, 1091, 218 Cal. Rptr. 725*

First Amendment policies and practical obstacles to enforcement weigh against imposition of duty on movie producers to warn patrons or provide security protection outside theater against possibility of violence incited by nature of film; activity of producing motion picture not grounds for imposition of liability even if film had tendency to attract violence-prone individuals to vicinity of theater. *Bill v. Superior Court (1982) 137 Cal. App. 3d 1002, 1011, 1013-1014, 187 Cal. Rptr. 625*

Recovery denied to person who claimed that defendant social services agency failed to take proper steps to find him adequate adoptive home and thereforedeprived him of adequate upbringing; no manageable standard for assessing wrongfulness of defendant's conduct or calculating plaintiff's damages. *Smith v. Alameda County Soc. Servs. Agency (1979) 90 Cal. App. 3d 929, 937, 153 Cal. Rptr. 712*

Private agency acting under governmental program for rehabilitation of drug offenders not liable for participant's escaping from "halfway house" and killing several people; same public policy considerations leading to legislative

immunization of public entities for release or probation of criminals apply to agency's actions. *Beauchene v. Synanon Found., Inc. (1979) 88 Cal. App. 3d 342, 348, 151 Cal. Rptr. 796*

[l] Question of Fact

If existence of duty rests on question of determining reasonable foreseeability of injury to plaintiff, liability primarily matter for jury determination unless reasonable minds could not differ on point. *Richards v. Stanley (1954) 43 Cal. 2d 60, 66, 271 P.2d 23*

Proper question for jury is whether it was reasonably foreseeable that injury was likely to result from defendant's conduct, not whether defendant foresaw or by exercise of ordinary care would have foreseen identical consequence that happened. *Werkman v. Howard Zink Corp. (1950) 97 Cal. App. 2d 418, 425, 218 P.2d 43*

[m] Question of Law

Foreseeability is question of law if reasonable minds could not differ on point. *Hooks v. Southern Cal. Permanente Med. Group (1980) 107 Cal. App. 3d 435, 443, 165 Cal. Rptr. 741*

Whether duty predicated on negligence principles exists is primarily question of law. *Stangle v. Fireman's Fund Ins. Co. (1988) 198 Cal. App. 3d 971, 974, 244 Cal. Rptr. 103*

Whether duty existed is question of law; determination that defendant owed plaintiff no duty of care is complete defense to cause of action for negligence. *Owens v. Kings Supermarket (1988) 198 Cal. App. 3d 379, 384-385, 243 Cal. Rptr. 627*

Determination of duty is primarily question of law in which foreseeability of risk to another is principal consideration. *De Lima v. Magnesite Waterproofing & Refinishing (1987) 191 Cal. App. 3d 776, 782, 236 Cal. Rptr. 519*

Whether legal duty exists in given case is primarily question of law; determination in typical negligence action that there is no duty giving rise to liability is essentially shorthand way of expressing conclusion that weight of public policy warrants departure from *Civ. Code § 1714(a)*, which broadly imposes liability on everyone for injury occasioned to another by his or her want of ordinary care or skill in management of his or her property or person, except so far as latter has, willfully or by want of ordinary care, brought injury on him or herself. *Wylie v. Gresch (1987) 191 Cal. App. 3d 412, 416, 236 Cal. Rptr. 552*

Whether duty of care exists is question of law for court. *Jones v. Grewe (1987) 189 Cal. App. 3d 950, 954, 234 Cal. Rptr. 717*

[n] Rescuers

Persons injured while undertaking necessary rescue are entitled, absent rash or reckless conduct on their part, to recover from person whose negligence created peril necessitating rescue. *Solgaard v. Guy F. Atkinson Co. (1971) 6 Cal. 3d 361, 368, 99 Cal. Rptr. 29, 491 P.2d 821*

Intoxicated motorist not liable to tow truck driver killed by third party while attempting to remove motorist's car from freeway after her arrest; tow truck driver was not rescuing motorist, but was performing job he had been hired to do. *Bryant v. Glastetter (1995) 32 Cal. App. 4th 770, 784, 38 Cal. Rptr. 2d 291*

Rescue doctrine expands risks rescuer may take in order to save third person in danger. *Scott v. Texaco, Inc. (1966) 239 Cal. App. 2d 431, 434, 48 Cal. Rptr. 785*

[o] Schools

School district was subject to liability for death of student who participated in "slap boxing match" during lunch break, if school district was aware of practice of slap boxing and its danger; that student's death resulted from his voluntary participation in dangerous activity was irrelevant, because that conduct is expected from young students, who therfore rquire supervision. *Dailey v. Los Angeles Unified Sch. Dist. (1970) 2 Cal. 3d 741, 750-751, 87 Cal. Rptr. 376, 470 P.2d 360*

School district entitled to summary judgment on claim that it failed to protect student from injuries caused by another student during fight, despite fact that student who caused injuries had been in trouble before; no aspect of assailant's prior conduct bore any relation to plaintiff, there was no indication that assailant even knew plaintiff before attack, and fight arose suddenly during lunch break, immediately after school monitor had passed through area in which fight occurred. *Thompson v. Sacramento City Unified Sch. Dist. (2003) 107 Cal. App. 4th 1352, 1369-1372, 132 Cal. Rptr. 2d 748*

School district not liable for death of boy who suffered fatal injuries from skateboarding games on school grounds while school was not in session; although defendant may have foreseen those activities, concomitant duty to forestall and prevent harm does not automatically follow. *Bartell v. Palos Verdes Peninsula Sch. Dist. (1978) 83 Cal. App. 3d 492, 500, 147 Cal. Rptr. 898*

University and student not in special relationship that would impose liability on university for personal injuries caused by student driving after drinking alcoholic beverages in dormitory in violation of university rules. *Baldwin v. Zoradi (1981) 123 Cal. App. 3d 275, 286, 295, 176 Cal. Rptr. 809*

[p] Special Relationships

Duty to warn another who may be endangered by conduct of third party arises if special relationship exists between actor and another that gives another right to protection; commonly recognized special relationships are those between common carriers and passengers, innkeepers and guests, andpossessors of land and those entering at owner's invitation. *Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 806, 205 Cal. Rptr. 842, 685 P.2d 1193*

Absent special relationship between parties, no duty exists to control conduct of third person to prevent him or her from causing harm to another. *Richards v. Stanley (1954) 43 Cal. 2d 60, 65, 271 P.2d 23*

General objective to "preserve, protect, and police" common areas as stated in bylaws and related covenants for privately owned community did not create special relationship imposing duty on property owners' association to prevent resident from driving while drunk and killing another resident. *Titus v. Canyon Lake Property Owners Assn. (2004) 118 Cal. App. 4th 906, 911-913, 13 Cal. Rptr. 3d 807*

Paramedics did not have special relationship with person they were transporting voluntarily to hospital, even though person was clearly acting erratically; therefore, paramedics had no affirmative duty to prevent person from escaping ambulance on arrival at hospital and were not liable for failing to protect her from her own suicidal, reckless, or irrational conduct when she was subsequently hit by car and killed. *Hernandez v. KWPH Enters. (2004) 116 Cal. App. 4th 170, 181, 10 Cal. Rptr. 3d 137*

Although duty of care was imposed based on analysis of *Rowland* factors, special relationship existed between Boy

Scouts and 12-year-old scout sufficient to impose duty on organization to take steps to protect scout from harm caused by sexual molestation by troop leader. *Juarez v. Boy Scouts of Am., Inc. (2000) 81 Cal. App. 4th 377, 410-411, 97 Cal. Rptr. 2d 12*

Christian Scientist Church and its members have no legal duty of care based on special relationship with seriously ill child who died after failing to respond to Church's spiritual practices; child's father was present and exercised legal control over decisions regarding choice of treatment for child, and only father could possibly be liable for failure to exercise proper judgment concerning whether to seek conventional medical treatment. *Quigley v. First Church of Christ, Scientist (1998) 65 Cal. App. 4th 1027, 1034-1035, 76 Cal. Rptr. 2d 792*

Special relationship among parties created if defendant's action is equivalent to inviting or enticing incompetent driver to tamper with vehicle. *Avis Rent a Car Sys., Inc. v. Superior Court (1993) 12 Cal. App. 4th 221, 233, 15 Cal. Rptr. 2d 711*

No special relationship exists between adoption agency and natural mother who gives child up for adoption that would place duty on agency to inform mother years later when it discovers that child has genetically transmitted disease. *Olson v. Children's Home Soc'y (1988) 204 Cal. App. 3d 1362, 1365-1367, 252 Cal. Rptr. 11*

If avoidance of foreseeable harm requires defendant to control or warn of conduct of another person, liability incurred only if defendant bears some special relationship to dangerous person or potential victim. *Lundy v. California Realty (1985) 170 Cal. App. 3d 813, 819, 216 Cal. Rptr. 575*

Special relationship creating duty to control conduct of third person requires knowledge of specific risk to identifiable and foreseeable victim. *Megeff v. Doland (1981) 123 Cal. App. 3d 251, 257, 176 Cal. Rptr. 467*

One who takes charge of third person whom he or she knows or should know is likely to cause bodily harm to others if not controlled, is under duty to exercise reasonable care to control third person to prevent harm. *Megeff v. Doland (1981) 123 Cal. App. 3d 251, 257, 176 Cal. Rptr. 467*

Trend favors expansion of list of special relationships justifying imposing liability and duty to aid or protect in any relation of dependence or mutual dependence. *Pamela L. v. Farmer (1980) 112 Cal. App. 3d 206, 211, 169 Cal. Rptr. 282* ; *Mann v. State of California (1977) 70 Cal. App. 3d 773, 779-780, 139 Cal. Rptr. 82*

Mere presence in social group does not create special relationship necessary to impose duty to control conduct of third person to prevent physical harm to another person. *Ronald M. v. White (1980) 112 Cal. App. 3d 473, 476, 169 Cal. Rptr. 370*

Absent special relationship, defendant under no duty to control conduct of another. *Bartell v. Palos Verdes Peninsula Sch. Dist. (1978) 83 Cal. App. 3d 492, 498, 147 Cal. Rptr. 898*

Once traffic officer has chosen to investigate plight of specific persons on freeway, special relationship arises and liability attaches if officer breached limited duty to protect under these special circumstances. *Mann v. State of California (1977) 70 Cal. App. 3d 773, 780, 139 Cal. Rptr. 82*

[q] Statutory Definition

Civ. Code § 1714(a) (liability for negligence) states civil law, not common law principle. *Rowland v. Christian (1968) 69 Cal. 2d 108, 111-112, 70 Cal. Rptr. 97, 443 P.2d 561*

Civ. Code § 1714 imposes duty on every person to exercise reasonable care to avoid injury to every other person; however, *Civ. Code § 1714* does not establish legal duty of defendant in any particular case. *Lundy v. California Realty (1985) 170 Cal. App. 3d 813, 818, 216 Cal. Rptr. 575*

[r] Voluntary Assumption of Duty

Although one need do nothing to rescue another from peril not of that individual's own making, person entering affirmative course of conduct affecting interests of another assumes duty to act and incurs liability for negligent acts or omissions. *Schwartz v. Helms Bakery Ltd. (1967) 67 Cal. 2d 232, 238, 60 Cal. Rptr. 510, 430 P.2d 68*

Evidence regarding hiring of security guards to patrol open air market did not show that landlord of market voluntarily assumed duty to safeguard property of market's tenants, and therefore landlord not liable for theft from tenant's stall. *Rotman v. Maclin Mkts., Inc. (1994) 24 Cal. App. 4th 1709, 1715-1716, 30 Cal. Rptr. 2d 130*

Defendant who voluntarily undertakes to render services to another person that defendant should recognize as necessary for protection of third party, has duty to third party to exercise reasonable care; defendant liable to third party for breach of this duty if (1) defendant's failure to exercise reasonable care increases risk of harm to third party, (2) defendant has undertaken to perform duty owed by another person to third party, or (3) third partysuffers harm because either third party or person to whom defendant rendered services relied on defendant's undertaking. *FNS Mortgage Serv. Corp. v. Pacific Gen. Group, Inc. (1994) 24 Cal. App. 4th 1564, 1572-1573, 29 Cal. Rptr. 2d 916* ; *but see Johnson v. County of Ventura (1994) 29 Cal. App. 4th 1400, 1406, 35 Cal. Rptr. 2d 150*

Once voluntary act performed, "good Samaritan" not required to continue rendering aid indefinitely. *Baker v. City of Los Angeles (1986) 188 Cal. App. 3d 902, 907, 233 Cal. Rptr. 760*

Defendant who begins affirmative course of conduct affecting interests of another assumes duty to act and incurs liability for negligent acts or omissions; one who undertakes an act is required to do it with care. *Bloomberg v. Interinsurance Exch. (1984) 162 Cal. App. 3d 571, 575, 207 Cal. Rptr. 853*

One who voluntarily assumes duty is required to exercise reasonable care in performing that duty; plaintiff may combine this theory with different negligence theory if warranted by facts. *White v. Uniroyal, Inc. (1984) 155 Cal. App. 3d 1, 33-34, 202 Cal. Rptr. 141*

[5] Elements of Cause of Action for Negligence

Elements of cause of action for negligence: (1) legal duty to use due care, (2) breach of that duty; (3) reasonably close causal connection between that breach and resulting injury; and (4) actual loss or damage. *Wylie v. Gresch (1987) 191 Cal. App. 3d 412, 416, 236 Cal. Rptr. 552*

Four essential elements of cause of action for negligence: (1) defendant's legal duty of care to plaintiff; (2) defendant's breach of duty by negligent act or omission; (3) injury to plaintiff as result of breach; and (4) compensable damages. *Robertson v. Wentz (1986) 187 Cal. App. 3d 1281, 1287, 232 Cal. Rptr. 634*

Actionable negligence: (1) defendant's legal duty to use due care; (2) breach of that duty; and (3) breach as proximate (or legal) cause of plaintiff's resulting injury. *Valdez v. J.D. Diffenbaugh Co. (1975) 51 Cal. App. 3d 494, 504, 124 Cal. Rptr. 467*

Cause of action for negligence: (1) duty of defendant with respect to injured person's injury; (2) violation of that duty; (3) causal relation between defendant's conduct and injury suffered; and (4) plaintiff's loss, that is, damages. *Premo v.*

Grigg (1965) 237 Cal. App. 2d 192, 195, 46 Cal. Rptr. 683

[6] Pleading

Pleading proximate cause in general terms. *Eads v. Marks (1952) 39 Cal. 2d 807, 812, 249 P.2d 257*

Pleading duty arising from contract. *Eads v. Marks (1952) 39 Cal. 2d 807, 811-812, 249 P.2d 257*

Complaint is required to set forth only essential facts with reasonable precision and with sufficient particularity to acquaint defendant with nature, source, and extent of cause of action. *Rannard v. Lockheed Aircraft Corp. (1945) 26 Cal. 2d 149, 156-157, 157 P.2d 1*

Pleading duty arising from statute. *Routh v. Quinn (1942) 20 Cal. 2d 488, 491-492, 127 P.2d 1*

Alleging negligent act or omission. *Guilliams v. Hollywood Hosp. (1941) 18 Cal. 2d 97, 101-102, 114 P.2d 1*

Denial on lack of information and belief is sufficient if matter is not presumably within defendant's knowledge. *Jensen v. Dorr (1911) 159 Cal. 742, 747, 116 P. 553*

Allegation for personal injuries suffered by peace officer that defendant's act of "slumping or going limp" caused plaintiff's knee to be injured was generally sufficient to state cause of action for negligence. *Gibb v. Stetson (1988) 199 Cal. App. 3d 1008, 1012, 245 Cal. Rptr. 283*

Facts from which jury could conclude that city should have warned employee of fellow employee's dangerous propensities are sufficiently alleged if employee was dating fellow employee, fellow employee was parolee who had been convicted of kidnapping, rape, and sexual assault, and employee had previously complained to supervisors that fellow employee had sexually harassed her. *Duffy v. City of Oceanside (1986) 179 Cal. App. 3d 666, 674-675, 224 Cal. Rptr. 879*

Facts alleged in complaint and not controverted in answer are not in issue. *Carlton v. Superior Court (1968) 261 Cal. App. 2d 282, 289, 67 Cal. Rptr. 568*

Cause of action in tort may be based on violation of statute. *Miglierini v. Havemann (1966) 240 Cal. App. 2d 570, 573, 49 Cal. Rptr. 795*

Complaint did not state cause of action based on negligence. *Miglierini v. Havemann (1966) 240 Cal. App. 2d 570, 573, 49 Cal. Rptr. 795*

Failure of complaint to state facts sufficient to constitute cause of action is proper affirmative defense. *Bracker v. American Nat'l Food, Inc. (1955) 133 Cal. App. 2d 338, 339-340, 284 P.2d 163*

Plaintiff must plead facts showing causal connection between defendant's negligence and plaintiff's injury as necessary. *Potter v. Richards (1955) 132 Cal. App. 2d 380, 384-385, 282 P.2d 113*

New matter is something relied on by defendant that is not put in issue by plaintiff and that must be pleaded by defendant. *Jetty v. Craco (1954) 123 Cal. App. 2d 876, 880, 267 P.2d 1055*

Plaintiff must plead facts showing existence of duty as necessary. *Pascoe v. Southern Cal. Edison Co. (1951) 102 Cal. App. 2d 254, 259, 227 P.2d 555*

Affirmative allegation in answer contrary to plaintiff's allegation is equivalent of denial. *Elliott v. Bertsch (1943) 59 Cal. App. 2d 543, 546-547, 139 P.2d 332*

[7] Verdicts

Special verdicts are valid in negligence actions even though jurors who do not join in negligence special verdict vote on proximate cause special verdict; judgment permitted to be entered on both special verdicts although nine identical jurors are not in agreement on questions of negligence and proximate cause. *Resch v. Volkswagen of Am., Inc. (1984) 36 Cal. 3d 676, 682, 205 Cal. Rptr. 827, 685 P.2d 1178*

Special verdicts apportioning damages in negligence actions are valid if they command votes of any nine jurors, who agree both that defendant isnegligent and that negligence is proximate cause of plaintiff's injuries. *Juarez v. Superior Court (1982) 31 Cal. 3d 759, 768, 183 Cal. Rptr. 852, 647 P.2d 128*

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A. Negligence Cause of Action

33-380 California Forms of Pleading and Practice--Annotated § 380.193

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§ 380.193 Law Reviews

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§ 380.194 Text References

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[Reserved]

§§ 380.195[Reserved]

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33-380 California Forms of Pleading and Practice--Annotated § 380.210

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§ 380.210 California Torts

For discussion of the doctrine of res ipsa loquitur and the presumption of negligence arising from a violation of statute, see California Torts, Ch. 3 (Matthew Bender).

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33-380 California Forms of Pleading and Practice--Annotated § 380.211

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§ 380.211 State Statutes

[1] Res Ipsa Loquitur

Res ipsa loquitur presumption. *Evid. Code § 646*

[2] Violation of Statute, Ordinance, or Regulation

Presumption of negligence arising from violation of statute, ordinance, or regulation. *Evid. Code § 669*

Violation of government rule, policy, manual, or guideline comes within presumption of *Evid. Code § 669* only under certain circumstances. *Evid. Code § 669.1*

"Statute" defined. *Evid. Code § 230*

Violation of prima facie speed limit does not create presumption of negligence. *Veh. Code § 40831*

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§ 380.212 Decisions

[1] Res Ipsa Loquitur

Doctrine is inapplicable if court must enter into field of conjecture to determine whether necessary elements are present, if conclusions based on that conjecture contradict experience reflected in judicial opinions and overlookequally probable explanations of accident. *Brown v. Poway Unified Sch. Dist. (1993) 4 Cal. 4th 820, 828, 15 Cal. Rptr. 2d 679, 843 P.2d 624*

Experience teaches that slips and falls are not so likely to be result of negligence that presumption to that effect is justified. *Brown v. Poway Unified Sch. Dist. (1993) 4 Cal. 4th 820, 826-828, 15 Cal. Rptr. 2d 679, 843 P.2d 624*

Issue of existence of conditions for application of doctrine of res ipsa loquitur is usually a question of fact for the jury, but all three conditions may exist as a matter of law. *Newing v. Cheatham (1975) 15 Cal. 3d 351, 359, 124 Cal. Rptr. 193, 540 P.2d 33*

Plaintiff is entitled to have jury instructed on res ipsa loquitur if sufficient evidence is presented to support conclusion that all elements of doctrine have been established. *Kerr v. Bock (1971) 5 Cal. 3d 321, 323-325, 95 Cal. Rptr. 788, 486 P.2d 684*

Plaintiff is entitled to establish that it was more probable than not that defendant's negligence caused accident by showing that defendant was responsible for all reasonably probable causes to which accident could be attributed; plaintiff is not required to exclude all other possible causes, including his or her own conduct. *Shahinian v. McCormick (1963) 59 Cal. 2d 554, 559, 30 Cal. Rptr. 521, 381 P.2d 377*

"Res ipsa loquitur," translated from Latin, means "the thing (or affair) speaks for itself." *Zentz v. Coca Cola Bottling*

Co. (1952) 39 Cal. 2d 436, 440, 247 P.2d 344

Application of doctrine is appropriate even if defendant is not in better position than plaintiff to explain what occurred if it appears more probable than not that injury resulted from negligence on defendant's part. *Zentz v. Coca Cola Bottling Co. (1952) 39 Cal. 2d 436, 445, 247 P.2d 344*

Application of doctrine is justified if defendant has superior knowledge of what occurred and if chief evidence of cause of accident may be accessible to defendant but inaccessible to plaintiff. *Ybarra v. Spangard (1944) 25 Cal. 2d 486, 490, 154 P.2d 687*

Trial court's determination that bone fragment in ground beef could not have been larger than one-eighth of inch and that no one could reasonably expect defendant to remove it from ground beef made doctrine of res ipsa loquitur inapplicable; trial court's determination was same as finding that fragment's presence could not be attributed to lack of due care, actual or presumed. *Ford v. Miller Meat Co. (1994) 28 Cal. App. 4th 1196, 1203, 33 Cal. Rptr. 2d 899*

Jury was entitled to rely on its own common knowledge in determining standard of care in medical malpractice action that arose after defendant left cap from surgical instrument in plaintiff's hip during surgery; cap was sufficiently large to have layperson apply common knowledge in assessing negligence; opinion of four physicians that defendant was not negligent, as opposed to only one who testified to contrary, did not preclude jury from relying on its common knowledge; under doctrine of res ipsa loquitur, proper to instruct jury that it can infer negligence from happening of accident itself, if it finds, based on common knowledge, the testimony of physicians called as expert witnesses, and all the circumstances, that the injury was more likely than not the result of negligence. *Gannon v. Elliot (1993) 19 Cal. App. 4th 1, 6-11, 23 Cal. Rptr. 2d 86*

Nonsuit in negligence action based on res ipsa loquitur is proper if plaintiff failed to present expert testimony regarding alleged medical malpractice or even describe precise nature of injury. *Zavala v. Board of Trs. (1993) 16 Cal. App. 4th 1755, 1764-1765, 20 Cal. Rptr. 2d 768*

Plaintiffs are not entitled to application of res ipsa loquitur doctrine in action for damages to real property caused by a fire, if evidence indicated two possible causes for the fire, only one of which was under defendant's control. *Gicking v. Kimberlin (1985) 170 Cal. App. 3d 73, 76-77, 215 Cal. Rptr. 834*

In some circumstances, court is entitled to take judicial notice of fact that certain events are ordinarily caused by someone's negligence. *Hinckley v. La Mesa R. V. Ctr., Inc. (1984) 158 Cal. App. 3d 630, 640, 205 Cal. Rptr. 22* (fire in relatively new vehicle ordinarily does not occur in absence of negligence)

When fire in motorhome was allegedly caused by defendant's negligent wiring, fact that plaintiff had inspected wiring after vehicle left defendant's actual control did nto preclude finding that agency or instrumentality causing fire was under defendant's exclusive control. *Hinckley v. La Mesa R. V. Ctr., Inc. (1984) 158 Cal. App. 3d 630, 640-641, 205 Cal. Rptr. 22*

Issue of applicability of doctrine properly taken from jury if one element was nonexistent as matter of law. *Fuller v. Sears, Roebuck & Co. (1982) 136 Cal. App. 3d Supp. 1, 7 , 186 Cal. Rptr. 26*

Plaintiff entitled to directed verdict on liability if plaintiff presented uncontro verted evidence supporting all three elements required for application of doctrine of res ipsa loquitur, and defendant failed to produce evidence sufficient to rebut presumption. *Sanchez v. Bay Gen. Hosp. (1981) 116 Cal. App. 3d 776, 786-789, 172 Cal. Rptr. 342*

Factor of greater probability of defendant's negligence is fundamental basis of doctrine. *Folk v. Kilk (1975) 53 Cal. App. 3d 176, 184-185, 126 Cal. Rptr. 172*

Conditional res ipsa loquitur jury instruction proper if there is conflict in evidence on one or more elements of doctrine, but evidence could support finding that elements were satisfied. *Cline v. Lund (1973) 31 Cal. App. 3d 755, 763-764, 107 Cal. Rptr. 629*

Trial court properly refused proposed res ipsa loquitur instruction if defendant to whom doctrine did not apply was included in scope of instruction. *Clemens v. Regents of Univ. of Cal. (1970) 8 Cal. App. 3d 1, 14, 87 Cal. Rptr. 108*

[2] Violation of Statute, Ordinance, or Regulation

Pursuant to legislative amendment to *Lab. Code § 6304.5*, effective January 1, 2000, Cal-OSHA workplace safety statutes and regulations may be used to establish negligence in action brought by injured worker against party who is not worker's employer, eliminating exception that had existed since 1971; exception still exists in action against state for taking or failing to take actions in regulatory capacity. *Elsner v. Uveges (2004) 34 Cal. 4th 915, 935-939, 22 Cal. Rptr. 3d 530, 102 P.3d 915*

Violation of guidelines concerning investigation of accidents by Highway Patrol officers forms basis of negligence per se instruction if subject would be exposed to disciplinary action for ignoring guidelines. *Clemente v. State of California (1985) 40 Cal. 3d 202, 214-216, 219 Cal. Rptr. 445, 707 P.2d 818*

Fact that manufacturer of airplane complied with safety regulations applicable to airplane's design did not preclude finding that design was defective. *Elsworth v. Beech Aircraft Corp. (1984) 37 Cal. 3d 540, 550, 208 Cal. Rptr. 874, 691 P.2d 630*

Presumption of negligence set forth in *Evid. Code § 669* applicable to violation of temporary restraining order. *Stafford v. United Farm Workers (1983) 33 Cal. 3d 319, 324, 188 Cal. Rptr. 600, 656 P.2d 564*

Violation of police department's internal regulations regarding police use of firearms created presumption of negligence. *Peterson v. City of Long Beach (1979) 24 Cal. 3d 238, 243-244, 155 Cal. Rptr. 360, 594 P.2d 477*

Fact that plaintiff is unsuccessful in establishing presumption of negligence based on statutory violation doess not preclude finding of negligence if plaintiff establishes basic elements of negligence cause of action. *Nunneley v. Edgar Hotel (1950) 36 Cal. 2d 493, 500-501, 225 P.2d 497* (defendant found negligent despite plaintiff's failure to establish all elements required to create presumption of negligence)

School district not liable for failing to report suspected child abuse as required by Child Abuse and Neglect Reporting Act, *Pen. Code § 11164 et seq.*, in action by students abused by substitute teacher while he was employed by different school district after employment with defendant had ended, as Act was intended to protect students under current custodial care of reporter; 2000 amendments to statute did not abrogate similar holding of *Randi W. v. Muroc Joint Unified School Dist. (1997) 14 Cal. 4th 1066, 60 Cal. Rptr. 2d 263, 929 P.2d 582* . *P.S. v. San Bernardino City Unified School Dist. (2009) 174 Cal. App. 4th 953, 964-965, 94 Cal. Rptr. 3d 788*

State building code regulation placing slope restriction on disability parking spaces and adjacent access aisles was intended to facilitate transition of disabled persons, particularly those in wheelchairs, from vehicle to pavement and was not designed to prevent injury to pedestrian who falls while walking across unoccupied parking space, even if injured party happens to have disability. *Urhausen v. Longs Drug Stores California, Inc. (2007) 155 Cal. App. 4th 254, 268-270, 65 Cal. Rptr. 3d 838*

Statute prohibiting parking vehicle on sidewalk was not designed to protect party from being struck by different vehicle

that jumped curb for reason unrelated to presence on sidewalk of illegally parked vehicle. *Victor v. Hedges (1999) 77 Cal. App. 4th 229, 238, 91 Cal. Rptr. 2d 466*

Jury finding that statute regulating employee housing conditions did not apply to farmer who allowed migrant farmworkers to occupy land under his control, would not preclude finding that farmer breached common-law duty to provide reasonably safe housing that was found to exist independent of statute. *Reyes v. Kosha (1998) 65 Cal. App. 4th 451, 465 n.5, 76 Cal. Rptr. 2d 457*

Evid. Code § 669 creates presumption of negligence only when negligence duty of care is first proven to exist under circumstances; if statute, ordinance, or regulation allegedly violated creates duty that is not *negligence* duty of care, violation of that statute, ordinance, or regulation does not create presumption of negligence. *California Serv. Station & Auto. Repair Ass'n v. American Home Assurance Co. (1998) 62 Cal. App. 4th 1166, 1176-1180, 73 Cal. Rptr. 2d 182* ; *see also* *Rosales v. City of Los Angeles (2000) 82 Cal. App. 4th 419, 430, 98 Cal. Rptr. 2d 144*

Violator of ordinance requiring abutting landowners to maintain public sidewalk owes duty to city, not to pedestrian who slipped and fell on dog excrement; trial court erred in instructing on negligence per se doctrine, because ordinance did not clearly and unambiguously create duty of care owing to pedestrians. *Selger v. Steven Bros., Inc. (1990) 222 Cal. App. 3d 1585, 1590-1591, 272 Cal. Rptr. 544*

City within class of persons whose property was intended to be protected by city fire code. *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1021, 244 Cal. Rptr. 507*

Building code requirement of fences at construction sites is designed to protect pedestrians from construction-related accidents on public walkways, not to protect plaintiff who dove into shallow water off reconstructed pier. *Fredette v. City of Long Beach (1986) 187 Cal. App. 3d 122, 136, 231 Cal. Rptr. 598*

Statute requiring school districts to provide special education programs to handicapped children not intended to "protect" parents from having to pay costs of alternative care. *Keech v. Berkeley Unified Sch. Dist. (1984) 162 Cal. App. 3d 464, 470-471, 210 Cal. Rptr. 7*

Violation of statute, ordinance, or regulation is question of fact for jury to decide. *Cade v. Mid-City Hosp. Corp. (1975) 45 Cal. App. 3d 589, 596-597, 119 Cal. Rptr. 571*

One injured by dog as result of violation of leash ordinance is entitled to recover damages against dog's owner. *Rollins v. Hedin (1952) 114 Cal. App. 2d 488, 490, 250 P.2d 728*

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33-380 California Forms of Pleading and Practice--Annotated § 380.213

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§ 380.213 Law Reviews

Leonard, *The Application of Criminal Legislation to Negligence Cases: A Reexamination, 23 Santa Clara L. Rev. 427 (1983)*

Holdych, *The Presumption of Negligence Rule in California: The Common Law and Evidence Code Section 669 , 11* Pac. L.J. 907 (1980)

Prosser, *Res Ipsa Loquitur in California, 37 Cal. L. Rev. 183 (1949)*

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33-380 California Forms of Pleading and Practice--Annotated § 380.214

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§ 380.214 Text References

Jefferson, California Evidence Benchbook (C.J.A.--Cal. C.E.B. 2d ed. 1982) Volume 1, Part X, *Burden of Proof, Burden of Producing Evidence, and Presumptions*

Witkin, California Evidence, Ch. III, *Burden of Proof and Presumptions,* §§ 130, 144, 230-273 (3d ed. 1986)

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33-380 California Forms of Pleading and Practice--Annotated §§ 380.215-380.229

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[Reserved]

§§ 380.215[Reserved]

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33-380 California Forms of Pleading and Practice--Annotated § 380.230

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.230 California Torts

For discussion of vicarious liability, see California Torts, Ch. 8 (Matthew Bender)

For discussion of various theories of joint liability, see California Torts, Ch. 9 (Matthew Bender).

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33-380 California Forms of Pleading and Practice--Annotated § 380.231

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§ 380.231 State Statutes

[1] Joint and Several Liability

Fair Responsibility Act of 1986. *Civ. Code §§ 1431-1431.5*

Limitation on joint and several liability in actions based on principles of comparative fault. *Civ. Code § 1431.2*

[2] Vicarious Liability

Principal is responsible to third persons for negligence of agent in transaction of business of agency. *Civ. Code § 2338*

Liability of private owner of motor vehicle. *Veh. Code § 17150*

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33-380 California Forms of Pleading and Practice--Annotated § 380.232

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§ 380.232 Decisions

[1] Joint and Several Liability

Joint and several liability requires that tortfeasor whose negligence was proximate cause of an indivisible injury remain liable for total amount of damages, regardless of comparative fault; Proposition 51 provides that defendant in any action for personal injury is liable only for amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of fault; Proposition 51 abolished need for equitable indemnity among multiple tortfeasors. *General Motors Corp. v. Doupnik (9th Cir. 1993) 1 F.3d 862, 865-866*

[2] Strict Liability

Whether activity is ultrahazardous and liability therefore applies in absence of negligence is determined by considering several factors and weight given to each as merited by evidence; issue, by its very nature, is one that cannot be decided on demurrer. *Travelers Indem. Co. v. City of Redondo Beach (1994) 28 Cal. App. 4th 1432, 1444, 34 Cal. Rptr. 2d 337*

[3] Vicarious Liability: Employer and Employee

Although workers' compensation cases can be helpful in determining employer's vicarious liability for employee's torts, cases are not controlling precedent if liability based on respondeat superior principles. *Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 967 n.2, 227 Cal. Rptr. 106, 719 P.2d 676*

Whether or not negligent act was committed within scope of employment is question of fact and burden of proof is

with plaintiff. *Ducey v. Argo Sales Co. (1979) 25 Cal. 3d 707, 721-722, 159 Cal. Rptr. 835, 602 P.2d 755*

City was not liable for arson fire set by city fire marshal while inspecting building in official capacity; fire marshal's act was so startling and unusual an occurrence as to be outside risks that should fairly be imposed on his public employer. *Thorn v. City of Glendale (1994) 35 Cal. Rptr. 2d 1*

Employer was not liable under doctrine of respondeat superior for injuries sustained by plaintiff struck by employer's van driven by employee who was then engaging in purely personal activity of driving his children to school before going home; different result was not compelled by fact that employee was on call 24 hours a day. *Le Elder v. Rice (1994) 21 Cal. App. 4th 1604, 1607-1610, 26 Cal. Rptr. 2d 749*

City was not liable under doctrine of respondeat superior for injuries sustained by police officer who was accidentally shot by fellow officer with whom he was socializing after duty hours, because officer was not acting within scope of his employment at time of shooting; fact that city expected loaded weapon to be on officer's person while off duty in order to respond to emergencies did not render city responsible under doctrine for accidental discharge of weapon. *Henriksen v. City of Rialto (1993) 20 Cal. App. 4th 1612, 1617-1622, 25 Cal. Rptr. 2d 308*

Analytically, question of whether tort is committed within course of employment turns on whether (1) act performed was either required or incident to employee's duties, or (2) employee's misconduct could reasonably be foreseen as outgrowth of employee's duties. *Spradlin v. Cox (1988) 247 Cal. Rptr. 347*

Employer is liable for injury caused by employee during personal errand if errand was foreseeable and minor deviation from employee's duties. *Lazar v. Thermal Equip. Corp. (1983) 148 Cal. App. 3d 458, 465, 195 Cal. Rptr. 890*

Good faith settlement by employee does not release employer jointly liable based on respondeat superior. *Mayhugh v. County of Orange (1983) 141 Cal. App. 3d 763, 767, 190 Cal. Rptr. 537*

Employer is vicariously liable under doctrine of respondeat superior for negligence of intoxicated employee driving home after attending Christmas party given at employer's premises during work hours and at which employer encouraged employee to drink excessive amounts of alcohol. *Harris v. Trojan Fireworks Co. (1981) 120 Cal. App. 3d 157, 165, 174 Cal. Rptr. 452*

Employer is generally liable for torts of employee committed within scope of employment. *Golden W. Broadcasters, Inc. v. Superior Court (1981) 114 Cal. App. 3d 947, 956, 171 Cal. Rptr. 95*

Doctrine of respondeat superior is grounded on deeply rooted sentiment that business enterprise cannot justly disclaim responsibility for accidents characteristic of its activities; respondeat superior includes liability for employee's intentional tort as well as negligence. *Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 618, 124 Cal. Rptr. 143*

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33-380 California Forms of Pleading and Practice--Annotated § 380.233

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§ 380.233 Law Reviews

Kornhauser & Revesz, *Sharing Damages Among Multiple Tortfeasors, 98 Yale L.J. 831 (1989)*

Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines, 101 Harv. L. Rev. 563 (1988)*

Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure, 21 U.C. Davis L. Rev. 1141 (1988)*

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33-380 California Forms of Pleading and Practice--Annotated § 380.234

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.234 Text References

Witkin, Summary of California Law. Torts, vol. 5, §§ 50-56, 59-64, 67-68 (joint and several liability); vol. 6, §§ 1220-1279 (liability for negligence of others) (9th ed. 1988)

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33-380 California Forms of Pleading and Practice--Annotated §§ 380.235-380.249

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[Reserved]

§§ 380.235[Reserved]

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33-380 California Forms of Pleading and Practice--Annotated § 380.250

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.250 State Statutes

[1] Motion for Summary Adjudication

Grounds for motion for summary adjudication. *Code Civ. Proc. § 437c(f)(1)*

Motion for summary adjudication is alternative to motion for summary judgment. *Code Civ. Proc. § 437c(f)(2)*

Effect of summary adjudication motion on trial of action. *Code Civ. Proc. § 437c(n)*

Cause of action has no merit. *Code Civ. Proc. § 437c(o)*

[2] Prejudgment Interest

Plaintiff's entitlement to prejudgment interest in personal injury action. *Civ. Code § 3291*

[3] Statutes of Limitations

Two-year statute of limitations in action for injury or death caused by wrongful act or neglect of another. *Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)* (one year, prior to 2003)

Four-year statute of limitations for injury or death caused by deficient planning or construction of improvement to real property. *Code Civ. Proc. § 337.1*

Ten-year statute of limitations for action to recover damages from latent deficiencies in planning or construction of improvement to real property. *Code Civ. Proc. § 337.15*

Three-year statute of limitations for injury to real or personal property. *Code Civ. Proc. § 338*

Statute of limitations for action against health care provider for injury or death. *Code Civ. Proc. § 340.5*

Statute of limitations for action against attorney for wrongful act or omission. *Code Civ. Proc. § 340.6*

Statute of limitations for actions brought by or on behalf of Dalkon Shield Victims. *Code Civ. Proc. § 340.7*

Pleading statute of limitations as bar. *Code Civ. Proc. § 458*

[4] Venue

General venue rule for negligence action. *Code Civ. Proc. § 395*

Venue in action against corporation. *Code Civ. Proc. § 395.5*

Venue in action against partnership or association. *Code Civ. Proc. §§ 395.2, 395.5*

Venue in action against state for injury or death. *Gov. Code § 955.2*

Venue in action against city, county, city and county, or local agency for negligent injury to persons or property. *Code Civ. Proc. § 394(a)*

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33-380 California Forms of Pleading and Practice--Annotated § 380.251

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.251 Decisions

[1] Motion for Summary Adjudication

If plaintiff pleads two separate and distinct causes of action as single cause of action, defendant is entitled to file summary adjudication motion challenging one of the distinct causes of action. *Lilienthal & Fowler v. Superior Court (1993) 12 Cal. App. 4th 1848, 1852-1855, 16 Cal. Rptr. 2d 458*

Motion for summary adjudication is not appropriate method of challenging legal sufficiency of opposing party's pleadings; motion for judgment on pleadings must be filed. *Merenda v. Superior Court (1992) 3 Cal. App. 4th 1, 6, 4 Cal. Rptr. 2d 87*

Summary adjudication motion is not proper to determine that punitive damages claim has merit; defendant is entitled to jury trial on issue. *Haines v. Parra (1987) 193 Cal. App. 3d 1553, 1559-1561, 239 Cal. Rptr. 178*

Summary adjudication order eliminates necessity of proving or disproving claim or defense at trial. *Conway v. Bughouse, Inc. (1980) 105 Cal. App. 3d 194, 202, 164 Cal. Rptr. 585*

[2] Statutes of Limitations

Damages are sufficient to make limitations period begin running if appreciable and actual harm consist of more than nominal damages. *Davies v. Krasna (1975) 14 Cal. 3d 502, 514, 121 Cal. Rptr. 705, 535 P.2d 1161* ; *City of San Diego v. United States Gypsum Co. (1994) 30 Cal. App. 4th 575, 582, 35 Cal. Rptr. 2d 876*

Cause of action against manufacturer of intrauterine device for personal injuries of abortion and unwanted pregnancy

accrued when injuries incurred, rather than seven years later when plaintiff learned of facts constituting possible fraud regarding pregnancy rate associated with device; plaintiff knew of or was able to discover cause of action for personal injury action based on undesirable side effect of device at time injuries sustained. *Snow v. A.H. Robins Co. (1985) 165 Cal. App. 3d 120, 128-131, 211 Cal. Rptr. 271*

Delayed accrual of cause of action that postpones running of statute of limitations applies to actions based on fraud and progressively developing or continuing wrongs if nature, extent, or permanence of harm are difficult to discover; cause of action in fraud against manufacturer of intrauterine device based on allegedly false and fraudulent representations accrued when plaintiff learned of facts constituting possible fraud, rather than when plaintiff's injuries first appeared. *Snow v. A.H. Robins Co. (1985) 165 Cal. App. 3d 120, 127, 134-135, 211 Cal. Rptr. 271*

If physical injury is essential element of cause of action, period of limitations does not commence until injury has occurred, even though this may be some time after occurrence of wrongful act. *Aldaco v. Tropic Ice Cream Co. (1980) 110 Cal. App. 3d 523, 526, 168 Cal. Rptr. 59*

Manner of pleading statute of limitations in answer was proper. *Brown v. World Church (1969) 272 Cal. App. 2d 684, 691, 77 Cal. Rptr. 669*

Defense of statute of limitations must be raised by defendant. *Dicker v. Bisno (1957) 155 Cal. App. 2d 554, 560, 318 P.2d 159*

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33-380 California Forms of Pleading and Practice--Annotated § 380.252

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§ 380.252 Law Reviews

Comment, *Liberalizing Summary Adjudication: A Proposal, 36 Hastings L. J. 419 (1985)*

Andre, *California Personal Injury Statutes of Limitations: The Modern Tort and the Judicial Abandonment of an Archaic Doctrine, 27 Santa Clara L. Rev. 657 (1987)*

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33-380 California Forms of Pleading and Practice--Annotated § 380.253

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§ 380.253 Text References

California Civil Procedure Before Trial, Vol. 1, Chs. 21-23, *Complaints* (2d ed. Cal. CEB 1990)

Witkin, California Procedure, Vol. 4, §§ 359-358, 420, 430-475, 537-576, Vol. 5, §§ 899-1079 (4th ed. 1997)

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33-380 California Forms of Pleading and Practice--Annotated §§ 380.254-380.269

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§§ 380.254[Reserved]

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§ 380.270 California Torts

For discussion of comparative negligence, assumption of risk, and related defenses, see California Torts, Ch. 4 (Matthew Bender)

For discussion of the effect of workers' compensation law, see California Torts, Ch. 10 (Matthew Bender)

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§ 380.271 State Statutes

[1] Express Assumption of Risk

All contracts that have as their object to exempt anyone from responsibility for fraud, willful injury, or violation of law, are against public policy. *Civ. Code § 1668*

[2] Firefighter's Rule

Statutory liability is imposed for injuries to peace officers, firefighters, and emergency medical personnel occasioned by want of ordinary care or skill in management of property or person. *Civ. Code § 1714.9*

[3] Workers' Compensation

Liability and conditions for workers' compensation. *Lab. Code § 3600*

Workers' compensation is exclusive remedy. *Lab. Code §§ 3601, 5300*

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33-380 California Forms of Pleading and Practice--Annotated § 380.272

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.272 Decisions

[1] Assumption of Risk

General rule limiting duty of care of coparticipant in active sports to avoidance of intentional and reckless misconduct is applicable to participants engaged in noncompetitive but active sports activity, such as ski boat driver towing water-skier. *Ford v. Gouin (1992) 3 Cal. 4th 339, 345, 11 Cal. Rptr. 2d 30, 834 P.2d 724*

Duty of care is reduced by either express agreement or "primary assumption of risk." *Knight v. Jewett (1992) 3 Cal. 4th 296, 308 n. 4, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

In "primary assumption of risk," by virtue of nature of activity and parties' relationship to activity, defendant owes no legal duty to protect plaintiff from particular risk of harm that caused injury; doctrine operates as complete bar to plaintiff's recovery. *Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *see also O'Donoghue v. Bear Mountain Ski Resort (1994) 30 Cal. App. 4th 188, 192-193, 35 Cal. Rptr. 2d 467*

In "secondary assumption of risk," defendant owes duty of care to plaintiff who proceeds to encounter known risk imposed by defendant's breach of duty; doctrine is merged into comparative fault scheme; trier of fact, in apportioning loss resulting from injury, is entitled to consider parties' relative responsibility. *Knight v. Jewett (1992) 3 Cal. 4th 296, 315, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

Use of "reasonable implied assumption of risk"/"unreasonable implied assumption of risk" terminology, as means of differentiating between cases in which plaintiff is barred from bringing action and those in which plaintiff is not barred, is more misleading than helpful. *Knight v. Jewett (1992) 3 Cal. 4th 296, 309-310, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

Question whether defendant owed legal duty to protect plaintiff from particular risk is not answered by reference to

reasonableness of plaintiff's conduct, but by reference to nature of activity or sport in which defendant is engaged and relationship of defendant and plaintiff to that activity or sport. *Knight v. Jewett (1992) 3 Cal. 4th 296, 309, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

Participant in active sport breaches legal duty of care to other participants only if participant intentionally injures coparticipant, engages in conduct so reckless as to be totally outside range of ordinary activity involved in sport, or increases risk beyond risk inherent in sport. *Knight v. Jewett (1992) 3 Cal. 4th 296, 320-321, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *see also Freeman v. Hale (1994) 30 Cal. App. 4th 1388, 1393, 36 Cal. Rptr. 2d 418* ; *Wattenbarger v. Cincinnati Reds, Inc. (1994) 28 Cal. App. 4th 746, 754, 33 Cal. Rptr. 2d 732* ; *Yancey v. Superior Court (1994) 28 Cal. App. 4th 558, 566-567, 33 Cal. Rptr. 2d 777*

Terminology distinguishing between "reasonable" and "unreasonable" implied assumption of risk is disapproved. *Knight v. Jewett (1992) 3 Cal. 4th 296, 307, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

Defense of assumption of risk, insofar as it is variant of contributory negligence, and defense of last clear chance are subsumed under general process of assessing liability in proportion to fault, and are not recognized as separate defenses. *Li v. Yellow Cab. Co. (1975) 13 Cal. 3d 804, 826, 119 Cal. Rptr. 858, 532 P.2d 1226*

Assumption of risk as variant of contributory negligence exists if plaintiff unreasonably undertakes to encounter specific known risk imposed by defendant's negligence. *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824, 119 Cal. Rptr. 858, 532 P.2d 1226*

Assumption of risk is not variant of contributory negligence, and therefore is still viable defense, if plaintiff agrees to relieve defendant of obligation of reasonable conduct toward plaintiff. *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 119 Cal. Rptr. 858, 532 P.2d 1226*

Owners of cattle ranch who had invited friends to ranch for barbecue could not be held liable for injuries to guest who asked to ride one of their horses, assured owners that she had ridden before, but was injured when she lost control of horse, which broke into gallop and swerved suddenly, throwing her into fence; primary assumption of risk provided defense to owners, who had no reason to suspect that horse would bolt, did nothing to increase risks inherent in riding, and were entitled to take guest at word when she assured them she had experience as rider. *Levinson v. Owens (2009) 176 Cal. App. 4th 1534, 1549-1551, 98 Cal. Rptr. 3d 779*

Triable issue of fact as to whether stable that provided horses for recreational trail riding could be held liable for increasing risks inherent in activity; conflicting evidence existed as to whether defendant's trail guide told riders that he wanted to increase gait of horses from walk to gallop, as he admitted would be proper course of conduct, or if instead he prompted his horse into gallop without notice, causing plaintiff's horse to also bolt into gallop unexpectedly and throw her from saddle. *Cohen v. Five Brooks Stable (2008) 159 Cal. App. 4th 1476, 1494-1495, 72 Cal. Rptr. 3d 471*

Triable issue of fact existed regarding whether ski resort increased inherent risks of downhill skiing by converting ordinary slope into racing slope without properly marking area. *Solis v. Kirkwood Resort Co. (2001) 94 Cal. App. 4th 354, 365-367, 114 Cal. Rptr. 2d 265*

Instructors of junior lifeguards had no duty to decrease inherent risk of injuries to students by instructing them to walk down beach and check ocean floor for uneven terrain before swimming. *Lupash v. City of Seal Beach (1999) 75 Cal. App. 4th 1428, 1437-1439, 89 Cal. Rptr. 2d 920*

Triable issue existed as to whether defendant's use of snowboard without retention strap increased risks to plaintiff beyond those inherent in skiing. *Campbell v. Derylo (1999) 75 Cal. App. 4th 823, 830, 89 Cal. Rptr. 2d 519*

River rafting company was not liable for injury sustained by passenger on metal-framed river raft who was allowed to sit in rear of raft and was injured when she hit her head on the metal frame when raft hit rapids; primary assumption of risk was applicable because rafting is inherently risky activity, metal framed rafts were industry norm, plaintiff was aware of risks, and guide had admonished plaintiff to hold on as raft approached rapids. *Ferrari v. Grand Canyon Dories (1995) 32 Cal. App. 4th 248, 257, 38 Cal. Rptr. 2d 65*

Under doctrine of "secondary assumption of risk," premises owner and organization sponsoring dance had no legal duty to protect plaintiff against inherent risks of social dancing, which may include falling, but had duty to use due care not to increase risk by making floor too slippery; defendants were not entitled to summary judgment against plaintiff who attended dance and fell because soap flakes had been applied to dance floor to make it slippery but had not been thoroughly swept up. *Bush v. Parents Without Partners (1993) 17 Cal. App. 4th 322, 329, 21 Cal. Rptr. 2d 178*

"Secondary assumption of risk" applied to firefighter who slipped and fell on wet steps on defendant's premises while conducting a fire safety inspection. *Donohue v. San Francisco Hous. Auth. (1993) 16 Cal. App. 4th 658, 665-666, 20 Cal. Rptr. 2d 148*

"Secondary assumption of risk" applied to strict products liability claim; "primary assumption of risk" was inapplicable to bar plaintiff's claim because manufacturer had duty to produce defect-free product. *Milwaukee Elec. Tool Corp. v. Superior Court (1993) 15 Cal. App. 4th 547, 562, 565-566, 19 Cal. Rptr. 2d 24*

"Secondary assumption of risk" applied to case in which both plaintiff-tenant and defendant-landlord had notice of danger of sloping lawn area on defendant's property, but plaintiff nevertheless proceeded to walk on area and sustained injury. *Curties v. Hill Top Developers, Inc. (1993) 14 Cal. App. 4th 1651, 1656, 18 Cal. Rptr. 2d 445*

"Secondary assumption of risk" applied to student's suit against school district for injuries he sustained during school recess after he joined other students in throwing dirt clods at each other; school district had statutorily-imposed duty to supervise students during recess; plaintiff could not, as matter of law, have voluntarily assumed risk that district would breach its statutorily-imposed duty of supervision. *Lucas v. Fresno Unified Sch. Dist. (1993) 14 Cal. App. 4th 866, 872-873, 18 Cal. Rptr. 2d 79*

[2] Comparative Negligence

Under comparative fault principles, damages are apportioned based on various causes contributing to plaintiff's harm as opposed to particular defendant's negligence; in action by residents living near landfill against tire company whose toxic waste disposal contaminated plaintiffs' water supply, comparative fault principles based on plaintiffs' cigarette smoking were applicable although plaintiffs' conduct did not contribute to water contamination, because conduct allegedly contributed to harm plaintiffs suffered, i.e., their fear of significantly increased risk of cancer; defendant had burden of establishing causal link between plaintiffs' smoking and harm suffered; if plaintiffs' smoking is negligent and portion of plaintiff's fear of developing cancer is attributable to smoking, court properly applyied comparative fault principles in determining extent to which plaintiff's emotional distress damages for this fear should be reduced to reflect proportion of these damages for which plaintiffs should bear responsibility. *Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 1011-1012, 25 Cal. Rptr. 2d 550, 863 P.2d 795*

Refusal to give instruction on comparative negligence regarding plaintiff's failure to wear helmet was proper if plaintiff had been advised by doctor to wear helmet after prior injury, but no evidence at trial clarified what type of helmet should have been worn, or whether helmet would have prevented particular injuries incurred. *Clemente v. State of California (1985) 40 Cal. 3d 202, 217-218, 219 Cal. Rptr. 445, 707 P.2d 818*

Plaintiff's negligence must be weighed against combined total of all other negligence, including that of nonparties, that

was proximate cause of plaintiff's injuries. *American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 589 n. 2, 146 Cal. Rptr. 182, 578 P.2d 899*

Fundamental purpose of comparative negligence system is assigning responsibility and liability for damages in direct proportion to amount of each party's negligence. *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226*

All-or-nothing rule of contributory negligence has been replaced with rule of comparative negligence under which liability for damages is apportioned inaccordance with fault of persons whose negligence caused the injuries. *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226*

Under comparative negligence, plaintiff's contributory negligence does not bar recovery, but damages awarded must be diminished in proportion to amount of negligence attributable to plaintiff. *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 829, 119 Cal. Rptr. 858, 532 P.2d 1226*

Use of special verdicts or jury interrogatories is not required, but is aid to jurors in assigning fault percentages and avoiding quotient verdicts. *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824, 119 Cal. Rptr. 858, 532 P.2d 1226*

Burden of proving plaintiff's contributory negligence for failing to use seat belt is on defendant, who must prove whether or not plaintiff in exercise of reasonable care should have used available seat belt and what injuries would have been sustained, according to expert testimony, if seat belt had been used. *Franklin v. Gibson (1982) 138 Cal. App. 3d 340, 343-344, 188 Cal. Rptr. 23*

Neither term "contributory negligence" nor concept of contributory negligence, meaning negligence on plaintiff's part contributing causally to plaintiff's injury, is abolished with doctrine of contributory negligence. *Wittenbach v. Ryan (1976) 63 Cal. App. 3d 712, 718, 134 Cal. Rptr. 47*

[3] Express Assumption of Risk

Public policy does not oppose private, voluntary transactions in which one party, for consideration, agrees to shoulder risk that law would otherwise have placed on other party. *Tunkl v. Regents of Univ. of Cal. (1963) 60 Cal. 2d 92, 101, 32 Cal. Rptr. 33, 383 P.2d 441*

Exculpatory language in health club membership form that referenced only injuries arising "from the negligence or other acts of anyone else using [the club]" did not shield health club from liability when injured club member alleged that her injury was caused by club's own negligence in failing to inspect and keep clean exercise equipment. *Zipusch v. LA Workout, Inc. (2007) 155 Cal. App. 4th 1281, 1290-1292, 66 Cal. Rptr. 3d 704*

Release at racetrack was given to allow spectator to watch car race from close-up perspective of pit area while protecting track from liability for injuries caused by potentially dangerous racing activities; release did not extend to injuries caused by collapse of bleachers in pit area due to defective construction or maintenance, because no causal relationship existed between collapse and reason release was given. *Sweat v. Big Time Auto Racing, Inc. (2004) 117 Cal. App. 4th 1301, 1306-1308, 12 Cal. Rptr. 3d 678*

Triable issue of fact existed regarding whether liability release signed as part of weekday season ski pass extended to injury sustained while skiing on weekend pursuant to single-day pass that did not carry separate release agreement. *Solis v. Kirkwood Resort Co. (2001) 94 Cal. App. 4th 354, 360-364, 114 Cal. Rptr. 2d 265*

Express assumption of risk and release from liability in health club membership contract clearly and unambiguously

covered injury to club member sustained while exercising under supervision of personal trainer employed by club. *Lund v. Bally's Aerobic Plus, Inc. (2000) 78 Cal. App. 4th 733, 738-739, 93 Cal. Rptr. 2d 169*

Skydiving company was not liable for death of skydiver over ocean because release executed while company was only operating jumps over inland areas was sufficiently unequivocal and broad enough in scope to apply to fatal jump. *Paralift, Inc. v. Superior Court (1994) 23 Cal. App. 4th 748, 755-757, 29 Cal. Rptr. 2d 177*

Agent and employee of entity to whom preinjury release was given and who was acting within course and scope of that agency and employment when accident occurred, was entitled to legal protection of release and waiver to same extent as entity, even though not specifically named in it. *Madison v. Superior Court (1988) 203 Cal. App. 3d 589, 593 n. 2, 250 Cal. Rptr. 299*

Rule is well established that in absence of fraud, overreaching, or excusable neglect, one who signs instrument may not avoid impact of its terms on ground that he or she failed to read it before signing it. *Madison v. Superior Court (1988) 203 Cal. App. 3d 589, 596 n. 5, 250 Cal. Rptr. 299*

Civ. Code § 1668 does not apply to every contract, but only to contracts that involve public interest; absent public interest involvement, *Civ. Code § 1668* does not invalidate contracts that seek to exempt one from liability for simple negligence or for strict liability; releases signed by persons seeking to participate in scuba diving activities and classes do not involve a public interest. *Madison v. Superior Court (1988) 203 Cal. App. 3d 589, 598-599, 250 Cal. Rptr. 299*

Releases signed by motorcycle dirt bike riders did not involve public interest. *Kurashige v. Indian Dunes, Inc. (1988) 200 Cal. App. 3d 606, 612, 246 Cal. Rptr. 310*

Fact that releasor signs two exculpatory agreements releasing and indemnifying defendant from any liability does not necessarily create enough ambiguity to invalidate either agreement; general exculpatory language in one agreement for rental of ultralight aircraft and more specific language regarding negligence in related waiver and release did not create ambiguity; both exculpatory clauses were operative and barred plaintiff's action for negligence. *Powers v. Superior Court (1987) 196 Cal. App. 3d 318, 320-322, 242 Cal. Rptr. 55*

Release signed by participant in bicycle race releasing sponsors and cities valid, because bicycle racing is not compelled essential service of great public importance; no triable issue of fact existed as to whether release related to type of risk that caused participant's injuries. *Okura v. United States Cycling Fed'n (1986) 186 Cal. App. 3d 1462, 1466-1468, 231 Cal. Rptr. 429*

[4] Fireghter's Rule

Liability provided in *Civ. Code § 1714.9(a)(1)* (providing exception to firefighter's rule for conduct causing injury after person knows or has reason to know of presence of peace officer, firefighter, or emergency medical personnel) does not apply when peace officer, firefighter, or emergency medical personnel is negligently injured by fellow public safety member employed by different public safety agency when public safety personnel were jointly engaged in discharge of their responsibilities. *Calatayud v. State of California (1998) 18 Cal. 4th 1057, 1059-1060, 1068, 1072, 77 Cal. Rptr. 2d 202, 959 P.2d 360*

Firefighter's rule not applicable to bar recovery by private safety employees injured in fire negligently started by employees of third party; by establishing public fire departments and taxing themselves to pay for their services, public in effect purchases exoneration from duty of care and is not required to pay twice, through taxation and individual liability, for those services; in contrast, defendant whose negligence injures private safety employees employed by another does not have same relationship with those private safety employees as member of public has with

publicly-employed firefighters, because defendant has not paid to be relieved of duty of care owed toward private employees. *Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 541-545, 34 Cal. Rptr. 2d 630, 882 P.2d 347*

Firefighter's rule not separate concept, but example of application of assumption of riskdoctrine set forth in *Knight v. Jewett (1992) 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; proper basis for rule is not plaintiff's voluntary acceptance of known risk of injury in course of employment, but rather public policy determination that person who negligently starts fire does not owe duty of care to protect responding firefighter from very danger that requires firefighter's presence. *Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 541, 34 Cal. Rptr. 2d 630, 882 P.2d 347*

Application of firefighter's rule to veterinarians and veterinary assistants tenuous if based on veterinarian's or veterinary assistant's subjective acceptance of foreseeable occupational hazard of dog bites; however, application of rule may be sound if based on defendant's relationship with plaintiff and defendant's conduct in entrusting animal to plaintiff's professional care and control. *Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 541, 34 Cal. Rptr. 2d 630, 882 P.2d 347*

Rationale for firefighter's rule is "primary assumption of risk" theory that party who negligently started fire has no legal duty to protect firefighters from very danger that they are employed to confront. *Knight v. Jewett (1992) 3 Cal. 4th 296, 309-310 n.5, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *Cohen v. McIntyre (1993) 16 Cal. App. 4th 650, 654-655, 20 Cal. Rptr. 2d 143*

Rule does not protect defendant who commits independent acts of misconduct after firefighters or police officers have arrived on premises; firefighter entitled to recover damages for personal injuries sustained as result of defendant's negligent or intentional misrepresentation of nature of hazard that firefighter was called to confront. *Lipson v. Superior Court (1982) 31 Cal. 3d 362, 373, 182 Cal. Rptr. 629, 644 P.2d 822* (misrepresentation as to toxic nature of chemicals involved in boil-over)

If defendant's maintenance of ultrahazardous activity or condition produces separate injury, firefighter entitled to seek recovery on theory of strict liability; firefighter's rule not bar to recovery under these circumstances. *Lipson v. Superior Court (1982) 31 Cal. 3d 362, 378-379, 182 Cal. Rptr. 629, 644 P.2d 822*

Common law firefighter's rule provides that negligence in causing fire furnishes no basis for liability to professional firefighter injured while fighting fire; firefighter injured while performing his or her duties has no cause of action against person whose negligence caused fire. *Hubbard v. Boelt (1980) 28 Cal. 3d 480, 484, 169 Cal. Rptr. 706, 620 P.2d 156* ; *Walters v. Sloan (1977) 20 Cal. 3d 199, 202, 142 Cal. Rptr. 152, 571 P.2d 609*

Firefighter's rule did not apply to negligence of truck driver who collided with police car while police car was responding at high speed to domestic disturbance. *Terry v. Garcia (2003) 109 Cal. App. 4th 245, 252-253, 134 Cal. Rptr. 2d 565*

Firefighter's rule barred police officer's negligence claim against state highway patrol officer for attack by police dog controlled by highway patrol officer that occurred while both officers were engaged in capture of felon, because hazard posed by dog was inherent in plaintiff's duties as police officer. *Farnam v. State of California (2000) 84 Cal. App. 4th 1448, 1452-1455, 101 Cal. Rptr. 2d 642*

Civ. Code § 1714.9(a) establishes duty by those present at scene of emergency to refrain from misstating material facts concerning nature of emergency to those public safety officials called to scene; wife of man who shot police officer after wife misrepresented to officer that her husband was not violent when she knew otherwise had duty under statute not to misrepresent nature of hazard. *Boon v. Rivera (2000) 80 Cal. App. 4th 1322, 1330-1333, 96 Cal. Rptr. 2d 276*

Firefighter's rule was applicable to protect psychiatrist from liability for injury to police officer caused by psychiatrist's patient in case in which psychiatrist allegedly knew that patient harbored homicidal feelings toward his work supervisor, but failed to warn authorities of patient's potential for violence. *Tilley v. Schulte (1999) 70 Cal. App. 4th 79, 83-84, 82 Cal. Rptr. 2d 497*

Firefighter's rule not bar to recovery by tow truck operator who was fatally injured while working to remove drunk driver's car from side of road, because operator was performing work he was hired to do and did not qualify as rescuer. *Bryant v. Glastetter (1995) 32 Cal. App. 4th 770, 777-778, 38 Cal. Rptr. 2d 291*

Exception to rule for independent act of misconduct or unrelated risk not applicable merely because firefighter or police officer encountered risk that caused injuries by chance rather than by being summoned to scene by radio call; highway patrol officer barred from recovery for injuries caused on his way to work when he saw tires come off truck, warned traffic behind him with flashers, had driver of truck pull over, moved around truck to spot tires, and was hit when tires bounced off wall and onto his motorcycle. *Kelhi v. Fitzpatrick (1994) 25 Cal. App. 4th 1149, 1152, 1158-1159, 31 Cal. Rptr. 2d 182*

Exception to rule that exists if police officer's presence is unrelated to negligence causing his or her injury not applicable unless officer has come to specific location to perform specific immediate duty and defendant's unrelated negligent or intentional conduct increases risks inherent in performing that duty. *Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 410-411, 22 Cal. Rptr. 2d 514*

Rule not to be subverted by artificial isolation of specific factors. *Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 415, 22 Cal. Rptr. 2d 514*

Rule precludes tort cause of action by plaintiff, employed and compensated for work that carries with it certain hazards, for damages resulting from those very hazards; in absence of employment or other compensation for activity from which injuries resulted, rule not applicable; assumption of risk in such case classified as "secondary assumption of risk," with plaintiff's damages apportioned according to comparative fault principles. *Davis v. Gaschler (1992) 11 Cal. App. 4th 1392, 1400-1401, 14 Cal. Rptr. 2d 679*

Variant of firefighter's rule is veterinarian's rule, under which veterinarian is deemed to assume risks incident to his or her profession, including risks inherent in treating injured animals. *Davis v. Gaschler (1992) 11 Cal. App. 4th 1392, 1400-1401, 14 Cal. Rptr. 2d 679* ; *Nelson v. Hall (1985) 165 Cal. App. 3d 709, 714, 211 Cal. Rptr. 668*

Rule is inapplicable to negligence that does not cause fire; application of rule is consistently denied if plaintiffs have alleged negligent failure to warn of hidden, known danger. *Terhell v. American Commonwealth Assocs. (1985) 172 Cal. App. 3d 434, 441, 218 Cal. Rptr. 256*

Rule does not bar firefighter from stating cause of action for personal injury sustained in fall through hole in roof of building while fighting fire on premises, if complaint alleged that defendants negligently maintained roof so as to create concealed opening that was hazardous to anyone on roof and that defendants knew of opening and its hazard, but failed to warn plaintiff of its existence. *Terhell v. American Commonwealth Assocs. (1985) 172 Cal. App. 3d 434, 437, 441-442, 218 Cal. Rptr. 256*

Rule is applicable to intentional acts that could have been reasonably foreseen by plaintiff; rule was defense to police officer's action for injuries sustained when defendant intentionally rammed marked police vehicle in which plaintiff was openly trailing defendant as suspected car thief. *City of Los Angeles v. O'Brian (1984) 154 Cal. App. 3d 904, 906-907, 201 Cal. Rptr. 561*

Rule does not bar police officer's recovery for injuries from an intentional assault orbattery if this criminal activity is

not part of risk that occasioned officer's presence. *Krueger v. City of Anaheim (1982) 130 Cal. App. 3d 166, 172-173, 181 Cal. Rptr. 631*

Firefighter's rule bars recovery of damages for injuries sustained by both paid-call firefighters, persons who volunteer to fight individual fires in exchange for fixed sum regardless of amount of time spent, and full-time, professional firefighters. *Baker v. Superior Court (1982) 129 Cal. App. 3d 710, 722, 181 Cal. Rptr. 311*

Rule is inapplicable to preclude recovery by firefighter or police officer whose injuries resulted from risks faced in common by all members of public, or significant percentage thereof, and for which firefighter or police officer has received no special training. *Malo v. Willis (1981) 126 Cal. App. 3d 543, 547, 178 Cal. Rptr. 774*

[5] Workers' Compensation

Defendant claiming protection from action at law under Workers' Compensation Act bears burden of pleading and proving, as affirmative defense, existence of conditions of compensation. *Doney v. Tambouratgis (1979) 23 Cal. 3d 91, 96-97, 151 Cal. Rptr. 347, 587 P.2d 1160* ; *Popejoy v. Hannon (1951) 37 Cal. 2d 159, 173, 231 P.2d 484*

Mere fact that defendant in tort action is also plaintiff's employer is not sufficient to raise exclusive remedy provisions of Workers' Compensation Act as affirmative defense. *Coca-Cola Bottling Co. v. Superior Court (1991) 233 Cal. App. 3d 1273, 1285, 286 Cal. Rptr. 855*

If employer properly pleads and proves existence of employment relationship as defense to employee's cause of action and no exception to exclusive remedy rule is established, civil court lacks subject matter jurisdiction to render judgment. *Johnson v. Stratlaw, Inc. (1990) 224 Cal. App. 3d 1156, 1164, 274 Cal. Rptr. 363*

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Chapter 380 NEGLIGENCE
PART III. RESEARCH GUIDE
E. Affirmative Defenses

33-380 California Forms of Pleading and Practice--Annotated § 380.273

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.273 Law Reviews

Hoffman, *Does Implied Assumption of the Risk Exist in California's Comparative Fault Scheme? 29 Cal. W. L. Rev. 409 (1993)*

Comment, *Rethinking Principles of Comparative Fault in Light of California's Proposition 51, 19 Pepperdine L. Rev. 1495 (1992)*

Wildman & Barker, *Time to Abolish Implied Assumption of a Reasonable Risk in California, 25 U.S.F. L. Rev. 647 (1991)*

Comment, *Total Equitable Indemnity Under Comparative Negligence: Anomaly or Necessity? 74 Cal. L. Rev. 1057 (1986)*

Dear & Zipperstein, *Comparative Fault and Intentional Torts: Doctrinal Barriers and Policy Considerations, 24 Santa Clara L. Rev. 1 (1984)*

Miller, *Extending the Fairness Principle of Li and American Motorcyle: Adoption of the Uniform Comparative Fault Act, 14 Pac. L.J. 835 (1983)*

Zavos, *Comparative Fault and the Insolvent Defendant: A Critique and Amplification of American Motorcycle Association v. Superior Court, 14 Loy. L.A. L. Rev. 775 (1981)*

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33-380 California Forms of Pleading and Practice--Annotated § 380.274

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§ 380.274 Text References

Comparative Negligence--Law and Practice (Matthew Bender)

Witkin, Summary of California Law, vol. 6, *Torts*, §§ 1280-1376 (10th ed. 2005)

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33-380 California Forms of Pleading and Practice--Annotated §§ 380.275-380.289

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[Reserved]

§§ 380.275[Reserved]

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 380 NEGLIGENCE
PART IV. FORMS
A. Negligence Cause of Action

33-380 California Forms of Pleading and Practice--Annotated § 380.290

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.290 Complaint for Damages [Civ. Code § 3333] for Personal Injury and Property Damage Based on Negligence [Civ. Code § 1714(a)]--General Form

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injury and Property Damage Based on Negligence [Civ. Code § 1714(a)]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR PERSONAL INJURY AND
_____ [*name*]	)	PROPERTY DAMAGE
[; and DOES 1 through _____, inclusive], Defend-	)	[LIMITED CIVIL CASE]
ant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
FIRST COUNT
(Negligence)

1. Defendant _____ [*name*] is, and at all times mentioned in this complaint was,

_____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a resident of _____ County, California, *or* a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ [*city*], _____ County, California].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued in this complaint as Does 1-_____, inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and alleges on this information and belief that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences alleged in this complaint, and that plaintiff's injuries as alleged in this complaint were proximately caused by that negligence.)]

[3. (Plaintiff is informed and believes and on this information and belief alleges that) (A)t all times mentioned in this complaint each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things alleged in this complaint, was acting within the course and scope of this agency and employment.]

4. On or about _____ [*date*], plaintiff was _____ [*allege facts showing status and activity of plaintiff placing him/her in class of persons to whom defendant owed a duty and the location of the accident if venue is based on this fact, e.g.,* grocery shopping at defendant's store located at _____, California *or* a pedestrian crossing _____ Street at its intersection with _____ Street in _____ California].

5. At this time and place, defendant[s, and each of them,] _____ [*allege facts such as defendant's ownership, possession, or control of the instrumentality causing the accident, the contractual or special relationship, or the statute, that establish defendant's duty to plaintiff, e.g.,* owned, maintained, controlled, managed, and operated this premises *or* was the owner of a _____ (*year, make, model*) automobile bearing California license number _____].

6. At this time and place, defendant[s, and each of them,] negligently _____ [*allege acts or omissions of defendant, e.g.,* owned, maintained, controlled, managed, and operated this grocery store *or* entrusted, owned, maintained, operated and drove this automobile] so as to cause _____ [*allege the result of defendant's negligence constituting breach of duty owed plaintiff, e.g.,* plaintiff's hand to be severely lacerated by pieces of broken glass on the shelf next to the ketchup bottles *or* the automobile to collide with plaintiff, violently throwing him/her to the pavement] and to directly and legally cause the injuries and damages described below.

7. As a direct and legal result of the negligence of defendant[s, and each of them,] plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, emotional, and nervous pain and suffering. [Plaintiff is informed and believes and on this information and belief alleges that these injuries will result in permanent disability to him/her.] As a result of these injuries, plaintiff has suffered general damages.

8. As a further direct and legal result of the negligence of defendant[s, and each of them,] plaintiff has incurred[, and will continue to incur,] medical and related expenses. Plaintiff does not know at this time the exact amount of expenses that have been incurred and that will be incurred in the future.

9. As a further direct and legal result of the negligence of defendant[s, and each of them,] plaintiff's earning capacity has been and will be greatly impaired, both in the past and present in an amount according to proof.

10. As a further direct and legal result of the negligence of defendant[s, and each of them,] plaintiff's _____ [*describe personal property*] was _____ [damaged *or describe damage, e.g.,* destroyed beyond repair, all to plaintiff's damage in the sum of $_____]. [*If property was not*

destroyed, add: Plaintiff _____ (has expended *or* must expend) $_____ for repair of the damage to _____ (*describe personal property*), which is a reasonable sum for this repair.] [*For either destroyed or damaged property, add:* Plaintiff lost the use of _____ (*describe personal property*) for a period of _____ (*specify length of time*) while it was being _____ (repaired *or* replaced), to plaintiff's damage in the sum of $_____.]

WHEREFORE, plaintiff prays judgment against defendant as hereinafter set forth.

SECOND COUNT
(_____ [*Specify theory, e.g.,* Strict Liability])

[*Paragraphs in succeeding causes of actions or counts should be numbered consecutively from the last paragraph of the immediately preceding cause of action or count*.]

[11. _____ (*If desired, specify any paragraphs from preceding counts to be incorporated by reference, e.g.,* Plaintiff realleges, refers to, and herein incorporates by reference as if set out in full Paragraphs 1 through 10 of the First Count.)]

[12. _____ (*Here and in subsequent numbered paragraphs, state facts constituting the count under the theory alleged, in ordinary and concise language*.)]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

[*Set forth prayer for relief for each count, for example*:]

On the FIRST COUNT:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

4. For damage to personal property _____ [according to proof *or* in the sum of $_____];

5. For interest at the legal rate according to proof;

On the SECOND COUNT:

6. For general damages according to proof;

7. For medical and related expenses according to proof;

8. For loss of earnings according to proof;

9. For damage to personal property _____ [according to proof *or* in the sum of $_____];

10. For interest at the legal rate according to proof;

On ALL COUNTS:

11. For costs of suit incurred; and

12. For such other and further relief as the court may deem proper.

Respectfully submitted,
_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff_____ [*name*]

[*Verification, if desired.*]

[2] Use of Form

This general complaint form may be used to obtain damages for personal injuries and property damage directly and legally caused by defendant's negligence. Depending on the facts of the case, counsel may wish to delete paragraphs of the complaint that do not apply. For instance, if counsel is certain that no property damage is involved, Paragraph 10 of the complaint and Paragraph 4 of the prayer, would be omitted.

[3] Causes of Action and Counts

The phrase "causes of action" is often used indiscriminately to mean what it says and also to mean "counts," which state differently the same cause of action [*see Eichler Homes of San Mateo, Inc. v. Superior Court (1961) 55 Cal. 2d 845, 847, 13 Cal. Rptr. 194, 361 P.2d 914]* . The essence of a cause of action is the existence of a primary right and one violation of that right [*Kaufman & Broad Bldg. Co. v. City & Suburban Mortgage Co. (1970) 10 Cal. App. 3d 206, 215, 88 Cal. Rptr. 858]* . An example of a primary right is the plaintiff's right to be free from injury to his or her person [*see Slater v. Blackwood (1975) 15 Cal. 3d 791, 795, 126 Cal. Rptr. 225, 543 P.2d 593* ; *see also Flowers v. Torrance Mem'l Hosp. Med. Ctr. (1994) 8 Cal. 4th 992, 997-998, 35 Cal. Rptr. 2d 685, 884 P.2d 142* (single set of facts not giving rise to separate and distinct claims for ordinary and professional negligence because health care provider's medical expertise and skill is merely factor affecting standard of care governing negligence action)].

A plaintiff may plead in one cause of action alternative, inconsistent theories of recovery under separate "counts" [*see Eichler Homes of San Mateo, Inc. v. Superior Court (1961) 55 Cal. 2d 845, 847, 13 Cal. Rptr. 194, 361 P.2d 914* ; *Tanforan v. Tanforan (1916) 173 Cal. 270, 273-274, 159 P. 709]* . For example, a plaintiff may bring an action to recoverdamages arising from personal injuries suffered in an automobile accident by seeking recovery under both negligence and willful misconduct theories [*see Savage v. Van Marle (1974) 39 Cal. App. 3d 241, 245, 114 Cal. Rptr. 51* ; *but see Flowers v. Torrance Mem'l Hosp. Med. Ctr. (1994) 8 Cal. 4th 992, 998, 35 Cal. Rptr. 2d 685, 884 P.2d 142* (single set of facts not giving rise to separate and distinct claims for ordinary and professional negligence because health care provider's medical expertise and skill is merely factor affecting standard of care governing negligence action)].

Generally, it is a good practice to state a separate count for each separate theory of liability, rather than to combine

theories in a single count or cause of action. This approach helps avoid inconsistent pleading in the same count, as well as confusion in the framing of issues [*see Steiner v. Rowley (1950) 35 Cal. 2d 713, 718-719, 221 P.2d 9* ; *Zumbrun v. University of S. Cal. (1972) 25 Cal. App. 3d 1, 9, 101 Cal. Rptr. 499]* .

Each separately stated cause of action must be separately numbered [*Cal. Rules of Ct. Rule 2.112(1)*], and separately stated counts should also be separately numbered. This number designation should appear as a heading in capital letters centered above the cause of action of count [*see, e.g.*, Los Angeles Co. Super. Ct. Rules, Rule 9.3(a)]. The paragraphs within each cause of action or count should be numbered with arabic numerals rather than roman numerals, and should be numbered consecutively throughout the complaint for ease of reference. In some courts, this practice is required [*see, e.g.*, Los Angeles Co. Super. Ct. Rules, Rule 9.2(b)].

For further discussion of counts and causes of action, see Ch. 123, *Complaints and Cross Complaints* , and Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[4] Allegations

Most courts summarize the elements of actionable negligence as a legal duty of care owed by defendant either to plaintiff or to the class of which plaintiff is a member, an act or omission by defendant that is a breach of the duty owed to plaintiff, injury and damages to plaintiff, and defendant's breach as an actual (or direct) and legal (or proximate) cause of plaintiff's injury and damages; generally, the courts consolidate these separate elements of actionable negligence, which the plaintiff has the burden of pleading and proving, into either three or four separate elements [*see Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 513-514, 150 Cal. Rptr. 1, 585 P.2d 851* ; *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc. (1970) 1 Cal. 3d 586, 594, 83 Cal. Rptr. 418, 463 P.2d 770* ; *Koepke v. Loo (1993) 18 Cal. App. 4th 1444, 1448-1449, 23 Cal. Rptr. 2d 34]* . However, applicable statutes indicate that the following five distinct elements are essential to a tort cause of action, including an action based on negligence: (1) duty on the part of defendant to use due care [*see Civ. Code §§ 1714(a), 3333*]; (2) breach of that duty [*see Civ. Code § 3333*]; (3)detriment to plaintiff (i.e., plaintiff's loss or harm suffered in person or property) [*see Civ. Code §§ 3281, 3282, 3333*]; (4) plaintiff's detriment being an actual (or direct) and legal (or proximate) result of defendant's breach of duty [*see Civ. Code § 3333*]; and (5) damages, that is, the measure of the detriment in terms of money [*see Civ. Code §§ 3281, 3333*].

[5] Pleading

The complaint may generally allege the elements of negligence [*see Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 513-514, 150 Cal. Rptr. 1, 585 P.2d 851]* . The facts giving rise to the existence of a duty must be pleaded in the complaint; a complaint that does not contain these facts is fatally defective [*see Jacoves v. United Merch. Corp. (1992) 9 Cal. App. 4th 88, 113, 11 Cal. Rptr. 2d 468]* . For further discussion, see *§ 380.290[5]*.

This complaint alleges (1) the residence of defendant (Paragraph 1) and (2) the place of the accident (Paragraph 4), either one of which may be the basis for venue [*see Code Civ. Proc. § 395(a)*; *see § 380.152[1]*]; the negligence and fictitious names of defendants sued pursuant to *Code Civ. Proc. § 474* (Paragraph 2); (3) facts regarding plaintiff's status and activity that establish the duty owed by defendant to plaintiff (Paragraph 4) [*see § 380.50* et seq.,]; (4) the actions or omissions of defendant that constitute the breach of duty and that directly and legally caused plaintiff's damages (Paragraph 6) [*see § 380.50* et seq. and *§ 380.70* et seq.]; and (5) plaintiff's damages consisting of general damages for pain and suffering (Paragraph 7), as well as medical expenses (Paragraph 8), loss of earnings and earning capacity (Paragraph 9), and property damage (Paragraph 10), as applicable [*see § 380.90* et seq.].

[6] Venue

In an action for injury to the person or to personal property or for death from a wrongful act or negligence, either the

county in which the injury occurs or the county in which the defendants, or some of them, reside at the commencement of the action is a proper county for the trial of the action [*Code Civ. Proc. § 395(a)*; *see § 380.152[1]*]. If venue is based on the situs of the wrongful act or negligence, the allegation of defendant's residence in Paragraph 1 is not needed. Special venue provisions apply if the defendant is a corporation, partnership, association, or governmental entity [*see § 380.152[2]-[4]*].

[7] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[8] Signature

Every pleading must be subscribed by the party or his or her attorney [*Code Civ. Proc. §§ 128.7(a), 446(a)*].

[9] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[10] Cross References

For alternative allegations of agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification*

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 380 NEGLIGENCE
PART IV. FORMS
A. Negligence Cause of Action

33-380 California Forms of Pleading and Practice--Annotated § 380.291

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.291 Answer to Complaint for Damages [Civ. Code § 3333] for Personal Injury or Property Damage Based on Negligence [Civ. Code § 1714(a)]--General Form]

[1] FORM Answer to Complaint for Damages [Civ. Code § 3333] for Personal Injury or Property Damage Based on Negligence [Civ. Code § 1714(a)]--General Form]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	ANSWER TO COMPLAINT FOR PERSONAL IN-
_____ [*name*], [et al.,]	)	JURY [and/or PROPERTY DAMAGE]
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Defendant answers the complaint of plaintiff [*name*] as follows:

ANSWER TO _____ [*specify, e.g.,*
FIRST] CAUSE OF ACTION

1. Answering paragraph _____ [*number*] of plaintiff's complaint, defendant denies the following allegations: [*set forth the material allegations denied, e.g.,* that defendant owed a duty to plaintiff to protect plaintiff

from the criminal activities of third persons entering on the defendant's premises, and that defendant had notice or knowledge of criminal activity by third persons on or in the vicinity of the defendant's premises prior to the date on which the plaintiff's alleged injuries were sustained.]

[*Repeat for all paragraphs containing allegations which defendant denies*]

2. Defendant has no information or belief sufficient to enable defendant to answer the allegations of paragraph _____ [*number*] of plaintiff's complaint, and basing [his/her/its] denial on that ground, denies generally and specifically each and every allegation contained in that paragraph.

[*Repeat for all paragraphs that defendant denies for lack of sufficient information or belief*]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES _____ [*set forth in this and, if necessary, subsequently numbered paragraphs ultimate facts establishing defense*]

WHEREFORE, defendant prays that plaintiff take nothing by the complaint and that defendant be awarded costs of suit.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[*Verification, if complaint was verified.*]

[2] Use of Form

This general answer form may be used to respond to a complaint for personal injuries and property damage.

[3] Caption

The caption should be completed in the same manner as the caption in the complaint, with one exception. If there is more than one party on either side, it is sufficient to state the name of the first party on each side with an appropriate indication of the other parties (i.e., "et al.") [*Code Civ. Proc. § 422.40*].

[4] General Denial

If the complaint is not verified, or is subject to *Code Civ. Proc. §§ 90-100*, which includes most limited civil cases [*see Code Civ. Proc. § 91*], or if the demand or the value of the property in controversy does not exceed $1,000, the defendant may make a general denial [*Code Civ. Proc. §§ 431.30(d), 431.40(a)*]. If the cause of action is a claim assigned to a third party for collection and the complaint is verified, the denial of the allegations must be made positively or according to the information and belief of the defendant, even if the complaint is subject to *Code Civ. Proc. §§ 90-100* [*Code Civ. Proc. § 431.30(d)*].

A general denial only puts in issue the material allegations of the complaint [*Code Civ. Proc. § 431.30(d)*].

[5] Specific Denials

If the complaint is verified, the denial of the allegations of the complaint must be made positively or according to the information and belief of the defendant, unless the complaint is subject to *Code Civ. Proc. §§ 90-100*, which includes most limited civil cases [*see Code Civ. Proc. § 91*] [*Code Civ. Proc. § 431.30(d)*]. If the defendant has no information or belief on the subject sufficient to enable the defendant to answer an allegation of the complaint, the defendant may so state in the answer and base a denial on that ground [*Code Civ. Proc. § 431.30(e)*].

The denials of the controverted allegations may be stated in any of the following ways [*Code Civ. Proc. § 431.30(f)*]:

- By reference to the specific paragraphs or parts of the complaint;
- By express admission of certain allegations of the complaint with a general denial of all of the allegations not so admitted; or
- By denial of certain allegations on information and belief, or for lack of sufficient information or belief, with a general denial of all allegations not so denied or expressly admitted.

Every material allegation of the complaint not denied in the answer will be deemed true [*Code Civ. Proc. § 431.20(a)*].

[6] Affirmative Defenses

An answer must contain a statement of any new matter constituting a defense [*Code Civ. Proc. § 431.30(b)(2)*]. Each defense must be separately stated and numbered and must refer to the causes of action they are intended to answer, in a manner by which they may be intelligently distinguished [*Code Civ. Proc. § 431.30(g)*; *Cal. Rules of Ct., Rule 2.112*].

The most common affirmative defenses asserted in a negligence action are the following:

- Comparative negligence [*see § 380.170[1]*; *see also § 380.370*];
- Statutes of limitations [*see § 380.150[1]*; *see also § 380.351*];
- Plaintiff's violation of statute, ordinance, or regulation as comparative negligence [*see § 380.110[1]*];
- Plaintiff's express assumption of risk [*see § 380.171[1]*; *see also § 380.373*];
- Plaintiff's implied assumption of risk [*see § 380.172[2][b]*; *see also § 380.374*];
- Imputed comparative negligence based on vicarious liability of plaintiff [*see § 380.131[1]*; *see also § 380.372*];
- Workers' compensation as plaintiff's exclusive remedy [*see § 380.174*; *see also § 380.376*]; and
- Plaintiff's failure to mitigate damages [*see § 380.91*; *see also § 380.292*].

Any ground for a demurrer to the complaint that does not appear on the face of the complaint may also be raised as an affirmative defense [*see Code Civ. Proc. § 430.30(b)*]. These defenses might include allegations that the court lacks jurisdiction, that the plaintiff lacks capacity, that there is another action pendingbetween the same parties on the same cause of action, or that the pleading does not state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10*].

[7] Prayer

Affirmative relief may not be claimed in the answer [*Code Civ. Proc. § 431.30(c)*]. If the defendant wishes to seek affirmative relief, the defendant must file a cross complaint [*see* Ch. 123, *Complaints and Cross Complaints*]. A defendant may, however, request costs and may also request attorney's fees, if allowed by the nature of the action [*see* Ch. 174, *Costs and Attorney's Fees*].

[8] Signature

Every pleading must be subscribed by the party or his or her attorney [*Code Civ. Proc. §§ 128.7(a), 446*].

[9] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[10] Cross References

For a complete discussion, forms, and list of many affirmative defenses, see Ch. 26, *Answers*

For a related form, *see § 380.290*.

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 380 NEGLIGENCE
PART IV. FORMS
A. Negligence Cause of Action

33-380 California Forms of Pleading and Practice--Annotated § 380.292

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.292 Affirmative Defense Allegation--Plaintiff's Failure to Mitigate Damages

[1] FORM Affirmative Defense Allegation--Plaintiff's Failure to Mitigate Damages

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff failed to exercise reasonable care and diligence to mitigate plaintiff's alleged damages in that, among other things, _____ [*set out acts or omissions plaintiff could have performed to mitigate damages, e.g.,* plaintiff did not return to work as soon as plaintiff had recovered from his/her injuries].

[2] Use of Form

This form of affirmative defense is for insertion in an answer to a complaint based on negligence if the plaintiff did not exercise reasonable care and diligence to mitigate his or her damages. The facts alleged in the form are taken from *Pretzer v. California Transit Co;*. [*Pretzer v. California Transit Co(1930) 211 Cal. 202, 294 P. 382]* . For further discussion of the duty to mitigate damages, see *§ 380.91*.

[3] Cross References

For discussion and forms, see Ch. 177, *Damages*

For a related form, *see § 380.291*.

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33-380 California Forms of Pleading and Practice--Annotated § 380.293

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.293 Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12]--Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injury, Property Damage, Wrongful Death [Judicial Council Form PLD-PI-001]--With General Negligence Attachment [Judicial Council Form PLD-PI-001(2)]

[1] FORM Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12]--Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injury, Property Damage, Wrongful Death [Judicial Council Form PLD-PI-001]--With General Negligence Attachment [Judicial Council Form PLD-PI-001(2)]

Click here to view image.

[2] Use of Form

This form of complaint consists of the Judicial Council general complaint form for use in any action based on personal injury, property damage, and/or wrongful death, along with the general negligence attachment [Judicial Council Forms PLD-PI-001, PLD-PI-001(2)]. The Judicial Council has also approved cause of action attachments based on premises liability [*see* Ch. 421, *Premises Liability*], motor vehicle accident [*see* Ch. 82, *Automobiles: Causes of Action*], intentional tort [*see* Ch. 58, *Assault and Battery* , and Ch. 362, *Mental Suffering and Emotional Distress*], and products liability [*see* Ch. 460, *Products Liability*]. If counsel seeks exemplary damages in addition to compensatory damages, the exemplary damages attachment must also be included [*see* Ch. 177, *Damages*]. The Judicial Council approved these forms effective January 1, 1982, although the forms shown were revised effective January 1, 2007. Use of these forms is optional [*see Code Civ. Proc. § 425.12*; *Cal. Rules of Ct., Rule 1.35(b)*]. Before using these forms, counsel should verify whether or not they have been modified.

For general information relating to the use of Judicial Council complaint forms, see Ch. 123, *Complaints and Cross Complaints* . These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A

noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Judicial Council Trial Court Forms

Code Civ. Proc. § 425.12 requires the Judicial Council to develop and approve official forms for use in California trial courts for any complaint, cross complaint, or answer in any action based on personal injury, property damage, or wrongful death [*see Code Civ. Proc. § 425.12*].

[4] Filling Out Complaint Form

[a] Caption

The box at the top of the page should be filled in with the name, address, and telephone number of the attorney or, if being filed in propria persona, the plaintiff. It should also include the name of the plaintiff being represented by the attorney filing the complaint.

The next box should contain the name and address of the court in which the complaint is to be filed.

The next box should contain the names of all plaintiffs and defendants. Although the form refers throughout to plaintiff and defendant in the singular, it is also intended to be used if there is more than one plaintiff or defendant (*see, e.g.,* Paragraphs 3.a. and 5.a.). For a complete discussion and examples of the manner of setting forth a party's name, see Ch. 108, *Captions and Introductions* .

If the plaintiff is ignorant of the true names or capacities of additional possible defendants and wishes to sue them under fictitious names pursuant to *Code Civ. Proc. § 474*, the box to the left of "DOES" should be checked and the number of "Doe defendants" entered. For a complete discussion of alleging Doe defendants, see Ch. 20, *Allegations Commonly Used* .

In the box entitled "COMPLAINT," the box labeled "AMENDED" should be checked if the complaint is being amended, which should be followed by the number of times the complaint has been amended, such as "first" if the complaint is being amended for the first time. In all actions other than those based on motor vehicle accidents, the box to the left of "OTHER" should be checked and the nature of the cause(s) of action specified (*e.g.,* general negligence, products liability, premises liability, etc.).

In the box labeled "Jurisdiction," the appropriate box should be marked to identify the action as a limited civil case (if the amount of damages sought is no more than $25,000) or as an unlimited civil case (if the amount of damages exceeds $25,000). If the action is a limited civil case, the appropriate box should be marked indicating whether the amount in controversy is greater than $10,000 or not. If the complaint is an amended complaint, and the amendment reclassifies the action from a limited to an unlimited civil case, or vice versa, then this should be indicated by marking the appropriate boxes.

[b] Parties (Paragraph 1.)

The names of all plaintiffs and defendants should be included in the appropriate spaces of Paragraph 1.

[c] Number of Pages (Paragraph 2.)

Once the complaint, including attachments and exhibits, is completed, the total number of pages should be inserted on line 2. That number should be no less than four because the three-page general complaint form must always have one or more cause of action attachments appended.

[d] Plaintiff's Capacity (Paragraph 3.)

If any plaintiff is not a competent adult suing on his or her own behalf, the capacity of each such plaintiff must be alleged by checking the appropriate boxes in Paragraph 3. and, where appropriate, providing the specified information. For a discussion and references relating to allegations of plaintiff's capacity, see Ch. 20, *Allegations Commonly Used* .

[e] Short Title

The short title of a case usually consists of the last name of the first plaintiff and the last name of the first defendant separated by a "v." The short title should be typed in the box labeled "SHORT TITLE" on the top of every page other than the first page.

[f] Plaintiff Using Fictitious Business Name (Paragraph 4.)

If any plaintiff is doing business under a fictitious name, the box in Paragraph 4. should be checked, the plaintiff should be identified, and the fictitious business name should be provided. Paragraph 4. also alleges that the named plaintiff has complied with the laws governing the use of fictitious business names.

[g] Defendant's Capacity (Paragraph 5.)

The capacity of each defendant not being sued as an individual should be alleged by checking the appropriate boxes in Paragraph 5. and by specifying information where indicated.

[h] Joinder of Parties (Paragraph 7.)

Paragraph 7. refers to a party who should have been joined as a plaintiff, but who would not consent to being a plaintiff and is therefore joined as a defendant pursuant to *Code Civ. Proc. § 382*. For discussion relating to joinder of parties under *Code Civ. Proc. § 382*, see Ch. 395, *Parties* .

[i] Venue (Paragraph 8.)

Paragraph 8. alleges the proper bases for venue in the chosen court. In an action for injury to person or personal property or for death from wrongful act or negligence, venue lies either in a county in which one or more of the defendants reside or in the county where the injury occured [*Code Civ. Proc. § 395(a)*]. If a defendant is a corporation or association, it may be sued "where the obligation or liability arises," or in the county of the defendant's principal place of business [*Code Civ. Proc. § 395.5*; *see* Ch. 571, *Venue*].

[j] Claims Statute (Paragraph 9.)

The appropriate boxes in Paragraph 9. should be checked if specific claims statutes are applicable. For example, claims against a decedent's estate are governed by *Prob. Code § 9000 et. seq.* and personal injury claims against public entities are governed by *Gov. Code § 910 et seq.* For discussion and forms relating to these claims statutes, see Ch. 440, *Probate: Is Probate Necessary ?*, and Ch. 464, *Public Entities and Officers: California Tort Claims Act*.

[k] Causes of Action (Paragraph 10.)

The causes of action that are attached to the particular complaint should be indicated in Paragraph 10. Each complaint must have at least one cause of action attached.

[l] Damages (Paragraph 11.)

Because a plaintiff who has suffered personal injury usually suffers additional damages subsequent to the filing of the complaint, it is suggested that the words "and/or will suffer" be typed to the right of the words "Plaintiff has suffered" in Paragraph 11., if personal injuries are alleged. The box to the left of each type of damages suffered by the plaintiff should then be checked.

If there is more than one plaintiff, it is suggested that the name(s) of the plaintiff(s) who suffered a particular type of damage be typed to the right of that checked damage item. For instance, if only plaintiff Jones suffered property damage, counsel should check the box to the left of "property damage" and add "(Plaintiff Jones)" to the right. Counsel may, however, wish to avoid unnecessarily narrowing the damages sought at the pleading stage of the action.

If all damages checked apply to all plaintiffs, the wording following 11. may be modified to read, for example "Plaintiffs Smith and Jones have suffered and/or will suffer."

For further discussion regarding pleading general and special damages, see Ch. 177, *Damages* .

[m] Specification of Damages (Paragraph 14.)

Paragraph 14. is used to indicate the damages being sought. In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

[5] Filling Out General Negligence Attachment to Complaint Form

The injury and damages aspects of the cause of action for negligence have already been pleaded in Paragraphs 11. and/or 12. of the complaint. Therefore, in the general negligence cause of action attachment to the complaint, the plaintiff must set forth ultimate facts alleging the existence of a duty owed by the defendant to the plaintiff, the defendant's breach of this duty, and the breach as the proximate cause of the plaintiff's injury and damages.

[6] Cross References

For a related form, see *§ 380.290*

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AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.294 Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12]--Answer [Code Civ. Proc. § 431.30] to Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injury, Property Damage, Wrongful Death [Judicial Council Form PLD-PI-003]

[1] FORM Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12]--Answer [Code Civ. Proc. § 431.30] to Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injury, Property Damage, Wrongful Death [Judicial Council Form PLD-PI-003]

Click here to view image.

[2] Use of Form

This form is an illustration of the Judicial Council answer form for use in responding to a complaint based on personal injury, property damage, and/or wrongful death [Judicial Council Form PLD-PI-003]. The Judicial Council approved this form effective January 1, 1982, with a nonsubstantive revision effective January 1, 2007. Use of the form is optional [*see Code Civ. Proc. § 425.12*; *Cal. Rules of Ct., Rule 1.35(b)*].

For general information relating to the use of Judicial Council answer forms, see Ch. 26, *Answers* . These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] General Denial

If the complaint is not verified, if the complaint is subject to *Code Civ. Proc. §§ 90-100*, which includes most limited civil cases [*see Code Civ. Proc. § 91*], or if the demand or the value of the property in controversy does not exceed

$1,000, the defendant may make a general denial [*Code Civ. Proc. §§ 431.30(d), 431.40(a)*]. The Judicial Council has adopted a form of general denial for this purpose [*Code Civ. Proc. § 431.40(c)*; Judicial Council Form PLD-050]. The general denial form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[4] Number of Pages and Use of Attachments

The total number of pages submitted must be indicated in Paragraph 1. Each attachment should comply with the form requirements of *Cal. Rules of Ct., Rule Title 2, Div. 2, Ch. 1*, and should contain the short title of the case and a space for the case number at the top [*see Cal. Rules of Ct., Rule 1.45(c)*].

[5] Cross References

For related forms, see *§§ 380.291* and *380.293*

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 380 NEGLIGENCE
PART IV. FORMS
A. Negligence Cause of Action

33-380 California Forms of Pleading and Practice--Annotated § 380.295

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.295 Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12]--Cross Complaint [Code Civ. Proc. § 425.10] in Action for Personal Injury, Property Damage, Wrongful Death [Judicial Council Form PLD-PI-002]

[1] FORM Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12]--Cross Complaint [Code Civ. Proc. § 425.10] in Action for Personal Injury, Property Damage, Wrongful Death [Judicial Council Form PLD-PI-002]

Click here to view image.

[2] Use of Form

This form is the Judicial Council cross complaint form for use in any action based on personal injury, property damage, and/or wrongful death [Judicial Council Form PLD-PI-002]. The form shown here is a revised form that is effective for use January 1, 2007. Use of the form is optional [*see Code Civ. Proc. § 425.12*; *Cal. Rules of Ct., Rule 1.35(b)*]. Before using this form, counsel should verify whether or not it has been modified.

For general information regarding the use of Judicial Council cross complaint forms, see Ch. 123, *Complaints and Cross Complaints* . These forms are available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Filling Out Cross Complaint

[a] Caption

The space entitled "CROSS-COMPLAINANT" should be filled in with the full name of each defendant on whose behalf the cross complaint is being asserted. The space entitled "CROSS- DEFENDANT" should be filled in with the

full name of each person or entity against whom the cross complaint is being asserted. If there is a possibility of additional persons or entities being liable and their names, capacities, and/or actions are unknown, the box to the left of "DOES" should be checked and a number placed on the line to the right.

Although the form refers throughout to cross complainant and cross defendant in the singular, it is also intended to be used if there is more than one cross complainant or cross defendant (*see, e.g.*, Paragraphs 3.a. and 4.a.).

In the box entitled "CROSS-COMPLAINT," the box labeled "AMENDED" should be checked if the cross-complaint is being amended, which should be followed by the number of times the cross-complaint has been amended, such as "first" if the cross-complaint is being amended for the first time.

The box entitled "CROSS-COMPLAINT" is also used to indicate the causes of action the cross complainant is asserting. If a cause of action for anything other than apportionment of fault, indemnification, or declaratory relief is being asserted, the box to the left of "Other" should be checked, its title typed to the right, and the appropriate cause of action attachment completed and appended to the form.

In the box labeled "Jurisdiction," the appropriate box should be marked toidentify the action as a limited civil case (if the amount sought is no morethan $25,000) or as an unlimited civil case (if the amount sought exceeds $25,000). If the cross-complaint reclassifies the action from a limited to an unlimited civil case, then this should be indicated by marking the appropriate box.

[b] Indemnification

[i] Declaratory Relief (Paragraph 9.)

A defendant may assert a cross complaint for declaratory relief against a joint tortfeasor to obtain a declaration of defendant's right to partial or complete indemnity should defendant be found liable to plaintiff. In addition to alleging a cause of action for declaratory relief regarding the cross complainant's right to implied equitable indemnity or partial equitable indemnity, Paragraph 9. might be used if the cross complainant seeks a determination of the cross defendant's duty to indemnify the cross complainant on a theory of implied contractual indemnity, or contractual indemnity, pursuant to a written agreement between the cross complainant and the cross defendant [*see Code Civ. Proc. § 1060*; for further discussion, *see* Ch. 182, *Declaratory Relief* , and Ch. 300, *Indemnity and Contribution* , §].

A cause of action for implied indemnity (Paragraph 7.) or partial equitable indemnity (Paragraph 8.) does not accrue until the cross complainant has incurred an actual loss through payment [*E. L. White, Inc. v. City of Huntington Beach (1978) 21 Cal. 3d 497, 506, 146 Cal. Rptr. 614, 579 P.2d 505* ; *People ex rel. Dep't of Transp. v. Superior Court (1980) 26 Cal. 3d 744, 757, 759, 163 Cal. Rptr. 585, 608 P.2d 673]* . The courts have indicated that the proper form of action for indemnity before the cross complainant has incurred a loss is an action for declaratory relief, namely, for a declaration that the cross complainant is entitled to be indemnified for any judgment rendered against the cross complainant in favor of the plaintiff [*see Roylance v. Doelger (1962) 57 Cal. 2d 255, 258-262, 19 Cal. Rptr. 7, 368 P.2d 535* ; *Dreybus v. Bayless Rents (1963) 213 Cal. App. 2d 506, 508, 28 Cal. Rptr. 825]* . Therefore, if the cross complainant is seeking indemnity, counsel should use Paragraph 9., alleging a cause of action for declaratory relief. Counsel may check Paragraphs 7. and 8. and incorporate them into Paragraph 9.

[ii] Indemnification Cause of Action (Paragraph 7.)

Paragraph 7. may be used if the cross complainant contends that the cross complainant, if found liable to plaintiff, would be entitled to complete implied equitable indemnity from a cross defendant. Implied equitable indemnity is appropriate if a passively negligent cross complainant is found vicariously liable for the active negligence of a cross defendant [*see Cobb v. Southern Pac. Co. (1967) 251 Cal. App. 2d 929, 933, 59 Cal. Rptr. 916* ; *Aerojet General*

Corp. v. D. Zelinsky & Sons (1967) 249 Cal. App. 2d 604, 57 Cal. Rptr. 701] . For a complete discussion of indemnity, see Ch. 300, *Indemnity and Contribution* .

[iii] Apportionment of Fault (Paragraph 8.)

Apportionment of fault is appropriate if a cross complainant found liable to plaintiff is only partially at fault and the cross defendants are also partially at fault. In such a case, the cross defendants should be forced to pay a share of plaintiff's judgment in proportion to their comparative negligence and to reimburse the cross complaint for any payment made to plaintiff in excess of the cross complainant's share of negligence [*see American Motorcyle Ass'n v. Superior Court (1978) 20 Cal. 3d 578, 586-588, 599, 146 Cal. Rptr. 182, 578 P.2d 899]* . For further discussion, see Ch. 300, *Indemnity and Contribution* .

[c] Additional Causes of Action (Paragraph 10.)

If a defendant fails to allege in a cross complaint any related cause of action the defendant has against the plaintiff, the defendant may not assert that cause of action in any other action [*Code Civ. Proc. § 426.30(a)*]. A defendant may assert in a cross complaint any cause of action the defendant has against any plaintiff or may assert a cause of action against any person, including a nonparty, if it arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action brought against the defendant [*Code Civ. Proc. § 428.10*]. For further discussion, see Ch. 123, *Complaints and Cross Complaints* .

If a defendant wishes to assert a cause of action other than those for which there is an attachment approved by the Judicial Council (listed in Paragraph 11.), or for indemnity, contribution, or declaratory relief, which can be alleged in Paragraphs 7.-9., respectively, defendant should check the box to the right of 10., insert the number of the cause of action, specify its title, and allege it in the space provided or in an additional attachment.

[d] Causes of Action Attachment (Paragraph 11.)

Paragraph 11. lists specific Judicial Council forms of causes of action that may be attached, as well as providing for attachment of a cause of action prepraed by counsel. This is done by checking the box for "Other" and specifying the cause of action being attached. If Paragraph 11. is used, counsel must also check the box for "Other" in the caption and specify the cause of action there.

The box "Other" in Paragraph 11. should not be check if causes of action for indemnification (Paragraph 7.), apportionment of fault (Paragraph 8.), or declaratory relief (Paragrpah 9.) are being stated, because they are asserted directly on the cross complaint form.

[e] Specification of Damages (Paragraph 14.)

Paragraph 14. of the form is filled out to illustrate its use in an unlimited civil case. If the form is being used in a limited civil case, the box in Paragraph 14.a.(2) should be checked and the phrase "in the amount of $" in Paragraph 14.a.(2) should be crossed out or slashed out and the words "according to proof" should be typed in instead of a dollar amount. No dollar amount may be alleged in an action to recover damages for personal injury or wrongful death [*see Code Civ. Proc. § 425.10(b)*].

[f] Cross References

For related forms, see *§§ 380.290* and *380.293*

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 380 NEGLIGENCE
PART IV. FORMS
A. Negligence Cause of Action

33-380 California Forms of Pleading and Practice--Annotated §§ 380.296-380.309

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

[Reserved]

§§ 380.296[Reserved]

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 380 NEGLIGENCE
PART IV. FORMS
B. Doctrines Affecting Proof of Negligence

33-380 California Forms of Pleading and Practice--Annotated § 380.310

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.310 Complaint for Damages [Civ. Code § 3333] for Personal Injury and Property Damage Based on Negligence [Civ. Code § 1714(a)]--Presumption of Negligence Arising From Statutory Violation [Evid. Code § 669]

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injury and Property Damage Based on Negligence [Civ. Code § 1714(a)]--Presumption of Negligence Arising From Statutory Violation [Evid. Code § 669]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR PERSONAL INJURY AND
_____ [*name*]	)	PROPERTY DAMAGE
[; and DOES 1 through _____, inclusive], Defend-	)	[Amount demanded _____
ant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
FIRST COUNT
(Statutory Violation)

1. Defendant _____ [*name*] is, and at all times mentioned in this complaint was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a resident of _____ County, California, *or* a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ [*city*], _____ County, California].

[2. Defendants Doe 1 through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.)]

3. [*Agency allegation, if appropriate. See § 380.290, Paragraph 3.*]

4. At all times mentioned herein, defendant was the owner of a certain _____ [*breed*] dog.

5. On or about _____ [*date*], plaintiff was _____ [*allege facts showing status and activity of plaintiff placing him/her in class of persons to whom defendant owed a duty and the location of the accident when venue is based on this fact, e.g.,* riding his bicycle in a northwesterly direction on Main Street near the intersection of First Avenue, in the City of Oakland, County of Alameda, State of California, when plaintiff was chased and bitten in the right leg by defendant's dog].

6. At this time and place there was in effect [*set forth statute, ordinance, or regulation allegedly violated by defendant, e.g.,* an ordinance of the City of Oakland, to wit, Oakland City Ordinance No. 84-73, article 119, which provides, in relevant part, that no person owning, possessing, or controlling any animal shall allow that animal to be at large, and that a dog is considered to be at large unless under effective restraint by a leash, except when the dog is on private property owned by, or in the possession of, the person owning or controlling the dog. A true and correct copy of this ordinance, certified as such by the city clerk, is attached as Exhibit A to this complaint and is incorporated in this complaint by reference.]

7. At this time and place, defendant[s, and each of them,] [was/were] in violation of the aforesaid [statute/ordinance/regulation] in that [*set forth facts showing defendant's violation of statute, ordinance, or regulation, e.g.,* defendant's dog was not under restraint by a leash or any other means, but was wandering loose on a public street.]

8. [*General damages allegation. See § 380.290, Paragraph 7.*]

9. [*Special damages allegation. See § 380.290, Paragraphs 8, 9, and 10.*]

WHEREFORE, plaintiff prays judgment against defendant as hereinafter set forth.

[*Second Count. See § 380.290, Paragraphs 11 and 12.*]

[*Prayer. See § 380.290.*]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

[*Verification, if desired. See § 380.290.*]

[2] Use of Form

This complaint form may be used to obtain damages for personal injuries directly and legally caused by defendant's negligence if that negligence is based on the defendant's violation of a statute, ordinance or regulation. Paragraph 6 sets forth the statute, ordinance, or regulation that was allegedly violated by the defendant, and Paragraph 7 describes the defendant's violation on which the presumption of negligence is based.

[3] Presumption of Failure to Exercise Due Care Based on Violation of Statute, Ordinance of Public Entity

The failure of a defendant to exercise due care is presumed if all of the following conditions are satisfied [*see Evid. Code § 669(a)*]:

- The defendant violated a statute, ordinance, or regulation of a public entity;
- The violation directly and legally (proximately) caused injury to the plaintiff or the plaintiff's property;
- The injury resulted from an occurrence of the nature that the statute, ordinance, or regulation was designed to prevent; and
- The plaintiff is one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

[4] Cross References

For a related form, *see § 380.290*.

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 380 NEGLIGENCE
PART IV. FORMS
B. Doctrines Affecting Proof of Negligence

33-380 California Forms of Pleading and Practice--Annotated § 380.311

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.311 Complaint for Damages [Civ. Code § 3333] for Personal Injury and Property Damage Based on Negligence [Civ. Code § 1714(a)]--Res Ipsa Loquitur [Evid. Code § 646]

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injury and Property Damage Based on Negligence [Civ. Code § 1714(a)]--Res Ipsa Loquitur [Evid. Code § 646]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR PERSONAL INJURY AND
_____ [*name*]	)	PROPERTY DAMAGE
[; and DOES 1 through_____, inclusive], Defend-	)	[LIMITED CIVIL CASE]
ant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
FIRST COUNT
(Res Ipsa Loquitur)

1. Defendant _____ [*name*] is, and at all times mentioned in this complaint was,

_____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a resident of _____ County, California, *or* a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ [*city*], _____ County, California].

2. [*Fictitious name allegation, if appropriate. See § 380.290, Paragraph 2.*]

3. [*Agency allegation, if appropriate. See § 380.290, Paragraph 3.*]

4. On or about _____ [*date*], plaintiff was _____ [*allege facts showing status and activity of plaintiff placing him/her in class of persons to whom defendant owed a duty and the location of the accident if venue is based on these facts, e.g.,* grocery shopping at defendant's store located at _____, California].

5. At this time and place, defendant[s, and each of them,] _____ [*allege facts showing defendant's ownership, possession, or control of the instrumentality causing the accident, e.g.,* so carelessly and negligently owned, maintained, controlled, managed, and operated this premises as to cause a ceiling fan to fall from the premises, striking plaintiff violently on his/her head].

6. At this time and place, defendant[s, and each of them,] had exclusive control and management of the premises, and _____ [*allege facts showing negligence, e.g.,* the falling of the ceiling fan and resulting damages as set forth below are such that in the ordinary course of things they would not have occurred if defendant had exercised ordinary care in the maintenance and operation of the premises. Because of the defendant's exclusive control and management of the premises, defendant is possessed of superior, if not exclusive, access to information concerning the precise cause of the accident, and plaintiff relies on the negligence of defendant as inferred from the general situation alleged in this complaint].

7. [*General damages allegation. See § 380.290, Paragraph 7.*]

8. [*Special damages allegation. See § 380.290, Paragraphs 8, 9, and 10.*]

WHEREFORE, plaintiff prays judgment against defendant as hereinafter set forth.

[*Second Count. See § 380.290, Paragraphs 11 and 12.*]

[*Prayer. See § 380.290.*]

Respectfully submitted,
_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff_____ [*name*]

[*Verification, if desired. See § 380.290.*]

[2] Use of Form

This complaint form may be used to obtain damages for personal injuries directly and legally caused by defendant's

negligence if the plaintiff seeks to apply the doctrine of res ipsa loquitur to the action. Paragraph 5 sets forth an allegation of the defendant's management and control of the instrumentality that caused the plaintiff's injuries, and Paragraph 6 sets forth an allegation that the accident would not have occurred if the defendant had exercised ordinary care in the management and control of the instrumentality that caused the plaintiff's injuries.

[3] Conditions for Application of Res Ipsa Loquitur Doctrine

The general conditions for the application of the doctrine of res ipsa loquitur are [*Newing v. Cheatham (1975) 15 Cal. 3d 351, 359, 124 Cal. Rptr. 193, 540 P.2d 33]* :

- The accident must be of a kind that ordinarily does not occur in the absence of someone's negligence;
- It must be caused by an agency or instrumentality within the defendant's exclusive control; and
- It must not have been due to any voluntary action or contribution on the plaintiff's part.

Once the conditions have been met, a presumption affecting the burden of producing evidence is created [*Evid. Code § 646(b)*], which requires a finding of negligence unless the defendant introduces sufficient evidence to sustain a finding that either (1) the accident resulted from some cause other than the defendant's negligence, or (2) the defendant exercised due care in all possible respects in which he or she might have been negligent [*Newing v. Cheatham (1975) 15 Cal. 3d 351, 364-365, 124 Cal. Rptr. 193, 540 P.2d 33]* .

[4] Cross References

For a related form, *see § 380.290*.

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Chapter 380 NEGLIGENCE
PART IV. FORMS
B. Doctrines Affecting Proof of Negligence

33-380 California Forms of Pleading and Practice--Annotated §§ 380.312-380.329

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

[Reserved]

§§ 380.312[Reserved]

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 380 NEGLIGENCE
PART IV. FORMS
C. Doctrines Affecting Liability

33-380 California Forms of Pleading and Practice--Annotated § 380.330

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.330 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injury and Property Damage Based on Negligence [Civ. Code § 1714(a)]--Vicarious Liability of Defendant

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injury and Property Damage Based on Negligence [Civ. Code § 1714(a)]--Vicarious Liability of Defendant

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR PERSONAL INJURY AND
_____ [*name*]	)	PROPERTY DAMAGE
[; and DOES 1 through _____, inclusive], Defend-	)	[LIMITED CIVIL CASE]
ant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
FIRST COUNT
(Negligence)

1. Defendant _____ [*name*] is, and at all times mentioned in this complaint was,

_____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a resident of _____ County, California, *or* a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ [*city*], _____ County, California].

2. [*Fictitious name allegation, if appropriate. See § 380.290, Paragraph 2.*]

3. [*Agency allegation, if appropriate. See § 380.290, Paragraph 3.*]

4. On or about _____ [*date*], at or about _____ [*time*], plaintiff was _____ [*allege facts showing status and activity of plaintiff placing him/her in class of persons to whom defendant owed a duty and the location of the accident when venue is based on this fact, e.g.,* a pedestrian crossing _____Street at its intersection with _____ Street in _____ California].

5. At this time and place, defendant _____ [*name*] was [*allege facts showing defendant's vicarious liability, e.g.,* the owner of a certain _____ (*year, make, model*) automobile, California License No. _____. At this time and place, defendant _____ (*name*) was using, operating, and driving that automobile with the permission, consent, and knowledge of defendant _____ (*name of owner*)].

6. At this time and place, defendant[s, and each of them,] _____ [*allege facts showing negligence, e.g.,* so negligently owned, maintained, controlled, managed, and operated this automobile so as to cause the automobile to collide with plaintiff, violently throwing him/her to the pavement] and to proximately cause the injuries and damages described below.

7. [*General damages allegation. See § 380.290, Paragraph 7.*]

8. [*Special damages allegation. See § 380.290, Paragraphs 8, 9, and 10.*]

WHEREFORE, plaintiff prays judgment against defendant as hereinafter set forth.

[*Second Count. See § 380.290, Paragraphs 11 and 12.*]

[*Prayer. See § 380.290.*]

Respectfully submitted,
_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff_____ [*name*]

[*Verification, if desired. See § 380.290.*]

[2] Use of Form

This complaint form may be used to obtain damages for personal injuries and property damage based on the vicarious liability of the defendant. Paragraph 5 should be used to set forth the facts on which the vicarious liability of the

defendant is based.

[3] Cross References

For a related form, *see § 380.290*.

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Chapter 380 NEGLIGENCE
PART IV. FORMS
C. Doctrines Affecting Liability

33-380 California Forms of Pleading and Practice--Annotated § 380.331

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.331 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injury and Property Damage Based on Negligence [Civ. Code § 1714(a)]--Joint and Several Liability of Defendants

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injury and Property Damage Based on Negligence [Civ. Code § 1714(a)]--Joint and Several Liability of Defendants

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR PERSONAL INJURY AND
_____ [*names*]	)	PROPERTY DAMAGE
[; and DOES 1 through _____, inclusive], Defend-	)	[LIMITED CIVIL CASE]
ants.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
FIRST COUNT
(Negligence)

1. [*Fictitious name allegation, if appropriate. See § 380.290, Paragraph 2.*]

2. [At all times mentioned in this complaint, defendants _____ [*names*] and DOES 1-10, and each of them were, _____ [*state capacity of defendants, e.g.,* physicians and surgeons licensed to practice medicine and perform surgery under the laws of the State of California and were engaged in the practice of medicine in _____ (*city*), California].

3. [At all times mentioned in this complaint, defendants _____ [*names*] and DOES 11-20, and each of them, were the agents and employees of defendants _____ [*named defendants*] and DOES 1-10, and, in doing the things hereinafter alleged, were acting in the scope of their agency and employment and with the permission and consent of defendants _____ [*named defendants*] and DOES 1-10.

4. On or about _____ [*date*], plaintiff _____ [*allege facts showing status and activity of plaintiff placing him/her in class of persons to whom defendants owed a duty, e.g.,* employed defendant _____ (*name*) to diagnose and treat a medical complaint then suffered by plaintiff. Pursuant to this employment, defendants, and each of them, rendered professionalservices in the diagnosis, treatment, and care of plaintiff for (his/her) condition].

5. From and after this time, defendants, and each of them, [*allege facts showing defendants' joint and several liability, e.g.,* so negligently failed to exercise the proper degree of knowledge and skill in examining, diagnosing, treating, and caring for plaintiff that plaintiff was caused to suffer the injuries and damages hereinafter alleged].

6. As a direct and legal result of the negligence of defendants, and each of them, plaintiff suffered [*specify plaintiff's injuries, e.g.,* an exacerbation of plaintiff's asbestosis to the point that hospitalization was required to treat it due to defendants' failure to render a timely diagnosis, and as a result suffered great physical and emotional pain and suffering].

7. [*General damages allegation. See § 380.290, Paragraph 7.*]

8. [*Special damages allegation. See § 380.290, Paragraphs 8, 9, and 10.*]

WHEREFORE, plaintiff prays judgment against defendant as hereinafter set forth.

[*Second Count. See § 380.290, Paragraphs 11 and 12.*]

[*Prayer. See § 380.290.*]

Respectfully submitted,
_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff_____ [*name*]

[*Verification, if desired. See § 380.290.*]

[2] Use of Form

This complaint form may be used to obtain damages for personal injuries and property damage based on the joint and several liability of the defendants. Paragraphs 1-3 specify the agency relationships of the defendants on which the claim

of joint and several liability is based. Paragraphs 4-10 specify that all of the defendants have caused the plaintiff's indivisible injury.

[3] Cross References

For a related form, *see § 380.290*.

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C. Doctrines Affecting Liability

33-380 California Forms of Pleading and Practice--Annotated §§ 380.332-380.349

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

[Reserved]

§§ 380.332[Reserved]

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
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33-380 California Forms of Pleading and Practice--Annotated § 380.350

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.350 Notice of Motion [Code Civ. Proc. § 1010] for Summary Adjudication of Cause of Action, Defense, Claim for Punitive Damages, or Issue of Duty [Code Civ. Proc. § 437c(f)]

[1] FORM Notice of Motion [Code Civ. Proc. § 1010] for Summary Adjudication of Cause of Action, Defense, Claim for Punitive Damages, or Issue of Duty [Code Civ. Proc. § 437c(f)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	NO. _____
vs.	NOTICE OF MOTION FOR SUMMARY ADJUDICATION[, STATEMENT OF UNDISPUTED MATERIAL FACTS, DECLARATION(S) OF _____ [name(s)], AND MEMORANDUM OF POINTS AND AUTHORITIES]
_____ [*name*], [et al.,] Defendant(s).	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
	[LIMITED CIVIL CASE]
	Date: _____
	Time: _____
	Location: _____
	Judge: _____
	Date Action Filed:_____
	Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard in [_____ (Department or Division) of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify moving party, e.g.,* defendant _____ (*name*)] will move for an order granting summary adjudication in favor of _____ [*specify moving party, e.g.,* defendant] and against _____ [*specify opposing party, e.g.,* plaintiff] _____ (*name*)] with respect to _____ [*identify cause or causes of action, affirmative defense, claim for punitive damages, or issue of duty, e.g.,* the First and Fifth Causes of Action of plaintiff's First Amended Complaint, the claim for punitive damages set out in the Second Cause of Action of plaintiff's First Amended Complaint]. The motion will be made on the grounds that _____ [*specify, e.g.,* there is no merit to the First andFifth Causes of Action of plaintiff's First Amended Complaint and no merit to the claim for punitive damages set out in the Second Cause of Action of plaintiff's First Amended Complaint.]

The motion will be based on this notice of motion; the attached declaration(s) of _____ [*name(s)*]; [the affidavit(s) of _____ (*name(s)*);] [the admission(s) of _____ (*name(s)*);] [the deposition(s) of _____ (*name(s)*);] [judicial notice, which is hereby requested, of _____ (*specify matter(s) of which notice is to be taken*);] the attached statement of undisputed material facts; the attached memorandum of points and authorities; the papers, records, and file herein; and such evidence as may be presented at the hearing of the motion.
Dated: _____

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This form of notice of motion is for use by a party to move for summary adjudication with respect to one or more causes of action within an action, an affirmative defense, a claim for punitive damages, or the issue of whether one or more defendants owed a duty to one or more plaintiffs [*Code Civ. Proc. § 437c(f)*].

[3] Alternative to Summary Judgment Motion

A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment [*Code Civ. Proc. § 437c(f)(2)*]. Summary adjudication may not be granted, however, if the notice of motion is only for summary judgment [*Gonzales v. Superior Court (1987) 189 Cal. App. 3d 1542, 1545-1546, 235 Cal. Rptr. 106]* .

[4] Specification of Issues

A court may adjudicate only those issues that are specified in the motion for summary adjudication [*Homestead Sav. v. Superior Court (1986) 179 Cal. App. 3d 494, 498-499, 499, 224 Cal. Rptr. 554]* .

[5] Supporting Papers

A motion for summary adjudication must be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which the court must or may take judicial notice [*Code Civ. Proc. § 437c(b)(1)*]. The moving party may not rely on his or her own pleadings (even if verified) to support the motion [*Code*

Civ. Proc. § 437c(p)]. The supporting papers must include a separate statement setting forth plainlyand concisely all material facts that the moving party contends are undisputed; each material fact that is stated must be followed by a reference to the supporting evidence [*Code Civ. Proc. § 437c(b)*; *United Cmty. Church v. Garcin (1991) 231 Cal. App. 3d 327, 335-337, 282 Cal. Rptr. 368]* . The motion for summary adjudication should also be supported by a memorandum of points and authorities, because the court may construe the moving party's failure to file such a memorandum as an admission that the motion is not meritorious and therefore as cause for its denial [*see Cal. Rules of Ct., Rule 3.1113* (requirements for memorandum of points and authorities)].

[6] Cross References

For complete discussion and forms, see Ch. 537, *Summary Judgment*

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33-380 California Forms of Pleading and Practice--Annotated § 380.351

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.351 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Action Barred by Statute of Limitations [Code Civ. Proc. §§ 335.1, 338(b), (c), 458]

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Action Barred by Statute of Limitations [Code Civ. Proc. §§ 335.1, 338(b), (c), 458]

AS A _____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the action is barred by the provisions of _____ [*if action based on personal injury, Code Civ. Proc. § 335.1 or, if action based on injury to real property, Code Civ. Proc. § 338(b) or, if action based on injury to personal property, Code Civ. Proc. § 338(c)*].

[2] Use of Form

This affirmative defense allegation is for use in an answer to a complaint seeking damages based on ordinary negligence if the plaintiff failed to file the complaint within the applicable limitations period. An action for personal injury or wrongful death must be filed within two years (one year, prior to January 1, 2003) [*Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)*; Ch. 345, *Limitation of Actions*, § 345.14]; an action for damages to real or personal property must be filed within three years [*Code Civ. Proc. § 338(b), (c)*].

If more than one affirmative defense is set forth in the answer, each defense must be separately stated [*Code Civ. Proc. § 431.30(g)*] and numbered [*Cal. Rules of Ct., Rule 2.112(1)*]. If the complaint sets forth more than one cause of action, the affirmative defense must refer to the cause of action it is intended to answer [*Code Civ. Proc. § 431.30(g)*].

[3] Alternative Procedures

If the fact that the action is barred by the statute of limitations appears on the face of the complaint or from any matter

the court must or may take judicial notice of [*see Evid. Code §§ 451, 452*], the defendant may raise the objection by demurrer [*Code Civ. Proc. § 430.30(a)*]. Whether or not the fact so appears, if the defense can be indisputably established by affidavits, declarations, admissions, answers to interrogatories, or depositions, the defendant may move for summary judgment on that ground [*see Code Civ. Proc. § 437c*; *see* Ch. 537, *Summary Judgment*]. If the fact does not so appear and cannot be indisputably established on a motion for summary judgment because fact issues must be determined, the defendant may allege the bar of the statute as an affirmative defense in the answer to the complaint and then move for a separate trial of that issue [*see Code Civ. Proc. § 597*].

[4] Pleading Statute of Limitations in Answer

A defendant asserting that the action is barred by the statute of limitations may, in the answer to the complaint, plead the bar of the statute in one of two ways:

- By alleging all of the facts showing that the action is barred and indicating that the lateness of the commencement of the action is being urged as a defense [*Brown v. World Church (1969) 272 Cal. App. 2d 684, 691, 77 Cal. Rptr. 669]* ; or

- By stating generally that the cause of action is barred by a specified section of the Code of Civil Procedure or, if the section is subdivided, by a specified section and the subdivision [*Code Civ. Proc. § 458*].

If the second method is used and the defendant fails to specify the code section relied on or, if the section is subdivided, the code section and the subdivision relied on, the plea is insufficient [*Brown v. World Church (1969) 272 Cal. App. 2d 684, 691, 77 Cal. Rptr. 669]* and is subject to a demurrer on the ground that it does not state facts sufficient to constitute a defense [*see Code Civ. Proc. §§ 430.20(a), 430.50(b)*].

Code Civ. Proc. § 458 further provides that if the allegation that the action is barred is controverted, the party pleading the defense must establish, at trial, the facts showing that the cause of action is barred. The plaintiff does not, however, file a replication to the answer. Rather, the statute provides that the statement of any new matter in the answer in avoidance or constituting a defense must, at trial, be deemed controverted by the opposite party [*Code Civ. Proc. § 431.20(b)*]. Because the affirmative defense is deemed controverted by operation of law, the defendant has the burden of establishing it at trial.

[5] Pleading Statute of Limitations by Demurrer

A complaint that shows on its face, or from any matter properly brought to the court's attention that the court must or may take judicial notice of [*see Evid. Code §§ 451-456*], that the cause of action sued on is barred by the statute of limitations is subject to a demurrer on the ground that it fails to state a cause of action [*see Code Civ. Proc. §§ 430.10(e), 430.50(a)*].

[6] Cross References

For a related form, *see § 380.291*.

See Ch. 26, *Answers* , Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 345, *Limitation of Actions*

For memoranda of points and authorities relating to assertion of the statute of limitations, see generally California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 143, *Limitation of Actions* (Matthew Bender)

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33-380 California Forms of Pleading and Practice--Annotated §§ 380.352-380.369

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[Reserved]

§§ 380.352[Reserved]

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33-380 California Forms of Pleading and Practice--Annotated § 380.370

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.370 Affirmative Defense Allegation--Comparative Negligence of Plaintiff--General Form

[1] FORM Affirmative Defense Allegation--Comparative Negligence of Plaintiff--General Form

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that Plaintiff failed to exercise reasonable and ordinary care, caution, or prudence for his/her own safety in order to avoid the alleged accident. The resulting injuries and damages, if any, sustained by plaintiff were proximately caused and contributed to by the negligence of plaintiff [in that, among other things, _____ (*set out acts or omissions of plaintiff constituting negligence, e.g.,* plaintiff failed to look where she was placing her hand)].

[2] Use of Form

This form of affirmative defense allegation is for insertion in an answer to a complaint based on negligence if plaintiff's negligence was a contributing factor to the accident. For a discussion of comparative negligence, see *§ 380.170[1]*.

If more than one affirmative defense is set forth in the answer, each defense must be separately stated [*Code Civ. Proc. § 431.30(g)*] and numbered [*Cal. Rules of Ct., Rule 2.112(1)*]. If the complaint sets forth more than one cause of action, the affirmative defense must refer to the cause of action it is intended to answer [*Code Civ. Proc. § 431.30(g)*].

[3] Pleading Comparative Negligence

The defendant has the burden of pleading and proving that the plaintiff was negligent and that the plaintiff's negligence was a proximate cause of the accident and resulting injuries [*Simmons v. Wexler (1979) 94 Cal. App. 3d 1007, 1014, 156 Cal. Rptr. 810]* . Many practitioners prefer to plead facts as generally as possible to avoid tying themselves down to a specific set of narrow facts at the pleading stage. The basic elements of negligence may be generally alleged in a

complaint or answer [*see Singer v. Superior Court (1960) 54 Cal. 2d 318, 323, 5 Cal. Rptr. 697, 353 P.2d 305* ; *Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 513-514, 150 Cal. Rptr. 1, 585 P.2d 851]* . Therefore, it is likely that a defendant can plead plaintiff's comparative fault generally and omit the allegations of the specific actions of plaintiff set out as optional language in the example.

[4] Cross References

For a related form, see *§ 380.291*

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33-380 California Forms of Pleading and Practice--Annotated § 380.371

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.371 Affirmative Defense Allegation--Comparative Negligence of Plaintiff--Plaintiff's Violation of Statute, Ordinance, or Regulation [Evid. Code § 669]

[1] FORM Affirmative Defense Allegation--Comparative Negligence of Plaintiff--Plaintiff's Violation of Statute, Ordinance, or Regulation[Evid. Code § 669]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that at the time and place of the alleged injuries, plaintiff was not exercising ordinary care, caution, or prudence to prevent his/her injuries. Plaintiff was injured while _____ [*allege actions of plaintiff at time of accident that were in violation of statute, ordinance, or regulation, e.g.,* standing in a roadway hitchhiking]. That conduct was in direct violation of _____ [*cite or identify statute, ordinance, or regulation, e.g., Section 21957 of the Vehicle Code*], then and there in full force and effect, which provides that _____ [*set forth relevant portions, e.g.,* no person shall stand in a roadway for the purpose of soliciting a ride from the driver of any vehicle]. Therefore, the alleged injuries were proximately caused by the negligence of plaintiff.

[2] Use of Form

This affirmative defense allegation is for insertion in an answer to a complaint based on negligence if the plaintiff's conduct at the time of the accident was in violation of a statute, ordinance, or regulation.

[3] Cross References

For related forms, see *§§ 380.291* and *380.370*

For a general form alleging violation of a statute, regulation, or ordinance, see Ch. 531, *Statutes and Ordinances*

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33-380 California Forms of Pleading and Practice--Annotated § 380.372

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.372 Affirmative Defense Allegation--Comparative Negligence of Plaintiff--Based on Vicarious Liability

[1] FORM Affirmative Defense Allegation--Comparative Negligence of Plaintiff--Based on Vicarious Liability

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. _____ [*Allege facts demonstrating that the proximate cause of plaintiff's injuries and/or damages is the negligence of a third person that is properly imputed to plaintiff, e.g.,* Plaintiff is seeking to recover for damage to the motor of its truck, which it had rented to defendant. Defendant is informed and believes that the reason the motor was damaged while being used by defendant is that it contained an insufficient amount of oil. The truck was operated by defendant with an insufficient amount of oil as a proximate result of the negligence of plaintiff's employees in failing to properly maintain and inspect the truck prior to renting it to defendant].

2. Because of the relationship existing between plaintiff and _____ [*specify, e.g.,* plaintiff's employee] at the time and place alleged in the complaint, the contributory negligence of _____ [*specify, e.g.,* plaintiff's employee] is imputed to plaintiff and plaintiff's recovery, if any, from defendant must be reduced accordingly.

[2] Use of Form

This affirmative defense allegation is for use in an answer to a complaint if the proximate cause of the plaintiff's injuries or damages is the negligence of a third person that is properly imputed to the plaintiff.

[3] Cross References

For related forms, see *§§ 380.291* and *380.370*

For form alleging that automobile driver's negligence is imputed to passenger, see Ch. 82, *Automobiles: Causes of Action*

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33-380 California Forms of Pleading and Practice--Annotated § 380.373

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.373 Affirmative Defense Allegation--Express Assumption of Risk by Plaintiff

[1] FORM Affirmative Defense Allegation--Express Assumption of Risk by Plaintiff

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. Prior to _____ [*date of injury or death*], namely, on _____ [*date*], _____ [plaintiff *or* _____ (*name*), plaintiff's decedent] signed a written waiver, release, and indemnity agreement.

[*EITHER, plead effect of agreement*]

2. A copy of the agreement referred to in Paragraph 1 is attached hereto as Exhibit 1 and made a part hereof. By the terms of that agreement, _____ [plaintiff *or* plaintiff's decedent], in consideration of _____ [*specify, e.g.* being enrolled in a scuba diving training class given by _____ (defendant *or* _____ [*name*], defendant's employer)], expressly released and discharged _____ [defendant *or* defendant's employer, and his/her officers, agents, and employees,] from any and all liability for any negligence on his/her/their part that might result in, and expressly waived all claims for damages for, injury to the person, damage to the property, or the death of _____ [plaintiff *or* plaintiff's decedent] _____ [*specify activities, e.g.,* while participating in the scuba diving course or activities] and, by the express terms of which _____ [plaintiff *or* plaintiff's decedent] expressly assumed all risks of any injury he/she might suffer to person or property as a result of the negligence of defendants or any of them during the _____ [*specify, e.g.,* training course].

[*OR, plead terms of agreement*]

2. The agreement referred to in Paragraph 1 provides[, in relevant part,] as follows: _____ [*set forth exact terms of agreement*].

[2] Use of Form

This form is for use in an answer to the complaint in an action based on negligence for damages for personal injury, property damage, or wrongful death, to allege the affirmative defense of express assumption of risk because the plaintiff or the plaintiff's decedent signed a written waiver and release agreement before the injury or death [*see § 380.171[1]*].

[3] Cross References

For related forms, see *§§ 380.291* and *380.370*.

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33-380 California Forms of Pleading and Practice--Annotated § 380.374

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.374 Affirmative Defense Allegation--Implied Assumption of Risk by Plaintiff--Primary Assumption of Risk by Participant in Active Sport

[1] FORM Affirmative Defense Allegation--Implied Assumption of Risk by Plaintiff--Primary Assumption of Risk by Participant in Active Sport

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff is completely barred from recovery because plaintiff's injury resulted from his/her participation with defendant in an active sport, namely _____ [*specify sport or activity in which plaintiff and defendant were engaged, e.g.,* touch football], and defendant neither intentionally injured plaintiff nor engaged in conduct that was so reckless as to fall outside the range of the ordinary activity involved in that sport. Therefore, defendant owed no duty to protect plaintiff from the particular risk of harm that caused the injury.

[*If appropriate, add:* The sport as played by plaintiff and defendant involved the type of physical contact that generally could be expected to result in injury(, and even though the sport was not organized and well-defined, plaintiff knew of the type of conduct involved).]

CAUTION:

The first paragraph of this form is based on what is, apparently, a plurality opinion of the Supreme Court in *Knight v. Jewett* [*Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *see § 380.172[3]*]. Pending further clarification by the Court, the weight of decisional guidance in the lead opinion and the vitality of the dissent's analysis are therefore unclear [*see Del Mar Water, Light & Power Co. v. Eshleman (1914) 167 Cal. 666, 682, 140 P. 591* (any proposition or principle stated in opinion not to be taken as opinion of Court unless agreed to by at least four justices)]. The optional second paragraph includes language that would support the analysis used in the dissent [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 336-338, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (Kennard, J., dissenting)].

Counsel should therefore consider asserting affirmative defenses under both theories to the extent that both theories are supported by the facts, pending further clarification by the Court.

[2] Use of Form

This form is for use by a defendant to allege as an affirmative defense that the plaintiff is barred by implied assumption of risk from recovering damages for injuries suffered during participation in an active sport. The defense is based on the rule that participants in an active sport cannot recover for injuries suffered during that participation unless the injuries were caused by either intentional or reckless misconduct falling outsidethe range of the ordinary activity involved in the sport [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 320, 321, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (George, J., joined by Lucas, C.J., and Arabian, J.; Mosk, J., concurring and dissenting)]. The optional paragraph is based on the analysis used in three justices' dissenting opinions [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 323, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (Panelli, J., concurring and dissenting, joined by Baxter, J., concurring in result, but dissenting in favor of consent analysis stated in dissent by Kennard, J.)], and, if nothing else should add to the viability of the defense if supported by the facts of the case.

For a form of affirmative defense allegation for use if a plaintiff has expressly assumed the risk, *see § 380.373*.

[3] Assumption of Risk by Participants in Active Sports

A participant in an active sport breaches a legal duty of care to other participants--that is, engages in conduct that properly may subject him or her to financial liability--only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport [*Knight v. Jewett (1992) 3 Cal. 4th 296, 320, 321, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (George, J., joined by Lucas, C.J., and Arabian, J., with Mosk, J., apparently concurring on this point)].

The proper analysis by which this result is reached is not entirely clear. At least three justices of the California Supreme Court analyzed the issue and concluded that if, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury, the doctrine of assumption of risk continues to operate as a complete bar to the plaintiff's recovery [*Knight v. Jewett (1992) 3 Cal. 4th 296, 307, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (plurality opinion)]. The Court referred to this approach as "primary assumption of risk" [*Knight v. Jewett (1992) 3 Cal. 4th 296, 307, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . The focal point is whether the defendant's alleged conduct breached the legal duty of care that the defendant owed to the plaintiff [*see Ford v. Gouin (1992) 3 Cal. 4th 339, 344, 11 Cal. Rptr. 2d 30, 834 P.2d 724* (companion case to *Knight*)].

The dissent in *Knight* favored a "consent-based" analysis under which the defense of implied assumption of the risk remains a complete bar to recovery in negligence cases in which the plaintiff has knowingly and voluntarily consented to encounter a specific risk [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 331, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . Their approach is a subjective evaluation of what a particular plaintiff knew and appreciated about the encountered risk [*Knight v. Jewett (1992) 3 Cal. 4th 296, 324, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (Kennard, J., dissenting, with whom two other justices concurred; criticizing that lead opinion because "by thus transforming an affirmative defense into an element of the plaintiff's negligence action, the plurality would abolish the defense without acknowledging that it is doing so")].

For further discussion, see *§ 380.172[2][a]*.

[4] Cross References

For related forms, see *§§ 380.291* and *380.370*

For memoranda of points and authorities relating to assertion of primary assumption of risk, see California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender)

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33-380 California Forms of Pleading and Practice--Annotated § 380.375

AUTHOR: MICHAEL S. FIELDS CONTRIBUTING EDITORIAL CONSULTANT Mr. Fields is a private practitioner in Beverly Hills who has specialized in personal injury litigation since 1969.

§ 380.375 Affirmative Defense Allegation--Implied Assumption of Risk by Plaintiff--Secondary Assumption of Risk

[1] FORM Affirmative Defense Allegation--Implied Assumption of Risk by Plaintiff--Secondary Assumption of Risk

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff assumed the risk of plaintiff's alleged injuries in that plaintiff [*specify facts showing plaintiff's assumption of risk, e.g.,* proceeded to walk across the mezzanine area of defendant's premises even though defendant had posted prominent signs at each entrance to the mezzanine stating that that area was closed for cleaning]. The resulting injuries and damages, if any, sustained by plaintiff were proximately caused and contributed to by the negligence of plaintiff in that, among other things, [*set out acts or omissions of plaintiff constituting negligence, e.g.,* plaintiff ignored the warning signs posted by defendant and the obvious wet condition of the floor in the mezzanine area where plaintiff allegedly slipped and fell and sustained the injuries complained of].

[2] Use of Form

This form is for use by a defendant to allege the affirmative defense that the plaintiff should share in the liability for his/her injuries because of the plaintiff's secondary assumption of risk. According to the lead opinion in *Knight v. Jewett* [*Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* , the doctrine of assumption of risk, in light of the adoption of comparative fault principles, consists of two separate defenses: (1) primary assumption of risk, which applies if the defendant does not owe a duty to the plaintiff and operates as a complete bar to the plaintiff's recovery; and (2) secondary assumption of risk, which applies if the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty. Secondary assumption of risk is merged into the comparative fault scheme, and the trier of fact may consider the parties' relative responsibility in apportioning the loss resulting from the injury [*Knight v. Jewett (1992) 3 Cal. 4th 296, 315, 11 Cal. Rptr. 2d 2, 834*

P.2d 696] .

[3] Cross References

For related forms, see *§§ 380.291* and *380.370*.

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California Forms of Pleading and Practice--Annotated

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 380 NEGLIGENCE
PART IV. FORMS
E. Affirmative Defenses

33-380 California Forms of Pleading and Practice--Annotated § 380.376

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§ 380.376 Affirmative Defense--Workers' Compensation as Plaintiff's Exclusive Remedy [Lab. Code §§ 3601, 5300]

[1] FORM Affirmative Defense--Workers' Compensation as Plaintiff's Exclusive Remedy [Lab. Code §§ 3601, 5300]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that at the time and place of plaintiff's alleged accident, plaintiff was an employee of defendant, plaintiff was performing services growing out of and incidental to his/her employment, plaintiff was acting within the course of his/her employment, and plaintiff's exclusive remedy is that provided by workers' compensation benefits pursuant to *Sections 3201 through 6149 of the Labor Code*.

[2] Use of Form

This form of affirmative defense allegation is for insertion in an answer to a complaint against the plaintiff's employer, if the plaintiff's injuries were incurred while the plaintiff was in the course of his or her employment. Under these circumstances, except for a few notable exceptions, the plaintiff's exclusive remedy is workers' compensation [*see Lab. Code §§ 3600, 3601, 5300*].

A defendant in a negligence action who claims to be one of the class of persons protected from an action at law by the provisions of the Workers' Compensation Act bears the burden of pleading and proving, as an affirmative defense to the action, the existence of the conditions of compensation set forth in the Act that are necessary to its application [*Doney v. Tambouratgis (1979) 23 Cal. 3d 91, 96-97, 151 Cal. Rptr. 347, 587 P.2d 1160* ; *Coca-Cola Bottling Co. v. Superior Court (1991) 233 Cal. App. 3d 1273, 1283-1284, 286 Cal. Rptr. 855]* . For a discussion of workers' compensation law, see Ch. 577, *Workers' Compensation* .

[3] Cross References

For related forms, see *§§ 380.291* and *380.370*

For forms and discussion of workers' compensation law, see Ch. 577, *Workers' Compensation*

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 385 NEGOTIABLE INSTRUMENTS

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Chapter 385 NEGOTIABLE INSTRUMENTS
PART I. SCOPE

33-385 California Forms of Pleading and Practice--Annotated § 385.01

§ 385.01 Scope of Chapter

This chapter discusses "negotiable instruments" under Division 3 of the Commercial Code, as enacted operative January 1, 1993 [*see Com. Code § 3101*]. The chapter includes forms for use in actions on the most common kinds of negotiable instruments: promissory notes [*see §§ 385.90 -385.118*] and checks [*see §§ 385.119 -385.127*], as well as allegations of affirmative defenses having general application for holder in due course issues in those actions [*see §§ 385.128 -385.132*].

This chapter focuses on actions by and between the parties to a check, other than banks. For discussion and forms relating to banks' duties and liabilities with respect to checks, see Ch. 95, *Banks, Deposits, and Checks* .

In addition to negotiable instruments as governed by Division 3, this chapter discusses *Civ. Code § 1719*, which imposes penalties for writing bad checks [*see §§ 385.119, 385.120*]. The many Civil Code sections regulating notes, negotiable or otherwise, secured by deeds of trusts or mortgages on real estate are discussed in Ch. 555, *Trust Deeds and Real Property Mortgages* .

For discussion and a form relating to *Com. Code § 3311*, which governs the tender of checks in satisfaction of disputed, unliquidated claims, see Ch. 6, *Accord and Satisfaction* .

For discussion and a form relating to *Civ. Code § 1725*, which prohibits a retailer from requiring credit card information before accepting a check in payment of a transaction, see Ch. 127, *Consumer Contracts and Loans* .

For forms for use in actions involving assignment of nonnegotiable instruments and choses in action generally, see Ch. 60, *Assignments* .

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PART I. SCOPE

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§ 385.02 Cross References

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For forms for use in actions involving assignments, see Ch. 60, *Assignments*

For forms for use in actions involving checks when a bank is a party, see Ch. 95, *Banks, Deposits, and Checks*

For forms for use in actions involving the cancellation of instruments, see Ch. 107, *Cancellation of Instruments*

For discussion of and a form of judgment applicable to the Uniform Foreign-Money Claims Act (*Code Civ. Proc. § 676 et seq.*), see Ch. 177, *Damages* , and Ch. 318, *Judgments*

For discussion and forms of defense to collection of checks or notes given in payment of gambling debts, see Ch. 272, *Gambling*

For forms for use in actions involving securities, see Ch. 515, *Securities and Franchise Regulation*

For discussion and forms for use when the note is secured by real property, see Ch. 555, *Trust Deeds and Real Property Mortgages*

For forms for use in actions involving usurious interests on notes, see Ch. 568, *Usury*

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[Reserved]

§§ 385.03[Reserved]

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§ 385.10 Governing Law

Negotiable instruments are governed by Division 3 of the Commercial Code (*Com. Code § 3101 et seq.*). Division 3 does not apply to money, payment orders, which are governed by Division 11 (*Com. Code § 11101 et seq.*), or securities, which are governed by Division 8 (*Com. Code § 8101 et seq.*) [*Com. Code § 3102(a)*]. Regulations of the Board of Governors of the Federal Reserve System and operating circulars of the Federal Reserve Banks supersede any inconsistent provision of Division 3 to the extent of the inconsistency [*Com. Code § 3102(c)*].

If there is conflict between Division 3 and Division 4 (*Com. Code § 4101 et seq.*) or Division 9 (*Com. Code § 9101 et seq.*), Divisions 4 and 9 govern [*Com. Code § 3102(b)*].

Penalties imposed against the drawer of checks that are unpaid for specified reasons are governed by *Civ. Code § 1719*.

Unless governed by the particular provisions authorizing issuance of bonds, notes, commercial paper, leases, or other evidences of indebtedness by a public body, *Gov. Code § 5450 et seq.* govern a pledge of collateral by a public body to secure the evidence of indebtedness.

Cases decided under prior versions of Division 3 have been retained without any notation that they were decided under prior law except when it is not apparent from the date of the case which law it interpreted.

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§ 385.11 Definitions

[1] Instruments

"Instrument" means a negotiable instrument [*Com. Code § 3104(b)*], and, throughout this chapter, both terms are used interchangeably. Negotiable instruments are classified as notes, drafts [*see Com. Code § 3104(e)*], checks [*see Com. Code § 3104(f)*], and certificates of deposit [*see Com. Code § 3104(j)*]. Checks include cashier's checks [*see Com. Code § 3104(g)*], teller's checks [*see Com. Code § 3104(h)*], demand drafts [*see Com. Code § 3104(k)*], and traveler's checks [*see Com. Code § 3104(i)*; *but see Com. Code § 3312(a)(1)* (for purposes of that section, "check" means cashier's check, teller's check, or certified check)].

An instrument that complies with the requirements of negotiability (*see § 385.13[1]*) is one or more of the following:

- A draft if it is an order or written instruction to pay money signed by the person giving the instruction. The instruction may be addressed to any person, including the person giving the instruction, or to one or more persons jointly or in the alternative but not in succession. An authorization to pay is not an order unless the person authorized to pay is also instructed to pay [*Com. Code §§ 3103(a)(6), 3104(e)*].

- A check if it is (a) a draft, other than a documentary draft, payable on demand and drawn on a bank, (b) a cashier's check or teller's check, or (c) a demand draft [*see Com. Code § 3104(k)*]. An instrument may be a check even though it is described on its face by another term, such as "money order" [*Com. Code § 3104(f)*].

- A certificate of deposit if it contains an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money. A certificate of deposit is a note of the bank [*Com. Code § 3104(j)*].

- A note if it is a promise or written undertaking to pay money signed by the person undertaking to pay. An acknowledgment of an obligation by the obligor is not a promise unless the obligor also

undertakes to pay the obligation [*Com. Code §§ 3103(a)(9), 3104(e)*].

If an instrument falls within the definition of both "note" and "draft," a person entitled to enforce the instrument may treat it as either a note or a draft [*Com. Code § 3104(e)*].

A cashier's check is a draft with respect to which the drawer and drawee are the same bank or branches of the same bank [*Com. Code § 3104(g)*].

A teller's check is a draft drawn by a bank (1) on another bank, or (2) payable at or through a bank [*Com. Code § 3104(h)*].

A traveler's check is an instrument that (1) is payable on demand, (2) is drawn on or payable at or through a bank, (3) is designated by the term "traveler's check" or by a substantially similar term, and (4) requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the instrument [*Com. Code § 3104(i)*].

A demand draft is a writing, not signed by a customer, that is created by a third party under the purported authority of the customer for the purpose of charging the customer's account with a bank. A demand draft must contain the customer's account number, and may contain the customer's printed or typewritten name, a notation that the customer authorized the draft, or the statement "No Signature Required" or words to that effect. The term "demand draft" does not include a check purportedly drawn by and bearing the signature of a fiduciary [*Com. Code § 3104(k)*; *see Com. Code § 3307(a)(1)*].

A "certified check" means a check accepted by the bank on which it is drawn. Acceptance may be made as stated in *Com. Code § 3409(a)* (*see § 385.25*) or by a writing on the check that indicates that the check is certified. The drawee of a check has no obligation to certify the check, and refusal to certify is not dishonor of the check [*Com. Code § 3409(d)*].

[2] Parties to Instruments

The term "issuer" includes both makers and drawers [*see Com. Code § 3105(c)*]. A maker is a person who signs or is identified in a note as a person undertaking to pay [*Com. Code § 3103(a)(5)*]. A drawer is a person who signs or is identified in a draft as a person ordering payment [*Com. Code § 3103(a)(3)*].

A drawee is the person ordered in a draft to make payment [*Com. Code § 3103(a)(2)*]. A drawee becomes an "acceptor" when it has accepted a draft [*Com. Code § 3103(a)(1)*; *see Com. Code § 3409(a)* (defining "acceptance" and discussed in *§ 385.35*)].

An "endorser" is a person who makes an endorsement [*Com. Code § 3204(b)*]. Various types of endorsements are discussed in *§ 385.19*.

There may also be "accommodation parties" and "accommodated parties" to instruments [*see Com. Code § 3419*], as discussed in *§ 385.40*.

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§ 385.12 Negotiation

[1] In General

Negotiation is a voluntary or involuntary transfer of possession of an instrument by a person other than the issuer to a person who thereby becomes its holder, and is thus entitled to enforce it [*Com. Code §§ 3201(a), 3301*; *see Com. Code § 3105* (issue, issuer)]. Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its endorsement by the holder [*Com. Code § 3201(b)*; *see Com. Code § 3103(a)(11)* ("remitter" means person who purchases instrument from its issuer if instrument is payable to identified person other than purchaser)].

Remitter transactions usually involve a cashier's check or teller's check. For example, B buys goods from S and pays for them with a cashier's check issued by Bank and purchased from Bank by B. The check is issued when it is delivered by Bank to B, whether it is payable to B or to S [*see Com. Code § 3105(b)*; Official Comment 2 to U.C.C. § 3-201 (1990)]. If the check is payable to B, negotiation requires B to endorse the check and deliver it to S. If the check is payable to S, negotiation occurs when B transfers the check to S. B is the remitter and, until delivery of the check to S, is also the owner of the check, even though B is never a party to the check [Official Comment 2 to U.C.C. § 3-201 (1990)].

If an instrument is payable to bearer or if it has been endorsed in blank, it may be negotiated by transfer of possession alone [*Com. Code §§ 3201(b), 3205(b)*; *see also* discussion § 385.19[2]].

Negotiation does not occur if a transferor purports to transfer less than the entire instrument. The transferee obtains no rights under Division 3 and has only the rights of a partial assignee [*Com. Code § 3203(d)*].

Negotiation is effective even if obtained (1) from an infant, a corporation exceeding its powers, or a person without capacity; (2) by fraud, duress, or mistake; or (3) in breach of duty or as part of an illegal transaction [*Com. Code § (a)*].

To the extent permitted by other law, negotiation may be rescinded or may be subject to other remedies, but those remedies may not be asserted against a subsequent holder in due course or against a person paying the instrument in good faith and without knowledge of facts that are a basis for rescission or other remedy [*Com. Code § (b)*; *see also §§*

385.115, 385.116 ("real" defenses available against holder in due course)].

[2] Transfer

An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument [*Com. Code § 3203(a)*]. Whether or not a transfer is a negotiation, transfer of an instrument vests the transferee with any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument [*Com. Code § 3203(b)*; *see Com. Code § 3203(d)* (discussed under *§ 385.12[1]*); *Finalco, Inc. v. Roosevelt (1991) 235 Cal. App. 3d 1301, 1305-1306, 3 Cal. Rptr. 2d 865* (entity that reacquired note it had previously assigned while it was holder and that knew of default and defenses at time of reacquisition as taking free from all claims and defenses to same extent as holder)]. *Com. Code § (b)*is known as the "shelter" doctrine, and its purpose is to assure the holder in due course a free market for its paper. Thus, when a transferee takes an instrument from a holder in due course, the transferee takes free from all claims and defenses to the same extent as did the holder in due course *even if* the transferee is aware of those claims and defenses. If this were not the rule, a holder in due course could be deprived of a market for the instrument if the obligor widely disseminated notice of a claim or defense. *Com. Code § (b)* does not make the transferee a holder in due course; it transfers the freedom from claims and defenses of the original holder in due course to each succeeding transferee [*Finalco, Inc. v. Roosevelt (1991) 235 Cal. App. 3d 1301, 1305-1306, 3 Cal. Rptr. 2d 865* (decided under former *Com. Code § 3201(1)*)].

Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of endorsement by the transferor, the transferee has a specifically enforceable right to the transferor's unqualified endorsement, but negotiation of the instrument does not occur until that endorsement is made [*Com. Code § 3203(c)*].

[3] Endorsement

An endorsement is a signature, other than that of a signer as maker, drawer, or acceptor, that, alone or accompanied by other words, is madeon an instrument for negotiating the instrument. Regardless of the signer's intent, a signature and its accompanying words is an endorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than endorsement. For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument [*Com. Code § 3204(a)*; *see Com. Code § 3204(b)* (endorser as one who makes endorsement)]. An endorsement may also be made for the purpose of restricting payment of the instrument or incurring endorser's liability on the instrument [*Com. Code § 3204(a)*].

For the purpose of determining whether the transferee of an instrument is a holder, an endorsement that transfers a security interest in the instrument is effective as an unqualified endorsement of the instrument [*Com. Code § 3204(c)*]. If an instrument is payable to a holder under a name that is not the holder's name, endorsement may be made by the holder in the name stated in the instrument or in the holder's name, or both, but a person paying or taking the instrument for value or collection may require signature in both names [*Com. Code § 3204(d)*].

For discussion of specific types of endorsements, see *§ 385.19*.

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§ 385.13 Forms of Negotiable Instruments

[1] Basic Criteria

Except as provided in *Com. Code § 3104(c)* and *(d)* (discussed *below*), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it is all of the following [*Com. Code § 3104(a)*]:

(1) Is payable to bearer or to order at the time it is issued or first comes into a holder's possession;

(2) Is payable on demand or at a definite time; and

(3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral [*see Commercial Nat. Bank of Peoria v. Kermeen (1990) 225 Cal. App. 3d 396, 402, 275 Cal. Rptr. 122* (cognovit clause in preprinted promissory note form as not, without more, showing voluntary and knowing waiver of fundamental due process rights; without such waiver, sister-state court has no personal jurisdiction over defendant and its judgment is not entitled to full faith and credit in California)], or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

An order that meets all of the requirements of *Com. Code § 3104(a)*, except that it is not payable to bearer or to order at the time it is issued or first comes into a holder's possession, and otherwise falls within the definition of "check" [*see Com. Code § 3104(f)* (discussed in *§ 385.11*)] is a negotiable instrument and a check [*Com. Code § 3104(c)*]. However, a promise or order other than a check is not a negotiable instrument if, at the time it is issued or first comes into a holder's possession, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by Division 3 [*Com. Code § 3104(d)*].

[2] Unconditional Promise or Order to Pay

Except as provided in *Com. Code § 3106*, for the purposes of *Com. Code § 3104(a)*, a promise or order is unconditional

unless it states (1) an express condition to payment, (2) that the promise or order is subject to or governed by another writing [*see Growth Equities Corp. v. Freed (1991) 227 Cal. App. 3d 506, 509-511, 277 Cal. Rptr. 848* (note secured by and "subject to" partnership agreement as nonnegotiable)], or (3) that rights or obligations with respect to the promise or order are stated in another writing. A reference to another writing does not of itself make the promise or order conditional [*Com. Code § 3106(a)*].

A promise or order is not made conditional (1) by a reference to another writing for a statement of rights with respect to collateral, prepayment, or acceleration [*see Growth Equities Corp. v. Freed (1991) 227 Cal. App. 3d 506, 509, 277 Cal. Rptr. 848* (fact that note was secured by partnership agreement did not undermine its negotiability, but fact that note stated on its face that it was "subject to" agreement did)], or (2) because payment is limited to resort to a particular fund or source [*Com. Code § 3106(b)*].

When a note states that it is "secured by" and "subject to" another agreement, the "subject to" language is not redundant and does not mean the same thing as "secured by" [*Growth Equities Corp. v. Freed (1991) 227 Cal. App. 3d 506, 509-510, 277 Cal. Rptr. 848* (distinguishing *Mann v. Leasko (1960) 179 Cal. App. 2d 692, 4 Cal. Rptr. 124* , which involved note that was secured by lien but did not recite that it was subject to lien)].

If a promise or order requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the promise or order [*see, e.g., Com. Code § 3104(i)* (traveler's check)], the condition does not make the promise or order conditional for the purposes of *Com. Code § 3104(a)*. If the person whose specimen signature appears on an instrument fails to countersign the instrument, the failure to countersign is a defense to the issuer's obligation, but the failure does not prevent a transferee of the instrument from becoming a holder of the instrument [*Com. Code § 3106(c)*].

If a promise or order at the time it is issued or first comes into a holder's possession contains a statement, required by applicable statutory oradministrative law, to the effect that the holder's or transferee's rights are subject to claims or defenses that the issuer could assert against the original payee, the promise or order is not thereby made conditional for the purposes of *Com. Code § 3104(a)*; but, if the promise or order is an instrument, there cannot be a holder in due course of the instrument [*Com. Code § 3106(d)*; *see, e.g., 16 C.F.R. § 433.2* (requires legend; *see* discussion under *§ 385.29[2][g]*)].

[3] Payable on Demand or at Definite Time

A promise or order is "payable on demand" if it (1) states that it is payable on demand or at sight, or otherwise indicates that it is payable at the will of the holder, or (2) does not state any time of payment [*Com. Code § 3108(a)*].

Subject to rights of prepayment, acceleration, extension at the option of the holder, or extension to a further definite time at the maker's or acceptor's option or automatically on or after a specified act or event, a promise or order is "payable at a definite time" if it is payable at one of the following times [*Com. Code § 3108(b)*]:

- On elapse of a definite period of time after sight or acceptance;
- At a fixed date or dates; or
- At a time or times readily ascertainable at the time the promise or order is issued [*see Com. Code § 3105(a)* (issue is first delivery of instrument by maker or drawer for purpose of giving rights on instrument to any person)].

If an instrument payable at a fixed date is also payable on demand made before the fixed date, the instrument is payable on demand until the fixed date and, if demand for payment is not made before that date, becomes payable at a definite

time on the fixed date [*Com. Code § 3108(c)*].

An instrument may be antedated or postdated. If the instrument is payable at a fixed period after date, the date stated determines the time of payment [*Com. Code § 3113(a)*]. Except as provided in *Com. Code § 4401(c)* (which allows a bank to pay postdated check before its date unless customer complies with notification procedure), an instrument payable on demand is not payable before the date of the instrument [*Com. Code § 3113(a)*]. If an instrument is undated, its date is the date of its issue or, in the case of an unissued instrument, the date it first comes into a holder's possession [*Com. Code § 3113(b)*].

[4] Payable to Order or Bearer

A negotiable instrument is required to be made payable either to order or to bearer [*Com. Code § 3104(a)(1)*; *Rottman v. Hevener (1921) 54 Cal. App. 485, 487, 202 P. 334]* . "Bearer" means the person in possession of an instrument, document of title, or certificated security that is payable to bearer or endorsed in blank [*Com. Code § 1201(b)(5)*]. A promise or order is payable to bearer if it is any of the following [*Com. Code § 3109(a)*]:

- States that it is payable to bearer or to the order of bearer or otherwise indicates that the person in possession of the promise or order is entitled to payment;

- Does not state a payee; or

- States that it is payable to or to the order of cash or otherwise indicates that it is not payable to an identified person.

A promise or order that is not payable to bearer is payable to order if it is payable (1) to the order of an identified person or (2) to an identified person or order. A promise or order that is payable to order is payable to the identified person [*Com. Code § 3109(b)*]. An "identified person" may be identified in any way, including by name, identifying number, office, or account number [*see Com. Code § 3110(c)*].

An instrument that is payable to bearer may become payable to an identified person if it is specially endorsed pursuant to *Com. Code § 3205(a)*, which is discussed in *§ 385.19[1]*. An instrument that is payable to an identified person may become payable to bearer if it is endorsed in blank *Com. Code § 3205(b)*, which is discussed in *§ 385.19[2]* [*Com. Code § 3109(c)*].

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§ 385.14 Other Writings

Subject to applicable law regarding exclusion of proof of contemporaneous or previous agreements, the obligation of a party to an instrument to pay the instrument may be modified, supplemented, or nullified by a separate agreement of the obligor and a person entitled to enforce the instrument, if the instrument is issued or the obligation is incurred in reliance on the agreement or as part of the same transaction giving rise to the agreement. To the extent an obligation is modified, supplemented, or nullified by an agreement under this section, the agreement is a defense to the obligation [*Com. Code § 3117*].

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§ 385.15 Parol or Extrinsic Evidence

Terms with respect to which the parties' confirmatory memoranda agree or that are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to those terms as are included in the writing may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement, but may be explained or supplemented by the following [*Com. Code § 2202*]:

- By course of dealing or usage of trade [*Com. Code § 1303(b), (c)*; *see,e.g., Insurance Co. of North America v. NNR Aircargo Service (USA), Inc. (9th Cir. 2000) 201 F.3d 1111, 1113-1115* (under *Com. Code § 1303(b)*, receipt of 47 identical invoices for 47 separate transactions was sufficient to constitute course of dealing, modifying shipping agreement)] or by course of performance [*Com. Code § 1303(a)*]; and

- By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement [*Com. Code § 2202*].

Thus, a prior or contemporaneous oral agreement that a promissory note is not payable according to its terms is no defense to an action on that note in the absence of fraud, mistake, lack or failure of consideration, or nonoccurrence of a condition precedent [*Coast Bank v. Holmes (1971) 19 Cal. App. 3d 581, 589, 97 Cal. Rptr. 30]* . Nevertheless, under *Com. Code § 2202*, evidence of oral collateral agreements is to be excluded in the interpretation of promissory notes only when the fact finder is likely to be misled [*Birsner v. Bolles (1971) 20 Cal. App. 3d 635, 637-639, 97 Cal. Rptr. 846]* .

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§ 385.16 Rules of Construction

[1] Contradictory Terms

If an instrument contains contradictory terms, typewritten terms prevail over printed terms, handwritten terms prevail over both, and words prevail over numbers [*Com. Code § 3114*].

[2] Interest

Unless otherwise provided in the instrument [*Com. Code § 3112(a)*]:

- An instrument is not payable with interest, and
- Interest on an interest-bearing instrument is payable from the date of the instrument [*Com. Code § 3112(a)*].

Interest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument. If an instrument provides for interest, but the amount of interest payable cannot be ascertained from the description, interest is payable at the judgment rate in effect at the place of payment of the instrument and at the time interest first accrues [*Com. Code § 3112(b)*].

[3] Payment in Foreign Money

Unless the instrument otherwise provides, an instrument that states the amount payable in foreign money may be paid in the foreign money or in an equivalent amount in dollars calculated by using the current bank-offered spot rate at the place of payment for the purchase of dollars on the day on which the instrument is paid [*Com. Code § 3107*].

[4] Place of Payment

Except as otherwise provided for items in Division 4 (*Com. Code § 4101 et seq.*), an instrument is payable at the place

of payment stated in the instrument. If no place of payment is stated, an instrument is payable at the address of the drawee or maker stated in the instrument. If no address is stated, the place of payment is the place of business of the drawee or maker. If a drawee or maker has more than one place of business, the place of payment is any place of business of the drawee or maker chosen by the person entitled to enforce the instrument. If the drawee or maker has no place of business, the place of payment is the residence of the drawee or maker [*Com. Code § 3111*].

[5] Joint and Several Liability; Right to Contribution

Except as otherwise provided in the instrument, two or more persons who have the same liability on an instrument as makers, drawers, acceptors, endorsers who endorse as joint payees, or anomalous endorsers are jointly and severally liable in the capacity in which they sign [*Com. Code § 3116(a)*].

Except as provided in *Com. Code § 3419(e)* [*see § 385.40[1]*] or by agreement of the affected parties, a party having joint and several liability who pays the instrument is entitled to receive from any party having the same joint and several liability contribution in accordance with applicable law [*Com. Code § 3116(b)*]. Discharge of one party having joint and several liability by a person entitled to enforce the instrument does not affect the right under *Com. Code § 3116(b)* of a party having the same joint and several liability to receive contribution from the party discharged [*Com. Code § 3116(c)*]. For discussion and forms dealing with indemnity and contribution generally, see Ch. 300, *Indemnity and Contribution* .

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§ 385.17 Determining to Whom Instrument Is Payable

[1] Maker's Intent Governs

The person to whom an instrument is payable may be identified in any way, including by name, identifying number, office, or account number [*Com. Code § 3110(c)*]. The person to whom an instrument is initially payable is determined by the intent of the person, whether or not authorized, who signed the instrument as, or in the name or behalf of, the issuer [*Com. Code § 3110(a)*; *see Com. Code § 3105(c)* (issuer includes both makers and drawers)]. The instrument is payable to the person intended by the signer even if that person is identified in the instrument by a name or other identification that is not that of the intended person.If more than one person signs in the name or behalf of the issuer of an instrument and all the signers do not intend the same person as payee, the instrumentis payable to any person intended by one or more of the signers [*Com. Code § 3110(a)*].

When the issuer's signature is made by automated means, such as a check-writing machine, the payee of the instrument is determined by the intent of the person who supplied the name or identification of the payee, whether or not authorized to do so [*Com. Code § 3110(b)*].

[2] Instrument Payable to Account

If an instrument is payable to an account that is identified only by number, the instrument is payable to the person to whom the account is payable. An instrument that is payable to an account identified by number and by the name of a person is payable to the named person, whether or not that person is the owner of the account identified by number [*Com. Code § 3110(c)(1)*].

[3] Instrument Payable to Trust, Estate, or Representative

An instrument payable to a trust, an estate, or a person described as trustee or representative of a trust or estate is payable to the trustee, the representative, or a successor of either, whether or not the beneficiary or estate is also named [*Com. Code § 3110(c)(2)(A)*].

[4] Instrument Payable to Agent or Officer

An instrument payable to a person described as agent or similar representative of a named or identified person is payable to the represented person, the representative, or a successor of the representative [*Com. Code § 3110(c)(2)(B)*].

An instrument payable to an office or to a person described as holding an office is payable to the named person, the incumbent of the office, or a successor to the incumbent [*Com. Code § 3110(c)(2)(D)*].

[5] Instrument Payable to Fund or Organization That Is Not Legal Entity

An instrument payable to a fund or organization that is not a legal entity is payable to a representative of the members of that fund or organization [*Com. Code § 3110(c)(2)(C)*].

[6] Instrument With Alternative or Joint Payees

If an instrument is payable to two or more persons alternatively, it is payable to any of them and may be negotiated, discharged, or enforced by any or all of them in possession of the instrument. If an instrument payable to two or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively [*Com. Code § 3110(d)*].

If an instrument is payable to two or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them [*Com. Code § 3110(d)*; *Feldman Constr. Co. v. Union Bank (1972) 28 Cal. App. 3d 731, 735, 104 Cal. Rptr. 912]* .

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§ 385.18 Signatures

[1] How Made; Effect

A signature may be made (1) manually or by means of a device or machine, and (2) by the use of any name, including a trade or assumed name, or by a word, mark, or symbol executed or adopted by a person with present intention to authenticate a writing [*Com. Code § 3401(b)*]. A person is not liable on an instrument unless (1) the person signed the instrument, or (2) the person is represented by an agent or representative who signed the instrument and the signature is binding on the represented person under *Com. Code § 3402*[*Com. Code § 3401(a)*].

Signatures can be those of makers, drawers, acceptors, endorsers, guarantors, or accommodation parties [*see Com. Code § 3203(a), 3419*].

For discussion of how to establish the validity of a signature in an action on an instrument, see the discussion *§ 385.49*.

[2] When Representive's Signature Binds Represented Party

If a person acting or purporting to act as a representative signs an instrument by signing either the name of the represented person or the name of the signer, the represented person is bound by the signature to the same extent the represented person would be bound if the signature were on a simple contract. If the represented person is bound, the signature of the representative is the "authorized signature of the represented person" and the represented person is liable on the instrument, whether or not identified in the instrument [*Com. Code § 3402(a)*].

[3] Liability of Person Signing as Representative

If a representative signs the name of the representative to an instrument, the signature is an authorized signature of the represented person, and the form of the signature shows unambiguously that the signature is made on behalf of the represented person who is identified in the instrument, the representative is not liable on the instrument [*Com. Code § 3402(b)(1)*].

Subject to *Com. Code § 3402(c)* (discussed *below*), if the form of the signature does not show unambiguously that the

signature is made in a representative capacity or the represented person is not identified in the instrument, therepresentative is liable on the instrument to a holder in due course that took the instrument without notice that the representative was not intended to be liable on the instrument [*Com. Code § 3402(b)(2)*].With respect to any other person, the representative is liable on the instrument unless the representative proves that the original parties did not intend the representative to be liable on the instrument [*Com. Code § 3402(b)(2)*].

If a representative signs the name of the representative as drawer of a check without indication of the representative status and the check is payable from an account of the represented person who is identified on the check, the signer is not liable on the check if the signature is an authorized signature of the represented person [*Com. Code § 3402(c)*].

[4] Unauthorized Signature

Unless otherwise provided in Division 3 or Division 4, an unauthorized signature is ineffective except as the signature of the unauthorized signer in favor of a person who in good faith pays the instrument or takes it for value. An unauthorized signature may be ratified for all purposes of Division 3 [*Com. Code § 3403(a)*]. For example, the maker's signature "MM by CA, Attny in fact" on a note was held to be authorized even though the power of attorney was not executed until two days after the note was signed because the particular power of attorney specified that it "ratified and confirmed" all things that the attorney in fact "shall cause to be done" in furtherance of the specific transaction referred to in the power of attorney [*see White v. Moriarty (1993) 15 Cal. App. 4th 1290, 1295-1296, 19 Cal. Rptr. 2d 200]* .

If the signature of more than one person is required to constitute the authorized signature of an organization, the signature of the organization is unauthorized if one of the required signatures is lacking [*Com. Code § 3403(b)*].

The civil or criminal liability of a person who makes an unauthorized signature is not affected by any provision of Division 3 that makes the unauthorized signature effective for the purposes of Division 3 [*Com. Code § 3403(c)*].

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§ 385.19 Endorsements

[1] Special Endorsement

If an endorsement is made by the holder of an instrument, whether payable to an identified person or payable to bearer, and the endorsement identifies a person to whom it makes the instrument payable, it is a "special endorsement." When specially endorsed, an instrument becomes payable to the identified person and may be negotiated only by the endorsement of that person. The principles stated in *Com. Code § 3110* (*see § 385.17*) apply to special endorsements [*Com. Code § 3205(a)*; *see also Com. Code § 3204* (endorsements in general, discussed in *§ 385.76[4]*)].

[2] Endorsement in Blank

If an endorsement is made by the holder of an instrument and it is not a special endorsement, it is a "blank endorsement." When endorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until it is specially endorsed [*Com. Code § 3205(b)*; *see Spencer v. Sterling Bank (1998) 63 Cal. App. 4th 1055, 1059-1060, 74 Cal. Rptr. 2d 576* (endorsement "for deposit only," while restrictive, is also a blank endorsement because it does not specify where or for whose benefit the checks are to be deposited.].

The holder may convert a blank endorsement that consists only of a signature into a special endorsement by writing, above the signature of the endorser, words identifying the person to whom the instrument is made payable [*Com. Code § 3205(c)*].

[3] Anomalous Endorsement

An anomalous endorsement is an endorsement made by a person who is not the holder of the instrument. An anomalous endorsement does not affect the manner in which the instrument may be negotiated [*Com. Code § 3205(d)*; *see also Com. Code § 3419(c)*, discussed in *§ 385.76[11][b]*].

[4] Restrictive Endorsements

[a] Generally of No Effect

An endorsement limiting payment to a particular person or otherwise prohibiting further transfer or negotiation of the instrument is not effective to prevent further transfer or negotiation of the instrument [*Com. Code § 3206(a)*]. Similarly, an endorsement stating a condition to the right of the endorsee to receive payment does not affect the right of the endorsee to enforce the instrument. A person paying the instrument or taking it for value or collection may disregard the condition, and the rights and liabilities of that person are not affected by whether the condition has been fulfilled [*Com. Code § 3206(b)*].

The presence on an instrument of an endorsement to which *Com. Code § 3206* applies does not prevent a purchaser of the instrument from becoming a holder in due course of the instrument unless the purchaser is a converter under *Com. Code § 3206(c)* or has notice or knowledge of breach of fiduciary duty as stated in *Com. Code § 3206(d)* [*Com. Code § 3206(e)*].

[b] Provide Defense to Obligor

In an action to enforce the obligation of a party to pay the instrument, the obligor has a defense if payment would violate an endorsement to which *Com. Code § 3206* applies and the payment is not permitted by *Com. Code § 3206* [*Com. Code § 3206(f)*].

[c] "For Deposit Only"

If an instrument bears an endorsement (1) described in *Com. Code § 4201(b)* ("pay any bank"), or (2) in blank or to a particular bank using the words "for deposit," "for collection," or other words indicating a purpose of having the instrument collected by a bank for the endorser or for a particular account, a person, other than a bank, who purchases the instrument when so endorsed converts the instrument unless the amount paid for the instrument is received by the endorser or applied consistently with the endorsement [*Com. Code § 3206(c)(1)*]. Similarly, a depositary bank that purchases the instrument or takes it for collection when so endorsed converts the instrument unless the amount paid by the bank with respect to the instrument is received by the endorser or applied consistently with the endorsement [*Com. Code § 3206(c)(2)*; *see Spencer v. Sterling Bank (1998) 63 Cal. App. 4th 1055, 1059-1060, 74 Cal. Rptr. 2d 576* (bank's acceptance for collection of cashiers' checks endorsed "for deposit only," for deposit to third party's trust account, was not violation of restrictive endorsement)]. A payor bank that is also the depositary bank or that takes the instrument for immediate payment over the counter from a person other than a collecting bank converts the instrument unless the proceeds of the instrument are received by the endorser or applied consistently with the endorsement [*Com. Code § 3206(c)(3)*]. Any other payor bank or intermediary bank may disregard the endorsement and is not liable if the proceeds of the instrument are not received by the endorser or applied consistently with the endorsement [*Com. Code § 3206(c)(4)*].

[d] Endorsement to Agent, Trustee, or Fiduciary

Except for an endorsement for collection [*see Com. Code § 3206(c)* (*see § 385.19[4][c]*)], if an instrument bears an endorsement using words to the effect that payment is to be made to the endorsee as agent, trustee, or other fiduciary for the benefit of the endorser or another person, unless there is notice of breach of fiduciary duty as provided in *Com. Code § 3307* (discussed in *§ 385.41*), a person who purchases the instrument from the endorsee or takes the instrument from the endorsee for collection or payment may pay the proceeds of payment or the value given for the instrument to the endorsee without regard to whether the endorsee violates a fiduciary duty to the endorser [*Com. Code § 3206(d)(1)*]. A subsequent transferee of the instrument or person who pays the instrument is neither given notice nor otherwise affected by the restriction in the endorsement unless the transferee or payor knows that the fiduciary dealt with the instrument or its proceeds in breach of fiduciary duty [*Com. Code § 3206(d)(2)*].

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§ 385.20 Cancellation of Prior Endorsements by Reacquisition

Reacquisition of an instrument occurs if it is transferred to a former holder, by negotiation or otherwise. A former holder who reacquires the instrument may cancel endorsements made after the reacquirer first became a holder of the instrument. If the cancellation causes the instrument to be payable to the reacquirer or to bearer, the reacquirer may negotiate the instrument. An endorser whose endorsement is canceled is discharged, and the discharge is effective against any subsequent holder [*Com. Code § 3207*].

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§ 385.21 "Fictitious Payees"

[1] Endorsement Effective in Favor of Holder

If an impostor, by use of the mails or otherwise, induces the issuer of an instrument to issue the instrument to the impostor, or to a person acting in concert with the impostor, by impersonating the payee of the instrument or a person authorized to act for the payee, an endorsement of the instrument by any person in the name of the payee is effective as the endorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection [*Com. Code § 3404(a)*].

If (1) a person whose intent determines to whom an instrument is payable [*see Com. Code § 3110(a), (b)* (*see § 385.17[1]*)] does not intend the person identified as payee to have any interest in the instrument, or (2) the person identified as payee of an instrument is a fictitious person, the following rules apply until the instrument is negotiated by special endorsement [*Com. Code § 3404(b)*; *see Com. Code § 3205(a)* (*see § 385.19[1]*)]:

- Any person in possession of the instrument is its holder.

- An endorsement by any person in the name of the payee stated in the instrument is effective as the endorsement of the payee in favor of a person who, in good faith, pays the instrument or takes it for value or for collection.

The phrase "person identified as payee" in *Com. Code § 3404(b)* refers to the named payee, not the intended payee. When a claim or defense depends on proving that "a person whose intent determines to whom an instrument is payable (subdivision (a) or (b) of Section 3110) does not intend the person identified as payee to have any interest in the instrument" [*Com. Code § 3404(b)*], the claimant or defendant is required to prove that the person identified as payee on the instrument (the named payee) was not the intended payee as determined under *Com. Code § 3110(a)*, and that the maker or drawer of the instrument so intended [*Unlimited Adjusting Group, Inc. v. Wells Fargo Bank (2009) 174 Cal. App. 4th 883, 894-895, 94 Cal. Rptr. 3d 672*].

For purposes of *Com. Code § 3404(a)* or *(b)*, an endorsement is made in the name of a payee if (1) it is made in a name

substantially similar to that of the payee or (2) the instrument, whether or not endorsed, is deposited in a depositary bank to an account in a name substantially similar to that of the payee [*Com. Code § 3404(c)*].

[2] Liability of Person Paying Instrument

With respect to an instrument to which *Com. Code § 3404(a)* or *(b)* applies, if a person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure contributes to a loss resulting from payment of the instrument, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss [*Com. Code § 3404(d)*].

Ordinary care, as used in Division 3 in the case of a person engaged in business, means observance of reasonable commercial standards,prevailing in the area in which the person is located, with respect to the business in which the person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by Division 3 or Division 4 [*Com. Code § 3103(a)(7)*].

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§ 385.22 Fraudulent Endorsement by Employee

[1] Terms Defined

In the case of an instrument payable to an employer, a fraudulent endorsement is a forged endorsement purporting to be that of the employer [*Com. Code § 3405(a)(2)(A)*]. In the case of an instrument with respect to which the employer is the issuer, a forged endorsement is one that purports to be that of the person identified as payee [*Com. Code § 3405(a)(2)(B)*].

For purposes of *Com. Code § 3405*, "employee" includes an independent contractor and employee of an independent contractor retained by the employer [*Com. Code § 3405(a)(1)*].

An employee has responsibility with respect to instruments if he or she has authority for any of the following [*Com. Code § 3405(a)(3)*]:

- To sign or endorse instruments on behalf of the employer;
- To process instruments received by the employer for bookkeeping purposes, for deposit to an account, or for other disposition;
- To prepare or process instruments for issue in the name of the employer;
- To supply information determining the names or addresses of payees of instruments to be issued in the name of the employer;
- To control the disposition of instruments to be issued in the name of the employer; or
- To act otherwise with respect to instruments in a responsible capacity.

"Responsibility" does not include authority that merely allows an employee to have access to instruments or blank or

incomplete instrument forms that are being stored or transported or are part of incoming or outgoing mail, or similar access [*Com. Code § 3405(a)(3)*].

[2] When Fraudulent Endorsement Effective

For the purpose of determining the rights and liabilities of a person who, in good faith, pays an instrument or takes it for value or for collection, if an employer entrusted an employee with responsibility with respect to the instrument and the employee or a person acting in concert with theemployee makes a fraudulent endorsement of the instrument, the endorsement is effective as the endorsement of the person to whom the instrument is payable if it is made in the name of that person [*Com. Code § 3405(b)*]. If the person paying the instrument or taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure contributes to a loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss [*Com. Code § 3405(b)*; *see Com. Code § 3103(a)(7)* (ordinary care means observance of reasonable commercial standards, prevailing in area with respect to business in which person is engaged); *see, e.g., Newman v. Wells Fargo Bank (2001) 87 Cal. App. 4th 73, 83-85, 104 Cal. Rptr. 2d 310* (complaint alleging that bank allowed plaintiff's employees to cash or deposit checks in their personal accounts despite suspicious circumstances indicating fraud stated cause of action under *Com. Code § 3405(b)*)].

Under *Com. Code § 3405(b)*, an endorsement is made in the name of the person to whom an instrument is payable if (1) it is made in a name substantially similar to the name of that person or (2) the instrument, whether or not endorsed, is deposited in a depositary bank to an account in a name substantially similar to the name of that person [*Com. Code § 3405(c)*].

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§ 385.23 Delivery

"Delivery" of an instrument means voluntary transfer of possession [*Com. Code § 1201(b)(15)*]. The first delivery of an instrument by the maker or drawer, whether to a holder or nonholder, for the purpose of giving rights on the instrument to any person is "issue" [*Com. Code § 3105(a)*].

Delivery is necessary for transfer of an instrument [*see Com. Code § 3203(a)*, discussed in *§ 385.12[2]*].

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§ 385.24 Consideration

"Consideration" means any consideration sufficient to support a simple contract. The drawer or maker of an instrument has a defense if the instrument is issued without consideration [*Com. Code § 3303(b)*; *see Saks v. Charity Mission Baptist Church (2001) 90 Cal. App. 4th 1116, 1133-1137, 110 Cal. Rptr. 2d 45* (in breach of contract action by real estate investor against church, attempting to hold church liable for promissory notes signed by pastor, evidence established church's defense that notes lacked consideration)].

If an instrument is issued for a promise of performance, the issuer has a defenseto the extent performance of the promise is due and the promise has not been performed [*Com. Code § 3303(b)*].

If an instrument is issued for value as stated in *Com. Code § 3303(a)* (discussed in *§ 385.28[3]*), the instrument is also issued for consideration [*Com. Code § 3303(b)*].

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§ 385.25 Who May Enforce Instrument

"Person entitled to enforce" an instrument means any of the following [*Com. Code § 3301*]:

- The holder of the instrument;
- A nonholder in possession of the instrument who has the rights of a holder; or
- A person not in possession of the instrument who is entitled to enforce the instrument pursuant to *Com. Code § 3309* (*see § 385.48*) or *Com. Code § 3418(d)*. *Com. Code § 3418(d)* provides that, if an instrument is paid or accepted by mistake and the payor or acceptor recovers payment or revokes acceptance, the instrument is treated as dishonored, and the person from whom payment is recovered has rights as a person entitled to enforce the dishonored instrument [*but see Com. Code § 3418(c)* (revocation of payment or acceptance as not permitted against person who took the instrument in good faith and for value or who, in good faith, changed position in reliance on the payment or acceptance)].

A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument [*Com. Code § 3301*].

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§ 385.26 Holder

The holder of a negotiable instrument is the person in possession of the instrument if the instrument is payable to bearer [*Com. Code § 1201(b)(21)*; *see also Com. Code § 3205(b)* (instrument endorsed in blank as payable to bearer)].

If an instrument is payable to an identified person, one is a holder if he or she is the identified person and is in possession of the instrument [*Com. Code § 1201(b)(21)*].

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§ 385.27 Defenses to Enforcement

[1] "Real" Defenses Assertable Against Holder in Due Course

Anyone's right to enforce the obligation of a party to pay an instrument, including the rights of a holder in due course, is subject to all of the following "real" defenses [*see Com. Code § 3305(b)*; Official Comment 1 to UCC § 3-305 (1990); *see also Com. Code § 3305(c)* (discussed in *§ 385.27[8]*)]:

- A defense of the obligor based on the obligor's infancy to the extent it is a defense to a simple contract [*Com. Code § 3305(a)(1)(A)*; *see Civ. Code § 1556*; *Fam. Code §§ 6500 et seq., 6700 et seq.*; *see also* Ch. 367A, *Minors: Tort Actions*] 365, *Minors: Contract Actions*, §§ 365.30 et seq., 365.160-365.162 (disaffirmation of minors' contracts);

- A defense of the obligor based on duress, lack of legal capacity, or illegality of the transaction that, under other law, nullifies the obligation of the obligor [*Com. Code § 3305(a)(1)(B)*; *see §§ 385.115, 385.116, 385.129, 385.130*];

- A defense of the obligor based on fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms [*Com. Code § 3305(a)(1)(C)*]; and

- A defense of the obligor based on discharge of the obligor in insolvency proceedings [*Com. Code § 3305(a)(1)(D)*]. For a form of affirmative defense based on discharge in bankruptcy, see Ch. 94, *Bankruptcy* . "Insolvency proceeding" is defined in *Com. Code § 1201(b)(22)* to include any assignment for the benefit of creditors or other proceedings intended to liquidate or rehabilitate the estate of the person involved. For discussion of assignments for the benefit of creditors, see Ch. 307, *Insolvency* [*see also* Official Comment 1 to UCC § 3-305 (1990) (insolvency includes bankruptcy whether or not the debtor is insolvent, which is defined in *Com. Code § 1201(b)(23)* as person who either has ceased to pay his or her debts in ordinary course of business or cannot pay his or her debts as they become due or is insolvent within meaning of federal bankruptcy law)].

[2] Fraud in the Essence

The fraud referred to in *Com. Code § 3305(a)(1)(C)* is "real" or "essential" fraud, sometimes referred to as fraud in the essence or fraud in the factum, and is effective against a holder in due course. A common illustration is that of a maker who is tricked into signing a note in the belief that it is merely a receipt or some other document. The theory of the defense is that the signature on the instrument is ineffective because the signer did not intend to sign such an instrument at all. Under this provision, the defense extends to an instrument signed with knowledge that it is a negotiable instrument, but without knowledge of its essential terms. The test of the defense is that of excusable ignorance of the contents of the writing signed. The party must not only have been in ignorance, but must also have had no reasonable opportunity to obtain knowledge. In determining what is a reasonable opportunity, all relevant factors are to be taken into account, including the signer's intelligence, education, business experience, and ability to read and understand English. Also relevant is the nature of the representations that were made, whether the signer had good reason to rely on the representations or to have confidence in the person making them, the presence or absence of any third person who might read orexplain the instrument to the signer, or any other possibility of obtaining independent information, and the apparent necessity, or lack of it, for acting without delay. Unless the misrepresentation meets this test, it is cut off by a holder in due course [Official Comment 1 to U.C.C. § 3-305 (1990); *see also Fleming v. Kagan (1961) 189 Cal. App. 2d 791, 796-797, 11 Cal. Rptr. 737* (discussing difference between fraud that makes note void and that which only makes it voidable)].

[3] Miscellaneous Division 3 Defenses

The obligor of a negotiable instrument may assert the following defenses of the obligor stated in other sections of Division 3 against any person entitled to enforce the instrument except a holder in due course [*Com. Code § 3305(a)(2), (b)*; Official Comment 2 to U.C.C. § 3-305 (1990); *see also Com. Code § 3305(c)* (discussed in *§ 385.27[8]*)]:

- Nonissuance of the instrument, conditional issuance, and issuance for a special purpose [*Com. Code § 3105(b)*];
- Issuance without consideration or for which promised performance has not been given [*see Com. Code § 3303(b)* (*see § 385.24*)];
- Failure to countersign a traveler's check [*Com. Code § 3106(c)*];
- Modification of the obligation by separate agreement [*Com. Code § 3117*];
- Payment that violates a restrictive endorsement [*Com. Code § 3206(f)*]; and
- Breach of warranty when a draft is accepted [*Com. Code § 3206(f)*].

An unissued instrument, or an unissued incomplete instrument that is completed, is binding on the maker or drawer, but nonissuance is a defense [*Com. Code § 3105(b)*; *see Com. Code §§ 3105(a)* ("issue" as first delivery by maker or drawer for purpose of giving rights on instrument), 3115 (incomplete instruments)]. For an affirmative defense based on an incomplete instrument having been complete without authority of the signer, see *§ 385.132*. An instrument that is conditionally issued or is issued for a special purpose is binding on the maker or drawer, but failure of the condition or special purpose to be fulfilled is a defense [*Com. Code § 3105(b)*].

Defenses available to accommodation parties [*Com. Code § 3305(d)*] are discussed in *§ 385.40[3]*.

[4] Common Law and Contract Defenses

Except when the party seeking payment of the instrument is a holder in due course, the obligor may assert any defense of the obligor that would be available against enforcement of a right to payment under a simple contract [*Com. Code § 3305(a)(2), (b)*; *see also Com. Code § 3305(c)* (discussed in *§ 385.27[8]*)]. The most prevalent defenses this provision are fraud, misrepresentation, or mistake in the issuance of the instrument [Official Comment 2 to U.C.C. § 3-305 (1990); *but see Com. Code § 3305(a)(1)(C)* (*discussed under § 385.27[1]*; this type of fraud or mistake may be elevated to level that allows it to be asserted against holder in due course)].

[5] Claim in Recoupment

The right to enforce a party's obligation to pay an instrument is subject to a claim in recoupment that the obligor has against the original payee of the instrument if the claim arose from the transaction that gave rise to the instrument. As against a transferee of the instrument, the obligor's claim in recoupment may be asserted only to reduce the amount owing on the instrument at the time the action is brought [*Com. Code § 3305(a)(3)*]. A claim in recoupment cannot be asserted against a holder in due course except in the rare instance when the original payee was a holder is due course [*Com. Code § 3305(a)(3), (b)*].

For example, Buyer issues a note to Seller as payment for equipment that Seller promises to deliver. If the equipment is not delivered or is delivered and is rightfully rejected, Buyer has a defense to payment of the note because the performance that was consideration for the note was not rendered [*see Com. Code § 3303(b)*; Official Comment 3 to U.C.C. § 3-305 (1990)]. This defense is included in *Com. Code § 3305(a)(2)* and can always be asserted against Seller [Official Comment 3 to U.C.C. § 3-305 (1990) (result same as that under former *Com. Code § 3408*)]. If Buyer accepted the equipment and could not, under Division 2, revoke acceptance, but incurred expenses for repair, Buyer would be obligated to pay the price of the equipment that is represented by the note, but would also have a claim in recoupment based on its claim for breach of warranty. That claim could be asserted against Seller to reduce the amount owing on the note. It would not matter whether Seller was a holder in due course, because *Com. Code § 3305(b)* allows assertion of a claim in recoupment against a holder in due course unless that claim in recoupment is "against a person other than the holder" [Official Comment 3 to U.C.C. § 3-305 (1990)]. If Seller negotiates the note to a holder who has notice of Buyer's warranty claim at the time of the negotiation, holder is not a holder in due course [*see Com. Code § 3302(a)(2)(F)*]. Buyer may assert the claim in recoupment against holder but only to reduce the amount owed on the note. If holder had no notice, holder would be a holder in due course and Buyer may not assert the claim against holder [Official Comment 3 to U.C.C. § 3-305 (1990)].

[6] Lost or Stolen Instrument

An obligor is not obliged to pay the instrument if the person seeking enforcement of the instrument does not have rights of a holder in due course and the obligor proves that the instrument is a lost or stolen instrument [*Com. Code § 3305(c)*].

[7] Property or Possessory Right in Instrument or Proceeds

A person taking an instrument, other than a person having rights of a holder in due course, is subject to a claim of a property or possessory right in the instrument or its proceeds, including a claim to rescind a negotiation and to recover the instrument or its proceeds [*Com. Code § 3306*].

A person having rights of a holder in due course takes free of the claim to the instrument [*Com. Code § 3306*].

Claims covered by *Com. Code § 3306* include not only claims to ownership but also any other claim of a property or possessory right. It includes the claim to a lien or the claim of a person in rightful possession of an instrument who was wrongfully deprived of possession. Also included is a claim based on *Com. Code § (b)* for rescission of a negotiation of the instrument by the claimant [Official Comment to U.C.C. § 3-306 (1990); *see also* rescission example in Official Comment 4 to U.C.C. § 3-305 (1990), discussed in *§ 385.27[8]*].

[8] Defenses Requiring Joinder of Third Party

Except as stated in *Com. Code § 3305(d)* (action against accomodation party), in an action to enforce the obligation of a party to pay the instrument, the obligor may not assert against the person entitled to enforce the instrument a defense, claim in recoupment, or claim to the instrument (*Com. Code § 3306*) of another person, but the other person's claim to the instrument may be asserted by the obligor if the other person is joined in the action and personally asserts the claim against the person entitled to enforce the instrument [*Com. Code § 3305(c)*].

Com. Code § 3305(c) applies principally to cases in which an obligation is paid with the instrument of a third person. For example, Buyer buys goods from Seller and negotiates to Seller a cashier's check issued by Bank in payment of the price. Shortly after delivering the check to Seller, Buyer learns that Seller defrauded Buyer in the sale transaction. Seller may enforce the check against Bank even though Seller is not a holder in due course. Bank has no defense to its obligation to pay the check and it may not assert defenses, claims in recoupment, or claims to the instrument of Buyer except to the extent permitted by the "but" clause of the first sentence of *Com. Code § 3305(c)*. Buyer may have a claim to the instrument under *Com. Code § 3306* based on a right to rescind the negotiation to Seller because of Seller's fraud [Official Comment 4 to U.C.C. § 3-305 (1990); *see also Com. Code § (b)*; Official Comment 2 to U.C.C. § 3-201 (1990)].

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§ 385.28 Holder in Due Course

[1] Elements

Subject to *Com. Code § 3106(c), (d)* (*see § 385.13[2]*), "holder in due course" means the holder of an instrument, which, when issued or negotiated to the holder, did not bear such apparent evidence of forgery or alteration or was not otherwise so irregular or incomplete as to call into question its authenticity, who took the instrument [*Com. Code § 3302(a)*]:

- For value;
- In good faith;
- Without notice that the instrument was overdue [*see Com. Code § 3304* (discussed in *§ 385.28[4]*)] or had been dishonored or that there was an uncured default with respect to payment of another instrument issued as part of the same series;
- Without notice that the instrument contains an unauthorized signature or has been altered;
- Without notice of any claim to the instrument described in *Com. Code 3306* (see *§ 385.27[7]*); and
- Without notice that any party has a defense or claim in recoupment described in *Com. Code 3305(a)* (*discussed under § 385.27[1]*).

Although an offer to sell a note for two thirds of its value is not itself sufficient to raise an inference that the instrument is tainted, it is a circumstance to be considered in determining the question of a buyer's good faith. Nevertheless, if the trial court found that the buyer acted in good faith, the fact that the buyer acquired a note with a value of $11,064 for $7,000 does not defeat his or her status as a holder in due course; that consideration was adequate [*Wilson v. Steele (1989) 211 Cal. App. 3d 1053, 1065, 259 Cal. Rptr. 851* ; *see Witty v. Clinch (1929) 207 Cal. 779, 783, 279 P. 797* (accord; inadequacy of price paid on negotiable paper as not of itself sufficient to raise inference of suspicion that

holder was buying tainted instrument)]. Similarly, the fact that the payee of a note and the beneficiary of the deed of trust securing it are different people does not constitute such an irregularity as to preclude the buyer from becoming a holder in due course, at least when it gives no notice of the actual defect to which that particular note is subject [*Wilson v. Steele (1989) 211 Cal. App. 3d 1053, 1065, 259 Cal. Rptr. 851]* .

The payee of an instrument can be a holder in due course, even though this is not the usual situation. For example, a Wells Fargo customer paid a consulting firm for services by check, on which it later stopped payment. When the firm presented the check to Wells Fargo, the bank paid it by issuing a cashier's check to the firm but later issued a stop payment on the cashier's check. When the firm tried to deposit it at another bank, the cashier's check was not honored. The firm brought suit against Wells Fargo for wrongful dishonor of the cashier's check. The court found that the firm had given value for the cashier's check and was entitled to holder-in-due-course status under *Com. Code § 3302* [*Gentner v. Wells Fargo Bank (1999) 76 Cal. App. 4th 1165, 1168-1170, 90 Cal. Rptr. 2d 904* (*Com. Code § 3418* precluded bank from recovering its mistaken payment as long as payee took instrument in good faith)].

To be effective, notice must be received at a time and in a manner that gives a reasonable opportunity to act on it [*Com. Code § 3302(f)*].

Notice of discharge of a party, other than discharge in an insolvency proceeding, is not notice of a defense that negates one's status as a holder in due course, but discharge is effective against a person who became a holder in due course with notice of the discharge [*Com. Code § 3302(b)*]. Public filing or recording of a document does not of itself constitute notice of a defense, claim in recoupment, or claim to the instrument [*Com. Code § 3302(b)*].

Except to the extent a transferor or predecessor in interest has rights as a holder in due course, a person does not acquire rights of a holder in due course of an instrument taken in any of the following ways [*Com. Code § 3302(c)*]:

- By legal process or by purchase in an execution, bankruptcy, or creditor's sale or similar proceeding;
- By purchase as part of a bulk transaction not in ordinary course of business of the transferor; or
- As the successor in interest to an estate or other organization.

If the promise of performance that is the consideration for an instrument has been partially performed [*see Com. Code § 3303(a)(1)* (discussed under--Value, *below*)], the holder may assert rights as a holder in due course of the instrument only to the fraction of the amount payable under the instrument equal to the value of the partial performance divided by the value of the promised performance [*Com. Code § 3302(d)*].

[2] Rights Limited to Amount Secured

If the person entitled to enforce an instrument has only a security interest in the instrument and the person obliged to pay the instrument has a defense, claim in recoupment, or claim to the instrument that may be asserted against the person who granted the security interest, the person entitled to enforce the instrument may assert rights as a holder in due course only to an amount payable under the instrument that, at the time of enforcement of the instrument, does not exceed the amount of the unpaid obligation secured [*Com. Code § 3302(e)*; *see Adolph Ramish, Inc. v. Woodruff (1934) 2 Cal. 2d 190, 204, 40 P.2d 509* (pledgee of promissory notes as holder in due course only to extent or amount of debt owed by pledgor)].

[3] Value

An instrument is issued or transferred for value if any of the following apply [*Com. Code § 3303(a)*; *see also Com. Code § 3303(b)* (discussed in *§ 385.90[14]*)]:

- The instrument is issued or transferred for a promise of performance, to the extent the promise has been performed [*cf. Com. Code § 3303(b)* (promise unperformed)];

- The transferee acquires a security interest or other lien in the instrument other than a lien obtained by judicial proceeding;

- The instrument is issued or transferred as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due;

- The instrument is issued or transferred in exchange for a negotiable instrument; or

- The instrument is issued or transferred in exchange for the incurring of an irrevocable obligation to a third party by the person taking the instrument.

[4] When Instrument Is Overdue

An instrument that is payable on demand becomes overdue at the earliest of the following times [*Com. Code § 3304(a)*]:

- On the day after the day demand for payment is duly made;

- If the instrument is a check, 90 days after its date; or

- If the instrument is not a check, when the instrument has been outstanding for a period of time after its date that is unreasonably long under the circumstances of the particular case in light of the nature of the instrument and usage of the trade.

If an instrument is payable at a definite time, the principal is payable in installments, and a due date has not been accelerated, the instrument becomes overdue on default under the instrument for nonpayment of an installment, and the instrument remains overdue until the default is cured [*Com. Code § 3304(b)(1)*]. If an instrument is payable at a definite time, but the principal is *not* payable in installments, and the due date has not been accelerated, the instrument becomes overdue on the day after the due date [*Com. Code § 3304(b)(2)*]. If an instrument is payable at a definite time and a due date with respect to principal has been accelerated, the instrument becomes overdue on the day after the accelerated due date [*Com. Code § 3304(b)(3)*].

Unless the due date of principal has been accelerated, an instrument does not become overdue if there is default in payment of interest but no default in payment of principal [*Com. Code § 3304(c)*].

[5] Defenses Against Holder in Due Course

The right of a holder in due course to enforce the obligation of a party to pay the instrument is subject to the defenses of the obligor stated in *Com. Code § 3305(a)(1)* (*see* items (1)-(4) listed under § 385.27[1]), but is not subject to the defenses of the obligor stated in *Com. Code § 3305(a)(2)* or claims in recoupment stated in *Com. Code § 3305(a)(3)* (*see* items (5) and (6), respectively, under § 385.27[1]) against a person other than the holder [*Com. Code § 3305(b)*].

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§ 385.29 Limitations on Holder in Due Course Doctrine

[1] Close Connection to Seller and Transaction

Com. Code § 3302 is subject to any law limiting status as a holder in due course in particular classes of transactions [*Com. Code § 3302(g)*]. One limitation created by case law denies the status of a holder in due course to a financial institution that actively participates in a transaction in which a promissory note is given and has a close connection with the seller [*Coml. Credit Corp. v. Orange Co. Mach. Works (1950) 34 Cal. 2d 766, 771, 214 P.2d 819* ; *see King v. Central Bank (1977) 18 Cal. 3d 840, 846, 135 Cal. Rptr. 771, 558 P.2d 857* ; *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 822, 94 Cal. Rptr. 796, 484 P.2d 964* ; *Morgan v. Reasor Corp. (1968) 69 Cal. 2d 881, 894-895, 73 Cal. Rptr. 398, 447 P.2d 638* (superseded on another point by enactment of *Civ. Code § 1801.4* to exclude specified construction and sales contracts from Unruh Act)]. The California Supreme Court held that, since the assignee of the contract and note (the plaintiff) had advanced money to the seller with the understanding that these instruments would be assigned by the seller to the plaintiff, had supplied the contract forms to the seller, and had actively participated in the transaction from its inception, it could not claim holder in due course status. In the assignee's action against the buyer and maker of the note, the Court held that the maker could properly raise the defense of failure of consideration (failure to deliver equipment purchased under conditional sales contract pursuant to which note had been given) [*see Com. Code § 3303(b)* (*see § 385.24*)]. The Court noted that, in a very real sense, the finance company was a moving force in the transaction from its very inception and had acted as a party to it [*Coml. Credit Corp. v. Orange Co. Mach. Works (1950) 34 Cal. 2d 766, 771, 214 P.2d 819]* .

The underlying rationale of the holding is that the finance company is better able to bear the risk of the dealer's insolvency than the buyer and is in a far better position to protect his or her interests against unscrupulous and insolvent dealers [*Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 825, 94 Cal. Rptr. 796, 484 P.2d 964]* .

[2] Consumer Protection Statutes

[a] Override of Commercial Code

Com. Code § 9403 establishes rules regarding agreements not to assert claims and defenses against assignees. In general, an agreement between an account debtor and an assignor not to assert against an assignee any claim or defense

that the account debtor may have against the assignor is enforceable by an assignee taking an assignment that satisfies all of the following conditions [*Com. Code § 9403(b)(1)-(4)*]:

- It is taken for value [*see Com. Code §§ 3303(a), 9403(a)*].
- It is taken in good faith.
- It is taken without notice of a claim of a property or possessory right to the property assigned.
- It is taken without notice of a defense or claim in recoupment of the type that may be asserted against a person entitled to enforce a negotiable instrument under *Com. Code § 3305(a).*

However, this does not apply to defenses of a type that may be asserted against a holder in due course of a negotiable instrument under *Com. Code § 3305(b)* [*Com. Code § 9403(c)*]. For discussion of *Com. Code § 3305(a)* and *(b),* see *§ 385.27[1]*.

In a consumer transaction, if a record evidences the account debtor's obligation, and other law apart from Division 9 of the Commercial Code requires that the record include a statement to the effect that the rights of an assignee are subject to claims or defenses that the account debtor could assert against the original obligee, and the record does not include such a statement, then both of the following apply [*Com. Code § 9403(d)(1), (2)*]:

- The record has the same effect as if the record included such a statement.
- The account debtor may assert against an assignee those claims and defenses that would have been available if the record included such a statement.

Except to that extent, *Com. Code § 9403* does not displace other law apart from Division 9 which gives effect to an agreement by an account debtor not to assert a claim or defense against an assignee [*Com. Code § 9403(f)*].

Com. Code § 9403 is subject to any other law apart from Division 9 which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes [*Com. Code § 9403(e)*].

Some provisions of other law apart from Division 9 are discussed below.

[b] Unruh Act and Rees-Levering Motor Vehicle Sales and Finance Act

The Unruh Act (*Civ. Code § 1801 et seq.*), relating to retail installment sales, provides that no contract or obligation may contain any provision by which the buyer agrees not to assert against a seller a claim or defense arising out of the sale or agrees not to assert against an assignee such a claim or defense other than as provided in *Civ. Code § 1804.2* [*Civ. Code § 1804.1(a)*].

An assignee of the seller's rights is subject to all equities and defenses of the buyer against the seller arising out of the sale, notwithstanding an agreement to the contrary, but the assignee's liability may not exceed the amount of the debt owing to the assignee at the time of the assignment [*Civ. Code § 1804.2(a)*; *see Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 823, 94 Cal. Rptr. 796, 484 P.2d 964* (involving language in earlier version of statute)]. The assignee has recourse against the seller to the extent of any liability incurred by the assignee pursuant to *Civ. Code § 1804.2,* regardless of whether the assignment was with or without recourse [*Civ. Code § 1804.2(b)*].

The Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*) contains substantially identical

provisions [*see Civ. Code §§ 2983.5, 2983.7(a)*].

The Unruh Act further provides that no retail installment account may require or entail the execution of any note or series of notes by the buyer that, when separately negotiated, will cut off as to third parties any right of action or defense that the buyer may have against the seller [*Civ. Code § 1810.7*; *see Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 822 n.19, 94 Cal. Rptr. 796, 484 P.2d 964* (citing predecessor statute)].

For further discussion of the Unruh Act, see Ch. 501, *Sales: Retail Installment Sales* . For further discussion of the Rees-Levering Motor Vehicle Sales and Finance Act, see Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* ; *see also* California Legal Forms, Ch. 47, *Automotive Financing and Vehicle Leasing* (Matthew Bender).

[c] Discount-Buying Services

The statutes governing contracts for discount-buying services (*Civ. Code § 1812.100 et seq.*) provide that no retail installment account may require or entail the execution of any note or series of notes by the buyer that, when separately negotiated, will cut off as to third parties any right of action or defense that the buyer may have against the seller [*Civ. Code § 1812.113*]. Additionally, no right of action or defense arising out of a contract for discount-buying services that the buyer has against the discount-buying organization may be cut off by assignment or transfer of the contract to any third party [*Civ. Code § 1812.114*].

For further discussion of discount-buying services, see Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* .

[d] Seller-Assisted Marketing Plans

The rights of an assignee of a seller-assisted marketing plan contract [*see Civ. Code § 1812.200 et seq.*] or the seller's rights are subject to all equities, rights, and defenses of the purchaser against the seller [*Civ. Code § 1812.211*].

For further discussion of seller-assisted marketing plans see *Ch. 515, Securities and Franchise Regulations, § 515.50* et seq.

[e] Dance Studio Act and Health Studio Services Act

The Dance Studio Act (*Civ. Code § 1812.50 et seq.*) covers contracts for dance studio lessons and other services, whereas the Health Studio Services Act (*Civ. Code § 1812.80 et seq.*) covers contracts for health studio services. Both Acts provide that no right of action or defense arising out of any contract that the buyer has against the seller, and that would be cut off by assignment, is cut off by assignment of the contract to any third party, whether or not he or she acquires the contract in good faith and for value, unless the assignee gives notice of the assignment to the buyer as provided in the respective Act [*Civ. Code §§ 1812.56* (dance studios), *1812.88* (health studios)].

Both Acts also prohibit governed contracts from requiring the execution of any note or series of notes by the buyer that, when separately negotiated, will cut off as to third parties any right of action or defense that the buyer may have against the seller [*Civ. Code §§ 1812.55* (dance studios), *1812.87* (health studios)].

For further discussion of dance and health studios, see Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* .

[f] Song-Beverly Credit Card Act of 1971

The Song-Beverly Credit Card Act of 1971 (*Civ. Code § 1747 et seq.*) limits the applicability of the holder in due

course doctrine with respect to multiparty credit cards, such as MasterCard and Visa. The Act allows the cardholder to raise against the card issuer any defenses that he or she has against the retailer if (1) the amount of the initial transaction exceeded $50, (2) the purchase was made in California or, if not within California, within 100 miles from the cardholder's current designated address in California, and (3) the cardholder made a good faith attempt to resolve the problem or disagreement with the retailer [*Civ. Code § 1747.90(a)(1)*]. The monetary and geographic limitations do not apply if the retailer and the card issuer are related in any of the following ways [*Civ. Code § 1747.90(a)(2)*]:

(1) They are the same entity;

(2) The issuer controls the retailer, directly or indirectly, or both are controlled by the same entity;

(3) The retailer is a franchised dealer of the issuer's products or services; or

(4) The retailer obtained the order for the transaction through a mail solicitation made by or participated in by the issuer in which thecardholder was solicited to enter into the transaction by using the credit card of that issuer.

For further discussion of credit card regulation, see Ch. 127, *Consumer Contracts and Loans* .

[g] Federal Trade Commission Regulations

In 1975, the Federal Trade Commission adopted regulations to preserve consumers' claims and defenses. These regulations are set forth in *16 C.F.R. §§ 433.1-433.3*. These regulations (as enunciated on September 1, 1989) have been specifically adopted by the California Legislature as applicable to consumer credit contracts as defined in *16 C.F.R. § 433.1(i)*. The regulations provide specialized disclosures and permit consumers to preserve their claims and defenses against enforcement, notwithstanding the sale of their loan obligation to a third party [Stats. 1989, ch. 1462, § 4].

In connection with any sale or lease of goods or services to consumers, in or affecting commerce, it is an unfair or deceptive act or practice (1) to take or receive a consumer credit contract that fails to contain, in at least 10-point boldface type, the notice that any holder of the contract is subject to all claims and defenses that the debtor could assert against the seller, or (2) to accept as full or partial payment for such sale or lease the proceeds of any purchase money loan, unless any consumer credit contract made in connection with the purchase money loan contains a like notice [*16 C.F.R. § 433.2*; *see Com. Code § 3106(d)* (*see § 385.13[2]*)].

Under prior versions of Division 3, this legend may have had the unintended effect of making the note conditional and, thus, nonnegotiable. Nevertheless, *Com. Code § 3106(d)*, as amended by Stats. 1992, ch. 914, § 6, was designed to allow for one to preclude the possibility of a holder in due course without rendering the note nonnegotiable or excluding the note from Division 3 [*see* Uniform Commercial Code Comment No. 3 to *Com. Code § 3106(d)*].

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§ 385.30 Presentment

[1] How and Where Made

Presentment is a demand made by or on behalf of a person entitled to enforce an instrument to the drawee or a party obliged to pay the instrument or, in the case of a note or accepted draft payable at a bank, to the bank, to pay the instrument [*Com. Code § 3501(a)(1)*]. Presentment is also a demand made by or on behalf of a person entitled to enforce a draft to the drawee to accept a draft [*Com. Code § 3501(a)(2)*].

The rules regarding presentment set forth in *Com. Code § 3501(b)* are subject to Division 4 (*Com. Code § 4101 et seq.*), agreement of the parties, and clearinghouse rules and the like [*Com. Code § 3501(b)*].

Presentment may be made at the place of payment of the instrument and must be made at the place of payment if the instrument is payable at a bank in the United States [*Com. Code § 3501(b)(1)*]. Presentment may be made by any commercially reasonable means, including an oral, written, or electronic communication, and is effective when the demand for payment or acceptance is received by the person to whom presentment is made [*Com. Code § 3501(b)(1)*]. Presentment is effective if made to any one of two or more makers, acceptors, drawees, or other payors [*Com. Code § 3501(b)(1)*].

On demand of the person to whom presentment is made, the person making presentment is required to do the following [*Com. Code § 3501(b)(2)*]:

(A) Exhibit the instrument;

(B) Give reasonable identification and, if presentment is made on behalf of another person, reasonable evidence of authority to do so; and

(C) Sign a receipt on the instrument for any payment made or surrender the instrument if full payment is made.

[2] Rights of Party to Whom Presentment Is Made

Without dishonoring the instrument, the party to whom presentment is made may do the following [*Com. Code § 3501(b)(3)*]:

(A) Return the instrument for lack of a necessary endorsement; or

(B) Refuse payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or rule.

The party to whom presentment is made may treat presentment as occurring on the next business day after the day of presentment if the party to whom presentment is made has established a cutoff hour not earlier than 2 p.m. for the receipt and processing of instruments presented for payment or acceptance and presentment is made after the cutoff hour [*Com. Code § 3501(b)(4)*].

The foregoing rules regarding presentment are subject to Division 4 (*Com. Code § 4101 et seq.*), agreement of the parties, and clearinghouse rules and the like [*Com. Code § 3501(b)*].

[3] When Presentment Is Required

Except when the instrument by its terms does not require presentment or the party obligated on an instrument pays it voluntarily, presentment is required for acceptance and payment or dishonor [*see Com. Code § 3502* (*see* § 3853.31)]. With respect to notes, revised Division 3 recognizes that, in practice, payees do not make formal demand for payment in the majority of cases and the maker forwards payment voluntarily on the due date [Official Comment 2 to U.C.C. § 3-502 (1990)].

Under former Division 3, presentment was necessary to charge "secondary parties." That is no longer the case, and the concept of "secondary parties" has been omitted from the current Division 3 [*see* Official Comments to U.C.C. §§ 3-414, 3-502 (1990)]. A drawer's liability is now established in accordance with *Com. Code § 3414*, see *§ 385.37*. An endorser's liability is now established in accordance with *Com. Code § 3415*, see *§ 385.38*.

[4] When Presentment Is Excused

In any case in which presentment is otherwise required for dishonor under *Com. Code § 3502* and presentment is excused under *Com. Code § 3504*, dishonor occurs without presentment if the instrument is not duly accepted or paid [*Com. Code § 3502(e)*]. Presentment for payment or acceptance of an instrument is excused if any of the following occur [*Com. Code § 3504(a)*]:

(1) The person entitled to present the instrument cannot with reasonable diligence make presentment;

(2) The maker or acceptor has repudiated an obligation to pay the instrument or is dead or in insolvency proceedings;

(3) By the terms of the instrument presentment is not necessary to enforce the obligation of endorsers or the drawer;

(4) The drawer or endorser whose obligation is being enforced has waived presentment [*see Com. Code § 3504(b)* (waiver of presentment as waiver of notice of dishonor)] or otherwise has no reason to expect or right to require that the instrument be paid or accepted; or

(5) The drawer instructed the drawee not to pay or accept the draft or the drawee was not obligated to the drawer to pay the draft.

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§ 385.31 Times for Presentment and Dishonor

[1] Notes Payable on Demand

If a note is payable on demand, the note is dishonored if presentment is duly made to the maker and the note is not paid on the day of presentment [*Com. Code § 3502(a)(1)*; *see Com. Code § 3113* (*see § 385.13[3]*)].

[2] Notes Not Payable on Demand

If a note is not payable on demand, is not payable at or through a bank, and by its terms does not require presentment, the note is dishonored if it is not paid on the day it becomes payable [*Com. Code § 3502(a)(3)*; *see Com. Code § 3113* (*see § 385.13[3]*)].

If a note is not payable on demand and is payable at or through a bank or the terms of the note require presentment, the note is dishonored if presentment is duly made and the note is not paid on the day it becomes payable or the day of presentment, whichever is later [*Com. Code § 3502(a)(2)*].

[3] Checks and Unaccepted Drafts Presented to Payor Bank

If a check is duly presented for payment to the payor bank otherwise than for immediate payment over the counter, the check is dishonored if the payor bank makes timely return of the check or sends timely notice of dishonor or nonpayment under *Com. Code § 4301* or *4302*, or becomes accountable for the amount of the check under *Com. Code § 4302* [*Com. Code § 3502(b)(1)*; *see Com. Code § 4105(3)* (payor bank as bank that is drawee of draft); *see also Com. Code § 3113* (*see § 385.13[3]*)].

[4] Checks and Unaccepted Drafts Payable on Demand

If an unaccepted draft other than a documentary draft is payable on demand and *Com. Code § 3502(b)(1)* does not apply, the draft is dishonored if presentment for payment is duly made to the drawee and the draft is not paid on the day of presentment [*Com. Code § 3502(b)(2)*; *see Com. Code § 3103(a)(2)* (drawee as person ordered in draft to make payment); *see also Com. Code § 3113*(discussed in *§ 385.13[3]*)].

[5] Checks and Unaccepted Drafts Payable on Date Stated in Draft

If an unaccepted draft other than a documentary draft is payable on a date stated in the draft, the draft is dishonored if either of the following occur [*Com. Code § 3502(b)(3)*; *see Com. Code § 3113* (*see § 385.13[3]*)]:

(A) Presentment for payment is duly made to the drawee and payment is not made on the day the draft becomes payable or the day of presentment, whichever is later; or

(B) Presentment for acceptance is duly made before the day the draft becomes payable and the draft is not accepted on the day of presentment.

[6] Checks and Unaccepted Drafts Payable on Lapse of Time

If an unaccepted draft other than a documentary draft is payable on elapse of a period of time after sight or acceptance, the draft is dishonored if presentment for acceptance is duly made and the draft is not accepted on the day of presentment [*Com. Code § 3502(b)(4)*; *see Com. Code § 3113* (*see § 385.13[3]*)].

[7] Unaccepted Documentary Drafts

Dishonor of an unaccepted documentary draft occurs according to the rules stated in *Com. Code § 3502(b)(2), (3),* and *(4)*(discussed *above*), except that the drawee may delay payment or acceptance without dishonoruntil no later than the close of the third business day of the drawee following the day on which payment or acceptance is required by *Com. Code § 3502(b)(2), (3),* or *(4)* [*Com. Code § 3502(c)*; *see Com. Code § 3113* (*see § 385.13[3]*)].

[8] Accepted Drafts

If an accepted draft is payable on demand, the draft is dishonored if presentment for payment is duly made to the acceptor and the draft is not paid on the day of presentment [*Com. Code § 3502(d)(1)*; *see Com. Code § 3103(a)(1)* (acceptor as drawee who has accepted draft); *see also Com. Code § 3409* (discussed in *§ 385.35*)].

If an accepted draft is not payable on demand, the draft is dishonored if presentment for payment is duly made to the acceptor and payment is not made on the day it becomes payable or the day of presentment, whichever is later [*Com. Code § 3502(d)(2)*; *see Com. Code § 3113* (*see § 385.13[3]*)].

[9] Consent to Late Acceptance

If a draft is dishonored because timely acceptance of the draft was not made and the person entitled to demand acceptance consents to a late acceptance, from the time of acceptance, the draft is treated as never having been dishonored [*Com. Code § 3502(f)*].

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§ 385.32 Notice of Dishonor

[1] Manner of Giving

Notice of dishonor may be given by any person [*Com. Code § 3503(b)*]. Notice of dishonor may be given by any commercially reasonable means, including an oral, written, or electronic communication. A notice is sufficient if it reasonably identifies the instrument and indicates that the instrument has been dishonored or has not been paid or accepted. Return of an instrument given to a bank for collection is sufficient notice of dishonor [*Com. Code § 3503(b)*].

Giving notice of dishonor that complies with this section or having notice of dishonor excused under *Com. Code § 3504(b)* (see *§ 385.32[3]*) is a prerequisite to enforcement of an endorser's obligation under *Com. Code § 3415(a)* (*see § 385.38[1]*) or a drawer's obligation under *Com. Code § 3414(d)* (*see § 385.37[1]*) [*Com. Code § 3503(a)*].

[2] Time for Giving

Subject to *Com. Code 3504(c)*, with respect to an instrument taken for collection by a collecting bank, notice of dishonor must be given (1) by the bank before midnight of the next banking day following the banking day on which the bank receives notice of dishonor of the instrument, or (2) by any other person within 30 days following the day on which the person receives notice of dishonor [*Com. Code § 3503(c)*]. With respect to any other instrument, notice of dishonor must be given within 30 days following the day on which dishonor occurs [*Com. Code § 3503(c)*].

Delay in giving notice of dishonor is excused if the delay was caused by circumstances beyond the control of the person giving the notice and the person giving the notice exercised reasonable diligence after the cause of the delay ceased to operate [*Com. Code § 3504(c)*].

[3] When Notice of Dishonor Is Excused

Notice of dishonor is excused if (1) by the terms of the instrument, notice of dishonor is not necessary to enforce the obligation of a party to pay the instrument, or (2) the party whose obligation is being enforced waived notice of dishonor [*Com. Code § 3504(b)*].

A waiver of presentment is also a waiver of notice of dishonor [*Com. Code § 3504(b)*].

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§ 385.33 Protest of Dishonor

Under former Division 3, protest of dishonor was required to enforce an endorser's or drawer's liability [*see* former *Com. Code § 3501(3), (4)*]. Except for the possibility that protest may be required for liability on international drafts governed by foreign law, protest is no longer mandatory but must be requested by the holder. Protest is a service provided by the banking system to establish that dishonor has occurred [Official Comment to U.C.C. § 3-505 (1990)].

A protest is a certificate of dishonor made by a United States consul or vice consul or by a notary public or other person authorized to administer oaths by the law of the place where dishonor occurs. It may be made on information satisfactory to that person. The protest must identify the instrument and certify either that presentment has been made or, if not made, the reason why it was not made, and that the instrument has been dishonored by nonacceptance or nonpayment. The protest may also certify that notice of dishonor has been given to some or all parties [*Com. Code § 3505(b)*].

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§ 385.34 Evidence and Presumptions of Dishonor and Notice of Dishonor

The following are admissible as evidence and create a presumption of dishonor and of any notice of dishonor stated [*Com. Code § 3505(a)*]:

(1) A document regular in form as provided in *Com. Code § 3505(b)* that purports to be a protest [*see* discussion in *§ 385.33*];

(2) A purported stamp or writing of the drawee, payor bank, or presenting bank on or accompanying the instrument stating that acceptance or payment has been refused unless reasons for the refusal are stated and the reasons are not consistent with dishonor; and

(3) A book or record of the drawee, payor bank, or collecting bank, kept in the usual course of business, which shows dishonor, even if there is no evidence of who made the entry.

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§ 385.35 Acceptance by Drawee

[1] As Presented

A check or other draft does not itself operate as an assignment of the funds in the hands of the drawee available for its payment. The drawee is not liable on the instrument until the drawee accepts it [*Com. Code § 3408*]. "Acceptance" means the drawee's signed agreement to pay a draft as presented. Acceptance must be written on the draft and may consist of the drawee's signature alone. Acceptance may be made at any time and becomes effective when notification pursuant to instructions is given or the accepted draft is delivered for the purpose of giving rights on the acceptance to any person [*Com. Code § 3409(a)*; *see also Com. Code §§ 3414(c)* (discussed in *§ 385.37[2]*), *3415(c)* (discussed in *§ 385.38[3]*)]. A draft may be accepted although it has not been signed by the drawer, is otherwise incomplete, is overdue, or has been dishonored [*Com. Code § 3409(b)*].

If a draft is payable at a fixed period after sight and the acceptor fails to date the acceptance, the holder may complete the acceptance by supplying a date in good faith [*Com. Code § 3409(c)*].

[2] With Varying Terms

If the terms of a drawee's acceptance vary from the terms of the draft as presented, the holder may refuse the acceptance and treat the draft as dishonored. In that case, the drawee may cancel the acceptance [*Com. Code § 3410(a)*].

The terms of a draft are not varied by an acceptance to pay at a particular bank or place in the United States, unless the acceptance states that the draft is to be paid only at that bank or place [*Com. Code § 3410(b)*].

If the holder assents to an acceptance varying the terms of a draft, the obligation of each drawer and endorser that does not expressly assent to the acceptance is discharged [*Com. Code § 3410(c)*].

[3] Obligations of Acceptor

Acceptance of a draft obligates the acceptor to pay the draft as follows [*Com. Code § 3413(a)*]:

(1) According to its terms at the time it was accepted, even though the acceptance states that the draft is payable "as originally drawn" or equivalent terms;

(2) If the acceptance varies the terms of the draft, according to the terms of the draft as varied; or

(3) If the acceptance is of a draft that is an incomplete instrument, according to its terms when completed, to the extent stated in *Com. Code §§ 3115* (incomplete instrument) and *3407* (alteration).

The acceptor owes its obligation to a person entitled to enforce the draft or to the drawer or an endorser who paid the draft under *Com. Code § 3414* or *3415* [*Com. Code § 3413(a)*].

If the certification of a check or other acceptance of a draft states the amount certified or accepted, the obligation of the acceptor is that amount [*Com. Code § 3413(b)*]. If (1) the certification or acceptance does not state an amount, (2) the amount of the instrument is subsequently raised, and (3) the instrument is then negotiated to a holder in due course, the obligation of the acceptor is the amount of the instrument at the time it was taken by the holder in due course [*Com. Code § 3413(b)*].

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§ 385.36 Issuer's Liability

The issuer of a note or cashier's check or other draft drawn on the drawer is obliged to pay the instrument (a) according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or (b) if the issuer signed an incomplete instrument, according to its terms when completed, to the extent stated in *Com. Code §§ 3115* (incomplete instruments) and *3407* (alteration) [*Com. Code § 3412*; *see also* discussion in *§ 385.11[2]*]. The issuer's obligation is owed to a person entitled to enforce the instrument or to an endorser who paid the instrument under *Com. Code § 3415* (see *§ 385.38*) [*Com. Code § 3412*].

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§ 385.37 Drawer's Liability on Draft

[1] After Dishonor

Except in the case of cashier's checks or other drafts drawn on the drawer, if an unaccepted draft is dishonored, the drawer is obliged to pay the draft (1) according to its terms at the time it was issued or, if not issued, at the time it first came into possession of a holder, or (2) if the drawer signed an incomplete instrument, according to its terms when completed, to the extent stated in *Com. Code §§ 3115* (incomplete instrument) and 3407 (alteration) [*Com. Code § 3414(a), (b)*]. The drawer owes this obligation to a person entitled to enforce the draft or to an endorser who paid the draft under *Com. Code § 3415* [*Com. Code § 3414(a), (b)*].

If a draft is accepted, the acceptor is not a bank, and the acceptor dishonors the draft, the drawer's obligation to pay the draft is the same as the obligation of an endorser under *Com. Code § 3415(a)* and *(c)* (see *§ 385.38*) [*Com. Code § 3414(d)*]. A drawer's obligation under *Com. Code § 3414(d)* may not be enforced unless (1) the drawer is given notice of dishonor of the instrument complying with *Com. Code § 3503* (discussed in *§ 385.32[1]*), or (2) notice of dishonor is excused under *Com. Code § 3504(b)* (see *§ 385.32[3]*) [*Com. Code § 3503(a)*].

[2] Discharged by Bank's Acceptance

If a draft is accepted by a bank, the drawer is discharged, regardless of when or by whom acceptance was obtained [*Com. Code § 3414(c)*; *see also Com. Code § 3410(c)* (discussed in *§ 385.35[2]*)].

[3] Drawer's Disclaimer

A drawer has no liability under *Com. Code § 3414(b)* to pay a draft, other than a check, that contains a disclaimer stating that the draft is drawn "without recourse" or otherwise disclaiming liability of the drawer to pay the draft [*Com. Code § 3414(e)*]. A disclaimer of the liability stated in *Com. Code § 3414(b)* is not effective if the draft is a check [*Com. Code § 3414(e)*].

[4] Discharge by Assignment

The drawer of a check may discharge his or her obligation to pay the check, to the extent deprived of funds, by assigning to the person entitled to enforce the check the rights of the drawer against the drawee with respect to the funds if all of the following occur [*Com. Code § 3414(f); but see Com. Code § 3414(a)* (provision inapplicable to cashier's checks or other drafts drawn on drawer)]:

- The check is not presented for payment or given to a depositary bank for collection within 30 days after its date;

- The drawee suspends payments after expiration of the 30-day period without paying the check; and

- Because of the suspension of payments, the drawer is deprived of funds maintained with the drawee to cover payment of the check.

In most cases, the payee will not suffer any loss because of the existence of federal deposit insurance that covers accounts up to $100,000. Thus, in most cases, *Com. Code § 3414(f)* is expected to be of little importance. However, *Com. Code § 3414(f)* contemplates damage caused by delays in obtaining full payment [Official Comment 6 to U.C.C. § 3-414 (1990)].

[5] Debit Card Holder's Liability

A debit card holder has no liability for erroneous or fraudulent transfers initiated by the card issuer or its agent or employee [*Civ. Code § 1748.31(c)*]. With regard to unauthorized use of a debit card, the card holder is liable only if all of the following conditions are satisfied [*Civ. Code § 1748.31(a)*]:

- The card is an accepted debit card.

- Subject to certain conditions regarding notification (see below), the liability is not in excess of $50.

- The issuer has given adequate notice to the card holder of the potential liability.

- The issuer has provided the card holder with a description of the means by which the issuer may be notified of loss or theft of the card.

- The unauthorized use occurs before the issuer has been notified by the card holder that an unauthorized use of the debit card has occurred or may occur as the result of a loss, theft, or otherwise.

- The issuer has provided a means to identify the card holder to whom the debit card was issued.

If the card holder fails to report an unauthorized use that appears on a periodic statement within 60 days of the issuer's transmittal of the statement, and if the issuer establishes that the unauthorized use would not have occurred had the card holder notified the issuer within the 60-day period, the card holder is liable for the amount of each unauthorized transfer that occurs after the close of the 60 days and before notice to the issuer. If the card holder's delay in notifying the issuer is due to extenuating circumstances beyond the card holder's reasonable control, the time for notifying the issuer is extended to a reasonable period. Examples of such extenuating circumstances include, but are not limited to, extended travel, death or serious illness of the card holder or a member of the card holder's family, hospitalization, permanent mental impairment, or a serious physical impairment, unless the circumstance did not reasonably contribute to the card holder's delay in notifying the issuer within the 60-day period [*Civ. Code § 1748.31(b)*].

To reduce the risk that a debit card will be used without authorization, California law provides, generally, that no person, firm, partnership, association, corporation, or limited liability company that accepts debit cards for the

transaction of business may print more than the last five digits of the debit card account number or the expiration date on any electronically printed receipt [*Civ. Code § 1747.09(a), (b)*], whether the receipt is given to the cardholder [*Civ. Code § 1747.09(a)(1)*] or, starting January 1, 2009, the vendor retains the receipt and the cardholder either signed it or used a personal identification number to complete the transaction [*Civ. Code § 1747.09(a)(2), (3), (d)*; *see Civ. Code § 1747.09(c)* (section does not apply to other documents used for internal administrative purposes)].

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§ 385.38 Endorser's Liability

[1] After Dishonor

If an instrument is dishonored, an endorser is obliged to pay the amount due on the instrument (1) according to the terms of the instrument at the time it was endorsed or, (2) if the endorser endorsed an incomplete instrument, according to its terms when completed, to the extent stated in *Com. Code §§ 3115* (incomplete instrument) and 3407 (alteration) [*Com. Code § 3415(a)*]. The endorser owes this obligation to a person entitled to enforce the instrument or to a subsequent endorser who paid the instrument under this section [*Com. Code § 3415(a)*].

An endorser's obligation under *Com. Code § 3415(a)* may not be enforced unless (1) the endorser is given notice of dishonor of the instrument complying with *Com. Code § 3503* (discussed in *§ 385.32[1]*), or (2) notice of dishonor is excused under *Com. Code § 3504(b)* (see *§ 385.32[3]*) [*Com. Code § 3503(a)*].

An endorser's liability under *Com. Code § 3415(a)* is subject to *Com. Code § 3415(b)-(d)* (discussed in *§ 385.38[2], [3]*) and to *Com. Code § 3419(d)* (relating to accomodation parties, discussed in *§ 385.40[2]*),

[2] Endorser's Disclaimer

If an endorsement states that it is made "without recourse" or otherwise disclaims liability of the endorser, the endorser is not liable under *Com. Code § 3415(a)* to pay the instrument [*Com. Code § 3415(b)*].

[3] Discharge of Endorser's Liability

If notice of dishonor of an instrument is required by *Com. Code § 3503* (discussed in *§ 385.32*) and notice of dishonor complying with that section is not given to an endorser, the the endorser's liability under *Com. Code § 3415(a)* is discharged [*Com. Code § 3415(c)*; *see also Com. Code § 3410(c)* (discussed in *§ 385.35[2]*)].

If a draft is accepted by a bank after an endorsement is made, the endorser's liability under *Com. Code § 3415(a)* is discharged [*Com. Code § 3415(d)*].

If an endorser of a check is liable under *Com. Code § 3415(a)* and the check is not presented for payment, or given to a depositary bank for collection, within 30 days after the day the endorsement was made, the liability of the endorser under *Com. Code § 3415(a)* is discharged [*Com. Code § 3415(e)*].

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§ 385.39 Warranties on Transfer and Presentment

The Division 3 warranties made by parties on transfer and presentment [*Com. Code §§ 3416* (transfer), *3417*(presentment)] are substantially similar to the Division 4 warranties made on transfer and presentment [*Com. Code §§ 4207, 4208*], except to the extent necessary to reflect the fact that the Division 3 transfer warranties apply to "instruments," which is to say "negotiable instruments" [*see Com. Code § 3104(b)*], whereas the Division 4 transfer warranties apply to "items" [*see Com. Code § 4104(a)(9)*]. A nonnegotiable note may be an "item." A check is usually both a negotiable instrument within Division 3 [*Com. Code § 3104(b)-(f)*] and an "item" within Division 4 [*Com. Code § 4104(a)(9)*].

Similarly, the presentment warranties of both Division 3 and Division 4 apply to "unaccepted drafts." "Checks" are "unaccepted drafts" under both definitions [*Com. Code §§ 3104(b)-(f), 4104(a)(7), (9)*; *see Com. Code § 4104*; Official Comment to U.C.C. § 4-208 (1990) ("draft" as used in Division 4 includes items that are orders to pay, which may include instruments that are not negotiable)]. The presentment warranties of *Com. Code § 3417(d)* apply to presentment of notes and accepted drafts to any party obligated on the instrument, including an endorser and to presentment of dishonored drafts if presentment is made to the drawer or endorser [Official Comment 4 to U.C.C. § 3-417 (1990)].

For discussion of transfer and presentment warranties under both Division 3 and 4, see Ch. 95, *Banks, Deposits, and Checks* .

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§ 385.40 Accommodation Parties

[1] Signature in Any Capacity

If an instrument is issued for value given for the benefit of a party to the instrument (the "accommodated party") and another party to the instrument (the "accommodation party") signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party "for accommodation" [*Com. Code § 3419(a)*].

An accommodation party may sign the instrument as maker, drawer, acceptor, or endorser and, subject to *Com. Code § 3419(d)*, is obliged to pay the instrument in the capacity in which the accommodation party signs. The obligation of an accommodation party may be enforced notwithstanding any statute of frauds and whether or not the accommodation party receives consideration for the accommodation [*Com. Code § 3419(b)*].

A person signing an instrument is presumed to be an accommodation party and there is notice that the instrument is signed for accommodation if the signature is an anomalous endorsement [*see Com. Code § 3205(d)* (discussed in § 385.189[3])], or is accompanied by words indicating that the signer is acting as surety or guarantor with respect to the obligation of another party to the instrument [*Com. Code § 3419(c)*]. The obligation of an accommodation party to pay the instrument is not affected by the fact that the person enforcing the obligation had notice when he or she took the instrument that the accommodation party signed the instrument for accommodation [*Com. Code § 3419(c)*]. The latter rule, however, is subject to the exceptions provided in *Com. Code § 3605* (*see § 385.45[6], [7]*) [*Com. Code § 3419(c)*].

[2] Guarantee of Collection Only

If the signature of a party to an instrument is accompanied by words indicating unambiguously that the party is guaranteeing collection rather than payment of the obligation of another party to the instrument, the signer is obliged to pay the amount due on the instrument to a personentitled to enforce the instrument only if any of the following occur [*Com. Code § 3419(d)*]:

- Execution of judgment against the other party has been returned unsatisfied;

- The other party is insolvent or in an insolvency proceeding;
- The other party cannot be served with process; or
- It is otherwise apparent that payment cannot be obtained from the other party.

[3] Defenses of Accommodation Party

In an action to enforce the obligation of an accommodation party to pay an instrument, the accommodation party may assert against the person entitled to enforce the instrument any defense or claim in recoupment under *Com. Code § 3305(a)* that the accommodated party could assert against the person entitled to enforce the instrument, except the defenses of discharge in insolvency proceedings, infancy, and lack of legal capacity [*Com. Code § 3305(d)*]. For discussion of any defense or claim in recoupment under *Com. Code § 3305(a)*, see *§§ 385.27[1], [3] -[5]*.

[4] Right of Reimbursement

An accommodation party who pays the instrument is entitled to reimbursement from the accommodated party and is entitled to enforce the instrument against the accommodated party [*Com. Code § 3419(e)*].

An accommodated party who pays the instrument has no right of recourse against, and is not entitled to contribution from, an accommodation party [*Com. Code § 3419(e)*; *Quality Wash Group V, Ltd. v. Hallak (1996) 50 Cal. App. 4th 1687, 1701-1702, 58 Cal. Rptr. 2d 592]* . An accommodation maker who pays the payee or holder of a negotiable instrument generally has the same rights as a guarantor under *Civ. Code § 2848* in that the accommodation maker then is entitled to enforce the note against the primary maker ("party accommodated") in accordance with its terms. Thus, the maker might have the right to recover attorney's fees and interest at the note rate rather than the legal rate [*Flojo Internat., Inc. v. Lassleben (1992) 4 Cal. App. 4th 713, 721-722, 6 Cal. Rptr. 2d 99* (payee assigned note to accommodation maker after payment)]. For discussion of a guarantor's rights under the Civil Code and forms for their enforcement, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

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§ 385.41 Third Party's Liability for Fiduciary's Breach

[1] "Fiduciary" and "Represented Person" Defined

As used in this discussion and *Com. Code § 3307*, "fiduciary" means an agent, trustee, partner, corporate officer or director, limited liability company manager, or other representative owing a fiduciary duty with respect to an instrument [*Com. Code § 3307(a)(1)*]. "Represented person" means the principal, beneficiary, partnership, corporation, limited liability company, or other person to whom the fiduciary duty is owed [*Com. Code § 3307(a)(2)*]. For a complaint under *Com. Code § 3307*, for use by a represented person against a bank that took a check with notice of breach of duty by the fiduciary, see Form 75 in Ch. 95, *Banks, Deposits, and Checks* .

[2] Instrument Payable to Fiduciary Personally

If an instrument is issued by the represented person or the fiduciary as such and made payable to the fiduciary personally, one who (1) takes the instrument from the fiduciary for payment or collection or for value and (2) has knowledge of the fiduciary status of the fiduciary does not have notice of the breach of fiduciary duty unless the taker knows of the breach of fiduciary duty [*Com. Code § 3307(b)(3)*; *cf. Fin. Code §§ 953* (authorization for bank withdrawals), 6661 (authorization for savings and loan withdrawals when notice of adverse claims); *Prob. Code § 18100* (when person dealing in good faith with fiduciary is not bound to inquire regarding fiduciary's power to conduct transaction)].

[3] Instrument Payable to Fiduciary or Represented Person

If an instrument is payable to the represented person or the fiduciary as such, one who (i) takes the instrument from the fiduciary for payment or collection or for value and (ii) has knowledge of the fiduciary status of the fiduciary has notice of the breach of fiduciary duty if the instrument is taken or deposited as follows [*Com. Code § 3307(b)(2);§ 385.41[2]*]:

- Taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary;

- Taken in a transaction known by the taker to be for the personal benefit of the fiduciary; or

- Deposited to an account other than an account of the fiduciary, as such, or an account of the represented person.

[4] Instrument Issued to Taker by Fiduciary or Represented Person

If an instrument is issued by the represented person or the fiduciary as such to the taker as payee, one who (1) takes the instrument from the fiduciary for payment or collection or for value, and (2) has knowledge of the fiduciary status of the fiduciary has notice of the breach of fiduciary duty if the instrument is taken or deposited as follows [*Com. Code § 3307(b)(4)*; *see also § 385.41[2]*]:

- Taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary;

- Taken in a transaction known by the taker to be for the personal benefit of the fiduciary; or

- Deposited to an account other than an account of the fiduciary as such, or an account of the represented person.

[5] Notice of Represented Person's Claim

In the foregoing situations, under *Com. Code § 3307(b)(2)-(4)*, if the represented person makes a claim to the instrument or its proceeds on the basis that the transaction of the fiduciary is a breach of fiduciary duty, notice of breach of fiduciary duty by the fiduciary is notice of the claim of the represented person [*Com. Code § 3307(b)(1)*].

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§ 385.42 Incomplete Instruments

An incomplete instrument is a signed writing, whether or not issued by the signer, is the contents show at the time of signing that it is incomplete but that the signer intended it to be completed by the addition of words or numbers [*Com. Code § 3115(a)*]. Subject to *Com. Code § 3115(c)* (discussed *below*), if an incomplete instrument is an instrument under *Com. Code § 3104* (*see §§ 385.11[1]* and *385.13[1]*), it may be enforced according to its terms if it is not completed, or according to its terms as augmented by completion. If an incomplete instrument is not an instrument under *Com. Code § 3104* but, after completion, the requirements of *Com. Code § 3104* are met, the instrument may be enforced according to its terms as augmented by completion [*Com. Code § 3115(b)*].

If words or numbers are added to an incomplete instrument without authority of the signer, there is an alteration of the incomplete instrument under *Com. Code § 3407* [*Com. Code § 3115(c)*]. The burden of establishing that words or numbers were added to an incomplete instrument without authority of the signer is on the person asserting the lack of authority [*Com. Code § 3115(d)*]. For a form for an affirmative defense for use in an action on an incomplete instrument, see *§ 385.132*.

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§ 385.43 Alteration of Instrument; Forged Signature on Instrument

[1] Meaning and Effect of Alteration

"Alteration" means (1) an unauthorized change in an instrument that purports to modify in any respect the obligation of a party, or (2) an unauthorized addition of words or numbers or other change to an incomplete instrument relating to the obligation of a party [*Com. Code § 3407(a)*]. Except as provided in *Com. Code § 3407(c)*, an alteration that is fraudulently made discharges a party whose obligation is affected by the alteration unless that party assents or is precluded from asserting the alteration. No other alteration discharges a party, and the instrument may be enforced according to its original terms [*Com. Code § 3407(b)*].

A payor bank or drawee paying a fraudulently altered instrument or a person taking it for value, in good faith and without notice of the alteration,may enforce rights with respect to the instrument (1) according to its original terms, or (2) in the case of an incomplete instrument altered by unauthorized completion, according to its terms as completed [*Com. Code § 3407(c)*]. For a form of affirmative defense based on alteration, see *§ 385.114*.

[2] Lack of Ordinary Care Can Preclude Assertion of Alteration or Forged Signature

A person whose failure to exercise ordinary care contributes to an alteration of an instrument or to the making of a forged signature on an instrument is precluded from asserting the alteration or the forgery against a person who, in good faith, pays the instrument or takes it for value or for collection [*Com. Code § 3406(a)*]. Under *Com. Code § 3406(a)*, the burden of proving failure to exercise ordinary care is on the person asserting the preclusion [*Com. Code § 3406(c)*].

Under *Com. Code § 3406(a)*, if the person asserting the preclusion fails to exercise ordinary care in paying or taking the instrument and that failure contributes to loss, the loss is allocated between the person precluded and the person asserting the preclusion according to the extent to which the failure of each to exercise ordinary care contributed to the loss [*Com. Code § 3406(b)*]. Under *Com. Code § 3406(b)*, the burden of proving failure to exercise ordinary care is on the person precluded [*Com. Code § 3406(c)*].

Whether *Com. Code § 3406(a)* creates any cause of action is debatable [*compare* Official Comment 1 to U.C.C. § 3-406 (1990) ("Section 3-406 adopts the doctrine of Young v. Grote, 4 Bing. 253 (1827), which held that a drawer who so

negligently draws an instrument as to facilitate its material alteration is liable to a drawee who pays the altered instrument in good faith. Under Section 3-406 the doctrine is expanded to apply not only to drafts but to all instruments.") *with* *Burns v. Neiman Marcus Group, Inc. (2009) 173 Cal. App. 4th 479, 494-495, 93 Cal. Rptr. 3d 130* (favorably citing Virginia Supreme Court's opinion stating that drawer of check can have no statutory right of action under Virginia version of Section 3-406 because that statute contains no words showing legislative intent to create any cause of action)]. It is clear, however, that Com. Code § 3-406(b) does not create any cause of action but operates only in conjunction with Com. Code § 3-406(a) [*Burns v. Neiman Marcus Group, Inc. (2009) 173 Cal. App. 4th 479, 493, 93 Cal. Rptr. 3d 130*]. That is, subdivision (a) empowers a person, on taking a fraudulently altered or forged instrument in good faith and for value or collection, or on paying such an instrument in good faith, to treat the instrument as it is written, if a lack of ordinary care by the obligor on the instrument substantially contributed to the alteration or the forgery [*see* Official Comment 1 to U.C.C. § 3-406 (1990)]; and subdivision (b) provides a comparative-negligence rule to be applied in the event that subdivision (a) is invoked by a person whose own lack of ordinary care also substantially contributed to the alteration or forgery [*see* Official Comment 4 to U.C.C. § 3-406 (1990)]. Therefore, in the absence of a claim of preclusion under Com. Code § 3-406(a), subsection (b) of that section does not become applicable [*Burns v. Neiman Marcus Group, Inc. (2009) 173 Cal. App. 4th 479, 494, 93 Cal. Rptr. 3d 130*].

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§ 385.44 Conversion of Instruments

[1] Availability of Action

The law applicable to conversion of personal property applies to instruments [*Com. Code § 3420(a)*]. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument, or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment [*Com. Code § 3420(a)*]. This covers cases in which a depositary or payor bank takes an instrument bearing a forged endorsement. It also covers cases in which an instrument is payable to two persons, the two persons are not alternative payees, and it is negotiated by only one of them [*see* Official Comment to U.C.C. § 3-420 (1990)].

[2] Missing Endorsements

If a bank makes payment with respect to a check, to a person not entitled to receive payment, then the bank is liable for conversion under *Com. Code § 3420(a)*, without regard to whether the check bore a forged or unauthorized endorsement or there was a missing endorsement [*Gil v. Bank of America (2006) 138 Cal. App. 4th 1371, 1377, 42 Cal. Rptr. 3d 310]* . For further discussion, see *Ch. 95, Banks, Deposits, and Checks, § 95.328*.

[3] Not Available to Drawer or Payee Who Never Took Delivery

An action for conversion of an instrument may not be brought by the following persons [*Com. Code § 3420(a)*]:

- The issuer or acceptor of the instrument.

- A payee or endorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a copayee.

Under former *Com. Code § 3419*, cases were divided on whether the drawer of a check paid on a forged endorsement had a cause of action against the depositary bank that took the check [*see, e.g.,* *Cooper v. Union Bank (1973) 9 Cal. 3d 371, 378, 107 Cal. Rptr. 1, 507 P.2d 609* ; *Tedesco v. Crocker National Bank (1983) 148 Cal. App. 3d 1211, 1216, 196 Cal. Rptr. 534* (drawer has cause of action); *Allied Concord etc. Corp. v. Bank of America (1969) 275 Cal. App.*

2d 1, 7-8, 80 Cal. Rptr. 622 (drawer has no conversion claim against depositary or collecting bank)]. *Com. Code § 3420(a)(1)* resolved this prior conflict by stating that the drawer has no cause of action for conversion. The check represents an obligation of the drawer rather than property of the drawer. Thus, there is no reason why a drawer should have an action in conversion. The drawer's appropriate remedy is against the drawee bank for recredit of his or her account [Official Comment 1 to U.C.C. § 3-420 (1990)]. The drawee then has a cause of action against the depositary bank for breach of warranty under *Com. Code § 3417(a)(1)* or *4208(a)(1)*. The loss will fall on the entity that gave value to the forger, usually the depositary bank [Official Comment 1 to U.C.C. § 3-420 (1990)].

*Com. Code § 3420(a)(2)*resolved a similar conflict regarding whether a payee who never took delivery of the check has a cause of action for conversion by limiting causes of action for conversion to payees who took delivery of the check [Official Comment 1 to U.C.C. § 3-420 (1990)].

[4] Liability for Conversion

In an action for conversion of an instrument, the measure of liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument [*Com. Code § 3420(b)*].

A representative, other than a depositary bank, who has in good faith dealt with an instrument or its proceeds on behalf of one who was not the person entitled to enforce the instrument is not liable in conversion to the person who is entitled to enforce the instrument beyond the amount of any proceeds that it has not paid out [*Com. Code § 3420(c)*].

A depositary bank is ultimately liable in the case of a forged endorsement because of its warranty to the payor bank under *Com. Code § 4208(a)(1)* and it is usually the most convenient defendant, especially in cases involving multiple checks drawn on different banks. There is no reason to make the owner of a check bring multiple actions against various payor banks and to require those banks to assert warranty rights against the depositary bank. Thus, the defense provided by *Com. Code § 3420(c)* is limited to collecting banks other than depositary banks. If the owner of a checks sues both the payor bank and the depositary bank, he or she is entitled to only one recovery [Official Comment 3 to U.C.C. § 3-420 (1990)].

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§ 385.45 Discharge

[1] In General

A party's obligation of to pay an instrument is discharged as stated in Division 3 or by an act or agreement with the party that would discharge an obligation to pay money under a simple contract [*Com. Code § 3601(a)*]. However, discharge of the obligation of a party is not effective against a person acquiring rights of a holder in due course of the instrument without notice of the discharge [*Com. Code § 3601(b)*; *see § 385.110*]. Counsel may also wish to consider the related defense or cross claim of setoff, which is discussed in Ch. 26, *Answers* [*see Code Civ. Proc. § 431.70*].

[2] Extent to Which Taking Check or Note Discharges Underlying Obligation

Unless the parties agree otherwise, if a certified check, cashier's check, or teller's check is taken in payment of an obligation, the obligation is discharged to the extent of the amount of the check [*Com. Code § 3310(a)* (but discharge of obligation does not affect any liability obligor may have as endorser)].

Unless the parties agree otherwise, and except as provided in *Com. Code § 3310(a)*, if a note or an uncertified check is taken in payment of an obligation, the obligation is suspended to the extent of the amount of the check or note [*Com. Code § 3310(b)*; *see Jessup Farms v. Baldwin (1983) 33 Cal. 3d 639, 656, 190 Cal. Rptr. 355, 660 P.2d 813* (predecessor section, former *Com. Code § 3802*, inapplicable because parties did not agree to suspend original obligation but only intended, by execution of second note, to renew balance of existing obligation)]. In the case of an uncertified check, suspension continues until dishonor of the check or until it is paid orcertified. Payment or certification of the check results in discharge of the obligation to the extent of the amount of the check [*Com. Code § 3310(b)(1)*; *Cornwell v. Bank of America (1990) 224 Cal. App. 3d 995, 1000-1001, 274 Cal. Rptr. 322* (underlying obligation not discharged until check paid); *see Navrides v. Zurich Ins. Co. (1971) 5 Cal. 3d 698, 706, 97 Cal. Rptr. 309, 488 P.2d 637* (dictum, accord; check is never payment of debt for which it is given until check itself is paid or otherwise discharged, unless expressly agreed to be taken in payment)]. In the case of a note, suspension continues until dishonor of the note or until it is paid. Payment of the note results in discharge of the obligation to the extent of the payment [*Com. Code § 3310(b)(2)*].

Under *Com. Code § 3310(b)(1)*, once a check is honored, the underlying obligation is considered fully discharged as of

the time the check was received by the creditor. In a case in which a judgment debtor sent a check for the judgment amount to the creditor's counsel and the counsel's bank put a five-day hold on the checks, the court held that interest on the judgment did not continue to accrue until the checks were cleared for payment by the bank [*Long v. Cuttle Construction Co. (1998) 60 Cal. App. 4th 834, 837-838, 70 Cal. Rptr. 2d 698* (no interest accrued during suspension of obligation, which extended until point of discharge)].

If the check or note is dishonored and the obligee of the obligation for which the instrument was taken is the person entitled to enforce that instrument, the obligee may enforce either the instrument or the obligation [*Com. Code § 3310(b)(3)*; *see also Com. Code § 3310(b)(4), (c)*; *accord*, *Cignetti v. American Trust Co. (1956) 139 Cal. App. 2d 744, 746, 294 P.2d 490* (disapproved on other grounds in *Navrides v. Zurich Ins. Co. (1971) 5 Cal. 3d 698, 712, 97 Cal. Rptr. 309, 488 P.2d 637*)].

Unless the parties agree otherwise, and except as provided in *Com. Code § 3310(a)*, if the obligee is the person entitled to enforce the instrument but no longer has possession of it because it was lost, stolen, or destroyed, the obligation may not be enforced to the extent of the amount payable on the instrument, and, to that extent, the obligee's rights against the obligor are limited to enforcement of the instrument [*Com. Code § 3310(b)(4)*].

[3] Payment

Subject to *Com. Code § 3602(b)*, an instrument is paid to the extent payment is made (1) by or on behalf of a party obliged to pay the instrument, and (2) to a person entitled to enforce the instrument [*Com. Code § 3602(a)*]. To the extent of the payment, the obligation of the party obliged to pay the instrument is discharged even though payment is made with knowledge of a claim to the instrument under *Com. Code § 3306* by another person [*Com. Code § 3602(a)*; *see* discussion in *§ 385.27[7]*].

The obligation of a party to pay the instrument is not discharged under *Com. Code § 3602(a)* if either of the following applies [*Com. Code § 3602(b)*]:

- A claim to the instrument under *Com. Code § 3306* (see *§ 385.27[7]*) is enforceable against the party receiving payment and (A) payment is made with knowledge by the payor that payment is prohibited by injunction or similar process of a court of competent jurisdiction, or (B) in the case of an instrument other than a cashier's check, teller's check, or certified check, the party making payment accepted, from the person having a claim to the instrument, indemnity against loss resulting from refusal to pay the person entitled to enforce the instrument; or

- The person making payment knows that the instrument is a stolen instrument and pays a person it knows is in wrongful possession of the instrument.

[4] Tender of Payment

Tender of payment of an obligation to pay an instrument, made to a person entitled to enforce the instrument, is governed by principles of law applicable to tender of payment under a simple contract [*Com. Code § 3603(a)*].

If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument and the tender is refused, the obligation of an endorser or accommodation party having a right of recourse with respect to the obligation to which the tender relates is discharged, to the extent of the amount of the tender [*Com. Code § 3603(b)*].

If tender of payment of an amount due on an instrument is made to a person entitled to enforce the instrument, the obligation of the obligor to pay interest after the due date on the amount tendered is discharged [*Com. Code § 3603(c)*].

If presentment is required with respect to an instrument and the obligor is able and ready to pay on the due date at every place of payment stated in the instrument, the obligor is deemed to have made tender of payment on the due date to the person entitled to enforce the instrument [*Com. Code § 3603(c)*].

[5] Cancellation or Renunciation

A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument by either of the following [*Com. Code § 3604(a)*]:

(1) An intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party's signature, or the addition of words to the instrument indicating discharge; or

(2) An signed written agreement not to sue or other signed written renunciation of rights against the party.

However, cancellation or striking out of an endorsement pursuant to *Com. Code § 3604(a)* does not affect the status and rights of a party derived from the endorsement [*Com. Code § 3604(b)*].

Discharge under *Com. Code § 3604* of a party's obligation to pay an instrument does not discharge an endorser's or accommodation party's obligation who has a right of recourse against the discharged party [*Com. Code § 3605(b)*; *see also Com. Code § 3419(e)* (accommodation party's right of recourse)]. Similarly, if a note is held in joint tenancy, consent of both payees is necessary to extinguish the obligation represented by the note [*see Lovetro v. Steers (1965) 234 Cal. App. 2d 461, 466, 44 Cal. Rptr. 604* (dictum)].

[6] Effect of Discharge, Extension, or Modification on Endorser or Accommodation Party

"Endorser," as used in *Com. Code § 3605*, includes a drawer of a draft that was accepted by an entity other than a bank and then dishonored [*Com. Code § 3605(a)*; *see Com. Code § 3414(d)* (see *§ 385.37[1]*)].

If a person entitled to enforce an instrument agrees, with or without consideration, to extend the due date of the obligation of a party to pay the instrument, the extension discharges an endorser or accommodation party who has a right of recourse against the party whose obligation is extended to the extent the endorser or accommodation party proves that the extension caused loss to the endorser or accommodation party with respect to the right of recourse [*Com. Code § 3605(c)*]. Nevertheless, an accommodation party is not discharged under *Com. Code § 3605(c)* unless the person entitled to enforce the instrument knows of the accommodation or has notice under *Com. Code § 3419(c)* that the instrument was signed for accommodation [*Com. Code § 3605(h)*; *see Com. Code § 3419(c)* (discussed in *§ 385.40[1]*)].

If a person entitled to enforce an instrument agrees, with or without consideration, to a material modification of the obligation of a party other than an extension of the due date, the modification discharges the obligation of an endorser or accommodation party having a right of recourse against the person whose obligation is modified to the extent the modification causes loss to the endorser or accommodation party with respect to the right of recourse [*Com. Code § 3605(d)*]. Nevertheless, an accommodation party is not discharged under *Com. Code § 3605(d)* unless the person entitled to enforce the instrument knows of the accommodation or has notice under *Com. Code § 3419(c)* that the instrument was signed for accommodation [*Com. Code § 3605(h)*; *see Com. Code § 3419(c)* (*see § 385.40[1]*)]. The loss suffered by the endorser or accommodation party as a result of the modification is equal to the amount of the right of recourse unless the person enforcing the instrument proves that no loss was caused by the modification or that the loss caused by the modification was an amount less than the amount of the right of recourse [*Com. Code § 3605(d)*].

[7] Effect of Impairment of Collateral on Endorser or Accommodation Party

If a party's obligation to pay an instrument is secured by an interest in collateral and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of an endorser or accommodation party having a right of recourse against the obligor is discharged to the extent of the impairment [*Com. Code § 3605(e)*; *see Com. Code § 3605(a)* (endorser includes drawer of draft dishonored after acceptance by entity other than bank); *see also Com. Code § 3414(d)* (discussed in *§ 385.37*)]. However, an accommodation party is not discharge *Com. Code § 3605(e)* unless the person entitled to enforce the instrument knows of the accommodation or has notice *Com. Code § 3419(c)* that the instrument was signed for accommodation [*Com. Code § 3605(h)*; *see Com. Code § 3419(c)* (*see § 385.40[1]*); *see also Com. Code § 3605(i)* (*see § 385.45[8]*)].

The value of an interest in collateral is impaired to the extent (1) the value of the interest is reduced to an amount less than the amount of the right of recourse of the party asserting discharge, or (2) the reduction in value of the interest causes an increase in the amount by which the amount of the right of recourse exceeds the value of the interest [*Com. Code § 3605(e)*]. The burden of proving impairment is on the party asserting discharge [*Com. Code § 3605(e)*].

If the obligation of a party is secured by an interest in collateral not provided by an accommodation party and a person entitled to enforce the instrument impairs the value of the interest in collateral, the obligation of any party who is jointly and severally liable with respect to the secured obligation is discharged to the extent the impairment causes the party asserting discharge to pay more than that party would have been obliged to pay, taking into account rights of contribution, if impairment had not occurred [*Com. Code § 3605(f)*]. If the party asserting discharge is an accommodation party not entitled to discharge under *Com. Code § 3605(e)*, the party is deemed to have a right to contribution based on joint and several liability rather than a right to reimbursement. The burden of proving impairment is on the party asserting discharge [*Com. Code § 3605(f)*].

Under *Com. Code § 3605(e)* or *(f)*, impairing value of an interest in collateral includes the following [*Com. Code § 3605(g)*]:

(1) Failure to obtain or maintain perfection or recordation of the interest in collateral;

(2) Release of collateral without substitution of collateral of equal value;

(3) Failure to perform a duty to preserve the value of collateral owed, under Division 9 (*Com. Code § 9101 et seq.*) or other law, to a debtor or surety or other person secondarily liable; or

(4) Failure to comply with applicable law in disposing of collateral.

[8] Consent Vitiates Discharge

A party is not discharged under *Com. Code § 3605* if (1) the party asserting discharge consents to the event or conduct that is the basis of the discharge, or (2) the instrument or a separate agreement of the party provides for waiver of discharge under *Com. Code § 3605* either specifically or by general language indicating that parties waive defenses based on suretyship or impairment of collateral [*Com. Code § 3605(i)*].

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§ 385.46 Statutes of Limitations

[1] Action on Note Payable at Definite Time

Except as provided in *Com. Code § 3118(e)* (see *§ 385.46[5]*), an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date [*Com. Code § 3118(a)*].

[2] Action on Demand Note

Except as provided in *Com. Code § 3118(d)* (acceptor's obligation) or (e) (certificates of deposit), if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within six years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of 10 years [*Com. Code § 3118(b)*].

[3] Action on Unaccepted Drafts

Except as provided in *Com. Code § 3118(d)* (acceptor's obligation), an action to enforce the obligation of a party to an unaccepted draft to pay the draft must be commenced within 3 years after dishonor of the draft or 10 years after the date of the draft, whichever period expires first [*Com. Code § 3118(c)*].

[4] Actions Against Acceptors or on Accepted Drafts

An action to enforce the obligation of the acceptor of a certified check or the issuer of a teller's check, cashier's check, or traveler's check must be commenced within three years after demand for payment is made to the acceptor or issuer, as the case may be [*Com. Code § 3118(d)*].

An action to enforce the obligation of a party to pay an accepted draft, other than a certified check, must be commenced (1) within six years after the due date or dates stated in the draft or acceptance if the obligation of the acceptor is payable at a definite time, or (2) within six years after the date of the acceptance if the obligation of the acceptor is

payable on demand [*Com. Code § 3118(f)*].

[5] Action on Certificates of Deposit

An action to enforce the obligation of a party to a certificate of deposit to pay the instrument must be commenced within six years after demand for payment is made to the maker, but, if the instrument states a due date and the maker is not required to pay before that date, the six-year period begins when a demand for payment is in effect and the due date has passed [*Com. Code § 3118(e)*].

[6] All Other Actions

Unless governed by other law regarding claims for indemnity or contribution, the following actions must be commenced within three years after the cause of action accrues [*Com. Code § 3118(g)*]:

- An action for conversion of an instrument, for money had and received, or like action based on conversion;

- An action for breach of warranty; or

- An action to enforce an obligation, duty, or right arising under Division 3 and not governed by *Com. Code § 3118*.

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§ 385.47 Notice to Third Parties

In an action for breach of an obligation for which a third person is answerable over pursuant to Division 3 or Division 4 (*Com. Code § 4101 et seq.*), the defendant may give the third person written notice of the litigation, and the person notified may then give similar notice to any other person who is answerable over [*Com. Code § 3119*].

If the notice states (1) that the person notified may come in and defend and (2) that failure to do so will bind the person notified in an action later brought by the person giving the notice as to any determination of fact common to the two litigations, the person notified is so bound unless after seasonable receipt of the notice the person notified does come in and defend [*Com. Code § 3119*].

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§ 385.48 Enforcement of Lost, Destroyed, or Stolen Instruments

A person not in possession of an instrument is entitled to enforce the instrument if all of the following apply [*Com. Code § 3309(a)*; *but see Com. Code § 3305(c)* (discussed in *§ 385.27[6]*)]:

- The person was in possession of the instrument and entitled to enforce it when loss of possession occurred;

- The loss of possession was not the result of a transfer by the person or a lawful seizure; and

- The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process. If the lost, stolen, or destroyed instrument is a teller's check, cashier's check, or certified check, *Com. Code § 3312* establishes a much simpler claim procedure for use by the payee or remitter [*see Ch. 95, Banks, Deposits, and Checks, § 385.128*].

The court of appeal has held that a joint payee alleged a cause of action for recovery of the amount of a check from the drawer under *Com. Code § 3309* when, with regard to the requirement that "the person was in possession" before loss of possession, it alleged that it was a joint payee of a check which was delivered to a copayee who deposited the check without obtaining plaintiff's endorsement or consent [*Crystaplex Plastics, Ltd. v. Redevelopment Agency of the City of Barstow (2000) 77 Cal. App. 4th 990, 999-1000, 92 Cal. Rptr. 2d 197* (failure to allege plaintiff's actual possession of check was not fatal to cause of action because delivery of check to joint payee was sufficient to satisfy possession requirement)].

A person seeking enforcement of an instrument under *Com. Code § 3309(a)* is required to prove the terms of the instrument and the person's right to enforce the instrument [*Com. Code § 3309(b)*]. If that proof is made, *Com. Code § 3308* (*see* discussion in *§ 385.49*) applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to

enforce the instrument. Adequate protection may be provided by any reasonable means [*Com. Code § 3309(b)*]. For a form of complaint to enforce a lost note, see *§ 385.100*.

Civ. Code § 3415 governs restoration of lost instruments and authorizes an action by the owner to require execution of a duplicate. However, in the case of negotiable instruments, *Civ. Code § 3415(b)* requires an indemnity bond. For discussion of *Civ. Code § 3415* and related forms, see Ch. 356, *Lost Papers* .

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§ 385.49 Establishing Signatures

In an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings [*Com. Code § 3308(a)*]. If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity, but the signature is presumed to be authentic and authorized unless the action is to enforce the liability of the purported signer and the signer is dead or incompetent at the time of trial of the issue of validity of the signature [*Com. Code § 3308(a)*].

If an action to enforce the instrument is brought against a person as the undisclosed principal of a person who signed the instrument as a party to the instrument, the plaintiff has the burden of establishing that the defendant is liable on the instrument as a represented person under *Com. Code § 3402(a)* (*see § 385.18[2]*) [*Com. Code § 3308(a)*].

If the validity of signatures is admitted or proved and there is compliance with *Com. Code § 3308(a)*, a plaintiff producing the instrument is entitled to payment if the plaintiff proves entitlement to enforce the instrument under *Com. Code § 3301*(*see* discussion in *§ 385.25*), unless the defendant proves a defense or claim in recoupment. If a defense or claim in recoupment is proved, the right to payment of the plaintiff is subject to the defense or claim, except to the extent the plaintiff proves that the plaintiff has rights of a holder in due course that are not subject to the defense or claim [*Com. Code § 3308(b)*; *see Com. Code §§ 3302(b), 3305(a)-(c)* (discussed under *§ 385.27[1]*)].

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§ 385.70 California Points and Authorities

For memoranda of points and authorities related to forms in this chapter, see California Points and Authorities, Ch. 166, *Negotiable Instruments* (Matthew Bender)

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§ 385.71 California Legal Forms

For legal forms for negotiable instruments, see California Legal Forms, Ch. 55, *Negotiable Instruments* (Matthew Bender)

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§ 385.72 California Real Estate

For discussion of promissory notes secured by real property, see California Real Estate Law and Practice, Ch. 110, *Notes* (Matthew Bender)

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§ 385.73 Forms of Discovery

For defendant's forms of interrogatories to plaintiff in an action by a bank against the endorser of a note, see Bender's Forms of Discovery, *Promissory Notes and Bills* (Matthew Bender)

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§ 385.74 State Statutes

[1] Balloon Payments

Special notice requirements when note with balloon payment is secured by real property containing one to four residential units. *Civ. Code § 2924i*

Requirements of notice prior to due date and of language in note specifying right to notice for notes with balloon payments when "arranger of credit" involved and note is for seller to purchase dwelling with four or fewer families. *Civ. Code §§ 2956, 2957, 2966*

[2] Definitions in Division 3

"Acceptance." *Com. Code § 3409*

"Acceptor." *Com. Code § 3103(a)(1)*

"Accommodated party." *Com. Code § 3419*

"Accommodation party." *Com. Code § 3419*

"Alteration." *Com. Code § 3407*

"Anomalous endorsement." *Com. Code § 3205*

"Blank endorsement." *Com. Code § 3205*

"Cashier's check." *Com. Code § 3104(g)*

"Certificate of deposit." *Com. Code § 3104(j)*

"Certified check." *Com. Code § 3409(d)*

"Check." *Com. Code § 3104(f)*

"Consideration." *Com. Code § 3303(b)*

"Demand draft." *Com. Code § 3104(k)*

"Draft." *Com. Code § 3104(e)*

"Drawee." *Com. Code § 3103(a)(2)*

"Drawer." *Com. Code § 3103(a)(3)*

"Endorsement." *Com. Code § 3204*

"Endorser." *Com. Code § 3204*

"Good faith." *Com. Code § 1201(b)(20)*

"Holder in due course." *Com. Code § 3302*

"Incomplete instrument." *Com. Code § 3115*

"Instrument." *Com. Code § 3104(b)*

"Issue." *Com. Code § 3105*

"Issuer." *Com. Code § 3105*

"Maker." *Com. Code § 3103(a)(5)*

"Negotiable instrument." *Com. Code § 3104*

"Negotiation." *Com. Code § 3201*

"Note." *Com. Code § 3104(e)*

"Order." *Com. Code § 3103(a)(6)*

"Ordinary care." *Com. Code § 3103(a)(7)*

"Party." *Com. Code § 3103(a)(8)*

"Payable at definite time." *Com. Code § 3108*

"Payable on demand." *Com. Code § 3108*

"Payable to bearer." *Com. Code § 3109*

"Payable to order." *Com. Code § 3109*

"Payment." *Com. Code § 3602*

"Person entitled to enforce." *Com. Code § 3301*

"Presentment." *Com. Code § 3501*

"Promise." *Com. Code § 3103(a)(9)*

"Prove." *Com. Code § 3103(a)(10)*

"Reacquisition." *Com. Code § 3207*

"Remitter." *Com. Code § 3103(a)(11)*

"Special endorsement." *Com. Code § 3205*

"Teller's check." *Com. Code § 3104(h)*

"Transfer of instrument." *Com. Code § 3203*

"Traveler's check." *Com. Code § 3104(i)*

"Value." *Com. Code § 3303(a)*

[3] Definitions in Division 4 Applicable in Division 3

"Bank." *Com. Code § 4105*

"Banking day." *Com. Code § 4104*

"Clearinghouse." *Com. Code § 4104*

"Collecting bank." *Com. Code § 4105*

"Depositary bank." *Com. Code § 4105*

"Documentary draft." *Com. Code § 4104*

"Intermediary bank." *Com. Code § 4105*

"Item." *Com. Code § 4104*

"Payor bank." *Com. Code § 4105*

"Suspends payments." *Com. Code § 4104*

[4] General Provisions

General provisions and definitions. *Com. Code § 3101 et seq.*

Negotiation, transfer, and endorsement. *Com. Code § 3201 et seq.*

Enforcement of instruments; holders in due course. *Com. Code § 3301 et seq.*

Liability of parties. *Com. Code § 3401 et seq.*

Presentment, dishonor, notice of dishonor. *Com. Code § 3501 et seq.*

Discharge and payment. *Com. Code § 3601 et seq.*

[5] Issuance of Negotiable Instruments by Public Body

Unless governed by particular provisions authorizing issuance of bonds, notes, commercial paper, or other evidences of indebtedness by public body, *Gov. Code § 5450 et seq.* does not govern pledge of collateral by public body to secure indebtedness. *Gov. Code § 5450(a)*

Pledge of collateral by public body to secure repayment of indebtedness is valid and binding lien in accordance with terms of pledge document from time pledge is made. *Gov. Code § 5451*

[6] Liability of Drawer

Liability of maker for punitive damages in specified dishonors, exception for stop payment for good faith dispute. *Civ. Code § 1719*

[7] Prepayment

Restrictions on enforcement of prepayment clauses when enforcing due-on-sale clauses. *Civ. Code § 2954.10*

[8] Unfair and Deceptive Practices

Production, advertising, offering to sell, selling, distributing, or otherwise transferring for use in California any simulated check is prohibited and may be enjoined; civil penalty. *Bus. & Prof. Code § 22433*

Failure of check casher, as defined in *Civ. Code § 1789.31* to exclude insured bank or savings and loan association or retail seller within meaning of *Civ. Code § 1749.1(b)*, to post notice of fees and acceptable forms of identification [*see Civ. Code § 1789.30*] is unfair business practice under *Bus. & Prof. Code § 17200*. *Civ. Code § 1789.32*

[9] Usury Exemptions

Certain commercial paper usury exemptions. *Corp. Code §§ 25116-25118*

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§ 385.75 Federal Regulations

Preservation of consumers' claims and defenses. *16 C.F.R. § 433.1 et seq.*

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§ 385.76 Decisions

[1] Covenant of Good Faith and Fair Dealing

Standard for tort recovery requires every person to act with reasonable regard for his or her own interests; when maker stopped making payments on installment note and did not inform payee of their intention to bring note current with proceeds of second note, payee does not breach covenant of good faith and fair dealing by recording notice of default. *Gaffney v. Downey Savings & Loan Assn. (1988) 200 Cal. App. 3d 1154, 1171-1172, 246 Cal. Rptr. 421*

[2] Defenses

Denial of "execution" puts in issue whether defendant's signature was obtained by fraud or whether instrument was delivered, but not defense of fraud in inducement or "sham transaction." *FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 401-403, 282 Cal. Rptr. 508*

Setoff is defense to action on note and may be raised by affirmative defense or by cross complaint. *American National Bank v. Stanfill (1988) 205 Cal. App. 3d 1089, 1097, 252 Cal. Rptr. 861*

Whether individual makers of note who were also directors of corporate depositor and authorized signatories of corporate deposit account were depositors withinmeaning of *Com. Code § 4401* and thus entitled to assert defense of setoff based on bank's payment of unauthorized withdrawals from corporate account is issue of fact to be determined on case-by-case basis. *American National Bank v. Stanfill (1988) 205 Cal. App. 3d 1089, 1098-1101, 252 Cal. Rptr. 861*

[3] Drafts and Bills of Exchange

Check differs from bill of exchange in that it is always drawn on bank deposit, whereas bill is not. *Wilson v. Buchenau (N.D. Cal. 1942) 43 F. Supp. 272, 275*

"Draft" or "bill of exchange" is order by one person on another to pay sum of money therein stated to third person on demand or at future time therein specified. *People v. McNear (1961) 190 Cal. App. 2d 541, 546, 12 Cal. Rptr. 124*

[4] Endorsement

Complaint alleging that bank allowed plaintiff's employees to cash or deposit checks with fraudulent endorsements in their personal accounts despitesuspicious circumstances indicating fraud stated cause of action under *Com. Code § 3405(b)*. *Newman v. Wells Fargo Bank (2001) 87 Cal. App. 4th 73, 83-85, 104 Cal. Rptr. 2d 310*

Signatures were presumed genuine in absence of contrary evidence [former *Com. Code § 3307(1)(b)*; *now see Com. Code § 3308*]; in absence of any contrary evidence, endorsements on note constituted substantial evidence of endorsee's status as holder. *White v. Moriarty (1993) 15 Cal. App. 4th 1290, 1296 n.2, 19 Cal. Rptr. 2d 200* ; *see Com. Code § 3204(a)* (defining endorsement)

Endorsement by attachment to note does not make endorsee holder in due course when there is space to endorse on note itself. *Pribus v. Bush (1981) 118 Cal. App. 3d 1003, 1007-1010, 173 Cal. Rptr. 747*

Possession by third person of negotiable promissory note, payable to corporation, bearing endorsement of the corporation, regular in form, and signed by its general manager, is sufficient to raise presumption that officer so endorsing it had authority to make endorsement and that person having possession of it is owner of note. *California Standard Fin. Corp. v. J.D. Millar Realty Co. (1931) 118 Cal. App. 185, 189, 5 P.2d 41*

Endorsement of draft by holder to collecting bank by means of rubber stamp is sufficient. *Allenberg v. Rapken & Co. Ltd., (1930) 108 Cal. App. 99, 102, 291 P. 281*

[5] Enforcement of Lost, Destroyed, or Stolen Instruments

Joint payee alleged cause of action for recovery of amount of check from drawer under *Com. Code § 3309* when it was alleged that it was joint payee of check which was delivered to copayee who deposited it without obtaining plaintiff's endorsement or consent. *Crystaplex Plastics, Ltd. v. Redevelopment Agency of the City of Barstow (2000) 77 Cal. App. 4th 990, 999-1000, 92 Cal. Rptr. 2d 197*

[6] Holders in Due Course

[a] Determination of Status and Burden of Proof

Payee of check is entitled to holder-in-due-course status under *Com. Code § 3302*; bank precluded from recovering its mistaken payment as long as payee took instrument in good faith. *Gentner v. Wells Fargo Bank (1999) 76 Cal. App. 4th 1165, 1168-1170, 90 Cal. Rptr. 2d 904*

Summary judgment is precluded by existence of issues of fact whether plaintiff banks achieved status of holders in due course; holder in due course status does not cut off defenses if holder has dealt with one asserting defense; material issues pertaining to status as defense include whether plaintiffs were involved in transactions on which the notes were

based, whether they knew that underlying obligations were voidable (*now see Com. Code § 3302(a)*), whether they had notice that defendant's note had been partially discharged (*now see Com. Code § 3602*), and whether they knew that underlying sales agreements were executory. *Barclays Discount Bank Ltd. v. Levy (9th Cir. 1984) 743 F.2d 722, 725-728*

Bank was mere transferee and not holder in due course when it acquired notes as security for loan that contained only endorsement to borrower and its successors and assigns and no endorsement to bank. *Security Pacific National Bank v. Chess (1976) 58 Cal. App. 3d 555, 561-562, 129 Cal. Rptr. 852*

Instances in which bank is agent of payee of promissory note rather than holder in due course. *Michigan Nat'l Bank v. Hardman Aerospace (1973) 36 Cal. App. 3d 196, 203 n.4, 111 Cal. Rptr. 514*

Plaintiff has burden of proof that he or she took check for value and as holder in due course when payee's title to check was defective because of fraud in negotiating it. *Bramante v. Krug (1956) 143 Cal. App. 2d 771, 772, 300 P.2d 71*

[b] Duty to Inquire

Purchaser of negotiable paper before maturity is not required to make inquiry of makers as to consideration and circumstances leading up to its execution. *Witty v. Clinch (1929) 207 Cal. 779, 783, 279 P. 797* ; *Allenberg v. Rapken & Co., Ltd. (1930) 108 Cal. App. 99, 103, 291 P. 281*

Holder is not called required make inquiry concerning execution and consideration for which negotiable instrument given, under penalty of having bad faith imputed to him or her, unless there is something on face of instrument or circumstances surrounding its negotiating to arouse suspicion. *Barthelmess v. Cavalier (1934) 2 Cal. App. 2d 477, 487, 38 P.2d 484*

[c] Good Faith

Requirement of "good faith" generally means that transaction was honestly conceived and consummated without collusion, fraud, knowledge of fraud, or intent to assist in perpetration of fraud. *Mann v. Leasko (1960) 179 Cal. App. 2d 692, 697, 4 Cal. Rptr. 124*

"Good faith" is defined as act done honestly, whether it is done negligently or not. *Appel v. Morford (1943) 62 Cal. App. 2d 36, 40, 144 P.2d 95* ; *now see Com. Code § 1201(b)(20)*

Mere knowledge of facts sufficient to put prudent person on inquiry does not affect position of one as bona fide purchaser or pledgee. *Barthelmess v. Cavalier (1934) 2 Cal. App. 2d 477, 487, 38 P.2d 484*

Holder may assume bona fide character only as to advances made prior to maturity of instrument when note is taken as collateral security for future advances. *Sonoma County Nat'l Bank v. Skinner (1919) 42 Cal. App. 202, 205, 183 P. 464*

[d] Knowledge Affecting Status

Mere presence of suspicious circumstances that would be sufficient to put reasonably prudent individual on inquiry does not negate existence of good faith as to holder in due course of negotiable instrument. *Mann v. Leasko (1960) 179 Cal. App. 2d 692, 697, 4 Cal. Rptr. 124*

Nothing short of actual knowledge of defects in instrument or of actual bad faith will defeat status of endorsee who otherwise qualifies as holder indue course. *Mann v. Leasko (1960) 179 Cal. App. 2d 692, 698, 4 Cal. Rptr. 124*

Endorsee having actual knowledge of infirmity in payee's title as not becoming holder in due course of check. *California Bank v. Diamond (1956) 144 Cal. App. 2d 387, 392, 301 P.2d 60*

Filing of lis pendens in action to cancel promissory note and trust deed on real property securing note, as not conveying to holder in due course of note constructive notice of maker's equities against payee; promissory note as personal property so that former *Code Civ. Proc. § 409* (*now see Code Civ. Proc. § 405.24*) is not applicable. *Ross v. Title Guar. & Trust Co. (1934) 136 Cal. App. 393, 400, 29 P.2d 236* ; *now see Com. Code § 3302(b)*

Qualified endorsement as not impairing negotiability, and one taking such instrument without knowledge of defects and paying value therefor as occupying position of holder in due course against maker. *Ross v. Title Guar. & Trust Co. (1934) 136 Cal. App. 393, 403, 29 P.2d 236*

Mere knowledge of facts sufficient to put prudent person on inquiry or mere suspicion of infirmity or defect of title, without actual knowledge, as not precluding transferee from occupying position of holder in due course unless circumstances or suspicions are so cogent and obvious that to remain passive would amount to bad faith. *Allenberg v. Rapken & Co., Ltd. (1930) 108 Cal. App. 99, 103, 291 P. 281*

[7] Impairment of Contract Constitutionally Prohibited

Application of increased penalty on bond delinquencies imposed by amendment to statute [*Sts. & Hy. Code § 6442*] made after bonds were issued as unconstitutional impairment of contract; penalty had to remain at rate in effect when bonds were issued. *Schuhart v. Pinguelo (1991) 230 Cal. App. 3d 1599, 1604-1606, 282 Cal. Rptr. 144*

[8] Negotiability of Instruments

[a] Determination in General

Provision in promissory note that makers, sureties, guarantors, and endorsers of note consented to extensions of time at or after maturity of note as not rendering note nonnegotiable when note definitely fixed payment date and only purpose of provision was to permit holder and subsequent endorsees of note to extend time of payment, at or after maturity, without releasing maker or any person who may have endorsed instrument prior to its maturity of liability that has attached to them as endorsers. *Pugh v. Dawson (1928) 95 Cal. App. 505, 509-510, 273 P. 39*

Negotiability of one of several notes maturing at different times belonging to single transaction and forming connective series as not affected by provision that, on failure of maker to pay any one of notes of series to which it belongs, rest shall become due and payable. *Havens v. Foskett (1927) 81 Cal. App. 653, 658, 254 P. 642*

[b] Unaffected by Other Writings

Negotiability of bond as not destroyed by conditions of trust indenture securing it when, on its face, it is an unconditional promise to pay, signed by maker, engaging to pay at fixed future time to bearer, certain sum of money. *Siebenhauer v. Bank of Cal. Nat'l Ass'n (1930) 211 Cal. 239, 243, 294 P. 1062*

Contemporaneous execution and transfer of promissory note and nonnegotiable contract securing performance by lien on real property as not, in and of itself, impairing negotiability of note. *Mann v. Leasko (1960) 179 Cal. App. 2d 692, 696-697, 4 Cal. Rptr. 124*

Negotiability of promissory note otherwise negotiable in form, secured by mortgage or deed of trust on real or personal property, as not affected or abridged by reason of statement therein that it is so secured by fact that instrument is so secured, or by any conditions contained in mortgage or deed of trust securing it. *Mann v. Leasko (1960) 179 Cal. App. 2d 692, 696, 4 Cal. Rptr. 124* ; *but see Growth Equities Corp. v. Freed (1991) 227 Cal. App. 3d 506, 509-511, 277 Cal. Rptr. 848* (distinguishing *Mann* and holding note to be nonnegotiable because it recited that it was secured by and "subject to" other agreement)

Promissory note as unconditional promise to pay under former *Civ. Code § 3084* (*now see Com. Code § 3106(b)(2)*), even though parties indicated by contemporaneous writing that fund from which repayment should be made and thereby set forth circumstances that gave rise to instrument. *Martin v. Ajax Constr. Co. (1954) 124 Cal. App. 2d 425, 430, 269 P.2d 132*

[9] Notation on Instrument

Marginal notation placed on promissory note by maker before signing note with intention of making notation part of contract as substantive part of note. *Rogers v. Harris (1955) 138 Cal. App. 2d 1, 4-5, 291 P.2d 68*

Placing of notation on instrument by note teller for purpose of teller's own information in computing interest as amounting at most to spoliation and not as constituting material alteration of instrument. *American Trust Co. v. Greuner (1936) 13 Cal. App. 2d 279, 282, 56 P.2d 967*

[10] Parol Evidence

Oral agreement collateral to promissory note that repayment schedule would be adopted and terms of note renegotiated on date of note's maturity as sufficiently consistent with terms of note to be admissible as parol evidence supporting affirmative defense to nonpayment of note on date of maturity. *Bank of Beverly Hills v. Catain (1982) 128 Cal. App. 3d 28, 36, 180 Cal. Rptr. 67*

[11] Parties to Instruments

[a] In General

Extent of obligation assumed in and by promissory notes or bills of exchange as determined by intention of parties rather than by particular place whereone of parties has placed his signature; signing in unusual place as having no other

effect than requiring proof to disclose capacity in which instrument was signed. *Engelman v. Gordon (1966) 242 Cal. App. 2d 510, 517-518, 51 Cal. Rptr. 627*

[b] Accommodation Parties

Maker of promissory note as not "accommodation party" within meaning of *Com. Code § 3415* if third person who was allegedly accommodated and who received loan proceeds was not party to note. *Bank of America v. Superior Court (1970) 4 Cal. App. 3d 435, 439, 84 Cal. Rptr. 421*

Whether or not defendants are accommodation endorsers on note as ordinarily question of fact for fact finder. *Western Hardwood Lbr. Co. v. Superior Furniture Mfg., Ltd. (1936) 18 Cal. App. 2d 287, 289, 63 P.2d 828*

[c] Agents

Agent who signs promissory note in his or her own name as personally liable unless he or she indicates on writing itself intention to bind principal only. *Hollywood Nat. Bank v. International Business Machines Corp. (1974) 38 Cal. App. 3d 607, 617, 113 Cal. Rptr. 494* ; *now see Com. Code § 3404(a)(2)*

Agent's power to endorse commercial paper not to be implied from authority to collect debt. *Cignetti v. American Trust Co. (1956) 139 Cal. App. 2d 744, 748, 294 P.2d 490*

[d] Coobligors

Shareholder of corporation that executed promissory note was coobligor, not merely surety, when note stated on its face that shareholder was jointly and severally liable on debt and nothing in its terms indicated that she executed it in any capacity other than obligor. *Jessup Farms v. Baldwin (1983) 33 Cal. 3d 639, 645 n.4, 190 Cal. Rptr. 355, 660 P.2d 813*

[e] Endorsers

Contract of endorser, except insofar as he or she qualifies it in writing, is that if instrument is dishonored he or she will, on compliance by holder with conditions, pay amount of note [former *Civ. Code § 3116*; *now see Com. Code § 3415*], and constituting conditional promise to pay note. *Hurlbut v. Quigley (1919) 180 Cal. 265, 269, 180 P. 613*

Obligation of endorser of promissory note is totally separate and independent from that of makers. *Wiener v. Van Winkle (1969) 273 Cal. App. 2d 774, 786, 78 Cal. Rptr. 761*

Note endorsed "without recourse" is qualified endorsement in which endorser warrants that he or she has no knowledge of any fact that would render instrument valueless, but endorser does not warrant that obligor will pay. *Fleming v. Kagan (1961) 189 Cal. App. 2d 791, 799, 11 Cal. Rptr. 737* ; *see Com. Code § 3415(b)*

Assignment of "all right, title and interest" of payee endorsed on instrument is equivalent to endorsement without recourse and makes endorser mere assignor of title who will not be liable as endorser on maker's default. *Kane v.*

Eastman (1931) 110 Cal. App. 753, 758, 295 P. 63 ; *Gaetani v. Goss-Golden West Sheet Metal (2000) 84 Cal. App. 4th 1118, 1120, 101 Cal. Rptr. 2d 432* (construing former *Com. Code § 3414(1)*); *see Com. Code § 3415(b)*

[f] Joint Obligors

Release of one joint debtor does not extinguish obligation of any of other joint debtors to pay so much of debt as was not paid by released obligor [*Civ. Code § 1543*]. *Lovetro v. Steers (1965) 234 Cal. App. 2d 461, 477, 44 Cal. Rptr. 604*

[g] Payees

Check made payable to order of "Security Pacific National Bank A/C No. 260 049 569 G.C. Associates" designated G.C. Associates as payee and Security Pacific National Bank as payee's agent (pursuant to *Com. Code § 3117*) authorized to deposit funds in specified account. *Fireman's Fund Ins. Co. v. Security Pac. Nat. Bank (1978) 85 Cal. App. 3d 797, 814-817, 149 Cal. Rptr. 883*

[12] Presentment

Giving of checks constitutes conditional payment only; drawer of check not exonerated by failure of payee to present checks for payment except to extent payee can show loss by reason of failure. *Zinn v. Fred R. Bright Co. (1969) 271 Cal. App. 2d 597, 603, 76 Cal. Rptr. 663* ; *now see Com. Code § 3414(f)* (drawee's suspension of payments)

[13] Transfer and Negotiation

Transfer occurs at time of certification if check is certified at instance of payee to whom check has been delivered; if certification is procured at instance of drawer, transfer does not occur until check is delivered to payee. *Umbsen v. Crocker First Nat'l Bank (1949) 33 Cal. 2d 599, 601-602, 203 P.2d 752*

Payment of instrument by one who is neither party to paper nor in any way bound for its payment generally constitutes purchase in absence of anything showing contrary intent. *Proctor v. Pyle (1939) 33 Cal. App. 2d 121, 130-131, 91 P.2d 187*

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Witkin, Summary of California Law, vol. 3, *Negotiable Instruments* (10th ed. 2005)

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33-385 California Forms of Pleading and Practice--Annotated § 385.90

§ 385.90 Complaint for Money Due on Default [Civ. Code § 3302] on Note [Com. Code § 3104(e)]--By Payee Against Maker--Demand Note [Com. Code §§ 3108(a), 3118(b), 3502(a)(1)]

[1] FORM Complaint for Money Due on Default [Civ. Code § 3302] on Note [Com. Code § 3104(e)]--By Payee Against Maker--Demand Note [Com. Code §§ 3108(a), 3118(b), 3502(a)(1)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONEY
_____ [*name*], [and DOES I	)	[Amount demanded _____
through_____,]	)	(exceeds or does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, a resident of _____ [*city*], _____County, California [*or allege other basis of venue, e.g., county where note was made or is payable*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I through _____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of such fictitiously named defendants is responsible in some manner or status to pay the obligation

described herein and that plaintiff's loss as herein alleged was proximately caused by defendants' acts.)]

3. On or about _____ [*date*], at _____ [*city*], _____ County, California, defendant, for valuable consideration, made, executed, and delivered to plaintiff his/her/its promissory note [of that date] in the [principal] amount of $_____, payable _____ [*describe terms of payment, e.g.,* to plaintiff or order, on demand, with interest thereon at the rate of _____ percent per annum from the date of the note]. A copy of this note is attached as Exhibit A and incorporated by reference.

4. On or about _____ [*date*], plaintiff demanded that defendant pay the note _____ [*describe demand, e.g.,* by mailing a copy of the letter attached as Exhibit B and incorporated by reference, to defendant by certified mail, return receipt requested]. Defendant failed [and refused] andcontinues to fail [and refuse] to pay the note, or any part of it [other than the sum of $_____], and there is now due, owing, and unpaid from defendant to plaintiff the sum of $_____, together with interest thereon [at the rate of _____ percent per annum from _____ (*date*)].

[5. The note provides that in the event legal action is taken to enforce collection, the maker promises to pay such sum as the court may fix as reasonable attorney's fees. (Plaintiff has employed _____ (*name*), an active member of the State Bar of California, to file and prosecute this action and has become obligated to pay this attorney a reasonable fee for his/her services.) The amount of $_____ is a reasonable attorney's fee for the prosecution of this action.]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For the [principal] sum of $_____;

2. For interest on the [principal] sum at _____percent per annum from _____ [*date*];

3. For reasonable attorney's fees in the sum of $_____;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This complaint is for use in an action by the payee of a promissory note against the maker to recover the sums owed after maturity. Although it is intended as a general form of complaint, the hypothetical facts used in Paragraph 3 and the allegations in Paragraph 4 are appropriate only for demand notes. These include notes that do not state any time for payment [*see Com. Code § 3108(a)* (*see § 385.13[3]*)] and whose maker did not assert any of its rights under *Com. Code § 3501(b)(2)-(4)* (discussed in *§ 385.30[1], [2]*) [*see Com. Code § 3501(a)* (presentment as demand for payment)]. Therefore, in cases involving other types of notes, counsel should modify the allegations in Paragraph 3 that reflect the terms of the note on which he or she is suing and should replace Paragraph 4 with appropriate allegations from §§ 385.91-385.96, *385.98*, and *385.99*.

[3] General Allegations

This complaint alleges:

- The capacity and residence of the defendant (Paragraph 1).

- The existence of fictitious defendants (Optional Paragraph 2).

- The execution, delivery, and terms of the note and the fact that the note was issued for consideration (Paragraph 3) [*see FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 383, 282 Cal. Rptr. 508* (in simple action on note, allegation of execution of note alleges existence of contract, incorporation of copy of note alleges its terms, and allegation of nonpayment in accordance with those terms alleges breach)].

- Demand for payment and nonpayment [*see Com. Code § 3502(a)(1)* (dishonor of demand note, discussed in *§ 385.31[1]*); *see also Com. Code § 3501(a)* (presentment as demand)].

- The existence of an attorney's fee provision and plaintiff's engagement of an attorney to prosecute the action.

This last allegation is not necessary [*see Civ. Code § 1717(a)* (attorney's fees pursuant to contract provision as element of costs); *Ganey v. Doran (1987) 191 Cal. App. 3d 901, 911-912, 236 Cal. Rptr. 787* (contract provision for attorney's fees need not be pleaded if contract is made part of complaint)]. Reasonable attorney's fees are fixed by the court on notice and motion by a party [*Civ. Code § 1717(a)*]. For discussion of attorney's fees awards pursuant to a contract provision and forms and procedures for their recovery, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

[4] Demand for Payment and Attorney's Fees

In the case of a demand note, the normal rule is that suit may be filed without making a demand for payment [*see Prescott v. Grady (1891) 91 Cal. 518, 520-523, 27 P. 755* (under normal rules of pleading, there would be no "breach," and therefore no accrual of cause of action, until there was dishonor, but demand notes are subject to special rule); *see also* Official Comments 2 and 3 to U.C.C. § 3-502 (1990)]. However, if plaintiff seeks attorney's fees in accordance with an attorney's fee provision in the contract, a demand must normally be made prior to suit [*All-West Design, Inc. v. Boozer (1986) 183 Cal. App. 3d 1212, 1226, 228 Cal. Rptr. 736* (under facts of case, which involved cross complaint on installment note, no error occurred in awarding attorney's fees even though no prelitigation demand was made); *Green v. Carlstrom (1963) 212 Cal. App. 2d 240, 244, 27 Cal. Rptr. 850* (acceleration of installment note)].

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case in superior court [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[6] Limitation Period for Actions on Demand Notes

Com. Code § 3118(b) provides two limitation periods for commencement of actions on demand notes other than certificates of deposit, which are governed by *Com. Code § 3118(e)*, and certain obligations of banks governed by *Com. Code § 3118(d)*:

- If demand is made to the maker, an action to enforce the obligation of a party to pay the note must be commenced within six years after demand; and

- If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal or interest on the note has been paid for a continuous period of 10 years.

This reflects a change from prior law, in that drawers and endorsers now are subject to a limitation period that runs from the same date [Official Comment 2 to *UCC § 3118* (1990)].

[7] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

An action on a note is a form of action for breach of contract [*FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 383, 282 Cal. Rptr. 508]* . Thus, the proper venue is the county where the defendant resides, where the note was to be paid, or where the note was made [*Code Civ. Proc. § 395(a)*]. If the maker is a corporation, venue is proper in the county where the corporation maintains its principal place of business, where the note was made, or where it is to be paid [*Code Civ. Proc. § 395.5*; *see Code Civ. Proc. §§ 395.2* (action against unincorporated association), 410.70 (action against persons jointly liable)].

[8] Waiver of Security

If the note is secured by real property or by an interest in real property, an action on the note will amount to waiver of plaintiff's security interest [*Code Civ. Proc. § 726(a)*]. Thus, it is usually more prudent to foreclose on the collateral first. Similarly, if the note is secured by personal property, a combined action on the note and under the security agreement may be more prudent than simply proceeding on the note [*see Com. Code § 9601*(secured party's options on default); *but see* Official Comment 1 to UCC § 3-106 (1990) (statement that note is subject to or governed by security agreement renders it nonnegotiable)]. If the collateral is real property, see Ch. 555, *Trust Deeds and Real Property Mortgages* . If the collateral is personal property, see Ch. 503, *Sales: Secured Transactions* .

[9] Cross References

For alternative allegations as to agency, capacity, and residence of parties and for fictitious name allegations, see Ch. 20, *Allegations Commonly Used* .

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions* .

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints* .

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages* .

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers* .

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter* .

For alternative forms for prayers, see Ch. 420, *Prayers* .

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers* .

For allegations showing proper venue, see Ch. 571, *Venue* .

For alternative forms for verification, see Ch. 572, *Verification* .

[10] Forms of Discovery

For interrogatories for use in actions involving payment of obligations, see Bender'sForms of Discovery, Ch. 152, *Promissory Notes and Bills* (Matthew Bender)

[11] State Statutes

Award of attorney's fees in action on contract. *Civ. Code § 1717(a)*

Permissible recovery of interest on damages. *Civ. Code §§ 3287* (sum certain), *3289* (rate stipulated in contract)

Detriment caused by breach of obligation to pay money. *Civ. Code § 3302*

Promise payable to order. *Com. Code § 3109(b)*

Limitation periods. *Com. Code § 3118*

When demand note is overdue. *Com. Code § 3304(a)*

Obligation of maker of note. *Com. Code § 3412*

Time of dishonor of demand note. *Com. Code § 3502(a)(1)*

[12] Attorney's Fees

Allowance for legal services rendered on appeal is proper when promissory note provides for recovery of reasonable attorney's fees incurred in enforcement thereof. *American City Bank v. Zetlen (1969) 272 Cal. App. 2d 65, 67, 76 Cal. Rptr. 898*

[13] Consideration

Burden of pleading and proving lack of consideration to support written instrument is on party seeking to avoid it on that ground. *Hualde Ranch Co. v. Beebe (1935) 3 Cal. App. 2d 592, 593-594, 40 P.2d 545*

[14] Demand

No actual demand is necessary on demand note, whether negotiable or nonnegotiable, under principle that obligation for payment of money on demand is due immediately. *Rottman v. Hevener (1921) 54 Cal. App. 485, 488, 202 P. 334*

[15] Interest

Prejudgment interest is not allowed on delinquent interest payments under interest-only note; express agreement is required to compound interest. *Ninety Five Ten v. Crain (1991) 231 Cal. App. 3d 36, 39-41, 282 Cal. Rptr. 141* (disapproving *Daum Development Corp. v. Yuba Plaza, Inc. (1970) 11 Cal. App. 3d 65, 89 Cal. Rptr. 458* , to extent that it may be construed to sanction award of interest on interest in absence of agreement therefor)

[16] Pleading

Allegation that note was made implies delivery; further allegation of delivery is unnecessary. *Smith v. Waite (1894) 103 Cal. 372, 373, 37 P. 232*

Genuineness and due execution, in form exhibited, of copy of note annexed to complaint is admitted for all purposes of trial unless denied by verified answer. *Ward v. Clay (1890) 82 Cal. 502, 505, 23 P. 50* (dictum)

Person suing on promissory note generally is not required to plead or prove contractual relationship giving rise to execution and delivery of note. *Fellom v. Adams (1969) 274 Cal. App. 2d 855, 863, 79 Cal. Rptr. 633*

[17] Presentment

Note not payable at any particular place is payable and to be presented for payment at residence or place of business of maker or wherever maker may be found, at option of presentor. *Wills v. Booth (1907) 6 Cal. App. 197, 203, 91 P. 759* ; *now see Com. Code §§ 3501, 3502(a)*

Presentment for payment of note is excused if maker has no place of business or residence within state or maker's place of business or residence cannot be ascertained with reasonable diligence. *Wills v. Booth (1907) 6 Cal. App. 197, 203, 91 P. 759* (allegation as to lack of knowledge of whereabouts of maker based on information and belief is insufficient)

[18] Statute of Limitations

Debt is payable and due immediately when obligation is for payment of money on demand, on call, or on demand after date, and statute of limitations begins running at once if not immediately paid. *Rottman v. Hevener (1921) 54 Cal. App. 485, 488, 202 P. 334*

[19] Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, §§ 11, 17, 22, 39, 42-46, 48, 51, 52, 58-64, 100, 115, 118, 122 (10th ed. 2005)

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§ 385.91 Allegations Regarding Terms and Nonpayment of Installment Note [Com. Code §§ 3108(b), 3118(a), 3502(a)(2), (3)]

[1] FORM Allegations Regarding Terms and Nonpayment of Installment Note [Com. Code §§ 3108(b), 3118(a), 3502(a)(2), (3)]

1. On or about _____ [*date*], at _____ [*city*], _____ County, California, defendant, for valuable consideration, made, executed, and delivered to plaintiff his/her/its promissory note [of that date] in the [principal] amount of $_____, payable _____ [*describe terms of payment, e.g.,* to plaintiff or order, on (or before) July 1, 2006, with quarterly installment payments in the amount of $_____, beginning on September 30, 2001, each payment to be credited first to interest at the rate of _____ percent per annum on the unpaid principal amount]. A copy of this note is attached as Exhibit A and incorporated by reference.

2. [Although plaintiff has made demand therefor,] [D]efendant has not paid the amount due on the note, or any part thereof, except

[*EITHER*]

the installments due _____ [*specify, e.g.,* to and including July 20, 2005]

[*OR*]

the following amounts:

_____ $ _____
____ [*date*] _____
_____

_____ $ _____
____ [*date*] _____
_____

_____ $ _____
____ [*date*] _____
_____

[*CONTINUE*]

After application of those payments to interest and principal in accordance with the terms of the note, there remains a balance due and owing to the date of this complaint in the amount of $_____, principal, and $_____, interest. No part of this balance has been paid to date.

[2] Use of Form

These allegations are for use in place of Paragraphs 3 and 4, respectively, of *§ 385.90* in an action by a payee against the maker on default of payments due on an installment promissory note. Paragraph 1 of this form may be used in place of Paragraph 3 of the form in *§ 385.90*, and Paragraph 2 may be used in place of Paragraph 4. An installment note is a species of "note payable at a definite time" [*see Com. Code § 3108(b)* (*see § 385.13[3]*)].

Because one need not allege the payee's or holder's exercise of an option to accelerate [*see § 385.92*], Paragraph 2 of this form and the allegation in *§ 385.92* may appear interchangeable. Nevertheless, Paragraph 2 is intended for use only in the anomalous situation in which the note has not been accelerated and plaintiff seeks to recover only the delinquentinstallments or those delinquent installments he or she is entitled to collect [*see Bliss v. California Coop. Producers (1947) 30 Cal. 2d 240, 246, 181 P.2d 369]* .

Demand for payment may not be necessary before commencement of suit unless the terms of the note require presentment [*see Com. Code § 3502(a)(2), (3)* (dishonor of demand note, discussed in *§ 385.31[2]*); *see also Com. Code § 3501(a)* (presentment as demand)] or unless plaintiff seeks to recover attorney's fee in accordance with a provision for them in the note [*see § 385.90*].

[3] Limitation Period Applicable to Notes Payable at Definite Time

Unless the note is a certificate of deposit, and thus governed by *Com. Code § 3118(e)*, an action to enforce the obligation of a party to pay a note payable at a definite time must be commenced within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date [*Com. Code § 3118(a)*; *see also* Official Comment 2 to *U.C.C. § 3118* (1990) (current provision is change from prior law; drawers and endorsers now are subject to limitation period that runs from same date)].

When a note is payable in installments (and the payee does not accelerate), a cause of action on each installment accrues on the day following the date that installment is due, and the statute of limitations begins to run against each installment as it becomes due [*White v. Moriarty (1993) 15 Cal. App. 4th 1290, 1299, 19 Cal. Rptr. 2d 200* (considered effect under *Code Civ. Proc. § 337(1)*; *see now Com. Code § 3118(a)*)].

[4] State Statutes

Note payable in installments is payable at definite time. *Com. Code § 3108(b)*

Effect of partial transfer of instrument. *Com. Code § 3203(d)*

When installment note is overdue. *Com. Code § 3304(b)*

Time of dishonor of note payable in installments. *Com. Code § 3502(a)(2), (3)*

[5] Interest

Payee is entitled to recover interest at contract rate from date last installment of note was due until date of judgment. *Reid v. Balter (1993) 14 Cal. App. 4th 1186, 1196, 18 Cal. Rptr. 2d 287* (note was not accelerated, suit was brought after last installment came due)

[6] Rights of Transferee of Installment Note

Transferee of installment note is holder in due course as to installments to mature infuture when transfer is made after one or more but not all of installments are due on its face if he or she has no notice of default in payment of past due installments. *Bliss v. California Coop. Producers (1947) 30 Cal. 2d 240, 246, 181 P.2d 369* ; *see also Wilson v. Steele (1989) 211Cal. App. 3d 1053* (decided under former *Com. Code § 3304(3)(a), (4)(f)* (*now see Com. Code §§ 3302(a)(2)(C), 3304(b), (c)*); knowledge that interest-only installment payments had not been made as not depriving transferee of status as holder in due course)

Transferee of installment note is not required to ascertain whether or not past due installments had been paid in order to be holder in due course as to installment to mature in future. *Bliss v. California Coop. Producers (1947) 30 Cal. 2d 240, 245, 181 P.2d 369*

[7] Cross References

For forms for use in actions involving retail installment sales, see Ch. 501, *Sales: Retail Installment Sales*

For a related form, *see § 385.90*.

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§ 385.92 Allegations Regarding Installment Note With Option to Accelerate and That Balance of Note Payable in Installments Is Unpaid After Payee's Election to Accelerate [Com. Code § 3108(b)]

[1] FORM Allegations Regarding Installment Note With Option to Accelerate and That Balance of Note Payable in Installments Is Unpaid After Payee's Election to Accelerate [Com. Code § 3108(b)]

1. [*Terms of installment note. See § 385.91[1], Paragraph 2.*]

[2. By its terms, the note provides that plaintiff may, at his/her/its election, declare the remaining (principal) balance immediately due and payment in the event any installment is not paid when due.]

3. [Although plaintiff has made demand therefor,] [D]efendant has not paid _____ [*specify number or dates of unpaid installments, e.g.,* any installments due after, and including that due on, June 30, 2006], or any part thereof, and, as provided in the note, [plaintiff has exercised its option to accelerate and] the whole amount thereof is now due, owing, and unpaid, together with interest [at the rate of _____] thereon from _____ [*date*] [and an additional _____ (*specify any additional interest or amount owed as prepayment penalty, e.g.,* six months' interest or $_____ as prepayment penalty)].

[2] Use of Form

These allegations are for use in place of Paragraphs 3 and 4 of the form in *§ 385.90[1]* in an action by a payee against the maker on default of payments due on an installment promissory note when the payee has elected to accelerate the date of maturity for the payment of the whole amount due [*see Com. Code § 3106(b)* (option to accelerate as not condition that renders note nonnegotiable)]. Paragraph 1 of this form may be used in place of Paragraph 3 of the form in *§ 385.90[1]*, and Paragraph 3 may be used in place of Paragraph 4. Paragraph 2 of this form is not necessary if a copy of the note is attached to the complaint and incorporated by reference, or if the acceleration option is set forth as a term in Paragraph 1. Nevertheless, its use is recommended for clarity.

Unless the terms of the note require presentment, it is not necessary to allege demand for payment (Paragraph 3) [*see Com. Code § 3502(a)(2), (3)* (dishonor of demand note, discussed in *§ 385.31[2]*); *see also Com. Code § 3501(a)* (presentment as demand)] unless plaintiff seeks to recover attorney's fees in accordance with a provision for these fees

in the note [*see § 385.90*].

The allegation that plaintiff exercised its option to declare the remaining principal sum of a promissory note due and payable is unnecessary because commencement of the action itself is sufficient to show exercise of this option [*Title G. & T. Co. v. Fraternal Finance Co. (1934) 220 Cal. 362, 364, 30 P.2d 515* ; *Green v. Carlstrom (1963) 212 Cal. App. 2d 240,243-244, 27 Cal. Rptr. 850* ;*see, e.g., Federal Sav. and Loan Ins. Corp. v. Musacchio (N.D. Cal. 1988) 695 F. Supp. 1044, 1047-1048]* .

[3] State Statutes

Note is payable at definite time even though subject to acceleration. *Com. Code § 3108(b)*

[4] Decisions

[a] Acceleration

Under *Com. Code § 1303(e)*, fact that payee had told maker and guarantors that it did not intend to accelerate note but hoped they could agree on deferred payment plan and generally lenient collection practices does not provide basis for claim of estoppel, given language in note that payee's failure to exercise its option to accelerate would not be construed as waiver of that option. *U.S. v. Grayson (9th Cir. 1989) 879 F.2d 620, 624* (interpreting California law for guidance)

After default, holder is entitled to proceed with action on note containing acceleration clause even though note payment had been extended three years. *Title G. & T. Co. v. Fraternal Finance Co. (1934) 220 Cal. 362, 363-364, 30 P.2d 515*

[b] Interest on Accelerated Note

Holder of promissory note who accelerates its maturity is not entitled to recover portion of unpaid balance representing unearned interest. *Furesz v. Garcia (1981) 120 Cal. App. 3d 793, 796-797, 174 Cal. Rptr. 803*

[c] Prepayment Penalties on Accelerated Notes

Prepayment penalty specified in note to apply whether prepayment was "voluntary or involuntary, including any prepayment effected by holder's exercise of acceleration clause," is enforceable against holder of junior encumbrance who paid after holder's acceleration. *Pacific Trust Co. TTEE v. Fidelity Sav. & Loan Assn. (1986) 184 Cal. App. 3d 817, 823-826, 229 Cal. Rptr. 269* ; *but see Tan v. California Fed. Sav. & Loan Assn. (1983) 140 Cal. App. 3d 800, 809-811, 189 Cal. Rptr. 775* (prepayment penalty not required under terms of note when due-on-sale clause is enforced)

Civ. Code § 1671 does not invalidate prepayment penalty of six months' interest since federal regulations at time note was made provided for prepayment penalties; prepayment penalty is enforceable against holder of junior encumbrance. *Pacific Trust Co. TTEE v. Fidelity Sav. & Loan Assn. (1986) 184 Cal. App. 3d 817, 821-823, 824-826, 229 Cal. Rptr. 269*

Prepayment penalty of six months' interest was not unenforcable as unreasonable restraint on alienation. *Sacramento Sav. & Loan Assn v. Superior Court (1983) 137 Cal. App. 3d 142, 145-147, 186 Cal. Rptr. 823*

[5] Cross References

For related forms, *see §§ 385.90, 385.91*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.93

§ 385.93 Allegations Regarding Terms and Acceleration of Series of Notes on Failure to Pay One

[1] FORM Allegations Regarding Terms and Acceleration of Series of Notes on Failure to Pay One

1. On _____ [*date*], at _____ [*city*], _____ County, California, defendant executed and delivered to plaintiff his/her/its promissory notes in writing. The original maturity dates and amounts of these notes are as follows: _____ [*set forth maturity dates and amounts of notes sued on*]. True copies of these notes are attached hereto, in order of original maturity date, as Exhibits A through _____, and incorporated by this reference.

2. Each of the promissory notes provides that the note shall become due and payable forthwith, at the option of the holder, if the principal or interest of any other note of this series is not paid at maturity.

3. Defendant has not paid the note due on _____ [*date*], or the note due on _____ [*date*], _____ [*continue alleging other notes due*] or any part thereof. [Plaintiff is now, and has been at all times, the holder of every note mentioned in this complaint.] [Plaintiff has, by written notice delivered to defendant on _____ (*date*), and following the defaults, exercised his/her/its option to declare each and every other note in the same series due and payable forthwith and demanded immediate payment of them. A copy of this written notice is attached as Exhibit E and incorporated by reference.] By reason of the foregoing, the total principal sum of $_____ is unpaid, due, and owing to plaintiff from defendant on all of the notes, together with costs of collection and interest on the notes of _____ percent per annum on _____ [*specify interest due on each note*].

[2] Use of Form

These allegations are for use in place of Paragraphs 3 and 4 of the form in *§ 385.90[1]* in an action by a payee against a maker on default of payments due on one or more notes in a series of notes that give the holder the option to declare the entire series due on the failure to pay one of them [*see Com. Code § 3106(b)(1)* (note is not rendered conditional by reference to another writing for statement of rights with respect to acceleration); Official Comment 1 to U.C.C. 3-106 (1990)]. Paragraphs 1 and 2 of this form are for use in place of Paragraph 3 of the form in *§ 385.90[1]*; Paragraph 3 of this form is for use in place of Paragraph 4 of the form in *§ 385.90[1]*.

If the notes contain attorney's fees provisions, the allegation of demand in Paragraph 3 should be retained [*see § 385.90*; *see also Com. Code § 3108(a)(1)* (note that indicates it is payable at will of holder as note payable on demand)].

[3] Decisions

Civ. Code § 1479, governing application of payment on several obligations, requiresapplication of payment to note with earliest maturity date or asotherwise mandating ratable allocation among obligations with same maturity date, regardless of whether such obligations are secured or unsecured. *Jessup Farms v. Baldwin (1983) 33 Cal. 3d 639, 654, 190 Cal. Rptr. 355, 660 P.2d 813* (dictum, as renewal of already matured obligation left only one obligation)

When single action is brought to recover on series of promissory notes, each containing attorney's fees provision, and plaintiff recovers on some but not all notes, trial court as required to apportion fees among litigants. *Epstein v. Frank (1981) 125 Cal. App. 3d 111, 125, 177 Cal. Rptr. 831*

Negotiability of one of several notes maturing at different times belonging to single transaction forming connective series as not affected by provision that, on failure of maker to pay any one of series, rest shall become due and payable to holder. *Havens v. Foskett (1927) 81 Cal. App. 653, 658, 254 P. 642*

[4] Cross Reference

For related forms, *see §§ 385.90 -385.92*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.94

§ 385.94 Allegation of Partial Payment

[1] FORM Allegation of Partial Payment

Although plaintiff has made demand therefor, defendant has not paid on the note, or any part thereof, except the following amounts:

_____ $ _____
____ [*date*] _____
_____

_____ $ _____
____ [*date*] _____
_____

_____ $ _____
____ [*date*] _____
_____

There is now due, owing, and unpaid from defendant to plaintiff on the promissory note a balance of $_____, principal, together with interest from _____ [*date*].

[2] Use of Form

The foregoing allegation is for use in place of Paragraph 4 of *§ 385.90[1]* in an action by a payee against the maker on default of some, but not all, payments due on a promissory note [*Com. Code § 3602(a)* (obligation discharged to extent of payment); *but see Com. Code § 3601(b)* (discharge as not effective against person acquiring rights of holder in due course without notice of discharge)].

The foregoing allegation allows more flexibility than the allegation of partial payment in *§ 385.91[1]* in that it is not limited to use with installment notes and the partial payments need not have been installments.

[3] State Statutes

Holder's rights when promise that was consideration for instrument is only partially performed. *Com. Code § 3303(b)*

Payment or satisfaction. *Com. Code § 3601 et seq.*

[4] Decisions

Offer of partial performance as of no effect [*Civ. Code § 1486*]; tenderer required to do and offer everything necessary on his or her part and to make known his or her purpose fairly and without ambiguity; tender of two separately mailed partial payments as not constituting valid tender. *Gaffney v. Downey Savings & Loan Assn. (1988) 200 Cal. App. 3d 1154, 1165-1166, 246 Cal. Rptr. 421*

[5] Cross References

For related forms, *see §§ 385.90 -385.92*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.95

§ 385.95 Allegations of Terms and Nonpayment of Note Payable at or After Sight [Com. Code § 3108(a), (b)]

[1] FORM Allegations of Terms and Nonpayment of Note Payable at or After Sight [Com. Code § 3108(a), (b)]

1. On or about _____ [*date*], in _____ [*city*], _____ County, California, defendant, for valuable consideration, made, executed, and delivered to plaintiff his/her/its promissory note [of that date] in the amount of $_____, payable to the order of plaintiff, together with interest thereon at the rate of _____ percent per annum, _____ [at sight *or* _____(*number*) days after sight]. A copy of the note is attached hereto as Exhibit A and made a part hereof.

2. On or about _____ [*date*], plaintiff presented the note to _____ [*allege presentment in accordance with terms of note, e.g.,* defendant at the address stated in the note] and thereby demanded payment in accordance with the terms of the note. No part of the note has been paid[, although the time provided for in the note has elapsed], and there is now due, owing, and unpaid from defendant to plaintiff on the note the sum of $_____.

[2] Use of Form

The foregoing allegations are for use in place of Paragraphs 3 and 4, respectively, of *§ 385.90[1]* in an action by a payee against a maker of a note payable "at sight" or a specified number of days "after sight." A note is "payable on demand" if it states that it is payable at sight [*Com. Code § 3108(a)(1)*]. A note is "payable at a definite time" if it is payable on elapse of a definite period of time after sight [*Com. Code § 3108(b)*].

Presentment implies demand for payment [*see Com. Code § 3501(a)*; *see also Com. Code § 3502(a)(1)* (discussed in *§ 385.31*), *Com. Code § 3502(a)(2), (3)* (discussed in *§ 385.31[2]*)].

[3] State Statutes

Presentment and dishonor. *Com. Code §§ 3501, 3502*

[4] Cross Reference

For related forms, *see §§ 385.90 -385.92*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.96

§ 385.96 Allegation Regarding Terms of Note With No Time for Payment Expressed [Com. Code § 3108(a)(2)]

[1] FORM Allegation Regarding Terms of Note With No Time for Payment Expressed [Com. Code § 3108(a)(2)]

On or about _____ [*date*], at _____ [*city*], _____ County, defendant, for valuable consideration, made, executed, and delivered to plaintiff his/her/its promissory note in writing dated on that day, wherein defendant promised to pay to the order of plaintiff at _____ [*city*], _____ County, the sum of $_____ [, together with interest thereon at the rate of percent _____ per annum]. The time when the note was to be paid was not expressed in the note. A copy of the note is attached hereto as Exhibit A and made a part hereof.

[2] Use of Form

The foregoing allegation is for use in place of Paragraph 3 of *§ 385.90[1]* in an action for money due on a note by a payee against the maker when no time for payment is expressed in the note. A note that does not express a time for payment is a form of demand note [*Com. Code § 3108(a)(2)*].

[3] Cross Reference

For a related form, *see § 385.90*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.97

§ 385.97 Allegations Regarding Acknowledgment by Maker of Obligation Previously Barred by Statute of Limitations [Code Civ. Proc. § 360]

[1] FORM Allegations Regarding Acknowledgment by Maker of Obligation Previously Barred by Statute of Limitations [Code Civ. Proc. § 360]

1. Thereafter, on _____ [*date*], [plaintiff _____ (*describe any new consideration or promise flowing from plaintiff to defendant, e.g.,* agreed to guarantee certain debts of defendant), and, as a part of the consideration for this _____ (*specify, e.g.,* guarantee),] defendant acknowledged and agreed in writing that defendant would pay to plaintiff all monies on the promissory note even though plaintiff's claim on that note had become barred by the provisions of _____ [*specify applicable statute of limitations, e.g., Commercial Code Section 3118(a)*], on _____ [*date*]. A copy of that written acknowledgment is attached hereto as Exhibit B and made a part hereof.

2. No part of the principal or interest on the promissory note has been paid [except _____ (*continue with any payments made before the limitation period began to run, e.g.,* $_____, which was paid on June 23, 1982, and $_____, which was paid on July 20, 1983]. Immediately prior to the commencement of the above-entitled action, plaintiff demanded of defendant that defendant pay to plaintiff the balance of the principal and interest now due and unpaid on the promissory note, but defendant refused and still refuses to pay the balance of the principal or interest or any part of the balance. There is now due, owing, and unpaid from defendant to plaintiff the sum of $_____, principal with interest thereon at the rate of _____ percent per annum from _____ [*date*].

[2] Use of Form

The foregoing allegations are for use in an action for money due on default on a note by the payee against the maker after the maker has made a written an acknowledgment of the obligation on a note previously barred by the statute of limitations [*see Code Civ. Proc. § 360* (necessity of written acknowledgment, signed by person obligated, to renew contract); *see also Com. Code § 3303(b)* (discussed in *§ 385.90[14]*)]. Paragraph 1 of the foregoing form may be inserted in *§ 385.90* between Paragraphs 3 and 4 of that form; Paragraph 2 is for use in place of Paragraph 4 of *§ 385.90*. The allegation in Paragraph 1 regarding additional consideration flowing from plaintiff to defendant is optional

because, under *Code Civ. Proc. § 360*, the preexisting debt itself, even though barred by statute of limitations, is sufficient consideration to support a new acknowledgment of or promise to pay the note [*Easton v. Ash (1941) 18 Cal. 2d 530, 534-535, 116 P.2d 433]* . For further discussion of, and another form relating to, *Code Civ. Proc. § 360*, see Ch. 345, *Limitation of Actions* .

[3] Decisions

Code Civ. Proc. § 360 (renewal of obligation by acknowledgment) as requiring only that acknowledgment of existing debt be in writing signed by party to be charged. *Easton v. Ash (1941) 18 Cal. 2d 530, 536, 116 P.2d 433* ; *see also Carlton Browne & Co. v. Superior Court (1989) 210 Cal. App. 3d 35, 43-46, 258 Cal. Rptr. 118* (under *Code Civ. Proc. § 360.5*, which governs waiver of limitations defense, acknowledgment by obligor's agent as sufficient)

Writing as insufficient acknowledgment under *Code Civ. Proc. § 360* unless it contains some reference to debt that admits that there is debt owing to creditor for which debtor is liable and willing to pay. *Searles v. Gonzalez (1923) 191 Cal. 426, 430, 216 P. 1003*

Promise of one of several joint obligors as not reviving as against others cause of action barred by limitation, nor as suspending running of statute. *Searles v. Gonzalez (1923) 191 Cal. 426, 434, 216 P. 1003*

[4] Cross Reference

For related forms, *see §§ 385.90, 385.91*

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33-385 California Forms of Pleading and Practice--Annotated § 385.98

§ 385.98 Allegations Regarding Terms and Default Due to Failure to Furnish Additional Security [Com. Code § 3104(a)(3)(ii)]

[1] FORM Allegations Regarding Terms and Default Due to Failure to Furnish Additional Security [Com. Code § 3104(a)(3)(ii)]

1. By terms of this note, defendant deposited with plaintiff _____ [*specify collateral furnished to secure the loan, e.g.,* 100 shares of XYZ Corp., registered in the name of defendant,] to secure the note. The note further provided that plaintiff had the right to require additional security as he/she/it deemed proper and that the note became due and payable on defendant's failure to provide any additional security requested by plaintiff.

2. On or about _____ [*date*], plaintiff served notice of demand for additional security _____ [*specify additional collateral requested, e.g.,* in the amount of $_____] on defendant. A copy of this notice is attached hereto as Exhibit B and made a part hereof.

3. Thereafter, defendant refused and continues to refuse to furnish additional security. [Plaintiff demanded that defendant pay the note, but] [N]o part of the note [or interest thereon] has been paid, and there is now unpaid on account of the note $_____, principal, and interest thereon [at the rate of _____ percent per annum from _____(*date*)].

[2] Use of Form

The foregoing allegations are for use in an action by a payee against a maker on default of payment on a promissory note occasioned by the maker's failure to furnish additional security as agreed to in the note. Paragraphs 1 and 2 of the foregoing form may be inserted in the form of complaint [§ 385.90[1]] after Paragraph 3. Paragraph 3 of this form is for use in place of Paragraph 4 of *§ 385.90[1]*. The allegation of demand in Paragraph 3 of this form may or may not be necessary [*see § 385.90[1]*].

[3] State Statutes

Undertaking to give, maintain, or protect collateral to secure payment as not affecting negotiability. *Com. Code § 3104(a)(3)(ii)*

[4] Decisions

Payee on unambiguously worded promissory note who had right to call for additional security as not required to specify character of additional security. *Kent v. Lampman (1943) 59 Cal. App. 2d 407, 410, 139 P.2d 57*

[5] Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, §§ 10, 19 (10th ed. 2005)

[6] Cross Reference

For related forms, *see §§ 385.90, 385.91*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.99

§ 385.99 Allegations Regarding Terms of Note Payable to Bearer [Com. Code § 3109]

[1] FORM Allegations Regarding Terms of Note Payable to Bearer [Com. Code § 3109]

1. On or about _____ [*date*], in _____ [*city*], _____ County, California, defendant, for valuable consider ation, made, executed, and delivered to _____ [*name or* plaintiff] his/her/its promissory note [of that date] payable to bearer in the principal amount of $_____, payable _____ [*describe other terms of payment, e.g.,* on _____ (*date*), with interest from the date of the note at the rate of _____ percent per annum]. A copy of the note is attached as Exhibit A and incorporated by reference.

2. [On or about _____(*date*), for valuable consideration, _____(*name*) delivered (and negotiated) the note to plaintiff.] Plaintiff now holds the note and is the bearer of it.

[2] Use of Form

These allegations are for use in place of Paragraph 3 of *§ 385.90[1]* in an action against the maker of a bearer note on default of payment [*see Com. Code § 3109* (discussed in *§ 385.13[4]*)].

[3] State Statutes

Instruments payable to bearer. *Com. Code § 3109(a), (c)*

[4] Decisions

Negotiability of instrument payable to bearer is not destroyed by conditions of trust indenture securing it. *Siebenhauer v. Bank of Cal. Nat'l Ass'n (1930) 211 Cal. 239, 243, 294 P. 1062*

[5] Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, §§ 14, 23, 53 (10th ed. 2005)

[6] Cross Reference

For related forms, *see §§ 385.90, 385.91*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.100

§ 385.100 Complaint for Money Due on Default [Civ. Code § 3302] on Lost Note [Civ. Code § 3309]--By Personal Representative of Payee Against Maker

[1] FORM Complaint for Money Due on Default [Civ. Code § 3302] on Lost Note [Civ. Code § 3309]--By Personal Representative of Payee Against Maker

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], as _____ [*specify title, e.g.,* Executor of the Will] of _____ [*name*], deceased, Plaintiff, vs. _____ [*name*], [and DOES I through _____] Defendant(s).	)))))))	NO. _____ COMPLAINT FOR ENFORCEMNT OF LOST INSTRUMENT [Amount demanded _____ (exceeds or does not exceed) $10,000] [LIMITED CIVIL CASE]

Plaintiff alleges:

1. Plaintiff is the duly appointed, qualified, and acting _____ [*title, e.g.,* executor of the will] of _____ [*decedent's name*], who died on _____ [*date*]. On _____ [*date*], letters _____ [testamentary *or* of administration *or* of administration with will annexed], a certified copy of which is attached hereto as Exhibit A and made a part hereof, were issued to plaintiff, and, since that time, plaintiff has been and now is the personal representative of decedent's estate.

2. The cause of action sued on herein arose in and is payable in _____ County, California, and defendant is a resident of _____ County, California [*or other allegation of capacity and residence of defendant; see § 385.90[1], Paragraph 1*].

[3. *Fictitious name allegation, if appropriate. See § 385.90[1], Paragraph 2.*]

4. On or about _____ [*date*], at _____ [*city*], _____ County, California, defendant, for valuable consideration, made, executed, and delivered to decedent his/her/its promissory note [of that date] in the amount of $_____, payable _____ [*describe terms of payment, e.g.,* to decedent or order, three years from date, with interest at the rate of _____ percent per annum]. [A copy of this note is attached hereto as Exhibit B and made a part hereof.]

5. On a date unknown to plaintiff, the note was lost and remains lost as of the date of filing this complaint. [Plaintiff is informed and believesand on such information and belief alleges that] [D]ecedent did not transfer the note or any interest in it. Plaintiff also did not transfer the note or any interest in it. [Plaintiff is informed and believes and on such information and belief alleges that] [T]he note was never seized or taken from decedent in any lawful manner. _____ [*Continue with fact establishing plaintiff's knowledge of the foregoing, e.g.,* Decedent maintained a notebook that contained copies of decedent's will and copies of all documents relating to decedent's assets and liabilities. Decedent's will mentioned the note that is the subject of this action, and the notebook contained a copy of the note and referenced the note's due date on a schedule of maturities of all notes and bonds owned to decedent. The will was last revised only three months before decedent's death].

6. Plaintiff is now entitled to enforce the instrument.

7. After plaintiff's appointment as _____ [*title, e.g.,* executor], plaintiff _____ [*explain efforts to locate lost note or manner of its destruction, e.g.,* went through all of decedent's papers and belongings, including decedent's safe deposit box. A second copy of the note was found in the safe deposit box. Plaintiff inquired of the bank and brokerage firm that handled decedent's affairs whether they had the original note or whether decedent had asked them to act as collection agent on the note. Neither the bank nor the brokerage firm had the note or had been asked by decedent to collect it. Plaintiff spoke with the attorney who last revised decedent's will. The attorney did not have the original note].

8. [*Allegation of demand for payment and amount owing. See § 385.90[1], Paragraph 4.*]

[*EITHER*]

9. When plaintiff demanded of defendant that defendant pay the note, plaintiff _____ [*specify indemnity and form of offer, e.g.,* tendered defendant a surety bond in excess of the amount owing on the note and requested that defendant inform him/her immediately, if the bond was unsatisfactory, what other indemnification defendant required. Defendant has not replied].

[*OR*]

9. Plaintiff is ready, willing, and able to indemnify defendant against any loss that might occur by reason of a claim by any other person to enforce the note.

[*CONTINUE*]

10. [*Allegations as to attorney's fees. See § 385.90[1], Paragraph 5.*]

[*Prayer. See § 385.90[1].*]

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 385.90[1].*]

[2] Use of Form

The foregoing complaint is for use in an action by a personal representative of a deceased payee against the maker of a lost, overdue promissory note for enforcement of that note [*see Com. Code § 3309* (discussed in *§ 385.48*]. U.C.C. § 3-309 is a modification of former U.C.C. § 3-804. The rights stated are those of "a person entitled to enforce the instrument" at the time of loss rather than those of an "owner," as in former Section 3-804 [Official Comment to U.C.C. § 3-309 (1990)]. *Com. Code § 3301* defines "person entitled to enforce an instrument" and includes both persons not in possession who are entitled to enforce the instrument in accordance with *Com. Code § 3309* [*see Com. Code § 3301(c)*] and anyone who, under applicable law, is a successor to the holder or otherwise acquires the holder's rights [Official Comment to U.C.C. § 3-301].

Although *Civ. Code § 3415(b)* requires the court to order the owner of a lost or destroyed negotiable instrument to give an indemnity bond to any person reissuing, reexecuting, or reacknowledging the instrument, *Com. Code § 3309*, as amended by Stats. 1992, ch. 914, § 6, only requires "adequate protection" to be given to the person required to pay the instrument unless the court finds that the person required to pay the instrument already is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means [*see also § 385.100[4]*].

For discussion and forms relating to surety bonds, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[3] Allegations

This complaint alleges (1) plaintiff's capacity as personal representative (Paragraph 1) [*see Com. Code § 3301(c)* (person entitled to enforce instrument); *Prob. Code §§ 9650, 9651* (powers and responsibilities of personal representatives generally)]; (2) the execution, delivery, and terms of the lost instrument and the fact that the note was issued for consideration (Paragraph 4) [*see FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 383, 282 Cal. Rptr. 508* (in simple action on note, allegation of execution of note alleges existence of contract, incorporation of copy of note alleges its terms, and allegation of nonpayment in accordance with those terms alleges breach)]; (3) the loss of the note while plaintiff or decedent was its holder, that neither plaintiff nor decedent transferred the note or had it lawfully seized, and plaintiff's inability to obtain possession of the note (Paragraph 5) [*Com. Code § 3309(a)*]; (4) that plaintiff is the holder of the lost note (Paragraph 6); (5) additional efforts to find the note, sufficient to sustain the conclusion that it is lost (Paragraph 7) [*see Com. Code § 3309(a)(3)*]; and (6) alternative allegations regarding indemnity oradequate protection: either that it was tendered at the time of demand (first alternative Paragraph 9) or that plaintiff stands ready, willing, and able to provide it if the court determines it is necessary (second alternative Paragraph 9) [*see Com. Code § 3309(b)*].

The form adopts the allegation of demand for payment from *§ 385.90*, but other demand allegations [*see, e.g., §§ 385.91 -385.93, 385.95, 385.98*] may be more appropriate depending on the terms of the note and the event of default [*see §§*

385.90 and *385.91*].

[4] U.C.C. Comment on Indemnification

Under U.C.C. § 3-309(b), judgment to enforce the instrument may not be given unless the court finds that the defendant will be adequately protected against a claim to the instrument by a holder that may appear at some later time. The court is given discretion to determine how adequate protection is to be assured. Former U.C.C. § 3-804 allowed the court to "require security indemnifying the defendant against loss." Under *Section 3-309* adequate protection is a flexible concept. For example, there is substantial risk that a holder in due course may make a demand for payment if the instrument was payable to bearer when it was lost or stolen. On the other hand, if the instrument was payable to the person who lost it and that person did note endorse it, no other person could be the holder of the instrument. In some cases, there is risk of loss only if there is doubt about whether the facts alleged by the person who lost the instrument are true. Thus, the type of adequate protection that is reasonable in the circumstances may depend on the degree of certainty about the facts of the case [Official Comment to U.C.C. § 3-309 (1990)]. This is a change from prior California law. Nevertheless, pre-Code cases are included below for possible guidance.

[5] Cross References

For a form of declaration of loss and notice of claim by the payee or remitter of a lost, stolen, or destroyed teller's check, cashier's check, or certified check, see Ch. 95, *Banks, Deposits, and Checks*

For forms for use in actions involving lost papers generally, see Ch. 356, *Lost Papers*

For discussion and forms relating to surety bonds, see Ch. 538, *Suretyship, Bonds, and Undertakings*

[6] State Statutes

Issuance of duplicate document for lost or destroyed documents. *Civ. Code § 3415*

Person entitled to enforce instrument includes person not in possession of instrument who is entitled to enforce instrument under *Com. Code § 3309*. *Com. Code § 3301(c)*

Defense that instrument is lost or stolen. *Com. Code § 3305(c)*

Action for payment of lost, destroyed, or stolen negotiable instruments. *Com. Code § 3309*

Claim of loss procedure for lost, stolen, or destroyed, teller's check, certified check, or cashier's check. *Com. Code § 3312*

[7] Decisions

[a] Enforcement of Lost, Destroyed, or Stolen Instruments

Interpretation of requirement in *Com. Code § 3309* that "person was in possession" before possession was lost, to hold

that joint payee alleged cause of action for recovery of amount of check from drawer under that section by alleging it was joint payee of check which was delivered to copayee, who deposited it without obtaining plaintiff's endorsement or consent. *Crystaplex Plastics, Ltd. v. Redevelopment Agency of the City of Barstow (2000) 77 Cal. App. 4th 990, 999-1000, 92 Cal. Rptr. 2d 197* (failure to allege plaintiff's actual possession of check was not fatal to cause of action because delivery of check to joint payee was sufficient to satisfy possession requirement)

[b] Indemnity

Even if it produces hardship, better rule as to require indemnity in all cases, whether note has been lost or destroyed. *Randolph v. Harris (1865) 28 Cal. 561, 565* (note destroyed by fire; indemnity tendered before suit and again during trial, though not in proper form); *Welton v. Adams & Co. (1854) 4 Cal. 37, 41* (certificate of deposit destroyed in fire; owners unable to provide security)

Failure to tender indemnity before suit as not fatal to recovery and only affects the question of costs, which plaintiff can have only if indemnity was tendered before suit. *Randolph v. Harris (1865) 28 Cal. 561, 565-566*

On issue of indemnity, no distinction as existing between note that was destroyed by fire and one that was lost. *Randolph v. Harris (1865) 28 Cal. 561, 564-565*

Trustee's demand for corporate surety (rather than individual surety) before executing reconveyance of lost note and mortgage as reasonable because corporate sureties generally remain in existence longer, able to be located longer, and less subject to financial vagaries. *Huckell v. Matranga (1979) 99 Cal. App. 3d 471, 479-480, 160 Cal. Rptr. 177*

Indemnity as not essential in case of nonnegotiable instrument. *Dollar v. International Banking Corp. (1910) 13 Cal. App. 331, 342, 109 P. 499* (nonnegotiable deposit receipt)

[c] Obligations on Instrument After Loss

Person as not losing right to collect lost instrument, which is primary evidence of obligation; loss or destruction of instrument as not changing obligation of parties. *Johnston v. Wolf (1931) 118 Cal. App. 388, 391, 5 P.2d 673* (trade acceptance apparently lost in mail in transit to endorsee)

[d] Proof of Loss

Example of testimony of owner as being sufficient to establish loss of paid and canceled note and mortgage on way home from recorder's office. *Woods v. Jensen (1900) 130 Cal. 200, 205, 62 P. 473* ; *see also California National Bank v. Weldon (1910) 14 Cal. App. 765, 769-770, 113 P. 334* (check apparently lost in mail between banks in collection chain after depositary bank paid payee)

[8] Text References

P. Bestos, BENDER'S U.C.C. SERVICE, MODERN U.C.C. LITIGATION FORMS, § 3-804 (Matthew Bender)

[9] Cross Reference

For related forms, *see §§ 385.90, 385.91*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.101

§ 385.101 Complaint [Code Civ. Proc. § 425.10] for Money Due on Default [Civ. Code § 3302] on Note--By Joint Payee [Com. Code § 3110(d)] Against Maker and Copayee [Code Civ. Proc. § 382]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Money Due on Default [Civ. Code § 3302] on Note--By Joint Payee [Com. Code § 3110(d)] Against Maker and Copayee [Code Civ. Proc. § 382]

[*Caption. See § 385.90[1].*]

Plaintiff alleges:

1. Defendants are, and at all times herein mentioned were, residents of _____ [*city*], _____ County, California [*or allege other capacity and residence of defendants or other basis of venue, e.g., county where note was made or is payable*].

[2. *Fictitious name allegation, if appropriate. See § 385.90[1], Paragraph 2.*]

3. On or about _____ [*date*], in _____ [*city*], _____ County, California, defendant _____ [*name of maker*], for valuable consideration, made and delivered to plaintiff and defendant _____ [*name of copayee*] jointly his/her/its promissory note [of that date] in the principal amount of $_____, payable _____ [*describe terms of payment, e.g.,* to plaintiff and defendant _____ (*name of copayee*) or order, on or before _____(*date*), with interest on that amount from the date of the note at the rate of _____ percent per annum]. A copy of this note is attached hereto as Exhibit A and made a part hereof.

4. Defendant _____ [*name of copayee*] is a necessary party to a complete determination of the question involved herein but has refused to join plaintiff in the suit. Such defendant is joined as a party defendant in the above-entitled action pursuant to the provisions of *Code of Civil Procedure Section 382*.

5. No part of the note has been paid[, although plaintiff has made demand therefor], and there is now due and owing on

account of the note $_____, principal, together with interest thereon [at the rate of _____ percent per annum from _____(*date*)].

6. [*Allegations as to attorney's fees. See § 385.90[1], Paragraph 5.*]

[*Prayer. See § 385.90[1].*]

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 385.90[1].*]

[2] Use of Form

The foregoing complaint is for use in an action for money due on default on a note by a joint payee against the maker when the copayee is unwillingto join as a plaintiff and is made a codefendant [*see Com. Code §§ 3110(d), 3116(a)* (endorsers who endorse as joint payees, discussed in *§ 385.16[5]* and *§ 385.17[6]*)].

[3] Allegations

The foregoing complaint alleges (1) defendants' residences or other allegation for venue (Paragraph 1); (2) the execution of the note by the maker, for consideration, and its delivery to plaintiff and the copayee defendant (Paragraph 3) [*see FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 383, 282 Cal. Rptr. 508]* ; (3) defendant copayee's unwillingness to join in the action and the necessity of the copayee's joinder as a defendant pursuant to *Code Civ. Proc. § 382* (Paragraph 4); and (4) nonpayment despite maturity or demand (Paragraph 5) [*Com. Code §§ 3501, 3502(a)*; *see also § 385.90* (demand is usually prerequisite to award pursuant to attorney's fees provision in note)]. Counsel may prefer to substitute demand allegations from another form [*see, e.g., §§ 385.91 -385.93, 385.95, 385.98*].

[4] State Statutes

Instruments payable to two or more persons. *Com. Code § 3110(d)*

[5] Cross Reference

For related forms, *see §§ 385.90, 385.91*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.102

§ 385.102 Complaint [Code Civ. Proc. § 425.10] for Money Due on Default [Civ. Code § 3302] on Note--By Payee Against Maker and Party Endorsing Before Delivery [Com. Code §§ 3415, 3419(b), (c)]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Money Due on Default [Civ. Code § 3302] on Note--By Payee Against Maker and Party Endorsing Before Delivery [Com. Code §§ 3415, 3419(b), (c)]

[*Caption. See § 385.90[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 385.101[1], Paragraph 1.*].

[2. *Fictitious name allegation, if appropriate. See § 385.90[1], Paragraph 2.*]

3. On _____ [*date*], at _____ [*city*], _____ County, California, defendant [*name of maker*], for valuable consideration, made and delivered to plaintiff his/her/its promissory note [of that date] in the amount of $_____, payable _____ [*describe terms of payment, e.g.,* to plaintiff or order, on demand, with interest at the rate of _____ percent per annum]. A copy of this note is attached hereto as Exhibit A and made a part hereof.

4. Before delivery of the note to plaintiff, defendant _____ [*name of endorser*] placed his/her/its signature in blank on the back of the note and endorsed the note. A copy of the reverse side of the note is attached hereto as Exhibit B and made a part hereof.

5. [*Unless the note is a demand note, begin:* At maturity of the note,] [O]n _____ [*date*], plaintiff presented the note to defendant _____ [*name of maker*] for payment and _____ [*name of maker*] refused and continues to refuse to pay the note.

6. On _____ [*date*], notice of dishonor was given to defendant _____ [*name of*

endorser]. [A copy of the notice of dishonor is attached hereto as Exhibit C and made a part hereof.]

7. No part of the note has been paid[, although plaintiff has demanded payment from _____ (*name of endorser*)], and there is now due, owing, and unpaid from defendants to plaintiff on account of the note the sum of $_____, principal, together with interest thereon [at the rate of _____ percent per annum from _____ (*date*)].

8. [*Allegations as to attorney's fees. See § 385.90[1], Paragraph 5.*]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For the sum of $_____, with interest thereon at _____ percent per annum from _____ [*date*];

2. For reasonable attorney's fees in the sum of $_____;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 385.90[1].*]

[2] Use of Form

The foregoing form of complaint is for use in an action for money on default on a note by the payee against the maker and a party endorsing before delivery. Such an anomalous endorser is presumed to be an accommodation party [*Com. Code § 3419(c)*] and is obligated to pay the instrument in the capacity in which he or she signed the instrument (in this case, in the capacity of endorser) [*Com. Code § 3419(b)*; *see* discussion in *§ 385.40[1]*]. Thus, the endorser is not liable on the note until after presentment (if required) to the maker and receipt by the endorser of notice of dishonor [*see Com. Code § 3415* (discussed in *§ 385.38*; *see also* discussion in *§ 385.103[4]*].

Although both the maker and endorser are named as defendants in the foregoing form, plaintiff may have only one recovery [*see also Com. Code § 3419(e)* (accommodation party who pays instrument as entitled to reimbursement from accommodated party)].

[3] Allegations

The foregoing complaint alleges (1) defendants' residences or other allegation for venue (Paragraph 1); (2) the execution of the note by the maker, for consideration, and its delivery to plaintiff (Paragraph 3) [*see FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 383, 282 Cal. Rptr. 508]* ; (3) the gratuitous endorsement before delivery (Paragraph 4) [*see Com. Code § 3419(a)-(c)*; Official Comments 1, 2 to U.C.C. § 3-419 (1990)]; (4) presentment and dishonor of the note at maturity (Paragraph 5) [*see Com. Code §§ 3501, 3502(a)*; *see also § 385.90* (demand is usually prerequisite to award pursuant to attorney's fees provision in note)]; (5) that notice of dishonor was given to the endorser (Paragraph 6) [*see Com. Code §§ 3415(a), (c), 3503*]; and (6) that the note remains unpaid (Paragraph 7).

Counsel may wish to substitute, in whole or in part, allegations from §§ 385.91-385.96, *385.98, 385.99* regarding terms

of the note or default and presentment to the maker.

[4] State Statutes

Endorser's liability. *Com. Code § 3415*

Accommodation party. *Com. Code § 3419*

[5] Decisions

Complaint in action on note against endorser as required to allege essential facts relative to presentment of note on maturity to makers thereof and to demand on them that they pay it, along with immediate notice of dishonor or nonpayment to endorser. *Merchants Nat'l Bank v. Bentel (1913) 166 Cal. 473, 476, 137 P. 25* ; *Keyes v. Fenstermaker (1864) 24 Cal. 329, 332-333* ; *Harris v. Hilland (1934) 2 Cal. App. 2d 404, 405, 38 P.2d 164* ; *Wills v. Booth (1907) 6 Cal. App. 197, 201, 91 P. 759*

Endorsing party signing before delivery of note so as to add credit thereto as endorser entitled to notice of maker's nonpayment. *Fessenden v. Summers (1880) 62 Cal. 484, 487-488*

Proper demand and notice of protest as waived when it is clear that demand would have been refused. *Engelman v. Gordon (1966) 242 Cal. App. 2d 510, 518, 51 Cal. Rptr. 627* ; *now see Com. Code § 3504*

Whether or not defendants are accomodation endorsers as ordinarily question of fact for factfinder. *Western Hardwood Lbr. Co. v. Superior Furniture Mfg., Ltd. (1936) 18 Cal. App. 2d 287, 289, 63 P.2d 828* ; *accord*, Official Comment 3 to U.C.C. § 3-419 (1990)

Endorser for accommodation and for purpose of lending credit to transaction as unable to be held liable for contribution. *Gardiner v. Holcomb (1927) 82 Cal. App. 342, 353, 255 P. 523* ; *see now Com. Code § 3419(e)*

[6] Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, §§ 22-23, 29, 39, 48, 51-52 (10th ed. 2005)

[7] Cross Reference

For related forms, *see §§ 385.90, 385.91*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.103

§ 385.103 Complaint [Code Civ. Proc. § 425.10] for Money Due on Default [Civ. Code § 3302] on Note--By Payee Against Accommodation Maker or Guarantor [Com. Code § 3419]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Money Due on Default [Civ. Code § 3302] on Note--By Payee Against Accommodation Maker or Guarantor [Com. Code § 3419]

[*Caption. See § 385.90[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 385.90[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 385.90[1], Paragraph 2.*]

3. On or about _____ [*date*], at _____ [*city*], _____ County, California, _____ [*name of maker*], for valuable consideration, made, executed, and delivered to plaintiff his/her/its promissory note, in and by which note _____ [*name of maker*] promised to pay _____ [*set forth terms of note, e.g.,* 36 months after the date thereof, to plaintiff or order, the sum of $_____, together with interest thereon at the rate of _____ percent per annum]. A copy of the note is attached hereto as Exhibit A and made a part hereof.

4. On or about _____ [*date*], and prior to delivery to plaintiff, defendant _____ [*name of accommodation party*], as a part of the same transaction, _____ (*specify way in which accommodation party signed note,.e.g.,* signed the note, beneath the signature of _____ (*name of maker*), followed by the notation "Guarantor"].

5. [Although plaintiff has demanded payment from defendant,] [T]here is now due, owing, and unpaid to plaintiff from defendant on account of the promissory note the sum of $_____, principal, and interest thereon [at the rate of _____ percent per annum from _____ (*date*)].

6. [*Allegations as to attorney's fees. See § 385.90[1], Paragraph 5.*]

[*Prayer. See § 385.90[1].*]

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 385.90[1].*]

[2] Use of Form

The foregoing complaint is for use in an action by a payee against a guarantor on default by the maker of payment due on a promissory note. Under *Com. Code § 3419*, as revised by Stats. 1992, ch. 914, § 6, a person signing as guarantor is presumed to be an accommodation maker and obligated to pay the instrument in the capacity in which he or she signs the instrument, here as maker [*Com. Code § 3419(b)*; *see* discussion in *§ 385.40[1]*; *see also § 385.103[4]*].

An accommodation maker who pays the payee or holder of a negotiable instrument generally has the same rights as a guarantor under *Civ. Code § 2848* in that the accommodation maker then is entitled to enforce the note against the primary maker ("party accommodated") in accordance with its terms [*Flojo Internat., Inc. v. Lassleben (1992) 4 Cal. App. 4th 713, 721-722, 6 Cal. Rptr. 2d 99* (payee assigned note to accommodation maker after payment)]. For discussion of guarantor's rights under the Civil Code and forms for their enforcement, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[3] Allegations

The foregoing complaint alleges (1) the execution of the note by the maker, for consideration, and its delivery to plaintiff (Paragraph 3) [*see FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 383, 282 Cal. Rptr. 508]* ; (2) the signature by the accommodation party (Paragraph 4) [*see Com. Code § 3419(a)-(c)*; Official Comments 1, 2 to U.C.C. § 3-419 (1990)]; and (3) default and demand for payment note at maturity and the fact that the note remains unpaid (Paragraph 5) [*see Com. Code §§ 3501, 3502(a)*; *see also § 385.90* (demand is usually prerequisite to award pursuant to attorney's fees provision in note); *Flojo Internat., Inc. v. Lassleben (1992) 4 Cal. App. 4th 713, 721-722, 6 Cal. Rptr. 2d 99* (payee assigned note to guarantor after payment; guarantor entitled to enforce note against maker in accordance with its terms, including increased interest rate after default and attorney's fee provision)].

Counsel may wish to substitute, in whole or in part, allegations from §§ 385.91-385.96, *385.98, 385.99* regarding terms of the note or default and presentment or demand.

[4] U.C.C. Comment on Accommodation Parties

Former Division 3 was confusing because the obligation of a guarantor was covered in both U.C.C. §§ 3-415 and 3-416. The latter section suggested that a signature accompanied by words of guaranty created an obligation distinct from that of an accommodation party. Revised Division 3 eliminates that confusion by stating in Section 3-419 the obligation of a person who uses words of guaranty. Portions of former Section 3-416 are preserved: Section 3-416(2) is reflected in U.C.C. § 3-419(d), and former Section 3-416(4) is reflected in U.C.C. § 3-419(c) [Official Comment 4 to U.C.C. § 3-419 (1990)].

U.C.C. § 3-419(b) states that an accommodation party is liable on the instrument in the capacity in which the party

signed the instrument. In most cases, that will be either that of a maker or endorser. But subsection (d) provides a limitation on subsection (b). If the signature of the accommodation party is accompanied by words indicating unambiguously that the party is guaranteeing collection rather than payment of the instrument,liability is limited to that stated in subsection (d), which is based on former Section 3-416(2) [Official Comment 4 to U.C.C. § 3-419 (1990)].

Whether a person is an accommodation party is a question of fact, but it is almost always the case that a comaker who signs with words of guaranty after the signature is an accommodation party. Under U.C.C. § 3-419(c), signing with words of guaranty or as an anomalous endorser also creates a presumption that the signer is an accommodation party [Official Comment 3 to U.C.C. § 3-419 (1990)].

An accommodation party may sign the instrument at the time value is obtained by the accommodated party or later [Official Comment 1 to U.C.C. § 3-419 (1990)]. It does not matter whether the accommodation party signs gratuitously at the time the instrument is issued or after the instrument is in the possession of a holder. U.C.C. § 3-319(b) takes the view that there need be no consideration running to the accommodation party and is intended to change ocassional decisions holding that there is no sufficient consideration when the accommodation party signs a note after it is in the hands of a holder who has givein value. Such an accommodation party is liable to the holder even though there is no extension or time or other concession [Official Comment 2 to U.C.C. § 3-419 (1990)].

[5] State Statutes

Contract of accommodation party. *Com. Code § 3419*

[6] Decisions

Shareholder of corporation that executed promissory note as principal obligor rather than merely surety when note stated on its face that shareholder was jointly and severally liable on debt and nothing in its terms indicated that shareholder executed note in any capacity other than obligor. *Jessup Farms v. Baldwin (1983) 33 Cal. 3d 639, 645 n.4, 190 Cal. Rptr. 355, 660 P.2d 813*

Rule that, in suit against surety, principal obligation and its nonpayment must be clearly set forth because surety's liability is only conditional as having no application when instrument sued on is unconditional by its terms and condition to which it is subject is created by extrinsic facts entirely. *Thompson v. Koeller (1920) 183 Cal. 476, 479, 191 P. 927*

Continuing guaranty as form of suretyship obligation and subject to all provisions of law relating to suretyship. *Wiener v. Van Winkle (1969) 273 Cal. App. 2d 774, 786, 78 Cal. Rptr. 761*

[7] Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, §§ 23, 29, 48, 51 (10th ed. 2005)

[8] Cross Reference

For related forms, *see §§ 385.90, 385.91, 385.102*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.104

§ 385.104 Complaint [Code Civ. Proc. § 425.10] for Money Due on Default [Civ. Code § 3302] on Note--By Endorsee Against Maker--Transfer by Endorsement in Blank [Com. Code § 3205(b)]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Money Due on Default [Civ. Code § 3302] on Note--By Endorsee Against Maker--Transfer by Endorsement in Blank [Com. Code § 3205(b)]

[*Caption. See § 385.90[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 385.90[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 385.90[1], Paragraph 2.*]

3. On or about _____ [*date*], in _____ [*city*], _____ County, California, for valuable consideration, defendant made, executed, and delivered to _____ [*name of payee*], his/her/its promissory note. A copy of the note[, both front and back,] is attached hereto as Exhibit A and made a part hereof.

4. By the terms of this note, defendant promised to pay _____ [*name of payee*] or order $_____, _____ [*describe terms of payment, e.g.,* on presentation to Bank at its main office in Los Angeles, California, on June 30, 1995, and interest on that amount from the date of the note at the rate of _____ percent per annum].

5. On _____ [*date*], for valuable consideration, _____ [*name of payee*] endorsed the note in blank and delivered it to plaintiff, who continues in possession of it.

6. [On or about _____(*date*), plaintiff demanded that defendant pay the note _____ (*describe demand, e.g.,* by presenting the note to Bank for payment), but] [N]o part of this note has been paid, and there

is now due, owing, and unpaid on account of the note the sum of $_____, principal, together with interest thereon [at the rate of _____ percent per annum from _____ (*date*)].

7. [*Allegations as to attorney's fees. See § 385.90[1], Paragraph 5.*]

[*Prayer. See § 385.90[1].*]

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 385.90[1].*]

[2] Use of Form

The foregoing complaint is a general form for use in an action by an endorsee, who may or may not qualify as a holder in due course [*see Com. Code § 3302*], against the maker on default of the payment due on apromissory note. The foregoing form alleges a blank endorsement (Paragraph 5) [*see Com. Code § 3205(b)* (endorsement in blank as making instrument payable to bearer)]. If a special endorsement was used, counsel may substitute allegations from § 385.105 or 385.106.

If the endorsement was an "anomalous endorsement," such as one made before issuance and delivery of the note, or if the purpose of the endorsement was not clear, the most likely effect is that the endorser is an accommodation party and liable as an endorser [*Com. Code §§ 3204(a), 3205(d), 3419(a)-(c)*; *see § 385.102*].

[3] Allegations

Older cases hold a complaint sufficient to state a cause of action by a holder of a promissory note if it alleges that (1) at the time the note was made, it was delivered to the payee (Paragraph 3); (2) the payee endorsed the note in blank (Paragraph 5); and (3) the plaintiff was in possession of it (Paragraph 5) [*see, e.g., Eames v. Crosier (1894) 101 Cal. 260, 261-262, 35 P. 873]* . The following additional allegations, however, seem necessary or appropriate under the Commercial Code: (4) the note was issued for consideration (Paragraph 3) [*see Com. Code §§ 3303* (value and consideration), *3305(a) (b)* (defenses); *see also FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 383, 282 Cal. Rptr. 508* (in simple action on note, allegation of execution of note alleges existence of contract, incorporation of copy of note alleges its terms, and allegation of nonpayment in accordance with those terms alleges breach)]; (5) plaintiff gave value when the original payee transferred the note to plaintiff (Paragraph 5) [*see Com. Code § 3302(a)(2)(A)* (holder in due course as one who, among other things, took for value)]; and (6) any necessary presentment or demand for payment was made (Paragraph 6) [*see Com. Code § 3502(a)*]. Demand for payment before commencement of suit is generally necessary to recover attorney's fees in accordance with a provision therefor in the note [*see § 385.90*].

For alternative allegations regarding terms of the note and types of defaults, see *§§ 385.90 -385.93, 385.95, 385.96, 385.98, 385.99*.

[4] State Statutes

Negotiation and transfer. *Com. Code § 3204*

Special endorsement; blank endorsement; anomalous endorsement. *Com. Code § 3205*

Persons entitled to enforce instrument. *Com. Code § 3301*

Holder in due course. *Com. Code § 3302*

[5] Decisions

Endorsement in blank as making note payable to bearer. *Eames v. Crosier (1894) 101 Cal. 260, 261-262, 35 P. 873* ; *accord Com. Code § 3205(b)*

Mere presence of suspicious circumstances that would be sufficient to put reasonably prudent individual on inquiry as not negating existence of good faith in holder in due course of negotiable instrument. *Mann v. Leasko (1960) 179 Cal. App. 2d 692, 697, 4 Cal. Rptr. 124*

Nothing short of actual knowledge of defects in instrument or of actual bad faith as defeating status of endorsee who otherwise qualifies as holder in due course. *Mann v. Leasko (1960) 179 Cal. App. 2d 692, 698, 4 Cal. Rptr. 124*

Promissory note containing unqualified endorsement as prima facie evidence of delivery to and ownership thereof by plaintiff, authority of payee to endorse it, and status of plaintiff as holder and therefore, prima facie, as holder in due course. *California Standard Fin. Corp. v. J.D. Millar Realty Co. (1931) 118 Cal. App. 185, 188, 5 P.2d 41* ; *Pugh v. Dawson (1928) 95 Cal. App. 505, 516, 273 P. 39*

[6] Cross References

For alternative forms of complaints involving assignments of nonnegotiable bills and notes, see Ch. 60, *Assignments*

For related forms, *see §§ 385.90, 385.91*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.105

§ 385.105 Complaint [Code Civ. Proc. § 425.10] for Money Due on Default [Civ. Code § 3302] on Note--By Endorsee Against Maker and Payee/Endorser [Com. Code § 3415(a)-(c)]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Money Due on Default [Civ. Code § 3302] on Note--By Endorsee Against Maker and Payee/Endorser [Com. Code § 3415(a)-(c)]

[*Caption. See § 385.90[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 385.101[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 385.90[1], Paragraph 2.*]

3. On or about _____ [*date*], in _____ [*city*], _____ County, California, for valuable consideration, defendant _____ [*name of maker*] made, executed, and delivered to defendant _____ [*name of payee*] his/her/its promissory note. A copy of the note[, both front and back,] is attached hereto as Exhibit A and made a part hereof.

4. By terms of this note, defendant _____ [*name of maker*] promised to pay to the order of defendant _____ [*name of payee*] $_____, _____ [*describe terms of payment, e.g.,* on June 30, 1995, and interest on that amount from the date of the note at the rate of _____ percent per annum].

5. On or about _____ [*date*], for valuable consideration, defendant _____ [*name of payee*] endorsed the note _____ [in blank *or* by special endorsement as follows: _____ (*set out special endorsement, e.g.,* pay to the order of _____(*name of plaintiff*), signed _____ (*name of payee/endorser*))] and delivered the note to plaintiff[, who remains in possession of it].

6. On or about _____ [*date*], plaintiff presented the note to defendant _____ [*name of maker*] for payment but that defendant refused and continues to refuse to pay the note.

7. On or about _____ [*date*], notice of dishonor was given to [plaintiff and] defendant _____ [*name of payee/endorser*].

8. [On or about _____(*date*), plaintiff presented the note to defendant _____ (*name of payee/endorser*) for payment but that defendant refused and continues to refuse to pay the note.] No part of the note has been paid by defendants, or by either of them, and there is now due, owing, and unpaid on account of the note the sum of $_____, principal, and interest thereon from _____ [*specify, e.g.,* the date of the note] at the rate of _____ percent per annum.

9. [*Allegations as to attorney's fees. See § 385.90[1], Paragraph 5.*]

[*Prayer. See § 385.90[1].*]

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 385.90[1].*]

[2] Use of Form

The foregoing complaint is for use in an action by an endorsee against the maker and the payee/endorser to recover the amount due on default of the promissory note [*see Com. Code § 3415(a)-(c)*(endorser's liability on note)]. The obligation of an endorser is owed to a person entitled to enforce the instrument or to a subsequent endorser who paid the instrument under *Com. Code § 3415* [*Com. Code § 3415(a)*]. The latter situation is addressed in *§ 385.107*.

[3] Allegations

Paragraphs 1-6 of the foregoing form contain the same allegations as those in *§ 385.104* (endorsee against maker), except that Paragraph 5 of this form offers alternative allegations regarding the type of endorsement [*Com. Code § 3205(a), (b)*]. The only additional allegations in the foregoing form of complaint are (1) that the endorser was given notice of dishonor (Paragraph 7) [*see Com. Code §§ 3415(c), 3503(a)* (if notice of dishonor is required under *Com. Code § 3503*, it must be given to endorser or endorser's liability is discharged)] and (2) that, after that notice of dishonor, the endorser still has not paid the note (Paragraph 8). The allegations regarding demand for payment are optional (Paragraphs 6, 8) because it may or may not be necessary, depending on the type and terms of the note [*see Com. Code §§ 3501, 3502(a); but see § 385.90* (demand generally necessary for attorney's fee award)].

[4] State Statutes

Contract of endorser; endorser's liability. *Com. Code § 3415*

[5] Cross Reference

For related forms, *see §§ 385.90, 385.91, 385.104*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.106

§ 385.106 Complaint [Code Civ. Proc. § 425.10] for Money Due on Default [Civ. Code § 3302] on Note--By Remote Endorsee Against Maker--Blank and Special Endorsements [Com. Code § 3205(a), (b)]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Money Due on Default [Civ. Code § 3302] on Note--By Remote Endorsee Against Maker--Blank and Special Endorsements [Com. Code § 3205(a), (b)]

[*Caption. See § 385.90[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 385.90[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 385.90[1], Paragraph 2.*]

3. [*Original issuance of note. See § 385.104[1], Paragraph 3.*]

4. [*Terms of note. See § 385.104[1], Paragraph 4.*]

5. On or about _____ [*date*], for valuable consideration, _____ [*name of payee*] endorsed and delivered the note to _____ [*name of second endorser*] by special endorsement in words and figures as follows: _____ [*set out special endorsement verbatim, e.g.,* pay to the order of _____ (*name of second endorser*), signed _____ (*name of payee and first endorser*)].

6. On or about _____ [*date*], for valuable consideration, _____ [*name of second endorser*] endorsed the note in blank and delivered it to plaintiff[, who remains in possession of it].

7. [*Presentment or demand, default, and nonpayment. See § 385.104[1], Paragraph 6.*]

8. [*Allegations as to attorney's fees. See § 385.90[1], Paragraph 5.*]

[*Prayer. See § 385.90[1].*]

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 385.90[1].*]

[2] Use of Form

The foregoing form of complaint is for use in an action by a remote endorsee against the maker on default of payment due on a promissory note.

[3] Allegations

The foregoing form contains the same allegations as those in § 385.104 with the addition of another endorsement, a special endorsement (Paragraph 5). A special endorsement is one made by a holder of an instrument, whether that instrument is payable to an identified person or to bearer, that identifies the person to whom it makes the instrument payable. Once specially endorsed, the instrument becomes payable to that identified person and requires that person's endorsement for negotiation (Paragraph 6) [*Com. Code § 3205(a)*; *see also Com. Code § 3110* (determining to whom instrument is payable)].

[4] Decisions

Holder who derives title to negotiable instrument through holder in due course, and who was not party to any fraud or illegality affecting instrument, as having all rights of that former holder in respect to all parties prior thereto. *Finalco, Inc. v. Roosevelt (1991) 235 Cal. App. 3d 1301, 1305-1306, 3 Cal. Rptr. 2d 865* (decided under former *Com. Code § 3201(a)*; *now see Com. Code § 3203(b)*); *Pugh v. Dawson (1928) 95 Cal. App. 505, 517, 273 P. 39*

[5] Cross Reference

For related forms, *see §§ 385.90, 385.91, 385.104, 385.105*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.107

§ 385.107 Complaint [Code Civ. Proc. § 425.10] for Money Due on Default [Civ. Code § 3302] on Note--By Endorsee Against Maker and Payee/Initial Endorser After Payment of Note by Initial Endorsee [Com. Code § 3415(a)-(c)]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Money Due on Default [Civ. Code § 3302] on Note--By Endorsee Against Maker and Payee/Initial Endorser After Payment of Note by Initial Endorsee [Com. Code § 3415(a)-(c)]

[*Caption. See § 385.90[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 385.101[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 385.90[1], Paragraph 2.*]

3. [*Original issuance of note. See § 385.105[1], Paragraph 3.*]

4. By terms of this note, defendant _____ [*name of maker*] promised to pay to the order of defendant _____ [*name of payee*] $_____, _____ [*describe terms of payment, e.g.,* on June 30, 1995, and interest on that amount from the date of the note at the rate of _____ percent per annum].

5. On or about _____ [*date*], for valuable consideration, defendant _____ [*name of payee*] endorsed and delivered the note to plaintiff.

6. Thereafter and before maturity of the note, for valuable consideration, plaintiff endorsed and delivered the note to _____ [*name of second endorsee*].

7. On or about _____ [*date*], the note was presented to defendant _____ [*name of maker*] for payment but that defendant refused and continues to refuse to pay the note.

8. On or about _____ [*date*], notice of dishonor was given to [plaintiff and] defendant _____ [*name of payee/initial endorser*].

9. On or about _____ [*date*], plaintiff paid _____ [*name of second endorsee*], holder and owner of the note, $_____, principal, and $_____, interest, then due on the note.

10. Thereafter, plaintiff notified defendants that he/she/it had paid the note to the holder.

11. No part of the note has been paid by defendants, or by either of them, and there is now due, owing, and unpaid on account of the note the sum of $_____, principal, and interest on that amount from the date of the note at the rate of _____ percent per annum.

12. [*Allegations as to attorney's fees. See § 385.90[1], Paragraph 5.*]

[*Prayer. See § 385.90[1].*]

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 385.90[1].*]

[2] Use of Form

The foregoing complaint is for use in an action by an endorsee, who subsequently endorsed and transferred the note and paid it at maturity to the subsequent endorsee, to recover the sums paid plus interest from the maker and payee/initial endorser [*see Com. Code § 3415(a)-(c)* (endorser's liability on note)]. The obligation of an endorser is owed to a person entitled to enforce the instrument or to a subsequent endorser who paid the instrument under *Com. Code § 3415* [*Com. Code § 3415(a)*]. The former situation is addressed in *§ 385.105*.

[3] Allegations

The foregoing form of complaint alleges (1) the issuance and terms of the note (Paragraphs 3, 4) [for alternative allegations of terms, *see §§ 385.90 -385.93, 385.95, 385.96, 385.98, 385.99*]; (2) endorsement and transfer to plaintiff (Paragraph 5) [*Com. Code § 3502*]; (3) plaintiff's subsequent endorsement and transfer to another (Paragraph 6) [*Com. Code § 3502*; for more specific allegations of blank and special endorsements, *see §§ 385.104 -385.106*]; (4) presentation of the note to defendant maker for payment and nonpayment (Paragraph 7) [*see Com. Code §§ 3501(a), 3502(a)* (demand for payment may or may not be necessary, depending on terms of note); *but see § 385.90* (demand generally necessary for attorney's fees award)]; (5) that the payee/initial endorser was given notice of dishonor (Paragraph 8) [*Com. Code § 3503(a)*]; (6) that plaintiff paid the subsequent holder and the amount of payment (Paragraph 9); (7) that plaintiff notified both defendants of the payment (Paragraph 10); but (8) that defendant's have not reimbursed plaintiff and the amount owing (Paragraph 11).

[4] State Statutes

Endorser's liability. *Com. Code § 3415*

[5] Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, §§ 9, 16-17, 20-33, 36, 39-41, 48-52, 55-57, 103-104 (10th ed. 2005)

[6] Cross Reference

For related forms, *see §§ 385.90, 385.91, 385.104 -385.106*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.108

§ 385.108 Complaint [Code Civ. Proc. § 425.10] for Money Due on Default [Civ. Code § 3302] on Note--By Endorsee Against Maker and Payee/Endorser [Com. Code § 3415(a)]--Presentment and Notice Excused or Waived [Com. Code § 3504(a)(1), (4), (b)]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Money Due on Default [Civ. Code § 3302] on Note--By Endorsee Against Maker and Payee/Endorser [Com. Code § 3415(a)]--Presentment and Notice Excused or Waived [Com. Code § 3504(a)(1), (4), (b)]

[*Caption. See § 385.90[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 385.101 Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 385.90[1], Paragraph 2.*]

3. [*Original issuance of note. See § 385.105[1], Paragraph 3.*]

4. By the terms of this note, defendant _____ [*name of maker*] promised to pay to the order of defendant _____ [*name of payee*] $_____, _____ [*specify terms, e.g.,* on or before June 30, 1995, with interest on that amount from the date of the note at the rate of _____ percent per annum].

5. Thereafter and on _____ [*date*], defendant _____ [*name of payee*] endorsed and delivered the note to plaintiff.

[*EITHER, if presentment was waived as part of endorsement*]

6. [Before maturity of the note,] [D]efendant _____ [*name of payee/endorser*] waived its presentment to and demand for payment of defendant _____ [*name of maker*] [and notice to himself/herself/itself of dishonor] by endorsing the back of the note under the statement of waiver [*unless endorsement shows on copy of note attached as exhibit, add:* as follows: _____ (*set forth verbatim, e.g.,* presentment, demand, and notice of dishonor are hereby waived by the undersigned)].

[*OR, if presentment was waived by separate writing*]

6. On or about _____ [*date*], defendant _____ [*name of payee/endorser*], with full knowledge of the fact that the note had not been presented to defendant _____ [*name of maker*], that payment of the note had not been demanded, and that no notice of the nonpayment had been given to him/her/it, waived presentment [and notice of dishonor] in writing [and, by that writing, promised to pay the note]. A copy of this waiver is attached hereto marked Exhibit B and made a part hereof.

[*OR, if presentment cannot be made after the exercise of reasonable diligence*]

6. At the maturity of the note, plaintiff made diligent search and inquiry to find defendant _____ [*name of maker*] at _____ [*place where note was made or is payable*] in order to present the note to him/her/it and then and there to demand payment of the note, but, after the exercise of reasonable diligence, plaintiff could not find defendant _____ [*name of maker*], and, as a result, presentment and demand could not be made and the note was not paid. On _____ [*date*], notice of dishonor was given to defendant _____ [*name of payee/endorser*].

[*CONTINUE*]

7. [Although demand for payment has been made,] [N]o part of the note has been paid by defendants, or by either of them, and there is now due, owing, and unpaid on account of the note the sum of $_____, principal, and interest on that amount from _____ [*specify, e.g.,* the date of the note] at the rate of _____ percent per annum.

8. [*Allegations as to attorney's fees. See § 385.90[1], Paragraph 5.*]

[*Prayer. See § 385.90[1].*]

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 385.90[1].*]

[2] Use of Form

The foregoing complaint is for use in an action by an endorsee against the maker and payee/endorser on default of payment on a promissory note when presentment and/or notice of dishonor have been excused or waived because either (1) the endorser waived presentment and notice of dishonor (first and second alternative Paragraphs 6) [*see Com. Code § 3504(a)(4)* (endorser whose obligation is being enforced waived presentment), (b) (party whose obligation is being

enforced waived notice of dishonor; waiver of presentment as also waiver of notice of dishonor)] or (2) the person entitled to make presentment cannot with reasonable diligence make presentment (third alternative Paragraph 6) [*Com. Code § 3504(a)(1)*].

There are other instances in which presentment is excused, the most common being when it is not necessary under the terms of the note [*Com. Code § 3504(a)(3)*; *see also* discussion in see *§ 385.32[3]*, Official Comments to U.C.C. § 3-502 (1990); *but see § 385.90* (demand generally necessary for attorney's fees award)].

Except for the allegations relating to waiver or excuse of presentment, the foregoing form contains the same basic allegations of issuance, delivery, and endorsement used in *§§ 385.104* and *385.105*. For alternative allegations regarding terms of the note and types of defaults, see *§§ 385.90 -385.93, 385.95, 385.96, 385.98, 385.99*.

[3] State Statutes

Presentment defined; rights of party to whom presentment is made. *Com. Code § 3501*

Presentment and dishonor, and timing thereof. *Com. Code § 3502*

Notice of dishonor. *Com. Code § 3503*

Excused presentment and notice of dishonor. *Com. Code § 3504*

Evidence and presumptions regarding dishonor and notice of dishonor. *Com. Code § 3505*

[4] Decisions

Endorsement preceded by statement waiving presentment, demand, and notice of protest as constituting valid endorsement with enlarged liability. *Hurlbut v. Quigley (1919) 180 Cal. 265, 269, 180 P. 613*

Proper demand and notice of protest as waived in action against endorser on promissory note, when it is clear that demand would have been refused. *Engelman v. Gordon (1966) 242 Cal. App. 2d 510, 518, 51 Cal. Rptr. 627*

Statement on note that makers and endorsers of note waive diligence, demand, protest, and notice as sufficient allegation of waiver for complaint, regardless of fact that complaint itself did not contain such allegation. *White v. Standard Lbr. & Wrecking Co. (1916) 29 Cal. App. 646, 649, 157 P. 544*

[5] Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, §§ 46, 48-49, 59-61, 63, 100, 115 (10th ed. 2005)

[6] Cross Reference

For related forms, *see §§ 385.90, 385.91, 385.104 -385.107*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.109

§ 385.109 Complaint [Code Civ. Proc. § 425.10] for Money Due on Default [Civ. Code § 3302] on Note--By Endorsee Against Maker and Payee--Note Transferred by Delivery [Com. Code § 3203(c)]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Money Due on Default [Civ. Code § 3302] on Note--By Endorsee Against Maker and Payee--Note Transferred by Delivery [Com. Code § 3203(c)]

[*Caption. See § 385.90[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 385.101[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 385.90[1], Paragraph 2.*]

3. [*Original issuance of note. See § 385.105[1], Paragraph 3.*]

4. By the terms of this note, defendant _____ [*name of maker*] promised to pay to the order of defendant payee $_____, _____ [*specify terms, e.g.,* on or before June 30, 1995, with interest on that amount from the date of the note at the rate of _____ percent per annum].

5. Thereafter, payee transferred the note to plaintiff without endorsing it.

6. On or about _____ [*date*], and before maturity, plaintiff required defendant _____ [*name of payee*] to endorse the note, which that defendant did by placing his/her/its name in blank on the back of the note pursuant to the provisions of *Commercial Code Section 3203(c).*

7. On or about _____ [*date*], plaintiff presented the note to defendant _____ [*name of maker*] for payment at _____ [*city*], _____ County, California, where, by its terms, it was payable, but payment was refused and the note was not paid.

8. On or about _____ [*date*], plaintiff gave notice of dishonor to defendant _____ [*name of payee*].

9. [Although plaintiff has demanded payment from defendant _____ (*name of payee*),] [N]o part of the note has been paid, and there is now unpaid on account of the note the sum of $_____, principal, and interest on that amount at the rate of _____ percent per annum from _____ [*specify, e.g.,* the date of the note].

10. [*Allegations as to attorney's fees. See § 385.90[1], Paragraph 5.*]

[*Prayer. See § 385.90[1].*]

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 385.90[1].*]

[2] Use of Form

The foregoing complaint is for use in an action by an endorsee against the maker and payee on default of payment on a promissory note when the payee transferred the note by delivery alone and subsequently endorsed it on plaintiff's request as required by *Com. Code § 3203(c)*.

Except for the allegations relating to transfer without endorsement (Paragraph 5) [*Com. Code § 3203(c)*], plaintiff's request for endorsement, and defendant payee's endorsement (Paragraph 6) [*Com. Code § 3203(c)*], the foregoing form contains the same basic allegations of issuance, delivery, presentment, notice of dishonor, and nonpayment used in *§§ 385.104* and 385.105. For alternative allegations regarding terms of the note, see *§§ 385.90 -385.93, 385.95, 385.96, 385.98, 385.99*. Presentment to defendant maker may or may not be necessary, depending on the terms of the note, but demand before instituting suit is generally necessary to support the award of attorney's fees under a provision in the note [*see Com. Code § 3502*; *§ 385.90*].

[3] State Statutes

Right to endorsement on transfer. *Com. Code § 3203(c)*

[4] Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, §§ 20-21 (10th ed. 2005)

[5] Cross Reference

For related forms, *see §§ 385.90, 385.91, 385.104 -385.106*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.110

§ 385.110 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Tender of Amount Due on Note [Civ. Code § 1500 Code Civ. Proc. § 2074 Com. Code § 3603]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Tender of Amount Due on Note [Civ. Code § 1500 Code Civ. Proc. § 2074 Com. Code § 3603]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges the following:

1. On or about _____ [*date*], and prior to the commencement of this action, defendant _____ [*describe how tender was made, e.g.,* offered in writing to pay plaintiff at _____ (*city*), _____ County, California, $_____] in full payment and satisfaction of the note that is the subject of this action. [That offer was accompanied by delivery to plaintiff of defendant's check number 527 in the amount of $_____, which check has never been presented for payment.]

[2. Defendant was ready and able to pay that amount on the date it was due at every place of payment provided for in the note.]

3. Plaintiff refused and continues to refuse to accept the payment so tendered [but has not made any objections to the tender].

4. On or about _____ [*date*], defendant deposited to the credit of plaintiff in _____ [*specify name, and type of entity where deposit was made, e.g.,* Big Bank, a national trust and savings association], located at _____ [*city*], California, the sum of $_____ in accordance with *Civil Code Section 1500*.

5. On _____ [*date*], defendant notified plaintiff in writing of the deposit by _____ [*specify method of delivery of notice, e.g.,* certified mail, return receipt requested] to _____ [*state*

place to which notice was delivered]. A copy of the notice is attached hereto as Exhibit 1 and made a part hereof.

[2] Use of Form

The foregoing affirmative defense based on defendant's tender of the amount due on a note is for use by the defendant in an action brought by the holder of a promissory note alleging default of payment due. *Com. Code § 3603(a)* provides that the effect of tender is governed by principles of law applicable to payment under a simple contract, which are set forth in *Civ. Code §§ 1485-1495, 1500, 1504* and *Code Civ. Proc. §§ 2074, 2076*.

[3] Allegations

Paragraph 1 alleges the tender or offer of payment [*see Code Civ. Proc. § 2074* (offer in writing to pay sum of money, if not accepted, as equivalentto actual production and tender of money); *see also Com. Code § 3310(b)(1)*(discussed in the Introduction *§ 385.45[2]*]).

Optional Paragraph 2 is for use when presentment is required with respect to the instrument [*see Com. Code § 3603(c)* (discussed in the Introduction under--Tender of Payment, *above*); *see also Com. Code § 3603(b)* (tender, if refused, discharges obligation of endorser or accommodation party who has right of recourse)]. Tender discharges the obligation to pay interest after the due date on the amount tendered [*Com. Code § 3603(c)*; *see Civ. Code § 1504*].

Civ. Code § 1500 provides that an obligation for the payment of money is extinguished by an offer of payment if the amount is immediately deposited in the name of the creditor with a bank or savings and loan association in California in good repute and the creditor is notified of the deposit (Paragraphs 5, 6).

[4] Discharge and Holders in Due Course

Discharge, by tender or otherwise, is not effective against a person acquiring the rights of a holder in due course of the instrument without notice of the discharge [*Com. Code § 3601(b)*]. Notice of discharge is not treated as a defense that prevents holder in due course status. Discharge is effective against a holder in due course only if the holder had notice of the discharge when he, she, or it acquired holder in due course status. For example, if an instrument bearing a canceled endorsement is taken by a holder, the holder has notice that the endorser has been discharged. In that example, the discharge is effective against the holder even if the holder is a holder in due course [Official Comment to U.C.C. § 3-601 (1990)].

[5] Cross References

For the format of denials and affirmative defenses in answers, see Ch. 26, *Answers*

For an alternative form of defense related to tender, see Ch. 140, *Contracts*

[6] State Statutes

Effects of offers of performance by obligor. *Civ. Code § 1485 et seq.*

Tender as stopping interest and extinguishing incidents of obligation. *Civ. Code § 1504*

Offer in writing to pay sum of money, if not accepted, as equivalent to actual production and tender of money. *Code*

Civ. Proc. § 2074

Person rejecting tender required to state specific grounds. *Code Civ. Proc. § 2076*

Effects of tender of payment. *Com. Code § 3603*

[7] Decisions

Offer of partial performance as of no effect [*Civ. Code § 1486*]; tenderer required to do and offer everything necessary on his or her part and must make known his or her purpose fairly and without ambiguity; tender of two separately mailed partial payments as not constituting valid tender. *Gaffney v. Downey Savings & Loan Assn. (1988) 200 Cal. App. 3d 1154, 1165-1166, 246 Cal. Rptr. 421*

Notices of payment errors sent by creditor with returned partial payments as sufficient because debtor knew what was required; reasonable compliance as all that is required for notice to be sufficient under *Civ. Code § 1501* and *Code Civ. Proc. § 2076*. *Gaffney v. Downey Savings & Loan Assn. (1988) 200 Cal. App. 3d 1154, 1166, 246 Cal. Rptr. 421*

Although offer of payment stops accrual of interest on obligation, offer to pay part of amount owed as not stopping accrual of prejudgment interest if it is conditioned on creditor's dropping demand for other sums claimed. *Klinger v. Realty World Corp. (1987) 196 Cal. App. 3d 1549, 1553-1554, 242 Cal. Rptr. 592* ; *see Civ. Code §§ 1494, 1504*; *Lovetro v. Steers (1965) 234 Cal. App. 2d 461, 479, 44 Cal. Rptr. 604*

Tender and deposit of amount owing pursuant to *Civ. Code § 1500* as stopping accrual of interest. *Klinger v. Realty World Corp. (1987) 196 Cal. App. 3d 1549, 1554 n.2, 242 Cal. Rptr. 592*

Neither *Civ. Code § 1501* (waiver of inadequacies of tendered performance if no objection made at time of tender) nor *Code Civ. Proc. § 2076* (same) as prohibiting collection of prepayment penalty after collection agent mistakenly accepted payoff from maker's agent without penalty; *Civ. Code § 1501* and *Code Civ. Proc. § 2076* as applying to intentional failures to demand proper tender. *Sanguansak v. Myers (1986) 178 Cal. App. 3d 110, 115-117, 223 Cal. Rptr. 490*

Party as discharged to extent of all subsequent liability for interest, costs, and attorney's fees [*Civ. Code § 1504*; former *Com. Code § 3604* (*now see Com. Code § 3603*)] by tender of full payment to holder of promissory note when or after it is due. *Still v. Plaza Marina Commercial Corp. (1971) 21 Cal. App. 3d 378, 385, 98 Cal. Rptr. 414*

Purpose of *Code Civ. Proc. § 2076* (specification of grounds for rejection of tender) as to inform debtor who is willing and able to pay promissory note what creditor demands so that offer may be made to conform. *Still v. Plaza Marina Commercial Corp. (1971) 21 Cal. App. 3d 378, 386, 98 Cal. Rptr. 414*

Tender as having effect of putting other party on promissory note in default if that party refuses to accept tender that is proper offer of performance made with intent to extinguish obligation [*Civ. Code § 1485*]. *Still v. Plaza Marina Commercial Corp. (1971) 21 Cal. App. 3d 378, 385, 98 Cal. Rptr. 414* (dictum)

Tender, to be valid, as required to be of full performance [*Civ. Code § 1486*] and unconditional [*Civ. Code § 1494*]. *Still v. Plaza Marina Commercial Corp. (1971) 21 Cal. App. 3d 378, 385, 98 Cal. Rptr. 414*

Deposit in bank of principal and accrued interest due on promissory note after suit was brought as neither available as defense nor operative to deprive plaintiff of his or her right to costs. *Rottman v. Hevener (1921) 54 Cal. App. 485, 491, 202 P. 334*

[8] Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, §§ 29, 31, 44, 46, 48, 55, 66-68, 70 (10th ed. 2005)

[9] Cross Reference

For related forms, *see §§ 385.90, 385.112*.

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§ 385.111 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Note Not Properly Presented for Payment [Com. Code § 3502(a)(2)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Note Not Properly Presented for Payment [Com. Code § 3502(a)(2)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges the following:

1. By the terms of the promissory note set forth in plaintiff's complaint, the note was payable _____ [at *or* through] _____ [*state where presentment to be made, e.g.,* the Bank of _____ (*name*)], _____ [*city*], _____ County, California, on _____ [*date*].

2. The note was not presented for payment at _____ [*state where presentment to be made, e.g.,* that bank] according to its terms.

3. On _____ [*date*], the date on which the note was payable, defendant had funds available at _____ [*state where presentment to be made, e.g.,* the bank] for the purpose of paying the note and was ready, willing, and able to pay the note.

[2] Use of Form

The foregoing affirmative defense, based on plaintiff's failure to present the note for payment in accordance with its terms, is for use by the defendant in an action brought by the holder of a promissory note alleging default of payment due [*see Com. Code § 3502(a)(2)*]. The form is for use only when the note is not payable on demand and is payable at or through a bank or the terms of the note require presentment [*Com. Code § 3502(a)(2)*]. It does not address "improper" presentment arising from an obligee's failure to comply with any of the obligor's prerogatives set forth in *Com. Code § 3501(b)* (discussed in *§ 385.30[2]*).

In the great majority of cases, presentment of the note is waived and formal demand is not contemplated. Rather, the

maker is expected to send payment to the holder when it is due. If payment is note made when due, the holder usually makes demand for payment [Official Comment 2 to U.C.C. § 3-502 (1990)].

[3] State Statutes

How presentment made. *Com. Code § 3501*

[4] Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, §§ 46, 48, 59-60, 100 (10th ed. 2005)

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33-385 California Forms of Pleading and Practice--Annotated § 385.112

§ 385.112 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Satisfaction and Discharge of Note [Com. Code § 3603] Through Payment

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Satisfaction and Discharge of Note [Com. Code § 3603] Through Payment

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges the following:

1. On or about _____ [*date*], _____ [*name, e.g.,* defendant] discharged the obligation that is the basis of this action by paying _____ [*name and status of entity paid, e.g.,* John Doe, holder of the note described in the complaint on file herein] all sums then owing on the note.

[*EITHER*]

2. At the time _____ [*name, e.g.,* defendant] paid _____ [*name entity paid, e.g.,* John Doe], he/she/it believed him/her/it to be the true owner of the note, had no knowledge that any other person or entity claimed the note, and had no knowledge that the note was stolen or that holder was in wrongful possession of the note.

[*OR*]

2. At the time _____ [*name, e.g.,* defendant] paid _____ [*name entity paid, e.g.,* John Doe], he/she/it knew of _____ [*identify claimant, e.g.,* plaintiff's] claim to the note, but had not then, and never has, accepted any indemnity from _____ [plaintiff *or* that claimant] against any loss resulting from refusal to pay the note.

3. At the time _____ [*name, e.g.,* defendant] paid _____ [*name entity paid, e.g.,* John Doe], he/she/it did not know of any injunction or other court order prohibiting payment of the note.

[2] Use of Form

The foregoing affirmative defense based on the payment of the note is for use by the defendant in an action brought by the payee or holder of a promissory note alleging default of payment due [*see Com. Code § 3602* (discussed in the Introduction under--Payment, *above*)]. This defense is not effective against a person who acquired rights of a holder in due course of the instrument without knowledge of the discharge [*Com. Code § 3601(b)*]. A holder who acquired the note with knowledge of the payment would not be a holder in due course [*see Com. Code § 3302*; *see also § 385.110*].

If payment is by check, the underlying obligation is not discharged until the check itself is paid [*Com. Code § 3310(b)*; *Cornwell v. Bank of America(1990) 224 Cal. App. 3d 995, 1000-1001, 274 Cal. Rptr. 322]* . Thus, counsel may wish to add an additional allegation that the check has been negotiated by the creditor and paid [*but see Civ. Code § 1476* (if creditor directs particular manner of performance, risk of loss in mail would be on creditor)].

[3] State Statutes

Performance by or for obligor as extinguishing obligation. *Civ. Code § 1473*

If creditor directs debtor to perform obligation in particular manner, obligation as extinguished by performance in that manner, even though creditor does not receive benefit of that performance. *Civ. Code § 1476*

Payment as performance. *Civ. Code § 1478*

Effect of discharge against holder in due course. *Com. Code § 3601(b)*

[4] Decisions

Payment of promissory note as performance extinguishing obligation arising out of promise to pay and as permitted to be made by any party to joint contract or by anyone on behalf of maker at his request or with his consent. *Moran v. Abbey (1883) 63 Cal. 56, 61-62*

Creditor as not "directing" payment by mail by providing debtor with self-addressed envelopes and payment coupons when creditor also accepts payments by other methods; thus, check lost in mail did not amount to payment. *Cornwell v. Bank of America (1990) 224 Cal. App. 3d 995, 999-1001, 274 Cal. Rptr. 322*

Elements of equitable estoppel under *Evid. Code § 623*; even though third party's check did not clear, doctrine as applicable to estop payee from asserting maker's liability on note after maker did what payee instructed him to do in response to maker's request that payee accept third-party payoff and relinquish its security interest. *San Diego Credit Union v. Smith (1986) 176 Cal. App. 3d 919, 922-923, 222 Cal. Rptr. 467*

Exchange of money from guarantor to payee for note that is not marked paid as sale of note on which action can be brought by guarantor. *Collection Control Bureau v. Weiss (1975) 50 Cal. App. 3d 865, 869-871, 123 Cal. Rptr. 625*

Instrument payable to two payees jointly as discharged by payment to holder pursuant to former *Com. Code § 3603* (*now see Com. Code § 3602*) only if properly negotiated by endorsement by both payees. *Feldman Constr. Co. v. Union Bank (1972) 28 Cal. App. 3d 731, 737, 104 Cal. Rptr. 912*

Promissory note as discharged by check for amount due if there is express agreement providing for that form of payment. *Bose v. Mills (1951) 101 Cal. App. 2d 782, 785-786, 226 P.2d 5*

[5] Cross Reference

For a related form, *see § 385.112*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.113

§ 385.113 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Extension of Maturity Through Execution of Renewal Note

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Extension of Maturity Through Execution of Renewal Note

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges the following:

1. The note set forth in the complaint herein was by its terms payable on _____ [*date*].

2. On that date, defendant made, executed, and delivered to plaintiff a renewal note by which he/she/it promised and agreed to pay to plaintiff the sum of $_____, _____ [*set forth relevant terms of renewal note, e.g.,* two years from the date of the note, with interest payable quarterly at the (increased) rate of _____ percent per annum]. [At the same time, defendant paid to plaintiff the sum of $_____, which was the interest then due on the note set forth in the complaint herein.] [A copy of the renewal note is attached hereto as Exhibit 1 and made a part hereof.]

3. Plaintiff accepted this renewal note and interest as payment for the [principal] amount owed on the note set forth in the complaint herein and as an extension of credit represented by that note.

4. The renewal note is not yet due and payable.

[2] Use of Form

The foregoing affirmative defense based on the extension of the maturity date of the note by execution of a renewal note is for use by the maker in an action brought by the payee or holder of a promissory note alleging default of payment due [*see Civ. Code § 1530* (novation)]. This defense is not effective against a person who acquired rights of a holder in due course of the instrument without knowledge of the discharge [*Com. Code § 3601(b)*; *see also § 385.110*].

[3] Effect on Endorser or Accommodation Party

An extension of the due date discharges an endorser or accommodation party who has a right of recourse against the party whose obligation is extended to the extent the endorser or accommodation party proves that the extension caused it loss with respect to the right of recourse [*Com. Code § 3605(c)*; *see also Com. Code § 3605(i)* (consent or waiver)]. Thus, the foregoing form can be modified for use by an endorser or accommodation party with a right of recourse by (1) modifying the allegations to make clear that the renewal note was executed by the maker without the concurrence or consent of the endorser or accommodation party, (2) deleting Paragraph 4, (3) adding an allegation regarding the right of recourse [*see Com. Code § 3419(e)*], and (4) adding an allegation that the extension caused the endorser's or accommodation party's loss, most likely by deterioration of the maker's financial condition during the period of the extension so that the value of the right of recourse was reduced [*see* Official Comment 4 to U.C.C. § 3-605 (1990)].

If the renewal note constitutes more than extension of the due date and amounts to a material modification of the obligation, the modification discharges the obligation of an endorser or accommodation party having a right of recourse against the person whose obligation is modified to the extent the modification causes loss to the endorser or accommodation party with respect to the right of recourse. In this case, however, the amount of the loss is deemed equal to the amount of the right of recourse unless the party seeking to enforce the instrument proves that it was less [*Com. Code § 3605(d)*; *see* Official Comment 5 to U.C.C. § 3-605 (1990)].

[4] State Statutes

Consideration and writing required for release. *Civ. Code § 1541*

[5] Decisions

Promissory note as not paid and obligation thereon as not extinguished by execution of another note, but time for its payment as thereby suspended until maturity of new note. *Easton v. Ash (1941) 18 Cal. 2d 530, 535, 116 P.2d 433* ; *Selig Cahn, Inc. v. California Wrecking Co. (1937) 9 Cal. 2d 617, 619, 71 P.2d 1113* ; *Newman v. Nickell (1920) 50 Cal. App. 138, 140, 194 P. 710*

Extension of time in which to pay money due as conferring on debtor advantage or benefit sufficient to constitute consideration. *Adolph Ramish, Inc. v. Woodruff (1934) 2 Cal. 2d 190, 207, 40 P.2d 509*

Parol evidence as admissible to prove collateral oral agreement that note would in effect be paid by new note, to be negotiated on date of original note's maturity, which would set repayment schedule. *Bank of Beverly Hills v. Catain (1982) 128 Cal. App. 3d 28, 35-36, 180 Cal. Rptr. 67*

Note given in renewal for one void for want of consideration as, like first, invalid and unenforceable. *Pacific Ry. Advertising Co. v. Carr (1916) 29 Cal. App. 722, 725, 157 P. 529*

[6] Cross References

For discussion and a form of affirmative defense based on novation, see Ch. 140, *Contracts*

For related forms, *see §§ 385.110, 385.112*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.114

§ 385.114 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Alteration of Note [Com. Code §§ 3302(a)(2)(D), 3305(a)(2), (b), 3407]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Alteration of Note [Com. Code §§ 3302(a)(2)(D), 3305(a)(2), (b), 3407]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges the following:

1. After the execution and delivery of the note mentioned in plaintiff's complaint and before the commencement of the above-entitled action, the note was fraudulently altered by _____ [*specify the nature of alteration, e.g.,* changing the maturity date from _____ (*date*) to _____ (*date*) *or* changing the principal amount due from $_____ to $_____ *or* erasing or otherwise deleting the name of _____ (*name*) as comaker *or* changing the place of payment from _____ (*city*), _____ County, California, to _____(*city*), _____ County, California].

2. The foregoing material alteration of the note was without the knowledge or consent of defendant.

[2] Use of Form

The foregoing affirmative defense based on an alteration of the obligation contained in a note is for use by the defendant in an action brought by the holder of a promissory note alleging default of payment due [*Com. Code § 3407*; *see also Com. Code § 3406* (preclusions, comparative negligence)]. This defense may not be maintained against a person who took the note for value, in good faith, and without knowledge of the alteration [*see Com. Code § 3305(a)(2), (b)*]. Nor can it be asserted by a person whose want of ordinary care contributed to the alteration against a person who, in good faith, paid the instrument or took it for value [*Com. Code § 3406(a)*; for discussion of burdens of proof regarding preclusion, *see § 385.43[2]*]. A holder who took the note for value in good faith and without notice of the alteration may enforce the note according to its original terms or, in the case of an incomplete instrument altered by an unauthorized completion, according to its terms as completed [*Com. Code § 3407(c)*]. The defense can be asserted against a holder

who knows of the alteration or claim of alteration at the time he or she became the holder [*see Com. Code § 3302(a)(2)(D)*; for a form of affirmative defense based on holder's knowledge of any infirmity, *see § 385.128*].

This is a personal defense of the party whose obligation is modified, and anyone whose obligation is not affected is not discharged. But, if an alteration discharges a party, any party who has a right of recourse against that party is also discharged, because the obligation of the party with the right of recourse is affected by the alteration [Official Comment 1 to U.C.C. § 3-407 (1990)].

Assent to the alteration given before or after it is made will prevent a party from asserting the discharge (Paragraph 2). The phrase "or is precluded from asserting the alteration" in *Com. Code § 3407(b)* recognizes the possibility of an estoppel or other ground barring the defense that does not arise from assent [Official Comment 1 to U.C.C. § 3-407 (1990)].

If blanks are filled or an incomplete instrument is otherwise completed, the loss is on the party who left the instrument incomplete and the instrument may be enforced in its completed form. This result is intended even though the instrument was stolen from the issuer and completed after the theft [Official Comment 2 to U.C.C. § 3-407 (1990)].

The word "material" was dropped from the current version of *Com. Code § 3407*; and the type of alteration addressed is one that changes the contract of the parties in any respect. As under the former version of the statute, the alteration must be fraudulently made. Thus, there is no discharge if a blank is filled in the honest belief that it is authorized or if a change is made with a benevolent motive, such as the desire to give the obligor the benefit of a lower interest rate. Changes favorable to the obligor are unlikely to be made with any fraudulent intent, but if such an intent is found, the alteration may operate as a discharge [Official Comment 1 to U.C.C. § 3-407 (1990)].

[3] State Statutes

Nonconsenting parties relieved by alteration. *Civ. Code § 1700*

Alteration of instruments. *Com. Code § 3407*

[4] Decisions

Mere placing of notation on instrument by note teller for purpose of his or her information in computing interest as not constituting material alteration of instrument. *American Trust Co. v. Greuner (1936) 13 Cal. App. 2d 279, 282, 56 P.2d 967*

Defendant in action to rescind who executed and delivered promissory note on basis of alteration as allowed to rest on defense either that parties assented to alteration or that, as holder in due course, it could be enforced according to original tenor [*Com. Code § 3407(b)*]. *Lange v. Curtin (1936) 11 Cal. App. 2d 161, 165-166, 53 P.2d 185*

[5] Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, §§ 16, 23, 55, 56 (10th ed. 2005)

[6] Cross Reference

For alternative forms of complaints and defenses involving material alteration of obligations, see Ch. 140, *Contracts*

For related form, *see §§ 385.110, 385.112*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.115

§ 385.115 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Note Given Pursuant to Illegal Agreement [Civ. Code § 1689(b)(6) Com. Code § 3305(a)(1)(B), (b)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Note Given Pursuant to Illegal Agreement [Civ. Code § 1689(b)(6) Com. Code § 3305(a)(1)(B), (b)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the _____ [*specify instrument, e.g.,* note] was made, executed, and delivered pursuant to a [written] agreement between plaintiff and _____ [*specify, e.g.,* defendant] that was and is contrary to law [and public policy], in that _____ [*specify portions of agreement contrary to public policy, e.g.,* the agreement provided that defendant would issue the note as payment for construction of a residence by _____(*name*), a person not licensed as a contractor, as required by *Business and Professions Code Section 7031*].

[2] Use of Form

The foregoing affirmative defense--that the note in question was given pursuant to an illegal agreement--is for use by the defendant in an action brought by the holder of a promissory note alleging default of payment due [*see Civ. Code § 1689(b)(6)*; *Com. Code § 3305(a)(1)(B), (b)*].

The defense that an instrument was issued as part of an illegal transaction, if the illegality is sufficient under applicable local law to nullify the obligation of the obligor, is a "real" defense, which thus may be asserted against a holder in due course [*Com. Code § 3305(a)(1)(B), (b)*; *see also § 385.116*]. The effect of the illegality is a matter of local law. Usury and gambling are types of illegality most frequently asserted under *Com. Code § 3305(a)(1)(B)*. If, under the applicable local law, the effect of the illegality is to make the obligation entirely null and void, the defense may be asserted against a holder in due course. Otherwise, it is cut off [Official Comment 1 to U.C.C. § 3-305 (1990)].

[3] State Statutes

Consideration as required to be lawful. *Civ. Code § 1607*

Violation of law, public policy, and morals defined. *Civ. Code § 1667*

Grounds for rescission based on public policy. *Civ. Code § 1689(b)(6)*

Other writings permissibly affecting instrument. *Com. Code § 3117*

Rescission of negotiation of instrument for illegality. *Com. Code §*

Defense of illegality of transaction. *Com. Code § 3305(a)(1)(B), (b)*

[4] Decisions

If note was given for loan to pay for construction by unlicensed contractor, that illegality as barring recovery on note, even by holder in due course. *Wilson v. Steele (1989) 211 Cal. App. 3d 1053, 1063-1064, 259 Cal. Rptr. 851* (remanded for determination of illegality; decided under former *Com. Code § 3305(2)*)

Maker of note who was innocent dupe in transaction and was not corrupt as not estopped to urge defense of usury even though collusive confidant fraudulently inserted usurious rate of interest for purpose of defeating action for interest on note. *Paillet v. Vroman (1942) 52 Cal. App. 2d 297, 306, 126 P.2d 419*

Transaction as not usurious, but rather in nature of sale or accord and satisfaction, if lender agreed to accept prepayment of face amount plus full interest to maturity date from maker and to cancel note therefor. *McCarty v. Mellinkoff (1931) 118 Cal. App. 11, 13, 4 P.2d 595*

[5] Cross References

For alternative forms of complaints and defenses based on public policy considerations, see Ch. 140, *Contracts*

For discussion and forms of defenses based on gambling, see Ch. 272, *Gambling*

For discussion and forms of defenses based on usury, see Ch. 468, *Usury*

For related forms, *see §§ 385.110, 385.112, 385.116*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.116

§ 385.116 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Note Given for Illegal Consideration [Civ. Code § 1607 Com. Code § 3305(a)(1)(B), (b)]--Gambling Debt [Penal Code § 330]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Note Given for Illegal Consideration [Civ. Code § 1607 Com. Code § 3305(a)(1)(B), (b)]--Gambling Debt [Penal Code § 330]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the _____ [*specify instrument, e.g.,* promissory note] set forth in the complaint herein as the subject of this action was and is void, having been given made, executed, and delivered for illegal consideration, specifically, to pay a gambling debt. The whole of the consideration of the note was money won by plaintiff by playing at the game of _____ [*specify*]. On or about _____ [*date*], plaintiff and defendant engaged in the game of _____ [*specify*], and, in that game, the plaintiff won from defendant the sum of $_____. Defendant made and delivered to plaintiff the promissory note in payment of the money so won by the plaintiff and for no other reason and for no other consideration.

[2] Use of Form

The foregoing affirmative defense that the note in question is void because it was given for illegal consideration, specifically, in payment of an illegal gambling debt, is for use by the defendant in an action brought by the holder of a promissory note alleging default of payment due [*Civ. Code § 1607*; *Com. Code § 3305(a)(1)(B), (b)*; *Penal Code § 330*; *see also § 385.115*].

[3] State Statutes

Illegality of gambling. *Penal Code § 330*

[4] Decisions

Owner of a gambling house who honors (subsequently dishonored) check or extends credit (memoranda of indebtedness) for purpose of providing prospective customer with funds with which to gamble and then participates in transaction is unable to recover amount of check or note. *Metropolitan Creditors Service v. Sadri (1993) 15 Cal. App. 4th 1821, 1832, 19 Cal. Rptr. 2d 646*

English judgment for amount of dishonored check payable to English gambling club and issued to purchase gambling tokens is entitled to enforcement in California; debt arose in jurisdiction that permits casino gambling; enforcement of that debt, in view of California's expanded acceptance of gambling as manifested in part by introduction of California lottery, is not so antagonistic to California's public policy interests as to preclude extension ofcomity. *Crockford's Club, Ltd. v. Si-Ahmed (1988) 203 Cal. App. 3d 1402, 1406, 250 Cal. Rptr. 728*

Maker is allowed to show against other than holder in due course that consideration for note was illegal in action on promissory note. *Fellom v. Adams (1969) 274 Cal. App. 2d 855, 862, 79 Cal. Rptr. 633*

Owner of gambling house is unable to recover on check honored for purpose of providing prospective customer with funds with which to gamble when customer then participates in transaction thus promoted. *Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 63, 71 Cal. Rptr. 817*

[5] Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, §§ 29, 31, 32, 55 (10th ed. 2005)

[6] Cross Reference

For related forms, *see §§ 385.110, 385.112, 385.115*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.117

§ 385.117 Affirmative Defense--Action Barred by Statute of Limitations [Com. Code § 3118(a), (b)]

[1] FORM Affirmative Defense--Action Barred by Statute of Limitations [Com. Code § 3118(a), (b)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the cause of action as alleged in the complaint is barred by the provisions of *Commercial Code Section 3118* _____ [*specify subdivision, e.g.,* (a)].

[2] Use of Form

This affirmative defense based on the running of the statute of limitations is for use by the defendant in an action brought by the holder of a promissory note alleging default of payment due [*see Com. Code § 3118(a), (b)* (discussed in *§ 385.117[1], [2]*)].

[3] State Statutes

Six-year limitation on note payable at definite time. *Com. Code § 3118(a)*

Ten-year limitation on note payable on demand. *Com. Code § 3118(b)*

[4] Decisions

Promise by one of several joint obligors on promissory note is unable to revive, as against other obligors, cause of action barred by limitation or to suspend running of statute. *Searles v. Gonzalez (1923) 191 Cal. 426, 434, 216 P. 1003*

Action based on mistake or imperfection in writing (promissory note) is required to be brought within three years of

discovery of mistake [former *Code Civ. Proc. § 338(4)*; *now see Code Civ. Proc. § 338(d)*]. *Sapin v. Security First Nat'l Bank (1966) 243 Cal. App. 2d 201, 206, 52 Cal. Rptr. 254*

[5] Cross Reference

For alternative forms for defenses that action is barred by statute of limitations, see Ch. 345, *Limitation of Actions*

For related forms, *see §§ 385.90, 385.110, 385.112*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.118

§ 385.118 Affirmative Defense--Equitable Estoppel [Evid. Code § 623]

[1] FORM Affirmative Defense--Equitable Estoppel [Evid. Code § 623]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the plaintiff is estopped from asserting that defendant is any longer liable on the note in that _____ [*allege specific facts constituting estoppel, showing plaintiff's representation or conduct on which defendant relied, e.g.,* on or about _____ (*date*), when defendant had agreed to sell the motor vehicle that was security for the note, he/she and the prospective purchaser went to plaintiff's office at _____(*address*) and explained to plaintiff's _____(employee *or* agent *and name of agent or employee if known*) that defendant was selling the vehicle that was the security for the note and that the purchaser wanted to pay the balance owing on the note and wanted plaintiff to release its security interest in the vehicle. _____ (*Name of purchaser*) then gave plaintiff his/her check for $_____, which was the amount plaintiff claimed it was owed. Plaintiff knew that prudent business practice and ordinary care required that plaintiff not release its security interest in, and that defendant not relinquish his/her title to, the vehicle until _____'s (*name of purchaser*) check had cleared. Nevertheless, without verifying that the check tendered by _____ (*name of purchaser*) was drawn on sufficient funds, plaintiff instructed defendant to relinquish title to the vehicle by signing off on the "pink slip" and releasing it to _____(*name of purchaser*). Defendant acquiesced in plaintiff's instructions, signed off on the "pink slip," and turned it over to _____ (*name of purchaser*) because he/she believed that plaintiff had verified that the check was good and that by complying with plaintiff's instructions, he/she would be released from liability on the note.]

[2] Use of Form

The foregoing form of affirmative defense based on equitable estoppel (sometimes called estoppel in pais or estoppel by conduct) is for use by a defendant in answer to a payee's complaint to collect on a promissory note after the defendant has taken action as instructed by the payee and that the payee, actually or impliedly, represented would fully discharge the defendant from liability on the note [*see Civ. Code § 1476* (obligation extinguished by performance in accordance with creditor's instruction)].

The required elements of the defense are (1) a representation or concealment of material facts, (2) made with knowledge, actual or virtual, of the facts, (3) to a party ignorant, actually and permissibly, of the truth, (4) with the intent, actual or virtual, that the latter act on it, and (5) that defendant was induced to rely on it [*Evid. Code § 623*; *see San Diego Credit Union v. Smith (1986) 176 Cal. App. 3d 919, 922-923, 222 Cal. Rptr. 467]* .

[3] State Statutes

Party who has, by statement or conduct, intentionally and deliberately led another to believe particular thing to be true and to act on such belief as not allowed in any litigation arising out of such statement or conduct to contradict it. *Evid. Code § 623*

[4] Decisions

Once party has gained advantage on basis of specific representations, it is not thereafter permitted to disavow its previous representations. *Alling v. Universal Manufacturing Corp. (1992) 5 Cal. App. 4th 1412, 1442, 7 Cal. Rptr. 2d 718* (applying doctrine to bar proof under licensing agreement after plaintiffs had represented to court and defendant that they were only pursuing claims under purchase agreement)

Elements of doctrine of equitable estoppel; doctrine not applicable if one element (here reliance on sign posted where lottery ticket was purchased) is missing. *Hair v. State of California (1991) 2 Cal. App. 4th 321, 328-329, 2 Cal. Rptr. 2d 871*

Estoppel [*see Evid. Code § 623*] as requiring reliance and detriment; reliance may be unreasonable as matter of law when particular agreement provides that it will not affect matter with respect to which plaintiff alleges reliance. *Aragon-Haas v. Family Security Ins. Services, Inc. (1991) 231 Cal. App. 3d 232, 241, 282 Cal. Rptr. 233* (wrongful termination action; employee stock purchase agreement provided that it would not affect status or terms of employer-employee or independent contractor relationship)

Equitable estoppel as not available to bar collection of prepayment penalty when collection agent mistakenly accepted payoff from maker's agent without penalty and maker's agent knew of clear penalty language in note. *Sanguansak v. Myers (1986) 178 Cal. App. 3d 110, 117-118, 223 Cal. Rptr. 490*

Payee as equitably estopped under *Evid. Code § 623* from asserting maker's liability on note after maker did what payee instructed him to do in response to maker's request that payee accept third-party payoff and relinquish its security interest. *San Diego Credit Union v. Smith (1986) 176 Cal. App. 3d 919, 922-923, 222 Cal. Rptr. 467*

Civ. Code § 1606, which provides that moral obligation may be sufficient consideration, as not applicable to revive obligation that payee is equitably estopped from asserting; thus, extension agreement not binding on maker. *San Diego Credit Union v. Smith (1986) 176 Cal. App. 3d 919, 923-924, 222 Cal. Rptr. 467*

[5] Text References

Witkin, Summary of California Law, vol. 13, *Equity*, §§ 190-191 (10th ed. 2005)

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Volume 33: Motions After Trial thru Negotiable Instruments-Chs. 371-385
Chapter 385 NEGOTIABLE INSTRUMENTS
PART IV. FORMS

33-385 California Forms of Pleading and Practice--Annotated § 385.119

§ 385.119 Notice From Payee to Drawer Regarding Potential Liability of Maker for Treble Damages [Civ. Code § 1719(a), (c)]

[1] FORM Notice From Payee to Drawer Regarding Potential Liability of Maker for Treble Damages [Civ. Code § 1719(a), (c)]

TO: _____ [*name of drawer*]

_____ [*Name of payee*] is the payee of a check you wrote for $_____. The check was not paid because you stopped payment, and the payee demands payment. You may have a good faith dispute as to whether you owe the full amount. If you do not have a good faith dispute with the payee and fail to pay the payee the full amount of the check in cash, a service charge of an amount not to exceed $25 for the first check passed on insufficient funds and an amount not to exceed $35 for each subsequent check passed on insufficient funds, and the costs to mail this notice within 30 days after this notice was mailed, you could be sued and held responsible to pay at least both of the following:

(1) The amount of the check.

(2) Damages of at least $100 or, if higher, three times the amount of the check up to $1,500.

(3) The cost of mailing this notice.

If the court determines that you do have a good faith dispute with the payee, you will not have to pay the service charge, treble damages, or mailing cost mentioned above. If you stopped payment because you think you have a good faith dispute with the payee, you should try to work out your dispute with the payee. You can contact the payee at:

_____ [*name of payee*]

_____ [*street address*]

_____ [*telephone number*].

You may wish to contact a lawyer to discuss your legal rights and responsibilities.

_____ [*name of sender of notice*]

[2] Use of Form

This form is the statutory notice set forth in *Civ. Code § 1719(c)*. It, or a substantially similar notice, must be sent to the payee at least 30 days prior to the commencement of suit if the maker wishes to recover damages under *Civ. Code § 1719* against a payee who has stopped payment on a check [*Civ. Code § 1719(c)*; *see § 385.120* (complaint for use in such an action)].

In cases other than those involving stop payments, this notice may be modified to constitute the demand required by *Civ. Code § 1719(a)*. In that case, the statement in the second sentence of the form giving the reason that payment was not made should be replaced with the actual reason, that is, lack of funds or the fact that maker has no account with the drawee [*see Civ. Code § 1719(a)(6)*].

[3] Rights of Assignee

The assignee of the payee or a holder of the check may demand, recover, or enforce the service charge, damages, and costs specified in *Civ. Code § 1719* to the same extent as the original payee [*Civ. Code § 1719(i)*]. A drawer is liable for damages and costs only if all of the requirements of that section have been satisfied. Furthermore, the drawer will not be liable more than once under that section on each check for a service charge, damages, or costs [*Civ. Code § 1719(j)*].

[4] Service Charge

Notwithstanding any penal sanctions that may apply, any person who passes a check on insufficient funds will be liable to the payee for the amount of the check and a service charge payable to the payee of not more than $25 for the first check passed on insufficient funds and not more than $35 for each subsequent check passed on insufficient funds [*Civ. Code § 1719(a)(1)*]. However, a person will not be liable for the service charge if, at any time, he or she presents the payee with written confirmation by his or her financial institution that the check was returned to the payee by the financial institution due to an error on its part. Furthermore, a person will not be liable for the service charge if he or she presents the payee with written confirmation that his or her account had insufficient funds as a result of a delay in the regularly scheduled transfer of, or the posting of, a direct deposit of a social security or government benefit assistance payment [*Civ. Code § 1719(a)(4), (5)*].

If a person becomes liable for treble damages for a check that is the subject of a written demand [*see § 385.120[4]*], that person will no longer be liable for any service charge for that check or for any costs to mail the written demand [*Civ. Code § 1719(a)(2)*; *Imperial Merchant Servs., Inc. v. Hunt (2009) 47 Cal. 4th 381, 386-387, 97 Cal. Rptr. 3d 464, 212 P.3d 736*].

[5] Copy and Certified Mail Receipt

The notice and demand must be sent to the maker by certified mail [*Civ. Code § 1719(a)(2)*], unless the payee is the court. In that case, written demand for payment may be mailed to the drawer by the court clerk [*Civ. Code § 1719(g)*].

In the case of a stop payment, a court may not award damages or costs under *Civ. Code § 1719* unless a copy of this notice and a signed certified mail receipt showing delivery, or, if refused, attempted delivery, of the notice to the drawer's last known address are received into evidence [*Civ. Code § 1719(d)*]. In the case of a stop payment when the

demand is mailed by the court clerk, however, the court may not award damages or costs under *Civ. Code § 1719(d)*, unless the court receives into evidence a copy of the written demand and a certificate of mailing by the court clerk in the form provided by statute for service in civil actions [*Civ. Code § 1719(g)*; *see Code Civ. Proc. § 1013a*(service in civil actions)]. The requirements of *Civ. Code § 1719* with regard to remedies are mandatory on the court [*Civ. Code § 1719(h)*].

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33-385 California Forms of Pleading and Practice--Annotated § 385.120

§ 385.120 Complaint for Money Due on Dishonor of Check [Civ. Code §§ 1719, 3302]--By Payee Against Drawer [Com. Code § 3414(b)]

[1] FORM Complaint for Money Due on Dishonor of Check [Civ. Code §§ 1719, 3302]--By Payee Against Drawer [Com. Code § 3414(b)]

[*Caption. See § 385.90[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 385.90[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 385.90[1], Paragraph 2.*]

3. On or about _____ [*date*], defendant, for valuable consideration, issued and delivered to plaintiff his/her/its check, number _____, dated _____, and [purportedly] drawn on _____ [*name of drawee*], at its branch located at _____ [*address of office on which drawn, city*], _____ County, California, and payable to the order of _____ [plaintiff *or* _____ (*name*), plaintiff's assignor,] in the amount of $_____. A copy of the check, front and back, is attached as Exhibit A and incorporated by reference.

4. [*If desired or necessary, describe plaintiff's collection attempts, e.g.,* On or about _____ (*date*), plaintiff endorsed the check for collection and deposited the check to his/her/its account at First Bank.] On or about _____ [*date*], the check was presented to the drawee for payment but was not paid. [It was returned by the drawee (on which it was purportedly drawn) with the notation that _____ (there were not sufficient funds for payment *or* defendant did not have an account with drawee *or* defendant had instructed the drawee to stop payment on the check).]

5. On or about _____ [*date*], plaintiff made written demand of defendant to pay the

$_____ [in accordance with the requirements of *Civil Code Section 1719*, informing him/her/it of the provisions of that section. The demand and notice were sent by certified mail at a cost to plaintiff of $_____. (Copies of the demand and notice and the signed certified mail receipt showing delivery to defendant's address are attached to this complaint as Exhibits B and C, respectively, and made parts hereof.)]

[6. Plaintiff is informed and believes and thereon alleges that defendant stopped payment on the check without any reasonable belief that he/she/it was legally entitled to do so because _____ (*describe circumstances indicating nonexistence of bona fide dispute, e.g.,* even though plaintiff wrote and called defendant to see if this dispute could be resolved, defendant never said there was any problem with the goods for which the check was payment and has never asked plaintiff to exchange or to repair them. Defendant said only that he/she decided after delivering the check that he/she could not afford the purchase, although he/she has refused to return the goods).]

[7. Plaintiff made a reasonable effort to reconcile and resolve this dispute prior to instituting this action. In addition to sending the notice required by *Civil Code Section 1719*, which advised defendant to try to work out our dispute and how to contact plaintiff, plaintiff _____ (*describe other attempts to resolve dispute, e.g.,* telephoned defendant several times over the course of a two-week period and sent a letter asking defendant to contact plaintiff to discuss any dissatisfaction with the goods for which the check was payment or to establish a payment plan for the amount of the check. Defendant refused to speak on the telephone to plaintiff and never responded to plaintiff's letter).]

8. Defendant has not paid the check or any part thereof, and there is now due, owing, and unpaid from defendant to plaintiff the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the [principal] sum of $_____;

2. For interest on the [principal] sum of $_____ from _____ [*date*];

[3. For $1,500 plus the costs of mailing demand by certified mail pursuant to *Civil Code Section 1719*;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 385.90[1].*]

[2] Use of Form

This complaint is for use in an action by a payee against the drawer following the dishonor of a check after the payee has made an unsuccessful demand on the drawee for payment and desires to recover the amount due [*see Com. Code § 3414(b)* (discussed in *§ 385.37[1]*)].

For a complaint for use after dishonor against the drawer of a check payable to bearer, see *§ 385.124*.

[3] Allegations

This complaint alleges:

- Defendant's residence or other basis for venue (Paragraph 1).
- Defendant's issuance of the check and delivery to plaintiff or plaintiff's assignor (Paragraph 3).
- Presentment and dishonor (Paragraph 4) [*see Com. Code § 3501(b)(2)(4)* (discussed in *§ 385.30[1], [2]*), *3502(b)* (when unaccepted draft is dishonored); *see also Com. Code § 3505(a)* (evidence and presumptions of dishonor)].
- Demand for payment (Paragraph 5).
- Nonpayment (Paragraph 8).

The requirement under former Division 3 of notice of dishonor or protest has been eliminated except as a prerequisite to enforcement of an endorser's liability or in the case of dishonor after acceptance by an acceptor other than a bank [Official Comment 2 to U.C.C. § 3-414 (1990); Official Comment 1 to U.C.C. § 3-502 (1990)]. The liability of the drawer of an unaccepted draft is treated as primary liability [Official Comment 2 to U.C.C. § 3-414 (1990)]. Nevertheless, the allegation regarding demand (Paragraph 5) has been retained in the belief that it is customary and prudent and because it is required if plaintiff seeks treble damages pursuant to *Civ. Code § 1719* [*Civ. Code § 1719(a), (c), (d), (g)*; for the statutory notice set forth in *Civ. Code § 1719(c), see § 385.119*]. In the case of a stop payment, if delivery of the written demand was refused, a signed receipt showing attempted delivery is sufficient evidence [*Civ. Code § 1719(d)*], unless the demand is mailed by the court clerk. In that case, the court may not award damages or costs in accordance with *Civ. Code § 1719(d)* unless the court receives into evidence a copy of the written demand and a certificate of mailing by the court clerk in the form provided by statute for service in civil actions [*Civ. Code § 1719(g)*; *see Code Civ. Proc. § 1013a* (service in civil actions)]. In either situation, Paragraph 5 should be modified accordingly.

Optional Paragraphs 6 and 7 and the optional allegations in Paragraphs 4 and 5 are for use if the plaintiff wishes to seek treble damages pursuant to *Civ. Code § 1719*, discussed in *§ 385.120[4]*.

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[4] Statutory Treble Damages

[a] Nonpayment After Demand

Notwithstanding any penal sections that may apply [*see, e.g., Penal Code § 476a*], any person who passes a check on insufficient funds (subject to thequalifications below) will be liable to the payee for the amount of the check and a service charge payable to the payee of not more than $25 for the first check passed on insufficient funds and not more than $35 for each subsequent check passed on insufficient funds [*Civ. Code § 1719(a)(1)*]. However, a person will not be liable for the service charge if, at any time, he or she presents the payee with written confirmation by his or her financial institution that the check was returned to the payee by the financial institution due to an error on its part. Furthermore, a person will not be liable for the service charge if he or she presents the payee with written confirmation

that his or her account had insufficient funds as a result of a delay in the regularly scheduled transfer of, or the posting of, a direct deposit of a social security or government benefit assistance payment [*Civ. Code § 1719(a)(4), (5)*].

Notwithstanding any penal sanctions that may apply, a person who passes a check on insufficient funds will be liable to the payee for damages equal to treble the amount of the check if a written demand for payment is mailed by certified mail to the person who passed the check. The person who passed the check has 30 days from the date the demand was mailed to pay the amount of the check, service charge, and the costs to mail the demand. If those amounts are not paid, the person who passed the check will be liable instead for the amount of the check, minus any partial payment made within 30 days of the demand, and damages equal to treble that amount, but not less than $100 or more than $1,500. When a person becomes liable for treble damages for a check that is the subject of a written demand, that person will no longer be liable for any service charge for that check and any costs to mail the written demand funds [*Civ. Code § 1719(a)(2)*]. As used here, "pass a check on insufficient funds" means to make, utter, draw, or deliver any check, draft, or order for the payment of money on any bank, depository, firm, or corporation that refuses to honor the check, draft, or order because (1) of lack of funds or credit in the account to pay the check, or (2) the maker does not have an account with the drawee, or (3) the maker instructed the drawee to stop payment [*Civ. Code § 1719(a)(6)*; *cf. Com. Code § 3103(a)(3), (5)* (Commercial Code definitions limit "maker" to person who issues note, whereas person who issues check is "drawer")].

The written demand for payment must be sent by certified mail (see optional allegations in Paragraph 5) and must inform the maker of the provisions of *Civil Code § 1719*, the amount of the check, and the amount of the service charge payable to the payee [*Civ. Code § 1719(a)(2)*]. If the payee-plaintiff prevails under *Civ. Code § 1719*, treble damages are mandatory [*Civ. Code § 1719(h)*; *see Mughrabi v. Suzuki (1988) 197 Cal. App. 3d 1212, 1215-1216, 243 Cal. Rptr. 438]* .

A drawer is liable for damages and costs only if all of the requirements of *Civ. Code § 1719* have been satisfied. Furthermore, the drawer will not be liable more than once under that section on each check for a service charge, damages, or costs [*Civ. Code § 1719(j)*].

The statutory damages prescribed in *Civ. Code § 1719* are exclusive in the sense that the payee or an assignee, on recovering a service charge pursuant to that section, may not also recover prejudgment interest under *Civ. Code § 3287*. If, after a proper demand, the service charge is not paid (together with the amount of the check and the cost of mailing the demand), and the payee or assignee sues for treble damages instead, then in that case as well, prejudgment interest may not be recovered [*Imperial Merchant Servs., Inc. v. Hunt (2009) 47 Cal. 4th 381, 386-387, 97 Cal. Rptr. 3d 464, 212 P.3d 736*].

In lieu of pursuing the statutory relief authorized in *Civ. Code § 1719*, if the check was taken as payment of an obligation, the payee or an assignee may seek damages for breach of the underlying obligation [*see Com. Code § 3310(b)(3)*], and in that case, prejudgment interest may be claimed [*Imperial Merchant Servs., Inc. v. Hunt (2009) 47 Cal. 4th 381, 394, 97 Cal. Rptr. 3d 464, 212 P.3d 736* ; *see Com. Code § 3302* (interest is recoverable)].

[b] When Drawer Has Stopped Payment

There is no cause of action under *Civ. Code § 1719* if the drawer has stopped payment to resolve a good faith dispute with the payee [*Civ. Code § 1719(a)(3)*]. To recover under this provision when the drawer has stopped payment, the payee must prove by clear and convincing evidence both (1) that there was no good faith dispute, as defined in *Civ. Code § 1719(b)* (Paragraph 6) [*Civ. Code § 1719(a)(3)*], and (2) that he or she made a reasonable effort to reconcile and resolve the dispute prior to institutingthe action (Paragraph 7) [*Civ. Code § 1719(e)*]. The requirements of *Civ. Code § 1719(a)* and *(e)* appear to be inconsistent. Nevertheless, this inconsistency may be resolved if the dispute referred to in *Civ. Code § 1719(e)* is interpreted as the dispute about nonpayment rather than the "good faith dispute" defined in *Civ. Code § 1719(b)* and referred to in *Civ. Code § 1719(a)(3)*.

If the reason for nonpayment is that payment on the check was stopped, the payee must first send notice to the maker in substantially the form set forth in *Civ. Code § 1719(c)* (*see* optional allegations in Paragraph 5) [*Civ. Code § 1719(c)*; *see Civ. Code § 1719(d), (g)* (copies of notice and certified mail receipt showing delivery, or attempted delivery if refused, required as evidence in case of stop payment; copy of written demand and certificate of mailing in form required by *Code Civ. Proc. § 1013a* for service in civil actions required as evidence in case of stop payment when demand is by court); *see also § 385.119* (form for notice)].

[c] Determining Existence of Good Faith Dispute

In the case of a stop payment, the existence of a "good faith dispute" is determined by the trier of fact. A "good faith dispute" is one in which the court finds that the maker of the check had a reasonable belief of his or her legal entitlement to withhold payment. Grounds to such an entitlement include, but are not limited to, the following: services were not rendered; goods were not delivered; goods or services purchased were faulty, not as promised, or otherwise unsatisfactory; or there was an overcharge [*Civ. Code § 1719(b)*].

[d] Jurisdiction and Venue

A cause of action under *Civ. Code § 1719* may be brought in the small claims court by the original payee if it does not exceed the jurisdiction of that court or in any other appropriate court [*Civ. Code § 1719(e)*].

An action on a check is covered by *Code Civ. Proc. § 395*, relating to venue in contract actions [*Roff v. Crenshaw (1945) 69 Cal. App. 2d 536, 538, 159 P.2d 661]* .

[e] Action by Payee's Assignee

A cause of action under *Civ. Code § 1719* may be brought by a holder of the check or an assignee of the payee. The proceeding is a limited civil case. If the assignee is acting on behalf of the payee for a flat fee or a percentage fee, the assignee may not charge the payee a greater flat fee or percentage fee for that portion of the amount collected that represents treble damages than is charged the payee for collecting the face amount of the check, draft, or order [*Civ. Code § 1719(f)*]. This restriction does not apply to an action brought in small claims court [*Civ. Code § 1719(f)*].

The assignee of the payee or a holder of the check may demand, recover, or enforce the service charge, damages, and costs specified in *Civ. Code § 1719* to the same extent as the original payee [*Civ. Code § 1719(i)*].

[5] Limitation Period

An action to enforce the obligation of a party to an unaccepted draft to pay the draft must be commenced within 3 years after dishonor of the draft or within 10 years after the date of the draft, whichever period expires first [*Com. Code § 3118(c)*]. This reflects a change from prior law. Drawers and endorsers now are subject to a limitation period that runs from the same date [Official Comment 2 to U.C.C. § 3-118 (1990)].

[6] Decisions

In action on check under *Civ. Code 1719*, maker of dishonored check may raise defense under *Com. Code § 3101 et seq.* to establish that check is unenforceable. *Cohen v. Disner (1995) 36 Cal. App. 4th 855, 857*

[7] Cross Reference

For complaints involving banks, see Ch. 95, *Banks, Deposits, and Checks*

For related forms, *see §§ 385.90, 385.119.*

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§ 385.121 Complaint for Money Due on Dishonor of Check [Civ. Code § 3302]--By Endorsee Against Drawer and Endorser [Com. Code §§ 3414(b), 3415]

[1] FORM Complaint for Money Due on Dishonor of Check [Civ. Code § 3302]--By Endorsee Against Drawer and Endorser [Com. Code §§ 3414(b), 3415]

[*Caption. See § 385.90[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 385.101[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 385.90[1], Paragraph 2.*]

3. On or about _____ [*date*], in _____ [*city*], _____ County, California, defendant _____ [*name of drawer*], for valuable consideration, issued and delivered to defendant _____ [*name of payee*] his/her/its check, number _____, dated _____, and [purportedly] drawn on _____ [*name of drawee*], at its branch located at _____ [*address of office on which drawn, city*], _____ County, California, payable to defendant _____[*name of payee*] or order, in the amount of $_____. A copy of the check, front and back, is attached as Exhibit A and incorporated by reference.

4. On or about _____ [*date*], for valuable consideration, defendant _____ [*name of payee*] endorsed the check _____ [in blank *or* by special endorsement as follows: _____ (*set out special endorsement, e.g.,* pay to the order of _____ (*name of plaintiff*), signed _____ (*name of payee/endorser*)] and delivered the check to plaintiff.

5. [*If desired or necessary, describe plaintiff's collection attempts, e.g.,* On or about _____ (*date*), plaintiff endorsed the check for collection and deposited the check to his/her/its account at First Bank.] On or about

_____ [*date*], the check was duly presented to drawee for payment, but it was not paid. [It was returned to plaintiff with the notation marked thereon that payment was not made because defendant _____ (*name of drawer*) _____ (*give reason, e.g.,* did not have sufficient funds on deposit with the drawee to pay the check).]

6. On or about _____ [*date*], notice of dishonor was given to defendant _____ [*name of payee/endorser*].

7. Defendants have not paid the check, or any part thereof, and there is now due, owing, and unpaid from defendants to plaintiff on account of that check the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For the [principal] sum of $_____;

2. For interest on the [principal] sum from _____ [*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 385.90[1].*]

[2] Use of Form

This complaint is for use in an action by an endorsee of a check against the drawer and the original payee/endorser after the check has been dishonored [*see Com. Code §§ 3414(b)* (drawer's liability), 3415 (endorser's liability)]. Plaintiff may add the optional allegations from § 385.120 and modify the prayer to seek additional damages from the drawer in accordance with *Civ. Code § 1719*, but plaintiff may have only one recovery.

[3] Allegations

This complaint alleges:

- The issuance of the check to defendant payee and its terms (Paragraph 3) [*see Com. Code §§ 3105, 3303*].

- Its endorsement and negotiation to plaintiff (Paragraph 4) [*see Com. Code §§ 3202, 3204-3205*].

- Plaintiff's negotiation of the check and its presentment and dishonor (Paragraph 5) [*see Com. Code §§ 3501-3503*].

- That the endorser was given notice of dishonor (Paragraph 6) [*see Com. Code §§ 3415(c), 3503(a)* (if notice of dishonor is required under *Com. Code § 3503*, it must be given to endorser or endorser's liability is discharged)].

- That, after the notice of dishonor, the check remains unpaid (Paragraph 7).

An endorser's liability is discharged if the check is not presented for payment or given to a depositary bank for collection within 30 days after the day the endorsement was made [*Com. Code § 3415(e)*]. Therefore, if more than 30 days separate the dates of endorsement alleged in Paragraph 4 and presentment alleged in Paragraph 5, counsel should insert additional allegations regarding deposit for collection within the 30-day period in Paragraph 5.

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[4] State Statutes

Who may enforce instrument. *Com. Code § 3301*

Liability of drawer. *Com. Code § 3414*

Liability of endorser. *Com. Code § 3415*

Presentment. *Com. Code § 3501*

Dishonor of unaccepted draft. *Com. Code § 3502(b)*

Notice of dishonor. *Com. Code § 3503*

[5] Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, §§ 23, 48 (10th ed. 2005)

[6] Cross Reference

For related forms, *see §§ 385.90, 385.104 -385.109, 385.120*

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33-385 California Forms of Pleading and Practice--Annotated § 385.122

§ 385.122 Complaint for Money Due on Dishonor of Check [Civ. Code § 3302]--By Endorsee Against Drawer and Subsequent Endorser [Com. Code §§ 3414(b), 3415]--Endorsement for Accommodation of Payee [Com. Code § 3419(a)-(c)]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Money Due on Dishonor of Check [Civ. Code § 3302]--By Endorsee Against Drawer and Subsequent Endorser [Com. Code §§ 3414(b), 3415]--Endorsement for Accommodation of Payee [Com. Code § 3419(a)-(c)]

[*Caption. See § 385.90[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 385.101[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 385.90[1], Paragraph 2.*]

3. On or about _____ [*date*], in _____ [*city*], _____ County, California, defendant _____ [*name of drawer*], for valuable consideration, issued and delivered to _____ [*name of payee/first endorser*] his/her/its check, number _____, dated _____, and [purportedly] drawn on _____ [*name of drawee*], at its branch located at _____ [*address of office on which drawn, city*], _____ County, California, payable to _____ [*name of payee/first endorser*] or order, in the amount of $_____. A copy of the check, front and back, is attached hereto as Exhibit A and made a part hereof.

4. On or about _____ [*date*], for valuable consideration, _____ [*name of payee/first endorser*] endorsed the check [*specify endorsement if desired, e.g.,* by special endorsement as follows: pay to the order of _____(*name of plaintiff*), signed _____ (*name of payee/first endorser*)] and delivered the check to plaintiff.

5. [Thereafter,] [D]efendant _____ [*name of second endorser*] personally guaranteed the endorsement of _____ [*name of payee/first endorser*] by endorsing the check in blank.

6. On or about _____ [*date*], plaintiff as owner and holder of the check _____ [*describe plaintiff's collection attempts, e.g.,* endorsed the check for collection and deposited the check to his/her/its account at First Bank]. On or about _____ [*date*], the check was duly presented to drawee for payment, but it was not paid. [It was returned to plaintiff with the notation marked thereon that payment was not made because defendant _____ (*name of drawer*) _____ (*give reason, e.g.,* did not have sufficient funds on deposit with the drawee to pay the check).]

7. On or about _____ [*date*], notice of dishonor was given to all prior endorsers.

8. Defendants have not paid the check, or any part thereof, and there is now due, owing, and unpaid from defendants to plaintiff on account of that check the sum of $_____.

[*Prayer. See § 385.121.*]

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 385.90[1].*]

[2] Use of Form

This complaint is for use in an action by an endorsee of a check against the drawer and subsequent endorser/accommodation endorser after dishonor of the check [*see Com. Code § 3419(a)-(c)*]. The payee/first endorser is not a defendant. Except for that difference, the allegations in this complaint are basically the same as those in § 385.121, with the addition of allegations:

- Regarding the second endorsement (Paragraph 5) [*see Com. Code §§ 3419(c)* (anomalous endorsement or words of guaranty as creating presumption that party is signing as accommodation party), *3205(d)* (anomalous endorsement as one made by person who is not holder of instrument)].

- That plaintiff was owner and holder of the note (Paragraph 6) [*see Com. Code §§ 3109(c)* (instrument payable to identified person as becoming payable to bearer if endorsed in blank), *3201(b), 3205(b), (c)* (negotiation of check endorsed in blank)].

- That both prior endorsers (prior to plaintiff, who may have endorsed the check in presenting it for collection) were given notice of dishonor (Paragraph 7) [*see Com. Code §§ 3415(c), 3503(a)* (if notice of dishonor is required under *Com. Code § 3503*)].

The second endorser will be an anomalous endorser, and therefore presumed to be an accommodation endorser, whether he or she endorsed the check before or after its delivery to plaintiff [*see* Official Comments 1, 2 to U.C.C. § 3-419 (1990)]. Endorsement before delivery is the situation addressed in *§ 385.102*, although that complaint is for use in an action on a note.

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when inclusion is necessary, in all pleadings and other papers filed in the court's

public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[3] Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, § 24 (10th ed. 2005)

[4] Cross Reference

For related forms, *see §§ 385.90, 385.102, 385.103, 385.120, 385.121*

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33-385 California Forms of Pleading and Practice--Annotated § 385.123

§ 385.123 Complaint [Code Civ. Proc. § 425.10] for Money Due on Dishonor of Check [Civ. Code § 3302]--By Endorsee Against Prior Endorsers [Com. Code § 3415]--Two or More Payees [Com. Code § 3116]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Money Due on Dishonor of Check [Civ. Code § 3302]--By Endorsee Against Prior Endorsers [Com. Code § 3415]--Two or More Payees [Com. Code § 3116]

[*Caption. See § 385.90[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 385.101[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 385.90[1], Paragraph 2.*]

3. On or about _____ [*date*], in _____ [*city*], _____ County, California, _____ [*name of drawer*], for valuable consideration, issued and delivered to defendants _____ and _____ [*names of payees/endorsers*] his/her/its check, number _____, dated _____, and [purportedly] drawn on _____ [*name of drawee*], at its branch located at _____ [*address of office on which drawn, city*], _____ County, California, payable to the order of _____ and _____ [*names of payees/endorsers*], in the amount of $_____. A copy of the check, front and back, is attached hereto as Exhibit A and incorporated by reference.

4. On or about _____ [*date*], for valuable consideration, _____ and _____ [*names of payees/endorsers*] endorsed the check [*specify endorsement if desired, e.g.,* by special endorsement as follows:pay to the order of _____ (*name of plaintiff*), signed _____ and _____(*names of payees/endorsers*)], and delivered the check to plaintiff.

5. On or about _____ [*date*], plaintiff _____ [*describe plaintiff's collection attempts,*

e.g., endorsed the check for collection and deposited the check to his/her/its account at First Bank]. On or about _____ [*date*], the check was duly presented to drawee for payment, but it was not paid. [It was returned to plaintiff with the notation marked thereon that payment was not made because defendant _____ (*name of drawer*) _____ (*give reason, e.g.,* did not have sufficient funds on deposit with the drawee to pay the check).]

6. On or about _____ [*date*], notice of dishonor was given to both defendants.

7. Defendants have not paid the check, or any part thereof, and there is now due, owing, and unpaid from defendants to plaintiff on account of that check the sum of $_____.

[*Prayer. See § 385.121.*]

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 385.90[1].*]

[2] Use of Form

This complaint is for use in an action by an endorsee of a check against the payees/endorsers after dishonor of a check payable to joint payees [*see Com. Code §§ 3116, 3415*]. Endorsers usually are not jointly and severally liable, but they are when an instrument is payable to two payees jointly and endorsed by both of them [Official Comment 2 to U.C.C. § 3-116 (1990)].

[3] Allegations

This complaint alleges:

- The issuance of the check to defendants as joint payees and its terms (Paragraph 3) [*see Com. Code §§ 3105, 3110(d), 3303*].

- Its endorsement and negotiation to plaintiff for value (Paragraph 4) [*see Com. Code § 3202, 3204-3205*].

- Plaintiff's negotiation of the check and its presentment and dishonor (Paragraph 5) [*see Com. Code §§ 3501-3503*; *see also § 385.121*].

- That both defendant/endorsers were given notice of dishonor (Paragraph 6) [*see Com. Code §§ 3415(c), 3503(a)* (if notice of dishonor is required under *Com. Code § 3503*, it must be given to endorser or endorser's liability is discharged)].

- That after that notice of dishonor, the check remains unpaid (Paragraph 7).

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[4] State Statutes

Effect of instrument payable to two or more persons. *Com. Code § 3110(d)*

Joint and several liability of parties to instrument. *Com. Code § 3116*

[5] Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, § 17 (10th ed. 2005)

[6] Cross Reference

For related forms, *see §§ 385.90[1], 385.102, 385.107, 385.120, 385.121*

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33-385 California Forms of Pleading and Practice--Annotated § 385.124

§ 385.124 Complaint for Money Due on Dishonor of Check [Civ. Code § 3302]--By Holder Against Drawer [Civ. Code § 3414(b)]--Check Payable to Bearer [Com. Code § 3109]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Money Due on Dishonor of Check [Civ. Code § 3302]--By Holder Against Drawer [Civ. Code § 3414(b)]--Check Payable to Bearer [Com. Code § 3109]

[*Caption. See § 385.90[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 385.90[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 385.90[1], Paragraph 2.*]

3. On or about _____ [*date*], defendant, for valuable consideration, issued and delivered to _____ [plaintiff *or name of person to whom check was originally delivered*] his/her/its check, number _____, dated _____, and [purportedly] drawn on _____ [*name of drawee*], at its branch located at _____ [*address of office on which drawn, city*], _____ County, California, and payable to _____ [cash *or* the order of cash *or* bearer *or* the order of bearer], in the amount of $_____. A copy of the check, front and back, is attached as Exhibit A and incorporated by reference.

[4. On or about _____ [*date*], (for valuable consideration,) the check was delivered to plaintiff.]

5. [*If desired or necessary, describe plaintiff's collection attempts, e.g.,* On or about _____ (*date*), plaintiff endorsed the check for collection and deposited the check to his/her/its account at First Bank.] On or about _____ [*date*], the check was presented to the drawee for payment but was not paid. [On _____ (*date*), notice of dishonor was given to defendant.]

6. No part of the check has been paid, and there is now due and owing to plaintiff thereon the sum of $_____ with interest thereon from _____ [*date*].

[*Prayer. See § 385.120.*]

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 385.90[1].*]

[2] Use of Form

This complaint is for use in an action by a holder against the drawer on the dishonor of a check made payable to bearer [*Com. Code §§ 3109, 3201(b), 3414(b)*]. Counsel may wish to add the optional allegations from § 385.120 to attempt to collect the penalty and costs authorized by *Civ.Code § 1719*. It is not clear, however, that the holder of a check payable to bearer is considered a "payee" within the meaning of *Civ. Code § 1719*.

[3] Allegations

This complaint alleges the issuance and delivery of a check payable to bearer (Paragraph 3) [*Com. Code § 3109(a)(1), (3)*]. In addition to the optional allegations in Paragraph 3, a check is payable to bearer if it does not state a payee [*Com. Code § 3109(a)(2)*], if it otherwise indicates that the person in possession of it is entitled to payment [*Com. Code § 3109(a)(1)*], or if it otherwise indicates that it is not payable to an identified person [*Com. Code § 3109(a)(3)*].

If the check was originally issued to plaintiff, optional Paragraph 4 is not necessary. A check payable to bearer may by negotiated by delivery alone [*see Com. Code § 3201(b)*; Official Comment 1 to *U.C.C. § 3109* (1990)]. Thus, the transfer to plaintiff alleged in optional Paragraph 4 does not contain any allegation regarding endorsement, although one may be added [*see, e.g., Com. Code § 3109(c)* (instrument originally payable to bearer may become payable to identified person if it is specially endorsed pursuant to *Com. Code § 3205(a)*]. The optional allegation regarding consideration is for use if it is necessary to establish plaintiff's status as a holder in due course [*see Com. Code § 3302(a)(2)(A)* (holder in due course as one who, among other things, took for value)].

Notice of dishonor is no longer a prerequisite to enforcement of drawer's liability (Paragraph 5) [*see* Official Comment 2 to U.C.C. § 3-414 (1990); Official Comment 1 to U.C.C. § 3-502 (1990); *see also § 385.120*].

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers when inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*].

[4] State Statutes

When instrument is payable to bearer. *Com. Code § 3109*

Person entitled to enforce instrument. *Com. Code § 3301*

[5] Decisions

Payee of check entitled to holder-in-due-course status under *Com. Code § 3302*; bank precluded from recovering its mistaken payment as long as payee took instrument in good faith. *Gentner v. Wells Fargo Bank (1999) 76 Cal. App. 4th 1165, 1168-1170, 90 Cal. Rptr. 2d 904*

[6] Cross Reference

For related forms, *see §§ 385.90, 385.100, 385.121*

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33-385 California Forms of Pleading and Practice--Annotated § 385.125

§ 385.125 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Failure of Consideration [Com. Code §§ 3303(b), 3305(a)(2), (b)(2)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Failure of Consideration [Com. Code §§ 3303(b), 3305(a)(2), (b)(2)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that he/she/it received no consideration in exchange for the _____ [*specify instrument, e.g.,* check], and any alleged consideration tendered failed completely in that _____ [*describe failure of consideration, e.g.,* at the time the check was presented, no part of the promise in return for which the check was issued had been performed].

[2] Use of Form

This affirmative defense based on failure of consideration is for use in an action brought by a party who is not a holder in due course against an obligor on an instrument for default in payment allegedly due [*Com. Code §§ 3303(b), 3305(a)(2)*]. The defense of failure of consideration cannot be asserted against a holder in due course, except to the extent the holder knew of the defense when he or she acquired his or her interest in the instrument [*see Com. Code §§ 3302(a)(2)(F), 3305(b)*].

[3] Decisions

Failure of consideration is good defense to action on negotiable promissory note by one not holder in due course. *Bliss v. California Coop. Producers (1947) 30 Cal. 2d 240, 248-249, 181 P.2d 369* ; *Benson v. Andrews (1955) 138 Cal. App. 2d 123, 132, 292 P.2d 39*

Affirmative defense that instrument sued on, although unconditional by its terms, was actually given as collateral security for other obligation, and thus is conditional. *Thompson v. Koeller (1920) 183 Cal. 476, 480, 191 P. 927*

When plaintiff is not holder in due course, general denial as putting in issue question whether consideration was given for note that recites that it was given for consideration. *FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 397, 282 Cal. Rptr. 508*

Defense of failure of consideration as inapplicable when one receives what one has bargained for but it has become worthless; defense of frustration may be applicable. *FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 397-401, 282 Cal. Rptr. 508*

Rule that defendant's admitted signature on negotiable instrument entitles holder to recover unless defendant establishes defense as superseding *Civ. Code § 1614*, providing that written instrument is presumptive evidence of consideration. *Lane & Pyron, Inc. v. Gibbs (1968) 266 Cal. App. 2d 61, 66-67, 71 Cal. Rptr. 817*

Knowledge that note was given in consideration of executory agreement not yet performed by payee as not preventing endorsee for value from being holder in due course, unless he or she has notice of breach of agreement. *Mann v. Leasko (1960) 179 Cal. App. 2d 692, 697, 4 Cal. Rptr. 124*

Original payee on instrument as subject to defense of lack of consideration. *Seaboard Fin. Co. v. Miles & Sons (1951) 102 Cal. App. 2d 526, 528, 227 P.2d 892*

Failure to comply with oral agreement that has entered into and become part of consideration for note as failure of consideration. *Benjamin Moore & Co. v. O'Grady (1935) 9 Cal. App. 2d 695, 699-700, 50 P.2d 847*

Burden of pleading and proving lack of consideration to support written instrument as on party seeking to avoid it on that ground. *Hualde Ranch Co. v. Beebe (1935) 3 Cal. App. 2d 592, 594, 40 P.2d 545*

General denial alone as not sufficient to raise defense of failure of consideration on note. *California Standard Fin. Corp. v. J.D. Millar Realty Co. (1931) 118 Cal. App. 185, 190-191, 5 P.2d 41*

Fact that note was originally executed for insufficient consideration as affirmative defense. *California Standard Fin. Corp. v. J.D. Millar Realty Co. (1931) 118 Cal. App. 185, 190-191, 5 P.2d 41* ; *Portuguese American Bank v. Schultz (1920) 49 Cal. App. 508, 512-513, 193 P. 806*

One who would assert failure or partial failure of consideration for promissory note as required to allege this failure or be barred from presenting evidence on that point. *Portuguese American Bank v. Schultz (1920) 49 Cal. App. 508, 512-513, 193 P. 806*

[4] Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, § 29 (10th ed. 2005)

[5] Cross Reference

For related forms, *see §§ 385.115, 385.116, 385.128*

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33-385 California Forms of Pleading and Practice--Annotated § 385.126

§ 385.126 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Certification of Check [Com. Code §§ 3409(a), (d), 3414(c), 3415(d)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Certification of Check [Com. Code §§ 3409(a), (d), 3414(c), 3415(d)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that, after the making and delivery of the check set forth in plaintiff's complaint herein, plaintiff presented the check to the _____ [*name of bank*] at _____ [*city*], _____County, California, the bank on which it was drawn, and caused the check to be certified by that bank, thereby discharging defendant pursuant to *Commercial Code Section 3409*.

[2] Use of Form

The foregoing affirmative defense based on the check in question having been certified is for use by a drawer or endorser in an action brought by the payee or holder. A check is "certified" when it is accepted by the bank on which it is drawn [*Com. Code § 3409(a), (d)*; *see* discussion in *§ 385.35[1]*]. Once the check is certified, the drawer is discharged [*Com. Code § 3414(c)*; *see also Com. Code § 3414(f)*], as is any endorser who endorsed the check before the acceptance or certification [*see Com. Code § 3415(d)*]. After certification, only the bank remains liable on the check in accordance with *Com. Code §§ 3312* and *3411* [*see* Ch. 95, *Banks, Deposits, and Checks*].

[3] State Statutes

Certification of check as discharge of drawer. *Com. Code § 3414(c)*

Certification of check as discharge of prior endorsers. *Com. Code § 3415(d)*

[4] Decisions

Certification of check as transferring drawer's claim against bank to payee or holder of check. *Umbsen v. Crocker First Nat'l Bank (1949) 33 Cal. 2d 599, 601-602, 203 P.2d 752*

Acceptor or certifier of check as liable on acceptance or certification according to tenor of instrument at time of acceptance or certification. *Wells Fargo Bank & Union Trust Co. v. Bank of Italy (1931) 214 Cal. 156, 157-158, 4 P.2d 781*

[5] Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, §§ 11, 42, 44, 46, 48, 58, 62, 118, 122 (10th ed. 205)

[6] Cross Reference

For additional forms of complaints involving certification of checks by banks, see Ch. 95, *Banks, Deposits, and Checks*

For related forms, *see §§ 385.119, 385.120*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.127

§ 385.127 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Check Not Presented Within 30 Days After Endorsement [Com. Code § 3415(e)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Check Not Presented Within 30 Days After Endorsement [Com. Code § 3415(e)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges the following:

1. Defendant's endorsement of the check that is the subject of this complaint and delivery of the check to plaintiff occurred on or about _____ [*date*].

2. Plaintiff failed to present the check to the drawee for payment or to give the check to a depositary bank for collection within 30 days after the date of this defendant's endorsement.

[2] Use of Form

The foregoing affirmative defense is for use by an endorser whose liability has been discharged because of plaintiff's failure to present for payment or to give it to a depositary bank for collection within 30 days after defendant endorsed it [*see Com. Code § 3415(e)*].

[3] State Statutes

Discharge of endorser's liability for delay in presentment. *Com. Code § 3415(e)*

[4] Cross References

For a related form, *see § 385.111*.

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33-385 California Forms of Pleading and Practice--Annotated § 385.128

§ 385.128 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Holder Had Notice of Infirmity, Defense, or Claim [Com. Code § 3302(a)(2)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Holder Had Notice of Infirmity, Defense, or Claim [Com. Code § 3302(a)(2)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges the following:

1. _____ [*Name of payee or previous holder*] assigned or transferred the _____ [*specify, e.g.,* promissory note] that is the subject of this complaint to plaintiff on or about _____ [*date*].

2. Plaintiff claims to be a purchaser in good faith, for value, and without notice of any infirmities in or of, or defenses against enforcement of, the note, but she/he/it at all times knew of the infirmities of the note alleged herein.

[*Continue with allegations of particular defense or infirmity, incorporating them from another defense form if appropriate*]

[2] Use of Form

The foregoing affirmative defense based on the holder's knowledge of the infirmities of a promissory note is for use in an action brought by a holder against the obligor for default in payment allegedly due [*see Com. Code § 3302(a)(2)* (discussed in the Introduction under Holder in Due Course--Elements, *above*)].

For discussion of the related "shelter" doctrine of *Com. Code § 3203(b)*, see discussion in the Introduction under--Transfer, *above.*

[3] State Statutes

Claims and defense that will negate taker's status as holder in due course. *Com. Code § 3302(a)(2)*

Defenses applicable to holders in due course. *Com. Code § 3305(a)(1), (b)*

Defenses that may not be asserted against holders in due course who had not notice of them. *Com. Code § 3305(a)(2), (3), (b)*

[4] Decisions

Endorsee having actual notice of infirmity in payee's title as not becoming holder in due course. *California Bank v. Diamond (1956) 144 Cal. App. 2d 387, 392, 301 P.2d 60*

Filing of lis pendens notice as not conveying to holder in due course of note secured by real property constructive notice of maker's equities against payee. *Ross v. Title Guar. & Trust Co. (1934) 136 Cal. App. 393, 400, 29 P.2d 236* ; *now see Com. Code § 3302(b)*

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33-385 California Forms of Pleading and Practice--Annotated § 385.129

§ 385.129 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant's Signature Obtained by Duress [Com. Code § 3305(a)(1)(B)]--Threats of Criminal Prosecution

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant's Signature Obtained by Duress [Com. Code § 3305(a)(1)(B)]--Threats of Criminal Prosecution

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges the following:

1. On or about _____ [*date*], at _____ [*city*], _____ County, California, plaintiff _____ [*set forth facts showing threats of criminal prosecution, e.g.,* fraudulently caused a criminal complaint to be lodged against defendant and thereafter informed defendant that the criminal complaint would be dismissed if defendant signed the note set forth in plaintiff's complaint].

2. By reason of plaintiff's coercion, intimidation, and threat of criminal prosecution, defendant signed the _____ [*specify type of instrument, e.g.,* note]; defendant signed it solely to avoid a continuance of the prosecution.

3. On or about _____ [*date*], and subsequent to defendant's execution of the _____ [*specify type of instrument, e.g.,* note], the criminal charge was dismissed.

[2] Use of Form

The foregoing affirmative defense based on plaintiff's coercing defendant to sign an instrument through threats of criminal prosecution is for use in an action brought by the payee or holder of an instrument. Duress sufficient under local law to nullify an obligation is a "real" defense that may be asserted against a holder in due course [*Com. Code § 3305(a)(1)(B), (b)*].

Whether duress is a defense to enforcement of an instrument under *Com. Code § 3305(a)(1)(B)* is a matter of degree. An instrument signed at the point of a gun is void, even in the hands of a holder in due course. One signed under threat

to prosecute the child of the maker for theft may be merely voidable, so that defense is cut off. The statutes differ in their provisions and the interpretations given them. They are primarily matters of local concern and local policy. All such matters are therefore left to local law. If, under local law, the effect of the duress is to make the obligation entirely null and void, the defense may be asserted against a holder in due course. Otherwise, it is cut off [Official Comment 1 to U.C.C. § 3-305 (1990)].

[3] State Statutes

Consent to contract as not real when elements of duress, fraud, undue influence, and mistake are present. *Civ. Code § 1567*

Elements of duress. *Civ. Code § 1568*

Acts constituting duress. *Civ. Code § 1569*

[4] Decisions

Instrument as void and unenforceable if executed or obtained through clear threat of criminal prosecution, particularly if threat is carried to extent of actually initiating prosecution. *Slocum v. Nelson (1945) 72 Cal. App. 2d 33, 37-38, 163 P.2d 888*

[5] Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, §§ 29, 31, 32, 55 (10th ed. 2005)

[6] Cross References

For alternative forms of complaints and defenses involving duress, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*

For a related form, *see § 385.90*

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33-385 California Forms of Pleading and Practice--Annotated § 385.130

§ 385.130 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Drawer or Maker Incompetent [Civ. Code § 1556 Com. Code § 3305(a)(1)(B)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Drawer or Maker Incompetent [Civ. Code § 1556 Com. Code § 3305(a)(1)(B)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that, at all times referred to in the complaint, defendant was _____ [*specify type of incapacity, e.g.,* of unsound mind and was wholly and absolutely incompetent and unable to understand the nature of the transactions in which he/she then participated. He/She was incapable of making any contract, including the note that is the subject of this action]. [Plaintiff at all times knew of the aforementioned circumstances.]

[2] Use of Form

The foregoing affirmative defense based on the defendant's lack of legal capacity is for use in an action brought by an obligee against a drawer or maker of an instrument for default in payment allegedly due. Lack of legal capacity sufficient under local law to nullify an obligation is a "real" defense that may be asserted against a holder in due course [*Com. Code § 3305(a)(1)(B), (b)*].

Lack of capacity under *Com. Code § 3305(a)(1)(B)* covers mental incompetence, guardianship, ultra vires acts or lack of corporate capacity to do business, or any other incapacity apart from infancy (which is addressed by *Com. Code § 3305(a)(1)(A)*). Such incapacity is largely statutory. Its existence and effect is left to the law of each state. If, under the state law, the effect is to render the obligation of the instrument entirely null and void, the defense may be asserted against a holder in due course. If the effect is merely to render the obligation voidable at the election of the holder, the defense is cut off [Official Comment 1 to U.C.C. § 3-305 (1990)].

[3] State Statutes

Capacity of persons without understanding to contract. *Civ. Code § 38*

Contracts made by persons without understanding but before they are adjudicated as lacking capacity. *Civ. Code § 39*

Power to enter contracts after judicial determination of incapacity. *Civ. Code § 40*

Incapacity of minors, insane persons, and convicts. *Civ. Code § 1556*

[4] Cross References

For alternative forms relating to insanity and incompetency, see Ch. 304 *Insane and Other Incompetent Persons*

For related forms, *see §§ 385.128, 385.129*

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33-385 California Forms of Pleading and Practice--Annotated § 385.131

§ 385.131 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Forged or Unauthorized Signature [Com. Code § 3403]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Forged or Unauthorized Signature [Com. Code § 3403]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that he/she did not sign the _____ [*specify instrument, e.g.,* note] set forth in plaintiff's complaint. The signature to the note purporting to be that of defendant was forged and made without the authority of defendant, the person whose signature it purports to be.

[2] Use of Form

The foregoing affirmative defense based on the defendant's forged or unauthorized signature is for use in an action brought by a payee or holder against a maker or endorser for default in payment allegedly due [*Com. Code § 3403*]. To be a holder in due course, one must have taken the instrument in question without notice that it contained an unauthorized signature and the instrument must not have contained any apparent evidence of forgery [*see Com. Code § 3302(a)(1), (2)(D)*].

[3] California Points and Authorities

For memoranda of points and authorities related to the presentation in evidence of forged instruments as intrinsic fraud, see California Points and Authorities, Ch. 105, *Fraud and Deceit, Duress, Menace, Undue Influence, and Mistake* (Matthew Bender)

[4] State Statutes

Effect of unauthorized signatures. *Com. Code § 3403*

[5] Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, §§ 39, 40, 53, 58, 119, 128-131 (10th ed. 2005)

[6] Cross References

For alternative forms of defenses and complaints involving forgeries in actions by or against banks, see Ch. 95, *Banks, Deposits, and Checks*

For a related form, *see § 385.128*

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33-385 California Forms of Pleading and Practice--Annotated § 385.132

§ 385.132 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--No Delivery [Com. Code § 3105(b)] and Incomplete Instrument [Com. Code § 3115]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--No Delivery [Com. Code § 3105(b)] and Incomplete Instrument [Com. Code § 3115]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges the following:

1. On or about _____ [*date*], defendant signed his/her name to a _____ [*specify instrument, e.g.,* blank promissory note] without filling in the date, the name of the payee, the amount, and the maturity date and left the incomplete instrument in _____ [*describe location, e.g.,* a desk drawer in his/her office at _____ (*address*), _____ (*city*), California].

2. On or about _____ [*date*], the _____ [*specify instrument, e.g.,* note] disappeared from defendant's _____ [*describe location, e.g.,* desk drawer in his/her office], and, without defendant's authority, the note was completed by a person or persons unknown to the defendant by writing in the date, the name of the payee, the amount, and the maturity date.

3. The _____ [*specify instrument, e.g.,* note in question] is attached to plaintiff's complaint as Exhibit A.

4. Plaintiff was not a holder in due course of the _____ [*specify instrument, e.g.,* note], in that _____ [*explain, e.g.,* plaintiff at the time of the transfer to him/her of the note knew of the above facts].

[2] Use of Form

The foregoing affirmative defense based on the lack of delivery [*Com. Code § 3105(b)*] and incompleteness of the instrument [*Com. Code § 3115*; *see also Com. Code §§ 3406, 3407* (liability for alterations)] is for use in an action

brought by a holder not in due course against a maker or drawer of an instrument for default in payment allegedly due. Lack of delivery or issuance is not a defense that may be asserted against a holder in due course [*see Com. Code § 3305(a)(2), (b)*], but, if one know of the existence of that defense when he or she acquired the instrument, he or she would not be a holder in due course [*Com. Code § 3302(a)(2)(F)*].

[3] State Statutes

Defense of nonissuance or incompleted instrument. *Com. Code § 3105(b)*

Enforceability of incomplete instruments. *Com. Code § 3115*

Effect of alteration of instrument. *Com. Code §§ 3406, 3407*

[4] Delivery or Issuance

Delivery as not essential to execution of negotiable instrument; lack of delivery as not defense against holder in due course. *Security-First Nat'l Bank v. Bank of America (1943) 22 Cal. 2d 154, 160, 137 P.2d 452*

Payee of negotiable instrument as having no interest in it until its delivery, and maker, therefore, as incurring no liability or obligation to payee until delivery. *Rogers v. Harris (1955) 138 Cal. App. 2d 1, 6, 291 P.2d 68* ; *Bogan v. Wiley (1949) 90 Cal. App. 2d 288, 292, 202 P.2d 824*

[5] Incomplete Instrument

Instrument as enforceable in hands of bona fide holder if person executed negotiable or nonnegotiable instrument containing blanks and entrusts it to third person, with power, express or implied, to fill in blanks in certain manner. *Phillips v. Clifford F. Reid, Inc. (1934) 3 Cal. App. 2d 304, 309, 39 P.2d 512* ; *now see Com. Code § 3115(b)*

[6] Text References

Witkin, Summary of California Law, vol. 4, *Negotiable Instruments*, §§ 9, 32, 41, 55 (10th ed. 2005)

[7] Cross References

For alternative forms involving fraudulent conveyances, see Ch. 270, *Fraudulent Conveyances*

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[a] Petition

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[a] Content and Time

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[4] Hearing

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[1] Prepare and File Contest

[a] Prepare Contest

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[b] Serve and File Papers

[c] Argue Motion at Hearing

[d] Prepare and File Order

[e] Appeal

[2] Prepare Motion to Modify Judgment of Newspaper's Standing to Reflect New Name

[a] Prepare Papers

[b] Give Notice and File Papers

[c] Argue Motion at Hearing

[d] Prepare and File Order

[e] Appeal

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[1] FORM

[2] Use of Form

[3] Filing and Publishing

[4] State Statutes

[5] Decisions

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§ 386.71 Petition [Gov. Code §§ 6008, 6020] to Have Standing as a Newspaper of General Circulation Under Criteria of Gov. Code § 6008 Ascertained and Established by Judicial Decree [Gov. Code § 6027]

[1] FORM

[2] Use of Form

[a] Proceeding Under Gov. Code § 6008

[3] Governing Law

[4] Filing and Publishing

[5] State Statutes

[6] Decisions

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[1] FORM

[2] Use of Form

[3] Publication

[a] Requirement

[b] Proof of Publication in Newspaper

[4] State Statutes

[5] Decisions

[6] Cross Reference

§ 386.73 Proceedings for Obtaining Order Directing Publication of Petition and Notice Regarding the Adjudication of Newspaper's Status [Gov. Code § 6021]--Ex Parte Application, Declaration [Code Civ. Proc. § 2015.5], and Order [Code Civ. Proc. § 1003]

[1] FORM

[2] Use of Form

§ 386.74 Order Setting Time and Place for Hearing on Petition Declaring Status of Newspaper as One of General Circulation Under Gov. Code § 6000 or 6008 [Gov. Code § 6022]

[1] FORM

[2] Use of Form

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[4] Cross Reference

§ 386.75 Contest of Petition for Adjudication of Newspaper's Status as Newspaper of General Circulation Under Gov. Code § 6000 or 6008 [Gov. Code § 6022]

[1] FORM

[2] Use of Form

[3] Caption

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[1] FORM

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[1] FORM

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[1] FORM

[2] Use of Form

[3] Cross Reference

§ 386.79 Order Vacating, Modifying, or Setting Aside Judgment of Newspaper's Standing as Newspaper of General Circulation Under Gov. Code § 6000 or 6008 [Gov. Code § 6024(1)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross Reference

§ 386.80 Notice of Motion for Order Modifying Judgment of Newspaper's Standing as Newspaper of General Circulation Under Gov. Code § 6000 or 6008 to Reflect Change in Name [Gov. Code § 6024(2)]

[1] FORM

[2] Use of Form

[3] Notice Requirement

[4] Caption

[5] State Statutes

[6] Decisions

[7] Cross Reference

§ 386.81 Declaration in Support of Motion for Order Modifying Judgment of Newspaper's Standing as Newspaper of General Circulation Under Gov. Code § 6000 or 6008 [Gov. Code § 6024(2)]

[1] FORM

[2] Use of Form

[3] Cross Reference

§ 386.82 Order [Code Civ. Proc. § 1003] Modifying Judgment of Newspaper's Standing as Newspaper of General Circulation Under Gov. Code § 6000 or 6008 to Reflect Change in Name [Gov. Code § 6024(2)]

[1] FORM

[2] Use of Form

[3] Cross Reference

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34-386 California Forms of Pleading and Practice--Annotated § 386.01

§ 386.01 Scope of Chapter

This chapter discusses procedures relating to a newspaper's status as one of general circulation for the purpose of qualifying to publish official and legal notices and advertising [*see Gov. Code § 6040*]. It contains forms for use in proceedings to qualify a newspaper as one of general circulation [*see* §§ 386.70-386.74], a form for use in contesting adjudication of a newspaper's status as one of general circulation [*see § 386.75*], a form of judgment of a newspaper's status [*see § 386.76*], and forms for use in seeking to have a judgment adjudicating a newspaper's status as one of general circulation vacated, modified, or set aside [*see* §§ 386.77-386.82].

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§ 386.02 Cross References

For discussion of news reporter's immunity from contempt under Evid. Code § 1071 for refusing to disclose source of unpublished information, see Ch. 135, *Contempt* .

For forms for use in action against newspaper for libel, see Ch. 340, *Libel and Slander* .

For a complaint for invasion of privacy based on newspaper publication, see Ch. 429, *Privacy* .

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[Reserved]

§§ 386.03[Reserved]

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34-386 California Forms of Pleading and Practice--Annotated § 386.10

§ 386.10 Governing Law

The definitions of terms and criteria for defining a newspaper of general circulation are set forth in *Gov. Code §§ 6000-6008*. The special proceeding to obtain a judgment of a newspaper's standing is governed by *Gov. Code §§ 6020-6027*. Requirements for publication of official notices generally are governed by *Gov. Code §§ 6040-6044* and the manner and time periods for such publication are prescribed by *Gov. Code §§ 6060-6066*. Prior to 1943, the criteria for a newspaper of general circulation and the procedure for obtaining an adjudication of a newspaper's standing as such a newspaper were found in the former Political Code §§ 4460-4464. Cases dealing with newspapers of general circulation, decided prior to 1943, thus refer to the former Political Code rather than the current Government Code sections.

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34-386 California Forms of Pleading and Practice--Annotated § 386.11

§ 386.11 Significance of a Newspaper's Status

Whenever any official advertising, notice, resolution, order, or other matter is required by law to be published in a newspaper, publication must be made in a newspaper of general circulation [*Gov. Code § 6040*]. Publication in a newspaper of general circulation is not required when the notice or other matter is not required by law to be published in a newspaper [*Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control (1966) 65 Cal. 2d 349, 377, 55 Cal. Rptr. 23, 420 P.2d 735]* .

On or after July 1, 1952, to qualify as a newspaper of general circulation for the purpose of publishing official matter, a newspaper must obtain, or have previously obtained, a judicial decree establishing the newspaper as having such status [*Gov. Code § 6027*].

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34-386 California Forms of Pleading and Practice--Annotated § 386.12

§ 386.12 Alternative Criteria for Newspaper of General Circulation

[1] Generally

Gov. Code §§ 6000 and *6008* provide two alternative definitions of a newspaper of general circulation. For the purpose of obtaining an adjudication of its standing, a newspaper may qualify as one of general circulation under either the criteria of *Gov. Code § 6000* or *Gov. Code § 6008*.

The differences between the requirements of the two sections are briefly summarized as follows. Under *Gov. Code § 6000*, a newspaper must have been established and must have been printed and published in the same city or town for at least one year prior to the filing of its petition for an adjudication of its standing. *Gov. Code § 6008* does not require that the newspaper be printed and published in the same city or town, but it does require that the newspaper have been established and published for at least three years prior to the filing of the petition for an adjudication of its standing. *Gov. Code § 6008* also requires a substantial distribution list of paid subscribers in the area for which the newspaper seeks an adjudication of its standing, a minimum amount of space in the newspaper that is devoted to news coverage, and that the newspaper have only one principal office of publication, located in the area for which the newspaper seeks adjudication of its standing.

[2] Common Requirements

[a] Generally

Gov. Code §§ 6000 and *6008* both require that the newspaper be published for the dissemination of local or telegraphic news and intelligence of a general character, that it have a bona fide subscription list of paying subscribers, and that it be published at regular intervals of not less than weekly in the area for which the newspaper seeks an adjudication of its status [*Gov. Code §§ 6000, 6008(a)*].

Cases have interpreted the requirements of regular intervals to mean publishing not at equal intervals, but with regularity, and not only occasionally [*In re Tribune Publishing Co. (1910) 12 Cal. App. 754, 756, 108 P. 667]* . For example, a newspaper published every week, although not always published on the same day of each week, is published at regular intervals [*In re Christensen (1951) 104 Cal. App. 2d 375, 379, 231 P.2d 152]* .

[b] Of Being Published

For a newspaper to be published pursuant to *Gov. Code § 6000*, it must have been issued from the place where it is printed and sold to or circulated among its subscribers during the entire one-year period required by *Gov. Code § 6000* [*Gov. Code § 6004*]. A newspaper is "published" for the purpose of *Gov. Code § 6008* if it is issued from the place where it is sold to or circulated among its subscribers during the entire three-year period required by *Gov. Code § 6008* [*Gov. Code § 6008*].

[c] Of Being Established

For a newspaper to be established pursuant to the requirements of *Gov. Code § 6000*, it must have been in existence under a specified name during the entire one-year period prior to the filing of the petition [*Gov. Code § 6002*]. As required by *Gov. Code § 6008*, a newspaper that is established is one that is in existence under a specified name during the entire three-year period prior to the filing of the petition [see *Gov. Code § 6008*]. Pursuant to both sections, however, a modification of the newspaper's name during the required period that does not substantially change the newspaper's identity will not affect whether or not the newspaper is established [*see Gov. Code §§ 6002, 6008*; *see also Gov. Code § 6024*]. For example, changing a newspaper's name by dropping one word from the name, if the identity of the newspaper is not destroyed by the change, will not affect the newspaper's standing [*In re Lefavor (1917) 35 Cal. App. 145, 147, 169 P. 412]* . Similarly, a change in a newspaper's ownership or consolidation with another newspaper does not, in and of itself, affect a newspaper's standing [*Brown Newspaper Publishing Co. v. Superior Court (1981) 114 Cal. App. 3d 462, 468, 170 Cal. Rptr. 611]* .

[3] Content

Gov. Code §§ 6000 and *6008* both require that a newspaper of general circulation contain local or telegraphic news and intelligence of a general character [*see Gov. Code §§ 6000, 6008*]. The news may be either local or telegraphic, but need not be both [*see In re Herman (1920) 183 Cal. 153, 162, 191 P. 934]* .

The required news and intelligence must be of a general character in order to serve the legislative purpose of having legal notices published in newspapers, assuring that such notices will come to the attention of a substantial number of persons in the affected area [*see In re Norwalk Call (1964) 62 Cal. 2d 185, 190, 41 Cal. Rptr. 666, 397 P.2d 426* ; *see also In re Herman (1920) 183 Cal. 153, 164, 191 P. 934]* . In the case of *In re Herman (1920) 183 Cal. 153, 163-164, 191 P. 934* , decided under former Political Code § 4460, the California Supreme Court stated that an example of a newspaper containing news and intelligence of a general character is one that contains news accounts of court and official proceedings, accounts of activity of the state legislature, reviews of court decisions, general advertisements, personal notices, and diverse local current events. In another case, a court held that a newspaper containing information about candidates for local office, news about the local school district, American Legion post, local business, social events, and advertisements contained news of interest to the local public, and intelligence of a general character [*In re Paradise News Press (1957) 151 Cal. App. 2d 496, 498, 311 P.2d 555]* .

Conversely, a newspaper generally containing no news or legal notices, but consisting chiefly of tables, directories, and weather information, does not contain news and intelligence of a general character, and therefore does not qualify as a newspaper of general circulation [*In re Herman (1920) 183 Cal. 153, 162-164, 191 P. 934]* .

[4] Subscribers

Gov. Code §§ 6000 and *6008* both require that a newspaper of general circulation have a "bona fide subscription list of paying subscribers." A bona fide subscription list has been defined as a list containing only those who, in good faith, pay regularly for subscriptions [*In re Herman (1920) 183 Cal. 153, 164-165, 191 P. 934]* . Neither section requires a specific number of subscribers [*In re Herman (1920) 183 Cal. 153, 164-165, 191 P. 934* ; *see In re Paradise News*

Press (1957) 151 Cal. App. 2d 496, 499, 311 P.2d 555 ; *In re Green (1913) 21 Cal. App. 138 142, 131 P. 91]* . Evidence that there is considerable circulation to nonsubscribers or that the number of subscribers has decreased in proportion to the population of an area does not preclude a newspaper from having a bona fide subscription list [*In re Paradise News Press (1957) 151 Cal. App. 2d 496, 499, 311 P.2d 555* ; *In re Application of Simpson (1923) 217 P. 789]* .

If a newspaper seeks to qualify as a newspaper of general circulation under *Gov. Code § 6008*, it must meet the additional requirement that it has had a substantial distribution to paid subscribers in the area for which it seeks adjudication of its standing. It has been held that although the phrase "substantial distribution to paid subscribers" is relative, its meaning is determinable and not unconstitutionally vague. For example, a newspaper that had a paid distribution of less than two hundredths of one percent of the local population did not have a substantial distribution to paid subscribers within the meaning of *Gov. Code § 6008* [*In re Carson Bulletin (1978) 85 Cal. App. 3d 785, 794-795, 149 Cal. Rptr. 764]* .

[5] Printed and Published Pursuant to Gov. Code § 6000

[a] Definition of "Printed"

Pursuant to *Gov. Code § 6000*, a newspaper of general circulation must have been printed and published at regular intervals in the area for which it seeks an adjudication of its standing. *Gov. Code § 6003* defines the term "printed" as being the mechanical work of producing the newspaper, that is, the typesetting, and the impressing of type on paper. This mechanical work must have been performed for a year prior to the newspaper's petition regarding its standing. "Printing" does not refer to any particular method of reproduction, but merely to the general mechanical process [*In re News-Ledger (1967) 255 Cal. App. 2d 211, 215, 63 Cal. Rptr. 69* ; *In re "Sonora Daily" (1951) 108 Cal. App. 2d 53, 59, 238 P.2d 111]* .

[b] Published and Printed in Same Place

"Published," as defined in *Gov. Code § 6004*, means that the newspaper is issued from the place where it is printed and sold during the entire one-year period required in *Gov. Code § 6000*. The terms "printed" and "published" are not synonymous [*Gov. Code § 6005*]. The requirement of *Gov. Code § 6004* that a newspaper be printed and pub lished in the same place refers to the same city, town, county, or other area where the official publications of the newspaper are to be made, not to the same situs or building [*In re Christensen (1951) 104 Cal. App. 2d 375, 378-379, 231 P.2d 152]* . In addition, *Gov. Code § 6004.5* requires that a newspaper of general circulation, if printed or published in a city or town, must be both printed and published in that same city or town.

The requirement that a newspaper of general circulation be printed and published in the city, town, or county where it seeks to publish legal notices has been held to be reasonable and constitutional [see *In re Application of Monrovia Evening Post (1926) 199 Cal. 263, 269-270, 248 P. 1017]* . A newspaper will not qualify under *Gov. Code § 6000* as a newspaper of general circulation for a city if the mechanical work of printing is performed in another city [*In re Covina Argus-Citizen (1960) 177 Cal. App. 2d 315, 319, 2 Cal. Rptr. 184* ; see also *In re Application of Monrovia Evening Post (1926) 199 Cal. 263, 266-267* (decided under former Pol. Code §§ 4460-4464)]. Nevertheless, such newspaper may qualify as a newspaper of general circulation for the county in which it is both printed and published [*Western States Newspapers, Inc. v. Gehringer (1962) 203 Cal. App. 2d 793, 797, 22 Cal. Rptr. 144* ; *In re Covina Argus-Citizen (1960) 177 Cal. App. 2d 315, 319, 2 Cal. Rptr. 184]* . An interpretation that *Gov. Code § 6004.5* requires a newspaper to be published and printed in the same city in order to qualify as a newspaper of general circulation for the county is contrary to the policy of encouraging competitive enterprise and contrary to the general purpose of the statute [*In re Lynwood Herald American (1957) 152 Cal. App. 2d 901, 909, 313 P.2d 584]* .

[6] Newspaper for Particular Group

[a] Generally

Prior to 1974 and the enactment of Gov. Code *§ 6008, Gov. Code* § 6000 provided the only criteria for a newspaper of general circulation. Therefore, *Gov. Code §§ 6001-6007* were enacted with the purpose of governing and defining a newspaper of general circulation under the standards of *Gov. Code § 6000* only. The following discussion of *Gov. Code § 6001* and the cases decided under it may therefore apply only to the standards of *Gov. Code § 6000,* although it would seem to apply to the analysis of a newspaper's standing under *Gov. Code § 6008* as well.

A newspaper that is devoted to the interests, entertainment, or instruction of a particular class, trade, calling, profession, race, or denomination, or published for such purpose, does not qualify as a newspaper of general circulation [*Gov. Code § 6001*]. Nevertheless, if such a newspaper also contains news of a general character, and items of interest to the general public, so that the general reading public might look to the newspaper for news of passing events, it may still qualify as a newspaper of general circulation [*In re Labor Journal (1923) 190 Cal. 500, 503-504, 213 P. 498* ; *In re David (1929) 98 Cal. App. 69, 73, 276 P. 419]* .

[b] Foreign Language Newspaper

Although there has been at least one opinion to the contrary, it has been held that a newspaper published in a foreign language may be a newspaper of general circulation [*In re La Opinion (1970) 10 Cal. App. 3d 1012, 1017, 1018, 89 Cal. Rptr. 404* ; see also *Richardson v. Tobin (1872) 45 Cal. 30, 33* (case decided prior to enactment of statutes defining newspaper of general circulation); but see *In re L'Italo-Americano (1934) 2 Cal. App. 2d 690, 692-696, 38 P.2d 810]* .

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§ 386.13 Exemption of Newspapers Established Prior to 1923

The standing of a newspaper that was established prior to 1923 is unaffected by the requirements of *Gov. Code §§ 6000-6075* regarding newspapers of general circulation [*Gov. Code § 6006*]. Therefore, a newspaper that met all the requirements of a newpaper of general circulation prior to 1923 is not disqualified from such status by subsequently failing to meet statutory requirements [*In re Norwalk Call (1964) 62 Cal. 2d 185, 189, 41 Cal. Rptr. 666, 397 P.2d 426* ; *Brown Newspaper Publishing Co. v. Superior Court (1981) 114 Cal. App. 3d 462, 467, 170 Cal. Rptr. 611]* . Thus, newspapers of general circulation prior to 1923 are thereafter freed from the requirement that they be printed and published in the same place [*Brown Newspaper Publishing Co. v. Superior Court (1981) 114 Cal. App. 3d 462, 467, 170 Cal. Rptr. 611* ; *In re Anaheim Daily Gazette (1963) 214 Cal. App. 2d 438, 444, 29 Cal. Rptr. 520]* . A newspaper established prior to 1923 is entitled to the exemption, despite changes in the political structure or names of government entities in the newspaper's area, and changes in the name or ownership of the newspaper that occur after 1923 [*In re Norwalk Call (1964) 62 Cal. 2d 185, 189-190, 41 Cal. Rptr. 666, 397 P.2d 426* ; *Brown Newspaper Publishing Co. v. Superior Court (1981) 114 Cal. App. 3d 462, 469, 170 Cal. Rptr. 611]* .

Whether a newspaper of general circulation that was established prior to 1923 may obtain an adjudication that it is a newspaper of general circulation for every city incorporated since 1923 within the county in which the newspaper is established is a question that has not yet been decided by the courts; however, an attempt to obtain this adjudication by ex parte modification of a prior decree and without the published notice required by *Gov. Code § 6021* is impermissible [*In re Molz (2005) 127 Cal. App. 4th 836, 843-846, 26 Cal. Rptr. 3d 131]* .

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§ 386.14 Exemptions During Wartime

The status of a newspaper of general circulation is not affected if publication of the newspaper is discontinued because of conditions induced by a war to which the United States is a party, so long as the publication is renewed either while the war is still pending, or within one year from the date hostilities officially terminate [*Gov. Code § 6006*]. For example, when, due to wartime conditions, the mechanical work of printing a newspaper was discontinued in the town in which it was published, but was reinstated within one year following the end of the war, the newspaper's standing as one of general circulation was unchanged [*In re Hancock (1949) 92 Cal. App. 2d 481, 488-489, 207 P.2d 61]* .

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§ 386.15 Procedure for Obtaining Adjudication of General Circulation Status

[1] Petition

On and after July 1, 1952, a newspaper will not be, in fact or in law, a newspaper of general circulation unless it obtains or has obtained a judicial decree establishing its status [*Gov. Code § 6027*]. In order to obtain a decree establishing its status as a newspaper of general circulation, the publisher, manager, editor, or attorney for the newspaper must file a verified petition in the superior court of the county in which the newspaper is established, printed, and published, or, under *Gov. Code § 6008*, in the county in which it is established and published [*Gov. Code §§ 6008, 6020*].The petition must set forth facts which justify an adjudication of status as a newspaper of general circulation [*Gov. Code § 6020*].

A petition alleging that a newspaper meets all the requirements of *Gov. Code § 6000* is sufficient; it is not required to allege in addition that the newspaper is not devoted to a particular class, as prohibited by *Gov. Code § 6001* [*In re The Santa Ana Independent (1946) 75 Cal. App. 2d 764, 765-766, 171 P.2d 548]* . A petition made pursuant to *Gov. Code § 6008* must set forth facts showing that the newspaper meets the criteria of that section [see *Gov. Code § 6008*].

[2] Notice of Petition

The petition, or substance of the petition, together with a notice that the petitioner intends on a named day to apply for an order declaring it to be a newspaper of general circulation, must be published in the petitioning newspaper. In addition, publication must be made in another newspaper of general circulation published in the same city as the petitioner. If there is no such newspaper, or if such newspaper refuses to publish the petition and notice, then the petitioner must publish the required documents in a newspaper of general circulation published in the same county as the petitioner, or, if there is no such newspaper, or it refuses to publish, then in a newspaper of general circulation of an adjacent county, or other newspaper as directed by the court [*Gov. Code § 6021*]. Such publication must be made for 10 days [*Gov. Code §§ 6021, 6062*]. The period of notice commences on the first day of publication and terminates at the end of the tenth day, including therein the first day. Publication must be made on each day on which the newspaper is published during the period [*Gov. Code § 6062*].

Publication of notice required by *Gov. Code § 6021* is satisfied by publication in a weekly newspaper for a period of 10 days; publication for 10 weeks in a weekly newspaper is not required [*In re The Santa Ana Independent (1946) 75*

Cal. App. 2d 764, 766-768, 171 P.2d 548] . The court is not permitted to make notice requirements in addition to the requirements of publication of notice and petition imposed by *Gov. Code § 6021* [*In re Carson Bulletin (1978) 85 Cal. App. 3d 785, 790, 796, 149 Cal. Rptr. 764]* .

[3] Hearing and Judgment

On proof of the publication of the petition and notice, the court sets the petition for hearing [*Gov. Code § 6022*]. Any person may appear and contest the petition, either prior to or on the day set for the hearing, or the day to which it is continued, regardless of whether or not such person has a pecuniary interest in the matter [*Gov. Code § 6022*; see also *In re Herman (1920) 183 Cal. 153, 158, 191 P. 934]* . The court hears the proofs of the petitioner and any contestants, and within 10 days thereafter, renders its decision and judgment. The clerk enters the judgment in the records of the court [*Gov. Code § 6023*].

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§ 386.16 Vacating or Modifying Judgment

The decision and judgment establishing the general circulation status of a newspaper may be vacated, modified, or set aside by the court on its own motion, or on the motion of any person, whether or not a party to the original proceeding, on (a) a verified statement of facts made to the court; (b) 10 days notice to the petitioner for the newspaper in question; and (c) a satisfactory showing made to the court that the newspaper has ceased to be a newspaper of general circulation [*Gov. Code § 6024(1)*]. The decision or judgment may also be modified on a satisfactory showing made to the court that the newspaper has modified its name without any substantial change in its character or identity as a newspaper of general circulation [*Gov. Code § 6024(2)*]. All publications made in a newspaper during the period it was adjudged to be a newspaper of general circulation, however, are valid and sufficient [*Gov. Code § 6025*].

A motion to vacate, modify, or set aside a judgment declaring a newspaper to be one of general circulation will be granted when the newspaper has failed to meet either the requirements of *Gov. Code § 6000* or *Gov. Code § 6008* [*In re Carson Bulletin (1978) 85 Cal. App. 3d 785, 789-790, 149 Cal. Rptr. 764]* . Nevertheless, if a newspaper qualified as one of general circulation prior to 1923, its standing as a newspaper of general circulation will be upheld, or upheld and modified, if it has subsequently failed to meet the requirements of a newspaper of general circulation [*Brown Newspaper Publishing Co. v. Superior Court (1981) 114 Cal. App. 3d 462, 468, 469, 170 Cal. Rptr. 611* ; *In re The Anaheim Daily Gazette (1963) 214 Cal. App. 2d 438, 444-445, 29 Cal. Rptr. 520]* .

A newspaper may not seek modification of a prior decree regarding which cities are within its scope as a newspaper of general circulation using *Gov. Code § 6024*; a change of this type is in substance a petition for an order declaring it to be newspaper of general circulation and requires the newspaper to follow the procedural requirements of *Gov. Code §§ 6021, 6022* and provide notice of the petition to the public [*In re Molz (2005) 127 Cal. App. 4th 836, 844, 26 Cal. Rptr. 3d 131]* .

On a motion to vacate a judgment determining the status of a newspaper, the moving party has the burden of proof of showing that ultimate facts have materially changed subsequent to the original order, and particularly that the newspaper has ceased to be one of general circulation [*In re Hancock (1949) 92 Cal. App. 2d 481, 486, 207 P.2d 61]* .

An adjudication of a newspaper's status may be modified if, for example, the newspaper is no longer printed in the city

for which it is a newspaper of general circulation, but is printed and published in the same county. In such a case, the newspaper's standing as one of general circulation for the city would be vacated, whereas its standing for the county would be upheld [*In re Covina Argus-Citizen (1960) 177 Cal. App. 2d 315, 319-320, 2 Cal. Rptr. 184]* .

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§ 386.17 Appeal

The Court of Appeal has jurisdiction over an appeal from a judgment on a general-circulation petition [*Lendennie v. Sabel (In re Perris City News) (2002) 96 Cal. App. 4th 1194, 1197-1199, 118 Cal. Rptr. 2d 38* ; *In re Molz (2005) 127 Cal. App. 4th 836, 841, 26 Cal. Rptr. 3d 131* ; *see Cal. Const., art. VI, § 11(a)*].

Gov. Code § 6026, enacted in 1943, provides that an appeal may be taken to the Supreme Court from any final decision or judgment relating to a newspaper's standing, or from any final order vacating, modifying, or setting aside a decision or judgment previously entered [*In re Hancock (1949) 92 Cal. App. 2d 481, 485, 207 P.2d 61* (reasonable construction of *Gov. Code § 6026* would also permit appeal from order denying motions to vacate, modify, or set aside decree previously entered)]. This statute conflicts, however, with constitutional provisions adopted in 1966. Those provisions confer appellate jurisdiction on the Supreme Court only when a judgment of death has been pronounced [*Cal. Const., art. VI, § 11*], when the Supreme Court transfers a case to itself from a court of appeal [*Cal. Const., art. VI, § 12(a)*], or when it reviews a decision of a court of appeal [*Cal. Const., art. VI, § 12(b)*]. With those exceptions, courts of appeal have appellate jurisdiction whenever superior courts have original jurisdiction [*Cal. Const., art. VI, § 11(a)*]. Because general-circulation petitions are matters over which the superior courts have original jurisdiction [*Gov. Code § 6020*], the court of appeal has appellate jurisdiction over appeals from judgments resolving those petitions. Therefore, since appellate jurisdiction conferred by the California Constitution cannot be destroyed or abridged by legislative action, the limiting language of *Gov. Code § 6026* is declared void and courts of appeal are judicially interpreted to have appellate jurisdiction over any final decision or judgment concerning a general-circulation petition [*Lendennie v. Sabel (In re Perris City News) (2002) 96 Cal. App. 4th 1194, 1197-1199, 118 Cal. Rptr. 2d 38]* .

An order *denying* a motion to vacate a judgment that a newspaper is a newspaper of general circulation is also appealable to the courts of appeal [*In re Molz (2005) 127 Cal. App. 4th 836, 841-843, 26 Cal. Rptr. 3d 131]* .

On appeal, the finding of the trial court that the newspaper is one of general circulation is conclusive, unless the evidence appears insufficient to support that finding as a matter of law [*In re Herman (1920) 183 Cal. 153, 162, 191 P. 934* ; *In re David (1929) 98 Cal. App. 69, 71, 276 P. 419]* .

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[Reserved]

§§ 386.18[Reserved]

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§ 386.30 State Statutes

[1] Foreign Language Newspapers

Foreign language newspapers published in language of enemy nation. *Gov. Code §§ 6075-6078*

[2] Misrepresentation of Newspaper's Circulation

Misrepresentation of newspaper's circulation by publisher as unlawful. *Bus. & Prof. Code § 17533*

Alternative definitions of newspaper of general circulation. *Gov. Code §§ 6000, 6008*

Newspaper for particular class as not newspaper of general circulation. *Gov. Code § 6001*

Definition of "established" newspaper. *Gov. Code §§ 6002, 6008*

Definition of "printed." *Gov. Code § 6003*

Definition of "published." *Gov. Code §§ 6004, 6008*

Requirement of printing and publishing in same city or town. *Gov. Code § 6004.5*

Printed and published as separate terms. *Gov. Code § 6005*

[3] Procedure for Establishing Newspaper's Standing

Petition to obtain standing as newspaper of general circulation. *Gov. Code § 6020*

Establishing standing as newspaper of general circulation. *Gov. Code §§ 6020-6027*

Requirements as to publication of petition and notice. *Gov. Code § 6021*

Setting for hearing on petition; any person as permitted to contest petition. *Gov. Code § 6022*

Hearing on petition and entry of judgment. *Gov. Code § 6023*

Conditions for vacating, modifying, or setting aside judgment of newspaper's status. *Gov. Code § 6024*

Validity of publications in newspaper at time it is adjudged to be one of general circulation. *Gov. Code § 6025*

Judicial decree of newspaper's standing as required on and after July 1, 1952. *Gov. Code § 6027*

[4] Proof of Publication

Evidence of publication of document or notice required by law or court order to be published in newspaper as given by affidavit of printer of newspaper, or his or her foreman or principal clerk, annexed to a copy of the document or notice, specifying the times when, and paper in which, publication was made. *Code Civ. Proc. § 2010*

Affidavit of printer, foreman, or principal clerk as filed with court or county clerk. *Code Civ. Proc. § 2011*

[5] Publication of Notices

Publication requirements of official matter. *Gov. Code §§ 6040-6044*

Definitions of "daily" and "weekly" newspapers for purposes of publication. *Gov. Code § 6040.5*

Manner of publication. *Gov. Code §§ 6060-6066*

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§ 386.31 Decisions

[1] Appeal

Finding of trial court that newspaper is one of general circulation as conclusive on appeal unless evidence appears insufficient to support finding as matter of law. *In re Herman (1920) 183 Cal. 153, 162, 191 P. 934* ; *In re David (1929) 98 Cal. App. 69, 71, 276 P. 419* (cases decided under former Pol. Code §§ 4460-4464)

An order denying a motion to vacate a judgment that a newspaper is a newspaper of general circulation is appealable to the courts of appeal. *In re Molz (2005) 127 Cal. App. 4th 836, 841-843, 26 Cal. Rptr. 3d 131*

Reasonable construction of *Gov. Code § 6026* as permitting appeal from orders denying motions to vacate, set aside, or modify decree previously entered. *In re Hancock (1949) 92 Cal. App. 2d 481, 485, 207 P.2d 61*

[2] Consolidation of Newspapers

Two newspapers as legally consolidated for purposes of establishing their status as newspaper of general circulation. *In re Gluckman (1936) 6 Cal. 2d 455, 456, 58 P.2d 166* (decided under former Pol. Code §§ 4460-4464)

[3] Contesting Petition

Any person as allowed to contest petition of newspaper to have itself declared a newspaper of general circulation, and judgment of court to that effect may be vacated on motion by any person, whether or not such person has pecuniary interest in matter. *In re Herman (1920) 183 Cal. 153, 158, 191 P. 934* (decided under former Pol. Code §§ 4460-4464)

[4] County Newspapers

Los Angeles County zoning ordinance requiring hearings to be published in newspaper of general circulation for county as satisfied by publication in newspaper of general circulation for county, even though published in different part of county from part to which notice referred. *Steiger v. Board of Supervisors (1956) 143 Cal. App. 2d 352, 358-359, 300 P.2d 210*

Newspaper as being one of general circulation for county, but not for particular city. *In re Christensen (1951) 104 Cal. App. 2d 375, 379, 231 P.2d 152*

[5] Exemption of Prior Newspapers from Statutory Requirements

[a] Generally

Statutory classification imposing requirements on new newspapers and not on existing ones as reasonable and constitutional. *In re Byers (1933) 219 Cal. 446, 450, 27 P.2d 641* (decided under former Pol. Code §§ 4460-4464)

[b] Newspapers Prior to 1923

Whether a newspaper of general circulation that was established prior to 1923 may obtain an adjudication that it is a newspaper of general circulation for every city incorporated since 1923 within the county in which the newspaper is established is a question that has not yet been decided by the courts; however, an attempt to obtain this adjudication by ex parte modification of a prior decree and without the published notice required by § *Gov. Code § 6021* is impermissible. *In re Molz (2005) 127 Cal. App. 4th 836, 843-846, 26 Cal. Rptr. 3d 131]*

Newspaper meeting all requirements of established newspaper of general circulation before 1923 as not disqualified from such status by subsequently ceasing to be printed in place of publication. *Brown Newspaper Publishing Co. v. Superior Court (1981) 114 Cal. App. 3d 462, 467, 170 Cal. Rptr. 611*

Newspaper established prior to 1923 as exempt from statutory requirements pursuant to *Gov. Code § 6000*, although it did not rely on exemption when its status was adjudicated in 1952, and its place of printing changed in 1965. *Brown Newspaper Publishing Co. v. Superior Court (1981) 114 Cal. App. 3d 462, 467-468, 170 Cal. Rptr. 611*

Change in name, ownership, and consolidation as not negating newspaper's exemption from printing requirement under *Gov. Code § 6006*. *Brown Newspaper Publishing Co. v. Superior Court (1981) 114 Cal. App. 3d 462, 469, 170 Cal. Rptr. 611*

Newspaper established as newspaper of general circulation before 1923 that has continued to meet standards in force at that time as entitled to exemption of *Gov. Code § 6006* even though during some intervening time in the past it did not meet additional requirements added by Legislature and subsequently eliminated. *In re Norwalk Call (1964) 62 Cal. 2d 185, 189, 41 Cal. Rptr. 666, 397 P.2d 426*

Newspaper as entitled to exemption of *Gov. Code § 6006* even though changes of political structure or names of government entities occurred within its area after 1923. *In re Norwalk Call (1964) 62 Cal. 2d 185, 189-190, 41 Cal. Rptr. 666, 397 P.2d 426*

Plain meaning of *Gov. Code § 6006* as freeing newspapers of general circulation before 1923 from requirement that they be printed in place of publication. *In re Anaheim Daily Gazette (1963) 214 Cal. App. 2d 438, 444, 29 Cal. Rptr. 520*

[c] Wartime

Exemption of *Gov. Code § 6007* as applying when mechanical work of printing newspaper is discontinued in town where newspaper is published, due to war conditions. *In re Hancock (1949) 92 Cal. App. 2d 481, 488-489, 207 P.2d 61*

[6] Legislative Intent

Legislature as intending newspaper of general circulation to be one to which general public would resort in order to be informed of news and intelligence, editorial opinion, and advertisements. *In re Herman (1920) 183 Cal. 153, 164, 191 P. 934* (decided under former Pol. Code §§ 4460-4464)

Purpose of limiting publication of notices in established newspaper of general circulation as assuring that published material will come to attention of substantial number of people in area. *In re Norwalk Call (1964) 41 Cal. Rptr. 666, 397 P.2d 426*

General object of statutes pertaining to publication as providing means of displaying public notices, and one legislative requirement furthering that object is that newspaper must have fixed and permanent abode in order to qualify as organ for publication of such notices. *In re "Sonora Daily" (1951) 108 Cal. App. 2d 53, 58-59, 238 P.2d 111*

Notice by publication as required to be such as would be reasonably likely to bring fact of pendency and purpose of proceeding to attention of those interested. *In re David (1929) 98 Cal. App. 69, 74, 276 P. 419* (case decided under former Pol. Code §§ 4460-4464)

Statute (former Pol. Code § 4460, now *Gov. Code § 6000*) as intending that newspaper for official public advertising for city must be published within such city and be known as newspaper of that city for period of at least one year prior to petition to qualify for such official publication of advertising. *In re Miller (1910) 15 Cal. App. 43, 44-45, 113 P. 690* (decided under former Pol. Code §§ 4460-4464)

[7] Foreign Language Newspapers

When Legislature requires publication in daily newspaper but does not specify language in which newspaper must be published, court as having no power to require that publication be in newspaper of a particular language. *Richardson v. Tobin (1872) 45 Cal. 30, 33* (decided under Stats. 1871-2, p. 804)

Gov. Code § 6000, properly construed, as not precluding foreign language newspaper from being newspaper of general circulation. *In re La Opinion (1970) 10 Cal. App. 3d 1012, 1017, 1018, 89 Cal. Rptr. 404*

Fact that definition of newspaper of general circulation does not require such newspapers to be published in English as matter of legislative judgment and not matter of due proces requiring courts to impose such requirement by judicial construction. *In re La Opinion (1970) 10 Cal. App. 3d 1012, 1019-1020, 89 Cal. Rptr. 404*

California statutes requiring publication of legal notices and advertisements printed in English as not imposing any requirement as to nature of newspaper in which notices appear. *In re La Opinion (1970) 10 Cal. App. 3d 1012, 1018, 89 Cal. Rptr. 404*

Newspaper published in foreign language as not one of general circulation. *In re L'Italo-Americano (1934) 2 Cal. App. 2d 690, 692-696, 38 P.2d 810* (case decided under former Pol. Code §§ 4460-4464)

[8] Newspaper for Particular Class

Fact that newspaper devoted to interests of particular class of persons, such as persons engaged in some business or calling, and specialized in news primarily of interest to such class, as not excluding newspaper from qualifying as one of general circulation if it also publishes news of general character. *In re Labor Journal (1923) 190 Cal. 500, 503-504, 213 P. 498* (case decided under former Pol. Code §§ 4460-4464)

Newspaper devoted to particular class as possibly newspaper of general circulation if it publishes intelligence of passing events, news, and items of interest to general public, together with news of interest to particular class, so long as news is of such character that general reading public might look to newspaper for news of passing events. *In re David (1929) 98 Cal. App. 69, 73, 276 P. 419* (case decided under former Pol. Code §§ 4460-4464)

[9] Petition and Notice Requirement

Court as not permitted to make notice requirements in addition to requirements of publication of notice and petition required by *Gov. Code § 6021*. *In re Carson Bulletin (1978) 85 Cal. App. 3d 785, 790, 796, 149 Cal. Rptr. 764*

Petition to establish newspaper as one of general circulation, if containing all matters required by *Gov. Code § 6000*, as not required to allege that *Gov. Code § 6001* does not apply to newspaper. *In re Santa Ana Independent (1946) 75 Cal. App. 2d 764, 765-766*

Publication of notice required by *Gov. Code § 6021* for period of 10 days as satisfied by publication in weekly newspaper for period of 10 days; publication as not required to be made for 10 weeks in such newspaper. *In re The Santa Ana Independent (1946) 75 Cal. App. 2d 764, 766-768, 171 P.2d 548*

[10] Petition to Vacate or Modify Judgment

A newspaper may not seek modification of a prior decree regarding which cities are within its scope as a newspaper of general circulation using *Gov. Code § 6024*; a change of this type is in substance a petition for an order declaring it to be newspaper of general circulation and requires the newspaper to follow the procedural requirements of *Gov. Code §§ 6021, 6022* and provide notice of the petition to the public. *In re Molz (2005) 127 Cal. App. 4th 836, 844, 26 Cal. Rptr. 3d 131]*

Motion to vacate judgment declaring newspaper to be one of general circulation as properly granted when newspaper failed to meet requirements of *Gov. Code § 6000* or *Gov. Code § 6008*. *In re Carson Bulletin (1978) 85 Cal. App. 3d 785, 789-790, 149 Cal. Rptr. 764*

Decree reflecting newspaper's qualification as newspaper of general circulation as upheld or upheld and modified under *Gov. Code § 6024(2)*, even though place of printing changed, if newspaper qualified prior to 1923. *Brown Newspaper Publishing Co. v. Superior Court (1981) 114 Cal. App. 3d 462, 468, 469, 170 Cal. Rptr. 611* ; *in re The Anaheim Daily Gazette (1963) 214 Cal. App. 2d 438, 444-445, 29 Cal. Rptr. 520*

Gov. Code § 6024 language stating that court may vacate, modify, or set aside decision and judgment as not meaning that court has discretion to determine whether newspaper's failure to meet standards of newspaper of general circulation may be disregarded. *In re Covina Argus-Citizen (1960) 177 Cal. App. 2d 315, 318-319, 2 Cal. Rptr. 184*

Adjudication that newspaper is one of general circulation for city and county as permitted to be modified under *Gov. Code § 6024* to vacate only portion adjudging newspaper to be one of general circulation for city. *In re Covina Argus-Citizen (1950) 177 Cal. App. 2d 315, 319-320, 2 Cal. Rptr. 184*

On a motion to vacate judgment determining status of newspaper, petitioner as having burden of proof to show that ultimate facts have materially changed subsequent to original order and particularly that newspaper has ceased to be one of general circulation. *In re Hancock (1949) 92 Cal. App. 2d 481, 486, 207 P.2d 61*

Petitioner as failing to show that newspaper had ceased to be one of general circulation when evidence showed that *Gov. Code § 6007* applied and that during wartime between 3,000 and 4,000 copies of newspaper had been printed per week in city of 13,000, serving surrounding area of 55,000, although there was some variation in delivery due to wartime shortages. *In re Hancock (1949) 92 Cal. App. 2d 481, 489-490, 207 P.2d 61*

Original judgment that newspaper one of general circulation as res judicata; burden as on party seeking to vacate judgment to prove newspaper has ceased to be one of general circulation. *In re Simpson (1923) 62 Cal. App. 549, 552, 217 P. 789*

[11] Publication of Official Notices

Gov. Code § 6040, requiring publication of official notices in a newspaper of general circulation, as applying only when the matter in question is required by law to be published in a newspaper. *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control (1966) 65 Cal. 2d 349, 377, 55 Cal. Rptr. 23, 420 P.2d 735*

[12] Requirements for Newspaper of General Circulation

[a] Alternative

Gov. Code § 6008 as providing criteria for newspaper of general circulation alternative to criteria of *Gov. Code § 6000* so that newspaper as required either to be printed in the applicable area, or to have substantial distribution to paid subscribers in that area. *In re Carson Bulletin (1978) 85 Cal. App. 3d 785, 792-793, 149 Cal. Rptr. 764*

[b] Content

Newspaper containing no news, no legal notices except for particular notice at issue, but containing chiefly temperature, rainfall, and other tables and directories, as not qualified to be newspaper of general circulation. *In re Herman (1920) 183 Cal. 153, 162-164, 191 P. 934* (decided under former Pol. Code §§ 4460-4464)

Under statute (former Pol. Code § 4460, now *Gov. Code § 6000*), either local or telegraphic news, but not both, as required for newspaper of general circulation, along with intelligence of general character. *In re Herman (1920) 183 Cal. 153, 162, 191 P. 934* (decided under former Pol. Code § 4460)

Although having small circulation, newspaper of daily publication, published for chief purpose of giving notice of court proceedings, real estate transactions, and probate and execution sales, and including want ads and limited news items, as qualifying as newspaper in which legal notice of trust deed could be published. *Baldwin v. Brown (1924) 193 Cal. 345, 351-352, 224 P. 462* (decided under former Pol. Code §§ 4460-4464)

In determining whether or not newspaper qualifies as one of general circulation pursuant to *Gov. Code § 6001*, test as being content of newspaper, not persons to whom it appeals. *In re La Opinion (1970) 10 Cal. App. 3d 1012, 1018-1019, 89 Cal. Rptr. 404*

Lack of editorials as not precluding newspaper from qualifying as one of general circulation under *Gov. Code § 6000*. *In re Paradise News Press (1957) 151 Cal. App. 2d 496, 498, 311 P.2d 555*

Information regarding candidates for local positions, school district news, American Legion Posts, local business, social news, and advertisements as news items of interest to people living in area of publication, and as constituting intelligence of general character within meaning of *Gov. Code § 6000*. *In re Paradise News Press (1957) 151 Cal. App. 2d 496, 311 P.2d 555*

Finding by trial court that newspaper was one of general circulation as not supported by the evidence, which indicated that no telegraphic news, social or political news, or personal items were reported, and local news items were limited to those of interest to construction industry. *In re David (1929) 98 Cal. App. 69, 74, 276 P. 419* (case decided under former Pol. Code §§ 4460-4464)

[c] Delivery

No difference between getting newspapers by mail or by newspaper delivery for purposes of requirements of *Gov. Code § 6000*. *In re Paradise News Press (1957) 151 Cal. App. 2d 496, 499, 311 P.2d 555*

[d] Established Newspaper

Purpose of requiring that publications be made in established newspaper of general circulation as not affected by changes in name or political structure of area served by newspaper. *In re Norwalk Call (1964) 62 Cal. 2d 185, 190, 41 Cal. Rptr. 666, 397 P.2d 426*

Change in name, ownership, and consolidation as not independently affecting newspaper's status as newspaper of general circulation. *Brown Newspaper Publishing Co. v. Superior Court (1981) 114 Cal. App. 3d 462, 468, 170 Cal. Rptr. 611*

Change in name, ownership, and consolidation as not requiring new one-year period under *Gov. Code § 6000*. *Brown Newspaper Publishing Co. v. Superior Court (1981) 114 Cal. App. 3d 462, 469, 170 Cal. Rptr. 611*

Changing of newspaper's name by dropping one word from name during one-year period prior to petition as not changing newspaper's character or destroying its identity for purposes of determining whether or not it was newspaper of general circulation. *In re Lefavor (1917) 35 Cal. App. 145, 147, 169 P. 412* (decided under former Pol. Code §§ 4460-4464)

[e] Principal Office of Publication

A newspaper's "principal office of publication" for purposes of *Gov. Code § 6008(d)* is located in the city where its distribution center and circulation staff are located. *In re Tri-Valley Herald (1985) 169 Cal. App. 3d 865, 872, 215 Cal. Rptr. 529*

[f] Printed and Published

"Printing" in *Gov. Code § 6003* as not referring to exclusive means of using type to reproduce copies of newspaper, but as referring to general mechanical means of multiplying copies. *In re News-Ledger (1967) 255 Cal. App. 2d 211, 215, 63 Cal. Rptr. 69*

When actual printing occurred in another county for preponderant part of one year before filing petition, petition as

properly de nied. *In re News-Ledger (1967) 255 Cal. App. 2d 211, 216, 63 Cal. Rptr. 69* (case decided under *Gov. Code § 6000*, prior to enactment of *Gov. Code § 6008* establishing alternative criteria for newspaper of general circulation)

Word "publish" as ordinarily meaning to disclose, reveal, proclaim, circulate, or make public. *Western States Newspapers, Inc. v. Gehringer (1962) 203 Cal. App. 2d 793, 797-798, 22 Cal. Rptr. 144*

For purposes of defining newspaper of general circulation, term "published" as not including printing of newspaper and as not referring to publishing in newspaper, but term as limited to publishing of newspaper. *Western States Newspapers, Inc. v. Gehringer (1962) 203 Cal. App. 2d 793, 797, 22 Cal. Rptr. 144*

Newspaper as not qualifying as one of general circulation for city unless printed in city, although it may qualify as newspaper of general circulation for county in which it is printed and published. *Western States Newspapers, Inc. v. Gehringer (1962) 203 Cal. App. 2d 793, 797, 22 Cal. Rptr. 144* ; *In re Covina Argus-Citizen (1960) 177 Cal. App. 2d 315, 319, 2 Cal. Rptr. 184* (cases decided under *Gov. Code § 6000*, prior to enactment of *Gov. Code § 6008*, establishing alternative criteria for newspaper of general circulation)

Requirement that newspaper must be printed and published in same city to have standing as newspaper of general circulation for that city as constitutional as applied in withdrawing newspaper's standing pursuant to *Gov. Code § 6024*. *In re Covina Argus-Citizen (1960) 177 Cal. App. 2d 315, 320, 2 Cal. Rptr. 184* (case decided prior to enactment of *Gov. Code § 6008* establishing alternative criteria for newspaper of general circulation)

Interpretation that *Gov. Code § 6004.5* requires newspaper to be both published and printed in same city just to qualify as newspaper of general circulation for county as contrary to policy of encouraging competitive enterprise and contrary to general purpose of statute. *In re Lynwood Herald American (1957) 152 Cal. App. 2d 901, 909, 313 P.2d 584* (case decided under *Gov. Code § 6000*, prior to enactment of *Gov. Code § 6008* establishing alternative criteria for newspaper of general circulation)

Gov. Code § 6004.5 as not affecting requirement that for newspaper to qualify as one of general circulation in particular area, newspaper must be both printed and published within that area. *In re The Paul Bunyan News (1959) 175 Cal. App. 2d 80, 81-82, 345 P.2d 527* ; *In re Lynwood Herald American (1957) 152 Cal. App. 2d 901, 908-909, 313 P.2d 584* (cases decided under *Gov. Code § 6000*, prior to enactment of *Gov. Code § 6008* establishing alternative criteria for newspaper of general circulation)

Requirement of *Gov. Code § 6004* that newspaper be printed and published in same place as referring to same city, town, county, or other area where publication is to be made, not same situs or building. *In re Christensen (1951) 104 Cal. App. 2d 375, 378-379, 231 P.2d 152* (case decided under *Gov. Code § 6000*, prior to enactment of *Gov. Code § 6008* establishing alternative criteria for newspaper of general circulation)

Word "printed" as used in *Gov. Code §§ 6000* and *6003* as including reproduction by any process so that no particular printing process is required in order for newspaper to qualify as newspaper of general circulation. *In re "Sonora Daily" (1951) 108 Cal. App. 2d 53, 59, 238 P.2d 111*

Fact that newspaper uses in its make up boiler-plate material procured elsewhere than at place where newspaper is printed and published as insufficient to disqualify newspaper from being one of general circulation. *In re Hoyle (1927) 84 Cal. App. 511, 515, 258 P. 726*

When mechanical work of printing newspaper is performed in one city, that newspaper as not one of general circulation qualified to print legal notices in another city. *Application of Monrovia Evening Post (1926) 199 Cal. 263, 266-267,*

248 P. 1017 (decided under former Pol. Code §§ 4458, 4460-4464, prior to enactment of *Gov. Code § 6008* establishing alternative criteria for newspaper of general circulation)

Requirement that newspaper of general circulation be printed and published in city, town, or county where it seeks to publish notices as reasonable and constitutional. *Application of Monrovia Evening Post (1926) 199 Cal. 263, 269-270, 248 P. 1017* (decided under former Pol. Code §§ 4458, 4460-4464, prior to enactment of *Gov. Code § 6008* establishing alternative criteria for newspaper of general circulation)

[g] Regular Intervals

Requirement of statute (former Pol. Code § 4460, now *Gov. Code § 6000*) that newspaper be published at regular intervals as not requiring equal intervals, but as requiring regularity, that is, that newspaper not be published only occasionally. *In re Tribune Publishing Co. (1910) 12 Cal. App. 754, 756, 108 P. 667*

Newspaper published every week, though not always on same day of each week, as being published at regular intervals. *In re Christensen (1951) 104 Cal. App. 2d 375, 379, 231 P.2d 152*

[h] Subscribers

Bona fide subscription list as meaning list containing only those who in good faith pay regularly for subscriptions, and not requiring any specific number of subscribers. *In re Herman (1920) 183 Cal. 153, 164-165, 191 P. 934* (decided under former Pol. Code §§ 4460-4464)

Requirement in *Gov. Code § 6008* of "substantial distribution to paid subscribers," though relative, as not meaning paid distribution to less than two-hundredths of one percent of local population. *In re Carson Bulletin (1978) 85 Cal. App. 3d 785, 795, 149 Cal. Rptr. 764*

Gov. Code § 6008 requirement of substantial distribution to paid subscribers as not unconstitutionally vague. *In re Carson Bulletin (1978) 85 Cal. App. 3d 785, 794-795, 149 Cal. Rptr. 764*

Fact that there is considerable circulation above subscription list as not precluding newspaper from being one of general circulation; question is one of fact for trial court. *In re Paradise News Press (1957) 151 Cal. App. 2d 496, 499, 311 P.2d 555*

Evidence as sustaining finding that newspaper had bona fide subscription list of paying customers when evidence indicated that 14,500 copies were distributed within county one year to 2,000 paying subscribers, including 500 paid-up subscribers. *In re The Santa Ana Independent (1946) 75 Cal. App. 2d 764, 768-769, 171 P.2d 548*

Evidence that population of city in which newspaper is printed and published has increased, while number of subscribers has decreased, as insufficient to compel finding that newspaper has ceased to be one of general circulation. *In re Simpson (1923) 62 Cal. App. 549, 555-556, 217 P. 789* (decided under former Pol. Code §§ 4460-4464)

Newspaper's general circulation as depending on diversity of its subscribers rather than on number of subscribers. *In re Green (1913) 21 Cal. App. 138, 142, 131 P. 91* (decided under former Pol. Code §§ 4460-4464)

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§ 386.32 Attorney General Opinions

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34-386 California Forms of Pleading and Practice--Annotated § 386.50

§ 386.50 Petitioner's Procedures

[1] Prepare Petition and Notice of Intention

[a] Petition

1. Determine whether newspaper qualifies as one of general circulation under *Gov. Code § 6000* or under alternative criteria of *Gov. Code § 6008* [*see* Introduction under *§ 386.12[1]*].

2. Prepare verified petition alleging newspaper's standing under criteria of either *Gov. Code § 6000* or *Gov. Code § 6008*. The petitioner, as publisher, manager, editor, or attorney of newspaper, must verify petition [*see Gov. Code §§ 6008, 6020*; *§ 386.70* and *386.71*].

[b] Notice of Intention

Prepare accompanying notice of intention to apply on named day for order declaring status of newspaper as one of general circulation [*see Gov. Code § 6021*; *§ 386.72*].

[2] File Petition and Notice of Intention

File original petition and notice with clerk of superior court of the county in which newspaper is established, printed, and published [*see Gov. Code § 6020*], or in which it is established [*see Gov. Code § 6008*]. Pay filing fees for first paper filed in a civil proceeding [*see Gov. Code § 70611*].

[3] Publish Petition or Substance of Petition, and Notice of Intention

[a] Content and Time

Either the substance of petition or the petition itself, together with notice of intention, must be published for 10 days [*see Gov. Code § 6021*; Comments to *§ 386.72*].

[b] Manner

Publication must be made in petitioning newspaper and in some other newspaper of general circulation in same city or county, or in adjacent county [*see Gov. Code § 6021*; Comments to *§ 386.72*].

[c] Court Order Directing Publication

1. If there is no such other newspaper in the same city [*see* Paragraph B, *above*], or it refuses to publish, and if there is no such newspaper in the same county, or it refuses to publish, and if petitioner does not publish in a newspaper of general circulation in an adjacent county, a court order must be obtained directing publication in some newspaper [*see Gov. Code § 6021*].

2. If a court order is sought, prepare an ex parte application, declaration, and order according to standard procedures for such applications [*see § 386.73*; *see also* Ch. 372, *Motions and Orders*].

[d] Proof of Publication

Prepare proof of publication by petitioning newspaper. Ordinarily, the other newspaper in which publication is made will prepare its proof of publication [*see Code Civ. Proc. § 2010*]. File proof of publication [*see Code Civ. Proc. § 2011*].

[4] Hearing

[a] Order Setting Hearing

On proof of publication, prepare an order setting time and place for hearing on petition to be presented to the court for signature [*see § 386.74* and Ch. 372, *Motions and Orders*].

[b] Hearing

1. The court sets petition for hearing on proof of petition and notice [*see Gov. Code § 6022*].

2. Petitioner presents proof to court [*see Gov. Code § 6023*].

3. Court hears proof of contestant, if any [*see Gov. Code § 6023*].

[c] Judgment

Within 10 days after hearing, the court must render its decision and judgment and the clerk must enter it in the records of the court [*see Gov. Code § 6023*]. The statute does not specifically provide who is to prepare the judgment. Pursuant to *Cal. Rules of Ct., Rule 3.1590*, however, the court may designate a party to prepare a proposed judgment. If so directed, prepare the proposed judgment for signature by the court [*see § 386.76*, and *Ch. 318, Judgments, § 318.40* et seq.].

[5] Appeal

Judgment may be appealed from [*see Gov. Code § 6026*; *see also* Cal. Const., art. III, § 11]. For procedures on appeal, see Ch. 40, *Appeal: An Overview* et seq.

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§ 386.51 Contestant's Procedures

[1] Prepare and File Contest

[a] Prepare Contest

Any person may contest petition, either prior to or on the day set for the hearing, or the day to which hearing is continued [*see Gov. Code § 6022*]. Prepare opposition, alleging that newspaper does not meet criteria of either *Gov. Code § 6000* or *Gov. Code § 6008* [*see § 386.75*].

[b] File Contest

File opposition with the clerk of the court and pay fee [*see Gov. Code § 70612*].

[2] Hearing

Contestant appears either prior to or on day set for hearing, or the day to which it is continued [*Gov. Code § 6022*], and presents proof to court [*see Gov. Code § 6023*].

[3] Appeal

Judgment may be appealed from [*see Gov. Code § 6026*; *see also Cal. Const., art. VI, § 11*]. For procedures on appeal, see Ch. 40, *Appeal: An Overview* et seq.

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§ 386.52 Procedures to Vacate, Modify, or Set Aside Judgment, or Modify Judgment to Reflect a New Name

NOTE:

The following procedures are for use by persons who may or may not have been parties to the original proceeding. A motion to vacate, modify, or set aside the judgment of a newspaper's standing pursuant to *Gov. Code § 6024(1)* may be brought by any person, whether or not a party to the original proceeding, on a showing that the newspaper has ceased to be one of general circulation. A motion to modify the judgment to reflect the newspaper's new name pursuant to *Gov. Code § 6024(2)* may be brought by any interested party, whether or not a party to the original proceeding. Such a motion would most likely be brought by a person representing the original petitioning newspaper, although that person would not necessarily have been the original petitioner.

[1] Motion to Vacate, Modify, or Set Aside Judgment of Newspaper's Standing

[a] Prepare Papers

1. Notice of Motion

Prepare notice of motion, such as the one set out in *§ 386.77* [*see Gov. Code § 6024(1)*; *see also Code Civ. Proc. § 1010*].

2. Verified Statement of Facts

The motion must be accompanied by a verified statement of facts, showing that the newspaper has ceased to be one of general circulation [*see Gov. Code § 6024(1)(a) § 386.78*].

3. Supporting Memorandum

A supporting memorandum is not specifically required to be submitted in support of

the motion, but it is better practice to submit a memorandum, as is generally required in law and motion proceedings [*see Cal. Rules of Ct., Rules 3.1103(a), 3.1113*; *see also* Ch. 417, *Points and Authorities*].

[b] Serve and File Papers

1. Time of Service

Ten days' notice to the original petitioner is required by *Gov. Code § 6024(1)*. However, if possible, counsel should also comply with the longer notice period applicable to noticed motions generally [*see Code Civ. Proc. §§ 1005* (effective January 1, 1005, at least 16 court days' notice required for most motions), *1013*].

2. Manner of Service

Serve papers on the original petitioner in the same manner as with other notices of motion [*see Gov. Code § 6024(1)*; *Code Civ. Proc. §§ 1010-1013*; *see also* Ch. 372, *Motions and Orders*].

3. Filing Papers

Prepare proof of service and file with moving papers in the court in which the original petition was heard [*see Code Civ. Proc. § 1013a*; *see also* Ch. 372, *Motions and Orders* ; Ch. 371, *Motions After Trial* ; and Ch. 518, *Service of Summons and Papers*].

[c] Argue Motion at Hearing

Moving party has burden of proving that newspaper has ceased to be one of general circulation [*see Gov. Code § 6024(1)*; *In re Hancock (1949) 92 Cal. App. 2d 481, 486, 207 P.2d 61* ; *In re Simpson (1923) 62 Cal. App. 549, 552, 217 P. 789]* .

[d] Prepare and File Order

1. If the court grants motion, prepare order, as in § 386.79, and file original order after it is signed by the judge.

2. Prepare, serve, and file notice of entry of order [*Code Civ. Proc. § 664.5*; *see also Code Civ. Proc. § 1019.5(a)* and Ch. 372, *Motions and Orders*].

[e] Appeal

1. An order denying a motion to vacate, modify, or set aside a decree previously entered is appealable under *Gov. Code § 6026* [*In re Hancock (1949) 92 Cal. App. 2d 481, 485, 207 P.2d 61]* .

2. Appeals from superior courts are made to the court of appeal [*Cal. Const., art. VI, § 11(a)*], but *Gov. Code § 6026*, enacted prior to adoption of *Cal. Const., art. VI, § 11*, provides that a final order vacating, modifying, or setting aside a judgment previously entered is appealable to the California Supreme Court. Since *Cal. Const., art. VI, § 11(a)* limits appellate jurisdiction to the Supreme Court to death penalty cases, it appears that this later adopted constitutional provision supersedes the previously enacted *Gov. Code § 6026*. For further discussion relating to appellate jurisdiction in civil cases, see Ch. 40, *Appeal: An Overview* .

[2] Prepare Motion to Modify Judgment of Newspaper's Standing to Reflect New Name

[a] Prepare Papers

1. Notice of Motion

Prepare notice of motion, such as the one set out in *§ 386.80* [*see Gov. Code § 6024(2)*; *see also Code Civ. Proc. § 1010*].

2. Verified Statement of Facts

The motion must be accompanied by a verified statement of facts showing that the newspaper has modified its name without destroying its character or identity as a newspaper of general circulation [*see Gov. Code § 6024(2) § 386.81*].

3. Supporting Memorandum

A supporting memorandum is not specifically required to be submitted in support of the motion, but it is better practice to submit a memorandum, as is generally required in law and motion proceedings [*see Cal. Rules of Ct., Rules 3.1103(a), 3.1113*; *see also* Ch. 417, *Points and Authorities*].

[b] Give Notice and File Papers

1. Notice

NOTE:
Gov. Code § 6024(2)* apparently requires 10 days' notice on petitioner. Nevertheless, the petitioner, or his or her successor, is most likely to bring this motion. Since there would be no party on whom to serve notice in such a situation, notice by publication may be sufficient. Also, although 10 days' notice to the original petitioner is required by *Gov. Code § 6024*, a lengthier notice period is applicable to noticed motions generally [*see *Code Civ. Proc. §§ 1005* (effective January 1, 1005, at least 16 court days' notice required for most motions), *1013*]. It is therefore recommended that counsel comply with the longer notice period whenever possible.

2. Filing Papers

Depending on the type of notice given, either prepare proof of service or proof of publication [*see Code Civ. Proc. §§ 1013a, 2010, 2011*; *see also* Ch. 518, *Service of Summons and Papers*]. File such proof with moving papers in the court in which the original petition was heard [*see* Ch. 371, *Motions After Trial* ; Ch. 372, *Motions and Orders* ; and Ch. 518, *Service of Summons and Papers*].

[c] Argue Motion at Hearing

Moving party has burden of proving that modification of newspaper's name has not destroyed newspaper's character as newspaper of general circulation [*see Gov. Code § 6024(2)*; Comments to *§ 386.80*].

[d] Prepare and File Order

1. If the court grants motion, prepare order, as in *§ 386.82*, and file original order after it is signed by the

judge.

2. Prepare, serve, and file notice of entry of order [*Code Civ. Proc. § 664.5*; *see also Code Civ. Proc. § 1019.5(a)* and Ch. 372, *Motions and Orders*].

[e] Appeal

See *§ 386.52[1][e]*.

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[Reserved]

§§ 386.53[Reserved]

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34-386 California Forms of Pleading and Practice--Annotated § 386.70

§ 386.70 Petition [Gov. Code § 6020] to Have Standing as a Newspaper of General Circulation Under Criteria of Gov. Code § 6000 Ascertained and Established by Judicial Decree [Gov. Code § 6027].

[1] FORM Petition [Gov. Code § 6020] to Have Standing as a Newspaper of General Circulation Under Criteria of Gov. Code § 6000 Ascertained and Established by Judicial Decree [Gov. Code § 6027].

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
In the Matter of the Petition of	)	PETITION TO ASCERTAIN AND ESTABLISH
_____ [*name*] to Have the Standing	)	STANDING AS A NEWSPAPER OF GENERAL
of _____ [*name*] as a Newspaper of	)	CIRCULATION
General Circulation Ascertained and Established.		[*Gov. Code §§ 6000, 6020*]

_____

Petitioner, _____ [*name*], alleges:

1. Petitioner is the _____ [publisher of *or* manager of *or* editor of *or* attorney for] the newspaper known as _____ [*state name of newspaper*], hereinafter referred to as "the newspaper."

2. The newspaper is a newspaper of general circulation published for the dissemination of _____ [local *or* telegraphic] news and intelligence of a general character in [_____ (*city and/or county*),] California. The business address of the newspaper is _____.

3. The newspaper has a bona fide subscription list of paying subscribers numbering _____ [*state number*] in [that] _____ [city *or* county *or* California] [and elsewhere in the surrounding area] [and has an average _____ (weekly *or* daily *or other*) circulation of _____ (*state number*)].

4. For more than one year preceding the filing of this petition, the newspaper has been established under the name of _____ [*state name of newspaper*], and has been printed and published regularly _____ [*specify interval of not less than weekly, e.g.*, every Thursday] in _____ [*name of city or county or* California].

5. During the whole of the one-year period preceding the filing of this petition, the mechanical work of producing the newspaper, that is, the work of typesetting and impressing type on paper, has been performed in _____ [*name of city or county or* California]; the newspaper has been issued from the same _____ [city *or* county] where it is printed and sold; it has been both printed and published in the same _____ [city *or* county]; and it has been published as a _____ [weekly *or* daily *or other*] newspaper on each _____ [*specify day(s) of week newspaper is published*] of each calendar week.

WHEREFORE, petitioner prays for judgment ascertaining and establishing _____ [*name of newspaper*] as a newspaper of general circulation, as defined in *Section 6000 of the Government Code*, for the [City of _____, and/or the County of _____, and] State of California.
Dated: _____.

_____ [*signature*]

Petitioner

[_____ (*signature*)

Attorney for Petitioner]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The foregoing form is for use in obtaining an adjudication of a newspaper's status as one of general circulation for a city or county, or both, or for the state, under the criteria of *Gov. Code § 6000*. For a newspaper to qualify as one of general circulation under the criteria of *Gov. Code § 6000*, it must have been established, printed, and published for at least one year prior to the filing of the petition, and, if printed or published in a town or city, it must be printed and published in the same town or city [*Gov. Code §§ 6000, 6004.5*]. If the newspaper is not printed and published in the same town or city, the petitioner must proceed under the alternative criteria of *Gov. Code § 6008* [see discussion in Introduction *§ 386.12*]. For obtaining an adjudication of a newspaper's status under the alternative criteria of *Gov. Code § 6008*, see *§ 386.71*.

A newspaper may be adjudged as a newspaper of general circulation for either a city or a county [see *Gov. Code § 6000*; see also *In re Covina Argus-Citizen (1960) 177 Cal. App. 2d 315, 319-320, 2 Cal. Rptr. 184* ; *In re Christensen (1951) 104 Cal. App. 2d 375, 379, 231 P.2d 152]* . A newspaper may also be adjudged one of general circulation for the state [see *Gov. Code § 6000*].

[3] Filing and Publishing

The petition must be filed in the superior court of the county in which the newspaper is established, printed, and published. It may be filed by the newspaper's publisher, manager, editor, or attorney, and must be verified [*Gov. Code § 6020*]. The petition must be published in a newspaper of general circulation, together with a notice of intention [*Gov. Code § 6021*; see *§ 386.72*].

[4] State Statutes

"Newspaper of general circulation" defined. *Gov. Code § 6000*

"Established" newspaper defined. *Gov. Code § 6002*

"Printed" newspaper defined. *Gov. Code § 6003*

"Published" newspaper defined. *Gov. Code § 6004*

Printing and publishing in same city. *Gov. Code § 6004.5*

"Printed" and "published" as not synonymous. *Gov. Code § 6005*

Petition to have standing ascertained and established. *Gov. Code § 6020*

Necessity of judicial decree after 1952. *Gov. Code § 6027*

Official publications to be in newspaper of general circulation. *Gov. Code § 6040*

[5] Decisions

Requirement of bona fide subscription list as not requiring specific number of subscribers. *In re Herman (1920) 183 Cal. 153, 164-165, 191 P. 934*

Gov. Code § 6006 as exempting newspapers in existence before 1923 from requirement that printing be done in place of publication. *In re The Anaheim Daily Gazette (1963) 214 Cal. App. 2d 438, 441, 29 Cal. Rptr. 520*

Newspaper as not qualifying as one of general circulation for city unless it is printed in city, although it may qualify as newspaper of general circulation for county in which it is printed and published. *Western States Newspapers, Inc. v. Gehringer (1962) 203 Cal. App. 2d 793, 797, 22 Cal. Rptr. 144* ; *In re Covina Argus-Citizen (1960) 177 Cal. App. 2d 315, 319, 2 Cal. Rptr. 184*

Gov. Code § 6004.5 as not affecting requirement that for newspaper to qualify as one of general circulation in particular area, newspaper must be both printed and published within that area. *In re The Paul Bunyan News (1950) 175 Cal. App. 2d 80, 81-82, 345 P.2d 527* ; *In re Lynwood Herald American (1957) 152 Cal. App. 2d 901, 908-909,*

313 P.2d 584

Interpretation that *Gov. Code § 6004.5* requires newspaper to be both published and printed in same city just to qualify as newspaper of general circulation for county as contrary to policy of encouraging competitive enterprise, and contrary to general purpose of statute. *In re Lynwood Herald American (1957) 152 Cal. App. 2d 901, 909, 313 P.2d 584*

Requirement of *Gov. Code § 6004* that newspaper be printed and published in same place as referring to same city, town, county, or other area where publication is to be made, not same situs or building. *In re Christensen (1951) 104 Cal. App. 2d 375, 378-379, 231 P.2d 152*

Newspaper published every week though not always on same day of each week as being published at regular intervals. *In re Christensen (1951) 104 Cal. App. 2d 375, 379, 231 P.2d 152*

Requirement of statute (former Pol. Code § 4460, now *Gov. Code § 6000*) that newspaper be published at regular intervals as not requiring equal intervals, but as requiring regularity, that is, that newspaper not be published only occasionally. *In re Tribune Publishing Co. (1910) 12 Cal. App. 754, 756, 108 P. 667*

[6] Attorney General Opinions

Newspapers of general circulation for city and county. *63 Ops. Cal. Att'y Gen. 176 (1980)*

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34-386 California Forms of Pleading and Practice--Annotated § 386.71

§ 386.71 Petition [Gov. Code §§ 6008, 6020] to Have Standing as a Newspaper of General Circulation Under Criteria of Gov. Code § 6008 Ascertained and Established by Judicial Decree [Gov. Code § 6027]

[1] FORM Petition [Gov. Code §§ 6008, 6020] to Have Standing as a Newspaper of General Circulation Under Criteria of Gov. Code § 6008 Ascertained and Established by Judicial Decree [Gov. Code § 6027]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Petition of _____ [*name*] to Have the Standing of _____ [*name*] as a Newspaper of General Circulation Ascertained and Established.	)))))	NO. _____ PETITION TO ASCERTAIN AND ESTABLISH STANDING AS NEWSPAPER OF GENERAL CIRCULATION [*Gov. Code §§ 6008, 6020*]

_____

Petitioner, _____ [*name*], alleges:

1. Petitioner is the _____ [publisher of *or* manager of *or* editor of *or* attorney for] the newspaper known as _____ [*state name of newspaper*], hereafter referred to as "the newspaper."

2. The newspaper is a newspaper of general circulation published for the dissemination of _____ [local *or* telegraphic] news and intelligence of a general character in _____ [*specify city, county, district, or judicial district*], California. The business address of the newspaper is _____ [*number*], _____ [*street*].

3. The newspaper has a bona fide subscription list of paying subscribers, numbering _____, and a substantial distribution to paying subscribers, numbering _____, within _____ [*state name of city, county, district, or judicial district for which petitioner seeks adjudication of newspaper's status*].

4. For more than three years preceding the filing of this petition, the newspaper has been established under the name of _____, and has been so established and published, that is, issued and sold or distributed regularly _____ [*specify interval of not less than weekly, e.g.*, every Thursday] in _____ [*state, name of city, county, district, or judicial district for which petitioner seeks adjudication of newspaper's status*].

5. During each year of the three-year period preceding the filing of this petition, the newspaper has maintained a minimum coverage of _____ [local *or* telegraphic] news and intelligence of a general character of not less than twenty-five percent of its total inches; it has had only one principal office of publication, located in _____ [*name of city, county, district, or judicial district for which petitioner seeks adjudication of newspaper's status*].

WHEREFORE, petitioner prays for judgment ascertaining and establishing _____ [*name of newspaper*] as a newspaper of general circulation, as defined in *Section 6008 of the Government Code*, for _____ [*name of city, county, district, or judicial district for which petitioner seeks adjudication of newspaper's status*].
Dated: _____.

_____ [*signature*]

Petitioner

[_____ (*signature*)

Attorney for Petitioner]

[*Verification. See § 386.70.*]

[2] Use of Form

The foregoing form is for use in obtaining an adjudication of a newspaper's status as one of general circulation, under the criteria of *Gov. Code § 6008*, enacted as an alternative to the criteria of *Gov. Code § 6000*.

[a] Proceeding Under Gov. Code § 6008

Petitioner should proceed under *Gov. Code § 6008*, and use this form rather than § 386.70, if the newspaper is printed or published in a town or city, but is not printed and published in the same town or city as required by *Gov. Code §§ 6000* and *6004.5* [see *§ 386.70*]. In order to qualify under *Gov. Code § 6008*, however, the newpaper must have been established and published for at least three years prior to the filing of the petition, whereas under *Gov. Code § 6000*, the newspaper must have been established, published, and printed for only one year prior to filing the petition. In addition, *Gov. Code § 6008* requires that, during the three-year period preceding the petition, the newspaper has maintained a minimum coverage of news and intelligence of a general character of twenty-five percent of its total inches, has had only one principal office of publication, which is located in the area for which it seeks an adjudication of its status, and has had a substantial distribution to paid subscribers in the area for which it seeks an adjudication of its status [see *In re Carson Bulletin (1978) 85 Cal. App. 3d 785, 792-793, 149 Cal. Rptr. 764]* .

[3] Governing Law

Prior to 1974 and the enactment of Gov. Code *§ 6008, Gov. Code* § 6000 provided the only criteria for a newspaper of general circulation. Therefore, *Gov. Code §§ 6001-6007* were enacted with the purpose of governing and defining a newspaper of general circulation under the standards of *Gov. Code § 6000* only. In addition, any cases decided prior to

1974 were decided under *Gov. Code § 6000* and may or may not apply to a newspaper of general circulation under the criteria of *Gov. Code § 6008*.

[4] Filing and Publishing

The petition must be filed in the superior court of the county in which the newspaper is established and published. It may be filed by the newspaper's publisher, manager, editor, or attorney, and must be verified [*Gov. Code §§ 6008, 6020*]. The petition, or substance thereof must be published in a newspaper of general circulation, together with a notice of intention [*Gov. Code § 6021*; see *§ 386.72*].

[5] State Statutes

Alternative criteria for "newspaper of general circulation." *Gov. Code § 6008*

[6] Decisions

Gov. Code § 6008 as providing criteria for newspaper of general circulation alternative to criteria of *Gov. Code § 6000* so that newspaper as required either to be printed in the applicable area or to have substantial distribution to paid subscribers in that area. *In re Carson Bulletin (1978) 85 Cal. App. 3d 785, 792-793, 149 Cal. Rptr. 764*

Gov. Code § 6008 requirement of substantial distribution to paid subscribers as not unconstitutionally vague. *In re Carson Bulletin (1978) 85 Cal. App. 3d 785, 794-795, 149 Cal. Rptr. 764*

Requirement in *Gov. Code § 6008* of "substantial distribution to paid subscribers," though relative, as not meaning paid distribution to less than two-hundredths of one percent of the local population. *In re Carson Bulletin (1978) 85 Cal. App. 3d 785, 795, 149 Cal. Rptr. 764*

[7] Cross Reference

For a related form, see *§ 386.70*.

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34-386 California Forms of Pleading and Practice--Annotated § 386.72

§ 386.72 Notice of Intention to Apply on Named Day for Order Declaring Status of Newspaper as One of General Circulation Under Gov. Code §§ 6000-6008 [Gov. Code § 6021]

[1] FORM Notice of Intention to Apply on Named Day for Order Declaring Status of Newspaper as One of General Circulation Under Gov. Code §§ 6000-6008 [Gov. Code § 6021]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
In the Matter of the Petition of	)	NOTICE OF INTENTION TO APPLY FOR OR-
_____ [*name*] to Have the Standing	)	DER DECLARING STATUS OF NEWSPAPER AS
of _____ [*name*] as a Newspaper of	)	ONE OF GENERAL CIRCULATION
General Circulation Ascertained and Established.		[*Gov. Code § 6021*]

_____

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], California, petitioner intends to apply for an order declaring the newspaper known as _____ [*state name of newspaper*] to be a newspaper of general circulation for _____ [*name of city, county, district, or judicial district for which petitioner seeks adjudication of newspaper's status*].
Dated: _____

_____ [*signature*]

Attorney for Petitioner

[2] Use of Form

The foregoing form is for use by petitioner to provide notice, as required by *Gov. Code § 6021*, that petitioner intends to apply on a named day for an order that the newspaper be ascertained and established as one of general circulation.

[3] Publication

[a] Requirement

The petition, as in § 386.70 or 2, or the substance of the petition, must be published together with the foregoing notice [*Gov. Code § 6021*]. Publication of the petition, or its substance, and the foregoing notice must be made for 10 days [*Gov. Code §§ 6021, 6062*]. Publication must be made in the petitioning newspaper and in some other newspaper of general circulation published in the same city, or if there is no such other newspaper, or it refuses to publish, then in some newspaper of general circulation for the county. If there is no other newspaper of general circulation for the county, or if such newspaper refuses to publish, then publication must be made in some newspaper of general circulation in an adjacent county, or in another newspaper as directed by the court [*Gov. Code § 6021*].

[b] Proof of Publication in Newspaper

Evidence of the publication of a document or notice required by law, or by an order of a court or judge, to be published in a newspaper may be given by the affidavit, or declaration under penalty executed pursuant to *Code Civ. Proc. § 2015.5*, of the printer of the newspaper, or his or her foreman or principal clerk, annexed to a copy of the document or notice, specifying the times when, and the paper in which, the publication was made [*Code Civ. Proc. § 2010*]. The affidavit or declaration is filed with the court clerk [*Code Civ. Proc. § 2011*].

[4] State Statutes

Publication of petition and notice. *Gov. Code § 6021*

Period of publication as 10 days. *Gov. Code § 6062*

[5] Decisions

Court as not permitted to make notice requirements in addition to requirements of publication of notice and petition in *Gov. Code § 6021*. *In re Carson Bulletin (1978) 85 Cal. App. 3d 785, 790, 149 Cal. Rptr. 764*

Publication of notice required by *Gov. Code § 6021* for period of 10 days as satisfied by publication in weekly newspaper for period of 10 days; publication as not required to be made for 10 weeks in such newspaper. *In re The Santa Ana Independent (1946) 75 Cal. App. 2d 764, 766-768, 171 P.2d 548*

[6] Cross Reference

For related forms, see *§§ 386.70* and *386.71*.

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34-386 California Forms of Pleading and Practice--Annotated § 386.73

§ 386.73 Proceedings for Obtaining Order Directing Publication of Petition and Notice Regarding the Adjudication of Newspaper's Status [Gov. Code § 6021]--Ex Parte Application, Declaration [Code Civ. Proc. § 2015.5], and Order [Code Civ. Proc. § 1003]

[1] FORM Proceedings for Obtaining Order Directing Publication of Petition and Notice Regarding the Adjudication of Newspaper's Status [Gov. Code § 6021]--Ex Parte Application, Declaration [Code Civ. Proc. § 2015.5], and Order [Code Civ. Proc. § 1003]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	EX PARTE APPLICATION FOR ORDER DIR-
	)	ECTING PUBLICATION OF PETITION AND NO-
In the Matter of the Petition of	)	TICE REGARDING ADJUDICATION OF NEWS-
_____ [*name*] to Have the Standing	)	PAPER'S STATUS
of _____ [*name*] as a Newspaper of	)	[*Gov. Code § 6021*];
General Circulation Ascertained and Established.	)	DECLARATION OF
		_____ [*name*];
		AND ORDER

_____

APPLICATION

I, _____ [*name*], hereby apply, _____ [as petitioner *or* on behalf of petitioner] in the above-entitled matter, for an order directing the publication of the [substance of the] petition and notice of intention to apply on a named day for an order declaring the status of the above-named newspaper as one of general circulation, in order to enable such publication in compliance with *Section 6021 of the Government Code*.

Dated: _____

_____ [*signature*]

[Attorney for] Petitioner

DECLARATION

I, _____ [*name*], declare:

1. I am the petitioner in the above-entitled matter.

2. I have filed with this court a verified petition to have the standing of the newspaper known as _____ [*state name of newspaper*], hereinafter referred to as "the newspaper," as a newspaper of general circulation ascertained and established, pursuant to Section _____ [*6000 or 6008 of the Government Code*].

[*EITHER*]

3. There are no newspapers of general circulation in the city or county [, or adjacent county,] in which to publish [the substance of] such petition and the accompanying notice of intention pursuant to the publication requirements of *Section 6021 of the Government Code*.

[*OR*]

3. On _____ [*date*], I requested publication of [the substance of] such petition and the accompanying notice of intention in a newspaper of general circulation for _____ [*state name of city, county, or adjacent county*] known as _____ [*state name of other newspaper*]. That newspaper refused to make such publication. [In addition, although I attempted, on _____ [*date*], to have such publication made in _____ (state name(s) of other newspaper(s)), (an)other newspaper(s) of general circulation, in _____ (*state name of city, county, or adjacent county*), such publication was refused.]

4. It is necessary that the court direct publication of [the substance of] the petition and accompanying notice of intention in some newspaper in order that petitioner be enabled to comply with the publication requirements of *Section 6021 of the Government Code*.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

ORDER DIRECTING PUBLICATION

[*Gov. Code § 6021*]

Proof having been made to the satisfaction of the court,

IT IS HEREBY ORDERED that the [substance of the] petition to have the above--named newspaper adjudicated as one of general circulation, together with the notice of intention to apply on a named day for an order declaring the newspaper to be one of general circulation, be published, pursuant to *Section 6062 of the Government Code*,

(1) In the petitioning newspaper, and

(2) In the _____ [*name of newspaper*], a newspaper of general circulation in _____ [*name of city, county, or adjacent county*].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The foregoing form is for use in obtaining an order directing publication of the petition and notice of intention in a particular newspaper when publication by the petitioner in another newspaper is not possible because other newspapers of general circulation in the city, county, or adjacent county do not exist or will not consent to publish the petition and notice of intention [see *Gov. Code § 6021*].

Publication must be made in the petitioner's newspaper and in some other newspaper of general circulation in the same city, or if none exists, or publication in such newspaper is refused, then in some newspaper of general circulation for the county. If there is no such newspaper in the county, or if it refuses publication, then the petitioner may either publish the petition and notice of intention in a newspaper of general circulation for an adjacent county, or in such other newspaper as the court directs [*Gov. Code § 6021*].

Counsel should consult local rules regarding the procedure for making ex parte applications. For a discussion of ex parte applications for orders generally, see Ch. 372, *Motions and Orders* .

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34-386 California Forms of Pleading and Practice--Annotated § 386.74

§ 386.74 Order Setting Time and Place for Hearing on Petition Declaring Status of Newspaper as One of General Circulation Under Gov. Code § 6000 or 6008 [Gov. Code § 6022]

[1] FORM Order Setting Time and Place for Hearing on Petition Declaring Status of Newspaper as One of General Circulation Under Gov. Code § 6000 or 6008 [Gov. Code § 6022]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
In the Matter of the Petition of	)	ORDER SETTING TIME AND PLACE FOR
_____ [*name*] to have the Standing	)	HEARING ON PETITION
of _____ [*name*] as a Newspaper of	)	[*Gov. Code § 6022*]
General Circulation Ascertained and Established.		
_____		

On proof having been made to the satisfaction of the court that the [substance of the] petition in the above-entitled matter, together with the notice of intention to apply for an order declaring the petitioning newspaper to be one of general circulation, have been published in the petitioning newspaper, and in _____ [*name of other newspaper*] in accordance with the requirements of *Sections 6021* and *6062 of the Government Code* [and as directed by order of the court entered herein on _____ [*date*],

IT IS ORDERED that the time and place of hearing the petition are set for _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], California.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The foregoing form is for use in obtaining an order setting the time and place of the hearing on a petition for adjudication of a newspaper's status. On proof of publication of the petition and notice of intention, the court sets the time and place for hearing [*Gov. Code § 6022*].

For discussion of required proof of publication, see Comments to *§ 386.72*.

[3] State Statutes

Setting time and place of hearing. *Gov. Code § 6022*

[4] Cross Reference

For related forms, see *§§ 386.72* and *386.73*.

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34-386 California Forms of Pleading and Practice--Annotated § 386.75

§ 386.75 Contest of Petition for Adjudication of Newspaper's Status as Newspaper of General Circulation Under Gov. Code § 6000 or 6008 [Gov. Code § 6022]

[1] FORM Contest of Petition for Adjudication of Newspaper's Status as Newspaper of General Circulation Under Gov. Code § 6000 or 6008 [Gov. Code § 6022]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Petition of _____ [*name*] to Have the Standing of _____ [*name*] as a Newspaper of General Circulation Ascertained and Established.	))))	NO. _____ CONTEST OF PETITION FOR ADJUDICATION OF NEWSPAPER'S STATUS AS NEWSPAPER OF GENERAL CIRCULATION [*Gov. Code § 6022*]
_____ _____ [*name*], Contestant, vs. _____ [*name*], Respondent.	))	

Contestant, _____ [*name*], alleges:

[1. *Allege particular legal capacity, if any, of contestant, such as corporate status, e.g.*, _____ (*name of contestant*) was and is a corporation duly organized and existing under the laws of California, with its principal place of business in _____ County, California.]

2. The standing of _____ [*name of petitioning newspaper*] as a newspaper of general circulation, as defined in Section _____ [*6000 or 6008] of the Government Code*], for _____ [*name of city, county, district, or judicial district for which petitioner is seeking adjudication of newspaper's status*],

California, should be denied on the following grounds:

[*EITHER, if petitioner is seeking adjudication under the criteria of Gov. Code § 6000, the enumerated grounds might include the following:*]

(a) _____ [*Name of newspaper*] does not have a bona fide subscription list of paying subscribers.

(b) _____ [*Name of newspaper*] is a newspaper devoted to the interests, or published for the entertainment or instruction of a particular _____ [class *or* profession *or* trade *or* calling *or* race *or* denomination], that is _____ [*name of class, profession, trade, calling, race or denomination*], with the avowed purpose to entertain or instruct such class, within the contemplation of *Section 6001 of the Government Code*.

(c) _____ [*Name of newspaper*] has not been established, as that term is defined in *Section 6002 of the Government Code*, in that it has not been in existence under that name for the whole of one year immediately preceding the filing of the petition.

(d) _____ [*Name of newspaper*] is not printed and published in the same _____ [city *or* town], as required by *Section 6004.5 of the Government Code*, in that it is printed in the _____ [city *or* town] of _____ [*name of city or town*] and published in the _____ [city *or* town] of _____ [*name of city or town*].

[*OR, if petitioner is seeking adjudication under the criteria of Gov. Code § 6008, the enumerated grounds might include the following:*]

(a) _____ [*Name of newspaper*] does not have a substantial distribution to paid subscribers in _____ [*name of city, county, district, or judicial district for which petitioner seeks adjudication*].

(b) [*Name of newspaper*] has not been established, in that it has not been in existence under a specified name, during the entire three-year period prior to filing its petition.

[*CONTINUE with any other grounds based on deviation from the substantive requirements of either Gov. Code § 6000 or Gov. Code § 6008 or the procedural requirements of Gov. Code §§ 6020-6027*].

WHEREFORE, contestant prays that the petition be denied and that contestant be awarded such other and further relief as the court may deem proper.
Dated: _____

_____ [*signature*]

Contestant

_____ [*signature*]

Attorney for Contestant

[*Verification. See § 386.70*]

[2] Use of Form

The foregoing form is for use by anyone seeking to contest the petition to have a newspaper's status adjudicated as one of general circulation. Any person may appear and contest the petition, either prior to or on the day set for the hearing, or the day to which it is continued [*Gov. Code § 6022*]. Because a petition may be based on the criteria of a newspaper of general circulation as found in either *Gov. Code § 6000* or *Gov. Code § 6008*, the contestant will also have to base his, her, or its argument on the newspaper's failure to meet the criteria of the applicable section.

[3] Caption

When a contest is filed, it is suggested that, as in the case of a cross complaint, the title of the proceeding and parties should contain a double caption, as shown in the caption of the foregoing form.

[4] Capacity of Contestant

"Any person" may appear and contest the petition [*Gov. Code § 6022*]. Therefore, it would seem to be unnecessary to allege the capacity or interest of the contestant. If, however, the contetant has a particular legal capacity, such as that of a corporation, the capacity should be alleged initially in the body of the document.

[5] State Statutes

Right of "any person" to appear and contest petition. *Gov. Code § 6022*

Hearing and decision. *Gov. Code § 6023*

[6] Decisions

Contestant as not required to have pecuniary interest in matter. *In re Herman (1920) 183 Cal. 153, 158, 191 P. 934*

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34-386 California Forms of Pleading and Practice--Annotated § 386.76

§ 386.76 Judgment Ascertaining and Establishing Newspaper as One of General Circulation Under Gov. Code § 6000 or 6008

[1] FORM Judgment Ascertaining and Establishing Newspaper as One of General Circulation Under Gov. Code § 6000 or 6008

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Petition of _____ [*name*] to Have the Standing of _____ [*name*] as a Newspaper of General Circulation Ascertained and Established.	)	NO. _____
_____	)	JUDGMENT ASCERTAINING AND ESTABLISHING NEWSPAPER AS ONE OF GENERAL CIRCULATION
_____ [*name*],	)	[*Gov. Code § 6023*]
Contestant,	)	
vs.		
_____ [*name*],		
Respondent.		

The verified petition of _____ [*name*] to have the standing of _____ [*name of newspaper*] ascertained and established as a newspaper of general circulation, as defined in Section _____ [*6000 or 6008 of the Government Code*], came on regularly for hearing by the court on _____ [*date*], in [_____ (Department *or* Division) _____ of] the above-entitled court. Petitoner appeared _____ [by his/her attorney _____ (*name*) *or* on his/her own behalf] [and contestants(s) appeared _____ (by his/her attorneys(s) _____ (*name(s)*) *or* on his/her own behalf].

Evidence, both oral and documentary, was introduced [on behalf of _____ (both *or* all) parties], and

the matter was [argued and] submitted for decision. On proof made to the satisfaction of the court, the court finds as follows:

1. The [substance of the] petition and notice of intention of petitioner to apply to the court on a named day for an order declaring the newspaper to be a newspaper of general circulation was duly published pursuant to *Section 6062 of the Government Code*, proof of such publication was duly made, and the court set the petition for hearing, as required by *Sections 6021* and *6022 of the Government Code*.

2. The _____ [*name of newspaper*] is a newspaper of general circulation, published for the dissemination of _____ [local *or* telegraphic] newsand intelligence of a general character in the City of _____, County of _____, California.

[*EITHER, if pursuant to Gov. Code § 6000*]

3. The petitioning newspaper has a bona fide subscription list of paying subscribers, numbering _____ in the _____ [city *or* county] [and elsewhere in the surrounding area].

4. For more than one year preceding the filing of the petition, the petitioning newspaper has been established under the name of _____ [*name*], and has been printed and published at regular intervals in _____ [*name of city or county*].

5. During the whole of such one-year period, the mechanical work of producing the petitioning newspaper, that is, the work of typesetting and impressing type on paper, has been performed in _____ [*name of city or county*]; the newspaper has been issued from the same _____ [city *or* county] where it is printed and sold; it has been both printed and published in the _____ [city *or* county]; and it has been published as a _____ [weekly *or* daily *or other*] newspaper on each _____ [*specify day(s) of week newspaper is published*] [and has had an average _____ (weekly *or* daily *or other*) circulation of _____ (*state number*)].

[*OR, if pursuant to Gov. Code § 6008*]

3. The petitioning newspaper has a bona fide subscription list of paying subscribers numbering _____, and a substantial distribution to paying subscribers numbering _____, within _____ [*state name of city, county, district, or judicial district for which newspaper is adjudicated as one of general circulation*].

4. For more than three years preceding the filing of the petition, the newspaper has been established under the name of _____, and has been so established and published, that is, issued and sold or distributed at regular intervals of not less than weekly in _____ [*state name of city, district, or judicial district for which newspaper is adjudged as one of general circulation*].

5. During each year of such three-year period, the newspaper has maintained a minimum coverage of _____ [local *or* telegraphic] news and intelligence of a general character of not less than 25 percent of its total inches; and has had only one principal office of publication, located in _____ [*state name of city, county, district, or judicial district for which newspaper is adjudicated as one of general circulation*].

WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the _____ [*name of newspaper*] is a newspaper of general circulation, as defined in section _____ [6000or *6008 of the*

Government Code], for _____ [*state name of city, county, district, or judicial district*], California.
Dated: _____

_____ [*signature*]

Judge of the Superior Court

CAUTION:

In a contested action or special proceeding, the party submitting a judgment for entry must prepare and mail a copy of the notice of entry of judgment to all appearing parties and file proof of service, together with the original notice of entry of judgment, unless a prevailing party was not represented by counsel or the court orders the clerk to mail notice. [*Code Civ. Proc. § 664.5*].

[2] Use of Form

This form is for use by the petitioner to obtain a judgment that the petitioning newspaper is one of general circulation. If requested by the court to do so, counsel for petitioner will prepare the judgment and present it to the judge for signature. Within 10 days after the hearing on the petition, the court must render its decision and judgment and the clerk must enter it in the court records [*Gov. Code § 6023*]. If there are any contestants to the petition, a notice of entry of judgment must be served on any contestant appearing at the hearing [*see Code Civ. Proc. § 664.5*]. For a form of notice of entry of judgment, see *Ch. 318 Judgments, § 318.40* et seq.

[3] Findings

Findings are included in this judgment because *Gov. Code § 6023* provides for the court to render its decision and judgment.

[4] State Statutes

Rendition and entry of judgment. *Gov. Code § 6023*

Validity of publications in newspaper. *Gov. Code § 6025*

[5] Cross Reference

For related forms, see *§§ 386.70* and *386.71*.

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Volume 34: Newspapers thru Parties-Chs. 386-396
Chapter 386 NEWSPAPERS
PART V. FORMS

34-386 California Forms of Pleading and Practice--Annotated § 386.77

§ 386.77 Notice of Motion for Order Vacating, Modifying, or Setting Aside Judgment of Newspaper's Standing as Newspaper of General Circulation Under Gov. Code § 6000 or 6008 [Gov. Code § 6024(1)]

[1] FORM Notice of Motion for Order Vacating, Modifying, or Setting Aside Judgment of Newspaper's Standing as Newspaper of General Circulation Under Gov. Code § 6000 or 6008 [Gov. Code § 6024(1)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Petition of	)	
_____ [*name*] to Have Standing of	)	NO. _____
_____ [*name*] as a Newspaper of	)	NOTICE OF MOTION AND MOTION FOR OR-
General Circulation Ascertained and Established.	)	DER _____ [VACATING *or*
_____	)	MODIFYING *or* SETTING ASIDE] JUDGMENT
_____ [*name*],	)	OF NEWSPAPER'S STANDING AS NEWSPAPER
Contestant,	)	OF GENERAL CIRCULATION
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Respondent.		Location: _____
		Judge: _____
		Date Action Filed: _____

_____

To _____ [*name*], petitioner and respondent in the above-entitled matter [, and to _____ (his/her) attorney of record _____ (*name*)]:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], contestant herein will, and hearby does, move for an order _____ [vacating *or* modifying *or* setting aside] the judgment of the

above-named newspaper's status as a newspaper of general circulation for _____ [*name of city, county, district, or judicial district for which newspaper was declared to be a newspaper of general circulation*], California. The motion will be made on the grounds that the newspaper has ceased to be a newspaper of general circulation as defined in Section _____ [*6000 or 6008] of the Government Code*].

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the supporting memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Contestant _____ [*name*]

[2] Use of Form

This notice of motion is for use by any person, whether or not a party to the original proceeding, to move for an order vacating, modifying, or setting aside the court's judgment of a newspaper's standing as a newspaper of general circulation. The motion must be accompanied by a verified statement of facts to the court.

[3] Notice

Although *Gov. Code § 6024(1)* requires 10 days' notice of this motion, *Code Civ. Proc. § 1005* imposes a lengthier notice period for noticed motions generally, with more time required if the notice is served by mail, express mail, other method of overnight delivery, or fax [*see Code Civ. Proc. § 1005(b)* (effective January 1, 1005, at least 16 court days' notice required for most motions)]. It is therefore a prudent practice to comply with the longer notice period of *Code Civ. Proc. § 1005* whenever possible.

[4] Required Showing

In order to obtain an order vacating, modifying, or setting aside a judgment of newspaper's standing as one of general circulation, the moving party must make a satisfactory showing to the court that the newspaper has ceased to be one of general circulation [*Gov. Code § 6024(1)*]. The moving party has the burden of showing that ultimate facts have materially changed subsequent to the original order adjudicating the newspaper's standing [*In re Hancock (1949) 92 Cal. App. 2d 481, 486, 207 P.2d 61]* . The motion is properly granted if the newspaper no longer meets the requirements of either *Gov. Code § 6000* or *6008* [*In re Carson Bulletin (1978) 85 Cal. App. 3d 785, 789-790, 149 Cal. Rptr. 764]* .

[5] Caption

The double caption in this form should be used to indicate the moving party as "contestant" and the original petitioner as "respondent." The statute does not specifically refer to the moving party as "contestant," however that term has been used in this form as one possible designation for the moving party that might avoid confusion. The moving party need not have been a contestant to the original petition, however [*see Gov. Code § 6024(1)*].

[6] Supporting Memorandum

A supporting memorandum is not specifically required to be submitted in support of the motion, but it is better practice

to submit a memorandum, as is generally required in law and motion proceedings [*see Cal. Rules of Ct., Rules 3.1103(a), 3.1113*; *see also* Ch. 417, *Points and Authorities*].

[7] Decisions

Gov. Code § 6024 language stating that court "may" vacate, modify, or set aside decision and judgment as not meaning that court has discretion to determine whether or not newspaper's failure to meet standards of newspaper of general circulation may be disregarded. *In re Covina Argus-Citizen (1960) 177 Cal. App. 2d 315, 318-319, 2 Cal. Rptr. 184*

Adjudication that newspaper is one of general circulation for city and county as permitted to be modified under *Gov. Code § 6024* to vacate only portion adjudging newspaper to be one of general circulation for city. *In re Covina Argus-Citizen (1960) 177 Cal. App. 2d 315, 319-320, 2 Cal. Rptr. 184*

Petitioner as failing to show that newspaper had ceased to be one of general circulation when evidence showed that *Gov. Code § 6007* applied and that during wartime between 3,000 and 4,000 copies of newspaper had been printed per week in city of 13,000, serving surrounding area of 55,000, although there was some variation in delivery due to wartime shortages. *In re Hancock (1940) 92 Cal. App. 2d 481, 489-490, 207 P.2d 61*

Original judgment that newspaper is one of general circulation as res judicata, and burden as on party seeking to vacate judgment to prove newspaper has ceased to be one of general circulation. *In re Simpson (1923) 62 Cal. App. 549, 552, 217 P. 789*

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Volume 34: Newspapers thru Parties-Chs. 386-396
Chapter 386 NEWSPAPERS
PART V. FORMS

34-386 California Forms of Pleading and Practice--Annotated § 386.78

§ 386.78 Declaration in Support of Motion for Order Vacating, Modifying, or Setting Aside Judgment of Newspaper's Standing as Newspaper of General Circulation [Gov. Code § 6024(1)]

[1] FORM Declaration in Support of Motion for Order Vacating, Modifying, or Setting Aside Judgment of Newspaper's Standing as Newspaper of General Circulation [Gov. Code § 6024(1)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Petition of _____ [*name*] to Have the Standing of _____ [*name*] as a Newspaper of General Circulation Ascertained and Established. _____ _____ [*name*], Contestant, vs. _____ [*name*], Respondent.	))))))))	NO. _____ DECLARATION OF _____ [*name*] IN SUPPORT OF MOTION TO _____ [VACATE *or* MODIFY *or* SET ASIDE] JUDGMENT OF NEWSPAPER'S STANDING AS NEWSPAPER OF GENERAL CIRCULATION Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for the contestant].

2. On _____ [*date*], the above-entitled court entered judgment, a copy of which is attached hereto as

Exhibit A, adjudging the newspaper to be a newspaper of general circulation, as defined in Section _____ [*6000 or 6008 of the Government Code*], for _____ [*name of city, county, district, or judicial district for which newspaper was adjudged to be one of general circulation*], California.

3. The newspaper has ceased to be a newspaper of general circulation as so defined in that _____ [*specify, e.g.*, for more than one year since such adjudication it has not been printed and published, as those terms are defined in *Sections 6003* and *6004 of the Government Code*, in the _____ (City *or* County) of _____, but has been and now is printed in the _____ (City *or* County) of _____].

4. The newspaper also fails to qualify as a newspaper of general circulation under the criteria of Section _____ [6000 *or* 6008] in that _____[*specify failure to meet criteria of alternative section, e.g.*, the newspaper no longer has only one principal office of publication, as required by *Section 6008 of the Government Code*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form is used to support a motion to vacate, modify, or set aside a judgment pursuant to *Gov. Code § 6024(1)*. That section requires that the motion be accompanied by a "verified statement of facts," which in this form is referred to as a declaration [*see Code Civ. Proc. § 2015.5*]. The declaration must include statements showing why the newspaper in question has ceased to be a newspaper of general circulation. Since a newspaper may qualify as one of general circulation under either *Gov. Code § 6000* or *Gov. Code § 6008*, the declaration must state why the newspaper fails to quality under each of those two sections.

[3] Cross Reference

For a related form, see *§ 386.77*.

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PART V. FORMS

34-386 California Forms of Pleading and Practice--Annotated § 386.79

§ 386.79 Order Vacating, Modifying, or Setting Aside Judgment of Newspaper's Standing as Newspaper of General Circulation Under Gov. Code § 6000 or 6008 [Gov. Code § 6024(1)]

[1] FORM Order Vacating, Modifying, or Setting Aside Judgment of Newspaper's Standing as Newspaper of General Circulation Under Gov. Code § 6000 or 6008 [Gov. Code § 6024(1)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Petition of _____ [*name*] to Have the Standing of _____ [*name*] as a Newspaper of General Circulation Ascertained and Established.	)	NO. _____ ORDER _____ [VACATING *or* MODIFYING *or* SETTING ASIDE] JUDGMENT OF NEWSPAPER'S STANDING AS NEWSPAPER OF GENERAL CIRCULATION Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____
_____ _____ [*name*], Contestant, vs. _____ [*name*], Respondent.	)	

_____

The motion of contestant _____ [*name*] for an order _____ [vacating *or* modifying *or* setting aside] the judgment entered herein on _____ [*date*], adjudging _____ [*name*] to be a newspaper of general circulation for _____ [*name of city, county, district, or judicial district*], California, came on regularly for hearing by the court on _____ [*date*]. The contestant appeared by counsel _____ [*name*]; respondent appeared _____ [by counsel _____ (*name*) *or* on his/her own behalf].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the judgment entered on _____ [*date*], adjudging _____ [*name of newspaper*] to be a newspaper of general circulation for _____ [*name of city, county, district, or judicial district*], California, be and hereby is, _____ [vacated *or* modified *or* set aside] [to read _____ (*specify modification, for example, if newspaper was previously newspaper of general circulation for a city, and now is newspaper of general circulation for the county only*)].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form of order is for use when the court has granted a motion to vacate, modify, or set aside an earlier judgment adjudging a newspaper to be one of general circulation on a showing that the newspaper has ceased to be one of general circulation [*see Gov. Code § 6024(1)*].

[3] State Statutes

Appeal to Supreme Court as permitted from any final order vacating, modifying, or setting aside decision as to newspaper's status. *Gov. Code § 6026*; *but see Cal. Const., art. VI, § 11(a)* (limiting appellate jurisdiction of Supreme Court to death penalty cases only; this constitutional provision appears to supersede the previously enacted *Gov. Code § 6026*, and would require any appeal be taken to court of appeal); *see also* discussion in Procedural Checklist, Paragraph IX(E)

[4] Decisions

Reasonable construction of *Gov. Code § 6026* as permitting appeal from orders denying motions to vacate, modify, or set aside decree previously entered. *In re Hancock (1949) 92 Cal. App. 2d 481, 485, 207 P.2d 61*

[5] Cross Reference

For a related form, see *§ 386.77*.

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34-386 California Forms of Pleading and Practice--Annotated § 386.80

§ 386.80 Notice of Motion for Order Modifying Judgment of Newspaper's Standing as Newspaper of General Circulation Under Gov. Code § 6000 or 6008 to Reflect Change in Name [Gov. Code § 6024(2)]

[1] FORM Notice of Motion for Order Modifying Judgment of Newspaper's Standing as Newspaper of General Circulation Under Gov. Code § 6000 or 6008 to Reflect Change in Name [Gov. Code § 6024(2)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Petition of _____ [*name*] to Have the Standing of _____ [*name*] as a Newspaper of General Circulation Ascertained and Established. _____ [_____ (*name*), Contestant, vs. _____ (*name*), Respondent.]	)))))))	NO. _____ NOTICE OF MOTION AND MOTION TO MODIFY JUDGMENT OF NEWSPAPER'S STANDING AS NEWSPAPER OF GENERAL CIRCULATION TO REFLECT CHANGE IN NAME

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], petitioner in the above-entitled matter will, and hereby does, move for an order modifying the judgment of the above-named newspaper's status as a newspaper of general circulation for _____ [*name of city, county, district, or judicial district for which newspaper was adjudged to be one of general circulation*], California, to reflect a modification in such newspaper's name.

The motion will be made on the ground that the newspaper has modified its name without any substantial change in its character or identity as a newspaper of general circulation.

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum of points and authorities [served and] filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Contestant _____ [*name*]

[2] Use of Form

This form is for use in obtaining an order modifying the judgment of a newspaper's standing to reflect a modification in the newspaper's name. The decision and judgment of a newspaper's standing as one of general circulation may be modified by the court on its own motion or on the motion of any person interested, whether or not a party to the original proceeding, on a verified statement of facts made to the court, along with 10 days' notice to the petitioner, and a satisfactory showing to the court that the newspaper has modified its name without any substantial change in its character or identity as a newspaper of general circulation [*Gov. Code § 6024(2)*].

[3] Notice Requirement

It would seem that this motion would be made by a person representing the newspaper, who wished to have the original judgment reflect the newspaper's new name. Nevertheless, *Gov. Code § 6024(2)* appears to require 10 days' notice to the original petitioner only. It seems unlikely that someone representing the newspaper for purposes of this motion would need to give notice of the motion to someone who represented the same newspaper for purposes of the original petition. It is therefore unclear what notice is actually required on this motion. It is suggested that notice of the motion might be given in the same manner as notice of the original petition, that is, by publication in the petitioning newspaper and some other newspaper of general circulation, pursuant to the requirements of *Gov. Code § 6021* [*see § 386.72*].

Regarding the time period required for notice, although *Gov. Code § 6024(2)* requires 10 days' notice of this motion, *Code Civ. Proc. § 1005* imposes a lengthier notice period for noticed motions generally, with more time required if the notice is served by mail, express mail, other method of overnight delivery, or fax [*see Code Civ. Proc. § 1005(b)* (effective January 1, 1005, at least 16 court days' notice required for most motions)]. It is therefore a prudent practice to comply with the longer notice period of *Code Civ. Proc. § 1005* whenever possible.

[4] Caption

The double caption in this form reflects the contingency that there was a contestant to the original petition. If there was no such contestant, then that part of the caption referring to a contestant and respondent should be deleted.

[5] State Statutes

Modifying judgment to reflect modification in newspaper's name. *Gov. Code § 6024(2)*

[6] Decisions

Decree reflecting newspaper's qualification as newspaper of general circulation as upheld or upheld and modified under *Gov. Code § 6024(2)*, if newspaper qualified prior to 1923, even though place of printing changed. *Brown Newspaper Publishing Co. v. Superior Court (1981) 114 Cal. App. 3d 462, 468, 469, 170 Cal. Rptr. 611* ; *In re The Anaheim Daily Gazette (1963) 214 Cal. App. 2d 438, 444-445, 29 Cal. Rptr. 520*

[7] Cross Reference

For a related form, see *§ 386.77*.

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34-386 California Forms of Pleading and Practice--Annotated § 386.81

§ 386.81 Declaration in Support of Motion for Order Modifying Judgment of Newspaper's Standing as Newspaper of General Circulation Under Gov. Code § 6000 or 6008 [Gov. Code § 6024(2)]

[1] FORM Declaration in Support of Motion for Order Modifying Judgment of Newspaper's Standing as Newspaper of General Circulation Under Gov. Code § 6000 or 6008 [Gov. Code § 6024(2)]

[*Caption. See § 386.80.*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, the petitioner herein and an interested party in the above-entitled matter in that I am the publisher of the above-named newspaper].

2. On _____ [*date*], the above-entitled court entered judgment, a copy of which is attached hereto as Exhibit A, adjudging _____ [*name of newspaper as it appeared in original petition*] to be a newspaper of general circulation, as defined in Section _____ [*6000 or 6008 of the Government Code*], for _____ [*name of city, county, district, or judicial district for which newspaper was adjudged to be one of general circulation*], California.

3. On _____ [*date*], the newspaper's name was modified. Its present name is _____. The modification of name has not caused any substantial change in the newspaper's character or identity as a newspaper of general circulation. The newspaper still meets the requirements of Section _____ [*6000 or 6008 of the Government Code*] for a newspaper of general circulation.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The foregoing declaration is for use in support of a motion to modify a judgment of a newspaper's standing, pursuant to *Gov. Code § 6024(2)*. That section requires that the motion be accompanied by a verified statement of facts, referred to in the foregoing form as a declaration [see *Code Civ. Proc. § 2015.5*]. The declaration must include statements that the modification of the newspaper's name does not affect the newspaper's general character or identity as a newspaper of general circulation [see *Gov. Code § 6024(2)*].

[3] Cross Reference

For a related form, see *§ 386.80*.

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Chapter 386 NEWSPAPERS
PART V. FORMS

34-386 California Forms of Pleading and Practice--Annotated § 386.82

§ 386.82 Order [Code Civ. Proc. § 1003] Modifying Judgment of Newspaper's Standing as Newspaper of General Circulation Under Gov. Code § 6000 or 6008 to Reflect Change in Name [Gov. Code § 6024(2)]

[1] FORM Order [Code Civ. Proc. § 1003] Modifying Judgment of Newspaper's Standing as Newspaper of General Circulation Under Gov. Code § 6000 or 6008 to Reflect Change in Name [Gov. Code § 6024(2)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the Petition of	)	
_____ [*name*] to Have the Standing	)	NO. _____
of _____ [*name*] as a Newspaper of	)	ORDER MODIFYING JUDGMENT OF NEWSPA-
General Circulation Ascertained and Established.	)	PER'S STANDING AS NEWSPAPER OF GENER-
_____	)	AL CIRCULATION
[_____ (*name*)	)	[*Gov. Code § 6024(2)*]
Contestant,	)	
vs.		
_____ (*name*)		
Respondent.]		

_____

The motion of _____ [*name of moving party*] for an order modifying the judgment entered herein on _____ [*date*], adjudging _____ [*name of newspaper as in original petition*] to be a newspaper of general circulation for _____ [*name of city, county, district, or judicial district*], California, came on regularly for hearing on _____ [*date*]. The moving party appeared _____ [by counsel _____ (*name*) *or* on his/her own behalf] [; respondent _____ (*name*) appeared by counsel _____ (*name*).

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the judgment entered on _____ [*date*], adjudging _____ [*name of newspaper as in original petition*] to be a newspaper of general circulation for _____ [*name of city, county, district, or judicial district*] California, be and hereby is modified to reflect a change in the newspaper's name so that it is now adjudged that _____ [*name of newspaper as modified*] is a newspaper of general circulation, as defined in Government Code Section _____ [*6000 or 6008*], for _____ [*name of city, county, district, or judicial district*], California.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The foregoing form of order is for use when the court has granted a motion to modify an earlier judgment adjudging a newspaper to be one of general circulation to reflect a modification of the newspaper's name [see *Gov. Code § 6024(2)*].

[3] Cross Reference

For a related form, see *§ 386.80*.

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Chapter 387 NONMARITAL COHABITATION

34-387 California Forms of Pleading and Practice--Annotated 387.syn

§ 387.syn Synopsis to Chapter 387: NONMARITAL COHABITATION

§ 387.01 Scope of Chapter

§ 387.02 Cross References

§§ 387.03-387.09 [Reserved]

§ 387.10 Governing Law

§ 387.11 Legal Recognition of Cohabitation

[1] In General

[2] Domestic Partner Registration Before January 1, 2005

[a] Scope of Prior Law

[b] Definitions and Eligibility for State Registration

[c] Registration With Secretary of State

[d] Termination of Domestic Partnership

[e] Legal Effects of Domestic Partnership

[f] State Preemption of Local Domestic Partnership Laws

[3] Domestic Partnerships on and After January 1, 2005

[a] Scope of Current Law

[b] Requirements for Domestic Partnership

[c] Legal Effects of Domestic Partnership

[d] Registration of Domestic Partnership

[e] Termination of Domestic Partnership

[f] State Preemption of Local Domestic Partnership Laws

[4] Hospital Visitation by Domestic Partners

[5] Gay and Lesbian Cohabitants

[a] Property Agreements

[b] Need for Agreement to Register Domestic Partnership

[c] Custody of Children

[d] Tort and Civil Rights Actions

§ 387.12 Unmarried Parents

§ 387.13 Common-Law Marriage

§§ 387.14-387.29 [Reserved]

§ 387.30 Governing Law

§ 387.31 Cohabitation and Marriage Contrasted

[1] Overview

[2] Confidential Relationship

[3] Contractual Freedom

[4] Property Rights

[5] Tort and Contract Liability

[6] Wrongful Death

[7] Loss of Consortium

[8] Obligation of Support

[9] Inheritance Rights

[10] Family Allowance and Probate Homestead

[11] Right to Administer Estate

[12] Employment Benefits

[13] Unemployment Benefits

[14] Tax Impact

[15] Evidentiary Privileges

[16] Minority and Parental Authority

[17] Obtaining Credit

[18] Criminal Liability

§ 387.32 Effect of Cohabitation by Married or Divorced Person

§ 387.33 Joint Property Ownership by Unmarried Cohabitants

[1] Joint Bank Accounts

[2] Joint Ownership of Automobiles

[3] Joint Ownership of Real Property

[a] In General

[b] Joint Tenancy

[c] Tenancy in Common

§ 387.34 Credit Discrimination Against Unmarried Cohabitants--Requirement of Equal Treatment

§§ 387.35-387.49 [Reserved]

§ 387.50 Scope of Analysis

§ 387.51 Governing Law

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§ 387.01 Scope of Chapter

This chapter starts with an overview of cohabitation and a review of domestic partnerships [*see § 387.10* et seq.].

This chapter then examines the legal effects of cohabitation, and compares the rights of married persons to those of nonmarital partners in a number of contexts. It also discusses various forms of joint ownership available to nonmarital partners. This chapter also briefly summarizes federal and state laws prohibiting credit discrimination against nonmarital partners [*see § 387.30* et seq.].

This chapter then discusses the enforcement of rights that unmarried, cohabiting parties may acquire in relation to each other concerning property, support, and related matters, by implied agreement between themselves, when neither of them believes himself or herself to be legally married to the other [*see § 387.50* et seq.]. It also discusses equitable remedies that may be available to the nonmarital partners. It sets forth forms of complaint for use in enforcing implied agreements [*see* §§ 387.200-387.201].

For a general discussion of contracts and related forms, see Ch. 140, *Contracts* .

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For full discussion of constitutional protections for unwed parents, see Ch. 12B, *Adoptions: Unmarrried Minors*

For full discussion of standards for custody orders and modification or termination of custody orders, see Ch. 223, *Dissolution of Marriage: Child Custody*

For effect of cohabitation on child support award, see Ch. 224, *Dissolution of Marriage: Child Support*

For discussion of effect of cohabitation on spousal support award, see Ch. 225, *Dissolution of Marriage: Spousal Support*

For discussion of rights of children of nonmarital partnership to bring wrongful death action for death of nonmarital partner, see Ch. 181, *Death and Survival Actions* .

For discussion of pleading and procedural requirements in actions for accounting based on breach of contract, see Ch. 7, *Accounting, Action for* .

For discussion of putative marriage, see Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights*

For general discussion of enforcing contracts, and related forms, see Ch. 140, *Contracts* .

For general discussion of injunctive relief, see Ch. 303, *Injunctions* .

For discussion of and procedure for obtaining partition of property, see Ch. 397, *Partition* .

For discussion of statute of frauds in general, see Ch. 530, *Statute of Frauds*

For discussion of pleading of common counts generally, see Ch. 121, *Common Counts* .

For detailed discussion of procedural requirements for bringing civil action on a contract, see Ch. 123, *Complaints and Cross Complaints* , Ch. 140, *Contracts* , and Ch. 2, *Procedural Guide for Civil Actions* .

For general discussion of items recoverable as costs in a civil action, see Ch. 174, *Costs and Attorney's Fees* .

For discussion of parentage, child custody, and child support proceedings under Family Code, see Ch. 223, *Dissolution of Marriage: Child Custody* , Ch. 224, *Dissolution of Marriage: Child Support* , *and* *Ch. 394, Parent and Child* .

For discussion of remedies related to prevention of harassment and domestic violence, see Ch. 293, *Harassment and Domestic Violence* .

For discussion of procedures for obtaining temporary restraining orders and preliminary and permanent injunctions in civil actions generally, see Ch. 303, *Injunctions* .

For discussion of partnerships and joint ventures, see Ch. 400, *Partnerships: Governing Statutes* , et seq.

For discussion of procedures and forms for bringing an action for partition, see Ch. 397, *Partition* .

For discussion and forms for use in obtaining appointment of receivers, see Ch. 486, *Receivers* .

For a comprehensive discussion of the statute of frauds, see Ch. 530, *Statute of Frauds* .

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[Reserved]

§§ 387.03[Reserved]

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A. Cohabitation In General and Domestic Partnerships

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§ 387.10 Governing Law

The rights of unmarried cohabitants (referred to as "nonmarital partners" in this chapter) are not regulated, as such, by statute. The leading case defining the rights and duties of nonmarital partners is *Marvin v. Marvin (1976) 18 Cal. 3d 660, 681, 134 Cal. Rptr. 815, 557 P.2d 106* . The leading case extending the constitutional protection of the parent-child relationship to unmarried parents is *Stanley v. Illinois (1972) 405 U.S. 645, 649-659, 92 S. Ct. 1208, 31 L. Ed. 2d 551* .

Statutory provisions governing the availability of federal income tax dependency deductions to a nonmarital partner for his or her cohabitant and the cohabitant's children or dependents are contained in *I.R.C. § 152(d)(2)(H), (f)(3)*. Statutory provisions governing the availability of unemployment benefits for a nonmarital partner who resigns to accompany his or her nonmarital partner to another location are contained in *Unemp. Ins. Code § 1256*. Other statutory provisions that permit nonmarital partners to approximate the incidents of marriage are discussed in *§ 387.30* et seq.

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§ 387.11 Legal Recognition of Cohabitation

[1] In General

The California Supreme Court has taken judicial notice of a modern increase in the number of couples living together without marriage [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 665, 134 Cal. Rptr. 815, 557 P.2d 106* ; *see* Comment, *In re Cary: A Judicial Recognition of Illicit Cohabitation, 25 Hastings L.J. 1226 (1974)* (according to federal census, approximately eight times more couples were living together without marriage in 1970 than in 1960)]. The Court has noted the following categories of persons who may choose to live together without marriage [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 675-676 n.11, 134 Cal. Rptr. 815, 557 P.2d 106]* :

- Persons who make a deliberate decision to avoid the strictures of the community property system by not getting married.

- Couples who seek an intimate and committed relationship without the permanency that marriage implies.

- Persons who fear the loss of pension, welfare, or tax benefits that may be occasioned by marriage [*see Beckman v. Mayhew (1975) 49 Cal. App. 3d 529, 532-533, 122 Cal. Rptr. 604]* .

- Couples who would like to try living together on an experimental basis as a prelude to marriage.

- Persons who cannot spare the time or money required to dissolve a former marriage [*see In re Raya (1967) 255 Cal. App. 2d 260, 262, 63 Cal. Rptr. 252]* .

- Persons who erroneously believe that the doctrine of common-law marriage prevails in California and that merely by living together they can become legally married.

To this list must be added persons who are unable to marry, including persons who are still married to, although

separated from, a previous partner, and couples of the same sex, discussed in *§ 387.11[5]*, who are prohibited from marrying in California [*see Fam. Code § 300*; Kay & Amyx, *"Marvin v. Marvin:* Preserving the Options," *65 Cal. L. Rev. 937 (1977)*; *see also* discussion of right to marry in Ch. 359, *Marriage* .].

In addition, on and after January 1, 2000, unmarried couples of the same sex, or of the opposite sex who are over age 62 and eligible for Social Security benefits, who meet applicable requirements may register with the State of California as "domestic partners" [*Fam. Code § 297 et seq.* (operative until January 1, 2005); *§ 387.11[2]*]. Starting January 1, 2005, the requirements for registration are modified and the consequences of registration are significantly broadened [*Fam. Code § 297 et seq.* (operative on and after January 1, 2005); *§ 387.11[3][d]*].

This legislation grants legal recognition to registered domestic partners comparable to marriage, both procedurally and in terms of substantive rights and obligations granted to and imposed on partners, and is supported by policy considerations similar to those favoring marriage [*Koebke v. Bernardo Heights Country Club (2005) 36 Cal. 4th 824, 845, 31 Cal. Rptr. 3d 565]* . The California Defense of Marriage Act (*Fam. Code § 308.5*), which provides that only marriage between a man and a woman is valid or recognized in this state, does not preclude the legislature from giving registered domestic partners the same rights and obligations as spouses [*Knight v. Superior Court (2005) 128 Cal. App. 4th 14, 22-31, 26 Cal. Rptr. 3d 687]* .

[2] Domestic Partner Registration Before January 1, 2005

[a] Scope of Prior Law

An increasing number of California communities permit unmarried couples to register with a local city or county clerk as "domestic partners." Registration has varying effects depending on the terms of the local ordinance, such as eligibility to participate in health care benefits as a beneficiary of a partner who is employedby the city or county. In addition, on and after January 1, 2000, legislation permits registration of "domestic partnerships" with the State of California [*Fam. Code § 297 et seq.*]. The following discussion concerns the requirements for, and effects of, statewide registration, which generally will preempt local laws on domestic partnerships on and after July 1, 2000 (*see § 387.11[2][f]*) [*see Fam. Code § 299.6(a)*].

[b] Definitions and Eligibility for State Registration

On and after January 1, 2000, two unmarried adults who "have chosen to share one another's lives in an intimate and committed relationship of mutual caring" may register as domestic partners with the Secretary of State of California if they meet the following requirements [*Fam. Code § 297(a), (b)* (operative until January 1, 2005)]:

1. Both persons are at least 18 years old, capable of consenting to the domestic partnership, and are either (a) members of the same sex or, (b) if one or both of them qualify for Social Security benefits, and with respect to such qualifying persons who are members of the opposite sex, one or both are over the age of 62;

2. Neither person is married, a member of another domestic partnership, or related to one another by blood in such a way that would prevent them from marrying in California--assuming they otherwise were permitted to marry;

3. Both persons have a common residence;

4. Both persons agree to be jointly responsible for each other's "basic living expenses" incurred during the partnership;

5. Both persons file a Declaration of Domestic Partnership with the Secretary of State in accordance with state law; and

6. Neither person has previously have filed a Declaration of Domestic Partnership with the Secretary of State without it having already been terminated in accordance with state law.

As used in the above requirements, the term "have a common residence" means that both partners share the same residence. It is not necessary that the legal right to possess the residence be in both partner's names, and the fact that one partner leaves the residence does not mean that there ceases to be a common residence if the person who left intends to return. In addition, the fact that either or both partners have additional residences does not preclude their having a common residence [*see Fam. Code § 297(c)* (operative until January 1, 2005)].

"Joint responsibility" and "basic living expenses" are also defined by statute. "Joint responsibility" means that each partner agrees to provide for the other partner's basic living expenses if that partner is unable to provide for himself or herself. "Basic living expenses" means shelter, utilities, and all other costs directly related to maintenance of the common household of the partners' common residence. It also means any other cost, such as medical care, if some or all of the cost is paid as a benefit because a person is another person's domestic partner [*see Fam. Code § 297(d), (e)* (operative until January 1, 2005)].

For discussion of the rights of third parties to enforce the "joint responsibility" of the partners, see *§ 387.11[3][c]* [*see Fam. Code § 297(e)* (operative until January 1, 2005)].

[c] Registration With Secretary of State

To register a domestic partnership at the state level, persons who meet the eligibility requirements for registration (*see § 387.11[2][b]*) must file a completed Declaration of Domestic Partnership form with the Secretary of State, and pay a filing fee. The form--which is promulgated by the Secretary of State and distributed both through its offices and county clerk offices--must require each applicant to (1) recite that he or she currently meets the eligibility requirements for registration, (2) provide a mailing address, (3) sign the form with a declaration that all representations are true, correct, and contain no material omissions of fact to the best of his or her knowledge and belief, and (4) have his or her signature acknowledged by a notary public. Both partners are to sign one form (*see § 387.160*). A violation of the registration procedures is punishable as a misdemeanor [*see Fam. Code § 298* (operative until January 1, 2005)].

On accepting the Declaration, the Secretary of State will register it and return a copy of the registered form to the partners at the address they provided for their common residence [*see Fam. Code § 298.5(a)* (operative until January 1, 2005)].

No person who has filed a Declaration of Domestic Partnership may file a new Declaration until at least six months after the date that a Notice of Termination of Domestic Partnership (*see § 387.11[3][e]*) was filed with the Secretary of State in connection with the termination of the most recent domestic partnership. However, this prohibition does not apply if the prior domestic partnership ended because one of the partners died or married [*see Fam. Code § 298.5(b)* (operative until January 1, 2005)].

[d] Termination of Domestic Partnership

Termination of a domestic partnership that has been established of record with the Secretary of State is complete on the happening of any of the following: (1) one partner giving, or sending to the other by certified mail, a written notice that he or she is terminating the partnership; (2) death of a partner; (3) marriage of a partner; or (4) the cessation of the partners having a common residence [*see Fam. Code § 299(a)* (repealed January 1, 2005)].

On termination, at least one partner must file a Notice of Termination of Domestic Partnership (a form promulgated by the Secretary of State) with the office of the Secretary of State by certified mail (*see § 387.161*). The date of receipt of the form by the Secretary of State will be deemed the actual termination date of the domestic partnership, unless termination occurs because of one partner's marriage or death--in which case the date will be that listed on the termination form. The partner who files the Notice of Termination of Domestic Partnership must send a copy of the notice to the last known address of the other partner [*see Fam. Code § 299(b)* (repealed January 1, 2005)].

A former domestic partner who has given a copy of a Declaration of Domestic Partnership to any third party in order to qualify for any benefit or right must, within 60 days of termination of the partnership, give or send to that third party written notification of the termination at the third party's last known address. A third party who suffers a loss as a result of the failure by a domestic partner to send this notice is entitled to seek recovery from the partner who was obliged to send it for any actual resulting loss [*see Fam. Code § 299(c)* (repealed January 1, 2005)]. However, failure to notify a third party of the termination of a domestic partnership does not delay or prevent its termination [*see Fam. Code § 299(d)* (repealed January 1, 2005)].

[e] Legal Effects of Domestic Partnership

As a result of establishing a domestic partnership that is eligible for state registration, the partners are jointly responsible, pursuant to their agreement, for each other's "basic living expenses," as defined by statute (*see § 387.11[2][b]*). In addition, persons to whom these "basic living expenses" are owed may enforce this responsibility if, in extending credit or providing goods or services, they relied on the existence of the domestic partnership and the agreement of the partners to be jointly responsible for those specific expenses [*Fam. Code § 297(e)* (operative until January 1, 2005); *Fam. Code § 299.5(a)* (repealed January 1, 2005)].

State registration as a domestic partner is not evidence of, and does not establish, any rights existing under law other than as expressly provided to domestic partners in *Fam. Code § 297 et seq.* (establishment, registration, and termination, of domestic partnerships), and any provision of law specifically referring to domestic partners. And the existence of the above statutory provisions does not diminish any right under any other provision of law [*see Fam. Code § 299.5(a)* (repealed January 1, 2005); *Holguin v. Flores (2004) 122 Cal. App. 4th 428, 435-437, 18 Cal. Rptr. 3d 749* (domestic partnership statute does not apply to unmarried cohabiting couples generally)]. In addition, state registration (1) does not of itself change the character of real or personal property or any interest in property owned by either partner or both of them before registering, and (2) does not of itself create any interest in, or rights to, any real or personal property owned by one partner in the other partner, including, but not limited to, rights similar to community or quasi-community property [*see Fam. Code § 299.5(c), (d)* (repealed January 1, 2005)]. Moreover, the formation of a domestic partnership does not change the individual income or estate tax liability of each domestic partner before or during the partnership, unless otherwise provided by law [*see Fam. Code § 299.5(f)* (repealed January 1, 2005)].

Any property or interest that the parties acquire during their partnership in which title is shared will be held by them in "proportion of interest assigned to each partner at the time the property or interest was acquired unless expressly agreed in writing by both parties," and this principle governs any division of property on termination of the partnership [*see Fam. Code § 299.5(e)* (repealed January 1, 2005)]. Finally, on termination of the partnership, the partners, from that time forward, will incur none of the obligations to one another as domestic partners that are created in *Fam. Code § 297 et seq.* (establishment, registration, and termination, of domestic partnerships) and other any provision of law specifically referring to domestic partners [*see Fam. Code § 299.5(b)* (repealed January 1, 2005)].

Apart from the above legal effects, legislation that became operative January 1, 2002, established a variety of legal rights that flow from attaining the status of a domestic partner, as defined in *Fam. Code § 297*. Two of the most significant of these are that:

1. A cause of action for wrongful death or for negligent infliction of emotional distress may now be

brought with respect to a domestic partner [*Civ. Code § 1714.01*; *Code Civ. Proc. § 377.60(a), (f)*; see *Bouley v. Long Beach Memorial Medical Center (2005) 127 Cal. App. 4th 601, 606, 25 Cal. Rptr. 3d 813* (2002 and 2005 amendments to *Code Civ. Proc. § 377.60*, giving domestic partners standing, operate retroactively and apply to deaths occurring before January 1, 2002); see also *Armijo v. Miles (2005) 127 Cal. App. 4th 1405, 1412, 26 Cal. Rptr. 3d 623* (amendment to *Code Civ. Proc. § 377.60*, giving domestic partners standing, does not violate California Defense of Marriage Act (*Fam. Code § 308.5*) because it has nothing to do with marriage)].

2. A domestic partner may be treated as a "stepparent" for purposes of filing a petition for adoption of a child of his or her domestic partner [*Fam. Code § 9000(b), (g)*].

In addition, the legislation that became operative January 1, 2002, set forth a host of other domestic partner rights in the areas of (1) continued health coverage for a partner and his or her child under the Public Employees' Medical andHospital Care Act on the death of the employee or annuitant; (2) rights to make health care decisions on behalf of a domestic partner under certain circumstances; (3) coverage under group health care service plans; (4) use of sick leave to attend to an ill domestic partner; (5) conservatorship proceedings; (6) unemployment benefits that otherwise might be lost in following a domestic partner to a new location; (7) participation by children of a domestic partner in administration of a decedent's estate; and (8) claims for disability benefits on behalf of a domestic partner who is mentally unable to make the claim for benefits. The legislation also provided that termination of a domestic partnership, among other effects, revokes a bequest of property made in a will to a former domestic partner, as described in *Probate Code Section 6122.1*. Finally, the legislation extended to domestic partners a limited number of tax benefits--relating to an exclusion from gross income for certain amounts expended for medical care and employer provided coverage under an accident or health plan, and with respect to a deduction for certain health insurance costs of self-employed individuals and regarding some group health plans.

[f] State Preemption of Local Domestic Partnership Laws

The provisions for state registration of domestic partners (*§ 387.11[3][c]*) preempt any local ordinance regarding domestic partnership on and after July 1, 2000. Any domestic partnership previously established under local ordinance will remain valid, but on and after July 1, 2000, such a partnership will be governed by the state law provided that state registration occurs [*see Fam. Code § 299.6(a), (b)*]. If state registration does *not* occur, the provisions of the Domestic Partner Act do not apply to the partnership [*Velez v. Smith (2006) 142 Cal. App. 4th 1154, 1167, 48 Cal. Rptr. 3d 642* (registration of domestic partnership under local law does not constitute registration under Act)].

Despite state preemption, however, local jurisdictions are expressly permitted to retain or adopt ordinances, policies, or laws that offer rights within that jurisdiction to domestic partners or that impose duties on third parties regarding domestic partners, as defined by *Fam. Code § 297 et seq.* or as more broadly defined by the local jurisdiction, that are in addition to those provided under state law. Those local rights may be conditioned on the partners' agreement to assume the additional obligations set forth in *Fam. Code § 297 et seq.* [*see Fam. Code § 299.6(c)*].

[3] Domestic Partnerships on and After January 1, 2005

[a] Scope of Current Law

The California Domestic Partner Rights and Responsibilities Act of 2003 extends the rights and duties of marriage to persons registered as domestic partners on and after January 1, 2005 [Stats. 2003, ch. 421]. Transitional and administrative provisions of this legislation took effect January 1, 2004, but its major provisions become operative January 1, 2005 [Stats. 2003, ch. 421 § 14]. This legislation is intended (1) to provide all caring and committed couples, regardless of their gender or sexual orientation, the opportunity to obtain essential rights and to assume corresponding duties; and (2) to further the state's interests in promoting stable and lasting family relationships and in protecting

residents from the consequences of various common life crises [*see* Stats. 2003, ch. 421].

The provisions of this Act are intended to apply to all California domestic partnerships in existence on or after January 1, 2005, including those registered under prior law. Accordingly, the Secretary of State is directed to send a statutory letter to existing registered domestic partners on or before June 30, 2004, to send the letter again on or before December 1, 2004, and to send the letter again on or before January 31, 2005. The letter advises registered domestic partners that state law relating to the rights and responsibilities of domestic partners changes as of January 1, 2005; and that domestic partners who do not wish to be subject to "new rights and responsibilities, including laws governing community property, those governing property transfer, those regarding duties of mutual financial support and mutual responsibilities for certain debts to third parties, and many others" must terminate their domestic partnership before January 1, 2005. The statutory letter further advises existing domestic partners that the requirements for termination of a domestic partnership also change as of January 1, 2005 [*see Fam. Code § 299.3*].

An amendment enacted during 2004 and operative January 1, 2005, allowed parties to domestic partnerships registered before January 1, 2005, to make enforceable agreements between themselves up to June 30, 2005 [*Fam. Code § 297.5(k)(2)*; *see Fam. Code §§ 1600-1620*]. The remaining notice from the Secretary of State to pre-2005 registered partners was required to include a sentence advising partners that they would have until June 30, 2005, to enter into a written agreement with their domestic partners that would be enforceable in the same manner as a premarital agreement under California law [*Fam. Code § 299.3*].

[b] Requirements for Domestic Partnership

Two adults may establish a domestic partnership when both persons file a declaration of domestic partnership with the Secretary of State, and (1) both have a common residence; (2) neither is married to someone else, or is a member of another domestic partnership with someone else that has not been terminated, dissolved, or adjudged a nullity; (3) they are not related by blood in a way that would prevent them from being married to each other; (4) both are at least age 18; (5) either (a) both persons are members of the same sex or (b) at least one is eligible for Social Security benefits, and at least one is over the age of 62; and (6) both are capable of consenting to the domestic partnership [*Fam. Code § 297(b)* (operative January 1, 2005); *Velez v. Smith (2006) 142 Cal. App. 4th 1154, 1165-1166 , 48 Cal. Rptr. 3d 642* (to obtain benefits of Domestic Partnership Act, formal registration is necessary)].

A legal union of two persons of the same sex, other than a marriage, that was validly formed in another jurisdiction, will be recognized as a domestic partner ship, whether or not it is called a domestic partnership in the other jurisdiction, if it is substantially equivalent to a California domestic partnership [*Fam. Code § 299.2* (operative January 1, 2005)].

[c] Legal Effects of Domestic Partnership

Registered domestic partners are declared to have the same rights, protections, andbenefits, and are subject to the same responsibilities, obligations, and duties under law, as are granted to and imposed spouses [*Fam. Code § 297.5(a)* (operative January 1, 2005)]. Former and surviving domestic partners have the same rights and duties as former spouses and widows or widowers, respectively [*Fam. Code § 297.5(b), (c)* (operative January 1, 2005); *Velez v. Smith (2006) 142 Cal. App. 4th 1154, 1172, 48 Cal. Rptr. 3d 642* ("former" domestic partners must have been previously registered in California with Secretary of State, not merely registered under local domestic partnership law)].

The rights and obligations of registered domestic partners with respect to a child of either of them are the same as those of spouses, and the rights and obligations of former or surviving domestic partners with respect to a child of either are the same as those of former or surviving spouses [*Fam. Code § 297.5(d)* (operative January 1, 2005)]; *see Charisma R. v. Kristina S. (2006) 140 Cal. App. 4th 301, 307-308, 44 Cal. Rptr. 3d 332* (registered domestic partner of birth mother is entitled to bring petition to establish parental relationship with child born to birth mother by artificial insemination from anonymous donor).

Statutes, administrative regulations, court rules, government policies, common law, and any other provisions or sources of law are to be considered in determining the law relating to spouses that becomes law relating to domestic partners [*Fam. Code § 297.5 (a), (b), (c)* (operative January 1, 2005)]. However, the domestic partnership law does not modify the California Constitution or any statute that was adopted by initiative [*Fam. Code § 297.5(i)* (operative January 1, 2005)]. References in pertinent other law to date of marriage are deemed to refer to the date of registration of a domestic partnership with the state [*Fam. Code § 297.5(k)(1)*]. However, for domestic partnerships registered before January 1, 2005, an agreement fully executed and in force as of June 30, 2005, is enforceable if it would be a valid premarital agreement but for its date [*Fam. Code § 297.5(k)(2)*; *see Fam. Code §§ 1600-1620*]. Registered domestic partners have the same rights regarding nondiscrimination as do spouses [*Fam. Code § 297.5(f)*].

When state law relies on federal law, registered domestic partners will be treated by California law as if federal law recognized a domestic partnership in the same manner as California law [*Fam. Code § 297.5(e)*, (operative January 1, 2005)].

The California Domestic Partner Rights and Responsibilities Act [Stats. 2003, ch. 421] may impact other state laws that provide rights or protections based on family or domestic partner status, such as the California Fair Employment and Housing Act [Stats. 1980, ch. 992], the California Family Rights Act [Stats. 1991, ch. 462], and the California Insurance Equality Act [Stats. 2004, ch. 488]. Some other state laws that establish specific rights for domestic partners, such as the right to sue for negligent infliction of emotional distress or wrongful death [*see Civ. Code § 1714.01*; *Code Civ. Proc. § 377.60(a), (f)*], or the right to be treated as a "stepparent" when adopting a domestic partner's child [*see Fam. Code § 9000(b), (g)*], may be largely redundant now. These laws, especially the ones enacted before 2004, represent legislative attempts to establish in specific contexts an equivalence between rights of spouses and rights of domestic partners that is the general rule after enactment of the California Domestic Partner Rights and Responsibilities Act [Stats. 2003, ch. 421]. However even apparently redundant laws may still have some significant features [*see, e.g., Code Civ. Proc. § 377.60(f)* (amended to allow a person to sue as a domestic partner for a death that occurred before January 1, 2002, if the person can establish the first six of the factors required for a domestic partnership under former *Fam. Code § 297* as it read from 2002 through 2004)].

Despite the most recent amendments to the domestic partnership laws, registered domestic partners are not treated the same as spouses in all respects. For example, they are not entitled to numerous benefits provided to married couples by the federal government, such as marital benefits relating to Social Security, Medicare, federal housing, food stamps, veterans' benefits, military benefits, and federal employment benefits [*Velez v. Smith (2006) 142 Cal. App. 4th 1154, 1173, 48 Cal. Rptr. 3d 642]* . The prerequisites for the formation of a domestic partnership also differ from marriage, e.g., minors who wish to marry may do so with parental consent [*see Fam. Code § 302*], while there is no similar provision for minors who wish to register as domestic partners, and same sex couples must share a common residence before they can register as domestic partners [*see Fam. Code § 297(b)(1)*], while there is no similar limitation for persons who wish to marry [*Velez v. Smith (2006) 142 Cal. App. 4th 1154, 1173, 48 Cal. Rptr. 3d 642]* . An individual may be considered a putative spouse under *Fam. Code § 2251* when the individual entered into a marriage that was void or voidable, but there is no similar provision that recognizes a putative domestic partner [*Velez v. Smith (2006) 142 Cal. App. 4th 1154, 1172-1174, 48 Cal. Rptr. 3d 642* ; *but see In re Domestic Partnership of Ellis & Arriaga (2008) 162 Cal. App. 4th 1000, 1009-1012, 76 Cal. Rptr. 3d 401* (disagreeing with *Velez* and applying putative spouse doctrine to domestic partners)]..

The State Board of Equalization grants registered domestic partners the same property tax relief that is afforded to spouses, e.g., real property transfers between registered domestic partners are excluded from reassessment at full cash value for property tax purposes in the same manner that transfers between spouses are excluded [*Strong v State Bd. of Equalization (2007) 155 Cal. App. 4th 1182, 1190-1195, 66 Cal. Rptr. 3d 657*].

[d] Registration of Domestic Partnership

The Declaration of Domestic Partnership form developed by the Secretary of State must require a person wishing to become a domestic partner (1) to state that he or she meets the requirements of *Family Code Section 297*; (2) to provide a mailing address; (3) to consent to California court jurisdiction for a dissolution proceeding or any other proceeding related to the partners' rights and obligations, even if one or both partners leaves California; (4) to sign the form with a declaration that its representations are true; and (5) to file a form with notarized signatures with the Secretary of State. It is a misdemeanor to file an intentionally and materially false Declaration of Domestic Partnership [*Fam. Code § 298(c)* (operative January 1, 2005); *see § 387.160* (form for Declaration of Domestic Partnership)].

Either party or both parties may indicate a change of name in the Declaration of Domestic Partnership [*Fam. Code § 298(d)*]. In such event, the Certificate ofRegistered Domestic Partnership issued by the Secretary of State must include the name used by each party before registration of the domestic partnership and the new name selected by each party on registration of the domestic partnership [*Fam. Code § 298.5(e)*]. Parties to a registered domestic partnership are not required to have the same name, neither party is required to change his or her name, and a person's name is not changed on registration as a domestic partner unless that person elects to change his or her name [*Fam. Code § 298.6(a)*]. A person may adopt the current last name of the other domestic partner, the last name of either domestic partner given at birth, a name that combines into a single last name all or a segment of the current last name or the last name of either domestic partner given at birth, or a hyphenated combination of last names [*Fam. Code § 298.6(b)(2)*].

No one who has filed a Declaration of Domestic Partnership may file a new Declaration, or enter a civil marriage with someone other than their registered domestic partner, unless the prior domestic partnership has been ended by termination, dissolution, judgment of nullity, or the other partner's death [*Fam. Code § 298.5(c)* (operative January 1, 2005)].

A person's reasonable, good faith belief that his or her domestic partnership was validly registered with the Secretary of State entitles that person to the rights and responsibilities of a registered domestic partner, even if the registration never occurred [*In re Domestic Partnership of Ellis & Arriaga (2008) 162 Cal. App. 4th 1000, 1003, 1008-1012, 76 Cal. Rptr. 3d 401* (applying putative spouse doctrine to domestic partners)].

[e] Termination of Domestic Partnership

California Superior Courts have jurisdiction over proceedings relating to dissolution and nullity of domestic partnerships and to legal separation of domestic partners. Generally, such proceedings follow the same procedures as apply in the corresponding marriage actions, and the partners have the same rights, protections, and benefits, and are subject to the same responsibilities, obligations, and duties as spouses in those actions [*Fam. Code § 299(d)* (operative January 1, 2005)]. However, in accordance with the consent acknowledged by domestic partners in the Declaration of Domestic Partnership form, proceedings for dissolution, nullity, or legal separation of a domestic partnership registered in California may be filed in California superior courts even if neither domestic partner is a resident of California or maintains a domicile in California [*Fam. Code § 299(d)* (operative January 1, 2005)].

Termination by filing a form is available for some short-term domestic partnerships, where there are no children or support issues and limited property, in a procedure modeled on the summary dissolution of marriage procedure provided in *Fam. Code § 2400 et seq.* The partners may file the form Termination of Domestic Partnership with the Secretary of State to terminate their partnership when all the following circumstances exist at the time of filing: (1) the notice is signed by both partners; (2) there are no children born before or after, or adopted after, registration of the domestic partnership; (3) the duration of the domestic partnership is no more than five years; (4) neither partner has any interest in real property, except for certain leases; (5) there are no unpaid obligations incurred by either or both partners after registration that exceed an amount specified by statute; (6) the total fair market value of community property assets is less than an amount specified by statute and neither partner has separate property assets in excess of that amount; (7) the partners have executed an agreement dividing their assets and liabilities; (8) the partners waive any rights to support;

(9) the partners have read a brochure prepared by the Secretary of State about terminating a domestic partnership; and (10) both partners wish to terminate the domestic partnership [*Fam. Code § 299(a)* (operative January 1, 2005)]. The domestic partnership will be terminated effective six months after the filing of a Notice of Termination of Domestic Partnership unless one of the partners has revoked the termination notice, and this termination will have the same effect as a judgment of dissolution [*Fam. Code § 299(b)* (operative January 1, 2005); *see § 387.161* (form for Notice of Termination of Domestic Partnership)]. After the termination takes effect, either party may bring an action to set it aside for fraud, duress, mistake, or any other ground recognized at law or in equity, and a court may set it aside upon proof that the parties did not meet the requirements for filing of the Notice of Termination of Domestic Partnership [*Fam. Code § 299(c)* (operative January 1, 2005)].

[f] State Preemption of Local Domestic Partnership Laws

The provisions for state registration of domestic partners preempt any local ordinance regarding domestic partnership on and after July 1, 2000. Domestic partnerships established under local ordinance before that date remain valid, but after July 1, 2000, they are governed by state law provided that state registration occurs [*Fam. Code § 299.6(a), (b)*]. If state registration does *not* occur, the provisions of the Domestic Partner Act do not apply to the partnership [*Velez v. Smith (2006) 142 Cal. App. 4th 1154, 1167, 48 Cal. Rptr. 3d 642* (registration of domestic partnership under local law does not constitute registration under Act)].

Despite state preemption, however, local jurisdictions are expressly permitted to retain or adopt ordinances, policies, or laws that offer rights within that jurisdiction or that impose duties on third parties regarding domestic partners, as defined by *Fam. Code § 297 et seq.*, or as more broadly defined by the local jurisdiction, that are in addition to those provided under state law. These local rights may be conditioned on the partners' agreement to assume the additional obligations set forth in *Fam. Code § 297 et seq.* [*Fam. Code § 299.6(c)*].

State and local agencies may exercise their regulatory authority to implement statutes providing rights to, or imposing responsibilities on, domestic partners [*Fam. Code § 297.5(h)* (operative January 1, 2005)].

[4] Hospital Visitation by Domestic Partners

On and after January 1, 2000, health facilities must allow "a patient's domestic partner, the children of the patient's domestic partner, and the domestic partner of the patient's parent or child" to visit the patient, unless (1) visitors are not otherwise allowed; (2) visits by a particular person would endanger the health or safety of the patient, the staff, or another visitor, or would significantly be disruptive to the facility; or (3) the patient has expressed a preference that a particular person not visit. Health facilities, moreover, retain the right to establish reasonable restrictions on visitation."Domestic partner" for these purposes has the same meaning as that given in *Fam. Code § 297* (*§ 387.11[2]*) [*see Health & Safety Code § 1261*].

[5] Gay and Lesbian Cohabitants

[a] Property Agreements

In sanctioning express and implied-in-fact contracts between nonmarital cohabitants and allowing enforcement of equitable remedies by former cohabitants in certain situations [*see § 387.50* et seq.], the California Supreme Court appears to have indirectly approved the enforcement of cohabitation agreements and equitable remedies between gay and lesbian couples [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 665, 134 Cal. Rptr. 815, 557 P.2d 106]* . Willingness of the Court to apply the principles articulated in the *Marvin* case to same-sex cohabitants can be seen from the following:

- The Court concluded that the former Family Law Act (predecessor to the Family Code) did not govern the property rights of unmarried couples, andapplication of the Family Law Act would have

excluded gay and lesbian couples because of the prohibition on same-sex marriage [*see Fam. Code § 300*; *see also Marvin v. Marvin (1976) 18 Cal. 3d 660, 665, 681, 134 Cal. Rptr. 815, 557 P.2d 106* ; *but cf. Fam. Code § 297 et seq.* (provisions for domestic partner registration); for discussion of requirements for marriage, *see* Ch. 359, *Marriage*].

- The Court was careful to employ the term "nonmarital partners" as opposed to "putatively married persons" or any other term with primarily heterosexual connotations [*see Marvin v. Marvin (1976) 18 Cal. 3d 660*].

- The Court did not condition the contractual options and noncontractual remedies approved in *Marvin* on the eligibility of the parties to marry or on the sex of the parties [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 683-684, 134 Cal. Rptr. 815, 557 P.2d 106* ; *cf. Kroopf v. Guffey (1986) 183 Cal. App. 3d 1351, 1357, 1360, 228 Cal. Rptr. 807* (domestic relations principles did not apply in action to enforce cohabitation agreement against nonresident defendant)].

- Sexual activity between consenting adults in California has, for the most part, been decriminalized.

Nevertheless, property agreements between unmarried couples of the same or of the opposite sex that are based on the performance of sexual services will be enforced only to the extent of any severable portions that are supported by independent consideration [*see also Marvin v. Marvin (1976) 18 Cal. 3d 660, 672, 674, 134 Cal. Rptr. 815, 557 P.2d 106* ; *see Bergen v. Wood (1993) 18 Cal. Rptr. 2d 75* (oral agreement for companionship and hostess services, without cohabitation, are inextricably intertwined with sexual relationship and unenforceable); *Whorton v. Dillingham (1988) 202 Cal. App. 3d 447, 452-454, 248 Cal. Rptr. 405* (oral agreement for sexual services with severable, enforceable provisions); *Jones v. Daly (1981) 122 Cal. App. 3d 500, 508-509, 176 Cal. Rptr. 130* (unenforceable oral agreement inseparably based on sexual services)].

Apart from traditional contractual arrangements regarding property rights, unmarried couples of same or of the opposite sex may also use powers of attorney and powers of attorney for health care to secure for themselves the rights to *manage* one another's property and to be involved with one another's health care decisions [*see Prob. Code §§ 4000 et seq., 4400 et seq., 4600 et seq.* (Power of Attorney Law; Uniform Statutory Form Power of Attorney Act; Health Care Decisions Law)].

For further discussion of the enforceability of agreements between nonmarital partners, see *§ 387.50* et seq.

[b] Need for Agreement to Register Domestic Partnership

On and after January 1, 2000, unmarried couples of the same sex, or of the opposite sex who are over age 62 and eligible for Social Security benefits, who agree to be responsible for one another's basic living expenses, share a common residence, and meet other requirements, may register with the State of California as "domestic partners," as discussed in *§ 387.11[2]*. [*Fam. Code § 297 et seq.* (operative until January 1, 2005)]. On and after January 1, 2005, the consequences of such registration are significantly broadened, and the requirements are modified, in particular by the elimination of the requirement for an agreement to share living expenses, as discussed in *§ 387.11[3]* [*Fam. Code § 297 et seq.* (operative on and after January 1, 2005)].

It appears that elements of the registration requirement applicable before 2005 [*Fam. Code § 297(b), (d)* (operative until January 1, 2005); *§ 387.11[2]*], that the parties share a common residence and have an agreement to be jointly responsible for each other's "basic living expenses" incurred during the partnership, is an implicit sanction of same sex partners entering into a binding contract that is in the nature of at least a limited property or support agreement. Note also that, while the registration statute does not expressly require a written agreement, such an agreement may have been contemplated by the Legislature, because of the enforcement rights of third parties to whom "basic living

expenses" are owed and who relied on the agreement and partnership in extending credit or providing goods or services. In the absence of a writing, it would seem difficult to for a third party to establish reliance on an agreement. Therefore, the state domestic partnership statutes appear to reinforce the need for written cohabitation agreements, and lend weight to the premise that agreements for property and support should be enforceable by same sex couples if they are not otherwise entered into for an unlawful purpose.

[c] Custody of Children

The California Supreme Court has recognized in a number of cases that lesbian cohabitants may both be a child's mother, with attendant custody and support rights and obligations. In one case, the Court upheld a "second parent" adoption in which the mother of a child conceived by artificial insemination consented to the child's adoption by the mother's lesbian partner, thereby making the partner the child's "second parent" [*see Sharon S. v. Superior Court (2003) 31 Cal. 4th 417, 2 Cal. Rptr. 3d 699, 73 P.3d 554]* . In a subsequent case, the Court held that under the Uniform Parentage Act (*Fam. Code §§ 7600-7730*), a woman may be a presumed mother of a child of her lesbian partner if they agree to raise the child together, she receives the child into her home, and she holds the child out as her natural child [*see Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 33 Cal. Rptr. 3d 46, 117 P.3d 660]* . The Court has also held that when a woman provides ova to her lesbian partner so that the partner can bear a child who will be raised in their joint home, both women are considered to be the child's parents [*see K.M. v. E.G. (2005) 37 Cal. 4th 130, 33 Cal. Rptr. 3d 61, 117 P.3d 673]* . The lesbian mother of a child is also estopped from challenging the validity of a stipulated judgment declaring that she and her lesbian partner are the child's parents [*see Kristine H. v. Lisa R. (2005) 37 Cal. 4th 156, 33 Cal. Rptr. 3d 81, 117 P.3d 690]* .

The lesbian partner of a child's birth mother may file a petition to establish her parental relationship with the child who is conceived by artificial insemination from an anonymous donor [*Charisma R. v. Kristina S. (2006) 140 Cal. App. 4th 301, 307-308, 44 Cal. Rptr. 3d 332*]. Her presumed parent status depends on affirmative findings that she received the child into her home and openly held the child out as her natural child. If the trial court finds that the woman is a presumed parent, then it should determine(1) whether the petitioner actively participated in causing the child to be conceived with the understanding that she would raise the child as her own with the birth mother, (2) whether she voluntarily accepted the rights and obligations of parenthood after the child was born, and (3) whether any one else claims to be the child's second parent [*Charisma R. v. Kristina S. (2009) 175 Cal. App. 4th 361, 367-377, 96 Cal. Rptr. 3d 26* ; *Charisma R. v. Kristina S. (2006) 140 Cal. App. 4th 301, 309-310, 44 Cal. Rptr. 3d 332*]. Evidence that the woman has no biological tie to the child does not rebut the presumption of the woman's parenthood [*Charisma R. v. Kristina S. (2006) 140 Cal. App. 4th 301, 310, 44 Cal. Rptr. 3d 332*].

The petitioner is not required to receive the child in her home for a "significant period of time" to be considered a presumed parent under *Fam. Code § 7611(d)* [*Charisma R. v. Kristina S. (2009) 175 Cal. App. 4th 361, 370-374, 96 Cal. Rptr. 3d 26]* . The "receiving" requirement of *Fam. Code § 7611(d)* is a necessary formality, but not one that requires "receipt" for any particular duration [*Charisma R. v. Kristina S. (2009) 175 Cal. App. 4th 361, 372, 96 Cal. Rptr. 3d 26]* . Instead, the petitioner's receipt of the child in her home must be sufficiently unambiguous as to constitute a clear declaration regarding the nature of their relationship, but it need not continue for any specific duration. Although cohabitation for an extended period may strengthen a claim for presumed parent status, *Fam. Code § 7611(d)* does not require that cohabitation or coparenting continue for any particular period of time [*Charisma R. v. Kristina S. (2009) 175 Cal. App. 4th 361, 374, 96 Cal. Rptr. 3d 26]* .

[d] Tort and Civil Rights Actions

Civ. Code § 1714.01 provides that domestic partners, as defined in *Fam. Code § 297*, are entitled to recover damages for negligent infliction of emotional distress to the same extent as spouses under California law. Prior to the enactment of *§ 1714.01*, case law held that an intimate gay or lesbian relationship is not included within the "close relationship" needed for recovery of tort damages for negligent infliction of emotional distress based on witnessing an injury to

another person [*Coon v. Joseph (1987) 192 Cal. App. 3d 1269, 1274-1276, 237 Cal. Rptr. 873* (gay man who witnessed verbal abuse and physical assault of his gay partner lacked sufficiently close relationship, as a matter of law, to warrant recovery for injury); *see Dillon v. Legg (1968) 68 Cal. 2d 728, 740-741, 69 Cal. Rptr. 72, 441 P.2d 912* (factors for negligent infliction of emotional distress: (1) nearness to scene; (2) sensory and contemporaneous observance; and (3) plaintiff and victim closely related)].

Also, courts have held that state benefits under a dental plan can be denied to nonmarital partners of gay and lesbian state employees without constituting unlawful discrimination on the basis of sexual orientation or marital status [*Hinman v. Department of Personnel Administration (1985) 167 Cal. App. 3d 516, 523-530, 213 Cal. Rptr. 410* ; *but see Gov. Code § 22750 et seq.* (authorizing state and local public entities to offer health care coverage to domestic partners of employees and annuitants); *Health & Safety Code § 1261* (visitation rights of domestic partners at health care facilities)]. For discussion of the distinction between cohabitation and marriage with respect to various tort and civil rights issues, see the discussion in *§ 387.31[5]-[7]*.

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§ 387.12 Unmarried Parents

Constitutional protection of the parent-child relationship extends to unmarried, as well as to married parents, and to fathers as well as to mothers [*see Stanley v. Illinois (1972) 405 U.S. 645, 649-659, 92 S. Ct. 1208, 31 L. Ed. 2d 551]* . Thus, the parental rights of unmarried fathers who promptly come forward to accept their parental responsibilities cannot be terminated absent a showing of unfitness [*Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 849, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* ; *see Michael M. v. Giovanna F. (1992) 5 Cal. App. 4th 1272, 1284-1285, 7 Cal. Rptr. 2d 460* (mother conceived cohabitant's child, then gave birth after marrying another man); *but see Adoption of Michael H. (1995) 10 Cal. 4th 1043, 1047-1048, 1060* (clarifying *Kelsey S.* holding); *see also In re Kyle F. (2003) 112 Cal. App. 4th 538, 540, 5 Cal. Rptr. 3d 190* (unwed father chargeable with unlawful intercourse under *Penal Code § 261.5* is not necessarily disqualified from asserting right to withhold consent to adoption)]. A man who cohabits with a child's mother may assert parental rights and responsibilities with respect to the child as a presumed father based on receiving the child into his home and holding the child out as his own [*see Librers v. Black (2005) 129 Cal. App. 4th 114, 123, 28 Cal. Rptr. 3d 188]* . However, a woman who cohabited with the father of minor children may not seek custody and visitation rights with respect to the children as a presumed or de facto mother when the parental rights of the natural mother have not been terminated [*Scott v. Superior Court (2009) 171 Cal. App. 4th 540, 544-547, 89 Cal. Rptr. 3d 843]* .

For full discussion of constitutional protections for unwed parents, see Ch. 12B, *Adoptions: Unmarried Minors* . For discussion of issues relating to gay and lesbian parents, *see § 387.11[5]*. For discussion of the right of an unmarried woman to make use of procedures for artificial insemination, see Ch. 412, *Paternity* [*see Hecht v. Superior Court (1993) 16 Cal. App. 4th 836, 852-855, 20 Cal. Rptr. 2d 275* ; *cf. Kane v. Superior Court (1995) 37 Cal. App. 4th 1577, 1587, 44 Cal. Rptr. 2d 578* (involving right of surviving unmarried cohabitant to take custody of vials of frozen sperm willed to her)].

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§ 387.13 Common-Law Marriage

Common-law marriage was abolished in California in 1895 [*see Estate of Shipp (1914) 168 Cal. 640, 641, 144 P. 143]* . Thus, the only way to contract a valid marriage in California is by complying with the statutory requirements governing "solemnization" [*see Fam. Code § 300 et seq.*; *see also Fam. Code § 500 et seq.* (confidential marriage for unmarried man and unmarried woman living together as husband and wife)]. These requirements include procuring a license, going through a ceremonial marriage conducted by an authorized person, and filing a certificate of registry of marriage [*Fam. Code § 300*; *see also Fam. Code § 307* (religious ceremony absent clergy)]. Regardless of how long the parties live together in California and hold themselves out to the public as man and wife, a valid marriage cannot be contracted except by solemnization [*see Estate of Shipp (1914) 168 Cal. 640, 641, 144 P. 143* ; *Fam. Code § 300* (consent of parties alone does not constitute marriage)]. For full discussion of the formal requirements for a valid marriage, see Ch. 359, *Marriage* .

California recognizes a marriage contracted out-of-state as valid, if it is valid according to the laws of the place of contracting [*Fam. Code § 308*]. Thus, if persons coming to California have previously complied with the requirements for common-law marriage (ordinarily cohabitation with the intent to be married) in a state recognizing such marriages, the marriage of the parties will be recognized as valid in California. For further discussion of this rule, see Ch. 359, *Marriage* .

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[Reserved]

§§ 387.14[Reserved]

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§ 387.30 Governing Law

The leading case defining the rights and duties of nonmarital partners during cohabitation is *Marvin v. Marvin (1976) 18 Cal. 3d 660, 681, 134 Cal. Rptr. 815, 557 P.2d 106* . Statutory provisions that allow nonmarital partners to *approximate* the incidents of marriage include: *Prob. Code § 150(b), (c)* (mutual wills); *Prob. Code § 5100 et seq.* (joint bank accounts with rights of survivorship); *Veh. Code § 4150.5* (joint ownership of motor vehicles], *Civ. Code §§ 682, 683, 683.2* (joint ownership of real property); *Ins. Code § 10170* (purchase of life insuranceirrevocably designating each other as beneficiary).

Statutory provisions governing the effect of cohabitation on rights and duties in a prior marriage are contained in *Fam. Code § 4323* (spousal support); *Fam. Code § 4057.5* (child support), and *Fam. Code §§ 3011, 3020, 3040* (child custody and child visitation).

Statutory provisions prohibiting discrimination in the granting or denial of credit and in credit reporting practices based on a person's marital status are contained in *15 U.S.C. § 1691 et seq.* and *Civ. Code § 1812.30 et seq.* Rights of unmarried parents are briefly discussed in *§ 387.10* et seq., and more completely discussed in Ch. 223, *Dissolution of Marriage: Child Custody* .

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§ 387.31 Cohabitation and Marriage Contrasted

[1] Overview

Although cohabitation by unmarried persons does not give rise to the same legal effects as marriage, nonmarital partners may nevertheless acquire certain rights and incur responsibilities to each other and to third parties because of their relationship and living arrangements. The discussion that follows provides an overview of the various legal rights, remedies, and obligations that are affected by marriage, and contrasts the effect, if any, that nonmarital cohabitation would have on the same subjects. The discussion also suggests methods by which nonmarital partners may achieve some of the effects of marriage.

[2] Confidential Relationship

Married persons are ordinarily regarded as being in a "confidential relationship," which requires the courts to scrutinize their contracts, property transfers, and other business dealings carefully for evidence of unfairness to one another [*see, e.g., In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 150, 133 Cal. Rptr. 583* ; *see also Fam. Code § 721*, as discussed in Ch. 122, *Community Property*].

Nonmarital partners, by contrast, are not considered to be in a confidential relationship merely because they live together. However, as with any two unrelated and unmarried persons, a confidential relationship may be found to exist in a particular case if one has gained the confidence of the other and purports to act or advise with the other's interest in mind [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 682 n.22, 134 Cal. Rptr. 815, 557 P.2d 106]* . In such a case, the parties' business dealings with each other will be scrutinized carefully for fairness.

For a discussion of the factors that a court will consider in finding a confidential relationship and the effect of such a relationship on the agreements of the parties, see discussion in *§ 387.53[3]*.

[3] Contractual Freedom

In addition to the restrictions imposed by their confidential relationship [*see Fam. Code § 721*], married persons are

subject to certain limitations on their freedom to contract with each other. Briefly, married persons are forbidden to make contracts that (1) alter their "legal relations" [*Fam. Code § 1620*]; (2) promote dissolution of their marriage [*In re Marriage of Dawley (1976) 17 Cal. 3d 342, 350, 131 Cal. Rptr. 3, 551 P.2d 323]* ; or (3) waive or limit the support obligation of either spouse [*see In re Marriage of Higgason (1973) 10 Cal. 3d 476, 487-488, 110 Cal. Rptr. 897, 516 P.2d 289* (disapproved on other grounds in *In re Marriage of Dawley (1976) 17 Cal. 3d 342, 352, 131 Cal. Rptr. 3, 551 P.2d 323*); *see Fam. Code § 720*; *see also* Ch. 225, *Dissolution of Marriage: Spousal Support* , and Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure 2d Ed. (Matthew Bender), Chs. 201, 210].

In contrast, nonmarital partners have great freedom to make express contracts structuring their relationship in any way they please. They may contract explicitly regarding the division of their property in the event of separation. They may contract that one partner will work while the other partner stays home and takes care of the house and that the employed partner will pay the domestic partner a salary for those services [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 674 n.10, 134 Cal. Rptr. 815, 557 P.2d 106]* . This freedom to contract allows unmarried couples to structure their relationship in accordance with their needs and desires, rather than in accordance with traditional notions of marriage. The enforceability of such agreements is discussed in detail in Part II. The drafting and preparation of express contracts between nonmarital partners is discussed in detail in Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure 2d Ed. (Matthew Bender), Ch. 200.

[4] Property Rights

In the absence of a contractual provision to the contrary, and except as otherwise provided by statute, property acquired by either spouse during marriage while domiciled in California is community property, in which each spouse has an equal one-half interest [*Fam. Code §§ 751, 760*; *see Fam. Code §§ 721, 770, 1500, 1620*]. This interest includes the right of equal management and control during the marriage [*see Fam. Code §§ 1100, 1102*], the right to one-half of the accumulated community property on dissolution of the marriage [*see Fam. Code § 2550*], the right to dispose of half of the community property by will [*see Prob. Code § 6101*], and the right to succeed to the other spouse's one-half of the community property if he or she dies intestate [*see Prob. Code §§ 100, 6401*]. For full discussion of community property rights, see Ch. 122, *Community Property* .

The community property laws do not apply to the property of nonmarital partners, regardless of how long they have lived together or how closely their relationship may resemble a marriage in other respects [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 681, 134 Cal. Rptr. 815, 557 P.2d 106]* . However, as discussed in *§ 387.50* et seq., nonmarital partners may acquire mutual rights to share in theproperty accumulated during the relationship in a variety of ways, including express agreement, implied-in-fact agreement, and quasi-contract.

[5] Tort and Contract Liability

Community property, including the earnings of each spouse, may become liable for the contracts of each spouse entered into during the marriage and for the torts of each spouse committed during the marriage [*see Fam. Code §§ 900, 910, 1000*; *see also* Ch. 222, *Dissolution of Marriage: Property Division and Valuation*]. Although the community property laws do not apply to cohabitants and may not be used to subject the earnings of nonmarital partners to liability for the torts or contracts of the other partner [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 681, 134 Cal. Rptr. 815, 557 P.2d 106]* , in some cases other theories of liability may apply [*see § 387.71*].

[6] Wrongful Death

A spouse, domestic partner, or a "putative spouse" who is found by the court to have believed in good faith that the marriage was valid, has the statutory right to bring an action for damages for the wrongful death of the other spouse or domestic partner [*Code Civ. Proc. § 377.60(a), (b), (f)*; *see generally* Levy, Golden & Sacks, California Torts, Ch. 55 (Matthew Bender); *see also Fam. Code § 2251(a)*; *Centinela Hospital Medical Center v. Superior Court (1989) 215*

Cal. App. 3d 971, 975, 263 Cal. Rptr. 672 (good-faith belief in lawful marriage must be *reasonable*)]. The determination of good faith is based on an objective standard, namely, that a reasonable person in the same situation would have believed that he or she was lawfully married [*Welch v. State of California (2000) 83 Cal. App. 4th 1374, 1378-1379, 100 Cal. Rptr. 2d 430* (couple made no attempt whatsoever to procure either a marriage license or formally solemnize their union; therefore a claim of good faith belief lacked any reasonable basis)].

The wrongful death action is purely statutory, and the statutes are strictly construed [*see, e.g.,* *Kunakoff v. Woods (1958) 166 Cal. App. 2d 59, 62, 332 P.2d 773]* . If a person is not listed in the statute as one eligible to bring an action for wrongful death, that person has no cause of action, regardless of how close he or she was to the decedent, or how much he or she actually depended on the decedent for support. Thus, nonmarital partners who do not qualify as "domestic partners" under *Family Code Section 297* do not have a cause of action for wrongful death [*Garcia v. Douglas Aircraft Co. (1982) 133 Cal. App. 3d 890, 893, 184 Cal. Rptr. 390* (decedent's fiancee); *Rosales v. Battle (2003) 113 Cal. App. 4th 1178, 1182-1185, 7 Cal. Rptr. 3d 13* (decedent's concubine under Mexican law)]. A limited statutory exception allows a person to sue as a domestic partner for a death that occurred before January 1, 2002, if the person can establish the first six of the factors required for a domestic partnership under former *Fam. Code § 297* as it read from 2002 through 2004 [*Code Civil Proc. § 377.60(f)(2)*]. This exclusion of nonmarital partners from the wrongful death statute has been held not to constitute an unconstitutional denial of equal protection [*Holguin v. Flores (2004) 122 Cal. App. 4th 428, 437-443, 18 Cal. Rptr. 3d 749* ; *Garcia v. Douglas Aircraft Co. (1982) 133 Cal. App. 3d 890, 894-895, 184 Cal. Rptr. 390* ; *Harrod v. Pacific Southwest Airlines, Inc. (1981) 118 Cal. App. 3d 155, 157-158, 173 Cal. Rptr. 68* ; *Aspinall v. McDonnell Douglas Corp. (9th Cir. 1980) 625 F.2d 325, 328]* .

It should be noted, however, that minors may sue for wrongful death regardless of their relationship to the decedent, if, at the time of the decedent's death, they resided for the previous 180 days in the decedent's household and were dependent upon the decedent for at least one-half of their support [*Code Civ. Proc. § 377.60(c)*]. Thus, minors who are either the children of a nonmarital partnership or the children of one of the nonmarital partners by a former marriage are potential plaintiffs in a wrongful death action based on the death of one of the nonmarital partners. For further discussion of the procedure for bringing a wrongful death action, see Ch. 181, *Death and Survival Actions* and Levy, Golden & Sacks, California Torts, Ch. 55 (Matthew Bender).

[7] Loss of Consortium

Since 1974, spouses have had the right to sue for loss of consortium--that is, for the loss of companionship, love, and sexual relations--when a third person intentionally or negligently injures the other spouse [*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal. 3d 382, 408-409, 115 Cal. Rptr. 765, 525 P.2d 669* ; *see also* *Tong v. Jocson (1977) 76 Cal. App. 3d 603, 604-605, 142 Cal. Rptr. 726* ; *Borer v. American Airlines, Inc. (1977) 19 Cal. 3d 441, 444, 138 Cal. Rptr. 302, 563 P.2d 858* ; *see generally* Levy, Golden & Sacks, California Torts, Ch. 56 (Matthew Bender)]. This is a cause of action created by decisional law, rather than by statute.

However, the California Supreme Court has also held that the right to recover for loss of consortium is founded on the relationship of marriage, and absent such a relationship the right does not exist [*Elden v. Sheldon (1988) 46 Cal. 3d 267, 277-279, 250 Cal. Rptr. 254, 758 P.2d 582]* . In reaching this conclusion, the Court disapproved a court of appeal decision [*Butcher v. Superior Court (1983) 139 Cal. App. 3d 58, 71, 188 Cal. Rptr. 503]* that had held that a loss of consortium action could be maintained if the plaintiff alleged that he or she and the injured party were in a relationship that was stable and significant and the equivalent of a de facto marriage [*Elden v. Sheldon (1988) 46 Cal. 3d 267, 278-279, 250 Cal. Rptr. 254, 758 P.2d 582]* . The Court relied on the state's interest in promoting the responsibilities of marriage, and the difficulty of assessing the emotional, sexual, and financial relationship of the parties to determine whether their arrangement was the equivalent of a marriage, to require a legal marriage for recovery of loss of consortium damages [*Elden v. Sheldon (1988) 46 Cal. 3d 267, 279, 250 Cal. Rptr. 254, 758 P.2d 582* ; *see* *Matuz v. Gerardin Corp. (1989) 254 Cal. Rptr. 725* ; *see also* *Zwicker v. Altamont Emergency Room Physicians Medical Group (2002) 98 Cal. App. 4th 26, 32-35, 118 Cal. Rptr. 2d 912* (premarital injury cannot provide basis for loss of consortium

claim)].

[8] Obligation of Support

When persons marry, they contract toward each other a mutual obligation of "support" [*Fam. Code § 720*], as more fully discussed in Ch. 225, *Dissolution of Marriage: Spousal Support* . The mutual obligation of support between spouses is regarded as so important that public policy forbids any preseparation contract between the spouses in which the support obligation of either spouse is waived or limited [*see, e.g., In re Marriage of Higgason (1973) 10 Cal. 3d 476, 487-488, 110 Cal. Rptr. 897, 516 P.2d 289* (disapproved on other grounds in *In re Marriage of Dawley (1976) 17 Cal. 3d 342, 352, 131 Cal. Rptr. 3, 551 P.2d 323*); *see Fam. Code § 1612(a)(7)* (premarital agreement may not contain provisions in violation of public policy); *but see Fam. Code § 3580* (contract regarding support during legal separation as permitted)]. In addition, effective January 1, 2002, any premarital provision regarding spousal support, including but not limited to a waiver following termination of marriage, is not enforceable if the party against whom the support provision is enforced was *not* represented by independent legal counsel at the time the agreement was signed, or if the provision is unconscionable at the time of enforcement. An otherwise unenforceable support provision does not become enforceable *solely* because the party against whom enforcement is sought was represented by independent counsel [*Fam. Code § 1612(c)*]. The court may order one spouse to continue to support the other during the pendency of a proceeding to dissolve the marriage [*see Fam. Code § 3600 et seq.*] and in the judgment of dissolution [*see Fam. Code § 4330 et seq.*].

In contrast, there is no duty of support as such arising from nonmarital cohabitation because such a duty would revive, de facto, the institution of common law marriage [*see Friedman v. Friedman (1993) 20 Cal. App. 4th 876, 883-890* ; *see also Marvin v. Marvin (1976) 18 Cal. 3d 660, 685 n.26, 134 Cal. Rptr. 815, 557 P.2d 106]* . Nevertheless, a duty of support between nonmarital partners may be based on contractual and equitable principles, as discussed further in Part II [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 684-685, 134 Cal. Rptr. 815, 557 P.2d 106* ; *Friedman v. Friedman (1993) 20 Cal. App. 4th 876, 883-890* (award of pendente lite "spousal support" on basis of implied contract in "Marvin" action was abuse of discretion)].

The Ninth Circuit bankruptcy panel has held that a stipulated judgment in an action for quasi-marital support is not a support or alimony obligation that is nondischargeable in bankruptcy under *11 United States Code Section 523(a)(5)* [*see In re Doyle (9th Cir. B.A.P. 1986) 16 C.B.C. 2d 761, 764, 15 B.C.D. 700]* .

[9] Inheritance Rights

If a spouse dies intestate, all of the community property and a portion of the decedent's separate property pass to the surviving spouse [*see Prob. Code §§ 100, 101, 6401, 6402, 6402.5, 6414*; *see also* Ch. 441, *Probate: Disposition Without Administration*]. Beginning July 1, 2003, if a registered domestic partner dies intestate, the surviving domestic partner inherits the deceased partner's separate property in the same manner as would a surviving spouse [*Prob. Code § 6401(c)*]. By contrast, a nonmarital, nonregistered partner who is not related to his or her other partner is not eligible to succeed to the property of the decedent partner by intestate succession [*cf. Rosales v. Battle (2003) 113 Cal. App. 4th 1178, 1184-1186, 7 Cal. Rptr. 3d 13* (decedent's concubine cannot inherit under California's intestacy laws despite having heir status under Mexico's intestacy laws)]. If the partners desire that neither acquire any rights in the property of the other by virtue of their relationship, the absence of intestate rights may be one reason to refrain from either marrying or registering as domestic partners.

However, if the partners desire to approximate the incidents of marriage as closely as possible without marrying, they may choose to make mutual wills [*see* former *Prob. Code § 23* (applicable to mutual wills made before January 1, 1985); *Prob. Code § 150(b), (c)* (applicable to mutual wills made on or after January 1, 1985)], to put money in joint bank accounts with rights of survivorship (*see § 387.33[1]*) [*see Prob. Code § 5100 et seq.*], to hold title to motor vehicles (*see § 387.33[2]*) [*see Veh. Code § 4150.5*], and real property (*see § 387.33[3]*) [*see Civ. Code §§ 682, 683,*

683.2], as joint tenants, to purchase life insurance irrevocably designating each other as beneficiary [*Ins. Code § 10170*], or to provide for one another by inter vivos gifts of property.

[10] Family Allowance and Probate Homestead

Under certain circumstances, a surviving spouse may have the right to declare a probate homestead in, and to receive a family allowance from, the estate of a decedent spouse [*see Prob. Code § 6520 et seq.* (probate homestead); *Prob. Code § 6540 et seq.* (family allowance); *see generally* Ch. 448, *Probate: Family Allowance*]. Because these rights are statutory, a nonmarital partner will not be entitled to claim them on death of the other partner. If the nonmarital partners wish to make provision for each other in the event of death, they may do so by will, by executing mutual written promises that each is entitled to be paid a certain sum from the estate of the other, or by buying life insurance and designating the other person as beneficiary.

[11] Right to Administer Estate

By statute, a surviving spouse or a domestic partner is given first priority in being appointed administrator of a decedent spouse's estate if the decedent died intestate or did not name an executor in his or her will [*Prob. Code §§ 8440,8460, 8461(a), 8462*; *see Prob. Code § 37* (definitions of "domestic partner" and "surviving domestic partner")]. A nonmarital partner who is not a "domestic partner" as defined under *Family Code Section 297*, unless related to his or her decedent partner and "entitled to succeed" to a portion of the decedent's estate as an heir, has no priority to administer the decedent partner's estate except under the eighteenth and last statutory category of "any other person" [*Prob. Code §§ 8461, 8462*].

[12] Employment Benefits

Certain employment fringe benefits, such as insurance coverage, may be offered to spouses of married persons, but not to partners of unmarried cohabitants without violating the *equal protection clause* of the California Constitution. For example, one court of appeal has held that gay and lesbian nonmarital partners of state employees may be denied dental benefits without unlawfully discriminating on the bases of sexual orientation and marital status. The court in that case reasoned that the denial of benefits was not based on sexual orientation because all unmarried persons were similarly treated and were denied benefits. Furthermore, the statutory distinction, conferring statutory rights on married persons that are not afforded unmarried persons, was rationally related to the legitimate state purpose of promoting marriage [*Hinman v. Department of Personnel Administration (1985) 167 Cal. App. 3d 516, 523-530, 213 Cal. Rptr. 410]* .

[13] Unemployment Benefits

A person who voluntarily resigns from employment and chooses to accompany his or her nonmarital partner to another location may be able to collect state unemployment insurance benefits if the resignation occurred in order to preserve the family unit established between the partners [*MacGregor v. Unemployment Ins. Appeals Bd. (1984) 37 Cal. 3d 205, 207, 207 Cal. Rptr. 823, 689 P.2d 453]* . For purposes of *Unemp. Ins. Code § 1256*, the California Supreme Court has held that "good cause" for resignation includes the desire to preserve a nonmarital family relationship [*MacGregor v. Unemployment Ins. Appeals Bd. (1984) 37 Cal. 3d 205, 207, 207 Cal. Rptr. 823, 689 P.2d 453]* . However, it appears that the duration of the relationship, the existence of one or more children of the relationship, the acknowledgment of parenthood of those children by the nonmarital partners, and the assumption of responsibilities for care and support of the children by the partners are all factors the court will consider in determining whether a family relationship exists [*MacGregor v. Unemployment Ins. Appeals Bd. (1984) 37 Cal. 3d 205, 214, 207 Cal. Rptr. 823, 689 P.2d 453]* .

Unemp. Ins. Code § 1256 otherwise provides that an individual may be deemed to have left his or her most recent work with good cause if he or she leaves employment to accompany his or her spouse to a place from which it is impractical to commute to the employment. For these purposes, "spouse" includes a person to whom marriage is imminent [*Unemp.*

Ins. Code § 1256; *Altaville Drug Store, Inc. v. Employment Development Department (1988) 44 Cal. 3d 231, 233, 236-237, 242 Cal. Rptr. 732, 746 P.2d 871]* . If the marriage is not imminent, however, the employee does not have "good cause" to resign voluntarily from his or her employment [*Norman v. Unemployment Ins. Appeals Bd. (1983) 34 Cal. 3d 1, 9, 192 Cal. Rptr. 134, 663 P.2d 904]* .

For further discussion of eligibility of unemployment insurance benefits, see Wilcox, California Employment Law, Ch. 80 (Matthew Bender).

[14] Tax Impact

Some of the most important practical consequences of marriage are found in the areas of income, gift, and estate taxation. Married persons are eligible to file joint income tax returns [*I.R.C. § 6013*]. They are eligible for gift tax exemptions and deductions [*I.R.C. § 2523*], and for the marital deduction from estate tax [*I.R.C. § 2056*]. In contrast, nonmarital partners are given none of the tax advantages conferred on married persons. For discussion of the tax consequences of express contracts between nonmarital partners to pool earnings, to provide support, or to pay one another compensation for services, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure 2d Ed. (Matthew Bender), Ch. 200.

A nonmarital partner may, under some circumstances, claim his or her cohabitant and the cohabitant's children as dependents, provided they have resided in the same household for an entire year, the taxpayer has paid more than one-half their support, and certain other requirements are met [*I.R.C. §§ 151(c), 152(d)(1), 152(d)(2)(H)*; *see I.R.C. § 152(f)(3)*; *Treas. Reg. § 1.152-1(b)* (no dependency exemption if relationship illegal); *L. Turnipseed (1957) 27 T.C. 758* ; *Buckley v. Commissioner (1962) 37 T.C. 664* ; *Ensminger v. Commissioner of Int. Rev. (4th Cir. 1979) 610 F.2d 189 , cert. denied, 446 U.S. 941 (1980)* ; *see also* Billy L. Kieffer, Sr. v. Commissioner (1987) T.C.M. 1987-213 (taxpayer's former wife cohabited with him and looked after their children; dependency exemption allowed)]. For further discussion, see CCH Federal Tax Service.

[15] Evidentiary Privileges

When persons marry, they become entitled to assert two evidentiary privileges: (1) the privilege against disclosure of confidential marital communications [*Evid. Code § 980-987*]; and (2) the privilege not to testify against one's spouse or to be called as a witness against one's spouse in any proceeding in which that spouse is a party [*Evid. Code § 970-973*]. These privileges are discussed in Ch. 359, *Marriage* .

These evidentiary privileges are not included in the rules of evidence to further the discovery of the truth, but rather to protect marriage from dissension, discord,and distrust which might arise if the spouses could not confide in each other and keep each other's secrets [*see People v. Peak (1944) 66 Cal. App. 2d 894, 903, 153 P.2d 464* (disapproved on other grounds in *People v. Hood (1969) 1 Cal. 3d 444, 454, 82 Cal. Rptr. 618, 462 P.2d 370*)]. No comparable evidentiary privileges protect confidentiality of a nonmarital relationship.

[16] Minority and Parental Authority

Marriage "emancipates" a minor and terminates parental authority [*Fam. Code §§ 7002(a), 7505(b)*; *see also* discussion in Ch. 394, *Parent and Child*]. Likewise, marriage terminates a guardianship of the person of a minor, although guardianship of the minor's estate continues until the minor reaches 18 years of age [*Prob. Code § 1600*].

In contrast, unmarried cohabitation by a minor has no effect on the authority of a parent or guardian over that minor, nor does it have any impact on the contractual capacity of a minor.

[17] Obtaining Credit

State and federal law prohibit discrimination in the granting or denial of credit and in credit reporting practices based on a person's marital status [*see 15 U.S.C. § 1691 et seq.*; *Civ. Code § 1812.30 et seq.*]. The extent of protection offered nonmarital partners under these statutes and the remedies available for violations are discussed in *§ 387.34*.

[18] Criminal Liability

In most respects the potential criminal liability of married persons and nonmarital partners is the same. Since the passage of the so-called "Consenting Adults Bill" [Stats. 1975, ch. 71], and previous ameliorative legislation, adultery, cohabitation, and adulterous cohabitation are no longer crimes in California. Fornication has never been a crime in California. Thus, marital status generally has little effect on a person's criminal liability for sexual behavior. The one major area of difference is that a married person can be prosecuted for bigamy if he or she knowingly marries while a spouse from a previous undissolved marriage is still alive [*see Penal Code §§ 281-284*; *see also* Ch. 359, *Marriage*]. In contrast, a person who is engaging in a nonmarital partnership, even one of long duration, is subject to no criminal penalty if he or she later marries a third person.

In one other case, marital status continues to determine criminal liability. An act of sexual intercourse with a female who is not the wife of the perpetrator constitutes "unlawful sexual intercourse" if the female is under the age of 18 years [*Penal Code § 261.5*], and is punishable by incarceration in the county jail or state prison [*Penal Code § 264*]. By its terms, this statute does not apply if the male and female are married.

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§ 387.32 Effect of Cohabitation by Married or Divorced Person

The Family Code and its predecessor, the Family Law Act [*see* former *Civ. Code § 4000 et seq.*], have taken fault out of most family law proceedings. Dissolution is available for irreconcilable differences [*Fam. Code § 2310(a)*]. Equal division of the community property is mandatory, regardless of spousal misdeeds [*Fam. Code § 2550*; *see* discussion in Ch. 222, *Dissolution of Marriage: Property Division and Valuation*]. Evidence of acts of misconduct by a spouse is generally inadmissible in dissolution proceedings [*see Fam. Code § 2335*]. Thus, cohabitation by either spouse with a third party before the marriage is terminated will have no effect on the right to dissolution or the division of property.

The amount of spousal support, either temporary or permanent, will probably be affected by cohabitation. Under *Fam. Code § 4323*, cohabitation by a supported party creates a rebuttable presumption of a diminished need for support. The effect of this presumption is fully discussed in Ch. 225, *Dissolution of Marriage: Spousal Support* .

In some circumstances, the amount of child support may be affected by cohabitation [*see Fam. Code § 4057.5*]. For further discussion, see Ch. 224, *Dissolution of Marriage: Child Support* .

Cohabitation may also have an effect on child custody and visitation rights. The court may consider the living arrangements of a parent in determining the best interests of the child, which is the basis for determining the right to custody between parents or in awarding custody to a nonparent based on detriment to the child from parental custody [*see Fam. Code § 3011, 3020, 3040*]. A parent's cohabitation could also be considered in connection with a proposed change of child custody. Such cohabitation could either be a positive or negative factor in the court's custody determination [*see In re Reyna (1976) 55 Cal. App. 3d 288, 298, 126 Cal. Rptr. 138]* . For full discussion of standards for custody orders and modification or termination of custody orders, see Ch. 223, *Dissolution of Marriage: Child Custody* .

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§ 387.33 Joint Property Ownership by Unmarried Cohabitants

[1] Joint Bank Accounts

The California Multiple-Party Accounts Law [*see Prob. Code § 5100 et seq.*] governs multiple-party accounts without regard to the type of financial institution involved. All joint accounts are multiple-party accounts [*see Prob. Code § 5132(a)*]. The law applies to accounts in existence on July 1, 1990, and to accounts established after that date. Under this law, a deposit made in a bank in the names of two cohabitants made payable to the survivor is no longer presumed to be in joint tenancy, as was the case prior to July 1, 1990 [*see* former Fin. Code§ 825 (statutory presumption repealed operative July 1, 1990, by Stats. 1989, ch. 397)].

A signature card, passbook, contract, or instrument evidencing an account must contain substantially the following words, or words to the same effect, to create a joint account: "This account or certificate is owned by the named parties. Upon the death of any of them, ownership passes to the survivor(s)" [*Prob. Code § 5203(a)(1)*]. Tenancy in common accounts are created by stating: "This account or certificate is owned by the named parties as tenants in common. On the death of any party, the ownership interest of that party passes to the named pay-on-death payee(s) of that party or, if none, to the estate of that party" [*Prob. Code § 5203(a)(6)*]. The form language quoted above is not necessary if the contract of deposit creates substantially the same relationship between the parties as the form language does [*see Prob. Code § 5203(b)*].

In addition, under the Multiple Party-Accounts Law, during the lifetime of nonmarital partners having an account together, the account belongs to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent [*see Prob. Code § 5301(a)*]. However, each party to a multiple-party account may be vulnerable to withdrawal of the funds in the account by the other party regardless of the net contribution of the parties [*see Prob. Code § 5401(a), (c)(3)*], unless the terms of the account or deposit agreement provide safeguards such as the requirement of the signatures of both parties on any checks or withdrawal requests or orders [*see Prob. Code § 5401(b)*]. Withdrawal of funds in excess of a party's net contribution to the account will transfer ownership by way of gift, to the extent that there is no agreement, special power of attorney, or independent legal obligation that requires the withdrawing party to account for the funds [*Lee v. Yang (2003) 111 Cal. App. 4th*

481, 491-492, 3 Cal. Rptr. 3d 819 (no right to reimbursement of funds withdrawn by party following broken engagement); *see Prob. Code § 5301(a)*]. For discussion of the effect of the California Multiple-Party Accounts Law on married couples, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

[2] Joint Ownership of Automobiles

Two or more persons may be co-owners of a motor vehicle as joint tenants, partners, tenants in common, or as husband and wife owning community property [*Veh. Code § 4150.5*; *Civ. Code § 682*]. The words describing the joint owners on the certificate of ownership (title) determine whose signature is required to transfer the vehicle inter vivos and whether or not it must go through probate on the death of one of the co-owners.

If the automobile is registered to "Harriet Winter *or* Paul Hoffman" without an indication of community ownership or tenancy in common, the vehicle is deemed held in joint tenancy. On the death of a co-owner the interest of the decedent passes to the survivor unless a contrary intention is set forth in writing on the application for registration [*Veh. Code § 4150.5(a), (b)*]. However, the use of the conjunction "or" means that either of the co-owners may transfer the vehicle during the lifetime of the other without obtaining his or her signature [*Veh. Code § 4150.5(a), (b)*].

Survivorship rights can be combined with a requirement that the signatures of both parties are necessary for an inter vivos transfer or conveyance of the vehicle by the parties taking title in the following manner: "Harriet Winter *and* Paul Hoffman as joint tenants with right of survivorship" [*see Veh. Code § 4150.5(c)*]. If reference to joint tenancy is omitted, so that title reads "Harriet Winter *and* Paul Hoffman," both signatures are still required for inter vivos transfer, but the vehicle is subject to probate in the event of one party's death.

[3] Joint Ownership of Real Property

[a] In General

Unmarried cohabitants make title in one of the three following forms, if they decide to purchase real property jointly: (1) as joint tenants, (2) as tenants in common, or (3) as tenants in partnership [*see Civ. Code § 682*].

The discussion below is confined to a brief treatment of joint tenancy and tenancy in common, because property is not usually taken in the name of a partnership unless it is owned by a number of persons or used in a partnership business.

It is also possible to hold jointly owned property in the name of one of the cohabitants. However, the interest of the person whose name does not appear on the record title will be subject to loss if the person with record title sells the property to a bona fide purchaser for value without notice of the interest of the other cohabitant [*see Huber v. Danning, (9th Cir. B.A.P. 1992) 147 B.R. 526*) (cohabitant's equitable interest in shared residence lost when property sold in bankruptcy proceedings of cohabitant/debtor who held grant deed); *see Civ. Code §§ 1107, 1214*; *see also* California Real Estate Law and Practice, Ch. 82 (Matthew Bender)].

For a general discussion of jointly held interests, see Ch. 316, *Joint Tenancy and Tenancy In Common* . For a more detailed discussion, see California Real Estate Law and Practice, Ch. 345 (Matthew Bender).

[b] Joint Tenancy

The principal distinguishing feature of joint tenancy is the "right of survivorship," which provides that when one joint tenant dies the other automatically assumes full ownership of the property [*see, e.g., Siberell v. Siberell (1932) 7 P.2d 1003]* . Because a decedent's interest in joint tenancy is not subject to probate administration [*Cole v. Cole (1956) 139 Cal. App. 2d 691, 694, 294 P.2d 494]* , this form of ownership is a popular means of avoiding probate. However, the operation of the right of survivorship on the death of one of the joint tenants is a transfer subject to federal estate tax [*see I.R.C. § 2040*]. For discussion of estate tax treatment of joint tenancy interests, see CCH Federal Tax Service

(CCH).

In order to characterize ownership of real property as a joint tenancy, the interests of each joint tenant in the property must be identical and coextensive [*E.g., Kaupe v. Kaupe (1955) 131 Cal. App. 2d 511, 513, 280 P.2d 856]* . Thus, this form of tenancy should not be used unless the parties intend that each should own a half interest in the property, and desire a right of survivorship.

[c] Tenancy in Common

Tenancy in common is the other major option for ownership of real property between nonmarital partners. Ownership of real property by more than one person, if not in the form of joint tenancy, tenancy in partnership, or community property, constitutes a tenancy in common [*Civ. Code §§ 685, 686*].

The primary attributes of a tenancy in common are as follows:

(1) Each tenant in common owns an undivided interest in the real property [*Estate of Horn (1951) 102 Cal. App. 2d 635, 639, 228 P.2d 99]* .

(2) Unlike joint tenancy, there is no right of survivorship (*see § 387.33[3][b]*), and thus each tenant has the power to devise his or her interest in the property by will. This fact makes tenancy in common the preferred form of title for an nonmarital partner who wishes his or her interest in the real property to go to his or her children or third persons on death, rather than to the nonmarital partner. Of course, one partner's interest can be willed to the other if the testator so chooses.

(3) No tenant in common may exclude his or her cotenants from the property [*see, e.g., Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 548, 176 P.2d 1]* .

(4) The interests of cotenants need not be equal; one nonmarital partner may, for example, own an undivided one-third interest in the property while the other owns an undivided two-thirds interest. In this way, each party's ownership interests may reflect the actual value of his or her contribution to the purchase of the property. The percentage interests of each cotenant should be set forth in the deed or other writing [*see Civ. Code § 1091*].

(5) The decedent's interest in real property as a tenant in common is subject to probate administration under the general rule that any property that can be disposed of by will must be administered in probate [*see Estate of Heigho (1960) 186 Cal. App. 2d 360, 365, 9 Cal. Rptr. 196]* .

For discussion of estate tax treatment of property held by a decedent as a tenant in common, see CCH Federal Tax Service (CCH).

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§ 387.34 Credit Discrimination Against Unmarried Cohabitants--Requirement of Equal Treatment

"Credit" may be defined as the obtainment of money, property, labor, or services on a deferred-payment basis [*Civ. Code § 1812.30(g)*]. Both federal and state law prohibit discrimination on the basis of marital status in either extending credit or reporting credit information [*see 15 U.S.C. § 1691 et seq.*; *Civ. Code § 1812.30 et seq.*]. Thus, no unmarried person may be denied credit if his or her earnings and other property are such that a married person managing and controlling the same amount of earnings and other property would receive credit [*Civ. Code § 1812.30(c)*], nor may an unmarried person be offered credit on terms less favorable than those offered to a married person managing and controlling the same amount of earnings and other property [*Civ. Code § 1812.30(d)*].

It is not clear whether the statutory provisions above guarantee that an unmarried couple with combined earnings and other property equal to that of a married couple is entitled to equal treatment in the extension of credit to them as a couple. For example, if Todd is earning $15,000 per year and his nonmarital partner Mary is earning $10,000 per year, it has not yet been determined whether they are entitled by statute to equal treatment when they apply for a mortgage loan from Bank X, as are their married friends John and Bernice who have the same incomes. It can be argued that a refusal to lend to Todd and Mary as a couple because they are not married constitutes credit discrimination on the basis of their marital status, which is forbidden by law [*see Civ. Code § 1812.30(c), (d)*].

On the other hand, if Todd and John apply for credit individually, an argument may be made that John may legally get more favorable treatment than Todd. Because Todd is unmarried and because Mary is not joining in the loan application or co-signing for the loan, Todd's sole source of funds for repaying the debt is his income of $15,000. In contrast, in the absence of a contractual agreement to the contrary, the earnings of both John and Bernice are community property [*see Fam. Code § 760*], subject to the management and control of each spouse [*Fam. Code § 1100*], and liable for the contracts of either spouse made during marriage [*Fam. Code §§ 910, 911*]. Thus, because John has management and control over $25,000, and Todd has management and control over only $15,000, it would appear that John could legally be given more favorable treatment by a lender [*see Civ. Code § 1812.30(c), (d)*].

Credit agencies reporting on joint credit accounts are required to file credit information received after January 1, 1977, under the name of each person responsible for the account, or in another manner which would enable either person

automatically to gain access to the credit history of the account withouthaving in any way to list or refer to the name of the other person. Agencies must also provide access to all information about the account in the name of each person responsible for the account [*Civ. Code § 1812.30(e)*].

For a discussion of credit reporting abuses and their particular impact on nonmarital partners, see Note, *Constitutional Right of Privacy and Investigative Consumer Reports: Little Brother Is Watching You, 2 Hast. Const. L.Q. 773 (1975)*. For further discussion of the remedies available to a person aggrieved by consumer credit reporting practices, see Ch. 129, *Consumer Credit Reporting* .

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[Reserved]

§§ 387.35[Reserved]

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§ 387.50 Scope of Analysis

This analysis discusses the enforcement of rights that unmarried cohabiting parties ("nonmarital partners") may acquire in relation to each other concerning property, support, and related matters, by an express agreement, when neither of them believes himself or herself to be legally married to the other. It includes a form of complaint for use in enforcing an express agreement [*see § 387.160*].

For a discussion of the legal effects of unmarried cohabitation generally, see *§§ 387.10* et seq. and *387.30* et seq. For discussion of drafting cohabitation agreements and sample forms, see California Family Law Practice and Procedure, 2d Ed. (Matthew Bender), Ch. 200.

The validity and legal effects of marriage, including out-of-state "common law" marriage, are discussed in Ch. 359, *Marriage* . For discussion of putative marriage, see *Ch. 25, Annulment (Nullity) of Marriage and Related Spousal Rights, § 25.50* et seq.

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§ 387.51 Governing Law

The leading case recognizing the enforceability of express agreements between nonmarital partners is *Marvin v. Marvin (1976) 18 Cal. 3d 660, 681, 134 Cal. Rptr. 815, 557 P.2d 106* . The general statute of limitations on an action to enforce an express written agreement is contained in *Code Civ. Proc. § 337*. The general statute of limitations on an express oral agreement is contained in *Code Civ. Proc. § 339(1)*.

Statutory provisions regarding parentage, custody, and child support in nonmarital situations are contained in *Fam. Code §§ 3020, 3021, 4000, 4001, 6211*. The statutory provisions governing injunctions and other relief relating to harassment and domestic violence between nonmarital partners are contained in *Fam. Code § 6200 et seq.*

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§ 387.52 Types of Enforceable Express Agreements

[1] Agreements to Pool Earnings and Accumulations of Property

Express agreements between nonmarital partners to pool earnings and other funds and to share in the joint accumulations of property during the term of the nonmarital relationship are enforceable in California [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 674, 134 Cal. Rptr. 815, 557 P.2d 106* ; *Vallera v. Vallera (1943) 21 Cal. 2d 681, 685, 134 P.2d 761* ; *Trutalli v. Meraviglia (1932) 215 Cal. 698, 700-701, 12 P.2d 430* ; *Whorton v. Dillingham (1988) 202 Cal. App. 3d 447, 451, 248 Cal. Rptr. 405]* . Similarly, express agreements between nonmarital partners to keep each partner's earnings and property separate, to pool some but not all of their earnings and property, or to hold property as joint tenants or tenants in common are enforceable [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 674*].

The California Supreme Court has rejected the argument that an agreement to pool property and for support is unenforceable under *Civ. Code § 43.5*, which provides that no cause of action arises for breach of a promise of marriage. The Court considered this contention "strained" and concluded that pooling and support agreements not part of or accompanied by a promise of marriage are not barred from enforcement by *§ 43.5* [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 674, 134 Cal. Rptr. 815, 557 P.2d 106]* .

[2] Provisions for Support, Attorney's Fees, and Costs

The California Supreme Court has suggested that an agreement between nonmarital partners regarding property, earnings, and expenses may legitimately be coupled with a support agreement that extends even after the end of the relationship [*see* *Marvin v. Marvin (1976) 18 Cal. 3d 660, 674-675, 134 Cal. Rptr. 815, 557 P.2d 106* ; *Byrne v. Laura (1997) 52 Cal. App. 4th 1054, 1063, 1067, 60 Cal. Rptr. 2d 908* ; *see also* *Cochran v. Cochran (1997) 56 Cal. App. 4th 1115, 1123-1124, 66 Cal. Rptr. 2d 337* (if party makes support payments as provided in agreement, statute of limitations does not begin to run until agreement is breached by failure to pay)]. When such an agreement is proven to exist, it is enforceable against the estate of the supporting party [*Byrne v. Laura (1997) 52 Cal. App. 4th 1054, 1064, 60 Cal. Rptr. 2d 908* (express agreement to provide lifetime support)].

However, courts will examine the underlying consideration for the agreement; and when, for example, domestic services by the supported party constitutes the consideration for post-relationship support and the parties do not in fact cohabit, the court may refuse to recognize an agreement between nonmarital partners forsuch support [*Bergen v. Wood (1993) 14 Cal. App. 4th 854, 857-860, 18 Cal. Rptr. 2d 75* ; *but see Milian v. De Leon (1986) 181 Cal. App. 3d 1185, 1193, 226 Cal. Rptr. 831* (cohabitation not prerequisite to finding of enforceable implied property agreement)]. In one such case, the court did not address or even acknowledge the possibility that consideration other than domestic services could form the basis for such a contract, because there was no consideration present that was severable from sexual services, which cannot form the basis of consideration for a support agreement [*see Bergen v. Wood (1993) 14 Cal. App. 4th 854, 858-860, 18 Cal. Rptr. 2d 75* ; *see also § 387.53[2]*].

The parties may also include in an express agreement a provision with respect to the payment of costs and attorney's fees in the event of litigation concerning the agreement [*see Civ. Code § 1717*]. Ordinarily, neither party to a lawsuit can recover attorney's fees in the absence of specific statutory authority or an express or implied agreement between the parties for such fees [*Code Civ. Proc. § 1021*; *Prentice v. North American Guar. Corp. (1963) 59 Cal. 2d 618, 620, 30 Cal. Rptr. 821, 381 P.2d 645]* . However, even in the absence of an agreement, the prevailing party is entitled as a matter of right to recover costs in any action or proceeding, except as otherwise expressly provided by statute [*Code Civ. Proc. §§ 1021, 1032(b)*]. For a general discussion of items recoverable as costs in a civil action, see Ch. 174, *Costs and Attorney's Fees* .

[3] Enforcement of Out-of-State Agreements

Before a California court can entertain an action against a nonresident defendant based on an alleged breach of an express agreement with a nonmarital partner, the court must at least have limited personal jurisdiction over the defendant. Limited jurisdiction may be asserted if the following conditions are met [*Henderson v. Superior Court (1978) 77 Cal. App. 3d 583, 590-592, 142 Cal. Rptr. 478* ; *see Kroopf v. Guffey (1986) 183 Cal. App. 3d 1351, 1357-1358, 228 Cal. Rptr. 807* (allegations that action was based on defendant's activities in California and defendant was domiciled in California when action arose as sufficient constitutional basis for assertion of personal jurisdiction over defendant)]:

- There is a substantial nexus between the plaintiff's cause of action and the defendant's activity in California;
- The balance of convenience to the parties favors allowing the action in California; and
- The State of California has an interest in assuming jurisdiction.

For discussion of personal jurisdiction in family law proceedings generally, see Ch. 221, *Dissolution of Marriage: Procedure* .

Applying the above test to an alleged oral agreement to pool earnings, share accumulations, and provide support, made in Florida between Florida domiciliaries and arising out of acts performed mostly in Florida and involving title to land and chattels located mainly in Florida, the court of appeal concluded that not even limited jurisdiction existed. The court noted that California has a distinct public interest in not attracting to the state and drawing into its court system controversies arising out of extramarital and nonmarital affairs carried on and concluded by nonresidents outside the state, characterizing an attempt to litigate such claims in California as the "grossest form of forum shopping" [*Henderson v. Superior Court (1978) 77 Cal. App. 3d 583, 593-594, 142 Cal. Rptr. 478]* .

In another case, the court of appeal held that California did not have personal jurisdiction over a New Jersey defendant in a breach of contract action brought by his former nonmarital partner. The plaintiff moved to New Jersey to live with the defendant, but when the relationship failed, she brought an oral contract action in California for support, medical

insurance, an automobile, and other items that the defendant allegedly promised her. The court of appeal stated that the defendant did not have "minimum contacts" with California because his actions did not cause an effect in California. The alleged contract was not to be performed in California, and if breached, was breached in New Jersey. The defendant lived in New Jersey, did no business in California, and did not even travel in California [*Walter v. Superior Court (1986) 178 Cal. App. 3d 677, 680-682, 224 Cal. Rptr. 41]* .

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§ 387.53 Factors Affecting Enforceability of Express Agreements

[1] Sexual Relationship Per Se Does Not Invalidate Agreement

The fact that the parties to an otherwise enforceable agreement live together and/or engage in a sexual relationship outside of marriage will not, in and of itself, invalidate their agreement [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 670-671, 134 Cal. Rptr. 815, 557 P.2d 106* ; *Trutalli v. Meraviglia (1932) 215 Cal. 698, 701-702, 12 P.2d 430* (agreement between nonmarital partners as enforceable notwithstanding their "unlawful relation" and the public policy favoring marriage)]. This is true in California whether the parties to the agreement are a man and a woman, two men, or two women [*see Whorton v. Dillingham (1988) 202 Cal. App. 3d 447, 451, 248 Cal. Rptr. 405]* . Adults who voluntarily live together and engage in a sexual relationship are competent to contract respecting their earnings and property rights [*Whorton v. Dillingham (1988) 202 Cal. App. 3d 447, 451, 248 Cal. Rptr. 405]* . The principle applies even with respect to persons who live together on less than a full-time basis [*see Cochran v. Cochran (2001) 89 Cal. App. 4th 283, 293, 106 Cal. Rptr. 2d 899* (evidence that parties lived together two to four days a week both before and at time they entered their *Marvin* agreement sufficed to raise triable issue of fact that they cohabited)].

[2] Consideration Issues

[a] Sexual Services as Invalid Consideration for Agreement

Although nonmarital partners are competent to contract between themselves, the performance of sexual services cannot form valid consideration for such a contract. Agreements between nonmarital partners are invalid and unenforceable to the extent that they rest on a consideration of sexual services [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 670-671, 134 Cal. Rptr. 815, 557 P.2d 106]* .

In determining whether particular agreements are enforceable under this rule, the courts have acknowledged that "a standard which inquires whether an agreement involves or contemplates a sexual relationship is vague and unworkable because virtually all agreements between nonmarital cohabitants involve or contemplate a mutual sexual relationship" [*Whorton v. Dillingham (1988) 202 Cal. App. 3d 447, 451, 248 Cal. Rptr. 405]* . The relevant inquiry is whether the

agreement is supported by consideration independent and severable from the sexual services component [*Whorton v. Dillingham (1988) 202 Cal. App. 3d 447, 454, 248 Cal. Rptr. 405]* . Any severable part of the agreement supported by independent consideration will be enforceable [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 672, 134 Cal. Rptr. 815, 557 P.2d 106]* .

The courts have tended to define "severable" and "independent" in financial terms. If the claimed consideration consists of services for which monetary compensation is ordinarily expected, it will be severable and independent from the agreement concerning sexual services. Conversely, if the consideration consists of services "normally incident to the state of cohabitation itself," it will be inseparable from the sexual consideration and will not support an enforceable obligation [*see* *Bergen v. Wood (1993) 14 Cal. App. 4th 854, 859, 18 Cal. Rptr. 2d 75* ; *Whorton v. Dillingham (1988) 202 Cal. App. 3d 447, 454-455, 248 Cal. Rptr. 405]* . Under this standard, a party acting as chauffeur, secretary, and bodyguard was permitted to assert these services as valid consideration for a cohabitation agreement [*Whorton v. Dillingham (1988) 202 Cal. App. 3d 447, 454-455, 248 Cal. Rptr. 405]* , while persons characterizing their services as those of "companion," "confidant," or "hostess" have been denied recovery [*see* *Bergen v. Wood (1993) 14 Cal. App. 4th 854, 859-860, 18 Cal. Rptr. 2d 75* ; *Whorton v. Dillingham (1988) 202 Cal. App. 3d 447, 454-455, 248 Cal. Rptr. 405* ; *Jones v. Daly (1981) 122 Cal. App. 3d 500, 507-509, 176 Cal. Rptr. 130]* .

In one case, a cohabitating couple "started living together by mutual agreement as Husband and Wife." An appellate court rejected the defendant's argument that the relationship was "meretricious" because he agreed to provide the plaintiff with an ownership interest in assets and to share income in exchange for her agreement to become pregnant and bear his children. Although the couple engaged in sexual relations and the plaintiff perceived this to be part of her "role," she clearly understood that this was only one aspect of their relationship, and that the overall relationship was one of mutual commitment. There was no evidence that the parties' agreement rested on an explicit and inseparable consideration of sexual services, and the court stated that "this case does not come close to establishing a meretricious relationship, either in whole or in part" [*Della Zoppa v. Della Zoppa (2000) 86 Cal. App. 4th 1144, 1154, 103 Cal. Rptr. 2d 901]* .

[b] "Homemaker" Services as Consideration

Many cohabitation arrangements resemble "traditional" marriages in that one partner provides financial support for the household while the other contributes his or her labor in a homemaking capacity. The overwhelming weight of legal authority in California holds that a promise to perform homemaking services is a lawful and adequate consideration for a contract [*see, e.g.,* *Marvin v. Marvin (1976) 18 Cal. 3d 660, 670 n.5, 134 Cal. Rptr. 815, 557 P.2d 106* ; *Bergen v. Wood (1993) 14 Cal. App. 4th 854, 859, 18 Cal. Rptr. 2d 75* ; *Taylor v. Taylor (1954) 66 Cal. App. 2d 390, 398, 152 P.2d 480* (putative spouse action)].

However, because homemaking services have traditionally been performed without monetary compensation, by women, this traditional arrangement is especially susceptible to the argument that the services are "incident to the state of cohabitation itself," making them inseparable from sexual services and thus invalid consideration to support a cohabitation agreement. Although this analysis has been criticized, and appears unsupportable under *Marvin* [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106]* and other cases, it has been used in at least one case to deny recovery to a former nonmarital partner [*see* *Jones v. Daly (1981) 122 Cal. App. 3d 500, 508-509, 176 Cal. Rptr. 130* ; *but see* *Bergen v. Wood (1993) 14 Cal. App. 4th 854, 859, 18 Cal. Rptr. 2d 75* (criticizing *Jones* as inconsistent with *Marvin* in this respect)].

[3] Requirement of Fair Dealing--Effect of Confidential Relationship

Generally, parties who are not married are not in a confidential relationship [*cf. Fam. Code § 721* (confidential relationship between married persons); *see also* discussion in Ch. 122, *Community Property*], and if they contract with each other with regard to property, earnings, and expenses, they are presumed to be dealing at arm's length [*see, e.g.,*

Fernandez v. Fernandez (1961) 194 Cal. App. 2d 782, 790, 15 Cal. Rptr. 374 (case involving premarital contract)]. However, in some instances, a confidential relationship may arise between nonmarital partners, and in those instances economic transactions between them should be governed by the principles applicable to such relationships [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 682 n.22, 134 Cal. Rptr. 815, 557 P.2d 106]* . For a discussion of the existence and possible effects of a confidential relationship, see *§ 387.79*.

In responding to a challenge to an agreement on the ground that the parties were in a confidential relationship at the time it was drafted and executed, it wouldappear there are two major bases for a defense:

- Full and fair disclosure by both parties at the time of contracting (*see § 387.53[4]*); and
- Representation of each party by independent counsel (*see § 387.53[5]*).

[4] Full and Fair Disclosure

To insure that neither party can claim that he or she was induced to transfer property or make any other promises without adequate knowledge of all relevant facts, each party to a cohabitation agreement should make a full, fair, and complete disclosure to the other of:

- His or her property, assets, and expectancies; and
- His or her intentions and expectations regarding the relationship.

Complete disclosure is an essential prerequisite to the validity of contracts between persons in a confidential relationship [*see generally Corp. Code § 16403*; *Prob. Code § 16002*; *Cal. Rules Prof. Conduct, Rule 3-300*]. In upholding the validity of premarital contracts, the courts have often relied in part on the complete disclosure of property and assets [*see, e.g., In re Marriage of Dawley (1976) 17 Cal. 3d 342, 347, 131 Cal. Rptr. 3, 551 P. 2d 323]* . Given the fact that the California Supreme Court has opened the door to the finding of a confidential relationship between nonmarital partners in some circumstances, complete disclosure seems no less essential in the drafting of a cohabitation agreement.

[5] Representation by Independent Counsel

Representation by independent counsel during the drafting and execution of a cohabitation agreement would seem likely to support the validity of the agreement in the face of subsequent challenges. Charges of fraud, misrepresentation, or overreaching by a trusted partner would be harder to sustain if, at the time the agreement was signed, each party had the agreement scrutinized by his or her own counsel who explained its legal significance in detail [*see Cal. Rules Prof. Conduct, Rule 3-310(C)*; *see also Flatt v. Superior Court (1994) 9 Cal. 4th 275, 282-285, 36 Cal. Rptr. 2d 537, 885 P.2d 950]* .

[6] Applicability of Statute of Frauds--Writing Not Required Under Premarital Contract Statutes

Unlike premarital contracts, which must ordinarily be in writing and signed by both parties in order to be enforceable, contracts between nonmarital partners are not subject to formal requirements for their validity unless a writing is required by the statute of frauds (*see § 387.53[7]*) [*see Fam. Code §§ 1601, 1611* (applicable to premarital agreements executed on or after January 1, 1986); for agreements executed before that date, see former *Civ. Code §§ 5134, 5135*]. The California Supreme Court has explicitly held that the formal statutory requirements for the validity of a premarital contract, have no application to contracts in contemplation of a common living arrangement. Compliance with these formalities is limited to contracts in contemplation of marriage in which parties agree to release or modify the property rights that would otherwise arise from marriage [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 673-674, 134 Cal. Rptr.*

815, 557 P.2d 106 (construing former *Civ. Code § 5133 et seq.*].

[7] Applicability of General Statute of Frauds

There is no general requirement, statutory or otherwise, that cohabitation agreements be in writing in order to be enforceable. In fact, the California Supreme Court has noted that the majority of California cases enforcing agreements between nonmarital partners involved oral agreements [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 674 n.9, 134 Cal. Rptr. 815, 557 P.2d 106]* . Notwithstanding the lack of a specific statute governing these agreements, an agreement between nonmarital partners must be evidenced by a writing signed by the party against whom enforcement is sought if the subject matter of the agreement brings it within the provisions of a statute requiring specified contracts to be in writing.

Civ. Code § 1624 requires the following contracts, among others, to be evidenced by a writing signed by the party against whom enforcement is sought:

- An agreement to answer for the debt of another;
- An agreement to sell an interest in real property; and
- An agreement allowing another to act as one's agent in the sale or purchase of any interest in real property.

Furthermore, many statutes other than the general statute of frauds require contracts to be in writing [*see, e.g., Lab. Code § 300*, requiring an assignment of wages to be in writing].

For a comprehensive discussion of the statute of frauds, see Ch. 530, *Statute of Frauds* .

[8] Estoppel to Assert Statute of Frauds

When a written cohabitation agreement is required by statute due to the subject matter of the agreement (*see § 387.53[9]*), the defendant may be estopped from asserting the invalidity of the agreement based on the statute of frauds. Estoppel to assert the statute of frauds is available for the following reasons [*Cline v. Festersen (1954) 128 Cal. App. 2d 380, 387, 275 P.2d 149* ; *see Whorton v. Dillingham (1988) 202 Cal. App. 3d 447, 456, 248 Cal. Rptr. 405* (estoppelargument prevailed); *see also Byrne v. Laura (1997) 52 Cal. App. 4th 1054, 1064, 60 Cal. Rptr. 2d 908]* :

- To prevent fraud that would result from denying enforcement of a contract after one party has been induced by the other seriously to change his or her position in reliance on the contract; or
- When unjust enrichment would result if a party who received benefits of the other's performance were allowed to rely on the statute.

Estoppel situations may be easier to prove if a confidential or fiduciary relationship existed between the nonmarital partners. For discussion of confidential and fiduciary relationships between nonmarital partners, see *§ 387.79*.

[9] Effect on Agreement of Existing Marriage to Third Party

A cohabitation agreement is not made invalid merely because one of the cohabitants is still married to another person, at least if the married parties have separated. Once a married couple has separated, subsequent earnings of each spouse are separate property, and the other spouse ordinarily cannot assert any interest in those earnings [*Fam. Code § 771*; *see Fam. Code § 4338* (postseparation earnings may be subject to court-ordered support obligation)]. However, if a

cohabitation agreement attempts to transfer community property or other property in which the other spouse has an assertable interest, the transfer may be voidable at the option of the aggrieved spouse [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 673, 134 Cal. Rptr. 815, 557 P.2d 106]* . For full discussion of management and control of community property, see Ch. 122, *Community Property* .

In a case involving the alleged breach of a cohabitation agreement by a party who was married to another person, the trial court sustained the defendant's demurrer to the complaint on the grounds that the agreement violated public policy because it was promotive of a dissolution of the defendant's marriage and because its terms impaired the community property rights of the defendant's wife. The appellate court reversed, holding that the complaint was sufficient to state a cause of action since it alleged that the defendant and his wife were separated when the plaintiff and defendant made the agreement. This allegation raised the possibility that the defendant's marriage was beyond redemption at the time the parties entered into the agreement so that the agreement would not be contrary to public policy, and that defendant was separated from his wife within the meaning of former *Civ. Code §§ 5118* or *5119* [*now see Fam. Code §§ 771, 772*], so that his earnings would be his separate property [*Feldman v. Nassi (1980) 111 Cal. App. 3d 881, 884-887, 169 Cal. Rptr. 9]* . Whether the same result would be reached if a married spouse who is not separated entered into a cohabitation agreement with another person is not clear.

For a general discussion of the effects of cohabitation on the legal relations of one of the cohabitants and his or her estranged spouse, see Part I. For a discussion of the rights of a spouse in community property assets transferred by the other spouse, including any right of reimbursement to the community, see Ch. 122 *Community Property* and Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

[10] Effect of Cohabitants' Subsequent Marriage to Each Other

Marriage of the parties to an express cohabitation agreement does not as such preclude enforcement of the agreement, at least with regard to property interests the parties acquired pursuant to the agreement before their marriage. In one case, for example, a trial court ruled that a couple's marriage following a period of cohabitation did not vitiate any *Marvin* type claim to enforce their nonmarital cohabitation agreement. But the court limited the *Marvin* action to income and properties owned and received prior to the couple's marriage [*Della Zoppa v. Della Zoppa (2000) 86 Cal. App. 4th 1144, 1149, 103 Cal. Rptr. 2d 901]* . Also, there may be considerations with regard to the statute of limitations in bringing an action on the agreement, as discussed further, under *§ 387.54[2]*.

Moreover, in any later proceedings for marital dissolution or legal separation, there may be issues regarding whether any property acquired jointly by the parties before the marriage was intended to be "transmuted" into community property. Furthermore, there may be issues regarding whether the community has acquired an interest in such property if community funds are used to make payments or improve the property. For further discussion, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

If parties to a cohabitation agreement marry and wish to *continue* to be bound by the terms of their cohabitation agreement, enforcement of the agreement may be difficult. Unlike premarital agreements, cohabitation agreements are not ordinarily entered into in contemplation of marriage. Thus, it is unlikely that a nonmarital cohabitation would be held to constitute a waiver of valuable rights acquired through marriage, such as community property rights. Therefore, from a planning standpoint, parties to a cohabitation agreement who later decide to marry are often encouraged to enter into a premarital agreement that meets the requirements of premarital agreements statute.

At least one appellate court has upheld a cohabitation agreement after the marriage of the parties. The agreement created, rather than waived, rights that would arise by marriage. It provided that the couple would split their earnings and efforts, and that a parcel of property would belong to both of them. After they married, the parties deeded the property to the wife as an unmarried woman. The court held that the agreement was still enforceable and that evidence that the parties still regarded the agreement as binding supported the conclusion that the property was jointly owned [

In re Marriage of Stitt (1983) 195 Cal. Rptr. 172 ; *see Watkins v. Watkins (1983) 143 Cal. App. 3d 651, 653, 192 Cal. Rptr. 54]* .

For discussion on consolidation of causes of action related to nonmarital cohabitation with family law proceedings, see *§ 387.55[1]*.

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§ 387.54 Enforcement of Express Agreements by Civil Action

[1] Contract Actions Generally

As in the case of other valid contracts, an action for damages for breach of contract, or for other contractual remedies, may be brought to enforce the terms of a valid express cohabitation agreement. Such an action should be brought as a regular civil action, because the statutory provisions concerning family law proceedings are not generally applicable to property and support actions between nonmarital partners [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 681, 134 Cal. Rptr. 815, 557 P.2d 106* ; *see also Code Civ. Proc. § 411.10* (commencement of civil actions)]. An action for an accounting may brought as an alternative to a damages action, or combined with a damages action. A combined form of complaint seeking damages and an accounting is set forth in *§ 387.180*.

For a more detailed discussion of procedures required in bringing a civil action on a contract, see Ch. 123, *Complaints and Cross Complaints* , Ch. 140, *Contracts* , and Ch. 2, *Procedural Guide for Civil Actions*). For discussion of theories of recovery that may be alleged in the absence of a valid, express cohabitation agreement, see *§ 387.70* et seq.

[2] Statute of Limitations

In general, an action on an express cohabitation agreement must be brought within the following periods after accrual of the cause of action [*see Code Civ. Proc. § 312*]:

- If the agreement is written, within four years [*Code Civ. Proc. § 337(1)*]; or

- If the agreement is oral, within two years [*Code Civ. Proc. § 339(1)*; *see Kurokawa v. Blum (1988) 199 Cal. App. 3d 976, 989, 245 Cal. Rptr. 463]* .

For a discussion of the limitations periods applicable when equitable remedies are sought, either alone or in connection with traditional legal remedies, see *§ 387.80*. Accrual of the cause of action is also discussed in that section.

[3] Related Remedies

In some cases, there may be other remedies in addition to an action to enforce the terms of an express cohabitation agreement that are appropriate to address a breach of the agreement. For example, if property the parties own is at issue and is capable of partition, the aggrieved party may wish to bring an action for partition of the property [*see Code Civ. Proc. § 872.210*]. For a discussion of procedures and forms for bringing such an action, see Ch. 397, *Partition* .

Similarly, if the parties' property has been lost, dissipated, or transferred by one of the parties, the other party may wish to prevent damage to his or her property interests by seeking a temporary restraining order and preliminary injunction [*see Civ. Code § 3420 et seq.*]. For discussion and forms for use in obtaining these remedies, see Ch. 303, *Injunctions* .

If a going business is involved, other than one requiring the use of one party's professional or vocational license, the aggrieved party may wish to secure the appointment of a receiver to take charge of the business pending determination of the action [*see Code Civ. Proc. § 564*; *Cal. Rules of Ct., Rule 3.1175* (ex parte application for appointment of receiver)]. For discussion and forms for use in obtaining appointment of receivers, see Ch. 486, *Receivers* .

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§ 387.55 Enforcement of Express Agreement in Other Proceedings

[1] Consolidation of Nonmarital Property Issues With Family Law Matters

Although property and support issues arising between nonmarital cohabitatants are treated as ordinary civil matters and are not generally governed by the substantive or procedural provisions of the Family Code [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 681, 134 Cal. Rptr. 815, 557 P.2d 106]* , some courts may allow consolidation of such matters with matters normally handled by the family law department [*see Code Civ. Proc. § 1048(a)*; Los Angeles Co. Super. Ct. Rules, Rule 9.25 (general rule for consolidation motion); *see also* former Los Angeles Co. Super. Ct., Man. of Proc. for Fam. Law Dept., §§ XII-XIII (actions regarding property and support issues between nonmarital partners were required to be filed in civil department but could be consolidated with family law matter after noticed motion and jury trial waiver); *cf. In re Marriage of Gagne (1990) 225 Cal. App. 3d 277, 285-290* (dissolution court had jurisdiction to inquire into enforceability and effect of parties' *Marvin*-type premarital loan agreement on family residence, as pleadings placed matter in issue)].

Consolidation should be distinguished from directly asserting a cause of action based on nonmarital cohabitation in a proceeding for marital dissolution or legal separation. That process, sometimes referred to as "tacking," has been historically permitted by some courts pursuant to local rules, although such joinder of causes in the family law petition is generally prohibited, as discussed in Ch. 221, *Dissolution of Marriage: Procedure* [*see Cal. Rules of Ct., Rule 5.104*]. Counsel should check the local rules to ascertain the court's practice in this regard.

It should be noted that, while the family law statutes and rules are generallyinapplicable to property and support actions between nonmarital partners, other actions involving nonmarital partners are properly brought under these statutes and rules. For example, parentage, child custody, and child support proceedings are governed by the Family Code regardless of whether the parents are or have been married to each other [*see Fam. Code §§ 3020, 3021, 4000, 4001, 7602*; see also Ch. 223, *Dissolution of Marriage: Child Custody , and Ch. 224, Dissolution of Marriage: Child Support* , and Ch. 394, *Parent and Child*]. The provisions of the Domestic Violence Prevention Act [*Fam. Code § 6200 et seq.*] also apply to nonmarital partners [*Fam. Code § 6211(b)*; *see Fam. Code § 6209*; *see also* Ch. 293, *Harassment and Domestic*

Violence].

[2] Consideration of Nonmarital Property Issues in Probate Proceedings

The surviving partner of a nonmarital relationship that is not a registered domestic partnership generally has no claims as an *heir* of the other's estate [*see Prob. Code §§ 6401-6402*]. When the surviving partner asserts a claim based on oral contract, it is a third-party claim adverse to the estate, and it is not cognizable in an heirship proceeding [*Estate of Fincher (1981) 119 Cal. App. 3d 343, 349, 174 Cal. Rptr. 18* ; *see Prob. Code § 9000 et seq.* (creditors' claims generally)]. If, however, the parties were married at the time of the decedent's death, so that the survivor is a surviving spouse who has a right to assert his or her claim to true community property rights in an heirship proceeding, the probate court has the power to resolve claims based on alleged nonmarital agreements because, once all necessary parties are before the court, a party will not be required to sever and litigate a multifaceted claim in separate proceedings [*Estate of Fincher (1981) 119 Cal. App. 3d 343, 349-350, 174 Cal. Rptr. 18]* .

If a surviving nonmarital partner is a beneficiary under a deceased partner's will, the survivor may file a petition to determine rights under the will [*Prob. Code § 11700*], along with a separate petition to determine rights resulting from the nonmarital relationship [*see Estate of Black (1984) 160 Cal. App. 3d 582, 588, 206 Cal. Rptr. 663* (decided under former Prob. Code § 1080; *now see Prob. Code § 11700*)]. Filing the petitions does not automatically trigger a no-contest clause in the decedent's will, unless the will provides otherwise [*Estate of Black (1984) 160 Cal. App. 3d 582, 586, 592, 206 Cal. Rptr. 663* (decided under former Prob. Code § 1080; *now see Prob. Code § 11700*)].

For further discussion and forms relating to probate proceedings and to consideration of additional claims made by persons who otherwise properly invoke the jurisdiction of the probate court under *Prob. Code § 11700*, see California Probate Practice, Ch. 23 (Matthew Bender). For discussion of making a general creditor's claim against an estate, see California Probate Practice, Chs. 12, 13 (Matthew Bender).

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[Reserved]

§§ 387.56[Reserved]

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§ 387.70 Governing Law

The leading case recognizing the enforceability of implied agreements between nonmarital partners is *Marvin v. Marvin (1976) 18 Cal. 3d 660, 681, 134 Cal. Rptr. 815, 557 P.2d 106* . There are no statutory provisions that specifically govern agreements between nonmarital partners. Contracts are generally governed by Part 2 of Division 3 of the Civil Code (*Civ. Code § 1549 et seq.*). Obligations in general are governed by Part 1 of Division 3 of the Civil Code (*Civ. Code § 1427 et seq.*). *Fam. Code § 6700* governs the capacity of minors to make contracts.

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§ 387.71 Theories of Recovery

[1] Overview

In the absence of an express contract governing property rights (*see § 387.50* et seq.), the following remedies may be available to a nonmarital partner to vindicate his or her property rights in a dispute between the parties or when the other partner dies, depending on the facts involved [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 684, 134 Cal. Rptr. 815, 557 P.2d 106]* :

(1) An action on an implied contract of the parties to pool efforts and earnings and share accumulations (*see § 387.74*);

(2) An action to enforce an implied partnership or joint venture agreement (*see § 387.75*);

(3) An action to enforce an implied agreement to own property jointly (*see § 387.76*);

(4) An action in quantum meruit for the reasonable value of services rendered (*see § 387.77*); or

(5) An action seeking the imposition of a constructive or resulting trust or an equitable lien (*see § 387.78*).

A nonmarital partner may also seek to enforce any other implied agreement that may be evidenced by the conduct of the parties [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 684, 134 Cal. Rptr. 815, 557 P.2d 106* ; *see, e.g., Schick v. Lerner (1987) 193 Cal. App. 3d 1321, 1325, 238 Cal. Rptr. 902* (action against attorney and others arose out of action for division of property and financial support)]. One court of appeal has even concluded that cohabitation is not a prerequisite to finding an implied agreement between unmarried persons concerning their property [*Milian v. De Leon (1986) 181 Cal. App. 3d 1185, 1193*]. However, another court of appeal has indicated that, at least in the absence of an express agreement on the subject, cohabitation is a prerequisite to an award of post-relationship support [*see Bergen v. Wood (1993) 14 Cal. App. 4th 854, 857-858, 18 Cal. Rptr. 2d 75]* .

[2] Impact of *Marvin* Decision

The major impact of the *Marvin* decision has been that it authorized the unmarried to use theories of implied contract and equitable remedies to vindicate their property rights against their nonmarital partners [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 684, 134 Cal. Rptr. 815, 557 P.2d 106]* . Even before *Marvin*, California courts had long permitted the enforcement of express oral and written contracts between nonmarital partners pertaining to property rights and compensation, so long as the furnishing of sexual services was not an inseparable part of the consideration for the contract [*see, e.g., Trutalli v. Meraviglia (1932) 215 Cal. 698, 701-702, 12 P.2d 430* ; *see § 387.53[2][a]*].

However, before *Marvin*, courts ordinarily refused to examine the conduct of the parties to determine if it revealed an implied contract, or if equitable considerations justified a judicial determination of property or compensation rights [*e.g., Lazzarevich v. Lazzarevich (1948) 88 Cal. App. 2d 708, 719, 200 P.2d 49* ; *Oakley v. Oakley (1947) 82 Cal. App. 2d 188, 191-192, 185 P.2d 848* ; *but see Keene v. Keene (1962) 57 Cal. 2d 657, 662-664, 21 Cal. Rptr. 593, 371 P.2d 329* (court was willing to entertain suit for implied or quasi-contractual recovery of compensation for services rendered)]. This approach was probably based in part on a reluctance to "encourage" nonmarital partnerships [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 682, 134 Cal. Rptr. 815, 557 P.2d 106]* , and in part on the theory that unmarried partners have no reasonable expectation of the legal benefits that attend the status of marriage [*see Vallera v. Vallera (1943) 21 Cal. 2d 681, 685, 134 P.2d 761]* .

In *Marvin*, by contrast, the California Supreme Court concluded that nonmarital partners should receive the same treatment as other unmarried adults with respect to their contract and property rights [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 682, 134 Cal. Rptr. 815, 557 P.2d 106]* . The Court noted that there is no more reason to presume that services by a nonmarital partner are contributed as a gift than there is to presume that funds used to improve the other partner's property are contributed as a gift. The Court also pointed out that granting remedies to nonmarital partners would not discourage marriage, because under prior law the defendant partner was encouraged to avoid marriage as a means of retaining ownership of all of his or her accumulated earnings. Moreover, although public policy favors fostering and promoting marriage, the perpetuation of judicial rules that result in the inequitable distribution of property accumulated during a nonmarital relationship is neither a just nor an effective way of carrying out that policy [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 683, 134 Cal. Rptr. 815, 557 P.2d 106]* .

[3] Family Law Statutes as Inapplicable

Any property or compensation rights that arise between nonmarital partners derive either from their express or implied contract, or from equitable principles [*Kroopf v. Guffey (1986) 183 Cal. App. 3d 1351, 1357-1358, 228 Cal. Rptr. 807]* . The California Supreme Court has expressly rejected the theory that the property rights of nonmarital partners are determined by reference to the statutory rights of actual or putative spouses. Thus, the provisions of the former Family Law Act or its successor provisions in the Family Code do not govern the property and support rights of parties to a nonmarital relationship [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 680-681, 680 n.18, 134 Cal. Rptr. 815, 557 P.2d 106]* .

However, as discussed in *§ 387.10* et seq., and *§ 387.55[1]*, the provisions of the Family Code *are* applicable to some issues that may arise between nonmarital partners, such as issues involving parentage, custody, and support of children, and issues involving domestic violence [*see Fam. Code §§ 3020, 3021, 4000, 4001, 6211(b), 7602*].

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§ 387.72 Express and Implied-in-Fact Contracts Compared

In general, the terms "express contract" and "implied-in-fact contract" do not denote two different kinds of contracts. The difference between express and implied-in-fact contracts lies in the type of evidence used to prove the existence of an agreement between the parties. If the agreement is stated in words, either oral or written, it is an express contract [*Civ. Code § 1620*]. If the agreement is proven by the acts and conduct of the parties, interpreted in the light of the subject matter and of the surrounding circumstances, it is an implied contract [*Civ. Code § 1621*; *Marvin v. Marvin (1976) 18 Cal. 3d 660, 678 n.16, 134 Cal. Rptr. 815, 557 P.2d 106]* .

Regardless of whether the contract is considered implied-in-fact or express, the obligations of the parties arise from the objective evidence of the parties' words and acts that manifest consent to the making of a promise. Thus, an implied-in-fact contract is clearly distinguished from a "quasi-contractual obligation," in which the obligation is nonconsensual and imposed in law [*see Desny v. Wilder (1956) 46 Cal. 2d 715, 734-736, 299 P.2d 257* ; *see also § 387.77[3]*].

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§ 387.73 Subjects of Implied-in-Fact Contracts

[1] Not Generally Limited by Fact of Nonmarital Relationship

As with an express contract between nonmarital partners, the subject matter of an implied-in-fact contract is not generally limited by the fact that the parties arenonmarital partners [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 670-671, 134 Cal. Rptr. 815, 557 P.2d 106* ; *Trutalli v. Meraviglia (1932) 215 Cal. 698, 701-702, 12 P.2d 430* ; regarding express contracts, see *§ 387.53[1]*)]. For discussion of the types of property and compensation agreements that nonmarital partners may enter into and that may be enforced by the courts as implied contracts, see *§§ 387.52, 387.53[2]*.

[2] Special Issues Regarding Post-Relationship Support Agreements

One type of implied-in-fact contract that may be difficult to enforce is a contract for post-relationship support (commonly called "palimony"). It may be difficult to prove, from the parties' conduct alone, that they had an agreement regarding one party's financial responsibility for the other following the termination of their relationship. It has also been held by at least one court that actual cohabitation, i.e., regularly shared living quarters, is a prerequisite to an award of post-relationship support, as discussed in *§ 387.52[2]* [*see Bergen v. Wood (1993) 14 Cal. App. 4th 854, 857-858, 18 Cal. Rptr. 2d 75* ; *cf. Milian v. De Leon (1986) 181 Cal. App. 3d 1185, 1193, 226 Cal. Rptr. 831* (cohabitation not prerequisite to finding of enforceable implied property agreement)]. For discussion of alternate theories on which a claim for post-relationship support may be based, see *§ 387.81*.

[3] Proof of Existence of Implied-in-Fact Contracts

As noted in *§ 387.72*, an implied-in-fact contract is an agreement, the existence and terms of which are manifested by conduct [*Civ. Code § 1621*; *see Alderson v. Alderson (1986) 180 Cal. App. 3d 450, 459-464, 225 Cal. Rptr. 610]* . Thus, the conduct of the parties before and during the nonmarital relationship is evidence that may be used by a nonmarital partner to prove the existence and terms of an implied agreement with the other partner pertaining to property rights, support, or compensation [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 684, 134 Cal. Rptr. 815, 557*

P.2d 106] . "Clear and convincing evidence" is required to establish one partner's claim to a share of property to which title is held solely in the other partner's name [*Maglica v. Maglica (1998) 66 Cal. App. 4th 442, 448-449, 78 Cal. Rptr. 2d 101* ; *Tannehill v. Finch (1986) 188 Cal. App. 3d 224, 228, 232 Cal. Rptr. 749* ; *see Evid. Code § 662* (presumption, rebuttable only by clear and convincing evidence, that owner of legal title to property is owner of full beneficial title)].

Conduct relevant to the existence of a particular type of implied agreement is discussed in conjunction with the various agreements below.

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§ 387.74 Implied Pooling Agreement

[1] Absence of Presumption For or Against

The California Supreme Court has noted that merely because a couple did not participate in a valid marriage ceremony, no inference or presumption should be drawn that the couple intended to keep their earnings and property separate and independent [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 675-676 n.11, 134 Cal. Rptr. 815, 557 P.2d 106]* . However, it is equally clear that cohabitation alone does not give a nonmarital partner the rights of a cotenant in the other partner's earnings and accumulations during the period of their relationship [*see Vallera v. Vallera (1943) 21 Cal. 2d 681, 684-685, 134 P.2d 761]* . Thus, both the terms and existence of an implied pooling agreement must be explicitly proven (*see § 387.74[2]*). The only presumption that a court may entertain in determining whether or not the parties intended a pooling agreement is that they intended to deal fairly with each other and that any property accumulated during the relationship should be divided either according to their own tacit understanding or in a fair manner [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 675-676 n.11, 682, 134 Cal. Rptr. 815, 557 P.2d 106]* .

One court of appeal has noted that the terms of an implied pooling agreement may be "very general and nonspecific" [*Alderson v. Alderson (1986) 180 Cal. App. 3d 450, 463, 225 Cal. Rptr. 610* ; see *§ 387.74[2]*].

[2] Proof of Implied Pooling Agreement

Evidence that may be relevant to establishing the existence or nonexistence of an implied pooling agreement between nonmarital partners during their relationship includes the following [*see Garcia v. Venegas (1951) 106 Cal. App. 2d 364, 368, 235 P.2d 89]* :

> (1) *The reason why the parties did not marry.* Did they avoid marriage to escape the permanent personal and financial commitment that marriage implies? Did they remain single only because they feared the loss of pension, or other benefits resulting from marriage? Was their relationship intended to be a trial period, that is, a prelude to possible marriage? Were they prevented from marrying because of the difficulty and expense of obtaining a divorce from a previous spouse, rather than because of intrinsic

reluctance to marry? Did they believe erroneously that the doctrine of common-law marriage prevailed in California and that they were in fact married [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 675-676 n.11, 134 Cal. Rptr. 815, 557 P.2d 106]* ?

(2) *The parties' banking practices.* Did they maintain joint or separate checking and savings accounts? Did they pay joint bills from the same account?

(3) *The parties' credit practices.* Did they have joint charge accounts? Did they make joint applications for loans?

(4) *The extent to which each contributed funds and services to joint projects, activities, and property acquisitions.* What were the nature, duration, extent, and estimated value of those contributions?

One court of appeal upheld a claim of a nonmarital partner based on an implied contract to equally share property the couple accumulated during the relationship on the basis of the following evidence: (1) one party's testimony on the existence of the implied agreement; (2) the fact that the couple held themselves out socially, as well as otherwise, as husband and wife; (3) the fact that the couple had three children and all three took the man's surname; (4) the fact that the couple pooled their financial resources; and (5) the fact that the couple used pooled resources to purchase real property, made joint decisions regarding the property, contributed services toward the upkeep of the property, and purchased much of the property jointly as husband and wife [*see Alderson v. Alderson (1986) 180 Cal. App. 3d 450, 461, 225 Cal. Rptr. 610]* .

By contrast, evidence that unmarried persons live together, hold themselves out as married, and act as companions and confidants toward each other does not, by itself, necessarily show an implied agreement to share property. However, these facts, when taken together and in conjunction with other facts bearing more directly on an alleged arrangement to share property, may show an implied agreement to share property [*Maglica v. Maglica (1998) 66 Cal. App. 4th 442, 457, 78 Cal. Rptr. 2d 101]* .

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§ 387.75 Implied Partnership and Joint Venture Agreements

[1] Application of Partnership and Joint Venture Law to Nonmarital Relationships--Few Guidelines Established

In *Marvin*, the California Supreme Court sanctioned the right of a nonmarital partner to attempt to prove an implied partnership or joint venture agreement between the plaintiff and his or her nonmarital partner [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 684, 134 Cal. Rptr. 815, 557 P.2d 106]* . The *Marvin* plaintiff attempted to prove an express contract between herself and her nonmarital partner for the pooling of assets and sharing of accumulations, as well as for support. She did not allege any type of implied contract, particularly not an implied partnership or joint venture contract. Thus, although the Court opened the door to the enforcement of implied partnership and joint venture agreements between nonmarital partners, it did not set forth any guidelines on the extent to which partnership and joint venture law generally can govern the rights, duties, and financial arrangements of nonmarital partners in the absence of an express agreement.

One commentator has suggested that the Uniform Partnership Act [*Corp. Code § 15001 et seq.*] provides an attractive model for express contracts between nonmarital partners and even between married persons, because it offers structure, flexibility, and equal rights to both partners, and it requires high standards of fair dealing and accountability [*see* Weitzman, *Legal Regulation of Marriage: Tradition and Change, 62 Cal. L. Rev. 1169, 1255-1258 (1974)*]. However, this model has not been expressly adopted by the courts. For discussion of the requisites for and legal attributes of a partnership or joint venture, see Ch. 400, *Partnerships: Governing Statutes* , et seq.

The *Marvin* Court's holding that implied partnership and joint venture agreements between nonmarital partners are enforceable was based in part on the unfairness of enforcing such implied agreements between putative spouses, but not between nonmarital partners [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 677, 134 Cal. Rptr. 815, 557 P.2d 106]* . The Court cited two cases in which a putative spouse was allowed to share in certain property based on an implied partnership agreement with the other supposed spouse. In both of those cases, the claim of the putative spouse to the property in question was asserted at the end of the putative relationship on the death of the other partner [*see Estate of*

Vargas (1974) 36 Cal. App. 3d 714, 717-718, 111 Cal. Rptr. 779 ; *Sousa v. Freitas (1970) 10 Cal. App. 3d 660, 666, 89 Cal. Rptr. 485]* . In both cases, the contest was between the legal spouse of the decedent and the putative spouse as to the percentage of property which each was entitled to inherit. The characterization of the putative relationship as an implied partnership was incidental to division of the estate between the legal and putative spouses.

[2] Effects Other Than Division of Property

Characterization of a property relationship between nonmarital partners as a partnership or joint venture may be useful for other reasons, or have other effects, than those involving distribution of the affected property on the termination of the relationship. A third party seeking to impose tort liability on both partners of a nonmarital relationship for a tort committed by one of them would at least have a plausible ground of recovery if he or she could establish an implied partnership or joint venture agreement between the nonmarital partners. Once this implied agreement has been established, the tort creditor could argue that the tort was committed in the course of partnership business, and that both the partners were jointly and severally liable [*see Corp. Code §§ 15013-15015*; *see also § 387.75[3]*]. A similar argument could be made by a contract creditor. Between the parties themselves, the proof of an implied partnership agreement might give rise to remedies for breach of fiduciary duty and for an accounting, as well as for division of existing partnership property at the end of the relationship by separation or death (*see § 387.75[3]*).

Although nonmarital partners may assert, as between themselves, variousthe ories, including joint venture, to recover property and compensation on the termination of their relationship, every cohabitation is not necessarily a joint venture, nor for all purposes [*Planck v. Hartung (1979) 98 Cal. App. 3d 838, 842, 159 Cal. Rptr. 673* (joint venture asserted for purposes of respondeat superior)].

[3] Proof of Implied Partnership or Joint Venture Agreement

Proof of the existence of a partnership or joint venture agreement between nonmarital partners depends on the acts and conduct of the parties, and not on the use of particular words between them [*see Ramos v. Pacheco (1944) 64 Cal. App. 2d 304, 308, 148 P.2d 704]* . The parties need not expressly intend to create a partnership or joint venture, and they need not know the legal effect of their acts, as long as they intend to do the things that create a partnership or joint venture [*e.g., California Employment Stabilization Comm'n v. Walters (1944) 64 Cal. App. 2d 554, 558, 149 P.2d 17]* .

This point is illustrated by an early case involving a business enterprise between nonmarital partners [*Ramos v. Pacheco (1944) 64 Cal. App. 2d 304, 308-309, 148 P.2d 704]* . A man and woman had executed a written agreement whereby the woman would receive 20 percent of the net profits and a salary of $10 per week from a grocery store the parties operated. Both parties devoted their total time and energies to the development of the business. The parties then decided that no money should be withdrawn in excess of their living expenses and all profits should be invested in real property in joint tenancy or equal shares. Also, they lived together in an apartment at the store as husband and wife. In determining that the parties had created a partnership relationship in the business, the court relied on the following facts [*Ramos v. Pacheco (1944) 64 Cal. App. 2d 304, 308-309, 148 P.2d 704]* :

- The woman, by written agreement, was to receive a portion of the net profits of the business, in addition to her salary.

- The parties subsequently agreed that no money except living expenses would be withdrawn from the business and all profits would be invested in joint property.

- The parties lived and cohabited together, and worked together at the same tasks.

- They invested their monies so as to evidence an intention to share equally in the profits of the enterprise.

In holding that nonmarital partners are entitled to prove the existence of a partnership or joint venture agreement by reference to the conduct of the parties, the *Marvin* court [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 684, 134 Cal. Rptr. 815, 557 P.2d 106]* , relied on the Washington case of *In re Estate of Thornton* [*In re Estate of Thornton (1972) 81 Wash. 2d 72, 499 P.2d 864, 865]* . In *Thornton*, the Washington Supreme Court held that the surviving member of a nonmarital couple had presented a prima facie case that she was entitled to one-half of the decedent partner's estate by proving her partnership interest in the decedent's farm and cattle ranch. The enterprise was originally acquired by decedent and was the primary asset of his estate. The Washington court acknowledged that a contract, either express or implied, is essential to the creation of a partnership. However, direct evidence is not necessary to establish the contract. Rather, the existence of the partnership may be inferred from the facts surrounding the inception of the business and the conduct of the parties throughout its operation.

The following facts convinced the Washington court of the existence of a partnership between the decedent and his surviving nonmarital partner, entitling the surviving partner to a one-half interest in the decedent's ranch [*In re Estate of Thornton (1972) 81 Wash. 2d 72, 499 P.2d 864, 867-868]* :

- The parties each contributed property, labor, skill, and experience or some combination of these to the enterprise;

- The parties had shared equally in making important decisions regarding the management of the ranch; and

- The parties had lived together and benefited jointly from the profits of the business.

All three of the above elements--namely a joint interest in a common business undertaking, an understanding as to the sharing of profits and losses, and a right of joint control--are apparently essential to proof of the existence of a partnership or joint venture in the absence of an express agreement [*see DeSuza v. Andersack (1976) 63 Cal. App. 3d 694, 700, 133 Cal. Rptr. 920* ; *Connor v. Great Western Sav. & Loan Ass'n (1968) 69 Cal. 2d 850, 863, 73 Cal. Rptr. 369, 447 P.2d 609]* . Although the Corporations Code provides that receipt by a person of a share of the profits of a business is prima facie evidence that he or she is a partner in the business, except when the payment consists of payment of debt, wages, an annuity, or interest [*Corp. Code § 15007(4)*], courts have held that absent the right of joint participation in the management and control of a business, the mere fact that one party receives benefits as consideration for services rendered or as a return on a capital contribution does not, as a matter of law, make that person a partner or joint venturer [*Bank of California v. Connolly (1973) 36 Cal. App. 3d 350, 364, 111 Cal. Rptr. 468* ; *see Keene v. Keene (1962) 57 Cal. 2d 657, 668, 21 Cal. Rptr. 593, 371 P.2d 329]* .

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§ 387.76 Implied Agreement to Own Property Jointly

[1] Acquisition Through Both Parties' Contribution of Funds

Even in the absence of an express agreement, a nonmarital partner is entitled toshare in property jointly accumulated during the relationship in the proportion that his or her funds were contributed towards its acquisition [*e.g., Hill v. Estate of Westbrook (1950) 95 Cal. App. 2d 599, 603, 213 P.2d 727]* . Neither equal contributions nor cohabitation by the parties is required for the application of this rule. The court may find a joint tenancy and an implied agreement to divide property equally even if the parties made unequal contributions to the acquisition of the property [*see Milian v. De Leon (1986) 181 Cal. App. 3d 1185, 1194, 226 Cal. Rptr. 831]* .

The form of the remedy in a case involving jointly owned property is a suit for imposition of a resulting trust (*see § 387.78[2]*).

[2] Acquisition Through Contribution of Services

Although the rule was formerly otherwise [*see Keene v. Keene (1962) 57 Cal. 2d 657, 664-665, 21 Cal. Rptr. 593, 371 P.2d 329]* , a nonmarital partner may also acquire an interest in property accumulated during the relationship to the extent that his or her rendition of services contribute to its acquisition [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 679, 134 Cal. Rptr. 815, 557 P.2d 106]* . For example, if one partner's services benefit the other partner by making it unnecessary for him or her to pay someone else for the services, the savings "enhance the financial base" of the second partner, enabling him or her to expend funds for the acquisition of property and giving the party contributing the services an equitable interest in the property so acquired [*see* Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 Fam. L.Q. 101, 123 (1976)]. The remedy in that case is also the imposition of a resulting trust (*see § 387.78[2]*).

[3] Contributions to Property Previously Acquired by Other Party

When one nonmarital partner contributes funds, property, or services to the improvement of property already owned by

the other partner, the contributing partner does not ordinarily acquire an ownership interest in the property. He or she may be entitled to recover the reasonable value of the contributions if it can be shown that they were made with the expectation of monetary reward (*see § 387.77*). If a right to recovery is proved, it may be enforced by an action to impose an equitable lien on the property (*see § 387.78[4]*).

Contributing funds or services to the improvement of the other party's property may also, in some cases, be evidence tending to show the existence of an implied partnership or joint venture agreement, giving the contributor an equal interest in the property in question. However, as discussed in *§ 387.75[3]*, other elements must also be proven before an implied partnership or joint venture agreement may be proven.

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§ 387.77 Recovery in Quantum Meruit for Services Rendered

[1] Theories of Recovery Summarized

The common count of quantum meruit may be pleaded to recover compensation for services rendered to a nonmarital partner based on either of two theories [*see Rotea v. Izuel (1939) 14 Cal. 2d 605, 608-609, 95 P.2d 927* ; *Maglica v. Maglica (1998) 66 Cal. App. 4th 442, 449, 78 Cal. Rptr. 2d 101]* :

- That the parties had entered into an implied-in-fact contract for compensation (*see § 387.77[2]*); or

- That although there was no contract for compensation between the parties, either express or implied, failure to compensate the party performing the services would unjustly enrich the other (*see § 387.77[3]*).

Even before *Marvin*, the Supreme C ourt suggested that either of these theories of recovery was available to a nonmarital partner if he or she could comply with its specific requirements of pleading and proof [*Keene v. Keene (1962) 57 Cal. 2d 657, 669, 21 Cal. Rptr. 593, 597, 371 P.2d 329]* .

[2] Implied-in-Fact Contract for Compensation

[a] Nature of Contract

An implied-in-fact contract for compensation arises when one party performs for another, with expectation of payment, a special service of a character which is ordinarily charged for and the latter knowingly accepts it in circumstances negating an inference of gift. In such a case, a contract to pay the reasonable value of the services in question will be implied [*Keene v. Keene (1962) 57 Cal. 2d 657, 664, 21 Cal. Rptr. 593, 371 P.2d 329]* . It has also been suggested that an implied-in-fact contract to compensate for services can arise merely because one party requests another to perform certain services [*see* Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 Fam. L.Q. 101, 118 (1976)].

Under the previous law governing nonmarital partnerships, in the absence of an express agreement for compensation or for sharing in joint accumulations, the performance of both domestic chores and extraordinary services by a nonmarital partner was presumed to constitute a gift or a "contribution to the general living expenses of both [parties]" [*Keene v. Keene (1962) 57 Cal. 2d 657, 668, 21 Cal. Rptr. 593, 371 P.2d 329]* . This barrier to judicial enforcement of implied compensation contracts was removed by the *Marvin* case, which specifically held that contributions of services by a nonmarital partner can no longer be presumed to be a gift [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 683, 134 Cal. Rptr. 815, 557 P.2d 106]* .

[b] Proof of Contract

In order to recover compensation for services rendered on a theory of implied-in-fact contract, the nonmarital partner seeking compensation must prove the following [*see* *Marvin v. Marvin (1976) 18 Cal. 3d 660, 684, 134 Cal. Rptr. 815, 557 P.2d 106]* :

- That services were performed and the nature of those services;
- That they were performed with an expectation of payment; and
- The reasonable value of the services rendered (*see § 387.77[2][c]*).

[c] "Reasonable Value of Services"

The amount recoverable by a nonmarital partner in an action on an implied contract for compensation for services rendered is the "reasonable value" of those services, provided they were of direct benefit to the recipient [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 684, 134 Cal. Rptr. 815, 557 P.2d 106* ; *Maglica v. Maglica (1998) 66 Cal. App. 4th 442, 449, 78 Cal. Rptr. 2d 101]* . Ordinarily, the value of services in a quantum meruit suit is a question of fact for the trier of fact [*Culver Adjustment Bureau v. Hawkins Constr. Co. (1963) 217 Cal. App. 2d 143, 146, 31 Cal. Rptr. 569]* . The value of services rendered may be measured by what it would cost to obtain similar services in the market place. However, at least two other measures of recovery may be proposed for computing the "reasonable value" of services rendered by one nonmarital partner for the benefit of the other.

The first alternative measure of recovery that has been proposed is that of "opportunity cost." Opportunity cost is the amount which the plaintiff partner would have earned in employment if he or she had not performed services for the benefit of the other nonmarital partner [*see* Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 Fam. L.Q. 101, 113 (1976)]. Such a measure of recovery might be appropriate if a partner with potential for earning a sizeable salary if regularly employed outside the home forgoes that employment and devotes his or her full time to performance of domestic tasks for the benefit of the nonmarital partnership.

A second possible measure of recovery might be the amount by which the services contributed by one nonmarital partner enhanced the lifetime earning potential of the other partner. This measure of recovery might be appropriate, for example, when one nonmarital partner used all of his or her earnings to support the other through professional school. In such a case, it might be argued that the working partner is entitled to reimbursement above and beyond the actual money contributed to the student's support.

However, it is erroneous to base a finding of the reasonable value of a plaintiff's services to a defendant's business during the period they were cohabiting on the value by which the defendant benefited as a result of those services. Ruling on that basis allows a trier of fact to improperly value the plaintiff's services as if they had purchased a de facto ownership interest in the defendant's business, even though the defendant never agreed to transfer any interest to the plaintiff [*Maglica v. Maglica (1998) 66 Cal. App. 4th 442, 450-452, 78 Cal. Rptr. 2d 101]* .

In determining the amount of recovery due a nonmarital partner for services rendered to the other partner, the court may set off the value of the services against any support or other benefit received from the other partner [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 684, 134 Cal. Rptr. 815, 557 P.2d 106]* .

[d] Special Problems With Domestic Services

The California Supreme Court did not distinguish between ordinary household and domestic services and extraordinary services (such as nursing care or business services) when it stated that no services by a nonmarital partner will be presumed to have been rendered as a gift [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 683, 134 Cal. Rptr. 815, 557 P.2d 106]* . However, it may be easier to prove that extraordinary services were rendered with expectation of payment, than to prove that ordinary household and domestic services were performed with the expectation of payment (*see § 387.77[2][b]*). Furthermore, if the relationship resembled a "traditional" marriage in that one party kept house and the other supported him or her financially, the court may find that the parties implicitly intended the services rendered to be fully compensated by the support provided during the term of the relationship [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 684, 134 Cal. Rptr. 815, 557 P.2d 106* ; *see also § 387.77[2][c]*].

[3] Compensation to Avoid Unjust Enrichment

As discussed in *§ 387.77*, the common count of quantum meruit may be pleaded to recover for the reasonable value of services rendered based on a defendant's quasi-contractual obligation implied in law, even if no implied compensation agreement is alleged [*see Rotea v. Izuel (1939) 14 Cal. 2d 605, 608-609, 95 P.2d 927]* . Nothing in the *Marvin* opinion expressly limits this right in the context of claims against nonmarital partners.

However, certain facts indicate that the Court may have intended quantum meruit recovery by nonmarital partners to be limited to cases in which the right to recovery is supported by an implied-in-fact contract. As judicial precedent for a nonmarital partner's recovery in quantum meruit, *Marvin* cited *Hill v. Estate of Westbrook*, in which a nonmarital partner sought recovery for services rendered to her partner [*Hill v. Estate of Westbrook (1952) 39 Cal. 2d 458, 462, 247 P.2d 19]* . In *Hill*, the California Supreme Court held that the trial court properly found that plaintiff had not sustained her burden of proving that her partner had promised to pay for her services and that she had rendered the services because of an expectation of monetary reward. To the extent *Hill* is relied on as the basis of anonmarital partner's right to recover in quantum meruit, it would seem that recovery should be based on an understanding between the parties. In addition, California courts have traditionally conditioned a recovery for the reasonable value of services rendered between other persons of close affinity, such as a mother and child, on a showing of circumstances that would warrant the inference that both parties expected that compensation would be made [*Crane v. Derrick (1910) 157 Cal. 667, 672, 109 P. 31* ; *Payne v. Bank of America (1954) 128 Cal. App. 2d 295, 304, 275 P.2d 128]* .

The best argument for permitting quasi-contractual recovery under *Marvin* may be the Court's statement that nonmarital partners may reasonably expect that courts will fairly apportion property accumulated during their relationship, even in the absence of a tacit understanding between the partners [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 682, 134 Cal. Rptr. 815, 557 P.2d 106]* .

Recovery in quantum meruit based on quasi-contractual principles is predicated on the plaintiff's right to restitution of benefits conferred in rendering services to a defendant who would be unjustly enriched if he or she were permitted to retain those benefits. The law imposes a quasi-contractual obligation on an unjustly enriched defendant regardless of the parties' intent because good conscience dictates that under the circumstances the defendant who has been benefitted by the services should make reimbursement or restitution of the benefit received [*see Desny v. Wilder (1956) 46 Cal. 2d 715, 734, 299 P.2d 257* ; *Kossian v. American Nat. Ins. Co. (1967) 254 Cal. App. 2d 647, 650, 62 Cal. Rptr. 225* ; *see also Hultin v. Taylor (1970) 6 Cal. App. 3d 802, 806, 86 Cal. Rptr. 285]* .

In general, the right to restitution of a benefit conferred based on quasi-contractual principles arises when the defendant has been unjustly enriched through fraud, mistake, or coercion [*Hultin v. Taylor (1970) 6 Cal. App. 3d 802, 806, 86 Cal. Rptr. 285]* . For example, a putative wife has been allowed to recover the reasonable value of household services rendered because of her mistaken good faith belief in the validity of her marriage. The wife's services would not have been rendered but for her belief in the validity of the marriage and in the continuance of benefits incident to the status of marriage [*see Sanguinetti v. Sanguinetti (1937) 9 Cal. 2d 95, 100-101, 69 P.2d 845]* .

In cases in which the party who provided the services had no reasonable belief that he or she was legally married to the other party, the equitable considerations permitting a putative spouse to recover in quasi-contract for the reasonable value of household services rendered are not present. Persons who knowingly enter a nonmarital relationship cannot claim to have had reasonable expectations of benefits which attend the status of marriage. Furthermore, a person who has conferred a benefit on another is not entitled to restitution when the expectation of reward consists of a mistaken belief that an existing relation will continue or that a future relation will come into existence, unless the conferring of the benefit is conditioned thereon [*Hultin v. Taylor (1970) 6 Cal. App. 3d 802, 806, 86 Cal. Rptr. 285* (quoting from Restatement of Restitution, § 58)].

Thus, a nonmarital partner who confers a substantial benefit on his or her partner would not be entitled to restitution of the benefit conferred merely because the relationship terminates shortly thereafter. The partner may only recover if the partner manifested his or her understanding either that he or she expected compensation or that the benefit was conferred on the partner on the condition that the relationship would continue. In the latter case, the condition may be stated in specific words, or it may be inferred from the circumstances [*see Restatement of Restitution, § 58, comment b*].

As a matter of public policy, a nonmarital partner who has expended funds to support a child, in reliance on his partner's representations that he is the child's father, may not sue the partner on an unjust enrichment theory for the return of the funds after discovering that the child is not his biological child [*McBride v. Boughton (2004) 123 Cal. App. 4th 379, 382, 20 Cal. Rptr. 3d 115]* . To give a former putative father the right to restitution from the child's biological parents would give priority to the former putative father's desire to be made financially whole, to the potential detriment of the child's ongoing needs [*McBride v. Boughton (2004) 123 Cal. App. 4th 379, 389, 20 Cal. Rptr. 3d 115]* .

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§ 387.78 Resulting and Constructive Trusts and Equitable Liens

[1] Nature and Uses

Certain equitable remedies may be used by nonmarital partners as an alternative to, or in conjunction with, contractual remedies. Specifically, a court may employ principles of resulting trust, constructive trust, or other additional equitable remedies, such as equitable liens to equitably divide the property of nonmarital partners [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 684 n.25, 134 Cal. Rptr. 815, 557 P.2d 106* ; *Nelson v. Nevel (1984) 154 Cal. App. 3d 132, 139, 201 Cal. Rptr. 93]* . Resulting trusts, constructive trusts, and equitable liens are very much akin to each other. Their basic purposes are to identify and impress on certain property the beneficial rights that have arisen in an innocent party who in some way contributed to the acquisition, protection, or improvement of that property [*see Holder v. Williams (1959) 167 Cal. App. 2d 313, 315-316, 334 P.2d 291* ; *see also Keene v. Keene (1962) 57 Cal. 2d 657, 674-675, 21 Cal. Rptr. 593, 371 P.2d 329* (J. Peters dissenting)].

These equitable remedies can be used in cases in which a contractual remedy cannot be used, such as in the situation in which it is not possible to establish an express or implied agreement between the parties [*see Vallera v. Vallera (1943) 21 Cal. 2d 681, 685, 134 P.2d 761]* . These equitable remedies can also be used in conjunction with a contractual remedy. For example, they may be used in a casein which there is a contract by which one party has certain rights, and the court imposes a constructive trust to protect those rights on breach by the other party [*see Redke v. Silvertrust (1971) 6 Cal. 3d 94, 100-101, 98 Cal. Rptr. 293, 490 P.2d 805]* .

However, a bona fide purchaser without actual or constructive notice takes free of any equitable or constructive interests in real property [*see Huber v. Danning, (9th Cir. B.A.P. 1992) 147 B.R. 526, 529* . Thus, the Ninth Circuit Bankruptcy Appellate Panel held that a cohabitant's shared occupancy of her home with a debtor who held an unrecorded grant deed to the home did not impart constructive notice of the cohabitant's equitable property interest in the home to a bankruptcy trustee. Therefore, the bankruptcy trustee could avoid the constructive trust interest in the property to the extent that they are avoidable by a BFP under California law [*Huber v. Danning, (9th Cir. B.A.P. 1992) 147 B.R. 526, 529* ; *see 11 U.S.C. § 544(a)(3)*].

[2] Resulting Trusts

[a] When Resulting Trust Arises

A resulting trust arises when a transfer of real or personal property is made to one person, and the consideration is paid by or for another. In such a case, the trust is presumed to result in favor of the person by or for whom the payment is made [*see* former *Civ. Code § 853* (repealed operative July 1, 1987; but its repeal was not intended to disturb case law concerning resulting trusts); *see also Prob. Code §§ 15002, 15003*; *Keene v. Keene (1962) 57 Cal. 2d 657, 665, 21 Cal. Rptr. 593, 371 P.2d 329]* . It is not necessary that the person in whom the trust results pay the entire consideration for the property. A resulting trust may be established in a fractional interest in the property when the one urging the trust pays only a portion of the purchase price [*Keene v. Keene (1962) 57 Cal. 2d 657, 665, 21 Cal. Rptr. 593, 371 P.2d 329]* .

[b] Requirements for Resulting Trust

The specific requirements the nonmarital partner must meet in order to be entitled to a resulting trust are unclear. Prior to the decision in *Marvin v. Marvin (1976) 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106* , the California Supreme Court had ruled in *Vallera v. Vallera*, that, even in the absence of an express agreement to pool earnings and share equally in the joint accumulations of property during the term of the relationship, a nonmarital partner would be entitled to share in the property jointly accumulated in the proportion that his or her funds contributed toward its acquisition [*Vallera v. Vallera (1943) 21 Cal. 2d 681, 685, 134 P.2d 761]* . Although *Vallera* did not specify the theory that would permit such a recovery, it appears that the Court was relying on the doctrine of resulting trust, as evidenced by the cases the Court cited in support of the rule [*see Hayworth v. Williams (1909) 102 Tex. 308, 116 S.W. 43, 45-46* ; *Delamour v. Roger (1852) 7 La. Ann. 152]* .

Subsequently, in *Keene v. Keene*, the Court considered a nonmarital partner's claim to an interest in real property acquired during the term of the relationship and standing in defendant's name. Plaintiff's claim was based on her contribution of certain services in connection with the acquisition of the property. The Court denied the claim insofar as it was based on the *Vallera* rule, holding that the word "funds" as used in *Vallera* meant cash or property of value that may be converted into cash, and excluded services [*Keene v. Keene (1962) 57 Cal. 2d 657, 663-667, 21 Cal. Rptr. 593, 371 P.2d 329]* .

Marvin overruled *Keene* on this point. It made clear that a nonmarital partner is entitled to an equitable remedy, such as a resulting trust, for services as well as funds contributed toward the acquisition of property [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 677, 684, 134 Cal. Rptr. 815, 557 P.2d 106* ; *see also Hyman v. Hyman (Tex. Civ. App. 1954) 275 S.W.2d 149, 151* (relying on *Hayworth* and stating principle that plaintiff need not show that his or her labor produced part of actual funds used to purchase property, if plaintiff shows that plaintiff and defendant were working together for a common purpose and proceeds of labor performed by them became their joint property)].

In denying the application of a resulting trust, the Court in *Keene* set forth two requirements for resulting trusts that are not considered in *Marvin*. The first is that a resulting trust cannot be predicated on contributions of funds or services to the improvement of property rather than to its acquisition [*Keene v. Keene (1962) 57 Cal. 2d 657, 667, 21 Cal. Rptr. 593, 371 P.2d 329]* . If contributions are made to the improvement of property, an equitable lien may be available, as discussed in *§ 387.78[4]*.

The second requirement imposed by *Keene* is that if services, rather than funds, are the basis of a resulting trust, the services must be rendered to the grantor of the property who then transfers the property to the grantee in whole or partial consideration for these services [*Keene v. Keene (1962) 57 Cal. 2d 657, 666-667, 21 Cal. Rptr. 593, 371 P.2d 329]* . This requirement was arguably overruled by the *Marvin* decision, which removed the distinction between funds and services, as discussed *above*. The requirement has also been criticized as not consistent with prior California case law [

see Comment, *The Property Rights of Meretricious Spouses: The Effect of the New 'No Punishment' Policy Indicated by the Consenting Adults Bill, 16 Santa Clara Law. 783, 795 (1976)*], and it is specifically not a requirement for the imposition of a resulting trust by the Second Restatement of Trusts [*see Restatement of Trusts 2d, § 440, comment h*].

It thus appears that a nonmarital partner may obtain a resulting trust on property held by the other partner when the following requirements are met:

(1) The defendant acquired property; and

(2) The plaintiff contributed funds or services toward the acquisition of the property.

If the contribution is in the form of services, which may be household services, a monetary value will have to be established for the services to determine the extent of the plaintiff's resulting trust in the property. An example of a situation involving nonmarital partners in which a resulting trust might be imposed is when one partner purchased a home for the partners, and the other partner's services contributed to the acquisition of funds for the downpayment by, for instance, doing the housework, which allowed the buying partner the time to acquire the funds for the downpayment. Another example is when one partner owned a house in which both partners lived, and the second partner contributed to its acquisition by making payments on the loan in excess of the rental value for the portion occupied by the second partner.

Once a resulting trust has been declared, the plaintiff has a judicially declared interest in the property standing in the name of the defendant. The plaintiff's interest can be realized by sale of the property and appropriate division of the proceeds or by having either plaintiff or defendant pay the other for his or her interest in return for clear title to the property. The plaintiff's interest in real property can be secured by recording an abstract of the judgment.

[3] Constructive Trusts

In order to fulfill the reasonable expectations of the parties to a nonmarital relationship, a court may, when appropriate, employ the principle of constructive trust [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 684, 134 Cal. Rptr. 815, 557 P.2d 106* ; *see Nelson v. Nevel (1984) 154 Cal. App. 3d 132, 139, 201 Cal. Rptr. 93* ; *Hall v. Hall (1950) 98 Cal. App. 2d 209, 212, 219 P.2d 808]* . A constructive trust is an equitable remedy to compel a person who has property to which he or she is not justly entitled to transfer it to the person entitled to it [*Weiss v. Marcus (1975) 51 Cal. App. 3d 590, 600, 124 Cal. Rptr. 297* ; *Bainbridge v. Stoner (1940) 16 Cal. 2d 423, 428, 106 P.2d 423* ; *see Taylor v. Fields (1986) 178 Cal. App. 3d 653, 660, 665, 224 Cal. Rptr. 186* (no constructive trust imposed)]. By imposing a constructive trust, the one whose property has been taken is not relegated to a personal claim that might have to be shared with other creditors, but is given the right to a restoration of the property itself. Thus, the titleholder is the constructive trustee holding title to the property for the benefit of the rightful owner [*Bainbridge v. Stoner (1940) 16 Cal. 2d 423, 428-429, 106 P.2d 423]* . The difference between a constructive trust and a resulting trust is that a constructive trust is based on the wrongful acquisition of the property of another, whereas a resulting trust is based on acquisition of property using consideration supplied by another.

A person is a constructive or involuntary trustee of property for the person entitled to the property if he or she acquired it by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act [*Civ. Code §§ 2223, 2224*]. Thus, a constructive trust may be imposed where the substantive basis of the action is that property standing in the defendant's name has been obtained through violation of a confidential relationship that raises a presumption of undue influence (*see § 387.79*) [*see* former *Civ. Code § 2235*; *Prob. Code §§ 16002, 16004*]. *Prob. Code § 16004(c)* provides that transaction between trustee and beneficiary, which occurs during existence of trust, or while trustee's influence with beneficiary remains, and by which trustee obtains an advantage from the beneficiary, is presumed to be violation of trustee's fiduciary duties; unlike former *Civ. Code § 2235*, *Prob. Code § 16004(c)* contains no language relating to a presumption of undue influence. Assuming that *Prob. Code § 16004(c)*, like former *Civ. Code § 2235*, is relevant to

nonmarital relationships, prior case law may still be viable to determine whether presumption of violation of spouse's fiduciary duties arises) [*e.g.*, *Day v. Greene (1963) 59 Cal. 2d 404, 411, 29 Cal. Rptr. 785, 380 P.2d 385]* . Such breach of confidential relationship might arise in a nonmarital relationship if the defendant partner induced the plaintiff partner to give the defendant funds to invest for the plaintiff but instead invested the funds in the name of the defendant.

A constructive trust does not arise unless there is property transferred to the trustee on which the constructive trust can be fastened. Thus, although a constructive trust arises when a transfer of the title to land or a chattel or a chose in action is obtained by one of the methods mentioned above (for example, fraud), no constructive trust can be imposed if a person is induced by one of those same methods to render services *after* the transfer that improve the property, even though the person rendering the services is entitled to recover their value [*Keene v. Keene (1962) 57 Cal. 2d 657, 665 n.5, 21 Cal. Rptr. 593, 371 P.2d 329* (quoting from *Restatement of Restitution, § 160, comment i*)]. A nonmarital partner in this situation may, however, have the right to an equitable lien if the services have been rendered in improving the property accumulated during the relationship (*see § 387.78[4]*).

A constructive trust will not be imposed if the person seeking its imposition has "unclean hands." One court of appeal refused to impose a constructive trust to enforce an alleged agreement for support against the estate of a decedent by the decedent's noncohabiting lover, because the lover knew that the decedent was married during the course of their relationship. It further found that because the lover could not obtain any relief under the parties' illegal agreement at law, no constructive trust theory was available to her [*Taylor v. Fields (1986) 178 Cal. App. 3d 653, 666, 224 Cal. Rptr. 186]* .

[4] Equitable Liens

Although an equitable lien was not specifically mentioned in *Marvin* as a remedy available to a nonmarital partner, it should be considered a possible equitable remedy to protect the expectations of a party to a nonmarital relationship in a case in which a resulting or constructive trust proves inadequate [*see* *Marvin v. Marvin (1976) 18 Cal. 3d 660, 684 n.25, 134 Cal. Rptr. 815, 557 P.2d 106* ; *but see* *Taylor v. Polackwich (1983) 145 Cal. App. 3d 1014, 1021, 194 Cal. Rptr. 8* (equitable remedy improper when party seeking rehabilitative award has no underlying right to relief on any theory); *Marvin v. Marvin (1981) 122 Cal. App. 3d 871, 876, 176 Cal. Rptr. 555* (some recognized underlying obligation in law or equity necessary to support application of any equitable remedy; need of one party and ability of other to pay insufficient)].

In contrast with the remedy of constructive trust, which arises from a property owner's wrongdoing (§ 387.78[3]), the equitable lien remedy is imposed to prevent the owner's unjust enrichment. A person rendering services in improving or otherwise increasing the value of the property of another, who is entitled to restitution because of the fraud, duress, undue influence, or mistake of the other [*see Civ. Code § 1689* (grounds for rescission and restitution)], may be entitled to an equitable lien for the value of the services or expenditures [*see Restatement of Restitution, § 170, comments a, b*], even though he or she would not be entitled to a constructive trust [*see* *Keene v. Keene (1962) 57 Cal. 2d 657, 665 n.5, 21 Cal. Rptr. 593, 371 P.2d 329]* . This situation might arise in a nonmarital relationship in which the plaintiff partner contributed money and labor toward improving property held in the name of the defendant partner based on the other partner's promise to share in the proceeds of the sale of the property. If, on separation of the parties, the defendant refused to acknowledge that the plaintiff had any interest in the property, the plaintiff could obtain an equitable lien on the property for the value of the money and labor that improved the property.

A nonmarital partner is also entitled to have property in the other partner's name impressed with an equitable lien if he or she is obligated on a promissory note to make payments toward the purchase of the property. In such a case, the lien may be impressed to protect the partner in the event he or she is called upon to pay any part of the debt [*Beckman v. Mayhew (1975) 49 Cal. App. 3d 529, 534, 122 Cal. Rptr. 604]* .

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§ 387.79 Confidential or Fiduciary Relationship

[1] Existence of Confidential Relationship

A confidential relation exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. The prerequisite to a confidential relationship is the reposing of trust and confidence by one person in another who is cognizant of this fact [*Estate of Sanders (1985) 40 Cal. 3d 607, 615, 221 Cal. Rptr. 432, 710 P.2d 232* ; *Vai v. Bank of America (1961) 56 Cal. 2d 329, 337-338, 15 Cal. Rptr. 71, 364 P.2d 247]* .

In general, parties who are not married are not presumed to share a confidential relationship [*In re Marriage of Dawley (1976) 17 Cal. 3d 342, 355, 131 Cal. Rptr. 3, 551 P.2d 323]* , and if they contract with each other with regard to property, they are presumed to be dealing at arm's length [*see Fernandez v. Fernandez (1961) 194 Cal. App. 2d 782, 790, 15 Cal. Rptr. 374]* . However, in some instances a confidential relationship may arise between the nonmarital partners [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 682 fn. 22, 134 Cal. Rptr. 815, 557 P.2d 106]* .

The existence of a confidential relationship may be established by testimony of one party that he or she reposed trust and confidence in the other and indicated that fact to the other party. If the testimony is disputed, various considerations about the parties' relationship may indicate whether trust and confidence was reposed, including: (1) the length and permanence of the relationship; and (2) the nature of the relationship with regard to property and business affairs, such as whether or not they commingled or shared their property. Other relevant factors may include the relative age, sophistication, and business experience of the party in whom confidence is alleged to have been reposed as compared to the other party [*see Estate of Nelson (1964) 224 Cal. App. 2d 138, 141-144, 36 Cal. Rptr. 352]* .

A confidential relationship should be distinguished from a fiduciary relationship, which exists when one persons controls the property of another [*Vai v. Bank of America (1961) 56 Cal. 2d 329, 337-338, 15 Cal. Rptr. 71, 364 P.2d 247* ; *see § 387.79[2]*]. Although the two relationships frequently exist simultaneously [*see Vai v. Bank of America (1961) 56 Cal. 2d 329, 338, 15 Cal. Rptr. 71, 364 P.2d 247]* , a confidential relationship may exist although there is no

fiduciary relationship, and vice versa [*see Estate of Cover (1922) 188 Cal. 133, 143, 204 P. 583* (confidential relationship existed without fiduciary one); *In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 150-155, 133 Cal. Rptr. 583* (confidential relationship ceased but fiduciary duties continued)].

[2] Existence of Fiduciary Relationship

No fiduciary duty is imposed by law between unmarried cohabitants [*Maglica v. Maglica (1998) 66 Cal. App. 4th 442, 448, 78 Cal. Rptr. 2d 101]* . However, a fiduciary duty may be undertaken by the parties' agreement, or, by one party having control over the property of the other, even if there is no confidential relationship (*§ 387.79[1]*) [*see Maglica v. Maglica (1998) 66 Cal. App. 4th 442, 448-449, 78 Cal. Rptr. 2d 101* (clear and convincing evidence of entrustment of property or agreement to buy property together must be presented to overcome presumption of title taken solely in one party's name)]. Thus, for example, while it may be clear that the partners do not repose trust and confidence in each other,one partner may be in possession of the other partner's property, and as to that property he or she will be a fiduciary [*Vai v. Bank of America (1961) 56 Cal. 2d 329, 338, 15 Cal. Rptr. 71, 364 P.2d 247* ; *In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 150-155, 133 Cal. Rptr. 583]* .

[3] Effect of Confidential or Fiduciary Relationship

The effects of a confidential and of a fiduciary relationship are essentially the same [*cf. Fam. Code §§ 721(b), 1100(e)* (married couples subject to "the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other")]. A fiduciary or a person in a confidential relationship has a duty to act in the best interest of the beneficiary or the other party to the confidential relationship, and to make full disclosure of all material facts within his or her knowledge relating to transactions in which the parties are involved or which affect them in their fiduciary or confidential relationship. If a transaction between the parties improves the fiduciary's position or allows him or her to obtain a favorable opportunity or otherwise to gain, benefit, or profit, it "may fairly be said that an unfair advantage has been obtained," and the court may nullify the transaction or grant other remedies to avoid injustice, as discussed in *§ 387.79[4]* [*see Main v. Merrill, Lynch, Pierce, Fenner, & Smith, Inc. (1977) 67 Cal. App. 3d 19, 31-32, 136 Cal. Rptr. 378* ; *Estate of Sanders (1985) 40 Cal. 3d 607, 616, 221 Cal. Rptr. 432, 710 P.2d 232]* .

[4] Remedies for Breach of Confidential or Fiduciary Relationship

If a breach of the confidential or fiduciary relationship exists because one party gained an unfair advantage over the other party (*see § 387.79[3]*), the injured party may have a choice of remedies. If the injured party can show that the other party obtained a contract or deed through undue influence, or that the transaction involved inadequate consideration, the contract or deed may be rescinded [*see Ramos v. Pacheco (1944) 64 Cal. App. 2d 304, 148 P.2d 704]* . If there is no contract or deed to be rescinded, the advantage resulting from the undue influence may be remedied by a resulting trust, a constructive trust, or an equitable lien as discussed in *§ 387.78*.

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§ 387.80 Statute of Limitations

[1] Generally

An action on an oral cohabitation agreement between nonmarital partners must be brought within two years after accrual of the cause of action [*Code Civ. Proc. §§ 312, 339(1)*]. The two-year period applies not only to actions on express oral agreements, but also to implied-in-fact agreements [*see Davies v. Krasna (1975) 14 Cal. 3d 502, 509-511, 121 Cal. Rptr. 705, 535 P.2d 1161* ; *Kurokawa v. Blum (1988) 199 Cal. App. 3d 976, 989, 245 Cal. Rptr. 463]* . Recovery under the theory of quantum meruit for the value of services performed is also governed by the two-year period [*see Maglica v. Maglica (1998) 66 Cal. App. 4th 442, 452-454, 78 Cal. Rptr. 2d 101* ; *Johnstone v. E & J Mfg. Co. (1941) 45 Cal. App. 2d 586, 587-588, 114 P.2d 658]* .

An action based strictly in equity, such as one in which the plaintiff claims an interest in property standing in the defendant's name and acquired during the period of cohabitation and seeks to impose a resulting or constructive trust, must be brought within four years [*see Potter v. Bland (1955) 136 Cal. App. 2d 125, 134, 288 P.2d 569* (resulting trust); *Wrightson v. Dougherty (1936) 5 Cal. 2d 257, 264, 54 P.2d 13* (constructive trust); *Pack v. Vartanian (1965) 232 Cal. App. 2d 466, 474-475, 42 Cal. Rptr. 729* (applying rule to action by putative spouse under former case law governing putative spouses); Civ. Code § 343 (four-year period for actions for relief not specified in other statutes of limitation)]. However, the nature of the right sued on, not the form of the action or the relief demanded, determines the applicability of the statute of limitations. Thus, if the primary purpose of the action is to recover money under an oral contract and the equitable remedy is merely ancillary to the perfection of plaintiff's right under the oral contract, the two-year limitation period applies [*Jefferson v. J.E. French Co. (1960) 54 Cal. 2d 717, 718-719, 7 Cal. Rptr. 899, 355 P.2d 643* (holding accounting as ancillary to perfection of plaintiff's right under oral contract); *see Code Civ. Proc. § 339(1)*].

When an action is based on a fraudulent breach of a contractual duty, such as a violation of a confidential relationship constituting constructive fraud, a three-year period applies [*see Code Civ. Proc. § 338(d)*; *Day v. Greene (1963) 59 Cal. 2d 404, 411, 29 Cal. Rptr. 785, 380 P.2d 385* (finding that constructive fraud was substantive basis of action to

impose constructive trust)], even though a breach of an oral contract may also be involved.

[2] Accrual of Cause of Action

Few cohabitation agreements are for a specified term or contain specified payment dates. Thus, there may be a question of when a cause of action on the agreement accrues and the statute of limitations begins to run [*see Code Civ. Proc. § 312*]. Generally, if there is an express or implied agreement, a cause of action for breach of the agreement accrues at the time the parties separate and the party having control of the property or funds fails to comply with the agreement [*see Kurokawa v. Blum (1988) 199 Cal. App. 3d 976, 989, 245 Cal. Rptr. 463* ; *Estate of Fincher (1981) 119 Cal App. 3d 343, 352, 174 Cal. Rptr. 18]* . If the relationship is deemed to be in the nature of an implied partnership (*see § 387.75* et seq.), the cause of action accrues at the same time [*see Estate of Fincher (1981) 119 Cal. App. 3d 343, 353, 174 Cal. Rptr. 18]* . If the agreement contemplates payment for the plaintiff's services or other contributions that are of a continuous nature during the period of the relationship, it may be inferred that payment will be made whenthe relationship ends. Thus, in this situation, the statute also begins to run when the relationship ends [*Corato v. Estate of Corato (1927) 201 Cal. 155, 159-160, 255 P. 825* ; *see Hill v. Estate of Westbrook (1950) 95 Cal. App. 2d 599, 604, 213 P.2d 727]* .

However, even if the parties have separated, the statute of limitations will not begin to run until the obligated party *refuses to perform*. Thus, if the obligor continues to perform after separation, such as by paying agreed on support, there has been no breach, no cause of action has accrued, and the statute of limitations has not begin to run [*Cochran v. Cochran (1997) 56 Cal. App. 4th 1115, 1124, 66 Cal. Rptr. 2d 337]* .

If the promise by one of the parties is not continuous and, therefore, not of indefinite duration--for example, if one party promises to pay a lump sum at a specified time--the cause of action accrues at the time of the breach, and the statute begins to run at that time [*Niles v. Rapoport & Sons (1942) 53 Cal. App. 2d 644, 650-651, 128 P.2d 50]* . Thus, if reimbursement for monies contributed is to be made at the date of the death of one nonmarital partner, the cause of action does not accrue, and the statute of limitations does not begin to run, until the date of death [*Hill v. Estate of Westbrook (1950) 95 Cal. App. 2d 599, 604, 213 P.2d 727]* .

A cause of action for fraud based on the claim that a party to the agreement intentionally misrepresented his or her intent to comply with the terms of the agreement must be commenced within three years after the discovery of the facts constituting the fraud [*Code Civ. Proc. § 338(d)*]. The fact of fraud becomes immediately apparent when the parties separate and the alleged fraudulent party fails to comply with the agreement; the cause of action for fraud thus accrues at that time [*Kurokawa v. Blum (1988) 199 Cal. App. 3d 976, 989, 245 Cal. Rptr. 463]* .

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§ 387.81 Support and Injunctive Relief

[1] Permanent Support--Lack of Statutory or Judicial Standards

The provisions of the Family Code governing property rights and mutual support rights of married persons do not apply to nonmarital partners, as discussed in *§ 387.71[3]* [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 681, 134 Cal. Rptr. 815, 557 P.2d 106* ; *see In re Marriage of Bukaty (1986) 180 Cal. App. 3d 143, 148, 225 Cal. Rptr. 492]* . Moreover, the special family law procedural rules, including local court rules, do not apply to property and support actions between nonmarital partners [*Schafer v. Superior Court (1986) 180 Cal. App. 3d 305, 311, 225 Cal. Rptr. 513* ; *but see § 387.55[1]*].

No statute authorizes a court to require one unrelated person to support another, and the California Supreme Court has reserved the issue of whether postseparation support is available to a nonmarital partner in the absence of an agreement [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 685 n.26, 134 Cal. Rptr. 815, 557 P.2d 106]* .

[2] Possible Theories for Permanent Support--Implied Agreement

Apart from an express agreement for support, which is discussed in *§ 387.50* et seq., it may be possible for a nonmarital partner to seek support on the basis of an implied agreement, or under one of the other theories discussed in *§ 387.81[3]* [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 684, 134 Cal. Rptr. 815, 557 P.2d 106* ; *Friedman v. Friedman (1993) 20 Cal. App. 4th 876, 886, 24 Cal. Rptr. 2d 892]* . It appears, however, that an implied agreement must be based on proof of something more than the relationship, need, and ability to pay. It must be founded on an ascertained agreement of the parties, manifested by conduct. There must be specific conduct from which it can be concluded that the parties agreed that they would be bound by the obligations of support that would have inured to their benefit had they been married [*Friedman v. Friedman (1993) 20 Cal. App. 4th 876, 887-888, 24 Cal. Rptr. 2d 892]* . This standard suggests that there must be conduct from which it may be inferred that the parties had a meeting of the minds that their relationship was to impose on them all the rights and obligations of mutual support as if they were legally married. To date, no reported decision has found any such implied agreement [*see Friedman v. Friedman (1993) 20 Cal. App. 4th 876, 887-888, 24 Cal. Rptr. 2d 892* (evidence that parties took title to property jointly and filed joint tax returns

insufficient); *see also Schafer v. Superior Court (1986) 180 Cal. App. 3d 305, 310, 225 Cal. Rptr. 513* ; *Marvin v. Marvin (1981) 122 Cal. App. 3d 871, 876, 176 Cal. Rptr. 555* (*Marvin II*)].

One court of appeal held that, at least in the absence of an express agreement, cohabitation is a prerequisite to an award of post-relationship support, and denied a claim for support brought by a party who had never lived with her nonmarital partner [*see Bergen v. Wood (1993) 14 Cal. App. 4th 854, 857-858, 18 Cal. Rptr. 2d 75]* .

[3] Other Theories

In *Marvin I*, the California Supreme Court reserved the question of whether, in the absence of an express or implied contractual obligation, a party to a nonmarital relationship might be entitled to support payments from the other party after the relationship terminates [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 684, 134 Cal. Rptr. 815, 557 P.2d 106]* . In *Marvin II*, the appellate court on remand held that an award of rehabilitative support cannot be made on findings that merely establish that the plaintiff needs support and that the defendant is capable of providing it. Rather, any award of support must be supported by an underlying obligation in law or equity. If the court has found that the defendant has no obligation to provide plaintiff with a reasonable sum for support and maintenance,that the plaintiff suffered no damage from the parties' nonmarital relationship or its termination, and that the defendant was not unjustly enriched and did not commit any wrongful act in regard to the relationship or its termination, the court may not create a totally new substantive right under the guise of doing equity, simply by stating that the plaintiff has a right to assistance from the defendant until the plaintiff becomes self-supporting [*Marvin v. Marvin (1981) 122 Cal. App. 3d 871, 875-876, 176 Cal. Rptr. 555]* . This issue of noncontractual bases for support remains unresolved, although if there are any such remedies, it appears that they will not be lightly accepted at the appellate level [*see Friedman v. Friedman (1993) 20 Cal. App. 4th 876, 886 n.3, 890, 24 Cal. Rptr. 2d 892* (despite court's concern with respondent's economic situation, it regretted there was no basis on which her short-term needs could be met under existing law)].

Any possible theories probably lie within the court's equitable powers [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 685 n.25, 134 Cal. Rptr. 815, 557 P.2d 106]* . One such theory is promissory estoppel [*see* Restatement of Contracts § 90]. Even if no contract for future support may be inferred from the parties' conduct, one party may argue that a previous furnishing of support by the other party gave rise to an implied *promise* (rather than contract) that support would not be terminated without giving the supported party a reasonable opportunity to secure other means of support. If the supported party relied on this implied promise to his or her detriment--for example, by foregoing opportunities to earn income or to acquire income-producing skills--the paying party might be estopped to deny that the implied promise had been made [*cf. Youngman v. Nevada Irrigation Dist. (1969) 70 Cal. 2d 240, 249, 74 Cal. Rptr. 398, 449 P.2d 462* ; *Bank of California v. Connolly (1973) 36 Cal. App. 3d 350, 365, 111 Cal. Rptr. 468]* . However, there must be proof that the alleged promisee, in fact, relied on the promise by acting or forebearing from acting in a certain way because of the promise [*Friedman v. Friedman (1993) 20 Cal. App. 4th 876, 885, 24 Cal. Rptr. 2d 892]* .

Another possibility is the related doctrine of equitable estoppel, by which a party may be estopped from denying any statement or conduct if he or she has thereby intentionally and deliberately led another to believe a particular thing to be true and to act on that belief [*see Evid. Code § 623*]. However, there must be a clear nexus between the statement or conduct of the party to be estopped and the subsequent conduct of the party seeking to invoke estoppel. Further, the party invoking estoppel must be ignorant of the true facts [*Friedman v. Friedman (1993) 20 Cal. App. 4th 876, 885, 24 Cal. Rptr. 2d 892]* .

There is a general equitable principle of implied-in-law (or quasi-) contract, under which a contract will be implied regardless of the parties' intent, if required to prevent unjust enrichment [*see Youngman v. Nevada Irrigation Dist. (1969) 70 Cal. 2d 240, 250, 74 Cal. Rptr. 398, 449 P.2d 462* ; *see also* Note, *Beyond Marvin: A Proposal for Quasi-Spousal Support, 30 Stan. L. Rev. 359, 385 (1978)* (for discussion of view that court's inherent equity powers should be used to presume support agreement between parties to nonmarital relationship that approximates de facto family)]. However, it appears that California courts are unwilling to invoke this doctrine as a basis for awarding support

in a nonmarital relationship [*see Friedman v. Friedman (1993) 20 Cal. App. 4th 876, 883-890, 24 Cal. Rptr. 2d 892* (noting concern that such a general equitable right would have the effect of resurrecting doctrine of common law marriage in California)].

[4] Temporary Support Pendente Lite

The provisions of the Family Code governing temporary spousal support are not by their terms applicable to proceedings involving nonmarital partners [*see Fam. Code § 3600*; *see also Marvin v. Marvin (1976) 18 Cal. 3d 660, 684 n.24, 134 Cal. Rptr. 815, 557 P.2d 106]* . If a party to a nonmarital action asserts a right to support beyond the termination of the nonmarital relationship, any provision for temporary support during the pendency of the proceeding must be made in the form of a preliminary injunction [*see Code Civ. Proc. §§ 526, 527*; *see also § 387.81[5]*]. A trial court has no authority to fashion an equitable remedy to award support pending trial in any form other than the recognized provisional remedies applicable to civil actions in general [*Friedman v. Friedman (1993) 20 Cal. App. 4th 876, 883-886, 24 Cal. Rptr. 2d 892* (rejecting theory of inherent equity powwer to issue temporary "order to pay money")].

The plaintiff must show that irreparable harm will result if such temporary relief is not granted and that a final judgment of damages for breach of the contract is an inadequate remedy [*Friedman v. Friedman (1993) 20 Cal. App. 4th 876, 889-890, 24 Cal. Rptr. 2d 892* ; *see Code Civ. Proc. § 526(a)(2), (4)*]. However, no reported decision has yet permitted an award of pendente lite support on this basis [*see Friedman v. Friedman (1993) 20 Cal. App. 4th 876, 889-890, 24 Cal. Rptr. 2d 892* (finding that plaintiff had adequate remedy at law because, although disabled, she still had $59,000 in savings and was not yet destitute)].

[5] Injunctive Relief in General

While the provisions of the Family Code are not applicable to property and support disputes arising between nonmarital partners [*Marvin v. Marvin (1976) 18 Cal. 3d 660, 681, 134 Cal. Rptr. 815, 557 P.2d 106]* , a nonmarital partner is entitled to seek injunctive relief of the kind available to every civil litigant during the pendency of the litigation [*see Code Civ. Proc. § 527*]. Such relief could include an order restraining the defendant from [*Code Civ. Proc. § 526*]:

- Committing waste or causing great or irreparable injury to the plaintiff; or

- Any act in violation of the plaintiff's rights that would tend to render the subsequent judgment ineffectual.

For a discussion of procedure for obtaining injunctive relief in the context of marital dissolution proceedings, see Ch. 221, *Dissolution of Marriage: Procedure* . Procedures for obtaining injunctive relief in civil actions generally are set forth in Ch. 303, *Injunctions* .

As discussed in *§ 387.55[1]*, the provisions of the Domestic Violence Prevention Act [*Fam. Code § 6200 et seq.*], governing injunctions and other relief are applicable to nonmarital partners [*Fam. Code § 6211(b)*]. For further discussion, see Ch. 293, *Harassment and Domestic Violence* .

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§ 387.82 Attorney's Fees and Costs

In the absence of an agreement for recovery of attorney's fees [*see Civ. Code § 1717*], neither party to an action concerning the agreement can recover attorney's fees unless there is specific statutory support for such recovery [*Code Civ. Proc. § 1021*]. The prevailing party in a lawsuit is entitled as a matter of right to recover his or her costs, except as otherwise expressly provided by statute [*Code Civ. Proc. §§ 1021, 1032(b)*]. For a general discussion of items recoverable as costs in a civil action, see Ch. 174, *Costs and Attorney's Fees* .

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34-387 California Forms of Pleading and Practice--Annotated §§ 387.83-387.99

[Reserved]

§§ 387.83[Reserved]

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34-387 California Forms of Pleading and Practice--Annotated § 387.100

§ 387.100 California Family Law

California Family Law Practice and Procedure, 2d Ed. (Matthew Bender), Chs. 25, 200, 201, 210.

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34-387 California Forms of Pleading and Practice--Annotated § 387.101

§ 387.101 State Statutes

Joint ownership of real property. *Civ. Code §§ 682, 683, 683.2*

Prohibition against discrimination based on marital status. *Civ. Code § 1812.30 et seq.*

Effect of cohabitation on child custody and child visitation. *Fam. Code §§ 3011, 3020, 3040*

Effect of cohabitation on child support in prior marriage. *Fam. Code § 4057.5*

Effect of cohabitation on spousal support in prior marriage. *Fam. Code § 4323*

Purchase of life insurance irrevocably designating beneficiaries. *Ins. Code § 10170*

Mutual wills. *Prob. Code § 150(b), (c)*

Joint bank accounts. *Prob. Code § 5100 et seq.*

Joint ownership of vehicles. *Veh. Code § 4150.5*

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§ 387.102 Federal Statutes

Prohibition against credit discrimination based on marital status. *15 U.S.C. § 1691 et seq.*

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34-387 California Forms of Pleading and Practice--Annotated § 387.103

§ 387.103 Text References

California Probate Practice, Ch. 8 (Matthew Bender).

California Real Estate Law and Practice, Ch. 345 (Matthew Bender).

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[Reserved]

§§ 387.104[Reserved]

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34-387 California Forms of Pleading and Practice--Annotated § 387.120

§ 387.120 California Family Law

California Family Law Practice and Procedure, chs. 1, 2, 200 (Matthew Bender 2d ed.).

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34-387 California Forms of Pleading and Practice--Annotated § 387.121

§ 387.121 State Statutes

Statute of frauds, generally. *Civ. Code § 1624*

Statute of limitations (general) on action to enforce express written agreement. *Code Civ. Proc. § 337*

Statute of limitations (general) on action to enforce express oral agreement. *Code Civ. Proc. § 339(1)*

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[Reserved]

§§ 387.122[Reserved]

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34-387 California Forms of Pleading and Practice--Annotated § 387.140

§ 387.140 California Family Law

For discussion of drafting cohabitation agreements and sample forms, see California Family Law Practice and Procedure, (Matthew Bender 2d Ed.), Chs. 200, 201

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34-387 California Forms of Pleading and Practice--Annotated § 387.141

§ 387.141 State Statutes

Statute of limitations on oral cohabitation agreement. *Code Civ. Proc. §§ 312, 339(2)*

Provisions governing injunctions and other relief relating to harassment and domestic violence between nonmarital partners. *Fam. Code § 6200 et seq.*

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34-387 California Forms of Pleading and Practice--Annotated § 387.142

§ 387.142 Annotations

Annot., Property Rights Arising From Relationship of Couple Cohabiting Without Marriage, 3 A.L.R.4th 13 (1981).

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34-387 California Forms of Pleading and Practice--Annotated § 387.143

§ 387.143 Law Reviews

Bruch, *Cohabitation in the Common Law Countries a Decade After Marvin: Settled in or Moving Ahead? 22 U.C.D.L. Rev. 717 (1989)*.

Oldham & Caudill, *A Reconnaissance of Public Policy Restrictions Upon Enforcement of Contracts Between Cohabitants*, 18 Fam. L.Q. 93 (1984).

Comment, *Applying Marvin v. Marvin to Same-Sex Couples: A Proposal for a Sex-Preference Neutral Cohabitation Contract Statute, 25 U.C.D. L. Rev. 1029 (1992).*

Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances, 92 Colum. L. Rev. 1164 (1992)*.

Note, *Taylor v. Polackwich: Property Rights of Unmarried Cohabitants--From Marvin to Equity, 14 Golden Gate L. Rev. 745 (1984)*.

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34-387 California Forms of Pleading and Practice--Annotated § 387.144

§ 387.144 Text References

California Probate Practice, Chs. 12, 13, 23 (Matthew Bender).

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[Reserved]

§§ 387.145[Reserved]

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34-387 California Forms of Pleading and Practice--Annotated § 387.160

§ 387.160 Declaration of Domestic Partnership--Secretary of State Form DP-1

[1] FORM Declaration of Domestic Partnership--Secretary of State Form DP-1

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of the mandatory form for use after January 1, 2005, in statewide registration of a domestic partnership in California--Declaration of Domestic Partnership (form DP-1)--which is promulgated by the California Secretary of State [*see Fam. Code § 298*].

The form, which is available through county clerk offices and the Secretary of State, recites that each partner meets the statutory requirements for statewide registration of a domestic partnership [*Fam. Code § 297*] and provides space for the partners to set forth a mailing address, which need not be the same as their common residence address. By signing this form, the partners give their consent to the jurisdiction of California courts for any proceeding related to the partner's rights and obligations even if both completely leave California [*see Fam. Code § 298(c)*]. The form must be signed by each partner before a notary public. Although the form does not contain a declaration under penalty of perjury, it does contain a preprinted declaration that the "representations are true, correct, and contain no material omissions of fact to our best knowledge and belief." It is a misdemeanor to file an intentionally and materially false Declaration of Domestic Partnership [*Fam. Code § 298(c)*].

Either party or both parties may indicate a change of name in the Declaration of Domestic Partnership [*Fam. Code § 298(d)*]. In such event, the Certificate of Registered Domestic Partnership issued by the Secretary of State must include the name used by each party before registration of the domestic partnership and the new name selected by each party on registration of the domestic partnership [*Fam. Code § 298.5(e)*].

To accomplish registration, the completed form must be mailed, along with a filing fee (the amount of which is stated on the form), to the office of the California Secretary of State, at the address listed on the form. It is recommended that the form (and filing fee) be sent by certified mail, return receipt requested (although certified mail is not required for

registration).

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§ 387.161 Notice of Termination of Domestic Partnership--Secretary of State Form DP-2

[1] FORM Notice of Termination of Domestic Partnership--Secretary of State Form DP-2

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of the mandatory form of Notice of Termination of Domestic Partnership (form DP-2), for use after January 1, 2005, in notifying the California Secretary of State of the termination of a domestic partnership that has been registered in California when the conditions permitting termination without court action are present [*see Fam. Code § 299*]. The form, which is available through county clerk offices and the Secretary of State, must be signed by both domestic partners, and although it may be that both partners' signatures need not be notarized [*cf. Fam. Code §§ 299(a)(1), 298(c)*], it is clear that notarization of at least one of the signatures is required [*Fam. Code § 298(a)(1)*]. The form provides a line where the partners can include the file number under which the domestic partnership was registered if they know it.

By signing this form, the partners represent that they have read and understood a brochure prepared by the Secretary of State. They also declare that all of the conditions specified in *Fam. Code § 299(a)* exist.

At the bottom of the form, the partners must provide the name and address of the person to whom a copy of the filed document should be returned. If neither party effectively revokes the termination notice, the domestic partnership is terminated six months after the notice was filed. After the termination takes effect, either party may bring an action to set it aside for fraud, duress, mistake, or any other ground recognized at law or in equity, and a court may set it aside upon proof that the parties did not meet the requirements for filing of the Notice of Termination of Domestic Partnership [*Fam. Code § 299(c)*].

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34-387 California Forms of Pleading and Practice--Annotated § 387.162

§ 387.162 Revocation of Termination of Domestic Partnership--Secretary of State Form DP-3

[1] FORM Revocation of Termination of Domestic Partnership--Secretary of State Form DP-3

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of the mandatory form of Revocation of Termination of Domestic Partnership (form DP-3), for use in notifying the California Secretary of State that a domestic partner is revoking a notice of termination of domestic partnership that was filed with the Secretary within the previous six months [*see Fam. Code § 299(b)*]. The partner who is revoking must fill in the date of the previously filed termination notice and the other partner's name. Only one signature is required, but the revocation is effective only if the partner who is revoking sends a copy of the revocation to the other partner by first-class mail, postage prepaid, addressed to the other partner's last known address [*Fam. Code § 299(b)*].

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34-387 California Forms of Pleading and Practice--Annotated § 387.163

§ 387.163 Petition--Domestic Partnership--Judicial Council Form

[1] FORM Petition--Domestic Partnership--Judicial Council Form

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of the mandatory form of Petition for use in initiating an action for dissolution, legal separation, or nullity of a domestic partnership [Cal. Judicial Council Form FL-103]. Because the substantive rights and responsibilities of the parties and the court procedures for dissolution by domestic partners generally follow the corresponding rights, responsibilities, and procedures for dissolution by married couples [*Fam. Code §§ 297.5, 299(d)*], there are few differences between the use of this form and the use of the corresponding form for dissolution of marriage [*see* Cal. Judicial Council Form FL-100].

The line for date of registration or equivalent should be filled in with the date the Declaration of Domestic Partnership was filed with the California Secretary of State [*see Fam. Code § 297.5(k)* (date of registration deemed to be date of marriage for purposes of laws made applicable to domestic partners that refer to date of marriage)]. If the parties established a legal union substantially equivalent to a California domestic partnership in another state [*see Fam. Code § 299.2*], then the law of that state would determine what date should be filled in as "equivalent." The block for "Residence" applies only to partnerships established out of state. If a partnership was established in California by filing the mandatory California form of Declaration of Domestic Partnership, then both partners have agreed to the jurisdiction of California courts [*see Fam. Code § 298(c)*].

There may be some difficulty in determining whom to declare as minor children. Children "adopted during this domestic partnership" is clear enough, but it may be less clear whether there are "children of this relationship" born either before or during the domestic partnership. Children with respect to whom a party is asking for custody, visitation, or support orders should be listed, but controversy may be anticipated until the underlying law is clarified [*see Fam. Code § 297.5(d)* (rights and obligations of domestic partners with respect to a child of either of them are the same as those of spouses)]. Page 2 of the form provides a box to check when a petitioner seeks a determination of parentage for

children born to petitioner and respondent prior to the domestic partnership. Other orders that do not fit the categories on the form may be specified after "Other."

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34-387 California Forms of Pleading and Practice--Annotated § 387.164

§ 387.164 Response--Domestic Partnership--Judicial Council Form

[1] FORM Response--Domestic Partnership--Judicial Council Form

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of the mandatory form of Response for use in an action for dissolution, legal separation, or nullity of a domestic partnership [Cal. Judicial Council Form FL-123]. Because the substantive rights and responsibilities of the parties and the court procedures for dissolution by domestic partners generally follow the corresponding rights, responsibilities, and procedures for dissolution by married couples [*Fam. Code §§ 297.5, 299(d)*], there are few differences between the use of this form and the use of the corresponding form for dissolution of marriage [*see* Cal. Judicial Council Form FL-120]. Most of the lines of this form are identical to lines on the form of Petition--Domestic Partnership (see *§ 387.163*), and the comments on registration date, address, and minor children in relation to the Petition form are also applicable to the Response form.

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[Reserved]

§§ 387.165[Reserved]

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§ 387.180 Complaint for Breach of Express Pooling and Support Agreement [Civ. Code §§ 1620, 3300]

[1] FORM Complaint for Breach of Express Pooling and Support Agreement [Civ. Code §§ 1620, 3300]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR ACCOUNTING AND DAM-
_____ [*name*],	)	AGES
Defendant.	)	(Breach of Contract)
	)	
	)	

Plaintiff alleges:

FIRST CAUSE OF ACTION (BREACH OF POOLING AGREEMENT AND ACCOUNTING)

1. Defendant is, and at all times herein mentioned was, a resident of _____ County, California.

2. On or about _____ [*date*], in the City of _____, County of _____, State of California, while they were living with each other, plaintiff and defendant entered into _____ [an oral *or* a written] agreement by the terms of which they agreed to treat as joint property the earnings and income, and all property acquired therewith, which resulted from all personal service, skill, effort, and

work that each of them, thereafter, individually or jointly,performed, expended, or contributed during their relationship and while they lived with each other. The agreement was to terminate _____ [*specify, e.g.,* when the parties ceased to live with each other and one party expressed his or her intention not to continue the relationship with the other. The parties agreed that in such an event each would account to the other for all property treated as joint property under the agreement and divide it equally between them]. [*If the contract is written, add:* A copy of the contract is attached to and incorporated into this complaint as "Exhibit A."]

3. Thereafter, from _____ [*date*], to _____ [*date*], plaintiff and defendant continued to live together, accumulating as joint property earnings and income, and all property acquired therewith, which resulted from all personal service, skill, effort, and work that each of them, individually and jointly, had performed, expended, or contributed during the time they lived with each other. On or about _____ [*date*], plaintiff and defendant ceased to live with each other, and, on or about _____ [*date*], plaintiff/defendant informed defendant/plaintiff that he/she had no intention of continuing to live with defendant/plaintiff.

4. The joint property acquired and accumulated pursuant to the terms of the above-alleged agreement includes as follows:

[*List type and amount of property, such as the following*]

a. $_____ deposited in a checking account in defendant's name at _____ [*name of bank or financial institution*] in _____ [*city*].

b. _____ [*number*] shares of stock in _____ [*name of corporation*], a _____ [*state*] corporation, held by plaintiff as registered owner.

c. A _____ [*year and make*] automobile registered in the name of defendant.

d. The entire furnishings located in the residence in which plaintiff and defendant lived at _____ [*street address*], City of _____, County of _____, California].

5. Plaintiff is informed and believes and thereon alleges that additional joint property was acquired and accumulated during the term of the agreement between plaintiff and defendant. The full extent and nature of this property are unknown to plaintiff at this time. Plaintiff will seek leave to amend this complaint to identify and describe the property when such is ascertained.

6. At the time plaintiff and defendant ceased to live with one another, and at all times since, plaintiff has had possession, custody, and control of none of the property described above [except _____ (*describe property that plaintiff has retained possession, custody, and control of*)], while defendant has had a retained possession, custody, and control of all of the [other] property described above, together with additional property belonging to the parties as joint property, the nature and extent of which are unknown to plaintiff at this time.

7. On or about _____ [*date*], plaintiff requested defendant to account for and divide equally all the joint property herein described, both known and unknown to plaintiff, but defendant failed and refused, and continues to fail and refuse, to account for any of the joint property, or to divide any portion of the joint property in defendant's control and possession with plaintiff equally, or at all.

8. Plaintiff has performed all the conditions of the agreement on his/her part to be performed [except for accounting for and dividing equally with defendant all the joint property in his/her possession, custody, and control, but plaintiff's performance of this condition is excused by defendant's failure and refusal to account for any of the property in either

plaintiff's or defendant's possession, custody, or control].

9. As a proximate result of defendant's failure and refusal to account to plaintiff for any of the property in her/his possession, custody, or control as herein alleged, plaintiff has sustained damages.

SECOND CAUSE OF ACTION (BREACH OF CONTRACT FOR SUPPORT)

10. Plaintiff refers to and incorporates, as though fully set forth herein, Paragraphs 1-3, inclusive, of the First Cause of Action.

11. On or about _____ [*date*], plaintiff and defendant further agreed [orally *or* in writing *or* in the written contract referred to in Paragraph 2 and attached hereto as Exhibit A] that _____ [*specify support terms, e.g,* in the event that their relationship should terminate as provided in their prior oral agreement hereinabove alleged, if one party's share of joint property was insufficient to provide him or her with an adequate means of support sufficient to provide for the party's reasonable general living expenses, and that party was without any other means to provide such support, the other party would provide such support until such time as the party could independently provide such support or for a period of one year, whichever came first]. [*If the contract is written and is separate from the pooling agreement, add:* A copy of the contract for support is attached to and incorporated into this complaint as "Exhibit B."]

12. At the time that plaintiff and defendant ceased to live with one another, plaintiff had no independent, adequate means to support himself/herself and to pay for his/her reasonable general living expenses. On or about _____ [*date*], plaintiff informed defendant of this fact and requested that defendant satisfy her/his obligation under the _____ [written *or* oral] agreement to supportplaintiff until such time as plaintiff was independently able to provide for his/her general living expenses.

13. In response to plaintiff's request to provide support, defendant failed and refused, and continues to fail and refuse, to perform the terms and conditions of the agreement in that defendant has not made any payments to plaintiff for plaintiff's support [since _____ (*date*)].

14. There is now due and unpaid to plaintiff from defendant under the agreement the sum of $_____, which is a reasonable sum to provide plaintiff with the adequate support necessary to pay his/her reasonable general living expenses from _____ [*date plaintiff notified defendant of support requirements*], until the date of this complaint.

15. Defendant's breach is a continuing one, and payments due to plaintiff from defendant will continue to accrue. Plaintiff will seek leave to file a supplemental complaint at the time of the trial of this action to set forth the additional amounts, if any, that have accrued under the agreement and are then due and unpaid.

WHEREFORE, plaintiff prays judgment against defendant as follows:

On the FIRST CAUSE OF ACTION:

1. That the court order that defendant account to plaintiff for all the joint property, earnings and income, and all property acquired therewith, which resulted from all personal service, skill, effort, and work that plaintiff and defendant, and each of them, performed, expended, or contributed during the period of their relationship and while they lived with each other;

2. That, on ascertaining the nature and extent of the property subject to the agreement between the parties, the court award plaintiff damages in the amount of one-half of the property; and

3. That, in the alternative, if plaintiff and defendant are able to stipulate to a specific division of the property subject to the agreement, the court order a division of the property pursuant to such a stipulation.

On the SECOND CAUSE OF ACTION:

1. For damages in the sum of $_____ for the support of plaintiff, together with interest therein at _____ percent per annum, and such additional sums accruing under the agreement to provide plaintiff with support and remaining due and unpaid at the time of trial.

On BOTH CAUSES OF ACTION:

1. For costs of the suit herein incurred; and

2. For such other and further relief as the court deems proper.

_____ [*signature*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

This form is a complaint for damages and an accounting for breach of an express oral or written pooling and support agreement, to be used by a nonmarital partner in an action against a copartner who has breached the agreement (*see § 387.52[1]*). The complaint must state whether the contract was oral or written, because a complaint on a contract is subject to a special demurrer if it cannot be ascertained from the pleading whether the contract is written, oral, or implied by conduct [*Code Civ. Proc. § 430.10(g)*]. If the agreement was in writing, a copy of it should be attached to the complaint as an exhibit.

The first cause of action alleges the failure of the defendant copartner to account for the property that was acquired or accumulated during the relationship and is in the copartner's possession, custody, or control. The second cause of action alleges the failure of the defendant to provide plaintiff with support following the termination of the relationship. The complaint prays for damages or, in the alternative, for an order for division in kind of the property that was acquired or accumulated during the relationship.

Prior to filing the complaint, counsel should ascertain whether or not local trial delay reduction rules will apply to the action. For discussion of trial delay reduction rules, see Ch. 532, *Trial Court Delay Reduction* .

Counsel must also ensure that the action is brought within the applicable period of limitations, as discussed in *§ 387.54[2]*. A related discussion is set forth in *§ 387.80*.

The Judicial Council has approved official complaint and cause of action forms for breach of contract actions generally [*see Code Civ. Proc. § 425.12*; Cal. Judicial Council Forms PLD-C-001, PLD-C-001(1)]. The use of these forms is permissive, not mandatory. Judicial Council forms may be obtained from the clerk of the court in the county where the action is to be commenced [*Code Civ. Proc. § 425.12*].

[3] State Statutes

Statute of limitations (general) on action to enforce express written agreement. *Code Civ. Proc. § 337*

Statute of limitations (general) on action to enforce express oral agreement. *Code Civ. Proc. § 339(1)*

Complaints in general. *Code Civ. Proc. § 425.10*

[4] Cross References

For pleading and procedural requirements in actions for accounting, see Ch. 7, *Accounting, Action for* .

For pleading and procedural requirements in actions based on breach of contract, see Ch. 140, *Contracts* .

For allegations in a complaint and procedures to follow in obtaining preliminary injunctions generally, see Ch. 303, *Injunctions* .

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[Reserved]

§§ 387.181[Reserved]

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34-387 California Forms of Pleading and Practice--Annotated § 387.200

§ 387.200 Complaint [Code Civ. Proc. § 425.10] for Breach of Implied Pooling Contract or to Impress Constructive Trust [Civ. Code §§ 1621, 2224, 3300]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Breach of Implied Pooling Contract or to Impress Constructive Trust [Civ. Code §§ 1621, 2224, 3300]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DAMAGES AND TO IM-
Defendant.	)	PRESS CONSTRUCTIVE TRUST
	)	
	)	

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, a resident of _____ County, California.

2. On or about _____ [*date*], plaintiff and defendant commenced living together at _____ [*street address*], City of _____, County of _____, California. As part of a contract implied by the conduct of the parties, at the time plaintiff and defendant commenced living together, plaintiff gave up her/his career as a _____ [*describe plaintiff's employment or career prior to entering into relationship*] and devoted her/his entire skills, efforts, labors, and earnings in [*describe nature of*

services performed by plaintiff, e.g., maintaining plaintiff's and defendant's household, assisting defendant in running his/her business (by _____ (*specify tasks performed, e.g.,* handling correspondence and keeping the books)), and performing various services for defendant to free his/her time for pursuing business opportunities].

3. As a further part of a contract implied by the conduct between plaintiff and defendant, defendant understood that plaintiff would perform, expend, or contribute such skills, efforts, labors, and earnings on the condition that defendant would combine his/her skill, efforts, labor, and earnings with those of plaintiff and would share any property acquired as a result of those skills, efforts, labor, and earnings with plaintiff.

4. Thereafter, defendant manifested his/her assent to the condition on which plaintiff performed, expended, and contributed her/his skills, efforts, labor, and earnings as herein described by accepting the skills, efforts, labor, and earnings of plaintiff, and treating her/his skills, efforts, labor, and earnings as the joint property of both plaintiff and defendant.

5. Thereafter, in confirmation of this mutual understanding between plaintiff and defendant, plaintiff and defendant understood that all skills, efforts, labor, and earnings, and all property acquired therewith, that each party had performed, expended or contributed, were to be treated as their joint property. Each party understood that, although one party may retain title, possession, custody, or control of the joint property, he or she would account for such property to the other party at the termination of the relationship, when either party manifested an intent to discontinue living together with the other party.

6. At the time plaintiff and defendant commenced living together, and at all times during their relationship while they lived with each other, the most confidential relations existed between plaintiff and defendant and plaintiff reposed the greatest confidence and trust in defendant. Plaintiff entrusted defendant to manage and care for all the joint property acquired and accumulated during the term of the relationship, and to account for all joint property acquired and accumulated through the joint efforts of plaintiff and defendant. As a result of this confidence reposed in defendant, and of which defendant was aware, defendant did retain title, possession, custody, and control of the joint property herein described.

7. On or about _____ [*date*], plaintiff and defendant ceased to live with each other, and on or about _____ [*date*], defendant/plaintiffinformed plaintiff/defendant that he/she had no intention of continuing to live with her/him. Plaintiff thereupon requested that defendant account to her/him all of the joint property acquired and accumulated during the period in which they lived with each other.

8. As a result of the trust and confidence plaintiff reposed in defendant, plaintiff relied on defendant to perform his agreement with plaintiff and to disclose fully all of the joint property of the parties, its nature, extent, and value, and relied on defendant to divide the joint property of plaintiff and defendant in a manner that would result in a substantially equal division of the property. Defendant knew and was apprised of the trust and confidence so reposed in him/her by plaintiff.

9. In response to plaintiff's request to account for all joint property acquired and accumulated through the joint efforts of plaintiff and defendant, defendant violated the confidence plaintiff had placed in him/her and fraudulently repudiated the mutual understanding that had existed during the period in which plaintiff and defendant lived with each other by representing to plaintiff that he/she did not have in his/her possession, custody, or control any property in which plaintiff was entitled to share; by refusing, and continuing to refuse, to account for any property in his/her possession, custody, and control; and by refusing, and continuing to refuse, to disclose to plaintiff the nature, extent, and value of the joint property.

10. Plaintiff is informed and believes and thereon alleges that the amount of joint property acquired and accumulated during the period in which plaintiff and defendant lived with each other is extensive and includes

_____ [*describe specifically property known to plaintiff*]. Plaintiff will seek leave to amend this complaint to insert a complete description of these properties when such can be ascertained.

11. Because of the violation of the confidence plaintiff had placed in defendant and of the repudiation of the mutual understanding between plaintiff and defendant respecting the treatment of all property acquired and accumulated through the skills, efforts, labor, and earnings of plaintiff and defendant, and each of them, defendant should be declare by this court to be an involuntary trustee, holding one-half of the joint property, and the rents, issues, and profits therefrom in constructive trust for plaintiff with the duty to convey the same to her/him forthwith.

WHEREFORE, plaintiff prays judgment as follows:

1. That defendant be compelled to account for all joint property acquired and accumulated through the skills, efforts, labor, and earnings of plaintiff and defendant, and each of them, during their relationship;

2. That on ascertaining the nature, extent, and value of the joint property, the court order a division of the property between plaintiff and defendant, and that defendant be declared the constructive trustee of one-half of the property and be compelled to transfer legal title and possession of one-half of that property and one-half of the rents, issues, and profits therefrom to plaintiff;

3. Or, in the alternative, that the court ascertain the nature, extent, and value of the joint property and award plaintiff damages for breach of contract in the amount of one-half of the value of that property;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court deems proper.

_____[*signature*]

Attorney for Plaintiff

[*Verification, if desired. see § 387.160[1].*]

[2] Use of Form

This form is a sample complaint in an action by a nonmarital partner against his or her copartner, in which the plaintiff alleges that he or she had an implied-in-fact agreement with the defendant to pool their efforts and earnings and share in the joint accumulations of property during the time in which they lived with each other (*see § 387.70* et seq.). It also alleges that there was a confidential relationship between plaintiff and defendant in which plaintiff entrusted to defendant all care of the joint property. By failing to acknowledge or account for the joint property at the termination of the relationship, defendant violated the confidential relationship and plaintiff's trust and became the constructive trustee of one-half of the property acquired and accumulated during the relationship (*see § 387.78[3]*).

This complaint is designed to be used in a situation in which the plaintiff partner was financially supported by the defendant partner during their relationship, and performed domestic and other services for the defendant during that time in lieu of holding down a paying job. Because the courts distinguish between services that are ordinarily compensated with money and services that are not, and frequently find the latter to be inseparable from sexual services and thus invalid support for a cohabitation agreement, a complaint of this type should clearly set forth the types of services performed by the plaintiff, in language that distinguishes them from services of a sexual nature (*see § 387.53[2]*).

A complaint on a contract must specify whether the contract is written, oral, or implied by conduct, or it will be subject to a demurrer [*Code Civ. Proc. § 430.10(g)*; *see* Ch. 140, *Contracts*].

For a discussion of the applicability of the equitable doctrine of constructive trust to nonmarital relationships, see *§ 387.78*.

[3] State Statutes

Implied contract defined. *Civ. Code § 1621*

Creation of involuntary (constructive) trust. *Civ. Code § 2224*

[4] Cross References

For discussion and alternative forms for use in actions to impress constructive trusts, see Ch. 561, *Trusts: Constructive Trusts* .

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Volume 34: Newspapers thru Parties-Chs. 386-396
Chapter 387 NONMARITAL COHABITATION
PART IV. FORMS
B. Enforcement Of Rights Under Cohabitation Agreements
2. Enforcement Of Implied Agreements And Equitable Remedies

34-387 California Forms of Pleading and Practice--Annotated § 387.201

§ 387.201 Complaint [Code Civ. Proc. § 425.10] in Quantum Meruit for Reasonable Value of Work, Labor, and Services

[1] FORM Complaint [Code Civ. Proc. § 425.10] in Quantum Meruit for Reasonable Value of Work, Labor, and Services

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONEY
_____ [*name*],	)	(Quantum Meruit)
Defendant.	)	
	)	
	)	

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, a resident of the County of _____, California.

2. On or about _____ [*date*], plaintiff and defendant commenced living with each other. On or about _____ [*date*], the parties separated from each other without any intention of continuing their relationship.

3. During the period in which the parties lived with each other, plaintiff rendered work, labor, and services, to

defendant, which work, labor, and services primarily consisted of _____ [*describe specifically, e.g.,* housekeeping services, accounting services, and secretarial services].

4. At all times herein mentioned, plaintiff reasonably expected to be compensated for the above-described work, labor, and services to defendant, because _____ [*describe basis of plaintiff's reasonable expectation, e.g.,* the work, labor, and services performed by plaintiff are of the type ordinarily performed for compensation, and defendant on several occasions promised to make such compensation].

5. At all times herein mentioned, the reasonable value of the work, labor, and services rendered by plaintiff exceeded the value of support plaintiff received from defendant during the term of their relationship. The total amount by which the reasonable value of the work, labor, and services rendered by plaintiff exceeded the value of support received by plaintiff is $_____.

6. No part of this sum has been paid, and there is now due and unpaid from defendant to plaintiff the sum of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____;

2. For the costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____[*signature*]

Attorney for Plaintiff

[*Verification, if desired. see § 387.160[1].*]

[2] Use of Form

This form is a sample complaint in an action in which a nonmarital partner seeks to recover the reasonable value of services rendered to his or her copartner during the period of their relationship pursuant to an implied-in-fact contract for payment (*see § 387.77[2]*). In order to recover compensation for services rendered on a theory of implied-in-fact contract, the nonmarital partner seeking compensation must establish the following [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 684, 134 Cal. Rptr. 815, 557 P.2d 106]* :

1. That services were performed and the nature of those services;

2. That they were performed with an expectation of payment; and

3. The reasonable value of the services rendered.

For further discussion of the possibly theories of recovery in quantum meruit for services performed for the benefit of a nonmarital partner, see *§ 387.77*.

[3] State Statutes

Complaints in general. *Code Civ. Proc. § 425.10*

[4] Cross References

For general discussion of pleading common counts and related forms, see Ch. 121, *Common Counts* .

For general discussion of contracts and related forms, see Ch. 140, *Contracts* .

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Volume 34: Newspapers thru Parties-Chs. 386-396
Chapter 388 NONPROFIT CORPORATIONS

34-388 California Forms of Pleading and Practice--Annotated 388.syn

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§ 388.13 Suspension of Corporate Powers

[1] Grounds for Suspension

[2] Voidability of Contracts During Suspension

[3] Revocation of Tax Exempt Status

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§ 388.14 Tort Liability

§ 388.15 Alter Ego Liability; Piercing Corporate Veil

§ 388.16 Indemnification of Corporate Agent

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[3] Availability and Scope of Indemnification

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[b] In Action by Corporation or Attorney General

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§ 388.32 Self-Dealing Transactions

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§ 388.33 Law Governing Assets in Charitable Trust

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§ 388.38 Director's Right to Inspect Books and Records

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§ 388.50 Definition of Member and Memberships

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§ 388.52 Members Not Required

§ 388.53 Issuance and Transfer of Memberships

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§ 388.56 Liability of Members Generally

[1] For Dues

[2] Limited Liability to Creditors for Corporation's Obligations

[3] Creditors' Actions to Reach Amounts Due to Corporation

§ 388.57 Liability for Distributions

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[2] Contents of Demand

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[5] Petition to Set Aside Demand of Members

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§ 388.136 Law Reviews

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§ 388.150 Allegation of Capacity and Principal Place of Business [Code Civ. Proc. § 395.5]--Public Benefit Corporation [Corp. Code §§ 5004, 5140]

[1] FORM

[2] Use of Form

[3] Legal Capacity of Corporations

[4] Venue

[5] Cross References

[6] State Statutes

[7] Decisions

§ 388.151 Allegation of Capacity and Principal Place of Business [Code Civ. Proc. § 395.5]--Mutual Benefit Corporation [Corp. Code §§ 5004, 7140]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross Reference

§ 388.152 Proceedings for Indemnification for Defense Expenses [Corp. Code §§ 5238(a),(d),(e)(3), 7237(a),(d),(e)(3)]--Notice of Motion in Pending or Completed Case and Supporting Declaration [Code Civ. Proc. § 2015.5]

[1] FORM

[2] Use of Form

[3] Timing of Motion

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[5] Attorney's Fees and Costs

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[1] FORM

[2] Use of Form

[3] Personal Jurisdiction Over Corporation

[4] Cross Reference

§ 388.154 Proceedings for Indemnification for Defense Expenses [Corp. Code §§ 5238(a),(d),(e)(3), 7237(a),(d),(e)(3)]--Order [Code Civ. Proc. § 1003] Granting Motion for Indemnification for Defense Expenses

[1] FORM

[2] Use of Form

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§ 388.155 Complaint for Indemnification for Defense Expenses--Successful Defense of Underlying Claim [Corp. Code §§ 5238(d), 7237(d)]

[1] FORM

[2] Use of Form

[3] Attorney's Fees and Costs

[4] Verification

[5] Jurisdiction

[6] Cross References

§ 388.156 Complaint for Indemnification for Defense Expenses--Directors or Members Approved Indemnification [Corp. Code §§ 5238(e)(1), (2), 7237(e)(1), (2)]

[1] FORM

[2] Use of Form

[3] Attorney's Fees and Costs

[4] Cross Reference

§ 388.157 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Is Volunteer Director or Executive Officer of Public Benefit Corporation [Corp. Code § 5239]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

[5] State Statutes

§ 388.158 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Is Volunteer Director or Executive Officer of Mutual Benefit Corporation [Corp. Code § 7231.5]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

[5] California Points and Authorities

[6] Cross Reference

§ 388.159 Affirmative Defense [Code Civ. Proc. 431.30(b)(2)--Defendant Is Volunteer Director or Officer of Nonprofit Corporation and Corporation Is Insured [Corp. Code § 5047.5]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Applicability of Defense

[5] Cross Reference

§ 388.160 Proceedings for Order Permitting Filing of Complaint Seeking Damages Against Volunteer Director or Officer of Nonprofit Corporation [Code Civ. Proc. § 425.15]--Petition [Code Civ. Proc. § 425.15(a)] and Supporting Declaration [Code Civ. Proc. § 2015.5]

[1] FORM

[2] Use of Form

[3] Accompanying Papers

[4] Service of Petition and Proposed Pleading

[5] Response by Intended Defendant

[6] Tolling of Limitation Period on Underlying Action

§ 388.161 Proceedings for Order Permitting Filing of Complaint Seeking Damages Against Volunteer Director or Officer of Nonprofit Corporation [Code Civ. Proc. § 425.15]--Notice of Hearing of Petition

[1] FORM

[2] Use of Form

[3] Cross Reference

§ 388.162 Proceedings for Order Permitting Filing of Complaint Seeking Damages Against Volunteer Director or Officer of Nonprofit Corporation [Code Civ. Proc. § 425.15]--Order

[1] FORM

[2] Use of Form

[3] Cross Reference

§ 388.163 Complaint by Creditors of Corporation Against Members to Apply Membership Assessments in Satisfaction of Judgment [Corp. Code §§ 5352, 7353]

[1] FORM

[2] Use of Form

[3] Corporation as Defendant

[4] Jurisdiction

[5] Cross Reference

§ 388.164 Allegations--By Creditor Seeking to Be Joined as Plaintiff [Code Civ. Proc. § 378; Corp. Code §§ 5352(b), 7353(b)]

[1] FORM

[2] Use of Form

[3] Cross Reference

§ 388.165 Complaint by Creditor of Corporation Against Members to Apply Improper Distributions in Satisfaction of Prior Claims [Corp. Code §§ 5420(b), 7420(b), (c)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Punitive Damages

[5] Liability for Fraudulent Transfer

[6] Cross Reference

§ 388.166 Petition for Writ of Mandate [Code Civ. Proc. § 1086] to Enforce Members' Right to Inspect and Copy Membership Lists and Use Them in Mailings [Corp. Code §§ 6331, 8331]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction and Venue

[5] Hearing and Order

[6] Cross References

[7] State Statutes

§ 388.167 Complaint [Code Civ. Proc. § 425.10] for Removal of Director for Cause [Corp. Code §§ 5223, 7223]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Corporation Must Be Party

[5] Jurisdiction and Venue

[6] Cross Reference

§ 388.168 Application for Appointment of Directors [Corp. Code §§ 5220(e), 7220(e)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Where Action May Be Brought

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Chapter 388 NONPROFIT CORPORATIONS
PART I. SCOPE

34-388 California Forms of Pleading and Practice--Annotated § 388.01

§ 388.01 Scope of Chapter

This chapter discusses and contains forms relating to public benefit corporations and mutual benefit corporations, with emphasis on liability and indemnification of directors, rights of members with regard to records, voting, transfer of memberships, derivative actions and dissolution, and rights of creditors to reach assessments and improper distributions.

The chapter includes an allegation of plaintiff's capacity [*see* §§ 388.150-388.151]. It also includes an application for indemnification for expenses, judgment, or settlement by a corporation, director, officer, employee, or agent, either in the form of a notice of motion in a pending or completed case [*see § 388.152*] or an order to show cause if indemnification is related to a threatened action or one in which corporation is not a party [*see § 388.153*], an order for indemnification [*see § 388.154*], and a complaint for indemnification of expenses by a director, officer, employee, or agent who successfully defended the underlying claim [*see § 388.155*] or after directors or members have approved indemnification [*see § 388.156*].

Additionally, the chapter contains affirmative defenses for use by a defendant volunteer director or officer [*see* §§ 388.157-388.159], and forms for use to obtain an order allowing the filing of a complaint for money damages against a volunteer officer or director when the immunity of *Code Civ. Proc. § 425.15* does not apply [*see* §§ 388.160-388.162].

Forms relating to creditors include a complaint by creditors of a corporation against members to apply membership assessments in ssatisfaction of judgment [*see § 388.163*], allegations regarding joinder of other creditors [*see § 388.164*], and a complaint by a creditor of the corporation against members to apply improper distributions in satisfaction of prior claims [*see § 388.165*].

Forms related to members' rights include a petition for writ of mandate to enforce members' right to inspect and copy membership lists and use them in mailings [*see § 388.166*], a complaint by members or director(s) against the corporation and one other director for removal of defendant director [*see § 388.167*], and an application for appointment of directors of a corporation that has not issued memberships when all the directors have resigned, died, or become incompetent, or when the initial directors were not named in the articles and all the incorporators resigned, died, or became incompetent before initial directors were elected [*see § 388.168*].

For a discussion and forms relating to actions for breach of charitable trusts, including a complaint to bring a member's derivative action against a director of a nonprofit corporation for breach of charitable trust, complaints and affirmative defenses for an action seeking damages or an accounting against a director for a self-dealing transaction, and a petition for court supervision of voluntary winding up of a nonprofit corporation, see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

For a detailed discussion of certain types of unincorporated associations and related forms, see Ch. 110, *Churches and Religious Organizations* , Ch. 124, *Condominiums and Other Common Interest Developments* , and Ch. 61, *Associations and Clubs* . Rights and remedies of persons denied or expelled from membership on the basis of discrimination are discussed in Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

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§ 388.02 Cross References

For discussion and forms relating to actions and proceedings involving unincorporated associations, see Ch. 61, *Associations and Clubs* .

For discussion and forms relating to actions and proceedings under the Nonprofit Religious Corporation Law, see Ch. 110, *Churches and Religious Organizations* .

For discussion and forms relating to prohibited bases of exclusion or expulsion from membership, see Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

For discussion and forms relating to actions and proceedings involving common interest associations, see Ch. 124, *Condominiums and Other Common Interest Developments* .

For discussion and forms relating to actions and proceedings under the General Corporation Law, see Ch. 168, *Corporations: Derivative Actions* .

For discussion and forms relating to actions and proceedings involving charitable trusts, including those applicable to nonprofit corporations holding assets in charitable trust, see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

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PART I. SCOPE

34-388 California Forms of Pleading and Practice--Annotated §§ 388.03-388.09

[Reserved]

§§ 388.03[Reserved]

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§ 388.10 Governing Law

Public benefit corporations are governed by the Nonprofit Public Benefit Corporation Law, *Corp. Code § 5110 et seq.* [*see Corp. Code § 5060*]. Mutual benefit corporations are governed by the Nonprofit Mutual Benefit Corporation Law, *Corp. Code 7110 et seq.* [*see Corp. Code § 5059*]. *Corp. Code § 5000 et seq.* sets forth general provisions and definitions governing all nonprofit corporations. When a nonprofit mutual benefit corporation holds assets in charitable trust, the conduct of its directors will be governed by *Corp. Code § 5230 et seq.*, the standards of conduct applicable to nonprofit public benefit corporations with respect to the assets held in charitable trust [*Corp. Code § 7238*].

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§ 388.11 Types of Nonprofit Corporations

[1] Public and Mutual Benefit

A nonprofit public benefit corporation may be established for any public or charitable purpose [*Corp. Code § 5111*]. Its assets are deemed to be impressed with a charitable trust, by virtue of the charitable purposes set forth in the articles of incorporation [*American Center For Education, Inc. v. Cavnar (1978) 80 Cal. App. 3d 476, 486, 145 Cal. Rptr. 736* ; *see Corp. Code § 5130* (articles required to provide statement of public and/or charitable purpose)].

A nonprofit mutual benefit corporation may be formed for any lawful purpose. If all of a corporation's assets, however, are irrevocably dedicated to charitable, religious or public purposes and if, on dissolution, the law or the corporation's articles or bylaws require its assets to be distributed to a person or persons carrying on a charitable, religious, or public purpose or purposes, the corporation may not be formed as a nonprofit mutual benefit corporation [*Corp. Code § 7111*].

When a nonprofit mutual benefit corporation holds charitable assets in trust, the Nonprofit Mutual Benefit Corporation Law (*Corp. Code § 7110 et seq.*) includes several special provisions applicable only to those corporations [*see Corp. Code §§ 7135* (power of court to impress charitable trust on assets of mutual benefit corporation), *7238* (director of corporation holding assets in charitable trust subject to same standards applied to director of nonprofit public benefit corporation), *7240* (corporation holding assets in charitable trust subject to examination by Attorney General), *7913* (notice to Attorney General of disposition of assets held in trust); *see generally* Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts*].

[2] Owners Association

Typically, no person may hold more than one membership in a nonprofit mutual benefit corporation, nor may any fractional memberships be held, unless the memberships are held in an owners' association [*Corp. Code § 7312*]. However, the articles or bylaws of an owners' association, created in connection with any of the forms of development referred to in *Bus. & Prof. Code § 11004.5*, may permit a person who owns an interest, or who has a right of exclusive occupancy, in more than one lot, parcel, area, apartment, or unit to hold a separate membership in the owners' association for each such lot, parcel, area, apartment, or unit [*Corp. Code § 7312(d)*]. Owners' associations are

discussed in Ch. 124, *Condominiums and Other Common Interest Developments* .

[3] Mutual Water Company

In the case of membership in a mutual water company, as defined in *Corp. Code § 14300*, the articles or bylaws may permit a person entitled to membership by reason of the ownership, lease, or right of occupancy of more than one lot, parcel, or other service unit to hold a separate membership in the mutual water company for each lot, parcel, or other service unit [*Corp. Code § 7312(e)*].

[4] Religious Corporations

A nonprofit religious corporation is governed generally by *Corp. Code § 9110 et seq.* A nonprofit religious corporation may be formed primarily or exclusively for any religious purposes [*Corp. Code § 9111*]. A corporation sole may be formed by the bishop, chief priest, presiding elder, or other presiding officer of any religious denomination, society, or church, for the purpose of administering and managing its affairs, property, and temporalities [*Corp. Code § 10002*]. Religious organizations are discussed in Ch. 110, *Churches and Religious Organizations* .

[5] Eleemosynary Corporations Organized Before 1980

Eleemosynaries organized or existing under former former *Corp. Code § 10200 et seq.*, in effect on December 31, 1979, are deemed to be nonprofit public benefit corporations organized for charitable purposes and are subject to the Nonprofit Public Benefit Corporation Law (*Corp. Code § 5110 et seq.*). If the corporation is organized exclusively for religious purposes, however, it is deemed to be a nonprofit religious corporation, and is subject to the Nonprofit Religious Corporation Law (*Corp. Code § 9110 et seq.*) [*Corp. Code § 10200*].

[6] Medical or Hospital Services and Health Care Plan Corporations

A nonprofit corporation may be formed as a public benefit or mutual benefit corporation for the purpose of defraying or assuming the cost of medical services [*see Corp. Code § 10810 et seq.*]. A corporation may be organized as a health care service plan, as defined in *Health & Safety Code § 1345(f)*, under the laws pertaining to nonprofit public and mutual benefit corporations [*see Corp. Code § 10820 et seq.*].

[7] Legal Services Corporation

A nonprofit corporation may be formed as a mutual benefit corporation for the purposes of administering a system or systems of defraying the cost of professional services of attorneys [*see Corp. Code § 10830 et seq.*].

[8] Unincorporated Associations

A nonprofit association is an unincorporated association with a primary common purpose other than to operate a business for profit [*Corp. Code § 18020(a) see* Ch. 61, *Associations and Clubs*].

[9] Trade or Commerce Association Formed Before 1980

A nonprofit corporation that was organized for certain purposes, such as a chamber of commerce, a board of trade, and a mechanics' institute, former *Corp. Code § 12000 et seq.* in effect on December 31, 1979, is governed by the General Corporation Law (*Corp. Code § 100 et seq.*) if the corporation is organized with capital stock. It is subject to the Nonprofit Mutual Benefit Corporation Law (*Corp. Code 7110 et seq.*) if the corporation is organized without capital stock [*Corp. Code § 12000*].

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§ 388.12 Capacity to Sue and Be Sued

A nonprofit corporation may be sued as provided in the Code of Civil Procedure. As a condition of its existence as a corporation, it is subject to the provisions of the Code of Civil Procedure authorizing the attachment of corporate property [*Corp. Code §§ 5004, 5005*; *see also* Ch. 160, *Corporations: Capacity*].

A nonprofit corporation, even though it is not engaged in business but is organized for social welfare work, may maintain an action for libel without proof of special damage, if it is dependent for its support on voluntary contributions, the number and amount of which are likely to be affected by the publication on which the complaint is based [*see Washburn v. Wright (1968) 261 Cal. App. 2d 789, 793, 68 Cal. Rptr. 224* , and related form in Ch. 61, *Associations and Clubs*].

For forms alleging the capacity and principal place of business of a nonprofit corporation, see *§§ 388.150* and *388.151*.

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§ 388.13 Suspension of Corporate Powers

[1] Grounds for Suspension

The corporate powers, rights, and privileges of a domestic or foreign public or mutual benefit corporation that is exempt from paying franchise taxes may be suspended or forfeited, as the case may be, for failure to file the annual return or statement required under *Rev. & Tax. Code § 23772* or *23774*, or to pay any amount due under *Rev. & Tax. Code § 23703* or *23772* on or before the last day of the 12th month following the close of its taxable year [*Rev. & Tax. Code § 23775*; *see also* Ch. 160, *Corporations: Capacity*].

The corporate powers, rights, and privileges of a domestic or foreign public or mutual benefit corporation also may be suspended or forfeited, as the case may be, for any of the following acts [*Rev. & Tax. Code §§ 23301*, *23301.5*; *see Rev. & Tax. Code § 19141* (specified monetary penalty for failure to file reports required by *Corp. Code § 6810* or *8810*)]:

- Failure to pay any tax, penalty, or interest, or any portion thereof, which is due and payable under the Corporation Tax Law [*Rev. & Tax. Code § 23001 et seq.*] or the administrative provisions [*Rev. & Tax Code § 19001 et seq.*], either at the time the return is required to be filed, or on or before the 15th day of the ninth month following the close of the taxable year, by 6:00 p.m. on the last day of the 12th month after the close of the taxable year;

- Failure to pay any tax, penalty, or interest, or any portion thereof, due and payable on notice and demand from the Franchise Tax Board, or due and payable under the Corporation Tax Law (*Rev. & Tax. Code § 23001 et seq.*) or the administrative provisions (*Rev. & Tax Code § 19001 et seq.*) by 6:00 p.m. on the last day of the 11th month following the due date of the tax; or

- Failure to file a return.

[2] Voidability of Contracts During Suspension

Every contract made while a corporation's powers are suspended or forfeited is voidable by the party other than the

corporate taxpayer. The party that has the right to declare a contract to be voidable may only exercise that right in a lawsuit with respect to the contract. The rights of the parties to the contract will be affected only to the extent expressly provided by a final judgment, which will not be issued unless the corporate taxpayer has been given a reasonable opportunity to cure the voidability [*Rev. & Tax. Code §§ 23304.1(a), 23304.5*; for discussion and forms, *see* Ch. 160, *Corporations: Capacity*].

[3] Revocation of Tax Exempt Status

Any exemption that has been granted to an organization under *Rev. & Tax. Code § 23701 et seq.* may be revoked by the Franchise Tax Board if the organization fails to to do any of the following [*Rev. & Tax. Code § 23777*]:

- File any return required under *Rev. & Tax. Code § 23772 et seq.* or pay any amount due under the Corporation Tax Law [*see Rev. & Tax. Code § 23703 et seq.*] or *Rev. & Tax. Code § 18401 et seq.* on or before the last day of the 12th month following the close of the taxable year;

- Comply with *Rev. & Tax. Code § 19504* (relating to powers of the Franchise Tax Board to examine records and subpoena witnesses); or

- Confine its activities to those permitted by the section under which the exemption was granted.

[4] Reestablishment of Exemption

An organization that has had its exempt status revoked may be reestablished as an exempt organization by doing all of the following [*Rev. & Tax. Code § 23778*]:

- Filing a new application for exemption and paying a specified filing fee [*see Rev. & Tax. Code § 23701*];

- Filing any returns, statements, or paying amounts due that were not previously submitted or paid and that resulted in the revocation; and

- If revocation occurred under *Rev. & Tax. Code § 23777(c)* (engaging in activities beyond the scope of the exemption), filing satisfactory proof that the organization has corrected its nonexempt activities and will operate in an exempt manner in the future, and paying any tax for the period during which the organization was not qualified for exemption.

[5] Relief From Suspension

Any organization that has been suspended or suffered the forfeiture provided for in *Rev. & Tax. Code § 23775* may be revived by filing all of the following [*Rev. & Tax. Code § 23776(a)*; *see also Rev. & Tax. Code § 23305a* (certificate of revivor) discussed in Ch. 160, *Corporations: Capacity*]:

- An application of revivor;

- A new application for exemption [*see Rev. & Tax. Code § 23701*], if required by the Franchise Tax Board;

- Any returns, statements, notifications, or amounts due under *Rev. & Tax Code § 23772*, *23774*, or *23775*, which were not previously submitted or paid, and which resulted in the suspension or forfeiture; and

- An information return or statement and the amounts specified under *Rev. & Tax. Code § 23772* for each year, or part of a year, during the period of suspension or forfeiture in which the organization conducted any activities or received income, grants, gifts, or any other asset.

Any organization exempt from tax under *Rev. & Tax. Code § 23701* which has suffered the suspension provided for in *Rev. & Tax. Code § 23301* or *23301.5* may be required by the Franchise Tax Board to file a new application for exemption in connection with an application for revivor [*Rev. & Tax. Code § 23776(b)*; *see Rev. & Tax. Code § 23305*].

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§ 388.14 Tort Liability

Charitable immunity does not exist under California law. Thus, California nonprofit corporations and their directors, officers, employees, and agents are liable for their torts [*see Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 503-514, 229 Cal. Rptr. 456, 723 P.2d 573* ; *Raven's Cove Townhomes, Inc. v. Knuppe Development Co. (1981) 114 Cal. App. 3d 783, 799-803, 171 Cal. Rptr. 334* ; *see Civ. Code § 1714(a)* (everyone is liable for injuries arising from willful or negligent acts); *see also* Ch. 124, *Condominiums and Other Common Interest Developments* , and Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts*].

An individual director is liable if he or she specifically authorizes, directs, or participates in the corporation's tortious conduct, or knows or reasonably should know that some hazardous condition or activity under his or her control could injure a third person, and negligently fails to take or order appropriate action to avoid the harm [*Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 508-509, 229 Cal. Rptr. 456, 723 P.2d 573* (and cases cited therein)]. *Frances T. v. Village Green Owners Assn.* was an action brought by a condominium owner against a homeowners' association and its directors for damages for personal injuries inflicted by an intruder. The assault was alleged to have occurred because of the association's failure to provide adequate lighting in common areas. The association's liability was premised on its duty as a landlord and its failure to perform that duty by providing adequate lighting [*Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 499, 503, 229 Cal. Rptr. 456, 723 P.2d 573]* .

Raven's Cove Townhomes, Inc. v. Knuppe Development Co. involved liability for failure to exercise supervisory and managerial responsibilities. The members of a homeowners' association brought an action against the former board of directors of the association, who were also the developers of the townhouses, for breach of their fiduciary duties to the association in failing to properly determine operating costs and fund a maintenance reserve account. The developer-directors were held strictly liable for failing to exercise their supervisory and managerial responsibility to assess each condominium unit for adequate reserve funds for the purpose of maintenance and repair [*Raven's Cove Townhomes, Inc. v. Knuppe Development Co. (1981) 114 Cal. App. 3d 783, 798-801, 171 Cal. Rptr. 334* (developer knew that bay front exposure created particular maintenance problems regarding paint and exterior trim)]. Furthermore, a potential for conflict of interest existed on the part of the developer-directors. Directors have the obligation to act with undivided loyalty and to avoid transactions that benefit the developer's interest at the expense of the association and its

members [*see* *Raven's Cove Townhomes, Inc. v. Knuppe Development Co. (1981) 114 Cal. App. 3d 783, 799, 171 Cal. Rptr. 334]* . The fiduciary relationship between the directors of the association and its homeowners is analogous to that of a corporate promoter and the corporate shareholders [*Raven's Cove Townhomes, Inc. v. Knuppe Development Co. (1981) 114 Cal. App. 3d 783, 800, 171 Cal. Rptr. 334]* .

For a discussion of limited immunity of volunteer directors and officers, *see § 388.17*.

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§ 388.15 Alter Ego Liability; Piercing Corporate Veil

The alter ego doctrine is not specifically mentioned in the Nonprofit Public or Mutual Benefit Corporation Law (*Corp. Code §§ 5110 et seq., 7110 et seq.*), or in the General Corporation Law (*Corp. Code § 100 et seq.*) [*but see Corp. Code § 300(e)* (disregard of corporate formalities by principals of close corporation as not to be considered in determining whether shareholders are liable for debts of corporation)]. It is an equitable doctrine [*Dow Jones Co. v. Avenel (1984) 151 Cal. App. 3d 144, 147-148, 198 Cal. Rptr. 457]* . It appears that there are no reported California cases that apply the alter ego doctrine to impose liability for an obligation of a nonprofit corporation on a person who controlled that corporation. Nevertheless, the doctrine arguably should apply in the nonprofit context to impose liability on an individual who disregards the corporate entity or uses his or her control of a nonprofit corporation for private gain or to conceal or divert assets, and it would be inherently unfair to the third party not to pierce the corporate veil [*see Minifie v. Rowley (1921) 187 Cal. 481, 487, 202 P. 673* (elements necessary for application of doctrine); *see also* Advising California Nonprofit Corporations, § 5.63 (Cal. C.E.B. 1984)]. For discussion of the alter ego doctrine and forms relating to the procedural aspects of its application, see Ch. 161, *Corporations: Alter Ego Liability* .

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§ 388.16 Indemnification of Corporate Agent

[1] In General

The Nonprofit Public Benefit Corporation Law (*Corp. Code § 5110 et seq.*) and the Nonprofit Mutual Benefit Corporation Law (*Corp. Code § 7110 et seq.*) contain similar indemnity provisions that closely parallel the indemnity provisions in the General Corporation Law (*Corp. Code § 100 et seq.*) [*see Corp. Code § 317* (indemnity provision in General Corporation Law); *see also* Ch. 167, *Corporations: Directors and Management* ; Ballantine & Sterling, California Corporation Laws, Ch. 19, § 406.08].

In general, a nonprofit public or mutual benefit corporation has the power to indemnify any person who was or is a party, or is threatened to be made a party, to any "proceeding" by reason of the fact that the person is or was an "agent" of the corporation, against "expenses" actually and reasonably incurred in connection with the proceeding [*Corp. Code §§ 5238(b), 7237(b)*].

[2] Definition of Agent, Proceeding, and Expenses

For the purposes of *Corp. Code § 5238* or *7237*, "agent" means any one of the following persons [*Corp. Code §§ 5238(a), 7237(a)*]:

(1) Anyone who is or was a director, officer, employee, or other agent of the corporation;

(2) Anyone who is or was serving at the request of the corporation as a director, officer, employee, or agent of another foreign or domestic corporation, partnership, joint venture, trust, or other enterprise; or

(3) Anyone who was a director, officer, employee, or agent of a foreign or domestic corporation that was a predecessor corporation of the corporation or of another enterprise at the request of the predecessor corporation.

The term "proceeding" is defined as any threatened, pending, or completed action or proceeding, whether civil, criminal, administrative, or investigative [*Corp. Code §§ 5238(a), 7237(a)*].

"Expenses" include, without limitation, attorneys' fees and any expenses of establishing a right to indemnification under *Corp. Code § 5238(d)* or *(e)(3)* or *7237(d)* or *(e)(3)* [*Corp. Code §§ 5238(a), 7237(a)*].

[3] Availability and Scope of Indemnification

[a] In Action Other Than by Corporation or Attorney General

Any person who was or is a party or is threatened to be made a party to any proceeding by reason of the fact that the person is or was an agent of the corporation may be indemnified by the corporation against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred in connection with the proceeding if the person acted in good faith and in a manner he or she reasonably believed to be in the best interests of the corporation. In a criminal proceeding, the person must also have no reasonable cause to believe his or her conduct was unlawful [*Corp. Code §§ 5238(b), 7237(b)*; *see Corp. Code § 7238* (*Corp. Code § 5233* as applicable to mutual benefit corporation holding assets in charitable trust)]. However, the corporation may not indemnify the person in an action by or in the right of the corporation to procure a judgment in its favor, or in an action brought under *Corp. Code § 5233* (respecting self-dealing transactions) or by the Attorney General or a person granted relator status by theAttorney General for breach of duty relating to the assets held in charitable trust [*Corp. Code §§ 5238(b), 7237(b)*].

The termination of the proceeding by judgment, order, settlement, conviction, or on a plea of nolo contendere or its equivalent will not, of itself, create a presumption that the person did not act in good faith and in a manner that the person reasonably believed to be in the best interests of the corporation, or that the person had reasonable cause to believe that his or her conduct was unlawful [*Corp. Code §§ 5238(b), 7237(b)*].

[b] In Action by Corporation or Attorney General

Any person who was or is a party or is threatened to be made a party to any threatened, pending, or completed action by or in the right of the corporation, brought under *Corp. Code § 5233* (regarding self-dealing transactions), or brought by the Attorney General or a person granted relator status by the Attorney General for breach of duty relating to the assets held in charitable trust, to procure a judgment in its favor by reason of the fact that the person is or was an agent of the corporation, may be indemnified by the corporation against expenses actually and reasonably incurred in connection with the defense or settlement of the action. To be entitled to indemnification, the person must have acted in good faith and in a manner he or she believed to be in the best interests of the corporation, and with the care, including reasonable inquiry, that an ordinarily prudent person in a like position would use under similar circumstances [*Corp. Code §§ 5238(c), 7237(c)*; *see Corp. Code § 7238* (*Corp. Code § 5233* as applicable to mutual benefit corporation holding assets in charitable trust)].

No indemnification will be made pursuant to *Corp. Code § 5238(c)* or *7237(c)* in the following situations [*Corp. Code §§ 5238(c), 7237(c)*]:

- With respect to any claim, issue, or matter as to which the person is determined to be liable to the corporation in the performance of the person's duty to the corporation. Nevertheless, the person may be indemnified if, and to the extent that, the court in which the proceeding is or was pending determines on application that, in view of all the circumstances of the case, the person is fairly and reasonably entitled to indemnity for the expenses that the court will determine;

- With respect to amounts paid in settling or otherwise disposing of a threatened or pending action, with or without court approval; or

- With respect to expenses incurred in defending a threatened or pending action that is settled or

otherwise disposed of without court approval unless it is settled with the approval of the Attorney General.

[4] Determination to Indemnify

[a] Mandatory Indemnification

To the extent that an agent of a corporation has been successful on the merits in defense of any proceeding referred to in *Corp. Code § 5238(b)* or *(c)* or *7237(b)* or *(c)* (discussed *above*), or in defense of any claim, issue, or matter in the proceeding, the agent must be indemnified against expenses actually and reasonably incurred by the agent in connection with the proceeding [*Corp. Code §§ 5238(d), 7237(d)*].

For forms of application, order to show cause, and order awarding indemnification for defense expenses, see §§ 388.152-388.154. For a form of complaint for indemnification expenses, see *§ 388.155*.

[b] Permissive Indemnification

Except for the mandatory indemnification (discussed *above*), any indemnification will be made by the nonprofit public or mutual benefit corporation only if authorized in a specific case, on a determination that indemnification of the agent is proper in the circumstances because the agent has met the applicable standard of conduct set forth in *Corp. Code § 5238(b)* or *(c)* or *7237(b)* or *(c)*, by one of the following [*Corp. Code §§ 5238(e), 7237(e)*]:

- A majority vote of a quorum consisting of directors who are not parties to the proceeding;

- Approval of the members (defined in *Corp. Code § 5034*), with the persons to be indemnified not being entitled to vote; or

- The court in which the proceeding is or was pending on application made by the corporation, agent, attorney, or other person rendering services in connection with the defense, whether or not the application by the agent, attorney, or other person is opposed by the corporation.

For forms of application, order to show cause, and order awarding indemnification for defense expenses, see §§ 388.152-388.154.

[c] Advancement of Expenses

Expenses incurred in defending any proceeding may be advanced by the corporation prior to the final disposition of the proceeding after the corporation receives an undertaking by or on behalf of the agent to repay the amount, unless it is determined ultimately that the agent is entitled to be indemnified [*Corp. Code §§ 5238(f), 7237(f)*]. *Corp. Code §§ 5236(a)* and *7235(a)* (restrictions on corporate loans, guarantees, and advances to directors and officers) do not apply to such advances [*Corp. Code §§ 5238(f), 7237(f)*].

[d] When Indemnification Invalid

A provision made by a nonprofit public or mutual benefit corporation to indemnify its directors or officers or those of its subsidiary for the defense of any proceeding, whether contained in the articles, bylaws, a resolution of members or directors, an agreement, or otherwise, is invalid unless it is consistent with *Corp. Code § 5238* or *7237* [*Corp. Code §§ 5238(g), 7237(g)*]. These sections, however, do not affect any right to indemnification to which persons other than the directors and officers may be entitled by contract or otherwise [*Corp. Code §§ 5238(g), 7237(g)*].

No indemnification or advance may be made under *Corp. Code § 5238* or *7237*, except as provided in *Corp. Code §*

5238(d) or *(e)(3)* or *7237(d)* or *(e)(3)* [*see § 388.16[4]*], in any of the following circumstances [*Corp. Code §§ 5238(h), 7237(h)*]:

(1) The indemnification or advance is inconsistent with a provision of the articles, bylaws, a resolution of the members, or an agreement in effect at the time of the accrual of the alleged cause of action asserted in the proceeding in which the expenses were incurred or other amounts were paid, which prohibits or otherwise limits indemnification; or

(2) The indemnification or advance is inconsistent with any condition expressly imposed by a court approving a settlement.

[5] Insurance

A nonprofit public or mutual benefit corporation has the power to purchase and maintain insurance on behalf of any agent of the corporation against any liability asserted against or incurred by the agent in the capacity of agent or arising out of the agent's status as an agent, whether or not the corporation would have the power to indemnify the agent against the liability under the provisions of *Corp. Code § 5238* or *7237*[*Corp. Code §§ 5238(i), 7237(i)*]. A public benefit corporation or a mutual benefit corporation holding assets in charitable trust, however, has no power to purchase and maintain the insurance to indemnify any agent of the corporation for a violation of the provisions with respect to self-dealing transactions described in *Corp. Code § 5233* [*Corp. Code §§ 5238(i), 7237(i)*].

[6] Special Rules for Employee Benefit Plan Fiduciaries

Corp. Code § 5238 or *7237* does not apply to any proceeding against any trustee, investment manager, or other fiduciary of an employee benefit plan in the person's capacity as a trustee, investment manager, or other fiduciary, even though the person may also be an agent, as defined in *Corp. Code § 5238(a)* or *7237(a)*, of the employer corporation [*Corp. Code §§ 5238(j), 7237(j)*]. A corporation has the power to indemnify the trustee, investment manager, or other fiduciary to the extent permitted by *Corp. Code § 207(f)* [*Corp. Code §§ 5238(j), 7237(j)*; *see Corp. Code § 207(f)* (subject to limitation in articles, corporation may indemnify and purchase and maintain insurance on behalf of fiduciaries of plans or trusts)].

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§ 388.17 Liability of Volunteer Directors and Officers

[1] In General

Nonprofit public and mutual benefit corporations have different provisions for the liability of volunteer directors and officers [*see Corp. Code §§ 5239, 7231.5*]. But certain terms are defined in the same manner for both types of nonprofit corporations [*see § 388.17[2]*].

[2] Definitions

"Volunteer" is defined as the rendering of services without compensation [*Corp. Code §§ 5239(b), 7231.5(b)*].

"Compensation" means remuneration whether by way of salary, fee, or other consideration for services rendered. The payment of per diem, mileage, or other reimbursement expenses to a director or executive officer does not affect that person's status as a volunteer [*Corp. Code §§ 5239(b), 7231.5(b)*].

The term "executive officer" includes the president, vice president, secretary, or treasurer of the corporation, or any other individual who serves in a similar capacity, who assists in establishing the policy of the corporation [*Corp. Code §§ 5239(c), 7231.5(c)*].

[3] Volunteers of Public Benefit Corporations

A volunteer director or volunteer executive officer of a nonprofit public benefit corporation is not personally liable to a third party for monetary damages caused by the director or executive officer's negligent act or omission in the performance of that person's duties as a director or executive officer if all of the following conditions are met [*Corp. Code § 5239(a)*; *see also Corp. Code § 5239(g)* (applies to acts occurring on or after January 1, 1988)]:

(1) The act or omission was within the scope of the director's or executive officer's duties;

(2) The act or omission was performed in good faith;

(3) The act or omission was not reckless, wanton, intentional, or grossly negligent; and

(4) Damages caused by the act or omission are covered pursuant to a liability insurance policy issued to the corporation, either in the form of a general liability policy, a director's and officer's liability policy, or personally to the director or executive officer.

If the damages are not covered by a liability insurance policy, the volunteer director or executive officer is not personally liable for the damages if the board of directors of the corporation and the person have made all reasonable efforts in good faith to obtain available liability insurance [*Corp. Code § 5239(a)(4)*]. A nonprofit public benefit corporation with an annual budget of less than $25,000 that is exempt from federal income taxation under *I.R.C. § 501(c)(3)* makes "all reasonable efforts in good faith to obtain available liability insurance" if it makes at least one inquiry per year to purchase a general liability insurance policy with a coverage amount of at least $25,000 and that insurance is not available at a cost of less than 5 percent of the previous year's budget of the corporation [*Corp. Code § 5239(h)*]. For a nonprofit public benefit corporation in its first year of operation, *Corp. Code § 5239(h)* applies for as long as the budget of the corporation does not exceed $25,000 in its first year of operation [*Corp. Code § 5239(h)*].

Corp. Code § 5239 does not eliminate or limit the director or officer's liability with respect to self-dealing transactions, improper distributions, loans, and guarantees, and in any action or proceeding brought by the Attorney General [*Corp. Code § 5239(e)*; *see Corp. Code §§ 5233, 5237* (self-dealing)].

Nothing in *Corp. Code § 5239* limits the liability of the corporation for any damages caused by acts or omissions of the volunteer director or executive officer [*Corp. Code § 5239(d)*] or creates a duty of care or basis of liability for damages or injury caused by the acts or omissions of a director or officer [*Corp. Code § 5239(f)*].

For a form for an affirmative defense for use by a volunteer director or officer of a public benefit corporation, see *§ 388.157*.

[4] Volunteers of Trade, Professional, and Labor Organizations Established as Mutual Benefit Corporations

Except as provided in *Corp. Code §§ 7233*(dealing with transactions involving directors) and 7236 (respecting directors' liability for distributions, loans, and guarantees), there is no monetary liability on the part of, and no cause of action for damages will arise against, any volunteer director or volunteer executive officer of a nonprofit mutual benefit corporation based on any alleged failure to discharge the person's duties as a director or officer if the duties are performed in a manner that meets all of the following criteria [*Corp. Code § 7231.5(a)*]:

- The duties are performed in good faith;

- The duties are performed in a manner the director or officer believes to be in the best interests of the corporation; and

- The duties are performed with the care, including reasonable inquiry, that an ordinarily prudent person in a like position would use under similar circumstances.

Corp. Code § 7231.5 applies only to trade, professional, and labor organizations incorporated pursuant to the Nonprofit Mutual Benefit Corporation Law that operate exclusively for fraternal, educational, and other nonprofit purposes, and under the provisions of *I.R.C. § 501(c)*[*Corp. Code § 7231.5(d)*]. *Corp. Code § 7231.5* does not limit the provisions of *Corp. Code § 7231*, describing general duties and liabilities of directors [*Corp. Code § 7231.5(e)*].

For a form for an affirmative defense for use by a volunteer director or officer of a mutual benefit corporation, see *§*

388.158.

[5] Volunteers of Tax-Exempt and Insured Nonprofit Corporations

[a] Immunity for Good Faith Acts Within Scope of Duties

Except as otherwise provided in *Corp. Code § 5047.5*, no cause of action for monetary damages arises against any person serving without compensation as a director or officer of a nonprofit corporation subject to the Nonprofit Public Benefit Corporation Law (*Corp. Code § 5110 et seq.*), Nonprofit Mutual Benefit Corporation Law (*Corp. Code § 7110 et seq.*), or Nonprofit Religious Corporation Law (*Corp. Code § 9110 et seq.*) on account of any negligent act or omission occurring (1) within the scope of that person's duties as a director acting as a board member, or within the scope of that person's duties as an officer acting in an official capacity; (2) in good faith; (3) in a manner that the person believes to be in the best interest of the corporation; and (4) is in the exercise of his or her policymaking judgment [*Corp. Code § 5047.5(b)*; *see Corp. Code § 5047.5(a)* (declaration of legislative intent)]. For these purposes, the payment of actual expenses incurred in attending meetings or otherwise in the execution of the duties of a director or officer does not constitute compensation [*Corp. Code § 5047.5(f)*].

[b] Tax-Exempt Status and General Liability Insurance Required

Corp. Code § 5047.5 only applies to nonprofit corporations organized to provide religious, charitable, literary, educational, scientific, social, or other forms of public service that are exempt from federal income taxation under *I.R.C. § 501(c)(3)* or *501(c)(6)*[*Corp. Code § 5047.5(d)*].

In addition, the immunity applies only if the following conditions are met:

- The nonprofit corporation maintains a general liability insurance policy with an amount of coverage of at least $500,000 if the corporation's annual budget is less than $50,000, or $1,000,000, if the corporation's annual budget equals or exceeds $50,000 [*Corp. Code § 5047.5(e)*]; and

- The claim against the director or officer may also be made directly against the corporation, and a liability insurance policy is applicable to the claim [*Corp. Code § 5047.5(e)*].

If a general liability policy is found to cover the damages caused by the director or officer, no cause of action may be maintained against the director or officer [*Corp. Code § 5047.5(e)*].

For a form for an affirmative defense under *Corp. Code § 5047.5* for use by a volunteer director or officer of a nonprofit corporation, see *§ 388.159*.

[c] When Immunity Does Not Apply

Corp. Code § 5047.5 does not limit the liability of a director or officer for any of the following [*Corp. Code § 5047.5(c)*]:

- Self-dealing transactions, as described in *Corp. Code § 5233* (applicable to public benefit corporations) or *9243* (applicable to religious corporations) [*see Corp. Code § 7238* (*Corp. Code § 5233* as applicable to mutual benefit corporation holding assets in charitable trust)];

- Conflicts of interest, as described in *Corp. Code § 7233*, applicable to mutual benefit corporations;

- Actions with respect to directors' liability for improper distributions, loans, and guarantees, as described in *Corp. Code § 5237* (public benefit corporations), 7236 (mutual benefit corporations), or

9245 (religious corporations);

- In the case of a charitable trust, an action or proceeding against a trustee brought by a beneficiary of the trust;

- Any action or proceeding brought by the Attorney General;

- Intentional, wanton, or reckless acts, gross negligence, or an action based on fraud, oppression, or malice; or

- Actions brought under the Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*).

Corp. Code § 5047.5 also does not apply to any volunteer director or officer who receives compensation from the corporation in any other capacity, including, but not limited to, as an employee [*Corp. Code § 5047.5(i)*].

Corp. Code § 5047.5 does not limit the liability of a nonprofit corporation for any negligent act or omission of a director, officer, employee, agent, or servant occurring within the scope of his or her duties [*Corp. Code § 5047.5(g)*], nor does it apply to any corporation that unlawfully restricts membership, services, or benefits conferred on the basis of political affiliation, age, or any characteristic listed or defined in *Civ. Code § 51(b)* or *(e)* ("Unruh Civil Rights Act"); i.e., sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation [*Corp. Code § 5047.5(h)*].

The difference between a negligent act within the scope of an officer's or director's duty and an intentional act for which the officer or director may be liable is illustrated (in the context of for-profit case law) by the nonrenewal or termination of a third party's contract with a corporation. If the officer or director votes to terminate the contract for reasons he or she believes serve the corporation's best interests, the officer or director would not be liable. However, a director or officer who, motivated by political alliances, influences the corporation to terminate a third party's contract with the corporation may be liable for intentional interference with economic advantage [*see, e.g., Plate v. Sun-Diamond Growers (1990) 225 Cal. App. 3d 1115, 1126, 275 Cal. Rptr. 667* (officers who persuaded corporation to terminate exclusive sales representative and then left corporation, started own firm, and became exclusive representative in same area held liable and not entitled to indemnification from corporation); *Mouchette v. Board of Education (1990) 217 Cal. App. 3d 303, 312, 266 Cal. Rptr. 1* (director of school board who, motivated by political alliances, influenced board to terminate plaintiff's contract)].

[6] Court Order to Sue Volunteer Officer or Director

[a] When Order Is Required

If a nonprofit corporation is organized to provide charitable, educational, scientific, social, or other forms of public service, and bases its federal income tax exemption on any of the Internal Revenue Code sections listed below, no cause of action may be filed against any of its volunteer officers or directors for any act or omission done while acting in the capacity of, and scope of his or her duties as, a board member or officer without first obtaining a court order allowing the complaint or other pleading that includes that claim to be filed [*Code Civ. Proc. § 425.15(a), (e)(1)*]. The nonprofit corporation for which the volunteer director or officer serves must base its federal income tax exemption on one of the following [*Code Civ. Proc. § 425.15(e)(1)*]:

- *I.R.C. § 501(c)(1)* (entities organized under federal law), except any credit union;

- *I.R.C. § 501(c)(4)* (civic leagues and employee associations);

- *I.R.C. § 501(c)(5)* (labor, agricultural, or horticultural);
- *I.R.C. § 501(c)(7)* (clubs for pleasure or recreation); or
- *I.R.C. § 501(c)(19)* (armed forces or veterans' organizations).

The protection of *Code Civ. Proc. § 425.15(a)* applies to volunteer officers and directors of all nonprofit corporations, whether organized as public benefit, mutual benefit, or religious corporations [*Code Civ. Proc. § 425.15(e)(1)*]. A "volunteer" may receive per diem, mileage, or other reimbursement expenses and remain a volunteer within the meaning of *Code Civ. Proc. § 425.15*, but he or she cannot receive any compensation or remuneration whether by way of salary, fee, or other consideration for services rendered [*Code Civ. Proc. § 425.15(d)*].

Unlike some of the other statutes providing immunity to volunteer officers and directors [*see, e.g., Corp. Code §§ 5047.5, 5239*; *§ 388.17[3*] and *§ 388.17[5]*], *Code Civ. Proc. § 425.15* does not require the volunteer to have acted in good faith, nor is insurance, or an attempt to acquire insurance, a criterion. The volunteer receives this pre-filing protection if the act or omission was done in the scope of the volunteer office [*see Code Civ. Proc. § 425.15(a)*]. This protection does not extend to any corporationthat unlawfully restricts membership, services, or benefits conferred on the basis of political affiliation, age, or any characteristic listed or defined in *Civ. Code § 51(b)* or *(e)* ("Unruh Civil Rights Act"); i.e., sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation [*Code Civ. Proc. § 425.15(e)(2)*]. Nothing in *Code Civ. Proc. § 425.15* is to be construed to affect any action against the corporation for a negligent act or omission of one of its volunteer officers or directors [*Code Civ. Proc. § 425.15(c)*].

[b] Proceedings to Obtain Order Allowing Pleading to Be Filed

To obtain the order, the plaintiff must file (1) a verified petition therefor accompanied by (2) the proposed pleading and (3) supporting affidavits (or declarations under *Code Civ. Proc. § 2015.5*) stating the facts on which the liability is based [*Code Civ. Proc. § 425.15(a)*; *see § 388.160*]. The plaintiff has the burden of establishing that the evidence substantiates the claim [*Code Civ. Proc. § 425.15(a)*].

Nothing in *Code Civ. Proc. § 425.15* affects the plaintiff's right to discover evidence on the issue of damages [*Code Civ. Proc. § 425.15(a)*].

[c] Statute of Limitations Tolled

The filing of the petition, proposed pleading, and accompanying affidavits tolls the running of any applicable statute of limitations until the final determination of the matter, which ruling, if favorable to the petitioning party, permits the proposed pleading to be filed [*Code Civ. Proc. § 425.15(a)*].

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[Reserved]

§§ 388.18[Reserved]

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§ 388.30 Directors' Standard of Care

[1] General Standard

The general standard of care to which the directors of nonprofit public and mutual corporations are held is the same as that which is applicable to directors of commercial corporations. A director of a nonprofit public or mutual benefit corporation is required to perform the duties of a director, including duties as a member of any committee of the board on which the director may serve, in good faith, in a manner the director believes to be in the best interests of the corporation, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances [*see Corp. Code §§ 309(a)* (commercial corporations), 5231(a) (public benefit corporations), *7231(a)* (mutual benefit corporations); *see also* Ch. 167, *Corporations: Directors and Management*]. This standard applies without regard to whether the director is compensated by the corporation [*Corp. Code §§ 5230(a), 7231(a)*].

The foregoing standard of care governs the duties of directors of public and mutual benefit corporations with regard to any acts or omissions in connection with the election, selection, or nomination of directors [*Corp. Code §§ 5232(a), 7232(a)*].

Actions for breach of charitable trusts held by public or mutual benefit corporations are governed by *Corp. Code § 5142* or *7142*, and are discussed in Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

[2] Reliance on Information and Reports

In performing the duties of a director of a public or mutual benefit corporation, the director may rely on information, opinions, reports, or statements, including financial statements and other financial data, prepared or presented by one of the following [*Corp. Code §§ 5231(b), 7231(b)*]:

- One or more officers or employees of the corporation whom the director believes to be reliable and competent in the matters presented;

- Counsel, independent accountants, or other persons regarding matters that the director believes to be within the person's professional or expert competence; or

- A committee on which the director does not serve that is composed exclusively of any (or any combination of) directors or persons described in either of the two categories listed above [*see Corp. Code §§ 5231(b)(1), (2), 7231(b)(1), (2)*], as to matters within its designated authority, if the director believes the committee merits confidence, and the director acts in good faith after reasonable inquiry when the circumstances so indicate.

[3] Scope of Liability

A person who performs the duties of a director of a public or mutual benefit corporation in accordance with the foregoing standard of care is not liable for any alleged failure to discharge his or her obligations as a director, including, without limitation, any actions or omissions that exceed or defeat a public or charitable purpose to which a corporation, or assets held by it, are dedicated [*Corp. Code §§ 5231(c), 7231(c)*; *see Corp. Code § 7238* (if mutual benefit corporation holds assets in charitable trust, conduct of its directors with respect to assets held in charitable trust as governed by standards of conduct applicable to directors of nonprofit public benefit corporations); *see also* Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts*]. An exception to this limited liability exists for self-dealing transactions, as governed by *Corp. Code § 5233* [*see § 388.32*]. For a discussion regarding investment standards [*see Corp. Code §§ 5240, 5241*], see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

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§ 388.31 Authority to Bind Corporation

A nonprofit public or mutual benefit corporation is bound by any contract or conveyance, and acquires rights under the contract or conveyance whether it is executed or wholly or partly executory, if the contract or conveyance is made in the name of the corporation and is (1) authorized or ratified by the board, or (2) done within the scope of actual or apparent authority conferred by the board or within the agency power of the officer executing it, except as the board's authority is limited by law other than the Nonprofit Public Benefit or Nonprofit Mutual Benefit Corporation Law [*Corp. Code §§ 5141(b), 7141(b)*; *see also Corp. Code §§ 5214, 7214* (authority of officers to bind corporation, absent actual knowledge that signing officer lacked authority to execute instrument)].

No limitation on the activities, purposes, or powers of the corporation or on the powers of members, officers, or directors, or on the manner of the exercise of those powers, contained in or implied by *Corp. Code §§ 6510-6721* (dissolution of nonprofit public benefit corporation) or by *Corp. Code §§ 8510-8724* (dissolution of nonprofit mutual benefit corporation) may be asserted as between the corporation or member, officer or director and any third person, except in one of the following proceedings [*Corp. Code §§ 5141(a), 7141(a)*]:

(1) Proceedings by a member of the state to enjoin the doing or continuation of any unauthorized activities by the corporation or its officers, or both, in cases in which third parties have not acquired rights from the activities;

(2) Proceedings to dissolve the corporation; or

(3) Proceedings by the corporation or by a member suing in a representative suit against the officers or directors of the corporation for violation of their authority.

The binding effect of contracts or conveyances, and the prohibition against asserting limitations on corporate powers, are both subject to the conditions set forth in *Corp. Code § 5142* or *7142* if the corporation holds assets in charitable trust [*Corp. Code §§ 5141, 7141*; *see* discussion in Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts*].

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§ 388.32 Self-Dealing Transactions

[1] Overview

The General Corporation Law (*Corp. Code § 100 et seq.*) and the Nonprofit Public Benefit Corporation Law (*Corp. Code § 5110 et seq.*) differ greatly in their definition and treatment of self-dealing transactions [*see* Ballantine & Sterling, California Corporation Laws, Ch. 19, § 406.02]. Because mutual benefit corporations are organized primarily for the benefit of their members and their assets are distributed to the members on dissolution, the Nonprofit Mutual Benefit Corporation Law's treatment of self-dealing transactions is similar to the provisions of the General Corporation Law [*compare Corp. Code §§ 7233, 7234 with Corp. Code § 310* (discussed in Ch. 167, *Corporations: Directors and Management*].

[2] By Director of Public Benefit Corporation

[a] Defined

The Nonprofit Public Benefit Corporation Law defines a self-dealing transaction as a transaction (1) to which the public benefit corporation is a party, (2) in which one or more of its directors has a material financial interest, and (3) that does not meet the requirements of approval and fairness described in *§ 388.32[2][b]* [*Corp. Code § 5233(a)*; *see Corp. Code § 5233(d)*]. This definition does not include any of the following [*Corp. Code § 5233(b)*]:

(1) An action of the board fixing the compensation of a director as a director or officer of the corporation;

(2) A transaction that is part of a public or charitable program of the corporation if it is approved or authorized by the corporation in good faith and without unjustified favoritism, and results in a benefit to one or more directors because they are in the class of persons intended to be benefited by the program; or

(3) A transaction, of which the interested director or directors have no actual knowledge, and which does not exceed the lesser of 1 percent of the gross receipts of the corporation for the preceding fiscal year or $100,000.

[b] Transaction Approved or Ratified

Relief will not be granted in an action against a director of a nonprofit public benefit corporation for involvement in a self-dealing transaction if either the Attorney General or the court approved the transaction before or after it was consummated [*Corp. Code § 5233(d)(1)*; *see also 11 Cal. Code Reg. § 999.1 et seq.* (Attorney General's regulations regarding approval of self-dealing transactions); Ballantine & Sterling, California Corporation Laws, Ch. 19, § 406.02].

Nor will relief be granted in an action against a director of a nonprofit public benefit corporation for involvement in a self-dealing transaction if the following facts are established [*Corp. Code § 5233(d)(2)*]:

The corporation entered into the transaction for its own benefit;

(B) The transaction was fair and reasonable as to the corporation at the time the corporation entered into the transaction;

(C) Prior to consummating the transaction the board authorized or approved the transaction in good faith by a vote of a majority of the directors not counting the vote(s) of the interested director(s), and withknowledge of the material facts concerning the transaction and the director's interest in the transaction; and

(D) Prior to authorizing or approving the transaction the board considered and determined in good faith, after reasonable investigation, that a more advantageous arrangement could not have been obtained, or the corporation could not have in fact obtained a more advantageous arrangement.

Similarly, relief will not be granted if the following facts are established [*Corp. Code § 5233(d)(3)*]:

(A) A committee or person authorized by the board approved the transaction in accordance with *Corp. Code § 5233(d)(2), above*;

(B) It was not reasonably practicable to obtain approval of the board prior to entering into the transaction; and

(C) The board, after determining in good faith that the conditions specified in (A) and (B) above were satisfied, ratified the transaction at its next meeting by a vote of a majority of directors not counting the vote(s) of the interested director(s).

In determining the presence of a quorum, interested directors may be counted as present at a meeting of the board that authorizes, approves, or ratifies a contract or transaction [*Corp. Code § 5233(g)*].

For a form of affirmative defense based on prior approval or ratification of a self-dealing transaction, see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

[c] Action Against Interested Director

[i] Relief Available

If a self-dealing transaction with a nonprofit public benefit corporation has taken place, the court will order the interested director to do such things and pay such damages as, in its discretion, will provide the public benefit corporation with an equitable and fair remedy. The court's order must take into account any benefit received by the corporation and whether the interested director(s) acted in good faith and with intent to further the best interests of the corporation. The relief ordered by the court may include, but is not limited to, requiring the interested director to do the following [*Corp. Code § 5233(h)*]:

(1) Account for any profits made from the self-dealing transaction, and pay them to the corporation;

(2) Pay the corporation the value of the use of any of its property used in the self-dealing transaction; and

(3) Return or replace any property lost to the corporation as a result of the self-dealing transaction, together with any income or appreciation lost to the corporation, or account for any proceeds of sale of the property, and pay the proceeds to the corporation, together with interest at the legal rate. The court may award prejudgment interest to the extent provided in *Civ. Code § 3287* or *3288*. In addition, the court may, in its discretion, award exemplary damages for a fraudulent or malicious violation of *Corp. Code § 5233*.

For a form of complaint against a director of a nonprofit public benefit corporation or a nonprofit mutual benefit corporation holding assets in trust seeking an accounting or actual and punitive damages arising out of a self-dealing transaction, see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

[ii] Parties and Jurisdiction

An action to redress a self-dealing transaction with a nonprofit public benefit corporation may be brought by the Attorney General or, if the Attorney General is joined as an indispensable party, by any of the following [*Corp. Code § 5233(c)*]:

(1) The corporation, or a member asserting the right in the name of the corporation in a derivative action pursuant to *Corp. Code § 5710*;

(2) A director of the corporation;

(3) An officer of the corporation; or

(4) Any person granted relator status by the Attorney General.

The action must be brought in the superior court of the proper county [*Corp. Code § 5233(c)*; *see Corp. Code § 5068* (defining "proper county")].

[iii] Statute of Limitations

Generally, an action to redress a director's self-dealing transaction with a nonprofit public benefit corporation must be filed within two years after written notice setting forth the material facts of the transaction and the director's interest in the transaction is filed with the Attorney General in accordance with Attorney General regulations, if any. If no such notice is filed, the action must be filed within three years after the transaction occurred. The Attorney General, however, has 10 years after the transaction occurred within which to file an action [*Corp. Code § 5233(e)*; *see 11 Cal. Code Reg. § 999.1(g)* (notice of self-dealing transaction as deemed "filed" for purposes of commencement of limitation period when received at one of Attorney General's addresses list in *11 Cal. Code Reg. § 999.1(a)*); *see also* Ballantine & Sterling, California Corporation Laws, Ch. 19, § 406.02].

Notwithstanding the expiration of the applicable limitation period, in any action for breach of an obligation of the corporation to an interested director, when the obligation arises from a self-dealing transaction that has not been approved in accordance with *Corp. Code § 5233(d)*, the court may, by way of offset only, make any order authorized by *Corp. Code § 5233(h)* [*Corp. Code § 5233(f)*; *see 388.32[2][c][i]*].

[3] By Director of Mutual Benefit Corporation

The Nonprofit Mutual Benefit Corporation Law is more permissive with respect to self-dealing transactions than the Nonprofit Public Benefit Corporation Law. It provides that no contract or other transaction between a corporation and one of its directors, or between a corporation and any domestic or foreign corporation, firm, or association in which one or more of its directors has a material financial interest, is either void or voidable because the director or other corporation, firm, or association is a party to the contract or transaction or is present at the meeting of the board or committee of the board that authorizes, approves, or ratifies the contract or transaction, if one of the following conditions is satisfied [*Corp. Code § 7233(a)*; *but see Corp. Code 7238* (mutual benefit corporation holding assets in charitable trust as governed by standards applicable to public benefit corporation)]:

(1) The material facts of the transaction, as well as the director's interest in the transaction, are fully disclosed to or known by the members, who approve the transaction in good faith, but any membership owned by any interested director is not entitled to vote;

(2) The material facts of the transaction and the director's interest in it are fully disclosed to or known by the board or committee, and they authorize, approve, or ratify the contract or transaction in good faith by a vote sufficient without counting the vote of an interested director, and the contract or transaction is just and reasonable to the corporation at the time it is authorized, approved, or ratified; or

(3) The person asserting the validity of the contract or transaction sustains the burden of proving that it was just and reasonable to the corporation at the time it was authorized, approved, or ratified.

A mere common directorship does not constitute a material financial interest within the meaning of the self-dealing transaction provisions. In addition, a director is not interested in a resolution fixing the compensation of another director, officer, or employee of the corporation [*Corp. Code § 7233(a)*].

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§ 388.33 Law Governing Assets in Charitable Trust

When a nonprofit mutual benefit corporation holds assets in charitable trust, the conduct of its directors will be governed by the standards of conduct applicable to nonprofit public benefit corporations with respect to the assets held in charitable trust [*Corp. Code § 7238*]. Thus, it follows that the procedures set forth in *11 Cal. Code Reg. §§ 999.1(a)* and *999.3(a)(b)* for notifying or obtaining approval of the Attorney General with respect to self-dealing transactions involving public benefit corporations will apply to mutual benefit corporations holding assets in charitable trust [*see* Ballantine & Sterling, California Corporation Laws, Ch. 19, § 406.02; *see also* Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

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§ 388.34 Common Director Transactions

No contract or other transaction between a nonprofit public or mutual benefit corporation and any corporation, business corporation, or association of which one or more of its directors are directors is either void or voidable because the director(s) is/are present at the meeting of the board or committee that authorizes, approves, or ratifies the contract or transaction, if one of the following conditions is satisfied [*Corp. Code §§ 5234(a), 7233(b)*]:

(1) The material facts of the transaction and the director's other directorship are fully disclosed to or known by the board or committee, and they authorize, approve, or ratify the contract or transaction in good faith by a vote sufficient without counting the vote of the common director(s) or, in the case of mutual benefit corporations, the contract or transaction is approved by the members in good faith; or

(2) Regarding contracts or transactions not approved in accordance with paragraph (1), *above*, the contract or transaction is just and reasonable to the corporation at the time it is authorized, approved, or ratified.

The foregoing does not apply to self-dealing transactions that are governed by *Corp. Code § 5233* (*see § 388.32[2]*) or *Corp. Code § 7233(a)* (*see § 388.32[3]*) [*Corp. Code §§ 5234(b), 7233(b)*].

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§ 388.35 Compensation of Directors and Officers

[1] Of Public Benefit Corporations

The board of directors of a nonprofit public benefit corporation has the responsibility to fix the compensation of directors, and no obligation to pay compensation is voidable simply because the person receiving the compensation participated in the decision to pay it, so long as the amount is just and reasonable to the corporation [*Corp. Code § 5235(a)*]. In the absence of fraud, any liability for payment of excessive compensation is limited to the amount paid that exceeds what is just and reasonable, plus interest [*Corp. Code § 5235(b)*].

[2] Of Mutual Benefit Corporations

There is no provision in the Nonprofit Mutual Benefit Corporation Law (*Corp. Code § 7110 et seq.*) that deals specifically with the issue of compensation of directors and officers. There are, however, two provisions that deal with transactions between the corporation and one or more of its directors that include actions involving compensation of a director.

The first provision states that no contract or other transaction between a corporation and one or more of its directors in which the director has a material financial interest is either void or voidable because the director is present at the meeting of the board that authorizes, approves, or ratifiesthe transaction, if the material facts of and the director's interest in the transaction are fully disclosed to or known by the board, the board authorizes, approves, or ratifies the transaction in good faith without counting the vote of the interested director, and the transaction is just and reasonable to the corporation at the time it is authorized, approved, or ratified [*Corp. Code § 7233(a)(2)*]. The resolution fixing a director's compensation is a transaction between a corporation and one or more of its directors. Thus, if such a resolution is passed in good faith by a vote of the fully informed board that is sufficient for approval without counting the votes of the interested director, and the compensation is just and reasonable to the corporation, the compensation will be upheld [*Corp. Code § 7233(a)(2)*; *see* Ballantine & Sterling, California Corporation Laws, Ch. 19, § 406.04].

The second section provides that if a transaction between a corporation and one or more of its directors is not approved in accordance with *Corp. Code § 7233(a)(2)*, then the person who is asserting the validity of the transaction sustains the

burden of proving that the compensation was just and reasonable to the corporation at the time it was authorized, approved, or ratified [*Corp. Code § 7233(a)(3)*; *see* Ballantine & Sterling, California Corporation Laws, Ch. 19, § 406.04].

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§ 388.36 Directors' Liability for Distributions, Loans, and Guarantees

[1] Prohibited Transactions

Subject to the duties and liabilities of directors defined in *Corp. Code § 5231* or *7231* (discussed in *§ 388.30*), directors of public and mutual benefit corporations are jointly and severally liable to the corporation and, in the case of a mutual benefit corporation, to the creditors entitled to institute an action to assert the liability, when they approve any of the following corporate actions [*Corp. Code §§ 5237(a), 7236(a)*]:

(1) The making of any distribution in the case of a public benefit corporation, or the making of any improper distributions in the case of a mutual benefit corporation [*see Corp. Code §§ 5420* (public benefit corporation), 7411-7414, 7420 (mutual benefit corporation), *see § 388.80* et seq.];

(2) The distribution of assets after institution of dissolution proceedings, without paying or adequately providing for all known liabilities of the corporation, excluding any claims not filed by creditors within the time limits set by the court in notices given to creditors [*see Corp. Code §§ 6515, 6613, 6713, 8517, 8613, 8713* (notice to creditors); *see also* Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* ; Ballantine and Sterling, California Corporation Laws, Ch. 19, §§ 415.02, 415.03;]; and

(3) The making of any loan or guarantee contrary to *Corp. Code § 5236* or *7235* [*see § 388.37*].

A director who is present at a meeting of the board, or a board committee, at which an action specified in *Corp. Code § 5237(a)* or *7236(a)* is taken and who abstains from voting is considered to have approved the action [*Corp. Code §§ 5237(b), 7236(b)*].

[2] Who May Bring Action

In the case of a public benefit corporation, the Attorney General may bring suit in the name of the corporation to redress all types of improper distributions [*Corp. Code § 5237(c)(3)*].

In the case of distributions by a mutual benefit corporation that are contrary to *Corp. Code §§ 7411-7413*, suit may be brought in the name of the corporation against any or all liable directors by the creditors or the head organization described in *Corp. Code § 7420(c)* [*Corp. Code § 7236(c)(1)*; *see also* discussion of *Corp. Code §§ 7411-7413*, *7420(c)* in *§ 388.57[2]*]. Similarly, directors of a public benefit corporation who make a distribution prohibited by *Corp. Code § 5237(a)(1)* may be sued in the name of the corporation by a creditor, director, the Attorney General, or by a member in a derivative action that meets the requirements of *Corp. Code § 5710* [*Corp. Code § 5237(c)(1)*; *see also § 388.57*]. For a form of complaint in a derivative action that may be adapted for use by a member seeking to redress an improper distribution, see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

In the case of distributions prohibited by *Corp. Code § 5237(a)(2),(3)* or *7236(a)(2),(3)* (distributions made after dissolution proceedings have been commenced and improper loans and guarantees), suit may be brought in the name of the nonprofit public or mutual benefit corporation to enforce the liability of any and all directors involved in the making of the distribution, loan, or guarantee by any creditor of the corporation whose debts or claims arose prior to the taking of the corporate action and who did not consent to it [*Corp. Code §§ 5237(c)(2), 7236(c)(2)*].

In the case of a mutual benefit corporation, suit regarding an improper loan or guarantee may be brought against any and all directors who are liable for the corporate action by any member at the time of the corporate action who did not consent to it, without regard to the requirements for derivative actions contained in *Corp. Code § 7710* [*Corp. Code § 7236(c)(3)*].

For further discussion on this topic, see generally Ballantine & Sterling, California Corporation Laws, Ch. 19, § 406.05 (Matthew Bender).

[3] Damages Recoverable

The damages recoverable from a director of a nonprofit public or mutual benefit corporation are the amount of the illegal distribution, or if the illegal distribution consists of property, the fair market value of that property at the time of the distribution plus interest thereon from that date at the legal rate on judgments until paid, together with all reasonably incurred costs of appraisal or any other valuation of that property; or the loss sufferedby the corporation as a result of the illegal loan or guarantee. In an action for the benefit of creditors of a mutual benefit corporation, the damages recoverable cannot exceed the liabilities owed to the nonconsenting creditors at the time of the violation [*Corp. Code §§ 5237(d), 7236(d)*]. Any director sued may implead all other directors liable and compel contribution either in that action or in an independent action [*Corp. Code §§ 5237(e), 7236(e)*]. Directors who are liable will also be entitled to be subrogated to the rights of the corporation [*Corp. Code §§ 5237(f), 7236(f)*].

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§ 388.37 Limitations on Corporate Loans, Guarantees, and Advances

[1] By Public Benefit Corporations

A nonprofit public benefit corporation may not loan any money or property to or guarantee the obligation of a director or officer, unless it is approved by the Attorney General [*Corp. Code § 5236(a)*]. This prohibition is subject to the following three exceptions:

- A corporation may advance money to a director or officer of the corporation or of its parent or any subsidiary for expenses reasonably anticipated to be incurred in the performance of the duties of the officer or director if, in the absence of the advance, the director or officer would be entitled to be reimbursed by the corporation, its parent, or any subsidiary for those expenses [*Corp. Code § 5236(a)*].

- A corporation may pay the premiums on a life insurance policy on the life of a director or officer if repayment to the corporation of the amount paid by it is secured by the proceeds of the policy and its cash surrender value [*Corp. Code § 5236(b)*].

- The corporation may loan money to or for the benefit of an officer for the purchase of his or her principal residence if, in the board's judgment, the loan is necessary to secure the officer's services or continued services, and the loan is secured by real property located in California [*Corp. Code § 5236(c)*].

[2] By Mutual Benefit Corporations

The provisions of the Nonprofit Mutual Benefit Corporation Law regarding corporate loans, guarantees, and advances more closely resemble the rules applicable to business corporations [*see* Ballantine & Sterling, California Corporation Laws, Ch. 19, § 406.05 (Matthew Bender)]. Unless prohibited by the articles or bylaws of the corporation, a nonprofit mutual benefit corporation may loan money or property to, or guarantee the obligation of, any director or officer of the corporation or of its parent, affiliate, or subsidiary, provided the following conditions are met [*Corp. Code § 7235(a)*]:

- The board determines the loan or guarantee may reasonably be expected to benefit the corporation;

and

- Prior to consummating the transaction or any part of it, the loan or guarantee is either approved by the members, without counting the vote of the director or officer, if a member, or approved by the vote of a majority of directors then in office, without counting the vote of the director who is to receive the loan or the benefit of the guarantee.

Notwithstanding the above requirements, a nonprofit mutual benefit corporation may advance money to a director or officer of the corporation, or of its parent, affiliate, or subsidiary, for any reimbursable expenses reasonably anticipated to be incurred in the performance of the duties of the director or officer [*Corp. Code § 7235(b)*].

The conditions set forth in *Corp. Code § 7235(a)* or *(b)* do not apply to credit unions, or to the payment by a corporation of premiums on a life insurance policy on the life of a director or officer, so long as repayment to the corporation is secured by the proceeds of the policy and its cash surrender value, or to loans permitted under any statute regulating any special class of corporations [*Corp. Code § 7235(c)*].

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§ 388.38 Director's Right to Inspect Books and Records

Every director has the absolute right at any reasonable time to inspect and copy all books, records, and documents of every kind and to inspect the physical properties of the corporation [*Corp. Code §§ 6334, 8334*]. However, although not expressly stated, a director's right of inspection may be subordinated to other statutes specifically protecting confidential or private records from inspection, and to the privacy right of the California constitution [*see Chantiles v. Lake Forest II Master Homeowners Assn. (1995) 37 Cal. App. 4th 914, 45 Cal. Rptr. 2d 1* (holding that homeowners' association members have constitutional privacy rights in their voting decisions, even when conducted by proxy ballot, and homeowners' association director's statutory right to inspect records of association must be balanced against this privacy right)]. For discussion of the enforcement of inspection rights generally, see *§ 388.80* et seq..

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[Reserved]

§§ 388.39[Reserved]

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§ 388.50 Definition of Member and Memberships

A "member" of a nonprofit public or mutual benefit corporation is defined as any person who, pursuant to a specific provision of the corporations's articles or bylaws, has the right to vote for the election of directors, on a disposition of all or substantially all of the assets of the corporation, or on a merger or dissolution. In the case of a mutual benefit corporation, however, the right to vote may be governed by *Corp. Code § 7132(a)(2)* (permitting holders of debt securities to be granted certain voting rights) [*Corp. Code § 5056(a)*].

In addition, "member" means any person who is designated as a member in the corporation's articles or bylaws and, pursuant to a specific provision of the articles or bylaws, has the right to vote on changes to the articles or bylaws [*Corp. Code § 5056(a)*].

When a member of a corporation is not a natural person, the member may authorize in writing one or more natural persons to vote on its behalf on any or all matters that may require a vote of the members [*Corp. Code § 5056(c)*].

The articles or bylaws of a nonprofit public or mutual benefit corporation may confer some or all of the rights of a member on anyone who does not have voting rights [*Corp. Code § 5056(b)*; *see also* Ballantine & Sterling, California Corporation Laws, Ch. 19, § 407.01 (Matthew Bender)].

Furthermore, a nonprofit public or mutual benefit corporation may refer to persons associated with it as members, even though those persons are not members under *Corp. Code § 5056* [*Corp. Code §§ 5332(a), 7333(a)*]. A corporation may also benefit, serve, or assist persons who are not members under *Corp. Code § 5056* for consideration, in an amount that the board determines or that is authorized or provided for in the corporation's articles or bylaws [*Corp. Code §§ 5332(b), 7333(b)*].

A person is not a member by viture of any rights the person has (1) as a delegate, (2) to designate or select a director or directors, or (3) as a director [*Corp. Code § 5056(d)*].

A "membership" refers to the rights of a member according to the articles and bylaws of a nonprofit public or mutual

benefit corporation and by statute [*Corp. Code § 5057*]. A "membership certificate," as referred to in the Nonprofit Mutual Benefit Corporation Law, means a document evidencing a transferable property interest in the corporation [*Corp. Code § 5058*].

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§ 388.51 Definition of Shares and Shareholder

As used in the Nonprofit Mutual Benefit Corporation Law (*Corp. Code § 7110 et seq.*), "shares" means the units into which the ownership interests in a business corporation or foreign business corporation are divided in the articles [*Corp. Code § 5072*]. "Common shares" means shares that have no preference over any other shares with respect to distribution of assets on liquidation or with respect to payment of dividends [*Corp. Code § 5043*]. "Shareholder" means one who is a holder of record of shares [*Corp. Code § 5071*].

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§ 388.52 Members Not Required

A nonprofit public or mutual benefit corporation may admit persons to membership, as provided in its articles or bylaws, or may provide in its articles or bylaws that it will have no members [*Corp. Code §§ 5310(a), 7310(a)*]. If there is no provision in the articles or bylaws for members, the corporation is deemed to have no members [*Corp. Code § 5310(a), 7310(a)*]. A corporation that has no members includes a corporation in which the directors are the only members [*Corp. Code §§ 5310(c), 7310(c)*].

When a corporation has no members, any action for which there is no specific provision of the Nonprofit Public Benefit Corporation Law (*Corp. Code § 5110 et seq.*) or of the Nonprofit Mutual Benefit Corporation Law (*Corp. Code § 7110 et seq.*) applicable to a corporation that has no members and that would otherwise require approval by a majority of all members (as provided in *Corp. Code § 5033*) or approval by the members (as provided in *Corp. Code § 5034*) will require only approval of the board, notwithstanding any contrary statute or provision in the corporation's articles or bylaws [*Corp. Code §§ 5310(b), 7310(b)(1)*]. In the case of a mutual benefit corporation, all rights that would otherwise vest in members to share in a distribution on dissolution will vest in the directors [*Corp. Code § 7310(b)(2)*].

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§ 388.53 Issuance and Transfer of Memberships

[1] Eligibility

A nonprofit public or mutual benefit corporation may issue memberships for no consideration or for consideration determined by the board, subject to its articles or bylaws [*Corp. Code §§ 5311, 7311*; *see also Corp. Code §§ 5140(e), 7140(d)* (corporation's power to issue memberships)].

In addition to issuing memberships, a nonprofit mutual benefit corporation may also issue, purchase, redeem, receive, take or otherwise acquire, own, sell, lend, exchange, transfer or otherwise dispose of, pledge, use, and otherwise deal in and with its memberships, bonds, debentures, notes, and debt securities [*Corp. Code § 7140(d)*; *see also* Ballantine & Sterling, California Corporation Laws, Ch. 19, § 407.02 (Matthew Bender)].

Except as provided in its articles or bylaws, a nonprofit public or mutual benefit corporation may admit any person to membership [*Corp. Code §§ 5313, 7315(a)*]. A mutual benefit corporation, however, may not admit its subsidiary (as defined in *Corp. Code § 5073*) to membership [*Corp. Code § 7315(b)*].

[2] Multiple or Fractional Memberships

A person may hold only one membership, and may not hold any fractional memberships, except for the following [*Corp. Code §§ 5312, 7312(a),(b)*]:

- Two or more persons may have an indivisible interest in a single membership when authorized and under circumstances prescribedby the articles or bylaws of the corporation subject to *Corp. Code § 5612* or *7612*, relating to fiduciaries and coowners; and

- If the articles or bylaws provide for classes of membership and permit a person to be a member of more than one class, a person may hold a membership in one or more classes.

For mutual benefit corporations, the following exceptions to the prohibitions against multiple and

fractional memberships also apply [*Corp. Code § 7312(c)-(f)*]:

- Any branch, division, or office of any person, not formed primarily to be a member, may hold a separate membership;

- In the case of ownership in an owners' association [*see Bus. & Prof. Code § 11004.5*], the articles or bylaws may permit a person who owns an interest, or who has a right of exclusive occupancy, in more than one lot, parcel, area, apartment, or unit to hold a separate membership in the owners association for each lot, parcel, area, apartment, or unit;

- In the case of membership in a mutual water company [*see Corp. Code § 14300*], the articles or bylaws may permit a person entitled to membership by reason of the ownership, lease, or right of occupancy of more than one lot, parcel, or other service unit to hold a separate membership in the mutual water company for each lot, parcel, or other service unit;

- In the case of a membership in a mobilehome park acquisition corporation [*see Bus. & Prof. Code § 11010.8* (definition)], a bona fide secured party who has, pursuant to a security interest in a membership, taken title to the membership by foreclosure, repossession, or voluntary repossession, and who is actively attempting to resell the membership to a prospective homeowner or resident of the mobilehome park, may own more than one membership.

[3] Classes of Membership

"Class" refers to those memberships that are (1) identified in the articles or bylaws as being a different type of membership; or (2) have the same rights with respect to voting, dissolution, redemption, and transfer [*Corp. Code § 5041*]. For these purposes, rights are considered the same if they are determined by a formula applied uniformly [*Corp. Code § 5041*].

A nonprofit public or mutual benefit corporation may issue memberships having different rights, privileges, preferences, restrictions, or conditions, as authorized by its articles or bylaws [*Corp. Code §§ 5330, 7330*]. Unless the articles or bylaws of a corporation provide otherwise, all memberships have the same rights, privileges, preferences, restrictions, and conditions [*Corp. Code §§ 5331, 7331*].

In the case of a mutual benefit corporation, the articles may provide for one or more classes of memberships that are redeemable, in whole or in part, at the option of the corporation or the member [*Corp. Code § 7332(a)*]. The articles may also state the terms and conditions of the redemption, the amount of consideration for the redemption, and the time of its occurrence. However, a membership will not be redeemed if the redemption is prohibited by *Corp. Code § 7410 et seq.* [*Corp. Code § 7332(a)*; *see § 388.57[2]*]. A corporation may create a sinking fund or similar provision, or enter into an agreement, for the redemption or purchase of its memberships to the extent permitted by law [*Corp. Code § 7332(b)*].

[4] Transferability of Memberships

Unless the corporation's articles or bylaws provide otherwise, and subject to *Corp. Code §§ 5613* or *7613* (relating to proxies), no member of a nonprofit public or mutual benefit corporation may transfer a membership or any right arising from membership, with or without consideration, and all rights of membership cease on the member's death or dissolution [*Corp. Code §§ 5320(a), 7320(a)*; *but see Corp. Code § 5320(c)* (section does not prohibit transfer of membership in limited equity housing cooperative provided transfer is consistent with *Health & Safety Code § 33007.5*, [*repealed 2009*; *now see Civ. Code § 817*]; *see also* Ch. 124, *Condominiums and Other Common Interest Developments*)].

A mutual benefit corporation may, in its articles or bylaws, provide for or authorize the board to provide for, the transfer of memberships, or of memberships within any class or classes, with or without restriction or limitation, including transfer on the death, dissolution, merger, or reorganization of a member [*Corp. Code § 7320(b)*]. When transfer rights have been provided, no restriction of them is binding with respect to memberships issued before the adoption of the restriction, unless the holders of the memberships being transferred voted in favor of the restriction [*Corp. Code § 7320(c)*].

[5] Membership Certificates or Cards Issued by Mutual Benefit Corporations

[a] Contents

A mutual benefit corporation may, although it is not required to, issue membership certificates, identity cards, or similar devices to members that serve to identify members qualifying to use the corporation's facilities or services [*Corp. Code § 7313(a)*]. When membership certificates are issued, they must state the following [*Corp. Code § 7313(b)*]:

- That the corporation is a nonprofit mutual benefit corporation that may notmake distributions to its members, except on dissolution, or, if the articles or bylaws so provide, it may not make distributions to its members during its life or on dissolution; and

- If there are restrictions on transferability, a statement that a copy of the restrictions are on file with the secretary of the corporation andare open for inspection by members on the same basis as the records of the corporation.

If the membership certificates are transferable only with consent of the corporation, or there are no membership certificates, then instead of complying with paragraph (2) above, the corporation may, or if there are no membership certificates must, give notice to the transferee of the information that would otherwise be provided by legends required by paragraph (2) above [*Corp. Code § 7313(c)*]. This notice must occur within a reasonable time after the corporation is first notified of the proposed transfer and before the membership is transferred on the books of the corporation [*Corp. Code § 7313(c)*].

[b] Replacement Certificates

If the articles or bylaws of the corporation are amended so that the required statements on the outstanding certificates are no longer accurate, the board may cancel the outstanding certificates and issue new ones conforming to the article or bylaw amendments [*Corp. Code § 7313(d)*], and order holders of outstanding certificates to surrender and exchange them for new certificates within a reasonable time specified by the board [*Corp. Code § 7313(e)*]. The board may provide that holders of certificates ordered to be surrendered are not entitled to exercise rights of membership until the certificate is surrendered and exchanged [*Corp. Code § 7313(e)*]. This cessation of membership rights may occur only after notice of the order to surrender is given to the holder and only until the certificate is exchanged [*Corp. Code § 7313(e)*].

If a certificate is alleged to be lost, stolen, or destroyed, the nonprofit mutual benefit corporation may issue a new certificate and require the owner of the lost, stolen, or destroyed certificate to give the corporation a bond or other adequate security to indemnify it against any claim that may be made against it on account of the alleged loss, theft, or destruction [*Corp. Code § 7314(a)*]. If the corporation refuses to replace the certificate alleged to have been lost, stolen, or destroyed, the owner of the lost, stolen, or destroyed certificate, or the owner's legal representative may bring an action in the superior court of the proper county for an order requiring the corporation, or its legal successor, to issue a new certificate [*Corp. Code § 7314(b)*; *see Corp. Code § 5068* (defining "proper county")].

[6] Securities Qualification May Be Required

The definition of "security" includes any membership in an incorporated or unincorporated association [*Corp. Code § 25019*]. Thus, the requirements of qualification of securities (*Corp. Code § 25110 et seq.*) may apply. However, memberships are exempt from qualification [*see Corp. Code § 25100(j)* (exempting nonprofit corporation securities); *see generally* Ch. 515, *Securities and Franchise Regulation*].

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§ 388.54 Termination of Membership

[1] Resignation or Expiration

A member of a nonprofit public or mutual benefit corporation may resign at any time, but in the case of a mutual benefit corporation, the articles or bylaws may require reasonable notice before a resignation is effective [*Corp. Code §§ 5340(a), 7340(a)*]. The resigning member is not relieved from any obligation for charges incurred, services or benefits actually rendered, dues, and assessments or fees, or from obligations arising from contract, ownership of land, or otherwise. The corporation may enforce these obligations or obtain damages for their breach [*Corp. Code §§ 5340(b), 7340(b)*].

Unless renewed, memberships expire when the period of time for which they were issued has elapsed [*Corp. Code §§ 5340(c), 7340(c)*].

[2] Expulsion, Suspension, or Termination

[a] Procedural Fairness Standard

A nonprofit public or mutual benefit corporation may not expel or suspend a member or terminate or suspend membership rights unless it follows a procedure that satisfies the requirements of *Corp. Code § 5341* or *7341* [*Corp. Code §§ 5341(a), 7341(a)*]. An expulsion, termination, or suspension not in accordance with these requirements is void and without effect [*Corp. Code §§ 5341(a), 7341(a)*]. Termination of voting rights is an effective termination of membership, and thus *Corp. Code § 5341* requires that the termination of voting rights by amendment of the bylaws be done in accordance with a fair and reasonable procedure and in good faith [*Ferry v. San Diego Museum of Art (1986) 180 Cal. App. 3d 35, 40, 45-46, 225 Cal. Rptr. 258* (decided before enactment of *Corp. Code § 5342*; *see § 388.54[3]*].

An expulsion, suspension, or termination must be done in good faith and in a fair and reasonable manner [*Corp. Code §§ 5341(b), 7341(b)*]. A procedure is fair and reasonable when it conforms to all of the following requirements [*Corp. Code §§ 5341(c), 7341(c)*]:

- The provisions of the procedure are set forth in the articles or bylaws of the corporation, or copies of the provisions are sent annually to all the members as required by the articles or bylaws;

- The procedure provides the giving of 15 days' prior notice of the expulsion, suspension, or termination and the reasons for it; and

- The procedure provides an opportunity for the member to be heard, orally or in writing, at least five days before the effective date of the expulsion, suspension, or termination by a person or body authorized to decide that the proposed expulsion, suspension, or termination not take place.

While any procedure that conforms to the foregoing requirements is fair and reasonable, the court may also find other procedures to be fair and reasonable when the full circumstances of the expulsion, suspension, and termination are considered [*Corp. Code §§ 5341(b), 7341(b)*]. It should be noted that an expulsion, suspension, or termination based on substantive grounds that violate contractual or other rights of the member or are otherwise unlawful is not made valid by compliance with *Corp. Code § 5341* or *7341*[*Corp. Code §§ 5341(f), 7341(f)*]. A member who is expelled or suspended, or whose membership is terminated, is liable for any charges incurred, services or benefits actually rendered, and any dues, assessments, or fees incurred before the expulsion, suspension, or termination or arising from contract or otherwise [*Corp. Code §§ 5341(g), 7341(g)*].

[b] Notice Required

The notices required by the fair expulsion, suspension, or termination procedures may be given by any method reasonably calculated to provide actual notice. If notice is given by mail, it must be given by first-class or registered mail sent to the last address of the member shown on the corporation's records [*Corp. Code §§ 5341(d), 7341(d)*].

[c] Action Challenging Expulsion, Termination, or Suspension

Any action challenging an expulsion, suspension, or termination of membership must be commenced within one year after the date of the expulsion, suspension, or termination [*Corp. Code §§ 5341(e), 7341(e)*].

The court may order any relief, including reinstatement, that it finds to be equitable under the circumstances [*Corp. Code §§ 5341(e), 7341(e)*]. No vote of the members or board will be set aside solely because a person was wrongfully excluded by virtue of the challenged expulsion, suspension, or termination at the time of the vote, unless the court also finds that the wrongful expulsion, suspension, or termination was in bad faith and for the purpose, and with the effect, of wrongfully excluding the member from the vote or from the meeting at which the vote took place, so as to effect the outcome of the vote [*Corp. Code §§ 5341(e), 7341(e)*].

[3] Change in Membership Requirements of Public Benefit Corporation

Before any amendment of the articles or bylaws of a nonprofit public benefit corporation that would terminate all memberships or any class of memberships may be adopted, the corporation must give written notice to members not less than 45 nor more than 90 days prior to any vote by the members on the amendment. The notice must describe the effect of the amendment on the corporation and the members [*Corp. Code § 5342(a),(b)*]. The amendment must be approved by the members (as described in *Corp. Code § 5034*) [*Corp. Code § 5342(c)*].

"Approval by the members" means approval or ratification by affirmative vote of a majority of the votes represented and voting at a duly held meeting at which a quorum is present (which affirmative votes also constitute a majority of the required quorum) or written ballot in conformity with *Corp. Code § 5513*, or by affirmative vote or written ballot of any greater portion that is required by the bylaws for all or any specified membership action [*Corp. Code § 5034*].

The written notice need not be given at least 45 days in advance of the vote if all members entitled to vote receive a written notice prior to the vote setting forth the information described above and sign a written waiver of the 45-day notice [*Corp. Code § 5342(b)*].

The bylaws may impose additional requirements for termination of all memberships of any class of memberships [*Corp. Code § 5342(d)*]. If a member requests, the corporation must allow the member to inspect the membership list and copy all names and addresses from it or must provide the member with the names, addresses, and voting rights of all members [*Corp. Code § 5342(e)*; *see Corp. Code § 6330(a)* (access to membership list, *see § 388.58*); *see also § 388.166* (petition for writ of mandate to enforce member's access to membership list)].

Corp. Code § 5341 [*see § 388.54[2]*] does not apply to termination of all memberships or of any class of memberships pursuant to amendment of the articles or bylaws [*Corp. Code § 5342(g)*; *but see Ferry v. San Diego Museum of Art (1986) 180 Cal. App. 3d 35, 40, 45-46, 225 Cal. Rptr. 258* (decided prior to enactment of *Corp. Code § 5342*; termination of voting rights was effective as termination of membership, and therefore *Corp. Code § 5341* requirements of fair procedure were applicable)].

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§ 388.55 Rights Regarding Fraudulent Issuance or Sale of Memberships

Nothing in the Nonprofit Public Benefit Corporation Law or the Nonprofit Mutual Benefit Corporation Law may be construed in derogation of any rights or remedies that a creditor or member may have against any promoter, member, director, officer, or the corporation because of participation in any fraud or illegality practiced on the creditor or member by the person or by the corporation in connection with the issuance or sale of memberships or securities [*Corp. Code §§ 5353, 7354*]. Nor may these statutes be construed in derogation of any rights that the corporation may have by rescission, cancellation, or otherwise because of any fraud or illegality practiced on it by any person in connection with the issuance or sale of memberships or securities [*Corp. Code §§ 5353, 7354*].

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§ 388.56 Liability of Members Generally

[1] For Dues

The articles or bylaws of a nonprofit public or mutual benefit corporation may provide for dues, assessments, or fees on the members of the corporation [*Corp. Code §§ 5351, 7351*]. However, liability for the dues, assessments, or fees is not created merely by a provision authorizing them. Thus, a member may avoid liability for dues, assessments, or fees by promptly resigning after learning of them, unless the member is liable for them by contract or otherwise [*Corp. Code §§ 5351, 7351*].

A person holding a membership as executor, administrator, guardian, trustee, receiver, or in any representative or fiduciary capacity is not personally liable for any unpaid balance of the purchase price of the membership, or for any amounts owing to the corporation by the member, but the estate and funds in the hands of the fiduciary are liable for the amounts due [*Corp. Code §§ 5354, 7352*].

[2] Limited Liability to Creditors for Corporation's Obligations

A member of a nonprofit public or mutual benefit corporation is not personally liable for the debts, liabilities, or obligations of the corporation simply by virtue of his or her membership [*Corp. Code §§ 5350(a), 7350(a)*; *see, e.g., ECC Construction Inc. v. Ganson (2000) 82 Cal. App. 4th 572, 576, 98 Cal. Rptr. 2d 292* (individual homeowner members of condominium complex homeowners association who were not parties to corporation's contract to repair common areas after earthquake had no personal liability for its debts or liabilities under construction contract)]. A member is not liable for any obligation arising from membership, unless the person was admitted to membership on the person's application or with the person's consent [*Corp. Code §§ 5350(b), 7350(b)*].

In the case of a mutual benefit corporation, ownership of an interest in real property, when a condition of its ownership is membership in a corporation, will be considered consent to membership for the purpose of liability arising from membership [*Corp. Code § 7350(c)*].

[3] Creditors' Actions to Reach Amounts Due to Corporation

Before a creditor may bring an action against a member to reach and apply the liability, if any, of a member to the corporation to pay the amount due on the member's membership or otherwise due to the corporation, final judgment must have been rendered in favor of the creditor against the corporation and execution must have been returned unsatisfied, in whole or in part, unless these proceedings would be useless [*Corp. Code §§ 5352(a), 7353(a)*; *see § 388.163*].

With or without reducing their claims to judgment, all creditors may intervene in any creditor's action to reach and apply unpaid amounts due the corporation, joining any and all members who owe amounts to the corporation. Several judgments may be rendered for and against the parties to the action or in favor of a receiver for the benefit of the respective parties to the action [*Corp. Code §§ 5352(b), 7353(b)*; *see § 388.164*].

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§ 388.57 Liability for Distributions

[1] Liability of Members, Officers, and Directors of Public Benefit Corporation

A nonprofit public benefit corporation is not permitted to make any distribution to members [*Corp. Code § 5410*]. When any person receives any distribution, he or she is liable to the corporation for the amount received, with interest on that amount at the legal rate on judgments until paid [*Corp. Code § 5420(a)*]. Liability under *Corp. Code § 5420* does not affect a persons' liability, if any, under the Uniform Fraudulent Transfer Act (*Civ. Code § 3439 et seq.*) [*Corp. Code § 5420(d)*; *see* Ch. 270, *Fraudulent Conveyances* , for discussion of Act].

The court may award punitive damages for the benefit of the corporation against any director, officer, member, or other person who caused, received, or aided and abetted in the making of the distribution with intent to defraud the corporation [*Corp. Code § 5420(b)*].

Suit may be brought in the name of the corporation by a creditor, a director, the Attorney General, or, subject to meeting the requirements of *Corp. Code § 5710* (procedures for derivative actions), a member [*Corp. Code § 5420(b)*].

Any person sued under *Corp. Code § 5420* may implead all other persons liable and may, in the absence of fraud by the moving party, compel contribution, either in that action or in an independent action against persons not joined in the action [*Corp. Code § 5420(c)*].

For a complaint by a creditor against members to apply improper distributions in satisfaction of prior claims, see *§ 388.165*.

The prohibition against making distributions to members does not apply to the purchase of a membership in a limited equity housing cooperative (as defined in *Health & Safety Code § 33007.5*, [*repealed 2009*; *now see Civ. Code § 817*]; *see* Ch. 124, *Condominiums and Other Common Interest Developments*) that is organized as a public benefit corporation [*Corp. Code § 5410*].

[2] Liability of Members of Mutual Benefit Corporations

[a] Limitations on Distributions

In general, a nonprofit mutual benefit corporation is not permitted to make distributions, except on dissolution [*Corp. Code §§ 7410, 7411(a)*]. Nevertheless, a corporation may purchase or redeem memberships,subject to the requirements of *Corp. Code §§ 7412, 7413,* and *7414* (discussed *below*) [*Corp. Code § 7411(b)*].

A mutual benefit corporation and its subsidiaries are not permitted to make distributions if the corporation or the subsidiary making the distribution is, or as a result of the distribution would be, likely to be unable to meet its liabilities (except those whose payment is otherwise adequately provided for) as they mature [*Corp. Code § 7412*].

A mutual benefit corporation and its subsidiaries are not permitted to purchase or redeem memberships of the parent or subsidiary if the corporation's articles contain a provision authorized by *Corp. Code § 7132(a)(4)(B)* (relating to distributions of assets of subordinate corporation to head organization on dissolution) and the corporation or the subsidiary making the redemption or purchase is, or as a result of the redemption or purchase would be, likely to be unable to meet the obligations resulting from that article provision [*Corp. Code § 7413*; *see Corp. Code § 7132(a)(4)* (head organization as one under whose authority subordinate corporation is created)].

The articles or bylaws of a nonprofit mutual benefit corporation may contain additional restrictions on redemption and purchase of memberships [*Corp. Code § 7414*].

[b] Amount of Liability on Receipt of Distribution

When a person receives a distribution prohibited by *Corp. Code §§ 7411-7414*, including a payment in redemption of a membership, with knowledge of facts indicating its impropriety, he or she is liable to the corporation, and in some cases to the corporation for the benefit of the head organization, or for the benefit of all of the creditors of the corporation whose claims or debts arose before the time of the distribution and who did not consent to it, for the amount received, with interest at the legal rate on judgments until paid [*Corp. Code § 7420(a),(b)*]. Liability to the corporation for the benefit of the head organization or for the benefit of creditors is limited to the amount of the corporations' obligations to the head organization at the time of the violation, or to the amount of the corporation's liabilities to nonconsenting creditors at the time of the violation [*Corp. Code § 7420(b)*].

[c] Action to Enforce Liability

Suit may be brought in the name of the corporation to enforce the liability to creditors for a violation of *Corp. Code § 7411* or *7412* against any or all persons liable. The suit is brought by one or more creditors of the corporation whose debts or claims arose prior to the time of the distribution and who have not consented to it, whether or not they have reduced their claims to judgment [*Corp. Code § 7420(c)(1)*; *see also Corp. Code § 7236(a)(1),(c)(1)* (directors' liability, *see § 388.57*)]. Suit may also be brought in the name of the corporation to enforce the liability to the head organization for a violation of *Corp. Code § 7413* against any or all persons liable. The suit is brought by any head organization that, according to the corporation's articles, is entitled to a distribution of assets on dissolution [*Corp. Code § 7420(c)(2)*; *see also Corp. Code § 7236(a)(1),(c)(1)*].

Any person sued may implead all other persons liable and may, in the absence of fraud by the moving party, compel contribution, either in that action or in an independent action against persons not joined in the action [*Corp. Code § 7420(d)*].

For a complaint by a creditor against members to apply improper distributions in satisfaction of prior claims, see *§ 388.165*.

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§ 388.58 Right to Inspect Membership Lists

[1] Scope and Timing of Inspection

Unless the corporation provides a reasonable alternative, a member of a nonprofit public or mutual benefit corporation may do either or both of the following [*Corp. Code §§ 6330(a), 8330(a)*]:

- Inspect and copy the record of all the members' names, addresses, and voting rights, at reasonable times, after giving the corporation five business days' notice by written demand;

- Obtain from the secretary of the corporation, on written demand and tender of a reasonable charge, an alphabetized list of the names, addresses, and voting rights of those members entitled to vote for the election of directors, as of the most recent record date for which it has been compiled or as of a date specified by the member subsequent to the date of the demand. The alphabetized list must be made available on or before 10 business days after the demand is received, or after the date specified in the demand as the date as of which the list is to be compiled, whichever is later [*Corp. Code §§ 6330(a)(2), 8330(a)(2)*].

The right of inspection extends to records of each subsidiary of a corporation [*Corp. Code §§ 6312, 8312*]. The right includes the right to copy and make extracts [*Corp. Code §§ 6311, 8311*]. If the records sought are not maintained in written form, the corporation must make the records available in written form at its own expense [*Corp. Code §§ 6310, 8310* ("writing" includes cathode ray tube and similar electronic communications methods)]. The rights of members provided in *Corp. Code § 6310 et seq.* or *8310 et seq.* may not be limited by contract or by the articles or bylaws [*Corp. Code §§ 6313, 8313*].

The right of inspection is subject to *Corp. Code § 6331* or *8331* [*see § 388.58[5]*], and *Corp. Code § 6332* or *8332* [*see § 388.58[8*]; *Corp. Code §§ 6330(a), 8330(a)*]. For example, if a petition is filed to limit the right of inspection on constitutional grounds, the court may suspend the runningof time limits in *Corp. Code § 6330(a)* or *8330* [*Corp. Code §§ 6332(b), 8332(b)*].

[2] Contents of Demand

The demand to inspect and copy or to obtain an alphabetized list must state the purpose for which the list is requested [*Corp. Code §§ 6330(a)(1),(2), 8330(a)(1),(2)*].

[3] Who May Exercise Right

[a] By Any Member

These inspection rights may be exercised by any member, for a purpose reasonably related to his or her interest as a member [*Corp. Code §§ 6330(b), 8330(b)*; *see also Corp. Code §§ 6311, 8311* (inspections may be made in person or by agent or attorney)].

[b] By Authorized Number of Members

These inspection rights may also be exercised by the authorized number of members for a purpose reasonably related to their interest as members [*Corp. Code §§ 6330(b), 8330(b)*]. "Authorized number" means one of the following [*Corp. Code §§ 5036(a)-(c)*]:

(1) Except as provided in (2) or (3), *below,* five percent of the voting power;

(2) If (disregarding any provision for cumulative voting that would otherwise apply) the total number of votes entitled to be cast for a director is 1,000 or more, but less than 5,000, the authorized number is 2 1/2 percent of the voting power, but not less than 50; or

(3) If (disregarding any provision for cumulative voting that would otherwise apply) the total number of votes entitled to be cast for a director is 5,000 or more, the authorized number is 1/20th of one percent of the voting power, but not less than 125.

Any right that may be exercised by the authorized number may be exercised by a member with written authorizations obtained within an 11-month period from members who, in the aggregate, hold the equivalent voting power [*Corp. Code § 5036(d)*].

[4] Denial of Demand

[a] Proposal of Alternative Method

Within 10 days of receiving the demand, the corporation may, without providing access to or a copy of the membership list, deliver to the person or persons making the demand a written offer of an alternative method of achieving the purpose identified in the demand [*Corp. Code §§ 6330(c), 8330(c)*]. An alternative method that accomplishes the proper purpose set forth in the demand in a reasonable and timely manner will be deemed a reasonable alternative, unless the corporation fails to do those things it offered to do within a reasonable time after acceptance of the offer by the member [*Corp. Code §§ 6330(c), 8330(c)*; *see KQED, Inc. v. Hall (1982) 135 Cal. App. 3d 951, 956-958, 185 Cal. Rptr. 630* (corporation's prior review of materials to be mailed as not proper condition of alternative procedure)].

Any rejection of the offer must be in writing and must indicate the reasons the alternative method proposed by the corporation does not meet the proper purpose of the demand [*Corp. Code §§ 6330(c), 8330(c)*].

[b] Denial of Access if Information Sought for Purpose Unrelated to Membership

If the corporation reasonably believes that the information sought by a single member's demand will be used for a

purpose unrelated to that person's interest as a member, the corporation may deny access to the list [*Corp. Code §§ 6330(b)(1), 8330(b)(1)*].

[c] Action to Compel Compliance by Single Member

If the corporation denies a single member access to the list, the member may institute an action under *Corp. Code § 6336* or *8336* [*see § 388.59[2]*] to compel compliance. In that action, the court must compel compliance unless the corporation proves either (1) that the member will allow use of the information for purposes unrelated to the person's interest as a member, or (2) that the alternative method offered reasonably achieves the proper purpose set forth in the demand [*Corp. Code §§ 6330(b)(1), 8330(b)(1)*].

[5] Petition to Set Aside Demand of Members

[a] Availability and Timing

If the corporation, in good faith and with a substantial basis, believes the list demanded by the authorized number of members [*see Corp. Code § 5036*] will be used for a purpose other than one reasonably related to the member's interest as a member, or when it provides a reasonable alternative [*see Corp. Code §§ 6330(c), 8330(c)*], the corporation may petition the superior court of the proper county for an order setting aside the demand [*Corp. Code §§ 6331(a), 8331(a)*; *see Corp. Code § 5068* (defining "proper county")].

Except as provided in *Corp. Code § 6331(c)* or *8331(c)* [discussed *below*], a petition for an order to show cause why a protective order pursuant to *Corp. Code § 6331(d)* or *8331(d)* should not issue must be filed within 10 business days after (a) the demand by the authorized number of membersor (b) receipt of a written rejection of an offer of a reasonable alternative by the corporation, whichever is later [*Corp. Code §§ 6331(b), 8331(b)*].

A corporation may file the petition more than 10 business days after the demand or rejection, on a showing that the delay was caused by excusable neglect. But in no event may the petition be filed more than 30 days after demand or rejection, whichever is later [*Corp. Code §§ 6331(c), 8331(c)*].

The petition must be accompanied by an application for a hearing on the petition [*Corp. Code §§ 6331(b), 8331(b)*].

If the corporation fails to file a petition within the time allowed by *Corp. Code § 6331(b)* or *(c)*, or *8331(b)* or *(c)*, whichever is applicable, or fails to obtain a protective order pursuant to *Corp. Code § 6331(d)* or *8331(d)*, the corporation must comply with the demand and it cannot bring any further action [*Corp. Code §§ 6331(e), 8331(e)*].

[b] Protective Order and Order to Show Cause

On the filing of the petition, the court issues a protective order staying production of the membership list until the hearing on the order to show cause. The hearing must be set not more than 20 days from the date of the filing of the petition [*Corp. Code §§ 6331(b), 8331(b)*]. The order to show cause must be granted unless the court finds that there is no reasonable probability that the corporation will prevail in setting aside the demand [*Corp. Code §§ 6331(b), 8331(b)*; *see Corp. Code §§ 6331(f), 8331(f)* (showing required to set aside demand)].

On the return day of the order to show cause, the court may issue another protective order staying production of the list until final adjudication of the petition [*Corp. Code §§ 6331(d), 8331(d)*]. But to issue this protective order, the court must find that the rights of the requesting parties can reasonably be preserved and that the corporation is likely to prevail against the member [*Corp. Code §§ 6331(d), 8331(d)*].

[c] Final Order to Set Aside Demand

In order for the court to issue the final order setting aside the demand, the corporation must prove one of the following [*Corp. Code §§ 6331(f), 8331(f)*]:

- That there is a reasonable probability that the requesting parties will permit use of the membership list for a purpose unrelated to their interests as members, or

- That the method offered by the corporation is a reasonable alternative in that it reasonably achieves the proper purpose set forth in the requesting parties' demand and that the corporation intends and is able to effectuate the reasonable alternative.

In the final order, the court may, in its discretion, order an alternative mechanism for achieving the proper purposes of the requesting parties, or impose just and proper conditions on the use of the membership list that reasonably assure compliance with *Corp. Code §§ 6330* or *8330* and *6338* or *8338* [*Corp. Code §§ 6331(g), 8331(g)*; *see KQED, Inc. v. Hall (1982) 135 Cal. App. 3d 951, 957-958, 185 Cal. Rptr. 630* (*Corp. Code § 6331(g)* is not authority for approving alternative procedure that permits corporation's prior review of materials to be mailed); *see § 388.59[7]*].

The court must award reasonable costs and expenses, including reasonable attorney's fees, to requesting parties who successfully oppose any petition or application filed [*Corp. Code §§ 6331(h), 8331(h)*].

[6] Petition by Requesting Parties for Writ of Mandate to Compel Access

If the corporation does not, within the time allowed, comply with a demand by the authorized number of members [*see Corp. Code § 5036*], or obtain a protective order staying production of the list, or a final order setting aside the demand, which is then in effect, the requesting parties may petition the superior court of the proper county for a writ of mandamus pursuant to *Code Civ. Proc. § 1085* compelling the corporation to comply with the demand [*Corp. Code §§ 6331(i), 8331(i)*; *see Corp. Code § 5068* (defining "proper county"); *see also § 388.166*].

At the hearing, the court will hear the parties summarily, by affidavit, or otherwise. No inquiry may be made in this proceeding into the use for which the authorized number seek the list [*Corp. Code §§ 6331(i), 8331(i)*].

The court must issue a peremptory writ of mandamus unless it appears that one of the following conditions exist [*Corp. Code §§ 6331(i), 8331(i)*]:

- The demand was not made by the authorized number [*see Corp. Code § 5036*];

- The demand has been complied with;

- The corporation offered a reasonable alternative procedure [*see Corp. Code §§ 6330(c), 8330(c)*] that was not rejected in writing within a reasonable time; or

- A protective or final order properly issued [*see Corp. Code §§ 6331(d),(f),(g), 8330(d),(f),(g)*] is then in effect.

The court must award reasonable costs and expenses, including reasonable attorney's fees, to persons granted an order under this provision [*Corp. Code §§ 6331(i), 8331(i)*].

[7] Misuse of List

[a] Prohibited Uses

The membership list is a corporate asset. Without the consent of the board, a membership list or any part of it may not be obtained or usedby any person for any purpose not reasonably related to a member's interest as a member. Without limiting that general rule, the following uses of a membership list or any part of it, if done without the consent of the board, are prohibited [*Corp. Code §§ 6338(a), 8338(a)*; *see Corp. Code §§ 6338(e), 8338(e)* ("membership list" in this context means the record of members' names and addresses)]:

- To solicit money or property, unless the money or property will be used solely to solicit the vote of the members in an election to be held by the corporation;
- For any purpose that the user does not reasonably and in good faith believe will benefit the corporation;
- For any commercial purpose or purpose in competition with the corporation; or
- For sale to or purchase by any person.

[b] Remedies for Misuse

Any person who misuses the membership list is liable for any damage the misuse causes the corporation, and must account for and pay to the corporation any profit derived as a result of the misuse [*Corp. Code §§ 6338(b), 8338(b)*; *see also Corp. Code §§ 6331(j), 8331(j)*]. The court, in its discretion, may also award exemplary damages for fraudulent or malicious misuses [*Corp. Code §§ 6338(b), 8336(b)*]. The corporation may also seek injunctive relief necessary to restrain misuse of a membership list or part of one [*Corp. Code §§ 6338(c), 8338(c)*; *see also Corp. Code §§ 6331(j), 8331(j)*; *see generally* Ch. 303, *Injunctions*].

In any action or proceeding under *Corp. Code § 6338* or *8338*, the court may award the corporation reasonable costs and expenses, including reasonable attorney's fees, in connection with the action or proceeding [*Corp. Code §§ 6338(d), 8338(d)*; *see also Corp. Code §§ 6331(j), 8331(j)*].

[8] Petition to Limit Inspection on Constitutional Grounds

On petition of the corporation or any member, the superior court of the proper county may limit or restrict the rights of inspection set forth in *Corp. Code § 6330* or *8330* when necessary to protect the rights of any member under the United States or California Constitutions [*Corp. Code §§ 6332(a), 8332(a)*; *see Corp. Code § 5068* (defining "proper county")]. The order issued will provide, insofar as possible, for alternative mechanisms by which the persons seeking access to the membership list may communicate with other members for purposes reasonably related to their interests as members [*Corp. Code §§ 6332(a), 8332(a)*].

If requested by the person making the petition, the court may issue a temporary order suspending the running of any time limit specified in *Corp. Code § 6330* or *8330* for compliance with that section. The order may be extended, after hearing and notice, until final adjudication of the petition, whenever it appears that the petitioner may prevail on the merits, and it is otherwise equitable to do so [*Corp. Code §§ 6332(b), 8332(b)*].

[9] Application to Postpone Meeting Because of Corporate Delay

If the proper purpose of the person or persons making a demand for inspection is frustrated by various forms of delay resulting from actions by the corporation, the person or persons may, in the court's discretion, apply to the superior court for an order postponing any members' meeting previously noticed for a period equal to the period of the delay [*Corp. Code §§ 6335, 8335*]. This relief is available for the following forms of delay [*Corp. Code §§ 6335, 8335*]:

- Any delay by the corporation in complying with a demand beyond the time limits specified in *Corp. Code § 6330* or *8330*;

- Any delay caused by the filing of a petition under *Corp. Code § 6331* or *8331* (petition to set aside demand) or *6332* or *8332* (petition to limit inspection on constitutional grounds); or

- Any delay caused by the proposal of an alternative method of achieving the purpose of the demand pursuant to *Corp. Code § 6330(c)* or *8330(c)*.

Members may obtain a postponement order in a proceeding brought pursuant to *Corp. Code § 6331* or *8331* to set aside the demand on the filing of a verified complaint in the proper county, and after a hearing. Notice of the hearing must be given to the persons and in the manner as the court may direct [*Corp. Code §§ 6335, 8335*; *see Corp. Code § 5068* (defining "proper county")].

The right to obtain a postponement order is in addition to any other legal or equitable remedies available to the members [*Corp. Code §§ 6335, 8335*].

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§ 388.59 Right to Inspect Other Records

[1] Accounting Books, Records, and Minutes

Any member may make a written demand on the corporation at any reasonable time to inspect the accounting books and records and minutes of proceedings of the members, board, and committees of the board for a purpose reasonably related to that person's interest as a member [*Corp. Code §§ 6333, 8333*]. *Corp. Code §§ 6320 et seq.* or *8320 et seq.* generally govern the records and reports required to be kept by nonprofit public or mutual benefit corporations.

[2] Enforcement of Inspection Rights

If a lawful demand for membership lists or inspection of records is refused, the superior court of the proper county, or the county where therecords in question are kept, may enforce the demand or right of inspection with just and proper conditions. Alternatively, the court may, for good cause shown, appoint one or more competent inspectors or independent accountants (1) to audit the financial statements kept in California, and investigate the property, funds, and affairs of any corporation and of any subsidiary corporation, domestic or foreign, keeping records in California; and (2) to report on them in a manner to be directed by the court [*Corp. Code §§ 6336(a), 8336(a*); *see Corp. Code § 5068* (defining "proper county")].

Under penalty of punishment for contempt of court, all officers and agents of the corporation must produce to the appointed inspectors or accountants all books and documents in their custody or power [*Corp. Code §§ 6336(b), 8336(b)*].

Unless the court orders them to be paid or shared by the corporation, all expenses of the investigation or audit must be defrayed by the member asserting inspection rights [*Corp. Code §§ 6336(c), 8336(c)*].

In any action or proceeding under *Corp. Code § 6330 et seq.* or *8330 et seq.* (except as required by *Corp. Code § 6331* or *8331, see § 388.58[5]*), if the court finds that the failure of the corporation to comply with a proper demand was without justification, the court may award the member reasonable costs and expenses, including reasonable attorney's fees [*Corp. Code §§ 6337, 8337*; *see Moran v. Oso Valley Greenbelt Assn. (2001) 92 Cal. App. 4th 156, 160-161, 111*

Cal. Rptr. 2d 636 (once trial court concluded that association "wrongfully" withheld directors' minutes from member, denying attorney's fees and costs without further explanation was abuse of discretion); *see also Moran v. Oso Valley Greenbelt Assn. (2004) 117 Cal. App. 4th 1029, 1038, 12 Cal. Rptr. 3d 435* (trial court's award of attorney fees on remand held to be proper)].

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[Reserved]

§§ 388.60[Reserved]

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§ 388.80 Annual Membership Meetings

Meetings of members of nonprofit public and mutual benefit corporations may be held in a place within or outside of California as may be stated in or fixed in accordance with the corporation's bylaws [*Corp. Code §§ 5510(a), 7510(a)*]. If no other place is stated or fixed, meetings of the members are to be held at the principal executive office of the corporation [*Corp. Code §§ 5510(a), 7510(a)*].

Members not physically present in person (or, if proxies are allowed, by proxy) at a meeting of members may do the following pursuant to electronic transmission by and to the corporation [*see Corp. Code §§ 20, 21* (definitions)] or electronic video screen communication [*Corp. Code §§ 5510(a), 7510(a) ; see Corp. Code §§ 5510(f), 7510(f), see § 388.81*]:

- Participate in a meeting of members;
- Be deemed present in person (or, if proxies are allowed, by proxy); and
- Vote at a meeting of members, whether that meeting is to be held at a designated place or in whole or in part by means of electronic transmission by and to the corporation or by electronic video screen communication.

This procedure is applicable unless prohibited by the bylaws of the corporation. It must be authorized by the board of directors in its sole discretion, and is subject to the requirement of consent [*see Corp. Code § 20(b)*] and to those guidelines and procedures that the board of directors may adopt [*Corp. Code §§ 5510(a), 7510(a)*].

A regular meeting of the members must be held at least once in each year that directors are to be elected, and may be held from time to time as stated in or fixed in accordance with the bylaws [*Corp. Code §§ 5510(b), 7510(b)*].

If a corporation with members fails to hold a required regular meeting for a period of 60 days after the date designated for the meeting, or, if no date is designated, for a period of 15 months after the formation of the corporation, or for a

period of 15 months after its last regular meeting, or if the corporation fails to hold a written ballot for a period of 60 days after the date designated for the ballot, then the superior court of the proper county may summarily order the meeting to be held or the ballot to be conducted on the application of a member or, in the case of a nonprofit public benefit corporation, of the Attorney General. The corporation must receive notice and an opportunity to be heard [*Corp. Code §§ 5510(c), 7510(c)*; *see Corp. Code § 5068* (defining "proper county")]. The court may issue other orders as appropriate, including orders designating the time and place of the meeting, the record date for determination of members entitled to vote, and the form for notice of the meeting [*Corp. Code §§ 5510(d), 7510(d)*; *see also Corp. Code §§ 5611, 7611* (determination of record date)].

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§ 388.81 Electronic Meetings

A meeting of the members may be conducted, in whole or in part, by electronic transmission by and to the corporation or by electronic video screen communication if [*Corp. Code §§ 5510(f), 7510(f)*]:

- The corporation implements reasonable measures to provide members in person (or, if proxies are allowed, by proxy) a reasonable opportunity to participate in the meeting and to vote on matters submitted to the members, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with those proceedings; and

- When any member votes or takes other action at the meeting by means of electronic transmission to the corporation or electronic video screen communication, a record of that vote or action is maintained by the corporation.

Any request by a corporation, to a member who has provided an unrevoked consent to the use of electronic transmission by the corporation for communications under or pursuant to the Corporations Code, for consent to conduct a meeting of members by electronic transmission by and to the corporation must include a notice that "absent consent of the member pursuant to clause (b) of Section 20" of the Corporations Code, the meeting will be held at a physical location in accordance with *Corp. Code § 5510(a)* [*Corp. Code §§ 5510(f), 7510(f)*; *see 388.80*].

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§ 388.82 Special Membership Meetings

Special meetings of members may be called for any lawful purpose by the board, the chairman of the board, the president, any other persons that are specified in the bylaws, or five percent or more of the members [*Corp. Code §§ 5510(e), 7510(e)*].

A special meeting of members must be fixed by the board at a time not less than 35 days, nor more than 90 days days after the receipt of the request by any person entitled to call a special meeting of members [*Corp. Code §§ 5511(c), 7511(c)*]. If the board does not give notice within 20 days after receipt of the request, the persons entitled to call a special meeting may give the notice or the superior court of the proper county must summarily order the giving of notice, after notice to the corporation giving it an opportunity to be heard [*Corp. Code §§ 5511(c), 7511(c)*; *see Corp. Code § 5068* (defining "proper county")]. The court may issue other orders as appropriate, including orders designating the time and place of the meeting, the record date for determination of members entitled to vote, and the form of notice of the meeting [*Corp. Code §§ 5511(c), 7511(c)*; *see also Corp. Code §§ 5611, 7611* (determination of record date)].

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§ 388.83 Notice of Meetings

A written notice of any meeting of members at which members are required or permitted to take action must be given not less than 10 nor more than 90 days before the date of the meeting to each member who, on the record date for notice of the meeting, is entitled to vote at the meeting. If notice is given by mail, and is not mailed by first-class, registered, or certified mail, then not less than 20 days notice must be given. The notice must state the place, date, and time of the meeting, the means of electronic transmission by and to the corporation [*see Corp. Code §§ 20, 21* (definitions)] or electronic video screen communication, if any, by which members may participate in the meeting, and in the case of a special meeting, the general nature of the business to be transacted, or, in the case of a regular meeting, the matters the board intends to present for action [*Corp. Code §§ 5511(a), 7511(a)*; *see also Corp. Code §§ 5611, 7611* (determination of record date)]. When directors are to be elected at a meeting, the notice must include the names of those who are nominees at the time the notice is given [*Corp. Code §§ 5511(a), 7511(a)*].

A court may find that notice not given in conformity with the provisions above is still valid if it was given in a fair and reasonable manner [*Corp. Code §§ 5511(g), 7511(g)*].

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§ 388.84 Validity of Actions at Meeting

[1] Conditions for Validity

The transactions of any meeting of members, however called and noticed, and wherever held, are as valid as if they took place at a meeting that was duly held after regular call and notice if the following conditions are met [*Corp. Code §§ 5511(e), 7511(e)*]:

- A quorum is present, either in person or by proxy; and

- Either before or after the meeting, each of the persons entitled to vote who are not present in person or by proxy signs a written waiver of notice or a consent to the holding of the meeting, or an approval of the minutes of the meeting.

[2] Quorum

Unless otherwise set by the bylaws, one third of the voting power, represented in person or by proxy, constitutes a quorum at a meeting of members [*Corp. Code §§ 5512(a), 7512(a)*]. If the bylaws are to be amended to increase the quorum, the amendment may be adopted only by approval of the members in accordance with *Corp. Code § 5034* [*Corp. Code §§ 5512(a), 7512(a)*; *see § 388.84[3]*].

When a bylaw authorizes a corporation to conduct a meeting with a quorum of less than one-third of the voting power, then the only matters that may be voted on at any regular meeting actually attended, in person or by proxy, by less than one-third of the voting power are matters about whose general nature notice was given [*Corp. Code §§ 5512(b), 7512(b)*].

[3] Actions Taken by Ballot or Consent

Unless prohibited by the articles or bylaws and in the case of elections of directors by cumulative voting, any action that may be taken at any regular or special meeting of members may be taken without a meeting, if the corporation

distributes a written ballot to every member entitled to vote on the matter [*Corp. Code §§ 5513(a), 7513(a)*; *see Corp. Code §§ 5513(b)-(f), 7513(b)-(f)* (details regarding written ballots)]. Unless otherwise provided by the articles or bylaws, and if approved by the board ofdirectors, that ballot and any related material may be sent by electronic transmission by the corporation [*see Corp. Code § 20* (definition)] and responses may be returned to the corporation by electronic transmission to the corporation [*Corp. Code §§ 5513(a), 7513(a)*; *see Corp. Code § 21* (definition)].

Any action required or permitted to be taken by the members may be taken without a meeting, if all members individually or collectively consent in writing to the action [*Corp. Code §§ 5516, 7516*].

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§ 388.85 Proxies and Written Ballots

Any proxy or written ballot distributed to 10 or more members of a corporation with 100 or more members must afford an opportunity, on the proxy or written ballot, to specify a choice between approval and disapproval of each matter or group of related matters intended, at the time the proxy or written ballot is distributed, to be acted on at the meeting. The proxy or ballot must also provide, subject to reasonable specified conditions, that when the person solicited specifies a choice with respect to any matter the vote will be cast in accordance with that choice [*Corp. Code §§ 5514(a), 7514(a)*; *see also Corp. Code §§ 5613, 7613* (proxies authorized)].

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§ 388.86 Court-Ordered Meeting or Ballot

If for any reason it is impractical or unduly difficult for any corporation to call or conduct a meeting of its members, delegates, or directors, or otherwise obtain their consent, then the superior court of the proper county, on petition of a director, officer, delegate, member, or, in the case of a public benefit corporation, the Attorney General, may order that the meeting be called or that a written ballot or other form for obtaining the vote of members, delegates, or directors be authorized, in a manner that the court finds fair and equitable under the circumstances [*Corp. Code §§ 5515(a), 7515(a)*; *see Corp. Code §§ 5068* (defining "proper county"), *5515(b)-(d), 7515(b)-(d)* (notice of meeting and contents of order)].

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§ 388.87 Election of Directors by Members

[1] Nominations and Procedures

When directors of public or mutual benefit corporations are to be elected by the members of the corporation, reasonable nomination and election procedures are required [*Corp. Code §§ 5520, 7520(a)*; *see also Corp. Code §§ 5617, 7616* (action to determine validity of election)]. If the corporation complies with all of the provisions applicable to a corporation with the same number of members [*see Corp. Code §§ 5521-5524, §§ 7521-7524*], the nomination and election procedures of that corporation will be deemed reasonable. Those provisions, however, do not prescribe the exclusive means of making available to the members reasonable procedures for nomination and election of directors. A corporation may make available to the members other reasonable nomination and election procedures given the nature, size, and operations of the corporation [*Corp. Code §§ 5520(b), 7520(b)*].

A nomination and election procedure that does not provide the membership a fair and effective opportunity to participate in the choice or selection of the candidates or to vote for candidates other than those nominated by the nominating committee is not fair or lawful [*Braude v. Automobile Club of Southern Cal. (1978) 78 Cal. App. 3d 178, 186, 144 Cal. Rptr. 169* (decided under former Corp. Code § 2236 et seq.)]. Similarly, existing directors cannot perpetuate themselves in office. There must be some reasonable means by which a candidate can solicit proxies or votes other than at his or her own expense [*Braude v. Automobile Club of Southern Cal. (1978) 78 Cal. App. 3d 178, 183, 186, 144 Cal. Rptr. 169]* .

Except for directors who are elected as authorized by provisions relating to delegates [*see Corp. Code §§ 5152, 7152*] or voting by region or geographic area [*see Corp. Code §§ 5153, 7153*], and after close of nominations [*see Corp. Code §§ 5522, 7522*], any person who qualified to be elected to the board of directors of a corporation with 500 or more members may be nominated by the following [*Corp. Code §§ 5521, 7521(a),(b), (d)*; *see also Corp. Code § 7521(c)* (method for mutual benefit corporations in consumer retail business with one million or more members)]:

- Any method authorized by the bylaws, or the board;

- Petition delivered to an officer of the corporation, signed within 11 months preceding the next time directors will be elected by members representing two percent of the voting power for under 5,000 votes, and one-twentieth of one percent (but not less than 100 nor more than 500) for 5,000 or more votes; and

- Any member present, in person or by proxy, at a meeting to elect directors.

A corporation with 500 or more members may provide that, except for directors who are elected as authorized by provisions relating to delegates [*see Corp. Code §§ 5152, 7152*] or voting by region or geographic area [*see Corp. Code §§ 5153, 7153*], the articles or bylaws must set a date for the close of nominations for the board. The closing date must not be less than 50 nor more than 120 days before the day directors are to be elected [*Corp. Code §§ 5522(a), 7522(a),(b)*].

If more people are nominated than can be elected, nominees must have a reasonable opportunity to solicit votes and all members must have a reasonable opportunity to choose among the nominees [*Corp. Code §§ 5522(b), 7522(b)*]. A nominee must have a reasonable opportunity to communicate to the members the nominee's qualifications and the reasonsfor the nominee's candidacy [*Corp. Code §§ 5522(c), 7522(c)*]. If the number of people nominated is not more than the number of directors to be elected, those nominated and qualified may be declared to have been elected without any further action [*Corp. Code §§ 5522(d), 7522(d)*].

[2] Cumulative Voting

If the articles or bylaws of a nonprofit public or mutual benefit corporation authorize cumulative voting, every member entitled to vote at any election of directors may cumulate the member's votes and give one candidate a number of votes equal to the number of directors to be elected multiplied by the number of votes to which the member is entitled, or distribute the member's votes on the same principle among as many candidates as the member thinks fit [*Corp. Code §§ 5616(a), 7615(a)*].

An article or bylaw provision authorizing cumulative voting may only be repealed or amended by approval of the members [*see Corp. Code § 5034*; *see § 388.84[3]*], but repeal of the provision may require the vote of a greater proportion of the members, or of the members of any class [*Corp. Code §§ 5616(a), 7615(a)*].

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§ 388.88 Voting Rights; One Vote Per Member

Except as provided in a nonprofit public or mutual benefit corporation's articles or bylaws or if cumulative voting applies [*see Corp. Code §§ 5615, 7615*], each member is entitled to one vote on each matter submitted to a vote of the members [*Corp. Code §§ 5610, 7610*].

When two or more persons, whether fiduciaries, members of a partnership, joint tenants, tenants in common, husband and wife as community property, tenants by the entirety, or otherwise, hold an indivisible interest in a single membership, then, unless the secretary of the corporation is given written notice to the contrary and is furnished with a copy of the instrument or order appointing them or creating the relationship in which it is so provided, their acts with respect to voting will have the following effect [*Corp. Code §§ 5612, 7612*]:

- If only one votes, the act binds all.
- If more than one vote, the act of the majority binds all.

In the case of a public benefit corporation, voting agreements or voting trust agreements entered into by a member or members of a corporation, are not enforced [*Corp. Code § 5614*].

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§ 388.89 Members' Right to Request Results of Vote

For 60 days following the conclusion of an annual, regular, or special meeting of members, upon written request from a member the corporation must forthwith inform the member of the result of any particular vote of members taken at the meeting. The information includes the number of memberships voting for, the number of memberships voting against, and the number of memberships abstaining or withheld from voting. If the matter voted on was the election of directors, the corporation must report the number of memberships, or votes if voted cumulatively, cast for each nominee for director. If more than one class or series of memberships voted, the report must state the appropriate numbers by class and series of memberships [*Corp. Code §§ 6325, 8325*].

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§ 388.90 Board Meetings

Unless otherwise provided in the articles or bylaws, meetings of the board of directors may be called by the chair of the board, the president, any vice president, the secretary, or any two directors [*Corp. Code §§ 5211(a)(1), 7211(a)(1)*; *see Corp. Code § 5039.5* ("chair" includes "chairperson," "chairman," and "chairwoman")]. Regular meetings may be held without notice if the time and place of the meetings are fixed by the bylaws or the board. Special meetings may only be held on four days' notice by first-class mail or 48 hours' notice delivered personally or by telephone, including a voice messaging system, or by electronic transmission by the corporation [*see Corp. Code § 20* (definition)]. The articles or bylaws may not dispense with notice of a special meeting [*Corp. Code §§ 5211(a)(2), 7211(a)(2)*]. Each director present and voting at a meeting has one vote on each matter presented to the board of directors for action at that meeting. No director may vote at any meeting by proxy [*Corp. Code §§ 5211(c), 7211(c)*]. The provisions of *Corp. Code §§ 5211* and *7211* also apply to incorporators and committees of the board [*see Corp. Code §§ 5211(d), 7211(d)*]. For the rules governing waiver of notice, presence of quorums, and written consent without meetings, see *Corp. Code § 5211(a)(3)-(8), (b)* or *Corp. Code § 7211(a)(3)-(8), (b).*

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[Reserved]

§§ 388.91[Reserved]

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§ 388.110 Selection of Directors

[1] By Election

Unless they are designated or selected in accordance with *Corp. Code §§ 5220(d)* and *7220(d)* (discussed *below*), directors may be elected for terms of up to four years in the case of public benefit corporations and mutual benefit corporations, as fixed in the articles or bylaws. If there is no provision in the articles or bylaws, the terms are deemed to be for one year [*Corp. Code §§ 5220(a), 7220(a)*]. When the corporation has no members, then the directors may be elected for terms of up to six years [*Corp. Code §§ 5220(a), 7220(a)*]. The articles or bylaws may provide for staggering the terms of directors by dividing the total number of directors into groups of one or more directors. The terms of office of the several groups and the number of directors in each group need not be uniform [*Corp. Code §§ 5220(a), 7220(a)*].

Unless the articles or bylaws provide otherwise, each director must hold office until the expiration of the term for which he or she was elected and until a successor has been elected and qualified, unless the director has been removed from office [*Corp. Code §§ 5220(b), 7220(b)*]. A reduction in the authorized number of directors, or any amendment reducing the number of classes of directors, does not remove any director prior to the expiration of his or her term of office, unless the reduction or any amendment also provides for the removal of one or more specified directors [*Corp. Code §§ 5222(c), 7222(c)*].

The articles or bylaws may not be amended to extend the term of a director. Nor may any bylaw provision increasing the terms of the directors be adopted without approval of the members [*Corp. Code §§ 5220(a), 7220(a)*; *see Corp. Code § 5034* (defining approval of members; *see § 388.54[3]*)].

The articles or bylaws may provide for the election of one or more directors by members of any class voting as a class [*Corp. Code §§ 5220(c), 7220(c)*].

[2] By Designation or Selection

All or any portion of the directors authorized in the articles or bylaws of a corporation may be designated or selected by

a specified designator as provided by the articles or bylaws, rather than by election [*Corp. Code §§ 5220(d), 7220(d)*]. Directors who hold office by virtue of designation or selection may continue in office for the term prescribed by the governing article or bylaw provision, or in the absence of a prescribed term, until the governing article or bylaw provision is amended or repealed [*Corp. Code §§ 5220(d), 7220(d)*].

Unless otherwise provided in the articles or bylaws, the entitlement to designate or select a director or directors will cease if (1) the specified designator of that director or directors has died or ceased to exist; or (2) the entitlement of the specified designator to designate is in the capacity of an officer, trustee, or other status and the office, trust, or status has ceased to exist [*Corp. Code §§ 5220(d), 7220(d)*].

[3] Appointment by Court

If a corporation has not issued memberships and either (1) all the directors resign, die, or become incompetent, or (2) the initial directors have not been named in the articles and all the incorporators resign, die, or become incompetent before the election of the initial directors, the superior court of any county may appoint directors of the corporation upon application by any party in interest [*see Corp. Code §§ 5220(e)* (nonprofit public benefit corporations), *7220(e)* (nonprofit mutual benefit corporations), 9220(d) (nonprofit religious corporations), *12360(e)* (consumer cooperatives)].

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§ 388.111 Removal

[1] For Cause

If a director of a nonprofit public or mutual benefit corporation is declared of unsound mind by a final order of court, convicted of a felony, or found by a final order or judgment of any court to have breached any duties to the corporation [*see Corp. Code § 5230*], the board may declare his or her office vacant. In addition, the bylaws may provide that a director may be removed for missing a specified number of meetings [*Corp. Code §§ 5221, 7221(a)*]. The board, by a majority vote of the directors who meet all of the required qualifications to be a director, may declare vacant the office of any director who fails or ceases to meet any required specification [*see Corp. Code §§ 5151(c)(3), 7151(c)(3)*] that was in effect at the beginning of that director's current term of office [*Corp. Code §§ 5221(b), 7221(b)*].

At the suit of a director or the requisite number of members, the superior court of the proper county may remove any director from office in case of fraudulent or dishonest acts or gross abuse of authority or discretion with reference to the corporation, or a breach of any duties to the corporation [*Corp. Code §§ 5223(a), 7223(a), (b)(1)*; *see Corp. Code § 5068* (defining "proper county"); *see also Committee to Save the Beverly Highlands Homes Association v. The Beverly Highlands Homes Association (2001) 92 Cal. App. 4th 1247, 1272, 1271, 112 Cal. Rptr. 2d 732* (suit by committee was insufficient to enable plaintiffs to obtain removal of board pursuant to *Corp. Code § 7223*)]. In the case of a public benefit corporation, members holding 10 percent of the voting power, or 20 members, whichever is less, are required to institute suit [*Corp. Code § 5223(a)*; *see Corp. Code § 5036(a),(e)*]. In the case of a mutual benefit corporation, the lesser of 10 percent of the voting power, or 20 members if the total number of votes entitled to be cast for a director is less than 5,000, and 100 members if the total number of votes entitled to be cast for a director is 5,000 or more, are required to institute suit [*Corp. Code §§ 5036(a), (e), 7223(b)(2), (3)*].

The Attorney General may also bring an action, intervene in an action, and must be given notice of any action involving a public benefit corporation or any mutual benefit corporation holding assets in charitable trust [*Corp. Code §§ 5223(b), 7223(c)*].

For a complaint for removal of a director for cause, see *§ 388.167*.

[2] Without Cause

Subject to *Corp. Code § 5222(b)* and *(f)* or *Corp. Code § 7222(b)* and *(f)* (discussed *below*), any and all directors may be removed without cause if removal is approved by one of the following methods [*Corp. Code §§ 5222(a), 7222(a)*]:

- In a corporation with fewer than 50 members, removal is approved by a majority of all members [*see Corp. Code § 5033* ("approval of majority of all members" as majority of votes entitled to be cast)];

- In a corporation with 50 or more members, removal is approved by the members [*see Corp. Code § 5034*; *see § 388.54[3]*]; or

- In a corporation with no members, removal is approved by a majority of the directors then in office.

If an article or bylaw provision entitles a designator to designate one or more directors, any designated director may be removed without cause by the designator, unless otherwise provided in the articles or bylaws. Any designated director may only be removed under*Corp. Code § 5222(a)* or *Corp. Code § 7222(a)*with the written consent of the designating person or persons [*Corp. Code §§ 5222(f), 7222(f)*].

Unless otherwise provided in the articles or bylaws, the right to remove will not apply if (1) the designator entitled to that right has died or ceased to exist; or (2) the right is in the capacity of an officer, trustee, or other status and the office, trust, or status has ceased to exist [*Corp. Code §§ 5222(f)(3), 7222(f)(3)*].

In a corporation with members in which the articles or bylaws authorize members to cumulate their votes, unless the entire board is removed, no director may be removed if the votes cast against removal, or not consenting in writing to removal, would be sufficient to elect the director if voted cumulatively at an election at which the same total number of votes were cast (or, if the action is to be taken by written ballot, all memberships entitled to vote were voted), and the entire number of directors authorized at the time of the director's election were being elected at that time [*Corp. Code §§ 5222(b)(1), 7222(b)(1)*].

In a corporation with members, any director elected by the members of a class, voting as a class, pursuant to an article or bylaw provision may only be removed by the applicable vote of that class [*Corp. Code §§ 5222(b)(2), 7222(b)(2)*]. Similarly, any director elected by the members within a chapter or other organizational unit, region, or other geographic grouping may be removed only by the applicable vote of the members within the organizational unit or geographic grouping [*Corp. Code §§ 5222(b)(3), 7222(b)(3)*].

Any reduction in the authorized number of directors, or any amendment reducing the number of classes of directors, does not remove any director prior to the expiration of his or her term of office, unless the reduction or amendment also provides for the removal of one or more specified directors [*Corp. Code §§ 5222(c), 7222(c)*].

If a director designated pursuant to a governing article or bylaw provision [*see Corp. Code §§ 5220(d), 7220(d)*] is removed with or without cause, if a different person may be designated according to the article or bylaw provision, a new designation must be made [*Corp. Code §§ 5222(e)(1), 7222(e)(1)*]. If the governing article or bylaw provision contains no provision for designating a different person, it must be deemed repealed [*Corp. Code §§ 5222(e)(2), 7222(e)(2)*].

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§ 388.112 Filling Vacancies

Unless otherwise provided in the articles or bylaws of a nonprofit public or mutual benefit corporation, and except for a vacancy created by a removal of a director, vacancies on the board may be filled as follows [*Corp. Code §§ 5224(a), 7224(a)*; *see Corp. Code § 5032* (defining "approval by the board")]:

- By approval of the board; or

- If the number of directors in office at the time is less than a quorum, by (1) the unanimous written consent of the directors in office at that time, (2) the affirmative vote of a majority of the directors in office at that time at a meeting held pursuant to notice or waivers of notice complying with *Corp. Code § 5211* or *7211* [*see § 388.90*] or (3) a sole remaining director.

A vacancy created by the removal of a director may be filled only by approval of the members [*see Corp. Code § 5034*; *see § 388.54[3]*], unless the articles or a bylaw approved by the members provide that the board may fill a vacancy created by removal, or unless the corporation has no members [*Corp. Code §§ 5224(a), 7224(a)*].

If any vacancy is not filled by the directors, then the members may elect a director to fill the vacancy [*Corp. Code §§ 5224(b), 7224(b)*].

When a director resigns, unless the notice specifies a later time for the effectiveness of the resignation, his or her resignation will be effective on giving written notice to the chairman of the board, the president, the secretary, or the board of directors of the corporation. If a resignation is effective at a future time, a successor may be elected to take office when the resignation becomes effective [*Corp. Code §§ 5224(c), 7224(c)*].

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§ 388.113 Provisional Director

A nonprofit public or mutual benefit corporation may have an even number of directors who are equally divided and cannot agree regarding the management of the affairs of the corporation, with the result that the corporation's activities can no longer be conducted to its advantage, or that there is danger that the corporation's property, activities, or business will be impaired or lost. In this situation, the superior court of the proper county may appoint a provisional director, notwithstanding any provisions of the corporation's articles or bylaws, and whether or not an action is pending for an involuntary winding up or dissolution of the corporation [*Corp. Code §§ 5225(a), 7225(a)*; *see Corp. Code § 5068* (defining "proper county")]. Action for appointment of a provisional director may brought by any director or by members holding at least 331/3 percent of the voting power [*Corp. Code §§ 5225(a), 7225(a)*].

If the members of a corporation are deadlocked so that they cannot elect the directors to be elected at the time prescribed for their election, the superior court of the proper county may appoint a provisional director or directors, or order other equitable relief it deems appropriate, on petition of members holding 50 percent of the voting power, notwithstanding any provisions of the articles or bylaws [*Corp. Code §§ 5225(b), 7225(b)*].

In the case of a public benefit corporation, or a mutual benefit corporation holding assets in charitable trust, any person bringing an action for appointment of a provisional director must give notice to the Attorney General, who may intervene, or the Attorney General may bring an action [*Corp. Code §§ 5225(c), (d), 7225(c)*].

A provisional director must be an impartial person, who is neither a member nor a creditor of the corporation, nor related to any other directors of the corporation or to any judge making the provisional appointment [*Corp. Code §§ 5225(e), 7225(d)*]. A provisional director must have all therights and powers of a director, including the right to compensation fixed by the court (unless otherwise agreed with the corporation), until the deadlock in the board or among members is broken or until the provisional director is removed by order of the court or by approval of a majority of all members in accordance with *Corp. Code § 5033* [*Corp. Code §§ 5225(e), 7225(d)*].

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§ 388.114 Special Restrictions on Directors of Public Benefit Corporations

A director of a public benefit corporation must give notice to the Attorney General if his or her resignation will leave the corporation without a director in charge of its affairs [*Corp. Code § 5226*].

Not more than 49 percent of the directors of a public benefit corporation may be interested persons, which include the following [*Corp. Code § 5227(a),(b)*]:

- Any person currently being compensated by the corporation for services rendered to it within the previous 12 months, whether as a full or part-time employee, independent contractor, or otherwise, excluding any reasonable compensation paid to a director as a director; or

- Any brother, sister, ancestor, descendant, spouse, brother-in-law, sister-in-law, son-in-law, daughter-in-law, mother-in-law, or father-in-law of any person described in the first category above.

A person with standing [*see Corp. Code § 5142*] may bring an action to correct any violation of this requirement. The court may enter any order that will provide an equitable and fair remedy to the corporation, including an order for the election of additional directors, an order to enlarge the size of the board, or an order for the removal of directors [*Corp. Code § 5227(c)*].

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§ 388.130 California Corporation Laws

Ballantine & Sterling, California Corporation Laws, Ch. 19, *Nonprofit Corporations and Organizations* (Matthew Bender).

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§ 388.131 California Legal Forms

For discussion of the formation of California nonprofit corporations, and forms, see California Legal Forms, Ch. 13, *Nonprofit Corporations* (Matthew Bender)

For discussion of the formation of California nonprofit unincorporated associations, and forms, see California Legal Forms, Ch. 13A, *Nonprofit Unincorporated Associations* (Matthew Bender)

For discussion of the requirements and procedures for obtaining and maintaining tax-exempt status for nonprofit entities, and forms, see California Legal Forms, Ch. 13B, *Tax-Exempt Status for Nonprofit Entities* (Matthew Bender)

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§ 388.132 California Points and Authorities

For points and authorities for use in actions and proceedings relating to commercial corporations that may be adapted for use in the nonprofit context, see California Points and Authorities , Ch. 52, *Corporations* (Matthew Bender)

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§ 388.133 State Statutes

[1] Capacity

Nonprofit corporation subject to suit and attachment. *Corp. Code §§ 5004, 5005*

[2] Definitions and General Provisions

Applicability of Parts 2 and *3 of Corporations Code* governing nonprofit public benefit or mutual benefit corporations. *Corp. Code § 5003*

Notice or written notice. *Corp. Code §§ 5015, 5016*

"Directors" defined. *Corp. Code § 5047*

"Distribution" defined. *Corp. Code § 5049*

"Voting power" defined. *Corp. Code § 5078*

[3] Directors' Standard of Care

Performance of duties of director of public benefit corporation in good faith; director reliance on competent advisors. *Corp. Code §§ 5231, 7231*

Standard of care governing election, selection, or nomination of directors. *Corp. Code §§ 5232, 7232*

Self-dealing transactions by directors; definitions and remedies. *Corp. Code §§ 5233, 7233*

Liability of director with interest in contract or transaction with corporation. *Corp. Code §§ 5234, 7233*

Responsibility for fixing compensation of directors. *Corp. Code §§ 5235, 7233*

Prohibitions against certain corporate loans, guarantees, and advances to directors. *Corp. Code §§ 5236, 7235*

Liability for improper distributions, loans, and guarantees to directors. *Corp. Code §§ 5237, 7236*

[4] Indemnification of Agents

Indemnification of corporation's agents; insurance. *Corp. Code §§ 5238, 7237*

[5] Limited Liability of Volunteer Officers and Directors

Court approval required before complaint may be filed against volunteer based on acts or omissions undertaken in scope of duty. *Code Civ. Proc. § 425.15*

Limited liability of volunteer directors and officers of nonprofit corporations. *Corp. Code § 5047.5*

Volunteer director or officer of public benefit corporation not liable to third party for act or omission undertaken in good faith in scope of duty. *Corp. Code § 5239*

Volunteer director or officer of trade, professional, and labor organization formed under Mutual Benefit Corporation Law not liable for acts performed in discharge of duty to corporation in good faith as reasonable person would. *Corp. Code § 7231.5*; *but see Corp. Code §§ 7233, 7236* (exceptions)

[6] Members and Membership Rights

[a] Inspection Rights

Members' right to inspect and copy membership lists; when corporation may deny access; procedure for denial. *Corp. Code §§ 6330, 8330*

Petition by corporation for order setting aside demand for inspection or imposing reasonable alternative. *Corp. Code §§ 6331(a)-(h), 8331(a)-(h)*

Members' petition for writ of mandate to compel access. *Corp. Code §§ 6331(h),(i), 8331(h),(i)*

Corporation's remedies and members' liability for misuse of membership list; prohibited uses of list. *Corp. Code §§ 6331(j), 6338, 8331(j), 8338*

Limiting or restricting rights to membership lists to protect constitutional rights. *Corp. Code §§ 6332, 8332*

Members' right to inspect records of corporation. *Corp. Code §§ 6333, 8333*

Enforcing rights of inspection by court action. *Corp. Code §§ 6336, 8336*

[b] Issuance and Transfer

Class of membership defined. *Corp. Code § 5041*

Definitions of member, membership, and membership certificate. *Corp. Code §§ 5056, 5057, 5058*

Definition of shareholder, shares. *Corp. Code §§ 5071, 5072*

Members not required. *Corp. Code §§ 5310, 7310*

Issuance of memberships. *Corp. Code §§ 5310-5311, 7310-7311*

Multiple or fractional memberships. *Corp. Code §§ 5312, 7312*

Who may be member. *Corp. Code §§ 5313, 7315*

Transferability of memberships. *Corp. Code §§ 5320, 7320*

Issuance of memberships with different rights, preferences, and privileges. *Corp. Code §§ 5330, 5331, 7330, 7331*

Benefits to nonmembers permitted. *Corp. Code §§ 5332, 7333*

Issuance, contents, amendment, and surrendering of membership certificates of mutual benefit corporations. *Corp. Code § 7313*

Issuance of new certificate of mutual benefit corporations when certificate is lost, stolen, or destroyed. *Corp. Code §*

7314

Redeemable memberships of mutual benefit corporations. *Corp. Code § 7332*

[c] Meetings and Notice of Meetings

When meetings may or must be held. *Corp. Code §§ 5510, 7510*

Notice of meeting; waiver of notice. *Corp. Code §§ 5511, 7511*

Quorum required for meetings of public benefit corporations. *Corp. Code §§ 5512, 7512*

Action by written ballot; requirements and when authorized. *Corp. Code §§ 5513-5515, 7513-7515*

Action by written consent. *Corp. Code §§ 5516, 7516*

Name signed on ballot, consent, waiver, or proxy. *Corp. Code §§ 5517, 7517*

[d] Members' Liability

Liability of members for debts, liabilities, or obligations of corporation. *Corp. Code §§ 5350, 7350*

Liability of members for dues. *Corp. Code §§ 5351, 7351*

Procedure for creditor to bring action against member. *Corp. Code §§ 5352, 7353*

Liabilities with respect to fraud in issuance of memberships. *Corp. Code §§ 5353, 7354*

Personal liability of person holding membership in representative or fiduciary capacity. *Corp. Code §§ 5354, 7352*

Liability for distributions to members, which in mutual benefit corporation includes improper purchase or redemption of memberships. *Corp. Code §§ 5410, 5420, 7411-7414, 7420*

[e] Termination of Membership

Resignation or expiration of memberships. *Corp. Code §§ 5340, 7340*

Procedure for expulsion or suspension of memberships. *Corp. Code §§ 5341, 7341*

Procedure for change in requirements for membership in public benefit corporations. *Corp. Code § 5342*

[f] Voting Rights

Reasonable nomination and election procedures required. *Corp. Code §§ 5520-5522, 7520-7522*

Voting in general; determining record date and eligibility to vote; inspectors of elections. *Corp. Code §§ 5610-5611, 5615, 7610-7611, 7614*

Voting of membership held jointly or in name of two or more persons. *Corp. Code §§ 5612, 7612*

Proxies. *Corp. Code §§ 5613, 7613*

Voting trust or voting agreement by members of public benefit corporation as unenforceable. *Corp. Code § 5614*

Cumulative voting. *Corp. Code §§ 5616, 7615*

Action to determine validity of election. *Corp. Code §§ 5617, 7616*

[7] Merger

Merger procedure. *Corp. Code §§ 6010-6019.1, 8010-8019.1*

Effect of merger. *Corp. Code §§ 6020-6022, 8020-8022*

[8] Selection and Removal of Directors

Designation, selection, and election of directors; terms of office. *Corp. Code §§ 5220, 7220*

Removal of director for unsound mind or missing meetings. *Corp. Code §§ 5221, 7221*

Removal of director without cause. *Corp. Code §§ 5222, 7222*

Action for removal of director for fraudulent or dishonest acts, or gross abuse of authority. *Corp. Code §§ 5223, 7223*

Filling vacancies on board of directors. *Corp. Code §§ 5224, 7224*

Appointment of provisional directors. *Corp. Code §§ 5225, 7225*

Notice to Attorney General when director of public benefit corporation resigns if resignation will leave corporation without director. *Corp. Code § 5226*

Restrictions on numbers of interested directors of public benefit corporations. *Corp. Code § 5227*

[9] Suspension or Forfeiture of Powers

Contracts made with corporation during period of its suspension or forfeiture are voidable at instance of any party other than taxpayer. *Rev. & Tax. Code §§ 23304.1, 23304.5*

Suspension or forfeiture for failure to file franchise tax return or statements required by *Rev. & Tax. Code § 23772* or *23774*, or to pay amounts due under *Rev. & Tax. Code § 23703* or *23772*. *Rev. & Tax Code § 23775*

Relief from suspension or forfeiture by filing application of revivor, new application for exemption, and any reports or amounts due. *Rev. & Tax. Code § 23776*

Revocation of exempt status for failure to file required franchise tax return, pay amounts due, comply with *Rev. & Tax. Code § 19504*, or confine activities to those permitted. *Rev. & Tax. Code § 23777*

Penalties assessed against public or mutual benefit corporations for failure to file annual statements required by *Corp. Code § 6810* or *8810*. *Rev. & Tax. Code § 19141*

[10] Vehicle and Other Donations

Nonprofit organization engaged in solicitation for charitable purposes must provide donor of motor vehicle, aircraft, or vessel with receipt containing specified information. *Bus. & Prof. Code § 22930*

Exclusion from compliance with dealership laws for charitable organization [*see I.R.C. § 501(c)(3)*; *Rev. & Tax. Code § 23701d*] that accepts donations of vehicles for resale; recordkeeping requirements. *Veh. Code §§ 286(o), 1660*

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§ 388.134 Administrative Regulations

General provisions and definitions relating to regulation of nonprofit corporations. *11 Cal. Code Reg. § 999.1*

Attorney General's regulation of public benefit corporations. *11 Cal. Code Reg. § 999.2*

Attorney General's regulation of mutual benefit corporations. *11 Cal. Code Reg. § 999.3*

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§ 388.135 Decisions

[1] Derivative Actions

Members of nonprofit mutual benefit corporation (homeowners' association) are prohibited from instituting or maintaining action in right of corporation unless action is derivative suit [*see Corp. Code § 7710*]; thus, individual homeowner was without standing to sue insurer for failure to pay claim under policy held by association when association did not pursue litigation regarding nonpayment. *Gantman v. United Pacific Ins. Co. (1991) 232 Cal. App. 3d 1560, 1567-1569, 284 Cal. Rptr. 188*

[2] Election of Directors

Election procedures that (1) failed to give any more than minimal legal notice of meeting at which directors were to be elected, (2) failed to disclose nominees to be voted on at meeting, and (3) made it impractical for anyone to communicate effectively with members held unfair and illegal. *Braude v. Havenner (1974) 38 Cal. App. 3d 526, 533, 113 Cal. Rptr. 386* (decided under former Corp. Code § 2236 et seq.)

In determining challenge to corporate election, court should consider all factors bearing on validity of election and give effective direction to relief required. *Braude v. Havenner (1974) 38 Cal. App. 3d 526, 530, 113 Cal. Rptr. 386*

[3] First Amendment Rights

City ordinance unconstitutional as applied to nonprofit organizations to prohibit them from selling products constituting or carrying religious, political, philosophical, or ideological message related to their purpose without peddler's permit and to give police chief discretion to issue or deny permit; when commercial and pure speech are inextricably intertwined, entirety must be protected as noncommercial speech. *Gaudiya Vaishnava Soc. v. City of San Francisco (9th Cir. 1990) 952 F.2d 1059, 1066*

[4] Member Rights

Incorporated association's rule limiting membership to those primarily engaged in real estate business held anticompetitive and in violation of Cartwright Act (*Bus. & Prof. Code § 16720 et seq.*), and thus rule could not provide basis for denial of membership. *Marin County Bd. of Realtors, Inc. v. Palsson (1976) 16 Cal. 3d 920, 940-941, 130 Cal. Rptr. 1, 549 P.2d 833*

Professional society (unincorporated association) that wields monopoly power and effects significant economic and professional concerns is clothed with public interest and cannot reject applicant for membership without giving applicant fair opportunity to defend against rejection. *Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 552, 561, 116 Cal. Rptr. 245, 526 P.2d 253*

Writ of mandate is proper remedy for member of labor union (unincorporated association) to challenge suspension without fair hearing. *Cason v. Glass Bottle Blowers Asso. (1951) 37 Cal. 2d 134, 140, 143-147, 231 P.2d 6*

[5] Member Liabilities

Pursuant to *Corp. Code § 7350(a)*, individual homeowner members of condominium complex homeowners association who were not parties to corporation's contract to repair common areas after earthquake had no personal liability for its debts or liabilities under construction contract. *ECC Construction Inc. v. Ganson (2000) 82 Cal. App. 4th 572, 576, 98 Cal. Rptr. 2d 292*

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§ 388.136 Law Reviews

Facchina et al, *Privileges & Exemptions Enjoyed by Nonprofit Organizations, 28 U.S.F. L. Rev. 85 (1993)*

Fishman, *Standards of Conduct for Directors of Nonprofit Corporations, 7 Pace L. Rev. 389 (1987)*

Comment, *Member Liability for Dues, Fees, Fines, and Assessments in Nonprofit Associations and Corporations, 19 U.S.F. L. Rev. 393 (1985)*

Moody, *State Statutes Governing Directors of Charitable Corporations, 18 U.S.F. L. Rev. 749 (1984)*

Sproul, *Is California's Mutual Benefit Corporation Law the Appropriate Domicile for Community Associations? 18 U.S.F. L. Rev. 695 (1984)*

Comment, *Review of Selected 1981 California Legislation, 13 Pac. L.J. 584 (1982)*

Symposium: California Nonprofit Corporation Law, 13 U.S.F. L. Rev. 729-912 (1979)

Sloss & Becker, *The Organization Affected With a Public Interest and Its Members--Justice Tobriner's Contribution to Evolving Common Law Doctrine, 29 Hastings L.J. 99 (1977)*

Howland, *The History of the Supervision of Charitable Trusts and Corporations in California, 13 UCLA L. Rev. 1029 (1966)*

Note, *Torts: Charitable Institutions: Liability for Negligence of Agents, 39 Cal. L. Rev. 455 (1951)*

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§ 388.137 Text References

Advising California Nonprofit Corporations (Cal. C.E.B. 1984)

Marsh's California Corporation Law, Ch. XXIII (Prentice-Hall 3d ed. 1990)

Witkin, California Procedure, vols. 4-5, *Pleading*, §§ 75-80, 854, 1055-1061 (4th ed. 1997)

Witkin, Summary of California Law, vol. 9, *Corporations*, §§ 78-111, *180*, *181*, 222-227 (10th ed. 2005)

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§ 388.150 Allegation of Capacity and Principal Place of Business [Code Civ. Proc. § 395.5]--Public Benefit Corporation [Corp. Code §§ 5004, 5140]

[1] FORM Allegation of Capacity and Principal Place of Business [Code Civ. Proc. § 395.5]--Public Benefit Corporation [Corp. Code §§ 5004, 5140]

_____[*Identify party, e.g.* Plaintiff] _____[*name of corporation*] is, and at all times herein mentioned was, a corporation duly organized and existing under the Nonprofit Public Benefit Corporation Law of the State of California, with its principal place of business in_____[*city*], _____ County, California.

[2] Use of Form

This allegation of capacity and principal place of business of a nonprofit public benefit corporation [*see Corp. Code § 5110 et seq.*] is for use in a complaint or answer [*see Corp. Code §§ 5004, 5140*]. The allegation of principal place of business may be included if it is necessary to establish venue [*see Code Civ. Proc. § 395.5*]. However, if venue is to be established on a different basis, such as the county in which the liability arose [*see Code Civ. Proc. § 395.5*], the allegation of principal place of business should be omitted [*see generally* Ch. 571, *Venue*].

[3] Legal Capacity of Corporations

Although it is customary to plead corporate organization and existence to assert a corporation's capacity to be sued, the failure to affirmatively allege capacity of a corporation to sue is not a proper ground for general demurrer [*Los Angeles Railway Co. v. Davis (1905) 146 Cal. 179, 180-181, 79 P. 865]* . Similarly, the suspension or forfeiture of corporate powers for failure to comply with tax laws is generally raised by the other party to the litigation in the form of an affirmative defense or by motion for summary judgment [*see* Ch. 160, *Corporations: Capacity*].

[4] Venue

A nonprofit corporation may be sued in the county in which the contract is made or is to be performed, or in which the obligation or liability arises or the breach occurs, or in which the corporation's principal place of business is situated,

subject to the power of the court to change the place of trial as in other cases [*Code Civ. Proc. § 395.5*].

[5] Cross References

For a form for specific denial of plaintiff's corporate status, see Ch. 26, *Answers* .

For an allegation of capacity and principal office of an unincorporated nonprofit association, see Ch. 61, *Associations and Clubs*

For an allegation of capacity and principal office of a church incorporated in California, see Ch. 110, *Churches and Religious Organizations*

For alternative allegations of venue, see Ch. 571, *Venue*

[6] State Statutes

Corporation subject to suit. *Corp. Code § 5004*

Powers of public benefit corporations. *Corp. Code § 5140*

[7] Decisions

Venue in class action is not based on service to particular defendant unless plaintiff, as representative of class, has personal cause of action against that defendant. *General Motors Corp. v. Superior Court (1983) 141 Cal. App. 3d 966, 969-970, 190 Cal. Rptr. 742*

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34-388 California Forms of Pleading and Practice--Annotated § 388.151

§ 388.151 Allegation of Capacity and Principal Place of Business [Code Civ. Proc. § 395.5]--Mutual Benefit Corporation [Corp. Code §§ 5004, 7140]

[1] FORM Allegation of Capacity and Principal Place of Business [Code Civ. Proc. § 395.5]--Mutual Benefit Corporation [Corp. Code §§ 5004, 7140]

_____[*Identify party, e.g.*, Plaintiff] _____[*name of corporation*] is, and at all times herein mentioned was, a corporation duly organized and existing under the Nonprofit Mutual Benefit Corporation Law of the State of California, with its principal place of business in_____[*city*], _____ County, California.

[2] Use of Form

This allegation of capacity and principal place of business of a nonprofit mutual benefit corporation [*see Corp. Code § 7110 et seq.*] is for use in a complaint or answer [*see Corp. Code §§ 5004, 7140*]. For discussion of allegations of capacity and principal place of business, see the Comments to *§ 388.150*.

[3] State Statutes

Mutual benefit corporations have powers of natural person. *Corp. Code § 7140*

[4] Cross Reference

For related Form, *see § 388.150*.

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34-388 California Forms of Pleading and Practice--Annotated § 388.152

§ 388.152 Proceedings for Indemnification for Defense Expenses [Corp. Code §§ 5238(a),(d),(e)(3), 7237(a),(d),(e)(3)]--Notice of Motion in Pending or Completed Case and Supporting Declaration [Code Civ. Proc. § 2015.5]

[1] FORM Proceedings for Indemnification for Defense Expenses [Corp. Code §§ 5238(a),(d),(e)(3), 7237(a),(d),(e)(3)]--Notice of Motion in Pending or Completed Case and Supporting Declaration [Code Civ. Proc. § 2015.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR IN-
Plaintiff,	)	DEMNIFICATION OF DEFENSE EXPENSES [,
vs.	)	SUPPORTING DECLARATION OF
_____ [*name*],	)	_____ (*name*), AND MEMOR-
Defendant.	)	ANDUM OF POINTS AND AUTHORITIES]
	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To_____[*name of corporation*]:

NOTICE IS HEREBY GIVEN that on_____[*date*], at_____[*time*], or as soon

thereafter as the matter can be heard, in the courtroom of [_____ (Department *or* Division) _____ of] the above-entitled court, located at_____[*name, if any, and street address of building*] in_____[*city*], California, defendant_____[*name*] will, and hereby does, move for an order_____[compelling *or* authorizing] you to indemnify him/her for defense expenses incurred in the above-entitled_____[action *or* proceeding]. The motion will be made on the ground that the moving party is an agent as defined in Corporations Code Section _____[*5238 or 7237*], was made a defendant in the above-entitled_____[action *or* proceeding] because of this status, and is eligible for indemnification for his/her defense expenses under that section.

The motion will be based on this notice of motion, the attached declaration of_____[*name*], the attached memorandum of points and authorities, the records on file herein, and such evidence as may be presented at the hearing.

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

SUPPORTING DECLARATION OF_____[*name*]

I,_____[*name*], declare:

1. I am _____[*identify declarant, e.g.,* a member of the board of directors] of _____[*name*] (hereinafter "the corporation"), which is a corporation organized and existing under California's Nonprofit _____[Mutual *or* Public] Benefit Law and a defendant in this action. I have been a _____[*specify, e.g.,* director] since_____[*date*][, serving in that capacity without compensation], and was serving in that capacity at the time of the incidents that are the basis of this action.

2. I was named as a defendant in this lawsuit by reason of the fact that I am a_____[*specify, e.g.,* director] of defendant corporation, specifically by reason of the fact, as alleged at Paragraph _____ of the complaint, _____ [*specify, e.g.,* that I was present at the meeting of directors on _____ (*date*), and voted with the majority of directors at that meeting to offer _____ [*name*] a three-year contract of employment as the managing officer of the corporation's hospice program].

[3. Judgment (on the merits) was entered in my favor in this matter on _____ (*date*). (The transcript of my testimony during the _____ (court *or* jury) trial is attached hereto as Exhibit "A" and made a part of this declaration.)]

4. I voted in good faith to _____ [*specify action taken, e.g.,* approve _____'s (*name*) employment in that capacity] because I believed it was in the best interest's of the corporation to do so. _____ [*Refer to specific portions of transcript that establish declarant's good faith and belief that the action was in the corporation's best interests, or set forth facts demonstrating declarant's good faith consideration of the decision and reasons why declarant believed it was in the corporation's best interest, e.g.,* After reviewing the applications of the five candidates considered by the personnel committee to be the most qualified, and meeting with each of them in person to discuss how each of them would function in the position of hospice director, it was clear to me that the position of hospice director requires extensive knowledge, stamina, awareness, sensitivity, some medical

background, and great compassion. None of the other candidates had ever managed as large a hospice program as was completed by the corporation or for as long a time. Only two of the other applicants had ever managed a hospice program in California. By all objective criteria, and based on my opinion of the candidates formed at the interviews, it was clear to me that _____ (*name*) was the best candidate for the position and would do the best job for the corporation].

[*Continue, in as many separate paragraphs as necessary, to refer to specific portions of transcript, or to set forth facts that negate any specific grounds of malicious intent or intent to benefit declarant rather than the corporation. Paragraphs 5-7 are examples not intended to be appropriate for every situation.*]

5. Although I was aware that _____ (*name*) was under contract to plaintiff at the time, I did not intend to jeopardize plaintiff's economic prospects, or those of its clients or members, by inducing _____ [*name*] to breach his/her contract with plaintiff. In addition, from my work as a vice president of a bank, from consultations in that capacity with the bank's attorneys, and based on the advice of the corporation's counsel, I believed the corporation's right to hire _____ [*name*] was protected by the privilege of fair competition.

6. Although I have known _____ (*name*) socially for over 10 years, I did not intend to receive any favor or benefit for myself in voting that the corporation employ him/her; nor was the relationship a factor in my decision that he/she was the best candidate for the position.

7. Although _____ [*name*] is my son-in-law, I did not intend to receive any favor or benefit for myself in voting that the corporation employ him/her; nor was the relationship a factor in my decision that he/she was the best candidate for the position.

[*CONTINUE*]

8. In connection with the defense of this action, I have_____[incurred and become obligated to pay *or* paid (some of)] the following expenses: [*list items and state amount of each, e.g.:*

Attorney's fees	$_____
Deposition costs	$_____
Filing fees	$_____].

9. The foregoing expenses were necessary because_____[*specify, e.g.,* the corporation's insurance policy did not provide for the defense of directors in civil actions in which the corporation was also a party].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

MEMORANDUM
[*Add memorandum supporting motion*.]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

This notice of motion is for use by an agent of a nonprofit public or mutual benefit corporation [*see Corp. Code §§ 5238(a), 7237(a)*] claiming that he or she is entitled to indemnity from the corporation for defense expenses incurred in an action or proceeding in which he or she was sued because of being an agent of the corporation, and in which the corporation is a party as of the time of entry of judgment [*see § 388.16*].

With appropriate modification, this form may be used by the attorney or any other person rendering services in connection with the defense to seek an order compelling or authorizing the corporation to provide indemnity, or by the corporation to seek an order authorizing it to provide indemnity [*see Corp. Code §§ 5238(e)(3), 7237(e)(3)*].

A memorandum must be filed and a copy served with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*].

[3] Timing of Motion

An order directing the corporation to provide indemnity for expenses incurred in a judicial (as distinguished from an administrative or investigative) proceeding may be issued by the court "in which such proceeding is or was pending" [*Corp. Code §§ 5238(e)(3), 7237(e)(3)*]. This language suggests that the court's power to issue the order continues indefinitely. However, when a judgment becomes final, the court that rendered it loses jurisdiction of the cause except to the extent that a statute continues the court's jurisdiction for a specific purpose. Thus, the probable meaning of the quoted language, as respects timing of the motion, is that the motion may be made after, as well as before, the judgment is entered, as long as the court retains jurisdiction of the cause, which is ordinarily until the judgment becomes final. Thereafter, a claimant for indemnification would be obliged to begin a new action [*see § 388.155*].

[4] Evidentiary Showing

The agent has the burden of proving that his or her conduct was within the applicable standard of *Corp. Code § 5238(b)* or *(c)* or *7237(b)* or *(c)*[*see § 388.16[3]*]. The declarations in support of the motion, the judgment in favor of the agent and any findings supporting it, or any matters of which the court is requested to take judicial notice should therefore address all elements of the applicable standard [*see Plate v. Sun-Diamond Growers (1990) 225 Cal. App. 3d 1115, 1125-1126, 275 Cal. Rptr. 667* (applying *Corp. Code § 317*; notwithstanding deferential standard of review, judgment against agents but in favor of corporation as establishing that agents acted in their own personal interest and not in best interests of corporation and therefor were not entitled to indemnity)].

[5] Attorney's Fees and Costs

Attorney's fees and costs incurred by the moving party in obtaining an order compelling or authorizing the corporation to provide indemnity are also subject to indemnity [*see Corp. Code §§ 5238(a), 7237(a)*].

[6] Cross References

For discussion and forms relating to indemnification of agents of for-profit corporations, see Ch. 167, *Corporations: Directors and Management*

For discussion and forms relating to noticed motions in general, see Ch. 372, *Motions and Orders*

[7] California Points and Authorities

For a memorandum of points and authorities supporting a motion for indemnification for expenses incurred in defending a proceeding without success on the merits in the context of for-profit corporations, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

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34-388 California Forms of Pleading and Practice--Annotated § 388.153

§ 388.153 Proceedings for Indemnification for Defense Expenses [Corp. Code §§ 5238(a),(d),(e)(3), 7237(a),(d),(e)(3)]--Order to Show Cause in Threatened Action or One in Which Corporation Is Not Party

[1] FORM Proceedings for Indemnification for Defense Expenses [Corp. Code §§ 5238(a),(d),(e)(3), 7237(a),(d),(e)(3)]--Order to Show Cause in Threatened Action or One in Which Corporation Is Not Party
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	
_____ [*name*],	)	
[and DOES I through_____,]	)	
Defendant(s).	)	NO. _____
_____	)	ORDER TO SHOW CAUSE RE INDEMNIFICA-
_____ [*name*],	)	TION FOR DEFENSE EXPENSES
Applicant,	)	
vs.	)	
_____ [*name of corporation*],	)	
Respondent.	)	
	)	

To_____[*name of corporation*]:

YOU ARE ORDERED to appear on _____[*date*], at _____[*time*], in the courtroom of [_____ (Department *or* Division) _____ of] the above-entitled court, located

at_____[*name, if any, and street address of building*] in _____[*city*], California, to show cause, if any, why you should not be ordered to indemnify _____[*name*], defendant and applicant herein, for his or her defense expenses incurred in the above-entitled _____[action *or* proceeding] as requested in the declaration of _____[*name*] heretofore filed.

This order and a copy of the declaration shall be served on you by delivery of copies to an appropriate agent for service of process at least _____[*number*] days before the date of the hearing.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This order to show cause is for use by a corporate agent of a nonprofit public or mutual benefit corporation [*see Corp. Code §§ 5238(a), 7237(a)*; *see also § § 388.16[2]*] to claim entitlement to receive indemnity from the corporation for defense expenses. Defense expenses may be recoverable if they were incurred in a civil action or proceeding in which the agent was sued in his or her representative capacity, but in which the corporation was not a party at the time of entry of judgment. The form may also be used by the attorney or any other person rendering services in connection with the defense, if the application is made by the attorney or other person [*see Corp. Code §§ 5238(e)(3), 7237(e)(3)*].

[3] Personal Jurisdiction Over Corporation

An order directing the corporation to provide indemnity will not be effective unless the court has obtained personal jurisdiction over the corporation. If the corporation is not already a party to the action or proceeding, it will be necessary to obtain jurisdiction by appropriate service of process [*see Code Civ. Proc. § 1917*; *Tiffany Records, Inc. v. M.B. Krupp Distributors, Inc. (1969) 276 Cal. App. 2d 610, 615, 81 Cal. Rptr. 320* (personal jurisdiction in action for damages)].

One method of obtaining the necessary jurisdiction is to begin a new action and serve a summons on the corporation, but *Corp. Code § 5238* or *7237* contemplates that the added expense and delay involved in a new action will be avoided by moving for an order in the action or proceeding in which the expenses subject to indemnification were incurred. An order to show cause is probably the appropriate process by which jurisdiction is obtained, since it can be used for that purpose in other contexts [*see* Ch. 372, *Motions and Orders*].

The order to show cause must be served on the corporation (not on the corporation's attorney) in the manner of serving a summons. If the corporation fails to appear at the hearing after being duly served, it will be necessary to present for filing a proof of service before going ahead with the hearing. For discussion of service of process and forms of proof of service of process, see Ch. 518, *Service of Summons and Papers*

[4] Cross Reference

For related Form, *see § 388.152*.

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§ 388.154 Proceedings for Indemnification for Defense Expenses [Corp. Code §§ 5238(a),(d),(e)(3), 7237(a),(d),(e)(3)]--Order [Code Civ. Proc. § 1003] Granting Motion for Indemnification for Defense Expenses

[1] FORM Proceedings for Indemnification for Defense Expenses [Corp. Code §§ 5238(a),(d),(e)(3), 7237(a),(d),(e)(3)]--Order [Code Civ. Proc. § 1003] Granting Motion for Indemnification for Defense Expenses

[*Caption. As on papers previously filed.*]

This matter came on for hearing on _____[*date*]. _____[*Name*], the moving party, appeared by _____[*name*], counsel; _____[*name of corporation*] _____ [appeared by _____ (*name*), counsel *or* failed to appear].

The court, having received evidence and heard the arguments of counsel, finds as follows:

[1. _____ (*Name of corporation*) was duly served with _____ (a notice of the motion *or* an order to show cause).]

2. _____[*Name of corporate agent*] was made a defendant in the above-entitled _____[action *or* proceeding] by reason of the fact that he/she is an agent of the corporation under the definition of agent in Corporations Code Section _____ [*5238 or 7237*].

3. The above-entitled_____[action *or* proceeding] is a proceeding as to which indemnification for defense expenses may be made by the corporation as provided in Corporations Code Section _____ [*5238 or 7237*].

4. In doing the acts or omissions that were the basis of the above-entitled _____[action *or* proceeding], _____[*name of corporate agent*] acted in good faith and in a manner that he/she believed to be in the best interests of the corporation [including such reasonable inquiry as an ordinarily prudent person would have used in similar circumstances] [*in a criminal matter add:* and had no reasonable cause to believe that his/her conduct was

unlawful].

5. _____[*Name of agent*] was _____[successful *or* partially successful *or* unsuccessful] in defending on the merits, as shown by the judgment entered on _____[*date*].

6. _____[*Name of agent*] has incurred and is obligated to pay or has paid the following amounts in connection with defending the above-entitled _____[action *or* proceeding], which amounts are "expenses" subject to indemnification under Corporations Code Section _____ [*5238 or 7237*]: _____[*list, identifying items and amount for each item*].

[7. _____ (*If claimant was not successful on the merits but did succeed with some special or technical defense, state finding that he or she adhered to the applicable standard of conduct required by Corp. Code § 5238(b) or (c) or 7237(b) or (c)).*]

[8. _____ (*If claimant was not successful in defending the action or proceeding, state circumstances justifying indemnification).*]

9. _____[*Name of agent*] is entitled to indemnification from the corporation for all of the defense expenses incurred by him/her as set forth in Finding 6 above.

Good cause appearing,

IT IS ORDERED that _____[*name of agent*] have and recover from _____[*name of corporation*] the sum of $ _____ as indemnification for defense expenses pursuant to Corporations Code Section _____ [*5238 or 7237*].

_____[*date*]

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form is for use by a corporate agent of a nonprofit public or mutual benefit corporation [*see Corp. Code §§ 5238(a), 7237(a)*] whose motion for an order compelling the corporation to provide indemnity is granted. This form may be used whether the motion is made on notice or on an order to show cause.

[3] Findings

Corp. Code § 5238(e) or *7237(e)* implicitly requires findings as to the propriety of indemnification under the circumstances [*see Plate v. Sun-Diamond Growers (1990) 225 Cal. App. 3d 1115, 1125-1126, 275 Cal. Rptr. 667* (applying *Corp. Code § 317*)]. It would seem, however, that reference to a judgment in favor of the claimant would constitute an implied finding that he or she is entitled to be indemnified because of success in defending on the merits.

[4] Applicable Standard of Conduct

The applicable standard of conduct (the fourth finding) varies depending on the nature of the action or proceeding [*see Corp. Code §§ 5238(b),(c), 7237(b),(c)*; *see § 388.16[3]*].

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§ 388.155 Complaint for Indemnification for Defense Expenses--Successful Defense of Underlying Claim [Corp. Code §§ 5238(d), 7237(d)]

[1] FORM Complaint for Indemnification for Defense Expenses--Successful Defense of Underlying Claim [Corp. Code §§ 5238(d), 7237(d)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONEY
_____ [*name of corporation*],	)	(Indemnification for Defense Expenses)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. Defendant_____[*name of corporation*] is, and at all times herein mentioned was, a corporation organized and existing under the _____[*specify governing law, e.g.,* Nonprofit Public Benefit Corporation Law of California] [*if foreign corporation, add:* and subject to *Corporations Code Section 2115*], with its principal place of business in _____ County, California.

2. Plaintiff is an agent of the corporation under the definition of that term in Corporations Code Section _____ [5238 *or* 7237] in that _____[*specify*].

3. By reason of being an agent of the corporation, plaintiff was made a defendant in the _____[action *or* proceeding] in this court, No. _____, entitled _____.

4. Plaintiff successfully defended that _____[action *or* proceeding] on the merits.

5. In connection with the defense of that _____[action *or* proceeding], plaintiff actually and reasonably incurred and became obligated to pay, and has paid [some of] the following expenses: _____[*list, identifying items and stating the amount of each item*].

WHEREFORE, plaintiff prays for judgment as follows:

1. That plaintiff have and recover from _____[*name of corporation*] the sum of $ _____ as indemnification for defense expenses pursuant to Corporations Code Section _____ [*5238 or 7237*];

2. For costs of suit herein incurred, including reasonable attorney's fees in the amount of $ _____, pursuant to Corporations Code Section _____ [*5238 or 7237*]; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I,_____[*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____[*signature*]

[2] Use of Form

This complaint is for use by a corporate agent of a nonprofit public or mutual benefit corporation [*see Corp. Code §§ 5238(a), 7237(a)*] claiming that he or she is entitled to be indemnified by the corporation for defense expenses. If the expenses were actually and reasonably incurred in a civil action or proceeding in which the agent was sued because of his or her capacity as agent of the corporation, and the agent acted in good faith and in a manner reasonably believed to be in the best interests of the corporation, then the agent must be indemnified if he or she successfully defended the action or proceeding on the merits [*see Corp. Code §§ 5238(b)-(d), 7237(b)-(d)*].

This form may also be used if the defense expenses were incurred in a criminal proceeding or an administrative or investigative proceeding, in which case the allegation in Paragraph 3 will have to be changed accordingly.

[3] Attorney's Fees and Costs

Attorney's fees and costs incurred by the plaintiff in obtaining a judgment for indemnification are also subject to indemnity [*see Corp. Code §§ 5238(a), 7237(a)*].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also,if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the first paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 72055(a)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[6] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to FAX service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter* ,

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue*

For alternative verification forms, see Ch. 572, *Verification*

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34-388 California Forms of Pleading and Practice--Annotated § 388.156

§ 388.156 Complaint for Indemnification for Defense Expenses--Directors or Members Approved Indemnification [Corp. Code §§ 5238(e)(1), (2), 7237(e)(1), (2)]

[1] FORM Complaint for Indemnification for Defense Expenses--Directors or Members Approved Indemnification [Corp. Code §§ 5238(e)(1), (2), 7237(e)(1), (2)]

[*Caption. See § 388.155.*]

Plaintiff alleges:

1. [*Corporate status. See § 388.155, Paragraph 1.*]

2. [*Plaintiff as corporate agent. See § 388.155, Paragraph 2.*]

3. [*Plaintiff was named in action or proceeding because he or she was agent of corporation. See § 388.155, Paragraph 3.*]

4. Indemnification was approved by _____ [a majority vote of a quorum consisting of directors who are not parties to that _____ (action *or* proceeding) *or* the members (in accordance with *Corporations Code Section 5034*), with the persons to be indemnified not being entitled to vote the issue].

5. In connection with the defense of that _____[action *or* proceeding], plaintiff actually and reasonably incurred and became obligated to pay, and has paid [some of], the following expenses: _____[*list, identifying items and stating the amount of each item*].

WHEREFORE, plaintiff prays for judgment as follows:

1. That plaintiff have and recover from _____[*name of corporation*] the sum of $ _____ as indemnification for defense expenses pursuant to Corporations Code Section

_____ [*5238 or 7237*];

2. For costs of suit herein incurred, including reasonable attorney's fees in the amount of $ _____, pursuant to Corporations Code Section _____ [*5238 or 7237*]; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 388.155.*]

[2] Use of Form

This complaint is for use by a corporate agent of a nonprofit public or mutual benefit corporation [*see Corp. Code §§ 5238(a), 7237(a)*] claiming that he or sheis entitled to be indemnified by the corporation for defense expenses. If the expenses were actually and reasonably incurred in a civil action or proceeding in which the agent was sued because of his or her capacity as agent of the corporation, and the agent acted in good faith andin a manner reasonably believed to be in the best interests of the corporation, then the agent must be indemnified if the directors or members of the corporation approved the indemnification [*see Corp. Code §§ 5238(b), (c), (e)(1), (2), 7237(b), (c), (e)(1), (2)*].

The foregoing form may also be used if the defense expenses were incurred in a criminal proceeding or an administrative or investigative proceeding, in which case the allegation in Paragraph 3 will have to be changed accordingly.

[3] Attorney's Fees and Costs

Attorney's fees and costs incurred by the plaintiff in obtaining a judgment for indemnification are also subject to indemnity [*see Corp. Code §§ 5238(a), 7237(a)*].

[4] Cross Reference

For related Form, *see* to § 388.155.

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§ 388.157 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Is Volunteer Director or Executive Officer of Public Benefit Corporation [Corp. Code § 5239]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Is Volunteer Director or Executive Officer of Public Benefit Corporation [Corp. Code § 5239]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant_____[*name*] alleges that:

1. _____[*Name of defendant director or executive officer*] _____[is *and/or* at the time of the acts or omissions complained of was] a_____[*specify title, including office within definition of Corp. Code § 5239(c) if appropriate, e.g.,* director and the treasurer] of_____[*name of corporation*], a nonprofit public benefit corporation [(in its first year of operation) with an annual budget (thus far) of less than twenty-five thousand dollars ($25,000)], and was serving in that capacity without compensation [except for _____ (*specify any exception permitted by Corp. Code § 5239(b), e.g.,* payment of reimbursable expenses)].

2. The act or omission complained of was within the scope of the his/her duties as_____[*specify, e.g.,* director], in that [*specify how act or omission was within the duties of the director or executive officer*].

3. The act or omission was performed in good faith.

4. The act or omission was not reckless, wanton, intentional, or grossly negligent.

[*EITHER, if insurance available*]

5. Any damages caused by the act or omission are compensable by insurance pursuant to a policy issued to _____ [_____ (*name of corporation*), in the form of _____ a (general *or* director's and officer's) liability policy *or* _____ (*name of defendant volunteer director or*

executive officer) personally, in the form of _____ (*specify, e.g.,* a general liability policy)].

[*OR, if insurance not available*]

5. The board of directors of the corporation and defendant_____[*name*] made all reasonable efforts to obtain liability insurance in that _____ [they contacted several insurers over a period of several months but were unable to obtain coverage at a cost that was affordable *or, if corporation's budget was less than $25,000 annually:* made at least one inquiry annually seeking to purchase general liability insurance coverage of at least $25,000 and that insurance was never available at a cost of less than _____ (*specify amount exceeding 5 percent of corporation's previous year's budget*)].

[2] Use of Form

The foregoing form of affirmative defense is for use in an answer to an action brought against a volunteer director or executive officer of a nonprofit public benefit corporation by a third party for monetary damages caused by the director's or officer's alleged negligent act or omission in the performance of that person's duties as a director or officer [*see Corp. Code § 5239(a)*]. This defense is applicable only to acts or omissions occurring on or after January 1, 1988 [*Corp. Code § 5239(g)*; *see § 388.17[3]*].

This form may not be used in answer to an action brought against a volunteer director or executive officer (1) under *Corp. Code § 5233* (relating to liability for self-dealing transactions) or *5237* (pertaining to liability for improper distributions, loans, and guarantees), or (2) by the Attorney General [*Corp. Code § 5239(e)*].

[3] Allegations

The foregoing form alleges (1) that the defendant is a volunteer director or executive officer of a nonprofit public benefit corporation (Paragraph 1) [*see Corp. Code § 5239(b)* ("volunteer" defined)]; (2) that the act or omission was within the scope of the defendant's duties as a director or executive officer (Paragraph 2) [*Corp. Code § 5239(a)(1)*]; (3) that the act or omission was performed in good faith (Paragraph 3) [*Corp. Code § 5239(a)(2)*]; (4) that the act or omission was not reckless, wanton, intentional, or grossly negligent (Paragraph 4) [*Corp. Code § 5239(a)(3)*]; and (5) that any damages are compensable by insurance issued to the corporation in the form of a general liability policy or a director's and officer's liability policy or to the defendant director or executive officer personally (first alternative Paragraph 5), or that reasonable efforts were made to obtain liability insurance (second alternative Paragraph 5) [*see Corp. Code § 5239(a)(4)*].

The allegation in second alternative Paragraph 5 regarding at least one inquiry annually is for use by a director or officer of a public benefit corporation with an annual budget of less than $25,000, which is an optional allegation in Paragraph 1. Those allegations in Paragraphs 1 and second alternative Paragraph 5 are derived from *Corp. Code § 5239(h)*, which defines "all reasonable efforts in good faith to obtain available liability insurance" for corporations with annual budgets of less than $25,000 as making at least one inquiry per year to purchase a general liability insurance policy with a coverage amount of at least $25,000 and finding that insurance not available at a cost of less than 5 percent of the previous year's budget of the corporation (Paragraph 5). In the case of a public benefit corporation in its first year of operation, the special definition remains applicable for as long as the budget does not exceed $25,000 (*see* Paragraph 1) [*Corp. Code § 5239(h)*].

[4] Cross References

For discussions and forms relating to answers in general, see Ch. 26, *Answers*

For discussions and forms relating to affirmative defenses for use in answers to actions brought against directors for self-dealing transactions, see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts*

[5] State Statutes

Directors liability for self-dealing transactions. *Corp. Code § 5233*

Directors liability for improper distributions, loans, and guarantees. *Corp. Code § 5237*

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Volume 34: Newspapers thru Parties-Chs. 386-396
Chapter 388 NONPROFIT CORPORATIONS
PART IV. FORMS

34-388 California Forms of Pleading and Practice--Annotated § 388.158

§ 388.158 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Is Volunteer Director or Executive Officer of Mutual Benefit Corporation [Corp. Code § 7231.5]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Defendant Is Volunteer Director or Executive Officer of Mutual Benefit Corporation [Corp. Code § 7231.5]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant_____[*name*] alleges that:

1. _____[*Name of defendant director or executive officer*] _____[is *and/or* at the time of the acts or omissions complained of was] a_____[*specify title, including office within definition of Corp. Code § 7231.5(c) if appropriate, e.g.,* director and the treasurer] of_____[*name of corporation*], a nonprofit mutual benefit corporation, and was serving in that capacity without compensation [except _____ (*specify any exception permitted by Corp. Code § 7231.5(b), e.g.,* mileage reimbursement].

2. _____[*Name of corporation*] is qualified under *Internal Revenue Code Section 501(c)* as an exempt corporation and is a_____[trade *or* professional *or* labor] organization operated exclusively for_____[fraternal *or* educational *or specify other nonprofit purpose*] purposes.

3. Defendant_____[*name*] did the things complained of in the performance of his/her duties as_____[*specify, e.g.,* director], which duties he/she performed in good faith, in a manner he/she believed to be in the best interests of the corporation.

4. In performing the duties that gave rise to the complaint, defendant_____[*name*] exercised such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances[, in that _____ (*specify any inquiry made, e.g.,* defendant relied on the report of a certified appraiser)].

[2] Use of Form

The foregoing form of affirmative defense is for use in an answer to an action brought against a volunteer director or

executive officer of a mutual benefit corporation for monetary damages based on the director's or officer's alleged failure to discharge the person's duties as a director or officer [*see Corp. Code § 7231.5(a)*]. This form may only be used by trade, professional, and labor organizations incorporated under the Nonprofit Mutual Benefit Corporation Law (*Corp. Code § 7110 et seq.*) that operate exclusively for fraternal, educational, and other nonprofit purposes, and under the provisions of *I.R.C. § 501(c)* [*Corp. Code § 7231.5(d)*].

This defense is applicable only to acts or omissions occurring on or after January 1, 1988 [Stats. 1987, ch. 1201, § 29]. It may not be used in answer to an action brought against a volunteer director or executive officer under *Corp. Code § 7233* (relating to liability for self-dealing transactions) or *7236* (pertaining to liability for improper distributions, loans, and guarantees) [*Corp. Code § 7231.5(a)*; *see also Corp. Code § 7238* (*Corp. Code § 5230 et seq.* as governing directors' duties towards mutual benefit corporation that holds assets in charitable trust)].

[3] Allegations

The foregoing form alleges (1) that the defendant is a volunteer director or executive officer of a nonprofit mutual benefit corporation (Paragraph 1) [*Corp. Code § 7231.5(a)*]; (2) that the corporation is qualified under *I.R.C. § 501(c)* for one of the requisite purposes (Paragraph 2) [*see Corp. Code § 7231.5(d)*]; (3) that the defendant performed the acts complained of as part of his or her duties as a director or officer and performed them in good faith, in a manner he or she believed to be in the best interests of the corporation (Paragraph 3) [*Corp. Code § 7231.5(a)(1),(2)*]; and (4) that the defendant performed the duties with the care, including reasonable inquiry, that an ordinarily prudent person in a like position would use under similar circumstances (Paragraph 4) [*Corp. Code § 7231.5(a)(3)*].

[4] Cross References

For discussion of the business judgment rule in the context of commercial corporations, see Ch. 167, *Corporations: Directors and Management*

[5] California Points and Authorities

For points and authorities regarding application of the business judgment rule in the context of commercial corporations, see California Points and Authorities , Ch. 52, *Corporations* (Matthew Bender)

[6] Cross Reference

For a related Form, *see § 388.157*.

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34-388 California Forms of Pleading and Practice--Annotated § 388.159

§ 388.159 Affirmative Defense [Code Civ. Proc. 431.30(b)(2)--Defendant Is Volunteer Director or Officer of Nonprofit Corporation and Corporation Is Insured [Corp. Code § 5047.5]

[1] FORM Affirmative Defense [Code Civ. Proc. 431.30(b)(2)--Defendant Is Volunteer Director or Officer of Nonprofit Corporation and Corporation Is Insured [Corp. Code § 5047.5]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant_____[*name*] alleges that:

1. _____[*Name of defendant director or officer*] is a director and/or officer of_____[*name of corporation*], a nonprofit corporation, and is serving without compensation.

[*EITHER, if defendant is a director*]

2. The act or omission occurred within the scope of the defendant's duties as a director acting as a board member, in that_____[*specify the duty as a board member*].

[*OR, if defendant is an officer*]

2. The act or omission was within the scope of the defendant's duties as an officer acting in an official capacity, in that_____[*specify how act or omission was within scope of defendant's official capacity*].

[*CONTINUE*]

3. The act or omission occurred in good faith in a manner the defendant believed to be in the best interests of the corporation.

4. The act or omission occurred in the exercise of the defendant's policymaking judgment.

[*EITHER, if corporation's annual budget is less than $50,000*]

5. The corporation's annual budget is less than $50,000, and the corporation maintains a general liability insurance policy with an amount of coverage of at least $500,000.

[*OR, if corporation's annual budget equals or exceeds $50,000*]

5. The corporation's annual budget equals or exceeds $50,000, and the corporation maintains a general liability insurance policy with an amount of coverage of at least $1,000,000.

[2] Use of Form

This affirmative defense is for use in an answer to an action brought against a volunteer director or officer of a nonprofit corporation for monetary damages based on negligence in the performance of that person's duties as a director or officer [*see Corp. Code § 5047.5(b)*]. It may only be used by directors and officers of nonprofit corporations organized to provide religious, charitable, literary, educational, scientific, social, or other forms of public service that are exempt from federal income taxation under *I.R.C. § 501(c)(3)* or *(c)(6)* [*Corp. Code § 5047.5(d)*].

[3] Allegations

This form alleges that:

- The defendant is a director or officer of a nonprofit corporation serving without compensation (Paragraph 1) [*see Corp. Code § 5047.5(b)*].

- The defendant is a director acting within the scope of that person's duties as a director acting as a board member (first alternative Paragraph 2), or the defendant is an officer acting within the scope of that person's duties as an officer in an official capacity (second alternative Paragraph 2) [*Corp. Code § 5047.5(b)(1)*].

- The act or omission occurred in good faith, in a manner the defendant believed to be in the best interests of the corporation (Paragraph 3) [*Corp. Code §§ 5047.5(b)(2)-(3)*].

- The act or omission occurred in the exercise of the defendant's policymaking judgment (Paragraph 4) [*Corp. Code § 5047.5(b)(4)*].

- The corporation's annual budget is less than $50,000 and the corporation maintains a general liability insurance policy with an amount of coverage of at least $500,000 (first alternative Paragraph 5) [*Corp. Code § 5047.5(e)(1)*] or the corporation's annual budget equals or exceeds $50,000 and the corporation maintains a general liability insurance policy of at least $1,000,000 (second alternative Paragraph 5) [*Corp. Code § 5047.5(e)(2)*].

[4] Applicability of Defense

This defense may only be alleged if the claim against the director or officer may also be made directly against the corporation, and a liability insurance policy is applicable to the claim [*Corp. Code § 5047.5(e)*].

The defense may not be used to limit the liability of a director or officer for any of the acts listed in *Corp. Code § 5047.5(c)* [*see § 388.17[5][c]*]. The defense may not be alleged by a director or officer of a nonprofit corporation that unlawfully restricts membership, services, or benefits conferred on the basis of political affiliation, age, or any characteristic listed or defined in *Civ. Code § 51(b)* or *(e)* ("Unruh Civil Rights Act"); *i.e.*, sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation [*Corp. Code § 5047.5(h)*]. The defense also may not be used by any volunteer director or officer who receives compensationfrom the corporation in any other capacity, including, but not limited to, as an employee [*Corp. Code § 5047.5(i)*].

[5] Cross Reference

See also Comments and References to *§ 388.157*.

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34-388 California Forms of Pleading and Practice--Annotated § 388.160

§ 388.160 Proceedings for Order Permitting Filing of Complaint Seeking Damages Against Volunteer Director or Officer of Nonprofit Corporation [Code Civ. Proc. § 425.15]--Petition [Code Civ. Proc. § 425.15(a)] and Supporting Declaration [Code Civ. Proc. § 2015.5]

[1] FORM Proceedings for Order Permitting Filing of Complaint Seeking Damages Against Volunteer Director or Officer of Nonprofit Corporation [Code Civ. Proc. § 425.15]--Petition [Code Civ. Proc. § 425.15(a)] and Supporting Declaration [Code Civ. Proc. § 2015.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Petition of _____ [*name*], Petitioner, for Order Allowing Filing of Complaint Against _____[*name*], Volunteer _____ Officer *or* Director] of Non-profit Corporation	)))))	NO. _____ PETITION FOR ORDER ALLOWING FILING OF COMPLAINT AGAINST VOLUNTEER _____ [OFFICER *or* DIRECTOR] OF NONPROFIT CORPORATION, AND SUPPORTING DECLARATION OF _____ [*name*]

Petitioner, _____[*name*], alleges:

1. Petitioner expects to be the plaintiff in the proposed complaint attached hereto and filed herewith.

2. The proposed complaint names [_____ (*name of corporation*) and]_____[*name of individual*] as defendant(s).

3. [Defendant] _____[*name of corporation*] is a nonprofit corporation organized under _____[*specify status that will bring corporation within Code Civ. Proc. § 425.15, e.g.,* California's Nonprofit Mutual Benefit Corporation Law and bases its federal income tax exemption on *Internal Revenue Code Section 501(c)(7)*].

4. The proposed complaint alleges causes of action against _____[*name of individual*] for money damages based on _____[*specify, e.g.,* wrongful termination, sexual harassment, and interference with contract].

5. Although _____[*name of individual*] [is and] was, at the time of the acts or omissions complained of, _____ [*specify, e.g.,* a member of the board of directors of _____ (*name of corporation*)], I do not believe the acts and omissions complained of were undertaken by _____[*name of proposed individual defendant*] in the scope of his/her duties as _____[*specify, e.g.,* a member of the board of directors]. My reasons for believing the acts and omissions alleged were undertaken by the proposed defendant for his/her personal interests and not on behalf of the corporation are set forth in the proposed complaint in Paragraph(s) _____, on page(s) _____, lines _____, and in the accompanying declaration in Paragraphs _____.

6. For the reasons set forth in the supporting declaration filed and served herewith, I believe the immunity afforded by *Code of Civil Procedure Section 425.15* is not applicable to provide a defense to _____[*name of proposed defendant*] for the acts complained of in the proposed complaint.

WHEREFORE petitioner prays for an order authorizing him/her to file a [*specify if appropriate, e.g.,* first amended] complaint, in the form of the proposed complaint, including a cause of action for money damages against _____[*name of individual defendant*] and of all other proper orders.

VERIFICATION

I, _____[*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein set forth on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

SUPPORTING DECLARATION OF _____[*name*]

I, _____[*name*], declare:

1. I am _____[*identify declarant, e.g.,* the plaintiff in the proposed complaint attached hereto and served and filed herewith *or other statement as appropriate*].

2. The proposed [_____[*specify if appropriate, e.g.,* first amended] complaint attached hereto, sets forth causes of action against _____[*name of proposed defendant*] for _____[*specify, e.g.,* intentional interference with contract].

[*Present evidence to substantiate claim, e.g.:*]

3. _____[*Name of proposed individual defendant*] was only a director at large, and not a member of the personnel committee, the fundraising committee, the finance committee, or any other standing committee of the board. He/She did not ordinarily have any responsibility for or take any interest in personnel or fundraising matters.

4. _____[*Name of proposed individual defendant*] and _____ (*name*) were romantically involved and had been for several months before I was summarily dismissed as vice president in charge of fundraising. It was common knowledge among those of us who stayed in the office on thethird Wednesday evening each month to be available during the board of directors meetings that _____[*name of proposed defendant*] was attracted to _____[*name of new vice president of fund raising*] and desirous of establishing a romantic relationship with her. He talked about her, and often met her after the board meetings to go out to dinner. _____[*Name of proposed defendant*] openly and obviously lobbied the personnel director to hire _____[*name of new vice president of fund raising*]. Some of this lobbying occurred within my hearing in the corporate offices before the board meeting of _____[*date*].

5. _____[*Name of proposed individual defendant*] and _____[*name of new vice president of fund raising*] travelled together to a conference in New Orleans three weeks after _____[*name of new vice president*] replaced me as vice president in charge of fundraising. True and correct copies of the nonprofit corporation's bills for the corporate Master Cards of _____[*name of proposed defendant*] and _____[*name of new vice president*] are attached to the declaration of _____[*name*], served and filed herewith. He/She is the accounts payable clerk and custodian of those corporate records. Those bills and the cancelled corporate checks also attached to that declaration establish that _____[*name of proposed defendant*] and _____[*name of new vice president*] attended the conference in New Orleans at the corporations expense.

6. _____[*Name of new vice president of fundraising*] had no prior experience in either fundraising or the nonprofit sector. That lack of experience is established by the true and correct copy of her resume that is attached to the declaration of _____[*name*], served and filed herewith. He/She is the director of personnel and custodian of those corporate records.

[*CONTINUE*]

7. I believe that the facts stated in Paragraphs 3-6 of this Declaration establish that _____ [*specify element of proof making immunity inapplicable, e.g.,* in doing the things complained of _____ (*name of proposed defendant*) was not acting in his capacity as a member of the board of directors], so that the immunity afforded by *Code of Civil Procedure Section 425.15* is not applicable to provide a defense.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

This petition and supporting declaration are for use by a person to obtain leave from the court to file a complaint for money damages against a volunteer director or officer of a nonprofit corporation [*see Code Civ. Proc. § 425.15*]. The

form may be modified to seek an order allowing the filing of a cross complaint or an amended complaint [*see Code Civ. Proc. §§ 422.10, 425.15*; *see also Cal. Rules of Ct., Rule 3.1324* (requirements for motions to amend pleadings)].

No claim for damages against a volunteer director or officer of a nonprofit corporation may be included in a complaint or other pleading unless the court enters an order allowing the claim to be filed [*Code Civ. Proc. § 425.15(a)*; *see § 388.17[6][a]*]. There are various immunity provisions applicable to volunteer directors and officers of nonprofit corporations, most of which are merely raised by answer or affirmative defense [*see § 388.17[6][a]*]. With the exception of a similar provision applicable to punitive damage claims against volunteer directors and officers of religious corporations [*see Code Civ. Proc. § 425.14(a),* discussed in Ch. 110, *Churches and Religious Organizations*], *Code Civ. Proc. § 425.15* is the only immunity requiring an order to file the complaint or amended complaint against the volunteer. Additionally, it is only applicable to nonprofit corporations that base their federal income tax exemption on specified Internal Revenue Code sections [*Code Civ. Proc. § 425.15(a),(e)(1)*; *see § 388.17[6][a]*].

The example facts in the supporting declaration in the form are based in part on *Wanland v. Los Gatos Lodge, Inc. (1991) 230 Cal. App. 3d 1507, 1522-1523, 281 Cal. Rptr. 890* , a case in which the evidence of romantic involvement between the corporate officer and the person who took plaintiff's job was insufficient and too late in time to establish any unprivileged interference with contract. Counsel should state in as many paragraphs as necessary the facts that substantiate plaintiff's claim and that establish the element lacking for *Code Civ. Proc. § 425.15* to apply.

[3] Accompanying Papers

This petition must be verified and must be accompanied by (1) the proposed pleading, and (2) supporting affidavits (or declarations under *Code Civ. Proc. § 2015.5*) stating the facts on which the liability is based. The plaintiff has the burden of establishing that the evidence substantiates the claim [*Code Civ. Proc. § 425.15(a)*], so the facts in the declarations should be as extensive as is necessary to carry that burden.

[4] Service of Petition and Proposed Pleading

The court must order service of the petition on the party against whom the action is proposed to be filed [*Code Civ. Proc. § 425.15(a)*]. The statute is silent regarding the manner and timing of this service, so counsel should determine whether any local rule provides for service. Otherwise, the court is free to determine how service should be accomplished and also whether or not it wishes a hearing, submission of points and authorities, or argument before it rules on thematter. Counsel should be prepared to provide a form of order and/or notice of hearing to carry out the court's wishes [*see § 388.161* (notice of hearing)].

[5] Response by Intended Defendant

The intended defendant may submit opposing affidavits (or declarations under *Code Civ. Proc. § 2015.5*) to the court before the court makes its determination [*Code Civ. Proc. § 425.15(a)*]. The statute is silent regarding the amount of time the intended defendant may have to submit opposing affadavits, so counsel should check to see if any local rule determines the matter.

[6] Tolling of Limitation Period on Underlying Action

The filing of the petition, proposed pleading, and accompanying affidavits tolls the running of any applicable statute of limitations until the final determination of the matter [*Code Civ. Proc. § 425.15(a)*].

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34-388 California Forms of Pleading and Practice--Annotated § 388.161

§ 388.161 Proceedings for Order Permitting Filing of Complaint Seeking Damages Against Volunteer Director or Officer of Nonprofit Corporation [Code Civ. Proc. § 425.15]--Notice of Hearing of Petition

[1] FORM Proceedings for Order Permitting Filing of Complaint Seeking Damages Against Volunteer Director or Officer of Nonprofit Corporation [Code Civ. Proc. § 425.15]--Notice of Hearing of Petition

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Petition of _____ [*name*], Petitioner, for Order Allowing Filing of Complaint Against _____ [*name*], Volunteer _____ [Director *or* Officer] of Nonprofit Corporation	)	NO. _____ NOTICE OF HEARING OF PETITION FOR ORDER ALLOWING FILING OF COMPLAINT AGAINST VOLUNTEER _____ [DIRECTOR *or* OFFICER] OF NONPROFIT CORPORATION Date: _____ Time: _____ Dept.: _____ Judge: _____ Action Not Filed: _____ Trial Date Not Set: _____

To _____[*name of proposed defendant or other person on whom notice was ordered served*]:

NOTICE IS HEREBY GIVEN that _____[*name of petitioner*], as petitioner [and proposed plaintiff], has filed herein a petition for an order allowing him/her to file a complaint against _____[*name of*

individual] for money damages based on _____[*specify, e.g.*, wrongful termination, sexual harassment, and interference with contract], reference to which is made for further particulars. You are permitted to file a response to the petition on or before _____[*date*]. Any response should be filed _____[*specify, e.g.*, in accordance with Local Rule 34]. The time and place of hearing of the petition has been set for _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*].

The petition is supported by the declaration(s) of _____[*name(s)*],[and] the proposed complaint [and the memorandum of points and authorities] served and filed herewith, and on such evidence as may be presented at the hearing of the petition.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[2] Use of Form

This notice hearing of petition is for use by a person wishing to file a complaint against a volunteer director or officer of a nonprofit corporation ordinarily protected by the immunity of *Code Civ. Proc § 425.15* in the event the court wishes a hearing on the petition for order allowing the filing. *Code Civ. Proc. § 425.15(a)* requires the court to order service of the petition on the party against whom the action is proposed to be filed, and to allow the proposed defendant to file opposing affadavits (or declarations under *Code Civ. Proc. § 2015.5*) prior to making its determination. Other particulars will be determined by local rule and the court's discretion, and this form should be modified accordingly.

[3] Cross Reference

For related Form, *see § 388.160*.

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34-388 California Forms of Pleading and Practice--Annotated § 388.162

§ 388.162 Proceedings for Order Permitting Filing of Complaint Seeking Damages Against Volunteer Director or Officer of Nonprofit Corporation [Code Civ. Proc. § 425.15]--Order

[1] FORM Proceedings for Order Permitting Filing of Complaint Seeking Damages Against Volunteer Director or Officer of Nonprofit Corporation [Code Civ. Proc. § 425.15]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Petition of _____ [*name*], Petitioner, for Order Allowing Filing of Complaint Against _____ [*name*], Volunteer _____ [Director *or* Officer] of Nonprofit Corporation	)))))	No. _____ ORDER GRANTING LEAVE TO FILE COMPLAINT

The petition of _____[*name*] for an order allowing him/her to file a _____[*specify if appropriate, e.g.,* first amended] complaint against defendant _____[*name*] to seek monetary damages _____ [came on regularly for hearing by the court on _____ (*date*) *or* was determined by the court without a hearing]. [*Continue as desired with appearances or submissions:* Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].]

On proof made to the satisfaction of the court that the plaintiff has established evidence that substantiates that plaintiff's claim against defendant _____[*name*] is not barred by the immunity of *Code of Civil Procedure Section 425.15*,

IT IS ORDERED that the petition be, and it hereby is, granted and that plaintiff _____[*name*] be allowed to file a[n] [amended] complaint that includes a claim for monetary damages against defendant _____[*name*].
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form is an order for use when the court has granted a petition for an order allowing the filing of a complaint for money damages against a volunteer director or officer of a nonprofit corporation. The court must determine, on the basis of the supporting and opposing affidavits (or declarations under *Code Civ. Proc. § 2015.5*) presented, that the petitioner has established evidence that substantiatesthe claim, by establishing that the claim is not barred by the immunity of *Code Civ. Proc. § 425.15*.

[3] Cross Reference

For related forms, *see §§ 388.160* and *388.161*.

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34-388 California Forms of Pleading and Practice--Annotated § 388.163

§ 388.163 Complaint by Creditors of Corporation Against Members to Apply Membership Assessments in Satisfaction of Judgment [Corp. Code §§ 5352, 7353]

[1] FORM Complaint by Creditors of Corporation Against Members to Apply Membership Assessments in Satisfaction of Judgment [Corp. Code §§ 5352, 7353]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONEY
_____ [*name of corporation*],	)	(To Apply Membership Assessments to Unsatisfied
and_____ [*names*],	)	Judgment)
[and DOES I through_____,]	)	[Amount demanded _____
Defendants.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. Defendant _____[*name of corporation*] is, and at all times herein mentioned was, a corporation organized and existing under the_____[*specify governing law, e.g.,* Nonprofit Public Benefit Corporation Law of California] [*if defendant is a foreign corporation, add:* and subject to *Corporations Code Section 2115*] with its principal place of business in _____ County, California.

2. Defendants _____[*names of defendant members*] are residents of _____ County,

California. [*Continue to name defendant members and their residences, perhaps with a separate paragraph listing the names of members in each county.*] Each of the defendants was, at the time of the act herein complained of, a member of_____[*name of corporation*].

[3. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the obligations owed by defendant _____[*name of corporation*] to plaintiff.)]

4. Plaintiff is a creditor of defendant corporation. Defendant corporation's debt to plaintiff originated on _____[*date*] and is for _____[*describe nature of claim*]. Judgment based on the debt wasentered in favor of plaintiff against the corporation in the Superior Court of _____County, case number _____ on _____[*date*]. _____[A writ of execution was issued in that matter and has been returned unsatisfied in whole or in part *or* It would be useless to pursue execution on the judgment].

5. The member defendants, and each of them, are indebted to defendant corporation for _____[*specify nature of debt, e.g.,* membership dues and assessments] in the following amounts [for the following membership years]:

	Name	Year	Dues/Assessment
a.	_____	_____	$ _____
	_____	_____	
	____		
b.	_____	_____	$ _____
	_____	_____	
	____		

etc.

WHEREFORE, plaintiff prays for judgment as follows:

1. That plaintiff recover from each of the member defendants the amount of _____[*specify nature of debt, e.g.,* membership dues and assessments] for which each is liable to the defendant corporation;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 388.155.*]

[2] Use of Form

This form is for use by a creditor of a nonprofit public or mutual benefit corporation against members to apply membership payments due the corporation in satisfaction of judgments in favor of the creditor against the corporation [*see Corp. Code §§ 5352(a), 7353(a)*; *see § 388.56[3]*].

The corporation must give credit on the unpaid balance due it for amounts paid by any member in this type of action [*Corp. Code §§ 5352(c), 7353(c)*].

[3] Corporation as Defendant

The corporation has been named as a defendant because the action is in the nature of a creditor's suit, which is governed by *Code Civ. Proc. § 708.210 et seq.*, and in which the judgment debtor is required to be joined as a party [*Code Civ. Proc. § 708.220*]. Additionally, a party who must be joined but is not willing to be is generally made a defendant [*see Code Civ. Proc. § 379(a)(2)* (joinder as defendant of one who has claim or interest in property that is subject of action)].

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 85.1, 86(a)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the first paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 72055(a)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[5] Cross Reference

For related form, *see § 388.155*.

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34-388 California Forms of Pleading and Practice--Annotated § 388.164

§ 388.164 Allegations--By Creditor Seeking to Be Joined as Plaintiff [Code Civ. Proc. § 378; Corp. Code §§ 5352(b), 7353(b)]

[1] FORM Allegations--By Creditor Seeking to Be Joined as Plaintiff [Code Civ. Proc. § 378; Corp. Code §§ 5352(b), 7353(b)]

_____[*Name of creditor who seeks to intervene*] is, and at all times herein mentioned was, a creditor of defendant corporation. Defendant corporation's debt to_____[*name of creditor who seeks to intervene*] is for_____[*describe nature of claim*] in the currently outstanding amount of $_____, which obligation originated on_____[*date*] and has [not] been reduced to judgment._____[*Name of creditor who seeks to intervene*] has a right to relief against the member defendants and his/her/its joinder is authorized by Corporations Code Section _____ [*5352(b) or 7353(b)*].

[2] Use of Form

This allegation is for insertion in a motion or pleading by a creditor of a nonprofit public or mutual benefit corporation who seeks to be joined as a plaintiff in an action against members to apply membership payments due to the corporation in satisfaction of claims or judgments in favor of the creditor owing by the corporation [*see Corp. Code §§ 5352(a), 7353(a)*; *see also Code Civ. Proc. § 378* (discussed in Ch. 395, *Parties*)]. All creditors of the corporation, with or without reducing their claims to judgment, may intervene in any creditor's action to reach and apply unpaid amounts due the corporation [*Corp. Code §§ 5352(b), 7353(b)*]. Several judgments may be rendered for and against the parties to the action, or in favor of a receiver for the benefit of the respective parties [*Corp. Code §§ 5352(b), 7353(b)*; *see* Ch. 486, *Receivers*].

[3] Cross Reference

For related Form, *see §§ 388.155, 388.163*.

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Volume 34: Newspapers thru Parties-Chs. 386-396
Chapter 388 NONPROFIT CORPORATIONS
PART IV. FORMS

34-388 California Forms of Pleading and Practice--Annotated § 388.165

§ 388.165 Complaint by Creditor of Corporation Against Members to Apply Improper Distributions in Satisfaction of Prior Claims [Corp. Code §§ 5420(b), 7420(b), (c)]

[1] FORM Complaint by Creditor of Corporation Against Members to Apply Improper Distributions in Satisfaction of Prior Claims [Corp. Code §§ 5420(b), 7420(b), (c)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	
a Corporation, and	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR MONEY
Plaintiff,	)	(To Apply Improper Distributions to Unsatisfied
vs.	)	Claims)
_____ [*names*], [and DOES I	)	[Amount demanded _____ (exceeds
through _____,] Defendants.	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. Plaintiff is a creditor of_____[*name of corporation*] ("the corporation"), which is, and at all times mentioned in this complaint was, a corporation organized and existing under the_____[*specify governing law, e.g.,* Nonprofit Public Benefit Corporation Law of California]. Plaintiff brings this action on its own behalf and on behalf of and in the name of the corporation and for its benefit.

2. [*Capacity and residence of defendant members. See § 388.163, Paragraph 2.*]

3. [*Fictitious defendants allegation. See § 388.163, Paragraph 3.*]

4. Plaintiff is a creditor of the corporation [*when plaintiff is a creditor of a mutual benefit corporation, add*: whose _____ (debt *or* claim) arose prior to the time of the _____ (distribution *or* payment) in redemption of a membership herein complained of, and to which _____ (distribution *or* payment in redemption of a membership) plaintiff did not consent.] The corporation's debt to plaintiff is for_____[*describe nature of claim*] in the currently outstanding amount of $_____, which obligation originated on_____[*date*] and that has [not] been reduced to judgment.

5. On or about_____[*date*], the corporation made a _____ [distribution of its _____ (cash *or* property consisting of _____ (*specify*) *or* payment in redemption of a membership].

[*EITHER, if plaintiff is a creditor of a public benefit corporation*]

6. Plaintiff is informed and believes, and on that basis alleges, that the distribution alleged in Paragraph 4 of this complaint was contrary to law,in that *California Corporations Code Section 5410* prohibits any distribution by a nonprofit public benefit corporation to members.

[*OR, if plaintiff is a creditor of a mutual benefit corporation, and distribution was involved*]

6. Plaintiff is informed and believes, and on that basis alleges, that the distribution alleged in Paragraph 4 of this complaint was contrary to law, in that the corporation is, or as a result of making the distribution will be, likely to be unable to meet its liabilities as they mature.

[*OR, if plaintiff is a creditor of a mutual benefit corporation, and purchase or redemption was involved*]

6. Plaintiff is informed and believes, and thereon alleges, that the_____[purchase *or* redemption] alleged in Paragraph 4 of this complaint was contrary to law, in that the articles of incorporation of the corporation contain a provision that, in the event of dissolution for any reason, any remaining assets must be distributed to the head organization, and the corporation making the_____[purchase *or* redemption] is, or as a result of making the_____[purchase *or* redemption] will be, likely to be unable to meet such obligation to the head organization.

[*CONTINUE*]

7. Defendant(s) received the_____[distribution *or* payment in redemption of a membership] alleged in Paragraph 4 of this complaint [*if defendant is member of mutual benefit corporation, add:* with knowledge of the facts indicating its impropriety.] [*Continue allegation with any supporting facts.*]

[*EITHER, if defendant is a member of public benefit corporation*]

8. As a result of the improper distribution alleged in Paragraph 4 of this complaint, each defendant is liable to the corporation for the benefit of all creditors up to the amount received by each defendant plus interest at the legal rate on judgments.

[*OR, if defendant is a member of mutual benefit corporation*]

8. As a result of the improper_____[distribution *or* payment in redemption of a membership] alleged in Paragraph 4 of this complaint, each defendant is liable to the corporation for the benefit of all creditors not consenting to the distribution up to the amount received by each defendant, plus interest thereon at the legal rate on judgments, but not exceeding $_____[*sum equal to liabilities of corporation to nonconsenting creditors*].

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____, to be apportioned among the defendants according to the_____[distribution *or* payment in redemption of a membership] received by each defendant, and to be awarded to the corporation for the benefit of all_____[creditors *or* nonconsenting creditors];

2. For interest at the legal rate on the amount of the_____[distribution *or* payment in redemption of a membership] received by each defendant from and after_____[*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 388.155.*]

[2] Use of Form

The foregoing form of complaint is for use by a creditor of either a public benefit corporation or a mutual benefit corporation to recover damages from members who have received improper distributions, including payments in redemption of memberships of mutual benefit corporations [*see Corp. Code §§ 5420(b), 7420(b),(c)*; *see § 388.57*].

[3] Allegations

The complaint alleges (1) plaintiff's capacity as a creditor entitled to bring the action in the name of the corporation (Paragraph 1) [*see Corp. Code §§ 5420(b), 7420(c)*]; (2) the capacity of the defendant members (Paragraph 2); (3) the existence of fictitious defendants (optional Paragraph 3) [*see Code Civ. Proc. § 474*]; (4) the capacity of plaintiff as a creditor and, in the case of a creditor of a mutual benefit corporation, that the debt or claim arose prior to the making of the distribution or payment in redemption of a membership to which the creditor did not consent (Paragraph 4) [*see Corp. Code §§ 5420(a),(b), 7420(c)(1)*]; (5) that the corporation made a distribution or, in the case of a creditor of a mutual benefit corporation, a payment in redemption of a membership (Paragraph 5); (6) that the alleged distribution or payment in redemption of a membership was unlawful [*see Corp. Code §§ 5410, 7410-7414*] (alternative Paragraphs 6); (7) that the defendant received the distribution or payment in redemption of a membership and, in the case of a creditor of a mutual benefit corporation, that the defendant had knowledge of its impropriety (Paragraph 7) [*see Corp. Code §§ 5420(a), 7420(b)*]; and (8) the amount of liabilities to creditors (alternative Paragraphs 8) [*Corp. Code §§ 5420(a), 7420(a)-(c)*].

[4] Punitive Damages

When the plaintiff is a creditor of a public benefit corporation, the court may award punitive damages for the benefit of the corporation against anydirector, officer, member, or other person who caused, received, or aided and abetted in the making of any distribution [*Corp. Code § 5420(b)*].

[5] Liability for Fraudulent Transfer

Nothing in *Corp. Code § 5420* or *7420* affects any liability a person may have under the Uniform Fraudulent Transfer Act (*Civ. Code § 3439 et seq.*) [*Corp. Code §§ 5420(d), 7420(e)*; *see generally* Ch. 270, *Fraudulent Transfers*].

[6] Cross Reference

For related forms, *see §§ 388.163, 388.155*.

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34-388 California Forms of Pleading and Practice--Annotated § 388.166

§ 388.166 Petition for Writ of Mandate [Code Civ. Proc. § 1086] to Enforce Members' Right to Inspect and Copy Membership Lists and Use Them in Mailings [Corp. Code §§ 6331, 8331]

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. § 1086] to Enforce Members' Right to Inspect and Copy Membership Lists and Use Them in Mailings [Corp. Code §§ 6331, 8331]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*],	)	
Petitioner(s),	)	NO. _____
vs.	)	PETIITON FOR WRIT OF MANDATE
_____ [*name of corporation*	)	(To Compel Inspection of Membership List)
and names of individual respondents, if any],	)	
Respondent(s).	)	
	)	

Petitioner(s) allege(s):

1. Petitioner(s) is/are, and at all times herein mentioned was/were, member(s) in good standing of respondent_____[*name of corporation*], and [together] control_____[*specify percentage of voting power in compliance with Corp. Code § 5036, e.g.,* five percent] of the voting power of the corporation.

2. Respondent_____[*name of corporation*], hereinafter called "Corporation," is, and at all times mentioned in this complaint was, a nonprofit_____[public *or* mutual] benefit] corporation, composed of numerous dues paying members, and_____[having its principal place of business *or* keeping its

corporate records] in_____[*city*], _____ County, California. The Corporation has a present membership numbering approximately_____[*number*] persons.

3. Respondent_____[*name*], is, and at all times mentioned in this complaint was, secretary of the Corporation, and the Corporation's agent and employee. In doing the things herein alleged, respondent_____[*name*] was, and now is, acting within the scope of this agency.

4. Respondent_____[*name*], secretary of the Corporation, now has, and at all times mentioned in this complaint has had, possession and control of the membership list of the Corporation.

5. On_____[*date*], petitioner(s) made and served on the Corporation and respondent_____[*name*], secretary of the Corporation, a written demand for permission to inspect and copy the membership list of the Corporation as of _____ [the last record date for which it has been compiled *or* _____ (*specify date*)], and for necessary facilities andassistance in the course of this examination. A photostatic copy of the demand is attached hereto as Exhibit A and made a part hereof.

6. The Corporation and respondent_____[*name*], secretary of the Corporation, have refused, and continue to refuse, to permit petitioner(s) to inspect and copy the membership list, although they each have the authority to permit the inspection.

7. Respondents have not obtained a protective order staying production of the list, or a final order setting aside the demand.

8. Petitioner(s) does/do not have a plain, speedy, and adequate remedy in the ordinary course of law in that pecuniary compensation would not afford adequate relief, because it would not give petitioner(s) the right to inspect and copy the Corporation's membership list, and the appropriate amount of pecuniary compensation, even if such existed, would be extremely difficult to ascertain.

[9. Petitioner(s) has/have exhausted his/her/their internal administrative remedies within the Corporation.]

WHEREFORE petitioner(s) pray(s):

1. That, on the hearing of this application and the return thereto, if any, this court issue its peremptory writ of mandate commanding respondent Corporation and respondent_____[*name*], secretary of Corporation, to permit petitioner(s) or his/her/their duly authorized representative to inspect and copy forthwith the membership list of Corporation as of_____[*date*], and to afford such facilities and assistance in the course of this inspection as the court deems proper.

2. For costs and expenses of suit herein incurred, including reasonable attorney's fees in the amount of $_____, pursuant to Corporations Code Section _____ [*6331(i) or 8331(i)*]; and

3. For such other and further relief as the court may deem proper.

_____ [*signature(s)*]
Attorney for Petitioner(s)

VERIFICATION

I,_____[*name*], am [one of] the petitioner(s) in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

CAUTION:

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Proof of service on each respondent and real party in interest of a copy of a petition that seeks an alternative writ must accompany the petition when it is offered for filing except when, in its discretion and for good cause, the court has granted the application for the writ ex parte [*Code Civ. Proc. § 1107*; for a discussion of serving the petition, *see* Ch. 358, ***Mandate and Prohibition***]. Points and authorities also customarily accompany a petition filed in a superior court, although they do not appear to be expressly required by statute. When no alternative writ is sought, proof of service of a copy of the petition need not accompany the application, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

[2] Use of Form

The foregoing petition is for use by the requisite number of members [*see Corp. Code § 5036*] of a nonprofit public or mutual benefit corporation to obtain a peremptory writ of mandate to compel the corporation and its secretary to permit the members or their duly authorized representative to inspect and copy the corporation's membership list for a specified period [*see Corp. Code §§ 6331(i), 8330(i)*; *see § 388.56[6]*].

[3] Allegations

The petition alleges facts showing that (1) petitioner is a beneficially interested party and petitioner (or petitioners) controls the requisite voting power (Paragraph 1) [*see Code Civ. Proc. § 1086*; *Corp. Code §§ 5036* (requisite voting power), *6331(i), 8331(i)*]; (2) respondent corporation's and respondent secretary's status and capacities (Paragraphs 2-4); (3) petitioner has made a distinct and express demand on respondents to perform the duty sought to be compelled by the writ (Paragraph 5) [*see Corp. Code §§ 6330(a), 8330(a)*]; (4) respondents have refused to permit the inspection requested (Paragraph 6); (5) respondents have not obtained a protective order staying production of the list, or a final order setting aside the demand (Paragraph 7) [*see Corp. Code §§ 6331(i), 8331(i)*]; and (6) petitioner has no plain, speedy, and adequate remedy in the ordinary course of law (Paragraph 8) [*see Code Civ. Proc. § 1086*].

[4] Jurisdiction and Venue

The petition is filed in the superior court for the proper county [*Corp. Code §§ 6331(i), 8331(i)*]. The "proper county" means the county in which the corporation's principal office in California is located or, if the corporation has no such office, Sacramento County [*Corp. Code § 5068*].

[5] Hearing and Order

At the hearing, the court will hear the parties summarily, by affidavit, or otherwise. No inquiry may be made in this proceeding into the use for which the authorized number seek the list [*Corp. Code §§ 6331(i), 8331(i)*].

The court must issue a peremptory writ of mandamus unless it appears that one of the conditions listed in *Corp. Code § 6331(i)* or *8331(i)* [*see 388.58[6]*] exists.

The court must award reasonable costs and expenses, including reasonable attorney's fees, to persons granted an order [*Corp. Code §§ 6331(i), 8331(i)*].

[6] Cross References

For additional discussion and forms for use in mandate proceedings, see Ch. 358, *Mandate and Prohibition*

[7] State Statutes

Writ of mandate. *Code Civ. Proc. §§ 1084-1097, 1107, 1108*

Code Civ. Proc. § 307 et seq. (civil actions generally) as applicable to and as rules of practice in mandamus proceedings, except as otherwise provided in *Code Civ. Proc. § 1067 et seq.* (review, mandamus, prohibition). *Code Civ. Proc. § 1109*

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34-388 California Forms of Pleading and Practice--Annotated § 388.167

§ 388.167 Complaint [Code Civ. Proc. § 425.10] for Removal of Director for Cause [Corp. Code §§ 5223, 7223]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Removal of Director for Cause [Corp. Code §§ 5223, 7223]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiffs,	)	
vs.	)	NO. _____
_____ [*name of corporation*],	)	COMPLAINT FOR REMOVAL OF DIRECTOR
and	)	[*Corp. Code § 5223* or *7223*]
_____ [*names*], [and DOES I	)	
through_____,]	)	
Defendant(s).	)	
	)	

Plaintiff(s) allege(s):

[*EITHER, if suit is brought by director(s)*]

1. Plaintiff(s) is/are (a) director(s) of the corporation.

[*OR, if suit is against a public benefit corporation, or a mutual benefit corporation in which total number of votes entitled to be cast for a director is less than 5,000*]

1. Plaintiff(s) is/are _____ (the holder(s) of record of _____ (*specify number, the lesser of at least twice the authorized number of members according to Corp. Code § 5036*) percent of the voting power *or* twenty members) of defendant Corporation.]

[*OR, if suit is against a mutual benefit corporation in which the total number of votes entitled to be cast for a director is 5,000 or more*]

1. Plaintiff(s) is/are _____ (the holder(s) of record of _____ (*specify number, the lesser of at least twice the authorized number of members according to Corp. Code § 5036*) percent of the voting power *or* one hundred members) of defendant Corporation.]

[*CONTINUE*]

2. [*Corporate status. See § 388.163, Paragraph 1.*]

3. Defendant(s)_____[*names(s)*] is/are, and at the time of the acts complained of herein was/were, (a) director(s) of defendant corporation.

[*In as many separate paragraphs as necessary, allege commission of fraudulent or dishonest acts or gross abuse of authority or discretion by defendant director(s); see Comments to this form. Paragraphs 4-7 are examples not intended to be appropriate for every situation.*]

4. At a meeting of the board of directors held on_____[*date*], defendants_____[*names*] voted to approve the making of a $_____ loan by defendant corporation to defendant_____[*name*].

5. All defendants knew that the loan served no corporate purpose, did not provide financing for the purchase of a principal residence by an officer of the corporation in order to procure any officer's continuing services for the corporation, and would not benefit the corporation in any way.

6. All defendants knew at the time they approved the making of the loan that its sole purpose was to allow defendant_____[*name of borrower*] to make speculative personal business investments, that no interest payments would be required on the principal amount loaned until its maturity, and that if defendant _____'s [*name of borrower*] expected investment return did not materialize, the loan would not be repaid without resort to litigation against defendant_____[*name of borrower*] by on or behalf of the corporation.

7. On_____[*date*], $_____ of defendant corporation's funds were paid to_____[*name of borrower*] in return for which_____[*name of borrower*] signed a demand note payable to the corporation. No director or officer or any other person on behalf of defendant corporation has ever demanded payment of the loan, and the entire sum of $_____, with interest thereon, remains due and owing to the corporation.

[*CONTINUE*]

8. The_____[*specify abuse complained of, e.g.,* loan] constitutes a violation of Corporations Code Section _____ [*specify, e.g., 5236*], breach of the duties of a director of a

nonprofit_____[public *or* mutual] benefit corporation, and grounds for removal of defendant(s) as director(s) of defendant corporation.

WHEREFORE, plaintiff(s) pray(s) judgment as follows:

1. For removal of defendant(s)_____[*name(s)*] from the office of director of the corporation;

[2. That defendant(s) _____ (*name(s)*) be barred from reelection to the office of director for a period of _____ (*number*) years or such other period as the court prescribes;]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff(s)

[*Verification, if desired. See § 388.155.*]

[2] Use of Form

The foregoing form of complaint is for use by a director or directors or the requisite number of members of a nonprofit public or mutual benefit corporation to have a director removed for fraudulent or dishonest acts or gross abuse of authority or discretion [*see Corp. Code §§ 5223, 7223*].

[3] Allegations

The foregoing complaint alleges (1) plaintiff's capacity to sue (alternative Paragraphs 1) [*see Corp. Code §§ 5223(a), 7223(b)*]; (2) capacity and principal place of business for defendant corporation (Paragraph 2); (3) defendant director's capacity (Paragraph 3); (4) the fraudulent or dishonest acts or gross abuse of authority or discretion (Paragraphs 4-7) [*see Corp. Code §§ 5223(a), 7223(a)*]; and (5) the acts constitute a breach of statutory duties and grounds for removal (Paragraph 8).

For further discussion of who may bring such an action, see *§ 388.111[1]*. For discussion of what constitutes an authorized number of members under *Corp. Code § 5036*, see *§ 388.58[3][b]*.

[4] Corporation Must Be Party

Corp. Code § 5223(a) or *7223(a)* requires the corporation to be made a party to an action for removal of a director for cause. Generally, a party who must be joined but is not willing to be is made a defendant [*see Code Civ. Proc. § 379(a)(2)*].

[5] Jurisdiction and Venue

The complaint is filed in the superior court for the proper county [*Corp. Code §§ 5223(a), 7223(a)*]. The "proper county" means the county in which the corporation's principal office in California is located or, if the corporation has no such office, Sacramento County [*Corp. Code § 5068*].

[6] Cross Reference

For related form, *see § 388.155*.

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34-388 California Forms of Pleading and Practice--Annotated § 388.168

§ 388.168 Application for Appointment of Directors [Corp. Code §§ 5220(e), 7220(e)]

[1] FORM Application for Appointment of Directors [Corp. Code §§ 5220(e), 7220(e)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Application of _____ [*name*], Applicant	))))	APPLICATION FOR APPOINTMENT OF DIRECTORS

Applicant alleges:

1._____[*name of corporation*] ("the Corporation") is a California_____[*type of corporation, e.g.,* nonprofit public benefit *or* nonprofit mutual benefit *or* nonprofit religious *or* consumer cooperative] corporation, organized under the [California Nonprofit Corporation Law *or* Consumer Cooperative Corporation Law] and having its principal office in_____[*city*], California.

2. Applicant,_____[*name*], is a resident of_____[*city or county*], California, and is a party in interest in this matter by virtue of_____[*describe*].

3. The Corporation has not issued any memberships.

[*EITHER*]

4. All of the directors of the Corporation have_____[*specify, e.g.,* resigned *and/or* died *and/or* become incompetent].

[*OR*]

4. The Corporation's initial directors have not been named in its articles, and all incorporators of the Corporation have_____[*specify, e.g.,* resigned *and/or* died *and/or* become incompetent] before the election of the initial directors.

[*CONTINUE*]

WHEREFORE, applicant prays:

[*EITHER*]

1. That this court appoint directors of the corporation under the authority granted to the court by Corporations Code Section_____ [*for a nonprofit public benefit corporation: 5220(e) or, for a nonprofit mutual benefit corporation: 7220(e) or, for a nonprofit religious corporation: 9220(d) or, for a consumer cooperative corporation: 12360(e)*];

[*OR*]

1. That this court appoint_____[*name(s)*] as directors of the Corporation under the authority granted to the court by Corporation Code Section_____ [*for a nonprofit public benefit corporation: 5220(e) or, for a nonprofit mutual benefit corporation: 7220(e) or, for a nonprofit religious corporation: 9220(d) or, for a consumer cooperative corporation: 12360(e)*];

[*CONTINUE*]

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Applicant _____ [*name*]

[2] Use of Form

This form is an application by a "party in interest" requesting the superior court to appoint directors of a nonprofit public benefit corporation, nonprofit mutual benefit corporation, nonprofit religious corporation, or consumer cooperative corporation, that has not issued memberships, when its directors have all resigned, died, or become incompetent, or when no initial directors were named in the articles and all the incorporators have resigned, died, or become incompetent [*see Corp. Code §§ 5220(e)* (nonprofit public benefit corporations), *7220(e)* (nonprofit mutual benefit corporations), *9220 (d)* (nonprofit religious corporations), *12360(e)* (consumer cooperatives); *see § 388.110[3]*].

The governing statutes specify that the superior court may appoint directors on "application" by any party in interest. This pleading accordingly is titled "Application" and is otherwise drafted in the general form of a petition.

[3] Allegations

This form contains the following allegations:

- That the corporation in question is a California nonprofit public benefit corporation, nonprofit mutual benefit corporation, nonprofit religious corporation, or consumer cooperative corporation, organized under the applicable California laws and having its principal office in California [Paragraph 1].

- The residence of the person making the application (referred to in this form as the "applicant,"), the fact that the applicant is a "party in interest" in the matter, and the basis for the allegation that the applicant is a party in interest [Paragraph 2]. Note that the statute does not define who qualifies as a "party in interest" for purposes of the right to bring this type of action.

- That the Corporation has not issued any memberships [Paragraph 3].

- That either (1) all of the directors of the corporation have resigned, died, or become incompetent [Paragraph 4, first alternative]; or (2) the Corporation's initial directors were not named in its articles and all incorporators of the corporation resigned, died, or become incompetent before the election of initial directors.

The form provides two alternative versions of the prayer for appointment of directors. The first simply prays for the appointment of directors in accordance with the court's statutory authority. The second requests that specific persons be appointed as directors. Although the governing statutes do not expressly authorize the applicant to request that specific persons be appointed, the court's general authority to appoint directors under the circumstances discussed here clearly includes authority to appoint specific persons requested by the applicant to that capacity if the court deems it appropriate.

[4] Where Action May Be Brought

The governing statutes provide that the superior court of any county may appoint directors upon application by any party in interest [*see Corp. Code §§ 5220(e)* (nonprofit public benefit corporations), *7220(e)* (nonprofit mutual benefit corporations), *9220(d)* (nonprofit religious corporations), *12360(e)* (consumer cooperatives)]. Thus, it appears that the action may be brought in any county, without regard to the location of the nonprofit entity's offices, if any, or the residence of the applicant.

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34-389 California Forms of Pleading and Practice--Annotated 389.syn

§ 389.syn Synopsis to Chapter 389: NONSUIT AND MOTIONS FOR JUDGMENT

§ 389.01 Scope of Chapter

§ 389.02 Cross References

§§ 389.03-389.09 [Reserved]

§ 389.10 Governing Statutes

§ 389.11 Motion for Nonsuit

[1] Basis for Motion

[2] After Plaintiff's Opening Statement

[3] After Presentation of Plaintiff's Evidence

[4] Multiple Defendants

[5] Motion for Judgment on the Pleadings Compared

[6] Motion In Limine to Exclude All Evidence Compared

[7] Motion for Directed Verdict Compared

[8] Partial Nonsuit

[9] Determination of Motion

[10] Order on Motion

[11] Appeal of Judgment of Nonsuit

[12] Review When Motion for Nonsuit Is Denied

[13] Appeal of Expedited "Mini-Trial" Based on Offers of Proof Treated as Nonsuit

§ 389.12 Motion for Judgment

[1] Basis for Motion

[2] Rebuttal and Waiver of Rebuttal

[3] Ruling on Motion

[4] Statement of Decision

[5] Adjudication on Merits

[6] Appellate Review of Judgment

§ 389.13 Code Civ. Proc. § 1038 Motion for Defense Costs

§§ 389.14-389.29 [Reserved]

§ 389.30 State Statutes

§ 389.31 Decisions

[1] Motion for Judgment

[2] Motion for Nonsuit

[a] Appeal

[b] Nature of Motion for Nonsuit

[c] Plaintiff's Postmotion Procedure

[d] Res Ipsa Loquitur

[e] Ruling on Motion

[f] Timeliness of Motion

§ 389.32 Text References

§§ 389.33through 389.39 [Reserved]

§ 389.40 Moving Party's Checklist

§§ 389.41-389.49 [Reserved]

§ 389.50 Order Granting Judgment of Nonsuit [Code Civ. Proc. § 581c(a)]

[1] FORM

[2] Use of Form

§ 389.51 Judgment on Motion for Judgment [Code Civ. Proc. § 631.8(a)]--By Defendant or Plaintiff

[1] FORM

[2] Use of Form

[3] Cross References

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Volume 34: Newspapers thru Parties-Chs. 386-396
Chapter 389 NONSUIT AND MOTIONS FOR JUDGMENT
PART I. SCOPE

34-389 California Forms of Pleading and Practice--Annotated § 389.01

§ 389.01 Scope of Chapter

This chapter discusses grounds and procedures for obtaining and opposing motions for nonsuit and motions for judgment and includes forms of orders for use when these motions are granted [*see §§ 389.50* and *389.51*].

Because a motion for nonsuit or judgment is usually made orally in open court, forms of notices of motion are not included in this chapter. However, in some cases, a written notice of motion may be given or required [*see § 389.40, below*]. The general forms of a notice of motion in Ch. 372, *Motions and Orders*, may be adapted for this purpose.

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34-389 California Forms of Pleading and Practice--Annotated § 389.02

§ 389.02 Cross References

For a procedural guide and forms for use in dismissing an action on other grounds, see Ch. 212, *Dismissal*

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[Reserved]

§§ 389.03[Reserved]

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34-389 California Forms of Pleading and Practice--Annotated § 389.10

§ 389.10 Governing Statutes

The statutes governing motions for nonsuit and motions for judgment are *Code Civ. Proc. §§ 581c* and *631.8*, respectively.

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§ 389.11 Motion for Nonsuit

[1] Basis for Motion

A motion for nonsuit is tantamount to a demurrer to the evidence by which a defendant contests the sufficiency of plaintiff's evidence before presenting his or her own [*Hamilton v. Gage Bowl, Inc. (1992) 6 Cal. App. 4th 1706, 1710, 8 Cal. Rptr. 2d 819* ; *see also Alpert v. Villa Romano Homeowners Assn. (2000) 81 Cal. App. 4th 1320, 1328* (motion has effect of demurrer to evidence; it concedes truth of facts proved and contends those facts are not sufficient as matter of law to sustain plaintiff's case)]. The defendant does not, by making the motion, waive the right to present evidence if the motion is denied [*Code Civ. Proc. § 581c(a)*]. A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, plaintiff's evidence does not permit a jury to find in plaintiff's favor [*Haley v. Casa Del Rey Homeowners Assn. (2007) 153 Cal. App. 4th 863, 876, 63 Cal. Rptr. 3d 514* ; *Stonegate Homeowners Assn. v. Staben (2006) 144 Cal. App. 4th 740, 745, 50 Cal. Rptr. 3d 709* ; *Burlesci v. Petersen (1998) 68 Cal. App. 4th 1062, 1065, 80 Cal. Rptr. 2d 704* ; *accord Unigard Ins. Group v. O'Flaherty & Belgum (1995) 38 Cal. App. 4th 1229, 1234, 45 Cal. Rptr. 2d 565]* .

In a motion for nonsuit, only the grounds of the motion specified by defendant may be considered by the trial court [*Smith v. Roach (1975) 53 Cal. App. 3d 893, 898, 126 Cal. Rptr. 29* ; *Timmsen v. Forest E. Olson, Inc. (1970) 6 Cal. App. 3d 860, 868, 86 Cal. Rptr. 359]* .

Motions for nonsuit are usually made orally in open court. A notice of motion may be prepared if the motion is anticipated before trial or time is available to prepare it, for example, if, by stipulation, the statement of facts set forth in plaintiff's trial brief is deemed to be plaintiff's opening statement [*see Timmsen v. Forest E. Olson, Inc. (1970) 6 Cal. App. 3d 860, 863, 86 Cal. Rptr. 359]* . In the case of an oral motion for nonsuit in a jury trial, it is common practice for counsel to ask for permission to approach the bench and to make the motion at the bench. This procedure gives the court an opportunity to excuse the jury from the courtroom.

[2] After Plaintiff's Opening Statement

The defendant may move for a judgment of nonsuit only after and not before the plaintiff has completed giving the opening statement or after the presentation of the plaintiff's evidence in a jury trial [*Code Civ. Proc. § 581c(a)*].

Defendant may move for nonsuit based on plaintiff's opening statement in a jury trial or a nonjury trial [*Lingenfelter v. County of Fresno (2007) 154 Cal. App. 4th 198, 204, 64 Cal. Rptr. 3d 378* ; *Nelson v. Specialty Records, Inc. (1970) 11 Cal. App. 3d 126, 141, 89 Cal. Rptr. 540* ; *see Hamilton v. Gage Bowl, Inc. (1992) 6 Cal. App. 4th 1706, 1710, 8 Cal. Rptr. 2d 819* ; *Enterprise Leasing Corp. v. Shugart Corp. (1991) 231 Cal. App. 3d 737, 747 n.5, 282 Cal. Rptr. 620]* . In ruling on the motion when it is made following the plaintiff's opening statement, the trial court must assume that the plaintiff can prove all the favorable facts alleged [*see Cooper v. State Farm Mut. Auto Ins. Co. (2009) 177 Cal. App. 4th 876, 891, 99 Cal. Rptr. 3d 870]* . A nonsuit is proper only if the court concludes that there will be no evidence that would support a judgment in the plaintiff's favor [*Bresnahan v. Chrysler Corp. (1995) 32 Cal. App. 4th 1559, 1564-1565, 38 Cal. Rptr. 2d 446]* . The court must accept as proven all of the facts that counsel expects to prove and must indulge in all the favorable inferences reasonably arising from these facts. The motion is granted only if it is clear that counsel has undertaken to state all of the facts expected to be revealed [*Hamilton v. Gage Bowl, Inc. (1992) 6 Cal. App. 4th 1706, 1710, 8 Cal. Rptr. 2d 819]* and that those facts do not constitute a cause of action [*Smith v. Roach (1975) 53 Cal. App. 3d 893, 897-898, 126 Cal. Rptr. 29* (reversing nonsuit granted on theory that opening statement described a defense); *see Jensen v. Hewlett-Packard Co. (1993) 14 Cal. App. 4th 958, 965-966, 18 Cal. Rptr. 2d 83* (affirming nonsuit)].

For example, nonsuit is proper when counsel fails to describe all the elements of a prima facie case [*see, e.g., Nelson v. Specialty Records, Inc. (1970) 11 Cal. App. 3d 126, 141, 89 Cal. Rptr. 540]* or reveals a complete defense [*see, e.g., Russell v. Soldinger (1976) 59 Cal. App. 3d 633, 642, 131 Cal. Rptr. 145* ; *see also Enterprise Leasing Corp. v. Shugart Corp. (1991) 231 Cal. App. 3d 737, 747, 282 Cal. Rptr. 620]* .

If there is any substantial evidence to support a judgment in plaintiff's favor, nonsuit after plaintiff's opening statement is not proper [*Willis v. Gordon (1978) 20 Cal. 3d 629, 633, 143 Cal. Rptr. 723, 574 P.2d 794]* .

Courts have traditionally taken a restrictive view of the circumstances under which a nonsuit at the close of an opening statement is appropriate because nonsuit at that point takes the case away from the jury on a procedural device. Indeed, granting a nonsuit at that point is particularly dangerous because counsel rarely present such an explicit, full, and unabridged version of the plaintiff's case that the court can be sufficiently confident of the impossibility of proof of a cause of action to abruptly terminate the litigation [*Galanek v. Wismar (1999) 68 Cal. App. 4th 1417, 1424, 81 Cal. Rptr. 2d 236]* . Thus, a nonsuit at this stage is disfavored and should be denied if the statement is not plainly insufficient [*Baber v. Napa State Hospital (1989) 209 Cal. App. 3d 213, 217, 257 Cal. Rptr. 55* ; *see Galanek v. Wismar (1999) 68 Cal. App. 4th 1417, 1424, 81 Cal. Rptr. 2d 236* (nonsuit on opening statement disfavored and should be avoided unless there isclear and unequivocal demonstration of total lack of a cause of action by plaintiff)].

Alternatively stated, a trial court must not grant a nonsuit motion unless the plaintiff's evidence, viewed most favorably to the plaintiff, could not possibly support a jury verdict for the plaintiff [*Diesel Electric Sales & Service, Inc. v. Marco Marine San Diego, Inc. (1993) 16 Cal. App. 4th 202, 210, 20 Cal. Rptr. 2d 62* ; *see Bresnahan v. Chrysler Corp. (1995) 32 Cal. App. 4th 1559, 1564, 38 Cal. Rptr. 2d 446* (nonsuit reversed; nonsuit may not be granted unless, accepting as true both plaintiff's favorable evidence and every favorable inference that may be drawn from it, that evidence is yet insufficient to support a verdict for plaintiff)]. Even when an unartful plaintiff's opening statement is technically deficient, if there is any possibility that the evidence might support recovery, the court is encouraged to deny the motion for a nonsuit in favor of, and in reliance on, its power to direct a verdict after hearing the evidence [*Beavers v. Allstate Ins. Co. (1990) 225 Cal. App. 3d 310, 328, 274 Cal. Rptr. 766]* .

[3] After Presentation of Plaintiff's Evidence

Defendant may move for nonsuit after the plaintiff's presentation of evidence in a jury trial [*Code Civ. Proc. § 581c(a)*]. However, because submission of the plaintiff's case to the jury will be precluded by a successful nonsuit motion, courts grant these motions only under very limited circumstances. A trial court must not grant the motion if the plaintiff has

presented evidence that would support a jury verdict in the plaintiff's favor [*Espinosa v. Little Co. of Mary Hospital (1995) 31 Cal. App. 4th 1304, 1313, 37 Cal. Rptr. 2d 541]* .

In ruling on the motion, the court must give plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference that may be drawn in plaintiff's favor, disregarding any conflicting evidence, and accepting the evidence most favorable to plaintiff as true. Nonsuit is proper if the evidence viewed in this light would not be sufficient to support a jury verdict in plaintiff's favor [*Nally v. Grace Community Church (1988) 47 Cal. 3d 278, 291, 253 Cal. Rptr. 97, 763 P.2d 948 , cert. denied, 490 U.S. 1007* ; *Campbell v. General Motors Corp. (1982) 32 Cal. 3d 112, 117-118, 184 Cal. Rptr. 891, 649 P.2d 224* ; *Ewing v. Cloverleaf Bowl (1978) 20 Cal. 3d 389, 395, 143 Cal. Rptr. 13, 572 P.2d 1155* ; *see McComber v. Wells (1999) 72 Cal. App. 4th 512, 521, 85 Cal. Rptr. 2d 376]* . The trial court must not weigh the evidence or consider the credibility of the witnesses in determining the sufficiency of the evidence. Rather, the court must interpret all of the evidence most favorably to the plaintiff's case and most strongly against the defendant and must resolve all presumptions, inferences, conflicts, and doubts in plaintiff's favor [*Saunders v. Taylor (1996) 42 Cal. App. 4th 1538, 1541, 50 Cal. Rptr. 2d 395* ; *see Khajavi v. Feather River Anesthesia Medical Group (2000) 84 Cal. App. 4th 32, 43, 100 Cal. Rptr. 2d 627]* .

More than a mere scintilla of evidence in plaintiff's favor, however, is required to avoid a nonsuit. Substantial evidence creating a conflict for the jury to resolve is required [*Nally v. Grace Community Church (1988) 47 Cal. 3d 278, 291, 253 Cal. Rptr. 97, 763 P.2d 948* ; *Burlesci v. Petersen (1998) 68 Cal. App. 4th 1062, 1065, 80 Cal. Rptr. 2d 704* ; *see also Alpert v. Villa Romano Homeowners Assn. (2000) 81 Cal. App. 4th 1320, 1327]* .

The evidence must be sufficient to support each of the elements of plaintiff's cause of action [*see, e.g., Miller v. Los Angeles County Flood Control Dist. (1973) 8 Cal. 3d 689, 703-704, 106 Cal. Rptr. 1, 505 P.2d 193* ; *Mikialian v. City of Los Angeles (1978) 79 Cal. App. 3d 150, 165, 144 Cal. Rptr. 794]* . Thus, plaintiff must produce evidence that supports a logical inference in plaintiff's favor and which does more than merely permit speculation or conjecture. Although the court may infer facts from the evidence those inferences must be logical and reasonable. They may not be illogically and unreasonably drawn, nor can inferences be based on mere possibility or flow from suspicion, imagination, speculation, supposition, surmise, conjecture or guesswork [*Kidron v. Movie Acquisition Corp. (1995) 40 Cal. App. 4th 1571, 1580-1581, 47 Cal. Rptr. 2d 752]* .

The motion must be denied if from the evidence it can logically and reasonably be inferred that sufficient facts exist to support a recovery, regardless of whether the evidence is susceptible to conflicting inferences. The court has a duty to let the case go to the jury if in the court's mind there is doubt about the inferences that may reasonably be drawn from the evidence [*Espinosa v. Little Co. of Mary Hospital (1995) 31 Cal. App. 4th 1304, 1313, 37 Cal. Rptr. 2d 541]* .

After a motion for nonsuit in a jury trial, on plaintiff's request, the trial court must permit plaintiff to reopen the case and to introduce further evidence, because one of the objects of the motion is to provide an opportunity for plaintiff to rectify any deficiencies of proof. The court's refusal to do so is error, which requires reversal if plaintiff shows prejudice [*Abreu v. Svenhard's Swedish Bakery (1989) 208 Cal. App. 3d 1446, 1457, 257 Cal. Rptr. 26* ; *see also Alpert v. Villa Romano Homeowners Assn. (2000) 81 Cal. App. 4th 1320, 1337* (denial of request to reopen that is accompanied by offer of proof of evidence that will cure deficiency is reversible error)]. The right to present further evidence is waived, however, unless the plaintiff both requests leave to reopen and makes an offer of proof, describing the evidence and explaining how it would cure the deficiencies [*Alpert v. Villa Romano Homeowners Assn. (2000) 81 Cal. App. 4th 1320, 1337]* .

[4] Multiple Defendants

Nonsuit may be granted in favor of fewer than all defendants if there is more than one defendant in the action [*Associated Oil Co. v. Mullin (1930) 110 Cal. App. 385, 391, 294 P. 421* ; *see Gerard v. Ross (1988) 204 Cal. App. 3d 968, 981,251 Cal. Rptr. 604* (nonsuit granted in favor of one of multiple defendants in tort action)] and fewer than all

the causes of action if trial is on more than one cause of action [*Code Civ. Proc. § 581c(b)*; *see Aufdemkamp v. Pierce (1935) 4 Cal. App. 2d 276, 281, 40 P.2d 599]* . In a personal injury or property damage case, other defendants are precluded from referring at trial to the fault, absence from the action, or involvement of a defendant whose motion for nonsuit has been granted [*Code Civ. Proc. 581c(d)*].

[5] Motion for Judgment on the Pleadings Compared

A motion for nonsuit differs from a motion for judgment on the pleadings in that it is directed to the sufficiency of the evidence rather than to the sufficiency of the pleadings. Thus, if the plaintiff's opening statement fails to establish the elements of a prima facie case without varying materially from the pleadings, the proof is insufficient, and the proper motion is for nonsuit rather than for judgment on the pleadings [*Nelson v. Specialty Records, Inc. (1970) 11 Cal. App. 3d 126, 142, 89 Cal. Rptr. 540]* .

[6] Motion In Limine to Exclude All Evidence Compared

Unlike a usual motion in limine that seeks to keep particular evidence from the jury, a motion in limine to exclude all evidence seeks to terminate a trial without evidence being introduced [*Mechanical Contractors Assn. v. Greater Bay Area Assn. (1998) 66 Cal. App. 4th 672, 676-677, 78 Cal. Rptr. 2d 225]* . A motion to to exclude all evidence on a particular claim is the functional equivalent of a common law motion for judgment on the pleadings, or if decided in light of evidence produced during discovery, nonsuit [*Aas. v. Superior Court (2000) 24 Cal. 4th 627, 634-635, 101 Cal. Rptr. 2d 718, 12 P.3d 1125* ; *Mechanical Contractors Assn. v. Greater Bay Area Assn. (1998) 66 Cal. App. 4th 672, 676-677, 78 Cal. Rptr. 2d 225* (granting defendant's motion in limine at outset of trial to exclude all of plaintiff's evidence, in effect granted nonsuit)].

[7] Motion for Directed Verdict Compared

A motion for directed verdict may be made by either the plaintiff or defendant and usually is made at the conclusion of evidence, although it may be made at any time before the case is submitted to the jury [*Gibson v. Southern Pacific Co. (1955) 137 Cal. App. 2d 337, 346, 290 P.2d 347]* . The grounds of the motion, however, are the same as that of a motion for nonsuit [*see Frisk v. Merrihew (1974) 42 Cal. App. 3d 319, 325, 116 Cal. Rptr. 781]* . The standard for ruling on a motion for nonsuit and directed verdict is the same [*Adams v. City of Fremont (1998) 68 Cal. App. 4th 243, 263, 80 Cal. Rptr. 2d 196]* . For a complete discussion of directed verdicts, see Ch. 326A, *Jury Verdicts* .

[8] Partial Nonsuit

If the evidence supports granting the motion as to some but not all the issues involved in the action, the court must grant the motion as to those issues. The action then proceeds as to the issues remaining. Despite the granting of such a motion, no final judgment is entered prior to the termination of the action. The final judgment in the action, however, must, in addition to any matters determined in the trial, award judgment as the court determined on the motion for nonsuit [*Code Civ. Proc. § 581c(b)*].

[9] Determination of Motion

Regardless of when the motion is made, the trial court may not weigh the evidence or judge the credibility of the witnesses [*Estate of Callahan (1967) 67 Cal. 2d 609, 613, 63 Cal. Rptr. 277, 432 P.2d 965* ; *see Burlesci v. Petersen (1998) 68 Cal. App. 4th 1062, 1065, 80 Cal. Rptr. 2d 704]* . All relevant evidence, even if it is unreliable or has been erroneously admitted, must be given the credit and benefit of its full probative strength [*see Estate of Callahan (1967) 67 Cal. 2d 609, 617, 63 Cal. Rptr. 277, 432 P.2d 965* ; *Wickoff v. James (1958) 159 Cal. App. 2d 664, 668, 324 P.2d 661]* .

[10] Order on Motion

If the motion is granted, the judgment will operate as an adjudication on the merits unless the court specifies otherwise [*Code Civ. Proc. § 581c(c)*]. The motion may be granted as to some but not all the issues in the action, in which case no final judgment is entered [*see* discussion under *§ 389.11[8], above*].

Given that the judgment of nonsuit is a form of dismissal, it must be written, signed by the court, and filed in the action [*see Code Civ. Proc. § 581d*].

If a motion for nonsuit is denied, it may be renewed on satisfactory grounds [*Totton v. Superior Court (1936) 18 Cal. App. 2d 59, 60, 62 P.2d 1383* ; *see Code Civ. Proc. § 1008* (renewed motions)]. Subsequently, if the evidence presented by defendant corrects the defects in plaintiff's case, the denial of the motion, even if erroneous, will be viewed as harmless [*Withey v. Hammond Lbr. Co. (1934) 140 Cal. App. 587, 598, 35 P.2d 1080]* .

For discussion of renewing motions, *see* Ch. 374, *Motions to Reconsider and Renewed Motions* .

[11] Appeal of Judgment of Nonsuit

Because motions for nonsuit raise issues of law, the appellate court reviews the rulings on those motions de novo, employing the same standard that governs the trial court [*Khajavi v. Feather River Anesthesia Medical Group (2000) 84 Cal. App. 4th 32, 43, 100 Cal. Rptr. 2d 627* ; *Saunders v. Taylor (1996) 42 Cal. App. 4th 1538, 1541-1542, 50 Cal. Rptr. 2d 395* ; *see Lund v. Bally's Aerobic Plus, Inc. (2000) 78 Cal. App. 4th 733, 737, 93 Cal. Rptr. 2d 169]* .

When a nonsuit has been granted after the opening statement, the appellatecourt accepts as true all facts plaintiff asserted in plaintiff's opening statement and indulge every legitimate inference those facts support [*Hoff v. Vacaville Unified School Dist. (1998) 19 Cal. 4th 925, 930, 80 Cal. Rptr. 2d 811, 968 P.2d 522]* . A nonsuit at this early stage is disfavored and can only be upheld on appeal if, after accepting all the asserted facts as true and indulging in every legitimate inference drawn from those facts in favor of plaintiff, it can be said those facts and inferences lead inexorably to the conclusion plaintiff cannot establish an essential element of its cause of action or has inadvertently established uncontrovertible proof of an affirmative defense [*Galanek v. Wismar (1999) 68 Cal. App. 4th 1417, 1424, 81 Cal. Rptr. 2d 236* ; *Adkins v. State of California (1996) 50 Cal. App. 4th 1802, 1809, 59 Cal. Rptr. 2d 59* ; *see Bresnahan v. Chrysler Corp. (1995) 32 Cal. App. 4th 1559, 1564-1565, 38 Cal. Rptr. 2d 446* (when nonsuit granted after opening statement, reviewing court must assume that plaintiff can prove all favorable facts alleged; nonsuit proper only if court concludes there will be no evidence that would support a judgment in plaintiff's favor); *see also Kardly v. State Farm Mut. Auto. Ins. Co. (1989) 207 Cal. App. 3d 479, 483, 255 Cal. Rptr. 40* (reviewing court must accept as true all of plaintiff's properly pleaded allegations and indulge in every legitimate inference in plaintiff's favor that can be drawn from evidence)].

When a nonsuit has been granted after the presentation of plaintiff's case, the appellate court will not sustain the judgment unless, interpreting the evidence most favorably to plaintiff's case and most strongly against the defendant and resolving all presumptions, inferences, and doubts in favor of the plaintiff, a judgment for defendant is required as a matter of law [*Nally v. Grace Community Church (1988) 47 Cal. 3d 278, 291, 253 Cal. Rptr. 97, 763 P.2d 948 , cert. denied, 490 U.S. 1007* (affirming judgment of nonsuit); *accord Wolf v. Walt Disney Pictures and Television (2008) 162 Cal. App. 4th 1107, 1121, 76 Cal. Rptr. 3d 585* (also affirming judgment of nonsuit); *Bromme v. Pavitt (1992) 5 Cal. App. 4th 1487, 1496 n.2, 7 Cal. Rptr. 2d 608* ; *see Alpert v. Villa Romano Homeowners Assn. (2000) 81 Cal. App. 4th 1320, 1327* ; *Lund v. Bally's Aerobic Plus, Inc. (2000) 78 Cal. App. 4th 733, 737, 93 Cal. Rptr. 2d 169* (appellate court may affirm nonsuit only if plaintiff's case not supported by substantial evidence and defendant is entitled to judgment as matter of law); *Burlesci v. Petersen (1998) 68 Cal. App. 4th 1062, 1065, 80 Cal. Rptr. 2d 704* (evidence must be evaluated in light most favorable to plaintiff and least favorable defendant; all presumptions, inferences and doubts are resolved against defendant); *Goebel v. Lauderdale (1989) 214 Cal. App. 3d 1502, 1506, 263 Cal. Rptr. 275* (appellate court must (1) give plaintiff's evidence all value to which it is legally entitled, (2) recognize every legitimate

inference that may be drawn from that evidence, and (3) disregard conflicting evidence)]. In other words, while the reviewing court's duty in most appeals is to indulge every reasonable intendment in favor of sustaining the trial court, the reverse is true when an appeal is from an order of nonsuit. In the latter case the reviewing court must view the evidence as though the judgment had been in plaintiff's favor and order a reversal if such a judgment could be sustained [*Raber v. Tumin (1951) 36 Cal. 2d 654, 656, 226 P.2d 574]* .

It is not necessary that there be an absence of conflict in evidence before the trial court may exercise its power to grant a nonsuit; there must be a substantial conflict in evidence to deprive the court of this power [*Burlesci v. Petersen (1998) 68 Cal. App. 4th 1062, 1065, 80 Cal. Rptr. 2d 704* ; *Gerard v. Ross (1988) 204 Cal. App. 3d 968, 981, 251 Cal. Rptr. 604]* . A judgment of nonsuit will not be reversed if plaintiff's proof raises nothing more than speculation, suspicion, or conjecture; but reversal is warranted if there is some substance to plaintiff's evidence on which reasonable minds could differ [*Espinosa v. Little Co. of Mary Hospital (1995) 31 Cal. App. 4th 1304, 1313, 37 Cal. Rptr. 2d 541* ; *Alef v. Alta Bates Hospital (1992) 5 Cal. App. 4th 208, 214-215, 6 Cal. Rptr. 2d 900* ; *Baxter v. Alexian Brothers Hospital (1989) 214 Cal. App. 3d 722, 725, 262 Cal. Rptr. 867* ; *see Daum v. SpineCare Medical Group, Inc. (1997) 52 Cal. App. 4th 1285, 1318, 61 Cal. Rptr. 2d 260* (plaintiff must produce evidence supporting at least logical inference of liability, not merely speculation or conjecture; if there is no substantial evidence of liability, appellate court must affirm the grant of a nonsuit)].

The appellate court may not weigh the evidence or consider the witnesses' credibility [*Alpert v. Villa Romano Homeowners Assn. (2000) 81 Cal. App. 4th 1320, 1327* ; *Lund v. Bally's Aerobic Plus, Inc. (2000) 78 Cal. App. 4th 733, 737, 93 Cal. Rptr. 2d 169* ; *McComber v. Wells (1999) 72 Cal. App. 4th 512, 521, 85 Cal. Rptr. 2d 376]* . Rather, the appellate court is required to accept as true the evidence most favorable to the plaintiff, disregarding conflicting evidence. The court accepts as credible the testimony of plaintiff's witnesses [*Alpert v. Villa Romano Homeowners Assn. (2000) 81 Cal. App. 4th 1320, 1327, 1338]* .

An appellate court will consider grounds not specified in a motion for nonsuit only if it is clear that the defect is one which could not have been remedied had it been called to plaintiff's attention [*Lawless v. Calaway (1944) 24 Cal. 2d 81, 94, 147 P.2d 604]* . Despite *Lawless*, there is a split of authority over whether an appellate court may consider grounds argued by the defendant, but not relied on by the trial court in granting the motion. Some courts of appeal have held that appellate review is limited to those grounds relied on by the trial court, the theory being that the appellate court only need examine those grounds which a plaintiff may have been able to correct had they been called to its attention [*Alpert v. Villa Romano Homeowners Assn. (2000) 81 Cal. App. 4th 1320, 1328* (citing cases); *see also Serian Brothers, Inc. v. Agri-Sun Nursery (1994) 25 Cal. App. 4th 306, 312* (reviewing court should consider only grounds that were before trial court on motion for nonsuit because plaintiff should be given opportunity to correct deficiencies in his or her proof beforenonsuit is granted); *Jacobs v. Freeman (1980) 104 Cal. App. 3d 177, 188, 163 Cal. Rptr. 680* (same)]. Other courts have taken the view that a judgment of nonsuit can be sustained on any ground specified in the motion, even if not relied on by the trial court [*Alpert v. Villa Romano Homeowners Assn. (2000) 81 Cal. App. 4th 1320, 1328* (citing cases); *see also Saunders v. Taylor (1996) 42 Cal. App. 4th 1538, 1541-1542, 50 Cal. Rptr. 2d 395* (court may sustain granting of motion on any ground specified in motion whether or not it was ground relied on by trial court; court noted and disagreed with several appellate opinions which state that appellate court is restricted, not merely to grounds specified by moving party, but to specific ground or grounds relied on by trial court in granting motion); *Jensen v. Hewlett-Packard Co. (1993) 14 Cal. App. 4th 958, 971, 18 Cal. Rptr. 2d 83* (appellate court may affirm nonsuit on grounds trial court did not rely on in granting motion if plaintiff had notice of defect and opportunity to cure it)]. In either situation, i.e., whether the appellate court looks only at the reason or reasons stated by the trial judge in granting the motion, or at any reason advanced by the moving party in the trial court, the appellate court looks also at the problem of legal preclusion--whether, as a matter of law, there is no basis for the plaintiff's claim. In such circumstances, affirmance of the judgment of nonsuit is appropriate even if that ground was not advanced below [*Alpert v. Villa Romano Homeowners Assn. (2000) 81 Cal. App. 4th 1320, 1328]* .

The appellate court's review must be based on the whole record rather than on just the excerpts chosen by the appellant.

The reviewing court may not consider only supporting evidence in isolation, disregarding all contradictory evidence [*Kidron v. Movie Acquisition Corp. (1995) 40 Cal. App. 4th 1571, 1581, 47 Cal. Rptr. 2d. 752* ; *see also Alpert v. Villa Romano Homeowners Assn. (2000) 81 Cal. App. 4th 1320, 1327* (appellate court reviews entire record of trial court)].

Denial of a request to reopen which is accompanied by an offer of proof of evidence that will cure the deficiency is reversible error [*Alpert v. Villa Romano Homeowners Assn. (2000) 81 Cal. App. 4th 1320, 1337]* .

[12] Review When Motion for Nonsuit Is Denied

If a motion for nonsuit is denied, the case is tried on the merits, and, after trial, the moving party on appeal from the judgment asserts denial of the nonsuit motion as error, a reviewing court will review the sufficiency of the evidence to support the jury's verdict, not the sufficiency of the evidence at the time of the nonsuit motion [*Lowe v. San Francisco etc. Ry. Co. (1908) 154 Cal. 573, 575-576, 98 P. 678* ; *Ewing v. Gill Industries, Inc. (1992) 3 Cal. App. 4th 601, 613, 4 Cal. Rptr. 2d 640]* . In reviewing the denial of a motion for nonsuit, appellate courts, like trial courts, must evaluate the evidence in the light most favorable to the plaintiff. Reversal on the denial of a motion for nonsuit is only proper when no substantial evidence exists tending to prove each element of the plaintiff's case [*Wright v. Beverly Fabrics, Inc. (2002) 95 Cal. App. 4th 346, 351, 115 Cal. Rptr 2d 503* ; *Adams v. City of Fremont (1998) 68 Cal. App. 4th 243, 263, 80 Cal. Rptr. 2d 196]* .

Although no reported opinion has specifically approved the use of an extraordinary writ to review the denial of a motion for nonsuit, such review may be possible when there is no plain, speedy, and adequate remedy in the ordinary course of law [*see Code of Civ. Proc. §§ 1068, 1086, 1103*]. The denial of a motion for nonsuit, like the denial of a motion for summary judgment and the overruling of a demurrer, is not an appealable order because it is not a final judgment on the merits. As a general rule, when an order is not appealable, but is reviewable only on appeal from a subsequent judgment, various factors, such as the expense of proceeding with a trial and prejudice resulting from delay, may operate to make that remedy inadequate [*Phelan v. Superior Court (1950) 35 Cal. 2d 363, 370, 217 P.2d 951* ; *Whitney's at the Beach v. Superior Court (1970) 3 Cal. App. 3d 258, 264, 83 Cal. Rptr. 237* (writ of mandamus properly issued to review denial of motion for summary judgment)]. Further, the motion for nonsuit is the equivalent of a demurrer [*Hamilton v. City of San Diego (1990) 217 Cal. App. 3d 838, 843, 266 Cal. Rptr. 215]* , and extraordinary writs have been issued to review orders overruling demurrers [*see Harden v. Superior Court (1955) 44 Cal. 2d 630, 635-636, 642, 284 P.2d 9* (writ of prohibition granted); *City of Ontario v. Superior Court (1993) 12 Cal. App. 4th 894, 897-898, 903, 16 Cal. Rptr. 2d 32* (writ of mandate granted)]. For discussion of the use of extraordinary writs to review orders overruling demurrers, see *Ch. 206, Demurrers and Motions for Judgment on the Pleadings, § 206.29*.

[13] Appeal of Expedited "Mini-Trial" Based on Offers of Proof Treated as Nonsuit

Several trial courts have attempted to streamline trial proceedings by adjudicating a case from the bench based on offers of proof [*see, e.g., Stein-Brief Group, Inc. v. Home Indemnity Co. (1998) 65 Cal. App. 4th 364, 369, 76 Cal. Rptr. 2d 3* (trial court suggested "mini-trial" as alternative to summary judgment)]; however this "unusual and unorthodox procedure," without certain precautions, may result in an unnecessary reversal of the trial court's judgment because the reviewing court must treat the case as if it were the product of a motion for nonsuit after an opening statement [*Panico v. Truck Ins. Exchange (2001) 90 Cal. App. 4th 1294, 1296, 109 Cal. Rptr. 2d 638]* . Where both parties and the trial judge understand a procedure to be the functional equivalent of a motion for nonsuit in a jury trial based on plaintiff's opening statement, that subjects any ensuing judgment to an extremely strict standard of review--not only must all reasonable inferences be drawn in favor of the nonmoving party, but that party must be given the opportunity to amend the opening statement so as to correct its supposed defects [*Panico v. Truck Ins. Exchange (2001) 90 Cal. App. 4th 1294, 1299, 109Cal. Rptr. 2d 638* (case reversed, noting "moral to the story is that haste makes for a lower affirmance rate")].

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§ 389.12 Motion for Judgment

[1] Basis for Motion

After a party has completed his or her presentation of evidence in a trial by the court, the other party, without waiving his or her right to offer evidence in support of his or her defense or in rebuttal in the event the motion is not granted, may move for a judgment [*Code Civ. Proc. § 631.8(a)*]. This motion may also be made and granted as to any cross complaint [*Code Civ. Proc. § 631.8(a)*]. The purpose of the motion is to enable the trial court to dispense with the need for a party to present evidence when the opposing party has failed to sustain its burden of proof. Although the motion is generally made by a defendant at the close of a plaintiff's case, the principles apply equally to a motion by plaintiff at the close of a defendant's case [*see Roth v. Parker (1997) 57 Cal. App. 4th 542, 549, 67 Cal. Rptr. 2d 250* (motion may be brought by either party although generally it is defendant who brings motion); *People v. Mobil Oil Corp. (1983) 143 Cal. App. 3d 261, 267, 267 n.6, 192 Cal. Rptr. 155* ; *see also Du Zeff's Hollywood, Inc. v. Wald (1965) 235 Cal. App. 2d 678, 679-680, 45 Cal. Rptr. 584]* .

[2] Rebuttal and Waiver of Rebuttal

In ruling on the motion for judgment, the court may consider all evidence received if the party against whom the motion is made has had an opportunity to present additional evidence to rebut evidence received during the presentation of evidence deemed by the presenting party to have been adverse to him or her and to rehabilitate the testimony of a witness whose credibility has been attacked by the moving party [*see Code Civ. Proc. § 631.8(a)*; *see also § 389.12*].

If the evidence calls for rebuttal and rehabilitation and a party fails to claim that opportunity despite knowledge that it should and can do so, the opportunity is waived [*see People v. Mobil Oil Corp. (1983) 143 Cal. App. 3d 261, 274, 192 Cal. Rptr. 155]* .

[3] Ruling on Motion

The court as trier of the facts must weigh the evidence and may render a judgment in the moving party's favor or may decline to render any judgment until the close of all the evidence. The court may consider all evidence received, provided that the party against whom the motion for judgment has been made has had an opportunity to present

additional evidence to rebut evidence received during the presentation of evidence deemed by the presenting party to have been adverse to him or her and to rehabilitate the testimony of a witness whose credibility has been attacked by the moving party [*Code Civ. Proc. § 631.8(a)*]. It is the court's job under *Code Civ. Proc. § 631.8* to "weigh the evidence." This means all the pertinent evidence, not just the evidence that the parties selectively brought to the court's attention when arguing the motion [*County of Contra Costa v. Humore, Inc. (1996) 45 Cal. App. 4th 1335, 1344]* . Because *Code Civ. Proc. § 631.8* authorizes a trial court to weigh evidence and make findings, the court may refuse to believe witnesses and draw conclusions at odds with expert opinion [*Roth v. Parker (1997) 57 Cal. App. 4th 542, 550, 67 Cal. Rptr. 2d 250]* .

When a motion for judgment is made at the close of plaintiff's case, the court may consider defensive matter included in the evidence received. The opportunity to rebut is available only if the court exercises that discretion, not if the court has heard the evidence without considering it [*People v. Mobil Oil Corp. (1983) 143 Cal. App. 3d 261, 271-272, 192 Cal. Rptr. 155* ; *see also National Farm Workers Service Center, Inc. v. M. Caratan, Inc. (1983) 146 Cal. App. 3d 796, 807-808, 194 Cal. Rptr. 617]* .

If it appears that the evidence presented supports the granting of the motion as to some but not all the issues involved in the action, the court must grant the motion as to those issues, and the action proceeds as to the issues remaining. Despite the granting of the motion, no final judgment can be entered prior to the termination of the action, but the final judgment in the action must, in addition to any matters determined in the trial, award judgment as determined by the motion as provided by statute [*Code Civ. Proc. § 631.8(b)*].

[4] Statement of Decision

If judgment is rendered, the court must prepare a statement of decision if required as provided in *Code Civ. Proc. §§ 632* and *634* [*Code Civ. Proc. § 631.8(a), (b)*; *see* Ch. 529, *Statement of Decision*]. Accordingly, either party may request a statement of decision [*Code Civ. Proc. § § 631.8(a), 632*].

For discussion and forms for requesting a statement of decision, *see* Ch. 529, *Statement of Decision* .

[5] Adjudication on Merits

Unless the court specifies otherwise in its order of judgment, the judgment operates as an adjudication on the merits [*Code Civ. Proc. § 631.8(c)*]. The court has a limited discretion under this provision, controlled by the principles applicable to the doctrine of res judicata [*see American Broadcasting Cos. v. Walter Reade-Sterling, Inc. (1974) 43 Cal. App. 3d 401, 406-408, 117 Cal. Rptr. 617]* .

After adjudication on the merits, either party may move for a new trial [*see Watt v. Kantel (1970) 13 Cal. App. 3d 249, 252-253, 91 Cal. Rptr. 449]* .

[6] Appellate Review of Judgment

On appeal from a judgment entered under *Code Civ. Proc. § 631.8*, the trial court's decision will be upheld if it is supported by any substantial evidence [*Rodde v. Continental Ins. Co. (1979) 89 Cal. App. 3d 420, 423, 152 Cal. Rptr. 500* ; *Heap v. General Motors Corp. (1977) 66 Cal. App. 3d 824, 829-830, 136 Cal. Rptr. 304* ; *see San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc. (1999) 73 Cal. App. 4th 517, 528, 86 Cal. Rptr. 2d 473* (appellate court applies deferential substantial evidence standard); *County of Contra Costa v. Humore, Inc. (1996) 45 Cal. App. 4th 1335, 1343* (appellate court reviews judgment under substantial evidence rule); *Wilson v. S.L. Rey, Inc. (1993) 17 Cal. App. 4th 234, 241, 21 Cal. Rptr. 2d 552]* .

Consequently, when a trial court's factual finding is challenged on the ground there is no substantial evidence to sustain

it, the power of the reviewing court begins and ends with the determination as to whether, on the whole record, there is substantial evidence, contradicted or uncontradicted, that will support the trial court's determination [*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc. (1999) 73 Cal. App. 4th 517, 528, 86 Cal. Rptr. 2d 473]* .

Generally, the court's findings are liberally construed in favor of the judgment [*Native Sun Investment Group v. Ticor Title Ins. Co. (1987) 189 Cal. App. 3d 1265, 1272, 235 Cal. Rptr. 34]* . The appellate court views the evidence in the light most favorable to the respondents, resolving all evidentiary conflicts in favor of the prevailing party and indulging all reasonable inferences possible to uphold the trial court's findings [*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc. (1999) 73 Cal. App. 4th 517, 528, 86 Cal. Rptr. 2d 473]* . When the appellant did not request any more specific findings than those read into the record by the trial court, the reviewing court may also resort to implied findings to uphold the judgment [*Native Sun Investment Group v. Ticor Title Ins. Co. (1987) 189 Cal. App. 3d 1265, 1272, 235 Cal. Rptr. 34]* .

On the other hand, when the decisive facts are undisputed, the reviewing court is confronted with a question of law and is not bound by the trial court's findings. In other words, the appellate court is not bound by the trial court's interpretation of the law based on undisputed facts, but rather is free to draw its own conclusion of law. Thus, the appellate court will exercise a de novo review when confronted with a question of law and specifically the application of the law to the facts [*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc. (1999) 73 Cal. App. 4th 517, 528, 86 Cal. Rptr. 2d 473]* .

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§ 389.13 Code Civ. Proc. § 1038 Motion for Defense Costs

A defendant as to whom an action is dismissed by the granting of a motion for nonsuit is entitled to costs [*Code Civ. Proc. § 1032(a)(4), (b)*].

If the action is brought under the California Tort Claims Act or is for express or implied indemnity or for contribution in any civil action, defense costs may be available when a motion for judgment under *Code Civ. Proc. § 631.8* or a motion for nonsuit is granted. The award is based on the court's determination that the action was not brought with reasonable cause and in the good faith belief that there was a justifiable controversy under the facts and law that warranted the filing of the complaint, cross complaint, or complaint in intervention. The defendant or cross defendant may move for this determination when the motion for judgment or nonsuit is granted [*Code Civ. Proc. § 1038*].

For discussion of *Code Civ. Proc. § 1038*, see Ch. 510, *Sanctions* .

For further discussion of costs and attorney's fees, *see* Ch. 174, *Costs and Attorney's Fees* .

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[Reserved]

§§ 389.14[Reserved]

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§ 389.30 State Statutes

Time for motion for nonsuit. *Code Civ. Proc. § 581c(a)*

Order for judgment of nonsuit as adjudication on merits unless court otherwise specifies. *Code Civ. Proc. § 581c(c)*

In lieu of entering judgment, court as permitted to grant motion for nonsuit as to some but not all issues involved. *Code Civ. Proc. § 581c(b)*

In personal injury or property damage case, defendants as precluded from referring at trial to fault, absence from action, or involvement of defendant whose motion for nonsuit has been granted. *Code Civ. Proc. § 581c(d)*

Written order, signed by court, and filed in action as required for all dismissals ordered by court. *Code Civ. Proc. § 581d*

Opposing party as authorized to move for judgment after a party has completed the presentation of evidence in a trial by the court. *Code Civ. Proc. § 631.8(a)*

In lieu of entering judgment, court as permitted to grant motion for judgment as to some but not all issues involved. *Code Civ. Proc. § 631.8(b)*

Judgment granted pursuant to a motion for judgment as adjudication on the merits unless it specifies otherwise. *Code Civ. Proc. § 631.8(c)*

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§ 389.31 Decisions

[1] Motion for Judgment

Purpose of *Code Civ. Proc. § 631.8* is to enable trial court to dispense with need for defendant to produce evidence when court, after weighing the evidence at close of plaintiff's case, is persuaded plaintiff failed to sustain his or her burden of proof; thus, *Code Civ. Proc. § 631.8* serves same purpose as does *Code Civ. Proc. § 581c*, which permits court to grant nonsuit in a jury trial; thus, to prevail on defendants motion for judgment, defendants had to demonstrate that plaintiff failed to sustain plaintiff's burden of proof on all theories presented. *Brown v. Boren (1999) 74 Cal. App. 4th 1303, 1319, 88 Cal. Rptr. 2d 758*

Standard of review of judgment and its underlying findings entered under *Code Civ. Proc. § 631.8* is same as judgment granted after trial in which evidence was produced by both sides; findings supporting judgment are not erroneous if supported by substantial evidence; when trial court's factual finding is challenged, power of reviewing court begins and ends with determination whether, on whole record, there is substantial evidence, contradicted or uncontradicted, that will support trial court's determination; appellate court views evidence in light most favorable to respondents, resolving all evidentiary conflicts in favor of prevailing party and indulging all reasonable inferences possible to uphold trial court's findings; when decisive facts are undisputed, however, reviewing court is confronted with question of law and is not bound by trial court's findings, and appellate court will exercise de novo review when confronted with question of law and specifically application of law to facts. *San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc. (1999) 73 Cal. App. 4th 517, 528, 86 Cal. Rptr. 2d 473*

Purpose of *Code Civ. Proc. § 631.8* is to enable trial court to dispense with need for defendant to produce evidence when after weighing evidence at close of plaintiff's case court is persuaded plaintiff failed to sustain its burden of proof; Section 631.8 serves same purpose as does *Code Civ. Proc. § 581c*, which permits court to grant motion for nonsuit in jury trial; however, unlike motion for nonsuit, Section 631.8 motion may be brought by either party; substantial evidence standard of review applies to judgment given under Section 631.8; trial court's grant of motion will not be reversed if its finding are supported by substantial evidence; because Section 631.8 authorizes trial court to weigh evidence and make findings, court may refuse to believe witnesses and draw conclusions at odds with expert opinion. *Roth v. Parker (1997) 57 Cal. App. 4th 542, 549-550, 67 Cal. Rptr. 2d 250*

Trial court did not err in granting one defendant's *Code Civ. Proc. § 631.8* motion for judgment after court granted defendant's motion at outset of trial to try first issue of whether defendant adequately amended its release, court varied order of proof to permit defendant to proceed first, defendant presented evidence regarding issue and plaintiff declined court's invitation to present rebuttal evidence. *Olsen v. Breeze, Inc. (1996) 48 Cal. App. 4th 608, 626, 55 Cal. Rptr. 2d 818*

Motion for judgment allows trial court to dispense with need for defendant to produce evidence if, after weighing evidence at close of plaintiff's case, it is persuaded that plaintiff has failed to sustain its burden of proof; in weighing evidence, court may exercise its prerogatives as fact finder by refusing to believe witnesses and by drawing conclusions at odds with expert opinion. *Kirk Corp. v. First American Title Co. (1990) 220 Cal. App. 3d 785, 806, 270 Cal. Rptr. 24*

In reviewing judgment granted under *Code Civ. Proc. § 631.8* in favor of defendant after plaintiff's presentation of evidence in court trial, evidence is viewed most favorably to defendant, and judgment must be supported by substantial evidence; reviewing court determines whether judgment is supported by any competent and substantial evidence; when two or more inferences can be reasonably deduced from evidence, reviewing court is without power to substitute its deduction for those of trial court. *Kirk Corp. v. First American Title Co. (1990) 220 Cal. App. 3d 785, 806, 270 Cal. Rptr. 24*

Trial court is required to weigh evidence in determining motion for judgment under *Code Civ. Proc. § 631.8*; if two or more inferences reasonably can be drawn from facts, appellate court as without power to substitute its deductions for those of trial court. *Clark v. Rancho Santa Fe Assn. (1989) 216 Cal. App. 3d 606, 619 n.13, 265 Cal. Rptr. 41*

Review of grant of motion for judgment under *Code Civ. Proc. § 631.8* as governed by substantial evidence rule. *Bay General Community Hospital v. County of San Diego (1984) 156 Cal. App. 3d 944, 949 n.1, 203 Cal. Rptr. 184* (disapproved on other grounds in *County of San Diego v. State of California (1997) 15 Cal. 4th 68, 101 n.23, 61 Cal. Rptr. 2d 134, 931 P.2d 312*)

Substantial evidence rule applies to motions for judgment under *Code Civ. Proc. § 631.8*, and trial court as having properly based its findings of fact in ruling on motion on substantial evidence presented during plaintiff's case in chief. *People v. Mobil Oil Corp. (1983) 143 Cal. App. 3d 261, 275, 192 Cal. Rptr. 155*

Granting of motion for judgment under *Code Civ. Proc. § 631.8* in favor of defendants as proper when plaintiff had trial at which evidence was submitted and considered and found insufficient to prove plaintiff's cause of action. *Don Wilson Builders v. City of Torrance (1981) 126 Cal. App. 3d 114, 119-120, 178 Cal. Rptr. 690*

Necessity of defense evidence as eliminated when motion for judgment proper. *Rodde v. Continental Ins. Co. (1979) 89 Cal. App. 3d 420, 423, 152 Cal. Rptr. 500*

Motion for judgment as proper motion after plaintiff's presentation of evidence in trial by court. *Commonwealth Memorial, Inc. v. Telophase Soc'y of America (1976) 63 Cal. App. 3d 867, 869 n.1, 134 Cal. Rptr. 58* (motion for judgment as properly granted when plaintiff was not real party in interest in action for unlawful detainer)

Award of nominal damages to plaintiff as equivalent to judgment in favor of defendant. *Du Zeff's Hollywood, Inc. v. Wald (1965) 235 Cal. App. 2d 678, 680-681, 45 Cal. Rptr. 584*

[2] Motion for Nonsuit

[a] Appeal

On review of grant of nonsuit after opening statement, appellate court accepts as true all facts plaintiff asserted in opening statement and indulges every legitimate inference those facts support. *Hoff v. Vacaville Unified School Dist. (1998) 19 Cal. 4th 925, 930, 80 Cal. Rptr. 2d 811, 968 P.2d 522*

In reviewing judgment entered on grant of motion for nonsuit after close of plaintiff's case-in-chief, appellate court reviews entire record of trial court and views evidence in light most favorable to appellant; appellate court does not weigh evidence or consider credibility of witnesses; judgment cannot be sustained unless, interpreting evidence most favorably to plaintiff's case and most strongly against defendant and resolving all presumptions, inferences, and doubts in favor of plaintiff, judgment for defendant is required as matter of law; doctrine that sufficient evidentiary bases to reverse judgment of nonsuit is created by scintilla of evidence has been rejected; appellate court considers grounds which are both advanced by moving party and ruled on by trial court; split of authority exists over whether appellate court may consider grounds argued by defendant, but not relied on by trial court, in granting motion; in any event, appellate court considers whether, as matter of law, there is no basis for plaintiff's claim; in such circumstances, affirmance of judgment of nonsuit is appropriate even if that ground was not advanced below; denial of request to reopen which is accompanied by offer of proof of evidence that will cure deficiency is reversible error. *Alpert v. Villa Romano Homeowners Assn. (2000) 81 Cal. App. 4th 1320, 1327*

Appellate court independently reviews trial court's decision to grant nonsuit, using same standard employed by trial court; when trial court granted defendant's motion for nonsuit following presentation of plaintiff's evidence at trial, defendant was entitled to nonsuit only if evidence presented by plaintiff was insufficient as matter of law to permit jury to find in plaintiff's favor; in deciding sufficiency of evidence, appellate court does not weigh evidence or consider witnesses' credibility; appellate court accepts evidence most favorable to plaintiff, gives that evidence all the weight to which it is legally entitled, disregards conflicting evidence, and resolves all presumptions, inferences, and doubts against defendant; appellate court may affirm nonsuit only if plaintiff's case is not supported by substantial evidence and defendant is entitled to judgment as matter of law. *Lund v. Bally's Aerobic Plus, Inc. (2000) 78 Cal. App. 4th 733, 737, 93 Cal. Rptr. 2d 169*

In reviewing judgment of nonsuit, appellate court accepts plaintiff's version of the facts, giving plaintiff benefit of all legitimate inferences and disregarding conflicting evidence. *Lupash v. City of Seal Beach (1999) 75 Cal. App. 4th 1428, 1433, 89 Cal. Rptr. 2d 920*

On review of trial court's granting of nonsuit, appellate court must resolve all conflicts in evidence and draw all reasonable inferences in plaintiff's favor. *See Stapper v. GMI Holdings, Inc. (1999) 73 Cal. App. 4th 787, 791, 86 Cal. Rptr. 2d 688*

Nonsuit may be granted only when, disregarding conflicting evidence on defendant's behalf and giving plaintiff's evidence all value it is legally entitled, indulging in every legitimate inference that may be drawn from that evidence, result is determination that there is no evidence of sufficient substantiality to support verdict in plaintiff's favor; neither appellate court nor trial court may weigh evidence nor consider witnesses' credibility. *McComber v. Wells (1999) 72 Cal. App. 4th 512, 521, 85 Cal. Rptr. 2d 376*

With regard to nonsuit after conclusion of opening statement, both trial court and appellate court must accept all facts asserted in opening statement as true and must indulge every legitimate inference that may be drawn from those facts; nonsuit on opening statement disfavored and can only be upheld on appeal if, after accepting all asserted facts as true and indulging every legitimate inference in favor of plaintiff, it can be said those facts and inferences lead inexorably to conclusion plaintiff cannot establish essential element of its cause of action or has inadvertently established uncontrovertible proof of affirmative defense. *Galanek v. Wismar (1999) 68 Cal. App. 4th 1417, 1424, 81 Cal. Rptr. 2d 236*

In reviewing grant of nonsuit, appellate court follows same rules requiring evidence to be evaluated in light most favorable to plaintiff and least favorable to defendant; all presumptions, inferences and doubts resolved against defendant; appellate court may not affirm, unless judgment for defendant is required as matter of law. *Burlesci v. Petersen (1998) 68 Cal. App. 4th 1062, 1065, 80 Cal. Rptr. 2d 704*

Appellate courts, like trial courts, must in reviewing denial of motion for nonsuit evaluate evidence in light most favorable to plaintiff; reversal on denial of motion for nonsuit only proper when no substantial evidence exists tending to prove each element of plaintiff's case. *Adams v. City of Fremont (1998) 68 Cal. App. 4th 243, 263, 80 Cal. Rptr. 2d 196*

Appellate court must accept all facts asserted in opening statement as true and must indulge every legitimate inference which may be drawn from those facts; nonsuit at this early stage is disfavored and can only be upheld on appeal if, after accepting all asserted facts as true and indulging every legitimate inference in favor of plaintiff, it can be said those facts and inferences lead inexorably to conclusion plaintiff cannot establish essential element of its cause of action. *Stein-Brief Group, Inc. v. Home Indemnity Co. (1998) 65 Cal. App. 4th 364, 369, 76 Cal. Rptr. 2d 3*

In reviewing judgment of nonsuit, court must give plaintiff's evidence all value to which it is legally entitled, drawing every legitimate inference from evidence and disregarding conflicting evidence; plaintiff must produce evidence supporting at least logical inference of liability, not merely speculation or conjecture; if there is no substantial evidence of liability, court must affirm grant of nonsuit. *Daum v. SpineCare Medical Group, Inc. (1997) 52 Cal. App. 4th 1285, 1318, 61 Cal. Rptr. 2d 260*

Nonsuit should not have been granted on basis of answer to request for admission when there was other conflicting evidence; unlike with denial of party's right to amend a response to a request for admission, where the standard of review is abuse of discretion, much stricter standard of review applies to grant of judgments of nonsuit; court's power to direct verdict is same as court's power to grant nonsuit; nonsuit or directed verdict may be granted only when disregarding conflicting evidence and giving plaintiff's evidence all value it is legally entitled to, including indulging in every legitimate inference that may be drawn from evidence, result is that there is no evidence of sufficient substantiality to support verdict in plaintiff's favor if such a verdict were given; unless it can be said as matter of law that, when so considered, no other reasonable conclusion is legally deducible from the evidence and that any other holding would be so lacking in evidentiary support that a reviewing court would reverse on appeal, or the trial court would set it aside as matter of law, a trial court is not justified in taking the case from the jury. *CC-California Plaza Associates v. Paller & Goldstein (1996) 51 Cal. App. 4th 1042, 1049-1052, 59 Cal. Rptr. 2d 382*

On appeal from order granting nonsuit, appellate court considers grounds specified by moving party unless there is incurable defect; nonsuit granted after opening statement is disfavored and can only be upheld if, accepting all asserted facts as true and indulging every legitimate inference that may be drawn from those facts in plaintiff's favor, those facts and inferences inexorably lead to conclusion that plaintiff cannot establish essential element of cause of action, or has established uncontrovertible proof of an affirmative defense. *Adkins v. State of California (1996) 50 Cal. App. 4th 1802, 1809, 59 Cal. Rptr. 2d 59*

Although judgment of nonsuit must not be reversed if plaintiff's proof raises nothing more than speculation, suspicion, or conjecture, reversal is warranted if there is some substance to plaintiff's evidence on which reasonable minds could differ; only grounds specified by moving party in support of its motion should be considered by appellate court in reviewing judgment of nonsuit. *Heller v. Pillsbury Madison & Sutro (1996) 50 Cal. App. 4th 1367, 1384-1385, 58 Cal. Rptr. 2d 336*

An appellate court in reviewing a judgment of nonsuit will review the evidence in the light most favorable to the party appealing the nonsuit. *Hodges v. Mark (1996) 49 Cal. App. 4th 651, 657, 56 Cal. Rptr. 2d 700*

On appeal from judgment of nonsuit, reviewing court as guided by same rule as trial court in requiring evaluation of evidence in light most favorable to plaintiff. *LaMonte v. Sanwa Bank California (1996) 45 Cal. App. 4th 509, 517, 52 Cal. Rptr. 2d 861*

Because motions for nonsuit raise issues of law, appellate court reviews rulings on those motions de novo employing same standard that governs the trial court; court may sustain granting of motion on any ground specified in motion whether or not it was ground relied on by trial court. *Saunders v. Taylor (1996) 42 Cal. App. 4th 1538, 1541-1542, 50 Cal. Rptr. 2d 395* (noting and disagreeing with several appellate opinions which state that appellate court is restricted to specific ground or grounds relied on by trial court in granting motion)

In determining whether nonsuit was properly granted, reviewing court must resolve every conflict in testimony in plaintiff's favor and at same time indulge in every presumption and inference that could reasonably support plaintiff's case; rules governing granting of nonsuit, however, do not relieve plaintiff of burden of establishing elements of plaintiff's case; thus plaintiff must produce evidence that supports logical inference in plaintiff's favor and which does more than merely permit speculation or conjecture; if plaintiff produces no substantial evidence of liability or proximate cause, than granting of nonsuit proper. *Westside Center Associates v. Safeway Stores 23, Inc. (1996) 42 Cal. App. 4th 507, 531, 49 Cal. Rptr. 2d 793*

Plaintiff cannot prevail on appeal unless plaintiff can demonstrate substantial evidence in record to support each claim asserted; mere conjecture or nonsensical interpretations of evidence not sufficient to overturn nonsuit; rules governing granting nonsuit do not relieve plaintiff of burden of establishing elements of plaintiff's case; plaintiff must therefore produce evidence that supports logical inference in plaintiff's favor and which does more than merely permit speculation or conjecture; if plaintiff produces no substantial evidence of liability or proximate cause, then granting of nonsuit is proper; while court may infer facts from evidence, inferences must be logical and reasonable; decision about what inferences can be drawn by fact finder are questions of law for court's determination in that an inference may not be illogically and unreasonably drawn, nor can inference be based on mere possibility or flow from suspicion, imagination, speculation, supposition, surmise, conjecture or guesswork. *Kidron v. Movie Acquisition Corp. (1995) 40 Cal. App. 4th 1571, 1580-1581, 47 Cal. Rptr. 2d 752*

When motion for nonsuit was granted, reviewing court is required to evaluate evidence in light most favorable to plaintiff; court will not sustain judgment unless, interpreting evidence most favorably to plaintiff's case and most strongly against defendant and resolving all presumptions, inferences, and doubts in plaintiff's favor, judgment for defendant is required as matter of law. *Unigard Ins. Group v. O'Flaherty & Belgum (1995) 38 Cal. App. 4th 1229, 1235, 45 Cal. Rptr. 2d 565*

Nonsuits disfavored and appellate courts will not sustain them unless, interpreting evidence most favorably to plaintiff's case and most stronglyagainst defendant and resolving all presumptions, inferences and doubts in plaintiff's favor, judgment in defendant's favor is required as matter of law. *Resolution Trust Corp. v. Rossmoor Corp. (1995) 34 Cal. App. 4th 93, 99, 40 Cal. Rptr. 2d 328*

On appeal from judgment of nonsuit, reviewing court as not limited to consideration of grounds stated by trial court if defect is one which could not have been remedied had it been called to plaintiff's attention by motion. *DeVaughn Peace, M.D., Inc. v. St. Francis Medical Center (1994) 28 Cal. App. 4th 454, 459, 33 Cal. Rptr. 2d 459*

On motion for nonsuit, both trial and appellate courts as viewing evidence requiring higher burden of proof, such as claim for punitive damages, with that higher burden in mind. *Hoch v. Allied-Signal, Inc. (1994) 24 Cal. App. 4th 48, 59-61, 29 Cal. Rptr. 2d 615*

Appeal from judgment of nonsuit in defendant's favor at close of plaintiff's opening statement as upheld only if, after accepting all asserted facts as true and indulging every legitimate inference in plaintiff's favor, it can be said those facts

and inferences lead inexorably to conclusion that plaintiff cannot esablish essential element of cause of action or has inadvertently established uncontrovertible proof of affirmative defense. *Abeyta v. Superior Court (1993) 17 Cal. App. 4th 1037, 1041, 21 Cal. Rptr. 2d 680*

If plaintiff's evidence, when most favorably viewed, provides substantial evidence in support of each element of prima facie case without any affirmative defense, nonsuit as improper and to be reversed. *Diesel Electric Sales & Service, Inc. v. Marco Marine San Diego, Inc. (1993) 16 Cal. App. 4th 202, 211, 20 Cal. Rptr. 2d 62*

On appeal from judgment of nonsuit in favor of defendant at close of plaintiff's case, issue as whether plaintiff presented any substantial issue of fact for determination of jury, giving plaintiff's evidence all value to which it is legally entitled and indulging in every legitimate inference. *Walgren v. Dolan (1990) 226 Cal. App. 3d 572, 575, 276 Cal. Rptr. 554* ; *Harris v. Smith (1984) 157 Cal. App. 3d 100, 104, 203 Cal. Rptr 541*

On appeal from judgment of nonsuit, reviewing court as bound by same rules governing trial court in ruling on motion for nonsuit, and only grounds specified by moving party in support of its motion as to be considered by appellate court in reviewing judgment of nonsuit. *Marvin v. Adams (1990) 224 Cal. App. 3d 956, 960, 274 Cal. Rptr. 308* ; *Acme Galvanizing Co. v. Fireman's Fund Ins. Co. (1990) 221 Cal. App. 3d 170, 174, 270 Cal. Rptr. 405*

In reviewing judgment of nonsuit, appellate court as evaluating evidence in light most favorable to plaintiff; judgment as not sustained unless, interpreting evidence most favorably to plaintiff's case and most strongly against defendant and resolving all presumptions, inferences, and doubts in favor of plaintiff, judgment for defendant is required as matter of law; however, judgment of nonsuit as not reversed if plaintiff's proof raises nothing more than speculation, suspicion, or conjecture. *Conservatorship of Everette M. (1990) 219 Cal. App. 3d 1567, 1573, 1574, 269 Cal. Rptr. 182*

Variance between pleading and proof as not constituting error if no prejudice is shown and no objection to evidence or motion for nonsuit was made at trial. *Stokes v. Henson (1990) 217 Cal. App. 3d 187, 196, 265 Cal. Rptr. 836*

On appeal from judgment of nonsuit, reviewing court as guided by same rule as trial court, that is, evaluation of evidence in light most favorable to plaintiff. *De Lima v. Magnesite Waterproofing & Refinishing (1987) 191 Cal. App. 3d 776, 779, 236 Cal. Rptr. 519*

Reversal of judgment on nonsuit requires some substance to plaintiff's evidence on which reasonable minds could differ, and proof raising mere speculation, surmise, or conjecture is insufficient. *Travelers Insurance Co. v. Lesher (1986) 187 Cal. App. 3d 169, 203, 231 Cal. Rptr. 791 , disapproved on other grounds, Buss v. Superior Court (1997) 16 Cal. 4th 35, 50 n.12, 65 Cal. Rptr. 2d 366, 939 P.2d 766*)

Because motion for nonsuit is designed to call attention to correctable defects, granting motion after plaintiff's opening statement as upheld only if it is clear counsel has stated all facts. *Rokos v. Peck (1986) 182 Cal. App. 3d 604, 611, 227 Cal. Rptr. 480*

[b] Nature of Motion for Nonsuit

Motion has effect of demurrer to evidence; it concedes truth of facts proved and contends those facts are not sufficient as matter of law to sustain plaintiff's case. *Alpert v. Villa Romano Homeowners Assn. (2000) 81 Cal. App. 4th 1320, 1328*

Motion for nonsuit tantamount to demurrer to evidence; it admits truth of facts proved, but denies they sustain plaintiff's case as matter of law. *Stein-Brief Group, Inc. v. Home Indemnity Co. (1998) 65 Cal. App. 4th 364, 369, 76 Cal. Rptr. 2d 3* ; *Adkins v. State of California (1996) 50 Cal. App. 4th 1802, 1809, 59 Cal. Rptr. 2d 59*

Defendant is entitled to nonsuit if trial court determines that, as matter of law, evidence presented by plaintiff is insufficient to permit jury to find in plaintiff's favor. *Heller v. Pillsbury Madison & Sutro (1996) 50 Cal. App. 4th 1367, 1384, 58 Cal. Rptr. 2d 336*

Under *Code Civ. Proc. § 581c*, permitting court to grant nonsuit in jury trial, motion as equivalent to demurrer to evidence or motion for directed verdict. *Hamilton v. City of San Diego (1990) 217 Cal. App. 3d 838, 843, 266 Cal. Rptr. 215*

Motion for nonsuit as allowing defendant to challenge sufficiency of plaintiff's evidence; court as required to give to plaintiff's evidence all value to which it is legally entitled, indulging every legitimate inference that may be drawn from evidence in plaintiff's favor. *Coats v. K-Mart Corp. (1989) 215 Cal. App. 3d 961, 968-969, 264 Cal. Rptr. 12*

[c] Plaintiff's Postmotion Procedure

Trial court's denial of plaintiff's motion to reopen after motion for nonsuit is proper when additional evidence sought to be produced by plaintiff is irrelevant or would not be sufficient to rend defendants liable as matter of law. *S.C. Anderson, Inc. v. Bank of America (1994) 24 Cal. App. 4th 529, 538-539, 30 Cal. Rptr. 2d 286*

Plaintiff as waiving ability to repoen and present additional evidence to cure defects after motion for nonsuit because he failed to specify what additional evidence would be presented or how additional evidence would cure defects. *Consolidated World Investments, Inc. v. Lido Preferred Ltd. (1992) 9 Cal. App. 4th 373, 382, 11 Cal. Rptr. 2d 524*

Plaintiff as waiving opportunity to modify or add to opening statement after motion for nonsuit. *John Norton Farms, Inc. v. Todagco (1981) 124 Cal. App. 3d 149, 162, 177 Cal. Rptr. 215*

[d] Res Ipsa Loquitur

Nonsuit as improper in medical malpractice case when evidence was sufficient to raise doctrine of res ipsa loquitur. *Hale v. Venuto (1982) 137 Cal. App. 3d 910, 919-920, 187 Cal. Rptr. 357*

[e] Ruling on Motion

Nonsuit may be granted only when, disregarding conflicting evidence on defendant's behalf and giving plaintiff's evidence all value it is legally entitled, therein indulging in every legitimate inference that may be drawn from that evidence, result is determination that there is no evidence of sufficient substantiality to support verdict in plaintiff's favor; neither appellate court nor trial court may weigh evidence nor consider witnesses' credibility. *McComber v. Wells (1999) 72 Cal. App. 4th 512, 521, 85 Cal. Rptr. 2d 376*

In deciding if nonsuit after opening statement is proper, trial court and reviewing court must assume plaintiff can prove all favorable facts presented in opening statement; nonsuit on opening statement disfavored and should be avoided unless there is clear and unequivocal demonstration of total lack of a cause of action by plaintiff. *Galanek v. Wismar (1999) 68 Cal. App. 4th 1417, 1421, 1424, 81 Cal. Rptr. 2d 236*

Defendant entitled to nonsuit if trial court determines evidence presented by plaintiff is insufficient as matter of law to permit jury to find in plaintiff's favor; court may not weigh evidence or consider credibility of witnesses; instead, court must accept evidence most favorable to plaintiff as true and disregard conflicting evidence; plaintiff's evidence must be given all value to which it is legally entitled, including every legitimate inference that may be drawn in plaintiff's favor;

mere scintilla of evidence, however, not enough; substantial evidence creating a conflict for jury to resolve required. *Burlesci v. Petersen (1998) 68 Cal. App. 4th 1062, 1065, 80 Cal. Rptr. 2d 704*

Defendant entitled to nonsuit if trial court determines as matter of law plaintiff's evidence insufficient to allow jury to find in plaintiff's favor. *Adams v. City of Fremont (1998) 68 Cal. App. 4th 243, 262, 80 Cal. Rptr. 2d 196*

Motion for nonsuit or demurrer to evidence admits facts proved to be true, but denies that they sustain plaintiff's case as matter of law. *Mechanical Contractors Assn. v. Greater Bay Area Assn. (1998) 66 Cal. App. 4th 672, 677, 78 Cal. Rptr. 2d 225*

In determining whether plaintiff's evidence is sufficient, court may not weigh evidence or consider credibility of witnesses; rather, evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded; court must give to plaintiff's evidence all the value to which it is legally entitled, indulging every legitimate inference which may be drawn from the evidence in plaintiff's favor; substantial evidence, rather than mere scintilla of evidence, needed to create conflict for jury resolution. *Heller v. Pillsbury Madison & Sutro (1996) 50 Cal. App. 4th 1367, 1384, 58 Cal. Rptr. 2d 336*

In ruling on motion for nonsuit based on plaintiff's opening statement, trial court must assume plaintiff will be able to prove all favorable facts alleged. *Aspen Enterprises, Inc. v. Bodge (1995) 37 Cal. App. 4th 1811, 1817, 44 Cal. Rptr. 2d 763*

Defendant is entitled to nonsuit if trial court determines as matter of law that plaintiff's evidence does not permit jury to find in plaintiff's favor; in determining whether plaintiff's evidence is sufficient, court may not weight evidence or consider witness's credibility; court must accept as true the evidence most favorable to plaintiff and must disregard conflicting evidence; court must give plaintiff's evidence all value to which it is legally entitled, indulging every legitimate inference that may be drawn from evidence in plaintiff's favor; mere scintilla of evidence does not create conflict for jury's resolution; must be substantial evidence to create necessary conflict. *Unigard Ins. Group v. O'Flaherty & Belgum (1995) 38 Cal. App. 4th 1229, 1234-1235, 45 Cal. Rptr. 2d 565*

Nonsuit was improperly granted where trial court improperly failed to draw every inference in favor of plaintiff and improperly considered and determined credibility of plaintiff's expert witness. *McNall v. Summers (1994) 25 Cal. App. 4th 1300, 1314-1315, 30 Cal. Rptr. 2d 914*

Nonsuit is properly granted only if, as matter of law, evidence presented by plaintiff is insufficient to permit a jury to find in plaintif's favor. *Wilson v. Century 21 Great Western Realty (1993) 15 Cal. App. 4th 298, 301, 18 Cal. Rptr. 2d 779*

In determining sufficiency of plaintiff's evidence on motion for nonsuit, evidence is not weighed and credibility of witnesses is not considered; evidence most favorable to plaintiff is accepted as true and conflicting evidence is disregarded. *Campbell v. General Motors Corp. (1982) 32 Cal. 3d. 112, 118, 184 Cal. Rptr. 891, 649 P.2d 224* ; *Diesel Electric Sales & Service, Inc. v. Marco Marine San Diego, Inc. (1993) 16 Cal. App. 4th 202, 210, 20 Cal. Rptr. 2d 62* ; *Bolin v. San Bernardino City Unified School Dist. (1984) 155 Cal. App. 3d 759, 767, 202 Cal. Rptr. 416* ; *Harris v. Trojan Fireworks Co. (1984) 155 Cal. App. 3d 830, 834-835, 202 Cal. Rptr. 440* ; *Downer v. Bramet (1984) 152 Cal. App. 3d 837, 842, 199 Cal. Rptr. 830*

Nonsuit granted on cross complaint for misappropriation of trade secrets was proper when cross complainint presented no evidence of damages specific to that dispute and relevant to applicable measure of damages. *Unilogic, Inc. v. Burroughs Corp. (1992) 10 Cal. App. 4th 612, 627, 12 Cal. Rptr. 2d 741*

Nonsuit was improperly granted after plaintiff's opening statement in products liability market-share theory case when

plaintiff made offer of proof as to each prima facie element. *Wheeler v. Raybestos-Manhattan (1992) 8 Cal. App. 4th 1152, 1158, 11 Cal. Rptr. 2d 109*

In action by parents of child who suffered injuries arising from alleged medical malpractice, nonsuit at close of plaintiff's case was proper because parents had not filed tort claim against government (although claim had been filed on behalf of child), which was procedural prerequisite to filing suit. *Nguyen v. Los Angeles County Harbor/UCLA Medical Center (1992) 8 Cal. App. 4th 729, 732-735, 10 Cal. Rptr. 2d 709*

Trial court is not permitted to grant motion for nonsuit if evidence presented by plaintiff would support jury verdict; in reviewing plaintiff's evidence, trial court is not permitted to weigh evidence or to consider credibility of witnesses; instead, trial court is required to accept evidence most favorable to plaintiff as true, disregard conflicting evidence, and indulge every legitimate inference that may be drawn therefrom in plaintiff's favor. *Marvin v. Adams (1990) 224 Cal. App. 3d 956, 960, 274 Cal. Rptr. 308* ; *Acme Galvanizing Co. v. Fireman's Fund Ins. Co. (1990) 221 Cal. App. 3d 170, 173-174, 270 Cal. Rptr. 405*

Nonsuit in action against title insurance company for conspiracy to defraud was improperly granted under *Code Civ. Proc. § 338(d)* (three-year limitation on actions for fraud). *Aaroe v. First American Title Ins. Co. (1990) 222 Cal. App. 3d 124, 127-129, 271 Cal. Rptr. 434*

In motion for nonsuit, trial court disregards conflicting evidence on behalf of defendants and gives to plaintiff's evidence all value to which it is legally entitled; neither appellate court nor lower court may weigh evidence or consider credibility of witnesses. *Bell v. Sharp Cabrillo Hospital (1989) 212 Cal. App. 3d 1034, 1043 n.10, 260 Cal. Rptr. 886* ; *Delgado v. Heritage Life Ins. Co. (1984) 157 Cal. App. 3d 262, 275, 203 Cal. Rptr. 672* ; *Morgenroth v. Pacific Medical Center, Inc. (1976) 54 Cal. App. 3d 521, 530, 126 Cal. Rptr. 681*

Motion for nonsuit is not granted if plaintiff's evidence would support jury verdict in plaintiff's favor. *Zavala v. Board of Trustees (1993) 16 Cal. App. 4th 1755, 1763, 20 Cal. Rptr. 2d 768* ; *De Lima v. Magnesite Waterproofing & Refinishing (1987) 191 Cal. App. 3d 776, 779, 236 Cal. Rptr. 519* ; *Mast v. Magpusao (1986) 180 Cal. App. 3d 775, 777, 225 Cal. Rptr. 689*

Court is restricted to considering grounds specified by defendant when ruling on motion for nonsuit after plaintiff's opening statement. *Hurn v. Woods (1982) 132 Cal. App. 3d 896, 900, 183 Cal. Rptr. 495*

Nonsuit is proper when contract described in opening statement is unenforceable as contrary to public policy. *Russell v. Soldinger (1976) 59 Cal. App. 3d 633, 642, 131 Cal. Rptr. 145*

Nonsuit is proper when it is plainly evident that the facts plaintiff's counsel intends to prove will not constitute cause of action. *Smith v. Roach (1975) 53 Cal. App. 3d 893, 898, 126 Cal. Rptr. 29*

[f] Timeliness of Motion

Nonsuit after plaintiff's presentation of evidence is permitted only if no evidence of sufficient substantiality exists to support verdict for plaintiff; if existence of facts sufficient to support recovery can logically and reasonably be inferred from evidence, motion must be denied, regardless of whether evidence is also susceptible to conflicting inferences; however, proof that raises mere speculation, suspicion, surmise, guess, or conjecture is insufficient. *Ashcraft v. King (1991) 228 Cal. App. 3d 604, 610-611, 278 Cal. Rptr. 900*

Motion for nonsuit following presentation of plaintiff's evidence is properly granted when evidence is insufficient as matter of law to sustain verdict for plaintiff. *Williams v. Foster (1989) 216 Cal. App. 3d 510, 522, 265 Cal. Rptr. 15*

Nonsuit at completion of plaintiff's opening statement is improper when statement is not plainly insufficient as matter of law; court properly considers potential evidence in case that has been stipulated to by all parties when ruling on motion for nonsuit after plaintiff's opening statement. *John Norton Farms, Inc. v. Todagco (1981) 124 Cal. App. 3d 149, 162-163, 171-172, 177 Cal. Rptr. 215*

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§ 389.32 Text References

Witkin, California Procedure, vol. 7, *Trial*, §§ 416-429 (4th ed. 1997)

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[Reserved]

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§ 389.40 Moving Party's Checklist

☐ Determine if motion for nonsuit or for judgment may be made.

☐ If the sufficiency of plaintiff's evidence as described in plaintiff's opening statement in any trial or as presented by plaintiff in a jury trial is subject to challenge, prepare to file a motion for nonsuit [*see Code Civ. Proc. § 581c(a)*].

☐ If the sufficiency of the evidence presented by the opposing party when trial is by the court is subject to challenge, prepare to file motion for judgment [*see Code Civ. Proc. § 631.8(a)*].

☐ Determine whether the evidence supports the granting of the motion as to some but not all the issues involved in the action [*see Code Civ. Proc. §§ 581c(b), 631.8(b)*].

☐ Determine specific grounds for motion for nonsuit.

☐ Draft and file motion for nonsuit or judgment.

☐ Decide whether to make oral or written motion.

☐ If oral motion is to be made, consider first requesting permission to approach the bench, in order to make the motion there.

☐ Specify the grounds for the motion.

- ☐ Specify the claims of the opposing party challenged under the motion.

☐ Argue the motion.

☐ If the motion for nonsuit is granted:

- ☐ Prepare proposed order [for forms, *see §§ 389.50, 389.51*].
- ☐ Prepare claim for costs and reimbursements and, if entitled, a claim for attorney's fees.
- ☐ File proposed order and any request for costs.
- ☐ Argue for adoption of proposed order and granting of any request for costs.

☐ If the motion for judgment is granted:

- ☐ Consider requesting a statement of decision.
- ☐ Consider moving for new trial if judgment is not satisfactory.

☐ If motion for nonsuit is granted as to some issues.

- ☐ Make sure court record indicates clearly which issues have been nonsuited.
- ☐ Prepare for trial or other pretrial challenge on remaining issues.

☐ If motion for nonsuit or judgment is denied:

- ☐ Consider renewing the motion later, if grounds exist.
- ☐ Consider seeking appellate review of the denial.

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[Reserved]

§§ 389.41[Reserved]

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PART V. FORMS

34-389 California Forms of Pleading and Practice--Annotated § 389.50

§ 389.50 Order Granting Judgment of Nonsuit [Code Civ. Proc. § 581c(a)]

[1] FORM Order Granting Judgment of Nonsuit [Code Civ. Proc. § 581c(a)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER GRANTING MOTION FOR JUDGMENT OF NONSUIT
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

The motion of defendant _____[*name*] for an order granting judgment of nonsuit pursuant to *Code of Civil Procedure Section 581c(a)* on plaintiff's _____ [opening statement *or* presentation of evidence] was heard by the court on _____[*date*]. Defendant appeared by counsel _____ [*name*]; plaintiff appeared by counsel _____ [*name*].

Plaintiff having rested his/her case and good cause for an order for judgment of nonsuit having been shown in that _____ [*specify ground argued on motion*],

IT IS ORDERED, ADJUDGED, AND DECREED that the motion of defendant be, and hereby is, granted, that plaintiff

take nothing by the complaint on file herein, that this order shall [not] operate as an adjudication on the merits, and that defendant recover from plaintiff his/her costs in the sum of $_____ [and attorney's fees in the sum of $_____].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form of order in [1], *above*, is for use in granting defendant's motion for a judgment of nonsuit pursuant to *Code Civ. Proc. § 581c(a)*. Once the order is signed by the court and filed in the action, it constitutes a judgment and is effective for all purposes [*see Code Civ. Proc. § 581d*]. It constitutes an adjudication on the merits unless the court specifies otherwise [*Code Civ. Proc. § 581c(c)*].

Findings of fact are not necessary for a judgment of nonsuit [*Nelson v. Specialty Records, Inc. (1970) 11 Cal. App. 3d 126, 142, 89 Cal. Rptr. 540]* .

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34-389 California Forms of Pleading and Practice--Annotated § 389.51

§ 389.51 Judgment on Motion for Judgment [Code Civ. Proc. § 631.8(a)]--By Defendant or Plaintiff

[1] FORM Judgment on Motion for Judgment [Code Civ. Proc. § 631.8(a)]--By Defendant or Plaintiff
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*]	)	JUDGMENT
Defendant.	)	
	)	
	)	

This cause came on regularly for trial on _____[*date*], [in _____ (Department *or* Division) _____ of] the above-entitled court, the Honorable _____, Judge presiding[, sitting without a jury]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____[*name*]. Evidence, both oral and documentary, having been presented by [both] plaintiff [and defendant]: plaintiff [and defendant] having rested; _____ [defendant *or* plaintiff] having moved the court for a judgment pursuant to *Code of Civil Procedure Section 631.8(a)*; the court having weighed the evidence; _____ [*describe court's action with respect to statement of decision, e.g.,* and the court (on request of _____ (plaintiff *or* defendant)) having caused to be made and filed herein its statement of decision on _____(*date*) *or* and statement of decision not having been requested *or* and the court makes the following statement of decision: _____],

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED that the motion for judgment in favor of

_____ [defendant *or* plaintiff] _____ [*name*] be, and the same hereby is, granted[, provided that this judgment shall not operate as an adjudication on the merits],

[*EITHER*]

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiff take nothing by the complaint on file herein and that defendant have and recover from plaintiff costs in the sum of $_____ [and attorney's fees in the sum of $_____].

[*OR*]

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiff recover from defendant as follows:

1. The sum of $_____;

[2. Interest on this sum at the rate of _____percent per annum from and and after _____(*date*), to and including the date hereof; this interest amounting to $_____;]

[3. Attorney's fees in the amount of $_____;] and

4. Plaintiff's costs herein incurred in the sum of $ _____.

[*CONTINUE*]

Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use as a judgment granting defendant's or plaintiff's motion for judgment pursuant to *Code Civ. Proc. § 631.8(a)*. The judgment granted is an adjudication on the merits unless it specifies otherwise [*Code Civ. Proc. § 631.8(c)*].

If a statement of decision was requested, the form includes an assertion that a statement of decision is included in the judgment itself or in a separate instrument [*see Code Civ. Proc. § 632*].

[3] Cross References

For forms relating to statements of decision, see Ch. 529, *Statement of Decision*

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[a] In General

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[a] In General

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[f] Protest of Nonpayment or Nonacceptance

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[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Decisions

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§ 390.72 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] Proximately Caused by Notary's Negligence [Civ. Code § 1714; Gov. Code § 8214] in Undertaking, in Violation of Law [Bus. & Prof. Code §§ 6125, 6126; Gov. Code § 8214.1(g)], to Draft Valid Formal Will--Action by Beneficiary Under Will Against Notary Resulting From Will's Being Denied Admission to Probate Because of Faulty Execution or Attestation [Prob. Code § 50]

[1] FORM

[2] Use of Form

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§ 390.01 Scope of Chapter

This chapter discusses the laws applicable to notaries public and contains a general form of complaint against a notary public to recover damages for a false certificate of acknowledgment [*see § 390.70*], a form of complaint against a notary for actual and exemplary damages for a false certificate of acknowledgment of the execution of a deed of trust pursuant to a scheme by the notary to defraud [*see § 390.71*], and a form of complaint against a notary for damages for negligence in drafting a will that was subsequently denied admission to probate because of improper execution or attestation [*see § 390.72*].

For forms of complaints for damages for fraud and negligence generally, see Ch. 269, *Fraud* , and Ch. 380, *Negligence* , respectively. For forms of complaints on a common count that may be adapted for use by a notary to recover notary fees improperly collected by another, see Ch. 121, *Common Counts* .

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§ 390.02 Cross References

For a discussion and forms of certificates of acknowledgment and affidavits, see Ch. 9, *Acknowledgments* , and Ch. 15, *Affidavits, Certificates, and Declarations* , respectively.

For discussion relating to penalty for perjury by a witness to an acknowledgment, see Ch. 9, *Acknowledgments* .

For a discussion and forms of oaths and affirmations, see Ch. 392, *Oath and Affirmation* .

For a discussion and forms for use in disciplinary proceedings against a notary, see Ch. 473, *Public Agency Adjudication* et seq.

For a discussion and forms relating to release of a surety, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

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[Reserved]

§§ 390.03[Reserved]

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§ 390.10 Governing Law

Notaries public are governed generally by *Gov. Code § 8200 et seq.* and by *2 Cal. Code Reg. §§ 21912* and *21914*, adopted by the California Secretary of State pursuant to the authority granted by *Gov. Code § 8220*. There are, in addition, a number of statutes in the various codes relating to notaries public or to services performed by notaries public. For example, *Civ. Code § 1180 et seq.* govern acknowledgment and proof of execution of instruments, and *Civ. Code §§ 1181, 1182(4)*, and *1183(e)* authorize notaries public to take the proof or acknowledgment of instruments any place in California, outside California but within the United States, and outside the United States, respectively. *Evid. Code § 1451* provides that a certificate of the acknowledgment of a writing other than a will, or a certificate of the proof of such a writing, is prima facie evidence of the facts recited in the certificate and the genuineness of the signature of each person by whom the writing purports to have been signed, if the certificate meets the requirements of *Civ. Code § 1180 et seq.* For a discussion and forms of acknowledgments, see Ch. 9, *Acknowledgments* .

Other code sections affecting notaries public are cited as appropriate throughout this Legal Background and in the Research Guide under *§ 390.52*.

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§ 390.11 Appointment of Notaries Public

[1] By Secretary of State

Notaries public are appointed and commissioned by the California Secretary of State in such number as the Secretary of State deems necessary for the public convenience [*Gov. Code § 8200*].

The Secretary of State may also appoint and commission state, county, and public school district employees as notaries public to act for and on behalf of their employing governmental entity. A duly authorized representative of the employing governmental entity must, however, execute a certificate that the appointment is made for the purposes of the employing governmental entity [*Gov. Code § 8202.5*].

In addition, the Secretary of State may appoint and commission notaries public for United States military and naval reservations of the Army, Navy, Coast Guard, Air Force, and Marine Corps, wherever located in California [*Gov. Code § 8203.1*]. The appointment is made on the recommendation of the commanding officer of the reservation in which the notary public is to act [*Gov. Code § 8203.2*].

[2] Exception for Officers of U.S. Military

Apart from the foregoing statutory provisions, any officer on active duty or performing inactive duty training in the armed forces having the general powers of a notary public under *10 U.S.C. § 936* or *1044a* (Pub. L. Nos. 90-632, 101-510) and any successor statutes may perform all notarial acts for any person serving in the armed forces of the United States, or their spouses, wherever the person serving or spouse may be, or for any person eligible for legal assistance under laws and regulations of the United States, wherever he or she may be, for any person serving with, employed by, or accompanying the armed forces outside the United States and outside the Canal Zone, Puerto Rico, Guam, and the Virgin Islands, and any person subject to the Uniform Code of Military Justice outside of the United States [*Civ. Code § 1183.5*].

For forms of certificates of acknowledgments and jurats for use by such officers, see Ch. 9, *Acknowledgments* , and Ch. 15, *Affidavits, Certificates, and Declarations* , respectively.

[3] Mandate as Remedy if Secretary of State Fails to Act

In enacting *Gov. Code § 8200*, authorizing the Secretary of State to appoint and commission notaries public in such number as the Secretary of State deems necessary for the public convenience, the Legislature contemplated that notaries public should be appointed in accordance with the need for them. Under the statute, discretion is vested in the Secretary of State as to the number to appoint and who is to be selected. Nevertheless, the statute imposes a mandatory duty to appoint notaries public. Hence, should the Secretary of State fail or refuse to exercise his or her discretion in the matter, mandate will lie to compel the Secretary of State to do so [*see Hollman v. Warren (1948) 32 Cal. 2d 351, 354-356, 196 P.2d 562* (construing *Gov. Code § 8200* prior to its 1967 amendment substituting "Secretary of State" for "Governor")].

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§ 390.12 Qualifications for Appointment

To be appointed as a notary public, a person must be a California resident and at least 18 years old [*Gov. Code § 8201(a)(1), (2)*]. However, to be appointed a notary public for a United States military or naval reservation in California [*see discussion under § 390.11*], the appointee must be a United States citizen, at least 18 years old, and a federal civil service employee at the reservation in which the person will act as notary public [*Gov. Code § 8203.3*]. The requirement that a notary public be a United States citizen, however, violates the *equal protection clause* of *U.S. Const., amend. XIV* [*see Bernal v. Fainter (1984) 467 U.S. 216, 228, 104 S. Ct. 2312, 81 L. Ed. 2d 175* (Texas statute that did not apply to military but to all notaries)].

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§ 390.13 Territorial Limitation on Power to Act as Notary Public

Notaries public may act as such in any part of California [*Gov. Code § 8200*]. But a notary public appointed for a United States military or naval reservation [*see § 390.11*] may be authorized to act only within the boundaries of the reservation for which he or she was appointed [*Gov. Code § 8203.2*].

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§ 390.14 Term of Office

The term of office of a notary public is four years commencing with the date specified in the commission [*Gov. Code § 8204*]. A notary public appointed for a United States military or naval reservation also has a four-year term of office, but the appointment terminates if the person appointed ceases to be employed as a federal civil service employee at the reservation for which he or she was appointed. In such event, the commanding officer of the reservation is required to notify the Secretary of State of the termination within 30 days thereof, and the termination of the notary public's appointment is treated as a resignation [*Gov. Code § 8203.4*].

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§ 390.15 Application and Fees; Confidentiality of Information

An applicant for appointment and commission as a notary public must complete an application form and submit his or her photograph as prescribed by the Secretary of State [*Gov. Code § 8201.5*]. The applicant must include, as part of the application, an application fee of $15 and a commission fee of $5 to cover the costs of administering the notary program. The application fee is nonrefundable, but the commission fee is refunded if the applicant is not appointed as a notary public [*2 Cal. Code Reg. § 21912*; *see Gov. Code § 12197.1* (maximum application, examination, and commission fee)].

Beginning July 1, 2005, an applicant for notary public must also provide satisfactory proof that he or she has completed an appropriate course of study concerning the functions and duties of a notary public [*Gov. Code § 8201(b)*; *see Gov. Code § 8201(a)(3)*; *see also § 390.16*].

The Secretary of State may cancel a notary public's commission if a check or other remittance accepted as payment for the examination, application, commission, and fingerprint fee is not paid on presentation to the financial instititution on which the check or other remittance was drawn [*see Gov. Code § 8204.1* (providing for written notice and opportunity to pay by cashier's check before cancellation)].

Except for the applicant's name and address, the information in the application is confidential and may not be divulged by an official or employee having access to it to any person other than the applicant, the applicant's authorized representative, or an employee or officer of the federal or state government, or of a local agency as defined in *Gov. Code § 6252*, actingin his or her official capacity. The information is to be used by the Secretary of State for the sole purpose of carrying out the duties prescribed in *Gov. Code § 8200 et seq.* [*Gov. Code § 8201.5*].

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§ 390.16 Course of Study

For an appointment as a notary public on or after July 1, 2005, the applicant must have satisfactorily completed a six-hour course of study approved by the Secretary of State concerning the functions and duties of a notary public [*Gov. Code § 8201(a)(3), (b)(1)*; *see Gov. Code § 8201.2*]. An applicant who holds a California notary public commission and who has satisfactorily completed the six-hour course at least one time must satisfactorily complete a three-hour refresher course of study prior to reappointment as a notary public [*Gov. Code § 8201(b)(2)*].

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§ 390.17 Examination

The applicant must complete a written examination prescribed by the Secretary of State to determine the applicant's fitness to exercise the functions of the office of notary public [*Gov. Code § 8201(a)(4)*]. This requirement also applies to applicants for appointment as a notary public in a United States military or naval reservation in California [*Gov. Code § 8203.3*]. The questions asked in the examination must be based on California law as set forth in the booklet on California laws relating to notaries public that is distributed by the Secretary of State [*Gov. Code § 8201(a)(4)*]. The questions may be answered before, and sworn to by, any notary public. The notary's fee for such service is $5 [*2 Cal. Code Reg § 21914*].

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§ 390.18 Investigation; Fingerprinting

Before granting an appointment as a notary public, the Secretary of State is required to determine that the applicant possesses the required honesty, credibility, truthfulness, and integrity to fulfill the responsibilities of the position. To assist in determining the identity of the applicant and whether the applicant has been convicted of a disqualifying crime specified in *Gov. Code § 8214.1(b)*, the Secretary of State must require that applicants be fingerprinted [*Gov. Code § 8201.1*; *see § 390.32[1]* for discussion of *Gov. Code § 8214.1(b)*].

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§ 390.19 Refusal to Appoint

The Secretary of State may refuse to appoint a person as a notary public on any of the grounds on which he or she may revoke or suspend the commission of a notary public [*see Gov. Code § 8214.1*]. These grounds are discussed in *§ 390.32[1]*.

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§ 390.20 Application for Name Change

A notary public who changes his or her name must complete an application for name change form and file that application with the Secretary of State. Information on the name change form is subject to the confidentiality provisions of *Gov. Code § 8201.5* (*see § 390.15*). On approval of the name change form, the Secretary of State issues a commission that reflects the notary public's new name. The term of commission and commission number will remain the same [*Gov. Code § 8213.6*]. A willful failure to notify the Secretary of State of a name change is punishable as an infraction by a fine of up to $500 [*Gov. Code § 8213.6*].

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§ 390.21 Official Bond and Oath

[1] Requirements

Every person appointed as a notary public must execute an official bond in the sum of $10,000 [*Gov. Code § 8212*; *see also Code Civ. Proc. § 995.440*]. The bond must be in the form of a bond executed by an admitted surety insurer and not a deposit in lieu of bond [*Gov. Code § 8212*]. No later than 30 days after the beginning of the term prescribed in the commission, the bond must be filed, and the person must take, subscribe, and file an oath of office in the county clerk's office of the county in which the person maintains a principal place of business, as shown in the application submitted to the Secretary of State. The commission does not take effect unless this is done within the 30-day period [*Gov. Code § 8213(a)*].

[2] Purpose of Bond

The bond is executed for the purpose of protecting those who may suffer by the notary's dishonesty or negligence in the performance of the notary's duties [*Lewis v. Agricultural Ins. Co. (1969) 2 Cal. App. 3d 285, 292, 82 Cal. Rptr. 509* ; *Hemet Home Buildings Assn. v. Wells (1934) 3 Cal. App. 2d 65, 76-77, 39 P.2d 233* ; *Hungate v. Wells (1933) 129 Cal. App. 133, 135, 18 P.2d 64* ; *see also § 390.29*].

[3] Duties of County Clerk and County Recorder

On the filing of the oath and bond, the county clerk is required to immediately transmit to the Secretary of State a certificate setting forth the fact of the filing and containing a copy of the official oath, personally signed by the notary public in the form set forth in the commission, and to immediately deliver the bond to the county recorder for recording [*Gov. Code § 8213(a)*].

The county recorder is required to record the bond and thereafter, unless specified to the contrary, mail it to the person named in the instrument and, if no person is named, to the party leaving it for recording [*Gov. Code § 8213(e)*].

[4] Recording Fee

The person appointed as a notary public must pay the recording fee specified in *Gov. Code § 27361* [*Gov. Code § 8214*; *see Gov. Code § 27361* (specifying graduated fee based on number of pages of document to be recorded)]. The fee may be paid to the county clerk who is required to transmit it to the county recorder [*Gov. Code § 8213(d)*].

[5] Transfer of Principal Place of Business to Another County

A notary public who transfers his or her principal place of business from one county to another may file a new oath of office and bond, or a duplicate of the original bond, with the county clerk of the county to which the principal place of business was transferred. A notary public who elects to make a new filing must, within 30 days of the filing, obtain an official seal [*see § 390.22*], which must include the name of the county to which the notary public has transferred. If the notary makes a new filing, the same filing and recording fees are applicable as in the case of the original filing and recording of the bond [*Gov. Code § 8213(b)*].

[6] Effect of Name Change

A notary public who submits an application for a name change to the Secretary of State [*see § 390.20*] must, within 30 days from the date that an amended commission is issued, file a new oath of office and an amendment to the bond with the county clerk in the county where the principal place of business is located. The amended commission with the name change does not take effect unless the filing is completed within the 30-day period. The amended commission with the name change takes effect on the date that the oath and amendment to the bond is filed with the county clerk. If the principal place of business address was changed in the application for name change, either a new or duplicate of the original bond must be filed with the county clerk with the amendment to the bond [*Gov. Code § 8213(c)*].

The notary public must, within 30 days of the filing, obtain an official seal [*see § 390.22*] that includes the name of the notary public and the name of the county to which the notary public has transferred, if applicable [*Gov. Code § 8213(c)*].

[7] Certified Copy as Evidence

A certified copy of the record of the official bond, together with all affidavits, acknowledgments, endorsements, and attachments, may be admitted in evidence without further proof in an action or proceeding with the same effect as the original [*Code Civ. Proc. § 995.260*].

[8] Release of Surety

If a surety of a notary desires to be released from responsibility on account of future acts, the release must be pursuant to *Code Civ. Proc. §§ 996.110-996.150* and not by cancellation or withdrawal pursuant to *Code Civ. Proc. §§ 996.310-996.360*. For this purpose, the surety must make application to the superior court of the county in which the notary public's principal place of business is located, and the copy of the application and notice of hearing must be served on the Secretary of State as the beneficiary [*Gov. Code § 8216*]. For discussion and forms relating to release of surety, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

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§ 390.22 Duties and Powers of Notary Public

[1] Regarding Official Seal

[a] Use of Seal

A notary public must provide and keep an official seal that must clearly show, when embossed, stamped, impressed, or affixed to a document, the name of the notary, the State Seal, the words "Notary Public," the name of the county in which the bond and oath of office are filed, and the date the notary public's commission expires. The seal may be circular not over two inches in diameter, or it may be a rectangular form of not more than one inch in width and two and one-half inches in length, with a serrated or milled edge border [*Gov. Code § 8207*; *see also § 390.21[5]*]. The seal of every notary public commissioned on or after January 1, 1992, must also contain the sequential identification numbers assigned by the Secretary of State to the notary and to the manufacturer or vendor [*Gov. Code § 8207*; *see Gov. Code §§ 8207.1, 8207.2*].

A notary public must authenticate all official acts with his or her official seal and may not use the seal except for the purpose of carrying out the duties and responsibilities set forth in *Gov. Code § 8200 et seq.* [*Gov. Code § 8207*; *see also § 390.22[2][e]*].

The seal must be affixed by a seal press or stamp that will print or emboss a seal that, under photographic methods, legibly reproduces the required elements of the seal set forth above [*Gov. Code § 8207*]. However, a notary acknowledgment will be deemed complete for recording purposes without a photographically reproducible official seal if the seal containing the required elements is present and legible, and the name of the notary, the county of the notary's principal place of business, the notary's telephone number, the notary's registration number, and the notary's commission expiration date are typed or printed in a manner that is photographically reproducible below, or immediately adjacent to, the notary's signature in the acknowledgment [*Gov. Code § 27201.5*; *see Gov. Code § 27201* (requirements for recordation generally)].

A notary must obtain a certificate of authorization from the Secretary of State in order to purchase a notary stamp from an authorized vendor [*see Gov. Code §§ 8207.2(d), (f), 8207.3(b), (f)*]. In addition, any notary whose official seal is lost, misplaced, destroyed, broken, damaged, or is rendered otherwise unworkable must immediately mail or deliver written

notice of that fact to the Secretary of State. If the notary requests a certificate of authorization to obtain a replacment seal, the Secretary must issue the certificate within five working days after receipt of the notice [*Gov. Code § 8207.3(e), (f)*]. Any person who willfully violates *Gov. Code §§ 8207.1-8207.3* is subject to a civil penalty of up to $1,500 for each violation [*Gov. Code § 8207.4(a), (c)*].

A notary public's seal on a document is presumed to be genuine [*Evid. Code § 1452(c), (f)*].

[b] Security of Seal

The seal must be kept in a locked and secured area, under the direct and exclusive control of the notary. Failure to secure the seal is cause for the Secretary of State to take administrative action against the commission held by the notary public under *Gov. Code § 8214.1* (*see § 390.32*) [*Gov. Code § 8207*].

The official seal of a notary public is the exclusive property of that notary public, and must not be surrendered to an employer on the termination of employment, whether or not the employer paid for the seal, or to any other person. The notary, or his or her representative, must destroy or deface the seal on termination, resignation, or revocation of the notary's commission [*Gov. Code § 8207*].

[2] Regarding Legal Instruments and Testimony

[a] In General

A notary public has the duty, when requested, to do the following:

- Demand acceptance and payment of foreign and inland bills of exchange, or promissory notes, protest them for nonacceptance and nonpayment, and, with regard only to the nonacceptance or nonpayment of bills and notes, exercise any other powers and duties that by the law of nations and according to commercial usages, or by the laws of any other state, government, or county may be performed by notaries [*Gov. Code § 8205(a)(1)*].

- Take the acknowledgment or proof of advance health directives, powers of attorney, mortgages, deeds, grants, transfers, and other written instruments executed by any person, and give a certificate of that proof or acknowledgment, endorsed on or attached to the instrument. The certificate must be signed by the notary public in the notarypublic's own handwriting. A notary public may not accept any acknowledgment or proof of any instrument that is incomplete [*Gov. Code § 8205(a)(2)*].

- Take depositions and affidavits, and administer oaths and affirmations, in all matters incident to the duties of the office, or to be used before any court, judge, officer, or board [*Gov. Code § 8205(a)(3)*; *see also Code Civ. Proc. § 2093* (empowering notaries public to administer oaths and affirmations)]. Any deposition, affidavit, oath, or affirmation must be signed by the notary public in the notary public's own handwriting [*Gov. Code § 8205(a)(3)*].

- Certify copies of powers of attorney under *Prob. Code § 4307*. The certification must be signed by the notary public in his or her own handwriting [*Gov. Code § 8205(a)(4)*].

[b] Presumption That Official Duty Has Been Performed

The presumption that official duty has been regularly performed [*Evid. Code § 664*] applies to notaries public [*Ryan v. Bank of Italy Nat'l Trust & Sav. Asso., (1930) 106 Cal. App. 690, 694, 289 P. 863* ; *Pardee v. Schanzlin (1906) 3 Cal. App. 597, 599, 86 P. 812* (both cases involving former *Code Civ. Proc. § 1963(15)*, the predecessor to *Evid. Code § 664*)].

[c] Presumption That Notary's Signature Is Genuine

It is presumed that the signature of a notary public affixed in his or her official capacity is genuine and authorized [*Evid. Code § 1453(c)*].

[d] Protest of Nonpayment or Nonacceptance as Prima Facie Evidence

The protest of a notary public [*see Gov. Code § 8205(a)(1)*, discussed under *§ 390.22[2]*], under his or her hand and official seal, of a bill of exchange or promissory note for nonacceptance or nonpayment is prima facie evidence of the facts recited in it if it specifies any of the following [*Gov. Code § 8208*]:

- The time and place of presentment;
- The fact that presentment was made and the manner of presentment;
- The cause or reason for protesting the bill; and
- The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found.

[e] Proof or Acknowledgment

The proof or acknowledgment of an instrument [*see Gov. Code § 8205(a)(2)*, discussed under *§ 390.22[2]*] may by made before a notary public at any place (1) within California [*Civ. Code § 1181*], (2) outside California but within the United States [*Civ. Code § 1182(4)*], and (3) outside the United States [*Civ. Code § 1183(e)*]. If, however, the proof or acknowledgment is made before a notary public outside the United States, the notary's signature must be proved or acknowledged (1) before a judge of a court of record of the country where the proof or acknowledgment is made, (2) by any American diplomatic officer, consul general, consul, vice consul, or consular agent, or (3) by an apostille (certification) affixed to the instrument pursuant to the terms of The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents (effected at The Hague, October 5, 1961) [*Civ. Code § 1183*].

The acknowledgment of an instrument must not be taken, however, unless the officer taking it has satisfactory evidence that the person making the acknowledgment is the individual who is described in and who executed the instrument [*Civ. Code §§ 1185(a), 1189(a)*; *see also Civ. Code § 1189(d)* (acknowledgments provided prior to January 1, 1993, and conforming to provisions of former *Civ. Code §§ 1189-1192* as valid)]. For the test to be applied in determining whether the officer who took the acknowledgment had satisfactory evidence of the identity of the person who made the acknowledgment, see *§ 390.70[6][a],[b]*.

Although taking an acknowledgment has been held to be a minsterial act that is devoid of the exercise of discretion [*Vanderhoof v. Prudential Sav. & Loan Asso. (1975) 46 Cal. App. 3d 507, 511, 120 Cal. Rptr. 207]* , a notary's failure to require the person making the acknowledgment to personally appear before the notary or to have personal knowledge or satisfactory evidence of the identity of the person who appears and makes the acknowledgment has been a frequent source of civil litigation against notaries public and their sureties when the acknowledgment proved to be false [*see §§ 390.70, 390.71*].

The officer taking and certifying an acknowledgment, or proof of an instrument for record, must authenticate the certificate by affixing to it his or her signature, followed by the name of his or her office, and his or her seal of office, if, by the laws of the state or country where the acknowledgment or proof is taken, or by authority of which the officer is acting, he or she is required to have an official seal [*Civ. Code § 1193*; *see also § 390.22[1]*].

The purpose of the certificate of acknowledgment is to establish the identify of the person making the acknowledgment and the genuineness of the signature affixed to the instrument [*Ryan v. Bank of Italy Nat'l Trust & Sav. Asso., (1930) 106 Cal. App. 690, 693, 289 P. 863]* . The certificate of acknowledgment of a writing other than a will, or a certificate of the proof of such a writing, or meeting statutory requirements, is prima facie evidence of the facts recited in the certificate and the genuineness of the signature of each person by whom the writing purports to have been signed [*Evid. Code § 1451*].

The requirements and statutory forms of certificates of acknowledgment are set forth in *Civ. Code § 1183.5* if the acknowledgment is taken before a military officer, or in *Civ. Code § 1189* for all other cases [*Civ. Code § 1188*; *see Civ. Code § 1189(d)*] (acknowledgments provided prior to January 1, 1993, valid if conforming to provisions of former *Civ. Code §§ 1189-1192* [repealed by Stats. 1990, ch. 335])]. Proof and certificates of proof of execution are covered by *Civ. Code § 1195 et seq.* For further discussion and forms of acknowledgments, see Ch. 9, *Acknowledgments* .

[f] Affidavits; Jurats

As already indicated, a notary public is authorized to take affidavits and to administer oaths and affirmations [*Gov. Code § 8205(a)(3)*].

A jurat is a certificate of the officer who administered the oath to a person, which is added to an affidavit, stating that the person, or affiant, subscribed and swore to the affidavit before the officer [*United States v. McDermott (1890) 140 U.S. 151, 153, 11 S. Ct. 746, 35 L. Ed. 391* ; *Allstate Saving & Loan Assn. v. Lotito, (1981) 116 Cal. App. 3d 998, 1005, 172 Cal. Rptr. 525* ; *see also Palm Springs Alpine Estates, Inc. v. Superior Court (1967) 255 Cal. App. 2d 883, 888, 63 Cal. Rptr. 618]* . Jurats are executed by notaries pursuant to their power under *Gov. Code § 8205(a)(3)* (discussed under *§ 390.22[2][a]*).

When executing a jurat, a notary must administer an oath or affirmation to the affiant and must determine, from satisfactory evidence [*see Civ. Code § 1185(b)*], that the affiant is the person executing the document. The affiant must sign the document in the presence of the notary [*Gov. Code § 8202(a)*]. The form of a jurat is prescribed by statute [*Gov. Code § 8202(b)*].

As a condition to executing a jurat when the statement sworn or subscribed to is contained in a document purporting to identify the affiant and which includes the affiant's birthdate or age and a purported photograph or finger or thumbprint of the affiant, the notary public must require that the affiant verify the birthdate or age contained in the statement by showing either a certified copy of the birth certificate or an identification card or driver's license issued by the California Department of Motor Vehicles [*Gov. Code § 8230*]. However, for the purposes of preparing for submission of forms required by the United States Immigration and Naturalization Service, a notary public may also accept for identification any documents or declarations acceptable to the United States Immigration and Naturalization Service [*Gov. Code § 8230*].

For special requirements relating to the jurat of a notary public appointed by the California Secretary of State for a United States military or naval reservation, see *Gov. Code § 8203.5*.

For further discussion and forms of jurats, see Ch. 15, *Affidavits, Certificates, and Declarations* .

[3] To Keep Journal

[a] Single Active Journal

A notary public must keep one active sequential journal at a time of all official acts performed as a notary public [*Gov. Code § 8206(a)(1)*].

[b] Security of Journal

The journal must be kept in a locked and secured area, under the direct and exclusive control of the notary. Failure to secure the journal is cause for the Secretary of State to take administrative action against the commission held by the notary public under *Gov. Code § 8214.1* (*see § 390.32*) [*Gov. Code § 8206(a)(1)*].

[c] Contents

The journal must be in addition to and apart from any copies of notarized documents that may be in the possession of the notary public and must include all of the following [*Gov. Code § 8206(a)(2)*]:

- Date, time, and type of each official act.

- Character of every instrument sworn to, affirmed, acknowledged, or proved before the notary.

- The signature of each person whose signature is being notarized.

- A statement as to whether the identity of a person making an acknowledgment or taking an oath or affirmation was based on satisfactory evidence [*see* discussion of these terms in *§ 390.70[6][a], [b]*].

- If identity was established by satisfactory evidence under *Civ. Code § 1185*, the signature of the credible witness swearing or affirming to the identity of the individual or the type of identifying document, the governmental agency issuing the document, the serial or identifying number of the document, and the date of issue or expiration of the document.

- If the identity of the person making the acknowledgment or taking the oath or affirmation was established by the oaths or affirmations of two credible witnesses whose identities are proven on the presentation of any documents satisfying the requirements of *Civ. Code § 1185(b)(3)* or *(4)* (*see § 390.70[6]*), then the journal must contain the type of identifying documents, the identifying numbers of the documents, and the dates of issuance or expiration of the documents presented by the witnesses to establish their identity.

- The fee charged for the notarial service.

- If the document to be notarized is a deed, quitclaim deed, deed of trust affecting real property, or a power of attorney document, the notary public must require the party signing the document to place his or her right thumb print in the journal. If the right thumbprint is not available, then the notary must require the party to use his or her left thumb, or any available finger and must indicate this in the journal. If the signing party is physically unable to provide a thumbprint or fingerprint, the notary must indicate this in the journal and provide an explanation of that physical condition [*Gov. Code § 8206(a)(2)(G)* (not applicable to trustee's deed resulting from foreclosure under *Civ. Code § 2924* or to reconveyance deed)]. A notary who fails to obtain the required thumbprint is subject to a civil penalty of up to $2,500. An action to impose the penalty may be brought by the Secretary of State in an administrative proceeding, or by any public prosecutor in superior court, and an order of judgment for the penalty is enforceable as a civil judgment [*Gov. Code § 8214.23(a)* (public prosecutor must inform Secretary of State of imposition of penalty)].

[d] Loss of Journal

If a sequential journal of official acts performed by a notary public is stolen, lost, misplaced, destroyed, damaged, or

otherwise rendered unusable as a record of notarial acts and information, the notary public must immediately notify the Secretary of State by certified or registered mail. The notification must include the period of the journal entries, the notary public's commission number, the expiration date of the commission, and, when applicable, a photocopy of any police report that specifies the theft of the sequential journal of official acts [*Gov. Code § 8206(b)*].

[e] Request for Photostatic Copy of Line Item

On written request of any member of the public, the notary public must supply a photostatic copy of the line item representing the requested transaction at a cost of not more than 30 cents per page. Any such request must include the names of the parties, the type of document, and the month and year in which the document was notarized [*Gov. Code § 8206(c)*; *see also Bernd v. Eu (1979) 100 Cal. App. 3d 511, 519, 161 Cal. Rptr. 58* (setting forth statutory history of *Gov. Code § 8206*)].

[f] Restrictions on Surrender of Journal

The journal of notarial acts of a notary public is the exclusive property of that notary public, and may not be surrendered to an employer on termination of employment, whether or not the employer paid for the journal, or at any other time [*Gov. Code § 8206(d)*].

The notary public may not surrender the journal to any other person except as follows. The journal must be surrendered to the country clerk if the notary resigns, is disqualified or removed from office, allows his or her appointment to expire, or dies [*Gov. Code §§ 8206(d), 8209*]. Also, the notary must surrender the journal immediately, or as soon as possible, to a peace officer [*see Penal Code §§ 830.1, 830.2, 830.3*] who is investigating a criminal offense in his or her official capacity and within his or her authority, and who has reasonable suspicion to believe the journal contains evidence of a criminal offense [*Gov. Code § 8206(d)*]. If the peace officer seizes the journal, he or she must have probable cause as required by California and federal law, and any applicable requirements of, and exceptions to, those laws apply to a peace officer who is engaged in the search or seizure of a notary's sequential journal [*Gov. Code § 8206(d),(f)*]. The peace officer or relevant law enforcement agency seizing a notary journal must notify the Secretary of State by facsimile within 24 hours, or as soon as possible thereafter, of the name of the notary whose journal has been seized [*Gov. Code § 8206(d)*].

The notary public must obtain a receipt for the journal, and must notify the Secretary of State by certified mail within 10 days that the journal wasrelinquished to a peace officer. The notification must include the period of the journal entries, the commission number of the notary public, the expiration date of the commission, and a photocopy of the receipt. The notary public must obtain a new sequential journal. If the journal relinquished to a peace officer is returned to the notary public and a new journal has been obtained, the notary public must make no new entries in the returned journal [*Gov. Code § 8206(d)*].

A notary public who willfully fails to provide access to the journal when requested by a peace officer is subject to a civil penalty of up to $2,500. An action to impose the penalty may be brought by the Secretary of State in an administrative proceeding, or by any public prosecutor in superior court, and an order of judgment for the penalty is enforceable as a civil judgment [*Gov. Code § 8214.21* (public prosecutor must inform Secretary of State of imposition of penalty)].

[g] Inspection by Auditor or Employer

A notary public who is an employee must permit inspection and copying of journal transactions by a duly designated auditor or agent of the notary public's employer, provided that the inspection and copying is done in the presence of the notary public and the transactions are directly associated with the business purposes of the employer [*Gov. Code § 8206(d)*].

The notary public, on the request of the employer, must regularly provide copies of all transactions that are directly associated with the business purposes of the employer, but may not be required to provide copies of any transaction that is unrelated to the employer's business. Confidentiality and safekeeping of any copies of the journal provided to the employer is the responsibility of that employer [*Gov. Code § 8206(d)*].

[h] Production of Journal on Subpoena or Court Order

The notary public must provide the journal for examination and copying in the presence of the notary public upon receipt of a subpoena duces tecum or a court order, and must certify those copies if requested [*Gov. Code § 8206(e)*].

[4] Regarding Requests From Secretary of State

A notary public has the duty, on written request, to furnish the Secretary of State with certified copies of the notary's journal [*Gov. Code § 8205(b)(1)*]. Furthermore, a notary public must respond within 30 days of receiving written requests sent by certified mail from the Secretary of State's office for information relating to official acts performed by the notary [*Gov. Code § 8205(b)(2)*].

[5] To Notify Secretary of State of Change of Address

A notary public must notify the Secretary of State by certified mail within 30 days as to any change in the location or address of the notary's principal place of business or residence [*Gov. Code § 8213.5*].

A notary public may not use a commercial mail-receiving agency or post office box as his or her principal place of business or residence, unless the notary also provides the Secretary of State with a physical street address as the principal place of residence [*Gov. Code § 8213.5*].

A willful failure to notify the Secretary of State of a change of address is punishable as an infraction by a fine of up to $500 [*Gov. Code § 8213.5*].

[6] To Avoid Conflicts of Interest

A notary public who has a direct financial or beneficial interest in a transaction may not perform any notarial act in connection with it. Anotary public has a direct financial or beneficial interest in a transaction if, in the case of a financial transaction, the notary public is named individually as a principal to the transaction, and, with respect to real property, if the notary public is named individually as a grantor, grantee, mortgagor, mortgagee, trustor, trustee, beneficiary, vendor, vendee, lessor, or lessee to the transaction. A notary public does not have a direct financial or beneficial interest in a transaction by acting in the capacity of an agent, employee, insurer, attorney, escrow, or lender for a person having a direct financial or beneficial interest in the transaction [*Gov. Code § 8224*; *see also Chapman v. Hicks (1919) 41 Cal. App. 158, 164, 182 P. 336]* .

A notary public is also prohibited from taking the acknowledgment or proof of written instruments executed by himself or herself and from taking his or her own deposition or affidavit [*Gov. Code § 8224.1*; *see also Bank of America v. Dowdy (1960) 186 Cal. App. 2d 690, 694, 9 Cal. Rptr. 779]* .

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34-390 California Forms of Pleading and Practice--Annotated § 390.23

§ 390.23 Notary Fees

[1] When Required or Prohibited

Apparently there is no statutory requirement that a notary public actually charge a fee for his or her services. The statutory prohibition against a public officer's performing any official service without payment of the fee prescribed by law by its own terms excludes notaries public, unless the fees are required by law to be remitted to the state or to any other public agency [*see Gov. Code § 6100*]. The only fees required to be so remitted are those collected by a notary public who has been appointed and commissioned to act for and on behalf of the State of California, a county, or a public school district [*see Gov. Code § 8202.5*; *§ 390.25[3]*].

On the other hand, the charging or collecting of fees is in certain situations prohibited. For example, *Gov. Code § 8203.6* prohibits the collection of fees by a notary public appointed for a United States military or naval reservation in California for services rendered within the reservation in the capacity of a notary public. *Gov. Code § 6106* provides that no notary public, acting on behalf of California or any county or city, may receive any fee or compensation for services rendered in an affidavit or application relating to the securing of a pension, or the payment of a pension voucher, or any matter relating thereto. *Gov. Code § 8211(g)* prohibits the collection of fees for notarizing signatures on vote-by-mail ballot identification envelopes or other voting materials. *Gov. Code § 6107* prohibits the demand or receipt by a notary of any fee or compensation for a number of specified services relating to former members of the U.S. Armed Forces and provides that every failure or refusal to render the services specified on the request of a United States official or a claimant, or the claimant's guardian or attorney, renders the notary liable on his or her official bond.

[2] Amounts Authorized

[a] In General

For the fee authorized for services to be performed with respect to an examination given an applicant for appointment as a notary public and the charge authorized for supplying photostatic copies of entries in a notary public's journal, see *§§ 390.17, 390.22[3]*.

The fees, if any charged, cannot exceed those prescribed by *Gov. Code § 8211* and *8223*, or are as specifically allowed

by another statute or administrative regulation. Those fees are set out below.

[b] Acknowledgment or Proof

The fee for taking an acknowledgment or proof of a deed or other instrument, including the seal and the writing of the certificate, is $10 per signature [*Gov. Code § 8211(a)*].

[c] Oath or Affirmation

The fee for administering an oath or affirmation to one person and executing the jurat, including the seal, is $10 [*Gov. Code § 8211(b)*].

[d] Change of Immigration Status

The fee, exclusive of signature and verification, may not exceed $10 per individual for each set of forms relating to a change of the immigration status. If notary services are performed in relation to the set of immigration forms, additional fees may be collected pursuant *Gov. Code § 8211*.

This limitation applies whether or not the notary is acting as a notary, but it does not apply to an attorney, who is also a notary public, who is rendering professional services regarding immigration matters [*Gov. Code § 8223*].

[e] Deposition

The fee for all services rendered in connection with the taking of any deposition is the sum of $20, plus $5 for administering the oath to the witness and $5 for the certificate to the deposition [*Gov. Code § 8211(c)*].

[f] Protest of Nonpayment or Nonacceptance

The fee for every protest for the nonpayment of a promissory note or the nonpayment or nonacceptance of a bill of exchange, draft, or check, is $10 [*Gov. Code § 8211(d)*]. For serving a notice of nonpayment of a promissory note or the nonpayment or nonacceptance of a bill of exchange, draft, or check, the fee is $5 [*Gov. Code § 8211(e)*]. For recording a protest, the fee is $5 [*Gov. Code § 8211(f)*].

[g] Certifying Copy of Power of Attorney

The fee for certifying a copy of a power of attorney under *Prob. Code § 4307* is $10 [*Gov. Code § 8211(h)*].

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§ 390.24 Entry of Data on Immigration Forms

A notary public may enter data, provided by the client, on immigration forms provided by a federal or state agency [Gov. Code § 8233(b); for discussion of fees that may be charged, § 390.23[2][d]].

The authorization under Gov. Code § 8233(b), above, may not be construed to exempt a notary public who enters data on an immigration form at the direction of a client, or otherwise performs services of an immigration consultant from the requirements of *Bus. & Prof. Code § 22440 et seq.*, regulating immigration consultants [Gov. Code § 8233(c); *see Bus. & Prof. Code § 22441* (definition of "immigration consultant")].

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§ 390.25 Notary Public Employed by Public Entity

[1] When Charging Fee for Issuing or Filing Document in Connection With Appointment Is Prohibited

When a notary is appointed and commissioned as an employee of the state or of a county or public school district and the certificate executed by a duly authorized representative of the employing governmental entity [*see § 390.11*] is filed with any state or county officer, that officer may not charge any fee for the filing or issuance of any document in connection with the appointment [*Gov. Code § 8202.5*].

[2] Payment of Expenses

The state, county, or school district for which a notary public is appointed and commissioned may pay from any funds available for its support the premiums on any bond and the cost of any stamps, seals, or other supplies required in connection with the appointment, commission, or performance of the duties of the notary public [*Gov. Code § 8202.5*].

[3] Remission of Fees Collected

Any fees collected or obtained by any notary public whose documents have been filed without charge and for whom bond premiums have been paid by the notary public's employer must be remitted by the notary public to the employing agency, which is required to deposit the funds to the credit of the fund from which the notary public's salary is paid [*Gov. Code § 8202.5*].

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§ 390.26 Notary Public Employed by Private Employer

[1] Agreement Regarding Expenses and Fees

A private employer, pursuant to an agreement with an employee who is a notary public, may pay the premiums on any bond and the cost of any stamps, seals, or other supplies required in connection with the appointment, commission, or performance of the duties of such notary public. The agreement may also provide for the remission of fees collected by the notary public to the employer, in which case any fees collected or obtained by the notary public while the agreement is in effect must be remitted by the notary public to the employer who must deposit the funds to the credit of the fund from which the notary's compensation is paid [*Gov. Code § 8202.7*].

[2] Limitation on Notarial Services

A private employer who has entered into an agreement with his or her notary public pursuant to *Gov. Code § 8202.7* may, notwithstanding any other provision of law, limit, during the employee's ordinary course of employment, the providing of notarial services by the employee solely to transactions directly associated with the employer's business purposes [*Gov. Code § 8202.8*].

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§ 390.27 Use of Term "Notary Public"

[1] When Authorized

A notary public must not use the title "notary public" except for the purpose of rendering notarial service [*Gov. Code § 8207*].

[2] Advertising by Immigration Specialist

No notary public who holds himself or herself out as being an immigration specialist, immigration consultant, or any other title or description reflecting an expertise in immigration matters may advertise in any manner whatsoever that he or she is a notary public [*Gov. Code § 8223(a)*].

[3] When Advertising in Foreign Language; Effect of Failure to Comply

A notary public who is not an attorney and who advertises, by signs or other means of written communication other than a single desk plaque, the services of a notary public in a language other than English must post with that advertisement a notice, in both English and the other language, setting forth (1) the statement "I am not an attorney and, therefore, cannot give legal advice about immigration or any other legal matters," and (2) the fees set by statute that a notary public may charge [*Gov. Code § 8219.5(a)*].The Secretary of State must suspend for a period of not less than one year or revoke the commission of any notary public who fails to comply with the notice requirements of *Gov. Code § 8219.5(a)* or *(c)*. On the second offense, the Secretary must revoke the notary public's commission permanently [*Gov. Code § 8219.5(d)*].

The litera l translation of the phrase "notary public" into its Spanish equivalent, defined as "notario publico" or "notario" is prohibited. "Literal translation" means the translation of a word or phrase from one language to another without regard to the true meaning of the word or phrase in the language that is being translated [*Gov. Code § 8219.5(c)*].

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§ 390.28 Disposition of Notary Public's Records on Termination of Appointment

[1] Deposit With County Clerk

If a notary public resigns, is disqualified, is removed from office, or allows the appointment to expire without obtaining a reappointment within 30 days, all notarial records and papers must be delivered within 30 days to the clerk of the county in which the notary public's current official oath of office and bond are on file [*Gov. Code § 8209*].

If a notary public dies, his or her personal representative must promptly so notify the Secretary of State and deliver all notarial records and papers of the deceased to the clerk of the county in which the notary public's official oath of office and bond are on file [*Gov. Code § 8209*].

The records may be destroyed on court order after 10 years from the date they are deposited with the county clerk if no request for or reference to them has been made [*Gov. Code § 8209*].

[2] Penal and Civil Liability of Notary for Failure to Comply

A notary public who willfully refuses to deliver all notarial records and papers to the county clerk within 30 days, as required by *Gov. Code § 8209*, is guilty of a misdemeanor and is personally liable for damages to any person injured by such action or inaction [*Gov. Code § 8209*].

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§ 390.29 Civil Liability for Misconduct or Neglect

A notary public and the sureties on his or her official bond are civilly liable to the persons injured for all damages sustained as a result of the notary public's misconduct or neglect [*Gov. Code § 8214*; *see also Lewis v. Agricultural Ins. Co. (1969) 2 Cal. App. 3d 285, 292, 82 Cal. Rptr. 509* ; *Greeninger v. New Amsterdam Cas. Co. (1957) 152 Cal. App. 2d 645, 646, 313 P.2d 607* ; *see §§ 390.70* and *390.71*]. The misconduct or neglect must be a proximate, but not necessarily the sole, cause of the loss [*Common Wealth Ins. Systems, Inc. v. Kersten (1974) 40 Cal. App. 3d 1014, 1033,115 Cal. Rptr. 653* ; *Tutelman v. Agricultural Ins. Co. (1972) 25 Cal. App. 3d 914, 918-919, 102 Cal. Rptr. 296* ; *McDonald v. Plumb (1970) 12 Cal. App. 3d 374, 377-379, 90 Cal. Rptr. 822* ; *Bank of America v. Dowdy (1960) 186 Cal. App. 2d 690, 694-695, 9 Cal. Rptr. 779]* .

With respect to the surety's liability, any recovery that does not exhaust the full amount of the bond does not bar a further action for other causes up to the full amount of the bond [*Gov. Code § 8214*].

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§ 390.30 Statute of Limitations on Action Against Notary Public and Surety

An action against a notary public on his or her bond or in his or her official capacity must be commenced within one year from discovery of the acts constituting the cause of action for malfeasance or misfeasance or three years from the performance of the notarial act giving rise to the action, whichever is later; however, any such action must be commenced within six years at the latest [*see Code Civ. Proc. § 338(f)*; *see also Butterfield v. Northwestern National Ins. Co. (1980) 100 Cal. App. 3d 974, 976-979, 161 Cal. Rptr. 280]* .

Code Civ. Proc. § 338(f) does not apply to disciplinary proceedings against a notary by the Secretary of State [*Bernd v. Eu (1979) 100 Cal. App. 3d 511, 515-516, 161 Cal. Rptr. 58]* . Those disciplinary proceedings are discussed in *§ 390.32*.

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§ 390.31 Unlawful Acts

[1] Failure to Perform Notarial Duties; Misrepresentation; Coercion; Destruction of Records

Any notary public who willfully fails to perform any duty required in connection with the keeping of the notary's journal [*see Gov. Code § 8206*; *see also § 390.22[3]*], or who willfully fails to keep the notary seal under his or her direct and exclusive control, or who surrenders the seal to any person not otherwise authorized by law to possess it, is guilty of a misdemeanor [*Gov. Code § 8228.1(a)*; *see Gov. Code § 8228.1(c)* (misdemeanor penalty is not exclusive and does not affect any other relief or remedy provided by law)].

It is a misdemeanor for any person who is not a duly commissioned, qualified, and acting notary public for the State of California to (1) represent or hold himself or herself out to the public or to any person as being entitled to act as notary public, (2) assume, use, or advertise the title of notary public in such a manner as to convey the impression that the person is a notary public, or (3) purport to act as a notary public [*Gov. Code § 8227.1*].

It is also a misdemeanor for any person to solicit, coerce, or in any manner influence a notary public to perform an improper notarial act knowingthe act to be an improper notarial act, including any act required in connection with the keeping of the notary's journal (*see § 390.22[3]*) [*Gov. Code § 8225(a)*; *see Gov. Code § 8225(c)* (misdemeanor penalty is not exclusive and does not affect any other relief or remedy provided by law); *see also Gov. Code § 8206* (notarial journal)].

Any person who knowingly destroys, defaces, or conceals any records or papers belonging to the office of a notary public is also guilty of a misdemeanor and is civilly liable to any person injured as a result of the destruction, defacement, or concealment [*Gov. Code § 8221*].

For the penal and civil liability of a notary public who refuses to deliver his or her records and papers as required by statute on termination of his or her appointment, see *§ 390.28[2]*.

[2] In Relation to Papers Affecting Title to Residence

It is a felony for any person who is not a California notary to act in violation of *Gov. Code § 8227.1* in relation to any

document or instrument affecting title to, encumbering, or placing an interest secured by a mortgage or trust deed on realty consisting of a single-family residence with four or fewer dwelling units [*Gov. Code § 8227.3*]. Similarly, it is a felony for any person to make a false sworn statement to a notary public, with knowledge the statement is false, to induce the notary to perform an improper notarial act on an instrument or document affecting title to or encumbering such residential realty units [*Penal Code § 115.5(b)*].

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§ 390.32 Revocation or Suspension of Commission

[1] Grounds

The Secretary of State may revoke or suspend the commission of a notary public on any of the following grounds:

- Substantial and material misstatement or omission in the application submitted to the Secretary of State to become a notary public [*Gov. Code § 8214.1(a)*].

- Conviction of a felony or of a lesser offense involving moral turpitude, or of a lesser offense of a nature incompatible with the duties of notary public [*Gov. Code § 8214.1(b)*, (providing further that a conviction after a plea of nolo contendere is deemed to be a conviction within the meaning of the subdivision)].

- Revocation, suspension, restriction, or denial of a professional license, if the revocation, suspension, restriction, or denial was for misconduct based on dishonesty, or any cause substantially relating to the duties or responsibilities of a notary public [*Gov. Code § 8214.1(c)*].

- Failure to fully and faithfully discharge any of the duties or responsibilities required of a notary public [*Gov. Code § 8214.1(d)*].

- When adjudicated liable for damages in any suit grounded in fraud, misrepresentation, or violation of the state regulatory laws or in anysuit based on a failure to discharge fully and faithfully the duties as a notary public [*Gov. Code § 8214.1(e)*].

- Use of false or misleading advertising wherein the notary public has represented that the notary public has duties, rights, or privileges that he or she does not possess by law [*Gov. Code § 8214.1(f)*].

- Practice of law in violation of *Bus. & Prof. Code § 6125* [*Gov. Code § 8214.1(g)*].

- Charging more than the fees prescribed by *Gov. Code § 8200 et seq.* [*Gov. Code § 8214.1(h)*].

- Commission of any act involving dishonesty, fraud, or deceit with the intent to substantially benefit the notary public or another, or substantially injure another [*Gov. Code § 8214.1(i)*].

- Failure to complete the acknowledgment at the time the notary's signature and seal are affixed to the document [*Gov. Code § 8214.1(j)*].

- Failure to administer the oath or affirmation as required by *Gov. Code § 8205(a)(3)*, (*see § 390.22[2]*) [*Gov. Code § 8214.1(k)*].

- Execution of any certificate as a notary public containing a statement known to the notary public to be false [*Gov. Code § 8214.1*(*l*)].

- Violation of *Gov. Code § 8223* (*see § 390.27[2]*) [*Gov. Code § 8214.1(m)*].

- Failure to submit any remittance payable on demand by the Secretary of State under *Gov. Code § 8200 et seq.* or failure to satisfy any court-ordered money judgment, including restitution [*Gov. Code § 8214.1(n)*].

- Failure to secure the sequential journal of offical acts, pursuant to *Gov. Code § 8206* (*§ 390.22[3][b]*) or the official seal, pursuant to *Gov. Code § 8207* (*§ 390.22[1][b]*), or willful failure to report the theft or loss of the sequential journal, pursuant to *Gov. Code § 8206(b)* (§ 390.22[3]) [*Gov. Code § 8214.1(o)*].

- Violation of *Gov. Code § 8219.5* (notice required when advertisement of public is in language other than English) [*Gov. Code § 8214.1(p)*].

- Commission of an act in violation of *Gov. Code § 6203, 8214.2, 8225*, or *8227.3*, or of *Penal Code § 115, 470, 487*, or *530.5* [*Gov. Code § 8214.1(q)*].

- Willful failure to provide access to the sequential journal of official acts on request by a peace officer (*see § 390.22[3]*) [*Gov. Code § 8214.1(r)*].

Other grounds for suspension or revocation of a commission are set forth in *Gov. Code §§ 8217* and *8219.5* (*see § 390.27[3]*).

Aside from the procedures for revocation or suspension by the Secretary of State, a court in which a notary is convicted of certain crimes must revoke the notary's commission. On the conviction of a notary public for any felony or of any offense described in *Gov. Code § 6203* (misdemeanor to make or give false certificate) or *Gov. Code § 8200 et seq.* (duties of notaries), in addition to any other penalty, the court must revoke the commission of the notary public and must require the notary public to surrender to the court his or her notary seal. The court will then forward the seal, together with a certified copy of the judgment of conviction, to the Secretary of State [*Gov. Code § 8214.8*].

[2] Hearing

Prior to a revocation or suspension of his or her commission, or prior to the imposition of a civil penalty [*§ 390.33[3]*], a notary public has a rightto a hearing conducted in accordance with the provisions of *Gov. Code § 11500 et seq.* This is also true when an application for a commission has been denied, except when (1) the Secretary of State has, within one year previous to the application, and after proceedings conducted in accordance with *Gov. Code § 11500 et seq.*, denied

or revoked the applicant's application or commission, or (2) the Secretary of State has entered an order pursuant to *Gov. Code § 8214.4* (*see § 390.32[3]*) finding that the applicant has committed or omitted acts constituting grounds for suspension or revocation of a notary public's commission [*Gov. Code § 8214.3*].

The Notary Public Section of the Office of the Secretary of State must provide language assistance in adjudicative proceedings to the extent provided in *Gov. Code 11435.05 et seq.* [*Gov. Code § 11435.15(a)*].

For discussion and forms relating generally to administrative hearings under *Gov. Code § 11500 et seq.*, see Ch. 473, *Public Agency Adjudication* , through Ch. 473H, *Alternative Procedures for Agency Decisions* . For further discussion regarding language assistance requirements, see Ch. 473, *Public Agency Adjudication* .

[3] Effect of Resignation or Expiration of Term

Notwithstanding any provision of *Gov. Code § 8200 et seq.* or *Gov. Code § 11500 et seq.*, if the Secretary of State determines, after proceedings conducted in accordance with the provisions of *Gov. Code § 11500 et seq.*, that any notary public has committed or omitted acts constituting grounds for suspension or revocation of a notary's commission, neither the notary's resignation nor the expiration of his or her commission term bars the Secretary of State from instituting, or continuing, an investigation or instituting disciplinary proceedings. On completion of those disciplinary proceedings, the Secretary of State is required to enter an order finding the facts and stating the conclusion that the facts would or would not have constituted grounds for suspension or revocation of the commission had the commission still been in effect [*Gov. Code § 8214.4*].

[4] Procedure on Revocation of Commission

On revocation of the commission of a notary public, the Secretary of State is required to file a copy of the revocation with the county clerk of the county in which the notary public's principal place of business is located, and the county clerk is required to note the revocation and its date on the original record of the certificate [*Gov. Code § 8214.5*].

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§ 390.33 Enforcement of Statutes by Secretary of State

[1] Examination of Notary Public's Books and Records

The Secretary of State, or a peace officer [*see Penal Code §§ 830.1, 830.2, 830.3*] with reasonable suspicion and acting in his or her official capacity and within his or her authority, may enforce the provisions of *Gov. Code § 8200 et seq.* through the examination of a notary public's books, records, letters,contracts, and other pertinent documents relating to the notary public's official acts [*Gov. Code § 8228*].

[2] Suit to Enjoin Violation

The Secretary of State may sue, in a court of competent jurisdiction, to enjoin any person who has engaged, or is about to engage, in any acts or practices which constitute a violation of any provision of *Gov. Code § 8200 et seq.* or any rule or regulation prescribed under the authority of these sections, and the court may, in such case, issue a permanent or temporary injunction or restraining order without bond. The court's order or judgment is appealable by any party to the action [*Gov. Code § 8222(a)*].

The court may order a person subject to such injunction or restraining order to reimburse the Secretary of State for expenses incurred in the investigation, but the Secretary of State must refund any amount received as reimbursement should the injunction or restraining order be dissolved by an appellate court [*Gov. Code § 8222(b)*].

[3] Civil Penalty

In addition to any commissioning or disciplinary sanction, a violation of *Gov. Code § 8214.1(h), (j),* or *(k),* or a negligent violation of *Gov. Code § 8214.1(d),* is punishable by a civil penalty not to exceed $750 [*Gov. Code § 8214.15(b)*]. The civil penalty may be imposed by the Secretary of State if a hearing is not requested pursuant to *Gov. Code § 8214.3*. If a hearing is requested, the hearing officer must make the determination [*Gov. Code § 8214.15(c)*]. Any civil penalties collected are transferred to the General Fund [*Gov. Code § 8214.15(d)* (legislative intent)].

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[Reserved]

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§ 390.50 Related Matthew Bender Publications

For a discussions and forms for use by a notary in taking an acknowledgment of the execution of a deed, see California Legal Forms, Ch. 27, *Deeds and Recording* (Matthew Bender)

For a discussion and forms for use by a notary in taking an acknowledgment of a power of attorney by an individual, corporation, partnership, or public agency, see California Legal Forms, Ch. 98, *Powers of Attorney* (Matthew Bender)

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§ 390.51 California Constitution

Oaths of office. *Cal. Const., art. XX, § 3*

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§ 390.52 Federal Statutes

Oaths may be administered by U.S. military officers and judge advocates on active duty or performing inactive-duty training, courts martial, and judges of the United States Court of Appeals for the Armed Forces. *10 U.S.C. § 926*

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§ 390.53 State Statutes

[1] Acknowledgment or Proof of Written Instruments

Certificates of acknowledgment or proof. *Civ. Code § 1180 et seq.*

Authority of notary public to take. *Civ. Code §§ 1181, 1182(4), 1183(e)*; *Gov. Code § 8205(a)(2)*

Requirement that officer taking acknowledgment have satisfactory evidence that person making acknowledgment is individual who is described in and who executed instrument; definition of "satisfactory evidence"; presumption that law was complied with; burden of proof. *Civ. Code § 1185*

Effect of certificate as prima facie evidence. *Evid. Code § 1451*

[2] Affidavits

Who may take. *Code Civ. Proc. §§ 2012, 2013*

[3] Evidence

[a] Presumptions

Presumption that facts necessary to authorize acknowledgment, oath, or affirmation taken by officer on active duty or performing inactive duty training in U.S. Armed Forces exist. *Civ. Code § 1183.5*

Presumption that official duty has been regularly performed. *Evid. Code § 664*

Presumption that seal of nation recognized by executive power of United States or department, agency, or officer of such nation is genuine and authorized. *Evid. Code § 1452(c)*

Presumption that seal of notary public within any state of United States is genuine and authorized. *Evid. Code § 1452(f)*

Presumption that signature of notary public within any state of United States is genuine and authorized. *Evid. Code § 1453(c)*

[b] Prima Facie Evidence

Certificate of acknowledgment or proof of writing as prima facie evidence; exception. *Evid. Code § 1451*

[4] Jurat

Requirements and form for jurat. *Gov. Code § 8202*

[5] Landowners

Written permit to cut or remove plants from land of another as required to be signed by landowner or landowner's authorized agent and acknowledged before notary public or other person authorized to take acknowledgments. *Penal Code § 384a*

[6] Limitation of Actions

When action against notary or surety must be commenced. *Code Civ. Proc. § 338(f)*

[7] Notaries Public

Release of surety. *Code Civ. Proc. § 996.110 et seq.*; *Gov. Code § 8216*

Generally. *Gov. Code § 8200 et seq.*

Services required to be performed. *Gov. Code § 8205*

Authority to take acknowledgment or proof of writings. *Gov. Code § 8205(a)(2)*; *Civ. Code §§ 1181, 1182(4)*

Authority to take depositions. *Gov. Code § 8205(a)(3)*

Authority to take affidavits. *Gov. Code § 8205(a)(3)*; *Code Civ. Proc. §§ 2012, 2013*

Authority to administer oaths and affirmations. *Gov. Code § 8205(a)(3)*; *Code Civ. Proc. § 2093*

Authority to certify copies of powers of attorney under *Prob. Code § 4307*. *Gov. Code § 8205(a)(4)*

Notary seal, requirements and use of. *Gov. Code § 8207 et seq.*

Civil penalties. *Gov. Code § 8214.15*

Bond recording fee. *Gov. Code § 27361*

Criminal liability for inducing notary to act concerning certain residential real property. *Penal Code § 115.5(b)*

[8] Signature

Requirement that notary sign certificates of acknowledgment or proof, depositions, affidavits, oaths, and affirmations in his or her own handwriting. *Gov. Code § 8205(a)(2),(3)*

[9] U.S. Armed Forces

Performance of notarial acts by officers of U.S. Armed Forces having general powers of notary public. *Civ. Code § 1183.5*

[10] Vendors and Manufacturers of Notary Seals

Duties of vendors and manufacturers; civil penalties. *Gov. Code §§ 8207.2-8207.4*

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§ 390.54 Administrative Regulations

Fee for applying for commission as notary public. *2 Cal. Code Reg. § 21912*

Fee of notary before whom applicant takes examination for commission. *2 Cal. Code Reg. § 21914*

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§ 390.55 Decisions

[1] Acknowledgments

Test applied in determining whether officer who took acknowledgment of instrument was possessed of personal knowledge of identity of person who made acknowledgment. *Anderson v. Aronsohn (1919) 181 Cal. 294, 297* ; *Transamerica Title Ins. Co. v. Green (1970) 11 Cal. App. 3d 693, 700, 89 Cal. Rptr. 915*

Primary purposes of certificate of acknowledgment as being to provide prima facie evidence of truth of facts recited in certificate and to establish genuineness of signatures attached to instrument acknowledged. *Bernd v. Eu (1979) 100 Cal. App. 3d 511, 517, 161 Cal. Rptr. 58* (citing *Evid. Code § 1451*); *Transamerica Title Ins. Co. v. Green (1970) 11 Cal. App. 3d 693, 702, 89 Cal. Rptr. 915*

Act of taking acknowledgment of execution of written instrument as ministerial act devoid of exercise of discretion. *Vanderhoof v. Prudential Sav. & Loan Asso. (1975) 46 Cal. App. 3d 507, 511, 120 Cal. Rptr. 207* ; *Chapman v. Hicks (1919) 41 Cal. App. 158, 164, 182 P. 336*

Requisites of acknowledgment as being personal appearance of maker of instrument before officer who is to take acknowledgment, maker's acknowledgment that maker signed instrument, and officer's personal knowledge that maker is person he or she purports to be. *Transamerica Title Ins. Co. v. Green (1970) 11 Cal. App. 3d 693, 700, 89 Cal. Rptr. 915*

Reliance by officer taking acknowledgment solely on introduction by third party of purported maker of instrument as insufficient basis for personal knowledge required. *Transamerica Title Ins. Co. v. Green (1970) 11 Cal. App. 3d 693, 700-702, 89 Cal. Rptr. 915*

[2] Bond

"Surety bond" and notary's "official bond" defined. *Butterfield v. Northwestern National Ins. Co. (1980) 100 Cal.*

App. 3d 974, 978-979, 161 Cal. Rptr. 280

Surety bond of notary public as an official bond [*Gov. Code § 8212*] on which liability of surety is no greater than that of notary [*Gov. Code § 8214*]; when primary obligation on official bond is barred or in any legal way extinguished, surety as relieved. *Breckenridge v. Mason (1967) 256 Cal. App. 2d 121, 130, 64 Cal. Rptr. 201* (disapproved on another point in *Denham v. Superior Court (1970) 2 Cal. 3d 557, 563, 86 Cal. Rptr. 65, 468 P.2d 193*)

Surety Contract (bond) as interpreted by same rules as apply to other contracts. *Bank of America v. Dowdy (1960) 186 Cal. App. 2d 690, 693, 9 Cal. Rptr. 779*

Surety bond given pursuant to requirements of particular statute as incorporating provisions of that statute. *Bank of America v. Dowdy (1960) 186 Cal. App. 2d 690, 693, 9 Cal. Rptr. 779*

[3] Damages

Measure of damages as including amount of principal and interest on note in action on notary's bond involving false certification of acknowledgment of execution of mortgage. *Heidt v. Minor (1896) 113 Cal. 385, 389-390, 45 P. 700*

[4] Disciplinary Proceedings

Negligence or gross negligence of notary as permissible ground for disciplinary action under *Gov. Code § 8214.1(d)*. *Bernd v. Eu (1979) 100 Cal. App. 3d 511, 518, 161 Cal. Rptr. 58*

Statutes of limitation barring civil actions by aggrieved parties as inapplicable to disciplinary proceeding of state administrative agency; no time limitation statute pertaining to revocation or suspension of notary's commission as existing and hence administrative action by Secretary of State as not barred by mere passage of time. *Bernd v. Eu (1979) 100 Cal. App. 3d 511, 515-516, 161 Cal. Rptr. 58*

Certifying personal appearance and acknowledgment of person who did not appear, and failing to maintain record of transaction as required by *Gov. Code § 8206*, as constituting failure to fully and faithfully discharge official duties [*Gov. Code § 8214.1(d)*] and as justifying suspension of notary's commission. *Bernd v. Eu (1979) 100 Cal. App. 3d 511, 515-520, 161 Cal. Rptr. 58*

Notary's violation of statute prescribing requisites for taking acknowledgment as official misconduct for which notary public may be removed from office or suspended. *Transamerica Title Ins. Co. v. Green (1970) 11 Cal. App. 3d 693, 703, 89 Cal. Rptr. 915*

[5] Duties of Notary

Requirement that notary fully and faithfully discharge duties required of notary public [*Gov. Code § 8214.1(d)*] as encompassing due diligence inadherence to duty, as well as honesty and integrity. *Bernd v. Eu (1979) 100 Cal. App. 3d 511, 517, 161 Cal. Rptr. 58*

On assuming office, notary public as required to perform duties with honesty, integrity, diligence, and skill. *Bernd v. Eu (1979) 100 Cal. App. 3d 511, 517, 161 Cal. Rptr. 58* ; *Transamerica Title Ins. Co. v. Green (1970) 11 Cal. App. 3d 693, 702, 89 Cal. Rptr. 915* ; *Lewis v. Agricultural Ins. Co. (1969) 2 Cal. App. 3d 285, 292, 82 Cal. Rptr. 509* ; *Hemet Home Builders Asso. v. Wells (1934) 3 Cal. App. 2d 65, 76, 39 P.2d 233* ; *Hungate v. Wells (1933) 129 Cal. App. 133, 135, 18 P.2d 64*

[6] Elements of Cause of Action

To prevail in action against notary and his or her surety for damages, plaintiff as having burden of establishing (1) a duty on part of notary to plaintiff, (2) a violation of that duty, (3) that violation was a proximate cause of injury to plaintiff, and (4) nature and extent of plaintiff's damage. *McDonald v. Plumb (1970) 12 Cal. App. 3d 374, 376, 90 Cal. Rptr. 822*

[7] Evidence

[a] Customs

Trial court in cross action against notary and his surety arising out of acknowledgment of signatures which were forged as erring in admitting evidence that notaries in county customarily did not comply with requirements of *Civ. Code § 1185*. *Transamerica Title Ins. Co. v. Green (1970) 11 Cal. App. 3d 693, 702-703, 89 Cal. Rptr. 915*

[b] Falsity of Certificate of Acknowledgment

Evidence required to be produced by injured party to prove falsity of recitals in certificate of acknowledgment. *Greenwald v. United States (1963) 223 Cal. App. 2d 434, 440-441, 35 Cal. Rptr. 772* (quoting from *Luttrell v. Columbia Casualty Co. (1934) 136 Cal. App. 513, 515, 28 P.2d 1067*)

[8] Jurats

Notary as unable to avoid liability for official misconduct by subterfuge of signing jurat with fictitious name. *Bank of America v. Dowdy (1960) 186 Cal. App. 2d 690, 694, 9 Cal. Rptr. 779*

[9] Liability

[a] Breach of Duty

Notary as liable for damages proximately caused by notary's breach of duty. *Garton v. Title Ins. & Trust Co. (1980) 106 Cal. App. 3d 365, 377-378, 165 Cal. Rptr. 449*

[b] Fraud

Notary's surety as liable for damages resulting from fraudulent acts of notary committed in performance of his or her duties. *Lewis v. Agricultural Ins. Co. (1969) 2 Cal. App. 3d 285, 292, 82 Cal. Rptr. 509* (quoting from *Hungate v. Wells (1933) 129 Cal. App. 133, 135, 18 P.2d 64*)

[c] Jurat

Notary as not exempt from civil liability because of reliance on secretary to type appropriate jurat and secretary's failure to do so. *Bernd v. Eu (1979) 100 Cal. App. 3d 511, 518, 161 Cal. Rptr. 58*

[10] Oath

Oath prescribed by *Cal. Const., art. XX, § 3*, as applied to notary public as constitutional. *Wirin v. Ostly (1961) 191 Cal. App. 2d 710, 712-713, 13 Cal. Rptr. 31 , cert. denied, 368 U.S. 952, 82 S. Ct. 393, 7 L. Ed. 2d 385 (1962)*

[11] Obligation of Sureties

Obligation of sureties on official bond as strictissimi juris; but rule of strictissimi juris as coming into operation only after meaning of terms of bond have been ascertained. *Bank of America v. Dowdy (1960) 186 Cal. App. 2d 690, 692-693, 9 Cal. Rptr. 779*

[12] Official Misconduct

Notary's violation of statute prescribing requisites for taking acknowledgment as official misconduct for which injured person may recover against notary and notary's sureties on official bond. *Transamerica Title Ins. Co. v. Green (1970) 11 Cal. App. 3d 693, 703, 89 Cal. Rptr. 915*

Wrongful use by notary of notary seal as official misconduct. *Bank of America v. Dowdy (1960) 186 Cal. App. 2d 690, 694, 695, 9 Cal. Rptr. 779*

Affixing fictitious name to certificate of acknowledgment as official misconduct. *Bank of America v. Dowdy (1960) 186 Cal. App. 2d 690, 695, 9 Cal. Rptr. 779*

[13] Qualifications

Requirement that notary public be United States citizen as violative of *equal protection clause of Fourteenth Amendment*. *Bernal v. Fainter (1984) 467 U.S. 216, 228, 104 S. Ct. 2312, 81 L. Ed. 2d 175*

[14] Statute of Limitations

Former *Code Civ. Proc. § 338(6)* (*now see Code Civ. Proc. § 338(f)*) as applying to actions against notary's surety so that action not brought within six-year period specified by that section, regardless of when misdeed was discovered, as barred. *Butterfield v. Northwestern National Ins. Co. (1980) 100 Cal. App. 3d 974, 979, 161 Cal. Rptr. 280*

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§ 390.56 Attorney General Opinions

Notary public as not required to ascertain validity of title, Attorney at Law, in giving certificate of acknowledgment or jurat. *60 Ops. Cal. Att'y Gen. 133 (1977)*

Notary public as required by *Gov. Code § 6100* [prior to its amendment] to charge fee for services [*Gov. Code §§ 8211, 8211.5, 8211.8*]. *59 Ops. Cal. Att'y Gen. 679 (1976)*

Requirements for notarial seals. *42 Ops. Cal. Att'y Gen. 84, 85-87 (1963)*

Effect of use of nonconforming notarial seals. *42 Ops. Cal. Att'y Gen. 56, 56-59 (1963)*

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§ 390.57 Law Reviews

Note, *Torts: The Privity Rule: Liability for Injury to Intangible Interests Based on Negligent Performance of a Contract, 46 Cal. L. Rev. 851 (1958)*

Comment, *Notaries Public: Duty in Taking Acknowledgements: Certification Upon Personal Knowledge, 12 Cal. L. Rev. 229 (1923)*

Comment, *Notaries: Acknowledgment by a Party in Interest, 2 Cal. L. Rev. 335 (1914)*

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Witkin, Summary of California Law, vol. 12, *Real Property*, §§ 284-291 (10th ed. 2005)

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[Reserved]

§§ 390.59[Reserved]

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Chapter 390 NOTARIES PUBLIC
PART IV. FORMS

34-390 California Forms of Pleading and Practice--Annotated § 390.70

§ 390.70 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] Based on Notary Public's Official Misconduct or Neglect--Action by Person Injured Against Notary Public and Surety on Notary's Official Bond [Gov. Code § 8214]--False Certificate of Acknowledgment [Civ. Code §§ 1185, 1189]--General Form

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] Based on Notary Public's Official Misconduct or Neglect--Action by Person Injured Against Notary Public and Surety on Notary's Official Bond [Gov. Code § 8214]--False Certificate of Acknowledgment [Civ. Code §§ 1185, 1189]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], and	)	COMPLAINT FOR DAMAGES
_____ [*name*], a corporation,	)	
Defendants.	)	
	)	
	)	

Plaintiff alleges:

1. At all times herein mentioned, defendant _____ [*name*], hereinafter referred to as "defendant notary," was and is a duly commissioned, qualified, and acting notary public for the State of California and a resident of _____ County, California.

2. Defendant _____ [*name*], hereinafter referred to as "defendant surety," is, and at all times herein

mentioned was, an insurance corporation, organized and existing under the laws of _____ [*specify, e.g.,* California], with its principal place of business located in [_____ (*name of city or judicial district*),] _____ County, California.

3. On or about _____ [*date*], defendant surety executed its official bond as surety for and on behalf of defendant notary, as notary public, in the sum of $_____, in accordance with the requirements of *Government Code Section 8212*. Bond was given to assure the faithful performance of the official duties of defendant notary as notary public. [*If the surety was not an admitted surety insurer, add:* After execution of the bond, it was approved by the Honorable _____ (*name*), a Judge of the Superior Court of California, County of _____.] On _____ [*date*] the bond was filed with the County Clerk of _____ County, and, on_____ [*date*] it was recorded in the office of the County Recorder of that county in Book _____ of Official Records, at Page _____. The bond was in full force and effect at all times herein mentioned.

[4. _____ (*Set forth facts, if any, showing that a signed and acknowledged instrument was required by plaintiff before making a detrimental change of position, e.g.:* On or about _____ (*date*) one _____ (*name*) sought to borrow from plaintiff the sum of $_____, which was to be repaid _____ (*specify, e.g.,* one year from the date the loan was made) with interest at the rate of _____ percent per annum. Plaintiff informed _____ (*name of borrower*) that plaintiff would loan the money only on condition that repayment of the loan with interest on the due date was guaranteed by _____ (*name*), _____ (*describe relationship to borrower*), and that execution of the guaranty had to be acknowledged by _____ (*name of guarantor*) before a notary public of California).]

5. _____ [*Set forth facts concerning acknowledgment, e.g.:* Thereafter, on or about _____ (*date*) _____ (*name of borrower*) presented to plaintiff a written guaranty, purportedly signed by _____ (*name of guarantor*) guaranteeing that if _____ (*name of borrower*) failed to repay, in whole or in part, the principal of the loan with interest on the due date, _____ (*name of guarantor*) would forthwith, on receiving written notice from plaintiff, pay plaintiff the unpaid amount. Affixed to the written guaranty was a Certificate of Acknowledgment executed by, and bearing the official seal of, defendant notary in which it was certified that on _____ (*date*) _____ (*name of guarantor*), had personally appeared before defendant notary, as such notary public, that _____ (*name of guarantor*) was proved to defendant notary on the basis of satisfactory evidence to be the person who was described in and whose name was subscribed to the written guaranty, and that _____ (*name of guarantor*) then and there acknowledged that he/she had executed the written guaranty. A copy of the guaranty with the Certificate of Acknowledgment affixed is attached hereto as Exhibit A and made a part hereof].

6. Plaintiff is informed and believes and thereon alleges that the Certificate of Acknowledgment was, and is, false and that defendant notary _____ [at all times _____ (knew *or* should have known) that it was false *or* took the acknowledgment without knowing, or having satisfactory evidence that, the person making the acknowledgment was the individual who was described in and who executed the instrument].

7. Ignorant of the falsity of the Certificate of Acknowledgment and relying on the truth of its statements, plaintiff, on _____ (*date*) _____ [*specify plaintiff's acts in reliance of false acknowledgment, e.g.,* delivered to _____ (*name of borrower*) the sum of $_____ and took in return a promissory note, dated the same day and signed by _____ (*name of borrower*), in which _____ (*name of borrower*) promised to pay to plaintiff one year from date the sum of $_____ with interest thereon atthe rate of _____ percent per annum. A copy of the promissory note is attached hereto as Exhibit B and made a part hereof].

8. _____ [*Allege facts showing detriment sustained, e.g.:* _____ (*Name of borrower*) failed to pay all or any part of the principal or interest on _____ (*due date*), or at any other time, and has, notwithstanding plaintiff's repeated demands, failed and refused, and continues to fail and refuse, to do so. Plaintiff is informed and believes and thereon alleges that _____ (*name of borrower*) is hopelessly insolvent and is unable to pay all or any part of the principal or interest on the note. In addition, _____ (*name of guarantor*) has failed and refused, and continues to fail and refuse, to pay the amount due on the note, the interest, or any part of either, on the grounds that he/she had never seen the written guaranty prior to the time he/she was asked to make good on it, that he/she did not sign it, and that he/she never appeared before defendant notary and acknowledged that he/she had signed it].

9. As a proximate result of defendant's false certificate and plaintiff's acting on it as herein alleged, plaintiff has been damaged _____ [*specify, e.g.*, in the sum of $_____ (*amount of principal*), together with interest on that sum at the rate of _____ percent per annum from and after _____ (*date note was executed and delivered*)].

WHEREFORE, plaintiff prays judgment as follows:

1. Against defendant notary for _____ [*specify, e.g.*, the sum of $_____ (*principal*) plus interest on that sum at the rate of _____ percent per annum from _____ (*date*) until paid];

2. Against defendant surety for the amount of the judgment against defendant notary [up to the limit of the surety's bond];

3. Against both defendants for costs of suit herein incurred by plaintiff; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The foregoing form of complaint may be used by a person to recover damages from a notary public and the notary's surety for an injury sustained as the proximate result of the official misconduct or neglect of a notary in failing to comply with statutory requirements in taking the acknowledgment of the execution of an instrument [*see Civ. Code §§ 1185, 1189*; *Gov. Code § 8214*].

[3] Allegations

A complaint against a notary public and his or her surety for damages resulting from the notary's official misconduct or neglect should allege facts showing the following:

1. Defendant notary is a duly commissioned, qualified, and acting notary public [*Gov. Code §§ 8200, 8201*]. This is alleged in Paragraph 1 of the foregoing form and establishes, from a pleading standpoint, the notary's duty to the public to comply with statutes when performing notarial acts.

2. The identity of the surety as a bonding or insurance company. This is alleged in Paragraph 2 of the form.

3. Defendant notary is covered by a bond [*Gov. Code § 8212*] issued by defendant surety. This is alleged in Paragraph 3.

4. Defendant notary performed a notarial act in his or her official capacity. Paragraph 5 alleges the making of a certificate of acknowledgment by the notary.

5. The act was wrongful (breach of duty), constituting official misconduct or neglect [*Gov. Code § 8214*; *see Civ. Code § 1185* (duties of officer taking acknowledgment)]. This is alleged in Paragraph 6.

6. Plaintiff relied on the notarial act in making a change of position. This is alleged in Paragraph 7.

7. Plaintiff suffered detriment or loss [*see Civ. Code § 3282*] as a result of the wrongful act. This is alleged in Paragraph 8.

8. The notary's wrongful act was a proximate cause of plaintiff's detriment [*see Civ. Code § 3333*; *Bank of America v. Dowdy (1960) 186 Cal. App. 2d 690, 694, 9 Cal. Rptr. 779* ; *MacBride v. Schoen (1932) 121 Cal. App. 321, 322-323, 8 P.2d 888]* . This is alleged in Paragraph 9.

9. Plaintiff sustained damages, that is, the measure of the detriment in terms of money [*see Civ. Code §§ 3281, 3333*]. This is also alleged in Paragraph 9.

Capacity allegations and allegations laying venue have been included (Paragraphs 1, 2), although they are not expressly required. Paragraph 1 is a combination venue/capacity/duty allegation. The statement as to defendant's residence lays venue in the county of defendant's residence [*see Code Civ. Proc. § 395(a)*]. If venue is not based on the place of defendant's residence, the statement as to residence may be omitted. The statement that defendant is a notary public establishes both the capacity in which defendant is being sued and his or her duty to comply with statutory requirements in the performance of his or her official acts. Paragraph 2 is a capacity/venue allegation. The statement as to the surety's corporate status and place of incorporation alleges its capacity. The paragraph also identifies the defendant as an

insurance corporation. The statement as to the location of its principal place of business establishes venue [*Code Civ. Proc. § 395.5*] and may be omitted if venue is based on some other fact, such as the place of the notary's residence (Paragraph 1). For a discussion of venue generally and forms for use on motions to change venue, see Ch. 571, *Venue* . For memoranda of points and authorities supporting and opposing motions to change venue generally, see California Points and Authorities, Ch. 238, *Venue* (Matthew Bender).

Paragraph 4 should be included if the particular instrument was expressly required by plaintiff to be signed and acknowledged by the maker and delivered to plaintiff as a condition precedent to plaintiff's change of position. Such fact, when it exists, tends to strengthen the reliance allegation (Paragraph 7) without which the false certificate would not be a proximate cause (Paragraph 9) of plaintiff's loss.

If the facts are such as to justify a claim for exemplary, or punitive, damages under *Civ. Code § 3294* (for example, if the notary public intentionally embarked on a scheme to defraud plaintiff [*see Civ. Code § 3294(a), (c)(3)*], plaintiff should, of course, seek them. In such event, the complaint should include the allegations establishing the fraud [*see § 390.71*, Paragraphs 11, 13]).

[4] Statute of Limitations

For a discussion of the period of limitation applicable to an action against a notary public for damages, see *§ 390.30*.

[5] Verification

Although verification of this complaint is not required, verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[6] Requirements for Taking Acknowledgment

The requisites of an acknowledgment under *Civ. Code § 1185* are the personal appearance of the maker of the instrument before the notary public, the maker's acknowledgment that he or she signed the instrument, and the notary's determination on the basis of satisfactory evidence that the person is the person he or she purports to be [*see Civ. Code § 1185(a),(b)*; see also *§ 390.22[2][e]*]. The form of the certificate of acknowledgment for use in all cases, except acknowledgments made before military officers, is set forth by statute [*Civ. Code §§ 1188, 1189(a)(1)*; *see Civ. Code § 1183.5* (acknowledgment made before military officer)].

"Satisfactory evidence, for purposes of establishing the identity of the person making an acknowledgment, means the absence of any information, evidence, or other circumstances that would lead a reasonable person to believe that the person making the acknowledgment is not the individual he or she claims to be and any one of the following" [*Civ. Code § 1185(b)*]:

(1) The oath or affirmation of a credible witness personally known to the officer, and whose identity is proven to the officer on presentation of any document satisfying the requirements of paragraph (3) or (4), below, that the person making the acknowledgment is personally known to the witness and that each of the following are true: (a) the person making the acknowledgment is the person named in the document; (b) the person making the acknowledgment is personally known to the witness; (c) it is the reasonable belief of the witness that under the circumstances it would be very difficult or impossible for that person to obtain another form of identification; (d) the person making the acknowledgment does not possess any of the identification documents named below in paragraphs (3) and (4); and (e) the witness does not have a financial interest in the document being acknowledged and is not named in the document;

(2) The oath or affirmation under penalty of perjury of two credible witnesses, whose identities are proven to the officer on presentation of any document satisfying the requirements of paragraph (3) or (4), below, that each listed above in paragraph (1) is true;

(3) Reasonable reliance on the presentation to the officer of any one of the following, if the document is current or has been issued within five years: (a) an identification card or driver's license issued by the California Department of Motor Vehicles, or (b) a passport issued by the Department of State of the United States; or

(4) Reasonable reliance on the presentation of any one of the following, if the document is current or has been issued within five years and contains a photograph and description of the person named on it, is signed by the person, bears a serial or other identifying number, and, in the event that the document is a passport, has been stamped by the United States Citizenship and Immigration Services of the Department of Homeland Security: (a) a passport issued by a foreign government; (b) a driver's license issued by a state other than California or by a Canadian or Mexican public agency authorized to issue drivers' licenses; (c) an identification card issued by a state other than California; (d) an identification card issued by any branch of the Armed Forces of the United States; (e) an inmate identification card issued on or after January 1, 1988, by the Department of Corrections and Rehabilitation, if the inmate is in custody (inmate identification cards issued prior to that date are also satisfactory evidence if the inmate is in custody), or (f) an employee identification card issued by an agency or office of the State of California or by an agency or office of a city, county, or city and county in California.

A notary public who fails to obtain the satisfactory evidence required by paragraph (1), above, or who willfully states as true any material fact that he or she knows to be false, is subject to a civil penalty of up to $10,000 [*Civ. Code §§ 1185(b)(1)(B), 1189(a)(2)*]. An action to impose the penalty may be brought by the Secretary of State in an administrative proceeding, or by any public prosecutor in superior court, and an order of judgment for the penalty is enforceable as a civil judgment [*Civ. Code §§ 1185(b)(1)(B), 1189(a)(2)* (public prosecutor must inform Secretary of State of imposition of penalty)].

[7] Presumption and Burden of Proof

An officer who has taken an acknowledgment pursuant to *Civ. Code § 1185* is presumed to have operated in accordance with law [*Civ. Code § 1185(c)*]. The burden of proof in establishing the negligence or misconduct of the officer in any action for damages based on the officer's failure to establish the proper identity of the person making the acknowledgment is on the party who files the action [*Civ. Code § 1185(d)*].

[8] Perjury

Any person convicted of perjury under *Civ. Code § 1185* forfeits any financial interest in the acknowledged document [*Civ. Code § 1185(e)*].

[9] State Statutes

Prohibition against taking acknowledgment of instrument unless officer taking it knows or has satisfactory evidence that person making acknowledgment is person who is described in and who executed instrument. *Civ. Code § 1185*

Forms of certificates of acknowledgment. *Civ. Code §§ 1183.5* (acknowledgement taken before military officer), *1189(a)* (all others); *but see Civ. Code § 1189(d)* (acknowledgment provided prior to January 1, 1993, and conforming to former *Civ. Code §§ 1189-1192* as valid)

Surety as liable on principal's default without demand or notice. *Civ. Code § 2807*

Admission of certified copy of bond in evidence without further proof when bond recorded pursuant to statute. *Code Civ. Proc. § 995.260*

Notary's official bond, amount and form. *Gov. Code § 8212*

Filing bond and oath of office; recording bond. *Gov. Code § 8213*

Civil liability of notary and notary's surety for notary's official misconduct or neglect. *Gov. Code § 8214*

[10] Decisions

[a] Bonds

Official bond as surety bond applicable to acts of public officials; nature of suretyship relationship. *Butterfield v. Northwestern National Ins. Co. (1980) 100 Cal. App. 3d 974, 978-979, 161 Cal. Rptr. 280*

Surety bond of notary public as official bond [*Gov. Code § 8212*] on which liability of surety is no greater than that of notary [*Gov. Code § 8214*]; when primary obligation on official bond is barred or in any legal way extinguished, surety as relieved. *Breckenridge v. Mason (1967) 256 Cal. App. 2d 121, 130, 64 Cal. Rptr. 201*

[b] False Acknowledgment

Lack of value of forged document as not exonerating negligent notary public from liability to injured party for false notarial acknowledgment. *Iselin-Jefferson Financial Co. v. United California Bank (1976) 16 Cal. 3d 886, 891-892, 129 Cal. Rptr. 670, 549 P.2d 142*

Liability of notary public to person who executed instrument for taking of acknowledgment of altered instrument contrary to requirements of *Civ. Code § 1185*, whether notary intentionally took acknowledgment with knowledge instrument had been altered or merely did so negligently. *Garton v. Title Ins. & Trust Co. (1980) 106 Cal. App. 3d 365, 377-378* (liability results whether notary intentionally took acknowledgment with knowledge instrument had been altered or merely did so negligently)

Officer in taking acknowledgment as required by *Civ. Code §§ 1185, 1189* to have acknowledging party appear in person, and officer as required to certify that such party personally appeared; instrument acknowledged in violation of this rule, for example when it is acknowledged through telephone, as rendering officer liable in damages if it should turn out that acknowledgment was by imposter. *McDonald v. Plumb (1970) 12 Cal. App. 3d 374, 376, 90 Cal. Rptr. 822*

Notary public's certification that person is present when person is absent as negligence rendering notary liable on his or her bond for false certificate. *Lewis v. Agricultural Ins. Co. (1969) 2 Cal. App. 3d 285, 292, 82 Cal. Rptr. 509*

Both notary and his or her sureties as liable for official misconduct for making false certificate of acknowledgment. *Bank of America v. Dowdy (1960) 186 Cal. App. 2d 690, 693, 9 Cal. Rptr. 779*

Liability of notary public to grantor for false acknowledgment of deed. *Greeninger v. New Amsterdam Cas. Co. (1957) 152 Cal. App. 2d 645, 646, 313 P.2d 607*

Notary public as liable to person injured if false certificate of acknowledgment is proximate cause of person's loss.

Greeninger v. New Amsterdam Cas. Co. (1957) 152 Cal. App. 2d 645, 646-647, 313 P.2d 607

Liability of surety on notary's bond for false certificate of acknowledgment, irrespective of valuelessness of instrument, if notary knew acknowledgment was false and certificate of acknowledgment was made by notary for purpose of deceiving and defrauding plaintiff. *Hemet Home Builders Asso. v. Wells (1934) 3 Cal. App. 2d 65, 69-80, 39 P.2d 233*

Notary and his or her surety as liable for negligence of notary in taking acknowledgment or for making false certificate of acknowledgment. *Hemet Home Builders Asso. v. Wells (1934) 3 Cal. App. 2d 65, 77, 39 P.2d 233*

Surety on notary public's bond as liable for damages to party injured by false certificate of acknowledgment. *Luttrell v. Columbia Casualty Co. (1934) 136 Cal. App. 513, 515, 28 P.2d 1067*

[c] Negligence

Civil liability for negligently certifying an acknowledgment as well established, both under *Gov. Code § 8214*, which specifically provides for civil recovery due to official misconduct or neglect of a notary public, and under case law. *Bernd v. Eu (1979) 161 Cal. Rptr. 58*

Notary as grossly negligent in processing certificate of acknowledgment when she did not bother to read its contents. *Bernd v. Eu (1979) 100 Cal. App. 3d 511, 517, 161 Cal. Rptr. 58*

Notary and her surety as required to indemnify injured party if notary was negligent and negligence was proximate cause of injury. *Common Wealth Ins. Systems, Inc. v. Kersten (1974) 40 Cal. App. 3d 1014, 1032, 115 Cal. Rptr. 653*

Notary's breach of statutory duty (*Civ. Code § 1185*) as negligence per se. *Transamerica Title Ins. Co. v. Green (1970) 11 Cal. App. 3d 693, 702, 89 Cal. Rptr. 915*

[d] Proximate Cause

Although false notarial acknowledgment does not generally cause loss if forged instrument would have been worthless if genuine, notary as liable for loss if evidence shows that plaintiff would not have entered into transaction but for false acknowledgment. *Iselin-Jefferson Financial Co. v. United California Bank (1976) 16 Cal. 3d 886, 891, 129 Cal. Rptr. 670, 549 P.2d 142*

Requirement that notary's misconduct or neglect be a proximate, but not necessarily sole, cause of plaintiff's loss. *Common Wealth Ins. Systems, Inc. v. Kersten (1974) 40 Cal. App. 3d 1014, 1033, 115 Cal. Rptr. 653* ; *Tutelman v. Agricultural Ins. Co. (1972) 25 Cal. App. 3d 914, 918-919, 102 Cal. Rptr. 296*

Proximate cause of injury as cause which, in natural and continuous sequence, produces injury, and without which injury would not have occurred; notary's wrongful act as not required to be sole cause of injury. *McDonald v. Plumb (1970) 12 Cal. App. 3d 374, 377, 90 Cal. Rptr. 822*

Necessity of showing proximate cause of loss or damage, in addition to showing that act was wrongful or negligent, in order to recover for wrongful or negligent act of notary. *MacBride v. Schoen (1932) 121 Cal. App. 321, 322-323, 8 P.2d 888*

[11] Cross References

For a discussion and forms of certificates of acknowledgment, see Ch. 9, *Acknowledgments* .

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§ 390.71 Complaint [Code Civ. Proc. § 425.10] for Actual [Civ. Code § 3333] and Exemplary [Civ. Code § 3294(c)(3)] Damages Based on Notary Public's Official Misconduct or Neglect--Action by Purchaser of Trust Deed and Note Against Notary Public/Real Estate Broker and Surety on Notary's Official Bond [Gov. Code § 8214]--False Certificate of Acknowledgment [Civ. Code §§ 1185, 1189] of Execution of Trust Deed [Civ. Code § 2952] Pursuant to Scheme to Defraud [Civ. Code §§ 1709, 1710]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Actual [Civ. Code § 3333] and Exemplary [Civ. Code § 3294(c)(3)] Damages Based on Notary Public's Official Misconduct or Neglect--Action by Purchaser of Trust Deed and Note Against Notary Public/Real Estate Broker and Surety on Notary's Official Bond [Gov. Code § 8214]--False Certificate of Acknowledgment [Civ. Code §§ 1185, 1189] of Execution of Trust Deed [Civ. Code § 2952] Pursuant to Scheme to Defraud [Civ. Code §§ 1709, 1710]

[*Caption. See § 390.70[1].*]

Plaintiff alleges:

1. At all times hereinafter mentioned, defendant _____ [*name*], hereinafter referred to as "defendant notary," was and is a duly commissioned, qualified, and acting notary public for the State of California, a duly licensed real estate broker, and a resident of [_____ (*name of city or judicial district*),] _____ County, California.

2. [*Capacity of defendant surety and location of principal place of business. See § 390.70[1], Paragraph 2.*]

3, [*Execution, filing, and recording of official bond. See § 390.70[1], Paragraph 3.*]

4. On or about _____ [*date*] defendant notary, in his/her capacity as notary public, executed a Certificate of Acknowledgment, authenticated with his/her official seal, affixed to a deed of trust, certifying that on _____ [*date*] _____ [*name of purported trustor*] personally appeared before defendant notary, as notary public, that he/she was proved to defendant notary on the basis of satisfactory evidence to be

the person whose name was subscribed to the deed of trust, and that he/she then and there acknowledged that he/she had executed the deed of trust. A copy of the trust deed and Certificate of Acknowledgment is attached hereto as Exhibit A and made a part hereof.

5. The deed of trust was purportedly given to secure payment of a promissory note, bearing _____ [*specify date, e.g.,* the date, _____ *or* the same date as the deed of trust], in the principal sum of $_____, payable _____ [*specify, e.g.,* in full two years from date] with interest at the rate of _____ percent per annum. The note was purportedly executed by the trustor of the deed of trust, as maker, in favor of _____ [*name*], as payee, who is the purported beneficiary named in the deed of trust.

6. By virtue of the Certificate of Acknowledgment affixed to the deed of trust, the trust deed was, on _____ [*date*] recorded in the office of the County Recorder of _____ County, California, in Book _____, page _____, of Official Records.

7. Thereafter, on or about _____ [*date*] defendant notary represented to plaintiff that the trust deed and note were a good investment and, in his/her capacity as a licensed real estate broker, solicited plaintiff to purchase them.

8. In reliance on the deed of trust, defendant notary's affixed Certificate of Acknowledgment, and the fact that the trust deed with the certificate affixed was recorded, plaintiff, on or about _____ [*date*] agreed to purchase the promissory note and trust deed. As a condition of the purchase, plaintiff required that the signature of the payee of the note endorsing the note over to plaintiff and the signature of the beneficiary on the assignment of the trust deed to plaintiff be acknowledged before a notary public.

9. On _____ [*date*], defendant notary delivered to plaintiff the promissory note, purportedly endorsed to plaintiff by the payee, and an assignment of the trust deed to plaintiff, purportedly executed by the beneficiary, each having attached to it a Certificate of Acknowledgment executed by defendant notary certifying that the person who signed the instrument personally appeared before defendant notary, as notary public, that he/she was proved to defendant notary on the basis of satisfactory evidence to be the person whose name was subscribed to the instrument, and that he/she then and there acknowledged that he/she executed the instrument. A copy of the note and certificate and a copy of the assignment and certificate are attached hereto as Exhibits B and C, respectively, and made a part hereof.

10. Relying on the certificates of acknowledgment as establishing the identity and genuineness of the signatures of the endorser/assignor on the promissory note and assignment, plaintiff _____ [*e.g.,* paid defendant notary the purchase price agreed to].

11. The deed of trust, promissory note, and assignment were and are false in that the persons named in them as maker/beneficiary, maker/payee, and assignor, respectively, as well as the property purportedly described in the trust deed, were and are fictitious. Defendant notary, with the intent to defraud plaintiff through the use of his/her powers as a notary public, prepared the foregoing instruments, signed each in the fictitious name designated, and executed the Certificates of Acknowledgment affixed to each instrument. The certificates were false in that no one ever appeared before defendant notary at any time and acknowledged that he or she executed any of these particular instruments and, as alleged above, the signatures on each were of fictitious persons and were made by defendant notary himself/herself.

12. As a proximate result of defendant notary's fraudulent acts, as herein alleged, plaintiff has been damaged in the sum of $_____ principal, together with interest on this sum at the rate of _____ percent per annum from and after _____ [*date note was executed*].

13. Defendant notary, in committing the foregoing alleged acts, intentionally misrepresented the facts to plaintiff and engaged in a deceitful course of conduct with the intention of depriving plaintiff of property, and plaintiff is, therefore,

entitled to an award of exemplary, or punitive, damages.

WHEREFORE, plaintiff prays judgment as follows:

1. Against defendant notary in the sum of $_____ as actual, or compensatory, damages;

2. Against defendant notary for exemplary, or punitive, damages;

3. Against defendant surety for the amount of compensatory damages awarded against defendant notary [up to the limit of the surety's bond];

4. Against both defendants for the costs of suit herein incurred by plaintiff; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 390.70[1].*]

[2] Use of Form

The foregoing form of complaint may be used by a person in an action against a notary public and the notary's surety to recover actual and punitive damages from the notary public and actual damages, up to the bond limit, from defendant surety, sustained by plaintiff as a proximate result of defendant notary's scheme to defraud plaintiff by selling to plaintiff a false trust deed and promissory note. The form assumes that the scheme required for completion acts by both a notary public and a licensed real estate broker and that the notary and broker are the same person. With appropriate modifications, the form may also be used if the notary and broker are different persons and the action is against both and the surety of each. For conspiracy allegations that may, in such event, be incorporated in the foregoing form, see Ch. 126, *Conspiracy* .

[3] Allegations

The essential allegations of a complaint against a notary public and his or her surety for damages resulting from the notary's official misconduct or neglect are set forth in *§ 390.70[3]*. The foregoing complaint contains these allegations.

In addition, the foregoing complaint, in Paragraphs 4-7, 9, and 11 alleges the acts undertaken by defendant notary in carrying out his or her scheme to defraud plaintiff. Paragraphs 8, 10, and 12 allege plaintiff's reliance and resulting detriment and Paragraph 13 summarizes the allegations as a basis for claiming exemplary damages. For a detailed discussion of actions based on fraud or deceit and the essential allegations of such a complaint, see Ch. 269, *Fraud and Deceit* . For a discussion of exemplary damages and the requirements of a complaint seeking them, see Ch. 177, *Damages* .

[4] State Statutes

Fraud which will vitiate consent required under *Civ. Code § 1567(3)* to create contract. *Civ. Code §§ 1571-1573*

Fraud as ground for rescission of contract. *Civ. Code § 1689*

Actionable fraud or deceit. *Civ. Code §§ 1709, 1710, 1711*

Exemplary or punitive damages. *Civ. Code §§ 3294, 3294.5*

Measure of damages for fraud. *Civ. Code §§ 3333, 3343*

[5] Decisions

Notary public and his or her surety as liable for notary's official misconduct or neglect in making false certificate of acknowledgment of instrument, if certificate was a proximate cause of plaintiff's loss, even though instrument, if valid, would be uncollectible because of purported maker's insolvency or instrument is worthless because it is fictitious. See *Iselin-Jefferson Financial Co. v. United California Bank (1976) 16 Cal. 3d 886, 890-892, 129 Cal. Rptr. 670, 549 P.2d 142* (false certification of acknowledgment of forged signature on guaranty agreement); *Tutelman v. Agricultural Ins. Co (1972) 25 Cal. App. 3d 914, 917-919, 102 Cal. Rptr. 296* (false certification of acknowledgment of signatures on fictitious trust deed and assignment); *Hemet Home Builders Asso. v. Wells (1934) 3 Cal. App. 2d 65, 70-80, 39 P.2d 233* (false certification of acknowledgment of signatures on fictitious trust deeds)

Notary who is guilty of negligence or intentional wrongdoing as personally liable to injured party; by reason of notary's bond, surety as also answerable to injured party. *Butterfield v. Northwestern National Ins. Co. (1980) 100 Cal. App. 3d 974, 978, 161 Cal. Rptr. 280*

Liability of sureties on notary public's bond for notary's misconduct in falsely certifying acknowledgment of false deeds of trust and false assignments of deed of trusts; notary and surety as liable if notary performs official act as part of scheme to defraud. *Tutelman v. Agricultural Ins. Co. (1972) 25 Cal. App. 3d 914, 916-919, 102 Cal. Rptr. 296*

Measure of damages of one who has relied on false certificate of acknowledgment of mortgage or trust deed in making loan as amount of debt and interest sought to be secured by mortgage or trust deed. *Hemet Home Builders Asso. v. Wells (1934) 3 Cal. App. 2d 65, 77, 39 P.2d 233*

Notary and his or her surety as liable for damages proximately resulting from false acknowledgment of deed of trust. *Cole v. Ladeveze (1934) 137 Cal. App. 748, 750, 31 P.2d 447* (citing former Pol. Code § 801; now see *Gov. Code § 8214*)

[6] Cross References

See also *§ 390.70*.

For a discussion and a form of complaint for use in an action against a real estate broker based on fraud, see Ch. 103, *Brokers* .

For a discussion and forms of complaints for use in an action based on conspiracy, see Ch. 126, *Conspiracy* .

For a discussion and the requirements of a complaint seeking an award of exemplary damages, see Ch. 177, *Damages* .

For a discussion and forms of complaint for use in actions based on fraud generally, see Ch. 269 *Fraud and Deceit* .

For memoranda of points and authorities supporting and opposing demurrers, motions for summary judgment, and motions for judgment notwithstanding the verdict in actions based on conspiracy, see 3 California Points and Authorities, *Conspiracy*.

For memoranda of points and authorities supporting and opposing demurrers and motions for new trial with respect to actual and exemplary damages claimed, see 5 California Points and Authorities, *Damages*, Part I.

For memoranda of points and authorities supporting and opposing demurrers and motions for judgment on the pleadings in fraud actions, see 8 California Points and Authorities, *Fraud and Deceit*.

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Volume 34: Newspapers thru Parties-Chs. 386-396
Chapter 390 NOTARIES PUBLIC
PART IV. FORMS

34-390 California Forms of Pleading and Practice--Annotated § 390.72

§ 390.72 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] Proximately Caused by Notary's Negligence [Civ. Code § 1714; Gov. Code § 8214] in Undertaking, in Violation of Law [Bus. & Prof. Code §§ 6125, 6126; Gov. Code § 8214.1(g)], to Draft Valid Formal Will--Action by Beneficiary Under Will Against Notary Resulting From Will's Being Denied Admission to Probate Because of Faulty Execution or Attestation [Prob. Code § 50]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] Proximately Caused by Notary's Negligence [Civ. Code § 1714; Gov. Code § 8214] in Undertaking, in Violation of Law [Bus. & Prof. Code §§ 6125, 6126; Gov. Code § 8214.1(g)], to Draft Valid Formal Will--Action by Beneficiary Under Will Against Notary Resulting From Will's Being Denied Admission to Probate Because of Faulty Execution or Attestation [Prob. Code § 50]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Negligence)
Defendant.	)	[*Civ. Code §§ 1714, 3333*; *Gov. Code § 8214*]
	)	
	)	

_____

Plaintiff alleges:

1. Plaintiff is the _____ [*state relationship, e.g.*, sister *or* friend] of _____ [*name*], hereinafter referred to as "the decedent"[, and one of the decedent's heirs at law].

2. At all times herein mentioned, defendant was and is a duly commissioned, qualified, and acting notary public for the

State of California and a resident of _____ County, California.

3. At none of the times herein mentioned was defendant an active member of the State Bar of California.

4. On our about _____ [*date*], defendant represented to the decedent that, as a notary public, he/she was authorized by law to draw valid wills and do all that was legally required to assure their admission to probate and that he/she had the necessary training and skill to do so. Defendant _____ [knew *or* should have known] that those representations were false and that there was no reasonable ground to support a belief that they were true. Defendant made the representations for the purpose of inducing the decedent to procure defendant to draw and secure the execution of decedent's will for a monetary compensation.

5. Thereafter, in reliance on defendant's representations, the decedent engaged defendant to draw decedent's will and to do all that was necessary to create a document that would be admitted to probate, and plaintiff paid defendant the sum of $_____ for this service. At the same time, the decedent instructed defendant that plaintiff was to be named _____ [the sole *or* a] beneficiary in the will and that she/he was to _____ [succeed to all of decedent's property *or* to receive _____ (*describe property*)] on decedent's death. Defendant orally agreed to draw a valid will according to decedent's instructions and to have it properly executed.

6. Thereafter, pursuant to the agreement and instructions, defendant prepared _____ [a document entitled _____ (*e.g.*, Last Will and Testament) *or* an untitled document purporting to be the last will and testament] of _____ [*name of decedent*], had the decedent sign it, and affixed to the document his/her _____ [jurat *or* Certificate of Acknowledgment] authenticated by his/her notarial seal. A copy of the document with the affixed _____ [jurat *or* Certificate of Acknowledgment] and notarial seal is attached hereto as Exhibit A and made a part hereof.

7. The will was improperly _____ [executed *or* attested *or other*] in that defendant negligently _____ [*state, e.g.*, failed to have the decedent subscribe his/her name to the will in the presence of two or more witnesses, or to acknowledge in the presence of two or more witnesses that he/she signed the will and that it was his/her will].

8. On _____ [*date*], the decedent died in _____ County, California, without having revoked or altered the terms of his/her purported will, and leaving an estate _____ [*if plaintiff was to receive all or a specified sum state* with an appraised value of $_____ *or if plaintiff was to receive specified property state* including _____ (*describe property*) which had an appraised value of $_____]. At all times after execution of the purported will until his/her death, the decedent believed that the will was valid and that it would, on his/her death, transfer the _____ [entire estate *or* the sum of $_____ *or specify property*] to plaintiff.

9. On _____ [*date*], a petition for probate of the purported will was filed in the Superior Court of California, County of _____, but, because of the infirmity alleged above, the purported will was, by order of the court dated _____ [*date*], denied admission to probate.

10. Subsequently, the estate was, by order of the superior court, distributed to decedent's heirs at law according to the laws of intestate succession, and, instead of receiving the _____ [entire estate *or* sum of $_____ *or specify property*], as decedent intended, _____ [plaintiff received nothing *or* plaintiff, as one of decedent's heirs at law, received _____ (the sum of $_____ *or* property having a value of $_____ *or* money and property, the total value of which, at the time of distribution, was $_____), which is less than what plaintiff would have received had the will been valid].

11. As a proximate result of defendant's unlawful undertaking to draw and secure the proper execution and attestation of a valid will for the decedent, naming plaintiff as _____ [the sole *or* a] beneficiary, and his/her negligent failure to do so, plaintiff has been damaged in the sum of $_____ [*value of entire estate or of specified sum or value of property which was to have been received, less value of any amount of property received under laws of intestate succession*].

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 390.70[1].*]

[2] Use of Form

This form of complaint may be used by the intended beneficiary, under an invalid will drafted by defendant notary public, to recover the loss sustained by reason of the will's being denied admission to probate because of its improper drafting, execution, or attestation.

[3] Allegations

A complaint for damages based on negligence must contain allegations showing (1) a duty by defendant to plaintiff, (2) a breach of that duty, (3) a loss or detriment by plaintiff, (4) the loss or detriment was the proximate result of defendant's negligence, and (5) damages (measure of the loss in terms of money) [*see, e.g., Johnstone v. Panama-Pacific International Exposition Co. (1921) 187 Cal. 323, 326, 202 P.34* ; *Miglierini v. Havemann (1966) 240 Cal. App. 2d 570, 572, 49 Cal. Rptr. 795* ; *Civ. Code §§ 3281, 3282, 3333*; *Code Civ. Proc. § 425.10(b)*]. The duty, of course, is to use due care [*see, e.g., Tucker v. Lombardo (1956) 47 Cal. 2d 457, 462-463, 303 P.2d 1041]* , and may arise from a contractual relation [*see, e.g., Allied Properties v. John A. Blume & Associates (1972) 25 Cal. App. 3d 848, 853, 856-858, 102 Cal. Rptr. 259* (contract to conduct study of engineering feasibility of a small boat pier; negligence not established); *Hobson v. Silvea (1920) 50 Cal. App. 35, 38, 194 P. 525* (contract as imposing on bailee duty of exercising ordinary care in preservation of bailed property)]. Both breach of duty (negligence) and proximate cause may be alleged generally [*see, e.g., McMillan v. Western P.R. Co. (1960) 54 Cal. 2d 841, 845, 9 Cal. Rptr. 361, 357 P.2d 449* ; *Rannard v. Lockheed Aircraft Corp. (1945) 26 Cal. 2d 149, 156-157, 157 P.2d 1]* .

This complaint alleges facts showing the existence of a duty (Paragraphs 4, 5), the breach of that duty (Paragraphs 6, 7) loss (Paragraphs 9, 10), proximate cause (Paragraph 11), and damages (Paragraph 11).

[4] Liability of Notary Public and Surety

Civ. Code § 1714(a) makes every person liable for injuries resulting from the person's willful acts or from the person's want of ordinary care (i.e., negligence) in the management of his or her property or person. The statute states the general principle that a person is liable for injuries caused by his or her failure to exercise reasonable care in the circumstances, and it has been held that no exception to this fundamental principle should be made unless clearly supported by public policy [*Rowland v. Christian (1968) 69 Cal. 2d 108, 112, 70 Cal. Rptr. 97, 443 P.2d 561]* . Moreover, the violation of a statute imposing a duty constitutes negligence per se [*Transamerica Title Ins. Co. v. Green (1970) 11 Cal. App. 3d 693, 702, 89 Cal. Rptr. 915]* . Under the general negligence principle, liability has been imposed on a notary public for the latter's negligent performance of a contract to draft a valid will [*Biakanja v. Irving (1958) 49 Cal. 2d 647, 650-651, 320 P.2d 16* ; *see also, e.g.,* *Timmsen v. Forest E. Olson, Inc. (1970) 6 Cal. App. 3d 860, 871, 86 Cal. Rptr. 359* (agent who violates his or her duty to use reasonable care, skill, and diligence as liable for any losses which his or her principal may sustain as the result of his or her negligence or breach of duty); *Northwestern Title Security Co. v. Flack (1970) 6 Cal. App. 3d 134, 145, 85 Cal. Rptr. 693* (negligent preparation of title report)].

In addition, *Gov. Code § 8214* provides that for the official misconduct or neglect of a notary public, the notary public and the sureties on the notary public's offical bond are liable in a civil action to the persons injured for all damages sustained. Even though the act of a notary public in undertaking to draft a will is unlawful [*Bus. & Prof. Code §§ 6125, 6126*; *Gov. Code § 8214.1(g)*] and, therefore, is not included among the duties of a notary public listed in *Gov. Code §§ 8200-8230* or in any other code section, the taking of acknowledgments and the execution of jurats are listed among such duties [*see Gov. Code § 8205(a)(2),(3)*], as is the requirement that the notary public authenticate with his or her official seal all official acts [*Gov. Code § 8207*]. It would, therefore, appear that if the notary public performs an authorized duty as a substitute for an act essential to create a valid will, and this substitution renders the will that the notary has undertaken to draft invalid, the notary's conduct would constitute official misconduct or neglect under *Gov. Code § 8214*, rendering both the notary public and the surety liable. Nevertheless, apparently neither of the two cases involving the affixing of a notarial seal to an improperly executed or attested will involved an action against the surety. *Biakanja v. Irving (1958) 49 Cal. 2d 647, 320 P.2d 16* , was an action by the beneficiary named in the invalid will against the notary public only (liability imposed), and *Vanderhoof v. Prudential Sav. & Loan Asso., (1975) 46 Cal. App. 3d 507, 120 Cal. Rptr. 207* , was an action by the beneficiary named in the invalid will against the notary public's employer (liability not imposed). Of course, in *Biakanja* it may be that a second action was instituted against the surety after the notary's liability was established, but that does not appear from the court's record in *Biakanja.*

Nevertheless, since it would appear that the surety would, to the extent of its liability under its bond, be liable under *Gov. Code § 8214*, and because both the notary public and the surety may be sued in the same action [*see, e.g.,* *Kane v. Mendenhall (1936) 5 Cal. 2d 749, 752-753, 56 P.2d 498* (action against broker and his surety under real estate broker's law)], counsel may wish to join the surety. If so, Paragraphs 2 and 3 of § 390.70[1] may be incorporated in the foregoing complaint.

[5] State Statutes

Practice of law by person who is not member of California State Bar, and not otherwise authorized by statute or court rule to practice law in California, is prohibited and punishable as misdemeanor. *Bus. & Prof. Code §§ 6125, 6126*

Practice of law by notary public in violation of *Bus. & Prof. Code § 6125* as ground for discipline. *Gov. Code § 8214.1(g)*

[6] Decisions

Undertaking to draft valid will by notary public who is not member of California State Bar as unauthorized practice of law. *Biakanja v. Irving (1958) 49 Cal. 2d 647, 651, 320 P.2d 16*

Notary public who drew and improperly supervised execution of will, substituting jurat for required attestation, as liable to beneficiary named in will for damages sustained as result of will's being denied admission to probate because of notary's negligence in failing to have will properly attested as required by *Prob. Code § 50*. *Biakanja v. Irving (1958) 49 Cal. 2d 647, 648-651, 320 P.2d 16* (disapproving *Buckley v. Gray (1895) 110 Cal. 339, 42 P. 900* and *Mickel v. Murphy (1957) 147 Cal. App. 2d 718, 305 P.2d 993* , insofar as these cases are in conflict with foregoing rule)

Notary public as breaching no duty in taking and certifying acknowledgment of will at request of testator who believed that this would result in creating valid will, even though notary public knew it would not, since acknowledgment of execution of written instruments is ministerial act devoid of exercise of discretion and for notary to have advised testator of legal effect would have been illegal act, since it would have constituted unlawful practice of law. *Vanderhoof v. Prudential Sav. & Loan Asso., (1975) 46 Cal. App. 3d 507, 511512, 120 Cal. Rptr. 207*

[7] Law Reviews

Note, "Torts: The Privity Rule: Liability for Injury to Intangible Interests Based on Negligent Performance of a Contract," *46 Cal. L. Rev. 851 (1958)*

[8] Cross References

For a discussion and forms of complaints for use in negligence actions generally, see Ch. 380, *Negligence* .

For memoranda of points and authorities for use in actions based on negligence, see 11 California Points and Authorities, *Negligence*.

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Chapter 391 NUISANCE

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§ 391.94 Complaint for Temporary Writ of Injunction [Health & Safety Code § 11573; Code Civ. Proc. §§ 526, 527(a)] and Permanent Injunction [Civ. Code § 3422; Health & Safety Code §§ 11570, 11571] to Abate Public or Private Nuisance and for Damages [Civ. Code § 3333; Health & Safety Code § 11570]--Buildings or Places Where Controlled Substances Are Manufactured, Sold, or Kept [Health & Safety Code §§ 11570-11587]

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§ 391.95 Allegation of Liability for Damages for Personal Injury [Civ. Code § 3333; Code Civ. Proc. § 731] Based on Nuisance [Civ. Code § 3479]--Cause of Action Attachment to Judicial Council Form of Complaint for Personal Injury [Code Civ. Proc. § 425.12]

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[1] FORM

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[1] FORM

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§ 391.101 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Business Operating in Permitted Zone [Code Civ. Proc. § 731a]

[1] FORM

[2] Use of Form

[3] Cross References

§ 391.102 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--No Notice of Nuisance to Successive Owner

[1] FORM

[2] Use of Form

[3] Cross References

§ 391.103 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Statute of Limitations [Code Civ. Proc. §§ 335.1, 338(b), (c), 458]

[1] FORM

[2] Use of Form

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§ 391.104 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Preexisting Agricultural Use Not Nuisance [Civ. Code § 3482.5(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 391.105 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Preexisting Agricultural Processing Use Not Nuisance [Civ. Code § 3482.6(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 391.106 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Obstruction of Light and Air Not Nuisance

[1] FORM

[2] Use of Form

[3] Cross References

§ 391.107 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Doctrine of Balancing of Conveniences

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 391.108 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)] to Owner's Action for Damages for Creation of Nuisance by Lessee--Lawful Use Was Consented to by Owner

[1] FORM

[2] Use of Form

[3] Cross References

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34-391 California Forms of Pleading and Practice--Annotated § 391.01

§ 391.01 Scope of Chapter

This chapter discusses and contains forms for use in nuisance actions. Included are complaint forms seeking the abatement of a private nuisance [*see § 391.90*], and a public nuisance [*see § 391.91*], a threatened nuisance [*see § 391.92*] and several forms specifically alleging the most common nuisances [*see §§ 391.93 -391.99*]. Also included are allegation forms for use in asserting, in an answer to a nuisance action, the most common affirmative defenses [*see §§ 391.100 -391.108*].

For forms for use in actions between adjoining landowners, see Ch. 11, *Adjoining Landowners* . For general forms relating to temporary restraining orders and preliminary and permanent injunctions, see Ch. 303, *Injunctions* . For forms relating to pollution as a nuisance, see Ch. 418, *Pollution and Environmental Matters* . For forms for use in nuisance actions against public entities, see Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities* . For forms for use in trespass actions, see Ch. 550, *Trespass* .

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§ 391.02 Cross References

For a discussion and forms for use in nuisance actions between adjoining landowners, see Ch. 11, *Adjoining Landowners* .

For a discussion of nuisance caused by airports, see Ch. 16, *Airplanes and Airports* .

For a form relating to, and a discussion of nuisances caused by the unlawful sale, serving, or giving away of alcoholic beverages, see Ch. 19, *Alcoholic Beverages: Civil Liability* .

For a complaint for nuisance caused by dogs on the property of plaintiff, see Ch. 23, *Animals: Civil Liability* .

For a procedural guide, forms, and a discussion of the use of injunctions generally, see Ch. 303, *Injunctions* .

For a discussion and forms for use in public and private nuisance actions related to pollution, see Ch. 418, *Pollution and Environmental Matters* .

For a petition for writ of mandate to compel a municipal or county government to vacate an order revoking a business license on the ground that the business constitutes a public nuisance, see Ch. 471B, *Licensing by Public Agencies* .

For a discussion and forms for use in a nuisance action against a public entity, see Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities* .

For a discussion and forms for use in trespass actions, see Ch. 550, *Trespass* .

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[Reserved]

§§ 391.03[Reserved]

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§ 391.10 Governing Statutes

Statutory provisions generally defining and providing for abatement of nuisances are found in Civ. Code §§ 3479-3503, Code Civ. Proc. §§ 731, 731.5, and *Penal Code §§ 370-372*.

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§ 391.11 Definitions

[1] Nuisance

The California legislature has defined a nuisance as anything that is injurious to health, is indecent or offensive to the senses, or is an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property or that unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, river, bay, stream, canal, or basin, or of any public park, square, street, or highway [*Civ. Code § 3479*; *Penal Code § 370*]. An act that affects an entire community or neighborhood or any considerable number of persons is not less a nuisance because the extent of the annoyance or damage inflicted on individuals is unequal [*Penal Code § 371*].

In a broader sense, the term "nuisance" is applied to a multiplicity of wrongful acts that may arise out of numerous types of tortious conduct, whether negligent, intentional, or involving ultrahazardous activities [*Sturges v. Charles L. Harney, Inc. (1958) 165 Cal. App. 2d 306, 317-318, 331 P.2d 1072]* . Activities that disturb or prevent the comfortable enjoyment of property are sufficient to constitute nuisances even though they do not directly damage land or prevent its use [*Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 126, 99 Cal. Rptr. 350]* .

Although California's broad statutory definition of nuisance appears to embrace nearly any type of interference with the enjoyment of property, it does not extend to permitting recovery for a defective product under a nuisance cause of action [*City of San Diego v. United States Gypsum Co. (1994) 30 Cal. App. 4th 575, 585-586, 35 Cal. Rptr. 2d 876* ; *see § 391.25[5]*].

[2] Abatement of Nuisance

Abatement of a nuisance is defined in Black's Law Dictionary as "the removal, stoppage, prostration, or destruction of that which causes a nuisance, whether by breaking or pulling it down, or otherwise removing, destroying, or effacing it" [Black's Law Dictionary (5th ed. 1979) at 962].

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§ 391.12 Public Nuisance

A public nuisance is one that affects at the same time an entire community or neighborhood or any considerable number of persons, although the extent of the annoyance or damage inflicted on individuals may be unequal [*Civ. Code § 3480*]. The term "public nuisance" comprehends an act or omission that interferes with the interests of the community or the health, comfort, and convenience of the general public [*Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 123, 99 Cal. Rptr. 350]* . No lapse of time can legalize a public nuisance that amounts to an actual obstruction of a public right [*Civ. Code § 3490*]. For an allegation form for use in a complaint based on a public nuisance, see *§ 391.91*.

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§ 391.13 Private Nuisance

[1] Definition

The legislature has defined a "private nuisance" as every nuisance not included in the definition of a public nuisance [*Civ. Code § 3481*; *see Civ. Code § 3480* and § 391.12 regarding definition of public nuisance]. The essence of a private nuisance is an interference with the use and enjoyment of a property right. The fact that plaintiff may have suffered a personal injury or have suffered an interference with some purely personal right is not sufficient to support an action based on private nuisance; there must be an interference with the use and enjoyment of a property interest. Any interest sufficient to be dignified as a property right is sufficient to support an action based on a private nuisance. Such an interest would include a tenancy for a term, but not that of a licensee, lodger or employee [*Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 124-125, 99 Cal. Rptr. 350]* . Mere apprehension of injury from a dangerous condition may constitute a nuisance if it interferes with the comfortable enjoyment of property [*McIvor v. Mercer-Fraser Co. (1946) 76 Cal. App. 2d 247, 254, 172 P.2d 758* ; *see also Lew v. Superior Court (1993) 20 Cal. App. 4th 866, 873, 25 Cal. Rptr. 2d 42]* .

For a form of complaint for damages based on a private nuisance, see *§ 391.90*.

[2] Requirement of Unreasonable Conduct Causing Substantial Harm

The interference with use and enjoyment of a property right, to constitute a nuisance, must be conduct that is unreasonable and that causes substantial harm. The general rule is that the unreasonable, unwarrantable, or unlawful use by a person of his or her own property that interferes with the rights of others is a nuisance, and that any unwarranted activity that causes substantial injury to the property of another or obstructs its reasonable use and enjoyment is a nuisance that may be abated [*Hutcherson v. Alexander (1968) 264 Cal. App. 2d 126, 130, 70 Cal. Rptr. 366]* .

In determining what is reasonable, courts look to the totality of the circumstances and attempt to balance the interests of both parties [*Boccardo v. United States (N.D. Cal. 1972) 341 F. Supp. 858, 865]* . Furthermore, in determining whether the harm is so unreasonable that it may constitute a nuisance, the gravity of the harm must be weighed against the utility of the defendant's conduct [*Shields v. Wondries (1957) 154 Cal. App. 2d 249, 255, 316 P.2d 9]* . One court has stated that people who live in organized communities must of necessity suffer some inconvenience and annoyance

from their neighbors and must submit to annoyances consequent to the reasonable use of property by others. Thus, not every annoyance or disturbance is a nuisance [*Schild v. Rubin (1991) 232 Cal. App. 3d 755, 764, 283 Cal. Rptr. 533]* .

If a holding that certain conduct causes substantial harm would conflict with a prior determination by the Public Utilities Commission, then no recovery is available, because *Pub. Util. Code § 1759* prohibits an award of damages that would frustrate declared policies of the commission [*San Diego Gas & Elec. v. Superior Court (1996) 13 Cal. 4th 893, 903, 55 Cal. Rptr. 2d 724, 920 P.2d 669]* . For further discussion, see *§ 391.30[2]*.

Harm that is sufficiently substantial and unreasonable to justify an award of damages may not necessarily be sufficient to justify issuance of an injunction. Circumstances in which a plaintiff in an action based on nuisance may be entitled to injunctive relief are *discussed under § 391.30[4]*.

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§ 391.14 Comparison of Private and Public Nuisances

A private nuisance is a civil wrong based on a disturbance of private rights in land, whereas a public nuisance is not dependent on disturbance of any rights in land but is based on interference with rights of the community at large [*Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 124, 99 Cal. Rptr. 350]* . On many occasions, a public nuisance will also be a private nuisance. The distinction between the two, although sometimes hard to draw, is important because it is determinative of the standing of a private party to bring an action. If the alleged nuisance is not a private nuisance to a private individual as well, that individual does not have a cause of action on account of a public nuisance unless he or she alleges facts showing special injury to himself or herself of a character different in kind, rather than degree, from that suffered by the general public [*Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 124, 99 Cal. Rptr. 350* ; *see Civ. Code § 3493*]. For example, allegations that the health of the general public and plaintiffs, as members of the public, is being injured by defendant's activity (pollution), but that the health of each plaintiff is being injured to a greater degree, merely alleges damages different in degree, but not kind, suffered by the general public and therefore is insufficient to support a private action based on a public nuisance [*Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 125, 99 Cal. Rptr. 350* ; *see also Koll-Irvine Ctr. Prop. Owners Ass'n v. County of Orange (1994) 24 Cal. App. 4th 1036, 1040-1041, 29 Cal. Rptr. 2d 664* ; *cf. Birke v. Oakwood Worldwide (2009) 169 Cal. App. 4th 1540, 1549-1550, 87 Cal. Rptr. 3d 602]* .

If, however, the alleged nuisance is a private nuisance to a private individual as well as a public nuisance, the kind-versus-degree rule does not apply. Thus, neighbors of an apartment building that was used for the sale of illegal drugs were entitled to bring a suit for damages against the building's owners, because the activities at the building adversely affected the neighbors' use and enjoyment of their homes and was therefore a private nuisance [*see Lew v. Superior Court (1993) 20 Cal. App. 4th 866, 873, 25 Cal. Rptr. 2d 42]* . Similarly, the tenant of an apartment could bring suit against the owners of the apartment complex for harm caused by secondhand cigarette smoke that allegedly permeated the outdoor common areas without a showing that the tenant suffered damage different in kind from that suffered by the general public, so long as plaintiff alleged that the presence of the secondhand smoke interfered with plaintiff's use and enjoyment of the common area outdoor facilities [*Birke v. Oakwood Worldwide (2009) 169 Cal. App. 4th 1540, 1551, 87 Cal. Rptr. 3d 602*].

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§ 391.15 Permanent Nuisance

A nuisance is considered permanent if it is of such a character that it will presumably continue indefinitely and, as a practical matter, cannot be abated [*Phillips v. City of Pasadena (1945) 27 Cal. 2d 104, 107, 162 P.2d 625]* . The clearest example of a permanent nuisance is one in which the offending structure or condition is maintained as a necessary part of the operations of a public utility [*Spaulding v. Cameron (1952) 38 Cal. 2d 265, 267, 239 P.2d 625* ; *see also Bartleson v. United States (9th Cir. 1996) 96 F.3d 1270, 1276* (likening military artillery range to public utility for purposes of permanent nuisance)]. Nevertheless, if there is doubt regarding the permanence of the injury, a plaintiff may elect whether to treat a particular nuisance as permanent or continuing [*Baker v. Burbank-Glendale-Pasadena Airport Auth. (1985) 39 Cal. 3d 862, 870, 218 Cal. Rptr. 293, 705 P.2d 866* ; *see also KFC W., Inc. v. Meghrig (1994) 23 Cal. App. 4th 1167, 1180-1181, 28 Cal. Rptr. 2d 676]* .

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§ 391.16 Continuing Nuisance

A nuisance is considered continuing, rather than permanent, if it may be abated or discontinued at any time [*Mangini v. Aerojet-General Corp. (1991) 230 Cal. App. 3d 1125, 1146, 281 Cal. Rptr. 827* ; *see also KFC W., Inc. v. Meghrig (1994) 23 Cal. App. 4th 1167, 1180-1181, 28 Cal. Rptr. 2d 676]* . Every repetition of a continuing nuisance is a separate wrong for which the injured person may bring successive actions for damages until the nuisance is abated, even though an action based on the original wrong may be barred by the statute of limitations [*Phillips v. City of Pasadena (1945) 27 Cal. 2d 104, 107-108, 162 P.2d 625* ; *see, e.g., Wilshire Westwood Assocs. v. Atlantic Richfield Co. (1993) 20 Cal. App. 4th 732, 744, 24 Cal. Rptr. 2d 562* (action to recover expenses incurred in abating contamination by gas station on property as timely because nuisance was continuing); *see § 391.91[5]*].

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§ 391.17 Comparison of Permanent and Continuing Nuisances

In determining whether a nuisance is permanent or continuing [*see § 391.15*], the courts do not mechanically apply the discontinued-or-abated rubric. Regardless of literal abatability, if either abatement or successive lawsuits would be inappropriate or unfair as a *practical* matter, the nuisance may be regarded as permanent and the plaintiff relegated to a single lawsuit, subject to a single limitation period, for all past and anticipated future harms [*see Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 269, 271, 288 P.2d 507* ; *Capogeannis v. Superior Court (1993) 12 Cal. App. 4th 668, 678, 15 Cal. Rptr. 2d 796]* . Courts make this determination by considering such factors as expense, time, and legitimate competing interests [*see Capogeannis v. Superior Court (1993) 12 Cal. App. 4th 668, 678, 15 Cal. Rptr. 2d 796* (citing *Spaulding v. Cameron (1952) 38 Cal. 2d 265, 268, 239 P.2d 625*)].

However, the courts prefer finding a continuing nuisance to protect the plaintiff from contingencies such as unforeseen future injury and the statute of limitations itself, and to encourage abatement [*Baker v. Burbank-Glendale-Pasadena Airport Auth. (1985) 39 Cal. 3d 862, 870, 218 Cal. Rptr. 293, 705 P.2d 866* ; *Capogeannis v. Superior Court (1993) 12 Cal. App. 4th 668, 678, 15 Cal. Rptr. 2d 796]* . Thus, if it is doubtful that the injury caused by a nuisance is permanent, courts are inclined to favor the right to successive actions [*see Baker v. Burbank-Glendale-Pasadena Airport Auth. (1985) 39 Cal. 3d 862, 872, 218 Cal. Rptr. 293, 705 P.2d 866* ; *Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1148, 281 Cal. Rptr. 827]* . Furthermore, as discussed in *§ 391.15*, if the distinction between permanent and continuing nuisance is close or doubtful, the plaintiff is permitted to elect which theory to pursue [*see Capogeannis v. Superior Court (1993) 12 Cal. App. 4th 668, 679, 15 Cal. Rptr. 2d 796* ; *Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1145, 281 Cal. Rptr. 827* ; *see also Spaulding v. Cameron (1952) 38 Cal. 2d 265, 267-269, 239 P.2d 625* ; *KFC W., Inc. v. Meghrig (1994) 23 Cal. App. 4th 1167, 1180-1181, 28 Cal. Rptr. 2d 676]* .

However, a plaintiff cannot avoid the three-year limitations period applicable to actions for a permanent nuisance simply by characterizing the action as one for a continuing nuisance. For limitations purposes, if the action is brought after the three-year limitations period has expired, a plaintiff is required to prove that the nuisance is actually a continuing nuisance rather than a permanent one by presenting substantial evidence that the injury is capable of being abated and that the cost of abatement is reasonable [*Mangini v. Aerojet-Gen. Corp. (1996) 12 Cal. 4th 1087, 1090, 51 Cal. Rptr. 2d 272, 912 P.2d 1220]* . Failure to provide evidence showing that plaintiff's property can be repaired or the damage abated at a reasonable cost by reasonable means will defeat a claim that the nuisance should be treated as a

continuing nuisance [*McCoy v. Gustafson (2009) 180 Cal. App. 4th 56, 85-86, 103 Cal. Rptr. 3d 37]* . Expert witness testimony may be required to prove that abatement or repair can be achieved at a reasonable cost by reasonable means, and failure to designate an expert to provide such testimony can defeat an effort to prove a continuing nuisance [*McCoy v. Gustafson (2009) 180 Cal. App. 4th 56, 96-101, 103 Cal. Rptr. 3d 37]* .

The continuing nature of a nuisance refers to the continuing damage caused by the offensive condition, not the acts causing the offensive conduct. Thus, a nuisance may be continuing even if the defendant's offensive conduct has ended years earlier [*Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1147, 281 Cal. Rptr. 827]* . In addition, the salient feature of a continuing trespass or nuisance is that its impact may vary over time [*see Field-Escandon v. DeMann (1988) 204 Cal. App. 3d 228, 234, 251 Cal. Rptr. 49* ; *see also Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1147, 281 Cal. Rptr. 827* (holding that, assuming this test is correct statement of law, hazardous waste contamination that has migrated or spread on property continuously since it was initially dumped, and impact of which has therefore varied over time, would satisfy the *Field-Escandon* test)].

The distinction between continuing and permanent nuisances, irrespective of whether they are public or private nuisances, is important in determining the amount of damages recoverable, whether a plaintiff is entitled to an injunction, and when the statute of limitations commences to run. For a discussion of this aspect of nuisances, see *§§ 391.26* and *391.31*.

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§ 391.18 Nuisance Per Se

The semantics of *Civ. Code § 3479* provide little guidance in ascertaining the degree of danger or harm which must be present for a condition or an activity to be considered a nuisance. If *Civ. Code § 3479* is the only applicable statute, considerable judicial discretion is allowed in determining whether an alleged danger is sufficiently serious to justify abatement [*City of Bakersfield v. Miller (1966) 64 Cal. 2d 93, 99, 48 Cal. Rptr. 889, 410 P.2d 393]* . However, in certain areas of the law the term has been defined with more particularity. Any action or condition declared by the legislature to be a public nuisance is a nuisance per se. No proof is required, beyond the actual fact of the prescribed actions or conditions, to establish them as nuisances. No ill effects need be proved [*McClatchy v. Laguna Lands Ltd. (1917) 32 Cal. App. 718, 725, 164 P. 41]* . There is no need for an allegation of irreparable injury in order to obtain an injunction when the facts allege a nuisance per se [*Los Angeles Brick & Clay Prods. Co. v. City of Los Angeles (1943) 60 Cal. App. 2d 478, 486, 141 P.2d 46]* . In addition to the state legislature, municipal legislative bodies have the power to define the standards by which courts are to judge whether or not a nuisance exists [*City of Bakersfield v. Miller (1966) 64 Cal. 2d 93, 100, 48 Cal. Rptr. 889, 410 P.2d 393]* . A nuisance per se may also be found when an activity violates a local zoning ordinance [*see, e.g.,* *City of Claremont v. Kruse (2009) 177 Cal. App. 4th 1153, 1164-1166, 100 Cal. Rptr. 3d 1* (injunction against medical marijuana dispensary upheld as nuisance per se because dispensary violated city's local zoning laws)].

The following are examples of activities or conditions declared by the state legislature or municipal bodies to be nuisances: [*see* *In re Application of Brambini (1923) 192 Cal. 19, 39, 218 P. 569* ; the use as dwelling units of areas zoned only for storage purposes [*see* *City & County of San Francisco v. Padilla (1972) 23 Cal. App. 3d 388, 401, 100 Cal. Rptr. 223]* ; the keeping and maintaining of more than five hogs [*see* *People v. Johnson (1954) 129 Cal. App. 2d 1, 8, 277 P.2d 45]* ; the use of a building for illegal gambling or prostitution [*Penal Code § 11225(a)*; *see also § 391.24[11]*], or as a bathhouse that encourages or permits conduct that, according to federal guidelines, can transmit AIDS [*Penal Code § 11225(b)*; *see also § 391.24[12]*]; and the use of a building for selling, serving, storing, keeping, manufacturing, or giving away a controlled substance [*see Health & Safety Code § 11570*; *Lew v. Superior Court (1993) 20 Cal. App. 4th 866, 871, 25 Cal. Rptr. 2d 42* ; *see also § 391.24[13]*].

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§ 391.19 Limited Injunctive Relief Against Zoned Businesses

Injunctive relief is not available to private persons against a commercial enterprise or airport operating in a zone in which its operation is expressly permitted unless it is employing "unnecessary and injurious methods" of operation [*Code Civ. Proc. § 731a*]. Thus, an injunction may be obtained against a business operating in an appropriate zone or district only if it is proved the business employs "unnecessary and injurious methods" of operation, or if an action is commenced in the name of the people of the State of California [*Code Civ. Proc. § 731a*].

Code Civ. Proc. § 731a was enacted to eliminate injunctive relief when the business is operated in its appropriate zone and the only showing is an injury and nuisance to the plaintiff from the business's operation. To be entitled to an injunction, plaintiff must now show more, namely, that the defendant employed unnecessary and injurious methods in the operation of the business [*Gelfand v. O'Haver (1948) 33 Cal. 2d 218, 220, 200 P.2d 790]* . This statute applies only to injunctive relief sought by a private person and does not bar an action for recovery of damages [*Wilson v. Interlake Steel Co. (1982) 32 Cal. 3d 229, 234, 185 Cal. Rptr. 280, 649 P.2d 922* ; *Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 130, 99 Cal. Rptr. 350]* . For a further discussion of this statute,§ 391.30[3]. For a form asserting an affirmative defense based on this statute, see *§ 391.101*.

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§ 391.20 Doctrine of Balancing of Conveniences

Once a court has determined that a defendant is a wrongdoer and that a plaintiff's property has been occupied, the court has a great deal of discretion in deciding whether the plaintiff is entitled to a mandatory injunction to abate the nuisance [*see* Ch. 303, *Injunctions*]. In reaching this decision, courts attempt to balance the conveniences of the parties and consider the following guidelines [*see* *Loma Portal Civic Club v. American Airlines, Inc. (1964) 61 Cal. 2d 582, 588, 39 Cal. Rptr. 708, 394 P.2d 548* ; *Dolske v. Gormley (1962) 58 Cal. 2d 513, 520-521, 25 Cal. Rptr. 270, 375 P.2d 174* ; *Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 200, 323 P.2d 1001* ; *Anderson v. Souza (1952) 38 Cal. 2d 825, 841, 243 P.2d 497* ; *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 559, 250 P.2d 660]* :

- Doubtful cases should be decided in favor of plaintiff.

- For the court to refuse the injunction defendant must be innocent; the nuisance must not be the result of defendant's willful act.

- Plaintiff must have acted in good faith, in no way be responsible for the nuisance, and must not have delayed unnecessarily in seeking the injunction.

- The interests of third persons and the general public must be considered.

- The relative hardships on the parties must be considered; will either side suffer irreparable injuries if an injunction is or is not granted.

- The character of the interest to be protected must be considered.

- Can relief for defendant be fashioned which is no greater than necessary to protect defendant's interest; defendant should not be granted a fee interest in plaintiff's property if an easement would suffice to protect defendant's interest.

For further discussion of this doctrine, see *§ 391.30[4]*. For a form asserting an affirmative defense based on this

doctrine, see *§ 391.107*.

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§ 391.21 Persons and Entities Liable for Nuisance

[1] Public Entities

Public entitles are not immune from liability based on nuisance [*Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 936-937, 101 Cal. Rptr. 568, 496 P.2d 480]* . A municipality may be found liable for creating or maintaining a nuisance even though a governmental activity is involved [*Phillips v. City of Pasadena (1945) 27 Cal. 2d 104, 106, 162 P.2d 625]* . Nuisance actions against public entities are not barred by the immunity provisions of *Gov. Code § 815* (limiting liability of public entities) to the extent that they are founded on statutes such as *Civ. Code §§ 3479-3481* [*Vedder v. County of Imperial (1974) 36 Cal. App. 3d 654, 661, 111 Cal. Rptr. 728]* . For further discussion, see Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities* .

[2] Successive Owners

Every successive owner of property who neglects to abate a continuing nuisance on or in the use of the property, created by a former owner, is liable in the same manner as the person who created the nuisance [*Civ. Code § 3483*]. However, the successor in interest must have actual or constructive notice or knowledge of the nuisance before he or she may be held liable [*see Pierce v. German Sav. & Loan Soc'y (1887) 72 Cal. 180, 183, 13 P. 478* ; *Reinhard v. Lawrence Warehouse Co. (1940) 41 Cal. App. 2d 741, 746, 107 P.2d 501]* . For a form asserting an affirmative defense based on lack of notice of the nuisance to a successive owner, see *§ 391.102*.

[3] Prior Owners or Possessors of Affected Property

Nuisance does not require an invasion of real property other than one's own, and therefore a prior owner or possessor of property may be liable to a later owner of the same property for committing a nuisance [*Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App. 4th 334, 343, 23 Cal. Rptr. 2d 377* ; *see also KFC W., Inc. v. Meghrig (1994) 23 Cal. App. 4th 1167, 1179, 28 Cal. Rptr. 2d 676* ; *Wilshire Westwood Assocs. v. Atlantic Richfield Co. (1993) 20 Cal. App. 4th 732, 745-746, 24 Cal. Rptr. 2d 562* ; *Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1134, 281 Cal. Rptr. 827]* . For example, an agricultural landowner was entitled to bring a nuisance action against the oil companies that formerly owned the real property for having discharged hazardous waste onto the property that was continuing to pollute the soil and groundwater [*Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App.*

4th 334, 344, 23 Cal. Rptr. 2d 377] . The applicable statutes governing nuisance law in California [*see, e.g., Civ. Code § 3479*] have been construed broadly to allow an owner of property to sue for damages from a nuisance on his or her own property as well as damages from nuisances originating on neighboring property [*Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App. 4th 334, 343, 23 Cal. Rptr. 2d 377* ; *see also Wilshire Westwood Assocs. v. Atlantic Richfield Co. (1993) 20 Cal. App. 4th 732, 745-746, 24 Cal. Rptr. 2d 562* ; *Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1134, 281 Cal. Rptr. 827]* .

A former owner that created a nuisance on its own property cannot claim a "consent defense." Lessees being sued by their lessors are permitted this defense to avoid an absurd result. For example, if an owner leased property for the purpose of operating a quarry, it would be ludicrous to permit the owner to sue the lessee at the end of the lease term for creating the inevitable hole that was the object of the lease [*see § 391.30[8]*]. However, it makes no sense to extend this rule and thereby hold that an owner is not liable to a successor owner of the property for creating a nuisance on that property merely because the original owner "consented" to his or her own use of the property [*Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App. 4th 334, 344-345, 23 Cal. Rptr. 2d 377* ; *see also Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1138, 281 Cal. Rptr. 827]* . Moreover, a former lessee that has created a nuisance on the leased property is liable as a prior possessor to subsequent owners who acquire the property and then discover the nuisance, because the subsequent owners have not consented to the nuisance [*see Wilshire Westwood Assocs. v. Atlantic Richfield Co. (1993) 20 Cal. App. 4th 732, 745-746, 24 Cal. Rptr. 2d 562]* .

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§ 391.22 Nuisance and Negligence

[1] Distinction Between Harm and Conduct

Nuisance is not a separate tort but a species of damage occasioned by conduct that is tortious because it falls into the usual categories of tort liability. Nuisance is a field of tort liability, rather than a type of tortious conduct. It has reference to the interests invaded, to the damage as harm inflicted, but not to any particular kind of act or omission that has led to the invasion. The attempt frequently made to distinguish between nuisance and negligence is based on an entirely mistaken emphasis on what the defendant has done rather than the result which has followed, overlooking completely the well-established fact that negligence is merely one type of conduct which may give rise to a nuisance [*Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 372-373, 82 Cal. Rptr. 689]* .

[2] Liability for Nuisance Without Negligence

Although liability for a nuisance may exist without negligence, the torts of negligence and nuisance may be, and frequently are, coexisting and practically inseparable. However, a nuisance need not grow out of acts of negligence. A nuisance may be the result of skillful efforts directed toward accomplishing the desired end. The skillful efforts, however, may lack proper regard for the rights of others [*Sturges v. Charles L. Harney, Inc. (1958) 165 Cal. App. 2d 306, 318, 331 P.2d 1072]* . It is the injury to property itself which gives rise to liability based on nuisance, irrespective of care or lack of care. It is immaterial whether the acts were willful or negligent; the essential fact is that, whatever the cause, the result is a nuisance. The adoption of the most advanced machinery and methods of production do not justify the continuance of that which, in spite of them, remains a nuisance [*Snow v. Marian Realty Co. (1931) 212 Cal. 622, 625-626, 299 P. 720]* .

However, one court of appeal has concluded that nuisance liability based on a natural (as opposed to an artificial) condition of land cannot be imposed absent a finding that there was negligence in dealing with that condition *see Lussier v. San Lorenzo Valley Water Dist. (1988) 206 Cal. App. 3d 92, 102, 106, 253 Cal. Rptr. 470* (holding that landowner not liable on nuisance theory for damage allegedly caused by accumulation of vegetation on watershed after rainstorms if no negligent conduct alleged)].

[3] Pleading and Proof of Nuisance and Negligence

Negligence need not necessarily be pleaded or proved to recover for nuisance. When both are alleged, nuisance and negligence are merely different theories of recovery for invasion of the same primary right; there is but one cause of action, although it may be stated in two counts [*Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 372-373, 82 Cal. Rptr. 689]* .

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34-391 California Forms of Pleading and Practice--Annotated § 391.23

§ 391.23 Attractive Nuisance Doctrine Abolished

The common law doctrine of attractive nuisance imposed liablity on the possessor of land for bodily harm to young children trespassers caused by a structure or other artificial condition maintained on the land when four conditions were met [*see King v. Lennen (1959) 53 Cal. 2d 340, 343, 1 Cal. Rptr. 665, 348 P.2d 98* , approving Restatement of Torts, § 339]. *Under Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* , however, the liability of a possessor of property to trespassing children is no longer limited by the conditions set out in Restatement (Second) of Torts, § 339, or by the terms of other special doctrines and theories created as exceptions to a general rule barring trespassers from recovery for negligence, but is now governed by *Civ. Code § 1714(a)*, which imposes general liability on every person for injuries occasioned to others by want of ordinary care in the management of his or her property [*see Beard v. Atchison, Topeka & Santa Fe Ry. Co. (1970) 4 Cal. App. 3d 129, 135-136, 84 Cal. Rptr. 449* ; *see generally* Ch. 421, *Premises Liability*]. The attractive nuisance doctrine has, therefore, been effectively abolished in California [*Smith v. Americania Motor Lodge (1974) 39 Cal. App. 3d 1, 7, 113 Cal. Rptr. 771]* . For further discussion, see Ch. 421, *Premises Liability* .

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§ 391.24 Activities Considered Nuisances

[1] Broad Range of Possible Activities

The term "nuisance" is broad enough to encompass almost any conceivable type of interference with enjoyment or use of land or property [*Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 919, 162 Cal. Rptr. 194]* . The following are examples of kinds of activities and conditions which have been judged to be nuisances. This discussion is not intended to be exhaustive; rather, its purpose is to acquaint the reader with some of the more common situations giving rise to nuisance actions.

[2] Airports

Complaints for property and personal injury damages caused by operation of an airport and the resulting fumes, vibration, and noise from jet aircraft have been held to state a cause of action for nuisance [*Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 937, 101 Cal. Rptr. 568, 496 P.2d 480]* . Nuisance actions against municipalities for airport operation are not barred by federal preemption [*Greater Westchester Homeowners Ass'n v. City of Los Angeles (1979) 26 Cal. 3d 86, 100, 160 Cal. Rptr. 733, 603 P.2d 1329]* .

Abatement of properly zoned airports is restricted by *Code Civ. Proc. § 731a*. Also, *Code Civ. Proc. § 731b* provides that proof that an airport has been in existence for three years constitutes a rebuttable presumption that the airport is not a nuisance.

For further discussion and forms, see Ch. 16, *Airplanes and Airports* . For a form asserting an affirmative defense based on the fact that a business is operating in a permitted zone, see *§ 391.101*.

[3] Encroachments

The maintenance of a building which overhangs or encroaches on the premises of another constitutes a nuisance, regardless of whether or not it is due to any negligent act or omission [*Kafka v. Bozio (1923) 191 Cal. 746, 748, 218 P. 753]* . For further discussion and forms, see Ch. 11, *Adjoining Landowners* .

[4] Fire Hazards

A fire hazard constitutes a public nuisance [*Vedder v. County of Imperial (1974) 36 Cal. App. 3d 654, 661, 111 Cal. Rptr. 728]* . The fact that a building was constructed in accordance with all existing statutes does not immunize it from subsequent abatement as a public nuisance when it is judged to be a fire hazard using standards from statutes enacted subsequent to the erection of the building. In appropriate circumstances, a governmental agency may abate a public nuisance created by a building which is a fire hazard by demolishing the building [*City of Bakersfield v. Miller (1966) 64 Cal. 2d 93, 101-103, 48 Cal. Rptr. 889, 410 P.2d 393]* . For a form of complaint asserting a nuisance based on a hazard on nearby property, see *§ 391.93*.

[5] Noise

Noise which unreasonably interferes with neighbors' comfortable enjoyment of life and property constitutes a nuisance [*People v. Mason (1981) 124 Cal. App. 3d 348, 353-354, 177 Cal. Rptr. 284* ; *see also Anderson v. Souza (1952) 38 Cal. 2d 825, 837, 243 P.2d 497]* .

A legitimate business operating in a properly zoned district may be enjoined as a nuisance for creating too much noise even though it is in the business of creating sound. Thus, the requirements of *Code Civ. Proc. § 731a* that there be evidence of the employment of "unnecessary and injurious methods of operation" before an injunction may issue against a business operating in a zoned district were met, and the issuance of an injunction was affirmed, because defendant music studio used a residence for a studio, did nothing to soundproof it or adapt it to the operation of the business, left windows open, and permitted noise to emanate from the studio day and night [*Gelfand v. O'Haver (1948) 33 Cal. 2d 218, 221, 200 P.2d 790]* . For a form of allegation for use in a complaint based on a nuisance created by noise and vibrations, see *§ 391.96*.

The issue of noise as a nuisance creates a clear example of the courts striving to balance the right to the comfortable enjoyment of property with the right to use property for legitimate business purposes [*see § 391.52[2]*]. Appellate courts are careful to scrutinize injunctions to insure that they are not overly broad and do not enjoin the conduct of an entire business, where the business is not a nuisance per se, if a lesser restriction will afford plaintiff the relief to which he or she may be entitled. Contiguous property owners must to a reasonable degree yield their desire for privacy to the general welfare which is contributed to by the operation of legitimate businesses [*see Anderson v. Souza (1952) 38 Cal. 2d 825, 841, 843, 243 P.2d 497]* .

Thus, an injunction totally restraining defendants from operating a private airport because of the nuisance created by the attendant noise was reversed because, although concededly a nuisance, plaintiff failed to prove the airport could not be used at all without creating a nuisance [*Anderson v. Souza (1952) 38 Cal. 2d 825, 843-845, 243 P.2d 497]* . Although the amplified music, foot stomping, and hand clapping coming from another defendant's restaurant and bar was properly adjudicated a nuisance, an injunction prohibiting such noise "audible anywhere in the neighborhood" was found to be overly broad. An audible level of noise is not necessarily a nuisance. The injunction should have been worded so as to permit some noise to be audible, except that which unreasonably interfered with the plaintiffs' use and enjoyment of their property [*People v. Mason (1981) 124 Cal. App. 3d 348, 352-354, 177 Cal. Rptr. 284]* .

[6] Diversion or Obstruction of Water Flow

An act of obstruction or diversion of the natural flow of water may constitute a nuisance as defined by *Civ. Code § 3479* [*Helix Land Co. v. City of San Diego (1978) 82 Cal. App. 3d 932, 949, 147 Cal. Rptr. 683]* . Thus, a person creates a nuisance when he or she conducts leveling operations on his or her property without adequately preparing the hillside, resulting in an inundation of water and mud on plaintiff's property [*Spaulding v. Cameron (1952) 38 Cal. 2d 265, 266, 239 P.2d 625]* . A property owner who by artificial means brings water on his or her land for purposes of irrigation and allows a portion to injure adjoining land has created a nuisance [*Fredericks v. Fredericks (1951) 108 Cal. App. 2d*

242, 244, 238 P.2d 643] . For a form of allegations for use in a complaint based on a nuisance created by the diversion of water onto plaintiff's property, see *§ 391.99*.

[7] Odors

The creation of smells and noxious odors that are a source of discomfort or diminish the value of neighboring property constitutes a nuisance [*see Varjabedian v. City of Madera (1977) 20 Cal. 3d 285, 293-294, 142 Cal. Rptr. 429, 572 P.2d 43* (sewage treatment plant); *Eaton v. Klimm (1933) 217 Cal. 362, 370, 18 P.2d 678* (asphalt mixing plant); *Wade v. Campbell (1962) 200 Cal. App. 2d 54, 58, 19 Cal. Rptr. 173* (dairy farm)].

[8] Pollution of Air, Water, or Soil

The pollution of air, water, or soil may constitute a nuisance [*see Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App. 4th 334, 341, 23 Cal. Rptr. 2d 377* (soil and water); *Helix Land Co. v. City of San Diego (1978) 82 Cal. App. 3d 932, 949, 147 Cal. Rptr. 683* (water); *Guttinger v. Calaveras Cement Co. (1958) 160 Cal. App. 2d 460, 463, 325 P.2d 145* (air)]. For a form of allegations for use in a complaint based on a nuisance created by air pollution, see *§ 391.97*. For further discussion and forms relating to air and water pollution, see Ch. 418, *Pollution and Environmental Matters* .

[9] Obstruction of Streets

The unlawful barricading of a public street may constitute a nuisance for which a person specially injured may maintain an action [*Phillips v. City of Pasadena (1945) 27 Cal. 2d 104, 106, 162 P.2d 625]* . For a form of allegations for use in a complaint based on a nuisance created by the obstruction of a public street, see *§ 391.98*.

[10] Obscenity

Anything that is indecent, including conduct offensive to a community's moral sensibilities, may constitute a public nuisance, whether or not it is offensive to any of the five senses. The exhibition of obscene material, including books, magazines, films, and live performances, may be restrained as a public nuisance under the general public nuisance statutes [*Civ. Code §§ 3479, 3480*; *Penal Code §§ 370, 371*] despite the concurrent application of criminal statutes. The fact that the obscene or other indecent exhibits take place behind closed doors and are viewed only by those who choose to view them does not defeat the community's interest in regulating them [*People ex rel. Busch v. Projection Room Theater (1976) 17 Cal. 3d 42, 51, 130 Cal. Rptr. 328, 550 P.2d 600]* .

Abatement of this type of nuisance requires a prior judicial determination, after a full adversary hearing, of whether the material is obscene under prevailing law. Neither summary abatement nor temporary injunctive relief is constitutionally permissible as a remedy in the abatement of the sale or display of obscene material [*People ex rel. Camil v. Buena Vista Cinema (1976) 57 Cal. App. 3d 497, 502, 129 Cal. Rptr. 315]* . Further, the closing of bookstores or theaters, either temporarily or permanently, or the enjoining of the exhibition of magazines or films not specifically judicially determined to be obscene, constitutes an impermissible prior restraint in violation of *U.S. Const. amends. I, XIV*. Abatement must be directed to particular books or films that have been adjudged obscene rather than against the premises in which the material is sold, exhibited, or displayed [*People ex rel. Busch v. Projection Room Theater (1976) 17 Cal. 3d 42, 58-59, 130 Cal. Rptr. 328, 550 P.2d 600]* .

[11] Gambling, Lewdness, or Prostitution

The Red Light Abatement Law (*Penal Code § 11225 et seq.*) provides that every building used for the purpose of illegal gambling, lewdness, assignation, or prostitution is a nuisance that shall be enjoined, abated and prevented, whether it is a public or private nuisance [*Penal Code § 11225(a)*]. These provisions prescribe certain specific forms of relief not available under the general nuisance statutes, including temporary injunctions, removal and sale of fixtures, and closure

of the premises for one year [*Penal Code §§ 11227, 11230*]. In early 1983, the California Supreme Court held that neither the Red Light Abatement Law nor the court's general equitable powers allow the imposition of damages in an action under the Red Light Abatement Law [*see People ex rel. Van de Kamp v. American Art Enters., Inc. (1983) 33 Cal. 3d 328, 333-334, 188 Cal. Rptr. 740, 656 P.2d 1170]* . However, the legislature later that year added *Penal Code § 11230*, which allows a court, in lieu of ordering a building to be closed, to order the person responsible for the nuisance to pay damages, which are to be deposited in the Restitution Fund in the State Treasury to indemnify persons filing claims as victims of crimes.

The primary purpose of the Red Light Abatement Law is to regulate houses of ill fame and similar places where acts of lewdness and prostitution are habitually practiced and carried on as a business [*People v. Barbiere (1917) 33 Cal. App. 770, 775, 166 P. 812]* . The term "lewdness" is not synonymous with prostitution; it includes all other immoral or degenerate conduct or conversation between persons of the opposite sex and includes the solicitation of sexual acts to be performed elsewhere [*People v. Bayside Land Co. (1920) 48 Cal. App. 257, 260, 191 P. 994]* . More recent cases hold that the term is broad enough to include live lewd entertainment, such as stage shows or other exhibitions featuring obscene performances, although it may not include the mere exposure of genitals [*People ex rel. Hicks v. Sarong Gals (1972) 27 Cal. App. 3d 46, 50-52, 103 Cal. Rptr. 414* ; *see also Mitchell v. Superior Court (1989) 49 Cal. 3d 1230, 1255, 265 Cal. Rptr. 144, 783 P.2d 731* (defining "lewd" conduct under *Penal Code § 647(a)* and holding that acts were clearly lewd)]. The term "lewdness" is not broad enough to bring within the purview of the Red Light Abatement Law the exhibition of obscene magazines or films in bookstores or theaters [*People ex rel. Busch v. Projection Room Theater (1976) 17 Cal. 3d 42, 60, 130 Cal. Rptr. 328, 550 P.2d 600]* .

An injunction issued under the Red Light Abatement Law is binding only on the parties to the action or those acting in concert with them. An injunction binding on prior operators of a nuisance will not bind assignees of those with ownership interests in the property who are not operators of the nuisance, and therefore will not bind bona fide arm's-length purchasers of the property [*People ex rel. Gwinn v. Kothari (2000) 83 Cal. App. 4th 759, 768-769, 100 Cal. Rptr. 2d 29* ; *see Penal Code §§ 11226, 11234*].

[12] Bathhouses

The Red Light Abatement Law (*Penal Code § 11225 et seq.*) provides that every building or place used as a bathhouse that, as a primary activity, encourages or permits conduct that, according to guidelines of the federal Centers for Disease Control, can transmit AIDS is a nuisance that may be enjoined, abated, and prevented. Damages may also be recovered whether the nuisance is public or private [*Penal Code § 11225(b)*].

A "bathhouse" is defined as a business that, as its primary purpose, provides facilities for a spa, whirlpool, communal bath, sauna, steam bath, mineral bath, mud bath, or facilities for swimming. Activities named in the statute as included under the federal guidelines are anal intercourse, oral copulation, and vaginal intercourse [*Penal Code § 11225(b)*].

[13] Place Used for Keeping or Distributing Controlled Substances (Drug Houses)

[a] Definition

Every building or place used for unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance, precursor, or analog specified in the Uniform Controlled Substances Act [*Health & Safety Code § 11000 et seq.*], and every building or place where any of those acts take place, is a nuisance that must be enjoined, abated, and prevented. Any building that meets the definition of *Health & Safety Code § 11570* is a nuisance, whether the drug activity is conducted by the building's owner, a tenant of the building, a person entering the building with permission, or anyone else [*Lew v. Superior Court (1993) 20 Cal. App. 4th 866, 871, 25 Cal. Rptr. 2d 42]* .

[b] Gang Activity

Gang activity that obstructs residents' use of their own property, obstructs the free passage or use of public streets, and is indecent or offensive to the senses, meets the statutory standard for public nuisance [*People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1120, 60 Cal. Rptr. 2d 277, 929 P.2d 596* ; *see also People v. Englebrecht (2001) 88 Cal. App. 4th 1236, 1261* (alleged gang member was not entitled to jury trial on question of gang membership, and injunction barring specified gang activities was not unconstitutionally broad)].

[c] Abatement by Public Official or Private Citizen

A district attorney, city attorney, or private citizen may maintain an action to abate and prevent a Section 11570 nuisance whenever there is reason to believe that the nuisance is kept, maintained, or exists [*see Health & Safety Code § 11571*]. In Los Angeles County, San Diego County, and Alameda County, a city prosecutor or city attorney may also file an unlawful detainer action to remove from the property persons in violation of controlled substance provisions [*see Health & Safety Code § 11571.1*].

Relief available in an abatement action includes closure of the premises pending trial, removal and sale of personal property used in maintaining the nuisance, closure of the premises for a year, and fines [*Health & Safety Code § 11571 et seq.*].

[d] Suit for Damages

In addition to injunctive relief, damages may be recovered for a building or place that is a nuisance because it is used to keep or distribute controlled substances, whether the nuisance is public or private [*Health & Safety Code § 11570*]. For example, residents of neighboring property may bring a small claims action for damages without seeking an abatement [*Lew v. Superior Court (1993) 20 Cal. App. 4th 866, 872, 25 Cal. Rptr. 2d 42]* .

For a form of complaint by a private citizen under *Health & Safety Code § 11570*, for both injunctive relief to abate a nuisance and for damages, see *§ 391.94*.

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§ 391.25 Activities Not Considered Nuisances

[1] Commercial Agriculture

No agricultural activity, operation, or facility, or appurtenances thereof, conducted or maintained for commercial purposes, and in a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality, shall be or become a nuisance, private or public, due to any changed condition in or about the locality, after it has been operation for more than three years if it was not a nuisance at the time it began [*Civ. Code § 3482.5(a)(1)*; *see also Rancho Viejo v. Tres Amigos Viejos (2002) 100 Cal. App. 4th 550, 567, 123 Cal. Rptr. 2d 479* (if agricultural activity has been ongoing for more than three years, change of ownership of land on which activity occurs within three-year period is irrelevant to application of statute)]. The language of *Civ. Code § 3482.5(a)(1)* does not limit its preclusive effect to nuisance actions commenced by nonagricultural plaintiffs; the statute applies broadly to bar a nuisance action brought by one commercial agricultural entity against another [*Souza v. Lauppe (1997) 59 Cal. App. 4th 865, 874-875, 69 Cal. Rptr. 2d 494* (plaintiff's substitution of row crops for the different process of rice farming was changed condition within meaning of statute)]. In addition, this provision applies even if the nuisance consists of a physical invasion of neighboring property, such as might be caused by irrigation runoff, and even if the cause of action is labeled as one for trespass [*Rancho Viejo v. Tres Amigos Viejos (2002) 100 Cal. App. 4th 550, 560-563 , 123 Cal. Rptr. 2d 479]* . This statutory exclusion does not apply if the defendant obstructs the free passage or use, in the customary manner, of any navigable lake, river, bay, stream, canal, or basin, or any public party, square, street, or highway [*Civ. Code § 3482.5(b)*; *see also Civ. Code § 3482.5(c)* (subdivision not invalidating other specified statutes), and (e) (defining "agricultural activity, operation, or facility, or appurtenances thereof")].

Civ. Code § 3482.5 prevails over any contrary provision of any ordinance or regulation of any city, county, city and county, or other political subdivision of the state. However, this provision does not preclude any such entity from lawfully adopting an ordinance allowing notification to a prospective homeowner that the dwelling is in close proximity to an agricultural activity, operation, facility, or appurtenances thereof and is subject to the provisions of the section consistent with *Civ. Code § 1102.6a* (disclosures on transfer of real property) [*see Civ. Code § 3482.5(d)*].

For a form asserting the affirmative defense that a preexisting agricultural use is not a nuisance, see *§ 391.104*.

[2] District Agricultural Associations

No activity of a district agricultural association operated in compliance with *Food & Agric. Code § 3001 et seq.* shall be or become a private or public nuisance due to any changed condition in or about the locality, after it has been in operation for more than three years, if it was not a nuisance at the time it began. This exclusion does not apply, however, to any public nuisance action brought by a city, county, or city and county, alleging that the activities, operations, or conditions of a district agricultural association have substantially changed after more than three years from the time the activities, operations, or conditions began [*Civ. Code § 3482.5(a)(2)* (provision also inapplicable to activities of 52nd Dist. Agricultural Association conducted on state exposition and fair grounds)].

For a form asserting the affirmative defense that a preexisting activity of a district agricultural association is not a nuisance, see *§ 391.104*.

[3] Agricultural Processing

No agricultural processing activity, operation, or facility, or appurtenances thereof, shall be or become a private or public nuisance due to any changed condition in or about the locality after it has been in continuous operation for more than three years [*Civ. Code § 3482.6(a)*; *see also Civ. Code § 3482.6(e)* (definitions of "agricultural processing activity," "continuous operation," and "proper and accepted customs and standards")]. A nuisance action may be brought against an agricultural processing activity, operation, facility, or appurtenances thereof that has substantially increased its operations or activities after January 1, 1993, with respect to those increases in activities or operations that have a significant effect on the environment. However, for increases that have been in effect for more than three years, it is rebuttably presumed, for purposes of producing evidence, that the increase was not substantial [*Civ. Code § 3482.6(b)*].

The provisions of *Civ. Code § 3482.6* prevail over any contrary provision of any local ordinance or regulation, except regulations adopted under *Health & Safety Code § 41700* as applied to agricultural processing activities, operations, facilities, or appurtenances thereof surrounded by housing or commercial development on January 1, 1993 [*Civ. Code § 3482.6(d)*]. However, the provisions of *Civ. Code § 3482.6* do not supersede any provision of law, other than provisions of Part Three of the Civil Code [*Civ. Code § 3479 et seq.*], if the agricultural processing activity, operation, facility, or appurtenances thereof, is a public or private nuisance as specifically defined or described in that provision [*Civ. Code § 3482.6(c)*]. The exclusionary provisions of *Civ. Code § 3482.6* do not apply to any litigation pending or any cause of action accruing before January 1, 1993 [*Civ. Code § 3482.6(f)*].

For a form asserting the affirmative defense that a preexisting agricultural processing use is not a nuisance, see *§ 391.105*.

[4] Obstruction of Light and Air

No structure may be considered a nuisance merely because it obstructs the passage of light and air to the building of the adjoining owner or merely because it obstructs the adjoining owner's view of neighboring property [*Ingwersen v. Barry (1897) 118 Cal. 342, 343, 50 P. 536* ; *Sher v. Leiderman (1986) 181 Cal. App. 3d 867, 875-880, 226 Cal. Rptr. 698* ; *Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 127, 99 Cal. Rptr. 350]* . Similarly, a nuisance does not exist merely because an otherwise lawful structure built on adjacent property is considered unattractive, such as one that is viewed as being too large or ponderous [*Oliver v. AT&T Wireless Servs. (1999) 76 Cal. App. 4th 521, 534-536, 90 Cal. Rptr. 2d 491* (unattractive appearance of otherwise lawful cellular transmission tower on adjacent property could not support action for nuisance)]. For a form of affirmative defense asserting that obstruction of light and air is not a nuisance, see *§ 391.106*.

There are some statutory exceptions to the rule that obstruction of light and air does not constitute a nuisance. For example, *Civ. Code § 841.4*, the "spite fence" statute, provides that any fence or other structure in the nature of a fence

unnecessarily exceeding 10 feet in height, that is maliciously erected or maintained for the purpose of annoying the owner or occupant of adjoining property, is a private nuisance [*Civ. Code § 841.4*; *see also Wilson v. Handley (2002) 97 Cal. App. 4th 1301, 1309-1310, 119 Cal. Rptr. 2d 263* (row of trees planted along property line may be "structure in nature of fence," but other requirements of statute must be met to constitute private nuisance)]. In addition, under the appropriate circumstances, Pub. Res. Code § 25763 may provide a remedy if neighboring trees prevent sunlight from reaching a solar collector [*see* Pub. Res. Code § 25763; *Sher v. Leiderman (1986) 181 Cal. App. 3d 867, 880-883, 226 Cal. Rptr. 698]* .

[5] Defective or Polluting Products

Although California's broad statutory definition of nuisance appears to embrace nearly any type of interference with the enjoyment of property, it does not extend to permitting recovery for a defective product under a nuisance cause of action [*City of San Diego v. United States Gypsum Co. (1994) 30 Cal. App. 4th 575, 585-586, 35 Cal. Rptr. 2d 876]* . Thus, the deterioration of asbestos-containing building materials and the consequent release of asbestos fibers and dust did not give rise to a cause of action against the manufacturers and distributors of the materials for creation of a continuing nuisance. In response to plaintiff's argument that a manufacturer of a defective product could be liable in nuisance because "the stream of commerce can carry pollutants every bit as effectively as a stream of water," the court noted that under this theory nuisance would become a monster that would devour in one gulp the entire law of tort. Moreover, other jurisdictions considering this issue have not permitted recovery of damages for defective asbestos-containing building materials under a nuisance cause of action. The court concluded that plaintiffs had essentially pleaded a products liability action, not a nuisance action [*City of San Diego v. United States Gypsum Co. (1994) 30 Cal. App. 4th 575, 584-586, 35 Cal. Rptr. 2d 876]* .

Although recognizing the validity of this analysis if a plaintiff seeks damages for harm caused to the plaintiff's own property, a subsequent court of appeal opinion held that public entities, seeking abatement on behalf of the people of the state, could pursue a claim for public nuisance against lead manufacturers. In that particular case, potential liability was premised on the promotion of lead paint for use in the interior of buildings with knowledge of the hazard that this use would create, which the court recognized as different than merely producing a defective product or failing to warn of a defective product. The defendants' affirmative conduct in promoting use of the paint in an unsafe manner contributed to the creation of a hazardous condition, which could constitute a public nuisance [*County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal. App. 4th 292, 309-310, 40 Cal. Rptr. 3d 313]* . The court held, however, that the public entities could not recover damages for harm caused to their own buildings under a nuisance theory, because that would be allowing recovery of nuisance damages for what was essentially a products liability claim [*County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal. App. 4th 292, 313, 40 Cal. Rptr. 3d 313]* .

[6] Sport Shooting Ranges

A person who operates or uses a sport shooting range, as defined in *Civ. Code § 3482.1(a)*, is not subject to civil liability, including liability for nuisance, arising out of noise or noise pollution, if the range is in compliance with any noise control laws or ordinances, if any, applicable to the range at the time its construction or operation was approved, or if there were no applicable laws in operation at the time the range's construction or operation was approved [*Civ. Code § 3482.1(b)(1), see Civ. Code § 3482.1(c)*]. A sport shooting range that was in operation and not in violation of existing law at the time of enactment of any noise control law or ordinance must be permitted to continue operating, even if the range does not conform to a new ordinance or an amendment to an existing ordinance, provided that there has been no substantial change in the nature or use of the range [*Civ. Code § 3482.1(b)(2)*]. Rules or regulations adopted by any state department or agency to limit noise do not apply to sport shooting ranges that are exempt from liability under *Civ. Code § 3482.1* [*Civ. Code § 3482.1(b)(3)*].

Therefore, a person who owns or acquires real property adversely affected by a sport shooting range may not maintain a nuisance action for noise or noise pollution, if there has been no substantial change in the natureor use of the range.

However, *Civ. Code § 3482.1* does not prohibit actions for negligence or recklessness in the operation of a sport shooting range, or by a person using the range [*Civ. Code § 3482.1(c)*].

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§ 391.26 Remedies for Permanent or Continuing Nuisances

The distinction between continuing and permanent nuisances, whether the nuisance is public or private, is important in determining what damages may be recovered by a private person. These two types of nuisances are defined and discussed in *§§ 391.15* and *391.16*. If a nuisance is permanent, the plaintiff is entitled to bring only one action in which he or she may recover all damages accrued as well as anticipated future damages, including the amount of the decrease in market value of his or her property. If the nuisance is continuing and can be abated, the plaintiff is entitled to an injunction to have the nuisance abated as well as a judgment for all damages having accrued until the commencement of the action and damages for the temporary decrease in the value of the use of the property while the nuisance continues. If a continuing nuisance remains unabated, the plaintiff may bring successive actions for damages that have accrued until the commencement of each action. However, the plaintiff may not obtain a double recovery that would result from an award of both anticipated future damages as well as an injunction ordering abatement of the nuisance [*Spaulding v. Cameron (1952) 38 Cal. 2d 265, 267-269, 239 P.2d 625]* .

It is often difficult to classify a nuisance as either permanent or continuing. An attempt to do so may result in serious injustice to one of the parties. If plaintiff assumes the nuisance is not permanent and sues only for past damages, he or she may be met with the plea of res judicata in a later action for additional injury if the court then decides the nuisance was permanent in character from its inception. If the initial injury is slight and plaintiff delays suit until he or she has suffered substantial damage, and the court then determines that the nuisance was permanent, defendant may be able to raise the defense that the statute of limitations ran from the time of the initial injury [*see § 391.91[5]*]. If defendant is willing and able to abate the nuisance, however, it is unfair to award damages on the theory that it will continue [*Spaulding v. Cameron (1952) 38 Cal. 2d 265, 268, 239 P.2d 625]* . Therefore, in cases of uncertainty, plaintiff has the choice of treating the nuisance as either permanent or continuing. If defendant is not privileged to continue the nuisance and is able to abate it, he or she cannot complain if the plaintiff elects to bring successive actions as damages accrue until abatement takes place. On the other hand, if it appears improbable as a practical matter that the nuisance can or will be abated, the plaintiff should not be left to the troublesome remedy of successive actions but should be allowed in one action to obtain both past and anticipated future damages [*Spaulding v. Cameron (1952) 38 Cal. 2d 265, 268, 239 P.2d 625]* .

If time for bringing an action for a permanent nuisance has expired, a plaintiff may not bring an action for a continuing

nuisance but attempt to recover damages that would only be available in an action for a permanent nuisance. In one case, for example, a plaintiff was unable to obtain refinancing on real property due to soil contamination caused by the previous owner. Because the time period for filing a claim for a permanent nuisance had expired, plaintiff sued the previous owner for a continuing nuisance and sought to recover the difference in interest paid under the original loan and what would have been paid had plaintiff been able to obtain refinancing at a lower rate. However, the court of appeal held that plaintiff could not recover such damages for a continuing nuisance. The court concluded that the interest rate differential damages were effectively a component of damages for diminution in value of the land and as such would be available only in an action for a permanent nuisance [*Gehr v. Baker Hughes Oil Field Operations, Inc. (2008) 165 Cal. App. 4th 660, 670-671, 81 Cal. Rptr. 3d 219*].

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§ 391.27 Remedies for Private Nuisances

[1] Civil Action

Any person whose property is injuriously affected or whose personal enjoyment is lessened by a nuisance, as defined in *Civ. Code § 3479*, may bring a civil action seeking either injunctive relief or damages [*Code Civ. Proc. § 731*; *see § 391.27[2], [3]*].

[2] Seeking Injunctive Relief

An injunction is the traditional method of abating a nuisance [*Los Angeles Brick & Clay Prods. Co. v. City of Los Angeles (1943) 60 Cal. App. 2d 478, 486, 141 P.2d 46]* . Courts have a great deal of discretion in deciding whether to grant an injunction to abate a nuisance [*see § 391.52[2]*].

[3] Seeking Damages

A plaintiff may bring a nuisance action that either seeks only damages as relief or seeks both damages and abatement [*Cushing-Wetmore Co. v. Gray (1907) 152 Cal. 118, 119-120, 92 P. 70* ; *see also Lew v. Superior Court (1993) 20 Cal. App. 4th 866, 872, 25 Cal. Rptr. 2d 42]* . The amount of damages recoverable in a nuisance action is governed by *Civ. Code §§ 3281* and *3333* [*Coats v. Atchison, Topeka & Santa Fe Ry. Co. (1905) 1 Cal. App. 441, 444, 82 P. 640* ; *see* Ch. 177, *Damages*]. *Civ. Code § 3281* provides that every person who suffers detriment from the unlawful act or omission of another, may recover from the person at fault a compensation in money that is called damages. *Civ. Code § 3333* provides that for the breach of an obligation not arising from contract, the measure of damages is the amount that will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

Even in the absence of physical injury, an occupant of land is entitled to recover damages for the annoyance, discomfort, inconvenience, and mental suffering caused by a nuisance [*Acadia, Cal., Ltd. v. Herbert (1960) 54 Cal. 2d 328, 337, 5 Cal. Rptr. 686, 353 P.2d 294* ; *Smith v. County of Los Angeles (1989) 214 Cal. App. 3d 266, 287-288, 262 Cal. Rptr. 754* ; *see also Lew v. Superior Court (1993) 20 Cal. App. 4th 866, 873, 25 Cal. Rptr. 2d 42* ; *but see Baker v. Burbank-Glendale-Pasadena Airport Auth. (1990) 220 Cal. App. 3d 1602, 1610, 270 Cal. Rptr. 337* (no recovery for personal harm of emotional distress on private nuisance theory, although lack of injury to plaintiff's

property was basis of holding that no private nuisance cause of action had been stated); *Institoris v. City of Los Angeles (1989) 210 Cal. App. 3d 10, 23, 258 Cal. Rptr. 418]* . In assessing the amount of damages, the court appropriately may consider the sentimental and aesthetic value of things destroyed, the plaintiff's affection for his or her possessions, and any interference with plaintiff's peace, comfort, and quiet [*Griffin v. Northridge (1944) 67 Cal. App. 2d 69, 73, 153 P.2d 800]* . Furthermore, if the nuisance is intentional, exemplary damages may be awarded [*Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 920, 162 Cal. Rptr. 194]* . Additional damages which may be allowed in a nuisance action include compensation for the depreciation in market, rental or usable value of plaintiff's realty caused by the nuisance [*Ingram v. City of Gridley (1950) 100 Cal. App. 2d 815, 821, 224 P.2d 798]* .

[4] Abatement Through Self-Help

A person injured by a private nuisance may abate it by removing, or, if necessary, destroying the thing that constitutes the nuisance, without committing a breach of the peace, or doing unnecessary injury [*Civ. Code § 3502*]. If a private nuisance results from a mere omission of the wrongdoer, and cannot be abated without entering on the wrongdoer's land, a person must give reasonable notice to the wrongdoer before entering to abate the nuisance [*Civ. Code § 3503*]. The fact that a nuisance has been abated does not prejudice the right of any person to recover damages for its past existence [*Civ. Code § 3484*; *Code Civ. Proc. § 731*].

Although *Civ. Code §§ 3502* and *3503* establish limited right to "self-help" abatement, counsel should exercise great caution before advising a client to proceed in this manner. A court may subsequently find that the condition abated by the client did not constitute a nuisance. Furthermore, the client may go further than allowed in abating the nuisance and find himself or herself as a defendant in an action for damages. For example, after a defendant entered his neighbor's land and chopped down trees whose roots and branches encroached on his property, the neighbor obtained a judgment against the defendant for treble damages. Although the defendant would have been justified in cutting off the offending portions of the trees or in suing for damages and abatement of the nuisance, he was not justified in taking the law into his own hands even to accomplish what the neighbor-plaintiff should have done [*Fick v. Nilson (1950) 98 Cal. App. 2d 683, 685, 220 P.2d 752]* . In another case, defendant hired a contractor to excavate and sever the roots of a tree on plaintiffs' property that extended into defendant's yard. In their action against defendant for nuisance, negligence, and destruction of timber, plaintiffs alleged that they had had to remove the tree at their own expense because the excavation had been performed negligently and had caused the tree to become unsafe, unable to support life, and a nuisance. The court of appeal reversed and remanded summary judgment for defendant because a landowner has no absolute right to remove encroaching branches or roots from his or her property, regardless of the damage to his or her neighbor's property; the removal must be done with reasonable care and without unnecessary injury [*Booska v. Patel (1994) 24 Cal. App. 4th 1786, 1789-1791, 30 Cal. Rptr. 2d 241]* .

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§ 391.28 Remedies for Public Nuisances

[1] Indictment or Information

One remedy for a public nuisance is an indictment or information [*Civ. Code § 3491*], which is regulated by the Penal Code [*Civ. Code § 3492*; *compare Penal Code §§ 370, 371* (definition of public nuisance) *with Civ. Code §§ 3479, 3480* (definition of public nuisance)]. Under the Penal Code, it is a misdemeanor to maintain or commit any public nuisance, the punishment for which is not otherwise described, or to willfully omit to perform any legal duty relating to the removal of a public nuisance [*Penal Code § 372*].

A criminal indictment or information is one remedy for abating a public nuisance, but it is not the exclusive remedy [*People ex rel. Gallo v. Acuna (1997) 14 Cal. 4th 1090, 1119, 60 Cal. Rptr. 2d 277, 929 P.2d 596* (California Street Terrorism Enforcement and Prevention Act, *Penal Code §§ 186.20 et seq.*, is not exclusive remedy for abating criminal street gang activity and does not preempt use of general public nuisance statutes)].

[2] Civil Action or Abatement

[a] By District or City Attorney

Another remedy for a public nuisance is civil action brought in the name of the people of the State of California to abate the nuisance. The action may be brought by either the district attorney of any county in which the nuisance exists or the city attorney of any town or city in which the nuisance exists [*Code Civ. Proc. § 731*; *see People ex rel. Clancy v. Superior Court (1985) 39 Cal. 3d 740, 750 n.5, 218 Cal. Rptr. 24, 705 P.2d 347]* .

When the state in its representative capacity prosecutes a cause of action for a public nuisance, it is confined to seeking an abatement of the public nuisance; money damages are not available to the state [*Code Civ. Proc. § 731*; *Selma Pressure Treating Co. v. Osmose Wood Preserving Co. (1990) 221 Cal. App. 3d 1601, 1613, 271 Cal. Rptr. 596]* . However, this limitation applies only if the state is acting in its representative capacity to protect the public interest generally. If the state has a property interest that has been injured by a nuisance, the state may, like any property owner, seek damages [*Selma Pressure Treating Co. v. Osmose Wood Preserving Co. (1990) 221 Cal. App. 3d 1601, 1614, 271 Cal. Rptr. 596]* .

A defendant has no right to a jury trial when sued by a public entity seeking equitable abatement of a public nuisance [*People v. Bhakta (2008) 162 Cal. App. 4th 973, 978-979, 76 Cal. Rptr. 3d 421*].

[b] By Special District

If a question arises as to whether a special district has the power to bring an action to abate a public nuisance, the grant of empowerment to bring such an action must be clear and specific [*see Lamont Storm Water Dist. v. Pavich (2000) 78 Cal. App. 4th 1081, 1084-1085, 93 Cal. Rptr. 2d 288]* . For example, although a mosquito abatement district has this statutory authority [*see Health & Safety Code §§ 2000-2010*], a storm water district does not [*Lamont Storm Water Dist. v. Pavich (2000) 78 Cal. App. 4th 1081, 1084-1085, 93 Cal. Rptr. 2d 288* ; *see* Stats. 1984, ch. 1128, § 77].

[c] By Private Person

A private person may also bring a civil action to abate a public nuisance, but only if the nuisance is specially injurious to that private person [*Civ. Code § 3493*]. To have standing to bring the action, the private person must show that he or she has suffered an injury different in kind, not just degree, from that suffered by the general public [*Buchanan v. Los Angeles County Flood Control Dist. (1976) 56 Cal. App. 3d 757, 768, 128 Cal. Rptr. 770]* . However, this rule does not apply to a nuisance that is a private nuisance as well as a public nuisance. In this situation, a private person does not lose his or her rights as a landowner merely because others suffer damages of the same kind, or even of the same degree [*Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 124, 99 Cal. Rptr. 350* ; *see also Lew v. Superior Court (1993) 20 Cal. App. 4th 866, 873, 25 Cal. Rptr. 2d 42]* .

In one novel case, apartment renters were held to have stated a cause of action under the federal Racketeer Influenced and Corrupt Organizations Act (civil RICO) (*18 U.S.C.S. § 1961 et seq.*) against neighbors (residents of a notoriously disruptive university housing cooperative) whose illegal drug sales and related criminal and violent activity severely affected the neighborhood. The court noted that defendant's alleged conduct ranged from "assault to vandalism," and that the complaint read more like "an enumeration of the ten plagues than a pleading in federal court." The federal court of appeals allowed the RICO claim on the ground that plaintiffs' economic leasehold interests were damaged by the type of unlawful conduct that "lies at the heart of RICO," that is, violation of drug laws [*Oscar v. University Students Co-op. Ass'n (9th Cir. 1991) 939 F.2d 808, 812-814]* . It is interesting to note, however, the dissenting observation that if plaintiffs' claims stated any cause of action, it would be public nuisance [*see Oscar v. University Students Co-op. Ass'n (9th Cir. 1991) 939 F.2d 808, 814-815, n.2* (dissenting opinion of Rymer, J.)]. For discussion of civil RICO generally, see Ch. 565, *Unfair Competition* .

[3] Abatement Through Self-Help

In addition to bringing a civil action to abate a public nuisance [*see § 391.28[2][c]*], a private person may, under limited circumstances, abate a public nuisance by removing or, if necessary, destroying the nuisance. However, the public nuisance must be specially injurious to that private person. Moreover, the person must accomplish the removal or destruction without committing a breach of the peace or doing unnecessary injury [*Civ. Code § 3495*]. For a discussion of the legal perils involved in self-help abatement, see *§ 391.27[4]*.

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§ 391.29 Scope of Injunction to Be Limited

As a general rule, an injunction should never go beyond the necessities of the case [*Anderson v. Souza (1952) 38 Cal. 2d 825, 840-841, 243 P.2d 497]* . If a court orders the abatement of a nuisance, the decree should not enjoin more than the specific thing which might constitute the nuisance [*Wheeler v. Gregg (1949) 90 Cal. App. 2d 348, 368-369, 203 P.2d 37]* . If the operation of a legitimate business creates a nuisance, the relief granted should be directed and confined to the elimination of the nuisance, unless under the peculiar circumstances of the case the business, lawful in itself, cannot be conducted without creating a nuisance and violating the rights of contiguous property owners. Furthermore, if plaintiff seeks relief that requires the closure of a business, the burden is on plaintiff to prove that the business cannot be operated without creating a nuisance [*see* *Anderson v. Souza (1952) 38 Cal. 2d 825, 841, 843, 243 P.2d 497]* .

These principles were applied by the Supreme Court in an action in which plaintiffs sought, and obtained from the trial court, an injunction ordering the defendant to cease operations as a private airport. Although the Supreme Court agreed that plaintiffs had proved that defendant's operation constituted a nuisance, the judgment enjoining defendants from operating the airport was reversed because plaintiffs had not met their burden of proving that the airport could not be operated in a way that would not constitute a nuisance. If the imposition of limitations would have sufficed to abate the nuisance, the complete abatement of the operation of the airport would be beyond the rights of plaintiffs [*Anderson v. Souza (1952) 38 Cal. 2d 825, 843-844, 243 P.2d 497]* .

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§ 391.30 Defenses

[1] Nuisances Sanctioned by Statute

Civ. Code § 3482 provides that nothing which is done or maintained under the express authority of a statute can be deemed a nuisance. However, the exculpatory effect of *Civ. Code § 3482* has been circumscribed by decisions giving a narrow construction to the statute.

A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury [*Hassell v. San Francisco (1938) 11 Cal. 2d 168, 171, 78 P.2d 1021* ; *Pekarek v. City of San Diego (1994) 30 Cal. App. 4th 909, 918, 36 Cal. Rptr. 2d 22]* . For example, in a case involving a child struck by a van whose driver's view was obstructed by an ice cream truck, a city was not liable to the child for creating a nuisance by permitting ice cream trucks to operate on the city streets. The language of the city ordinance authorizing the operation of ice cream trucks on city streets showed that the city council had carefully considered risks to pedestrians such as the child, but nonetheless had authorized the very conduct (sales of food from vehicles on public streets) that led to the child's injury [*Pekarek v. City of San Diego (1994) 30 Cal. App. 4th 909, 917-918, 36 Cal. Rptr. 2d 22]* . This requirement of "express" authorization embodied in the statute itself insures that an unequivocal legislative intent to sanction a nuisance will be effectuated, while avoiding the uncertainty that would result were every generally worded statute a source of undetermined immunity from nuisance liability [*Greater Westchester Homeowners Ass'n v. City of Los Angeles (1979) 26 Cal. 3d 86, 101, 160 Cal. Rptr. 733, 603 P.2d 1329* ; *see also Varjabedian v. City of Madera (1977) 20 Cal. 3d 285, 291, 142 Cal. Rptr. 429, 572 P.2d 43]* .

However, although an activity authorized by statute cannot be a nuisance, the manner in which the activity is performed may constitute a nuisance [*Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 129, 99 Cal. Rptr. 350* ; *but see Farmers Ins. Exchange v. State of California (1985) 175 Cal. App. 3d 494, 501* (authorizing statute need not predict precise nature of damages but need only authorize governmental action; defense of statutory authorization under *Civ. Code § 3482* applies to acts done pursuant to the Emergency Services Act)].

In applying these principles, the Supreme Court has affirmed findings of liability for nuisance against cities for the noise created by an airport whose construction was sanctioned by both federal and state statutes [*Greater Westchester Homeowners Ass'n v. City of Los Angeles (1979) 26 Cal. 3d 86, 100-101, 160 Cal. Rptr. 733, 603 P.2d 1329* ; *but see Institoris v. City of Los Angeles (1989) 210 Cal. App. 3d 10, 14, 23, 258 Cal. Rptr. 418* (plaintiff no longer owned property interest claimed to be harmed by nuisance because of prescriptive aviation easement benefiting airport)] and for the smells emitted by a sewage treatment plant whose construction was authorized by state statute [*Varjabedian v. City of Madera (1977) 20 Cal. 3d 285, 291-292, 142 Cal. Rptr. 429, 572 P.2d 43]* .

For a form of affirmative defense asserting statutory authority for the creation of the condition allegedly constituting a nuisance, see *§ 391.100*.

[2] Conduct Regulated by Public Utilities Commission

If a holding that certain conduct causes substantial harm would conflict with a prior determination by the Public Utilities Commission, the California Supreme Court has held that no recovery is available, because *Pub. Util. Code § 1759* prohibits an award of damages that would frustrate declared policies of the commission [*San Diego Gas & Elec. Co. v. Superior Court (1996) 13 Cal. 4th 893, 903, 55 Cal. Rptr. 2d 724, 920 P.2d 669]* . The case arose in the context of an action to recover property damages allegedly caused by the presence of high-voltage electric lines near plaintiffs' property; plaintiffs alleged that the fear of electric fields led to a diminution in the value of the property. The Commission had concluded in prior proceedings, after consultation and evidentiary hearings, that the available evidence did not support a reasonable belief that electromagnetic fields of the sort caused by power lines create a substantial risk of physical harm, and that unless and until the evidence supports such a belief regulated utilities need take no action to reduce to reduce field levels from existing power lines. The Court held that the findings necessary to support a nuisance cause of action--that reasonable persons viewing the matter objectively would experience a substantial fear that the fields would cause physical harm, and would deem the invasion so serious as to outweigh the social utility of the existing power lines--would impermissibly interfere with the Commission's regulatory power [*San Diego Gas & Elec. Co. v. Superior Court (1996) 13 Cal. 4th 893, 939, 55 Cal. Rptr. 2d 724, 920 P.2d 669]* .

[3] Zoning Regulations

Whenever a city has established a zone in which certain businesses or airports are expressly permitted, except in an action to abate a public nuisance brought in the name of the people of the State of California, no person or corporation may be enjoined from the reasonable and necessary operation in such zone of any use expressly permitted in the zone, nor may the use be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation. This provision does not apply to the regulation and working hours of refineries and similar establishments whose operation produces offensive odors [*see Code Civ. Proc. § 731a*]. The purpose in adopting this statute was to eliminate injunctive relief where the business is operated in its appropriate zone and the only showing is an injury and nuisance to the plaintiff caused by the operation of the business [*Gelfand v. O'Haver (1948) 33 Cal. 2d 218, 220, 200 P.2d 790]* . The mere fact that a commercial enterprise is conducting its business in a district zoned for its type of activity does not justify the maintenance by it of a nuisance. In order to obtain injunctive relief in a private action against nuisance-creating commercial enterprises whose activities are protected by zoning ordinances, plaintiff must show that the defendant employed "unnecessary and injurious methods" in the operation of the business. In making such a showing plaintiff is not restricted to adducing evidence of failure by defendant to pursue the methods customarily and usually employed in other similar businesses, but may also show that there are devices or more efficient management which would reduce the conduct or activity causing the nuisance and that such devices or management are available to defendant at a reasonable expense. The failure to secure such devices or management when they are available at a reasonable expense renders the conduct or activity causing the nuisance unnecessary and unreasonable [*Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 129*

For example, despite the fact that defendant's property was properly zoned for a golf course, plaintiff was appropriately

granted an injunction requiring additional fencing and a redesign of two holes in order to prevent the nuisance caused by golf balls being propelled onto plaintiff's property [*Sierra Screw Prods. v. Azusa Greens, Inc. (1979) 88 Cal. App. 3d 358, 365-366, 151 Cal. Rptr. 799]* .

Conversely, *Code Civ. Proc. § 731a* has been applied to deny an injunction to a plaintiff who proved defendant's drop forging plant constituted a nuisance as defined by *Civ. Code § 3479*. Although the court denied an injunction because it found the area was zoned for drop forging and defendant's methods of operation were reasonable and necessary, plaintiff was allowed to recover damages [*McNeill v. Redington (1944) 67 Cal. App. 2d 315, 320* . For additional discussion of *Code Civ. Proc. § 731a*, see *§ 391.19*. For a form asserting an affirmative defense based on this statute, see *§ 391.101*.

[4] Balancing of Conveniences

Once a court has determined a defendant is a wrongdoer and that a plaintiff's property has been occupied, the court has a great deal of discretion in deciding whether or not the plaintiff is entitled to a mandatory injunction to abate the nuisance [*see* Ch. 303, *Injunctions*]. In reaching this decision, courts attempt to balance the conveniences of the parties and consider the guidelines [*see § 391.52[2]*].

These guidelines were applied to deny an injunction in a case involving an encroachment on 15/100 acre of land worth $150 per acre, where the encroaching reservoir cost $7,000 to construct, served 500 people, and where damages of $762.41 were allowed. The appellate court affirmed the denial of a mandatory injunction, emphasizing the serious harm to defendant if the injunction were granted, the defendant's inadvertance and innocent mistake in constructing the reservoir, the fully compensatory nature of the damages, and the serious injury to the public if the reservoir were ordered removed [*Ukhtomski v. Tioga Mut. Water Co. (1936) 12 Cal. App. 2d 726, 728-729, 55 P.2d 1251]* .

The balancing of conveniences doctrine is often invoked as a defense when plaintiff seeks an injunction to vindicate technical and unsubstantial rights that will impose an unusual hardship on the public or the defendant. If a court follows this doctrine and concludes that it should deny plaintiff an injunction despite the nuisance, its action approaches an exercise of the right of eminent domain in favor of a private person. Therefore, the burden of proof is on the defendant to prove that irreparable injury would result if the injunction were to issue [*Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 200, 323 P.2d 1001]* . For an excellent review of several cases following this doctrine, see *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 559-565, 250 P.2d 660* . For additional discussion of and a form for an affirmative defense based on the doctrine of balancing of conveniences, see *§ 391.107* and Ch. 11, *Adjoining Landowners* .

[5] Comparative Negligence

Frequently a plaintiff will allege both nuisance and negligence [*see § 391.22*]. In such a case, defendant should consider asserting the affirmative defense of comparative negligence [*see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226]* . Prior to *Li*, the rule in California was that the contributory negligence of a plaintiff was a bar to his or her recovery based on a nuisance [*Curtis v. Kastner (1934) 220 Cal. 185, 191, 30 P.2d 26]* .

After *Li*, at least one court of appeal has held that a trial court may instruct the jury on comparative negligence principles in a nuisance action alleging damages to real property if the defendant presents evidence that, if a nuisance exists, it arose because of defendant's negligence (as opposed to intentional or reckless conduct) [*Tint v. Sanborn (1989) 211 Cal. App. 3d 1225, 1234, 259 Cal. Rptr. 902]* . It has not been decided, however, whether comparative fault principles can properly be applied to a nuisance that all parties concede arose from intentional or reckless conduct, or an ultrahazardous activity as to which strict liability in tort might be applied [*Tint v. Sanborn (1989) 211 Cal. App. 3d 1225, 1234 n.3, 259 Cal. Rptr. 902]* . For further discussion of comparative negligence, and a form for asserting this affirmative defense, see Ch. 380, *Negligence* .

[6] Failure to Mitigate Damages

A person injured by the tortious act of another is under an active duty to use reasonable care and diligence to minimize his or her loss. He or she is not entitled to compensation for damages that could have been avoided by reasonable efforts or expense [*Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 949, 122 Cal. Rptr. 470]* . Therefore, if a plaintiff seeks damages allegedly caused by a nuisance and there is a possibility that plaintiff has not used reasonable efforts to mitigate damages, defendant should plead this fact as an affirmative defense [for a form asserting this affirmative defense, see Ch. 380, *Negligence*].

[7] Freedom of Speech

Defendant may assert *First Amendment* rights as an affirmative defense if the injunction sought would restrict freedom of expression. This defense is most likely applicable in cases involving "moral nuisances" [*see, e.g.,* *People ex rel. Busch v. Projection Room Theater (1976) 17 Cal. 3d 42, 58-59, 130 Cal. Rptr. 328, 550 P.2d 600]* .

[8] Lessor's Consent to Nuisance Precludes Award of Damages in Action by Lessor

A landowner's consent to a particular use of the property is a defense to an action for damages brought by the landowner for creation of a nuisance by the lessee or a prior lessee [*see* *Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1138-1139, 281 Cal. Rptr. 827* (quoting from Restatement (Second) of Torts § 839)]. A successor owner is bound by a valid consent by a predecessor owner. Thus, once an original owner has lost the right to sue by authorizing construction of the nuisance, he or she can pass no right to sue to a grantee [*Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1139, 281 Cal. Rptr. 827]* .

Consent cannot, however, impede the abatement of a public nuisance [*Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1139, 281 Cal. Rptr. 827]* . The defense of consent is not vitiated simply because a landowner seeks damages based on special injury from a public nuisance [*Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1139, 281 Cal. Rptr. 827* (quoting with approval statement that in such a case, private and public nuisance both exist in a sense)].

For a form asserting the affirmative defense of consent, see *§ 391.108*.

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§ 391.31 Statute of Limitations

[1] Private Nuisance

The statute of limitations for injury to real property is three years [*Code Civ. Proc. § 338(b)*]. This statute applies to nuisance actions based on encroachments or injury to real property [*see Kafka v. Bozio (1923) 191 Cal. 746, 750-751, 218 P. 753* ; *Tracy v. Ferrera (1956) 144 Cal. App. 2d 827, 828-829, 301 P.2d 905* ; *O'Hair v. California Prune & Apricot Growers Ass'n (1933) 130 Cal. App. 673, 676, 20 P.2d 375]* . Presumably, the two-year (one-year, prior to January 1, 2003) statute of limitations [*Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)*; Ch. 345, *Limitation of Actions,* § 345.14] applies if a plaintiff is suing for personal injury or wrongful death resulting from a nuisance.

A cause of action for nuisance accrues, and the statute of limitations begins to run, when damage first occurs, not when the condition causing the nuisance first is created [*see Spaulding v. Cameron (1952) 38 Cal. 2d 265, 268, 239 P.2d 625* ; *Meigs v. Pinkham (1910) 159 Cal. 104, 108-110, 112 P. 883]* . Whether an action based on nuisance is barred by the statute of limitations frequently depends on whether the nuisance is considered permanent or continuing. If the nuisance is continuing, every repetition of the wrong creates an additional basis for liability and starts the running of a new statute of limitations. Thus, even though an action to recover the initial damages may be barred, if the nuisance is continuing rather than permanent, the injured person is entitled to bring an action for all damages occurring within the limitation period until the nuisance is abated [*see Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 937, 101 Cal. Rptr. 568, 496 P.2d 480* ; *Phillips v. City of Pasadena (1945) 27 Cal. 2d 104, 107-108, 162 P.2d 625]* . For example, property owners who discovered a continuing nuisance on their property caused by gasoline contamination were not barred by the statute of limitations from filing a suit to recover their costs of removing the contaminated soil because the statutory period did not begin running until the cleanup was complete and the nuisance had therefore been abated [*Wilshire Westwood Assocs. v. Atlantic Richfield Co. (1993) 20 Cal. App. 4th 732, 744-745, 24 Cal. Rptr. 2d 562]* .

However, a plaintiff cannot avoid the three-year limitations period applicable to actions for a permanent nuisance simply by characterizing the action as one for a continuing nuisance. For limitations purposes, if the action is brought after the three-year limitations period has expired, a plaintiff is required to prove that the nuisance is actually a continuing nuisance rather than a permanent one by presenting substantial evidence that the injury is capable of being

abated and that the cost of abatement is reasonable [*Mangini v. Aerojet-Gen. Corp. (1996) 12 Cal. 4th 1087, 1090, 51 Cal. Rptr. 2d 272, 912 P.2d 1220]* . Failure to provide evidence showing that plaintiff's property can be repaired or the damage abated at a reasonable cost by reasonable means will defeat a claim that the nuisance should be treated as a continuing nuisance [*McCoy v. Gustafson (2009) 180 Cal. App. 4th 56, 85-86, 103 Cal. Rptr. 3d 37]* .

For discussion of the distinction between permanent and continuing nuisances as affecting damages, see *§ 391.26*. For a form asserting the statute of limitations as an affirmative defense, see *§ 391.103*.

[2] Public Nuisance

Civ. Code § 3490 provides that no lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right. This provision has been construed to mean that the statute of limitations is no defense to an action brought by a public entity to abate a public nuisance [*Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1142, 281 Cal. Rptr. 827]* .

However, in actions brought by private citizens to recover damages for special injury caused by a public nuisance, the Supreme Court has characterized the nuisance as either "continuing" or "permanent," and has used the characterization to determine whether the suit is subject to the statute of limitations [*Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1142-1143, 281 Cal. Rptr. 827* (distinguishing *Wade v. Campbell (1962) 200 Cal. App. 2d 54, 60-61, 19 Cal. Rptr. 173* , which stated that defenses of laches and bar of statute of limitations were inapplicable in cases in which private parties suffered special injury from public nuisances, on ground that *Wade* involved a continuing nuisance); *see Baker v. Burbank-Glendale-Pasadena Airport Auth. (1985) 39 Cal. 3d 862, 868-869, 218 Cal. Rptr. 293, 705 P.2d 866* (permanent nuisances subject to statute of limitations; continuing nuisance action may be brought at any time); *Phillips v. City of Pasadena (1945) 27 Cal. 2d 104, 107-108, 162 P.2d 625* (same)].

In an action brought by a private citizen for damages to real property caused by a public nuisance, if the nuisance is permanent, the three-year statute of limitations in *Code Civ. Proc. § 338(b)* applies and begins to run when the permanent nuisance is created [*Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1144, 281 Cal. Rptr. 827]* . As noted under § 391.31[1], for limitations purposes, if an action is brought by a private plaintiff seeking damages for a continuing nuisance after this three-year limitations period has expired, the plaintiff is required to prove that the nuisance is actually a continuing nuisance, rather than a permanent one, by presenting substantial evidence that the injury is capable of being abated and that the cost of abatement is reasonable [*Mangini v. Aerojet-Gen. Corp. (1996) 12 Cal. 4th 1087, 1090, 51 Cal. Rptr. 2d 272, 912 P.2d 1220]* .

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[Reserved]

§§ 391.32[Reserved]

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§ 391.50 Related Matthew Bender Publications

For a memorandum of points and authorities relating to the use of injunctions in the abatement of a private nuisance, see s California Points and Authorities, Ch. 116, *Injunctions*

For memoranda of points and authorities pertaining to actions to abate a nuisance, see s California Points and Authorities, Ch. 167, *Nuisance*

For memoranda of points and authorities relating to encroachments on real property, see s California Points and Authorities, Ch. 225, *Trespass*

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§ 391.51 State Statutes

[1] Generally

Nuisance defined. *Civ. Code § 3479*

Private nuisance defined. *Civ. Code §§ 3479-3481*

Public nuisance defined. *Civ. Code § 3480*; *Penal Code § 370*

Liability of successive owner for continuing nuisance. *Civ. Code § 3483*

Lapse of time does not legalize public nuisance amounting to actual obstruction of public right. *Civ. Code § 3490*

In personal injury or property damage case, defendants are precluded from referring at trial to fault, absence from action, or involvement of defendant whose motion for summary judgment or nonsuit has been granted. *Code Civ. Proc. §§ 437c(j), 581c(d)*

Nuisance defined for purposes of State Housing Law (*Health & Safety Code § 17910 et seq.*) as nuisance defined in Civil Code or any form of nuisance recognized at common law or in equity. *Health & Safety Code § 17920(k)*

[2] Activities/Conditions Not Nuisances

Anything done or maintained under express authority or authority of statute is not nuisance. *Civ. Code § 3482*

Sport shooting range, in operation and not in violation of existing law at time of construction or of enactment of noise control ordinance, not subject to action for nuisance. *Civ. Code § 3482.1*

Activity of district agricultural association in operation for more than three years is not nuisance. *Civ. Code §*

3482.5(a)(2)

Agricultural activity, operation, facility, or appurtenance in continuous operation for more than three years is not nuisance; cause of action for public or private nuisance is available for substantial increase in activities after 1992 that has significant effect on environment. *Civ. Code § 3482.6(a), (b)*

Commercial agricultural enterprises in business for three years is no nuisance. *Civ. Code § 3482.5*

Operations of airport are permanent, not continuing, nuisance. *Civ. Code § 3482.7*

Airport in existence for three years is presumed not to be nuisance. *Code Civ. Proc. § 731b*

[3] Attorney's Fees and Costs

Award of costs, including costs of investigation, discovery, and attorney's fees, in cases in which government seeks to enjoin sale, distribution, or public exhibition of obscene matter as defined in *Penal Code § 311*; seeks to enjoin use of building for illegal gambling, lewdness, or prostitution or seeks to enjoin such acts under Red Light Abatement Law; seeks to enjoin use of building, or seeks to enjoin in any building unlawful sale, manufacture, service, storage, or keeping or giving away of any controlled substance as authorized by *Health & Safety Code §§ 11570-11587* of the California Uniform Controlled Substances Act; or seeks to enjoin unlawful sale, service, storage, or keeping or giving away of alcoholic liquor as authorized by the Unlawful Liquor Sale Abatement Law (*Penal Code §§ 11200-11207*). *Civ. Code § 3496*

[4] Moral Nuisances

Building used for illegal gambling, lewdness, assignation, or prostitute is nuisance (Red Light Abatement Law). *Penal Code §§ 11225-11235*

[5] Public Nuisance as Misdemeanor

Public nuisance defined and made misdemeanor. *Penal Code §§ 370-372*

Public nuisance is unlawful even if damage inflicted on individuals is unequal. *Penal Code § 371*

Duty of district attorney or city attorney to prosecute person maintaining public nuisance on his or her property. *Penal Code § 373a*

[6] Remedies

[a] In General

Basis for injunctive relief against nuisance. *Civ. Code §§ 3369, 3422*; *Code Civ. Proc. §§ 526, 731*

Specific and preventive relief is prohibited to enforce penalty law except in case of nuisance or as otherwise provided by law. *Civ. Code § 3369*

Damages are recoverable for nuisance. *Civ. Code § 3484*; *Code Civ. Proc. § 731*

Remedies against public nuisance. *Civ. Code §§ 3491-3495*; *Code Civ. Proc. § 731*

Private party is allowed to maintain action for public nuisance specially injurious to him or her but not otherwise. *Civ. Code § 3493*

Remedies against private nuisance. *Civ. Code §§ 3501-3503*

[b] Abatement of Nuisances

Public nuisance is appropriately abated by any public body or officer so authorized. *Civ. Code § 3494*

Private person is authorized to abate specially injurious public nuisance. *Civ. Code § 3495*

Abatement and civil action are remedies against private nuisance. *Civ. Code § 3501*

Abatement of private nuisance through self-help without breach of peace. *Civ. Code § 3502*

Reasonable notice is prerequisite for self-help abatement of private nuisance requiring entry on land. *Civ. Code § 3503*

Civil actions are authorized to be brought in name of people or by district attorney or city attorney to abate public nuisance. *Code Civ. Proc. § 731*

Limitations on abatement of industrial and commercial operation. *Code Civ. Proc. § 731a*

Minimum requirements for county or city nuisance abatement ordinances. *Gov. Code §§ 25845* (county), 38773.5 (city)

County or city permitted to provide by ordinance that court may order owner to pay treble costs of abatement on entry of second or subsequent civil or criminal judgment within two-year period after finding that owner of property is responsible for condition that may be abated in accordance with ordinance enacted under minimum statutory requirements. *Gov. Code §§ 25845.5* (county), 38773.7 (city)

Abatement of buildings potentially hazardous to life in event of earthquake. *Health & Safety Code §§ 17980.1-17980.5*

Enforcement agency, tenant, or tenant association permitted to seek court order appointing receiver to repair conditions in substandard building. *Health & Safety Code § 17980.7*

State Department of Public Health is authorized to enjoin and abate public nuisances. *Health & Safety Code § 131075*

Abatement of contamination caused by discharge of sewage or other waste. *Health & Safety Code §§ 117585*

[7] Specific Nuisances Per Se

Public nuisances under Food and Agriculture Code include infested plants, black currant, Meyer lemon plants, Caprifig trees, camelthorn, animals infected with dourine, noncomplying poultry meat, noncomplying honey. *Food & Agric. Code §§ 5904, 5951-5952, 5985, 6171-6177, 7301, 9621, 25556, 29731*

Alcoholic beverage in club room without license is public nuisance. *Bus. & Prof. Code § 25604*

Nonconforming billboards are public nuisances. *Bus. & Prof. Code § 5461*

Abatement of illegal on-premises advertising display. *Bus. & Prof. Code §§ 5499.2, 5499.3 et seq.*

Nonresidential building used for manufacturing, selling, or possessing counterfeit goods is abatable nuisance. *Bus. & Prof. Code § 17800 et seq.*

Substantial failure by mobile home park management to provide and maintain physical improvements in common facilities in good working order and substantial violation of mobile home park rules are public nuisance. *Civ. Code § 798.87(a)*

Spite fence is private nuisance. *Civ. Code § 841.4*

Motion picture exhibiting actual intentional killing or cruelty to people or animals is nuisance *Civ. Code §§ 3504 et seq.*

Public nuisances under Fish and Game Code include water pollution in Trinity and Klamath River Fish and Game District, infected or diseased fish or aquatic plants in violation of law, frogs, fish reduction plant operating illegally, illegally used fishing net, improperly marked fish traps, unmarked lobster traps. *Fish & Game Code §§ 5800, 6302, 6855, 7707, 8630, 9007, 9008*

Weeds and rubbish are nuisance. *Gov. Code §§ 39501-39588*

Abandoned excavations are nuisance. *Gov. Code §§ 50230-50257*

Nuisances under Health and Safety Code include water works conducted in violation of law, cesspools, breeding places of pests, place used in connection with controlled substances, unlawfully operated swimming pool, deleterious food. *Health & Safety Code §§ 2041, 2800.5, 4762, 11570, 106670, 116060, 116063, 111890*

Building or place used for unlawful selling of controlled substance, precursor, or analog is nuisance subject to injunction, abatement, and prevention; damages may be recovered whether nuisance is public or private; who may bring action and procedure. *Health & Safety Code § 11570 et seq.*

Nuisances under Penal Code include signs or lights on railway tracks, sign contrary to law, building where liquor sold illegally, gambling ship, carrying concealed weapon, carrying weapons listed in Penal Code § 12120(a), machine guns, assault weapons, bombs, and other destructive devices. *Penal Code §§ 369h, 556.3, 11200, 11300-11318, 12028, 12029, 12251,* 12282, *12307*

Nuisances under Public Resources Code include unauthorized operation of placer mine, public oil or gas well, uncontrolled fire, fire hazard on state property. *Pub. Res. Code §§ 3600-3609, 3967, 4170.5, 4171-4181*

Encroachment on state or county highways is nuisance. *Sts. & Hy. Code §§ 723, 1484*

Prohibited sign, signal, device, or light on public highway is public nuisance subject to removal or abatement. *Veh. Code § 21467*

[8] Statutes of Limitations

Lapse of time does not legalize public nuisance amounting to actual obstruction of public right. *Civ. Code § 3490*

Two-year statute of limitations for action for personal injury. *Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)* (one year, prior to 2003)

Three-year statute of limitations for action for trespass on or injury to real property. *Code Civ. Proc. § 338(b)*

Three-year statute of limitations for action for injury to personal property. *Code Civ. Proc. § 338(c)*

Manner of pleading statute of limitations as defense. *Code Civ. Proc. § 458*

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§ 391.52 Decisions

[1] Generally

Court exercising discretion in denying injunction is almost exercising right of eminent domain in favor of private person. *Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 200, 323* , P.2d 1001

Any person whose property is injuriously affected or whose personal enjoyment is lessened by nuisance is entitled to maintain action for damages or abatement. *Phillips v. City of Pasadena (1945) 27 Cal. 2d 104, 106, 162 P.2d 625*

Duty to place guards and lights on obstruction in highway. *Stockton Auto. Co. v. Confer (1908) 154 Cal. 402, 405-406, 97 P. 881*

Structure is not nuisance merely because it obstructs passage of light and air to adjoining building. *Ingwersen v. Barry (1897) 118 Cal. 342, 343, 50 P. 536*

No liability of successive owner for nuisance created by former owner in absence of notice. *Pierce v. German Sav. & Loan Soc'y (1887) 72 Cal. 180, 183, 13 P. 478* ; *Reinhard v. Lawrence Warehouse Co. (1940) 41 Cal. App. 2d 741, 746, 107 P.2d 501*

Manufacturer of defective product is not liable in nuisance; deterioration of asbestos-containing building materials did not constitute continuing nuisance. *City of San Diego v. United States Gypsum Co. (1994) 30 Cal. App. 4th 575, 584-586, 35 Cal. Rptr. 2d 876*

Owner of property is permitted to sue former owner or lessee for damages caused by nuisance created on owner's property; nuisance is not required to originate on neighboring property. *Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App. 4th 334, 343, 23 Cal. Rptr. 2d 377* ; *Mangini v. Aerojet-General Corp. (1991) 230 Cal. App. 3d 1125, 1138* ; *see also KFC W., Inc. v. Meghrig (1994) 23 Cal. App. 4th 1167, 1179, 28 Cal. Rptr. 2d 676* ; *Wilshire Westwood Assocs. v. Atlantic Richfield Co. (1993) 20 Cal. App. 4th 732, 745-746, 24 Cal. Rptr. 2d 562*

Plaintiff's having acquired or improved land after nuisance interfering with it has come into existence is not in itself sufficient to bar plaintiff's action; this conduct is one factor to be considered in determining whether nuisance is actionable. *Hellman v. La Cumbre Golf & Country Club (1992) 6 Cal. App. 4th 1224, 1231, 8 Cal. Rptr. 293*

Otherwise lawful construction that interferes with neighbor's light, air, and view is neither public nor private nuisance if builders did not act with malice. *Wolford v. Thomas (1987) 190 Cal. App. 3d 347, 359-360, 235 Cal. Rptr. 422*

Defendants' misconduct consisting of omission rather than affirmative actions does not preclude nuisance liability. *Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 920, 162 Cal. Rptr. 194*

Statutory definition of nuisance pursuant to *Civ. Code § 3479* is broad enough to encompass almost any conceivable type of interference with enjoyment or use of land or property. *Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 919, 162 Cal. Rptr. 194*

Physical interference with enjoyment of land or condition constituting danger to neighborhood is nuisance. *Buchanan v. Los Angeles County Flood Control Dist. (1976) 56 Cal. App. 3d 757, 768, 128 Cal. Rptr. 770*

When personal discomfort is basis of nuisance action, test of liability is effect of alleged interference on comfort of normal persons of ordinary sensibilities in community. *Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 126, 99 Cal. Rptr. 350*

Adoption of most approved applicances and methods of production does not justify continuance of that which, in spite of them, remains a nuisance. *Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 126, 99 Cal. Rptr. 350*

Property owner has constitutional right to have issue of whether property constitutes public nuisance determined by due process. *Leppo v. City of Petaluma (1971) 20 Cal. App. 3d 711, 717, 97 Cal. Rptr. 840*

Unwarranted activity causing substantial injury to property of another or obstructing its reasonable use and enjoyment is nuisance which may be abated; even lawful use of one's property is nuisance if part of general scheme is to annoy neighbor and if main purpose of use is to prevent neighbor from reasonable enjoyment of neighbor's property. *Hutcherson v. Alexander (1968) 264 Cal. App. 2d 126, 130 70 Cal. Rptr. 366*

Violation of penal statute is not nuisance unless acts would constitute nuisance in absence of statute. *Stegner v. Bahr & Ledoyen, Inc. (1954) 126 Cal. App. 2d 220, 231, 272 P.2d 106*

Nuisance as anything which obstructs free use of property so as to interfere with its comfortable enjoyment. *Los Angeles Brick & Clay Prods. Co. v. City of Los Angeles (1943) 60 Cal. App. 2d 478, 486*

[2] Doctrine of Balancing of Conveniences

Trial court properly considered present use and nature of land in ascertaining whether or not there is irreparable injury. *Brown Derby Hollywood Corp. v. Hatton (1964) 61 Cal. 2d 855, 860, 40 Cal. Rptr. 848, 395 P.2d 896*

Proof of irreparable injury is necessary element of defense based on balancing of conveniences. *Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 200, 323 P.2d 1001*

Owners of property contiguous to commercial enterprises are required to reasonable degree to suffer reasonable inconvenience for general welfare. *Anderson v. Souza (1952) 38 Cal. 2d 825, 843-844, 243 P.2d 497*

Impropriety of enjoining entire business when business not nuisance per se, if lesser restriction will afford plaintiff relief to which he or she is entitled. *Anderson v. Souza (1952) 38 Cal. 2d 825, 841, 243 P.2d 497*

Substantial harm is required in action for nuisance; gravity of harm is weighed against utility of defendant's conduct. *Shields v. Wondries (1957) 154 Cal. App. 2d 249, 255, 316 P.2d 9*

[3] Moral Nuisance

Provisions of Red Light Abatement Law (*Penal Code § 11225 et seq.*) do not authorize award of damages against owner of property used for purposes prohibited by law. *People ex rel. Van de Kamp v. American Art Enters., Inc. (1983) 33 Cal. 3d 328, 332, 188 Cal. Rptr. 740, 656 P.2d 1170*

Complaint by law enforcement officer for injunction under *Civ. Code §§ 3479, 3480* against operator of bookstore and theater displaying obscene material stated cause of action, but abatement, if granted, must be directed to particular book or film, not to premises. *People ex rel. Busch v. Projection Room Theater (1976) 17 Cal. 3d 42, 58-59, 130 Cal. Rptr. 328, 550 P.2d 600*

First Amendment right to free speech is not infringed by closure of theater as public nuisance, since closure was reasonable exercise of police power pursuant to *Penal Code § 11230*. *People ex rel. Sorenson v. Randolph (1979) 99 Cal. App. 3d 183, 189-190, 160 Cal. Rptr. 69*

Exhibit of obscene films is subject to restraint under public nuisance statutes. *People ex rel. Camil v. Buena Vista Cinema (1976) 57 Cal. App. 3d 497, 500-501, 129 Cal. Rptr. 315*

[4] Negligence and Nuisance

Nuisance resulting from merely negligent conduct. *Coates v. Chinn (1958) 51 Cal. 2d 304, 307-308, 332 P.2d 289*

Instruction to jury on comparative negligence principles in nuisance action alleging damages to real property was proper because defendant claimed that if nuisance existed, it arose because of plaintiff's negligence. *Tint v. Sanborn (1989) 211 Cal. App. 3d 1225, 1234, 259 Cal. Rptr. 902*

Plaintiff seeking recovery under theories of private nuisance and negligence has but one cause of action. *Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 372-373, 82 Cal. Rptr. 689*

Although nuisance may exist without negligence, negligence and nuisance frequently coexist and are practically inseparable. *Sturges v. Charles L. Harney, Inc. (1958) 165 Cal. App. 2d 306, 318, 331 P.2d 1072*

Nuisance results from nonnegligent skillfully directed efforts not having due regard for rights of others. *Sturges v. Charles L. Harney, Inc. (1958) 165 Cal. App. 2d 306, 318, 331 P.2d 1072*

[5] Nuisance Per Se

City's ordinance prohibiting signs on property adjacent to freeways and declaring placement or maintenance of signs adjacent to freeways nuisance was authorized by *Gov. Code § 38774(a)*; compliance with zoning law procedures was unnecessary. *City of Escondido v. Desert Outdoor Adver., Inc. (1973) 8 Cal. 3d 785, 787-790, 106 Cal. Rptr. 172, 505 P.2d 1012*

Declaration that nonconforming billboards were public nuisances and authorization of injunctive relief were within state's police power. *People ex rel. Dept. of Transportation v. Ad Way, Inc. (1992) 8 Cal. App. 4th 309, 314*

City has power to pass general office regulations to prevent nuisances. *People v. Johnson (1954) 129 Cal. App. 2d 1, 6, 277 P.2d 45*

Operation of quarry was not nuisance per se. *Morton v. Superior Court (1954) 124 Cal. App. 2d 577, 581, 269 P.2d 81*

Blasting in populated area that causes injury is tortious and open to injunction under designation of nuisance per se. *Alonso v. Hills (1950) 95 Cal. App. 2d 778, 783, 214 P.2d 50*

Allegation of irreparable injury is unncessary for injunction when facts allege nuisance per se. *Los Angeles Brick & Clay Prods. Co. v. City of Los Angeles (1943) 60 Cal. App. 2d 478, 486, 141 P.2d 46*

[6] Permanent or Continuing Nuisance

All damages, both past and prospective, are recoverable if nuisance is permanent; only damages accrued at commencement of action are recoverable if nuisance is temporary. *Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 268-269, 288 P.2d 507*

In cases of uncertainty regarding whether nuisance is permanent or continuing, plaintiff has election of treating nuisance as either permanent or not. *Spaulding v. Cameron (1952) 38 Cal. 2d 265, 268, 239 P.2d 625* ; *see also KFC W., Inc. v. Meghrig (1994) 23 Cal. App. 4th 1167, 1180-1181, 28 Cal. Rptr. 2d 676*

Remedy for continuing nuisance, one which can be abated, is successive actions for damages accrued until commencement of each action. *Spaulding v. Cameron (1952) 38 Cal. 2d 265, 267, 239 P.2d 625*

Only one action is allowed for recovery of both past and anticipated future damages caused by permanent nuisance. *Spaulding v. Cameron (1952) 38 Cal. 2d 265, 267, 239 P.2d 625*

Clearest example of permanent nuisance is one where offending structure or condition maintained as necessary part of operations of public utility. *Spaulding v. Cameron (1952) 38 Cal. 2d 265, 267, 239 P.2d 625*

Nuisance is considered permanent when of such character that it will presumably continue indefinitely. *Phillips v. City of Pasadena (1945) 27 Cal. 2d 104, 107, 162 P.2d 625*

Nuisance is continuing if it may be discontinued at any time; every repetition of continuing nuisance is separate wrong for which injured person may bring successive actions for damages until nuisance abated, even though action based on original wrong may be barred. *Phillips v. City of Pasadena (1945) 27 Cal. 2d 104, 107-108, 162 P.2d 625*

[7] Public Nuisance

City's suggestion that "hard rock" concerts are per se public nuisance, justifying their exclusion from concert hall because of their content, was erroneous. *Cinevision Corp. v. City of Burbank (9th Cir. 1984) 745 F.2d 560, 572*

Public nuisance is species of catch-all criminal offense, and suit to abate public nuisance may trigger criminal prosecution of owner of property. *People ex rel. Clancy v. Superior Court (1985) 39 Cal. 3d 740, 750, 218 Cal. Rptr.*

24, 705 P.2d 347

To state cause of action based on public nuisance, private party must show injury to person or property different in kind from that suffered by general public. *Frost v. City of Los Angeles (1919) 181 Cal. 22, 24-25, 183 P. 342* ; *see also Koll-Irvine Ctr. Prop. Owners Ass'n v. County of Orange (1994) 24 Cal. App. 4th 1036, 1040-1041, 29 Cal. Rptr. 2d 664*

Homeowners' allegations that fences built on public right-of-way blocked sight lines for drivers entering and exiting their garage, thereby causing fear of hitting pedestrian or otherwise being in vehicle collision, stated special injury sufficient to support claim for public nuisance. *Kempton v. City of Los Angeles (2008) 165 Cal. App. 4th 1344, 1349, 81 Cal. Rptr. 3d 852*

Special injury requirement was satisfied by allegation that plaintiff incurred costs as consequence of being required by local air pollution control district to test property to determine extent of hazardous substances deposited on land by prior possessor. *Mangini v. Aerojet-General Corp. (1991) 230 Cal. App. 3d 1125, 1143*

Municipality generally has power to provide by ordinance for summary abatement of public nuisance and for recovery of abatement costs; in absence of statute or ordinance permitting recovery of abatement costs, costs are borne by public as whole and are not recoverable from tortfeasor whose negligence created need for service. *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1017-1018, 244 Cal. Rptr. 507*

Code Civ. Proc. § 731, general provision permitting government entities to abate public nuisance, does not authorize government to recover costs of abatement. *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1019, 244 Cal. Rptr. 507*

Civ. Code § 3493, providing that private person may maintain action for public nuisance if it is specially injurious to that person, but not otherwise, provides no authority for public entity, whose utility poles and related property were damaged by fire that spread from defendant's premises, to recover damages for "specially injurious" public nuisance. *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1020, 244 Cal. Rptr. 507* (pointing out, however, that *Pub. Util. Code § 10251* authorizes municipalities to sue to recover all damages sustained as result of negligent injury to facility or equipment)

Allegations of maintenance of liquified petroleum gas storage facility near home were not sufficient to state cause of action for public nuisance when no showing made of special damage to plaintiff different than to others in vicinity. *Brown v. Petrolane, Inc. (1980) 102 Cal. App. 3d 720, 726-727, 162 Cal. Rptr. 551*

Validity of county ordinance defining public nuisance; field of defining public nuisance was not preempted by legislature; communal ranch was subject to equitable relief in form of injunction and demolition order for violation of county health ordinance. *People v. Wheeler (1973) 30 Cal. App. 3d 282, 285-296, 106 Cal. Rptr. 260 (Wheeler's Ranch)*

Violations of city planning code are public nuisance. *City & County of San Francisco v. Padilla (1972) 23 Cal. App. 3d 388, 401, 100 Cal. Rptr. 223*

Term "public nuisance" means act or omission that interferes with interest of community or comfort and convenience of general public and includes interference with public health, comfort, and convenience. *Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 123, 99 Cal. Rptr. 350*

Remedies against public nuisance (that is, redress for wrong to community) are by indictment or information, civil action, or abatement; remedy by civil action is ordinarily properly left to appointed representative of community and

properly maintained by private person only if public nuisance is specially injurious to him or her. *Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 123, 99 Cal. Rptr. 350* ; *see Civ. Code §§ 3491, 3493*; *Code Civ. Proc. § 731*

Ownership of land on which public nuisance maintained does not, of itself, make owner indispensable party defendant in action to abate nuisance. *People v. Superior Court (1969) 1 Cal. App. 3d 167, 170, 81 Cal. Rptr. 555*

[8] Private Nuisance

Unlawful barricading of public street is nuisance for which person specially injured may maintain action. *Phillips v. City of Pasadena (1945) 27 Cal. 2d 104, 106, 162 P.2d 625* ; *see also Brown v. Rea (1907) 150 Cal. 171, 174, 88 P. 713*

Law relating to private nuisances as one of degree; use that would be reasonable under one set of facts as possibly unreasonable under another. *Hassell v. San Francisco (1938) 11 Cal. 2d 168, 170, 78 P.2d 1021*

Tenant has sufficient property interest to acquire standing to bring action against landlord based on nuisance. *Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 920, 162 Cal. Rptr. 194*

Private person affected by private nuisance has standing to bring action for abatement. *Buchanan v. Los Angeles County Flood Control Dist. (1976) 56 Cal. App. 3d 757, 768, 128 Cal. Rptr. 770*

Essence of private nuisance is interference with use and enjoyment of land and without it, fact of personal injury or of interference with some purely personal right is not enough for private nuisance. *Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 124-125, 99 Cal. Rptr. 350*

[9] Remedies

In determining availability of injunctive relief, court must consider interests of third persons and of general public. *Loma Portal Civic Club v. American Airlines, Inc. (1964) 61 Cal. 2d 582, 588, 39 Cal. Rptr. 708, 394 P.2d 548*

Even in absence of physical injury, occupant of land is entitled to recovery of damages for discomfort and annoyance and for mental suffering occasioned by fear for safety proximately caused by nuisance. *Acadia, Cal., Ltd. v. Herbert (1960) 54 Cal. 2d 328, 337, 5 Cal. Rptr. 686, 353 P.2d 294*

In action to recover damages caused by nuisance, plaintiff is entitled to recover for personal discomfort and annoyance without proving any damage to plaintiff's property. *Judson v. Los Angeles Suburban Gas Co. (1910) 157 Cal. 168, 171-172, 106 P. 581*

Propriety of maintaining action for damages caused by nuisance without seeking abatement. *Cushing-Wetmore Co. v. Gray (1907) 152 Cal. 118, 119-120, 92 P. 70*

Prevention or abatement of nuisance is accomplished by injunction. *McCarthy v. Gaston Ridge Mill & Mining Co. (1904) 144 Cal. 542, 545, 78 P. 7*

Complaint to abate threatened nuisance must allege probable and imminent danger, not necessarily inevitable injury. *Nicholson v. Getchell (1892) 96 Cal. 394, 395-396, 31 P. 265*

When considering whether party may recover for future damages consisting of depreciation of property as consequence

of nuisance, court must presume that party will comply with terms of valid court order to abate nuisance. *Alexander v. McKnight (1992) 7 Cal. App. 4th 973, 978, 9 Cal. Rptr. 2d 453*

Red Light Abatement Act (*Penal Code § 11225 et seq.*) does not authorize judgment enjoining person from engaging in sex-related businesses. *People v. Louden (1983) 148 Cal. App. 3d 1147*

Damages are not recoverable for potential, future injuries arising from threat of nuisance, although prospective nuisance may be enjoined if danger probable and imminent. *Helix Land Co. v. City of San Diego (1978) 82 Cal. App. 3d 932, 950-951, 147 Cal. Rptr. 683*

Court is not authorized to abate nuisance injurious to plaintiff's business and to defer judgment on issue of past damages in order to consider evidence accumulated after nuisance. *Hutcherson v. Alexander (1968) 264 Cal. App. 2d 126, 134-136, 70 Cal. Rptr. 366*

Injunction to restrain defendants from maintaining nuisance and money damages for past annoyance, inconvenience, and discomfort is not double recovery. *Mock v. Shulman (1964) 226 Cal. App. 2d 263, 269-270, 38 Cal. Rptr. 39*

Remedy of injunction is drastic, and if issuance would work inequitable burden on defendant and injured party may be adequately compensated in damages, court appropriately exercises discretion in refusing injunction. *Baglione v. Leue (1958) 160 Cal. App. 2d 731, 734, 325 P.2d 471* ; *see also Heilbron v. Fowler Switch Canal Co. (1888) 75 Cal. 426, 17 P. 535*

Weight of authority in California recognizes rule that if encroachment does not irreparably injure plaintiff, was innocently made, and cost of removal is great compared to inconvenience to plaintiff by continuance of encroachment, court may deny injunction and compel plaintiff to accept damages. *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 559, 250 P.2d 660*

Damages recoverable for nuisance include depreciation in market, rental or usable value of realty. *Ingram v. City of Gridley (1950) 100 Cal. App. 2d 815, 821, 224 P.2d 798*

In determining damages for nuisance, sentimental and aesthetic value of things destroyed, owner's affection for his or her possessions, and peace, comfort, and quiet are proper considerations. *Griffin v. Northridge (1944) 67 Cal. App. 2d 69, 73, 153 P.2d 800*

Impropriety of denying mandatory injunction based on relative hardship when defendant acted with full knowledge of plaintiff's rights and with understanding of consequences. *Morgan v. Veach (1943) 59 Cal. App. 2d 682, 690, 139 P.2d 976* (affirming injunction requiring building to be moved by defendant who deliberately violated building restrictions)

To obtain relief at law for nuisance, plaintiff is obligated to prove damage. *O'Hair v. California Prune & Apricot Growers Ass'n (1933) 130 Cal. App. 673, 675, 20 P.2d 375*

[10] Statute of Limitations

Statute of limitations on permanent nuisance runs from time nuisance is created. *Phillips v. City of Pasadena (1945) 27 Cal. 2d 104, 107, 162 P.2d 625*

Statute of limitations does not bar action for nuisance when defendant's conduct continuous to time of trial. *Vowinckel v. N. Clark & Sons (1932) 216 Cal. 156, 164-165, 13 P.2d 733*

Cause of action for nuisance accrues when damage occurs, not when condition causing nuisance first created. *Meigs v. Pinkham (1910) 159 Cal. 104, 108-110, 112 P. 883*

Statute of limitations on nuisance claim involving continuous and repeated property damage incident to public improvement does not begin to run until situation has stabilized. *Lee v. Los Angeles County Metro. Transp. Auth. (2003) 107 Cal. App. 4th 848, 857-858, 132 Cal. Rptr. 2d 444*

[11] Statutory Authority

City was not liable to child struck by van whose driver's view was obstructed by ice cream truck on grounds of creating nuisance by permitting ice cream trucks to operate on city streets; language of city ordinance authorizing operation of ice cream trucks on city streets showed that city council had carefully considered risks to pedestrians such as child, but nonetheless had authorized very conduct (sales of food from vehicles on public streets) that led to child's injury. *Pekarek v. City of San Diego (1994) 30 Cal. App. 4th 909, 917-918, 36 Cal. Rptr. 2d 22*

Activity authorized by statute is not nuisance; but manner in which activity is performed possibly constitutes nuisance. *Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 129, 99 Cal. Rptr. 350*

Construction of state highway under statutory authority is no nuisance. *Lombardy v. Peter Kiewit Sons' Co. (1968) 266 Cal. App. 2d 599, 605, 72 Cal. Rptr. 240*

Activity of releasing water from reservoir carried out as express power of district is no nuisance. *Larson v. Santa Clara Valley Water Conservation Dist. (1963) 218 Cal. App. 2d 515, 526, 32 Cal. Rptr. 875*

[12] Types of Nuisance Actions

[a] Against Public Entities

Nuisance action against city for maintaining noisy airport is not precluded by federal preemption or by *Civ. Code § 3482* providing that nothing done under authority of statute is nuisance. *Greater Westchester Homeowners Ass'n Inc. v. City of Los Angeles (1979) 26 Cal. 3d 86, 94-102, 160 Cal. Rptr. 733, 603 P.2d 1329*

Gov. Code § 815 (immunity of public entity) does not bar nuisance actions against public entities to extent founded on *Civ. Code § 3479* (defining nuisance) or other applicable statutory provision. *Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 937, 101 Cal. Rptr. 568, 496 P.2d 480*

Municipality is liable for creating or maintaining nuisance even though governmental activity involved. *Phillips v. City of Pasadena (1945) 27 Cal. 2d 104, 106, 162 P.2d 625*

Gov. Code § 815 (immunity of public entity) does not bar nuisance action against public entity founded on *Civ. Code §§ 3479-3481* (public and private nuisance). *Vedder v. County of Imperial (1974) 36 Cal. App. 3d 654, 661, 111 Cal. Rptr. 728*

State's barricading street in subdivision that formerly provided pedestrian and vehicular access to ocean was not public or private nuisance to owners of property in subdivision who failed to establish that barricade damaged them in manner different from public and failed to establish that they had at any time private right to drive across beach. *Roark v. State of Cal. ex rel. Dept. Parks & Recreation (1971) 20 Cal. App. 3d 155,158*

[b] Alcoholic Beverages

Furnishing of alcoholic beverages to minor subsequently injured in automobile accident is not private nuisance. *Cory v. Shierloh (1981) 29 Cal. 3d 430, 436-437, 174 Cal. Rptr. 500, 629 P.2d 8*

Unlawful sale of liquor, of itself, is not nuisance under *Civ. Code § 3479*. *People v. Robin (1943) 56 Cal. App. 2d 885, 889, 133 P.2d 436*

[c] Class Action

Class action is inappropriate to enjoin public nuisance. *Diamond v. General Motors Corp. (1971) 20 Cal. App. 3d 374, 378-383, 97 Cal. Rptr. 639* (action to enjoin industrial corporations from discharging pollutants and to enjoin sale and registration of motor vehicles in Los Angeles County)

[d] Criminal Nuisance

Maintaining criminal nuisance of continuing nature on one's property subjects offender to multiple prosecutions and convictions under criminal statutes. *Dapper v. Municipal Court (1969) 276 Cal. App. 2d 816, 818-819, 81 Cal. Rptr. 340*

Definition of street obstruction as public nuisance in *Penal Code § 370* is limited to unreasonable obstructions, and, as so construed, is constitutional. *Pain v. Municipal Court (1968) 268 Cal. App. 2d 151, 153-154, 73 Cal. Rptr. 862*

[e] Fire Hazard

Maintenance of fire hazard sufficiently extreme to menace public health and safety constitutes public nuisance within meaning of *Civ. Code § 3480*; if such condition exists, public entity has right to abate nuisance summarily, particularly in face of emergency. *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1017, 244 Cal. Rptr. 507*

Fire hazard is nuisance. *Vedder v. County of Imperial (1974) 36 Cal. App. 3d 654, 661, 111 Cal. Rptr. 728* ; *People v. Oliver (1948) 86 Cal. App. 2d 885, 889, 195 P.2d 926*

[f] Noise

Noise from bar and restaurant in residential area caused by loud music, foot stomping, and handclapping was public nuisance, but injunction against permitting noise audible anywhere in neighborhood was overbroad. *People v. Mason (1981) 124 Cal. App. 3d 348, 351-354, 177 Cal. Rptr. 284*

[g] Pollution

Odor from sewage treatment plant was nuisance. *Varjabedian v. City of Madera (1977) 20 Cal. 3d 285, 293-294, 142 Cal. Rptr. 429, 572 P.2d 43*

Odor, dust, and noise emanating from operation of asphalt mixing plant was nuisance. *Eaton v. Klimm (1933) 217 Cal. 362, 370, 18 P.2d 678*

Smoke, sand and cement blown onto plaintiff's building during construction of defendant's building was nuisance. *Snow v. Marian Realty Co. (1931) 212 Cal. 622, 623-624, 299 P. 720*

Act of pollution, obstruction, or diversion of water is nuisance under *Civ. Code § 3479*. *Helix Land Co. v. City of San Diego (1978) 82 Cal. App. 3d 932, 949, 147 Cal. Rptr. 683*

Dust, odors and sounds arising from defendant's dairy was nuisance. *Wade v. Campbell (1962) 200 Cal. App. 2d 54, 58, 19 Cal. Rptr. 173*

Air pollution was nuisance. *Guttinger v. Calaveras Cement Co. (1958) 160 Cal. App. 2d 460, 463, 325 P.2d 145*

[h] Spite Fences

Malicious intent is necessary for finding wall erected as spite fence. *Haehlen v. Wilson (1936) 11 Cal. App. 2d 437, 441-442, 54 P.2d 62*

[i] Tenant-Landlord

Landowners were not liable for tenant's underground gas tank leaks that caused soil contamination on plaintiff's property; landowner's liability to third party for nuisance created by tenant and unknown to the landowner is limited, with landowner under no duty to perform rigorous type of inspection necessary to prevent such leak. *Resolution Trust Corp. v. Rossmoor Corp. (1995) 34 Cal. App. 4th 93, 98-100, 40 Cal. Rptr. 2d 328*

Lessor was not liable to third party for continuing nuisance created by tenant, absent either active participation by the landowner in creation of nuisance or other negligent conduct; liability for nuisance requires some form of active participation that is intentional, reckless, negligent, or involves an ultrahazardous activity. *Resolution Trust Corp. v. Rossmoor Corp. (1995) 34 Cal. App. 4th 93, 98-100, 40 Cal. Rptr. 2d 328*

Nuisance liablity is not precluded by existence of contractual relationship between tenant and landlord. *Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 919, 162 Cal. Rptr. 194*

[j] Water

Defendant's leveling operations, which did not adequately prepare hillside and resulted in inundation of plaintiff's property with mud, were nuisance. *Spaulding v. Cameron (1952) 38 Cal. 2d 265, 266, 239 P.2d 625*

Act of pollution, obstruction, or diversion of water is nuisance under *Civ. Code § 3479*. *Helix Land Co. v. City of San Diego (1978) 82 Cal. App. 3d 932, 949, 147 Cal. Rptr. 683*

Complaint alleging creation of fill on adjoining property causing surface water to be diverted from its natural course onto plaintiff's property and causing mud and rock to flow onto plaintiff's properties alleged creation and maintenance of nuisance. *Sturges v. Charles L. Harney, Inc. (1958) 165 Cal. App. 2d 306, 317, 331 P.2d 1072*

Property owner who by artificial means brings water on land for purposes of irrigation and allows portion to injure land of adjoining owner is liable for damages; injunction is appropriate to abate nuisance. *Fredericks v. Fredericks (1951) 108 Cal. App. 2d 242, 244, 238 P.2d 643*

[13] Zoning

Purpose in adopting *Code Civ. Proc. § 731a* (injunction in industrial or commercial zones or airports) was to eliminate injunctive relief if business operated in appropriate zone and only showing is injury and nuisance to plaintiff caused by business's operation; legitimate business operating in properly zoned district was properly enjoined as nuisance for creating too much noise even though in business of creating sound. *Gelfand v. O'Haver (1948) 33 Cal. 2d 218, 220, 200 P.2d 790*

Operator of golf course at location zoned for such use was properly enjoined to redesign two fairways so that golf balls would no longer land on plaintiff's adjacent business property. *Sierra Screw Prods. v. Azusa Greens, Inc. (1979) 88 Cal. App. 3d 358, 364-371, 151 Cal. Rptr. 799*

Mere fact that commercial enterprise conducting its business in district zoned for its type of activity did not justify maintenance by it of nuisance. *Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 130, 99 Cal. Rptr. 350*

Code Civ. Proc. § 731a denies injunctive relief to private persons whenever commercial enterprise operates within legally defined area under express permit and does not employ unnecessary and injurious methods of operation. *Christopher v. Jones (1964) 231 Cal. App. 2d 408, 411, 41 Cal. Rptr. 828*

Injunction denied, but damages granted, against drop forging plant operating in properly zoned area. *McNeill v. Redington (1944) 67 Cal. App. 2d 315, 318-319, 154 P.2d 428*

Location of plaintiffs' residences in area zoned by city for semi-industrial purposes did not justify creation or continuance by defendant of private nuisance. *Fendley v. City of Anaheim (1930) 110 Cal. App. 731, 735-736, 294 P. 769*

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PART IV. PROCEDURAL CHECKLIST

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§ 391.70 Plaintiff's Checklist

NOTE:
The following procedural guide is for use in actions to abate and recover damages for nuisances. It is, however, illustrative only of procedures commonly utilized. Any given case may require procedures not set forth here. For a list of essential allegations in a complaint for damages for and to enjoin an encroachment, see Ch. 11, *Adjoining Landowners* . For a procedural checklist and forms for use in obtaining injunctive relief generally, see Ch. 303, *Injunctions* . For a procedural checklist for bringing actions against public entities and employees, see Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities* .

[1] Facts to Be Ascertained

NOTE:
Not all of the following facts will be ascertainable from the client in the initial interview. Subsequent interviews may be required or it may be necessary to ascertain the facts from others, including the potential defendant(s), by use of discovery proceedings. The following facts, although not necessarily in the order indicated, are required to enable counsel to determine whether there is a basis for a cause of action for nuisance, and if so, to enable counsel to determine the type of relief to seek and then to prepare the complaint.

1. Facts relating to plaintiff.

a. Name, address, and telephone number of plaintiff.

b. Capacity of plaintiff (such as minor, adult, trustee, conservator, guardian, executor, partnership, domestic corporation, or foreign corporation).

c. Any personal or property damages sustained to date by plaintiff.

d. Additional facts, as desired, relating to plaintiff's stability and financial solvency (such as employment status, prior residences, credit, bank, and personal references).

NOTE:
If preliminary injunctive relief is being sought, it is vital that counsel warn his or her client of the client's ultimate potential liability on two bonds: first, the bond which may be required before issuance of a temporary restraining order and, second, the bond which will be required if a preliminary injunction is issued [see *Code Civ. Proc. § 529*]. Counsel should inform the client of this ultimate risk in applying for preliminary injunctive relief, make certain that the client can assume the risk given the nature of the potential liability involved in the case, and then write the client a letter confirming this aspect of the interview.

2. Facts relating to potential defendants.

a. Name and address of each potential defendant.

In an action for nuisance, potential defendants are:

(1) Any person, including a corporation or other legal entity, public or private, maintaining a nuisance.

(2) Any person, including a corporation or other legal entity, public or private, proposing to do an act, by himself or herself or through agents and employees, which will result in the creation of a nuisance.

(3) Any agent or employee of a person or entity who has created or participated in the creation or maintenance of a nuisance.

b. Capacity of each potential defendant (such as minor, adult, trustee, conservator, guardian, executor, partnership, domestic corporation, or foreign corporation).

c. Occupation, including name and address of employer, of each individual defendant.

3. Facts relating to witnesses.

a. Name, address, and telephone number of each witness to the defendants' conduct or threats, and of each person to whom any of the parties might have spoken, including name of the employer of each such witness or person.

b. Background personal information about each witness, such as age and occupation.

4. Facts relating to potential cause of action.

a. The property interest of plaintiff, if any, and a description of the premises.

b. The property interest of defendant, if any, and a description of the premises.

c. Relative location of the property of plaintiff and defendant.

d. Particular acts or omissions by defendant which caused or threatened to cause injury to plaintiff, including [*see § 391.24*]:

(1) Dates and times of such conduct or threats;

(2) Place;

(3) Description of what has occurred to date; and

(4) Reasons why such conduct or threats will result in irreparable injury to plaintiff, if injunctive relief is sought.

e. Character of the area in which defendant's activity took place, and zoning restrictions, if any [*see § 391.30[3]*].

f. Whether or not defendant was acting pursuant to a permit or other official sanction.

g. Elements of resulting injury to plaintiff and plaintiff's property interest.

h. Whether defendant's actions affect an entire community or neighborhood or a considerable number of persons. If so, what facts show that plaintiff has received injury different in kind, as opposed to degree, from that suffered by others [*see § 391.14*].

i. Request, if any, by plaintiff to defendant that defendant refrain from doing act complained of.

j. Whether or not plaintiff was in possession of his property when defendant's wrongful act occurred.

k. Date(s) of harm.

l. Damages sustained by plaintiff.

[2] Documents to Be Obtained

NOTE:
Not all of the following documents wil be obtainable from the client in the initial interview. Subsequent interviews may be required, or, where circumstances will permit it, they might be mailed to the attorney. It might, however, be necessary to obtain the documents from someone other than the client. If the contents of any document must be proved at trial, the document itself must be presented unless secondary evidence is admissible [*see Evid. Code § 1520 et seq.*].

1. Written statements, if any, of parties or witnesses, including correspondence between plaintiff and defendant regarding the nuisance.

2. Diagrams, photographs, maps, or other descriptions of property or conduct involved.

3. When plaintiff claims a personal injury, authorization for release of medical information signed by plaintiff.

4. Any document tending to show the items or amounts of damage, including bills, receipts, cancelled checks, medical records, and medical reports.

5. Documents showing that other residents have also complained of defendant's activity. For example:

a. Letters.

b. Police reports showing citizens' complaints.

NOTE:
Certain local police records may be examined and copied under the Public Records Act [*Gov. Code § 6250 et seq.*; *see Gov. Code § 6254(f)*; for a discussion of the Public Records Act, see DeMeo, s California Deposition and Discovery Practice, Vol. 1, P 2.13(4)(a), Vol. 4, P 16.22(4)].

6. Personal memoranda of plaintiff concerning the nuisance, such as journals, diaries, notes, and letters.

[3] Preliminary Determinations

1. Jurisdiction.

a. Action for injunction.

An action seeking permanent injunctive relief is in the jurisdiction of the superior court and is not a limited civil action [*see Code Civ. Proc. §§ 85, 86(a)(8)*].

b. Action for damages only.

If the action is for damages only and the amount sought is $25,000 or less, the action is a limited civil case within the jurisdiction of the superior court. If the amount sought is over $25,000, jurisdiction is in the superior court as other than a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 32.5, 85, 86(a)(1)*].

c. Action for injunction and damages.

If the action is for a permanent injunction it must be brought in the superior court even though it also seeks damages in an amount below the monetary jurisdiction of superior court [*see Silverman v. Greenberg (1938) 12 Cal. 2d 252, 254, 83 P.2d 293]* .

2. Venue.

If injury to real property is claimed, the proper county for trial of an action for nuisance is the county where the property is located [*Code Civ. Proc. § 392(a)(1)*]. Otherwise, the proper county is the county in which the injury occurred or in which the defendant resides [*Code Civ. Proc. § 395(a)*].

3. Factors to be considered for any cause of action.

a. Financial solvency of possible defendants.

b. Difficulties, if any, involved in obtaining jurisdiction over the various defendants.

c. Difficulties, if any, in proving liability.

4. Whether the client may abate the nuisance by self-help.

CAUTION:
The abatement of a nuisance through self-help may subject the client to liability if the condition is subsequently judged not to have been a nuisance, or if the client commits a breach of the peace or does unnecessary injury while abating the nuisance [*see Civ. Code § 3502*; § 391.27[4]].

Under limited circumstances, a private person may abate either a private or public nuisance through self-help without the need of a lawsuit [*see Civ. Code §§ 3495, 3502, 3503*; *see also §§ 391.27[4], 391.28[2][c]*].

[4] Selection of Appropriate Action

1. Actions based on nuisance [*Civ. Code § 3479*].

a. Private action to abate private nuisance and/or for compensatory and/or punitive damages. See *§ 391.90* and *§ 391.52[8]*. See also *Civ. Code §§ 3479-3481*.

b. Private action to abate public nuisance specially injurious to plaintiff and/or for compensatory and/or punitive damages. See *§§ 391.90* and *391.91* and *§ 391.91[9]*. See also *Civ. Code §§ 3479, 3480*, and *3493*.

c. Private action to abate nuisance per se. See *§ 391.52[5]*.

d. Private action to abate threatened nuisance. See *§ 391.92*.

e. Public action to abate public nuisance. This may be the only alternative for abatement of a public nuisance which is not a private nuisance as to the client and does not cause special injury to the client different in kind, rather than degree, from that suffered by the general public [*see Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 124, 99 Cal. Rptr. 350]* . In such a case, or when the damages may be de minimus and the client is unable or unwilling to bear the litigation expense, counsel should advise the client to request the district attorney or city attorney to bring an action to enjoin the nuisance [*see Code Civ. Proc. § 731*].

2. Additional or alternative counts.

a. Count based on negligence [*Civ. Code § 1714(a)*].

When defendant's conduct is negligent, a separate count based on negligence may be included in the complaint along with a count based on nuisance [*Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 372-373, 82 Cal. Rptr. 689* ; *see § 391.22*; *see also* Ch. 380, *Negligence*].

b. Count for intentional or negligent infliction of emotional distress.

In addition to property damages and personal injuries, damages may be recovered for intentional or negligent interference with the mental or emotional tranquility of the

plaintiff [*see Stoiber v. Honeychuck (1980) 101 Cal. App. 3d 903, 921-922, 162 Cal. Rptr. 194]* . Neither physical impact nor physical injuries need to be proved [*see Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 930, 167 Cal. Rptr. 831, 616 P.2d 813* ; *see generally* Ch. 362, *Mental Suffering and Emotional Distress*].

c. Count for trespass [for procedure and forms *see* Ch. 550, *Trespass*].

d. Action based on strict liability for ultrahazardous activity [for procedures and forms, *see* Ch. 256, *Explosives*].

e. Action for inverse condemnation if defendant is a public entity having the power of eminent domain [for forms and procedures, *see* Ch. 247, *Eminent Domain*].

[5] Prepare Complaint for Injunction and/or Damages

1. Injunction to abate nuisance.

For a detailed procedural guide for obtaining a temporary restraining order and/or a preliminary injunction and/or a permanent injunction, see Ch. 303, *Injunctions* .

CAUTION:
On granting an injunction the court must require the applicant to post a bond [*Code Civ. Proc. § 529*]. The client should be advised of this requirement before proceeding with the action and the necessary arrangements made prior to the application being presented to the court. Counsel seeking injunctive relief should also carefully investigate local practice and the local rules of court for specific additional requirements governing the granting of such relief in the court from which it is sought.

2. Essential allegations.

The allegations that should be included in a complaint seeking the abatement of a nuisance and damages are as follows:

a. Plaintiff's proprietary interest in, and location of, the property affected by the nuisance [*see § 391.90[1]*, Paragraph 1].

b. Name, capacity, and proprietary interest of defendant, if any, in property on which nuisance is located [*see § 391.90[1]*, Paragraph 2].

c. Fictitious name allegations, if appropriate [*see § 391.90[1]*, Paragraph 3].

d. Agency allegations, if appropriate [*see § 391.90[1]*, Paragraph 4].

e. Relative locations of plaintiff's and defendant's properties [*see see § 391.90[1]*, Paragraph 5].

f. Actions of defendant creating the nuisance [*see § 391.90[1]*, Paragraph 6].

g. Effects of defendant's actions on plaintiff's property interest falling within the statutory definition of nuisance [*see Civ. Code § 3479*; *see § 391.90[1]*, Paragraph 7].

h. Plaintiff's request, and defendant's refusal, to abate the nuisance [*see § 391.90[1]*, Paragraph 8].

i. Defendant's continued maintenance of the nuisance against plaintiff's will [*see § 391.90[1]*, Paragraph 9].

j. Nature and amount of damages suffered by plaintiff [*see § 391.90[1]*, Paragraph 10].

k. Necessity for a multiplicity of suits unless an injunction is granted [*see § 391.90[1]*, Paragraph 11].

l. Irreparable injury to plaintiff unless an injunction is granted [*see § 391.90[1]*, Paragraph 12].

m. Lack of a plain, speedy, or adequate remedy at law and the express authority for an injunction [*see § 391.90[1]*, Paragraph 13].

n. If plaintiff seeks punitive damages pursuant to *Civ. Code § 3294*, the willful, oppressive, and malicious nature of defendant's conduct [*see § 391.90[1]*, Paragraph 14].

3. Special allegations depending on nature of nuisance and relief sought.

a. Public nuisance.

A private person alleging a count based on a public nuisance must allege in what way the nuisance is specially injurious to him or her [*see Civ. Code § 3493*; § 391.14; *see § 391.91*].

b. Nuisance per se.

Ordinarily, the only necessary allegation of a nuisance per se is the existence of the acts or conditions defined by a statute as constituting a nuisance. There is no need to allege any damages, irreparable injury, multiplicity of suits, or lack of a plain, speedy, or adequate remedy at law [*see Los Angeles Brick & Clay Prods. Co. v. City of Los Angeles (1943) 60 Cal. App. 2d 478, 486, 141 P.2d 46* ; *McClatchy v. Laguna Lands Ltd. (1917) 32 Cal. App. 718, 725, 164 P. 41* ; *see also § 391.52[5]*]. Some statutes defining a nuisance may set out additional requirements that should also be pleaded [*see, e.g., Penal Code § 11226* (requiring a private person filing a complaint under the Red Light Abatement Law be a citizen of California and resident of the county in which the alleged nuisance is located)].

4. Subscription.

The complaint must be signed by at least one attorney of record in the attorney's individual name (or by the party if he or she is not represented). It must also state the signer's address and telephone number [*Code Civ. Proc. § 128.7(a)*].

5. Verification.

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*]) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For a form of verification, see *§ 391.90[1]*. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26,

Answers .

6. Summons.

a. Use of the form of summons adopted by the California Judicial Council is mandatory [*Gov. Code § 68511*; *see Cal Rules of Court, Rule 1.31(a)*]. Copies may be obtained from court clerks.

b. For a form of summons and procedures for service, see Ch. 518, *Service of Summons and Papers* .

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Volume 34: Newspapers thru Parties-Chs. 386-396
Chapter 391 NUISANCE
PART IV. PROCEDURAL CHECKLIST

34-391 California Forms of Pleading and Practice--Annotated § 391.71

§ 391.71 Defendant's Guide

NOTE:
The following guide is illustrative only of procedures commonly utilized. Any given case may require procedures not set forth here. The purpose of this guide is to enumerate the steps taken by counsel for defendant prior to trial of an action to abate a nuisance or for damages or both. Counsel defending against an application for injunc tive relief should carefully investigate local practice and the local rules of court for particular requirements governing opposition to injunctive relief. For a procedural check-list and forms for use in opposing injunctive relief generally, see Ch. 303, *Injunctions* .

[1] Facts to Be Ascertained

1. General facts.

a. Name, address, and telephone number of defendant.

b. Capacity of defendant (such as minor, adult, trustee, conservator, guardian, executor, partnership, domestic corporation, or foreign corporation).

NOTE:
Defendant's capacity generally will be revealed by the complaint. Nevertheless, counsel will wish to confirm the allegation with his client and of course, if the capacity is not disclosed by the complaint, to ascertain it.

c. Additional facts, as desired, relating to defendant's stability and financial solvency (such as employment status, prior residences, and credit, bank, and personal references).

d. Occupation, including name and address of employer, of plaintiff.

e. Capacity of plaintiff.

2. Facts required for the answer.

a. Date, manner, and place of service.

b. Allegations of complaint.

Ascertain which of the facts alleged in the complaint are true, which are false, and of which defendant does not know the truth or falsity.

3. Facts relating to possible affirmative defenses.

NOTE:
A list of possible affirmative defenses is *set out in § 391.71[5]*. The following facts should be obtained to determine their possible applicability.

a. Is there express statutory authority for the condition complained of [*see Civ. Code § 3482*]?

b. Did plaintiff consent to the condition complained of?

c. Was there any contributory negligence on the part of plaintiff?

d. Does defendant have a valid permit for the activities creating the alleged nuisance?

e. Is the district in which the alleged nuisance is located zoned for defendant's activity [see *Code Civ. Proc. § 731a*]?

f. If defendant is operating an airport, commercial agricultural activity, district agricultural association, or agricultural processing activity, operation, or facility, has defendant been doing so for more than three years [*see Civ. Code §§ 3482.5(a), 3482.6(a)*; *Code Civ. Proc. § 731b*]?

4. Facts relating to possible cross complaint [*Code Civ. Proc. §§ 426.30, 428.10-428.80*]. Ascertain facts, if any, that might constitute the basis of a cross complaint against plaintiff, a codefendant, or both, or some person or entity not yet a party to the action, or against both the plaintiff, or a codefendant, and others. See generally Ch. 123, *Complaints and Cross Complaints* .

[2] Documents to Be Obtained

NOTE:
If the contents of any document must be proved at trial, the document itself must be presented unless secondary evidence is admissible [*see Evid. Code § 1520 et seq.*].

1. Written statements, if any, of parties or witnesses, including correspondence between plaintiff and defendant regarding the alleged nuisance.

2. Diagrams, photographs, maps, or other descriptions of the property or conduct involved.

3. Personal memoranda of defendant concerning the alleged nuisance, such as journals, diaries, notes, and letters.

4. Zoning permit.

5. License to carry on trade or business.

6. Any document which would tend to prove any affirmative defense [*see § 391.71[5]*].

[3] Preliminary Determinations

1. Jurisdiction of the subject matter.

See *§ 391.70[3]*, and Ch. 324, *Jurisdiction: Subject Matter* . If the court lacks subject matter jurisdiction, counsel should consider the following:

a. Demurrer [*Code Civ. Proc. § 430.10(a)*; *see* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*].

b. Motion to have the action transferred to the proper court in California, if any, having jurisdiction of the subject matter [*Code Civ. Proc. § 396*; *see* Ch. 571, *Venue*].

2. Jurisdiction over defendant.

Jurisdiction over the defendant attaches on proper service of the summons [*Code Civ. Proc. § 410.50(a)*; *see also* Ch. 323, *Jurisdiction: Personal*]. If proper jurisdiction of the defendant has not been attained, counsel should consider a motion to quash service of summons [*Code Civ. Proc. § 418.10(a)(1)*; for a discussion of personal jurisdiction and forms for use in making a motion to quash, see s California Points and Authorities, Ch. 167, *Jurisdiction*].

3. Venue.

a. See *§ 391.70[3]*, and Ch. 571, *Venue* .

b. If the court in which the action has been filed is not the proper court for the trial [*see Code Civ. Proc. §§ 392-402*], counsel may move for an order transferring the action to the proper court [*Code Civ. Proc. § 396b*]. If the defendant has not answered, demurred, or otherwise filed a response and the motion to transfer is denied, the court must allow the defendant time to move to strike, demur, or otherwise plead [*Code Civ. Proc. § 396b(e)*]. Counsel may also move for a change of venue or place of trial on any of the grounds enumerated in *Code Civ. Proc. § 397*. For procedure and forms, see Ch. 571, *Venue* , for memoranda of points and authorities, see s California Points and Authorities, Ch. 238, *Venue* .

NOTE:
The motion for change of venue, whether made on the ground that the court in which the action was filed is not the proper court or made on any other grounds, should not be confused with a motion to transfer a case from a court lacking, to a court having, jurisdiction of the subject matter under *Code Civ. Proc. § 396*, discussed under Paragraph (1)(b), *above*.

4. Defects in complaint.

Counsel may wish to file a demurrer if the complaint is subject to any of the defects enumerated in *Code Civ. Proc. § 430.10*. For a discussion of, and forms for use in filing demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda of points and authorities relating to demurrers, see s California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* .

[4] Opposition to Application for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction

See Ch. 303, *Injunctions* , for a discussion of, procedural check-list for, and forms for opposition to applications for this type of relief.

[5] Drafting the Answer

1. For a discussion of and forms to use in drafting the answer [*Code Civ. Proc. § 431.30*], see Ch. 26, *Answers* .

2. Affirmative Defenses

In response to a complaint seeking the abatement of a nuisance, counsel should consider asserting the following affirmative defenses [*Code Civ. Proc. § 431.30(b)(2)*]:

a. Express statutory authority [*Civ. Code § 3482*; *see §§ 391.30[1], 391.100*].

b. Zoning regulations [*Code Civ. Proc. § 731a*; *see §§ 391.30[3], 391.101*].

c. No notice to successive owner [*see §§ 391.21[2], 391.102*].

d. Statute of limitations [*Code Civ. Proc. §§ 335.1, 338(b), (c)*; *see* former *Code Civ. Proc. § 340(3)*; *see also § 391.31*; *see § 391.103*; Ch. 345, *Limitation of Actions*].

e. Preexisting airport or agricultural use [*Civ. Code § 3482.5(a)(1)* (commercial agricultural activity), (2) (activity of district agricultural association, *Civ. Code § 3482.6* (agricultural processing facility); *Code Civ. Proc. § 731b* (airport); *see also § 391.25[1]*; *see § 391.104*].

f. Obstruction of light and air not nuisance [*see §§ 391.25[4], 391.106*].

g. Balancing of conveniences [*see §§ 391.20, 391.107*].

h. Failure to mitigate damages [*see § 391.30[6]*; for a form for asserting this affirmative defense, see Ch. 380, *Negligence*].

i. Freedom of speech [*see § 391.30[7]*].

j. Comparative Negligence [*see §§ 391.22, 391.30[5]*; *see generally* Ch. 380, *Negligence*].

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34-391 California Forms of Pleading and Practice--Annotated §§ 391.72through 391.89

[Reserved]

§§ 391.72[Reserved]

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Volume 34: Newspapers thru Parties-Chs. 386-396
Chapter 391 NUISANCE
PART V. FORMS

34-391 California Forms of Pleading and Practice--Annotated § 391.90

§ 391.90 Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. §§ 526, 731] to Abate Private Nuisance [Civ. Code §§ 3479-3481] and for Damages [Civ. Code §§ 3294, 3333; Code Civ. Proc. § 731]--General Form

[1] FORM Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. §§ 526, 731] to Abate Private Nuisance [Civ. Code §§ 3479-3481] and for Damages [Civ. Code §§ 3294, 3333; Code Civ. Proc. § 731]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AND PRELIMIN-
_____ [*name*], and DOES 1	)	ARY AND PERMANENT INJUNCTION
through _____,	)	(Nuisance)
Defendants.	)	
	)	

_____

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, the _____ [*specify proprietary interest, e.g.,* owner] and in possession and control of certain real property consisting of land and _____ [*describe improvements, e.g.,* a single family house] at _____ [*address*], _____ County, California, and more particularly described as follows: _____ [*give legal description*].

2. Defendant _____ [*name*] is, and at all times herein mentioned was, the _____ [*specify proprietary interest or other capacity, e.g.,* owner and in possession and control of certain real property consisting of land and _____ (*describe improvements, e.g.,* a bar and restaurant) at

_____ (*address*), _____ County, California, and more particularly described as follows: _____ (*give legal description*)].

3. The true names or capacities, whether individual, corporate, associate, or otherwise, of defendants DOE I through DOE _____ [*roman numeral, e.g.,* V] are unknown to plaintiff, who therefore sues such defendants by such fictitious names, and will amend this complaint to show their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the defendants designated as a DOE is responsible in some manner for the nuisance herein referred to [*add when seeking damages:* and thereby proximately caused injuries and damages to the plaintiff as herein alleged].

4. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of such agency and employment.

5. Plaintiff's property and the property of defendants, and each of them, are _____ [*describe relative locations, e.g.,* adjoining each other at plaintiff's north and defendants' south boundaries].

6. At all times herein mentioned, and since _____ [*date*], defendants, and each of them, have occupied, used, and maintained their premises in such a manner that _____ [*allege facts demonstrating nuisance, e.g.,* loud music, hand clapping, foot stomping and other noises emanate from defendants' bar and restaurant on a daily basis between 2 P.M. and 2 A.M.].

7. The aforementioned occupation, use, and maintenance of the property of defendants constitutes a nuisance within the meaning of *Section 3479 of the Civil Code,* in that it _____ [*specify basis of nuisance, e.g.,* is injurious to plaintiff's health and interferes with the comfortable enjoyment of plaintiff's property].

8. On or about _____ [*date*], plaintiff gave notice to defendants, and each of them, of the damage caused by the nuisance, and requested its abatement, but defendants, and each of them, have refused, and continue to refuse, to abate the nuisance.

9. Defendants, and each of them, have threatened to and will, unless restrained by this court, continue to maintain the nuisance and continue the acts complained of, and each and every act has been, and will be, without the consent, against the will, and in violation of the rights of plaintiff.

[*EITHER*]

10. As a proximate result of the nuisance created by the defendants, and each of them, plaintiff has been, and will be, damaged in the sum of $_____ which is necessary to _____ [*specify damage to be corrected, e.g.,* replace fallen ceiling tiles in plaintiff's house].

[*AND/OR*]

10. As a [further] proximate result of the nuisance, the value of plaintiff's property has been diminished by $_____. Unless the nuisance is abated, plaintiff's property will be progressively further diminished in value.

[*AND/OR*]

10. As a [further] proximate result of the nuisance created by defendants, and each of them, plaintiff has been hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has suffered general damages in an amount according to proof.

[*AND/OR*]

10. As a [further] proximate result of the nuisance created by defendants, and each of them, plaintiff has incurred [, and will continue to incur,] medical and related expenses in an amount according to proof.

[*AND/OR*]

10. As a [further] proximate result of the nuisance created by defendants, and each of them, plaintiff's earning capacity has been greatly impaired, both in the past and present, in an amount according to proof.

[*CONTINUE*]

11. Unless defendants, and each of them, are restrained by order of this court, it will be necessary for plaintiff to commence many successive actions against defendants, and each of them, to secure compensation for damages sustained, thus requiring a multiplicity of suits, and plaintiff will be daily threatened with _____ [*specify damage caused by nuisance, e.g.,* loud music, hand clapping, foot stomping, and other noises from the property of defendants, and each of them].

12. Unless defendants, and each of them, are enjoined from continuing their course of conduct, plaintiff will suffer irreparable injury in that _____ [*specify irreparable injury, e.g.,* the usefulness and economic value of plaintiff's property will be substantially diminished and plaintiff will be deprived of the comfortable enjoyment of his/her property];

13. Plaintiff has no plain, speedy, or adequate remedy at law, and injunctive relief is expressly authorized by *Sections 526* and *731 of the Code of Civil Procedure.*

[14. In maintaining the nuisance, defendants, and each of them, are acting with full knowledge of the consequences and damage being caused to plaintiff, and their conduct is willful, oppressive and malicious; accordingly, plaintiff is entitled to punitive damages against defendants, and each of them.]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For a preliminary and a permanent injunction enjoining defendants, and each of them, and their agents, servants, and employees, and all persons acting under, in concert with, or for them from _____ [*specify each act, course of conduct, and condition defendants are to be prohibited from doing, commencing, continuing, or maintaining, e.g.,* emitting any noise from their premises sufficiently loud to disturb plaintiff's comfortable enjoyment of plaintiff's property].

2. For general damages according to proof;

3. For _____ [*specify special damages, if any, e.g.*, the reasonable cost of replacing fallen ceiling tiles in plaintiff's house in the sum of $_____];

[4. For punitive damages;]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This general form of complaint is for use in seeking a preliminary and permanent injunction for the abatement of a private nuisance as well as for damages. The victim of a nuisance is entitled to both damages and an injunction, an injunction being the traditional method of abating a nuisance [*Los Angeles Brick & Clay Prods. Co. v. City of Los Angeles (1943) 60 Cal. App. 2d 478, 486, 141 P.2d 46]* . For a discussion and forms for use in seeking a temporary restraining order as well as an injunction and/or damages, see Ch. 303, *Injunctions* .

[3] Private and Public Nuisances

A nuisance is anything which is injurious to health, is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or which unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway [*Civ. Code § 3479*; *Penal Code § 370*]. A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, al though the extent of the annoyance or damage inflicted on individuals may be unequal [*Civ. Code § 3480*]. Every nuisance that is not a public nuisance is a private nuisance [*see Civ. Code § 3481*]. For a general discussion of public and private nuisances, see *§ 391.11*.

This form is for use in asserting a cause of action based on a private nuisance. A private person may not assert a cause of action based on a public nuisance unless he or she alleges facts showing special injury to himself or herself of a character different in kind, rather than degree, from that suffered by the general public [*Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 124, 99 Cal. Rptr. 350* ; *see Civ. Code § 3493*]. For an allegation of the requisite special injury for insertion in this complaint to permit a private plaintiff to assert a cause of action based on a public nuisance, see *§ 391.91*.

[4] Permanent and Continuing Nuisances

A nuisance is considered permanent when it is of such a character that it will presumably continue indefinitely and, as a practical matter, cannot be abated. A nuisance is considered continuing, rather than permanent, if it may be abated or discontinued at any time. Every repetition of a continuing nuisance is a separate wrong for which the injured person may bring successive actions for damages until the nuisance is abated, even though an action based on the original wrong may be barred by the statute of limitations [*Phillips v. City of Pasadena (1945) 27 Cal. 2d 104, 107-108, 162 P.2d 625* ; *see § 391.15*].

It is often difficult to categorically classify a nuisance as either permanent or continuing. However, the distinction between the two is important in determining the amount of damages recoverable, whether or not a plaintiff is entitled to an injunction, and when the statute of limitations commences to run [*see § 391.26*].

In cases of uncertainty, the plaintiff has the election of treating the nuisance as either permanent or continuing [*Spaulding v. Cameron (1952) 38 Cal. 2d 265, 268, 239 P.2d 625* ; *Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1145, 281 Cal. Rptr. 827]* . This complaint assumes plaintiff has chosen, at least at the initial pleading stage, to treat the nuisance as continuing. This alternative, unlike that of asserting a permanent nuisance, allows plaintiff to seek abatement of the nuisance and may avoid possible statute of limitations problems. Should the court determine the nuisance is permanent and deny an injunction for that reason, plaintiff would then be able to obtain the future damages which he or she would be denied if the court had found the nuisance to be continuing and granted an injunction [*see Spaulding v. Cameron (1952) 38 Cal2d 265, 268, 239 P.2d 625* ; *see also § 391.26*].

[5] Allegations

[a] In General

This complaint alleges the following:

- Plaintiff's proprietary interest and location of his or her property (Paragraph 1) [*see Civ. Code § 3479*; *Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 126, 99 Cal. Rptr. 350* ; § 391.11[1]].

- Defendants' proprietary interests and location of their property (Paragraph 2); although some nuisances may not involve defendants' property, such as the obstruction of a public street [*see Civ. Code § 3479*; *see also § 391.98*], most do.

- Fictitious names of defendants (Paragraph 3) [*see Code Civ. Proc. § 474*; *see also § 391.90[5][b]*].

- Agency relationship of defendants (Paragraph 4) [*see* Ch. 427, *Principal and Agent*].

- Relative locations of plaintiff's and defendants' properties (Paragraph 5); (6) actions of defendants creating nuisance (Paragraph 6) [*see Civ. Code § 3479*].

- Effects of defendants' actions on plaintiff falling within the statutory definition of nuisance (Paragraph 7) [*see Civ. Code § 3479*; *see also § 391.11[1]*].

- Plaintiff's request that defendants abate the nuisance (Paragraph 8) [*see § 391.20*].

- Defendants' continued maintenance of the nuisance against plaintiff's will (Paragraph 9).

- Nature and amount of damages (Paragraph 10) [*see § 391.90[6]*; *see also §§ 391.26, 391.27*; *see generally* Ch. 177, *Damages*].

- Necessity for a multiplicity of suits unless an injunction is granted (Paragraph 11) and irreparable injury to plaintiff unless an injunction is granted (Paragraph 12) [*see Code Civ. Proc. § 526*; *see generally* Ch. 303, *Inunctions*].

- Lack of a plain, speedy or adequate remedy at law and the express authority foran injunction (Paragraph 13) [*Code Civ. Proc. § 731*].

- For use as an optional paragraph when plaintiff seeks punitive damages, the willful, oppressive, and malicious conduct of defendants warranting punitive damages (Paragraph 14) [*Civ. Code § 3294*].

[b] Fictitiously Named Defendants

When the plaintiff is ignorant of the name of a defendant, he or she must state that fact in the complaint and designate this defendant by any name (Paragraph 3) [*see Code Civ. Proc. § 474*]. The purpose of this allegation is to enable a plaintiff to bring an action against the fictitiously named defendant before it is barred by the statute of limitations [*Austin v. Massachusetts Bonding & Ins. Co. (1961) 56 Cal. 2d 596, 602, 15 Cal. Rptr. 817, 364 P.2d 681]* . However, even though fictitious defendants are named, the statute of limitations is not tolled if no cause of action is alleged against them [*Williams v. Goodman (1963) 214 Cal. App. 2d 856, 861-862, 29 Cal. Rptr. 877]* . Therefore, even when a plaintiff thinks he knows and has named all appropriate defendants, it is a good practice for this paragraph to be included and for the charging allegations in the complaint to refer to "defendants, and each of them." This paragraph and the suggested charging allegation are not mandatory and may be deleted at counsel's discretion [*see also* Ch. 20, *Allegations Commonly Used*].

[6] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[7] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b),* 446] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[8] Jurisdiction

An action seeking permanent injunctive relief is in the jurisdiction of the superior court and is not a limited civil case [*see Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*].

[9] Venue

In an action for injuries to real property, the county in which the property is located is the proper county for the trial of the action [*Code Civ. Proc. § 392(a)(1)*].

[10] Cross References

For forms for, and a discussion of, nuisances between adjoining landowners, see Ch. 11, *Adjoining Landowners*

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For forms of preliminary and permanent injunctions and a procedural guide relating to injunctions, see Ch. 303, *Injunctions*

For forms relating to pollution as a nuisance, see Ch. 418, *Pollution and Environmental Matters*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* and Ch. 572, *Verification* , respectively

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PART V. FORMS

34-391 California Forms of Pleading and Practice--Annotated § 391.91

§ 391.91 Allegation--Public Nuisance [Civ. Code §§ 3479, 3480] Specially Injurious to Plaintiff [Civ. Code § 3493]

[1] FORM Allegation--Public Nuisance [Civ. Code §§ 3479, 3480] Specially Injurious to Plaintiff [Civ. Code § 3493]

The nuisance affects, at the same time, a considerable number of persons in that _____ [*specify, e.g.,* it blocks all public access to Main Street]; but it causes special injury to plaintiff in that _____ [*specify injury to plaintiff different in kind from that suffered by others, e.g.,* the construction of barriers and gates by defendant across Main Street blocks all means of ingress and egress to and from plaintiff's property which abuts on and lies on both sides of Main Street].

[2] Use of Form

This allegation is for use in a complaint by a private person seeking a preliminary and permanent injunction for the abatement of a public nuisance and/or compensatory and/or punitive damages based on a public nuisance. If this allegation is added after Paragraph 7 in § 391.90[1], the complaint will state a cause of action based on a public nuisance. When uncertain whether the nuisance is public or private, counsel may wish to plead both private and public nuisances in alternative counts using §§ 391.90[1] and 391.91[1]. For a discussion and comparison of private and public nuisances, see *§ 391.91[9]*.

The hypothetical facts used in this allegation are from a case holding that the obstruction of a public road constitutes a public nuisance and, when the obstruction blocks all means of access to a person's property, that person has suffered special injury sufficient to give him or her standing to sue for abatement of the public nuisance [*Tucker v. Watkins (1967) 251 Cal. App. 2d 327, 331, 59 Cal. Rptr. 453]* .

[3] Public Nuisance

A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted on individuals may be unequal [*Civ. Code § 3480*]. A private person may maintain an action for a public nuisance if it is specially injurious to himself or herself, but not otherwise [*Civ. Code § 3493*].

[4] Special Injury as Prerequisite

When a public nuisance is not also a private nuisance as to a private individual, he or she does not have a cause of action based on the public nuisance unless he or she alleges facts showing special injury to himself or herself in person or property of a character different in kind, rather than degree, from that suffered by the general public [*Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 124, 99 Cal. Rptr. 350* ; see *§ 391.14*].

[5] Statute of Limitations

One advantage to bringing a private action based on a public nuisance is that there is no statute of limitations applicable to a public nuisance [*see § 391.91[9]*]. No lapse of time can legalize a public nuisance amounting to an actual obstruction of public right [*Civ. Code § 3490*]. Furthermore, neither the defense of laches nor the defense of the statute of limitations may be asserted against a private person bringing an abatement action to stop a continuing public nuisance from which he or she is suffering special injury [*Wade v. Campbell (1962) 200 Cal. App. 2d 54, 60-61, 19 Cal. Rptr. 173* ; *see § 391.91[5]*].

[6] Cross References

See also *§ 391.90*

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34-391 California Forms of Pleading and Practice--Annotated § 391.92

§ 391.92 Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. § 526] to Abate Threatened Nuisance [Civ. Code § 3479]

[1] FORM Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. § 526] to Abate Threatened Nuisance [Civ. Code § 3479]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR PRELIMINARY AND PER-
_____ [*name*], and DOES 1	)	MANENT INJUNCTION
through _____,	)	(Threatened Nuisance)
Defendants.	)	[*Civ. Code § 3479*; *Code Civ. Proc. §§ 526, 527(a)*]
	)	

_____

1. [*Capacity and residence of plaintiff. See § 391.90[1], Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 391.90[1], Paragraph 2.*]

3. [*Fictitious name allegation. See § 391.90[1], Paragraph 3.*]

4. [*Agency allegation, if appropriate. See § 391.90[1], Paragraph 4.*]

5. [*Relative location of plaintiff's and defendants' properties. See § 391.90[1], Paragraph 5.*]

[6. The area in which plaintiff resides is in the location of a growing community, which is part business and part residential.]

7. Defendants, and each of them, plan and threaten _____ [*specify threatened action, e.g.,* to construct and operate an asphalt plant] on their property.

8. _____ [*Allege additional facts demonstrating that threatened actions will create a nuisance, e.g.,* The prevailing winds in proximity to the properties of plaintiff and defendants are from the northwest, and defendants' intended site of operation is located in a northwest direction from plaintiff's residence].

9. _____ [*Allege specific manner in which threatened action will create a nuisance, e.g.,* Any operation of business comparable to defendants' planned operation will cause noxious and malodorous gases, fumes, and other contaminants to pollute the air in the vicinity of and over plaintiff's property] proximately resulting in the interference of plaintiff's [, and plaintiff's family's,] comfortable enjoyment of life and property, will be injurious to the health of plaintiff [and that of his/her family], and will result in the creation of a nuisance as defined by *Section 3479 of the Civil Code*.

10. Unless defendants, and each of them, are enjoined from _____ [*specify, e.g.,* constructing and operating the proposed asphalt plant], plaintiff will suffer irreparable injury in that _____ [*specify irreparable injury, e.g.,* the usefulness and economic value of plaintiff's property will be substantially diminished and plaintiff will be deprived of the comfortable enjoyment of his/her property].

11. Plaintiff has no adequate remedy at law for the threatened nuisance in that _____ [*specify facts in addition to those previously alleged which tend to demonstrate the inadequacy of any legal remedy, especially monetary damages, which plaintiff might pursue, e.g.,* the threatened air pollution will cause a significant health hazard to plaintiff *or* it will be impossible for plaintiff to determine the precise amount of damage which he/she will suffer if defendants' threatened conduct is not restrained] and injunctive relief is authorized by *Section 526 of the Code of Civil Procedure.*

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For a preliminary and a permanent injunction enjoining defendants, and each of them, and their agents, servants, and employees, and all persons acting under, in concert with, or for them, from _____ [*specify act, course of conduct, and/or condition defendants are to be prohibited from doing, e.g.,* constructing and operating an asphalt plant on defendants' premises];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 391.90.*]

CAUTION:

This complaint must either be verified or accompanied by affidavits (or declarations under penalty of

perjury [*Code Civ. Proc. § 2015.5*]) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* .

[2] Use of Form

This form of complaint is for use in seeking a preliminary and permanent injunction to prevent the creation of a threatened nuisance. A complaint seeking the abatement of a threatened nuisance must allege facts showing the danger is probable and imminent [*Helix Land Co. v. City of San Diego (1978) 82 Cal. App. 3d 932, 950-951, 147 Cal. Rptr. 683* , citing *Nicholson v. Getchell (1892) 96 Cal. 394, 396, 31 P. 265]* . For discussion and forms for use in also seeking a temporary restraining order, see Ch. 303, *Injunctions* .

[3] Allegations

The complaint alleges the following:

- Capacity and residence of the parties (Paragraphs 1 and 2).
- Fictitious names of defendants (Paragraph 3) [*see Code Civ. Proc. § 474* and § 391.90[5][b]].
- Agency relationship of defendants (Paragraph 4) [*see generally* Ch. 427, *Principal and Agent*].
- Relative locations of plaintiff's and defendants' properties (Paragraph 5).
- General nature of neighborhood (Paragraph 6) [to be used when the nature of the neighborhood helps establish defendants' threatened actions as a nuisance].
- Threatened actions of defendants which would create a nuisance (Paragraph 7).
- Additional facts demonstrating how the threatened actions will create a nuisance (Paragraph 8).
- Probable effects of defendants' threatened actions that fall within the statutory definition of nuisance (Paragraph 9) [*see Civ. Code § 3479* and § 391.11[1]].
- Facts showing why defendants' conduct will constitute irreparable injury (Paragraph 10) [*Code Civ. Proc. §§ 526(a)(2), 527(a)*; *see E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1]* .
- Facts showing why plaintiff lacks a plain, speedy, or adequate remedy at law and the express authority for an injunction (Paragraph 11) [*see Civ. Code §§ 3422(1)-(3), 3479*; *Code Civ. Proc. § 526(a)(4)-(6)*].

[4] Decisions

Prospective nuisance as enjoinable only on allegation of facts showing danger is probable and imminent. *Helix Land Co. v. City of San Diego (1978) 82 Cal. App. 3d 932, 950-951, 147 Cal. Rptr. 683*

[5] Cross References

See also *§ 391.90*

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34-391 California Forms of Pleading and Practice--Annotated § 391.93

§ 391.93 Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. §§ 526, 731] to Abate Nuisance [Civ. Code § 3479]--Hazard on Nearby Property Endangering Plaintiff's Proprietary Interest

[1] FORM Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. §§ 526, 731] to Abate Nuisance [Civ. Code § 3479]--Hazard on Nearby Property Endangering Plaintiff's Proprietary Interest

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAIN T FOR PRELIMINARY AND PER-
_____ [*name*], and DOES 1	)	MANENT INJUNCTION
through _____,	)	(Nuisance)
Defendants.	)	[*Civ. Code § 3479*; *Code Civ. Proc. §§ 526, 527(a), 731*]
	)	

_____

1. [*Capacity and residence of plaintiff. See § 391.90[1], Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 391.90, Paragraph 2.*]

3. [*Fictitious name allegation, if appropriate. See § 391.90[1], Paragraph 3.*]

4. [*Agency allegation, if appropriate. See § 391.90[1], Paragraph 4.*]

5. [*Relative location of plaintiff's and defendants' properties. See § 391.90[1], Paragraph 5.*]

6. At all times herein mentioned, and since on or about _____ [*date*], defendants, and each of them, have _____ [*allege acts or omissions creating hazard threatening plaintiff's proprietary interest, e.g.,* stored on their property, in close proximity to the property of plaintiff, gasoline-soaked rags and other flammable material]. The resulting condition has created a _____ [*specify nature of hazard, e.g.,* fire] hazard extremely dangerous to the property of plaintiff.

7. This _____ [*specify nature of hazard, e.g.,* fire] hazard is an obstruction to the free use of plaintiff's property, interferes with his/her comfortable enjoyment of life and property, and constitutes a nuisance under *Section 3479 of the Civil Code.*

8. Unless the nuisance created by defendant is abated and defendant enjoined and ordered to remove the alleged _____ [*specify nature of hazard, e.g.,* fire] hazard, the health, well-being, and comfortable enjoyment of life and property of plaintiff [and plaintiff's family] will suffer irreparable damage.

9. Plaintiff has no plain, speedy, or adequate remedy at law, and injunctive relief is authorized by *Sections 526* and *731 of the Code of Civil Procedure.*

10. On or about _____ [*date*], plaintiff gave notice to defendants, and each of them, requesting the abatement of the alleged nuisance and the _____ [*specify nature of hazard, e.g.,* fire] hazard created by it, but defendants, and each of them, have refused, and continue to refuse, to abate the nuisance.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For a preliminary and a permanent injunction ordering defendants, and each of them, to _____ [*specify requested relief, e.g.,* remove all gasoline-soaked rags and other combustible material from their premises].

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 391.90[1].*]

CAUTION:

This complaint must either be verified or accompanied by affidavits (or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*]) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* .

[2] Use of Form

This form of complaint is for use in seeking a preliminary and permanent injunction ordering the abatement of a nuisance created by a hazard on nearby property endangering plaintiff's proprietary interest. The complaint does not seek damages, but merely the abatement of the nuisance. For a form seeking both abatement and damages, see *§ 391.90[1]*. For a discussion and forms for use in also seeking a temporary restraining order, see Ch. 303, *Injunctions* . The hypothetical facts used in the example were modified and taken from *People v. Oliver (1948) 86 Cal. App. 2d 885, 195 P.2d 926* .

[3] Allegations

The complaint alleges the following:

- Capacity and residence of the parties (Paragraphs 1 and 2).
- Fictitious names of defendants (Paragraph 3) [*see Code Civ. Proc. § 474* and § 391.90[5][b]].
- Agency relationship of defendants (Paragraph 4) [*see generally* Ch. 427, *Principal and Agent*].
- Relative locations of plaintiff's and defendants' properties (Paragraph 5);
- Description of actions of defendants creating a hazard dangerous to plaintiff's property (Paragraph 6).
- Manner in which defendants' actions constitute a nuisance pursuant to *Civ. Code § 3479* (Paragraph 7) [*see § 391.11[1]*].
- Irreparable injury to plaintiff unless an injunction is granted and the nuisance abated (Paragraph 8) [*Code Civ. Proc. §§ 526(a)(2), 527(a)*; *see E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1]* .
- Plaintiff's lack of a plain, speedy, or adequate remedy at law and the authority for an injunction (Paragraph 9) [*see Civ. Code §§ 3422(1)-(3), 3479*; *Code Civ. Proc. § 526(a)(4)-(6)*].
- Plaintiff's notice to defendant and request that the nuisance be abated (Paragraph 10) [*see § 391.20*].

[4] Cross References

See also *§ 391.90*

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34-391 California Forms of Pleading and Practice--Annotated § 391.94

§ 391.94 Complaint for Temporary Writ of Injunction [Health & Safety Code § 11573; Code Civ. Proc. §§ 526, 527(a)] and Permanent Injunction [Civ. Code § 3422; Health & Safety Code §§ 11570, 11571] to Abate Public or Private Nuisance and for Damages [Civ. Code § 3333; Health & Safety Code § 11570]--Buildings or Places Where Controlled Substances Are Manufactured, Sold, or Kept [Health & Safety Code §§ 11570-11587]

[1] FORM Complaint for Temporary Writ of Injunction [Health & Safety Code § 11573; Code Civ. Proc. §§ 526, 527(a)] and Permanent Injunction [Civ. Code § 3422; Health & Safety Code §§ 11570, 11571] to Abate Public or Private Nuisance and for Damages [Civ. Code § 3333; Health & Safety Code § 11570]--Buildings or Places Where Controlled Substances Are Manufactured, Sold, or Kept [Health & Safety Code §§ 11570-11587]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*]	)	
Plaintiff	)	No. _____
vs.	)	COMPLAINT FOR TEMPORARY WRIT OF IN-
_____ [*name(s)*] [and DOES 1	)	JUNCTION AND PERMANENT INJUNCTION
through _____],	)	[*Civ. Code §§ 3333, 3422*; *Code Civ. Proc. §§ 526,*
Defendant(s).	)	*527(a)*; *Health & Safety Code §§ 11570-11587*]
	)	

_____

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, a citizen of California resident in _____ County, which is the county in which the nuisance that is the subject of this complaint exists.

2. Defendant _____ [*name*] is, and at all times herein mentioned was, the _____ [

specify proprietary interest, e.g., owner *or* lessor *or* agent of the owner] of the building in which the nuisance exists.

[3. Defendant _____ (*name*) is, and at all times herein mentioned was, the person conducting or maintaining the nuisance that is the subject of this complaint.]

[4. *Fictitious name allegation. See § 391.90, Paragraph 3.*]

[5. *Agency allegation, if appropriate. See § 391.90, Paragraph 4.*]

6. At all times herein mentioned, and since _____ [*date*], defendants, and each of them, have occupied, used, and maintained the premises at _____ [*address*], _____ [*city*], _____ [*county*] for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away a controlled substance, precursor, or analog, as specified in *Health & Safety Code §§ 11000-11651*, [namely, _____ (*specify*),] and the building is a _____ [public *or* private] nuisance pursuant to *Section 11570 of the Health & Safety Code*.

7. Defendants have threatened to and will, unless restrained by this court, continue to maintain the nuisance and continue the acts complained of, in violation of the rights of plaintiff.

[*EITHER*]

8. As a proximate result of the nuisance created by the defendants, plaintiff has been, and will be, damaged in the sum of $_____ because _____ [*specify, e.g.,* plaintiff's property has diminished in value because of its proximity to the nuisance, which poses a hazard of explosion because of the chemical manufacturing process maintained within the property].

[*AND/OR*]

9. As a [further] proximate result of the nuisance, plaintiff has been hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of these injuries, plaintiff has suffered general damages in an amount according to proof.

[*AND/OR*]

10. As a [further] proximate result of the nuisance created by defendants, and each of them, plaintiff has incurred[, and will continue to incur,] medical and related expenses in an amount according to proof.

[*CONTINUE*]

11. Plaintiff has no plain, speedy, or adquate remedy at law, and injunctive relief is expressly authorized in *Sections 11570-11587 of the Health & Safety Code*.

[12. In maintaining the nuisance, defendants, and each of them, are acting with full knowledge of the consequences and damage being caused to plaintiff, and their conduct is willful, oppressive, and malicious; accordingly, plaintiff is

entitled to punitive damages against defendants in the sum of $_____.]

[*ADD, if desired*]

13. A temporary writ of injunction to close the premises is necessary in this case to abate and prevent the _____ [continuance *or* recurrence] of this nuisance.

WHEREFORE, plaintiff prays judgment against defendants as follows:

1. For a preliminary and permanent injunction enjoining defendants and their agents, servants, employees, and all persons acting under, in concert with, or for them from unlawfully selling, serving, storing, keeping, manufacturing, or giving away a controlled substance, precursor, or analog, as specified in *Sections 11000-11651 of the Health & Safety Code*, in the building described above.

[2. For a temporary writ of injunction to close the premises;]

3. For general damages _____ [in the sum of $_____ *or* in an amount within the jurisdiction of this court];

4. For _____ [*specify special damages, if any, e.g.*, the diminution in value of plaintiff's property because of the nuisance];

[5. For punitive damages (in the sum of $_____);]

6. For costs of suit herein incurred; and

7. For such other relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 391.90.*]

[2] Use of Form

This complaint for injunctive relief is for use by a person who is affected by the maintenance of a building or other place that is a nuisance because it is used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away a controlled substance, precursor, or analog, as specified in *Health & Safety Code §§ 11000-11651* [*Health & Safety Code §§ 11570-11587*]. A private citizen resident in the county, as well as the district attorney or city attorney, may maintain an action to enjoin, abate, and prevent such a nuisance and to recover damages therefor [*Health & Safety Code §§ 11570, 11571*].

[3] Allegations

The complaint alleges the following:

- Capacity and residence of the parties (Paragraphs 1-3).

- Fictitious names of defendants (optional Paragraph 4) [*see Code Civ. Proc. § 474* and § 391.90[5][b]].

- Agency relationship of defendants (optional Paragraph 5) [*see generally* Ch. 427, *Principal and Agent*].

- Actions of defendants in maintaining a nuisance by selling, serving, storing, keeping, manufacturing, or giving away of controlled substances (Paragraph 6) [*see Health & Safety Code §§ 11570, 11571*].

- Defendants' threatened continued maintenance of the nuisance (Paragraph 7);

- Nature and amount of damages (alternative Paragraphs 8-10) [*see § 391.90[6]*].

- Lack of plain, speedy, adequate remedy at law and express statutory authority for injunction (Paragraph 11) [*Health & Safety Code §§ 11570, 11571*; *see Health & Safety Code §§ 11570-11587*].

- An optional request for punitive damages for use when it is alleged that the defendant acted with malice or oppression (Paragraph 12) [*Civ. Code § 3294(a)*].

- Optional request for temporary writ of injunction (Paragraph 13) [*see Health & Safety Code §§ 11573-11574*].

[4] Verification

The complaint for abatement of a nuisance brought pursuant to *Health & Safety Code §§ 11570, 11571* must be verified when brought by a private citizen [*Health & Safety Code § 11572*].

[5] Costs

If the existence of the nuisance is established in the action, plaintiff's costs are a lien on the building or place [*Health & Safety Code § 11579*]. If the court finds no reasonable ground or cause for the action, however, the costs are taxed against the plaintiff [*Health & Safety Code § 11578*].

[6] Temporary Writ

If the existence of the nuisance is shown in the action to the satisfaction of the court or judge, the court or judge must allow a temporary writ of injunction to abate and prevent the continuance or recurrence of the nuisance [*Health & Safety Code § 11573*]. If the writ is granted, the court will require an undertaking from the applicant to the effect that the applicant will pay to the defendant enjoined such damages, not exceeding a specified amount, as the defendant sustains by reason of the injunction if the court finally decides that the applicant was not entitled to the injunction [*Health & Safety Code § 11573*]. Protective orders are available to protect witnesses to the existence of the nuisance from threats of violence [*see Health & Safety Code § 11573.5(a)*]. A temporary writ issued after a hearing may include an order for closure of the premises pending trial, but reasonable notice and an opportunity to be heard must be provided all tenants who may be affected by the order [*see Health & Safety Code § 11573.5(b), (c)*]. In addition, the court must order the defendant to provide relocation assistance to any tenant ordered to vacate the premises because of

closure, provided the tenant was not actively involved in the nuisance activity [*see Health & Safety Code § 11573.5(d)*].

The remedies provided in *Health & Safety Code § 11573.5* are in addition to any other existing remedies for nuisance abatement actions, including, but not limited to, capital improvements to the property such as security gates, improved interior or exterior lighting, security guards, posting of signs, owner membership in neighborhood or local merchant associations, attending property management training programs, and making cosmetic improvements to the property [*Health & Safety Code § 11573.5(f)(1)*].

At all stages of an action brought under *Health & Safety Code § 11570 et seq.*, the court has equitable powers to order steps necessary to remedy the problem and enhance the abatement process [*Health & Safety Code § 11573.5(f)(2)*].

[7] Dismissal Restrictions

Once a complaint is filed by a private citizen, it cannot be dismissed by him or her or for want of prosecution, except on a sworn statement made by the citizen and his or her attorney setting forth the reasons why the action should be dismissed, and by dismissal ordered by the court [*Health & Safety Code § 11576*].

[8] Cross References

For forms of temporary restraining orders, orders to show cause, and preliminary and permanent injunctions, see Ch. 303, *Injunctions*

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34-391 California Forms of Pleading and Practice--Annotated § 391.95

§ 391.95 Allegation of Liability for Damages for Personal Injury [Civ. Code § 3333; Code Civ. Proc. § 731] Based on Nuisance [Civ. Code § 3479]--Cause of Action Attachment to Judicial Council Form of Complaint for Personal Injury [Code Civ. Proc. § 425.12]

[1] FORM Allegation of Liability for Damages for Personal Injury [Civ. Code § 3333; Code Civ. Proc. § 731] Based on Nuisance [Civ. Code § 3479]--Cause of Action Attachment to Judicial Council Form of Complaint for Personal Injury [Code Civ. Proc. § 425.12]

SHORT TITLE: CASE NUMBER:

_____ _____
_____

_____ [*specify number, e.g.,* FIRST] CAUSE OF ACTION--Nuisance (*Civ. Code § 3479*)

ATTACHMENT TO COMPLAINT

Plaintiff _____ [*name*] alleges that:

NUI-1. At all times herein mentioned _____ [*describe area*] was a _____ [*specify public area, e.g.,* public park *or* square *or* highway] in _____ County, California, and open to public travel and use.

NUI-2. On or about _____ [*date*], plaintiff _____ [*name*] was lawfully in the _____ [*specify public area, e.g.,* public park *or* square *or* highway] which was at that time _____ [*specify general activity being conducted by defendants, e.g.,* undergoing excavation and construction work by defendants].

NUI-3. Prior to _____ [*date*], defendants, and each of them, _____ [*specify acts causing nuisance, e.g.,* caused large unguarded excavations to be created, permitted large mounds of debris to accumulate and to re-

main unprotected and unmarked in the pathways of the public area, obstructed an extensively used walkway in the public area, permitted large amounts of stone, asphalt, and other debris to remain strewn in the pathway of pedestrians lawfully using the open thoroughfare,] and, in general, committed acts and omissions constituting the creation of a nuisance within the meaning of *Section 3479 of the Civil Code*.

NUI-4. As a proximate result of the statutory violation and maintenance of the nuisance, plaintiff, on _____ [*date*], _____ [*describe accident, e.g.,* fell and struck his/her head on a piece of excavated material,] suffering the injuries and damages alleged.

Page _____

[2] Use of Form

This form is for use in an action seeking damages for personal injuries based on a nuisance created by defendants. In addition to the count basedon nuisance as set forth in this form, counsel may wish to include in the complaint an additional count, using the Judicial Council General Negligence Attachment [Cal. Judicial Council Form PLD-PI-001(2)], based on the negligence of defendants in creating the conditions causing the accident [*see* Ch. 380, *Negligence*].

The form is designed as a cause of action to be attached to the Judicial Council form of complaint for damages resulting from personal injury [*see Cal. Rules of Ct., Rule 1.45(c)*; Cal. Judicial Council Form PLD-PI-001]. For instructions and a filled-in example of the Judicial Council complaint form, see Ch. 380, *Negligence* . The paragraphs of this form must be numbered consecutively beginning with one, and must be preceded with one or more identifying letters derived from the title of the cause of action [*Cal. Rules of Ct., Rule 1.45(c)*]. The paragraphs in this form are lettered "NUI" as derived from the title "Nuisance." The form should be prepared in the format prescribed by *Cal. Rules of Ct., Title 2, Div. 2, Ch. 1*, which includes a requirement that the lines on the page be numbered consecutively [*see Cal. Rules of Ct., Rule 1.45*]. For discussion of format requirements under *Cal. Rules of Ct., Title 2, Div. 2, Ch. 1*, see Ch. 123, *Complaints and Cross Complaints* .

For general information relating to the use of Judicial Council complaint forms, see Ch. 123, *Complaints and Cross Complaints* . These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. Noninteractive versions in PDF format also are available at www.lexisone.com at no charge.

If the Judicial Council complaint for personal injury is not used, this form may be adapted for use in a complaint drafted by counsel. Use of the Judicial Council pleading forms is optional [*Cal. Rules of Ct., Rule 1.35(b)*].

[3] Cross References

For a related form, see *§ 391.90*

For forms for use in actions for personal injury damages based on the liability of the possessor of land, see Ch. 421, *Premises Liability*

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34-391 California Forms of Pleading and Practice--Annotated § 391.96

§ 391.96 Allegations--Private Nuisance [Civ. Code §§ 3479-3481]--Noise and Vibrations

[1] FORM Allegations--Private Nuisance [Civ. Code §§ 3479-3481]--Noise and Vibrations

1. At all times herein mentioned, and since _____ [*date*], defendants, and each of them, have conducted, and now conduct, a _____ [*describe business, e.g.,* bar and restaurant business] under the name _____ on their premises.

2. At all times herein mentioned, and since _____ [*date*], defendants, and each of them, have conducted their business in such a manner as to constitute a private nuisance, as defined by *Sections 3479-3481 of the Civil Code*, in that _____ [*specify acts constituting nuisance, e.g.,* between the hours of _____ [*time*] and _____ [*time*] daily, defendants, and each of them, have caused and permitted such loud music, foot stomping and hand clapping that the noise and vibrations disturb plaintiff, prevents him/her from sleeping, prevents the use of his/her patio] and is generally injurious to plaintiff's health, is offensive to the senses, is an obstruction to the free use of plaintiff's property and interferes with plaintiff's comfortable enjoyment of life and property.

[3. Defendants, and each of them, are creating the nuisance as the result of unnecesary, unreasonable, and injurious methods of operation of their business.]

[2] Use of Form

These allegations are for use in a complaint seeking compensatory [*Civ. Code § 3333*; *Code Civ. Proc. § 731*] and/or punitive [*Civ. Code § 3294*] damages and/or a preliminary [*Code Civ. Proc. § 527(a)*] and/or permanent [*Code Civ. Proc. §§ 526, 731*] injunction for the abatement of a private nuisance [*Civ. Code §§ 3479-3481*] created by noise and vibrations from defendant's business premises. They should be inserted in place of Paragraphs 6 and 7 in § 391.90[1].

The facts used in the example were modified and taken from *People v. Mason (1981) 124 Cal. App. 3d 348, 177 Cal. Rptr. 284* . For a discussion of noise as a nuisance, see *§ 391.52[12][f]*. For a form and discussion of the possible defense that the business is being conducted in an area specifically zoned for that business, see *§§ 391.30[3]* and *391.101*.

[3] Allegations

This complaint alleges the following:

- The nature of the specific business being conducted by defendants on their premises (Paragraph 1);

- The specific type of conduct or activity causing the nuisance and its effect on plaintiff's comfortable enjoyment of his or her life and property (Paragraph 2) [*Civ. Code §§ 3479-3481*]; and

- As an optional paragraph for use when defendants conduct a business in a zoned district, that the nuisance results from unnecessary, unreasonable, and injurious methods of operation of defendants' business (Paragraph 3) [*see Code Civ. Proc. § 731a*; *see § 391.30[3]*].

[4] Cross References

For related forms, see *§ 391.90*

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§ 391.97 Allegations--Private Nuisance [Civ. Code §§ 3479-3481]--Air Pollution

[1] FORM Allegations--Private Nuisance [Civ. Code §§ 3479-3481]--Air Pollution

1. At all times herein mentioned, and since _____ [*date*], defendants, and each of them, have conducted, and now conduct, a _____ [*describe business, e.g.,* cement manufacturing business] under the name _____ on their premises.

2. At all times herein mentioned, and since _____ [*date*], defendants, and each of them, have conducted their business in such a manner as to constitute a private nuisance, as defined by *Sections 3479-3481 of the Civil Code*, in that _____ [*specify acts constituting nuisance, e.g.,* their cement plant emits large quantities of dust, chemicals, and other contaminants into the air which are carried by the natural winds and air currents onto plaintiff's premises and collect on the flower beds, entrance way, and building] and are generally injurious to plaintiff's health, are offensive to the senses, and interfere with plaintiff's comfortable enjoyment of life and property.

[3. Defendants, and each of them, are creating the nuisance as the result of unnecessary, unreasonable, and injurious methods of operation of their business.]

[2] Use of Form

These allegations are for use in a complaint seeking compensatory [*Civ. Code § 3333*; *Code Civ. Proc. § 731*] and/or punitive [*Civ. Code § 3294*] damages and/or a preliminary [*Code Civ. Proc. § 527(a)*] and/or permanent [*Code Civ. Proc. §§ 526, 731*] injunction for the abatement of a private nuisance [*Civ. Code §§ 3479-3481*] created by air pollution from defendant's business premises. They should be inserted in place of Paragraphs 6 and 7 in § 391.90[1].

The facts used in the example were modified and taken from a case affirming a finding that a cement plant emitting dust and chemicals which were deposited on plaintiffs' property constituted a nuisance [*see Guttinger v. Calaveras Cement Co. (1958) 160 Cal. App. 2d 460, 461-462, 325 P.2d 145]* . For a discussion of both water and air pollution as a nuisance, see *§ 391.24[8]* and Ch. 418, *Pollution and Environmental Matters* . For a form and discussion of the possible defense that the business is being conducted in an area specifically zoned for that business, see *§§ 391.30[3]* and *391.101*.

[3] Allegations

This complaint alleges the following:

- The nature of the specific business being conducted by defendants on their premises (Paragraph 1);

- specific type of conduct or activity causing the nuisance and its effect on plaintiff's comfortable enjoyment of his or her life and property (Paragraph 2) [*Civ. Code §§ 3479-3481*]; and

- As an optional paragraph for use when defendants conduct a business in a zoned district, that the nuisance results from unnecessary, unreasonable, and injurious methods of operation of defendants' business (Paragraph 3) [*see Code Civ. Proc. § 731a*; *see also sect; 391.30[3]*].

[4] Cross References

See also *§§ 391.90* and *391.96*

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34-391 California Forms of Pleading and Practice--Annotated § 391.98

§ 391.98 Allegations--Private Nuisance [Civ. Code §§ 3479-3481]--Obstruction of Public Street

[1] FORM Allegations--Private Nuisance [Civ. Code §§ 3479-3481]--Obstruction of Public Street

1. At all times herein mentioned plaintiff's premises fronted on _____ [*name of street*], a public street which had been used by plaintiff and the public continuously until _____ [*date*]. _____ [*Name of street*], is located within _____ [*city*], _____ County, California.

2. On or about _____ [*date*], defendants, and each of them, barricaded _____ [*name of street*] and forcibly prevented, and do now forcibly prevent, plaintiff and the public generally from traveling over or using _____ [*name of street*].

3. Plaintiff is specially damaged by this barricade in that he/she is deprived of the right of ingress and egress to and from his/her premises in both directions from _____ [*name of street*].

[2] Use of Form

These allegations are for use in a complaint seeking compensatory [*Civ. Code § 3333*; *Code Civ. Proc. § 731*] and/or punitive [*Civ. Code § 3294*] damages and/or a preliminary [*Code Civ. Proc. § 527(a)*] and/or permanent [*Code Civ. Proc. §§ 526, 731*] injunction for the abatement of a private nuisance [*Civ. Code §§ 3479-3481*] created by the obstruction of a public street. To complete the complaint, these allegations should be inserted in place of Paragraphs 5-7 of § 391.90[1]. Paragraph 2 of § 391.90[1] should also be omitted. For a discussion of the obstruction of a public street as a nuisance, see *§ 391.24[9]*.

[3] Allegations

This complaint alleges the following: (1) the name and location of the public street on which plaintiff's property fronts (Paragraph 1); (2) defendants' obstruction of the public street (Paragraph 2) [see *Civ. Code § 3479*]; (3) the obstruction prevents ingress and egress to plaintiff's property, a special injury (Paragraph 3) [*see Civ. Code § 3493*; *Brown v. Rea (1907) 150 Cal. 171, 174, 88 P. 713* ; *see also § 391.14*].

[4] Cross References

See also *§§ 391.90* and *391.96*

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§ 391.99 Allegations--Private Nuisance [Civ. Code §§ 3479-3481]--Diversion of Naturally Accumulated Waters Onto Plaintiff's Property

[1] FORM Allegations--Private Nuisance [Civ. Code §§ 3479-3481]--Diversion of Naturally Accumulated Waters Onto Plaintiff's Property

1. Plaintiff's property and the property of defendant[s, and each of them], are _____ [*describe relative locations, e.g.,* adjoining each other at plaintiff's north and defendant's south boundaries].

2. At all times mentioned herein, and since _____ [*date*], defendant[s, and each of them], have occupied, used, and maintained their premises so that _____ [*allege facts demonstrating nuisance, e.g.,* through defendant's construction and maintenance of a drainage ditch, water that had naturally accumulated in a pond on defendant's land now flows onto plaintiff's land].

3. The aforementioned occupation, use, and maintenance of the property of defendant[s, and each of them], constitutes a nuisance within the meaning of *Section 3479 of the Civil Code*, in that it _____ [*specify basis of nuisance, e.g.,* interferes with plaintiff's comfortable enjoyment of his property].

[2] Use of Form

These allegations are for use in a complaint seeking compensatory damages [*Civ. Code § 3333*; *Code Civ. Proc. § 731*], punitive damages, if appropriate [*Civ. Code § 3294*], and preliminary [*Code Civ. Proc. § 527(a)*] and permanent [*Code Civ. Proc. §§ 526, 731*] injunctive relief for the abatement of a private nuisance [*Civ. Code §§ 3479-3481*] created by the diversion of water onto plaintiff's land. To complete the complaint, these allegations should be inserted in place of Paragraphs 5-7 of § 391.90[1].

When water is caused to flow onto the land of another that would not naturally flow thereon, that is an invasion and injury to the right of property and a nuisance per se, and its continuance or maintenance may be enjoined [*Galbreath v. Hopkins (1911) 159 Cal. 297, 301, 302, 113 P. 174]* . This complaint uses the diversion of naturally accumlating waters as the factual example warranting relief. With appropriate modification the complaint may be used for other types of wrongful flowing [see *§ 391.24[6]*].

Negligence and nuisance are very similar concepts; negligence is one type of conduct that might give rise to a nuisance. If recovery of damages is sought under the same state of facts but under different theories of recovery (private nuisance and negligence), there is but one cause of action [*Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 372-375, 82 Cal. Rptr. 689]* . For discussion and forms of allegations for use in seeking to recover for damages caused by water based on a negligence theory, see Ch. 421 *Premises Liability* .

This form is adapted from the fact situation in *Galbreath v. Hopkins (1911) 159 Cal. 297, 113 P. 174* .

[3] Allegations

This complaint alleges (1) the relative locations of plaintiff's and defendant's properties (Paragraph 5), (2) actions of defendants creating a nuisance (Paragraph 6) [*see Civ. Code § 3479*], and (3) the effects of defendant's actions on plaintiff falling within the statutory definition of nuisance (Paragraph 7).

[4] Cross References

For related forms, see *§§ 391.90* and *391.96*

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34-391 California Forms of Pleading and Practice--Annotated § 391.100

§ 391.100 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Statutory Authority [Civ. Code § 3482]

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Statutory Authority [Civ. Code § 3482]

AS A [_____ *(if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES the actions and conditions complained of by plaintiff are expressly authorized by _____ [*specify statutory authority*] and may not be judged a nuisance as *Section 3482 of the Civil Code* provides that nothing done or maintained under the express authority of a statute can be deemed a nuisance.

[2] Use of Form

This affirmative defense is for insertion in an answer to a complaint based on nuisance when the condition complained of was created pursuant to express statutory authority. This defense is based on *Civ. Code § 3482* which provides that nothing done or maintained under the express authority of a statute can be deemed a nuisance. The exculpatory effect of *Civ. Code § 3482* has been circumscribed by decisions giving a narrow construction to the statute [*see, e.g., Greater Westchester Homeowners Ass'n v. City of Los Angeles (1979) 26 Cal. 3d 86, 100-101, 160 Cal. Rptr. 733, 603 P.2d 1329]* . For a more complete discussion of this defense, see *§ 391.30*.

If more than one affirmative defense is set forth in the answer, each defense must be separately stated [*Code Civ. Proc. § 431.30(g)*] and numbered [*Cal. Rules of Ct., Rule 2.112(1)*]. If the complaint sets forth more than one one cause of action, the affirmative defense must refer to the cause of action it is intended to answer [*Code Civ. Proc. § 431.30(g)*].

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§ 391.101 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Business Operating in Permitted Zone [Code Civ. Proc. § 731a]

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Business Operating in Permitted Zone [Code Civ. Proc. § 731a]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that defendant is a business operating in an area zoned for the type of business conducted by defendant and, pursuant to *Section 731a of the Code of Civil Procedure*, it may not be enjoined or restrained from reasonable and necessary operation in its present location.

[2] Use of Form

This affirmative defense is for insertion in an answer to a complaint seeking an injunction against an alleged nuisance created by a business or airport operating in an area zoned for such use. Except in an action to abate a public nuisance brought in the name of the people of the State of California, no such business may be enjoined from reasonable and necessary operation in such zone, nor may it be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation [*Code Civ. Proc. § 731a*]. For a more complete discussion of this defense, see *§ 391.30[3]*.

[3] Cross References

See also *§ 391.100*

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34-391 California Forms of Pleading and Practice--Annotated § 391.102

§ 391.102 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--No Notice of Nuisance to Successive Owner

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--No Notice of Nuisance to Successive Owner

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES he/she is the successive owner of the subject property and, prior to being served with the complaint in this action, had no notice or knowledge of the alleged nuisance.

[2] Use of Form

This affirmative defense is for insertion in an answer to a complaint based on nuisance when the defendant is a successive owner of the property and had no notice of the alleged nuisance. Although *Civ. Code § 3483* provides for the liability of a successive owner for a nuisance created by a former owner, an exception has been judicially created when the successive owner had no actual notice or knowledge of the nuisance [*see Pierce v. German Sav. & Loan Soc'y (1887) 72 Cal. 180, 183, 13 P. 478* ; *Reinhard v. Lawrence Warehouse Co. (1940) 41 Cal. App. 2d 741, 746, 107 P.2d 501]* . For a discussion of this defense, see *§ 391.21[2]*.

[3] Cross References

See also *§ 391.100*

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§ 391.103 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Statute of Limitations [Code Civ. Proc. §§ 335.1, 338(b), (c), 458]

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Statute of Limitations [Code Civ. Proc. §§ 335.1, 338(b), (c), 458]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that the action is barred by the provisions of _____ [*if action based on nuisance creating personal injury, allege* Section 335.1 *or, if action based on injury to real property, allege* Section 338(b) *or, if action based on injury to personal property, allege* Section 338(c)] of the Code of Civil Procedure.

[2] Use of Form

This affirmative defense is for use in an answer to a complaint not filed within the applicable period of limitation. For a discussion of the application of statutes of limitations to nuisances, see *§ 391.31*.

[3] Cross References

See also *§ 391.100*

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§ 391.104 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Preexisting Agricultural Use Not Nuisance [Civ. Code § 3482.5(a)]

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Preexisting Agricultural Use Not Nuisance [Civ. Code § 3482.5(a)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

[*EITHER, if agricultural activity is for commercial purposes*]

that the agricultural _____ [activity *or* operation *or* facility] complained of

1. Was, at all material times, _____ [conducted *or* maintained] for commercial purposes, and in a manner consistent with proper and accepted customs and standards, as established and followed by similar agricultural operations in the same locality;

2. Began operation on or about _____ [*date*], more than three years ago; and, therefore,

3. Pursuant to *Section 3482.5(a)(1) of the Civil Code*, may not be or become a nuisance due to any changed condition in or about the locality.

[*OR, if activity is of a district agricultural association*]

that the activity complained of

1. Was, at all material times, activity of a district agricultural association that is operated in compliance with *Section*

3001 et seq. of the Food and Agricultural Code, that commenced operation on or about _____ [*date*], a period of more than three years prior to the commencement of this action;

2. Was not a nuisance at the time it began; and, therefore,

3. Pursuant to *Section 3482.5(a)(2) of the Civil Code*, may not be or become a nuisance due to any changed condition in or about the locality.

[2] Use of Form

This affirmative defense is for insertion in an answer to a complaint contending that the defendant's commercial agricultural activity, operation, or facility constitutes a nuisance. The first alternative of the defense is based on *Civ. Code § 3482.5(a)(1)*, which excludes, under specified conditions, an agricultural activity, operation, or facility, or appurtenances thereof, conducted or maintained for commercial purposes from being or becoming a nuisance. The second alternative of the defense is based on *Civ. Code § 3482.5(a)(2)*, which similarly excludes activity of a district agricultural association that is operated in compliance with *Food & Agric. Code § 3001 et seq.* For further discussion of this defense, see *§ 391.25[1]*.

[3] Cross References

See also *§ 391.100*

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34-391 California Forms of Pleading and Practice--Annotated § 391.105

§ 391.105 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Preexisting Agricultural Processing Use Not Nuisance [Civ. Code § 3482.6(a)]

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Preexisting Agricultural Processing Use Not Nuisance [Civ. Code § 3482.6(a)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST) SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the alleged nuisance complained of by plaintiff,

1. Was, at all material times, an agricultural processing _____ [activity *or* operation *or* facility *or* appurtenances thereof] because it was [*describe activity, e.g.,* a facility for the canning of fruits and vegetables];

2. Was, at all material times, _____ [conducted *or* maintained] for commercial purposes, and in a manner consistent with compliance with all applicable state and federal statutes and regulations governing its operation with respect to the condition or effect alleged to be a nuisance;

3. Began operation on or about _____ [*date*], which is more than three years ago, was not a nuisance on that date, and has been in operation for more than 30 days per year since that date;

4. Has not substantially increased its operations or activities after January 1, 1993;

5. Is not a public or private nuisance as specifically defined or described in any provision of law other than *Civ. Code § 3479 et seq.*; and, therefore,

6. Pursuant to *Section 3482.6(a) of the Civil Code*, may not be or become a private or public nuisance due to any changed condition in or about the locality.

[2] Use of Form

These affirmative defense allegations are for insertion in an answer to a complaint contending that the defendant's

commercial agricultural processing activity, operation, facility, or appurtenances thereof is a nuisance. These allegations are based on *Civ. Code § 3482.6*, which excludes a commercial agricultural processing activity, operation, facility, or appurtenances thereof from being or becoming a nuisance, if it has been in continuous operation for more than three years, was not a nuisance at the time it began operating, and has not substantially increased its operations after January 1, 1993 [*Civ. Code § 3482.6(a), (b)*]. This defense is not available for any litigation pending or any cause of action accruing before January 1, 1993 [*Civ. Code § 3482.6(f)*]. For further discussion of this defense, see *§ 391.25*.

[3] Cross References

See also *§ 391.100*

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34-391 California Forms of Pleading and Practice--Annotated § 391.106

§ 391.106 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Obstruction of Light and Air Not Nuisance

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Obstruction of Light and Air Not Nuisance

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the alleged nuisance complained of by plaintiff consists of the mere obstruction of the view and the passage of light and air to plaintiff's property. Such a condition may not be considered a nuisance.

[2] Use of Form

This affirmative defense is for insertion in an answer to a complaint alleging that defendant's obstruction of light and/or air and/or view constitutes a nuisance. For further discussion of this defense, see *§ 391.25[4]*.

[3] Cross References

See also *§ 391.100*

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34-391 California Forms of Pleading and Practice--Annotated § 391.107

§ 391.107 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Doctrine of Balancing of Conveniences

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Doctrine of Balancing of Conveniences

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. In creating the condition alleged by plaintiff to be a nuisance, defendant acted innocently and in good faith in that _____ [*specify facts demonstrating good faith, e.g.,* defendant relied on a surveyor licensed by the State of California and on maps and boundary descriptions that showed the property on which the building is located to belong to defendant. At no time until after the completion of the building was defendant informed that the subject land belonged to plaintiff].

2. In seeking an injunction for abatement of the alleged nuisance, plaintiff is seeking to protect a technical and unsubstantial right. The alleged nuisance does no irreparable injury to plaintiff, but, in fact, creates damages of a de minimis nature which can be fully compensated by damages. The alleged nuisance does not adversely affect any existing use of plaintiff's land in that _____ [*specify facts demonstrating de minimus injury to plaintiff, e.g.,* defendant's building is built on two inches of plaintiff's land, 15 feet away from the closest edge of plaintiff's driveway and 25 feet away from the closest edge of plaintiff's house].

3. The issuance of an injunction ordering the abatement of the alleged nuisance would impose a hardship on defendant greatly disproportionate to that imposed on plaintiff by the continuance of the alleged nuisance in that _____ [*specify facts demonstrating relative hardship, e.g.,* the cost of moving defendant's house would be at least $ _____, whereas the damage to plaintiff caused by allowing defendant's house to remain where it was built is de minimus].

[4. After defendant's creation of the alleged nuisance, plaintiff delayed more than _____ (*specify*

number, e.g., eight) years before notifying defendant of the alleged nuisance and seeking legal relief.]

[5. The issuance of an injunction ordering the abatement of the alleged nuisance would be contrary to the interest of third persons and the general public in that _____ (*specify facts demonstrating interests of third persons and general public, e.g.,* defendant's building is used as a "half-way house" for recovering drug addicts and an injunction ordering abatement of the alleged nuisance would force the closure of this needed facility).]

[2] Use of Form

This affirmative defense is for insertion in an answer to a complaint seeking an injunction ordering the abatement of an alleged nuisance. Once plaintiff has proved that defendant is a wrongdoer, the doctrine of balancing of conveniences may be invoked to convince the court not to issue an injunction based on a weighing of the relative conveniences and hardships of the parties. For a discussion of the guidelines followed by courts when this doctrine is invoked, see *§ 391.20*.

[3] Allegations

This form alleges the following:

- The defendant acted innocently and in good faith in creating the alleged nuisance (Paragraph 1) [*see Dolske v. Gormley (1962) 58 Cal. 2d 513, 520-521, 25 Cal. Rptr. 270, 375 P.2d 174]* ;

- Damages to plaintiff are de minimis, and, in fact, plaintiff is seeking to protect a technical and unsubstantial right (Paragraph 2) [*see Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 200, 323 P.2d 1001* ; *Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 559-564, 250 P.2d 660]* ;

- Disproportionate hardship would result from issuance of an injunction (Paragraph 3) [*see Dolske v. Gormley (1962) 58 Cal. 2d 513, 521, 25 Cal. Rptr. 270, 375 P.2d 174]* ;

- If applicable, delay by plaintiff in notifying defendant and seeking relief (Paragraph 4) [*see Dolske v. Gormley (1962) 58 Cal. 2d 513, 521, 25 Cal. Rptr. 270, 375 P.2d 174]* ; and

- If applicable, interests of third persons and the general public favor denial of the injunction (Paragraph 5) [*see Loma Portal Civic Club v. American Airlines, Inc. (1964) 61 Cal. 2d 582, 588, 39 Cal. Rptr. 708, 394 P.2d 548* ; *see also* Restatement of Torts §§ 933, 942].

[4] Cross References

See also *§ 391.100*

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34-391 California Forms of Pleading and Practice--Annotated § 391.108

§ 391.108 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)] to Owner's Action for Damages for Creation of Nuisance by Lessee--Lawful Use Was Consented to by Owner

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)] to Owner's Action for Damages for Creation of Nuisance by Lessee--Lawful Use Was Consented to by Owner

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that use of the property by defendant, as [prior] lessee of _____ [plaintiff *or* plaintiff's predecessor], was at all times lawful and authorized by the lease.

[2] Use of Form

This affirmative defense is for insertion in an answer to a complaint for damages alleging that a lessee or a prior lessee of the plaintiff's land created a nuisance. For further discussion of this defense, see *§ 391.30[8]*.

[3] Cross References

See also *§ 391.100*

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§ 392.syn Synopsis to Chapter 392: OATH AND AFFIRMATION

§ 392.01 Scope of Chapter

§ 392.02 Cross References

§§ 392.03through 392.09 [Reserved]

§ 392.10 Governing Law

§ 392.11 Definitions

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[2] Affidavits and Declarations Under Penalty of Perjury Contrasted

§ 392.12 Power to Administer Oaths

§ 392.13 When Oath Is Required

§ 392.14 Witness's Capacity to Take Oath Required

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§ 392.17 Affirmation

[1] By Witness

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§ 392.18 Objections to Witness's Oath or Failure to Take Oath

§ 392.19 Perjury

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§ 392.40 State Constitution

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[1] Afirmation

[2] Authority to Administer Oath

[3] Oaths and Affirmations Generally

[4] Oath as Including Affirmation

[5] Oath Required to be Taken

[6] Perjury

§ 392.42 Decisions

[1] Power to Administer Oaths

[2] Form of Oath

[3] Capacity to Take Oath

[4] Validity of Oath

[5] Objections to Adequacy of Oath

[6] When Oath Required

[7] Perjury

§ 392.43 Text References

§§ 392.44through 392.59 [Reserved]

§ 392.60 Oath of Witness in Action or Proceeding--Statutory Form [Code Civ. Proc. § 2094(a)(1)]

[1] FORM

[2] Use of Form

§ 392.61 Affirmation of Witness in Action or Proceeding--Statutory Form [Code Civ. Proc. § 2094(a)(2)]

[1] FORM

[2] Use of Form

§ 392.62 Unsworn Written Affirmation in Lieu of Oath Required of Person Appointed to Discharge Duties in Particular Action, Proceeding, or Matter [Code Civ. Proc. § 2015.6]

[1] FORM

[2] Use of Form

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§ 392.01 Scope of Chapter

This chapter discusses the administration and taking of oaths and affirmations generally, requirements as to the form of oaths and affirmations, and the capacity of a witness to testify under oath.

It includes a form of oath [*see § 392.60*] and a form of affirmation for use by a witness in an action or proceeding [*see § 392.61*], and a general form of unsworn written affirmation in lieu of a required oath for use by a person appointed to discharge specific duties [*see § 392.62*].

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34-392 California Forms of Pleading and Practice--Annotated § 392.02

§ 392.02 Cross References

- For forms of affidavits and declarations under penalty of perjury in general, see Ch. 15, *Affidavits, Certificates, and Declarations*

- For forms of letters of guardians and conservators containing written affirmations, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , and Ch.281, *Guardianship and Conservatorship: Appointment of Conservators*

- For forms of letters of executors and administrators containing written affirmations, see Ch. 442, *Probate: Initiating Probate Administration* ,

- For a form of oath of a receiver, see Ch. 486, *Receivers*

- For a discussion of taking the testimony of a witness, see Ch. 551, *Trial*

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[Reserved]

§§ 392.03[Reserved]

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§ 392.10 Governing Law

Oaths and affirmations of witnesses are governed by *Code Civ. Proc. §§ 2093, 2094* and *Evid. Code § 710*.

Written affirmations for persons performing specific duties are governed by *Code Civ. Proc. § 2015.6*.

Oaths required for persons holding particular offices or performing specific duties are governed by *Cal. Const., art. XX, § 3* and by the statutes pertaining to those offices or duties [*see § 392.41[5], below*].

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§ 392.11 Definitions

[1] Oath

Although there is no statutory definition of "oath," the use of that term in other statutory language indicates that an oath is a solemn declaration making a promise or swearing as to the truth of testimony given [*see, e.g., Evid. Code § 751*; *see also Code Civ. Proc. § 2094*].

Generally, the term "oath" includes the terms "affirmation" and "declaration" [*Civ. Code § 14*; *Code Civ. Proc. § 17*]. Use of the term "oath" in specific statutes also often includes the term "affirmation" [*see, e.g., Corp. Code § 16*; *Elec. Code § 335*; *Health & Safety Code § 17*].

The difference between an oath and an affirmation is one of form, based originally on religious beliefs including those concerning the propriety of making an oath invoking the name of a deity. In common usage, a witness taking an oath swears by God or some deity that he or she is telling the truth, whereas a witness making an affirmation affirms, without swearing to any deity, that he or she is telling the truth [*see Code Civ. Proc. § 2094*].

[2] Affidavits and Declarations Under Penalty of Perjury Contrasted

Affidavits or declarations under penalty of perjury, unlike oaths or affirmations by witnesses, officers, or others giving oral promises, are writings, and verify the truth of written, rather than oral, statements. An affidavit is a written declaration under oath, made without notice to the adverse party [*Code Civ. Proc. § 2003*]. A declaration under penalty of perjury is a written statement declaring under penalty of perjury, rather than swearing by oath, that a written statement is true [*see Code Civ. Proc. § 2015.5*].

For discussion and forms relating to affidavits and declarations under penalty of perjury, see Ch. 15, *Affidavits, Certificates, and Declarations* .

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§ 392.12 Power to Administer Oaths

Every court, every judge, or retired judge, or clerk of any court, every justice or retired justice, and every notary public, and every officer or person authorized to take testimony in any action or proceeding or to decide on evidence, is authorized to administer oaths or affirmations [*Code Civ. Proc. § 2093*; *see Code Civ. Proc. §§ 128(a)(7), 177(4), 179*; *Gov. Code §§ 1225, 8205(a)(3)*].

Shorthand reporters certified under *Bus. & Prof. Code § 8020 et seq.* may also administer oaths [*Code Civ. Proc. § 2093*].

Members of the Legislature, executive officers, county officers and their deputies, former judges other than those retired for disability or against whom a formal disciplinary proceeding was pending at the time of retirement or resignation, and mayors also have the general power to administer oaths and affirmations [*Gov. Code §§ 1225, 24057, 40603*].

In addition, particular persons are often authorized by statute to administer oaths in connection with their particular functions or duties [*see, e.g., Bus. & Prof. Code §§ 6049(a), 6052* (state bar board of governors and committee members); *Gov. Code § 11528* (officers of state agencies); *Ins. Code § 734* (state insurance commissioner)].

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§ 392.13 When Oath Is Required

Prior to testifying in any action or proceeding, a witness is required to take an oath or make an affirmation or declaration, except that a child under the age of 10 or a dependent person with a substantial cognitive impairment may, in the court's discretion, be required only to promise to tell the truth [*Evid. Code § 710*; for further discussion, *see § 392.14*].

Receivers, jurors, interpretors for witnesses, and executors and adminstrators of estates, among others, must take oaths swearing that they will perform their duties as requried [*Code Civ. Proc. §§ 232(b), 567*; *Evid. Code § 751*; *Prob. Code § 8403*].

Persons holding specific public offices are also required to take oaths swearing to perform their duties according to specified standards [*see, e.g., Gov. Code §§ 1360, 18151, 18153, 24102*].

In addition, oaths may be required by statute for special proceedings. For example, jurors at coroners' inquests and workers' compensation judges in workers' compensation proceedings are required to take oaths [*Code Civ. Proc. § 236*; *Lab. Code § 5312*].

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§ 392.14 Witness's Capacity to Take Oath Required

A witness is required to take an oath prior to giving his or her testimony, except that a child under the age of 10 may, in the court's discretion, be required only to promise to tell the truth [*Evid. Code § 710*].

There are no statutes specifically providing who has the capacity to take an oath for the purposes of testifying in an action or proceeding. Nevertheless, a person will be disqualified as a witness if he or she is incapable of understanding his or her duty to tell the truth [*Evid. Code § 701(a)(2)*]. A witness must have an understanding, prior to taking the oath, of the nature and obligation of the oath [*People v. Watrous (1935) 7 Cal. App. 2d 7, 10, 45 P.2d 380* (overruled on other grounds in *People v. Burton (1961) 55 Cal. 2d 328, 352, 11 Cal. Rptr. 65, 359 P.2d 433* ; decided prior to the enactment of *Evid. Code § 701*)]. No particular religious belief or conviction is necessary, however, to having the capacity to take an oath [*see* *People v. Burton (1961) 55 Cal. 2d 328, 341-342, 11 Cal. Rptr. 65, 359 P.2d 433* , quoting from *People v. Lamb (1953) 121 Cal. App. 2d 838, 845, 264 P.2d 126]* .

Extreme youth is not per se sufficient to disqualify a witness [*People v. Watrous (1935) 7 Cal. App. 2d 7, 10, 45 P.2d 380* (overruled on other grounds in *People v. Burton (1961) 55 Cal. 2d 328, 352, 11 Cal. Rptr. 65, 359 P.2d 433*); *see Evid. Code § 700* (every person irrespective of age is qualified to be witness)]. A child under the age of ten may possess sufficient understanding of the nature of an oath and sufficient moral sensibility to have the capacity to take an oath as a competent witness [*see* *People v. Burton (1961) 55 Cal. 2d 328, 341, 11 Cal. Rptr. 65, 359 P.2d 433* ; *People v. Lamb (1953) 121 Cal. App. 2d 838, 845, 264 P.2d 126]* . A child need not have a detailed knowledge of the nature of the oath, as long as he or she realizes that some evil will follow if he or she does not tell the truth [*People v. Burton (1961) 55 Cal. 2d 328, 341-342, 11 Cal. Rptr. 65, 359 P.2d 433* ; *People v. Lamb (1953) 121 Cal. App. 2d 838, 845, 264 P.2d 126]* . Whether or not a child is competent to be a witness and therefore to take an oath is within the discretion of the trial judge [*People v. Trolinder (1953) 121 Cal. App. 2d 819, 823, 264 P.2d 601* ; *People v. O'Connor (1941) 44 Cal. App. 2d 301, 304, 112 P.2d 279]* . However, the oath may not be dispensed with in the case of a child witness, even if in camera testimony is otherwise authorized [*In re Heather H. (1988) 200 Cal. App. 3d 91, 95-96, 246 Cal. Rptr. 38]* .

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§ 392.15 Form of Administering Oath to Witness

Code Civ. Proc. § 2094 provides that an oath, affirmation, or declaration in an action or a proceeding may be administered by obtaining an affirmative response to one of the of the following:

- "You do solemnly state that the evidence you shall give in this issue (or matter) shall be the truth, the whole truth, and nothing but the truth, so help you God" [*Code Civ. Proc. § 2094(a)(1)*].

- "You do solemnly state, under penalty of perjury, that the evidence that you shall give in this issue or matter shall be the truth, the whole truth, and nothing but the truth." [*Code Civ. Proc. § 2094(a)(2)*].

As an alternative to the two forms prescribed in *Code Civ. Proc. § 2094(a)*, the court may administer an oath, affirmation, or declaration in an actionor proceeding in a manner that is calculated to awaken the person's conscience and impress the person's mind with the duty to tell the truth. The court must satisfy itself that the person testifying understands that his or her testimony is being given under penalty of perjury [*Code Civ. Proc. § 2094(b)*].

It is appropriate for the court to give a modified version of the statutory forms of oath or affirmation set out in *Code Civ. Proc. § 2094(a)*, when it is satisfied that a particular witness would accept a different form as being more solemn or obligatory. Nevertheless, a court does not abuse its discretion by administering one of the statutory forms of oath or affirmation unless it can be shown that the court was informed that the witness regarded some other form of oath as being more obligatory or that the witness did not consider the usual form to be at all obligatory [*see People v. Green (1893) 99 Cal 564, 569-570, 34 P. 231* (decided under former Code Civ. Proc. § 2094)].

The purpose of requiring a witness to give an oath is to prevent perjury, and the form of oath given is less important than its effectiveness in preventing perjury [*see Clifton v. Superior Court (1970) 7 Cal. App. 3d 245, 254, 86 Cal. Rptr. 612]* .

The administration of an oath without the words "oath," "swear," "depose," or "so help you God" is merely an irregularlity of form; it does not render the oath invalid [*see People v. Brown (1954) 125 Cal. App. 2d 83, 88, 269 P.2d 918* ; *People v. Parent (1903) 139 Cal. 600, 601, 73 P. 423]* . Nevertheless, the witness must at least be asked to swear

or affirm that he or she will tell the truth [*People v. Portlock (1931) 118 Cal. App. 566, 567-568, 5 P.2d 920]* .

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§ 392.16 Form of Taking Oath by Witness

A witness must express his or her "affirmative response" to the one of the statutory forms of oath or affirmation when it is administered [*see Code Civ. Proc. § 2094(a)*; *see also* discussion in *§ 392.15*]. Although it is better practice for a witness to give his or her affirmative response audibly, he or she is not required to do so, and in certain circumstances a deliberate nod may be equally expressive of assent [*People v. Thomas (1967) 65 Cal. 2d 698, 708, 56 Cal. Rptr. 305, 423 P.2d 233 , cert. denied, 389 U.S. 868* (decided under former Code Civ. Proc. § 2094); *People v. O'Connor (1941) 44 Cal. App. 2d 301, 304-305, 112 P.2d 279* (decided under former Code Civ. Proc. § 2094)].

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§ 392.17 Affirmation

[1] By Witness

As defined by common usage, an oath involves a person's formal invocation of an accepted deity to witness that person's sincere intention to do what he or she says. An affirmation, by contrast, is solemn declaration of the same intent by a person who conscientiously objects to the taking of an oath [*see also § 392.11[1]*]. Given these definitions, a witness may make an affirmation or declaration, in lieu of an oath, by giving an affirmative response to the statutory form of affirmation set out in *Code Civ. Proc. § 2094(a)(2)*. This form of affirmation, as distinguished from the form of oath set out in *Code Civ. Proc. § 2094(a)(1)*, does not invoke God but calls for a witness to tell the truth under penalty of perjury [*see also* discussion in *§ 392.15*].

[2] Written Affirmation by Nonwitness

Whenever an oath is required to be taken by a person appointed to discharge specific duties, such as an executor, administrator, guardian, conservator, appraiser, receiver, or elisor, an unsworn written affirmation may be made in lieu of taking the oath [*Code Civ. Proc. § 2015.6*].

The written affirmation must commence "I solemnly affirm," must state the substance of the other matter required by the oath and the date and place of execution, and must be subscribed by the person making the affirmation [*Code Civ. Proc. § 2015.6*].

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34-392 California Forms of Pleading and Practice--Annotated § 392.18

§ 392.18 Objections to Witness's Oath or Failure to Take Oath

Generally, any objections to the form or manner of an oath taken by a witness are waived if not made at the time the witness testifies, or at least during trial or before the verdict, while the defect is capable of being remedied [*People v. Haeberlin (1969) 272 Cal. App. 2d 711, 716, 77 Cal. Rptr. 553* ; *Estate of Wilson (1953) 116 Cal. App. 2d 523, 526, 253 P.2d 1011* ; *Estate of Da Roza (1947) 82 Cal. App. 2d 550, 555-556, 186 P.2d 725]* . Such objections are therefore improperly made for the first time on appeal or on a motion for new trial [*Trigueiro v. Skow (1937) 24 Cal. App. 2d 253, 256, 74 P.2d 836* ; *see also People v. Lamb (1953) 121 Cal. App. 2d 838, 847, 264 P.2d 126]* .

If a witness testifies without taking an oath and no objection is made at the time because that fact was not discovered until after the verdict, the verdict may be set aside. If the fact that no oath was administered is known at the time, however, objection is waived if not made prior to the verdict [*Trigueiro v. Skow (1937) 24 Cal. App. 2d 253, 256, 74 P.2d 836]* .

When an objection is made to the form or manner of an oath or the failure to take an oath, every presumption will be made in favor of the regularity of the proceedings in trial court [*People v. O'Connor (1941) 112 P.2d 279]* . For example, the mode that a witness adopts in taking an oath will be presumed to be the one that accords with his or her belief, as long as no objection is made at the time the oath is taken [*see People v. Parent (1903) 139 Cal. 600, 601-602, 73 P. 423]* . Similarly, even when the record shows no affirmative answer on the partof a witness at the time the oath was administered, it will not be assumed that the court permitted the witness to testify without his or her assent to the oath, whether by nodding or otherwise [*People v. O'Connor (1941) 44 Cal. App. 2d 301, 304-305, 112 P.2d 279]* .

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§ 392.19 Perjury

Every person who, having taken an oath that he or she will testify, declare, depose, or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by California law be administered, willfully and contrary to that oath states as true any material matter which he or she knows to be false, is guilty of perjury [*Penal Code § 118(a)*].

It is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner, or that the person accused of perjury did not go before, or was not in the presence of, the officer purporting to administer the oath, if the accused caused or procured the officer to certify that the oath had been taken or administered [*Penal Code § 121*].

A person will not be convicted of perjury when proof of falsity rests solely on contradiction by testimony of a single person other than the alleged perjurer. Proof of falsity may be established, however, by direct or indirect evidence [*Penal Code § 118(b)*].

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[Reserved]

§§ 392.20[Reserved]

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§ 392.40 State Constitution

Public utilities commission authorized to administer oaths. *Cal. Const., art. XII, § 6*

Oath of office of state officers and employees. *Cal. Const., art. XX, § 3*

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§ 392.41 State Statutes

[1] Afirmation

Unsworn written affirmation in lieu of oath. *Code Civ. Proc. § 2015.6*

Affirmation of witnesses. *Code Civ. Proc. §§ 2094*

[2] Authority to Administer Oath

Secretary of Board of Examiners of Veterinary Medicine. *Bus. & Prof. Code § 4805*

State Bar Board of Governors and committees. *Bus. & Prof. Code §§ 6049(a), 6052*

Contractors' State License Board. *Bus. & Prof. Code § 7009*

Licensed land surveyor. *Bus. & Prof. Code § 8760*

Member of State Athletic Commission. *Bus. & Prof. Code § 18845(a)*

Officers of armed forces. *Civ. Code §§ 1183.5, 1201*

Courts, judges, justices, and certain former judges. *Code Civ. Proc. §§ 128(a)(7), 177(4), 179, 2093*; *Gov. Code § 1225*

Court clerk. *Code Civ. Proc. § 2093*

Officer or person authorized to take testimony or decide on evidence in any action or proceeding. *Code Civ. Proc. § 2093*

Notary public. *Code Civ. Proc. § 2093*; *Gov. Code § 8205*

Department of Education officers. *Educ. Code § 60*

Member of Legislature. *Gov. Code § 1225*

Certain officers of state agencies in proceedings authorized by those agencies. *Gov. Code § 11528*

State comptroller may designate person to administer oath. *Gov. Code § 12403*

Representative of state personnel board. *Gov. Code § 18671*

County officers. *Gov. Code § 24057*

Mayor. *Gov. Code § 40603*

President of Board of Pilot Commissioners. *Harb. & Nav. Code § 1155*

State Insurance Commissioner. *Ins. Code § 734*

Naval guard and naval militia officers. *Mil. & Vet. Code § 16*

State Water Rights Board member. *Water Code § 1080*

Reclamation Board officer or member. *Water Code § 8585*

Witness is disqualified if incapable of understanding duty to tell truth. *Evid. Code § 701(a)(2)*

[3] Oaths and Affirmations Generally

Form of administering oath generally. *Code Civ. Proc. § 2094(a)*

Discretion of court to modify general form of administering oath. *Code Civ. Proc. § 2094(b)*

Shorthand reporters certified under *Bus. & Prof. Code § 8020 et seq. Code Civ. Proc. § 2093*

Secretary of Senate and Chief Clerk of Assembly. *Gov. Code § 9191.5*

Public Utilities Commission and designated employees. *Pub. Util. Code § 311*

[4] Oath as Including Affirmation

Oath includes affirmation. *Bus. & Prof. Code § 20*; *Civ. Code § 14*; *Code Civ. Proc. § 17*; *Corp. Code § 16*; *Educ. Code § 76*; *Elec. Code § 335*; *Fish & Game Code § 60*; *Fin. Code § 16*; *Harb. & Nav. Code § 17*; *Health & Safety Code § 17*; *Ins. Code § 17*; *Lab. Code § 16*; *Mil. & Vet. Code § 15*; *Penal Code § 7*; *Pub. Res. Code § 16*; *Pub. Util. Code § 15*; *Rev. & Tax Code § 17*; *Sts. & Hy. Code § 17*; *Unemp. Ins. Code § 16*; *Veh. Code § 16*; *Water Code § 16*; *Welf. & Inst. Code § 16*

[5] Oath Required to be Taken

Attorney on admission to bar. *Bus. & Prof. Code § 6067*

Receiver before commencing duties. *Code Civ. Proc. § 567*

Juror and alternate juror. *Code Civ. Proc. §§ 232(b), 234*

Party filing cost memorandum in civil action. Cal Rules of Ct., Rule 3.177(a)(1)

Member of county central committee. *Elec. Code §§ 7210, 7408*

Witness in court proceeding. *Evid. Code § 710*

Interpreter at trial. *Evid. Code § 751*

Failure to take oath by public officer is misdemeanor. *Gov. Code § 1303*

Public officer appointed, nominated, or commissioned by governor. *Gov. Code § 1360*

Public disaster service employees. *Gov. Code § 3102*

Person appointed to state position other than civil service. *Gov. Code § 18151*

Civil service employee on appointment. *Gov. Code § 18153*

County deputy. *Gov. Code § 24102(c)*

Juror at coroner's inquest. *Code Civ. Proc. § 236*

City officer. *Gov. Code § 36507*

Court reporter. *Gov. Code § 69946*

Member of Harbor Commission. *Harb. & Nav. Code §§ 4042, 6055*

Port Commissioner. Health & Safety Code §§ 6243, 6833

Workers' compensation judge in compensation proceedings. *Lab. Code § 5312*

Member of grand jury. *Penal Code § 911*

Officer taking charge of jurors. *Penal Code §§ 1121, 1128*

Officer on return of property taken under warrant. *Penal Code § 1537*

Personal representative. *Prob. Code §§ 8403, 8852*

Special administrator. *Prob. Code § 8542*

Person on appointment as guardian. *Prob. Code § 2300*

Member of county board of public welfare. *Welf. & Inst. Code § 18103*

[6] Perjury

Definition of perjury. *Penal Code § 118*

Irregularity in oath is no defense to perjury. *Penal Code § 121*

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§ 392.42 Decisions

[1] Power to Administer Oaths

When statute authorized court to administer particular oath, oath administered by clerk in open court and under court's direction constitutes oath administered by court. *Oaks v. Rodgers (1874) 48 Cal. 197, 200-201* (interpretation of Stats. 1862, ch. CXXI)

Officer administering oath is proper person to certify oath. *Dunn v. Ketchum (1869) 38 Cal. 93, 99*

When statute requires affidavit to be made or oath to be administered and certified, but does not designate particular officer before whom act may be performed, act may be done before any officer having general authority under state law to administer and certify oaths. *Dunn v. Ketchum (1869) 38 Cal. 93, 99*

Deputy county clerk has authority to administer oaths, pursuant to *Gov. Code § 24057*. *People v. Brown (1954) 125 Cal. App. 2d 83, 88, 269 P.2d 918*

Deputy county clerk is ex officio clerk of superior court and, as such, has power to administer oaths to witnesses under *Code Civ. Proc. § 2093*. *People v. Collins (1907) 6 Cal. App. 492, 501, 92 P. 513* ; *see also Tate v. Superior Court (1975) 45 Cal. App. 3d 925, 929, 119 Cal. Rptr. 835*

[2] Form of Oath

Although it is better practice for witness to voice his or her reply when oath is read, *Code Civ. Proc. § 2094* requires only that witness express assent, and in certain circumstances deliberate nod may be equally expressive of assent. *People v. Thomas (1967) 65 Cal. 2d 698, 708, 56 Cal. Rptr. 305, 423 P.2d 233 , cert. denied, 389 U.S. 868*

Omission of words "so help me God" is irregularity in form, not substance, of oath, and is no defense to prosecution for perjury. *People v. Parent (1903) 139 Cal. 600, 601, 73 P. 423*

Usual form of oath is discretionary with court. *People v. Green (1893) 99 Cal. 564, 569-570, 34 P. 231*

Court did not abuse discretion in administering usual form of oath to witness when it was not at least informed that witness regarded some other form as more obligatory, or that he or she did not consider the usual form as at all obligatory. *People v. Green (1893) 99 Cal. 564, 570, 34 P. 231*

Legislature has having power to prescribe form of oaths for state officers. *Cohen v. Wright (1863) 22 Cal. 293, 310*

Former Code Civ. Proc. § 2096 excused nondeist from affirming belief in God as prerequisite to serving on grand jury, even though *Penal Code § 911* prescribes oath for grand jury members that contains words "so help me God." *People v. Cohen (1970) 12 Cal. App. 3d 298, 306, 90 Cal. Rptr. 612*

Administration or taking of oath without words "oath," "swear," or "depose" is no defense to prosecution for perjury. *People v. Brown (1954) 125 Cal. App. 2d 83, 88, 269 P.2d 918*

No authority exists to require that assent to taking oath be audibly given. *People v. O'Connor (1941) 44 Cal. App. 2d 301, 305, 112 P.2d 279*

Administering oath substantially same as that prescribed by *Code Civ. Proc. § 2094* before voir dire is not prejudicial error, although different form of oath might normally be given. *People v. O'Connor (1941) 44 Cal. App. 2d 301, 304, 112 P.2d 279*

Form of oath was insufficient when child witness was asked if she would tell truth and would call on God to witness that she told truth but she was not asked to swear or affirm that she would tell truth. *People v. Portlock (1931) 118 Cal. App. 566, 567-568, 5 P.2d 920*

[3] Capacity to Take Oath

Child under age of ten possessing sufficient intelligence, understanding, and ability to receive and fairly accurately recount his or her impressions, and having sufficient understanding of nature of oath and moral sensibility to realize that he or she should tell truth and is likely to be punished for falsehood, is competent to testify as witness. *People v. Burton (1961) 55 Cal. 2d 328, 341, 11 Cal. Rptr. 65, 359 P.2d 433* (decided under *Code Civ. Proc. § 1880*, now repealed)

No religious belief or conviction is necessary to have capacity to take oath, and child is not required to have detailed knowledge of nature of oath, as long as child understands evil will follow if he or she does not tell truth. *People v. Burton (1961) 55 Cal. 2d 328, 341-342, 11 Cal. Rptr. 65*

Question of whether or not child is competent to be witness is within discretion of trial judge; his or her conclusion regarding qualification is final on appeal unless there is affirmative showing of abuse of discretion. *People v. Trolinder (1953) 121 Cal. App. 2d 819, 823, 264 P.2d 601*

Question of competency of child witness regarding whether or not child appreciates meaning of oath is matter of discretion of trial court; determination as undisturbed on appeal. *People v. O'Connor (1941) 44 Cal. App. 2d 301, 304, 112 P.2d 279*

Statutory requirement that witness be sworn before testifying implies requirement that witness have some understanding, before oath is administered, of nature and obligation thereof. *People v. Watrous (1935) 45 P.2d 380*

(overruled on other grounds in *People v. Burton (1961) 55 Cal. 2d 328, 352, 11 Cal. Rptr. 65, 359 P.2d 433*); *People v. Lamb (1953) 121 Cal. App. 2d 838, 844, 264 P.2d 126* (cases decided prior to enactment of former Evid. Code § 701(b), now *Evid. Code § 701(a)(2)*, requiring witness to understand duty to tell truth)

[4] Validity of Oath

Purpose of requiring oath is to prevent perjury, and declaration by person before magistrate that statements were true constituted oath for purposes of perjury even if person was not formally sworn. *Clifton v. Superior Court (1970) 7 Cal. App. 3d 245, 254, 86 Cal. Rptr. 612*

Hearing considered one continuous session so that when witness who has been sworn is recalled to stand, reminding witness that he or she has already been sworn is sufficient, and reswearing witness is unnecessary. *People v. Haeberlin (1969) 272 Cal. App. 2d 711, 716, 77 Cal. Rptr. 553*

California Legislature has indicated liberal policy in determining whether or not compliance with formalities in taking oath has been had; manifested intent with which act such as taking oath is done weighs more heavily than strict observance of act's ceremonial aspects. *People v. Walker (1967) 247 Cal. App. 2d 554, 562, 55 Cal. Rptr. 726 , cert. denied, 389 U.S. 824*

Oath given by witness before grand jury on date of witness's first appearance is binding on witness for duration of proceeding; swearing in witness on succeeding days is unnecessary. *People v. Sagehorn (1956) 140 Cal. App. 2d 138, 154*

When officer with authority to administer oaths certified that oath had been taken, evidence is sufficient to support conclusion that oath was administered. *People v. Brown (1954) 125 Cal. App. 2d 83, 88, 269 P.2d 918*

Every presumption is in favor of regularity of proceedings in trial court, and although record shows no affirmative answer on part of witness when taking oath, it cannot be assumed that court permitted witness to testify without his or her assent to oath, whether by nodding or otherwise. *People v. O'Connor (1941) 44 Cal. App. 2d 301, 304-305, 112 P.2d 279*

[5] Objections to Adequacy of Oath

When witness had difficulty with her speech and nodded rather than giving audible response to oath administered by court clerk, any inadequacy of oath-taking was waived by failure to object and by taking witness on cross examination. *People v. Thomas (1967) 65 Cal. 2d 698, 708, 56 Cal. Rptr. 305, 423 P.2d 233 , cert. denied, 389 U.S. 868*

Mode that witness adopts in taking oath is presumed to be one that accords with his or her belief and if at time of taking oath witness makes no objection to form of administration, takes oath, and testifies, witness is not allowed later to escape penalty of perjury by claiming oath was improperly administered. *People v. Parent (1903) 139 Cal. 600, 601-602, 73 P. 423*

Objection to defect of not being sworn or defect in manner of administering oath is similar to objection to defect in form of question asked during proceeding, in that such objection must have been raised at time whendefect could have been easily cured. *People v. Haeberlin (1969) 272 Cal. App. 2d 711, 716, 77 Cal. Rptr. 553*

Objection that evidence is not admissible because witness has not been sworn is waived if not made when evidence is offered or at least while defect is capable of being remedied. *Estate of Wilson (1953) 116 Cal. App. 2d 523, 526, 253 P.2d 1011*

Failure to challenge or object to child's qualifications to testify constitutes implied waiver which precludes raising of point on appeal. *People v. Lamb (1953) 121 Cal. App. 2d 838, 847, 264 P.2d 126*

Objection that witness has not been properly sworn is improper grounds for new trial, since such objection must be made during trial, before verdict, or at some time while defect is capable of being remedied. *Estate of Da Roza (1947) 82 Cal. App. 2d 550, 556, 186 P.2d 725*

In administrative proceeding, permitting person to testify without being sworn is not jurisdictional matter but at most judicial error, which cannot be taken advantage of except by timely objection. *Tennant v. Civil Service Com. (1946) 77 Cal. App. 2d 489, 498, 175 P.2d 568*

When witness testifies without having been sworn, verdict is set aside if error is not discovered until after verdict, but if fact of error is known at time of testimony, failure to object to testimony when given precludes objection after verdict. *Trigueiro v. Skow (1937) 24 Cal. App. 2d 253, 256, 74 P.2d 836*

[6] When Oath Required

In child custody proceedings, report by probation officer must be presented in affidavit form or otherwise under oath. *Fewel v. Fewel (1943) 23 Cal. 2d 431, 436, 144 P.2d 592* ; *Dahl v. Dahl (1965) 237 Cal. App. 2d 407, 414, 46 Cal. Rptr. 881*

[7] Perjury

False statement made under oath administered by notary is basis for charge of perjury. *People v. Walker (1967) 247 Cal. App. 2d 554, 559, 55 Cal. Rptr. 726 , cert. denied, 389 U.S. 824*

Conviction of perjury under *Penal Code § 118* requires proof that defendant (1) took oath that he or she would testify, declare, depose, or certify truly before (2) competent tribunal or person, (3) that oath was taken in case in which oath may be lawfully administered, and (4) that he or she willfully and contrary to oath stated as true some material fact which he or she knew was false. *People v. Walker (1967) 247 Cal. App. 2d 554, 559, 55 Cal. Rptr. 726 , cert. denied, 389 U.S. 824* (decided prior to 1980 and 1989 amendments to *Penal Code § 118*)

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§ 392.43 Text References

Witkin, California Procedure, Vol. 7, *Trial*, § 158 (4th ed. 1997)

Witkin, Summary of California Law, Vol. 14, *Wills and Probate*, §§ 446-450 (10th ed. 2005)

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[Reserved]

§§ 392.44[Reserved]

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34-392 California Forms of Pleading and Practice--Annotated § 392.60

§ 392.60 Oath of Witness in Action or Proceeding--Statutory Form [Code Civ. Proc. § 2094(a)(1)]

[1] FORM Oath of Witness in Action or Proceeding--Statutory Form [Code Civ. Proc. § 2094(a)(1)]

You do solemnly state that the evidence you shall give in this _____ [issue *or* matter]shall be the truth, the whole truth, and nothing but the truth, so help you God.

[*The person testifying takes the oath by expressing his or her assent, audibly if possible, by saying "I do," "Yes," or an equivalent to the foregoing statement.*]

[2] Use of Form

The form in [1], *above*, is the form of oath normally administered [*People v. Green (1893) 99 Cal. 564, 569-570, 34 P. 231* (form of oath discretionary with court)] to a witness in an action or proceeding, by a judge, retired judge, clerk, or other person authorized to take testimony [*see Code Civ. Proc. §§ 2093, 2094 see also Evid. Code § 710*].

For discussion regarding the court's discretionary power to administer an alternative form of oath or affirmation, see *§§ 392.15, 392.17[1]*.

Although it is better practice for the witness to voice his or her reply when oath is read, *Code Civ. Proc. § 2094* requires only that the witness express an affirmative response, and in certain circumstances, a deliberate nod may be equally expressive of assent [*People v. Thomas (1967) 65 Cal. 2d 698, 708, 56 Cal. Rptr. 305, 423 P.2d 233 , cert. denied, 389 U.S. 868* ; *see* discussion in *§ 392.16*].

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34-392 California Forms of Pleading and Practice--Annotated § 392.61

§ 392.61 Affirmation of Witness in Action or Proceeding--Statutory Form [Code Civ. Proc. § 2094(a)(2)]

[1] FORM Affirmation of Witness in Action or Proceeding--Statutory Form [Code Civ. Proc. § 2094(a)(2)]

You do solemnly state, under penalty of perjury, that the evidence that you shall give in this issue or matter shall be the truth, the whole truth, and nothing but the truth.

[*The person testifying makes the affirmation by expressing his or her assent, audibly if possible, by saying "I do," "Yes," or an equivalent to the foregoing statement.*]

[2] Use of Form

The form in [1], *above*, is the usual form of affirmation, also termed a declaration, made by a witness in an action or proceeding who chooses to affirm, rather than swear, that he or she will tell the truth [*see Code Civ. Proc. § 2094* and discussion in *§§ 392.15, 392.17[1]*].

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34-392 California Forms of Pleading and Practice--Annotated § 392.62

§ 392.62 Unsworn Written Affirmation in Lieu of Oath Required of Person Appointed to Discharge Duties in Particular Action, Proceeding, or Matter [Code Civ. Proc. § 2015.6]

[1] FORM Unsworn Written Affirmation in Lieu of Oath Required of Person Appointed to Discharge Duties in Particular Action, Proceeding, or Matter [Code Civ. Proc. § 2015.6]

AFFIRMATION

I solemnly affirm _____ [*state substance of required oath, e.g.*, that I will perform the duties of personal representative according to law].

Executed on _____, [*date*], at _____ [*place*].

_____ [*signature*]

[2] Use of Form

The form of affirmation in [1], *above*, is for use by any person appointed to discharge specific duties in a particular action, matter, or proceeding who is required by law to take an oath relating to those duties [*Code Civ. Proc. § 2015.6*].

Persons who might use this oath include, but are not limited to, executors and administrators of estates [*Prob. Code § 8542*], guardians and conservators [*Prob. Code § 2300*], appraisers, receivers, and elisors [*Code Civ. Proc. § 2015.6*].

In lieu of taking the required oath, such person may choose to make a written affirmation, as in this form. The affirmation must commence "I solemnly affirm," must state the substance of the required oath and the date and place of execution, and must be signed by the person making the affirmation [*Code Civ. Proc. § 2015.6*].

The affirmation example given in this form is found in the Judicial Council form of letters for a decedent's estate [*see* Ch. 442, *Probate: Initiating Probate Administration* ,]. Judicial Council forms of letters of guardianship and

conservatorship also contain affirmations as prescribed by *Code Civ. Proc. § 2015.6* [*see* Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , and Ch. 281, *Guardianship and Conservatorship:Appointment of Conservators*].

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§ 393.syn Synopsis to Chapter 393: OIL AND GAS

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§ 393.02 Cross References

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§ 393.10 Governing Law

§ 393.11 Nature of Landowner's Oil and Gas Interest

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[1] Analogous to Rent

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§ 393.64 Complaint for Damages [Civ. Code § 3300] for Breach of Oil and Gas Lease That Requires Lessee to Pay Delayed Drilling Rental--By Landowner-Lessor Against Lessee--Judicial Council Contract Complaint With Breach of Contract Cause of Action Attachment [Code Civ. Proc. § 425.12; Cal. Judicial Council Forms PLD-C-001, PLD-C-001(1)]

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§ 393.01 Scope of Chapter

This chapter discusses interests in oil and gas, including the following:

- The right to drill for and produce oil and gas [*see § 393.11*].
- Conveyance of oil and gas rights [*see § 393.12*].
- Oil and gas leases [*see § 393.13*].
- Royalty interests [*see §§ 393.14, 393.15*].
- Rights of cotenants [*see § 393.16*].
- Surface and subsurface interests [*see §§ 393.17, 393.18*].
- Oil and gas liens [*see § 393.19*].
- Abandonment and termination of oil and gas interests [*see §§ 393.20, 393.21*].

The chapter contains forms for use in actions involving oil and gas, including the following:

- A demand for a lessee's quitclaim or surrender [*see § 393.60*] and a complaint to quiet title and for damages and forfeiture [*see § 393.61*] for the lessee's failure to surrender or quitclaim an interest covered by an expired or abandoned oil and gas lease.
- A complaint to terminate a dormant mineral right [*see § 393.62*] and a notice of intent to preserve a mineral right [*see § 393.63*].
- A Judicial Council form of contract complaint with breach of contract cause of action attached for

use in an action for delayed drilling rentals [*see § 393.64*].

- A complaint for an accounting of royalties by one cotenant against another cotenant [*see § 393.65*].

- A complaint for injunctive relief and damages for subsurface trespass and conversion of oil and gas obtained from a well that was slant drilled [*see § 393.66*].

- A complaint for termination of an oil and gas lessee's right of entry to or occupation of the surface of land in certain urban areas [*see § 393.67*].

For discussion of acquiring oil and gas leases from the United States or California, and of federal and state regulation of oil and gas production, see Regulation Of The Gas Industry (Matthew Bender).

For detailed coverage of the transactional side of oil and gas law in California, see California Legal Forms, Ch. 36, *Oil and Gas Rights and Leases* (Matthew Bender).

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§ 393.02 Cross References

For discussion and forms relating to actions for accounting in general, see Ch. 7, *Accounting, Action for*

For discussion and forms relating to actions for declaratory relief, see Ch. 182, *Declaratory Relief*

For discussion of and forms relating to actions for wrongful death, see Ch. 181, *Death and Survival Actions*

For discussion and forms relating to injunctive relief in general, see Ch. 303, *Injunctions*

For discussion and forms relating to landlord-tenant issues in general, see Ch. 330, *Landlord and Tenant: General Introduction* , et seq.

For discussion and forms that can be adapted for use in enforcing oil and gas liens, see Ch. 361, *Mechanics' Liens*

For discussion and forms relating to mines and minerals in general, see Ch. 363, *Mining* .

For discussion and forms relating to issues involved in environmental litigation, see Ch.418, *Pollution and Environmental Matters*

For discussion and forms relating to actions to quiet title in general, see Ch. 482, *Quieting Title*

For discussion and forms relating to actions for trespass in general, see Ch. 550, *Trespass*

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[Reserved]

§§ 393.03[Reserved]

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§ 393.10 Governing Law

Interests in oil and gas are governed primarily by common law rules [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 650-651, 52 P.2d 237]* .

Termination of an oil and gas lessee's right of entry to or occupation of the surface is governed by *Code Civ. Proc. §§ 772.010-772.060*. Oil and gas leases with regard to public lands are governed by *Pub. Res. Code §§ 6801-6879* and oil and gas leases by public agencies are covered in *Pub. Res. Code §§ 7051-7062*.

The surrender or quitclaim of a lessee's interest in an expired or abandoned mineral right lease, such as an oil and gas lease, is covered in *Civ. Code §§ 883.110-883.140*. Actions to terminate a dormant interest in oil and gas are governed by *Civ. Code §§ 883.210-883.270*. Actions to quiet title are governed by *Code Civ. Proc. §§ 760.010-765.060*. Damages for subsurface trespass are governed by *Code Civ. Proc. § 349*3/4.

Oil and gas liens are governed by *Code Civ. Proc. §§ 1203.50-1203.66*. The production of oil and gas is regulated in California by *Pub. Res. Code §§ 3000-3865*.

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§ 393.11 Nature of Landowner's Oil and Gas Interest

[1] Interest Extends to Exclusive Right to Drill and Retain Substances

The owner of land does not have an absolute title to oil and gas in place as corporeal real property, but possesses the exclusive right to drill for oil and gas and to retain all substances brought to the surface [*Callahan v. Martin (1935) 3 Cal. 2d 110, 117, 43 P.2d 788]* . A landowner's unqualified and absolute title to oil and gas attaches after these substances have been reduced to possession [*Bernstein v. Bush (1947) 29 Cal. 2d 773, 778, 177 P.2d 913]* .

[2] Oil and Gas in Place Doctrine Rejected

Because of the practical difference between oil and gas and solid minerals, the Supreme Court of California has rejected the theory, known as the "oil and gas in place doctrine," that oil and gas in place beneath the surface of the land constitutes an estate in definite corporeal real property. Solid minerals remain in place beneath the surface of the land, while oil and gas, because of their fugacious and vagrant nature, may be drawn from beneath the surface of other lands as well as from below the property on which a well has been drilled [*Gerhard v. Stephens (1968) 68 Cal. 2d 864, 878, 69 Cal. Rptr. 612, 442 P.2d 692]* .

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§ 393.12 Conveyance of Landowner's Oil and Gas Rights

[1] Interest Constitutes Estate in Real Property

Although the oil and gas in place doctrine has been rejected [*see § 393.11[2]*], interests in oil and gas are estates in real property that may be conveyed separately and apart from a grant of the surface title [*see Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 649, 52 P.2d 237]* .

[2] Rights of Profit *a Prendre* and Incorporeal Hereditament

[a] Interests Are Similar

When the surface owner transfers his or her exclusive right to drill for and produce oil and gas, the right granted to a lessee or assignee is a profit *a prendre.* A profit *a prendre*, which is the right to remove a part of the substance of the land, is an interest in real property in the nature of an incorporeal hereditament [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 649, 52 P.2d 237* ; *Callahan v. Martin (1935) 3 Cal. 2d 110, 118, 43 P.2d 788]* .

The term "corporeal hereditament" generally refers to tangible real property. An incorporeal hereditament is a right stemming from a corporeal thing. When it relates to land, an incorporeal hereditament constitutes a limited estate or interest in land [*Gerhard v. Stephens (1968) 68 Cal. 2d 864, 878 n. 7, 69 Cal. Rptr. 612, 442 P.2d 692]* .

Although a profit *a prendre* is very similar to an incorporeal hereditament, the two interests are not identical. For example, a landowner's assignment of royalties that is limited to the duration of an existing lease creates in the assignee an incorporeal hereditament in real property, but it does not contemplate the grant of profit *a prendre.* The term "profit *a prendre*" refers solely to the right to remove a part of the substance of the land or, in the context of oil and gas law, the right to drill for and produce oil and gas. Under the circumstances referred to by example, an operating lessee holds the profit *a prendre.* A royalty assignee does not intend to attempt operation, and is given no right of entry for such purpose [*see La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 138, 114 P.2d 351* ; *see also § 393.14[3][b]*].

[b] Nature of Estate Depends on Duration

The profit *a prendre* is an estate in real property whether it is unlimited as to duration or limited to a term of years. When the profit is unlimited in duration, it is a freehold interest, an estate in fee, and real property orreal estate. If it is granted for a term of years, the profit is a chattel real, which although it is not real property, is an estate or interest in real property [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 649, 52 P.2d 237* ; *Callahan v. Martin (1935) 3 Cal. 2d 110, 120, 43 P.2d 788* ; *see Cal-Cut Pipe & Supply, Inc. v. Haradine Petroleum, Inc. (1973) 35 Cal. App. 3d 359, 372, 110 Cal. Rptr. 666]* . The courts' description of a profit *a prendre* as a fee estate refers merely to the duration of the estate [*see Gerhard v. Stephens (1968) 68 Cal. 2d 864, 883, 69 Cal. Rptr. 612, 442 P.2d 692* ; *see also § 393.20[2]*].

[3] Conveyance By Lease

Under the usual oil and gas lease, the owner confers on the lessee for the term of the lease an exclusive right of profit to drill for and produce oil and gas. For this privilege, the lessee returns to the lessor a rent or royalty measured by a fraction of the oil produced. In addition to the right to receive royalty, the lessor has a reversionary interest in the right to drill for and produce oil and gas, dependent on the termination of the leasehold [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 649, 651, 52 P.2d 237* ; *see § 393.13* for additional discussion of leases].

For detailed coverage of oil and gas leases, including a complete lease form, see California Legal Forms, Ch. 36, *Oil and Gas Rights and Leases*.

[4] Conveyance By Assignment

A landowner may also convey his or her oil and gas rights by means of an assignment of royalty. When the owner intends to convey both a percentage of his or her royalty and the right to enter the land for production, the assignees become tenants in common with the landowner [*see § 393.14[2]*]. When the owner intends to assign merely fractional shares of production, however, the assignees' rights are limited to receipt of royalties [*see § 393.14[3]*]. In any case, the parties' intention is controlling in determining the extent of an assignment [*La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 138, 114 P.2d 351* ; *see § 393.14[4]*].

[5] Rule Against Perpetuities

[a] Uniform Statutory Rule Applies in California

The Uniform Statutory Rule Against Perpetuities has been enacted by the California Legislature [*Prob. Code § 21200 et seq.*]. This statutory rule supersedes the common law rule against perpetuities [*Prob. Code § 21201*], although the statutory rule generally parallels the common law rule. The statute provides that a nonvested property interest is invalid unless one of the following conditions is satisfied [*Prob. Code § 21205*]:

- When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or

- The interest either vests or terminates within 90 years after its creation.

The lives of individuals selected to govern the time of vesting may not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain [*Prob. Code § 21230*].

California appellate decisions interpreting the effect of the rule on oil and gas conveyances are not uniform [*compare Keville v. Hollister Co. (1972) 29 Cal. App. 3d 203, 207, 105 Cal. Rptr. 238 , with Dallapi v. Campbell (1941) 45 Cal. App. 2d 541, 545, 114 P.2d 646* ; *see* Williams and Meyers, Oil And Gas Law, Ch. 3, *Oil and Gas Conveyancing*, §§ 323, 335 (Matthew Bender)].

[b] Landowner's Executive Right

In one court of appeal decision, the court held that an executive interest in the mineral estate, which is the exclusive right reserved by the grantor to execute leases to secure exploration and development of minerals, did not violate the rule against perpetuities [*Keville v. Hollister Co. (1972) 29 Cal. App. 3d 203, 205 n. 1, 207, 105 Cal. Rptr. 238* ; *see § 393.14[2][c]*]. The court reasoned that an executive interest is a general power of appointment that vests on creation because it is presently exercisable [*Keville v. Hollister Co. (1972) 29 Cal. App. 3d 203, 207, 105 Cal. Rptr. 238]* . In an earlier case, however, one court found that an executive interest reserved by the grantor of subdivision lots violated the rule against perpetuities [*Dallapi v. Campbell (1941) 45 Cal. App. 2d 541, 545, 114 P.2d 646]* . The court in *Keville* distinguished *Dallapi* by noting that the power of appointment in *Dallapi* was special instead of general, and therefore was not presently exercisable [*Keville v. Hollister Co. (1972) 105 Cal. Rptr. 238* ; for additional discussion of these decisions, see Williams and Meyers, Oil And Gas Law, Ch. 3, *Oil and Gas Conveyancing*, § 323 (Matthew Bender)].

[c] Landowner's Reservation of Oil and Gas Rights

In one case, the court of appeal held that a deed reserving the grantor's oil and gas rights for a fixed period, and so long thereafter as oil and gas may be produced, was invalid under the rule against perpetuities [*Victory Oil Co. v. Hancock Oil Co. (1954) 125 Cal. App.2d 222, 230-231, 270 P.2d 604]* . In another case, however, the court of appeal held that a grantor's reservation of oil and gas rights, to expire in 20 years or later if production continued in paying quantities, did not violate the rule against perpetuities [*Rousselot v. Spanier (1976) 60 Cal. App. 3d 238, 242, 131 Cal. Rptr. 438]* . The court in *Rousselot* reasoned that the effect of the deed was to give the grantees a fee simple estate in the real property, subject to an incorporeal or nonpossessory interest to be enjoyed by the grantor for a determinable period. The court noted that the grantee's interest was vested immediately,and that expiration of the grantor's profit *a prendre* did not create a new estate in violation of the rule against perpetuities [*Rousselot v. Spanier (1976) 60 Cal. App. 3d 238, 241, 131 Cal. Rptr. 438* ; *see* [2], *above*]. The decision in *Victory Oil* was distinguished on its facts and on the basis of later California appellate cases that more specifically defined a profit *a prendre* [*see* *Rousselot v. Spanier (1976) 60 Cal. App. 3d 238, 242-243, 131 Cal. Rptr. 438* ; for additional discussion of these decisions, see Williams and Meyers, Oil And Gas Law, Ch. 3, *Oil and Gas Conveyancing*, § 335 (Matthew Bender)].

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§ 393.13 Oil and Gas Leases

[1] "Habendum" or Term Clause

[a] Duration of Term

The habendum clause governs the term of an oil and gas lease. Although determination of a lease's term requires consideration of all provisions, the habendum clause controls the period that the lease is to run, in the absence of later specific wording that would compel a different conclusion [*Montana-Fresno Oil Co. v. Powell (1963) 219 Cal. App. 2d 653, 659, 33 Cal. Rptr. 401]* .

[b] Common Provisions

The most common modern habendum clause states that the lease remains in force for a certain number of years and so long thereafter as oil or gas, or either of them, is produced on the land by the lessee [*see* Brown and Brown, The Law Of Oil And Gas Leases, Ch. 5, *The "Habendum" or Term Clause*, § 5.01 (Matthew Bender); *see also California Legal Forms, Ch. 36, Oil and Gas Rights and Leases § 36.200* (Matthew Bender)]. Some leases require "production in paying quantities" for the term to extend beyond the fixed period [*see, e.g., Valer Oil Co. v. Souza (1960) 182 Cal. App. 2d 790, 792, 6 Cal. Rptr. 301]* . The language providing for continuance of the lease after the definite term is often designated as a "thereafter" clause [*Montana-Fresno Oil Co. v. Powell (1963) 219 Cal. App. 2d 653, 659, 33 Cal. Rptr. 401* ; *see Dabney v. Edwards (1935) 5 Cal. 2d 1, 12, 53 P.2d 962* ; *see also Lough v. Coal Oil, Inc. (1990) 217 Cal. App. 3d 1518, 1528-1532, 266 Cal. Rptr. 611* (lease that was not profitable over 51 months expired by its own terms for failure to produce in paying quantities)].

[c] Automatic Expiration

A lease with the habendum clause's "and so long thereafter" phrase creates a determinable fee interest in a profit *a prendre* that terminates on the happening of the event named in the terms of the instrument. The habendum clause dominates the period that the lease runs, so that unless it is modified by other provisions, all rights of the lessee automatically cease at the fixed time if there is no production to extend the lease. No notice is required to effect termination [*see Montana-Fresno Oil Co. v. Powell (1963) 219 Cal. App. 2d 653, 666, 33 Cal. Rptr. 401* ; *Valer Oil*

Co. v. Souza (1960) 182 Cal. App. 2d 790, 798, 6 Cal. Rptr. 301 ; for discussion of a lessor's rights with regard to expired or abandoned leases, see *§§ 393.21[1][b], 393.60, 393.61*].

[2] Surrender Clause

[a] Basic Rule

The usual surrender clause contained in an oil and gas lease permits the lessee to extinguish a lease by surrendering it in whole or in part. Under this clause, the lessee may be able to retain the portion of leased acreage that appears most promising while eliminating the obligations of rentals, protection, exploration, and development with respect to the portion that appears least promising [*Beverly Hills Oil Co. v. Beverly Hills Unified Sch. Dist. (1968) 264 Cal. App. 2d 603, 608, 70 Cal. Rptr. 640]* .

[b] Reduction of Rent Does Not Mean Royalty

As used in the surrender clause of an oil and gas lease, the term "rent" has been defined as compensation for the lessee's privilege of delayed drilling, even if a lease inadvertently omits a "drill or pay" clause. Under such circumstances, the words "rent" and "royalty" are not synonomous, and the latter refers to the share of production reserved by the landowner-lessor [*see* *Beverly Hills Oil Co. v. Beverly Hills Unified Sch. Dist. (1968) 264 Cal. App. 2d 603, 610-611, 70 Cal. Rptr. 640* ; *see also* [3][b], *below*, and § 393.14[1][b]].

[c] Acts Constituting the Commencement of Drilling

Work preparatory to drilling may be sufficient to constitute the commencement of drilling, but such preliminary work must be something more than a pretense. The following acts constitute the beginning of drilling operations [*Butler v. Nepple (1960) 54 Cal. 2d 589, 595, 6 Cal. Rptr. 767, 354 P.2d 239]* :

- The location of wells;
- The hauling of lumber;
- The erection of derricks;
- Provision for a water supply;
- The moving of machinery; and
- Other, similar acts preliminary to the beginning of the actual drilling.

To constitute the beginning of drilling operations, the above work must be performed with the bona fide intention to proceed thereafter with actualdrilling operations prosecuted with reasonable diligence toward the completion of the well [*Butler v. Nepple (1960) 54 Cal. 2d 589, 595, 6 Cal. Rptr. 767, 354 P.2d 239]* . The failure to prosecute drilling operations with reasonable diligence after the original preparatory work has been done, however, is evidence that the commencement of the well was not done in good faith [*Butler v. Nepple (1960) 54 Cal. 2d 589, 597, 6 Cal. Rptr. 767, 354 P.2d 239]* .

[3] Payment of Rental for Privilege of Delayed Drilling

[a] As Alternative to Drilling

Two types of oil and gas lease provisions, known as the "unless" type and the "drill or pay" type [*see* [b], *below*],

provide for the payment of rental as an alternative to the obligation to drill or commence drilling [*Butler v. Nepple (1960) 54 Cal. 2d 589, 594, 6 Cal. Rptr. 767, 354 P.2d 239]* . Under both types of leases, the lessee must either commence drilling within a certain time or pay rental, but the consequences of the lessee's failure, and the remedies available to the lessor, are different [*see* [3][c], *below*].

[b] "Unless" Type Provision Distinguished From "Drill or Pay" Type Provision

Under an "unless" provision, the lease is automatically forfeited or terminated unless the lessee either drills or pays the rental, as provided in the lease. When a lease contains a "drill or pay" provision, however, the lease is not forfeited or terminated by the failure to comply with its terms, but on the failure to drill or commence drilling as required, the obligation to pay rental becomes absolute as an alternative requirement [*Butler v. Nepple (1960) 54 Cal. 2d 589, 594, 6 Cal. Rptr. 767, 354 P.2d 239]* . The main difference between the "drill or pay" type of lease and the "unless" type is that the former contains terms requiring payment of rent when drilling operations are not commenced within the time specified, while the latter provides for termination of the lease when the lessee fails to drill within the time limit and also fails, as an alternative, to pay delay rentals [*Walston v. Flintridge Oil Co. (1955) 133 Cal. App. 2d 660, 662, 284 P.2d 895]* .

[c] Action to Collect Rent or to Quiet Title

Under a "drill or pay" lease, the lessor may bring an action to enforce the payment of delayed drilling rentals [*Richfield Oil Corp. v. Bloomfield (1951) 103 Cal. App. 2d 589, 590-591, 229 P.2d 838* ; *see Walston v. Flintridge Oil Co. (1955) 133 Cal. App. 2d 660, 662, 284 P.2d 895* ; *see also § 393.64*]. When a lease contains an "unless" provision, however, the lessee is not obligated to pay delayed drilling rentals because the lease terminates automatically at the lessee's option not to commence drilling or to pay rent. Thus, a lessor may not bring an action for delayed drilling rentals under an "unless" type of lease [*Fritsch v. Fisher (1957) 151 Cal. App. 2d 732, 734-735, 312 P.2d 21]* .

However, the lessor under an "unless" type of lease may maintain a quiet title action to free his or her estate of the lessee's expired oil and gas interest [*see Richfield Oil Corp. v. Bloomfield (1951) 103 Cal. App. 2d 589, 591-592, 229 P.2d 838* ; *see also §§ 393.60, 393.61*]. The lessor may also bring an action for forfeiture of $150 and for damages resulting from a lessee's failure to quitclaim or surrender and interest covered by an expired oil and gas lease [*see Civ. Code § 883.140(b), (c)*; *see also §§ 393.21[1][b], 393.60, 393.61*].

[d] Notice of Default

When a "drill or pay" lease contains a provision requiring notice of the lessee's default for the failure to commence drilling or to pay rent, notice of default is indispensable before the lessor's action to enforce the payment of rent. A notice of default provision in an "unless" lease, however, does not create a condition precedent to termination of the lease, because the lease automatically expires when the lessee fails to commence drilling operations within the time specified and also fails to exercise the privilege of paying delay rentals in advance. Thus, notice of default need not precede an action to quiet title against a lessee's interest in an "unless" type of oil and gas lease that has expired and a provision that requires such notice has no effect on termination [*Richfield Oil Corp. v. Bloomfield (1951) 103 Cal. App. 2d 589, 591-592, 229 P.2d 838]* .

[4] Community Leases

[a] Royalties Are Shared

Under a community lease, several landowners lease their respective lots as one tract, with the sole and exclusive right in the lessee to drill for and produce oil on any part of it. Each owner shares proportionately in the royalties irrespective of the lot or lots on which oil is discovered. Thus, the owners of lots on which no well is drilled share equally the fruits of the common venture with the lessors whose land proves productive [*Tanner v. Title Ins. & Trust Co. (1942) 20 Cal.*

2d 814, 818, 129 P.2d 383] .

[b] Interests Created

By executing a community lease, a lessor assigns or conveys to his or her colessors a percentage interest in all oil produced on his or her land by the lessee during the lease's continuance. In consideration for this transfer, the other lessors execute mutual assignments. The royalty transferred by each landowner to his or her colessors is an incorporeal hereditament in gross [*see § 393.12*]. A grantee's interest in the oil produced onthe property of one of the colessors is entirely separate and distinct from the royalty interest retained in oil that might be produced from his or her own premises. The only connection between the two interests is that the pro rata assignment of royalty by one of the lessors is the consideration for the other lessors' conveyances [*Tanner v. Title Ins. & Trust Co. (1942) 20 Cal. 2d 814, 820, 129 P.2d 383]* .

[c] Effect of Conveyance of Land on Royalty

The royalty reserved by an individual lessor in oil produced from his or her land passes to a grantee of the fee as an incident of the conveyance, unless reserved by the deed. The incorporeal hereditament owned by the grantor in oil produced from the land of colessors, however, does not follow the conveyance of the lessor's land. This royalty interest in a community lease can only be conveyed by a specific transfer [*Tanner v. Title Ins. & Trust Co. (1942) 20 Cal. 2d 814, 820, 129 P.2d 383]* .

[d] Surrender of Lands Subject to Lease

Community oil leases commonly provide for the apportionment of benefits among all owners notwithstanding the surrender by the lessee of any of the lands subject to the lease. A unilateral surrender by the lessee under such a provision does not terminate the right of the owners of surrendered premises to continue to share in the royalties accruing under the community lease [*Tanner v. Title Ins. & Trust Co. (1942) 20 Cal. 2d 814, 821, 129 P.2d 383* ; *First Nat. Bank v. Standard Oil Co. (1928) 91 Cal. App. 705, 708, 267 P. 548]* . A bilateral agreement executed for the purpose of surrendering certain lands also does not change the rights and obligations of the lessors among themselves with respect to the remaining lots under the lease when the agreement indicates an intention to affect only the relationship between the lessors, collectively, and the lessee [*see* *Tanner v. Title Ins. & Trust Co. (1942) 20 Cal. 2d 814, 821, 822, 129 P.2d 383]* .

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§ 393.14 Royalty Interest of Landowner-Lessor

[1] Analogous to Rent

[a] Similarities Between "Rent" and "Royalty"

The royalty that a lessee renders to a lessor for the right to drill for and produce oil and gas is analogous to rent. The right to receive future rents and royalties is an incorporeal hereditament, which is an interest in land that may be conveyed [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 651, 52 P.2d 237* ; *Callahan v. Martin (1935) 3 Cal. 2d 110, 124, 43 P.2d 788* ; *see § 393.12[2]*].

When a landowner conveys drilling rights to a lessee in exchange for the right to receive a portion of the oil and gas produced, the landowner's royalty interest, like the right to receive rent under other kinds of leases, flows from the agreement of the parties. The character of the lessor's relationship with the lessee and the nature of royalty payments as compensation for use of the land are not changed by the fact that the oil and gas would have been the lessor's personal property if the lessor had produced the minerals directly instead of entering a lease [*Atlantic Oil Co. v. Los Angeles County (1968) 69 Cal. 2d 585, 601, 72 Cal. Rptr. 886, 446 P.2d 1006]* .

[b] Terms "Rent" and "Royalty" Not Always Synonymous

Although the terms "royalty" and "rent" are frequently used interchangeably, the meaning of these words is not the same in every context. When discussing the principle that oil and gas leases generally create an interest in real property that is a profit *a prendre*, or in the nature of an incorporeal hereditament, courts have often stated that a landowner's royalty is analogous to rent [*see* *Atlantic Oil Co. v. County of Los Angeles (1968) 69 Cal. 2d 585, 600-601, 601 n. 13, 72 Cal. Rptr. 886, 446 P.2d 1006* ; *Beverly Hills Oil Co. v. Beverly Hills Unified Sch. Dist. (1968) 264 Cal. App. 2d 603, 613-614, 70 Cal. Rptr. 640* ; *see* [a], *above*].

However, the term "rent" has also been defined as consideration for the privilege of delayed drilling under an oil and gas lease [*see* *Beverly Hills Oil Co. v. Beverly Hills Unified Sch. Dist. (1968) 264 Cal. App. 2d 603, 608, 70 Cal. Rptr. 640* ; *see also § 393.13[2][b]*]. Thus, the context in which the word "rent" is used should be considered before assuming that it means "royalty" or a share of production reserved by the landowner.

[2] Assignment Unlimited as to Duration

[a] Effect of Assignment

When a landowner makes an assignment of his or her royalty interest that is not limited to the duration of a particular lease, the landowner-assignor becomes a tenant in common with the assignees of percentage interests in the right to drill for and produce oil and gas [*see § 393.16*]. The assignee of an oil and gas royalty that is not limited to the duration of a particular lease has a right in the nature of a profit *a prendre*, which constitutes an interest or estate in real property [*see Callahan v. Martin (1935) 3 Cal. 2d 110, 125, 43 P.2d 788* ; *Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 651-652, 52 P.2d 237* ; *see also § 393.12[2]*].

[b] Assignees' Implied Right of Entry

The assignees of perpetual oil and gas rights possess implied rights of entry for the production of oil and gas equally with the lessor-landowner who retains a partial interest in the oil and gas to be produced. The right of entry arises as an incident to the grant of an estate in the oil and gasrights, and exists whether or not the assignment agreement is silent as to production rights. The assignee, however, takes an interest subject to existing leases of which he or she has actual or constructive notice, and thus, the right of entry is not absolute [*Callahan v. Martin (1935) 3 Cal. 2d 110, 125, 126, 43 P.2d 788]* . The right of entry may not effectively arise until expiration of a production lease existing at the time of the royalty assignment [*see Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 654, 52 P.2d 237]* .

[c] Landowner's Reservation of Executive Right

When making an assignment of a percentage of his or her oil and gas rights that creates a cotenancy, the landowner may properly reserve the exclusive right and power to lease the land for drilling and production [*see § 393.16*]. This reserved power is sometimes referred to as the executive right [*see Hollister Co. v. Cal-L Exploration Corp. (1972) 26 Cal. App. 3d 713, 721, 102 Cal. Rptr. 919* ; *see § 393.12[5][b]*].

[3] Assignment Is Limited to Existing Lease

[a] Grant of a Fractional Interest

The landowner-lessor does not intend in every case to make his or her royalty assignee a cotenant in the exclusive right to drill for oil and gas. Rather, the owner may grant merely a fractional interest in his or her reserved royalty, an interest that is not intended to endure beyond the limits of an existing lease. Under this type of grant, termination of the lease to which the royalties pertain results in the loss of the assignees' royalty interest created under it [*see La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 137, 140, 114 P.2d 351* (applying these rules to assignment of lessee's overriding royalty)].

[b] No Right of Entry in Assignees

An assignment of royalties that is limited to an existing lease creates in the assignee an incorporeal hereditament in real property, but it does not contemplate the grant of a profit *a prendre*--the right to remove a part of the substance of the land [*see § 393.12[2]*]. The assignee under these circumstances does not intend to attempt operation and is not given a right of entry for this purpose. Rather, the landowner retains exclusive drilling rights (unless conveyed to an operating lessee), and the holders of royalty interests contemplate nothing more than the receipt of their shares of the oil and gas production under a particular lease [*see La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 138, 114 P.2d 351]* .

[4] Interest Created Depends on Intent

The extent of an assignee's interest when the surface owner makes an assignment of royalty interests depends on the

intention of the parties involved [*see* *La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 137, 138, 114 P.2d 351]* . An intent to limit an assignment of oil royalty to a particular lease should be clearly and unequivocally indicated [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 653, 52 P.2d 237]* . Conversely, in the absence of a clear indication of intent, the courts will not construe royalty interests created for the duration of a specific oil and gas lease as granting the right to enter for purposes of production or as creating a tenancy in common in the profit *a prendre* for that purpose [*La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 138, 114 P.2d 351]* .

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§ 393.15 Overriding Royalty Interest of Lessee

[1] Creation of Interest

The term "overriding royalty" is applied generally to a fractional interest in the production of oil and gas that is created from the lessee's estate or interest. An overriding royalty may be created either by (1) reserving a portion of the production when the original lessee subleases his or her interest, or (2) a grant when the original lessee conveys a fractional share to a third person. Thus, an overriding royalty is essentially the same as a royalty, except that the latter is created by the landowner-lessor instead of the lessee [*see La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 135, 114 P.2d 351]* .

[2] Assignment of Interest

Essentially the same principles govern assignments of both overriding royalties and royalties. Thus, an operating lessee may assign an interest in the profit *a prendre* that is intended to make the assignee a tenant in common of the entire leasehold estate. The lessee may, however, intend to retain the operating rights contained in the profit *a prendre* and to convey merely a fractional share of the oil and gas produced, in the form of an overriding royalty. In any case, the parties' intention is controlling [*La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 138, 114 P.2d 351* ; *see § 393.14[4]*].

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§ 393.16 Rights of Cotenants

[1] Consent Is Not Required to Produce Oil and Gas

A tenant in common has the right to produce oil and gas without the consent of the other cotenants, provided that the tenant does not exclude the other cotenants [*see § 393.14[2]*]. Because an estate in oil and gas rights cannot be enjoyed except through the oil's removal, it is not considered waste for a cotenant to drill for and produce the oil and gas. It is reasoned that fugacious substances such as oil and gas could be lost entirely through drilling operations on other lands if the owners do notdiligently seek to possess them [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 655, 52 P.2d 237]* .

[2] Accounting Is Required

The producing cotenant must account to the other cotenants for their respective percentages of the profits. An accounting is required because the exclusive working by one cotenant may exhaust the oil and gas, and the uncertainty of the prospective value of the property may render it impossible to make a just partition [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 655, 656, 52 P.2d 237* ; *see § 393.65*].

[3] Deduction for Expenses

The interests of the nonproducing cotenants are generally subject to a charge or deduction for their proportion of drilling and operation expenses. When the cotenancy interests have been granted with the understanding and agreement that they will not be subject to the expenses, however, the general rule is controlled by the parties' agreement, express or necessarily implied, and the other units must bear the full expense of production [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 657, 52 P.2d 237]* . Doubts as to whether or not cotenancy interests are subject to production charges must generally be resolved by a construction of the cotenancy instruments as a whole, considered in light of the circumstances under which the instruments were executed [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 658, 52 P.2d 237]* .

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§ 393.17 Surface Interests

[1] Lessee's or Assignee's Implied Right to Possession for Production

[a] Right of Entry

The grantee of the right to drill for and produce oil has a right to such possession of the surface as is necessary and convenient for the exercise of the profit, but he or she has no general estate in the surface [*Dabney-Johnston Oil Corp. (1935) 4 Cal. 2d 637, 649-650, 52 P.2d 237]* . When it is apparent from the granting instrument as a whole that a right of profit *a prendre* is intended, the instrument need not contain express provision for a right of entry to drill for and produce oil. The right of entry is incident to the grant and exists without express mention [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 650, 52 P.2d 237]* .

[b] Permissible Extent of Use

When a landowner reserves or conveys oil and mineral rights in a specific tract of land, the surface area may be subjected only to such burdens as are reasonably necessary to the full enjoyment of the mineral estate in the particular parcel. The surface area may not be burdened by installations or fixtures designed to serve oil producing facilities not located on the parcel. In addition, the surface owner may not deprive the owner of the oil and mineral estate of his or her rights in the entire parcel by subsequently subdividing the surface area [*Wall v. Shell Oil Co. (1962) 209 Cal. App. 2d 504, 513, 25 Cal. Rptr. 908]* .

[2] Landowner's Development Rights

Society has an interest in development by both the owner of oil rights and the owner of the surface. Even though the right of the landowner subject to a prior oil and mineral estate is subordinate, he or she may exercise and develop the ownership rights to the fullest, although this exercise may to some degree affect the rights of the oil and mineral owner. The surface owner's exercise, however, may not unreasonably interfere with or prevent the enjoyment of the lessee's oil rights [*Wall v. Shell Oil Co. (1962) 209 Cal. App. 2d 504, 516-517, 25 Cal. Rptr. 908]* .

[3] Regulation of Well Spacing

[a] Waste Prevention; Public Nuisances

To prevent waste and to promote safe and orderly oil field operations, the Legislature has enacted rules regulating the spacing of oil wells [*Pub. Res. Code §§ 3600-3609*; *Richfield Oil Corp. v. Crawford (1952) 39 Cal. 2d 729, 737-738, 249 P.2d 600]* . Wells that are located within 100 feet of an outer boundary of a parcel of land, within 100 feet of a public street, road, or highway, or within 150 feet of another well are declared to be public nuisances [*Pub. Res. Code § 3600*]. This provision applies only to the surface location of oil wells [*Richfield Oil Corp. v. Crawford (1952) 39 Cal. 2d 729, 738, 249 P.2d 600]* .

[b] Slant Drilling Is Permitted When Surface Is Unavailable

When a parcel of property contains one or more acres of land and substantially all of the surface is unavailable for the surface location of oil or gas wells, the legislation permits slant drilling from an outside surface location [*see Pub. Res. Code § 3606*]. However, a person wishing to slant drill would be required to obtain drilling rights from the owner of these rights in the affected parcels [*see § 393.18[1]*].

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§ 393.18 Subsurface Interests

[1] Slant Drilling Is Prohibited

The surface owner's exclusive right to drill for and produce oil from beneath the surface of his or her land does not include the authority to sink a well at such an angle that it goes beyond the surface boundariesof the property, if extended downward, and intercepts oil and gas from beneath the surface of a neighboring owner. In exercising the right to drill on his or her property, the surface owner who drills the first well in a particular location undoubtedly draws from the oil strata underlying the surface of adjoining owners a considerable portion of the oil, gas, and other hydrocarbons that might be intercepted and brought to the surface by wells sunk on adjoining properties. In rejecting the doctrine of oil and gas in place, however, the courts did not intend to establish a rule that would enable anyone owning a surface location to extend or to drill a well or to bottom a well so as to capture oil and gas anywhere other than beneath his or her own surface location [*A.E. Bell Corp. v. Bell View Oil Synd. (1938) 24 Cal. App. 2d 587, 595, 596, 76 P.2d 167* ; *see §§ 393.11[2], 393.17[3][b]*].

[2] Actions to Enjoin Trespass and for Conversion of Oil and Gas

[a] Permissible Actions

A landowner or lessee commits a trespass when he or she extends an oil well beyond the surface boundaries of his or her property without having obtained, from adjoining owners, the right to slant drill. Adjoining owners or other persons injured by the subsurface trespass may maintain an action for injunctive relief to stop the trespass. These persons may also bring an action for damages from the conversion of the oil and gas [*A.E. Bell Corp. v. Bell View Oil Synd. (1938) 24 Cal. App. 2d 587, 603, 610, 76 P.2d 167* ; *see Pacific Western Oil Co. v. Bern Oil Co. (1939) 13 Cal. 2d 60, 66, 87 P.2d 1045* ; *Stafford v. Union Oil Co. (1959) 173 Cal. App. 2d 307, 313, 343 P.2d 380* ; *see also § 393.66*]. The question of whether a well was intentionally or unintentionally drilled at a slant is immaterial, except as it relates to the measure of damages, because the trespass arises from extending the well without permission [*Union Oil Co. v. Mutual Oil Co. (1937) 19 Cal. App. 2d 409, 413, 65 P.2d 896* ; *see* [d], *below*].

[b] Single Cause of Action for Trespass

Notwithstanding the continuing character of an act of trespass, there may be only one cause of action for any such act [*Code Civ. Proc. § 349*3/4]. This provision means that there may be only one suit for the cause of action then existing and arising from the act of trespass, including the original unlawful entry and the continuing presence of the well and removal of oil. Thus, subsequent acts of trespass by different persons create new causes of action even though the later production involves the same well [*see Shell Oil Co. v. Richter (1942) 52 Cal. App. 2d 164, 169-171, 125 P.2d 930]* .

[c] Parties

Any person who is injured by the trespass or conversion of oil and gas, including a landowner, lessor, lessee, or royalty owner, is entitled to bring an action for injunctive relief or damages. All other persons having an interest in the property, whether ownership or otherwise, may properly be joined as plaintiffs or defendants [*see A.E. Bell Corp. v. Bell View Oil Synd. (1938) 24 Cal. App. 2d 587, 603, 604, 76 P.2d 167]* .

[d] Measure of Damages

When oil or gas has been extracted by a person without right but asserting a claim of right in good faith or acting under an honest mistake of law or fact, the measure of damages is the value of the oil or gas at the time of extraction, without interest, after deducting all costs of development, operation, and production, including taxes and interest on all expenditures from the date thereof [*Code Civ. Proc. § 349*3/4].

However, when a well is intentionally diverted beneath adjoining property, the party committing the trespass must pay the value of the oil and gas converted without any deduction for expenses incurred in bringing it to the surface [*Pacific Western Oil Co. v. Bern Oil Co. (1939) 13 Cal. 2d 60, 73, 87 P.2d 1045]* .

[e] Statute of Limitations

An action for injunctive relief or damages with respect to an underground trespass from an oil or gas well drilled from a surface location on land other than property in which the aggrieved party has some right, title, or interest, must be commenced within 180 days after it accrues [*Code Civ. Proc. § 349*3/4(a)]. The same limitation applies to an action for conversion or for the taking or removing of oil or gas by means of such a well [Code Civ. Pro c. § 3493/4(b)].

When the trespass is committed by means of a new well on which drilling commenced after September 15, 1935, and the act was knowingly and intentionally committed, the cause of action does not accrue until discovery of the act by the aggrieved party. In all other cases, whether the well was drilled before or after September 15, 1935, the cause of the action accrues 10 days after the time when the well was first placed on production [*Code Civ. Proc. § 349*3/4]. This provision means that the action accrues 10 days after a well is placed on production in such a manner as to give rise to a cause of action on account of the removal of oil, or gas, because the act of removal is specifically made a part of the continuing trespass, the relief of which is limited to the one action [*Shell Oil Co. v. Richter (1942) 52 Cal. App. 2d 164, 169, 125 P.2d 930]* .

The purpose of the time limits in *Code Civ. Proc. § 349*3/4 is to secure a speedy determination of the rights of parties when wells trespass onto adjoining lands, in order to serve the public interest in the use and conservation of oil and to prevent a multiplicity of unnecessary suits. The statute was designed to determine speedily whether or not those in charge of wells had a right to operate them in the manner in which they weredrilled, and not to settle any controversy as to which persons are entitled to possession of the wells or how long they might remain in possession. Thus, the time limit in *Code Civ. Proc. § 349*3/4 is placed on, and is based on, an existing cause of action, and in no way appears intended to bar any future cause of action that did not then exist [*Shell Oil Co. v. Richter (1942) 52 Cal. App. 2d 164, 170, 125 P.2d 930]* .

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§ 393.19 Oil and Gas Liens

[1] Creation of Lien

Under the Oil and Gas Lien Act [*Code Civ. Proc. §§ 1203.50-1203.66*], an oil and gas lien arises in favor of any person who, under contract with the owner of any oil or gas leasehold, performs any labor or furnishes any material or services used or employed, or furnished to be used or employed, in the drilling or operating of any oil or gas well on the leasehold [*Code Civ. Proc. § 1203.52*]. A lien also arises when labor, services, or materials relate to the constructing, assembling, or repairing of any material furnished to be so used or employed [*Code Civ. Proc. § 1203.52*]. In adddition, these liens arise whether or not the material is incorporated in or becomes a part of the completed oil or gas well [*Code Civ. Proc. § 1203.52*]. A lien also arises in favor of subcontractors [*see Code Civ. Proc. § 1203.54*].

[2] Amount of Lien

The amount of the lien includes the sum due for labor performed, or materials or services furnished within six months before the date of recording the statement of lien as provided in *Code Civ. Proc. § 1203.58*, including, without limitation, shipping and mileage charges connected therewith, and interest from the due date [*Code Civ. Proc. § 1203.52*].

[3] Date Lien Arises

The oil or gas lien arises on the date the first item of material or services is furnished or the date the first labor for which a lien is claimed is performed [*Code Civ. Proc. § 1203.56*].

[4] Extent of Lien

Liens created under *Code Civ. Proc. § 1203.52* [*see* [1], *above*] extend to all of the following [*Code Civ. Proc. § 1203.53(a)-(c)*]:

- The oil and gas leasehold;

- All oil and gas wells located on the leasehold;
- All oil and gas produced from the wells; and
- All materials and fixtures owned by the leasehold owners and used or furnished for use in drilling or operating a well.

However, liens do not extend to any royalty interests, overriding interests, and production payments created by an instrument recorded before the date that materials or services were first furnished, or labor was first performed, and for which a lien is claimed [*Code Civ. Proc. § 1203.53(a), (c)*]. Oil and gas liens also do not extend to work done after production has ceased, such as removal of unused and abandoned pipelines from an abandoned oil field [*Coates v. Shell Western E & P, Inc. (1992) 5 Cal. App. 4th 904, 912-915, 7 Cal. Rptr. 2d 187]* .

[5] Statement of Lien Must Be Recorded

Every person claiming an oil or gas lien must record a verified statement setting forth all of the following information [*Code Civ. Proc. § 1203.58*]:

- The itemized amount claimed;
- The dates on which labor was performed or material or services were furnished;
- The name of the leasehold owner, if known;
- The name of the claimant and his or her mailing address;
- A description of the leasehold; and
- If the claimant is a subcontractor, the name of the person for whom the labor was immediately performed or the material or services were immediately furnished.

To be effective, the statement must be recorded within six months after the date the labor was performed or the material or services were furnished. The statement must be recorded in the office of the county recorder for the county in which the leasehold, or some part of the leasehold, is situated [*Code Civ. Proc. § 1203.58*].

[6] Notice of Lien Claim to Oil or Gas Purchaser

Nothwithstanding anything in *Code Civ. Proc. §§ 1203.50-1203.66* to the contrary, a lien in oil or gas, or the proceeds of sale, is not effective against any purchaser until written notice of the claim has been delivered to the purchaser [*Code Civ. Proc. § 1203.59*]. The notice must include the following information [*Code Civ. Proc. § 1203.59*]:

- The claimant's name and address;
- The amount for which the lien is claimed; and
- A description of the leasehold on which the lien is claimed.

The notice must be delivered personally to the purchaser or by registered letter or certified mail. On receipt of notice, the purchaser must withhold payments, to the extent of the lien amount claimed, until delivery of written notice that the claim has been paid. The withheld funds must be used for payment of the lien judgment on foreclosure. The lien

claimant must give written notice, within 10 days, that the claim has been paid [*Code Civ. Proc. § 1203.59*].

[7] Bond to Release Lien

[a] Recording Requirement

The lessor or owner of the property, or the contractor or subcontractor through whom liens are claimed, may record a bond with the county recorder [*Code Civ. Proc. § 1203.60(a)*]. When recorded, the bond takes the place of the property against which any claim for lien referred to in the bond is asserted. At any time within the period provided for enforcement in *Code Civ. Proc. § 1203.61*, any lien claimant may sue on the bond [*Code Civ. Proc. § 1203.60(b)*; *see* [9], *below*].

[b] Other Requirements of Bond

A bond filed under *Code Civ. Proc. § 1203.60* must do all of the following [*Code Civ. Proc. § 1203.60(a)*]:

- Describe the property on which liens are claimed;
- Refer to the liens in a manner sufficient to identify them;
- Be payable to the lien claimants in an amount equal to 150 percent of the amount of the claimed liens;
- Be executed by the party recording it, as principal, and by a corporate surety authorized to execute such bonds, as surety; and
- Be conditioned so that, in the event the liens are proven, the principal and surety will pay to the obligees named, or their assigns, the amounts of the liens, including costs.

[8] Preference and Priority

On compliance with the recording requirements of *Code Civ. Proc. § 1203.58* [*see* [5], *above*], the lien will be preferred to all other titles, charges, liens, or encumbrances that may attach to or on any of the property after the date the oil or gas lien arises [*Code Civ. Proc. § 1203.56*; *see* [3], *above*]. Liens for the performance of labor will be preferred to all other oil and gas liens. Otherwise, oil and gas liens arising on the same property under *Code Civ. Proc. §§ 1203.50-1203.66* have equal standing [*Code Civ. Proc. § 1203.57*].

[9] Enforcement

An oil and gas lien is enforced in the same manner as provided in *Civ. Code §§ 3082-3267* [*Code Civ. Proc. § 1203.61*]. An enforcement action must be filed within 180 days from the time of recording the lien. If proceedings to enforce the lien are not prosecuted to trial within two years after commencement, the court may in its discretion dismiss the case for want of prosecution. A dismissal for want of prosecution, unless expressly made without prejudice, or a judgment that no lien exists is equivalent to cancellation and removal of the lien from the record [*Code Civ. Proc. § 1203.61*].

For additional discussion and forms relating to enforcement of liens under *Civ. Code §§ 3082-3267* that can be adapted for enforcement of oil and gas liens, see Ch. 361, *Mechanics' Liens* .

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§ 393.20 Abandonment of Right to Remove Oil and Gas

[1] Profit *a Prendre* Is Subject to Abandonment

A profit *a prendre*, which is a lessee's or an assignee's right to drill for and produce oil and gas [*see § 393.12[2]*] can be abandoned, similarly to an easement or other incorporeal hereditament [*Gerhard v. Stephens (1968) 68 Cal. 2d 864, 877, 882, 69 Cal. Rptr. 612, 442 P.2d 692* ; *see Civ. Code §§ 883.110-883.270* (abandonment of mineral rights)]. A profit *a prendre* is subject to abandonment even though early California appellate court decisions classified a perpetual profit *a prendre* as a fee simple estate in real property [*Gerhard v. Stephens (1968) 68 Cal. 2d 864, 883, 69 Cal. Rptr. 612, 442 P.2d 692* ; *see Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 649, 52 P.2d 237]* .

[2] Description as Fee Estate Refers Merely to Duration

Ordinarily, a fee simple interest in real property may not be abandoned, but the description of a perpetual profit *a prendre* as a fee refers merely to the duration of the estate. California appellate courts have referred to a perpetual profit as a fee estate to distinguish it from a profit held for a term of years. The courts have also recognized that the holder of a profit to remove oil and gas enjoys no definitive possessory ownership of these substances until they are severed from the realty and reduced to possession. Thus, as an incorporeal rather than a corporeal interest, a profit *a prendre* can be abandoned, regardless of its duration [*see Gerhard v. Stephens (1968) 68 Cal. 2d 864, 883, 885, 886, 69 Cal. Rptr. 612, 442 P.2d 692]* .

[3] Justification for Permitting Abandonment

The California Supreme Court has justified the rule permitting abandonment of a perpetual right to remove oil and gas by noting that the right reverts to the surface estate, thereby freeing the land of its burden and permitting the owner more complete utilization and enjoyment of the property [*Gerhard v. Stephens (1968) 68 Cal. 2d 864, 887, 69 Cal. Rptr.612, 442 P.2d 692]* .

[4] Required Findings

In general, a finding of abandonment requires nonuse of the right accompanied by unequivocal and decisive acts clearly

showing anintention to abandon. The question of abandonment must be decided by the trier of fact [*Gerhard v. Stephens (1968) 68 Cal. 2d 864, 890, 891, 69 Cal. Rptr. 612, 442 P.2d 692]* .

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34-393 California Forms of Pleading and Practice--Annotated § 393.21

§ 393.21 Termination of Interests in Oil and Gas

[1] Quitclaiming Lessee's Interest in Expired or Abandoned Lease

[a] Demand for Deed

When the term of any oil, gas, or other mineral right lease has expired, or a lease has been abandoned, the lessor, his or her successor in interest, heirs, or grantees may demand a deed quitclaiming the lessee's interest in the land and minerals covered by the lease [*Civ. Code § 883.140(b)*; *see Civ. Code § 883.140(a)* (defining "lessee" and "lessor"); *see also § 393.60*]. Within 30 days after this demand, the lessee, his or her assignee, or other successor in interest must execute, acknowledge, and deliver, or cause to be recorded, a quitclaim deed. When the expiration or abandonment of a lease covers less than the entire interest of the lessee, the lessee must execute, acknowledge, and deliver a notice of surrender or termination or other appropriate instrument covering the interest that has expired or been abandoned [*Civ. Code § 883.140(b)*].

[b] Action for Damages for Failure to Quitclaim Interest

A lessee or successor in interest who fails to execute the deed, instrument, or notice required by *Civ. Code § 883.140(b)* within 30 days after the lessor's demand [*see* [a], *above*] is liable to the lessor for all damages sustained by the lessor as a result of the failure, including, but not limited to, court costs and reasonable attorney's fees in an action to clear title to the lessor's interest. In addition, the lessee must forfeit the sum of $150 [*Civ. Code § 883.140(c)*; *see § 393.61*].

[c] Demand Is Limited to Certain Mineral Rights

As used in the statutory scheme for quitclaiming the lessee's interest in an abandoned lease, the term "mineral right" means an interest in minerals, regardless of character, whether fugacious or nonfugacious, organic or inorganic, that is created by grant or reservation, regardless of form, whether a fee or lesser interest, mineral, royalty, or leasehold, absolute or fractional, corporeal or incorporeal, and includes express and implied appurtenant surface rights [*Civ. Code § 883.110*].

The lessor's right to demand a quitclaim from the lessee of an abandoned lease does not apply to a mineral right

reserved to the United States or to an oil or gas lease, mining claim, or other mineral right of a person entitled pursuant thereto, to the extent provided in *Civ. Code § 880.240* (specification of interests that are not subject to expiration) [Civ. Code § 883.120(a)]. Similarly, the lessor's right to demand a quitclaim is also inapplicable to a mineral right of the state or a local public entity, or of any other person, to the extent provided in *Civ. Code § 880.240* [*Civ. Code § 883.120(b)*].

[d] Relationship to Other Law and Statutory Rights to Clear Title Is Still Intact

The lessor's ability to demand a quitclaim from the lessee of an abandoned lease does not limit or affect the common law governing abandonment of a mineral right or any other procedure provided by statute for clearing an abandoned mineral right from title to real property [*Civ. Code § 883.130*].

[2] Action to Terminate Lessee's Right of Entry or Occupation

[a] By Owner of Fee Interest in Surface

When a right of entry or occupation provided by a mining rights lease, including a community lease, for the production of oil, gas, or other hydrocarbons encumbers all or part of the surface or surface zone of leasehold lands, any person who owns a fee interest in the surface may bring an action in superior court to terminate the right as to all or some described portion of the surface and surface zone in which the person owns an interest [*Code Civ. Proc. § 772.030(a)*; *see § 393.67*]. The term "surface zone" means the zone that lies above a plane that is 500 feet below the land's surface [*Code Civ. Proc. § 772.020(a)*].

[b] Action Is Limited to Lands in Certain Urban Areas

The action created by *Code Civ. Proc. § 772.030(a)* applies only to lands within a city in any county with a population exceeding 4,000,000, or with a population of more than 700,000 and less than 710,000, as determined by the 1960 Federal Decennial Census [*Code Civ. Proc. § 772.010*].

[c] Requirements for Terminating Right of Entry or Occupation

The court may render a judgment terminating a lessee's right of entry or occupation of the surface and surface zone, subject to those conditions that the court deems fair and equitable, if the evidence shows that all of the following requirements have been satisfied:

- The document that created the leasehold interest was originally executed more than 20 years before filing the action, regardless of any amendments to the document. However, if any amendment was entered expressly for the purpose of waiving, limiting, or rearranging surface rights of entry and occupation by the lessee, the 20-year period must be computed as if the document had been originallyexecuted on the date of the amendment's execution [*Code Civ. Proc. § 772.040(a)*];

- The subject land is not presently occupied by any of the following:

  - A producing oil or gas well or well bore [*Code Civ. Proc. § 772.040(b)(1)*];

  - A well or well bore being utilized for injection of water, gas, or other substance into geologic substrata as an aid to oil or gas production or to ameliorate subsidence [*Code Civ. Proc. § 772.040(b)(2)*];

  - A well or well bore being utilized for the disposal injection of waste oil well brine and by-products [*Code Civ. Proc. § 772.040(b)(3)*]; or

- A well or well bore being utilized for the production of water for use in oil field injection, waterflood, and pressure maintenance programs [*Code Civ. Proc. § 772.040(b)(4)*]; and

- Termination of the right of entry or occupation in the manner requested by plaintiff, or subject to conditions imposed by the court, would not significantly interfere with the right of the lessee, under the lease, to continue operations for the continued production of oil from leasehold strata beneath the surface zone in a practical and economic manner, utilizing production techniques that are appropriate to the leasehold area, consistent with good oil field practice. In addition, termination would not significantly interfere with the lessee's right, under the lease, to gather, transport, and market the oil [*Code Civ. Proc. § 772.040(c)*].

When the evidence shows that termination of the right of entry would significantly interfere with the lessee's right to continue to produce oil in a practical and economic manner, utilizing appropriate production techniques consistent with good oil field practice, and to gather, transport, and market the oil, the right may not be terminated. Such evidence establishes an absolute defense to the complaint [*Butcher v. Okmar Oil Co. (1977) 65 Cal. App. 3d 972, 975, 135 Cal. Rptr. 713* (decided under former *Code Civ. Proc. § 751.3*, substantially reenacted as *Code Civ. Proc. §§ 772.010-772.060*)].

[d] Qualification of Judgment

The court may qualify the judgment terminating the surface and surface zone right of entry or occupation so as to provide for limited surface and surface zone easements that the lessee may continue to enjoy within the subject land [*Code Civ. Proc. § 772.050(a)*].

In addition, a judgment may be conditioned on the relocation of pipelines, roadways, equipment, or lease facilities in a manner that will effectively free the land for surface use, while safeguarding continued oil and gas operations in a practical and economic manner [*Code Civ. Proc. § 772.050(b)*]. A judgment with any of these conditions must require payment of relocation costs by the plaintiff. However, the plaintiff is entitled to a setoff against the costs to the extent of any benefit to the lessee resulting from the installation of new equipment or material. The plaintiff bears the burden of proving that any benefit accrued to the lessee [*Code Civ. Proc. § 772.050(b)*].

[e] Certain Agreements Are Unaffected by Judgment

A judgment rendered in accordance with *Code Civ. Proc. §§ 772.010-772.060* may not change or affect the terms or operation of any valid unit agreement or valid operating agreement that comes within the provisions of *Pub. Res. Code § 3301* (authorizing cooperative development of oil or gas to prevent waste) or *Pub. Res. Code § 3321* (mandating unit production to arrest or ameliorate subsidence) [*Code Civ. Proc. § 772.030(b)*].

[f] Waiver of Action in Lease Is Against Public Policy

It is against public policy for any oil or gas lease, at its inception, to provide for the waiver of any rights created by *Code Civ. Proc. §§ 772.010-772.060*. In addition, it is against public policy for rights under those provisions to be waived by amendment to any oil or gas lease within 20 years after the date of its execution by a plaintiff or the plaintiff's predecessor in interest [*Code Civ. Proc. § 772.060*].

[3] Action to Terminate Dormant Mineral Rights

[a] Brought By Real Property Owner

The owner of real property subject to a mineral right may bring an action under *Civ. Code §§ 883.210-883.270* to

terminate the mineral right if it is dormant [*Civ. Code § 883.210*; *see § 393.62*]. Subject to *Civ. Code § 880.370* (five-year grace period to record notice of intent to preserve interest if time for filing expired before, on, or within five years after operative date of statute), *Civ. Code §§ 883.210-883.270* apply to all mineral rights, whether executed or recorded before, on, or after January 1, 1985 [*Civ. Code § 883.270*].

[b] Venue and Procedural Requirements

An action to terminate a mineral right must be brought in the superior court of the county where the real property subject to the mineral right is located. The action must be brought in the same manner and subject to the same procedure as an action to quiet title (*Code Civ. Proc. §§ 760.010-765.060*), to the extent applicable [*Civ. Code § 883.240*; for discussion and forms relating to quiet title actions, see Ch. 482, *Quieting Title*].

[c] Mineral Rights Are Not Subject to Action

In an action to terminate a dormant mineral right, the term "mineral right" has the same meaning and is subject to the same exceptions as in the statutory scheme for quitclaiming the lessee's interest in an abandoned lease [*Civ. Code §§ 883.110*, *883.120*; *see* [1][c], *above*].

[d] Dormant Mineral Right

For the purpose of *Civ. Code §§ 883.210-883.270*, a mineral right is dormant if all of the following conditions are satisfied for the 20-year period immediately preceding commencement of the action to terminate the mineral right [*Civ. Code § 883.220*]:

- There is no production of the minerals and no exploration, drilling, mining, development, or other operations that affect the minerals, whether on or below the real property's surface or on other property, whether or not unitized or pooled with the real property;

- No separate property tax assessment is made of the mineral right or, if made, no taxes are paid on the assessment; and

- No instrument creating, reserving, transferring, or otherwise evidencing the mineral right is recorded [*see Civ. Code §§ 883.230(a)*, *883.250*; *see also* [e], *below*].

A mineral right is not dormant if (1) a notice of intent to preserve the mineral right is recorded within the 20-year period immediately preceding commencement of the termination action or (2) a late notice of intent is recorded in accordance with *Civ. Code § 883.250* after commencement of the action to terminate [*Civ. Code § 883.230(c)*; *see* [e], *below*].

[e] Notice of Intent to Preserve Mineral Right

An owner of a mineral right may at any time record a notice of intent to preserve the mineral right [*Civ. Code § 883.230(a)*; *see § 393.63*]. In lieu of the statements of the character of the interest claimed, the record location of the documents evidencing the mineral rights claimed, and the legal description of the real property in which the interest is claimed as otherwise required by *Civ. Code § 880.330(b)* (contents of notice), and notwithstanding *Civ. Code § 880.340* (form of notice) or other provisions in *Civ. Code §§ 880.020-887.090* (marketable record title), a notice of intent to preserve a mineral right may refer generally and without specificity to any or all mineral rights claimed by claimant in any real property situated in the county [*Civ. Code § 883.230(b)*].

In an action brought to terminate a mineral right, the court will permit the mineral right's owner to record a late notice of intent to preserve the mineral right as a condition of the action's dismissal, on payment into court for the benefit of the real property's owner, the litigation expenses attributable to the mineral right, or portion of the right, for which the

notice is recorded. "Litigation expenses" means recoverable costs and expenses reasonably and necessarily incurred in preparation for the action, including a reasonable attorney's fee [*Civ. Code § 883.250*].

[f] Effect of Termination

A terminated mineral right is unenforceable and deemed to have expired. A court order terminating a mineral right is, for all purposes, equivalent to a conveyance of the mineral right to the real property's owner [*Civ. Code § 883.260*].

[g] Nonexclusive Remedy

Nothing in *Civ. Code §§ 883.210-883.270* limits or affects the common law governing abandonment of a mineral right or any other procedure provided by statute for clearing an abandoned mineral right from title to real property [*Civ. Code § 883.130*].

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§ 393.40 Related Matthew Bender Publications

[1] California Legal Forms

For detailed discussion of the transfer, assignment, and development of oil and gas interests in California, inluding coverage of the basic steps necessary to lease oil and gas interests as well as a complete lease document, see California Legal Forms, Ch. 36, *Oil and Gas Rights and Leases* (Matthew Bender)

For transactional coverage of the major types of natural resources, with a focus on the basic procedures that must be followed under state and federal law when establishing a timber operation, negotiating and executing a water supply contract, or staking a claim to a mine, see California Legal Forms, Ch. 36A, *Mining Claims, Timber Interests, and Water Rights* (Matthew Bender)

[2] California Environmental Law and Land Use Practice

For coverage of mineral ownership generally, including the respective rights of surface owners and mineral owners, and the environmental protection laws applicable to mineral development, see Manaster & Selmi, California Environmental Law And Land Use Practice, Ch. 82, *Mineral Development* (Matthew Bender)

[3] Oil and Gas Law

For detailed coverage of all aspects of oil and gas interests, see Williams & Meyers, Oil And Gas Law (Matthew Bender), including, for example, the following materials:

- Ch. 1, *A Brief Introduction to Scientific and Engineering Backround of Oil and Gas Law*
- Ch. 2, *Nature of Interests in Oil and Gas*.

- Ch. 3, *Oil and Gas Conveyancing*
- Ch. 6, *The Oil and Gas Lease--Express Provisions*.
- Vol. 7, *Oil and Gas Forms*
- Vol. 8, *Manual of Oil and Gas Terms*

[4] The Law of Oil and Gas Leases

For complete coverage of oil and gas leases, see Brown & Brown, The Law Of Oil And Gas Leases (Matthew Bender), including, for example, the following chapters:

- Ch. I, *Introduction*
- Ch. II, *Who May Make a Lease*
- Ch. III, *Consideration and Granting Clause*
- Ch. IV, *Description*
- Ch. V, *The "Habendum" or Term Clause*
- Ch. VI, *The Royalty Clauses*
- Ch. VII, *The Drilling and Rental Clause*
- Ch. X, *Operational Rights and Restrictions*
- Ch. XI, *The Assignment Clause*
- Ch. XVII, *Special Clauses in Leases and Assignments*

[5] Energy Law and Transactions

For all aspects of energy law, including state and federal regulations of energy transactions, see Muchow & Mogel, Energy Law And Practice (Matthew Bender), including, for example, the following chapters:

- Ch. 1, *The U.S. Energy Industry*.
- Ch. 3, *Federal Regulation of Energy Transactions*.
- Ch. 4, *State Utility Commission Regulation of Energy Transactions*.
- Ch. 5, *State Regulation of Oil and Gas Production*.
- Ch. 20, *Oil and Gas Contracts*.
- Ch. 34, *Oil and Gas Accounting*.

- Ch. 41, *State and Local Taxation of Oil and Gas*.
- Ch. 120, *Energy and the Environment*.

[6] Other Matthew Bender Oil and Gas Publications

American Gas Association, Regulation Of The Gas Industry (Matthew Bender)

Kramer and Martin, The Law Of Pooling And Unitization (Matthew Bender)

Rocky Mountain Mineral Law Foundation, Law Of Federal Oil And Gas Leases(Matthew Bender)

Polevoi and Smith, Federal Taxation Of Oil And Gas Transactions (Matthew Bender)

Crumbley, Oil, Gas & Energy Quarterly (Matthew Bender)

Southwestern Legal Foundation, Annual Institute On Oil And Gas Law And Taxation (Matthew Bender)

Southwestern Legal Foundation, Oil And Gas Reporter (Matthew Bender)

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§ 393.41 State Statutes

[1] Conveyance of Oil and Gas Interests

Registration and penal provisions governing telephonic sellers, including sellers of certain oil and gas interests. *Bus. & Prof. Code §§ 17511-17511.10*

Rule against perpetuities. *Prob. Code § 21200 et seq.*

[2] Oil and Gas Liens

Oil and Gas Lien Act. *Code Civ. Proc. §§ 1203.50-1203.66*

Oil and gas liens provided by Oil and Gas Lien Act are enforced in same manner as provided in *Civ. Code §§ 3082-3267. Code Civ. Proc. § 1203.61(a)*

[3] Quiet Title Actions

Generally. *Code Civ. Proc. §§ 760.010-765.060*

Quiet title remedy provided in *Code Civ. Proc. §§ 760.010-764.070* is not exclusive. *Code Civ. Proc. § 760.020*

Superior court has jurisdiction in actions to quiet title. *Code Civ. Proc. § 760.040*

Venue in quiet title actions is in county in which property or some part of property is located. *Code Civ. Proc. § 760.050(a)*

Contents and verification of complaint. *Code Civ. Proc. § 761.020*

Unknown defendants. *Code Civ. Proc. §§ 762.020(a), 762.060(a)*

Facts regarding unknown, uncertain, or contingent claims are required to be in complaint. *Code Civ. Proc. § 762.020(b)*

Plaintiff is required to name as defendants persons having adverse claims. *Code Civ. Proc. § 762.060(b)*

Service of process in quiet title actions. *Code Civ. Proc. §§ 763.010-763.040*

Judgment in quiet title actions. *Code Civ. Proc. §§ 764.010-764.080*

[4] Quitclaiming Interest in Expired or Abandoned Mineral Leases

Demand for quitclaim of lessee's interest when lease expired or abandoned. *Civ. Code § 883.140(b)*

Lessee who fails to quitclaim interest is liable for damages, including court costs and reasonable attorney's fees. *Civ. Code § 883.140(c)*

Lessee is required to quitclaim or surrender interest covered by expired or abandoned lease within 30 days of lessor's demand. *Civ. Code § 883.140(b)*

Action for forfeiture of $150 and for damages resulting from lessee's failure to quitclaim or surrender interest covered by expired or abandoned oil and gas lease. *Civ. Code § 883.140(c)*

[5] Regulation of Oil and Gas

Recordation of oil and gas leases. *Civ. Code § 1219*

Regulation of production in general. *Pub. Res. Code § 3000 et seq.*

Authorization of cooperative development of oil or gas to prevent waste. *Pub. Res. Code § 3301*

Mandatory unit production to arrest or ameliorate subsidence. *Pub. Res. Code § 3321*

Regulation of well spacing. *Pub. Res. Code §§ 3600-3609*

Oil and gas leases with respect to public lands. *Pub. Res. Code §§ 6801-6873*

[6] Termination of Dormant Mineral Rights

"Mineral right" defined. *Civ. Code § 883.110*

Exemptions to termination action. *Civ. Code § 883.120*

General provisions for terminating dormant mineral rights. *Civ. Code §§ 883.210-883.270*

Dormant mineral right described. *Civ. Code §§ 883.220, 883.230(c)*

Procedure. *Civ. Code § 883.240*

Notice of intent to preserve mineral right. *Civ. Code §§ 883.230, 883.250*

Effect of termination. *Civ. Code § 883.260*

Termination action is applicable to mineral rights whenever excuted or recorded. *Civ. Code § 883.270*

[7] Termination of Lessee's Right of Entry or Occupation

Action limited to lands in certain urban areas. *Code Civ. Proc. § 772.010*

Term "surface zone" defined. *Code Civ. Proc. § 772.020(a)*

Any person who owns fee interest in surface is entitled to bring action to terminate lessee's right of entry or occupation. *Code Civ. Proc. § 772.030(a)*

Action to terminate lessee's right must be brought in superior court. *Code Civ. Proc. § 772.030(a)*

Certain agreements unaffected by judgment. *Code Civ. Proc. § 772.030(b)*

Requirements for terminating right of entry or occupation. *Code Civ. Proc. § 772.040(a)-(c)*

Qualification of and conditions on judgment. *Code Civ. Proc. § 772.050*

Waiver of rights created by *Code Civ. Proc. §§ 772.010-772.060* in lease is against public policy. *Code Civ. Proc. § 772.060*

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§ 393.42 Federal Statutes

Liability for oil spill pollution. *33 U.S.C. § 2701 et seq.*

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§ 393.43 Decisions

[1] Abandonment of Oil and Gas Rights

Right to drill for and produce oil and gas is similar to easement or other incorporeal hereditament and thus, subject to abandonment. *Gerhard v. Stephens (1968) 68 Cal. 2d 864, 883, 69 Cal. Rptr. 612, 442 P.2d 692*

[2] Community Leases

When community lease does not restrict use to which surrendered lot may be put or provide for forfeiture of lessor's interest in community production, lessor is permitted to produce oil on adjacent land that has been surrendered from community lease even though lessor's activities decrease profits of cotenants. *Tanner v. Olds (1946) 29 Cal. 2d 110, 115-116, 173 P.2d 6*

In action seeking declaration that community oil and gas lease has terminated, lot owners who are entitled to share royalties on any oil that might be produced are indispensable parties. *Southern Cal. Title Clearing Co. v. Laws (1969) 2 Cal. App. 3d 586, 590, 83 Cal. Rptr. 8*

[3] Cotenants

Producing cotenant is required to account to other cotenants for their respective percentages of profits. *Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 655, 656, 52 P.2d 237*

[4] Federal Preemption

When state regulation affects ability of Federal Energy Regulatory Commission to regulate transportation and sale of natural gas comprehensively and to achieve objective of Natural Gas Act (uniformity of regulation) or presents prospect of interference with federal regulatory power, state law is preempted even though collision between regulations may not

be inevitable consequence. *Schneidewind v. ANR Pipeline Co. (1988) 485 U.S. 293, 310, 108 S. Ct. 1145, 99 L. Ed. 2d 316* (statute regulating issuance of securities by public utility transporting natural gas was preempted)

15 U.S.C. § 717 et seq., former § 3313 et seq. (repealed January 1, 1993), preempts authority of state (Mississippi) oil and gas board to require production company, in periods of slack demand, to purchase from all owners ratably in proportion to their various shares in common pool rather than only from owners who were also well operators, since ratable requirement would conflict with federal interest in protecting consumers by ensuring low prices. *Transcontinental Gas Pipe Line Corp. v. Oil & Gas Bd. (1986) 474 U.S. 409, 414-425, 106 S. Ct. 709, 88 L. Ed. 2d 732*

[5] Landowner's Oil and Gas Interest

Court's description of perpetual profit *a prendre* as fee estate refers merely to duration of estate. *Gerhard v. Stephens (1968) 68 Cal. 2d 864, 883, 69 Cal. Rptr. 612, 442 P.2d 692*

When granted to lessee or assignee, right to drill for and produce oil and gas is profit *a prendre*, which is right to remove part of substance of the land. *Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 649, 52 P.2d 237*

Interest in oil and gas is subject to conveyance separately and apart from grant of surface title. *Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 649, 52 P.2d 237*

Landowner does not have absolute title to oil and gas in place but possesses exclusive right to drill for oil and gas and to retain all substances brought to the surface. *Callahan v. Martin (1935) 3 Cal. 2d 110, 117, 43 P.2d 788*

Conveyance of land "ex of mining rights" conveys land subject only to existing oil and gas lease, not with perpetual right to drill. *Lough v. Coal Oil, Inc. (1990) 217 Cal. App. 3d 1518, 1525-1527, 266 Cal. Rptr. 611*

[6] Oil and Gas Leases

Construction by trial court of oil lease provision without consideration of extrinsic evidence is reversible error. *Southern Pacific Land Co. v. Westlake Farms, Inc. (1987) 188 Cal. App. 3d 807, 815-817, 233 Cal. Rptr. 794*

Habendum clause is modifiable by other lease provisions. *Southern Pacific Land Co. v. Westlake Farms, Inc. (1987) 188 Cal. App. 3d 807, 818-825, 233 Cal. Rptr. 794*

Oil and gas leases ordinarily contain clause permitting lessee to cease operations and to surrender lease if lessee no longer considers it possible to continue operations profitably. *La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 140, 114 P.2d 351*

When used in surrender clause of oil and gas lease, term "rent" means consideration for privilege of delayed drilling. *Beverly Hills Oil Co. v. Beverly Hills Unified Sch. Dist. (1968) 264 Cal. App. 2d 603, 608, 70 Cal. Rptr. 640*

[7] Oil and Gas Lien Act

Oil and Gas Lien Act's [*Code Civ. Proc. §§ 1203.50-1203.66*] definitions in *Code Civ. Proc. § 1203.51(b)* of oil and gas leasehold owner includes person holding any interest in legal or equitable title or both to any leasehold for oil or gas purposes and is not limited to actual owner in conventional sense. *Cal-Cut Pipe & Supply, Inc. v. Haradine Petroleum, Inc. (1973) 35 Cal. App. 3d 359, 369, 110 Cal. Rptr. 666*

Definitions of term "owner" in Oil and Gas Lien Act [*Code Civ. Proc. §§ 1203.50-1203.66*] is required to be liberally construed in plaintiff's favor under *Code Civ. Proc. § 1203.66*. *Cal-Cut Pipe & Supply, Inc. v. Haradine Petroleum, Inc. (1973) 35 Cal. App. 3d 359, 370, 110 Cal. Rptr. 666*

Legislature intended that phrase "person holding any interest in the title to any leasehold for oil or gas purposes" used in defining owner under *Code Civ. Proc. § 1203.51(b)* should include a person who holds an interest less than title in an oil and gas leasehold. *Cal-Cut Pipe & Supply, Inc. v. Haradine Petroleum, Inc. (1973) 35 Cal. App. 3d 359, 371, 110 Cal. Rptr. 666*

Grantee of right to drill for and produce oil, which is a profit *a prendre* or incorporeal hereditament, has an interest in title making him or her "owner" under *Code Civ. Proc. § 1203.51(b)* for purposes of enforcing liens for furnishing materials and services under Oil and Gas Lien Act [*Code Civ. Proc. §§ 1203.50-1203.66*]. *Cal-Cut Pipe & Supply, Inc. v. Haradine Petroleum, Inc. (1973) 35 Cal. App. 3d 359, 372, 110 Cal. Rptr. 666*

[8] Rental for Delayed Drilling

Action for delayed drilling rentals is not proper when lease contains "unless" type of provision automatically terminating lease unless lessee commences drilling or pays rent. *Fritsch v. Fisher (1957) 151 Cal. App. 2d 732, 734-735, 312 P.2d 21*

Demurrer to complaint in action seeking delayed drilling rentals was properly sustained when oil and gas lease was "unless" type. *Walston v. Flintridge Oil Co. (1955) 133 Cal. App. 2d 660, 663, 284 P.2d 895*

Notice of lessee's default is not required to effect termination of "unless" type lease before quiet title action because lease automatically expires when lessee fails to commence drilling or pay delayed drilling rental. *Richfield Oil Corp. v. Bloomfield (1951) 103 Cal. App. 2d 589, 590-591, 229 P.2d 838*

Notice of default provision has no effect on automatic termination in "unless" type of oil and gas lease. *Richfield Oil Corp. v. Bloomfield (1951) 103 Cal. App. 2d 589, 590-591, 229 P.2d 838*

[9] Royalty Interests

Assignment of overriding royalty by lessee conveys to assignee only the right to receive percentage of oil produced from wells bottomed under land to which lease pertained. *Federal Oil Co. v. Brower (1950) 36 Cal. 2d 367, 369-370, 224 P.2d 4*

Term "overriding royalty" refers to fractional interest in production of oil and gas that is created from lessee's estate or interest either by reservation or grant to third party. *La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 135, 114 P.2d 351*

Extent of assignee's interest under assignment of royalty or overriding royalty depends on intention of parties involved. *La Laguna Ranch Co v. Dodge (1941) 18 Cal. 2d 132, 137, 138, 114 P.2d 351*

Royalty that lessee renders to lessor for right to drill for and produce oil and gas, analogous to rent and right to receive future royalties, is incorporeal hereditament that may be conveyed. *Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 651, 52 P.2d 237*

[10] Rule Against Perpetuities

Grantor's reserved right to drill for and produce oil and gas, which is profit *a prendre*, was a present possessory interest that vested from the time it was first created and thus was not created in violation of rule against perpetuities codified in former *Civ. Code § 715.2* (*now see Prob. Code §§ 21201, 21205-21208, 21230*). *Rousselot v. Spanier (1976) 60 Cal. App. 3d 238, 241, 131 Cal. Rptr. 438*

Expiration of profit *a prendre* because oil and gas no longer found in paying quantities leaves grantees with their estate free of the burden and does not create new estate in violation of rule against perpetuities. *Rousselot v. Spanier (1976) 60 Cal. App. 3d 238, 241, 131 Cal. Rptr. 438*

Exclusive executive interest in mineral estate, which is the right to execute leases to secure exploration and development of minerals, reserved by grantor does not violate former *Civ. Code § 715.2* (rule against perpetuities) (*now see Prob. Code §§ 21201, 21205-21208, 21230*) because interest constitutes general power of appointment that vests immediately. *Keville v. Hollister Co. (1972) 29 Cal. App. 3d 203, 205-206 n.1, 207, 105 Cal. Rptr. 238*

Deed excepting and reserving to grantors all oil and gas and continuing interest for period of 20 years and so long thereafter as oil and gas may or shall be produced makes termination of production a dubious, uncertain event in violation of former *Civ. Code § 715.2* (rule against perpetuities) (*now see Prob. Code §§ 21201, 21205-21208, 21230*). *Victory Oil Co. v. Hancock Oil Co. (1954) 125 Cal. App. 2d 222, 230-231, 270 P.2d 604*

[11] Subsurface Trespass

Causing subsurface migration of oil field wastewater into a mineral estate (the groundwater pore space) without that landowner's consent constituted continuing trespass. *Starrh & Starrh Cotton Growers v. Aera Energy LLC (2007) 153 Cal. App. 4th 583, 592, 63 Cal. Rptr. 3d 165*

Injection of wastewater into well constitutes a trespass to mineral estate; damages are fair market cost of disposal of wastewater at other availablesites. *Cassinos v. Union Oil Co. (1993) 14 Cal. App. 4th 1770, 1778-1789, 18 Cal. Rptr. 2d 574*

*Code Civ. Proc. § 349*3/4 prohibiting more than one cause of action for an act of underground trespass does not bar cause of action based on act constituting new trespass. *Shell Oil Co. v. Richter (1942) 52 Cal. App. 2d 164, 171, 125 P.2d 930*

Award of costs of well to defendant in connection with injunctive relief in favor of plaintiff to enjoin subsurface trespass is not supported by *Code Civ. Proc. § 349*3/4, which deals solely with measure of damages when plaintiff seeks award of damages. *Union Oil Co. v. Domengeaux (1939) 30 Cal. App. 2d 266, 272, 86 P.2d 127*

Injunction is properly granted to stop subsurface trespass from oil well that deviates materially from the perpendicular due to slant drilling when plaintiffs have suffered damages, even though a specific amount is not sought, and the continuing trespass threatens future damages. *Union Oil Co. v. Domengeaux (1939) 30 Cal. App. 2d 266, 270-272, 86 P.2d 127*

Landowner's exclusive right to drill for and produce oil and gas from beneath surface of his or her land does not include authority to sink well at such an angle that it goes beyond surface boundaries of property, if extended downward, and intercepts oil and gas from subsurface of neighboring owner. *A.E. Bell Corp. v. Bell View Oil Synd. (1938) 24 Cal. App. 2d 587, 595, 596, 76 P.2d 167*

Action for subsurface trespass and conversion of oil and gas is authorized. *A.E. Bell Corp. v. Bell View Oil Synd.*

(1938) 24 Cal. App. 2d 587, 603, 610, 76 P.2d 167

[12] Surrender Clauses

Surrender of profit a prendre under surrender clause is effective without any additional consent of lessor, unless clause specifically states otherwise; surrender clause is not interpreted to allow lessor at any time to withhold acceptance and thus defeat lessee's right to surrender property, when this interpretation would effectively nullify parties' surrender provision. *Kennecott Corp. v. Union Oil Co. (1987) 196 Cal. App. 3d 1179, 1188, 1190, 242 Cal. Rptr. 403*

[13] Taxation of Oil and Gas Interests

Right to drill for and extract oil and gas from land is interest in real property under *Rev. & Tax Code § 104* that is subject to property taxation. *Atlantic Oil Co. v. Los Angeles County (1968) 69 Cal. 2d 585, 595-596, 72 Cal. Rptr. 886, 446 P.2d 1006*

Although classified as an incorporeal hereditament and an interest in land under general concepts of property law, the right to receive royalties as not considered real property under *Rev. & Tax Code § 104* for purposes of property taxation. *Atlantic Oil Co. v. Los Angeles County (1968) 69 Cal. 2d 585, 595, 72 Cal. Rptr. 886, 446 P.2d 1006*

Taxable value of oil and gas property was purchase price pursuant to *Rev. & Tax. Code§ 110* even though "proved" oil and gas reserves as defined by the applicable State Board of Equalization Rule [*18 Cal. Code Reg. § 468*] had not been established, because purchaser failed to establish different value by preponderance of the evidence. *California Minerals, L.P. v. County of Kern (2007) 152 Cal. App. 4th 1016, 1029, 62 Cal. Rptr. 3d 1*

Taxation of oil "at the market price at the well" means that costs of transportation and processing are deductible before percentage of royalties iscalculated. *Atlantic Richfield Co. v. State of California (1989) 214 Cal. App. 3d 533, 541-543, 262 Cal. Rptr. 683*

[14] Termination of Lessee's Right of Entry or Occupation

Statutory provisions authorizing action to terminate oil and gas lessee's right of entry to or occupation of surface [*Code Civ. Proc. §§ 772.010-772.060*] is not unconstitutional impairment of contractual obligations under U.S. *Const., Art I, § 10* or *Cal. Const., Art I, § 9*, and is also not unconstitutional denial of substantive due process under *U.S. Const., Amend. XIV* or *Cal. Const., Art I, § 15*. *Donlan v. Weaver (1981) 118 Cal. App. 3d 675, 683, 173 Cal. Rptr. 566*

Code Civ. Proc. §§ 772.010-772.060, which are reenactments of former *Code Civ. Proc. § 751.3*, are applicable retroactively to authorize termination of rights of entry or occupation under oil and gas leases executed both before and after effective date of statute. *Donlan v. Weaver (1981) 118 Cal. App. 3d 675, 679, 173 Cal. Rptr. 566*

Code Civ. Proc. §§ 772.010-772.060, providing for action to terminate lessee's right of entry to or occupation of leasehold surface, are intended to eliminate right of entry or occupation that affects and encumbers surface areas no longer utilized or needed for conduct of leasehold operations. *Donlan v. Weaver (1981) 118 Cal. App. 3d 675, 679-680, 173 Cal. Rptr. 566*

[15] Well Spacing Regulation

Well spacing statutes [*Pub. Res. Code §§ 3600-3609*] are constitutional on their face but unconstitutional as applied to

certain wells when application would not afford adequate means of protection as substitute for the right to drill an offset well. *Bernstein v. Bush (1947) 29 Cal. 2d 773, 780, 177 P.2d 913*

Writ of mandate is not proper to compel issuance of permit under well spacing statutes [*Pub. Res. Code §§ 3600-3609*] because there is no requirement that prospective drillers obtain permit or that state oil and gas supervisor issue permit before commencement of drilling. *Bernstein v. Bush (1947) 29 Cal. 2d 773, 781, 177 P.2d 913*

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34-393 California Forms of Pleading and Practice--Annotated § 393.60

§ 393.60 Demand for Quitclaim Deed of Lessee's Interest in Minerals Covered by Terms of Expired or Abandoned Oil and Gas Lease or for Notice of Surrender or Termination Covering Expired or Abandoned Portion of Lessee's Interest in Minerals [Civ. Code § 883.140(b)]--By Lessor to Lessee

[1] FORM Demand for Quitclaim Deed of Lessee's Interest in Minerals Covered by Terms of Expired or Abandoned Oil and Gas Lease or for Notice of Surrender or Termination Covering Expired or Abandoned Portion of Lessee's Interest in Minerals [Civ. Code § 883.140(b)]--By Lessor to Lessee

TO: _____ [*name of lessee, lessee's assignee, or other successor in interest*]

The oil and gas lease, dated _____ [*date*], between _____ [*name*], lessee, and _____ [*name*], lessor, covering _____ [*describe leased land, e.g.*, Lots 12-14 of the Scars Tract on Westbinder Road in Los Angeles, California], has _____ [by its terms expired *or* been abandoned] as of _____ [*date*]. Thus, _____ [your interest *or* the portion of your interest covered by the above lease] in the land and minerals as lessee has terminated.

As _____ [lessor *or* the lessor's heir *or* the lessor's grantee *or* the lessor's successor in interest], the undersigned demands that you execute, acknowledge, and deliver [, or cause to be recorded,] a _____ [deed quitclaiming all of your interest in the lands and minerals covered by the terms of the lease *or if expiration or abandonment covers less than lessee's entire interest*, notice or other appropriate instrument of surrender or termination covering the portion of your interest] that has _____ [expired *or* been abandoned], as required by *Civil Code Section 883.140(b)*.

Your failure to comply with the requirements of *Civil Code Section 883.140(b)* will make you liable to the undersigned, under this provision, for damages resulting from your refusal, including court costs and reasonable attorney's fees, and in addition, will cause you to forfeit the sum of $150.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Lessor['s Successor in Interest] _____ [*name*]

_____ [*date*]

[2] Use of Form

The form of demand in [1], *above*, may be used by a lessor under an oil and gas lease when seeking the lessee's agreement that his or her interest in the leased land and minerals [*Civ. Code § 883.110*] has expired or been abandoned. Within 30 days after a lessor's demand, the lessee or his or her successor in interest must execute, acknowledge, and deliver, or cause to be recorded, a deed quitclaiming his or her interest in an oil and gas lease that has expired or been abandoned [*Civ. Code §§ 883.110-883.140*]. When the expiration or abandonment covers less than the entire interest of the lessee in the leased land and minerals, the lessee must execute, acknowledge, and deliver a notice of surrender or termination or other appropriate instrument covering the interest that has expired or been abandoned [*Civ. Code § 883.140(b)*; *see § 393.21[1]*]. The lessor may bring an action for damages when a lessee fails to quitclaim or surrender an expired or abandoned interest [*Civ. Code § 883.140(c)*; *see § 393.61*; *see also § 393.21[1][b]*].

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§ 393.61 Complaint to Quiet Title [Code Civ. Proc. §§ 760.020(a), 761.020] and for Damages and Forfeiture [Civ. Code § 883.140(c)] With Respect to Expired or Abandoned Oil and Gas Lease--By Lessor Against Lessee Who Failed to Give Quitclaim Deed or Notice of Surrender or Termination Covering Terminated Interest [Civ. Code § 883.140(b)]

[1] FORM Complaint to Quiet Title [Code Civ. Proc. §§ 760.020(a), 761.020] and for Damages and Forfeiture [Civ. Code § 883.140(c)] With Respect to Expired or Abandoned Oil and Gas Lease--By Lessor Against Lessee Who Failed to Give Quitclaim Deed or Notice of Surrender or Termination Covering Terminated Interest [Civ. Code § 883.140(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s) of known defendant(s)*], [*if unknown defendants are included, add:*; and all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud on plaintiff's title thereto] [; and DOES I-_____, inclusive],	)	COMPLAINT TO QUIET TITLE AND FOR DAMAGES AND FORFEITURE
Defendant(s).	)	

Plaintiff alleges:

1. Plaintiff is the sole owner of real property located in _____ County, California, and described as follows: _____ [*set forth legal description, including street address or common designation, if any*].

2. The basis of plaintiff's title is _____ [*describe basis of plaintiff's title, e.g.,* a deed from _____ (*name of grantor*) granting the above-described property in fee simple to plaintiff, dated _____, and recorded in the Official Records of the County of _____, Book/Reel _____, page/image _____].

3. On or about _____ [*date*], plaintiff['s predecessor in interest] as lessor and defendant _____ [*name*] ['s predecessor in interest] as lessee entered into an oil and gas lease. A copy of the lease is attached to this complaint as Exhibit "A" and made a part of this complaint.

[4. Defendants DOES I-_____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants claim some right, title, estate, lien, or interest in the above-described property adverse to plaintiff's title; and that their claims, and each of them, constitute a cloud on plaintiff's title to that property.]

[5. *If "all persons unknown" are named as defendants, allege:* The defendants herein named as "all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud on plaintiff's title thereto" (hereinafter sometimes referred to as "the unknown defendants") are unknown to plaintiff. These unknown defendants, and each of them, claim some right, title, estate, lien, or interest in the previously described property adverse to plaintiff's title; and their claims, and each of them, constitute a cloud on plaintiff's title to that property.]

[6. *If the claim or share or quantity of the claim of a named defendant is unknown, uncertain, or contingent, allege:* The _____ (claim *or* quantity of the claim) of defendant(s) _____ (*name(s)*) is _____ (unknown *or* uncertain *or* contingent). *If the lack of knowledge, uncertainty, or contingency is caused by a transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, a vested remainder subject to defeasance, an executory interest, or a similar disposition, allege:* _____ (*Name*), age _____, is the person who would be entitled to an adverse interest if _____ (*describe contingency*) had occurred before the commencement of this action. *If that person is subject to a legal disability, allege:* He/She is subject to _____ (*specify legal disability*).]

7. The lease between plaintiff['s predecessor in interest] as lessor and defendant(s)['(s) predecessor(s) in interest] as lessee provided that _____ [*describe provisions on which plaintiff bases expiration or abandonment, e.g.,* if drilling operations were not commenced within one year from the date of the lease, it would terminate as to both parties, unless, before the expiration of one year, the lessee paid to the lessor a certain sum as rental, which would cover the privilege of deferring the commencement of drilling operations for a period of one year].

8. The lease _____ [expired *or* was abandoned] on or about _____ [*date*], because _____ [*state facts showing expiration or abandonment, e.g.,* defendant(s) failed to commence drilling or to pay delayed drilling rental before _____ (*date*) the date on which the lease would automatically expire if defendant(s) failed to take either action]. As a result of the _____ [expiration *or* abandonment] of the lease, _____ [defendant(s)'(s) entire interest *or* the portion of defendant(s)'(s)interest covered by the lease] in the above-described property and minerals has _____ [expired *or* been abandoned].

9. On _____ [*date*], plaintiff served on defendant(s) a demand that defendant(s) execute, acknowledge, and deliver [, or cause to be recorded,] a _____ [deed quitclaiming all of his/her/their interest as lessee in the lands and minerals covered by the terms of the lease *or* notice or other appropriate instrument of surrender or termination covering the portion of his/her/their interest as lessee] that had _____ [expired *or* been

abandoned], as required by *Civil Code Section 883.140(b)*.

10. Although more than 30 days have passed since defendant(s) was/were served with plaintiff's demand, defendant(s) has/have failed and refuse(s) to execute, acknowledge, and deliver[, or cause to be recorded,] a _____ [quitclaim deed *or* notice or other appropriate instrument of surrender or termination] covering his/her/their interest under the lease.

11. Plaintiff is seeking to quiet title against the claims of defendant(s) as follows: defendant(s) _____ [*name(s) of the named defendant(s)*], who claim(s) some right, title, estate, lien, or interest in and to the lands of plaintiff hereinbefore described, based on the lease described in Paragraph 3 [_____ (*continue with whichever are applicable:*; the claims of the successor defendants described in Paragraph _____; the claims of all unknown defendants described in Paragraph 5, whether or not the claim or cloud is known to plaintiff; and the unknown, uncertain, or contingent claim, if any, of _____ (*name*) more fully described in Paragraph 6)]. Claim(s) of defendant(s) is/are without any right whatever and defendant(s) has/have no right title, estate, lien, or interest whatever in the above-described property, or any part of that property[, except the following: _____ (*set forth any claims of which plaintiff admits the validity,.e.g.,* the utility easement held by Pacific Gas and Electric Company)].

12. Plaintiff seeks to quiet title as of _____ [*date*]. [*If requested determination date is other than date of filing complaint, allege:* Plaintiff seeks a determination as of this date because _____ (*specify reason, e.g.,* the lease automatically expired on this date as a result of defendant(s)'(s) failure to commence drilling or pay rental)].

13. As a proximate result of defendant(s)'(s) refusal to execute, acknowledge, and deliver[, or cause to be recorded,] a _____ [quitclaim deed *or* notice or other appropriate instrument of surrender or termination], plaintiff has suffered damages, as follows: _____ [*specify, e.g.,* Plaintiff has been forced to delay negotiations for leasing the land, at a loss of $_____. In addition, plaintiff has incurred and will continue to incur court costs and expenses for attorney's fees in the prosecution of this action].

WHEREFORE, plaintiff prays judgment against defendant [s, and each of them], as follows:

1. For a judgment that plaintiff is the owner in fee simple of the property and that defendant(s) has/have no interest in the property adverse to the plaintiff's [under the lease dated _____];

2. For damages in the sum of $_____;

3. For forfeiture of the sum of $150 to plaintiff by defendant(s);

4. For reasonable attorney's fees;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff_____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is a complaint that may be used in an action to quiet title [*Code Civ. Proc. § 760.010 et seq.*] against an oil and gas lease that has expired or been abandoned [*see Code Civ. Proc. § 761.020* (required contents of complaint)]. The complaint seeks damages and a forfeiture resulting from the lessee's failure to quitclaim or surrender his or her interest that has terminated due to the expiration or abandonment. A lessor may bring a quiet title action to free his or her estate of the lessee's expired or abandoned oil and gas interest [*see Richfield Oil Corp. v. Bloomfield (1951) 103 Cal. App. 2d 589, 592, 229 P.2d 838* ; *see § 393.13[3][c]*; *see also* Ch. 482, *Quieting Title*]. For example, the lessor may seek to quiet title when the lease contains a "drill or pay" [*see Walston v. Flintridge Oil Co. (1955) 133 Cal. App. 2d 660, 662, 284 P.2d 895* ("Unless" type of lease as distinguished from "drill or pay" type)] provision and the lessee has failed to commence drilling or pay rental within the required time, causing the lease to automatically terminate [*see § 393.13[3][c]*]. A lessor may combine an action for damages and forfeiture with the quiet title action when a lessee under an oil and gas lease that has expired or been abandoned fails or refuses to quitclaim or surrender his or her interest covered by the lease within 30 days after the lessor'sdemand [*see Civ. Code § 883.140(b), (c)*; *see § 393.60*; *see also § 393.21[1][b]*].

For discussions regarding who must be named as defendants in a quiet title action and the statutory designations for particular classes of defendants, see Ch. 482, *Quieting Title* . A plaintiff who intends to name unknown persons as defendants may wish to obtain a title report before commencing the action, because an examination of the record title and an inspection of the property will be necessary [*see Code Civ. Proc. § 762.060(b)*]. Also, the court may order plaintiff to obtain a title report and keep it available for inspection and copying by the parties [*Code Civ. Proc. § 762.040(b)*].

[3] Seeking Relief Against Personal Representatives and Successors

The form in [1], *above*, does not contain allegations regarding defendants who are personal representatives [*Code Civ. Proc. § 762.030(a)*] or heirs and intestate or testate successors [*Code Civ. Proc. § 762.030(b)*] of persons known or believed by the plaintiff to be deceased. If those defendants are necessary in your particular situation, use the appropriate allegations from Ch. 482, *Quieting Title* , Form 1.

[4] Allegations

The complaint in [1], *above*, alleges the following:

- Plaintiff's ownership of real property and a legal description of the property, including street address or common designation, if any (Paragraph 1) [*Code Civ. Proc. § 761.020(a), (b)*];

- The basis of plaintiff's title in the property (Paragraph 2) [*Code Civ. Proc. § 761.020(b)*];

- The entering of an oil and gas lease by plaintiff and defendant, or their predecessors in interest, and a description of the provisions on which plaintiff bases expiration or abandonment (Paragraphs 3 and 7);

- Fictitious and unknown defendants, if appropriate (Paragraphs 4 and 5) [*Code Civ. Proc. §§ 760.060* (rules governing civil actions generally are applicable in quiet title actions), *762.060(a)* (designation of unknown defendants)];

- The fact that a defendant's claim is unknown, contingent, or uncertain (Paragraph 6) [*Code Civ. Proc. § 762.060(b)*];

- Facts showing expiration or abandonment of the lease and the date of termination (Paragraph 8);

- Plaintiff's service on defendant of demand for quitclaim or surrender and the date of service (Paragraph 9) [*Civ. Code § 883.140(b)*; *see § 393.60*];

- Defendant's failure to quitclaim or surrender the expired or abandoned interest in the land and mineral rights within 30 days after plaintiff's demand (Paragraph 10) [*Civ. Code § 883.140(b)*];

- The adverse claims to plaintiff's title against which a determination is sought (Paragraph 11) [*Code Civ. Proc. § 761.020(c)*];

- The date on which plaintiff requests the determination to be effective, and if other than the date of filing the complaint, the reason for requesting a different date (Paragraph 12) [*Code Civ. Proc. § 761.020(d)*]; and

- Plaintiff's damages, including court costs and attorney's fees, resulting from defendant's refusal to quitclaim or surrender his or her interest (Paragraph 13) [*Civ. Code § 883.140(c)*].

[5] Verification

A quiet title complaint must be verified [*Code Civ. Proc. § 761.020*].

[6] Jurisdiction

The superior court has jurisdiction of quiet title actions [*Code Civ. Proc. § 760.040(a)*], including complete jurisdiction over the parties to the action and the property described in the complaint [*Code Civ. Proc. § 760.040(b)*]. The action is not a limited civil case [*Code Civ. Proc. § 580(b)(3)*].

[7] Venue

Subject to the court's power to transfer actions, the proper county for trial of a quiet title action with regard to real property is the county in which the property, or some part of the property, is located [*Code Civ. Proc. § 760.050(a)*; *see Civ. Code § 883.240*].

[8] Service of Process

In quiet title actions, the form, content, and manner of service is the same as in civil actions generally [*Code Civ. Proc. § 763.010(a)*]. The court must order service by publication in accordance with *Code Civ. Proc. § 415.50* if, on affidavit, it appears to the court's satisfaction that plaintiff has used reasonable diligence to ascertain the identity and residence of and to serve summons on the persons named as unknown defendants and persons joined as testate or intestate

successors of a person known or believed to be dead [*Code Civ. Proc. § 763.010(b)*]. Nothing in *Code Civ. Proc. § 763.010* authorizes service by publication on any person named as an unknown defendant who is in open and actual possession of the property [*Code Civ. Proc. § 763.010(c)*].

The conditions governing service by publication are set out in *Code Civ. Proc. § 763.020* and the contents of that service are set out in *Code Civ. Proc. § 763.030*. Before hearing a case in which it has ordered service by publication, the court must require proof that the summons has been served, posted, and published as required, and that the notice of pendency of action has been filed [*Code Civ. Proc. § 763.040*].

For a complete discussion of service of summons, see Ch. 518, *Service of Summons and Papers* .

[9] Attorney's Fees

In an action requesting forfeiture and for damages resulting from the lessee's failure to quitclaim or surrender an expired or abandoned interest, the lessor may recover reasonable attorney's fees to be fixed by the court [*Civ. Code § 883.140(c)*].

[10] Costs and Forfeiture

In an action to clear title to a lessor's interest following the lessee's failure to quitclaim or surrender an expired or abandoned interest, the lessor may recover court costs. The lessee will also be required to forfeit $150 to the lessor [*Civ. Code § 883.140(c)*].

[11] Limitation of Action

A statute of limitations does not run against a plaintiff seeking to quiet title while he or she is in possession of the property [*Muktarian v. Barmby (1965) 63 Cal. 2d 558, 560, 47 Cal. Rptr. 483, 407 P.2d 659]* . When the plaintiff is out of possession, however, the court must refer to the underlying theory of relief to determine which statute applies, because no statute of limitations specifically governs quiet title actions [*see Muktarian v. Barmby (1965) 63 Cal. 2d 558, 560, 47 Cal. Rptr. 483, 407 P.2d 659]* . For example, no action for the recovery of real property, or the possession of real property, can be maintained unless it appears that the plaintiff, or his or her predecessor, was seised or possessed of the property in question within five years before the action's commencement [*Code Civ. Proc. § 318*]. For additional discussion of statutes of limitations, see Ch. 345, *Limitations of Actions* .

[12] Lis Pendens

Immediately on commencing a quiet title action, which occurs by the filing of the complaint, the plaintiff must file a lis pendens in the office of the county recorder of each county in which any real property described in the complaint is located [*Code Civ. Proc. § 761.010(b)*]. The lis pendens gives constructive notice of the pendency of the action to subsequent purchasers or encumbrancers [*Code Civ. Proc. § 405.24*]. For forms of lis pendens, see Ch. 348, *Lis Pendens* .

[13] Cross References

For additional discussion and forms relating to quiet title actions in general, see Ch. 482, *Quieting Title* .

For additional comments and cross references, see *§§ 393.60*, *393.62*, *393.63*, and *393.64*.

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34-393 California Forms of Pleading and Practice--Annotated § 393.62

§ 393.62 Complaint to Terminate Dormant Mineral Right [Civ. Code § 883.210]--By Owner of Real Property Against Owner of Mineral Right

[1] FORM Complaint to Terminate Dormant Mineral Right [Civ. Code § 883.210]--By Owner of Real Property Against Owner of Mineral Right

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s) of known defendant(s)*], [*if unknown defendants are included, add:*; and all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to Plaintiff's title, or any cloud on Plaintiff's title thereto] [; and DOES I-_____, inclusive],	)	COMPLAINT TO TERMINATE DORMANT MINERAL RIGHT
Defendant(s).	)	

_____

Plaintiff alleges:

1. [*Plaintiff's ownership of real property. See § 393.61, Paragraph 1.*]

2. [*Basis of plaintiff's title. See § 393.61, Paragraph 2.*]

3. On or about _____ [*date*], plaintiff['s predecessor in interest] as purchaser of the above-described real property and defendant _____ [*name*] ['s predecessor in interest] as grantor of that property

entered into an agreement to reserve _____ [all *or* a portion] of the oil and gas interest in that real property. A copy of that agreement is attached to this complaint and marked Exhibit "A" and made a part of this complaint.

[4. *Fictitious name allegations, if appropriate. See § 393.61, Paragraph 4.*]

[5. *If "all persons unknown" are named as defendants, see § 393.61, Paragraph 5.*]

[6. *If the claim or share or quantity of the claim of a named defendant is unknown, uncertain, or contingent, see § 393.61, Paragraph 6.*]

7. For the period of 20 years immediately preceding commencement of this action, there has been no production of the minerals and noexploration, drilling, mining, development, or other operation that affects the minerals, whether on or below the surface of the real property or on any other property.

8. For the period of 20 years immediately preceding commencement of this action, no _____ [separate property tax assessment has been made of the mineral right *or* taxes have been paid on the separate property tax assessment of the mineral right].

9. For the period of 20 years immediately preceding commencement of this action, no instrument creating, reserving, transferring, or otherwise evidencing the mineral right has been recorded.

10. Plaintiff is seeking to quiet title against the claims of defendant(s) as follows: the dormant mineral rights of defendant(s) _____ [*name(s) of the named defendant(s)*], arising from the agreement described in Paragraph 3 [_____ (*continue with whichever are applicable:*; the claims of the successor defendants described in Paragraph _____; the claims of all unknown defendants described in Paragraph 5, whether or not the claim or cloud on plaintiff's title is known to plaintiff; and the unknown, uncertain, or contingent claim, if any, of _____ (*name*) more fully described in Paragraph 6)]. Claim(s) of defendant(s) is/are without any right whatever and defendant(s) has/have no right, title, estate, lien, or interest whatever in the above-described property, or any part of that property[, except the following: _____ (*set forth any claims of which plaintiff admits the validity,.e.g.,* the utility easement held by Pacific Gas and Electric Company)].

11. Plaintiff seeks to terminate the mineral right as of _____ [*date*]. [*If requested determination date is other than date of filing complaint, allege:* Plaintiff seeks a determination as of this date because _____ (*specify reason, e.g.,* it is 20 years from the date of the last evidence of an exercise of the mineral right that is the subject of this action)].

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them], as follows:

1. For a judgment that the above-described mineral right of defendant(s) is dormant and thereby terminated, unenforceable, and deemed to have expired and that defendant(s) has/have no interest in the property adverse to the plaintiff's interest;

2. For costs of suit herein incurred;

3. For reasonable attorney's fees; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification. See § 393.61*].

[2] Use of Form

The form in [1], *above*, is a complaint that may be used to bring an action to terminate [*Civ. Code § 883.120* (exemption from termination)] dormant mineral rights [*Civ. Code §§ 883.220, 883.230*] in a parcel of real property. An action to terminate a dormant mineral right is brought in the same manner and is subject to the same procedure as an action to quiet title, to the extent applicable [*Civ. Code § 883.240(b)*; *see Code Civ. Proc. § 760.010 et seq.* (quiet title actions); *see also Civ. Code § 883.270* (applicability of action regardless when executed or recorded)].

A mineral right may have been created by a lease in a number of ways, including through a land sale agreement that reserved oil and gas rights to the grantor, and may be dormant if specified conditions have occurred for the 20 years immediately preceding the action [*see Civ. Code § 883.220*]. The owner of real property subject to a dormant mineral right, such as a right to the oil and gas interest in real property, may bring an action to terminate that right [*Civ. Code § 883.210*; *see § 393.21[3]*].

By terminating the dormant mineral right, the property owner property may clear clouds on his or her title and make the property more marketable. A mineral right will not be dormant and subject to termination if either a notice of intent to preserve the mineral right has been filed or a late notice of intent is filed after the action to terminate the mineral right has been commenced [*Civ. Code §§ 883.230(c), 883.250*; *see § 393.21[3][c], [d]*; *see also Texaco, Inc. v. Short (1982) 454 U.S. 516, 518-540, 102 S. Ct. 781, 70 L. Ed. 2d 738* (Indiana statute terminating dormant mineral right after 20 years when owner of mineral right did not record notice of intent to preserve mineral right as constitutional)].

[3] Seeking Relief Against Personal Representatives and Successors

This form does not contain any allegations regarding defendants who are personal representatives [*Code Civ. Proc. § 762.030(a)*] or heirs and intestate or testate successors [*Code Civ. Proc. § 762.030(b)*] of persons known or believed by the plaintiff to be deceased. If those defendants are necessary in your particular situation, use the appropriate allegations from Ch. 482, *Quieting Title* , Form 1.

[4] Allegations

The complaint in [1], *above*, alleges the following:

- The adverse claims to the title of plaintiff, including the basis of the mineral rights sought to be terminated (Paragraphs 3-6, 10) [*Code Civ. Proc. § 761.020(c)*];

- The conditions prerequisite to declaring a mineral right dormant (Paragraphs 7-9) [*Civ. Code § 883.220*]; and

- The date on which plaintiff requests the determination to be effective and, if other than the date of filing the complaint, the reason for requesting a different date (Paragraph 10) [*Code Civ. Proc. § 761.020(d)*].

[5] Verification

A complaint to quiet title must be verified [*Code Civ. Proc. § 761.020*].

[6] Jurisdiction; General Procedure

An action to terminate a mineral right must be brought in the superior court of the county where the real property subject to the mineral right is located and is brought in the same manner and is subject to the same procedure as an action to quiet title, to the extent applicable [*Civ. Code § 883.240*; for discussion and procedures required by *Code Civ. Proc. § 760.010 et seq.* (quiet title action), see Ch. 482, *Quieting Title*].

[7] Cross References

For discussion and forms relating to mineral rights generally, see Ch. 363, *Mining* .

For additional comments and cross references, see *§ 393.61*.

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34-393 California Forms of Pleading and Practice--Annotated § 393.63

§ 393.63 Notice by Owner of Mineral Right to Owner of Real Property of Intent to Preserve Mineral Right [Civ. Code § 883.230]

[1] FORM Notice by Owner of Mineral Right to Owner of Real Property of Intent to Preserve Mineral Right [Civ. Code § 883.230]

Recording at request of,
and to be returned
when recorded to:

_____

[*name and address of party or attorney filing notice*]

_____

Space above this line for recorder's use

NOTICE OF INTENT TO PRESERVE MINERAL RIGHT

You are hereby notified that the undersigned owner of mineral rights in the real property located at _____ [*set forth legal description or street address or common designation, if any*] intends to preserve those mineral rights and that they shall not become dormant within the meaning of *Civil Code Sections 883.210-883.270*.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

ACKNOWLEDGMENT

State of _____,)
County of _____.)
_____)

On _____ [*date*], before me, _____ [*name and title of officer*], personally appeared _____ [*name(s)*], _____ [personally known to me *or* proved to me on the basis of satisfactory evidence] to be the person(s) whose name(s) is/are subscribed to this instrument, and acknowledged to me that he/she/they executed this instrument in his/her/their authorized capacity/capacities, and that by his/her/their signature(s) on the instrument the person(s), or the entity on behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Signature: _____ .....(Seal)

[2] Use of Form

This form is for use by the owner of a mineral right to record his or her intent to preserve that mineral right. If a notice of intent to preserve a mineral right is recorded within the 20 years immediately preceding commencement of an action to terminate the mineral right, that right is not dormant and cannot be terminated [*Civ. Code §§ 883.230, 883.260*]. With appropriate modification, the form may be adapted for use as a late notice of intent, which may be filed after a termination action has been commenced on payment of the plaintiff's litigation expenses [*see Civ. Code § 883.250*; *see also § 393.21[3][d]*].

[3] Description of Real Property

In lieu of the statement of the character of the interest claimed and the record location of the documents evidencing the mineral and in lieu of the legal description of the real property in which the interest is claimed as otherwise required by *Civ. Code § 880.330(b)* (contents of notice) and notwithstanding *Civ. Code § 880.340* (form of notice) or other provisions in *Civ. Code § 880.020 et seq.*, a notice of intent to preserve a mineral right may refer generally and without specificity to any or all mineral rights claimed by claimant in any real property situated in the county [*Civ. Code § 883.230(b)*].

[4] Acknowledgment

The form includes the required form of acknowledgment [*see Civ. Code §§ 1188, 1189(a)*; *but see Civ. Code § 1198(d)* (acknowledgments provided before January 1, 1993, and conforming to provisions of former *Civ. Code §§ 1189-1192*, as valid)]. Whether the notice must be executed and acknowledged in the same manner as an acknowledgment of a conveyance of real property is unclear. However, acknowledgment is generally required to record instruments and is recommended [*see Gov. Code § 27287*]. For additional discussion and alternative forms of acknowledgments, see Ch. 9, *Acknowledgments* .

[5] Cross References

For additional comments and cross references, see *§§ 393.61, 393.62*.

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34-393 California Forms of Pleading and Practice--Annotated § 393.64

§ 393.64 Complaint for Damages [Civ. Code § 3300] for Breach of Oil and Gas Lease That Requires Lessee to Pay Delayed Drilling Rental--By Landowner-Lessor Against Lessee--Judicial Council Contract Complaint With Breach of Contract Cause of Action Attachment [Code Civ. Proc. § 425.12; Cal. Judicial Council Forms PLD-C-001, PLD-C-001(1)]

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Oil and Gas Lease That Requires Lessee to Pay Delayed Drilling Rental--By Landowner-Lessor Against Lessee--Judicial Council Contract Complaint With Breach of Contract Cause of Action Attachment [Code Civ. Proc. § 425.12; Cal. Judicial Council Forms PLD-C-001, PLD-C-001(1)]

Click here to view image.

[2] Use of Form

This form is a filled in reproduction of the Judicial Council form of complaint for contract actions [Cal. JC Form PLD-C-001], to which a Judicial Council breach of contract cause of action has been attached [Cal. JC Form PLD-C-001(1); *see Code Civ. Proc. § 425.12(a)*]. Use of the Judicial Council form is optional [*see Code Civ. Proc. § 425.12*; *Cal. Rules of Ct., Rules 1.30(b), 1.35*] and it may be used in any action for damages [*see Civ. Code § 3300* (measure of dameges for breach of contract); *see also Civ. Code § 3287(a)* (recovery of prejudgment interest on sum certain or capable of being made certain)] for breach of an oil and gas lease provision, termed "drill or pay," requiring payment of rental for the privilege of delaying the commencement of drilling. Under a lease containing a "drill or pay" provision, the lease is not forfeited or terminated by the failure to comply with its terms, but on the failure to commence drilling as required, the obligation to pay rental becomes absolute as an alternative requirement [*Butler v. Nepple (1960) 54 Cal. 2d 589, 594, 6 Cal. Rptr. 767, 354 P.2d 239* ; *see § 393.13[3][b]*]. The lessor may bring an action to enforce the payment of delayed drilling rentals [*Richfield Oil Corp. v. Bloomfield (1951) 103 Cal. App. 2d 589, 590-591, 229 P.2d 838* ; *see § 393.13[3][c]*].

In contrast to the "drill or pay" type, an "unless" type of oil and gas lease provides for automatic termination unless the lessee either commences drilling or pays delayed drilling rental within certain specified limits. A lessor may not bring an action to collect rentals under an "unless" type of lease, but may maintain an action to quiet title against the lessee's

expired interest [*see Richfield Oil Corp. v. Bloomfield (1951) 103 Cal. App. 2d 589, 592, 229 P.2d 838* ; *see also § 393.61*].

These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. Noninteractive versions in PDF format also are available at www.lexisone.com at no charge.

For general information relating to the use of Judicial Council complaint forms, see Ch. 123, *Complaints and Cross Complaints* .

[3] Judicial Council Trial Court Forms

Code Civ. Proc. § 425.12(a) requires that the Judicial Council develop and approve official forms for use in California trial courts for any complaint, cross complaint, or answer in any action based on personal injury, property damage, wrongful death, unlawful detainer, breach of contract, or fraud. The Judicial Council must also develop and approve an official form for use as a statement of damages in accordance with *Code Civ. Proc. §§ 425.11* and *425.115* [*Code Civ. Proc. § 425.12(b)*].

[4] Filling Out Forms

For a detailed explanation of filling out the Judicial Council forms of contract complaint and breach of contract cause of action generally, see the Comments to that form in Ch. 140, *Contracts* .

[5] Verification

Counsel may attach a verification to this complaint if desired [*see § 393.61*]. Although verification of this complaint is not required, verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Cross References

For discussion of and forms relating to breach of contract in general, see Ch. 140 *Contracts* .

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34-393 California Forms of Pleading and Practice--Annotated § 393.65

§ 393.65 Complaint for Accounting--Against Cotenant for Royalties From Oil and Gas Production

[1] FORM Complaint for Accounting--Against Cotenant for Royalties From Oil and Gas Production

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR ACCOUNTING
Defendant.	)	
	)	
	)	

Plaintiff alleges:

1. Plaintiff is the sole owner of real property located in _____ County, California, and described as follows: _____ [*set forth legal description, including street address or common designation, if any*]. Plaintiff's ownership rights include the right to drill for and produce oil and gas.

2. _____ [Defendant _____ (*name*) is, and at all times herein mentioned was, a resident of _____ County, California *or allege other basis of venue as appropriate*].

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged and that each of the fictitiously named defendants has an interest with respect to an accounting in this action.]

4. Defendant is a cotenant with plaintiff by virtue of _____ [*specify transaction creating cotenancy, e.g.*, the assignment to defendant of _____ (*specify amount, e.g.*, one-half) of plaintiff's royalty interest in all oil and gas produced from the property owned by plaintiff, together with the right of entry onto the property for purposes of production. A copy of the agreement making the assignment, dated _____, is attached as Exhibit A and made a part of this complaint].

5. _____ [Between _____ (*date*), and _____ (*date*), *or* Beginning on or about _____ (*date*),] defendant _____ [*describe defendant's actions that necessitated accounting, e.g.*, collected all royalties from the property under an oil and gas lease entered into on or about _____ (*date*), between defendant and _____ (*name of lessee*)]. The royalties were taken and appropriated by defendant without plaintiff's knowledge and consent.

6. The amount received as royalties by defendant is unknown to plaintiff[, but plaintiff is informed and believes and thereon alleges that the amount exceeds the sum of $_____].

7. Plaintiff has demanded an accounting of the royalties collected by defendant, but defendant has failed and refused, and continues to fail and refuse, to render an accounting.

WHEREFORE, plaintiff prays judgment as follows:

1. For an accounting between plaintiff and defendant;

2. For the amount found to be due from defendant to plaintiff as a result of the accounting [and interest on that amount from and after _____ (*date*)];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[Verification, if desired. See *§ 393.61[1]*.]

[2] Use of Form

This form is a complaint for use in an action for an accounting. In this case, the action is brought by a cotenant of an interest in oil and gas against a producing cotenant who has collected the entire amount of royalties. The producing cotenant must account to the other cotenants for their respective percentages of the profits [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 655, 656, 52 P.2d 237* ; *see § 393.16[2]*; *see also* discussion and forms relating to accounting actions in general in Ch. 7, *Accounting, Action for*].

[3] Allegations

The complaint in [1], *above*, alleges the following:

- Plaintiff's ownership of land, together with rights to drill for and produce oil and gas (Paragraph 1);

- Defendant's identity and capacity and basis of venue (Paragraph 2);

- Fictitious names of defendants, if appropriate (Paragraph 3);

- The creation of a cotenancy between plaintiff and defendant, including a copy of any agreement (Paragraph 4);

- Defendant's collection of royalties under circumstances necessitating an accounting and without plaintiff's knowledge and consent (Paragraph 5) [*Dabney-Johnston Oil Corp. v. Walden (1935) 4 Cal. 2d 637, 655, 656, 52 P.2d 237* ; *Callahan v. Martin (1935) 3 Cal. 2d 110, 125, 43 P.2d 788* ; *see La Laguna Ranch Co. v. Dodge (1941) 18 Cal. 2d 132, 137-138, 114 P.2d 351]* ;

- The absence of knowledge as to the amount received by defendant and, if appropriate, the amount received based on plaintiff's information and belief (Paragraph 6) [*see Whann v. Doell (1923) 192 Cal. 680, 684, 221 P. 899* ; *St. James Church of Christ Holiness v. Superior Court of Los Angeles County (1955) 135 Cal. App. 2d 352, 359, 287 P.2d 387* ; *Raymond v. Independent Growers, Inc. (1955) 133 Cal. App. 2d 154, 160, 284 P.2d 57]* ; and

- Plaintiff's demand for an accounting and defendant's failure and refusal (Paragraph 7) [*see Wooster v. Nevills (1887) 73 Cal. 58, 60, 14 P.390]* .

[4] Jurisdiction

Although an accounting may be taken in a limited civil case where necessary to preserve the property or rights of any party to the case, an action for an accounting is in the jurisdiction of the superior court and is not a limited civil case [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*].

[5] Venue

An action for an accounting may be tried in the county of the defendant's residence [*see Code Civ. Proc. § 395*]. When plaintiff in one cause of action seeks, in addition to an accounting, other relief, the main relief sought determines the character of the action for venue purposes [*Neet v. Holmes (1942) 19 Cal. 2d 605, 611-612, 122 P.2d 557* ; for additional discussion of venue, see Ch. 571, *Venue*].

[6] Interest

Generally, when an accounting is required to arrive at a sum justly due, interest is not allowed to accrue before the date of judgment [*Schmidt v. Waterford Winery, Ltd. (1960) 177 Cal. App. 2d 28, 34-35, 1 Cal. Rptr. 874]* . An exception to the general rule may exist, however, when the amount due is a liquidated amount that could be ascertained before judgment [*see Civ. Code § 3287(a)*; *Schmidt v. Waterford Winery Ltd. (1960) 177 Cal. App. 2d 28, 34-35, 1 Cal. Rptr. 874]* . Thus, the particular facts of a case may support a request for interest prior to judgment, if at some point the amount of damages becomes certain or capable of being made certain by calculation. For further discussion of interest on damages, see *Ch. 177, Damages, § 177.140* et seq.

[7] Verification

Although verification of this complaint is not required, verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion,

see Ch. 26, *Answers* .

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Volume 34: Newspapers thru Parties-Chs. 386-396
Chapter 393 OIL AND GAS
PART IV. FORMS

34-393 California Forms of Pleading and Practice--Annotated § 393.66

§ 393.66 Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527], Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526], and Damages [Code Civ. Proc. § 3493/4] for Subsurface Trespass and Conversion of Oil and Gas From Slant Drilling of Well--By Landowner Against Adjoining Property Owner or Lessee

[1] FORM Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527], Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526], and Damages [Code Civ. Proc. § 3493/4] for Subsurface Trespass and Conversion of Oil and Gas From Slant Drilling of Well--By Landowner Against Adjoining Property Owner or Lessee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR TEMPORARY RESTRAINING
Defendant.	)	ORDER, PRELIMINARY AND PERMANENT IN-
	)	JUNCTIONS, AND DAMAGES FOR SUBSUR-
	)	FACE TRESPASS AND CONVERSION

_____

Plaintiff alleges:

1. Plaintiff is the sole owner of real property located in _____ County, California, and described as follows: _____ [*set forth legal description, including street address or common designation, if any*].

2. As sole owner of the above-described property, plaintiff has the exclusive right to drill for and produce oil and gas from the subsurface that falls within the boundaries of plaintiff's land, extended directly downward.

3. _____ [Defendant is the owner *or* Plaintiff alleges on information and belief that defendant is the oil and gas lessee] of real property located _____ [*describe location in relationship to plaintiff's property, e.g.*, directly adjacent to plaintiff's property on the northern boundary] and described as follows: _____ [*set forth legal description, including street address or common designation, if any*].

[4. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by their conduct.]

5. Beginning on or about _____ [*date*], and continuing to the present time, defendant wrongfully and unlawfully _____ [*specify defendant's wrongful acts, e.g.*, commenced the drilling of an oil and gas well _____ (into *or* that threatens to invade) the subsurface of plaintiff's land and produced oil and gas from a well that was bottomed beneath the surface of plaintiff's land].

[6. In committing the trespass beneath plaintiff's land, defendant did not assert a claim of right in good faith or act under an honest mistake of law or fact. The act of trespass was knowingly and intentionally committed.]

[*EITHER, if trespass is allegedly unintentional*]

7. The well drilled into the subsurface of plaintiff's property by defendant was first placed on production on or about _____ [*date*].

[*OR, if trespass is knowingly and intentionally committed*]

7. Plaintiff did not discover defendant's subsurface trespass until _____ [*date*].

[*CONTINUE*]

8. On or about _____ [*date*], [and a number of times since then,] plaintiff has demanded that defendant stop his/her wrongful conduct described above. Defendant has refused and still refuses to refrain from his/her conduct.

9. Defendant's wrongful conduct, unless and until enjoined and restrained by order of this court, will cause great and irreparable injury to plaintiff in that _____ [*specify facts showing great and irreparable injury, e.g.*, defendant will (continue drilling beneath the surface of plaintiff's land without right and, if oil and gas are found,) remove oil and gas from the oil strata lying beneath plaintiff's property, in violation of plaintiff's exclusive right].

10. Plaintiff has no adequate remedy at law for the injuries _____ [currently being suffered *or* that are threatened] because _____ [*specify facts showing inadequacy of legal remedy, e.g.*, plaintiff will be forced to institute a multiplicity of suits to obtain adequate compensation for his/her injuries].

11. As a proximate result of defendant's [knowing and intentional] acts of trespass, [including the wrongful removal and conversion of oil and gas,] plaintiff has suffered damages _____ [in the sum of $_____ *or* in an amount unknown to plaintiff. Plaintiff is informed and believes and thereon alleges that the amount exceeds the sum of $_____].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an order requiring defendant to show cause, if any, why he/she should not be enjoined as hereinafter set forth, during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanentinjunction, all enjoining defendant, and his/her agents, servants, and employees, and all persons acting under, in concert with, or for them:

a. From _____ [*specify acts to be prohibited, e.g.*, constructing, maintaining, or operating any oil or gas well or from taking oil, gas, or other hydrocarbon substances from a well that extends beneath the surface of plaintiff's land];

b. To _____ [*specify acts to be commanded, e.g.*, at his/her own cost and expense, immediately fill, plug, and permanently abandon any well drilled by him/her that extends beneath the surface of plaintiff's land, complying with all laws of the State of California in so doing, and doing all other acts necessary to protect the oil and gas producing zones beneath the land;

3. For damages in the sum of $_____, plus damages in such further sums as may be sustained and as are ascertained before final judgment herein;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[Verification. See *§ 393.61[1]*].

CERTIFICATION RE NOTICE

I hereby certify that _____ [on _____ (*date*), I informed defendant of what time and where the foregoing application for a temporary restraining order would be made *or* in good faith I attempted to inform defendant of what time and where the foregoing application for a temporary restraining order would be made, by _____ (*specify efforts*), but I was unable to do so *or* notice to defendant of the foregoing application for a temporary restraining order should not be required because _____ (*specify*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form is a complaint for use in an action for a temporary restraining order, preliminary injunction, permanent injunction [*see Civ. Code § 3422*; *Code Civ. Proc. § 526* (grounds for injunction); *see also Cal. Rules of Ct., Rule 3.1151*], and damages for subsurface trespass due to slant drilling for oil and gas. A person may not extend, drill, or bottom an oil and gas well anywhere other than beneath the surface of his or her own property, without having obtained the right to do so from the surface owner [*see A.E. Bell Corp. v. Bell View Oil Synd. (1938) 24 Cal. App. 2d 587, 595, 596, 76 P.2d 167* ; *see also § 393.18[1]*]. Landowners or other persons injured by a subsurface trespass from adjoining landowners or their lessees may maintain an action for injunctive relief to stop the trespass and for damages for the conversion of oil and gas produced from the offending well [*A.E. Bell Corp. v. Bell View Oil Synd. (1938) 24 Cal. App. 2d 587, 603, 610, 76 P.2d 167* ; *see Pacific Western Oil Co. v. Bern Oil Co. (1939) 13 Cal. 2d 60, 66, 87 P.2d 1045* ; *see also § 393.18[2]*].

[3] Allegations

This complaint alleges the following:

- Plaintiff's ownership of real property and a description of it (Paragraph 1);

- Plaintiff's exclusive right to drill for and produce oil and gas from the subsurface (Paragraph 2) [*Callahan v. Martin (1935) 3 Cal. 2d 110, 117, 43 P.2d 788]* ;

- Defendant's identity and capacity as owner or lessee of neighboring property (Paragraph 3) [*see A.E. Bell Corp. v. Bell View Oil Synd. (1938) 24 Cal. App. 2d 587, 603, 610, 76 P.2d 167]* ;

- Fictitious names of defendants (Paragraph 4);

- Defendant's act of subsurface trespass and conversion of oil and gas (Paragraph 5) [*Union Oil Co. v. Mutual Oil Co. (1937) 19 Cal. App. 2d 409, 413, 65 P.2d 896]* ;

- If appropriate, the fact that defendant's act was committed knowingly and intentionally (Paragraph 6) [*Pacific Western Oil Co. v. Bern Oil Co. (1939) 13 Cal. 2d 60, 73, 87 P.2d 1045]* ;

- The date the offending well was first placed on production or, if trespass was allegedly knowingly and intentionally committed by means of a new well on which drilling commenced after September 15, 1935, the date of discovery of the subsurface trespass (Paragraph 7) [*see Code Civ. Proc. § 349 3/4*];

- Defendant's refusal of plaintiff's demands to stop the acts of trespass (Paragraph 8);

- Facts showing great and irreparable injury from defendant's conductunless restrained (Paragraph 9) [*Code Civ. Proc. §§ 526(a)(2), 527(c)(1)*; *see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1]* ;

- Facts showing the absence of an adequate remedy at law (Paragraph 10) [*see Civ. Code § 3422(1)-(3)*; *Code Civ. Proc. § 526(a)(4)-(6)*]; and

- Plaintiff's damages from the trespass, including the value of oil and gas produced (Paragraph 11) [*see Code Civ. Proc. § 349 3/4*; *Pacific Western Oil Co. v. Bern Oil Co. (1939) 13 Cal. 2d 60, 73, 87 P.2d 1045]* .

[4] Verification or Affidavits Required

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction

An action seeking permanent injunctive relief is in the jurisdiction of the superior court and is not a limited civil case except as otherwise provided by statute [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*].

[6] Venue

Subject to a court's power to transfer actions and proceedings, the superior court in the county where the real property that is the subject of the action, or some part of the real property, is situated is the proper county for trial for injuries to real property [*see Code Civ. Proc. § 392(a)(1)*].

[7] Service Required Before Hearing on Injunction Following Temporary Restraining Order

In case a temporary restraining order (TRO) is granted without notice in the contingency [*see Code Civ. Proc. § 527(c)*], the party who obtained the TRO must, within five days from the date the order is issued or two days before the hearing, whichever is earlier, serve on the opposing party all of the following:

- A copy of the complaint if not previously served;
- The order to show cause stating the date, time, and place of the hearing;
- Any affidavits to be used in the application; and
- A copy of the memorandum in support of the application.

The court may for good cause, on the applicant's motion or on its own motion, shorten the time required for service on the opposing party [*Code Civ. Proc. § 527(d)(2)*]. When the matter first comes up for hearing, if the party who obtained the TRO is not ready to proceed, or if the party has failed to serve copies of the documents as required, the court will dissolve the TRO [*Code Civ. Proc. § 527(d)(3)*].

On the applicant's filing of an affidavit that the opposing party could not be served within the required time, the court may reissue any TRO previously issued. The reissued order must be made returnable [*see Code Civ. Proc. § 527(d)(1)*], with the time for hearing measured from the date of reissuance [*Code Civ. Proc. § 527(d)(5)*].

For discussion of the procedure for obtaining a TRO, including the requirements of *Cal. Rules of Ct., Rule 3.1150* (preliminary injunctions), see Ch. 303, *Injunctions* .

[8] Damages

Plaintiff may request an injunction against the trespass and damages for the resulting conversion of the oil and gas because legal and equitable remedies may be sought in the same action [*see Pacific Western Oil Co. v. Bern Oil Co. (1939) 13 Cal. 2d 60, 66, 87 P.2d 1045]* . When the subsurface trespass is unintentional, in computing damages production expenses must be deducted from the value of oil and gas wrongfully converted [*see Code Civ. Proc. § 349 3/4*]. However, when the trespass is intentional, defendant must pay the value of the oil and gas converted, without any deduction for expenses [*Pacific Western Oil Co. v. Bern Oil Co. (1939) 13 Cal. 2d 60, 73, 87 P.2d 1045* ; *see § 393.18[2][d]*].

[9] Statute of Limitations

An action for subsurface trespass and conversion of oil and gas must be commenced within 180 days after it accrues [*Code Civ. Proc. § 349 3/4*]. When a knowing and intentional trespass is committed by means of a new well on which drilling commenced after September 15, 1935, the cause of action does not accrue until discovery of the act by the aggrieved party. In all other cases, the cause of action accrues 10 days after the time when the well is first placed on production [*see Code Civ. Proc. § 349 3/4*; *see also § 393.18[2][e]*].

[10] Certification re Notice

No temporary restraining order will be granted without notice to the opposing party unless the applicant or the applicant's attorney certifies one of the following to the court under oath [*Code Civ. Proc. § 527(c)*; *see Cal. Rules of Ct., Rules 3.1200-3.1207* (requirements for ex parte applications)]:

- That within a reasonable time before the application the applicant informed the opposing party or the opposing party's attorney at what time and where the application would be made;

- That the applicant in good faith attempted but was unable to inform the opposing party and the opposing party's attorney, specifying the efforts made to contact them; or

- That for reasons specified the applicant should not be required to so inform the opposing party or the opposing party's attorney.

The requirement for certification as to notice does not apply to an order issued under the Family Code [*Code Civ. Proc. § 527(g)*].

[11] Cross References

For discussion and forms relating to injunctive relief in general, see Ch. 303, *Injunctions* .

For discussion and forms relating to trespass to real property in general, see Ch. 550, *Trespass* .

For memoranda of points and authorities supporting and opposing the issuance of preliminary injunctions, see California Points and Authorities, Ch. 116, *Injunctions* .

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Volume 34: Newspapers thru Parties-Chs. 386-396
Chapter 393 OIL AND GAS
PART IV. FORMS

34-393 California Forms of Pleading and Practice--Annotated § 393.67

§ 393.67 Complaint for Termination of Oil and Gas Lessee's Right of Entry to or Occupation of Surface Land in Certain Urban Areas [Code Civ. Proc. § 772.030(a)]--By Landowner Against Lessee

[1] FORM Complaint for Termination of Oil and Gas Lessee's Right of Entry to or Occupation of Surface Land in Certain Urban Areas [Code Civ. Proc. § 772.030(a)]--By Landowner Against Lessee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR TERMINATION OF RIGHT
Defendant.	)	OF ENTRY OR OCCUPATION
	)	
	)	

Plaintiff alleges:

1. Plaintiff is the owner of a fee interest in the surface of real property located in the City of _____ in _____ County, and described as follows: _____ [*set forth legal description, including street address or common designation, if any*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged.]

3. On or about _____ [*date*], plaintiff['s predecessor in ownership] entered into a written agreement,

entitled _____ [*specify, e.g.,* "Oil and Gas Lease"], with defendant['s predecessor in interest]. A copy of the agreement is attached to this complaint as Exhibit A and made a part of this complaint.

[4. On or about _____ [*date*], plaintiff('s predecessor in ownership) and defendant('s predecessor in interest) entered into an amendment of the agreement expressly for the purpose of _____ (waiving *or* limiting *or* rearranging) the lessee's surface right(s) of _____ (entry *and/or* occupation). A copy of the amendment is attached to this complaint as Exhibit B and made a part of this complaint.]

5. The agreement[, as amended,] granted defendant['s predecessor in interest] _____ [*specify rights granted under lease, including surface rights, e.g.*, the exclusive right to drill for and extract oil and gas from, andto store the oil and gas on, the land, including all rights necessary and convenient thereto, together with rights of way for passage over, on, and across the land for any or all of the above purposes. (Defendant was given sole and exclusive possession of the land, except for rights reserved by the lessor)].

[6. Under the terms of the agreement, (as amended,) plaintiff('s predecessor in ownership) reserved _____ (*specify surface rights, if any, reserved by lessor, e.g.*, the right to occupy the land or to lease it for agricultural, horticultural, or grazing uses, which were to be carried on subject to, and without interference with, the rights or operations of the lessee).]

[*EITHER, if seeking termination as to entire surface*]

7. The land held by defendant under the lease is not presently occupied by a producing oil or gas well, a well or well bore being used for the injection of water or the disposal injection of waste or by-products, or a well or well bore being used for the production of water for oil field purposes.

[*OR, if seeking termination as to only a portion of surface*]

7. A portion of the land held by defendant under the lease, consisting of _____ [*specify or describe portion, as appropriate, e.g.*, Lots 12, 14, and 15], is not presently occupied by a producing oil or gas well, a well or well bore being used for the injection of water or the disposal injection of waste or by-products, or a well or well bore being used for the production of water for oil field purposes.

[*CONTINUE*]

8. Termination of the defendant's right of _____ [entry to *and/or* occupation of] the surface and surface zone of the _____ [entire leased property *or* portion of the leased property described in Paragraph 7], in the manner requested by plaintiff, would not significantly interfere with defendant's rights under the lease to continue production of oil from leasehold strata beneath the surface zone in a practical and economic manner and to gather, transport, and market the oil.

[9. Plaintiff is willing to relocate pipelines, roadways, equipment, or lease facilities in a manner that will effectively free the land for surface use, while safeguarding continued oil and gas operations in a practical and economic manner.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a judgment terminating defendant's right of _____ [entry to *and/or* occupation of] the surface and surface zone of the described property;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 393.61.*]

[2] Use of Form

The form in [1], *above*, is a complaint that may be used to obtain, in accordance with *Code Civ. Proc. §§ 772.010-772.060*[*see also Donlan v. Weaver (1981) 118 Cal. App. 3d 675, 683, 173 Cal. Rptr. 566]* , termination of a lessee's right of entry to or occupation of all or part of the surface and surface zone [*Code Civ. Proc. § 772.020(a)* (surface zone defined)] of lands under an oil and gas leasehold. Any person who owns a fee interest in the surface may bring an action to terminate the lessee's right of entry or occupation when (1) the lease or its latest amendment affecting the right of entry is more than 20 years old, (2) the land to be freed of the interest is not occupied by a producing well, and (3) termination of the right will not significantly interfere with the lessee's continued production [*Code Civ. Proc. §§ 772.030(a), 772.040(a)-(c)*; *see Butcher v. Okmar Oil Co. (1977) 65 Cal. App. 3d 972, 974, 135 Cal. Rptr. 713* (decided under former *Code Civ. Proc. § 751.3*, substantially reenacted as *Code Civ. Proc. §§ 772.010-772.060*); *see also § 393.21[2]*].

[3] Allegations

The complaint in [1], *above*, alleges the following:

- Plaintiff's ownership of a fee interest in the surface of the real property, the city and county in which the property is located, and a description of the property (Paragraph 1) [*Code Civ. Proc. §§ 772.010, 772.030(a)*];

- Fictitious names of defendants, if appropriate (Paragraph 2);

- Execution of an oil and gas lease between plaintiff and defendant, or their predecessors, including the date on which it was entered, which must be more than 20 years before filing the action Paragraph 3) [*Code Civ. Proc. § 772.040(a)*];

- Execution of an amendment, if any, expressly for the purpose of waiving, limiting, or rearranging the lessee's surface rights, and the date of the amendment, which must be more than 20 years before filing the action (Paragraph 4) [*Code Civ. Proc. § 772.040(a)*];

- Rights granted to the defendant lessee under the agreement (Paragraph 5) [*Code Civ. Proc. § 772.030(a)*];

- Rights to the surface, if any, reserved by the plaintiff landowner (Paragraph 6);

- The absence of a producing well or well bore on the subject land or portion of the land (alternative forms of Paragraph 7) [*Code Civ. Proc. § 772.040(b)*];

- The absence of significant interference with the lessee's continued production if the right is terminated (Paragraph 8) [*Code Civ. Proc. § 772.040(c)*]; and

- Plaintiff's willingness to relocate defendant's ancillary facilities in a manner that will free the surface while safeguarding continued production (Paragraph 9) [*Code Civ. Proc. § 772.050(b)*].

[4] Termination Limited to Certain Urban Areas

The action to terminate a right of entry or occupation is limited to lands within a city in any county with a population exceeding 4,000,000, or with a population of more than 700,000 and less than 710,000, as determined by the 1960 Federal Decennial Census [*Code Civ. Proc. § 772.010*]. In the past, this apparently meant that the action was limited to land located within cities in Los Angeles and Orange Counties.

[5] Jurisdiction in Superior Court

An action to terminate a right of entry or occupation must be filed in superior court [*Code Civ. Proc. § 772.030(a)*].

[6] Venue

The county in which the real property that is the subject of the action, or some part of the property, is situated is the proper county for trial of an action for recovery of real property, or of an estate or interest therein, or for the determination in any form, of the right or interest [*Code Civ. Proc. § 392(a)(1)*].

[7] Verification

Verification of the complaint in [1], *above*, is not required, but verification of the complaint requires that the defendant file a verified answer [*Code Civ. Proc. § 446*] and precludes a general denial [*Code Civ. Proc. § 431.30(d)*].

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Chapter 394 PARENT AND CHILD

34-394 California Forms of Pleading and Practice--Annotated 394.syn

§ 394.syn Synopsis to Chapter 394: PARENT AND CHILD

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§ 394.11 Constitutional Protection of Parent-Child Relationship

§ 394.12 Age of Majority

§ 394.13 Meaning of "Parent"

§ 394.14 Presumed Fathers and Other Fathers

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§ 394.15 In Loco Parentis, De Facto Parentage, and Similar Doctrines

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§ 394.30 Parents' Right to Custody of Child

[1] Scope and Nature of Right

[2] Comparative Rights of Mothers and Fathers

[3] Rights of Surviving or Remaining Parent

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§ 394.33 Name of Child

§ 394.34 Property and Earnings of Child

[1] Child's Right to Property

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[3] Earnings From Entertainment, Artistic, or Sports Contracts

§ 394.35 Parents' Duties

[1] Control of Children

[2] Child Support

[a] Duty of Support

[b] Proceedings in Which Child Support May Be Ordered

[c] Amount of Support

§ 394.36 Termination of Parental Authority

§ 394.37 Support of Parents

[1] Adult Child's Duty to Support Parent in Need

[2] Civil Action to Enforce Duty

[3] Petition for Relief From Duty on Ground of Abandonment

§§ 394.38-394.49 [Reserved]

§ 394.50 Power of State to Limit Parental Authority

§ 394.51 Education of Child

§ 394.52 Employment of Child

§ 394.53 Discipline of Child

§ 394.54 Medical Care and Treatment of Child

[1] Requirement That Parents Provide Treatment

[2] Effect of Parents' Religious Beliefs

[3] Parental Consent; Delegation

[4] When Parental Consent Is Not Required

[5] Access to Minor's Health Care Records

§ 394.55 Caregiver's Authorization of School Enrollment and Medical Care

[1] Affidavit

[2] Third-Party Liability

§ 394.56 Child Abduction

§§ 394.57-394.69 [Reserved]

§ 394.70 Proceeding for Dissolution of Marriage, Nullity of Marriage, or Legal Separation

§ 394.71 Other Marital Custody Proceedings

§ 394.72 Nonmarital Custody Proceedings

[1] Need for Nonmarital Custody Orders

[2] Uniform Parentage Act

[3] Habeas Corpus

[4] Equitable Action

[5] Domestic Violence Prevention Act

§ 394.73 Nonparents and Custody Proceedings

[1] No General Jurisdiction

[2] Proceedings That May Be Initiated by Nonparents

[a] Guardianship

[b] Juvenile Court Dependency

[c] Domestic Violence Prevention Act Proceeding

[d] Termination of Parental Rights and Adoption

[e] Uniform Parentage Act Proceeding

[f] Action for Abuse of Parental Authority

[3] Custody Awards to Nonparents in Proceedings Initiated by Others

§ 394.74 Jurisdiction to Grant Visitation Rights

[1] Rights of Parents

[2] Rights of Nonparents

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§ 394.01 Scope of Chapter

This chapter discusses the nature and scope of the parent and child relationship. Governing principles, including constitutional protection of the relationship is considered in Part A [*see § 394.10 et seq.*]. Part A also covers the general rights and duties arising from the parent-child relationship [*see § 394.30 et seq.*].

Related forms include:

- Notice directing an employer to pay a minor's earnings to a parent [*see § 394.150*].
- Parents' relinquishment of a minor's earnings [*see § 394.151*].
- Petition to enforce a parent's duty to support a minor child [*see § 394.160*].
- Petition to enforce a child's duty to support a parent in need [*see § 394.161*].
- Petition by an abandoned child for relief from the duty to support a parent in need [*see § 394.162*], notice of pendency of proceeding [*see § 394.163*], and order [*see § 394.164*].
- Petition to enforce parent's duty to support an indigent adult child [*see § 394.165*].

Part B discusses child custody proceedings, including the various proceedings under California law in which child custody may be determined, along with discussion of jurisdiction to determine custody under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and Parental Kidnaping Prevention Act (PKPA) [*see § 394.70 et seq.*].

Related forms include:

- Petition for custody and support of minor children [*see § 394.170*].

- Response to that petition [*see § 394.171*].

- Petition for visitation by relative of a deceased parent [*see § 394.172*].

- Petition for grandparent visitation [*see § 394.173*].

- Request to register sister-state custody decree [*see § 394.174*] and a petition to modify a registered sister-state custody decree [*see § 394.175*].

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Establishing the parent-child relationship as a matter of legal record is discussed in Ch. 412, *Paternity* . The nature of an adoptive relationship and termination of parental rights are considered, respectively, in Ch. 12, *Adoptions: Nature and Effect* , and Ch. 12A, *Adoptions: Termination ofParental Rights* . Juvenile court dependency proceedings are discussed in Ch. 328, *Juvenile Courts: Dependency Proceedings* .

Child custody and visitation issues in the context of a proceeding for marital dissolution or legal separation, as well as standards by which child custody is to be determined in disputes between parents and nonparents, are discussed in Ch. 223, *Dissolution of Marriage: Child Custody* . For discussion of enforcing child custody and visitation awards under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), as well as discussion of remedies for child abduction under the Hague Convention on International Child Abduction, see Ch. 260, *Family Law Enforcement: Foreign Judgments* .

For discussion of child support issues in dissolution and separation proceedings, including an explanation of the statewide uniform child support guideline, see Ch. 224, *Dissolution of Marriage: Child Support* .

For discussion of minors' torts and contracts, see Ch. 367A, *Minors: Tort Actions* and Ch. 365,. *Minors: Contract Actions* .

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[Reserved]

§§ 394.03[Reserved]

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§ 394.10 Statutory Definition and Scope of Parent-Child Relationship

The parent-child relationship means the legal relationship existing between a child and his or her natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes both the mother-child and the father-child relationship [*Fam. Code § 7601*].

The above definition is a part of the Uniform Parentage Act (UPA) [*Fam. Code § 7600 et seq.*]. The UPA abolished the legal status of illegitimate child in California. In this regard, the UPA broadly states that the parent-child relationship extends equally to every child and to every parent, regardless of the marital status of the parents [*Fam. Code § 7602*]. With regard to rights of children, California law does not substantively differentiate between children on the basis of the marital status of their parents [*cf. Prob. Code § 6453*, discussed in Ch. 412, *Paternity* (different evidentiary burden under intestacy law)]. However, with regard to parents, the broad proclamation of *Fam. Code § 7602* is not consistently carried forth in the UPA and other California law. All parents do not have the same rights, regardless of marital status and regardless of gender. There are a number of areas of California law in which the statutory rights of unmarried fathers may be less than those of mothers and married fathers. For further discussion, see *§ 394.14*.

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§ 394.11 Constitutional Protection of Parent-Child Relationship

A parent's interest in the companionship, care, custody, and management of his or her children is a cognizable and substantial right that extends to all parents, and is within the protection of the federal due-process and equal-protection clauses. Thus, absent a powerful, countervailing state interest, the parent-child relationship must be protected [*Stanley v. Illinois (1972) 405 U.S. 645, 649-659, 92 S. Ct. 1208, 31 L. Ed. 2d 551* ; *see U.S. Const. amend. XIV*; *In re Kieshia E. (1993) 6 Cal. 4th 68, 76, 23 Cal. Rptr. 2d 775, 859 P.2d 1290* ; *see also Carmel-by-the-Sea v. Young (1970) 85 Cal. Rptr. 1, 466 P.2d 225* (canvassing cases finding constitutionally protected rights in family relationship); *In re Phillip B. (1979) 92 Cal. App. 3d 796, 801, 156 Cal. Rptr. 48* (family relationship within protection of federal constitutional right to privacy)].

Constitutional protection of the parent-child relationship extends to unmarried, as well as to married parents, and to fathers as well as to mothers [*see Stanley v. Illinois (1972) 405 U.S. 645, 651-652, 92 S. Ct. 1208, 31 L. Ed. 2d 551* ; *see also Fam. Code § 7602* (Uniform Parentage Act extends to every child and every parent, regardless of marital status of parents)]. All parents are entitled to a hearing on matters that affect their parental rights [*In re Reyna (1976) 55 Cal. App. 3d 288, 303, 126 Cal. Rptr. 138]* . Nevertheless, some legal classifications of parents based on gender and marital status have been accepted by both the United States and California Supreme Courts.

Gender-based distinctions cannot be justified on the theory that there is a fundamental difference between maternal and paternal relations and that a mother bears a closer relationship with a child than does a father [*Caban v. Mohammed (1979) 441 U.S. 380, 388-389, 99 S. Ct. 1760, 60 L. Ed. 2d 297]* . Nevertheless, disparate statutory treatment of fathers and mothers and of married and unmarried fathers does not violate equal protection per se [*Lehr v. Robertson (1983) 463 U.S. 248, 265-268, 103 S. Ct. 2985, 77 L. Ed. 2d 614* ; *Quilloin v. Walcott (1978) 434 U.S. 246, 255-256, 98 S. Ct. 549, 54 L. Ed. 2d 511* ; *cf. Tuan Anh Nguyen v. INS (2001) 533 U.S. 53, 121 S. Ct. 2053, 2057-2058, 150 L. Ed. 2d 115* (federal statute that provides different citizenship requirements for persons born abroad to unwed parents depending on whether mother or father is citizen parent, does not violate equal protection)]. Equal protection is violated only if a statute is applied disparately to persons who are, in fact, similarly situated with regard to their relationship with the child. An unwed father must "come forward" to participate in the rearing of his children to come within the protection

of the *equal protection clause* [*Lehr v. Robertson (1983) 463 U.S. 248, 265-268, 103 S. Ct. 2985, 77 L. Ed. 2d 614* ; *Caban v. Mohammed (1979) 441 U.S. 380, 392, 99 S. Ct. 1760, 60 L. Ed. 2d 297* ; *Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 849-850, 4 Cal. Rptr. 2d 615, 823 P.2d 1216]* . When there is no existing personal relationship between biological father and child, the father's *mere desire* to establish such a relationship does not invoke a fundamental liberty interest protected by the due process clause [*see* *Dawn D. v. Superior Court (1998) 17 Cal. 4th 932, 942-944, 72 Cal. Rptr. 2d 871, 952 P.2d 1139]* .

Under some circumstances, the scope of due process depends on the prior conduct of the parent. If an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest acquires substantial protection under the due process clause. At that point, it may be said that he acts as a father toward his children. But the mere existence of a biological link does not merit equivalent protection. The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he graspsthat opportunity and accepts some measure of responsiblity for the child's future, he may enjoy the blessings of the parent-child relationship. If he fails to do so, the Constitution does not automatically protect his interests [*Lehr v. Robertson (1983) 463 U.S. 248, 261-262, 103 S. Ct. 2985, 77 L. Ed. 2d 614* ; *Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 849-850, 4 Cal. Rptr. 2d 615, 823 P.2d 1216]* . For example, a father who had not executed a voluntary declaration of paternity or taken any other steps to formalize his role as the child's father before a dependency petition was filed had not sufficiently and timely demonstrated a full commitment to his parental responsibilities to merit constitutional protection [*see* *In re Jesusa V. (2004) 32 Cal. 4th 588, 610-611, 10 Cal. Rptr. 3d 205, 85 P.3d 2]* . The fact that an alleged biological father is effectively prevented from establishing a relationship with the child by the child's mother will not necessarily change this result, if he otherwise has no recognized basis for asserting paternity [*see* *Dawn D. v. Superior Court (1998) 17 Cal. 4th 932, 942-944, 72 Cal. Rptr. 2d 871, 952 P.2d 1139* (biological father took parenting classes and built home addition for child, but was prevented from helping to rear child by mother, who was married to another man throughout period of child's conception and birth and only briefly lived with biological father while separated from husband)].

Therefore, statutes that do not treat all parents equally may be unconstitutional as applied to the particular parent who is adversely affected [*see* *Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 850-851, 4 Cal. Rptr. 2d 615, 823 P.2d 1216]* .

For a general consideration of California's statutory distinctions regarding fathers, see *§ 394.14*. For further consideration of the constitutionality of disparate treatment in custodial rights, see *§ 394.30*. For further consideration of disparate treatment with regard to standing to bring a paternity action, see Ch. 412, *Paternity* . For further discussion of disparate treatment with regard to termination of parental rights and consent to adoption, see Ch. 12A, *Adoptions: Termination of Parental Rights* . For a general consideration of procreational rights of incarcerated fathers, see Ch. 359, *Marriage* .

Courts have also recognized that children have a fundamental independent right in belonging to a family unit [*In re Marilyn H. (1993) 5 Cal. 4th 295, 306, 19 Cal. Rptr. 2d 544, 851 P.2d 826* ; *see* *Adoption of Kay C. (1991) 228 Cal. App. 3d 741, 749, 278 Cal. Rptr. 907]* . However, one court has held that this fundamental right does not belong to an adopted child because adoption is a right bestowed by statute [*Adoption of Kay C. (1991) 228 Cal. App. 3d 741, 754, 278 Cal. Rptr. 907* ; *see also* *Louden v. Olpin (1981) 118 Cal. App. 3d 565, 567-569, 173 Cal. Rptr. 447* (constitutional right is not reciprocal to child to extent of allowing court to compel parental visitation)]. The rights of children transcend the biological parent-child relationship. They are not simply chattels belonging to the parent, but havefundamental interests of their own that may diverge from the interests of the parent [*In re Jasmon O. (1994) 8 Cal. 4th 398, 419, 33 Cal. Rptr. 2d 85, 878 P.2d 1297]* . These include the fundamental right to be protected from abuse and neglect and to have a home placement that is stable and permanent, and that allows the caretaker to make a full emotional commitment to the child. Therefore, the interests of the parents and the child must be balanced [*In re Marilyn H. (1993) 5 Cal. 4th 295, 306, 19 Cal. Rptr. 2d 544, 851 P.2d 826]* .

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§ 394.12 Age of Majority

A minor is an individual who is under 18 years of age. The period of minority is calculated from the first minute of the day on which the individual is born to the same minute of the corresponding day completing the period of minority [*Fam. Code § 6500*; *see In re Harris (1993) 5 Cal. 4th 813, 843-850, 21 Cal. Rptr. 2d 373, 855 P.2d 391]* . The age of majority was changed from 21 as of March 4, 1972. References in instruments, such as wills and trusts, that were executed before that date are to be construed as referring to an age of majority of 21 years [*Fam. Code § 6502(a)(1)*].

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§ 394.13 Meaning of "Parent"

The scope of persons who are included within the term "parent" depends on the particular matter at issue. The legislature is presumed to specify the intended meaning of "parent" if it wishes to enlarge or restrict the ordinary meaning of the term [*see* *In re Jodi B. (1991) 227 Cal. App. 3d 1322, 1326-1328, 278 Cal. Rptr. 242* (surveying numerous statutory provisions in which term is defined)]. Otherwise, it is assumed that it refers to one on whom the status has been legally conferred, that is, a natural or adoptive parent [*In re Jodi B. (1991) 227 Cal. App. 3d 1322, 1327-1328, 278 Cal. Rptr. 242* ; *see Fam. Code §§ 8616, 9305* (adoptive parents have all rights and are subject to all duties of parent-child relationship); *In re Jason V. (1991) 229 Cal. App. 3d 1168, 1171, 280 Cal. Rptr. 562* (ordinary meaning of "parent" cannot be disputed and does not include relative acting as legal guardian)].

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§ 394.14 Presumed Fathers and Other Fathers

The Uniform Parentage Act removed the legal distinction between legitimate and illegitimate children. However, it did not remove all distinctions between their fathers. The UPA recast those situations by which a child was legitimate under prior law as "presumptions" of paternity [*see Fam. Code § 7611*; *cf.* former *Civ. Code §§ 195, 215, 230*; former *Evid. Code §§ 621, 661*, prior to repeals and amendments made by Stats. 1975, ch. 1244].

The presumptions of paternity are considered in detail in Ch. 412, *Paternity* . For the most part, they arise from a marital relationship, evenif the marriage was void or voidable, or if it did not occur until after the birth of the child, or if it terminated before the birth of the child [*see Fam. Code §§ 7540, 7611(a)-(c)*]. A presumption that is not connected in some way to marriage is that arising from the father's receiving the child into his home and openly holding out the child as his natural born child [*Fam. Code § 7611(d)*]. There is also a presumption relating toa child *in utero* after the death of a person whose genetic material was used for posthumous conception of the child [*see Fam. Code § 7611(f)*; for discussion, *see* Ch. 412, *Paternity*]. In addition, with limited exception, the mere execution of a voluntary declaration by the mother of a child and a man, both of who agree is the father of the child, has the same force and effect as a paternity judgment [*see Fam. Code §§ 7573*].

In the context of a paternity action, the presumptions of paternity do have an evidentiary function [*see Fam. Code § 7612*, discussed in Ch. 412, *Paternity*]. However, in other areas of the law, the presumptions of paternity also have a substantive classification function. Certain rights are extended to, or withheld from a man who alleges that he is, or is alleged to be, the biological father of a child depending on whether he can qualify as a presumed father under *Fam. Code § 7611*.

For example, only a presumed father has a right equal to the mother's with regard to the custody, services, and earnings of a child [*Fam. Code §§ 3010(a)* (custody), 7500(a) (services and earnings); *see In re Zacharia D. (1993) 6 Cal. 4th 435, 449, 451, 24 Cal. Rptr. 2d 751, 862 P.2d 751]* . In some cases, the presumptions of paternity also determine whether or not a man has standing to bring a paternity action to establish his own paternity [*see Fam. Code §§ 7630, 7631*; *Michael M. v. Giovanna F. (1992) 5 Cal. App. 4th 1272, 1278, 7 Cal. Rptr. 2d 460* ; *see also Librers v. Black*

(2005) 129 Cal. App. 4th 114, 124-127, 28 Cal. Rptr. 3d 188 (mother's live-in boyfriend had standing under *Fam. Code § 7630* to bring paternity proceeding, based on presumption that he was child's natural father, which was established by his receipt of child into his home and his openly holding her out as his natural child); *Miller v. Miller (1998) 64 Cal. App. 4th 111, 120, 74 Cal. Rptr. 2d 797* (man who was child's biological father and who had received child into his home and held her out as his own had standing to pursue paternity claim under *Fam. Code § 7611(d)* even though child's mother was married to another man at time child was conceived and born); but see *Lisa I. v. Superior Court (2005) 133 Cal. App. 4th 605, 610, 34 Cal. Rptr. 3d 927* (man's claim that he is child's biological father is insufficient to give him statutory standing under *Fam. Code § 7630* to establish his paternity when he does not qualify as a presumed father under any provision of *Fam. Code § 7611*)]. Presumptions of paternity affect the determination of the parent-child relationship for purposes of intestate succession [*see Prob. Code § 6450 et seq.*, discussed in Ch. 412, *Paternity*], and the right to custody and reunification services with regard to a child adjudged a dependent of the juvenile court [*In re A.A. (2003) 114 Cal. App. 4th 771, 779-789, 7 Cal. Rptr. 3d 755* ; *In re Zacharia D. (1993) 6 Cal. 4th 435, 447-454, 24 Cal. Rptr. 2d 751, 862 P.2d 751* ; *see In re Sarah C. (1992) 8 Cal. App. 4th 964, 971-972, 975-976, 11 Cal. Rptr. 2d 414* ; *see also Welf. & Inst. Code §§ 361.2, 361.5*; *but cf. In re Julia U. (1998) 64 Cal. App. 4th 532, 74 Cal. Rptr. 2d 920* (father who was prevented by Department of Social Services action from contact with child, and thus, possibility of becoming presumed father, was deprived of fundamental due process right and entitled to reversal of juvenile court order terminating parental rights)]. And, a father's statutory rights with regard to termination of parental rights and adoption depend on whether or not he can meet one of the presumptions of paternity [*see Fam. Code §§ 7662, 7664, 8604, 8605*; *Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 844-850, 4 Cal. Rptr. 2d 615* P.2d1216, discussed in Ch. 12A, *Adoptions: Termination of Parental Rights* ; *see also In re Kyle F. (2003) 112 Cal. App. 4th 538, 542, 5 Cal. Rptr. 3d 190* (unwed father's rights regarding adoption of his child depend on whether he is presumed or natural father)].

Each such substantive use of the presumptions of paternity creates disparate treatment between fathers and mothers, and between presumed and "nonpresumed" fathers. This, in turn, raises constitutional questions (*see § 394.11*). Substantive classifications based on the presumptions are particularly suspect because whether or not a man can qualify as a presumed father is usually within the effective control of the mother. She can refuse to marry him, thereby leaving only the option of receiving the child into his home and openly holding out the child as his natural child. But she may also be able to prevent him from receiving the child into his home, for example, by placing the child for adoption [*see Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 847, 4 Cal. Rptr. 2d 615, 823 P.2d 1216]* ; *cf. Dawn D. v. Superior Court (1998) 17 Cal. 4th 932, 942-944, 72 Cal. Rptr. 2d 871, 952 P.2d 1139* (mother who lived with biological father when child conceived returned to live with husband when child born and deprived father of chance to be "presumed father"); *Barkaloff v. Woodward (1996) 47 Cal. App. 4th 393, 399, 55 Cal. Rptr. 2d 167* (mother stipulated to paternity judgment with man other than with whom she lived when her child was born). For further discussion, of the constitionality of substantive applications of the presumptions of paternity, see Ch. 412, *Paternity* .

The presumptions of paternity of *Fam. Code § 7611* are reflections of policy as to which fathers should be legally favored [*see In re Jesusa V. (2004) 32 Cal. 4th 588, 603, 10 Cal. Rptr. 3d 205, 85 P.3d 2* (although more than one individual may fulfill statutory criteria that give rise to presumption of paternity under *Fam. Code § 7611*, there can be only one presumed father; competing presumptions of paternity must be reconciled under *Fam. Code § 7612*)]. They are unaffected by the biological realities. A man's parentage of a child may be undisputed and legally proven, but he may nevertheless fail to be a presumed father [*see In re A.A. (2003) 114 Cal. App. 4th 771, 788-789, 7 Cal. Rptr. 3d 755* (determination in dependency case that one man is child's biological father does not necessarily defeat another man's presumed father status under *Fam. Code § 7611*); see also *Craig L. v. Sandy S. (2004) 125 Cal. App. 4th 36, 45-53, 22 Cal. Rptr. 3d 606* (when mother and her husband permitted biological father to receive child into his home and hold child out as his child, biological father may assert rebuttablepresumption of paternity provided by *Fam. Code § 7611(d)*, husband may assert rebuttable presumption of paternity provided by *Fam. Code § 7611(a)*, and court must decide under *Fam. Code § 7612* which presumption should prevail)]. Conversely, even if biological paternity is denied and legally disproved, a man may still be deemed to be a presumed father [*see In re Jesusa V. (2004) 32 Cal. 4th 588, 604-606, 10 Cal. Rptr. 3d 205, 85 P.3d 2* (nonbiological father's presumption of paternity under *Fam. Code § 7611(d)* not

necessarily defeated by biological father's competing claim to be child's presumed father); *In re Nicholas H. (2002) 28 Cal. 4th 56, 58-59, 63-64, 120 Cal. Rptr. 2d 146, 46 P.3d 932* (man's presumed father status under *Fam Code § 7611(d)* not necessarily rebutted under *Fam. Code § 7612(a)* by admission that he is not child's biological father); *see also Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 823 n.3, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* ; *Miller v. Miller (1998) 64 Cal. App. 4th 111, 119, 74 Cal. Rptr. 2d 797* ; but see *In re T.R. (2005) 132 Cal. App. 4th 1202, 1211-1212, 34 Cal. Rptr. 3d 215* (court denied stepfather's request for presumed father status under *Fam. Code § 7611(d)*, because of his history of molesting children, conduct which was fundamentally inconsistent with role of a parent)]. Courts are not bound to accord determinative weight to biology, but must weigh all relevant factors in determining which of two rebuttably presumed fathers will qualify as the child's presumed father [*In re Jesusa V. (2004) 32 Cal. 4th 588, 607-608, 612, 10 Cal. Rptr. 3d 205, 85 P.3d 2* ; *see Lisa I. v. Superior Court (2005) 133 Cal. App. 4th 605, 610-611, 34 Cal. Rptr. 3d 927* (child's biological father, who has no relationship with child and who has failed to make substantial efforts to establish parent-child relationship or to provide for child's support does not have constitutional liberty interest in opportunity to develop a relationship with the child)].

A valid declaration of paternity signed and filed by the biological father has the force of a judgment under *Fam. Code § 7573*, which trumps another man's presumed father status under Section 7611(d) [*Kevin Q. v. Lauren W. (2009) 175 Cal. App. 4th 1119, 1124, 1133, 1136-1141, 95 Cal. Rptr. 3d 477]* . A court does not have the discretion to ignore or treat as a rebuttable presumption a voluntary declaration of paternity [*Kevin Q. v. Lauren W. (2009) 175 Cal. App. 4th 1119, 1138, 95 Cal. Rptr. 3d 477]* because it is not a mere presumption that may be weighed against competing Section 7611 presumptions under *Fam. Code § 7612(b)* [*Kevin Q. v. Lauren W. (2009) 175 Cal. App. 4th 1119, 1141, 95 Cal. Rptr. 3d 477]* .

There is an evidentiary presumption of paternity arising from blood test evidence [*see Fam. Code § 7555*, discussed in Ch. 412, *Paternity*], but it does not bestow general presumed-father status on a man so proven to be the biological father because it is not included in the presumptions of *Fam. Code § 7611*. Even a judgment of paternity in a paternity action does not bestow presumed-father status on a man who cannot otherwise meet one of the presumptions of paternity [*see Adoption of Michael D. (1989) 209 Cal. App. 3d 122, 131 n.3, 256 Cal. Rptr. 884* (adjudged father cannot block adoption by withholding consent unless he otherwise qualifies as presumed father); *see also Fam. Code § 7660*; *see also In re Joshua R. (2002) 104 Cal. App. 4th 1020, 1025-1036, 128 Cal. Rptr. 2d 241* (alleged father unable to qualify as presumed father, and trial court found that biological paternity was irrelevant as reunification would not benefit child; therefore alleged father could not obtain either family reunification services or custody)].

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§ 394.14A Presumed Mothers

A woman is presumed to be the natural mother of a child if the child is *in utero* after the death of the decedent and the following conditions are satisfied [*Fam. Code § 7650(b)*; *Prob. Code § 249.5*]:

(a) The decedent, in writing, specified that her genetic material would be used for the posthumous conception of a child of the decedent, subject to the following:

(1) The specification was signed by the decedent and at least one competent witness.

(2) The specification could be revoked or amended only by a writing, signed by the decedent and at least one competent witness.

(3) The person designated by the decedent to use the genetic material was either of the following:
(A) The spouse or registered domestic partner of the decedent, as of the decedent's date of death.

(B) Some other person named in the specification as approved by the decedent to be the person designated by the decedent to use the genetic material for posthumous conception.

(b) The child or the child's representative has given written notice by certified mail, return receipt requested, that the decedent's genetic material was available for the purpose of posthumous conception. The notice must have been given to a person who had the power to control the distribution of either the decedent's property or death benefits payable by reason of the decedent's death, within four months of the date of issuance of a certificate of the decedent' s death or entry of a judgment determining the fact of the decedent's death, whichever event occurred first.

(c) The child was *in utero* using the decedent's genetic material and was *in utero* within two years of the date of

issuance of a certificate of the decedent's death or entry of a judgment determining the fact of the decedent's death, whichever event occurred first. This does not apply to a child who shares all of his or her nuclear genes with the person donating the implanted nucleus as a result of the application of somatic nuclear transfer technology commonly known as human cloning.

The California Supreme Court has held that under *Fam. Code § 7611(d)*, a woman may be a presumed mother of a child of her lesbian partner if they have agreed to raise the child together, she receives the child into her home, and she holds the child out as her natural child [*Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 113, 33 Cal. Rptr. 3d 46, 117 P.3d 660* ; *see* *Charisma R. v. Kristina S. (2009) 175 Cal. App. 4th 361, 370-374, 96 Cal. Rptr. 3d 26* (domestic partner of birth mother is not required to receive child in her home for "significant period of time" to be considered presumed parent under *Fam. Code § 7611(d)*)]. Although a child can have only one natural mother, this does not mean that a child cannot have two parents, bothof whom are mothers [*Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 117-118, 33 Cal. Rptr. 3d 46, 117 P.3d 660]* . This result is now possible under the domestic partnership statutes, specifically *Fam. Code § 297.5(d)*, which provides that the rights and obligations of registered domestic partners with respect to a child of either of them are the same as those of spouses. The Court has also recognized in an adoption case that a child can have two mothers [*Sharon S. v. Superior Court (2003) 31 Cal. 4th 417, 2 Cal. Rptr. 3d 699, 73 P.3d 554]* .

A registered domestic partner of the birth mother is entitled to bring a petition under *Fam. Code § 7611(d)* to establish her parental relationship with a child born to the birth mother by artificial insemination from an anonymous donor. The court must determine first, whether the petitioner is a presumed parent of the child under *Fam. Code § 7611(d)*, and then, whether this is an appropriate action in which to rebut the presumption that the petitioner is the child's parent [*Charisma R. v. Kristina S. (2006) 140 Cal. App. 4th 301, 309, 44 Cal. Rptr. 3d 332]* . Presumed parent status depends on affirmative findings that the petitioner received the child into her home and openly held the child out as her natural child. If the trial court finds that the petitioner is a presumed parent, then it should determine (1) whether the petitioner actively participated in causing the child to be conceived with the understanding that she would raise the child as her own with the birth mother, (2) whether she voluntarily accepted the rights and obligations of parenthood after the child was born, and (3) whether any one else claims to be the child's second parent [*Charisma R. v. Kristina S. (2006) 140 Cal. App. 4th 301, 309-310, 44 Cal. Rptr. 3d 332]* . Evidence that the petitioner has no biological tie to the child does not rebut the presumption of the petitioner's parenthood [*Charisma R. v. Kristina S. (2006) 140 Cal. App. 4th 301, 310, 44 Cal. Rptr. 3d 332]* . Moreover, the fact that the birth mother opposes presumed parent status for the petitioner does not control the determination of whether presumed parent status arises under *Fam. Code § 7611(d)*. Such a rule would be contrary to the public policy in favor of a child having two parents rather than one, and might implicate the constitutional rights of the person seeking presumed parent status and of the child in the establishment of the parent-child relationship [*Charisma R. v. Kristina S. (2006) 140 Cal. App. 4th 301, 310, 44 Cal. Rptr. 3d 332]* .

When a woman provides ova to her lesbian partner so that the partner can bear a child who will be raised in their joint home, both women are considered to be the child's parents [K.M. v. E.G. *(2005) 37 Cal. 4th 130, 134, 33 Cal. Rptr. 3d 61, 117 P.3d 673]* . An egg donor's genetic relationship with the resulting child constitutes evidence of a mother-child relationship under the Uniform Parentage Act, and the circumstance that her partner gave birth to the child also constitutes evidence of a mother-child relationship. Thus, both women are mothers of the child under the UPA [K.M. v. E.G. *(2005) 37 Cal. 4th 130, 142-143, 33 Cal. Rptr. 3d 61, 117 P.3d 673]* .

The Supreme Court has also held that the lesbian mother of a child is estopped from challenging the validity of a stipulated judgment declaring that she and her lesbian partner are the child's parents. Because the mother invoked the jurisdiction of the court to determine the child's parentage under the UPA, stipulated to the issuance of a judgment, and enjoyed the benefits of that judgment, it would be unfair to the partner and the child to permit the mother to challenge the validity of that judgment. It would also contravene the public policy that favors a child having two parents rather than one [*Kristine H. v. Lisa R. (2005) 37 Cal. 4th 156, 166, 33 Cal. Rptr. 3d 81, 117 P.3d 690]* .

A woman who has cared for a child and treated the child as her own may be granted presumed mother status under *Fam. Code § 7611(d)* when the child's birth mother is deceased [*In re Salvador M. (2003) 111 Cal. App. 4th 1353, 1357-1358, 4 Cal. Rptr. 3d 705* (although most case law has focused on definition of presumed father, legal principles concerning presumed father status apply equally to woman who is seeking presumed mother status)].

Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the mother-child relationship presumed under *Fam. Code § 7611(d)* [*Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 113, 33 Cal. Rptr. 3d 46, 117 P.3d 660* (district attorney brought action to establish that former lesbian partner of child's birth mother was child's presumed mother and thus obligated to pay support for child); *Wynn v. Superior Court (2009) 176 Cal. App. 4th 346, 350, 353-355, 98 Cal. Rptr. 3d 86* (child is necessarily interested party in proceeding to determine biological mother and may bring action to adjudicate parentage); *but see Scott v. Superior Court (2009) 171 Cal. App. 4th 540, 544-547, 89 Cal. Rptr. 3d 843* (woman who had intimate relationship with father of minor children did not have standing to join parents' UPA action to seek custody and visitation rights as presumed or de facto mother when parental rights of natural mother had not been terminated)].

In a mother's action for custody and visitation rights to her biological child, who has been raised by the biological father and his wife, the wife is not entitled to be joined as a party nor is she entitled to bring a separate action to be declared the child's presumed mother. The wife is not the child's presumed mother under either *Fam. Code § 7611(a)* by virtue of being married to the child's father, or under *Fam. Code § 7611(d)* because she received the child into her home and held him out as her own child. The presumptions set forth in *Fam. Code § 7611* do not apply in maternity cases when the child's birth mother is present and asserts legal parenthood. Because the child's natural father was known and present in the action, the child could have only one additional parent. Cases in which the courts have applied *Fam. Code § 7611* to recognize a presumed mother have all involved circumstances in which there was no competing claim to be the child's mother or second parent. When both the child's biological father and biological mother have identified themselves and come forward to assert their legal parentage, it is not appropriate to invoke a gender-neutral reading of the paternity presumptions to provide the child with another mother [*Amy G. v. M.W. (2006) 142 Cal. App. 4th 1, 16, 47 Cal. Rptr. 3d 297*].

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§ 394.15 In Loco Parentis, De Facto Parentage, and Similar Doctrines

In loco parentis (in place of parent) is a common-law doctrine that has beenhistorically applied in some contexts to impose certain parental obligations and confer certain parental benefits on persons other than parents. The term *in loco parentis* refers to any person who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formalities necssary to the establishment of a legal relationship of parent and child. It embodies the two ideas of assuming the parental status and discharging the parental duties [*Estate of Teddy (1963) 214 Cal. App. 2d 113, 119, 29 Cal. Rptr. 402]* .

Some older cases have stated or implied that one standing *in loco parentis* is entitled to all the rights of a parent [*see Trudell v. Leatherby (1931) 212 Cal. 678, 682, 300 P. 7* (overruled on other grounds in *Gibson v. Gibson (1971) 3 Cal. 3d 914, 923, 92 Cal. Rptr. 288, 479 P.2d 648*); *Loomis v. State of California (1964) 228 Cal. App. 2d 820, 823, 39 Cal. Rptr. 820]* . However, more recent cases have generally been unwilling to broaden the meaning of "parent" in a statute unless clearly intended by the Legislature [*see, e.g., In re Jodi B. (1991) 227 Cal. App. 3d 1322, 1325-1330, 278 Cal. Rptr. 242* (stepparent not entitled to reunification services as "parent" within meaning of juvenile dependency law).

A de facto parent is a person who has assumed, for a substantial period and on a day-to-day basis, the role of parent, fulfilling both the child's physical and psychological needs [*see Cal. Rules of Ct., Rule 5.502(a)(4)*; *In re B.G. (1974) 11 Cal. 3d 679, 692-693, 114 Cal. Rptr. 444, 523 P.2d 244* (foster parents, as de facto parents, may appear as parties in juvenile court proceedings); *In re A.A. (2003) 114 Cal. App. 4th 771, 779, 7 Cal. Rptr. 3d 755* (use of word "parent" in dependency statutes does not include de facto parents); *see also In re Jacob E. (2004) 121 Cal. App. 4th 909, 919, 18 Cal. Rptr. 3d 15* (juvenile court did not abuse discretion in refusing to find grandmother was de facto parent, where while child lived with her, grandmother acted contrary to role of parent); *Clifford S. v. Superior Court (1995) 38 Cal. App. 4th 747, 751-756, 45 Cal. Rptr. 2d 333* (de facto parent lacks standing to appeal denial or adequacy of reunification services)]. Arguably, requests for de facto status should be liberally granted [*see In re Ashley P. (1998) 62 Cal. App. 4th 23, 27, 72 Cal. Rptr. 2d 383]* . However, de facto parents have express rights as parties only in juvenile court dependency proceedings [*see In re Rachael C. (1991) 235 Cal. App. 3d 1445, 1452-1453, 1 Cal. Rptr. 2d 473*

(and cases cited); *see also* *In re Hirenia C. (1993) 18 Cal. App. 4th 504, 513, 22 Cal. Rptr. 2d 443]* .

As with *in loco parentis*, there has been a judicial reluctance to extend de facto parentage into other areas [*see* *In re Jamie G. (1987) 196 Cal. App. 3d 675, 684, 241 Cal. Rptr. 869* (de facto parents not entitled to reunification services under juvenile court dependency law)]. There is no procedure by which one can be declared a de facto parent, thereby becoming entitled to all of the rights and obligations of the parent-child relationship [*cf. Fam. Code § 8616* (adoptive parent has all such rights and obligations)].

Other similar and novel doctrines to extend parental rights to nonparents have also met with little success in California courts. Courts have rejected concepts of "equitable parentage" [*see* *In re Marriage of Lewis & Goetz (1988) 203 Cal. App. 3d 514, 519-520 250 Cal. Rptr. 30]* and "functional parenthood" [*see* *Nancy S. v. Michele G. (1991) 228 Cal. App. 3d 831, 840-841, 279 Cal. Rptr. 212]* . Deference to the Legislature in the area of extension of parental rights into nontraditional areas is clearly the current view of the California judiciary [*see* *Nancy S. v. Michele G. (1991) 228 Cal. App. 3d 831, 841-842, 279 Cal. Rptr. 212* ; *Curiale v. Reagan (1990) 222 Cal. App. 3d 1597, 1600-1601, 272 Cal. Rptr. 520* ; *In re Marriage of Lewis & Goetz (1988) 203 Cal. App. 3d 514, 519-520, 250 Cal. Rptr. 30]* .

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§ 394.16 Maternal Surrogacy Birth Arrangements

Couples who desire but who are unable to bear children are increasingly turning to the use of surrogates, often paying substantial sums of money in exchange for a lacking function of the birth process. The parties enter into a contract under which a surrogate mother agrees to provide the function and renounce any parental rights that she might otherwise be entitled to in exchange for monetary consideration. The California Supreme Court, in *Johnson v. Calvert*, upheld the basic validity and enforceablilty of surrogacy contracts against the argument that they are in violation of public policy [*Johnson v. Calvert (1993) 5 Cal. 4th 84, 95, 19 Cal. Rptr. 2d 494, 851 P.2d 776* ; *cf. In re Baby M (1988) 109 N.J. 396, 537 A.2d 1227, 1246-1248]* .

Two kinds of surrogate arrangements have come before the California courts. One involves *in vitro* fertilization, in which a woman's egg is removed from her body, fertilized in a laboratory using sperm provided by the intended father, and then implanted into the uterus of the surrogate, who carries the fetus and then gives birth to the child [*see Johnson v. Calvert (1993) 5 Cal. 4th 84, 105, 19 Cal. Rptr. 2d 494, 851 P.2d 776* (Kennard, J., dissenting)]. The egg is usually that of the woman who is the intended mother, and the sperm that of the intended father; but both egg and sperm could also come from anonymous donors and be fertilized *in vitro* for implantation in the surrogate's uterus, as in one reported decision [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1413, 72 Cal. Rptr. 2d 280]* . This arrangement has been called "gestational surrogacy" [*see In re Marriage of Moschetta (1994) 25 Cal. App. 4th 1218 1222, 30 Cal. Rptr. 2d 893]* .

The other arrangement involves the artificial insemination of the surrogate with the sperm of the intended father using the surrogate's egg [*see In re Marriage of Moschetta (1994) 25 Cal. App. 4th 1218, 1221-1222, 30 Cal. Rptr. 2d 893* (calling this arrangement "traditional surrogacy"); *Adoption of Matthew B. (1991) 232 Cal. App. 3d 1239, 1252, 284 Cal. Rptr. 18]* . The two arrangements differsignificantly in that with *in vitro* fertilization, the surrogate is not genetically related to the child. With artificial insemination in which the intended father's sperm fertilizes the surrogate's egg, the surrogate is the child's true biological mother [*see In re Marriage of Moschetta (1994) 25 Cal. App. 4th 1218, 1222, 30 Cal. Rptr. 2d 893]* .

This difference means that if the surrogate later changes her mind and refuses to fulfill her obligations under the contract, a different body of law applies depending on what type of surrogacy is at issue. With regard to gestational surrogacy, the California Supreme Court resolved the issue as one of parentage (maternity) under the Uniform Parentage Act [*see Fam. Code § 7650*] affected by principles of contract law but outside of the scope of adoption law [*see Johnson v. Calvert (1993) 5 Cal. 4th 84, 19 Cal. Rptr. 2d 494, 851 P.2d 776]* . *In vitro* fertilization and gestational surrogacy are discussed further in Ch. 412, *Paternity*.

In contrast, with artificial insemination, the parental rights of the father's wife can only arise by adoption. Therefore, the rights of the parties must be resolved under the adoption statutes [*In re Marriage of Moschetta (1994) 25 Cal. App. 4th 1218, 1222, 1228-1231, 30 Cal. Rptr. 2d 893* ; *Adoption of Matthew B. (1991) 232 Cal. App. 3d 1239, 1255-1259, 284 Cal. Rptr. 18]* . Surrogacy arrangements that require adoption are discussed in Ch. 12, *Adoptions: Nature and Effect* .

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[Reserved]

§§ 394.17[Reserved]

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§ 394.30 Parents' Right to Custody of Child

[1] Scope and Nature of Right

The most basic of parents' rights with respect to their children is the right to custody [*see Odell v. Lutz (1947) 78 Cal. App. 2d 104, 106, 177 P.2d 628* ; *In re Phillip B. (1979) 92 Cal. App. 3d 796, 801, 156 Cal. Rptr. 48]* . The right to custody embraces the sum of parental rights with respect to the rearing of a child, including the child's care, the right to the child's services and earnings [*see Fam. Code § 7500*, discussed in *§ 394.34*, the right to direct the child's activities, the right to make decisions regarding the control, education, and health of the child [*Burge v. City & County of San Francisco (1953) 41 Cal. 2d 608, 617, 262 P.2d 6* ; *see Fam. Code §§ 3003, 3006* (legal custody includes right of parent to ake decisions relating to health, education, and welfare of child)], and the right, as well as the duty, to prepare the child for additional obligations, which includes the teaching of moral standards, religious beliefs, and elements of good citizenship [*see Wisconsin v. Yoder (1972) 406 U.S. 205, 233, 92 S. Ct. 1526, 32 L. Ed. 2d 15]* .

The right of a fit and proper parent to his or her child's custody, while once expressed as somewhat in the nature of a property right [*see Turner v. Turner (1959) 167 Cal. App. 2d 636, 642, 334 P.2d 1011]* , is more properly characterized as a principle of parental autonomy [*see In re Phillip B. (1979) 92 Cal. App. 3d 796, 801, 156 Cal. Rptr. 48]* . Under this principle, a child may not be taken from the custody of a fit parent simply because the child might be better off in a nonparental custodial setting [*see Stanley v. Illinois (1972) 405 U.S. 645, 651-658, 92 S. Ct. 1208, 31 L. Ed. 2d 551]* .

Parents who are petitioning to terminate their child's guardianship, claiming that they are now able to adequately care for the child and are therefore entitled to regain custody of their child, do not have a constitutional right to have the guardianship terminated and the child returned to their custody. A parent's constitutional right against judicial interference with the parent's day-to-day child rearing decisions applies to a fit parent who has custody of the child. When parents do not have custody and are not participating in the day-to-day parenting of the child, they are not entitled to the constitutional protections afforded to parents acting in that role. The test for determining whether the guardianship should be terminated is the best interest of the child [*Guardianship of L.V. (2006) 136 Cal. App. 4th 481,*

484, 489, 491-497, 38 Cal. Rptr. 3d 894] .

[2] Comparative Rights of Mothers and Fathers

The mother of an unemancipated minor child, and the father, if presumed to be the father under *Fam. Code § 7611*, are equally entitled to the custody of the child [*Fam. Code § 3010(a)*]. Therefore, the statutory custodial rights of fathers depend on whether a father can meet one of the presumptions of paternity [*see In re Zacharia D. (1993) 6 Cal. 4th 435, 449, 451, 24 Cal. Rptr. 2d 751, 862 P.2d 751* ; *see also § 394.14*; Ch. 412, *Paternity* (discussion of presumptions of paternity)]. If so, his rights are equal to the mother's [*In re Kyle F. (2003) 112 Cal. App. 4th 538, 542, 5 Cal. Rptr. 3d 190]* ; if not, the statute gives the mother a superior claim to custody.

The constitutionality of this distinction is questionable if the father has come forward immediately after the birth of the child to assert and exercise his custodial rights [*see Lehr v. Robertson (1983) 463 U.S. 248, 103 S. Ct. 2985, 77 L. Ed. 2d 614* ; *Caban v. Mohammed (1979) 441 U.S. 380, 392, 99 S. Ct. 1760, 60 L. Ed. 2d 297* ; *In re Zacharia D. (1993) 6 Cal. 4th 435, 450-451, 24 Cal. Rptr. 2d 751, 862 P.2d 751* ; *Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 849-850, 4 Cal. Rptr. 2d 615, 823 P.2d 1216]* . For related discussion, see *§ 394.11*.

Otherwise, *Fam. Code § 3040(a)(1)* provides that in a custody dispute between parents, there is no gender preference. Under prior law, it was held that the former Family Law Act predecessor statute [*see* former *Civ. Code § 4600*] could not constitutionally be limited to fathers of legitimate children [*see In re Reyna (1976) 55 Cal. App. 3d 288, 297, 126 Cal. Rptr. 138]* .

[3] Rights of Surviving or Remaining Parent

If one parent is dead, is unable or refuses to take custody, or has abandoned the child, the other parent is entitled to custody of the child [*Fam. Code § 3010(b)*; *see People v. Ryan (1999) 76 Cal. App. 4th 1304, 1314-1315, 91 Cal. Rptr. 2d 160* (father both refused to take custody of and abandoned child)]. The right to custody is immediate, so that the surviving parent may exercise the incidents of the right without first obtaining a custody order from the court [*see Guardianship of Donaldson (1986) 178 Cal. App. 3d 477, 485-486, 223 Cal. Rptr. 707]* .

The priority of a parent to the custody of his or her child (absent proof of detriment to the child) as against a nonparent is set forth in *Fam. Code §§ 3040* and *3041*, and is discussed in detail in Ch. 223 *Dissolution of Marriage: Child Custody* .

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§ 394.31 Residence of Child

The residence of a parent with whom an unmarried, unemancipated minor maintains his or her place of abode is the residence of the child [*Gov. Code § 244(d)*; *see also Welf. & Inst. Code § 17.1*]. The residence of an unmarried, unemancipated minor cannot be changed by his or her own act [*Gov Code § 244(e)*; *see Fam. Code § 7050(e)(15)* (effect of emancipation)]. If a child's parents are divorced, the term "residence" as it applies to the child is subject to several possible interpretations depending on the context. For example, it may have a specialized meaning for insurance purposes [*Kibbee v. Blue Ridge Ins. Co. (1999) 69 Cal. App. 4th 53, 61-63, 81 Cal. Rptr. 2d 294* (involving homeowner's insurance policy)].

A parent entitled to the custody of a child has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child [*Fam. Code § 7501*; *see In re Marriage of LaMusga (2004) 32 Cal. 4th 1072, 1101, 12 Cal. Rptr. 3d 356, 88 P.3d 81* (factors court should consider when deciding whether to modify custody order in light of custodial parent's proposed change of residence)]. Restraint on removal of a child from the court's jurisdiction is discussed in Ch. 223 *Dissolution of Marriage: Child Custody* .

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§ 394.32 Marriage of Child

Parental authority, including the right to custody ceases if a minor child marries [*Fam. Code § 7505(b)*]. Therefore, an unmarried minor may marry only with the consent in writing of one or both parents and a court order [*Fam. Code § 302*]. A parent may have his or her minor child's marriage annulled if proper consent was not obtained for the child's marriage [*see Fam. Code § 2210(a)*]. The purpose of the statutes providing for parental control over the marriage of their minor children is to permit parents to exercise the control and discipline over their children to which they are entitled because of the right to custody [*Turner v. Turner (1959) 167 Cal. App. 2d 636, 641-642, 334 P.2d 1011* (minor child's marriage may be annulled if parental consent was obtained by fraud)].

For further discussion of parental consent to a child's marriage and annullment, see Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights* .

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§ 394.33 Name of Child

The rule giving the father, as against the mother, a primary right to have his child bear his surname has been abolished in California. The sole consideration when parents contest a surname is the child's best interest [*In re Marriage of Schiffman (1980) 28 Cal. 3d 640, 647, 169 Cal. Rptr. 918, 620 P.2d 579* (disapproving expressions to the contrary in *In re Trower (1968) 260 Cal. App. 2d 75, 77, 66 Cal. Rptr. 873* ; *In re Worms (1967) 252 Cal. App. 2d 130, 134-135, 60 Cal. Rptr. 88* ; *Montandon v. Montandon (1966) 242 Cal. App. 2d 886, 889-892, 52 Cal. Rptr. 43* ; *In re Larson (1947) 81 Cal. App. 2d 258, 262, 183 P.2d 688*)].

In determining the child's best interests, the length of time that the child has used a surname is to be considered. If the time is negligible because the child is very young, other facts may be controlling. For instance, the effect of a name change on preservation of the father-child relationship, the strength of the mother-child relationship, and the identification of the child as part of a family unit are all pertinent. The symbolic role that a surname other than the natural father's may play in easing relations with a new family if the custodial mother remarries should be balanced against the importance of maintaining the biological father-child relationship. The embarrassment or discomfort that a child may experience when he or she bears a surname different from the rest of the family should be evaluated [*In re Marriage of Schiffman (1980) 28 Cal. 3d 640, 647, 169 Cal. Rptr. 918, 620 P.2d 579]* .

A court may order that a child's name on the birth certificate be the hyphenated surnames of both parents, but that the child use the name of only one of the parents [*see* *In re Marriage of Douglass (1988) 205 Cal. App. 3d 1046, 1054-1056, 252 Cal. Rptr. 839]* . The mother's surname is not of less importance if it was the surname of a former husband rather than a birth-given surname [*In re Marriage of McManamy & Templeton (1993) 14 Cal. App. 4th 607, 611, 18 Cal. Rptr. 2d 216* (finding insufficient evidence to support change of child's name from the mother's surname, as recorded on birth certificate, to hyphenation of mother's and father's surnames)].

A petition to change a child's name may be filed in the superior court of the county where the child resides. The petition may be filed by either of the child's parents, by the child's guardian, or by a near relative or friend of the child as provided in *Family Code Section 7638* if both of the child's parents are dead and the child does not have a guardian [

Code Civ. Proc. § 1276(a)]. If neither parent has signed the petition, it must specify the names and addresses of the parents if living (or, if neither parent is living, the names and addresses of the child's near relatives), if known to the person proposing the name change [*Code Civ. Proc. § 1276(b)*]. If only one parent signs the petition, it must specify the other parent's address, if known [*Code Civ. Proc. § 1276(c)*]. The petition must specify the child's present name, his or her place of birth and current residence, and the reason for the proposed name change [*Code Civ. Proc. § 1276(a)*]. For general discussion and forms for use in petitioning for a change of name, see Ch. 377, *Name, Change of.*

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§ 394.34 Property and Earnings of Child

[1] Child's Right to Property

A parent, as such, has no control over the property of the child [*Fam. Code § 7502*; *see Emery v. Emery (1955) 45 Cal. 2d 421, 432, 289 P.2d 218]* . However, under the Probate Code, parents are generally entitled to receive money and property belonging to their child, subject to a duty to account to the child on reaching the age of majority [*Prob. Code § 3300*]. Money and property not exceeding $5,000 in value may be paid or delivered to a parent entitled to custody to be held in trust until the child reaches the age of majority [*Prob. Code § 3401*]. For larger amounts, property may be transferred to a custodian for the benefit of a minor under the California Uniform Transfers to Minors Act [*Prob. Code § 3900 et seq.*]. Other fiduciary arrangements, such as a formal trust or guardianship of estate may also be used [*see Prob. Code §§ 1501, 1514*]. Under all of these arrngements, a parent may serve in a fiduciary capacity with regard to the minor's property.

A court may direct that an allowance be made to a parent from a child's property for the child's past or future support, on proper conditions, if it is for the child's benefit [*Fam. Code § 3902*].

A parent cannot validly consent to a peace officer's search of the child's personal property over the child's objections, and if a search is made, it is in violation of the *Fourth Amendment* [*In re Scott K. (1979) 24 Cal. 3d 395, 403-404, 155 Cal. Rptr. 671, 595 P.2d 105]* .

[2] Parents' Right to Child's Earnings and Services

A child's earnings are treated differently from other property with regard to the rights of parents. The mother of an unemancipated minor child, and the father, if presumed to be the father under *Fam. Code § 7611*, are equally entitled to the services and earnings of the child [*Fam. Code § 7500(a)*]. For discussion of possible constitutional implications of providing different rights to fathers who do not qualify as "presumed" fathers, see *§§ 394.11* and *394.14*.

The employer of a minor must pay the minor's earnings to the minor until the parent entitled to the earnings gives the

employer notice that he or she claims the earnings [*Fam. Code § 7503*; *see § 394.150*]. There is authority that the word "earnings" is broader in scope than merely wages or salary and can encompass income derived from other sources, such as a sole proprietorship [*see In re Marriage of Imperato (1975) 45 Cal. App. 3d 432, 437, 119 Cal. Rptr. 590]* .

If one parent is dead, is unable or refuses to take custody, or has abandoned the child, the other parent is entitled to the services and earnings of the child [*Fam. Code § 7500(b)*].

The right to a minor child's earnings is dependent on the right to ustody and control of the child. Therefore, if the parents are separated, only the custodial parent has a right to the child's services and earnings [*see Watkins v. Clemmer (1933) 129 Cal. App. 567, 574-575, 19 P.2d 303* ; *see also Fam. Code § 771*]. The rights of a parent who has joint legal custody [*see Fam. Code § 3003*] but not joint physical custody [*see Fam. Code § 3004*] have not been determined.

The parent may relinquish to the child the right to receive the child's earnings [*see § 394.151*]. Abandonment by the parent is presumptive evidence of that relinquishment [*Fam. Code § 7504*]. Relinquishment is also effected by the emancipation of the minor, either partial or complete [*Fam. Code § 7050(b)*; *Slater v. California State Auto. Asso. (1962) 200 Cal. App. 2d 375, 376-377, 19 Cal. Rptr. 290]* .

If parents do receive their child's earnings during minority, the child has no right to claim a return of those earnings unless the child can show that he or she was emancipated from the parents and entitled to his or her own earnings. The burden is on the child to show that he or she was in fact emancipated by some legally recognized act of emancipation. In the absence of such a showing, the presumption is that no relinquishment by the parents took place and that the minor's earnings legally belonged to the parents [*Smith v. Smith (1918) 38 Cal. App. 388, 397, 176 P. 382]* . For further discussion, see Ch. 245, *Emancipation of Minors* .

If a third person commits a tort against a minor child and the child suffers a loss of earnings, the parents of the child have a cause of action against the third person to recover for the loss of the child's earnings and services that have economic value [*see Baxter v. Superior Court (1977) 19 Cal. 3d 461, 463-466, 138 Cal. Rptr. 315, 563 P.2d 871]* .

[3] Earnings From Entertainment, Artistic, or Sports Contracts

There is an exception to the general rule that parents are entitled to an unmarried minor's earnings if the child's earnings are derived from an entertainment, artistic, or sports contract. In any court order approving the contract, the court must require that at least 15 percent of the minor's gross earnings under the contract be set aside by the minor's employer and placed in a trust account in a bank, savings and loan, or similar financial institution, as prescribed by statute, and preserved for the minor's benefit [*Fam. Code §§ 6752(b), (d), 6753(a)*]. For further discussion of minors' entertainment industry contracts, see Ch. 365 *Minors: Contract Actions* .

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§ 394.35 Parents' Duties

[1] Control of Children

A parent is responsible to the state for the well-being of his or her child [*Turner v. Turner (1959) 167 Cal. App. 2d 636, 642, 334 P.2d 1011]* andhas a duty to rear and discipline the child [*Emery v. Emery (1955) 45 Cal. 2d 421, 429-430, 289 P.2d 218* ; *see § 394.53* (limitations on discipline)]. For purposes of the crime of contributing to the delinquency of a minor, a parent has the duty to exercise reasonable care, supervision, protection, and control over a minor child [*Penal Code § 272*; *see Williams v. Garcetti (1993) 5 Cal. 4th 561, 567-579, 20 Cal. Rptr. 2d 341, 853 P.2d 507* (statute expresses traditional parental duty and is not unconstitutionally vague or overbroad; however criminal liability requires gross or culpable departure from required standard of care)]. For discussion of parental liability for the torts of their children, Ch. 367A, *Minors: Tort Actions*.

[2] Child Support

[a] Duty of Support

The father and mother of a minor child have an equal responsibility to support their child in the manner suitable to the child's circumstances [*Fam. Code § 3900*]. This duty of support usually terminates when the child reaches the age of majority (18), but continues as to an unmarried child age 18 or older who is a full-time high school student, and who is not self-supporting, until the time when the child finishes high school or attains the age of 19 years, whichever occurs first [*Fam. Code § 3901*]. The duty of support may be continued past the age of majority by agreement [*Fam. Code § 3587*], or in the case of a child who is incapacitated from earning a living and without sufficient means [*Fam. Code § 3910*]. The duty of support under all of these circumstances is discussed further in Ch. 224 *Dissolution of Marriage: Child Support* .

[b] Proceedings in Which Child Support May Be Ordered

Child support may be ordered in various California proceedings involving the welfare of children. It may be ordere in a

proceeding for dissolution of marriage, nullity of marriage or for legal separation of the parties, as discussed in Ch. 224 *Dissolution of Marriage: Child Support* [*Fam. Code § 2010(c)*].

Under *Fam. Code § 4000*, if a parent willfully fails to provide support for his or her child, the other parent or the child by a guardian ad litem may bring an action against the parent to enforce the duty. This statute provides general jurisdiction for the court to consider whether or not a duty of support exists, and to make appropriate child support orders if it determines that there is a duty. It is available regardless of the marital status of the parents. The proceeding might be used to obtain child support for a child who is not receiving public assistance and whose custodial parent refuses to seek child support from the noncustodial parent. For a form for use in such an action, see *§ 394.160[1]*.

The Family Code also provides jurisdiction for the county, through its district attorney or other local child support agency, to obtain child support orders [*see Fam. Code §§ 4002, 17400 et seq.*]. Enforcement of support through the district attorney or other local child support agency is considered in Ch. 259, *Family Law Enforcement: Special Remedies for Enforcement of Support* .

A child support order may also be made in a proceeding to determine parentage under the Uniform Parentage Act [*Fam. Code § 7637*; *see Fam. Code § 7614*, as discussed in Ch. 412, *Paternity*]. A defendant charged with criminal child neglect or abandonment under *Penal Code § 270* may have proceedings or sentence suspended by agreeing to a bonded child support order [*Penal Code § 270b*].

The Uniform Interstate Family Support Act (UIFSA-- *Fam. Code § 4900 et seq.*) provides procedures for interstate establishment of support orders, as well as for the enforcement of existing foreign support orders. UIFSA is considered in detail in Ch. 259, *Family Law Enforcement: Special Remedies for Enforcement of Support.*

Guardianship law provides no express authority for a guardian of the person of a child to obtain an order for child support from a parent [*cf. Prob. Code § 2422* (authorizing converse, that is, order that child be supported solely from guardianship estate notwithstanding existence of person legally obligated to support child)]. However, it has been held that the appointment of a guardian does not prevent the court from ordering parent to provide support for his or her child [*see In re Marriage of O'Connell (1978) 80 Cal. App. 3d 849, 856, 146 Cal. Rptr. 26* ; *see also Fam. Code § 4000*)].

[c] Amount of Support

Regardless of the proceeding in which child support is at issue, the amount of support must be determined under the statewide uniform child upport guideline [*see Fam. Code § 4050 et seq.*]. For comprehensive treatment of the guideline, see Ch. 224 *Dissolution of Marriage: Child Support* .

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§ 394.36 Termination of Parental Authority

The authority of a parent over a child ceases on (1) the appointment, by a court, of a guardian of the person of a child; (2) the marriage of the child; or the child's attaining majority [*Fam. Code § 7505*]. The emancipation of a child also terminates most parental authority and obligations [*see Fam. Code § 7050*]. For further discussion, see Ch. 245, *Emancipation of Minors* .

Termination of parental authority is not the same as termination of parental rights or freeing a child from parental custody and control [*see Fam. Code § 7800 et seq.*]. The latter terminates the parent-child relationship for all purposes [*see Fam. Code § 7803*]. Termination of parental rights is considered in Ch. 12A, *Adoptions: Termination of Parental Rights* .

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§ 394.37 Support of Parents

[1] Adult Child's Duty to Support Parent in Need

Except as otherwise provided by law, an adult child must, to the extent of his or her ability, support a parent who is in need and unable to maintain himself or herself by work [*Fam. Code § 4400*; *see also Fam. Code § 4401* (promise of adult child to pay for necessaries previously furnished to needy parent is binding)]. This duty is strictly a creation of statute; there is no common law duty on adult children to protect and care for their aging parents [*People v. Heitzman (1994) 9 Cal. 4th 189, 212, 37 Cal. Rptr. 2d 236, 886 P.2d 1229]* . However, the duty is cumulative and not in substitution for any other duty [*Fam. Code § 4402*].

The purpose of this statutory duty is to protect the public from the burden of supporting people who have children who are able to support them [*People v. Heitzman (1994) 9 Cal. 4th 189, 210, 37 Cal. Rptr. 2d 236, 886 P.2d 1229]* . Nevertheless, the statute creates no liability to a public agency for reimbursement of support provided to an indigent parent [*County of San Bernardino v. Simmons (1956) 46 Cal. 2d 394, 398, 296 P.2d 329* ; *Freitas v. County of Contra Costa (1994) 28 Cal. App. 4th 163, 172 n.8, 33 Cal. Rptr. 2d 406]* . Further, the statute does not create a duty on an adult child to act to prevent elder abuse, if the child is not the caretaker of the parent [*People v. Heitzman (1994) 9 Cal. 4th 189, 210-212, 37 Cal. Rptr. 2d 236, 886 P.2d 1229* ; *see Penal Code § 368(a)*].

A married person's obligation to support an indigent parent is a community obligation for which the person is not required to reimburse the community. An individual has an obligation under *Fam. Code § 4400* to support an indigent parent to the extent the individual is able, and such an obligation imposed by statute is a "debt" within the meaning of *Fam. Code § 910*, which provides that the community estate is liable for a debt incurred by either spouse before or during marriage [*In re Marriage of Leni (2006) 144 Cal. App. 4th 1087, 1096-1098, 50 Cal. Rptr. 3d 886*].

[2] Civil Action to Enforce Duty

A parent, or the county on behalf of the parent, may bring an action against the child to enforce the duty of support [*Fam. Code § 4403(a)(1)*]. If the county furnishes support to a parent, the county has the same right as the parent to

whom the support was furnished to secure reimbursement and obtain continuing support [*Fam. Code § 4403(a)(2)*]. However, the right of the county to proceed on behalf of the parent or to obtain reimbursement is subject to any limitation otherwise imposed by California law [*Fam. Code § 4403(b)*]. The court may order the child to pay the county reasonable attorney's fees and court costs in a proceeding by the county [*Fam. Code § 4403(c)*].

In determining the amount to be ordered for support, the court must consider the following circumstances of each party [*Fam. Code § 4404*]:

- Earning capacity and needs.
- Obligations and assets.
- Age and health.
- Standard of living.
- Other factors the court deems just and equitable.

The court retains jurisdiction to modify or terminate an order for support if justice requires [*Fam. Code § 4405*].

For a form of petition to enforce an adult child's duty to support a parent in need, see *§ 394.161*.

[3] Petition for Relief From Duty on Ground of Abandonment

An adult child may file a petition in the county where a parent of the child resides requesting that the court make an order freeing the petitioner from the obligation otherwise imposed by law to support the parent. If the parent does not reside in this state, the petition must be filed in the county where the adult child resides [*Fam. Code § 4410*].

The court must relieve an adult child of the obligation to support his or her parent only if the petition alleges and the court finds all of the following [*Fam. Code § 4411*]:

(1) The child was abandoned by the parent when the child was a minor;

(2) The abandonment continued for a period of two or more years before the time the child attained the age of 18 years; and

(3) During the period of abandonment the parent was physically and mentally able to provide support for the child.

For a form of petition to obtain relief from the duty to support a parent, see *§ 394.162*.

On the filing of the petition, the clerk must set the matter for hearing by the court and must issue a citation, stating the time and place of the hearing. The citation is to be directed to the parent and to the parent's conservator, if any, or, if the parent is deceased, to the personal representative of the parent's estate. At least five days before the date of the hearing, the citation and a copy of the petition must be personally served on each person to whom it is directed, in the same manner as provided by law for the service of summons [*Fam. Code § 4412*; *see Code Civ. Proc. § 415.10 et seq.*]. For a form for use to give notice of the proceeding, see *§ 394.163*.

If the parent is a California resident, the court does not have jurisdiction to make an order until 30 days after the county counsel, or the district attorney in a couty not having a county counsel, of the county in which the parent resides has been served with notice of the pendency of the proceeding [*Fam. Code § 4413*].

If at the hearing the court determines that the requirements for relief are satisfied, the court must make an order that the petitioner is relieved from the obligation otherwise imposed by law to support the parent [*Fam. Code § 4414(a)*]. Such an order also releases the petitioner with respect to any state law under which a child is required to do any of the following [*Fam. Code § 4414(b)*]:

(1) Pay for the support, care, maintenance, and the like of a parent.

(2) Reimburse the state or a local public agency for furnishing the support, care, maintenance, or the like of a parent.

For a form of court order granting relief from the duty to support a parent, see *§ 394.164*.

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[Reserved]

§§ 394.38[Reserved]

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§ 394.50 Power of State to Limit Parental Authority

Although parents have very wide discretion in the control that they exercise over their children, the discretion is not absolute. A state's interest in the well-being of children is a sufficient interest to justify state intervention in the parent-child relationship, through exercise of its police powers [*see Cal. Const., art. XI, § 7*], to safeguard the child's health, development, and well-being [*Prince v. Commonwealth of Massachusetts (1944) 321 U.S. 158, 166-167, 64 S. Ct. 438, 88 L. Ed. 645* ; *In re Phillip B. (1979) 92 Cal. App. 3d 796, 801, 156 Cal. Rptr. 48]* . The most dire way in which a state may use its supervisory power to interfere with the parent-child relationship is in proceedings to permanently sever the parent-child relationship by "freeing the child from parental custody and control" [*see Fam. Code § 7800 et seq.*], or in current terminology, by terminating parental rights [*see Fam. Code § 7664*]. These proceedings are considered in Ch. 12, *Adoptions: Nature and Effect* .

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§ 394.51 Education of Child

As a general rule, a parent has the right to educate a child as he or she chooses [*see Burge v. City & County of San Francisco (1953) 41 Cal. 2d 608, 617, 262 P.2d 6]* . However, a state has the power reasonably to regulate all schools, to require that children of proper age attend school, to require that certain subjects essential to good citizenship be taught, and to require that nothing be taught that is inimical to the public welfare [*Pierce v. Society of Sisters (1925) 268 U.S. 510, 534, 45 S. Ct. 571, 69 L. Ed. 1070]* .

In California, state law controls the types of schooling or private instruction that a child must receive, the number of hours that a child must attend school, and the curriculum that a child must be taught while at school [*see Educ. Code §§ 48200 et seq., 48293, 48400 et seq., 51200 et seq., 51500 et seq.*]. There are alternatives, however, to traditional public school instruction that parents may seek for their children. For example, a child may be enrolled in work experience education courses [*Educ. Code §§ 49113, 51760 et seq.*], or in private school [*Educ. Code § 48222*], or may receive instruction from a private tutor [*Educ. Code § 48224*].

In addition, there are several statutory exemptions from the compulsory education attendance regulations [*see Educ. Code §§ 48200 et seq., 48410 et seq.*]. There is an available exemption if it is necessary for the minor child to work full time in order to support himself or herself [*Educ. Code § 49130*] if the child has obtained a certificate of proficiency [*Educ. Code § 48412*], or if the child has obtained a work permit [*Educ. Code § 48230*].

It is also possible for a child to be exempt from compulsory attendance on constitutional grounds. The state's regulatory power is subject to balancing process if it impinges on fundamental rights and interests, such as those protected by the *free exercise clause of the First Amendment*, and the traditional interest of parents regarding the religious upbringing of their children [*Wisconsin v. Yoder (1972) 406 U.S. 205, 214, 92 S. Ct. 1526, 32 L. Ed. 2d 15]* . Thus, a child may be exempted from the compulsory education laws if school attendance would interfere with the practice of a legitimate religious belief and the fundamental interest of parents to guide the religious future and education of their children, so long as the parental decision will not jeopardize the health or safety of the child or have a potential for significant social burdens [*Wisconsin v. Yoder (1972) 406 U.S. 205, 233-234, 92 S. Ct. 1526, 32 L. Ed. 2d 15]* .

There is now a statutory form by which a caregiver with whom a child resides may enroll the child in school and consent to school-related medical care on behalf of the child without express written authorization from a parent [*see Fam. Code §§ 6550, 6552*]. For further discussion, see *§ 394.55*.

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§ 394.52 Employment of Child

The employment of children is subject to extensive state regulation. There are restrictions not only on the number of hours and time periods in which a child may work, but also on the types of work or occupations in which children may engage [*see 8 Cal. Code Reg. § 11701 et seq.*; *Educ. Code § 49100 et seq.*; *Lab. Code §§ 1285 et seq., 1390 et seq.*]. For example, children under the age of 16 may not work in certain designated activities or occupations that are deemed dangerous to the health, safety, or morals of a minor [*see Lab. Code §§ 1294, 1294.1*]. The laws are designed to protect minors against overwork and exposure to dangerous, immoral, or unhealthful conditions *[56 Ops. Cal. Atty. Gen. 248, 249-50 (1973)]* . Although a parent may consent to the employment of a child in a prohibited occupation, the superior power of the state precludes the child's employment, despite the wishes of the parent [*Prince v. Commonwealth of Massachusetts (1944) 321 U.S. 158, 168-170, 64 S. Ct. 438, 88 L. Ed. 645]* .

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§ 394.53 Discipline of Child

A parent has the duty to rear and discipline his or her child and is permitted much discretion in exercising this parental duty [*see Emery v. Emery (1955) 45 Cal. 2d 421, 429-430, 289 P.2d 218]* . A parent in the exercise of this authority may lawfully inflict reasonable corporal punishment without being liable for battery [*People v. Whitehurst (1992) 9 Cal.App. 4th 1045, 1050, 12 Cal. Rptr. 2d 33]* and commit other acts, such as confining a child to his or her room, that would be tortious if directed toward third persons [*Gibson v. Gibson (1971) 3 Cal. 3d 914, 921, 92 Cal. Rptr. 288, 479 P.2d 648]* .

However, the parents' discretion regarding the control and discipline of a child does not include the right either willfully or negligently to inflict personal injuries on a child beyond the limits of reasonable parental discipline. A child, like any other person, has a right to freedom from such willful or negligent injuries. A parent may incur civil liability to a child for willful or malicious torts, as well as for negligent torts [*see Gibson v. Gibson (1971) 3 Cal. 3d 914, 921-923, 92 Cal. Rptr. 288, 479 P.2d 648* ; *Emery v. Emery (1955) 45 Cal. 2d 421, 429-430, 289 P.2d 218]* . Whether corporal punishment falls within the parameters of a parent's right to discipline involves considerations of both the necessity for the punishment and whether the amount of punishment was reasonable or excessive [*People v. Whitehurst (1992) 9 Cal. App. 4th 1045, 1050, 12 Cal. Rptr. 2d 33]* .

In addition, the willful infliction on a child of cruel or inhuman punishment or injury resulting in a traumtic condition is a felony [*Penal Code § 273d*]. The word "willful" within this context does not require a specific intent to violate the law or cause a traumatic condition. It merely requires a purpose or willingness to commit the act in question [*People v. Atkins (1975) 53 Cal. App. 3d 348, 358, 125 Cal. Rptr. 855]* . The jury must be instructed on the proper scope of a parent's right to discipline by corporal punishment [*People v. Whitehurst (1992) 9 Cal. App. 4th 1045, 1049-1052, 12 Cal. Rptr. 2d 33]* .

It is also a crime for a parent or any person willfully to cause or permit a child to suffer or to inflict unjustifiable physical pain or mental suffering on a child, and it is a crime for any person having the care or custody of a child willfully to cause or permit the person or health of the child to be injured or willfully to cause or permit a child to be

placed in a situation in which its person or health is endangered [*Penal Code § 273a*]. The word "willful" within this context does not require a criminal intent but merely requires conduct amounting to a reckless, gross, or culpable departure from the ordinary standard of due care for a child's well-being. It requires a departure from the conduct of an ordinarily prudent person under the same circumstances [*see People v. Peabody (1975) 46 Cal. App. 3d 43, 48-49, 119 Cal. Rptr. 780* ; *see also People v. Pointer (1984) 151 Cal. App. 3d 1128, 1134-1135, 199 Cal. Rptr. 357* ; *People v. Hernandez (1980) 111 Cal. App. 3d 888, 894-895, 168 Cal. Rptr. 898]* .

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§ 394.54 Medical Care and Treatment of Child

[1] Requirement That Parents Provide Treatment

The right of custody includes the right of parents to make decisions regarding the health of their children [*see Burge v. San Francisco (1953) 41 Cal. 2d 608, 617, 262 P.2d 6]* . This right is not unlimited, however, because parents also have a duty to see that their chld receives proper medical attendance or other remedial care. If parents fail to provide their children with adequate medical care, the state may intervene [*In re Phillip B. (1979) 92 Cal. App. 3d 796, 801, 156 Cal. Rptr. 48* ; *see Penal Code § 270* (parent who willfully fails to provide medical care for child may be guilty of misdemeanor)].

However, because the state should usually defer to the wishes of the parents, it has a serious burden of justification before abridging parental authority by substituting its judgment for that of the parents. Several relevant factors must be taken into consideration before a state insists on medical treatment rejected by the parents. The state should examine (1) the seriousness of the harm that the child is suffering or is substantially likely to suffer; (2) the evaluation for the treatment by the medical profession; (3) the risks involved in medically treating the child; and (4) the expressed preference of the child. The underlying consideration is the child's welfare and whether the child's best interests will be served by the medical treatment [*In re Phillip B. (1979) 92 Cal. App. 3d 796, 802, 156 Cal. Rptr. 48]* .

[2] Effect of Parents' Religious Beliefs

The religious beliefs of parents may prohibit the parents from seeking all or certain types of medical treatment for a child. Thus, questions may arise concerning the extent to which the parents may follow their religious beliefs without violating the duty of care owed to their children, and the propriety of state interference with those religious beliefs.

A parent is criminally liable for child neglect for the failure to provide medical attendance or "other remedial care" for his or her child [*Penal Code § 270*; *see also Welf. & Inst. Code § 300(b)* (juvenile court dependency jurisdiction on grounds of willful failure to provide medical treatment)]. Under this criminal statute, if a parent provides the child with teatment by spiritual means through prayer alone in accordance with the tenets and practices of a recognized church or

religious denomination, by a duly accredited practitioner thereof, that treatment constitutes "other remedial care" [*Penal Code § 270*; *see also Penal Code § 11165.2* (child abuse and neglect reporting); *Welf. & Inst. Code §§ 300(b), 16509.1, 18950.5* (limited recognition in juvenile court dependency proceedings of parents' right to provide spiritual treatment through prayer alone)].

However, the California Supreme Court has held that prayer treatment under *Penal Code § 270* shields parents only from misdemeanor liability for fiscal nonsupport. It does not exempt parents from prosecution under manslaughter [*see Penal Code § 192(b)*] and felony child-endangerment statutes [*see Penal Code § 273a(1)*] designed to protect children from serious injury [*Walker v. Superior Court (1988) 47 Cal. 3d 112, 126, 138,253 Cal. Rptr. 1, 763 P.2d 852* (prayer treatment of child is insufficient if risk of serious illness or physical harm is present); *see People v. Rippberger (1991) 231 Cal. App. 3d 1667, 1686-1687, 283 Cal. Rptr. 111]* .

Also, it is generally accepted that a state does have the authority to order certain medical care or treatment of a minor over the religious objections of parents. For example, a state may require the vaccination of children against disease over the objections of parents [*see Citizens for Parental Rights v. San Mateo County Bd. of Education (1975) 51 Cal. App. 3d 1, 12, 124 Cal. Rptr. 68]* .

[3] Parental Consent; Delegation

As a general proposition, parental consent is required for the provision of medical services to a child because minors may disaffirm their own contracts to acquire such services [*Ballard v. Anderson (1971) 4 Cal. 3d 873, 878, 95 Cal. Rptr. 1, 484 P.2d 1345* ; *see Aubel v. Sosso (1925) 72 Cal. App. 57, 60, 236 P. 319]* . Disaffirmance of contracts is discussed in Ch. 365, *Minors: Contract Actions* . However, the parent or guardian of a minor, as well as certain caregivers, may authorize in writing an adult into whose care a minor has been entrusted to consent to medical care or dental care, or both, for the minor [*Fam. Code § 6910*; *see Fam. Code §§ 6901, 6902* (medical and dental care defined); for discussion of authority of caregivers of a minor, see *§ 394.55*]. Either parent may delegate the right to consent if both parents have legal custody. Otherwise, only the parent with legal custody may delegate [*see Fam. Code § 6903*]. Legal custody is discussed in Ch. 223 *Dissolution of Marriage: Child Custody* .

There is now a statutory form by which a caregiver with whom a child resides may consent to medical treatment for the child without express written authorization from a parent [*see Fam. Code §§ 6550(a), 6552* (form)]. Such a caregiver, if a relative of the minor, may also authorize another adult into whose care a minor is entrusted to consent to medical or dental care [*Fam. Code § 6910*]. For further discussion, see Caregiver's Authorization of School Enrollment and Medical Care, *below.*

[4] When Parental Consent Is Not Required

An emancipated minor may consent to medical, dental, or psychiatric care without parental consent, knowledge, or liability [*Fam. Code § 7050(e)(1)*; *see also* Ch. 245, *Emancipation of Minors*]. Further, a number of statutes provide that a minor may consent to particular medical treatment, procedures, and services, and that the consent of the minor's parent is not necessary in those situations [*see Fam. Code § 6920*]. Such a consent given by a minor may not be disaffirmed because of minority [*Fam. Code § 6921*].

A minor who is at least 15 years old, living separate and apart from his or her parents, regardless of the length of separation, and managing his or her own financial affairs, regardless of the source, may consent to medical or dental care [*Fam. Code § 6922(a)*]. Theprovider may, with or without the consent of the minor, advise the parent of the treatment given or needed if the provider has reason to know the whereabouts of the parent, on the basis of information given by the minor [*Fam. Code § 6922(c)*].

A minor who is at least 12 years of age may consent to mental health treatment or counseling, except convulsive

therapy, psychosurgery, or psychotropic drugs [*Fam. Code § 6924(f)*; *see Welf. & Inst. Code § 5325(f), (g)* (convulsive therapy and psychosurgery defined)], on an outpatient basis, if (1) the minor, in the opinion of the attending professional person, is mature enough to participate intelligently in the outpatient services and (2) the minor either (a) would present a danger of serious physical or mental harm to self or others without the treatment or counseling or (b) is the alleged victim of incest or abuse [*Fam. Code § 6924(b)*].

Other situations in which a minor may consent to medical treatment include the following:

1. Medical care related to the prevention or treatment of pregnancy, except sterilization [*Fam. Code § 6925*], but including abortion [*American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 356, 66 Cal. Rptr. 2d 210, 940 P.2d 797* (upholding right on grounds of constitutional right to privacy)]. For further discussion of a minor's right to abortion, see Ch. 4, *Abortion and Birth Control Methods* .

2. Medical care related to the diagnosis or treatment of an infectious, contagious, or communicable disease, such as venereal disease, as long as the disease or condition is one that is required by law to be reported to a local health officer, or a related sexually transmitted disease, as may be determined by the state Director of Health Services [*Fam. Code § 6926* (minor must be at least 12 years of age); *see Health & Safety Code §§ 120130, 120500*].

3. Medical care related to the diagnosis or treatment and collection of medical evidence regarding an alleged rape or sexual assault [*Fam. Code §§ 6927* (rape victim must be at least 12 years of age), *6928*].

4. Medical care and counseling related to the diagnosis and treatment of a drug-related or alcohol-related problem [*Fam. Code § 6929(b)* (minor must be at least 12 years of age); *but cf. Fam. Code § 6929(g)* (requiring physician's disclosure to parent or legal guardian of medical information concerning child's treatment of drug or alcohol-related problem when parent or guardian has sought medical care and counseling for that problem)].

5. HIV (Acquired Immunity Deficiency Syndrome antibody) test [*Health & Safety Code § 121020(a)(1)* (minor must be at least 12 years of age)].

Implicit in all of these minor-consent statutes is the requirement that the minor be of sufficient maturity to give an informed consent to the treatment or procedure. A minor of any age who is unable to convince competent medical authorities that he or she has the requisite understanding and maturity to give an informed consent will be denied nonemergency treatment unless the consent of a parent is obtained [*see Ballard v. Anderson (1971) 4 Cal. 3d 873, 883, 95 Cal. Rptr. 1, 484 P.2d 1345]* .

A minor who by statute does not need parental consent to obtain medical treatment cannot dissaffirm the agreement for treatment because of minority [*see Fam. Code § 6921*], and therefore is responsible for the costs of the treatment [*see 57 Ops. Cal. Atty. Gen. 28, 29 (1974)]* . Unless the statute that expressly grants the minor the power to receive treatment without parental consent specifically excepts the parents from responsibility for payment [*see, e.g., Fam. Code §§ 6922(b), 6924(e), 6926(b), 6929(d)*], the parents are also liable for the costs incurred. Parents are required to furnish their minor children with necessities, and medical care is a necessity that comes within the parents' responsibility [*see 57 Ops. Cal. Atty. Gen. 28, 29-30 (1974)* ; *see also Bauman v. San Francisco (1940) 42 Cal. App. 2d 144, 161-163, 108 P.2d 989]* .

[5] Access to Minor's Health Care Records

The issue of who has the authority to consent to medical treatment of the minor also determines who has a right to inspect the minor's health care records [*see Health & Safety Code §§ 123110(a), 123115(a)*]. The right to inspect health

care records in the possession of the hospital, physician, or other health care provider includes a right to copies of any or all of those records [*Health & Safety Code § 123110(b)*]. A minor who has the right to consent to his or her own medical treatment is entitled to inspect his or her records pertaining only to the type of health care to which he or she is authorized to consent [*Health & Safety Code § 123110(a)*].

Notwithstanding these statutory provisions and any other provision of law, access to a child's medical and dental records may not be denied to a parent because that parent is not the child's custodial parent [*Fam. Code § 3025*]. However, *Fam. Code § 3025* does not establish an absolute right of noncustodial parental to access to such records; that is, it does not necessarily override other legal principles or privileges that may preclude parental access to such records [*see In re Daniel C.H. (1990) 220 Cal. App. 3d 814, 827, 269 Cal. Rptr. 624]* . Thus, for example, a parent may be denied access to the records and testimony of a child's psychotherapist, based on the psychotherapist-patient privilege [*see generally Evid. Code § 1010 et seq.*] if disclosure will harm the therapeutic relationship or have a detrimental effect on the child [*In re Daniel C.H. (1990) 220 Cal. App. 3d 814, 827-828, 269 Cal. Rptr. 624* ; *see Health & Safety Code § 123115(a)(2)*].

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§ 394.55 Caregiver's Authorization of School Enrollment and Medical Care

[1] Affidavit

Fam. Code §§ 6550 and *6552* provide for a "caregiver's authorization affidavit," which if validly executed by the caregiver as required by statute, authorizes a caregiver who is 18 years of age or older to enroll a child in school and consent to school-related medical care [*see Fam. Code § 6550(h)(3)* ("school-related medical care" defined)] on behalf of the minor [*see Fam. Code §§ 6550(a), 6552* (form)]. If the caregiver is also a qualified relative (as defined) [*see Fam. Code § 6550(h)(2)*], proper execution gives the caregiver the same rights to authorize medical and dental care for the child that are given to a legally appointed guardian of the person of a minor [*Fam. Code § 6550(a)*; *see Prob. Code § 2353* (guardian's right to authorize medical treatment for ward)]. This includes authorization for mental health treatment, subject to certain Probate Code limitations [*Fam. Code § 6550(a)*; *see Prob. Code § 2356*].

A caregiver's authorization affidavit is invalid unless it substantially contains, in not less than 10-point boldface type or a reasonable equivalent and enclosed in a box with 3-point rule lines, a warning to the effect that if any of the statements in the affidavit are incorrect, the affiant will be committing a crime punishable by a fine, imprisonment, or both [*Fam. Code § 6550(g)*; *see Fam. Code § 6552*].

Unfortunately, "caregiver" is not a term that is expressly defined in the statutes [*see Fam. Code § 6550(h)* (definitions)]. However, it is clear from the statutes and from the statutory text of the affidavit that the child must live with the caregiver [*see Fam. Code §§ 6550(f), 6552* (introductory statement that "minor named below lives in my home")]. However, if the child stops living with the caregiver, the caregiver must notify any school, health care provider, or health care service plan that has been given the affidavit [*Fam. Code § 6550(f)*].

No parental signature is required [*see Fam. Code §§ 6550, 6552*]. However, the text of the affidavit requires the caregiver to state either or both of the following: (1) that he or she has advised the parent or parents or other person having legal custody of the child of the caregiver'sintent to authorize medical care, and has received no objection; or (2) that he or she is unable to contact the parent or parents or other person having legal custody of the child to give notice of

the intended authorization. Both statements may be necessary if notice has been given to one parent and the other cannot be contacted [*see Fam. Code § 6552* (line 6)]. The decision of a caregiver to consent to or to refuse medical or dental care for a child is superseded by any contravening decision of the parent or other person having legal custody of the child, provided the decision of that parent or person does not jeopardize the life, health, or safety of the child [*Fam. Code § 6550(b)*].

Note that commencing January 1, 1997, a caregiver who is a child's relative and who meets the requirements of *Fam. Code § 6550* for authorizing medical and dental care, may give written authorization to another adult into whose care the child is entrusted to consent to medical or dental care for the child [*Fam. Code § 6910*; *see § 394.54[3]*, for discussion of delegating consent for medical care]. For related forms of authorizations by caregivers, *see California Legal Forms, Ch. 100A, Form Nos. 100A.20 100A.21* (Matthew Bender).

[2] Third-Party Liability

No person [*see Fam. Code § 6550(h)(1)* ("person" defined)] who acts in good faith reliance on a caregiver's authorization affidavit to provide medical or dental care, without actual knowledge of facts contrary to those stated on the affidavit, is subject to criminal liability or to civil liability to any person, or is subject to professional disciplinary action, for the reliance if the applicable portions of the affidavit are completed. This immunity applies even if medical or dental care is provided to a child against the wishes of the parent or other person having legal custody of the child as long as the person providing the medical or dental care has no actual knowledge of the wishes of that parent or person [*Fam. Code § 6550(c)*]. A person who relies on the affidavit has no obligation to make any further inquiry or investigation [*Fam. Code § 6550(d)*]. However, nothing in *Fam. Code § 6550* relieves an individual from liability for violations of other provisions of law [*Fam. Code § 6550(e)*].

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§ 394.56 Child Abduction

Penal Code § 277 et seq. provide criminal sanctions for persons, including parents, who take, conceal, entice away, detain, keep, or otherwise wrongfully withhold access to a child by the rightful custodian [*see Penal Code §§ 278-280*]. Thus, one parent may not necessarily unilaterally take his or her child from the other parent based on a right to custody arising solely from parental status rather than from a court order; *see People v. Ryan (1999) 76 Cal. App. 4th 1304, 1316-1317, 91 Cal. Rptr. 2d 160* (father lost his right to custody of child through abandonment, followed by unlawful detention and concealment in violation of former *Penal Code § 278*).

Parental acts done with the intent to endanger or injure the child are in excess of parental authority and are not entitled to immunity from prosecution. A parent who confines his or her child with the intent to endanger the child's health and safety or for an unlawful purpose may be prosecuted for false imprisonment *People v. Checketts (1999) 71 Cal. App. 4th 1190, 1195, 84 Cal. Rptr. 2d 491]* . For further discussion of these criminal abduction statutes, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, Ch. 142 (Matthew Bender 2d ed.).

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[Reserved]

§§ 394.57[Reserved]

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§ 394.70 Proceeding for Dissolution of Marriage, Nullity of Marriage, or Legal Separation

In a proceeding for dissolution of marriage, nullity of marriage, or for legal separation of the parties, the court has subject matter jurisdiction to inquire into, and render any judgment, and make orders that are appropriate concerning the custody of minor children of the marriage [*Fam. Code § 2010(b)*; *see also Fam. Code § 3022*]. Custody jurisdiction other matters within a such a proceeding are discussed in Ch. 223 *Dissolution of Marriage: Child Custody* .

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§ 394.71 Other Marital Custody Proceedings

Without filing a proceeding for dissolution of marrage or legal separation, a husband or wife may bring an action for the exclusive custody of the children of the marriage. The court may, during the pendency of the action or at the final hearing or afterwards, make any orders regarding the support, care, custody, education, and control of the children as may be just and in accordance with the natural rights the parents and the best interests of the children. The order may be modified or terminated at any time thereafter as the natural rights of the parties and the best interests of the children may require [*Fam. Code § 3120*]. The court may order one party to the action to pay the other party's attorney's fees and costs [*see Fam. Code § 3121*]. For a form for use to bring such an action, see *§ 394.170*.

A married person may also obtain temporary custody and visitation orders under the Domestic Violence Prevention Act [*see Fam. Code §§ 6252(b), 6323, 6340(a)*]. For further discussion, see *§ 394.72[5]*, and Ch. 293, *Harassment and Domestic Violence* .

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§ 394.72 Nonmarital Custody Proceedings

[1] Need for Nonmarital Custody Orders

An unmarried parent with the actual physical custody of his or her child might need judicial approval of the actual custody arrangement. A custody order might be essential if the other parent claims the right of custody [*see Fam. Code § 3010(a)*] and is threatening to unilaterally take the child [*see Penal Code § 277*]. Conversely, a biological unmarried noncustodial parent might need to obtain formal custody or visitation rights.

For these situations, there is no general statutory nonmarital custody proceeding by which a parent may obtain custody or visitation orders withregard to his or her own children regardless of marital status. Further, in the context of considering the rights of nonparents, it has been held that jurisdiction to adjudicate custody depends on some other proceeding that is properly before the court in which custody is at issue [*Curiale v. Reagan (1990) 222 Cal. App. 3d 1597, 1600, 272 Cal. Rptr. 520]* .

Nevertheless, the right of a parent to the custody of his or her child is fundamental and constitutionally protected, regardless of marital status [*Stanley v. Illinois (1972) 405 U.S. 645, 657-659, 92 S. Ct. 1208, 31 L. Ed. 2d 551* ; *see § 394.11*]. Thus, it would seem that state law must provide a forum for the determination of child custody matters between parents, regardless of marital status.

The two common procedures that have been used for this purpose have been the Uniform Parentage Act [*Fam. Code § 7600 et seq.*] and writ of habeas corpus [*Penal Code § 1473 et seq.*]. It is also possible that a parent may petition the court to exercise its equitable jurisdiction to determine the custody of a child (*see* [4], *below*).

[2] Uniform Parentage Act

Custody and visitation orders may be obtained in a proceeding under the Uniform Parentage Act, *Fam. Code § 7600 et seq.* (UPA) [*see Fam. Code §§ 7604* (pendente lite custody and visitation orders), *7637* (judgment in UPA action may include custody and visitation orders)]. Therefore, an unmarried mother may bring a parentage action for the purpose of

obtaining custody and visitation orders [*see Fam. Code § 7630(a)*]. A man may also bring a paternity action under the UPA for the purpose of establishing his own paternity, which would then also produce custody and visitation orders [*see Fam. Code §§ 7630, 7631*]. Paternity actions are considered, and forms are provided, in Ch. 412, *Paternity* .

Historically, there has been no bar to bringing a paternity action even if there was no actual dispute as to who was the father of the child. The parties simply stipulated to a judgment of paternity and proceeded with the contested issues, such as custody and visitation [*see Adoption of Pierce (1970) 5 Cal. App. 3d 316, 318, 85 Cal. Rptr. 104]* . Once paternity has been adjudicated, the court has continuing jurisdiction under the UPA to issue and modify custody and visitation orders [*Fam. Code § 7642*]. Thus, the UPA has filled the need for a generally available nonmarital custody proceeding.

The enactment of provisions for paternity establishment by execution of a voluntary declaration of paternity created some uncertainty concerning the court's jurisdiction under the UPA to issue custody and visitation orders on the basis of that declaration [*see Fam. Code § 7570 et seq.*]. However, statutes now clarify that, with limited exception, a completed voluntary paternity declaration that has been filed with the Department of Social Services establishes the paternity of a child, has the same force and effect as a paternity judgment, and "shall be recognized as a basis for the establishment of an order for child custody, visitation, or child support" [*Fam. Code §§ 7573, 7644*]. Nevertheless, to obtain such orders on the basis of the declaration, it appears that a court proceeding must be initiated.

The Judicial Council has approved a petition for child custody, visitation, and child support (without seeking a parentage judgment) that may be used in any of the following situations [*see* Cal. Judicial Council Form FL-260; *§ 394.170*]:

a. The parents are married to each other and no action is pending in any court for dissolution, legal separation, or nullity.

b. The parents have signed a Voluntary Declaration of Paternity and no action regarding the children has been filed in any other court. For a complete discussion of voluntary declarations of paternity, see Ch. 412, *Paternity* .

c. The parents are not married and have legally adopted a child together.

d. The petitioner and respondent in the proceeding have been determined to be the parents in juvenile or governmental child support case.

[3] Habeas Corpus

A person who is entitled to the physical custody of a child may enforce his or her right as against one wrongfully withholding the child by petition for writ of habeas corpus [*In re M. (1975) 14 Cal. 3d 783, 789, 122 Cal. Rptr. 531, 537 P.2d 363* ; *see Penal Code § 1473 et seq.*]. Habeas corpus proceedings are commonly used as a way of enforcing an existing custody order [*see, e.g., Rose v. Superior Court (1948) 86 Cal. App. 2d 173, 174, 194 P.2d 568]* .

However, the proceeding may also be used by an unmarried parent to obtain custody and visitation orders with regard to a child who is not subject to an existing order, but is in the actual physical custody and control of someone else, including the other parent [*see, e.g., In re M. (1975) 14 Cal. 3d 783, 786-787, 122 Cal. Rptr. 531, 537 P.2d 363* (child retained by other parent after visitation)]. It would seem that habeas corpus is not available to a parent with the actual physical custody of the child as a way to formalize a de facto custody arrangement.

Other persons with a claim to the custody of the child may join as parties [*In re Reyna (1976) 55 Cal. App. 3d 288, 304-305, 126 Cal. Rptr. 138]* . Federal habeas corpus is not available as a remedy in child custody matters [*Lehman*

v. Lycoming County Children's Services (1982) 458 U.S. 502, 513-516, 102 S. Ct. 3231, 73 L. Ed. 2d 928] . Habeas Corpus is discussed further, and forms are provided, in Ch. 292, *Habeas Corpus*.

[4] Equitable Action

There is a line of older cases that stand for the proposition that California courts have inherent equitable power to determine the custody of children residing in the state without express statutory authority [*see Titcomb v. Superior Court (1934) 220 Cal. 34, 40, 29 P.2d 206* ; *Stout v. Pate (1953) 120 Cal. App. 2d 699, 702-704, 261 P.2d 788* ; *Foy v. Foy (1937) 23 Cal. App. 2d 543, 546, 73 P.2d 618]* . These cases all arose in the context ofinterstate custody disputes, and their express jurisdictional holdings are no longer controlling because of the Uniform Child Custody Jurisdiction Act, and its successor, the Uniform Child Custody Jurisdiction and Enforcement Act [*see Plas v. Superior Court (1984) 155 Cal. App. 3d 1008, 1013, 202 Cal. Rptr. 490* (decided under former UCCJA); *see Fam. Code § 3400 et seq.*; *see also § 394.100* et seq.].

However, the California Supreme Court has noted that California has at least eight separate proceedings in which custody questions can be litigated, one of which is this general equitable action [*see In re B.G. (1974) 11 Cal. 3d 679, 696, 114 Cal. Rptr. 444, 523 P.2d 244* , citing Bodenheimer, *The Multiplicity of Child Custody Proceedings--Problems of California Law, 23 Stan. L. Rev. 703, 704-705 (1971)*]. Subsequent courts continue to adhere to this proposition [*see, e.g., Guardianship of Donaldson (1986) 178 Cal. App. 3d 477, 488, 223 Cal. Rptr. 707* ; *In re Marriage of Jenkins (1981) 116 Cal. App. 3d 767, 775, 172 Cal. Rptr. 331]* .

Although it appears to have rarely been done, a parent should be able to bring an equitable action for custody of or visitation with his or her own children, regardless of marital status, if there is no other appropriate forum. In addition, the Judicial Council has approved a petition for custody and support for use by unmarried parents that appears to have been based, at least in part, on this equitable principle, but requires that the parties have executed a voluntary declaration of paternity before bringing the petition--so that parentage *is not* in issue [*see § 394.170*; *Fam. Code § 7573*]. Voluntary declarations of paternity are discussed in detail in Ch. 412, *Paternity* .

[5] Domestic Violence Prevention Act

Under the Domestic Violence Prevention Act (DVPA), an emergency protective order may be obtained that includes, among other orders, an order for *temporary care and control* of "any minor child of the endangered person and the person against whom the order is sought," and there is no indication that these individuals must be in a marital relationship for this purpose [*Fam. Code § 6252(b)*].

However, it is somewhat unclear whether *nonemergency* custody orders can presently be obtained by unmarried parents using the DVPA alone. Prior law permitted a court in a DVPA proceeding to issue a temporary custody order to unmarried parents. A statute authorized the court to issue such an order after notice and a hearing with respect to a "minor child of the *petitioner and the respondent* " [former *Code Civ. Proc. § 547(a)*]. When the Family Code was adopted and incorporated the DVPA, however, it did not retain this language (italicized). Instead, *Fam. Code § 6323(a)(1)* provides that, subject to *Fam. Code § 3064* (limitations on ex parte custody orders) a court may issue an ex parte order determining the temporary custody of a minor child on the conditions the court determines to a party who has established a parent and child relationship under *Fam. Code § 6323(a)(2)*. There is no indication that the Legislature, in adopting the revised language, intended to preclude unmarried parents from using the DVPA to secure temporary custody orders, particularly when the Law Revision Commission comments indicate that the statute restates existing law without substantive change [L. Rev. Comm'n Comments to *Fam. Code § 6323*]. Nevertheless, a 1996 case in which an unmarried, nonparent was precluded from obtaining visitation of a child under the DVPA included language suggesting that unmarried parties--parents or not--may not use the DVPA to obtain either *custody or visitation* orders. Although the appellate court in that case was construing the visitation provisions of a prior version of *Fam. Code § 6323(a)*, it included the statement: "[t]he only proceedings to determine custody or visitation under the DVPA

are those allowed by [*Fam. Code §§] 6323* and *6340*, and we have already decided that those proceedings are limited to situations where the parties are married" [*Barkaloff v. Woodward (1996) 47 Cal. App. 4th 393, 399, 55 Cal. Rptr. 2d 167]* . It would appear, nevertheless, that the more correct focus is, and has been, on the status of the party seeking the custody order as a *parent*, rather than on the marital status of the parties [*see Fam. Code § 6323(a)*; *but see Fam. Code § 6346* (permitting party who has filed UPA action to seek custody or visitation order under UPA after notice and hearing under *Fam. Code § 6346*)].

In addition, even if unmarried parents are still technically permitted to seek nonemergency custody orders under the DVPA, the DVPA's focus on granting "temporary" custody orders--such as those incidental to other protective orders--does not make it a preferred vehicle for seeking longer term custody orders. Therefore, an unmarried parent who is the victim of domestic violence must initiate a different proceeding to obtain permanent custody and visitation orders.

For discussion of limitations on the court's jurisdiction in DVPA proceedings involving nonparents, see *§ 394.73[2][c], below*.

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§ 394.73 Nonparents and Custody Proceedings

[1] No General Jurisdiction

There is no general statutory procedure by which a nonparent can obtain parental rights, such as custody and visitation, with regard to a child. Recent efforts to judicially extend parental rights to nonparents, through such doctrines as *in loco parentis*, de facto parenthood, equitable estoppel, and functional parenthood, discussed in *§ 394.15*, have been rejected in deference to the Legislature [*see Nancy S. v. Michele G. (1991) 228 Cal. App. 3d 831, 835-842, 279 Cal. Rptr. 212* ; *Curiale v. Reagan (1990) 222 Cal. App. 3d 1597, 1599-1601, 272 Cal. Rptr. 520* ; *In re Marriage of Lewis & Goetz (1988) 203 Cal. App. 3d 514, 519-520, 250 Cal. Rptr. 30]* . Thus, if there is a general equitable action for custody, as discussed in*§ 394.72[4]*, it is unlikely that nonparents would have standing to bring the action. Nevertheless, there are proceedings that may be initiated by a nonparent to obtain the custody of a child, as discussed in [2], *below*.

[2] Proceedings That May Be Initiated by Nonparents

[a] Guardianship

The most common proceeding by which nonparents obtain custody of a child is probably the probate guardianship [*see Prob. Code § 1500 et seq.*; *but cf. Guardianship of Olivia J. (2000) 84 Cal. App. 4th 1146, 1161, 101 Cal. Rptr. 2d 364* (because of strong preference for parental custody and heavy burden nonparent must carry of demonstrating that parental custody is detrimental to child, petition for guardianship is intrusive and limited remedy that may not be easily adapted to achieving goal of protecting child from psychological harm and maintaining petitioner's relationship with child)]. A nonparent who seeks custody of a child lacks standing to initiate a custody proceeding under the Family Code. A guardianship petition under the Probate Code is the only judicial means for a nonparent to obtain custody when the parents have not initiated a custody proceeding [*Scott v. Superior Court (2009) 171 Cal. App. 4th 540, 546, 89 Cal. Rptr. 3d 843]* .

A petition for appointment of a guardian may be filed by a relative or other person on behalf of the child [*Prob. Code § 1510*]. A guardianship is commonly used to provide for the custody and care of a child if neither parent is able or

willing to have custody, such as if both parents are deceased, or have left the child in the care and custody of a nonparent, for whatever reason. Whether a guardianship petition may be used by a nonparent solely to obtain visitation, rather than custody, is unclear [*see Guardianship of Olivia J. (2000) 84 Cal. App. 4th 1146, 1161, 101 Cal. Rptr. 2d 364* (court expressly did not reach issue of whether, when, and in accordance with what legal standard, guardianship petition may be used as forum for nonparent to obtain visitation rights over objection of parent)].

For discussion of guardianship of minors, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , through Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships* .

[b] Juvenile Court Dependency

A nonparent who seeks the involuntary removal of a child from parental custody because of alleged parental misconduct should proceed by requesting the county to file a petition to bring the child within the dependency jurisdiction of the juvenile court under *Welf. & Inst. Code § 300 et seq.* A guardianship is inappropriate to adjudicate parental unfitness because it does not provide for parental reunification services, to which most parents are entitled under juvenile dependency jurisdiction [*see Welf. & Inst. Code § 361.5*; *see also Prob. Code § 1513(c)*]. If the child is removed from parental custody, there is a statutory preference for out-of-home placement with a relative [*Welf. & Inst. Code § 361.3*]. For further discussion of juvenile court dependency law, see Ch. 329, *Juvenile Courts: Dependency Proceedings* .

[c] Domestic Violence Prevention Act Proceeding

A nonparent may be a party to a proceeding under the Domestic Violence Prevention Act (DVPA) [*see, e.g., Polin v. Cosio (1993) 16 Cal. App. 4th 1451, 20 Cal. Rptr. 2d 714* ; *see also Fam. Code §§ 6211* (defining "domestic violence" in terms that could include nonparents both as perpetrators and victims), 6301]. However, a party who has not established a parent and child relationship under *Fam. Code § 6323(a)(2)* may not be granted custody or visitation rights in a proceeding under the DVPA [*Fam. Code § 3021(e)*; *see Barkaloff v. Woodward (1996) 47 Cal. App. 4th 393, 399, 55 Cal. Rptr. 2d 167]* . Nevertheless, a court may make appropriate custody and visitation orders under the Uniform Parentage Act (UPA) [*Fam. Code § 7600 et seq.*] after notice and a hearing, when the party who has requested custody or visitation has not established a parent and child relationship but has taken steps to establish that relationship by filing an action under the UPA [*Fam. Code § 6346*; *see* Ch. 412, *Paternity*].

[d] Termination of Parental Rights and Adoption

A nonparent may file a petition to declare a child free from parental custody and control (terminate parental rights) under *Fam. Code § 7800 et seq.* [*see Fam. Code § 7841* (petition may be filed by "any interested person")]. The most likely ground for such a proceeding is parental abandonment for six months [*see Fam. Code § 7822*; *In re Robert D. (1984) 151 Cal. App. 3d 391, 393-394, 198 Cal. Rptr. 801]* . Although the primary purpose of this proceeding is to free the child for adoption [*see Fam. Code § 7800*], there is no absolute requirement that the petition be brought in support of a pending adoption [*see In re Marcel N. (1991) 235 Cal. App. 3d 1007, 1011-1013, 1 Cal. Rptr. 2d 240]* . If parental rights are terminated, the court must either appoint a guardian for the child or refer the child for adoptive placement [*Fam. Code § 7893*]. For further discussion of termination of parental rights, see Ch. 12A, *Adoptions: Termination of Parental Rights* .

Adoption itself is a way for nonparents to obtain custody of a child [*see Fam. Code § 8616*]. However, the court has no statutory power to deny the adoption, yet order the child to remain in the custody of the prospective adoptive parents. If the adoption is denied because parental consent is required and not given, the child must be returned to the birth parent unless that would be detrimental to the child [*Fam. Code § 8804 (c)*; *see Fam Code § 3041*; *but see Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 851, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* (suggesting but not deciding that even if parent is entitled to prevent adoption by withholding consent, court may determine custody of child)]. For further discussion, see Ch. 12B, *Adoptions: Unmarried Minors* .

If adoption is denied because the court finds the prospective adoptive home to be unsuitable, the care and custody of the child is given to a publicagency [*Fam. Code § 8805*]. If the petitioners withdraw the petition or dismiss the proceeding, or a public agency recommends that the petition be denied, the agency must recommend a suitable plan for the child and appear in court on behalf of the child [Fam. Code § 8004(a)].

[e] Uniform Parentage Act Proceeding

Nonparents have some standing to bring an action under the Uniform Parentage Act [*see Fam. Code § 7630(b), (c)*]. However, these situations are limited to determinations of the existence of a father-child relationship. A nonparent generally has no standing under the UPA to obtain custody orders in his or her own behalf [*Curiale v. Reagan (1990) 222 Cal. App. 3d 1597, 1599-1600, 272 Cal. Rptr. 520* ; *accord West v. Superior Court (1997) 59 Cal. App. 4th 302, 306, 69 Cal. Rptr. 2d 160]* . Nevertheless, after a party has taken steps to establish a parent-child relationship by filing an action under the Uniform Parentage Act, a court may make appropriate custody and visitation orders pursuant to the UPA after notice and a hearing under *Fam. Code § 6346* (a provision of the DVPA), despite the fact that the party requesting custody or visitation has not established a parent-child relationship under *Fam. Code § 6323(a)(2)* [*Fam. Code § 6346*].

[f] Action for Abuse of Parental Authority

There is in the Family Code a civil action for abuse of parental authority, which may be brought by the child, by the child's relative within the third degree, or the supervisors of the county in which the child resides. If the abuse is established, the child may be freed from the parent's dominion and the duty of support and education may be enforced [*Fam. Code § 7507*]. This action is seldom, if ever, brought because parental abuse is addressed under juvenile court dependency jurisdiction [*see Welf. & Inst. Code § 300 et seq.*].

[3] Custody Awards to Nonparents in Proceedings Initiated by Others

Fam. Code § 3040 provides for a parental preference in awarding custody, but also allows the court to grant custody to a nonparent [*see Fam. Code § 3040(a)(2),(3)*]. *Fam. Code § 3041* allows custody to be granted to a nonparent on a finding that parental custody would be detrimental to the child.

These statutes are within Part 2 of Division 8 of the Family Code. This Part applies to the following proceedings [*Fam. Code § 3021*]:

(1) Dissolution of marriage, nullity of marriage, or legal separation (*see* Ch. 223, *Dissolution of Marriage: Child Custody*);

(2) For exclusive custody under *Fam. Code § 3120* (*see § 394.71*);

(3) Under the Domestic Violence Prevention Act [*Fam. Code § 6200 et seq.*]; and

(4) Under the Uniform Parentage Act [*Fam. Code § 7600 et seq.*].

As noted in [2], *above*, nonparents have no or limited standing to bring any of these proceedings. However, if any of these proceedings is properly before the court, having been initiated by a proper party, a nonparent who has or claims custody of the child may apply to be joined as a party [*Cal. Rules of Ct., Rule 5.154(b)*]. Custody may then be granted to the nonparent on a finding of detriment under *Fam. Code § 3041* and according to the order of preference in *Fam. Code § 3040* [*see H.S. v. N.S. (2009) 173 Cal. App. 4th 1131, 1137-1143, 93 Cal. Rptr. 3d 470* ; *see also Stever v. Stever (1936) 6 Cal. 2d 166, 168-170, 56 P.2d 1229]* . Grants of custody or visitation to a nonparent under the DVPA,

however, seem unlikely, in view of *Fam. Code § 3021(e)*, which precludes nonparents from seeking such orders in DVPA proceedings (*see* [2][c], *above*).

For further discussion of the parental preference doctrine, see Ch. 223 *Dissolution of Marriage: Child Custody* . For discussion of visitation rights of nonparents, see *§ 394.73[2]*.

It should be noted that in a proceeding for dissolution of marriage, nullity of marriage, or legal separation, and in a marital action for exclusive custody, jurisdiction is limited to "children of the marriage" [*Fam. Code §§ 2010(b), 3120*], that is, children for whom each party is a natural or adopted parent. Thus, in such an action, the court might award custody of a child of parties H and W to nonparent G on a finding that parental custody would be detrimental to the child, but would have no jurisdiction to grant custody of the child of W alone to anyone, including to H [*see Perry v. Superior Court (1980) 108 Cal. App. 3d 480, 484-485, 166 Cal. Rptr. 583]* .

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§ 394.74 Jurisdiction to Grant Visitation Rights

[1] Rights of Parents

In making an order for custody, the court must grant reasonable visitation rights to a parent unless it is shown that such visitation would be detrimental to the best interests of the child [*Fam. Code § 3100(a)*].

This statute is made expressly applicable in the Family Code to the following proceedings [*Fam. Code § 3021*]: (1) for dissolution of marriage, nullity of marriage, and legal separation; (2) in a marital action for exclusive custody [*Fam. Code § 3120*]; (3) in a proceeding under the Uniform Parentage Act [*see Fam. Code § 7637*]; (4) in a proceeding under the Domestic Violence Prevention Act; and (5) a proceeding to determine custody or visitation in an action brought by the district attorney or other local childsupport agency pursuant to *Fam. Code § 17404* [*see Fam. Code §§ 6323, 6340(a)*; *but see Fam. Code §§ 3021(e), 6323* (generally precluding grant of visitation rights to party who has not established parent-child relationship under *Fam. Code § 6323(a)(2)*); *Barkaloff v. Woodward (1996) 47 Cal. App. 4th 393, 398-399, 55 Cal. Rptr. 2d 167* (holding that visitation order under DVPA is authorized only when parties are in marital relationship)]. However, visitation is undoubtedly within the constitutionally protected fundamental right of parentage. This right does not depend on marital status and may not be abridged by statute absent a powerful countervailing state interest [*see Stanley v. Illinois (1972) 405 U.S. 645, 649-659, 92 S. Ct. 1208, 31 L. Ed. 2d 551* ; *see also Clarke v. Clarke (1950) 35 Cal. 2d 259, 262, 217 P.2d 401* ; *Feist v. Feist (1965) 236 Cal. App. 2d 433, 436, 46 Cal. Rptr. 93* (visitation rights are natural right of parenthood)]. Thus, it would seem that visitation may not be denied to a noncustodial parent (absent the requisite showing), regardless of the procedural stance in which the matter comes before the court [*see Gadbois v. Superior Court (1981) 126 Cal. App. 3d 653, 655-656, 179 Cal. Rptr. 19]* . In fact, there may be a parental right to invoke the court's equitable jurisdiction to grant visitation even if there is no other custody or child-related proceeding before the court [*see § 394.72[4]*].

The standards for determining the appropriateness and scope of visitation are discussed in Ch. 223, *Dissolution of Marriage: Child Custody* .

[2] Rights of Nonparents

[a] Generally

Fam. Code § 3100(a) provides that, in the discretion of the court, reasonable visitation rights may be granted to any other person who has an interest in the welfare of the child. *Fam. Code § 3104* provides special jurisdiction for a grandparent to petition for visitation, even if there is no other proceeding pending in which child custody and visitation is at issue, and *Fam. Code § 3103* amplifies further on the standards applicable to grandparent visitation, as discussed in [b], *below*. *Fam. Code § 3102* provides for visitation to specified relatives of a deceased parent, as discussed in [c], *below*. *Fam. Code § 3101* expressly provides jurisdiction to grant visitation rights (but not joint custody [*In re Marriage of Lewis & Goetz (1988) 203 Cal. App. 3d 514, 517-518, 250 Cal. Rptr. 30]*) to a stepparent despite the fact that the court otherwise has no jurisdiction in marital proceedings over a child who is not a "child of the marriage" [*see Fam. Code §§ 2010(b), 3120*; *Perry v. Superior Court (1980) 108 Cal. App. 3d 480, 483-485, 166 Cal. Rptr. 583]* .

Fam. Code § 3100(a) does not provide general authority, jurisdiction, or standing for a nonparent to bring an independent action for visitation with a child [*see White v. Jacobs (1988) 198 Cal. App. 3d 122, 124, 243 Cal.Rptr. 597* ; *In re Marriage of Lewis & Goetz (1988) 203 Cal. App. 3d 514, 518, 250 Cal. Rptr. 30* (stepparent); *Curiale v. Reagan (1990) 222 Cal. App. 3d 1597, 1600, 272 Cal. Rptr. 520* (parent's lesbian partner); *accord West v. Superior Court (1997) 59 Cal. App. 4th 302, 306, 69 Cal. Rptr. 2d 160* (former lesbian partner of child's biological mother)]. There must be some separate proceeding before the court in which custody is at issue and to which *Fam. Code § 3100(a)* applies [*see Curiale v. Reagan (1990) 222 Cal. App. 3d 1597, 1600, 272 Cal. Rptr. 520]* .

Fam. Code § 3100(a) applies in the Family Code Proceedings enumerated in *Fam. Code § 3021*, set forth in [1], *above*, except that a party who has not established a parent and child relationship under *Fam. Code § 6323(a)(2)* may not be granted visitation (or custody) rights in a proceeding under the DVPA [*Fam. Code § 3021(e)*; *Fam. Code § 6323(a)*; *but see Fam. Code § 6346* (permitting party who has filed UPA action to seek custody or visitation order under UPA after notice and hearing under *Fam. Code § 6346*)]. For other proceedings, such as guardianship [*Prob. Code § 1500 et seq.*], termination of parental rights-adoption [*Fam. Code § 7800 et seq.*], habeas corpus [*see In re Reyna (1976) 55 Cal. App. 3d 288, 297, 126 Cal. Rptr. 138]* , and juvenile court dependency [*Welf. & Inst. Code § 300 et seq.*], it may be that any right to visitation must be found in the specific law applicable to those proceedings [*but see White v. Jacobs (1988) 198 Cal. App. 3d 122, 124, 243 Cal. Rptr. 597* (noting that predecessor statute, former *Civ. Code § 4601*, applied in any proceeding in which child custody was at issue); *see also Reeves v. Bailey (1975) 53 Cal. App. 3d 1019, 1024-1026, 126 Cal. Rptr. 51* (visitation rights to grandparents in adoption proceeding under authority of former *Civ. Code § 4601*)].

Except for DVPA proceedings, nonparental visitation may be granted under *Fam. Code § 3100(a)* in any of the enumerated proceedings whether or not there is an actual custody dispute between the parents [*see In re Marriage of Gayden (1991) 229 Cal. App. 3d 1510, 1516 n.2, 280 Cal. Rptr. 862* ; *Fam. Code § 3021(e)*]. A nonparent may move to be joined as a party to the proceeding as a way of petitioning for visitation rights [*Fam. Code § 2021*; *Cal. Rules of Ct., Rule 5.154(b)*], apparently even after judgment has been entered [*see In re Marriage of Gayden (1991) 229 Cal. App. 3d 1510, 1513, 280 Cal. Rptr. 862]* . However, one court has found that the death of a party to a dissolution proceeding after judgment terminates any right of a nonparent to invoke the court's modification jurisdiction to obtain visitation [*see In re Marriage of Jenkins (1981) 116 Cal. App. 3d 767, 769, 172 Cal. Rptr. 331* ; *but see Fam. Code § 3102*, discussed in [c], *below*].

[b] Rights of Grandparents

Under *Fam. Code § 3103*, grandparents may be granted reasonable visitation with a minor child of a party to any of the proceedings enumerated in *Fam. Code § 3021* (*see* [1], *above*) if the court determines that visitation by the grandparent is in the best interest of the child.

In addition, *Fam. Code § 3104* provides special jurisdiction for the court to grant visitation to a grandparent if there is

no other proceeding pending regarding the child. A petition for visitation under this section may not be filed while the natural or adoptive parents are married, unless one or more of the following circumstances exist [*Fam. Code § 3104(b)*; *see In re Marriage of Harris (2004) 34 Cal. 4th 210, 223-230, 17 Cal. Rptr. 3d 842, 96 P.3d 141* (*Fam. Code § 3104* does not violate federal or California Constitutions, either on its face or as applied)]:

(1) The parents are currently living separately and apart on a permanent or indefinite basis.

(2) One of the parents has been absent for more than one month without the other spouse knowing the whereabouts of the absent spouse.

(3) One of the parents joins in the petition with the grandparents.

(4) The child is not residing with either parent.

(5) The child has been adopted by a stepparent.

At any time that a change of circumstances occurs such that none of these circumstances exist, a parent may move the court to terminate grandparental visitation and the court must grant the termination [*Fam. Code § 3104(b)*; *see Lopez v. Martinez, (2000) 85 Cal. App. 4th 279, 285-286, 102 Cal. Rptr. 2d 71* (stepparent adoption was "change of circumstances" under *Fam. Code § 3104* that required automatic termination of grandparent visitation at request of child's natural and adoptive parents)].

When there is no allegation or finding that the parent is unfit, and the parent agrees to some visitation, a court order establishing a grandparent visitation schedule over the parent's objection infringes on the parent's fundamental parenting right to make decisions about the care, custody, and control of his or her children [*see Kyle O. v. Donald R. (2000) 85 Cal. App. 4th 848, 862-863, 102 Cal. Rptr. 2d 476* ; *Punsly v. Ho (2001) 87 Cal. App. 4th 1099, 1105, 105 Cal. Rptr. 2d 139* (citing *Troxel v. Granville (2000) 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49*) *but see Fenn v. Sherriff (2003) 109 Cal. App. 4th 1466, 1470, 1473-1494, 1 Cal. Rptr. 3d 185* (parents' fundamental due process right to make decisions concerning care, custody, and control of children does not preclude state from ever ordering grandparent visitation over objection of two fit parents)]. There is a presumption that a fit parent acts in the best interest of his or her children [*In re Marriage of Harris (2004) 34 Cal. 4th 210, 230, 17 Cal. Rptr. 3d 842, 96 P.3d 141]* , and deference should be given to the parent's decision regarding the amount of visitation or even preference for a "less structured and more normal and spontaneous manner of visitation" [*Kyle O. v. Donald R. (2000) 85 Cal. App. 4th 848, 863, 102 Cal. Rptr. 2d 476]* .

For a form of petition for use for this purpose, see *§ 394.173*. For further discussion of grandparent visitation within a proceeding for dissolution of marriage, see Ch. 223, *Dissolution of Marriage: Child Custody* .

[c] Rights of Relatives of Deceased Parent

If a parent of an unemancipated minor child is deceased, the children, siblings, parents, and grandparents of the deceased parent may be granted reasonable visitation with the child during the child's minority on a finding that visitation would be in the best interests of the child [*Fam. Code § 3102(a)*]. Note that stepparents are not entitled to visitation under *Fam. Code § 3102* if the parent through whom they are connected to the child is deceased. Adoption by a person other than the child's stepparent or grandparent bars or terminates these visitation rights [*Fam. Code § 3102(c)*; *see* [3], *below*].

When there is no allegation that the surviving parent is unfit, a court order establishing visitation with relatives of a deceased parent over the surviving parent's objection will unconstitutionally infringe on the surviving parent's fundamental right to make decisions about the care, custody, and control of his or her child [*see, e.g., Zasueta v.*

Zasueta (2002) 102 Cal. App. 4th 1242, 1254-1255, 126 Cal. Rptr. 2d 245 (grandparents); *Herbst v. Swan (2002) 102 Cal. App. 4th 813, 814, 820, 125 Cal. Rptr. 2d 836* (adult sibling) *but see Fenn v. Sherriff (2003) 109 Cal. App. 4th 1466, 1470, 1473-1494, 1 Cal. Rptr. 3d 185* (parents' fundamental due process right to make decisions concerning care, custody, and control of children does not preclude state from ever ordering grandparent visitation over objection of two fit parents)]. For discussion of the standards under which the court will determine whether visitation with relatives of a child's deceased parent is in the best interests of the child, see Ch. 223, *Dissolution of Marriage: Child Custody* .

Fam. Code § 3102 applies in the proceedings enumerated in *Fam. Code § 3021* (*see* [1], *above*). However, before the enactment of the Family Code, this statutory right of visitation was not part of the former Family Law Act [*see* former *Civ. Code § 197.5*]. Jurisdiction under the statute did not depend on there being some separate proceeding in which custody of the child was at issue, such as one for dissolution of marriage. Rather, a relative could bring an independent action for visitation under the statute regardless of the marital status at death of the deceased parent through whom the right arose [*see Roquemore v. Roquemore (1969) 275 Cal. App. 2d 912, 913, 80 Cal. Rptr. 432]* . The Law Revision Commission in its Comment to *Fam. Code § 3102* states that the section continues former *Civ. Code § 197.5* without substantive change [*see also Fam. Code § 2*]. Therefore, the rights granted by the statute would not depend on there also being jurisdiction under one of the proceedings enumerated in *Fam. Code § 3021* [*cf. White v. Jacobs (1988) 198 Cal. App. 3d 122, 124, 243 Cal. Rptr. 597* ; *see also In re Marriage of Jenkins (1981) 116 Cal. App. 3d 767, 773-774, 172 Cal. Rptr. 331* (death of a parent terminates any right of nonparent to invoke the court'smodification jurisdiction in pending proceeding to obtain visitation rights)]. For a form for a petition for visitation under *Fam. Code § 3102*, see *§ 394.172*.

[3] Effect of Adoption

Adoption terminates any rights of the supplanted birth parents to visitation with the child [*Marckwardt v. Superior Court (1984) 150 Cal. App. 3d 471, 475, 198 Cal. Rptr. 41* ; *see Younger v. Younger (1895) 106 Cal. 377, 380, 39 P. 779]* .

Visitation to nonparents on the death of a parent under *Fam. Code § 3102* (*see* [2][c], *above*) is not available if the child has been adopted by a person other than the child's stepparent or grandparent. Any such visitation rights granted before the adoption of the child automatically terminate if the child is adopted by a person other than the child's stepparent or grandparent [*Fam. Code § 3102(c)*]. The statute is nondiscretionary, and visitation must be terminated if it applies. There is no discretion to reinstitute it under *Fam. Code § 3100(a)* [*Huffman v. Grob (1985) 172 Cal. App. 3d 1153, 1157, 218 Cal. Rptr. 659]* . Because by its terms *Fam. Code § 3102(c)* excepts from its application any case in which the child has been adopted by a person other than the child's stepparent or grandparent, a court may order grandparent visitation under section 3102 following the death of a parent even when a stepparent adoption has occurred [*Fenn v. Sherriff (2003) 109 Cal. App. 4th 1466, 1474-1475, 1 Cal. Rptr. 3d 185]* .

There is no similar provision in the Family Code that addresses the effect of adoption on nonparental visitation rights granted under the authority of other statutes, including *Fam. Code §§ 3100* (general authority), 3101 (stepparents), and 3103 and 3104 (grandparents) [*see Fenn v. Sherriff (2003) 109 Cal. App. 4th 1466, 1474-1476, 1 Cal. Rptr. 3d 185* (nothing in *Fam. Code § 3104* or legislative history suggests Legislature intended limitations in *Fam. Code § 3104(b)* to apply to grandparent petitions for visitation under *Fam. Code § 3102*, and by plain terms of *§ 3104(b)*, limitations apply only to petition for visitation under *§ 3104*)]. Visitation granted to a de facto parent in juvenile court dependency proceedings is not automatically terminated if the child is adopted [*In re Hirenia C. (1993) 18 Cal. App. 4th 504, 517-520, 22 Cal. Rptr. 2d 443]* .

In one case, the adoption of a child by maternal grandparents did not terminate visitation rights previously granted to the paternal grandparents because the adoption did not change the child's living arrangements from those in effect when visitation was granted and should not affect the visitation rights [*Reeves v. Bailey (1975) 53 Cal. App. 3d 1019, 1024-1026, 126 Cal. Rptr. 51]* . This reasoning might also preclude automatic termination of nonparental visitation if

the child is adopted by a stepparent [*see Roquemore v. Roquemore (1969) 275 Cal. App. 2d 912, 914-916, 80 Cal. Rptr. 432]* .

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§ 394.75 Jurisdictional Conflict

[1] Concurrent Jurisdiction

If two or more courts in California have concurrent jurisdiction, the general rule is that the court first assuming jurisdiction retains it to the exclusion of all other courts in which the action might have been initiated. Thus, the court in California that first makes a custody order retains exclusive jurisdiction over custody, and no other court in California has jurisdiction. For example, a court cannot appoint a guardian of the person of a minor if another court in California has made an earlier custody award in a dissolution proceeding [*Greene v. Superior Court of San Francisco (1951) 231 P.2d 821]* . However, if circumstances change or the child moves to a different county within the state, a motion for change of venue, made in the county of original jurisdiction, may be appropriate [*Greene v. Superior Court (1951) 37 Cal. 2d 307, 312, 231 P.2d 821* ; *see Ferreira v. Ferreira (1973) 9 Cal. 3d 824, 843, 109 Cal. Rptr. 80, 512 P.2d 304]* .

For discussion of custody jurisdiction as between courts of different states, see *§ 394.100 et seq.*

[2] Exclusive Jurisdiction of Juvenile Court

One exception to the rule that the first court to assume jurisdiction generally retains jurisdiction is that the juvenile court has *exclusive* jurisdiction over certain custody matters. Custodial issues regarding minors adjudged dependent children of the juvenile court may only be determined by the juvenile court [*see Welf. & Inst. Code § 302(c)*; *Dupes v. Superior Court (1917) 176 Cal. 440, 441-442, 168 P. 888* (juvenile court jurisdiction over minors supersedes jurisdiction of all other courts relating to custody of minors who are properly subject to jurisdiction of juvenile court)]. No other division of the superior court may hear proceedings under the Family Code regarding the custody of a dependent minor [*Welf. & Inst. Code § 304*; *see In re William T. (l985) 172 Cal. App. 3d 790, 797, 799-800, 218 Cal. Rptr. 420* (superior court with concurrent jurisdiction over related custody matters involving minor may not seek to enforce custody orders that conflict with orders properly issued by juvenile court)].

However, juvenile courts have been called on to scrutinize cases involving custody to ensure that dependency

jurisdiction is not being sought to finance a custody battle between parents at public expense. One appellate court has recommended that particular attention be paid to stipulated petitions based on allegations by a parent that a child is suffering "serious emotional damage" in order to bring the case within the court's jurisdiction [*In re John W. (1996) 41 Cal. App. 4th 961, 976, 48 Cal. Rptr. 2d 899]* .

It is improper for the juvenile court to continue to exercise jurisdiction over an orphan child if different relatives are seeking custody or guardianship or adoption. Because there are no issues of parental rights and familyreunification involved, juvenile court jurisdiction is inappropriate other than to issue emergency temporary custody orders. After issuing such an order, the juvenile court must then terminate its jurisdiction so as to allow the matter to be determined in a guardianship or adoption proceeding under the general jurisdiction of the superior court and according to the standards of the Family Code [*In re Vanessa P. (1995) 38 Cal. App. 4th 1763, 1770-1771, 45 Cal. Rptr. 2d 760]* .

[3] Juvenile Court Orders on Termination of Jurisdiction

The juvenile court may terminate its jurisdiction over a dependent minor and transfer its custody and visitation order to the general jurisdiction of the superior court [*Welf. & Inst. Code § 362.4*; *see* *In re Jennifer R. (1993) 14 Cal. App. 4th 704, 711-713, 17 Cal. Rptr. 2d 759]* . Such a transfer on termination of jurisdiction is sometimes referred to as an "exit order" [*see* *In re Katherine M. (1994) 27 Cal. App. 4th 91, 96, 33 Cal. Rptr. 2d 298* , *disapproved on other grounds in In re Chantal S. (1996) 13 Cal. 4th 196, 204, 212, 51 Cal. Rptr. 2d 866, 913 P.2d 1075]* . However, it is more properly termed a custody or visitation order on termination of jurisdiction. If there was another marital or paternity proceeding concerning the minor, the juvenile court's order must be filed in that proceeding [*Welf. & Inst. Code § 362.4*]. If no other proceeding was filed or is pending relating to the custody of the child, the juvenile court order may be used as the sole basis for opening a file with an assigned case number in the superior court in the county in which the custodial parent resides. Thereafter, the parties may move to modify the order in the superior court proceeding in which it was filed [*Welf. & Inst. Code § 362.4*; *In re Michael B. (1992) 8 Cal. App. 4th 1698, 1704-1705, 11 Cal. Rptr. 2d 290* ; *see In re Jennifer R. (1993) 14 Cal. App. 4th 704, 712-714, 17 Cal. Rptr. 2d 759]* .

The custody provisions of the Family Code do not apply to these juvenile court orders unless the legislature has expressly so provided [*In re Chantal S. (1996) 13 Cal. 4th 196, 206-207, 51 Cal. Rptr. 2d 866, 913 P.2d 1075* ; *see Fam. Code § 3021* (proceedings to which custody provisions of Family Code apply do not include juvenile court proceedings); *but cf.* *In re Maribel T. (2002) 96 Cal. App. 4th 82, 85-86, 116 Cal. Rptr. 2d 631* (order restricting removal of child from state erroneously failed to comply with requirements of *Fam. Code § 3024*)]. Thus, the juvenile court may require, as part of its order, that a parent's custody or visitation rights be conditioned on participation in counseling or psychotherapy, and the limitations on such an order set forth in *Fam. Code § 3190* do not apply [*In re Chantal S. (1996) 13 Cal. 4th 196, 206-211, 51 Cal. Rptr. 2d 866, 913 P.2d 1075]* . The period of the order need not be limited to one year [*cf. Fam. Code § 3190(a)*]; however, once the matter is transferred to the family law court, any party may move to modify the order [*In re Chantal S. (1996) 13 Cal. 4th 196, 213, 51 Cal. Rptr. 2d 866, 913 P.2d 1075]* .

For discussion of court-ordered parental counseling, *see* Ch. 223 *Dissolution of Marriage: Child Custody* .

For further discussion of juvenile dependency proceedings, see Ch. 328, *Juvenile Courts: Dependency Proceedings* .

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§ 394.76 Federal Court Jurisdiction

There is no federal court jurisdiction to issue child custody decrees [*Ankenbrandt v. Richards (1992) 504 U.S. 689, 112 S. Ct. 2206, 119 L. Ed. 2d 468, 482]* . Federal habeas corpus is also not available as a remedy in child custody matters [*Lehman v. Lycoming County Children's Services (1982) 458 U.S. 502, 513-516, 102 S. Ct. 3231, 73 L. Ed. 2d 928]* .

There is also a federal court doctrine of equitable abstention, because the subject matter of domestic relations cases has traditionally been considered an area of state interest [*see, e.g., Coats v. Woods (9th Cir. 1987) 819 F.2d 236, 236-237* , *cert. denied, 484 U.S. 802* ; *Peterson v. Babbitt (9th Cir. 1983) 708 F.2d 465, 466]* . Under this doctrine, a federal court will refuse to exercise jurisdiction based on the principle that federal courts should decline jurisdiction of cases concerning domestic relations if the primary issue concerns the status of parent and child, or husband and wife [*see Peterson v. Babbitt (9th Cir. 1983) 708 F.2d 465, 466]* . However, the United States Supreme Court has limited the scope ofdomestic relations abstention to situations in which related issues are pending in other proceedings in state court [*Ankenbrandt v. Richards (1992) 504 U.S. 689, 112 S. Ct. 2206, 119 L. Ed. 2d 468, 483-484]* .

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[Reserved]

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§ 394.100 Background and Need for Multijurisdictional Child Custody Standards

[1] Adoption of Original Uniform Child Custody Jurisdiction Act

Before 1974, the basis for jurisdiction over a child's custody depended only on the state's substantial interest in the child's welfare [*see Sampsell v. Superior Court (1948) 32 Cal. 2d 763, 780, 197 P.2d 739]* . Under this standard, more than one state could and did assume jurisdiction over the custody of the same child with the obvious actual and potential conflicts between the rulings of the courts in different states [*see Moniz v. Moniz (1956) 142 Cal. App. 2d 527, 528-529, 298 P.2d 710* ; *Stout v. Pate (1953) 120 Cal. App. 2d 699, 701, 261 P.2d 788* ; *Stout v. Pate (1953) 209 Ga. 786, 75 S.E.2d 748 , cert. denied in both cases, 347 U.S. 968 (1954)]* .

The potential for obtaining a "reversal" of a custody decree in one state by a judgment in another state, along with the ease of migration between states and countries, led to detriment to many children involved in custody disputes. The national response was the development of a uniform act, designed to be enacted in all states, so that each state would be required to follow the same rules to determine its jurisdiction to make custody orders. This act became known as the Uniform Child Custody Jurisdiction Act, referred to as the UCCJA throughout the remainder of this Subpart. The UCCJA was enacted in California in 1973 [Stas. 1973, ch. 693] and has been enacted, in some form, by all 50 states and the District of Columbia [*see In re Joseph D. (1993) 19 Cal. App. 4th 678, 681 n.1, 23 Cal. Rptr. 2d 574]* . California's UCCJA was, however, repealed, operative January 1, 2000, and superseded by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) [*see Fam. Code § 3400 et seq.*].

Prior to its repeal, the UCCJA contained the following statement of its purposes [former *Fam. Code § 3401(a)*]:

(1) To avoid jurisdiction competition and conflict with courts of other states in matters of child custody, which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;

(2) To promote cooperation with the courts of other states to the end that a custody decree is rendered in the state that can best decide the case in the interest of the child;

(3) To assure that litigation concerning the custody of a child ordinarily takes place in the state with which the child and his or her family have the closest connection and where significant evidence concerning his or her care, protection, training, and personal relationships is most readily available, and that courts in California decline the exercise of jurisdiction if the child and his or her family have a closer connection with another state;

(4) To discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

(5) To deter abductions and other unilateral removals of children undertaken to obtain custody awards;

(6) To avoid relitigation of custody decisions of other states in California insofar as feasible;

(7) To facilitate the enforcement of custody decrees of other states;

(8) To promote and expand the exchange of information and other forms of mutual assistance between the courts of California and those of other states concerned with the same child; and

(9) To make uniform the law of those states that enact it.

The UCCJA was required to be construed to promote these general purposes [former *Fam. Code § 3401(b)*].

The successor to the UCCJA, the UCCJEA, is to be construed according to similar general purposes [*see, e.g., Fam. Code § 3461*].

[2] Parental Kidnapping Prevention Act of 1980

[a] Introduction

The UCCJA did not resolve all problems of multiple assumptions of jurisdiction and parental child abductions. Therefore, in 1980--long prior to the adoption by California and many other jurisdictions of the current Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA; *see* [3], *below*)--Congress passed the Parental Kidnapping Prevention Act (hereafter, the PKPA) [*28 U.S.C. § 1738A*] in an attempt to compel states to extend full faith and credit to another state's custody determinations that complied with the rules of the PKPA. In its Declaration of Purpose behind the PKPA, Congress reiterated essentially the same concerns expressed earlier by the drafters of the former UCCJA [*see* Pub. Law 96-611, § 7].

The United States Supreme Court has stated that Congress' intent in enacting the PKPA was to extend the requirements of the Full Faith and Credit Clause to custody determinations. While some states had adopted the UCCJA, a number of states originally refused to adopt it or adopted it with modifications, resulting in an absence of national standards. Thepurpose of the PKPA, therefore, was to provide for nationwide enforcement of custody orders made in accordance with the UCCJA [*Thompson v. Thompson (1988) 484 U.S. 174, 181, 108 S. Ct. 513, 98 L. Ed. 2d 512]* .

[b] Summary of Special Terms Under PKPA

The PKPA expressly defines a number of specialized terms, which are summarized hereafter [*see 28 U.S.C. § 1738A(b)*]. These terms are more fully discussed in context in the remainder of this Part, and it is useful to compare them with similar (or substantially similar) terms defined under the UCCJEA which are set forth in [3][b], *below*, [*see Fam. Code § 3402*].

Under the PKPA [*see 28 U.S.C. § 1738A(b)*]

1. "Child" means a person under 18 years old.

2. "Contestant" means a person, including a parent or grandparent, who claims a right to custody of, or visitation with, a child.

3. "Custody determination" means a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders, and modifications.

4. "Home State" means the state in which, immediately preceding the time involved, the child lived with his or her parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the state in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period.

5. "Modification" and "modify" refer to a custody or visitation determination that modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody or visitation determination concerning the same child, whether made by the same court or not.

6. "Person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody.

7. "Physical custody" means actual possession and control of a child.

8. "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

9. "Visitation determination" means a judgment, decree, or other order of a court providing for the visitation of a child, and includes permanent and temporary orders and initial orders and modifications.

[3] Uniform Child Custody Jurisdiction and Enforcement Act

[a] Introduction

[i] Rationale for Development of UCCJEA and Operative Date

Differences in specific provisions of the PKPA and the UCCJA resulted in further loss of uniformity in jurisdictional rules among the states, due to inconsistent interpretations of the UCCJA and technical difficulties in applying the PKPA [Commissioner's Prefatory Note to UCCJEA, 9 Uniform Laws Annotated 650 (1999)]. Therefore, another uniform act, known as the Uniform Child Custody Jurisdiction and Enforcement Act, was developed to provide clearer standards for original jurisdiction over child custody, to enunciate a standard for continuing jurisdiction, to clarify modification jurisdiction, and to harmonize the law on simultaneous proceedings, clean hands, and forum non conveniens [Commissioner's Prefatory Note to UCCJEA, 9 Uniform Laws Annotated 650 (1999)]. This Act, referred to as the UCCJEA throughout this chapter, also included uniform enforcement procedures intended to accomplish for custody and visitation determinations the same uniformity that occurred in interstate child support following development of the Uniform Interstate Family Support Act [Commissioner's Prefatory Note to UCCJEA, 9 Uniform Laws Annotated 650 (1999); for discussion of UIFSA and UCCJEA enforcement procedures, *see* Ch. 260, *Family Law Enforcement: Foreign Judgments*].

Although the UCCJEA does not contain a formal statement of its purposes, they are similar to those expressed in the UCCJA and the PKPA, that is, to avoid jurisdictional competition and conflict between states, to promote cooperation between courts so that a custody decree will be rendered in the state that can best decide the matter in the child's interest, to discourage use of the interstate system for custody controversies, to deter child abductions, to avoid relitigation of custody decisions, and to facilitate enforcement of custody decrees [Commissioner's Comment to UCCJEA § 101, 9 Uniform Laws Annotated 657 (1999); *see Fam. Code § 3461*].

According to its drafters, the UCCJEA resolves a number of problematic jurisdictional aspects of the UCCJA and the PKPA, as summarized in [ii], *below* [*see* Commissioner's Prefatory Note to UCCJEA, 9 Uniform Laws Annotated 650-651 (1999)].

By the beginning of 2000, the UCCJEA--which was first promulgated in 1997--had been adopted in 15 states [Alabama, Alaska, Arkansas, California, Connecticut, Iowa, Maine, Minnesota, Montana, North Carolina, North Dakota, Oklahoma, Oregon, Tennessee, and Texas]. and had been introduced in eight additional states [Colorado, Illinois, Indiana, Kansas, Missouri, New York, Virginia, and Washington].

The UCCJEA was enacted in California, with minor modifications from the original act, and became operative, January 1, 2000 [Stats. 1999, ch.867]. A motion or other request for relief made in child custody proceeding or to enforce a child custody determination that was commenced *before* January 1, 2000, is governed by the law in effect at the time motion or other request was made [*see Fam. Code § 3465*]. Conversely, a motion filed *on or after* January 1, 2000, will be governed by the UCCJEA [Commissioner's Comment to UCCJEA, § 405, 9 Uniform Laws Annotated 706 (1999)].

[ii] UCCJEA Features That Aid in Resolving Jurisdictional Issues

[A] Home State Priority

Both the UCCJEA and PKPA prioritize home state jurisdiction. Under the PKPA, full faith and credit cannot be given to an initial child custody determination that is based on "significant state connections" unless there is no "home state"; therefore, "home state" jurisdiction is prioritized [*see 28 U.S.C. § 1738A(c)*]. Under the former UCCJA, a custody determination based on "significant connections" might have required enforcement even if enforcement would be denied under the PKPA, because the UCCJA authorized four independent bases of jurisdiction, without prioritization. Under the UCCJEA, "home state" jurisdiction is prioritized [*see Fam. Code § 3421*; Commissioner's Comment to UCCJEA § 201, 9 Uniform Laws Annotated 672 (1999); *see also In re A.C. (2005) 130 Cal. App. 4th 854, 861-862, 30 Cal. Rptr. 3d 431* (Mexico did not lose its "home state" jurisdiction over child who came to California for medical care)].

[B] Clarification of Emergency Jurisdiction

Under the UCCJA, it was unclear whether emergency jurisdiction could be exercised only to protect a child on a temporary basis until a court with appropriate jurisdiction issued a permanent order, or whether there was no time limit on a custody determination based on emergency jurisdiction. Also, it was unclear whether situations involving domestic violence directed against a parent or sibling of a child were sufficient to invoke emergency jurisdiction. Under the UCCJEA, emergency jurisdiction is exercised only to protect a child on a temporary basis, although an emergency custody order can sometimes become permanent. In addition, a domestic violence protective order that contains a custody determination is enforceable only if it complies with the PKPA and the UCCJEA [*see Fam. Code § 3424*; Commissioner's Comment to UCCJEA § 204, 9 Uniform Laws Annotated 678 (1999)].

Emergencies under the UCCJEA generally involve sexual or physical abuse. Unsubstantiated allegations are insufficient to invoke a court's emergency jurisdiction. The finding of an emergency may be made only after an evidentiary hearing, although a juvenile court can detain the child before that hearing [*In re A.C. (2005) 130 Cal. App. 4th 854, 864, 30*

Cal. Rptr. 3d 431] .

[C] Exclusive Continuing Jurisdiction in Decree State

Except in cases involving temporary emergency jurisdiction [*see Fam. Code § 3424*], a California court that has made a child custody determination consistent with the UCCJEA provisions for initial [*see Fam. Code § 3421*] or modification [*see Fam. Code § 3423*] jurisdiction has exclusive, continuing jurisdiction over the determination unless one of two events occurs [*Fam. Code § 3422(a)*]. First, if a California court or a court of another state determines that the child, the child's parents, and any person acting as a parent are no longer residents of California, then the California court will no longer have jurisdiction [*Fam. Code § 3422(a)(2)*; *see In re Marriage of Nurie (2009) 176 Cal. App. 4th 478, 511, 98 Cal. Rptr. 3d 200* (party may have more than one residence, and decree state retains jurisdiction until party abandons all residential ties with that state; judicial determination that all parties no longer reside in decree state is required to divest that state of continuing exclusive jurisdiction)]. Second, if a California court determines that the child, the child and one parent, or the child and a person acting as a parent no longer have any significant connection with California and that substantial evidence concerning the child's care, protection, training, and personal relationships is no longer available in California, then the California court will no longer have jurisdiction [*Fam. Code § 3422(a)(1)*].

The UCCJEA takes a strict "first in time" approach to jurisdiction [*In re Marriage of Nurie (2009) 176 Cal. App. 4th 478, 491, 98 Cal. Rptr. 3d 200]* . In general, once the court of an appropriate state [*Fam. Code § 3421(a)*] has made a child custody determination, that court has exclusive continuing jurisdiction [*Fam. Code § 3422(a)*]. A court of another state cannot modify the child custody determination [*Fam. Code §§ 3421(b), 3422(a), 3423, 3446(b)*] and must enforce that determination [*Fam. Code §§ 3443, 3445, 3446, 3448, 3453*; *In re Marriage of Nurie (2009) 176 Cal. App. 4th 478, 491, 98 Cal. Rptr. 3d 200]* . For further discussion of exclusive and continuing jurisdiction under the UCCJEA, see *§ 394.110[1]*.

Similarly, under the PKPA, full faith and credit must be given to a custody determination made by an original decree state pursuant to its continuing jurisdiction so long as the state has jurisdiction under its own laws and remains the residence of a child or contestant [*see 28 U.S.C. § 1738A(a), (c)(2)(E), (d)*].

By contrast, under the former UCCJA, it was unclear whether or for how long a custody-decree-granting state retained exclusive continuing jurisdiction to modify a decree. Furthermore, the UCCJA offered no guidance on determining whether or when a state with continuing jurisdiction had relinquished jurisdiction [*see Fam. Code § 3422*; Commissioner's Comment to UCCJEA § 202, 9 Uniform Laws Annotated 674-675 (1999)].

[D] Specification of Covered Custody Proceedings

Under the UCCJA, the definition of custody proceeding was ambiguous, so that states did not agree on whether the UCCJA applied to neglect, abuse, dependency, wardship, guardianship, termination of parental rights, or protection from domestic violence proceedings. Under the UCCJEA, virtually all proceedings that can involve custody of or visitation with a child, except for adoption proceedings, are expressly included within the definition of "custody determination" [*see Fam. Code § 3402(c),(d)*; Commissioner's Comment to UCCJEA § 102, 9 Uniform Laws Annotated 659 (1999)].

[E] "Best Interests" Language Eliminated

Under the former UCCJA, a state court could not assume custody jurisdiction on the basis of "significant connection" and "substantial evidence" without a finding that doing so was in a child's best interests. The UCCJA scheme wasdesigned to promote a child's best interests, but the "best interests" language was not intended to be an invitation to address the merits of a custody dispute in the jurisdictional determination or to otherwise provide that "best interests" considerations should override jurisdictional determinations, or provide an additional jurisdictional basis. Under the

UCCJEA, the term "best interests" has been eliminated, toclearly distinguish between jurisdictional and substantive standards relating to child custody and visitation [*see* Commissioner's Prefatory Note to UCCJEA, 9 Uniform Laws Annotated 652 (1999); *In re Marriage of Nurie (2009) 176 Cal. App. 4th 478, 491, 98 Cal. Rptr. 3d 200* ; *but cf. 28 U.S.C. § 1738A(c)* (retaining "best interests" language)]. For discussion of "best interests" as a substantive standard for custody determinations, see Ch. 223, *Dissolution of Marriage: Child Custody* .

[F] Custody Jurisdiction Harmonized With UIFSA

Many provisions of the UCCJA were not in conformity with the later-enacted Uniform Interstate Family Support Act [*see Fam. Code § 4900 et seq.*; for discussion of UIFSA *see* Ch. 260, *Family Law Enforcement: Foreign Judgments*]. UCCJEA provisions, by contrast, have been harmonized with UIFSA provisions, to further the goal of making of the law of interstate family proceedings as uniform as possible [*see* Commissioner's Prefatory Note to UCCJEA, 9 Uniform Laws Annotated 652 (1999)].

[G] Creation of Custody Enforcement Mechanism

Neither the PKPA nor the UCCJA provides specific remedies or procedures for interstate enforcement of child custody and visitation orders [*see* Commissioner's Prefatory Note to UCCJEA, 9 Uniform Laws Annotated 652 (1999)]. Thus, prior to the development of the UCCJEA, enforcement procedures differed widely from state to state, and lack of uniform procedures increased the cost of interstate enforcement actions by necessitating counsel in each state, decreasing the certainty of outcomes, and resulting in long, drawn out actions [*see* Commissioner's Prefatory Note to UCCJEA, 9 Uniform Laws Annotated 652 (1999)].

The UCCJEA provides several remedies for uniform enforcement of custody determinations [*see* Commissioner's Prefatory Note to UCCJEA, 9 Uniform Laws Annotated 653 (1999)]. First, there is a simple procedure for registering a custody determination in another state that should be particularly useful in international custody cases. Second, there is a swift remedy along the lines of habeas corpus that should enable prompt enforcement of violations of custody and visitation arrangements. Third, there is an extraordinary remedy, a warrant to take physical possession of a child, available to enforcing courts. Finally, there is a clarified role provided for public authorities, such as prosecutors, in the enforcement process [*see generally Fam. Code §§ 3442, 3443, 3445, 3446, 3451, 3455*]. These enforcement remedies are discussed in Ch. 260, *Family Law Enforcement: Foreign Judgments* .

[b] Summary of Special Terms Under UCCJEA

The UCCJEA expressly defines a number of specialized terms, which are summarized hereafter [*see Fam. Code § 3402*]. These terms are more fully discussed in context in the remainder of this chapter. For a listing of similar terms under the PKPA, see *§ 394.100[2][b]*.

Under the UCCJEA [*see Fam. Code § 3402*]:

1. "Abandoned" means left without provision for reasonable and necessary care or supervision.

2. "Child" means an individual who has not attained 18 years of age.

3. "Child custody determination" means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term does not include an order relating to child support or other monetary obligation of an individual.

4. "Child custody proceeding" means a proceeding in which legal custody, physical custody, or visitation

with respect to a child is an issue. The term includes a proceeding for dissolution of marriage, legal separation of the parties, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under *Fam. Code § 3441 et seq.* [*cf.* Commissioner's Comment to UCCJEA § 102, 9 Uniform Laws Annotated 659 (1999) (noting that cases involving Hague Convention on International Child Abduction are not listed in definition, because custody is not determined in such proceeding; but Hague cases are included in UCCJEA enforcement provisions, as discussed in Ch. 260, *Family Law Enforcement: Foreign Judgments*)].

5. "Commencement" means the filing of the first pleading in a proceeding.

6. "Court" means an entity authorized under the law of a state to establish, enforce, or modify a child custody determination.

7. "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than six months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

8. "Initial determination" means the first child custody determination concerning a particular child.

9. "Issuing court" means the court that makes a child custody determination for which enforcement is sought under *Fam. Code § 3400 et seq.*

10. "Issuing state" means the state in which a child custody determination is made.

11. "Modification" means a child custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.

12. "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity. This definition assures that the UCCJEA applies when the state is the moving party in a custody proceeding or has legal custody of a child [Commissioner's Comment to UCCJEA, § 102, 9 Uniform Laws Annotated 659 (1999)].

13. "Person acting as a parent" means a person, other than a parent, who: (1) has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and (2) has been awarded legal custody by a court or claims a right to legal custody under California law [*see also* Commissioner's Comment to UCCJEA § 102, 9 Uniform Laws Annotated 659-660 (1999) (explaining that California courts apply California law in deciding whether someone is "person acting as a parent," and need not undertake choice-of-law analysis to determine whether individual claiming such status has standing to seek custody)].

14. "Physical custody" means the physical care and supervision of a child.

15. "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States

Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

16. "Tribe" means an Indian tribe or band, or Alaskan Native village, that is recognized by federal law or formally acknowledged by a state.

17. "Warrant" means an order issued by a court authorizing law enforcement officers to take physical custody of a child (*see* Ch. 260, *Family Law Enforcement: Foreign Judgments*).

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§ 394.101 Preemption by PKPA; No Federal Court Jurisdiction

The PKPA preempts state law on the issue of jurisdiction by a state to render a valid custody decree [*People v. Superior Court (Smolin) (1986) 41 Cal. 3d 758, 770, 225 Cal. Rptr. 438, 716 P.2d 991 , rev'd on other grounds, California v. Superior Court of California (1987) 482 U.S. 400, 107 S. Ct. 2433, 96 L. Ed. 2d 332* ; *In re Marriage of Newsome (1998) 68 Cal. App. 4th 949, 958, 80 Cal. Rptr. 2d 555* ; *Wallace v. Superior Court (1993) 15 Cal. App. 4th 1182, 1184, 19 Cal. Rptr. 2d 157* ; *Adoption of Zachariah K. (1992) 6 Cal. App. 4th 1025, 1036, 8 Cal. Rptr. 2d 423* ; *Rogers v. Platt (1988) 199 Cal. App. 3d 1204, 1211, 245 Cal. Rptr. 532]* .

However, the PKPA does not provide for federal court jurisdiction over child custody jurisdictional disputes. It is up to the courts of the various states to construe and apply the PKPA to determine which state has jurisdiction [*see Thompson v. Thompson (1988) 484 U.S. 174, 187, 108 S. Ct. 513, 98 L. Ed. 2d 512]* .

Thus, there is no further remedy if the courts of two jurisdictions construe the PKPA differently so that each concludes that it is the proper jurisdiction to make the custody determination [*see Rogers v. Platt (D.C. Cir. 1987) 814 F.2d 683, 684-685* (conflicting orders from California and District of Columbia courts, but no federal court jurisdiction to resolve)]. However, as an increasing number of states, like California [*see Fam. Code § 3400 et seq.*], adopt the UCCJEA--which utilizes principles more closely aligned with those of the PKPA--there may be fewer circumstances in which construction of the PKPA is needed or in which PKPA preemption becomes an issue. The UCCJEA was drafted specifically to address and eliminate inconsistencies in state court interpretations of the UCCJA and the PKPA [*see* Commissioner's Prefatory Note to UCCJEA, 9 Uniform Laws Annotated 650 (1999)].

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§ 394.102 Framework for Analyzing Multijurisdiction Child Custody Questions

The PKPA requires one state to extend full faith and credit to a child custody determination made by another state if the determination is made consistently with the provisions of the PKPA [*28 U.S.C. § 1738A(a)*]. A state child custody determination is consistent with the PKPA if (1) the state has jurisdiction under its own laws and (2) the exercise of jurisdiction is proper under the jurisdictional rules of the PKPA [*28 U.S.C. § 1738A(c)*].

Therefore, a state's jurisdiction in a child custody dispute involving multiple jurisdictions depends on resolution of the following three questions:

> (1) Does the state have jurisdiction under its general child custody laws that must be applied in all cases, regardless of whether there is a multi-jurisdictional dispute?
>
> (2) Does the state have jurisdiction under its version of the UCCJA or UCCJEA?
>
> (3) Would the exercise of jurisdiction under state law conflict with the PKPA?

If the issue is whether California may assume jurisdiction over the matter, there must first be a proper basis for jurisdiction under some proceeding, for example a proceeding under the Family Code, a guardianship, or juvenile court dependency. Then, there must also be jurisdiction under California's UCCJEA. Then, the provisions of California law relied on to assume jurisdiction (general law and UCCJEA) must be scrutinized against the PKPA to ensure that there is no conflict, although there is now little, if any, likelihood of conflict with the PKPA when California has jurisdiction under the UCCJEA.

If the issue is whether California must extend full faith and credit to a custody determination made by another state, the same three questions must be addressed, looking to the law of that state for the answers to the first two. Those laws must then be evaluated in light of the PKPA.

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§ 394.103 Proceedings to Which PKPA and UCCJEA Apply

[1] Custody Determinations Under PKPA

The PKPA applies to "child custody determinations" as defined [*see 28 U.S.C. § 1738A(a)*]. A "custody determination" means a judgment, decree, or other order of a court providing for the custody or visitation of a child. It includes permanent and temporary orders, and initial orders and modifications [*28 U.S.C. § 1738A(b)(3)*]. This broad and unlimited definition, viewed in light of the purposes of the PKPA, indicates that its scope extends at least to all proceedings covered by the UCCJA [*see Adoption of Zachariah K. (1992) 6 Cal. App. 4th 1025, 1034, 8 Cal. Rptr. 2d 423* (and cases cited therein; PKPA applies to adoptions)], and to its successor statute, the UCCJEA [*see* Commissioner's Prefatory Note to UCCJEA, 9 Uniform Laws Annotated 650-651 (1999)].

[2] Custody Determinations, Proceedings, and Decrees Under UCCJEA

The UCCJEA provides grounds for a California court's exercise of jurisdiction over a "child custody determination" [*Fam. Code §§ 3421-3424*]. It is the exclusive method in California for determining the proper forum in child custody proceedings involving other jurisdictions [*In re Jaheim B. (2009) 169 Cal. App. 4th 1343, 1348, 87 Cal. Rptr. 3d 504]* . As used in the UCCJEA, "child custody determination" means a judgment, decree, or other order of a court providing for legal custody, physical custody, or visitation with a child, including a permanent, temporary (*see § 394.108*), initial (*see § 394.107[1]*), or modification (*see § 394.110*) order. It does not include an order relating to child support or other monetary obligation of an individual [*Fam. Code § 3402(c)*].

Under the UCCJEA, a "child custody proceeding" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. It includes a proceeding for dissolution of marriage, legal separation of the parties, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear [*Fam. Code § 3402(d)*]. The term does not include a proceeding involving enforcement under the UCCJEA [*see Fam. Code § 3441 et seq.*], juvenile delinquency, or contractual emancipation [*Fam. Code § 3402(d)*]; or an adoption proceeding or a proceeding to authorize emergency medical care for a child [*Fam. Code § 3403*].

Thus, nearly all proceedings in which custody is at issue are included within the scope of the UCCJEA [*In re Jaheim B. (2009) 169 Cal. App. 4th 1343, 1348, 87 Cal. Rptr. 3d 504* (dependency action is "child custody proceeding" subject to UCCJEA); *Brossoit v. Brossoit (1995) 31 Cal. App. 4th 361, 367 n.2, 36 Cal. Rptr. 2d 919* (UCCJA applies in guardianship proceedings); *In re Gloria F. (1989) 212 Cal. App. 3d 576, 582, 260 Cal. Rptr. 706 (UCCJA applies in proceedings to declare minor free of parental custody and control)]* .

Adoption proceedings are generally governed by other laws, such as the Interstate Compact on the Placement of Children (*see* Ch. 12B, *Adoptions: Unmarried Minors*) or the Uniform Adoption Act (1994), although the UCCJEA may sometimes apply under the UAA in states that adopt the UAA (but California has not) [Commissioner's Comment to UCCJEA § 103, 9 Uniform Laws Annotated 660-661 (1999); *see Fam. Code § 3403* (adoptions not covered); for California adoption proceedings, *cf.* former *Fam. Code § 3402(c)* (former UCCJA definition of "custody proceeding" did not expressly include or exclude adoption); *Adoption of Zachariah K. (1992) 6 Cal. App. 4th 1025, 1032-1034, 8 Cal. Rptr. 2d 423* (former UCCJA applies to proceeding to withdraw parental consent to adoption); *Souza v. Superior Court (1987) 193 Cal. App. 3d 1304, 1309-1310, 238 Cal. Rptr. 892* (former UCCJA applies to adoption proceedings)]. Proceedings for emergency medical care of children are not custody proceedings, and are governed by applicable state laws [Commissioner's Comment to UCCJEA § 103, 9 Uniform Laws Annotated 661 (1999); *see Fam. Code § 3403*].

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§ 394.104 Territorial Scope and International Application of PKPA and UCCJEA

[1] Application to States

"States" within the meaning of the PKPA include the 50 states of the United States, the District of Columbia, Puerto Rico, and the territories and possessions of the United States [*28 U.S.C. § 1738A(b)(8)*]. Similarly, under the UCCJEA, "state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States [*Fam. Code § 3402(o)*]. Therefore, the custody decrees of Puerto Rico, for example, are entitled to full faith and credit, if made in conformity with the PKPA and UCCJA or UCCJEA, despite the fact that Puerto Rico has not enacted either act [*see In re Marriage of Zierenberg (1992) 11 Cal. App. 4th 1436, 1443-1444, 16 Cal. Rptr. 2d 238]* .

[2] Application to Indian Tribes

The PKPA does not make reference to members of Native American tribes, but the UCCJEA does. Under the UCCJEA, a "tribe" means is an Indian tribe or band, or Alaskan Native village, that is recognized by federal law or formally acknowledged by a state [*Fam. Code § 3402(p)*]. A California court must treat a tribe as if it were a state of the United States when applying the jurisdictional provisions of the UCCJEA [*Fam. Code § 3404(b)*; *see Fam. Code §§ 3400 et seq.*]. A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of the UCCJEA [*see Fam. Code §§ 3400 et seq.*] must be recognized and enforced under the enforcement provisions of the UCCJEA [*Fam. Code § 3404(c)*; *see Fam. Code § 3441 et seq*].

However, a child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act [*25 U.S.C. § 1901 et seq.*] is governed by the ICWA, and is not subject to the UCCJEA to the extent that the ICWA governs the proceeding [*see Fam. Code § 3404(a)*]. If the ICWA requires that a case be heard in a tribal court, then ICWA provisions determine jurisdiction [Commissioner's Comment to UCCJEA § 104, 9 Uniform Laws Annotated 662 (1999)].

[3] International Application

The provisions of the UCCJEA have international application to child custody proceedings and determinations of other countries [Commissioner's Comment to UCCJEA § 105, 9 Uniform Laws Annotated 662 (1999); *see Fam. Code § 3405*]. A California court must treat a foreign country as if it were a state of the United States when making jurisdictional determinations [*Fam. Code § 3405(a)*]. Furthermore, a child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards [*see Fam. Code §§ 3400-3430*] of the UCCJEA must be recognized and enforced under the enforcement provisions [*see Fam. Code §§ 3441-3457*] of the UCCJEA [*Fam. Code § 3405(b)*; *In re Marriage of Nurie (2009) 176 Cal. App. 4th 478, 487, 98 Cal. Rptr. 3d 200 (Pakistan)* ; *In re Marriage of Sareen (2007) 153 Cal. App. 4th 371, 375, 62 Cal. Rptr. 3d 687 (India)* ; *In re Marriage of Paillier (2006) 144 Cal. App. 4th 461, 470, 50 Cal. Rptr. 3d 459 (France)]* .

A California court need not apply the UCCJEA if the child custody law of a foreign country violates fundamental principles of human rights [*Fam. Code § 3405(c)*]. In determining violations of human rights, the court's scrutiny should be on the child custody law of the foreign country and not on other aspects of the foreign country's legal system. Also, the court should invoke this option to *not* apply the UCCJEA in only the most egregious cases [Commissioner's Comment to UCCJEA § 105, 9 Uniform Laws Annotated 662 (1999)].

Finally, it would appear that a custody decree of a foreign country that does not conform to the jurisdictional rules of the PKPA and UCCJEA is not enforceable in California as a matter of comity. Under principles of international comity, courts of one country generally will give effect to the judgments of a court of a foreign nation if the foreign court has proper jurisdiction, and enforcement does not prejudice the rights of the enforcing country's citizens or violate its domestic public policy [*cf.* *In re Stephanie M. (1994) 7 Cal. 4th 295, 313-314, 27 Cal. Rptr. 2d 595, 867 P.2d 706* (decided under UCCJEA's predecessor statute, UCCJA (former *Fam. Code § 3400 et seq.*)); *see* Ch. 260, *Family Law Enforcement: Foreign Judgments* , for discussion of Hague Convention].

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§ 394.105 Exclusivity of UCCJEA in California

Apart from the PKPA (*see* §§ 394.101-394.102), the UCCJEA is the exclusive method in California for determining subject matter jurisdiction in custody cases [*In re Jaheim B. (2009) 169 Cal. App. 4th 1343, 1348, 87 Cal. Rptr. 3d 504* ; *In re Marriage of Sareen (2007) 153 Cal. App. 4th 371, 375, 62 Cal. Rptr. 3d 687* (UCCJEA applies to international custody disputes as well as interstate disputes); *In re S.W. (2007) 148 Cal. App. 4th 1501, 1508, 56 Cal. Rptr. 3d 665* (UCCJEA applies to dependency proceedings)].

The provisions of the UCCJA supersede any contrary decisional and statutory law [*Plas v. Superior Court (1984) 155 Cal. App. 3d 1008, 1013, 202 Cal. Rptr. 490* (contrary law superseded by UCCJEA's predecessor statute, UCCJA, former *Fam. Code § 3400 et seq.*)].

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§ 394.106 Personal Jurisdiction and Physical Presence Not Required

If a court has subject matter jurisdiction under the UCCJEA, then physical presence of, or personal jurisdiction over, a parent or a child is not necessary for a court to make a binding child custody determination [*Fam. Code § 3421(c)*; *see Fam. Code § 3406* (binding effect of child custody determination); *In re Marriage of Nurie (2009) 176 Cal. App. 4th 478, 487, 98 Cal. Rptr. 3d 200* (UCCJEA does not provide for jurisdiction by reason of presence of parties or by stipulation, consent, waiver, or estoppel); *see also § 394.114[1]* (notice requirements)].

A parent may appear and fully participate in a UCCJEA proceeding without submitting to the personal jurisdiction of the court. He or she may seek and oppose all orders related to custody and visitation, including restraining orders, such as stay-away orders and restraints on personal conduct [*Fam. Code § 3409(a)*; *cf. In re Marriage of Fitzgerald & King (1995) 39 Cal. App. 4th 1419, 1428-1429, 46 Cal. Rptr. 2d 558* (appearance of parent does not confer personal jurisdiction; decided under UCCJA, former *Fam. Code § 3400 et seq.*); *In re Marriage of Torres (1998) 62 Cal. App. 4th 1367, 1380, 73 Cal. Rptr. 2d 344* (in filing request for child support, out-of-state wife made general appearance and voluntarily submitted to court's general jurisdiction; decided under UCCJA); *see § 394.114[4]* (appearance and limited immunity)].

However, a person who is subject to personal jurisdiction in California on a basis *other than* physical presence in the state is not immune from service of process in California [*Fam. Code § 3409(b)*; *see § 394.114[4]* (appearance and limited immunity)].

Neither physical presence of a party or child, nor personal jurisdiction over a party or a child, is by itself sufficient to confer jurisdiction on a California court to make acustody determination [*Fam. Code § 3421(c)*; *cf.* former *Fam. Code § 3403(b), (c)* (jurisdictional requirements under UCCJA); *In re Marriage of Arnold & Cully (1990) 222 Cal. App. 3d 499, 503-504, 271 Cal. Rptr. 624* (physical presence); *In re Marriage of Ben-Yehoshua (1979) 91 Cal. App. 3d 259, 264, 154 Cal. Rptr. 80* (physical presence); both cases decided under former law]. Furthermore, neither the presence of minimum contacts nor service within California will confer jurisdiction [Commissioner's Comment to UCCJEA § 201, 9 Uniform Laws Annotated 673 (1999)]. Also, because jurisdiction to make a custody determination is subject matter

jurisdiction, an agreement of the parties to confer jurisdiction on a court that would not otherwise have jurisdiction under the UCCJEA is not effective [Commissioner's Comment to UCCJEA § 201, 9 Uniform Laws Annotated 673 (1999)].

The jurisdictional requirements for an initial child custody determination under the UCCJEA [*see Fam. Code § 3421(a)*], plus the notice and hearing requirements of the UCCJEA [*see Fam. Code § 3425*; *see also § 394.114[1]* (notice)], are all that is necessary to satisfy due process [Commissioner's Comment to UCCJEA § 201, 9 Uniform Laws Annotated 673 (1999)]. The requirements for an initial custody determination are subject to the UCCJEA requirements for temporary emergency jurisdiction [*Fam. Code § 3421(a)*], which permit a California court to take emergency jurisdiction over a child who is present in the state, in order to enter a temporary order to protect the child [*Fam. Code § 3424(a)*; *see § 394.108* (temporary emergency jurisdiction)].

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§ 394.107 Jurisdiction to Make Initial Custody Decree

[1] Summary of Basic Grounds Under UCCJEA and PKPA

[a] UCCJEA

Under the UCCJEA, an "initial determination" is the first child custody determination concerning a particular child [*Fam. Code § 3402(h)*]. Except as otherwise provided in the UCCJEA provisions for temporary emergency jurisdiction [*see Fam. Code § 3424*], a California court has jurisdiction to make an initial child custody determination only if any of the following are true [*Fam. Code § 3421(a), (b)*]:

1. California is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from California but a parent or person acting as a parent continues to live in California.

2. A court of another state does not have home state jurisdiction under paragraph one above [*Fam. Code § 3421(a)(1)*], or a court of the home state of the child has declined to exercise jurisdiction on the ground that California is the more appropriate forum under the UCCJEA provisions for inconvenient forum [*see Fam. Code § 3427*; *§ 394.111*], or declining jurisdiction based on unclean hands [*see Fam. Code § 3428*; *§ 394.112*], and both of the following are true:

a. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with California other than mere physical presence.

b. Substantial evidence is available in California concerning the child's care, protection, training, and personal relationships.

3. All courts having jurisdiction under paragraph one [*Fam. Code § 3421(a)(1)*] or paragraph two [*Fam.*

Code § 3421(a)(2)] above have declined to exercise jurisdiction on the ground that a California court is the more appropriate forum to determine the custody of the child under the UCCJEA provisions for inconvenient forum [*see Fam. Code § 3427*; *§ 394.111*] or declining jurisdiction based on unclean hands [*see Fam. Code § 3428*; *§ 394.112*].

4. No court of any other state would have jurisdiction under the criteria specified in Paragraph 1 [*Fam. Code § 3421(a)(1)*], Paragraph 2 [*Fam. Code § 3421(a)(2)*], or Paragraph 3 [*Fam. Code § 3421(a)(3)*], *above* [*Fam. Code § 3421(a)(4)*].

The UCCJEA additionally provides that physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination [*Fam. Code § 3421(c)*].

For related discussion of emergency jurisdiction, see *§ 394.108*. For discussion of a court's assumption of jurisdiction on the basis of "continuing jurisdiction," see *§ 394.110[1]*.

[b] PKPA

Under the PKPA, a "child custody determination" or "visitation determination" [*see 28 U.S.C. § 1738A(b)(3), (9)*] in the form of an "initial order" (not otherwise defined) [*see 28 U.S.C. § 1738A(b)(3)*], made by a state court is consistent with the provisions of the PKPA only if [*see 28 U.S.C. § 1738A(c)*]

1. The state court has jurisdiction under the law of that state; and

2. One of the following conditions is met:

a. The state (i) is the *home state* of the child on the date of the commencement of the proceeding or (ii) had been the child's home state within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

b. It appears that no other state would have jurisdiction under subparagraph (a); *and* it is in the best interest of the child that a court of that state assume jurisdiction, because (i) the child and the child's parents, or the child and at least one contestant, have a significant connection with the state other than mere physical presence in the state and (ii) there is available in the state substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

c. The child is physically present in the state and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse; or

d. It appears that no other State would have jurisdiction under any of the above grounds, or another state has declined to exercise jurisdiction on the ground that the state whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, *and* it is in the best interest of the child that the court assume jurisdiction.

For related discussion of emergency jurisdiction, see *§ 394.108*. For discussion of a court's assumption of jurisdiction on the basis of "continuing jurisdiction," see *§ 394.110[1]* [*see 28 U.S.C. § 1738A(c)(2)(E), (d)*].

[c] Former Law Compared

Under California's former UCCJA, jurisdiction to make a child custody determination by initial decree had to be based on one or more of the following grounds: (1) home state jurisdiction; (2) significant connection and substantial evidence; (3) emergency protection of the child; or (4) jurisdiction in no other state [*see* former *Fam. Code § 3403(a)*].

There was no express priority of these jurisdictional grounds under the UCCJA. Accordingly, a case that was decided shortly after California adopted the UCCJA in 1973 found that if any one of these grounds were present, California had jurisdiction under its law. However, better reasoned subsequent cases have held there was a preference for home state jurisdiction and that the home state was the "presumptively correct forum" [*In re Marriage of Newsome (1998) 68 Cal. App. 4th 949, 957, 80 Cal. Rptr. 2d 555* ; *see* *Plas v. Superior Court (1984) 155 Cal. App. 3d 1008, 1014, 202 Cal. Rptr. 490* ; *Hafer v. Superior Court (1981) 126 Cal. App. 3d 856, 866, 179 Cal. Rptr.132]* . This was true even if there were no case pending in the home state [*Hafer v. Superior Court (1981) 126 Cal. App. 3d 856, 862, 179 Cal. Rptr. 132]* .

[2] Home State Jurisdiction Preferred Under UCCJEA and PKPA

[a] Home State Rule Stated

[i] UCCJEA

Under *Fam. Code § 3421(a)(1)*, a California court has jurisdiction to make an initial child custody determination if California is the "home state" of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding and the child is absent from California but a parent or person acting as a parent continues to live in California.

As used in the UCCJEA, "home state" means the state in which, immediately preceding the time involved, the child lived with his or her parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the state in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period [*Fam. Code § 3402(g)*].

[ii] PKPA

Similarly, under the PKPA, a valid basis for a child custody or visitation determination made by a state court is that (1) the state court had jurisdiction under state law, and (2) that state (a) is the home state of the child on the date of the commencement of the proceeding, or (b) had been the child's home state within six months before the date of the commencement of the proceeding and the child is absent from the state because of his or her removal or retention by a contestant or for other reasons, and a contestant continues to live in that state [*28 U.S.C. § 1738A(c)(1), (2)*].

As used in the PKPA, "home state" means the state in which, immediately preceding the time involved, the child lived with his or her parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the state in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period [*28 U.S.C. § 1738A(b)(4)*].

[b] Preference for Home State Jurisdiction

Under the UCCJEA, home state jurisdiction to make an initial child custody determination is given priority over other jurisdictional bases, such as "significant connection and substantial evidence" jurisdiction [Commissioner's Comment to UCCJEA § 201, 9 Uniform Laws Annotated 672 (1999); *In re Marriage of Nurie (2009) 176 Cal. App. 4th 478, 489, 98 Cal. Rptr. 3d 200* (state with absolute priority to render initial child custody determination is child's home state)].

Thus, the UCCJEA is in harmony with the PKPA [*28 U.S.C. § 1738A*], which allows full faith and credit to be given to an initial custody determination made by a state with "significant connection" jurisdiction *only if* no home state exists [Commissioner's Comment to UCCJEA § 201, 9 Uniform Laws Annotated 672 (1999); *see 28 U.S.C. § 1738A(c)*]. Note that the UCCJEA's predecessor, the UCCJA, provided four concurrent bases of jurisdiction [*see* former *Fam. Code § 3403(a)*], which resulted in conflicts between state and federal law after the PKPA was enacted.

[c] Nature of Six-Month Requirement

[i] In General

Both the UCCJEA and PKPA define "home state" in terms of a child having lived in a state for at least six consecutive months immediately preceding the commencement of a custody proceeding (*see* definitions in *§ 394.100*) [*see 28 U.S.C. § 1738A(b)(4), (c)(2)(A*); *Fam. Code §§ 3402(g), 3421(a)(1)*]. In addition, when a child is absent from his or her home state, both the UCCJEA and PKPA permit jurisdiction to lie in that state's courts (on the basis of "home state" jurisdiction), if that state "had been the child's home state within six months before the commencement of the proceeding," and--in the case of the UCCJEA--the child's parent (or person acting as a parent) still lives in the state, or--in the case of the PKPA--a "contestant" still lives in the state [*see 28 U.S.C. § 1738A(c)(2)(A*); *Fam. Code § 3421(a)(1)*].

A Commissioner's Comment to the former UCCJA notes that the six-month period was selected in order to have a definite and certain test that, at the same time, is based on the reasonable assumption of fact that most American children are integrated into a community after living there for six months. Home-state jurisdiction includes the six-month period after the child is no longer in the home state to permit proceedings in that state during that period. That period was included in the former act to protect a custodial claimant if another claimant has removed the child from the jurisdiction.The UCCJA clearly intended that the custodian remaining in the state, by acting promptly, may bring proceedings in his or her own state [Commissioner's Comment to UCCJA § 3, 9 Uniform Laws Annotated 144 (1988)]. This comment appears to remain valid with respect to the UCCJEA [*see* Commissioner's Comment to UCCJEA § 101, 9 Uniform Laws Annotated 659 (1999) (noting that, while the definition of "home state" in UCCJEA was worded slightly differently from that in UCCJA, no substantive change was intended)].

Under the UCCJEA, the provision for extended six-month home state jurisdiction focuses on the status of a parent or person acting as a parent who remains behind when a child is absent from the home state, and requires no inquiry into reasons why the child is absent or has been removed [*see Fam. Code § 3421(a)(1)*; *cf.* former *Fam. Code § 3403(a)(1)* (state "had been the child's home state within six months before commencement of the proceeding and the child is absent ... because of removal or retention by a person claiming custody of the child or for other reasons, and a parent or person acting as parent continues to live in this state")]. This provision for extended six-month home state jurisdiction differs slightly from the PKPA, which requires a determination that a child has been removed "by a contestant or for other reasons" [Commissioner's Comment to UCCJEA § 201, 9 Uniform Laws Annotated 672 (1999); *see 28 U.S.C. § 1738A(c)(2)(A)*; for discussion of effects of eliminating "contestants" from the UCCJEA's jurisdictional standards, *see § 394.110[1]* (exclusive and continuing jurisdiction)]. If there is any distinction between these two requirements [Theoretically, a parent might still live in the state, but the contest might be between the other parent and a nonparent, neither of whom continues to live in the state; but it is unlikely that a state would be asked to take jurisdiction unless someone who was actually contesting custody lives in the state, and even more unlikely that a court would construe the UCCJEA to take jurisdiction in such a case], it appears that of the PKPA must prevail, based on a case decided under former law [*see Adoption of Zachariah K. (1992) 6 Cal. App. 4th 1025, 1036, 8 Cal. Rptr. 2d 423]* .

[ii] Construction of Six-Month Requirement

California's version of the UCCJEA did not become operative until January 1, 2000. However, there is case law construing the six month requirement of "home state" jurisdiction under the PKPA and former UCCJA, and a certain

proportion of cases tried under (and governed by) the former law will continue to be reported for some time [*see Fam. Code § 3465* (motion or other request for relief made in child custody proceeding or to enforce child custody determination that was commenced before January 1, 2000, is governed by law in effect at time motion or request was made)]. This existing and growing body of case law may constitute persuasive precedent with respect to corresponding custody determinations made, modified, or enforced under the current UCCJEA, at least until the UCCJEA is interpreted at the appellate level. Therefore, the discussion that follows should be viewed in the light of its potential application in current matters arising under the UCCJEA.

One issue addressed in the cases concerns the resolution of the location of a home state when two states both nominally meet the six-month criteria. This issue might arise in the case of a child who has been removed to another state from his or her original home state. In one case, for example, a mother left Puerto Rico, the place of marital domicile, and came to California with the children. The father commenced custody proceedings within six months of the date on which the children were removed. The mother waited for six months, and then commenced proceedings in California. But in this situation, the original home state is the appropriate jurisdiction. The rule under both the PKPA and the former UCCJA has been that if two states both have proper jurisdiction, the second in time must defer to the first [*28 U.S.C. § 1738A(g)*; former *Fam. Code § 3406(a)*; *see In re Marriage of Zierenberg (1992) 11 Cal. App. 4th 1436, 1442-1443, 16 Cal. Rptr. 2d 238* ; *§ 394.109*], a principle also carried forward in the UCCJEA [*Fam. Code § 3426(a)*]. Thus, because of the six-month requirement, the filing in the original state will always be first. The original home state will have jurisdiction for six months after removal, and the subsequent home state will not have jurisdiction until those six months have passed [*see In re Marriage of Zierenberg (1992) 11 Cal. App. 4th 1436, 1442-1443, 16 Cal. Rptr. 2d 238]* . For this reason, proof of the exact date on which a child is removed from a jurisdiction is crucial.

In another case, California properly assumed initial jurisdiction over a child custody dispute as the child's home state, even though the mother had taken the child to Pakistan when he was five months old and he was in Pakistan on the date he turned six months of age. Because the trip began as a "temporary absence," the time the child spent in Pakistan before the mother informed the father that she would not return to California was properly considered part of the child's period of residence in California [*In re Marriage of Nurie (2009) 176 Cal. App. 4th 478, 494 n.12, 98 Cal. Rptr. 3d 200]* .

A California court is not precluded from exercising jurisdiction due to pending custody proceedings in another state or country when this other state or country has not been the child's home state for the required six-month period [*In re Marriage of Sareen (2007) 153 Cal. App. 4th 371, 376-377, 62 Cal. Rptr. 3d 687* (pertinent question is not whether other state or country has jurisdiction under its own laws for custody proceeding but whether jurisdiction substantially complies with UCCJEA)]. A parent may not take a child to another jurisdiction, file a premature custody proceeding, and then use the time the child remains in that jurisdiction pending resolution of the petition to meet the six-month home state period, either in that custody proceeding or as a defense to the other parent's competing custody proceeding in another state [*In re Marriage of Sareen (2007) 153 Cal. App. 4th 371, 380, 62 Cal. Rptr. 3d 687* (to do so would condone blatant forum shopping)].

With respect to measuring six months in relation to when a proceeding "commences," one case suggested that the six-month period may be measured from the date on which a custody order is entered, rather than when the proceeding was initiated by filing [*see Peery v. Superior Court (1985) 174 Cal. App. 3d 1085, 1093 n.2, 219 Cal. Rptr. 882* (claiming there is conflict in cases regarding whether filing date or date of determination controls for purposed deciding whether there is home-state jurisdiction)]. However, cases that were cited as in conflict on the point all addressed "significant connection/substantial evidence" jurisdiction (*see* [3], *below*). Moreover, it seems inappropriate to construe the words of the PKPA (and UCCJEA) "date of the commencement of the proceeding" [*28 U.S.C. § 1738A(c)(2)(A)*; *Fam. Code § 3421(a)(1)*] or those of the former UCCJA "time of the commencement of the proceeding" [former *Fam. Code § 3403(a)(1)*] as referring to any point in time after the proceeding is initiated by filing [*see Adoption of Zachariah K. (1992) 6 Cal. App. 4th 1025, 1035, 8 Cal. Rptr. 2d 423* (subject matter jurisdiction either exists or does not exist at time action is commenced)]. Therefore, it appears that the date of filing rather than the date of when an order

is entered is more appropriate for measuring purposes[*see Haywood v. Superior Court (2000) 77 Cal. App 4th 949, 955, 92 Cal. Rptr. 2d 182* (because child was unborn when her mother initiated California action, California was not child's home state "at the commencement" of proceeding); *cf. Fam. Code § 3402(e)* ("commencement" defined as filing of first pleading in a proceeding)].

The nature of the claim advanced by the person asserting custody is another issue that has arisen. Under the PKPA and former UCCJA (and, presumably, the UCCJEA) a custody claim by a person acting as parent must at least be a *colorable* one, that is, one that is advanced in good faith on some plausible legal theory. A colorable claim may arise from a natural relationship with the child, from a legal relinquishment of custody by a parent, or through state intervention by a state agency or court. In the absence of one of these bases, there is no provision in law by which an unrelated person may unilaterally take custody of a child in derogation of the right to custody of the child's natural parent [*Rogers v. Platt (1988) 199 Cal. App. 3d 1204, 1212-1213, 245 Cal. Rptr. 532* ; *see Adoption of Zachariah K. (1992) 6 Cal. App. 4th 1025, 1037, 8 Cal. Rptr. 2d 423]* .

Cases have also considered the meaning of the term "to live with" in the context of the six-month requirement. To "live with" a parent or person acting as a parent has been said to require a deliberate manifestation to share a common place with the person during a substantial period of the time involved [*see Rogers v. Platt (1988) 199 Cal. App. 3d 1204, 1212-1213, 245 Cal. Rptr. 532* (temporary surrender of child for adoption)]. Such a manifestation is not established if a parent gives up custody of a child temporarily with the intent of surrendering the child for adoption, even though no legal consent to adoption is ever executed [*Rogers v. Platt (1988) 199 Cal. App. 3d 1204, 1212-1213, 245 Cal. Rptr. 532]* . One case suggests that the "lived with" requirement encompasses the legal concept of domicile, that is, the intent to permanently reside in a particular place, but this view is open to question as there is nothing in the language and purpose of the PKPA and UCCJA that suggests such a requirement [*see Cole v. Superior Court (1985) 173 Cal. App. 3d 265, 272, 218 Cal. Rptr. 905* ; *cf. Plas v. Superior Court (1984) 155 Cal. App. 3d 1008, 1016, 202 Cal. Rptr. 490* (Commissioners' Note to UCCJA states that significant connection/substantial evidence jurisdiction cannot be based on intent to establish domicile alone)]. The facts of the case [*see Cole v. Superior Court (1985) 173 Cal. App. 3d 265, 269, 218 Cal. Rptr. 905]* , involved the kind of conduct that the law was designed to prevent, that is, the unilateral removal of a child from the state of residence [*see* former *Fam. Code § 3401(a)(5)*].

[3] "Significant Connection and Substantial Evidence" Jurisdiction Distinguished

[a] Rule Stated

[i] UCCJEA and Former UCCJA Compared

Under the UCCJEA, even if California is not a child's "home state" [*Fam. Code § 3421(a)(1)*], California may exercise custody jurisdiction on the basis of "significant connection and substantial evidence" if a court of another state does not have home state jurisdiction, or a court of the home state of the child has declined to exercise jurisdiction on the ground that California is the more appropriate forum under the UCCJEA provisions for inconvenient forum [*see Fam. Code § 3427*; *see also § 394.111*], or declined jurisdiction based on unclean hands [*see Fam. Code § 3428*; *see also § 394.112*], *and* both of the following are true [*Fam. Code § 3421(a)(2)*]:

1. The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with California other than mere physical presence; and

2. Substantial evidence is available in California concerning the child's care, protection, training, and personal relationships.

Under the current UCCJEA, this "significant connection" jurisdiction differs from its predecessor statute, the UCCJA, in four important ways [*see Fam. Code § 3421(a)(2)*]. First, the UCCJEA eliminates "best interest of the child"

language (*see* [c][i], *below*). Second, the UCCJEA bases jurisdiction on "significant connections" between the child, the child and one parent, or the child and a person acting as a parent. Third, the UCCJEA permits a "significant connection" state to assume jurisdiction only when there is no home state or when a home state determines that a significant connection state would be a more appropriate forum. And fourth, the UCCJEA takes into consideration "substantial evidence" relating to the child's past, as well as present and future, care [*see* Commissioner's Comment to UCCJEA § 201, 9 Uniform Laws Annotated 672-673 (1999)].

[ii] PKPA and UCCJEA Compared

Under the PKPA, a state court may exercise custody jurisdiction on the basis of a "significant connection and substantial evidence" only if all of the following apply [*28 U.S.C. § 1738A(c)(2)(B)*]:

1. The state court otherwise has jurisdiction under its own law;

2. It appears that no other state would have "home state" jurisdiction;

3. It is in the child's best interests that the state assume jurisdiction because:

a. The child and the child's parents, or the child and at least one contestant, have a significant connection with the state, other than mere physical presence in the state; and

b. There is available in the state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

The PKPA's version of "significant connection and substantial evidence" jurisdiction closely resembles that of the current UCCJEA. Like the current UCCJEA, for example, the PKPA also requires a "significant connection" to be exercised only when no other state would have "home state" jurisdiction, and be based on contacts *other than mere physical presence* in the state [*compare 28 U.S.C. § 1738A(c)(2)(B) with Fam. Code § 3421(a)(2)*].

However, the PKPA, unlike the current UCCJEA, retains a reference to a child's "best interests." Nevertheless, as discussed in [c], *below*, this does not appear to bedirected to an assessment of the merits of a particular custody arrangement.

In addition, the PKPA, unlike the current UCCJEA, retains language (like that of the former UCCJA) that refers to a "child's present or future care, protection," and the like, as opposed to looking not only at present and future, but also at, past care and protection--which the current UCCJEA appears to do [*compare 28 U.S.C. § 1738A(c)(2)(B) with Fam. Code § 3421(a)(2)(B)*; former *Fam. Code § 3403(a)(2)*].

[b] Construction of Significant Connection and Substantial Evidence

[i] Significant Connection

Cases that have construed the PKPA and former UCCJA may prove instructive in applying the new UCCJEA, although the UCCJEA now more closely follows the PKPA in a number of areas. One of these concerns the effect of physical presence in a state. Both the PKPA and UCCJEA recite that "mere physical presence" does not establish a "significant connection." This principle is consistent with a case holding that the mere act of a parent in bringing a child to California in violation of a foreign custody decree does not establish a significant connection, especially because the law (here, the former UCCJA) was designed to prevent the violation of foreign custody decrees [*Neal v. Superior Court (1978) 84 Cal. App. 3d 847, 850, 148 Cal. Rptr. 841]* .

The first case in California to consider the existence of significant connections found them in a child's family ties [*Smith v. Superior Court (1977) 68 Cal. App. 3d 457, 464, 137 Cal. Rptr. 348* (child's home state was Oregon, but California had significant connections based on presence of numerous relatives; decided before enactment of PKPA, and exemplifying problems with UCCJA that led to PKPA); *cf. Guardianship of Donaldson (1986) 178 Cal. App. 3d 477, 491, 223 Cal. Rptr. 707* (illustrating that even after PKPA was enacted, California courts did not immediately grasp its significance; thus, California court recognized Illinois' right to assume significant connection/substantial evidence jurisdiction under UCCJA, even though California was child's home state; court did not even mention existence of PKPA)].

Another appellate court found a significant connection between the child and the state, because of the amount of time the child spent in California [*Peery v. Superior Court (1985) 174 Cal. App. 3d 1085, 1093, 219 Cal. Rptr. 882* (also finding "home state" jurisdiction)]. Similary, when a child was born in California and had only lived in that state, she had a "significant connection" with California, even though she was not yet born when the custody proceeding was initially filed [*Haywood v. Superior Court (2000) 77 Cal. App 4th 949, 956, 92 Cal. Rptr. 2d 182]* .

By contrast, a California trial court was found to lack "significant connection" jurisdiction when children who had lived in California for approximately four years had lived in another state for over three years [*In re Marriage of Newsome (1998) 68 Cal.App. 4th 949, 959, 80 Cal. Rptr. 2d 555]* . Thus, while it is difficult to discern "bright line" rules from these cases, it appears that the courts will look at not only the amount of time a child has spent in a particular state, but also at the nature of the contacts the child has had with other family members and in becoming established in that state.

[ii] Substantial Evidence

Under the UCCJEA and PKPA, there must be available in a state that assumes "significant connection/substantial evidence" jurisdiction substantial evidence concerning the child's care, protection, training, and personal relationships in that state [*28 U.S.C. § 1738A(c)(2)(B)*; *Fam. Code § 3421(a)(2)*]. Relevant evidence might include school records and teachers, medical evidence and reports of doctors, probation reports and other court records from prior disputes [*In re S.W. (2007) 148 Cal. App. 4th 1501, 1510-1511, 56 Cal. Rptr. 3d 665* (substantial evidence concerning children's care, protection, training, and personal relationships shown)]. The interest of the child is served if the forum has optimum access to relevant evidence about the child and family. This jurisdictional ground requires maximum rather than minimum contact with the state [Commissioner's Comment to UCCJA § 3, 9 Uniform Laws Annotated 145 (1988); *see Guardianship of Donaldson (1986) 178 Cal. App. 3d 477, 490, 223 Cal. Rptr. 707]* .

Determination of the availability of substantial evidence within the state depends on the particular issues that are in dispute. For example, if the key issue in controversy is the fitness of the noncustodial parent to exercise visitation rights, substantial evidence on this issue may be more readily available in the state in which the noncustodial parent resides [*Allison v. Superior Court (1979) 99 Cal. App. 3d 993, 999, 160 Cal. Rptr. 309 , criticized on other grounds in Kumar v. Superior Court (1982) 32 Cal. 3d 689, 699 n.12, 186 Cal. Rptr. 772, 652 P.2d 1003]* .

[iii] Related Timing Issues

Courts have considered at least two timing issues that pertain to the exercise of "significant connection and substantial evidence" jurisdiction. The first issue pertains to the timing of the exercise of jurisdiction as between two states that have *concurrent* jurisdiction on the basis of significant connections and substantial evidence [*see Adoption of Zachariah K. (1992) 6 Cal. App. 4th 1025, 1037, 8 Cal. Rptr. 2d 423]* . In such a case, it has been held that the PKPA requires deference to the first state to exercise its jurisdiction on this basis [*see 28 U.S.C. § 1738A(g)*; *Adoption of Zachariah K. (1992) 6 Cal. App. 4th 1025, 1037, 8 Cal. Rptr. 2d 423* ; *see also* former *Fam. Code § 3406(a)* (similar provision under former UCCJA)]. For further discussion, see *§ 394.109*.

A separate issue has concerned whether "significant connections and substantial evidence" are to be determined as of

the time of commencement of the proceeding or as of the hearing on the issue. The better rule seems clearly to be that subject matter jurisdiction either exists or does not exist at the time the action is commenced. Otherwise an absconding parent is encouraged to purposely delay a custody determination in order to gain time to establish significant contact with the state [*see Adoption of Zachariah K. (1992) 6 Cal. App. 4th 1025, 1035, 8 Cal. Rptr. 2d 423* ; *Plas v. Superior Court (1984) 155 Cal. App. 3d 1008, 1015 n.5, 202 Cal. Rptr. 490* ; *but see In re Marriage of Hopson (1980) 110 Cal. App. 3d 884, 894-895, 168 Cal. Rptr. 345]* .

[c] Use of "Best Interests of Child" Standard in Exercising Jurisdiction

[i] No "Best Interests" Language in UCCJEA

California's UCCJEA [*Fam. Code § 3400 et seq.*] governs jurisdiction over child custody and visitation orders, not substantive issues relating to custody and visitation awards. Therefore, the UCCJEA does not make use of the phrase "best interests of the child" [Commissioner's Prefatory Note to UCCJEA, 9 Uniform Laws Annotated 652 (1999); *In re Marriage of Nurie (2009) 176 Cal. App. 4th 478, 491, 98 Cal. Rptr. 3d 200]* .

[ii] Former UCCJA Compared to UCCJEA

The UCCJEA's predecessor, the former UCCJA [*see* former *Fam. Code § 3400 et seq*], precluded the exercise of jurisdiction based on "significant connection and substantial evidence" unless it was in a child's best interests [*see* former *Fam. Code § 3403(a)*]. However, according to the National Conference of Commissioners on Uniform State Laws, although the UCCJA was designed to promote the best interests of children, the "best interest" language in the UCCJA's jurisdictional provisions was never intended to invite courts to address the merits of custody disputes when making jurisdictional determinations, to allow "best interests" considerations to override jurisdictional determinations, or to provide an additional basis for jurisdiction under the UCCJA [Commissioner's Prefatory Note to UCCJEA, 9 Uniform Laws Annotated 652 (1999)]. Therefore, the term "best interests" was intentionally eliminated from the UCCJEA, to clearly distinguish between jurisdictional and substantive standards relating to custody and visitation [Commissioner's Prefatory Note to UCCJEA, 9 Uniform Laws Annotated 652 (1999)].

[iii] PKPA Compared to UCCJEA

The PKPA, unlike the UCCJEA, still provides that a state court cannot assume jurisdiction based on "significant connection and substantial evidence" unless it is in the best interests of the child to do so. But this language is not directed to the merits of the underlying dispute over who should have custody, but to the propriety of the court hearing the custody matter because specified criteria either have or have not been met [*see 28 U.S.C. § 1738A(c)(2)(B)*].

[4] Temporary Emergency Jurisdiction

Under the UCCJEA, a California court has temporary emergency jurisdiction if a child is present in California and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse [*see Fam. Code § 3424(a)*; *In re C. T. (2002) 100 Cal. App. 4th 101, 107, 121 Cal. Rptr. 2d 897]* . Generally, a temporary emergency order issued by a California court remains in effect only until another state court that has home state or exclusive, continuing jurisdiction to make or modify a custody determination for the child is able to enter a custody order [*see Fam. Code § 3424(b)*]. However, in some cases, if California later becomes the child's home state, a temporary emergency order issued by a California court will become a permanent child custody determination [*see Fam. Code § 3424(b)*].

If simultaneous proceedings for a child custody determination and a temporary emergency child custody order are commenced in California and another state, then the two state courts must communicate to determine how best to resolve the emergency situation [*see Fam. Code § 3424(d)*].

The PKPA also provides for jurisdiction to make a custody determination if a child is physically present in a state and either has been abandoned or it is necessary in an emergency to protect the child because of actual or threatened mistreatment or abuse [*see 28 U.S.C. § 1738A(c)(2)(C)*]. For further discussion of temporary emergency jurisdiction under the UCCJEA and PKPA, see *§ 394.108*.

[5] California Is More Appropriate Forum Because of Inconvenient Forum or Unjustified Conduct

The UCCJEA provides for jurisdiction in California if all the states that otherwise would have "home state" or "significant connection" jurisdiction decline to exercise jurisdiction because California is a more appropriate forum under *Fam. Code § 3427* (inconvenient forum, as discussed in *§ 394.111*), or under *Fam. Code § 3428* (unjustifiable conduct, as discussed in *§ 394.112*) [*Fam. Code § 3421(a)(3)*; *see* Commissioner's Comment to UCCJEA § 201, 9 Uniform Laws Annotated 673 (1999)].

Similarly, under the PKPA, a state may exercise jurisdiction if (1) it has jurisdiction under its own laws, (2) another state has declined to exercise jurisdiction on the ground that the state whose jurisdiction is in issue is the more appropriate forum to determine custody or visitation, and (3) it is in the child's best interest that the court assume jurisdiction [*28 U.S.C. § 1738A(c)(2)(D)*].

[6] Jurisdiction in No Other State

[a] Rule Stated

[i] UCCJEA

Under the UCCJEA, California may exercise initial custody jurisdiction if no court of any other state would have jurisdiction under the "home state," "significant connection and substantial evidence," or "more appropriate forum" grounds set forth in *Fam. Code § 3421(a)* [*Fam. Code § 3421(a)(4)*].

Unlike the PKPA and former UCCJA, however, the UCCJEA no longer makes reference to "best interest of the child." For a related discussion of the elimination of this phrase, see [3][c], *above*.

[ii] PKPA

Under the PKPA, a state may exercise jurisdiction if (1) it has jurisdiction under its own laws, (2) it appears that no other state would have jurisdiction under the "home state," "significant connection and substantial evidence," or "more appropriate forum" grounds set forth in Title *28 United States Code Section 1738A(c)(2)*, and *(3)* it is in the child's best interest that the court assume jurisdiction [*28 U.S.C. § 1738A(c)(2)(D)*].

[b] Former UCCJA Compared

Under the former UCCJA, a state could assume custody jurisdiction if it was in the best interest of the child that the court do so, and if one of the following conditions existed [Former *Fam. Code § 3403(a)(4)*]:

1. It appeared that no other state would have jurisdiction under prerequisites substantially in accordance with the other (UCCJA) grounds for jurisdiction; or

2. Another state had declined to exercise jurisdiction on the ground that the state now requested to take jurisdiction was the more appropriate forum to determine the custody of the child.

The Commissioner's Comment explained that this ground for jurisdiction, which was subsidiary in nature, was to be resorted to only if no other state could or would assume jurisdiction under the other criteria of the UCCJA

[Commissioner's Comment to UCCJA § 3, 9 Uniform Laws Annotated 145 (1988); *see In re Marriage of Fox (1986) 180 Cal. App. 3d 862, 873, 225 Cal. Rptr. 823]* .

Unlike the current UCCJEA or PKPA, California's former UCCJA provided that under this jurisdictional basis, California could assume jurisdiction based solely on the physical presence in California of the child, or of the child and a contestant [Former *Fam. Code § 3403(b)*].

[7] Effect of Stipulation or Acquiescence to Jurisdiction

Neither the UCCJEA nor the PKPA, or the former UCCJA, address the issue of whether a court may exercise custody jurisdiction on the basis of parties entering into a stipulation, or by one or both parties merely acquiescing to the court's assumption of jurisdiction in a particular matter. Strictly speaking, it would appear that parties may not, as such, through their action (by stipulation) or inaction (by acquiescence), confer custody jurisdiction on a court where it otherwise does not exist under the UCCJEA or PKPA, given that these statutes are the expression of a strong policy of creating a framework for the consistent exercise of jurisdiction on a national scale. In support of this view has been the general rule under the former UCCJA, namely, that subject matter jurisdiction may not be conferred simply by the consent of the parties [*see In re Marriage of Nurie (2009) 176 Cal. App. 4th 478, 487, 98 Cal. Rptr. 3d 200* ; *In re Jaheim B. (2009) 169 Cal. App. 4th 1343, 1348, 87 Cal. Rptr. 3d 504* ; *Adoption of Zachariah K. (1992) 6 Cal. App. 4th 1025, 1035, 8 Cal. Rptr. 2d 423* ; *In re Marriage of Arnold & Cully (1990) 222 Cal. App. 3d 499, 504, 271 Cal. Rptr. 624* ; *In re Marriage of Hopson (1980) 110 Cal. App. 3d 884, 891-892, 168 Cal. Rptr. 345* ; *In re Marriage of Ben-Yehoshua (1979) 91 Cal. App. 3d 259, 263, 154 Cal. Rptr. 80]* .

However, courts have not always strictly applied this rule in child custody cases. It has been held that normal principles of res judicata apply to the determination of subject matter jurisdiction under the former UCCJA [*Souza v. Superior Court (1987) 193 Cal. App. 3d 1304, 1311, 238 Cal. Rptr. 892]* . If a party had notice and the opportunity to be heard and either participated in the proceeding or consented to the decree, there should be no right to attack the jurisdiction of the decree state in another state [*Peery v. Superior Court (1985) 174 Cal. App. 3d 1085, 1093-1097, 219 Cal. Rptr. 882* (parent was validly served and allowed default to be entered in California without raising issue of subject matter jurisdiction under UCCJA); *see In re Marriage of Torres (1998) 62 Cal. App. 4th 1367, 1380, 73 Cal. Rptr. 2d 344* ; *see § 394.114[1]*]. Another appellate court enforced a noncustodial parent's stipulation to California modification jurisdiction, viewing the stipulation not as conferring jurisdiction, but as removing the decree state's last significant contact with the case (the noncustodial parent's continuing residence there) [*Daves v. Daves (1985) 173 Cal. App. 3d 97, 107-108, 218 Cal. Rptr. 879* ; *see § 394.110*]. It was perhaps significant that the courts of the decree state had held the stipulation to be valid and thereafter declined to exercise further jurisdiction.

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§ 394.108 Temporary Emergency Jurisdiction

[1] Under UCCJEA

[a] Nature of Emergency

[i] Overview of Rule

A California court has temporary emergency jurisdiction if a child is present in California and has been abandoned, or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse [*Fam. Code § 3424(a)*; *In re Jaheim B. (2009) 169 Cal. App. 4th 1343, 1349, 87 Cal. Rptr. 3d 504* ; *In re Marriage of Paillier (2006) 144 Cal. App. 4th 461, 470, 50 Cal. Rptr. 3d 459* ; *In re C. T. (2002) 100 Cal. App. 4th 101, 107, 121 Cal. Rptr. 2d 897]* . A California court may take temporary emergency jurisdiction to protect a child even though California can claim neither "home state" nor "significant connection and substantial evidence" jurisdiction [Commissioner's Comment to UCCJEA § 204, 9 Uniform Laws Annotated 677 (1999); *see* *In re Jaheim B. (2009) 169 Cal. App. 4th 1343, 1350-1351, 87 Cal. Rptr. 3d 504* (juvenile court had emergency jurisdiction because child was present in California when neglect occurred and court's action was necessary to protect child from immediate harm, even though child did not have home state under UCCJEA); *§ 394.107[1]*]. Furthermore, a California court's duty to enforce and not modify a child custody determination of another state is subordinate to the need to enter a temporary emergency order to protect a child [*see* Commissioner's Comment to UCCJEA § 204, 9 Uniform Laws Annotated 677 (1999)].

A custody determination made under the emergency jurisdiction provisions of the UCCJEA is normally only a temporary order, because the purpose of the order is only to protect the child until a state with UCCJEA jurisdiction (on a nonemergency basis) can make a custody determination [*In re Marriage of Paillier (2006) 144 Cal. App. 4th 461, 470, 50 Cal. Rptr. 3d 459* ; Commissioner's Comment to UCCJEA § 204, 9 Uniform Laws Annotated 677 (1999)]. However, a juvenile court in a dependency proceeding may continue to exercise its emergency jurisdiction as long as the reasons underlying the dependency exist [*In re Jaheim B. (2009) 169 Cal. App. 4th 1343, 1349-1350, 87 Cal. Rptr. 3d 504* (emergency jurisdiction can properly continue beyond detention hearing when risk of harm creating

emergency is ongoing)].

Under the UCCJEA, a California court may not assume temporary emergency jurisdiction on the basis of "neglect." Instead, emergency jurisdiction requires "mistreatment or abuse" [Commissioner's Comment to UCCJEA § 204, 9 Uniform Laws Annotated 678 (1999)].

Generally, an emergency protective order that contains a child custody determination is enforceable in other states if it complies with the UCCJEA and the PKPA [Commissioner's Comment to UCCJEA § 204, 9 Uniform Laws Annotated 678 (1999)]. However, an order issued after the assumption of temporary emergency jurisdiction is entitled to interstate enforcement and modification only if there has been notice and a reasonable opportunity to be heard, in accordance with the noticeprovisions [*see Fam. Code § 3425*; *In re C. T. (2002) 100 Cal. App. 4th 101, 107-109, 121 Cal. Rptr. 2d 897]* of the UCCJEA [Commissioner's Comment to UCCJEA § 204, 9 Uniform Laws Annotated 678 (1999)].

[ii] Construction Under Case Law

California cases that have interpreted provisions for emergency jurisdiction have construed the PKPA and California's former UCCJA. Although California's current UCCJEA is worded somewhat differently than its predecessor and now includes references to a child's siblings with respect to the need for protection from mistreatment or abuse, these cases may offer insight in construing the current statutes [*compare Fam. Code § 3424(a) with* former *Fam. Code § 3403(a)(3)*].

With respect to defining the circumstances of an "emergency" that justifies a court's exercise of jurisdiction, both the current UCCJEA and former UCCJA make reference not only to a child's actual or threatened mistreatment or abuse, but also to that of a child's parent. And the current UCCJEA extends this to a child's sibling. The PKPA, by contrast, refers only to the child [*compare Fam. Code § 3424(a) with 28 U.S.C. § 1738A(c)(2)(C)*; former *Fam. Code § 3403(a)(3)*]. This variance, however, would not seem to be in conflict with the PKPA. Because the ground extends to children who are *threatened* with mistreatment or abuse, it would seem consistent to provide that a home in which domestic violence is directed against a parent or sibling also places the child at risk [*see Cole v. Superior Court (1985) 173 Cal. App. 3d 265, 271, 218 Cal. Rptr. 905* (allegations of violence directed at parent and stepsibling would support finding that child is in danger)]. Thus, these additions in the UCCJEA should not be federally preempted [*cf. People v. Superior Court (Smolin) (1986) 41 Cal. 3d 758, 770, 225 Cal. Rptr. 438, 716 P.2d 991 , rev'd on other grounds, California v. Superior Court of California (1987) 482 U.S. 400, 107 S. Ct. 2433, 96 L. Ed. 2d 332]* .

Invocation of emergency jurisdiction is reserved for extraordinary circumstances [*see In re Marriage of Paillier (2006) 144 Cal. App. 4th 461, 470-473, 50 Cal. Rptr. 3d 459* (inappropriate exercise of court's temporary emergency jurisdiction)]. The emergency provision retains and reaffirms *parens patriae* jurisdiction, usually exercised by a juvenile court, which a state must assume if a child requires immediate protection. This jurisdiction exists if a child has been abandoned, or in emergency cases of child neglect. If there is child neglect without emergency or abandonment, jurisdiction on this basis does not exist [*In re Joseph D. (1993) 19 Cal. App. 4th 678, 688, 23 Cal. Rptr. 2d 574* ; *see Hafer v. Superior Court (1981) 126 Cal. App. 3d 856, 864-865, 179 Cal. Rptr. 132* ; *In re Marriage of Schwander (1978) 79 Cal. App. 3d 1013, 1020-1021, 145 Cal. Rptr. 325* ; *see also* Commissioner's Comment to UCCJA § 3, 9 Uniform Laws Annotated 145 (1988)]. However, if the potential for immediate harm is presented, emergency jurisdiction will lie. If the validity of allegations related to abandonment or neglect is uncertain, the very possibility that the allegations may be true is sufficient for a court to assume emergency jurisdiction [*In re Joseph D. (1993) 19 Cal. App. 4th 678, 688, 23 Cal. Rptr. 2d 574]* .

One court has held that California may take emergency jurisdiction and enter an interim custody order on the basis of allegations of a threatened abduction. Such an allegation was characterized as a threatened mistreatment of the child, creating emergency jurisdiction under the PKPA and (now former) UCCJA [*People v. Beach (1987) 194 Cal. App. 3d 955, 970, 240 Cal. Rptr. 50]* .

[b] Duration of Order

[i] Current Rules

[A] No Prior Custody Case Commenced or Determination Made

If there is no previous child custody determination that is enforceable under the UCCJEA and a child custody proceeding has not been commenced in a court of a state having UCCJEA jurisdiction under *Fam. Code §§ 3421-3423*, inclusive (regarding initial, exclusive and continuing, and modification jurisdiction), then a California custody determination made under the UCCJEA provisions for temporary emergency jurisdiction [*see Fam. Code § 3424*] remains in effect *until* an order is obtained from a court of a state that does have UCCJEA jurisdiction under *Fam. Code §§ 3421-3423*, inclusive [*Fam. Code § 3424(b)*].

However, a temporary emergency order issued by a California court becomes a final custody determination if (1) the order so provides, (2) California becomes the child's home state, and (3) a child custody proceeding has not been or is not commenced in a court of a state having UCCJEA jurisdiction under *Fam. Code §§ 3421-3423*, inclusive [*Fam. Code § 3424(b)*].

[B] When Prior Custody Case Has Been Commenced or Determination Made

If there is a previous child-custody determination that is enforceable under the UCCJEA, or a child custody proceeding has been commenced in a court of a state with UCCJEA jurisdiction under *Fam. Code §§ 3421-3423*, inclusive (regarding initial, exclusive and continuing, and modification jurisdiction), any California court order issued on the basis of UCCJEA temporary emergency jurisdiction must specify an adequate time period within which the moving party may obtain an order from that other state's court (that has UCCJEA jurisdiction under *Fam. Code §§ 3421-3423*, inclusive) [*Fam. Code § 3424(c)*; *In re Marriage of Paillier (2006) 144 Cal. App. 4th 461, 473, 50 Cal. Rptr. 3d 459* ; *In re C. T. (2002) 100 Cal. App. 4th 101, 109-110, 121 Cal. Rptr. 2d 897]* . The California order issued in California remains in effect until an order is obtained from the other state within the period specified, or the period expires [*Fam. Code § 3424(c)*].

The other state court might choose to decline jurisdiction on the basis that California is a more convenient forum if it concludes that California is in a better position to address the safety of the person who obtained the temporary emergency order or the safety of the child [Commissioner's Comment to UCCJEA § 204, 9 Uniform Laws Annotated 678 (1999); *see Fam. Code § 3427*].

For discussion of the duty of a California court with UCCJEA jurisdiction to communicate with another state's court to determine the duration of an emergency order issued by that court, see [c], *below*.

[ii] Construction Under Case Law

The current UCCJEA sets forth detailed criteria by which to determine the duration of a temporary emergency custody order [*Fam. Code § 3424(b), (c)*; *see* [i], *above*]. Case law that construes the former UCCJA may offer insight in construing the current statutes [*compare Fam. Code § 3424(b), (c) with* former *Fam. Code § 3403(a)(3)*].

For example, it has been held that an interim (that is, temporary) custody order is valid and enforceable even if the court subsequently determines that it does not have or should not further exercise jurisdiction [*see People v. Beach (1987) 194 Cal. App. 3d 955, 970, 240 Cal. Rptr. 50]* .

In addition, consistent with both the current UCCJEA and former UCCJA, courts have held that if if another state has proper jurisdiction under the UCCJA, emergency jurisdiction is a short-term, limited jurisdiction. It does not encompass jurisdiction to make permanent custody determinations, or to modify a custody decree of a court with continuing

jurisdiction [*In re Marriage of Paillier (2006) 144 Cal. App. 4th 461, 473, 50 Cal. Rptr. 3d 459* ; *In re Joseph D. (1993) 19 Cal. App. 4th 678, 690-693, 23 Cal. Rptr. 2d 574* ; *see In re Stephanie M. (1994) 7 Cal. 4th 295, 310 n.5, 27 Cal. Rptr. 2d 595, 867 P.2d 706]* . The court may make temporary orders only for such time as is necessary to allow a party to initiate appropriate proceedings in the state with regular jurisdiction under the UCCJA (or now, under the UCCJEA). It must communicate with the court with continuing jurisdiction, and defer to that court until such time as it declines to exercise its jurisdiction [*In re Joseph D. (1993) 19 Cal. App. 4th 678, 690-694, 23 Cal. Rptr. 2d 574* (while juvenile court could hold hearing to determine if emergency existed and issue temporary orders, it could not conduct dispositional hearing and exercise ongoing dependency jurisdiction over child who was subject to valid jurisdiction of another state); *cf. Fam. Code § 3424*].

Under the former UCCJA, as under the current UCCJEA [*see Fam. Code § 3424(b), (c)*] if there is no such other state with proper jurisdiction, a court exercising emergency jurisdiction may make all such orders and dispositions as are proper under its own jurisdiction [*In re Stephanie M. (1994) 7 Cal. 4th 295, 310 n.5, 27 Cal. Rptr. 2d 595, 867 P.2d 706]* .

[c] Court's Duty to Communicate With Other Court

A California court that has been asked to exercise temporary emergency jurisdiction, on being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of a state having UCCJEA jurisdiction under *Fam. Code §§ 3421-3423*, inclusive (regarding initial, exclusive and continuing, and modification jurisdiction), must immediately communicate with the other court [*Fam. Code § 3424(d)*; *see § 394.114[8]* (communication between courts); *In re C. T. (2002) 100 Cal. App. 4th 101, 110-111, 121 Cal. Rptr. 2d 897]* .

Similarly, if a California court is exercising jurisdiction pursuant to *Fam. Code §§ 3421-3423*, inclusive, on being informed that a custody proceeding has been commenced in, or a child custody determination has been made by, a court of another state under a statute similar to the California statute for temporary emergency jurisdiction, it must immediately communicate with the court of the other state to (1) resolve the emergency, (2) protect the safety of the parties and the child, and (3) determine a period for the duration of the temporary order [*Fam. Code § 3424(d)*; *see* Commissioner's Comment to UCCJEA § 204, 9 Uniform Laws Annotated 678 (1999); § 394.114[8] (communication between courts)].

[d] Party's Duty to Advise Court of Other Proceedings

The general pleading rules for UCCJEA jurisdiction [*see Fam. Code § 3429*] apply to proceedings for temporary emergency child custody orders, and must be strictly followed. Therefore, a person seeking a temporary emergency custody order must inform a California court of any other child custody proceedings that concern the child [Commissioner's Comment to UCCJEA § 204, 9 Uniform Laws Annotated 678 (1999)].

[e] Special Domestic Violence Considerations

California's version of the UCCJEA contains a special provision with respect to temporary emergency jurisdiction that is not taken from the model UCCJEA [*see* UCCJEA § 204, 9 Uniform Laws Annotated 676-677 (1999)]. This provision states [*Fam. Code § 3424(e)*]: "It is the intent of the Legislature in enacting [*Fam. Code § 3424(a)*] that the grounds on which a court may exercise temporary emergency jurisdiction be expanded. It is further the intent of the Legislature that these grounds include those that existed under [former *Fam. Code] § 3403* as that section read on December 31, 1999, particularly including cases involving domestic violence."

Former *Fam. Code § 3403*, a part of California's now-repealed UCCJA [*see* former *Fam. Code § 3400 et seq.*], contained the UCCJA's jurisdictional requirements, and authorized four concurrent bases of jurisdiction ("home state," "significant connections and substantial evidence," "emergency protection of the child," and "jurisdiction in no other

state") that also mentioned consideration of "the best interest of the child." Former *Fam. Code § 3403(a)(3)*, which dealt directly with emergency jurisdiction, and which is the only provision of that section that mentions cases involving domestic violence, authorized jurisdiction when "[t]he child is physically present in this state and (A) the child has been abandoned or (B) it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent. For the purposes of this subdivision, 'subjected to or threatened with mistreatment or abuse' includes a child who has a parent who is a victim of domestic violence, as defined in [*Fam. Code] § 6211*."

The Legislature's intentions as expressed in *Fam. Code § 3424(e)* regarding "expanded grounds for exercise of temporary emergency jurisdiction"under the UCCJEA are presently unclear and remain subject to further judicial or legislative clarification. One possible interpretation is that the courts are authorized to assume temporary emergency jurisdiction on any of the four jurisdictional grounds permitted by the former UCCJA when a case involves domestic violence and a child's safety and well-being is of paramount importance, but other narrower interpretations are also possible.

[2] Under PKPA

Under the PKPA, a court may make a child custody or visitation determination if (1) the court has jurisdiction under its own laws, and (2) the child is physically present in the state and either (a) has been abandoned, or (b) it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse [*28 U.S.C. § 1738A(c)(1),(2)(C)*].

In interpreting this provision, the Commissioners have commented, that under the PKPA, a temporary emergency child custody order that is based on neglect alone, without a finding of mistreatment or abuse, is not entitled to federal enforcement in other states [Commissioner's Comment to UCCJEA § 204, 9 Uniform Laws Annotated 678 (1999)].

Like the UCCJEA, the PKPA does not subjugate emergency jurisdiction to "home state" jurisdiction [*see 28 U.S.C. § 1738A(c)(2)(C)*; *Fam. Code § 3424*]. Thus, for example, in making an initial decree, there is no conflict between the PKPA and UCCJEA (or the former UCCJA) with regard to emergency jurisdiction.

Unlike the UCCJEA--which defines an "emergency" not only in terms of a child's abandonment or need for protection from actual or threatened mistreatment or abuse, but also in terms of a *sibling's or parent's* need for such protection--the PKPA speaks only in terms of the child [*see 28 U.S.C. § 1738A(c)(2)(C)*; *Fam. Code § 3424(a)*].

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§ 394.109 Simultaneous Proceedings in Other States

[1] Under UCCJEA

[a] Overview of Rule

[i] Rule Stated and Implications

Except as otherwise required with respect to temporary emergency jurisdiction under the UCCJEA (*see § 394.108*), a California court may not exercise jurisdiction under the UCCJEA if, at the time of the commencement of the proceeding, a proceeding concerning the custody of the child has been commenced in a court of another state having jurisdiction substantially in conformity with the UCCJEA [*see Fam. Code § 3400 et seq.*], unless the proceeding has been terminated or is stayed by the court of the other state because a California court is a more convenient forum under the inconvenient forum provisions of the UCCJEA [*Fam. Code § 3426(a)*; *see Fam. Code § 3427*].

Under the UCCJEA, simultaneous proceedings are not a significant issue, because if there is another home state, a California court cannot exercise "significant connection and substantial evidence" jurisdiction in order to make an initial child custody determination [*see Fam. Code § 3421*; *see also § 394.107*], and if there is another state with exclusive and continuing jurisdiction [*see Fam. Code § 3422*], a California court cannot exercise concurrent jurisdiction [Commissioner's Comment to UCCJEA § 206, 9 Uniform Laws Annotated 681 (1999)]. However, in a case in which no home state exists, no state has exclusive and continuing jurisdiction, and California and another state both have "significant connection and substantial evidence' jurisdiction, then a California court must not assume jurisdiction if a child custody proceeding has already been commenced in another state [Commissioner's Comment to UCCJEA § 206, 9 Uniform Laws Annotated 681 (1999). In this situation, the UCCJEA retains the "first in time" rule of its predecessor statute, the UCCJA (*see* Commissioner's Comment to UCCJEA § 206, 9 Uniform Laws Annotated 681 (1999); former *Fam. Code § 3406(a)*)].

[ii] Construction Under Case Law

Cases have considered the effect of pending or simultaneous proceedings between states, primarily in the context of the former UCCJA. These cases may provide insight in understanding the current UCCJEA.

Courts have held that if jurisdiction is proper in two states, the second in time must defer to the first as long as the first is properly exercising its jurisdiction [*In re Marriage of Torres (1998) 62 Cal. App. 4th 1367, 1375, 73 Cal. Rptr. 2d 344* ; *see In re Marriage of Zierenberg (1992) 11 Cal. App. 4th 1436, 1442, 16 Cal. Rptr. 2d 238]* .

Once a pending proceeding results in a custody order, the proceeding is no longer "pending" for purposes of first-in-time deference [*see In re Marriage of Steiner (1979) 89 Cal. App. 3d 363, 370, 152 Cal. Rptr. 612 , criticized, other grounds, in Kumar v. Superior Court (1982) 32 Cal. 3d 689, 699 n.12, 186 Cal. Rptr. 772, 652 P.2d 1003]* . At that point, the question becomes whether the decree state has continuing jurisdiction as of the time when another state is asked to assume jurisdiction over the matter [*see In re Marriage of Zierenberg (1992) 11 Cal. App. 4th 1436, 1443, 16 Cal. Rptr. 2d 238* ; *see also Kumar v. Superior Court (1982) 32 Cal. 3d 689, 699, 186 Cal. Rptr. 772, 652 P.2d 1003]* . Similarly, a proceeding is not pending if it has abated because of the death of a parent who is a party [*see In re Janette H. (1987) 196 Cal. App. 3d 1421, 1429-1430, 242 Cal. Rptr. 567* (death of party to California dissolution of marriage proceeding abated that proceeding)].

[b] Court's Duty to Inquire About Other State's Proceedings and Take Appropriate Action

[i] In General

[A] Need to Examine Court Documents and Other Information From Parties

Except as otherwise required with respect to temporary emergency jurisdiction under the UCCJEA (*see § 394.108*), a California court, before hearing a child custody proceeding, must examine the court documents and other information supplied by the parties pursuant to their UCCJEA declarations [*Fam. Code § 3426(b)*; *see Fam. Code § 3429*]. If the court determines that a child custody proceeding has been commenced in a court in another state having jurisdiction substantially in accordance with the UCCJEA, the California court must stay its proceeding and communicate with the court of the other state [*Fam. Code § 3426(b)*; *see Fam. Code § 3410*; § 394.114[8] (communication between courts)]. If that other court does not determine that the California court is a more appropriate forum, the California court must dismiss its proceeding [*Fam. Code § 3426(b)*].

[B] Construction of Court's Communication Duty

Cases have construed a court's duty to communicate with another court on determining that other proceedings are pending, primarily in the context of the former UCCJA. However, this case law may offer insight concerning the requirements of current law.

Courts have held that communication and consultation with another state in which proceedings are pending is not discretionary; it is mandatory [*In re Joseph D. (1993) 19 Cal. App. 4th 678, 693, 23 Cal. Rptr. 2d 574.]* . This duty comports with the purpose of the (now former) UCCJA and UCCJEA to promote cooperation with the courts of other states to the end that a custody decree is rendered in the state that can best decide the case in the interests of the child [*In re Aisha B. (1988) 206 Cal. App. 3d 1030, 1034, 254 Cal. Rptr. 116* ; *Guardianship of Donaldson (1986) 178 Cal. App. 3d 477, 491, 223 Cal. Rptr. 707* ; *see Fam. Code § 3426(b)*; former *Fam. Code § 3401(a)(2)*].

[ii] Rule in Modification Cases

In a proceeding to modify a child custody determination, a California court must determine whether a proceeding to enforce the determination has been commenced in another state. If a proceeding to enforce a child custody determination has been commenced in another state, the court may do any of the following [*Fam. Code § 3426(c)*]:

1. Stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying, or dismissing the proceeding for enforcement.

2. Enjoin the parties from continuing with the proceeding for enforcement.

3. Proceed with the modification under conditions it considers appropriate.

[iii] Rule When Both Modification and Enforcement Sought

If simultaneous proceedings are commenced for modification and enforcement of a child custody determination, then a California court with exclusive, continuing jurisdiction to modify a California custody determination may stay the modification proceeding, enjoin the parties from continuing with the enforcement proceeding in the other state, or proceed with modification of the determination under whatever conditions it considers appropriate [Commissioner's Comment to UCCJEA § 206, 9 Uniform Laws Annotated 681 (1999)].

Note that, although the PKPA [*28 U.S.C. § 1738A*] requires a court of another state to enforce a custody determination made consistently with the PKPA, the enforcement duty is subject to modification of the custody determination by a state with power to modify under the PKPA. Therefore, this provision of the UCCJEA is consistent with the PKPA [*see* Commissioner's Comment to UCCJEA § 206, 9 Uniform Laws Annotated 681 (1999)]. For further discussion of modification jurisdiction, see *§ 394.110*. For further discussion of enforcement procedures, see Ch. 260, *Family Law Enforcement: Foreign Judgments* .

[2] Under PKPA

Under the PKPA, a court must not exercise jurisdiction in any proceeding for a custody or visitation determination that is commenced during the pendency of another state's proceeding, if the court of that other state is exercising jurisdiction consistently with the provisions of the PKPA to make a custody determination [*28 U.S.C. § 1738A(g)*].

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§ 394.110 Jurisdiction to Modify Prior Custody Decree

[1] Bases for Modification Jurisdiction in California

[a] Modification of Prior California Decree

[i] When California Has Exclusive, Continuing Jurisdiction

A court that has continuing subject matter jurisdiction over a child custody proceeding retains the power to issue further orders in that proceeding, including orders to modify custody or visitation. As discussed hereafter, the UCCJEA and PKPA set forth specific criteria by which to determine whether a court has continuing jurisdiction.

Under the UCCJEA, except with respect to the exercise of temporary emergency jurisdiction [*see Fam. Code § 3424*], a California court that has made a custody determination consistent with the UCCJEA provisions for initial or modification proceedings [*see Fam. Code §§ 3421, 3423*], retains *exclusive, continuing* jurisdiction to modify that determination [*Fam. Code § 3422(a)*].

However, California's exclusive, continuing jurisdiction will end if either of the following occurs [*Fam. Code § 3422(a)*]:

1. A California court determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with California and that substantial evidence is no longer available in California concerning the child's care, protection, training, and personal relationships [*compare Fam. Code § 3422(a) with* UCCJEA § 202, 9 Uniform Laws Annotated 673 (1999) (model UCCJEA, which provides that jurisdiction will continue until court "determines that neither the child, the child's parents, and any person acting as a parent do not have a significant connection with [California]")]; or

2. A California court or a court of another state determines that the child, the child's parents, and any

person acting as a parent do not presently reside in California.

The language in subparagraph (2) is intended to have the same meaning as similar language in the PKPA and the Uniform Interstate Family Support Act [Commissioner's Comment to UCCJEA § 202, 9 Uniform Laws Annotated 674 (1999); *see* Ch. 260, *Family Law Enforcement: Foreign Judgments* (UIFSA)].

With respect to the "significant connection" aspect in subparagraph (1), a California court retains its exclusive, continuing jurisdiction over a custody determination for as long as the child, the child and a parent, or the child and a person acting as a parent continue to have a significant connection with California and there is substantial evidence in California regarding the child [*see In re Marriage of Nurie (2009) 176 Cal. App. 4th 478, 512, 98 Cal. Rptr. 3d 200* (statute unambiguously gives decree state sole power to decide whether jurisdiction has been lost on this basis); *see also § 394.107[3]*]. Even if the child acquires a new home state, California's jurisdiction continues, and only the California court may decide whether the relationship between the child and a parent or person remaining in California has become so attenuated that significant connections and substantial evidence no longer support jurisdiction [Commissioner's Comment to UCCJEA § 202, 9 Uniform Laws Annotated 674 (1999); *In re Marriage of Nurie (2009) 176 Cal. App. 4th 478, 512, 98 Cal. Rptr. 3d 200* (relevant inquiry is not which jurisdiction has most evidence or most significant connection to child, but whether California has so thoroughly lost connection that exercise of its jurisdiction would be unreasonable)]. According to a Commissioner's comment, under the UCCJEA, a person seeking to modify a custody determination must obtain an order from the original decree state *to the effect* that it no longer has jurisdiction, if any of the parties still reside in the original decree state [Commissioner's Comment to UCCJEA § 202, 9 Uniform Laws Annotated 674 (1999)].

With respect to the residency aspect, California loses its jurisdiction if the child, the parents, and all persons acting as parents physically leave California in order to live elsewhere [Commissioner's Comment to UCCJEA § 202, 9 Uniform Laws Annotated 674 (1999)]. In the UCCJEA, the phrase "do not presently reside" is not used in the sense of technical domicile. Thus, any state court can make the determination that another state court has lost jurisdiction because none of the parties are still living in the other state [Commissioner's Comment to UCCJEA § 202, 9 Uniform Laws Annotated 674-675 (1999); *see In re Marriage of Nurie (2009) 176 Cal. App. 4th 478, 511, 98 Cal. Rptr. 3d 200* (party may have more than one residence, and decree state retains jurisdiction until party abandons all residential ties with that state; judicial determination that all parties no longer reside in decree state is required to divest that state of continuing exclusive jurisdiction)].

Jurisdiction attaches when a proceeding commences. Thus, if all parties move out of California after a modification or other proceeding is commenced, but before the proceeding is concluded, then California will retain jurisdiction, unless the California court decides that another state court would be a more convenient forum [Commissioner's Comment to UCCJEA § 202, 9 Uniform Laws Annotated 675 (1999); *see Fam. Code § 3427*].

Once a California court loses jurisdiction, the California court cannot modify its own child custody determination unless it has jurisdiction under the standards for initial jurisdiction (*see* [ii], *below*). Also, the California court cannot modify the custody determinations of another state court that has acquired exclusive, continuing jurisdiction [Commissioner's Comment to UCCJEA § 202, 9 Uniform Laws Annotated 675 (1999)]. If all the parties leave California, jurisdiction is not reestablished merely by the return of the noncustodial parent, or by the fact that California again becomes the child's home state [Commissioner's Comment to UCCJEA § 202, 9 Uniform Laws Annotated 675 (1999)].

By providing specific rules for continuing jurisdiction [*Fam. Code § 3422*], the UCCJEA addresses and seeks to eliminate the confusion that existed under its predecessor statute, the UCCJA [Former *Fam. Code § 3400 et seq*], after the enactment of the PKPA. The PKPA requires that states give full faith and credit to custody determinations made by an original decree state pursuant to the decree state's continuing jurisdiction, so long as the decree state has jurisdiction under its own law and remains the residence of the child or any contestant [*see* Commissioner's Comment to UCCJEA § 202, 9 Uniform Laws Annotated 674 (1999); *28 U.S.C. § 1738(d)*]. The UCCJEA actually narrows the PKPA's

continuing jurisdiction provisions by eliminating continuing jurisdiction when a "contestant" remains in the original decree state. Thus, under the UCCJEA, if only a grandparent or other third party claiming a right to visitation remains in the original decree state, then there will be no continuing jurisdiction [Commissioner's Comment to UCCJEA § 202, 9 Uniform Laws Annotated 675 (1999)].

[ii] When California Lacks Exclusive, Continuing Jurisdiction

A California court that has made a child custody determination and does not have exclusive, continuing jurisdiction under the UCCJEA [*see Fam. Code § 3422* (discussed in [i], *above*)] may modify that determination onlyif the court has jurisdiction under the UCCJEA to make an initial custody determination [*Fam. Code § 3422(b)*; *see Fam. Code § 3421*]. For discussion of grounds for making an initial custody determination, see *§ 394.107*.

For discussion of a California court's ability to issue a temporary order enforcing visitation provisions of another state's custody decree, despite the California court's absence of modification jurisdiction [*see Fam. Code § 3444*], see Ch. 260, *Family Law Enforcement: Foreign Judgments* .

[iii] Former UCCJA Compared

The former UCCJA lacked express provisions concerning continuing jurisdiction and continuing residence of a contestant in the decree state. Under the former law, a state could not modify the decree of another state unless (1) it appeared to the court of the modifying state that the decree state no longer had jurisdiction under jurisdictional prerequisites substantially in accordance with the UCCJA or had declined to assume jurisdiction to modify the decree, and (2) the modifying state did have jurisdiction [Former *Fam. Code § 3414(a)*].

Because the PKPA preempts state law [*In re Marriage of Pedowitz (1986) 179 Cal. App. 3d 992, 999-1000, 225 Cal. Rptr. 186]* , to the extent that there was a conflict between the above provisions and those of the PKPA, the more specific requirements of the federal law were held to control [*see DeBoer v. DeBoer (1993) 509 U.S. 1301, 1302-1303, 114 S. Ct. 1, 125 L. Ed. 2d 755* (in denial of application for federal stay in "Baby Jessica" adoption case, statement by United States Supreme Court Justice Stevens that Michigan Supreme Court gave "comprehensive and thoughtful explanation" of governing rules of law in *In re Clausen (1993) 442 Mich. 648, 502 N.W.2d 649* , which held that PKPA compelled Michigan to give full faith and credit to Iowa decree denying adoption, and that Michigan could not exercise modification jurisdiction based on best interests of child)]. However, in *Kumar v. Superior Court* [*Kumar v. Superior Court (1982) 32 Cal. 3d 689, 186 Cal. Rptr. 772, 652 P.2d 1003]* , the California Supreme Court construed the UCCJA to essentially conform to the PKPA [*Kumar v. Superior Court (1982) 32 Cal. 3d 689, 699-702, 186 Cal. Rptr. 772, 652 P.2d 1003* ; *see In re Stephanie M. (1994) 7 Cal. 4th 295, 314-315, 27 Cal. Rptr. 2d 595, 867 P.2d 706]* . The Court in *Kumar* held that the point of focus must first be on whether the decree state has continuing jurisdiction. It explained that one state could not modify a child custody order of another state that continues to have jurisdiction, even if the state may have had jurisdiction were it an initial proceeding. If there were no continuing jurisdiction, then analysis would begin under (what later became--and later was subsequently repealed) *Fam. Code § 3403* to determine whether the state in which a proceeding was commenced had jurisdiction [*Kumar v. Superior Court (1982) 32 Cal. 3d 689, 696, 698-699, 186 Cal. Rptr. 772, 652 P.2d 1003* ; *see Zenide v. Superior Court (1994) 22 Cal. App. 4th 1287,1295, 27 Cal. Rptr. 2d 703* ; *In re Janette H. (1987) 196 Cal. App. 3d 1421, 1430-1431, 242 Cal. Rptr. 567]* .

Cases also found that it was of no import whether the decree state's continuing jurisdiction had been presently invoked. Accordingly, even if there was no presently pending proceeding in the decree state, California could not assume modification jurisdiction until the decree state considered that it no longer had jurisdiction [*McArthur v. Superior Court (1991) 235 Cal. App. 3d 1287, 1293, 1 Cal. Rptr. 2d 296]* .

[b] Modification of Another State's Decree

[i] UCCJEA

Under the UCCJEA, except as otherwise provided in the UCCJEA regarding temporary emergency jurisdiction [*see Fam. Code § 3424*], a California court may not modify a child custody determination made by a court of another state unless a California court has jurisdiction to make an initial determination on the basis of "home state" [*Fam. Code § 3421(a)(1)*] or "significant connection/substantial evidence" [*Fam. Code § 3421(a)(2)*] jurisdiction *and* either of the following determinations is made [*Fam. Code § 3423*]:

1. The court of the other state determines that it no longer has exclusive, continuing jurisdiction under the UCCJEA [*see Fam. Code § 3422*], or that a California court would be a more convenient forum under the UCCJEA provisions for inconvenient forum [*see Fam. Code § 3427*]; or

2. A California court or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

These are the only two situations in which a California court will have modification jurisdiction. Significantly, if any of the parties remain in the other state, only the court of the other state may determine that it no longer has exclusive, continuing jurisdiction over the custody order [*Fam. Code § 3422(a)(1)*]. However, if all of the parties have moved away from the other state, then either the California court or the court of the other state may determine that exclusive, continuing jurisdiction no longer exists [*Fam. Code § 3422(a)(2)*]. Procedures for modification of out-of-state custody determinations are further discussed in *§ 394.114[11]*.

If a California court learns that a child custody modification proceeding has been commenced in California simultaneously with a child custody enforcement proceeding in another state, the California court may stay the modification proceeding, enjoin the parties from continuing the enforcement proceeding, or proceed with modification, as appropriate [*Fam. Code § 3426(c)*]. For further discussion of simultaneous proceedings commenced in other states, see *§ 394.109*.

[ii] PKPA

Under the PKPA, a court may modify a determination of the custody of a child made by a court of another state, if [*28 U.S.C. § 1738A(f)*]:

1. It has jurisdiction to make such a child custody determination; and

2. The court of the other state no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

Similarly, a court may not modify a visitation determination made by a court of another state unless the court of the other state no longer has jurisdiction to modify that determination or has declined to exercise jurisdiction to modify such a determination [*28 U.S.C. § 1738A(h)*].

These provisions must also be read in connection with the PKPA's provisions for continuing jurisdiction, which contemplate that a decree state's jurisdiction will continue as long as the court has jurisdiction under its own state law and the state remains the residence of the child and any contestant [*28 U.S.C. § 1738A(d)*].

[2] Treatment of Specific Modification Issues

[a] Proceeding Brought by Noncustodial Parent in Decree State

Cases have considered whether a noncustodial parent who remains in the state whose court has continuing jurisdiction over custody, because of having issued a custody decree, may seek to modify that decree when the custodial parent and child have moved to a different state. This issue has particularly arisen with respect to visitation situations. While the controlling criteria for continuing jurisdiction and modification are currently set forth (for California purposes) in the UCCJEA and PKPA, as discussed in [1], *above*, preexisting cases may provide insight in applying current law.

For example, it has been held that a noncustodial parent with whom a child is visiting in the decree state is not permitted, except in compelling circumstances, to use the occasion to divest the other parent of custody by obtaining a custody modification in the decree state. To permit such a modification would place a premium on the abuse of the right of visitation and make it difficult for parties to agree on the free movement of the child from one parent to another [*In re Marriage of Kern (1978) 87 Cal. App. 3d 402, 408, 150 Cal. Rptr. 860* ; *see Bergen v. Bergen (3d Cir. 1971) 439 F.2d 1008, 1015* ; *see also Ferreira v. Ferreira (1973) 9 Cal. 3d 824, 829, 109 Cal. Rptr. 80, 512 P.2d 304]* .

The situation is different if the resident noncustodial parent's visitation rights are being frustrated by the custodial parent in the other jurisdiction. Under these circumstances, it has been held that a court of the decree state court may properly exercise its continuing jurisdiction to address the matter [*Pieri v. Superior Court (1991) 1 Cal. App. 4th 114, 119-122, 1 Cal. Rptr. 2d 742]* .

[b] What Constitutes "Leaving" Decree State

Courts have been asked to consider whether particular absences out of state constituted leaving the decree state, for purposes of determining whether a decree state retained continuing jurisdiction (*see* [1][a], *above*) to modify the decree.

One court, for example, refused to apply then current principles respecting parties who had left the state with respect to a child who had been made a dependent of a California juvenile court under *Welf. & Inst. Code § 300*. The court held that a California juvenile court may place a dependent child out of state [*see Fam. Code § 7901*, art. 5(a) (Interstate Compact on the Placement of Children)] without losing continuing jurisdiction over the child, even if both parents had also leave the state [*In re Gloria F. (1989) 212 Cal. App. 3d 576, 585-586, 260 Cal. Rptr. 706* (but holding that court should have considered yielding jurisdiction to more convenient forum)].

The effect of a parent's temporary absence has also been considered. One court, for example, refused to find that a noncustodial parent's seven-month absence from the decree state had terminated the state's continuing jurisdiction. The parent had returned to the decree state at the time when the California court had to determine its own jurisdiction [*In re Marriage of Ratshin (1983) 144 Cal. App. 3d 974, 978-980, 192 Cal. Rptr. 891]* . In contrast, another court refused to accept the case as controlling and concluded that under the express language of the PKPA, the issue had to be resolved according to the meaning of "residence" under the PKPA [*see 28 U.S.C. § 1738A(d)*]. The court held that residency is lost under the PKPA unless there was an intent to return to the decree state at the time of the temporary absence [*In re Marriage of Pedowitz (1986) 179 Cal. App. 3d 992, 1001-1002, 225 Cal. Rptr. 186]* .

[c] Modifying State's Review of Decree State's Initial Assumption of Jurisdiction

An ongoing issue in interjurisdictional custody disputes has been the treatment that a modifying state should give to the decree of another jurisdiction that, in the view of the modifying state, was entered through the improper exercise of initial jurisdiction by the decree state. A number of cases have considered this issue, and while they were decided prior to California's enactment of the UCCJEA, they may serve as some authority in applying current law.

Preliminarily, note that both PKPA and the former UCCJA may be construed to permit "second look" review of another state's jurisdictionaldetermination. Under the PKPA, a custody determination of another state is entitled to full faith and credit only if it is made consistently with its provisions [*28 U.S.C. § 1738A(a)*]. Under the former UCCJA, a state had to recognize and enforce a custody decree of another state only if that court had assumed jurisdiction under jurisdictional

prerequisites substantially in accordance with the UCCJA, or that was made under factual circumstances meeting the jurisdictional standards of the UCCJA [Former *Fam. Code § 3413*].

The UCCJEA contains similar language [*see Fam. Code 3443(a)*], but no reported California cases have yet construed this portion of it.

California courts, however, earlier construed the former UCCJA as giving California the right to modify another state's decree if California determined that the decree state was not entitled to assume jurisdiction under the UCCJA [*In re Marriage of Fox (1986) 180 Cal. App. 3d 862, 869, 872, 225 Cal. Rptr. 823* (finding no initial jurisdiction in decree state); *In re Marriage of Hopson (1980) 110 Cal. App. 3d 884, 893-894, 168 Cal. Rptr. 345* (finding no modification jurisdiction in state that had modified decree of another state)]. However, one California court has severely criticized another state for taking a second look at California's initial assumption of jurisdiction and denying full faith and credit to the California decree [*Peery v. Superior Court (1985) 174 Cal. App. 3d 1085, 1093-1097, 219 Cal. Rptr. 882]* . Another court has stated that the only orderly procedure to avoid a conflict of state rulings was to require one asserting lack of jurisdiction to challenge the assumption of jurisdiction by direct attack (for example, appeal) in that proceeding [*Souza v. Superior Court (1987) 193 Cal. App. 3d 1304, 1310-1311, 238 Cal. Rptr. 892]* .

These cases indicate that the PKPA and former UCCJA did not wholly succeed in achieving the goal of eliminating jurisdictional conflict in child custody cases. And it remains to be seen whether courts will apply the UCCJEA in a manner that will now ameliorate this issue. In light of this dilemma, it is perhaps unfortunate that Congress did not provide in the PKPA for federal court jurisdiction to resolve interstate custody jurisdictional issues [*see Thompson v. Thompson (1988) 484 U.S. 174, 187, 108 S. Ct. 513, 98 L. Ed. 2d 512]* .

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34-394 California Forms of Pleading and Practice--Annotated § 394.111

§ 394.111 Declining Jurisdiction in Inconvenient Forum

[1] Introduction

The issue of inconvenient forum may arise in at least two contexts. First, it may arise in the context of whether California has jurisdiction to make an initial or modification order in a custody matter [*see Fam. Code §§ 3421, 3423*; *28 U.S.C. § 1738A(c)(2)(D)*]. In that context, the question is typically whether *some other* state is an inconvenient forum so as to justify California's exercise of jurisdiction under the statutory criteria of the UCCJEA. For discussion of California's assumption of jurisdiction and application of those criteria, see *§§ 394.107* and *394.110*.

The issue also may arise if California, as the state with otherwise proper jurisdiction under the UCCJEA and PKPA, *declines* to exercise that jurisdiction. The UCCJEA sets forth specific criteria for declining jurisdiction on the ground of inconvenient forum [*Fam. Code § 3427(a)*], and these are discussed hereafter.

A court should decline jurisdiction as an inconvenient forum only if there is concurrent jurisdiction elsewhere [*In re Marriage of Nurie (2009) 176 Cal. App. 4th 478, 514, 98 Cal. Rptr. 3d 200]* .

[2] Standards for Inconvenient Forum

A California court that has jurisdiction to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum [*Fam. Code § 3427(a)*]. The issue of inconvenient forum may be raised on motion of a party, the court's own motion, or request of another court [*Fam. Code § 3427(a)*].

Before determining whether it is an inconvenient forum, a California court must consider whether it is appropriate for a court of another state to exercise jurisdiction [*Fam. Code § 3427(b)*]. For this purpose, the court must allow the parties to submit information and must consider all relevant factors, including [*Fam. Code § 3427(b)*]

1. Whether domestic violence has occurred and is likely to continue in the future and which state could

best protect the parties and the child.

2. The length of time the child has resided outside California.

3. The distance between the California court and the court in the state that would assume jurisdiction.

4. The degree of financial hardship to the parties in litigating in one forum over the other [*cf.* UCCJEA § 207, 9 Uniform Laws Annotated 682 (1999) (model UCCJEA refers to "the relative financial circumstances of the parties" for this factor)].

5. Any agreement of the parties as to which state should assume jurisdiction.

6. The nature and location of the evidence required to resolve the pending litigation, including testimony of the child.

7. The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence.

8. The familiarity of the court of each state with the facts and issues in the pending litigation.

The list of factors that a California court may consider in determining whether another state is in a better position to make a particular child custody determination is not meant to be exclusive [Commissioner's Comment to UCCJEA § 207, 9 Uniform Laws Annotated 683 (1999)].

If domestic violence is a factor, the California court should consider whether the parties are located in different states because one party is a victim of domestic violence or child abuse, and should also consider which of the two states can best protect a victim from further violence or abuse [Commissioner's Comment to UCCJEA § 207, 9 Uniform Laws Annotated 683 (1999)]. If distance is a factor, the court may decide to alleviate the problems by employing the communication [*see Fam. Code § 3411* (taking testimony in another state); *see also § 394.114[7]*] and cooperation [*see Fam. Code § 3412* (cooperation between courts); *see also § 394.114[9]*] provisions of the UCCJEA [Commissioner's Comment to UCCJEA § 207, 9 Uniform Laws Annotated 683 (1999)]. If expeditious resolution is a factor, the California court may consider the different procedural and evidentiary laws of the two states and the flexibility of court dockets [Commissioner's Comment to UCCJEA § 207, 9 Uniform Laws Annotated 683 (1999)]. Also, if one state court has jurisdiction to decide all the legal issues surrounding a family, *e.g.*, custody and support issues, or custody of children living in different states, it is desirable to determine that the court of that state is the most convenient forum [Commissioner's Comment to UCCJEA § 207, 9 Uniform Laws Annotated 683 (1999)].

Note that the Commissioner's Comment to the former UCCJA states that the purpose of the inconvenient forum provisions is to encourage judicial restraint in exercising jurisdiction whenever another state appears to be in a better position to determine custody of a child. It serves as a second check on jurisdiction once jurisdiction has been found to be proper. The provisions are a particular application of the inconvenient forum principle, recognized in most states by judicial law, adapted to the special needs of child custody cases. Judicial restrictions or exceptions to the inconvenient forum rule made in some states do not apply to this statutory scheme, which is limited to child custody cases. These provisions stress interstate judicial communication and cooperation. If there is doubt as to which is the more appropriate forum, the question may be resolved by consultation and cooperation among the courts involved [Commissioner's Comment to UCCJA § 7, 9 Uniform Laws Annotated 234 (1988)].

[3] Conditional Stay of Proceedings

If a California court determines that it is an inconvenient forum and that a court of another state is a more appropriate

forum, it must stay the proceedings on condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition that the court considers just and proper [*Fam. Code § 3427(c)*].

If a California court decides that it is an inconvenient forum for a child custody proceeding, it may not simply dismiss the action and leave the case in limbo. Instead, the California court must direct the parties to commence a child custody proceeding in the state that the California court has determined to be the more convenient forum [Commissioner's Comment to UCCJEA § 207, 9 Uniform Laws Annotated 683 (1999)]. The California court may impose other conditions as well, for example, it may issue temporary custody orders, actually dismiss the case if the custody proceeding is not commenced in the other state, or it may order a resumption of jurisdiction if the other state court refuses to take the case [Commissioner's Comment to UCCJEA § 207, 9 Uniform Laws Annotated 683 (1999)].

Before determining whether to decline or retain jurisdiction, a California court may communicate with a court of another state [*see Fam. Code § 3410*; *see also § 394.114[8]*] and exchange information regarding the assumption of jurisdiction by either court [Commissioner's Comment to UCCJEA § 207, 9 Uniform Laws Annotated 683 (1999)].

[4] Special Rule for Dissolution Cases

A California court may decline to exercise its UCCJEA jurisdiction if a child custody determination is incidental to an action for dissolution of marriage or another proceeding while still retaining jurisdiction over the dissolution of marriage or other proceeding [*Fam. Code § 3427(d)*].

[5] Payment of Costs and Attorney's Fees

If it appears to the court that it is clearly an inappropriate forum, the court may require the party who commenced the proceeding to pay, in addition to the costs of the proceeding in California, necessary travel and other expenses, including attorney's fees, incurred by the other parties or their witnesses. Payment would be made to the clerk of the court for remittance to the proper party [*Fam. Code § 3427(e)*].

This provision does not appear in the model UCCJEA [*see* UCCJEA § 207, 9 Uniform Laws Annotated 682-683 (1999)], but appeared in both the model UCCJA [*see* UCCJA § 7(g), 9 Uniform Laws Annotated 234 (1988)], and the California version of the UCCJA [*see* former *Fam. Code § 3407(g)*]. The provision was eliminated from the UCCJEA because a court that has jurisdiction under the UCCJEA cannot be a "clearly inappropriate forum" [*see* Commissioner's Comment to UCCJEA § 207, 9 Uniform Laws Annotated 683 (1999)].

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§ 394.112 Declining Jurisdiction Based on Unjustifiable Conduct (Unclean Hands)

[1] General Rule and Exceptions

Except as otherwise provided in the UCCJEA regarding the exercise of temporary emergency jurisdiction [*see Fam. Code § 3424*] or by any other California law, a California court generally must decline to exercise its jurisdiction over a custody matter if it acquired jurisdiction as the result of the "unjustifiable conduct" of a person seeking to invoke the court'sjurisdiction [*Fam. Code § 3428(a)*]. "Unjustifiable conduct" is not expressly defined in the UCCJEA, but it appears to be substantially equivalent to the term "unclean hands."

Despite the general rule, however, a court need not decline jurisdiction if at least one of the following is true [*Fam. Code § 3428(a)*]:

1. The parents and all persons acting as parents have acquiesced in the exercise of jurisdiction.

2. A court of the state otherwise having jurisdiction under the UCCJEA provisions for initial, exclusive and continuing, and modification jurisdiction inclusive [*see Fam. Code §§ 3421, 3422, 3423*] determines that California is a more appropriate forum under the UCCJEA provisions for inconvenient forum [*see Fam. Code § 3427*].

3. No court of any other state would have jurisdiction under the criteria specified in the UCCJEA provisions for initial, exclusive and continuing, and modification jurisdiction inclusive [*see Fam. Code §§ 3421, 3422, 3423*; *cf. In re Marriage of Fox (1986) 180 Cal. App. 3d 862, 874-875, 225 Cal. Rptr. 823* (jurisdiction may not be declined because of unclean hands unless there is another state that also has jurisdiction to make custody determination)].

The import of this rule is that when a parent acts reprehensibly by improperly removing, secreting, retaining, or restraining a child, that parent will not receive an advantage, because the UCCJEA requires a California court to decline

to exercise jurisdiction that is inappropriately invoked by a party [Commissioner's Comment to UCCJEA § 208, 9 Uniform Laws Annotated 684 (1999)]. For example, if a parent abducts a child prior to the issuance of a child custody determination and establishes a new home state for the child, the new home state should decline to hear the case under the unclean hands doctrine [Commissioner's Comment to UCCJEA § 208, 9 Uniform Laws Annotated 684 (1999); *see Fam. Code § 3428*].

On the other hand, if a party acquiesces in the court's jurisdiction despite the wrongful conduct, by either filing a pleading that submits to the court's jurisdiction or by not filing in the court that would otherwise have UCCJEA jurisdiction, then the court may hear the case [Commissioner's Comment to UCCJEA § 208, 9 Uniform Laws Annotated 685 (1999)]. Similarly, if the other exceptions to declining jurisdiction are met (as set forth above), the court may hear the case [*see* Commissioner's Comment to UCCJEA § 208, 9 Uniform Laws Annotated 685 (1999)].

In analyzing the conduct at issue, note that a technical illegality or wrong will not necessarily constitute unjustifiable conduct. For example, as a Commissioner's Comment explains, if a parent violates a joint custody decree by fleeing with a child to escape domestic violence, then an inquiry should be made before dismissing the case on the basis of unclean hands [Commissioner's Comment to UCCJEA § 208, 9 Uniform Laws Annotated 684 (1999)], and there is a special rule in California for domestic violence cases [*see Fam. Code § 3428(d)*], as discussed in [2], *below*. Also, the unjustifiable conduct must *create jurisdiction*; so if the court otherwise has exclusive and continuing jurisdiction, a party's wrongful conduct will not, as such, divest the court of jurisdiction--although that conduct may otherwise be sanctionable or remediable in some fashion by the court [*cf.* Commissioner's Comment to UCCJEA § 208, 9 Uniform Laws Annotated 685 (1999)].

Under case law decided before enactment of the UCCJEA, a court could decline to apply the "clean hands" doctrine if there had been misconduct of both parties [*In re Walker (1964) 228 Cal. App. 2d 217, 225-228, 39 Cal. Rptr. 243]* . In addition, the doctrine was held inapplicable to a court's determination of whether to retain jurisdiction if a child had moved to another state and the custodial parent had been frustrating visitation [*Bosse v. Superior Court (1979) 89 Cal. App. 3d 440, 444-445, 152 Cal. Rptr. 665]* . It was also held that the doctrine could not be applied to assume jurisdiction as against a parent who was defending against jurisdiction in California in a proceeding filed by the other parent [*In re Marriage of Ben-Yehoshua (1979) 91 Cal. App. 3d 259, 268, 154 Cal. Rptr. 80]* . The continuing validity of these holdings is presently unclear, particularly because the UCCJA currently requires that a court decline jurisdiction if its jurisdiction has been achieved through unjustifiable conduct, unless one of the enumerated exceptions exists [*Fam. Code § 3428(a)*].

[2] Special Rule in Domestic Violence Cases

In making a determination under the UCCJEA provisions for declining jurisdiction based on a person's unjustifiable conduct [*see Fam. Code § 3428*], a court must not consider as a factor weighing against the petitioner any taking of the child, or retention of the child after a visit or other temporary relinquishment of physical custody, from the person who has legal custody, if there is evidence that the taking or retention was a result of domestic violence against the petitioner, as defined in *Fam. Code § 6211* [*Fam. Code § 3428(d)*]. This provision does not appear in the model UCCJEA [*see* UCCJEA § 208, 9 Uniform Laws Annotated 683 (1999)]. However, it is essentially the same as a provision that created a domestic violence exception to the application of the clean hands doctrine under California's version of the UCCJEA's predecessor statute, the UCCJA [*cf.* former *Fam. Code § 3408(f)*].

[3] Court's Authority to Fashion Remedies

If a California court declines to exercise its jurisdiction on the basis of unjustifiable conduct [*see Fam. Code § 3428(a)*], it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of that conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under the UCCJEAprovisions for initial, exclusive and continuing, and modification jurisdiction, inclusive [*Fam. Code § 3428(b)*;

see Fam. Code §§ 3421, 3422, 3423].

One appropriate remedy in a case involving a party's unjustifiable conduct might be for the California court to notify the nonoffending parent and provide foster care until the child can be returned to the parent [Commissioner's Comment to UCCJEA § 208, 9 Uniform Laws Annotated 685 (1999)]. Another might be for the California court to stay the proceeding and order that a custody proceeding be commenced in a state that has UCCJEA jurisdiction, if a retention of California jurisdiction is needed to prevent a repetition of the unjustifiable conduct or to ensure the child's safety [Commissioner's Comment to UCCJEA § 208, 9 Uniform Laws Annotated 685 (1999)]. However, the California court is not making a forum non conveniens analysis, and if there is unjustifiable conduct, the court must decline jurisdiction [Commissioner's Comment to UCCJEA § 208, 9 Uniform Laws Annotated 685 (1999)].

[4] Payment of Costs and Attorney's Fees

If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction on the basis of unjustifiable conduct hands [*see Fam. Code § 3428(a)*], it must assess against the party seeking to invoke its jurisdiction necessary and reasonable expenses including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate [*Fam. Code § 3428(c)*; *cf.* former *Fam. Code § 3408(e)*].

The assessed costs and fees should be paid to the respondent who established that jurisdiction was based on unjustifiable conduct [Commissioner's Comment to UCCJEA § 208, 9 Uniform Laws Annotated 685 (1999)]. The court may not assess fees, costs, or expenses against the state of California unless authorized by law other than the UCCJEA [*Fam. Code § 3428(c)*].

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34-394 California Forms of Pleading and Practice--Annotated § 394.113

§ 394.113 Binding Effect of California Custody Decree

A child custody determination made by a California court that had UCCJEA jurisdiction [*see Fam. Code § 3421 et seq.*; *see also* §§ 394.107-394.110] binds all persons who have been served in accordance with California law or notified in accordance with UCCJEA standards for notice to persons outside California [*see Fam. Code § 3408*] or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard [*Fam. Code § 3406*]. As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified [*Fam. Code § 3406*].

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34-394 California Forms of Pleading and Practice--Annotated § 394.114

§ 394.114 General Procedure Under UCCJA

[1] Notice

[a] Persons Entitled to Notice

Before a child custody determination is made under the UCCJEA, *Fam. Code § 3425* requires that notice and an opportunity to be heard must be given to the following persons [*Fam. Code § 3425(a)*; *cf. Fam. Code § 3425(b)* (UCCJEA does not govern enforceability of child custody determination made *without* notice or opportunity to be heard)]:

1. To all persons entitled to notice under California law as in child custody proceedings between California residents;

2. To any parent whose parental rights have not been previously terminated; and

3. To any person having physical custody of the child.

Persons whose rights have not been terminated or who have physical custody of the child must be given notice in order for the custody determination to be afforded full faith and credit under the PKPA [Commissioner's Comment to UCCJEA § 205, 9 Uniform Laws Annotated 679 (1999); *see 28 U.S.C. § 1738A(e)*]. In addition, a parent's right to notice of custody proceedings affecting his or her child is constitutionally compelled, and a custody order made in the absence of such notice is invalid [*see McDowell v. Orsini (1976) 54 Cal. App. 3d 951, 961-962, 127 Cal. Rptr. 285]* .

For discussion of the manner in which persons entitled to notice must be given notice, see [2], *below*.

[b] Manner of Giving Notice

Under *Fam. Code § 3408*, notice may be given in a manner prescribed for service of process by California law or by the

law of the state in which the service is made [*Fam. Code § 3408(a)*]. Likewise, proof of service maybe made as prescribed by California law or by the law of the state in which the service is made [*Fam. Code § 3408(b)*]. If special service or notice rules, such as service by a peace officer in a case involving domestic violence, are available in either state, then they can be employed [Commissioner's Comment to UCCJEA § 108, 9 Uniform Laws Annotated 664 (1999)].

Although notice must be given in a manner reasonably calculated to give actual notice, it may be by publication if other means are not effective [*Fam. Code § 3408(a)*; *see In re Marriage of Nurie (2009) 176 Cal. App. 4th 478, 509, 98 Cal. Rptr. 3d 200* (*actual notice* is not required; notifying party's attorney of record in open court satisfies statutory notice requirement)].

Foreign countries usually have their own service and notice rules that must be followed, despite the fact that foreign countries are treated as states under the UCCJEA [Commissioner's Comment to UCCJEA § 108, 9 Uniform Laws Annotated 664 (1999); *see Fam. Code § 3405(a)*; *see also* Ch. 260, *Family Law Enforcement: Foreign Judgments* (discussion of Hague Convention)].

Notice is not required for the exercise of UCCJEA jurisdiction with respect to a person who *submits* to the jurisdiction of the court [*Fam. Code § 3408(c)*].

[2] UCCJEA Declaration

Every party in a custody proceeding in his or her first pleading or in an affidavit (or declaration under penalty of perjury) [*Code Civ. Proc. § 2015.5*] attached to that pleading must give certain information, if reasonably ascertainable, under oath concerning the child's present location and the places where the child has lived and the names and addresses of the persons with whom the child has lived for the past five years [*Fam. Code § 3429(a)*]. However, in cases involving domestic violence or child abuse, any addresses of the child and the party who is alleging violence or abuse are confidential and are not to be disclosed in the pleading or affidavit, if the addresses are unknown to the other party [*Fam. Code § 3429(a)*].

The pleading or affidavit must also give information under oath concerning other custody or custody-related proceedings involving the child [*Fam. Code § 3429(a)*] It must state whether the party [*Fam. Code § 3429(a)*]

1. Has participated as a party, witness, or in any other capacity in any other proceeding regarding custody or visitation of the child.

2. Knows of any proceeding that could affect the current proceeding, *e.g.*, proceedings involving custody enforcement, domestic violence, protective orders, termination of parental rights, and adoptions.

3. Knows the name and address of any person not a party to the proceeding who has physical custody of the child or claims custody or visitation rights to the child.

If the party has information regarding related proceedings or other involved persons, then the party must supply additional information, such as case numbers, nature of the proceedings, names and addresses, in the sworn pleading or affidavit [*Fam. Code § 3429(a), (c)*]. Related proceedings include more than just custody proceedings, for example, compliance with the Interstate Compact on the Placement of Children [*Fam. Code § 7901*], and criminal child abuse prosecutions involving a parent [Commissioner's Comment to UCCJEA § 209, 9 Uniform Laws Annotated 687 (1999)]. The Judicial Council form of Declaration Under Uniform Child Custody Jurisdiction Act is set forth in Ch. 221, *Dissolution of Marriage: Procedure* .

If the required information is not furnished, the court may stay the proceeding until the information is furnished [*Fam.*

Code § 3429(b)]. If the information is not furnished, the court nevertheless has jurisdiction to hear the case [Commissioner's Comment to UCCJEA § 209, 9 Uniform Laws Annotated 687 (1999)].

The court may examine the parties under oath as to details of the information furnished and as to other matters pertinent to the court's jurisdiction and the disposition of the case [*Fam. Code § 3429(c)*]. Each party has a continuing duty to inform the court of any custody proceedings concerning the child in California or any other state that could affect the current proceeding [*Fam. Code § 3429(d)*; *see In re Marriage of Nurie (2009) 176 Cal. App. 4th 478, 510, 98 Cal. Rptr. 3d 200* (statute does not specify remedy for party's failure to comply with continuing disclosure obligations, and does not require first-in-time court to relinquish jurisdiction)].

[3] Joinder of Additional Parties

The obligation to join a party and the right to intervene as a party in a child custody proceeding under the UCCJEA are governed by California law as in child custody proceedings between residents of California [*Fam. Code § 3425(c)*]. For a general discussion of custody proceedings, see Ch. 223, *Dissolution of Marriage: Child Custody* . For discussion of joinder, see Ch. 221, *Dissolution of Marriage: Procedure* .

[4] Appearance of Parties

[a] Appearance and Limited Immunity

A party to a child custody proceeding, including a modification proceeding, or a petitioner or respondent in a proceeding to enforce or register a child custody determination, is not subject to personal jurisdiction in California for another proceeding or purpose solely by reason of having participated in, or having been physically present for the purpose of participating in, the custody proceeding or the custody enforcement or registration proceeding [*Fam. Code § 3409(a)*]. "Participate" is meant to be read broadly. For example, if jurisdiction is proper under *Fam. Code § 3421 et seq.*, a party or respondent should be able to request custody without this constituting a request for affirmative relief that waives the person's objections to personal jurisdiction [Commissioner's Comment to UCCJEA § 109, 9 Uniform Laws Annotated 665 (1999)].

A person who is subject to personal jurisdiction in California on a basis other than physical presence is not immune from service of process in California [*Fam. Code § 3409(b)*]. A person from outside California who appears in a custody proceeding or custody enforcement proceeding will not have immunity if he or she is otherwise subject to California jurisdiction [Commissioner's Comment to UCCJEA § 109, 9 Uniform Laws Annotated 665 (1999)]. For example, if a child support obligor moves away from California, he or she will be subject to California jurisdiction for purposes of child support enforcement for as long as the child or the support obligee remains in California [*see Fam. Code § 4909(a)*; *see also* Ch. 260, *Family Law Enforcement: Foreign Judgments* (UIFSA)]. Thus, should the support obligor return to California to enforce the visitation aspects of a custody order, he or she will not be immune from California efforts to collect past-due child support [Commissioner's Comment to UCCJEA § 109, 9 Uniform Laws Annotated 665-666 (1999)].

A party present in California who is subject to the jurisdiction of another state is not immune from service of process allowable under the laws of the other state [*Fam. Code § 3409(b)*]. Thus, a party present in California who is subject to the jurisdiction of another state may be served with process to appear in the other state, if service is allowed under the laws of the other state [Commissioner's Comment to UCCJEA § 109, 9 Uniform Laws Annotated 666 (1999)].

The immunity granted by *Fam. Code § 3409(a)* does not extend to civil litigation based on acts that are committed by an individual while present in California that are unrelated to the individual's participation in a UCCJEA proceeding [*Fam. Code § 3409(c)*].

[b] Order for Personal Appearance

The court may order a party to a California child custody proceeding who is in California to appear before the court in person with or without the child [*Fam. Code § 3430(a)*]. Also, the court may order any nonparty who is in California and who has physical custody or control of the child to appear in person with the child [*Fam. Code § 3430(a)*; *see* Commissioner's Comment to UCCJEA § 210, 9 Uniform Laws Annotated 688 (1999)].

If a party to a child custody proceeding whose presence is desired by the court is outside California, the court may order that a notice given pursuant to the UCCJEA standards for notice to persons outside California [*see Fam. Code § 3408*; [1][b], *above*] include a statement directing the party to appear in person with or without the child and informing the party that failure to appear may result in a decision adverse to the party [*Fam. Code § 3430(b)*]. If a party to a child custody proceeding who is outside California is directed to appear or desires to appear personally before the court with or without the child, the court may require another party to pay reasonable and necessary travel and other expenses of the party and the child [*Fam. Code § 3430(d)*].

The court may enter any orders necessary to ensure the safety of the child and any person ordered to appear [*Fam. Code § 3430(c)*]. If safety is a major concern, for example, in cases that involve child abuse or domestic violence, the court may arrange for a party's testimony to be taken in another state, rather than order the party to appear with the child [Commissioner's Comment to UCCJEA § 210, 9 Uniform Laws Annotated 688 (1999)].

[5] Calendar Priority

If a question is raised in a child custody proceeding regarding the existence of or the exercise of jurisdiction under the UCCJEA, the question, on the request of a party, must be given priority on the calendar and handled expeditiously [*Fam. Code § 3407*; *cf.* former *Fam. Code § 3425* (under UCCJA, "case" must be given priority and expedited)]. It is the jurisdictional question, not the entire custody case, that must be expedited [Commissioner's Comment to UCCJEA § 107, 9 Uniform Laws Annotated 664 (1999)].

[6] Submission of Child's Birth Certificate to Court

Fam. Code § 3140, which requires that a child's birth certificate be submitted to the court in any custody proceeding in which one or both parents have not appeared, was expressly made applicable to the former UCCJA [former *Fam. Code § 3400 et seq.*; *see* former *Fam. Code § 3415*]. Operative January 1, 2000, the UCCJA was repealed and replaced with the UCCJEA [*see* Stats. 1999, ch. 867] and no express reference to Section 3140 was included. However, Section 3140 operates to determine whether a child is a missing person, and uses language of general applicability to custody matters, so it apparently still applies to proceedings under the UCCJEA.

[7] Taking Testimony in Another State

In addition to other available procedures, a party to a child custody proceeding may offer, by deposition or other means allowable in California for testimony taken in another state, the testimony of witnesses who are located in another state, including the testimony of the parties and the child [*Fam. Code § 3411(a)*]. The court on its own motion may order that the testimony of a person be taken in another state, and may prescribe the manner and terms on which the testimony is taken [*Fam. Code § 3411(a)*].

A California court may permit an individual residing in another state to be deposed or to testify before a designated court or other location in that state by telephone, audiovisual means, or other electronic means [*Fam. Code § 3411(b)*; *see In re Marriage of Nurie (2009) 176 Cal. App. 4th 478, 509 n.15, 98 Cal. Rptr. 3d 200* (telephone appearance is discretionary; court does not abuse its discretion by denying such request to party withholding child from home state in violation of court order)]. A California court must cooperate with other state courts in designating an appropriate location for the deposition or testimony [*Fam. Code § 3411(b)*]. Documentary evidence transmitted from another state

to a California court by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission [*Fam. Code § 3411(c)*].

[8] Communication Between Courts

A California court may communicate with a court in another state concerning a proceeding arising under the UCCJEA [*Fam. Code § 3410(a)*]. Communication is authorized regarding any proceeding arising under the UCCJEA, including a proceeding arising in a foreign tribunal or tribal court [Commissioner's Comment to UCCJEA § 110, 9 Uniform Laws Annotated 667 (1999)]. Communication may occur by telephonic conference, on-line electronic communication, or by any other method of communication [Commissioner's Comment to UCCJEA § 110, 9 Uniform Laws Annotated 667 (1999)].

The court may allow the parties to participate in the communication; if the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made [*Fam. Code § 3410(b)*]. The parties' participation in the communication may amount to a hearing if an opportunity to present facts and jurisdictional arguments exists [Commissioner's Comment to UCCJEA § 110, 9 Uniform Laws Annotated 667 (1999)].

Communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties, and a record need not be made of this type of communication [*Fam. Code § 3410(c)*]. Matters of cooperation between courts [*see Fam. Code § 3412*; [9], *below*] do not require a record to be made [Commissioner's Comment to UCCJEA § 110, 9 Uniform Laws Annotated 667 (1999)].

However, with respect to all other communication under *Fam. Code § 3410*, a record must be made of the communication, and the parties must be informed promptly of the communication and granted access to the record [*Fam. Code § 3410(d)*]. For the purposes of *Fam. Code § 3410*, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form]. *Fam. Code § 3410(e)*; *In re C. T. (2002) 100 Cal. App. 4th 101, 111-112, 121 Cal. Rptr. 2d 897]* . A record is meant to include notes of a court reporter who listened to a conference call, an electronic recording of a telephone call, a memorandum or electronic record of a communication between courts, or a memorandum or electronic record made by a court after a communication between courts [Commissioner's Comment to UCCJEA § 110, 9 Uniform Laws Annotated 667 (1999)].

Note that certain provisions of the UCCJEA *require* communication between courts in order to resolve jurisdictional questions [*see, e.g., Fam. Code § 3424(d), 3426(b)*]. For related discussion, see *§§ 394.107[4], 394.108[1][c]*.

[9] Request for Evidentiary Matter Between Courts; Preservation of Records

[a] Interstate Evidentiary Procedures

A California court may request the appropriate court of another state to do all of the following [*Fam. Code § 3412(a)*]:

1. Hold an evidentiary hearing.

2. Order a person to produce or give evidence pursuant to procedures of the other state.

3. Order that an evaluation be made with respect to the custody of a child involved in a pending proceeding [*cf.* Commissioner's Comment to UCCJEA § 112, 9 Uniform Laws Annotated 669 (1999) (UCCJEA takes no position on admissibility of custody evaluation conducted in another state)].

4. Forward to the California court a certified copy of the transcript of the record of the hearing, the

evidence otherwise presented, and any evaluation prepared in compliance with the request.

5. Order a party to a child custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.

On request of a court of another state, a California court may hold a hearing or enter any of the orders described above [*see Fam. Code § 3412(a)*], that is, a California court may hold an evidentiary hearing or enter the same orders that it may request from a court of another state [*see Fam. Code § 3412(b)*].

Travel and other necessary and reasonable expenses incurred at the request of a court of another state [*see Fam. Code § 3412(a), (b)*] may be assessed against the parties in accordance with California law [*Fam. Code § 3412(c)*; *cf.* former *Fam. Code § 3420(a)* (costs may be assessed "against the parties, or, if necessary, ordered paid by the state")]. Expenses are intended to be out-of-pocket costs, not overhead costs [Commissioner's Comment to UCCJEA § 112, 9 Uniform Laws Annotated 669 (1999)].

[b] Duty to Preserve and Forward Records

A California court must preserve the pleadings, orders, decrees, records of hearings, evaluations, and other pertinent records with respect to a child custody proceeding until the child attains 18 years of age [*Fam. Code § 3412(d)*]. Upon appropriate request by a court or law enforcement official of another state, the California court must forward a certified copy of those records [*Fam. Code § 3412(d)*].

[10] Registration and Enforcement of Out-of-State Decree

A child custody determination of another state may be registered in California, with or without a simultaneous request for enforcement, bysending a request for registration, two certified copies of the custody order, and other supporting documents to the appropriate California court [*Fam. Code § 3445(a)*; for a form of request, *see § 394.174*; *see also* Ch. 260, *Family Law Enforcement: Foreign Judgments*]. The UCCJEA does not specify which court is "the appropriate court," but under the former UCCJA the custody order could be filed in the clerk's office of any California superior court [*see* former *Fam. Code § 3416(a)*)]. A registered child custody determination of another state must be recognized and enforced by a California court [*Fam. Code § 3446(b)*]. However, registration is not required for enforcement of any child custody determination made in substantial conformity with the UCCJEA [*see Fam. Code § 3443(a)*].

A proceeding to enforce a child custody determination of another state is commenced by filing a verified petition with certified copies of the custody orders to be enforced and any registration attached [*Fam. Code § 3448(a)*; *see* Ch. 260, *Family Law Enforcement: Foreign Judgments*]. In addition, a party may request a California court to issue a temporary order to enforce a visitation schedule or visitation provisions of a child custody determination of another state [*Fam. Code § 3444(a)*; *see* Ch. 260, *Family Law Enforcement: Foreign Judgments*].

If a person violates a custody determination of another state, making it necessary to enforce the order in California, he or she may be required to pay reasonable expenses incurred by the party entitled to custody, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care [*see Fam. Code §§ 3450(b), 3452(a)*].

[11] Procedure for Modification of Out-of-State Decree

Under the UCCJEA [*Fam. Code § 3400 et seq.*], California will normally enforce, rather than modify, a child custody determination made by a sister state [*Fam. Code §§ 3423, 3443*; *see § 394.110*]. A California court may not modify a child custody determination made by a sister state unless the child, both of the child's parents, and any person acting as a parent have all moved away from the sister state, or unless a court of the sister state determines that it no longer has

exclusive and continuing jurisdiction or that it is an inconvenient forum [*Fam. Code §§ 3422, 3423*].

Thus, if any of the parties remain in the sister state, the party seeking to modify the sister-state decree must first obtain an order from the sister-state court to the effect that it no longer has jurisdiction (for discussion, see *§ 394.110*). Then, if a California court has jurisdiction under the UCCJEA provisions for initial jurisdiction [*Fam. Code § 3421*; *see § 394.107[1]*], it may modify the decree. If none of the parties remain in the sister state, a California court may modify a sister-state decree if it has jurisdiction under the requirements for initial jurisdiction [*Fam. Code § 3421*; *see § 394.107[1]*]. For a form of petition to modify a registered decree, see *§ 394.175*. Procedures for enforcement of sister-state orders are discussed further in Ch. 260, *Family Law Enforcement: Foreign Judgments*.

The PKPA [*28 U.S.C. § 1738A*] also provides for modification of an out-of-state decree, as described in *§ 394.110[1][b][ii]*, as did the former UCCJA [Former *Fam. Code § 3400 et seq.*; *see Lough v. Superior Court (1992) 8 Cal. App. 4th 136, 142-143, 10 Cal. Rptr. 2d 250]* . However, the UCCJA did not provide a specific procedure under which a court in one state could exercise its jurisdiction to modify a custody determination made by another state. Therefore, states that have adopted the UCCJA may follow their own procedural rules in establishing sister-state judgments as their own state judgments prior to modification.

[12] Appellate Review

Although an order making a jurisdictional determination under the UCCJEA may be final and appealable, appeal is seldom an adequate remedy in any child custody matter because of the significant time required for resolution. Based on practice under the former UCCJA, it appears that appellate courts will generally respond favorably to extraordinary writ petitions as a way of obtaining timely review of determinations under the UCCJEA [*see Zenide v. Superior Court (1994) 22 Cal. App. 4th 1287, 1293, 27 Cal. Rptr. 2d 703* (decided under former law)].

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[Reserved]

§§ 394.115[Reserved]

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§ 394.130 Related Titles From LEXIS Publishing

[1] California Family Law

For discussion and forms concerning the rights and liabilities arising from the parent and child relationship, including child custody matters, see Kirkland, Lurvey & Richmond California Family Law Practice and Procedure, Chs. 30-35, 142 (Matthew Bender 2d ed.)

For discussion and forms concerning child support, see Kirkland, Lurvey & Richmond California Family Law Practice and Procedure, Chs. 40-42 (Matthew Bender 2d ed.)

[2] California Legal Forms

For legal forms relating to forms in this part, see California Legal Forms, Ch. 100, *Control, Custody, and Support of Minors*

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§ 394.131 Federal Statutes

Federal prosecution for interstate flight to avoid state felony prosecution. *18 U.S.C. § 1073*

Custody proceedings under Indian Child Welfare Act of 1978. *25 U.S.C. §§ 1901-1963*

Parental Kidnapping Prevention Act. *28 U.S.C. § 1738A*

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§ 394.132 State Statutes

[1] Abduction of Child

Abduction or enticement of child from parent as forbidden. *Civ. Code § 49(a)*

Submission of child's birth certificate and determination that child is not missing person in custody proceedings. *Fam. Code § 3140*

Criminal penalties for abduction or detention of minor child by person not having right to custody. *Penal Code §§ 277, 278, 278.5, 279, 784.5*

[2] Child Custody Proceedings

Equal custody rights of mother and presumed father; either parent as entitled to custody if other parent is dead, is unable or refuses to take custody, or abandons child. *Fam. Code § 3010*

Authority of court to determine custody of child during child's minority. *Fam. Code §§ 3021, 3022*

Money sanctions for making false accusations of child abuse or neglect during custody proceedings. *Fam. Code § 3027*

Effect of abuse convictions, restraining orders, and criminal protective orders on custody determinations. *Fam. Code §§ 3030-3031*

Temporary and ex parte custody orders. *Fam. Code §§ 3060-3064*

Parent's action for exclusive custody without dissolution of marriage or legal separation. *Fam. Code § 3120*

Court's authority to order one party to exclusive custody action to pay other party's attorney's fees and costs [*Fam.*

Code § 3121]

Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). *Fam. Code § 3400 et seq.*

[3] Venue

Change of venue if parties have moved from county rendering decree. *Code Civ. Proc. § 397.5*

[4] Visitation

Authority of court to grant visitation rights to parents and others. *Fam. Code § 3100*

Stepparent visitation. *Fam. Code § 3101*

Visitation rights of relatives of deceased parent. *Fam. Code § 3102*

Grandparent visitation. *Fam. Code §§ 3103, 3104*

[5] Minors

Minors as persons under 18 years of age. *Fam. Code § 6500*

"Age of majority" and similar references construed. *Fam. Code § 6502*

[6] Parental Control

Mother and presumed father of minor child as equally entitled to services and earnings of child; either parent as entitled to services and earnings of child if other parent is dead, is unable or refuses to take custody, or has abandoned child. *Fam. Code § 7500*

Custodial parent as entitled to change child's residence. *Fam. Code § 7501*

Parents as without control over child's property. *Fam. Code § 7502*

Parental claim for child's wages. *Fam. Code § 7503*

Relinquishment of parental control. *Fam. Code § 7504*

Cessation of parental authority. *Fam. Code § 7505*

Action for abuse of parental authority. *Fam. Code § 7507*

[7] Support of Indigent Parent

Duty of adult child to support indigent parents. *Fam. Code §§ 4400-4405*

Relief from duty to support parent who abandoned child. *Fam. Code §§ 4410-4414*

Criminal penalty for failure to support indigent parent as required by law. *Penal Code § 270c*

[8] Support Proceedings

Civil suit to enforce parents' obligation to support minor child. *Fam. Code §§ 3900, 4000*

[9] Uniform Parentage Act

Uniform Parentage Act. *Fam. Code § 7600 et seq.*

Definition of parent and child relationship. *Fam. Code § 7601*

Parents' marital status as irrelevant to existence of parent and child relationship. *Fam. Code § 7602*

Methods of establishing parent and child relationship. *Fam. Code § 7610*

Conditions when man presumed to be natural father. *Fam. Code § 7611*

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§ 394.133 Decisions

[1] Abduction of Child

Contempt judgment against mother for violating child custody order is civil, rather than criminal, and does not preclude prosecution on double jeopardy grounds for child stealing under *Penal Code § 278.5*. *People v. Batey (1986) 183 Cal. App. 3d 1281, 1288-1289, 228 Cal. Rptr. 787*

Court's judgment holding father in civil contempt for failure to return child after scheduled visitation period does not bar subsequent criminal action pursuant to *Penal Code § 278.5* for same conduct. *People v. Derner (1986) 182 Cal. App. 3d 588, 591-593, 227 Cal. Rptr. 344*

Father who removed his child from country by deceiving mother during visitation period was guilty of concealment or detention of child in violation of court order pursuant to *Penal Code § 278.5* and felony false imprisonment under *Penal Code §§ 236* and *237*. *People v. Rios (1986) 177 Cal. App. 3d 445, 450-452, 222 Cal. Rptr. 913*

Parents state cause of action under *Civ. Code § 49* for abduction of teenage daughter by uncle when parents alleged that uncle interfered with parental relationship, inflicted emotional distress, induced daughter to remain away, and had sexual relationship with her. *Surina v. Lucey (1985) 168 Cal. App. 3d 539, 543-545, 214 Cal. Rptr. 509*

[2] Constitutional Issues

Parent lacks authority to consent to peace officer's search of child's personal property over child's objections; search made pursuant to faulty consent is violation of *Fourth Amendment*. *In re Scott K. (1979) 24 Cal. 3d 395, 403-404, 155 Cal. Rptr. 671, 595 P.2d 105*

[3] Federal Jurisdiction

Divorced mother's *42 U.S.C. § 1983* action against former husband and various governmental defendants, alleging wrongful deprivation of child custody in violation of liberty interest, was properly dismissed by federal district court on ground of equitable abstention. *Coats v. Woods (9th Cir. 1987) 819 F.2d 236, 236-237*

Federal diversity jurisdiction exists over tort action between former spouses in which noncustodial parent alleged interference with visitation rights. *McIntyre v. McIntyre (9th Cir. 1985) 771 F.2d 1316, 1317-1320*

Social worker who brought dependency proceeding is entitled to absolute immunity in father's *42 U.S.C. § 1983* civil rights action for interference with right to child custody; conciliation court counselors is entitled to quasi-judicial immunity for actions in providing counseling to father. *Meyers v. Contra Costa County Dep't of Social Services (9th Cir. 1987) 812 F.2d 1154, 1155-1159*

[4] Parental Rights

Fundamental right of parenting is personal in nature only in regard to parent; parental delegation of duties regarding child rearing, care, discipline, and education that jeopardize child's health or safety is subject to limitations by state. *Johnson v. Department of Social Services (1981) 123 Cal. App. 3d 878, 885-886, 177 Cal. Rptr. 49*

[5] Interstate and International Custody Jurisdiction

[a] Parental Kidnapping Prevention Act (PKPA)

Probable application of full faith and credit provisions of PKPA to formerly valid California child custody order is irrelevant in habeas corpus proceeding challenging California father's threatened extradition to foreign state on kidnapping charges. *State of California v. Superior Court (Smolin) (1987) 482 U.S. 400, 407-409, 107 S. Ct. 2433, 96 L. Ed. 2d 332*

[b] Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)

UCCJEA takes strict "first in time" approach to jurisdiction. *In re Marriage of Nurie (2009) 176 Cal. App. 4th 478, 491, 98 Cal. Rptr. 3d 200*

UCCJEA is exclusive method in California for determining proper forum in child custody proceedings involving other jurisdictions. *In re Jaheim B. (2009) 169 Cal. App. 4th 1343, 1348, 87 Cal. Rptr. 3d 504* ; *In re Marriage of Sareen (2007) 153 Cal. App. 4th 371, 375, 62 Cal. Rptr. 3d 687*

Dependency action is "child custody proceeding" subject to *UCCJEA. In re Jaheim B. (2009) 169 Cal. App. 4th 1343, 1348, 87 Cal. Rptr. 3d 504*

UCCJEA applies to international as well as interstate custody disputes. *In re Marriage of Sareen (2007) 153 Cal. App. 4th 371, 375, 62 Cal. Rptr. 3d 687*

UCCJEA does not provide for jurisdiction by reason of presence of parties or by stipulation, consent, waiver, or estoppel. *In re Marriage of Nurie (2009) 176 Cal. App. 4th 478, 487, 98 Cal. Rptr. 3d 200*

State with absolute priority to render initial child custody determination is child's home state. *In re Marriage of Nurie (2009) 176 Cal. App. 4th 478, 489, 98 Cal. Rptr. 3d 200*

California court is not precluded from exercising jurisdiction due to pending custody proceedings in another state or county that has not been child's home state for required six-month period. *In re Marriage of Sareen (2007) 153 Cal. App. 4th 371, 376-377, 62 Cal. Rptr. 3d 687*

California court has temporary emergency jurisdiction if child is present in California and has been abandoned or is threatened with mistreatment or abuse. *In re Jaheim B. (2009) 169 Cal. App. 4th 1343, 1350-1351, 87 Cal. Rptr. 3d 504* ; *In re Marriage of Paillier (2006) 155 Cal. App. 4th 461, 470, 50 Cal. Rptr. 3d 459*

Relevant evidence of child's "significant connection" with state may include school records and teachers, medical evidence and reports of doctors, probation reports, and other court records from prior disputes. *In re S.W. (2007) 148 Cal. App. 4th 1501, 1510-1511, 56 Cal. Rptr. 3d 665*

Mexico does not lose "home state" jurisdiction over child who comes to California for medical care. *In re A.C. (2005) 130 Cal. App. 4th 854, 861-862, 30 Cal. Rptr. 3d 431*

[c] Former Uniform Child Custody Jurisdiction Act (UCCJA)

CAUTION:

These cases were decided under the Uniform Child Custody Jurisdiction Act (UCCJA), which was repealed, January 1, 2000, and replaced on and after that date by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA; *Fam. Code § 3400 et seq.*).

Former *Civ. Code § 5155(3)* (*now see Fam. Code § 3406*) procedure is mandatory, not discretionary, and requiring trial court informed of competing action to consult with other state to determine most appropriate forum for custody decision. *In re Aisha B. (1988) 206 Cal. App. 3d 1030, 1033, 254 Cal. Rptr. 116*

Code Civ. Proc. § 128.5 (sanctions for bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay) applies only to California trial court proceedings, so trial court as having no supervisory and management authority to impose sanctions against out-of-state attorney for bringing child custody action in another state, when attorney is neither party to, nor attorney of record in, pending California action. *County of Imperial v. Farmer (1988) 205 Cal. App. 3d 479, 484-486, 252 Cal. Rptr. 382*

Trial court as properly refusing to modify Virginia custody decree established in California when Virginia unequivocally asserted continuing jurisdiction over custody by terms contained in decree. *In re Janette H. (1987) 196 Cal. App. 3d 1421, 1430-1431, 242 Cal. Rptr. 567*

California court in stepparent adoption as required to apply UCCJA and stay or dismiss proceeding in view of pending Hawaii action to modify visitation, when Hawaii court rendered original custody decree and elected to take modification jurisdiction and notice of modification action was given. *Souza v. Superior Court (1987) 193 Cal. App. 3d 1304, 1310-1312, 238 Cal. Rptr. 892*

California trial court as improperly declining to recognize and enforce husband's Lebanese custody decree under UCCJA, when wife was given reasonable notice and opportunity to be heard in Lebanese proceedings prior to its entry of final decree. *In re Marriage of Malak (1986) 182 Cal. App. 3d 1018, 1025-1029, 227 Cal. Rptr. 841*

California as lacking jurisdiction over custody dispute when child was born and raised in France, both parents lived with child as family in France, and child has been in California for four months before custody proceedings were filed. *Plas v. Superior Court (1984) 155 Cal. App. 3d 1008, 1017, 202 Cal. Rptr. 490*

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§ 394.134 Law Reviews

Scott, *Pluralism, Parental Preference, and Child Custody, 80 Cal. L. Rev. 615 (1992)*

Comment, *Homosexual Parenting: Child Custody and Adoption, 22 U.C. Davis L. Rev. 1009 (1989)*

Comment, *Recognizing Constitutional Rights of Custodial Parents: The Primacy of the Post-Divorce Family in Child Custody Modification Proceedings, 35 UCLA L. Rev. 677 (1988)*

Note, *Thompson v. Thompson: The Jurisdictional Dilemma of Child Custody Cases Under the Parental Kidnapping Prevention Act, 16 Pepp. L. Rev. 409 (1989)*

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[Reserved]

§§ 394.135[Reserved]

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PART IV. FORMS
A. Control of Minor's Earnings

34-394 California Forms of Pleading and Practice--Annotated § 394.150

§ 394.150 Notice to Employer to Pay Minor's Earnings to Parent [Fam. Code § 7503]

[1] FORM Notice to Employer to Pay Minor's Earnings to Parent [Fam. Code § 7503]

NOTICE IS HEREBY GIVEN: That _____ [*names*], parents of the minor _____ [*name*], claim the earnings of _____ [*name of minor*] under *Family Code Section 7503*. You are directed to hereafter pay the earnings of _____ [*name of minor*] directly to _____ [*names of parents*].

_____ [*date*]

_____ [*signature*]

_____ [*typed name of one parent*]

_____ [*signature*]

_____ [*typed name of other parent*]

[2] Use of Form

The form in [1], *above*, is form is for use by parents to give a minor's employer notice that the parents are claiming the earnings of the child. Until this notice is given, the employer must pay the earnings directly to the minor [*see Fam. Code § 7503*]. For further discussion, see *§ 394.34[2]*.

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A. Control of Minor's Earnings

34-394 California Forms of Pleading and Practice--Annotated § 394.151

§ 394.151 Parents' Relinquishment of Earnings of Minor [Fam. Code § 7504]

[1] FORM Parents' Relinquishment of Earnings of Minor [Fam. Code § 7504]

NOTICE IS HEREBY GIVEN: That _____[*names of parents*], parents of the minor _____ [*name*], relinquish their right to control and receive the earnings of _____ [*name*] under *Family Code Section 7504*. You are directed to hereafter pay the earnings of _____ [*name*] directly to him.

_____ [*date*]

_____ [*signature*]

_____ [*typed name of one parent*]

_____ [*signature*]

_____ [*typed name of other parent*]

[2] Use of Form

The form in [1], *above*, is for use by parents to give a minor's employer notice that the parents are relinquishing their right to receive the minor's earnings [*see* Fam. Code § 7404]. For further discussion, see *§ 394.34[2]*.

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[Reserved]

§§ 394.152[Reserved]

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B. Duty of Support

34-394 California Forms of Pleading and Practice--Annotated § 394.160

§ 394.160 Petition to Enforce Parental Duty of Support--By Relative on Behalf of Minor Child [Fam. Code § 4000]

[1] FORM Petition to Enforce Parental Duty of Support--By Relative on Behalf of Minor Child [Fam. Code § 4000]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name of child*], a minor,	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name of person from whom*	)	PETITION TO ENFORCE PARENTAL DUTY OF
support is sought],	)	SUPPORT
Respondent.	)	
	)	

_____

1. Petitioner _____ [*name*], is a minor and brings this action by _____ [*name*], his/her guardian ad litem by appointment of this court.

2. Respondent _____ [*name*], is petitioner's _____ [*e.g.*, natural father], and as such, has a duty to support petitioner in a manner suitable to his/her circumstances.

3. Despite this duty, _____ [*name*] has willfully failed to provide support for petitioner.

4. Petitioner is currently under the primary physical custody of _____ [*name*], his/her _____ [*e.g.*, mother], who has failed and refused to take steps to enforce _____ [*name*]'s duty of support.

5. Petitioner is/is not currently receiving public assistance under the Family Economic Security Act of 1982, *Welfare and Institutions Code Section 11200 et seq.* [Petitioner intends/does not intend to apply for such assistance.]

WHEREFORE, Petitioner prays for orders of court as follows:

1. Requiring _____ [*name of respondent*] to pay child support for the benefit of petitioner in such amounts and under such terms as are required by the statewide uniform child support guideline, *Family Code Section 4050 et seq.*

2. For costs of suit herein incurred, including reasonable attorney's fees;

3. For such other and further relief as the court deems proper.

_____ [*date*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____ [*name*], am the guardian ad litem for petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is a petition for use by a relative of a child to obtain child support on behalf of the child from a parent under *Fam. Code § 4000*. The premise of the form is that there is a child who is in need of support from one parent, but the other parent has taken no steps to obtain support. In such a case, the child by a guardian ad litem may bring an action against the parent to enforce the parent's duty of support [*Fam. Code § 4000*; *see Code Civ. Proc. § 372* (appointment of guardian ad litem)]. For forms for use to obtain the appointment of a guardian ad litem, see Ch. 291, *Guardians Ad Litem* .

Fam. Code § 4000 also authorizes one parent to seek child support from the other. This form may be adapted for that

use if there is no other applicable proceeding between the parents, such as one for dissolution of marriage or to establish paternity, in which child support may be ordered. For further discussion, see *§ 394.35[2][b]*.

The person from whom support is sought must be served. The other parent should also be served, whether or not the child is in the physical custody of that parent. If the child is receiving AFDC or other publicbenefits, the district attorney or other local child support agency of the county providing assistance must also be served [*see In re Marriage of Mena (1989) 212 Cal. App. 3d 12, 19, 260 Cal. Rptr. 314* ; *see also Fam. Code § 4004* (disclosure of receipt or intent to apply for public assistance)].

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34-394 California Forms of Pleading and Practice--Annotated § 394.161

§ 394.161 Petition to Enforce Child's Duty to Support Parent in Need [Fam. Code §§ 4400, 4403(a)]

[1] FORM Petition to Enforce Child's Duty to Support Parent in Need [Fam. Code §§ 4400, 4403(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION TO ENFORCE DUTY OF SUPPORT
Respondent.	)	
	)	
	)	

Petitioner _____ [*name*], alleges:

1. Petitioner _____ [*name*] is the _____ [biological *or* adoptive] _____ [father *or* mother] of respondent and is in need and unable to maintain himself/herself by work because _____ (*state facts that establish petitioner's inability to maintain himself/herself by work*].

2. Respondent is a resident of _____ County, California.

3. Petitioner's economic resources _____ [*describe source and amount, e.g.,* consist of SSI benefits of $_____ per month) *or* are set forth in the attached Income and Expense Declaration, which is incorporated by reference as though fully set forth at this point]. His/her resources are insufficient to provide for his/her reasonable needs.

4. Under *Family Code Section 4400*, respondent has a duty to provide support to petitioner, and currently has the ability to do so. Despite this duty and ability, respondent has failed and refused to provide any support for petitioner.

5. The sum of $_____ per month is reasonably required for petitioner's support and maintenance.

6. Petitioner does not have sufficient funds with which to pay attorney's fees or the costs of this action.

WHEREFORE, petitioner prays judgment against respondent as follows:

1. That respondent be ordered to pay petitioner the sum of $_____ per month for petitioner's support and maintenance;

2. For costs of suit herein incurred, including reasonable attorney's fees; and

3. For such other and further relief as the court may deem proper.

_____ [*date*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 394.160[1]*]

[2] Use of Form

The form in [1], *above*, is a petition is for use in an action by an indigent parent to enforce the statutory duty of support owed by an adult child [*see Fam. Code §§ 4400, 4403*]. For further discussion, see *§ 394.37*.

The petition alleges, in pertinent part, (1) petitioner's standing as an indigent parent (Paragraph 1) [*see Fam. Code §§ 4400, 4403*], (2) the basis for the amount of support requested (Paragraphs 3, 5) [*see Fam. Code § 4404*], and (3) respondent's failure and refusal to fulfill his or her duty of support (Paragraph 4).

[3] Attorney's Fees

An action under *Fam. Code § 4403* to enforce a duty to support a parent in need may be brought by the county [*Fam. Code § 4403(a)(1), (2)*], and the county may be awarded attorney's fees [*Fam. Code § 4403(c)*]. There is no express statutory authority for an award of attorney's fees to a private party.

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B. Duty of Support

34-394 California Forms of Pleading and Practice--Annotated § 394.162

§ 394.162 Proceedings by Abandoned Child for Relief From Duty to Support Parent in Need--Petition [Fam. Code §§ 4410, 4411]

[1] FORM Proceedings by Abandoned Child for Relief From Duty to Support Parent in Need--Petition [Fam. Code §§ 4410, 4411]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR RELIEF FROM DUTY TO SUP-
Respondent.	)	PORT PARENT
	)	
	)	

Petitioner _____ [*name*] alleges:

1. Petitioner _____ [*name*] was born on _____ [*date*], and is the adult child of _____ [*name of parent*] ("the parent").

2. The parent resides in _____ County, California.

3. While petitioner was a minor, he/she was abandoned by the parent on or about _____ [*date*], in that _____ [*set forth facts showing actual desertion with an intent to sever the parent and child relationship, e.g.,* the parent contributed no support to and had no contact with petitioner after his/her divorce from petitioner's mother. This abandonment continued for a period of _____ [*specify duration of at least*

two years] before the time petitioner reached the age of eighteen years.

4. During the period when petitioner was abandoned, the parent was physically and mentally able to support petitioner but failed to do so.

WHEREFORE, petitioner prays for an order of this court as follows:

1. That petitioner be freed from all obligation imposed by law to pay for the support, care, maintenance, and the like of _____ [*name of parent*];

2. That petitioner be freed from all obligation imposed by law to reimburse the State of California or a local public agency for furnishing support, care, maintenance, or the like to _____ [*name of parent*]; and

3. For such other and further relief as the court may deem proper.

_____ [*date*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 394.160[1]*]

[2] Use of Form

The form in [1], *above*, is a petition for use by adult child seeking to be freed from the obligation of supporting his or her parent on the ground that he or she was abandoned during minority by the parent [*Fam. Code § 4410*]. Though denominated a petition by the statute, it would most likely be used as a response in a proceeding initiated by the parent or county under *Fam. Code § 4403* to impose the duty of support (*see § 394.161*). Absent an affirmative step to seek support, there would seem to be no reason to petition for relief from the duty.

For further discussion, see the *§ 394.37[3]*. For additional related forms, see §§ 394.163-394.164 (notice and order).

[3] Jurisdiction and Venue

All jurisdiction under the Family Code is in the superior court [*Fam. Code § 200*]. The petition is to be filed in the county where the parent resides, or in the county where the adult child resides if the parent is not a California resident [*Fam. Code § 4410*]]

[4] Required Allegations

The petition must include all of the following allegations [*Fam. Code § 4411*]:

- While petitioner was a minor, he or she was abandoned by the parent;
- The abandonment continued for a period of two or more years before petitioner reached the age of

18; and

- During the period of abandonment, the parent was physically and mentally able to support petitioner.

[5] Citation and Service

On the filing of the petition, the clerk must set the matter for hearing and issue a citation directed to the parent, or the parent's conservator or personal representative. The citation must be served at least five days before the hearing [*Fam. Code § 4412*].

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B. Duty of Support

34-394 California Forms of Pleading and Practice--Annotated § 394.163

§ 394.163 Proceedings by Abandoned Child for Relief From Duty to Support Parent in Need--Notice of Pendency of Proceeding [Fam. Code § 4413]

[1] FORM Proceedings by Abandoned Child for Relief From Duty to Support Parent in Need--Notice of Pendency of Proceeding [Fam. Code § 4413]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF PENDENCY OF PROCEEDING FOR
Respondent.	)	RELIEF FROM DUTY TO SUPPORT PARENT
	)	
	)	

To _____ [*name*], _____ [County Counsel *or* District Attorney] of the County of _____, State of California:

NOTICE IS HEREBY GIVEN of the pendency of the above-entitled proceeding, in which _____ [*name of petitioner*], the petitioner in the proceeding, seeks to be freed from the obligation otherwise imposed by law under *Family Code Section 4410* to support _____ [*name of parent*], his/her parent. A hearing has been set in this matter for _____ [*date*], at _____ [*time*], _____ [Department *or* Division] _____, located at _____ [*address*].

_____ [*date*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Use of Form

The form in [1], *above*, is a notice of a proceeding under *Fam. Code § 4410* for relief from the legal obligation to support an indigent parent. If the parent resides in California, such a notice must be served on the county counsel of the county where the parent resides. If there is no county counsel for the parent's county of residence, it must be served on the district attorney of the county. The court lacks jurisdiction to make an order freeing the petitioner from the legal obligation to support the parent until the notice has been properly served and 30 days have elapsed since the date of service [*Fam. Code § 4413*].

For further discussion, see *§ 394.162*.

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34-394 California Forms of Pleading and Practice--Annotated § 394.164

§ 394.164 Proceedings by Abandoned Child for Relief From Duty to Support Parent in Need--Order [Fam. Code § 4414]

[1] FORM Proceedings by Abandoned Child for Relief From Duty to Support Parent in Need--Order [Fam. Code § 4414]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER OR RELIEF FROM DUTY TO SUPPORT
Respondent.	)	PARENT
	)	
	)	

This matter came on regularly for hearing on _____ [*date*], in _____ (Department *or* Division) _____ of the above-entitled court, the Honorable _____ [*name*], Judge, presiding. Petitioner appeared by his/her attorney _____ [*name*]. _____ [*Name of parent and/or conservator, or personal representative*] appeared by his/her attorney _____ [*name*]. [_____ (*Name of county counsel or district attorney*) appeared for the office of the _____ (county counsel *or* district attorney) of _____ County, California.] Evidence, both oral and documentary, having been presented, and the cause having been argued and submitted for decision, and _____ [the court(, on request of _____ (petitioner *or* defendant), having caused to be made and filed herein its statement of decision *or* a statement of decision not having been requested],

IT IS ORDERED, ADJUDGED, AND DECREED that petitioner is freed from the obligation imposed by law to pay for

the support, care, maintenance, and the like of _____ [*name of parent*], his/her parent, and from the obligation to reimburse the State of California or any local agency for the support, care, maintenance, and the like of _____ [*name of parent*].

_____ [*date*]

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is an order is for use by an adult child who has filed a petition to be freed from the obligation to support his or her parent, on the ground that the parent abandoned him or her for a period of two years or more during his or her minority [*see Fam. Code §§ 4410, 4411*]. If, on hearing, the court determines that the allegations in the petition are true, it must make an order relieving the petitioner from the obligation otherwise imposed by law to support the parent [*Fam. Code§ 4414(a)*]. Such an order also releases the petitioner with respect to any state law under which a child is required to pay for the support, care, maintenance, and the like of a parent, or to reimburse the State of California or a local public agency for providing support, care, maintenance, or the like to the parent [*Fam. Code § 4414(b)*].

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B. Duty of Support

34-394 California Forms of Pleading and Practice--Annotated § 394.165

§ 394.165 Petition to Enforce Duty of Support by Parent on Behalf of Adult Indigent Child [Fam. Code §§ 3910(a), 4000]

[1] FORM Petition to Enforce Duty of Support by Parent on Behalf of Adult Indigent Child [Fam. Code §§ 3910(a), 4000]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name of person from whom support is sought*],	)	PETITION TO ENFORCE PARENTAL DUTY TO SUPPORT ADULT INDIGENT CHILD
Respondent.	)	
	)	

_____

1. Petitioner, _____ [*name*], is the _____ [*e.g.*, father] of _____ [*name of adult indigent child*], born _____ [*date*], and who has reached the age of majority (hereinafter, "the child"). The child resides with petitioner as a member of his/her household.

2. Respondent _____ [*name*], is the child's _____ [*e.g.*, mother].

3. _____ [*name of child*] is incapacitated from earning a living and without sufficient means because _____ [*state facts that establish that child meets standard of Fam. Code § 3910, e.g.*, he/she is physically disabled and confined to a wheel chair and requires 24 hour custodial supervision and care, and is unable to work].

4. The child's economic resources _____ [consist of _____ (*e.g.*, SSI benefits of $_____ per month) *or* are set forth in the attached Income and Expense Declaration, which is incorporated by reference as though fully set forth at this point]. His/her resources are insufficient to provide for his/her reasonable needs.

5. Petitioner currently assists with the support of the child by _____ [*e.g.*, maintaining the child as a member of petitioner's household at no cost to the child and by providing and paying all costs associated with the care of the child].

6. Under *Family Code Section 3910*, respondent has a duty to maintain the child, and currently has the ability to do so. Despite this duty and ability, respondent has failed and refused to provide any support for the child.

7. The child _____ [is *or* is not] currently receiving public assistance under the Family Economic Security Act of 1982, *Welfare and Institutions Code Section 11200 et seq.* [The child _____ (intends *or* does not intend) to apply for such assistance.]

WHEREFORE, Petitioner prays for orders of court as follows:

1. Requiring _____ [*name of respondent*] to pay support for the benefit of the child in such amounts and under such terms as the court deems proper;

2. For costs of suit herein incurred, including reasonable attorney's fees;

3. For such other and further relief as the court deems proper.

_____ [*date*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 394.160* .]

[2] Use of Form

This form is a petition for use to bring an action under *Fam. Code § 4000* to enforce a parent's duty under *Fam. Code § 3910* to support an adult child who is incapacitated from earning a living and without sufficient means ("adult indigent child"). It is designed for use by the parent with whom the child resides to obtain support from the other parent. Such a petition may also be brought by the child through a guardian ad litem [*Fam. Code § 4000*]. For a form for a petition for the appointment of a guardian ad litem, see Ch. 291, *Guardians ad Litem* .

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B. Duty of Support

34-394 California Forms of Pleading and Practice--Annotated §§ 394.166-394.169

[Reserved]

§§ 394.166[Reserved]

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PART IV. FORMS
C. Custody and Visitation

34-394 California Forms of Pleading and Practice--Annotated § 394.170

§ 394.170 Petition for Custody and Support of Minor Children--Cal. Judicial Council Form FL-260

[1] FORM Petition for Custody and Support of Minor Children--Cal. Judicial Council Form 1296.80

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative version of the Judicial Council's approved form of Petition for Custody and Support of Minor Children [Cal. Judicial Council Form FL-260]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is intended for use by the parent of a minor child to obtain orders for child custody, visitation, and child support, as follows:

a. The parents are married to each other and no action is pending in any court for dissolution, legal separation, or nullity.

b. The parents have signed a Voluntary Declaration of Paternity and no action regarding the children has been filed in any other court. Although the form does not recite that the parents who signed the voluntary declaration are unmarried, that appears to be its intent, given the nature and use of the voluntary paternity declaration [*see Fam. Code §§ 7571(a), 7573, 7644*; *see also* Ch. 412, *Paternity*].

c. The parents are not married and have legally adopted a child together.

d. The petitioner and respondent in the proceeding have been determined to be the parents in juvenile or governmental child support case.

A notice on the form clarifies that the underlying action being brought will not terminate a marriage or establish a parental relationship.

In general, given the existence in California of widely available remedies for child custody, visitation, and support in traditional family law (including parentage) proceedings, there has been little modern need to institute a separate legal proceeding to secure custody, visitation, and support orders. However, the proceeding contemplated by this form fills a gap for those married parents who do not wish to bring a traditional dissolution, legal separation, or nullity proceeding (and who do not need domestic violence protective orders), but who are in need of custody, visitation, and support orders [*cf. Fam. Code § 3120* (independent action for exclusive custody and associated support orders, as discussed in *§ 394.71*)]. And, it enables unmarried persons who have signed a voluntary declaration of paternity or have adopted a child together to obtain such orders without having to bring a traditional parentage or other action [*see generally Fam. Code §§ 7573, 7644*; *see also* Ch. 412, *Paternity*].

Although the form makes reference to only three statutes [*Fam. Code §§ 3120, 3400* (title of UCCJEA); *Fam. Code § 3900* (parental duty of support)], it appears also to be applicable to actions under *Family Code §§ 7573*, and *7644* [*see Cal. Rules of Ct., Rule 2.110* (references to statutes and rules listed in lower right hand corner of form are advisory only)].

In using this form of petition, a completed declaration under the UCCJEA must be attached [*see Fam. Code §§ 3400 et seq., 3409*]. For an approved form of the UCCJEA declaration [Cal. Judicial Council Form FL-105] that this petition form requires, see Ch. 220, *Dissolution of Marriage: Master Procedural Guide* .

In addition, if the petition alleges that a voluntary declaration of paternity has been signed, a copy of the declaration must be attached. Also, a completed Income and Expense Declaration or Financial Statement (Simplified) must be attached [*see* Cal. Judicial Council Forms FL-150, FL-155]. The form, additionally, alludes to the use of attachments when there is insufficient space on the form to list such matters as the proposed visitation schedule [Cal. Judicial Council form FL-341], details of supervised visitation [Cal. Judicial Council form FL-341(A)], a request for child abduction prevention orders and child abduction prevention orders [Cal. Judicial Council forms FL-312, FL-341], a proposed holiday schedule [Cal. Judicial Council form FL-341(C)], a request for additional orders regarding child custody [Cal. Judicial Council form FL-341(D)], or a request for a joint legal custody order [Cal. Judicial Council form FL-341(E)] (*see* Paragraph 5).

A blank form of Response to Petition for Custody and Support of Minor Children [Cal. Judicial Council Form FL-270] must be served on the respondent at the time of serving the petition [*see § 394.171*]. The Judicial Council's form of "Summons (Uniform Parentage--Petition for Custody and Support)" must be served as well [Cal. Judicial Council Form FL-210]. For an illustrated form of this summons, see Ch. 412, *Paternity* .

Paragraph 6 of the form contains checkoff boxes by which the petitioner may request that attorney's fees be paid either by one of the parties, or that each party pay his or her own fees [*Fam. Code § 3121* (court's authority to order one party to exclusive custody action to pay other party's attorney's fees and costs); *see Fam. Code § 7644(b)* (authorizing appropriate orders, in action based on voluntary paternity declaration, under *Fam. Code § 7637*, which permits "ordering any other matter in the best interest of the child"); *cf. Fam. Code § 3452* (award of costs, fees, and expenses to prevailing party in enforcement action under UCCJEA); former *Civ. Code § 4370* (authorizing fee awards in any proceeding under former Family Law Act, which included action for exclusive custody)].

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34-394 California Forms of Pleading and Practice--Annotated § 394.171

§ 394.171 Response to Petition for Custody and Support of Minor Children--Cal. Judicial Council Form FL-270

[1] FORM Response to Petition for Custody and Support of Minor Children--Cal. Judicial Council Form 1296.81

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustrative version of the approved Judicial Council form of Response to Petition for Custody and Support of Minor Children [Cal. Judicial Council Form FL-270]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is intended for use in responding to a Petition for Custody and Support of Minor Children [Cal. Judicial Council Form FL-260] that has been served on the respondent along with a summons [*see* Cal. Judicial Council Form FL-210; see also Ch. 412, *Paternity*]. Its allegations mirror those of the petition [*see § 394.170*]. Within 30 days after the summons and petition have been served on the respondent, a copy of the completed response form must be served on the petitioner (or, if the petitioner is represented, on his or her counsel), and the original response form, along with proof of service, must be filed with the court.

As in the case of the petition, the response requires certain attachments, including a completed UCCJEA declaration [Cal. Judicial Council Form FL-105]. In addition, either an Income and Expense Declaration or Financial Statement (Simplified) [*see* Cal. Judicial Council Forms FL-150, FL-155] should be attached. For illustrative, filled-in versions of those forms, see Ch. 221, *Dissolution of Marriage: Procedure* . In addition, the following should be attached depending on the circumstances:

- If the response alleges that a voluntary declaration of paternity has been signed, a copy of the declaration [paragraph 2(b)].

- If the respondent proposes a schedule for visitation, a Child Custody and Visitation Attachment [Cal. Judicial Council form FL-311; paragraph 5(c)(1); *see also* Cal. Judicial Council form FL-341 (Child Custody and Visitation Order Attachment)].

- If the respondent requests supervised visitation, Cal. Judicial Council Form FL-341(A).

- If the respondent requests child abduction prevention orders, Cal. Judicial Council forms FL-312, FL-341(B).

- If the respondent proposes a holiday schedule, Cal. Judicial Council form FL-341(C) or other attachment.

- If the respondent requests additional orders regarding child custody, Cal. Judicial Council form FL-341(D) or other attachment.

- If the respondent requests joint legal custody orders, Cal. Judicial Council form FL-341(E) or other attachment.

For further discussion, see *§ 394.170*.

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34-394 California Forms of Pleading and Practice--Annotated § 394.172

§ 394.172 Relative of Deceased Parent's Petition for Visitation [Fam. Code § 3102]

[1] FORM Relative of Deceased Parent's Petition for Visitation [Fam. Code § 3102]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR VISITATION
Respondent.	)	
	)	
	)	

Petitioner, _____ [*name*], alleges:

1. Petitioner is the _____ [*specify family relationship, e.g.,* the matrnal grandparent] of the minor child _____ [*name*], born _____ [*date*].

2. _____ [*Name of surviving parent* is the _____ [mother *or* father] of the above-named child.

3. _____ [*Name of deceased parent*], the _____ [father *or* mother] of the above-named child, petitioner's _____ [e.g., son], is deceased, having died on _____ [*date*].

4. Both before and after the death of _____ [*name*], petitioner visited regularly with the child.

Petitioner has a warm and caring relationship with the child, and it is in the best interests of the child that this relationship continue.

5. _____ [*Allege facts indicating why court order is required to compel visitation, e.g.,* On _____ (*date*), the child's mother informed petitioner that she disapproved of petitioner's interaction with the child, and that she would no longer permit petitioner to have any visitation or other contact of any kind with the child].

6. A completed declaration under the Uniform Child Custody Jurisdiction and Enforcement Act is attached.

WHEREFORE, Petitioner prays for orders of this court as follows:

1. For an order of this court granting petitioner visitation with the child at such times and under such conditions to be determined.

2. For costs and reasonable attorneys' fees incurred in bringing this petition.

3. And for such other relief as the court deems proper.

_____ [*date*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioners _____ [*names*]

[*Verification. See § 394.160.*]

[2] Use of Form

The form in [1], *above*, is a petition under *Fam. Code § 3102* for visitation rights with a child. This statute provides for visitation for the family of a deceased parent. The petition may be filed by the children, siblings, parents, or grandparents of the deceased parent [*see Fam. Code § 3102(a)*].

This form is based on the assumption that prior law, which allowed relatives of a deceased parent to seek visitation whether or not another proceeding concerning custody of the child was pending before a court, has not been changed by the Family Code [*see* former *Civ. Code § 197.5*; *Roquemore v. Roquemore (1969) 275 Cal. App. 2d 912, 913, 80 Cal. Rptr. 432]* . For further discussion, see *§ 39.74[2]*.

Note that the respondent in this instance is the surviving parent who has custody of the child. As with any petition involving custody or visitation, a completed UCCJEA declaration should be attached [*see Fam. Code §§ 3400 et seq., 3429*].

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34-394 California Forms of Pleading and Practice--Annotated § 394.173

§ 394.173 Grandparents' Petition for Visitation [Fam. Code § 3104]

[1] FORM Grandparents' Petition for Visitation [Fam. Code § 3104]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR GRANDPARENT VISITATION
Respondent.	)	
	)	
	)	

Petitioners _____ [*names*], allege:

1. Petitioners are the _____ [paternal *or* maternal grandparents of _____ [*name of grandchild*], hereinafter referred to as "the child."

2. The mother of the child is _____ [*name*]; the father of the child is _____ [*name*]. The parents _____ [are *or* are not] currently married to each other.

3. _____ [*Allege contents of any current court order regarding custody of child, or lack of any current court order, e.g.,* There is currently no court order in effect regarding the legal or physical custody of the child, or granting vistiation rights with the child to anyone].

4. _____ [*Allege current physical custodial status of child, including county of residence or domicile,*

e.g., The child is in the actual physical custody of the mother, and is currently residing with her in _____ County, California].

[5. *If parents are currently married to each other allege one or more of the following:* The parents are currently living separately and apart from each other on a permanent or indefinite basis. *OR* The child's _____ (*e.g.*, father) has been absent for more than one month without the _____ (*e.g.*, mother's) knowing of his/her whereabouts. *OR* _____ (*name*), the child's _____ (*e.g.*, mother), joins in this petition. *OR* The child is not residing with either parent.]

6. _____ [*Allege facts establishing preexisting relationship between the grandparents and grandchild, that has engendered a bond, e.g.*, For the first six years of her life, the child lived in the home of petitioners. During that time, petitioners were the primary care givers and custodians of the child while both parents were working. After the child no longer resided in petitioners' home, petitioners maintained regular contact with the child through frequent visitation, including taking the child on a vacation every summer. As a result of this relationship, a bond was engenderedbetween petitioners and the child such that a continued relationship among them is in the best interests of the child].

7. _____ [*Allege facts indicating why court order is required to compel visitation, e.g.*, On or about _____ (*date*), the child's mother informed petitioners that she disapproved of petitioners' interaction with the child, and that she would no longer permit petitioners to have any visitation or other contact of any kind with the child].

[8. *Allege need for order requiring parents to pay costs associated with visitation, if applicable, e.g.*, Petitioners are persons of limited financial resources, as shown by the attached Income and Expense Declaration, and are unable to entirely bear the costs related to visitation with the child.]

9. A completed declaration under the Uniform Child Custody Jurisdiction and Enforcement Act is attached.

WHEREFORE petitioners pray for relief as follows:

1. For an order of this court granting petitioners visitation with the child at such times and under such conditions to be determined.

[2. For an order requiring _____ (*name of parent*) to pay the costs related to the requested visitation.]

3. For costs and reasonable attorneys' fees incurred in bringing this petition.

4. And for such other relief as the court deems proper.

_____ [*date*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioners _____ [*names*]

[*Verification. See § 394.160.*]

[2] Use of Form

The form in [1], *above*, is for use by grandparents to petition for a visitation order with their grandchild if there is no other proceeding pending in which custody of the grandchild is at issue [*see Fam. Code § 3104*; *cf. White v. Jacobs (1988) 198 Cal. App. 3d 122, 124, 243 Cal. Rptr. 597* (under prior law, no jurisdiction to grant visitation to grandparents unless child custody was pending in other proceeding)]. It may be adapted for use to petition for visitation within a pending proceeding, such as one for dissolution of marriage [*see Fam. Code § 3103*]. For further discussion of jurisdiction to grant visitation to grandparents, see *§ 39.74[2][b]*.

If the parents are married, one or more of the conditions set forth in *Fam. Code § 3104(b)* should be alleged (*see* paragraph 5). The petition should also allege facts showing a preexisting relationship between the grandparents and the grandchild that has engendered a bond such that visitation is in the best interests of the child [*Fam. Code § 3104(a)(1)*] (*see* paragraph 6).

If petitioners are unable to bear the costs of visitation, for example, airfare to transport the child across the country, costs related to the visitation may be requested [*see Fam. Code § 3104(i)*] (*see* paragraph 8). In this case, the Judicial Council Form of Income and Expense Declaration [*see* Cal. Judicial Council Form FL-150] should be attached. For an example, see Ch. 221, *Dissolution of Marriage: Procedure* .

Note that the respondent in this instance is the surviving parent who has custody of the child.

As with any petition involving custody or visitation, a completed UCCJEA declaration should be attached [*see Fam. Code §§ 3400 et seq., 3429*].

[3] Service

If the petition is filed independently, the petitioner must give notice of the petition by service of summons and a copy of the petition to each of the parents of the child, any stepparent, and any person who has physical custody of the child, by personal service under *Code Civ. Proc. § 415.10* [*Fam. Code § 3104(c)*]. If the petition is filed within a pending proceeding, the petitioner must give notice to the same persons by certified mail, return receipt requested, postage prepaid, to the person's last known address, or to the attorneys of record of th parties to the proceeding [*Fam. Code § 3103(c)*].

[4] Venue

Nothing in *Fam. Code § 3104* indicates in what county the petition may be filed. The preferred venue is probably the county of the child's domicile. This form alleges that domicile.

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34-394 California Forms of Pleading and Practice--Annotated § 394.174

§ 394.174 Request to Register Out-of-State Custody Order--Cal. Judicial Council Form FL-580

[1] FORM Request to Register Out-of-State Custody Order--Cal. Judicial Council Form FL-580

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustration of the Judicial Council form used torequest that a California court register an out-of-state custody order. Use of the Judicial Council form is optional. The form combines the request for registration of the order with a notice or registration and clerk's certificate of mailing.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. It may be filed separately from (and before) any pleadings to enforce or modify the order, or at the same time as such pleadings are filed. Note that, pursuant to statute, the request for registration may also be in the form of a "letter or other document requesting registration" [*Fam. Code § 3445(a)(1)*; *see* Cal. Judicial Council Form FL-580].

Under the UCCJEA, an out-of-state custody order may be registered in California, "with or without a simultaneous request for enforcement" by sending all of the following to the appropriate California court [*Fam. Code § 3445(a)*]:

1. A letter or other document requesting registration;

2. Two copies, including one certified copy, of the order sought to be registered, and a statement under penalty of perjury that to the best of the knowledge and belief of the person seeking registration the order has not been modified; and

3. Except in cases requiring confidentiality because of domestic violence [*see Fam. Code § 3429*], the name and address of the person seeking registration and any parent or person acting as a parent who has

been awarded custody or visitation in the decree.

Although this registration procedure is found within a statutory provision that anticipates eventual enforcement of the order after registration [*Fam. Code § 3445(a)*], it also appears applicable with respect to bringing a modification proceeding after registration. A companion statute, in fact, may contemplate this, because it provides that a California court must recognize and enforce, but may not modify, a registered child custody determination of a court of another state--*except* in accordance with the UCCJEA standards set forth in *Fam. Code § 3421 et seq.* [*see Fam. Code § 3446(b)*].

After the order is registered, the court is required to send notice of the registration to the persons whose names and addresses were set forth in the registration request and provide them with an opportunity to contest the registration. A person seeking to contest the validity of the registered order must request a hearing within 20 days after service of the notice. For an optional Judicial Council form for requesting a hearing, see *§ 394.176*.

If a hearing is held, the court must confirm the registered order unless the contestant establishes at least one of the grounds set forth in *Fam. Code § 3445(d)* (the issuing court's lack of UCCJEA jurisdiction; that the decree has been vacated, stayed or modified; or the contestant was not afforded proper notice in the underlying proceeding). In addition, the registered order will be confirmed as a matter of law if a timely request for a hearing is not made. Confirmation of a registered order, whether by operation of law or after notice and a hearing, precludes further contest of the order regarding any matter that could have been asserted at the time of registration [*Fam. Code § 3445(b)-(f)*].

For related discussion of registering a sister-state custody order for the purpose of enforcement, see Ch. 260, *Family Law Enforcement: Foreign Judgments* .

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34-394 California Forms of Pleading and Practice--Annotated § 394.175

§ 394.175 Petition to Modify Registered Decree

[1] FORM Petition to Modify Registered Sister-State Custody Decree

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION TO MODIFY REGISTERED SISTER-
_____ [*name*],	)	STATE CUSTODY DECREE
Respondent	)	[*Code Civ. Proc. § 1913*; *Fam. Code §§ 3423, 3445, 3446(b)*]
	)	
	)	

Petitioner alleges:

1. Petitioner _____[*name*] is the _____ [*e.g.*, mother] of the _____[*name of child*], a minor, born _____[*date*], in _____[*place of birth*].

2. Respondent, _____[*name*] is the _____ [*e.g.*, father] of the above-named child.

3. Petitioner and respondent were married at the times of the child's conception and birth. Thereafter, they were divorced by a decree of _____[*name and state of court*] dated _____. The child was determined to be a child of the marriage in the decree of divorce.

4. Under the above decree of divorce, _____ [*specify custody and visitation provisions of decree, e.g.,*

petitioner was granted primary physical custody of the child, subject to respondent's right to exercise "reasonable" visitation. Respondent's visitation rights are not further expressed or enumerated]. There have been no modifications of that judgment to date.

5. Thereafter, both parties permanently left the state of _____[*decree state*]. Petitioner and the child moved to California on _____[*date*], and California has been the continuous residence and domicile of the child since that time. California is now the child's home state within the meaning of the Parental Kidnapping Prevention Act (Title *28 of the United States Code, Section 1738A(b)(4), (c)(2)(A)*), and the Uniform Child Custody Jurisdiction and Enforcement Act (*Sections 3402(g)* and *3421(a)(1) of the California Family Code*).

6. Respondent moved to _____[*state of current residence*] on _____[*date*], and no longer retains any domicile or residence in, or significant contacts with, the state of _____[*decree state*]. _____[*Decree state*], therefore, no longer has continuing jurisdiction under the Parental Kidnapping Prevention Act (*Title 28 United States Code, Section 1738A(d)*), and the Uniform Child Custody Jurisdiction and Enforcement Act (*Section 3423 of the California Family Code*).

7. _____ [*Specify facts supporting modification of custody decree, e.g.,* On _____ (*date*), Respondent called petitioner and requested that the child be sent to Minnesota for a period of two months during Summer vacation. Petitioner is willing to grant the custodial period as requested, but only if the current custody and visitation order is modified to require respondent to return the child to petitioner's custody on or before _____ (*date*), thereby giving Petitioner an enforceable right to resume physical custody as of that date].

8. Petitioner has registered two copies of the above sister-state custody decree, at least one of which is certified, with the clerk of this court as provided by *Section 3445 of the California Family Code*. This registered decree _____ [has been confirmed without a hearing by operation of law under *Section 3445(e) of the California Family Code or* has been confirmed after court hearing under *Section 3445(d) of the California Family Code* and a certified copy of this court's confirmation order is attached *or* has not yet been confirmed, and petitioner will seek leave to amend this petition hereafter to set forth the circumstances of confirmation and will provide the court with a certified copy of any confirmation order issued hereafter].

9. A completed declaration under the Uniform Child Custody Jurisdiction and Enforcement Act is attached.

10. Petitioner has insufficient funds to pay the amount reasonable necessary for the cost of maintaining this proceeding and for attorney's fees. Respondent has the ability to pay these amounts.

WHEREFORE, Petitioner prays judgment as follows:

1. For an order modifying the _____[*decree state*] custody order of _____[*date*], to provide _____ [*specify, e.g.*, that respondent may have the temporary physical custody of the child from _____ (*date*), through _____ (*date*), inclusive, and that petitioner shall have physical custody at all other times];

2. For an order requiring respondent to pay the cost of round-trip airfare from California to _____[*state of Respondent's residence*];

3. For reasonable attorney's fees;

4. For costs of suit herein incurred;

5. For such other and further relief as the court may deem proper.

_____[*date*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See form in § 394.160.*]

[2] Use of Form

The form of petition in [1], *above* is for use to to petition to modify a sister-state custody decree under the UCCJEA and PKPA after it has been established of record in California [*see Fam. Code §§ 3445, 3446(b)*; for a form of request to register the sister-state decree, *see § 394.174, above*]. Although the UCCJEA does not specify a procedure for modifying a sister-state custody decree, the procedures set forth for enforcement by means of petition [*see Fam. Code § 3448*] suggest, by parity of reasoning, that a similar process would be appropriate for modification proceedings. In addition, the Code of Civil Procedure permits an action or special proceeding to be brought to establish a sister-state judgment [*see Code Civ. Proc. § 1913(a)*; *Hamilton v. Superior Court (1974) 37 Cal. App. 3d 418, 422, 112 Cal. Rptr. 450]* . Once so established, California then generally has the same right to modify the judgment as the court that rendered it [*see Leverett v. Superior Court of Alameda County (1963) 222 Cal. App. 2d 126, 130-132, 34 Cal. Rptr. 784]* , subject to the jurisdictional requirements of the PKPA and UCCJEA for custody modification [*see 28 U.S.C. § 1738A(f)*; *Fam. Code § 3423*].

The situation contemplated by this petition involves divorced parents, neither of whom continues to reside in the state that issued the divorce decree and custody order. The child and one parent now live in California, and that parent wants to modify the custodial arrangement. The circumstances are now such that California has modification jurisdiction under the UCCJEA and PKPA [*see 28 U.S.C. § 1738A(f)*; *Fam. Code § 3423*]. For purposes of illustration, it is assumed that California has become the child's "home state." The PKPA and UCCJEA permit a child's new home state (*see § 394.107*) to assume jurisdiction over the custody of a child if the decree state no longer has continuing jurisdiction [*Fam. Code § 3423(b)*; *28 U.S.C. § 1738A(f)*; *Lough v. Superior Court (1992) 8 Cal. App. 4th 136, 142-143, 10 Cal. Rptr. 2d 250]* . Other possible bases for the exercise of California jurisdiction are *set forth in § 394.110*, and this form may be modified accordingly to allege additional or alternative bases.

As with any petition involving custody or visitation, a completed UCCJEA declaration should be attached [*see Fam. Code §§ 3400 et seq., 3429*]. For further discussion of modification jurisdiction under the PKPA and UCCJEA, see *§ 394.110*.

Counsel should also prepare a summons for use with the petition. The general civil summons [Cal. Judicial Council Form 982(a)(9)] appears most appropriate for this purpose, rather than the standard family law summons, because the family law summons is directed to dissolution proceedings and contains restraining orders that would not necessarily apply in the context of interstate custody proceedings. The Judicial Council form of summons is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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PART IV. FORMS
C. Custody and Visitation

34-394 California Forms of Pleading and Practice--Annotated § 394.176

§ 394.176 Request for Hearing Regarding Registration of Out-Of-State Custody Decree--Cal. Judicial Council Form FL-585

[1] FORM Request for Hearing Regarding Registration of Out-Of-State Custody DecreeBCal. Judicial Council Form FL-585

Click here to view image.

[2] Use of Form

This form is the Judicial Council form of Request for Hearing Regarding Registration of Out-Of-State Custody Decree [Cal. Judicial Council Form FL-585], approved for optional use. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

At least one of the boxes in paragraph 2.a., 2.b., or 2.c. should be checked, inasmuch as the court must confirm the registered order unless a person contesting registration establishes one of the grounds stated in these paragraphs [*see Fam. Code § 3445(d)*].

Counsel should obtain a hearing date from the court and fill in paragraph 1, accordingly. A request for hearing to contest registration must be filed within 20 days of receipt of the notice of registration. Failure to timely contest registration will result in the registration of the out-of-state order being confirmed in California by operation of law [*see Fam. Code § 3445(c), (e)*].

See also *§ 394.174[2]*.

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[2] Permissive Joinder of New Party Defendant

[3] Compulsory Joinder of New Party by Plaintiff

[4] Compulsory Joinder of New Party by Defendant

[5] Compulsory Joinder of New Party by Omitted Party

[6] Joinder of Party Having Interest in Property

[7] Procedures for Objecting to Misjoinder

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§ 395.81 Defendant's or Plaintiff's Objection to Joinder

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[4] Compulsory Joinder of New Party by Defendant

[5] Compulsory Joinder of New Party by Omitted Party

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[3] Accompanying Papers

[4] Related Uses

[5] Cross References

§ 395.101 Proceedings for Leave to Amend Complaint [Code Civ. Proc. § 473(a)] to Bring in New Party--Permissive Joinder by Plaintiff of Party Plaintiff [Code Civ. Proc. § 378]--Supporting Declaration [Code Civ. Proc. § 2015.5]

[1] FORM

[2] Use of Form

§ 395.102 Proceedings for Leave to Amend Complaint [Code Civ. Proc. § 473(a)] to Bring in New Party--Permissive Joinder by Plaintiff of Party Defendant [Code Civ. Proc. § 379]--Notice of Motion

[1] FORM

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[6] Cross References

§ 395.103 Proceedings for Leave to Amend Complaint [Code Civ. Proc. § 473(a)] to Bring in New Party--Permissive Joinder by Plaintiff of Party Defendant [Code Civ. Proc. § 379]--Supporting Declaration

[1] FORM

[2] Use of Form

[3] Cross References

§ 395.104 Proceedings for Leave to Amend Complaint [Code Civ. Proc. § 473(a)] to Bring in New Party--Compulsory Joinder by Plaintiff of Party Defendant [Code Civ. Proc. § 389]--Notice of Motion [Code Civ. Proc. § 1010]

[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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§ 395.106 Proceedings for Leave to Amend Complaint [Code Civ. Proc. § 473(a)] to Bring in New Party--Permissive [Code Civ. Proc. §§ 378, 379] or Compulsory [Code Civ. Proc. § 389] Joinder by Plaintiff of Party Plaintiff or Defendant--Order Granting Motion

[1] FORM

[2] Use of Form

[3] Cross References

§ 395.107 Proceedings for Order Compelling Joinder of Omitted Party [Code Civ. Proc. § 389]--By Defendant or Omitted Party--Notice of Motion

[1] FORM

[2] Use of Form

[3] Accompanying Papers

[4] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

§ 395.110 Proceedings for Order Compelling Joinder of Omitted Party as Plaintiff or Defendant [Code Civ. Proc. § 389.5]--By Omitted Person Having Interest in Property--Notice of Motion

[1] FORM

[2] Use of Form

[3] Accompanying Papers

[4] Alternative Procedures

[5] Cross References

§ 395.111 Proceedings for Order Compelling Joinder of Omitted Party as Plaintiff or Defendant [Code Civ. Proc. § 389.5]--By Omitted Person Having Interest in Property--Supporting Declaration

[1] FORM

[2] Use of Form

[3] Cross References

§ 395.112 Proceedings for Order Compelling Joinder of Omitted Party as Plaintiff or Defendant [Code Civ. Proc. § 389.5]--By Omitted Person Having Interest in Property--Order Granting Motion

[1] FORM

[2] Use of Form

[3] Cross References

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§ 395.120 Proceedings for Order Granting Leave to Intervene in Pending Action [Code Civ. Proc. § 387]--Notice of Motion

[1] FORM

[2] Use of Form

[3] Accompanying Papers

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[5] Filing Fees

[6] Cross References

§ 395.121 Proceedings for Order Granting Leave to Intervene in Pending Action [Code Civ. Proc. § 387]--Declaration in Support of Motion

[1] FORM

[2] Use of Form

[3] Alternate Uses

[4] Cross References

§ 395.122 Proceedings for Order Granting Leave to Intervene in Pending Action [Code Civ. Proc. § 387]--Order

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§ 395.123 Proceedings for Order Granting Leave to Intervene in Pending Action [Code Civ. Proc. § 387]--Ex Parte Application, Declaration, and Order

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§ 395.124 Proceedings for Order Granting Leave to Intervene in Pending Action [Code Civ. Proc. § 387]--Application for Order to Show Cause Why Leave Should Not Be Granted to File a Complaint in Intervention

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[2] Use of Form

[3] Accompanying Papers

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[5] Cross References

§ 395.125 Proceedings for Order Granting Leave to Intervene in Pending Action [Code Civ. Proc. § 387]--Order to Show Cause Why Leave Should Not Be Granted to File Complaint in Intervention

[1] FORM

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§ 395.126 Proceedings for Order Granting Leave to Intervene in Pending Action [Code Civ. Proc. § 387]--Order Granting Oral Application for Leave to Intervene

[1] FORM

[2] Use of Form

[3] Cross References

§ 395.127 Complaint in Intervention [Code Civ. Proc. § 387]--General Form

[1] FORM

[2] Use of Form

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34-395 California Forms of Pleading and Practice--Annotated § 395.01

§ 395.01 Scope of Chapter

This chapter discusses and contains forms related to:

- Joinder of parties to a pending action, and forms for use in bringing additional parties into a pending action [*see § 395.110* et seq., for forms, *see § 395.100* et seq.].

- Intervention of parties in a pending action [*see § 395.30* et seq., for forms, *see § 395.120* et seq.].

The forms relating to joinder of parties are:

- Notices of motions by plaintiff for leave to amend the complaint to bring in a new party under the statutes governing permissive [*see §§ 395.100* and *395.102*] or compulsory joinder [*see § 395.104*], with supporting declarations [*see §§ 395.101*, *395.103*, and *395.105*], and an order permitting plaintiff to amend the complaint [*see § 395.106*].

- Notice of motion by a defendant or omitted party to compel joinder [*see § 395.107*], with a supporting declaration [*see § 395.108*] and order directing plaintiff to join the omitted party [*see § 395.109*].

- Notice of motion by a party having an interest in property for an order permitting joinder [*see § 395.110*], with a supporting declaration [*see § 395.111*], and an order [*see § 395.112*].

The forms relating to intervention are:

- Notice of motion for order granting leave to intervene [*see § 395.120*], with supporting declaration [*see § 395.121*], and order granting leave to intervene [*see* § 395.1 22].

- Ex parte application, declaration, and order granting leave to intervene [*see § 395.123*].

- Application for order to show cause why intervention should not be granted [*see § 395.124*].
- Order to show cause why intervention should not be granted [*see § 395.125*].
- Order granting oral application for leave to intervene [*see § 395.126*].
- Complaint in intervention [*see § 395.127*].

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§ 395.02 Cross References

- For forms of special demurrers raising the objection of lack of capacity to sue, see *Ch. 3, Abatement of Actions, § 3.30* et seq.

- For a form of affirmative defense that the plaintiff lacks capacity to sue, see *Ch. 3, Abatement of Actions, § 3.30* et seq.

- For forms of demurrers raising the objection of misjoinder of parties, see *Ch. 3, Abatement of Actions, 3.70* et seq.

- For forms for use in a proceeding for an order substituting a representative for a deceased party, see Ch. 21, *Amended and Supplemental Pleadings* .

- For a caption of a complaint to quiet title by adverse possession naming known and unknown defendants, see Ch. 13, *Adverse Possession* .

- For allegations raising the defense that the plaintiff assignor is not the real party in interest, see Ch. 60, *Assignments* .

- For captions and allegations in pleadings by, on behalf of, and against unincorporated associations and members, see Ch. 61, *Associations and Clubs* .

- For notice of motion and order for leave to file a cross complaint to bring in a new party, see Ch. 123, *Complaints and Cross Complaints* .

- For a form of general demurrer raising the objection that the plaintiff lacks standing to sue, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

- For forms for use in proceedings for appointment of a guardian ad litem for a minor or incompetent

person, see Ch. 291, *Guardians ad Litem* .

- For forms for use in actions in interpleader generally, see Ch. 314, *Interpleader* .

- For a notice of appeal on order denying intervention, see *Ch. 42, Appeal: Notice of Appeal, § 42.80[4]*.

- For form of complaint in intervention for use in proceedings in intervention for removal of a trustee, see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

- For forms for use in proceedings in intervention by an insurance carrier in worker's compensation action, see Ch. 577, *Workers' Compensation* .

- For additional and alternative forms for use in actions involving joinder of parties, see Ch. 3, *Abatement of Actions* , Ch. 181, *Death and Survival Actions* , and Ch. 123, *Complaints and Cross Complaints* .

- For discussions, forms, and procedural guides concerning demurrers and motions to strike, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 375, *Motions to Strike: Pleadings* , and Ch. 376, *Motions to Strike: Anti-SLAPP* . For discussions, forms, and procedural guides concerning motions generally, see Ch. 372, *Motions and Orders* .

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§§ 395.03[Reserved]

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A. Joinder of Parties

34-395 California Forms of Pleading and Practice--Annotated § 395.10

§ 395.10 Governing Law

The requirement that actions be prosecuted in the name of the real party in interest is set forth in *Code Civ. Proc. § 367*, subject to statutory exceptions [*see, e.g., Code Civ. Proc §§ 369*, 1368.3].

Proceedings for bringing additional parties into a pending action are governed by the Code of Civil Procedure. Permissive joinder of a new party plaintiff is governed by *Code Civ. Proc. § 378* and permissive joinder of a new party defendant by *Code Civ. Proc. § 379*. Compulsory joinder is governed by *Code Civ. Proc. § 389*. Discretionary joinder of an omitted party having an interest in property is governed by *Code Civ. Proc. § 389.5*. Intervention is governed by *Code Civ. Proc. § 387*. Proceedings for substituting new parties are governed by *Code Civ. Proc. §§ 368.5* (transferee of interest generally), 366.30 et seq. (continuation of action on plaintiff's death), and 366.40 et seq. and 366.50 (continuation of action on defendant's death); interpleader by *Code Civ. Proc. § 386*; and substituting new names for fictitious names by *Code Civ. Proc. § 474*. A new party may also be brought into a pending action by cross complaint, which is governed by *Code Civ. Proc. §§ 428.10-428.80*. In addition, there are a number of specific statutes authorizing joinder of parties and intervention [*see* Research Guide at § 395.50 et seq.].

Permissive joinder of parties is governed by *Code Civ. Proc. §§ 378, 379*, and *382*. Cross complaints are governed generally by *Code Civ. Proc. § 428.10* and joinder of cross complainants and cross defendants is governed by *Code Civ. Proc. § 428.20*. Compulsory joinder of parties is governed by *Code Civ. Proc. §§ 389, 389.5*. Amended and supplemental pleadings are governed by *Code Civ. Proc. §§ 464, 472*, and *473(a)*.

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A. Joinder of Parties

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§ 395.11 Joinder and Intervention Distinguished

Joinder of parties is the act of uniting as parties to an action all persons who have the same rights or against whom rights are claimed as coplaintiffs or codefendants [*see Code Civ. Proc. §§ 378, 379, 379.5, 389, 389.5*]. Intervention is the procedure by which a third person, not originally a party to the action, but claiming an interest in the subject matter of the action, enters into the case through a complaint in intervention in order to protect a right or interpose a claim [*see Code Civ. Proc. § 387*].

A person who is required to be joined in an action under *Code Civ. Proc. § 389* may also have a right to intervene under *Code Civ. Proc. § 387* if he or she has a sufficient interest in the subject matter of the action before the court, and counsel may choose to have a party brought into the action under either or both statutes [*Crofton v. Young (1941) 48 Cal. App. 2d 452, 455-456, 119 P.2d 1003]* . In addition, a person having an interest in real or personal property that is the subject of the action before the court may apply to the court to be made a party by amendment of the complaint [*Code Civ. Proc. § 389.5*].

A person may be so situated that he or she may become a party either by joinder under *Code Civ. Proc. §§ 389, 389.5* or by intervention under *Code Civ. Proc. § 387*. In such a situation, the determination of whether to proceed under the joinder statutes or by way of intervention may be based on whether the omitted party can adequately plead his or her case within the framework of the existing pleadings. If so, he or she may move for an order compelling joinder; if not, he or she may seek leave to intervene and file a new complaint in intervention setting forth the allegations in his or her own terms.

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A. Joinder of Parties

34-395 California Forms of Pleading and Practice--Annotated § 395.12

§ 395.12 Capacity and Standing to Sue Distinguished

[1] Capacity to Sue

Capacity to sue is the right to come into court [*Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6* ; *Friendly Village Community Assn., Inc. v. Silva & Hill Constr. Co. (1973) 31 Cal. App. 3d 220, 224, 107 Cal. Rptr. 123* ; *see also Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 18-19, 108 P.2d 906]* . All persons have the capacity to sue unless limited by statute. This includes corporations, unincorporated associations, partnerships, and public entities [*see Code Civ. Proc. § 369.5(a)* (unincorporated associations and partnerships); *Corp. Code § 207* (granting corporations all the powers of a natural person in carrying out their business activities); *Gov. Code § 945* (public entities)].

Minors, insane or incompetent persons, and persons for whom a conservator has been appointed, for example, lack capacity to sue in that they are generally required to sue through a guardian or conservator of their estate or a guardian ad litem appointed by the court [*Code Civ. Proc. § 372*; *see also Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 18, 108 P.2d 906]* . The appointment of the guardian, conservator, or guardian ad litem should be alleged in the complaint. For discussion and forms relating to appointment of conservators and guardians, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , and Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* . For discussion and forms relating to the appointment of guardians ad litem, see Ch. 291, *Guardians ad Litem* .

For further discussion of lack of capacity to sue, see *Ch. 3, Abatement of Actions, § 3.30* et seq.

[2] Standing to Sue

Whereas capacity to sue goes to the right of a person to come into court, standing to sue goes to the issue of the right of a person who has capacity to sue to sue for relief on the cause of action alleged [*see Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6* ; *American Alternative Energy Partners II v. Windridge, Inc. (1996) 42 Cal. App. 4th 551, 559, 49 Cal Rptr. 2d 686* ; *Friendly Village Community Assn., Inc. v. Silva & Hill Constr. Co. (1973) 31 Cal. App. 3d 220, 224, 107 Cal. Rptr. 123]* . Statute requires that, subject to statutory exceptions [*see, e.g., Code Civ. Proc §§ 369,* 1368.3 (discussed in *§ 395.12[5]*)], every action must be prosecuted in the name of the real party in interest [*Code Civ.*

Proc. § 367].

The real party in interest is one having an actual and substantial interest in the subject matter of the action and who would be benefitted or injured by the judgment in the action [*County of Alameda v. State Bd. of Control (1993) 14 Cal. App. 4th 1096, 1103, 18 Cal. Rptr. 2d 487* , quoting *Friendly Village Community Assn., Inc. v. Silva & Hill Constr. Co. (1973) 31 Cal. App. 3d 220, 225, 107 Cal. Rptr. 123* ; *see Redevelopment Agency v. Commission on State Mandates (1996) 43 Cal. App. 4th 1188, 1197, 51 Cal. Rptr. 2d 100* (real party in interest generally defined as any person or entity whose interest will be directly affected by proceeding; real party in interest may be entity in whose favor act complained of operates); *Ventura County Ry. Co. v. Hadley Auto Transport (1995) 38 Cal. App. 4th 878, 880, 45 Cal. Rptr. 2d 362* (real party in interest is person possessing right sued on according to substantive law)]. If the cause of action alleged shows an invasion of plaintiff's legally protected interests under the substantive law, nothing further is required. But, if the cause of action exists in favor of some person other than the plaintiff, the plaintiff is not the real party in interest, and he or she, although having the legal capacity to sue, lacks standing to sue on the cause of action pleaded [*Pillsbury v. Karmgard (1994) 22 Cal. App. 4th 743, 756, 27 Cal. Rptr. 2d 491* ; *Torres v. City of Yorba Linda (1993) 13 Cal. App. 4th 1035, 1041, 1043, 17 Cal. Rptr. 2d 400* ; *Friendly Village Community Assn., Inc. v. Silva & Hill Constr. Co. (1973) 31 Cal. App. 3d 220, 224, 107 Cal. Rptr. 123* ; *see Schmier v. Supreme Court (2000) 78 Cal. App. 4th 703, 707-708, 93 Cal. Rptr. 2d 580* (lack of standing)].

For example, an individual plaintiff facing the prospect of retroactive application of a statute has a strong interest in defeating retroactivity and has the requisite standing to raise that issue, whereas consumer/taxpayer/citizens plaintiffs who are only slightly and academically concerned with that issue lack standing to raise it [*Quackenbush v. Superior Court (1997) 60 Cal. App. 4th 454, 464-465, 70 Cal. Rptr. 2d 271* (relating to Proposition 213, the Personal Responsibility Act of 1996, adding *Civ. Code §§ 3333.3, 3333.4*)].

[3] Objecting to Lack of Capacity

The objection that the plaintiff lacks capacity to sue is a plea in abatement [*Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6]* that is raised by a special demurrer when the lack of capacity appears on the face of the complaint or from matter of which the court must or may take judicial notice [*see Evid. Code §§ 451, 452*], or by answer when the lack of capacity does not so appear and must be shown by extrinsic evidence [*see Code Civ. Proc. § 430.10(b)*]. It is a technical objection and must be pled specifically. Thus an affirmative defense or demurrer that contains a general assertion that plaintiff has not stated a cause of action is insufficient [*Color-Vue, Inc. v. Abrams (1996) 44 Cal. App. 4th 1599, 1604, 52 Cal. Rptr. 2d 443]* . For discussion and forms of demurrer and affirmative defense based on lack of capacity to sue, *see Ch. 3, Abatement of Actions, § 3.30* et seq.]. If the court sustains an objection for lack of capacity to sue, leave to substitute a party or entity having the requisite capacity may be granted by the court [*American Alternative Energy Partners II v. Windridge, Inc. (1996) 42 Cal. App. 4th 551, 559, 49 Cal Rptr. 2d 686]* .

Failure to object by demurrer or answer constitutes a waiver of the objection [*Code Civ. Proc. § 430.80(a)*] and cannot, therefore, be urged for the first time on appeal [*Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6* (involving predecessor statutes); *see American Alternative Energy Partners II v. Windridge, Inc. (1996) 42 Cal. App. 4th 551, 559, 49 Cal Rptr. 2d 686* (waiver in absence of appropriately raised objection)]. Once a plea in abatement is waived a court will rarely be justified in permitting the defense to be made later. However, in the unusual circumstance when a corporation announces that it does not intend to pay its delinquent taxes, a trial court may properly relieve a defendant from defendant's waiver and permit the defendant to assert the corporation's lack of capacity to sue [*Color-Vue, Inc. v. Abrams (1996) 44 Cal. App. 4th 1599, 1604 n.5, 1605, 52 Cal. Rptr. 2d 443* (defendant's waiver of plea not relieved; when suspension of corporate powers occurred after time to demur or answer had passed, defendants should have moved court for leave to file amended answer asserting plea)].

[4] Objecting to Lack of Standing

The objection that the plaintiff lacks standing to sue is normally raised by the filing of a general demurrer to the complaint alleging that the complaint fails to state facts sufficient to constitute a cause of action [*see Code Civ Proc. § 430.10(e)*] in that it shows on its face that plaintiff lacks standing to sue for the reason specified in the demurrer [*see Friendly Village Community Assn., Inc. v. Silva & Hill Constr. Co. (1973) 31 Cal. App. 3d 220, 224, 107 Cal. Rptr. 123* ; *see also Sacramento County Fire Protection Dist. v. Sacramento County Assessment Appeals Bd. (1999) 75 Cal. App. 4th 327, 331, 89 Cal. Rptr. 2d 215* (standing to sue goes toexistence of cause of action; demurrer can be used to challenge standing); for a form of general demurrer on this ground, *see* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*]. If the complaint states a cause of action in someone, but not in the plaintiff, a general demurrer for failure to state a cause of action will be sustained [*Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6* ; *Ventura County Ry. Co. v. Hadley Auto Transport (1995) 38 Cal. App. 4th 878, 880, 45 Cal. Rptr. 2d 362* ; *see Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 19, 108 P.2d 906* ; *Schmier v. Supreme Court (2000) 78 Cal. App. 4th 703, 707, 93 Cal. Rptr. 2d 580]* . If it further appears that the complaint cannot be amended to state a cause of action in the plaintiff, the demurrer is properly sustained without leave to amend [*see Friendly Village Community Assn., Inc. v. Silva & Hill Constr. Co. (1973) 31 Cal. App. 3d 220, 225-226, 107 Cal. Rptr. 123]* . Conversely, if the plaintiff can amend the complaint to substitute for plaintiff the real party in interest, plaintiff should be allowed to do so, so long as the amended complaint does not introduce a wholly different cause of action [*see Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 19-22, 108 P.2d 906* (amendment of complaint in a derivative action on behalf of a corporation to substitute for the nominal party plaintiff, who had no standing to sue, the nominal party having standing to sue, and adding an allegation of her capacity)]. Amendments to substitute a plaintiff with standing for one who is not a real party in interest are freely allowed [*Charpentier v. Los Angeles Rams Football Co. (1999) 75 Cal. App. 4th 301, 308, 89 Cal. Rptr. 2d 115]* .

A complaint that fails to disclose the right to sue is not only subject to a general demurrer (or to a motion for judgment on the pleadings) [*see* discussion in Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*], but may also be challenged at trial by an objection to the introduction of any evidence [*Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6]* , or by a motion for nonsuit [*see Pillsbury v. Karmgard (1994) 22 Cal. App. 4th 743, 757-758, 27 Cal. Rptr. 2d 491]* , or on appeal, despite a failure to demur [*Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6* ; *see also Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 18, 108 P.2d 906* ; *Color-Vue, Inc. v. Abrams (1996) 44 Cal. App. 4th 1599, 1604, 52 Cal. Rptr. 2d 443* (lack of standing not waived by failure to timely object; lack of standing can be raised at any time, even for first time on appeal)]. However, despite the rule that a failure to state of cause of action may be raised at any time during the trial and also on appeal, standing to sue is not a jurisdictional requirement, and reversal on appeal of a judgment in favor of a person lacking standing is justified and required only if the error complained of was of a prejudicial nature resulting in a miscarriage of justice [*In re Eugene W. (1972) 29 Cal. App. 3d 623, 631, 105 Cal. Rptr. 736* (no prejudice when complaint showed that plaintiff, who sued in individual capacity, was a county child welfare worker who, in that capacity, had standing to sue and defendant received notice and attended hearings)].

[5] Standing Established by Law

A person who otherwise would lack standing to sue on a claim or to enforce the rights of another may be authorized to do so by statute [*see Code Civ. Proc. § 367*] or by case law, or by both, in which case the complaint should allege the facts establishing the right to sue. The following are examples:

(1) A person expressly authorized by statute to sue [*Code Civ. Proc. § 369(a)(4)*], which includes the following:

(a) A personal representative of a decedent's estate [*Code Civ. Proc. § 369(a)(1)*; *see Prob. Code § 58*];

(b) A trustee of an express trust [*Code Civ. Proc. § 369(a)(2)*; *see Wolf v. Mitchell,*

Silberberg & Knupp (1999) 76 Cal. App. 4th 1030, 1033, 1035-1040, 90 Cal. Rptr. 2d 792] ;

(c) A person with whom, or in whose name, a contract is made for the benefit of another, except for a person on whom a power of sale has been conferred under a deed of trust or mortgage [*Code Civ. Proc. § 369(a)(3)*]. A trustee holding a power of sale under a deed of trust or mortgage may, however, sue to exercise a trustee's powers and duties under *Civ. Code § 2920 et seq.* [*Code Civ. Proc. § 369(b)*];

(d) An association established to manage a common interest development has standing to sue its own name as the real party in interest in matters pertaining to enforcement of the governing documents and some property damage [Code Civ. Proc. § 1368.3; *see Windham at Carmel Mountain Ranch Association v. Superior Court (2003) 109 Cal. App. 4th 1162, 135 Cal. Rptr. 2d 834]* ;

(e) A receiver may sue in his or her own name as receiver [*Code Civ. Proc. § 568*]. For discussion of actions by receivers and when court authorization to sue is required, as well as forms for use by a receiver to obtain court authorization to sue, see Ch. 486, *Receivers* ;

(f) A shareholder who asserts a cause of action of the corporation in a derivative suit [*see Corp. Code § 800(b)*; *see also Klopstock v. Superior Court (1941) 17 Cal. 2d 13, 16, 108 P.2d 906]* . For a discussion of derivative actions and forms for use in these actions, see Chs. 160, *Corporations: Capacity* , and 168, *Corporations: Derivative Actions* .

(2) The assignee of a properly assigned claim may maintain an action on the claim in his or her own name. For discussion and a form of complaint on an assigned claim, see Ch. 60, *Assignments* .

(3) A subrogee may sue in his or her own name on a subrogated claim [*see generally Code Civ. Proc. § 368.5*; *Casey v. Overhead Door Corp. (1999) 74 Cal. App. 4th 112, 121, 87 Cal. Rptr. 2d 603]* .For discussion and and forms for suing on subrogated claims, see Ch. 536, *Subrogation* .

(4) A person suing on behalf of a class, in which case the plaintiff must allege facts showing the action is a proper class suit and justifying his or her represenation of the other members of the class [*see Code Civ. Proc. § 382*; *City of San Jose v. Superior Court (1974) 12 Cal. 3d 447, 457-464, 115 Cal. Rptr. 797, 525 P.2d 701* ; *La Sala v. American Sav. & Loan Assn. (1971) 5 Cal. 3d 864, 871-872, 97 Cal. Rptr. 849, 489 P.2d 1113]* . For discussion of class actions and forms for use in these actions, see Ch. 120, *Class Actions* .

(5) An association suing on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit [*Driving Sch. Ass'n of Cal. v. San Mateo Union High Sch. Dist (1992) 11 Cal. App. 4th 1513, 1517*

(6) A limited partner who asserts a cause of action of the limited partnership in a derivative suit [*see Wallner v. Parry Professional Bldg., Ltd. (1994) 22 Cal. App. 4th 1446, 1449-1450, 27 Cal. Rptr. 2d 834* ; for discussion, *see Ch. 404, Partnerships: Actions Between Limited Partners and Partnerships, § 404.24*].

A citizen of California is an "interested person" within the meaning of *Gov. Code §§ 54960* and *54960.1* and thus has

standing to sue a legislative body of a local agency as provided in those sections for violations of the Ralph M. Brown Act [*McKee v. Orange Unified School District (2003) 110 Cal. App. 4th 1310, 2 Cal. Rptr. 3d 774]* .

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A. Joinder of Parties

34-395 California Forms of Pleading and Practice--Annotated § 395.13

§ 395.13 Definitions

[1] Joinder of Parties

Joinder of parties is the act of uniting as parties to an action, as either coplaintiffs or codefendants, all persons who have the same rights or against whom rights are claimed [*see Code Civ. Proc. §§ 378, 379, 379.5, 389, 389.5*].

[2] Proper Parties

Proper parties are those parties who have some interest in the action, whose rights it will be convenient to settle in the same action, and who may be joined under the rules of permissive joinder [*General Ins. Co. v. Whitmore (1965) 235 Cal. App. 2d 670, 674* ; *see Code Civ. Proc. §§ 378, 379*].

[3] Necessary Parties

"Necessary parties" is a term that is infrequently used since the amendment in 1971 (operative in 1972) of the joinder statutes. As formerly defined, necessary parties are those persons who are interested in a cause of action in that they might possibly be affected by the decision, or whose interests in the subject matter or transaction are such that it cannot be finally and completely settled without them. Their interests are so separable, however, that although they should normally be joined in the action, a valid judgment may be rendered between the parties before the court without affecting the interests of the nonjoined parties [*see Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 523, 106 P.2d 879]* . As currently used, the term "necessary party" appears to be a party that should have been joined as required by *Code Civ. Proc. § 389(a)* and was not; yet, the court was able to proceed to make a valid judgment between the parties present without seriously affecting the interests of the nonjoined parties [*see Camp v. Board of Supervisors (1981) 123 Cal. App. 3d 334, 354, 176 Cal. Rptr. 620* ; *Noguera v. Monterey County Unified Sch. Dist. (1980) 106 Cal. App. 3d 64, 73, 164 Cal. Rptr. 808* ; *see also County of San Joaquin v. State Water Resources Control Bd. (1997) 54 Cal. App. 4th 1144, 1149, 63 Cal. Rptr. 2d 277* (*Code Civ. Proc. § 389(a)* sets out a definition of persons who ought to be joined if possible, sometimes referred to as necessary parties)]. A person joined as a party pursuant to *Code Civ. Proc. § 389(a)* is also deemed a "necessary" party [*Countrywide Home Loans, Inc. v. Superior Court (1999) 69 Cal. App. 4th 785, 791, 82 Cal. Rptr. 2d 63]* .

In making the determination whether a case should proceed without an absent party, a court must consider and weigh the following factors: (1) the extent to which a judgment may prejudice the absent party or the parties already before the court; (2) the extent to which the prejudice may be lessened or avoided by protective provisions in the judgment; (3) whether a judgment rendered in the person's absence will provide an adequate remedy to the parties before the court; and (4) whether, if the action is dismissed for nonjoinder, the plaintiff will have an adequate remedy elsewhere [*Code Civ. Proc. § 389(b)*]. Courts have considerable discretion in considering and weighing the factors relevant to a determination of whether a case should proceed without an absent party [*Las Virgenes Educators Assn. v. Las Virgenes Unified School Dist. (2001) 86 Cal. App. 4th 1, 8* , citing *County of San Joaquin v. State Water Resources Control Bd. (1997) 54 Cal. App. 4th 1144, 1154, 63 Cal. Rptr. 2d 277]* .

[4] Indispensable Party

A party is indispensable whenever the court finds that in the absence of a party required to be joined under the provisions of Code Civ. Proc.§ 389(a), it would be preferable to dismiss the action without prejudice, the absent party being thus regarded as indispensable [*Code Civ. Proc. § 389(b)*; *see Cook v. Superior Court (2008) 161 Cal. App. 4th 569, 574, 73 Cal. Rptr. 3d 895* ; *County of San Joaquin v. State Water Resources Control Bd. (1997) 54 Cal. App. 4th 1144, 1149, 63 Cal. Rptr. 2d 277* ; for a discussion of persons required to be joined *see § 395.19*]. As intended by *Code Civ. Proc. § 389(b)*, a party is indispensable only in the conclusory sense that he or she is indispensable because he or she cannot be made a party to the action and it is determined that in his or her absence it would be preferable to dismiss the action rather than retain it [*see* Cal. L. Revision Comm'n Comment to *Code Civ. Proc. § 389*; *People ex rel. Lungren v. Community Redevelopment Agency (1997) 56 Cal. App. 4th 868, 875, 65 Cal. Rptr. 2d 786* ; for discussion of factors relevant to determining whether to dismiss or continue an action in the absence of the required party, *see also § 395.19[7]*]. However, decisional law often blurs this distinction and refers to those parties required to be joined in an action by the provisions of *Code Civ. Proc. § 389(a)* as "indispensable" [*see Kraus v. Willow Park Public Golf Course (1977) 73 Cal. App. 3d 354, 364, 140 Cal. Rptr. 744* ; *Vanoni v. County of Sonoma (1974) 40 Cal. App. 3d 743, 747, 115 Cal. Rptr. 485* ; *see also Harboring Villas Homeowners Assn. v. Superior Court (1998) 63 Cal. App. 4th 426, 428-429, 73 Cal. Rptr. 2d 646]* .

Whether a party qualifies as indispensable is ordinarily treated as a matter where the trial court has a large measure of discretion in weighing factors of practical realities and other considerations [*T.G. Oceanside, L.P. v. City of Oceanside (2007) 156 Cal. App. 4th 1355, 1365, 68 Cal. Rptr. 3d 320* ; *Kaczorowski v. Mendocino County Bd. of Supervisors (2001) 88 Cal. App. 4th 564, 568, 106 Cal. Rptr. 2d 14* ; *County of San Joaquin v. State Water Resources Control Bd. (1997) 54 Cal. App. 4th 1144, 1151-1154, 63 Cal. Rptr. 2d 277]* .

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§ 395.14 Purpose of Joinder Statutes

The purpose of joinder statutes (*Code Civ. Proc. §§ 378, 379, 389, 389.5*) is to continue to carry out the policies developed by the equity courts of avoiding piecemeal litigation and multiplicity of suits by compelling or permitting joinder of those persons needed for a complete settlement of a controversy [*see Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 520, 106 P.2d 879]* .

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§ 395.15 Permissive Joinder of Plaintiffs

[1] Nature of Permissive Joinder

California law provides for the permissive joinder of all parties in one action as plaintiffs if (1) they assert any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, or occurrence, or series of transactions or occurrences, and any question of law or fact common to all these persons will arise in the action; or (2) they have a claim, right, or interest adverse to the defendant in the property or controversy which is the subject of the action [*see Code Civ. Proc. § 378*; *State Farm Fire & Casualty Co. v. Superior Court (1996) 45 Cal. App. 4th 1093, 1112-1113, 53 Cal. Rptr. 2d 229* ; *Coleman v. Twin Coast Newspaper, Inc. (1959) 175 Cal. App. 2d 650, 653-654, 346 P.2d 488]* .

All plaintiffs who have joined in a cause of action need not be interested as to every cause of action or as to all relief prayed for. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief [*Code Civ. Proc. § 378(b)*].

[2] When Permitted

In determining whether or not joinder should be permitted, the California courts have looked to see if there is a common question of law or fact arising out of the same transaction, or in the subject of the action [*Parmely v. Boone (1939) 35 Cal. App. 2d 517, 519, 96 P.2d 164]* .

Joinder of plaintiffs is permitted if any factual relationship exists between alleged claims that arise out of the same transaction or series of transactions. To be joined as plaintiffs in a lawsuit, the plaintiffs must satisfy two requirements [*State Farm Fire & Casualty Co. v. Superior Court (1996) 45 Cal. App. 4th 1093, 1112-1113, 53 Cal. Rptr. 2d 229]* :

- They must allege the same transaction or occurrence and
- A common legal or factual question.

For example, joinder, at least as far as the pleadings were concerned, was found proper when 165 individual plaintiffs alleged claims arising out of an earthquake against two insurers and their separately named agents based on the insurers' alleged systematic practice in deceiving their policy holders concerning purchase of their earthquake insurance [*State Farm Fire & Casualty Co. v. Superior Court (1996) 45 Cal. App. 4th 1093, 1112-1114, 53 Cal. Rptr. 2d 229]* .

Joinder has also been held to be permissible in a taxpayers' suit for refunds of taxes paid, since the same question of law is involved, and the parties, if successful, would be entitled to the same relief [*People's Federal Savings and Loan Association v. State Franchise Tax Board (1952) 110 Cal. App. 2d 696, 699-700, 243 P.2d 902]* . In an action to recover usurious interest and damages, it was held proper to join both the insolvent corporation which paid the alleged usurious interest and it receivers [*North v. Cecil B. DeMille Productions, Inc. (1934) 2 Cal. 2d 55, 57, 39 P.2d 199]* . Purchasers of securities sold in violation of the Corporate Securities Act can be permitted to join in an action for money had and received [*Parmely v. Boone (1939) 35 Cal. App. 2d 517, 519, 96 P.2d 164]* .

Persons who have sustained personal injuries in the same accident may bring a single action against the tortfeasor [*Emery v. Pacific Employers Ins. Co. (1937) 8 Cal. 2d 663, 666, 67 P.2d 1046]* . It has been held that it was proper to join two plaintiffs in a cause of action for false imprisonment arising out of the same transaction when it was alleged that the defendants committed the acts complained of at the same time and place, and with the same persons present [*Peters v. Bigelow (1934) 137 Cal. App. 135, 140-142, 30 P.2d 450]* .

[3] Single or Separate Judgment

Although all the plaintiffs are joined in a single complaint and are seeking the samerelief, a joined plaintiff may seek either a single judgment or aseparate judgment regarding his or her own particular cause of action [*see North v. Cecil B. DeMille Productions, Inc. (1934) 2 Cal. 2d 55, 57, 39 P.2d 199* (insolvent corporation and its receivers joined as parties to recover usurious interest charged on loans); *Emery v. Pacific Employers Ins. Co. (1937) 8 Cal. 2d 663, 666, 67 P.2d 1046* (persons who have sustained personal injuries in same accident may bring single action against tortfeasor, each plaintiff recovering on own cause of action); *see also State Farm Fire & Casualty Co. v. Superior Court (1996) 45 Cal. App. 4th 1093, 1113-1114, 53 Cal. Rptr. 2d 229* (while not every plaintiff may have been victimized by same claims handling practice, that is matter that can be resolved during discovery and trial court retains right to sever particular plaintiffs claims to prevent prejudice to insurers)]. A party who subsequently joins an action as a plaintiff seeking a single judgment is bound by that judgment [*Jaffe v. Albertson Co. (1966) 243 Cal. App. 2d 592, 606-607, 53 Cal. Rptr. 25* (real estate broker joined in action by prospective buyer to seek specific performance of sale of property as bound by judgment of court that no contract of sale)].

[4] Jurisdictional Limits and Classification of Civil Actions

The following case authorities were issued when the jurisdictional amount of a case would determine whether the matter was to be heard in a municipal court or a superior court. With the complete unification of trial courts in the state into superior courts, the following cases may be helpful in determining issues relative to classification of a case as a limited or unlimited civil case [*see Ch. 324, Jurisdiction: Subject Matter Jurisdiction, § 324.60* et seq.].

Joinder is proper in a complaint in which plaintiffs' causes of action arise out of the same transaction when each plaintiff seeks damages within the jurisdictional limits of the court although the aggregate of the amounts demanded by the plaintiffs exceeds the jurisdictional amount permissible for an individual case [*Colla v. Carmichael U--Drive Autos, Inc., (1930) 111 Cal. App. 784, 111 Cal. App. Supp. 784, 294 P. 378* Moreover, the superior court would have jurisdiction over all joined plaintiffs in an action in which all the plaintiffs seek the same relief, but only some of them seek damages within the jurisdictional limits of the court and others seek recovery in amounts less than the prescribed amount normally necessary for the court to have jurisdiction [*Emery v. Pacific Employers Ins. Co. (1937) 8 Cal. 2d 663, 667-669, 67 P.2d 1046]* .

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§ 395.16 Permissive Joinder of Defendants

[1] When Permissible

All persons may be joined in one action as defendants if there is asserted against them any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all of these persons will arise in the action [*Code Civ. Proc. § 379(a)(1)*; *see Colusa Air Pollution Control Dist. v. Superior Court (1991) 226 Cal. App. 3d 880, 885, 277 Cal. Rptr. 110]* . For example, it is permissible to join as defendants in a negligence action two physicians who had separately treated plaintiff for the same injury at different times and places [*see Kraft v. Smith (1944) 24 Cal2d 124, 128-130, 148 P.2d 23]* . All persons may also be joined as defendants when there is asserted against them a claim, right, or interest adverse to them in property, or a controversy which is the subject of the action [*Code Civ. Proc. § 379(a)(2)*]. For example, both the primary and excess insurers can be joined as defendants in an action to recover loss of the same subject matter and interest [*see Fageol T. & C. Co. v. Pacific Indemnity Co. (1941) 18 Cal. 2d 731, 754, 56 P.2d 498]* .

It is not necessary that each defendant be interested as to every cause of action or as to all relief prayed for. Judgment may be given against one or more defendants according to their respective liabilities [*Code Civ. Proc. § 379(b)*; *see Colusa Air Pollution Control Dist. v. Superior Court (1991) 226 Cal. App. 3d 880, 885-886, 277 Cal. Rptr. 110* ; *Hege v. Worthington, Park, & Worthington (1962) 209 Cal. App. 2d 670, 681, 26 Cal. Rptr. 132]* .

[2] Doubt as to Liability

If the plaintiff is in doubt as to the person from whom he or she is entitled to redress, he or she may join two or more defendants, with the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined between the parties [*Code Civ. Proc. § 379(c)*]. When the plaintiff seeks to join several parties as defendants in a cause of action for a tort, the plaintiff may seek damages on grounds that the injuries sustained arose out of the joint actions of the defendants, independently concurrent actions, or successive actions [*Landau v. Salam (1971) 4 Cal. 3d 901, 903, 95 Cal. Rptr. 46, 484 P.2d 1390* (permissible to join defendants in action for injuries sustained in two separate and unrelated accidents when plaintiff claimed that he was uncertain which of the two incidents caused him to be permanently injured); *Lambert v. Southern Counties Gas Co. (1959) 52 Cal. 2d 347, 353-354, 340 P.2d 608]* .

In order to join defendants under *Code Civ. Proc. § 379(c)*, the plaintiff must plead facts showing the basis of a reasonable uncertainty, or a fair doubt as to the alternative or quantitative liability of defendants [*Landau v. Salam (1971) 4 Cal. 3d 901, 906-907, 95 Cal. Rptr. 46, 484 P.2d 1390* (by pleading an injury, negligence on part of defendants, and doubt as to which is liable, plaintiff had brought himself within joinder provision)].

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34-395 California Forms of Pleading and Practice--Annotated § 395.17

§ 395.17 Separate Trials and Protective Orders

When parties have been joined under *Code Civ. Proc. § 378* or *379*, the court may make such orders as may appear just to prevent any party frombeing embarrassed, delayed, or put to undue expense [*Code Civ. Proc. § 379.5*].

The court may order separate trials [*Code Civ. Proc. § 379.5*; *see Code Civ. Proc. §§ 579, 1048(b)*; *see also Pfefferle v. Lastreto (1962) 206 Cal. App. 2d 575, 579*

For a discussion, forms, and procedures concerning severance of actions, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

The court may also make any other order as the interests of justice may require, such as a protective order [*Code Civ. Proc. § 379.5*; *see Landau v. Salam (1971) 4 Cal. 3d 901, 908 n.9, 95 Cal. Rptr. 46, 484 P.2d 1390]* . Discussions of protective orders relating to discovery, which might give some guidance in seeking protective orders pursuant to *Code Civ. Proc. § 379.5*, are in Ch. 193, *Discovery: Depositions*, Ch. 194, *Discovery: Interrogatories*, Ch. 195, *Discovery: Inspection of Tangible Evidence*, Ch. 196, *Discovery: Requests for Admissions*.

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34-395 California Forms of Pleading and Practice--Annotated § 395.18

§ 395.18 Discretionary Joinder of Omitted Party

The court may order an omitted party to be brought into an action by amendment whenever the omitted party to an action for the recovery of real or personal property has an interest in the subject matter of the action and makes application to the court to be made a party [*Code Civ. Proc. § 389.5*].

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34-395 California Forms of Pleading and Practice--Annotated § 395.19

§ 395.19 Compulsory Joinder

[1] When Required

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action must be joined as a party in the action if [*Code Civ. Proc. § 389(a)*]:

- In the party's absence complete relief cannot be accorded among those already parties [*Code Civ. Proc. § 389(a)(1)*; *see* [2], *below*]; or

- A person claims an interest relating to the subject of the action and is so situated that the disposition of the action in his or her absence may:

  - As a practical matter, impair or impede his or her ability to protect that interest [*Code Civ. Proc. § 389(a)(2)(i)*]; or

  - Leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his or her claimed interest [*Code Civ. Proc. § 389(a)(2)(ii)*].

Joint tortfeasors with joint and several liability are not necessary parties under *Code Civ. Proc. § 389(a)*, but rather are permissive parties whose joinder is governed by *Code Civ. Proc. §§ 378* and *379* [*Countrywide Home Loans, Inc. v. Superior Court (1999) 69 Cal. App. 4th 785, 794, 796-798, 82 Cal. Rptr. 2d 63*)].

[2] Complete Relief

A person must be joined as a party if in his or her absence complete relief cannot be accorded among those already parties [*Code Civ. Proc. § 389(a)(1)*]. The complete relief clause of *Code Civ. Proc. § 389(a)* focuses not on whether complete relief can be afforded all possible parties to the action, but on whether complete relief can be afforded the parties named in the action [*Deltakeeper v. Oakdale Irrigation District (2001) 94 Cal. App. 4th 1092, 1101, 115 Cal.*

Rptr. 2d 244 , citing *Countrywide Home Loans, Inc. v. Superior Court (1999) 69 Cal. App. 4th 785]* .

For example, in an action by an environmental group against the California Coastal Commission for a writ of mandate to set aside the decisions of the regional commission authorizing a condominium project, the developer of the condominiums was required to be joined under *Code Civ. Proc. § 389(a)(1)* in that, in his absence, he would not be bound by any judgment adversely affecting his permit and would be free to collaterally attack any such judgment [*see Sierra Club, Inc. v. California Coastal Commission (1979) 95 Cal. App. 3d 495, 501, 157 Cal. Rptr. 190]* .

On the other hand, in an action for fraud, negligent misrepresentation, and general negligence in which plaintiff sought compensatory and punitive damages, joinder of absentees was held not necessary under *Code Civ. Proc. § 389(a)(1)* for plaintiff to obtain complete relief when, assuming plaintiff prevailed, plaintiff's damages could be ascertained and judgment rendered. Although some of the absentees participated in the alleged fraudulent scheme, joinder of joint tortfeasors is not necessary for a plaintiff to obtain complete relief [*Countrywide Home Loans, Inc. v. Superior Court (1999) 69 Cal. App. 4th 785, 793-794, 82 Cal. Rptr. 2d 63]* .

[3] Impair Nonparty's Ability to Protect Interest

Joinder must occur if a person claims an interest relating to the subject of the action and is so situated that the disposition of the action in his or her absence would, as a practical matter, impair or impede his or her ability to protect that interest [*Code Civ. Proc. § 389(a)(2)(i)*; *see In re Marriage of Lugo (1985) 170 Cal. App. 3d 427, 433, 217 Cal. Rptr. 74* (requiring written notice of action to suspend or reduce child support to county that provided financial assistance to child)].

For example, an action by a former federal employee in seeking a writ of mandate to compel the Unemployment Insurance Appeals Board to vacate its decision denying him unemployment benefits required the joining of the United States since it had a direct pecuniary interest in the outcome of the litigation, because a judgment compelling an award ofbenefits would fall upon federal funds [*Conrad v. Unemployment Ins. Appeals Bd. (1975) 47 Cal. App. 3d 237, 241, 120 Cal. Rptr. 803* ; *cf. Countrywide Home Loans, Inc. v. Superior Court (1999) 69 Cal. App. 4th 785, 795-796, 82 Cal. Rptr. 2d 63* (under facts, joinder under *Code Civ. Proc. § 389(a)(2)(i)* held not required to protect absentees' interests)].

The controlling test for determining whether a person is an indispensable party has been stated in two ways. First, where the plaintiff seeks some type of affirmative relief which, if granted, would injure or affect the interest of a third person not joined, that third person is an indispensable party [*Save Our Bay, Inc. v. San Diego Unified Port Dist. (1996) 42 Cal. App. 4th 686, 692, 49 Cal. Rptr. 2d 847* , citing *Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 522, 106 P.2d 879]* . Second, the same rule has been stated to be that a person is an indispensable party if his or her rights must necessarily be affected by the judgment [*Save Our Bay, Inc. v. San Diego Unified Port Dist. (1996) 42 Cal. App. 4th 686, 692, 49 Cal. Rptr. 2d 847* ; citing *Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 262, 73 P.2d 1163]* . For factors to determine whether a party is indispensable, *see* discussion in [7], *below*.

[4] Substantial Risk That Party Will Be Subject to Inconsistent Obligations

Finally, a party is required to be joined in a pending action if, in his or her absence, any disposition of the action would leave any of the persons already parties in the action subject to substantial risk of incurring multiple or inconsistent obligations by reason of his or her claimed interest [*Code Civ. Proc. § 389(a)(2)(ii)*]. For example, an assignee of chose in action would be required to be joined in an action for declaration of rights under a fire insurance policy in order to protect the defendant insurance company from future loss [*Greco v. Oregon Mut. Fire Ins. Co. (1961) 191 Cal. App. 2d 674, 687, 12 Cal. Rptr. 802* ; *cf. Countrywide Home Loans, Inc. v. Superior Court (1999) 69 Cal. App. 4th 785, 796-798, 82 Cal. Rptr. 2d 63* (under facts, joinder under *Code Civ. Proc. § 389(a)(2)(ii)* held not required to protect defendants)].

The determination of the existence of a "substantial risk" requires more than a theoretical possibility of the absent party's asserting a claim that would result in multiple liability. The risk must be substantial as a practical matter [*Union Carbide Corp. v. Superior Court (1984) 36 Cal. 3d 15, 21, 201 Cal. Rptr. 580, 679 P.2d 14* ; *accord Countrywide Home Loans, Inc. v. Superior Court (1999) 69 Cal. App. 4th 785, 796, 82 Cal. Rptr. 2d 63* ; *Harboring Villas Homeowners Assn. v. Superior Court (1998) 63 Cal. App. 4th 426, 430, 73 Cal. Rptr. 2d 646]* . Thus, in an action under the Cartwright Act (*Bus. & Prof. Code §§ 16700-16758*), it was held that joinder as parties of all persons in the chain of distribution of industrial gas from defendants to plaintiffs was not required because there was no showing that any intermediary indirect purchasers existed or that there was a danger of multiple recovery under the facts of the case [*Union Carbide Corp. v. Superior Court (1984) 36 Cal. 3d 15, 21-24, 201 Cal. Rptr. 580, 679 P.2d 14* ; *see Countrywide Home Loans, Inc. v. Superior Court (1999) 69 Cal. App. 4th 785, 796, 82 Cal. Rptr. 2d 63* (because absentee assigned all its rights and interests to plaintiff there was virtually no risk it would pursue claim against defendants; thus, absentee's joinder not required); *see also Harboring Villas Homeowners Assn. v. Superior Court (1998) 63 Cal. App. 4th 426, 428, 73 Cal. Rptr. 2d 646* (at demurrer stage in construction defect action by homeowners association against developer, secured lenders for each condominium unit held not indispensable parties because pleadings did not demonstrate substantial risk of multiple liability sufficient to require additional parties be joined in complaint)].

[5] Relevance of Cases Decided Prior to 1971 Amendment of Code Civ. Proc. § 389

Cases decided before the 1971 amendment to *Code Civ. Proc. § 389* (operative July 1, 1972) appear to be good law in so far as they relate to the compulsory joinder of parties in an action pursuant to *Code Civ. Proc. § 389(a)* who are subject to the court's service of process [*see* Cal. L. Revision Comm'n Comment to *Code Civ. Proc. § 389*]. For example, persons whose interests, rights, or duties will inevitably be affected by any judgment rendered in an action are required to be joined in that action. Typical of these persons are those who have undetermined interests in the same property or in a particular trust fund, when one of them seeks, in an action, to recover the whole, fix his or her share, or recover that portion claimed by him or her. Also typical of persons required to be joined in an action are those whose interests would be affected or injured by the granting of some type of affirmative relief sought by plaintiff in a pending action [*see Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 521-522, 106 P.2d 879]* . For cases illustrating types of persons required to be joined in an action, *see* the Research Guide under Decisions, § 395.53 et seq.. Cases holding that persons such as these, or others required to be joined under *Code Civ. Proc. § 389* before 1971 should not, however, be relied on for authority that the court cannot proceed in the absence of such a party [*see* discussion in [7], *below*].

[6] Cases Decided Under Federal Rules of Civil Procedure, Rule 19, as Persuasive Authority

Code Civ. Proc. § 389 tracks the language of its federal counterpart, *Fed Rules Civ. Proc., Rule 19*. Thus, it is appropriate to use federal precedents as a guide to the application of *Code Civ. Proc. § 389* [*Countrywide Home Loans, Inc. v. Superior Court (1999) 69 Cal. App. 4th 785, 791-792, 82 Cal. Rptr. 2d 63]* .

[7] Failure to Join

If a person described in *Code Civ. Proc. § 389(a)(1)* or *(2)* cannot be made a party, the court must determine whether in equity or good conscience the action should proceed among the parties before it or be dismissed without prejudice, the absent party being regarded as indispensable [*Code Civ. Proc. § 389(b)*; *see* Cal. L. Revision Comm'n Comment and Advisory Committee's Notes to § 389; *County of San Joaquin v. State Water Resources Control Bd. (1997) 54 Cal. App. 4th 1144, 1151, 63 Cal. Rptr. 2d 277* ; *Vanoni v. County of Sonoma (1974) 40 Cal. App. 3d 743, 747, 115 Cal. Rptr. 485* ; *see also Silver v. Los Angeles County Metropolitan Transportation Authority (2000) 79 Cal. App. 4th 338, 349, 94 Cal. Rptr. 2d 287* (nonjoined employees found to be indispensable parties); *but see Welch v. Bodeman, (1986) 176 Cal. App. 3d 833, 839* (relying on case law decided prior to effective date of 1971 amendment to *Code Civ. Proc. §*

389, and holding that trial court can be said to lack subject matter jurisdiction when absence of a truly indispensable party precludes court from rendering effective judgment between parties before it)].

In determining which course of action to follow, the court must examine the circumstances and consider certain factors, including [*Code Civ. Proc. § 389(b)*]:

> (1) To what extent a judgment rendered in the person's absence might be prejudicial to him or her or those who are already parties;
>
> (2) The extent to which, by protective provisions in the judgment, by the shaping of relief, or by other measures, the prejudice can be lessened or avoided;
>
> (3) Whether or not a judgment rendered in the person's absence will be adequate; and
>
> (4) Whether or not the plaintiff or cross complainant will have an adequate remedy if the action is dismissed for nonjoinder.

For example, a trial court's dismissal of an action for failure to join the Agua Caliente Band of Cahuilla Indians was reversed when under facts court concluded that (1) the public interest was sufficiently important to provide an exception to the general application of rule that an action challenging a contract should be dismissed if a party to the contract cannot be joined, (2) there would be no remedy available if the action was dismissed for nonjoinder, and (3) adequate judgment could be rendered in the Tribe's absence [*see People ex rel Lungren v. Community Redevelopment Agency (1997) 56 Cal. App. 4th 868, 880-885, 65 Cal. Rptr. 2d 786* (agreement between redevelopment agency and Tribe relating to casino)]. Similarly, an action challenging the validity of a contract properly proceeded without the nonjoined indispensable party (the United States, which was a party to the contract) when the plaintiffs would have been left without a remedy had their suit been dismissed [*see Vanoni v. Countyof Sonoma (1974) 40 Cal. App. 3d 743, 747, 115 Cal. Rptr. 485]* . In another example, the appellate court has declined to reverse a judgment that directly affected the affairs of a partnership and the respective shares of all partners, including percentages owned by nonjoined limited partners, when the issue of nonjoinder was not raised until appeal, and the absentee's interests were not inequitably affected because they were not bound by the judgment, and could protect their interests by relitigating the matter, and their interests were not adversely affected by the judgment [*see Kraus v. Willow Park Public Golf Course (1977) 73 Cal. App. 3d 354, 369-370, 140 Cal. Rptr. 744]* .

The first factor in *Code Civ. Proc. § 389(b)*, that is, to what extent a judgment rendered in the person's absence might be prejudicial to him or her or those who are already parties, is essentially the same assessment that must be made under *Code Civ. Proc. § 389(a)* in determining whether a party's absence would impair or impede that party's ability to protect his or her interests, and determining whether proceeding to judgment would subject existing parties to inconsistent obligations [*People ex rel Lungren v. Community Redevelopment Agency (1997) 56 Cal. App. 4th 868, 880, 65 Cal. Rptr. 2d 786* ; *see also Save Our Bay, Inc. v. San Diego Unified Port Dist. (1996) 42 Cal. App. 4th 686, 692, 49 Cal. Rptr. 2d 847* (for discussion, *see § 395.19*)].

The statute directs the court to consider all four factors listed in *Code Civ. Proc. § 389(b)* in making its determination as to whether the action should proceed in the absence of a party. No one factor listed in *Code Civ. Proc. § 389(b)* is ranked above another factor. A trial court's determination whether in equity and good conscience an action should proceed or should be dismissed is based on the particular facts posed in a particular case after evaluating all of the factors listed in *Code Civ. Proc. § 389(b)*. Depending on the particular case, a trial court might well decide that although three factors favor dismissing the action, the strength of a fourth factor indicates the action should proceed, or vice versa [*County of San Joaquin v. State Water Resources Control Bd. (1997) 54 Cal. App. 4th 1144, 1149, 1151-1153, 63 Cal. Rptr. 2d 277* ; *cf. Silver v. Los Angeles County Metropolitan Transportation Authority (2000) 79 Cal. App. 4th 338, 349, 94 Cal. Rptr. 2d 287* (court's broad discretion regarding weighing of factors)]. Moreover, the trial court's

determination under *Code Civ. Proc. § 389(b)* involves the balancing of competing considerations at a particular point in time and the determination is not revisited in light of subsequent events [*County of San Joaquin v. State Water Resources Control Bd. (1997) 54 Cal. App. 4th 1144, 1149, 1155 n.8, 63 Cal. Rptr. 2d 277* (when trial court dismissed action finding that adequate remedy existed in pending federal action, and state subsequently asserted *Eleventh Amendment* immunity against new complaints filed both in that federal court action and a new federal court lawsuit, plaintiffs' argument on appeal that they lacked an adequate remedy in the federal court action was rejected)].

If a judgment is obtained without an indispensable party in a situation in which the court is not aware of the existence of that party, sufficient grounds may exist for a court in equity to set aside the judgment [*see In re Olivia A. (1986) 181 Cal. App. 3d 237, 241-243, 226 Cal. Rptr. 382* (setting aside judgment if parties fraudulently concealed existence of indispensable party)].

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§ 395.20 Joinder in Cross Action

A defendant in an action may join any person as a cross complainant or cross defendant, whether or not such person is already a party to the action, if, had the cross complaint been filed as an independent action, the joinder of that party would have been permitted by the statutes governing joinder of parties [*Code Civ. Proc. § 428.20*; *see Roylance v. Doelger (1962) 57 Cal. 2d 255, 262, 19 Cal. Rptr. 7, 368 P.2d 535;]* . For a discussion, forms, and procedures relating to cross complaints, *see* Ch. 123, *Complaints and Cross Complaints ; see also Code Civ. Proc. § 428.10*.

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§ 395.21 Procedure

[1] Permissive Joinder of Party

In an action where all of the proper parties have not been joined, a plaintiff or cross complainant may join those persons who would have been permitted to be joined in the original complaint or cross complaint [*see Code Civ. Proc. §§ 378, 379*, discussed in *§§ 395.15 -395.16*]. A party seeking to add a nonjoined party after the complaint or cross complaint has been filed may amend the pleading by joining the desired party. This may be done as a matter of course any time before the answer or demurrer is filed or after demurrer and before the trial of the relevant issue [*Code Civ. Proc. § 472*; *Gross v. Department of Transportation (1986) 180 Cal. App. 3d 1102, 1104, 226 Cal. Rptr. 49]* . A party may also seek leave of the court to amend the pleadings to add a nonjoined party [*see Code Civ. Proc. § 473(a)*; *see also §§ 395.100 -395.107* for forms]. For a discussion, forms, and procedures relating to amended and supplemental pleadings, *see* Ch. 21, *Amended and Supplemental Pleadings* .

[2] Compulsory Joinder of New Party

When in an action there are omitted parties who under *Code Civ. Proc. § 389(a)* would be required to be joined in a complaint or cross complaint [*see* discussion in *§ 395.19*], and are not joined, the complaint or cross complaint is required to state their names, if known to the pleader, and the reasons why they are not joined [*Code Civ. Proc. § 389(c)*]. If the complainant determines that a party is required to be joined in the action, he or she may seek to join the omitted party by filing an amended pleading bringing in the new party. For applicable procedures, *see* discussion in *§ 395.21*; *see also § 395.104* for form.

Either the plaintiff or the defendant in an action may move the court to compel joinder of an omitted party by filing a notice of motion for an order bringing in the omitted party as a new party plaintiff or defendant under the provisions of *Code Civ. Proc. § 389* [*see De La Beckwith v. Superior Court (1905) 146 Cal. 496, 498, 80 P. 717* ; *see also § 395.107*]. The court, on learning that a party required to be joined under *Code Civ. Proc. § 389* has not been joined, must order that party joined, if feasible [*Code Civ. Proc. § 389*; *see Conrad v. Unemployment Ins. Appeals Bd. (1975) 47 Cal. App. 3d 237, 241, 120 Cal. Rptr. 803]* .

[3] Joinder of Omitted Party

An omitted party may move the court to be made a party to an action under either *Code Civ. Proc. § 389* or *389.5*. The omitted party may do this by either notice of motion for an order bringing him or her in as a new party or by an ex parte application [*see Cuneo v. Superior Court (1963) 213 Cal. App. 2d 452, 454, 28 Cal. Rptr. 791* (notice of motion); *Muller v. Robinson (1959) 174 Cal. App. 2d 511, 514, 345 P.2d 25* (ex parte application); *see §§ 395.107 -395.112*].

[4] Unwilling Plaintiff

If the consent of anyone who should have been joined as a plaintiff under the provisions of *Code Civ. Proc. § 389* cannot be obtained, he or she may be made a party defendant in the action. Plaintiff, in joining the unwilling party as a defendant must state the reasons for doing so in the complaint [*see Code Civ. Proc. § 382*; *see also Weingand v. Atlantic Savings & Loan Assn. (1970) 1 Cal. 3d 806, 818* (corporation as unwilling plaintiff in stock holder's derivative suit); *Estate of Kuebler v. Superior Court (1978) 81 Cal. App. 3d 500, 503-504, 146 Cal. Rptr. 481* (heir as unwilling plaintiff in action affecting estate)].

[5] Objections to Joinder, Misjoinder, and Nonjoinder

The defendant may raise the matter of defect of parties (nonjoinder) or misjoinder of a party by demurrer when the defect or misjoinder appears from the face of the complaint or from matter of which the court must take judicial notice [*Code Civ. Proc. §§ 430.10(d), 430.30(a)*; *see Code Civ. Proc. § 430.70*]. The defendant may raise the objection by answer when the defect or misjoinder is not apparent on the face of the complaint [*Code Civ. Proc. § 430.30(b)*].

The defendant should object to the failure to join a party or the matter may be waived if the court finds that the absentee's interests have not been inequitably affected [*see Kraus v. Willow Park Public Golf Course (1977) 73 Cal. App. 3d 354, 369-370, 140 Cal. Rptr. 744* ; *see also Jordan v. Department of Motor Vehicles (1999) 75 Cal. App. 4th 449, 469, 89 Cal. Rptr. 2d 333* ; *Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 45, 162 Cal. Rptr. 238]* . The contention that indispensable parties were not joined may be raised at anytime, although if raised for the first time on appeal, relief will be available only if the trial court was unable to render an effective judgment between the parties before it [*County of Alameda v. State Bd. of Control (1993) 14 Cal. App. 4th 1096, 1105 n.5, 18 Cal. Rptr. 2d 487* ; *see Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 522, 106 P.2d 879* ; *Kraus v. Willow Park Public Golf Course (1977) 73 Cal. App. 3d 354, 369-370, 140 Cal. Rptr. 744]* . *See* Ch. 3, *Abatement of Actions* , Ch. 181, *Death and Survival Actions* , and Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

Any party may object to another party's motion for joinder of a party by seeking leave of the court to amend the complaint to bring in the new party or for an order compelling joinder by filing a memorandum of points and authorities in opposition to the moving party's motion. *See* California Points and Authorities, Ch. 168, *Parties* (Matthew Bender) for forms of memoranda of points and authorities opposing joinder of a new party.

[6] Plaintiff's Obligation to Amend Pleadings

Regardless of who is the moving party (defendant or omitted party), the court, in granting the application for joinder of an absent party, will require the plaintiff to amend his or her pleading to include the new party either as a plaintiff or defendant [*see Abbot Kinney Co. v. City of Los Angeles (1959) 53 Cal. 2d 52, 59, 346 P.2d 385* ; *Irwin v. City of Manhattan Beach (1964) 227 Cal. App. 2d 634, 638, 38 Cal. Rptr. 875]* .

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§ 395.22 Review

Appeals from orders granting or denying joinder of a new party are not specifically authorized by *Code Civ. Proc. §§ 904.1* or *904.2*. However, current decisional law appears to sanction the seeking of immediate review by extraordinary writ of orders by the trial court in either granting or denying joinder of a party required to be joined pursuant to *Code Civ. Proc. § 389*. Historically, an order by a trial court joining a party to a pending action was not appealable until reviewed on appeal from an adverse final judgment [*see Wiseman v. Sklar (1930) 104 Cal. App. 369, 378, 285 P. 1081]* . More recently, however, parties seeking immediate review of an order compelling joinder have been successful in proceeding by way of a petition for a writ of mandate [*see Peerless Ins. Co. v. Superior Court (1970) 6 Cal. App. 3d 358, 363, 85 Cal. Rptr. 679* ; *see also People v. Superior Court (1969) 1 Cal. App. 3d 167, 172, 81 Cal. Rptr. 555* (petitioner sought writ of prohibition, but court granted writ of mandate, deeming it more appropriate remedy)].

Similarly, an order of a trial court denying joinder of a party required to be joined pursuant to *Code Civ. Proc. § 389* was generally not appealable except on review after final judgment [*Bank of California, Nat'l Asso. v. Superior Court of San Francisco (1940) 16 Cal. 2d 516, 520.* However, the courts, in some instances, had allowed the order to be attacked by a petition for writ of prohibition [*see Ambassador Petroleum Co. v. Superior Court of Los Angeles County (1930) 208 Cal. 667, 670* (court suggested a conditional writ of prohibition as appropriate remedy); *see also Morrow v. Superior Court of Kings County (1935) 9 Cal. App. 2d 16, 19* Currently, a petition for a writ of mandate to compel joinder appears to be an accepted procedure to attack a trial court's order denying joinder under *Code Civ. Proc. § 389* [*see Bank of Orient v. Superior Court (1967) 67 Cal. App. 3d 588, 599, 136 Cal. Rptr. 741]* .

Although contrary authority exists, it has been held that the trial court's determination under *Code Civ. Proc. § 389(b)* whether an action should proceed among the parties before it, or should be dismissed without prejudice, is reviewed by the appellate court for abuse of discretion [*County of San Joaquin v. State Water Resources Control Bd. (1997) 54 Cal. App. 4th 1144, 1151-1153, 63 Cal. Rptr. 2d 277* (rejecting *Save Our Bay, Inc. v. San Diego Unified Port Dist. (1996) 42 Cal. App. 4th 686, 692, 49 Cal. Rptr. 2d 847* , which applied the standard of de novo review); *see also Kaczorowski v. Mendocino County Bd. of Supervisors (2001) 88 Cal. App. 4th 564, 568, 106 Cal. Rptr. 2d 14* (abuse of discretion); *Silver v. Los Angeles County Metropolitan Transportation Authority (2000) 79 Cal. App. 4th 338, 348, 94 Cal. Rptr. 2d 287* (abuse of discretion); *People ex rel Lungren v. Community Redevelopment Agency (1997) 56 Cal.*

App. 4th 868, 875, 65 Cal. Rptr. 2d 786 (applying federal rule under which abuse of discretion is standard of review, except to extent determination whether party's interest is impaired involves question of law, in which case review is de novo)].

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Volume 34: Newspapers thru Parties-Chs. 386-396
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A. Joinder of Parties

34-395 California Forms of Pleading and Practice--Annotated §§ 395.23-395.29

[Reserved]

§§ 395.23[Reserved]

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34-395 California Forms of Pleading and Practice--Annotated § 395.30

§ 395.30 Governing Law

The right to intervene in a pending action and the requirements of filing and serving a complaint in intervention are governed by *Code Civ. Proc. § 387*.

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34-395 California Forms of Pleading and Practice--Annotated § 395.31

§ 395.31 Definition

Intervention as applied to matters of civil law, means that a third party is permitted to become by complaint a party to an action pending between other persons, either by joining the plaintiff in claiming what is sought by the complaint, by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and thedefendant [*Code Civ. Proc. § 387(a)*; *see also In re Estate of Ghio (1910) 157 Cal. 552, 559-560, 108 P. 516* ; *Mylan Laboratories Inc. v. Soon-Shiong (1999) 76 Cal. App. 4th 71, 77, 90 Cal. Rptr. 2d 111]* .

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34-395 California Forms of Pleading and Practice--Annotated § 395.32

§ 395.32 Purpose

The purposes of intervention are to obviate delay, avoid multiplicity of suits, and protect the interests of those who will be affected by the judgment [*People v. Superior Court (Good) (1976) 17 Cal. 3d 732, 736, 131 Cal. Rptr. 800, 552 P.2d 760* ; *Voyce v. Superior Court (1942) 20 Cal. 2d 479, 485-486, 127 P.2d 536* ; *In re Baby Girl A. (1991) 230 Cal. App. 3d 1611, 1618, 282 Cal. Rptr. 105]* .

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34-395 California Forms of Pleading and Practice--Annotated § 395.33

§ 395.33 Types of Intervention

California law now provides two types of intervention, permissive and mandatory [*see Code Civ. Proc. § 387(a), (b)*]. Permissive intervention is now governed by *Code Civ. Proc. § 387(a)*, which is basically the same provision as former *Code Civ. Proc. § 387* [*see § 395.34*]. Mandatory intervention is governed by *Code Civ. Proc. § 387(b)*, which apparently requires the court to grant leave to the moving party to file a complaint in intervention whenever he or she has an unconditional right to intervention by another statute, or has an interest in the property or transaction which is the subject of the action and is so situated that any disposition in the action would, in his or her absence, impair or impede his or her ability to protect that interest [*see* discussion in *§ 395.35*].

In certain situations, other procedures have the effect of permitting intervention. For example, a limited partner served on behalf of the partnership filed an answer and "intervened" through a cross complaint [*see Kobernick v. Shaw (1977) 70 Cal. App. 3d 914, 918-920, 139 Cal. Rptr. 188]* . A nonparty might be able to intervene to set aside a default judgment [*see, e.g., Fireman's Fund Ins. Co. v. Gerlach (1976) 56 Cal. App. 3d 299, 305, 128 Cal. Rptr. 396* (defendant's creditor sought intervention only to put plaintiff to its proof rather than being allowed default judgment); *Linder v. Vogue Investments, Inc. (1966) 239 Cal. App. 2d 338, 340-343, 48 Cal. Rptr. 633* (limited partner concurrently moved to intervene and set aside default)]. One who is aggrieved by a judgment, that is, one whose rights or interests are injuriously affected by the judgment, may become a party of record and obtain a right to appeal by moving to vacate the judgment pursuant to *Code Civ. Proc. § 663*. The interest must be immediate, pecuniary, and substantial, and not nominal or a remote consequence of the judgment [*County of Alameda v. Carleson (1971) 5 Cal. 3d 730, 736-737, 97 Cal. Rptr. 385, 488 P.2d 953]* .

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§ 395.34 Permissive Intervention

[1] Who May Intervene

Any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding providing the application is timely [*Code Civ. Proc. § 387(a)*]. The interest must be of such a direct or immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment [*Bechtel v. Axelrod (1942) 20 Cal. 2d 390, 393, 125 P.2d 836* ; *People v. City of Long Beach (1960) 183 Cal. App. 2d 271, 275, 6 Cal. Rptr. 658* ; *see Truck Ins. Exchange v. Superior Court (1997) 60 Cal. App. 4th 342, 436, 70 Cal. Rptr. 2d 255* (interest in litigation must be direct and immediate); *Redevelopment Agency v. Commission on State Mandates (1996) 43 Cal. App. 4th 1188, 1197-1198, 51 Cal. Rptr. 2d 100* (court abused its discretion in denying application of State of California Department of Finance (DOF) to intervene as indispensable party in administrative mandamus proceedings when application met standard for discretionary intervention under *Code Civ. Proc. § 387(a)* in that DOF had interest against success of city in its subvention (that is, reimbursement) claim to recover state funds for particular housing costs incurred by city; DOF has duty to supervise financial policies of state)].

Presented with a motion for intervention, the court must determine whether the intervener has established (1) it has a direct interest in the lawsuit; (2) intervention would not enlarge the issues raised by the original parties; and (3) the intervener would not "tread on the rights of the original parties to conduct their own lawsuit" [*Bame v. City of Del Mar (2001) 86 Cal. App. 4th 1346, 1364, 104 Cal. Rptr. 2d. 183* , quoting *Lincoln National Life Ins. Co. v. State Bd. of Equalization (1994) 30 Cal. App. 4th 1411, 1422, 36 Cal. Rptr. 2d 397* ; *see Code Civ. Proc. § 387*].

A trial court has broad discretion in determining whether to permit intervention [*Hinton v. Beck (2009) 176 Cal. App. 4th 1378, 1387, 98 Cal. Rptr. 3d 612* ; *City of Malibu v. California Coastal Com. (2005) 128 Cal. App. 4th 897, 902* ; *US Ecology, Inc. v. State of California (2001) 92 Cal. App. 4th 113, 139, 111 Cal. Rptr. 2d 689* , citing *People v. Superior Court (Good) (1976) 17 Cal. 3d 732, 737, 131 Cal. Rptr. 800]* .

[2] Direct Interest

A person has a direct interest justifying intervention in litigation when the judgment in the action either adds to or

detracts from his or her legal rights without reference to rights and duties not involved in the litigation [*Royal Indem. Co. v. United Enterprises, Inc. (2008) 162 Cal. App. 4th 194, 204, 75 Cal. Rptr. 3d 481* ; *Continental Vinyl Products Corp. v. Mead Corp. (1972) 27 Cal. App. 3d 543, 549, 103 Cal. Rptr. 806* ; *Olson v. Hopkins (1969) 269 Cal. App. 2d 638, 643, 75 Cal. Rptr. 33]* . For example, a subrogee would have a right to intervene in an injured party's cause of action against an alleged tortfeasor [*see Ventura County Employees' Retirement Association v. Pope(1978) 87 Cal. App. 3d 938, 947-955, 151 Cal. Rptr. 695]* ; or a nonprofit corporation composed of parents could properly intervene in an action concerning the desegregation of the school district since the reassignment of students would have a direct social, educational, and economic effect on the reassigned students and their parents [*Bustop v. Superior Court (1977) 69 Cal. App. 3d 66, 70-71, 137 Cal. Rptr. 793]* . Where parties seeking intervention have identical interests but can only speculate on the type of damage involved, and the party already litigating the matter is an able advocate of his/her and the other party's position, intervention may be denied [*City of Malibu v. California Coastal Com. (2005) 128 Cal. App. 4th 897, 902* .

For further examples of persons who have a direct interest in an action and therefore may properly intervene, see *§ 395.62[5]*.

[3] Consequential Interest

The courts, however, will deny intervention under *Code Civ. Proc. § 387(a)* whenever they determine that the asserted interest is indirect, consequential, or remote in that the threatened injury or benefit will not inevitably result from the judgment, but rather from the consequences of the judgment [*Royal Indem. Co. v. United Enterprises, Inc. (2008) 162 Cal. App. 4th 194, 212, 75 Cal. Rptr. 3d 481* ; *Jersey Maid Milk Products Co. v. Brock (1939) 13 Cal. 2d 661, 664-665, 91 P.2d 599* ; *Mary R. v. B & R Corp. (1983) 149 Cal. App. 3d 308, 314-315, 196 Cal. Rptr. 871]* . For example, a major shareholder of a bankrupt corporation would have only a consequential interest in an action being prosecuted by the trustee in bankruptcy since the asserted interest of the shareholder would be in enhancing the value of the stock, an indirect benefit flowing from the success of the suit [*Continental Vinyl Products Corp. v. Mead Corp. (1972) 27 Cal. App. 3d 543, 553, 103 Cal. Rptr. 806]* . An unsecured creditor of a defendant would have only a consequential interest not justifying intervention in an action involving a defendant who would be rendered unable to pay the owed debt in the event the suit was lost [*Olson v. Hopkins (1969) 269 Cal. App. 2d 638, 642-644, 75 Cal. Rptr. 33]* . Additionally, an insurer who denies coverage and refuses to defend does not have a direct interest in litigation between the plaintiff and its insured to justify intervention [*Hinton v. Beck (2009) 176 Cal. App.4th 1378, 1384, 98 Cal. Rptr. 3d 612*]. For further examples of prospective intervenors having only consequential interests, see *§ 395.62[3]*.

[4] Consequential Interest Becoming Direct

A consequential interest can convert to a direct interest. For example, failure by a general partner or officers of a corporation to exercise good faith in defending a suit against it would justify intervention by a limited partner or shareholder [*Kobernick v. Shaw (1977) 70 Cal. App. 3d 914, 918, 139 Cal. Rptr. 188* ; *Eggers v. National Radio Co. (1929) 208 Cal. 308, 313* . The impossibility of asserting a position that should be presented in the litigation would justify intervention by the federal government regarding federal fiscal policy involved in an action [*County of San Bernardino v. Harsh California Corp. (1959) 52 Cal. 2d 341, 346-347, 340 P.2d 617]* , or the state may intervene in an action to dissolve a corporation to protect the interest of shareholders not available to assert their interests which may escheat [*In re Mercantile Guaranty Co. (1965) 238 Cal. App. 2d 426, 437, 48 Cal. Rptr. 589]* . For further examples of consequential interests which may convert to direct interests, see *§ 395.62[4]*.

[5] Right to Intervene

A determination that an interest is direct and not consequential does not establish the right to intervene. Rather, the court must find that the interest is one which is proper to be determined in the action in which the intervention is sought

[*Isaacs v. Jones (1898) 121 Cal. 257, 261-262, 53 P. 793]* . Whether in a particular case intervention should be allowed is best determined by a consideration of the facts and circumstances of the case and the decision is ordinarily left to the sound discretion of the trial court [*Fireman's Fund Ins. Co. v. Gerlach (1976) 56 Cal. App. 3d 299, 302, 128 Cal. Rptr. 396]* . Its determination cannot be reversed on appeal unless it is arbitrary in the sense that it is not supported by any substantial basis in the record [*In re Yokohama Specie Bank (1948) 86 Cal. App. 2d 545, 554, 195 P.2d 555]* . A denial of intervention even when a direct interest is shown by those seeking to intervene is proper when the interests of the original litigants in conducting their own lawsuit on their own terms outweigh the intervenor's concerns of potential delay and multiplicity of actions [*People v. Superior Court (Good) (1976) 17 Cal. 3d 732, 737, 131 Cal. Rptr. 800, 552 P.2d 760]* . The courts have suggested that the right of intervention should be governed by a test within the two extremes of the loose test applied to permissive joinder and the strict test of the indispensable party rule, so that not only indispensable parties, but necessary or proper parties may be permitted to intervene [*Fireman's Fund Ins. Co. v. Gerlach (1976) 56 Cal. App. 3d 299, 302, 128 Cal. Rptr. 396]* .

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§ 395.35 Mandatory Intervention

A court must permit a party to file a complaint in intervention when the law confers an unconditional right to intervene [*Code Civ. Proc. § 387(b)*]. For example, *Code Civ. Proc. § 389.5* gives an omitted party the right to apply to a court to be made a party to a pending action whenever he or she has an interest in the property that is the subject of the action before the court [*see Allen v. Pitchess (1973) 36 Cal. App. 3d 321, 330, 111 Cal. Rptr. 658* (omitted parties permitted to intervene)]. For examples of other statutes specifically authorizing intervention, see *§ 395.60* et seq.

Additionally, a court must permit a party to intervene whenever he or she claims an interest relating to the property or transaction that is the subject of the action and is so situated that the disposition of the action without his or her presence would impair or impede the party's ability to protect that interest which cannot be adequately represented by the existing parties [*Code Civ. Proc. § 387(b)*]. It appears that a party who has a direct pecuniary interest in the subject matter in litigation must be permitted to intervene [*see Redevelopment Agency v. Commission on State Mandates (1996) 43 Cal. App. 4th 1188, 1197-1198, 51 Cal. Rptr. 2d 100* (court erred in denying application of State of California Department of Finance (DOF) to intervene under *Code Civ. Proc. § 387(b)* and abused itsdiscretion in denying discretionary intervention under *Code Civ. Proc. § 387(a)* when DOF had interest against success of city in its subvention (that is, reimbursement) claim to recover state funds for particular housing costs incurred by city, disposition of the action in DOF's absence could impair its ability to protect its interest in the subject matter of the action and because of peculiar role of State of California Commission on State Mandates (Commission) as a quasi-judicial agency adjudicating claims against state, Commission could not be said to have adequately represented all interests of DOF even though its staff agreed with DOF's position on the merits); *see also Coalition for Fair Rent v. Abdelnour (1980) 107 Cal. App. 3d 97, 114-116, 165 Cal. Rptr. 685]* . For discussion of what constitutes the interest necessary to intervene under *Code Civ. Proc. § 387(a)*, see *§§ 395.34[2]* and *[4]*.

A nonparty's interest in preserving the attorney-client privilege to prevent a document subject to the privilege from being used in the litigation between the parties, however, is not an interest that requires intervention under *Code Civ. Proc. § 387(b)*. Intervention as a party was not intended to be used as a means by which a nonparty can assert the attorney-client privilege and there is no need to intervene to become an actual party to the lawsuit to be able to assert the privilege. Rather, the nonparty can assert the privilege under *Evid. Code § 954* as long as the nonparty was the client or

other authorized person [*Mylan Laboratories Inc. v. Soon-Shiong (1999) 76 Cal. App. 4th 71, 78-80, 90 Cal. Rptr. 2d 111]* .

Code Civ. Proc. § 387(b) is similar to compulsory joinder under *Code Civ. Proc. § 389(a)* [*see § 395.10* et seq.]. If a nonparty meets the qualifications for compulsory intervention, the fact that such intervention would add to the complexity of the action or adversely affect the original parties does not provide grounds for barring intervention [*California Physicians' Service v. Superior Court (1980) 102 Cal. App. 3d 91, 96, 162 Cal. Rptr. 266]* .

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§ 395.36 Time to Intervene

The right to intervene is dependent upon the prospective intervenors making timely application [*Code Civ. Proc. § 387(a), (b)*]. Intervention is possible, if otherwise appropriate, even after judgment [*Mallick v. Superior Court (1979) 89 Cal. App. 3d 434, 437, 152 Cal. Rptr. 503]* . An application for leave to file a complaint in intervention is timely when made after a motion for a new trial is granted and the cause is still at issue [*Eggers v. National Radio Co. (1929) 208 Cal. 308, 312, 281 P. 58]* .

A nonparty who has a direct interest in the action may also intervene by moving to set aside a default judgment within six months after its entry [*Code Civ. Proc. § 473* (third paragraph); *see also Fireman's Fund Ins. Co. v. Gerlach (1976) 56 Cal. App. 3d 299, 301-303 128 Cal. Rptr. 396]* . Intervention after a default judgment may not be allowed, however, if the intervenor fails to diligently pursue the remedy under *Code Civ. Proc. § 473* [*Drinnon v. Oliver (1972) 24 Cal. App. 3d 571, 585-586, 101 Cal. Rptr. 120 , disapproved on other grounds in Johnson & Johnson v. Superior Court (1985) 38 Cal. 3d 243, 255 n.7, 211 Cal. Rptr. 517, 695 P.2d 1058]* . If the default judgment rendered is void on its face, the default judgment may be set aside, even if the motion is made by the intervening party after the six-month period is over [*Code Civ. Proc. § 473(d)*; *Ryerson v. Riverside Cement Co. (1968) 266 Cal. App. 2d 789, 793-794, 72 Cal. Rptr. 595]* .

The relevant statute granting the unconditional right to intervene in a particular situation must be consulted to determine whether it addresses the timeliness issue [*Mar v. Sakti Internat. Corp. (1992) 9 Cal. App. 4th 1780, 1784, 12 Cal. Rptr. 2d 388]* . If it does not, it should be deemed to refer the issue back to the discretionary standard of *Code Civ. Proc. § 387*. If the statute provides a standard of timeliness, both the right and the statute are to be treated as incorporated in *Code Civ. Proc. § 387(b)* [*Mar v. Sakti Internat. Corp. (1992) 9 Cal. App. 4th 1780, 1784, 12 Cal. Rptr. 2d 388* (adopting employer's right to intervene to recover workers' compensation sums in employee's action against third party "at any time before trial on the facts" as standard of timeliness of application to intervene)].

The applicable statute of limitations may affect the right to intervene. For example, the one-year statute of limitations of *Code Civ. Proc. § 340(c)* governing the filing of suits seeking damages in a tort action is applicable to subrogees. If the action is timely filed, subrogee may intervene even after the period of limitation has run [*Ventura County Employees'*

Retirement Association v. Pope (1978) 87 Cal. App. 3d 938, 955, 151 Cal. Rptr. 695] . By contrast, even though a wrongful death action is timely filed by some of a decedent's heirs, an omitted heir who wishes to intervene in the action must also file an application to intervene within the limitations period if that heir is asserting a new cause of action [*Andersen v. Barton Memorial Hospital, Inc. (1985) 166 Cal. App. 3d 678, 681* (construing *Code Civ. Proc. § 340.5*, former § 377 (*now see Code Civ. Proc. § 377.60 et seq.*))].

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§ 395.37 Effect of Intervention

An intervenor becomes an actual party to a suit on order of the court authorizing intervention [*Corridan v. Rose (1955) 137 Cal. App. 2d 524, 528, 290 P.2d 939]* . The intervening party is regarded as either a plaintiff or a defendant, depending on the party for whose success he or she seeks to intervene [*Timberidge Enterprises, Inc. v. City of Santa Rosa (1978) 86 Cal. App. 3d 873, 879, 150 Cal. Rptr. 606]* . On becoming a party in the action, the intervenor must take the case as he or she finds it. The newly joined party cannot take advantage of ordinary procedural irregularities that the original parties have either expressly or impliedly waived, since intervention must not retard the principal suit, delay the trial of the action, nor change the position of the parties [*Hospital Council of Northern Cal.v. Superior Court (1973) 30 Cal. App. 3d 331, 336, 106 Cal. Rptr. 247]* . However, on becoming a party, the intervenor has the same procedural rights and remedies as do the original parties and where timely, or otherwise appropriate, may object to the jurisdiction of the court or object that the complaint does not state a cause of action, demand a jury trial, or move to disqualify a judge [*Hospital Council of Northern Cal. v. Superior Court (1973) 30 Cal. App. 3d 331, 337 n.6, 106 Cal. Rptr. 247* ; *see Hausmann v. Farmers Ins. Exchange (1963) 213 Cal. App. 2d 611, 617, 29 Cal. Rptr. 75* ; *see also Adoption of Lenn E. (1986) 182 Cal. App. 3d 210, 218-219, 227 Cal. Rptr. 63]* . Moreover, the intervenor can obtain the same affirmative relief which he or she could properly achieve by cross complaint if he or she were an original party [*Marc Bellaire, Inc. v. Fleischman (1960) 185 Cal. App. 2d 591, 595, 8 Cal. Rptr. 650]* .

Counsel should note that an intervening plaintiff generally must accede to the original plaintiff and plaintiff's attorney in the prosecution of the case unless the intervenor can show the court that the original plaintiffs are not pursuing the conduct of the case to their and intervenor's best interests [*see Mann v. Superior Court (1942) 53 Cal. App. 2d 272, 280, 127 P.2d 970]* .

If the intervenor has entered the action as a defendant, the complaint in intervention may be considered as an answer and the original parties need not file a responsive pleading [*see Drinkhouse v. Van Ness (1927) 202 Cal. 359, 371, 372, 260 P. 869]* .

Whether or not the intervenor can continue to carry on an action after the plaintiff has voluntarily dismissed the suit under *Code Civ. Proc. § 581* may depend on the nature of the complaint in intervention. An intervenor who seeks only

to resist the plaintiff's cause of action cannot deprive that party of the privilege of a voluntary dismissal [*Klinghoffer v. Barasch (1970) 4 Cal. App. 3d 258, 261-262, 84 Cal. Rptr. 350]* . However, if the intervenor's complaint in intervention constitutes a request for affirmative relief or a cross complaint or claims adversely to both the original parties, the intervenor's right to have the issues determined cannot be affected by the dismissal of the plaintiff's action [*Farmer v. Union Oil Co. (1977) 75 Cal. App. 3d 42, 44-45 n.1, 141 Cal. Rptr. 848* ; *Voyce v. Superior Court (1942) 20 Cal. 2d 479, 488, 127 P.2d 536]* .

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§ 395.38 Procedures

[1] Mode of Intervention

A nonparty may apply to the court to file a complaint in intervention by way of notice of motion [*see Bowles v. Superior Court (1955) 44 Cal. 2d 574, 588-589, 283 P.2d 704]* ; or by ex parte application [*see Allen v. California Water & Tel. Co. (1947) 31 Cal. 2d 104, 107, 187 P.2d 393]* . An intervenor may also apply for an order to show cause why leave to intervene should not be granted [*Thorman v. Dome Producing etc. Co. (1942) 50 Cal. App. 2d 201, 202, 122 P.2d 927]* . A formal motion for intervention is not required and the application for leave to intervene may be made informally and authorized by an ex parte order [*Adoption of Lenn E. (1986) 182 Cal. App. 3d 210, 217, 227 Cal. Rptr. 63]* .

Whether intervention is permissive or mandatory, a petition to seek leave is required; without permission from the court, a party lacks any standing to the action. Though a party may assert it holds unconditional right to intervention, that right is not absolute. A court must initially determine if the petition is timely; this exercise of discretion is solely a judicial function, which may not be delegated to a clerk [*Lohnes v. Astron Computer Products (2001) 94 Cal. App. 4th 1150, 1153, 115 Cal. Rptr. 2d 34]* .

[2] Pleadings by Intervenor

An intervenor must file a complaint in intervention stating facts sufficient, if true, to constitute cause for intervention [*Hausmann v. Farmers Ins. Exchange (1963) 213 Cal. App. 2d 611, 615, 29 Cal. Rptr. 75* ; *see* discussion in *§ 395.34*]. However, the court should not apply rigid tests to the complaint in intervention in determining the sufficiency of the pleading [*Thorman v. Dome Producing etc. Co. (1942) 50 Cal. App. 2d 201, 203, 122 P.2d 927]* .

[3] Pleadings in Opposition to Intervention

An objection to the lack of an intervenor's standing to appear may be made by a general demurrer [*Timberidge Enterprises, Inc. v. City of Santa Rosa (1978) 86 Cal. App. 3d 873, 880, 150 Cal. Rptr. 606]* . An original party to an action may also move to strike the complaint in intervention on grounds that it fails to state facts sufficient to justify

intervention [*Jersey Maid Milk Products Co. v. Brock (1939) 13 Cal. 2d 661, 662, 91 P.2d 599]* . If the intervenor seeks affirmative relief, the affected party becomes a defendant and may file a cross complaint [*see* Ch. 123, *Complaints and Cross Complaints*].

[4] Failure to Object

A party must make a timely and appropriate objection to intervention or the matter will be considered waived and may not be raised on appeal [*Watson v. Collins (1962) 204 Cal. App. 2d 27, 30-32, 21 Cal. Rptr. 832* (objection not timely); *Traweek v. Draper (1956) 143 Cal. App. 2d 119, 121-122, 299 P.2d 391* (answer went to the cause of action of intervenor rather than grounds for intervention)].

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§ 395.39 Review

An order denying intervention is a final determination against the prospective intervenor and is effective immediately as a final judgment[*Dollenmayer Bowles v. Pryor (1906) 150 Cal. 1, 3, 87 P. 616* ; *Bame v. City of Del Mar (2001) 86 Cal. App. 4th 1346, 1363, 104 Cal. Rptr. 2d 183* ; *see Bowles v. Superior Court (1955) 44 Cal. 2d 574, 582, 283 P.2d 704* (denial is appealable, but declining to dismiss proceeding based on writ of prohibition in interest of justice)]. The denial of leave to intervene can be appealed only on this issue, the unsuccessful intervenor having no right to appeal from a judgment ultimately rendered in an action in which intervention was sought [*County of Alameda v. Carleson (1971) 5 Cal. 3d 730, 736* . A party whose complaint in intervention is stricken may also appeal immediately, since the judgment as to that party is final [*see Jersey Maid Milk Products Co. v. Brock (1939) 13 Cal. 2d 661, 662, 91 P.2d 599]* .

If the trial court refuses to assume jurisdiction over the request to intervene, the prospective intervenor may immediately seek a writ of mandate [*Mallick v. Superior Court (1979) 89 Cal. App. 3d 434, 439, 152 Cal. Rptr. 503* ; *see* Ch. 358, *Mandate and Prohibition*].

A prospective intervenor denied leave to intervene must appeal from this determination, or a subsequent independent action based on the same theory will be barred [*Berman v. Aetna Casualty & Surety Co. (1974) 40 Cal. App. 3d 908, 912, 115 Cal. Rptr. 566]* . However, if a party was denied the right under *Code Civ. Proc. § 663* to vacate a judgment that was incorrect or had erroneous conclusions of law, that party has standing to appeal the judgment in the case since it made itself a party to the case [*County of Alameda v. Carleson (1971) 5 Cal. 3d 730, 736-738, 97 Cal. Rptr. 385, 488 P.2d 953]* .

A successful intervenor has the same right to appeal after final judgment as does an original party if aggrieved by any order of the court [*Corridan v. Rose (1955) 137 Cal. App. 2d 524, 528-530, 290 P.2d 939]* . A party opposing intervention may not appeal an order permitting intervention until after final judgment [*Adoption of Lenn E. (1986) 182 Cal. App. 3d 210, 217, 227 Cal. Rptr. 63* ; *Sanders v. Pacific Gas & Elec. Co. (1975) 53 Cal. App. 3d 661, 669-670, 126 Cal. Rptr. 415]* .

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[Reserved]

§§ 395.40[Reserved]

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PART III. RESEARCH GUIDE
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34-395 California Forms of Pleading and Practice--Annotated § 395.50

§ 395.50 Related Matthew Bender Publications

For memoranda of points and authorities in support of or opposition to intervention or joinder, see California Points and Authorities, Ch. 16, *Amended and Supplemental Pleadings* ; Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* ; Ch. 124, *Intervention* ; Ch. 168, *Parties* (Matthew Bender)

For memoranda of points and authorities related to forms in this chapter, *see* California Points and Authorities, Ch. 16, *Amended and Supplemental Pleadings* , Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 168, *Parties* (Matthew Bender)

Moore's Federal Practice, Chs. 19, 20, 24 (3d ed. Matthew Bender)

California Forms of Pleading and Practice--Annotated

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Volume 34: Newspapers thru Parties-Chs. 386-396
Chapter 395 PARTIES
PART III. RESEARCH GUIDE
A. Joinder of Parties

34-395 California Forms of Pleading and Practice--Annotated § 395.51

§ 395.51 State Statutes

[1] Joinder of Parties

Permissive joinder of plaintiffs. *Code Civ. Proc. § 378*

Permissive joinder of defendants. *Code Civ. Proc. § 379*

Unwilling plaintiff made defendant. *Code Civ. Proc. § 382*

Compulsory joinder of parties. *Code Civ. Proc. § 389*

Joinder of person having interest in property. *Code Civ. Proc. § 389.5*

Environmental pollution actions. *Code Civ. Proc. § 388*

Actions as to be prosecuted in name of real party in interest, except as provided by statute [*see, e.g., Code Civ. Proc. §§ 369*, 1368.3 (actions by personal representative or trustee, and association established to manage common interest development)]. *Code Civ. Proc. § 367*

Substitution of parties on death, disability, or devolution of interest. *Code Civ. Proc. §§ 368.5, 375, 377.20 et seq.*

Separate trials of joined parties. *Code Civ. Proc. § 379.5*

Interpleader actions. *Code Civ. Proc. §§ 386-386.6*

Intervention in pending actions. *Code Civ. Proc. § 387*

Joinder of party having interest in property. *Code Civ. Proc. § 389.5*

Jurisdiction over party. *Code Civ. Proc. § 410.50*

Issuance of summons. *Code Civ. Proc. § 412.10*

Contents of summons. *Code Civ. Proc. § 412.20*

Summons for corporations. *Code Civ. Proc. § 412.30*

Service of amended complaint. *Code Civ. Proc. § 471.5*

Cross complaints. *Code Civ. Proc. §§ 428.10-428.80*

Amended and supplemental pleadings. *Code Civ. Proc. §§ 464, 472, 473(a)*

Adding true name of fictitious defendant. *Code Civ. Proc. § 474*

[2] Specific Statutory Authorization

Bringing in new party by cross complaint. *Code Civ. Proc. §§ 428.10(b), 428.20*

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§ 395.52 California Rules of Court

Request for accommodation by party with disability. *Cal. Rules of Ct., Rule 1.100*

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§ 395.53 Decisions

[1] Real Party in Interest

Person who invokes judicial process lacks standing if he or she, or those whom he or she represents, does not have a real interest in ultimate adjudication because he or she has neither suffered nor is about to suffer any injury of sufficient magnitude reasonably to assure that all of relevant facts and issues will be adequately presented; when enforcement of a rule may cause irreparable injury, only injured party may attack its constitutionality by action to enjoin its enforcement; writ of mandate is granted only when necessary to protect substantial right and only when it shows that some substantial damage will be suffered by petitioner if writ is denied. *Schmier v. Supreme Court (2000) 78 Cal. App. 4th 703, 707-708, 93 Cal. Rptr. 2d 580*

Ordinarily, trustee is real party in interest when cause of action is prosecuted on behalf of trust; exception to this rule, however, permits trust beneficiary to bring an action against third parties who actively participate in trustee's breach of trust. *Wolf v. Mitchell, Silberberg & Knupp (1999) 76 Cal. App. 4th 1030, 1033, 1036-1040, 90 Cal. Rptr. 2d 792*

Complaint filed by party who lacks standing is subject to demurrer; complaint filed by party lacking standing fails to state cause of action by particular named plaintiff, inasmuch as claim belongs to one other than plaintiff; more accurately stated rationale would be there is defect in parties, since party named as plaintiff is not real party in interest. *Charpentier v. Los Angeles Rams Football Co. (1999) 75 Cal. App. 4th 301, 307, 89 Cal. Rptr. 2d 115*

Code Civ. Proc. § 367 provides general rule that actions must be pursued in name of real party in interest; there is exception, however, when party transfers its interest in pending action to another; in those circumstances, action or proceeding may be continued in name of original party, or court may allow person to whom transfer is made to be substituted in action or proceeding; thus, when plaintiffs' settlement with defendant included assignment by defendant to plaintiffs of indemnity rights, if any, against remaining non-settling defendants, trial court erred in refusing to allow plaintiffs to pursue defendant's cross-complaint for indemnity. *Casey v. Overhead Door Corp. (1999) 74 Cal. App. 4th 112, 121, 87 Cal. Rptr. 2d 603*

Except as otherwise provided by statute, every action must be prosecuted in name of real party in interest; purpose of statute is to save defendant, against whom judgment may be obtained, from further harassment or vexation at hands of other claimants to same demand. *Keru Investments, Inc. v. Cube Co. (1998) 63 Cal. App. 4th 1412, 1424, 74 Cal. Rptr. 2d 744* .

Primary purpose underlying requirement that action be brought in name of real party in interest (*Code Civ. Proc. § 367*) as being to protect defendant from multiplicity of suits and further annoyance and vexation at hands of other claimants to same demand. *Vaughn v. Dame Construction Co. (1990) 223 Cal. App. 3d 144, 149, 272 Cal. Rptr. 261*

Purpose of *Code Civ. Proc. § 367*, requiring that actions be prosecuted in name of real party in interest, as being to protect defendant from multiplicity of actions predicated on same gravamen and to preserve to that defendant all personal defenses and counterclaims available. *Kaley v. Catalina Yachts (1986) 187 Cal. App. 3d 1187, 1195, 232 Cal. Rptr. 384*

Trial court as having power to allow an amendment to a complaint so long as it does not affect the substantial rights of the parties; amendment bringing in new party plaintiff proper if it does not change merits of case or liability of the defendants. *Polk & Hensley v. Coffin & Swain (1858) 9 Cal. 56, 58*

[2] Voluntary Intrusion Into Lawsuit

Corporation, by voluntarily intruding into lawsuit in which it was not a named party, as thereby consenting to court's jurisdiction over its corporate being and as bound by adjudications made in case. *California Concrete Co. v. Beverly Hills Savings & Loan Assn. (1989) 215 Cal. App. 3d 260, 267-268, 261 Cal. Rptr. 484*

[3] Joinder of Parties Generally

New entity resulting from reorganization by Federal Savings and Loan Insurance Corporation of insolvent institution insured by it as separate and distinct from former institution and as required to be named party if it is to be made part of any lawsuit involving its assets; if it wishes to become party to lawsuit involving assets and obligations of old institution, it must take appropriate procedural measures to intervene; alternatively, insolvent institution that has been named defendant, if it is no longer legally responsible for claim involved in lawsuit, may apply for order substituting new institution in as proper defendant; plaintiff as also able to amend complaint to substitute new entity in as proper defendant; if none of these things is done and new entity voluntarily intrudes itself into lawsuit, it has consented to jurisdiction of court over it and is bound by adjudications made in case. *California Concrete Co. v. Beverly Hills Savings & Loan Assn. (1989) 215 Cal. App. 3d 260, 267-268, 261 Cal. Rptr. 484*

When additional party plaintiff, joining in suit brought before statute of limitations has run against original plaintiff, seeks to enforce independent right, amended pleading does not relate back, so as to render substitution permissible or to preclude defense of statute of limitations. *Basin Construction Corp. v. Department of Water & Power (1988) 199 Cal. App. 3d 819, 826, 245 Cal. Rptr. 178*

Joinder of parties as authorized by *Code Civ. Proc. §§ 378, 379* (permissive joinder) should be liberally construed as permitting joinder in one action whenever possible and practicable to allow settlement of all matters of controversy between parties in furtherance of statutes. See *Coleman v. Twin Coast Newspaper, Inc. (1959) 175 Cal. App. 2d 650, 653, 346 P.2d 488* (joinder of parties plaintiff); *Kraft v. Smith (1944) 24 Cal. 2d 124, 130, 148 P.2d 23* (joinder of parties defendant)

Plaintiff as bringing himself or herself within *Code Civ. Proc. § 379(c)* (permissive joinder of defendants) by pleading injury, negligence by successive tortfeasors, and doubt as to which is liable, without otherwise having to expressly

allege any factual nexus connecting or associating pleaded claim against the several defendants. *Landau v. Salam (1971) 4 Cal. 3d 901, 906-908, 95 Cal. Rptr. 46, 484 P.2d 1390* (distinguishing between joinder under other subdivisions of *Code Civ. Proc. § 379*)

Sustaining demurrer without leave to amend complaint and dismissing action without leave to amend as abuse of discretion when plaintiff, by amending complaint, can set forth more specific information and demonstrate reasonable uncertainty as to respective liability of defendants. *Landau v. Salam (1971) 4 Cal. 3d 901, 909, 95 Cal. Rptr. 46, 484 P.2d 1390*

Fed. R. Civ. P., Rule 19 as guide to application of *Code Civ. Proc. § 389* as amended in 1971. *Conrad v. Unemployment Ins. Appeals Bd. (1975) 47 Cal. App. 3d 237, 120 Cal. Rptr. 803*

Action commences as to parties added to action pursuant to *Code Civ. Proc. § 389* at time they are joined. *Warren v. Atchison, T. and S.F. Ry. Co. (1971) 19 Cal. App. 3d 24* , but see *Taylor v. Sanford (1962) 203 Cal. App. 2d 330, 347, 21 Cal. Rptr. 697*

It is for reason of equity and convenience, and not because it is without power to proceed, that court should not proceed with case when it determines that "indispensable party" is absent and cannot be joined. *Kraus v. Willow Park Public Golf Course (1977) 73 Cal. App. 3d 354, 364, 140 Cal. Rptr. 744*

Trial court as having power to allow an amendment to a complaint so long as it does not affect the substantial rights of the parties; amendment bringing in new party plaintiff proper if it does not change merits of case or liability of the defendants. *Polk & Hensley v. Coffin & Swain (1858) 9 Cal. 56, 58*

[4] Compulsory Joinder

[a] Classification of Parties

[i] Generally

Necessary party as party that should have been joined as required by *Code Civ. Proc. § 389(a)* and was not, however, court able to proceed to make valid judgment between parties present without seriously affecting interest of nonjoined parties. See *Camp v. Board of Supervisors (1981) 123 Cal. App. 3d 334, 354*

Indispensable party as party in whose absence complete relief could not be accorded to existing parties in action, or by reason of claimed interest relating to subject of action was so situated that disposition of action in his or her absence might impair his or her ability to protect that interest or leave persons already parties subject to substantial risk of incurring inconsistent obligations. *Sierra Club, Inc. v. California Coastal Commission (1979) 95 Cal. App. 3d 495, 501-502, 157 Cal. Rptr. 190*

Proper parties as those parties having some interest in action and whose rights it will be convenient to settle in same action. *General Ins. Co. v. Whitmore (1965) 235 Cal. App. 2d 670, 674, 674*

Proper parties as not always necessary or indispensable parties. *Everfresh, Inc. v. Goodman (1955) 131 Cal. App. 2d 818, 820, 281 P.2d 560*

[ii] Proper Parties

Bankrupt as proper party plaintiff when trustee in bankruptcy has abandoned cause of action. See *Wood v. Lowe*

(1974) 39 Cal. App. 3d 296, 300, 114 Cal. Rptr. 69

Necessary and proper parties in actions involving trusts. *Hebbard v. Colgrove (1972) 28 Cal. App. 3d 1017, 1026-1028, 105 Cal. Rptr. 172*

Owner of leased property as proper but not indispensable party in action between lessee and sublessees over renewal of sublease. *Jones v. Feichtmeir (1949) 95 Cal. App. 2d 341, 345*

Plaintiff who has obtained leave to amend complaint generally as proper in adding new party defendant without special permission from trial court when new party is a proper party, nature of the action not materially changed, and purpose of amendment being complete disposition of matter before court. *Louvall v. Gridley (1886) 70 Cal. 507, 508*

[iii] Necessary Parties

The Department of General Services, Office of Administrative Hearings (OAH) was not a necessary party, let alone an indispensable one, in an autistic minor's action challenging a decision that affirmed the termination of funding for the educational portion of the minor's "In-Home Discrete Trial Program"; therefore, the trial court abused its discretion in dismissing the minor's petition for peremptory writ of administrative mandamus. The contracts between the Department of Developmental Services (DDS) and OAH unequivocally demonstrated that OAH was DDS' designee with respect to the fair hearing procedure of the Lanterman Developmental Disabilities Services Act (*Welf. & Inst. Code, § 4500 et seq.*). The minor could be accorded complete relief among those who were already parties without the need to join OAH. Moreover, OAH would suffer no harm from the minor's failure to join it as a party. *Hayes v. State Dept. of Developmental Services (2006) 138 Cal. App. 4th 1523, 1533-34, 42 Cal. Rptr. 3d 363*

The complete relief clause of *Code Civ. Proc. § 389(a)* focuses not on whether complete relief can be afforded all possible parties to the action, but on whether complete relief can be afforded the parties named in the action. *Deltakeeper v. Oakdale Irrigation District (2001) 94 Cal. App. 4th 1092, 1101, 115 Cal. Rptr. 2d 244* , citing *Countrywide Home Loans, Inc. v. Superior Court (1999) 69 Cal. App. 4th 785*

Code Civ. Proc. § 389(a) sets out definition of persons who ought to be joined ifpossible, sometimes referred to as necessary parties. *Silver v. Los Angeles County Metropolitan Transportation Authority (2000) 79 Cal. App. 4th 338, 348-349, 94 Cal. Rptr. 2d 287*

In action for fraud, negligent misrepresentation, and general negligence in which plaintiff sought compensatory and punitive damages, joinder of absentees held not necessary under *Code Civ. Proc. § 389(a)(1)* and *(2)*; *Code Civ. Proc. § 389(b)* addresses treatment of indispensable parties; joint tortfeasors with joint and several liability are not necessary parties, but rather permissive parties whose joinder governed by *Code Civ. Proc. §§ 378* and *379*. *Countrywide Home Loans, Inc. v. Superior Court (1999) 69 Cal. App. 4th 785, 791, 791 n.3, 793-798, 82 Cal. Rptr. 2d 63*

As defined by *Code Civ. Proc. § 389*, nonjoined heir is not indispensable party to wrongful death action; omitted heirs, however, are necessary parties toa wrongful death action. *Ruttenberg v. Ruttenberg (1997) 53 Cal. App. 4th 801, 808, 62 Cal. Rptr. 2d 78*

Land developers as necessary rather than indispensable parties in taxpayer's suit to enjoin county from approving subdivision development in violation of state zoning and planning laws in action which did not seek to cancel or suspend approval of those nonjoined land developers whose subdivisions had been previously approved, though they were slightly affected by action in that ongoing subdivision proceedings would be affected until resolution of issue. *Camp v. Board of Supervisors (1981) 123 Cal. App. 3d 334, 354, 176 Cal. Rptr. 620*

Probationary employees of school district that was taken over by unified school district as necessary rather than indispensable parties in action by secondary school teachers improperly terminated by new unified school district without offering employment to them. *Noguera v. North Monterey County Unified Sch. Dist. (1980) 106 Cal. App. 3d 64, 73, 164 Cal. Rptr. 808*

[iv] Indispensable Parties

When California Coastal Commission issued permit for project after conducting de novo proceeding following approval of project by local board of supervisors subject to California Environmental Quality Act (*Pub. Res. Code § 21000 et seq.*), and person opposed to project filed petition for mandamus and injunctive relief naming local board but not Commission as party, Commission was indispensable party as matter of law since (1) once Commission conducted its de novo examination, local board was no longer plaintiff's adversarial opponent; (2) if court had entered judgment against local board, that judgment would not bind Commission and would be vulnerable to collateral attack by Commission; and (3) judgment without Commission would not be complete determination of controversy nor would it be either effective or adequate under *Code Civ. Proc. § 389(b)(3)*. *Kaczorowski v. Mendocino County Bd. of Supervisors (2001) 88 Cal. App. 4th 564, 569-571, 106 Cal. Rptr. 2d 14* (trial court did not abuse its discretion in finding that there was failure to join indispensable party and, since statute of limitations had expired, Commission could no longer be made party to action, resulting in denial of petition for writ of mandate)

Courts have considerable discretion in considering and weighing factors in *Code Civ. Proc. § 389(b)* relevant to determination of whether case should proceed without absent party; in action for declaratory and injunctive relief brought by school teacher and educators association against school district, board, and principal, arising from principal's action in changing citizenship grades given to three students after complaint by student's parents, dismissal of action was not required based on failure to join parents of affected students as necessary parties under section 389(b) when, although parents had interest in matter, (1) matter was moot as to parents since students had already received benefit of grade change; (2) risk of multiple liability was hypothetical; (3) school district ably represented parents' interests; and (4) since question of whether students would be entitled to join honor society and attend field trip had already been decided, case was primarily addressed to scope of district's authority and only incidentally adjudicated interests of students and parents . *Las Virgenes Educators Assn. v. Las Virgenes Unified School Dist. (2001) 86 Cal. App. 4th 1, 7*

In mandate proceeding, trial court properly declined to reach petitioners' claims that county agency's payment of Social Security contributions for certain employees, and related income taxes, amounted to unconstitutional grants of extra compensation and gifts of public funds, because petitioners failed to join employees from whom recoupment would be sought, and those employees were indispensable parties; no *Code Civ. Proc. § 389(b)* factor for determining whether action should proceed among parties before it, or should be dismissed without prejudice is necessarily more important than another; section 389(b) refers to determination "in equity and good conscience"; trial court has substantial discretion with regard to weighing those factors to determine whether to proceed with action when, absent particular party, matter cannot be completely adjudicated. *Silver v. Los Angeles County Metropolitan Transportation Authority (2000) 79 Cal. App. 4th 338, 348-349, 94 Cal. Rptr. 2d 287*

At demurrer stage in construction defect action by homeowners association against developer, secured lenders for each condominium unit held not indispensable parties because pleadings did not demonstrate substantial risk of multiple liability sufficient to require additional parties be joined in complaint; "substantial risk" within meaning of *Code Civ. Proc. § 389(2)(a)(ii)* means more than theoretical possibility of absent party's asserting claim that would result in multiple liability; risk must be substantial as practical matter. *Harboring Villas Homeowners Assn. v. Superior Court (1998) 63 Cal. App. 4th 426, 428-430, 73 Cal. Rptr. 2d 646*

Indian tribe that had sovereign immunity held not to be indispensable party in action by Attorney General against community redevelopment agency challenging agency's contract with tribe under which agency would transfer real

property to tribe for use in tribe's gaming operations in exchange for share of gaming proceeds; although interests of tribe and agency under agreement were not identical, tribe's object in litigation, i.e., establishing that agency acted lawfully in entering into agreement, would duplicate that of agency and would be adequately represented by agency; public interest in obtaining some level of review of agency's actions in transferring property and placing it beyond reach of state's police power is sufficiently important to provide exception to general application of rule under *Code Civ. Proc. § 389* that action challenging contract should be dismissed if party to contract cannot be joined; moreover, with regard to fourth factor in *Code Civ. Proc. § 389(b)*, no remedy will be available to Attorney General once contract takes effect and property is transferred; in equity and good conscience, trial court's dismissal of action for failure to join tribe cannot be affirmed. *People ex rel Lungren v. Community Redevelopment Agency (1997) 56 Cal. App. 4th 868, 870, 877-885, 65 Cal. Rptr. 2d 786* (distinguishing cases that state that party to contract is always indispensable party to suit to set aside that contract)

When plaintiff seeks some type of affirmative relief which, if granted, would injure or affect third person's interest not joined, that third person is indispensable party; State of California, Department of Finance (DOF) should have been named in city's petition for writ of administrative mandamus seeking to overturn the State of California Commission on StateMandates' decision that city not entitled to reimbursement ("subvention") from state funds for particular housing costs incurred by city when relief requested by city, subvention of state funds, would certainly injure or effect interests of DOF; DOF was real party in interest and indispensable party under *Code Civ. Proc. § 389(a)*. *Redevelopment Agency v. Commission on State Mandates (1996) 43 Cal. App. 4th 1188, 1196-1198, 51 Cal Rptr. 2d 100*

Trial court's granting summary judgment in District's favor for failure to join indispensable party affirmed on appeal when petition for writ of mandate only named (1) third party as petitioner, (2) lead agency District that certified EIR as respondent and (3) city in which project located as real party in interest, but failed to name either landowner whose land had to be acquired to complete project who was indispensable party or any fictitiously named Does; District, as neither developer nor landowner, cannot be expected to represent landowner's interests, thus making landowner indispensable party to proceedings. *Save Our Bay, Inc. v. San Diego Unified Port Dist. (1996) 42 Cal. App. 4th 686, 690, 692, 699, 49 Cal. Rptr. 2d 847*

Plaintiff's children, who had beneficial interest in promissory note, were not indispensable parties to plaintiff's action on note, since they were not assignees and could not sue on note. *Niederer v. Ferreira (1987) 189 Cal. App. 3d 1485, 1496, 234 Cal. Rptr. 779*

County providing AFDC to mother was indispensable party in action to terminate father's parental rights since county, as assignee of mother's right to support, had right to seek reimbursement from father for AFDC payments and this right would be terminated if father's parental rights were terminated. *In re Olivia A. (1986) 181 Cal. App. 3d 237, 241-243, 226 Cal. Rptr. 382*

In action brought to establish constructive trust on proceeds from sale of property, defendant's husband who had equitable interest in property was not indispensable. *Martin v. Kehl (1983) 145 Cal. App. 3d 228, 243, 193 Cal. Rptr. 312*

Failure to join indispensable party is not jurisdictional defect and when case has been tried without objection to absence of party and claim of indispensable party raised for first time on appeal, underlying considerations of rule of indispensable party of avoiding piecemeal litigation and multiplicity of suits is of little consequence since judicial and litigant resources necessary to litigation have already been expended. *Martin v. Kehl (1983) 145 Cal. App. 3d 228, 243, 193 Cal. Rptr. 312*

Reorganization trustee as indispensable party under *Code Civ. Proc. § 389* in action by officers and directors of corporation involved in reorganization proceedings under federal *Bankruptcy Act. Miller v. R.K.A. Management Corp. (1979) 99 Cal. App. 3d 460, 467, 160 Cal. Rptr. 164*

All limited partners as indispensable parties in suit to dissolve and wind up affairs of partnership. *Kraus v. Willow Park Public Golf Course (1977) 73 Cal. App. 3d 354, 369, 140 Cal. Rptr. 744*

Former federal employer as indispensable party to action by former employee against Unemployment Insurance Appeals Board seeking recovery of unemployment benefits since award of benefits would fall on federal funds budgeted for support of employer. *Conrad v. Unemployment Ins. Appeals Bd. (1975) 47 Cal. App. 3d 237, 240-241, 120 Cal. Rptr. 803*

[b] When Absence Would Impair Ability to Protect Interest

Persons authorized to appeal granting of permit by Board of Permit Appeals as real parties in interest and required to be joined in action by grantees of permit in action for writ of prohibition restraining board from taking any action on appeal other than upholding previously granted permit. *Ursino v. Superior Court (1974) 39 Cal. App. 3d 611, 616-617, 114 Cal. Rptr. 404*

[c] When Action Affects Undetermined Interest of Omitted Party

Legal representative of estate in administration as required party in derivative suit filed by executor of estate of decendant's heir's on behalf of decedent's estate to recover monies alleged to have been wrongfully taken by decedent's brothers. *Klopstock v. Superior Court of San Francisco (1941) 17 Cal. 2d 13, 16*

Persons having undetermined interest in same property or trust fund as required to be joined in action by one of them seeking to recover all, to fix his or her share, or to recover claimed portion in property or trust fund since judgment in favor of one claimant would necessarily affect rights of others. *Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 521, 106 P.2d 879*

Corporation, or its trustee, if adjudged bankrupt, as required to be joined in representative action brought on its behalf by stockholders or officers of corporation, since its rights, not those of nominal plaintiff, are to be litigated, and corporation or trustee would be impaired or impeded in its ability to protect its interests if not joined in the action. *Miller v. R.K.A. Management Corp. (1979) 99 Cal. App. 3d 460, 467, 160 Cal. Rptr. 164* ; see also *Beyer v. Juno Oil Co. (1954) 42 Cal. 2d 11, 27-28, 265 P.2d 1* ; *Keeler v. Schulte (1957) 47 Cal. 2d 801, 803-804, 306 P.2d 430*

Partial assignees or subrogees as required to be joined in action when assignee or subrogee has substantial interest in claim of plaintiff. *Bank of Orient v. Superior Court (1977) 67 Cal. App. 3d 588, 595* ; *Taylor v. Sanford (1962) 203 Cal. App. 2d 330, 347* ; *Space Properties, Inc. v. Tool Research Co. (1962) 203 Cal. App. 2d 819, 828*

Spouse as required party in action to foreclose mechanic's lien on property held as tenants in common. *Frank Pisano & Associates v. Taggart (1972) 29 Cal. App. 3d 1, 22-24, 105 Cal. Rptr. 414*

Beneficiaries of trust as required to be joined as parties in action by trustee which involves his or her relations with beneficiaries, or relations of beneficiaries between themselves. *De Olazabal v. Mix (1937) 24 Cal. App. 2d 258, 261* ; see also *Lake v. Dowd (1929) 207 Cal. 290, 293-294* ; *Toomey v. Toomey (1939) 13 Cal. 2d 317, 319, 89 P.2d 634*

Partial owners of property as required to be joined in action for partition. *Solomon v. Redona, (1921) 52 Cal. App. 300, 306*

[d] When Affirmative Relief Sought Affecting Others

Party as required to be joined in action by plaintiff seeking some type of affirmative relief which, if granted, would injure or affect interest of third person, since complete relief cannot be accorded to those already parties. *Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 522, 106 P.2d 879*

Owners and holders of parent oil leases as required to be joined in action by lessors against sublessees for forfeiture of lease. *Hartman Ranch Co. v. Associated Oil Co. (1937) 10 Cal. 2d 232, 73 P.2d 1163*

United States as party required to be joined in action by former employee seeking unemployment insurance benefits. *Conrad v. Unemployment Ins. Appeals Bd. (1975) 47 Cal. App. 3d 237, 241-242, 120 Cal. Rptr. 803*

Unions and contractors as required to be parties to an action enjoining construction of public works until civil rights complied with since plaintiff sought relief which, if granted, would injure or affect interest of absent parties and court unable to grant complete relief in their absence. *Covarrubias v. James (1971) 21 Cal. App. 3d 129, 132-135, 98 Cal. Rptr. 257*

All parties to contract as required to be joined in action to rescind contract. *Holder v. Home Sav. & Loan Asso., (1968) 267 Cal. App. 2d 91, 107*

Grantees of deeded property as required to be joined in action to set aside deed on ground of illegality of granting deed. *Noble v. Merchants Nat. Realty Corp. (1967) 248 Cal. App. 2d 48, 51, 56 Cal. Rptr. 253*

Permittee in action to revoke permit as required to be joined. *Irwin v. City of Manhattan Beach (1964) 227 Cal. App. 2d 634, 636-637, 38 Cal. Rptr. 875*

Alleged improper user of water as required to be joined in action by water customer to enjoin water company from supplying water to user. *Thomson v. Talbert Drainage Dist. (1959) 168 Cal. App. 2d 687, 690, 336 P.2d 174*

Union as required to be joined by plaintiff in action against association of tile contractors to prohibit association from enforcing contract provision requiring it and union hired to do tile work from using particular construction method. *Miracle Adhesives Corp. v. Peninsula Tile Contractors' Asso. (1958) 157 Cal. App. 2d 591, 593*

Cab company as required to be joined in action by rival cab company to set aside Board of Permit Appeals decision permitting one company to operate certain number of cabs. *Greif v. Dullea (1944) 66 Cal. App. 2d 986, 994*

[e] When Complete Relief Cannot Be Accorded

In mandate proceeding, trial court acted within its discretion in finding employees on whose behalf county agency (MTA) made Social Security contributions, and from whom recoupment would be sought, were indispensable parties and due to nonjoinder of indispensable parties trial court properly declined to reach petitioners' claims that payments amounted to unconstitutional grants of extra compensation and gifts of public funds; if it were determined payments were illegal gifts of public funds, MTA might be subject to inconsistent judgment in later proceeding against MTA employees, who were not parties to action and who would not be collaterally estopped from arguing payments were proper; thus, determination in this proceeding that payments were illegal would not achieve complete adjudication of dispute, and would result in multiplicity of litigation. *Silver v. Los Angeles County Metropolitan Transportation Authority (2000) 79 Cal. App. 4th 338, 348-350, 94 Cal. Rptr. 2d 287*

Code Civ. Proc. § 389, as revised in 1971, limits compulsory joinder to those situations where absence of person may result in substantial prejudice to that person or to parties already before the court; section 389 conforms substantially to

Fed. R. Civ. P., Rule 19 and cases relating to federal rule are relevant. *People ex rel Lungren v. Community Redevelopment Agency (1997) 56 Cal. App. 4th 868, 874-875, 65 Cal. Rptr. 2d 786*

Environmental group seeking to set aside permit for construction of condominiums by regional commission must join developer of project since in his absence complete relief could not be accorded to parties already in case since developer not bound by decision and would be free to collaterally attack any judgment. See *Sierra Club, Inc. v. California Coastal Commission (1979) 95 Cal. App. 3d 495, 501, 157 Cal. Rptr. 190*

[f] When Not Required

In fraud, negligent misrepresentation, and general negligence action seeking compensatory and punitive damages, joinder of absentees held not necessary under *Code Civ. Proc. § 389(a)(1)* for plaintiff to obtain complete relief when, assuming plaintiff prevailed, plaintiff's damages could be ascertained and judgment rendered; joinder also not required under *Code Civ. Proc. § 389(a)(2)(i)* when one absentee sought to be joined could not claim any interest that might be harmed by litigation, interests of other absentees sought to be joined would not be sufficiently affected and defendants would present adequate defense concerning those other absentees; moreover, joinder not required under *Code Civ. Proc. § 389(a)(2)(ii)* as to absentee who assigned all its rights and interest to plaintiff because no risk existed that such absentee would pursue claim against defendants. *Countrywide Home Loans, Inc. v. Superior Court (1999) 69 Cal. App. 4th 785, 793-798, 82 Cal. Rptr. 2d 63*

Code Civ. Proc. § 389(a)(2) requires joinder of party only if nonparty is claiming interest relating to subject of action, not if nonparty merely has such interest; joinder of State of California was properly denied when requested only by plaintiff in bad faith insurance action in which defendant claimed preemption of state action by federal statute. *Hartenstine v. Superior Court (1987) 196 Cal. App. 3d 206, 222, 241 Cal. Rptr. 756*

Persons whose interests not prejudiced in concrete way by judgment rendered in absence of joinder are not required to be joined under *Code Civ. Proc. § 389*. *Van Atta v. Scott (1980) 27 Cal. 3d 424, 451-452, 166 Cal. Rptr. 149, 613 P.2d 210* (judges; questioned on other grounds in *In re York (1995) 9 Cal. 4th 1133, 1143, 40 Cal. Rptr. 2d 308, 892 P.2d 804*); *Serrano v. Priest (1976) 18 Cal. 3d 728, 750-753, 135 Cal. Rptr. 345, 557 P.2d 929* (governor and legislature); *Alta Loma School Dist. v. San Bernardino County Com. (1981) 124 Cal. App. 3d 542, 550, 177 Cal. Rptr. 506* (state)

Proper parties are not always necessary or indispensable and not required to be joined in pending action if complete determination of controversy can be made without prejudice to rights of omitted parties, for example beneficiaries of trust. *Bowles v. Superior Court (1955) 44 Cal. 2d 574, 582-584, 283 P.2d 704* ; *Hebbard v. Colgrove (1972) 28 Cal. App. 3d 1017, 1026-1027, 105 Cal. Rptr. 172*

Necessary parties should normally be made parties, yet if their interests are separable, they are not required to be brought into pending action. *Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 521, 523-524, 106 P.2d 879* (legatees in action contesting validity of will); *Camp v. Board of Supervisors (1981) 123 Cal. App. 3d 334* (developers in action to enjoin construction); *Noguera v. North Monterey County Unified Sch. Dist. (1980) 106 Cal. App. 3d 64, 164 Cal. Rptr. 808* (part-time teachers in action contesting failure to hire teachers in disincorporated district)

Generally, courts will not order new parties defendant to be brought into action against plaintiff's will unless presence of such new parties is necessary to determination of action. *Ambassador Petroleum Co. v. Superior Court (1930) 208 Cal. 667, 671, 284 P. 445* (lessors in action by state to enjoin statutory nuisance caused by lessees); *Goldsworthy v. Dobbins (1952) 110 Cal. App. 2d 802, 807, 243 P.2d 883* (holder of second deed of trust in action for specific performance on contract for sale of realty)

[g] When Parties Subject to Inconsistent Obligations

Substantial risk requires more than theoretical possibility that absent party's claim would result in multiple liability-risk must be substantial as practical matter. *Las Virgenes Educators Assn. v. Las Virgenes Unified School Dist (2001) 86 Cal. App. 4th 1, 8*

"Substantial risk" within meaning of *Code Civ. Proc. § 389(a)(2)(ii)*, means more than theoretical possibility of absent party's asserting claim that would result in multiple liability; risk must be substantial as practical matter. *Countrywide Home Loans, Inc. v. Superior Court (1999) 69 Cal. App. 4th 785, 796, 82 Cal. Rptr. 2d 63* ; *accord Harboring Villas Homeowners Assn. v. Superior Court (1998) 63 Cal. App. 4th 426, 428-430, 73 Cal. Rptr. 2d 646*

Assignee of chose in action must be joined in action for declaration of rights under fire insurance policy in order to protect defendant from future annoyance or loss. *Greco v. Oregon Mut. Fire Ins. Co. (1961) 191 Cal. App. 2d 674, 687, 12 Cal. Rptr. 802*

Former wife of plaintiff's husband as required to be joined in action for damages against telephone company for listing omitted party as "Mrs. Warner" since if relief granted and phone company discontinued listing it would subject itself to possible further action by omitted party in which present plaintiff might not be named as defendant. *Warner v. Pacific Tel. & Tel. Co. (1953) 121 Cal. App. 2d 497, 501, 263 P.2d 465*

Mutual debtor is required party in action by one creditor for money received by defendant for benefit of mutual debtor since if plaintiff should prevail, debtor would not be bound by judgment and defendant subject to further loss. *Nau v. Santa Ana Sugar Co. (1926) 79 Cal. App. 685, 695*

[5] Permissive Joinder

[a] Joint Tortfeasors

Joint tortfeasors with joint and several liability are not necessary parties under *Code Civ. Proc. § 389(a)*, but rather permissive parties whose joinder governed by *Code Civ. Proc. §§ 378* and *379*. *Countrywide Home Loans, Inc. v. Superior Court (1999) 69 Cal. App. 4th 785, 794, 796-798, 82 Cal. Rptr. 2d 63*

[b] New Party Defendant

Joinder of two independent and successive tortfeasors as defendants in single cause of action as proper if plaintiff pleads facts showing he or she entertains reasonable doubt as to which defendant is liable for injuries, or extent to which each defendant may be liable. *Landau v. Salam (1971) 4 Cal. 3d 901, 904-905, 95 Cal. Rptr. 46, 484 P.2d 1390* ; *Kraft v. Smith (1944) 24 Cal. 2d 124, 127*

Plaintiff as properly joining in single cause of action two or more parties defendant for injuries to property when plaintiff alleges right to relief arising out of same transaction and doubt as to which defendants should be held liable for damages sustained. See *Lambert v. Southern Counties Gas Co. (1959) 52 Cal. 2d 347, 353, 340 P.2d 608*

Procedure afforded by *Code Civ. Proc. § 379(c)* of joining as parties defendant when plaintiff has doubts as to their liability as available to plaintiff on showing that injury for which recovery is sought was proximately caused by negligence of one or more persons and there exists reasonable uncertainty requiring determination of some factual or legal issue in respect to alternative or quantitative liability. *Kraft v. Smith (1944) 24 Cal. 2d 124, 130-131, 148 P.2d 23*

Joinder of third party's insurer as party defendant as proper when plaintiff in action to recover on insurance policies is insured by two or more insurers separately in respect to same subject and interest. See *Fageol Truck & Coach Co. v. Pacific Indem. Co., 18 Cal. 2d 748, 751*

Joinder of parties defendant by plaintiff as proper if there exists both right to relief by plaintiff against defendants arising out of same transaction and common questions of law and fact are involved. *Kane v. Mendenhall (1936) 5 Cal. 2d 749, 755, 56 P.2d 498*

Plaintiff as being able to join as parties defendant in wrongful death action driver of automobile which struck and injured victim, and receiving hospital and attending doctor for subsequent negligent medical treatment, and to bring separate cause of action against hospital and doctor solely for their own negligent acts. See *Helling v. Lew (1972) 28 Cal. App. 3d 434, 439, 104 Cal. Rptr. 789*

Plaintiff insurance company as properly joining as parties defendant in action for determination of rights and liabilities under public liability insurancepolicy, its insured, alleged tortfeasor, his family, two other alleged tortfeasors, their families and insurers, and plaintiff, in personal injury suit against three tortfeasors, along with two hundred other Does allegedly injured. *General Insurance Co. v. Whitmore (1965) 235 Cal. App. 2d 670, 674-675, 45 Cal. Rptr. 556*

Joinder of either plaintiff's or defendant's insurer as party defendant as proper in action to recover on policy when benefits of contract run directly to injured plaintiff as member of public. *Zak v. State Farm etc. Ins. Co. (1965) 232 Cal. App. 2d 500, 505, 42 Cal. Rptr. 908* ; *Grier v. Ferrant (1944) 62 Cal. App. 2d 306, 312-313*

Joinder of principal and surety as defendants in one cause of action. *Dreher v. Fidelity & Casualty Co. (1957) 148 Cal. App. 2d 695, 700, 307 P.2d 407* ; see also *Rodabaugh v. Kauffman (1921) 53 Cal. App. 676, 682, 200 P. 747* (debtor and guarantor of promissory note)

Plaintiff's joinder of persons as parties defendant as proper when defendants have interest adverse to plaintiff in property or controversy which is subject of action. See *Lawler v. Gleason (1955) 130 Cal. App. 2d 390, 394, 279 P.2d 70*

Joinder of defendants by plaintiff as proper when one defendant offset payment to plaintiff of increased installation costs caused by faulty specifications of motors built by other defendant for plaintiff to sell to first defendant, and plaintiff is uncertain which defendant might be liable for resultant losses in transaction. *Dallman Supply Co. v. Sweet (1948) 86 Cal. App. 2d 780, 783, 195 P.2d 864*

Joinder as proper of defendant driver for negligence and defendant Los Angeles County for failure to protect public from dangerous and defective highway conditions when plaintiff in doubt as to recovery from either defendant, or both. *Morris v. Duncan (1936) 14 Cal. App. 2d 635, 639, 58 P.2d 669*

[c] New Party Plaintiff

Receiver of corporation, having equitable title over property of corporation as proper party plaintiff in action by corporation to recover usurious interest paid to defendant. *North v. Cecil B. DeMille Productions, Inc. (1934) 2 Cal. 2d 55, 57-58, 39 P.2d 199*

Joinder of party plaintiff after statute of limitations had passed is proper when general set of facts were not altered and defendants were not prejudiced. *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo (1985) 172 Cal. App. 3d 151, 160, 217 Cal. Rptr. 893*

Numerous employees of defendant corporation and members of employees' families were properly joined as plaintiffs under *Code Civ. Proc. § 378* in action for damages alleging injuries from exposure to hazardous chemicals in one location over period of years. *Anaya v. Superior Court (1984) 160 Cal. App. 3d 228, 233, 206 Cal. Rptr. 520*

Real estate broker as proper party plaintiff to action by prospective buyer to seek specific performance on contract of sale of certain property. *Jaffe v. Albertson Co. (1966) 243 Cal. App. 2d 592, 606, 53 Cal. Rptr. 25*

Joinder of 78 plaintiffs as proper in action for damages based on conspiracy and fraud of defendants in sale of houses to veterans. *Adams v. Albany (1954) 124 Cal. App. 2d 639, 646-647, 269 P.2d 142*

Joinder of 13 plaintiffs as proper in action arising out of same series of alleged misrepresentations by realty sellers which presented questions of law and fact concerning misrepresentations common to all parties. *Aldrich v. Transcontinental Land etc. Co. (1955) 131 Cal. App. 2d 788, 796, 281 P.2d 362*

Joinder of several parties in action for refunds of taxes paid as proper when same question of law is involved, and the parties, if successful, will be entitled to same relief, differing only as to amount of refund. *People's Federal Savings and Loan Association v. State Franchise Tax Board (1952) 110 Cal. App. 2d 696, 699-700, 243 P.2d 902*

Joinder of plaintiffs as proper when there exists both common interest in subject of action and any question of law or fact common to all plaintiffs. *Parmely v. Boone (1939) 35 Cal. App. 2d 517, 519, 96 P.2d 164*

Taxpayers challenging validity of assessment and to recover taxes paid under protest as properly joined in one cause of action. *DeMille v. County of Los Angeles (1938) 25 Cal. App. 2d 506, 508, 77 P.2d 905*

All persons having interest in certain property may be joined in single action as parties plaintiff for damages to property. *Union Oil Co. v. Domengeaux (1939) 30 Cal. App. 2d 266, 274, 86 P.2d 127*

Joinder of two parties as plaintiffs as proper when relief sought arises out of same transaction, whether jointly or severally, and there exists common question of law or fact. *Peters v. Bigelow (1934) 137 Cal. App. 135, 140, 30 P.2d 450*

Joinder of separate owners of two parcels of land as proper plaintiffs when lease of land was single instrument covering both parcels of land and intent of lease was to treat lots as one parcel in action to cancel lease in action to quiet title. *Garrison v. Hogan (1931) 112 Cal. App. 525, 531-533, 297 P. 87*

Joinder of five plaintiffs as proper in action for damages arising out of same automobile collision when each plaintiff prayed for separate award since collision of two automobiles was transaction out of which questions of law and fact common to all injured plaintiffs arose. *Colla v. Carmichael U--Drive Autos, Inc. (1930) 111 Cal. App. Supp. 784, 294 P. 378*

[d] When Not Permitted

Impermissible to join as new party plaintiff, after statute of limitations has run, person enforcing independent right. *Phoenix of Hartford Ins. Companies v. Colony Kitchens (1976) 57 Cal. App. 3d 140, 146, 128 Cal. Rptr. 893* ; *Bartalo v. Superior Court (1975), 51 Cal. App. 3d 526, 533*

Persons who do not meet requirements of *Code Civ. Proc. § 379(a)* or *(c)* as not proper parties defendant. *Hoag v. Superior Court (1962) 207 Cal. App. 2d 611, 618, 620, 24 Cal. Rptr. 659*

Persons who do not meet requirements of *Code Civ. Proc. § 378(a)* as not proper parties plaintiff. *Coleman v. Twin Coast Newspaper, Inc. (1959) 175 Cal. App. 2d 650, 653-654, 346 P.2d 488*

[6] Procedures for Joinder

[a] Amendment of Complaint

Court as allowing plaintiff leave to amend complaint to add new party plaintiff if amendment does not affect substantial rights of existing parties. *Pruitt v. Fontana (1956) 143 Cal. App. 2d 675, 684, 300 P.2d 371* (disapproved on other grounds in *Mattei v. Hopper (1958) 51 Cal. 2d 119, 126, 330 P.2d 625*)

Person as becoming party to action only in one of ways provided by law; if not named as party in original complaint, any proper person as permitted to be brought in by amendment of complaint under *Code Civ. Proc. § 473*, or to be designated by fictitious name on proper allegation in complaint to that effect under *Code Civ. Proc. § 474*. *Nissan v. Barton (1970) 4 Cal. App. 3d 76, 78-79, 84 Cal. Rptr. 36*

Court as required to allow plaintiff leave to amend complaint to bring in new party required to be joined under *Code Civ. Proc. § 389*. *Curtis v. Nye & Nissen (1927) 86 Cal. App. 507, 513, 261 P. 747*

Court as allowing plaintiff leave to amend complaint to add new party defendant if person proper party within meaning of *Code Civ. Proc. § 379*. *W.H. Marston Co. v. Kochritz (1926) 80 Cal. App. 352, 357, 251 P. 959*

[b] Court's Own Motion

Court may on own motion order joinder of party required to be joined. *Loock v. Pioneer Title Ins. & Trust Co. (1935) 4 Cal. App. 2d 245, 249, 40 P.2d 526* ; *Curtis v. Nye & Nissen (1927) 86 Cal. App. 507, 513, 261 P. 747*

[c] Cross Complaint

Defendant is generally authorized to file cross-complaint against concurrent tortfeasor for partial indemnity even when such concurrent tortfeasor was not named defendant in original complaint; tortfeasor merely permissive party to action against another with like liability and defendant-indemnitee will simply join indemnitor by cross-complaint. *Countrywide Home Loans, Inc. v. Superior Court (1999) 69 Cal. App. 4th 785, 797-799, 82 Cal. Rptr. 2d 63*

Cross complaint as proper in naming as sole cross defendants new third parties to action. *Roylance v. Doelger (1962) 57 Cal. 2d 255, 262, 19 Cal. Rptr. 7, 368 P.2d 535*

Cross complaint as not proper joinder when it alleges distinct and independent cause of action rather than cause of action arising out of same transaction or subject. *Alexander v. Superior Court (1959) 170 Cal. App. 2d 54, 56, 338 P.2d 502*

[d] Ex Parte Application

Trial court as allowing omitted party required to be joined under *Code Civ. Proc. § 389* to make ex parte application for order compelling joinder. *Muller v. Robinson (1959) 174 Cal. App. 2d 511, 513, 345 P.2d 25*

[e] Noticed Motion for Order Compelling Joinder

Noticed motion for order compelling joinder as permitted procedure by original party in joining party required to be joined under *Code Civ. Proc. § 389*. See *De La Beckwith v. Superior Court (1905) 146 Cal. 496, 498, 80 P. 717*

Court as allowing omitted party who was required to be joined to file notice of motion for order compelling joinder. *Cuneo v. Superior Court (1963) 213 Cal. App. 2d 452, 454-455, 28 Cal. Rptr. 791* ; *Wilson v. Frakes (1960) 178 Cal. App. 2d 580, 581-583, 3 Cal. Rptr. 434*

[7] Procedures for Objecting to Joinder, Misjoinder, or Nonjoinder

[a] Demurrer

Demurrer as proper procedure for objecting to plaintiff's failure to join party required to be joined in action. *Tuller v. Superior Court (1932) 215 Cal. 352, 355, 10 P.2d 43*

Standing to sue goes to existence of cause of action, i.e., whether plaintiff has right to relief in court; demurrer can be used to challenge standing. *Sacramento County Fire Protection Dist. v. Sacramento County Assessment Appeals Bd. (1999) 75 Cal. App. 4th 327, 331, 89 Cal. Rptr. 2d 215*

[b] Protective Order

Protective order under *Code Civ. Proc. § 379(b)*, or motion for severance under *Code Civ. Proc. § 1048*, as remedy rather than demurrer when joinder under *Code Civ. Proc. § 379(c)* works inconvenience to particular defendant. *Landau v. Salam (1971) 4 Cal. 3d 901, 908 n.9, 95 Cal. Rptr. 46, 484 P.2d 1390*

[c] Separate Trials

Trial court as having discretion to order separate trials between plaintiff and separate defendants as general rule in civil action against two or more defendants. *Pfefferle v. Lastret (1962) 206 Cal. App. 2d 575, 579* ; *Ellsworth v. United States Metals Corp., (1952) 110 Cal. App. 2d 727, 729*

Order granting separate trials as properly limited to cases where it appears that such joinder may embarrass party or delay trial of action. *Westphal v. Westphal (1943) 61 Cal. App. 2d 544, 548, 143 P.2d 405*

[8] Resulting Effect of Joinder or Nonjoinder

Indispensable party is not bound by judgment in action in which party was not joined. *Inland Counties Regional Center, Inc. v. Office of Administrative Hearings (1987) 193 Cal. App. 3d 700, 706, 238 Cal. Rptr. 422*

Failure to raise indispensable party issue at trial precludes raising it on appeal; failure to join indispensable party is not jurisdictional defect. *McKeon v. Hastings College (1986) 185 Cal. App. 3d 877, 888*

Court has no jurisdiction to grant relief against indispensable parties who are not joined. *Welch v. Bodeman (1986) 176 Cal. App. 3d 833, 839*

Failure to join party that should have been joined does not warrant outright denial of petition for mandamus, but as rather to be resolved by directing petitioner to amend petition to include party. *Haller v. Burbank Community Hospital Foundation (1983) 149 Cal. App. 3d 650, 659, 197 Cal. Rptr. 45*

Failure to join indispensable party as not jurisdictional defect in fundamental sense; even in absence of an indispensable party, court still has power to render decision as to parties before it. See *Ferraro v. Southern Cal. Gas Co. 102 Cal. App. 3d 33, 44, 162 Cal. Rptr. 238*

Nonjoined parties though required to be joined as not affected by judgment rendered between parties to suit and as able to protect their interests by relitigating matter. *Kraus v. Willow Park Public Golf Course (1977) 73 Cal. App. 3d 354, 370, 140 Cal. Rptr. 744*

Order granting leave to plaintiffs to amend complaint to join newly named defendants as tantamount to order joining them in action. *Warren v. Atchison, T. and S.F. Ry. Co. (1971) 19 Cal. App. 3d 24, 40, 96 Cal. Rptr. 317*

Dismissal of action by plaintiff after new party ordered joined by court as improper. *Wilson v. Frakes (1960) 178 Cal. App. 2d 580, 583* (joined party lessee of land owned by true owner and entered into agreement whereby named defendant would farm land and share equally in crops grown)

[9] Review

Writ of mandate as permissible procedure for seeking review of order by trial court denying order to compel joinder. *Bank of Orient v. Superior Court (1967) 67 Cal. App. 3d 588, 599, 136 Cal. Rptr. 741* ; but see *Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 527, 106 P.2d 879* (order of court denying joinder cannot be attacked on application for writ of prohibition)

Writ of mandate as permissible procedure for seeking review of order by trial court compelling joinder of new party. *Peerless Ins. Co. v. Superior Court (1970) 6 Cal. App. 3d 358, 363, 85 Cal. Rptr. 679* ; *see also People v. Superior Court (1969) 1 Cal. App. 3d 167, 172, 81 Cal. Rptr. 555*

[10] Statute of Limitations

Failure of individual plaintiff to join his partners in his successful action to recover fee for finding lender as not requiring reversal even though statute of limitations has since run on claim. *Tyrone v. Kelley (1973) 9 Cal. 3d 1, 14, 106 Cal. Rptr. 761, 507 P.2d 65* (defendants failed to object and defense was same under either plaintiff)

Where an amendment does not add a new defendant, but simply corrects a misnomer by which an old defendant was sued, case law recognizes an exception to the general rule of no relation back. Whether a plaintiff may amend the complaint to change a party's description or characterization after the statute of limitations has run depends on whether the misdescription or mischaracterization is merely a misnomer or defect in the description or characterization, or whether it is a substitution or entire change of parties. In the former case an amendment will be allowed; in the latter, it will not be allowed. Further, the allowance of amendment and relation back to avoid the statute of limitations does not depend on whether the parties are technically or substantially changed; rather the inquiry is as to whether the nature of the action is substantially changed. *Hawkins v. Pacific Coast Building Products, Inc. (2005) 124 Cal. App. 4th 1497, 1503-1504, 22 Cal. Rptr. 3d 453*

Amendment of complaint after statue of limitations has run to drop one party to action and add another who until that time was not party to proceeding as generally not permitted. *Chitwood v. County of Los Angeles (1971) 14 Cal. App. 3d 522, 525, 92 Cal. Rptr. 441* ; *Stephens v. Berry (1967) 249 Cal. App. 2d 474, 478, 57 Cal. Rptr. 505*

Statue of limitations usually affects only defendants added for first time after it has run and is affirmative defense available to parties added in this manner. *Worthington v. Kaiser Foundation Health Plan, Inc. (1970) 8 Cal. App. 3d*

435, 446-448, 87 Cal. Rptr. 272 ; *see Orloff v. Metropolitan Trust Co. (1941) 17 Cal. 2d 484, 489, 110 P.2d 396* ; *see also Sierra Club, Inc. v. California Coastal Commission (1979) 95 Cal. App. 3d 495, 503, 157 Cal. Rptr. 190*

[11] Venue

When case proper for joinder and one of defendants is resident of county where action is brought, change of venue as not permitted to be granted on motion of another defendant who is nonresident. *Dallman Supply Co. v. Sweet (1948) 86 Cal. App. 2d 780, 785, 195 P.2d 864*

[12] Waiver of Object to Misjoinder

Failure to object to defect in pleadings, such as misjoinder of parties, by demurrer or answer waives objection. *Jordan v. Department of Motor Vehicles (1999) 75 Cal. App. 4th 449, 469, 89 Cal. Rptr. 2d 333*

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§ 395.54 Law Reviews

Flickinger, *Standing in Racial Gerrymandering Cases, 49 Stanford L. Rev. 381 (1997)*

Blasko, Crossley & Lloyd, *Standing to Sue in the Charitable Sector, 28 U.S.F. L. Rev. 37 (1993)*

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§ 395.55 Text References

Witkin, *California Procedure*, Vol. 4, *Pleading*, §§ 103 et seq., 155-192 (4th ed. 1997)

Arnold, Commencing Civil Actions in California, Ch. 3, *Pleadings, Parties, Actions, and Issues*, §§ 3.05-3.08; Ch. 4, *Jurisdiction*, §§ 4.01-4.03; Ch. 9, *Acquiring Jurisdiction of the Parties*, §§ 9.01-9.08

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§ 395.61 State Statutes

[1] Intervention

Permissive intervention by nonparty. *Code Civ. Proc. § 387(a)*

Mandatory intervention by nonparty. *Code Civ. Proc. § 387(b)*

[2] Specific Statutory Authorization

Joinder of party having interest in property. *Code Civ. Proc. § 389.5*

Third-party claimant in personal property that is attached. *Code Civ. Proc. § 488.090*

Third-party claimant in personal property subject to claim and delivery. *Code Civ. Proc. § 514.050*

Third-party claimant in property levied on. *Code Civ. Proc. § 720.010 et seq.*

Intervention by persons challenging the validity of agency acts regarding community development. *Code Civ. Proc. §§ 860-870*

Intervention by claimant to interest in property subject to eminent domain. *Code Civ. Proc. § 1250.230*

Intervention by Attorney General in proceeding re escheat property. *Code Civ. Proc. § 1421*

Intervention by creditor to reach unpaid subscription of shareholder. *Corp. Code § 414*

Intervention by dissenting shareholder in action for appraisal of stock. *Corp. Code § 1304(a)*

Intervention by dissenting shareholder or creditor in corporation dissolution proceedings. *Corp. Code § 1800(c)*

Intervention by employer or employee in action against third party. *Lab. Code § 3853*

Third party permitted to contest will. *Prob. Code § 8270*

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§ 395.62 Decisions

[1] Appeal

Order denying intervention as appealable. *Knight v. Alefosio (1984) 158 Cal. App. 3d 716, 720, 205 Cal. Rptr. 42* ; *Mallick v. Superior Court (1979) 89 Cal. App. 3d 434, 439, 152 Cal. Rptr. 503* (mandamus also proper remedy when trial court refuses to assume jurisdiction); *Berman v. Aetna Casualty & Surety Co. (1974) 40 Cal. App. 3d 908, 912, 115 Cal. Rptr. 566*

Appeal from order denying motion to intervene as not ousting court of jurisdiction to try main case. *Olson v. Hopkins (1969) 269 Cal. App. 2d 638, 644-645, 75 Cal. Rptr. 33*

[2] Attorney's Fees

Interests of an intervenor are relevant only to its right to intervene and have no relevance to its right to attorney's fees, absent statutory or contractual rights thereto. *Big Bear Mun. Water Dist. v. Bear Valley Mutual Water Co. (1989) 207 Cal. App. 3d 363, 386, 254 Cal. Rptr. 757* (intervenor was party to action but not party to contract (consent judgment) authorizing award of attorney's fees to prevailing party)

[3] Consequential Interest

As a successful party under Code Civ. Proc. § 1021.5, a law firm's interest in a fee award would be directly and adversely affected if a final judgment issued prior to a motion for fees. The firm would forever lose the right to collect fees from the opposing party under § 1021.5. Thus, the firm had a sufficiently direct and immediate interest to permit intervention and a motion for an award of fees under § 1021.5. *Lindelli v. Town of San Anselmo (2006) 139 Cal. App. 4th 1499, 1500-1501, 43 Cal. Rptr. 3d 707*

Interest of lawyer seeking to protect right to fees payable out of litigation as consequential one. *Meadow v. Superior Court (1963) 59 Cal. 2d 610, 615, 30 Cal. Rptr. 824, 381 P.2d 648*

Principal municipal customer of water company suing others for declaration of itswater rights as having only consequential interest not justifying intervention. *Allen v. California Water & Tel. Co. (1947) 31 Cal. 2d 104, 109, 187 P.2d 393*

Intervention as properly denied to the wife of a defendant claiming potential threat to her community interest in marital property if defendant loses and execution is levied on the assets. *Bechtel v. Axelrod (1942) 20 Cal. 2d 390, 392-393, 125 P.2d 836*

Where issue involved in litigation is not within the scope of the California PublicEmployment Relations Board's exclusive jurisdiction, it has no direct or immediate interest in the action, and thus was properly denied the opportunity to intervene. *California Assn. of Professional Scientists v. Schwarzenegger (2006) 137 Cal. App. 4th 371, 381-382, 40 Cal. Rptr. 3d 354*

Court properly denied intervention where would-be intervenors failed to allege a tangible harm absent intervention, as opposed to a political or philosophical interest. *City and County of San Francisco v. State of California (2005) 128 Cal. App. 4th 1030, 1044, 27 Cal. Rptr. 3d 722*

Right of an attorney to intervene as a party in his client's action, for purpose of settling a dispute between him and his client as to attorneys' fees for services rendered in the same action, is limited to those specific actions wherein, by virtue of the contract of employment between the attorney and client, the former is given a specific present interest in the subject matter of the action, which interest might be jeopardized by the client's discharge of his original attorney and the employment of another to prosecute the action. *Brown v. Superior Court (2004) 116 Cal. App. 4th 320, 330, 9 Cal. Rptr. 3d 912*

Investigative administrative body's interest in overbroad effect of ancillary gag order and order sealing court records was only consequential interest in dismissed underlying action. *Mary R. v. B & R Corp. (1983) 149 Cal. App. 3d 308, 314-315, 196 Cal. Rptr. 871*

Trial court's refusal to permit intervention by football league management council in action regarding production of a team member's medical records as proper when council had no direct interest requiring protection and when same counsel already represented both the council and a party to the action. *National Football League Management Council v. Superior Court (1983) 138 Cal. App. 3d 895, 904 n.3, 188 Cal. Rptr. 337*

Insurer as not entitled to intervene in personal injury action against hospital, doctor, and others, since cause of action in tort is not property or transaction within *Code Civ. Proc. § 387* (allowing for intervention of persons who, inter alia, claim an interest relating to property or transaction which is the subject of the action). *California Physicians' Service v. Superior Court (1980) 102 Cal. App. 3d 91, 96, 97, 162 Cal. Rptr. 266*

Interest as consequential and thus insufficient for intervention when relief sought in action does not directly affect prospective intervenor's interest although result of action may indirectly benefit or harm him or her; thus an unsecured creditor of a defendant who will be rendered unable to pay debt if he loses lawsuit is held to have only consequential interest not justifying intervention in litigation. *Olson v. Hopkins (1969) 269 Cal. App. 2d 638*

Potential subrogee as having only consequential interest. *Hausmann v. Farmers Ins. Exchange (1963) 213 Cal. App. 2d 611, 615, 29 Cal. Rptr. 75*

Owner of property adjoining a parcel, the subject of a quiet title action to determine oil and gas rights, as not having a

direct interest permitting intervention in action. *People v. City of Long Beach (1960) 183 Cal. App. 2d 271, 275, 6 Cal. Rptr. 658*

Insurer who refused to defend except on reservation of rights as having only consequential interest not justifying intervention in an action against insured. *Corridan v. Rose (1955) 137 Cal. App. 2d 524, 530-531, 290 P.2d 939*

Owner of land adjoining parcel subject to eminent domain proceeding who claims that her property will be depreciated by the work of improvement as having only consequential interest not justifying intervention in proceeding. *Alhambra v. Jacob Bean Realty Co. (1934) 138 Cal. App. 251, 252-253, 31 P.2d 1052*

County seeking to acquire right-of-way for public street as having only consequential interest not justifying intervention in quiet title action to determine ownership of abandoned railroad rights-of-way in which private parties and a city are claimants. *Faus v. Pacific Elec. Ry. Co. (1955) 134 Cal. App. 2d 352, 359-361, 285 P.2d 1017*

Contingent beneficiary of trust seeking to intervene in divorce action between other persons in order to establish illegitimacy of a prior beneficiary to prevent his taking under trust and thus to establish the right of attempting intervenor to take as not permitted to do so because beneficiary's interest in divorce was consequential and not direct. *Bernheimer v. Bernheimer (1948) 87 Cal. App. 2d 242, 246-247, 196 P.2d 813* ; *see In re Marriage of Williams (1980) 101 Cal. App. 3d 507, 511-512, 161 Cal. Rptr. 808* (mother and sister of deceased parent)

[4] Consequential Interest Becoming Direct

United States as permitted to intervene in action involving imposition of local taxes when otherwise it would have been impossible for anyone to assert the fiscal policy of the federal government involved in federal statute at the heart of litigation. *County of San Bernardino v. Harsh California Corp. (1959) 52 Cal. 2d 341, 346-347, 340 P.2d 617*

Equitable-beneficial owner of property as proper intervenor in an action in which the trustee-legal owner refuses to defend his title or claims adversely to the beneficiary. *Elms v. Elms (1935) 4 Cal. 2d 681, 685, 52 P.2d 223*

Shareholders as proper parties to intervene in action against corporation when corporation's officers and board of directors fail in good faith to defend it in suit. *Eggers v. National Radio Co. (1929) 208 Cal. 308, 313* ; *Thorman v. Dome Producing & Developing Co. (1942) 50 Cal. App. 2d 201, 202-203, 122 P.2d 927*

Corp. Code § 15526 [repealed Jan. 1, 2010; *see Corp. Code § 15534*], providing that limited partner is not proper party to proceedings by or against limited partnership, as not barring limited partner's right to intervene in an action against limited partnership when general partner refuses to defend. *Kobernick v. Shaw (1977) 70 Cal. App. 3d 914, 918, 139 Cal. Rptr. 188* ; *Linder v. Vogue Invest. Inc. (1966) 239 Cal. App. 2d 338, 340*

Judgment creditor of insured as proper intervenor in action by insurance company for declaration of nonliability on fire policy on grounds that insured started fire when insured judgment proof, the creditor's only possibility of satisfying judgment was defendant insured's success in action, and insured defaulted in bad faith by refusing to litigate. *Fireman's Fund Ins. Co. v. Gerlach (1976) 56 Cal. App. 3d 299, 303-305, 128 Cal. Rptr. 396*

State as proper intervenor in action to dissolve corporation to protect the interest of shareholders not available to assert their interests when those interests mayescheat. *In re Mercantile Guaranty Co. (1965) 238 Cal. App. 2d 426, 437, 48 Cal. Rptr. 589*

[5] Direct Interest

Because the validity or invalidity of same-sex marriages under current California law involves only a pure question of law, couples who are not formal parties to this action are in no different position than if this question of law had been presented and resolved in an action involving some other same-sex couple rather than in an action in which the legal arguments regarding the validity of such marriages have been vigorously asserted not only by the city officials who authorized and registered such marriages but also by various amici curiae representing similarly situated same-sex couples. *Lockyer v. City and County of San Francisco (2004) 33 Cal. 4th 1055, 1115, 17 Cal. Rptr. 3d 225, 95 P.3d 459*

Proper to permit purported class of defrauded investors to intervene in action by the People against individuals and corporations seeking injunctive relief, civil penalties, and restitution to investors in connection with alleged oil drilling contract fraud. *People v. Superior Court (Good) (1976) 17 Cal. 3d 732, 736, 131 Cal. Rptr. 800, 552 P.2d 760*

Assignees as successors in interest permitted to intervene. *Dabney v. Philleo (1951) 38 Cal. 2d 60, 68, 237 P.2d 648* (assignees purchased heir's interest in share of estate)

When insurer might be subject to direct action under *Ins. Code § 11580* by judgment creditor who has or will obtain default judgment in third party action against insured, intervention by insurer is appropriate; trial court, therefore, abused its discretion in denying insurer's right to intervene in action by owners of personal property against insured moving and storage company that allegedly lost owners' property; court also rejected claim that insurer could not assert defenses of its insured, which was suspended as corporation for failure to pay taxes, distinguishing *Truck Ins. Exchange v. Superior Court (1997) 60 Cal. App. 4th 342, 346-349, 70 Cal. Rptr. 2d 255* , on basis that here insurer had not paid loss for which insured had right to recover from property owners but rather sought to intervene to protect its own interests in any action brought against it under *Ins. Code § 11580*; if insurer did not intervene, property owners would be able to obtain unopposed default judgment and then would be able to bring direct action against insurer for payment of that default judgment, which would have result of punishing insurer for something it did not do, since insurers have no control over solvency or corporate vitality of their insureds. *Reliance Ins. Co. v. Superior Court (2000) 84 Cal. App. 4th 383, 386*

Insurer that had accepted defense of claims against insured, asserting reservation of rights, held to have sufficiently direct interest in action brought by two other insurers against insured seeking to rescind their policies so as to justify insurer's intervention on insured's behalf in that action when all insurers issued general comprehensive liability policies to insured for successive policy periods, and insured could not defend suit because insured's corporate status had been suspended for failure to file state tax returns; at some point insurer may have right to assert claims for contribution from other two insurers for cost of defending and/or indemnifying insured; under circumstances, outcome of present action will have direct and substantial effect on insurer's right to seek equitable contribution, even though that right may not have ripened; if insurer was not allowed to intervene, default judgments rescinding other insurance policies would bar insurer from pursuing equitable contribution from other two insurers in any action for equitable contribution. *Truck Ins. Exchange v. Superior Court (1997) 60 Cal. App. 4th 342, 346-349, 70 Cal. Rptr. 2d 255*

Redwood preservation league that donated land to state for "state park purposes" had direct and substantial interest in subsequent action brought by neighboring lumber company to dispute park boundary; intervention was proper because of substantial probability of detrimental impact on league's interests (interests in continuing to receive contributions from members for acquisition of lands for park preservation and in ensuring that restrictive language in deed is carried out). *Simpson Redwood Co. v. State of California (1987) 196 Cal. App. 3d 1192, 1200-1201, 242 Cal. Rptr. 447*

Maternal grandparents had right to intervene and oppose adoption petition filed by paternal grandparents, when child's mother was murdered by child's father whose conviction and death sentence was on appeal at time of adoption proceeding. *Adoption of Lenn E. (1986) 182 Cal. App. 3d 210, 220, 227 Cal. Rptr. 63*

When statute exists specifically to protect public from hazard to its health and welfare that would allegedly occur

without that statute, members of public have right to intervene because they have substantial interest in protection and benefit provided by statute. *People ex rel. Rominger v. County of Trinity (1983) 147 Cal. App. 3d 655, 662-663, 195 Cal. Rptr. 186*

Employee as having unconditional right to intervene in action filed by employer to recover damages for personal injuries, and intervention timely even though filed after expiration of one-year limitation since employer had filed within limitation period. *Jordan v. Superior Court (1981) 116 Cal. App. 3d 202, 207, 172 Cal. Rptr. 30*

Party as entitled to intervene in representative capacity on behalf of users and consumers of services in class action. *Mallick v. Superior Court (1979) 89 Cal. App. 3d 434, 436, 152 Cal. Rptr. 503*

Subrogee as having right of action in injured party's cause of action, and if that cause of action has been timely filed, subrogee may intervene. *Ventura County Employees' Retirement Association v. Pope (1978) 87 Cal. App. 3d 938, 947-955, 151 Cal. Rptr. 695*

School district as having standing, and LAFCO as not having standing, to intervene on defendant's side in action by real estate developers to invalidate city policy that "school impact fees" may be charged where new subdivisions threaten to overload existing school facilities. *Timberidge Enterprises, Inc. v. City of Santa Rosa (1978) 86 Cal. App. 3d 873, 880-885, 150 Cal. Rptr. 606*

Nonprofit corporation composed of parents as proper party to intervene in action involving desegregation of school district since reassignment of students would have direct social, educational, and economic impact on students reassigned and their parents. *Bustop v. Superior Court (1977) 69 Cal. App. 3d 66, 70-71, 137 Cal. Rptr. 793*

Assignee of note and trust deed as entitled to intervene in action by city to collect onfaithful performance bond when contractor failed to perform work and defaulted on promissory note. See *Berman v. Aetna Casualty & Surety Co. (1974) 40 Cal. App. 3d 908, 912, 115 Cal. Rptr. 566* (however, prospective intervenor failed to timely appeal judgment denying right to intervene)

Judgment creditors as having been granted leave to intervene in injunction commenced against sheriff to enjoin execution sale. *Allen v. Pitchess (1973) 36 Cal. App. 3d 321, 326, 111 Cal. Rptr. 658* (intervention under joinder, *Code Civ. Proc. § 389.5*)

Division of Labor Law Enforcement as assignee of employee's claim against his employer for wages permitted to intervene. *Marc Bellaire, Inc. v. Fleischman (1960) 185 Cal. App. 2d 591, 595, 8 Cal. Rptr. 650*

[6] Dismissal of Action

Plaintiff in intervention as not entitled to carry on action on her complaint in intervention after dismissal of main action by plaintiff notwithstanding fact that she had been granted leave to intervene prior to dismissal when prior to dismissal she had not filed any pleading and had only obtained leave to file pleading and orders extending time within which to plead. *Klinghoffer v. Barasch (1970) 4 Cal. App. 3d 258, 261-262, 84 Cal. Rptr. 350*

[7] Grounds for Intervention

Not every interest in the outcome of litigation gives to its possessor right to intervene in lawsuit. Interest must be direct and not consequential, and it must be interest which is proper to be determined in action in which intervention is sought. *Isaacs v. Jones (1898) 121 Cal. 257, 261, 53 P. 793*

Presented with motion for intervention, court must determine whether intervenor has established (1) it has direct interest in lawsuit; (2) intervention would not enlarge issues raised by original parties; and (3) intervenor would not tread on rights of original parties to conduct their own lawsuit. *Bame v. City of Del Mar (2001) 86 Cal. App. 4th 1346, 1364, 104 Cal. Rptr. 2d 183*

Insurer disputing coverage of underlying claim was not entitled to intervene in products liability action against insured because insurer does not have sufficiently direct interest in lawsuit, intervention would enlarge scope of lawsuit to include issues necessary to determine coverage, and insured and insurer seek different factual resolutions of issues relevant to coverage. *Kuperstein v. Superior Court (1988) 204 Cal. App. 3d 598, 600-601, 251 Cal. Rptr. 385*

Environmental organization was entitled to intervene in action by state to preempt county's enactment of pesticide ordinances because intervenor had direct and immediate interest in lawsuit, intervenor's complaint raised no new legal or factual issues to be decided by trial court, and original parties' interest in litigating case on their own terms did not outweigh interest of environmental organization in intervening to protect its members' health and well-being. *People ex rel. Rominger v. County of Trinity (1983) 147 Cal. App. 3d 655, 664-665, 195 Cal. Rptr. 186*

Government entity has no greater authority to intervene in litigation of others than any other party. *Mary R. v. B & R Corp. (1983) 149 Cal. App. 3d 308, 314, 196 Cal. Rptr. 871*

Right to intervene in action under *Code Civ. Proc. § 387(a)* as requiring interest of direct and immediate character greater than that possessed by simple creditor of party. See *Olson v. Hopkins (1969) 269 Cal. App. 2d 638, 641-644, 75 Cal. Rptr. 33* (discussing cases under former *Code Civ. Proc. § 387*)

Interest justifying intervention as being of such direct or immediate character intervenor will either gain or lose by direct legal operation and effect of judgment. *People v. City of Long Beach (1960) 183 Cal. App. 2d 271, 275, 6 Cal. Rptr. 658*

[8] Independent Status of Intervenor

Intervenor has independent cause of action against defendant and not is limited by every procedural decision made by plaintiff, and thus may move to disqualify judge, or to object to jurisdiction of court or to pleadings on ground of failure to state cause of action; intervenor is also entitled to trial on merits despite plaintiff's waiver by failure to pursue litigation. *Deutschmann v. Sears, Roebuck & Co. (1982) 132 Cal. App. 3d 912, 915*

[9] Mode of Intervention

Ex parte application. *Allen v. California Water & Tel. Co. (1947) 31 Cal. 2d 104, 107, 187 P.2d 393* ; *Adoption of Lenn E. (1986) 182 Cal. App. 3d 210, 217, 227 Cal. Rptr. 63* ; *Marc Bellaire, Inc. v. Fleischman (1960) 185 Cal. App. 2d 591, 595, 8 Cal. Rptr. 650*

Cross complaint as proper mode of intervention by intervenor, a limited partner seeking to intervene to defend suit against limited partnership when general partner failed to defend it. *Kobernick v. Shaw (1977) 70 Cal. App. 3d 914, 919, 920, 139 Cal. Rptr. 188*

Hearing on notice. *Muller v. Robinson (1959) 174 Cal. App. 2d 511, 515, 345 P.2d 25* ; see *Bowles v. Superior Court (1955) 44 Cal. 2d 574, 588-589, 283 P.2d 704*

[10] Procedural Requirements

Necessary interest for intervention as being in matter in litigation in suit as originally brought. *Jersey Maid Milk Products Co. v. Brock (1939) 13 Cal. 2d 661, 663, 664, 91 P.2d 599* ; *People v. Brophy (1942) 49 Cal. App. 2d 15, 34, 120 P.2d 946*

Regardless of whether intervention is permissive or mandatory, a petition to seek leave is required; without permission from the court a party lacks any standing to the action. *Lohnes v. Astron Computer Products (2001) 94 Cal. App. 4th 1150, 1153, 115 Cal. Rptr. 2d 34*

Necessity for complaint in intervention to state sufficient facts to constitute cause for intervention. *Hausmann v. Farmers Ins. Exchange (1963) 213 Cal. App. 2d 611, 615, 29 Cal. Rptr. 75*

[11] Purpose of Allowing Intervention

Purpose of allowing intervention is to protect others potentially affected by judgment, thus obviating delay and multiplicity of suits; intervener becomes party to action with all of same procedural rights and remedies of original parties. Montgomeryv. *Bio-Med Specialties, Inc. (1986) 183 Cal. App. 3d 1292, 1296, 228 Cal. Rptr. 709*

[12] Right to Intervene--Determination

Trial court possesses discretion to deny intervention even when a direct interest is shown by the would-be intervenors if the interests of the original litigants outweigh the intervenor's concerns of potential delay and multiplicity of actions. *People v. Superior Court (Good) 17 Cal. 3d 732, 737, 131 Cal. Rptr. 800, 552 P.2d 760*

Court ruling on motion to intervene balances desirability of intervention to protect a direct interest against normal right of original parties to litigation to "conduct their lawsuit on their own terms" and potential of unduly extending litigation. *County of San Bernardino v. Harsh California Corp. (1959) 52 Cal. 2d 341, 346, 340 P.2d 617*

Owners of land within irrigation district whose property would be burdened with taxes to finance bonded indebtedness of district sought intervention in action to validate those bonds were denied right to intervene by trial court on basis that intervention would have introduced unnecessary collateral matter into lawfuit. *La Mesa etc. Irr. Dist. v. Halley (1925) 195 Cal. 739, 742, 235 P. 999*

Determination that interest is direct and not consequential does not of itself establish right to intervene; interest must be one "which is proper to be determined in the action in which the intervention is sought." *Isaacs v. Jones (1898) 121 Cal. 257, 261*

Where issue involved in litigation is not within the scope of the California Public Employment Relations Board's exclusive jurisdiction, it has no direct or immediate interest in the action, and thus was properly denied the opportunity to intervene. *California Assn. of Professional Scientists v. Schwarzenegger (2006) 137 Cal. App. 4th 371, 381-382, 40 Cal. Rptr. 3d 354*

Court properly denied intervention where would-be intervenors failed to allege a tangible harm absent intervention, as opposed to a political or philosophical interest. *City and County of San Francisco v. State of California (2005) 128 Cal. App. 4th 1030, 1044, 27 Cal. Rptr. 3d 722*

Court has discretion to permit intervention if nonparty's interest in litigation is direct and immediate, issues to be decided in case will not be increased by intervention, and reasons supporting intervention are stronger than those raised by parties against it. *Truck Ins. Exchange v. Superior Court (1997) 60 Cal. App. 4th 342, 351, 70 Cal. Rptr. 2d 255*

Trial court lacks discretion not to allow substitution of trustee in bankruptcy for plaintiff who has filed bankruptcy petition; however, although bankrupt's cause of action for personal injuries becomes part of bankruptcy estate when bankruptcy petition is filed, bankrupt is not divested of right to continue to prosecute action until bankruptcy trustee intervenes and substitutes in action as real party in interest. *Kaley v. Catalina Yachts (1986) 187 Cal. App. 3d 1187, 1194-1195, 1195 n.7, 232 Cal. Rptr. 384*

Intervention is properly permitted only if petitioner shows fact which satisfies requirements of *Code Civ. Proc. § 387(a)*. See *Socialist Workers Etc. Committee v. Brown (1975) 53 Cal. App. 3d 879, 891*

Trial court did not abuse discretion in denying right to intervene pursuant to *Code Civ. Proc. § 387*. *Squire v. City and County of San Francisco (1970) 12 Cal. App. 3d 974, 978-979, 91 Cal. Rptr. 347*

Motion to intervene was properly denied when it constituted attempt to relitigate matters already finally adjudicated, motion was not timely, and appellate court was not furnished with record sufficient to allow proper inquiry into alleged merits. *Reber v. Beckloff (1970) 6 Cal. App. 3d 341, 342-343, 85 Cal. Rptr. 807*

Right to intervene under *Code Civ. Proc. § 387(a)* is not absolute. *Muller v. Robinson (1959) 174 Cal. App. 2d 511, 515, 345 P.2d 25*

Insurer that has paid collision claim and become subrogated to rights of its insured is denied right to intervene to assert rights in action prosecuted by insured if trial court concludes that permitting intervention would prejudice the conduct of the litigation by interjecting the issue of insurance. *Corridan v. Rose (1955) 137 Cal. App. 2d 524, 530-531, 290 P.2d 939*

Trial court is vested with discretion in drawing balance and its determination cannot be reversed on appeal unless arbitrary in sense that not supported by any substantial basis. *In re Yokohama Specie Bank (1948) 86 Cal. App. 2d 545, 554, 195 P.2d 555*

[13] Time of Intervention

Application for leave to file a complaint in intervention was timely when made after motion for new trial granted and cause was still at issue. *Eggers v. National Radio Co (1929) 208 Cal. 308, 312*

Trial court did not abuse its discretion denying insurer's motion to intervene when insurer had taken no steps to participate in litigation until several years had passed and the parties had already reached a settlement; although insurer had a direct and immediate interest in the lawsuit, it was not entitled to intervene when it had consistently denied coverage and denied its insured a defense in the lawsuit. *Noya v. A.W. Coulter Trucking (2006) 143 Cal. App. 4th 838, 842, 49 Cal. Rptr. 3d 584*

Timeliness is hardly reason to bar intervention when direct interest is demonstrated and real parties in interest have not shown any prejudice other than being required to prove their case. *Truck Ins. Exchange v. Superior Court (1997) 60 Cal. App. 4th 342, 351, 70 Cal. Rptr. 2d 255* (motion made on eve of plaintiff obtaining default judgment)

Complaint in intervention, like any other complaint, is subject to affirmative defense based on applicable statute of limitations and, if it asserts new cause of action, application for leave to intervene must be filed within pertinent limitations period. *Basin Construction Corp. v. Department of Water & Power (1988) 199 Cal. App. 3d 819, 825, 245 Cal. Rptr. 178*

When employer or its insurer files timely action against tortfeasor to recover workers' compensation paid to injured employee, employee may intervene to recover damages for personal injury even if complaint in intervention is not filed withinstatute of limitations. *Home Insurance Co. v. Southern Cal. Rapid Transit District (1987) 196 Cal. App. 3d 522, 523-524, 241 Cal. Rptr. 858*

Complaint in intervention of workers' compensation insurer was properly dismissed on ground that plaintiffs in underlying third-party tort action had failed to serve and return summons within statutory three-year period under former *Code Civ. Proc. § 581*. *Chambers v. Santa Cruz City School Dist. (1987) 193 Cal. App. 3d 518, 522-524, 238 Cal. Rptr. 356*

Denial of party's application to intervene was proper when party had been involved in suit from outset, and had previously filed amicus brief, but did not attempt to intervene until after summary judgment motion had been fully argued and trial court had indicated its intent to grant motion. *Northern Cal. Psychiatric Society v. City of Berkeley (1986) 178 Cal. App. 3d 90, 109, 223 Cal. Rptr. 609*

Period of limitation under *Code Civ. Proc. § 340.5* applied to individual claim of heir seeking to intervene in wrongful death action that was otherwise filed within period of limitation and required that application for leave to intervene be filed within period if complaint in intervention asserts new cause of action. *Andersen v. Barton Memorial Hospital, Inc. (1985) 166 Cal. App. 3d 678, 682*

Person not party to action as originally commenced or tried may be permitted to intervene even after judgment by moving to vacate judgment under *Code Civ. Proc. § 663* when trial court draws incorrect conclusions of law or renders erroneous judgment on basis of uncontroverted facts. *Simac Design, Inc. v. Alciati (1979) 92 Cal. App. 3d 146, 152-153, 154 Cal. Rptr. 676*

Intervention is possible anytime, if otherwise appropriate, even after judgment and after appeal perfected. *Mallick v. Superior Court (1979) 89 Cal. App. 3d 434, 437, 152 Cal. Rptr. 503* (issue of intervention not a matter embraced in or affected by the judgment)

Reversible error of trial court in allowing intervention after entry of default judgment when intervenor was not diligent in pursuing remedy. *Drinnon v. Oliver (1972) 24 Cal. App. 3d 571, 585-586, 101 Cal. Rptr. 120*

Right to intervene in action after default or default judgment entered. *Linder v. Vogue Investments, Inc. (1966) 239 Cal. App. 2d 338, 343, 48 Cal. Rptr. 633*

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§ 395.63 Law Reviews

Note, *When a Permissive Intervenor Impairs the Plaintiff's Control, 35 Hastings L.J. 707 (1984)*

Comment, "Civil Procedure; intervention," 9 Pacific L.J. (1978)

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§ 395.64 Text References

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[Reserved]

§§ 395.65[Reserved]

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PART IV. PROCEDURAL CHECKLIST
A. Joinder of Parties
1. Parties Seeking Joinder

34-395 California Forms of Pleading and Practice--Annotated § 395.70

§ 395.70 Plaintiff's Joinder of New Party

[1] Permissive Joinder of Plaintiff Under Code Civ. Proc. § 378

[a] Preliminary Determinations

☐ Does the omitted party meet the requirements for joinder of a party plaintiff [*Code Civ. Proc. § 378*; *see § 395.70[1][b][ii], below*]?

☐ Will joinder avoid unnecessary duplication?

☐ Will close cooperation with other plaintiffs enhance or impair ability to present client's case in the light most persuasive to his or her interest?

☐ Will joinder unnecessarily confuse and complicate the issues?

☐ Will joinder result in a higher jurisdictional classification than counsel desires because the amount of damages sought or particular relief desired by a party is not available in a limited civil case [*see Code Civ. Proc. §§ 85, 86*]?

☐ Will joinder bring in an unpopular or unsympathetic plaintiff who may alienate the jury and endanger client's ability to obtain a favorable verdict?

☐ Will joinder give rise to a conflict of interest between plaintiffs, e.g., driver and passenger in a personal injury suit?

[b] Procedural Determinations

[i] Jurisdiction and Classification of the Case

☐ Will the court have jurisdiction over the subject matter of the action?

☐ Does the amount of damages sought classify the action as a limited or unlimited civil case?

☐ Does the type of relief sought classify the action as a limited or unlimited civil case?

☐ Will the court be able to grant the particular relief sought?

[ii] Grounds for Joinder

☐ Does the omitted party have a right to relief jointly, severally, or in the alternative, arising out of the same transaction or occurence or series of transactions or occurrences, and is there a question of law or fact common to the parties [*Code Civ. Proc. § 378(a)(1)*]; or

☐ Does the omitted party have a claim, right, or interest adverse to the defendant which is the subject of the action [*Code Civ. Proc. § 378(a)(2)*]?

[c] Procedures for Joinder

☐ Include party in original complaint [for a discussion, forms, and procedures, *see* Ch. 123, *Complaints and Cross Complaints*];

☐ Amend the complaint as a matter of course before the answer or demurrer is filed or after the demurrer and before trial of the issue of law thereon [*Code Civ. Proc. § 472*]; or

☐ File a notice of motion for leave to amend the complaint joining new party plaintiff who consents to joinder [*Code Civ. Proc. § 473(a)*; *see § 395.100* for form].

[2] Permissive Joinder of Defendant Under Code Civ. Proc. § 379

[a] Preliminary Determinations

☐ Does the omitted party meet the requirements for joinder of a party defendant [*Code Civ. Proc. § 379*; *see § 395.70[2][b][iii]*]?

☐ Have all potential defendants and the extent of their possible liability been ascertained?

☐ Will the omitted party be able to adequately respond to the judgment of the court?

☐ Will joinder of the omitted party enhance plaintiff's ability to obtain a favorable verdict through

evidence which reinforces plaintiff's assertion of wrongdoing?

☐ Will joinder of the omitted party impair plaintiff's ability to obtain a favorable verdict by providing defendants an opportunity to negate force and effect of plaintiff's case?

[b] Procedural Determinations

[i] Preliminary Considerations

☐ Will omitted party be subject to service of process [*see Code Civ. Proc. § 410.50*]?

☐ Will the court in which relief is sought have jurisdiction over the subject matter of the action, or in the case of a unified trial court, will the case be a limited civil case or otherwise [*see Cal. Const., art. VI, §§ 5(a), 10*; *Code Civ. Proc. §§ 85-86*]?

☐ Has the statute of limitations already run, thus, possibly preventing joinder of a new party defendant [*see Orloff v. Metropolitan Trust Co. (1941) 17 Cal. 2d 484, 489, 110 P.2d 396]* ?

[ii] Procedural Considerations

☐ Will joining the omitted party provide an opportunity to file action in more favorable judicial territory [*see Code Civ. Proc. §§ 392-402*; Ch. 571, *Venue*]?

☐ Will joining the omitted party provide an opportunity for more advantageous discovery procedures and evidentiary admissions [*see Code Civ. Proc. § 2016 et seq.* (*Code Civ. Proc. § 2016.010 et seq.* operative July 1, 2005); Ch. 190-200, *Discovery*]?

☐ Will joining of omitted party affect plaintiff's desire to have or avoid a jury trial [*see Cal. Const., art. I, § 16*; *Code Civ. Proc. § 592*; Ch. 322, *Juries and Jury Selection*]?

☐ Will joining of omitted party provide an opportunity for any defendant to file cross complaints against plaintiff, other defendants, or plaintiffs, thus confusing the issues and leading to plaintiff's loss of control of the case [*see Code Civ. Proc. §§ 428.10-428.80*; Ch. 123, *Complaints and Cross Complaints*]?

[iii] Grounds for Joinder

☐ Would omitted party be subject to a claim against him or her of any right to relief jointly, concurrently, severally, or in the alternative, arising out of the same transaction or occurence, or series of transactions or occurences, with a question of law or fact common to all parties [*Code Civ. Proc. § 379(a)(1)*]; or

☐ Would omitted party be subject to a claim, right, or interest adverse to him or her in the subject of the action [*Code Civ. Proc. § 379(a)(2)*]; or

☐ Does the plaintiff have a doubt as to the person from whom he or she is entitled to redress [*Code*

Civ. Proc. 379(c)]?

[c] Procedures for Joinder

☐ Include party in original complaint [for a discussion, forms, and procedures, *see* Ch. 123, *Complaints and Cross Complaints*];

☐ Amend the complaint as a matter of course before the answer or demurrer is filed or after the demurrer and before trial of the issue of law thereon [*Code Civ. Proc. § 472*]; or

☐ File a notice of motion for leave to amend the complaint joining new party defendant [*Code Civ. Proc. § 473(a)*; *see § 395.102* for form].

[3] Compulsory Joinder

[a] Procedural Determinations

[i] Preliminary Considerations

☐ Will omitted party be subject to service of process [*see Code Civ. Proc. § 410.50*]?

☐ Will the court in which relief is sought have jurisdiction over the subject matter of the action, or in the case of a unified trial court, will the case be a limited civil case or otherwise [*see Cal. Const., art. VI, §§ 5(a), 10*; *Code Civ. Proc. §§ 85-86*]?

☐ Has the statute of limitations already run, thus possibly preventing joinder of a new party defendant [*see Orloff v. Metropolitan Trust Co. (1941) 17 Cal. 2d 484, 489, 110 P.2d 396]* ?

[ii] Grounds for Joinder

☐ Will the omitted party's absence prevent the court from providing complete relief to those already parties to the action [*Code Civ. Proc. § 389(a)(1)*]; or

☐ Is the omitted party, by reason of his or her claimed interest in the subject of the action, so situated that in his or her absence the disposition, as a practical matter, might impair or impede his or her ability to protect that interest [*Code Civ. Proc. § 389(a)(2)(i)*]; or

☐ Will the disposition of the action in the omitted party's absence leave any of the persons already parties to the action subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the omitted party's claimed interest [*Code Civ. Proc. § 389(a)(2)(ii)*]?

[b] Procedures for Joinder

☐ Include party in original complaint [for a discussion, forms, and procedures, *see* Ch. 123, *Complaints and Cross Complaints*];

☐ Amend the complaint as a matter of course before the answer or demurrer is filed or after the demurrer and before trial of the issue of law thereon [*Code Civ. Proc. § 472*]; or

☐ File a notice of motion for leave to amend the complaint joining new party [*Code Civ. Proc. § 473(a)*; *see § 395.104* for form].

[4] Preparation, Service, and Filing of Papers

[a] Notice of Motion to Amend

A notice of motion may be required to obtain leave to amend the complaint to bring in a new party.

☐ Prepare the notice of motion with the appropriate number of copies [*see §§ 395.100, 395.102*, and *395.104* for forms].

☐ State the grounds on which joinder is sought as appropriate [*see § 395.70[1][b][i]* (permissive joinder of new party plaintiff), § 395.70[2][b][iii] (permissive joinder of new party defendant), and § 395[3][a][ii] (compulsory joinder of new party)].

☐ Prepare supporting declaration with the appropriate number of copies [*see §§ 395.101, 395.103*, and *395.105*].

☐ Prepare supporting memorandum of points and authorities with the appropriate number of copies [*see* California Points and Authorities, Ch. 168, *Parties* , for forms of supporting memoranda of points and authorities].

☐ Prepare order granting motion for leave to amend complaint [§ 395.106].

☐ File original copies of all moving papers with the clerk and pay filing fee.

☐ Serve each counsel or party in pro per in the action with separate copies. For a discussion, forms, and procedures for preparation, service, and filing of papers, see Ch. 372, *Motions and Orders* .

[b] Complaint and Amended Complaint

Plaintiff may include another person as party defendant, or amend the complaint as a matter of course or by leave of the court [*see § 395.70[1][c]* (permissive joinder of new party plaintiff); § 395.70[2][c] (permissive joinder of new party defendant); § 395.70[3][b] (compulsory joinder of new party), *above*]. For a discussion, forms, and procedures for the preparing and filing of complaints, see Ch. 123, *Complaints and Cross Complaints* . For a discussion, forms, and procedures for amending and filing of amended complaints, see Ch. 21, *Amended and Supplemental Pleadings* .

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§ 395.71 Defendant's Joinder of New Party

[1] Preliminary Determinations

[a] Procedural Determinations

[i] Preliminary Considerations

☐ Will omitted party be subject to service of process [*see Code Civ. Proc. § 410.50*]?

☐ Will the court in which relief is sought have jurisdiction over the subject matter of the action, or in the case of a unified trial court, will the case be a limited civil case or otherwise [*see Cal. Const., art. VI, §§ 5(a), 10*; *Code Civ. Proc. §§ 85-86*]?

☐ Has the statute of limitations already run, thus possibly preventing joinder of a new party [*see Orloff v. Metropolitan Trust Co. (1941) 17 Cal. 2d 484, 489, 110 P.2d 396]* ?

[ii] Grounds for Joinder of New Party

☐ Will the omitted party's absence prevent the court from providing complete relief among the parties already parties to the action [*Code Civ. Proc. § 389(a)(1)*]; or

☐ Is the omitted party, by reason of his or her claimed interest in the subject of the action, so situated that in his or her absence the disposition, as a practical matter, might impair or impede his or her ability to protect that interest [*Code Civ. Proc. § 389(a)(2)(i)*]; or

☐ Will the disposition of the action in the omitted party's absence leave any of the persons already parties to the action subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reasons of the omitted party's claimed interest [*Code Civ. Proc. § 389(a)(2)(ii)*]?

[b] Procedures for Joining New Party

☐ File a notice of motion for an order compelling plaintiff to bring in a new party [*Code Civ. Proc. § 389*; *see § 395.107* for form]; or

☐ File a cross complaint bringing in a new party under the provisions of compulsory joinder [*Code Civ. Proc. §§ 389* (joinder of parties), 428.10(b), 428.20 (filing of cross complaints)].

[2] Preparation, Service, and Filing of Papers

[a] Motion to Compel Joinder

☐ Prepare, file, and serve the notice of motion to compel joinder of a new party [*see § 395.107* for form] and accompanying papers in the manner prescribed in § 395.70[4].

[b] Cross Complaint

☐ Defendant may file a cross complaint bringing in a new party [*see Code Civ. Proc. § 428.20*]. For a discussion, forms, and procedures for preparing and filing of a cross complaint, see Ch. 123, *Complaints and Cross Complaints* .

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§ 395.72 Omitted Party Seeking Joinder

[1] Compulsory Joinder

[a] Procedural Determinations

[i] Jurisdiction

☐ Will the court in which relief is sought have jurisdiction over the subject matter of the action, or in the case of a unified trial court, will the case be a limited civil case or otherwise [*see Cal. Const., art. VI, §§ 5(a), 10*; *Code Civ. Proc. §§ 85-86*]?

[ii] Grounds for Joining Pending Action

☐ Will the omitted party's absence prevent the court from providing complete relief among those already parties to the action [*Code Civ. Proc. § 389(a)(1)*]; or

☐ Is the omitted party, by reason of his or her claimed interest in the subject of the action, so situated that in his or her absence the disposition, as a practical matter, might impair or impede his or her ability to protect that interest [*Code Civ. Proc. § 389(a)(2)(i)*]; or

☐ Will the disposition of the action in the omitted party's absence leave any of the persons already parties to the action subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the omitted party's claimed interest [*Code Civ. Proc. § 389(a)(2)(ii)*]?

[b] Procedures for Application for Joinder

☐ File a notice of motion for an order compelling joinder as a new party plaintiff or defendant [*Code Civ. Proc. § 389*; *see § 395.107* for form].

[2] Joinder of Party Having Interest in Property

[a] Procedural Determinations

[i] Jurisdiction

☐ Will the court in which relief is sought have jurisdiction over the subject matter of the action, or in the case of a unified trial court, will the case be a limited civil case or otherwise [*see Cal. Const., art. VI, §§ 5(a), 10*; *Code Civ. Proc. §§ 85-86*]?

[ii] Grounds For Joining Pending Action Under Code Civ. Proc. § 389.5

☐ Does the omitted party have an interest in the recovery of real or personal property which is the subject of the action; or

☐ Does the omitted party have an interest in the determination of conflicting claims concerning real or personal property which is the subject of the action?

[b] Procedures for Application for Joinder

☐ File a notice of motion for an order permitting joinder as a new party plaintiff or defendant [*Code Civ. Proc. § 389.5*; *see § 395.110* for form].

[3] Preparation, Service, and Filing of Papers

☐ Prepare, file, and serve the notice of motion by an omitted party to compel or permit joinder [*see §§ 395.110* and *395.111* for forms], and accompanying papers in the manner described in § 395.70[4].

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34-395 California Forms of Pleading and Practice--Annotated § 395.80

§ 395.80 Defendant's Objection to Misjoinder

[1] Permissive Joinder of New Party Plaintiff

For a list of considerations in determining whether to object to misjoinder, see *§ 395.70[1][a]* and *[b]*.

[2] Permissive Joinder of New Party Defendant

For a list of considerations in determining whether to object to misjoinder, see *§ 395.70[2][a]* and *[b]*.

[3] Compulsory Joinder of New Party by Plaintiff

For a list of considerations in determining whether to object to misjoinder, see *§ 395.70[3][a]*.

[4] Compulsory Joinder of New Party by Defendant

For a list of considerations in determining whether to object to misjoinder, see *§ 395.71[1]*.

[5] Compulsory Joinder of New Party by Omitted Party

For a list of considerations in determining whether to object to misjoinder, see *§ 395.72[1][a]*.

[6] Joinder of Party Having Interest in Property

For a list of considerations in determining whether to object to misjoinder, see *§ 395.72[2][a]*.

[7] Procedures for Objecting to Misjoinder

A defendant may object to misjoinder by:

☐ Answer [*Code Civ. Proc. § 430.30(b)*]. For a discussion, forms, and procedures concerning answers, see Ch. 26, *Answers* .

☐ Demurrer [*Code Civ. Proc. §§ 430.10(d), 430.30(a), 430.70*]. For a discussion, forms, and procedures for preparing demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

☐ Motion for Severance [*Code Civ. Proc. § 379.5*]. For a discussion, forms, and procedures relating to severance of actions, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

NOTE:

To prevent any party joined under the provisions governing permissive joinder of parties [*Code Civ. Proc. §§ 378, 379*] from being embarassed, delayed, or put to undue expense, the court may order, and counsel should seek, any order as the interests of justice may require [*Code Civ. Proc. § 379.5*].

[8] Preparation, Service, and Filing of Papers

[a] Answer

☐ Prepare, serve, and file the appropriate answer for objecting to misjoinder. For a discussion, forms, and procedures, see Ch. 26, *Answers* .

[b] Demurrer

☐ Prepare demurrer with accompanying supporting memorandum [*see* California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*] in accordance with the Code of Civil Procedure and the California Rules of Court [*Code Civ. Proc. §§ 430.10(d), 430.30(a), 430.70*; *Cal. Rules of Ct., Rules 3.1113(a), 3.1320*]. For a discussion, forms, and procedures, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[c] Motion for Severance

☐ Prepare motion for severance with accompanying memorandum of points and authorities [*see Code Civ. Proc. §§ 379.5, 579, 1048(b)*; California Points and Authorities, Ch. 168, *Parties*].

For a discussion, forms, and procedures, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

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§ 395.81 Defendant's or Plaintiff's Objection to Joinder

[1] Permissive Joinder of New Party Plaintiff

For a list of considerations in determining whether to oppose motion for leave to amend complaint, see *§ 395.70[1][b]*.

[2] Permissive Joinder of New Party Defendant

For a list of considerations in determining whether to oppose motion for leave to amend complaint, see *§ 395.70[2][a][ii]*

[3] Compulsory Joinder of New Party by Plaintiff

For a list of considerations in determining whether to oppose motion for leave to amend complaint, see *§ 395.70[3][a]*.

[4] Compulsory Joinder of New Party by Defendant

For a list of considerations in determining whether to oppose motion compelling joinder, see *§ 395.71[1]*.

[5] Compulsory Joinder of New Party by Omitted Party

For a list of considerations in determining whether to oppose motion compelling joinder, see *§ 395.72[1][a]*.

[6] Joinder of Party Having Interest in Property

For a list of considerations in determining whether to oppose permitting joinder, see *§ 395.72[2][a]*.

[7] Procedures for Objecting to Joinder

A defendant may object to joinder by filing a memorandum in opposition to the motion for leave to amend the

complaint to bring in a new party, or for an order compelling joinder of an omitted party. For forms of memoranda in opposition to joinder, see California Points and Authorities, Ch. 168, *Parties* .

NOTE:

To prevent any party joined under the provisions governing permissive joinder of parties [*Code Civ. Proc. §§ 378, 379*] from being embarrassed, delayed, or put to undue expense, the court may order separate trials, or any other order as the interests of justice may require [*Code Civ. Proc. § 379.5*]

[8] Preparation, Service, and Filing of Papers

For a discussion, forms, and procedures in preparing, filing, and serving amemorandum in opposition to bringing in a new party, see Ch. 372, *Motions and Orders* .

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§ 395.82 Defendant's Objection to Nonjoinder

[1] Compulsory Joinder of New Party by Plaintiff

For a list of considerations in determining whether to object to nonjoinder, see *§ 395.70[3][a]*.

[2] Compulsory Joinder of New Party by Defendant

For a list of considerations in determining whether to object to nonjoinder, see *§ 395.71[1]*.

[3] Compulsory Joinder of New Party by Omitted Party

For a list of considerations in determining whether to object to nonjoinder, see *§ 395.72[1][a]*.

[4] Joinder of Party Having Interest in Property

For a list of considerations in determining whether to object to nonjoinder, see *§ 395.72[2][a]*.

[5] Procedures for Objecting to Nonjoinder

A defendant may object to nonjoinder by:

- Answer [*Code Civ. Proc. 430.30(b)*]. For a discussion, forms, and procedures concerning answers, see Ch. 26, *Answers* .

- Demurrer [*Code Civ. Proc. §§ 430.10(d), 430.30(a), 430.70*]. For a discussion, forms, and procedures for preparing demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

NOTE:

Defendant may also file a notice of motion for an order compelling joinder [*see* *§ 395.107* for form] or a cross complaint bringing in a new party [***see*** *§ 395.71[1][b]*].

[6] Preparation, Service, and Filing of Papers

[a] Answer

☐ Prepare, file, and serve answer objecting to misjoinder. For a discussion, forms, and procedures, see Ch. 26, *Answers* .

[b] Demurrer

☐ Prepare demurrer with accompanying memorandum [*see* California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*] in accordance with the Code of Civil Procedure and the California Rules of Court [*Code Civ. Proc. §§ 430.10(d), 430.30(a), 430.70*; *Cal. Rules of Ct., Rules 3.1113(a), 3.1320*]. For a discussion, forms, and procedures, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

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[Reserved]

§§ 395.83[Reserved]

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§ 395.90 Intervenor's Guide

[1] Preliminary Determination of Nature of Prospective Intervenor's Interest in Action

☐ Determine whether or not the intervenor may intervene under *Code Civ. Proc. § 387(a)* in that he or she has an interest in:

☐ The matter in litigation;

☐ The success of either plaintiff or defendant; or

☐ Against both the plaintiff and defendant [*Code Civ. Proc. § 387(a)*; *see § 395.34*].

☐ Determine whether or not the intervenor has a right to mandatory intervenion in that he or she:

☐ Has an unconditional right to intervene conferred upon him or her by law; or

☐ Claims an interest relating to the property or transaction which is the subject of the action [*Code Civ. Proc. § 387(b)*; *see § 395.35*].

☐ Determine whether or not the intervenor has grounds to intervene under *Code Civ. Proc. § 387(a)* in that:

☐ He or she has a direct interest of such a character that the intervenor will either gain

or lose by the direct legal operation of the judgment [*see § 395.34[2]*]; or

☐ He or she has a consequential interest converted into a direct interest [*see § 395.34[4]*].

☐ If mandatory intervention is sought, determine whether or not the ability of the intervenor to protect his or her interest would be impaired or impeded by the disposition of the action when the interest could not be adequately represented by the existing parties [*see § 395.35*].

☐ Any provision of law confers an unconditional right to intervene; or

☐ The ability of the person seeking intervention to protect his or her claimed interest in the property or transaction which is the subject of the action would be impaired or impeded by the disposition of the action when that interest could not be adequately represented by the existing parties [*Code Civ. Proc. § 387(b)*; *see § 395.35*].

[2] Time of Intervention

☐ Determine at what stage in the proceedings intervention is to be made.

☐ Determine whether or not any applicable statute of limitations would affect nonparty's right to intervene. For example:

☐ The one-year statute of limitations governing tort actions [*see Code Civ. Proc. § 340*].

☐ Intervention under *Code Civ. Proc. § 387* must be timely [*see § 395.36*].

[3] Alternative Procedures Available

☐ Determine whether or not nonparty has authority to proceed under other applicable statutes, for example:

☐ Third parties who claim an interest in personal property that is either:

☐ Attached [*Code Civ. Proc. § 488.090*];

☐ Subject to claim and delivery [*Code Civ. Proc. § 514.050*]; or

☐ Levied on [*Code Civ. Proc. § 720.010 et seq.*].

☐ Nonparties challenging the validity of agency acts in regard to community development [*Code Civ. Proc. §§ 860-870*].

☐ Claimants to interest in property subject to eminent domain [*Code Civ. Proc. § 1250.230*].

☐ Nonparties having an interest in an action involving a corporation, for example:

☐ Creditor seeking to reach unpaid subscription of shareholder [*Corp. Code § 414*];

☐ Dissenting shareholder in action for appraisal of stock [*Corp. Code § 1304(a)*]; and

☐ Dissenting shareholder or creditor in corporation dissolution proceedings [*Corp. Code § 1800(c)*].

☐ Employer or employee in action against third party [*Lab. Code § 3853*].

☐ Nonparties ability to move, to set aside default judgments that affect their interest [*Code Civ. Proc. § 473(b), (d)*; *see* Ch. 489, *Relief From Judgments and Orders*].

☐ Nonparties ability to move to vacate judgments that affect their interest [*Code Civ. Proc. § 663*; *see also* Ch. 371, *Motions After Trial*].

☐ Determine whether or not the nonparty may be joined under the provisions of *Code Civ. Proc. §§ 378, 379, 389, 389.5*, for example:

☐ A nonparty's interest in the pending action may enable him or her to join another nonparty against whom he or she has a related claim.

☐ Other persons may share the nonparty's interest in the matter in litigation and the nonparty may wish to join them [*see § 395.10* et seq. for discussion of joinder].

☐ Determine whether the nonparty may intervene in a class action, for example:

☐ A nonparty who is a member of a class that is involved in a pending action may wish to intervene [*see Code Civ. Proc. § 382*; *Mallick v. Superior Court (1979) 89 Cal. App. 3d 434, 437-438, 152 Cal. Rptr. 503]* .

☐ A nonparty's interest in the matter in litigation may be shared by numerous other persons, thereby entitling him or her to use a complaint in intervention as the basis of bringing a class action [*see Code Civ. Proc. § 382*; *Eggers v. National Radio Co. (1929) 208 Cal. 308, 311-312, 281 P. 58* ; *see also* Ch. 120, *Class Actions*].

☐ Determine whether the nonparty may join in a pending action under other theories, for example:

☐ Substitution of parties [*see Code Civ. Proc. §§ 368.5, 375, 377.20 et seq.*; *see also Ch. 21, Amended and Supplemental Pleadings, § 21.27*, and Ch. 181, *Death and Survival Actions*]; and

☐ Interpleader [*see Code Civ. Proc. § 386*; *see also* Ch. 314, *Interpleader*].

[4] Mode of Intervention

Determine whether the nonparty should intervene by:

☐ Notice of motion [*see* [5], *below*, and §§ 395.120-395.122 for forms].

☐ Ex parte application [*see* [5], *below*, and § 395.123 for form].

☐ Ex parte application for order to show a cause why intervention should not be granted [*see* [5], *below*, and §§ 395.124, 395.125 for forms].

☐ Oral ex parte application [*see* [5], *below*, and § 395.126 for form].

☐ Alternative procedures [*see* [3], *above*].

[5] Preparation, Service, and Filing of Papers

☐ To intervene by notice of motion:

☐ Prepare proposed complaint in intervention [*see § 395.127* for form; for discussion of the requirements for a complaint in intervention, *see § 395.38[2]*.

☐ Prepare a notice of motion for leave to file a complaint in intervention [*see § 395.120* for form].

☐ Prepare a declaration in support of the motion [*see § 395.121* for form].

☐ Prepare a memorandum in support of the motion [*see* California Points and Authorities, Ch. 124, *Intervention*].

☐ Prepare an order granting leave to intervene [*see § 395.122* for form].

☐ File the original copy with the clerk of the court and pay the appropriate filing fee, if any, at the time the papers are presented to the clerk [*Gov. Code § 70612*; *see* Ch. 372, *Motions and Orders* , for procedure and forms].

☐ Serve the papers on the attorneys for both the plaintiff and the defendant in accordance with the Code of Civil Procedure [*see Code Civ. Proc. §§ 413.10-417.40*; *see also* Ch. 518, *Service of Summons and Papers*].

☐ Follow further procedures for noticed motions [*see* Ch. 372, *Motions and Orders*].

☐ To intervene by ex parte application:

☐ Prepare a proposed complaint in intervention [*see § 395.127* for form].

☐ Prepare a declaration, memorandum, and an order in support of or granting leave to intervene [*see § 395.123* for form].

☐ Present the papers to the appropriate court [*see* Ch. 372, *Motions and Orders*].

☐ If granted, serve the papers in accordance with the Code of Civil Procedure [*see* Ch. 518, *Service of Summons and Papers*].

☐ See Ch. 372, *Motions and Orders* , for discussion of procedure on ex parte application.

☐ To intervene by ex parte application for order to show cause, see *§§ 395.124*, *395.125* for forms and number 2, *above*.

☐ To intervene by an oral ex parte application, the intervenor must prepare the appropriate papers, file, and serve as outlined in numbers 1 and 2, *above* [*see § 395.126* for form].

☐ To intervene by cross complaint, the intervenor must prepare, file, and serve the appropriate papers as outlined in 1 and 2, *above* [for forms and procedures, *see* Ch. 123, *Complaints and Cross Complaints*].

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Volume 34: Newspapers thru Parties-Chs. 386-396
Chapter 395 PARTIES
PART IV. PROCEDURAL CHECKLIST
B. INTERVENTION

34-395 California Forms of Pleading and Practice--Annotated § 395.91

§ 395.91 Opposing Party's Guide

[1] Preliminary Determinations

See *§ 395.90[1] -[5]* for matters to be considered in determining whether intervenor has made a proper and timely application for leave to file a complaint in intervention.

[2] Objecting to Intervention

☐ If intervenor proceeds by way of noticed motion, prepare, file, and serve a memorandum in opposition to the motion for leave to intervene.

☐ If the intervenor has obtained leave to intervene by an ex parte application:

☐ Prepare, serve, and file a general demurrer in accordance with the Code of Civil Procedure [*see Code Civ. Proc. §§ 430.10(e), 430.50*; *Cal. Rules of Ct., Rules 3.1113(a), 3.1320*; for forms and procedures, *see* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*]; or

☐ Prepare, serve, and file a motion to strike in the appropriate manner [*see Code Civ. Proc. § 435*; *see also* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*].

☐ If an order to show cause why intervention should not be granted is issued, prepare, serve, and file in the appropriate manner an affidavit or declaration, along with a supporting memorandum in opposition to intervention [*see § 395.38[3]*].

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34-395 California Forms of Pleading and Practice--Annotated §§ 395.92-395.99

[Reserved]

§§ 395.92[Reserved]

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Volume 34: Newspapers thru Parties-Chs. 386-396
Chapter 395 PARTIES
PART V. FORMS
A. Joinder of Parties

34-395 California Forms of Pleading and Practice--Annotated § 395.100

§ 395.100 Proceedings for Leave to Amend Complaint [Code Civ. Proc. § 473(a)] to Bring in New Party--Permissive Joinder by Plaintiff of Party Plaintiff [Code Civ. Proc. § 378]--Notice of Motion

[1] FORM Proceedings for Leave to Amend Complaint [Code Civ. Proc. § 473(a)] to Bring in New Party--Permissive Joinder by Plaintiff of Party Plaintiff [Code Civ. Proc. § 378]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO AMEND COMPLAINT TO BRING IN NEW PARTY PLAINTIFF
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*name*], defendant, and to _____ [*name*], his/her attorney of record:

[*EITHER*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of]

this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* plaintiff] will move for an order granting plaintiff leave to amend the complaint herein to bring _____ [*name*] into this action as a party plaintiff. The motion will be made on the grounds that (1) the amendment is and will be in furtherance of justice, and (2) _____ [*name of new party*] has a right to relief against the defendant in this action arising out of the same _____ [transaction *or* occurrence *or* series of transactions *or* series of occurences] and there exists a common question of law or fact in that _____ [*specify particular ground, e.g.,* the new party is a person seeking damages for personal injury arising out ofthe same incident involving the same defendant].

[*OR*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], plaintiff will move for an order granting plaintiff leave to amend the complaint herein to bring _____ [*name*] into this action as a party plaintiff. The motion will be made on the grounds that (1) the amendment is and will be in furtherance of justice, and (2) _____ [*name of new party*] has a _____ [claim *or* right *or* interest] adverse to the defendant in the _____ [property *or* controversy] which is the subject of the action herein.

The motion will be based on this notice of motion and the proposed amended complaint, on the declaration of _____ [*name*] and the memorandum served and filed herewith, on the papers and records and file herein, and on such oral and documentary evidence as may be presented at the hearing on the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The notice of motion in [1], *above*, is for use by a plaintiff to secure a court order permitting the plaintiff to amend his or her complaint, pursuant to *Code Civ. Proc. § 473(a)*, to bring in a new party plaintiff under the provisions for permissive joinder of plaintiffs [*Code Civ. Proc. § 378*] when leave of the court is being sought in futherance of justice. However, plaintiff may amend the complaint bringing in the new party as a matter of course before the answer or demurrer is filed [*Code Civ. Proc. § 472*]. If such is the case, a notice of motion would not be necessary. This form would be used when the nonjoined plaintiff wishes to join in plaintiff's action.

If the motion is made on the ground that the omitted party has a right to relief against the defendant arising out of the same transaction [*Code Civ. Proc. § 378(a)(1)*], the first alternative ground (2) should be used. If the motion is on ground that the omitted party has an interest adverse to the defendant in property or in the controversy which is the subject of the action [*Code Civ. Proc. § 378(a)(2)*], the second alternative ground (2) should be used.

Counsel should insert where indicated the specific factual grounds supporting joinder, for example, that the new party is a person seeking damages for personal injury arising out of the same incident involving the same defendant [*see Emery v. Pacific Employers Ins. Co. (1937) 8 Cal. 2d 663, 666, 67 P.2d 1046]* .

For further examples of permissive joinder of parties plaintiff, see *§ 395.10 et seq. and § 395.50* et seq. for Research Guide to this part, *above*. For a discussion, forms, and procedures relating to amendment of pleadings, see Ch. 21,

Amended and Supplemental Pleadings .

[3] Accompanying Papers

A supporting memorandum must be filed and a copy served with the motion in [1], *above* [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, *see* Ch. 417, *Points and Authorities* .

[4] Related Uses

With appropriate modifications, this form may be used to request request leave to amend a cross complaint. In that case, *Code Civ. Proc. § 428.20* would also provide the authority for the motion. A cross complainant could be joined if, had the cross complaint been filed as an independent action, the joinder would have been permitted by *Code Civ. Proc. § 378* [*see Code Civ. Proc. § 428.20*].

[5] Cross References

For forms of notice of motion, declaration, and order granting or denying motion, and related papers for general use, see Ch. 372, *Motions and Orders*

For forms and discussion of amended pleadings generally, see Ch. 21, *Amended and Supplemental Pleadings*

For memoranda in support of and in opposition to permissive joinder of a new party plaintiff, see California Points and Authorities, Ch. 168, *Parties*

For memoranda in support of and in opposition to joinder of a new party plaintiff, see California Points and Authorities, Ch. 16, *Amended and Supplemental Pleadings*

For memoranda in support of and in opposition to demurrers for misjoinder of parties plaintiff, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*

California Civil Procedure Before Trial, vol. 1, Ch. 21, *Determining, Joining, and Naming Parties*, § 21.10 (Cal. CEB 3d ed. 2000)

Witkin, California Procedure, vol. 4, *Pleading*, §§ 160, 175-178, 301, 304 (4th ed. 1997)

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Chapter 395 PARTIES
PART V. FORMS
A. Joinder of Parties

34-395 California Forms of Pleading and Practice--Annotated § 395.101

§ 395.101 Proceedings for Leave to Amend Complaint [Code Civ. Proc. § 473(a)] to Bring in New Party--Permissive Joinder by Plaintiff of Party Plaintiff [Code Civ. Proc. § 378]--Supporting Declaration [Code Civ. Proc. § 2015.5]

[1] FORM Proceedings for Leave to Amend Complaint [Code Civ. Proc. § 473(a)] to Bring in New Party--Permissive Joinder by Plaintiff of Party Plaintiff [Code Civ. Proc. § 378]--Supporting Declaration [Code Civ. Proc. § 2015.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	DECLARATION OF
	)	_____ [*name*] IN SUPPORT OF
_____ [*name*],	)	MOTION
Plaintiff,	)	FOR LEAVE TO AMEND
vs.	)	COMPLAINT TO BRING IN
_____ [*name*],	)	NEW PARTY PLAINTIFF
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, the plaintiff in the above-described action].

2. This declaration is in support of plaintiff's motion to amend his/her complaint bringing in _____ [*name*] as a new party plaintiff to this action.

3. _____ [*Set forth nature of plaintiff's action and existing parties, e.g.*, Plaintiff's action is for damages against _____ (*name*), defendant arising from personal injuries sustained in an automobile accident].

[*EITHER, if relief is sought under Code Civ. Proc. § 378(a)(1)*]

4. _____ [*Name of omitted party*] has a right against _____ [*name*], defendant, in this action because _____ [*state facts showing that omitted party has a right to relief jointly, severally, or in the alternative against the defendant arising out of the same transaction or occurrence, or series of transactions or occurrences, e.g.*, he/she was a pedestrian injured in the same automobile accident involving the plaintiff, and by the same person, _____ (*name*), who is the defendant in this action, at the same time and in the same manner _____ (*state further relevant facts*)]. The common question of _____ [*specify question(s) of law or fact, e.g.*, defendant's negligence] will arise in this action.

[*OR, if relief is sought under Code Civ. Proc. § 378(a)(2)*]

4. _____ [*Name of omitted party*] has a right against _____ [*name*], defendant, in this action because _____ [*state facts showing that omitted party has a right, claim, or interest adverse to the defendant in the property or controversy which is the subject of the action e.g.*, it is a corporation in receivership of which _____ (*name*), plaintiff, has been appointed receiver and is the injured party in fact, having paid to _____ (*name*), defendant in this action, the usurious interest demanded by defendant and which plaintiff seeks to recover in this action _____ (*state further relevant facts*)].

[*CONTINUE*]

5. _____ [*Name of omitted party*] wishes to be joined as a plaintiff in this action as indicated in his/her declaration in support of this motion.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The declaration in [1], *above*, is for use by an attorney, or the plaintiff, in support of a motion pursuant to *Code Civ. Proc. § 473(a)* by plaintiff for leave to amend his or her complaint to bring in a new party plaintiff. For a form of notice of motion and motion for leave to amend to complaint to bring in new party plaintiff, see *§ 395.100. Code Civ. Proc. § 2009* authorizes a party to use an affidavit to support the motion, and *Code Civ. Proc. § 2015.5* authorizes a declaration under penalty of perjury in lieu of an affidavit. If the motion is made under *Code Civ. Proc. § 378(a)(1)* on the ground that the omitted party has a right to relief against the defendant arising out of the same transaction or occurrence, or

series of transactions or occurrences, the first alternative Paragraph 4 should be used. If the motion is made under *Code Civ. Proc. § 378(a)(2)* on the ground that the omitted party has a claim, right, or interest adverse to the defendant in the property or controversy which is the subject of the action, the second alternative Paragraph 4 should be used. *Code Civ. Proc. § 2015.5* authorizes a declarationunder penalty of perjury, as in the above form, in lieu of an affidavit. For a form of affidavit, see Ch. 15, *Affidavits, Certificates, and Declarations* .

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Chapter 395 PARTIES
PART V. FORMS
A. Joinder of Parties

34-395 California Forms of Pleading and Practice--Annotated § 395.102

§ 395.102 Proceedings for Leave to Amend Complaint [Code Civ. Proc. § 473(a)] to Bring in New Party--Permissive Joinder by Plaintiff of Party Defendant [Code Civ. Proc. § 379]--Notice of Motion

[1] FORM Proceedings for Leave to Amend Complaint [Code Civ. Proc. § 473(a)] to Bring in New Party--Permissive Joinder by Plaintiff of Party Defendant [Code Civ. Proc. § 379]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION TO
Plaintiff,	)	AMEND COMPLAINT TO BRING IN NEW
vs.	)	PARTY DEFENDANT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*name*], defendant, and to _____ [*name*], his/her attorney of record:

[*EITHER*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of]

this court, located at _____ [*street address*], _____ [*city*], plaintiff will move for an order granting plaintiff leave to amend the complaint herein to bring _____ [*name*] into this action as a party defendant. The motion will be made on the grounds that (1) the amendment is and will be in furtherance of justice, and (2) _____ [*name of plaintiff*] has a right to relief against the omitted party in the action herein arising out of the same _____ [transaction *or* occurrence *or* series of transactions *or* series of occurrences] and there exists a common question of law or fact in that _____ [*specify the particular ground, e.g.*, that the new party is liable as guarantor for the debt of the defendant on a promissory note] [, and (3) _____ (*name of plaintiff*) has a doubt as to the person from whom he/she is entitled to seek redress].

[*OR*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], plaintiff will move for an order granting plaintiff leave to amend the complaint herein to bring _____ [*name*] into this action as a party defendant. The motion will be made on the grounds that (1) the amendment is and will be in furtherance of justice, and (2) _____ [*name of plaintiff*] has a _____ [claim *or* right *or* interest] adverse to the omitted party in the _____ [property *or* controversy] which is the subject of the action herein [, and (3) _____ (*name of plaintiff*) has a doubt as to the person from whom he/she is entitled to seek redress].

The motion will be based on this notice of motion and the proposed amended complaint, on the declaration of _____ [*name*] and the memorandum served and filed herewith, on the papers and records and file herein, and on such oral and documentary evidence as may be presented at the hearing on the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The form in [1], *above*, is for use by plaintiff to secure a court order permitting plaintiff to amend his or her complaint, pursuant to *Code Civ. Proc. § 473*, to bring in a new party defendant under the provisions of permissive joinder of defendants, pursuant to *Code Civ. Proc. § 379*, when leave of the court is being sought in furtherance of justice. However, plaintiff may amend the complaint bringing in the new party as a matter of course before the answer or demurrer is filed [*Code Civ. Proc. § 472*]. In that case, a notice of motion would not be necessary.

If the motion is made on the ground that the plaintiff has a right to relief against the new party arising out of the same transaction [*Code Civ. Proc. § 379(a)(1)*], the first alternative ground (2) should be used. If the motion is made on the ground that the plaintiff has an interest adverse to the new party in the property or the controversy which is the subject of the action [*Code Civ. Proc. § 379(a)(2)*], the second alternative ground (2) should be used. If the motion is on grounds that plaintiff is in doubt as to who is liable--defendant, the new party, or both--then the additional ground (3) should be used [*Code Civ. Proc. § 379(c)*].

Counsel should insert where indicated the specific factual grounds supporting joinder, for example, that the new party is liable as a guarantor on a promissory note made by the defendant [*see Rodabaugh v. Kauffman (1921) 53 Cal. App. 676, 682, 200 P. 747]* . For further examples of permissive joinder of parties defendant, see *§ 395.10 et seq. and §*

395.50 et seq. for Research Guide. For a discussion, forms, and procedures relating to amendment of pleadings, see Ch. 21, *Amended and Supplemental Pleadings* .

[3] Accompanying Papers

A supporting memorandum must be filed and a copy served with the foregoing motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*].

[4] Requirements for Joinder in Negligence Action

In joining two or more defendants under *Code Civ. Proc. § 379(a)*, plaintiff must show a nexus between defendants. However, when joining additional defendants pursuant to *Code Civ. Proc. § 379(c)*, plaintiff need only set forth facts showing an injury, negligence of two or more defendants or successive or concurrent tortfeasors, and doubt as to who is liable, either one of the defendants, or both, and to what extent [*Landau v. Salam (1971) 4 Cal. 3d 901, 904-905, 95 Cal. Rptr. 46, 484 P.2d 1390]* .

[5] Related Uses

With appropriate modifications, this form may be used to support a motion for leave to amend a cross complaint. In that case, *Code Civ. Proc. § 428.20* would also provide the authority for the motion. A cross complainant could be joined if, had the cross complaint been filed as an indepedent action, the joinder would have been permitted by *Code Civ. Proc. § 378* [*see Code Civ. Proc. § 428.20*].

[6] Cross References

For forms of notice of motion, declaration, and order granting or denying motion, and related papers for general use, see Ch. 372, *Motions and Orders*

For forms and discussion of amended pleadings generally, see Ch. 21, *Amended and Supplemental Pleadings*

For memoranda of points and authorities in support of and in opposition to permissive joinder of a new party defendant, see California Points and Authorities, Ch. 168, *Parties*

For memoranda of points and authorities in support of and in opposition to joinder of a new party defendant, see California Points and Authorities, Ch. 16, *Amended and Supplemental Pleadings*

For memoranda of points and authorities in support of and in opposition to demurrers for misjoinder of parties defendant, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*

California Civil Procedure Before Trial, vol. 1, Ch. 21, *Determining, Joining, and Naming Parties,* § 21.11 (Cal CEB 3d ed. 2000)

Witkin, California Procedure, vol. 4, *Pleading,* §§ 160, 180-189, 191-192, 297 (4th ed. 1997)

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PART V. FORMS
A. Joinder of Parties

34-395 California Forms of Pleading and Practice--Annotated § 395.103

§ 395.103 Proceedings for Leave to Amend Complaint [Code Civ. Proc. § 473(a)] to Bring in New Party--Permissive Joinder by Plaintiff of Party Defendant [Code Civ. Proc. § 379]--Supporting Declaration

[1] FORM Proceedings for Leave to Amend Complaint [Code Civ. Proc. § 473(a)] to Bring in New Party--Permissive Joinder by Plaintiff of Party Defendant [Code Civ. Proc. § 379]--Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	DECLARATION OF
	)	_____ [*name*] IN SUPPORT OF
_____ [*name*],	)	MOTION FOR LEAVE TO
Plaintiff,	)	AMEND COMPLAINT TO BRING
vs.	)	IN NEW PARTY DEFENDANT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, the plaintiff in the above-described action].

2. This declaration is in support of plaintiff's motion to amend his/her complaint bringing in _____ [*name*] as a new party defendant to this action.

3. _____ [*Set forth nature of plaintiff's action and existing parties, e.g.*, Plaintiff's action is for damages against _____ (*name*), defendant for personal injury sustained in an automobile accident].

[*EITHER, if relief is sought under Code Civ. Proc. § 379(a)(1)*]

4. _____ [*Name of plaintiff*] has a right against _____ [*name*], defendant, in this action because _____ [*state facts showing that plaintiff has a right to relief jointly, severally, or in the alternative against the omitted party arising out of the same transaction or occurrence, or series of transactionsor occurrences, e.g.*, he/she is the owner of the automobile driven by _____ (*name*), defendant in this action, which struck plaintiff causing plaintiff to be injured _____ (*state further relevant facts*)]. The common question(s) of _____ [*specify common questions of law or fact*] will arise in this action.

[*OR, if relief is sought under Code Civ. Proc. § 379(a)(2)*]

4. _____ [*Name of plaintiff*] has a right against _____ [*name of omitted party*] in this action because _____ [*state facts showing that plaintiff has a right, claim, or interest adverse to the omitted party in the property or controversy which is the subject of the action, e.g.*, _____ (*name of omitted party*), sheriff of this county, accepted payment from _____ (*name*), defendant, as tender in redemption of the property which is the subject of the action, an amount inadequate to meet the price paid for, thereby making _____ (*name of omitted party*) a proper party in this action for declaratory relief to determine plaintiff's interest in the property in question. _____ (*State further relevant facts*)].

[*ADD, if plaintiff in doubt as to liability under Code Civ. Proc. § 379(c)*]

5. _____ [*Name of plaintiff*], however, is in doubt as to the person from whom he/she is entitled to redress in that _____ [*state facts showing that plaintiff entertains a doubt as to the defendant, the omitted party, or both, and to what extent each is liable, e.g.*, _____ (*name of omitted party*) may be quantitatively or alternately liable as a successive wrongdoer to plaintiff for personal injuries sustained by the negligent operation of an automobile by _____ (*name*), defendant, and/or by the negligent maintenance of property by _____ (*name of omitted party*) in that _____ (*state further relevant facts*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The declaration in [1], *above*, is for use by an attorney, or the plaintiff, in support of a motion pursuant to *Code Civ. Proc. § 473(a)* by plaintiff for leave to amend his or her complaint to bring in a new party defendant. *Code Civ. Proc. § 2009* authorizes a party to use an affidavit to support the motion, and *Code Civ. Proc. § 2015.5* authorizes a declaration under penalty of perjury in lieu of an affidavit. If the motion is made under *Code Civ. Proc. § 379(a)(1)* on the ground

that the plaintiff has a right to relief against the omitted party arising out of the same transaction or occurrence, or series of transactions or occurrences, the first alternative Paragraph 4 should be used. If the motion is made under *Code Civ. Proc. § 379(a)(2)* on the ground that the plaintiff has claim, right, or interest adverse to the omitted party in the property or controversy which is the subject of the action, the second alternative Paragraph 4 should be used. If the plaintiff is in doubt as to the person from whom plaintiff is entitled to redress, the added Paragraph 5 should be used in addition to either of the alternative Paragraphs 4. For a form of notice of motion and motion to amend complaint to bring in new party defendant, see *§ 395.102*.

[3] Cross References

For a form of notice of motion and motion to amend complaint to bring in new party defendant, see *§ 395.102*.

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34-395 California Forms of Pleading and Practice--Annotated § 395.104

§ 395.104 Proceedings for Leave to Amend Complaint [Code Civ. Proc. § 473(a)] to Bring in New Party--Compulsory Joinder by Plaintiff of Party Defendant [Code Civ. Proc. § 389]--Notice of Motion [Code Civ. Proc. § 1010]

[1] FORM Proceedings for Leave to Amend Complaint [Code Civ. Proc. § 473(a)] to Bring in New Party--Compulsory Joinder by Plaintiff of Party Defendant [Code Civ. Proc. § 389]--Notice of Motion [Code Civ. Proc. § 1010]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION TO
Plaintiff,	)	AMEND COMPLAINT TO BRING IN NEW
vs.	)	PARTY DEFENDANT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*name*], defendant, and to _____ [*name*], his/her attorney of record:

[*EITHER*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], plaintiff will move for an order granting plaintiff leave to amend the complaint herein to bring _____ [*name*] into this action as a party defendant [*if party to be joined is plaintiff who will not consent, add:* pursuant to *Section 382 of the Code of Civil Procedure*]. The motion will be made on the grounds that (1) the amendment is and will be in furtherance of justice, and (2) in the absence of _____ [*name of omitted party*], complete relief cannot be accorded among those already parties in that _____ [*specify particular ground, e.g.*, the omitted party is a limited partner required to be joined in an action to dissolve partnership]. _____ [*Name of omitted party*] is a person who is subject to service of process and whose joinder will not deprive this court of jurisdiction over the subject matter of this action.

[*OR*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], plaintiff will move for an order granting plaintiff leave to amend the complaint herein to bring _____ [*name*] into this action as a party defendant [*if party to be joined is plaintiff who will not consent, add:* pursuant to *Section 382 of the Code of Civil Procedure*]. The motion will be made on the grounds that (1) the amendment is and will be in furtherance of justice, and (2) _____ [*name of omitted party*] claims an interest relating to the subject of the action and is so situated that the disposition of the action in his/her absence may _____ [as a practical matter impair or impede his/her ability to protect that interest *or* leave _____ (*specify party to the action*) subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his/her claimed interest] in that _____ [*specify particular ground, e.g.*, the omitted party is a limited partner required to be joined in an action to dissolve partnership]. _____ [*Name of omitted party*] is a person who is subject to service of process and whose joinder will not deprive this court of jurisdiction over the subject matter of this action.

[*CONTINUE*]

The motion will be based on this notice of motion and the proposed amended complaint, on the declaration of _____ [*name*] and the memorandum of points and authorities served and filed herewith, on the papers and records and file herein, and on such oral and documentary evidence as may be presented at the hearing on the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The form in [1], *above*, is for use by plaintiff to secure a court order permitting plaintiff to amend his or her complaint, pursuant to *Code Civ. Proc. § 473(a)*, to bring in a new party under the provisions of compulsory joinder of parties [*see Code Civ. Proc. § 389*] when leave of the court is being sought in furtherance of justice. Plaintiff may amend the complaint bringing in the new party as a matter of course before the answer or demurrer is filed [*Code Civ. Proc. § 472*].

If the motion is made on the ground that in the absence of the omitted party complete relief cannot be accorded among those already parties [*see Code Civ.Proc. § 389(a)(1)*], the first alternative ground (2) should be used. If the motion is made on the ground that the omitted party claims an interest relating to the subject of the action [*Code Civ. Proc. § 389(a)(2)*], the second alternative ground (2) should be used with the appropriate alternative ground [*Code Civ. Proc. § 389(a)(2)(i)* or *(ii)*].

The form is for use in joining a defendant. It may also be used to join as a defendant pursuant to *Code Civ. Proc. § 382* a plaintiff whose consent to joinder cannot be obtained.

Counsel should insert where indicated the specific factual grounds supporting joinder, for example, that the omitted party is a limited partner required to be joined in an action to dissolve the partnership [*Kraus v. Willow Park Public Golf Course (1977) 73 Cal. App. 3d 354, 369, 140 Cal. Rptr. 744]* . For further examples of compulsory joinder of parties, see *§ 395.19* and *§ 395.50* et seq. for Research Guide.

[3] Accompanying Papers

A supporting memorandum must be filed and a copy served with the motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, *see* Ch. 417, *Points and Authorities* .

[4] Related Uses

With appropriate modifications, the form may be used to request leave to amend a cross complaint. In that case, *Code Civ. Proc. § 428.20* would also provide the authority for the motion. A cross complainant could be joined if, had the cross complaint been filed as an independent action, the joinder would have been permitted by *Code Civ. Proc. § 378* [*see Code Civ. Proc. § 428.20*].

[5] Cross References

For forms of notice of motion, declaration, and order granting or denying motion, and related papers for general use, see Ch. 372, *Motions and Orders*

For forms and discussion of amended pleadings generally, see Ch. 21, *Amended and Supplemental Pleadings*

For memoranda in support of and in oppositon to compulsory joinder of a new party, see California Points and Authorities, Ch. 168, *Parties*

For memoranda in support of and in opposition to joinder of a new party see California Points and Authorities, Ch. 16, *Amended and Supplemental Pleadings*

For memoranda in support of and in opposition to demurrers for misjoinder or nonjoinder of parties, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*

California Civil Procedure Before Trial, vol. 1, Ch. 21, *Determining, Joining, and Naming Parties,* §§ 21.7-21.9 (Cal CEB 3d ed. 2000)

Witkin, California Procedure, vol. 4, *Pleading,* §§ 158-159, 171-174, 190 (4th ed. 1997)

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Volume 34: Newspapers thru Parties-Chs. 386-396
Chapter 395 PARTIES
PART V. FORMS
A. Joinder of Parties

34-395 California Forms of Pleading and Practice--Annotated § 395.105

§ 395.105 Proceedings for Leave to Amend Complaint [Code Civ. Proc. § 473(a)] to Bring in New Party--Compulsory Joinder by Plaintiff of Party Defendant [Code Civ. Proc. § 389]--Supporting Declaration

[1] FORM Proceedings for Leave to Amend Complaint [Code Civ. Proc. § 473(a)] to Bring in New Party--Compulsory Joinder by Plaintiff of Party Defendant [Code Civ. Proc. § 389]--Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	DECLARATION OF
	)	_____ [*name*] IN SUPPORT
_____ [*name*],	)	OF MOTION FOR LEAVE TO
Plaintiff,	)	AMEND COMPLAINT TO
vs.	)	BRING IN NEW PARTY
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, the plaintiff in the above-described action].

2. This declaration is in support of plaintiff's motion to file an amended complaint bringing in _____ [*name*] as a new party defendant to this action.

3. _____ [*Set forth nature of plaintiff's action and existing parties, e.g.,* The action filed by plaintiff is an action brought by him/her against the general partners of the partnership to dissolve the partnership and to seek a declaration as to the rights and liabilities of the various partners *or other allegations as appropriate*].

[*EITHER, if relief is sought under Code Civ. Proc. § 389(a)(1)*]

4. _____ [*Name of omitted party*] has a right against _____ [*name of plaintiff or defendant*] because _____ [*state facts showing that in the absence of omitted party, complete relief cannot be accorded among those already parties, e.g.,* he/she is a limited partner in the partnership and a final decree in the action for dissolution cannot be had that disposes of all the questions involved in the ultimate disposition of the partnership property, its assets, or liabilities in that _____ (*state further relevant facts*)].

[*OR, if relief is sought under Code Civ. Proc. § 389(a)(2)(i)*]

4. _____ [*Name of omitted party*] has a right against _____ [*name of plaintiff or defendant*] because _____ [*state facts showing that omitted party claims an interest relating to the subject of the action and is so situated that the disposition of the action in his/her absence may, as a practical matter, impair or impede his/her ability to protect that interest, e.g.,* he/she is a limited partner and therefore required to be joined in an action for dissolution of the partnership to assure, that in the disposition of partnership property or accounting of partnership assets, his/her proportionate share of the property or assets will be correctly apportioned since in his/her absence the property may be disposed of in a manner that would impair or impede his/her ability to protect his/her interest in the property. _____ (*State further relevant facts*)].

[*OR, if relief is sought under Code Civ. Proc. § 389(a)(2)(ii)*]

4. _____ [*Name of omitted party*] has a right against _____ [*name of plaintiff or defendant*] because _____ [*state facts showing that omitted party claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, leave* _____ (*name of existing party subject to substantial risk of incurring double, multiple, or inconsistent obligations, e.g.,* he/she is a limited partner and therefore required to be joined in an action for dissolution of the partnership's property and assets including his/her share. Since these may be insufficient to meet the liabilities of the partnership, any disposition in the action in the absence of him/her would leave _____ (*name of existing party*) subject to further liability in that _____ (*state further relevant facts*)].

[*ADD, if omitted party is nonconsenting plaintiff*]

5. _____ [*Name of omitted party*] would not consent to be a plaintiff in this action. _____ [*Specify attempt to obtain consent*]. Therefore this motion is being made to add _____ [*name of omitted party*] as a party defendant pursuant to *Section 382 of the Code of Civil Procedure.*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The declaration in [1], *above*, is for use by an attorney or the plaintiff in support of a motion by plaintiff for leave to amend his or her complaint to bring in a new party defendant under the provisions of compulsory joinder [*Code Civ. Proc. § 389*]. *Code Civ. Proc. § 2009* authorizes a party to use an affidavit to support the motion, and *Code Civ. Proc. § 2015.5* authorizes a declaration under penalty of perjury in lieu of an affidavit. If the motion is made under *Code Civ. Proc. § 389(a)(1)* on the ground that complete relief cannot be accorded among those already parties in the omitted party's absence, the first alternative Paragraph 4 should be used. If the motion is made under *Code Civ. Proc. § 389(a)(2)(i)* on the ground that the omitted party has an interest in the subject of the action and as a practical matter the disposition of the action in his or her absence will impair the ability to protect that interest, the second alternative Paragraph 4 should be used. If the motion is made under *Code Civ. Proc. § 389(a)(2)(ii)* on the ground that the omitted party's interest in the subject of the action may subject him or her to substantial risk of incurring double, multiple, or otherwise inconsistent obligations should the action be disposed in his or her absence, the third alternative Paragraph 4 should be used.

Optional Paragraph 5 should be used if the moving party is seeking to add as a defendant, pursuant to *Code Civ. Proc. § 382*, a plaintiff who will not consent to be joined.

For a related form of notice of motion and motion to amend complaint to bring in new party defendant under the provisions of compulsory joinder, see *§ 395.104*.

[3] Cross References

For a related form of notice of motion and motion to amend complaint to bring in new party defendant under the provisions of compulsory joinder, see *§ 395.104*.

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Chapter 395 PARTIES
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A. Joinder of Parties

34-395 California Forms of Pleading and Practice--Annotated § 395.106

§ 395.106 Proceedings for Leave to Amend Complaint [Code Civ. Proc. § 473(a)] to Bring in New Party--Permissive [Code Civ. Proc. §§ 378, 379] or Compulsory [Code Civ. Proc. § 389] Joinder by Plaintiff of Party Plaintiff or Defendant--Order Granting Motion

[1] FORM Proceedings for Leave to Amend Complaint [Code Civ. Proc. § 473(a)] to Bring in New Party--Permissive [Code Civ. Proc. §§ 378, 379] or Compulsory [Code Civ. Proc. § 389] Joinder by Plaintiff of Party Plaintiff or Defendant--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Dept: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*name*], plaintiff, for an order granting leave to amend his/her complaint to bring in a new party _____ [plaintiff *or* defendant] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted as follows:

[*EITHER, if new party plaintiff*]

The motion is granted and plaintiff is granted leave to amend his/her complaint herein to join into this action _____ [*name of new party*] as a new party plaintiff.

[*OR, if new party defendant*]

The motion is granted and plaintiff is granted leave to amend his/her complaint herein to join into this action _____ [*name of new party*] as a new party defendant. Summons is to be issued thereon, and plaintiff is to serve _____ [*name of new party*] with a copy of the summons and a copy of the amended complaint within _____ days from the date of this order.

[*CONTINUE*]

Dated: _____.

_____ [*name*]
Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, grants leave to the plaintiff to amend his or her complaint to bring in a new party plaintiff or defendant under the provisions of permissive joinder [*Code Civ. Proc. §§ 378, 379*; *see §§ 395.100* and *395.102*], or a new party defendant under the provisions of compulsory joinder [*Code Civ. Proc. § 389*; *see § 395.104*]. The order may be submitted to the court for signature either with the filing of the notice of motion or after the hearing on the motion. Under *Cal. Rules of Ct., Rule 3.1312*, the prevailing party prepares the order. Counsel should check local court practice to determine the appropriate procedure.

For an order bringing in a new party plaintiff, the first alternative paragraph should be used. For an order bringing in a new party defendant, the second alternative paragraph should be used [*see Code Civ. Proc. §§ 412.10-412.30, 471.5*]. For a discussion, forms, and procedures relating to service and summons, see Ch. 518, *Service of Summons and Papers* .

[3] Cross References

For a discussion, forms, and procedures relating to service and summons, see Ch. 518, *Service of Summons and Papers* .

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34-395 California Forms of Pleading and Practice--Annotated § 395.107

§ 395.107 Proceedings for Order Compelling Joinder of Omitted Party [Code Civ. Proc. § 389]--By Defendant or Omitted Party--Notice of Motion

[1] FORM Proceedings for Order Compelling Joinder of Omitted Party [Code Civ. Proc. § 389]--By Defendant or Omitted Party--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER COMPELLING JOINDER OF OMITTED PERSON AS A PARTY _____ [PLAINTIFF *or* DEFENDANT]
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*name*], plaintiff, and to _____ [*name*], his/her attorney of record:

[*EITHER*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant *or name of omitted party*] will move for an order compelling plaintiff to bring _____ [*name of omitted party*] into this action as a new party _____ [plaintiff *or* defendant]. The motion will be made on the grounds that in the absence of _____ [*name of omitted party*], complete relief cannot be accorded among those already parties in that _____ [*specify particular ground, e.g.,* the omitted party is a limited partner required to be joined in an action to dissolve partnership]. [_____ (*Name of omitted party*) is a person who is subject to service of process and whose joinder will not deprive this court of jurisdiction over the subject matter of this action.]

[*OR*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant *or name of omitted party*] will move for an order compelling plaintiff to bring _____ [*name of omitted party*] into this action as a new party _____ [plaintiff *or* defendant]. The motion will be made on the grounds that _____ [*name of omitted party*] claims an interest relating to the subject of the action and is so situated that the disposition of the action in his/her absence may _____ [as a practical matter impair or impede his/her ability to protect that interest *or* leave _____ (*party to the action*) subject to substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his/her claimed interest] in that _____ [*specify particular ground, e.g.,* the omitted party is a limited partner required to be joined in an action to dissolve partnership]. [_____ (*Name of omitted party*) is a person who is subject to service of process and whose joinder will not deprive this court of jurisdiction over the subject matter of this action.]

[*CONTINUE*]

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the supporting memorandum served and filed herewith, on the papers and records and file herein, and on such oral and documentary evidence as may be presented at the hearing on the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

[2] Use of Form

The form in [1], *above*, is for use by defendant or an omitted party to secure an order requiring the plaintiff to amend his or her complaint to bring in a new party under the provisions of compulsory joinder of parties pursuant to *Code Civ. Proc. § 389*. For a form of notice of motion and motion to amend complaint to bring in new party defendant under the compulsory joinder provisions, see *§ 395.104*.

If the motion is made on the ground that in the absence of the omitted party complete relief cannot be accorded among those already parties [*Code Civ. Proc. § 389(a)(1)*], the first alternative ground should be used. If the motion is made on the ground that the omitted party claims an interest relating to the subject of the action [*Code Civ. Proc. § 389(a)(2)*],

the second alternative ground should be used with the appropriate alternative ground [*Code Civ. Proc. § 389(a)(2)(i)* or *(ii)*].

There is no specific authority authorizing an omitted party to file a motion for an order bringing him or her into a pending action pursuant to *Code Civ. Proc. § 389*. However, in cases in which an omitted party has used this procedure, the courts have not stated that it was an inappropriate method [*see Cuneo v. Superior Court (1963) 213 Cal. App. 2d 452, 454-455, 28 Cal. Rptr. 791* ; *Wilson v. Frakes (1960) 178 Cal. App. 2d 580, 581-583, 3 Cal. Rptr 434]* . Other procedures that an omitted party may consider in seeking joinder into a pending action are an ex parte application for an order directing the plaintiff to amend the complaint to bring him or her in as a new party [*see Muller v. Robinson (1959) 174 Cal. App. 2d 511, 514, 345 P.2d 25* ; *Crofton v. Young (1941) 48 Cal. App. 2d 452, 456, 119 P.2d 1003]* , or by intervention [*see Code Civ. Proc. § 387*; *Crofton v. Young (1941) 48 Cal. App. 2d 452, 456, 119 P.2d 1003* ; *see also § 395.30* et seq.].

[3] Accompanying Papers

A memorandum must be filed and a copy served with the foregoing motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*].

[4] Cross References

California Civil Procedure Before Trial, vol. 1, Ch. 21, *Determining, Joining, and Naming Parties,* §§ 21.7-21.9 (Cal CEB 3d ed. 2000)

Witkin, California Procedure, vol. 4, *Pleading,* §§ 158-159, 171-174, 190 (4th ed. 1997)

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A. Joinder of Parties

34-395 California Forms of Pleading and Practice--Annotated § 395.108

§ 395.108 Proceedings for Order Compelling Joinder of Omitted Party [Code Civ. Proc. § 389]--By Defendant or Omitted Party--Supporting Declaration

[1] FORM Proceedings for Order Compelling Joinder of Omitted Party [Code Civ. Proc. § 389]--By Defendant or Omitted Party--Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	DECLARATION OF
	)	_____ [*name*] IN SUPPORT
_____ [*name*],	)	OF MOTION FOR ORDER
Plaintiff,	)	COMPELLING JOINDER OF
vs.	)	OMITTED PARTY
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	
_____		

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, the defendant in the above-described action].

2. This declaration is in support of _____ [defendant's *or* the omitted party's] motion for an order compelling joinder of _____ [*name*] as a new party _____ [plaintiff *or* defendant] to this action.

3. [*State nature of plaintiff's actions and existing parties, see § 395.105, Paragraph 3.*]

4. [*State grounds for relief, see § 395.105, Alternative Paragraphs 4.*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The declaration in [1], *above*, is for use by an attorney, defendant, or an omitted party, in support of a motion by defendant, or an omitted party compelling joinder pursuant to *Code Civ. Proc. § 389*. For a form of notice of motion and motion to amend complaint to bring in new party defendant under the compulsory joinder provisions, see *§ 395.104*.

In selecting the appropriate alternative Paragraph 4, counsel should use the alternative paragraph that relates to the particular ground on which joinder is sought. For example, if joinder is sought pursuant to *Code Civ. Proc. § 389(a)(1)*, on the ground that complete relief cannot be accorded among those already parties in the omitted party's absence, the first alternative Paragraph 4 should be used. On the other hand, if joinder is sought pursuant to *Code Civ. Proc. § 389(a)(2)(i)*, on the ground that the omitted party has an interest in the subject of the action and as a practical matter the disposition of the action in his or her absence will impair the ability to protect that interest, the second alternative Paragraph 4 should be used. Similarly, if joinder is sought pursuant to *Code Civ. Proc. § 389(a)(2)(ii)*, on the ground that the omitted party's interest in the subject of the action may subject him or her to substantial risk of incurring inconsistent obligations should the action be disposed in his or her absence, the third alternative Paragraph 4 should be used.

Code Civ. Proc. § 2015.5 authorizes a declaration under penalty of perjury, as in the above form, in lieu of an affidavit. For a form of affidavit, see Ch. 15, *Affidavits, Certificates, and Declarations* .

[3] Cross References

For a notice of motion to compel joinder of omitted party, see *§ 395.107*.

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34-395 California Forms of Pleading and Practice--Annotated § 395.109

§ 395.109 Proceedings for Order Compelling Joinder of Omitted Party [Code Civ. Proc. § 389]--By Defendant or Omitted Party--Order Granting Motion

[1] FORM Proceedings for Order Compelling Joinder of Omitted Party [Code Civ. Proc. § 389]--By Defendant or Omitted Party--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Dept: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*name of defendant or omitted party*] for an order directing plaintiff to amend his/her complaint to bring in _____ [*name of omitted party*] as a new party _____ [plaintiff *or* defendant] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; _____ [*specify additional appearances, e.g.*, defendant appeared by counsel _____ (*name*); moving party appeared by counsel _____ (*name*)].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted as follows:

[*EITHER, if new party plaintiff*]

The motion is granted and plaintiff is directed to amend his/her complaint herein to join into this action _____ [*name of new party*] as a new party plaintiff.

[*OR, if new party defendant*]

The motion is granted and plaintiff is directed to amend his/her complaint herein to join into this action _____ [*name of new party*] as a new party defendant. Summons is to be issued thereon, and plaintiff is to serve _____ [*name of new party*] with a copy of the summons and a copy of the amended complaint within _____ days from the date of this order.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The order in [1], *above*, directs the plaintiff to file an amended complaint bringing in a new party plaintiff or defendant under the provisions of compulsory joinder [*Code Civ. Proc. § 389*; *see § 395.107*]. The order may be submitted to the court for signature either with the filing of the notice of motion or after the hearing on the motion. Pursuant to *Cal. Rules of Ct., Rule 3.1312*, the prevailing party should prepare the order. Counsel should check local court practice to determine the appropriate procedure.

For an order bringing in a new party plaintiff, the first alternative paragraph should be used. For an order bringing in a new party defendant, the second alternative paragraph should be used [*see Code Civ. Proc. §§ 412.10-412.30, 471.5*].

[3] Cross References

For a form of notice of motion and motion for order compelling joinder of omitted person as a party plaintiff or defendant, see *§ 395.107*. For a discussion, forms, and procedures relating to service and summons, see Ch. 518, *Service of Summons and Papers* .

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34-395 California Forms of Pleading and Practice--Annotated § 395.110

§ 395.110 Proceedings for Order Compelling Joinder of Omitted Party as Plaintiff or Defendant [Code Civ. Proc. § 389.5]--By Omitted Person Having Interest in Property--Notice of Motion

[1] FORM Proceedings for Order Compelling Joinder of Omitted Party as Plaintiff or Defendant [Code Civ. Proc. § 389.5]--By Omitted Person Having Interest in Property--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER COMPELLING JOINDER OF NEW PARTY _____ [PLAINTIFF *or* DEFENDANT] HAVING INTEREST IN PROPERTY
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*name*], plaintiff, and to _____ [*name*], his/her attorney of record, and to _____ [*name*], defendant, and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], California,

_____ [*name of omitted party*] will move for an order pursuant to *Section 389.5 of the Code of Civil Procedure*, directing plaintiff to amend his/her complaint to bring in _____ [*name of omitted party*] as a party _____ [plaintiff *or* defendant] in the above-entitled action. This motion will be made on the ground that _____ [*name of omitted party*] has an interest in the _____ [real *or* personal] property which is the subject of this action _____ [for recovery of the property *or* to determine conflicting claims to the property] in that _____ [*name of omitted party*] _____ [is *or* was] _____ [*specify particular interest, e.g.*, a beneficiary of a trust holding certain real property which is the subject of the action].

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the supporting memorandum served and filed herewith, on the papers and records and file herein, and on such oral and documentary evidence as may be presented at the hearing on the motion.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

[2] Use of Form

The form in [1], *above*, is for use by a nonparty to secure an order compelling plaintiff to join him or her as a party plaintiff or defendant in an action for the recovery of real or personal property, or to determine conflicting claims thereto. The motion may be made by a person having an interest in the subject of the action [*see Code Civ. Proc. § 389.5*].

[3] Accompanying Papers

A supporting memorandum must be filed and a copy served with the foregoing motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, *see* Ch. 417, *Points and Authorities* .

[4] Alternative Procedures

An omitted party may also proceed under *Code Civ. Proc. § 387(a)* to intervene in an action to which he or she has a real or personal property interest which is the subject of the action [*see § 395.30*]. However, intervention under *Code Civ. Proc. § 387(a)*, like joinder under *Code Civ. Proc. § 389.5*, is only discretionary. If the omitted party is united in interest with either the plaintiff or defendant, he or she must be joined as a party plaintiff or defendant [*see Code Civ. Proc. § 367*]. In this situation, the omitted party should seek the court to compel joinder under *Code Civ. Proc. § 389* or grant leave to intervene pursuant to *Code Civ. Proc. § 387(b)*. Similarly, the omitted party should seek to join or intervene under these sections whenever he or she is a party who should have been joined as required by *Code Civ. Proc. § 389(a)*.

[5] Cross References

For a declaration supporting this motion, see *§ 395.111*.

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34-395 California Forms of Pleading and Practice--Annotated § 395.111

§ 395.111 Proceedings for Order Compelling Joinder of Omitted Party as Plaintiff or Defendant [Code Civ. Proc. § 389.5]--By Omitted Person Having Interest in Property--Supporting Declaration

[1] FORM Proceedings for Order Compelling Joinder of Omitted Party as Plaintiff or Defendant [Code Civ. Proc. § 389.5]--By Omitted Person Having Interest in Property--Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	DECLARATION OF
	)	_____ [*name*] IN SUPPORT
_____ [*name*],	)	OF MOTION COMPELLING
Plaintiff,	)	JOINDER OF PARTY HAVING
vs.	)	INTEREST IN PROPERTY
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, the omitted party seeking to be joined in the above-described action].

2. This declaration is in support of _____ [my *or name of omitted party*] motion for an order bringing in _____ [me *or name of omitted party*] as a new party _____ [plaintiff *or* defendant] having an interest in the _____ [real *or* personal] property which is the subject of this action.

3. _____ [*Set forth nature of plaintiff's action and existing parties, e.g.*, Plaintiff's action is one _____ (for the recovery of *or* to determine conflicting claims to) the _____ (real *or* personal) property which is the subject of the action before the court against certain beneficiaries of a will setting up the trust which holds the property on behalf of the beneficiaries to the will].

4. _____ [*Name of omitted party*] has an interest in the _____ [real *or* personal] property which is the subject of the action before the court in that _____ [*state facts showing omitted party has an interest in the recovery of or in the determination of conflicting claims to the real or personal property which is the subject of the action, e.g.*, he/she is also a beneficiary of a trust holding the _____ (real *or* personal) property involved in the action, but was not joined in the action, and any disposition in the action in his/her absence would adversely affect his/her interest in that _____ (*state further relevant facts*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The declaration in [1], *above*, is for use by an omitted party, or his or her attorney, in support of a motion by the omitted party to be made a party to a pending action pursuant to *Code Civ. Proc. § 389.5*. The omitted party must have an interest in the recovery of or in the determination of conflicting claims to real or personal property which is the subject of the action before the court [*see Code Civ. Proc. § 389.5*].

Code Civ. Proc. § 2015.5 authorizes a declaration under penalty of perjury, as in the above form, in lieu of an affidavit. For a form of affidavit, see Ch. 15, *Affidavits, Certificates, and Declarations* .

[3] Cross References

For a form of notice of motion and motion for order compelling joinder of a new party having an interest in property, see *§ 395.110*.

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A. Joinder of Parties

34-395 California Forms of Pleading and Practice--Annotated § 395.112

§ 395.112 Proceedings for Order Compelling Joinder of Omitted Party as Plaintiff or Defendant [Code Civ. Proc. § 389.5]--By Omitted Person Having Interest in Property--Order Granting Motion

[1] FORM Proceedings for Order Compelling Joinder of Omitted Party as Plaintiff or Defendant [Code Civ. Proc. § 389.5]--By Omitted Person Having Interest in Property--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Dept: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*name of omitted party*], for an order directing plaintiff to amend his/her complaint to bring in _____ [*name of omitted party*] as a new party _____ [plaintiff *or* defendant], came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*]; _____ [*name of ommited party*] appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted as follows:

[*EITHER, if new party plaintiff*]

The motion is granted and plaintiff is directed to amend his/her complaint herein to join into this action _____ [*name of new party*] as a new party plaintiff.

[*OR, if new party defendant*]

The motion is granted and plaintiff is directed to amend his/her complaint herein to join into this action _____ [*name of new party*] as a new party defendant. Summons is to be issued thereon, and plaintiff is to serve _____ [*name of new party*] with a copy of the summons and a copy of the amended complaint within _____ days from the date of this order.

[*CONTINUE*]

Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This is an order directing the plaintiff to file an amended complaint bringing in a new party plaintiff or defendant under the provisions of joinder of parties having an interest in the property which is the subject of the action [*Code Civ. Proc. § 389.5*]. The order may be submitted to the court for signature either with the filing of the notice of motion or after the hearing on the motion. Pursuant to *Cal. Rules of Ct., Rule 3.1312*, the prevailing party should prepare the order. Counsel should check local court practice to determine the appropriate procedure.

For an order bringing in a new party plaintiff, the first alternative paragraph should be used. For an order bringing in a new party defendant, the second alternative paragraph should be used.

[3] Cross References

For a related form of notice of motion and motion for order compelling joinder of a new party having an interest in property, see *§ 395.110*. For a discussion, forms, and procedures relating to service and summons, see Ch. 518, *Service of Summons and Papers* .

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34-395 California Forms of Pleading and Practice--Annotated §§ 395.113-395.119

[Reserved]

§§ 395.113[Reserved]

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B. Intervention

34-395 California Forms of Pleading and Practice--Annotated § 395.120

§ 395.120 Proceedings for Order Granting Leave to Intervene in Pending Action [Code Civ. Proc. § 387]--Notice of Motion

[1] FORM Proceedings for Order Granting Leave to Intervene in Pending Action [Code Civ. Proc. § 387]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND
Plaintiff,	)	MOTION FOR LEAVE OF
vs.	)	COURT TO INTERVENE
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
_____ [*name*],	)	Dept: _____
Intervenor.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

To _____ [*name*], plaintiff, and to _____ [*name*], his/her/its attorney; and to _____ [*name*], defendant, and to _____ [*name*], his/her/its attorney:

[*EITHER, if intervention sought under Code Civ. Proc. § 387(a)*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], California, _____ [*name of intervenor*] will, and hereby does, move for an order granting leave to file a complaint in intervention in this action to _____ [*specify nature of action e.g.*, to quiet title]. The motion will be made pursuant to the provisions of *Section 387(a) of the Code of Civil Procedure* on the ground that the intervenor has an interest _____ [in the matter in litigation *or* in the success of _____ (plaintiff *or* defendant) *or* adverse to both plaintiff and defendant].

[*AND/OR, if intervention is sought under Code Civ. Proc. § 387(b)*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], California, _____ [*name of intervenor*] will, and hereby does, move for an order granting leave to file a complaint in intervention in this action to _____ [*specify nature of action e.g.*, to quiet title]. The motion will be made pursuant to the provisions of *Section 387(b) of the Code of Civil Procedure* on the ground that the intervenor _____ [has an unconditional right to intervene conferred by law *or* claims an interest relating to the property or transaction that is the subject matter of the action and he/she/it is so situated that the disposition of the action may as a practical matter impair or impede his/her/its ability to protect that interest which is not and cannot be adequately represented by the existing parties].

[*CONTINUE*]

The motion will be based on this notice of motion, the proposed complaint in intervention, the declaration of _____ [*name*] and the memorandum served and filed herewith, on the papers and records and file herein, and on such oral and documentary evidence as may be presented at the hearing on the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

[2] Use of Form

The form in [1], *above*, is for use by an intervenor seeking intervention through a noticed motion. If the motion is made under *Code Civ. Proc. § 387(a)* on the ground that the intervenor has an interest in the matter in litigation, or in the success of either plaintiff or defendant or against the success of both, the first alternative paragraph setting out the grounds for the motion should be used. If the motion is made under *Code Civ. Proc. § 387(b)* on ground that the intervenor has an unconditional right conferred by law to intervene or that the disposition of the action will impair or impede their interest in the subject of the action, the second alternative paragraph should be used. For discussion of cases which may fall under either permissive (*Code Civ. Proc. § 387(a)*) or mandatory (*Code Civ. Proc. § 387(b)*) intervention see *§§ 395.34* and *395.35*.

Under *Code Civ. Proc. § 387(b)*, a person who has specific statutory authorization to intervene has an unconditional right to do so. For example, such an unconditional right to intervene has been conferred upon either an employer or employee in an action by the other against a third party for personal injury [*see Lab. Code § 3853*]. For examples of

other statutes providing specific authorization to intervene, see *§ 395.61[2]*.

[3] Accompanying Papers

A supporting memorandum must be filed and a copy served with the foregoing motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, *see* Ch. 417, *Points and Authorities* .

The notice of motion for leave to intervene must be accompanied by an affidavit or declaration factually setting out the grounds for intervention [*see § 395.121* for form and a copy of the proposed complaint in intervention [*see § 395.127* for form]. An order granting the motion may also be submitted at this time [*see § 395.122* for form].

[4] Alternative Procedures

An intervenor may also file an ex parte application for leave to intervene [*see § 395.123* for form], or an application for an order to show cause why intervention should not be permitted [*see § 395.124* for form]. An oral application for intervention may also be made [*see § 395.126* (form of order granting oral request)].

[5] Filing Fees

On presentation of the notice of motion and accompanying papers for filing, a filing fee is required [*see Gov. Code § 70612*]. For a discussion of filing fees, see Ch. 123, *Complaints and Cross Complaints* .

[6] Cross References

California Civil Procedure Before Trial, vol. 3, Ch. 61, *Intervention*, § 61.1 et seq. (Cal CEB 3d ed. 2000)

Witkin, California Procedure, vol. 4, *Pleading*, §§ 193-215 (4th ed. 1997)

For memoranda in support of and in opposition to a motion for leave to intervene in a pending action, see California Points and Authorities, Ch. 124, *Intervention*

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34-395 California Forms of Pleading and Practice--Annotated § 395.121

§ 395.121 Proceedings for Order Granting Leave to Intervene in Pending Action [Code Civ. Proc. § 387]--Declaration in Support of Motion

[1] FORM Proceedings for Order Granting Leave to Intervene in Pending Action [Code Civ. Proc. § 387]--Declaration in Support of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF
vs.	)	_____ [*name*] IN SUPPORT
_____ [*name*],	)	OF MOTION FOR LEAVE
Defendant.	)	OF COURT TO INTERVENE
_____ [*name*],	)	Date: _____
Intervenor.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, the party seeking intervention in the above-described action to _____ (*specify, e.g.*, declare an election valid *or* quiet title) under Section _____ (387(a) of the Code of Civil Procedure *or 387(b) of the Code of Civil Procedure or both*)].

[*EITHER, if relief sought under Code Civ. Proc. § 387(a)*]

2. I have an interest _____ [*specify, e.g.*, in the matter in litigation *or* in the success of _____ (plaintiff *or* defendant) *or* adverse to both plaintiff and defendant].

[*AND/OR, if relief sought under Code Civ. Proc. § 387(b)*]

2. I have an _____ [unconditional right to intervene in the above-entitled action conferred on me by _____ (*specify statutory authorization, e.g., Lab. Code § 3853*) *or* an interest relating to the _____ (property *or* transaction) which is the subject of the above-entitled action].

[*EITHER, if reli ef sought under Code Civ. Proc. § 387(a)*]

3. _____ [*Set forth nature of plaintiff's action, existing parties, andother applicable facts, e.g.*, Plaintiff municipality has brought an action against the California Secretary of State to declare void an election _____ (*describe*) which intervening taxpayers seek to declare void].

[*AND/OR, if relief is sought under Code Civ. Proc. § 387(b)*]

3. _____ [*Here and in subsequent paragraphs set forth nature of plaintiff's action, existing parties, and other applicable facts, e.g.*, Plaintiff as a trustee of a trust holding certain property has filed an action against defendant sheriff for a writ of mandate ordering defendant to accept plaintiff's tender of redemption for the property].

[*EITHER, if relief is sought under Code Civ. Proc. § 387(a) and intervenor has an interest in the matter in litigation*]

4. _____ [*Name of intervenor*] has an interest in the matter in litigation in that _____ [*state facts setting forth interst, e.g.*, he or she is a taxpayer and elector in _____ County and has a direct interest in the outcome of the recently conducted election to determine _____ (*describe*)].

[OR, *if relief is sought under Code Civ. Proc. § 387(a) and intervenor has an interest in the success of either party*]

4. _____ [*Name of intervenor*] has an interest in the success of _____ [*name*], _____ [plaintiff *or* defendant] in that _____ [*state facts showing that intervenor has an interest in the success of either party, e.g.*, intervenor's rights are affected by the recently held election for _____ (*state further relevant facts*) which defendant refuses to declare valid because of certain alleged violations of the Election Code relating to the election as conducted].

[*OR, if relief is sought under Code Civ. Proc. § 387(a) and intervenor has an interest adverse to both parties*]

4. _____ [*Name of intervenor*] has an interest adverse to both parties in that _____ [*state facts showing that intervenor has an interest adverse to both parties in the action, e.g.*, it is a nonprofit corporation composed of parents within the school district who would be directly affected by any reassignment of

students to various other schools in accordance with the plan offered to the court by plaintiff organization or in accordance with the plan submitted to the court by defendant school district].

[*AND/OR, if relief sought under Code Civ. Proc. § 387(b) and intervenor has an unconditional right to intervene conferred by statute*]

4. _____ [*Name of intervenor*] has an unconditional right to intervene conferred by Section _____ [*specify statutory authority, e.g., 3853 of the Labor Code*].

[*AND/OR, if relief sought under Code Civ. Proc. § 387(b) and intervenor claims an interest relating to the property or transaction which is the subject of the action*]

4. _____ [*Name of intervenor*] has an interest relating to the _____ [property *or* transaction] which is the subject matter before the court and is so situated that any disposition of the action in his/her/its absence would as a practical matter impair or impede his/her/its ability to protect that interest in that _____ [*state facts showing intervenor's interest in the subject matter and why any disposition without his/her/its presence would detrimentally affect that interest, e.g.*, he/she/it has a right of ownership in the property in question adverse to both parties and his/her interest cannot be adequately represented in the pending action by the existing parties in that he/she have claims to the property in question adverse to each other and to that of the intervenor's right of ownership].

5. _____ [*Set forth facts showing motion is timely.*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form of declaration in [1], *above*, is for use by intervenor in supporting a motion for leave to intervene in a pending action under *Code Civ. Proc. § 387(a)* or *(b)*. It is repetitious of the statements of the proposed complaint in intervention [*see § 395.127*] and for that reason minimum facts may be stated. If the motion is made under *Code Civ. Proc. § 387(a)*, permissive intervention, one of the alternative paragraphs numbered 2, 3, and 4 under that banner should be used, depending on the particular legal ground desired. If the motion is made under *Code Civ. Proc. § 387(b)*, mandatory intervention, the appropriate alternative paragraphs in numbers 2, 3, and 4 under that banner should be used.

For a related form of notice of motion and motion for leave of court to intervene, see *§ 395.120*.

Code Civ. Proc. § 2015.5 authorizes a declaration under penalty of perjury, as in the foregoing form, in lieu of an affidavit. For a form of affidavit, see Ch. 15, *Affidavits, Certificates, and Declarations* .

[3] Alternate Uses

The form of declaration in support of a motion to intervene in a pending action may also be used to support an ex parte application for an order granting leave tointervene [*see § 395.123*] or for an order to show cause why leave should not be granted to intervene [*see §§ 395.124, 395.125*]. With appropriate modifications, this form may also be used to state

the allegations in the complaint in intervention [*see § 395.127*].

[4] Cross References

For a notice of motion for an order granting leave to intervene in a pending action, see *§ 395.120*.

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34-395 California Forms of Pleading and Practice--Annotated § 395.122

§ 395.122 Proceedings for Order Granting Leave to Intervene in Pending Action [Code Civ. Proc. § 387]--Order

[1] FORM Proceedings for Order Granting Leave to Intervene in Pending Action [Code Civ. Proc. § 387]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____
_____ [*name*],	)	Judge: _____
Intervenor.	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*name*], intervenor, for an order granting leave to intervene in the above-entitled action and file a [verified] complaint in intervention came on regularly for hearing by the court on _____ [*date*]. Proposed intervenor appeared by counsel _____ [*name*]; plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and hereby is, granted and _____ [*name*] is granted leave to intervene in this action and file the original of the complaint in intervention presented to the court.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use as an order made by the court after a hearing on a motion for leave to intervene in a pending action. For related forms of notice of motion and motion for leave of court to intervene, see *§ 395.120*. Pursuant to *Cal. Rules of Ct., Rule 3.1312*, the prevailing party should prepare the order.

[3] Necessity for Complaint in Intervention

The order, if granted, only allows the intervenor to file a complaint inintervention as an intervening party. Such complaint is subject to a motion to strike for failure to state grounds sufficient to justify intervention [*see § 395.38[3]*; *see also § 395.127* and the Comments thereto for a form of Complaint in Intervention] or to a demurrer for failure to state a cause of action [*see Jersey Maid Milk Products Co. v. Brock (1939) 13 Cal. 2d 661, 662, 91 P.2d 599* (motion to strike); *People v. Brophy (1942) 49 Cal. App. 2d 15, 23-24, 120 P.2d 946* (demurrer)].

[4] Cross References

For a notice of motion for an order granting leave to intervene in a pending action and supporting declaration, see *§§ 395.120* and *395.121*. For a general form of a complaint in intervention, see *§ 395.127*.

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34-395 California Forms of Pleading and Practice--Annotated § 395.123

§ 395.123 Proceedings for Order Granting Leave to Intervene in Pending Action [Code Civ. Proc. § 387]--Ex Parte Application, Declaration, and Order

[1] FORM Proceedings for Order Granting Leave to Intervene in Pending Action [Code Civ. Proc. § 387]--Ex Parte Application, Declaration, and Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	EX PARTE APPLICATION FOR LEAVE TO IN-
vs.	)	TERVENE, SUPPORTING DECLARATION OF
_____ [*name*],	)	_____ [*name*], SUPPORTING
Defendant.	)	MEMORANDUM AND ORDER
_____ [*name*],	)	Date: _____
Intervenor.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

APPLICATION

I, _____ [*name of attorney*], hereby apply on behalf of _____ [*name of applicant*] for an order granting leave to intervene in the above-entitled action as authorized by Section 387 _____ [(a) *or* (b) *or both*] of the Code of Civil Procedure.

[*EITHER, if intervention sought under Code Civ. Proc. § 387(a)*]

This application is being made on the ground that _____ [*name of applicant*] has an interest _____ [in the matter in litigation *or* in the success of _____ (plaintiff *or* defendant) *or* adverse to both plaintiff and defendant].

[*OR, if intervention sought under Code Civ. Proc. § 387(b)*]

This application is being made on the ground that _____ [*name of applicant*] _____ [has an unconditional right to intervene conferred by law *or* claims an interest relating to the property or transaction which is the subject of the action, and he/she/it is so situated that the disposition of the action may, as a practical matter, impair or impede his/her/its ability to protect thatinterest which is not being adequately represented by the existing parties].

[*CONTINUE*]

This application is based on the attached declaration and supporting memorandum and the complaint in intervention presented with this application.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

[*Set out facts supporting application. See § 395.121.*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

SUPPORTING MEMORANDUM

[*State points and authorities in support of application*]

ORDER GRANTING APPLICANT LEAVE TO INTERVENE

Proof having been made to the satisfaction of the court that the application ought to be granted,

IT IS ORDERED that the application be, and hereby is, granted and _____ [*name*] is granted leave to intervene in this action and file the original of the complaint in intervention presented to the court.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use as an ex parte application for leave to file a complaint in intervention. An ex parte application is ordinarily presented to the presiding judge of the court in which the application is made. The ex parte application, supporting declaration and memorandum, proposed complaint in intervention, and order may be presented in chambers [*see Code Civ. Proc. § 166(a)(1)*], and if permission to intervene is granted, the complaint is filed with the court clerk.

For related forms of notice of motion and motion for leave of court to intervene, declaration in support of motion for leave of court to intervene, and order, see *§§ 395.120 -395.122*.

Depending upon the particular interest that forms the basis for the proposed intervention, counsel should use the appropriate alternative paragraph in the foregoing form of application. Similarly, when preparing the proposed declaration, counsel should use the appropriate alternate Paragraphs 4 as illustrated in § 395.121.

[3] Requirement for Affidavit or Declaration

For discussion of the *Cal. Rules of Ct., Rule 3.1204* requirement that an ex parte order be supported by affidavit or declaration relating to the giving of or the attempt to give notice or that for specified reasons notice should not be required, see Ch. 372, *Motions and Orders* .

[4] Text References

California Civil Procedure Before Trial, vol. 3, Ch. 61, *Intervention*, § 61.1 et seq. (Cal CEB 3d ed. 2000)

Witkin, California Procedure, vol. 4, *Pleading*, §§ 193-215 (4th ed. 1997)

[5] Cross References

For a notice of motion for an order granting leave to intervene in a pending action and supporting declaration, see *§§ 395.120* and *395.121*. For a general form of a complaint in intervention, see *§ 395.127*.

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34-395 California Forms of Pleading and Practice--Annotated § 395.124

§ 395.124 Proceedings for Order Granting Leave to Intervene in Pending Action [Code Civ. Proc. § 387]--Application for Order to Show Cause Why Leave Should Not Be Granted to File a Complaint in Intervention

[1] FORM Proceedings for Order Granting Leave to Intervene in Pending Action [Code Civ. Proc. § 387]--Application for Order to Show Cause Why Leave Should Not Be Granted to File a Complaint in Intervention

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	APPLICATION FOR ORDER
	)	TO SHOW CAUSE WHY LEAVE
_____ [*name*],	)	SHOULD NOT BE GRANTED
Plaintiff,	)	TO FILE A COMPLAINT IN
vs.	)	INTERVENTION; SUPPORTING
_____ [*name*],	)	DECLARATION OF
Defendant.	)	_____ [*name*], AND
_____ [*name*],	)	SUPPORTING MEMORANDUM
Intervenor.	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

APPLICATION

I, _____ [*name of attorney*], hereby apply on behalf of _____ [*name of applicant*] for an order to show cause why _____ [*name of applicant*] should not be granted leave to file a complaint in intervention in the above-entitled action as authorized by Section 387 _____ [(a) *or* (b) *or both*].

[*EITHER, if intervention sought under Code Civ. Proc. § 387(a)*]

This application is being made on the grounds that _____ [*name of applicant*] has an interest _____ [in the matter in litigation *or* in the success of _____ (plaintiff *or* defendant) *or* adverse to both plaintiff and defendant].

[*AND/OR, if intervention sought under Code Civ. Proc. § 387(b)*]

This application is being made on the grounds that _____ [*name of applicant*] _____ [has an unconditional right to intervene conferred by law *or* claims an interest relating to the property or transaction which is the subject of the action, and he/she/it is so situated that the disposition of the action may, as a practical matter, impair or impede his/her/its ability to protect that interest which is not being adequately represented by the existing parties].

[*CONTINUE*]

This application is based on the attached declaration, memorandum and the complaint in intervention.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

DECLARATION OF _____ [*name*]

[*Set out facts in support of application. See § 395.121.*]

SUPPORTING MEMORANDUM

[*State points and cite authorities in support of application*]

[2] Use of Form

The form in [1], *above*, is for use on ex parte application to the court for an order to show cause why leave to file a complaint in intervention should not be granted. In the application for the show cause order, counsel should select the

appropriate alternate paragraph for the applicable interest of the intervenor. Similarly, in preparing the declaration in support of the order, counsel should use the proposed declaration in § 395.121, choosing the appropriate alternate paragraphs in accordance with the applicable interest and supporting facts. For related forms of notice of motion and motion for leave to intervene, and ex parte application for leave to intervene, see *§§ 395.120 -395.123*.

[3] Accompanying Papers

Because an order to show cause is a form of notice of motion, an application for the order should be supported by a memorandum, as required in support of a motion under *Cal. Rules of Ct., Rule 3.1113(a)* [*see, e.g., Cal. Rules of Ct., Rule 3.1176(b)* (requiring memorandum on order to show cause re appointment of receiver); *see also Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, *see* Ch. 417, *Points and Authorities* .

For discussion of the requirement of *Cal. Rules of Ct., Rule 3.1204* that an exparte order be supported by affidavit or declaration relating to the giving of or the attempt to give notice or that for specified reasons notice should not be required, *see* Ch. 372, *Motions and Orders* .

[4] Filing Fees

On presentation of the form in [1], *above*, and accompanying papers, a filing fee is payable [*Gov. Code § 70612*]. The prescribed filing fee will vary, depending upon the jurisdictional level of the court and its location. For a discussion of filing fees, see Ch. 123, *Complaints and Cross Complaints* .

[5] Cross References

For an order to show cause why leave should not be granted to file a complaint in intervention, see *§ 395.125*. For a general form of a complaint in intervention, see *§ 395.127*.

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Volume 34: Newspapers thru Parties-Chs. 386-396
Chapter 395 PARTIES
PART V. FORMS
B. Intervention

34-395 California Forms of Pleading and Practice--Annotated § 395.125

§ 395.125 Proceedings for Order Granting Leave to Intervene in Pending Action [Code Civ. Proc. § 387]--Order to Show Cause Why Leave Should Not Be Granted to File Complaint in Intervention

[1] FORM Proceedings for Order Granting Leave to Intervene in Pending Action [Code Civ. Proc. § 387]--Order to Show Cause Why Leave Should Not Be Granted to File Complaint in Intervention

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____
_____ [*name*],	)	Judge: _____
Intervenor.	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

To _____ [*name*], plaintiff, and to _____ [*name*], defendant, in the above-entitled action:

The ex parte application for an order to show cause why _____ [*name of intervenor*] should not be granted leave to file a complaint in intervention in this action being before this court, and good cause appearing therefor,

IT IS HEREBY ORDERED that _____ [*name*], plaintiff, and _____ [*name*],

defendant, appear on _____ [*date*], at _____ [*time*], in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], California, then and there to show cause, if any he/she/it has, why the order granting _____ [*name of intervenor*] leave to file a complaint in intervention should not be granted.

IT IS FURTHER ORDERED that, until the determination of this order to show cause, all proceedings in this action, including all efforts to dismiss this action, are stayed.

IT IS FURTHER ORDERED that _____ [*name*] shall serve a copy of this order, of the proposed complaint in intervention, and of the ex parte application for leave to intervene on counsel for _____ [both *or* all] parties in this action no later than _____ days before the time fixed for the hearing on this order to show cause.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form in [1], *above*, is for use for submission to the court with an application for an order to show cause why leave to file a complaint in intervention should not be granted. If granted, the court will fix the time and place for a hearing in this order to show cause.

[3] Order to Show Cause Distinguished

An order to show cause, while a form of notice of motion, is distinct from the statutory notice of motion of *Code Civ. Proc. § 1010*. It is a creation of the courts, not the Legislature. It is a court order, issued on ex parte application, requiring the party to whom it is directed to appear before the court at a specified time and show cause why the relief sought should not be granted.

[4] Cross References

For an application for an order to show cause why leave should not be granted to file a complaint in intervention, see *§ 395.124*. For a general form of a complaint in intervention, see *§ 395.127*.

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B. Intervention

34-395 California Forms of Pleading and Practice--Annotated § 395.126

§ 395.126 Proceedings for Order Granting Leave to Intervene in Pending Action [Code Civ. Proc. § 387]--Order Granting Oral Application for Leave to Intervene

[1] FORM Proceedings for Order Granting Leave to Intervene in Pending Action [Code Civ. Proc. § 387]--Order Granting Oral Application for Leave to Intervene

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____
_____ [*name*],	)	Judge: _____
Intervenor.	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The proposed [verified] complaint in intervention of _____ [*name*], together with oral application for leave to intervene in this action by filing the complaint in intervention, was presented to the court on _____ [*date*].

On proof made to the satisfaction of the court that the oral motion ought to be granted,

IT IS HEREBY ORDERED that the application be, and hereby is, granted, and _____ [*name*] is granted leave to intervene in this action and file the complaint in intervention presented to the court.

Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form in [1], *above*, is for use as an order made by the court on an oral application granting leave to intervene in a pending action. An oral motion to intervene made in the presence of opposing counsel adequately informs the other parties of the basis for the motion, even if no documents were filed to support such a motion [*Simac Design, Inc. v. Alciati (1979) 92 Cal. App. 3d 146, 157, 154 Cal. Rptr. 676]* .

[3] Cross References

For an application for an order to show cause why leave should not be granted to file a complaint in intervention, see *§ 395.124*.

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34-395 California Forms of Pleading and Practice--Annotated § 395.127

§ 395.127 Complaint in Intervention [Code Civ. Proc. § 387]--General Form

[1] FORM Complaint in Intervention [Code Civ. Proc. § 387]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT IN INTERVENTION
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____
_____ [*name*],	)	Judge: _____
Intervenor.	)	Date Action Filed: _____
	)	Trial Date: _____
	)	
_____		

COMPLAINT IN INTERVENTION

Intervenor, _____ [*name*], [by leave of court] alleges:

[*Since complaint is to be signed after court order is obtained granting leave to intervene, the allegation in Paragraph 1 may be used.*]

1. On _____ [*date*], the court granted intervenor leave to intervene in this action and to file this

complaint in intervention.

2. Intervenor is, and at all times herein mentioned was, _____ [*allege capacity and residence of intervenor, e.g.*, a resident of _____ County, California].

[*EITHER, if intervention sought under Code Civ. Proc. § 387(a)*]

3. Intervenor intervenes in this action on the grounds that _____ [*specify, e.g.*, intervenor has an interest in the matter in litigation consisting of ownership of the property in question by purchase at foreclosure sale and a right of ownership adverse to both parties which would be directly affected by the result of this action, as hereinafter set out more particularly].

[*OR*]

3. Intervenor intervenes in this action on the grounds that intervenor has a substantial interest in the success of _____ [plaintiff *or* defendant] in this action in that intervenor _____ [*specify, e.g.*, is the purchaser from _____ (plaintiff *or* defendant) of substantially all of the assets involved in the action and his interest would be directly affected by the result of this action, as hereinafter set out more particularly].

[*OR*]

3. Intervenor intervenes in this action on the grounds that intervenor has an interest against both plaintiff and defendant in this action consisting of _____ [*specify, e.g.*, a pecuniary interest by way of judgment against defendant for damages for personal injuries, and by reason of such judgment a statutory cause of action against plaintiff as defendant's insurer, which interest would be directly affected by the result of this action, as hereinafter set out more particularly].

[*AND/OR, if intervention is sought under Code Civ. Proc. § 387(b)*]

3. Intervenor intervenes in this action on the grounds that _____ [*specify, e.g.*, intervenor has an interest in the _____ (property *or* transaction) which is the subject matter of the action _____ (*specify, e.g.*, consisting of ownership of the property in question by purchase at foreclosure sale and a right of ownership adverse to both parties) which causes him/her/it to be so situated that the disposition of this action without the intervenor's presence would, as a practical matter, impede or impair his/her/its ability to protect that interest _____ (*specify reason, e.g.*, since the existing parties cannot adequately represent that interest in that they have claims to the property adverse to that of the intervenor)].

4. On _____ [*date*], plaintiff commenced this action against defendant _____ [*specify, e.g.*, to foreclose a first deed of trust on certain real property *or* for injunction and damages for unfair competition *or* to rescind the policy of public liability insurance issued to defendant *or other allegation as appropriate*].

5. [*Here, and in subsequent numbered paragraphs, allege in narrative form all facts necessary to establish the right or interest intervenor claims, commencing with allegations such as entry by plaintiff and defendant in the transaction, or their participation in the accident in question, followed by allegations as to acquisition by intervenor of his/her/its interest. Do not incorporate by reference paragraphs from plaintiff's complaint or defendant's answer; rather, restate as intervenor's own any such paragraphs that are appropriate and desired.*]

6. Intervenor _____ [*state, e.g.*, demands relief adverse to both plaintiff and defendant *or* joins with plaintiff in demanding the relief sought by his complaint *or* unites with defendant in resisting the claims of plaintiff *or other allegations as appropriate*].

WHEREFORE, intervenor prays judgment as follows:

1. _____ [*Set forth nature of relief requested.*]

2. For costs of suit herein incurred.

3. For such further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Intervenor

VERIFICATION

I, _____ [*name*], am the intervenor in the above-entitled action. I have read the foregoing complaint in intervention and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*signature*]
_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is for use as a complaint in intervention. *Code Civ. Proc. § 387* provides that intervention is made by complaint, setting forth the grounds on which the intervention rests, filed by leave of court. To obtain leave of court, a prospective intervenor may request leave to intervene through a notice of motion [*see § 395.120*], ex parte application [*see §§ 395.123, 395.126*], or by an application for an order to show cause why intervention should not be granted [*see § 395.124*].

[3] Requirements for Complaint in Intervention

Since *Code Civ. Proc. § 387* specifies a "complaint" as the means of intervening, the intervenor's basic pleading is always entitled a "complaint in intervention" whether he or she is uniting with defendant in resisting the claims of plaintiff, joining with plaintiff in demanding the same or similar relief, or demanding relief adverse to both parties.

The complaint in intervention can include either in the introductory clause of the complaint, or in a numbered paragraph, an allegation that the court has granted leave to intervene, as shown in Paragraph 1. Such an allegation is not necessary and may be omitted since the court order granting leave to intervene speaks for itself [*see Code Civ. Proc. § 387*].

The complaint in intervention must allege in summary form intervenor's interest by stating facts sufficient, if true, to constitute cause for intervention [*Hausmann v. Farmers Ins. Exchange (1963) 213 Cal. App. 2d 611, 615, 29 Cal. Rptr. 75]* as illustrated in Paragraph 3. Thereafter, intervenor pleads all essential allegations of the claim or denials of plaintiff's claim much as any plaintiff or defendant, with the added factor that he or she may have two opposing parties to deal with and must allege their respective acts or omissions if, and as appropriate to, the claimed interest.

The complaint in intervention is complete in itself and does not incorporate by reference any of the paragraphs of plaintiff's complaint or defendant's answer. The prayer is also a complete request for relief and does not incorporate prayers in pleadings already filed.

[4] Cross References

For an application for an order to show cause why leave should not be granted to file a complaint in intervention, see *§ 395.124*.

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Volume 35: Partition thru Paternity-Chs. 397-412
Chapter 397 PARTITION

35-397 California Forms of Pleading and Practice--Annotated 397.syn

§ 397.syn Synopsis to Chapter 397: PARTITION

§ 397.01 Scope of Chapter

§ 397.02 Cross References

§§ 397.03-397.09 [Reserved]

§ 397.10 Governing Law

§ 397.11 Purpose of Partition

§§ 397.12-397.29 [Reserved]

§ 397.30 Governing Statutes

§ 397.31 Revision of Partition Statutes

§ 397.32 Applicability of Partition Statutes

§ 397.33 Definitions

§ 397.34 Applicability of General Civil Statutes

§ 397.35 Jurisdiction

§ 397.36 Venue

§ 397.37 Statute of Limitations

§ 397.38 Laches

§ 397.39 Powers of Court

[1] Motions, Orders, and Decrees

[2] Equitable Nature

[3] Temporary Restraining Orders and Injunctions

[4] Appointment of Receiver

[5] Compensation Among Parties

[a] In General

[b] Rents, Profits, and Rental Value

§ 397.40 Who May Bring Partition Action

§ 397.41 Determination of Right to Partition

[1] In General

[2] Sufficiency of Interests

[a] Concurrent Interests

[b] Successive Estates

[c] Equitable Interests

[3] Particular Types of Property

[a] Partnership Property

[b] Partition of Community Property

[c] Partition of Condominium Project

[d] Partition of Homesteads

[e] Property Subject to Express Trust

§ 397.42 Waiver

§ 397.43 Parties

[1] Joinder of Interested Persons

[2] Known But Unrecorded Interests; BFPs; Encumbrancers

[3] Purchaser From Cotenant

[4] Unknown Persons or Interests

[5] Future Interests

[6] Deceased Interested Persons

[7] Persons Holding Oil and Gas Interests

§ 397.44 Determination of Interests of Parties

[1] In General

[2] Interests of Lienholders; Determination by Referee

[3] Interests of Unknown Parties

§ 397.45 Determination of State of Title

§ 397.46 Effect of Unpaid Judgment

§ 397.47 Joinder of Property

[1] In General

[2] Joinder of Parcels

§ 397.48 Consolidation of Actions

§ 397.49 Granting Separate Trials

§ 397.50 Determination of Manner of Partition

[1] Division of Property

[2] Partition by Sale

[3] Partition by Partial Sale

[4] Partition by Appraisal

§ 397.51 Removal of Property

§ 397.52 Title Report

§ 397.53 Complaint

§ 397.54 Summons

[1] Service Generally

[2] Service by Publication

§ 397.55 Lis Pendens

[1] Recordation and Service

[2] Additional Property

§ 397.56 Answer

[1] Required Allegations

[2] If Defendant Is Lienholder

[3] Compensatory Adjustment

§ 397.57 Interlocutory Judgment

[1] In General

[2] Multiple Interlocutory Judgments

[3] Binding on Referee

[4] Costs

§ 397.58 Appointment of Referee

[1] Types of Referees

[2] Procedure for Appointment

[3] Discretionary Power to Appoint

[4] On Partial Division and Partial Sale

[5] Ineligible Persons

[6] Court Authority Over Referee

§ 397.59 Authority and Duties of Referee

[1] In General

[2] To Make Report

[a] Filing and Contents

[b] Confirming, Modifying, or Setting Aside

[c] Effect

[3] Designating Property as Way, Road, or Street

[4] To Enter Into Contracts

[a] In General

[b] Liability of Referee

[c] Contract Provision for Interest

[d] Contracting With Attorney

[e] Contracting With Surveyor

[f] Contracting With Auctioneer

§ 397.60 Division of Property

[1] In General

[2] Division of Improvements

[3] Division With Purported Conveyance

[4] Division of Lots or Parcels

[5] Compensation to Correct Inequality; Owelty

[6] Lien on Undivided Interest

[7] Interests of Unknown Parties

§ 397.61 Final Judgment

[1] Order for Final Judgment

[2] Persons Bound

[3] Persons Not Bound

[4] Grounds to Set Aside

§ 397.62 Effect of Court's Conveyance or Transfer

§ 397.63 Costs of Partition

[1] In Partition Action

[2] In Related Action

[3] Apportionment of Costs

[4] Interest

[5] Payment of Costs

[6] As Lien

[7] Execution

§§ 397.64-397.79 [Reserved]

§ 397.80 Governing Law

§ 397.81 Decision to Order Sale

[1] In General

[2] Partial Sale

§ 397.82 Ineligible Purchasers

§ 397.83 Bona Fide Purchasers

§ 397.84 Sale of Certain Kinds of Property

[1] Separate Sale of Distinct Lots

[2] Sale of Real and Personal Property as Unit

[3] Sale of Securities or Perishable Personal Property

§ 397.85 Credit Sales

§ 397.86 Sales Procedure

[1] By Agreement of Parties

[2] By Court Determination

[3] Notice of Sale

[a] In General

[b] Private Sales

[4] Manner of Sale

[a] Public Auction or Private Sale

[b] Procedure for Public Auction

[c] Procedure for Private Sale

§ 397.87 Referees

[1] Duties of Referee

[2] Report of Referee

§ 397.88 Confirmation on Setting Aside Sale

[1] Motion

[2] Hearing on Sale

[3] Confirmation of Sale

[a] By Court

[b] Conveyance by Referee

[4] Vacating Sale

[a] In General

[b] Increased Offer

§ 397.89 Agents' Commissions

§ 397.90 Purchasers' Failure to Pay

§ 397.91 Purchaser as Party or Lienholder

§ 397.92 Orders Concerning Closing of Sale; Adjustments

§ 397.93 Disposition of Proceeds

[1] Disbursement

[2] Order of Application of Proceeds

[3] Partial Sale; Equitable Setoff

[4] Successive Estates

[5] Continuance Due to Nonallocation

§§ 397.94-397.109 [Reserved]

§ 397.110 Governing Law

§ 397.111 Purpose of Partition by Appraisal

§ 397.112 Agreement to Partition by Appraisal

[1] In General

[2] Contents

[3] Court Approval

§ 397.113 Appraisal by Referee; Referee's Report

§ 397.114 Motion to Confirm, Modify, or Set Aside Report

[1] Motion

[2] Hearing

[3] Order

[4] Judgment

§ 397.115 Availability of Other Remedies

§ 397.116 Default

§§ 397.117-397.129 [Reserved]

§ 397.130 California Points and Authorities

§ 397.131 Forms of Discovery

§ 397.132 California Real Estate

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[1] General Provisions

[2] Answer

[3] Condominiums

[4] Conveyances or Transfers of Interests

[5] Commencement of Action

[6] Costs

[7] Determination of Manner of Partition

[8] Determination of Right to Partition

[9] Determinations at Trial

[10] Division of Property

[11] Joinder of Parties

[12] Judgment of Partition

[13] Partition by Appraisal

[14] Powers of Court

[15] Partition by Sale

[16] Referees

[17] Summons

[18] Williamson Act

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[1] Generally

[2] Allotment of Improvements

[3] Attorney's Fees

[4] Community Property

[5] Interlocutory Judgment

[6] Jurisdiction to Partition Property

[7] Lease and Option Agreements

[8] Proof of Title

[9] Referee

[10] Review

[11] Trial

[12] Waiver

§ 397.135 Law Reviews

§ 397.136 Text References

§§ 397.137-397.149 [Reserved]

§ 397.150 State Statutes

[1] Consummation of Sale

[2] Disposition of Proceeds of Sale

[3] Manner of Sale

[4] Partition by Sale

[5] Sales Procedures

§ 397.151 Decisions

[1] Generally

[2] Confirmation

[3] Fees

[4] Interlocutory Decree

[5] Minimum Bid

§ 397.152 Text References

§§ 397.153-397.169 [Reserved]

§ 397.170 California Real Estate

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§§ 397.172-397.189 [Reserved]

§ 397.190 Facts to Be Ascertained

§ 397.191 Documents to Be Obtained

§ 397.192 Preliminary Determinations

§ 397.193 Information to Be Given to Plaintiff by Attorney

§ 397.194 Drafting of Complaint

§ 397.195 Preparation of Summons

§ 397.196 Service by Publication

§ 397.197 Filing Lis Pendens

§ 397.198 Issuance of Summons; Service of Summons and Complaint and Proof of Service

§ 397.199 Trial

§ 397.200 Appointment of Referee to Divide Property After Interlocutory Decree

§§ 397.201-397.219 [Reserved]

§ 397.220 Facts to Be Ascertained

§ 397.221 Documents to Be Obtained

§ 397.222 Preliminary Determinations

§ 397.223 Motions to Consider

§ 397.224 Defenses Particular to Partition

§ 397.225 Drafting Answer

§ 397.226 Service and Filing

§§ 397.227-397.239 [Reserved]

§ 397.240 Action for Partition of Real Property, Personal Property, or Both [Code Civ. Proc. § 872.210]--General Caption

[1] FORM

[2] Use of Form

§ 397.241 Action for Partition of Real Property, Personal Property, or Both [Code Civ. Proc. § 872.210]--Caption in Action Seeking Partition As to All Interests in the Property [Code Civ. Proc. § 872.550]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 397.242 Action for Partition of Real Property, Personal Property, or Both [Code Civ. Proc. § 872.210]--Caption in Action Seeking Partition if Defendant Deceased or Believed to Be Deceased and Personal Representative Unknown [Code Civ. Proc. § 872.530]

[1] FORM

[2] Use of Form

§ 397.243 Complaint [Code Civ. Proc. § 872.230] for Partition of Real Property, Personal Property, or Both [Code Civ. Proc. § 872.210]--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction

[6] Venue

[7] Cross References

[8] California Legal Forms

[9] State Statutes

[10] Decisions

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§ 397.244 Allegations--For Accounting and Appointment of Receiver [Code Civ. Proc. § 564]

[1] FORM

[2] Use of Form

[3] Cross References

[4] California Points and Authorities

[5] State Statutes

[6] Decisions

§ 397.245 Declaration Under Penalty of Perjury Regarding Dead or Presumably Dead Party [Code Civ. Proc. § 872.530(b)]

[1] FORM

[2] Use of Form

§ 397.246 Application and Declaration for Ex Parte Order to Authorize Procurement of Title Report [Code Civ. Proc. § 872.220(b)]

[1] FORM

[2] Use of Form

[3] Costs of Title Report

[4] Ex Parte Applications

[5] Cross References

[6] State Statutes

§ 397.247 Order [Code Civ. Proc. § 1003] Authorizing Procurement of Title Report [Code Civ. Proc. § 872.220(b)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 397.248 Notice of Pendency of Action [Code Civ. Proc. §§ 405.2, 405.4, 405.20] for Partition [Code Civ. Proc. § 872.250]

[1] FORM

[2] Use of Form

[3] Recording Requirement

[4] Contents

[5] Who May Issue and Sign

[6] Cross References

[7] State Statutes

§ 397.249 Ex Parte Application and Declaration for Order Directing Recordation of Notice of Pendency of Action [Code Civ. Proc. § 872.250(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 397.250 Answer [Code Civ. Proc. § 431.30] to Complaint for Partition [Code Civ. Proc. §§ 872.410-872.430]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

§ 397.251 Notice of Motion and Motion for Order Appointing Referee to Ascertain Interests of Lienholders [Code Civ. Proc. §§ 639, 872.630]

[1] FORM

[2] Use of Form

[3] Memorandum of Points and Authorities Required

§ 397.252 Report of Referee Concerning Liens on Property [Code Civ. Proc. § 872.630]

[1] FORM

[2] Use of Form

[3] Cross References

§ 397.253 Interlocutory Judgment [Code Civ. Proc. § 872.720]--Partition of Real Property, Personal Property, or Both, and Appointment of Referee

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

[5] Decisions

§§ 397.254-397.269 [Reserved]

§ 397.270 Interlocutory Judgment [Code Civ. Proc. §§ 872.720, 872.820]--Sale of Real Property

[1] FORM

[2] Use of Form

[3] Procedure Surrounding Sale

§ 397.271 Notice of Sale of Real Property [Code Civ. Proc. §§ 873.640, 873.650]--Public Auction or Private Sale

[1] FORM

[2] Use of Form

§ 397.272 Referee's Return and Report of Sale of Real Property--By Public Auction or Private Sale [Code Civ. Proc. § 873.710]

[1] FORM

[2] Use of Form

[3] Decisions

§ 397.273 Notice of Motion and Motion for Order Confirming Sale of Real Property [Code Civ. Proc. §§ 873.720, 873.730]

[1] FORM

[2] Use of Form

[3] Memorandum of Points and Authorities

§ 397.274 Declaration Under Penalty of Perjury in Support of Motion for Order Confirming Sale of Real Property [Code Civ. Proc. §§ 873.720, 873.730]

[1] FORM

[2] Use of Form

§§ 397.275-397.289 [Reserved]

§ 397.290 Stipulation for Partition by Appraisal [Code Civ. Proc. § 873.920]

[1] FORM

[2] Use of Form

§ 397.291 Consent of Referee to Appointment [Code Civ. Proc. §§ 873.920, 873.940]

[1] FORM

[2] Use of Form

[3] Cross References

§ 397.292 Notice of Motion and Motion for Order Approving Agreement, Staying Pending Division or Sale of Property, and Appointing Referees [Code Civ. Proc. §§ 873.930, 873.940]

[1] FORM

[2] Use of Form

§ 397.293 Declaration Under Penalty of Perjury in Support of Motion for Order Approving Agreement, Staying Pending Division or Sale of Property, and Appointing Referees [Code Civ. Proc. §§ 873.930, 873.940]

[1] FORM

[2] Use of Form

§ 397.294 Report of Appraisal by Referees [Code Civ. Proc. § 873.940]

[1] FORM

[2] Use of Form

§ 397.295 Notice of Motion and Motion for Order Confirming, Modifying, or Setting Aside Report of Referees [Code Civ. Proc. §§ 873.950, 873.960]

[1] FORM

[2] Use of Form

[3] Cross References

§ 397.296 Declaration Under Penalty of Perjury in Support of Motion for Order Confirming, Modifying, or Setting Aside Report of Referees [Code Civ. Proc. § 873.960]

[1] FORM

[2] Use of Form

§ 397.297 Notice of Motion and Motion for Entry of Judgment [Code Civ. Proc. § 873.960]

[1] FORM

[2] Use of Form

[3] Cross References

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§ 397.01 Scope of Chapter

This chapter discusses and contains forms relating to the partition of property generally. It includes the following forms:

- A general complaint for partition in kind or by sale of real and/or personal property with a choice of captions [*see* §§ 397.240-397.243].

- Allegations for an accounting and appointment of a receiver [*see § 397.244*].

- A declaration under penalty of perjury to be filed with the complaint when a party is deceased or presumably deceased and has no personal representative [*see § 397.245*].

- An ex parte application and declaration for an order to authorize procurement of a title report [*see § 397.246*] and a related order [*see § 397.247*].

- A notice of pendency of action for partition [*see § 397.248*] and an ex parte application and declaration for an order directing recordation of a notice of pendency of action [*see § 397.249*].

- An answer to a complaint for partition [*see § 397.250*].

- A notice of motion for an order appointing a referee [*see § 397.251*].

- A referee's report concerning liens on the property [*see § 397.252*].

- An interlocutory judgment for partition of real property, personal property, or both, and for appointment of a referee [*see § 397.253*].

This chapter also discusses partition by sale of the property and includes forms for interlocutory judgment [*see § 397.270*], notice of sale of real property by public or private auction [*see § 397.271*], a referee's return and report of sale of real property by public auction or private sale [*see § 397.272*], notice of motion for an order confirming the sale of

real property [*see § 397.273*], and declaration under penalty of perjury in support of a motion for an order confirming the sale of real property [*see § 397.274*].

This chapter also discusses partition by appraisal. It includes the following forms:

- A stipulation for partition by appraisal [*see § 397.290*].

- A referee's (1) consent to his or her appointment [*see § 397.291*], and (2) appraisal report [*see § 397.294*].

- A motion and supporting declaration for an order approving an agreement for partition by appraisal [*see §§ 397.292, 397.293*].

- A motion and supporting declaration for an order confirming, modifying, or setting aside the referee's report [*see §§ 397.295, 397.296*].

- A motion to obtain an order for entry of judgment [*see § 397.297*].

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§ 397.02 Cross References

For a discussion and forms for use in boundary disputes, see Ch. 101, *Boundaries*

For a discussion and forms for use in disputes involving deeds and restrictive covenants, see Ch. 184, *Deeds*

For a discussion and forms for use in disputes involving easements, see Ch. 240, *Easements*

For discussions and forms for use on sale of property of estate of deceased persons, see Ch. 444, *Probate: Sale of Estate Property*

For a discussion and forms for use in disputes involving the quieting of title, see Ch. 482, *Quieting Title*

For forms for use on sale of property under execution, see Ch. 254, *Executions and Enforcement of Judgments*

For a discussion and forms for use in disputes involving vendors and purchasers, see Ch. 569, *Vendor and Purchaser*

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[Reserved]

§§ 397.03[Reserved]

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§ 397.10 Governing Law

Partition is governed generally by *Code Civ. Proc. §§ 872.010-873.290, 874.010-874.240*, and *Civ. Code § 1359* (partition of condominiums). The procedure for partition by sale is governed by *Code Civ. Proc. §§ 873.510-873.850*. The procedure for partition by appraisal is governed by *Code Civ. Proc. §§ 873.910-874.240*.

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§ 397.11 Purpose of Partition

The object of a partition of property is to enable cotenants to obtain title in severalty to some definite portion of property owned in common, and thereby permanently end all disputes that may have arisen between them concerning the property [*see McGillivray v. Evans (1864) 27 Cal. 92]* . A decree or judgment in partition has no other effect than to sever the unity of possession, and does not vest in either of the cotenants any new or additional title [*Rancho Santa Margarita v. Vail (1938) 11 Cal. 2d 501, 539*].

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[Reserved]

§§ 397.12[Reserved]

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§ 397.30 Governing Statutes

Partition is governed generally by *Code Civ. Proc. §§ 872.010-873.290* and *874.010-874.240*. *Civ. Code § 1359* governs partition of condominiums.

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§ 397.31 Revision of Partition Statutes

In 1976 the Legislature enacted *Code Civ. Proc. §§ 872.010-872.240*, effective on January 1, 1977. These statutes codified, and in some instances amended, the existing law pertaining to the partition of real property. They were adopted pursuant to a Law Revision Commission recommendation and each new section was accompanied by an official comment from the Law Revision Commission or a legislative committee. As indicated in the Law Revision Commission comments, the primary purpose of the commission and of the Legislature was to codify existing law unless it was felt that there was some reason for making a change. When no change was made, it is of assistance to look at decisions decided prior to 1977 [*Richmond v. Dofflemyer (1980) 105 Cal. App. 3d 745, 753, 164 Cal. Rptr. 727]* . Therefore, pre-1977 decisions are cited throughout this chapter.

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§ 397.32 Applicability of Partition Statutes

The partition statutes (*Code Civ. Proc. §§ 872.010-874.240*) govern actions for partition of real property and, except to the extent not applicable (e.g., statutes governing lis pendens (*Code Civ. Proc. § 872.250*) and title report (*Code Civ. Proc. § 872.220*)), actions for partition of personal property [*Code Civ. Proc. § 872.020*]. It should be noted that *Code Civ. Proc. §§ 872.010-874.240* do not apply to property divisions under the Family Code or in other types of cases specifically governed by other statutes [Assembly Legislative Committee Comment to *Code Civ. Proc. § 872.020*].

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§ 397.33 Definitions

As used in *Code Civ. Proc. §§ 872.010-874.240*, *(a)* "action" means an action for partition under *Code Civ. Proc. §§ 872.010-874.240*; (b) "lien" means a mortgage, deed of trust, or other security interest in property whether arising from contract, statute, common law, or equity; (c) "property" includes real and personal property; (d) "remainder" includes a preliminary report, guarantee, binder, or policy of title insurance; and (e) "title report" includes a preliminary report, guarantee, binder, or policy of title insurance [*Code Civ. Proc. § 872.010*].

The term "lien" is defined broadly in *Code Civ. Proc. § 872.010(b)* to apply to any encumbrance on property, including security interests in personal property. The term "title report" in *Code Civ. Proc. § 872.010(e)* is drawn using the terminology employed in the title insurance industry [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 872.010*].

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§ 397.34 Applicability of General Civil Statutes

The statutes and rules governing practice in civil actions generally, apply to actions under *Code Civ. Proc. §§ 872.010-874.240* except when they are inconsistent with the provisions of *Code Civ. Proc. §§ 872.010-874.240* [*Code Civ. Proc. § 872.030*].

Code Civ. Proc. § 872.030 makes it clear that, although partition is nominally a civil action, *Code Civ. Proc. §§ 872.010-874.240* contain some special procedural provisions that apply to partition despite general rules to the contrary. For example, the partition provisions governing referees apply in partition actions notwithstanding any general provisions to the contrary that might be found in *Code Civ. Proc. §§ 638-645.1* (references and trials by referees) [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 872.030*].

Nothing in *Code Civ. Proc. §§ 872.010-874.240*, however, excuses compliance with any applicable laws, regulations, or ordinances governing the division, sale, or transfer of property [*Code Civ. Proc. § 872.040*].

Whether a particular law, regulation, or ordinance is applicable in a partitionaction is determined by the terms or a construction of that law, regulation, or ordinance [Assembly Legislative Committee Comment to *Code Civ. Proc. § 872.040*].

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§ 397.35 Jurisdiction

The superior court has jurisdiction of actions under *Code Civ. Proc. §§ 872.010-874.240* [*Code Civ. Proc. § 872.110(a)*; *see also Mears v. Jeffry (1947) 80 Cal. App. 2d 610, 615, 182 P.2d 294]* .

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§ 397.36 Venue

Subject to the power of the court to transfer actions [*Code Civ. Proc. §§ 396-399*], the proper county for the trial of actions under *Code Civ. Proc. §§ 872.010-874.240* is as follows [*Code Civ. Proc. § 872.110(b)*]:

- When the subject of the action is real property or real and personal property, the county in which the real property, or some part of the real property, is situated.

- When the subject of the action is personal property, the county in which the personal property is principally located at the commencement of the action or in which the defendants, or any of them, reside at the commencement of the action.

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§ 397.37 Statute of Limitations

The statute of limitations never bars relief between tenants in common in an action for partition. It is only if a party has, by operation of the statute of limitations (*see Code Civ. Proc. §§ 318-322, 325*), lost all right to and in the land and such right has, by prescription, become vested in another, that the statute of limitations has any effect in a partition action [*Adams v. Hopkins (1904) 144 Cal. 19, 27, 77 P. 712]* . In addition, the bringing of a partition suit will suspend the running of the statute of limitations and will prevent the acquisition of the property subject to the suit by a title by prescription [*Christy v. Spring Valley W.W. (1892) 97 Cal. 21, 24, 31 P. 1110]* .

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§ 397.38 Laches

The doctrine of laches is applicable to an action in partition when conflicting claims to the property are involved and an accounting is sought [*Corrigan v. Stiltz (1965) 233 Cal. App. 2d 381, 387-388, 43 Cal. Rptr. 548]* .

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§ 397.39 Powers of Court

[1] Motions, Orders, and Decrees

In the conduct of the partition action, the court may hear and determine all motions, reports, and accounts and may make any decrees and orders necessary or incidental to carrying out the purposes of *Code Civ. Proc. §§ 872.010-874.240* and to effectuating its decrees and orders [*Code Civ. Proc. § 872.120*]. The purpose of *Code Civ. Proc. § 872.120* is to give the broadest possible statutory authorization for powers that the court, to a large extent, apparently had prior to revision of the partition statutes. *Code Civ. Proc. §§ 872.130* (*see § 397.39[3]*) and *872.140* (*see § 397.39[5]*) elaborate on, but do not exhaust, the court's power in partition actions. Furthermore, the statutory provisions in partition actions are to be liberally construed in aid of the court's jurisdiction [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 872.120*].

[2] Equitable Nature

An action for partition is statutory but the powers conferred on the courts by statute are substantially those formerly exercised by the chancery courts in pursuit of the same object, and the methods employed by the code are, in the main, "a reflex of those pursued under former equity practice." It is equitable practice prescribed by law [*Jameson v. Hayward (1895) 106 Cal. 682, 687-688, 39 P. 1078* ; *Akley v. Bassett (1922) 189 Cal. 625, 647, 209 P. 576]* . Thus, the courts in partition actions dispense relief only on the condition that the equitable rights of a cotenant are respected and safeguarded [*Elbert, Ltd. v. Federated Income Properties (1953) 120 Cal. App. 2d 194, 200, 261 P.2d 743]* .

[3] Temporary Restraining Orders and Injunctions

In the conduct of the action, the court may issue temporary restraining orders and injunctions, with or without bond, for the purpose of (1) preventing waste; (2) protecting the property or title of the property; and (3) restraining unlawful interference with a partition of the property ordered by the court [*Code Civ. Proc. § 872.130*]. For further discussion and forms for use in temporary restraining orders and injunctions, see Ch. 303, *Injunctions* .

[4] Appointment of Receiver

The superior court has jurisdiction to appoint a receiver as an ancillary remedy in an action for partition of real property among tenants in common and should do so when the circumstances require it [*Blodgett v. Haddock (1949) 95 Cal. App. 2d 17, 18, 212 P.2d 26]* . The appointment may be made "ex parte" and without notice if the "imperative necessity" or emergency is shown in the petition or supporting affidavits [*Lent v. H.C. Morris Co. (1938) 25 Cal. App. 2d 305, 308, 77 P.2d 301]* . There is no precedent, however, for the appointment of a receiver in a partitionsuit, when no tenant in common is attempting to oust the plaintiff or is in any way interfering with his or her common possession and use of the property or otherwise endangering the rights of the plaintiff in the property [*Reas v. Clemence (1916) 173 Cal. 106, 108, 159 P. 432]* .

[5] Compensation Among Parties

[a] In General

The court may, in all cases, order allowance, accounting, contribution, or other compensatory adjustment among the parties according to the principles of equity [*Code Civ. Proc. § 872.140*]. For example, an equitable adjustment may be made to offset the use value of property against the expense of improvements [*Hunter v. Schultz (1966) 240 Cal. App. 2d 24, 31, 49 Cal. Rptr. 315]* .

Code Civ. Proc. § 872.140 makes clear the court's authority to order compensatory adjustment for such items as common improvements, unaccounted rents and profits, and other matters for which contribution may be required [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 872.140*]. For a discussion of the law governing payment of compensation cases of unequal division, see *§ 397.60[4]*.

[b] Rents, Profits, and Rental Value

In a partition action, one tenant in common out of possession may compel his or her cotenant in possession to account for rents and profits received by him or her from third persons. The tenant in possession may deduct from the rents and profits any amounts paid for taxes and for necessary and proper repairs and additions on the premises held in common during the period for which the rents were collected [*Goodenow v. Ewer (1860) 16 Cal. 461, 472]* . On the other hand, if a cotenant who has been in possession or use of the premises seeks to obtain contribution respecting improvements made, or amounts expended in protection or preservation of the property, the court, as incidental to the granting of the relief and by way of adjusting the rights of the parties, may charge the claimant defensively with at least a part of the reasonable value of his or her occupancy or use, and in some cases may hold him or her accountable for profits realized from the premises, even though he or she could not otherwise be required to account or be held liable for any of such benefits [*Hunter v. Schultz (1966) 240 Cal. App. 2d 24, 31-32, 49 Cal. Rptr. 315]* .

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§ 397.40 Who May Bring Partition Action

A partition action may be commenced and maintained by (1) a co-owner of personal property; or (2) an owner of an estate of inheritance, an estate for life, or an estate for years in real property when the property or estate therein is owned by several persons concurrently or in successive estates [*Code Civ. Proc. § 872.210(a)*]. Generally, a partition action may be maintained only by a person having the interest described by *Code Civ. Proc. § 872.210(a)* [*see Ryer v. Fletcher Ryer Co. (1899) 126 Cal. 482, 483-484, 58 P. 908* ; *Akagi v. Ishioka (1975) 47 Cal. App. 3d 426, 429, 120 Cal. Rptr. 807]* . An equitable interest, however, is sufficient to support a partition action [*Watson v. Sutro (1890) 86 Cal. 500, 528, 24 P. 172* ; *see § 397.41[1][c]*]. For example, a holder of an equity of redemption may maintain an action for partition [*Powers v. Powers (1963) 221 Cal. App. 2d 746, 750, 34 Cal. Rptr. 835]* .

Neither actual possession, nor the right to actual or immediate possession, is necessary to enable a cotenant to maintain an action in partition if he or she otherwise falls within the provisions of *Code Civ. Proc. § 872.210* [*see Skulich v. Skulich (1931) 213 Cal. 653, 654, 3 P.2d 12* (decided under former *Code Civ. Proc. § 752*)].

Under *Code Civ. Proc. § 872.210(a)(2)* (see discussion, *above*), if property is owned by several persons, whether or not they are joint tenants or tenants in common, partition is available to sever their interests. Thus, *Code Civ. Proc. § 872.210(a)(2)* permits partition of partnership property. It should be noted, however, that partition of partnership property is subject to the limitations of *Code Civ. Proc. § 872.730* [Assembly Legislative Committee Comment to *Code Civ. Proc. § 872.210*; *see § 397.41[3][a]*].

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§ 397.41 Determination of Right to Partition

[1] In General

The court, at either a contested or uncontested trial, determines whether the plaintiff has the right to partition [*see Code Civ. Proc. § 872.710(a)*; Assembly Legislative Committee Comment to *Code Civ. Proc. § 872.710*]. A cotenant need not assign any reason for his or her demand to partition; the only indispensable requirement to the award of partition is that a clear title be shown [*De Roulet v. Mitchel (1945) 70 Cal. App. 2d 120, 124, 160 P.2d 574]* .

In order to make the determination that the plaintiff has the right to partition, the court must find that the plaintiff has an interest in the property sufficient to maintain the action (*see § 397.41[2]*). In addition, the court must find the existence of any special conditions prerequisite to partition of interests in particular types of property, such as a condominium project [Assembly Legislative Committee Comment to *Code Civ. Proc. § 872.710*]. For a discussion of partition of specific types of property, see *§ 397.41[2]*.

[2] Sufficiency of Interests

[a] Concurrent Interests

Except as provided in *Code Civ. Proc. § 872.730* (*see § 397.41[2]*), partitionas to concurrent interests in the property will be as of right unless barred by a valid waiver [*Code Civ. Proc. § 872.710(b)*; *see § 397.134[12]*].

The right to partition of concurrent interests, however, is not absolute. As stated in *Code Civ. Proc. § 872.710(b)*, partition of partnership property is one situation where partition of concurrent interests is not a matter of right. In addition, *Code Civ. Proc. § 872.710* does not provide an absolute right to partition of cotenancy property on which a homestead has been declared [Assembly Legislative Committee Comment to *Code Civ. Proc. § 872.710*; see discussion of partition of homesteads in *§ 397.41[3][d]*]. Furthermore, as stated in *Code Civ. Proc. § 872.710(b)*, the right to partition may be defeated by a finding that there has been an express or implied waiver of the right. It should be noted, however, that *Code Civ. Proc. § 872.710(b)* does not provide standards for determining whether a purported waiver of the right to partition is valid but provides only that a valid waiver is a sufficient defense to the right to partition. The

validity of a waiver is determined by case law [Assembly Legislative Committee Comment to *Code Civ. Proc. § 872.710*].

[b] Successive Estates

Partition as to successive estates in the property will be allowed if it is in the best interest of all the parties. The court will consider whether the possessory interest has become unduly burdensome by reason of the following [*Code Civ. Proc. § 872.710(c)*]:

- Taxes or other charges;
- Expense of ordinary or extraordinary repairs;
- Character of the property and change in the character of the property since creation of the estates;
- Circumstances under which the estates were created and change in the circumstances since creation of the estates; and
- All other factors that would be considered by a court of equity having in mind the intent of the creator of the successive estates and the interests and needs of the successive owners.

[c] Equitable Interests

An equitable interest is sufficient to support a partition action [*Watson v. Sutro (1890) 86 Cal. 500, 528, 24 P. 172]* . For example, a holder of an equity of redemption may maintain an action for partition [*Powers v. Powers (1963) 221 Cal. App. 2d 746, 750, 34 Cal. Rptr. 835]* .

[3] Particular Types of Property

[a] Partnership Property

The provisions of *Code Civ. Proc. §§ 872.010-872.240* may be applied in a proceeding for partnership accounting and dissolution, or in an action for partition of partnership property, if the rights of unsecured creditors of the partnership will not be prejudiced and to the extent that the court determines that the provisions of *Code Civ. Proc. §§ 872.010-874.240* are a suitable remedy [*Code Civ. Proc. § 872.730*].

Code Civ. Proc. § 872.730 is an exception to the rule of *Code Civ. Proc. § 872.710* (*see § 397.41[1]*) that partition as to concurrent interests is a matter of right. *Code Civ. Proc. § 872.730* codifies prior case law to the effect that partition is an appropriate remedy where the affairs of the partnership are otherwise sufficiently settled and what remains is the division or sale of the property [Assembly Legislative Committee Comment to *Code Civ. Proc. § 872.730*].

In a partnership dissolution action, a court has authority to make a distribution of partnership real property in kind. This power, however, is conditioned on a finding that it is not necessary to hold a sale to satisfy partnership obligations [*Logoluso v. Logoluso (1965) 233 Cal. App. 2d 523, 530, 43 Cal. Rptr. 678]* .

[b] Partition of Community Property

An action between spouses or putative spouses for partition of their community or quasi-community property, or their quasi-marital interest in property, may not be commenced or maintained under *Code Civ. Proc. §§ 872.010-874.240* [*Code Civ. Proc. § 872.210(b)*]. *Code Civ. Proc. § 872.210(b)* codifies the rule that community property is not subject to partition. It should be noted, however, that *Code Civ. Proc. § 872.210(b)* only precludes severance of the community

interests of spouses; it does not preclude partition of other estates or interests in the property that may exist concurrently or successively with the community interests [Assembly Legislative Committee Comment to *Code Civ. Proc. § 872.210*; *see, e.g., In re Marriage of Graves (1988) 198 Cal. App. 3d 1047, 1050-1052, 244 Cal. Rptr. 110* (discussing need for partition of former community asset held in tenancy in common after marital dissolution)]. For a discusssion of the division of community property, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

[c] Partition of Condominium Project

The common areas of a condominium project are to remain undivided and not subject to judicial partition except as provided in *Civ. Code § 1359* (see discussion, *below*). There is no bar, however, to partition of a cotenancy in a condominium [*Civ. Code § 1359*].

A court can order partition of a condominium project under *Civ. Code § 1359* but only by sale of the entire project. In such a case, the owner of a condominium in a condominium project may maintain an action for partition by sale of the entire project as if the owners of all of the condominiums in the project were tenants in common in the entire project in the same proportion as their interests in the common areas. A partition by sale of a condominium project, however, shall only be ordered on a showing of one of the following [*Civ. Code § 1359*]:

(1) More than three years before the filing of the action, the project was damaged or destroyed so that a material part was rendered unfit for its prior use, and the project has not been rebuilt or repaired substantially to its state prior to the damage or destruction.

(2) Three-fourths or more of the project is destroyed or substantially damaged and condominium owners holding in aggregate more than a 50-percent interest in the common areas oppose repair or restoration of the project.

(3) The project has been in existence more than 50 years, is obsolete and uneconomic, and condominium owners holding in aggregate more than a 50-percent interest in the common areas oppose repair or restoration of the project.

(4) The conditions for such a sale, set forth in the declaration, have been met.

[d] Partition of Homesteads

The general rule is that homestead rights of a cotenant in his or her interest in the common property are not a bar to partition [*Young v. Hessler (1945) 72 Cal. App. 2d 67, 69, 164 P.2d 65]* . However, a court may refuse to include a portion of the common property, which is subject to a probate homestead, in the partition of the common property in order to protect the property rights of a surviving widow during her lifetime [*Mills v. Stump (1912) 20 Cal. App. 84, 90-91, 128 P. 349]* . In addition, when the common property is held by husband and wife as joint tenants and is subject to a valid homestead, one spouse may be barred from bringing a suit for partition of the homestead [*see Walton v. Walton (1943) 59 Cal. App. 2d 26, 36, 138 P.2d 54* ; *Kaupe v. Kaupe (1955) 131 Cal. App. 2d 511, 514, 280 P.2d 856]* . It should be noted, however, that the declaration of a homestead by a former spouse after a decree of divorce has been entered, does not bar a suit for partition [*Squibb v. Squibb (1961) 190 Cal. App. 2d 766, 770, 12 Cal. Rptr. 346]* .

[e] Property Subject to Express Trust

The court may, in its discretion, order to be sold property, or an interest therein, that is subject to an express trust [*Code Civ. Proc. § 872.840(a)*]. For a discussion and forms relating to partition by sale, see *§ 397.80 et seq., § 397.270 et seq.*. On division or sale of such property, the property or proceeds of sale allotted to the trustee of the express trust will be held by him or her on the trust therein stated, and no further action by the court pursuant to *Code Civ. Proc. § 872.840* is required [*Code Civ. Proc. § 872.840(b)*].

One cannot, of course, by a suit for partition, put an end to an express trust or defeat its lawful purposes, nor usurp the functions of the trustee; if, however, the property does not appear to be held under an active trust, a suit for partition is possible [*Varni v. Devoto (1909) 10 Cal. App. 304, 307, 101 P. 934]* . In addition, two co-owners may maintain a suit for partition as co-owners, despite the fact that one of these co-owners is the self-appointed trustee of the property in question by virtue of a power of attorney from the other co-owner [*O'Bryant v. Bosserman (1949) 94 Cal. App. 2d 353, 355, 210 P.2d 739]* .

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§ 397.42 Waiver

A co-owner may waive his or her right to partition by agreement [*Williams v. Williams (1967) 255 Cal. App. 2d 648, 651, 63 Cal. Rptr. 354]* . This agreement may be either express or implied [*Thomas v. Witte (1963) 214 Cal. App. 2d 322, 327, 29 Cal. Rptr. 412]* . For further discusssion, see California Real Estate Law and Practice, Ch. 371, *Partition and Other Terminations of Cotenancies* .

In addition, a waiver may be implied to prevent unfairness or the frustration of an agreement between the original co-owners [*see* *Pine v. Tiedt (1965) 232 Cal. App. 2d 733, 738, 43 Cal. Rptr. 184* ; *Penasquitos, Inc. v. Holladay (1972) 27 Cal. App. 3d 356, 358, 103 Cal. Rptr. 717]* . Under this principle of fairness, a successor-in-interest of a co-owner must stand in the shoes of his or her transferor and, therefore, is subject to the restrictions of an agreement between the original co-owners. Thus, an original co-owner against whom partition is sought is protected from being forced to lose his or her undivided interest contrary to the agreement under which the undivided interests were obtained [*American Medical International, Inc. v. Feller (1976) 59 Cal. App. 3d 1008, 1015, 131 Cal. Rptr. 270]* . For further discussion, see California Real Estate Law and Practice, Ch. 371, *Partition and Other Terminations of Cotenancies* .

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§ 397.43 Parties

[1] Joinder of Interested Persons

The plaintiff must join as defendants in the action all persons having or claiming interests of record (including liens) in the estate as to which partition is sought; these persons must be joined as defendants if they are actually known to the plaintiff or reasonably apparent from an inspection of the property [*Code Civ. Proc. § 872.510*]. Furthermore, a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action must be joined as a party in the action if either of the following exists [*Code Civ. Proc. § 389(a)*]:

- His or her absence will prevent complete relief from being accorded among those already parties.

- He or she claims an interest relating to the subject of the action and is so situated that the disposition of the action in his or her absence may either, as a practical matter, impair or impede his or her ability to protect that interest or leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his or her claimed interest.

For further discussion of joinder of parties, see Ch. 395, *Parties* . In a suit for partition it is indispensable that all cotenants who have not united in the complaint be made parties defendant. If one of the co-owners is not bound by the decree in partition, the purpose of the suit fails of accomplishment, for no one will then become a tenant in severalty [*Solomon v. Redona (1921) 52 Cal. App. 300, 306, 198 P. 643]* .

[2] Known But Unrecorded Interests; BFPs; Encumbrancers

If a person having or claiming an unrecorded interest in the property or a portion of the property was not a party to the action but the existence or claim of the interest was actually known to the plaintiff at any time before entry of the interlocutory judgment or would have been reasonably apparent from an inspection of the property, the judgment does not affect the interest of this person in the portion of the property or the proceeds from sale of the property allocated to the plaintiff [*Code Civ. Proc. § 874.225(b)*].

The intention of *Code Civ. Proc. § 874.225(b)* is to implement the requirement of *Code Civ. Proc. § 872.510* (*see § 397.43[1]*) that the plaintiff join all persons actually known to the plaintiff or reasonably apparent from an inspection of the property, who have or claim interests in the property or estate as to which partition is sought. It should be noted that *Code Civ. Proc. § 874.225(b)* is an exception to the rule stated in *Code Civ. Proc. § 874.210(c)* (*see § 397.61[2]*), that the judgment binds all persons having unrecorded interests in the property. *Code Civ. Proc. § 874.225(b)*, however, makes the judgment not conclusive only with respect to the share of the plaintiff. The portions of the property allocated to other parties in case of a division, or the entire property in case of a sale to a bona fide purchaser, are free of the unrecorded interests. The introductory portion of *Code Civ. Proc. § 874.225* makes clear that, notwithstanding the provisions of this section, a claimant may be bound by the proceeding if the claim was acquired from a party after commencement of the proceeding and with actual knowledge of the proceeding [Cal. L. Rev. Comm. Comments to *Code Civ. Proc. § 874.225*; *see Code Civ. Proc. § 1908(a)(2)*]. Nothing in *Code Civ. Proc. § 874.225(b)* shall be construed to impair the rights of a bona fide purchaser or encumbrancer for value dealing with the plaintiff or his or her successors in interest [*Code Civ. Proc. § 874.225(b)*].

[3] Purchaser From Cotenant

Persons who have purchased any portion of property from less than all of the cotenants of the property are necessary parties to a partition action concerning the property [*Gates v. Salmon (1868) 35 Cal. 576, 586-589]* . However, if such a portion of the property is purchased from all of the cotenants of the property, such a purchaser is not a necessary party to a partition action [*Richardson v. Loupe (1889) 80 Cal. 490, 498, 22 P. 227* ; *see also Middelcoff v. Cronise (1909) 155 Cal. 185, 189, 100 P. 232* ; *see also § 397.47[2]*].

[4] Unknown Persons or Interests

If the name of a person described in *Code Civ. Proc. § 872.510* (*see § 397.43[1]*) is not known to the plaintiff, the plaintiff must so state in the complaint [*Code Civ. Proc. § 872.520(a)*]. *Code Civ. Proc. § 872.550* states that if partition is sought as to all interests in the property, the plaintiff may join as defendants "all persons unknown claiming any interest in the property," naming them in that manner. Thus, *Code Civ. Proc. § 872.550* provides a means whereby the plaintiff may give the partition action an in rem effect [Assembly Legislative Committee Comment to *Code Civ. Proc. § 872.550*]. In addition, the court will on its own motion or on motion of any party, make orders for joinder of additional parties which are necessary or proper [*Code Civ. Proc. § 872.520(c)*].

[5] Future Interests

Provisions relating to partition are intended to make the one judgment of partition final and conclusive on all persons interested and not to permit the matter to be taken up piecemeal. Accordingly, provision is made for bringing in not only tenants in common but persons having future rights or interests [*Withington v. Collins (1943) 60 Cal. App. 2d 110, 114, 140 P.2d 493* ; *see Code Civ. Proc. § 872.510* and discussion in *§ 397.43[1]*].

If the ownership or the share or quantity of the interest of a person described in *Code Civ. Proc. § 872.510* (*see § 397.43[1]*) is unknown, uncertain, or contingent, the plaintiff must so state in the complaint. If the lack of knowledge, uncertainty, or contingency is caused by a transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, the plaintiff must also state in the complaint, so far as known to the plaintiff, the following [*Code Civ. Proc. § 872.520(b)*]:

(1) the name, age, and legal disability of the person in being who would be entitled to ownership of the interest; and

(2) the fact that the contingency on which the right of such person depends occurred prior to the commencement of the action.

The court will, on its own motion or on motion of any party, make such ordersfor appointment of guardians ad litem pursuant to *Code Civ. Proc. §§ 372, 373*, and *373.5* (provisions dealing with guardians, conservators, and guardians ad litem) as are necessary and proper [*Code Civ. Proc. § 872.520(c)*].

[6] Deceased Interested Persons

If a person described in *Code Civ. Proc. § 872.510* (*see § 397.43[1]*) is dead and the plaintiff knows of a personal representative, the plaintiff must join such personal representative as a defendant [*Code Civ. Proc. § 872.530(a)*]. If a person described in *Code Civ. Proc. § 872.510* is dead, or is believed by the plaintiff to be dead, and the plaintiff knows of no personal representative [*Code Civ. Proc. § 872.530(b)*]:

(1) The plaintiff must state these facts in an affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) filed with the complaint.

(2) If it is stated in the affidavit (or declaration) that such person is dead, the plaintiff may join as defendants "the testate and intestate successors of _____ (naming such deceased person), deceased, and all persons claiming by, through, or under said decedent," naming them in that manner.

(3) If it is stated in the affidavit (or declaration) that such person is believed to be dead, the plaintiff may join such person as a defendant, and he or she may also join "the testate and intestate successors of _____ (naming such person) believed to be deceased, and all persons claiming by, through, or under such person," naming them in that manner.

[7] Persons Holding Oil and Gas Interests

If property is subject to a lease, community lease, unit agreement, or other pooling arrangement with respect to oil or gas or both, the plaintiff need not join as defendants persons whose only interest in the property is that of a lessee, royalty-owner, lessor-owner of other real property in the community, unit, or pooled area, or working-interest-owner, or persons claiming under them. The judgment of partition will not affect the interests of such persons not joined as defendants [*Code Civ. Proc. § 872.540*]. For a discussion of interests relating to oil and gas, see Ch. 393, *Oil and Gas* .

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§ 397.44 Determination of Interests of Parties

[1] In General

The interests of the parties, plaintiff as well as defendant, may be put in issue, tried, and determined in the action [*Code Civ. Proc. § 872.610*]. An action for partition under our statute is, to some extent, sui generis. The parties named in the complaint, whether as plaintiffs or defendants, are all actors, each representing his or her interest. Whether plaintiffs or defendants, they are required to set forth fully and particularly the origin, nature, and extent of their respective interests in the property. This having been done, the interest of each, or all, may be put in issue by the others; and, if so, such issues are to be first tried and determined, and no partition can be made until the respective interests of all the parties have been ascertained and settled by a trial [*Morenhout v. Higuera (1867) 32 Cal. 289, 295]* .

[2] Interests of Lienholders; Determination by Referee

The court will determine the status and priority of all liens on the property to the extent necessary to grant the relief sought or other appropriate relief [*Code Civ. Proc. § 872.630(a)*]. The court may appoint a referee to ascertain the facts necessary for this determination of the status and priority of the liens. On application of the referee or a lienholder, the court will direct the issuance of process to compel attendance of witnesses, the production of books, documents, or things, and the filing of verified claims. The report of the referee must be made in writing to the court and must be confirmed, modified, or set aside and a new reference ordered, as the justice of the case may require [*Code Civ. Proc. § 872.630(b)*].

It is important to note that two distinct classes of referees may be appointed in a partition action. Pursuant to *Code Civ. Proc. § 872.630(b)*, a referee may be appointed to ascertain the facts necessary for the determination of the status and priority of all liens on the property subject to partition. Such a referee is appointed before the interlocutory decree. On the other hand, the referee appointed under *Code Civ. Proc. § 873.010* (*see* is appointed after the interlocutory decree and that referee's sole duty is to divide or sell the property as ordered by the court [*Richardson v. Loupe (1889) 80 Cal. 490, 501, 22 P. 227]* .

[3] Interests of Unknown Parties

The court may consider the interests of two or more unknown parties together, with respect to the action, but may not consider the interests of the unknown parties between each other [*Code Civ. Proc. § 872.640*].

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§ 397.45 Determination of State of Title

To the extent necessary to grant relief sought or other appropriate relief, the court will, on adequate proof, ascertain the state of the title to the property [*Code Civ. Proc. § 872.620*]. In contrast with *Code Civ. Proc. § 872.610* (*see § 397.44*), in cases where it is necessary to know the state of the title, *Code Civ. Proc. § 872.620* applies regardless of whether a defendant raises the issue in his or her pleadings [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 872.620*].

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§ 397.46 Effect of Unpaid Judgment

The existence of an unpaid judgment from one cotenant to another does notprevent partition. If the judgment is not a lien on the cotenant's interest, it is not different from any other extraneous claim. On the other hand, if it is a lien, the interest of the cotenant holding judgment may be protected in settling and determining the rights of the parties in the property [*Lazzarevich v. Lazzarevich (1952) 39 Cal. 2d 48, 51, 244 P.2d 1* ; *see § 397.44[2]*].

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§ 397.47 Joinder of Property

[1] In General

Real and personal property may be partitioned in one action [*Code Civ. Proc. § 872.240*]. If different parties, however, are interested in real and personal property joined in the action, severance may be appropriate [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 872.240*]. It should be noted that if partition of both real and personal property is alleged in a single cause of action, it is not possible to demur on the ground of misjoinder of causes of actions [*Bolan v. Gallagher (1921) 52 Cal. App. 503, 504, 199 P. 57]* .

[2] Joinder of Parcels

Real property consisting of several distinct parcels or tracts of land, and situated in different counties, may be joined in one action for partition [*Murphy v. Superior Court (1902) 138 Cal. 69, 72, 70 P. 1070]* . It is a well-settled rule, however, that, to justify such union in one suit, each parcel of land must be owned by the same persons [*Middelcoff v. Cronise (1909) 155 Cal. 185, 189, 100 P. 232]* . On the other hand, there is a universally accepted doctrine that one cotenant cannot by a conveyance of his or her interest in a portion of the property held in common prejudice the rights of his or her cotenants. In such a case, the grantee or successor of such a cotenant simply steps into the shoes of his or her grantor, subject to all the rights of the other cotenants and their successors as to partition.

For the purposes of partition, the whole property originally held in common by the cotenants, whether consisting of one or any number of parcels, continues to be a unit--the subject matter of a single action--just as if no change in the ownership had occurred. This means that a grantee may be a necessary party defendant even though a cotenant only as to one of the parcels involved; the fact that he or she is not interested in the other parcels is no ground of objection to the joinder in one action of the various parcels of land. There is but one cause of action stated, the partition of a single lot of real property originally held in common, and, for all purposes of the partition proceeding, still so held [*Middelcoff v. Cronise (1909) 155 Cal. 185, 189, 100 P. 232]* .

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§ 397.48 Consolidation of Actions

When an action is brought which relates to an action for partition of certain property, it is proper for the court to consolidate the actions and dispose of the issues involved in the related action in the trial of the action of partition [*Bixby v. Bent (1881) 59 Cal. 522, 531]* . For a discussion, procedures, and forms relating to consolidation of actions, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

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§ 397.49 Granting Separate Trials

It is a matter of discretion on the part of the trial court to grant separate trials as between the plaintiff and separate defendants, which discretion will not be interfered with on appeal except in the case of abuse [*Caldwell v. Regents of University (1917) 35 Cal. App. 639, 640, 170 P. 666]* .

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§ 397.50 Determination of Manner of Partition

[1] Division of Property

The court must order that the property be divided among the parties in accordance with their interests in the property as determined in the interlocutory judgment [*Code Civ. Proc. § 872.810*; *see § 397.57*]. *Code Civ. Proc. § 872.810* continues the preference of prior law for partition by division in kind. In an appropriate case, the court may order partition by sale [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 872.810*]. For a discussion of partition by sale, see *§ 397.50[2]* et seq., *§ 397.80* et seq. For a discussion of partition by appraisal, see *§ 397.110* et seq.

As a rule, the law favors partition in kind because it does not disturb the existing form of inheritance or compel a person to sell his or her property against his or her will. Forced sales are strongly disfavored [*Richmond v. Dofflemyer (1980) 105 Cal. App. 3d 745, 757, 164 Cal. Rptr. 727]* . It is no objection to a partition in kind that some of the cotenants prefer a sale to a partition [*Williams v. Wells Fargo Bank (1943) 56 Cal. App. 2d 645, 647, 133 P.2d 73]* .

[2] Partition by Sale

Notwithstanding *Code Civ. Proc. § 872.810* (*see § 397.50[1]*) the court will order that the property be sold and the proceeds be divided among the parties in accordance with their interests in the property as determined in the interlocutory judgment in the following situations [*Code Civ. Proc. § 872.820*]:

(1) If the parties agree to such relief, by their pleadings or otherwise.

(2) If the court determines that, under the circumstances, sale and division of the proceeds would be more equitable than division of the property.

For the purpose of making the determination, the court may appoint a referee and take into account his or her report.

For further discussion of partition by sale, see *§ 397.80 et seq.*

[3] Partition by Partial Sale

The court may order that a portion of the property be sold and the remainder divided if, in making the determination whether sale would be more equitable than division of the property, the court finds that sale and division of proceeds for that part of the property would be more equitable than division of the whole property [*Code Civ. Proc. § 872.830*; for further discussion of partition by sale, see *§ 397.80 et seq.*].

[4] Partition by Appraisal

If the interests of all parties are undisputed or have been adjudicated, the parties may agree on a partition by appraisal pursuant to *Code Civ. Proc. §§ 873.910-873.980* [*Code Civ. Proc. § 873.910*; for discussion and forms concerning partition by appraisal, see § 397.110 et seq., *§ 397.290 et seq.*

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§ 397.51 Removal of Property

The burden is on the co-owner claiming the right to remove property from the premises to establish what property is removable [*Formosa Corp. v. Rogers (1951) 108 Cal. App. 2d 397, 414, 239 P.2d 88]* .

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§ 397.52 Title Report

For purposes of *Code Civ. Proc. §§ 872.010-874.240*, the term "title report" includes a preliminary report, guarantee, binder, or policy of title insurance [*Code Civ. Proc. § 872.010(f)*].

If a title report is necessary and the action has not yet commenced, the plaintiff may procure the title report, and shall, in the complaint, indicate that it has been procured and designate a place where it will be kept for inspection, use, and copying by the parties. Alternatively, the court may, on application of a party, authorize the party to procure a title report; in this case the court shall designate a place where the title report shall be kept for inspection, use, and copying by the parties [*Code Civ. Proc. § 872.220*]. For a discussion of the allowance of cost of procuring a title report pursuant to *Code Civ. Proc. § 874.010*, see *§ 397.63*.

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§ 397.53 Complaint

The complaint must set forth all of the following:

(1) A description of the property that is the subject of the action; in the case of tangible personal property, the description must include its usual location; in the case of real property, the description must include both its legal description and its street address or common designation, if any [*Code Civ. Proc. § 872.230(a)*].

(2) All interests the plaintiff has or claims in the property [*Code Civ. Proc. § 872.230(b)*].

(3) All interests of record in the property or all interests in the property actually known to the plaintiff which belong to or are claimed by persons other than the plaintiff, that the plaintiff reasonably believes will be materially affected by the action, whether the names of such persons are known or unknown to the plaintiff [*Code Civ. Proc. § 872.230(c)*]; if the plaintiff has knowledge of a defendant's lien on the property, the plaintiff is under a statutory duty to set it forth in his or her complaint [*Stewart v. Abernathy (1944) 62 Cal. App. 2d 429, 432, 144 P.2d 844]* .

(4) The estate as to which partition is sought and a prayer for partition of the interests in that estate [*Code Civ. Proc. § 872.230(d)*].

(5) If the plaintiff seeks sale of the property, an allegation of the facts justifying the relief in ordinary and concise language [*Code Civ. Proc. § 872.230(e)*].

If the plaintiff has a lien on the property as well as an interest sufficient to maintain the action, he or she must allege his or her lien as well as his or her other interest [Assembly Legislative Committee Comment to *Code Civ. Proc. § 872.230*]. *Code Civ. Proc. § 872.230(c)*, however, only requires plaintiff to set out those interests that he or she reasonably believes will be materially affected by the partition action. Incorporation of a title report should be sufficient to satisfy this requirement as to recorded interests but not as to unrecorded interests known to the plaintiff. It should be noted that there may be interests of record in personal property filed to perfect a security interest under the Commercial Code [Assembly Legislative Committee Comment to *Code Civ. Proc. § 872.230*].

A complaint is subject to demurrer if it fails to allege the proportionate interests of the respective parties [*Neusted v. Skernswell (1945) 69 Cal. App. 2d 361, 363-364, 159 P.2d 49* (interpreting *Code Civ. Proc. § 753*, which is substantially similar to *Code Civ. Proc. §§ 872.230, 872.520*)].

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§ 397.54 Summons

[1] Service Generally

The form, content, and manner of service of summons is the same in partition actions as in civil actions generally [*Code Civ. Proc. § 872.310(a)*]. For service of summons in civil actions generally, see *Code Civ. Proc. § 412.10 et seq.* and the discussion in Ch. 518, *Service of Summons and Papers* . It should be noted that a decree of partition will not be vitiated, despite the fact that the summons fails to contain a description of the property and is directed only to the defendant, absent a showing of prejudice [*Rutledge v. Rutledge (1953) 119 Cal. App. 2d 114, 120, 259 P.2d 79]* . Furthermore, the court has power to permit an amendedsummons to issue when new parties are added in a partition action by an amended complaint [*Baldwin v. Foster (1910) 157 Cal. 643, 647, 108 P. 714]* .

[2] Service by Publication

Service on persons named as parties pursuant to *Code Civ. Proc. § 872.530(b)* (*see § 397.43[6]*) and *Code Civ. Proc. § 872.550* (*see § 397.43[4]*), and on other persons named as unknown defendants, must be by publication pursuant to *Code Civ. Proc. § 415.50* and the provisions of the partition statutes dealing with summons (*Code Civ. Proc. §§ 872.310-872.330*) [*Code Civ. Proc. § 872.310(b)*]. As a condition of establishing that the party to be served pursuant to publication under *Code Civ. Proc. § 415.50* cannot with reasonable diligence be served in another manner, the court may not require that a search be conducted of public databases where access by a registered process server to residential addresses is prohibited by law or by published policy of the agency providing the database. These databases include, but are not limited to, voter registration rolls and records of the Department of Motor Vehicles [*Code Civ. Proc. § 415.50(e)*].

If the court orders service by publication, the publication may name only the defendants to be served by the publication and describe only the property in which the defendants to be served thereby have or claim interests [*Code Civ. Proc. § 872.330(a)*]. Judgment based on failure to appear and answer following service under *Code Civ. Proc. § 872.330* is conclusive against the defendants named in the publication only in respect to property described in the publication [*Code Civ. Proc. § 872.330(b)*].

The order for service by publication is subject to the following conditions [*Code Civ. Proc. § 872.320*]:

- The plaintiff must post, not later than 10 days after the date the order is made, a copy of the summons and complaint on the real property that is the subject of the action.

- The plaintiff must record, if not already recorded, a notice of the pendency of the action (notice of lis pendens).

- The publication must describe the property that is the subject of the action. In addition to particularly describing the property, the publication must describe the property by giving its street address, if any, or other common designation, if any; but, if a legal description of the property is given, the validity of the publication is not affected by the fact that the street address or other common designation recited is erroneous or that the street address or other common designation is omitted.

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§ 397.55 Lis Pendens

[1] Recordation and Service

Immediately on filing the complaint for partition, the plaintiff must record a notice of the pendency of the action (lis pendens) in the office of the county recorder of each county in which any real property described in the complaint is located [*Code Civ. Proc. § 872.250*]. The recording of the lis pendens is an important step in the partition action. Prompt recording enables the court to deal with the title with certainty. The person required to record might be either the plaintiff or a cross complainant [Cal. L. Revision Comm'n Comment to *Code Civ. Proc. § 872.250*]. From the time of filing a lis pendens, all persons are deemed to have notice of that action as to the property described in the notice [*Code Civ. Proc. § 872.250*].

Prior to recordation of the notice, the party recording the notice must cause a copy of the notice to be mailed, by registered or certified mail, return receipt requested, to all known addresses of the parties to whom the real property claim is adverse, and to all owners of record of the real property affected by the real property claim as shown by the latest county assessment roll. If there is no known address for service on an adverse party or owner, then as to that party or owner a declaration under penalty of perjury to that effect may be recorded instead of the proof of service, and service on that party shall not be required. Immediately following recordation, a copy of the notice must also be filed with the court in which the action is pending. Service must also be made immediately and in the same manner on each adverse party later joined in the action [*Code Civ. Proc. § 405.22*].

Any notice of pendency of action is void and invalid as to any adverse party or owner of record unless mailing requirements are met for that party or owner and a proof of service in the form and content specified in *Code Civ. Proc. § 1013a* has been recorded with the notice of pendency of action [*Code Civ. Proc. § 405.23*].

From the time of recording the notice of pendency of action, a purchaser, encumbrancer, or other transferee of the real property described in the notice, is deemed to have constructive notice of the pendency of the noticed action as it relates to the real property and only of its pendency against parties not fictitiously named. The rights and interest of the claimant in the property, as ultimately determined in the pending noticed action, relate back to the date of the recording

of the notice [*Code Civ. Proc. § 405.24*].

If the lis pendens is not recorded, the court, on its own motion or on the motion of any party at any time, shall order the plaintiff or person seeking partition of the property, or another party on behalf of the plaintiff or other person, to record the notice and shall stay the action until the notice is recorded [*Code Civ. Proc. § 872.250(c)*]. The expense of recordation is allowed to the party incurring it [*Code Civ. Proc. § 872.250(c)*]. A failure to record a lis pendens immediately after filing the complaint, absent a showing of prejudice, will not vitiate a decree of partition [*Rutledge v. Rutledge (1953) 119 Cal. App. 2d 114, 120, 259 P.2d 79]* .

For further discussion and forms relating to lis pendens, see Ch. 348, *Lis Pendens* .

[2] Additional Property

After the filing of the notice of lis pendens, if partition of other real property is sought in the same action, the plaintiff or other person seeking this relief must immediately record a supplemental notice [*Code Civ. Proc. § 872.250(b)*]. The duty under *Code Civ. Proc. § 872.250(b)* to record the notice of lis pendens is on the person seeking to join the additional property; this might be either plaintiff or cross complainant [Cal. L. Revision Comm'n Comment to *Code Civ. Proc. § 872.250*].

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§ 397.56 Answer

[1] Required Allegations

The answer must set forth (1) any interest that the defendant has or claims in the property; (2) any facts tending to controvert any material allegations of the complaint that the defendant does not wish to be taken as true; and (3) if the defendant seeks sale of the property, an allegation of the facts justifying this relief in ordinary and concise language [*Code Civ. Proc. § 872.410*; *see Stewart v. Abernathy (1944) 62 Cal. App. 2d 429, 432, 144 P.2d 844* (interpreting a portion of *Code Civ. Proc. § 758* which is substantially similar to *Code Civ. Proc. § 872.410*)]. The requirement in *Code Civ. Proc. § 872.410(a)* that the defendant list his or her interest in the property includes liens as well as other interests claimed by the defendant [Cal. L. Revision Comm'n Comment to *Code Civ. Proc. § 872.410*]. An interlocutory decree of partition is conclusive as to any title acquired by defendant after he or she has filed the answer and before rendition of the interlocutory decree, unless the answer is amended so as to include the new title [*Christy v. Spring Valley Water-works (1890) 84 Cal. 541, 542-543, 24 P. 307]* .

[2] If Defendant Is Lienholder

If the defendant has or claims a lien on the property, the answer must set forth the date, character, and amount remaining due on the lien [*Code Civ. Proc. § 872.420*]. Further, nothing in *Code Civ. Proc. § 872.420* precludes the defendant from alleging any additional costs, fees, and expenses related to the lien that he or she may be entitled to in addition to the amount remaining due on the lien itself [Cal. L. Revision Comm'n Comment to *Code Civ. Proc. § 872.420*].

[3] Compensatory Adjustment

The answer may set forth any claim the defendant has for contribution or other compensatory adjustment [*Code Civ. Proc. § 872.430*]. If the defendant asserts new matter in his or her answer, the answer must be served on all of his or her codefendants as well as on the plaintiff [*Tu Junga Co. v. Barlcay (1909) 11 Cal. App. 60, 61, 103 P. 1092]* .

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§ 397.57 Interlocutory Judgment

[1] In General

If the court finds that the plaintiff is entitled to partition, it will make an interlocutory judgment that determines the interests of the parties in the property and orders the partition of the property and, unless it is to be later determined, the manner of partition [*Code Civ. Proc. § 872.720(a)*]. This interlocutory judgment has been made expressly appealable by *Code Civ. Proc. § 904.1(a)(8)* and an appeal from an interlocutory decree in partition operates as a stay without bond [*Neusted v. Skernswell (1945) 69 Cal. App. 2d 361, 369-370, 159 P.2d 49]* . It should be noted that *Code Civ. Proc. § 873.290(c)* provides that the property division is effective and title vests in accordance with the division on entry of the final judgment [*see Richmond v. Dofflemyer (1980) 105 Cal. App. 3d 745, 766, 164 Cal. Rptr. 727]* . For a discussion of final judgments in partition actions, see *§ 397.61*.

An error in an interlocutory decree in partition must be corrected by an appeal or motion for new trial [*Tormey v. Allen (1872) 45 Cal. 119, 121]* . For example, when an interlocutory judgment for partition in kind has become final, the judgment may not be amended to provide for a sale, despite the fact that it appears from the referee's report that a division of kind cannot be achieved without great prejudice to the owners [*Raisin Investment Co. v. Magginetti (1952) 109 Cal. App. 2d 163, 164-165, 240 P.2d 349]* .

[2] Multiple Interlocutory Judgments

If the court determines that it is impracticable or highly inconvenient to make a single interlocutory judgment that determines, in the first instance, the interests of all parties in the property, the court may first ascertain the interests of the original concurrent or successive owners. On ascertaining those interests, the court may make an interlocutory judgment as if such persons were the sole parties in interest and the only parties to the action. Thereafter the court may proceed in the same manner as between the original concurrent or successive owners and the parties claiming under them or may allow the interests to remain without further partition if the parties so desire [*Code Civ. Proc. § 872.720(b)*; *see Richmond v. Dofflemyer (1980) 105 Cal. App. 3d 745, 754, 164 Cal. Rptr. 727]* .

[3] Binding on Referee

The trial court has the power to make interlocutory judgments binding not only on the parties, but on the referee as well. The referee may not make recommendations or find values contrary to the interlocutory judgment by virtue of the court's instructions to the referee. Nor may the court change these at the time of final judgment [*Richmond v. Dofflemyer (1980) 105 Cal. App. 3d 745, 757, 164 Cal. Rptr. 727]* . For further discussion of referees, see *§ 397.58*.

[4] Costs

The court is not authorized to include in the interlocutory decree a judgment for costs against the defendant. That decree is only a determination of the respective interests of the parties in the land, preliminary to the final judgment of partition, and is, as its terms import, merely interlocutory in the proceedings. It is only after final judgment that costs are to be allowed [*Harrington v. Goldsmith (1902) 136 Cal. 168, 170, 68 P. 594* ; *see also § 397.63*]. For a general discussion of costs, see Ch. 174, *Costs and Attorney's Fees* .

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§ 397.58 Appointment of Referee

[1] Types of Referees

Two distinct classes of referees may be appointed in a partition action. Pursuant to *Code Civ. Proc. § 872.630(b)* (*see § 397.44[2]*), a referee may be appointed to ascertain the facts necessary for the determination of the status and priority of all liens on the property subject to partition. Such a referee is appointed before the interlocutory decree. On the other hand, the referee appointed under *Code Civ. Proc. § 873.010* is appointed after the interlocutory decree and his or her sole duty is to divide or sell the property as ordered by the court [*see Richardson v. Loupe (1889) 80 Cal. 490, 501, 22 P. 227]* .

[2] Procedure for Appointment

The court must appoint a referee to divide or sell the property as ordered by the court [*Code Civ. Proc. § 873.010(a)*]. The parties may nominate persons to serve as referees but, absent agreement among the parties, the choice of a referee is in the court's discretion [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.040*; *see also § 397.58[3]*]. The court must appoint as referee, however, any person or persons to whose appointment all parties have consented, unless such person (or persons) is ineligible to become a referee [*see Code Civ. Proc. § 873.040(a)*]. For a discussion of persons ineligible to be referees, *see § 397.58[5]*. In the case of a minor party or a party for whom a conservator of the estate has been appointed, the guardian or conservator of the estate of the party may consent to an appointment of a referee [*Code Civ. Proc. § 873.040(b)*].

Furthermore, the court may, with the consent of the parties, appoint three referees to divide or sell the property as ordered by the court [*Code Civ. Proc. § 873.030(a)*]. The three referees so appointed will have all the powers and may perform all the duties required of one referee [*Code Civ. Proc. § 873.030(b)*]. It should be noted that *Code Civ. Proc. § 873.030*, providing for court appointment of three referees only with the consent of the parties, replaces provisions of former *Code Civ. Proc. § 763* that provided for appointment of three referees as a matter of course [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.030*]. The court order appointing referee(s) does not, in itself, seem to be an order from which an appeal may be taken [*Fallon v. Brittan (1890) 84 Cal. 511, 514, 24 P. 381]* .

[3] Discretionary Power to Appoint

The word "shall," as used in *Code Civ. Proc. § 873.010* which provides that the court "shall appoint a referee to divide or sell the property as ordered by the court," should be construed to require the appointment of a referee only where it is determined that a referee is necessary or would be desirable or helpful. It should not be so strictly construed as to require the expense and time-consuming services of a referee if the court has adequate evidence before it to render its decision. The function of the interlocutory judgment is to permit the trial court to determine those matters which have been presented to it for determination, and which it can determine on the evidence submitted to it without the necessity of a referee. The only function of a referee is to assist the court in determining those matters which cannot be so determined on the evidence before it [*Richmond v. Dofflemyer (1980) 105 Cal. App. 3d 745, 755, 164 Cal. Rptr. 727]* .

[4] On Partial Division and Partial Sale

The court in its discretion may appoint a referee for sale and a referee for division, or may appoint a single referee for both [*Code Civ. Proc. § 873.020*]. *Code Civ. Proc. § 873.020* makes clear the court's discretion to appoint referees with different functions where property in an action is to be both divided and sold [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.020*].

[5] Ineligible Persons

The following persons cannot be appointed as referees under *Code Civ. Proc. §§ 872.010-874.240* [*Code Civ. Proc. § 873.050*]:

(1) A clerk or deputy clerk of the court.

(2) A former or present partner or employee of the judge.

(3) A relative within the third degree of the judge or the judge's spouse or spouse of such a relative.

(4) An owner of any interest in the property that is the subject of the action.

[6] Court Authority Over Referee

With respect to the referee, the court may determine whether a referee's bond is necessary and fix the amount of the bond [*Code Civ. Proc. § 873.010(b)(1)*]. Whether a bond is required depends on the circumstances of the case [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.010*]. The court may also instruct the referee, fix the reasonable compensation for the services of the referee, and provide for payment of the referee's reasonable expenses [*Code Civ. Proc. § 873.010(b)(2), (3)*]. In determining the amount of the referee's compensation, the court is allowed a wide discretion, and on appeal, a plain abuse of that discretion must appear or the judgment will be affirmed [*Treadwell v. Treadwell (1901) 134 Cal. 158, 158, 66 P. 197]* . The court may also provide for the date of commencement of the lien of the referee allowed by the law [*Code Civ. Proc. § 873.010(b)(4)*]. In addition, the court may require the filing of interim or final accounts of the referee, settle the accounts of the referee, and discharge the referee [*Code Civ. Proc. § 873.010(b)(5)*]; this applies particularly in, but is not limited to, sales transactions [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.010*]. Finally, the court may remove the referee and appoint a new referee [*Code Civ. Proc. § 873.010(b)(6), (7)*].

In addition, subject to the limitations of *Code Civ. Proc. §§ 873.110-873.160*, the court may [*Code Civ. Proc. § 873.110*]:

(1) Authorize or approve contracts of the referee for the services and expenses of surveyors, engineers, appraisers, attorneys, real estate brokers, auctioneers, and others [*see* § 395.59[4]].

(2) Allow and direct payment of or reject claims under such contracts.

(3) Provide for the date of commencement of any lien provided by law or contract for such claims. For a discussion of payment of costs by lien, see *§ 397.63*.

The ability to obtain the services of a third party may depend on assurance of security for payment, in order to protect the third party's right to payment despite any later settlement by the parties and dismissal of the action. For this reason, *Code Civ. Proc. § 873.110* vests the court with broad discretion to approve contracts for services, with the corresponding duty to provide adequate lien protection for persons who render such services [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.110*; for a discussion of liens for payment of costs, see *§ 397.63*].

Code Civ. Proc. § 873.110 recognizes that the court is the supervising entity in carrying out the partition. It removes from the referee, acting alone, the authority to engage the services of third persons for his or her assistance [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.110*].

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§ 397.59 Authority and Duties of Referee

[1] In General

The referee may perform any acts necessary to exercise the authority conferred by *Code Civ. Proc. §§ 872.010-874.240* or by order of the court [*Code Civ. Proc. § 873.060*]. *Code Civ. Proc. § 873.060* makes explicit the referee's general authority to effectuate the partition [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.060*].

On noticed motion, the referee or any party may petition the court for instructions concerning the referee's duties under *Code Civ. Proc. §§ 872.010-874.240* [*Code Civ. Proc. § 873.070*]. *Code Civ. Proc. § 873.070* enables the referee and parties to resolve expeditiously any administrative problems that arise in the execution of the referee's duties [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.070*].

[2] To Make Report

[a] Filing and Contents

The referee must file with the court a report of the referee's proceedings and give written notice of filing to each party who has appeared in the action [*Code Civ. Proc. § 873.280(a)*]. The report must include all of the following [*Code Civ. Proc. § 873.280(b)*]:

(1) A specification of the manner in which the referee has executed the referee's trust.

(2) A description of the property divided and of the share allotted to each party, along with any recommendation as to owelty [*see* discussion in *§ 397.60[5]*]. It should be noted that the description must be by metes and bounds, or lots and blocks, or such other method as will enable the precise location of each portion [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.280*].

(3) Any recommendation as to opening and closing public and private ways, roads, streets, and easements [*see § 397.59[3]*].

The referee's report is merely advisory and the court is free to make its own findings and to decree accordingly [*Machado v. Machado (1944) 66 Cal. App. 2d 401, 405, 152 P.2d 457]* . The referee is not required to report a valuation of the whole or of any allotment, or to hold a hearing for the parties before him or her [*Richardson v. Loupe (1889) 80 Cal. 490, 501, 22 P. 227]* . If the referee, however, places a value on the property, the court is not bound to adopt the basis used by the referee for his or her calculation as to the value reached, but may in its final decree make its own findings with respect to such matters [*MacDonald v. Bernal (1917) 34 Cal. App. 431, 432, 167 P. 902]* . Any dispute as to the relative value ofthe several allotments, or as to the justice of the division of the property in any other respect, is to be settled before the court which has full power to confirm, change, modify, or set aside the referee's report [*Richardson v. Loupe (1889) 80 Cal. 490, 501, 22 P. 227]* .

[b] Confirming, Modifying, or Setting Aside

Any party, on notice to the other parties who have appeared, may move the court to confirm, modify, or set aside the report of the referee [*Code Civ. Proc. § 873.290(a)*]. It should be noted that if no error appears on the face of the referee's report, none will be presumed; the report will not be set aside unless a party excepting to it shows such a state of facts as will make alleged error affirmatively and clearly appear [*Camicia v. Camicia (1944) 65 Cal. App. 2d 487, 491, 150 P.2d 814]* .

At the hearing on the motion, the court may do one of the following [*Code Civ. Proc. § 873.290(b)*]:

(1) Confirm the report as filed and enter judgment of partition accordingly;

(2) Confirm the report as modified by the court and enter judgment of partition accordingly; or

(3) Set aside the report, order preparation of a new report and, if necessary, appoint a new referee for this purpose.

In the case of appointment of a new referee, it should be noted that the order appointing the referee is not in itself an order from which an appeal may be taken [*Fallon v. Brittan (1890) 84 Cal. 511, 514, 24 P. 381]* .

[c] Effect

The report of the referee is not final until approved by the court and adopted in its judgment [*Cathcart v. Redlands Security Co. (1945) 67 Cal. App. 2d 591, 596, 155 P.2d 60]* . On entry of the judgment of partition, the division of the property is effective and title vests according to that division [*Code Civ. Proc. § 873.290*]. It is the judgment that gives effect to the referee's report [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.290*]. For a discussion of judgments in partition actions, see *§ 397.61*.

[3] Designating Property as Way, Road, or Street

In selling or dividing the property, the referee may, if it will be for the advantage of those interested, designate a portion of the property as a public or private way, road, or street [*Code Civ. Proc. § 873.080(a)*]. In connection with such a designation, the referee may also recommend the closure of any or all other roads on the property and allocation of the portion of the property occupied by such roads to the parties [*Code Civ. Proc. § 873.080(a)*]. Such a designation and recommendation must be adequate to accommodate public and private needs [*Code Civ. Proc. § 873.080(b)*].

The referee must report the fact of such a designation and recommendation to the court [*Code Civ. Proc. § 873.080(b)*]. The confirmation of the referee's report by the court is subject to any necessary action by the appropriate public entities [*Code Civ. Proc. § 873.080(c)*].

On confirmation of the referee's report, the following apply: (1) the portion of the property designated as a public way, road, or street must not be allocated to any of the parties, or sold, but must be an open and public way, road, or street; (2) the property designated as a private way, road, or street must be a private way for use of the parties interested; and (3) the roads recommended to be closed must be deemed abandoned on the terms stated in the order of confirmation [*Code Civ. Proc. § 873.080(c)*].

Code Civ. Proc. § 873.080 makes clear that the actions of the referee in disposing of the property and of the court in confirming the referee's actions must conform to any applicable laws [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.080*].

[4] To Enter Into Contracts

[a] In General

The court has the authority to authorize or approve contracts of the referee for the services and expenses of surveyors, engineers, appraisers, attorneys, real estate brokers, auctioneers, and others [*Code Civ. Proc. § 873.110*; *see § 397.58[6]*]. *Code Civ. Proc. § 873.110* contemplates that the court will authorize or approve contracts of the referees for third-party services and expenses, allow or reject claims thereunder, and in proper cases specify the priority of any lien therefor [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.110*]. For a discussion of payment of costs by lien, see *§ 397.63*.

[b] Liability of Referee

The referee is not personally liable on contracts made, or for expenses incurred, unless the referee expressly assumes such liability in writing [*Code Civ. Proc. § 873.160*]. The contract itself may provide a means of payment, for example, the commission of an auctioneer or a real estate broker from the proceeds of sale. In other cases, particularly where the property is divided, the third person will have lien rights [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.160*]. For a discussion of the commission of agents, see *§ 397.89*. For a discussion of the payment of costs by lien, see *§ 397.63*.

[c] Contract Provision for Interest

A contract for the services of an attorney, surveyor, auctioneer, or other thirdpersons may provide for the accrual of interest at a rate not in excess of the legal rate for amounts due under the contract that are not paid within three months after the time they become due and payable [*see Code Civ. Proc. § 873.150*].

[d] Contracting With Attorney

The referee may employ an attorney only with the approval of the court under *Code Civ. Proc. § 873.110* [*see § 397.58[6]*]. The application for approval must be in writing and must include the name of the attorney whom the referee wishes to employ and the necessity for the employment. The attorney so employed may not be attorney for, or associated with or employed by an attorney for, any party to the action except with the written consent of all the parties to the action. Any claim for compensation for the attorney must detail the services performed by the attorney [*Code Civ. Proc. § 873.120*].

[e] Contracting With Surveyor

The referee may, with the approval of the court pursuant to *Code Civ. Proc. § 873.110*, discussed in *§ 397.58[6]*, employ a surveyor with the necessary assistants to aid in making a sale or division of property [*Code Civ. Proc. § 873.130*]. Court approval is required since the amounts involved may be substantial and means of payment may present a problem [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.130*].

[f] Contracting With Auctioneer

The referee may, with the approval of the court pursuant to *Code Civ. Proc. § 873.110* (*see § 397.58[6]*), employ an auctioneer authorized to act as such in the locality, to conduct a public auction and to secure purchasers by such method for any property to be sold at public auction [*Code Civ. Proc. § 873.140*]. It should be noted that a contract for the services of an auctioneer may provide for the accrual of interest at a rate not in excess of the legal rate; this interest penalty applies to amounts due under the contract that are not paid within three months after the time they become due and payable [*see Code Civ. Proc. § 873.150*].

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§ 397.60 Division of Property

[1] In General

The referee appointed by the court to make a division of the property divides the property and allots the several portions to the parties. The decision concerning the relative quality and quantity of the allotments is made according to the interests of the parties in the property as determined in the interlocutory judgment [*Code Civ. Proc. § 873.210*]. *Code Civ. Proc. § 873.210* does not mandate, however, that each cotenant should receive his or her fair share of the more valuable parts of the property subject to partition, as well as the less valuable parts. Quality and quantity are to be considered in the allotments by the referee, but the determinative factor is that each party shall receive an allotment equal to his or her interest in the whole of the property [*Richmond v. Dofflemyer (1980) 105 Cal. App. 3d 745, 759, 164 Cal. Rptr. 727]* . Contentions that the referee might have made a more just and equitable division of the property are matters for the trial court to determine on the hearing of the referee's report; the determinations of the trial court will not be reversed absent a showing of abuse of discretion [*Capuccio v. Caire (1929) 207 Cal. 200, 211, 277 P. 475]* .

[2] Division of Improvements

The property must be divided so as to allot a party any portion that embraces improvements made by that party or that party's predecessor in interest, as far as it is practical, and to the extent it can be done without material injury to the rights of other parties. The value of such improvements is excluded from the determination of such a division and allotment [*Code Civ. Proc. § 873.220*].

If it is not practical to so allot the improvements, the court may take them into account by, for example, making a suitable allowance for them, since an action for partition is essentially equitable in nature [*Ventre v. Tiscornia (1913) 23 Cal. App. 598, 604, 138 P. 954* ; *Mercola v. Chester (1950) 97 Cal. App. 2d 140, 143, 217 P.2d 32]* . For a discussion of the equitable nature of partition actions, see *§ 397.39*. The other cotenants need not have consented to the improvements, but for such an allowance to be made for them, the improvements must have been (1) made by a cotenant, (2) at his or her own cost, (3) in good faith, (4) necessary to the preservation of the common property, and (5) permanent, and they must have (6) enhanced the value of the common property and (7) benefited the other cotenants [*Ventre v. Tiscornia (1913) 23 Cal. App. 598, 604, 138 P. 954* ; *Mercola v. Chester (1950) 97 Cal. App. 2d 140, 143,*

217 P.2d 32] .

It should be noted that the making of expenditures for such improvements will not operate as a bar to bringing a partition action [*Lazzarevich v. Lazzarevich (1952) 39 Cal. 2d 48, 50-51, 244 P.2d 1]* .

[3] Division With Purported Conveyance

If prior to the commencement of the action a party has executed a deed purporting to convey to a purchaser a portion of the property to be divided, to the extent it can be done without material injury to the rights of the other parties, the property must be so divided as to allot that portion to the purchaser, the purchaser's heirs or assigns, or such other action taken as to make the deed effectual as a conveyance of that portion of the property [*Code Civ. Proc. § 873.230*].

It should be noted that in such a conveyance the purchaser acquires all the interest of his or her grantor in the portion of the property purchased, and theconveyance does not sever the portion of the property from the general tract owned by the cotenants of the grantor. This means that if the general tract is partitioned, the purchaser takes subject to the contingency that the property purchased will be lost, if on partition of the general tract, that portion is not allotted to his or her grantor [*Gates v. Salmon (1868) 35 Cal. 576, 587-588]* .

[4] Division of Lots or Parcels

If real property consists of more than one distinct lot or parcel, the property will be divided by such lots or parcels without other internal division. This division will be done to the extent it can be done without material injury to the rights of the parties [*Code Civ. Proc. § 873.240*]. To facilitate division by individual lots, the parties may join additional property whether by complaint or by cross complaint [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.240*].

[5] Compensation to Correct Inequality; Owelty

One party may be required to compensate another, to correct an inequality, if division of the property cannot be made equally among the parties according to their interests without prejudice to the rights of some [*Code Civ. Proc. § 873.250(a)*]. No compensation, however, is required to be made to others by unknown owners [*Code Civ. Proc. § 873.250(b)*]. It should be noted that owelty of partition is distinguished from compensatory adjustments made under the ordinary principals of equity, as for accountings, allowances, and the like, pursuant to *Code Civ. Proc. § 872.140* [Cal. L. Revision Comm'n Comment to *Code Civ. Proc. § 873.250*; *see § 397.39[5]*].

In addition, minors are not required to compensate others unless it appears that the minor has personal property sufficient for that purpose and the minor's interest will be promoted by his or her payment of such compensation [*Code Civ. Proc. § 873.250(b)*]. The bar on requiring owelty of a minor applies to imposition of a lien on the share of the minor as well as to direct payment [Cal. L. Revision Comm'n Comment to *Code Civ. Proc. § 873.250*].

An owelty award is based on the value of real property, and therefore the award turns on a question of fact. Thus, in one case the plaintiffs were precluded from challenging the amount of the owelty award on appeal because they did not timely move for a new trial [*Jamison v. Jamison (2008) 164 Cal. App. 4th 714, 720, 79 Cal. Rptr. 3d 561*]. Whether the award is termed owelty or damages, it still requires an evaluation of the amount awarded in light of the evidence presented at trial, an issue that could and should be resolved at the trial court level. Thus, the same reasoning for requiring a motion for a new trial applies to both owelty awards and damage awards. Accordingly, a new trial motion was a prerequisite to the plaintiffs' challenge to the adequacy of the owelty award on appeal [*Jamison v. Jamison (2008) 164 Cal. App. 4th 714, 720, 79 Cal. Rptr. 3d 561*].

[6] Lien on Undivided Interest

On division of the property, a lien on an undivided interest of a party becomes a charge only on the share allotted to that

party [*Code Civ. Proc. § 873.260*]. The lien that is continued will be subordinate to charges on the property for its just proportion of the costs of partition [Cal. L. Revision Comm'n Comment to *Code Civ. Proc. § 873.260*; *see also § 397.63*].

[7] Interests of Unknown Parties

Where the court has determined the combined interests of two or more unknown parties, the entire portion of the property allocated to such parties remains undivided [*Code Civ. Proc. § 873.270*]. If, during the action, an unknown party becomes known, his or her interest may be determined and his or portion of the undivided property may be allocated to him or her [Cal. L. Revision Comm'n Comment to *Code Civ. Proc. § 873.270*].

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§ 397.61 Final Judgment

[1] Order for Final Judgment

If the court has ordered a partition [*see § 397.57*], appointed a referee [*see § 397.58*], if the referee has made his or her report [*see § 397.59*], and the referee's report has been confirmed [*see § 397.59[1][a]*], the court will order a final judgment of partition. The division of the property is effective and title vests in accordance with the division on entry of final judgment of partition [*see Code Civ. Proc. § 873.290*]. In the case of partition by sale, after (1) the court has ordered the property to be sold, (2) the sale has been made by the referee and confirmed by the court, and (3) the court has made an order directing the referee to execute a conveyance or other instrument of transfer, to collect the proceeds, take security, and perform other acts required to consummate the sale, the court will order a final judgment of partition [*see § 397.150[4]*].

[2] Persons Bound

The judgment in the action is binding and conclusive on all of the following [*Code Civ. Proc. § 874.210*]:

- All persons known and unknown who were parties to the action and who have or claim any interest in the property, whether present or future, vested or contingent, legal or beneficial, or several or undivided.

- All persons not in being or not ascertainable at the time the judgment is entered who have any remainder interest in the property, or in any portion of the property, after the determination of a particular estate in the property and who may be entitled to a beneficial interest in the property by any contingency. The judge, however, must make appropriate provision for the protection of these interests.

- Except as provided in *Code Civ. Proc. § 874.225*, all persons who were not parties to the action [*see § 397.61[3]*], and who have or claim any interest in the property that was not of record at the time the lis pendens was filed, or if none was filed, at the time judgment was recorded.

[3] Persons Not Bound

Except to the extent provided in *Code Civ. Proc. § 1908*, the judgment does not affect a claim in the property or part of the property of any person who was not a party to the action if either of the following conditions is satisfied [*Code Civ. Proc. § 874.225(a), (b)*]:

- The claim was of record at the time the lis pendens was filed or, if none was filed, at the time the judgment was recorded.

- The claim was actually known to the plaintiff or would have been reasonably apparent from an inspection of the property at the time the lis pendens was filed or, if none was filed, at the time the judgment was entered. For purposes of this condition, a claim in the property or part of the property of any person means the interest of the person in the portion of the property or proceeds of sale of the property allocated to the plaintiff [*Code Civ. Proc. § 874.225(b)* (subsection also provides that nothing in it may be construed to impair the rights of a bona fide purchaser or encumbrancer for value dealing with the plaintiff or the plaintiff's successors in interest)].

A claimant may be bound by the proceeding, however, if the claim was acquired from a party after commencement of the proceeding and with actual knowledge of the proceeding [*Code Civ. Proc. § 1908(a)(2)*; *see* Cal. L. Rev. Comm'n Comment to *Code Civ. Proc. § 874.225*].

[4] Grounds to Set Aside

A final decree or judgment in partition may be set aside to correct a mistake, if the mistake is extrinsic and collateral to the questions examined and determined in the original action and led the court to do what it evidently never intended to do [*Sullivan v. Lumsden (1897) 118 Cal. 664, 669, 50 P. 777]* . For further discussion and forms of judgments, see Ch. 318, *Judgments* .

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§ 397.62 Effect of Court's Conveyance or Transfer

A conveyance or transfer pursuant to *Code Civ. Proc. §§ 873.750, 873.790* (transfer on confirmation of sale) [*see § 397.88[2][b]*] or *Code Civ. Proc. § 873.960* (transfer on confirmation of report) [*see § 397.114[2]*], is binding and conclusive, in the same manner as a judgment [*Code Civ. Proc. § 874.240*].

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§ 397.63 Costs of Partition

[1] In Partition Action

The costs of partition include the following [*Code Civ. Proc. § 874.010*]:

(1) Reasonable attorney's fees incurred or paid by a party for the common benefit [*see § 397.63[3]*].

(2) The fee and expenses of the referee [*see § 397.58[6]*].

(3) The compensation provided by contract for services of a surveyor or other person employed by the referee in the action [*see § 397.59[4]*].

(4) The reasonable costs of a title report procured pursuant to *Code Civ. Proc. § 872.220* [*see § 397.52*] with interest on that amount at the legal rate from the time of payment or, if paid before commencement of the action, from the time of commencement of the action.

(5) Other disbursements or expenses determined by the court to have been incurred or paid for the common benefit.

The listing in *Code Civ. Proc. § 874.010* is illustrative only, and the costs of partition may include other expenses or disbursements, of a like or different kind, found by the court to have been incurred or paid for the common benefit [Cal. L. Revision Comm'n Comment to *Code Civ. Proc. § 874.010*]. The referee's fee must be a "reasonable sum" pursuant to *Code Civ. Proc. § 1023* (fees of referee). Furthermore, the expenses of the referee may include attorney's fees when appropriate [Cal. L. Revision Comm'n Comment to *Code Civ. Proc. § 874.010*; *see § 397.59[4][d]*].

[2] In Related Action

The costs of partition include reasonable expenses, including attorney's fees, necessarily incurred by a party for the common benefit in prosecuting or defending other actions or other proceedings. These other actions or proceedings must be for the protection, confirmation, or perfection of title, setting the boundaries, or making a survey of the

property. The reasonable expenses include interest on these expenses at the legal rate from the time of making the expenditures [*Code Civ. Proc. § 874.020*].

[3] Apportionment of Costs

Except as otherwise provided in *Code Civ. Proc. §§ 874.010-874.050*, the court apportions the costs of partition among the parties in proportion to their interests or makes other apportionments that are equitable [*Code Civ. Proc. § 874.040*]. For example, if property is partitioned between a 2/3 owner and 1/3 owner, the total attorneys's fees incurred by both parties for the common benefit should be charged to each party at that ratio. Attorney's fees and costs incurred by lienholders, however, cannot be awarded to the lienholders, where the record indicates that their interests were not in danger of being prejudiced during the partition proceeding [*Stutz v. Davis (1981) 122 Cal. App. 3d 1, 175 Cal. Rptr. 701]* .

As stated in *Code Civ. Proc. § 874.040*, usually the costs of partition are apportioned in proportion to the interests of the parties, but there may be cases in which some other arrangement will be equitable. For example, if litigation for the common benefit arises among only some of the parties, or if the interests of the parties in all items, lots, or parcels of property are not identical, the court may segregate the costs of partition to the extent practicable and apportion a partamong particular parties only [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 874.040*]. Furthermore the court may order that the share of the costs apportioned to a future interest be paid by other parties to the action or by the persons who are then the presumptive owners of the future interest [*Code Civ. Proc. § 874.050(a)*]. If the court orders payment in this manner, such payment is subject to a right of reimbursement, with interest at the legal rate, secured by a charge on the future interest [*Code Civ. Proc. § 874.050(b)*]. If a share of the costs is apportioned to a future interest, however, the amount is discounted based on the present value of the future interest [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 874.050*].

[4] Interest

If disbursements have been made by a party under the direction of the court, interest at the legal rate is allowed thereon from the time of making such disbursements [*Code Civ. Proc. § 874.030*].

[5] Payment of Costs

The costs of partition as apportioned by the court may be ordered paid in whole or in part prior to judgment [*Code Civ. Proc. § 874.110(a)*]. Any costs that remain unpaid must be included and specified in the judgment [*Code Civ. Proc. § 874.110(b)*]. The judgment referred to in *Code Civ. Proc. § 874.110* is the judgment entered at the conclusion of the case in the trial court [Assembly Legislative Committee Comment to *Code Civ. Proc. § 874.110*]. While *Code Civ. Proc. § 874.110(a)* requires payment by the parties, it should be noted that in the case of sale of the property, the proceeds are to be applied first to discharge the costs of partition before disbursement to the parties [Assembly Legislative Committee Comment to *Code Civ. Proc. § 874.110*]. For a discussion of partition by sale, see *§ 397.80 et seq.*

[6] As Lien

The costs of partition are a lien on the share of the party specified in the judgment [*Code Civ. Proc. § 874.120(a)*]. On application of a person entitled to a lien for payment of such costs and on a showing of good cause, the court may order a sale of all or a portion of the property before or after judgment for the benefit of all such lien claimants without priority among them [*Code Civ. Proc. § 874.130*]. The judgment referred to in *Code Civ. Proc. § 874.130* is the judgment entered at the conclusion of the case in the trial court [Assembly Legislative Committee Comment to *Code Civ. Proc. § 874.110*]. Liens for payment of costs of partition have priority over all other liens but have no priority among themselves [*see Code Civ. Proc. § 874.120*; *see also* Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 874.130*]. In addition, the remedies provided in *Code Civ. Proc. § 874.130* are cumulative [*see* Cal. L. Rev. Comm.

Comment to *Code Civ. Proc. § 874.130*].

[7] Execution

A judgment for unpaid costs of partition may be enforced by the person entitled to the costs by execution against the share of the party specified in the judgment or against other property of the party [*Code Civ. Proc. § 874.140*]. The judgment referred to in *Code Civ. Proc. § 874.140* is the judgment entered at the conclusion of the case in the trial court [Assembly Legislative Committee Comment to *Code Civ. Proc. § 874.110*]. The remedies provided in *Code Civ. Proc. § 874.140* are cumulative [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 874.140*].

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[Reserved]

§§ 397.64[Reserved]

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§ 397.80 Governing Law

Partition by sale is governed by *Code Civ. Proc. §§ 872.820, 872.830,* and 873.500-873.850.

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§ 397.81 Decision to Order Sale

[1] In General

Notwithstanding *Code Civ. Proc. § 872.810*, which provides for division of the property in kind (*see § 397.50*), the court will order that the property be sold and the proceeds be divided among the parties in accordance with their interests in the property as determined in the interlocutory judgment in the following situations [*Code Civ. Proc. § 872.820*]:

(1) If the parties agree to such relief, by their pleadings or otherwise.

(2) If the court determines that, under the circumstances, sale and division of the proceeds would be more equitable than division of the property; for the purpose of making the determination, the court may appoint a referee and take into account his or her report [*Code Civ. Proc. § 872.820*].

Whether or not a partition by sale would be more equitable than a partition in kind is a question of fact [*see Mitchell v. Cline (1890) 84 Cal. 409, 418, 24 P. 164* (interpreting former *Code Civ. Proc. § 763*)]. *Code Civ. Proc. § 872.820* changes the standard for allowing partition of the property by sale from "great prejudice" to "more equitable," thereby preserving the traditional preference for physical division while broadening the use of partition by sale [*see Butte Creek Island Ranch v. Crim (1982) 136 Cal. App. 3d 360, 365, 186 Cal. Rptr. 252* ; Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 872.820*]. For a discussion of the revision of the partition law see *§ 397.31*. There are two types of evidence which will demonstrate that a sale would be more equitable than partition in kind. The firstis evidence that the property is so situated that a division into subparcels of equal value cannot be made. The second is economic evidence to the effect that, due to the particular situation of the land, the partition in kind of the land would substantially diminish the value of each party's interest [*Butte Creek Island Ranch v. Crim (1982) 136 Cal. App. 3d 360, 365-367, 186 Cal. Rptr. 252]* .

[2] Partial Sale

The court may order that a portion of the property be sold and the remainder divided if, in making the determination

whether sale would be more equitable than division of the property, the court finds that sale and division of proceeds for part of the property would be more equitable than division of the whole property [*Code Civ. Proc. § 872.830*].

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§ 397.82 Ineligible Purchasers

The following persons cannot purchase property sold in the action directly or indirectly [*Code Civ. Proc. § 873.690(a)*]:

(1) The referee.

(2) The attorney of a party.

(3) The guardian or conservator of a party, unless for the benefit of the ward or conservatee.

It should be noted that *Code Civ. Proc. § 873.690(a)* precludes the listed parties only in partition sales. Sales made to enforce the lien of a referee, attorney, or guardian ad litem imposed under the statutes governing partition (*Code Civ. Proc. §§ 872.010-874.240*) are sales in which those persons may be interested and may participate [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.690*].

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§ 397.83 Bona Fide Purchasers

All sales to ineligible purchasers are void except that a sale to a bona fide purchaser following a sale to an ineligible purchaser [*see § 397.82*] cannot be disturbed [*Code Civ. Proc. § 873.690(b)*].

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§ 397.84 Sale of Certain Kinds of Property

[1] Separate Sale of Distinct Lots

Unless the interests and rights of the parties will be materially prejudiced thereby, the court must order that distinct lots or parcels of real property be sold separately [*Code Civ. Proc. § 873.620*].

[2] Sale of Real and Personal Property as Unit

The court may order that the real and personal property or any portion thereof be sold as a unit [*Code Civ. Proc. § 873.620(b)*]. It should be noted that when real and personal property are sold as a unit, it is subject to a combined offer or "one bid" [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.620*].

[3] Sale of Securities or Perishable Personal Property

The court may order securities listed on an established stock or bond exchange, and personal property that is perishable, that will depreciate in value if not promptly disposed of, or that will incur loss or expense by being kept, to be sold on such notice and conditions as may be appropriate [*Code Civ. Proc. § 873.660*]. Note that *Code Civ. Proc. § 873.660* applies notwithstanding the other provisions of *Code Civ. Proc. §§ 873.510-873.850* governing sale of property in partition actions [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.620*].

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§ 397.85 Credit Sales

The court may direct a sale on credit for the property or any part of the property [*Code Civ. Proc. § 872.630(a)*]. The court also may prescribe such terms of credit as may be appropriate [*Code Civ. Proc. § 873.630(b)*]. If the court fails to prescribe the terms of credit, however, the referee may accept offers that propose varying terms [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.630*]. In addition, the court may approve or prescribe the terms of security to be taken on the sale, including the manner in which title to the security is to be taken, whether in a single instrument or several instruments, according to the interests of the parties [*Code Civ. Proc. § 873.630(c)*]. If there are minors or unknown owners, the court may direct that a trustee or other fiduciary hold the security for them and act on their behalf [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.630*].

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§ 397.86 Sales Procedure

[1] By Agreement of Parties

Notwithstanding any other provisions contained in *Code Civ. Proc. §§ 872.010-874.240*, the court must order sale by such methods and on such terms as are expressly agreed to in writing by all parties to the action [*Code Civ. Proc. § 873.600*].

Code Civ. Proc. § 873.600 permits the parties to agree to sales procedures that may vary from the procedures prescribed in the statutes governing sale of property in partition action (*Code Civ. Proc. §§ 873.510-873.850*). It should be noted that for *Code Civ. Proc. § 873.600* to be operative, the consent of all parties is necessary whether or not they have appeared. As a consequence, *Code Civ. Proc. § 873.600* cannot be used when unknown owners are made parties unless a guardian ad litem has been appointed for them. On the other hand, the consent of persons named as parties who are not served and who have not appeared isunnecessary since their interests will not be affected by the judgment in the action [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.600*].

Code Civ. Proc. § 873.600 only empowers the owners to specify the terms and conditions of sale before the referee's entry into a contract. Thus, property owners could not invoke § 873.600 in connection with a stipulation adopting minimum terms while the motion to confirm was pending [*Sullivan v. Dorsa (2005) 128 Cal. App. 4th 947, 961, 27 Cal. Rptr. 3d 547]* .

[2] By Court Determination

The court may, at the time of trial or thereafter, prescribe such manner, terms, and conditions of sale not inconsistent with the provisions of the statutes governing sale of property in partition actions (*Code Civ. Proc. §§ 873.510-873.850*), as it deems proper for the particular property or sale [*Code Civ. Proc. § 873.610*]. In addition, the court may refer the manner, terms, and conditions of sale to the referee for recommendation but must not approve the referee's report except following a hearing on noticed motion [*Code Civ. Proc. § 873.610*].

[3] Notice of Sale

[a] In General

Notice of the sale of real or personal property must be given in the manner required for notice of sale of like property on execution [*Code Civ. Proc. § 873.640(a)*]. Such notice must also be given to every party who has appeared in the action and to such other interested persons as may have in writing requested the referee for special notice [*Code Civ. Proc. § 873.640(a)*]. If real and personal property are to be sold as a unit, notice of sale may be in the manner required for notice of sale of real property alone [*Code Civ. Proc. § 873.640(b)*]. The court may order such additional notice as it deems proper [*Code Civ. Proc. § 873.640(c)*]. If the court orders a new sale of property pursuant to *Code Civ. Proc. § 873.730* [*see § 397.88[3]*] or *Code Civ. Proc. § 873.740* [*see § 397.88[3][b]*], notice of sale must be as provided in *Code Civ. Proc. § 873.640* [*Code Civ. Proc. § 873.640(d)*]. Inadequate notice of sale to the parties or persons who have requested notice may be a ground for setting aside the sale [*see Code Civ. Proc. § 873.730*; *see also § 397.88[3]*].

The court prescribes the contents of the notice of sale, which must include the following [*Code Civ. Proc. § 873.650(a)*]:

- A description of the property;
- The time and place of sale; and
- Either a statement of the principal terms of sale, or an incorporation by reference of an order of the court, or a written statement containing such information which may be inspected at the place of business of the referee or the referee's attorney.

For a discussion of the determination of terms of sale, see *§ 397.86[2]*.

It should be noted that the court may permit variation from the published terms of sale if to do so will benefit the parties and will not prejudice the rights of other interested persons [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.650*; *see also § 397.88[2]*].

[b] Private Sales

A notice of private sale must state a place where bids or offers will be received and a day on or after which the sale will be made [*Code Civ. Proc. § 873.650(b)*]. In the case of a private sale, the place of sale will normally be the place of business of the referee [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.650*].

[4] Manner of Sale

[a] Public Auction or Private Sale

The property must be sold at public auction or private sale as the court determines will be more beneficial to the parties. For the purposes of making this determination, the court may refer the matter to the referee and take into account the referee's report [*Code Civ. Proc. § 873.520*]. In addition, part of the property may be sold at public auction and part at private sale if it appears that to do so will be more beneficial to the parties [*Code Civ. Proc. § 873.530*]. *Code Civ. Proc. § 873.520* makes clear that there is no preference for either public auction or private sale. The reference to a referee for a determination of whether public auction or private sale would be more beneficial may be combined with a reference to determine whether partition by sale is more equitable than partition by division [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.520*; for discussion of reference to determine if partition should be by sale, *see § 397.81*].

[b] Procedure for Public Auction

A sale at public auction to the highest bidder must be held in the county in which the action is pending or such other

place as may be specified by the court. Unless otherwise ordered by the court, personal property must be present at the sale. The sale may be postponed by the referee by public declaration as provided for sales on execution [*Code Civ. Proc. § 873.670*]. Execution is governed by *Code Civ. Proc. §§ 699.010-701.830*. For a discussion of execution sales, see Ch. 254, *Execution and Enforcement of Money Judgments* .

[c] Procedure for Private Sale

A sale at private sale must not be made before the day specified in the noticeof sale but can be made within one year thereafter. The bids or offers must be in writing and left at the place designated in the notice at any time after the first publication or, if none, the posting of the notice [*Code Civ. Proc. § 873.680*].

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§ 397.87 Referees

[1] Duties of Referee

The referee appointed by the court to make a sale of the property must sell the property in the manner and following the procedures provided in *Code Civ. Proc. §§ 873.510-873.850* [*Code Civ. Proc. § 873.510*].

[2] Report of Referee

On making the sale of property, the referee must report the sale to the court [*Code Civ. Proc. § 873.710(a)*]. The referee's report must contain, in addition to such other information as may be appropriate, all of the following information [*Code Civ. Proc. § 873.710(b)*]:

- A description of the property sold to each purchaser.
- The name of the purchaser.
- The sale price.
- The terms and conditions of the sale and the security, if any, taken.
- Any amounts payable to lienholders.
- A statement as to contractual or other arrangements or conditions as to agents' commissions.
- Any determination and recommendation as to opening and closing public and private ways, roads, streets, and easements.
- Other material facts relevant to the sale and the confirmation proceeding.

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35-397 California Forms of Pleading and Practice--Annotated § 397.88

§ 397.88 Confirmation on Setting Aside Sale

[1] Motion

A purchaser, the referee, or any party may move the court to confirm or set aside the sale [*Code Civ. Proc. § 873.720(a)*]. The moving party must give not less than 10 days notice of motion to [*Code Civ. Proc. § 873.720(b)*]:

- The purchaser, if the purchaser is not the moving party; and
- All other parties who have appeared in the action.

[2] Hearing on Sale

At the hearing, the court will examine the referee's report (*see § 397.87[2]*) and witnesses in relation to the report; the court then has power to either confirm the sale or vacate it [*see Code Civ. Proc. § 873.730*; *see also § 397.88[2]* and *[3]*].

[3] Confirmation of Sale

[a] By Court

The court may confirm the sale notwithstanding variance from the prescribed terms of sale if to do so will be beneficial to the parties and will not result in substantial prejudice to persons interested in the sale [*see Code Civ. Proc. § 873.730(b)*]. In the case of confirmation of a credit sale, the judge must determine whether the credit bidder is responsible before confirming the sale [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.730*].

[b] Conveyance by Referee

On confirmation of a sale, the court will order the referee to execute a conveyance or other instrument of transfer, to collect the proceeds, take security, and perform other acts required to consummate the sale. In addition, the order may

direct the referee concerning the distribution, deposit, or securing of sale deposits and sale proceeds [*Code Civ. Proc. § 873.750*]. On fulfillment of the terms of sale, the referee must execute a conveyance or other instrument of transfer to the purchaser. The conveyance or transfer of real property and the order authorizing such conveyance or transfer must be recorded in each county in which the property is located [*Code Civ. Proc. § 873.790*].

[4] Vacating Sale

[a] In General

The court may vacate the sale and direct that a new sale be made if it determines any of the following [*Code Civ. Proc. § 873.730(c)*]:

- The proceedings were unfair or notice of sale was not properly given. If there is no finding at the hearing of unfairness or improper notice, the sale may thereafter not be attacked on these grounds.

- The sale price is disproportionate to the value of the property.

- It appears that a new sale will yield a sum that exceeds the sale price by at least 10 percent on the first $10,000 and 5 percent on the amount in excess of the first $10,000, determined after a reasonable allowance for the expenses of a new sale.

Each of these grounds for vacating a sale is independently sufficient [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.730*].

[b] Increased Offer

If at the hearing under *Code Civ. Proc. § 873.730* (*see § 397.88[1]*) aresponsible bidder makes a written increased offer that exceeds the sale price by at least 10 percent on the first $10,000 and 5 percent on the amount in excess thereof, the court in its discretion may do either of the following [*Code Civ. Proc. § 873.740(a)*]:

- Vacate the sale and direct that a new sale be made.

- Vacate the sale, accept the increased offer, and confirm the sale to the offeror.

Except as provided in *Code Civ. Proc. § 873.740(c)*, the amount by which an increased offer exceeds the sale price is determined on the basis of the gross amount of the increased offer including any commission on the increased offer to which an agent may be entitled [*Code Civ. Proc. § 873.740(b)*]. *Code Civ. Proc. § 873.740(c)* provides that if in advance of sale, the court has so ordered or the parties have so agreed, if an increased offer is made by a party to the action who is not represented by an agent, the amount by which an increased offer of a nonparty exceeds the sale price is determined on the basis of the net amount of the increased offer excluding any commission on the increased offer to which an agent may be entitled [*Code Civ. Proc. § 873.740(c)*].

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§ 397.89 Agents' Commissions

The amount of agents' commissions on the sale, if any, is fixed by the court and divided or limited in the manner provided for private sales of real property in decedents' estates [*Code Civ. Proc. § 873.745*]. The statutory provisions governing agents' commissions in private sales of real property in probate are *Prob. Code § 10160 et seq.* [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.745*; for a discussion of these probate statutes, see Ch. 445, *Probate: Sale of Estate Property* , and Ch. 280, *Guardianship and Conservatorship*]. Thus, an order awarding a commission to a broker on an unconsummated sale of the partitioned property could not be sustained in light of *Prob. Code § 10160*, which precludes real estate commissions on unconsummated sales of estate property [*Sullivan v. Dorsa (2005) 128 Cal. App. 4th 947, 959, 27 Cal. Rptr. 3d 547]* .

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§ 397.90 Purchasers' Failure to Pay

If the purchaser, after the confirmation of the sale, fails to pay the sale price, the purchaser is subject to the court's jurisdiction and to further proceedings in the action. On such a failure, a party, or the referee, may on notice move the court to order either of the following forms of relief [*Code Civ. Proc. § 873.760*]:

- Resale of the property on notice as provided in *Code Civ. Proc. §§ 873.510-873.760*. If any loss is occasioned by the resale, the referee may recover the amount of the loss and costs and expenses incurred, including a reasonable attorney's fee, from the purchaser who failed to pay.

- Maintenance by the referee of an action against the purchaser for the amount of the sale price. If the referee recovers judgment, the referee will be awarded a reasonable attorney's fee against the purchaser.

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§ 397.91 Purchaser as Party or Lienholder

If the purchaser is a party or lienholder entitled to a share of the proceeds of sale, the referee may do the following [*Code Civ. Proc. § 873.770*]:

- Take the purchaser's receipt for so much of the proceeds of sale as belongs to the purchaser.

- Take security, or other arrangement satisfactory to the referee, for payment of amounts that are or may become due from the purchaser on account of the expenses of sale, general costs of the action, and costs of the referee.

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§ 397.92 Orders Concerning Closing of Sale; Adjustments

The court may make orders relating to the closing of a sale after confirmation, including escrow and closing provisions and, if the referee and purchaser so agree and the court on noticed motion determines it will not result in substantial prejudice to the parties, may make adjustments varying the terms of sale based on after-discovered defects [*Code Civ. Proc. § 873.780*]. *Code Civ. Proc. § 873.780* recognizes that modern transactions often involve, at closing, minor deviations or adjustments and, therefore, expressly authorizes the court to make rulings regarding them [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.780*].

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§ 397.93 Disposition of Proceeds

[1] Disbursement

The court will order the proceeds of sale and any security for such proceeds to be (1) paid, (2) transferred, (3) deposited in court, (4) placed in trust, or (5) invested in State of California or United States government obligations, or interest-bearing accounts. These accounts must be in an institution whose accounts are insured by an agency of the federal government, to or for the benefit of the persons in interest entitled thereto, as may be appropriate or as specifically provided in *Code Civ. Proc. §§ 873.810-873.850* (discussed *below*) [*Code Civ. Proc. § 873.810*]. Under *Code Civ. Proc. § 873.810*, the court must affirmatively specify the disposition of the proceeds, including proceeds for the shares of unknown owners. It should be noted that amounts invested in interest-bearing accounts pursuant to *Code Civ. Proc. § 873.810* may exceed the amount insured by an agency of the federal government provided that the accounts are in aninstitution that carries such insured accounts [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.810*].

[2] Order of Application of Proceeds

The proceeds of sale for any property sold must be applied in the following order [*Code Civ. Proc. § 873.820*]:

- Payment of the expenses of sale.
- Payment of the other costs of partition in whole or part or to secure any cost of partition later allowed.
- Payment of any liens on the property in their order of priority except liens that under the terms of sale are to remain on the property.
- Distribution of the residue among the parties in proportion to their shares as determined by the court.

[3] Partial Sale; Equitable Setoff

If only a portion of the property is sold, a tenant for life or years in an undivided share of the whole property may have his or her estate equitably set off in any part of the property not sold by way of complete or partial satisfaction of his or her share of the proceeds [*Code Civ. Proc. § 873.830*].

[4] Successive Estates

Regarding successive estates the court must do the following [*Code Civ. Proc. § 873.840*]:

- In the case of a tenant for life or years, ascertain the proportion of the proceeds of sale that will be a just and reasonable sum for the satisfaction of the estate of a tenant for life or years and order the amount distributed to him or her or held for his or her benefit.

- In the case of a contingent future right or estate, ascertain the proportional value of any vested or contingent future right or estate in the property and direct the proportion of the proceeds of sale to be distributed, secured, or held in such a manner as to protect the rights and interests of the parties.

- In the case of a tenant for life or defeasible estate with remainder over, notwithstanding any other provision of *Code Civ. Proc. § 873.840*, direct that the entire proceeds of sale be placed in trust as provided in *Code Civ. Proc. § 873.840* on a showing that the establishment of such a trust in economically feasible and will serve the best interests of the parties. The court must appoint a trustee, on security satisfactory to the court, who under court supervision must invest and reinvest the proceeds, pay the income of the investments, if any, to the life tenant or owner of the defeasible interest, and on termination of the life or defeasible estate, deliver or pay the corpus of the trust estate to the remainderman. The court will retain jurisdiction over the settlement of the accounts of the trustee and in all matters necessary for the proper administration of the trust and the final distribution of the trust fund.

Code Civ. Proc. § 873.840(c) makes clear that imposition of a trust under its terms is not mandatory in all cases but is discretionary with the court and then only if the establishment of a trust is both practical and desirable. Furthermore, investment under *Code Civ. Proc. § 873.840(c)* may be by purchase of other property for use of the parties if appropriate. In the case of successive life or defeasible estates, the court may be required to formulate a more complex formula for investment and distribution than is specified in the statute [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.840*].

[5] Continuance Due to Nonallocation

If the proceeds of the sale belonging to persons who are parties to the action, whether known or unknown, have not been allocated among the parties, the action may be continued as between these parties for the determination of their respective claims to the proceeds of sale, which must be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee, at the discretion of the court, and the court may, if necessary, require the parties to present the facts or law in controversy, by pleadings, as in an original action [*Code Civ. Proc. § 873.850*].

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[Reserved]

§§ 397.94[Reserved]

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§ 397.110 Governing Law

Statutes governing partition by appraisal are contained in *Code Civ. Proc. §§ 873.910-873.980*.

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§ 397.111 Purpose of Partition by Appraisal

The purpose of *Code Civ. Proc. §§ 873.910-873.980* is to provide an alternative method of partition for co-owners who agree to use the method of partition by appraisal. Although the same result can be accomplished by an agreement to arbitrate, the authority of the court under *Code Civ. Proc. §§ 873.910-873.980* is much broader than in the case of arbitration which is governed by *Code Civ. Proc. §§ 1280-1294.2* [*see* Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.910*].

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§ 397.112 Agreement to Partition by Appraisal

[1] In General

If the interests of all parties are undisputed or have been adjudicated, the parties may agree on a partition by appraisal pursuant to *Code Civ. Proc. §§ 873.910-873.980* [*Code Civ. Proc. § 873.910*]. The agreement binds the heirs, executors, administrators, successors, and assigns of the parties [*Code Civ. Proc. § 873.970*]. A guardian ad litem may be appointed to represent contingent interests and may agree to partition by appraisal on their behalf [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.910*].

If the parties cannot agree on partition by appraisal, a statutory procedure based on appraisal by a referee, with court supervision, may in some situations serve the interests of the parties since an acquisition method does not involve the same tax consequences as a partition sale [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.910*].

[2] Contents

The agreement must be in writing filed with the clerk of the court and must include all of the following [*Code Civ. Proc. § 873.920*]:

- A description of the property.
- The names of the parties and their interests.
- The names of the parties who are willing to acquire the interests.
- The names or names of a person or persons to whose appointment as referee or referees the parties consent.
- The date or dates as of which the interests to be acquired are to be appraised.

- Other terms mutually agreed on, which may include, but are not limited to, provisions relating to abandonment of the action if the appraised value of the interest to be acquired exceeds a stated amount, required deposits on account of purchase price, terms of any credit, title and objections to title, and payment of the expenses of the procedure authorized by *Code Civ. Proc. §§ 873.910-873.980* and of costs of the action.

[3] Court Approval

Any party to the agreement may, on noticed motion, apply to the court for approval of the agreement. If the court determines that the agreement complies with *Code Civ. Proc. § 873.920* (*see § 397.112[2]*) and that the terms and conditions are equitable, it will approve the agreement and stay any pending division or sale of the property [*Code Civ. Proc. § 873.930*]. It should be noted that the court, as a court of equity, may exercise a sound discretion in approving or refusing to approve a particular agreement [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.930*].

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§ 397.113 Appraisal by Referee; Referee's Report

The court will appoint one referee or, if provided in the agreement, three referees, to appraise the property and the interests involved. The referee will report the valuations and other findings to the court in writing filed with the clerk [*Code Civ. Proc. § 873.940*].

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§ 397.114 Motion to Confirm, Modify, or Set Aside Report

[1] Motion

Any party to the agreement or the referee, on 10 days notice to the referee (if the referee is not the moving party) and to the other parties to the agreement, may move the court to confirm, modify, or set aside the report [*Code Civ. Proc. § 873.950*].

[2] Hearing

At the hearing, the court will examine the report and witnesses. If the court determines that the proceedings have been regularly conducted, that transfer of title to the interests may regularly be made, and that no facts appear that would make the transfer inequitable, it will confirm the report and order the interests transferred to the acquiring parties in proportion to their respective interests, or in any other proportion that is set out in the agreement [*Code Civ. Proc. § 873.960*].

Code Civ. Proc. § 873.960 vests the court with equitable power to refuse to permit consummation of the transaction if it would be inequitable. The parties contract in light of this power of the court [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.960*].

[3] Order

The order of the court will be conditioned on payment of the amounts fixed as the purchase price and any other amounts required by the agreement, the giving of any required security, and payment by the parties of the expenses of the procedure authorized by *Code Civ. Proc. §§ 873.910-873.980* and of the general costs of the partition or an appropriate share thereof [*Code Civ. Proc. § 873.960*].

[4] Judgment

On motion of a party to the agreement or of the referee, which is made on not less than 10 days notice to the parties who

have appeared, the court will determine whether the conditions have been fulfilled and, if so, will enter judgmentconfirming the transfer. Otherwise, the action or proceeding will be ordered terminated on such further proceedings as may be ordered [*Code Civ. Proc. § 873.960*].

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§ 397.115 Availability of Other Remedies

The provisions of *Code Civ. Proc. §§ 873.910-873.980* are cumulative and if, for default or other cause, interests are not transferred and acquired pursuant to *Code Civ. Proc. §§ 873.910-873.980*, the parties may pursue their other rights of partition, subject to *Code Civ. Proc. § 873.970* [*Code Civ. Proc. § 873.980*]. If the proceeding aborts or is not carried out, the parties are not prejudiced as to their normal rights of partition except that an innocent party may elect to proceed under the agreement pursuant to *Code Civ. Proc. § 873.970* [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.970*; *see also § 397.116*].

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§ 397.116 Default

Code Civ. Proc. § 873.970 provides that in the event of default, the aggrieved parties may specifically enforce the agreement by further proceedings in the action or may pursue any other remedy they may have at law or in equity [*see Code Civ. Proc. § 873.970*]. Even though the subject of the agreement may be personal property, the agreement is specifically enforceable if the innocent party elects this remedy [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.970*].

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[Reserved]

§§ 397.117[Reserved]

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§ 397.130 California Points and Authorities

For memoranda of points and authorities relating to partition actions, see California Points and Authorities, Ch. 169, *Partition* (Matthew Bender)

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§ 397.131 Forms of Discovery

For forms of interrogatories in actions for partition of real and personal property, see Bender's Forms of Discovery, *Real Property* (Matthew Bender)

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§ 397.132 California Real Estate

For detailed discussion of partition of property, see California Real Estate Law and Practice, Ch. 371, *Partition and Other Terminations of Cotenancies* (Matthew Bender)

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§ 397.133 State Statutes

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Sale of property and division of proceeds. *Code Civ. Proc. § 872.820*

Partial division in kind and division by sale. *Code Civ. Proc. § 872.830*

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Combined interests of unknown parties as remaining undivided. *Code Civ. Proc. § 873.270*

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Procedure for service by publication. *Code Civ. Proc. §§ 872.320-872.330*

[18] Williamson Act

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Chapter 397 PARTITION
PART III. RESEARCH GUIDE
A. Partition Actions Generally

35-397 California Forms of Pleading and Practice--Annotated § 397.134

§ 397.134 Decisions

[1] Generally

Law favors partition over sale. *Mitchell v. Cline (1890) 84 Cal. 409, 418, 24 P. 164* (interpreting former statute)

All equities between parties are determined in action for partition. *Emeric v. Alvarado (1884) 64 Cal. 529, 610-611, 2 P. 418* (interpreting former statute)

Shares in mutual water company are personal property and, therefore, do not pass on partition of land unless they are appurtenant. *Richmond v. Dofflemyer (1980) 105 Cal. App. 3d 745, 763, 164 Cal. Rptr. 727*

Whether division of property between parties to action in partition is fair and equitable is question of fact. *Felder v. Felder (1967) 247 Cal. App. 2d 718, 724, 55 Cal. Rptr. 780* (interpreting former statute)

Right to have property partitioned is not conditioned on possibility that market value of property will rise. *Cohen v. Karubian (1966) 276 Cal. App. 2d 44, 49, 80 Cal. Rptr. 702* (interpreting former statute)

Final judgment is necessary for entry of costs. *Donlon v. Donlon (1957) 155 Cal. App. 2d 362, 368-369, 318 P.2d 189* (interpreting former statute)

Judgment for partition terminates tenancy. *Teutenberg v. Schiller (1955) 138 Cal. App. 2d 18, 22, 291 P.2d 53* (interpreting former statute)

Right of partition is subject to contract rights of parties. *Miranda v. Miranda (1947) 81 Cal. App. 2d 61, 68, 183 P.2d 61* (interpreting former statute)

Record owner is allowed expense of quitclaim deed. *Elbert, Ltd. v. Federated Income Properties (1933) 120 Cal. App. 2d 194, 209, 261 P.2d 743* (interpreting former statute)

[2] Allotment of Improvements

co-owner is granted tract on which he or she made improvements. *Seale v. Soto (1868) 35 Cal. 102, 105-107*

[3] Attorney's Fees

Attorney's fees are proper when services are for common benefit. *Randell v. Randell (1935) 4 Cal. 2d 575, 582-583, 50 P.2d 806*

Trial court's valuation of attorney's fees is proper when no evidence of this value is provided by either party. *Stutz v. Davis (1981) 122 Cal. App. 3d 1, 5, 175 Cal. Rptr. 701*

Attorney's fees incurred by one party for time-consuming and meritless contention are not attorney's fees incurred for common benefit. *Forrest v. Elam (1979) 88 Cal. App. 3d 164, 173, 151 Cal. Rptr. 591*

[4] Community Property

Community asset that was unadjudicated at time of marital dissolution was held by former spouses after dissolution as tenants in common and subject to separate partition action. *In re Marriage of Graves (1988) 198 Cal. App. 3d 1047, 1050, 244 Cal. Rptr. 110*

Action for partition of community property is not allowed. *Jacquemart v. Jacquemart (1956) 142 Cal. App. 2d 794, 796, 299 P.2d 281*

[5] Interlocutory Judgment

Interlocutory decree is necessary whether property is to be sold or partitioned. *Grant v. Murphy (1897) 116 Cal. 427, 431, 48 P. 481*

Interlocutory judgment has effect of severing joint tenancy so that owners are tenants in common. *Milian v. De Leon (1986) 181 Cal. App. 3d 1185, 1196, 226 Cal. Rptr. 831*

Interlocutory judgment dividing part of property and appointing referee to determine division of remainder is proper because court is not required to appoint referee. *Richmond v. Dofflemyer (1980) 105 Cal. App. 3d 745, 755-761, 164 Cal. Rptr. 727*

[6] Jurisdiction to Partition Property

"Minimum contacts" analysis set forth in *Code Civ. Proc. § 410.10* was inapplicable to establish personal jurisdiction over nonresident in action to partition military retirement benefits when federal law established more restrictive jurisdictional standard. *In re Marriage of Hattis (1987) 196 Cal. App. 3d 1162, 1167, 1170, 242 Cal. Rptr. 410* .

[7] Lease and Option Agreements

Lease and option agreements are contractual rights and, therefore, not subject to partition. *Penasquitos, Inc. v. Holladay (1972) 27 Cal. App. 3d 356, 359, 103 Cal. Rptr. 717*

[8] Proof of Title

Deed from grantor in actual possession at time of transfer is proof of title. *Scott v. Beck (1928) 204 Cal. 78, 80 266 P. 951*

Probate decree of partial distribution is proof of title. *Broome v. Broome (1919) 179 Cal. 638, 645, 178 P. 525*

Deed is only item of evidence and not conclusive to prove title in partition action. *Cosler v. Norwood (1950) 97 Cal. App. 2d 665, 666, 218 P.2d 800*

Plaintiff's long-term possession of property under deed from previous possessor is proof of title. *Snodgrass v. Errengy (1927) 86 Cal. App. 664, 667, 261 P. 497*

[9] Referee

Error in valuation by referee did not require equitable adjustment when error did not result in larger share being allotted to defendant co-owners. *Randell v. Randell (1935) 4 Cal. 2d 575, 580, 50 P.2d 806*

Confirmation of report of referee is adoption by court of facts so stated. *Worcester v. Worcester (1966) 246 Cal. App. 2d 56, 61, 54 Cal. Rptr. 436*

[10] Review

Orders determining lien and confirming referee's report are appealable because they are orders made after interlocutory judgment and relate to enforcement of judgment. *Heller Properties, Inc. v. Rothschild (1970) 11 Cal. App. 3d 705, 709-710, 90 Cal. Rptr. 133*

[11] Trial

Trial in partition action has commenced, and plaintiff's right to voluntary dismissal under *Code Civ. Proc. § 581* is cut off, when parties appear and present evidence before referee in partition proceeding. *Gray v. Superior Court (1997) 52 Cal. App. 4th 165, 173, 60 Cal. Rptr. 2d 428*

[12] Waiver

Party seeking partition is estopped to assert, or has waived right, when partition would conflict with previous agreement of parties as to use of property. *Heber v. Yaeger (1967) 251 Cal. App. 2d 258, 263, 59 Cal. Rptr. 353*

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§ 397.135 Law Reviews

Rosenberry, *The Application of the Federal and State Constitutions to Condominiums, Cooperatives and Planned Developments, 19 Real Prop. Prob. & Tr. J. 1 (1984).*

Comment, *Recent Developments, Equitable and Contractual Defenses to Partition, 18 Stan LR 1428 (1966)*

Note, *Trusts--Trust Intent and Purpose--Joint Tenancy--Partition, 11 So Cal. L Rev 87 (1940)*

Note, *Real Property--Tenants in Common--Right to Partition-- Relative Weight in California of Common Law and Procedural Code Law, 19 So Cal. L. Rev 286 (1946)*

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§ 397.136 Text References

Witkin, Summary of California Law, vol. 12, *Real Property*, 65 et seq. (10th ed. 2005)

Witkin, California Procedure, Vol. 5, *Pleading*, 638 et seq. (4th ed. 1997)

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[Reserved]

§§ 397.137[Reserved]

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§ 397.150 State Statutes

[1] Consummation of Sale

Report of referee. *Code Civ. Proc. § 873.710*

Confirmation or setting aside sale. *Code Civ. Proc. § 873.720*

Hearing. *Code Civ. Proc. § 873.730*

Increased offer. *Code Civ. Proc. § 873.740*

Commissions of agents. *Code Civ. Proc. § 873.745*

Conveyance, proceeds, distribution. *Code Civ. Proc. § 873.750*

Default. *Code Civ. Proc. § 873.760*

Setoff from party purchaser or lienholder. *Code Civ. Proc. § 873.770*

Closing of sale. *Code Civ. Proc. § 873.780*

Execution of conveyance or transfer. *Code Civ. Proc. § 873.790*

[2] Disposition of Proceeds of Sale

Disbursement by court order. *Code Civ. Proc. § 873.810*

Order of application of proceeds. *Code Civ. Proc. § 873.820*

Setoff to tenant for life or years. *Code Civ. Proc. § 873.830*

Successive estates. *Code Civ. Proc. § 873.840*

Continuance due to nonallocation. *Code Civ. Proc. § 873.850*

[3] Manner of Sale

Power of referee to sell property. *Code Civ. Proc. § 873.510*

Sale at public auction or private sale. *Code Civ. Proc. § 873.520*

Selling a portion of property at public auction and a portion at private sale. *Code Civ. Proc. § 873.530*

[4] Partition by Sale

Power of the court to order property sold. *Code Civ. Proc. § 872.820*

Power of the court to order partial division and sale. *Code Civ. Proc. § 872.830*

[5] Sales Procedures

Agreement of parties as to methods and terms of sale. *Code Civ. Proc. § 873.600*

Power of court to prescribe manner and terms. *Code Civ. Proc. § 873.610*

Sale of property in distinct lots. *Code Civ. Proc. § 873.620(a)*

Sale of real and personal property. *Code Civ. Proc. § 873.620(b)*

Credit sales. *Code Civ. Proc. § 873.630*

Notice of sale. *Code Civ. Proc. § 873.640*

Contents of notice. *Code Civ. Proc. § 873.650*

Sale of securities or perishable property. *Code Civ. Proc. § 873.660*

Procedure for public auction. *Code Civ. Proc. § 873.670*

Procedure for private sale. *Code Civ. Proc. § 873.680*

Ineligible or bona fide purchasers. *Code Civ. Proc. § 873.690*

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§ 397.151 Decisions

[1] Generally

Court on ordering partition by sale has no authority to decree sale subject to deed of trust in absence of stipulation or agreement between parties. *Cohen v. Karubian (1969) 276 Cal. App. 2d 44, 49, 80 Cal. Rptr. 702* (interpreting former statute)

Manner of sale, in partition by sale, is prescribed by statute. *Verdier v. Verdier (1953) 121 Cal. App. 2d 190, 192-193, 263 P.2d 57* (interpreting former statute)

Evidence that fair price may be secured on sale is necessary. *Williams v. Wells Fargo Bank (1943) 56 Cal. App. 2d 645, 651, 133 P.2d 73* ; *De Roulet v. Mitchel (1945) 70 Cal. App. 2d 120, 124, 160 P.2d 574* (interpreting former statute)

[2] Confirmation

Validity of sale is dependent on confirmation by court. *Schoonover v. Birnbaum (1907) 150 Cal. 734, 736, 89 P. 1108* (interpreting former statute)

Order confirming partition sale pursuant to *Code Civ. Proc. § 873.750* is appealable. *Solis v. Vallar (1999) 76 Cal. App. 4th 710, 713, 90 Cal. Rptr. 2d 677*

Incorporating order confirming sale into final decree in partition is proper. *Hirschberg v. Oser (1947) 82 Cal. App. 2d 282, 287, 186 P.2d 53*

[3] Fees

Right of trial court to fix attorney's and referees' fees at the time of confirmation of sale is not subject to attack by purchaser at sale. *Hirschberg v. Oser (1947) 82 Cal. App. 2d 282, 287, 186 P.2d 53*

[4] Interlocutory Decree

Interlocutory decree is required to state whether partition by sale should be made instead of partition in kind. *Stoffer v. Verhellen (1925) 195 Cal. 317, 318-319, 231 P. 233*

[5] Minimum Bid

It is not error to not require minimum bid when there is no evidence that lack of minimum bid caused sale at unfair price. *Hummel v. First National Bank (1987) 191 Cal. App. 3d 489, 494, 236 Cal. Rptr. 449*

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§ 397.152 Text References

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 638 et seq. (4th ed. 1997)

Witkin, Summary of California Law, vol. 12 *Real Property*, § 65 et seq. (10th ed. 2005)

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§ 397.170 California Real Estate

For discussion of partition by appraisal, see California Real Estate Law and Practice, Ch. 371, *Partition and Other Terminations of Cotenancies* (Matthew Bender).

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§ 397.171 State Statutes

Agreement to partition by appraisal. *Code Civ. Proc. § 873.910*

Contents of agreement. *Code Civ. Proc. § 873.920*

Approval of agreement. *Code Civ. Proc. § 873.930*

Appraisal by referee. *Code Civ. Proc. § 873.940*

Motion to modify, confirm, or set aside. *Code Civ. Proc. § 873.950*

Hearing on confirmation of report. *Code Civ. Proc. § 873.960*

Contents of order confirming report. *Code Civ. Proc. § 873.960*

Motion for final judgment confirming transfer. *Code Civ. Proc. § 873.960*

Binding effect of agreement. *Code Civ. Proc. § 873.970*

Relation to other rights to partition. *Code Civ. Proc. § 873.980*

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§ 397.190 Facts to Be Ascertained

1. Facts relating to plaintiff.

a. Name, address, and telephone number of plaintiff.

b. Capacity of plaintiff, such as minor, trustee, conservator, guardian, executor, partnership, domestic corporation, or foreign corporation.

c. Plaintiff's financial stability and financial solvency, such as employment status, prior residences, credit, bank, and personal references.

2. Facts relating to defendants.

a. Name and address of each potential defendant [*see Code Civ. Proc. § 872.510*; discussion in *§ 397.43*].

b. Exact name in which each of potential defendants acquired or claims an interest in property.

c. Capacity of each potential defendant, such as minor, adult, trustee, conservator, guardian, executor, partnership, domestic corporation, or foreign corporation.

3. Facts relating to property.

a. County or counties in which property is located [*see Code Civ. Proc. § 872.110(b)*; discussion in *§ 397.36*].

b. Description of property.

(1) Personal property: description must include its usual location [*see Code Civ. Proc. § 872.230*; discussion in *§ 397.53*].

(2) Real property: description must include its legal description and its secret address or common designation [*see Code Civ. Proc. § 872.230*; discussion in *§ 397.53*].

c. Plaintiff's precise interest in property [*see Code Civ. Proc. § 872.230(c)*; discussion in *§ 397.53*, and *Code Civ. Proc. § 872.410*; discussion in *§ 397.56*].

d. Date plaintiff obtained his or her interest.

e. Name and address of plaintiff's grantor or transferor.

f. Consideration, if any, paid by plaintiff for his or her interest.

g. Informal estimate of present market value of property.

h. Information concerning all liens [*see Code Civ. Proc. § 872.230(c)*; discussion in *§ 397.53*, and *Code Civ. Proc. § 872.420*; discussion in *§ 397.56[2]*].

4. Facts relating to potential cause of action.

a. The following information concerning any agreement affecting the right to partition [*see* discussion in *§ 397.42*]:

(1) Terms of agreement.

(2) Names of parties to agreement.

(3) Date of agreement.

b. Any other facts that might be construed to be a waiver of plaintiff's right to partition [*see Williams v. Williams (1967) 255 Cal. App. 2d 648, 651, 63 Cal. Rptr. 354* ; discussion in *§ 397.42*].

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§ 397.191 Documents to Be Obtained

1. Document by which plaintiff obtained his or her interest in the property.

2. Liens, mortgages, deeds of trusts, or other encumbrances affecting the property.

3. Notices of any action relating to such liens or encumbrances.

4. Pleadings in any action affecting the property.

5. Title report, including preliminary report, guarantee, binder, or policy of title insurance [*see Code Civ. Proc. § 872.010*; discussion in *§ 397.52*].

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§ 397.192 Preliminary Determinations

1. For general determinations, such as capacity, see Ch. 123, *Complaints and Cross Complaints* .

2. Superior court has jurisdiction [*see Code Civ. Proc. § 872.110*; discussion in *§ 397.35*].

3. Venue [*see Code Civ. Proc. § 872.110(b)*; discussion in *§ 397.36*].

a. Real property or combination of real and personal property: county where any portion of real property is situated is proper county for action.

b. Personal property: either county where personal property is principally located at commencement or in which any or all defendants reside at commencement.

4. Determine if TRO and/or injunction is needed; these may issue to prevent waste and protect property [*see Code Civ. Proc. § 872.130*; discussion in *§ 397.39[3]*].

5. Determine if receiver needs to be appointed; this is needed if plaintiff is being threatened with ouster [*see* discussion in *§ 397.39[4]*].

6. Determine if plaintiff wants to seek compensation for rents, profits, and rental value [*see* discussion in *§ 397.39[5][b]*].

7. Determine right to partition.

a. If plaintiff's interest in property is sufficient to maintain action [*see Code Civ. Proc. § 872.710*; discussion in *§ 397.41[2]*].

b. If property a particular type (i.e. partnership, homestead, condominium, community

property) requiring special prerequisites [*see* discussion in *§ 397.41[3]*].

8. Determine existence of waiver [*see Williams v. Williams (1967) 255 Cal. App. 2d 648, 651, 63 Cal. Rptr. 354* ; discussion in *§ 397.42*].

9. Determine all persons having or claiming interests of record, including liens, and join these persons as defendants [*see Code Civ. Proc. § 872.510*; discussion in *§ 397.43*].

10. Determine if title report necessary [*see Code Civ. Proc. § 872.220*; discussion in *§ 397.52*].

11. Determine if service by publication necessary; it is necessary if deceased persons claiming interests [*Code Civ. Proc. § 872.530(b)*] or unknown persons claiming interest [*Code Civ. Proc. § 872.530*] [*see Code Civ. Proc. § 872.310(b)*; discussion in *§ 397.54[2]*].

12. Determine manner of partition.

a. Partition in kind [*see Code Civ. Proc. § 872.810*; discussion in *§ 397.50[1]*].

b. Partition by sale [*see Code Civ. Proc. § 872.820*; discussion in *§ 397.50[3]*; *see also § 397.80 et seq.*].

c. Division of a portion of property by sale and a portion in kind [*see Code Civ. Proc. § 872.830*; discussion in *§ 397.50[3]*].

d. Partition by appraisal [*see Code Civ. Proc. § 873.910*; discussion in *§ 397.50[4]*; *see also § 397.110* et seq.].

13. Determine if plaintiff wishes to remove any property; the burden is on co-owner claiming right to remove to establish that right [*see Formosa Corp. v. Rogers (1951) 108 Cal. App. 2d 397, 414, 239 P.2d 88* ; discussion in *§ 397.51*].

14. Determine if there are improvements; if possible, improvements are allotted to party who made them [*see Code Civ. Proc. § 873.220*; discussion in *§ 397.60*].

15. Determine if any portion of property has been sold; if possible, property will be divided so as to allot portion to purchaser [*see Code Civ. Proc. § 873.230*; discussion in *§ 397.60[3]*].

16. Determine if equal division of property is possible; in the event of an inequality, one party may be required to compensate another [*see Code Civ. Proc. § 873.250(b)*; discussion in *§ 397.60[5]*].

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§ 397.193 Information to Be Given to Plaintiff by Attorney

1. Effect of judgment.

a. Judgment will not affect a claim in the property or a part of the property of any person who was not a party to the action if the claim was on record at the time the lis pendens was filed, of if plaintiff actually knew of the claim or the claim was reasonably apparent at the time the lis pendens was filled. However, a claimant may be bound by the proceeding if the claim was acquired from a party after commencement of the proceeding and with the actual knowledge of the proceeding [*see Code Civ. Proc. § 874.225(a), (b)*; Cal. Law Rev. Comm. Comments to *Code Civ. Proc. § 1908(a)(2)*; *see also § 397.61[3]*].

b. BFPs or encumbrancers are not bound if plaintiff knew of claim before interlocutory judgment or if claim was reasonably apparent from inspection [*see Code Civ. Proc. § 874.225(b)*; discussion in *§ 397.43[2]*].

c. Costs of partition will be apportioned among parties in proportion to their interests [*Code Civ. Proc. § 874.040*; discussion in *§ 397.63[3]*].

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§ 397.194 Drafting of Complaint

1. For general allegations (i.e., capacity, etc.), see Ch. 123, *Complaints and Cross Complaints* .

2. Essential allegations regarding partition action [*see Code Civ. Proc. § 872.230*; discussion in *§ 397.53*; *see also § 397.243*]:

a. Description of the property [*Code Civ. Proc. § 872.230(a)*].
(1) Personal property: description must include usual location.

(2) Real property: description must include both legal description and secret address or common designation.

b. The proportionate amount of all interests, including liens, the plaintiff has of claims in the property [*Code Civ. Proc. § 872.230(b)*; Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 872.230*].

c. The proportionate amount of all interests of record in the property, including all interests of others actually known to the plaintiff and all interests of others that plaintiff reasonably believes will be affected by the action [*Code Civ. Proc. § 872.230(c)*].

d. The estate as to which partition is sought and a prayer for partition of interests in that estate [*Code Civ. Proc. § 872.230(d)*].

e. If plaintiff seeks sale of property, an allegation of the facts justifying such relief in ordinary and concise language [*Code Civ. Proc. § 872.230(e)*].

3. Additional allegations for use in certain circumstances:

a. That the property to be partitioned is a condominium [*see Code Civ. Proc. § 1354(b)*; discussion in *§*

397.41[3][c]].

b. That the property to be partitioned consists of successive estates [*see Code Civ. Proc. § 872.710(c)*; discussion in *§ 397.41[2][b]*].

c. That the property to be partitioned is a partnership [*see Code Civ. Proc. § 872.730*; discussion in *§ 397.41[3][a]*].

d. That the property to be partitioned is a homestead [*see* discussion in *§ 397.41[3][d]*].

e. An allegation of facts showing that certain incidental relief is necessary, for example, appointment of receiver or compensation for rental value [*see* discussion in *§ 397.39*].

f. An allegation of facts showing expenditure of costs and counsel fees for the common benefit, for example costs of procuring title report [*see Code Civ. Proc. § 874.010*; discussion in *§ 397.63[1]*].

4. Copies to be prepared.

a. Original for filing.

b. One or more copies for service of each defendant; more copies are required if service is under *Code Civ. Proc. § 415.20* [*see* Ch. 518, *Service of Summons and Papers*].

c. Office copy.

d. Copy for client, if desired.

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§ 397.195 Preparation of Summons

1. Form, content, and service of summons as in civil actions generally [*see Code Civ. Proc. §§ 412.10-412.30*; Ch. 518, *Service of Summons and Papers*].

2. Prepare the following copies:

a. One original for each defendant to be served for filing.

b. One or more copies for service on each defendant; more copies are required if service is under *Code Civ. Proc. § 415.20* [*see* Ch. 518, *Service of Summons and Papers*].

c. Office copy.

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§ 397.196 Service by Publication

NOTE:
Service by publication is necessary if deceased persons or unknown persons are claiming interests [*see* *Code Civ. Proc. §§ 872.310, 872.320*; discussion in *§ 397.54[2]*].

1. For general procedure, see *Code Civ. Proc. § 415.50*. For procedure and forms, see Ch. 518, *Service of Summons and Papers* .

2. If the court orders publication [*Code Civ. Proc. § 872.320*]:

a. Not later than 10 days after date of order, post copy of summons and complaint on the real property.

b. Record lis pendens [*see § 397.197*].

c. Publication must contain a description of the property, using legal description and street address.

3. Prepare affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) of publisher or printer or his or her foreman or principal clerk, have it executed, and file it with the court clerk [*see Code Civ. Proc. §§ 417.10-417.30*].

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§ 397.197 Filing Lis Pendens

1. Draft lis pendens [*see Code Civ. Proc. § 872.250*; discussion in*§ 397.55*; *see also § 397.248*].

2. Immediately after filing complaint, file original lis pendens in office of county recorder of county where property is situated. For filing fee see *Gov. Code § 27361*. See also Ch. 348, *Lis Pendens* for discussion, procedure, and forms.

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§ 397.198 Issuance of Summons; Service of Summons and Complaint and Proof of Service

NOTE:
See *Code Civ. Proc. § 412.10 et seq.* and Ch. 518, *Service of Summons and Papers*.

1. Have the summons issued by the clerk of the court in which the action is filed and have it served together with a copy of the complaint.

2. Fill in declaration of service for each defendant served, have it executed, and file it with the court clerk [*see Code Civ. Proc. §§ 417.10 et seq., 2015.5*].

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§ 397.199 Trial

1. Present evidence establishing ownership of the property by plaintiff and defendants and of the proportionate amounts of interests owned by each, the interests of lienholders, the nature of the property and its improvements, and such additional evidence as will enable the court to determine the title and interests in the property [*see Code Civ. Proc. § 872.230*; discussion in *§ 397.44[2]*].

2. If partition by sale is desired, follow procedures set out in *Code Civ. Proc. § 873.510 et seq.* See discussion in *§ 397.80* et seq.

3. The court may appoint a referee to determine the status and priority of all liens on the property [*see Code Civ. Proc. § 872.630*; discussion in *§ 397.44[2]*].

4. Prepare interlocutory judgment of partition, if directed by the court [*see Code Civ. Proc. § 872.720*; discussion in *§§ 397.57* and *397.253* (form); *see also Cal. Rules of Ct., Rule 3.1590(i)* (party may be ordered to prepare written judgment when statement of decision is deemed waived)]. If partition is by sale, see also *§§ 397.80* et seq., *§ 397.271*.

5. Present the interlocutory judgment to the clerk of the court with the request that it be signed by the judge, entered as the interlocutory judgment in the case, and that conformed copies be returned.

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§ 397.200 Appointment of Referee to Divide Property After Interlocutory Decree

NOTE:

Two distinct classes of referees may be appointed in a partition action. Before the interlocutory decree, a referee may be appointed to ascertain facts regarding status and priority of liens on property [*see Code Civ. Proc. § 872.630(b)*; discussion in *§ 397.44[2]*]. After the interlocutory decree, the referee is appointed to divide or sell the property as ordered by the court. The procedure for appointing this kind of referee is discussed below [*see Code Civ. Proc. § 873.010*; discussion in *§ 397.58*].

The court will only appoint a referee pursuant to *Code Civ. Proc. § 873.010* if it determines that it is necessary [*Richmond v. Dofflemyer (1980) 105 Cal. App. 3d 745, 755, 164 Cal. Rptr. 727* ; discussion in *§ 397.58[3]*]. If the court determines that a referee is necessary, however, the parties may nominate persons to serve as referee but, absent agreement among the parties, the choice of a referee is in the discretion of the court [*see Code Civ. Proc. § 873.040(a)*; discussion in *§ 397.58[2]*].

1. If the parties agree to the appointment as referee of an eligible person or persons, prepare stipulation to that effect and submit to the court [*see Code Civ. Proc. §§ 873.030, 873.040*; discussion in *§ 397.58[2]*].

2. Referee files report with court describing division and gives written notice of filing to each party [*see Code Civ. Proc. § 873.280(b)*; discussion in *§ 397.59*].

3. Counsel examines report and determines whether to move the court to confirm, modify, or set aside the report [*see Code Civ. Proc. § 873.290*; discussion in *§ 397.59[2][b]*].

4. Prepare a notice of motion for an order confirming, modifying, or vacating the referees' report and proof of service, in the following number of copies [*see Code Civ. Proc. § 873.290*; discussion in *§ 397.59[2][b]*; for form of similar motion, *see § 397.295*].

a. Original for filing.

b. One copy for each party who has appeared in the action.

c. Information copy for each referee.

d. Office copy.

e. Copy for client, if desired.

f. Additional copies as desired.

5. Prepare the affidavit [*Code Civ. Proc. §§ 2003, 2009*], or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*], in support of motion in the same number of copies as the notice.

6. Prepare a memorandum in support of the motion [*Cal. Rules of Ct., Rule 3.1113(a)*] in the same number of copies as the notice.

7. Serve and file the notice, affidavit or declaration, and memorandum of points and authorities. For discussion, procedures, and forms relating to noticed motions, see Ch. 372, *Motions and Orders* .

8. Attend the hearing on the motion and present argument in support of the motion.

9. Prepare the order confirming, modifying, or setting aside the referees' report, and if appropriate, appointing new referees [*see Code Civ. Proc. § 873.290*; discussion in *§ 397.59[2][b]*].

10. Prepare judgment of partition [*see Code Civ. Proc. § 873.290*; discussion in *§ 397.61* For forms of judgments, *see* Ch. 318, *Judgments*].

11. Include in the final decree any additional orders made by court such as one for compensatory adjustment of unequal allotments [*see Code Civ. Proc. § 873.250*; discussion in *§ 397.60[5]*] or for the award of attorney's fees [*see Code Civ. Proc. § 874.010*; discussion in *§ 397.63*].

12. Present the final judgment to the clerk with the request that it be signed by the judge, entered, and conformed copies returned.

13. Prepare the notice of entry of judgment, mail a copy to all parties who have appeared in action, and file the original with the court together with the proof of service by mail [*Code Civ. Proc. § 664.5*]. For forms of notices of entry of judgment, see Ch. 318, *Judgments* .

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[Reserved]

§§ 397.201[Reserved]

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35-397 California Forms of Pleading and Practice--Annotated § 397.220

§ 397.220 Facts to Be Ascertained

1. Facts relating to defendant.

a. Name, address, and telephone number of defendant.

b. Capacity of defendant, such as minor, trustee, conservator, guardian, executor, partnership, domestic corporation, or foreign corporation.

c. Defendant's stability and financial solvency, such as employment status, prior residences, and credit, bank, and personal references, etc.

2. Facts required for the answer.

a. Date, manner, and place of service of complaint.

b. Allegations of complaint. Ascertain which of facts alleged are true, which are false, and which ones defendant does not know are true or false.

c. Affirmative defenses. For a discussion of affirmative defenses, see Ch. 26, *Answers* .

d. Equitable defenses. The nature of a partition action is equitable and therefore subject to equitable defenses. [*see* discussion in *§ 397.39[2]*].

e. Defendant's interest in the property and its estimated value [*see Code Civ. Proc. § 872.410*; discussion in *§ 397.56*].

f. Defendant's lien on the property and the following information [*see Code Civ. Proc. § 872.420*; discussion in *§ 397.56*]:

(1) Date and character of lien;

(2) Amount remaining due on lien; and

(3) If defendant has additional security for lien.

g. Additional costs, fees, and expenses related to lien [*see* discussion in *§ 397.56*].

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§ 397.221 Documents to Be Obtained

1. Summons and complaint that were served on defendant.

2. Document by which defendant acquired his or her interest in property.

3. Documents supporting defendant's lien, if any, on property.

4. Any other documents, including contracts affecting title to property or plaintiff's right to partition.

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35-397 California Forms of Pleading and Practice--Annotated § 397.222

§ 397.222 Preliminary Determinations

1. For discussion of general determinations such as capacity, see Ch. 26, *Answers* .

2. Jurisdiction of subject matter [*see Code Civ. Proc. § 872.110(a)*; discussion in *§ 397.35*]. For general discussion of subject matter jurisdiction, see Ch. 324, *Jurisdiction: Subject Matter Jurisdiction* .

3. Venue [*see Code Civ. Proc. § 872.110*; discussion in *§ 397.36*].

4. Defects in complaint [*see Code Civ. Proc. § 430.10*; *see also* Ch. 3, *Abatement of Actions* and Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*].

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§ 397.223 Motions to Consider

1. Motion to strike [*Code Civ. Proc. § 435*]. For procedure and forms, see Ch. 375, *Motions to Strike: Pleadings* , and Ch. 376, *Motions to Strike: Anti-SLAPP* . For memoranda of points and authorities, see California Points and Authorities, Ch. 160, *Motions to Strike* (Matthew Bender).

2. Motion for summary judgment [*Code Civ. Proc. § 437c*]. For procedure and forms, see Ch. 537, *Summary Judgment* . For memoranda of points and authorities, see California Points and Authorities, Ch. 169, *Partition* , and Ch. 221, *Summary Judgments* (Matthew Bender).

3. Motion for separate trial [*Code Civ. Proc. § 597*]. For procedure and forms, see Ch. 3, *Abatement of Actions* . For memoranda of points and authorities, see California Points and Authorities, Ch. 10, *Abatement and Survival of Actions* (Matthew Bender).

4. Motion or application to advance [*Cal. Rules of Ct., Rule 3.1335*]. For memoranda of points and authorities, see California Points and Authorities, Ch. 180, *Pretrial Proceedings* (Matthew Bender).

5. Motion to amend answer. For procedure and forms, see Ch. 21, *Amended and Supplemental Pleadings* . For memoranda of points and authorities, see California Points and Authorities, Ch. 16, *Amended and Supplemental Pleadings* (Matthew Bender).

6. Motion to expunge lis pendens [*see Code Civ. Proc. § 409.1*]. For procedure and forms, see Ch. 348, *Lis Pendens* .

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§ 397.224 Defenses Particular to Partition

1. As defined by statute, plaintiff is not entitled to maintain partition suit [*see Code Civ. Proc. § 872.210*; discussion in *§ 397.40*].

2. Plaintiff does not have interest in property sufficient to maintain action [*see Code Civ. Proc. § 872.710*; discussion in *§ 397.41[2]*].

3. In case of partition of successive estates, that partition is not in best interests of all parties [*see Code Civ. Proc. § 872.710*; discussion in *§ 397.41[2][b]*].

4. That valid waiver exists [*see Williams v. Williams (1967) 255 Cal. App. 2d 648, 651, 63 Cal. Rptr. 354* ; discussion in *§ 397.42*].

5. That property subject to partition suit is particular type (such as condominium or land owned by partnership), requiring prerequisites to maintenance of partition suit and plaintiff has not met those prerequisites [*see* discussion in *§ 397.41[3]*].

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§ 397.225 Drafting Answer

1. Defendant must file written pleading in response to summons within 30 days after summons is served on him or her [*see Code Civ. Proc. § 412.20*].

2. For general discussion, procedure, and forms relating to answers, see Ch. 26, *Answers* .

3. Contents of answer particular to partition action [*see* discussion in *§ 397.56*]:

a. Set forth defendant's interest, including liens [*Code Civ. Proc. § 872.410(a)*].

b. If defendant has or claims lien, set forth following [*Code Civ. Proc. § 872.420*]:
(1) Date of lien.

(2) Character of lien.

(3) Amount remaining due on lien.

(4) Additional costs, fees, and expenses related to lien.

c. Set forth any facts tending to controvert material allegations of complaint that defendant does not wish to be taken as true [*Code Civ. Proc. § 872.410(b)*].

d. If defendant seeks sale of property, set forth facts justifying partition by sale [*Code Civ. Proc. § 872.410(b)*; for further discussion, see *§ 397.80 et seq.*].

e. Set forth any claim by defendant for contribution or compensatory adjustment [*see Code Civ. Proc. § 872.430*; discussion in *§ 397.56*].

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§ 397.226 Service and Filing

1. Serve answer and/or any demurrers (with supporting points and authorities [*see Code Civ. Proc. § 430.30*], or any notices of motion (with supporting affidavits or declarations and points and authorities) on plaintiff or his or her attorney [*see Code Civ. Proc. §§ 1011-1013, 1015*]. For procedure, see Ch. 518, *Service of Summons and Papers* .

2. If new matter has been asserted in answer, answer should be served on all codefendants [*see Tu Junga Co. v. Barlcay (1909) 11 Cal. App. 60, 61, 103 P. 1092* ; discussion in *§ 397.56[3]*].

3. Proof of service. Prepare, or have prepared, proof of service. For procedure and forms, see Ch. 518, *Service of Summons and Papers* .

4. File with clerk of court all pleadings, notices of motion, and other papers [*see Code Civ. Proc. §§ 465, 1010*].

5. Fees. Defendant pays fees at time of filing first paper. For amount, see *Gov. Code § 70612*.

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[Reserved]

§§ 397.227[Reserved]

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35-397 California Forms of Pleading and Practice--Annotated § 397.240

§ 397.240 Action for Partition of Real Property, Personal Property, or Both [Code Civ. Proc. § 872.210]--General Caption

[1] FORM Action for Partition of Real Property, Personal Property, or Both [Code Civ. Proc. § 872.210]--General Caption

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	_____ [*specify title of document, e.g.,* COMPLAINT FOR PARTITION]
_____ [*name*],	)	
Defendant.	)	[Code Civ. Proc. §(§) _____]
	)	
	)	

_____

[2] Use of Form

The form is a caption for use as the caption for documents filed in an action for partition of real property, personal property, or both. If partition is sought as to all interests in the property, with unknown persons to be joined, the caption in *§ 397.241*, based on *Code Civ. Proc. § 872.550*, should be used instead of this caption. If partition is sought and the defendant is deceased or believed to be deceased, and the personal representative is unknown, the caption in *§ 397.242*, based on *Code Civ. Proc. § 872.530*, should be used instead of this caption.

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35-397 California Forms of Pleading and Practice--Annotated § 397.241

§ 397.241 Action for Partition of Real Property, Personal Property, or Both [Code Civ. Proc. § 872.210]--Caption in Action Seeking Partition As to All Interests in the Property [Code Civ. Proc. § 872.550]

[1] FORM Action for Partition of Real Property, Personal Property, or Both [Code Civ. Proc. § 872.210]--Caption in Action Seeking Partition As to All Interests in the Property [Code Civ. Proc. § 872.550]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO _____
_____ [*name of known defendant*]	)	_____ [*specify title of document, e.g.,* COMPLAINT FOR PARTITION]
and all persons unknown claiming any interest in the property, named as DOES I-_____, inclusive,	)	[Code Civ. Proc. §(§) _____]
Defendants.	)	

_____

[2] Use of Form

This form is a caption for use as the caption on documents filed in an action for partition, if partition is sought as to all interests in the property. If partition is sought as to all interests in the property, the plaintiff may join as defendants all persons unknown claiming any interest in the property, naming them in that manner [*Code Civ. Proc. § 872.550*].

[3] State Statutes

Joinder of unknown persons. *Code Civ. Proc. § 872.550*

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35-397 California Forms of Pleading and Practice--Annotated § 397.242

§ 397.242 Action for Partition of Real Property, Personal Property, or Both [Code Civ. Proc. § 872.210]--Caption in Action Seeking Partition if Defendant Deceased or Believed to Be Deceased and Personal Representative Unknown [Code Civ. Proc. § 872.530]

[1] FORM Action for Partition of Real Property, Personal Property, or Both [Code Civ. Proc. § 872.210]--Caption in Action Seeking Partition if Defendant Deceased or Believed to Be Deceased and Personal Representative Unknown [Code Civ. Proc. § 872.530]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO _____
_____ [*name of known defendant*],	)	_____ [*specify title of document, e.g.*, COMPLAINT FOR PARTITION]
and the testate and intestate successors of	)	
_____ [*name of decedent or person believed to be deceased*], _____	)	
[deceased *or* believed to be deceased], and all persons claiming by, through, or under said _____ [decendent *or* person believed to be deceased] named as Does I-_____, inclusive,	)	
Defendants.		

_____

[2] Use of Form

This form of caption is for use as the caption on documents filed in an action for partition, if the defendant is deceased or believed to be deceased. If the defendant is dead and the plaintiff knows of a personal representative, the plaintiff must join the personal representative as a defendant [*Code Civ. Proc. § 872.530(a)*]. If the defendant is dead, or believed by the plaintiff to be dead, and the plaintiff knows of no personal representative, the plaintiff must state these facts in an affidavit filed with the complaint [*Code Civ. Proc. § 872.530(b)(1)*]. If it is stated in the affidavit that the person is dead, the plaintiff may join as defendants "the testate and intestate successors of _____ (naming such deceased person), deceased, and all persons claiming by, through, or under said decedent," naming them in that manner [*Code Civ. Proc. § 872.530(b)(2)*]. If it is stated in the affidavit that such person is believed to be dead, the plaintiff may join such person as a defendant, and he or she may also join "the testate and intestate successors of _____ (naming such person) believed to be deceased, and all persons claiming by, through, or under such person," naming them in that manner [*Code Civ. Proc. § 872.530(b)(3)*].

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35-397 California Forms of Pleading and Practice--Annotated § 397.243

§ 397.243 Complaint [Code Civ. Proc. § 872.230] for Partition of Real Property, Personal Property, or Both [Code Civ. Proc. § 872.210]--General Form

[1] FORM Complaint [Code Civ. Proc. § 872.230] for Partition of Real Property, Personal Property, or Both [Code Civ. Proc. § 872.210]--General Form

[*Caption. See §§ 397.240-397.242.*]

[*EITHER, if seeking partition of real property only, or combination of real and personal property*]

1. The subject of this action is certain real property situated in _____ County, California.

[*OR, if seeking partition of personal property only and venue is established by location of property*]

1. The personal property which is the subject of this action was principally located at the commencement of this action in _____ County.

[*OR, if seeking partition of personal property only and venue is established by residence of any or all defendant(s)*]

1. Defendant(s) _____ [*name(s)*] was/were [a] resident(s) of _____ County, California at the commencement of this action.

[*CONTINUE with EITHER, if seeking partition of real property*]

2. The real property is commonly known as _____ [*specify street address or common designation, if any*], and more particularly described as follows: _____ [give legal description which may be single-spaced pursuant to *Cal. Rules of Ct., Rule 2.108(2)*, or incorporate title report attached as Exhibit and incorporated by reference].

[*AND/OR, if seeking partition of tangible personal property*]

3. The subject of this action is certain personal property described as _____ [*set out description, e.g.*, an oil painting depicting a rural American family] which is usually located at _____ [*specify usual location, e.g.*, 11 Elm Drive, Pecona, California].

[*CONTINUE*]

4. Plaintiff, _____ [*name*], is the owner of _____ [*specify proportionate amount of interest in property, e.g.*, an undivided one-sixth interest (as shown in the title report attached to this complaint as Exhibit A and made a part of this complaint by reference)] in the above-mentioned property which is coowned _____ [concurrently *or* in successive estates] by _____ [*name*], herein named as defendant, and which plaintiff reasonably believes will be materially affected by this action.

5. Defendant, _____ [*name*] _____ [has *or* claims] _____ [*specify proportionate amount of interest in property, e.g.*, an undivided one-sixth interest (as shown in the title report attached to this complaint as Exhibit A and made a part of this complaint by reference)] [of record] in the above-mentioned property which is coowned _____ [concurrently *or* in successive estates] by plaintiff and which plaintiff reasonably believes will be materially affected by this action.

[6. *If plaintiff wishes partition as to all interests in property, allege* : Plaintiff designates all persons unknown claiming any interests in the property as defendants DOES I- _____ inclusive.]

[*If a person required to be named as a defendant is dead and a personal representative has been appointed, use first alternative Paragraphs 7 and 8*]

7. _____ [*name*] who was co-owner of _____ [*specify nature and proportionate amount of interest, e.g.*, an undivided one-sixth interest in fee] in the property is deceased, as set out in the declaration of _____ [*name*], filed with this complaint.

8. On _____ [*date*], _____ [*name*] was duly appointed personal representative of _____ [*name*], deceased, by order of the Superior Court of California, County of _____ No. _____, and is hereby joined as defendant in this action.

[*If a person required to be named as a defendant is dead or believed to be dead and plaintiff knows of no personal representative, use second alternative Paragraphs 7 and 8*]

7. _____ [*name*] who was a co-owner of _____ [*specify nature and proportionate amount of interest, e.g.*, an undivided one-sixth interest in fee) in the property is _____ (deceased *or* believed to be deceased) and plaintiff knows of no personal representative, as set out in the declaration of _____ (*name*), filed with this complaint].

8. The plaintiff hereby joins as defendants the testate and intestate successors of _____ [*name*], _____ [deceased *or* believed to be deceased], and all persons claiming by, through, or under _____ [the decedent *or* this person].

[*CONTINUE*]

[9. *If plaintiff has knowledge of an unrecorded claim or interest in property, allege*: Defendant, _____ (*name*), is the owner of _____ (*specify proportionate amount of interest in property, e.g.*, an undivided one-sixth interest)that is unrecorded and coowned by plaintiff _____ (concurrently*or* in successive estates) and that plaintiff reasonably believes will be materially affected by this action.]

[*EITHER, if there are no liens or encumbrances*]

10. There are no liens or encumbrances on the property appearing of record or otherwise known to plaintiff or apparent from an inspection of the property.

[*OR, if there are liens and encumbrances*]

10. The liens and encumbrances on the property appearing of record or otherwise known to plaintiff or apparent from an inspection of the property and that plaintiff reasonably believes will be materially affected by this action are as follows: _____ [*set out liens or encumbrances including those belonging to plaintiff, in tabular form if there are many, showing name, nature of interest, and amounts remaining due*].

[*CONTINUE*]

[11. *If plaintiff has procured a title report, allege:* Prior to the commencement of this action, it was necessary for plaintiff to procure, and he/she procured, a title report. Plaintiff incurred the expense of $_____ in procuring the title report, and that sum is the reasonable expense thereof. The title report is, and will be, kept available for inspection, copying, and use by the parties at _____ (*specify address*). A copy of the title report is attached hereto as Exhibit A and made a part of this complaint.]

[12. *If ownership, share, or quantity of interest of person having or claiming interest is unknown, allege* : The _____ (ownership *or* share *or* quantity) of the interest claimed by _____ (*name or* DOE _____) is _____ (unknown *or* uncertain *or* contingent). *If lack of knowledge, uncertainty, or contingency caused by transfer to unborn or unascertained person or class member, or by transfer in form of contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, add:* So far as is known to plaintiff, the following person(s) in being would be entitled to ownership of the interest if the contingency on which the right of such person(s) depends occurred prior to the commencement of this action: _____ (*list names, ages, birthdates of any minors, and legal disabilities, if any for each such person, e.g.*, Mary Smith, a minor 12 years old, born _____ (*date*)).]

[13. *If parties agree to partition by sale, allege:* Plaintiff _____ (*name*) and defendant(s) _____(*name* (*s*)) have agreed to partition by sale of the property in question (and this agreement is attached to this complaint as Exhibit B and made a part of this complaint by reference).]

[14. *If plaintiff seeking partition by sale without agreement, allege* : Partition by sale of the property is more equitable than division in kind of the property because _____ (*set forth facts showing that sale is more equitable, e.g.*, the property is a painting and cannot be physically divided).]

[15. *If partition of successive estates is involved, allege:* Partition of the successive estates in the property is in the best interests of all the parties because _____ (*set forth facts showing that such partition is in the best interests of the parties, e.g.*, the property is so old that it requires extraordinary repairs, the expense of which has become unduly burdensome to the holder of the possessory interest).]

16. This action is brought and partition is sought herein, for the common benefit of the parties, to preserve and secure to each of them his/her respective interest and rights in the property, and plaintiff has incurred, and will incur, costs of partition herein, including reasonable attorney's fees, for the common benefit of the parties hereto, in _____ [*set forth either the approximate sum or* an amount not yet ascertainable].

[*Additional allegations such as those in see § 397.244* relating to an accounting and appointment of a receiver may be set forth here.]

WHEREFORE, plaintiff prays judgment as follows:

1. For partition _____ [in kind *and/or* by sale] of the _____ [*specify present or future or both*] interest(s) in the property according to the respective rights of the parties hereto;

2. For the expense reasonably incurred by plaintiff in obtaining a title report of the real property _____ [*specify either the costs of the title report or state*, in an amount not yet ascertainable], with interest thereon from _____ [*date of commencement of action*];

3. That the costs of partition, and of this action, including reasonable counsel fees expended by plaintiff and defendants for the common benefit, fees and expenses of referees, and other disbursements be ordered paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interest therein and more particularly that plaintiff be reimbursed for sums advanced in this regard beyond his/her just proportion thereof, and that the costs be included and specified in the judgment and become a lien on the several shares of the parties;

4. For the costs of partition, including attorney's fees, necessarily incurred by a party for the common benefit in prosecuting or defending other actions or other proceedings for the protection, confirmation, or perfection of title, setting the boundaries, or making a survey of the property, with interest thereon from _____ [*date of making expenditures*]; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

This form of complaint may be used in an action for partition of real property, personal property, or both [*Code Civ. Proc. §§ 872.210, 872.230*]. It is designed to be combined with one of the captions contained in §§ 397.240-397.242. This form should be titled: COMPLAINT FOR PARTITION [*Code Civ. Proc. §§ 872.210, 872.230*]. It may be used if either partition in kind [*Code Civ. Proc. § 872.810*] or partition by sale is sought [*Code Civ. Proc. § 872.820*].

[3] Allegations

The complaint alleges the following:

- For purposes of establishing venue either (1) if the subject of the action is real, or real and personal, property, the county in which real property is situated, or (2) if the subject of the action is personal property, the principal location of the personal property at the commencement of the action, or the county in which any or all defendants reside (Paragraph 1) [*see Code Civ. Proc. § 872.110*];

- The description of real property including its legal description and street address or common designation, if any (Paragraph 2) [*Code Civ. Proc. § 872.230(a)*];

- The description of tangible personal property, including its usual location (Paragraph 3) [*see Code Civ. Proc. § 872.230(a)*];

- All interests plaintiff has or claims in the property (Paragraph 4) [*see Code Civ. Proc. § 872.230(b)*];

- All interests of record or actually known to the plaintiff that defendants have or claim in the property and that the plaintiff reasonably believes will be materially affected by the action (Paragraph 5) [*see Code Civ. Proc. § 872.230(c)*];

- If partition is sought as to all interests in the property, the plaintiff may join as defendants "all persons unknown claiming any interest in the property," naming them in that manner (Paragraph 6) [*see Code Civ. Proc. § 872.550*];

- That a defendant was a co-owner of the property in question and is deceased (first alternative Paragraph 7) [*see Code Civ. Proc. § 872.530*] and, if plaintiff knows of the personal representative, that the personal representative is joined as a defendant (first alternative Paragraph 8) [*see Code Civ. Proc. § 872.530(a)*] or, if appropriate, that defendant was a co-owner of the property in question and is deceased or believed to be deceased and plaintiff knows of no personal representative (second alternative Paragraph 7) [*see Code Civ. Proc. § 872.530(b)*] and that the plaintiff joins as defendants the testate and intestate successors of (naming the deceased person or person believed to be deceased), deceased, or, believed to be deceased, naming them in that manner (second alternative Paragraph 8) [*see Code Civ. Proc. § 872.530(b)*];

- All unrecorded interests the defendant has in the property (Paragraph 9) [*see Code Civ. Proc. § 872.230*];

- Either that there are no liens or encumbrances or a list of all liens and encumbrances (alternative Paragraphs 10) [*see Code Civ. Proc. § 872.230*];

- That it is has been necessary for plaintiff to procure a title report (Paragraph 11) [*see Code Civ. Proc. § 872.220*];

- If the ownership, share, or quantity of the interest of a defendant is unknown, uncertain, or contingent, and if the lack of knowledge, uncertainty, or contingency is caused by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, so far as is known to the plaintiff, the name, age, and legal disability (if any) of the person in being who would be entitled to ownership of the interest and the contingency on which the right of that person depends occurred prior to the commencement of the action (Paragraph 12) [*see Code Civ. Proc. § 872.520(b)*];

- If appropriate, that the parties have agreed to partition by sale of the property (Paragraph 13) [*see Code Civ. Proc. § 872.820(a)*], or that sale and division of the proceeds would be more equitable than division of the property (Paragraph 14) [*see Code Civ. Proc. § 872.820(b)*];

- That partition of the successive estates in the property, if any, is in the best interests of all parties (Paragraph 15) [*see Code Civ. Proc. § 872.710(c)*];

- That plaintiff has incurred and will incur costs of partition, which include reasonable attorney's fees incurred or paid by a party for the common benefit; the fee and expenses of the referee; compensation provided by contract for services of a surveyor or other person employed by the referee in the action; and, if it is necessary, the reasonable costs of a title report with interest thereon at the legal rate from the time of payment or, if paid before commencement of the action, from the time of commencement of the action, and other disbursements or expenses determined by the court to have been incurred or paid for the common benefit (Paragraph 16) [*see Code Civ. Proc. § 874.010*; *see also Code Civ. Proc. §§ 874.020, 874.040*].

[4] Verification

Verification of this complaint is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction

Superior courts have jurisdiction to try partition cases [*Code Civ. Proc. § 872.110(a)*; *see Cal. Const., art. VI, § 10*; *Mears v. Jeffry (1947) 80 Cal. App. 2d 610, 615, 182 P.2d 294]* .

[6] Venue

Subject to the power of the court to transfer actions, the proper county for the trial of an action for partition, if the subject of the action is either real property or real and personal property, is the county in which the real property, or some portion of the real property, is situated [*Code Civ. Proc. § 872.110(b)*]. If the subject of the action is personal property, the proper county for the trial of an action for partition is the county in which the personal property is principally located at the commencement of the action or in which the defendants, or any of them, reside at the commencement of the action [*Code Civ. Proc. § 872.110*].

[7] Cross References

For forms of fictitious name allegations and forms of capacity, residence, and agency allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of verification, see Ch. 572, *Verification*

[8] California Legal Forms

For legal forms relating to title reports, see California Legal Forms, Ch. 26A, *Title Insurance* (Matthew Bender)

[9] State Statutes

Procedure for making state agency defendant when it has nonproperty tax lien on property. *Civ. Code § 2931a*

Appointment of receiver. *Code Civ. Proc. § 564.*

Definition of title report. *Code Civ. Proc. § 872.010(e)*

Jurisdiction. *Code Civ. Proc. § 872.110(a)*

Venue. *Code Civ. Proc. § 872.110(b)*

Persons able to bring partition action. *Code Civ. Proc. § 872.210*

Procurement of title report. *Code Civ. Proc. § 872.220*

Contents of complaint. *Code Civ. Proc. § 872.230*

Defendants. *Code Civ. Proc. §§ 872.510-872.550*

Partition of successive estates. *Code Civ. Proc. § 872.710(c)*

Unknown, uncertain, or contingent interest. *Code Civ. Proc. § 872.520*

Costs of procuring title report. *Code Civ. Proc. § 874.010(d)*

Costs and attorney's fees. *Code Civ. Proc. §§ 874.010-874.140*

[10] Decisions

Includability of abstract of title expenses. *Elbert, Ltd., v. Nolan (1948) 32 Cal. 2d 610, 618-619, 197 P.2d 537*

Plaintiff is required to set forth proportionate amount of interests in complaint. *Neusted v. Skernswell (1945) 69 Cal. App. 2d 361, 364, 159 P.2d 49*

Defendant is required to set forth liens on property. *Stewart v. Abernathy (1944) 62 Cal. App. 2d 429, 432, 144 P.2d 844*

Plaintiff is required to join persons holding future interests. *Withington v. Collins (1943) 60 Cal. App. 2d 110, 114, 140 P.2d 493*

Action for partition of real and personal property is permissible in single cause of action. *Bolan v. Gallagher (1921)*

52 Cal. App. 503, 504, 199 P. 57

Plaintiff is required to unite all cotenants in complaint. *Solomon v. Redona (1921) 52 Cal. App. 300, 198 P. 643*

[11] Text References

Witkin, California Procedure (2d ed), Vol. 3, *Pleading*, §§ 543-546

Witkin, Summary of California Law, vol. 12, *Real Property*, §§ 65-84 (10th ed. 2005)

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35-397 California Forms of Pleading and Practice--Annotated § 397.244

§ 397.244 Allegations--For Accounting and Appointment of Receiver [Code Civ. Proc. § 564]

[1] FORM Allegations--For Accounting and Appointment of Receiver [Code Civ. Proc. § 564]

1. Between _____ [*date*] and _____ [*date*], defendant _____ [*specify facts, e.g.*, collected and received from the tenants in possession of the real property all the rents and profits from the real property, amounting to at least $_____ (*specify estimated amount received by defendant*)].

2. Plaintiff has heretofore demanded of defendant that he/she account to plaintiff for any and all sums so received by him/her, and that he/she pay to plaintiff his/her share thereof, but defendant has failed and refused to make such accounting or to pay to plaintiff the sums due to him/her and still fails and refuses to do so.

3. Due to defendant's refusal to make an accounting of [*specify, e.g.*, rents collected] or to pay to plaintiff the sums due him/her, as alleged above, _____ [*specify effect, e.g.*, the proceeds from future rents and profits of said real property are in danger of being lost or misappropriated by defendant] unless a receiver is appointed by the court to _____ [*specify, e.g.*, take possession of the real property and to collect the rents until this action is finally determined].

[2] Use of Form

The allegations in this form are for insertion in a complaint for partition [*see § 397.243*] to allege that the plaintiff is entitled to an accounting and to the appointment of a receiver. A receiver may be appointed by the court in which an action or proceeding is pending in any case in which such court is empowered by law to appoint a receiver [*see Code Civ. Proc. § 564(a)*]. In the conduct of a partition action, the court may hear and determine all motions, reports, and accounts, and may make any decrees and orders necessary or incidental to carrying out the purposes of the partition statutes and to effectuating its decrees and orders [*see Code Civ. Proc. § 872.120*].

[3] Cross References

For a discussion of and forms for use in actions seeking an accounting, see Ch. 7, *Accounting, Action for*

For a discussion of and forms for use in actions seeking appointment of a receiver, see Ch. 486, *Receivers*

[4] California Points and Authorities

For memoranda of points and authorities relating to actions involving an accounting generally, see California Points and Authorities, Ch. 12, *Accounting* (Matthew Bender)

For memoranda of points and authorities relating to actions involving appointments of receivers generally, see California Points and Authorities, Ch. 200, *Receivers* (Matthew Bender)

[5] State Statutes

Appointment of receivers. *Code Civ. Proc. §§ 564-570*

Appointment of referee, under reference agreement or by court, to take accounting. *Code Civ. Proc. §§ 638, 639, 640*

Power of court to grant incidental relief. *Code Civ. Proc. § 872.120*

[6] Decisions

Pending partition action, cotenant may protect property against waste through appointment of receiver. *Chalta v. Biller (1931) 212 Cal. 745, 747, 300 P. 821*

Cotenant out of possession is able to compel accounting for rents and profits received by cotenant in possession. *Goodenow v. Ewer (1860) 16 Cal. 461, 471-472*

Appointment of receivers in actions for partition of real property. *Blodgett v. Haddock (1949) 95 Cal. App. 2d 17, 18, 212 P.2d 26* ; *Lent v. H.C. Morris Co. (1938) 25 Cal. App. 2d 305, 307-308, 77 P.2d 301*

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35-397 California Forms of Pleading and Practice--Annotated § 397.245

§ 397.245 Declaration Under Penalty of Perjury Regarding Dead or Presumably Dead Party [Code Civ. Proc. § 872.530(b)]

[1] FORM Declaration Under Penalty of Perjury Regarding Dead or Presumably Dead Party [Code Civ. Proc. § 872.530(b)]

[*Caption. See § 397.242.*]

I, _____ [*name*], declare:

1. I am the plaintiff in the above-entitled action.

2. I am seeking partition of the property more particularly described in the complaint in the above-entitled action.

3. Defendant _____ [*name*] was a co-owner of _____ [*specify nature and proportionate amount of interest, e.g.*, an undivided one-sixth interest in fee].

4. I have reason to believe that _____ [*name*] is deceased or believed to be deceased because _____ [*specify facts which indicate defendant is deceased or believed to be deceased, e.g.*, I was informed by a close relative of defendant's that defendant died on _____ [*date*], as shown in the death certificate which is attached to this declaration as Exhibit _____].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[_____ *date and place*]

_____ [*signature*]

[2] Use of Form

This form is a declaration under penalty of perjury that may be filed along with the complaint when a person who should be joined as defendant is dead, or is believed by the plaintiff to be dead, and the plaintiff knows of no personal representative. In that event, these facts must be stated in an affidavit filed with the complaint [*Code Civ. Proc. § 872.530(b)(1)*]. A declaration under penalty of perjury may be used in place of an affidavit [*Code Civ. Proc. § 2015.5*]. The caption set out in *§ 397.242* may be adapted for use in this form by inserting the following document title: DECLARATION REGARDING [PRESUMABLY] DEAD PARTY [*See Code Civ. Proc. § 872.530(b)*].

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35-397 California Forms of Pleading and Practice--Annotated § 397.246

§ 397.246 Application and Declaration for Ex Parte Order to Authorize Procurement of Title Report [Code Civ. Proc. § 872.220(b)]

[1] FORM Application and Declaration for Ex Parte Order to Authorize Procurement of Title Report [Code Civ. Proc. § 872.220(b)]

[*Caption. See §§ 397.240-397.242.*]

APPLICATION

I, _____ [*name*], hereby apply on behalf of _____ [*specify party, e.g.*, plaintiff] _____ [*name*] for an order, pursuant to *Code of Civil Procedure Section 872.220(b)*, authorizing procurement of a title report and designating a place where the title report shall be kept for inspection, use, and copying by the parties.
Dated: _____.

_____ [*firm name, if any*]

By: _____

..... [*signature*]

_____ [*typed name*]

Attorney for _____

..... [*party's status and name*]

DECLARATION

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*identify moving party, e.g.,* plaintiff)].

2. This is an action for partition of real property described as _____ [*set forth description of property, e.g.,* 11 Elm Dr., Pecona, California].

3. It is necessary to procure a title report concerning the property in question because _____ [*state facts showing necessity for title report, e.g.,* defendant, in his/her answer, is disputing the proportionate amount of plaintiff's interest in the property in question].

4. On _____ [*date*], I notified _____ [*name*], attorney for _____ [*identify party, e.g.,* defendant], by _____ [*state manner of notification, e.g.,* telephone], that this application for procurement of a title report would be made on _____ [*date*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[*Include all documentation that must accompany application. See § 397.246[4]*]

[2] Use of Form

This form is for use in applying for an ex parte order to authorize procurement of a title report. If it is necessary to have a title report, the court may, on application of a party, authorize the party to procure a title report and must designate a place where it will be kept for inspection, use, and copying by the parties [*see Code Civ. Proc. § 872.220(b)*]. An application for an ex parte order to authorize procurement of a title report must contain facts showing the necessity of a title report (Paragraph 3) [*see Code Civ. Proc. § 872.220*]. The captions set out in *see* §§ 397.240-397.242 may be adapted for use in this form. The form should be titled: EX PARTE APPLICATION AND DECLARATION FOR ORDER TO AUTHORIZE PROCUREMENT OF TITLE REPORT [*Code Civ. Proc. § 872.220(b)*].

[3] Costs of Title Report

It should be noted that the costs of partition include the reasonable costs of a title report with interest thereon at the legal rate from the time of payment or, if paid before commencement of the action, from the time of commencement of the action [*see Code Civ. Proc. § 874.010*].

[4] Ex Parte Applications

An ex parte application for an order must be accompanied by an affidavit or a declaration showing that one of the following is true [*Cal. Rules of Ct., Rule 3.1204(b)*]:

- Within the applicable time period (described below), the applicant informed the opposing party when and where the application would be made.

- The applicant in good faith attempted to inform the opposing party but was unable to do so, specifying the efforts made to inform the opposing party.

- For reasons specified, the applicant should not be required to inform the opposing party.

To come within the "applicable time period," a party seeking an ex parte order must notify all parties no later than 10 a.m. on the court day before the ex parte appearance, unless the party can show exceptional circumstances that justify a shorter time for notice [*Cal. Rules of Ct., Rule 3.1203(a)*; *see Cal. Rules of Ct., Rule 3.1205* (clerk must accept ex parte application even if it does not comply with these notification requirements)].

When notice of an ex parte application is given, the person giving notice must state with specificity the nature of the relief to be requested, and the date, time, and place for presentation of the application, and must attempt to determine whether the opposing party will appear to oppose the application [*Cal. Rules of Ct., Rule 3.1204(a)*]. Every ex parte application must be accompanied by a declaration regarding notice that states one of the following [*Cal. Rules of Ct., Rule 3.1204(b)(1)*]:

- The notice given, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected.

- Why notice should not be required.

In addition, if notice was provided later than 10 a.m. on the court day before the ex parte appearance, the declaration regarding notice must explain the exceptional circumstances that justify the shorter notice [*Cal. Rules of Ct., Rule 3.1204(c)*].

[5] Cross References

For alternative form of declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

For a procedural guide for use in making motions, see Ch. 372, *Motions and Orders*

[6] State Statutes

Procurement of title report. *Code Civ. Proc. § 872.220*

Costs of procurement of title report. *Code Civ. Proc. § 874.010*

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35-397 California Forms of Pleading and Practice--Annotated § 397.247

§ 397.247 Order [Code Civ. Proc. § 1003] Authorizing Procurement of Title Report [Code Civ. Proc. § 872.220(b)]

[1] FORM Order [Code Civ. Proc. § 1003] Authorizing Procurement of Title Report [Code Civ. Proc. § 872.220(b)]

[*Caption. See §§ 397.240-397.242.*]

Application having been made by _____ [*identify party, e.g.,* plaintiff] with proof having been made to the satisfaction of the court, and good cause appearing therefor,

IT IS ORDERED THAT:

1. _____ [*Identify party, e.g.,* Plaintiff] _____ [*name*] is authorized to procure a title report for use in connection with this action; and

2. The title report shall be kept at _____ [*specify place designated by the court, e.g.,* plaintiff's office] for the inspection, use, and copying of all parties hereto, any of whom may make a copy thereof.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use by either party when the court authorizes procurement of a title report. If it is necessary to have a title report, the court may, on application of a party, authorize the party to procure a title report and must designate a

place where it will be kept for inspection, use, and copying by the parties [*see Code Civ. Proc. § 872.220(b)*]. The caption set out in §§ 397.240-397.242 may be adapted for use in this form. This form should be entitled EX PARTE ORDER AUTHORIZING PROCUREMENT OF TITLE REPORT [*Code Civ. Proc. § 872.220(b)*].

[3] Cross References

For a related form, see *§ 397.246*.

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35-397 California Forms of Pleading and Practice--Annotated § 397.248

§ 397.248 Notice of Pendency of Action [Code Civ. Proc. §§ 405.2, 405.4, 405.20] for Partition [Code Civ. Proc. § 872.250]

[1] FORM Notice of Pendency of Action [Code Civ. Proc. §§ 405.2, 405.4, 405.20] for Partition [Code Civ. Proc. § 872.250]

Recorded at request of
and to be returned when
recorded to:

_____
[*name and address of party*
or attorney filing notice]

[*Caption. See §§ 397.240-397.242.*]

NOTICE IS GIVEN that the above-entitled action stating a real property claim as described in this notice was commenced on _____ [*date*], in the above-named court by _____ [*name of plaintiff*], plaintiff, against _____ [*name of defendant*], defendant; the action is now pending in the above-named court.

The action affects _____ [title to specific real property *or* the right to possession of specific real property *or* the use of an easement identified in this notice and in the pleading], situated [in part] in _____ [*county in which notice is to be recorded*] County, California, and is described as follows:

_____ [*Set forth legal description, including street address, of real property*].
Dated: _____.

_____ [*signature*]

Attorney for _____

[*identify party, e.g.,* Plaintiff]

ACKNOWLEDGMENT

State of _____)
County of _____)
_____

On _____ [*date*], before me, _____ [*name and title of officer*], personally appeared _____ [*name(s)*], who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to this instrument, and acknowledged to me that he/she/they executed this instrument in his/her/their authorized capacity/capacities, and that by his/her/their signature(s) on the instrument the person(s), or the entity on behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: _____ .....(Seal)

[2] Use of Form

This notice of pendency of action is for use in an action for partition of real property. The captions set out in §§ 397.240-397.242 may be adapted for use in this form. This form should be entitled NOTICE OF PENDING ACTION [*Code Civ. Proc. § 405.2*] FOR PARTITION [*Code Civ. Proc. § 872.250*].

Except in actions subject to *Code Civ. Proc. § 405.6*, the claimant must, prior to recordation of the notice, cause a copy of the notice to be mailed, by registered or certified mail, return receipt requested, to all known addresses of the parties to whom the real property claim is adverse and to all owners of record of the real property affected by the real property claim as shown by the latest county assessment roll. If there is no known address for service on an adverse party or owner, then as to that party or owner a declaration under penalty of perjury to that effect may be recorded instead of the proof of service required above, and the service on that party or owner is not required. Immediately following recordation, a copy of the notice must also be filed with the court in which the action is pending. Service must also be made immediately and in the same manner on each adverse party later joined in the action [*Code Civ. Proc. § 405.22*].

[3] Recording Requirement

Immediately on filing the complaint, the plaintiff must record a notice of pendency of the action in the office of the county recorder of each county in which any real property described in the complaint is located [*Code Civ. Proc. § 872.250(a)*]. If, thereafter, partition of other real property is sought in the same action, the plaintiff or other person seeking such relief must immediately record a supplemental notice [*Code Civ. Proc. § 872.250(b)*]. If the notice is not recorded, the court, on its own motion or on the motion of any party at any time, must order the plaintiff or person seeking partition of the property, or another party on behalf of the plaintiff or other person, to record the notice and must stay the action until the notice is recorded [*Code Civ. Proc. § 872.250(c)*; *see § 397.249*]. The expense of

recordation must be allowed to the party incurring it [*Code Civ. Proc. § 872.250(c)*]. From the time of filing the notice for record, all persons must be deemed to have notice of the pendency of the action as to the property described in the notice [*Code Civ. Proc. § 872.250(d)*]. The requirement of recording a lis pendens is not jurisdictional [*see Rutledge v. Rutledge (1953) 119 Cal. App. 2d 114, 120, 259 P.2d 79]* . Failure to so file, however, may result in subsequent bona fide purchasers and encumbrancers of record at the time the judgment is recorded not being bound by the partition judgment [Cal. L. Revision Comm'n Comment to *Code Civ. Proc. § 872.250*].

[4] Contents

A notice of pendency of action in which a real property claim is alleged must contain the names of all parties to the action and a description of the property affected by the action [*Code Civ. Proc. § 405.20*]. For a further discussion of *Code Civ. Proc. § 405.20* and related provisions, see Ch. 348, *Lis Pendens* .

[5] Who May Issue and Sign

An attorney of record in an action may sign a notice of pendency of action. Alternatively, a judge of the court in which an action that includes a real property claim is pending may, on request of a party thereto, approve a notice of pendency of action. A notice of pendency of action may not be recorded unless (1) it has been signed by the attorney of record, (2) it is signed by a party acting in propria persona and approved by a judge as provided in this section, or (3) the action is subject to *Code Civ. Proc. § 405.6* (eminent domain proceedings) [*Code Civ. Proc. § 405.21*]. This form assumes that the lis pendens will be issued by the attorney and will have to be adapted if it is issued by the court.

[6] Cross References

For further discussion and forms relating to lis pendens, see Ch. 348, *Lis Pendens*

[7] State Statutes

Acknowledgments. *Civ. Code §§ 1188, 1189*

Contents of general notice of lis pendens. *Code Civ. Proc. § 405.20*

Notice of lis pendens in partition action. *Code Civ. Proc. § 872.250*

Recorder's fees. *Gov. Code § 27361*

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35-397 California Forms of Pleading and Practice--Annotated § 397.249

§ 397.249 Ex Parte Application and Declaration for Order Directing Recordation of Notice of Pendency of Action [Code Civ. Proc. § 872.250(c)]

[1] FORM Ex Parte Application and Declaration for Order Directing Recordation of Notice of Pendency of Action [Code Civ. Proc. § 872.250(c)]

[*Caption. See §§ 397.240-397.242.*]

APPLICATION

I, _____ [*name*], hereby apply on behalf of _____ [*identify party, e.g.,* plaintiff] _____ [*name*] in the above-entitled partition action, for an order, pursuant to *Code of Civil Procedure Section 872.250(c),* directing recordation of Notice of Pendency of Action concerning the real property that is the subject of the above-entitled action, and staying the above-entitled action until the notice is recorded. The real property is situated in [part in] _____ [*specify county in which notice is to be recorded*] County, California and is described as follows:

_____ [*Set forth legal description, including street address, of real property*].
Dated: _____.

_____ [*signature*]

Attorney for _____

[*identify party, e.g.,* Plaintiff]

DECLARATION

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*identify moving party, e.g.,* plaintiff)].

2. On _____ [*date*], the complaint was filed in the above-entitled partition action that concerns real property situated in [part in] _____ [*specify county in which notice is to be recorded*] County, California and is described as follows:

_____ [*set forth legal description, including street address, of real property*].

3. A notice of the pendency of the action has not been filed in the office of the _____ [*specify county in which notice is to be recorded*] county recorder.

4. On _____ [*date*], I notified _____ [*name*], attorney for _____ [*identify party, e.g.,* defendant], by _____ [*state manner of notification, e.g.,* telephone], that this application for an ex parte order directing recordation of notice of pendency of the action and for a stay would be made on _____ [*date*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature*]

Attorney for _____

[*identify party, e.g.,* Plaintiff]

[2] Use of Form

This form is for use in applying for an ex parte order directing recordation of the notice of pendency of action and staying the action until the notice is recorded. Immediately on filing the complaint, the plaintiff must record a notice of the pendency of the action in the office of the county recorder of each county in which any real property described in the complaint is located [*see Code Civ. Proc. § 872.250(a)*]. If the notice is not recorded, the court, on its own motion or on the motion of any party at any time, must order the plaintiff or person seeking partition of the property, or another party on behalf of the plaintiff or other person, to record the notice and must stay the action until the notice is recorded [*Code Civ. Proc. § 872.250(c)*]. The expense of recordation must be allowed to the party incurring it [*Code Civ. Proc. § 872.250(c)*]. The captions set out in §§ 397.240-397.242 may be adapted for use in this form. The form should be titled: APPLICATION AND DECLARATION FOR EX PARTE ORDER DIRECTING RECORDATION OF NOTICE OF PENDENCY OF ACTION [*Code Civ. Proc. § 872.250(c)*].

[3] State Statutes

Requirement to record notice of pendency of action. *Code Civ. Proc. § 872.250*

Order staying proceedings until notice recorded. *Code Civ. Proc. § 872.250(c)*

[4] Cross References

For a related form, see *§ 397.248*.

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§ 397.250 Answer [Code Civ. Proc. § 431.30] to Complaint for Partition [Code Civ. Proc. §§ 872.410-872.430]

[1] FORM Answer [Code Civ. Proc. § 431.30] to Complaint for Partition [Code Civ. Proc. §§ 872.410-872.430]

[*Caption. See §§ 397.240-397.242.*]

Defendant _____ [*name*], in answer to the complaint herein, admits, denies, and alleges as follows:

1. Admits each and every allegation in Paragraph(s) _____.

2. Denies each and every allegation in Paragraph(s) _____.

3. Defendant has no information and belief as to the matters stated in Paragraph(s) _____ and basing his/her answer on this lack of knowledge, denies each and every allegation thereof.

4. This defendant has and owns _____ [*specify nature and proportionate amount of defendant's interest, e.g.,* an undivided one-half interest in fee] in the property described in the complaint of _____ [*date*], herein.

[5. *If defendant seeks allotment of a particular parcel as a part of his/her share of the property, allege:* This defendant has made improvements, namely _____ (*specify nature of improvements, e.g.,* erected a dwelling house) on that portion of the property described as _____.]

[6. *If defendant claims a lien on the property, allege:* Defendant owns a lien on the property in the nature of a _____ (*specify nature of lien, e.g.,* purchase money mortgage) and the amount remaining due on the lien is $_____.]

[7. *If defendant seeks compensatory adjustment, allege:* Plaintiff has received the benefit of _____ (

specify nature of benefit plaintiff received from property for which defendant is entitled to compensation, e.g., the use of the property) in the amount of $_____ (*specify value of benefit*) and for which defendant is entitled to compensation.]

AS SEPARATE AND AFFIRMATIVE DEFENSE(S) AND OBJECTION(S) TO THE COMPLAINT, defendant alleges:

[*Select appropriate objections, if any, from the following*]

1. Plaintiff has no interest in the real property in that _____ [*set forth facts which show that plaintiff has no interest, e.g.,* on or about _____ (*date*), plaintiff sold to defendant all his/her interest in the property in question pursuant to a contract of sale, a true copy of which is attached hereto as Exhibit A and incorporated herein by reference].

2. Defendant is the sole owner of the property described in plaintiff's complaint and in the deed attached hereto as Exhibit B and incorporated herein by this reference and is and was, at the time of commencement of this action, in actual and exclusive possession of the property.

3. On or about _____ [*date*], plaintiff and defendant waived their respective rights to judicial partition pursuant to a written agreement, a true copy of which is attached hereto as Exhibit C and incorporated herein by this reference.

WHEREFORE, Defendant prays:

1. That no partition by sale of the property be had, and that plaintiff take nothing by his/her complaint herein;

2. In the event the court decrees partition of the property, that the portion thereof described as _____ (*set forth description of portion, e.g.,* parcel no. 210) be allotted to this defendant as part of his/her share thereof;

[3. That this defendant's lien be paid before any partition of the property thereof, be made;]

[4. *Set forth demands for other forms of relief;*]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court deems proper.

[2] Use of Form

This form of answer is for use by a defendant in a partition action. The captions set out in §§ 397.240-397.242 may be adapted for use in this form. The form should be titled: ANSWER TO COMPLAINT FOR PARTITION [*Code Civ. Proc. §§ 872.410-872.430*].

[3] Allegations

The answer must set forth any interests, including liens, the defendant has in the property (Paragraphs 4, 6) [*see Code Civ. Proc. § 872.410*]. The defendant may set forth in the answer any claim for compensatory adjustment (Paragraph 7) [*see Code Civ. Proc. § 872.430*] and, if defendant has made improvements on the property, he or she may claim allotment of the portion of the property on which the improvements were made (Paragraph 5) [*see Code Civ. Proc. §*

873.220].

[4] Verification

For discussion of when an answer must be verified, see *Code Civ. Proc. §§ 92(b), 446*, and Ch. 26, *Answers* .

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§ 397.251 Notice of Motion and Motion for Order Appointing Referee to Ascertain Interests of Lienholders [Code Civ. Proc. §§ 639, 872.630]

[1] FORM Notice of Motion and Motion for Order Appointing Referee to Ascertain Interests of Lienholders [Code Civ. Proc. §§ 639, 872.630]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR OR-
vs.	)	DER APPOINTING REFEREE TO ASCERTAIN
_____ [*name*],	)	INTERESTS OF LIENHOLDERS [, SUPPORTING
Defendant.	)	DECLARATION OF _____ (*name*),
	)	AND SUPPORTING MEMORANDUM]
	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ (*address*), _____ (*city*), _____ [*identify party, e.g.,* plaintiff] will, and hereby does, move for an order, pursuant to *Sections 639* and *872.630 of the Code of Civil Procedure*, to appoint a referee to ascertain the status and priority of all liens on the property. The motion will be made on the grounds that _____ [*specify grounds, e.g.,* a determination as to the status and priority of all liens will protect the interests of all parties and prevent the need for further litigation concerning the liens].

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the supporting memorandum served and filed herewith, on the papers, records, and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Use of Form

This notice of motion is for use by either party to move the court for an order appointing a referee to ascertain the interests of lienholders. If the parties do not consent to the appointment of a referee, the court may on written motion of any party, or on its own motion, appoint a referee in certain cases [*see Code Civ. Proc. § 639(a)*]. If the parties do not agree on a referee, each party may submit up to three nominees, and the court must appoint one or more from the nominees against whom there is no legal objection [*Code Civ. Proc. §§ 639(a), 640(b)*]. In partition actions, the court may appoint a referee to ascertain the facts necessary for the determination of the status and priority of the liens on the property [*see Code Civ. Proc. § 872.630(b)*]. On application of the referee or a lienholder, the court must direct the issuance of process to compel attendance of witnesses, the production of books, documents, or things, and the filing of verified claims [*see Code Civ. Proc. § 872.630(b)*]. The report of the referee must be made in writing to the court and must be confirmed, modified, or set aside and a new reference ordered, as the justice of the case may require [*see Code Civ. Proc. § 872.630(b)*].

The captions set out in §§ 397.240-397.242 may be adapted for use in this form. The form should be titled: NOTICE OF MOTION FOR ORDER APPOINTING REFEREE TO ASCERTAIN INTERESTS OF LIENHOLDERS [*Code Civ. Proc. §§ 639, 872.630*].

[3] Memorandum of Points and Authorities Required

A supporting memorandum must be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; Cal. Rules of Ct., Rule 3.113(a); *see also* Cal. Rules of Ct., Rule 3.114(a) (motions for which memorandum is not required)]. For general discussion and forms, see Ch. 417, *Points and Authorities* .

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35-397 California Forms of Pleading and Practice--Annotated § 397.252

§ 397.252 Report of Referee Concerning Liens on Property [Code Civ. Proc. § 872.630]

[1] FORM Report of Referee Concerning Liens on the Property [Code Civ. Proc. § 872.630]

[*Caption. See §§ 397.240-397.242.*]

This matter was referred to the undersigned Referee by order of the above-entitled court, Honorable _____, Judge, presiding with directions to ascertain the status and priority of all liens on the property which is the subject of the above-entitled action. The report is as follows:

1. The hearing before the undersigned was held on _____ [*date*], at _____ [*specify address of hearing*]; true copies of the evidence offered before the undersigned are attached hereto as Exhibits A through _____, and by reference made a part of this report.

2. The outstanding liens on the property and the amount remaining due on such liens, in the order of their priority, are as follows:

(a) _____ [*set forth, in tabular form, all liens and the amounts remaining due thereon, in the order of their priority*].

(b) _____.
Dated: _____.

_____ [*signature*]

Referee

[2] Use of Form

This form is a report for use when a referee has been appointed to ascertain the facts necessary to determine the status and priority of the liens on the property [*see Code Civ. Proc. § 872.630*]. The captions set out in §§ 397.240-397.242 may be adapted for use in this form. The form should be titled: REPORT OF REFEREE [*Code Civ. Proc. § 872.630*].

[3] Cross References

For a related form, see *§ 397.253*.

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§ 397.253 Interlocutory Judgment [Code Civ. Proc. § 872.720]--Partition of Real Property, Personal Property, or Both, and Appointment of Referee

[1] FORM Interlocutory Judgment [Code Civ. Proc. § 872.720]--Partition of Real Property, Personal Property, or Both, and Appointment of Referee

[*Caption. See §§ 397.240-397.242.*]

The above-entitled cause came on regularly for trial on _____ [*date*], before the court, the Honorable _____, Judge, presiding, _____ [*name*] appearing as attorney for the plaintiff(s) and _____ [*name*] appearing as attorney for the defendant(s). Witnesses were sworn and examined and documentary evidence was introduced on behalf of the parties. The evidence being closed, the cause was submitted to the court for decision and, after deliberation thereon [the court made its statement of decision and the same having been settled, approved, and filed herein],

IT IS ORDERED, ADJUDGED, AND DECREED:

1. Plaintiff(s) and defendant(s) are the owners, as _____ [*specify nature of ownership in the property, e.g.*, tenants in common], of the following-described property: _____ [*specify legal description in the case of real property and/or, in the case of personal property, a description and the usual location, e.g.*, the moneys credited to bank account No. 223 00 2234 in the sum of $2,000 which are located in the Bank of Pecona, 11 First Avenue, Pecona, California]; plaintiff being the owner of an _____ [*specify proportionate amount of interest, e.g.*, an undivided one-sixth interest] in the property and defendant being the owner of _____ [*specify proportionate amount of interest, e.g.*, an undivided five-sixths interest] in the property.

2. That the property be partitioned and the resulting portions of the property be awarded to the parties in severalty according to their respective interest;

3. _____ [*name of referee*] [, _____ (*name of referee*), and _____ (*name of referee*), and each of them,] _____ [is *or* are] hereby appointed referee(s) of this court with full power to divide the property and allot the portions thereof to the parties according to their respective interests, and in all respects to do those things necessary to carry out the orders of this court which have been previously entered and those yet to be entered, and to make a report of his/her proceedings to the court.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form for interlocutory judgment is for use in an action for partition of realproperty, personal property, or both if the property is to be divided rather than sold. For a form of interlocutory judgment of partition by sale of the property, see *§ 397.270*. If the court finds that the plaintiff is entitled to partition, it must make an interlocutory judgment that determines the interests of the parties in the property and orders the partition of the property and, unless it is to be later determined, the manner of partition [*see Code Civ. Proc. § 872.720*]. If the court determines that it is impracticable or highly inconvenient to make a single interlocutory judgment that determines, in the first instance, the interests of all parties in the property, the court may first ascertain the interests of the original concurrent or successive owners and the parties claiming under them or may allow the interests to remain without further partition if the parties so desire [*see Code Civ. Proc. § 872.720(b)*].

The captions set out in §§ 397.240-397.242 may be adapted for use in this form. The form should be titled: INTERLOCUTORY JUDGMENT [*Code Civ. Proc. § 872.720*]. The term statement of decision appears in a bracketed phrase in the form because the statement of decision is only issued by the court on the request of a party appearing at trial which is made either within 10 days after the court announces a tentative decision, or, if the trial has lasted less than one day, prior to submission of the matter for decision [*see Code Civ. Proc. § 632*]. For discussion and forms concerning statement of decision, see Ch. 529, *Statement of Decision* .

Note that in a contested action or special proceeding, the party submitting a judgment for entry must prepare and mail a copy of the notice of entry of judgment to all appearing parties and must file with the court the original notice of entry of judgment together with the proof of service by mail [*Code Civ. Proc. § 664.5*; *see Cal. Rules of Ct., Rule 8.104(a)(2)* (service of notice of entry of judgment starts 60-day period for filing notice of appeal)].

[3] Cross References

For forms relating to judgment generally, see Ch. 318, *Judgments*

[4] State Statutes

Statement of decision. *Code Civ. Proc. § 632*

Interlocutory judgment of partition. *Code Civ. Proc. § 872.720*

[5] Decisions

Interlocutory decree to set forth rights and shares of parties. *Emeric v. Alvarado (1884) 64 Cal. 529, 612-615, 2 P.*

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[Reserved]

§§ 397.254[Reserved]

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35-397 California Forms of Pleading and Practice--Annotated § 397.270

§ 397.270 Interlocutory Judgment [Code Civ. Proc. §§ 872.720, 872.820]--Sale of Real Property

[1] FORM Interlocutory Judgment [Code Civ. Proc. §§ 872.720, 872.820]--Sale of Real Property

[*Caption. See §§ 397.240-397.242*]

The above-entitled cause came on regularly for trial on _____ [*date*], before the court, the Honorable _____, Judge, presiding, _____ [*name*] appearing as attorney for the plaintiff(s) and _____ [*name*] appearing as attorney for the defendant(s). Witnesses were sworn and examined and documentary evidence was introduced on behalf of the parties. The evidence being closed, the cause was submitted to the court for decision and, after deliberation thereon [the court made its statement of decision and the same having been settled, approved, and filed herein],

IT IS ORDERED, ADJUDGED, AND DECREED:

1. Plaintiff(s) and defendant(s) are the owners, as _____ [*specify nature of ownership in the property, e.g.,* tenants in common], of the following described property: _____ [*specify legal description of property*]; plaintiff being the owner of an _____ [*specify proportionate amount of interest, e.g.,* an undivided one-sixth interest in the property] and defendant being the owner of _____ [*specify proportionate amount of interst, e.g.,* an undivided five-sixths interest] in the property.

[*EITHER, if there are no liens and encumbrances*]

2. There are no liens or encumbrances on the property appearing of record or otherwise known to the parties or apparent from an inspection of the property.

[*OR, if there are liens and encumbrances*]

2. The liens and encumbrances on the property appearing of record or otherwise known to the parties or apparent from an inspection of the property and which will be materially affected by this action are as follows: _____ [*set out liens and encumbrances, including those belonging to plaintiff, in tabular form, if there are many, showing name, nature of interest, and amounts remaining due*].

[*CONTINUE*]

[*EITHER, if parties agree to sale of property*]

3. The parties agree to sale of the property and division of the proceeds in accordance with their respective interests as set forth in this judgment.

[*OR, if there is no agreement but sale of property is more equitable than division of proceeds*]

3. Under the circumstances, sale of the property and division of the proceedswould be more equitable than division of the property.

[*CONTINUE*]

4. _____ [*Name of referee*] [, _____ (*name of referee*), and _____ (*name of referee*), and each of them,] _____ [is *or* are,] hereby appointed referee(s) with authority to sell the property at public auction to the highest bidder for cash [except as may be otherwise provided by *Sections 873.600-873.690 of the Code of Civil Procedure*] on notice duly given in the manner required for the sale of real property on execution, or a private sale in the event the referee(s) shall determine that a private sale will be the most beneficial to all parties having interests therein, in which event the private sale shall be conducted in the manner and as required in private sales of real property estates of deceased persons as required by law.

[5. _____ *Set forth any restrictions on, or terms of, sale agreed on by the parties or imposed by the court, e.g.*, If anyone other than a party hereto becomes a purchaser, he/she shall pay at least two-thirds of the amount of the purchase price in cash and the remainder evidenced by a promissory note payable in equal installments over a 10-year period, bearing interest at the rate of _____ percent per annum on the unpaid balance, the interest to be payable monthly and the note to be secured by a first deed of trust on the property.]

6. The referee(s), after making the sale of the real property, _____ [is *or* are] hereby directed to report to this court his/her/their proceedings thereon, and, on confirmation of the sale of the real property by this court and the payment of the purchase price thereof, the referee(s) _____ [is *or* are] hereby authorized and directed to execute and deliver a deed of the real property sold to the purchaser thereof.

7. Unless modified by any order confirming sales hereafter entered herein, the proceeds from the sale shall be applied after the confirmation of the sale as follows:

a. To pay expenses connected with the sale of the property;

b. To pay the _____ [*specify other costs of partition to be paid in whole or in part, e.g.*, costs of

reference, including fees and disbursements of the referee(s)];

[c. To pay to defendant _____ (*name of lienholder*) the sums due, and to become due, under its _____ (*specify nature of lien or encumbrance, e.g.,* deed of trust and as verified by affidavit at the time of payment);] and

d. The residue to be divided _____ [in equal shares *or specify shares*] among plaintiff(s) and defendant(s) in proportion to their interests as set forth in this judgment.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form for interlocutory judgment is for use in an action for partition by sale of real property. The captions set out in §§ 397.240-397.242 may be adapted for use in this form. The form should be titled: INTERLOCUTORY JUDGMENT [*Code Civ. Proc. §§ 872.720, 872.820*]. The term "statement of decision" appears in a bracketed phrase in this form because the statement of decision is only issued by the court on the request of a party appearing at trial, which is made either within 10 days after the court announces a tentative decision, or, if the trial has lasted less than one day, prior to submission of the matter for decision [*see Code Civ. Proc. § 632*]. For discussion and forms concerning statement of decision, see Ch. 529, *Statement of Decision* . In a contested action or special proceeding, the party submitting a judgment for entry must prepare and mail a copy of the notice of entry of judgment to all appearing parties and must file with the court the original notice of entry of judgment together with the proof of service by mail [*Code Civ. Proc. § 664.5*; *see Cal. Rules of Ct., Rules 8.104(a), 8.751(a)*].

[3] Procedure Surrounding Sale

The court must order that the property be sold and the proceeds be divided among the parties in accordance with their interests in the property as determined in the interlocutory judgment if (1) the parties agree to such relief, by their pleadings or otherwise, or (2) the court determines that, under the circumstances, sale and division of the proceeds would be more equitable than division of the property (Paragraphs 1 and 3) [*see Code Civ. Proc. § 872.820*]. For the purpose of making the determination, the court may appoint a referee and take into account his or her report (Paragraph 4) [*see Code Civ. Proc. § 872.820*].

The property must be sold at public auction or private sale as the court determines will be more beneficial to the parties (Paragraph 4) [*see Code Civ. Proc. § 873.520*]. For the purpose of making this determination, the court may refer the matter to the referee and take into account the referee's report (Paragraph 4) [*see Code Civ. Proc. § 873.520*]. The court must order sale by any methods and on any terms that are expressly agreed to in writing by all parties to the action (Paragraph 5) [*see Code Civ. Proc. § 873.600*]. The court may, at the time of trial or thereafter, prescribe any manner, terms, and conditions of sale that it deems proper for the particular property or sale (Paragraph 5) [*see Code Civ. Proc. § 873.610*].

On confirmation of a sale, the court must order the referee to execute aconveyance or other instrument of transfer, to collect the proceeds, take security, and perform other acts required to consummate the sale (Paragraph 6) [*see Code Civ. Proc. § 873.750(a)*].

The proceeds of sale for any property sold must be applied in the following order [*see Code Civ. Proc. § 873.820*]:

- Payment of the expenses of sale.

- Payment of the other costs of partition in whole or in part or to secure any cost of partition later allowed.

- Payment of any liens on the property in their order of priority except liens which under the terms of sale are to remain on the property.

- Distribution of the residue among the parties in proportion to their shares as determined by the court (Paragraph 7).

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35-397 California Forms of Pleading and Practice--Annotated § 397.271

§ 397.271 Notice of Sale of Real Property [Code Civ. Proc. §§ 873.640, 873.650]--Public Auction or Private Sale

[1] FORM Notice of Sale of Real Property [Code Civ. Proc. §§ 873.640, 873.650]--Public Auction or Private Sale

[*Caption. See §§ 397.240-397.242*]

NOTICE IS HEREBY GIVEN that on or after _____ [*date*], at _____ [*time*], at the office of _____ [*name*], referee, at _____ [*specify address*], the undersigned _____ [*name(s)*], referee(s) duly appointed in the above-entitled action will sell the property described below, in the manner and on the terms described below:

1. The real property which is to be sold is located at _____ [*specify street address or common designation, if any*] and more particularly described as follows: _____ [*set forth legal description of property*].

[*EITHER, if property is to be sold at private sale*]

2. The real property will be sold at a private sale and bids or offers will be received at _____ [*specify location where bids and offers will be received*] by the undersigned referee(s) up to _____ [*time*], on _____ [*date*].

[*OR, if property is to be sold at public auction*]

2. The real property will be sold at a public auction to the highest bidder.

[*CONTINUE*]

[*EITHER, if terms of sale to be stated in notice*]

3. The terms of sale are as follows: _____ [*set forth terms of sale, e.g.,* the purchase price to be paid in cash in lawful money of the United States of America, payable 10 percent of the total purchase price at the time of presentation of bids and the balance on confirmation of sale by the above-entitled court; search and examination of title, title insurance, deeds and all instruments of title shall be at the expense of purchaser; insurance and taxes shall be prorated as of the date of the transfer of title; referee(s) reserve(s) the right to reject any and all bids].

[*OR, if terms of sale to be incorporated by reference*]

3. The terms of sale are set forth in _____ [*set forth either order of court or written statement that contains terms of sale, e.g.,* an order of the above-entitled court which is dated _____, which may be inspected at the place of business of [one of] the referee(s) [*or* the referee's attorney] which is located at _____ [*specify address*].
Dated: _____.

_____ [*signature*]

Referee

[_____(*signature*)

Referee]

[_____(*signature*)

Referee]

[2] Use of Form

This form of notice is for use when real property is sold by either public auction or private sale. The captions set out in §§ 397.240-397.242 may be adapted for use in this form. The form should be titled: NOTICE OF SALE OF REAL PROPERTY [*Code Civ. Proc. §§ 873.640, 873.650*].

Notice of the sale of real or personal property must be given in the manner required for notice of sale of like property on execution [*see Code Civ. Proc. § 873.640(a)*]. Execution is governed by *Code Civ. Proc. § 699.010 et seq.* The notice must also be given to every party who has appeared in the action and to such other interested persons as may have in writing requested the referee for special notice [*see Code Civ. Proc. § 873.640(a)*]. The court must prescribe the contents of the notice of sale, which must include a description of the property, the time and place of sale, and a statement of the principal terms of sale (Paragraphs 1, 2, 3) [*see Code Civ. Proc. § 873.650(a)*]. In place of the principal terms of sale, the notice may refer to an order of the court or to a written statement containing this information, which may be inspected at the place of business of the referee or the referee's attorney (second Paragraph 3) [*see Code Civ. Proc. § 873.650(a)*]. A notice of private sale must state a place where bids or offers will be received and a day on or after which the sale will be made (Paragraph 1) [*see Code Civ. Proc. § 873.650(b)*].

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35-397 California Forms of Pleading and Practice--Annotated § 397.272

§ 397.272 Referee's Return and Report of Sale of Real Property--By Public Auction or Private Sale [Code Civ. Proc. § 873.710]

[1] FORM Referee's Return and Report of Sale of Real Property--By Public Auction or Private Sale [Code Civ. Proc. § 873.710]

[*Caption. See §§ 397.240-397.242*]

The undersigned referee(s) render(s) this return and report of sale.

1. The real property to be sold is located at _____ [*specify address*] and is more particularly described as _____ [*set forth legal description*].

2. On _____ [*date*], I caused a written notice of sale, a copy of which is attached hereto as Exhibit A and made a part hereof, to be posted at _____ [*specify place where notice posted*] in _____ [*city*], _____ County, California.

[*EITHER, if property was sold at private sale*]

3. On _____ [*date*], I listed the property ordered to be sold by the interlocutory judgment entered herein with _____ [*set forth name of agent or broker that sold property and contractual or other arrangements or conditions as to agent's commissions, e.g.,* Canyon Realty Company, a licensed real estate broker, for the sum of $_____ and executed a signed listing agreement with the broker agreeing to pay _____ percent of the selling price as a commission].

[*OR, if property was sold at public auction*]

3. The property was offered for sale at _____ [*state time and place of sale, e.g.*, at the office of _____ (*name*), referee, at _____ (*specify address*), at _____ [*time*], on _____ [*date*].

[*CONTINUE*]

4. At the _____ [private sale *or* auction] the property was purchased by _____ [*name of purchaser*] for the total purchase price of $_____ [*state total purchase price*].

5. According to the terms and conditions of sale as set forth in the contract of sale, a copy of which is attached hereto and made a part hereof, _____ [*set forth terms and conditions of sale and security, taken, if any, e.g.*, _____ (*name of purchaser*) paid _____ (me *or* the broker) the sum of _____ (*specify amount paid as downpayment*) which represented _____ percent of the total purchase price, and _____ (I *or* the broker) executed a receipt for the downpayment and the purchaser agrees to pay the further sum of $_____ (*state amount of the balance of purchase price*) on confirmation of the sale by this court].

[6. According to the contract of sale, a copy of which is attached hereto and made a part hereof, the following amounts are due and payable to the following lienholders: _____ (*set forth in tabular form names of all lienholders and amounts payable to them*).]

[7. It has been determined and is hereby recommended that _____ (*set forth any determinations made as to opening and closing of public and private ways, roads, streets, and easements, e.g.*, the easement belonging to _____ (*name*) shall remain open for his/her benefit and use).]

[8. *Set forth other material facts relevant to sale and confirmation proceeding.*]
Dated: _____.

_____ [*signature*]

Referee

[_____ (*signature*)

Referee]

[_____ (*signature*)

Referee]

[2] Use of Form

This form for report of sale is for use when the referee has sold real property by private sale or public auction. The captions set out in §§ 397.240-397.242 may be adapted for use in the form. The form should be titled: REPORT OF SALE [*Code Civ. Proc. § 873.710*].

On making a sale of property, the referee must report the sale to the court [*Code Civ. Proc. § 873.710(a)*]. The referee's report must contain, in addition to any other material facts relevant to the sale and confirmation that may be appropriate,

the following [*see Code Civ. Proc. § 873.710*]:

- A description of the property sold to each purchaser (Paragraph 1).
- The name of the purchaser (Paragraph 4).
- The sale price (Paragraph 4).
- The terms and conditions of the sale and the security, if any, taken (Paragraph 5).
- Any amounts payable to lienholders (Paragraph 6).
- A statement as to contractual or other arrangements or conditions as to agents' commissions (Paragraph 3).
- A determination and recommendation as to opening and closing public and private ways, roads, streets, and easements (Paragraph 7).

[3] Decisions

Referee's report and return treated as return of sale. *Sting v. Beckham (1951) 105 Cal. App. 2d 503, 505-506, 233 P.2d 591*

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§ 397.273 Notice of Motion and Motion for Order Confirming Sale of Real Property [Code Civ. Proc. §§ 873.720, 873.730]

[1] FORM Notice of Motion and Motion for Order Confirming Sale of Real Property [Code Civ. Proc. §§ 873.720, 873.730]

[*Caption. See § 397.251.*]

To _____ [*specify party, e.g.*, defendant] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.*, defendant] _____ [*name*] will move for an order confirming the sale of the following described real property: _____ [*set forth street address and legal description of property*]. The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the supporting memorandum served and filed herewith, on the papers and records and file herein, and on such oral and documentary evidence as may be presented at the hearing on the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Use of Form

This notice of motion is for use by either party to move the court for an order confirming the sale of real property. The captions set out in §§ 397.240-397.242 may be adapted for use in this form. The form should be titled: NOTICE OF MOTION FOR ORDER CONFIRMING SALE OF REAL PROPERTY [*Code Civ. Proc. §§ 873.720, 873.730*].

A purchaser, the referee, or any party may move the court to confirm or set aside the sale [*see Code Civ. Proc. § 873.720(a)*]. The moving party must give not less than 10 days notice of motion to the purchaser if the purchaser is not the moving party; and to all other parties who have appeared in the action [*see Code Civ. Proc. § 873.720(b)*]. At the hearing, the court will examine the report and witnesses in relation to the report [*see Code Civ. Proc. § 873.730(a)*]. The court may confirm the sale notwithstanding a variance from the prescribed terms of sale if to do so will be beneficial to the parties and will not result in substantial prejudice to persons interested in the sale [*see* Code Civ. Proc. § 874.730(b)]. The court may vacate the sale and direct that a new sale be made if it determines that(1) the proceedings were unfair or notice of sale was not properly given (if there is no finding at the hearing of unfairness or improper notice, the sale may thereafter not be attacked on such grounds), (2) the sale price is disproportionate to the value of the property, or (3) it appears that a new sale will yield a sum that exceeds the sale price by at least 10 percent on the first $10,000 and 5 percent on the amount in excess of the first $10,000, determined after a reasonable allowance for the expenses of a new sale [*see Code Civ. Proc. § 873.730(c)*].

[3] Memorandum of Points and Authorities

A supporting memorandum must be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*; *see also Cal. Rules of Ct., Rule 3.1114(a)* (motions for which memorandum is not required)]. For general discussion and forms, see Ch. 417, *Points and Authorities* .

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35-397 California Forms of Pleading and Practice--Annotated § 397.274

§ 397.274 Declaration Under Penalty of Perjury in Support of Motion for Order Confirming Sale of Real Property [Code Civ. Proc. §§ 873.720, 873.730]

[1] FORM Declaration Under Penalty of Perjury in Support of Motion for Order Confirming Sale of Real Property [Code Civ. Proc. §§ 873.720, 873.730]

[*Caption. See §§ 397.240-397.242.*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*party*) *or other statement as appropriate*].

2. On _____ [*date*], notice of sale was properly given to _____ [*identify party(s) to whom notice was given*]. Copies of the notice of sale and proof of service are attached to this declaration as Exhibits A and B and made a part of this declaration.

3. On _____ [*date*], the real property that is the subject of the above-entitled action was sold by [public *or* private sale] by _____ [*name of referee*] [, _____ (*name of referee*), and _____ (*name of referee*), and each of them,] at _____ [*state location of sale*] to _____ [*name of purchaser*] [who was the highest bidder].

3. The terms of the sale are as follows: _____ [*set forth sales price and terms of sale, e.g.,* the purchase price of $100,000 to be paid in cash in lawful money of the United States of America, payable 10 percent of the total purchase price at the time of presentation of bids and the balance on confirmation of sale by the above-entitled Court; search and examination of title, title insurance, deeds, and all instruments of title shall be at the expense of purchaser; insurance and taxes shall be prorated as of the date of the transfer of title].

4. _____ [*Set forth facts showing that sale price is proportionate to value of property and sale was conducted in a fair manner, e.g.,* The appraised value of the property was $100,000 as shown in the appraisal of January 1, 1983, a copy of which is attached to this declaration as Exhibit C and all bids of $100,000 or more were considered as shown in the document entitled "Record of Bids," a copy of which is attached to this declaration as Exhibit D].

5. _____ [*Set forth facts showing that it does not appear that a new sale will yield a sum that exceeds sale price by 10 percent on first $10,000 and five percent on amount in excess thereof, e.g.,* A bid exceeded the sale price by 10 percent on the first $10,000 and five percent on the amount in excess of the first $10,000].

[6. _____ *If a variance from prescribed terms of sale has taken place, set forth facts showing that confirmation of sale will be beneficial to parties andwill not result in substantial prejudice to persons interested in sale, e.g.,* Extending payment of the purchase price over a 36-month period will accomplish a needed reduction in buyer's monthly payments and, therefore, prevent the seller from incurring the burden of conducting another sale].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[_____ *date*]
_____ [*signature*]

[2] Use of Form

This form is a declaration under penalty of perjury that may be filed along with the notice of motion and motion for an order confirming the sale of real property [*see Code Civ. Proc. §§ 873.720, 873.730*]. The captions set out in §§ 397.240-397.242 may be adapted for use in this form. The form should be titled: DECLARATION OF _____ [*name*] IN SUPPORT OF MOTION FOR ORDER CONFIRMING SALE OF REAL PROPERTY [*Code Civ. Proc. § 873.720*].

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[Reserved]

§§ 397.275[Reserved]

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35-397 California Forms of Pleading and Practice--Annotated § 397.290

§ 397.290 Stipulation for Partition by Appraisal [Code Civ. Proc. § 873.920]

[1] FORM Stipulation for Partition by Appraisal [Code Civ. Proc. § 873.920]

[*Caption. See §§ 397.240-397.242.*]

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that the following property be partitioned by appraisal, as provided in *Sections 873.910 through 873.980 of the Code of Civil Procedure*, on the following terms and conditions:

1. The property that is the subject of this agreement is located at _____ [*set forth address*] and more particularly described as _____ [*set forth legal description*].

2. The parties have and are willing to acquire the following interests:

a. _____ [*Name*] has _____ [*specify interest*] _____ [*if willing to acquire another party's interest or part thereof add:* and is willing to acquire the interest of _____ (*name*)].

b. _____ [*Continue for all parties*].

3. The parties consent to the appointment of _____ [*specify name(s) and address(es) of person(s) to whose appointment as referee(s) the parties agree; indicate only one person unless parties agree on appointment of three referees*] as referee(s) to appraise the property and interests involved.

4. The interests to be acquired shall be appraised as of _____ [*date*].

5. _____ [*Specify other terms, which may include, but are not limited to, provisions relating to*

abandonment of the action if appraised value of interest to be acquired by plaintiff exceeds a stated amount, required deposits on account of purchase price, terms of any credit, title and objections to title, and payment of expenses of appraisal procedure and of costs of action].
Dated: _____.

_____ [*signature*]

Plaintiff

_____ [*signature*]

Defendant

[2] Use of Form

This form of stipulation is for use when the parties agree to partition by appraisal [*see Code Civ. Proc. § 873.910*]. The captions set out in§§ 397.240-397.242 may be adapted for use in this form. The form should be titled: STIPULATION FOR PARTITION BY APPRAISAL [*Code Civ. Proc. § 873.920*].

The agreement to partition by appraisal must be in writing, filed with the clerk of court, and must include the following [*see Code Civ. Proc. § 873.920*]:

- A description of the property.
- The names of the parties and their interests.
- The names of the parties who are willing to acquire the interests.
- The name or names of a person or persons to whose appointment as referee or referees the parties consent.
- The date or dates as of which the interests to be acquired are to be appraised.
- Other terms mutually agreed on.

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35-397 California Forms of Pleading and Practice--Annotated § 397.291

§ 397.291 Consent of Referee to Appointment [Code Civ. Proc. §§ 873.920, 873.940]

[1] FORM Consent of Referee to Appointment [Code Civ. Proc. §§ 873.920, 873.940]

[*Caption. See §§ 397.240-397.242.*]

The undersigned person(s), being the nominee(s) of the parties hereinabove named, hereby consent(s) to being appointed as referee(s) for the purpose of the foregoing agreement to which this consent is attached.

_____ [*signature*]

_____ [*name*]

[_____ (*signature*)

_____ (*name*)]

[_____ (*signature*)

_____ (*name*)]

[2] Use of Form

This form of consent is for use when the parties agree to partition by appraisal and is designed to be attached to a stipulation for partition by appraisal [*see § 397.290*]. This consent is not required but is good practice [*see Code Civ. Proc. §§ 873.920, 873.940*]. The captions set out in §§ 397.240-397.242 may be adapted for use in this form. The form should be titled: CONSENT OF REFEREE(S) [*Code Civ. Proc. §§ 873.920, 873.940*].

[3] Cross References

For a related form, see *§ 397.290*.

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35-397 California Forms of Pleading and Practice--Annotated § 397.292

§ 397.292 Notice of Motion and Motion for Order Approving Agreement, Staying Pending Division or Sale of Property, and Appointing Referees [Code Civ. Proc. §§ 873.930, 873.940]

[1] FORM Notice of Motion and Motion for Order Approving Agreement, Staying Pending Division or Sale of Property, and Appointing Referees [Code Civ. Proc. §§ 873.930, 873.940]

[*Caption. See § 397.251.*]

To _____ [*specify party, e.g.*, defendant] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [*specify party, e.g.*, plaintiff] will, and hereby does, move for an order approving the agreement for partition by appraisal in the above-entitled action entered into by the parties on _____ [*date*], [staying the pending _____ (division *or* sale) of the property,] and providing for the appointment of _____ [*name of referee*], [_____ (*name of referee*), _____ (*name of referee*), and each of them,] to appraise the property and interests involved. The motion will be made on the grounds that the agreement complies with *Code of Civil Procedure Section 873.920* and that the terms and conditions are equitable.

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the supporting memorandum served and filed with this motion, on the papers, records, and file attached to this motion, and on oral and documentary evidence as may be presented at the hearing on the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Use of Form

This form is a notice of motion for use by either party to move the court for an order approving the agreement of the parties for partition by appraisal and appointing a referee to make the appraisal [*see § 397.290*]. The form also provides an optional request for an order staying a pending division or sale of the property. The captions set out in §§ 397.240-397.242 may be adapted for use in this form. The form should be titled: NOTICE OF MOTION FOR ORDER APPROVING AGREEMENT, [STAYING PENDING _____ (DIVISION *OR* SALE) OF THE PROPERTY], AND APPOINTING REFEREE(S) [*Code Civ. Proc. §§ 873.930, 873.940*].

Any party to the agreement may, on noticed motion, apply to the court for approval of the agreement [*see Code Civ. Proc. § 873.930*]. If the court determines that the agreement complies with *Code Civ. Proc. § 873.920* and that the terms and conditions are equitable, it must approve the agreement and stay any pending division or sale of the property [*see Code Civ. Proc. § 873.930(b)*]. The court must appoint one referee or, if provided in the agreement, three referees to appraise the property and the interests involved [*Code Civ. Proc. § 873.940*]. The referee must report the valuations and other findings to the court in writing filed with the clerk [*Code Civ. Proc. § 873.940*]. For forms of orders that may be adapted for use in granting or denying this motion, see *§ 397.247* and Ch. 372, *Motions and Orders* .

A supporting memorandum must be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*; *see also Cal. Rules of Ct., Rule 3.1113(a)* (motions for which memorandum is not required)]. For general discussion and forms, see Ch. 417, *Points and Authorities* .

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35-397 California Forms of Pleading and Practice--Annotated § 397.293

§ 397.293 Declaration Under Penalty of Perjury in Support of Motion for Order Approving Agreement, Staying Pending Division or Sale of Property, and Appointing Referees [Code Civ. Proc. §§ 873.930, 873.940]

[1] FORM Declaration Under Penalty of Perjury in Support of Motion for Order Approving Agreement, Staying Pending Division or Sale of Property, and Appointing Referees [Code Civ. Proc. §§ 873.930, 873.940]

[*Caption. See §§ 397.240-397.242.*]

I, _____, [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*party*) *or other statement as appropriate*].

2. On _____ [*date*], the parties entered into an agreement for partition by appraisal, a copy of which is attached to this declaration as Exhibit A.

3. The agreement includes a description of the property to be partitioned, the names of the parties and their interests, the names of the parties who are willing to acquire the interests, the name(s) of a person to whose appointment as referee(s) the parties consent, the date(s) as of which the interests to be acquired are to be appraised and other terms mutually agreed on, and, thereby, the agreement complies with *Section 873.920 of the Code of Civil Procedure.*

4. The terms and conditions of the agreement are equitable because _____ [*state facts showing that terms and conditions are equitable, e.g.,* the agreement provides for the abandonment of the action if the appraised value of the property is significantly more or less than the fair market value of comparable properties, thereby safeguarding the interests of the parties on both sides of the transaction].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[_____ *date and place*]
_____ [*signature*]

[2] Use of Form

This form is a declaration under penalty of perjury that may be filed along with a notice of motion for an order approving an agreement for partition by appraisal, staying pending division or sale of the property, if appropriate, and appointing a referee. The captions set out in §§ 397.240-397.242 may be adapted for use in this form. The form should be titled: DECLARATION OF _____ [*name*], IN SUPPORT OF MOTION FOR ORDER APPROVING AGREEMENT, [STAYING PENDING _____(DIVISION *or* SALE) OF THE PROPERTY], AND APPOINTING REFEREE(S) [*Code Civ. Proc. §§ 873.930, 873.940*].

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35-397 California Forms of Pleading and Practice--Annotated § 397.294

§ 397.294 Report of Appraisal by Referees [Code Civ. Proc. § 873.940]

[1] FORM Report of Appraisal by Referees [Code Civ. Proc. § 873.940]

[*Caption. See §§ 397.240-397.242.*]

The undersigned referee(s) render(s) this report of appraisal.

1. On _____ [*date*], _____ [I *or* we] appraised the following property and the interests therein hereinafter listed: _____ [*set forth address of property*] and more particularly described as _____ [*set forth legal description of property*]. The appraisal was made as of _____ [*date*], [*state date specified in agreement and/or order of appointment as effective date of appraisal*]. The total cash fair market value of the property as of that date was and is $_____.

2. The following interests in the property were appraised as of the same date and the following values assigned:

(a) To the interest of _____ [*name*], being _____ [*specify nature of interest*], a cash fair market value of $_____.

(b) _____ [*Continue for all interests*].

3. The following additional findings were made in connection with the foregoing appraisals: _____ [*specify; use list if there are many other findings*].
Dated: _____.

_____ [*signature*]

Referee

[_____ (*signature*)

Referee

_____ (*signature*)

Referee]

[2] Use of Form

This form of referees report is for use in an action for partition by appraisal after the referees have made the appraisal of the property. The court must appoint one referee, or, if provided in the agreement, three referees to appraise the property and the interests involved [*see Code Civ. Proc. § 873.940*]. The referee must report the valuations and other findings to the court in writing filed with the clerk [*Code Civ. Proc. § 873.940*]. The caption set out in §§ 397.240-397.242 may be adapted for use in this form. The form should be titled: REPORT OF APPRAISAL BY REFEREE(S) [*Code Civ. Proc. § 873.940*].

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35-397 California Forms of Pleading and Practice--Annotated § 397.295

§ 397.295 Notice of Motion and Motion for Order Confirming, Modifying, or Setting Aside Report of Referees [Code Civ. Proc. §§ 873.950, 873.960]

[1] FORM Notice of Motion and Motion for Order Confirming, Modifying, or Setting Aside Report of Referees [Code Civ. Proc. §§ 873.950, 873.960]

[*Caption. See § 397.251.]*

To _____ [*specify party, e.g.*, defendant] _____ [*name*] and to _____ [*name*], his/her attorney of record:

[*EITHER, if seeking confirmation of report*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.*, defendant] _____ [*name*] will, and hereby does, move for an order confirming the report of the referee(s) filed in this action respecting partition of the property by appraisal [so that it will read after modification as shown in the copy of the report attached hereto as Exhibit A]. The motion will be made on the grounds that the proceedings by the referee(s) have been regularly conducted, transfer of title to the interests involved may be regularly made, and this transfer would be equitable.

[*OR, if seeking modification of report*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of]

this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] _____ [*name*] will, and hereby does, move for an order modifying the report of the referee(s) filed in this action respecting partition of the property by appraisal [so that it will read after modification as shown in the copy of the report attached hereto as Exhibit A]. The motion will be made on the grounds that the proceedings by the referee(s) have not been regularly conducted _____ [*specify reason(s), e.g.,* because the referee failed to appraise the interests of the parties and, therefore, the referee's report must be modified to include appraisals of the interests of the parties so that transfer of title to the interests involved may be regularly and equitably made].

[*OR, if seeking to set aside report*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] _____ [*name*] will, and hereby does, move for an order setting aside the report of the referee(s) filed in this action respecting partition of the property by appraisal [so that it will read after modification as shown in the copy of the report attached hereto as Exhibit A]. The motion will be made on the grounds that the proceedings by the referee(s) have not been regularly conducted in that _____ [*specify, e.g.,* the appraised value of the property is significantly below fair market value as illustrated by the list of comparable property attached hereto as Exhibit A and, therefore, a new appraisal and a new referee's report must be made so that the transfer of title to the interests involved may be regularly and equitably made].

[*CONTINUE*]

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the supporting memorandum served and filed with this motion, on the papers, records, and file attached to this motion, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Use of Form

This form of notice is for use when any party or referee moves to set aside, confirm, or modify the referee's report. Any party to the agreement or the referee, on 10 days notice to the referee (if the referee is not the moving party), and to the other parties to the agreement, may so move the court [*see Code Civ. Proc. § 873.950*]. At the hearing, the court must examine the report and witnesses. If the court determines that the proceedings have been regularly conducted, that transfer of title to the interests may regularly be made, and that no facts appear which would make such transfer inequitable, it must confirm the report and order the interests transferred to the acquiring parties in proportion to their respective interests, or in such other proportion as is set out in the agreement [*see Code Civ. Proc. § 873.960*]. *Code Civ. Proc. § 873.960* vests the court with equitable power to refuse to permit consummation of the transaction if it would be inequitable [Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 873.960*].

The captions set out in §§ 397.240-397.242 may be adapted for use in this form. The form should be titled: NOTICE OF MOTION TO _____ [CONFIRM *or* MODIFY *or* SET ASIDE] REPORT OF REFEREE(S) [*Code Civ. Proc. §§ 873.950, 873.960*].

A supporting memorandum must be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For general discussion and forms, see Ch. 417, *Points and Authorities* .

[3] Cross References

For a discussion, procedural guide, and forms relating to motions generally, see Ch. 372, *Motions and Orders*

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Chapter 397 PARTITION
PART V. FORMS
C. Partition By Appraisal

35-397 California Forms of Pleading and Practice--Annotated § 397.296

§ 397.296 Declaration Under Penalty of Perjury in Support of Motion for Order Confirming, Modifying, or Setting Aside Report of Referees [Code Civ. Proc. § 873.960]

[1] FORM Declaration Under Penalty of Perjury in Support of Motion for Order Confirming, Modifying, or Setting Aside Report of Referees [Code Civ. Proc. § 873.960]

[*Caption. See §§ 397.240-397.242.*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record for _____ (*party*) *or other statement as appropriate*].

[*EITHER, if seeking confirmation of the report*]

2. The proceedings by the referee(s) have been regularly conducted because _____ [*state facts showing regularity of proceedings, e.g.*, the referee(s) appraised the property and interests involved as provided in the agreement of _____ [*date*], the appraised valuations were fair and reasonable as shown by the list of comparable property attached to this declaration as Exhibit A, and the valuations and findings were filed with the clerk of the court in accordance with *Section 873.940 of the Code of Civil Procedure*].

3. Transfer of title to the interests involved may be regularly and equitably made because _____ [*state facts showing that transfer may be regularly and equitably made, e.g.*, the interests involved have been appraised at a reasonable value].

[*OR, if seeking modification of the report*]

2. Modification of the referee's report is necessary because _____ [*state facts showing that modification is necessary, e.g.*, the report fails to list appraised values for the interests involved and, therefore, transfers of title to the interests cannot be regularly and equitably made].

[*OR, if seeking to set aside report*]

2. The referee's report should be set aside because _____ [*state facts showing necessity of setting aside report, e.g.*, the appraised value of the property is significantly below fair market value as illustrated by the list of comparable property attached hereto as Exhibit A].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[_____ *date and place*]

_____ [*signature*]

[2] Use of Form

This form of declaration is for use in support of a motion to confirm, modify, or set aside the referee's report. If the court determines that the proceedings have been regularly conducted, that transfer of title to the interests may regularly be made, and that no facts appear that would make the transfer inequitable, it must confirm the report and order the interests transferred to the acquiring parties in proportion to their respective interests, or in any other proportion that is set out in the agreement [*see Code Civ. Proc. § 873.960*].

The captions set out in §§ 397.240-397.242 may be adapted for use in this form. The form should be titled: DECLARATION OF _____ [*name*] IN SUPPORT OF MOTION TO _____ [CONFIRM *or* MODIFY *or* SET ASIDE REPORT] [*Code Civ. Proc. § 873.960*].

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35-397 California Forms of Pleading and Practice--Annotated § 397.297

§ 397.297 Notice of Motion and Motion for Entry of Judgment [Code Civ. Proc. § 873.960]

[1] FORM Notice of Motion and Motion for Entry of Judgment [Code Civ. Proc. § 873.960]

[*Caption. See §§ 397.240-397.242.*]

To _____ [*specify party, e.g.*, defendant] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [*specify plaintiff, defendant, or referee*], will, and hereby does, move the court for an order _____ [*specify, e.g.*, directing entry of judgment confirming the transfers previously ordered by this court]. The motion will be made on the grounds that _____ [*specify grounds, e.g.*, the following conditions contained in the order confirming the referee's report have been fulfilled: Payment of _____ (*specify purchase price and any other amounts required by the agreement*) was made on _____ (*date*); the security _____ (*specify security required, if any*) was given on _____ (*date*), payment of _____ (*specify expenses incurred by the partition by appraisal procedure described in Code Civ. Proc. § 873.910 et seq.*) was made on _____ (*date*); and payment of _____ (*specify general costs of partition or an appropriate share of the costs*) was made on _____ (*date*)].

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the supporting memorandum served and filed herewith, on the papers, records, and file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Use of Form

This notice of motion is for use by a party or referee, following confirmation of the referee's report, to obtain an order for entry of a judgment confirming the transfer. The court, on motion of a party to the agreement or of the referee, made on not less than 10 days notice to the parties who have appeared, must determine whether the conditions of the order confirming the report have been fulfilled and, if so, must enter judgment confirming the transfer. Otherwise, on such further proceedings as may be ordered, the action or proceeding will be ordered terminated [*see Code Civ. Proc. § 873.960*].

The captions set out in §§ 397.240-397.242 may be adapted for use in this form. The form should be titled: NOTICE OF MOTION FOR ENTRY OF JUDGMENT [*Code Civ. Proc. § 873.960*].

A supporting memorandum must be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For general discussion and forms, see Ch. 417, *Points and Authorities* .

[3] Cross References

For a discussion, procedural guide, and forms relating to motions generally, see Ch. 372, *Motions and Orders*

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Chapters 398-399 [RESERVED]

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[RESERVED]

Chapters 398[RESERVED]

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Volume 35: Partition thru Paternity-Chs. 397-412
Chapter 400 PARTNERSHIPS: GOVERNING STATUTES

35-400 California Forms of Pleading and Practice--Annotated 400.syn

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Chapter 400 PARTNERSHIPS: GOVERNING STATUTES
PART I. SCOPE

35-400 California Forms of Pleading and Practice--Annotated § 400.01

§ 400.01 Scope of Chapter

The purpose of this chapter is to describe, in general terms, the applicability of the several California laws that govern general partnerships, limited partnerships, and limited liability partnerships. Also covered are the statutory definitions that will be referred to in subsequent chapters dealing with partnership litigation [*see* Chs. 401-406]. Since by analogy partnership law also governs joint ventures, that entity is briefly discussed as well.

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35-400 California Forms of Pleading and Practice--Annotated § 400.02

§ 400.02 Cross References

- For discussion and forms relating to actions between general partners and their partnerships, see Ch. 401, *Partnerships: Actions Between General Partners and Partnership* .

- For discussion and forms relating to actions between general partners or partnerships and third parties, see Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties* .

- For discussion and forms relating to actions between dissociated partners, the partnership, and third parties, see Ch. 403, *Partnerships: Actions By and Against Dissociated Partners* .

- For discussion and forms relating to actions between limited partners and the partnership, see Ch. 404, *Partnerships: Actions Between Limited Partners and Partnerships* .

- For discussion and forms relating to actions between limited partners or partnerships and third parties, see Ch. 405, *Partnerships: Actions Between Limited Partners or Partnerships and Third Parties* .

- For discussion and forms relating to the dissolution of partnerships, see Ch. 406, *Partnerships: Dissolution* .

- For discussion and forms relating to unincorporated associations generally and nonprofit organizations, see Ch. 61, *Associations and Clubs* , Ch. 110, *Churches and Religious Organizations* , and Ch. 388, *Nonprofit Corporations* .

- For discussion and forms relating to corporations generally, see Ch. 160, *Corporations: Capacity* through Ch. 170, *Corporations: Dissolution and Winding Up*.

- For a discussion of mining partnerships, see Ch. 363, *Mining* .

- For discussion of securities regulations applicable to the public offering of limited partnership or

joint ventures interests, see *Ch. 515, Securities and Franchise Regulation, § 515.10 et seq.*

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35-400 California Forms of Pleading and Practice--Annotated §§ 400.03-400.09

[Reserved]

§§ 400.03[Reserved]

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Chapter 400 PARTNERSHIPS: GOVERNING STATUTES
PART II. LEGAL BACKGROUND
A. Governing Statutes

35-400 California Forms of Pleading and Practice--Annotated § 400.10

§ 400.10 Uniform Partnership Act (Pre-'97 Act)

[1] In General

The Uniform Partnership Act [former *Corp. Code § 15001 et seq.*] governed California general partnerships that were formed before January 1, 1997, the operative date of the Uniform Partnership Act of 1994 [*see Corp. Code § 16100 et seq.*; for more detailed discussion, *see § 400.11*]. For this reason, the Uniform Partnership Act is referred to in this and subsequent chapters (*see* Chs. 401-406) as the "pre-'97 Act." Partnerships formed under the pre-'97 Act remained subject to it only until the earlier of (1) the date when they elected to be governed by the Uniform Partnership Act of 1994, or (2) January 1, 1999 [*Corp. Code § 16111*]. As of that date, the pre-1997 Act was repealed, and its successor, the Uniform Partnership Act of 1994 (UPA'94) [*Corp. Code § 16100 et seq.*] governs all general partnerships regardless of their date of formation [*Corp. Code § 16111(a), (b)*; *see* Stats. 1996, ch. 1003, § 18 (repealing the pre-'97 Act operative January 1, 1999)].

Repeal of the pre-'97 Act, however, did not affect actions or proceedings commenced, or rights accrued, prior to the effective date of the UPA'94 [*Corp. Code § 16112*]. For that reason, discussion of the pre-'97 Act has been retained in the partnership coverage in this publication. All references to *Corp. Code §§ 15001-15045* in Chapters 400-406 are to the repealed provisions of the pre-'97 Act.

When the two acts have the same or similar provisions, this chapter and Chapters 401-406 will cite the pre-'97 Act first, followed by the corresponding UPA'94 provision. When the two Acts differ, the distinction will be pointed out in context and the appropriate act cited.

[2] Application to Other Partnership Forms

The pre-'97 Act also applied to all special, limited, and mining partnerships [*see Pub. Res. Code §§ 3940-3950* (statutory provisions governing mining partnerships)], except for specific provisions in statutes governing those partnerships that were inconsistent with provisions of the pre-'97 Act [former *Corp. Code § 15006(2)*]. Limited partnerships governed by the California Revised Limited Partnership Act ("CRLPA") [former *Corp. Code § 15611 et seq.*; *see* ch. 403], were specifically made subject to the pre-'97 Act in cases for which the CRLPA did not provide

[former *Corp. Code § 15722*].

Under the pre-'97 Act, every partnership that was not formed under the laws for special, limited, or mining partnerships was a general partnership.In addition, any special or limited partnership was a general partnership with respect to any partner who was not a special partner [former *Corp. Code § 15044*]. If read literally, former *Corp. Code § 15044* would have made limited partnerships impossible because there are no "special partners" in limited partnerships; however, the statutory intent to exclude limited as well as special partners from the rules governing general partners was made clear from the next sentence in that code section, which provided that every partner who was not a special or limited partner or a member of a mining partnership was a general partner. Thus, for example, if an intended limited partnership was defectively formed so that it did not achieve that status, it would be a general partnership and its partners would be treated as general partners [*Security Pac. Nat. Bank v. Matek, 175 Cal. App. 3d 1071, 1075, 223 Cal. Rptr. 288 (1985)* ; *see American Alternative Energy Partners II v. Windridge, Inc., 42 Cal. App. 4th 551, 560-562, 49 Cal. Rptr. 2d 686 (1996)* (limited partnership that was defectively formed at time of filing lawsuit had capacity to sue as general partnership)].

[3] Rules for Construction and Interpretation

Former *Corp. Code §§ 15004* and *15005* set forth the general rules for construction and interpretation of the pre-'97 Act. Under these sections, the rule requiring statutes in derogation of the common law to be strictly construed was deemed inapplicable to the pre-'97 Act; in addition, it was to be interpreted to effect its general purpose of making the law uniform in the states that enacted it [former *Corp. Code § 15004(1), (4)*]. The laws of agency and estoppel were applicable under the pre-'97 Act [former *Corp. Code § 15004(2), (3)*], and, in any case the pre-'97 Act did not provide for, the rules of law and equity, including the law merchant, were to govern [former *Corp. Code § 15005*; *Ellis v. Mihelis, 60 Cal. 2d 206, 217, 32 Cal. Rptr. 415, 384 P.2d 7 (1963)]* .

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35-400 California Forms of Pleading and Practice--Annotated § 400.11

§ 400.11 Uniform Partnership Act of 1994 (UPA'94)

[1] Enactment

The Uniform Partnership of 1994 [*Corp. Code § 16100 et seq.*] was enacted in 1996 [Stats. 1996, ch. 1003] and will be referred to in this and subsequent chapters (*see* Chs. 401-406) as "UPA'94."

[2] Operative Dates

UPA'94 initially applied to (1) partnerships formed on or after January 1, 1997, and (2) partnerships formed prior to January 1, 1997, that elected to be governed by the provisions of the UPA'94 instead of the pre-'97 Act [*Corp. Code § 15611(a)*]. On January 1, 1999, this two-year grace period expired, and since that date all partnerships have been subject to UPA'94, regardless of when they were formed [*Corp. Code § 15611(b)*]. UPA'94, however, does not affect actions or proceedings commenced, or rights accrued, prior to its effective date [*Corp. Code § 15612(a)*].

If a partnership formed under the pre-'97 Act elected to be governed by UPA'94 before January 1, 1999, to the extent that UPA'94's provisions limit partners' liabilities to third parties, those limitations applied to third parties who had done business with the partnership within one year preceding the partnership's election to be governed by UPA'94, but only if the third party knew or received notification of the partnership's election to be governed by UPA'94 [*Corp. Code § 16111(c)*; *see Corp. Code § 16102* (defining "notice" and "notification")]. This rule does not apply, however, to any of the UPA'94 provisions that specifically apply to the liability of registered limited liability partnerships [*Corp. Code § 16111(c)*].

[3] Application to Other Partnership Forms

UPA'94 governs all general partnerships, including limited liability partnerships [*Corp. Code § 16101(9)* (defining "partnership")]. The definition of "partnership" excludes any partnership formed under the ULPA [*Corp. Code § 15501 et seq.*] or CLRPA [*Corp. Code § 16101(7)*; *see Corp. Code § 15611 et seq.*; *see also § 400.20[8]*]. However, limited partnerships, to the extent the law governing them is not inconsistent, are also governed by UPA'94 [*Corp. Code § 15722*].

[4] Application of Rules of Law and Equity; Interest Rates

UPA'94's provisions regarding rights and duties of surviving partners, legal representatives of deceased partners, creditors of either, and creditors of the partnership all supersede any conflicting provisions in the Probate Code [*Corp. Code § 16109*]. Unless displaced by particular provisions of UPA'94, the principles of law and equity supplement UPA'94 [*Corp. Code § 16104(a)*]. When UPA'94 imposes an obligation to pay interest (*e.g.*, on the amount owed a dissociating partner for that partner's partnership interest), and the rate is not specified, the rate is the one specified in *Civ. Code § 3289* [*Corp. Code § 16104(b)*].

[5] Summary of Changes From Pre-'97 Act

[a] Brief Review

For those familiar with the law governing general partnerships before the effective date of UPA'94, the following brief review of the changes made by UPA'94 will aid in understanding the most important changes affecting the partnership's and the partners' liabilities, both to each other and to third parties.

[b] Entity Theory Adopted

First, UPA'94 expressly recognizes a partnership as an entity distinct from its partners, thereby mooting the old debate over whether a partnership is legally an entity or merely an aggregation of individuals [*Corp. Code § 16201*]. Adoption of the entity approach means that each partner has separate legal interests and that the ownership of the partnership assets is in the entity, not as undivided interests of the partners. The pre-'97 Act, in contrast, provided that partners were co-owners with other partners of specific partnership property, holding as "tenants in partnership" [former *Corp. Code § 15025*]. UPA'94 makes it clear that property acquired by a partnership becomes property of the partnership as an entity and not of the partners as tenants in partnership [*Corp. Code § 16203*].

[c] Fiduciary Duty

The pre-'97 Act contained very few explicit provisions on the fiduciary duties of partners to each other or to the partnership. As a result, case law was largely responsible for defining the scope of those duties. In contrast, UPA'94 has express provisions respecting the partners' duties of loyalty and care [*see Corp. Code § 16404*]. The duty of loyalty relates to appropriation of partnership opportunities, self-dealing, and competing with the partnership [*Corp. Code § 16404(b)*]. The duty of care requires partners to refrain from conduct that is grossly negligent, reckless, or constitutes intentional misconduct or knowing violation of law, and imposes an obligation of good faith and fair dealing [*Corp. Code § 16404(c), (d)*]. UPA'94 also prohibits the waiver of the duties of loyalty, due care, and good faith and fair dealing in the partnership agreement, except when it would not be unreasonable to do so [*Corp. Code § 16103(b)(3)-(5)*].

See Ch. 401, *Partnerships: Actions Between General Partners and Partnership* , for a discussion and forms relating to actions involving breaches of partners' fiduciary duties.

[d] Dissociation and Dissolution

UPA'94 ends the distinctions under the pre-'97 Act between partners who withdraw, those who retire, and those who die. "Dissociation," a term UPA'94 uses generically to describe any cessation of a person's partnership status [*see Corp. Code § 16601*], may be voluntary (*e.g.*, retirement) or involuntary (*e.g.*, death or expulsion), or rightful or wrongful, but in no case does a partner's dissociation require the partnership to dissolve if the remaining partners want to continue.

UPA'94 changes the rule that any change in the membership of a partnership causes its dissolution. As originally enacted, the pre-'97 Act followed the theory that any change in the membership of the partnership causes dissolution.

Later amendments to the Act liberalized the rule, but only to the extent of providing that a partnership can avoid dissolution if the partners have agreed *in advance* of the withdrawal or addition of a partner that the partnership will not dissolve [*see* former *Corp. Code § 15031(4), (7)*]. If the partnership continued after the withdrawal or addition of a partner, but not pursuant to a preexisting agreement not to dissolve, then a new partnership had to be formed or the business was treated as if it were operating as a dissolved but unliquidated enterprise [*see* former *Corp. Code § 15041*].

Under UPA'94 changes in the composition of the partnership do not necessarily dissolve the partnership, despite the absence of a prior agreement not to dissolve. Even in a partnership for a definite term or for a particular purpose, dissolution and winding up are not required when a partner dissociates before the expiration of the term if a majority in interest of the remaining partners agree within 90 days to continue the partnership and avoid dissolution and winding up [*Corp. Code § 16801(2)(A)*]. Similarly, in an at will partnership, the dissociation of a partner will not dissolve the partnership unless at least half of the partners decide to do so [*Corp. Code § 16801(1)*]. Thus, the dissociation of a partner, by itself, no longer constitutes an event of dissolution. Instead, it will trigger the buyout provisions of Article 7 of UPA'94. These buyout provisions are mandatory absent a provision to the contrary in the partnership agreement [*see Corp. Code § 16103(b)*; *see also* the discussion in Ch. 403, *Partnerships: Actions by and Against Dissociated Partners*]. The pre-'97 Act also required a buyout, but limited it to the interests of retiring or deceased partners [*see* former *Corp. Code § 15042*]. Moreover, UPA'94's buyout provisions are fairly detailed concerning the valuation of a dissociated partner's interest and the timing of payment, whereas the pre-'97 Act merely spoke of "the value of his interest at the date of dissolution."

[e] Joint and Several Liability

UPA'94 provides that a partnership may sue and be sued in the partnership name [*Corp. Code § 16307(a)*]. This follows the entity approach and is declarative of California law under *Code Civ. Proc. § 369.5(a)*.

Under UPA'94, partners are jointly and severally liable for all partnership obligations and not only for tort-type liabilities as under the pre-'97 Act [*Corp. Code § 16306(a)*; *but see United States v. Galletti (2004) 541 U.S. 114, 124 S.Ct. 1548, 158 L. Ed. 2d 279* (general partners' joint and several liability for partnership debts was irrelevant to determining primary liability for "employer's" liability for employment taxes; proper assessment of unpaid employment tax against partnership sufficed to extend statute of limitations for collection of tax from general partners who were secondarily liable for payment of partnership's debts)]. Generally, joint and several liability permits a creditor to proceed immediately against any of the joint and several judgment debtors. Under UPA'94, however, subject to certain exceptions,creditors are required to first exhaust the partnership assets before levying against a partner to satisfy a judgment based on a claim against the partnership [*Corp. Code § 16307(d)*]. For example, a judgment creditor may proceed directly against the assets of a partner who is liable independently as a primary tortfeasor, but must exhaust the partnership's assets before proceeding against the separate assets of the other partners who are liable only as partners.

For discussion and forms relating to the joint and several liability of partners, see Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties* .

[f] Partnership Agreements

UPA'94 has an extensive set of rules to govern the relations among partners and between the partners and the partnership. A great many of these rules, however, can be varied by express agreement of the parties [*see Corp. Code § 16103*]. Thus, UPA'94 may have its greatest impact on partnerships that are subject to UPA'94's rules because they do not have detailed, written partnership agreements, or the agreements they do have do not vary the statutory rules as permitted by UPA'94.

[g] Partnership Conversions

The pre-'97 Act authorized general partnerships to convert to limited liability partnerships [former *Corp. Code § 15051*], but its provisions did not treat the conversion of general partnerships into other entities, such as domestic or foreign limited partnerships and limited liability companies. UPA'94 contains detailed provisions [*see Corp. Code §§ 16901-16909*] covering conversions of partnerships (other than registered limited liability partnerships) into domestic or foreign other business entities (*i.e.*, limited partnerships, LLCs, corporations, and certain other business entities) [*see Corp. Code §§ 16901(12)* (definition of "other business entity"); *16902* (enumerating permissible conversions)]. These provisions include conditions for conversion, plan of conversion, approvals required for conversion, the effect of conversion on titles to real property and on the rights and liabilities of partners and the partnership, and the filing of statements of conversion.

[h] Mergers

While the pre-'97 Act authorized merger between partnerships and with limited liability companies provided the laws governing those parties to a merger permitted such a merger [former *Corp. Code § 15046*], these provisions were somewhat rudimentary, dealing primarily with the vote required for the general partnership to merge with another organization. The UPA'94 provisions [*see Corp. Code §§ 16910-16917*] are far more detailed, covering merger agreements, the law governing the surviving partnership, the effect of merger on title to real property, creditors rights and the liabilities of the members of the surviving entity, and, finally, the requirement of filing a statement of merger.

[i] Partnership Statements

UPA'94 refines and expands the role of partnership statements. The pre-'97 Act also provided for partnership statements, but their only function was to memorialize record title to real property [*see* former *Corp Code §§ 15010.5-15010.7*]. The pre-'97 Act also provided for public notice of a partnership dissolution in the form of newspaper publication and filing with the appropriate county clerk [*see* former *Corp. Code § 15035.5*], but did not specify the effect of such publication and filing. The partnership statements provided for under UPA'94 combine the functions of memorializing record title *and* giving constructive notice of changes in the partnership. These statements can limit a partner's or a partnership's liability to third parties in certain circumstances.

For discussion and forms related to the effect of filing partnership statements on third party liability, see Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties* .

[6] Correlation Table

This table compares and correlates the pre-'97 Act [former *Corp. Code §§ 15001-15058*] ("old UPA") with UPA'94 [*Corp. Code §§ 16100-16962*]. Use this table to determine the sections of the pre-'97 Act that correspond to those in the UPA'94, and vice versa. The table indicates whether or not a section was revised by UPA'94, and, if so, whether the revision was minor or major. Classification of revisions as "minor" or "major" obviously is a matter of degree involving the judgment of the authors of this table.

Pre-1997 Act Section	**UPA'94 Section**	**Effect**
15001	16100	Minor revision
15002	16101	Minor revision
15003	16102	Major revision
	16103	New
15004, 15005	16104	Minor revision
15010.5	16105	Minor revision
	16106	New

	16107	New
15004(4)	16108	No revision
15005	16109	No revision
	16110	New
	16111	New
	16112	New
	16113	New
	16114	New
	16201	New
15006	16202	Minor revision
15006(2)		Not reenacted, but see Pub. Res. Code § 3940
15007	16202(c)	Minor revision
	16203	New
15008	16204	Minor revision
15009	16301	Minor revision
15010	16302	Minor revision
15010.5	16105, 16302(b), 16304	Minor revision
15010.6		Not reenacted
15010.7	16303	Minor revision
15011		Not reenacted, but see § 16301
15012		Not reenacted
	16304	New
15013	16305(a)	Minor revision
15014	16305(b)	Minor revision
15015	16306	Minor revision
	16307	New
15016	16308	Minor revision
15017	16306(b)	Major revision
15018	16401	Minor revision
	16402	New
15019	16403(a), (b)	Minor revision
15020	16403(c)	Minor revision
15021(1)	16404(b)	Minor revision
15021(2)	16404(g)	Minor revision
	16404(b)-(f)	New
15022	16405(b)	Minor revision
	16405(a)	New

	16405(c)	New
15023	16406	No revision
15024		Not reenacted, but see § 16502
	16501	New
15025		Not reenacted
15026	16502	Minor revision
15027	16503	Minor revision
15028	16504	Minor revision
	16601	New
	16602	New
	16603	New
	16701	New
	16701.5	New
	16702	New
	16703	New
	16704	New
	16705	New
15029		Not reenacted
15030	16802(a)	No revision
15031	16801	Major revision
	16802(b)	New
15032		Not reenacted
	16803(c)	New
15033		Not reenacted
15034		Not reenacted
15035	16804	Minor revision
15035.5	16805	Major revision
15036		Not reenacted
15037	16803(a), (b)	Minor revision
15038		Not reenacted
15039		Not reenacted; but see 16405
15040	16807	Major revision
	16806	New, but see § 15035
15041		Not reenacted
15042		Not reenacted; but see 16701
15043		Not reenacted
15044		Not reenacted
15045	16109	No revision

	16901	New
	16902	New
	16903	New
	16904	New
	16905	New
	16906	New
	16907	New
	16908	New
	16909	New
15046	16910	Major revision
	16911	New
	16912	New
	16913	New
	16914	New
	16915	New
	16916	New
	16917	New
15047	16951	No revision
15048(a)	16952	No revision
15048(b)-(e)		Not reenacted
15049	16953	No revision
15050	16954	No revision
15051	16955	No revision
15052	16956	No revision
15053	16957	No revision
15054	16958	No revision
15055	16959	No revision
15056	16960	No revision
15057	16961	No revision
15058	16962	No revision

California Forms of Pleading and Practice--Annotated

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Volume 35: Partition thru Paternity-Chs. 397-412
Chapter 400 PARTNERSHIPS: GOVERNING STATUTES
PART II. LEGAL BACKGROUND
A. Governing Statutes

35-400 California Forms of Pleading and Practice--Annotated § 400.12

§ 400.12 Limited Partnership Laws Before 2008

[1] Uniform Limited Partnership Act

Until January 1, 2010, the Uniform Limited Partnership Act (ULPA) [*Corp. Code § 15501 et seq.*] generally governed limited partnerships formed before July 1, 1984, the operative date of the California Revised Limited Partnership Act (CRLPA) [*Corp. Code §§ 15534* (ULPA), 15711 (CRLPA); *see Corp. Code § 15611 et seq.* (CRLPA); *see also* [2], *below*].

On or after July 1, 1984, a limited partnership formed under the ULPA could elect to be governed by CRLPA [*Corp. Code § 15712(b)(1)* (CRLPA); *see* [2], *below*]. On or after January 1, 2008, a limited partnership originally formed under the ULPA could elect to be governed by the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code § 15912.06(a)(2)* (ULPA '08); *see Corp. Code § 15900 et seq.* (ULPA '08); *see also § 400.13[1]*].

Effective January 1, 2010, the ULPA is repealed [*Corp. Code § 15534* (ULPA)], and all limited partnerships, regardless of the date of formation, are governed by the ULPA '08, except as specified by the ULPA '08 [*Corp. Code § 15912.06(b)* (ULPA '08); *see Corp. Code § 15912.06(c)* (ULPA '08) (exceptions); *see also § 400.13[1]*]. However, the ULPA '08 does not affect an action commenced, proceeding brought, or right accrued before January 1, 2008 [*Corp. Code § 15912.07* (ULPA '08)].

[2] California Revised Limited Partnership Act

Until January 1, 2010, the California Revised Limited Partnership Act (CRLPA) [*Corp. Code § 15611 et seq.*] generally governed limited partnerships formed on or after July 1, 1984, and before January 1, 2008, the operative date of the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code §§ 15711, 15714, 15724* (CRLPA), 15912.06(a)(1) (ULPA '08); *see Corp. Code § 15900 et seq.* (ULPA '08)].

In addition, a limited partnership formed before July 1, 1984, could elect to be governed by CRLPA if all partners, or a lesser number as required by the partnership agreement, consented in writing to the election [*Corp. Code § 15712(b)(1)* (CRLPA) (election was prospective only and did not affect preexisting rights of third parties)].

Whether or not it elected to be governed by the CRLPA, a limited partnership formed before July 1, 1984, was required to file a new certificate of limited partnership in conformity with the CRLPA [*Corp. Code § 15712(b)(2)* (CRLPA); *see Corp. Code § 15621(a)* (CRLPA) (filing requirement)], and it could not maintain an action, suit, or proceeding in any California court until the certificate was filed [*Corp. Code § 15712(b)(4)* (CRLPA)]. After filing the certificate, a limited partnership could no longer make filings under the ULPA, and was governed by CRLPA with respect to filing certificates of dissolution and cancellation, amendments to certificates, and the formalities for executing or filing certificates [*Corp. Code §§ 15711, 15712(b)(2)* (CRLPA); *see Corp. Code §§ 15621-15628* (CRLPA) (filing requirements under CRLPA)]. No person may rely on the accuracy or completeness of information filed or recorded pursuant to the ULPA once a CRLPA certificate has been filed [*Corp. Code § 15712(b)(2)* (CRLPA)]. After a new certificate was filed by a ULPA limited partnership, that certificate, or an amendment to it, controlled the rights and obligations of the partners and the limited partnership between themselves except (1) to the extent they were affected by an amendment of the partnership agreement or by the partnership's election to be governed by CRLPA; or (2) with respect to mergers, which were governed by CRLPA regardless of when the limited partnership was formed [*Corp. Code § 15712(a), (c)* (CRLPA); *see Corp. Code §§ 15678.1-15678.10* (CRLPA) (merger provisions)].

On or after January 1, 2008, any limited partnership governed by the CRLPA could elect to be governed by the ULPA '08 [*Corp. Code § 15912.06(a)(2)* (ULPA '08); *see Corp. Code § 15900 et seq.* (ULPA '08); *see also § 400.13[1]*].

Effective January 1, 2010, CRLPA is repealed [*Corp. Code § 15724* (CRLPA)], and all limited partnerships, regardless of the date of formation, are governed by the ULPA '08, except as specified by the ULPA '08 [*Corp. Code § 15912.06(b)* (ULPA '08); *see Corp. Code § 15912.06(c)* (ULPA '08) (exceptions); *see also § 400.13[1]*]. However, the ULPA '08 does not affect an action commenced, proceeding brought, or right accrued before January 1, 2008 [*Corp. Code § 15912.07* (ULPA '08)].

[3] Application of General Partnership Law

Limited partnerships governed by the ULPA and the CRLPA were subject to general partnership law on matters not specifically covered by the ULPA or CRLPA [*Corp. Code § 15722* (CRLPA); *see Corp. Code § 16111* (UPA '94)]. The ULPA '08 adopts a different approach and does not rely on general partnership law or any other source for the rules governing limited partnerships [*see § 400.13[2][c]*].

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Chapter 400 PARTNERSHIPS: GOVERNING STATUTES
PART II. LEGAL BACKGROUND
A. Governing Statutes

35-400 California Forms of Pleading and Practice--Annotated § 400.13

§ 400.13 Uniform Limited Partnership Act of 2008

[1] Coverage of Act

The Uniform Limited Partnership Act of 2008 (ULPA '08) [*see* Stats. 2006, ch. 495, § 20; *Corp. Code § 15900 et seq.* (ULPA '08)], became operative on January 1, 2008 [*Corp. Code § 15912.04* (ULPA '08)]. Through the end of 2009, the ULPA '08 generally governed the following limited partnerships [*Corp. Code § 15912.06(a)* (ULPA '08)]:

- Limited partnerships formed on or after January 1, 2008.

- Limited partnerships formed before January 1, 2008, that elected to be subject to the ULPA '08. However, the election did not change the law governing the limited partnership's liability to a third party on an obligation incurred between the time of the election and the end of 2009, if the third party did business with the partnership during the year preceding the election and had no knowledge or notice of the election at the time the obligation was incurred [*Corp. Code § 15912.06(d)* (ULPA '08)].

Effective January 1, 2010, all limited partnerships, regardless of the date of formation, generally are governed by the ULPA '08 [*Corp. Code § 15912.06(b)* (ULPA '08)]. However, with respect to a limited partnership formed before January 1, 2008, the following rules apply unless the partners elect otherwise [*Corp. Code § 15912.06(c)* (ULPA '08)]:

- The perpetual duration possessed by limited partnerships formed under the ULPA '08 [*see Corp. Code § 15901.04(c)* (ULPA '08); *see § 400.13[3][b]*] does not apply, and the limited partnership has whatever duration it had under the law applicable immediately before January 1, 2008.

- The ULPA '08 provisions governing dissociation of limited partners [*see Corp. Code §§ 15906.01, 15906.02* (ULPA '08)] do not apply, and a limited partner has the same right and power to dissociate from the limited partnership, with the same consequences, as existed immediately before January 1, 2008.

- The ULPA '08 provision for the expulsion of a general partner by unanimous vote of the other partners [*see Corp. Code § 15906.03(d)* (ULPA '08)] does not apply.

- The ULPA '08 provision for the expulsion by court order [*see Corp. Code § 15906.03(e)* (ULPA '08)] does not apply, and a court has the same power to expel a general partner as the court had immediately before January 1, 2008.

- The ULPA '08 provision specifying the circumstances in which the dissociation of a general partner dissolves a limited partnership [*Corp. Code § 15908.01(c)* (ULPA '08)] does not apply, and the connection between a general partner's dissociation and the dissolution of the limited partnership is the same as existed immediately before January 1, 2008.

Moreover, the ULPA '08 does not affect an action commenced, proceeding brought, or right accrued before January 1, 2008 [*Corp. Code § 15912.07* (ULPA '08)]. Thus, because litigation involving California limited partnerships formed before 2008 may be governed by the ULPA or the CRLPA, this publication will continue to provide forms for use in litigation under those laws as well as under the ULPA '08. All references to *Corp. Code § 15501 et seq.* (ULPA) and to *Corp. Code § 15611 et seq.* (CRLPA) in this chapter are to provisions repealed as of 2010.

[2] Basic Approach of Act

[a] Background Considerations--Overview

The ULPA '08 extensively recasts and revises the provisions governing the organization and governance of limited partnerships. These changes are best understood in light of two important considerations underlying the Act, which was based large part on the Uniform Limited Partnership Act (2001) promulgated by the National Conference of Commissioners on Uniform State Laws [*see* Unif. Limited Partnership Act (2001), 6A U.L.A. (2003)].

[b] Current Role of Limited Partnerships

A basic consideration underlying the major changes made by the ULPA '08 is the recognition that entities such as limited liability general partnerships [*see § 400.14*], limited liability companies [*see* Ch. 346, *Limited Liability Companies*], and S corporations [*see I.R.C. §§ 1361(a), 1362*] have come to occupy many of the roles previously filled by limited partnerships. Those entities, however, do not lend themselves to two important roles that are still best accomplished through the use of limited partnerships.

First, a limited partnership is particularly appropriate as a vehicle for a sophisticated business enterprise with relatively entrenched management and relatively passive investors whose investment is essentially committed to the enterprise indefinitely. In such a case, a limited partnership provides the passive investors with the benefit of "pass-through" income tax treatment while affording them some control over management [*see* Unif. Limited Partnership Act (2001), Prefatory Note, 6A U.L.A. § 4.01[1] (2003); *see also* R. Bradbury Clark, California'S Uniform Limited Partnership Act of 2008--Summary and Analysis of the Act's Major Provisions, § 4.01[1] (LexisNexis 2007)].

A second situation in which a limited partnership is particularly appropriate is when a family seeks to manage intergenerational ownership and transfer of family assets, with one group of family members initially providing management and control, while other family members start out as essentially passive holders of interests but over time succeed to larger interests and more management control. Again, "pass-through" income tax treatment is ordinarily available to all limited and general partners [*see* Unif. Limited Partnership Act (2001), Prefatory Note, 6A U.L.A. 2-4 (2003); *see also* R. Bradbury Clark, California's Uniform Limited Partnership Act of 2008--Summary and Analysis of the Act's Major Provisions, § 4.01[1] (LexisNexis 2007)].

In either of the circumstances described above, a limited partnership can be especially useful when there is a relatively large or potentially unwieldy membership and carefully tailored managerial control, limited liability and pass-through tax treatment are required. Limited liability can also be achieved even for the management group, which can operate through a general partner that is organized as a corporation or limited liability company [*see* R. Bradbury Clark, California's Uniform Limited Partnership Act of 2008--Summary and Analysis of the Act's Major Provisions, § 4.01[1] (LexisNexis 2007)].

[c] Stand-Alone Nature of Act

Another consideration underlying the ULPA '08 (and the Uniform Limited Partnership Act (2001), which served as the basis for much of the ULPA '08) was the desire to eliminate the need to refer to general partnership law for any matters pertaining to limited partnerships [*see* Unif. Limited Partnership Act (2001), Prefatory Note, 6A U.L.A. 2-4 (2003)]. Accordingly, unlike its predecessors [*see § 400.12*], the ULPA '08 is a stand-alone law that does not rely on general partnership law or any other source for the rules governing limited partnerships. Thus, the ULPA '08 is the only source that needs to be consulted for the statutory rules governing formation, filings, contributions and distributions, rights of transferees and creditors, dissociation, dissolution, actions by partners, conversion and merger, dissenting limited partners' rights, and foreign limited partnerships.

The stand-alone nature of the ULPA '08 means that it is longer and more complex than its predecessors. For example, the ULPA '08 provides default rules (which apply unless superseded by the partners' agreement) for many aspects of limited-partnership duration, governance, management, and operation that were not covered in the ULPA or CRLPA. Therefore, counsel drafting partnership documents or considering an election to be governed by the ULPA '08 should carefully examine the Act and determine whether any of those default rules should be expressly overridden [*see* R. Bradbury Clark, California's Uniform Limited Partnership Act of 2008--Summary and Analysis of the Act's Major Provisions, § 4.01[2] (LexisNexis 2007)].

[3] Significant Changes Made by Act

[a] Partnership Purpose

The ULPA '08 authorizes the formation of a limited partnership for any lawful purpose, and a limited partnership may engage in any lawful business activity, whether or not for profit, except the banking business, the business of issuing insurance policies and assuming insurance risks, and the trust company business [*Corp. Code § 15901.04(b)* (ULPA '08)]. This represents a significant change from the CRLPA, which required limited partnerships to have an overall profit-making purpose [*see Corp. Code §§ 15616, 16202(a)* (CRLPA)]. The new law thus is tailored to facilitate the intergenerational family-ownership role identified for limited partnerships [*see* [2][b], *above*], and it opens the door for the use of limited partnerships to conduct nonprofit enterprises [*see* R. Bradbury Clark, California's Uniform Limited Partnership Act of 2008--Summary and Analysis of the Act's Major Provisions, § 4.02[2] (LexisNexis 2007).

[b] Partnership Duration

A limited partnership formed under the ULPA '08 has perpetual duration unless the partnership agreement provides otherwise [*Corp. Code §§ 15901.04(c), 15901.10(a)* (ULPA '08)]. A limited partnerships formed under previous law, however, has whatever duration it had under the law applicable immediately before January 1, 2008 [*see Corp. Code § 15912.06(c)(1)* (ULPA '08)].

[c] Partnership Agreement

The ULPA '08 is a stand-alone act and expressly provides default rules for many aspects of limited-partnership duration, governance, management, and operation that previous laws left to the parties' agreement [*see* [2][c], *above*]. Under the ULPA '08 the partnership agreement may override many of the default provisions, except that an agreement may not do

any of the following [*Corp. Code § 15901.10(b)* (ULPA '08)]:

- Vary a limited partnership's power under ULPA '08 to sue, be sued, and defend in its own name [*see Corp. Code § 15901.05* (ULPA '08)].

- Override the ULPA '08 provision that California law governs relations among the partners and between the partners and the limited partnership, and the liability of partners as partners for an obligation of the limited partnership [*see Corp. Code § 15901.06* (ULPA '08)].

- Vary the provisions of the ULPA '08 prescribing requirements for the signing of documents filed with the Secretary of State [*see Corp. Code § 15902.04* (ULPA '08)].

- Vary the information required to be maintained at the limited partnership's office [*see Corp. Code § 15901.11* (ULPA '08)] or unreasonably restrict partners' right to information [*see Corp. Code §§ 15903.04, 15904.07* (ULPA '08)], although the partnership agreement may impose reasonable restrictions on the availability and use of information and may define appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use.

- Eliminate general partners' duty of loyalty [*see Corp. Code § 15904.08* (ULPA '08)], although partnership agreement may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; and/or specify the number or percentage of partners that may authorize or ratify, after full disclosure to all partners of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty.

- Unreasonably reduce general partners' duty of care [*see Corp. Code § 15904.08(c)* (ULPA '08)].

- Eliminate the partners' obligation of good faith and fair dealing [*see Corp. Code §§ 15903.05(b), 15904.08(d)* (ULPA '08)], although the partnership agreement may prescribe the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable.

- Vary the power of a person to dissociate as a general partner [*see Corp. Code § 15906.04(a)* (ULPA '08)], except to require that the notice of intent to dissociate be in a record [*see Corp. Code § 15906.03(a)* (ULPA '08)].

- Eliminate the power of a court to decree dissolution when it is not reasonably practicable to carry on the activities of the limited partnership in conformity with the partnership agreement [*see Corp. Code § 15908.02(a)* (ULPA '08)].

- Vary the requirement to wind up the partnership's business [*see Corp. Code § 15908.03* (ULPA '08)].

- Unreasonably restrict any partner's right to maintain a direct action against the partnership or another partner [*see Corp. Code § 15910.01* (ULPA '08)].

- Restrict the right of a partner to approve a conversion or merger.

- Vary the provisions governing the rights of dissenting limited partners in conversions, mergers, or other reorganizations of the limited partnership [*see Corp. Code § 15911.20 et seq.* (ULPA '08)], except to the extent expressly permitted by those provisions.

- Restrict rights of a person other than a partner or a transferee.

[d] Partners' Fiduciary Duties

The ULPA '08 delineates, with more specificity than previous law, the fiduciary duties of general partners, which are the following [*Corp. Code § 15904.08(a)* (ULPA '08)]:

- A duty of loyalty to the limited partnership and the other partners, which is limited to (1) a duty to account to the limited partnership and hold as trustee for it any property, profit, or benefit derived by the general partner in the conduct and winding up of the limited partnership's activities or derived from a use by the general partner of limited partnership property, including the appropriation of a limited partnership opportunity; (2) a duty to refrain from dealing with the limited partnership in the conduct or winding up of the limited partnership's activities as or on behalf of a party having an interest adverse to the limited partnership; and (3) a duty to refrain from competing with the limited partnership in the conduct or winding up of the limited partnership's activities [*Corp. Code § 15904.08(b)* (ULPA '08)]. This specification of the general partners' duty of loyalty to a limited partnership is similar to that specified for partners in a general partnership under the Uniform Partnership Act of 1994, except that the ULPA '08 says the duty of loyalty is "limited" to the matters specified, while the Uniform Partnership Act of 1994 says the duty of loyalty "includes" the matters specified [*compare Corp. Code § 15904.08(b)* (ULPA '08) *with Corp. Code § 16404(b)* (UPA '94)].

- A duty of care to the limited partnership and the other partners in the conduct and winding up of the limited partnership's activities, which is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law [*Corp. Code § 15904.08(c)* (ULPA '08)].

In addition, both general partners and limited partners have a general obligation of good faith and fair dealing in exercising any rights and in discharging their duties to the partnership and the other partners under the ULPA '08 and under the partnership agreement [*Corp. Code §§ 15903.05(b), 15904.08(d)* (ULPA '08)]. Otherwise, the ULPA '08 itself imposes no fiduciary duties on limited partners [*Corp. Code § 15903.05(a)* (ULPA '08)].

[e] Limited Partners' Access to Partnership Information

The ULPA '08 provides limited partners with access to more information than was available under pervious law [*compare Corp. Code § 15903.04* (ULPA '08) *with Corp. Code § 15634* (CRLPA)]. However, the ULPA '08 permits the partnership to place certain restrictions on limited partners' access to and use of that information [*see Corp. Code § 15903.04(g), (h), (i)* (ULPA '08)].

[f] Judicial Dissolution

The ULPA '08 provides that when a partner applies for a judicial dissolution of a limited partnership, a nonapplying partner may buy out the partnership interest of the applying partner [*Corp. Code § 15908.02(b)-(f)* (ULPA '08)]. This option was not available under previous law [*see* R. Bradbury Clark, California's Uniform Limited Partnership Act of 2008--Summary and Analysis of the Act's Major Provisions, § 4.02[13] (LexisNexis 2007)].

[g] Transfer of Partnership Interests

The ULPA '08 provides a default rule that the only interest of a partner that is transferable is the right to receive distributions [*Corp. Code §§ 15901.02(ak), 15907.01* (ULPA '08)]. Under previous law, a partner's interest was assignable in whole or in part, and it could encompass the right to receive distributions as well as the assigning partner's entitlement to allocations of income, gain or loss, deductions, credits, and other items [*see Corp. Code § 15672(a)* (CRLPA)]. As a default rule, the ULPA '08 rule can be overridden, but only by an express provision in the limited

partnership agreement [*see* R. Bradbury Clark, California's Uniform Limited Partnership Act of 2008--Summary and Analysis of the Act's Major Provisions, § 4.02[14] (LexisNexis 2007)].

[4] Correlation Table

This table compares and correlates the provisions of the ULPA '08 with those of previous laws, the ULPA and the CRLPA, both of which are repealed as of January 1, 2010 [*see Corp. Code §§ 15534* (ULPA), 15724 (CRLPA); *see also § 400.12[1],[2]*]. Because the ULPA '08 is a stand-alone law, while the previous laws relied on general partnership law for many of the rules governing limited partnerships [*see* [2][c], *above*], many of the ULPA '08 provisions have no clear parallel in the ULPA or CRLPA.

ULPA '08 Corp. Code §	CRLPA Corp. Code §	ULPA Corp. Code §
15900	15721	15527
15901.02	15611	15501
15901.03		
15901.04	15616	15503
15901.05		
15901.06		
15901.07		
15901.08	15612	15505
15901.09	15613	
15901.10		
15901.11	15615	
15901.12	15617	15513
15901.13		
15901.14	15614	
15901.15	15637	
15901.16	15627	
15901.17	15627.5	
15902.01	15621	15502
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35-400 California Forms of Pleading and Practice--Annotated § 400.14

§ 400.14 Limited Liability Partnerships

A limited liability partnership is a general partnership governed by UPA'94 in the same manner as other general partnerships. The only types of limited liability partnerships recognized under either the pre-'97 Act or UPA'94 are registered limited liability partnerships and foreign limited liability partnerships [*Corp. Code § 16951*; former *Corp. Code § 15047*; *see § 400.20[5], [15]* (defining these partnerships)]. The distinguishing feature of the registered limited liability partnership is that partners are not jointly and severally liable for the debts of the partnership or other partners [*Corp. Code § 16306*; former *Corp. Code § 15015*]. This is discussed in Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties* , and Ch. 403, *Partnerships: Actions By and Against Dissociated Partners* .

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35-400 California Forms of Pleading and Practice--Annotated § 400.15

§ 400.15 Joint Ventures

Joint ventures, to the extent that courts treat them as partnerships, are governed by applicable partnership statutes [*see Orlopp v. Willardson Co. (1965) 232 Cal. App. 2d 750, 754, 43 Cal. Rptr. 125* ; *Milton Kauffman, Inc. v. Superior Court (1949) 94 Cal. App. 2d 8, 17, 210 P.2d 88]* . Courts occasionally treat joint ventures as distinct entities, however, in which case, they are governed by specific judicial opinions [*see, e.g.*, *Elsbach v. Mulligan (1943) 58 Cal. App. 2d 354, 369, 136 P.2d 651* (remedies of joint venturers as among themselves as different from those of partners)]. The decisional law applicable to joint ventures is discussed in connection with partnership litigation in the chapters to follow [*see* Chs. 401-406].

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[Reserved]

§§ 400.16[Reserved]

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35-400 California Forms of Pleading and Practice--Annotated § 400.20

§ 400.20 Definitions Pertaining to General Partnerships

[1] Scope

Both the pre-'97 Act and UPA'94 contain various definitional sections [*see, e.g., Corp. Code § 16101*, *16102*; former *Corp. Code § 15002*, *15003*]. Those definitions that are relevant to the litigation issues discussed in Chs. 401-406 are set out below so that they may be easily referenced in those chapters. When the definitions under the two Acts are identical or virtually the same, both Acts are cited. The pre-'97 Act and UPA'94 do, however, define some terms differently, or one Act may include a definition not found in the other. In such cases, either only one statute is cited in these materials and any differences between the two Acts identified or, if the language is not the same but it is clear that there is no substantive difference, only UPA'94 is cited along with a "see" reference to the pre-'97 Act.

Several UPA'94 definitions that relate solely to the conversion and merger of general partnerships have been omitted from the following list. Those definitions, to the extent they are relevant, are discussed in connection with actions by dissociated partners against a merged or converted partnership to enforce buy-out rights, or actions by creditors against those partners [*see* Ch. 403, *Partnerships: Actions By and Against Dissociated Partners*].

These definitions apply to all general partnerships, including limited liability partnerships, and to limited partnerships to the extent they are compatible with the limited partnership statutes. The ULPA and the CRLPA, which apply specifically to limited partnerships, also contain their own definitions, and these definitions are set out in *§ 400.21*.

[2] "Business"

"Business" includes every trade, occupation, and profession [*Corp. Code § 16101(1)*; former *Corp. Code § 15002(b)*].

[3] "Bankrupt" and "Debtor in Bankruptcy"

The pre-'97 Act defined "bankrupt" as including a debtor under Chapter 7 of the federal bankruptcy law or an insolvent under any state insolvency act [former*Corp. Code § 15002(d)*]. Under UPA'94, "debtor in bankruptcy" means a person who is the subject of either (a) an order for relief under Title 11 of the United States Code or a comparable order under a

successor statute of general application; or (b) a comparable order under federal, state, or foreign law governing insolvency [*Corp. Code § 16101(2)*].

[4] "Distribution"

Under UPA'94, a "distribution" is a transfer of money or other property from a partnership to a partner in the partner's capacity as a partner or to the partner's transferee [*Corp. Code § 16101(3)*].

[4A] "Electronic Transmission by the Partnership"

"Electronic transmission by the partnership" means a communication that is delivered to a recipient who has provided an unrevoked consent to the use of one of the following [*Corp. Code § 16101(4)(a),(b)*]:

- Facsimile telecommunication or electronic mail when directed to the facsimile number or electronic mail address, respectively, for that recipient on record with the partnership;

- Posting on an electronic message board or network that the partnership has designated for those communications, together with a separate notice to the recipient of the posting; or

- Another means of electronic communication.

The transmission must create a record that is capable of retention, retrieval, and review, and that thereafter may be rendered into clearly legible tangible form. However, an electronic transmission by a partnership to an individual partner is not authorized unless, in addition to satisfying the above requirements, the transmission satisfies the requirements applicable to consumer consent to electronic records as set forth in the Electronic Signatures in Global and National Commerce Act [*Corp. Code § 16101(4)(c)*; *see 15 U.S.C. § 7001(c)(1)*].

[4B] "Electronic Transmission to the Partnership"

"Electronic transmission to the partnership" means a communication delivered by one of the following [*Corp. Code § 16101(5)(a)*]:

- Facsimile telecommunication or electronic mail when directed to the facsimile number or electronic mail address, respectively, that the partnership has provided from time to time to partners for sending communications to the partnership;

- Posting on an electronic message board or network that the partnership has designated for those communications; or

- Another means of electronic communication.

The partnership must have placed in effect reasonable measures to verify that the sender is the partner (in person or by proxy) purporting to send the transmission [*Corp. Code § 16101(5)(b)*]. Furthermore, the transmission must create a record that is capable of retention, retrieval, and review, and that thereafter may be rendered into clearly legible tangible form [*Corp. Code § 16101(5)(c)*].

[5] "Foreign Limited Liability Partnership"

"Foreign limited liability partnership" means a partnership, other than a limited partnership, formed pursuant to an agreement governed by the laws of another jurisdiction and denominated or registered as a limited liability partnership or registered limited liability partnership under the laws of that jurisdiction (1) in which each partner is a licensed

person or a person licensed or authorized to provide professional limited liability partnership services in a jurisdiction or jurisdictions other than California; (2) which is licensed under the laws of the state to engage in the practice of public accountancy, the practice of architecture [*see Corp. Code § 16101(19)* (architecture included only until January 1, 2012)], or the practice of law; or (3) which (a) is related to a registered limited liability partnership that practices public accountancy or, to the extent permitted by this State Bar, practices law or is related to a foreign limited liability partnership, and (b) provides services related or complementary to the professional limited liability partnership services provided by, or provides services or facilities to, that registered limited liability partnership or foreign limited liability partnership [*Corp. Code § 16101(6)(A)*; former *Corp. Code § 15002(j)(1)*].

A partnership is "related to" a registered limited liability partnership or foreign limited liability partnership if (1) at least a majority of the partners in one partnership are also partners in the other partnership, or (2) at least a majority in interest in each partnership hold interests in or are members of another person, except an individual, and each partnership renders services pursuant to an agreement with that other person, or (3) one partnership, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the other partnership [*Corp. Code § 16101(6)(B)*; former *Corp. Code § 15002(j)(2)*].

[6] "Knowledge" and "Notice"

[a] Pre-'97 Act

A person has "knowledge" of a fact not only when the person has actual knowledge of that fact, but also when the person has knowledge of such other facts as in the circumstances shows bad faith [former *Corp. Code § 15003(1)*]. A person has "notice" of a fact when the person who claims the benefit of the notice either (1) states the fact to that person, or (2) delivers through the mail, or by other means of communication, a written statement of the fact to that person or to a proper person at that person's place of business or residence [former *Corp. Code § 15003(2)*].

[b] UPA'94

The definitions of "knowledge" and "notice" under UPA'94 are more precise than under the pre-'97 Act, especially with respect to imputed knowledge or notice, and are tied to the contents of limited liability partnership registrations and to partnership statements, which, as noted in *§ 400.11[5][i]*, serve to put third parties on notice of certain facts concerning the partnership.

A person knows a fact if the person has actual knowledge of it [*Corp. Code § 16102(a)*]. A person has "notice" of a fact if any of the following apply [*Corp. Code § 16102(b)*; *see Corp. Code §§ 16953(f), 16959(f)*]:

- The person knows of it.
- The person has received a notification of it.
- The person has reason to know it exists from all of the facts known to the person at the time in question.
- The facts are contained in a registration filed by a registered limited liability partnership or foreign limited liability partnership.

A person notifies or gives a notification to another by taking steps reasonably required to inform the other person in ordinary course, whether or not the other person knows of it [*Corp. Code § 16102(c)*]. A person receives a notification when either of the following apply [*Corp. Code § 16102(d)*]:

- The person knows of the notification.

- The notification is duly delivered at the person's place of business or at any other place held out by the person as a place for receiving communications.

A person *other than an individual* knows, has notice, or receives a notification of a fact for purposes of a particular transaction when the individual conducting the transaction knows, has notice, or receives a notification of the fact, or in any event when the fact would have been brought to the individual's attention if the person had exercised reasonablediligence. The person exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the individual conducting the transaction and there is reasonable compliance with the routines. Reasonable diligence does not require an individual acting for the person to communicate information unless the communication is part of the individual's regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information [*Corp. Code § 16102(e)*]. This rule essentially attributes to an entity the notice or knowledge of individuals conducting its transactions, and requires the entity to make sure the person conducting the transaction is kept informed.

A different and stricter rule applies, however, when the entity is a partnership and it is the partner who has knowledge, notice, or receives notification of a fact relating to the partnership. In such a case, the partner's knowledge, notice or receipt of notification is effective immediately as knowledge by, notice to, or receipt of a notification by the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner [*Corp. Code § 16102(f)*].

[7] "Licensed Person"

"Licensed person" means any person who is duly licensed, authorized, or registered under the Business and Professions Code to provide professional limited liability partnership services, or who is lawfully able to render professional limited liability partnership services in California [*Corp. Code § 16101(7)*; former *Corp. Code § 15002(h)*].

[8] "Partnership"

"Partnership" means an association of two or more persons to carry on as coowners a business for profit formed under the pre-'97 Act or UPA'94, a predecessor law, or comparable law of another jurisdiction, and includes, for all purposes of the laws of California, a registered limited liability partnership [*Corp. Code § 16101(9)*; former *Corp. Code § 15006(1)*; *see also Corp. Code § 16202*]. It excludes any partnership formed under the Uniform Limited Partnership Act [*Corp. Code § 15501 et seq.*] or California Revised Limited Partnership Act [*Corp. Code § 16101(9)*; *see Corp. Code § 15611 et seq.*].

[9] "Partnership Agreement"

"Partnership agreement" means the agreement, whether written, oral, or implied, among the partners concerning the partnership, including amendments to the partnership agreement [*Corp. Code § 16101(10)*]. This definition is a general codification of case law and the pre-'97 Act has no comparable provision.

[10] "Partnership at Will"

"Partnership at will" means a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking [*Corp. Code § 16101(11)*]. The pre-'97 Act contained no comparable definition, but its dissolution provisions distinguished between partnerships at will and those for a particular term or undertaking [*see* former *Corp. Code § 15031*].

[11] "Partnership Interest"

Under the pre-'97 Act, a partner's interest in the partnership was defined as the partner's share of the profits and surplus, which is personal property [former *Corp. Code § 15026*; *see Tinseltown Video, Inc. v. Transportation Insurance Company (1998) 61 Cal. App. 4th 184, 196-197, 71 Cal. Rptr. 2d 371* (partnership interest in video stores was interest in personalty, not realty, for purposes of insurance coverage for trespass)]. The property rights of a partner under the pre-'97 Act consisted of rights in specific partnership property, the partner's interest in the partnership, and the right to participate in management [former *Corp. Code § 15024*].

Under UPA'94, "partnership interest" and "partner's interest in the partnership" are defined inclusively but, because UPA'94 dispenses with the concept of tenancy in partnership, without reference to property rights in specific partnership property. Thus, these terms include all of a partner's interests in the partnership, including the partner's transferable interest and all management and other rights [*Corp. Code § 16101(12)*].

[12] "Person"

"Person" means an individual, corporation, business trust, estate, trust, partnership, limited partnership, limited liability partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity [*Corp. Code § 16101(13)*; *see* former *Corp. Code § 15002(c)*].

[13] "Professional Limited Liability Partnership Services"

"Professional limited liability partnership services" means the practice of public accountancy, the practice of architecture [*see Corp. Code § 16101(19)* (architecture included in this definition only until January 1, 2012)], or the practice of law [*Corp. Code § 16101(14)*; former *Corp. Code § 15002(g)*].

[14] "Property"

"Property" means all property, real, personal, or mixed, tangible or intangible, or any interest therein [*Corp. Code § 16101(15)*].

[15] "Registered Limited Liability Partnership"

"Registered limited liability partnership" means a partnership, other than a limited partnership, formed pursuant to an agreement governed by Article 8 [former *Corp. Code § 15047 et seq.*] or Article 10 [*Corp. Code § 16951 et seq.*] of the Corporations Code, and that is registered with the Secretary of State [*see Corp. Code § 16953*; former *Corp. Code § 15049*]. In addition, a registered limited liability partnership must meet *one* of the following requirements [*Corp. Code § 16101(8)(A)*; former *Corp. Code § 15002(i)(1)*]:

- Each of the partners is either a "licensed person" [*see* [7], *above*] or a person who is licensed or authorized to provide professional limited liability partnership services in a jurisdiction(s) other than California.

- The partnership is licensed under California law to engage in the practice of public accountancy, the practice of architecture [*see Corp. Code § 16101(19)* (architecture included only until January 1, 2012)], or the practice of law. The California Board of Accountancy licenses accounting partnerships, and the State Bar of California licenses law partnerships.

- The partnership is (1) related to a registered limited liability partnership that practices public accountancy or, to the extent permitted by the State Bar, practices law or is related to a foreign limited liability partnership; and (2) provides services related or complementary to the professional limited liability partnership services provided by, or provides services or facilities to, that registered limited

liability partnership or foreign limited liability partnership.

A partnership is related to a registered limited liability partnership or foreign limited liability partnership if [*Corp. Code § 16101(8)(B)*; former *Corp. Code § 15002(i)(2)*]:

- At least a majority of the partners in one partnership are also partners in the other partnership;

- At least a majority in interest in each partnership hold interests in or are members of another person, other than an individual, and each partnership renders services pursuant to an agreement with that other person; or

- One partnership, directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the other partnership.

[16] "Statement"

Under UPA'94, "statement" means a statement of [*Corp. Code § 16101(17)*]:

- Partnership authority [*see Corp. Code § 16303*].

- Denial of partnership authority [*see Corp. Code § 16304*].

- Dissociation [*see Corp. Code § 16704*].

- Dissolution [*see Corp. Code § 16805*].

- Conversion [*see Corp. Code § 16906*].

- Merger [*see Corp. Code § 16915*].

- An amendment or cancellation of any of the foregoing.

There is no comparable definition of "statement" under the pre-'97 Act. As noted above [*see § 400.11[5][i]*]. However, statements of partnership may be recorded under that Act to memorialize partnership title to real property and/or to limit the authority of individual partners to convey or encumber partnership real property [*see* former *Corp. Code §§ 15010.5-15010.7*].

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§ 400.21 Definitions Pertaining Specifically to Limited Partnerships

[1] In General

As a stand-alone law, the Uniform Limited Partnership Act of 2008 (ULPA '08), provides an exhaustive compilation of definitions pertaining specifically to limited partnerships [*see Corp. Code § 15901.02* (ULPA '08)]. Those definitions are discussed below [*see* [2]-[39], *below*]. In addition, the discussion below includes, as appropriate, citations to the definitions provided by the California Revised Limited Partnership Act (CRLPA) [*Corp. Code § 15611 et seq.* (CRLPA)], which is of limited applicability until January 1, 2010, when it will be repealed [*see Corp. Code § 15724* (CRLPA); *see also § 400.12[2]*]. The Uniform Limited Partnership Act (ULPA) [*Corp. Code § 15501 et seq.* (ULPA)], which preceded the CRLPA and also has some limited applicability until its repeal on January 1, 2010 [*see Corp. Code § 15534* (ULPA); *see also § 400.12[1]*], does not provide a separate compilation of definitions.

[2] "Acknowledged"

"Acknowledged" means that an instrument is either of the following [*Corp. Code § 15901.02(a)* (ULPA '08); *see also Corp. Code § 15611(a)* (CRLPA)]:

(1) Formally acknowledged as provided in the Civil Code [*see Civ. Code § 1180 et seq.*].

(2) Executed to include substantially the following wording preceding the signature: "It is hereby declared that I am the person who executed this instrument, which execution is my act and deed. Any certificate of acknowledgment taken without this state before a notary public or a judge or clerk of a court of record having an official seal need not be further authenticated."

[3] "Certificate of Limited Partnership"

"Certificate of limited partnership" means a certificate that meets the requirements of the ULPA '08 [*see Corp. Code § 15902.01* (ULPA '08)]. The term includes the certificate as amended or restated [*Corp. Code § 15901.02(b)* (ULPA '08); *see also Corp. Code § 15611(c)* (CRLPA)].

[4] "Contribution"

"Contribution," except in the phrase "right of contribution," means any benefit provided by a person to a limited partnership in order to become a partner or in the person's capacity as a partner [*Corp. Code § 15901.02(c)* (ULPA '08); *see also Corp. Code § 15611(g)* (CRLPA)].

[5] "Debtor in Bankruptcy"

"Debtor in bankruptcy" means a person that is the subject of either of the following [*Corp. Code § 15901.02(d)* (ULPA '08)]:

- An order for relief under the Bankruptcy Code [*see 11 U.S.C. § 101 et seq.*] or a comparable order under a successor statute of general application.

- A comparable order under federal, state, or foreign law governing insolvency.

[6] "Designated Office"

"Designated office" means either of the following [*Corp. Code § 15901.02(e)* (ULPA '08)]:

- With respect to a limited partnership, the office that the limited partnership is required to designate and maintain under the ULPA '08 [*see Corp. Code § 15901.14* (ULPA '08)].

- With respect to a foreign limited partnership, its principal office.

[7] "Distribution"

"Distribution" means a transfer of money or other property from a limited partnership to a partner in the partner's capacity as a partner or to a transferee on account of a transferable interest owned by the transferee [*Corp. Code § 15901.02(f)* (ULPA '08); *see also Corp. Code § 15611(j)* (CRLPA)].

[8] "Domestic Corporation"

"Domestic corporation" means a corporation formed under California law [*Corp. Code § 15901.02(g)* (ULPA '08)].

[9] "Electronic Transmission by the Partnership"

"Electronic transmission by the partnership" means a communication that meets both of the following requirements [*Corp. Code § 15901.02(h)* (ULPA '08)]:

- It is delivered by any of the following means:

  (1) Facsimile transmission or electronic mail when directed to the facsimile number or electronic mail address, respectively, for the recipient on the record with the partnership.

  (2) Posting on an electronic message board or other electronic database that the partnership has designated for the communication, together with a separate notice to the recipient of the posting. Valid delivery occurs on the later of either the posting or delivery of the separate notice of delivery.

(3) Other means of electronic communication.

- It is to a recipient that has provided an unrevoked consent to the use of the means of transmission used by the partnership in the electronic transmission.

[10] "Electronic Transmission to the Partnership"

"Electronic transmission to the partnership" means a communication that meets both of the following requirements [*Corp. Code § 15901.02(i)* (ULPA '08)]:

- It is delivered by any of the following means:

  (1) Facsimile communication or other electronic mail when directed to the facsimile number or electronic mail address, respectively, that the partnership has provided from time to time to the partners for sending communications to the partnership.

  (2) Posting on an electronic message board or electronic database that the partnership has designated for the communication. A transmission is validly delivered when posting occurs.

  (3) Other means of electronic communication.

- It is a communication as to which the partnership has placed in effect reasonable measures to verify that the sender is the partner purporting to send the transmission, either in person or by proxy.

[11] "Foreign Limited Liability Limited Partnership"

"Foreign limited liability limited partnership" means a foreign limited partnership whose general partners have limited liability for the obligations of the foreign limited partnership [*Corp. Code § 15901.02(j)* (ULPA '08)].

[12] "Foreign Limited Partnership"

"Foreign limited partnership" means a partnership formed under the laws of a jurisdiction other than California and required by those laws to have one or more general partners and one or more limited partners. The term includes a foreign limited liability limited partnership [*Corp. Code § 15901.02(k)* (ULPA '08); *see Corp. Code § 15901.02(j)* (ULPA '08); [11], *above*; *see also Corp. Code § 15611(l)* (CRLPA)].

[13] "Foreign Other Business Entity"

"Foreign other business entity" means an other business entity formed under the laws of any state other than California or under the laws of a foreign country [*Corp. Code § 15901.02*(*l*) (ULPA '08); *see also Corp. Code § 15611(m)* (CRLPA)].

[14] "General Partner"

"General partner" means the following [*Corp. Code § 15901.02(m)* (ULPA '08); *see also Corp. Code § 15611(n)* (CRLPA)]:

- With respect to a limited partnership, a person that (1) becomes a general partner under the ULPA '08 [*see Corp. Code § 15904.01* (ULPA '08)] or (2) was a general partner in a limited partnership when the limited partnership became subject to the ULPA '08 [*see Corp. Code § 15912.06(a), (b)* (ULPA '08)].

- With respect to a foreign limited partnership, a person that has rights, powers, and obligations similar to those of a general partner in a limited partnership.

[15] "Interests of All Partners"

"Interests of all partners" means the aggregate interests of all partners in the current profits derived from business operations of the partnership [*Corp. Code § 15901.02(n)* (ULPA '08); *see also Corp. Code § 15611(o)* (CRLPA)].

[16] "Interests of Limited Partners"

"Interests of limited partners" means the aggregate interests of all limited partners in their respective capacities as limited partners in the current profits derived from business operations of the partnership [*Corp. Code § 15901.02(o)* (ULPA '08); *see also Corp. Code § 15611(p)* (CRLPA)].

[17] "Limited Partner"

"Limited partner" means the following [*Corp. Code § 15901.02(p)* (ULPA '08); *see also Corp. Code § 15611(q)* (CRLPA)]:

- With respect to a limited partnership, a person that (1) becomes a limited partner under the ULPA '08 [*see Corp. Code §§ 15903.01, 15907.02(h)* (ULPA '08)], or (2) was a limited partner in a limited partnership when the limited partnership became subject to the ULPA '08 under *Corp. Code § 15912.06(a)* or *(b)* (ULPA '08)].

- With respect to a foreign limited partnership, a person that has rights, powers, and obligations similar to those of a limited partner in a limited partnership.

[18] "Limited Partnership or Domestic Limited Partnership"

"Limited partnership or domestic limited partnership," except in the phrases "foreign limited partnership" and "foreign limited liability limited partnership," means an entity, having one or more general partners and one or more limited partners, that is formed under the ULPA '08 by two or more persons, or that becomes subject to the ULPA '08 through a conversion or merger under *Corp. Code § 15911.01 et seq.* or through *Corp. Code § 15912.06(a)* or *(b)* (which provide when limited partnerships in existence before 2008 become subject to the ULPA '08) [*Corp. Code § 15901.02(q)* (ULPA '08)].

[19] "Mail"

"Mail" means first-class mail, postage prepaid, unless registered mail is specified. "Registered mail" includes certified mail [*Corp. Code § 15901.02(r)* (ULPA '08); *see also Corp. Code § 15611(s)* (CRLPA)].

[20] "Majority in Interest of All Partners"

"Majority in interest of all partners" means more than 50 percent of the interests of all partners [*Corp. Code § 15901.02(s)* (ULPA '08); *see also Corp. Code § 15611(t)* (CRLPA)].

[21] "Majority in Interest of the Limited Partners"

"Majority in interest of the limited partners" means more than 50 percent of the interests of limited partners [*Corp. Code § 15901.02(t)* (ULPA '08); *see also Corp. Code § 15611(u)* (CRLPA)].

[22] "Other Business Entity"

"Other business entity" means a corporation, general partnership, limited liability company, business trust, real estate investment trust, or an unincorporated association other than a nonprofit association, but the term excludes a limited partnership [*Corp. Code § 15901.02(u)* (ULPA '08)].

[23] "Parent of a Limited Partnership"

"Parent of a limited partnership" means any of the following [*Corp. Code § 15901.02(v)* (ULPA '08)]:

- A general partner of the limited partnership.

- A person possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of a general partner of the limited partnership.

- A person owning, directly or indirectly, limited partnership interests possessing more than 50 percent of the aggregate voting power of the limited partnership.

[24] "Partner"

"Partner" means a limited partner or general partner [*Corp. Code § 15901.02(w)* (ULPA '08); *see also Corp. Code § 15611(x)* (CRLPA)].

[25] "Partnership Agreement"

"Partnership agreement" means the partners' agreement, whether oral, implied, in a record, or in any combination, concerning the limited partnership. The term includes the agreement as amended [*Corp. Code § 15901.02(x)* (ULPA '08); *see also Corp. Code § 15611(y)* (CRLPA)].

[26] "Person"

"Person" means an individual, partnership, limited partnership, trust, estate, association, corporation, limited liability company, or other entity, whether domestic or foreign [*Corp. Code § 15901.02(y)* (ULPA '08); *see also Corp. Code § 15611(z)* (CRLPA)].

[27] "Person Dissociated as a General Partner"

"Person dissociated as a general partner" means a person dissociated as a general partner of a limited partnership [*Corp. Code § 15901.02(z)* (ULPA '08)].

[28] "Principal Office"

"Principal office" means the office where the principal executive office of a limited partnership or foreign limited partnership is located, whether or not the office is located in California [*Corp. Code § 15901.02(aa)* (ULPA '08)].

[29] "Proxy"

"Proxy" means a written authorization signed by a partner or the partner's attorney in fact giving another person the power to vote with respect to the interest of that partner. "Signed," for this purpose, means the placing of the partner's name on the proxy, whether by manual signature, typewriting, telegraphic transmission, or otherwise, by the partner or the partner's attorney in fact [*Corp. Code § 15901.02(ab)* (ULPA '08); *see also Corp. Code § 15611(aa)* (CRLPA)].

[30] "Record"

"Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form [*Corp. Code § 15901.02(ac)* (ULPA '08)].

[31] "Required Information"

"Required information" means the information that a limited partnership is required to maintain under the ULPA '08 [*Corp. Code § 15901.02(ad)* (ULPA '08); see *Corp. Code § 15901.11* (ULPA '08)].

[32] "Return of Capital"

"Return of capital" means any distribution to a partner to the extent that the aggregate distributions to that partner do not exceed that partner's contributions to the partnership [*Corp. Code § 15901.02(ae)* (ULPA '08); *see also Corp. Code § 15611(ab)* (CRLPA)].

[33] "Sign"

"Sign" means (1) to execute or adopt a tangible symbol with the present intent to authenticate a record; or (2) to attach or logically associate an electronic symbol, sound, or process to or with a record with the present intent to authenticate the record [*Corp. Code § 15901.02(af)* (ULPA '08)].

[34] "State"

"State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States [*Corp. Code § 15901.02(ag)* (ULPA '08)].

[35] "Time a Notice is Given or Sent"

"Time a notice is given or sent," unless otherwise expressly provided, means any of the following [*Corp. Code § 15901.02(ah)* (ULPA '08); *see also Corp. Code § 15611(af)* (CRLPA)]:

- The time a written notice to a partner or the limited partnership is deposited in the U.S. mail.

- The time any other written notice is personally delivered to the recipient, is delivered to a common carrier for transmission, or is actually transmitted by the person giving the notice by electronic means to the recipient.

- The time any oral notice is communicated, in person or by telephone or wireless, to the recipient or to a person at the office of the recipient who the person giving the notice has reason to believe will promptly communicate it to the recipient.

[36] "Transact Intrastate Business"

"Transact intrastate business" means, for purposes of registration, entering into repeated and successive transactions of business in California, other than interstate or foreign commerce [*Corp. Code § 15901.02(ai)(1)* (ULPA '08); *see also Corp. Code § 15611(ag)(1)* (CRLPA)].

A foreign limited partnership is not considered to be transacting intrastate business solely because of its status as one or more of the following: (1) a shareholder of a foreign corporation transacting intrastate business, (2) a shareholder of a

domestic corporation, (3) a limited partner of a foreign limited partnership transacting intrastate business, (4) a limited partner of a domestic limited partnership, (5) a member or manager of a foreign limited liability company transacting intrastate business, or (6) a member or manager of a domestic limited liability company [*Corp. Code § 15901.02(ai)(2)* (ULPA '08); *see also Corp. Code § 15611(ag)(2)* (CRLPA)].

Also, without excluding other activities that may not constitute transacting intrastate business, a foreign limited partnership is not considered to be transacting intrastate business solely by reason of carrying on in California one or more of the following activities [*Corp. Code § 15901.02(ai)(3)* (ULPA '08); *see also Corp. Code § 15611(ag)(3)* (CRLPA)]:

- Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims and disputes.

- Holding meetings of its partners or carrying on other activities concerning its internal affairs.

- Maintaining bank accounts.

- Maintaining offices or agencies for the transfer, exchange, and registration of its securities or depositories with relation to its securities.

- Effecting sales through independent contractors.

- Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where the orders require acceptance outside California before becoming binding contracts.

- Creating or acquiring evidences of debt or mortgages, liens, or security interests on real or personal property.

- Securing or collecting debts or enforcing mortgages and security interests in property securing the debts.

- Conducting an isolated transaction completed within a period of 180 days and not in the course of a number of repeated transactions of like nature.

- Transacting business in interstate commerce.

Further, a person is not be deemed to be transacting intrastate business in California solely because of the person's status as a limited partner of a domestic limited partnership or a foreign limited partnership registered to transact intrastate business in California [*Corp. Code § 15901.02(ai)(4)* (ULPA '08); *see also Corp. Code § 15611(ag)(4)* (CRLPA)].

The foregoing definition of "transact intrastate business" does not apply in determining the contacts or activities that may subject a foreign limited partnership to service of process, taxation, jurisdiction, or other regulation under any other law of California [*Corp. Code § 15901.02(ai)* (ULPA '08)].

[37] "Transfer"

"Transfer" includes an assignment, conveyance, deed, bill of sale, lease, mortgage, creation of a security interest or encumbrance, gift, and transfer by operation of law [*Corp. Code § 15901.02(aj)* (ULPA '08)].

[38] "Transferable Interest"

"Transferable interest" means a partner's right to receive distributions [*Corp. Code § 15901.02(ak)* (ULPA '08)].

[39] "Transferee"

"Transferee" means a person to which all or part of a transferable interest has been transferred, whether or not the transferor is a partner [*Corp. Code § 15901.02(al)* (ULPA '08)].

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[Reserved]

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35-400 California Forms of Pleading and Practice--Annotated § 400.30

§ 400.30 Related Matthew Bender Publications

For discussion and analysis of the enactment of and transition to UPA'94, see Ballantine & Sterling, California Corporation Laws, Ch. 24, *Partnerships* (Matthew Bender)

For discussion and analysis of the enactment of and transition to ULPA '08, see Ballantine & Sterling, California Corporation Laws, Ch. 25, *Limited Partnerships* (Matthew Bender).

For statements of partnerships, certificates of limited partnership, and registration forms for limited liability partnerships, see California Legal Forms, Ch. 15, *General Partnerships*; Ch. 15A, *Formation of Limited Partnerships*; Ch. 16C, *Limited Liability Partnerships* (Matthew Bender)

For memoranda relating to general and limited partnerships, see California Points and Authorities, Ch. 170, *Partnerships and Joint Ventures* (Matthew Bender)

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§ 400.31 State Statutes

[1] Limited Liability Partnerships

Definition of licensed person. *Corp. Code § 16101(7)*; former *Corp. Code § 15002(h)*

Definition of registered limited liability partnership. *Corp. Code § 16101(8)*; former *Corp. Code § 15002(i)*

Definition of foreign limited liability partnership. *Corp. Code § 16101(6)*; former *Corp. Code § 15002(j)*

Limitation on partners' personal liability. *Corp. Code § 16306*; former *Corp. Code § 15015*

Formation, registration, and existence of limited liability partnership. *Corp. Code §§ 16951-16962*; former *Corp. Code §§ 15047-15058*

[2] Uniform Limited Partnership Act of 2008

General provisions. *Corp. Code §§ 15900-15901.17*

Formation, certificate of limited partnership, and other filings. *Corp. Code §§ 15902.01-15902.09*

Limited partners. *Corp. Code §§ 15903.01-15903.07*

General partners. *Corp. Code §§ 15904.01-15904.09*

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Dissolution. *Corp. Code §§ 15908.01-15908.09*

Foreign limited partnerships. *Corp. Code §§ 15909.01-15909.08*

Actions by partners. *Corp. Code §§ 15910.01-15910.06*

Conversion and merger. *Corp. Code §§ 15911.01-15911.19*

Dissenting limited partners. *Corp. Code §§ 15911.20-15911.33*

Miscellaneous provisions. *Corp. Code §§ 15912.01-15912.07*

[3] California Revised Limited Partnership Act (CRLPA)

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Partnership name, office, and records. *Corp. Code §§ 15612-15615*

Contents and enforceability of partnership agreement. *Corp. Code §§ 15618-15619*

Formation and certificate of limited partnership; service of process. *Corp. Code §§ 15621-15628*

Limited partners. *Corp. Code §§ 15631-15638*

General partners. *Corp. Code §§ 15641-15645*

Partners' contributions to partnership. *Corp. Code §§ 15651-15655*

Partners' right to distributions; effect of withdrawal from partnership. *Corp. Code §§ 15661-15666*

Transfer and charging of partnership interests. *Corp. Code §§ 15671-15675*

Conversions. *Corp. Code §§ 15677.1-15679.1*

Merger. *Corp. Code §§ 15678.1-15678.10*

Rights of dissenting limited partners. *Corp. Code §§ 15679.1-15679.14*

Dissolution. *Corp. Code §§ 15681-15685*

Foreign limited partnerships. *Corp. Code §§ 15691-15699*

Class and derivative actions by limited partners. *Corp. Code §§ 15701, 15702*

Transition to CRLPA. *Corp. Code §§ 15710-15714*

Application of general partnership law. *Corp. Code § 15722*

Repeal of CRLPA, effective January 1, 2010. *Corp. Code § 15724*

[4] Uniform Limited Partnership Act (ULPA)

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Formation of limited partnership. *Corp. Code § 15502*

Certificate of limited partnership: contents, filing, amendment, and cancellation. *Corp. Code §§ 15502, 15506, 15524-15525.5*

Limited partners: rights and liabilities. *Corp. Code §§ 15501, 15507, 15508, 15510, 15511, 15513-15521*

General partners: rights and liabilities. *Corp. Code §§ 15509, 15512, 15520, 15520.5*

Creditors of limited partners. *Corp. Code § 15522*

Distributions. *Corp. Code § 15523*

Attorney general's powers. *Corp. Code § 15532*

Repeal of ULPA, effective January 1, 2010. *Corp. Code § 15534*

[5] Uniform Partnership Act (Pre-'97 Act)

Definitions and construction of terms. Former *Corp. Code §§ 15001-15004*

Nature of partnership and partnership property. Former *Corp. Code §§ 15006-15008*

Partners' liability to third parties; effect of partnership statement. Former *Corp. Code §§ 15009-15017*

Rights and duties of partners to each other. Former *Corp. Code §§ 15018-15023*

Partnership interests: assignment and transfer. Former *Corp. Code §§ 15024-15028*

Dissolution. Former *Corp. Code §§ 15029-15043*

Mergers. Former *Corp. Code § 15046*

[6] Uniform Partnership Act of 1994 (UPA'94)

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Scope and limitation of partnership agreement. *Corp. Code § 16103*

Statement of partnership. *Corp. Code § 16105*

Effective dates of UPA'94; election to be governed by. *Corp. Code § 16111*

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Rights and duties of partners to each other. *Corp. Code §§ 16401-16406*

Transferee of partnership interests; creditors' rights. *Corp. Code §§ 16501-16504*

Partner's dissociation. *Corp. Code §§ 16601-16705*

Winding up partnership business. *Corp. Code §§ 16801-16807*

Conversions and mergers. *Corp. Code §§ 16901-16917*

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§ 400.32 Law Reviews

Thomas E. Rutledge & Phuc H. Lu, *No Good Deed Goes Unpunished: Pitfalls for Counsel to a Business Organization About to Be Governed by a New Law, 45 Brandeis L.J. 755 (2007)*

Stephanson, *How to Establish a Successful Family Limited Partnership, 44(7) Prac. Law. 41 (1998)*

Bishop, *The Limited Liability Partnership Amendments to the Uniform Partnership Act* (1994), *53 Bus. Law. 101 (1997)*

Fischer, *Representing Partnerships: Who Is/Are the Clients(s)*, 26 Prac. L.J. 961 (1995)

Merril, *Partnership Property and Partnership Authority Under the Revised Uniform Partnership Act, 49 Bus. Law. 83 (1993)*

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35-401 California Forms of Pleading and Practice--Annotated 401.syn

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§ 401.41 Complaint for Damages for Breach of Partnership Agreement [Corp. Code § 16405(b)(1); former Corp. Code § 15038(b)(1)(B); Civ. Code § 3300], Breach of Fiduciary Duty [Corp. Code §§ 16404(c), 16405(b)(2)(A)], Conversion [Civ. Code § 3336], and Fraud [Civ. Code §§ 1709, 3333]--Repudiation of Partnership Contract and Conversion of Partnership Assets by Partner [Civ. Code §§ 1573, 1710(4)]

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[6] Cross References

§ 401.42 Complaint for Partnership Accounting [Corp. Code § 16405(b); former Corp. Code § 15022] and for Declaratory Relief--By Wrongfully Excluded Partner [Corp. Code §§ 16401(f), 16405(b)(1); former Corp. Code §§ 15018(e), 15022(a)]

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§ 401.43 Allegation for Complaint for Partnership Accounting [Corp. Code § 16405(b)(2)(a); former Corp. Code § 15022(c)]--Against Partner(s) Who Received Benefits From Partnership Without Copartner's Consent [Corp. Code § 16404(b)(1); former Corp. Code § 15021(1)]

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35-401 California Forms of Pleading and Practice--Annotated § 401.01

§ 401.01 Scope of Chapter

This chapter covers actions between general partners and between the partners and the partnership based on:

- Partnership contractual rights.
- The partners' right to an accounting.
- The Partners' right to have access to partnership information.
- Actions based on breach of partnership fiduciary duties.

Actions between dissociated partners and the partnership or third parties are governed by specific rules under UPA'94 and are discussed in Ch. 403, *Partnerships: Actions By and Against Dissociated Partners* .

Actions between partners to dissolve the partnership [*see* Ch. 406, *Partnerships: Dissolution*].

This chapter contains the following forms:

- Complaints by partners based on rescission or repudiation of a partnership agreement [*see §§ 401.40, 401.41*].
- Complaints and allegations by partners for accounting without dissolution of the partnership [*see* §§ 401.42-401.44].
- An allegation to be used when a joint venture is alleged [*see § 401.45*].

Legal Topics:

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

Business & Corporate LawGeneral PartnershipsDissolution & Winding UpGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionWithdrawalBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpAccountingBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewContracts LawTypes of ContractsPartnership AgreementsTortsIntentional TortsBreach of Fiduciary DutyGeneral Overview

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§ 401.02 Cross References

- For discussion and forms relating to actions for accounting, see Ch. 7, *Accounting, Action For* .
- For discussion and forms relating contract actions, see Ch. 140, *Contracts* .
- For discussion and forms relating to actions for conversion, see Ch. 150, *Conversion* .
- For discussion and forms relating to actions for fraud and deceit, see Ch. 269, *Fraud and Deceit* .
- For discussion of the statutes governing general partnerships, see Ch. 400, *Partnerships: Governing Statutes* .
- For discussion and forms relating to actions between general partners or partnerships and third parties, see Ch. 402, *Partnerships: Actions Between General Partners or General Partnership and Third Parties* .
- For discussion and forms relating to actions between dissociated partners, the partnership, and third parties, see Ch. 403, *Partnerships: Actions By and Against Dissociated Partners* .
- For discussion and forms relating to the dissolution of partnerships, see Ch. 406, *Partnerships: Dissolution* .
- For discussion and forms relating actions for rescission and restitution, see Ch. 490, *Rescission and Restitution* .
- For discussion and forms relating to actions for specific performance, see Ch. 528, *Specific Performance* .
- For discussion and forms relating to actions based on unfair competition, see Ch. 565, *Unfair*

Competition .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionWithdrawalContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesSpecific PerformanceContracts LawThird PartiesGeneral Overview

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[Reserved]

§§ 401.03[Reserved]

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§ 401.10 Governing Law

[1] Under Uniform Acts

Since January 1, 1999, all partnerships have been governed by the Uniform Partnership Act of 1994 (UPA'94) [*Corp. Code § 16111(b)*; see *Corp. Code § 16100 et seq.*], regardless of when they were formed. Prior to that date, partnerships formed before January 1, 1997, were governed by the earlier of (1) the date when they elected to be governed by the UPA'94, or (2) January 1, 1999 [*Corp. Code § 16111*]. As of January 1, 1999, the pre-1997 version of the UPA (pre-'97 Act) was repealed [Stats. 1996 ch. 1003, §§ 1.2, 18, operative Jan. 1, 1999]. Repeal of the pre-'97 Act, however, did not affect actions or proceedings commenced, or rights accrued, prior to the effective date of the UPA'94 [*Corp. Code § 16112*]. For that reason, discussion of the pre-'97 Act has been retained in the partnership coverage in this publication. All references to *Corp. Code §§ 15001-15045* in this chapter are to the repealed provisions of the pre-'97 Act. For more detailed discussion see *Ch. 400, Partnerships: Governing Statutes, §§ 400.10, 400.11*.

Prior to partnership dissolution or the dissociation of a partner, the relations between general partners, and between the partnership and the partners, are governed by *Corp. Code §§ 16401-16406*. The pre-'97 Act specifically provided for actions to rescind a partnership agreement [former *Corp. Code § 15039*], but that provision was not carried over to UPA'94. Instead, the latter Act broadly authorizes partners to maintain an action to enforce rights and protect interests, including rights and interests arising independently of the partnership relationship [*Corp. Code § 16405*].

[2] Joint Ventures

As in the case of partners, the relationship between joint venturers is fiduciary, and the rights of joint venturers are governed by the same principles and rules of law that govern partnerships [*see Zeibak v. Nasser (1938) 12 Cal. 2d 1, 12, 82 P.2d 375* ; *Butler v. Union Trust Co. (1918) 178 Cal. 195, 198, 172 P. 601* ; *Cahill Bros., Inc. v. Clementina Co. (1962) 208 Cal. App. 2d 367, 388, 25 Cal. Rptr. 301]* . Pre-'97 Act decisions involving actions between joint venturers routinely cite that Act as governing the relations between partners and between the partners and the partnership [*see, e.g., Leff v. Gunter (1983) 33 Cal. 3d 508, 514, 189 Cal. Rptr. 377, 658 P.2d 740]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsGeneral OverviewBusiness & Corporate LawGeneral PartnershipsFormationGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewBusiness & Corporate LawJoint VenturesGeneral OverviewBusiness & Corporate LawJoint VenturesManagement Duties & LiabilitiesContracts LawTypes of ContractsJoint ContractsContracts LawTypes of ContractsPartnership Agreements

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Chapter 401 PARTNERSHIPS: ACTIONS BETWEEN GENERAL PARTNERS AND PARTNERSHIP
PART II. LEGAL BACKGROUND

35-401 California Forms of Pleading and Practice--Annotated § 401.11

§ 401.11 Enforcement of Partners' Rights and Duties Under Pre-'97 Act

[1] Partnership's Right to Accounting

Every partner must account to the partnership for any benefit, and hold as trustee for it any profits, derived without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use of partnership property [former *Corp. Code § 15021(1)*]. This rule also applies to a representatives of a deceased partner when they are liquidating the partnership as representatives of the last surviving partner [former *Corp. Code § 15021(2)*].

[2] Partner's Right to Accounting

Other than actions for dissolution or to enforce the rights of withdrawing partners, partners in partnerships governed by the pre-'97 Act are given the right to a formal account as to partnership affairs when [former *Corp. Code § 15022(a)-(d)*]:

- The partner is wrongfully excluded from the partnership business or possession of its property by copartners.
- The right exists under the terms of any agreement.
- A copartner has a duty to account for benefits received from use of partnership property without the consent of the other partners [*see* former Corp. Code § 15201].
- Other circumstances render it just and reasonable.

[3] Actions at Law Between Partners

[a] General Rule

[i] Partnerships

The general rule, in cases decided under the pre-'97 Act, is that in the absence of statutory authority, no action at law may be maintained between partners with respect to partnership transactions [*Johnstone v. Morris (1930) 210 Cal. 580, 583-584, 292 P. 970* ; *Malott v. Seymour (1950) 101 Cal. App. 2d 245, 246, 225 P.2d 310]* . One partner suing another must bring an equitable suit for dissolution and for an accounting [*Hosking v. Spartan Properties, Inc. (1969) 275 Cal. App. 2d 152, 156, 79 Cal. Rptr. 893]* . The reason for the general rule is that it cannot be known whether the partner suing is in fact indebted to the partnership, or that the other members may not also be creditors of the partnership, or that there may not be outstanding firm debts entitled to preference over the debt due the partners themselves sufficient to exhaust the firm assets [*Malott v. Seymour (1950) 101 Cal. App. 2d 245, 246-247, 225 P.2d 310]* . In addition, in a partnership transaction, a partner usually becomes the creditor or debtor of the partnership rather than the creditor or debtor of his or her copartner [*Long v. Newlin (1956) 144 Cal. App. 2d 509, 513, 301 P.2d 271]* .

[ii] Joint Ventures

As with partnerships, generally a joint venturer cannot maintain an action at law against other joint venturers arising out of any transaction of the joint venture. The proper remedy is an equitable action for dissolution and accounting of the affairs of the enterprise [*Barlin v. Barlin (1956) 145 Cal. App. 2d 390, 393, 302 P.2d 457]* . The partnership exceptions to the general rule, however, also apply to joint ventures [*see* *Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 557, 140 Cal. Rptr. 330* ; *Mayo v. Pacific Project Consultants, Inc. (1969) 1 Cal. App. 3d 1013, 1019, 82 Cal. Rptr. 117* ; *see also* [b], *below*].

Some cases treat joint ventures somewhat differently than partnerships with respect to actions between joint venturers. At least one court has held that the partnership rule requiring an equitable action for an accounting rather than an action at law does not apply with the same force to joint venturers, who may sue each other at law for damages [*Elsbach v. Mulligan (1943) 58 Cal. App. 2d 354, 369, 136 P.2d 651* ; *see also* *Keyes v. Nims (1919) 43 Cal. App. 1, 9, 184 P. 695* ; *contra* *Cunningham v. De Mordaigle (1947) 82 Cal. App. 2d 620, 621, 186 P.2d 423]* . However, the cases treating joint ventures differently from partnerships are in the minority.

[b] Exceptions

The general rule is subject to exceptions that arise when reasons for denying a legal action do not exist, e.g., the transaction in question is not connected with the partnership business [*Hosking v. Spartan Properties, Inc. (1969) 275 Cal. App. 2d 152, 157, 79 Cal. Rptr. 893]* . Similarly, an action for damages is appropriate when, although the partnership came into existence, a partner had caused a wrongful dissolution of the partnership by converting its assets to his own use [*Laughlin v. Haberfelde (1946) 72 Cal. App. 2d 780, 788, 165 P.2d 544]* , or by refusing to perform a severable undertaking in the partnership agreement relating solely to a transaction between the partners [*Van Fleet-Durkee, Inc. v. Oyster (1952) 112 Cal. App. 2d 739, 247 P.2d 403* ; *Blonder v. Gentile (1957) 149 Cal. App. 2d 869, 309 P.2d 147]* .

The general rule also is inapplicable when the very existence of the partnership is at issue [*Long v. Newlin (1956) 144 Cal. App. 2d 509, 512, 301 P.2d 271]* . For example, one partner may seek to rescind the partnership agreement on the basis of fraud [*Weltman v. Kaye (1959) 167 Cal. App. 2d 607, 612-613, 334 P.2d 917* ; *Long v. Newlin (1956) 144 Cal. App. 2d 509, 512, 301 P.2d 271]* ; or, when a partner repudiates the partnership agreement and converts the partnership assets, the other partner or partners may bring an action for damages for fraud or conversion [*Navarro v. Perron, (2004) 122 Cal. App. 4th 797, 802, 19 Cal. Rptr. 3d 198* ; *see* *Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 562-563, 140 Cal. Rptr. 330* (involving joint venture); *Boyd v. Bevilacqua (1966) 247 Cal. App. 2d 272, 294-295, 55 Cal. Rptr. 610* (involving joint venture)]. If there is a breach of the partnership agreement, the test for determining whether or not a partner may bring an action at law against the breaching copartner is whether or not damages resulting from the breach belong exclusively to other partners and not to the partnership, and whether or not damages can be assessed without taking account of the partnership business [*Long v. Newlin (1956) 144 Cal. App. 2d 509, 513-514,*

301 P.2d 271] . It is also proper to combine an action at law with an accounting and dissolution of the partnership, when circumstances require, in order to afford full and adequate relief to the parties [*Prince v. Harting (1960) 177 Cal. App. 2d 720, 736-737, 2 Cal. Rptr. 545]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsDissolution & Winding UpGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpAccountingBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpDistribution of Estate PropertyBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionPartnership LiabilitiesBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersPartnership PropertyBusiness & Corporate LawJoint VenturesDissolution & Winding UpCivil ProcedureRemediesEquitable AccountingsPartnershipsContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawTypes of ContractsDivisible ContractsContracts LawTypes of ContractsPartnership Agreements

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35-401 California Forms of Pleading and Practice--Annotated § 401.12

§ 401.12 Enforcement of Partners' Rights and Duties Under UPA'94

[1] By Partnership Against Partner

A partnership may maintain an action against a partner for a breach of the partnership agreement or a violation of a duty to the partnership that causes harm to the partnership [*Corp. Code § 16405(a)*]

[2] Actions by Partners

Apart from the rights a partner has to commence an action to dissolve the partnership or to enforce that partner's rights as a dissociating partner, a partner in a partnership governed by UPA'94 may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to do any of the following [*Corp. Code § 16405(b)*]:

- Enforce the partner's rights under the partnership agreement.

- Enforce the partner's rights granted under UPA'94, including the rights specified in *Corp. Code § 16401*.

- Enforce the rights and protect the interests of the partner, including those that arise independently of the partnership.

Note that the language of *Corp. Code § 16405(b)* gives a partner the right to sue for an accounting in conjunction with the enforcement of *any* of these rights. Former *Corp. Code § 15022* in the pre-'97 Act also gives a partner the right to an accounting independent of an action to dissolve the partnership. It can be argued that unless that section is construed to permit a partner to seek an accounting prior to dissolution, it would appear to be merely duplicative of other sections of the pre-'97 Act that permit a partner seek a court-supervised dissolution [*see* former *Corp. Code § 15032*], to wind up partnership affairs [*see* former *Corp. Code § 15037*], and to obtain an accounting in accordance with the rules for settling accounts between partners [*see* former *Corp. Code § 15040*]. Thus, former *Corp. Code § 15022* can only be saved from being an "idle act" if it permits a partner to enforce the right to an accounting in circumstances not requiring dissolution. The same observations apply with respect to *Corp. Code § 16405(b)*. As a practical matter, however, it

seems likely that a partnership in which a partner is forced to seek the aid of equity to enforce his or her rights has deteriorated to the point where dissolution is imminent.

Corp. Code § 16405(b) permits a partner to maintain an action to enforce the partner's rights *without* an accounting. This raises the question of whether decisions under the pre-'97 Act--requiring, with some exceptions [*see § 401.11[3][b]*], an action for accounting between partners or the partnership--remain good law under UPA'94. Since the reason for the general rule--that an accounting is necessary because it is impossible to determine the indebtedness of the parties until partnership accounts have been settled--have not changed, it is likely that pre-'97 Act case law will continue to apply and that, as a rule, courts will not entertain actions at law for damages unless they include a prayer for an accounting as well.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsDissolution & Winding UpGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionBreach of Agreement & ExpulsionBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpAccountingBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionPartnership LiabilitiesBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewContracts LawTypes of ContractsPartnership Agreements

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35-401 California Forms of Pleading and Practice--Annotated § 401.13

§ 401.13 Actions Related to Partnership Formation

[1] Issues Arising in Partnership Formation

[a] Generally

A threshold issue in partnership litigation, often involving those claiming either to be or not to be partners, is whether or not a partnership was actually formed. Whether or not a partnership has been formed may in turn determine the remedies available to partners in the event of disagreements between them.

[b] Objective Intent to Form Partnership

A partnership [*see Corp. Code § 16101(9), 16202*; former *Corp. Code § 15006* (defining "partnership"); *see also* Ch. 400, *Partnerships: Governing Statutes*] may be formed whether or not the persons intend to form one [*Corp. Code § 16202(a)*], and its existence does not depend on a formal written agreement [*Cochran v. Board of Supervisors (1978) 85 Cal. App.3d 75, 81, 149 Cal. Rptr. 304]* . For example, a partnership formed for the purpose of buying and selling real property may be created by oral agreement, and is not voidable under the provisions of the statute of frauds that requires a contract for the creation, sale, or transfer of an interest in land to be in writing [*Sadugor v. Holstein (1962) 199 Cal. App. 2d 477, 480, 18 Cal. Rptr. 859* ; *En Taik Ha v. Kang (1960) 187 Cal. App. 2d 84, 90-91, 9 Cal. Rptr. 425* ; *see Civ. Code § 1624(a)(3)*]. A partnership may also be inferred from the acts and declarations of the parties [*Cochran v. Board of Supervisors (1978) 85 Cal. App. 3d 75, 81, 149 Cal. Rptr. 304]* .

[c] Intent to Carry On Business for Profit

Although a partnership may be formed without the parties' subjective intent to form one [*Corp. Code § 16202(a)*], the parties nevertheless must have the intention of carrying on a business as coowners for a profit [*see Corp. Code § 16202(a)*; former *Corp. Code § 15006(1)*; *Cochran v. Board of Supervisors (1978) 85 Cal. App. 3d 75, 81, 149 Cal. Rptr. 304* ; *In re Marino, 813 F.2d 1562, 1565* (9th Cir. [Cal.] 1987)]. This intention may be determined from the terms of the parties' agreement or from surrounding circumstances [*Security Pac. Nat. Bank v. Matek (1985) 175 Cal. App. 3d 1071, 1075, 223 Cal. Rptr. 288]* . Under both UPA'94 and its immediate predecessor, an express agreement to divide profits is not a prerequisite to prove the existence of a partnership [*Holmes v. Lerner (1999) 74 Cal. App. 4th 442,*

453-454, 457, 88 Cal. Rptr. 2d. 130 ; *see* former *Corp. Code § 15006*; *Corp. Code § 16202(a)* (statutory definitions of partnership); *see also* former *Corp. Code § 15018*; *Corp. Code § 16401(b)* (rules for situation in which the partners have not expressly stated an agreement regarding sharing of profits)]. For discussion of the significance of sharing profits and losses, see [f], *below*.

[d] Community of Interest

Courts have used the term "community of interest" to refer either to the parties' joint interest in the capital, profit, and loss of the business, or to the parties' right to make contracts, incur liabilities, and otherwise manage the affairs of the business [*Moulin v. Der Zakarian (1961) 191 Cal. App. 2d 184, 189, 12 Cal. Rptr. 572* ; *People v. Woolson (1960) 181 Cal. App. 2d 657, 669, 5 Cal. Rptr. 766]* .

Numerous cases interpreting the pre-'97 Act have held that one of the essential elements of a partnership is that each partner must have some control over the management of the enterprise [*People v. Park (1978) 87 Cal. App. 3d 550, 564, 151 Cal. Rptr. 146* ; *Bank of California v. Connolly (1973) 36 Cal. App. 3d 350, 364, 111 Cal. Rptr. 468* ; *Billups v. Tiernan (1970) 11 Cal. App. 3d 372, 379, 90 Cal. Rptr. 246]* . It is not necessary, however, that the partners' duties be equal [*Cochran v. Board of Supervisors (1978) 85 Cal. App. 3d 75, 81, 149 Cal. Rptr. 304 (1978)]* . Furthermore, partners may by agreement entrust the management of the business to one or more of the partners, the making of such an agreement being itself an exercise of the requisite right of control [*see Corp. Code § 16401(f)*; former *Corp. Code § 15018(e)* (all partners have equal right to manage); *Moulin v. Der Zakarian (1961) 191 Cal. App. 2d 184, 190, 12 Cal. Rptr. 572* ; *Singleton v. Fuller (1953) 118 Cal. App. 2d 733, 741* ; *Constans v. Ross (1951) 106 Cal. App. 2d 381, 388-389, 235 P.2d 113]* .

[e] Contributions to Capital

Although it is assumed that each partner ordinarily will contribute capital to the partnership [*see Corp. Code § 16401(a)(1)*; former *Corp. Code § 15018(a)* (partner's account credited for contributions)], an equal (or any) contribution to capital by each partner is not necessarily required to find the existence of a partnership [*Galardi v. State Bar (1987) 43 Cal. 3d 683, 691, 238 Cal. Rptr. 774, 739 P.2d 134* (rule stated for joint venture); *Sandberg v. Jacobson (1967) 253 Cal. App. 2d 663, 667-668, 61 Cal. Rptr. 436 (1967)]* . For example, some partners may contribute their labor and skill to the venture in lieu of capital [*Galardi v. State Bar (1987) 43 Cal. 3d 683, 691, 238 Cal. Rptr. 774, 739 P.2d 134* ; *Okun v. Morton (1988) 203 Cal. App. 3d 805, 250 Cal. Rptr. 220]* .

[f] Agreement for Division of Profits and Losses

The basic statutory definition of a partnership is the association of two or more persons to carry on as co-owners a business for profit [*Corp. Code § 16202(a)*; former *Corp. Code § 15006*]. Under definitions in earlier versions of the UPA, which placed greater emphasis on the division of profits and losses, there is case law stating that agreement to share profits and losses is an essential element of a partnership [*see, e.g.,* *People v. Park (1978) 87 Cal. App. 3d 550, 563, 151 Cal. Rptr. 146]* . More recently, however, it was held that under the version of the UPA that immediately preceded UPA'94, profit sharing is evidence of a partnership, rather than a required element of the definition of a partnership. The actual sharing of profits therefore was prima facie evidence which was to be considered, in light of any other evidence, when determining if a partnership exists [*Holmes v. Lerner (1999) 74 Cal. App. 4th 442, 453-454, 457, 88 Cal. Rptr. 2d. 130* ; *see also* former *Corp. Code § 15018* (provides rules for situation in which the partners have not expressly stated an agreement regarding sharing of profits)].

UPA'94, like its immediate predecessor, does not expressly require profit sharing as an essential element of a partnership [*see Corp. Code § 16202(a)*]. Under the UPA'94, the sharing of profits is recharacterized as an evidentiary presumption, rather than prima facie evidence [*Corp. Code § 16202(c)(3)*; *Holmes v. Lerner (1999) 74 Cal. App. 4th 442, 454 n. 14, 88 Cal. Rptr. 2d. 130]* . A person who receives a share of the profits of a business is presumed to be a

partner in the business, except as noted below [*Corp. Code § 16202(c)(3)*].

The inference of partnership from an agreement to share profits, however, must be accompanied by some evidence that the agreement is in furtherance of the parties' intention to carry on a business together. Thus, a landowner's agreement to share with another profits to be derived from sale of the land does not, without more, establish a prima facie case for a partnership [*Bank of California v. Connolly (1973) 36 Cal. App. 3d 350, 111 Cal. Rptr. 468]* . Similarly, the presumption is overcome when substantial evidence is introduced showing the relationship to be that of lender and borrower with the profits being paid for services rendered or money advanced [*Dills v. Delira Corp. (1956) 145 Cal. App. 2d 124, 131, 302 P.2d 397]* .

The presumption of a partnership relation does not apply if profits were received in payment for [*Corp. Code § 16202(c)(3)(A)-(F)*; former *Corp. Code § 15007(4)*]:

- A debt by installments or otherwise.
- Services as an independent contractor.
- Wages.
- Rent to a landlord.
- An annuity to a surviving spouse or representative of a deceased or retired partner.
- Interest on a loan, even though the amount of the payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, rights to income, proceeds, or increase in value derived from the collateral.
- The consideration for the sale of the goodwill of a business or other property by installments or otherwise.

With respect to losses, subject to their agreement and except for limitations with respect to preexisting liabilities and limited liability partnership liabilities, partners must contribute toward the losses of the partnership, whether capital or otherwise, according to their shares of the profits [*Corp. Code § 16401(b)*; former *Corp. Code § 15018(a)*]. Further, an agreement for a division of the profits implies an agreement to also bear the losses of the enterprise [*Sandberg v. Jacobson (1967) 253 Cal. App. 2d 663, 668, 61 Cal. Rptr. 436]* , which may be used to rebut a contention that, because there is no provision in the parties' agreement for sharing losses, the party charged with the debts of an alleged partnership must be merely an investor in the business and therefore not liable to its creditors [*Meirelles v. Good (1961) 192 Cal. App. 2d 40, 49, 13 Cal. Rptr. 215]* . The implied agreement to share losses may also be used to aid parties claiming status as partners by virtue of an agreement that is silent regarding the division of losses [*Martyn v. Leslie (1955) 137 Cal. App. 2d 41, 61, 290 P.2d 58]* . As with the division of profits, the division of losses may be left to the agreement of the parties [*Corp. Code § 16103*; former *Corp. Code § 15018*; *Sandberg v. Jacobson (1967) 253 Cal. App. 2d 663, 668, 61 Cal. Rptr. 436]* .

[g] Partnership Agreement

A partnership can be formed only with the consent of the parties [*Solomont v. Polk Development Co. (1966) 245 Cal. App. 2d 488, 497, 54 Cal. Rptr. 22]* . Consequently, some kind of partnership agreement, whether express or implied, oral or written, is necessary [*Leff v. Gunter (1983) 33 Cal. 3d 508, 518, 189 Cal. Rptr. 377, 658 P.2d 740]* . "Partnerships by estoppel" [*see* Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties*] are not an exception to this rule because they involve only the treatment of persons as if they were partners

based on their conduct; that conduct, however, does not actually result in the formation of a partnership.

Whether an agreement is express or implied, its provisions define the respective rights and duties of the parties within statutory limits [*Corp. Code § 16103*; former *Corp. Code § 15018*]. When interpreting partnership agreements, the courts follow the rules governing the interpretation of contracts generally [*Corp. Code § 16104(a)*; former *Corp. Code § 15005*; *DeSimoni v. Brusco (1987) 191 Cal. App. 3d 914, 916, 236 Cal. Rptr. 711]* . Interpretation of a partnership agreement presents a question of law that may be decided de novo by an appellate court [*Broffman v. Newman (1989) 213 Cal. App. 3d 252, 257, 261 Cal. Rptr. 532]* . For a discussion of the role of the partnership agreement in regulating relations between partners, see *§ 401.14*.

[h] Licensing Requirements

The need to comply with licensing statutes can present litigation issues that go to the existence of a partnership. Licensing statutes regulating certain trades and professions may require that a partnership obtain a license as an entity apart from any licenses or permits held by its members [*CH & M Associates v. City of El Centro (1980) 109 Cal. App. 3d 399, 409, 167 Cal. Rptr. 392* ; *see, e.g., Bus. & Prof. Code §§ 5072* (accountants), *7029.1, 7067.6-7068.2* (contractors), *8561, 8562, 8569* (structural pest control operators), *23951-23953* (on-sale liquor businesses)]. Furthermore, some professional partnerships are required to notify the appropriate regulatory board when the partnership is formed or dissolved.

The settled rule is that when the object of a statute requiring a license for the privilege of carrying on a business is to prevent improper persons from engaging in that business or to protect the public, the imposition of a penalty [*see, e.g., Bus. & Prof. Code §§ 5120, 5536, 7028, 16240*] amounts to a prohibition against doing the business without a license and a contract made by an unlicensed person in violation of the statute is void [*Wilson v. Steele (1989) 211 Cal. App. 3d 1053, 1059, 259 Cal. Rptr. 851]* . The taint of illegality can affect not only the relationships between unlicensed or defectively licensed partnerships and third parties, but can also affect the contract of partnership as well. Thus, in *Hooper v. Barranti* [*Hooper v. Barranti (1947) 81 Cal. App. 2d 570, 184 P.2d 688]* , an ousted partner could not establish his interest under a partnership agreement that the parties, in *pari delicto*, knew was illegal from its inception because it contemplated operation of an on-sale liquor business without the required partnership license that under the circumstances could not have been obtained. Later decisions distinguished *Hooper* on its facts and carved out exceptions that indicate that the extent to which an illegal contract will be enforced will depend on the policy of the law transgressed, the kind of illegality, and the particular circumstances. For example, the fact that a partnership formed to acquire property and construct residences thereon lacks a contractor's license at the time the partnership agreement is made does not affect the validity of that agreement, because the license could be subsequently obtained or the construction work let to another contractor [*McNichols v. Nelson Valley Bldg. Co. (1953) 116 Cal. App. 2d 266, 271, 253 P.2d 744]* . Furthermore, when a business that has been illegally conducted for want of a license that could have been obtained, as distinguished from an unlawful enterprise, is voluntarily terminated, the transaction has been consummated and a plaintiff's right to share in the proceeds of the partnership business does not depend on the court's enforcement of an illegal contract [*Denning v. Taber (1945) 70 Cal. App. 2d 253, 257, 160 P.2d 900* ; *Norwood v. Judd (1949) 93 Cal. App. 2d 276, 285, 209 P.2d 24* ; *Greene v. Brooks (1965) 235 Cal. App. 2d 161, 168-169, 45 Cal. Rptr. 99]* . This rule applies with special force when the plaintiff is clearly less culpable in failing to secure a license or when the partieshave entered an agreement to divide the assets of the business after its voluntary termination [*Denning v. Taber (1945) 70 Cal. App. 2d 253, 257, 160 P.2d 900* ; *Norwood v. Judd (1949) 93 Cal. App. 2d 276, 285, 209 P.2d 24]* .

A partner who performs professional services for the partnership may be required to be licensed. For example, a partner who negotiates leases of partnership property, or who performs other real estate services for the partnership, is required to be licensed as a real estate broker, because in such transactions the partner is not acting on his or her own account, but on behalf of another. A partner's failure to obtain such a license, however, does not make the partnership agreement illegal [*Broffman v. Newman (1989) 213 Cal. App. 3d 252, 261-262, 261 Cal. Rptr. 532]* .

[i] Burden of Proof

Determining whether a partnership has been created is primarily a matter of deciding whether the parties intended to do those things that would make them partners irrespective of their awareness of the legal consequences of their conduct [*Westcott v. Gilman (1915) 170 Cal. 562, 569, 150 P. 777]* . The burden of proving the existence of a partnership rests with the party alleging that fact [*Toney v. Nolder (1985) 173 Cal. App. 3d 791, 796, 219 Cal. Rptr. 497]* . In the absence of a written partnership agreement, proof of partnership must be by a preponderance of the evidence [*Weiner v. Fleischman (1991) 54 Cal. 3d 476, 490, 286 Cal. Rptr. 40, 816 P.2d 892]* . The presumptions of general application set forth in *Evid. Code §§ 600-670* apply in all legal actions involving partnerships [*Evid. Code § 300*]

The determination of whether a partnership has been created is a mixed question of law and fact [*Halperin v. Raville (1986) 176 Cal. App. 3d 765, 773, 222 Cal. Rptr. 350]* . Appellate review is limited to a determination of whether substantial evidence supports the trial court's conclusion [*Cochran v. Board of Supervisors (1978) 85 Cal. App. 3d 75, 81, 149 Cal. Rptr. 304]* .

[2] Commencement of Partnership

In general, and absent an intention to the contrary, a partnership commences at the time the parties enter into the partnership agreement. When the parties intend that the partnership is not to come into being until some future time, or until the occurrence of a condition precedent, then the partnership is not created until the time has arrived or the condition has been satisfied [*Solomont v. Polk Development Co. (1966) 245 Cal. App. 2d 488, 496, 54 Cal. Rptr. 22]* . For example, when the parties intended that an employee's capital contribution to an existing partnership be a condition precedent to his retroactive acquisition of a partnership interest, no new partnership between the parties was created because the employee failed to make the required contribution [*Hollis v. Rock Creek Pack Station (D. Nev. 1984) 594 F. Supp. 156, 160* (applying California law)].

[3] Breach of Agreement to Form Partnership

[a] Action for Damages Is Proper Remedy

Under pre-'97 Act case law, when one party breaches an agreement to form a partnership, the other party's remedy is an action at law for damages rather than one for dissolution and accounting; the latter remedy is appropriate only when the partnership has actually come into being [*Braxdale v. Bange (1958) 166 Cal. App. 2d 399, 402, 333 P.2d 420* ; *Triplett v. Triplett (1931) 117 Cal. App. 466, 469, 4 P.2d 238* ; *Taylor v. Nelson (1915) 26 Cal. App. 681, 682, 147 P. 1189]* . For example, an action for damages is proper when the parties agree that on the happening of a condition precedent a partnership will be formed, but one of the parties prevents that condition from happening [*Barry v. Barton (1922) 189 Cal. 183, 186, 207 P. 902* ; *Greene v. Vargas (1935) 7 Cal. App. 2d 127, 129, 45 P.2d 347]* . The condition, however, must clearly be a condition precedent, and the failure of a partner to make the agreed contribution to the partnership after business has commenced will not necessarily mean that the partnership does not exist or that the defaulting partner has forfeited the right to an accounting [*Bowen v. Velliquette (1957) 153 Cal. App. 2d 847, 851, 315 P.2d 95* ; *Whitley v. Bradley (1910) 13 Cal. App. 720, 729, 110 P. 596]* . Similarly, when the memorandum of a preliminary oral agreement recites the parties' intention to be bound by a later written contract, execution of that contract is not a condition precedent to the creation of the partnership when the parties indicate otherwise by performance under the oral agreement [*Laughlin v. Haberfelde (1946) 72 Cal. App. 2d 780, 785, 165 P.2d 544]* .

These decisions are based on contract law and appear to be good law under UPA'94.

[b] Measure of Damages

In the absence of any means of determining the value of prospective profits of the partnership business, the proper measure of damages in an action for breach of an agreement to form a partnership is the loss sustained by the plaintiff in

preparing to join the partnership. This loss includes the loss of profits and any loss in value of the plaintiff's existing business [*Overstreet v. Merritt (1921) 186 Cal. 494, 505-506, 200 P. 11]* . The plaintiff is also entitled to recover for services performed pursuant to the agreement [*Braxdale v. Bange (1958) 166 Cal. App. 2d 399, 403, 333 P.2d 420]* .

[4] Rescission of Partnership Agreement

[a] Under Pre-'97 Act

Under the pre-'97 Act, when a partnership contract was rescinded on the ground of the fraud or misrepresentation of one of the parties to the contract, the party entitled to rescind was entitled to the following, without prejudice to any other right [former *Corp. Code § 15039(a)-(c)*; *see, e.g.,* *Sy First Family Limited Partnership v. Cheung (1999) 70 Cal. App. 4th 1334, 1339-1340, 83 Cal. Rptr. 2d 340* (in investors' action for breach of contract, fraud, and relief under *Corp. Code § 15039*, lien for each plaintiff against partnership's assets was imposed and general partner was ordered to indemnify each plaintiff in same amount)]:

- To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him or her for the purchase of an interest in the partnership and for any capital or advances contributed by him or her.

- To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him or her in respect of the partnership liabilities.

- To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership.

[b] Need for Accounting

Although decisions under the pre-'97 Act held that because the very existence of the partnership is at issue, an equitable action for accounting is not necessary when rescission is sought [*Long v. Newlin (1956) 144 Cal. App. 2d 509, 513, 301 P.2d 271]* , the foregoing remedies, with the possible exception of indemnification of the plaintiff, would seem to require an accounting because they specifically require partnership liabilities to third parties be satisfied, e.g., to determine what portion of the partnership property the plaintiff could assert a lien on. UPA'94 does not mention rescission of the partnership agreement or any remedies flowing from rescission, but it does give any partner the right to maintain an action against the partnership or another partner, *with or without an accounting as to partnership business*, to, among other things [*Corp. Code § 16405(b)(1)-(3)*]:

- Enforce the partner's rights under the partnership agreement.

- Enforce fiduciary duties each partner owes the other [*see Corp. Code § 16404*; *see also* discussion in *§ 401.20*].

- Enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relation.

This grant of enforcement rights seems broad enough to include actions for rescission that were specifically sanctioned under the pre-'97 Act, and suggests that pre-'97 Act decisions permitting actions for damages by the injured partner will apply under UPA'94. Again, however, to afford complete relief it is likely that an action for accounting would be joined with the wronged partner's claim for damages.

[c] Grounds

A partnership contract is subject to rescission in the same manner and for the same causes as other contracts [*Weltman v. Kaye (1959) 167 Cal. App. 2d 607, 613, 334 P.2d 917* ; *Long v. Newlin (1956) 144 Cal. App. 2d 509, 512, 301 P.2d 271]* . It is thus subject to rescission for fraud or mistake [*see* *Brown v. Klein (1928) 89 Cal. App. 153, 154, 156, 264 P. 496]* . Rescission of contracts, in general, is governed by *Civ. Code §§ 1688-1693*.

[d] Effect

The effect of rescinding a partnership agreement is that the partnership never existed, although any person holding himself or herself out as a partner is not excused from liability to creditors of the partnership [*Weltman v. Kaye (1959) 167 Cal. App. 2d 607, 614, 334 P.2d 917]* .

When a partnership agreement is rescinded on grounds of fraud, a partner may continue to use the partnership name, but the rescinding partner is entitled to compensation for any contributions that enhanced the value of that name [*Neptune Society Corp. v. Longanecker (1987) 194 Cal. App. 3d 1233, 1245-1246, 240 Cal. Rptr. 117]* .

[e] Measure of Damages

When one party effectively rescinds a partnership agreement on the ground of fraudulent inducement by the other party to enter into the agreement, the rescinding party may recover any money or property owed to him or her by the other party, including sums advanced to purchase an interest in the partnership [*Civ. Code § 1692*; *Long v. Newlin (1956) 144 Cal. App. 2d 509, 512-513, 301 P.2d 271]* , or amounts due for the value of his or her services [*Weltman v. Kaye (1959) 167 Cal. App. 2d 607, 614, 334 P.2d 917]* .

[5] Repudiation of Partnership Agreement

[a] Action for Damages

Under pre-'97 Act decisions, the general rule that a partner may not sue his or her copartner in an action at law prior to obtaining an accounting does not apply when the copartner's wrongful act is not only breach of contract, but also is tortious and results in termination of the partnership and conversion of its assets [*Boyd v. Bevilacqua (1966) 247 Cal. App. 2d 272, 288, 55 Cal. Rptr. 610]* . Thus, when one partner excludes the other, repudiates the existence of the partnership, and converts partnership assets, the victim is permitted to sue the copartner who wrongfully caused dissolution for damages, without seeking judicial dissolution and an accounting [*Corp. Code § 16405(b)(1)* and former *Corp. Code § 15038*; *see* *Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 557, 140 Cal. Rptr. 330* (involving joint venture)]. The victim in such a case also has alternative remedies: the innocent partner may waive the tort or breach and sue specifically to enforce the agreement and obtain a judicial dissolution and an accounting and, if necessary, imposition of a trust on partnership or joint venture property; or the partner may sue for damages for conversion of his or her interest in the partnership assets; or he or she may sue for damages for breach of the agreement, including profits that might have been made, the same as for any other action for damages for breach of any other contract. That the victim partner may sue for damages without seeking dissolution does not mean he or she is required to; the choice of remedy is vested in the victim, not in the wrongdoing partner [*Navarro v. Perron (2004) 122 Cal. App. 4th 797, 802, 19 Cal. Rptr. 3d 198* ; *Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 564, 140 Cal. Rptr. 330]* . In such a case, the wronged partner can plead cumulative or inconsistent causes of action [*Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 564-565, 140 Cal. Rptr. 330]* .

In addition to the remedies just described, UPA'94 permits the wronged partner to maintain an action against a partner, with or without an accounting as to partnership business, for the latter's breach of the fiduciary duties of loyalty and care [*Corp. Code § 16405(b)(2)(A)*]. Repudiation of the partnership agreement and conversion of the partnership assets would specifically be a breach of the duty of care, which requires partners to refrain from engaging in intentional misconduct, among other things [*Corp. Code § 16404(c)*].

[b] Measure of Damages

The proper measure of damages for repudiation of a partnership agreement and conversion of its assets depends on which theory of liability is applied. Thus, the appropriate measure of damages might be conversion damages pursuant to *Civ. Code § 3336* [*see Wilson v. Brown (1929) 96 Cal. App. 140, 143, 273 P. 847]* , damages for fraud or tortious conduct generally, pursuant to *Civ. Code §§ 1709* and *3333* [*see Boyd v. Bevilacqua (1966) 247 Cal. App. 2d 272, 294-295, 55 Cal. Rptr. 610]* , or damages for breach of contract pursuant to *Civ. Code § 3300* [*see Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 562-563, 140 Cal. Rptr. 330]* . Depending on the facts of a case of partnership repudiation, however, there may be little practical difference in the measure of damages applied [*Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 562-563, 140 Cal. Rptr. 330]* . For example, the loss of prospective profits that is a natural and direct consequence of the breach of contract is a recoverable element of damages in an action for breach of contract [*Nelson v. Reisner (1958) 51 Cal. 2d 161, 171, 331 P.2d 17* ; *James v. Herbert (1957) 149 Cal. App. 2d 741, 749, 309 P.2d 91]* , or in an action for tortious conduct by a copartner [*Ellis v. Navarro (1943) 61 Cal. App. 2d 755, 759-760, 143 P.2d 735]* .

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§ 401.14 Role of Partnership Agreement in Regulating Relations Between Partners

[1] As Alternative to Statutory Provisions

In most cases, the partnership agreement governs relations among partners and between partners and the partnership [*see Corp. Code § 16103(a)*; former *Corp. Code § 15018*]. This allows the partners to vary certain statutory default rules that apply in the absence of an agreement to the contrary.

[2] Statutory Variances Generally

Unlike the pre-'97 Act, UPA'94 provides a specific list of *limitations* on the partners' ability to vary by agreement the rules governing the partnership relation [*see Corp. Code § 16103(b)*]. In some instances UPA'94 places limits on the *degree* to which rights and duties may be varied, rather than giving the partners unfettered discretion to substitute rules of their own. In contrast, under the pre-'97 Act the particular statute conferring rights or imposing duties contained language such as "subject to any agreement between the partners" [*see, e.g.,* former *Corp. Code § 15019* (concerning access to partnership books)], which, if read literally, would permit certain statutory rights or duties of partners (as between themselves) to be abolished by agreement. In reality, however, the fiduciary duties of partners would dictate that only reasonable incursions on certain statutory rights and duties, e.g, the partners' right to access partnership books, could be imposed by agreement [*see* discussion in *§ 401.20* (fiduciary duties)].

[3] Variance Under Pre-'97 Act

The ability of the partners to vary certain rules of the pre-'97 Act by agreement will be dealt with in connection with the specific rights and duties, discussed in *§ 401.20*.

[4] Variance Under UPA'94

Under UPA'94, the partnership agreement cannot do the following, among other things [*Corp. Code § 16103(b)*]:

- Impose unreasonable restrictions on the rights of partners under *Corp. Code § 16403(b)* and *(c)* to access books and records or to be furnished with information [*see § 401.21*].

- Eliminate a partner's duty of loyalty under *Corp. Code § 16404(b)* [*see § 401.20*], or *Corp. Code § 16603(b)(3)* (duties of dissociated partners), although the agreement may (a) establish types or categories of activities that do not violate the duty, or (b) allow, with full disclosure, for ratification of acts that would violate the duty.

- Reduce unreasonably a partner's duty of care under *Corp. Code § 16404(c)* [*see § 401.20*].

- Eliminate a partner's obligation of good faith and fair dealing under *Corp. Code § 16404(d)*, but a partnership agreement may prescribe standards by which performance of the obligation is be measured so long as the standards are not manifestly unreasonable [*see § 401.20*].

- Vary the power of a partner to dissociate under *Corp. Code § 16602(a)* [*see* Ch. 403, *Partnerships: Actions By and Against Dissociated Partners*], except to require that the notice of dissociation be in writing.

- Vary the right of a court to expel a partner under the circumstances specified by *Corp. Code § 16601(5)* [*see* Ch. 403, *Partnerships: Actions By and Against Dissociated Partners*].

- Vary the rule that provides that UPA'94 governs registered limited liability partnerships with respect to (a) relations among partners and between the partners and the partnership, and (b) the partners' liability for partnership obligations [*see Corp. Code § 16106(b)*].

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§ 401.15 Partnership Accounts

[1] Pre-'97 Act

Former *Corp. Code § 15018* contains rules governing the rights and duties of partners in relation to the partnership, which apply subject to any contrary agreement between the partners. That section provides that each partner must be repaid his or her contributions, whether by way of capital or advances to the partnership property. In addition, each partner shares equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied.

Except as provided in former *Corp. Code § 15015(b)*, which provides an exception for partners in limited liability partnerships, each partner must also contribute towards the losses, whether of capital or otherwise, sustained by the partnership, according to his or her share in the profits [former *Corp. Code § 15018(a)*; *see* former *Corp. Code § 15015(b)-(e), (g)* (rules governing limitation of liability of partners in limited liability partnerships); *see also Wall v. Siegel (1998) 62 Cal. App. 4th 875, 879-880, 73 Cal. Rptr. 2d 102* (determination of each general partner's obligation on loan)]. In the absence of an agreement to the contrary, an equal participation in profits and losses is presumed, regardless of any inequality in amounts contributed by each partner to the partnership and regardless of whether or not a partner contributed only services to the partnership [*Kovacik v. Reed (1957) 49 Cal. 2d 166, 169, 315 P.2d 314]* .

The partnership, to the extent of its partnership assets, must indemnify every partner for any payments made and personal liabilities reasonably incurred by that partner in the ordinary and proper conduct of the partnership business or for the preservation of partnership business or property [former *Corp. Code § 15018(b)*]. A partner who, in aid of the partnership, makes any payment or advance beyond the amount of capital that he or she agreed to contribute, must be paid interest from the date of the payment or advance [former *Corp. Code § 15018(c)*]. A partner is entitled to interest on his or her capital contributions only from the date when repayment should have been made [former *Corp. Code § 15018(d)*].

[2] Under UPA'94

[a] Credits and Charges

Unless the partnership agreement provides otherwise, each partner is deemed to have an account that is subject to both

of the following [*Corp. Code § 16401(a)*]:

- Credited with an amount equal to the money, and the value of any other property, net of liabilities, that the partner contributes to the partnership, plus the partner's share of the partnership profits.

- Charged with an amount equal to the money and the value of any other property, net of liabilities, distributed by the partnership to the partner, plus the partner's share of partnership losses.

Corp. Code § 16401(a)(2) states that the charges against a partner's account for distributions and losses are "subject to Sections 16306 and 16957," referring to the fact that partners in registered limited liability partnerships are not personally liable for partnership obligations or partnership losses unless a majority in interest of the partners agree otherwise [*see Corp. Code § 16306(c)-(f)*]. The purpose of the reference to *Corp. Code § 16957* is not as clear since that section simply defines what an illegal distribution from a limited liability partnership is but says nothing about how it might be treated in a recipient partner's account. It does, however, provide that a cause of action with respect to an obligation to return any distribution is extinguished unless the action is brought within 4 years after the distribution is made [*Corp. Code § 16957(b)*]. Neither that provision, however, nor any other provision of UPA'94, sets forth who may bring an action with respect to an obligation to return a distribution or under what circumstances a recipient may be required to return it.

[b] Profits and Losses

Subject to the partnership agreement, each partner is entitled to an equal share of partnership profits and chargeable with a share of partnership losses in proportion to the partner's share of profits [*Corp. Code § 16401(b)*]. Again, the reference in *Corp. Code § 16401(b)* to partnership losses is "subject to Sections 16306 and 16957," referring to the fact that partners in registered limited liability partnerships are not personally liable for partnership obligations or partnership losses unless they and a majority in interest of the partners agree otherwise [*see Corp. Code § 16306(c)-(f)*]. The purpose of the reference to *Corp. Code § 16957* is not as clear since that section simply deals with what an illegal distribution from a limited liability partnership is. Presumably it means that if a distribution is made of profits, that distribution is subject to *Corp. Code § 16957*, with whatever obligations it may impose for return of such a distribution [*see*, [a], *above*].

[c] Payments and Advances

Subject to the partnership agreement, a partner is entitled to be reimbursed for payments made and indemnified for liabilities incurred in the ordinary course of business or for the preservation of the partnership business or property [*Corp. Code § 16401(c)*]. Similarly, a partner is entitled to be reimbursed for advances to the partnership in excess of the capital the partner agreed to contribute [*Corp. Code § 16401(d)*].

Payments or advances that become partnership obligations are loans that accrue interest from the date of the payment or advance [*Corp. Code § 16401(e)*]. If an obligation to pay interest arises under UPA'94 and the rate is not specified, the rate is that specified in *Civ. Code § 3289* [*Corp. Code § 16104(b)*]. Since the right to receive interest on payments and advances may be altered or eliminated by the agreement of the partners [*see Corp. Code § 16103*], however, a partner who makes payments on partnership real property that another partner is supposed to make will not be entitled to interest on these payments when the partnership agreement provides that no partner is entitled to interest on contributions to capital [*In re Stanton (9th Cir. B.A.P. 1984) 38 B.R. 746, 753 , appeal dismissed, 766 F.2d 1283 (1985)]* .

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§ 401.16 Remuneration of Partners

Subject to the partnership agreement, a partner is not entitled to receive remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the partnership business [*Corp. Code § 16401(h)*; former *Corp. Code § 15018(f)*; *Cagnolatti v. Guinn (1983) 140 Cal. App. 3d 42, 50, 189 Cal. Rptr. 151* ; *Van Ruiten v. Van Ruiten (1969) 268 Cal. App. 2d 619, 624, 74 Cal. Rptr. 186]* . Under the pre-'97 Act, the exception to the "no remuneration" rule extends only to "surviving partners" [*see* former *Corp. Code § 15018(f)*; *see also* *Chazan v. Most (1962) 209 Cal. App. 2d 519, 523-524, 25 Cal. Rptr. 864]* . The fact that one partner contributes greater skill and takes over management of the partnership business does not give rise to a right to extra compensation, absent agreement [*Vangel v. Vangel (1953) 116 Cal. App. 2d 615, 631, 254 P.2d 919]* .

Whether or not an agreement for compensation exists is a question of fact [*Busick v. Stoetzl (1968) 264 Cal. App. 2d 736, 738-740, 70 Cal. Rptr. 581]* and may be implied by a course of conduct or found in an express agreement [*Broffman v. Newman (1989) 213 Cal. App. 3d 252, 259, 261 Cal. Rptr. 532]* . For example, a partner's failure to object to the compensation of another partner can constitute an implied agreement and estoppel [*Broffman v. Newman (1989) 213 Cal. App. 3d 252, 260, 261 Cal. Rptr. 532]* .

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§ 401.17 Management and Control

Subject to the partnership agreement, each partner has equal rights in the management and conduct of the partnership business [*Corp. Code § 16401(f)*; former *Corp. Code § 15018(e)*], and all partners may use and possess partnership property on the partnership's behalf [*Corp. Code § 16401(g)*].

A difference arising as to a matter in the ordinary course of business may be decided by a majority of partners. Under the pre-'97 Act, this is subject to the proviso that no act in contravention of any partnership agreement may be rightfully done without the consent of all partners [former *Corp. Code § 15018(h)*]. Under UPA'94, the majority rule exceptions requiring unanimous consent are for acts outside the ordinary course of business and any amendment of the partnership agreement [*Corp. Code § 16401(j)*]. The partnership agreement, of course, may allocate voting power generally or with respect to specific issues. For example, a provision in a partnership agreement that vested all control, management, and direction of the partnership business in the Class A partners was held to have granted them the right to hire and fire the managing partner, and the vote of all of the partners was not required [*DeSimoni v. Brusco (1987) 191 Cal. App. 3d 914, 916-917, 236 Cal. Rptr. 711]* .

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§ 401.18 Admitting New Partners

Absent a contrary agreement, all partners must agree to the admission of new partners [*Corp. Code § 16401(i), (j)*; former *Corp. Code § 15018(g)*].

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§ 401.19 Distributions in Kind

Under UPA'94, subject to the partnership agreement, a partner has no right to receive, and may not be required to accept, a distribution in kind [*Corp. Code § 16402*]. There is no parallel provision under the pre-'97 Act.

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§ 401.20 Partner Fiduciary Duties

[1] Pre-'97 Act Contrasted With UPA'94

Although many cases decided under the pre-'97 Act articulate the scope of partners' fiduciary duties to one another and the partnership, the Act itself contains only passing references to these matters [*see, e.g.,* former *Corp. Code §§ 15020* (duty to disclose information affecting partnership), 15021 (duty to account for benefits derived from partnership transactions)].

UPA'94, in contrast, does define in more or less detail the fiduciary duties partners owe each other and the partnership, including the obligation of good faith and fair dealing. It also provides that the partnership agreement can modify the extent of these duties if to do so would not be manifestly unreasonable [*see Corp. Code § 16103(b)(3)* (modification of duty of loyalty)].

Since UPA'94's fiduciary duty rules are largely codifications of cases decided prior to its enactment, the following discussion annotates UPA'94's provisions with cases decided under the pre-'97 Act. Note, however, that the extent to which a case decided under the pre-'97 Act imposes a higher level of loyalty or care, it may be in conflict with the specific provisions of UPA'94.

[2] Duties and Obligations Owed

Under UPA'94, a partner owes the fiduciary duties of loyalty and care to the partnership and the other partners [*Corp. Code § 16404(a)*]. These duties, whether imposed by UPA'94 or the partnership agreement, must be discharged, or any rights exercised, consistently with the obligation of good faith and fair dealing [*Corp. Code § 16404(d)*]. In cases decided under the pre-'97 Act, a partner's duties to copartners were likened to the duties owed by a fiduciary. Thus, partners are deemed trustees for each other in the conduct of the partnership business, and each is required to act in the highest good faith and may not seek to obtain any advantage in partnership affairs by the slightest misconduct, misrepresentation, concealment, threat, or adverse pressure of any kind [*Leff v. Gunter (1983) 33 Cal. 3d 508, 514, 189 Cal. Rptr. 377, 658 P.2d 740* (involving joint venture); *Page v. Page (1961) 55 Cal. 2d 192, 197, 10 Cal. Rptr. 643, 359 P.2d 41* ; *Oliker v. Gershunoff (1987) 195 Cal. App. 3d 1288, 1305, 241 Cal. Rptr. 415* ; *Wortham & Van Liew v. Superior Court (1987) 188 Cal. App. 3d 927, 932, 233 Cal. Rptr. 725* ; *see BT-I v. Equitable Life Assurance*

Society (1999) 75 Cal. App. 4th 1406, 1411-1414, 89 Cal. Rptr. 2d 811 (general partner's fiduciary duty not to purchase partnership debt and foreclose out a partner cannot be contracted away in partnership agreement)]. For example, in one case a limited partnership merged into a new entity, the interests of the limited partners were cashed out, and the general partner retained an equity interest in the post-merger entity, which then sold the limited partnership assets to third parties for more than their cash-out valuation. The limited partners claimed that the general partners breached their fiduciary duties by actions that benefitted themselves at the expense of the limited partners. The court held that the claims of the limited partners were individual rather than derivative in nature; the gravamen of the claims asserted were injuries to the interests of the limited partners, and not to the interests of the partnership or the general partner [Everest Investors 8 v. *McNeil Partners (2003) 114 Cal. App. 4th 411, 424, 429, 8 Cal. Rptr. 3d 31]* .

The obligation of good faith and fair dealing cannot be abrogated by the partnership agreement. However, the partnership agreement may prescribe standards to measure a partner's performance of the obligation [*Corp. Code § 16103(b)(5)*].

A partner does not violate a duty or obligation under UPA'94 or the partnership agreement simply because the partner's conduct furthers his or her own interest [*Corp. Code § 16404(e)*; *see, e.g.,* *Jones v. Wagner (2001) 90 Cal. App. 4th 466, 473-474, 108 Cal. Rptr. 2d 669* (no breach of fiduciary duty for partner to bid on and purchase partnership real property at foreclosure sale which took place after other partners failed to fulfill their obligation to make mortgage payments on property)]. The apparent purpose of this provision [*Corp. Code § 16404(e)*] is to excuse partners from accounting for incidental benefits obtained in the course of partnership activities when there is no detriment to the partnership. The statute cannot be invoked to justify a partner's substantial use of partnership property at the expense of the partnership [*Enea v. Superior Court (2005) 132 Cal. App. 4th 1559, 1566, 34 Cal. Rptr. 3d 513]* . In addition, under pre-'97 Act case law, one partner is not liable for a breach of fiduciary duty by another partner unless the former is personally in some way at fault, either by participating in the breach of duty by the other partner through consent or otherwise, or by negligence in permitting it to occur [*Kazanjian v. Rancho Estates Ltd. (1991) 235 Cal. App. 3d 1621, 1627, 1 Cal. Rptr. 2d 534]* .

In a case in which a partnership incorporated, and one shareholder who sold his shares to the other shareholder pursuant to a buyout agreement claimed breach of fiduciary duties relative to the sale, the court held that generally after a partnership is incorporated, the rights or obligations that partners can enforce against each other no longer exist. In the absence of a pre-incorporation agreement or evidence that the corporate form was disregarded, shareholders in a duly formed corporation operating in accordance with legal requirements do not become de facto partners, and thereby acquire fiduciary duties to each other, simply because they earn the same salary and refer to each other for convenience as partners. They have the rights and obligations of shareholders, not partners [*Persson v. Smart Inventions, Inc. (2005) 125 Cal. App. 4th 1141, 1159, 23 Cal. Rptr. 3d 335]* .

[3] Duty of Loyalty

The duty of loyalty requires partners [*Corp. Code § 16404(b)*]:

- To account to the partnership and hold as trustee for it any property, profit, or benefit obtained in the conduct and winding up of partnership business or derived from the use of partnership property or information, including the appropriation of a partnership opportunity.

- To refrain from dealing with the partnership during the conduct or winding up of the business as, or on behalf of, a party having an adverse interest to the partnership.

- To refrain from competing with the partnership business prior to the partnership's dissolution.

The list of loyalty-related obligations in *Corp. Code § 16404(b)* is not exclusive; the statute provides that "loyalty to the

partnership and the other partners *includes* all of" the listed obligations (emphasis added). Thus, the statute leaves further articulation of the duty of loyalty to traditional common law processes [*Enea v. Superior Court (2005) 132 Cal. App. 4th 1559, 1565, 34 Cal. Rptr. 3d 513* (one partner could not occupy partnership's real property and pay below-market rent over objection of other partner)].

In cases decided under the pre-'97 Act, it was held that the fiduciary duty owed by one partner to another extends to all partnership transactions, including transactions contemplated by the partnership and constituting the object or purpose for which the partnership was formed [*Leff v. Gunter (1983) 33 Cal. 3d 508, 514, 189 Cal. Rptr. 377, 658 P.2d 740* (partner seized joint venture opportunity)]. The duty of loyalty can arise even during negotiations for the partnership [*Solomont v. Polk Development Co. (1966) 245 Cal. App. 2d 488, 495, 54 Cal. Rptr. 22]* .

For a discussion of the partners' duties during the winding up of the partnership business, see Ch. 406, *Partnerships: Dissolution* . For a discussion of the partners' duties after a partner has dissociated, see Ch. 403, *Partnerships: Actions By and Against Dissociated Partners* .

[4] Modification of Duty of Loyalty

The duty of loyalty is imposed by law. It does not depend on any provision in the partnership agreement [*Enea v. Superior Court (2005) 132 Cal. App. 4th 1559, 1566-1567, 34 Cal. Rptr. 3d 513]* . It may not be eliminated by the partnership agreement; however, the agreement may, if not manifestly unreasonable [*Corp. Code § 16103(b)(3)(A), (B)*]:

- Identify specific types or categories of activities that do not violate the duty of loyalty, or

- Provide for ratification by all partners or a specified number or percentage, after full disclosure of all material facts, of acts or transactions that would violate the duty of loyalty by all or some lesser number of partners [*see, e.g., Skone v. Quanco Farms (1968) 261 Cal. App. 2d 237, 241, 68 Cal. Rptr. 26]* .

[5] Duty of Care

A partner's duty of care requires that the partner refrain from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law in conducting partnership business or winding up the partnership [*Corp. Code § 16404(c)*]. This duty of care may not be unreasonably reduced by the partnership agreement [*Corp. Code § 16103(b)(4)*].

[6] Fiduciary Duties of Partner's Personal or Legal Representative

The duties and obligations discussed above apply to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner [*Corp. Code § 16404(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionBreach of Fiduciary DutyBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionNegligent Acts of PartnersBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionPartnership LiabilitiesBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesFiduciary ResponsibilitiesGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesFiduciary ResponsibilitiesDuty of DisclosureBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesFiduciary ResponsibilitiesDuty of Good Faith & LoyaltyBusiness &

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§ 401.21 Access to Books and Records

[1] Pre-'97 Act

[a] Inspection of Partnership Books

The partnership books must be kept, subject to any agreement between the partners, at the principal place of business of the partnership. At all times every partner must have access to, and may inspect and copy, any of the partnership books [former *Corp. Code § 15019*; *see* [2][a], *below* (discussing pre-'97 Act decision)].

[b] Partners' Duty to Inform

On demand by any partner or legal representative of a deceased partner or partner under legal disability, partners must render true and full information of all things affecting the partnership [former *Corp. Code § 15020*]. Every partner must account to the partnership for any benefit, and hold as trustee for it, any profits derived by him or her without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him or her of partnership property [former *Corp. Code § 15021(1)*].

For discussion of disclosure requirements as interpreted under pre-'97 Act decisions, see [2][b], *below*.

[2] UPA'94

[a] Partnership's Duties

A partnership must keep its books and records, in writing or in any other form capable of being converted into clearly legible tangible form, at its chief executive office [*Corp. Code § 16403(a)*]. This rule is one that can be changed by the partnership agreement but cannot be changed in a way which would unreasonably restrict partners' access to books and records [*see Corp. Code § 16103(b)(2)*]. The partnership must provide access to its books and records to partners and their agents and attorneys. Access must also be provided to former partners and their agents and attorneys, but only as to records for the period during which they were partners. Right to access generally means providing an opportunity to inspect and copy books and records during ordinary business hours. The partnership may impose a reasonable charge,

covering the cost of labor and material, for copies of documents furnished [*Corp. Code § 16403(b)*]. The partnership agreement may not unreasonably restrict any of the rights of access just described [*Corp. Code § 16103(b)(2)*].

In a case decided under the pre-'97 Act, it was held that a partner's statutory right to inspect and copy any of the partnership books may be exercised without a showing of either good cause or proper purpose [*McCain v. Phoenix Resources, Inc. (1986) 185 Cal. App. 3d 575, 579, 230 Cal. Rptr. 25]* . UPA'94 does not require that a partner have or demonstrate any particular purpose for wanting access. On the other hand, the duty of loyalty set forth in *Corp. Code § 16404(b)* and the duty to exercise partnership rights consistently with the obligation of good faith and fair dealing probably impose some limitations on purposes for which a partner may access records and use the information obtained from them.

[b] Obligation to Furnish Information

Each partner and the partnership must provide to a partner, and to the legal representative of a deceased partner or partner under a legal disability, both of the following, which may be transmitted by electronic transmission by the partnership [*Corp. Code § 16403(c)*; *see Corp. Code § 16101(4)* ("electronic transmission by the partnership" defined)]:

- Without demand, any information concerning the partnership's business and affairs, reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or UPA'94; and

- On demand, any other information concerning the partnership's business and affairs, except to the extent the demand or information demanded is unreasonable or otherwise improper under the circumstances.

This obligation to provide information cannot be unreasonably restricted by the partnership agreement [*Corp. Code § 16103(b)(2)*].

In cases decided under the pre-'97 Act, it was held that its disclosure requirement extends to any information in the possession of the partnership's attorney that is related to partnership business [*Wortham & Van Liew v. Superior Court (1987) 188 Cal. App. 3d 927, 932, 233 Cal. Rptr. 725* ; *McCain v. Phoenix Resources, Inc. (1986) 185 Cal. App. 3d 575, 581, 230 Cal. Rptr. 25]* . An attorney for the partnership has a fiduciary obligation to all of the partners that requires disclosure to all of them of all matters concerning the partnership [*Wortham & Van Liew v. Superior Court (1987) 188 Cal. App. 3d 927, 931-932, 233 Cal. Rptr. 725]* . For example, under *Evid. Code § 962* (the joint client exception to the attorney-client privilege), an attorney for the partnership may be properly compelled to testify about information received from one partner concerning partnership transactions in an action by a second partner seeking dissolution of the partnership and an accounting. The attorney-client privilege will not bar disclosure of matters related to partnership business simply because that business was conducted through a law firm. Only matters involving purely private or personal interests of one of the partners may be privileged [*Wortham & Van Liew v. Superior Court (1987) 188 Cal. App. 3d 927, 931-933, 233 Cal. Rptr. 725* ; *McCain v. Phoenix Resources, Inc. (1986) 185 Cal. App. 3d 575, 580-581, 230 Cal. Rptr. 25]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 401.22 Continuation of Term Partnership

A partnership that is created for a definite term or particular undertaking may be continued after the expiration of the term or completion of the undertaking. If the partnership is continued and there is no express agreement to do so, the rights and duties of the partners remain the same as they were at the expiration of the term or completing of the undertaking so far as consistent with a partnership at will [*Corp. Code § 16406(a)*; former *Corp. Code § 15023(1)*]. Partners who acted in the partnership business and who continue the business without settlement or dissolution are presumed to have agreed that the partnership will continue [*Corp. Code § 16406(b)*; former *Corp. Code § 15023(2)*.

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[Reserved]

§§ 401.23[Reserved]

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§ 401.30 Related Matthew Bender Publications

For discussion and analysis of partners' reciprocal rights and duties and those owed the partnership, see Ballantine & Sterling, California Corporation Laws, Ch. 24 (Matthew Bender)

For discussion and forms related to the drafting of general partnership agreements, see California Legal Forms, Ch. 15, *General Partnerships*, Pt. A (Matthew Bender)

For memoranda of points and authorities relating to accounting actions generally, see California Points and Authorities, Ch. 12, *Accounting* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 401.31 State Statutes

[1] Actions Related to Partnership Formation

Rescission of contracts generally. *Civ. Code §§ 1688-1693*

Measure of breach of contract damages. *Civ. Code § 3300 et seq.*

Measure of conversion damages. *Civ. Code § 3336*

Partnership defined. *Corp. Code § 16202*; former *Corp. Code § 15006*

Rules determining existence of partnership. *Corp. Code § 16202(c)*; former *Corp. Code § 15007*

Rights of rescinding partner. Former *Corp. Code § 15038*

[2] Partnership Licensing Requirements

Accountants. *Bus. & Prof. Code § 5072*

Contractors. *Bus. & Prof. Code §§ 7029.1, 7067.6-7068.2*

Structural pest control operators. *Bus. & Prof. Code §§ 8561, 8562, 8569*

On-sale liquor business. *Bus. & Prof. Code §§ 23951-23953*

[3] Rights and Duties of Partners

Controlled by partnership agreement. *Corp. Code § 16103*; former *Corp. Code § 15018*

With respect to partners' accounts. *Corp. Code § 16401(a)-(e)*; former *Corp. Code § 15018(a)-(d)*

Partner's equal right to manage partnership affairs. *Corp. Code § 16401(f)*; former *Corp. Code § 15018(e)*

Partners not entitled to remuneration; exceptions. *Corp. Code § 16401(h)*; former *Corp. Code § 15018(f)*

Unanimous consent required to admit new partner. *Corp. Code § 16401(i)*; former *Corp. Code § 15018(g)*

Resolution of differences by majority vote. *Corp. Code § 16401(j)*; former *Corp. Code § 15018(h)*

No right to distributions in kind. *Corp. Code § 16402*

Maintenance and right to inspect partnership books. *Corp. Code § 16403(a), (b)*; former *Corp. Code § 15019*

Partner's duty to disclose information. *Corp. Code § 16403(c)*; former *Corp. Code § 15020*

Fiduciary duties to partners and partnership. *Corp. Code § 16404*

Continuation of rights and duties after expiration partnership term or undertaking. *Corp. Code § 16406*; former *Corp. Code § 15023*

[4] Actions by Partners

Application of rules of law and equity to cases not provided for by pre-'97 Act or UPA'94. *Corp. Code § 16104(a)*; former *Corp. Code § 15005*

Right to accounting; grounds. *Corp. Code § 16405(b)*; former *Corp. Code § 15022*

To enforce rights under UPA'94. *Corp. Code § 16405(b)(2)*

To protect interests of partner independent of partnership relation. *Corp. Code § 16405(b)(3)*

Legal Topics:

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

[1] Action for Accounting Generally

Accounting between partners is governed by partnership agreement. *Mervyn Investment Co. v. Biber (1921) 184 Cal. 637, 644, 194 P. 1037*

Accounting action brought pursuant to former *Corp. Code § 15021* or *15022* is governed by four year statute of limitations of *Code Civ. Proc. § 343*. *Manok v. Fishman (1973) 31 Cal. App. 3d 208, 213, 107 Cal. Rptr. 266*

[2] Actions Between Partners

[a] General Rule

One partner suing another must bring equitable action for accounting rather than action at law. *Hosking v. Spartan Properties, Inc. (1969) 275 Cal. App. 2d 152, 156, 79 Cal. Rptr. 893*

Action for accounting required because partnership dispute ordinarily involves taking of partnership account to determine whether or not plaintiff is liable to refund more than he or she claims in action, and because in partnership transactions partner does not usually become creditor or debtor of copartner but of partnership. *Long v. Newlin (1956) 144 Cal. App. 2d 509, 513, 301 P.2d 271*

Test for whether or not partner may bring action at law against copartner is whether damages resulting from breach of partnership agreement belong exclusively to other partners and not to partnership, and whether damages can be assessed without taking account of partnership business. *Long v. Newlin (1956) 144 Cal. App. 2d 509, 513-514, 301 P.2d 271*

[b] Exceptions

Rule against actions at law inapplicable when transaction not connected with partnership business. *Hosking v.*

Spartan Properties, Inc. (1969) 275 Cal. App. 2d 152, 157, 79 Cal. Rptr. 893

General rule inapplicable when very existence of partnership is in issue. *Long v. Newlin (1956) 144 Cal. App. 2d 509, 512, 301 P.2d 271*

When no complex account involving variety of partnership transactions is involved, accounting is not prerequisite to suit between partners. *Van Fleet-Durkee, Inc. v. Oyster (1952) 112 Cal. App. 2d 739, 748, 247 P.2d 403*

[c] Alternative Remedies

When partnership has been dissolved by one partner purchasing other partner's interest, without full accounting, and buying partner later discovers selling partner fraudulently hid assets or misappropriated partnership funds, purchasing partner may elect to rescind purchase and sue for accounting or affirm purchase and sue at law for damages resulting from fraud. *Johnstone v. Morris (1930) 210 Cal. 580, 584, 292 P. 970*

When one partner repudiates partnership and converts partnership assets, victim partner may elect between remedies of damages, on the one hand, or dissolution, liquidation of partnership assets and distribution of proceeds, on the other. *Navarro v. Perron (2004) 122 Cal. App. 4th 797, 802, 19 Cal. Rptr. 3d 198*

Wronged partner may plead cumulative or inconsistent causes of action by waiving tort or breach and sue specifically to enforce the agreement and obtain judicial dissolution and an accounting and, if necessary, a trust on partnership or joint venture property; or partner may sue for damages for conversion of his or her interest in the partnership assets; or partner may sue for damages for breach of agreement, including profits that might have been made. *Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 564-565, 140 Cal. Rptr. 330*

Combining action for damages for fraud of partners committed against partnership with accounting and dissolution of partnership is proper when circumstances so require in order to afford full and adequate relief. *Prince v. Harting (1960) 177 Cal. App. 2d 720, 736-737, 2 Cal. Rptr. 545*

[3] Breach of Executory Agreement to Form Partnership

In absence of any means of determining value of prospective profits of partnership business, proper measure of damages in action for breach of agreement to form partnership is loss sustained by plaintiff in preparing to join partnership, including loss of profits and loss in value of plaintiff's existing business. *Overstreet v. Merritt (1921) 186 Cal. 494, 505-506, 200 P. 11*

Action at law permitted for breach of agreement to form partnership when its terms are not void for uncertainty or want of mutuality. *Braxdale v. Bange (1958) 166 Cal. App. 2d 399, 402, 333 P.2d 420*

In action for breach of contract to form partnership, plaintiff entitled to recover for services performed pursuant to contract. *Braxdale v. Bange (1958) 166 Cal. App. 2d 399, 403, 333 P.2d 420*

[4] Conspiracy

Partners entitled to maintain action at law against other partners for civil conspiracy. *Olivet v. Frischling (1980) 104 Cal. App. 3d 831, 839-840, 164 Cal. Rptr. 87*

When partner is deprived of possession of partnership business through conspiracy of copartner and third person,

partner is permitted either to sue both copartner and third person for damages or to sue copartner alone based on breach of fiduciary relationship. *Ellis v. Navarro (1943) 61 Cal. App. 2d 755, 759, 143 P.2d 735* ; *Sterman v. Ziem (1936) 17 Cal. App. 2d 414, 419-420, 62 P.2d 160*

[5] Damages

Loss of prospective profits that is natural and direct consequence of breach of contract is recoverable element of damages in action for breach of contract. *Nelson v. Reisner (1958) 51 Cal. 2d 161, 171, 331 P.2d 17* ; *James v. Herbert (1957) 149 Cal. App. 2d 741, 749, 309 P.2d 91* (involving joint venture)

Damages consisting of loss of anticipated profits not required to be established with certainty; showing of reasonable probability that profits would have been earned except for breach is sufficient. *Nelson v. Reisner (1958) 51 Cal. 2d 161, 171-172, 331 P.2d 17* ; *James v. Herbert (1957) 149 Cal. App. 2d 741, 749, 309 P.2d 91* (involving joint venture)

Punitive damages proper in action for conspiracy against joint venturers who excluded one joint venturer from participation in venture and profits. *James v. Herbert (1957) 149 Cal. App. 2d 741, 749-750, 309 P.2d 91*

In action by one partner against others for conspiracy and conversion of partnership property, damages are not limited to actual value of property to which plaintiff was deprived, but include prospective profits lost as consequence of wrongful conduct of defendants. *Ellis v. Navarro (1943) 61 Cal. App. 2d 755, 759-760, 143 P.2d 735*

Evidence of past and present profits admissible to determine compensation recoverable by plaintiff partner in action for conspiracy and conversion of partnership property by copartners. *Ellis v. Navarro (1943) 61 Cal. App. 2d 755, 760, 143 P.2d 735*

[6] Declaratory Relief

Action for declaratory relief to construe partnership agreement. *Jacoby v. Feldman (1978) 81 Cal. App. 3d 432, 435-436, 441-442, 146 Cal. Rptr. 334* ; *Moreno v. Jessup Buena Vista Dairy (1975) 50 Cal. App. 3d 438, 445, 123 Cal. Rptr. 393* ; *Page v. Page (1962) 199 Cal. App. 2d 527, 528, 532-533, 18 Cal. Rptr. 897*

[7] Evidence

Correctness of private books of one partner must be established by extrinsic proof. *Riley v. Brown (1925) 72 Cal. App. 468, 474, 237 P. 833*

[8] Joint Ventures

[a] Accounting

Despite failure of joint venture, defaulting party is generally entitled to accounting of property interests. *Alfinito v. Sater (1966) 246 Cal. App. 2d 362, 377, 54 Cal. Rptr. 636*

Representative of deceased party to joint venture has right to accounting on dissolution. *Davis v. California Motors (1946) 73 Cal. App. 2d 241, 246, 166 P.2d 52*

[b] Actions Between Joint Venturers

In case of joint venturers, one of whom holds note made by other to effectuate their venture, usury law does not prevent enforcement of note even though its terms would violate usury law if note had been made to memorialize loan; since note is part of transaction that is not "loan or forbearance of any money, goods or things in action" [*see Cal. Const., art. XV, § 1*], usury law does not apply; whether transaction is joint venture or loan is question of fact. *Junkin v. Golden West Foreclosure Serv., Inc. (2010) 180 Cal. App. 4th 1150, 1155-1158, 103 Cal. Rptr. 3d 582* (review of facts supported conclusion that parties to promissory note were joint venturers, not lender and borrower)

Evidence supported verdict and damages for plaintiff in action against joint venturer for breach of fiduciary duty based on defendant's ouster of plaintiff from real estate development venture, with proffered compensation that was grossly inadequate in view of potential value of venture. *Pellegrini v. Weiss (2008) 165 Cal. App. 4th 515, 524-527, 81 Cal. Rptr. 3d 387*

Remedies of joint venturers and partners when joint venturer or partner repudiates agreement are not exclusively governed by former *Corp. Code § 15038* (damages for breach of partnership agreement). *Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 557, 140 Cal. Rptr. 330*

When one party to joint venture agreement has partly performed by rendering services and advancing money in furtherance of joint enterprise and other coadventurer repudiates agreement, former is permitted to sue for breach of contract, is not limited to action for dissolution and accounting, and by common count can recover value of services rendered and amount of money advanced. *Mayo v. Pacific Project Consultants, Inc. (1969) 1 Cal. App. 3d 1013, 1019, 82 Cal. Rptr. 117*

Fact that party breaching joint venture agreement did not benefit from part performance of party suing for breach is no defense to action. *Mayo v. Pacific Project Consultants, Inc. (1969) 1 Cal. App. 3d 1013, 1019, 82 Cal. Rptr. 117*

One venturer cannot sue another in law relative to joint venture transaction, but is required to resort to equitable suit for dissolution and accounting; exceptions. *Hosking v. Spartan Properties, Inc. (1969) 275 Cal. App. 2d 152, 156-157, 79 Cal. Rptr. 893*

Action for fraud between joint venturers. *Timberlake v. Schwank (1967) 248 Cal. App. 2d 708, 711, 56 Cal. Rptr. 799* ; *Elsbach v. Mulligan (1943) 58 Cal. App. 2d 354, 366-367, 136 P.2d 651*

Joint venturers can bring action at law when no validly created joint venture existed from beginning. *Aman v. Batt (1962) 205 Cal. App. 2d 180, 186, 23 Cal. Rptr. 34*

Rule requiring accounting between partners does not apply with equal force to joint venturers, who may sue at law for damages. *Elsbach v. Mulligan (1943) 58 Cal. App. 2d 354, 369, 136 P.2d 651*

Joint venturer permitted to bring action against coventurer for breach of agreement, share of profits or losses, or contributions in excess of share, when amount to be recovered is certain and accounting is not required. *Tufts v. Mann (1931) 116 Cal. App. 170, 183, 2 P.2d 500* ; *Iron etc. Co. v. American Milling etc. Co. (1931) 115 Cal. App. 238, 249, 1 P.2d 1008*

[9] Loans Between Partners

Action at law between partners permissible on promissory note between partners because transaction was separate from partnership transactions. *Blee v. Lead Mountain Mines (1937) 8 Cal. 2d 550, 552, 66 P.2d 646* ; *Van Fleet-Durkee, Inc. v. Oyster (1952) 112 Cal. App. 2d 739, 748, 247 P.2d 403*

General rule prohibiting actions at law is inapplicable to loan by one partner to another, even when borrowing partner intends to, and does, put money into partnership. *Montgomery v. Riess (1959) 176 Cal. App. 2d 711, 716-717, 1 Cal. Rptr. 550* ; *Collins v. Meis (1934) 139 Cal. App. 233, 236, 33 P.2d 472* ; *Arnheim v. Gordon (1913) 21 Cal. App. 754, 755-756, 132 P. 840*

[10] Proof of Partnership Existence

[a] Need For Agreement

Existence of partnership not dependent on formal written agreement. *Cochran v. Board of Supervisors (1978) 85 Cal. App. 3d 75, 81, 149 Cal. Rptr. 304*

Intention to form partnership may be determined from the terms of the parties' agreement or from surrounding circumstances. *Security Pac. Nat. Bank v. Matek (1985) 175 Cal. App. 3d 1071, 1075, 223 Cal. Rptr. 288* .

Partners' "community of interest" refers to either joint interest in capital, profit, and loss of the business, or to partners' right to make contracts, incur liabilities, and otherwise manage business. *Moulin v. Der Zakarian (1961) 191 Cal. App. 2d 184, 189, 12 Cal. Rptr. 572* ; *People v. Woolson (1960) 181 Cal. App. 2d 657, 669, 5 Cal. Rptr. 766* .

[b] Contributions to Capital

Equal (or any) contribution to capital by each partner not necessary to prove partnership existence. *Galardi v. State Bar (1987) 43 Cal. 3d 683, 691, 238 Cal. Rptr. 774, 739 P.2d 134*

Partners may contribute their labor and skill to venture in lieu of capital. *Galardi v. State Bar (1987) 43 Cal. 3d 683, 691, 238 Cal. Rptr. 774, 739 P.2d 134* ; *Okun v. Morton (1988) 203 Cal. App. 3d 805, 250 Cal. Rptr. 220*

[c] Agreement for Division of Profits and Losses

Express agreement to divide profits is not prerequisite to prove existence of partnership; profit sharing is prima facie evidence of being a partner, rather than required element of definition of partnership. *Holmes v. Lerner (1999) 74 Cal. App. 4th 442, 453-454, 457, 88 Cal. Rptr. 2d 130*

Agreement to share profits and losses is essential element of partnership. *People v. Park (1978) 87 Cal. App. 3d 550, 564, 151 Cal. Rptr. 146*

Inference of partnership from agreement to share profits must be accompanied by some evidence that agreement is in furtherance of intention to carry on a business. *Bank of California v. Connolly (1973) 36 Cal. App. 3d 350, 364, 111 Cal. Rptr. 468*

Presumption of partnership (from agreement to share profits) overcome by evidence showing the relationship to be that of lender and borrower with profits being paid for services rendered or money advanced. *Dills v. Delira Corp. (1956) 145 Cal. App. 2d 124, 131, 302 P.2d 397*

Implied agreement to share losses (from agreement to share profits) may also be used to aid parties claiming status as partners by virtue of agreement that is silent regarding division of losses. *Martyn v. Leslie (1955) 137 Cal. App. 2d 41, 61, 290 P.2d 58*

[d] Partnership Agreement

Some kind of partnership agreement, whether express or implied, oral or written, is necessary to prove partnership' existence. *Leff v. Gunter (1983) 33 Cal. 3d 508, 518, 189 Cal. Rptr. 377, 658 P.2d 740*

Interpretation of partnership agreement presents question of law that may be decided de novo by appellate court. *Broffman v. Newman (1989) 213 Cal. App. 3d 252, 257, 261 Cal. Rptr. 532*

[e] Licensing Requirements

Ousted partner could not establish interest under partnership agreement that all parties knew was illegal because it contemplated operation of on-sale liquor business without required partnership license that was unobtainable. *Hooper v. Barranti (1947) 81 Cal. App. 2d 570, 184 P.2d 688*

Partnership agreement to acquire property and to construct residences thereon not invalid because partnership lacks contractor's license at time of agreement; license could be subsequently obtained or construction work let to another contractor. *McNichols v. Nelson Valley Bldg. Co. (1953) 116 Cal. App. 2d 266, 271, 253 P.2d 744*

Plaintiff's right to share in proceeds of unlicensed partnership business does not depend on court's enforcement of illegal contract where business has been terminated and parties agree to divide assets. *Denning v. Taber (1945) 70 Cal. App. 2d 253, 257, 160 P.2d 900* ; *Norwood v. Judd (1949) 93 Cal. App. 2d 276, 285, 209 P.2d 24*

Failure of a partner to obtain license to perform partnership's work does not make partnership agreement illegal. *Broffman v. Newman (1989) 213 Cal. App. 3d 252, 261-262, 261 Cal. Rptr. 532*

[f] Burden of Proof

Whether partnership has been created depends primarily on whether parties intended to do those things that would make them partners irrespective of their awareness of legal consequences of their conduct. *Westcott v. Gilman (1915) 170 Cal. 562, 569, 150 P. 777]*

Burden of proving partnership existence rests with the party alleging that fact. *Toney v. Nolder (1985) 173 Cal. App. 3d 791, 796, 219 Cal. Rptr. 497*

Absent written partnership agreement, proof of partnership must be by preponderance of the evidence. *Weiner v. Fleischman (1991) 54 Cal. 3d 476, 490, 286 Cal. Rptr. 40, 816 P.2d 892*

[g] Commencement of Partnership

Partnership commences at time of agreement unless parties intend partnership to come into being at some future time or on occurrence of condition precedent. *Solomont v. Polk Development Co. (1966) 245 Cal. App. 2d 488, 496, 54 Cal. Rptr. 22*

[11] Repudiation of Partnership and Conversion

[a] Action at Law

When one partner repudiates partnership and converts partnership assets, victim partner may elect between remedies of damages, on the one hand, or dissolution, liquidation of partnership assets and distribution of proceeds. *Navarro v. Perron (2004) 122 Cal. App. 4th 797, 802, 19 Cal. Rptr. 3d 198*

When one partner excludes other, repudiates existence of partnership, and converts partnership assets, victim is permitted to sue for damages without seeking judicial dissolution and accounting. *Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 557, 140 Cal. Rptr. 330* (involving joint venture)

When joint venturer has partly performed by rendering services and advancing money in furtherance of joint enterprise, and co-venturer repudiates agreement, former can sue for breach of contract and by common count can recover value of services rendered and money advanced. *Mayo v. Pacific Project Consultants, Inc. (1969) 1 Cal. App. 3d 1013, 1018-1019, 82 Cal. Rptr. 117*

Fact that party breaching joint venture agreement did not benefit from part performance of party suing for breach is no defense to action. *Mayo v. Pacific Project Consultants, Inc. (1969) 1 Cal. App. 3d 1013, 1019, 82 Cal. Rptr. 117*

General rule that partner may not sue copartner in action at law inapplicable when wrongful act is not only breach of contract but also tortious and results in termination of partnership and conversion of assets. *Boyd v. Bevilacqua (1966) 247 Cal. App. 2d 272, 288, 55 Cal. Rptr. 610* (involving joint venture)

[b] Conversion

Conversion of partnership or joint venture assets includes conversion of interests in real property. *Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 568-569, 140 Cal. Rptr. 330* (case involved joint venture)

When partners exclude copartner and appropriate partnership property to their use, excluded partner may bring action for conversion and obtain personal judgment for damages against offending partners. *Wilson v. Brown (1929) 96 Cal. App. 140, 143, 273 P. 847*

[c] Damages

Damages for repudiation of joint venture agreement and conversion includes profits that venture could reasonably have been expected to earn during period of joint venture, computed in accordance with agreement of parties. *Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 571-572, 140 Cal. Rptr. 330*

Proper measure of damages for repudiation of partnership agreement and conversion of assets depends on whether plaintiff proceeds on theory of breach of contract, conversion, or tortious conduct generally. *Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 562-563, 140 Cal. Rptr. 330*

[d] Fraud

In case of repudiation of partnership or joint venture agreement and conversion of assets, fraud action seeking damages under *Civ. Code §§ 1709* and *3333* is proper. *Boyd v. Bevilacqua (1966) 247 Cal. App. 2d 272, 294-295, 55 Cal. Rptr. 610*

Joint venturers are fiduciaries and any transaction by one securing advantage over other or others is presumptively fraudulent for purposes of showing constructive fraud. *Boyd v. Bevilacqua (1966) 247 Cal. App. 2d 272, 290, 55 Cal. Rptr. 610*

[12] Rescission

Pursuant to former *Corp. Code § 15039*, arbitration award rescinded investment agreement, imposed lien for each plaintiff against partnership's assets, and ordered general partner to indemnify each plaintiff. *Sy First Family Limited Partnership v. Cheung (1999) 70 Cal. App. 4th 1334, 1339-1340, 83 Cal. Rptr. 2d 340*

Partnership contract is subject to rescission in same manner and for same causes as other contracts. *Weltman v. Kaye (1959) 167 Cal. App. 2d 607, 613, 334 P.2d 917* ; *Long v. Newlin (1956) 144 Cal. App. 2d 509, 512, 301 P.2d 271*

Effect of rescinding partnership agreement is that partnership has never existed, although person holding himself or herself out as partner is not excused from liability to creditors of partnership. *Weltman v. Kaye (1959) 167 Cal. App. 2d 607, 614, 334 P.2d 917*

Pursuant to former *Corp. Code § 15039(c)*, party entitled to rescind partnership agreement is also entitled to indemnification by person guilty of fraud or misrepresentation against all partnership debts and liabilities. *Long v. Newlin (1956) 144 Cal. App. 2d 509, 512-513, 301 P.2d 271*

Accounting is not necessary prior to action at law for rescission of partnership contract. *Long v. Newlin (1956) 144 Cal. App. 2d 509, 513, 301 P.2d 271*

Innocent misrepresentations of material facts may be constructive fraud and ground for rescission of partnership contract. *Brown v. Klein (1928) 89 Cal. App. 153, 156, 264 P. 496*

[13] Rights and Duties of Partners

[a] Compensation

Absent agreement, partner is not entitled to any compensation for services to partnership other than share of profits. *Estate of McConnell (1936) 6 Cal. 2d 493, 497, 58 P.2d 639* ; *Wind v. Herbert (1960) 186 Cal. App. 2d 276, 286, 8 Cal. Rptr. 817*

Absent agreement to contrary, fact that one partner contributes greater skill and takes over management of business does not entitle partner to extra compensation. *Vangel v. Vangel (1953) 116 Cal. App. 2d 615, 631, 254 P.2d 919*

Agreement providing for compensation of partner for services may be oral and either express or implied. *Neilsen v. Holmes (1947) 82 Cal. App. 2d 315, 324, 186 P.2d 197*

[b] Disclosure

Fiduciary duty of disclosure terminates on formation of contract for sale of partnership interest; that is, when selling partner accepts offer to purchase, after which matters affecting value of interest sold need not be disclosed. *Stone v. Millstein (9th Cir. 1986) 804 F.2d 1434, 1437-1438* (diversity case applying California law, distinguishing *Estate of Witlin (1978) 83 Cal. App. 3d 167, 175-176, 147 Cal. Rptr. 723* , as involving special duty to deceased partner's estate, and *Laux v. Freed (1960) 53 Cal. 2d 512, 522, 2 Cal. Rptr. 265, 348 P.2d 873* as involving special duties owed during dissolution and liquidation)

Attorney for partner represents all partners in partnership business; thus, joint client rule of *Evid. Code § 962* is applicable to communication by one partner to attorney not made in presence of other partners. *Wortham & Van Liew*

v. Superior Court (1987) 188 Cal. App. 3d 927, 931-933, 233 Cal. Rptr. 725 ; *McCain v. Phoenix Resources, Inc. (1986) 185 Cal. App. 3d 575, 581, 230 Cal. Rptr. 25* ; see also *Hecht v. Superior Court (1987) 192 Cal. App. 3d 560, 565-567, 237 Cal. Rptr. 528* (rule applied against attorney for founding shareholder when business run as partnership was later incorporated)

Between fiduciaries, actual notice is question of fact, and distribution of report at partnership meeting is insufficient to charge other partners with notice of separate interests or profit on lease that is reported in footnote. *Rosenfeld, Meyer & Susman v. Cohen (1987) 191 Cal. App. 3d 1035, 1059, 237 Cal. Rptr. 14*

Limitation period on former partners' cause of action against other former partners for fraud based on concealment of profits derived from sale and rental of property to dissolved partnership is postponed by fraudulent concealment and does not commencing until plaintiffs had actual or inquiry notice. *Rosenfeld, Meyer & Susman v. Cohen (1987) 191 Cal. App. 3d 1035, 1059-1060, 237 Cal. Rptr. 14*

[c] Fiduciary Duty

Relationship between partners is fiduciary in nature, imposing on partners duty of good faith and fair dealing and requiring that no partner may take any unfair advantage. *Nelson v. Abraham (1947) 29 Cal. 2d 745, 750-751, 177 P.2d 931* ; *Wind v. Herbert (1960) 186 Cal. App. 2d 276, 284, 8 Cal. Rptr. 817*

Partner has no right to use partnership property for purposes unrelated to partnership, is bound to act in highest good faith to copartner, and cannot obtain any advantage over copartner in partnership affairs by slightest misrepresentation or concealment. *Galardi v. State Bar (1987) 43 Cal. 3d 683, 693, 238 Cal. Rptr. 774, 739 P.2d 134* (concerning joint venturers)

Generally after incorporation of partnership, the rights or obligations that partners can enforce against each other no longer exist; without preincorporation agreement or evidence that corporate form was disregarded, shareholders in duly-formed corporation operating in accordance with legal requirements do not become de facto partners and acquire fiduciary duties to each other simply because they earn same salary and refer to each other as partners. *Persson v. Smart Inventions, Inc. (2005) 125 Cal. App. 4th 1141, 1159, 23 Cal. Rptr. 3d 335*

Limited partners' claims that general partners breached fiduciary duties by engaging in wrongful actions related to merger transaction that benefitted general partners at expense of limited partners were individual rather than derivative in nature. Everest Investors 8 v. *McNeil Partners (2003) 114 Cal. App. 4th 411, 424, 429, 8 Cal. Rptr. 3d 31*

No breach of fiduciary duty occurred when partner bid on and purchased partnership real property at foreclosure sale which took place after other partners failed to fulfill their obligation to make mortgage payments on property. *Jones v. Wagner (2001) 90 Cal. App. 4th 466, 473-474, 108 Cal. Rptr. 2d 669*

Fiduciary duties owed among partners are limited, and continuing fiduciary duty that survives dissolution of partnership is breached by remaining partners only if they exclude ex-partner from benefits of existing partnership opportunity. *Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal. App. 4th 1509, 1551, 80 Cal. Rptr. 2d 94*

When partnership is held liable to third party based on partner's negligence, partnership is entitled to seek indemnity from partner whose negligence caused loss and pursuit of indemnity action does not violate any fiduciary obligation partnership owed to ex-partner. *Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal. App. 4th 1509, 1551, 80 Cal. Rptr. 2d 94*

Good faith is presumed, and, in absence of evidence of bad faith, firing managing partner is proper under provisions of

partnership agreement vesting all control, management, and direction of business of partnership in Class A partners. *DeSimoni v. Brusco (1987) 191 Cal. App. 3d 914, 916-917, 236 Cal. Rptr. 711*

[d] Unfair Competition

Partner's secret competition with partnership, exploiting partnership opportunity for personal benefit, breaches fiduciary duty to copartners by unfair competition, even after partner's withdrawal from partnership. *Leff v. Gunter (1983) 33 Cal. 3d 508, 513-517, 189 Cal. Rptr. 377, 658 P.2d 740* (case involved joint venture)

Partner who agrees to give personal attention to partnership business may not engage in any other business that gives partner an interest adverse to partnership or prevents partner from giving partnership all attention that would be advantageous to it. *Olivet v. Frischling (1980) 104 Cal. App. 3d 831, 843, 164 Cal. Rptr. 87* (*disapproved on other grounds by Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521, 28 Cal. Rptr. 2d 475, 869 P.2d 454*)

[14] Partnership Accounts

Former *Corp. Code § 15018(a)* controlled determination of each general partner's obligation on loan taken out by limited partnership; each was liable on losses of partnership according to respective share in profits. *Wall v. Siegel (1998) 62 Cal. App. 4th 875, 879-880, 73 Cal. Rptr. 2d 102*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsDissolution & Winding UpGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionBreach of Agreement & ExpulsionBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpDistribution of AssetsBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionBreach of Fiduciary DutyBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionNegligent Acts of PartnersBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionPartnership LiabilitiesBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesFiduciary ResponsibilitiesDuty of Good Faith & LoyaltyBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersLosses & ProfitsBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersManagement & VotingBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersPartnership PropertyBusiness & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesCivil ProcedureRemediesEquitable AccountingsPartnershipsContracts LawContract InterpretationGood Faith & Fair DealingContracts LawDefensesFraud & MisrepresentationConstructive FraudContracts LawDefensesFraud & MisrepresentationMaterial MisrepresentationContracts LawRemediesElection of RemediesReal Property LawOwnership & TransferTransfer Not By DeedGeneral OverviewTortsBusiness TortsUnfair Business PracticesElementsTortsIntentional TortsConversionRemediesTortsVicarious LiabilityPartnersGeneral Overview

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PART III. RESEARCH GUIDE

35-401 California Forms of Pleading and Practice--Annotated § 401.33

§ 401.33 Law Reviews

Feldman, *Your Partner's Keeper: The Duty of Good Faith and Fair Dealing Under the Revised Uniform Partnership Act, 48 S.M.U. L. Rev. 1931 (1995)*

Harris, *Why Anti-Competitive Clauses Should be Unenforceable in Law Partnership Agreements: An Argument for Rejecting California's Approach in Howard v. Babcock*, 8 Georgetown Journal of Legal Ethics 669 (1995)

Johnson, *Limit Liability for Lawyers: General Partners Need Not Apply, 51 Bus. Law 85 (1995)*

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Welborn, *Breaking Partnership Deadlock, 39 Prac. Law. No. 1, p. 57 (1993)*

Schwartz, *Compensation of a Partner for Services: Problems in Interpreting the U.P.A. and Partnership Agreements, 19 Sw. U.L. Rev. 1 (1990)*

Comment, *U.P.A. Section 18(h): Majority Control, Dissenting Partners, and the Need for Reform, 13 U.C. Davis L. Rev. 903 (1980)*

Comment, *A Partner's Right of Inspection Under Section 19 of the Uniform Partnership Act: The Case for a Reasonable Restrictions Amendment, 13 U.C. Davis L. Rev. 887 (1980)*

Legal Topics:

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

Business & Corporate LawGeneral PartnershipsGeneral OverviewBusiness & Corporate LawGeneral PartnershipsFormationPartnership AgreementsBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesFiduciary ResponsibilitiesDuty of Good Faith & LoyaltyContracts LawContract InterpretationGood Faith & Fair DealingContracts LawTypes of ContractsPartnership Agreements

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§ 401.34 Text References

Witkin, Summary of California Law, vol. 9, *Partnership*, §§ 30, 33 (10th ed. 2005)

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[Reserved]

§§ 401.35[Reserved]

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PART IV. FORMS

35-401 California Forms of Pleading and Practice--Annotated § 401.40

§ 401.40 Complaint by Partner Against Copartner--For Restitution Based on Rescission of Partnership Contract [Civ. Code §§ 1689, 1692] and for Lien on Surplus Partnership Property [Corp. Code § 16405(b)(3); former Corp. Code § 15039(a)]--Fraudulent Misrepresentation [Civ. Code §§ 1567, 1571, 1572]

[1] FORM Complaint by Partner Against Copartner--For Restitution Based on Rescission of Partnership Contract [Civ. Code §§ 1689, 1692] and for Lien on Surplus Partnership Property [Corp. Code § 16405(b)(3); former Corp. Code § 15039(a)]--Fraudulent Misrepresentation [Civ. Code §§ 1567, 1571, 1572]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RESTITUTION AND INDEM-
_____ [*name*],	)	NIFICATION
Defendant.	)	(Rescission of Partnership Contract)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____[*name of individual partner*] is, and at all times herein mentioned was, a resident of _____ County, California _____[*or other capacity and residence*].

2. On or about _____[*date*], in _____, California, plaintiff and defendant entered into _____ [a written *or* an oral] contract to carry on, as partners, a business known as _____[*name of partnership*], located in _____[*city*], _____ County,

California, that business being _____ [*specify nature of business, e.g.*, a collection agency]. [A copy of the agreement is attached as Exhibit _____ and made a part hereof.]

3. On or about _____[*date*], at _____[*city*], _____ County, California, defendant represented to plaintiff that _____ [*specify fraudulent misrepresentation, e.g.*, the same business, previously owned solely by defendant, had made net profits in the previous year of $_____, and that on the date of the agreement between plaintiff and defendant, the value of the business was $_____].

4. Defendant made that representation _____ [knowing it to be false *or* with no reasonable ground for believing it to be true] and with the intent to induce plaintiff to enter into the aforementioned contract.

5. Plaintiff, at the time the representation was made by defendant, and at the time plaintiff entered into the contract in reliance on that representation, was ignorant of its falsity, and believed it to be true. In reliance on the representation, plaintiff was induced to, and did, enter into the partnership contract, and _____ [*specify injury, e.g.*, pay consideration for his/her one-half interest to defendant in the total amount of $_____].

6. Plaintiff had no knowledge of the aforementioned injury caused to him/her by defendant until on or about _____[*date*], at which time plaintiff discovered the falsity of defendant's representation.

[*EITHER*]

7. On or about _____[*date*], plaintiff notified defendant in writing that he/she had rescinded the contract on the ground of fraudulent misrepresentation and offered to restore to defendant all consideration given by him/her on condition that defendant restore to plaintiff _____ [the consideration advanced by him/her in the sum of $_____ *or specify other consideration*]. Defendant refused, and continues to refuse, to return that consideration.

[*OR*]

7. Plaintiff intends service of summons of this complaint to serve as notice of rescission of the aforementioned contract, and hereby offers to restore all consideration furnished by defendant under the contract, on condition that defendant restore to him/her _____ [the consideration furnished by plaintiff in the sum of $_____ *or describe other consideration*].

[*CONTINUE*]

8. As a result of defendant's fraud and misrepresentation, plaintiff is entitled to rescission of the agreement, to recover all amounts paid by him/her under the agreement, amounting to a total sum of $_____, and to be indemnified by defendant against all debts and liabilities of the partnership.

WHEREFORE, plaintiff prays judgment as follows:

1. For a determination by the Court that the partnership contract between plaintiff and defendant has been rescinded and for an order of restitution to plaintiff _____ [of the consideration paid by plaintiff in the sum of $_____, with interest at the rate of _____ percent per annum from _____ (*date*) *or describe other consideration*];

2. For an order granting plaintiff indemnification against all debts and liabilities of the partnership.

3. For cost of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____[*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, may be used by a partner who is rescinding a partnership contract on the ground of fraudulent misrepresentation to obtain restitution of benefits conferred by him or her as a result of the contract [*see Civ. Code §§ 1689(b)(1), 1692*]. A partnership contract is subject to rescission in the same manner and for the same causes as other contracts, and a partner may bring an action for rescission and restitution without first seeking an accounting [*Weltman v. Kaye (1959) 167 Cal. App. 2d 607, 613, 334 P.2d 917* ; *Long v. Newlin (1956) 144 Cal. App. 2d 509, 512, 301 P.2d 271]* . This form assumes a fact situation in which the plaintiff has bought a partnership interest and soon discovers that he or she has been deceived concerning its actual worth [*see, e.g., Weltman v. Kaye (1959) 167 Cal. App. 2d 607, 613, 334 P.2d 917* (partnership lasts less than five months)]. The complaint here also assumes there are no issues concerning the plaintiff's liability to third parties that would require an accounting.

This form does *not* include a prayer for either of the following, both of which are remedies set forth in former *Corp. Code § 15039* (inapplicable after January 1, 1999): (1) that the plaintiff have a lien on the surplus partnership property after creditors are satisfied; or (2) that to the extent the plaintiff has paid partnership liabilities, he or she be granted the status of a partnership creditor. These remedies would appear to be appropriate only in the context of an action for accounting to determine what partnership liabilities were incurred, by whom, and what surplus remains. This form does, however, include a prayer that the plaintiff be indemnified by the defendant against all debts and liabilities of the partnership, a remedy also included in former *Corp. Code § 15039* [former *Corp. Code § 15039(c)*], and one that it appears could be granted without the need to determine what partnership obligations, if any, the plaintiff might be liable for. For further discussion, see *§ 401.13[4]*.

[3] Allegations

The complaint in [1], *above*, alleges:

- Existence of the agreement to be rescinded (Paragraph 2).

- The misrepresentation made by defendant (Paragraph 3) [*Civ. Code § 1689(b)(1)*; *see Weltman v. Kaye (1959) 167 Cal. App. 2d 607, 609-610, 334 P.2d 917]* .

- Defendant's intent to induce plaintiff to enter into the partnership contract (Paragraph 4) [*see Civ. Code §§ 1567, 1571, 1572*; *South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 Cal. App. 3d 750, 765, 102 Cal. Rptr. 286]* .

- Plaintiff's reliance on the misrepresentation, to his or her damage (Paragraph 5) [*see South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 Cal. App. 3d 750, 765, 102 Cal. Rptr. 286]* .

- Date that plaintiff discovered the falsity of the representation (Paragraph 6) [*see Code Civ. Proc. § 337(3)*].

- Plaintiff's notice of rescission and offer to restore defendant's consideration or plaintiff's intent that the service of summons of the complaint serve as that notice and offer to restore (alternative Paragraphs 7) [*Civ. Code § 1691*].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[5] Venue

The superior court in the county of defendant's residence at the commencement of the action is the proper court for trial of the action [*Code Civ. Proc. § 395(a)*].

[6] Cross References

For general discussion of the requirements for complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to actions for rescission and restitution, see Ch. 490, *Rescission and Restitution*

For memoranda of points and authorities relating to fraud as a ground for rescission of a contract, see California Points and Authorities, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake* (Matthew Bender)

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Volume 35: Partition thru Paternity-Chs. 397-412
Chapter 401 PARTNERSHIPS: ACTIONS BETWEEN GENERAL PARTNERS AND PARTNERSHIP
PART IV. FORMS

35-401 California Forms of Pleading and Practice--Annotated § 401.41

§ 401.41 Complaint for Damages for Breach of Partnership Agreement [Corp. Code § 16405(b)(1); former Corp. Code § 15038(b)(1)(B); Civ. Code § 3300], Breach of Fiduciary Duty [Corp. Code §§ 16404(c), 16405(b)(2)(A)], Conversion [Civ. Code § 3336], and Fraud [Civ. Code §§ 1709, 3333]--Repudiation of Partnership Contract and Conversion of Partnership Assets by Partner [Civ. Code §§ 1573, 1710(4)]

[1] FORM Complaint for Damages for Breach of Partnership Agreement [Corp. Code § 16405(b)(1); former Corp. Code § 15038(b)(1)(B); Civ. Code § 3300], Breach of Fiduciary Duty [Corp. Code §§ 16404(c), 16405(b)(2)(A)], Conversion [Civ. Code § 3336], and Fraud [Civ. Code §§ 1709, 3333]--Repudiation of Partnership Contract and Conversion of Partnership Assets by Partner [Civ. Code §§ 1573, 1710(4)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Repudiation of Partnership Contract and Conversion
Defendant.	)	of Partnership Assets)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST COUNT
(Breach of Contract)

1. [*Defendant's capacity and residence. See § 401.40[1], Paragraph 1.*]

2. On or about _____[*date*], at _____[*city*], _____ County, California, plaintiff and defendant entered into a _____ [written *or* oral] contract, to carry on a business, specifically, _____ [*specify nature of business, e.g.*, a real estate development firm], located in _____[*city*], _____ County, California, as a partnership. _____ [A copy of the agreement is attached as Exhibit _____ and by reference *or* The terms of the agreement were that _____ (*set forth essential terms of agreement, e.g.*, plaintiff agreed to contribute $_____ to the partnership business and defendant agreed to contribute $_____ to the partnership business, and that plaintiff and defendant would share profits and losses equally and would share equally in the management of the business)].

3. Plaintiff has performed all conditions, covenants, and promises required to be performed on his/her part in accordance with the terms and conditions of the contract [, except _____ (*specify conditions not performed*), the performance of which was excused on the ground that_____ (*specify*)].

4. On or about _____[*date*], defendant breached the contract by repudiating the existence of the partnership and denying plaintiff's interest in the partnership business and partnership assets, and by converting partnership assets to his/her own use, those assets consisting of _____ [*specify, e.g.*, the partnership interest in real property described as _____ (*address or location*)].

5. As a proximate result of defendant's breach of the partnership contract, _____ [*specify damages proximately caused by breach, e.g.*, plaintiff suffered damage in that he/she contributed $_____ to the partnership business and he/she contributed services in management of the partnership business, with a value of $_____]. [Plaintiff also lost profits that would have been earned by the partnership but for defendant's breach, in the sum of $_____.]

SECOND COUNT
(Breach of Fiduciary Duty)

6. Plaintiff refers to and herein incorporates Paragraphs 2-4 of the First Count.

7. By intentionally repudiating the existence of the partnership and denying plaintiff's interest in the partnership business, and by converting partnership assets to his/her own use, defendant has breached the duty of care imposed by *Corporations Code Section 16404(c)* to the partnership and to plaintiff.

8. As a proximate result of defendant's breach of his/her duty of care to the partnership and to plaintiff, _____ [*specify damages proximately caused by breach, e.g.*, plaintiff suffered damage in that he/she contributed $_____ to the partnership business and he/she contributed services in management of the partnership business, with a value of $_____]. [Plaintiff also lost profits that would have been earned by the partnership but for defendant's breach, in the sum of $_____.]

THIRD COUNT
(Conversion)

9. Plaintiff refers to and herein incorporates Paragraphs 2-4 of the First Count.

10. At all times herein mentioned, and in particular on or about _____[*date*], plaintiff was, as a partner

at the time the property was acquired by the partnership, and still is, an owner, and was, and still is, entitled to the possession of the following property: _____ [*describe property, e.g.*, the partnership interest in real property, owned by the partnership, described as _____ (*address or location*)].

11. On or about _____[*date*], and at _____[*city*], _____ County, California, the above-mentioned property had a value of $_____.

[12. As a proximate result of defendant's conversion of the above-mentioned property, plaintiff _____ (*allege injuries suffered that are the natural, reasonable, and proximate results of the conversion*), all to plaintiff's damage in the sum of $_____.]

[13. Between the time of defendant's conversion of the above-mentioned property to his/her own use and the filing of this action, plaintiff _____ (*describe time and money properly expended in pursuit of the converted property*) all to plaintiff's further damage in the sum of $_____.]

14. In doing the acts herein alleged, defendant acted with oppression, fraud, and malice, and plaintiff is entitled to punitive damages.

FOURTH COUNT
(Actual Fraud)

15. Plaintiff refers to and herein incorporates Paragraphs 2-4 of the First Count, and Paragraph 14 of the Third Count.

16. By entering into the partnership agreement, defendant promised, on _____[*date*], that defendant and plaintiff would share equally in the ownership of the partnership business and assets and in the profits and losses of the partnership business.

17. At the time defendant made the promise to plaintiff, defendant had no intention of performing that promise.

18. The promise was made by defendant with the intent to induce plaintiff to _____ [*specify, e.g.*, contribute $_____ and services to the partnership] from which defendant could gain profits and benefits for himself/herself.

19. Plaintiff, at the time the promise was made and at the time plaintiff took the actions herein alleged, was ignorant of defendant's secret intention not to perform and could not, in the exercise of reasonable diligence, have discovered defendant's secret intention. In reliance on defendant's promise, plaintiff _____ [*specify, e.g.*, contributed $_____ and services to the partnership]. If plaintiff had known of defendant's actual intention, plaintiff would not have taken that action.

20. As a proximate result of defendant's fraud and the facts alleged in this complaint, plaintiff was induced to, and did, _____ [*specify, e.g.*, pay $_____ to the partnership and contribute services to the partnership business with a value of $_____] by reason of which plaintiff has been damaged in the sum of $_____.

FIFTH COUNT
(Constructive Fraud)

21. Plaintiff refers to and herein incorporates Paragraphs 2-4 of the First Count, and Paragraph 14 of the Third Count.

22. By virtue of the partnership agreement, the relationship between plaintiff and defendant was fiduciary in nature. Defendant thereby owed plaintiff the fiduciary duties of loyalty and care, and the obligation to conduct the partnership business in good faith and fair dealing. Because plaintiff's confidence in defendant's integrity caused plaintiff to entrust defendant with the authority to act for the partnership, a confidential relationship existed at all times herein mentioned between plaintiff and defendant.

23. Defendant breached his/her fiduciary duties to plaintiff and violated the relationship of trust and confidence by excluding plaintiff from his/her interest in the partnership business and assets and by securing an advantage over plaintiff by misleading plaintiff to his/her prejudice.

24. Plaintiff placed confidence in and relied on defendant until on or about _____[*date*], when plaintiff discovered defendant's acts committed in breach of his/her fiduciary duties. Until that date, plaintiff had reasonably relied on defendant in view of their relationship as partners under the partnership agreement.

25. As a result of defendant's fraud as herein alleged, plaintiff has been damaged in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the sum of $_____;

2. For interest on the sum of $_____ from and after _____[*date*];

3. For punitive and exemplary damages;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification if desired. See § 401.40[1]* .]

[2] Use of Form

The form in [1], *above*, is for use by a partner whose copartner has repudiated the partnership and converted the partnership assets. In such a case, the wronged partner may bring an action at law for damages for breach of the partnership agreement [*Corp. Code § 16405(b)(1)*; former *Corp. Code § 15038(b)(1)(B)*]. The plaintiff has a choice of legal theories under which to seek damages: breach of contract, breach of the fiduciary duty of care [*Corp. Code §§ 16404(c), 16405(b)(2)(A)*] conversion, actual fraud, and constructive fraud [*Navarro v. Perron (2004) 122 Cal. App. 4th 797, 802, 19 Cal. Rptr. 3d 198* ; *see Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 564-565, 140 Cal. Rptr. 330* ; *Boyd v. Bevilacqua (1966) 247 Cal. App. 2d 272, 290, 294-295, 55 Cal. Rptr. 610* ; *Wilson v. Brown (1929) 96 Cal.*

App. 140, 143, 273 P. 847 ; *see also* the discussion in *§ 401.13[5]*]. The plaintiff may also bring an action for dissolution and an accounting, although those remedies are not required [*Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 564-565, 140 Cal. Rptr. 330* ; *see Corp. Code § 16405(b)*]. If a plaintiff seeks an accounting, he or she may combine the allegations in this complaint with those found in *§ 401.42*. For forms of complaints for dissolution and an accounting, see Ch. 406, *Partnerships: Dissolution* .

The Judicial Council has promulgated pleading forms that may be used for a complaint for breach of contract and fraud [*see Code Civ. Proc. § 425.12*]. These optional forms may be used in lieu of the form in [1], *above*.

[3] Allegations

[a] First Count

The first count alleges:

- The existence of the partnership agreement (Paragraph 2) [*see* *Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321]* ,

- Plaintiff's performance or excusable nonperformance of the contract (Paragraph 3) [*see* *Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377]* ,

- Defendant's breach by repudiating the partnership and converting partnership assets (Paragraph 4) [*see* former *Corp. Code § 15038(b)(1)(B)*; *Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377]* , and

- Damages proximately caused by the breach, including, if appropriate, anticipated profits from the partnership business (Paragraph 5) [*Civ. Code § 3300*; *Nelson v. Reisner (1958) 51 Cal. 2d 161, 171, 331 P.2d 17]* .

[b] Second Count

The second count incorporates Paragraphs 2-4 of the first count and also alleges:

- Defendant's breach of his/her fiduciary duty of care to the partnership and to plaintiff (Paragraph 7) [*Corp. Code § 16404(c)*], and

- Damages proximately caused by the breach, including, if appropriate, anticipated profits from the partnership business (Paragraph 8) [*Civ. Code § 3300*; *Nelson v. Reisner (1958) 51 Cal. 2d 161, 171, 331 P.2d 17]* .

[c] Third Count

The third count incorporates Paragraphs 2-4 of the first count and also alleges:

- Plaintiff's interest in, and right to possession of, the property (Paragraph 10) [*Igauye v. Howard (1952) 114 Cal. App. 2d 122, 127, 249 P.2d 558]* ,

- Value of the property at the date and place of conversion (Paragraph 11) [*see Civ. Code § 3336*],

- Damages proximately caused by the conversion, if such measure of damages is sought rather than value of property converted (Paragraphs 12 and 13) [*see Civ. Code § 3336*], and

- Defendant's oppression, fraud, and malice, entitling plaintiff to punitive damages (Paragraph 14) [*Civ. Code § 3294*; *Haigler v. Donnelly (1941) 18 Cal. 2d 674, 681, 117 P.2d 331]* .

[d] Fourth Count

The fourth count incorporates Paragraphs 2-4 of the first count and Paragraph 14 of the third count, and also alleges:

- A promise by defendant concerning a material fact (Paragraph 16) [*Civ. Code § 1710(4)*],

- That the promise was made without any intention of performing it (Paragraph 17) [*Civ. Code § 1710(4)*],

- Defendant's intent to induce plaintiff to act in reliance (Paragraph 18) [*see Bondi v. Jewels by Edwar, Ltd. (1968) 267 Cal. App. 2d 672, 677, 73 Cal. Rptr. 494]* , and

- Plaintiff's actions in justifiable reliance on the promise (Paragraph 19) [*see Bondi v. Jewels by Edwar, Ltd. (1968) 267 Cal. App. 2d 672, 677, 73 Cal. Rptr. 494]* , and resulting damages (Paragraph 20) [*Civ. Code §§ 1709, 3333*].

[e] Fifth Count

The fifth count incorporates Paragraphs 2-4 of the first count and Paragraph 14 of the third count, and also alleges:

- The existence of a confidential, fiduciary relationship between plaintiff and defendant (Paragraph 22) [*see Nelson v. Abraham (1947) 29 Cal. 2d 745, 750-751, 177 P.2d 931* ; *Wind v. Herbert (1960) 186 Cal. App. 2d 276, 284, 8 Cal. Rptr. 817]* ,

- Defendant's breach of fiduciary duty by misleading plaintiff to his/her prejudice (Paragraph 23) [*Civ. Code § 1573*],

- Plaintiff's actual and justifiable reliance on defendant (Paragraph 24) [*see Civ. Code § 1573*], and

- The resulting damages (Paragraph 25) [*Civ. Code §§ 1709, 3333*; *see Boyd v. Bevilacqua (1966) 247 Cal. App. 2d 272, 290, 55 Cal. Rptr. 610]* .

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[5] Venue

In a breach of contract action, the proper court is either the superior court in the county where the defendant resides, where the contract was to be performed, or where the contract was entered into [*Code Civ. Proc. § 395(a)*].

[6] Cross References

For general discussion of the requirements for complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to contract actions generally, see Ch. 140, *Contracts*

For discussion and forms relating to conversion actions generally, see Ch. 150, *Conversion*

For discussion and allegations relating to damages for contract or tort actions, see Ch.177, *Damages*

For discussion and forms relating to actions for actual and constructive fraud generally, see Ch. 269, *Fraud and Deceit*

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35-401 California Forms of Pleading and Practice--Annotated § 401.42

§ 401.42 Complaint for Partnership Accounting [Corp. Code § 16405(b); former Corp. Code § 15022] and for Declaratory Relief--By Wrongfully Excluded Partner [Corp. Code §§ 16401(f), 16405(b)(1); former Corp. Code §§ 15018(e), 15022(a)]

[1] FORM Complaint for Partnership Accounting [Corp. Code § 16405(b); former Corp. Code § 15022] and for Declaratory Relief--By Wrongfully Excluded Partner [Corp. Code §§ 16401(f), 16405(b)(1); former Corp. Code §§ 15018(e), 15022(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR PARTNERSHIP ACCOUNT-
Defendant(s).	)	ING AND DECLARATORY RELIEF
	)	
	)	

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Accounting)

1. [*Defendant's capacity and residence. See § 401.40[1], Paragraph 1.*]

2. [*Allege creation of partnership by agreement. See § 401.40[1], Paragraph 2.*]

3. On or about _____[*date*], defendant(s) assumed sole possession and control of the _____ [business *or* assets *or* business and assets] [, specifically _____ (*specify assets, e.g.,* the building owned by the partnership and used for its business, located at _____[*address*])] of the partnership, and thereafter _____ [controlled *or* operated *or* controlled, operated, and conducted] the same to the exclusion of plaintiff and without making any accounting to plaintiff of the income or disbursements, or of the net profits or losses realized by the partnership. The conduct of defendant(s) was wrongful, in that _____ [*specify, e.g.,* it was in violation of the partnership agreement, (which gives each partner equal rights in the management and conduct of the partnership business,) and was a breach of defendant(s)' fiduciary duties of loyalty and care to plaintiff.].

4. The partnership has never been dissolved and no accounting has been made of the partnership business to plaintiff [*optional:* since _____ (*date*)]. Plaintiff has made repeated demands on defendant(s) for an accounting, but defendant(s) _____ [has *or* have] failed, refused, and neglected to make the same, and continue(s) to fail, refuse, and neglect to do so.

SECOND CAUSE OF ACTION
(Declaratory Relief)

5. Plaintiff refers to and herein incorporates Paragraphs 1-4 of the First Cause of Action.

[6. _____ (*Allege facts under which a controversy has arisen with respect to the partnership, e.g.,* Subsequent to _____ (*date*), the date on or about which defendants assumed possession and control of the partnership business, defendants have operated and continue to operate the partnership business, with the same assets and in the same premises in which the partnership business was conducted, and transacted business with the same customers and suppliers who were the customers and suppliers of the partnership. Defendants have changed the partnership name, however, to _____[*name*]).]

7. An actual controversy has arisen, and now exists, between defendant(s) and plaintiff concerning their respective rights and duties in that plaintiff contends _____ [*specify, e.g.,* that the business and good will of _____ (*new name of partnership*) are the property and assets of the partnership of plaintiff and defendants], whereas defendant(s) dispute(s) this contention and contend(s) _____ [*specify, e.g.,* that the business and good will of _____ (*new name*) are the _____ (sole property of defendants *or* property and assets of a new partnership between defendants only, and not including plaintiff as a partner)].

8. Plaintiff desires a judicial determination of his/her rights and duties, and a declaration as to _____ [*specify, e.g.,* whether the new business operated by defendant(s) is _____ (his/her sole property *or* the property of a new partnership between defendants only)].

9. A judicial declaration is necessary and appropriate at this time under the circumstances in order that plaintiff may ascertain his/her rights with respect to the partnership _____ [business *or* assets *or* business and assets]. [_____ (*Allege any financial or other burden being caused plaintiff by the unsettled state of affairs, e.g.,* plaintiff is being denied any share of profits from the business, imposing a serious financial burden on plaintiff).]

WHEREFORE, plaintiff prays judgment as follows:

On the FIRST CAUSE OF ACTION:

1. For a full and complete accounting of the partnership, from _____[*date*];

2. For a judgment in favor of plaintiff and against defendant(s) for the amount found to be due under that accounting;

On the SECOND CAUSE OF ACTION:

3. For a declaration of the rights and interests of plaintiff and defendant(s) in and to the partnership business and assets;

On all CAUSES OF ACTION:

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification if desired. See § 401.40[1]*]

[2] Use of Form

The form in [1], *above*, is for use by a partner seeking a partnership accounting because he or she has been wrongfully excluded by copartners from the partnership business or possession of partnership property. The excluded partner may also seek declaratory relief as to all the partners' rights and duties with respect to the partnership business or assets. Although the complaint contains both causes of action, the plaintiff may wish to allege only one of them, depending on the facts of the case. The optional language referring the partnership agreement giving partners equal management rights (Paragraph 3) should be included if in fact the agreement does so provide [*see Corp. Code § 16401(f)*; former *Corp. Code § 15018(e)* (partners have equal management rights)].

The pre-'97 Act expressly gave any wrongfully excluded partner the right to a formal accounting as to partnership affairs [former *Corp. Code § 15022(a)*; *see § 401.11[2]* (other circumstances where partner entitled to accounting)]. There is no cognate provision under UPA'94, but a partner generally may enforce his or her rights under the partnership agreement by seeking legal or equitable relief, with or without an accounting [*Corp. Code § 16405(b)(1)*]. Moreover, UPA'94's specification of fiduciary duties owed by partners permits the excluded partner to seek the same relief under any of several theories based on allegations of breach of the duties of loyalty and care and failure to meet the obligation of good faith and fair dealing [*see Corp. Code §§ 16404(b), (c), (d), 16405(b)(2)(A)* (enforcement of fiduciary duties)]. For further discussion, see *§§ 401.12, 401.20*.

[3] Breach of Contract and Fraud

Using the allegations in § 401.41[1], counts for breach of contract and fraud could be could be added to the form in [1], *above*. Under both the pre-'97 Act and UPA'94, the wronged partner is given the option of seeking legal or equitable relief, with or without an accounting [*Corp. Code § 16405(b)*; former *Corp. Code § 15038(b)(1)(B)*; *Navarro v. Perron (2004) 122 Cal. App. 4th 797, 802, 19 Cal. Rptr. 3d 198* ; *Gherman v. Colburn (1977) 72 Cal. App. 3d 544,*

564-565, 140 Cal. Rptr. 330 ; *Prince v. Harting (1960) 177 Cal. App. 2d 720, 736-737, 2 Cal. Rptr. 545* (action for damages for fraud combined with action for dissolution and accounting)]. Note that under UPA'94 an action for accounting on dissolution will not revive any other claim for relief barred by law [*Corp. Code § 16405(c)*].

[4] Allegations

[a] First Count

The first cause of action alleges:

- The existence of a written or oral partnership agreement (Paragraph 2) [*see Corp. Code § 16405(b)(1)*; former *Corp. Code § 15022*],

- Wrongful exclusion of plaintiff from partnership business or property by defendant(s) in violation of the partnership agreement and of the fiduciary duties owed the plaintiff (Paragraph 3) [*Corp. Code § 16405(b)(1), (2)(A)*; former *Corp. Code § 15022(a)*], and

- That there has as yet been no dissolution or accounting of the partnership (Paragraph 4).

[b] Second Count

The second cause of action incorporates Paragraphs 1-4 of the first cause of action and also alleges:

- In an optional paragraph, facts showing how the controversy has arisen (Paragraph 6),

- Existence and nature of actual controversy between the parties (Paragraph 7) [*see Code Civ. Proc. § 1060*],

- The specific declaratory relief sought by plaintiff (Paragraph 8) [*see Code Civ. Proc. § 1060*]; and

- Why a judicial declaration is necessary and appropriate at the time of the action (Paragraph 9) [*see Code Civ. Proc. § 1061*].

[5] Statute of Limitations for Accounting

An accounting action brought pursuant to *Corp. Code § 16405(b)* or former *Corp. Code § 15021* or *15022* is governed by the statute of limitations found in *Code Civ. Proc. § 343* [*Manok v. Fishman (1973) 31 Cal. App. 3d 208, 213, 107 Cal. Rptr. 266* ; *see Corp. Code § 16405(c)*]. That section provides that the action must be commenced within four years after the cause of action has accrued.

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified [*Code Civ. Proc. §§ 92(b), 446*], and will also preclude a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[7] Venue

In an action for accounting and declaratory relief, the proper court is the superior court either in the county where the defendant(s) or some of them reside, where the contract was to be performed, or where the contract was entered into [*Code Civ. Proc. § 395(a)*].

[8] Cross References

For discussion and forms relating to actions for partnership dissolution and accounting, see Ch. 406, *Partnerships: Dissolution*

For a complaint for an accounting action between partners after dissolution, and for a procedural guide for use with accounting actions generally, see Ch. 7, *Accounting, Action For*

For discussion and forms relating to declaratory relief actions generally, see Ch. 182, *Declaratory Relief*

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35-401 California Forms of Pleading and Practice--Annotated § 401.43

§ 401.43 Allegation for Complaint for Partnership Accounting [Corp. Code § 16405(b)(2)(a); former Corp. Code § 15022(c)]--Against Partner(s) Who Received Benefits From Partnership Without Copartner's Consent [Corp. Code § 16404(b)(1); former Corp. Code § 15021(1)]

[1] FORM Allegation for Complaint for Partnership Accounting [Corp. Code § 16405(b)(2)(a); former Corp. Code § 15022(c)]--Against Partner(s) Who Received Benefits From Partnership Without Copartner's Consent [Corp. Code § 16404(b)(1); former Corp. Code § 15021(1)]

3. Plaintiff is informed and believes that on or about _____[*date*], defendant(s) _____ [*specify acts constituting receipt of benefit from partnership formation, conduct, liquidation, or use of partnership property, e.g.,* sold partnership property, specifically 1,000 t-shirts manufactured in the course of partnership business, to _____ (*name*) for a profit]. Plaintiff is informed and believes and thereon alleges that such profit exceeds $_____]. Defendant(s) received that benefit without plaintiff's consent.

[2] Use of Form

The form in [1], *above*, is for use in a complaint for accounting, such as the one in *§ 401.42[1]*, by a partner when his or her copartner or copartners received a benefit from a partnership transaction or partnership property without his or her consent [former *Corp. Code §§ 15021, 15022(c), 16404(b)(1)*; *see, e.g., Enea v. Superior Court (2005) 132 Cal. App. 4th 1559, 1565, 34 Cal. Rptr. 3d 513* (one partner may not occupy partnership's real property and pay below-market rent over objection of other partner)]. This allegation may be inserted in place of Paragraph 3 in *§ 401.42[1]*. If there is more than one partner seeking an accounting, the foregoing allegation may be modified accordingly.

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35-401 California Forms of Pleading and Practice--Annotated § 401.44

§ 401.44 Allegation for Complaint for Partnership Accounting [Corp. Code § 16405(b)(2)(A); former Corp. Code § 15022(c)]--Against Partner(s) Who Competed With Partnership Prior to Dissolution [Corp. Code § 16404(b)(3); former Corp. Code § 15021(1)]

[1] FORM Allegation for Complaint for Partnership Accounting [Corp. Code § 16405(b)(2)(A); former Corp. Code § 15022(c)]--Against Partner(s) Who Competed With Partnership Prior to Dissolution [Corp. Code § 16404(b)(3); former Corp. Code § 15021(1)]

3. Plaintiff is informed and believes that on or about _____[*date*], defendant(s) _____ [*specify acts of competition with partnership, e.g.,* without informing plaintiff and without plaintiff's knowledge or consent, submitted a bid to _____ (*name of owner*) for the construction and lease-back of facilities on property located at _____ (*city*), which bid was based on information acquired during the time plaintiff and defendant(s) were copartners, was lower than the bid previously submitted by plaintiff and defendant(s) acting as copartners, and was accepted by _____ (*name of owner*). Defendant(s) thereby seized a partnership opportunity for which plaintiff is informed and believes and thereon alleges that defendant(s) obtained a profit exceeding $ _____].

[2] Use of Form

The form in [1], *above*, is for use in a complaint for accounting, such as the one in *§ 401.42[1]*, by a partner when his or her copartner(s) have taken a partnership opportunity for themselves prior to the partnership's dissolution. This allegation may be inserted in place of Paragraph 3 in *§ 401.42[1]*. Under UPA'94 and case law construing the pre-'97 Act, it is a breach of a partner's fiduciary duty to copartners to compete with the partnership prior to its dissolution [*Corp. Code § 16404(b)(3)*; former *Corp. Code § 15021(1)*; *Leff v. Gunter (1983) 33 Cal. 3d 508, 513-517, 189 Cal. Rptr. 377, 658 P.2d 740* (involving joint venture)].

For a discussion of the duty of partners to account to the partnership for any profits obtained without the consent of the other partners, see *§ 401.11[1]*. The fiduciary duties of partners are discussed in *§ 401.20*. For a discussion the extent to which a partner's fiduciary duty not to compete with the partnership continues after his or her dissociation or the dissolution of the partnership, see Ch. 403, *Partnerships: Actions By and Against Dissociated Partners* .

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Chapter 401 PARTNERSHIPS: ACTIONS BETWEEN GENERAL PARTNERS AND PARTNERSHIP
PART IV. FORMS

35-401 California Forms of Pleading and Practice--Annotated § 401.45

§ 401.45 Allegation for Complaint [Code Civ. Proc. § 425.10] By One Joint Venturer Against Another

[1] FORM Allegation for Complaint [Code Civ. Proc. § 425.10] By One Joint Venturer Against Another

2. On or about _____[*date*], at _____[*city*], _____ County, California, plaintiff and defendant formed a joint venture by _____ [an oral *or* a written] agreement, for the purpose of _____ [*specify, e.g.,* building a residence]. [A copy of the agreement is attached as Exhibit _____ and made a part hereof.]

[2] Use of Form

The form in [1], *above*, is for use by a joint venturer in an action against another joint venturer, to allege the existence of the joint venture, by agreement, between the parties. Actions between joint venturers are governed by the same law governing actions between partners [*see Orlopp v. Willardson Co. (1965) 232 Cal. App. 2d 750, 754, 43 Cal. Rptr. 125 ; Milton Kauffman, Inc. v. Superior Court (1949) 94 Cal. App. 2d 8, 17, 210 P.2d 88]* . Therefore, the foregoing allegation may be substituted for the allegation of the existence of a partnership in any of the complaint forms in this chapter, Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties* , Ch. 403, *Partnerships: Actions By and Against Dissociated Partners,* or Ch. 406, *Partnerships: Dissolution* .

[3] Need to Allege Joint Venture

Although it would be appropriate to specifically allege the existence of a joint venture, failure to do so is not fatal to the complaint. In an action between partners or joint venturers, if an agreement is alleged, it is unnecessary to specifically refer to it as a joint venture or a partnership, as the case may be [*see Nelson v. Abraham (1947) 29 Cal. 2d 745, 749-750, 177 P.2d 931]* . When a complaint alleges a partnership, relief will not be denied if proof establishes a joint venture instead [*Hupfeld v. Wadley (1948) 89 Cal. App. 2d 171, 174, 200 P.2d 564]* .

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35-402 California Forms of Pleading and Practice--Annotated 402.syn

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[b] Joining Individual Partners

[2] Service

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[1] FORM

[2] Use of Form

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PART I. SCOPE

35-402 California Forms of Pleading and Practice--Annotated § 402.01

§ 402.01 Scope of Chapter

This chapter discusses actions between partners or partnerships and third parties under UPA'94. The application of the pre-'97 Act is discussed as appropriate throughout the chapter. The chapter contains the following forms:

- Affirmative defenses to actions by partnerships that have not complied with fictitious name statutes or not joined all partners [*see §§ 402.40, 402.41*].
- Complaints against a partnership and partners for misapplication of money [*see § 402.42*]
- Complaints against partners and partnerships when one person is misrepresented as a partner [*see §§ 402.43, 402.44*]
- Forms for obtaining and enforcing charging order and order of sale of interest [*see* §§ 402.45-402.47].
- An affirmative defense for a partner in a registered limited liability partnership [*see § 402.48*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporate NamesFictitious NamesGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesBusiness & Corporate LawLimited Liability PartnershipsBusiness & Corporate LawLimited PartnershipsManagement Duties & Liabilities

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§ 402.02 Cross References

- For application of and discussion relating to UPA'94 generally, and differences from the pre-'97 Act, see Ch. 400, *Partnerships: Governing Statutes*

- For discussion and forms relating to actions by and between the partners and the partnership, see Ch. 401, *Partnerships: Actions Between General Partnerships and Partners*

- For discussion and forms relating to actions by and against dissociated partners, see Ch. 403, *Partnerships: Actions By and Against Dissociated Partners*

- For discussion and forms relating to actions between limited partners and partnerships, see Ch. 404, *Partnerships: Actions Between Limited Partners and Partnerships*

- For discussion and forms relating to actions between limited partners or partnerships and third parties, see Ch. 405, *Partnerships: Actions Between Limited Partners or Partnerships and Third Parties*

- For discussion and forms relating to dissolution of general and limited partnerships, see Ch. 406, *Partnerships: Dissolution*

- For discussion and forms relating to allegations used in actions against partners and partnerships, see Ch. 20, *Allegations Commonly Used*

- For discussion and forms relating to partnership liability resulting from auto accident involving partner, see *Ch. 82, Automobiles: Causes of Action § 82.16*

- For discussion and forms relating to contract actions generally, see Ch. 140, *Contracts*

- For discussion and forms relating to the liability of principals and agents, see Ch. 427, *Principal and*

Agent

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesLiability of AgentBusiness & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesLiability of PrincipalBusiness & Corporate LawLimited PartnershipsGeneral OverviewBusiness & Corporate LawLimited PartnershipsDissolution & Winding UpContracts LawThird PartiesGeneral Overview

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[Reserved]

§§ 402.03[Reserved]

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§ 402.10 Governing Statutes

UPA'94 statutes governing relations of partners to third parties dealing with the partnership generally are contained in *Corp. Code §§ 16301-16308*. Comparable statutes for the pre-'97 Act generally are contained in former *Corp. Code §§ 15009-15017*. Statutes setting forth the requirements for fictitious names generally are contained in *Bus. & Prof. Code §§ 17910-17923*.

Since January 1, 1999, all partnerships have been governed by the Uniform Partnership Act of 1994 (UPA'94) [*Corp. Code § 16111(b)*; *see Corp. Code § 16100 et seq.*], regardless of when they were formed. Prior to that date, partnerships formed before January 1, 1997, were governed by the earlier of (1) the date when they elected to be governed by the UPA'94, or (2) January 1, 1999 [*Corp. Code § 16111*]. As of January 1, 1999, the pre-1997 version of the UPA (pre-'97 Act) was repealed [Stats. 1996 ch. 1003, §§ 1.2, 18, operative Jan. 1, 1999]. Repeal of the pre-'97 Act, however, did not affect actions or proceedings commenced, or rights accrued, prior to the effective date of the UPA'94 [*Corp. Code § 16112*]. For that reason, discussion of the pre-'97 Act has been retained in the partnership coverage in this publication. All references to *Corp. Code §§ 15001-15045* in this chapter are to the repealed provisions of the pre-'97 Act. For more detailed discussion see *§§ 400.10, 400.11* in Ch. 400, *Partnerships: Governing Statutes.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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35-402 California Forms of Pleading and Practice--Annotated § 402.11

§ 402.11 Suits by Partnerships

[1] In Partnership Name

UPA'94 specifically provides that a partnership may bring an action in the partnership name [*Corp. Code § 16307(a)*]. Although not provided for under the pre-'97 Act, the UPA'94 provision is declarative of *Code Civ. Proc. § 369.5(a),* which allows a partnership to sue in the name it has assumed or by which it is known.

A partnership that is transacting business under a fictitious business name, however, may not maintain any action on or on account of any contract made, or transaction had, in the fictitious business name in any state court until a fictitious business name statement has been executed, filed, and published [*Bus. & Prof. Code § 17918*].

[2] Fictitious Business Name

The Business and Professions Code specifies requirements for executing, filing with the Secretary of State, and publishing the fictitious business name statement [*see Bus. & Prof. Code §§ 17910-17917*]. The statement expires every five years, or on a change in certain facts set forth in the statement, or when a statement of abandonment of the fictitious business name is filed [*Bus. & Prof. Code § 17920*]. A general partner who withdraws from the partnership may file a statement of withdrawal from the partnership operating under a fictitious business name [*Bus. & Prof. Code § 17923(a)*].

[3] Failure to Comply With Fictitious Business Name Requirements

For a partnership, other than a limited partnership that has filed a certificate of limited partnership with the California Secretary of State under *Corp. Code §§ 15621* or *15902.01*, a foreign limited partnership that has filed an application for registration with the California Secretary of State under *Corp. Code §§ 15692* or *15902.02,* a registered limited liability partnership that has filed a registration under *Corp. Code § 16953* or former *Corp. Code § 15049*, or a foreign limited liability partnership that has filed an application for registration under Corp. Code § 16959 or former *Corp. Code § 15055*, a fictitious business name is a name that does not include the surname of each general partner or a name that suggests the existence of additional owners, as described in Corp. Code §§ 17900(c) (discussed *below*) and 17901

("general partner" defined) [*Bus. & Prof. Code § 17900(b)(2)*]. For a limited partnership that has filed a certificate of limited partnership under *Corp. Code §§ 15621* or *15902.01*, or a foreign limited partnership that has filed an application for registration under *Corp. Code §§ 15692* or *15902.02*, a fictitious business name is any name other than the name of the limited partnership as on file with the California Secretary of State [*Bus. & Prof. Code § 17900(b)(4)*]. A name that suggests the existence of additional owners is one that includes such words as "Company," "& Company," "& Son," "& Sons," "& Associates," "Brothers," and the like, but not words that merely describe the business being conducted [*Bus. & Prof. Code § 17900(c)*].

The penalty for a partnership's failure to comply with the fictitious business name requirements is that the partnership may not, as plaintiff or cross complainant, maintain an action on any contract or transaction made under the fictitious business name [*Bus. & Prof. Code § 17918*; *Vance v. Gilbert (1918) 178 Cal. 574, 578, 174 P. 42* ; *see Hixson v. Boren (1956) 144 Cal. App. 2d 547, 554, 301 P.2d 615* (decided under former fictitious name statutes)]. A partnership may, however, maintain a tort action without filing a fictitious business name statement [*Thompson v. Byers (1931) 116 Cal. App. 214, 216-217, 2 P.2d 496* (decided under former fictitious name statutes)]. In addition, a noncomplying partnership may still be sued as a defendant [*Vance v. Gilbert (1918) 178 Cal. 574, 578, 174 P. 42]* .

A partnership's noncompliance with the fictitious business name requirements is not a jurisdictional defect [*Tyrone v. Kelley (1973) 9 Cal. 3d 1, 13-14, 106 Cal. Rptr. 761, 507 P.2d 65]* . It is merely a matter of abatement, and compliance is sufficient if it occurs at any time before the trial [*Tyrone v. Kelley (1973) 9 Cal. 3d 1, 14, 106 Cal. Rptr. 761* ; *Rudneck v. Southern California M. & R. Co. (1920) 184 Cal. 274, 281-282, 193 P. 775* (decided under former fictitious name statutes); *Kadota Fig Asso. of Producers v. Case-Swayne Co. (1946) 73 Cal. App. 2d 796, 804-805, 167 P.2d 518* (decided under former fictitious name statutes)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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35-402 California Forms of Pleading and Practice--Annotated § 402.12

§ 402.12 Suits Against Partnership and Partners

[1] Naming the Partnership and Partners as Defendants

[a] Partnership Name

A partnership may be sued in the partnership name, a name that it has assumed, or the name by which it is known [*Corp. Code § 16307(a)*; *Code Civ. Proc. § 369.5(a)*].To acquire jurisdiction over a partnership, the partnership entity must be designated as the defendant; naming only the individual partners in the complaint is not sufficient [*Epstein v. Frank (1981) 125 Cal. App. 3d 111, 119-120, 177 Cal. Rptr. 831* ; *Hildebrand v. Stonecrest Corp. (1959) 174 Cal. App. 2d 158, 169, 344 P.2d 378* ; *Potts v. Whitson (1942) 52 Cal. App. 2d 199, 207, 125 P.2d 947]* .

[b] Joining Individual Partners

Any member of a partnership, other than a registered limited liability partnership [*see Corp. Code § 16306(g)*; *see also § 402.22* for further discussion of registered limited liability partnerships], may be joined as a party in an action against the partnership, and a personal judgment against that partner may be obtained [*Corp. Code § 16307(b)*; *see Code Civ. Proc. § 369.5(b)*]. Under UPA'94, a judgment against a partnership is *not* a judgment against a partner. Furthermore, a judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner [*Corp. Code § 16307(c)*]. Similarly, under case law decided before UPA'94, if an individual partner was not named as a defendant, he or she was liable only to the extent of his or her interest in partnership property, but not as an individual [*Fazzi v. Peters (1968) 68 Cal. 2d 590, 595-598, 68 Cal. Rptr. 170, 440 P.2d 242* ; *Promotus Enterprises, Inc. v. Jiminez (1971) 21 Cal. App. 3d 560, 566-567, 98 Cal. Rptr. 571]* .

[2] Service

[a] Partnership

The statement of partnership authority may designate an individual or a corporation as agent for service of process [*Corp. Code § 16309(a)*; *see Corp. Code § 16310*]. Certain foreign partnerships are required to file a statement with the

Secretary of State designating an agent for service of process [*Corp. Code § 15800*]. In addition, a limited partnership formed on or after July 1, 1984, must maintain an agent in California for service of process and designate the name of the agent in the certificate of limited partnership [*Corp. Code §§ 15614(b), 15621(a)* (CRLPA); *Corp. Code §§ 15901.14(a)(2), 15902.01(a)(3)* (ULPA '08)]. If a partnership does not have a designated agent for service of process, however, service on the partners is adequate service on the partnership [*Vance v. Gilbert (1918) 178 Cal. 574, 576-577, 174 P. 42]* .

For additional discussion of service of summons on a partnership and service requirements generally, as well as forms for service of summons, see Ch. 518, *Service of Summons and Papers* .

[b] Individual Partners

Service must be made on at partner individually, regardless of whether or not the partner was served on behalf of the partnership, in order to obtain a personal judgment against that partner [*see Code Civ. Proc. § 369.5(b)*; *Dillard v. McKnight (1949) 34 Cal. 2d 209, 215, 209 P.2d 387]* . If service of process is made on a partner individually, a judgment of personal liability may be obtained whether that liability is joint, joint and several, or several [*Code Civ. Proc. § 369.5(b)*].

[3] Venue

If an unincorporated association has filed a statement with the Secretary of State pursuant to statute, designating its principal office in California, the proper county for trial of an action against the association is the same as it would be for a corporation [*Code Civ. Proc. § 395.2*]. Subject to the court's power to change the place of trial, a corporation may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs, or in the county where the principal place of business of such corporation is situated [*Code Civ. Proc. § 395.5*]. The county of the partnership's principal place of business is the county of the principal office listed in the filed statement [*see Code Civ. Proc. § 395.2*].

When a plaintiff sues the members of an association under the association's common name and seeks to make an individual member a party to the action regardless of the liability of the association, the action must be transferred to the county of residence of one of the defendants, either the association or an individual member, if the individual member so insists [*Carruth v. Superior Court (1978) 80 Cal. App. 3d 215, 221, 145 Cal. Rptr. 344* ; *Mosby v. Superior Court (1974) 43 Cal. App. 3d 219, 226, 117 Cal. Rptr. 588]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionGeneral OverviewBusiness & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesCivil ProcedureVenueGeneral OverviewCivil ProcedureVenueCorporationsCivil ProceduresPleading & PracticeService of ProcessProofGeneral OverviewGovernmentsLocal GovernmentsClaims By & Against

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35-402 California Forms of Pleading and Practice--Annotated § 402.13

§ 402.13 Partners' Relation to Third Parties Dealing With Partnership

[1] Partner as Agent

[a] Authority to Bind Partnership

Each partner is an agent of the partnership for purpose of the partnership business, subject to the effect of a statement of partnership authority [*Corp. Code § 16301(1)*; *see* former *Corp. Code § 15009*; *see* [3], *below*]. The acts of a partner for apparently carrying on the ordinary course of business bind the partnership unless the partner had no authority to act in a particular matter and the person with whom the partner was dealing knew or received notification [*see Corp. Code § 16102* (knowledge and notice construed)] that the partner lacked authority [*Corp. Code § 16301(1)*; *see* former *Corp. Code § 15009(1)*; *Security Pac. Nat. Bank v. Matek (1985), 175 Cal. App. 3d 1071, 1076, 223 Cal. Rptr. 288* ; *see also Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd. (1993) 12 Cal. App. 4th 74, 91, 15 Cal. Rptr. 2d 585* , describing the agency powers of a general partnership in the context of the applicability of pre-'97 Act to a limited partnership].

The effect of this statutory imposition of agency is that a partner, without more, has authority to bind the partnership with respect to acts for apparently carrying on its business in the ordinary course without a showing of express authority, either oral or written, from the other members of the partnership [*Ellis v. Mihelis (1963) 60 Cal. 2d 206, 217, 32 Cal. Rptr. 415, 384 P.2d 7]* . Thus, when a partner's conduct is limited to matters apparently within the ordinary course of the partnership business, the partner can bind the other partners without obtaining their written consent [*Ellis v. Mihelis (1963) 60 Cal. 2d 206, 218, 32 Cal. Rptr. 415, 384 P.2d 7* ; *Owens Palos VerdesMonaco (1983) 142 Cal. App. 3d 855, 865, 191 Cal. Rptr. 381]* .

[b] Scope of Partnership Business

The apparent scope of the partnership business primarily depends on the conduct of the partnership and its partners and what they cause third parties to believe about the partners' authority [*Blackmon v. Hale (1970) 1 Cal. 3d 548, 557, 83 Cal. Rptr. 194, 463 P.2d 418* ; *Owens v. Palos Verdes Monaco (1983) 142 Cal. App. 3d 855, 865, 191 Cal. Rptr. 381]* . Ostensible agency or acts within the scope of the partnership business are presumed when the business done by the

supposed agent, so far as open to the observation of third parties, is consistent with the existence of an agency, and when, as to the transaction in question, the third party was justified in believing that an agency existed [*Blackmon v. Hale (1970) 1 Cal. 3d 548, 557, 83 Cal. Rptr. 194, 463 P.2d 418]* . For example, when the nature of a partnership business implies borrowing money to accommodate necessities of the business, a partner has the authority to borrow and binds the partnership in so doing even if the partner signs the loan documents as an individual, if the partner has told the lender that the loan is needed for the partnership business and the lender understands that the partner is borrowing for that purpose [*Security Pac. Nat. Bank v. Matek (1985) 175 Cal. App. 3d 1071, 1076-1077, 223 Cal. Rptr. 288]* . Similarly, when two attorneys practiced law in a partnership under both of their names and held themselves out to the public as partners, both partners were liable to a client for misappropriation of that client's funds by one of the partners [*Blackmon v. Hale (1970) 1 Cal. 3d 548, 558, 83 Cal. Rptr. 194, 463 P.2d 418]* . In such a case, public policy dictates that a partnership must inform those who deal with its members in the course of its business of any special restrictions on a particular partner's authority because a person dealing with a partnership is usually in no position to know of special agreements between the partners and thus cannot be charged with knowledge of these agreements absent specific notice [*Blackmon v. Hale (1970) 1 Cal. 3d 548, 558, 83 Cal. Rptr. 194, 463 P.2d 418* ; *but see Corp. Code § 16303(e)* (in certain situations third party deemed to know of limitations on partner authority contained in recorded statement of partnership authority)].

If the act of a partner is within the apparent scope of the partner's authority, an objecting copartner has the burden of proving both the acting partner's lack of authority and knowledge of this lack of authority on the part of the person with whom the acting partner dealt [*Barton v. Ludy (1938) 11 Cal. 2d 1, 3, 76 P.2d 654]* .

[c] Limitation on Authority

A partner is not the agent of the partnership, and the partner's acts do not bind the partnership, if the acts are not for carrying on the ordinary course of the partnership business or business of the kind carried on by the partnership [*Corp. Code § 16301(2)*; *see* former *Corp. Code § 15009(2)*]. Thus, a partner, without the consent of all other partners, has no authority to do any act destructive of the partnership or not apparently done for the purpose of carrying on the partnership in the usual manner [*Milazo v. Gulf Ins. Co. (1990) 224 Cal. App. 3d 1528, 1538, 274 Cal. Rptr. 632]* . In one case, a court refused to enforce a contract for the sale of all partnership assets that would make it impossible for the partnership to continue, without the consent of all the partners to the sale, even when the partnership agreement provided that such a sale could be approved by less than all of the partners [*Patel v. Patel (1989) 212 Cal. App. 3d 6, 9-10, 260 Cal. Rptr. 255]* .

[d] Partner Acts May Be Authorized

The acts of a partner outside the ordinary course of partnership business may bind the partnership if the other partners authorize those acts [*Corp. Code § 16301(2)*; *see* former *Corp. Code § 15009(2)*].

[e] Wrongful Acts

A partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of partnership business or with the authority of the partnership [*Corp. Code § 16305(a)*; *see* former *Corp. Code § 15013*]. The principle of liability is the same as that applicable to a principal and agent [*Madsen v. Cawthorne (1938) 30 Cal. App. 2d 124, 126, 85 P.2d 909]* . Similarly, a partnership is liable for any loss resulting from the misapplication of any money or property received by a partner acting in the course of the partnership business or with authority of the partnership [*Corp. Code § 16305(b)*; *see* former *Corp. Code § 15014*] However, a partnership may be relieved from liability for the wrongs of any of its partners acting individually if the third party with whom the partner is dealing knows it is dealing with the partner in an individual capacity [*Blackmon v. Hale (1970) 1 Cal. 3d 548, 557, 83 Cal. Rptr. 194, 463 P.2d 418]* .

[2] Transfers of Partnership Property

[a] Authorized Transfers

A partner may authorize a transfer of property if acting as an agent for the partnership or if the partnership is otherwise bound by the partner's acts [*see* [1], *above*]. The method of authorized transfer depends on how the property is held. Partnership property may be held in the partnership name, in a partner's name with an indication of the partner's status as a partner or of the existence of the partnership, or solely in the a partner's name with no reference to the partner's status or the existence of the partnership. In the first instance, a partner may transfer property by signing a transfer instrument in the partnership's name [*Corp. Code § 16302(a)(1)* (UPA'94 applies to all property); *see* former *Corp. Code § 15010(1)* (pre-'97 Act applied to real property conveyances)]. In the second and third instances, a partner may transfer property by signing a transfer instrument in the partner's name [*Corp. Code § 16302(a)(2), (3)*; former *Corp. Code § 15010(2),(3)*].

If one person holds all partners' interest in the partnership, all partnership property vests in that person. That person may execute a document in the name of the partnership to evidence vesting of the property in that person and may file or record the document [*Corp. Code § 16302(d)*; *see* former *Corp. Code § 15010(5)*].

[b] Recovering Property From Unauthorized Transfers

A partnership may recover its property from a transferee only if it proves that theperson who transferred it was not an agent of the partnership and that the partnership was not bound by the person's acts [*see* [1] (partner as agent of partnership), *above*, and [3], *below* (effect of partnership statement on authorized real property transfers)]. In addition, the partnership must prove either that a subsequent transferee for value knew or received notification that the person who signed the transfer instrument lacked authority to bind the partnership or, as to a transferee for value, when the property was held solely in the name of the partner with no indication of the partner's status or the existence of the partnership, that the transferee knew or received notification that the property was partnership property and that the person who signed the transfer instrument lacked authority to bind the partnership [*Corp. Code § 16302(b)*; *see* former *Corp. Code § 15010(3)*].

A partnership may not recover partnership property from a subsequent transferee if the partnership would not meet the above rule to recover property from an earlier transferee [*Corp. Code § 16302(c)*; *see* former *Corp. Code § 15010(3)*].

Under the pre-'97 Act, a partnership could not recover real property sold by a contract executed by fewer than all of the partners when the partnership was in the business of buying and selling real estate and the property offered by the contract was part of the stock held for sale, because the sale was in the ordinary course of partnership business [*Ellis v. Mihelis (1963) 60 Cal. 2d 206, 218, 32 Cal. Rptr. 415, 384 P.2d 7* ; *Patel v. Patel (1989) 212 Cal. App. 3d 6, 9, 260 Cal. Rptr. 255* ; *Owens v. Palos Verdes Monaco (1983) 142 Cal. App. 3d 855, 865, 191 Cal. Rptr. 381* ; *see* [1], *above*; *but see Corp. Code § 16303(e)* (third party deemed to know of limitation on partner's authority to transfer real property if certified copy of partnership statement of authority is recorded in county recorder's office)].

[3] Statement of Partnership Authority

[a] Effect

A statement of partnership authority under UPA'94 may protect third parties dealing with partners in a partnership, and also protect the partnership and partners against liability from the unauthorized acts of partners, by giving notice of the authority of partners in the partnership. Except as to transfers of real property, third parties without notice to the contrary may rely conclusively on a filed statement if it is uncontradicted by later filed statements. Third parties who purchase real property held in the name of the partnership without knowledge to the contrary may conclusively rely on a filed statement that is not limited by another filed statement, and are deemed to know of any limitations on the authority of a partner to act if the statement of partnership authority is on record in the recording office [*Corp. Code §*

16303(d)(1), (e); *see* former *Corp. Code § 15010.7*]. However, UPA'94 specifically provides that third parties are *not* deemed to know of a limitation on the authority of a partner because the limitation is contained in a filed statement, except to the extent UPA'94 so provides [*Corp. Code § 16303(f)*].

[b] Specify Partner Authority or Limitations on Authority

A statement of partnership authority may be used to specify the authority, or limitations on the authority, of some or all of the partners to enter into transactions on behalf of the partnership, and any other matter [*Corp. Code § 16303(a)(2)*; *see* former *Corp. Code § 15010.7* (pre-'97 Act applied only to real property)]. The statement's effect on dealings between third parties and the partnership and individual partners depends on the extent to which the third parties have notice and knowledge of the statement [*see Corp. Code § 16102* (knowledge and notice construed)].

[c] Real Property

A grant of authority to transfer real property held in the name of a partnership contained in a certified copy of a filed statement of partnership authority recorded in the office of the county recorder where the real property is located, is conclusive in favor of a person who gives value without knowledge to the contrary, as long as and to the extent that a certified copy of a filed statement containing a limitation on that authority is not then of record in that office. The recording in that office of a certified copy of a filed cancellation of a limitation on authority revives the previous grant of authority [*Corp. Code § 16303(d)(2)*; *see* former *Corp. Code § 15010.7*; *see also Federal Deposit Insurance Corp. v. Superior Court (1997) 54 Cal. App. 4th 337, 345-348, 62 Cal. Rptr. 2d 713* (interpreting former *Corp. Code § 15010.5*, the predecessor statute under former UPA)]. A third party is deemed to know of a limitation on the authority of a partner to transfer real property held in the name of the partnership if a certified copy of the filed statement containing the limitation on authority is recorded in the county recorder's office where the real property is located [*Corp. Code § 16303(e)*; *see* former *Corp. Code § 15010.7*].

[d] Property Other Than Real Property

A third person dealing with a partner on behalf of a partnership may rely conclusively on a grant of authority in a filed statement of partnership authority for all transfers for value other than transfers of real estate with the following exceptions [*Corp. Code § 16303(d)(1)* (UPA'94 only, no comparable provision under pre-'97 Act)]:

- If there was a subsequent statement on file that limited the authority granted to the partner (a filed cancellation of a limitation revives a previous grant of authority); or

- If the third party had knowledge that the partner was not authorized to take the actions prescribed in the statement.

[4] Statement of Denial

Under UPA'94, a partner or third person named as a partner in a statement of partnership authority may file a statement of denial to deny the partner's authority or status as a partner [*Corp. Code § 16304*]. There was no comparable provision under the pre-'97 Act.

Legal Topics:

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§ 402.14 Partnership Liability for Partner Actions

A partnership is liable for loss or injury caused to a person, or for a penalty incurred for the wrongful act or omission, or other actionable conduct of a partner acting in the ordinary course of the partnership business or with the authority of the partnership[*Corp. Code § 16305(a)*; former *Corp. Code § 15013*]. Similarly, the partnership is liable for any loss resulting from the misapplication of any money or property received by a partner acting in the course of the partnership business or with authority of the partnership [*Corp. Code § 16305(b)*; former *Corp. Code § 15014*]. However, a partnership may be relieved from liability for the wrongs of any of its partners acting individually if the third party with whom the partner is dealing knows it is dealing with the partner in an individual capacity [*Blackmon v. Hale (1970) 1 Cal. 3d 548, 557-558, 83 Cal. Rptr. 194, 463 P.2d 418]* .

Legal Topics:

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§ 402.15 Partner Liability for Partnership Obligations

[1] Basic Rule

Under UPA'94, partners are jointly and severally liable for all partnership obligations unless otherwise agreed by the claimant or provided by law [*Corp. Code § 16306(a)*]. The UPA'94 joint and several liability differs from the pre-'97 Act, under which partners were jointly and severally liable only for tort liabilities and only were jointly liable for other obligations [former *Corp. Code § 15015(a)(1), (2)*].

[2] Newly-Admitted Partners

Under UPA'94, a newly admitted partner is not personally liable for partnership obligations incurred before the partner's admission to the partnership [*Corp. Code § 16306(b)*]. Under the pre-'97 Act, a newly-admitted partner was liable for all obligations of the partnership arising before admission as though he or she were a partner when the obligation arose. However, under the pre-'97 Act, the liability for the partnership obligations could be satisfied only from partnership property [former *Corp. Code § 15017*].

[3] Applications of Partner Liability

Under the pre-'97 Act, which had the same standard of liability as UPA'94 with respect to tort liabilities, all partners in a partnership have been found liable for any injury to an innocent third party occasioned by the fraud of any of the partners acting within the scope of their authority in a partnership transaction with the party, whether or not the partners knew of the fraud [*Stout v. Turney (1978) 22 Cal. 3d 718, 723, n.6, 150 Cal. Rptr. 637, 586 P.2d 1228* ; *Zemelman v. Boston Ins. Co. (1970) 4 Cal. App. 3d 15, 18, 84 Cal. Rptr. 206* ; *Grant v. Weatherholt (1954) 123 Cal. App. 2d 34, 46, 266 P.2d 185]* .

An incident of a partner's liability for debts and obligations of the partnership is that, at least under some circumstances, a partner may be bound individually by agreements of the partnership. For example, a general partner of a limited partnership was held bound by an agreement of the partnership to arbitrate disputes [*Keller Construction Co. v. Kashani (1990) 220 Cal. App. 3d 222, 228, 269 Cal. Rptr. 259]* . The partnership had entered into a contract that

required all disputes to be settled by arbitration. A dispute arose and the other party commenced an arbitration proceeding against the partnership and its sole general partner, who had signed the contract on behalf of the partnership. The court held that the arbitration provision obligated the partner as well as the partnership and confirmed an arbitration award.

Partners need not be separately assessed for a partnership tax debt for which they are secondarily liable in order for an extended statute of limitations for collection [*26 U.S.C. § 6502*] to apply to them. In a case in which the IRS timely assessed unpaid employment taxes against a partnership that never satisfied the debt, the IRS filed a proof of claim for those taxes in the general partners' Chapter 13 petitions under the Bankruptcy Code. The partners argued that the assessment extended the statute of limitations only against the partnership; the IRS had not separately assessed the general partners within the limitations period. The U.S. Supreme Court held that because the partnership was only relevant taxpayer for purposes of the assessment and collection statutes, proper assessment of the tax against the partnership sufficed to extend the statute of limitations for collection of the tax from the general partners, who were liable for the payment of the partnership's debts. Timely assessment against the partnership was sufficient to extend the statute of limitations to collect the tax in a judicial proceeding, whether from the partnership itself or from those liable for its debts [*United States v. Galletti (2004) 541 U.S. 114, 123, 124 S.Ct. 1548, 158 L. Ed. 2d 279]* .

Partners of a partnership that has filed a Chapter 11 petition under the Bankruptcy Code [*11 U.S.C. §§ 1101 et seq.*] continue to incur individual liability for post-petition debts of the partnership [*In re Safren (Bankr. S.D. Cal. 1986) 65 B.R. 566, 572]* .

[4] Effect of Leaving the Partnership

UPA'94 specifically provides that dissociating from or leaving a partnership does not of itself discharge a partner's liability for partnership obligations incurred before the dissociation [*Corp. Code § 16703*; *see Alioto v. U.S. (N.D. Cal. 1984) 593 F. Supp. 1402, 1413* (decided under pre-'97 Act, which had no specific provision); *see also* Ch. 403, *Partnerships: Actions By and Against Dissociated Partners*].

A partner who withdraws may be liable for subsequent partnership obligations to third parties having no knowledge of the withdrawal [*Marsh Wall Products, Inc. v. Henry Marcus Building Specialties (1958) 162 Cal. App. 2d 371, 379, 328 P.2d 259]* , but UPA'94 clarifies that the failure to amend a partnership statement of authority or file a statement of dissociation after a partner dissociates may not be used to hold a dissociating partner liable as a partner [*Corp. Code § 16308(d)*; *see § 402.18, below*, for further discussion of how a person who is not a partner may be held liable as a partner].

[5] Effect of Partner Agreements on Liability

An agreement between general partners that neither will be liable for the others' debts [*Gardiner v. Gaither (1958) 162 Cal. App. 2d 607, 617, 329 P.2d 22]* or that liability will be limited to the amount of their original contributions [*McClung v. Saito (1970) 4 Cal. App. 3d 143, 150, 84 Cal. Rptr. 44]* cannot change their liability to third persons. Although joint obligors may seek contribution among themselves [*Civ. Code § 1432*; *see Corp. Code § 16401(c)*], each partner is liable for the entire amount of the debt [*Webster v. San Joaquin Fruit etc. Assn. (1916) 32 Cal. App. 264, 265, 162 P. 654* ; *Brazil v. Azevedo (1916) 32 Cal. App. 364, 368, 162 P. 1049]* . Thus, in an action on a joint partnership obligation a court may render a several judgment against thosepartners served, although when all partners are served a joint judgment is proper [*Merchants Nat. Bank v. Clark-Parker Co. (1932) 215 Cal. 296, 299, 9 P.2d 826* ; *but see De Martini v. Industrial Acci. Com. (1949) 90 Cal. App. 2d 139, 151, 202 P.2d 828 (1949)* (several judgments may be had against partners on a joint liability for worker's compensation if all partners are parties to the action)].

[6] Insurance and Indemnity

Although a partner is liable for the wrongful acts of copartners committed in the ordinary course of business, a partner may be insured against that liability [*American States Ins. Co. v. Borbor (9th Cir. [Cal.] 1987) 826 F.2d 888, 892-893]* . Thus, a comprehensive liability policy insuring all partners against any claims arising out of their operation of the partnership business will cover a partner for any claims arising out of the wrongful acts of another partner, as long as the partner did not encourage, aid, or abet the partner who committed the wrongful acts [*American States Ins. Co v. Borbor (9th Cir. [Cal.] 1987) 826 F.2d 888, 892-895]* . Furthermore, while all partners are jointly liable to third parties for the wrongful acts of any partner, an innocent partner is entitled to indemnity from the partner who committed the wrong without the innocent partner's knowledge or authorization [*In re Flick (Bankr. S.D. Cal. 1987) 75 B.R. 204, 206]* .

Legal Topics:

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§ 402.16 Fraud and Misrepresentation

All partners are jointly and severally liable for the fraud of one of the partners in contracts relating to the partnership, regardless of whether they knew of the fraud [*Stewart v. Levy (1868) 36 Cal. 159, 165* ; *Pearson v. Norton (1964) 230 Cal. App. 2d 1, 14-15, 40 Cal. Rptr. 634* ; *Grant v. Weatherholt (1954) 123 Cal. App. 2d 34, 46, 266 P.2d 185* ; *B.F. Goodrich Co. v. Naples (S.D. [Cal] 1954) 121 F. Supp. 345, 353]* , and even though the object of the partner in doing the fraudulent act was personal enrichment [*Wagner v. Shapona (1954) 123 Cal. App. 2d 451, 457, 267 P.2d 378* , *disapproved on other grounds in Neff v. Ernst (1957) 48 Cal. 2d 628, 311 P.2d 849]* . Thus, a partner innocent of making fraudulent insurance claims will nevertheless be precluded from receiving any portion of the proceeds of fire policies insuring the firm's property when his or her copartner has made such claims within the scope of his or her authority, thereby voiding the policies in accordance with their terms [*Zemelman v. Boston Ins. Co. (1970) 4 Cal. App. 3d 15, 19, 84 Cal. Rptr. 206]* .

The scope of a partnership's activities, and thus its liabilities for fraud and misrepresentation, may be extended beyond its dissolution. For example, a partner who appoints a copartner to wind up the affairs of the partnership, knowing that funds must be procured to release pledged securities, is liable as a principal for the fraudulent acts of the partner in procuring the funds [*Gift v. Ahrnke (1951) 107 Cal. App. 2d 614, 622, 237 P.2d 706* (citing *Civ. Code § 2338*); *see also Blackmon v. Hale (1970) 1 Cal. 3d 548, 558-559, 83 Cal. Rptr. 194, 463 P.2d 418* (Supreme Court held that partnership liability was created when, after dissolution of law partnership, one partner diverted a client's money held in firm's trust account to his own uses)]. However, the partnership is relieved from liability for the wrongs of its partners acting individually when the third person knows that he or she is dealing with the partner in an individual capacity [*Blackmon v. Hale (1970) 1 Cal. 3d 548, 559, 83 Cal. Rptr. 194, 463 P.2d 418]* . The court in *Blackmon* held that because the client whose funds were misappropriated was not *notified* that the partner with whom he was dealing was acting in his individual capacity, the client's testimony indicating he thought he was dealing only with the absconding partner was not conclusive on the issue of whether he was knowingly a client of the firm; it merely reflected confusion as to what is an attorney-client relationship.

Legal Topics:

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§ 402.17 Negligence

Negligence of a partner or agent of a partnership is imputed to the other partners [*Buckley v. Chadwick (1955) 45 Cal. 2d 183, 190, 289 P.2d 242* ; *Cahill Bros., Inc. v. Clementina Co. (1962) 208 Cal. App. 2d 367, 376, 25 Cal. Rptr. 301]* . Acts characterized as willful and malicious, as well as simple negligence, will give rise to partnership liability [*Madsen v. Cawthorne (1938) 30 Cal. App. 2d 124, 126, 85 P.2d 909]* . A partner's contributory negligence will bar recovery in a wrongful death suit brought by a deceased copartner's representative [*Buckley v. Chadwick (1955) 45 Cal. 2d 183, 192-193, 289 P.2d 242]* . In addition, one partner's knowledge of the unsafe condition of an instrumentality used in the partnership business will be imputed to all partners in an action for damages resulting from injuries caused by the unsafe condition [*Fererira v. Silvey (1918) 38 Cal. App. 346, 349-350, 176 P. 371]* . A partner's knowledge or receipt of notification of a fact relating to the partnership is effective immediately as knowledge by or notification to the partnership except in the case of a fraud on the partnership committed by or with the consent of that partner [*Corp. Code § 16102(f)*; *see* former *Corp. Code § 15012*].

Because partners are jointly and severally liable for wrongful acts or omissions of a partner acting in the ordinary course of the partnership business [*Corp. Code § 16305, 16306(a)*; former *Corp. Code §§ 15013, 15014*; *Blew v. Horner (1986) 187 Cal. App. 3d 1380, 1393, 232 Cal. Rptr. 660]* , a several judgment against one partner resulting from that partner's own negligent acts will not render another copartner liable for contribution when the copartner was neither served nor a party to the action [*Young v. Evans (1944) 62 Cal. App. 2d 365, 372, 144 P.2d 651* ; *see* *Blew v. Horner (1986) 187 Cal. App. 3d 1380, 1393, 232 Cal. Rptr. 660* (dictum: because liability of partners for torts is joint and several, action may be brought against one partner without joining other partners)].

Legal Topics:

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§ 402.18 Misrepresentation of Person as Partner

[1] Statutory Standard

If a person who is not a partner purports to be a partner, or consents to be represented to be a partner, in a partnership, that person will be liable to anyone who enters into a transaction with the partnership or purported partnership based on that representation. Misrepresentations that are made in a public manner may increase liability to include persons who rely on the misrepresentation, even though the purported partner did not know that those persons relied on the misrepresentation [*Corp. Code § 16308(a)*; *see* former *Corp. Code § 15016(1)*; *see also Armato v. Baden (1999) 71 Cal. App. 4th 885, 897-899, 84 Cal. Rptr. 2d 294* (assuming that former *Corp. Code § 15016* applied, independent contractor doctors for medical group were not jointly liable under ostensible partnership theory for allegedly negligent treatment plaintiff received from group's physician assistant)].

The partnership may be liable to a third person who enters into a transaction with the partnership based on the misrepresentation if all the partners consent to the representation. If fewer than all of the partners consent to the representation, then those partners become jointly and severally liable [*Corp. Code § 16308(b)*; *see* former *Corp. Code § 15016(2)*].

[2] "Partnership by Estoppel"

The term "partnership by estoppel" traditionally is used to describe the legal consequence of misrepresentations about a person being a partner to third parties who rely on those misrepresentations in extending credit. This term is accurate insofar as it reflects the operation of the law of estoppel in prohibiting the person misrepresented as a partner fromdenying liability to the same extent as if that person were a partner. To the extent that the term implies that an actual partnership, or a partnership liability, *necessarily* will result from such a misrepresentation, however, the term is misleading. The requirements for liability are statutory and are explained in [1], *above*.

[3] Question of Fact

Whether an individual is deemed a partner by estoppel is usually a question of fact. It becomes a question of law only

when the evidence is not in conflict and is susceptible of only one reasonable inference [*Redman v. Walters (1979) 88 Cal. App. 3d 448, 455, 152 Cal. Rptr. 42]* .

[4] Acts and Conduct Must Lead to Belief That Person Is Partner

When it is claimed that a person who is not a partner is liable as such, the issue is whether that person's acts and conduct were sufficient to lead the creditor to believe that the person was a partner and assumed responsibility as a partner [*J & J Builders Supply v. Caffin (1967) 248 Cal. App. 2d 292, 297, 56 Cal. Rptr. 365]* . For example, a defendant's status as a partner was held to be established by estoppel when he was introduced to the plaintiff as a partner, he signed payroll checks for employees in the partnership name, and he signed a letter referring to joint responsibility for the merchandise plaintiff delivered to the partnership [*Wirta v. Vergona (1961) 195 Cal. App. 2d 365, 366-367, 15 Cal. Rptr. 804]* . An intent to deceive is not required [*Crabbe v. Mires (1952), 112 Cal. App. 2d 456, 459, 246 P.2d 991]* . All that is required to establish an individual's status as a partner is a showing that the person's actions would induce a reasonable and prudent person to believe that the individual is a partner [*Crabbe v. Mires (1952) 112 Cal. App. 2d 456, 459, 246 P.2d 991]* .

[5] Pleading Must Include Representation of Partnership and Reliance

A plaintiff relying on the doctrine of estoppel to establish the existence of a partnership obligation must plead a representation of partnership and a reliance on this representation [*Moen v. Art's Cafe (1950) 95 Cal. App. 2d 577, 579, 213 P.2d 393]* .

[6] Being Named in Statement of Partnership Is Not Enough

A person is not liable as a partner merely because the person is named by another in a statement of partnership [*Corp. Code § 16308(c)*] or by an unauthorized declaration of someone else that an individual was a partner [*Hunter v. Croysdill (1959) 169 Cal. App. 2d 307, 316, 337 P.2d 174]* . In one case decided under the pre-'97 Act, for instance, the insertion of an individual's name as a partner on a partnership tax return did not make that individual a partner by estoppel when the individual had no part in that insertion on the return and knew nothing about it [*United States v. Coson (9th Cir. [Cal.] 1961) 286 F.2d 453, 462]* .

[7] Liability of Partner by Estoppel

When a partnership liability results, a partner by estoppel is liable as though that person were an actual member of the partnership. When no partnership liability results, a partner by estoppel is liable jointly with any other person who consented to the contract or made representations in any way that would incur liability; otherwise the liability is separate [*Corp. Code § 16308(a)*; *see* former *Corp. Code § 15016(1)(a), (b)*].

[8] Third Person as Agent

When a person represents to anyone, or consents to another representing, either that the person is a partner in an existing partnership or is a partner with one or more other persons who are not actual partners, the person becomes an agent of the persons consenting to the representation. The person may thus bind the other persons to the same extent and in the same manner as could a partner in fact with respect to persons who rely on the representation [*Corp. Code § 16308(b)*; *see* former *Corp. Code § 15016(2)*].

[9] Former Partners

UPA'94, which introduced the concepts of partnership statements of authority and statements of dissociation, clarifies that the failure to amend a partnership statement of authority or file a statement of dissociation after a partner dissociates may not be used to hold that partner liable as a partner [*Corp. Code § 16308(d)*].

[10] No Liability If Statutory Standard Is Not Met

UPA'94 clarifies that persons who are not partners are not liable as partners to other persons [*Corp. Code § 16308(e)*], other than for misrepresentations of partnership status meeting the statutory standard [*see* [1], *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsFormationPartnership by EstoppelBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionPartnership LiabilitiesBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersAuthority to ActContracts LawDefensesFraud & MisrepresentationGeneral OverviewTortsVicarious LiabilityPartnersGeneral Overview

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§ 402.19 Judgments

Under UPA'94, a judgment against a partnership is not a judgment against a partner and may not be satisfied from a partner's assets without a judgment against the partner [*Corp. Code § 16307(c)*]. Similarly, a judgment creditor of a partner may not execute against the assets of the partner to satisfy a judgment based on a claim against the partnership unless [*Corp. Code § 16307(d)*]:

- A judgment based on the same claim has been obtained against the partnership and execution is returned unsatisfied in whole or in part;
- The partnership is in bankruptcy;
- The partner agrees that the creditor does not need to exhaust partnership assets;
- The court grants permission to levy against the partner after finding that partnership assets are clearly insufficient, the exhaustion of partnership assets is excessively burdensome, or that the court's permission is an appropriate exercise of its equity powers; or
- Liability is imposed on the partner by law or contract independent of the existence of the partnership.

These same rules apply to purported partners [*Corp. Code § 16307(e)*; *see § 402.18*, *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionPartnership Liabilities

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§ 402.20 Charging Orders

[1] UPA'94

UPA'94 provides the exclusive remedy by which a judgment creditor of a partner or a partner's transferee may satisfy a judgment out of the partner's transferable interest in the partnership [*Corp. Code § 16504(a), (e)*]. Under this remedy, a judgment creditor of a partner or of a partner's transferee may apply for a court order charging that interest to satisfy the judgment. The court has the power to appoint a receiver of partnership distributions and to make all other orders, directions, accounts, and inquiries the judgment debtor might have made or that the circumstances of the case may require [*Corp. Code § 16504(a)*].

UPA'94 specifically provides that a charging order is a lien on the judgment debtor-partner's transferable interest and that the court may order a foreclosure of an interest subject to a charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee [*Corp. Code § 16504(b)*]. At any time before foreclosure, an interest charged may be redeemed by the partner judgment debtor, by other partners out of their separate property, or out of partnership property with the consent of all the partners whose interests are not charged [*Corp. Code § 16504(c)*].

Code Civ. Proc. § 708.310 (contained in Chapter 6 of Division 2 to Title 9, entitled Miscellaneous Creditors' Remedies) specifically provides that if a money judgment is rendered against a partner but not against the partnership, the judgment debtor's interest in the partnership may be applied toward the satisfaction of the judgment by an order charging the judgment debtor's interest pursuant to *Corp. Code § 16504*.

[2] Pre-'97 Act

[a] Partner's Right in Specific Partnership Property

Under the pre-'97 Act, a partner's right in specific partnership property (UPA'94 eliminates a partner's specific right in partnership property [*Corp. Code § 16203*; *see* Ch. 401, *Partnerships: Actions Between General Partners and Partnership*]) was not subject to enforcement of a money judgment, except on a claim against the partnership [former *Corp. Code § 15025(2)(c)*]. In addition, the statutes governing writs of execution and levy provide that the interest of a

partner in a partnership is not a type of property subject to enforcement of a money judgment when the partnership is not a judgment debtor [*Code Civ. Proc. § 699.720(a)(2)*]. Therefore, as a general rule, a creditor with a judgment against a partner but not against the partnership ordinarily cannot execute directly on partnership assets or on the partner's interest in the partnership.

[b] Partner's Partnership Interest

Under the pre-'97 Act, as under UPA'94, a judgment creditor of a partner or a partner's transferee could satisfy a judgment out of the partner's transferable interest in the partnership [former *Corp. Code § 15028*]. The pre-'97 Act implied, but did not specifically provide, that a debtor/partner's partnership interest may be foreclosed upon [former *Corp. Code § 15028*; *see 402.21, below*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionDerivative ActionsBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersTransfers of InterestsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionContracts LawSecured TransactionsDefaultForeclosure & RepossessionRedemption

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§ 402.21 Foreclosing Partnership Interest

[1] Available as Remedy

UPA'94 specifically provides for foreclosure of a partner's transferable interest in a partnership based on the lien created by a charging order at any time by a court having jurisdiction [*Corp. Code § 16504(b)*]. The pre-'97 Act did not specifically provide for foreclosure as a remedy, but implied its existence [*see* former *Corp. Code § 15028(2)*] and that remedy has been judicially determined to exist [*Hellman v. Anderson (1991) 233 Cal. App. 3d 840, 844-848, 284 Cal. Rptr. 830]* .

For forms for use by a judgment creditor to obtain an order for sale of the judgment debtor's partnership interest, see §§ 402.45-402.47.

[2] Foreclosure and Execution

Debtor partners have argued that *Code Civ. Proc. § 699.720(a)(2)*, which exempts a partner's interest in a partnership from execution, also protects their interests from foreclosure. The courts have rejected this argument. The courts note the exception under *Code Civ. Proc. § 699.720(b)* allowing the satisfaction of a money judgment by any procedure other than an execution, and further note the difference between an execution sale (pursuant to a writ of execution) and a foreclosure sale of a debtor partner's interest. The issuance of a writ of execution is a ministerial act and the clerk has no discretion to refuse it. Once the writ is issued, the levying officer discharges the writ, and no court intervention is required. In contrast, both court supervision and discretion are involved in orderinga sale to foreclose the lien created by a charging order on a partnership interest. Thus, under the court analysis, *Code Civ. Proc. § 699.720* does not apply [*Hellman v. Anderson (1991) 233 Cal. App. 3d 840, 848-850, 284 Cal. Rptr. 830* ; *see also Crocker Nat. Bank v. Perroton (1989) 208 Cal. App. 3d 1, 5-6, 255 Cal. Rptr. 794* (distinguishing execution and charging order)].

[3] Conditions for Granting Foreclosure

Because foreclosure is permissive under both acts, case law has developed criteria for determining when foreclosure is appropriate. The case law, which was developed under the Pre-'97 Act and should also apply under UPA'94, articulates

the following criteria for granting foreclosure [*Hellman v. Anderson (1991) 233 Cal. App. 3d 840, 852-853, 284 Cal. Rptr. 830* ; *see also Crocker Nat. Bank v. Perroton (1989) 208 Cal. App. 3d 1, 6-7, 255 Cal. Rptr. 794]* :

- A charging order under *Corp. Code § 16504* or former *Corp. Code § 15028* must have been issued;
- A charging order remains and for a reasonable time is likely to remain unsatisfied; and
- The nondebtor partners consent to foreclosure, or foreclosure will not unduly interfere with partnership business regardless of those partners' consent.

The First District holds that the nondebtor partners' consent is always required [*Crocker Nat. Bank v. Perroton (1989) 208 Cal. App. 3d 1, 9-10, 255 Cal. Rptr. 794* (limited partner's interest was being sold, general partner consented)]. The Third District holds that the court has discretion to decide whether or not the nondebtor partners' consent is required. The court's discretion must be exercised in accordance with equitable principles, and consent is required only if the foreclosure will unduly interfere with the partnership business [*Hellman v. Anderson (1991) 233 Cal. App. 3d 840, 850-853, 284 Cal. Rptr. 830]* . An example of undue interference is a foreclosure of the interest of a partner with essential managerial skills, which causes that partner to abandon the partnership [*see Hellman v. Anderson (1991) 233 Cal. App. 3d 840, 852, 284 Cal. Rptr. 830]* .

[4] Burden of Proof of Undue Interference

The burden of proving undue interference with the partnership business is on the debtor partner because the debtor partner has particular knowledge of the facts relevant to the issue. This is an exception to the ordinary allocation of burdens of proof [*Hellman v. Anderson (1991) 233 Cal. App. 3d 840, 853, 284 Cal. Rptr. 830]* .

[5] Order May Not Increase Purchaser's Rights

A supplementary order for sale of a judgment debtor's partnership interest cannot allow the purchaser to acquire more rights in the partnership than the debtor partner possessed [*Crocker Nat. Bank v. Perroton (1989) 208 Cal. App. 3d 1, 10, 255 Cal. Rptr. 794]* . Thus, the creditor or purchaser at foreclosure usually will only acquire the right to profits, surplus, and distributions attributable to the debtor partner's interest, but will have no interest in partnership property or management participation [*see Hellman v. Anderson (1991) 233 Cal. App. 3d 840, 852, 284 Cal. Rptr. 830* ; *Corp. Code § 16503*; former *Corp. Code § 15027*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersManagement & VotingCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsWrits of Execution

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§ 402.22 Limiting Partner's Liability in Registered Limited Liability Partnerships

[1] Generally

Under UPA'94 and the pre-'97 Act, a partner in a registered limited liability partnership is not liable or accountable, directly or indirectly, including by way of indemnification, contribution, assessment, or otherwise, for debts, obligations, or liabilities chargeable to the partnership or another partner in the partnership, whether arising in tort, contract, or otherwise, that are incurred, created, or assumed by the partnership while the partnership is a registered limited liability partnership, by reason of being a partner or acting in the conduct of the business or activities of the partnership [*Corp. Code § 16306(c)*; former *Corp. Code § 15015(b)*].

[2] Limitation on Liability May Be Changed by Agreement

All or certain specified partners of a registered limited liability partnership, if the specified partners agree, may be liable in their capacity as partners for all or specified debts, obligations, or liabilities of the limited liability partnership if the partners possessing a majority of the interests of the partners in the current profits of the partnership, or a different vote if required in the partnership agreement, specifically agreed to the specified debts, obligations, or liabilities in writing, before the debt, obligation, or liability was incurred. Such an agreement may be modified or revoked, but a modification or revocation will not affect a partner's liability for any debts, obligations, or liabilities of a registered limited liability partnership incurred, created, or assumed by the limited liability partnership before the modification or revocation [*Corp. Code § 16306(d)*; former *Corp. Code § 15015(c)*].

[3] Individual Liability May Still Apply

A partner in a registered limited liability partnership remains personally liable to third parties for that partner's tortious conduct [*Corp. Code § 16306(e)*; former *Corp. Code § 15015(d)*].

[4] Partner May Not Be Named in Suit Against Partnership Unless Personal Liability Applies

A partner in a registered limited liability partnership is not a proper party to a proceeding by or against the partnership if

personal liability for partnership debts, obligations, or liabilities is asserted unless the partner is personally liable by agreement [*see* [2], *above*] or the tortious conduct of the partner [*Corp. Code § 16306(g)*; former *Corp. Code § 15015(f)*; *see* [3], *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited Liability PartnershipsBusiness & Corporate LawLimited PartnershipsGeneral OverviewBusiness & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesContracts LawTypes of ContractsPartnership AgreementsTortsVicarious LiabilityPartnersGeneral OverviewTortsVicarious LiabilityPartnersLimited Partners

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§ 402.23 Liability of Joint Venturers to Third Parties

[1] Contract Liability

The relations of joint venturers, whether between themselves or with third parties, generally are the same as those of partners and, to that extent, are governed by partnership law [*Orlopp v. Willardson Co. (1965) 232 Cal. App. 2d 750, 754, 43 Cal. Rptr. 125* ; *Milton Kauffman, Inc. v. Superior Court (1949) 94 Cal. App. 2d 8, 17, 210 P.2d 88]* . Therefore, former *Corp. Code § 15009* (pre-'97 Act), and *Corp. Code § 16301* (UPA'94) providing that every partner is an agent of the partnership for the purpose of carrying on the business of the partnership, also governs a joint venturer's authority to bind the other venturers [*see Medak v. Cox (1970) 12 Cal. App. 3d 70, 76, 90 Cal. Rptr. 452* ; *see also § 402.13[1]*]. Each joint venturer thus has authority to bind the others in making contracts reasonably necessary to carry out the enterprise [*Smalley v. Baker (1968) 262 Cal. App. 2d 824, 837, 69 Cal. Rptr. 521]* . If a joint venturer is acting beyond the scope of his or her authority, the other venturers are not bound when the third party had no knowledge of the existence of a joint venture [*Block v. D. W. Nicholson Corp. (1947) 77 Cal. App. 2d 739, 745, 176 P.2d 739]* .

There have been occasional cases holding that in certain joint ventures, one joint venturer may not have the power to bind another [*see Stilwell v. Trutanich (1960) 178 Cal. App. 2d 614, 619, 3 Cal. Rptr. 285* ; *Nels E. Nelson, Inc. v. Tarman (1958) 163 Cal. App. 2d 714, 726, 329 P.2d 953]* . These cases however, appear to rest on factual situations involving ventures of a limited scope, in which the joint venturers did not have equal control of the venture [*see Smalley v. Baker (1968) 262 Cal. App. 2d 824, 837, 69 Cal. Rptr. 521]* .

For discussion of a partner's authority to bind a partnership, see §§ 402.13-402.15.

[2] Ostensible Joint Venturer

As with a partner, a person who represents himself or herself as a joint venturer, or who consents to a representation by another that he or she is a joint venturer, may be liable as a joint venturer by estoppel [*see Rivett v. Nelson (1958) 158 Cal. App. 2d 268, 276, 322 P.2d 515]* . For discussion of misrepresentation of a person as a partner and partnership by estoppel, see *§ 402.18*, and for forms that may be modified for use by a third party against an ostensible joint venturer, see §§ 402.43-402.44.

[3] Tort Liability

As with partners, the liability of joint venturers for tortious acts of other joint venturers is governed by the law governing principals and agents, under which a principal whose agent has committed a tort in the transaction of the agency's business is jointly and severally liable to an injured party [*Cahill Bros., Inc. v. Clementina Co. (1962) 208 Cal. App. 2d 367, 388, 25 Cal. Rptr. 301* ; *see § 402.13[1]*; *see also generally* Ch. 427, *Principal and Agent*]. Therefore, the negligence of one joint venturer is imputable to the others [*Hupfeld v. Wadley (1948) 89 Cal. App. 2d 171, 175, 200 P.2d 564]* . Similarly, when one joint venturer, acting within the scope of the venture and in furtherance of its agreed purpose, fraudulently procures benefits retained by the joint venturers, all the joint venturers are liable for compensatory damages caused by the fraud [*Rickless v. Temple (1970) 4 Cal. App. 3d 869, 893-894, 84 Cal. Rptr. 828]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedJoint VenturersBusiness & Corporate LawAgency RelationshipsAuthority to ActGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsJoint & Several LiabilityBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesUnlawful Acts of AgentsGeneral OverviewBusiness & Corporate LawAgency RelationshipsEstablishmentGeneral OverviewBusiness & Corporate LawJoint VenturesGeneral OverviewBusiness & Corporate LawJoint VenturesManagement Duties & LiabilitiesTortsVicarious LiabilityJoint Ventures

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[Reserved]

§§ 402.24[Reserved]

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§ 402.30 Related Matthew Bender Publications

For discussion and forms relating to fictitious business name statement, statement of withdrawal from partnership operating under a fictitious business name, and statement of abandonment of fictitious business name, see California Legal Forms, Ch. 15, *General Partnerships*, Pt. A (Matthew Bender)

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35-402 California Forms of Pleading and Practice--Annotated § 402.31

§ 402.31 State Statutes

[1] Acknowledgment

Form for acknowledgment for use in all situations. *Civ. Code § 1189(a)*; *but see Civ. Code § 1189(d)* (acknowledgments provided before January 1, 1993, and conforming to provisions of former *Civ. Code §§ 1189-1192* are valid)

Acknowledgment by duly authorized person in form specified in *Civ. Code § 1189* is prima facie evidence that instrument is duly authorized act of entity named in instrument and conclusive evidence thereof in favor of good faith purchaser, lessee, or encumbrancer. *Civ. Code § 1190*

[2] Actions by and Against Partnerships

Partnership may sue and be sued in name of partnership. *Corp. Code § 16307(a)*

Partnership may sue or be sued in name it has assumed or by which it is known. *Code Civ. Proc. § 369.5(a)*

Partnership and partners may be sued in same or separate actions. *Corp. Code § 16307(b)*

Partner may be joined as party in action against partnership; judgment against partner based on his or her personal liability permitted if served as individual. *Code Civ. Proc. § 369.5(b)*

Proper venue in action against unincorporated association. *Code Civ. Proc. § 395.2*

[3] Agents

Requirements for summons on partnership and partner individually. *Code Civ. Proc. § 412.30*

Designation of agent of foreign limited partnership. *Corp. Code §§ 15692, 15627,* 15092, *15800*; former *Corp. Code § 15058*

Fee for filing designation of partnership agent. *Gov. Code § 12187*

[4] Enforcement of Judgment

Partnership property subject to attachment. *Code Civ. Proc. § 487.010(b)*

Application of judgment debtor's interest in partnership toward satisfaction of judgment entered against partner but not against partnership. *Code Civ. Proc. § 708.310*

Partner's right in specific partnership property not subject to enforcement of money judgment except on claim against partnership. Former *Corp. Code § 15025(c)*

Partner has no interest in partnership property that may be transferred voluntarily or involuntarily. *Corp. Code § 16501*

Partner's judgment creditor permitted to obtain order charging debtor partner's partnership interest with payment of debt. *Corp. Code § 16504(a)*; former *Corp. Code § 15028(1)*

Charging order is exclusive remedy for judgment creditor to satisfy judgment out of partner's transferable interest. *Corp. Code § 16504(e)*

Foreclosure is specifically permitted. *Corp. Code § 16504(b)*

[5] Fictitious Business Name

Filing of fictitious business name statement does not authorize use of name in violation of another's rights. *Bus. & Prof. Code § 14418*

Fictitious business names. *Bus. & Prof. Code § 17900 et seq.*

Definition of partnership fictitious business name. *Bus. & Prof. Code § 17900(b)(2)*

Definition of limited partnership fictitious business name. *Bus. & Prof. Code § 17900(b)(4)*

Fictitious business name statement; statutory form. *Bus. & Prof. Code § 17913*

Signature of statement by general partner. *Bus. & Prof. Code § 17914(c)*

Statement required to be filed in county of principal place of business. *Bus. & Prof. Code § 17915*

Method of filing; certification by clerk. *Bus. & Prof. Code § 17916*

Publication requirements. *Bus. & Prof. Code § 17917*

Person failing to comply with fictitious business name requirements is prohibited from maintaining action on contract

or transaction. *Bus. & Prof. Code § 17918*

Filing statement after bankruptcy. *Bus. & Prof. Code § 17919*

Expiration of fictitious business name statement. *Bus. & Prof. Code §§ 17920, 17921*

Statement of abandonment of use of fictitious business name. *Bus. & Prof. Code § 17922*

Statement of withdrawal from partnership operating under fictitious business name. *Bus. & Prof. Code § 17923*

County clerk must furnish forms for statements. *Bus. & Prof. Code § 17924*

Filing fees. *Bus. & Prof. Code § 17929*

Executing, filing, or publishing false statement is misdemeanor. *Bus. & Prof. Code § 17930*

[6] Liability of Partners and Partnership to Third Parties

Partner as agent of partnership; acts of partner binding partnership; limitation on authority of partner. *Corp. Code § 16301*; former *Corp. Code § 15009*

Rules for conveyance of partnership real property. *Corp. Code § 16302*; former *Corp. Code § 15010*

Statement of partnership; conclusive presumption created. Former *Corp. Code § 15010.5*

Statement of partnership permitted after death of partner. Former *Corp. Code § 15010.6*

Statement of partnership authority: content, filing, and effect. *Corp. Code § 16303*

Admission or representation of partner concerning partnership affairs within scope of partner's authority as evidence against partnership. Former *Corp. Code § 15011*

Notice to or knowledge of partner as imputed to partnership except when that partner commits fraud on partnership. *Corp. Code § 16102(f)*; former *Corp. Code § 15012*

Partnership liable for wrongful acts of partner in ordinary course of business. *Corp. Code § 16305(a)*; former *Corp. Code § 15013*

Partnership liable for partner's or partnership's misapplication of money or property. *Corp. Code § 16305(b)*; former *Corp. Code § 15014*

Partners' liability is joint and several. *Corp. Code § 16306(a)*; former *Corp. Code § 15015*

Person may be liable for misrepresenting himself or herself as partner and may be agent of persons consenting to representation of partnership; partnership is liable when all members consent to that representation. *Corp. Code § 16308*; former *Corp. Code § 15016*

Pre-'97 Act: new partner is liable for existing partnership obligations, but liability may be satisfied only out of partnership property. Former *Corp. Code § 15017*

UPA'94: new partner is not personally liable for existing partnership obligations. *Corp. Code § 16306(b)*

[7] Partnership Interest

Definition of partnership interest. *Civ. Code § 684*

Partnership interest under UPA'94. *Corp. Code § 16101(12)*

Transferable partnership interest is partner's share of profits and losses and right to receive distributions. *Corp. Code § 16502*

[8] Objections to Complaint

Defect of parties is grounds for objection to complaint. *Code Civ. Proc. § 430.10(d)*

Objection to complaint by answer permitted when grounds for objection does not appear on face of complaint. *Code Civ. Proc. § 430.30(b)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsGeneral OverviewBusiness & Corporate LawCorporate NamesGeneral OverviewBusiness & Corporate LawGeneral PartnershipsFormationGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionPartnership LiabilitiesBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersTransfers of InterestsBusiness & Corporate LawLimited PartnershipsFormationBusiness & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesCivil ProcedureVenueAgentsCivil ProcedureVenueCorporationsReal Property LawOwnership & TransferBusiness & Corporate Entities

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§ 402.32 Decisions

[1] Allegations

In order to bind joint and individual property of partners, complaint designating partnership as such is not required, as long as there are allegations that there is an association of two or more persons transacting business under common name. *Nicholls v. Anders (1936) 13 Cal. App. 2d 440, 443, 56 P.2d 1289*

[2] Attachment

Attachment against individual partner in action on note signed by individual is proper under *Code Civ. Proc. § 483.010(c)* even though borrower was nonmanaging, inactive partner in general partnership because loan was made at request of managing partner and loan proceeds were immediately loaned to partnership pursuant to loan condition. *Security Pac. Nat. Bank v. Matek (1985) 175 Cal. App. 3d 1071, 1073-1077, 223 Cal. Rptr. 288*

[3] Authority of Partner

Apparent scope of partnership's business depends primarily on conduct of partnership and its partners and what they cause third persons to believe about the authority of partners. *Blackmon v. Hale (1970) 1 Cal. 3d 548, 557, 83 Cal. Rptr. 194, 463 P.2d 418*

Ostensible agency or acts within scope of partnership business is presumed when business done by supposed agent, as observed by third parties, is consistent with existence of agency, and when third party was justified in believing that agency existed as to transaction in question. *Blackmon v. Hale (1970) 1 Cal. 3d 548, 557, 83 Cal. Rptr. 194, 463 P.2d 418*

Public policy requires that person dealing with partner in course of partnership business be informed of special

restrictions on partner's authority, otherwise person cannot be charged with knowledge of those restrictions. *Blackmon v. Hale (1970) 1 Cal. 3d 548, 558, 83 Cal. Rptr. 194, 463 P.2d 418*

Partner may sue individually only for own damages; action for damages to partnership is maintainable only by all partners or partnership. *Lewis v. Hayes (1918) 177 Cal. 587, 589-590, 171 P. 293* (libel action)

[4] Creditor's Charging Order

Order granting or denying judgment creditor's motion for charging order under former *Corp. Code § 15028* is appealable. *Baum v. Baum (1959) 51 Cal. 2d 610, 615, 335 P.2d 481*

Payment of partnership debts made in preference to payment of debts of individual partner. *Whelan v. Shain (1896) 115 Cal. 326, 328-329, 47 P. 57*

Former *Corp. Code § 15028* is not proper procedure for judgment creditor when judgment debtor's interest in partnership is contested; action under former *Code Civ. Proc. § 720* (*now Code Civ. Proc. § 708.210*) is properprocedure in such a case. *Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 763-764, 104 Cal. Rptr. 921*

Former *Corp. Code § 15028* does not authorize court to appoint receiver to take over and preserve contested partnership interests. *Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 764, 104 Cal. Rptr. 921*

Former *Corp. Code § 15028* provides proper procedure for spouse of partner to enforce property settlement following dissolution of marriage action. *Lesh v. Lesh (1970) 8 Cal. App. 3d 883, 891-892, 87 Cal. Rptr. 632*

Judgment creditor obtaining charging order does not acquire any greater rights with respect to partnership or other partners than judgment debtor is entitled to for his or her own benefit. *Ribero v. Callaway (1948) 87 Cal. App. 2d 135, 138, 196 P.2d 109* (decided under former *Civ. Code § 2422*)

[5] Evidence

In action on promissory note, ambiguous on its face as to whether signed by partner in individual capacity or on behalf of partnership, parol evidence is admissible to resolve ambiguity. *McCollum v. Steitz (1968) 261 Cal. App. 2d 76, 78, 67 Cal. Rptr. 703*

Former *Corp. Code § 15011* does not provide that partner's admission is conclusive evidence against partnership. *Silver v. Schwartz (1956) 142 Cal. App. 2d 92, 99, 297 P.2d 1018*

[6] Fictitious Business Name

When compliance with fictitious business name statute appears to be simple matter and serious disruption of efficient administration of justice might result from continuance to permit compliance, trial judge has discretion to refuse to abate proceedings. *Tyrone v. Kelley (1973) 9 Cal. 3d 1, 14, 106 Cal. Rptr. 761, 507 P.2d 65*

Compliance with fictitious business name statutes is matter of abatement, and compliance is sufficient if accomplished at any time before trial. *Tyrone v. Kelley (1973) 9 Cal. 3d 1, 14, 106 Cal. Rptr. 761, 507 P.2d 65* ; *Rudneck v. Southern California M. & R. Co. (1920) 184 Cal. 274, 281-282, 193 P. 775* (decided under former fictitious name statutes, Civ. Code §§ 2466, *2468*); *Kadota Fig Asso. of Producers v. Case-Swayne Co. (1946) 73 Cal. App. 2d 796, 804-805, 167 P.2d 518* (decided under former fictitious name statutes, Civ. Code §§ 2466, *2468*)

Burden of proof on plaintiff partnership to show compliance with statutory fictitious business name requirements. *Rudneck v. Southern California M. & R. Co. (1920) 184 Cal. 274, 281, 193 P. 775* ; *Hixson v. Boren (1956) 144 Cal. App. 2d 547, 555, 301 P.2d 615* (cases decided under former fictitious name statutes Civ. Code §§ 2466-2469)

Only penalty for partnership's failure to file fictitious business name statement is inability to maintain action; requirement does not prevent partnership from being made defendant. *Vance v. Gilbert (1918) 178 Cal. 574, 578, 174 P. 42* (decided under former fictitious name statutes, Civ. Code §§ 2466, *2468*)

Judgment based on noncompliance with fictitious business name statutes does not bar later action brought after compliance with statutes. *Sweeney v. Stanford (1885) 67 Cal. 635, 636, 8 P. 444* ; *Folden v. Lobrovich (1957) 153 Cal. App. 2d 32, 35, 314 P.2d 56* (decided under former fictitious name statutes, Civ. Code §§ 2466, *2468*)

Person whose name appears in partnership's fictitious business name certificate is not held to be general partner for that reason only. *J.C. Wattenbarger & Sons v. Sanders (1963) 216 Cal. App. 2d 495, 500, 30 Cal. Rptr. 910*

Defendant's failure to raise technical defense of plaintiff's failure to comply with fictitious business name statutes as waiver. *Folden v. Lobrovich (1957) 153 Cal. App. 2d 32, 34, 314 P.2d 56* (decided under former fictitious name statutes, Civ. Code §§ 2466, *2468*)

Requirement of filing fictitious business name statement is constitutional. *Hixson v. Boren (1956) 144 Cal. App. 2d 547, 554, 301 P.2d 615* (decided under former fictitious name statutes, Civ. Code §§ 2466, *2468*)

Failure to file fictitious business name statement does not bar maintenance of tort action. *Thompson v. Byers (1931) 116 Cal. App. 214, 216-217, 2 P.2d 496*

Objection to plaintiff's failure to comply with fictitious business name statutes is made by demurrer if noncompliance appears on face of complaint. *Bryant v. Wellbanks (1927) 88 Cal. App. 144, 152, 263 P. 332* (decided under former fictitious name statutes, Civ. Code §§ 2466, *2468*)

Assignee of partnership permitted to comply with fictitious business name statutes after he or she files action. *Bryant v. Wellbanks (1927) 88 Cal. App. 144, 154-155, 263 P. 332* (decided under former fictitious name statutes, Civ. Code §§ 2466, *2468*)

[7] Liability of Partners

[a] Partnerships

Proper assessment of unpaid employment tax against partnership sufficed to extend statute of limitations for collection of tax from general partners who were liable for payment of partnership's debts; timely assessment of tax against partnership was sufficient to extend statute of limitations to collect tax in judicial proceeding, whether from partnership itself or from those liable for its debts. *United States v. Galletti (2004) 541 U.S. 114, 124 S.Ct. 1548, 158 L. Ed. 2d 279, 285* .

Partner who withdraws from partnership and whose name is deleted from partnership name is not liable for later misapplication of third party's money by another partner. *Blackmon v. Hale (1970) 1 Cal. 3d 548, 560, 83 Cal. Rptr. 194, 463 P.2d 418*

Although under *Corp. Code § 16306(a)* all partners were jointly and severally liable for bank loan on real property,

after foreclosure and entry of deficiency judgment, assignment of judgment to partnership and 11 of 12 partners extinguished the debt; the 11 partners could not acquire bank's right to collect balance of judgment from 12th partner, their co-obligor. *Great Western Bank v. Kong (2001) 90 Cal. App. 4th 28, 31-33, 108 Cal. Rptr. 2d 266*

Under successor liability provisions of municipal code, general partner of partnership to which hotel was transferred is jointly liable with partnershipand other partners [*see* former *Corp. Code § 15015*] for city transient occupancy taxes for period before hotel was transferred to partnership. *City of San Diego v. DeLeeuw (1993) 12 Cal. App. 4th 10, 13, 15 Cal Rptr. 2d 98* (taxes should be been paid from "hold back" in escrow on transfer but were not)

When partnership is named in action, but individual partners are not named as defendants, individual partners are liable to extent of their interests in partnership property but not as individuals. *Fazzi v. Peters (1968) 68 Cal. 2d 590, 595-598, 68 Cal. Rptr. 170, 440 P.2d 242* ; *Promotus Enterprises, Inc. v. Jiminez (1971) 21 Cal. App. 3d 560, 566-567, 98 Cal. Rptr. 571*

Former *Corp. Code § 15015* not applied to permit third party to recover against individual partner who entered into separate obligation to perform partnership contract because individual partner's obligation was extinguished by judgment in favor of partnership and against third party on partnership's cross complaint. *Hughes Tool Co. v. Max Hinrichs Seed Co. (1980) 112 Cal. App. 3d 194, 205, 169 Cal. Rptr. 160*

Partner who withdraws from partnership is liable for subsequent partnership obligations when third party has no knowledge of withdrawal. *Marsh Wall Products, Inc. v. Henry Marcus Building Specialties (1958) 162 Cal. App. 2d 371, 379, 328 P.2d 259*

[b] Joint Ventures

Payment of judgment in favor of plaintiffs, former joint venturers, without any further allocation of their interests creates tenancy in common, under which each was presumed to have one-half interest; party seeking more has burden of proving entitlement to it. *Parker v. Walker (1992) 5 Cal. App. 4th 1173, 1182-1183, 6 Cal. Rptr. 2d 908*

Former *Corp. Code § 15009* (partner's authority to bind partnership) governs joint venturer's authority to bind other joint venturers. *Medak v. Cox (1970) 12 Cal. App. 3d 70, 76 n.2, 90 Cal. Rptr. 452*

Joint venturer binds other joint venturer by contracts reasonably necessary to carry out enterprise. *Smalley v. Baker (1968) 262 Cal. App. 2d 824, 837, 69 Cal. Rptr. 521*

Negligent conduct of one joint venturer may be imputed to other joint venturers. *Cahill Bros., Inc. v. Clementina Co. (1962) 208 Cal. App. 2d 367, 387, 25 Cal. Rptr. 301*

Joint venturer does not have power to bind other joint venturers when venture is of limited scope and powers of venturers are delegated or unequal. *Stilwell v. Trutanich (1960) 178 Cal. App. 2d 614, 619, 3 Cal. Rptr. 285* ; *Nels E. Nelson, Inc. v. Tarman (1958) 163 Cal. App. 2d 714, 726, 329 P.2d 953*

[8] Dormant Partner

When one partner holds himself or herself out as sole owner, that ostensible partner is agent of dormant one, and dormant partner is bound by ostensible partner's representations. *Nels E. Nelson, Inc. v. Tarman (1958) 163 Cal. App. 2d 714, 728, 329 P.2d 953* ; *Bissell v. King (1928) 91 Cal. App. 420, 423, 267 P. 356*

Transaction entered into by one partner on behalf of partnership creates joint obligation of undisclosed or dormant

partner when transacting partner has authority to make transaction, which is for benefit of partnership. *Schwaegler Co. v. Marchesotti (1948) 88 Cal. App. 2d 738, 743*

Because liability of partners on contract is joint, judgment obtained against fewer than all partners extinguishes claim against all, even when partners not made defendants were dormant and unknown to plaintiff at time action was commenced. *Iwanaga v. Hagopian (1919) 39 Cal. App. 584, 584-585, 179 P. 523*

[9] Incoming Partner

Express or implied agreement is necessary to create liability of incoming partner for existing partnership obligations. *Griffin v. Williamson (1955) 137 Cal. App. 2d 308, 315, 290 P.2d 361*

Contract permissible to define incoming partner's liability. *Pecarovich v. Becker (1952) 113 Cal. App. 2d 309, 316, 248 P.2d 123*

[10] Libel

Partners may recover damages caused to them individually by libel, but may not recover for any damage resulting to partnership. *Lewis v. Hayes (1918) 177 Cal. 587, 589-590, 171 P. 293*

[11] Ostensible Partner

[a] Liability

Liability of ostensible partner is founded on equitable doctrine of estoppel. *Dodd v. Tebbetts (1926) 198 Cal. 333, 340, 244 P. 1081*

Independent contractor doctors who worked part-time for medical group were not jointly liable under ostensible partnership theory for allegedly negligent treatment plaintiff received from group's physician assistant; even if former *Corp. Code § 15016* applied, it did not support imposition of liability since defendants did not represent themselves (or consent to another representing them) as "partners in an existing partnership" or as a partner "with one or more persons not actual partners." *Armato v. Baden (1999) 71 Cal. App. 4th 885, 897-899, 84 Cal. Rptr. 2d 294*

Mere listing of independent contractor doctors' names on door to medical group's office and on appointment cards and prescription pads does not reasonably induce belief that doctors and group's physician assistant, or doctors and medical group, were copartners. *Armato v. Baden (1999) 71 Cal. App. 4th 885, 898-899, 84 Cal. Rptr. 2d 294*

Whether or not individual was ostensible partner depends on whether or not his or her conduct was factually and legally sufficient to lead another person to believe he or she was copartner and assumed responsibility as copartner, as determined by trial court from all evidence presented. *J & J Builders Supply v. Caffin (1967) 248 Cal. App. 2d 292, 297, 56 Cal. Rptr. 365* ; *J.C. Wattenbarger & Sons v. Sanders (1963) 216 Cal. App. 2d 495, 500-501, 30 Cal. Rptr. 910*

Unauthorized declarations made outside the presence of ostensible partner does not establish ostensible partnership. *J & J Builders Supply v. Caffin (1967) 248 Cal. App. 2d 292, 297, 56 Cal. Rptr. 365*

Declarations of partnership made by another in presence of ostensible partner, when ostensible partner must have known that response negating representation should be made to avoid misleading plaintiff, is adoptive admission of

partner. *J & J Builders Supply v. Caffin (1967) 248 Cal. App. 2d 292, 297, 56 Cal. Rptr. 365*

Reliance on actual or apparent representation of partnership is essential element to be proved in order to find defendant is ostensible partner. *J.C. Wattenbarger & Sons v. Sanders (1963) 216 Cal. App. 2d 495, 501, 30 Cal. Rptr. 910*

Use of word "partnership" not necessary to representation of ostensible partner, as long as representation indicates current association with another, with division of responsibilities. *Hunter v. Croysdill (1959) 169 Cal. App. 2d 307, 314-315, 337 P.2d 174*

Plaintiff not required to have made exhaustive inquiries into background of person claiming to be partner; inquiries regarding ostensible partner's ability to meet financial obligations is sufficient. *Hunter v. Croysdill (1959) 169 Cal. App. 2d 307, 315, 337 P.2d 174*

Declarations of alleged partner that another is his or her copartner corroborated copartner's representations, and therefore were admissible on issue of reliance once fact of copartner's representations had been independently established. *Hunter v. Croysdill (1959) 169 Cal. App. 2d 307, 316, 337 P.2d 174*

To create liability of ostensible partner, intent to deceive is not required, as long as under particular circumstances reasonably prudent person would be induced to believe person was partner. *Crabbe v. Mires (1952) 112 Cal. App. 2d 456, 459, 246 P.2d 991*

[b] Liability of Dormant Partner

Three requirements necessary before principal is held liable for act of ostensible agent: person dealing with agent must do so with reasonable belief in agent's authority, belief must be generated by some act or neglect of principal, and third person relying on agent's apparent authority must not be guilty of negligence. *Associated Creditors' Agency v. Davis (1975) 13 Cal. 3d 374, 399, 118 Cal. Rptr. 772, 530 P.2d 1084*

[c] Pleading

Plaintiff relying on doctrine of equitable estoppel is required to plead representation of partnership and reliance on that representation. *Moen v. Art's Cafe (1950) 95 Cal. App. 2d 577, 579, 213 P.2d 393*

[d] Proof Required

Person asserting ostensible partnership is required to prove that acts, acquiescenses, and representations of party warranted conclusion of partnership and justifiable reliance on representations. *Kloke v. Pongratz (1940) 38 Cal. App. 2d 395, 403, 101 P.2d 522*

[12] Partnership as Legal Entity

[a] Generally

Limited partnership is separate entity from limited partners for purposes of suing and being sued. *Evans v. Galardi (1976) 16 Cal. 3d 300, 311, 128 Cal. Rptr. 25, 546 P.2d 313*

Unincorporated association not recognized as jural entity except when specifically provided by statute. *Juneau etc. Corp. v. Intl. Longshoremen (1951) 37 Cal. 2d 760, 763, 235 P.2d 607*

Partnership is not legal entity except when exceptional circumstances exist. *Reed v. Industrial Acci. Com. (1937) 10 Cal. 2d 191, 192-193, 73 P.2d 1212* ; *J & J Builders Supply v. Caffin (1967) 248 Cal. App. 2d 292, 296, 56 Cal. Rptr. 365*

Authorities do not clearly delineate when partnership is treated as separate entity; each case as determined by policy considerations and fairness. *Epstein v. Frank (1981) 125 Cal. App. 3d 111, 119, 177 Cal. Rptr. 831*

In procedural matters, partnership is treated like corporation, and entity concept predominates. *Epstein v. Frank (1981) 125 Cal. App. 3d 111, 119, 177 Cal. Rptr. 831*

Recent trend of case law recognizes unincorporated associations as separate legal entities. *People v. Sobiek (1973) 30 Cal. App. 3d 458, 467, 106 Cal. Rptr. 519* ; *see People v. Farsight (1998) 64 Cal. App. 4th 1402, 1408, 75 Cal. Rptr. 2d 858* (partner can be guilty of fraudulently appropriating partnership property for purposes of claim of title defense to embezzlement under *Pen. Code § 511*)

[b] Partners as Plaintiffs

Objection that plaintiff was operating as partnership and did not join other partners as plaintiffs is waived by defendants if not raised in answer to complaint. *Tyrone v. Kelley (1973) 9 Cal. 3d 1, 14, 106 Cal. Rptr. 761, 507 P.2d 65*

Associated individuals required to sue in their individual names. *Case v. Kadota Fig Asso. of Producers (1950) 35 Cal. 2d 596, 602, 220 P.2d 912* ; *see Oliver v. Swiss Club Tell (1963) 222 Cal. App. 2d 528, 540, 35 Cal. Rptr. 324* (cases decided prior to 1967 amendment to former *Code Civ. Proc. § 388* (*now see Code Civ. Proc. § 369.5*) providing that partners may sue in partnership name)

[c] Partnership as Defendant

For purpose of being sued, partnership is separate legal entity distinct from its members. *Artana v. San Jose Scavenger Co. (1919) 181 Cal. 627, 629-630, 185 P. 850*

Action contemplated by *Code Civ. Proc. § 388* is against partners to enforce claim against partnership, not against partners as individuals, unless they are made parties as individuals. *Artana v. San Jose Scavenger Co. (1919) 181 Cal. 627, 629, 185 P. 850*

Interest of individual partner in partnership assets is not subject to enforcement except on claim against partnership entity. *Epstein v. Frank (1981) 125 Cal. App. 3d 111, 120, 177 Cal. Rptr. 831*

To acquire jurisdiction over partnership, partnership entity is required to be designated as defendant; naming individual partners is insufficient. *Epstein v. Frank (1981) 125 Cal. App. 3d 111, 119-120, 177 Cal. Rptr. 831* ; *Hildebrand v. Stonecrest Corp. (1959) 174 Cal. App. 2d 158, 169, 344 P.2d 378* ; *Potts v. Whitson (1942) 52 Cal. App. 2d 199, 207, 125 P.2d 947*

Action against association sued in its common name is action against single defendant. *Barr v. United Methodist Church (1979) 90 Cal. App. 3d 259, 273, 153 Cal. Rptr. 322* ; *Potts v. Whitson (1942) 52 Cal. App. 2d 199, 205, 125 P.2d 947*

When partners sued as individuals and partnership is not named in action, judgment against partnership is improper.

Hildebrand v. Stonecrest Corp. (1959) 174 Cal. App. 2d 158, 169, 344 P.2d 378

[13] Privacy

Partnership permitted to state cause of action for invasion of privacy. *H & M Associates v. City of El Centro (1980) 109 Cal. App. 3d 399, 409-410, 167 Cal. Rptr. 392*

[14] Res Judicata

Judgment against one partner in action brought against him or her personally on tort arising out of partnership business is not res judicata as to subsequent litigation against another partner. *Dillard v. McKnight (1949) 34 Cal. 2d 209, 214, 209 P.2d 387*

When partners are joined in suit against partnership, resulting in paid, satisfied judgment against jointly liable partners, later suit against partnership is barred. *Minehan v. Silveria (1936) 11 Cal. App. 2d 266, 267, 53 P.2d 770*

[15] Revivor

Capacity of limited partnership that mistakenly filed certificate of cancellation [*see Corp. Code § 15623* (CRLPA); *Corp. Code § 15902.03* (ULPA '08)] was revived when Secretary of State canceled cancellation certification; revivor validated partnership's earlier motion to vacate sister state judgment so as to render motion timely, although it could not be heard until after revivor. *Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd. (1993) 12 Cal. App. 4th 74, 86, 15 Cal. Rptr. 2d 585* (court had not dismissed motion, but took it off calendar to allow time for reinstatement)

[16] Service

Judgment entered after service on fewer than all partners is not personal judgment against partners not actually served. *Dillard v. McKnight (1949) 34 Cal. 2d 209, 215, 209 P.2d 387*

Service against partners is adequate service against partnership. *Vance v. Gilbert (1918) 178 Cal. 574, 576-577, 174 P. 42*

[17] Statute of Limitations

Statute of limitations on claims against limited partnership is not tolled pursuant to *Code Civ. Proc. § 351*, when general partner is absent from state. *Epstein v. Frank (1981) 125 Cal. App. 3d 111, 120, 177 Cal. Rptr. 831* (note that *Abramson v. Brownstein (9th Cir. 1990) 897 F.2d 389, 391-393* , held *Code Civ. Proc. § 351* unconstitutional, as violating the Commerce Clause; applied to nonresident defendant who could have been served under long-arm statute).

[18] Tort Liability

In bankruptcies of individual partners, one partner's withholding of creditor's funds on behalf of partnership and in ordinary course of business is conversion and requires imputation of that partner's knowledge and intentto other partner so as to make debt nondischargeable as to both partners. *In re Cecchini (9th Cir. 1986) 780 F.2d 1440, 1444)*

All partners liable for fraud of one partner in contracts relating to partnership made with innocent third parties, whether or not all partners knew of that fraud. *Zemelman v. Boston Ins. Co. (1970) 4 Cal. App. 3d 15, 18, 84 Cal. Rptr. 206*

Punitive damages awarded against both partner and partnership proper when partner acted maliciously. *Black v. Shearson, Hammill & Co. (1968) 266 Cal. App. 2d 362, 369, 72 Cal. Rptr. 157*

Mere membership in unincorporated association does not make all members liable for unlawful acts of other members without their participation, knowledge, or approval. *Orser v. George (1967) 252 Cal. App. 2d 660, 670-671, 60 Cal. Rptr. 708*

Tort liability of partnership and partner is based on same principles as tort liability of principal and agent. *Madsen v. Cawthorne (1938) 30 Cal. App. 2d 124, 126, 85 P.2d 909*

Partnership liable for willful misconduct of partner while engaged in business of partnership. *Madsen v. Cawthorne (1938) 30 Cal. App. 2d 124, 125-126, 85 P.2d 909*

In tort action, partners may be joined or sued severally. *Rogers v. Ponet (1913) 21 Cal. App. 577, 581, 132 P. 851*

[19] Venue

When plaintiff sues members of association under common name and seeks to make individual member of association party to action regardless of liability of association, action is required to be transferred to county of residence of one of defendants, if individual defendant so insists. *Carruth v. Superior Court (1978) 80 Cal. App. 3d 215, 221, 145 Cal. Rptr. 344* ; *Mosby v. Superior Court (1974) 43 Cal. App. 3d 219, 226, 117 Cal. Rptr. 588*

When venue provisions conflict, preference given to right of individual defendant to trial in county of his or her residence. *Mosby v. Superior Court (1974) 43 Cal. App. 3d 219, 226, 117 Cal. Rptr. 588*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 402.33 Law Reviews

Comment, *Apparent Authority and the Joint Venture: Narrowing the Scope of Agency Between Business Associates, 13 U.C.D. L. Rev. 831 (1980)*

Note, *Res Judicata and Collateral Estoppel in the Law of Partnership, 65 Cal. L. Rev. 863 (1977)*

Hargrove, *The Charging Order: Helpful Tool for Creditor's Counsel*, 51 State B.J. 394 (1976)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 402.34 Text References

Witkin, California Procedure, vol. 8, *Enforcement of Judgment*, § 287 (4th ed. 1997)

Witkin, Summary of California Law, vol. 9, *Partnership*, §§ 43-46 (9th ed. 1989)

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§§ 402.35[Reserved]

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35-402 California Forms of Pleading and Practice--Annotated § 402.40

§ 402.40 Affirmative Defense Allegation--To Partnership's Action Based on Contract or Transaction--Partnership's Noncompliance With Fictitious Business Name Statutes

[1] FORM Affirmative Defense Allegation--To Partnership's Action Based on Contract or Transaction--Partnership's Noncompliance With Fictitious Business Name Statutes

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], Defendant alleges:

Plaintiffs are partners doing business under the fictitious name of _____. The _____ [contract *or* transaction] that is the subject of the cause of action of plaintiff's complaint in the above-entitled action was entered into by plaintiffs under that fictitious name. Plaintiffs have not filed and published a fictitious business name statement with the County Clerk of _____ County, the county of plaintiffs' principal place of business, as required by *Business and Professions Code Sections 17915* and *17917*. Plaintiffs thus lack capacity to maintain a cause of action on the above-mentioned _____ [contract *or* transaction] under the fictitious business name.

[2] Use of Form

[a] Generally

The form in [1], *above*, is for use as an affirmative defense in an answer to a complaint filed by a partnership under its fictitious business name in an action based on a contract or transaction, when the plaintiff partners have neither filed a fictitious business name statement in the county of the partnership's principal place of business nor published the statement in a newspaper of general circulation in that county [*see Bus. & Prof. Code §§ 17915, 17917*]. The plaintiffs in such a case may not maintain the action until they have executed, filed, and published the required statement [*Bus. & Prof. Code § 17918*].

When using the contract action answer form approved by the Judicial Council [*Cal. Rules of Ct., Rule 1.45*], the form

would be inserted in the paragraph in the answer form that provides for alleging affirmative defenses.

[b] Demurrer

If the complaint shows on its face that the partnership name is fictitious and does not show compliance with the statutory provisions, the objection may be raised by demurrer [*see Code Civ. Proc. § 430.10(b)*]. For discussion and forms of demurrers generally, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 371, *Motions After Trial* .

[c] Abatement of Action

Noncompliance with the fictitious business name statutes is not a jurisdictional defect [*Tyrone v. Kelley (1973) 9 Cal. 3d 1, 13-14, 106 Cal. Rptr. 761, 507 P.2d 65]* . Noncompliance is merely a matter of abatement, and compliance is sufficient if accomplished at any time before the trial [*Tyrone v. Kelley (1973) 9 Cal. 3d 1, 14, 106 Cal. Rptr. 761, 507 P.2d 65* ; *Rudneck v. Southern California M. & R. Co. (1920) 184 Cal. 274, 281-282, 193 P. 775* (decided under former fictitious name statutes Civ. Code §§ 2466, *2468*); *Kadota Fig Asso. of Producers v. Case-Swayne Co. (1946) 73 Cal. App. 2d 796, 804-805, 167 P.2d 518* (decided under former fictitious name statutes Civ. Code §§ 2466, *2468*)].

[3] Cross References

For forms for use in alleging fictitious business names, see Ch. 20, *Allegations Commonly Used*

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

For discussion and forms for demurrers, answers, and defenses to contract actions generally, see Ch. 140, *Contracts*

For fictitious business name statement, statement of withdrawal from partnership operating under a fictitious business name, and statement of abandonment of fictitious business name, see California Legal Forms, Ch. 15, *General Partnerships* (Matthew Bender)

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PART IV. FORMS

35-402 California Forms of Pleading and Practice--Annotated § 402.41

§ 402.41 Affirmative Defense--To Contract Action or Action Based on Partnership Transaction Brought by Partner--Nonjoinder of Partners as Plaintiffs

[1] FORM Affirmative Defense--To Contract Action or Action Based on Partnership Transaction Brought by Partner--Nonjoinder of Partners as Plaintiffs

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], Defendant alleges:

There is a defect of parties plaintiff in that plaintiff sues alone on a _____ [contract *or* transaction] that was _____ [made *or* entered into] by a partnership of which he/she is a member. There are other members of the partnership, and in the absence of those other members, complete relief cannot be accorded among those already parties. The other members of the partnership are subject to service of process in that _____ [*specify, e.g.,* they presently reside in California]. Their joinder will not deprive this court of jurisdiction of the subject matter of this action.

[2] Use of Form

[a] Generally

The form in [1], *above*, is for use as an affirmative defense in an answer to a complaint based on a contract or transaction involving a partnership, when the complaint has been filed by an individual partner and the other partner or partners have not been joined. If an action is based on a claim by a partnership, the partners must sue either in the partnership name [*see Code Civ. Proc. § 369.5(a)* and *Corp. Code § 16307(a)*] or as individual partners with all partners joined [*see Williams v. Southern P. R. Co. (1895) 110 Cal. 457, 459, 42 P. 974]* . The objection that an individual plaintiff was operating as a partnership and did not join other partners as plaintiffs must be raised by the defendant in the answer to the complaint, or it is waived [*Tyrone v. Kelley (1973) 9 Cal. 3d 1, 14, 106 Cal. Rptr. 761, 507 P.2d 65* ; *see Williams v. Southern P. R. Co. (1895) 110 Cal. 457, 461-462, 42 P. 974]* .

When using the contract action answer form approved by the Judicial Council [*Cal. Rules of Ct., Rule 1.45*], the language in this form should be inserted in the paragraph in the answer form that provides for alleging affirmative defenses.

[b] Demurrer

If it appears on the face of the complaint that the action is based on the claim of a partnership of which the plaintiff is a member and that other partners are not parties, the objection to the nonjoinder is grounds for a demurrer [*see Code Civ.Proc. § 430.10(d)*]. For discussion and forms fordemurrers generally, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Allegations

The essential allegations of this affirmative defense are [*see Code Civ. Proc. § 389(a)*]:

- That the persons to be added are subject to service of process;

- That joining the persons as parties will not deprive the court of jurisdiction over the subject matter of the action; and

- That failure to join the persons will either result in incomplete relief to those already parties or, because of a specified interest relating to the subject matter of the action, may result in a disposition of the action in their absence to their detriment or may adversely affect obligations of those who are already.

See *Ch. 3, Abatement of Actions, § 3.70 et seq.*

[4] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

For discussion and forms for demurrers, answers, and defenses to contract actions generally, see Ch. 140, *Contracts*

For discussion and forms relating to joinder of parties generally, see Ch. 395, *Parties*

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Volume 35: Partition thru Paternity-Chs. 397-412
Chapter 402 PARTNERSHIPS: ACTIONS BETWEEN GENERAL PARTNERS OR PARTNERSHIP AND THIRD PARTIES
PART IV. FORMS

35-402 California Forms of Pleading and Practice--Annotated § 402.42

§ 402.42 Complaint for Damages--For Partner's Misapplication of Money or Property--By Injured Party Against Partnership and Partners Individually and as Members of Partnership

[1] FORM Complaint for Damages--For Partner's Misapplication of Money or Property--By Injured Party Against Partnership and Partners Individually and as Members of Partnership

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	(Misapplication of Money or Property)
Defendants.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____[*name*] is, and at all times herein mentioned was, a partnership, sued herein under the name _____ [it has assumed *or* by which it is known].

2. _____ [*Allege basis of venue, e.g.,* Defendant _____'s (*name of partnership*) principal place of business is in _____ County, California (, in the _____ (*name*) Judicial District)].

3. Defendants _____[*names*] are, and at all times herein mentioned were, members of the

above-named partnership and are sued herein both individually and as partners in defendant _____[*name of partnership*]. [Defendants _____ (*names*) are, and at all times herein mentioned were, residents of _____ County, California.]

[4. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by those fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by their conduct.)]

5. At all times herein mentioned, and in particular on or about _____[*date*], plaintiff was, and still is, the owner of, and is entitled to theimmediate possession of, certain _____ [money *or* property], specifically, _____ [*describe, e.g.,* $25,000 in the form of a cashier's check, payable to the _____ (*partnership name*) Trust Account].

[6. On or about _____ (*date*), and at _____ (*city*), _____ County, California, the above-mentioned property had a value of $_____.]

[*EITHER, if individual partner received money or property*]

7. On or about _____[*date*], defendant _____[*name of individual partner*], received such _____ [money *or* property] from plaintiff, in conducting the partnership business, specifically, _____ [*describe, e.g.,* a law practice], and while acting within the apparent scope of his/her authority to bind the partnership, by _____ [*specify, e.g.,* representing plaintiff in a purchase of real property, instructing plaintiff to give defendant a cashier's check with which he/she would make an offer to purchase the property on plaintiff's behalf. Defendant _____ (*name*) requested and received from plaintiff a cashier's check payable to the _____ (*partnership name*) Trust Account].

8. On or about _____[*date*], defendant _____[*name*] misapplied the _____ [money *or* property] by _____ [*specify, e.g.,* obtaining the signatures of defendant partners _____ (*names*) on the check, depositing it into his/her separate account, and diverting it to his/her own use].

[*OR, if partnership received money or property*]

7. On or about _____[*date*], defendant _____[*partnership name*], received that _____ [money *or* property] from plaintiff, in the course of the partnership business, in that, _____ [*specify, e.g.,* while representing plaintiff in a purchase of real property, defendant _____ (*name of partner*) instructed plaintiff to give defendant a cashier's check with which he/she would make an offer to purchase the property on plaintiff's behalf. Plaintiff delivered a cashier's check, payable to the _____ (*partnership name*) Trust Account to defendant _____ (*partner*) at the office of the partnership at _____ (*street address*), _____ (*city*), _____ County, California].

8. On or about _____[*date*] defendant _____[*name of partner*] misapplied that _____ [money *or* property] by _____ [*specify, e.g.,* obtaining the signatures of defendant partners _____ (*names*) on the cashier's check, depositing it into his/her own separate account, and diverting it to his/her own use].

[*CONTINUE*]

9. On or about _____[*date*], plaintiff _____[orally] demanded the immediate return of the above-mentioned _____ [money *or* property], but defendants failed and refused, and continue to fail and refuse, to return the property to plaintiff. [A copy of plaintiff's written demand for return of the property is attached as Exhibit _____ and made a part hereof.]

[10. As a proximate result of defendant's misapplication, _____ (*allege injuries suffered that are the natural, reasonable, and proximate results of the conversion, e.g.,* plaintiff's offer to purchase the real property was never made, and plaintiff lost the opportunity to make a profit on the purchase of the property. The real property in question had a value of $_____ on _____ (*date*), and six months later, on _____ (*date*), was appraised as having a value of $_____), all to plaintiff's damage in the sum of $_____.]

[11. Between the time of defendant _____'s (*name*) misapplication of the above-mentioned _____ (money *or* property) to his/her own use and the filing of this action, plaintiff _____ (*describe time and money properly expended in pursuit of the misapplied money or property, e.g.,* made numerous, long-distance phone calls to defendant), all to plaintiff's further damage in the sum of $_____.]

[12. The aforementioned acts of defendant _____ (*partner*) were willful, wanton, malicious, and oppressive, (were undertaken with the intent to defraud,) and justify the awarding of exemplary and punitive damages against defendant _____ (*partner*). Those acts were done _____ (in the ordinary course of the partnership business *or* with the authority of defendant(s) _____ (*name(s) of copartner(s)*) and therefore also justify the awarding of exemplary and punitive damages against defendant _____ (*partnership*).]

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

1. For the value of the _____ [money *or* property] misapplied, in the sum of $_____;

2. For interest at the legal rate on the foregoing sum pursuant to *Civil Code Section 3336*, from and after _____[*date*];

[3. For damages for the proximate and foreseeable loss resulting from defendant's misapplication in the sum of $_____;]

[4. For damages for time and money properly expended in pursuit of the misapplied _____ (money *or* property) in the sum of $_____;]

[5. For punitive and exemplary damages;]

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____[*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

[a] Contents

This complaint is for use against a partnership and the partners individually, by a party whose money or property has been misapplied by one of the partners. A partnership is liable for a loss that occurs when a partner in the course of partnership business or while acting with the authority of the partnership receives or causes the partnership to receive money or property of a third person and the money or property is misapplied [*Corp. Code § 16305(b)*; *see* former *Corp. Code § 15014*].

[b] Conversion Action

It is unclear whether the damages recoverable under *Corp. Code § 16305(b)* or former *Corp. Code § 15014* are the same as those recoverable for conversion [*see Civ. Code § 3336*]. It appears, however, that because the tort of conversion is an intentional act involving substantial interference with the plaintiff's right of possession [*see Jordan v. Talbot (1961) 55 Cal. 2d 597, 610, 12 Cal. Rptr. 488, 361 P.2d 20]* , and conversion may involve the misappropriation of money [*see Haigler v. Donnelly (1941) 18 Cal. 2d 674, 681, 117 P.2d 331]* , the misapplication of money or property under *Corp. Code § 16305(b)* and former *Corp. Code § 15014* may be pleaded as an action for conversion.

In a conversion action, a plaintiff may recover either the value of the converted property at the time of the conversion, with the interest from that time, or an amount sufficient to indemnify the party injured for the loss that is the natural, reasonable, and proximate result of the wrongful act complained of and that a proper degree of prudence on plaintiff's part would not have averted [*Civ. Code § 3336*]. The alternative damage provision, allowing for recovery of the natural, reasonable, and proximate result of the act applies when awarding damages based on the property's value would be manifestly unjust [*Myers v. Stephens (1965) 233 Cal. App. 2d 104, 116, 43 Cal. Rptr. 420]* . Further, in a conversion action the plaintiff may recover fair compensation for the time and money properly expended in pursuit of the property [*Civ. Code § 3336*]. In addition, exemplary damages may be recovered in a conversion action, as well as in tort actions generally [*see Civ. Code § 3294*; *Haigler v. Donnelly (1941) 18 Cal. 2d 674, 681, 117 P.2d 331]* .

If counsel for plaintiff seeks the damages available in a conversion action, he or she should include Paragraphs 10 and 11 in the form. For further discussion of conversion actions and for additional complaint forms, see Ch. 150, *Conversion* .

[3] Allegations

The complaint in [1], *above* alleges:

- That the partnership is sued in the name it has assumed or by which it is known (Paragraph 1) [*see Code Civ. Proc. § 369.5(a)* and *Corp. Code § 16307(a)*];

- The basis of venue for the action (Paragraph 2);

- That the individual partners are joined as defendants and are sued as members of the partnership and as individuals (Paragraph 3) [*see Code Civ. Proc. § 369.5(b)* and *Corp. Code § 16307(b)* (action may be brought against partnership and partners in same or separate actions); *Fazzi v. Peters (1968) 68 Cal. 2d 590, 595-598, 68 Cal. Rptr. 170, 440 P.2d 242* ; *Promotus Enterprises, Inc. v. Jiminez (1971) 21 Cal. App. 3d 560, 566-567, 98 Cal. Rptr. 571]* ;

- Plaintiff's ownership of money or property misapplied by defendant (Paragraph 5) [*see Corp. Code § 16305(b)*; former *Corp. Code § 15014*];

- The value of the money or property at the time it was misapplied (Paragraph 6) [*see Civ. Code § 3336*];

- The individual partner or partnership received the property or money and either that the property or money was transferred within the course of the partnership's business (Paragraph 7) or that it was transferred while the partner acted with the authority of the partnership [*Corp. Code § 16305(b), see* former *Corp. Code § 15014(b)*];

- The individual partner (or any partner) misapplied the money or property (Paragraph 8) [*Corp. Code § 16305(b)*; *see* former *Corp. Code § 15014*];

- Plaintiff's demand for the return of the money or property (Paragraph 9) [*see Flennaugh v. Heinrich (1948) 89 Cal. App. 2d 214, 222, 200 P.2d 580* (required in conversion action)];

- Damages proximately caused by the misapplication (Paragraph 10) [*see Civ. Code § 3336* (alternative damages for conversion)];

- The costs incurred in plaintiff's pursuit of the money or property (Paragraph 11) [*see Civ. Code § 3336* (conversion damages)]; and

- That defendant individual partner's acts were willful, wanton, malicious, oppressive, and fraudulent, and justify an award of punitivedamages against both the defendant individual partner and the defendant partnership (Paragraph 12) [*see Civ. Code § 3294*; *Corp. Code § 16305(a)*; former *Corp. Code § 15013*; *Haigler v. Donnelly (1941) 18 Cal. 2d 674, 681, 117 P.2d 331* (conversion action); *Black v. Shearson, Hammill & Co. (1968) 266 Cal. App. 2d 362, 369, 72 Cal. Rptr. 157]* .

Factual examples in the allegations of this form are based generally on the facts found in *Blackmon v. Hale (1970) 1 Cal. 3d 548, 83 Cal. Rptr. 194, 463 P.2d 418* .

[4] Jurisdiction

To acquire jurisdiction over a partnership, the partnership entity must be designated as a defendant [*Epstein v. Frank (1981) 125 Cal. App. 3d 111, 119-120, 177 Cal. Rptr. 831* ; *Hildebrand v. Stonecrest Corp. (1959) 174 Cal. App. 2d*

158, 169, 344 P.2d 378 ; *Potts v. Whitson (1942) 52 Cal. App. 2d 199, 207, 125 P.2d 947]* . A partnership may be sued in its name or the name it has assumed, or the name by which it is known [*Corp. Code § 16307(a)*; *Code Civ. Proc. § 369.5(a)*]. Individual partners must also be named, however, in order to obtain personal judgments against them. A judgment against a partnership is not a judgment against a partnership. A judgment may not be satisfied from a partner's assets without a judgment against the partner [*Corp. Code § 16307(c)*; *see Fazzi v. Peters (1968) 68 Cal. 2d 590, 595-598, 68 Cal. Rptr. 170, 440 P.2d 242* ; *Promotus Enterprises, Inc. v. Jiminez (1971) 21 Cal. App. 3d 560, 566-567, 98 Cal. Rptr. 571]* .

[5] Punitive Damages

In an action for the breach of an obligation not arising from contract, when the defendant has been guilty of oppression, fraud, or malice, the plaintiff may recover punitive damages [*Civ. Code § 3294(a)*]. Specifically, punitive damages are recoverable in an action for conversion [*Haigler v. Donnelly (1941) 18 Cal. 2d 674, 681, 117 P.2d 331]* . When, by any wrongful act or omission of any partner acting in the ordinary course of the partnership business or with the authority of the partnership, loss or injury is caused to any person not being a partner in the partnership, or any penalty is incurred, the partnership is liable [*Corp. Code § 16305(a)*; *see* former *Corp. Code § 15013*]. Therefore, if the defendant partner is liable for punitive damages, and if the defendant was acting within the ordinary course of partnership business or with partnership authority, punitive damages may be recovered against the partnership as well [*see Black v. Shearson, Hammill & Co. (1968) 266 Cal. App. 2d 362, 369, 72 Cal. Rptr. 157]* .

[6] Venue

If a partnership has filed a statement with the Secretary of State containing the location of its principal place of business pursuant to statute an action against the partnership may be brought in the county of its principal place of business [*Code Civ. Proc. § 395.2*]. If the partnership has not filed such a statement, the proper place for trial is the county where the contract was made or is to be performed, or where the obligation or liability arises or the breach occurs, subject to the power of the court to change the place of trial as in other cases [*Code Civ. Proc. § 395.5*; *see § 402.12[3]*].

[7] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[8] Cross References

For allegations used in complaints generally, see Ch. 20, *Allegations Commonly Used*

For alternative caption forms, see Ch. 108, *Captions and Introductions*

For discussion and forms for use in writing complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to conversion actions generally, see Ch. 150, *Conversion*

For alternative forms for prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification*

For discussion and forms relating to service generally, see Ch. 518, *Service of Summons and Papers*

For allegations in a complaint showing proper venue, see Ch. 571, *Venue* ,

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35-402 California Forms of Pleading and Practice--Annotated § 402.43

§ 402.43 Complaint for Damages--For Extension of Credit in Reliance on Representations of Partnership--Against Apparent Partner Making Representations and Against Actual or Apparent Partners Consenting to Representation Individually or Individually and in Name of Partnership

[1] FORM Complaint for Damages--For Extension of Credit in Reliance on Representations of Partnership--Against Apparent Partner Making Representations and Against Actual or Apparent Partners Consenting to Representation Individually or Individually and in Name of Partnership

[*Caption. See § 402.42.*]

Plaintiff alleges:

1. _____ [*Allege capacity and residence of defendant(s), e.g.* Defendant(s) _____ (*name(s) of apparent partner or apparent partner and partners or other persons consenting to representations*) is/are, and at all times herein mentioned was/were, (a) resident(s) of _____ County, California].

[2. Defendant _____ (*name*) is, and at all times herein mentioned was, a partnership, sued herein under the name _____ (it has assumed *or* by which it is known), with its principal place of business in _____ (*city*), _____ County, California. Defendant(s) _____ (*name(s)*;) is/are, and at all times herein mentioned was/were, partner(s) of the foregoing named partnership and is/are sued herein both individually and as (a) partner(s) in defendant _____ (*name of partnership*).]

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

4. Beginning on or about _____[*date*], and until _____[*date*], defendant _____[*apparent partner*] represented to plaintiff that he/she was a partner with defendant(s)

_____[*name(s) of individual(s) and/or partnership*] by _____ [*specify representation, e.g.,* telling plaintiff that he/she had recently become a new partner in the partnership of _____ (*partnership name*), and that he/she was now contributing to the management of the partnership's business].

5. The representations were made with the consent of defendant(s) _____[*name(s) of individual(s) and/or partnership*] by _____ [*allege facts showing consent, e.g.,* their presence at the time defendant _____ (*apparent partner*) made the representations, and their failure to deny or negate the representations].

6. Plaintiff, acting in reliance on the representations, extended credit to the _____[apparent] partnership in the sum of $_____, to be paid _____[*specify terms of payment*] [for the following goods sold and delivered: _____ (*specify*)]. Plaintiff's reliance was justified in that _____ [*specify, e.g.,* plaintiff had dealt with defendant _____ (*name of partnership*) on several previous occasions, and each time had extended credit and had been repaid by defendant _____ (*name of partnership*)].

7. No part of that sum has been paid, although demand therefor has been made, and there is now due, owing, and unpaid to plaintiff from defendants, and each of them, the sum of $_____, with interest thereon at the rate of _____ percent per annum, from _____[*date*].

8. On or about _____[*date*], plaintiff became aware that defendant _____[*name of apparent partner*] was not a partner with defendant(s) _____[*name of individual(s) and/or partnership*], and ceased extending credit to the _____ _____[apparent] partnership from that date.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages in the sum of $_____, plus interest at the legal rate;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

VERIFICATION

I, _____[*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

This complaint is for use in an action by a party who has extended credit to an actual or apparent partnership on the basis of representations by an apparent partner, and with the consent of a partner or partners in an existing partnership or one or more individuals not actually partners. When a person, by words spoken or written or by conduct, represents himself or herself as a partner in an existing partnership or with one or more persons not actual partners, or when he or she consents to that representation, he or she is liable to any such person to whom that representation has been made, who has, relying on the representation, given credit to the actual or apparent partnership [*see Corp. Code § 16308(a)*; former *Corp. Code § 15016(1)*].

If the apparent partner made the representation or consented to its being made in a public manner, he or she is liable to the person extending credit, whether the representation has or has not been made or communicated to the person giving credit by or with the knowledge of the apparent partner who made or consented to the representation [*Corp. Code § 16308(a)*; former *Corp. Code § 15016(1)*].

[3] Allegations

This complaint alleges:

- That defendant apparent partner represented to plaintiff that he or she was in fact a partner in an existing partnership or with one or more individuals not actually partners (Paragraph 4) [*Corp. Code § 16308(a)*; former *Corp. Code § 15016(1)*];

- Consent by one or more defendants, as individuals if they are not actual partners, as individuals if they are actual partners but do not represent all the partners, or as individuals and on behalf of a partnership if they constitute all partners in an actual partnership, to those representations (Paragraph 5) [*Corp. Code § 16308(a)*; former *Corp. Code § 15016*];

- Plaintiff's extension of credit to the apparent partnership in reliance on the representations (Paragraph 6) [*Corp. Code § 16308(a)*; former *Corp. Code § 15016(1)*; *see J.C. Wattenbarger & Sons v. Sanders (1963) 216 Cal. App. 2d 495, 501, 30 Cal. Rptr. 910]* and facts alleging justifiable reliance [*see Crabbe v. Mires (1952) 112 Cal. App. 2d 456, 459, 246 P.2d 991* ; *Kloke v. Pongratz (1940) 38 Cal. App. 2d 395, 403, 101 P.2d 522]* ;

- The amount unpaid and owed to plaintiff by the apparent partnership (Paragraph 7) [*see Corp. Code § 16308(a)*; former *Corp. Code § 15016(1)*]; and

- When plaintiff became aware that the apparent partnership did not exist or that the apparent partner was not actually a partner and ceased extending credit (Paragraph 8) [*see Corp. Code § 16308(a)*; former *Corp. Code § 15016(1)*].

[4] Joint or Partnership Liability

If a person is represented to be a partner in an existing partnership or with one or more persons who are not actual partners, he or she is an agent of the persons consenting to the representation and may bind them in the same manner as if he or she were a partner in fact, with respect to persons who rely on the representation. If all members of the existing partnership consent to the representation, a partnership act or obligation results. In all other cases, the act or obligation is the joint act or obligation of the person acting and the persons consenting to the representation [*Corp. Code § 16308(b)*; former *Corp. Code § 15016(2)*].

If partnership liability results from the representations of apparent partnership, the apparent partner who makes or

consents to the representations is liable as though he or she were an actual member of the partnership [*Corp. Code § 16308(a)*; former *Corp. Code § 15016(1)(a)*]. If no partnership liability results, he or she is liable jointly with the other persons, if any, who consent to the contract or representation so as to incur liability [*Corp. Code § 16308(a)*; former *Corp. Code § 15016(1)(b)* (joint and several liability)].

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35-402 California Forms of Pleading and Practice--Annotated § 402.44

§ 402.44 Allegations for Complaint for Damages--For Extension of Credit in Reliance on Representations of Partnership--Against Actual or Apparent Partners Making Representation Individually or Individually and in Name of Partnership and Against Apparent Partner Consenting to That Representation

[1] FORM Allegations for Complaint for Damages--For Extension of Credit in Reliance on Representations of Partnership--Against Actual or Apparent Partners Making Representation Individually or Individually and in Name of Partnership and Against Apparent Partner Consenting to That Representation

4. Beginning on or about _____[*date*], and until _____[*date*], defendant(s) _____[*name(s)*] represented to plaintiff that _____[*name of apparent partner*] was a partner with defendant(s) _____[*name(s) of individual(s) and/or partnership*] by _____ [*specify representation, e.g.,* telling plaintiff that defendant _____ (*name*) had recently formed a partnership with _____ (*name of apparent partner*), and that _____ (*name of apparent partner*) invested $50,000 in the partnership].

5. The representations were made with the consent of defendant _____[*name of apparent partner*] by _____ [*allege facts showing consent, e.g.,* his/her presence at the time the representations were made, and his/her failure to make any response negating the representations under circumstances in which he/she was aware that a statement negating the representations was necessary to avoid misleading plaintiff to plaintiff's detriment].

[2] Use of Form

The allegations in [1], *above*, are for use in a complaint, such as the one in *§ 402.43[1]*, by a person who has extended credit to an actual or apparent partnership in reliance on false representations of partnership [*see Corp. Code § 16308*; former *Corp. Code § 15016*]. These allegations may be inserted in place of Paragraphs 4 and 5 in the form at *§ 402.43[1]*, in a case in which the representations are made by the individuals or partners and the apparent partner merely consents to those representations.

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35-402 California Forms of Pleading and Practice--Annotated § 402.45

§ 402.45 Proceedings for Order Charging Judgment Debtor's Partnership Interest With Payment of Unsatisfied Judgment--Notice of Motion

[1] FORM Proceedings for Order Charging Judgment Debtor's Partnership Interest With Payment of Unsatisfied Judgment--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER CHARGING JUDGMENT DEBTOR'S PARTNERSHIP INTEREST
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To_____ [*identify party, e.g.*, defendant] _____[*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], _____[

name], _____ [*identify party. e.g.,* plaintiff] as judgment creditor of _____ [*identify party, e.g.,* defendant] _____[*name of judgment debtor*] will, and hereby does, move for an order:

1. Charging _____[*name of judgment debtor*]'s interest in _____ [*name of partnership],* a partnership, with its principal place of business located at _____[*street address*], _____ [*city],* _____ County, California, and having as its members _____[*names*], with payment of the unsatisfied portion of the judgment entered on _____[*date*], in the above-entitled action, that portion being the sum of $_____.

2. Charging that partnership interest with payment of interest on the unsatisfied portion of that judgment, at the legal rate from _____[*date*].

[3. Appointing a receiver of _____ (*name of judgment debtor*)'s share of profits and any other money due or to fall due to him/her in respect of that partnership.]

[4. *Specify any other orders, directions, accounts, or inquiries that judgment debtor might have made or that circumstances require, e.g.,* That the partnership pay _____ (*identify party, e.g.,* defendant) _____ (*name of judgment debtor*) all partnership profits past due and unpaid to him/her.] The motion will be made on the grounds that _____[*name of judgment debtor*], _____ [plaintiff *or* defendant] herein, is a judgment debtor of _____[*name*], _____ [plaintiff *or* defendant] herein, pursuant to a judgment entered in the above-entitled action on _____[*date*]. A certified copy of the judgment is attached as Exhibit _____ to the declaration accompanying this motion. That judgment remains [wholly] unsatisfied in the amount of $_____.

The motion will be based on this notice of motion, on the declaration of _____[*name*], who is the attorney for the _____ [*identify party, e.g.,* plaintiff], judgment creditor, on the memorandum of points and authorities served and filed herewith, on the papers and records on file in this action, and on any oral and documentary evidence that may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

[2] Use of Form

The form in [1], *above,* is for use by the judgment creditor of an individual partner in obtaining an order to charge that partner's interest in the partnership with payment of the unsatisfied portion of the judgment. A charging order may be obtained on due application to the court that entered the judgment or to any other court. At the time of making the order, or at a later time, the court may also appoint a receiver of the judgment debtor's share of partnership profits or any other money due or to fall due to the judgment debtor in respect to the partnership. The court may also make all other orders, directions, accounts, and inquiries that the debtor partner might have made or that the circumstances of the case may require [*Corp. Code § 16504*; former *Corp. Code § 15028(1)*].

Appointment of a receiver may facilitate implementation of the charging order and eventual sale of the debtor partner's interest [*see § 402.46*]. A receiver has authority to sell the debtor's interest on the notice and in the manner of an execution sale as prescribed by *Code Civ. Proc § 701.510 et seq.* [*Code Civ. Proc. § 568.5*; *see also Code Civ. Proc. § 567* (oath and undertaking of receiver)].

Although this form is for use in the court in which the judgment was rendered, *Corp. Code § 16504(a)* and former *Corp. Code § 15028(1)* provide that a judgment creditor may also apply for a charging order in other courts having jurisdiction. In such a case, the judgment creditor would not use this form of noticed motion, but rather would file an application with the court. Although not specified in the statute, it appears that the application would take the form of a petition.

A memorandum must be filed and a copy served with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[3] Cross References

For discussion and forms relating to the execution and enforcement of judgments and judgment liens, see Ch. 318, *Judgments*

For discussion, procedural guide, and forms relating to motions and notices of motion generally, see Ch. 372, *Motions and Orders*

For discussion of appointed receivers generally, and for forms for use in motions for appointment of receivers, see Ch. 486, *Receivers*

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Chapter 402 PARTNERSHIPS: ACTIONS BETWEEN GENERAL PARTNERS OR PARTNERSHIP AND THIRD PARTIES
PART IV. FORMS

35-402 California Forms of Pleading and Practice--Annotated § 402.46

§ 402.46 Proceeding for Order of Sale of Judgment Debtor's Partnership Interest in Satisfaction of Judgment--Notice of Motion

[1] FORM Proceeding for Order of Sale of Judgment Debtor's Partnership Interest in Satisfaction of Judgment--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER FOR SALE OF JUDGMENT DEBTOR'S
vs.	)	PARTNERSHIP INTEREST
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____[*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], _____ [*identify party, e.g.,* plaintiff] will move for an order that:

1._____[*Name of judgment debtor*]'s interest in _____[*name of partnership*], a California partnership, doing business as _____[*fictitious business name*], be sold pursuant to the charging order imposed on that interest by order of this Court dated _____ and the judgment rendered on _____[*date*], which remains unsatisfied.

2. _____[*Name*], _____ [*describe status, e.g.,* qualified and acting receiver under the charging order *or* the creditor *or* _____ (*name of county*) County Sheriff], be authorized to sell the aforementioned interest pursuant to Code of Civil Procedure Sections [*if receiver is involved add: 568.5*,] *701.530* and 701.545 through 701.830.

The motion will be made on the grounds that _____[*name of judgment creditor*], _____ [plaintiff *or* defendant] herein, obtained an order charging _____[*name of judgment debtor*]'s interest in the above-described partnership with payment of an unsatisfied judgment in the sum of $_____, together with interest. The judgment remains unsatisfied and _____ [consent of the nondebtor partners is not necessary because _____ (*specify, e.g.,* debtor no longer takes an active part in the management of the partnership and foreclosure of debtor's interest will not unduly interfere with the partnership business) *or* all (general) partners, other than the debtor, in the foregoing named partnership have consented to the sale].

The motion will be based on this notice of motion, on the declaration of _____[*name*], who is the attorney for the _____ [*identify party, e.g.,* plaintiff], judgment creditor, on the memorandum of points and authorities served and filed herewith, on the records and file herein, and on any evidence that may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

[2] Use of Form

The form in [1], *above*, is for use by a judgment creditor to obtain an order for sale of a judgment debtor's partnership interest when the creditor has obtained a charging order [*see § 402.45*] against the partnership interest but has not yet received payment in satisfaction of the judgment.

Whether counsel should use the statement regarding consent or the statement that the sale will not cause any undue interference with the partnership business is a function of which district the case is in or which strategy counsel wishes to employ [*compare Hellman v. Anderson (1991) 233 Cal. App. 3d 840, 850-853, 284 Cal. Rptr. 830 and Crocker Nat. Bank v. Perroton (1989) 208 Cal. App. 3d 1, 9-10, 255 Cal. Rptr. 794* ; *see* discussion in *§ 402.21*].

If a receiver has been appointed, usually at the time the charging order was imposed, he or she will have authority to sell the debtor's interest on the notice and in the manner of an execution sale as prescribed by *Code Civ. Proc § 701.510 et seq.* The sale is not final until confirmed by the court [*Code Civ. Proc. § 568.5*].

Although the cases distinguish between an execution sale and foreclosure of a debtor's interest under a charging order [*see Hellman v. Anderson (1991) 233 Cal. App. 3d 840, 847-850, 284 Cal. Rptr. 830* ; *Crocker Nat. Bank v. Perroton (1989) 208 Cal. App. 3d 1, 6-7, 255 Cal. Rptr. 794]* , the order for the sale that was upheld in *Crocker* referred to it as an execution sale and authorized the sheriff to conduct the sale [*Crocker Nat. Bank v. Perroton (1989) 208 Cal. App.*

3d 1, 9 n.6, 255 Cal.Rptr. 794] . Counsel should consult with the sheriff in the county where the sale will be conducted to determine if the creditor can conduct the sale itself or if the sheriff will conduct it, and if so, what formalities will be required.

[3] Accompanying Papers

A memorandum must be filed and a copy served with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[4] Cross References

For discussion and forms relating to writs of execution and levy, see Ch. 318, *Judgments*

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35-402 California Forms of Pleading and Practice--Annotated § 402.47

§ 402.47 Proceedings for Order for Sale of Judgment Debtor's Partnership Interest in Satisfaction of Judgment--Supporting Declaration

[1] FORM Proceedings for Order for Sale of Judgment Debtor's Partnership Interest in Satisfaction of Judgment--Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____
vs.	)	[*name*] IN SUPPORT OF MOTION FOR ORDER OF SALE
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____[*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*name of judgment creditor*)].

2. _____[*Name of judgment creditor*], _____ [plaintiff *or* defendant] herein, is a

judgment creditor of _____[*name of judgment debtor*], _____ [plaintiff *or* defendant] herein, as a result of a judgment entered in the above-entitled action on _____[*date*].

3. _____[*Name of judgment debtor*], _____ [plaintiff *or* defendant] herein, is a member of _____[*name of partnership*], a California partnership, doing business as _____[*fictitious business name*]. The other member(s) of the foregoing named partnership is/are: _____[*names of all other partners*].

4. On _____[*date*], _____ [*name of judgment creditor*] obtained an order from this court charging [*name of judgment debtor*]'s interest in the foregoing named partnership with payment of the unsatisfied [portion of the] judgment in the sum of $_____, together with interest. A certified copy of the charging order is attached as Exhibit _____.

5. As of the date of this declaration, _____[*name of judgment creditor*] has received no monies as a result of the charging order and the judgment remains unsatisfied.

[*EITHER*]

6. _____ [*Develop to extent possible facts proving sale will not disrupt partnership business, e.g.,* As established at the examination of the debtor on _____ (*date*), the debtor no longer takes an active part in the management of the partnership, so foreclosure of debtor's interest will not unduly interfere with the partnership business].

[*OR*]

6. On _____[*date*], _____ [*name of document, e.g.,* Conditional Nonopposition to Sale], which constitutes consent to the sale of the interest and which was signed by all partners other than the debtor, was filed in this court.

[*CONTINUE*]

I declare under penalty of perjury under the laws of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

The form in [1], *above,* is a declaration for use by a judgment creditor in support of a motion for sale of a judgment debtor's partnership interest [*see § 402.46*] when the creditor has obtained a charging order [*see § 402.45*] against the partnership interest but has not yet received payment in satisfaction of the judgment.

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35-402 California Forms of Pleading and Practice--Annotated § 402.48

§ 402.48 Affirmative Defense on Ground of Misjoinder of Party Defendant--Defendant Is Partner in Registered Limited Liability Partnership [Corp. Code § 16306(c); former Corp. Code § 15015]

[1] FORM Affirmative Defense on Ground of Misjoinder of Party Defendant--Defendant Is Partner in Registered Limited Liability Partnership [Corp. Code § 16306(c); former Corp. Code § 15015]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST) SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION] defendant alleges that there is a misjoinder of defendants in that _____[*name*] has been joined as a defendant and he/she is not a proper party to the action against _____[*name of partnership*] because the action asserts personal liability against defendant, the partnership is a registered limited liability partnership, and defendant has not agreed to be personally liable for any partnership debts, obligations, or liabilities.

[2] Use of Form

The form in [1], *above* is for use as an affirmative defense in an answer to a complaint against a registered limited liability partnership (LLP) and its partners in an action for debts, obligations, or liabilities in which personal liability of the partner is asserted. Unless a partner in an LLP has agreed to be liable or the basis of the action is the tortious action of the partner, partners are not proper parties in an action against the LLP in which personal liability of the partners is asserted [*Corp. Code § 16306(g)*; former *Corp. Code § 15015(f)*].

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Chapter 403 PARTNERSHIPS: ACTIONS BY AND AGAINST DISSOCIATED PARTNERS

35-403 California Forms of Pleading and Practice--Annotated 403.syn

§ 403.syn Synopsis to Chapter 403: PARTNERSHIPS: ACTIONS BY AND AGAINST DISSOCIATED PARTNERS

§ 403.01 Scope of Chapter

§ 403.02 Cross References

§§ 403.03-403.09 [Reserved]

§ 403.10 Governing Law

[1] Former and Current Law

[2] Pre-'97 Act

[3] UPA'94

§ 403.11 Events Triggering a Partner's Dissociation Under UPA'94

[1] Subject to Agreement

[2] Partner's Giving Notice

[3] Provision in Partnership Agreement

[4] Unanimous Vote of Other Partners

[5] Judicial Determination

[6] Financial Problems

[7] Death or Incapacity

[8] Distribution of Transferable Interest in Partnership by Trust or Estate

[9] Partners Dissenting From Conversion or Merger Under UPA'94

[a] Conversions

[b] Mergers

§ 403.12 Power of Partner to Dissociate Under UPA'94

[1] In General

[2] Wrongful Dissociation

§ 403.13 Buyout of Dissociating Partners Under UPA'94

[1] Terms of Buyout

[2] Accounting for Goodwill

[3] Payment or Tender of Buyout Price on Failure to Reach Agreement

[4] Court Action to Determine Buyout Price

[5] Duty Owed Dissociated Partners Respecting Buyout

[6] Fiduciary Duties of Partner's Personal or Legal Representative

§ 403.14 Termination of Rights and Duties of Dissociating Partner

[1] Management of Partnership Business

[2] Duty Not to Compete With Partnership

[3] Duties of Loyalty and Care

§ 403.15 When Liability of Dissociated Partners Is Discharged

[1] Partnership Obligations Incurred Prior to Dissociation

[2] Partnership Obligations Incurred After Dissociation

[3] When Partnership Obligation Altered

[4] Placing Third Persons on Notice of Dissociation

§ 403.16 Liability of Partnership and Partners for Acts of Dissociated Partner

§ 403.17 Use of Dissociated Partner's Name

§§ 403.18-403.29 [Reserved]

§ 403.30 Related Matthew Bender Publications

§ 403.31 State Statutes

[1] Dissociation Generally

[2] Dissociating Partner's Rights and Liabilities

[3] Effect of Dissociation on Partnership Liability

[4] Personal Representatives of Deceased Partner

[5] Purchase of Dissociating Partner's Interest

§ 403.32 Decisions

[1] Action by Personal Representative of Deceased Partner

[2] Dissolution Not Caused by Dissociation Under Pre-'97 Act

[3] Liability of Dissociating Partner for Partnership Obligations

[4] Notice of Dissociation or Dissolution

[5] Purchase of Dissociating Partner's Interest

[a] Buy-Sell Agreements

[b] Duties of Continuing Partners

[6] Use of Partnership Name After Dissociation

[7] Valuation of Dissociated Partner's Interest

[a] Assessment of Costs and Fees

[b] Generally

[c] Goodwill

[d] Interest

[e] Profits

[f] Unfinished Business

[8] Venue

§ 403.33 Law Reviews

§ 403.34 Text References

§§ 403.35-403.39 [Reserved]

§ 403.40 Complaint to Determine Buyout Price Under UPA'94 [Corp. Code § 16405(b)(2)(B)]--By Dissociating Partner [Corp. Code § 16701(i)]

[1] FORM

[2] Use of Form

[a] Partner's Right to Buyout Price

[b] Wrongfully Dissociating Partners

[3] Allegations

[4] Prayer

[5] Verification

[6] Venue

[7] Cross References

§ 403.41 Allegations for Complaint to Determine Buyout Price Under UPA'94 [Corp. Code § 16405(b)(2)(B)]--By Partner Dissenting From Merger or Conversion of Partnership [Corp. Code §§ 16909(e), 16914(e)]

[1] FORM

[2] Use of Form

§ 403.42 Affirmative Defense to Action to Determine Buyout Price [Corp. Code § 16701(i)]--Partner Wrongfully Withdrew Before Expiration of Term of Partnership [Corp. Code § 16701(h)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 403.43 Affirmative Defense to Action to Determine Buyout Price [Corp. Code § 16701(i); former Corp. Code § 15043]--Existence of Partners' Agreement Settling Accounts [Corp. Code § 16103; former Corp. Code § 15043]

[1] FORM

[2] Use of Form

§ 403.44 Complaint for Partnership Accounting Under Pre-'97 Act [former Corp. Code § 15043] and Interest or Profits Based on Retired or Deceased Partner's Interest [former Corp. Code § 15042]--By Retired Partner or Representative of Deceased Partner Against Partner(s) Continuing Business [former Corp. Code § 15042]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Rights of Retiring Partner or Partner's Estate When Business Continued

[5] Right to Accounting Before Choosing Between Interest and Profits

[6] Verification

[7] Venue

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Chapter 403 PARTNERSHIPS: ACTIONS BY AND AGAINST DISSOCIATED PARTNERS
PART I. SCOPE

35-403 California Forms of Pleading and Practice--Annotated § 403.01

§ 403.01 Scope of Chapter

This chapter covers actions involving dissociated partners; that is, those who have withdrawn voluntarily or involuntarily from a partnership that is continued by the remaining partners. It discusses actions related to the dissociated partner's right to have his or her interest in the partnership acquired by the partnership, and actions involving the liabilities of dissociating partners. This chapter does not cover actions between former partners of a dissolved partnership, which are covered in Ch. 406, *Partnerships: Dissolution* .

This chapter contains the following forms:

- A complaint and allegation by a partner to enforce his or her contractual or statutory buyout provisions [*see §§ 403.40, 403.41*].

- Affirmative defenses to actions to enforce buyout provisions [*see §§ 403.42, 403.43*].

- A complaint for accounting by a retired partner or the personal representative of a deceased partner [*see § 403.44*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionWithdrawal

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35-403 California Forms of Pleading and Practice--Annotated § 403.02

§ 403.02 Cross References

- For discussion and forms relating to actions for accounting, see Ch. 7, *Accounting, Action For* .
- For discussion and forms relating to contract actions, see Ch. 140, *Contracts* .
- For discussion of the statutes governing general partnerships, see Ch. 400, *Partnerships: Governing Statutes* .
- For discussion and forms relating to actions between partners, see Ch. 401, *Partnerships: Actions Between General Partners and Partnership* .
- For discussion and forms relating to actions between general partners or partnerships and third parties, see Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties* .
- For discussion and forms relating to the dissolution of partnerships, see Ch. 406, *Partnerships: Dissolution* .
- For discussion and forms relating to actions based on unfair competition, see Ch. 565, *Unfair Competition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionGeneral OverviewContracts LawThird PartiesGeneral Overview

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35-403 California Forms of Pleading and Practice--Annotated §§ 403.03-403.09

[Reserved]

§§ 403.03[Reserved]

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PART II. LEGAL BACKGROUND

35-403 California Forms of Pleading and Practice--Annotated § 403.10

§ 403.10 Governing Law

[1] Former and Current Law

Since January 1, 1999, all partnerships have been governed by the Uniform Partnership Act of 1994 (UPA'94) [*Corp. Code § 16111(b)*; *see Corp. Code § 16100 et seq.*], regardless of when they were formed. Prior to that date, partnerships formed before January 1, 1997, were governed by the earlier of (1) the date when they elected to be governed by the UPA'94, or (2) January 1, 1999 [*Corp. Code § 16111*]. As of January 1, 1999, the pre-1997 version of the UPA (pre-'97 Act) was repealed [Stats. 1996 ch. 1003, §§ 1.2, 18, operative Jan. 1, 1999]. Repeal of the pre-'97 Act, however, did not affect actions or proceedings commenced, or rights accrued, prior to the effective date of the UPA'94 [*Corp. Code § 16112*]. For that reason, discussion of the pre-'97 Act has been retained in the partnership coverage in this publication. All references to *Corp. Code §§ 15001-15045* in this chapter are to the repealed provisions of the pre-'97 Act. For more detailed discussion, see *§§ 400.10, 400.11* in Ch. 400, *Partnerships: Governing Statutes.*

[2] Pre-'97 Act

As originally enacted, the pre-'97 Act [*see* Legal Background in Ch. 400, *Partnerships: Governing Statutes*] provided that the withdrawal of a partner from the partnership, whether voluntary or because of death, bankruptcy, or expulsion, was an event that caused the partnership to dissolve. Under the pre-'97 Act, "dissolution" was defined as the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on, as distinguished from the winding up, of the business [former Corp. Code § 15029]. The pre-'97 Act was later liberalized to permit the partners to agree *in advance* of the death or withdrawal of a partner not to dissolve [*see* former Corp. Code §§ 15031(4), (7)], and although no specific provision addressed the continuation of a partnership by agreement after a partner's bankruptcy or expulsion, cases decided under the pre-'97 Act held that a partnership could be continued by agreement after the expulsion of a partner [*Heller v. Pillsbury Madison & Sutro (1996) 50 Cal. App. 4th 1367, 1385, 58 Cal. Rptr. 2d 336* ; *Cagnolatti v. Guinn (1983) 140 Cal. App. 3d 42, 48, 189 Cal. Rptr. 151]* .

The pre-'97 Act did not have unified or complete provisions for the status, rights, or duties of partners that withdrew from a partnership that had not dissolved. Generally speaking, for the purpose of fixing the rights and duties of partners after loss of a partner, the pre-'97 Act treated the departed partner and the partnership as if a dissolution had occurred and a partnership accounting was necessary [*see, e.g.,* former Corp. Code §§ 15034(liability of partners for

post-dissolution acts), 15036 (discharge of liabilities on dissolution)]. In sum, under the pre-'97 Act, if the partnership continued after the withdrawal or addition of a partner, but not pursuant to a preexisting agreement not to dissolve, then theoretically a new partnership had to be formed or the business was treated as if it were operating as an unliquidated enterprise [*see* former Corp. Code §§ 15041 (rights of creditors against those continuing partnership), 15042 (right of retiring or deceased partner to have partnership interest purchased), 15043 (right to accounting against partners continuing business)]. As a practical matter, however, a continuing but unliquidated partnership would remain, de facto, a partnership.

[3] UPA'94

UPA'94 ended the distinctions under the pre-'97 Act between partners who withdraw, become bankrupt, retire, or die [*see Corp. Code §§ 16601-16603*]. "Dissociation," a term UPA'94 uses generically to describe any cessation of a person's partnership status [*see Corp. Code § 16601*], may be voluntary (*e.g.*, retirement) or involuntary (*e.g.*, death or expulsion), or rightful or wrongful, but in no case does a partner's dissociation require the partnership to dissolve if the remaining partners want to continue. Thus, changes in the composition of the partnership do not dissolve the partnership, despite the absence of a prior agreement not to dissolve. Even in a partnership for a definite term or for a particular purpose, dissolution and winding up are not required when a partner dissociates before the expiration of the term if a majority in interest of the remaining partners may agree within 90 days to continue the partnership and avoid dissolution and winding up [*Corp. Code § 16801*]. In an at will partnership, the dissociation of a partner will dissolve the partnership only if at least half of the partners vote affirmatively to dissolve [*Corp. Code § 16801(1)*].

Instead of causing dissolution, the withdrawal of a partner will trigger the buyout provisions of Article 7 of UPA'94 [*Corp. Code §§ 16701-16705*]. These buyout provisions are mandatory absent a provision to the contrary in the partnership agreement [*see Corp. Code § 16103(b)*], and are fairly detailed concerning the valuation of a dissociated partner's interest and the timing of payment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionBreach of Agreement & ExpulsionBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionContinuationBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionDeath & IncapacityBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionWithdrawalBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpAccountingBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionPartnership LiabilitiesBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewContracts LawTypes of ContractsPartnership Agreements

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35-403 California Forms of Pleading and Practice--Annotated § 403.11

§ 403.11 Events Triggering a Partner's Dissociation Under UPA'94

[1] Subject to Agreement

The events noted in this section as triggering a partner's dissociation, except the judicial determination discussed in [5], *below*, are all subject to contrary provisions in the partnership agreement [*see Corp. Code § 16103(b)*].

[2] Partner's Giving Notice

A partner may dissociate from a partnership voluntarily at any time by giving notice to the partnership of withdrawal as a partner on that date or on a stated later date [*Corp. Code § 16601(1)*]. A voluntary dissociation may be rightful or wrongful with quite different consequences, which are discussed in *§ 403.12*.

[3] Provision in Partnership Agreement

A partner is dissociated on the occurrence of an event specified in the partnership agreement as causing the partner's dissociation [*Corp. Code § 16601(2)*]. For example, a professional partnership agreement would commonly require dissociation if a partner's license to practice is revoked. The range of possible events that could be specified is exceptionally wide and could be almost anything that would not violate some applicable law, such as laws prohibiting discrimination that apply to the partnership. A partner may also be expelled if the partnership agreement so provides [*Corp. Code § 16601(3)*].

[4] Unanimous Vote of Other Partners

Absent an agreement providing otherwise, a partner may be expelled by the unanimous vote of the other partners if any of the following apply [*Corp. Code § 16601(4)*]:

- It is unlawful to carry on the partnership business with that partner.

- There has been a transfer of all or substantially all of that partner's transferable interest in the partnership, other than a transfer for security purposes, or a court order charging the partner's interest,

that has not been foreclosed.

- Within 90 days after the partnership notifies a corporate partner that it will be expelled because it has filed a certificate of dissolution or the equivalent, its charter has been revoked, or its right to conduct business has been suspended by the jurisdiction of its incorporation, and the certificate of dissolution has not been revoked or the corporation's charter or its right to conduct business has not been reinstated.

- A partnership, limited partnership, or limited liability company that is a partner has been dissolved and its business is being wound up.

[5] Judicial Determination

On application by the partnership or another partner, a court may order a partner's expulsion for any of the following reasons [*Corp. Code § 16601(5)*]:

- The partner engaged in wrongful conduct that adversely and materially affected the partnership business.

- The partner willfully or persistently committed a material breach of the partnership agreement or of a duty owed to the partnership or the other partners [*see Corp. Code § 16404*; *see also* Ch. 401, *Partnerships: Actions Between General Partners and Partnership*].

- The partner engaged in conduct relating to the partnership business that makes it not reasonably practicable to carry on the business in partnership with that partner.

[6] Financial Problems

If the partner acts or fails to act in any of the following instances, that partner is dissociated from the partnership unless the partnership agreement provides otherwise [*Corp. Code § 16601(6)*]:

- By becoming a debtor in bankruptcy [*see Corp. Code § 16101(2)* (definition); *see also* Ch. 400, *Partnerships: Governing Statutes*].

- By executing an assignment for the benefit of creditors.

- By seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of that partner or all or substantially all of that partner's property.

- By failing, within 90 days after the appointment, to have vacated or stayed the appointment of a trustee, receiver, or liquidator of the partner or of all or substantially all of the partner's property obtained without the partner's consent or acquiescence, or failing within 90 days after the expiration of a stay to have the appointment vacated.

[7] Death or Incapacity

A partner who is an individual is dissociated from the partnership by death, the appointment of a guardian or general conservator of that partner, or a judicial determination that the partner has otherwise become incapable of performing the partner's duties under the partnership agreement [*Corp. Code § 16601(7)*].

[8] Distribution of Transferable Interest in Partnership by Trust or Estate

A partner that is a trust or acting as a partner by virtue of being a trustee of a trust is dissociated upon the distribution of the trust's entire transferable interest in the partnership, but not merely upon the substitution of a successor trustee [*Corp. Code § 16601(8)*]. A partner that is an estate or acting as a partner by virtue of being a personal representative of an estate is dissociated when the estate's entire transferable interest in the partnership is distributed, but not merely upon the substitution of a successor personal representative [*Corp. Code § 16601(9)*].

[9] Partners Dissenting From Conversion or Merger Under UPA'94

[a] Conversions

If a partner in a general partnership that is converting into another kind of entity, such as limited liability company, does not vote in favor of the conversion and does not agree to become a partner, member, shareholder, or holder of an interest in the converted other business entity, that partner may rightfully dissociate from the partnership as of the date the conversion takes effect [*Corp. Code § 16909(e)*].

Within 10 days after the other partners' approval of conversion, the converting partnership must send notice of the approval to each partner that has not approved the conversion, accompanied by copies of *Corp. Code § 16701* (the mandatory buyout provisions) and a brief description of the procedure to be followed under that section if the partner wishes to dissociate from the partnership. A partner that wants to dissociate must send written notice of dissociation within 30 days after the date of the notice of the approval of the conversion. The converting partnership must then cause the partner's interest in the entity to be purchased in accordance with *Corp. Code § 16701* [*Corp. Code § 16909(e)*; *see § 403.13* (buyout of partner's interest)].

[b] Mergers

If a partner in a California partnership that will not survive a merger does not vote in favor of the merger and does not agree to become a partner, member, shareholder, or holder of interest of equity securities of the surviving partnership or surviving other business entity, that partner has the right to dissociate from the partnership as of the date the merger takes effect [*Corp. Code § 16914(e)*].

Within 10 days after the other partners' approval of a merger, the partnership must send notice of the approval to each partner that has not approved the conversion, accompanied by copies of *Corp. Code § 16701* (the mandatory buyout provisions) and a brief description of the procedure to be followed under that section if the partner wishes to dissociate from the partnership. A partner who wants to dissociate must send written notice of dissociation within 30 days after the date of the notice of the approval of the merger. The disappearing partnership must then cause the partner's interest in partnership to be purchased [*Corp. Code § 16914(e)*; *see § 403.13* (buyout of partner's interest)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsDissolution & Winding UpGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionBreach of Agreement & ExpulsionBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersTransfers of InterestsBusiness & Corporate LawLimited Liability CompaniesDissolution & Winding UpBusiness & Corporate LawLimited PartnershipsDissolution & Winding UpMergers & Acquisitions LawMergersDuties & Liabilities of ShareholdersCivil ProcedureParties SubstitutionsDeath of PartyContracts LawTypes of ContractsPartnership Agreements

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35-403 California Forms of Pleading and Practice--Annotated § 403.12

§ 403.12 Power of Partner to Dissociate Under UPA'94

[1] In General

A partner has the power to dissociate at any time, rightfully or wrongfully, by giving the partnership the notice of that intent, effective when thepartnership has notice [*see Corp. Code § 16102(b)* (defining "notice"); *see also* Ch. 400, *Partnerships: Governing Statutes*] or as of a specified later date [*Corp. Code § 16602(a)*]. The partnership agreement cannot vary a partner's *power* to dissociate, except to require the dissociating partner to notify the partnership in writing [*Corp. Code § 16103(b)(6)*]. It appears, however, that the partnership agreement can impose conditions, restrictions, or other requirements on dissociation before it is rightful. If a partner's dissociation does not comply with the partnership agreement, it would then be wrongful [*see Corp. Code § 16602(b)(1)*].

[2] Wrongful Dissociation

As noted in [1], *above*, a partner's dissociation will be wrongful if it is in breach of an express provision of the partnership agreement. In addition, subject to contrary provisions in the partnership agreement of a partnership for a definite term or a particular undertaking, dissociation is also wrongful if the partner dissociates before the expiration of the term or the completion of the undertaking and any of the following apply [*Corp. Code § 16602(b)(2)*]:

- The partner withdraws by express will, unless the withdrawal follows within 90 days after another partner's dissociation by death or otherwise under *Corp. Code § 16601(6)-(10)*, inclusive, or wrongful dissociation under *Corp. Code § 16602(b)*.

- The partner has been expelled by judicial determination [*see Corp. Code § 16601(5)*; *see also § 403.11[5]*].

- The partner is dissociated by reason of becoming a debtor in bankruptcy.

- A partner that is not an individual, trust or estate is expelled or otherwise dissociated because it willfully dissolves or terminates.

UPA'94 distinguishes between rightful and wrongful dissociation for the purpose of allocating rights and liabilities [*see* discussion in *§ 403.13*]. For example, a wrongfully dissociating partner is liable to the partnership and the other partners for damages caused by the dissociation, in addition to any other obligation that partner may have to them [*Corp. Code § 16602(c)*]. A wrongfully dissociating partner also is not permitted a voice in determining whether a partnership should waive dissolution and continue in business [*see Corp. Code § 16802(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionWithdrawal

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35-403 California Forms of Pleading and Practice--Annotated § 403.13

§ 403.13 Buyout of Dissociating Partners Under UPA'94

[1] Terms of Buyout

Under UPA'94, when a partner dissociates, whether rightfully or wrongfully, that partner's interest in the partnership must be bought out by the partnership at a price determined by a formula set forth in UPA'94, except and to the extent otherwise provided in the partnership agreement [*Corp. Code § 16701(a)*].

The buyout price under UPA'94 is the amount that would have been distributable to the dissociating partner on dissolution and winding up, i.e., after creditors have been paid and accounts settled [*see Corp. Code § 16807* (order of distribution); *see also* Ch. 406, *Partnerships: Dissolution*] if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of: (1) the liquidation value, or (2) the value based on the sale of the entire business as a going concern (without the dissociated partner), and the partnership was wound up as of that date [*Corp. Code § 16701(b)*]. Interest must be paid from the date of dissociation to the date of payment [*Corp. Code § 16701(b)*]. If the rate of interest is not specified in the partnership agreement or otherwise, the interest rate is as specified in *Civ. Code 3289* [*Corp. Code § 16104(b)*].

Damages for wrongful dissociation and any other amounts owing, whether or not presently due, to the partnership by the dissociating partner must be offset against the buyout price, with interest from the date the amount owed is due until the date of payment [*Corp. Code § 16701(c)*].

UPA'94's buyout provisions do not apply to a partner who dissociates within 90 days prior to the partnership's dissolution. Instead, such a partner is treated as any other partner and must wait for the winding up of the partnership, with the amount distributable to that partner taking into account any amounts owed by the partner to the partnership (whether or not presently due), including damages for wrongful dissociation [*Corp. Code § 16701.5*].

[2] Accounting for Goodwill

As noted in [1], *above*, the buyout price is subject to provisions of the partnership agreement, which may or may not specifically provide for payment of a dissociating partner's share of partnership goodwill. Under the pre-'97 Act, it was held that if some of the partners continue to operate the partnership business after withdrawal of a partner, they must

account to the retiring partner for the goodwill of the business and pay that partner his, her or its share of the goodwill in an accounting [*Driskill v. Thompson (1956) 141 Cal. App. 2d 479, 484, 296 P.2d 834 (1956)]* . The same rule appears to apply, absent a contrary agreement, under the buyout provisions of UPA'94, when the partnership is valued as a going concern for purposes of calculating the buyout price for a dissociated partner's interest.

An exception to the requirement that goodwill be included is based on case law under the pre-'97 Act holding that a law partnership does not have goodwill that can be legally divided on dissolution, since the goodwill attaches to the individual partners and not to the partnership. Payment for goodwill following dissolution of a law partnership was held barred byCalifornia *Cal. Rules Prof. Conduct, Rule 2-200(A)*, which prohibits the division of fees for legal services among lawyers who are not partners or associates within the same firm, unless the client consents in writing and the fee bears a reasonable relationship to the services rendered by all of them. Thus, the goodwill of a law partnership cannot be assigned a monetary value or be distributed as an asset on dissolution of the partnership [*Fraser v. Bogucki (1988) 203 Cal. App. 3d 604, 607-610, 250 Cal. Rptr. 41* ; *see Lyon v. Lyon (1966) 246 Cal. App. 2d 519, 524, 54 Cal. Rptr. 829]* . In the context of the buyout of a dissociated partner under UPA'94, this rule means that a withdrawing law partner cannot receive an allocation of partnership goodwill as part of the buyout price.

[3] Payment or Tender of Buyout Price on Failure to Reach Agreement

If no agreement for the purchase of a dissociated partner's interest is reached within the 120 days of a written demand for payment, the partnership must pay, or cause to be paid, in cash, to the dissociated partner the amount the partnership estimates to be the buyout price with accrued interest, less any offsets, including those arising out of damages for wrongful dissociation [*Corp. Code § 16701(e)*].

A partner who has wrongfully dissociated from a partnership for a definite term or particular undertaking [*see Corp. Code § 16602(b)(2)*; *see also § 403.12[2]*] is not entitled to payment of any portion of the buyout price until the expiration of the term or completion of the undertaking, unless the partner establishes to the satisfaction of a court that earlier payment will not cause undue hardship to the business of the partnership. If the payment is deferred it must be adequately secured and bear interest [*Corp. Code § 16701(h)*]. If the payment may be deferred, the partnership may tender a written offer to pay the estimated amount of the deferred buyout price, with interest but reduced by offsets, stating the time payment, type of security, and the other terms and conditions of the obligation [*Corp. Code § 16701(f)*].

Either payment or tender of an offer to pay a dissociated partner the buyout price must be accompanied by [*Corp. Code § 16701(g)*]:

- A statement of partnership assets and liabilities as of the date of dissociation.
- The latest available partnership balance sheet and income statement, if any.
- An explanation of how the estimated amount of the payment was calculated.
- Written notice that the payment is in full satisfaction of the obligation to purchase unless, within 120 days after the written notice, the dissociated partner commences an action to determine the buyout price and any offsets or other terms of the obligation to purchase.

[4] Court Action to Determine Buyout Price

In addition to a dissociated partner's right to maintain an action to enforce any buyout provision in the partnership agreement [*Corp. Code § 16405(b)(1)*], a dissociated partner may also maintain an action pursuant to *Corp. Code § 16405(b)(2)(B)* against the partnership to determine the buyout price of that partner's interest, including any offsets or other terms of the obligation to purchase. That action must be commenced within 120 days after the partnership has

tendered payment or an offer to pay, or within one year after written demand for payment if the partnership has not paid or tendered an offer of payment. The court must determine the buyout price, offsets, and accrued interest, and enter a judgment for any additional payment or refund. The court must also determine the security for payment and other terms of the obligation [*Corp. Code § 16701(i)*].

The court may assess reasonable attorney's fees and the fees and expenses of appraisers or experts, in amounts that the court finds equitable, against a party that the court finds acted arbitrarily, vexatiously, or not in good faith. That finding may be based on the partnership's failure to tender payment or an offer to pay or to furnish the statement [*see* [3], *above*] that must accompany an offer to pay or tender of payment [*Corp. Code § 16701(i)*].

[5] Duty Owed Dissociated Partners Respecting Buyout

Although it is difficult to imagine circumstances in which a dissociated partner might attempt to invoke the former partners' duty of loyalty and care, at least with respect to events occurring *after* the partner's dissociation, the other partners' obligation of good faith and fair dealing remains an obligation until the dissociating partner's interest has been purchased. This is the holding of cases decided before UPA'94 was enacted and can be inferred from its provisions for the buyout of dissociated partners.

For example, when a partnership is dissolved by the death of a partner, the surviving partners owe a fiduciary duty to the deceased partner's estate to make a full and fair disclosure of all matters substantially affecting the fair market value of the partnership then known to them from the commencement of the buy-out negotiations until consummation of the buyout [*Estate of Witlin (1978) 83 Cal. App. 3d 167, 175, 147 Cal. Rptr. 723]* . On the other hand, decisions under the pre-'97 Act also held that because a partner's interest in the partnership is terminated by a sale of that interest [*Vai v. Bank of America (1961) 56 Cal. 2d 329, 339, 15 Cal. Rptr. 71, 364 P.2d 247]* , the fiduciary duty owed to this partner by the remaining partners ceases on the date of sale, even if the actual transfer of the interest occurs at a later date [*Stone v. Millstein (9th Cir. [Cal.] 1986) 804 F.2d 1434, 1438* ; *see also Lund v. Albrecht (9th Cir. [Cal.] 1991) 936 F.2d 459, 463* (partner's fiduciary duty to a selling partner ends when the partieshave formed and signed a contract to purchase the partnership interests of the selling partner)].

When an offer to purchase partnership property was made one month after the contract to purchase the selling partner's interest was made, the remaining partners had no duty to inform the selling partner of the later offer since the seller's interest had been terminated on the date of the contract of sale, even though the offer was received before the partnership interest was actually transferred [*Stone v. Millstein (9th Cir. [Cal.] 1986) 804 F.2d 1434, 1438* ; *but see Lund v. Albrecht (9th Cir. [Cal.] 1991) 936 F.2d 459, 464* (partner found to have breached fiduciary duty by failing to disclose to other partner offers to purchase partnership property at prices greater than value partners had decided on during negotiations to dissolve and sell partnership interest, the court holding that even though offers had been received after proposed terms of dissolution and buyout were agreed to in writing, that writing was not definitive agreement)].

Under UPA'94, the partners' obligation of good faith and fair dealing to dissociated partners may be inferred from the provisions of *Corp. Code § 16701(g)*, which requires, at the time a payment or an offer to pay for a dissociated partner's interest in made, full disclosure of partnership financial matters and of how the buyout price was calculated. Furthermore, if a dissociated partner decides to refuse the partnership's offer and commence an action to have the buyout price determined by a court, the court may assess fees of attorneys, appraisers, and other experts against a party that the court finds acted arbitrarily, vexatiously, or not in good faith [*Corp. Code § 16701(i)*].

[6] Fiduciary Duties of Partner's Personal or Legal Representative

The duties and obligations discussed above apply to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner [*Corp. Code § 16404(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpAccountingBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpDistribution of AssetsBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpValuationBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesFiduciary ResponsibilitiesGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesFiduciary ResponsibilitiesDuty of Good Faith & LoyaltyBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersTransfers of Interests

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35-403 California Forms of Pleading and Practice--Annotated § 403.14

§ 403.14 Termination of Rights and Duties of Dissociating Partner

[1] Management of Partnership Business

A dissociating partner's rights and duties with respect to the partnership and its property generally come to an end on dissociation. Thus, when a partner dissociates, either rightfully or wrongfully, the partner's right to participate in the management and conduct of the business terminates [*Corp. Code § 16603*].

[2] Duty Not to Compete With Partnership

The partner's duty under *Corp. Code § 16404(b)(3)* to refrain from competing with the partnership terminates on dissociation [*Corp. Code § 16603*]. Within limits, however, the partnership agreement may continue a partner's obligation to refrain from competing with the partnership. *Bus. & Prof. Code § 16602* allows a partner, on or in anticipation of a dissolution of the partnership or dissociation of the partner from the partnership, to agree not to carry on a similar business within a specified geographic area where the partnership business has been conducted as long as any other partner, or anyone deriving title to the business or its goodwill from another partner, carries on a like business. The California Supreme Court has held that *Bus. & Prof. Code § 16602* applies to partners in law firms as well as to other professional partnerships, that an agreement among law partners imposing a reasonable toll on departing partners who compete with the firm is enforceable, and that such an agreement is not inconsistent with *Cal. Rules Prof. Conduct, Rule 1-500*, which prohibits attorneys from entering agreements that restrict the right to practice [*Howard v. Babcock (1993) 6 Cal. 4th 409, 412, 418-419, 25 Cal. Rptr. 2d 80, 863 P.2d 150]* .

An agreement pursuant to *Bus. & Prof. Code § 16602* does not require the partners to pay the withdrawing partner for goodwill [*South Bay Radiology Medical Associates v. Asher (1990) 219 Cal. App. 3d 1092, 220 Cal. App. 3d 1074, 1084, 269 Cal. Rptr. 15]* .

[3] Duties of Loyalty and Care

Only with respect to matters arising and events occurring *before* the partner's dissociation, the partner's duties of loyalty [*see Corp. Code § 16404(b)(1), (2)*; *see also* Ch. 401, *Partnerships: Actions Between General Partners and Partnership*], and care [*see Corp. Code § 16404(c)*] as to the conduct of the partnership business are generally

continued after dissociation [*Corp. Code § 16603*]. This means, for example, that a dissociated partner could not assist a person with a claim against the partnership that arose before the partner's dissociation; nor could a dissociated partner make any recklessly false accusation against a partnership with respect to a transaction occurring before dissociation.

Legal Topics:

For related research and practice materials, see the following legal topics:
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35-403 California Forms of Pleading and Practice--Annotated § 403.15

§ 403.15 When Liability of Dissociated Partners Is Discharged

[1] Partnership Obligations Incurred Prior to Dissociation

A partner's dissociation does not, of itself, discharge that partner's liability for a partnership obligation incurred *before* dissociation [*Corp. Code § 16703(a)*]. Sometimes, however, the partnership agreement or a buyout agreement will indemnify a dissociated partner against past and future partnership liabilities. UPA'94 expressly requires, subject to the provisions of such an agreement, that a dissociating partner be indemnified against all partnership liabilities, except liabilities of the partner to the partnership for any damage caused to the partnership arising from an obligation incurred by the dissociated partner after dissociation for whichthe partnership is liable pursuant to *Corp. Code § 16702(a)* [*Corp. Code § 16701(d)*; *see § 403.16*].

If there is no indemnification agreement, a separate agreement between the creditor or client can be used to discharge the withdrawing partner's liability. The pre-'97 Act expressly provided that on dissolution of a partnership, an individual partner's liability for preexisting matters was not terminated except by performance of the agreement creating the liability or by the express or implied consent of the other contracting party that the partner need not perform the agreement [former Corp. Code § 15036(1); *see Redman v. Walters (1979) 88 Cal. App. 3d 448, 453, 152 Cal. Rptr. 42* (law partner's failure to obtain clients' agreement that partner could withdraw from representation meant partner remained liable for any negligent act of partnership or of one or more of the remaining partners with respect to representation)]. Although the pre-'97 Act referred to the liability of a partner on dissolution, that is because, generally speaking, withdrawal (dissociation) of a partner caused dissolution under that Act.

UPA'94 also provides that by entering an agreement with a partnership creditor and the partners continuing the business, a dissociated partner may be released from liability for a partnership obligation [*Corp. Code § 16703(c)*].

[2] Partnership Obligations Incurred After Dissociation

Although discharge from post-dissociation partnership obligations is the rule, a partner's dissociation does not of itself discharge the partner's liability for a partnership obligation incurred after dissociation. Except for partners in domestic and foreign registered limited liability partnerships, a partner who dissociates is liable as a partner to the other party in a transaction entered into by the partnership, including a partnership surviving a conversion or merger, that took place

within two years after the partner dissociates, if at the time of entering into the transaction *all* of the following apply to the other party [*Corp. Code § 16703(a)*]:

- The other party reasonably believed that the dissociated partner was a partner;

- The other party had no notice [*see Corp. Code § 16102(b)* (defining "notice"); *see also* Ch. 400, *Partnerships: Governing Statutes*] of the partner's dissociation;

- The other party is not deemed to have knowledge of the partner's dissociation under *Corp. Code § 16303(e)*, which provides that third parties are deemed to have knowledge of limitations of authority contained in partnership statements recorded in the county recorder's office [*see* Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties*]; and

- The other party is not deemed to have notice under *Corp. Code § 16704(c)*, which provides that third parties are deemed to have notice of a dissociation 90 days after a statement of dissociaton [*see Corp. Code § 16704*] is filed with the Secretary of State by the partner or the partnership.

A two-year overhang of liability may be avoided by giving actual notice to persons who might have claims for which the dissociated partner might be liable within the two year period, and by giving constructive notice by filing and, as appropriate, recording a statement of dissociation. In the alternative, by agreement with a partnership creditor and the partners continuing the business, a dissociated partner may be released from liability for a post-dissociation partnership obligation [*Corp. Code § 16703(c)*].

[3] When Partnership Obligation Altered

UPA'94 relieves a dissociated partner from liability for a partnership obligation, regardless of when incurred, if the partnership's creditor, having notice of the partner' dissociation [*see Corp. Code § 16102(b)* (defining "notice"); *see also* Ch. 400, *Partnerships: Governing Statutes*], but without the dissociated partner's consent, agrees to a material alteration in the nature or time of payment of a partnership obligation [*Corp. Code § 16703(d)*].

[4] Placing Third Persons on Notice of Dissociation

As noted in [2], *above*, a dissociating partner and/or the partnership can notify third parties of the dissociation and can give constructive notice to the world by filing and, if appropriate, recording, a statement of dissociation.

The partner or the partnership may file a statement of dissociation with the Secretary of State. The statement of dissociation must state the name of the partnership, any identification number issued by the Secretary of State, and that the partner is dissociated [*Corp. Code § 16704(a)*]. The filed statement is a "limitation" on the dissociating partner's authority [*Corp. Code § 16704(b)*], which means that any person dealing with the dissociated partner who knows of the limitation or has been notified of it cannot bind the partnership in those dealings. With respect to real property transactions, a filed *and recorded* statement of dissociation will give third persons immediate constructive knowledge of the limitation on authority under *Corp. Code § 16303(e)*. With respect to all other transactions, a filed statement will give notice to third parties 90 days after the statement has been filed with the Secretary of State [*Corp. Code § 16704(c)*].

Since the circumstances of the partner's dissociation may make a 90-day window of joint and several liability for non-real property transactions undesirable from the points of view of both the dissociating partner and the partnership, most partnerships, in addition to filing a statement ofdissociation, will give actual notice of a partner's dissociation to partnership creditors at the earliest possible time.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionBreach of Agreement & ExpulsionBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionContinuationBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionWithdrawalBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionPartnership LiabilitiesBusiness & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesTortsVicarious LiabilityPartnersGeneral Overview

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§ 403.16 Liability of Partnership and Partners for Acts of Dissociated Partner

Corp. Code § 16702(a) provides that for two years after a partner dissociates, the partnership, including a partnership that survives a conversion or merger, remains bound by the acts of a dissociated partner only if the third party reasonably believed the dissociated partner was still a partner, had no notice [*see Corp. Code § 16102(b)* (defining "notice"); *see also* Ch. 400, *Partnerships: Governing Statutes*] of the dissociation, and is not deemed to have knowledge or notice of the dissociation based on a recorded partnership statement [*see Corp. Code § 16303(e)*] or a filed statement of dissociation [*see Corp. Code § 16704(c)*]. The same rules respecting the effect of the filing and, if appropriate, recording a statement of dissociation that apply to a dissociated partner's liability also apply to the partnership's and remaining partners' liability [*Corp. Code § 16704(c)*; *see* discussion in *§ 403.15[4]* .

A buyout agreement governed by UPA'94 is not required to indemnify the dissociated partner for that partner's post-dissociation actions that bind the partnership [*see Corp. Code § 16701(d)*]. Furthermore, if the partnership is liable for an act of the dissociated partner within the two-year period, that partner is liable to the partnership for any damages arising out of the obligation the partner incurred [*Corp. Code § 16702(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 35: Partition thru Paternity-Chs. 397-412
Chapter 403 PARTNERSHIPS: ACTIONS BY AND AGAINST DISSOCIATED PARTNERS
PART II. LEGAL BACKGROUND

35-403 California Forms of Pleading and Practice--Annotated § 403.17

§ 403.17 Use of Dissociated Partner's Name

Continued use of a partnership name, or a dissociated partner's name as part of the partnership name, by partners continuing the business does not of itself make the dissociated partner liable for an obligation of the partners or the partnership that continues the business [*Corp. Code § 16705*].

Legal Topics:

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[Reserved]

§§ 403.18[Reserved]

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35-403 California Forms of Pleading and Practice--Annotated § 403.30

§ 403.30 Related Matthew Bender Publications

For discussion and analysis of the rights and duties of dissociating partners, see Ballantine & Sterling, California Corporation Laws, Ch. 24 (Matthew Bender)

For discussion and forms related to dissociation of partners and the liquidation of their interests, see California Legal Forms, Ch. 15, *General Partnerships*, Pt. B (Matthew Bender)

For discussion and forms related to the conversion and merger of general partnerships, see California Legal Forms, Ch. 15,*General Partnerships*, Pt. C (Matthew Bender)

For memoranda of points and authorities relating to accounting actions generally, see California Points and Authorities, Ch. 12, *Accounting* (Matthew Bender)

For memoranda of points and authorities relating to actions involving partnerships generally, see California Points and Authorities, Ch. 170, *Partnerships and Joint Ventures* (Matthew Bender)

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35-403 California Forms of Pleading and Practice--Annotated § 403.31

§ 403.31 State Statutes

[1] Dissociation Generally

Continuation of partnership for fixed term. Former Corp. Code § 15023

Covenant not to compete on dissociation. *Bus. & Prof. Code § 16602*

Dissolution defined. Former Corp. Code § 15029

Events causing dissociation. *Corp. Code § 16601*; former Corp. Code § 15031

Notice of dissolution. Former Corp. Code § 15035.5

Partner dissenting from partnership conversion. *Corp. Code § 16909(e)*

Partner dissenting from partnership merger. *Corp. Code § 16914(e)*

Prior agreement not to dissolve on death or withdrawal of partner. Former Corp. Code § 15031(7)

Right of partner to dissociate. *Corp. Code § 16602(a)*

Statement of dissociation. *Corp. Code § 16704*

Use of partnership name after dissociation. *Corp. Code § 16705*

Wrongful dissociation. *Corp. Code § 16602(b), (c)*

[2] Dissociating Partner's Rights and Liabilities

Liability of dissociating partner for existing partnership liabilities. *Corp. Code § 16703(a)*; former Corp. Code § 15036(1)

Liability of dissociating partner for post-dissociation partnership liabilities. *Corp. Code § 16703(b)*

Partnership's right to damages against wrongfully dissociating partner. *Corp. Code § 16602(c)*; former Corp. Code § 15038(b)(1)(B)

Release of dissociating partner from partnership liability. *Corp. Code § 16703(c)*; former Corp. Code § 15036(2)

Termination of dissociating partner's rights and duties. *Corp. Code § 16603*

[3] Effect of Dissociation on Partnership Liability

Liability of partnership for acts of dissociated partner after dissolution or dissociation. *Corp. Code § 16702*; former Corp. Code § 15035

Rights of creditor generally on continuation of partnership business after dissolution. Former Corp. Code § 15041

[4] Personal Representatives of Deceased Partner

Executor or administrator continuing partnership business of decedent on order of court. *Prob. Code § 9762*

Right of deceased partner's personal representative to compel surviving partner to render account. *Prob. Code § 9761*

Rights of legal representative of deceased partner on continuation of partnership business. Former Corp. Code § 15042

Surviving partner not appointed administrator when interested person objects. *Prob. Code § 8402*

[5] Purchase of Dissociating Partner's Interest

Action to determine buyout price of dissociating partner's interest in partnership. *Corp. Code § 16701(i)*

Buyout of dissociating partner's interest in partnership. *Corp. Code § 16701(a)-(h)*; former Corp. Code § 15038(b)(2),(3)(B)

No buyout of dissociating partner's interest within 90 days of dissolution. *Corp. Code § 16701.5*

Right of legal representative of deceased partner to receive value of partner's interest from continuing partners. Former Corp. Code § 15042

Legal Topics:

For related research and practice materials, see the following legal topics:
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35-403 California Forms of Pleading and Practice--Annotated § 403.32

§ 403.32 Decisions

[1] Action by Personal Representative of Deceased Partner

Administrator or executor of deceased partner has no power to handle partnership property or affairs, since right to possession, control, and disposition of partnership property vests in surviving partner. *Minifie v. Rowley (1921) 187 Cal. 481, 483-484, 202 P. 673*

Executor of will of last surviving partner is entitled to bring action for recovery of partnership property without joining executors of wills of earlier deceased partners. *Minifie v. Rowley (1921) 187 Cal. 481, 484, 202 P. 673*

[2] Dissolution Not Caused by Dissociation Under Pre-'97 Act

Expulsion of a partner does not cause dissolution if partnership agreement provides for continuation in that event. *Heller v. Pillsbury Madison & Sutro(1996) 50 Cal. App. 4th 1367, 1385, 58 Cal. Rptr. 2d 336 (1996)* ; *Cagnolatti v. Guinn (1983) 140 Cal. App. 3d 42, 48, 189 Cal. Rptr. 151*

Sale, conveyance, transfer, or assignment by partner of his or her interest in partnership or property to copartner or third party does not of itself dissolve partnership, although entire circumstances connected with transfer may be sufficient to cause dissolution. *Chatten v. Martell (1958) 166 Cal. App. 2d 545, 551, 333 P.2d 364*

Partner who has parted with his or her partnership interest is not permitted to join in action for dissolution of partnership. *Chatten v. Martell (1958) 166 Cal. App. 2d 545, 552, 333 P.2d 364*

Partnership for particular undertaking is not dissolved by express will of partner. *Zeibak v. Nasser (1938) 12 Cal. 2d 1, 13, 82 P.2d 375*

Death of partner does not necessarily dissolve partnership. *Zeibak v. Nasser (1938) 12 Cal. 2d 1, 17, 82 P.2d 375*

[3] Liability of Dissociating Partner for Partnership Obligations

Individual partner's liability for existing partnership liability is not terminated on dissolution except by performance of agreement creating that liability or by express or implied consent of other contracting party that he or she need not perform. *Redman v. Walters (1979) 88 Cal. App. 3d 448, 453, 152 Cal. Rptr. 42*

In suit brought by creditor of partnership against partnership and surviving partner, neither executor nor heirs of deceased partner were indispensable or necessary parties. *Pearson v. Norton (1964) 230 Cal. App. 2d 1, 18, 40 Cal. Rptr. 634*

[4] Notice of Dissociation or Dissolution

Defendant partner is required to show that creditor had actual notice of partnership dissolution if creditor had had prior credit dealings with partnership. *Credit Bureaus of Merced County v. Shipman (1959) 167 Cal. App. 2d 673, 678, 334 P.2d 1036*

Publication of notice of dissolution of partnership alone does not compel finding of creditor's actual knowledge of dissolution. *Credit Bureaus of Merced County v. Shipman (1959) 167 Cal. App. 2d 673, 678, 334 P.2d 1036*

Partnership is not bound if creditor had actual notice of dissolution at time of transaction, even though notice of dissolution had not been published pursuant to former Corp. Code § 15035.5. *Carvalho v. McCoy (1954) 128 Cal. App. 2d 702, 705, 276 P.2d 21*

Partner seeking to avoid liability has burden of showing that creditor of partnership had notice of dissolution of partnership prior to transaction. *Epley v. Hiller (1954) 128 Cal. App. 2d 100, 104, 274 P.2d 696*

Creditor must know of existence of partnership prior to its dissolution and has burden of proving that knowledge in order to bind partnership for acts of partner after dissolution, pursuant to former Corp. Code § 15035. *Vogler v. Ingrao (1954) 123 Cal. App. 2d 341, 344, 266 P.2d 826*

[5] Purchase of Dissociating Partner's Interest

[a] Buy-Sell Agreements

Partners' agreement to partial division in kind of partnership assets are valid and must be honored by court, as long as agreement is proved and not assailed on grounds of mistake or fraud. *Logoluso v. Logoluso (1965) 233 Cal. App. 2d 523, 528, 43 Cal. Rptr. 678*

Partners are permitted to agree that partnership will not be dissolved by death of partner; that interest of deceased partner may be purchased by surviving partners for stated sum or formula; or that investment of deceased partner will continue, and statutes do not control partnership liquidation under those circumstances. *Wood v. Gunther (1949) 89 Cal. App. 2d 718, 727, 201 P.2d 874*

[b] Duties of Continuing Partners

Although partners have fiduciary duties towards each other, selling partner has no cause of action against buying partner based on buying partner's stated intent not to resell to third persons when seller could not rely on statement as

matter of law because it was made after seller decided to sell and buyer's resale to others was motivated by changes in circumstances that occurred after statement was made. *Edmunds v. Valley Circle Estates (1993) 16 Cal. App. 4th 1290, 1297-1304, 20 Cal. Rptr. 2d 701*

Fiduciary duty of disclosure terminates on formation of contract for sale of partnership interest, contract being formed when selling partner communicates to buying partner acceptance of offer to purchase, after which matters affecting value of interest sold need not be disclosed. *Stone v. Millstein (9th Cir. 1986) 804 F.2d 1434, 1437-1438* (diversity case applying California law, distinguishing *Estate of Witlin (1978) 83 Cal. App. 3d 167, 176, 147 Cal. Rptr. 723* , as involving special duty to deceased partner's estate and *Laux v. Freed (1960) 53 Cal. 2d 512, 517, 2 Cal. Rptr. 265, 348 P.2d 873* , as involving special duties owed during dissolution and liquidation)

Surviving or liquidating partner is, if not trustee, at least quasi trustee for former partners. *Metzenbaum v. Metzenbaum (1953) 115 Cal. App. 2d 395, 398, 252 P.2d 31*

Surviving partner is trustee of partnership property and owes maximum of good faith and personal confidence to decedent and decedent's beneficiaries. *Sibert v. Shaver (1952) 111 Cal. App. 2d 833, 839, 245 P.2d 514*

[6] Use of Partnership Name After Dissociation

On dissolution of partnership, remaining partner has right to continue business under original partnership name. *Speka v. Speka (1954) 124 Cal. App. 2d 181, 190, 268 P.2d 129*

[7] Valuation of Dissociated Partner's Interest

[a] Assessment of Costs and Fees

Court has discretion to tax partners proportionately for appraisers' fee. *Zeibak v. Nasser (1938) 12 Cal. 2d 1, 19-20, 82 P.2d 375*

Fee of expert accountant appointed by and acting under direction of court is chargeable cost in partnership dissolution action. *ABC Egg Ranch v. Abdelnour (1963) 223 Cal. App. 2d 12, 19, 35 Cal. Rptr. 487*

Assessment of receiver's costs, fees, and expenses are within sound discretion of trial court, and assessment of those costs against party whose conduct made appointment of receiver necessary is proper. *Luchs v. Ormsby (1959) 171 Cal. App. 2d 377, 389, 340 P.2d 702*

[b] Generally

Retiring partner who waits too long to compel liquidation and distribution of any net proceeds under former Corp. Code § 15038(a) while remaining partners continue business has waived rights under that section and is left only with right to accounting under former Corp. Code § 15042. *Oliker v. Gershunoff (1987) 195 Cal. App. 3d 1288, 1295-1298, 241 Cal. Rptr. 415* (waited three years)

Value of retiring partner's share for purpose of former Corp. Code § 15042 is required to be determined as of date of partnership dissolution. *Casida v. Roberts (1959) 51 Cal. 2d 853, 856, 337 P.2d 829*

[c] Goodwill

Good will is partnership asset, even in case of partnership at will. *Driskill v. Thompson (1956) 141 Cal. App. 2d 479, 484, 296 P.2d 834*

Partners are competent witnesses as to value of partnership property. *Vangel v. Vangel (1953) 116 Cal. App. 2d 615, 627, 254 P.2d 919*

When one partner becomes disabled and unable to participate in partnership business, copartner continuing business has appropriated good will and has duty to account to retired partner for its value. *Miller v. Hall (1944) 65 Cal. App. 2d 200, 205-206, 150 P.2d 287*

Leasehold interests, permits to do business, and good will of partnership are partnership assets. *Ruppe v. Utter (1925) 76 Cal. App. 19, 24-25, 243 P. 715*

[d] Interest

Under former Corp. Code § 15042, departing partner is required to elect share of post-dissolution profits attributable to use of partner's share of assets of former partnership or payment of prejudgment interest and by electing to claim share of profits for nine years of post-dissolution litigation between former partners, departing partner is barred from seeking prejudgment interest. *Rosenfeld, Meyer & Susman v. Cohen (1987) 191 Cal. App. 3d 1035, 1055-1056, 237 Cal. Rptr. 14*

When accounting and distribution of partnership assets are delayed through fault of partner having possession, interest is allowed from date when balance should have been ascertained and paid. *Chazan v. Most (1962) 209 Cal. App. 2d 519, 524, 25 Cal. Rptr. 864*

Partner is permitted to collect interest when partnership funds have been wrongfully withheld or when partner in charge of partnership books wrongfully makes overdraft. *Luchs v. Ormsby (1959) 171 Cal. App. 2d 377, 388, 340 P.2d 702*

When conduct of partner warrants, court has discretion to penalize such partner by charging interest from date of dissolution. *Speka v. Speka (1954) 124 Cal. App. 2d 181, 187, 268 P.2d 129*

[e] Profits

Application of former Corp. Code § 15042 entitling deceased partner's estate to interest or profits attributable to decedent's share in partnership "unless otherwise agreed," is not precluded by partnership agreement that only provides for appraisal of decedent's share but is silent on issue of payment of interest or profits. *Estate of Zucker (1990) 218 Cal. App. 3d 1198, 1204, 268 Cal. Rptr. 4*

Delay in appraising value of deceased partner's interest in partnership does not justify refusal to pay estate interest on value under former Corp. Code § 15042, absent findings that estate either acted in bad faith or was more than partially responsible for delay. *Estate of Zucker (1990) 218 Cal. App. 3d 1198, 1205, 268 Cal. Rptr. 4*

In real estate investment partnership, profits accruing under former Corp. Code § 15042 on retired partner's interest used by continuing partners prior to settlement of account did not include post-dissolution appreciation of value of realty owned on date of dissolution and later sold; facts that retired partner, an attorney, joined competing business and never told continuing partners of legal consequences of failure to settle account were equitable considerations. *Oliker v. Gershunoff (1987) 195 Cal. App. 3d 1288, 1303-1307, 241 Cal. Rptr. 415*

Retiring partner is entitled to have accounting made before being compelled to choose between profits and interest

pursuant to former Corp. Code § 15042. *Casida v. Roberts (1959) 51 Cal. 2d 853, 857, 337 P.2d 829*

[f] Unfinished Business

Remaining partners' bad faith in connection with dissolution (failure to properly account for income from unfinished business, repudiation of agreement settling compensation dispute) does not bar their right to accounting and share of profits from unfinished business completed by withdrawing partners. *Rosenfeld, Meyer & Susman v. Cohen (1987) 191 Cal. App. 3d 1035, 1063, 237 Cal. Rptr. 14*

Absent partnership agreement, attorneys' fees received on cases in progress on dissolution are post-dissolution income of unfinished business to be allocated to former partners according to their respective ownership interests in former partnership. *Jewel v. Boxer (1984) 156 Cal. App. 3d 171, 177-178, 203 Cal. Rptr. 13*

Court are required to look at circumstances existing on date of dissolution of partnership, and not to events occurring thereafter, to determine whether business of dissolved partnership is unfinished business. *Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal. App. 3d 200, 217, 194 Cal. Rptr. 180*

Case in progress on date of dissolution of law partnership is unfinished business. *Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal. App. 3d 200, 217, 194 Cal. Rptr. 180*

Surviving partner's expenditure of time, labor, and skill in administration of partnership assets incident to successful termination of unfinished business entitles him or her to remuneration under former Civ. Code § 2412 (now *Corp. Code § 16401(h)*). *Jacobson v. Wikholm (1946) 29 Cal. 2d 24, 29, 172 P.2d 878*

[8] Venue

Defendant partner in partnership dissolution action not permitted to have venue changed to his or her county of residence when any other defendant partner resides in county in which suit was brought. *Rudnick v. Delfino (1956) 140 Cal. App. 2d 260, 265-266, 294 P.2d 983*

Action for accounting is personal and defendant is entitled to have trial in county of his or her residence despite fact that plaintiff was seeking order compelling defendant to convey real property located in different county. *Hays v. Cowles (1943) 60 Cal. App. 2d 514, 518, 141 P.2d 26* ; *see* *Coe v. Kessler (1956) 139 Cal. App. 2d 536, 541, 294 P.2d 83*

Legal Topics:

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§ 403.33 Law Reviews

Booth, *Fiduciary Duty and the Former Partner* (Nov. 1992) *48 Bus. Law. 315*

Comment, *The Expulsion Clause in a Partnership Agreement: A Pre-Planned Dissolution* (1980) *13 UCD L. Rev. 868*

Legal Topics:

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§ 403.34 Text References

Witkin, Summary of California Law, vol. 9, *Partnership*, §§ 47-60 (9th ed. 1989)

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§§ 403.35[Reserved]

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PART IV. FORMS

35-403 California Forms of Pleading and Practice--Annotated § 403.40

§ 403.40 Complaint to Determine Buyout Price Under UPA'94 [Corp. Code § 16405(b)(2)(B)]--By Dissociating Partner [Corp. Code § 16701(i)]

[1] FORM Complaint to Determine Buyout Price Under UPA'94 [Corp. Code § 16405(b)(2)(B)]--By Dissociating Partner [Corp. Code § 16701(i)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO DETERMINE PARTNER'S
_____ [*names*],	)	BUYOUT PRICE
Defendants.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____[*name of partnership*] is, and at all times herein mentioned was, a partnership having its chief executive office at _____, _____[*street and city*], _____ County, California. Defendants _____[*names of partners*] are, and at all times herein mentioned were, members of defendant partnership, and are, and at all times herein mentioned were, residents of _____ County, California.

2. On or about _____[*date*], in _____, California, plaintiff gave defendants written notice of plaintiff's intention to dissociate from defendant partnership as of _____[*date*], and included in that notice a demand for payment of plaintiff's interest in the partnership, hereinafter referred to as "the buyout price."

[A copy of the notice is attached as Exhibit _____ and incorporated by reference.]

[*EITHER*]

3. One hundred twenty days have elapsed since the date defendants received notice of plaintiff's written demand for payment of the buyout price and there has been no payment of the buyout price to plaintiff.

[*OR*]

3. Defendants have offered plaintiff a buyout price within 120 days of plaintiff's dissociation. Plaintiff did not and does not agree to or accept that buyout price because it is inadequate to compensate plaintiff for his/her interest in the partnership.

[*CONTINUE*]

4. By refusing to pay the buyout price to plaintiff, defendants have acted arbitrarily, vexatiously, and not in good faith. [*Add if appropriate:* Defendants have also acted arbitrarily, vexatiously, and not in good faith, by refusing to furnish plaintiff with accurate and trustworthy documentation of defendants' buyout offer, including the following: a statement of partnership assets as of the date of plaintiff's dissociation; the partnership's latest balance sheet and income statement; and an explanation of how the amount of the buyout price was estimated].

WHEREFORE, plaintiff prays judgment as follows:

[1. For appointment of appraisers to determine the buyout price of plaintiff's interest in defendant partnership;]

[2. For an order compelling defendants to render an accounting of the partnership business on _____[*date*], the date of plaintiff's dissociation;]

[3.] For a determination of the plaintiff's buyout price as of _____[*date*], the date of plaintiff's dissociation

[4.] For a judgment in the amount the court shall determine to be the buyout price, plus interest from _____[*date of dissociation*] until the date of payment; and

[5.] For an order granting plaintiff indemnification against all debts and liabilities of the partnership incurred on and after the date of plaintiff's dissociation;

[6.] For cost of suit herein incurred, including the cost of appraisers' and attorneys' fees; and

[7.] For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____[*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

[a] Partner's Right to Buyout Price

The form in [1], *above*, may be used by a dissociated partner who is seeking to recover from the partnership the value of his or her partnership interest after either the partnership has refused to pay the value of that interest or the parties cannot agree on its value. Although UPA'94 refers to an action "to determine the buyout price of [a] partner's interest" [*Corp. Code § 16701(i)*], the Act also authorizes the dissociated partner to maintain an action to "enforce ... the partner's right on dissociation to have the partner's interest in the partnership purchased" [*Corp. Code § 16405(b)(2)(B)*]. Thus, the relief sought includes not only a determination of the buyout price, but a judgment against the defendants for that amount. For discussion of the right of dissociated partners to receive a buyout of their interests and how those interests are valued, see *§ 403.13*. In the event the dissociation of the partner is the result of his or her death, this form should be modified to indicate the plaintiff's capacity as the decedent's legal representative [*see* Ch. 20, *Allegations Commonly Used*].

[b] Wrongfully Dissociating Partners

This complaint assumes that the plaintiff's dissociation did not occur before the expiration of the partnership's limited term or undertaking and therefore that it was not wrongful [*see Corp. Code § 16602(b)* (defining wrongful dissociation)]. When dissociation is wrongful because it is premature, the partnership is not required to pay the buyout price within 120 days of dissociation, but within the same period it must make tender of an estimate of the buyout price, adequately secured and interest-bearing, payable on the expiration of the term or undertaking [*Corp. Code § 16701(h)*]. If the plaintiff is a wrongfully dissociating partner, the form in [1], *above*, should be modified to indicate that, rather than failure to pay, no buyout price estimate was tendered to the plaintiff, or that it was not adequately secured. A prematurely dissociating partner, however, may avoid a deferred buyout if he or she alleges and proves that earlier payment would not cause undue hardship to the partnership business [*Corp. Code § 16701(h)*]. In that event, the form in [1], *above*, must be modified to make such an allegation. For an affirmative defense to a complaint by a wrongfully dissociating partner alleging nonpayment of the buyout price, see *§ 403.42[1]*.

[3] Allegations

The complaint in [1], *above*, alleges:

- The capacity of a defendant partnership [*see Code Civ. Proc. § 369.5(a)*], that it is being sued in its

name [*Corp. Code § 16307(a)*], and that the partners are also defendants [*see Corp. Code § 16307(b)* (partnership and partners may be sued in same action)] (Paragraph 1).

- The plaintiff's dissociation from the partnership and his or her demand for payment of a buyout price [*Corp. Code § 16701(e)*] (Paragraph 2).

- Either that the defendants have not paid the buyout price as required by *Corp. Code § 16701(e)* [*see Corp. Code § 16701(i)* (action must be commenced within one year of failure to tender or offer to pay buyout price)], or that plaintiff did not agree to defendants' offer (Paragraph 3).

- That the defendants' conduct was arbitrary, vexatious, and not in good faith, based on the failure to make any offer to pay or to provide the required documentation of an offer [*see Corp. Code § 16701(g)* (documents required to accompany a payment or tender of payment)], thus permitting the court to award the plaintiff attorneys', appraisers' and other experts' fees [*Corp. Code § 16701(i)*] (Paragraph 4).

[4] Prayer

The form in [1], *above*, gives the plaintiff the option of seeking various kinds of relief, depending on the circumstances. For example, the court could be asked to appoint appraisers to determine the buyout price (Paragraph 1), or the plaintiff may request an accounting of the partnership business as part of the action to determine the buyout price (Paragraph 2) [*Corp. Code § 16405(b)*]. The prayer for a judgment against defendants in the amount of the buyout price includes a prayer for interest from the date of dissociation to the date of payment, which the dissociating partner is entitled to under UPA'94 (Paragraph 4) [*Corp. Code § 16701(b)*]. The partnership must also indemnify the dissociated partner against all partnership liabilities, whether incurred before or after dissociation (Paragraph 5) [*Corp. Code § 16701(d), see § 403.16* (acts of dissociated partner creating partnership liability)].

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[6] Venue

The superior court in the county in which the defendants, or some of them, reside at the commencement of the action is the proper court for trial of the action [*Code Civ. Proc. § 395(a)*].

[7] Cross References

For general discussion of the requirements for complaints, see Ch. 123, *Complaints and Cross Complaints*

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35-403 California Forms of Pleading and Practice--Annotated § 403.41

§ 403.41 Allegations for Complaint to Determine Buyout Price Under UPA'94 [Corp. Code § 16405(b)(2)(B)]--By Partner Dissenting From Merger or Conversion of Partnership [Corp. Code §§ 16909(e), 16914(e)]

[1] FORM Allegations for Complaint to Determine Buyout Price Under UPA'94 [Corp. Code § 16405(b)(2)(B)]--By Partner Dissenting From Merger or Conversion of Partnership [Corp. Code §§ 16909(e), 16914(e)]

2. On or about _____[*date*], in _____, California, plaintiff received written notice that defendant partnership would _____ [merge and disappear into *or* convert into] _____ [*name and type of entity, e.g.,* a California limited liability company] as of _____[*date*]. [A copy of the notice is attached hereto as Exhibit _____ and made a part hereof.] Plaintiff did not vote in favor of the _____ [*specify:* merger *or* conversion] and does not agree to become a _____ [*specify, e.g.,* partner *or* member *or* shareholder *or* holder of interest] in _____[*name of surviving or converted entity*].

3. Within 30 days of the date of the notice referred to in Paragraph 2, above, plaintiff sent written notice to defendants that plaintiff desired to dissociate from defendant partnership, and included in that notice a demand for payment of plaintiff's interest in the partnership, hereinafter referred to as "the buyout price." [A copy of the notice is attached as Exhibit _____ and incorporated by reference.]

[2] Use of Form

The form in [1], *above*, is for use in a complaint for enforcement of a dissenting partner's right to have his or her interest in a partnership purchased when he or she does not vote for a merger or conversion of the partnership and does not agree to become a partner, member, shareholder, or holder of interest of equity securities in the surviving entity [*see Corp. Code §§ 16909(e)* (conversions), *16914(e)* (mergers)]. These allegations may be inserted in place of Paragraph 2 in *§ 403.40[1]*.

For a discussion of the right of dissenting partners to dissociate from the partnership, see *§ 403.11[9]*. The right of dissociating partners to receive a buyout of their partnership interests is discussed in *§ 403.13*.

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35-403 California Forms of Pleading and Practice--Annotated § 403.42

§ 403.42 Affirmative Defense to Action to Determine Buyout Price [Corp. Code § 16701(i)]--Partner Wrongfully Withdrew Before Expiration of Term of Partnership [Corp. Code § 16701(h)]

[1] FORM Affirmative Defense to Action to Determine Buyout Price [Corp. Code § 16701(i)]--Partner Wrongfully Withdrew Before Expiration of Term of Partnership [Corp. Code § 16701(h)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

The action is barred by *California Corporations Code Section 16701(h)*, in that plaintiff has wrongfully dissociated from defendant partnership prior to the expiration of its term or undertaking and therefore is not entitled to payment of any portion of the buyout price for his/her interest in defendant partnership until the expiration of the partnership term or completion of the partnership undertaking. A copy of the partnership agreement specifying the partnership _____ [term *or* undertaking] is attached as Exhibit _____ and incorporated by reference.

[2] Use of Form

The form in [1], *above*, is for use by a partnership that is a defendant in an action to determine the buyout price of a dissociating partner's interest in the partnership. It should be used when the plaintiff has dissociated prematurely from the partnership and has not alleged that the partnership can make immediate payment of the buyout price without suffering undue hardship to its business [*Corp. Code § 16701(h)*]. For a discussion of a dissociating partner's right to payment of the buyout price for his or her partnership interest, see *§ 403.13*. Refer also to the discussion in *§ 403.40[2][b]*.

[3] Cross References

For discussion and forms relating to answers and affirmative defenses generally, see Ch. 26, *Answers*

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35-403 California Forms of Pleading and Practice--Annotated § 403.43

§ 403.43 Affirmative Defense to Action to Determine Buyout Price [Corp. Code § 16701(i); former Corp. Code § 15043]--Existence of Partners' Agreement Settling Accounts [Corp. Code § 16103; former Corp. Code § 15043]

[1] FORM Affirmative Defense to Action to Determine Buyout Price [Corp. Code § 16701(i); former Corp. Code § 15043]--Existence of Partners' Agreement Settling Accounts [Corp. Code § 16103; former Corp. Code § 15043]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

The action is barred by an agreement between plaintiff and defendant(s), executed on _____[*date*], at _____[*place*], California, which was entered for the purpose of establishing the method for determining the amount that plaintiff is entitled to as a buyout of his/her interest in defendant partnership, an amount that defendant(s) have offered to plaintiff. [A copy of the agreement is attached as Exhibit _____ and incorporated by reference.]

[2] Use of Form

The form in [1], *above*, is for use by a partnership that is a defendant in an action to determine the buyout price of a dissociating partner's interest in the partnership. It should be used when the partnership agreement or an ancillary agreement between the parties fixes the formula for arriving at the buyout price.

Both the pre-'97 Act and UPA'94 contemplate that the partners will arrive at their own agreement concerning their respective rights in the partnership, including the right to a buyout of their interests [*see* former Corp. Code § 15043 (right of dissociating partner to accounting subject other agreement), *Corp. Code § 16103* (partnership agreement generally governs relations between partners); *see also* former Corp. Code § 15040 (court's power to settle partnership accounts subject to partners' agreement)]. Under pre-'97 Act decisions, any agreement by the parties settling partnership accounts barred an action for accounting by the court [*Cayton v. Walker (1858) 10 Cal. 450, 456* ; *Pilch v. Milikin (1962) 200 Cal. App. 2d 212, 223, 19 Cal. Rptr. 334]* .

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35-403 California Forms of Pleading and Practice--Annotated § 403.44

§ 403.44 Complaint for Partnership Accounting Under Pre-'97 Act [former Corp. Code § 15043] and Interest or Profits Based on Retired or Deceased Partner's Interest [former Corp. Code § 15042]--By Retired Partner or Representative of Deceased Partner Against Partner(s) Continuing Business [former Corp. Code § 15042]

[1] FORM Complaint for Partnership Accounting Under Pre-'97 Act [former Corp. Code § 15043] and Interest or Profits Based on Retired or Deceased Partner's Interest [former Corp. Code § 15042]--By Retired Partner or Representative of Deceased Partner Against Partner(s) Continuing Business [former Corp. Code § 15042]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR PARTNERSHIP ACCOUNT-
_____ [*name*],	)	ING AND INTEREST OR PROFITS
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. Plaintiff _____ (*name*) is the duly appointed, qualified, and acting _____ (administrator *or* executor) of the estate of _____ (*name of deceased partner*), deceased. Decedent died on _____ (*date*).]

2. [*Capacity and residence of defendant(s). See § 403.40*, Paragraph 1.]

3. On or about _____[*date*], _____ [plaintiff *or* decedent] and defendant(s) entered

into a[n] _____ [written *or* oral] partnership agreement at _____[*city*], _____ County, California for the purpose of carrying on the business of _____[*specify*], under the name of _____[*name of partnership*]. The principal place of business of the partnership was located at _____[*city*], _____ County, California. [A copy of the agreement is attached as Exhibit _____ and made a part hereof.] The partnership, under that name, conducted the aforementioned business from that time until _____[*date*], when it was dissolved by the _____ [retirement *or* death] of _____ [plaintiff *or* decedent].

4. Since that date, defendant(s) _____ [has *or* have] continued to carry on the partnership business. There has been no settlement of accounts between plaintiff and defendant(s).

5. The partnership agreement provides that _____ [plaintiff *or* decedent] has a _____ [*specify, e.g.,* one-third] interest in the partnership assets.

6. Defendant(s) _____ [is *or* are] in possession of the partnership books, assets, and accounts and the books, assets, and accounts of the continuing business. The amount of partnership assets and liabilities and the amount of _____ [plaintiff's *or* decedent's] interest in the partnership as of the date of dissolution is unknown to plaintiff and cannot be ascertained without an accounting of profits and losses that occurred during the operation of the partnership business. The amount of profits of the continuing business that are attributable to _____ [plaintiff's *or* decedent's] interest is also unknown to plaintiff and cannot be determined without an accounting of the continuing business by defendant(s).

WHEREFORE, plaintiff prays judgment against defendant(s) [, and each of them,] as follows:

1. For an order compelling defendant(s) to render an accounting of the partnership business on _____[*date*], the date of dissolution, and an accounting of the continuing business from that date;

2. For a determination of _____ [plaintiff's *or* decedent's] interest as of the date of dissolution of the partnership;

3. For judgment against defendant(s) in the amount of _____ [plaintiff's *or* decedent's] partnership interest, as determined by the court;

4. For judgment against defendant(s) for interest on _____ [plaintiff's *or* decedent's] partnership interest or, in lieu thereof, and at plaintiff's option after accounting is made, for the profits earned by the business subsequent to dissolution of the partnership that are attributable to the use of _____ [plaintiff's *or* decedent's] right in the property of the dissolved partnership.

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 403.40[1].*]

[2] Use of Form

The form in [1], *above*, is for use by either a retired partner or the legal representative of a deceased partner of a partnership governed by the pre-'97 Act. Subject to any agreement to the contrary, the pre-'97 Act specifically entitled any partner, or the partner's legal representative, to an accounting of the partner's interest at the date of dissolution against the persons or partners continuing the business [former Corp. Code § 15043]. Furthermore, a retired partner or the legal representative of a deceased partner had the right to become the dissolved partnership's creditor to the extentof the retired or deceased partner's interest in the partnership [former Corp. Code § 15042; *see* [3], *below*].

This form should not be used in proceedings governed by the UPA'94. The UPA'94 established a completely new scheme governing the purchase of the interest of a dissociating partner [*Corp. Code § 16701*]. Under this scheme, payment or tender of the value of a dissociating partner's interest must be accompanied by (1) a statement of partnership assets and liabilities as of the date of dissolution; (2) the latest available partnership balance sheet and income statement, if any, and (3) an explanation of how the estimated amount of the payment was calculated [*Corp. Code § 16701(g)*]. For a form for use in proceedings governed by UPA'94, see *§ 403.40*. For an explanation of the limited circumstances in which the pre-'97 Act remains applicable, see *§ 403.10[1]*; *see also §§ 400.10, 400.11* in Ch. 400, *Partnerships: Governing Statutes.*

[3] Allegations

The complaint in [1], *above*, alleges:

- If the action is brought by the legal representative of a deceased partner, the plaintiff's capacity as legal representative (Paragraph 1) [former Corp. Code §§ 15042, 15043].

- The existence of the partnership and dissolution on either the plaintiff's retirement or the decedent's death (Paragraph 3) [*see* former Corp. Code §§ 15031(4),(7), 15042].

- The continuance of the partnership business subsequent to dissolution, and the lack of an accounting between plaintiff and defendant(s) (Paragraph 4) [former Corp. Code § 15042].

- Plaintiff's or deceased partner's share of property of the dissolved partnership (Paragraph 5) [*see* former Corp. Code § 15042].

- The necessity of an accounting by defendant(s) of the partnership and the continuing business (Paragraph 6) [*see* former Corp. Code § 15042; *Casida v. Roberts (1959) 51 Cal. 2d 853, 857, 337 P.2d 829]* .

[4] Rights of Retiring Partner or Partner's Estate When Business Continued

Under the pre-'97 Act, unless the parties agreed otherwise, a retired partner or the legal representative of a deceased partner could have the value of the partner's interest ascertained as of the date of dissolution, and could receive that amount as an ordinary creditor from those who continued the business without settling accounts. In addition, that partner or his or her legal representative could recover interest on that amount or, at the option of that partner or his or her legal representative, could recover profits made by the continuing business attributable to the use of that partner's right to the property of the dissolved partnership. Creditors of the dissolved partnership, however, had priority over separate creditors or the representative of the retired or deceased partner on any such claims [former Corp. Code §

15042].

[5] Right to Accounting Before Choosing Between Interest and Profits

The retired or deceased partner's right to an accounting accrued as against the partner or partners continuing the business at the date of dissolution, in the absence of any agreement to the contrary [former Corp. Code § 15043]. In an action against the partner or partners continuing the partnership business to obtain an accounting and to recover the retired or deceased partner's interest, the retiring partner or deceased partner's representative was entitled to have an accounting made before being compelled to choose between (1) interest on the value of the partnership interest, or (2) profits attributable to the use of the partner's right in the property of the partnership [*see Casida v. Roberts (1959) 51 Cal. 2d 853, 857, 337 P.2d 829* (retiring partner)].

[6] Verification

See the discussion in *§ 403.40[5]*.

[7] Venue

See the discussion in *§ 403.40[6]*.

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§ 404.02 Cross References

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[a] Application of ULPA '08

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§ 404.12 Foreign Limited Partnerships

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§ 404.14 Right to Vote

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§ 404.15 Loans

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[2] ULPA

§ 404.16 Partners' Contributions

[1] ULPA '08

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[3] ULPA

§ 404.17 Distributions

[1] ULPA '08

[a] Partners' Right to Distributions

[b] Amount of Distributions

[c] Postdistribution Liability

[2] CRLPA

[a] Partners' Right to Distributions

[b] Postdistribution Liability

[3] ULPA

[a] Partners' Right to Distributions

[b] Postdistribution Liability

§ 404.18 Dissociation or Withdrawal of Limited Partner

[1] ULPA '08

[a] Causes of Dissociation

[b] Effect of Dissociation

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§ 404.19 Death of Limited Partner

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§ 404.30 Related Matthew Bender Publications

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§ 404.40 Petition for Writ of Mandate Under CRLPA--By Limited Partner Against Partnership and General Partners to Compel Making and Mailing or Delivering Specified Partnership Records [Corp. Code § 15634(f), (g) (CRLPA)]

[1] FORM

[2] Use of Form

[3] Allegations

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[5] Limited Partner's Right to Partnership Information

[6] Extending Time for Respondents to Comply

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[8] Cross References

§ 404.41 Allegation for Petition for Writ of Mandate Under CRLPA--By Limited Partner in Partnership Having More Than 35 Limited Partners to Compel Mailing of Partnership's Annual Report [Corp. Code § 15634(c)(1) (CRLPA)]

[1] FORM

[2] Use of Form

[3] Limited Partners' Right to Annual Report

§ 404.42 Allegation for Petition for Writ of Mandate Under CRLPA by Limited Partner Representing 5 Percent of Limited Partners' Interests in Partnership--To Compel Delivery or Mailing of Income Statement and Balance Sheet [Corp. Code § 15634(c)(2) (CRLPA)]

[1] FORM

[2] Use of Form

[3] Right to Income Statements

§ 404.43 Complaint Under ULPA '08 by Limited Partner Against Partnership and General Partners to Enforce Partnership Rights [Corp. Code § 15910.01 (ULPA '08)]

[1] FORM

[2] Use of Form

§ 404.44 Complaint--Class Action Under CRLPA by Limited Partners in Domestic Partnership or in Foreign Limited Partnership [Code Civ. Proc. § 382; Corp. Code § 15701 (CRLPA)]

[1] FORM

[2] Use of Form

[3] Allegations

§ 404.45 Complaint Under ULPA '08 or CRLPA for Payment of Fair Market Value of Dissenting Interest After Reorganization of Limited Partnership--By Dissenting Limited Partner [Corp. Code § 15679.6 (CRLPA); Corp. Code § 15911.25 (ULPA '08)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Time for Commencing Action

[5] Appraisal

[6] Costs and Attorney's Fees

[7] Action Brought by Limited Partnership

§§ 404.46-404.59 [Reserved]

§ 404.60 Complaint--Limited Partner's Derivative Action on Behalf of Partnership Under ULPA '08 [Corp. Code § 15910.02 (ULPA '08)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Proceeds of Derivative Action; Costs and Attorney's Fees

§ 404.61 Complaint--Limited Partner's Derivative Action on Behalf of Partnership Under CRLPA [Corp. Code § 15702 (CRLPA)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Attorney's Fees

§ 404.62 Notice of Motion to Excuse Plaintiff From Requirement of Contemporaneous Status as Partner in Derivative Action Under ULPA '08 or CRLPA [Corp. Code § 15702(a)(1) (CRLPA); Corp. Code § 15910.03(b) (ULPA '08)]

[1] FORM

[2] Use of Form

§§ 404.63-404.69 [Reserved]

§ 404.70 Complaint Under ULPA '08 or CRLPA for Damages for Breach of Limited Partnership Agreement--By Limited Partnership Against Withdrawing or Dissociating General Partner [Corp. Code § 15662(a) (CRLPA); Corp. Code § 15906.04 (ULPA '08)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] General Partner's Liability for Wrongful Withdrawal or Dissociation

[6] Cross References

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35-404 California Forms of Pleading and Practice--Annotated § 404.01

§ 404.01 Scope of Chapter

This chapter discusses the formation, conversion, and merger of limited partnerships, the rights and liabilities of general and limited partners in relation to the limited partnership and its members, and actions by limited partners and on behalf of limited partnerships. The chapter contains the following forms:

- Forms to enforce and protect limited partners' rights and interests, including forms for proceedings to compel the production of records and information by limited partnerships [*see §§ 404.40 -404.43*].

- A class action complaint by limited partners in a domestic or foreign limited partnership [*see § 404.44*].

- A complaint for payment by a limited partnership of the fair market value of a dissenting partner's interest after reorganization of the limited partnership [*see § 404.45*].

- Complaints and a notice of motion for use in partner's derivative action on behalf of the partnership [*see §§ 404.60 -404.62*].

- A complaint by a limited partnership for damages for breach of the partnership agreement by a withdrawing or dissociating general partner [*see § 404.70*].

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35-404 California Forms of Pleading and Practice--Annotated § 404.02

§ 404.02 Cross References

- For a general discussion of the governing statutes and definitions pertaining to general and limited partnerships and definitions pertaining to limited partnerships, see Ch. 400, *Partnerships: Governing Statutes* .

- For discussion and forms pertaining to actions between third parties and limited partners and limited partnerships, see Ch. 405, *Partnerships: Actions Between Limited Partners or Partnerships and Third Parties* .

- For discussion and forms pertaining to dissolution of limited partnerships, see Ch. 406, *Partnerships: Dissolution* .

- For discussion and forms pertaining to actions by and against general partners and general partnerships, see Ch. 401, *Partnerships: Actions Between General Partners and Partnerships* , and Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties* .

- For discussion and forms for use in class actions generally, see Ch. 120, *Class Actions* .

- For discussion and forms relating to contract actions generally, see Ch. 140, *Contracts* .

- For discussion and forms relating to derivative actions by the shareholders of a corporation, see Ch. 168, *Corporations: Derivative Actions* .

- For discussion of securities regulations applicable to public offerings of limited partnership or joint ventures interests, and complaints for rescission or damages for failure to comply with securities laws, see Ch. 515, *Securities and Franchise Regulation* .

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[Reserved]

§§ 404.03[Reserved]

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§ 404.10 Governing Law

[1] Limited Partnership Laws Before 2008

[a] Uniform Limited Partnership Act (ULPA)

Until January 1, 2010, the Uniform Limited Partnership Act (ULPA) [*Corp. Code § 15501 et seq.*] generally governed limited partnerships formed before July 1, 1984, the operative date of the California Revised Limited Partnership Act (CRLPA) [*Corp. Code §§ 15534* (ULPA), 15711 (CRLPA); *see Corp. Code § 15611 et seq.* (CRLPA); *see also* [b], *below*].

On or after July 1, 1984, a limited partnership formed under the ULPA could elect to be governed by CRLPA [*Corp. Code § 15712(b)(1)* (CRLPA); *see* [b], *below*]. On or after January 1, 2008, a limited partnership originally formed under the ULPA could elect to be governed by the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code § 15912.06(a)(2)* (ULPA '08); *see Corp. Code § 15900 et seq.* (ULPA '08); *see also* [2][a], *below*].

Effective January 1, 2010, the ULPA is repealed [*Corp. Code § 15534* (ULPA)], and all limited partnerships, regardless of the date of formation, are governed by the ULPA '08, except as specified by the ULPA '08 [*Corp. Code § 15912.06(b)* (ULPA '08); *see Corp. Code § 15912.06(c)* (ULPA '08) (exceptions); *see also* [2][a], *below*]. However, the ULPA '08 does not affect an action commenced, proceeding brought, or right accrued before January 1, 2008 [*Corp. Code § 15912.07* (ULPA '08)].

[b] California Revised Limited Partnership Act (CRLPA)

Until January 1, 2010, the California Revised Limited Partnership Act (CRLPA) [*Corp. Code § 15611 et seq.*] generally governed limited partnerships formed on or after July 1, 1984, and before January 1, 2008, the operative date of the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code §§ 15711, 15714, 15724* (CRLPA), 15912.06(a)(1) (ULPA '08); *see Corp. Code § 15900 et seq.* (ULPA '08)].

In addition, a limited partnership formed before July 1, 1984, could elect to be governed by CRLPA if all partners, or a lesser number as required by the partnership agreement, consented in writing to the election [*Corp. Code § 15712(b)(1)*

(CRLPA) (election was prospective only and did not affect preexisting rights of third parties)].

On or after January 1, 2008, any limited partnership governed by the CRLPA could elect to be governed by the ULPA '08 [*Corp. Code § 15912.06(a)(2)* (ULPA '08); *see Corp. Code § 15900 et seq.* (ULPA '08); *see also* [2][a], *below*].

Effective January 1, 2010, CRLPA is repealed [*Corp. Code § 15724* (CRLPA)], and all limited partnerships, regardless of the date of formation, are governed by the ULPA '08, except as specified by the ULPA '08 [*Corp. Code § 15912.06(b)* (ULPA '08); *see Corp. Code § 15912.06(c)* (ULPA '08) (exceptions); *see also* [2][a], *below*]. However, the ULPA '08 does not affect an action commenced, proceeding brought, or right accrued before January 1, 2008 [*Corp. Code § 15912.07* (ULPA '08)].

[c] Application of General Partnership Law

Limited partnerships governed by the ULPA and the CRLPA were subject to general partnership law on matters not specifically covered by the ULPA or CRLPA [*Corp. Code §§ 15722, 16111* (CRLPA); *see former Corp. Code § 15006(2)*]. The ULPA '08 adopts a different approach and does not rely on general partnership law or any other source for the rules governing limited partnerships [*see* [2][b], *below*].

[2] Uniform Limited Partnership Act of 2008 (ULPA '08)

[a] Application of ULPA '08

The Uniform Limited Partnership Act of 2008 (ULPA '08) [*see* Stats. 2006, ch. 495, § 20; *Corp. Code § 15900 et seq.* (ULPA '08)], became operative on January 1, 2008 [*Corp. Code § 15912.04* (ULPA '08)]. Through the end of 2009, the ULPA '08 generally governed the following limited partnerships [*Corp. Code § 15912.06(a)* (ULPA '08)]:

- Limited partnerships formed on or after January 1, 2008.

- Limited partnerships formed before January 1, 2008, that elected to be subject to the ULPA '08. However, the election did not change the law governing the limited partnership's liability to a third party on an obligation incurred between the time of the election and the end of 2009, if the third party did business with the partnership during the year preceding the election and had no knowledge or notice of the election at the time the obligation was incurred [*Corp. Code § 15912.06(d)* (ULPA '08)].

Effective January 1, 2010, all limited partnerships, regardless of the date of formation, generally are governed by the ULPA '08 [*Corp. Code § 15912.06(b)* (ULPA '08)]. However, with respect to a limited partnership formed before January 1, 2008, the following rules apply unless the partners elect otherwise [*Corp. Code § 15912.06(c)* (ULPA '08)]:

- The perpetual duration possessed by limited partnerships formed under the ULPA '08 [*see Corp. Code § 15901.04(c)* (ULPA '08)] does not apply, and the limited partnership has whatever duration it had under the law applicable immediately before January 1, 2008.

- The ULPA '08 provisions governing dissociation of limited partners [*see Corp. Code §§ 15906.01, 15906.02* (ULPA '08)] do not apply, and a limited partner has the same right and power to dissociate from the limited partnership, with the same consequences, as existed immediately before January 1, 2008.

- The ULPA '08 provision for the expulsion of a general partner by unanimous vote of the other partners [*see Corp. Code § 15906.03(d)* (ULPA '08)] does not apply.

- The ULPA '08 provision for the expulsion by court order [*see Corp. Code § 15906.03(e)* (ULPA '08)] does not apply, and a court has the same power to expel a general partner as the court had immediately before January 1, 2008.

- The ULPA '08 provision specifying the circumstances in which the dissociation of a general partner dissolves a limited partnership [*Corp. Code § 15908.01(c)* (ULPA '08)] does not apply, and the connection between a general partner's dissociation and the dissolution of the limited partnership is the same as existed immediately before January 1, 2008.

Moreover, the ULPA '08 does not affect an action commenced, proceeding brought, or right accrued before January 1, 2008 [*Corp. Code § 15912.07* (ULPA '08)]. Thus, because litigation involving California limited partnerships formed before 2008 may be governed by the ULPA or the CRLPA, this chapter will continue to provide discussion of those laws, and forms for use in litigation under those laws, as well as discussion and forms relevant to the ULPA '08. All references to *Corp. Code § 15501 et seq.* (ULPA) and to *Corp. Code § 15611 et seq.* (CRLPA) in this chapter are to provisions repealed as of 2010.

[b] Inapplicability of General Partnership Law

Unlike its predecessors [*see* [1], *above*], the ULPA '08 is a stand-alone law that does not rely on general partnership law or any other source for the rules governing limited partnerships [*see* R. Bradbury Clark, California's Uniform Limited Partnership Act of 2008--Summary and Analysis of the Act's Major Provisions, § 4.01[2] (LexisNexis 2007)]. Thus, the ULPA '08 is the only source that needs to be consulted for the statutory rules governing formation, filings, contributions and distributions, rights of transferees and creditors, dissociation, dissolution, actions by partners, conversion and merger, dissenting limited partners' rights, and foreign limited partnerships.

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§ 404.11 Formation of Limited Partnerships

[1] ULPA '08

To form a limited partnership under the ULPA '08, the partners must (1) enter into a partnership agreement and (2) file a certificate of limited partnership with the Secretary of State [*Corp. Code § 15902.01(a)* (ULPA '08)]. The partnership agreement may be made before or after the filing of the certificate of limited partnership [*Corp. Code § 15902.01(a)* (ULPA '08)]. The certificate of limited partnership must be prepared on a form prescribed by the Secretary of State and must state all of the following [*Corp. Code § 15902.01(a)* (ULPA '08)]:

- The name of the limited partnership [*see Corp. Code § 15901.08* (ULPA '08) (requirements for name)].

- The address of the limited partnership's initial designated office.

- The name and address of the initial agent for service of process [*see Corp. Code § 15901.16(1)(d)* (ULPA '08) (requirements for agent)].

- The name and the address of each general partner.

In addition, the certificate of limited partnership may contain any other matters, but it may not contain any provisions that are inconsistent with the restrictions on the contents of the limited partnership agreement [*Corp. Code § 15902.01(b)* (ULPA '08); *see Corp. Code § 15901.10(b)* (ULPA '08) (restrictions on contents of limited partnership agreement)].

Generally, the limited partnership is formed when the Secretary of State files the certificate of limited partnership, unless the certificate specifies a delayed effective date [*Corp. Code § 15902.01(c)* (ULPA '08); *see Corp. Code § 15902.06(c)* (ULPA '08) (procedure to revoke certificate before delayed effective date); *see also Corp. Code § 15902.01(f)* (ULPA '08) (Secretary of State may cancel filing of certificate of limited partnership if filing fee is not paid)].

Generally, if any provision of a limited partnership agreement is inconsistent with the filed certificate of limited partnership, the agreement prevails as to partners and transferees, and the filed certificate prevails as to persons, other than partners and transferees, that reasonably rely on the filed certificate to their detriment [*Corp. Code § 15902.01(d)* (ULPA '08)].

A limited partnership may record in the office of the county recorder of any county in this state a certified copy of the certificate of limited partnership, or any amendment thereto, which has been filed by the Secretary of State [*Corp. Code § 15902.01(e)* (ULPA '08)].

[2] CRLPA

Under the CRLPA, a limited partnership was formed by the partners executing a partnership agreement and the general partners executing, acknowledging, and filing a certificate of limited partnership. The certificate must be filed in the office of, and on a form prescribed by, the Secretary of State. The certificate was required to state all of the following [*Corp. Code § 15621(a)* (CRLPA)]:

- The name of the partnership.
- The street address of the principal executive office [*see Corp. Code § 15614(a)* (CRLPA) (requiring office to be maintained in California and certain records to be kept there)].
- The names and addresses of the general partners.
- The name and address of an agent for service of process or a corporate agent [*see Corp. Code § 15614(b)* (CRLPA) (requiring agent for service of process to be maintained in California)].
- Any other matters that the person filing the certificate determined to include.

The limited partnership was formed at the time the certificate was filed in the office of the Secretary of State [*Corp. Code § 15621(b)* (CRLPA)]. For all purposes, a copy of the certificate of limited partnership duly certified by the Secretary of State is conclusive evidence of the formation of a limited partnership and prima facie evidence of its existence [*Corp. Code § 15621(c)* (CRLPA)]. A limited partnership that is defectively formed due to its failure to file a certificate of limited partnership may still have the capacity to sue as a general partnership [*American Alternative Energy Partners II v. Windridge, Inc. (1996) 42 Cal. App. 4th 551, 560-562, 49 Cal. Rptr. 2d 686* (partnership's noncompliance with certificate requirement held to have rendered it a general partnership under former *Corp. Code § 15044* with capacity to sue at time of filing complaint)].

[3] ULPA

Before July 1, 1984, under the ULPA, a limited partnership was formed by filing a certificate of limited partnership with the county recorder [*Corp. Code § 15502(1)(b), (2)* (ULPA)]. The certificate was required to contain all of the following [*Corp. Code § 15502(1)(a)* (ULPA)]:

- The name of the partnership.
- The character of the business.
- The location of the principal place of business.

- The name and place of residence of each member, with general and limited partners designated as such.

- The partnership's term of existence.

- The amount of cash and a description of and the agreed value of the other property contributed by each limited partner.

- The additional contributions, if any, agreed to be made by each limited partner and the times at which, or the events on the happening of which, additional contributions must be made.

- The time, if agreed upon, when the contribution of each limited partner is to be returned.

- The share of the profits or the other compensation by way of income that each limited partner will receive by reason of his or her contribution.

- The right, if given, of a limited partner to substitute an assignee as contributor in his or her place, and the terms and conditions of the substitution.

- The right, if given, of the partners to admit additional limited partners.

- The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority.

- The right, if given, of the remaining general partner or partners to continue the business on the death, retirement, or insanity of a general partner.

- The right, if given, of a limited partner to demand and receive property other than cash in return for his or her contribution.

- The right, if given, of a limited partner to vote on certain matters affecting the basic structure of the partnership [*see Corp. Code § 15507(b)* (ULPA)], and the vote required for election or removal of general partners, or to cause other action to be effective as to the limited partnership.

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§ 404.12 Foreign Limited Partnerships

[1] ULPA'08

[a] Laws Governing Foreign Limited Partnership

The laws of the state or other jurisdiction under which a foreign limited partnership is organized govern relations among the partners of the foreign limited partnership and between the partners and the foreign limited partnership [*Corp. Code § 15909.01(a)* (ULPA '08)]. Those same laws govern the liability of partners as partners for an obligation of the foreign limited partnership, except as to foreign limited liability limited partnerships, which are treated as if they were foreign limited partnerships [*Corp. Code § 15909.01(a)* (ULPA '08)].

[b] Registration of Foreign Limited Partnership

A foreign limited partnership may apply for a certificate of registration to transact business in California [*Corp. Code § 15909.02(a)* (ULPA '08); *see* [c], *below* (activities that constitute transacting business in California)]. An application must be prepared on a form prescribed by the California Secretary of State, signed and acknowledged by a general partner of the foreign limited partnership, and filed with the Secretary of State [*Corp. Code § 15909.02(a)* (ULPA '08)]. The application must state all of the following [*Corp. Code § 15909.02(a)* (ULPA '08)]:

- The name of the foreign limited partnership and, if the name does not comply with the requirements for the name of a California limited partnership [*see Corp. Code § 15901.08* (ULPA '08) (name requirements)], an alternate name adopted pursuant to ULPA '08 naming requirements for foreign limited partnerships [*see Corp. Code § 15909.05(a)* (ULPA '08)].

- The name of the state or other jurisdiction under whose law the foreign limited partnership is organized, and the date of its formation.

- The address of the foreign limited partnership's designated office and, if the laws of the jurisdiction under which the foreign limited partnership is organized require the foreign limited partnership to maintain an office in that jurisdiction, the address of the required office.

- The name and address of the foreign limited partnership's initial agent for service of process in California [*see Corp. Code § 15901.16(d)(1)* (ULPA '08)].

- The name and address of each of the foreign limited partnership's general partners.

- Whether the foreign limited partnership is a foreign limited liability limited partnership.

A foreign limited partnership must deliver with the completed application a certificate of existence or a record of similar import signed by the Secretary of State or other official having custody of the foreign limited partnership's publicly filed records in the state or other jurisdiction under whose law the foreign limited partnership is organized [*Corp. Code § 15909.02(b)* (ULPA '08)].

A foreign limited partnership may not be denied a certificate of registration by reason of any difference between the laws of the jurisdiction under which the foreign limited partnership is organized and the laws of California [*Corp. Code § 15909.01(b)* (ULPA '08)]. A certificate of registration does not authorize a foreign limited partnership to engage in any business or exercise any power that a limited partnership may not engage in or exercise in California [*Corp. Code § 15909.01(c)* (ULPA '08)].

A foreign limited partnership may record in the office of the county recorder of any county in California a certified copy of the application for registration to transact business, together with the certificate of registration, that has been filed by the Secretary of State. The recording creates a conclusive presumption in favor of any bona fide purchaser or encumbrancer for value of the partnership real property located in the county in which the certified copy has been recorded, that the persons named as general partners in the application are the general partners of the partnership, and that they are all of the general partners of the partnership [*Corp. Code § 15902.01(e)* (ULPA '08)].

[c] Transacting Business in California

Transacting business in California, for purposes of registration, refers to entering into repeated and successive transactions of business in California, other than interstate or foreign commerce [*Corp. Code § 15901.02(ai)(1)* (ULPA '08)]. Transacting business in California generally includes the ownership in California of income-producing real property or tangible personal property, other than property involved in one of the activities described below that are excluded from the statutory definition of transacting business in California [*Corp. Code § 15909.03(b)* (ULPA '08)].

A foreign limited partnership is not considered to be transacting business in California for this purpose solely because of its status as one or more of the following [*Corp. Code § 15901.02(ai)(2)* (ULPA '08); *see also Corp. Code § 15611(ag)(2)* (CRLPA)]:

- A shareholder of a foreign corporation transacting intrastate business.

- A shareholder of a domestic corporation.

- A limited partner of a foreign limited partnership transacting intrastate business.

- A limited partner of a domestic limited partnership.

- A member or manager of a foreign limited liability company transacting intrastate business.

- A member or manager of a domestic limited liability company.

In addition, without excluding other activities that may not constitute transacting intrastate business, a foreign limited partnership is not considered to be transacting intrastate business solely by reason of carrying on in California one or more of the following activities [*Corp. Code § 15901.02(ai)(3)* (ULPA '08); *see also Corp. Code § 15611(ag)(3)* (CRLPA)]:

- Maintaining or defending any action or suit or any administrative or arbitration proceeding, or effecting the settlement thereof or the settlement of claims and disputes.

- Holding meetings of its partners or carrying on other activities concerning its internal affairs.

- Maintaining bank accounts.

- Maintaining offices or agencies for the transfer, exchange, and registration of its securities or depositories with relation to its securities.

- Effecting sales through independent contractors.

- Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where the orders require acceptance outside California before becoming binding contracts.

- Creating or acquiring evidences of debt or mortgages, liens, or security interests on real or personal property.

- Securing or collecting debts or enforcing mortgages and security interests in property securing the debts.

- Conducting an isolated transaction completed within a period of 180 days and not in the course of a number of repeated transactions of like nature.

- Transacting business in interstate commerce.

Further, a person is not be deemed to be transacting intrastate business in California solely because of the person's status as a limited partner of a domestic limited partnership or a foreign limited partnership registered to transact intrastate business in California [*Corp. Code § 15901.02(ai)(4)* (ULPA '08); *see also Corp. Code § 15611(ag)(4)* (CRLPA)].

The foregoing definitions of transacting business in California do not apply in determining the contacts or activities that may subject a foreign limited partnership to service of process, taxation, jurisdiction, or other regulation under any other law of California [*Corp. Code §§ 15901.02(ai), 15909.03(c)* (ULPA '08)].

[d] Consequences of Failure to Register

A foreign limited partnership transacting business in California may not maintain an action or proceeding in California unless it has a certificate of registration to transact business in California [*Corp. Code § 15909.07(b)* (ULPA '08)]. However, the lack of a certificate of registration to transact business in California does not impair the validity of a contract or act of the foreign limited partnership or prevent the foreign limited partnership from defending an action or proceeding in California [*Corp. Code § 15909.07(d)* (ULPA '08)].

Any foreign limited partnership that transacts intrastate business in California without registration is subject to a penalty of $20 for each day that the unauthorized intrastate business is transacted, up to a maximum of $10,000 [*Corp. Code § 15909.07(c)* (ULPA '08); *see Corp. Code § 2258* (procedure to collect penalty)].

A partner of a foreign limited partnership is not liable for the obligations of the foreign limited partnership solely by reason of the foreign limited partnership's having transacted business in California without a certificate of registration [*Corp. Code § 15909.07(e)* (ULPA '08)].

If a foreign limited partnership transacts business in California without a certificate of registration or cancels its certificate of registration, it appoints the California Secretary of State as its agent for service of process for rights of action arising out of the transaction of business in California [*Corp. Code § 15909.07(f)* (ULPA '08)].

[2] CRLPA

Under the CRLPA, a foreign limited partnership seeking to transact intrastate business in California was required to obtain a certificate of registration from the California Secretary of State [*Corp. Code §§ 15692, 15693* (CRLPA)]. The CRLPA definition of transacting business in California for this purpose was substantially similar to the ULPA '08 definition [*compare Corp. Code § 15611(ag)(1)* (CRLPA) *with Corp. Code § 15901.02(ai)(1)* (ULPA '08); *see* [1][c], *above*].

A certificate of registration issued before January 1, 2008 (the effective date of the ULPA '08), remains valid, since the ULPA '08 does not affect any right accrued before that date [*Corp. Code § 15912.07* (ULPA '08)].

A foreign limited partnership transacting intrastate business in California before January 1, 2008, could not maintain any action, suit, or proceeding in any California court if it was not registered in California [*Corp. Code § 15697(a)* (CRLPA)]. A partnership that had not registered was deemed to have appointed the California Secretary of State as its agent for service of process with respect to causes of action arising out of a transaction of business in California [*Corp. Code § 15697(e)* (CRLPA)]. Any action commenced or proceeding brought before January 1, 2008, continues to be governed by CRLPA [*Corp. Code § 15912.07* (ULPA '08)].

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§ 404.13 Limited Partners' Right to Partnership Information

[1] ULPA '08

Under the ULPA '08, on 10 days' demand made in a writing or other "record" received by the limited partnership [*see Corp. Code § 15901.02(ac)* (ULPA '08) ("record" means information that is inscribed on tangible medium or that is stored in electronic or other medium and is retrievable in perceivable form)], a limited partner may inspect and copy any information required to be maintained by the limited partnership [*see Corp. Code § 15901.11*], during regular business hours in the limited partnership's designated office. The limited partner need not have any particular purpose for seeking the information [*Corp. Code § 15903.04(a)* (ULPA '08)].

In addition, during regular business hours and at a reasonable location specified by the limited partnership, a limited partner generally may obtain from the limited partnership, which may transmit the information electronically, and inspect and copy true and full information regarding the state of the activities and financial condition of the limited partnership and other information regarding the activities of the limited partnership as is just and reasonable if all of the following circumstances exist [*Corp. Code § 15903.04(b)* (ULPA '08)]:

- The limited partner seeks the information for a purpose reasonably related to the partner's interest as a limited partner.

- The limited partner makes a demand in a record received by the limited partnership, describing with reasonable particularity the information sought and the purpose for seeking the information.

- The information sought is directly connected to the limited partner's purpose.

Within 10 days after receiving a demand from a limited partner under the foregoing procedure, the limited partnership must, in a record, inform the limited partner (1) what information the limited partnership will provide in response to the demand; (2) when and where the limited partnership will provide the information; and (3) if the limited partnership declines to provide any demanded information, the limited partnership's reasons for declining [*Corp. Code § 15903.04(c)* (ULPA '08)].

A person dissociated as a limited partner generally has a similar right to inspect and copy information about the limited partnership during regular business hours in the limited partnership's designated office if (1) the information pertains to the period during which the person was a limited partner, (2) the person seeks the information in good faith, and (3) the person otherwise meets the requirements for a limited partner to obtain access to the information [*Corp. Code § 15903.04(d),(e)* (ULPA '08); *but see Corp. Code §§ 15903.04(f), 15907.04* (ULPA '08) (inspection rights of representative of deceased limited partner)]. For discussion of dissociation of limited partners, see *§ 404.18*.

Despite the foregoing, a limited partnership has the right to keep confidential from limited partners, for a period of time the limited partnership deems reasonable, any information (1) that the limited partnership reasonably believes to be in the nature of trade secrets or other information the disclosure of which the limited partnership in good faith believes is not in the best interest of the limited partnership or could damage the limited partnership or its business, or (2) that the limited partnership is required by law or by agreement with a third party to keep confidential [*Corp. Code § 15903.04(g)* (ULPA '08)].

A limited partnership may impose reasonable restrictions on the use of information obtained under the foregoing procedures. In a dispute concerning the reasonableness of such a restriction, the limited partnership has the burden of proving reasonableness [*Corp. Code § 15903.04(h)* (ULPA '08)].

A limited partnership may charge a person that makes a demand for information under the foregoing procedures reasonable costs of copying, limited to the costs of labor and material [*Corp. Code § 15903.04(i)* (ULPA '08)].

Whenever the ULPA '08 or a partnership agreement provides for a limited partner to give or withhold consent to a matter, before the consent is given or withheld, the limited partnership must, without demand, provide the limited partner with all information material to the limited partner's decision that the limited partnership knows [*Corp. Code § 15903.04(j)* (ULPA '08)].

A limited partner or person dissociated as a limited partner may exercise the foregoing rights through an attorney or other agent. Any confidentiality or restriction imposed on the use of the information applies both to the attorney or other agent and to the limited partner or person dissociated as a limited partner [*Corp. Code § 15903.04(k)* (ULPA '08)].

The foregoing rights to obtain information do not extend to a person as transferee, but they may be exercised by the legal representative of an individual under a legal disability who is a limited partner or person dissociated as a limited partner [*Corp. Code § 15903.04*(*l*) (ULPA '08)].

[2] CRLPA

[a] In General

In a limited partnership governed by the CRLPA, a limited partner has the right to receive specific partnership information. Under CRLPA, any request, inspection, or copying by a limited partner may be made by the limited partner or by the limited partner's agent or attorney [*Corp. Code § 15634(i)* (CRLPA)]. On the request of a limited partner, the general partners must promptly deliver to the limited partner, at the expense of the partnership, a copy of all partnership information required by the CRLPA to be maintained by the partnership [*Corp. Code § 15634(a)* (CRLPA); *see Corp. Code § 15615(a), (b), (d)* (CRLPA) (information required to be maintained by CRLPA)]. On reasonable request, each limited partner may also inspect and copy during normal business hours any of the partnership records required to be maintained by the partnership under *Corp. Code § 15615* (CRLPA) [*Corp. Code § 15634(b)(1)* (CRLPA)].

[b] Tax Information

In a limited partnership governed by the CRLPA, each limited partner has the right, on reasonable request, to obtain from the general partners a copy of the limited partnership's federal, state, and local tax or information returns for each year, promptly after the returns become available [*Corp. Code § 15634(b)(2)* (CRLPA)]. In addition, the general partners must send to each of the partners, within 90 days after the end of each taxable year, such information as is necessary to complete federal and state income tax or information returns. In the case of a limited partnership with 35 or fewer limited partners, a copy of the partnership's federal, state, and local income tax or information returns for the year must also be furnished [*Corp. Code § 15634(e)* (CRLPA)].

[c] Amendment to Agreement

In a limited partnership governed by the CRLPA, the general partners must promptly furnish to a limited partner a copy of any amendment to the partnership agreement executed by a general partner pursuant to a power of attorney from the limited partner [*Corp. Code § 15634(d)* (CRLPA)].

[d] Partnership With More Than 35 Limited Partners

In a limited partnership governed by the CRLPA and having more than 35 limited partners, the general partners must send an annual report to each of the partners not later than 120 days after the close of the fiscal year. The report must contain a balance sheet as of the end of the fiscal year and an income statement and statement of cash flows for the fiscal year. In addition, in a limited partnership with more than 35 limited partners, the limited partners representing at least 5 percent of the interests of the limited partners may make a written request to a general partner for an income statement of the limited partnership for the initial 3-month, 6-month, or 9-month period of the current fiscal year ended more than 30 days prior to the date of the request and a balance sheet of the partnership as of the end of that period. The statement must be delivered or mailed to the limited partners within 30 days after the request [*Corp. Code § 15634(c)* (CRLPA)].

[e] Waiver of Right Is Unenforceable

Any waiver of the rights of limited partners to receive, inspect, or copy partnership books and information under CRLPA is unenforceable [*Corp. Code § 15634(h)* (CRLPA)].

[f] Enforcing Right to Partnership Information

In addition to any other remedies, a court of competent jurisdiction may enforce the duty of general partners to make, mail, or deliver the information and financial statements that limited partners are entitled to receive, inspect, and copy. For good cause shown, the court may also extend the time that the general partners have to comply [*Corp. Code § 15634(f)* (CRLPA)]. In any such action, if the court finds that the failure of the partnership to comply was without justification, the court may award an amount sufficient to reimburse the partners bringing the action for reasonable expenses incurred by the partners, including attorney's fees [*Corp. Code § 15634(g)* (CRLPA); *see Berti v. Santa Barbara Beach Properties (2006) 145 Cal. App. 4th 70, 74-76, 51 Cal. Rptr. 3d 364* (statute allows court to award attorney's fees incurred in post-judgment proceedings for enforcement of judgment in action brought under that statute)].

[3] ULPA

The ULPA merely provides that a limited partner has the same rights as a general partner to have the partnership books kept at the principal place of business of the partnership, and to inspect and copy any of them at all times [*Corp. Code § 15510(1)(a)* (ULPA)]. ULPA does not specify the rights of general partners regarding partnership books, but states that general partners have the same rights, in general, as partners in a general partnership [*see Corp. Code § 15509(1)* (ULPA)]. The law governing general partnerships provides that partnership books and records, in writing or in any

other form capable of being converted into clearly legible tangible form, must be kept at the partnership's chief executive office, and that all partners have the right to inspect and copy them [*Corp. Code § 16403*].

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§ 404.14 Right to Vote

[1] ULPA '08

The ULPA '08 provides that the partnership agreement may provide to all or certain specified classes of limited partners the right to vote, separately or with all or any class or the general partners, on any matter [*Corp. Code § 15903.07(b)* (ULPA '08)].

[2] CRLPA and ULPA

Both the CRLPA and the ULPA provide that the limited partners have the right to vote on matters of general partnership administration [*see Corp. Code §§ 15632(b)(5), 15636(f)* (CRLPA); *Corp. Code § 15507(b)* (ULPA); *see also* discussion of the effects of control of a business in Ch. 405, *Partnerships: Actions Between Limited Partners or Partnerships and Third Parties*].

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§ 404.15 Loans

[1] ULPA '08 and CRLPA

A limited or general partner in a limited partnership governed by the ULPA '08 or the CRLPA may lend money to and transact other business with the partnership. A partner making a loan to or transacting business with the partnership generally has the same rights and obligations with respect to the loan or other transaction as a person that is not a partner [*Corp. Code § 15901.12* (ULPA '08); *Corp. Code § 15617* (CRLPA)]. However, this general power to transact business with the partnership does not affect a general partner's fiduciary duty not to purchase partnership debt and foreclose out a partner [*see BT-I v. Equitable Life Assurance Society (1999) 75 Cal. App. 4th 1406, 1415, 89 Cal. Rptr. 2d 811* (decided under *Corp. Code § 15617* (CRLPA))].

[2] ULPA

The ULPA is more restrictive than the ULPA '08 or the CRLPA with respect to a limited partner's right to loan money to the partnership. Like the ULPA '08 and the CRLPA, the ULPA permits a limited partner to lend money to and transact other business with the limited partnership. Unless the limited partner is also a general partner, he or she may also receive on account of resulting claims against the partnership, with general creditors, a pro rata share of the assets. If, however, at the time of receipt the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners, no limited partner may, with respect to any such claim, receive any partnership property as collateral security or receive any payment, conveyance, or release from liability from a general partner [*Corp. Code § 15513(a)* (ULPA)].

Under the ULPA, a limited partner may not make a loan on the security of partnership property if, at the time the loan is made, the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners [*Corp. Code § 15513(b)*]. Making a secured loan, receiving collateral security, or a payment, conveyance, or release in violation of these provisions is a fraud on the creditors of the limited partnership [*Corp. Code § 15513(c)* (ULPA)].

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§ 404.16 Partners' Contributions

[1] ULPA '08

Under the ULPA '08, a partner's contribution to a limited partnership may consist of tangible or intangible property or other benefit to the partnership, including money, services performed, promissory notes, other agreements to contribute cash or property, and contracts for services to be performed [*Corp. Code § 15905.01* (ULPA '08)].

A partner's obligation to contribute money or other property or other benefit to, or to perform services for, a limited partnership is not excused by the partner's death, disability, or other inability to perform personally [*Corp. Code § 15905.02(a)* (ULPA '08)].

If a partner does not make a promised nonmonetary contribution, the partner is obligated at the option of the limited partnership to contribute money equal to the value of that portion, as stated in the required information, of the stated contribution that has not been made [*Corp. Code § 15905.02(b)* (ULPA '08); *see Corp. Code § 15901.02(ad)* ("required information" refers to information limited partnership is required to maintain under *Corp. Code § 15901.11* (ULPA '08)].

The obligation of a partner to make a contribution or return money or other property paid or distributed in violation of the ULPA '08 may be compromised only by consent of all partners. If, without notice of any such compromise, a creditor of the limited partnership extends credit or otherwise acts in reliance on a partner's contribution obligation that is not fulfilled because of the partner's death, disability, or other inability to perform personally, the creditor may enforce the original obligation [*Corp. Code § 15905.02(c)* (ULPA '08)].

A partnership agreement may provide that the interest of a partner who fails to make any required contribution or other payment will be subject to specific remedies for, or specific consequences of, the failure. A provision will be enforceable in accordance with its terms unless the partner seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the agreement was made. The specific remedies or consequences may include loss of voting, approval, or other rights, loss of the partner's ability to actively participate in the management and operations of the partnership, liquidated damages, or a reduction of the defaulting

partner's economic rights. The reduction of the defaulting partner's economic rights may include one or more of the following provisions [*Corp. Code § 15905.02(d)* (ULPA '08)]:

- Diluting, reducing, or eliminating the defaulting partner's proportionate interest in the partnership.
- Subordinating the defaulting partner's interest in the partnership to that of nondefaulting partners.
- Permitting a forced sale of the partnership interest.
- Permitting the lending or contribution by other partners of the amount necessary to meet the defaulting partner's commitment.
- Adjusting the interest rates or other rates of return, preferred, priority, or otherwise, with respect to contributions by or capital accounts of the other partners.
- Fixing the value of the defaulting partner's interest in the partnership by appraisal, formula and redemption, or sale of the defaulting partner's interest in the partnership at a percentage of that value.

The foregoing list of remedies for a partner's default does not affect (1) the rights of third-party creditors of the partnership to seek equitable remedies or (2) any rights existing under the Uniform Fraudulent Transfer Act [*Corp. Code § 15905.02(d)(7)* (ULPA '08); *see Civ. Code § 3439 et seq.* (Uniform Fraudulent Transfer Act)].

[2] CRLPA

Under the CRLPA, a limited or general partner need not make any contribution in money, property, or services, or other obligation to contribute money or property or to render services to acquire a partnership interest [*Corp. Code § 15651* (CRLPA)].

Subject to the terms of the limited partnership agreement, a partner is not excused from an obligation to perform any promise to contribute cash or property or to perform services for any reason, including death or disability. If the partner does not make the required contribution of property or services, the partner is obligated at the option of the limited partnership to contribute cash equal to the portion of the fair market value, or the agreed value if stated in the partnership agreement, of the contribution that has not been made [*Corp. Code § 15655* (CRLPA)]. This option is in addition to, and not in lieu of, any other rights, including the right of specific performance, that the limited partnership may have against the partner under the partnership agreement or applicable law [*Corp. Code § 15655* (CRLPA)].

Under the CRLPA, the obligation of a partner to make a contribution may be compromised only by the written consent of all the partners [*Corp. Code § 15636(c)* (CRLPA)]. No limited partner may be required to make any additional contribution to the partnership, however [*Corp. Code § 15636(a)* (CRLPA)].

[3] ULPA

Under the ULPA, the contribution of a limited partner may be in cash or other property, but not services [*Corp. Code § 15504* (ULPA)].

The ULPA specifically provides that a limited partner is liable to the partnership for the difference between his or her contribution as actually made and that stated in the certificate as having been made. He or she is also liable for any unpaid contribution that he or she agreed in the certificate to make in the future at the time and on the conditions stated in the certificate [*Corp. Code § 15517(1)* (ULPA)]. A limited partner holds as trustee for the partnership specific property stated in the certificate as contributed by that limited partner, but that was not contributed or that has been

wrongfully returned, and money or other property wrongfully paid or conveyed to that partner on account of his or her contribution [*Corp. Code § 15517(2)(b)* (ULPA)]. These liabilities of a limited partner may be waived or compromised only by the consent of all partners. A waiver or compromise does not affect the right of a partnership creditor to enforce such a liability if the creditor was one who extended credit or whose claim arose after the filing and before cancellation or amendment of the certificate of limited partnership [*Corp. Code § 15517(3)* (ULPA)].

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§ 404.17 Distributions

[1] ULPA '08

[a] Partners' Right to Distributions

Any distribution by a limited partnership governed by the ULPA '08 must be shared among the partners on the basis of the value, as stated in the partnership's required records when the partnership decides to make the distribution, of the contributions the limited partnership has received from each partner [*Corp. Code § 15905.03* (ULPA '08)].

A partner does not have a right to any distribution before the dissolution and winding up of the limited partnership unless the limited partnership decides to make an interim distribution [*Corp. Code § 15905.04* (ULPA '08)]. A person who has been dissociated from the partnership does not have a right to receive a distribution on account of dissociation [*Corp. Code § 15905.05* (ULPA '08)].

A partner does not have a right to demand or receive any distribution from a limited partnership in any form other than cash. Subject to the partnership's obligation to pay its creditors on the winding up of the partnership's activities [*see Corp. Code § 15908.09(b)* (ULPA '08)], a limited partnership may distribute an asset in kind to the extent each partner receives a percentage of the asset equal to the partner's share of distributions [*Corp. Code § 15905.06* (ULPA '08)].

The profits and losses of a limited partnership must be allocated among the partners in the manner provided in the partnership agreement. If the partnership agreement does not otherwise provide, profits and losses must be allocated in the same manner as the partners' share distributions [*Corp. Code § 15905.035* (ULPA '08)].

When a partner or transferee becomes entitled to receive a distribution, the partner or transferee has the status of, and is entitled to all remedies available to, a creditor of the limited partnership with respect to the distribution. However, the limited partnership's obligation to make a distribution is subject to an offset for any amount owed to the limited partnership by the partner or dissociated partner on whose account the distribution is made [*Corp. Code § 15905.07* (ULPA '08)].

The limited partnership agreement may impose further limitations on distributions by the partnership [*see Corp. Code §*

15905.08(a) (ULPA '08)].

[b] Amount of Distributions

A limited partnership may not make a distribution if, after the distribution, (1) the partnership would not be able to pay its debts as they become due in the ordinary course of the partnership's activities; or (2) the partnership's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the partnership were to be dissolved, wound up, and terminated at the time of the distribution, to satisfy the preferential rights upon dissolution, winding up, and termination of partners whose preferential rights are superior to those of the persons receiving the distribution [*Corp. Code § 15905.08(b)* (ULPA '08)]. A limited partnership's indebtedness, including indebtedness issued in connection with or as part of a distribution, is not considered a liability for purposes of this provision if the terms of the indebtedness provide that payment of principal and interest are made only to the extent that a distribution could then be made to partners under this provision [*Corp. Code § 15905.08(f)* (ULPA '08)]. To determine that the foregoing provision does not prohibit a given distribution, a limited partnership may use (1) financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances, or (2) a fair valuation or other method that is reasonable in the circumstances [*Corp. Code § 15905.08(c)* (ULPA '08)]. Generally, the effect of such a distribution is measured as follows [*Corp. Code § 15905.08(d)* (ULPA '08)]:

- In the case of distribution by purchase, redemption, or other acquisition of a transferable interest in the limited partnership, as of the date money or other property is transferred or debt incurred by the limited partnership.

- In all other cases, as of the date (1) the distribution is authorized, if the payment occurs within 120 days after that date; or (2) the payment is made, if payment occurs more than l20 days after the distribution is authorized.

However, if indebtedness is issued as a distribution, each payment of principal or interest on the indebtedness is treated as a distribution, the effect of which is measured on the date the payment is made [*Corp. Code § 15905.08(g)* (ULPA '08)].

A limited partnership's indebtedness to a partner incurred by reason of a distribution made in accordance with the foregoing is at parity with the limited partnership's indebtedness to its general unsecured creditors [*Corp. Code § 15905.08(e)* (ULPA '08)].

[c] Postdistribution Liability

A general partner that consents to a distribution made in violation of the restrictions described in [b], *above*, is personally liable to the limited partnership for the amount of the distribution that exceeds the amount that could have been distributed without the violation, if it is established that in consenting to the distribution the general partner breached his or her or its fiduciary duties [*Corp. Code § 15905.09(a)* (ULPA '08); *see Corp. Code § 15904.08* (ULPA '08) (fiduciary duties of general partner)]. A partner or transferee that received a distribution knowing that the distribution to that partner or transferee was made in violation of the foregoing provisions is personally liable to the limited partnership but only to the extent that the distribution received by the partner or transferee exceeded the amount that could have been properly paid [*Corp. Code § 15905.09(b)* (ULPA '08)].

An action to enforce the general partner's personal liability for excess distributions must be commenced within four years after the distribution [*Corp. Code § 15905.09(d)* (ULPA '08)]. In such an action, the general partner may (1) implead any other person who is liable and compel contribution from the person, and (2) implead any person who received an excess distribution and compel contribution from the person in the amount of the excess received by that person [*Corp. Code § 15905.09(c)* (ULPA '08)].

[2] CRLPA

[a] Partners' Right to Distributions

Distributions of the money or property of a limited partnership governed by the CRLPA must be made to the partners in the manner provided in the partnership agreement. If the agreement does not provide otherwise, distributions that are a return of capital must be made in proportion to the contributions of each partner and distributions that are not a return of capital must be made in proportion to the allocation of profits [*Corp. Code § 15654* (CRLPA)]. The profits and losses of a limited partnership must be allocated among the partners in the manner provided in the partnership agreement. If the agreement does not provide otherwise, profits and losses must be allocated in proportion to the contributions of each partner [*Corp. Code § 15653* (CRLPA)]. Subject to the rights of a withdrawing partner or a contrary partnership agreement, no limited partner has priority over any other limited partner as to return of contributions or as to compensation as a limited partner by way of income [*Corp. Code § 15636(b)* (CRLPA); *see Corp. Code § 15664*].

Subject to the rights of creditors when a partnership is wound up [*see Corp. Code § 15684*], once a partner becomes entitled to receive a distribution, that partner has the status of, and is entitled to all remedies available to, a creditor of the limited partnership with respect to the distribution [*Corp. Code § 15665* (CRLPA)]. Subject to any contrary provision in the partnership agreement, no limited partner has the right to receive property other than money on distribution [*Corp. Code § 15636(d)* (CRLPA)], and a partner may not be compelled to accept a distribution of any asset in kind from a limited partnership in lieu of a proportionate distribution of money being made to other partners [*Corp. Code § 15636(e)* (CRLPA)].

A partner is entitled to receive distributions on withdrawal from the partnership [*see Corp. Code § 15664* (CRLPA); *see also § 404.18[2]*], and on dissolution of the partnership [*see Corp. Code § 15684* (CRLPA); *see also* Ch. 406, *Partnerships: Dissolution*]. In addition, except as otherwise provided by the CRLPA, a partner is entitled to receive distributions from a limited partnership before his or her withdrawal and before the dissolution and winding up of the partnership, to the extent and at the times or on the happening of the events specified in the partnership agreement [*see Corp. Code § 15661* (CRLPA)].

[b] Postdistribution Liability

A partner is obligated to return a distribution from a limited partnership to the extent that, at the time of the distribution, the partner knew that immediately after giving effect to the distribution, all liabilities of the limited partnership, other than liabilities to partners on account of their interests in the partnership and liabilities as to which recourse of creditors is limited to specified property of the limited partnership, exceed the fair value of the partnership assets other than that specified property [*Corp. Code § 15666(a)* (CRLPA)].

Any action with respect to an obligation to return such a distribution must be brought within four years after the distribution is made [*Corp. Code § 15666(b)* (CRLPA)].

[3] ULPA

[a] Partners' Right to Distributions

In a limited partnership governed by the ULPA, a limited partner has the right to receive a share of the profits or other compensation by way of income and a right to the return of his or her contribution [*Corp. Code § 15510(2)* (ULPA)]. The partners may agree that one or more limited partners will have priority over other limited partners as to return of their contributions, their compensation by way of income, or any other matter. If such an agreement is made, it must be stated in the certificate of limited partnership. In the absence of such a statement, all limited partners stand on equal footing [*Corp. Code § 15514* (ULPA)].

A limited partner may receive from the partnership the share of the profits or other compensation by way of income stipulated for in the certificate, provided that after such a payment is made, whether from the property of the partnership or that of a general partner, the partnership assets exceed all liabilities of the partnership except liabilities to limited partners on account of their contributions and to general partners [*Corp. Code § 15515* (ULPA)]. A limited partner is not entitled to receive any part of his or her contribution until all of the following have occurred [*Corp. Code § 15516(1)* (ULPA)]:

- All liabilities of the partnership, except those to general partners and limited partners for their contributions, have been paid or there remains partnership property sufficient to pay them.

- The consent of all members is had, unless the return of the contribution may be rightfully demanded without it under other statutory provisions.

- The certificate of limited partnership is canceled or amended to set forth the withdrawal or reduction.

A limited partner may also demand the return of his or her contribution on dissolution of the partnership, on the date specified in the certificate for its return, or after he or she has given six months' notice in writing to all other partners, if no time is specified in the certificate either for the return of the contribution or for the dissolution of the partnership [*Corp. Code § 15516(2)* (ULPA)].

In the absence of any statement in the certificate to the contrary or the consent of all members, a limited partner, irrespective of the nature of his or her contribution, has only the right to demand and receive cash in return for his or her contribution [*Corp. Code § 15516(3)* (ULPA)].

[b] Postdistribution Liability

A limited partner who has rightfully received a return of his or her capital contribution is liable to the partnership for any sum, not in excess of the return with interest, necessary to discharge partnership liabilities to all creditors who extended credit or whose claims arose before that return [*Corp. Code § 15517(4)* (ULPA)].

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§ 404.18 Dissociation or Withdrawal of Limited Partner

[1] ULPA '08

[a] Causes of Dissociation

A limited partner generally does not have a right to dissociate from the limited partnership before the termination of the partnership [*Corp. Code § 15906.01(a)* (ULPA '08)]. However, a person will be dissociated as a limited partner on the occurrence of any of the following events [*Corp. Code § 15906.01(b)* (ULPA '08)]:

- The limited partnership's having notice of the person's express will to withdraw as a limited partner or on a later date specified by the person.

- An event agreed to in the partnership agreement as causing the person's dissociation as a limited partner.

- The person's expulsion as a limited partner pursuant to the partnership agreement.

- The person's expulsion as a limited partner by the unanimous consent of the other partners if any of the following circumstances exists:

  - It is unlawful to carry on the limited partnership's activities with the person as a limited partner;

  - There has been a transfer of all of the person's transferable interest in the limited partnership, other than a transfer for security purposes, or a court order charging the person's interest, which has not been foreclosed;

  - The person is a corporation and, within 90 days after the limited partnership notifies the person that it will be expelled as a limited partner because it has filed a certificate of dissolution or the equivalent, its charter has been revoked, or its right to conduct business

has been suspended by the jurisdiction of its incorporation, there is no revocation of the certificate of dissolution or no reinstatement of its charter or its right to conduct business; or

- The person is a limited liability company or partnership that has been dissolved and whose business is being wound up.

- On application by the limited partnership, the person's expulsion as a limited partner by judicial order for any of the following reasons:

  - The person engaged in wrongful conduct that adversely and materially affected the limited partnership's activities;

  - The person willfully or persistently committed a material breach of the partnership agreement or of the obligation of good faith and fair dealing [*see Corp. Code § 15903.05(b)* (ULPA '08)]; or

  - The person engaged in conduct relating to the limited partnership's activities that makes it not reasonably practicable to carry on the activities with the person as limited partner.

- In the case of a person who is an individual, the person's death.

- In the case of a person that is a trust or is acting as a limited partner by virtue of being a trustee of a trust, distribution of the trust's entire transferable interest in the limited partnership, but not merely by reason of the substitution of a successor trustee.

- In the case of a person that is an estate or is acting as a limited partner by virtue of being a personal representative of an estate, distribution of the estate's entire transferable interest in the limited partnership, but not merely by reason of the substitution of a successor personal representative.

- Termination of a limited partner that is not an individual, partnership, limited liability company, corporation, trust, or estate.

- The limited partnership's participation in a conversion or merger [*see Corp. Code § 15911.01 et seq.*; *see also § 404.20[2]*], if the limited partnership (1) is not the converted or surviving entity; or (2) is the converted or surviving entity but, as a result of the conversion or merger, the person ceases to be a limited partner.

[b] Effect of Dissociation

On dissociation as a limited partner in a limited partnership governed by the ULPA '08, a person generally has no further rights as a limited partner [*Corp. Code § 15906.02(a)(1)* (ULPA '08)]. However, if dissociation is caused by the limited partner's death, the deceased partner's personal representative or other legal representative may exercise the powers of a transferee of the partner's interest, or the powers of a current limited partner for purposes of settling the deceased partner's estate [*Corp. Code §§ 15906.02(a)(1), 15907.04* (ULPA '08); *see Corp. Code §§ 15903.04, 15907.02* (ULPA '08)].

On dissociation as a limited partner, the person's obligation of good faith and fair dealing as a limited partner [*see Corp. Code § 15903.05(b)* (ULPA)] continues only as to matters arising and events occurring before the dissociation [*Corp.*

Code § 15906.02(a)(2) (ULPA '08)]. Further, any transferable interest owned by the person in the person's capacity as a limited partner immediately before dissociation generally is owned by the person as a mere transferee [*Corp. Code § 15906.02(a)(3)* (ULPA '08)]. However, special rules apply if the dissociation is the result of the limited partner's death or the conversion or merger of the partnership [*Corp. Code § 15906.02(a)(3)* (ULPA '08); *see Corp. Code §§ 15907.04, 15911.01 et seq.*].

A person's dissociation as a limited partner does not of itself discharge the person from any obligation to the limited partnership or the other partners which the person incurred while a limited partner [*Corp. Code § 15906.02(b)* (ULPA '08)].

The Secretary of State is not required to verify that the person withdrawing or dissociating was ever actually named in an official filing as a general or limited partner [*Corp. Code § 15902.04(c)* (ULPA '08)].

[2] CRLPA

A limited partner may withdraw from a limited partnership governed by the CRLPA only at the time specified in the partnership agreement or on the happening of events in the agreement [*Corp. Code § 15663* (CRLPA)]. On withdrawal, a limited partner is entitled to receive any distribution to which he or she is entitled under the partnership agreement, and is also entitled to receive, within a reasonable time after withdrawal, the fair value of the limited partner's interest in the partnership as of the date of the withdrawal based on the limited partner's right to share in distributions [*Corp. Code § 15664* (CRLPA)].

[3] ULPA

The ULPA does not expressly address "dissociation" or "withdrawal," but it contains provisions governing a limited partner's demand for the return of his or her contribution, including a return made prior to dissolution or termination of the partnership. A limited partner in a partnership governed by the ULPA may not receive any part of his or her contribution until all of the following conditions are met [*Corp. Code § 15516(1)* (ULPA)]:

- All liabilities of the partnership have been paid, or there remains property sufficient to pay them.

- The consent of all members is obtained, unless the return of the contribution may otherwise be rightfully demanded.

- The certificate is canceled or amended to set forth the withdrawal or reduction.

A limited partner may demand the return of his or her contribution under any of the following circumstances [*Corp. Code § 15516(2)* (ULPA)]:

- On the dissolution of the partnership.

- On a date specified for such a return in the certificate.

- After the limited partner has given six months' notice in writing to all the other partners, if no time is specified in the certificate either for the return or for dissolution of the partnership.

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§ 404.19 Death of Limited Partner

[1] ULPA '08

If a partner in a limited partnership governed by the ULPA '08 dies, the deceased partner's personal representative or other legal representative may exercise the rights of a transferee of the partnership interest [*Corp. Code § 15907.04* (ULPA '08); *see Corp. Code § 15907.02* (ULPA '08); *see also § 404.21[1*] (rights of transferees)]. For the purposes of settling the estate, the deceased partner's personal representative or other legal representative may exercise the rights of a current limited partner to inspect and copy information pertaining to the partnership [*Corp. Code § 15907.04* (ULPA '08); *see Corp. Code § 15903.04* (ULPA '08); *see also § 404.13[1]*].

[2] CRLPA and ULPA

Under both the CRLPA and the ULPA, a deceased limited partner's executor or administrator may exercise all the partner's rights for the purpose of settling the partner's estate [*Corp. Code § 15675(a)* (CRLPA); *Corp. Code § 15521* (ULPA)]. The ULPA also provides that the executor or administrator may exercise such power as the deceased had to constitute the deceased's assignee as a substituted limited partner. The ULPA also provides that the estate of a deceased limited partner is liable for all his or her liabilities as a limited partner [*Corp. Code § 15521* (ULPA)].

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§ 404.20 Conversions and Mergers of Limited Partnerships

[1] Governing Law

The ULPA '08 and the CRLPA contain essentially identical provisions governing conversions and mergers of limited partnerships and the rights of limited partners who dissent from those reorganizations [*compare Corp. Code § 15677.1 et seq.* (CRLPA) (conversions), *Corp. Code § 15678.1 et seq.* (CRLPA) (mergers), *and Corp. Code § 15679.1 et seq.* (CRLPA) (dissenters' rights) *with Corp. Code § 15911.01 et seq.* (ULPA '08) (conversions), *Corp. Code § 15911.11 et seq.* (ULPA '08) (mergers), *and Corp. Code § 15911.20 et seq.* (ULPA '08) (dissenters' rights)]. Accordingly, for purposes of accomplishing a conversion or merger, including satisfying the rights of dissenting limited partners, it is immaterial whether a limited partnership is otherwise subject to the ULPA '08 or the CRLPA.

The ULPA does not contain any provisions for the conversion or merger of limited partnerships. Thus, if conversion or merger of a limited partnership governed by the ULPA is desired, the partnership should first make an election to be governed by the ULPA '08 [*see Corp. Code § 15912.06(a)(2)* (ULPA '08) (on or after January 1, 2008, limited partnership originally formed under prior law may elect to be governed by ULPA '08); *see also § 404.10[1][a], [2][a]*].

[2] Conversion

[a] When Conversion Is Permitted

A limited partnership may be converted into an "other business entity" (that is, a corporation, general partnership, limited liability company, business trust, real estate investment trust, or an unincorporated association other than a nonprofit association [*see Corp. Code § 15611(v)* (CRLPA); *Corp. Code § 15901.02(u)* (ULPA '08)]), a foreign other business entity (that is, an "other business entity" formed under the laws of any state other than California or under the laws of a foreign country) [*see Corp. Code 15611(m)*; *Corp. Code § 15901.02(l)* (ULPA '08)], or a foreign limited partnership [*Corp. Code § 15911.02(a)*]. Pursuant to a conversion into a domestic or foreign partnership or limited liability company, or into a foreign limited partnership, each of the partners of the converting limited partnership must receive a percentage interest in the profits and capital of the converted entity, equal to that partner's percentage interest in profits and capital of the converting limited partnership as of the effective time of the conversion [*Corp. Code § 15677.2(a)* (CRLPA); *Corp. Code § 15911.02(a)(1)* (ULPA '08)]. Pursuant to a conversion into an other business entity

or foreign other business entity not specified above, each limited partnership interest of the same class must be treated equally with respect to any distribution of cash, property, rights, interests, or securities of the converted entity, unless all limited partners of the class consent, and the nonredeemable limited partnership interest of the converting limited partnership are converted only into nonredeemable interests or securities of the converted entity unless all holders of the nonredeemable interests consent [*Corp. Code § 15677.2(a)* (CRLPA); *Corp. Code § 15911.02(a)(2)* (ULPA '08)]. The conversion of a limited partnership to an other business entity or a foreign limited partnership may be effected only if both of the following conditions are satisfied [*Corp. Code § 15677.2(b)* (CRLPA); *Corp. Code § 15911.02(b)* (ULPA '08)]:

- The law under which the converted entity will exist expressly permits the formation of that entity pursuant to a conversion.

- The limited partnership complies with all other requirements of any other law that applies to conversion to the converted entity.

[b] When Conversion Is Effective

A conversion into an other business entity, foreign other business entity, or a foreign limited partnership will become effective on the earliest date that all of the following occur [*Corp. Code § 15677.4(a)* (CRLPA); *Corp. Code § 15911.04(a)* (ULPA '08)]:

- The approval of the plan of conversion by the partners of the converting limited partnership as provided in *Corp. Code § 15677.3* (CRLPA) or *Corp. Code § 15911.03* (ULPA '08) [*see* [d], *below*].

- The filing of all documents required by law to create the converted entity, which documents will also contain a statement of conversion, if required under *Corp. Code § 15677.6* (CRLPA) or *Corp. Code § 15911.06* (ULPA '08) [*see* [i], *below*].

- The occurrence of the effective date, if set forth in the plan of conversion.

A copy of the statement of partnership authority or articles of organization complying with *Corp. Code § 15677.6* (CRLPA) or *Corp. Code § 15911.06* (ULPA '08) [*see* [i], *below*] if applicable, duly certified by the Secretary of State, is conclusive evidence of the conversion of the limited partnership [*Corp. Code § 15677.4(b)*].

[c] Applicable Definitions

The following special definitions apply for purposes of conversion procedures:

- "Converted entity" means the other business entity, foreign other business entity, or foreign limited partnership that results from a conversion of a domestic limited partnership [*Corp. Code § 15677.1(a)* (CRLPA); *Corp. Code § 15911.01(a)* (ULPA '08)].

- "Converted limited partnership" means a domestic limited partnership that results from a conversion of an other business entity, foreign other business entity, or a foreign limited partnership pursuant to *Corp. Code § 15677.8* (CRLPA) or *Corp. Code § 15911.08* (ULPA '08) [*Corp. Code § 15677.1(b)* (CRLPA); *Corp. Code § 15911.01(b)* (ULPA '08); *see* [h], *below*].

- "Converting limited partnership" means a domestic limited partnership that converts to an other business entity, foreign other business entity, or a foreign limited partnership pursuant to the CRLPA or the ULPA '08 [*Corp. Code § 15677.1(c)* (CRLPA); *Corp. Code § 15911.01(c)* (ULPA '08)].

- "Converting entity" means an other business entity, foreign other business entity, or foreign limited partnership that converts to a domestic limited partnership pursuant to the terms of *Corp. Code § 15677.8* (CRLPA) or *Corp. Code § 15911.08* (ULPA '08) [*Corp. Code § 15677.1(d)* (CRLPA); *Corp. Code § 15911.01(d)* (ULPA '08); *see* [h], *below*].

[d] Plan of Conversion

A limited partnership that desires to convert to an other business entity, foreign other business entity, or a foreign limited partnership must approve a plan of conversion that states the terms and conditions of the conversion as well as other information required by statute [*Corp. Code § 15677.3(a)* (CRLPA); *Corp. Code § 15911.03(a)* (ULPA '08)].

The plan of conversion must be approved by all general partners of the converting limited partnership and by a majority in interest of each class of limited partners of the converting limited partnership, unless a greater or lesser approval is required by the partnership agreement of the converting limited partnership. However, if the limited partners of the limited partnership would become personally liable for any obligations of the converted entity as a result of the conversion, the plan of conversion must be approved by all of the limited partners of the converting limited partnership, unless the plan of conversion provides that all limited partners will have dissenters' rights under *Corp. Code § 15679.1 et seq.* (CRLPA) or *Corp. Code § 15911.20 et seq.* (ULPA '08) [*Corp. Code § 15677.3(b)* (CRLPA); *Corp. Code § 15911.03(b)* (ULPA '08); *see* [4], [5], *below* (dissenters' rights)].

When the conversion becomes effective, every partner of the converting limited partnership, except those that exercise dissenters' rights, is deemed a party to any governing documents for the converted entity adopted as part of the plan of conversion, whether or not the partner has executed the plan of conversion or the governing documents for the converted entity. Any adoption of governing documents made pursuant to a plan of conversion will be effective at the effective time or date of the conversion [*Corp. Code § 15677.3(c)* (CRLPA); *Corp. Code § 15911.03(c)* (ULPA '08)].

[e] Amending Plan of Conversion

A plan of conversion may be amended before the conversion takes effect if the amendment is approved by all general partners of the converting limited partnership and, if the amendment changes any of the principal terms of the plan of conversion, the amendment is approved by the limited partners of the converting limited partnership in the same manner and to the same extent as required for the approval of the original plan of conversion [*Corp. Code § 15677.3(d)* (CRLPA); *Corp. Code § 15911.03(d)* (ULPA '08)].

[f] Abandoning Conversion

The general partners of a converting limited partnership, by unanimous approval at any time before the conversion is effective, may in their discretion abandon a conversion, without further approval by the limited partners, subject to the contractual rights of third parties other than limited partners [*Corp. Code § 15677.3(e)* (CRLPA); *Corp. Code § 15911.03(e)* (ULPA '08)].

[g] Conversion of Limited Partnership Into Foreign Limited Partnership or Foreign Other Business Entity

The conversion of a limited partnership into a foreign limited partnership or foreign other business entity must comply with *Corp. Code § 15677.2* (CRLPA) or *Corp. Code § 15911.02* (ULPA '08) [*Corp. Code § 15677.5(a)* (CRLPA); *Corp. Code § 15911.05(a)* (ULPA '08); *see* [a], *above*]. If the limited partnership is converting into a foreign limited partnership or foreign other business entity, those conversion proceedings must be in accordance with the laws of the state or place of organization of the foreign limited partnership or foreign other business entity and the conversion will become effective in accordance with that law [*Corp. Code § 15677.5(b)* (CRLPA); *Corp. Code § 15911.05(b)* (ULPA '08)].

To enforce an obligation of a limited partnership that has converted to a foreign limited partnership or foreign other business entity, the Secretary of State will be the agent for service of process in an action or proceeding against that converted foreign entity, if the agent designated for the service of process for that entity is a natural person and cannot be found with due diligence or if the agent is a corporation and no person, to whom delivery may be made, can be located with due diligence, or if no agent has been designated and if no one of the officers, partners, managers, members, or agents of that entity may be located after diligent search, and it is so shown by affidavit to the satisfaction of the court [*Corp. Code § 15677.5(c)(1)* (CRLPA); *Corp. Code § 15911.05(c)(1)* (ULPA '08)]. The court may then make an order that service be made by personal delivery to the Secretary of State or to an assistant or deputy Secretary of State of two copies of the process together with two copies of the order, and the order will set forth an address to which the process will be sent by the Secretary of State. Service in this manner is deemed complete on the 10th day after delivery of the process to the Secretary of State [*Corp. Code § 15677.5(c)(1)* (CRLPA); *Corp. Code § 15911.05(c)(1)* (ULPA '08)]. Upon receipt of the process and order and the fee set forth in *Gov. Code § 12206*, the Secretary of State will provide notice to that entity of the service of the process by forwarding by certified mail, return receipt requested, a copy of the process and order to the address specified in the order [*Corp. Code § 15677.5(c)(2)* (CRLPA); *Corp. Code § 15911.05(c)(2)* (ULPA '08)].

[h] Conversion of Other Business Entity, Foreign Other Business Entity, or Foreign Limited Partnership to Domestic Limited Partnership

An other business entity, foreign other business entity, or a foreign limited partnership may be converted to a domestic limited partnership only if the converting entity is authorized by the laws under which it is organized to effect the conversion [*Corp. Code § 15677.8(a)* (CRLPA); *Corp. Code § 15911.08(a)* (ULPA '08)]. An other business entity, foreign other business entity, or a foreign limited partnership that desires to convert into a domestic limited partnership must approve a plan of conversion or an other instrument as is required to be approved to effect the conversion pursuant to the laws under which that entity is organized [*Corp. Code § 15677.8(b)* (CRLPA); *Corp. Code § 15911.08(b)* (ULPA '08)]. The conversion of an other business entity, foreign other business entity, or a foreign limited partnership into a domestic limited partnership must be approved by the number or percentage of the partners, members, shareholders, or holders of interest of the converting entity as is required by the law under which that entity is organized, or a greater or lesser percentage, subject to applicable laws, as set forth in the converting entity's partnership agreement, articles of organization, operating agreement, articles or certificate of incorporation, or other governing document [*Corp. Code § 15677.8(c)* (CRLPA); *Corp. Code § 15911.08(c)* (ULPA '08)].

The conversion by an other business entity, foreign other business entity, or a foreign limited partnership into a domestic limited partnership will be effective under Article 7.4 at the time the conversion is effective under the law under which the converting entity is organized, as long as a certificate of limited partnership containing a statement of conversion has been filed with the Secretary of State. If the converting entity's governing law is silent as to the effectiveness of the conversion, the conversion will be effective upon the completion of all acts required under California law to form a limited partnership [*Corp. Code § 15677.8(d)* (CRLPA); *Corp. Code § 15911.08(d)* (ULPA '08)].

The filing with the Secretary of State of a certificate of conversion or a certificate of limited partnership containing a statement of conversion pursuant to *Corp. Code § 15677.8(a)* (CRLPA) or *Corp. Code § 15911.08(a)* (ULPA '08) has the effect of filing a certificate of cancellation by the converting foreign limited partnership or foreign limited liability company. No converting foreign limited partnership or foreign limited liability company that has made the filing is required to file a certificate of cancellation under *Corp. Code §§ 15696* (CRLPA), 15902.03 (ULPA '08), or 17455 as a result of that conversion. If a converting other business entity is a foreign corporation qualified to transact business in California, the foreign corporation, by virtue of the filing, will automatically surrender its right to transact intrastate business [*Corp. Code § 15677.8(e)* (CRLPA); *Corp. Code § 15911.08(e)* (ULPA '08)].

[i] Statement of Conversion

Upon conversion of a limited partnership, one of the following applies [*Corp. Code § 15677.6(a)* (CRLPA); *Corp. Code § 15911.06(a)* (ULPA '08)]:

- If the limited partnership is converting into a domestic limited liability company, a statement of conversion must be completed on the articles of organization for the converted entity and filed with the Secretary of State.

- If the limited partnership is converting into a domestic partnership, a statement of conversion must be completed on the statement of partnership authority for the converted entity. If no statement of partnership authority is filed, a certificate of conversion must be filed separately.

- If the limited partnership is converting into a domestic corporation, a statement of conversion must be completed on the articles of incorporation for the converted entity and filed with the Secretary of State.

- If the limited partnership is converting to a foreign limited partnership or foreign other business entity, a certificate of conversion must be filed with the Secretary of State.

Any certificate or statement of conversion must be executed and acknowledged by all general partners, unless a lesser number is provided in the certificate of limited partnership, and must set forth required information [*Corp. Code § 15677.6(b)* (CRLPA); *Corp. Code § 15911.06(b)* (ULPA '08)].

The filing with the Secretary of State of a certificate of conversion or a statement of partnership authority, articles of organization, or articles or certificate of incorporation containing a statement of conversion as set forth in *Corp. Code § 15677.6(a)* (CRLPA) or *Corp. Code § 15911.06(a)* (ULPA '08) has the effect of the filing of a certificate of cancellation by the converting limited partnership. No converting limited partnership that has made the filing is required to file a certificate of dissolution or a certificate of cancellation under *Corp. Code § 15623* (CRLPA) or *Corp. Code § 15902.03* (ULPA '08) as a result of that conversion [*Corp. Code § 15677.6(c)* (CRLPA); *Corp. Code § 15911.06(c)* (ULPA '08)].

[j] Converting Entity Unchanged

An entity that converts into another entity is for all purposes the same entity that existed before the conversion [*Corp. Code § 15677.9(a)* (CRLPA); *Corp. Code § 15911.09(a)* (ULPA '08)]. When the conversion takes effect, all of the following apply [*Corp. Code § 15677.9(b)* (CRLPA); *Corp. Code § 15911.09(b)* (ULPA '08)]:

- All the rights and property, whether real, personal, or mixed, of the converting entity or converting limited partnership are vested in the converted entity or converted limited partnership.

- All debts, liabilities, and obligations of the converting entity or converting limited partnership continue as debts, liabilities, and obligations of the converted entity or converted limited partnership.

- All rights of creditors and liens upon the property of the converting entity or converting limited partnership are preserved unimpaired and remain enforceable against the converted entity or converted limited partnership to the same extent as against the converting entity or converting limited partnership as if the conversion had not occurred.

- Any action or proceeding pending by or against the converting entity or converting limited partnership may be continued against the converted entity or converted limited partnership as if the

conversion had not occurred.

[k] Liabilities of Partners

A partner of a converting limited partnership is liable for all of the following [*Corp. Code § 15677.9(c)* (CRLPA); *Corp. Code § 15911.09(c)* (ULPA '08)]:

- All obligations of the converting limited partnership for which the partner was personally liable before the conversion.

- All obligations of the converted entity incurred after the conversion takes effect. Those obligations, however, may be satisfied only out of property of the entity if that partner is a limited partner; or a shareholder in a corporation; or unless expressly provided otherwise in the articles of organization or other governing documents, a member of a limited liability company; or a holder of equity securities in an other converted entity if the holders of equity securities in that entity are not personally liable for the obligations of that entity under the law under which the entity is organized or its governing documents [*Corp. Code § 15677.9(c)(2)* (CRLPA); *Corp. Code § 15911.09(c)(2)* (ULPA '08)].

A partner of a converted limited partnership remains liable for any and all obligations of the converting entity for which the partner was personally liable before the conversion, but only to the extent that the partner was liable for the obligations of the converting entity prior to the conversion [*Corp. Code § 15677.9(d)* (CRLPA); *Corp. Code § 15911.09(d)* (ULPA '08)]. If the other party to a transaction with the limited partnership reasonably believes when entering the transaction that the limited partner is a general partner, the limited partner is liable for an obligation incurred by the limited partnership within 90 days after the conversion takes effect. The limited partner's liability for all other obligations of the limited partnership incurred after the conversion takes effect is that of a limited partner [*Corp. Code § 15677.9(e)* (CRLPA); *Corp. Code § 15911.09(e)* (ULPA '08)].

[3] Merger

[a] Entities That May Be Merged

The following entities may be merged [*Corp. Code § 15678.1* (CRLPA); *Corp. Code § 15911.11* (ULPA '08)]:

- Two or more limited partnerships into one limited partnership.

- One or more limited partnerships and one or more other business entities into one of those other business entities.

- One or more limited partnerships and one or more other business entities into one limited partnership.

Notwithstanding the foregoing, the merger of any number of limited partnerships with any number of other business entities may be effected only if the other business entities that are organized in California are authorized by the laws under which they are organized to effect the merger and (1) if a limited partnership is the surviving limited partnership, the foreign other business entities are not prohibited by the laws under which they are organized from effecting the merger; and (2) if a foreign limited partnership or foreign other business entity is the survivor of the merger, the merger is authorized by the laws of the jurisdiction under which the survivor is organized [*Corp. Code § 15678.1* (CRLPA); *Corp. Code § 15911.11* (ULPA '08)].

[b] When Merger Is Effective

A merger is effective on the filing of a certificate of merger, or the agreement of merger, if one is required under *Corp. Code § 15678.4* (CRLPA) or *Corp. Code § 15911.14* (ULPA '08), in the office of the Secretary of State, unless the certificate provides for a future effective date. For all purposes, a copy of the certificate or agreement of merger duly certified by the Secretary is conclusive evidence of the merger [*Corp. Code § 15678.5(a), (b)* (CRLPA); *Corp. Code § 15911.15(a), (b)* (ULPA '08); for discussion of the procedure for filing a certificate, *see* [j], *below*].

For discussion of the effect of merger on the rights of creditors, see Ch. 405, *Partnerships: Actions Between Limited Partners or Partnerships and Third Parties* . For discussion of enforcement by dissenting partners of their right to have the merging limited partnership purchase their partnership interests, see [4], [5], *below*.

[c] Applicable Definitions

A limited partnership that is merged with or into one or more other limited partnerships or other business entities is referred to as a "constituent limited partnership" [*Corp. Code § 15611(e)* (CRLPA); *Corp. Code § 15911.01(f)* (ULPA '08)]. An other business entity that is merged with or into one or more limited partnerships is a "constituent other business entity" [*Corp. Code § 15611(f)* (CRLPA); *Corp. Code § 15911.01(g)* (ULPA '08)]. A corporation that is merged with or into one or more limited partnerships or other business entities is a "constituent corporation" [*Corp. Code § 15611(d)* (CRLPA); *Corp. Code § 15911.01(e)* (ULPA '08)]. Constituents include all of the following:

- A "surviving corporation," "surviving limited partnership," or "surviving other business entity," with or into which one or more other limited partnerships or other business entities have been merged [*Corp. Code § 15611(d)-(f), (ad), (ae)* (CRLPA); *Corp. Code § 15911.01(e), (f), (g)*; *see Corp. Code § 15911.01*(*l*), (m) (ULPA '08)].

- "Disappearing limited partnership or partnerships" or "disappearing other business entity or entities," which do not survive the merger [*Corp. Code § 15611(h), (i)* (CRLPA); *Corp. Code § 15911.01(h), (i)* (ULPA '08)].

[d] Merger Agreement

Each limited partnership and each other business entity desiring to merge must approve an agreement that states the terms and conditions of the merger as well as other information required by statute [*Corp. Code § 15678.2(a)* (CRLPA); *Corp. Code § 15911.12(a)* (ULPA '08) (required contents of merger agreement)]. Other persons, including a "parent" of a constituent partnership, may be parties to the merger agreement [*Corp. Code § 15678.2(a)* (CRLPA); *Corp. Code § 15911.12(a)* (ULPA '08)]. A "parent" of a specified limited partnership means [*Corp. Code § 15611(w)* (CRLPA); *Corp. Code § 15901.02(v)* (ULPA '08)]:

- Each general partner of the limited partnership;

- Each person possessing, directly or indirectly, the power to direct or cause the direction of the management and policies of a general partner of the partnership; and

- A person owning, directly or indirectly, limited partnership interests possessing more than 50 percent of the aggregate voting power of the specified limited partnership.

Any other details or provisions that are required by the laws under which any constituent other business entity is organized must be included in the agreement of merger. Any California corporation that is a constituent in the merger, as well as each limited partnership, will have to approve the merger and incorporate into the merger agreement, the details and provisions required by *Corp. Code § 1113(b)*, which is discussed in Ch. 169, *Corporations: Reorganizations* [*Corp. Code § 15678.2(a)(4)* (CRLPA); *Corp. Code § 15911.12(a)(4)* (ULPA '08)].

The requirements of *Corp. Code § 1113(b)* are substantially similar to the approval requirements for limited partnerships [*cf. Corp. Code § 15678.2(a)* (CRLPA); *Corp. Code § 15911.12(a)* (ULPA '08); for discussion of approval requirements for limited partnerships, *see* [g], *below*)], except that votes required for approval are as defined for corporations in *Corp. Code §§ 152, 1200, 1201,* and *1300*. *Corp. Code § 1113(b)(5)*, in turn, incorporates the requirements of *Corp. Code § 15678.2(a)* (CRLPA) and *Corp. Code § 15911.12(a)* (ULPA '08) when a California limited partnership is a party in the merger, *Corp. Code § 16911* if a domestic partnership is a party, *Corp. Code § 6019.1* if a public benefit or religious corporation is a party to the merger, *Corp. Code § 8019.1* if a mutual benefit corporation is a party to the merger, *Corp. Code § 12540.1* if a consumer cooperative corporation is a party to the merger, or *Corp. Code § 17551(a)* when a domestic limited liability company is a party in the merger [*Corp. Code § 1113(b)(5)*].

[e] Right to Request Copy of Merger Agreement

At the request of a limited partner of a constituent partnership, or a holder of shares, interests, or other securities of a constituent other business entity, the general partners of the surviving limited partnership or the authorized person of the surviving other business entity must promptly deliver, at the surviving partnership's or surviving other business entity's expense, a copy of the merger agreement to the limited partner or holder of shares or other securities. The right to receive a copy may not be waived [*Corp. Code § 15678.2(f)* (CRLPA); *Corp. Code § 15911.12(f)* (ULPA '08)].

[f] Limitations on Conversion of Partnership Interests

Each limited partnership interest of the same class within any constituent limited partnership that has more than 35 limited partners must be treated equally with respect to any distribution of cash, property, rights, interests, or securities, unless all partners of the class consent. This does not apply, however, to a limited partnership interest in another constituent limited partnership that is being canceled and that is held by (1) a constituent limited partnership, (2) its parent, or (3) a limited partnership of which the constituent limited partnership is a parent [*Corp. Code § 15678.2(b)* (CRLPA); *Corp. Code § 15911.12(b)* (ULPA '08); *see Corp. Code § 15611(w)* (CRLPA); *Corp. Code § 15901.02(v)* (ULPA '08) ("parent" defined), discussed in [d], *above*].

Notwithstanding this equal-treatment requirement, except in a merger of a limited partnership with a limited partnership in which it controls at least 90 percent of the limited partnership interests entitled to vote with respect to the merger, unless all of the limited partners of the class consent, the unredeemable limited partnership interests of a constituent limited partnership may be converted only into unredeemable interests or securities of the surviving limited partnership or other business entity or a parent if the merger is one in which a constituent limited partnership with more than 35 limited partners or a constituent other business entity (or its parent) owns, directly or indirectly, prior to the merger, any of the following [*Corp. Code § 15678.2(b)* (CRLPA); *Corp. Code § 15911.12(b)* (ULPA '08)]:

- Limited partnership interests of another constituent limited partnership or interests or securities of a constituent other business entity representing more than 50 percent of the interests or securities entitled to vote with respect to the merger of the other constituent limited partnership or constituent other business entity, or

- More than 50 percent of the voting power, as defined in *Corp. Code § 194.5*, of a constituent other business entity that is a California corporation.

These limitations on conversions do not apply to any transaction if the Commissioner of Corporations has approved the terms and conditions of the transaction and their fairness, pursuant to *Corp. Code § 25142* [*Corp. Code § 15678.3* (CRLPA); *Corp. Code § 15911.13* (ULPA '08); for discussion of the qualification of sales of securities by the Commissioner of Corporations, *see* Ch. 515, *Securities and Franchise Regulation*].

[g] Requirements for Approval

Unless the partnership agreement of a constituent limited partnership requires a greater approval, the merger agreement must be approved by all general partners of each constituent partnership, and the principal terms of the merger must be approved by a majority in interest of each class of limited partners of each constituent limited partnership [*Corp. Code § 15678.2(a)* (CRLPA); *Corp. Code § 15911.12(a)* (ULPA '08)]. Notwithstanding this requirement, if as a result of the merger the limited partners of any constituent limited partnership become personally liable for any obligations of a constituent limited partnership or constituent other business entity, the principal terms of the agreement of merger must be approved by all of the limited partners of the constituent limited partnership, unless the agreement of merger provides that all limited partners may have the dissenters' rights provided by the CRLPA or ULPA '08 [*Corp. Code § 15678.2(a)* (CRLPA); *Corp. Code § 15911.12(a)* (ULPA '08); *see Corp. Code § 15679.1 et seq.* (CRLPA); *Corp. Code § 15911.20 et seq.* (ULPA '08) (dissenters' rights)]. The agreement of merger must be approved on behalf of each constituent other business entity by those persons required to approve the merger by the laws under which it is organized [*Corp. Code § 15678.2(a)* (CRLPA); *Corp. Code § 15911.12(a)* (ULPA '08)].

An agreement of merger approved in the manner noted above may either (1) effect any amendment to the partnership agreement of any constituent limited partnership, or (2) effect the adoption of a new partnership agreement for a constituent limited partnership if it is the surviving limited partnership in the merger. Any amendment to a partnership agreement or adoption of a new partnership agreement becomes effective at the effective time or date of the merger [*Corp. Code § 15678.2(e)* (CRLPA); *Corp. Code § 15911.12(e)* (ULPA '08)]. Notwithstanding these requirements, if a greater number of limited partners is required to approve an amendment to the partnership agreement of a constituent limited partnership than is required to approve the agreement of merger [*see Corp. Code § 15678.2(a)* (CRLPA); *Corp. Code § 15911.12(a)* (ULPA '08)], and the number of limited partners that approve the agreement of merger is less than the number of limited partners required to approve an amendment to the partnership agreement of the constituent limited partnership, any amendment to the partnership agreement or adoption of a new partnership agreement of that constituent limited partnership becomes effective only if the agreement of merger provides that all of the limited partners have the dissenters' rights provided by the CRLPA or the ULPA '08 [*Corp. Code § 15678.2(e)* (CRLPA); *Corp. Code § 15911.12(e)* (ULPA '08); *see Corp. Code § 15679.1 et seq.* (CRLPA); *Corp. Code § 15911.20 et seq.* (ULPA '08) (dissenters' rights)].

In addition, if any limited partners have a right to require the partnership to buy their partnership interests for cash, the partnership must mail to each such limited partner a notice of approval of the merger by the requisite vote or consent of the limited partners, within 10 days after the date of approval. The notice must be accompanied by (1) a copy of the statutes governing the right to payment for a dissenting interest; (2) a statement of the price that the partnership has determined represents the fair market value of its outstanding interests; and (3) a brief description of the procedure to be followed if the limited partner wishes to exercise the right to sell a dissenting interest. The statement of price constitutes an offer by the partnership to buy at the price stated any dissenting interests [*Corp. Code § 15679.3(a)* (CRLPA); *Corp. Code § 15911.22(a)* (ULPA '08)]. For discussion of the procedures for purchasing the interest of a dissenting partner, see [4], [5], *below*.

[h] Abandoning Merger

The general partners of a constituent limited partnership, in their discretion, may abandon a merger, subject to the any contractual rights of third parties, including other constituent limited partnerships and constituent other business entities, without further approval by the limited partnership interests, at any time prior to the effective date of the merger [*Corp. Code § 15678.2(d)* (CRLPA); *Corp. Code § 15911.12(d)* (ULPA '08)]. The effective date of the merger is the date on which a certificate of merger or the agreement of merger, as is applicable, is filed in the office of the Secretary of State, unless the certificate or agreement provides for a future date [*Corp. Code § 15678.5(a)* (CRLPA); *Corp. Code § 15911.15(a)* (ULPA '08); for discussion of the procedure for filing a certificate, *see* [j], *below*].

[i] Amending Merger

Notwithstanding its prior approval, a merger agreement may be amended before filing the certificate of merger or the agreement of merger, as is provided in *Corp. Code § 15678.4* (CRLPA) or *Corp. Code § 15911.14* (ULPA '08), if the amendment is approved by the general partners of each constituent partnership in the same manner as required for approval of the original merger agreement. If the amendment changes any of the principal terms of the agreement, the amendment must also be approved by the limited partners of each constituent limited partnership in the same manner and to the same extent as required for the approval of the original agreement, and by each constituent other business entity [*Corp. Code § 15678.2(c)* (CRLPA); *Corp. Code § 15911.12(c)* (ULPA '08)].

[j] Filing of Certificate of Merger

If the surviving entity is a limited partnership or an other business entity (other than a corporation in a merger in which a domestic corporation is a constituent party), after approval of a merger, the constituent limited partnerships and any constituent other business entities must file a certificate of merger, on an official form, in the office of the Secretary of State [*Corp. Code § 15678.4(a)* (CRLPA); *Corp. Code § 15911.14(a)* (ULPA '08)]. The required contents of the certificate are set out in *Corp. Code § 15678.4(a)* (CRLPA) and *Corp. Code § 15911.14(a)* (ULPA '08).

If the surviving entity is a domestic corporation or a foreign corporation in a merger in which a domestic corporation is a constituent party, the surviving corporation must file a copy of the agreement of merger and attachments required under *Corp. Code § 1113(g)(1)* in the office of the Secretary of State, after the merger is approved by the constituent limited partnerships and constituent other business entities. The certificate of merger must be executed and acknowledged by all general partners of each domestic constituent limited partnership, unless a lesser number is provided in its certificate of limited partnership [*Corp. Code § 15678.4(b)* (CRLPA); *Corp. Code § 15911.14(b)* (ULPA '08)].

The merger becomes effective on filing of the certificate or agreement of merger (if an agreement of merger is required under *Corp. Code § 15678.4(b)* (CRLPA) or *Corp. Code § 15911.14(b)* (ULPA '08)), unless the certificate or agreement provides for a future effective date. In the case of a certificate, any future effective date must not be more than 90 days after the filing date [*Corp. Code §§ 15678.4(a)(4), 15678.5(a)* (CRLPA); *Corp. Code §§ 15911.14(a)(4), 15911.15(a)* (ULPA '08)]. In addition, filing the certificate or agreement, as applicable, has the effect of filing a certificate of cancellation for each disappearing limited partnership [*Corp. Code § 15678.4(c)* (CRLPA); *Corp. Code § 15911.14(c)* (ULPA '08)].

[k] Assumption of Tax Liability

Upon a merger pursuant to *Corp. Code § 15678.1 et seq.* (CRLPA), a surviving domestic or foreign limited partnership or other business entity will be deemed to have assumed the liability of each disappearing domestic or foreign limited partnership or other business entity that is taxed under *Rev. & Tax. Code § 17001 et seq.* or *Rev. & Tax. Code § 23001 et seq.* for the following [*Corp. Code § 15678.10(a)* (CRLPA)]:

- To prepare and file, or to cause to be prepared and filed, tax and information returns otherwise required of that disappearing entity as specified in *Rev. & Tax. Code § 18501 et seq.*

- To pay any tax liability determined to be due.

The Secretary of State's office will notify the Franchise Tax Board of the merger [*Corp. Code § 15678.10(b)* (CRLPA)].

[4] Purchase of Dissenting Limited Partner's Interest

[a] In General

If approval of outstanding limited partnership interests is required for a limited partnership to participate in a "reorganization," which includes a merger or conversion [*see Corp. Code § 15679.1(a)(1), (2)* (CRLPA); *Corp. Code § 15911.20(a)(1), (2)* (ULPA '08)], pursuant to the partnership agreement or otherwise, each limited partner holding an outstanding interest may require the partnership to purchase that partner's dissenting interest for cash at its fair market value. The fair market value is determined as of the day before the first announcement of the terms of the proposed reorganization, excluding any appreciation or depreciation caused by the proposed reorganization [*Corp. Code § 15679.2(a)* (CRLPA); *Corp. Code § 15911.21(a)* (ULPA '08)].

[b] Reorganization

In addition to referring to conversions and mergers [*see Corp. Code § 15679.1(a)(1), (2)* (CRLPA); *Corp. Code § 15911.20(a)(1), (2)* (ULPA '08)], a "reorganization" that triggers dissenters' rights also includes the acquisition by one limited partnership of a controlling interest in all or substantially all of the assets of another limited partnership or other business entity in exchange for the partnership interests or equity securities of the acquiring partnership or other business entity or for certain of its debt securities [*see Corp. Code § 15679.1(a)(3), (4)* (CRLPA); *Corp. Code § 15911.20(a)(3), (4)* (ULPA '08)].

[c] Dissenting Interest Defined

A "dissenting limited partner" is the record holder of a dissenting interest, and includes an assignee of record of such an interest [*Corp. Code § 15679.2(c)* (CRLPA); *Corp. Code § 15911.21(c)* (ULPA '08)]. A "dissenting interest" is the interest of a limited partner that satisfies all of the following conditions [*Corp. Code § 15679.2(b)* (CRLPA); *Corp. Code § 15911.21(b)* (ULPA '08)]:

- Either (A) immediately before the reorganization, the interest was not either (i) listed on any certified national securities exchange, or (ii) listed on the Federal Reserve's list of OTC margin stocks, provided that, in either instance, the limited partnership whose outstanding interests are so listed provides a summary of the rights of dissenting partners in its notice to limited partners requesting their approval of the proposed reorganization; or (B) demands for payment are filed with respect to 5 percent or more of the outstanding interests of any class of interests described in (A)(i) or (ii) (interest not listed and dissenting partners received notice of rights);

- The interest was outstanding on the date for the determination of limited partners entitled to vote on the reorganization;

- The interest was not voted in favor of the reorganization or, if the interest is described in (A)(i) or (ii) of the first paragraph listed above (interest not listed and dissenting partners received notice of rights), it was voted against the reorganization. If the approval for the proposed reorganization is sought by written consent rather than at a meeting, the former of these conditions applies, that is, the interest was not voted in favor of the reorganization;

- The limited partner has demanded that the limited partner purchase the interest at its fair market value; and

- The limited partner submits the interest for endorsement, if applicable.

A dissenting interest loses its status as a dissenting interest, and the holder of the interest ceases to be entitled to require the partnership to purchase the interest, when any of the following events occur [*Corp. Code § 15679.11* (CRLPA); *Corp. Code § 15911.30* (ULPA '08)]:

- The partnership abandons the reorganization, in which case the partnership must pay, on demand, reasonable expenses and attorney's fees to any dissenting partner who initiated a proceeding in good faith under *Corp. Code § 15679.1 et seq.* (CRLPA) or *Corp. Code § 15911.20 et seq.* (ULPA '08);

- The interest is transferred before its submission for endorsement [*see* [d], *below*];

- The dissenting partner and the partnership do not agree on the status of the interest as a dissenting interest or on the purchase price of the dissenting interest, and neither files a complaint or intervenes in a pending action within six months after the date on which notice of approval was mailed to the partner [*see* [5], *below*]; or

- The dissenting partner, with the consent of the partnership, withdraws the demand for purchase of the dissenting interest.

[d] Demand for Payment

To receive payment for a dissenting interest, the dissenting partner must make a written demand for purchase and payment in cash of its fair market value, which is determined as of the day before the first announcement of the terms of the proposed reorganization, excluding any appreciation or depreciation caused by the proposed reorganization [*Corp. Code §§ 15679.2(a), 15679.3(b)* (CRLPA); *Corp. Code §§ 15911.21(a), 15911.22(b)* (ULPA '08)]. The demand is not effective for any purpose until the partnership or its transfer agent receives it at the following times [*Corp. Code § 15679.3(b)* (CRLPA); *Corp. Code § 15911.22(b)* (ULPA '08)]:

- If the limited partner's interest is described by *Corp. Code § 15679.2(b)(1)(A)* (CRLPA) or *Corp. Code § 15911.21(b)(1)(A)* (ULPA '08) (interest not listed and dissenting partners received notice of rights), no later than the date of the limited partners' meeting to vote on the reorganization; or

- In any other case, within 30 days after the date the partnership mails notice that the reorganization was approved [*see Corp. Code § 15679.3(a)* (CRLPA); *Corp. Code § 15911.22(a)* (ULPA '08) (mailing of notice of approval and offer to purchase dissenting interests), discussed in [3][g], *above*].

The demand must state the number or amount of the limited partner's interest, and state what the limited partner claims to be the fair market value of that interest on the day before the announcement of the proposed reorganization. The statement of value constitutes an offer to sell the interest at that price [*Corp. Code § 15679.3(c)* (CRLPA); *Corp. Code § 15911.22(c)* (ULPA '08)].

A dissenting partner may not withdraw a demand for payment unless the partnership consents to withdrawal of the demand [*Corp. Code § 15679.10* (CRLPA); *Corp. Code § 15911.29* (ULPA '08); *see Corp. Code § 15679.11(d)* (CRLPA); *Corp. Code § 15911.30(d)* (ULPA '08) (withdrawal, with consent, destroys dissenting interest)]. Except as expressly limited by *Corp. Code § 15679.1 et seq.* (CRLPA) and *Corp. Code § 15911.20 et seq.* (ULPA '08), dissenting partners continue to have all the rights and privileges incident to their interests immediately before the reorganization, including limited liability, until the partnership pays for their dissenting interests [*Corp. Code § 15679.10* (CRLPA); *Corp. Code § 15911.29* (ULPA '08)].

Within 30 days after the date the partnership mails notice that the reorganization was approved [*see Corp. Code § 15679.3(a)* (CRLPA); *Corp. Code § 15911.22(a)* (ULPA '08) (mailing of notice of approval and offer to purchase dissenting interests), discussed in [3][g], *above*], the dissenting partner must also submit to the partnership the certificate representing the interest for sale, to be stamped or endorsed with a statement that the interest is a dissenting interest or exchanged for certificates of appropriate denominations so stamped or endorsed [*Corp. Code § 15679.4*

(CRLPA); *Corp. Code § 15911.23* (ULPA '08)]. If there is no certificate, written notice of the number or amount of interest for sale must be submitted [*Corp. Code § 15679.4* (CRLPA); *Corp. Code § 15911.23* (ULPA '08)].

[e] Payment

If the partnership and dissenting partner agree that the limited partner's interest is a dissenting interest, and agree on the price to be paid for the dissenting interest, the dissenting partner is entitled to the agreed price, together with legal interest from the date the reorganization is consummated. All agreements fixing the fair market value of any dissenting partner's interest as between the partnership and the partner must be in writing and filed in the records of the partnership [*Corp. Code § 15679.5(a)* (CRLPA); *Corp. Code § 15911.24(a)* (ULPA '08)].

Payment of the fair market value for a dissenting interest must be made within 30 days after the amount has been agreed on, or within 30 days after any statutory or contractual conditions to the reorganization are satisfied, whichever is later. In the case of dissenting interests evidenced by certificates, the payment is subject to surrender of the certificates, unless provided otherwise by agreement [*Corp. Code § 15679.5(b)* (CRLPA); *Corp. Code § 15911.24(b)* (ULPA '08)].

No payment or portion of a payment may be made, however, to the extent it violates *Corp. Code § 15666* (CRLPA) or *Corp. Code § 15905.09* (ULPA '08) or *Civ. Code § 3439 et seq.*, which prohibit payments that defraud creditors or cause partnership liabilities to exceed assets. In these circumstances, the dissenting partners become creditors of the partnership for the amount not paid, together with legal interest until the date of payment, but are subordinate to all other creditors in any proceeding relating to the winding up and dissolution of the limited partnership. The debt is to be paid when permissible [*Corp. Code § 15679.8* (CRLPA); *Corp. Code § 15911.27* (ULPA '08)].

Any cash distributions made by a partnership to a dissenting partner after the date the reorganization is consummated, but before any payment by the partnership for the partner's dissenting interest, must be credited against the total amount to be paid by the partnership for the dissenting interest [*Corp. Code § 15679.9* (CRLPA); *Corp. Code § 15911.28* (ULPA '08)].

For discussion of a dissenting partner's right to bring an action if the partnership denies that the partner's interest is a dissenting interest or fails to agree on the fair market value of the partner's interest, see [5], *below*.

[f] Limited Partnerships Subject to Buy-Out Provisions

Dissenters' rights apply to the following limited partnerships [*Corp. Code § 15679.13(a)* (CRLPA); *Corp. Code § 15911.32(a)* (ULPA '08)]:

- A domestic limited partnership formed on or after January 1, 1991;

- A foreign limited partnership if (A) the foreign limited partnership was formed on or after January 1, 1991, or filed an application to qualify to do business on or after January 1, 1991, and (B) limited partners holding more than 50 percent of the voting power held by all limited partners of the foreign limited partnership reside in California; and

- A limited partnership if the partnership agreement so provides or if all general partners and a majority in interest of the limited partners determine that the provisions apply.

[g] Limited Partnerships to Which Buy-Out Provisions Do Not Apply

Dissenters' rights do not apply to the following limited partnerships or interests [*Corp. Code § 15679.13(b)* (CRLPA); *Corp. Code § 15911.32(b)* (ULPA '08)]:

- Limited partnership interests governed by limited partnership agreements whose terms and provisions specifically set forth the amount to be paid for such interests in the event of a reorganization of the limited partnership; or

- Limited partnerships with 35 or fewer limited partners, unless the partnership agreement provides that the provisions will apply or unless all general partners and a majority in interest of the limited partners determine that the provisions apply.

[5] Action to Compel Purchase of Dissenting Interest

[a] Complaint and Limitation Period

If the partnership denies that a partner's interest is a dissenting interest [*see* [4][c], *above*], or the partnership and a dissenting partner fail to agree on the fair market value of the dissenting interest, the limited partner or any interested limited partnership may file a complaint in the superior court of the proper county to determine whether the interest is a dissenting interest or the fair market value of the dissenting interest, or both, or may intervene in any action pending on such a complaint [*Corp. Code § 15679.6(a)* (CRLPA); *Corp. Code § 15911.25(a)* (ULPA '08); for discussion of intervention, *see* Ch. 395, *Parties*]. The complaint must be filed within six months after the date on which notice of the approval of the "reorganization" (which includes a conversion or merger) by the requisite vote or consent of the limited partners was mailed to the limited partner [*Corp. Code § 15679.6(a)* (CRLPA); *Corp. Code § 15911.25(a)* (ULPA '08); *see Corp. Code § 15679.1(a)* (CRLPA); *Corp. Code § 15911.20(a)* (ULPA '08) (defining "reorganization")]. Two or more dissenting partners may join as plaintiffs or be joined as defendants in any such action, and two or more such actions may be consolidated [*Corp. Code § 15679.6(b)* (CRLPA); *Corp. Code § 15911.25(b)* (ULPA '08)].

For a complaint for payment of the fair market value of a dissenting partner's interest after reorganization, see *§ 404.45*.

[b] Appointment of Appraiser

The court may appoint one or more appraisers to determine the fair market value per interest of the partnership's outstanding limited partnership interests, by class if necessary. Within the time fixed by the court, the appraisers, or a majority of them, must make and file a report with the court clerk. Then, on the motion of any party, the report must be submitted to the court and considered, along with such additional evidence as the court considers relevant. If the court finds the report reasonable, the court may confirm it [*Corp. Code § 15679.7(a)* (CRLPA); *Corp. Code § 15911.26(a)* (ULPA '08)]. If a majority of the appraisers appointed fails to make and file a report within 30 days from the date of their appointment, or within any further time as may be allowed by the court, or the report is not confirmed by the court, the court must determine the fair market value per interest of the outstanding limited partnership interests, by class if necessary [*Corp. Code § 15679.7(b)* (CRLPA); *Corp. Code § 15911.26(b)* (ULPA '08)].

[c] Trial

In the trial of the action, the court must determine the issues. If the status of the partnership interest as a dissenting interest is in issue, the court first must determine that issue. If the fair market value of the dissenting interest is at issue, the court must determine, or must appoint one or more impartial appraisers to determine, the fair market value of the dissenting interest [*Corp. Code § 15679.6(c)* (CRLPA); *Corp. Code § 15911.25(c)* (ULPA '08)].

[d] Judgment and Review

Judgment must be rendered against the partnership for payment of an amount equal to the fair market value, as determined by the court, of each dissenting interest that any dissenting partner who is a party, or has intervened, is entitled to require the partnership to purchase, plus interest at the legal rate from the date of consummation of the

reorganization [*Corp. Code § 15679.7(c)* (CRLPA); *Corp. Code § 15911.26(c)* (ULPA '08)]. However, the judgment cannot require any payment that would defraud creditors or cause partnership liabilities to exceed assets under *Corp. Code § 15666* (CRLPA) or *Corp. Code § 15905.09* (ULPA '08) or *Civ. Code § 3439 et seq.* [*Corp. Code § 15679.7(c)* (CRLPA); *Corp. Code § 15911.26(c)* (ULPA '08); *see Corp. Code § 15679.8* (CRLPA); *Corp. Code § 15911.27* (ULPA '08)].

The court must assess and apportion costs of the action as it considers equitable, including reasonable compensation for the appraisers, to be fixed by the court. The partnership must pay the costs, however, if the appraisal exceeds the price offered by the partnership. If the value awarded by the court for the dissenting interest is more than 125 percent of the price offered by the partnership, the court, in its discretion, may include attorney's fees and fees of expert witnesses in the costs award [*Corp. Code § 15679.7(e)* (CRLPA); *Corp. Code § 15911.26(e)* (ULPA '08)].

Any judgment must be payable forthwith. With respect to partnership interests evidenced by transferable certificates of interest, however, the judgment is payable only on endorsement and delivery to the partnership of those certificates representing the interests described in the judgment [*Corp. Code § 15679.7(d)* (CRLPA); *Corp. Code § 15911.26(d)* (ULPA '08); *see* [4][d], *above*, for discussion of endorsement of certificates].

Any party may appeal from the judgment [*Corp. Code § 15679.7(d)* (CRLPA); *Corp. Code § 15911.26(d)* (ULPA '08); *see generally* Ch. 40, *Appeal: An Overview* , et seq.].

[e] Attacking Validity of Reorganization

No limited partner who has a right to demand payment of cash for the partner's interest has any right at law or in equity to attack the validity of a reorganization or to have the reorganization set aside or rescinded, except in an action to test whether the vote or consent of the partners required to authorize or approve the reorganization has been obtained in accordance with the procedures established by the partnership agreement [*Corp. Code § 15679.14(a)* (CRLPA); *Corp. Code § 15911.33(a)* (ULPA '08); *see Corp. Code § 15679.1(a)* (CRLPA); *Corp. Code § 15911.20(a)* (ULPA '08) (defining "reorganization" to include mergers, conversions, and other acquisitions of limited partnerships)].

If one of the parties to a reorganization is directly or indirectly controlled by, or under common control with, another party to the reorganization, *Corp. Code § 15679.14(a)* (CRLPA) and *Corp. Code § 15911.33(a)* (ULPA '08) do not apply to any limited partner of the controlled party who has not demanded cash payment for a dissenting interest. However, if the partner institutes any action to attack the validity of the reorganization or to have the reorganization set aside or rescinded, the partner thereafter has no right to demand payment for a dissenting interest [*Corp. Code § 15679.14(b)* (CRLPA); *Corp. Code § 15911.33(b)* (ULPA '08); *see Corp. Code § 15679.1(b)* (CRLPA); *Corp. Code § 15911.20(b)* (ULPA '08) ("control" defined)]. Additionally, in any action to attack the validity of the reorganization or to have the reorganization set aside or rescinded, (1) a party to a reorganization that controls another party to a reorganization has the burden of proving that the transaction is just and reasonable as to the limited partners of the controlled party; and (2) a person who controls two or more parties to a reorganization has the burden of proving that the transaction is just and reasonable as to the limited partners of any party so controlled [*Corp. Code § 15679.14(c)* (CRLPA); *Corp. Code § 15911.33(c)* (ULPA '08)].

Corp. Code § 15679.14(b) and *(c)* (CRLPA) and *Corp. Code § 15911.33(b)* and *(c)* (ULPA '08) do not apply if a majority in interest of the limited partners, other than those who are directly or indirectly controlled by, or under common control with, another party to the reorganization, approve or consent to the reorganization [*Corp. Code § 15679.14(d)* (CRLPA); *Corp. Code § 15911.33(d)* (ULPA '08)].

Corp. Code § 15679.14 (CRLPA) and *Corp. Code § 15911.33* (ULPA '08) do not prevent a limited partner of a limited partnership that is a party to a reorganization from bringing an action, at law or in equity and as to any matters other than to attack the validity of the reorganization or to have it set aside or rescinded, against (1) a general partner of the

partnership, (2) the partnership, or (3) any person controlling a general partner [*Corp. Code § 15679.14(e)* (CRLPA); *Corp. Code § 15911.33(e)* (ULPA '08)].

If litigation is instituted to test the sufficiency or regularity of the vote or consent of the limited partners in authorizing a reorganization, any proceedings on a cause of action for refusal to purchase a dissenting interest must be suspended until final determination of that litigation [*Corp. Code § 15679.12* (CRLPA); *Corp. Code § 15911.31* (ULPA '08)].

California Forms of Pleading and Practice--Annotated

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Chapter 404 PARTNERSHIPS: ACTIONS BETWEEN LIMITED PARTNERS AND PARTNERSHIPS
PART II. LEGAL BACKGROUND

35-404 California Forms of Pleading and Practice--Annotated § 404.21

§ 404.21 Transfer or Assignment of Partnership Interest

[1] ULPA '08

In a limited partnership governed by the ULPA '08, the only interest of a partner that is transferable is the partner's transferable interest [*Corp. Code § 15907.01* (ULPA '08)]. "Transferable interest" refers to the partner's right to receive distributions [*Corp. Code § 15901.02(ak)* (ULPA '08)], and it is considered personal property [*Corp. Code § 15907.01* (ULPA '08)].

A transfer of all or part of a partner's transferable interest is permissible and does not by itself cause the partner's dissociation or a dissolution and winding up of the limited partnership's activities [*Corp. Code § 15907.02(a)(1), (2)* (ULPA '08)]. Also, a transfer does not, as against the other partners or the limited partnership, entitle the transferee to participate in the management or conduct of the limited partnership's activities, to require access to information concerning the limited partnership's transactions (other than an account of the limited partnership's transactions on the dissolution and winding up of the limited partnership), to inspect or copy the required information or the limited partnership's other records, or to exercise any other rights or powers of a partner [*Corp. Code § 15907.02(a)(3), (c)* (ULPA '08); *see Corp. Code § 15901.02(ad)* ("required information" refers to information a limited partnership is required to maintain under *Corp. Code § 15901.11* (ULPA '08))].

A transferee has a right to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled [*Corp. Code § 15907.02(b)* (ULPA '08)]. However, the transferor retains all duties and obligations of a partner and retains the rights of a partner other than the interest in distributions transferred [*Corp. Code § 15907.02(d)* (ULPA '08)].

A limited partnership need not give effect to a transferee's rights until the limited partnership has notice of the transfer [*Corp. Code § 15907.02(e)* (ULPA '08)].

A transfer of a partner's transferable interest in the limited partnership in violation of a restriction on transfer contained in the partnership agreement is ineffective as to any person having notice of the restriction at the time of transfer [*Corp. Code § 15907.02(f)* (ULPA '08)].

A transferee that becomes a partner with respect to a transferable interest is liable for the transferor's obligations under *Corp. Code § 15905.02* (ULPA '08) and 15905.09 (ULPA '08) [*Corp. Code § 15907.02(g)* (ULPA '08)]. However, the transferee is not obligated for liabilities unknown to the transferee at the time the transferee became a partner [*Corp. Code § 15907.02(g)* (ULPA '08)].

A transferee of a partnership interest, including a transferee of a general partner, may become a limited partner if and to the extent that (1) the partnership agreement provides or (2) all general partners and a majority in interest of the limited partners consent [*Corp. Code § 15907.02(h)* (ULPA '08)].

If a partner dies, the deceased partner's personal representative or other legal representative may exercise the rights of a transferee [*see Corp. Code § 15907.02* (ULPA '08)] and, for the purposes of settling the estate, may exercise the rights of a current limited partner to inspect and copy information pertaining to the partnership [*Corp. Code § 15907.04* (ULPA '08); *see Corp. Code § 15903.04* (ULPA '08); *see also § 404.13[1]*].

[2] CRLPA

Under the CRLPA, a limited partnership interest is assignable in whole or in part [*Corp. Code § 15672(a)* (CRLPA)]. The partnership agreement may provide that the interest of a partner or assignee in a limited partnership may be evidenced by a certificate of interest issued by the limited partnership, may provide for the assignment or transfer of any interest represented by such a certificate and the admission of transferees of the certificates as additional or substituted limited partners, and may make other provisions with respect to the form of those certificates not inconsistent with *Corp. Code § 15611 et seq.* [*Corp. Code § 15638* (CRLPA)]. A certificate of interest may be, but is not required to be, a security as defined in *Com. Code § 8102(a)(15)* [*Corp. Code § 15638* (CRLPA)].

The assignment does not dissolve the limited partnership. Except as provided in CRLPA, the assignment does not entitle the assignee to become a limited partner or to exercise any rights of a partner. An assignment entitles the assignee to receive, to the extent assigned, only the distributions and the allocations of income, gain, loss, deduction, credit, or similar item to which the assignor would be entitled [*Corp. Code § 15672(a)* (CRLPA)]. Except as otherwise provided in the assignment, an assignee of a limited partnership interest in a limited partnership with over 100 limited partners is also entitled to all of the rights granted to limited partners pursuant to *Corp. Code § 15634* [*Corp. Code § 15672(a)* (CRLPA); *see § 404.13[2]*]. A limited partner remains a partner on assignment of all or part of his or her interest, with the rights that the assignee does not acquire or possess, subject to the assignee becoming a limited partner [*Corp. Code § 15672(a)* (CRLPA)].

The pledge, or granting, of a security interest, lien, or other encumbrance in or against any or all of the partnership interest of a partner will not cause the partner to cease to be a partner, nor will it grant to anyone else the power to exercise any rights or powers of a partner [*Corp. Code § 15672(b)*].

An assignee of a partnership interest, including an assignee of a general partner, may become a limited partner if and to the extent that (1) the partnership agreement provides, or (2) all general partners and a majority in interest of the limited partners consent [*Corp. Code § 15674(a)* (CRLPA)]. An assignee who becomes a limited partner has, to the extent assigned, the rights and powers of a limited partner, and is subject to the restrictions and liabilities of a limited partner, under the partnership agreement and other provisions of CRLPA. An assignee who becomes a limited partner is liable also for the obligations of the assignor to make contributions under *Corp. Code § 15651 et seq.* The assignee is not obligated, however, for liabilities that were unknown to the assignee at the time he or she became a limited partner and that could not be ascertained from the partnership agreement [*Corp. Code § 15674(b)* (CRLPA)].

If an assignee becomes a limited partner, the assignor is not released from the assignor's liability to the limited partnership [*Corp. Code § 15674(c)* (CRLPA); *see Corp. Code §§ 15624(c), 15652, 15666* (CRLPA)]:

- For a false statement in a certificate relating to the partnership.
- For preexisting claims of creditors.
- To return distributions made to him or her that were made when partnership liabilities to creditors exceeded partnership assets.

A majority in interest of the limited partners may remove a general partner who assigns all of that general partner's interest in the partnership to a third party [*Corp. Code § 15674(d)* (CRLPA)].

[3] ULPA

The ULPA provides that a limited partner's interest is assignable [*Corp. Code § 15519(1)* (ULPA)]. An assignee who does not become a substituted limited partner does not have the same rights as a limited partner to inspection of partnership books, accounts of partnership transactions, or to vote on partnership matters. Such an assignee is entitled only to receive the share of profits, compensation, or return of contributions, to which his or her assignor would be otherwise entitled [*Corp. Code § 15519(3)* (ULPA)].

An assignee has the right to become a substituted limited partner if all the partners consent, or if the assignor is empowered by the certificate to give the assignee that right, and does so [*Corp. Code § 15519(4)* (ULPA)]. When the assignee becomes a substituted limited partner, the general partners are required to add his or her name to the list of limited partners kept at the principal office of the partnership [*see Corp. Code §§ 15621, 15711, 15712(b)* (CRLPA) (requirements of CRLPA relating to certificates and information as applicable to partnerships governed by ULPA)].

A substituted limited partner has all the rights and powers of, and is subject to all the restrictions and liabilities of, his or her assignor, except those liabilities of which he or she was ignorant at the time he or she became a limited partner, and that could not be ascertained from the certificate [*Corp. Code § 15519(6)* (ULPA)]. The substitution of an assignee as a limited partner does not release the assignor from liability to the partnership for false statements in certificates or from the obligation to return distributions [*Corp. Code § 15519(7)* (ULPA); *see Corp. Code §§ 15622(c), 15712(b)* (CRLPA)].

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35-404 California Forms of Pleading and Practice--Annotated § 404.22

§ 404.22 Execution of Records and Certificates

[1] ULPA '08

[a] Signing and Filing of Documents

Documents (or "records" [*see Corp. Code § 15901.02(ac)* (ULPA '08)]) delivered to the Secretary of State for filing pursuant to the ULPA '08 must be signed in the following manner [*Corp. Code § 15902.04(a)* (ULPA '08]:

- An initial certificate of limited partnership must be signed by all general partners listed in the certificate.

- An amendment designating as general partner a person admitted under *Corp. Code § 15908.01(c)(2)* (ULPA '08) following the dissociation of a limited partnership's last general partner must be signed by that person.

- An amendment required by *Corp. Code § 15908.03(c)* (ULPA '08) following the appointment of a person to wind up a dissolved limited partnership's activities must be signed by that person.

- Any other amendment must be signed by (1) at least one general partner listed in the certificate of limited partnership; (2) each other person designated in the amendment as a new general partner; and (3) each person that the amendment indicates has dissociated as a general partner, unless (a) the person is deceased or a guardian or general conservator has been appointed for the person and the amendment so states; or (b) the person has previously delivered to the Secretary of State for filing a certificate of dissociation.

- A restated certificate of limited partnership must be signed by at least one general partner listed in the certificate, and, to the extent the restated certificate effects a change addressed by any other requirement listed here, the restated certificate must be signed in a manner that satisfies that requirement.

- A certificate of cancellation must be signed by all general partners listed in the certificate of limited

partnership or, if the certificate of limited partnership of a dissolved limited partnership lists no general partners, by the person appointed pursuant to *Corp. Code § 15908.03(c)* or *(d)* (ULPA '08) to wind up the dissolved limited partnership's activities.

- Certificates of conversion must be signed as provided in *Corp. Code § 15911.06(b)* (ULPA '08).

- Certificates of merger must be signed as provided in *Corp. Code § 15911.14(a)* (ULPA '08).

- Any other record delivered on behalf of a limited partnership to the Secretary of State for filing must be signed by at least one general partner listed in the certificate of limited partnership.

- A certificate of dissociation by a person pursuant to *Corp. Code § 15906.05(a)(4)* (ULPA '08) stating that the person has dissociated as a general partner must be signed by that person.

- A certificate of withdrawal by a person pursuant to *Corp. Code § 15903.06* (ULPA '08) must be signed by that person.

- A record delivered on behalf of a foreign limited partnership to the Secretary of State for filing must be signed by at least one general partner of the foreign limited partnership.

- Any other record delivered on behalf of any person to the Secretary of State for filing must be signed by that person.

A record authorized or required to be delivered to the Secretary of State for filing under the ULPA '08 must be completed on a form prescribed by and in a medium permitted by the Secretary of State, and must be delivered to the Secretary of State. Unless the Secretary of State determines that a record does not comply with the filing requirements of the ULPA '08, and if all requisite fees have been paid, the Secretary of State must file the record [*Corp. Code § 15902.06(a)* (ULPA '08)]. If the Secretary of State determines that a record delivered for filing does not conform to the law and returns it to the person delivering it, the record may be resubmitted accompanied by a written opinion of the member of the State Bar of California delivering the record or representing the person delivering it, to the effect that the specific provisions of the record objected to by the Secretary of State do conform to law and stating the points and authorities on which the opinion is based [*Corp. Code § 15902.06(d)* (ULPA '08)]. The Secretary of State must rely, with respect to any disputed point of law, other than the application of *Corp. Code §§ 15901.08*, *15901.09*, *15909.02*, *15909.05*, on that written opinion in determining whether the record conforms to law. When filed by the Secretary of State on resubmission, the record is effective retroactively as of the date that the original record was delivered to the Secretary of State for filing [*Corp. Code § 15902.06(d)* (ULPA '08)].

Any person may sign by an attorney in fact any record to be filed pursuant to the ULPA '08 [*Corp. Code § 15902.04(b)* (ULPA '08)].

Any person, other than a general partner, delivering a record to the Secretary of State for filing, must state the statutory authority for such action after the signature on the appropriate record [*Corp. Code § 15902.05(d)* (ULPA '08)].

A record filed without a signature is effective without being signed [*Corp. Code § 15902.05(c)* (ULPA '08)].

[b] Action to Compel Signature or Filing

If a person required by the ULPA '08 to sign a record or deliver a record to the Secretary of State for filing fails to do so, any other person aggrieved by that failure may petition the superior court to issue one or more of the following orders [*Corp. Code § 15902.05(a)* (ULPA '08)]:

- An order that the person sign the record.
- An order that the person deliver the record to the Secretary of State for filing.
- An order that the Secretary of State file the record unsigned.

If the aggrieved person is not the limited partnership or foreign limited partnership to which the record pertains, the aggrieved person must make the limited partnership or foreign limited partnership a party to the action [*Corp. Code § 15902.05(b)* (ULPA '08)]. In any action under this provision, if the court finds the failure of the person to comply with the requirement to sign a record or deliver a record to the Secretary of State for filing to have been without justification, the court may award an amount sufficient to reimburse the aggrieved persons bringing the action for the reasonable expenses incurred by those persons, including attorney's fees, in connection with the action or proceeding [*Corp. Code § 15902.05(b)* (ULPA '08)].

[c] False Information

If a record delivered to the Secretary of State for filing under the ULPA '08 and filed by the Secretary of State contains false information, a person that suffers loss by reliance on the information may recover damages for the loss as follows [*Corp. Code § 15902.08(a)* (ULPA '08)]:

- From a person that signed the record, or caused another to sign it on the person's behalf, and knew the information to be false at the time the record was signed; and
- From a general partner that has notice that the information was false when the record was filed or has become false because of changed circumstances, if the general partner had notice for a reasonably sufficient time before the information was relied upon to enable the general partner to effect an amendment [*see Corp. Code § 15902.02* (ULPA '08)], file a petition to compel a signature of a record [*see Corp. Code § 15902.05* (ULPA '08)], or deliver to the Secretary of State for filing a certificate of correction [*see Corp. Code § 15902.07* (ULPA '08)].

Signing a record authorized or required to be filed under the ULPA '08 constitutes an affirmation under the penalties of perjury that the facts stated in the record are true [*Corp. Code § 15902.08(b)* (ULPA '08)].

[2] CRLPA

[a] In General

If a general partner who is required under the CRLPA to execute or file a certificate of limited partnership fails to do so after demand within a reasonable time, or refuses to do so, any other partner, or any person appointed by a court of competent jurisdiction, may prepare, execute, and file a certificate of limited partnership with the Secretary of State [*Corp. Code § 15625(a)* (CRLPA)].

If a general partner who is required to execute any certificate fails to do so within a reasonable time, or refuses to do so, or if there is any dispute concerning the filing of a certificate of amendment, a certificate of continuation, a certificate of dissolution, or a certificate of cancellation of limited partnership, any partner may petition the superior court to direct the execution of the certificate. If the court finds that it is proper for the certificate to be executed, and that any person so designated has failed or refused to execute the certificate, or if the court determines that any certificate should be filed, it must order a party to file a certificate. If the general partner's failure or refusal to comply with the requirement to file any certificate was without justification, the court may award to the partners bringing the action an amount

sufficient to reimburse them for their reasonable expenses, including attorney's fees incurred in connection with the action or proceeding [*Corp. Code § 15625(b)* (CRLPA)].

Any person, other than a general partner, filing any certificate must state the statutory authority after the signature on the appropriate certificate [*Corp. Code § 15625(c)* (CRLPA)].

[b] False Statements

If a limited partner executes a certificate of limited partnership pursuant to *Corp. Code § 15633*, that limited partner is liable for any false statement in the certificate or for a statement in the certificate that is materially inconsistent with the partnership agreement. The limited partner is liable to any party who suffers loss in reliance on such a statement if the limited partner knew, or should have known, the statement was false when he or she executed the certificate and an amendment was not filed [*Corp. Code §§ 15622(e), 15624(c)*; *see Corp. Code § 15712(b)* (applying certificate requirements of CRLPA to all limited partnerships, including those governed by ULPA)].

[c] Inconsistent Statements

Any general partner, or any limited partner executing a certificate pursuant to *Corp. Code § 15633* is liable for any statement in the certificate of limited partnership that is materially inconsistent with the partnership agreement, if the partner knew or should have known that the statement was false when made and an amendment was not filed, and if the person suffering the loss relied on the statement or misstatement [*Corp. Code § 15624(c)* (CRLPA)]. A partner executing such a certificate is also liable to a party relying on any material misstatements of fact contained in the certificate. A general partner may be liable even if he or she did not execute the certificate if he or she knew or should have known that the statement was false or inconsistent at the time or became false or inconsistent and failed to file an amendment [*Corp. Code § 15624(c)* (CRLPA); *see* Ch. 405, *Partnerships: Actions Between Limited Partners or Partnerships and Third Parties* , for discussion and forms for third party actions based on partners' liability].

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§ 404.23 Rights and Duties of General Partners

[1] ULPA '08

[a] General Partner's Authority

In a limited partnership governed by the ULPA '08, each general partner is an agent of the partnership for the purposes of its activities [*Corp. Code § 15904.02(a)* (ULPA '08)]. An act of a general partner, including the signing of a record in the partnership's name, for apparently carrying on in the ordinary course the limited partnership's activities or activities of the kind carried on by the limited partnership, binds the limited partnership, unless the general partner did not have authority to act for the limited partnership in the particular matter and the person with which the general partner was dealing knew, had received a notification, or had notice under *Corp. Code § 15901.03(d)* (ULPA '08) that the general partner lacked authority [*Corp. Code § 15904.02(a)* (ULPA '08)].

An act of a general partner that is not apparently for carrying on in the ordinary course the limited partnership's activities, or activities of the kind carried on by the limited partnership, binds the limited partnership only if the act was actually authorized by all the other partners [*Corp. Code § 15904.02(b)* (ULPA '08)].

All general partners ordinarily have equal rights in the management and conduct of the limited partnership's activities [*Corp. Code § 15904.06(a)* (ULPA '08); *see Corp. Code § 15904.07* (ULPA '08) (general partner's access to information pertaining to limited partnership)]. Except as expressly provided in the ULPA '08, any matter relating to the activities of the limited partnership may be exclusively decided by the general partner or, if there is more than one general partner, by a majority of the general partners [*Corp. Code § 15904.06(a)* (ULPA '08)]. For example, the consent of all partners is necessary (1) to amend the partnership agreement; and (2) to sell, lease, exchange, or otherwise dispose of all, or substantially all, of the limited partnership's property, with or without the good will, other than in the usual and regular course of the limited partnership's activities [*Corp. Code § 15904.06(b)* (ULPA '08)].

A partnership agreement may provide for the creation of classes of general partners, defining define the rights, powers, and duties of those classes, including rights, powers, and duties senior to other classes of general partners [*Corp. Code § 15904.09(a)* (ULPA '08)]. The partnership agreement may provide to all or certain specified classes of general partners the right to vote separately or with all or any class of the general partners on any matters [*Corp. Code § 15904.09(b)*

(ULPA '08)].

A general partner is not entitled to remuneration for services performed for the partnership [*Corp. Code § 15904.06(f)* (ULPA '08)]. However, a limited partnership must reimburse a general partner for payments made and indemnify a general partner for liabilities incurred by the general partner in the ordinary course of the activities of the partnership or for the preservation of its activities or property [*Corp. Code § 15904.06(c)* (ULPA '08)]. A limited partnership must also reimburse a general partner for an advance to the limited partnership beyond the amount of capital the general partner agreed to contribute [*Corp. Code § 15904.06(d)* (ULPA '08)]. A payment or advance made by a general partner that gives rise to one of these reimbursement obligations constitutes a loan to the limited partnership that accrues interest from the date of the payment or advance [*Corp. Code § 15904.06(e)* (ULPA '08)].

[b] General Partner's Fiduciary Duties

A general partner's fiduciary duties to the limited partnership and the other partners consist of a duty of loyalty and a duty of care [*Corp. Code § 15904.08(a)* (ULPA '08)].

The duty of loyalty to the limited partnership and the other partners is limited to the following [*Corp. Code § 15904.08(b)* (ULPA '08)]:

- A duty to account to the limited partnership and hold as trustee for it any property, profit, or benefit derived by the general partner in the conduct and winding up of the limited partnership's activities or derived from a use by the general partner of limited partnership property, including the appropriation of a limited partnership opportunity.

- A duty to refrain from dealing with the limited partnership in the conduct or winding up of the limited partnership's activities as or on behalf of a party having an interest adverse to the limited partnership.

- A duty to refrain from competing with the limited partnership in the conduct or winding up of the limited partnership's activities.

The duty of care to the limited partnership and the other partners in the conduct and winding up of the limited partnership's activities is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law [*Corp. Code § 15904.08(c)* (ULPA '08)].

A general partner must discharge the duties to the partnership and the other partners under the ULPA '08 or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing [*Corp. Code § 15904.08(d)* (ULPA '08)]. A general partner does not violate a duty or obligation under the ULPA '08 or under the partnership agreement merely because the general partner's conduct furthers the general partner's own interest [*Corp. Code § 15904.08(e)* (ULPA '08)].

[c] Liability of Partnership and General Partner

A limited partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a general partner acting in the ordinary course of activities of the limited partnership or with authority of the limited partnership [*Corp. Code § 15904.03(a)* (ULPA '08)]. If, in the course of the limited partnership's activities or while acting with authority of the limited partnership, a general partner receives or causes the limited partnership to receive money or property of a person not a partner, and the money or property is misapplied by a general partner, the limited partnership is liable for the loss [*Corp. Code § 15904.03(b)* (ULPA '08)].

Generally, all general partners are liable jointly and severally for all obligations of the limited partnership unless otherwise agreed by the claimant or provided by law [*Corp. Code § 15904.04(a)* (ULPA '08)]. However, a person that becomes a general partner of an existing limited partnership is not personally liable for an obligation of a limited partnership incurred before the person became a general partner [*Corp. Code § 15904.04(b)* (ULPA '08)].

[2] CRLPA and ULPA

[a] In General

Under both the CRLPA and the ULPA, general partners in a limited partnership have the same rights and powers, and are subject to the same liabilities, as are partners in a general partnership [*Corp. Code § 15643* (CRLPA); *Corp. Code § 15509* (ULPA); *see* Ch. 401, *Partnerships: Actions Between General Partners and Partnership* , and Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties*].

Under the ULPA, the authority of the general partners in a limited partnership is limited in that they may not do any of the following without the written consent or ratification of the specific act by all the limited partners [*Corp. Code § 15509(1)*]:

- Perform any act in contravention of the certificate.
- Perform any act that would make it impossible to carry on the ordinary business of the partnership.
- Confess a judgment against the partnership.
- Possess partnership property, or assign their rights in specific partnership property for other than a partnership purpose.
- Admit a person as a general partner.
- Admit a person as a limited partner, unless the right to do so is given in the certificate of limited partnership.
- Continue the business with partnership property on the death, retirement, or insanity of a general partner, unless the right to do so is given in the certificate.

[b] General Partner Who Is Also Limited Partner

A general partner of a limited partnership governed by the CRLPA may make contributions to the limited partnership and share in the profits and losses of, and in distributions from, the limited partnership as a general partner. A general partner may also make contributions, and share in the profits, losses, and distributions, as a limited partner, if the general partner's interest as a limited partner is separately designated in the partnership agreement. A person who is both a general and a limited partner has the rights and powers, and is subject to the restrictions and liabilities, of a general partner. Except as otherwise provided in the partnership agreement, he or she also has the powers, and is subject to the restrictions, of a limited partner to the extent of his or her participation as a limited partner [*Corp. Code § 15644* (CRLPA)].

Similarly, under the ULPA a person may be a general partner and a limited partner in the same partnership at the same time [*Corp. Code § 15512(1)* (ULPA)]. A person who is a general and a limited partner has all the rights and powers and is subject to all the restrictions of a general partner, except that with respect to his or her contribution, he or she has all the rights against the other partners that he or she would have if he or she were not also a general partner [*Corp.*

Code § 15512(2) (ULPA)].

[c] Withdrawal

Under the CRLPA, a partnership agreement may provide that a general partner may withdraw from a limited partnership at the time, or on the happening, of events specified in the partnership agreement, or that a general partner may not have the right to withdraw as a general partner of a limited partnership. Notwithstanding any restriction on a general partner's right to withdraw, a general partner may withdraw from a limited partnership at any time by giving written notice to the other partners. If the withdrawal violates the partnership agreement, however, the limited partnership may recover from the withdrawing general partner damages for breach of the partnership agreement. In addition to other remedies, the partnership has the right to offset the damages against any amounts otherwise distributable to the general partner. In the case of a partnership for a fixed term, a withdrawal by a general partner prior to the expiration of that term is a breach of the partnership agreement [*Corp. Code § 15662(a)* (CRLPA)].

Subject to any liability for breach of the partnership contract, a general partner who ceases to be a general partner has all of the following rights and liabilities [*Corp. Code § 15662(b)* (CRLPA)]:

- He or she retains the same interest in his or her capital account and distributions, but the interest is that of a limited partner.

- He or she is not personally liable for partnership debts incurred after he or she ceases to be a general partner, other than debts incurred by reason of being deemed to be acting as a general partner [*see Corp. Code § 15642*].

- He or she will be entitled to vote as a limited partner on all matters except the admission and compensation of a general partner.

- He or she will have his or her interest in profits, losses, and distributions reduced pro rata with all other partners to provide compensation or an interest in the partnership, or both, to a new general partner.

[3] Exercising Business Judgment

In any partnership, including a limited partnership, the relationship between partners is fiduciary in nature, imposing on partners a duty of good faith and fair dealing, and requiring that no partner may take unfair advantage [*see Corp. Code § 15904.08* (ULPA '08); *see also Nelson v. Abraham (1947) 29 Cal. 2d 745, 750-751, 177 P.2d 931* ; *Everest Investors 8 v. McNeil Partners (2003) 114 Cal. App. 4th 411, 424, 429, 8 Cal. Rptr. 3d 31* (limited partners' claims that general partners breached fiduciary duties by engaging in wrongful actions related to merger transaction that benefitted general partners at expense of limited partners were individual rather than derivative in nature); *Wind v. Herbert (1960) 186 Cal. App. 2d 276, 284, 8 Cal. Rptr. 817*]. Limited partnerships are also governed to some extent by the rules relating to corporations. The characteristics of limited partners, which include limited investor liability, delegation of authority to management, and the fiduciary duty owed by management to investors, are similar to those existing in corporate investment. In the latter context, it has long been the rule that directors are not liable to stockholders for mistakes made in exercising honest business judgment, or for losses incurred in the good faith performance of their duties when they have used the standard of care of an ordinarily prudent person. By this standard, a general partner may not be held liable for mistakes made or losses incurred in the good faith exercise of reasonable business judgment [*see Corp. Code § 15904.08(c)* (ULPA '08) (general partner's duty of care is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or knowing violation of law); *Wyler v. Feuer (1978) 85 Cal. App. 3d 392, 402, 149 Cal. Rptr. 626* (decided under ULPA); *but see Everest Investors 8 v. McNeil Partners (2003) 114 Cal. App. 4th 411, 429-432, 8 Cal. Rptr. 3d 31* (triable issues of fact existed regarding general partner's business judgment rule defense in limited partners' action for breach of fiduciary duty; summary judgment could not be upheld based on theory

that general partner conducted good faith and reasonable investigation into whether merger transaction was in best interests of limited partners)].

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§ 404.24 Actions by Partners

[1] ULPA '08

[a] Partner's Direct Action

A limited or general partner in a partnership governed by the ULPA '08 may maintain a direct action against the limited partnership or another partner for legal or equitable relief, with or without an accounting as to the partnership's activities, to enforce the rights and otherwise protect the interests of the partner, including rights and interests under the partnership agreement or under the ULPA '08 or arising independently of the partnership relationship [*Corp. Code § 15910.01(a)* (ULPA '08)]. A partner bringing a direct action must plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited partnership [*Corp. Code § 15910.01(b)* (ULPA '08)].

The accrual of, and any time limitation on, a right of action by a partner under the ULPA '08 is governed by other law [*Corp. Code § 15910.01(c)* (ULPA '08)]. A right to an accounting on the dissolution and winding up of a partnership does not revive a claim barred by law [*Corp. Code § 15910.01(c)* (ULPA '08)].

[b] Partner's Derivative Action

A limited or general partner in a limited partnership governed by the ULPA '08 may bring a derivative action to enforce a right of the partnership if either (1) the partner first makes a demand on the general partners, requesting that they cause the limited partnership to bring an action to enforce the right, and the general partners do not bring the action within a reasonable time; or (2) a demand on the general partners would be futile [*Corp. Code § 15910.02* (ULPA '08); *see Corp. Code § 15910.04* (ULPA '08) (complaint must state with particularity date and content of plaintiff's demand and general partners' response to the demand, or why demand is excused as futile)].

A derivative action may be maintained only by a person that is a partner at the time the action is commenced and (1) was a partner when the conduct giving rise to action occurred, or (2) whose status as a partner devolved on the person by operation of law or pursuant to the terms of the partnership agreement from a person that was a partner at the time of that conduct [*Corp. Code § 15910.03(a)* (ULPA '08)]. However, any partner that does not meet the foregoing

requirements may nevertheless be allowed in the discretion of the court to maintain a derivative action if the court determines that (1) there is a strong prima facie case in favor of the claim asserted on behalf of the partnership, (2) no other similar action has been or is likely to be instituted, (3) the plaintiff acquired an interest in the partnership before there was disclosure to the public and to the plaintiff of the wrongdoing of which the plaintiff complains, (4) unless the action can be maintained the defendant may retain a gain derived from the defendant's willful breach of a fiduciary duty, and (5) the requested relief will not result in unjust enrichment of the partnership or any partner [*Corp. Code § 15910.03(b)* (ULPA '08)]. The court's determination may be made only on motion by the plaintiff and after a hearing at which the court considers such evidence, by affidavit or testimony, as it deems material [*Corp. Code § 15910.03(b)* (ULPA '08)].

In any derivative action, the court may, on motion of the limited partnership or a general partner, require the plaintiff to furnish a bond of up to $50,000 if (1) there is no reasonable possibility that the prosecution of the cause of action alleged in the complaint against the moving party will benefit the limited partnership or its partners; or (2) the moving party, if other than the partnership, did not participate in the transaction complained of in any capacity [*Corp. Code § 15910.06* (ULPA '08)]. The motion generally must be made within 30 days after service of the summons on the limited partnership or the general partner, but the court may extend that period by up to 60 days [*Corp. Code § 15910.06(a)(2)* (ULPA '08)].

Generally, any proceeds or other benefits of a derivative action, whether by judgment, compromise, or settlement, belong to the limited partnership and not to the derivative plaintiff [*Corp. Code § 15910.05(a)(1)* (ULPA '08)]. If the derivative plaintiff receives any of those proceeds, the derivative plaintiff must immediately remit them to the limited partnership [*Corp. Code § 15910.05(a)(2)* (ULPA '08)]. If a derivative action is successful in whole or in part, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, from the recovery of the limited partnership [*Corp. Code § 15910.05(b)* (ULPA '08)].

[2] CRLPA

[a] Class Action

Any limited partner of a foreign or domestic limited partnership governed by the CRLPA may bring a class action on behalf of all or a class of limited partners to enforce any claim common to those limited partners. The action is governed by the law governing class actions generally, except that to maintain the class action there is no requirement that the class be so numerous that joinder of all members is impracticable [*Corp. Code § 15701* (CRLPA)]. For discussion of class actions generally, see Ch. 120, *Class Actions* .

[b] Derivative Action

Limited partners may bring or defend actions on behalf of the partnership if two conditions are met [*Corp. Code § 15702(a)* (CRLPA)]. First, the plaintiff must allege either of the following in the complaint [*Corp. Code § 15702(a)(1)* (CRLPA)]:

- That he or she was a partner of record or beneficially, at the time of the transaction or any part thereof of which plaintiff complains [*see, e.g., Jones v. Wells Fargo Bank (2003) 112 Cal. App. 4th 1527, 1534, 5 Cal. Rptr. 3d 835* (plaintiff who alleged that bank's loan and forbearance agreement were usurious was not limited partner when original loan was made, but alleged that he was partner when defendants arranged forbearance agreement; allegation was sufficient to challenge forbearance agreement)].

- That plaintiff's interest thereafter devolved on plaintiff by operation of law from a partner who was a partner at the time of the transaction, or any part of the transaction, of which plaintiff complains.

Any partner who does not meet this first condition nevertheless may be allowed, at the discretion of the court, to maintain the action. In order to do so, the partner must make a preliminary showing to the court, and obtain a court determination, that certain factors exist. The showing and determination must be made by motion and after a hearing at which the court must consider any evidence by affidavit or testimony that it deems material. For the partner to maintain the action, the court must determine that (1) there is a strong prima facie case in favor of the claim asserted on behalf of the limited partnership, (2) no other similar action has been or is likely to be instituted, (3) the plaintiff acquired the interest before there was disclosure to the public or to the plaintiff of the wrongdoing of which plaintiff complains, (4) unless the action is maintained the defendant may retain a gain derived from the defendant's willful breach of a fiduciary duty, and (5) the requested relief will not result in unjust enrichment of the limited partnership or of any partner the following factors exist [*Corp. Code § 15702(a)(1)* (CRLPA)].

The second condition for any partner of a limited partnership to institute or maintain a derivative action is that the plaintiff must allege in the complaint, with particularity, his or her efforts to secure from the general partners the action that the plaintiff desires, or the reasons for not making that effort. The plaintiff must further allege that he or she has either informed the limited partnership or the general partners in writing of the ultimate facts of each cause of action against each defendant, or delivered to the limited partnership or the general partners a true copy of the complaint that plaintiff proposes to file [*Corp. Code § 15702(a)(2)* (CRLPA)].

In an action brought by limited partners under CRLPA on behalf of the limited partnership, the limited partnership or any defendant who is a general partner or who was a general partner at the time of the acts complained of may move for an order, on notice and hearing, requiring that the plaintiff furnish security. The motion may be brought at any time within 30 days after service of summons on the limited partnership or on any such defendant, although the court may, for good cause shown on application of the limited partnership or any defendant, extend the 30-day period for an additional period not exceeding 60 days. The motion must be based on one or both of the following grounds [*Corp. Code § 15702(b)* (CRLPA)]:

- There is no reasonable possibility that prosecution of the cause of action alleged in the complaint against the moving party will benefit the limited partnership or its partners.

- The moving party, if it is someone other than the limited partnership, did not participate in the transaction complained of in any capacity.

At the hearing on a motion for security, the court must consider oral or written evidence, by witnesses or affidavit, that may be material (1) to the ground on which the motion is based, or (2) to a determination of the probable reasonable expenses, including attorney's fees, of the limited partnership and the moving party that will be incurred in the defense of the action. If the court determines after hearing the evidence that the moving party has established a probability in support of any of the grounds on which the motion is based, the court must fix the nature and amount of security, not to exceed $50,000, to be furnished by plaintiff for reasonable expenses, including attorney's fees, that may be incurred by the moving party and the limited partnership in connection with the action. A ruling by the court on the motion is not a determination of any issue in the action or of the merits of any such issue [*Corp. Code § 15702(c)* (CRLPA)].

The amount of the security thereafter may be increased or decreased at the court's discretion on a showing that the security provided has or may become inadequate or excessive, but the court may not increase the total amount of the security beyond $50,000 in the aggregate for all defendants. If the court, on such a motion, determines that plaintiff must furnish security as to one or more defendants, the action must be dismissed as to those defendants unless the security required by the court has been furnished within any reasonable time fixed by the court. The limited partnership and the moving party will have recourse to the security in an amount that the court determines on the termination of the action [*Corp. Code § 15702(c)* (CRLPA)].

For forms relating to the motion for security that may be adapted for use in a derivative action by limited partners, see Ch. 168, *Corporations: Derivative Actions* .

If the plaintiff, either before or after a motion for security is made or any order or determination is made pursuant to such a motion, posts good and sufficient bond or bonds in the aggregate amount of $50,000 to secure the reasonable expenses of the parties entitled to make the motion, the plaintiff has complied with the security requirements and with any order for security previously made. Any motion for security then pending will be dismissed and no further or additional bond or other security will be required [*Corp. Code § 15702(d)* (CRLPA)].

If a motion for security is filed, no pleadings need be filed by the limited partnership or any other defendant. The prosecution of the action will be stayed until 10 days after the court has disposed of the motion [*Corp. Code § 15702(e)* (CRLPA)].

For further discussion of security and bonds generally, see Ch 538, *Suretyship, Bonds, and Undertakings* .

[3] ULPA

Under the ULPA, a limited partner is not a proper party to an action by or against a limited partnership, except when the object is to enforce his or her right against or liability to the partnership [*see Corp. Code § 15526* (ULPA)]. Cases decided under ULPA, however, provide that limited partners may intervene and file cross complaints in suits against limited partnerships when the general partners refuse to defend the action [*see Kobernick v. Shaw (1977) 70 Cal. App. 3d 914, 918-920, 919, 139 Cal. Rptr. 188* ; *Linder v. Vogue Investments, Inc. (1966) 239 Cal. App. 2d 338, 340-341, 48 Cal. Rptr. 633* ; for forms relating to intervention generally, *see* Ch. 395, *Parties*].

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35-404 California Forms of Pleading and Practice--Annotated §§ 404.25-404.29

[Reserved]

§§ 404.25[Reserved]

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35-404 California Forms of Pleading and Practice--Annotated § 404.30

§ 404.30 Related Matthew Bender Publications

For memoranda relating to actions against limited partnerships, see California Points and Authorities, Ch. 170, *Partnerships and Joint Ventures* (Matthew Bender)

For discussion and analysis of the enactment of and transition to ULPA '08, see Ballantine & Sterling, California Corporation Laws, Ch. 25, *Limited Partnerships* (Matthew Bender).

For discussion of the rights and remedies of limited partners in real estate syndicates, see California Real Estate Law and Practice, Ch. 33, *Remedies of Syndicate Investors* (Matthew Bender)

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35-404 California Forms of Pleading and Practice--Annotated § 404.31

§ 404.31 State Statutes

[1] Uniform Limited Partnership Act of 2008 (ULPA '08)

[a] Formation of Limited Partnership

Filing of certificate of limited partnership. *Corp. Code §§ 15902.01*, *15902.06* (ULPA '08)

Signature required on filed records. *Corp. Code § 15902.04* (ULPA '08)

[b] Limited Partners

Becoming limited partner. *Corp. Code § 15903.01* (ULPA '08)

Liability of limited partner. *Corp. Code § 15903.03* (ULPA '08)

Access to partnership information. *Corp. Code § 15903.04* (ULPA '08)

Fiduciary duties of limited partner. *Corp. Code § 15903.05* (ULPA '08)

Classes of limited partners. *Corp. Code § 15903.07* (ULPA '08)

[c] General Partners

Becoming general partner. *Corp. Code § 15904.01* (ULPA '08)

Liability of general partner. *Corp. Code § 15904.04* (ULPA '08)

Management powers. *Corp. Code § 15904.06* (ULPA '08)

Access to partnership information. *Corp. Code § 15904.07* (ULPA '08)

Fiduciary duties of general partner. *Corp. Code § 15904.08* (ULPA '08)

Classes of general partners. *Corp. Code § 15904.09* (ULPA '08)

[d] Dissociation of Partners

Dissociation of limited partner. *Corp. Code §§ 15906.01, 15906.02* (ULPA '08)

Dissociation of general partner. *Corp. Code §§ 15906.03-15906.07* (ULPA '08)

[e] Actions by Partners

Direct actions. *Corp. Code § 15910.01* (ULPA '08)

Derivative actions. *Corp. Code §§ 15906.02-15906.06* (ULPA '08)

[f] Reorganizations of Limited Partnerships

Conversion into other entity. *Corp. Code §§ 15911.02-15911.09* (ULPA '08)

Merger. *Corp. Code §§ 15911.10-15911.19* (ULPA '08)

Rights of dissenting limited partners. *Corp. Code §§ 15911.20-15911.33* (ULPA '08)

[2] California Revised Limited Partnership Act (CRLPA)

[a] Distributions

Allocation of partnership profits and losses. *Corp. Code § 15653* (CRLPA)

Manner of permissible distributions of partnership money and property. *Corp. Code § 15654* (CRLPA)

Right to receive distributions prior to withdrawal or dissolution. *Corp. Code § 15661* (CRLPA)

Partner entitled to distribution has status of creditor. *Corp. Code § 15665* (CRLPA)

Partner's liability to return distribution to partnership. *Corp. Code § 15666* (CRLPA)

[b] General Partners

Admission of additional general partners after formation of limited partnership. *Corp. Code § 15641* (CRLPA)

Rights, powers, and liabilities of general partner same as partner in general partnership. *Corp. Code § 15643* (CRLPA)

Right of general partner to make contributions as limited partner in same limited partnership. *Corp. Code § 15644* (CRLPA)

Withdrawal of general partner. *Corp. Code § 15662* (CRLPA)

[c] Limited Partners

Admission of additional limited partners after formation of limited partnership. *Corp. Code § 15631* (CRLPA)

Rights of limited partners relating to partnership records; enforcement of rights by court action. *Corp. Code § 15634* (CRLPA)

Attorney General's actions to enforce rights of limited partners. *Corp. Code § 15635* (CRLPA)

General rules relating to limited partners' rights in limited partnership. *Corp. Code § 15636* (CRLPA)

Withdrawal of limited partner. *Corp. Code § 15663* (CRLPA)

Rights of limited partner after withdrawal. *Corp. Code § 15664* (CRLPA)

Effect of death or incompetence of limited partner. *Corp. Code § 15675* (CRLPA)

Rights of limited partners in foreign limited partnerships. *Corp. Code § 15694* (CRLPA)

Class actions by limited partners. *Corp. Code § 15701* (CRLPA)

Derivative actions by limited partners on behalf of limited partnership. *Corp. Code § 15702* (CRLPA)

[d] Merger or Conversion of Limited Partnerships

Definitions applicable to conversions. *Corp. Code § 15677.1* (CRLPA)

Limited partnerships permitted to convert into other business entity, foreign other business entity, or foreign limited partnership. *Corp. Code § 15677.2* (CRLPA)

Plan of conversion; effective dates. *Corp. Code §§ 15677.3-15677.4* (CRLPA)

Conversion into foreign limited partnership or foreign other business entity. *Corp. Code § 15677.5* (CRLPA)

Conversion of other business entity, foreign other business entity, or foreign limited partnership into domestic limited partnership. *Corp. Code § 15677.8* (CRLPA)

Effect of conversion. *Corp. Code §§ 15677.6, 15677.7, 15677.9* (CRLPA)

Two or more limited partnerships enabled to merge into one. *Corp. Code § 15678.1(a)* (CRLPA)

One or more limited partnerships and one or more other business entities enabled to merge into one of those other business entities. *Corp. Code § 15678.1(b)* (CRLPA)

One or more limited partnerships and one or more other business entities enabled to merge into one limited partnership. *Corp. Code § 15678.1(c)* (CRLPA)

Merger agreement; approval; certificate of merger. *Corp. Code §§ 15678.2-15678.5* (CRLPA)

Merger of foreign limited partnerships or foreign other business entities and domestic limited partnerships. *Corp. Code § 15678.7* (CRLPA)

Assumption of tax liability of disappearing partnership or entity upon merger. *Corp. Code § 15678.10* (CRLPA)

Application of *Corp. Code § 15679.1 et seq.* to reorganizations, including merger. *Corp. Code § 15679.1(a)* (CRLPA)

Right of dissenting partner to require limited partnership to purchase dissenting interest. *Corp. Code § 15679.2(a)* (CRLPA)

Dissenting interest defined. *Corp. Code § 15679.2(b)* (CRLPA)

Notice of offer to purchase dissenting interests; demand for payment. *Corp. Code § 15679.3* (CRLPA)

Submission of certificate for endorsement. *Corp. Code § 15679.4* (CRLPA)

Payment for dissenting interest. *Corp. Code §§ 15679.5, 15679.9, 15679.10* (CRLPA)

Action to compel purchase of dissenting interest. *Corp. Code § 15679.6* (CRLPA)

Court-appointed appraisers. *Corp. Code § 15679.7(a), (b)* (CRLPA)

Judgment in action to compel purchase of dissenting assets. *Corp. Code § 15679.7(c), (d)* (CRLPA)

Costs in action to compel purchase of dissenting assets. *Corp. Code § 15679.7(e)* (CRLPA)

Prohibited payments in action to compel purchase of dissenting assets. *Corp. Code § 15679.8* (CRLPA)

Destruction of dissenting interest. *Corp. Code § 15679.11* (CRLPA)

Suspension of action to compel purchase of dissenting interest during litigation to attack validity of merger. *Corp. Code § 15679.12* (CRLPA)

Application of Corp. Code *§ 15679.1 et seq. Corp. Code* § 15679.13 (CRLPA)

Attack on validity of merger. *Corp. Code § 15679.14* (CRLPA)

[e] Partnership Interests

Partnership agreement providing for certificates evidencing interest, transfer of interests, and constitution of assignee as additional or substituted limited partner. *Corp. Code § 15638* (CRLPA)

Assignment of interest in limited partnership. *Corp. Code §§ 15638, 15672* (CRLPA)

Rights of assignee of limited partnership interest. *Corp. Code §§ 15638, 15674* (CRLPA)

Interest in limited partnership is personal property; partner has no interest in specific partnership property. *Corp. Code § 15671* (CRLPA)

[f] Rules Governing General and Limited Partners

Loans by partner to limited partnership permitted. *Corp. Code § 15617* (CRLPA)

Contributions of partners to limited partnership. *Corp. Code § 15651* (CRLPA)

Two or more real estate investment trusts enabled to merge into one. *Corp. Code § 23006(a)(1)* (CRLPA)

One or more real estate investment trusts with one or more limited partnerships enabled to merge into one limited partnership. *Corp. Code § 23006(a)(2)* (CRLPA)

One or more real estate investment trusts with one or more limited partnerships enabled to merge into one real estate investment trust. *Corp. Code § 23006(a)(3)* (CRLPA)

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35-404 California Forms of Pleading and Practice--Annotated § 404.32

§ 404.32 Decisions

[1] Assignment of Interest

Assignees of limited partners who are not substituted limited partners have no right to interfere in management of partnership business and no voice in internal management; such assignees have no standing to bring action against general partners for breach of fiduciary duty, declaratory relief, and injunction. *Kellis v. Ring (1979) 92 Cal. App. 3d 854, 860, 155 Cal. Rptr. 297* (decided under ULPA)

Assignee has right only to income, profits, and return of contribution, and may only bring action against general partners relating to interference with those rights. *Kellis v. Ring (1979) 92 Cal. App. 3d 854, 860, 155 Cal. Rptr. 297* (decided under ULPA)

[2] General Partner's Rights and Liabilities

Dismissal of limited partner/investor's common law claim against general partner for negligent mismanagement is proper in view of failure to introduce evidence of industry standard for management and in view of evidence that partnership's catches and revenues were comparable to those of other fishing ventures in area, based on consultation with industry expert and preparation of projections with aid of industry journals and publications. *Toombs v. Leone (9th Cir. 1985) 777 F.2d 465, 470*

Dismissal of limited partner/investor's claim against general partner for breach of fiduciary duty is proper in view of failure to establish that general partner had gained any advantage over him. *Toombs v. Leone (9th Cir. 1985) 777 F.2d 465, 470*

Limited partners' claims that general partners breached fiduciary duties by engaging in wrongful actions related to merger transaction that benefitted general partners at expense of limited partners were individual rather than derivative in nature. *Everest Investors 8 v. McNeil Partners (2003) 114 Cal. App. 4th 411, 424, 429, 8 Cal. Rptr. 3d 31*

Triable issues of fact existed regarding general partner's business judgment rule defense in limited partners' action for breach of fiduciary duty; summary judgment could not be upheld based on theory that general partner conducted good faith and reasonable investigation into whether merger transaction was in best interests of limited partners. *Everest Investors 8 v. McNeil Partners (2003) 114 Cal. App. 4th 411, 429-432, 8 Cal. Rptr. 3d 31*

General partner's fiduciary duty not to purchase partnership debt and foreclose out a partner cannot be contracted away in partnership agreement; limited partnership agreement cannot relieve general partner of its fiduciary duties in matters fundamentally related to partnership business. *BT-I v. Equitable Life Assurance Society (1999) 75 Cal. App. 4th 1406, 1415, 89 Cal. Rptr. 2d 811*

Innocent general partner required by former *Corp. Code §§ 15018(b), 15040(d)* to reimburse limited partner for proportionate share of sums expended to repay unauthorized loan obtained by other general partner (who was insolvent and misappropriated proceeds) and secured by partnership property. *Kazanjian v. Rancho Estates, Ltd. (1991) 235 Cal. App. 3d 1621, 1627-1630, 1 Cal. Rptr. 2d 534* (dissent noted that no claim for "secondary" liability on contribution theory was before trial or appellate court, and limited partner waived any claim by ratification implicit in approving repayment of loan)

General partner is not liable to limited partners for mistakes or losses incurred in the good faith exercise of reasonable business judgment. *Wyler v. Feuer (1978) 85 Cal. App. 3d 392, 402, 149 Cal. Rptr. 626* (decided under ULPA)

Partnership agreement provision denying general partner right to accounting and forfeiting his or her investment on termination of partnership agreement is unenforceable. *Moldovan v. Fischer (1957) 149 Cal. App. 2d 600, 611, 308 P.2d 844* (decided under ULPA)

[3] Limited Partner's Rights and Liabilities

Claims of limited partners that general partners breached fiduciary duties by engaging in wrongful actions related to merger transaction that benefitted themselves at expense of limited partners were individual rather than derivative in nature; trial court erred in granting summary judgment on ground that claims were derivative. *Everest Investors 8 v. McNeil Partners (2003) 114 Cal. App. 4th 411, 424, 429, 8 Cal. Rptr. 3d 31*

Limited partner is proper party to bring derivative actions under *Corp. Code § 15526* against general partners for self dealing and breach of fiduciary duties. *Wallner v. Parry Professional Bldg., Ltd. (1994) 22 Cal. App. 4th 1446, 1449-1450*

Limited partner's derivative action under *Corp. Code § 15526* is inappropriate to challenge decisions of general partner in exercise of good business judgment. *Wallner v. Parry Professional Bldg., Ltd. (1994) 22 Cal. App. 4th 1446, 1453-1454*

Attorney for partner represents all partners in matters of partnership business; thus joint client rule of *Evid. Code § 962* applies to communication by one partner to attorney not made in presence of other partners. *Wortham & Van Liew v. Superior Court (1987) 188 Cal. App. 3d 927, 931-933, 233 Cal. Rptr. 725*

Right of limited partners under *Corp. Code § 15510(1)(a), (b)* (ULPA) to inspect partnership books and to have true and full information of all things affecting partnership on demand is exercisable without showing of good cause or proper purpose. *McCain v. Phoenix Resources, Inc. (1986) 185 Cal. App. 3d 575, 579-580, 230 Cal. Rptr. 25*

Right of limited partners under *Corp. Code § 15510(1)(b)* (ULPA) to information and inspection applies to documents and information relating to partnership business in possession of attorney for general partner. *McCain v. Phoenix*

Resources, Inc. (1986) 185 Cal. App. 3d 575, 580-581, 230 Cal. Rptr. 25

Limited partnership may bring action in its own name. *Diamond View Limited v. Herz (1986) 180 Cal. App. 3d 612, 614 n.1, 225 Cal. Rptr. 651*

Although limited partners are prohibited from bringing actions on behalf of limited partnership (under ULPA only), they are not precluded from filing cross complaint under circumstances in which it would be proper for them to intervene. *Kobernick v. Shaw (1977) 70 Cal. App. 3d 914, 918-920, 139 Cal. Rptr. 188* (decided under ULPA)

Although limited partner is not proper party in action against limited partnership, limited partner may intervene in suit against limited partnership when general partner refuses to defend unmeritorious action. *Linder v. Vogue Investments, Inc. (1966) 239 Cal. App. 2d 338, 340-341, 48 Cal. Rptr. 633* (decided under ULPA)

Action for forcible detainer is permitted against limited partner holding lease of business premises, by general partner who is entitled to exclusive control of business and all benefits of lease. *Moldovan v. Fischer (1957) 149 Cal. App. 2d 600, 608, 308 P.2d 844* (decided under ULPA)

Action for declaratory relief to determine limited partner's right to share of partnership profits. *Lissman v. McDonald (1953) 119 Cal. App. 2d 228, 258 P.2d 1057* (decided under ULPA)

[4] Nature of Limited Partner's Interest

Limited partner's interest in partnership is personalty and does not entitle limited partner to interest in partnership real property; thus, limited partner's action against partnership formed by general partners and to which limited partnership real property was conveyed does not support filing of lis pendens. *North Coast Business Park v. Superior Court (1984) 158 Cal. App. 3d 858, 860, 205 Cal. Rptr. 81*

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§ 404.33 Law Reviews

Rutheford B Campbell, Jr., *Bumping Along the Bottom: Abandoned Principles and Failed Fiduciary Standards in Uniform Partnership and LLC Statutes, 96 Ky. L.J. 163 (2008)*

Thomas E. Rutledge & Phuc H. Lu, *No Good Deed Goes Unpunished: Pitfalls for Counsel to a Business Organization About to Be Governed by a New Law, 45 Brandeis L.J. 755 (2007)*

Buxbaum and Etlin, *Limited Partners' Liability for Impermissible Control Activity Under the Revised California Limited Partnership Statute, 16 Sw. U.L. Rev. 535 (1986)*

Note, *Procedures and Remedies in Limited Partners' Suits for Breach of the General Partner's Fiduciary Duty, 90 Harv. L. Rev. 763 (1977)*

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§ 404.34 Text References

Witkin, *Summary of California Law*, vol. 9, *Partnership*, § 69 et seq. (10th ed. 2005)

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PART IV. FORMS
A. Direct Actions by Limited Partners

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§ 404.40 Petition for Writ of Mandate Under CRLPA--By Limited Partner Against Partnership and General Partners to Compel Making and Mailing or Delivering Specified Partnership Records [Corp. Code § 15634(f), (g) (CRLPA)]

[1] FORM Petition for Writ of Mandate Under CRLPA--By Limited Partner Against Partnership and General Partners to Compel Making and Mailing or Delivering Specified Partnership Records [Corp. Code § 15634(f), (g) (CRLPA)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	
Petitioner, vs. _____ [*name*],	)	NO. _____
Respondents.	)	PETITION FOR WRIT OF MANDATE
	)	
	)	

_____

Petitioner alleges:

1. Respondent _____ [*name of partnership*] is, and at all times herein mentioned was, a limited partnership, sued herein under the name _____ [it has assumed *or* by which it is known], with its principal place of business located in _____ [*city*], _____ County, California. [A certified copy of the certificate of limited partnership, filed with the Secretary of State on _____ (*date*), is attached as Exhibit _____ and incorporated by reference.] [The partnership has _____ (*number*) limited partners.]

2. Respondent[s] _____ [*name(s)*] is/are, and at all times herein mentioned was/were, [a] general partner[s] of the above-named partnership.

3. Petitioner is a limited partner of the above-named partnership.

[*EITHER, if partnership records were not delivered:*]

4. On _____ [*date*], petitioner made _____ [an oral *or* a written] request to respondents that respondents deliver to petitioner [at the office at which the partnership keeps its records, pursuant to *Corporations Code Sections 15614* and *15615*,] the partnership records [for petitioner to inspect and copy during normal business hours,] pursuant to Corporations Code Section _____[15634(a) *or* 15634(b)(1)]. [A copy of the request is attached as Exhibit _____ and incorporated by reference.] Respondents failed and refused, and continue to fail and refuse, to comply with petitioner's request.

[*OR, if partnership tax returns were not delivered:*]

4. On _____ [*date*], petitioner made _____ [an oral *or* a written] request to respondents to deliver to petitioner, pursuant to *Corporations Code Section 15634(b)(2)*, a copy of the partnership's federal, state, and local _____ [income tax *or* tax information] returns for the year. [A copy of the request is attached as Exhibit _____ and incorporated by reference.] Respondents failed and refused, and continue to fail and refuse, to comply with petitioner's request, despite the fact that the returns requested by petitioner have become available.

[*OR, if copy of amendment to partnership agreement were not delivered:*]

4. On or about _____ [*date*], respondent _____ [*name of general partner*] executed an amendment to the partnership agreement, pursuant to a power of attorney from petitioner. Although at least _____ [*number*] _____ [days *or* months] have passed since the amendment was executed, respondents have failed to mail or deliver a copy of the amendment to petitioner, as required by *Corporations Code Section 15634(d)*, despite petitioner's demand[s] that they do so.

[*OR, if tax information necessary for petitioner's tax returns was not delivered:*]

4. On _____ [*date*], the taxable year of the partnership ended. Although more than 90 days have passed, respondents have not mailed petitioner information necessary to complete federal and state _____ [income tax *or* tax information] returns [*add, if appropriate, when partnership has 35 or fewer limited partners:* or a copy of the partnership's federal, state, and local _____ (income tax *or* tax information) returns], pursuant to *Corporations Code Section 15634(e)*, despite petitioner's demand[s] that they do so.

[*CONTINUE*]

5. Respondents' failure to _____ [mail *or* deliver] copies of the above-mentioned _____ [partnership records *or* tax returns *or* tax information *or* amendment] is without justification in that _____ [*specify, e.g.*, respondent _____ (*name*) has informed petitioner that the _____ (*specify, e.g.*, tax returns) _____ is/are available, and other limited partners have informed petitioner that they have received the _____ (*specify, e.g.*, tax returns) from respondents].

6. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law other than the relief sought in this petition in that _____ [*state facts showing absence of adequate legal remedy, e.g.,* monetary damages will not provide petitioner with information necessary to file his/her income tax returns].

WHEREFORE, petitioner prays:

1. That the court issue an alternative writ of mandate commanding respondents to [make and] _____ [mail *or* deliver] to petitioner [and to petitioner's _____ (agent *or* attorney)], at _____ [*street address*], _____ [*city*], California, [and _____ (*street address*), _____ (*city*), California] [a copy of] the _____ [*specify records, returns, or other information sought, e.g.,* partnership income tax returns for the taxable year ending _____ (*date*)], or to show cause before this court at a time specified by court order why they have not done so and why a peremptory writ should not issue;

2. That on return of the alternative writ and the hearing of this petition, this court issue its peremptory writ of mandate commanding respondents, and each of them, to [make and] _____ [mail *or* deliver] to petitioner [and to petitioner's _____ (agent *or* attorney)], at _____ [*street address*], _____ [*city*], California, [and _____ (street address), _____ (city), California] [a copy of] the _____ [*specify record, returns, or other information sought, e.g.,* partnership income tax returns for the taxable year ending _____ (*date*)];

3. For reasonable attorney's fees incurred in connection with this proceeding[, in the sum of $_____];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____

_____[*signature*]

[2] Use of Form

The petition in [1], *above*, is for use in obtaining a writ of mandate to enforce the right of a limited partner to have partnership information and financial statements made and mailed or delivered to him or her [*see Corp. Code § 15634(f)* (CRLPA)]. It may be used only by a limited partner in a limited partnership that is formed on or after July 1, 1984, or is otherwise governed by CRLPA [*Corp. Code § 15611 et seq.*; *see Corp. Code §§ 15711, 15712, 15714*; *see also § 404.10[1][b]*].

[3] Allegations

This petition alleges the following:

- The capacity and principal place of business of respondent limited partnership (Paragraph 1) [*see Corp. Code § 15634* (CRLPA)];

- The capacity of respondents as general partners in the partnership (Paragraph 2) [*see Corp. Code § 15634* (CRLPA)];

- Petitioner's status as a limited partner in respondent partnership (Paragraph 3) [*see Corp. Code § 15634* (CRLPA)];

- That respondents failed either (1) to deliver to petitioner, on reasonable request, either at the petitioner's address or at the partnership's office for petitioner's inspection and copying, the partnership records required to be kept at a partnership office pursuant to *Corp. Code §§ 15614* and *15615* (CRLPA), (2) to deliver to petitioner, on reasonable request, a copy of partnership federal, state, and local income tax or information returns, after those returns have become available, (3) to deliver or mail to petitioner a copy of any amendment to the partnership agreement that was executed by a general partner pursuant to a power of attorney from petitioner, or (4) to mail to petitioner within 90 days after the end of the taxable year information necessary for petitioner to complete income tax or information returns and, in the case of a partnership with 35 or fewer limited partners, copies of partnership income tax or information returns (Paragraph 4) [*see Corp. Code § 15634(a), (b), (d), (e)* (CRLPA)];

- The reason why respondents' failure to comply with the statutory requirements is without justification (Paragraph 5) [*see Corp. Code § 15634(g)* (CRLPA)]; and

- The absence of any plain, speedy, and adequate remedy, in the ordinary course of law (Paragraph 6) [*Code Civ. Proc. § 1086*].

The allegations in any of the Paragraph 4 alternatives may be modified to allege that the request or demand for the particular records was made by an agent or attorney of the petitioner [*see Corp. Code § 15634(i)* (CRLPA)].

[4] Verification

A petition for writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Proof of service of a copy of the petition on each respondent and real party in interest must accompany the petition when it is offered for filing, except when, in the court's discretion and for good cause, the court has granted the application for the writ ex parte [*Code Civ. Proc. § 1107*]. A supporting memorandum is required to accompany a petition for writ of mandate filed in a superior court [*Cal. Rules of Ct., Rules 3.1103(a)(2), 3.1113*; for discussion and forms, *see* Ch. 358, *Mandate and Prohibition*].

[5] Limited Partner's Right to Partnership Information

A limited partner in a limited partnership governed by CRLPA has rights entitling him or her to receive or to inspect and copy partnership information and financial records specified in *Corp. Code § 15634* (CRLPA). Any waiver by a partner of these rights is unenforceable [*Corp. Code § 15634(h)* (CRLPA)]. In addition to any other remedies pertaining to those rights, a court of competent jurisdiction may enforce the duty of the partnership and general partners to make and mail or deliver the specified information and financial statements [*see Corp. Code § 15634(f)* (CRLPA)].

[6] Extending Time for Respondents to Comply

For good cause shown, the court may extend the time respondents have to comply with the requirements imposed by *Corp. Code § 15634(a)-(e)* (CRLPA) [*Corp. Code § 15634(f)* (CRLPA)]. For discussion and forms relating to extensions of time generally, see Ch. 524, *Shortening and Extension of Time* .

[7] Costs and Attorney's Fees

In any proceeding to enforce a limited partner's right of access to partnership information, if the court finds that the failure of the partnership to comply with the requirements of *Corp. Code § 15634(a)-(e)* (CRLPA) to have been without justification, the court may award an amount sufficient to reimburse the petitioning partner or partners for reasonable expenses incurred, including attorney's fees, in connection with the proceeding [*see Corp. Code § 15634(g)* (CRLPA); *see also Berti v. Santa Barbara Beach Properties (2006) 145 Cal. App. 4th 70, 74-76, 51 Cal. Rptr. 3d 364* (statute allows court to award attorney's fees incurred in post-judgment proceedings for enforcement of judgment in action brought under that statute)].

[8] Cross References

For forms relating to shareholders' petitions for writ of mandate to enforce their rights of access to corporate information and records, see Ch. 165, *Corporations: Corporate Records and Reports* .

For discussion and forms relating to writs of mandate generally, see Ch. 358, *Mandate and Prohibition* .

For memoranda relating to mandate proceedings generally, see California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender).

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35-404 California Forms of Pleading and Practice--Annotated § 404.41

§ 404.41 Allegation for Petition for Writ of Mandate Under CRLPA--By Limited Partner in Partnership Having More Than 35 Limited Partners to Compel Mailing of Partnership's Annual Report [Corp. Code § 15634(c)(1)(CRLPA)]

[1] FORM Allegation for Petition for Writ of Mandate Under CRLPA--By Limited Partner in Partnership Having More Than 35 Limited Partners to Compel Mailing of Partnership's Annual Report [Corp. Code § 15634(c)(1)(CRLPA)]

4. _____ [*date*] was the close of respondent partnership's fiscal year. Although respondent partnership has more than 35 limited partners, respondents have failed to mail to petitioner an annual report within 120 days of the close of the fiscal year, as required by *Corporations Code Section 15634(c)(1)*, despite petitioner's demand[s] that they do so.

5. Respondents' failure to mail the annual report to petitioner is without justification in that _____ [*specify, e.g.*, respondent general partners have met several times during the 120 days since the expiration of respondent partnership's fiscal year, and have had ample opportunity to prepare an annual report].

[2] Use of Form

The allegations in [1], *above*, are for use by a limited partner in a limited partnership governed by CRLPA that has more than 35 limited partners. These allegations are designed to be inserted in a petition for writ of mandate to compel the general partners to mail an annual report to the limited partner, as required by *Corp. Code § 15634(c)(1)* (CRLPA) [*Corp. Code § 15534(f)*]. The allegations may be substituted for Paragraphs 4 and 5 in the *form in § 404.40[1]*.

These allegations should be used only by limited partners in limited partnerships governed by CRLPA (*Corp. Code § 15611 et seq.*). A limited partnership formed prior to July 1, 1984, may be governed instead by ULPA (*Corp. Code § 15501 et seq.*). The ULPA '08, which generally governs limited partnerships formed on or after January 1, 2008, does not impose an annual-report requirement that these allegations address under CRLPA. For discussion of the application of the ULPA '08, the CRLPA, and the ULPA generally, see *§ 404.10*.

[3] Limited Partners' Right to Annual Report

Under CRLPA, in the case of any limited partnership with more than 35 limited partners, the general partners must send an annual report to each of the partners no later than 120 days after the close of the fiscal year. The report must contain a balance sheet as of the end of the fiscal year, and an income statement and statement of cashflows for the fiscal year [*Corp. Code § 15634(c)(1)* (CRLPA)]. Any financial statements must be accompanied by a report, if any, of the independent accountants engaged by the partnership or, if there is no such report, the certificate of a general partner of the partnership that these financial statements were prepared without audit from the books and records of the limited partnership [*Corp. Code § 15634(c)(3)* (CRLPA)].

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35-404 California Forms of Pleading and Practice--Annotated § 404.42

§ 404.42 Allegation for Petition for Writ of Mandate Under CRLPA by Limited Partner Representing 5 Percent of Limited Partners' Interests in Partnership--To Compel Delivery or Mailing of Income Statement and Balance Sheet [Corp. Code § 15634(c)(2) (CRLPA)]

[1] FORM Allegation for Petition for Writ of Mandate Under CRLPA by Limited Partner Representing 5 Percent of Limited Partners' Interests in Partnership--To Compel Delivery or Mailing of Income Statement and Balance Sheet [Corp. Code § 15634(c)(2) (CRLPA)]

4. Petitioner's interest in respondent limited partnership represents at least 5 percent of the limited partners' interests in respondent partnership.

5. On _____ [*date*], petitioner made a written request to respondent general partners for an income statement of respondent partnership for the initial _____ [three-month *or* six-month *or* nine-month] period of the current fiscal year, which period ended more than 30 days prior to the date of the request. Petitioner also requested a balance sheet of respondent partnership as of the end of that period. [A copy of the request is attached as Exhibit _____, and incorporated by reference.] Although 30 days have passed since the request was made, respondents have not delivered or mailed the statement to petitioner.

6. Respondents' failure to deliver or mail the statement to petitioner is without justification in that _____ [*specify, e.g.,* respondent general partners have been maintaining records on respondent partnership's income for the period herein mentioned].

[2] Use of Form

The allegations in [1], *above,* are for use by a limited partner representing at least 5 percent of the limited partners' interest in a limited partnership governed by the CRLPA [*see § 404.10[1][b]*] that has more than 35 limited partners. These allegations are designed to be inserted in a petition for writ of mandate to compel the general partners to deliver or mail an income statement and balance sheet to the limited partner as required by *Corp. Code § 15634(c)(2)* (CRLPA). These allegations may be substituted for Paragraphs 4 and 5 in the Form at § 404.40[1], and the remainder of that form renumbered accordingly.

[3] Right to Income Statements

Under CRLPA, in the case of any limited partnership with more than 35 limited partners, limited partners representing at least 5 percent of the interests of limited partners may make a written request to a general partner for an income statement of the limited partnership for the initial three-month, six-month, or nine-month period of the current fiscal year ended more than 30 days prior to the date of the request and a balance sheet of the partnership as of the end of that period. The statement must be delivered or mailed to the limited partners within 30 days following the request [*Corp. Code § 15634(c)(2)* (CRLPA)]. The statement must also be accompanied by a report of any independent accountants engaged by the partnership. If no such report exists, the statement must be accompanied by a certificate of a general partner that the statement was prepared without audit from the books and records of the partnership [*Corp. Code § 15634(c)(3)* (CRLPA)].

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35-404 California Forms of Pleading and Practice--Annotated § 404.43

§ 404.43 Complaint Under ULPA '08 by Limited Partner Against Partnership and General Partners to Enforce Partnership Rights [Corp. Code § 15910.01 (ULPA '08)]

[1] FORM Complaint Under ULPA '08 by Limited Partner Against Partnership and General Partners to Enforce Partnership Rights [Corp. Code § 15910.01 (ULPA '08)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	
Plaintiff, vs. _____ [*names*],	)	NO. _____
Defendants.	)	COMPLAINT FOR _____ [*e.g.*,
	)	INJUNCTIVE RELIEF/DAMAGES (Refusal to
	)	provide access to partnership information)] [Amount
		demanded _____ (exceeds *or* does
		not exceed) $10,000] [LIMITED CIVIL CASE]

_____

Plaintiff alleges as follows:

1. Defendant _____ [*name of limited partnership*] is, and at all times herein mentioned was, a limited partnership, sued herein under the name _____ [it has assumed *or* by which it is known], with its principal place of business located in _____ [*city*], _____ County, California.

2. Defendant[s] _____ [*name(s)*] is/are, and at all times herein mentioned was/were, [a] general partner[s] of the above-named partnership.

3. Plaintiff is a limited partner in the above-named partnership.

4. On or about _____ [*date*], defendant[s] _____ [*name(s)*], plaintiff, and defendant partnership's other limited partners executed a written partnership agreement at _____ [*city*], _____ County, California, for the purpose of forming defendant limited partnership, to carry on the business of _____ [*specify*], under the name of _____ [*name of partnership*]. A copy of the agreement is attached as Exhibit _____ and incorporated by reference. On or about _____ [*date*], the defendant partnership's certificate of limited partnership was filed with the Secretary of State, in compliance with *Corporations Code Section 15902.01*. A copy of the certificate of limited partnership certified by the Secretary of State is attached as Exhibit _____ and incorporated by reference.

5. Plaintiff has performed all conditions, covenants, and promises plaintiff is required to perform in accordance with the terms and conditions of the partnership agreement.

[*Allege violation of plaintiff's rights or interests sought to be enforced or protected, e.g.:*]

6. On _____ [*date*], plaintiff served on the partnership a written request that the partnership allow plaintiff to inspect and copy the information required to be maintained at the defendant partnership's designated office, pursuant to *Corporations Code Sections 15903.04(a)* and *15901.11*. [A copy of the request is attached as Exhibit _____ and incorporated by reference.] Even though more than 10 days have elapsed since the service of plaintiff's request, defendants failed and refused, and continue to fail and refuse, to comply with plaintiff's request.

7. As a proximate result of defendants' conduct alleged in Paragraph 6, _____ [*describe actual or threatened injury to plaintiff that is not solely result of injury suffered or threatened to be suffered by limited partnership*].

[*Continue with the following:*]

WHEREFORE, plaintiff prays judgment as follows:

1. For an order compelling defendants to _____ [*e.g.*, allow plaintiff to inspect and copy the information required to be maintained at the defendant partnership's designated office];

2. For compensatory damages in the sum of $_____;

3. For interest on the amount of $_____, at the legal rate, from and after _____ [*date*];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[2] Use of Form

The complaint in [1], *above*, may be used by a limited partner in a partnership governed by the ULPA '08 to bring a direct action against the limited partnership or another partner for legal or equitable relief to enforce and protect the limited partner's rights and interests, including rights and interests under the partnership agreement or under the ULPA '08 or arising independently of the partnership relationship [*Corp. Code § 15910.01(a)* (ULPA '08)]. A partner bringing a direct action must plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited partnership [*Corp. Code § 15910.01(b)* (ULPA '08)].

This form is a skeletal complaint to which causes of action should be added according to the facts of the individual case.

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35-404 California Forms of Pleading and Practice--Annotated § 404.44

§ 404.44 Complaint--Class Action Under CRLPA by Limited Partners in Domestic Partnership or in Foreign Limited Partnership [Code Civ. Proc. § 382; Corp. Code § 15701 (CRLPA)]

[1] FORM Complaint--Class Action Under CRLPA by Limited Partners in Domestic Partnership or in Foreign Limited Partnership [Code Civ. Proc. § 382; Corp. Code § 15701 (CRLPA)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
individually and on behalf of all others similarly situated,	)	NO. _____
	)	CLASS ACTION COMPLAINT FOR
Plaintiff, vs. _____ [*name(s)*],	)	_____ [*specify, e.g.,* DAMAGES]
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[*EITHER*]

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a limited partnership, sued herein under the name _____ [it has assumed *or* by which it is known], with its principal place of business in _____ [_____ County, California (, in the _____ (*name*) Judicial] District) *or* _____ (*give state other than California, e.g.,* Missouri) and registered with the California Secretary of State, stating _____ (the address of its agent for service of process in _____ County, California *or* that the Secretary of State is to act as its agent for service of process *or*

the address of its principal office in California in _____ County, California)].

[*OR*]

1. Defendant[s] _____ [*name(s)*] is/are, and at all times herein mentioned was/were, general partners in the limited partnership known as _____ [*name*], hereafter referred to as "the partnership," and is/are sued herein both individually and as partner[s] in the partnership. [Defendant(s) is/are, and at all times herein mentioned was/were, residents of _____ County, California.]

[*OR*]

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a limited partnership, sued herein under the name _____ [it has assumed *or* by which it is known], with its principal place of business in _____ [_____ County, California (, in the _____ (*name*) Judicial District) *or* _____ (*specify state other than California, e.g.,* Missouri) and registered with the California Secretary of State, stating _____ (the address of its agent for service of process in _____ County, California *or* that the Secretary of State is to act as its agent for service of process *or* the address of its principal office in the state in _____ County, California)]. Defendant[s] _____ [*name(s)*] is/are, and at all times herein mentioned was/were, [a] general partner[s] in defendant partnership, and is/are sued herein both individually and as partner[s] in the partnership. [Defendant(s) is/are, and at all times herein mentioned was/were, residents of _____ County, California.]

[*CONTINUE*]

2. Plaintiff is, and at all times herein mentioned was, a limited partner in _____ [defendant *or* the] partnership.

3. Plaintiff brings this action on his/her own behalf and on behalf of all persons similarly situated. The class that plaintiff represents is composed of _____ [*specify, e.g.,* all the limited partners in _____ (defendant *or* the) partnership].

4. There is a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented in that all of them have the same claim[s] against defendant[s] relating to their rights as limited partners. Proof of a common or single state of facts will establish the right of each member of the class to recover. The claims of the plaintiff are typical of those of the class and plaintiff will fairly and adequately represent the interests of the class.

[5. There is no plain, speedy, or adequate remedy other than by maintenance of this class action since plaintiff is informed and believes that the damage to each plaintiff is relatively small (in that _____ [*specify type and amount of damage*]), making it economically unfeasible to pursue remedies other than a class action. Consequently there would be a failure of justice but for the maintenance of the present class action.]

[6. In this and subsequent paragraphs, allege the acts of defendant(s) and other facts giving rise to a cause of action by limited partners against the limited partner and/or general partner or partners.]

WHEREFORE, plaintiff prays judgment against defendant[s][, and each of them,] as follows:

1. For damages _____ [according to proof or in the sum of $_____];

[2. For interest from and after _____ (*date*) at the legal rate;]

[3. For exemplary and punitive damages;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Add verification, if desired. See § 404.40 for form that may be adapted.*]

[2] Use of Form

The form in [1], *above*, is a skeletal complaint to which causes of action may be added according to the facts of the individual case. It is for use by a limited partner to bring an action on behalf of all, or a class of, the limited partners in a limited partnership.

Under the CRLPA, any limited partner of a foreign or domestic limited partnership may bring a class action on behalf of all or a class of limited partners to enforce any claim common to those limited partners. The action is governed by the law governing class actions generally, except that to maintain the class action, there is no requirement that the class be so numerous that joinder of all members is impracticable [*Corp. Code § 15701* (CRLPA); *see Code Civ. Proc. § 382* (requirements of class actions in general)]. The ULPA '08 and the ULPA do not expressly authorize such class actions. It appears, however, that a limited partner in a partnership governed by the ULPA '08 or the ULPA may bring a class action under the *Code Civ. Proc. § 382*, which allows for class actions generally, as long as he or she can satisfy the requirements for class actions [for general discussion of class actions, *see* Ch.120, *Class Actions*].

[3] Allegations

This complaint alleges the following:

- The capacity and residence of defendant(s) as domestic or foreign limited partnership and/or general partner(s) (Alternative Paragraphs 1) [*see Code Civ. Proc. §§ 395.2, 395.5*; *Corp. Code § 15701* (CRLPA)];

- Plaintiff's capacity as a limited partner (Paragraph 2) [*see Corp. Code § 15701* (CRLPA)];

- That plaintiff is bringing the action on behalf of a class of limited partners (Paragraph 3) [*see Corp. Code § 15701* (CRLPA)];

- A community of interest with the members of the class, and the adequacy of plaintiff's representation

of the interests of the class (Paragraph 4) [*see Code Civ. Proc. § 382*; *Corp. Code § 15701* (CRLPA); *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 809, 94 Cal. Rptr. 796, 484 P.2d 964* ; *Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 704, 63 Cal. Rptr. 724, 433 P.2d 732*]; and

- If appropriate, that a class action is the only remedy available because damage to each plaintiff is so small (Paragraph 5) [*see Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 702, 63 Cal. Rptr. 724, 433 P.2d 732*].

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35-404 California Forms of Pleading and Practice--Annotated § 404.45

§ 404.45 Complaint Under ULPA '08 or CRLPA for Payment of Fair Market Value of Dissenting Interest After Reorganization of Limited Partnership--By Dissenting Limited Partner [Corp. Code § 15679.6 (CRLPA); Corp. Code § 15911.25 (ULPA '08)]

[1] FORM Complaint Under ULPA '08 or CRLPA for Payment of Fair Market Value of Dissenting Interest After Reorganization of Limited Partnership--By Dissenting Limited Partner [Corp. Code § 15679.6 (CRLPA); Corp. Code § 15911.25 (ULPA '08)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff, vs. _____ [*name*],	)	COMPLAINT FOR DAMAGES (Valuation of Dis-
Defendant.	)	senting Interest in Limited Partnership)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges as follows:

1. Defendant _____ [*name of partnership*] is, and at all times herein mentioned was, a limited partnership, sued herein under the name _____ [it has assumed *or* by which it is known], with its principal place of business located in _____ [*city*], _____ County, California. [A certified copy of the certificate of limited partnership, filed with the Secretary of State on _____ (*date*), is attached as Exhibit _____ and incorporated by reference.] [The partnership has _____ (*number*) limited partners.]

2. _____ [*Allege that surviving limited partnership succeeded to liabilities of disappearing limited partnership after merger, if applicable. See Ch. 405, Partnerships: Actions Between Limited Partners or Partnerships and Third Parties.*]

3. Defendant [is, and] at all times herein mentioned was[,] _____ [a domestic limited partnership formed on or after January 1, 1991, or a foreign limited partnership that _____ (was formed on or after January 1, 1991, *or* filed an application to qualify to do business on or after January 1, 1991), and in which limited partners holding more than 50 percent of all the limited partners' voting power reside in California or a limited partnership in which _____ (the partnership agreement provides *or* all general partners and a majority in interest of the limited partners have determined) that *Corporations Code Sections 15679.1 et seq.* shall apply to the partnership].

4. Defendant [has, and] at all times herein mentioned had[,] _____ [over 35 limited partners *or* 35 or fewer limited partners and _____ (defendant's partnership agreement provides or all general partners and a majority in interest of the limited partners of defendant have determined) that *Corporations Code Sections 15679.1 et seq.* and *15911.20 et seq.* shall apply to the partnership].

5. On or about _____ [*date*], plaintiff became record holder of a limited partnership interest in defendant. _____ [*Identify source of plaintiff's right to vote on reorganization, e.g.,* The partnership agreement to which plaintiff and defendant are parties] requires the approval of outstanding limited partnership interests before defendant can participate in a reorganization.

6. On or about _____ [*date*], defendant first announced, by means of _____ [*specify*], the terms of a proposed merger *or* conversion that constituted a reorganization as defined by *Corporations Code Sections 15679.1(a)* and *15911.20(a)*.

[*EITHER*]

7. On or about _____ [*date*], the general partners of defendant approved a merger agreement providing that _____ [*set forth general terms of merger, e.g.,* defendant and _____ (*name*), a limited partnership, would be merged and that _____ (*name*) would become the sole surviving partnership]. The agreement was approved by the general partners of defendant and the principal terms of the merger were also approved by a majority in interest of each class of limited partners of defendant.

[*OR*]

7. On or about _____ [*date*], the general partners of defendant approved a plan of conversion providing that _____ [*set forth general terms of conversion*]. The plan of conversion was approved by the general partners of defendant and by a majority in interest of each class of limited partners of defendant.

[*CONTINUE*]

Plaintiff's limited partnership interest was outstanding on _____ [*date*], the date for the determination of limited partners entitled to vote on the merger.

[*EITHER*]

8. Plaintiff did not vote in favor of the merger.

[*OR, if approval for the reorganization was sought by written consent or if plaintiff's interest either was not listed on any certified national securities exchange or listed on the Federal Reserve's list of OTC margin stocks:*]

8. Plaintiff voted against the merger.

[*CONTINUE*]

9. On or about _____ [*date*], defendant mailed to plaintiff a notice of approval of the reorganization by the requisite vote or consent of the limited partners[, together with an offer to buy dissenting interests for a price of $ _____ (*specify terms of offer*)].

[*EITHER*]

10. A certificate of merger was filed with the Secretary of State of California evidencing that merger took effect on _____ [date of filing *or* future date provided in certificate].

[*OR*]

10. The conversion became effective on _____ [*date*].

[*CONTINUE*]

[*EITHER*]

11. On or about _____ [*date*], immediately before the occurrence of the reorganization herein alleged, plaintiff's limited partnership interest was not _____ [listed on any certified national securities exchange *or* listed on the Federal Reserve's list of OTC margin stocks]. [Defendant had outstanding interests that were so listed and provided a summary of the rights of dissenting partners in its notice to limited partners requesting their approval of the proposed reorganization.]

[*OR*]

11. Demands for payment pursuant to *Corporations Code Sections 15679.3(b)* and *15911.22(b)* were filed with respect to 5 percent or more of the outstanding interests of any class of interests that were not _____ [listed on any certified national securities exchange *or* listed on the Federal Reserve's list of OTC margin stocks].

[*CONTINUE*]

12. On or about _____ [*date*], plaintiff made a written demand on defendant [through its transfer

agent, _____ (*name*),] for purchase and payment in cash of the fair market value of plaintiff's interest in the amount of $ _____, which represented the value of plaintiff's interest on _____ [date one day before terms of the proposed reorganization were announced], excluding any appreciation or depreciation caused by the proposed reorganization. The demand was received by defendant [through its transfer agent, _____ (*name*),] on _____ [*if plaintiff's interest either was not listed on any certified national securities exchange or listed on the Federal Reserve's list of OTC margin stocks, date of or before limited partners' meeting to vote on reorganization; otherwise, within 30 days after the date defendant mails notice that the reorganization was approved*].

13. On or about _____ [*date within 30 days after mailing of notice of approval of reorganization and offer to buy dissenting interests*], plaintiff submitted to defendant _____ [the certificate representing his/her/its interest for sale, to be stamped or endorsed or exchanged for certificates of appropriate denominations or written notice of the number or amount of plaintiff's interest for sale].

14. Since defendant's receipt of plaintiff's demand as herein alleged, and up to and including the present, defendant has refused to [accept the status of plaintiff's interest as a dissenting limited partnership interest within the meaning of *Corporations Code Sections 15679.2(b)* and *15911.21(b)* or to] agree to pay and pay plaintiff the fair market value of his/her/its dissenting limited partnership interest.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a determination that plaintiff's interest is a dissenting limited partnership interest within the meaning of *Corporations Code Sections 15679.2(b)* and *15911.21(b)*;

2. For a determination of the fair market value of plaintiff's dissenting limited partnership interest;

3. For payment of the fair market value of plaintiff's dissenting limited partnership, plus interest at the legal rate on judgments from _____ [*date merger became effective*].

4. For costs of suit herein incurred [, including reasonable compensation for court-appointed appraisers, fees of expert witnesses, and attorney's fees]; and

5. For such other and further relief as the court may deem proper.
Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Add verification, if desired. See § 404.40 for form that may be adapted.*]

[2] Use of Form

The complaint in [1], *above*, is for use against a limited partnership that has approved a conversion to an other business entity or foreign limited partnership pursuant to *Corp. Code § 15677.1 et seq.* (CRLPA) or *Corp. Code § 15911.01 et*

seq. (ULPA '08), or a merger with one or more limited partnerships pursuant to *Corp. Code § 15678.1 et seq.* (CRLPA) or *Corp. Code § 15911.10 et seq.* (ULPA '08), but has refused to purchase the interest of a dissenting limited partner who did not consent to the merger or conversion [*see Corp. Code § 15679.6* (CRLPA); *Corp. Code § 15911.25* (ULPA '08)]. It may also be adapted for use by a limited partnership to obtain a court determination of the status of a limited partner's interest and the value of that interest [*see Corp. Code § 15679.6(a)* (CRLPA); *Corp. Code § 15911.25(a)* (ULPA '08); *see also* [7], *below*]. This complaint is for use by a limited partner only when *Corp. Code § 15679.1 et seq.* (CRLPA) or *Corp. Code § 15911.20 et seq.* (ULPA '08) (rights of dissenting limited partners) applies. For example, these provisions usually apply to a domestic limited partnership that has more than 35 limited partners and was formed on or after January 1, 1991 [*see Corp. Code § 15679.13* (CRLPA); *Corp. Code § 15911.32* (ULPA '08)]. For discussion of the applicability of *Corp. Code § 15679.1 et seq.* (CRLPA) and *Corp. Code § 15911.20 et seq.* (ULPA '08), see *§ 404.20[1]*.

[3] Allegations

This complaint alleges the following:

- The capacity and residence of the limited partnership and its general partners (Paragraph 1).

- The disappearance of the limited partnership after merger, if applicable (Paragraph 2) [*Corp. Code § 15678.6* (CRLPA); *Corp. Code § 15911.16* (ULPA '08)].

- The applicability of *Corp. Code § 15679.1 et seq.* (CRLPA) and *Corp. Code § 15911.20 et seq.* (ULPA '08) to defendant (Paragraphs 3, 4) [*Corp. Code § 15679.13* (CRLPA); *Corp. Code § 15911.32* (ULPA '08)].

- Plaintiff's right to vote on merger or conversion (Paragraph 5) [*Corp. Code §§ 15678.2(a), 15679.2(a)* (CRLPA); *Corp. Code §§ 15911.12(a), 15911.21(a)* (ULPA '08)];

- Defendant's announcement of proposed merger or conversion (Paragraph 6) [*Corp. Code § 15679.2(a)* (CRLPA); *Corp. Code § 15911.21(a)* (ULPA '08) (fair market value determined as of day before announcement)].

- The approval of the conversion [*Corp. Code § 15677.3(b)* (CRLPA); *Corp. Code § 15911.03(b)* (ULPA '08)] or merger [*Corp. Code § 15678.2(a)* (CRLPA); *Corp. Code § 15911.12(a)* (ULPA '08)] and the status of plaintiff's interest as an outstanding interest (Paragraph 7) [*Corp. Code § 15679.2(b)(2)* (CRLPA); *Corp. Code § 15911.21(b)(2)* (ULPA '08)].

- Plaintiff's dissenting vote (Paragraph 8) [*Corp. Code § 15679.2(b)(3)* (CRLPA); *Corp. Code § 15911.21(b)(3)* (ULPA '08)].

- The mailing of notice of approval of the merger and offer to buy dissenting interests (Paragraph 9) [*Corp. Code § 15679.3(a)* (CRLPA); *Corp. Code § 15911.22(a)* (ULPA '08)].

- When the conversion or merger became effective (Paragraph 10) [*Corp. Code §§ 15677.4, 15678.5* (CRLPA); *Corp. Code §§ 15911.04, 15911.15* (ULPA '08)].

- The status of plaintiff's dissenting interest (Paragraph 11) [*Corp. Code § 15679.2(b)(1)* (CRLPA); *Corp. Code § 15911.21(b)(1)* (ULPA '08)].

- Plaintiff's timely demand for payment (Paragraph 12) [*Corp. Code §§ 15679.2(b)(4), 15679.3(b)*

(CRLPA); *Corp. Code §§ 15911.21(b)(4), 15911.22(b)* (ULPA '08)].

- Plaintiff's submission of certificates for endorsement or written notice of interest for sale (Paragraph 13) [*Corp. Code §§ 15679.2(b)(5), 15679.4* (CRLPA); *Corp. Code §§ 15911.21(b)(5), 15911.23* (ULPA '08)].

- Defendant's refusal to recognize the dissenting interest or pay fair market value for it (Paragraph 14) [*Corp. Code § 15679.6* (CRLPA); *Corp. Code § 15911.25* (ULPA '08)].

[4] Time for Commencing Action

A dissenting interest loses its status as a dissenting interest, and the holder of the interest ceases to be entitled to require the partnership to purchase the interest, if the dissenting partner and the partnership do not agree on the status of the interest as a dissenting interest, or on the purchase price of the dissenting interest, and neither files a complaint or intervenes in a pending action within six months after the date on which notice of approval was mailed to the partner [*Corp. Code § 15679.11(c)* (CRLPA); *Corp. Code § 15911.30(c)* (ULPA '08)].

[5] Appraisal

The court may appoint one or more appraisers to determine the fair market value per interest of the partnership's outstanding limited partnership interests, by class if necessary [*Corp. Code § 15679.7(a)* (CRLPA); *Corp. Code § 15911.26(a)* (ULPA '08)]. For discussion of the procedure for obtaining a court-ordered appraisal, see *§ 404.20[5][b]*.

[6] Costs and Attorney's Fees

The court must assess and apportion costs of the action as it considers equitable. This includes reasonable compensation for the appraisers, in an amount to be fixed by the court. The partnership must pay the costs, however, if the appraisal exceeds the price offered by the partnership. If the value awarded by the court for the dissenting interest is more than 125 percent of the price offered by the partnership, the court may, in its discretion, include attorney's fees and fees of expert witnesses in the costs award [*Corp. Code § 15679.7(e)* (CRLPA); *Corp. Code § 15911.26(e)* (ULPA '08)].

[7] Action Brought by Limited Partnership

If the partnership denies that a partner's interest is a dissenting interest, or the partnership and a dissenting partner fail to agree on the fair market value of the dissenting interest, any interested limited partnership may file an action seeking a determination of the status of the interest or the fair market value of the dissenting interest, or both. Either the limited partner or any interested limited partnership may also intervene in any action pending on a complaint by a limited partner or an interested limited partnership [*Corp. Code § 15679.6(a)* (CRLPA); *Corp. Code § 15911.25(a)* (ULPA '08)].

Two or more dissenting partners may join as plaintiffs or be joined as defendants in any such action, and two or more such actions may be consolidated [*Corp. Code § 15679.6(b)* (CRLPA); *Corp. Code § 15911.25(b)* (ULPA '08)].

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Chapter 404 PARTNERSHIPS: ACTIONS BETWEEN LIMITED PARTNERS AND PARTNERSHIPS
PART IV. FORMS
A. Direct Actions by Limited Partners

35-404 California Forms of Pleading and Practice--Annotated §§ 404.46-404.59

[Reserved]

§§ 404.46[Reserved]

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PART IV. FORMS
B. Derivative Actions by Limited Partners

35-404 California Forms of Pleading and Practice--Annotated § 404.60

§ 404.60 Complaint--Limited Partner's Derivative Action on Behalf of Partnership Under ULPA '08 [Corp. Code § 15910.02 (ULPA '08)]

[1] FORM Complaint--Limited Partner's Derivative Action on Behalf of Partnership Under ULPA '08 [Corp. Code § 15910.02 (ULPA '08)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff, vs. _____ [*names*],	)	NO. _____
[and DOES I through _____,]	)	COMPLAINT FOR _____ [*specify, e.g.,* DAMAGES]
Defendants.	)	
	)	
	)	

Plaintiff alleges:

1. Defendant _____ [*name*], hereinafter referred to as "the partnership," is, and at all times herein mentioned was, a _____ [California] limited partnership _____ [certified with the Secretary of State *or* certified to transact intrastate business in California], with its principal place of business located in _____ [_____ County, California (, in the _____ [*name*] Judicial District) *or* _____ (*specify state other than California, e.g.,* Nebraska) and registered with the California Secretary of State, stating _____ (the address of its agent for service of process in _____ County, California *or* that the Secretary of State is to act as its agent for service of process *or* the address of its principal office in the state in _____ County, California)].

2. _____ [*Allege capacity and/or residence of other defendants, e.g.,* Defendant[s]

_____ (*name(s)*) is/are, and at all times herein mentioned was/were, general partners in the partnership known as _____ (name), hereafter referred to as "the partnership," and is/are sued herein both individually and as partner[s] in the partnership. (Defendant(s) is/are, and at all times herein mentioned was/were, residents of _____ County, California.)]

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by those fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

[4. At all times herein mentioned, each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the scope of that agency.]

[*EITHER*]

5. At all times herein mentioned, and at the time of the transaction complained of herein, plaintiff was a limited partner in the partnership.

[*OR*]

5. Plaintiff is a limited partner in the partnership, and plaintiff's interest in the partnership devolved on plaintiff by operation of law or pursuant to the terms of the partnership agreement from _____ [*name*], a person that was a partner at the time of the transaction complained of herein.

[*OR, if plaintiff will seek order excepting him/her from requirement of contemporaneous status as partner:*]

5. Plaintiff is at present a _____ [partner of record *or* beneficial partner] of the partnership.

[*CONTINUE*]

6. _____ [*Allege facts stating cause of action against defendant(s) other than the partnership that show injury to partnership*].

[*EITHER*]

7. On _____ [*date*], plaintiff made a written demand on the general partners of the partnership to bring an action on the claim described in Paragraph 6. A copy of plaintiff's demand is attached as Exhibit _____ and incorporated by reference. In a letter dated _____, the general partners and the partnership refused to prosecute this action for the following reasons: _____ [*specify*]. A copy of the letter is attached as Exhibit _____ and incorporated by reference. The general partners and the partnership continue to refuse to prosecute this action.

[*OR*]

7. Plaintiff did not make a demand on the general partners to bring an action on the claim described in Paragraph 6,

because such a demand would be futile, for the following reasons: _____ [*specify with particularity, as required by Corp. Code § 15910.04*].

WHEREFORE, plaintiff prays judgment against defendants _____ [*specify names of defendants other than partnership*] as follows:

1. _____ [*Specify relief sought, e.g.,* For damages in the sum of $_____];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Add verification, if desired. See § 404.40 for form that may be adapted.*]

[2] Use of Form

The complaint in [1], *above*, may be used by a limited partner in a limited partnership governed by the ULPA '08 to bring a derivative action to enforce a right of the partnership. Generally, such an action cannot be brought unless either (1) the partner first makes a demand on the general partners, requesting that they cause the limited partnership to bring an action to enforce the right, and the general partners do not bring the action within a reasonable time; or (2) a demand on the general partners would be futile [*Corp. Code § 15910.02* (ULPA '08)]. In the complaint, the plaintiff must state with particularity the date and content of plaintiff's demand and general partners' response to the demand, or why demand is excused as futile [*Corp. Code § 15910.04* (ULPA '08)].

Furthermore, a derivative action generally may be maintained only by a person that is a partner at the time the action is commenced and (1) was a partner when the conduct giving rise to action occurred, or (2) whose status as a partner devolved on the person by operation of law or pursuant to the terms of the partnership agreement from a person that was a partner at the time of that conduct [*Corp. Code § 15910.03(a)* (ULPA '08)]. However, under certain circumstances the court may authorize a partner who does not meet these requirements to maintain a derivative action [*Corp. Code § 15910.03(b)* (ULPA '08)]. For a form for a motion for an order authorizing a derivative action by partner who was not a partner at the time of the events giving rise to the action, *see § 404.62*].

For further discussion of derivative actions under the ULPA '08, see *§ 404.24[1][b]*.

For a complaint that may be used to bring a limited partner's derivative action under the CRLPA, see *§ 404.61*.

Limited partners in partnerships governed by ULPA are not proper parties to actions by the partnership, unless the object of the action is to enforce the limited partner's rights against or liability to the partnership [*Corp. Code § 15526* (ULPA)]. For further discussion, see *§ 404.24[3]*.

[3] Allegations

This complaint alleges the following:

- That the plaintiff was limited partner at the time of the transaction complained of, or that his or her status as partner devolved on him or her by operation of law from one who was a partner at the time of that transaction, or, if plaintiff plans to seek an order excepting him or her from the requirement of contemporaneous status as partner, that plaintiff is at present a partner of record or a beneficial partner (Alternative Paragraphs 5) [*see Corp. Code § 15910.03* (ULPA '08)].

- The cause of action that has accrued to the partnership (Paragraph 6) [*see Corp. Code § 15910.02* (ULPA '08)].

- Plaintiff's efforts to secure the desired action from the general partners, his or her written notice informing the partnership or the general partners of the ultimate facts of each cause of action or delivery of a copy of the proposed complaint, and the reasons for his or her failure to obtain that action, or the reasons for not making that effort (Alternative Paragraphs 7) [*see Corp. Code § 15910.02, 15910.04* (ULPA '08)].

[4] Proceeds of Derivative Action; Costs and Attorney's Fees

Generally, any proceeds or other benefits of a derivative action, whether by judgment, compromise, or settlement, belong to the limited partnership and not to the derivative plaintiff [*Corp. Code § 15910.05(a)(1)* (ULPA '08)]. If the derivative plaintiff receives any of those proceeds, the derivative plaintiff must immediately remit them to the limited partnership [*Corp. Code § 15910.05(a)(2)* (ULPA '08)]. However, if a derivative action is successful in whole or in part, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, from the recovery of the limited partnership [*Corp. Code § 15910.05(b)* (ULPA '08)].

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B. Derivative Actions by Limited Partners

35-404 California Forms of Pleading and Practice--Annotated § 404.61

§ 404.61 Complaint--Limited Partner's Derivative Action on Behalf of Partnership Under CRLPA [Corp. Code § 15702 (CRLPA)]

[1] FORM Complaint--Limited Partner's Derivative Action on Behalf of Partnership Under CRLPA [Corp. Code § 15702 (CRLPA)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff, vs. _____ [*names*],	)	NO. _____
[and DOES I through _____,]	)	COMPLAINT FOR _____ [*specify, e.g.,* DAMAGES]
Defendants.	)	
	)	
	)	

Plaintiff alleges:

1. Defendant _____ [*name*], hereinafter referred to as "the partnership," is, and at all times herein mentioned was, a _____ [California] limited partnership _____ [certified with the Secretary of State *or* certified to transact intrastate business in California], with its principal place of business located in _____ [_____ County, California (, in the _____ [*name*] Judicial District) *or* _____ (*specify state other than California, e.g.,* Nebraska) and registered with the California Secretary of State, stating _____ (the address of its agent for service of process in _____ County, California *or* that the Secretary of State is to act as its agent for service of process *or* the address of its principal office in the state in _____ County, California)].

2. _____ [*Allege capacity and/or residence of other defendants, e.g.,* Defendant[s]

_____ (*name(s)*) is/are, and at all times herein mentioned was/were, general partners in the partnership known as _____ (name), hereafter referred to as "the partnership," and is/are sued herein both individually and as partner[s] in the partnership. (Defendant(s) is/are, and at all times herein mentioned was/were, residents of _____ County, California.)]

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by those fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

[4. At all times herein mentioned, each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the scope of that agency.]

[*EITHER*]

5. At all times herein mentioned, and at the time of the transaction complained of herein, plaintiff was a _____ [partner of record *or* beneficial partner] of the partnership.

[*OR*]

5. Plaintiff is a _____ [partner of record *or* beneficial partner] of the partnership, as devolved on plaintiff by operation of law from _____ [*name*], who was a _____ [partner of record *or* beneficial partner] of the partnership at the time of the transaction complained of herein.

[*OR, if plaintiff will seek order excepting him/her from requirement of contemporaneous status as partner:*]

5. Plaintiff is at present a _____ [partner of record *or* beneficial partner] of the partnership.

[*CONTINUE*]

6. _____ [*Allege facts stating cause of action against defendant(s) other than the partnership that show injury to partnership*].

[*EITHER*]

7. On or about _____ [*date*], plaintiff made the following efforts to secure action by the general partners of the partnership to pursue the above claim against the aforementioned defendants: _____ [*set forth those efforts with particularity*]. On _____ [*date*], plaintiff _____ [informed the _____ (partnership *or* general partners) in writing of the ultimate facts of each cause of action herein alleged or delivered to the _____ (partnership *or* general partners) a true copy of the complaint that plaintiff proposed to file in this action] and demanded that the general partners take such action as is necessary for the partnership to prosecute the cause of action against the aforementioned defendants. The general partners and the partnership refused, and continue to refuse, to prosecute this action, and plaintiff's efforts to obtain such action have failed for the following reasons: _____ [*set forth reasons general partners failed to act on the claim*]. In so refusing to prosecute this action, the general partners did not act in good faith or in any reasonable belief that their refusal to commence this action was good business judgment or in the best interest of the partnership.

Rather, the refusal by the general partners was in bad faith and breached their fiduciary duty to maintain and defend the interests of the partnership.

[*OR*]

7. Plaintiff did not make any effort to secure action from the general partners in prosecuting this action because any such effort would have been futile, in that _____ [*set forth facts demonstrating futility of demand*]. Nevertheless, plaintiff, on _____ [*date*], _____ [informed the _____ (partnership *or* general partners) in writing of the ultimate facts of each cause of action herein alleged against each defendant or delivered to the _____ (partnership *or* general partners) a true copy of the complaint that plaintiff then proposed to file in this action].

WHEREFORE, plaintiff prays judgment against defendants _____ [*specify names of defendants other than partnership*] as follows:

1. _____ [*Specify relief sought, e.g.,* For damages in the sum of $_____];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Add verification, if desired. See § 404.40 for form that may be adapted.*]

[2] Use of Form

The complaint in [1], *above,* is a skeletal form for use by a partner in bringing a derivative action on behalf of a limited partnership governed by the CRLPA or a foreign limited partnership [*see Corp. Code § 15702* (CRLPA)]. Specific causes of action should be added according to the facts of the particular case.

For a complaint for use in a derivative action on behalf of a limited partnership governed by the ULPA '08 [*see Corp. Code § 15910.02 et seq.*], see *§ 404.60*.

Limited partners in partnerships governed by ULPA are not proper parties to actions by the partnership, unless the object of the action is to enforce the limited partner's rights against or liability to the partnership [*Corp. Code § 15526* (ULPA)]. For further discussion, see *§ 404.24[3]*.

[3] Allegations

This complaint alleges the following:

- That the plaintiff was partner of record or beneficial partner at the time of the transaction complained of, or that his or her status as partner devolved on him or her by operation of law from one who was a partner at the time of that transaction, or, if plaintiff plans to seek an order excepting him or her from the requirement of contemporaneous status as partner, that plaintiff is at present a partner of record or a beneficial partner (Alternative Paragraphs 5) [*see Corp. Code § 15702(a)(1)* (CRLPA)].

- The cause of action that has accrued to the partnership (Paragraph 6) [*see Corp. Code § 15702(a)* (CRLPA)].

- Plaintiff's efforts to secure the desired action from the general partners, his or her written notice informing the partnership or the general partners of the ultimate facts of each cause of action or delivery of a copy of the proposed complaint, and the reasons for his or her failure to obtain that action, or the reasons for not making that effort (Alternative Paragraphs 7) [*see Corp. Code § 15702(a)(2)* (CRLPA)].

[4] Attorney's Fees

In a shareholder's derivative suit pursuant to *Corp. Code § 800*, attorney's fees may be recovered against the corporation if the plaintiff's success in prosecuting the action results in a substantial benefit to the corporation [*Fletcher v. A. J. Industries, Inc. (1968) 266 Cal. App. 2d 313, 323-324, 72 Cal. Rptr. 146*]. There is no direct authority permitting the recovery of attorney's fees in a partner's derivative suit. Because such a suit is similar in nature to the shareholder's derivative suit, however, attorney's fees may possibly be recovered on the same grounds. Counsel therefore may wish to add an allegation to that effect to this complaint.

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35-404 California Forms of Pleading and Practice--Annotated § 404.62

§ 404.62 Notice of Motion to Excuse Plaintiff From Requirement of Contemporaneous Status as Partner in Derivative Action Under ULPA '08 or CRLPA [Corp. Code § 15702(a)(1) (CRLPA); Corp. Code § 15910.03(b) (ULPA '08)]

[1] FORM Notice of Motion to Excuse Plaintiff From Requirement of Contemporaneous Status as Partner in Derivative Action Under ULPA '08 or CRLPA [Corp. Code § 15702(a)(1) (CRLPA); Corp. Code § 15910.03(b) (ULPA '08)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], et al. Defendants.	)))))))	NO. _____ NOTICE OF MOTION AND MOTION FOR ORDER EXCUSING PLAINTIFF FROM REQUIREMENT OF CONTEMPORANEOUS STATUS AS PARTNER IN DERIVATIVE ACTION [, SUPPORTING DECLARATION OF _____ (*name*), AND SUPPORTING MEMORANDUM] [Telephone Appearance] Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

_____

To each defendant, and to the attorney of record for each defendant:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], plaintiff _____ [*name*] will, and hereby does, move for an order allowing plaintiff to maintain this derivative action under the exception to the requirement of contemporaneous status as partner contained in _____ [*if partnership is governed by CRLPA, Corporations Code Section 15702(a)(1) or if partnership is governed by ULPA '08, Corporations Code Section 15910.03(b)*]. The motion is made on the following grounds:

(1) That there is a strong prima facie case in favor of the claim asserted by plaintiff on behalf of the limited partnership;

(2) That no other similar action has been, or is likely to be, instituted;

(3) That the plaintiff acquired his/her/its partnership interest before there was disclosure to the public or to the plaintiff of the wrongdoing of which plaintiff complains;

(4) That unless the action can be maintained, defendant[s] _____ [*name(s)*] may retain a gain derived from the willful breach of a fiduciary duty by such defendant[s]; and

(5) That the requested relief will not result in unjust enrichment of the limited partnership or any partner.

The motion will be based on this notice of motion, on the affidavit(s) _____[*or* declaration(s)] of _____ [*name(s*)] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[2] Use of Form

The notice of motion in [1], *above*, may be used to move for an order allowing a partner to pursue a derivative action on behalf of a limited partnership governed by the ULPA '08 or the CRLPA even though the partner did not have an interest in the partnership at the time of the events complained of. For forms of complaints for derivative actions, see *§§ 404.60* (ULPA '08), 404.61 (CRLPA).

Generally, a derivative action on behalf of a limited partnership may be maintained only by a person that is a partner at the time the action is commenced and (1) was a partner when the conduct giving rise to action occurred, or (2) whose status as a partner devolved on the person by operation of law or pursuant to the terms of the partnership agreement from a person that was a partner at the time of that conduct [*Corp. Code § 15702(a)(1)* (CRLPA); *Corp. Code § 15910.03(a)* (ULPA '08)]. However, any partner that does not meet the foregoing requirements may nevertheless be allowed in the discretion of the court to maintain a derivative action if the court determines that all of the following conditions exist [*Corp. Code § 15702(a)(1)* (CRLPA), *Corp. Code § 15910.03(b)* (ULPA '08)]:

- There is a strong prima facie case in favor of the claim asserted on behalf of the partnership.

- No other similar action has been or is likely to be instituted.

- The plaintiff acquired an interest in the partnership before there was disclosure to the public and to the plaintiff of the wrongdoing of which the plaintiff complains.

- Unless the action can be maintained, the defendant may retain a gain derived from the defendant's willful breach of a fiduciary duty.

- The requested relief will not result in unjust enrichment of the partnership or any partner.

The court's determination may be made only on motion by the plaintiff and after a hearing at which the court considers such evidence, by affidavit or testimony, as it deems material [*Corp. Code § 15702(a)(1)* (CRLPA); *Corp. Code § 15910.03(b)* (ULPA '08)].

For further discussion of derivative actions by limited partners, see *§ 404.24[1][b],[2][b]*.

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[Reserved]

§§ 404.63[Reserved]

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C. Actions by Limited Partnership

35-404 California Forms of Pleading and Practice--Annotated § 404.70

§ 404.70 Complaint Under ULPA '08 or CRLPA for Damages for Breach of Limited Partnership Agreement--By Limited Partnership Against Withdrawing or Dissociating General Partner [Corp. Code § 15662(a) (CRLPA); Corp. Code § 15906.04 (ULPA '08)]

[1] FORM Complaint Under ULPA '08 or CRLPA for Damages for Breach of Limited Partnership Agreement--By Limited Partnership Against Withdrawing or Dissociating General Partner [Corp. Code § 15662(a) (CRLPA); Corp. Code § 15906.04 (ULPA '08)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*names*],	)	NO. _____
Plaintiffs, vs. _____ [*name*],	)	COMPLAINT FOR DAMAGES (Withdrawing General Partner's Breach of Partnership Agreement)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiffs allege:

1. Plaintiff _____ [*name*] is, and at all times herein mentioned was, a limited partnership, suing herein under the name _____ [it has assumed *or* by which it is known]. Plaintiffs _____ [*names of remaining general partners*] are, and at all times herein mentioned were, general partners in plaintiff partnership.

2. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California.

3. On or about _____ [*date*], plaintiff general partners, defendant, and plaintiff partnership's limited partners executed _____ [a written *or* an oral] partnership agreement at _____ [*city*], _____ County, California for the purpose of forming plaintiff limited partnership, to carry on the business of _____ [*specify*], under the name of _____ [*name of partnership*], with plaintiff general partners and defendant as general partners [for a term of _____ (*specify*)]. [A copy of the agreement is attached as Exhibit _____ and incorporated by reference.] [On or about _____ (*date*), plaintiff general partners and defendant filed a certificate of limited partnership with the Secretary of State, in compliance with _____ [*Corporations Code Section 15621(a) or Corporations Code Section 15902.01*]. A copy of the certificate of limited partnership certified by the Secretary of State is attached as Exhibit _____ and incorporated by reference.]

4. Plaintiff general partners have performed all conditions, covenants, and promises they are required to perform in accordance with the terms and conditions of the contract [, except _____ (*specify conditions not performed*), the performance of which was excused on the ground that _____ (*specify*)].

5. On or about _____ [*date*], defendant breached the partnership agreement by _____ [withdrawing *or* dissociating] from plaintiff partnership [prior to the expiration of the term of the partnership].

6. As a proximate result of defendant's breach of the partnership contract, _____ [*specify damages proximately caused by breach, e.g.,* plaintiffs lost profits that would have been earned during the fixed term of the partnership but for defendant's withdrawal, in the sum of $_____]. [*If limited partnership is governed by ULPA '08, for each partner joined as a plaintiff, allege injury that is not solely the result of injury to the partnership, as required by Corp. Code § 15910.01(b) (ULPA '08).*]

7. Plaintiffs are entitled to offset the damages suffered as a result of defendant's breach against the amounts otherwise distributable to defendant as a general partner, pursuant to _____ [*Corporations Code Section 15662(a) or Corporations Code Section 15905.07*].

WHEREFORE, plaintiffs pray judgment as follows:

1. For compensatory damages in the sum of $_____;

2. For interest on the amount of $_____, at the legal rate, from and after _____ [*date*];

3. For an order declaring that plaintiffs are entitled to offset the amount of damages and interest awarded to them as a result of defendant's breach against any amounts found to be distributable to defendant as a general partner;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiffs

VERIFICATION

I, _____ [*name*], am a plaintiff in the above-entitled action and a general partner of _____ [*name of partnership*], a plaintiff in the above-entitled action, and am authorized to make this verification on plaintiff partnership's behalf. I have read the foregoing complaint and know the contents thereof. I am informed and believe that the matters stated therein are true and on that ground I allege that the matters stated therein are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____

_____[*signature*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action by a limited partnership under the CRLPA or the ULPA '08 against a general partner who has breached the partnership agreement by withdrawing or dissociating from the partnership [*see Corp. Code § 15662(a)* (CRLPA); *Corp. Code § 15906.04(b)* (ULPA '08)]. This form may be for use by a limited partnership governed by the ULPA by citing *Corp. Code § 15712(b)(2)* (ULPA) instead of *Corp. Code § 15621* (CRLPA) or *Corp. Code § 15902.01* in Paragraph 3, deleting the allegations in Paragraph 7 of the complaint and Paragraph 3 of the Prayer, and using general contract law [*see* Ch. 140, *Contracts*] as authority for the form. For discussion of the application of the ULPA '08, the CRLPA, and the ULPA in general, see *§ 404.10*.

[3] Allegations

This complaint alleges the following:

- Plaintiffs' capacity as a limited partnership and its general partners (Paragraph 1) [*see Corp. Code § 16301* (UPA '94); *see also Corp. Code § 15643* (CRLPA); *Corp. Code § 15904.02* (ULPA '08)].

- The partnership agreement, by which defendant became a general partner (Paragraph 3) [*see Corp. Code § 15662(a)* (CRLPA); *Corp. Code § 15901.10* (ULPA '08); *Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377*].

- Plaintiff general partners' performance or excusable nonperformance of the agreement (Paragraph 4) [*see Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377*].

- Defendant's breach by withdrawing or dissociating from the partnership (Paragraph 5) [*Corp. Code § 15662(a)* (CRLPA); *Corp. Code § 15906.04* (ULPA '08)].

- Damages proximately caused by the breach (Paragraph 6) [*see Civ. Code § 3300*; *Corp. Code § 15662(a)* (CRLPA); *Corp. Code § 15906.04* (ULPA '08)].

- Plaintiffs' right to offset the damages caused by the breach against any distributions owed by the partnership to defendant as a withdrawing or dissociating general partner (Paragraph 7) [*Corp. Code §*

15662(a) (CRLPA); *Corp. Code § 15905.07* (ULPA '08)].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] General Partner's Liability for Wrongful Withdrawal or Dissociation

Under the CRLPA, a general partner may withdraw from a limited partnership at any time by giving written notice to the other partners. If the withdrawal violates the partnership agreement, however, the limited partnership may recover from the withdrawing general partner damages for breach of the partnership agreement. In the case of a partnership for a fixed term, a withdrawal by a general partner prior to the expiration of the term is a breach of the partnership agreement. In addition to any other remedies, the limited partnership may offset the damages from the breach against any amounts otherwise distributable to the general partner [*Corp. Code § 15662(a)* (CRLPA)].

Under the ULPA '08, a general partner may dissociate from the partnership by express will at any time, but the dissociation is wrongful if it is in breach of an express provision of the partnership agreement or if it occurs before the termination of the limited partnership [*Corp. Code § 15906.04(a),(b)* (ULPA '08)]. A person that wrongfully dissociates as a general partner is liable to the limited partnership for damages caused by the dissociation [*Corp. Code § 15906.04(c)* (ULPA '08)]. In addition, the person will be liable for damages to any partner who suffers injury that is not solely the result of an injury suffered by the partnership [*Corp. Code §§ 15906.04(c), 15910.01(b)* (ULPA '08)].

[6] Cross References

For discussion and forms relating to contract actions generally, see Ch. 140, *Contracts* .

For discussion and allegations relating to damages in contract actions, see Ch. 177, *Damages* .

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35-405 California Forms of Pleading and Practice--Annotated 405.syn

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§ 405.30 Related Matthew Bender Publications

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[3] Allegations

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§ 405.43 Allegations for Complaint Under ULPA '08 or CRLPA for Damages Against Limited Partnership and Partners--Limited Partner Participated in Control of Business [Corp. Code § 15632(a) (CRLPA); Corp. Code § 15903.03(a) (ULPA '08)]

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[1] FORM

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§ 405.45 Complaint for Damages--Against Limited Partnership and Partners Governed by ULPA--Liability of

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[1] FORM

[2] Use of Form

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Chapter 405 PARTNERSHIPS: ACTIONS BETWEEN LIMITED PARTNERS OR PARTNERSHIPS AND THIRD PARTIES

PART I. SCOPE

35-405 California Forms of Pleading and Practice--Annotated § 405.01

§ 405.01 Scope of Chapter

The discussion and forms in this chapter deal with actions between third parties and limited partnerships and their partners. This chapter includes forms for actions against limited partnerships governed by the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code § 15900 et seq.* (ULPA '08)], the California Revised Limited Partnership Act (CRLPA) [*Corp. Code § 15611 et seq.* (CRLPA)], and the Uniform Limited Partnership Act (ULPA) [*Corp. Code § 15501 et seq.*]. The forms include:

- Complaints under the ULPA '08 and the CRLPA by third parties that relied on misstatements in a limited partnership certificate or other record filed for the limited partnership [*see §§ 405.40, 405.41*].

- A complaint under the ULPA '08 or the CRLPA by a third party for damages arising out of a transaction occurring before the limited partnership certificate was filed [*see § 405.42*].

- Complaint allegations under the ULPA '08 or the CRLPA against a limited partner based on the partner's participation in control of the partnership business [*see § 405.43*].

- Complaint allegations under the ULPA '08 or the CRLPA against a surviving limited partnership after merger, for obligations of the disappearing business entity [*see § 405.44*].

- A complaint against a limited partnership and partners governed by the ULPA when the limited partner controlled partnership business [*see § 405.45*].

- An affirmative defense by a limited partner asserting his or her limited liability under the ULPA '08, the CRLPA, or the ULPA [*see § 405.46*].

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§ 405.02 Cross References

- For a general discussion of the governing statutes and definitions pertaining to general and limited partnerships, see Ch. 400, *Partnerships: Governing Statutes* .

- For discussion and forms pertaining to actions between general and limited partners and limited partnerships, see Ch. 404, *Partnerships: Actions Between Limited Partners and Partnerships* .

- For discussion and forms pertaining to dissolution of limited partnerships, see Ch. 406, *Partnerships: Dissolution* .

- For discussion and forms pertaining to actions by and against general partners and general partnerships, see Ch. 401, *Partnerships: Actions Between General Partners and Partnerships* , and Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties* .

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PART II. LEGAL BACKGROUND

35-405 California Forms of Pleading and Practice--Annotated § 405.10

§ 405.10 Governing Law

[1] Limited Partnership Laws Before 2008

[a] Uniform Limited Partnership Act (ULPA)

Until January 1, 2010, the Uniform Limited Partnership Act (ULPA) [*Corp. Code § 15501 et seq.* (ULPA)] generally governed limited partnerships formed before July 1, 1984, the operative date of the California Revised Limited Partnership Act (CRLPA) [*Corp. Code §§ 15534* (ULPA), 15711 (CRLPA); *see Corp. Code § 15611 et seq.* (CRLPA); *see also* [b], *below*].

On or after July 1, 1984, a limited partnership formed under the ULPA could elect to be governed by CRLPA [*Corp. Code § 15712(b)(1)* (CRLPA); *see* [b], *below*]. On or after January 1, 2008, a limited partnership originally formed under the ULPA could elect to be governed by the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code § 15912.06(a)(2)* (ULPA '08); *see Corp. Code § 15900 et seq.* (ULPA '08); *see also* [2][a], *below*].

Effective January 1, 2010, the ULPA is repealed [*Corp. Code § 15534* (ULPA)], and all limited partnerships, regardless of the date of formation, are governed by the ULPA '08, except as specified by the ULPA '08 [*Corp. Code § 15912.06(b)* (ULPA '08); *see Corp. Code § 15912.06(c)* (ULPA '08) (exceptions); *see also* [2][a], *below*]. However, the ULPA '08 does not affect an action commenced, proceeding brought, or right accrued before January 1, 2008 [*Corp. Code § 15912.07* (ULPA '08)].

[b] California Revised Limited Partnership Act (CRLPA)

Until January 1, 2010, the California Revised Limited Partnership Act (CRLPA) [*Corp. Code § 15611 et seq.* (CRLPA)] generally governed limited partnerships formed on or after July 1, 1984, and before January 1, 2008, the operative date of the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code §§ 15711, 15714, 15724* (CRLPA), 15912.06(a)(1) (ULPA '08); *see Corp. Code § 15900 et seq.* (ULPA '08)].

In addition, a limited partnership formed before July 1, 1984, could elect to be governed by CRLPA if all partners, or a

lesser number as required by the partnership agreement, consented in writing to the election [*Corp. Code § 15712(b)(1)* (CRLPA) (election was prospective only and did not affect preexisting rights of third parties)].

On or after January 1, 2008, any limited partnership governed by the CRLPA could elect to be governed by the ULPA '08 [*Corp. Code § 15912.06(a)(2)* (ULPA '08); *see Corp. Code § 15900 et seq.* (ULPA '08); *see also* [2][a], *below*].

Effective January 1, 2010, CRLPA is repealed [*Corp. Code § 15724* (CRLPA)], and all limited partnerships, regardless of the date of formation, are governed by the ULPA '08, except as specified by the ULPA '08 [*Corp. Code § 15912.06(b)* (ULPA '08); *see Corp. Code § 15912.06(c)* (ULPA '08) (exceptions); *see also* [2][a], *below*]. However, the ULPA '08 does not affect an action commenced, proceeding brought, or right accrued before January 1, 2008 [*Corp. Code § 15912.07* (ULPA '08)].

[c] Application of General Partnership Law

Limited partnerships governed by the ULPA and the CRLPA were subject to general partnership law on matters not specifically covered by the ULPA or CRLPA [*Corp. Code §§ 15722, 16111* (CRLPA); *see former Corp. Code § 15006(2)*]. The ULPA '08 adopts a different approach and does not rely on general partnership law or any other source for the rules governing limited partnerships [*see* [2][b], *below*].

[2] Uniform Limited Partnership Act of 2008 (ULPA '08)

[a] Application of ULPA '08

The Uniform Limited Partnership Act of 2008 (ULPA '08) [*see* Stats. 2006, ch. 495, § 20; *Corp. Code § 15900 et seq.* (ULPA '08)] became operative on January 1, 2008 [*Corp. Code § 15912.04* (ULPA '08)]q. Through the end of 2009, the ULPA '08 generally governed the following limited partnerships [*Corp. Code § 15912.06(a)* (ULPA '08)]:

- Limited partnerships formed on or after January 1, 2008.

- Limited partnerships formed before January 1, 2008, that elected to be subject to the ULPA '08. However, the election did not change the law governing the limited partnership's liability to a third party on an obligation incurred between the time of the election and the end of 2009, if the third party did business with the partnership during the year preceding the election and had no knowledge or notice of the election at the time the obligation was incurred [*Corp. Code § 15912.06(d)* (ULPA '08)].

Effective January 1, 2010, all limited partnerships, regardless of the date of formation, generally are governed by the ULPA '08 [*Corp. Code § 15912.06(b)* (ULPA '08)]. However, with respect to a limited partnership formed before January 1, 2008, the following rules apply unless the partners elect otherwise [*Corp. Code § 15912.06(c)* (ULPA '08)]:

- The perpetual duration possessed by limited partnerships formed under the ULPA '08 [*see Corp. Code § 15901.04(c)* (ULPA '08)] does not apply, and the limited partnership has whatever duration it had under the law applicable immediately before January 1, 2008.

- The ULPA '08 provisions governing dissociation of limited partners [*see Corp. Code §§ 15906.01, 15906.02* (ULPA '08)] do not apply, and a limited partner has the same right and power to dissociate from the limited partnership, with the same consequences, as existed immediately before January 1, 2008.

- The ULPA '08 provision for the expulsion of a general partner by unanimous vote of the other partners [*see Corp. Code § 15906.03(d)* (ULPA '08)] does not apply.

- The ULPA '08 provision for the expulsion of a general partner by court order [*see Corp. Code § 15906.03(e)* (ULPA '08)] does not apply, and a court has the same power to expel a general partner as the court had immediately before January 1, 2008.

- The ULPA '08 provision specifying the circumstances in which the dissociation of a general partner dissolves a limited partnership for dissolution [*Corp. Code § 15908.01(c)* (ULPA '08)] does not apply, and the connection between a general partner's dissociation and the dissolution of the limited partnership is the same as existed immediately before January 1, 2008.

Moreover, the ULPA '08 does not affect an action commenced, proceeding brought, or right accrued before January 1, 2008 [*Corp. Code § 15912.07* (ULPA '08)]. Thus, because litigation involving California limited partnerships formed before 2008 may be governed by the ULPA or the CRLPA, this chapter will continue to provide discussion of those laws, and forms for use in litigation under those laws, as well as discussion and forms relevant to the ULPA '08. All references to *Corp. Code § 15501 et seq.* (ULPA) and to *Corp. Code § 15611 et seq.* (CRLPA) in this chapter are to provisions repealed as of 2010.

[b] Inapplicability of General Partnership Law

Unlike its predecessors [*see* [1], *above*], the ULPA '08 is a stand-alone law that does not rely on general partnership law or any other source for the rules governing limited partnerships [*see* R. Bradbury Clark, California's Uniform Limited Partnership Act of 2008--Summary and Analysis of the Act's Major Provisions, § 4.01[2] (LexisNexis 2007)]. Thus, the ULPA '08 is the only source that needs to be consulted for the statutory rules governing formation, filings, contributions and distributions, rights of transferees and creditors, dissociation, dissolution, actions by partners, conversion and merger, dissenting limited partners' rights, and foreign limited partnerships.

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35-405 California Forms of Pleading and Practice--Annotated § 405.11

§ 405.11 Definitions

A limited partnership generally is a partnership formed by two or more persons under California law, having one or more general partners and one or more limited partners [*Corp. Code § 15501* (ULPA); *Corp. Code § 15611(r)* (CRLPA); *Corp. Code § 15901.02(q)* (ULPA '08)]. A limited partner is a partner who is admitted to the limited partnership in accordance with the partnership agreement without participating in control of the partnership business and without being liable for partnership obligations [*see Corp. Code §§ 15501, 15504, 15510* (ULPA); *Corp. Code §§ 15611(q), 15632, 15651* (CRLPA); *Corp. Code §§ 15901.02(p), 15903.01, 15903.03(a), 15907.02(g)* (ULPA '08)]. A general partner is a partner who acts for the partnership and is liable for partnership obligations [*see Corp. Code § 15509(1)* (ULPA); *Corp. Code §§ 15611(n), 15643* (CRLPA); *Corp. Code §§ 15901.02(m), 15904.01, 15904.04(a)* (ULPA '08)].

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35-405 California Forms of Pleading and Practice--Annotated § 405.12

§ 405.12 Liability

[1] Partnership

[a] ULPA '08

In a limited partnership governed by the ULPA '08, each general partner is an agent of the limited partnership for the purposes of its activities. An act of a general partner for apparently carrying on in the ordinary course the limited partnership's activities, or activities of the kind carried on by the limited partnership, binds the limited partnership, unless the general partner did not have authority to act for the partnership in the particular matter and the person dealing with the general partner knew, had received a notification, or had notice [*see Corp. Code § 15901.03(d)* (ULPA '08)] that the general partner lacked authority [*Corp. Code § 15904.02(a)* (ULPA '08)].

A limited partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a general partner acting in the ordinary course of activities of the limited partnership or with authority of the limited partnership [*Corp. Code § 15904.03(a)* (ULPA '08)]. If, in the course of the limited partnership's activities or while acting with authority of the limited partnership, a general partner receives or causes the limited partnership to receive money or property of a person not a partner, and the money or property is misapplied by a general partner, the limited partnership is liable for the loss [*Corp. Code § 15904.03(b)* (ULPA '08)].

[b] CRLPA and ULPA

In a partnership governed by the CRLPA or the ULPA, a general partner has all of the rights, powers, and duties of a partner in a partnership without limited partners [*Corp. Code § 15509(1)* (ULPA); *Corp. Code § 15643* (CRLPA)]. Therefore, the acts of a general partner in conducting partnership business bind the limited partnership [*see Corp. Code § 16301* (UPA '94); *see also* discussion in Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties* relating to general partner's authority to bind partnership]. For example, a limited partnership is bound by a contract executed on its behalf by a general partner [*Coronet Constr. Co., Inc. v. Palmer (1961) 194 Cal. App. 2d 603, 608, 15 Cal. Rptr. 601* (decided under ULPA)]. Similarly, the limited partnership is liable for the wrongs of a general partner committed in the ordinary course of the business of the partnership or with the authority of

copartners [*see Corp. Code § 16305(a)* (UPA '94)]. The limited partnership will also be liable for a general partner's misapplication of money or property, either when acting with apparent authority or after that money or property has been received by the partnership in the ordinary course of partnership business [*see Corp. Code § 16305(b)* (UPA '94)].

[2] Limited Partners

As a general rule, a limited partner is not liable for any obligation of the limited partnership unless he or she participates in the control of the partnership business [*see Corp. Code § 15507(a)* (ULPA); *Corp. Code § 15632(a)* (CRLPA); *Corp. Code § 15903.03(a)* (ULPA '08); *but see* [4]-[8] and *§ 405.16, below*].

[3] General Partners

[a] ULPA '08

In a limited partnership governed by the ULPA '08, a general partner ordinarily is personally liable for all obligations of the limited partnership [*Corp. Code § 15904.04(a)* (ULPA '08) (general partners jointly and severally liable)]. However, a person that becomes a general partner of an existing limited partnership is not personally liable for an obligation of a limited partnership incurred before the person became a general partner [*Corp. Code § 15904.04(b)* (ULPA '08)].

To the extent not inconsistent with the preceding paragraph, a general partner may be joined in an action against the limited partnership or named in a separate action [*Corp. Code § 15904.05(a)* (ULPA '08)].

A judgment against a limited partnership is not by itself a judgment against a general partner. A judgment against a limited partnership may not be satisfied from a general partner's assets unless there is also a judgment against the general partner [*Corp. Code § 15904.05(b)* (ULPA '08)].

A judgment creditor of a general partner may not levy execution against the assets of the general partner to satisfy a judgment based on a claim against the limited partnership, unless the partner is personally liable for the claim and one of the following circumstances exists [*Corp. Code § 15904.05(c)* (ULPA '08)]:

- A judgment based on the same claim has been obtained against the limited partnership, and a writ of execution on the judgment has been returned unsatisfied in whole or in part.

- The limited partnership is a debtor in bankruptcy.

- The general partner has agreed that the creditor need not exhaust limited partnership assets.

- A court grants permission to the judgment creditor to levy execution against the assets of a general partner based on a finding that limited partnership assets subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of limited partnership assets is excessively burdensome, or that the grant of permission is an appropriate exercise of the court's equitable powers.

- Liability is imposed on the general partner by law or contract independent of the existence of the limited partnership.

[b] CRLPA and ULPA

In a limited partnership governed by the CRLPA or the ULPA, a general partner is subject to all the same liabilities as a partner in a partnership without limited partners [*see Corp. Code § 15509(1)* (ULPA); *Corp. Code § 15643* (CRLPA)]. Therefore, actions by third parties against such limited partnerships generally involve only the general partners and are governed by the law applying to general partnerships [*see Corp. Code § 15509(1)* (ULPA); *Corp. Code § 15643*

(CRLPA); *see also* Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties*].

[4] Dual Capacity as General and Limited Partner

[a] ULPA '08

In a limited partnership governed by the ULPA '08, a person may be both a general partner and a limited partner [*Corp. Code § 15901.13* (ULPA '08)]. A person that is both a general and limited partner has the rights, powers, duties, and obligations provided by the ULPA '08 and the partnership agreement in each of those capacities [*Corp. Code § 15901.13* (ULPA '08)]. When the person acts as a general partner, the person is subject to the obligations, duties and restrictions under the ULPA '08 and the partnership agreement for general partners [*Corp. Code § 15901.13* (ULPA '08)]. When the person acts as a limited partner, the person is subject to the obligations, duties and restrictions under the ULPA '08 and the partnership agreement for limited partners [*Corp. Code § 15901.13* (ULPA '08)].

[b] CRLPA and ULPA

In a limited partnership governed by the CRLPA or the ULPA, a person may be both a general and a limited partner at the same time. He or she has all the rights and powers and is subject to all the restrictions of a general partner, except that he or she also has the powers and is subject to the restrictions of a limited partner to the extent of his or her contribution to the limited partnership as a limited partner [*see Corp. Code § 15512* (ULPA); *Corp. Code § 15644* (CRLPA)].

[5] Limited Partner Whose Name Is in Partnership Name

[a] ULPA '08

The name of a partnership governed by the ULPA '08 may contain the name of a limited partner [*Corp. Code § 15901.08(a)* (ULPA '08)]. The ULPA '08 imposes no special liability requirements on a limited partner whose name is included in the partnership's name.

[b] CRLPA

The name of a limited partnership governed by the CRLPA may contain the name of a limited partner [*Corp. Code § 15612(b)*]. Before January 1, 1991, a limited partner who knowingly permitted his or her name to be used in the name of a limited partnership was liable for obligations of the limited partnership to persons who reasonably believed that the person was a general partner at the time of the transaction, unless (1) the name was also the name of a general partner, or (2) the business of the limited partnership had been carried on under a name in which the limited partner's name appeared before the admission of that limited partner [*see former Corp. Code §§ 15612(b)* (amended by Stats. 1990, ch. 1088, § 2), 15632(d) (repealed by Stats. 1990, ch. 1088, § 4)].

[c] ULPA

If a limited partner's name appears in the name of a limited partnership governed by the ULPA, the limited partner is liable as a general partner to partnership creditors who extend credit to the partnership without actual knowledge that he or she is not a general partner [*Corp. Code § 15505(2)* (ULPA)].

[6] False Information in Filed Record or Certificate

[a] ULPA '08

Signing a record authorized or required to be filed under the ULPA '08 [*see Corp. Code § 15901.02(ac)* (ULPA '08) ("record" defined)] constitutes an affirmation under the penalties of perjury that the facts stated in the record are true [

Corp. Code § 15902.08(b) (ULPA '08)]. If a record delivered to the Secretary of State for filing under the ULPA '08 and filed by the Secretary of State contains false information, a person that suffers loss by reliance on the information may recover damages for the loss from both of the following [*Corp. Code § 15902.08(a)* (ULPA '08)]:

- A person that signed the record, or caused another to sign it on the person's behalf, and knew the information to be false at the time the record was signed.

- A general partner that has notice that the information was false when the record was filed or has become false because of changed circumstances, if the general partner has notice for a reasonably sufficient time before the information is relied upon to enable the general partner to effect an amendment [*see Corp. Code § 15902.02*], seek a court order for a proper filing [*see Corp. Code § 15902.05*], or deliver to the Secretary of State for filing a certificate of correction [*see Corp. Code § 15902.07* (ULPA '08)].

For a form for a complaint based on false statements in a record filed for a limited partnership, *see § 405.40*.

[b] CRLPA

A limited partner in a partnership governed by the CRLPA may be liable for a false statement in the certificate of limited partnership if he or she is named as a general partner in the certificate [*Corp. Code § 15632(a)* (CRLPA)]. In addition, any general or limited partner executing a certificate of limited partnership [*see Corp. Code § 15633* (CRLPA)] is liable for any statement materially inconsistent with the partnership agreement or any material misstatement of fact contained in the certificate if the partner knew or should have known that the statement was false when made and an amendment was not filed, and if the person suffering the loss relied on the statement or misstatement [*Corp. Code § 15624(c)* (CRLPA); for a complaint based on false statements, *see § 405.41*].

Any general partner is liable for any statement materially inconsistent with the partnership agreement or any material misstatement of fact contained in the certificate if the general partner knew or should have known that the statement became false and an amendment was not filed, and if the person suffering the loss relied on the statement or misstatement [*Corp. Code § 15624(c)* (CRLPA); *see § 405.41[1]*].

[7] Erroneous Belief in Limited Partner Status

[a] ULPA '08

Generally, a person that makes an investment in a business enterprise that would otherwise be governed by the ULPA '08, and erroneously but in good faith believes that the person has become a limited partner in the enterprise, is not liable for the enterprise's obligations by reason of making the investment, receiving distributions from the enterprise, or exercising any rights of or appropriate to a limited partner, if, on ascertaining the mistake, the person does one of the following [*Corp. Code § 15903.06(a)* (ULPA '08)]:

- Causes an appropriate certificate of limited partnership, amendment, or certificate of correction to be signed and delivered to the Secretary of State for filing.

- Withdraws from future participation as an owner in the enterprise by signing a certificate of withdrawal, on a form prescribed by the Secretary of State, and delivering the certificate to the Secretary of State for filing.

If a person makes a diligent effort in good faith to comply with paragraph (1) above and is unable to cause the appropriate certificate of limited partnership, amendment, or certificate of correction to be signed and delivered to the

Secretary of State for filing, the person has the right to withdraw from the enterprise pursuant to paragraph (2) above even if the withdrawal would otherwise breach an agreement with others that are or have agreed to become co-owners of the enterprise [*Corp. Code § 15903.06(c)* (ULPA '08)].

In any event, a person that makes an investment as described above is liable to the same extent as a general partner to any third party that enters into a transaction with the enterprise, believing in good faith that the person is a general partner, before the Secretary of State files a certificate of withdrawal, certificate of limited partnership, amendment, or certificate of correction to show that the person is not a general partner [*Corp. Code § 15903.06(b)* (ULPA '08)].

[b] CRLPA

If a certificate of limited partnership has not been filed for an enterprise that would otherwise be governed by the CRLPA, a person who makes a contribution to the purported limited partnership and in good faith believes that he or she has become a limited partner is not liable for the obligations of the purported limited partnership if, on ascertaining that the certificate has not been filed and after a failure of the general partners to file the certificate within a reasonable time after request, that person promptly files the certificate of limited partnership [*Corp. Code § 15633(a)* (CRLPA)]. A limited partner executing and filing a certificate of limited partnership must send a copy of the certificate to each general partner at the general partner's last known address [*Corp. Code § 15633(a)* (CRLPA)]. A person who makes a contribution to the purported limited partnership and in good faith believes that he or she has become a limited partner is liable only to any third party who transacted business with the purported limited partnership before the certificate is filed and who reasonably believed that the person was a general partner at the time of the transaction [*Corp. Code § 15633(b)* (CRLPA)].

[c] ULPA

A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he or she has become a limited partner in a limited partnership that would otherwise be governed by the ULPA is not liable as a general partner if, on ascertaining the mistake, he or she promptly renounces his or her interest in the profits of the business or other compensation by way of income [*Corp. Code § 15511* (ULPA); *see Tiburon Nat. Bank v. Wagner (1968) 265 Cal. App. 2d 868, 876-877, 71 Cal. Rptr. 832*]. It has been held that six months from the time that the limited partner learns of his or her possible liability, to the time he or she renounces any interest in partnership profits or compensation is not "prompt" for this purpose [*Vidricksen v. Grover (9th Cir. 1966) 363 F.2d 372, 373*].

[8] Fraud

Any partner authorizing the fraud of a general partner is liable for the resulting injury to a third party, whether or not the authorizing partner is a limited partner [*Russell v. Warner (1950) 96 Cal. App. 2d 986, 988-989, 217 P.2d 43* (decided under ULPA)]. In addition, under the ULPA, every member of a special or limited partnership who commits any fraud in the affairs of the partnership is guilty of a misdemeanor [*Corp. Code § 15531* (ULPA)].

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§ 405.13 Service on Limited Partnership

[1] ULPA '08

In addition to the generally applicable methods of service [*see Code Civ. Proc. § 413.10 et seq.*], process may be served on a limited partnership or foreign limited partnership governed by the ULPA '08 as follows [*Corp. Code § 15901.16(a)* (ULPA '08)]. Personal service of a copy of any process against the limited partnership or foreign limited partnership constitutes valid service on the limited partnership if delivered either [*Corp. Code § 15901.16(b)* (ULPA '08)]:

- To any individual designated by it as agent or to any general partner.

- If the designated agent or, if a limited partnership, general partner is a corporation, to any person named in the latest certificate of the corporate agent [*see Corp. Code § 1505*] at the office of the corporate agent or to any officer of the general partner.

No change in the address of the agent for service of process if the agent is an individual, or appointment of a new agent for service of process, is effective (1) for a limited partnership until an amendment to the certificate of limited partnership is filed, or (2) for a foreign limited partnership until an amendment to the application for registration is filed [*Corp. Code § 15901.16(b)* (ULPA '08)].

In the case of a foreign limited partnership that has appointed the Secretary of State as agent for service of process [*see Corp. Code § 15909.07(f)*], service of process may be accomplished by hand-delivery to the Secretary of State (or to any person employed in the capacity of assistant or deputy) of one copy of the process for each defendant to be served, together with a copy of the court order authorizing the service and the fee for service. The order must include and set forth an address to which process must be sent by the Secretary of State [*Corp. Code § 15901.16(b)* (ULPA '08)].

If an agent for service of process has resigned and has not been replaced, or if the agent designated cannot with reasonable diligence be found at the address designated for personal delivery of the process, and it is shown by affidavit to the satisfaction of the court that process against a limited partnership or foreign limited partnership cannot be served

with reasonable diligence on the designated agent or, if a foreign limited partnership, upon any general partner by hand in the manner provided in *Code Civ. Proc. § 415.10, 415.20(a)*, or *415.30(a)*, the court may make an order that the service be made on a domestic limited partnership that has filed a certificate or on a foreign limited partnership that has a certificate of registration to transact business in California by hand-delivery to the Secretary of State (or to any person employed in the Secretary of State's office in the capacity of assistant or deputy) of one copy of the process for each defendant to be served, together with a copy of the order authorizing the service. Service in this manner will be deemed complete on the 10th day after delivery of the process to the Secretary of State [*Corp. Code § 15901.16(c)(1)* (ULPA '08)]. On receipt of any such copy of process and the fee for service, the Secretary of State must give notice of the service of the process to the limited partnership or foreign limited partnership, at its principal office, by forwarding to that office, by registered mail with request for return receipt, the copy of the process [*Corp. Code § 15901.16(c)(2)* (ULPA '08)]. The Secretary of State must keep a record of all process served on the Secretary of State under the ULPA '08, recording the time of service and the action taken by the Secretary of State. A certificate under the Secretary of State's official seal, certifying to the receipt of process, the giving of notice to the limited partnership or foreign limited partnership, and the forwarding of the process, is competent and prima facie evidence of the matters stated in the certificate [*Corp. Code § 15901.16(c)(3)* (ULPA '08)].

The certificate of a limited partnership and the application for a certificate of registration of a foreign limited partnership must designate, as the agent for service of process, an individual residing in California or a corporation that has complied with *Corporations Code Section 1505* and whose capacity to act as an agent has not terminated. If an individual is designated, the statement must set forth that person's complete business or residence address in California. If a corporate agent is designated, no address for it need be set forth [*Corp. Code § 15901.16(d)(1)* (ULPA '08)].

An agent designated for service of process may file with the Secretary of State a signed and acknowledged written statement of resignation as an agent. The authority of the agent to act in that capacity will then cease, and the Secretary of State must immediately give written notice of the filing of the certificate of resignation by mail to the limited partnership or foreign limited partnership, addressed to its designated office [*Corp. Code § 15901.16(d)(2)* (ULPA '08)].

If an individual who has been designated the agent for service of process for a domestic or foreign limited partnership dies or resigns or no longer resides in California, or if the corporate agent for that purpose resigns, dissolves, withdraws from the state, forfeits its right to transact intrastate business, has its corporate rights, powers and privileges suspended, or ceases to exist, (1) the domestic limited partnership must promptly file an amendment to the certificate designating a new agent, or (2) the foreign limited partnership must promptly file an amendment to the application for registration [*Corp. Code § 15901.16(d)(3)* (ULPA '08)].

[2] CRLPA and ULPA

The CRLPA provides statutory requirements relating to service of process on all limited partnerships, including those otherwise governed by ULPA after they have filed the certificate required by *Corp. Code §§ 15621(a), 15712(b)(2)* [*Corp. Code §§ 15614, 15621(a), 15627, 15711, 15712(b)* (CRLPA)]. The CRLPA requires that every limited partnership continuously maintain an agent in California for service of process on the limited partnership [*Corp. Code § 15614(b)* (CRLPA)]. The name and address of that agent or, if a corporate agent is designated, only the name of the agent must appear in the certificate of limited partnership [*Corp. Code § 15621(a)(4)* (CRLPA)].

A partnership already in existence and otherwise governed by the ULPA may not maintain any action, suit, or proceeding in any California court until it has complied with these requirements [*see Corp. Code § 15712(b)(4)* (CRLPA)].

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§ 405.14 Effect of Conversion of Limited Partnership or Conversion of Other Entity Into Limited Partnership

Under both the ULPA '08 and the CRLPA, a limited partnership may be converted into another business entity or a foreign other business entity or a foreign limited partnership under certain conditions [*Corp. Code § 15677.2* (CRLPA); *Corp. Code § 15911.02* (ULPA '08)]. Similarly, an other business entity or a foreign other business entity or a foreign limited partnership may be converted to a domestic limited partnership under certain conditions [*Corp. Code § 15677.8* (CRLPA); *Corp. Code § 15911.08* (ULPA '08)]. For discussion of conversion requirements and procedures, see Ch. 404, *Partnerships: Actions Between Limited Partners and Partnerships* .

An entity that converts into another entity is for all purposes the same entity that existed before the conversion [*Corp. Code § 15677.9(a)* (CRLPA); *Corp. Code § 15911.09(a)* (ULPA '08)]. When the conversion takes effect, all of the following apply [*Corp. Code § 15677.9(b)* (CRLPA); *Corp. Code § 15911.09(b)* (ULPA '08)]:

- All the rights and property, whether real, personal, or mixed, of the converting entity or converting limited partnership are vested in the converted entity or converted limited partnership.

- All debts, liabilities, and obligations of the converting entity or converting limited partnership continue as debts, liabilities, and obligations of the converted entity or converted limited partnership.

- All rights of creditors and liens upon the property of the converting entity or converting limited partnership are preserved unimpaired and remain enforceable against the converted entity or converted limited partnership to the same extent as against the converting entity or converting limited partnership as if the conversion had not occurred.

- Any action or proceeding pending by or against the converting entity or converting limited partnership may be continued against the converted entity or converted limited partnership as if the conversion had not occurred.

A partner of a converting limited partnership is liable for all of the following [*Corp. Code § 15677.9(c)* (CRLPA);

Corp. Code § 15911.09(c) (ULPA '08)]:

- All obligations of the converting limited partnership for which the partner was personally liable before the conversion.

- All obligations of the converted entity incurred after the conversion takes effect. Those obligations, however, may be satisfied only out of property of the entity if that partner is a limited partner; or a shareholder in a corporation; or unless expressly provided otherwise in the articles of organization or other governing documents, a member of a limited liability company; or a holder of equity securities in an other converted entity if the holders of equity securities in that entity are not personally liable for the obligations of that entity under the law under which the entity is organized or its governing documents [*Corp. Code § 15677.9(c)(2)* (CRLPA); *Corp. Code § 15911.09(c)(2)* (ULPA '08)].

A partner of a converted limited partnership remains liable for any and all obligations of the converting entity for which the partner was personally liable before the conversion, but only to the extent that the partner was liable for the obligations of the converting entity prior to the conversion [*Corp. Code § 15677.9(d)* (CRLPA); *Corp. Code § 15911.09(d)* (ULPA '08)]. If the other party to a transaction with the limited partnership reasonably believes when entering the transaction that the limited partner is a general partner, the limited partner is liable for an obligation incurred by the limited partnership within 90 days after the conversion takes effect. The limited partner's liability for all other obligations of the limited partnership incurred after the conversion takes effect is that of a limited partner [*Corp. Code § 15677.9(e)* (CRLPA); *Corp. Code § 15911.09(e)* (ULPA '08)].

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§ 405.15 Effect of Merger on Surviving or Disappearing Partnerships

[1] ULPA '08

On the merger of limited partnerships or limited partnerships and other business entities pursuant to the ULPA '08 [*see* Ch. 404, *Partnerships: Actions Between Limited Partners and Partnerships*], the separate existence of the disappearing limited partnerships and disappearing other business entities ceases [*Corp. Code § 15911.16(a)* (ULPA '08)]. The surviving limited partnership or surviving other business entity succeeds, without other transfer, act or deed, to all the rights and property, whether real, personal, or mixed, of each of the disappearing limited partnerships and disappearing other business entities [*Corp. Code § 15911.16(a)* (ULPA '08)]. The surviving limited partnership or surviving other business entity also will be subject to all the debts and liabilities of each of the disappearing limited partnerships and disappearing other business entities in the same manner as if the surviving limited partnership or surviving other business entity had itself incurred them [*Corp. Code § 15911.16(a)* (ULPA '08)].

All rights of creditors, and all liens on the property of each of the constituent limited partnerships and constituent other business entities are preserved unimpaired, and they may be enforced against the surviving limited partnership or the surviving other business entity to the same extent as if the debt, liability, or duty that gave rise to that lien had been incurred or contracted by the surviving limited partnership or the surviving other business entity. However, such liens on the property of a disappearing limited partnership or disappearing other business entity are limited to the property affected by the liens immediately prior to the time the merger is effective [*Corp. Code § 15911.16(b)* (ULPA '08)].

Any action or proceeding pending by or against any disappearing limited partnership or disappearing other business entity may be prosecuted to judgment, and the judgment will bind the surviving limited partnership or surviving other business entity [*Corp. Code § 15911.16(c)* (ULPA '08)]. Alternatively, the surviving limited partnership or surviving other business entity may be proceeded against or be substituted in the place of the disappearing limited partnership or disappearing other business entity [*Corp. Code § 15911.16(c)* (ULPA '08)].

Nothing in the ULPA '08 provisions governing mergers is intended to affect the liability a general partner of a disappearing limited partnership may have in connection with the debts and liabilities of the disappearing limited

partnership existing prior to the time the merger is effective [*Corp. Code § 15911.16(d)* (ULPA '08)].

[2] CRLPA

A merger involving a limited partnership governed by the CRLPA generally becomes effective on the filing of a certificate of merger with the Secretary of State [*Corp. Code § 15678.5(a)* (CRLPA)]. In such a merger, one limited partnership or other business entity survives and the other limited partnership or partnerships or other business entity or entities disappear [*see Corp. Code §§ 15611(h), (i), (ad), (ae)* (CRLPA); for further discussion of merger of limited partnerships, *see* Ch. 404, *Partnerships: Actions Between Limited Partners and Partnerships*]. The separate existence of the disappearing partnerships and other business entities ceases, and the surviving partnership or other business entity succeeds, without other transfer, act, or deed, to all the rights and property, whether real, personal, or mixed, of each of the disappearing partnerships and other business entities and are subject to all the debts and liabilities of each in the same manner as if the surviving partnership or other business entity had itself incurred them [*Corp. Code § 15678.6(a)* (CRLPA)].

All rights of creditors and all liens on the property of each of the constituent partnerships and constituent other business entities to a merger are preserved unimpaired and may be enforced against the surviving partnership or other business entity to the same extent as if the debt, liability, or duty that gave rise to the lien had been incurred or contracted by it. Liens on the property of a disappearing partnership or other business entity are limited, however, to the property affected by the liens immediately prior to the time the merger is effective [*Corp. Code § 15678.6(b)* (CRLPA)]. Any action or proceeding pending by or against any disappearing partnership or disappearing other business entity may be prosecuted to judgment. The judgment binds the surviving partnership or other business entity. Alternatively, the action or proceeding may be prosecuted against the surviving partnership or other business entity by substitution of the surviving limited partnership or the surviving other business entity in the disappearing partnership's or disappearing other business entity's place [*Corp. Code § 15678.6(c)* (CRLPA)].

After the merger, the surviving domestic or foreign limited partnership or other business entity will be deemed to have assumed the liability of each disappearing domestic or foreign limited partnership or other business entity that is taxed under the Personal Income Tax Law [*Rev. & Tax. Code § 17001 et seq.*)] or the Corporation Tax Law [*Rev. & Tax. Code § 23001 et seq.*)] for both of the following [*Corp. Code § 15678.10(a)* (CRLPA)]:

- To prepare and file, or to cause to be prepared and filed, tax and information returns otherwise required of that disappearing entity as specified in *Rev. & Tax. Code § 18501 et seq.*

- To pay any tax liability determined to be due.

The Secretary of State's office will notify the Franchise Tax Board of the merger [*Corp. Code § 15678.10(b)* (CRLPA)].

If a disappearing partnership or other business entity owned real property in California and the merger was governed by either California law or the law of a jurisdiction providing substantially that the making and filing of a merger agreement or certificate vests in the surviving partnership or other business entity all the real property of the disappearing partnership or other business entity, the filing of a certified certificate of merger, or a certified copy of the merger agreement or certificate of merger, is evidence of record ownership by the surviving partnership or other business entity of the real property [*Corp. Code § 15678.8* (CRLPA); *see* Ch. 404, *Partnerships: Actions Between Limited Partners and Partnership* , for discussion of filing of the certificate under California law]. The certificate or agreement of merger must be filed in the office of the county recorder in any county in California in which any real property of the disappearing limited partnership or disappearing other business entity is located [*Corp. Code § 15678.8* (CRLPA)]. Recording creates a conclusive presumption that the merger was validly completed, and the presumption operates in favor of bona fide purchasers or encumbrancers for value [*Corp. Code § 15678.9* (CRLPA)].

For allegations for use when a surviving partnership is subject to a liability incurred by a disappearing partnership in a merger governed by the CRLPA, see *§ 405.44*.

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§ 405.16 Control of Partnership Business

[1] Limited Partner

[a] ULPA '08

A limited partner in a limited partnership governed by the ULPA '08 may incur liability as a general partner for obligations of the limited partnership if he or she participates in the control of the partnership business [*Corp. Code § 15903.03(a)* (ULPA '08); *see Corp. Code § 15903.03(b)* (ULPA '08) (acts that do not constitute participation in control of business); *see also* [2], *below*]. However, a limited partner who participates in the control of the business without being named as a general partner may be held liable as a general partner only to persons who transact business with the limited partnership with actual knowledge of that partner's participation in control and with a reasonable belief, based upon the limited partner's conduct, that the partner is a general partner at the time of the transaction [*Corp. Code § 15903.03(a)* (ULPA '08)]. Nothing in the ULPA '08 is intended to affect the liability of a limited partner to third parties for the limited partner's participation in tortious conduct [*Corp. Code § 15903.03(a)* (ULPA '08)].

[b] CRLPA and ULPA

As a general rule, a limited partner in a limited partnership governed by the CRLPA or the ULPA is liable as a general partner if he or she participates in the control of the business, or if he or she participates in tortious conduct [*Corp. Code § 15507(a)* (ULPA); *Corp. Code § 15632(a)* (CRLPA); *Refinite Sales Co. v. Fred R. Bright Co. (1953) 119 Cal. App. 2d 56, 64, 258 P.2d 1116* (decided under ULPA)]. Under CRLPA, however, even a limited partner who exercises control of the business and is not named as a general partner is not liable to persons transacting business with the limited partnership unless those persons transact the business with actual knowledge of that partner's participation in control and with a reasonable belief, based on the limited partner's conduct, that the limited partner is a general partner at the time of the transaction. Nothing in CRLPA will be construed to affect the liability of a limited partner to third parties for the limited partner's participation in tortious conduct [*Corp. Code § 15632(a)* (CRLPA)].

[2] Activity Not Considered Participation in Control of Business

[a] ULPA '08

A limited partner in a limited partnership governed by the ULPA '08 does not participate in the control of the business solely by doing, attempting to do, or having the right or power to do, one or more of the following [*Corp. Code § 15903.03(b)* (ULPA '08)]:

- Being any of the following:
  - An independent contractor for, an agent or employee of, or a person that transacts business with, the limited partnership or a general partner of the limited partnership.
  - An officer, director, or shareholder of a corporate general partner of the limited partnership.
  - A member, manager, or officer of a limited liability company that is a general partner of the limited partnership.
  - A limited partner of a partnership that is a general partner of the limited partnership.
  - A trustee, administrator, executor, custodian, or other fiduciary or beneficiary of an estate or trust that is a general partner.
  - A trustee, officer, advisor, shareholder, or beneficiary of a business trust that is a general partner.
- Consulting with and advising a general partner with respect to the business of the limited partnership.
- Acting as surety for the limited partnership or for a general partner, guaranteeing one or more specific debts of the limited partnership, providing collateral for the limited partnership or general partner, borrowing money from the limited partnership or a general partner, or lending money to the limited partnership or a general partner.
- Approving or disapproving an amendment to the partnership agreement.
- Voting on, proposing, or calling a meeting of the partners.
- Winding up the partnership pursuant to the ULPA '08 [*see Corp. Code § 15908.03* (ULPA '08)].
- Executing and filing a certificate pursuant to court order [*see Corp. Code § 15902.05* (ULPA '08)], a certificate of withdrawal [*see Corp. Code § 15902.04(a)(11)* (ULPA '08)], or a certificate of cancellation of the certificate of limited partnership [*see Corp. Code § 15902.04(a)(6)* (ULPA '08)].
- Serving on an audit committee or committee performing the functions of an audit committee.
- Serving on a committee of the limited partnership or the limited partners for the purpose of approving actions of the general partner.
- Calling, requesting, attending, or participating at any meeting of the partners or the limited partners.

- Taking any action required or permitted by law to bring, pursue, settle, or terminate a derivative action on behalf of the limited partnership.

- Serving on the board of directors or a committee of, consulting with or advising, being or acting as an officer, director, stockholder, partner, member, manager, agent, or employee of, or being or acting as a fiduciary for, any person in which the limited partnership has an interest.

- Exercising any right or power permitted to limited partners under the ULPA '08 and not specifically listed above.

The fact that ULPA '08 states that the preceding activities do not constitute participation in the control of partnership business does not mean that any other conduct, or the possession or exercise of any other power, by a limited partner does constitute participation in the control of the business of the limited partnership [*Corp. Code § 15903.03(c)* (ULPA '08)].

[b] CRLPA

A limited partner in a partnership governed by the CRLPA does not participate in the control of the business for the purpose of liability solely by doing, attempting to do, or having the right or power to do one or more of the following [*Corp. Code § 15632(b)* (CRLPA)]:

- Being any of the following:

  - An independent contractor for, or an agent or employee of, or one who transacts business with, the limited partnership or a general partner of the limited partnership.

  - An officer, director, or shareholder of a corporate general partner of the limited partnership [*see, e.g., Gruendl v. Oewel Partnership (1997) 55 Cal. App. 4th 654, 659, 64 Cal. Rptr. 2d 217* (limited partner not deemed to have participated in control merely because he exercised his duties as president of corporate general partner)].

  - A member, manager, or officer of a limited liability company that is a general partner of the limited partnership.

  - A limited partner of a partnership that is a general partner of the limited partnership.

  - A trustee, administrator, executor, custodian, or other fiduciary or beneficiary of an estate or trust that is a general partner.

  - A trustee, officer, advisor, shareholder, or beneficiary of a business trust that is a general partner.

- Consulting with and advising a general partner with respect to the business of the limited partnership.

- Acting as surety for the limited partnership or for a general partner, guaranteeing one or more specific debts of the limited partnership, or providing collateral for the limited partnership or for a general partner, or borrowing money from the limited partnership or from a general partner, or lending money to the limited partnership or to a general partner [*see, e.g., Gruendl v. Oewel Partnership (1997) 55 Cal. App. 4th 654, 659, 64 Cal. Rptr. 2d 217* (limited partner not deemed to have participated in

control merely because he acted as surety or lent money to limited partnership)].

- Approving or disapproving an amendment to the partnership agreement.

- Voting on, proposing, or calling a meeting of the partners for one or more of the following matters [*Corp. Code § 15636(f)* (CRLPA)]:

    - The dissolution and winding up of the limited partnership.

    - The merger of the limited partnership or the sale, exchange, lease, mortgage, pledge, or other transfer of all or a substantial part of, or granting or a security interest in, the assets of the limited partnership other than in the ordinary course of its business.

    - The incurrence of indebtedness by the limited partnership other than in the ordinary course of its business.

    - A change in the nature of the business.

    - Transactions in which the general partners have an actual or potential conflict of interest with the limited partners or partnership.

    - An election to continue the business of the limited partnership under circumstances other than when there is no remaining or surviving general partner [*see also Corp. Code § 15636(f)(3)* (CRLPA), *noted below*].

    - The admission of a general partner under circumstances under than when there is no remaining or surviving general partner [*see also Corp. Code § 15636(f)(3)* (CRLPA), *noted below*].

- Having the right to vote on any of the following matters:

    - The removal of a general partner [*see Corp. Code § 15636(f)(2)* (CRLPA)].

    - The admission of a general partner or an election to continue the business of the limited partnership after the general partner ceases to be a general partner, when there is no remaining or surviving general partner [*see Corp. Code § 15636(f)(3)* (CRLPA)].

    - With respect to a limited partnership that is registered as an investment company under the Investment Company Act of 1940, or the SEC rules and regulations under that Act, any matter to be approved by the holders of beneficial interests in the investment company, including the election of directors or trustees of the investment company, the approving or terminating of investment advisory or underwriting contracts, and the approving of auditors [*see Corp. Code § 15636(f)(4)(A)* (CRLPA)].

    - Other matters related to the business of the limited partnership that the partnership agreement states in writing may be subject to the approval or disapproval of the limited partners [*see Corp. Code § 15636(f)(4)(B)* (CRLPA)].

- Winding up the partnership [*see Corp. Code § 15683* (CRLPA)].

- Executing and filing a certificate of limited partnership [*see Corp. Code § 15625* (CRLPA)], certificate of dissolution [*see Corp. Code § 15624(a)(3)* (CRLPA)], or certificate of cancellation of certificate of limited partnership [*see Corp. Code § 15624(a)(4)* (CRLPA)].

- Serving on an audit committee or committee performing the functions of an audit committee.

- Serving on a committee of the limited partnership or of the limited partners for the purpose of approving actions of the general partner.

- Calling, requesting, attending, or participating at any meeting of the partners or of the limited partners.

- Taking any action required or permitted by law to bring, pursue, settle, or terminate a derivative action on behalf of the limited partnership.

- Serving on the board of directors or on a committee of, consulting with, or advising, being, or acting as an officer, director, stockholder, partner, member, manager, agent, or employee of, or being or acting as a fiduciary for, any person in which the limited partnership has an interest.

- Exercising any other right or power permitted to limited partners under the CRLPA [*see Corp. Code § 15611 et seq.* (CRLPA)].

The enumeration of the activities listed above does not mean that any other conduct, or the possession or exercise of any other power by a limited partner, necessarily constitutes participation by the limited partner in the control of the business of the limited partnership [*see Corp. Code § 15632(c)* (CRLPA)].

[c] ULPA

A limited partner in a limited partnership governed by the ULPA is not deemed to have exercised control of the partnership business by possessing or exercising his or her power to vote on matters affecting the basic structure of the partnership, including the following matters or matters of a similar nature [*Corp. Code § 15507(b)* (ULPA)]:

- Election or removal of general partners.

- Termination of the partnership.

- Amendment of the partnership agreement.

- Sale of all or substantially all of the assets of the partnership.

The foregoing matters are not exclusive, and the ULPA's listing of them does not indicate that any other powers possessed or exercised by a limited partner are sufficient to cause him or her to be deemed to have taken part in the control of the partnership business [*Corp. Code § 15507(c)* (ULPA)]. Thus, for example, a limited partner is not subject to liability as a general partner if, although he or she participates in the partnership business as its employee, he or she has no control over management of it and does not make loans or other business transactions with it [*Grainger v. Antoyan (1957) 48 Cal. 2d 805, 807-813, 313 P.2d 848* (decided under ULPA)]. As another example, a limited partner is not liable for partnership obligations when he or she acts as an agent of a corporation that is the sole general partner of the partnership [*Western Camps, Inc. v. Riverway Ranch Enterprises (1977) 70 Cal. App. 3d 714, 729-730, 138 Cal. Rptr. 918* (decided under ULPA)].

On the other hand, limited partners were held liable to creditors as general partners under the ULPA in a case in which they had the power to withdraw partnership funds without the knowledge or consent of the general partner, to limit the general partner's control of the business, and to make business decisions [*Holzman v. De Escamilla (1948) 86 Cal. App. 2d 858, 860, 195 P.2d 833* (decided under ULPA)]. In the factual context of a specific case, the dominant consideration in determining the personal liability of a limited partner for partnership liabilities is reliance of the third party rather than actual control exercised by the limited partner [*Western Camps, Inc. v. Riverway Ranch Enterprises (1977) 70 Cal. App. 3d 714, 729, 138 Cal. Rptr. 918* (decided under ULPA)].

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§ 405.17 Creditor's Remedy Against Partner in Limited Partnership

[1] ULPA '08

On application to a court of competent jurisdiction by any judgment creditor of a partner or transferee of an interest in a limited partnership governed by the ULPA '08, the court may charge the transferable interest of the judgment debtor with payment of the unsatisfied amount of the judgment with interest. To the extent of the charging order, the judgment creditor has only the rights of a transferee. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor from the limited partnership and make all other orders, directions, accounts, and inquiries that the judgment debtor might have made or that the circumstances of the case may require to give effect to the charging order [*Corp. Code § 15907.03(a)* (ULPA '08)].

A charging order constitutes a lien on the judgment debtor's transferable interest. The court may order a foreclosure on the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee [*Corp. Code § 15907.03(b)* (ULPA '08)].

At any time before foreclosure, an interest charged may be redeemed by any of the following [*Corp. Code § 15907.03(c)* (ULPA '08)]:

- The judgment debtor.
- One or more of the other partners, using property other than limited partnership property.
- The limited partnership, using limited partnership property, if all partners whose interests are not so charged consent to the redemption.

The foregoing provisions provide the exclusive remedy by which a judgment creditor of a partner or transferee may satisfy a judgment out of the judgment debtor's transferable interest [*Corp. Code § 15907.03(e)* (ULPA '08)]. No creditor of a partner has any right to obtain possession or otherwise exercise legal or equitable remedies with respect to

the property of the limited partnership [*Corp. Code § 15907.03(f)* (ULPA '08)].

The foregoing provisions of the ULPA '08 do not deprive any partner or transferee of the benefit of any exemption laws applicable to the partner's or transferee's transferable interest [*Corp. Code § 15907.03(d)* (ULPA '08)].

[2] CRLPA

On application to a court of competent jurisdiction by any judgment creditor of a partner in a limited partnership governed by the CRLPA, the court may charge the limited partnership interest of the partner with payment of the unsatisfied amount of the judgment, with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the limited partnership interest [*Corp. Code § 15673* (CRLPA); for forms for obtaining judgment creditor's charging order, *see* Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties* ; for discussion of an assignee's rights, *see* Ch. 404, *Partnerships: Actions Between Limited Partners and Partnership*].

[3] ULPA

The judgment creditor of a limited partner in a partnership governed by the ULPA may apply to a court of competent jurisdiction for an order charging that partner's interest in the limited partnership with payment of the unsatisfied amount of the claim. The court may also appoint a receiver and make all other orders, directions, and inquiries that the circumstances of the case might require. The interest may be redeemed with the separate property of any general partner, but may not be redeemed with the partnership property [*Corp. Code § 15522* (ULPA)]. Although the ULPA, unlike the ULPA '08 or the CRLPA [*see* [1], [2], *above*], does not specifically provide for a charging order against the interest of a general partner, the Uniform Partnership Act of 1994 does provide for a charging order against a general partner's interest [*see Corp. Code § 16504* (UPA '94)].

If a judgment creditor has obtained an order charging a limited partnership with payment of an unsatisfied judgment and the judgment nevertheless remains unsatisfied, the judgment creditor may obtain a further order for sale of the debtor's partnership interest, as long as all partners other than the debtor consent to the sale of the interest [*Crocker Nat'l Bank v. Perroton (1989) 208 Cal. App. 3d 1, 8-9, 255 Cal. Rptr. 794* (decided under ULPA)]. For further discussion of execution sale of a judgment debtor's partnership interest and forms for use by a judgment creditor to obtain a charging order, see Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties* .

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§ 405.18 Withdrawal or Dissociation of General Partner

[1] Amendment of Certificate of Limited Partnership

When a general partner ceases to be a general partner of a limited partnership governed by the CRLPA, the general partners must file a certificate of amendment to the certificate of limited partnership with the Secretary of State within 30 days [*Corp. Code § 15622(b)(5)* (CRLPA)]. Except as provided in *Corp. Code § 15642* (CRLPA), no person has any liability because the amendment has not been filed to reflect the withdrawal if the amendment is filed within 30 days of the withdrawal [*see Corp. Code §§ 15624(d), 15712(b)(2)* (CRLPA)]. The limited partners are not liable for any failure to file such an amendment [*see Corp. Code § 15624(e)* (CRLPA)].

Like the CRLPA, the ULPA '08 requires the filing of an amendment to the certificate of limited partnership when a general partner dissociates from the partnership [*Corp. Code § 15902.02(b)(2)* (ULPA '08)]. However, the ULPA '08 does not contain a provision exonerating the remaining partners for a failure to file the amendment. Rather, the ULPA '08 provides a procedure for an aggrieved person to obtain a court order requiring the filing of the amendment [*see Corp. Code § 15902.05* (ULPA '08)].

[2] Effect of Withdrawal or Dissociation of General Partner

[a] ULPA '08

After a person is dissociated as a general partner in a limited partnership governed by the ULPA '08, and before the limited partnership is dissolved, converted, or merged out of existence, the limited partnership is bound by an act of the person only if both of the following circumstances exist [*Corp. Code § 15906.06(a)* (ULPA '08)]:

- The act would have bound the limited partnership under Section 15904.02 before the dissociation.

- At the time the other party enters into the transaction, (1) less than two years have passed since the dissociation, and (2) the other party does not have notice of the dissociation and reasonably believes that the person is a general partner.

If a limited partnership is bound as described above, the person dissociated as a general partner that caused the limited partnership to be bound is liable to the limited partnership for any damage caused to the limited partnership arising from the obligation [*Corp. Code § 15906.06(b)(1)* (ULPA '08)]. The dissociated person is also liable for any damage caused by the dissociation to a general partner or another person dissociated as a general partner who becomes liable for the obligation of the limited partnership [*Corp. Code § 15906.06(b)(2)* (ULPA '08)].

A person's dissociation as a general partner does not of itself discharge the person's liability as a general partner for an obligation of the limited partnership incurred before dissociation. Generally, the person is not liable for a limited partnership's obligation incurred after dissociation [*Corp. Code § 15906.07(a)* (ULPA '08)]. However, a person whose dissociation as a general partner resulted in a dissolution and winding up of the limited partnership's activities is liable to the same extent as a general partner [*see Corp. Code § 15904.04* (ULPA '08)] on an obligation incurred by the limited partnership after dissolution [*Corp. Code § 15906.07(b)* (ULPA '08); *see Corp. Code § 15908.04* (ULPA '08)]. Also, a person that has dissociated as a general partner but whose dissociation did not result in a dissolution and winding up of the limited partnership's activities is liable on a transaction entered into by the limited partnership after the dissociation only if (1) a general partner would be liable on the transaction; and (2) at the time the other party enters into the transaction, less than two years have passed since the dissociation, and the other party does not have notice of the dissociation and reasonably believes that the person is a general partner [*Corp. Code § 15906.07(c)* (ULPA '08)].

By agreement with a creditor of a limited partnership and the limited partnership, a person dissociated as a general partner may be released from liability to the creditor for an obligation of the limited partnership [*Corp. Code § 15906.07(d)* (ULPA '08)]. Also, a person dissociated as a general partner is released from liability for an obligation of the limited partnership if the limited partnership's creditor, with notice of the person's dissociation as a general partner but without the person's consent, agrees to a material alteration in the nature or time of payment of the obligation [*Corp. Code § 15906.07(e)* (ULPA '08)].

[b] CRLPA

A general partner who withdraws from a limited partnership governed by the CRLPA is not personally liable for partnership debts incurred after the person ceases to be a general partner, other than any debts incurred by reason of that person's being deemed to be acting as a general partner under *Corp. Code § 15642* (CRLPA) [*Corp. Code § 15662(b)(2)* (CRLPA)].

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§ 405.30 Related Matthew Bender Publications

For memoranda relating to actions against limited partnerships, see California Points and Authorities, Ch. 170, *Partnerships and Joint Ventures* (Matthew Bender)

For discussion of the liability of partners in limited partnership syndicates, under both ULPA and CRLPA, see *California Real Estate Law & Practice, Ch. 34, Remedies for Third Parties, §§ 34.01 -34.12* (Matthew Bender).

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§ 405.31 State Statutes

[1] Uniform Limited Partnership Act of 2008 (ULPA '08)

[a] General Provisions

Definitions. *Corp. Code § 15901.02* (ULPA '08)

Service on limited partnership. *Corp. Code § 15901.16(a)* (ULPA '08)

[b] Filing Requirements

Filing of certificate of limited partnership. *Corp. Code §§ 15902.01, 15902.06* (ULPA '08)

Signature required on filed records. *Corp. Code § 15902.04* (ULPA '08)

Petition for court order directing signature or filing of record for limited partnership. *Corp. Code § 15902.05* (ULPA '08)

Liability for false information in filed record. *Corp. Code § 15902.08* (ULPA '08)

[c] Limited Partners

Liability of limited partner for obligations of limited partnership. *Corp. Code § 15903.03* (ULPA '08)

Liability of investor in limited partnership. *Corp. Code § 15903.06* (ULPA '08)

[d] General Partners

General partner as agent of limited partnership. *Corp. Code § 15904.02* (ULPA '08)

Liability of limited partnership for actions of general partner. *Corp. Code § 15904.03* (ULPA '08)

Liability of general partner for obligations of limited partnership. *Corp. Code § 15904.04* (ULPA '08)

Joining general partner in action against limited partnership; separate action against general partner. *Corp. Code § 15904.05* (ULPA '08)

[e] Dissociation of Partner

Liability of limited partnership for actions of dissociated general partner. *Corp. Code § 15906.06* (ULPA '08)

Liability of dissociated general partner. *Corp. Code § 15906.07* (ULPA '08)

[f] Transfer of Interest in Limited Partnership

Court order charging transferred partnership interest with payment of judgment against transferor or transferee. *Corp. Code § 15907.03* (ULPA '08)

[g] Dissolution of Limited Partnership

Liability of general partner after dissolution of limited partnership. *Corp. Code § 15908.05* (ULPA '08)

Claims against dissolved limited partnership. *Corp. Code §§ 15908.06-15908.09* (ULPA '08)

[h] Reorganizations of Limited Partnerships

Rights of creditors after conversion of limited partnership. *Corp. Code § 15911.09* (ULPA '08)

Rights of creditors after merger of limited partnership with other limited partnership or other business entity. *Corp. Code § 15911.16* (ULPA '08)

[2] California Revised Limited Partnership Act

[a] Liability of Limited Partner

Limited partner's liability generally. *Corp. Code § 15632(a)* (CRLPA)

Acts permitted by limited partner without being in control of partnership business. *Corp. Code §§ 15632(b), (c), 15636(f)* (CRLPA)

Liability for erroneous belief that person is limited partner. *Corp. Code § 15633* (CRLPA)

[b] Liability of General Partner

General partner's rights, powers, and liabilities are same as partner in partnership without limited partners. *Corp. Code § 15643* (CRLPA)

Liability of partner who is both general and limited partner. *Corp. Code § 15644* (CRLPA)

[c] Creditor's Charging Order

Court order charging partner's interest in limited partnership with payment of judgment against partner. *Corp. Code § 15673* (CRLPA)

[d] Merger

Creditors' rights after merger of limited partnership. *Corp. Code § 15678.6* (CRLPA)

Assumption of tax liability of disappearing partnership or entity upon merger. *Corp. Code § 15678.10* (CRLPA)

[e] Partnership Certificate and Records

Specified records required to be kept at limited partnership's designated office in state. *Corp. Code § 15615* (CRLPA)

Partnership in existence on July 1, 1984, may not maintain action, suit, or proceeding until it has filed certificate of limited partnership with Secretary of State. *Corp. Code § 15712(b)(4)* (CRLPA)

[f] Service on Limited Partnership

Every limited partnership required to maintain in California both office and agent for service of process. *Corp. Code § 15614* (CRLPA)

Service of process on limited partnerships. *Corp. Code § 15627* (CRLPA)

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§ 405.32 Decisions

[1] Arbitration

Sole general partner is bound by agreement between limited partnership and third party to arbitrate disputes. *Keller Construction Co. v. Kashani (1990) 220 Cal. App. 3d 222, 228, 269 Cal. Rptr. 259*

[2] Authority of General Partner

Limited partnership is bound by contract executed on its behalf by general partner. *Coronet Constr. Co., Inc. v. Palmer (1961) 194 Cal. App. 2d 603, 608, 15 Cal. Rptr. 601* (decided under ULPA)

Whether or not certificate of limited partnership is recorded at time partnership commences its business, partnership complies with statutory requirements and has status of limited partnership with respect to any creditor with whom it deals after certificate is recorded. *Stowe v. Merrilees (1935) 6 Cal. App. 2d 217, 221-222, 44 P.2d 368* (decided under ULPA)

[3] Fraud

Nonfiduciary third party that purchased partnerships from general partners of limited partnership, allegedly at below fair market value, could not be liable to limited partners for conspiring with general partners to breach general partners' duty to limited partners; only duty allegedly breached was fiduciary duty owed by general partners to limited partners; cause of action for civil conspiracy does not arise if alleged conspirator was not personally bound by duty violated by the wrongdoing. *Everest Investors 8 v. Whitehall Real Estate Limited Partnership XI (2002) 100 Cal. App. 4th 1102, 1106-1108, 123 Cal. Rptr. 2d 297*

Dominant consideration in determining personal liability of limited partner for partnership liabilities is reliance of third

party rather than actual control exercised by limited partner. *Western Camps, Inc. v. Riverway Ranch Enterprises (1977) 70 Cal. App. 3d 714, 729, 138 Cal. Rptr. 918* (decided under ULPA)

Duty is imposed on limited partners to make sure that limited partnership has been properly formed; sanction for failure to perform that duty is liability as general partner. *Tiburon Nat. Bank v. Wagner (1968) 265 Cal. App. 2d 868, 875, 71 Cal. Rptr. 832* (decided under ULPA)

Failure to record certificate of limited partnership may subject limited partners to individual liability for debts of partnership. *Tiburon Nat. Bank v. Wagner (1968) 265 Cal. App. 2d 868, 875-876, 71 Cal. Rptr. 832* (decided under ULPA)

Failure of limited partner to renounce his or her interest in partnership when he or she discovers his or her status is not that of limited partner may subject partner to individual liability for partnership debts. *Tiburon Nat. Bank v. Wagner (1968) 265 Cal. App. 2d 868, 876-877, 71 Cal. Rptr. 832* (decided under ULPA)

If limited partnership is not formed in compliance with limited partnership statutes or if limited partner takes part in control of the business, he or she is subject to liability of general partner. *Refinite Sales Co. v. Fred R. Bright Co. (1953) 119 Cal. App. 2d 56, 64, 258 P.2d 1116* (decided under ULPA)

Partner authorizing fraud of general partner is liable for injury to third party, whether or not authorizing partner is limited partner. *Russell v. Warner (1950) 96 Cal. App. 2d 986, 988-989, 217 P.2d 43* (decided under ULPA)

Limited partners are liable to creditors as general partners in case in which they had power to withdraw partnership funds without knowledge or consent of general partner and could limit general partner's control of business, in addition to making business decisions. *Holzman v. De Escamilla (1948) 86 Cal. App. 2d 858, 860, 195 P.2d 833* (decided under ULPA)

[4] Limited Partner Not Liable for Partnership Obligations

Limited partner is not subject to liability of general partner if, although he or she participates in business as its employee, he or she has no control over management of it and does not make loans or other business transactions with it. *Grainger v. Antoyan (1957) 48 Cal. 2d 805, 807-813, 313 P.2d 848* (decided under ULPA)

Limited partner is not liable for partnership obligation when he or she acts as agent of corporation that is sole general partner of the partnership. *Western Camps, Inc. v. Riverway Ranch Enterprises (1977) 70 Cal. App. 3d 714, 729-730, 138 Cal. Rptr. 918* (decided under ULPA)

Fictitious business name statement failing to disclose partner's status as limited partner does not by itself mandate that partner be liable to creditor as general partner. *J. C. Wattenbarger & Sons v. Sanders (1963) 216 Cal. App. 2d 495, 500, 30 Cal. Rptr. 910* (decided under ULPA)

[5] Statute of Limitations

Code Civ. Proc. § 351 violates *Commerce Clause* when applied to nonresident defendant who could have been served under long-arm statute. *Abramson v. Brownstein (9th Cir. 1990) 897 F.2d 389, 391-393*

Statute of limitations on claims against limited partnership is not tolled pursuant to *Code Civ. Proc. § 351* when general partner is absent from state. *Epstein v. Frank (1981) 125 Cal. App. 3d 111, 120, 177 Cal. Rptr. 831* (decided under ULPA)

[6] Suit Against Limited Partners in Individual Capacity

Individual partnership assets are unavailable to satisfy judgment against limited partner in his or her individual capacity. *Evans v. Galardi (1976) 16 Cal. 3d 300, 307, 128 Cal. Rptr. 25, 546 P.2d 313* (decided under ULPA)

Limited partner is not proper party to proceedings by or against limited partnership and limited partnership is not involved in suits against limited partners in their individual capacity. *Evans v. Galardi (1976) 16 Cal. 3d 300, 311, 128 Cal. Rptr. 25, 546 P.2d 313* (decided under ULPA)

Interest of individual partner in partnership assets is not subject to attachment or execution except on claim against partnership entity. *Epstein v. Frank (1981) 125 Cal. App. 3d 111, 120, 177 Cal. Rptr. 831* (decided under ULPA)

[7] Suit Against Partnership Entity

Limited partnership is entity separate from its partners when sued and served with process, and when executing on its assets, and is considered permanently within state, regardless of whereabouts of general partners. *Epstein v. Frank (1981) 125 Cal. App. 3d 111, 120, 177 Cal. Rptr. 831* (decided under ULPA)

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§ 405.33 Law Reviews

Thomas E. Rutledge & Phuc H. Lu, *No Good Deed Goes Unpunished: Pitfalls for Counsel to a Business Organization About to Be Governed by a New Law, 45 Brandeis L.J. 755 (2007)*

Buxbaum and Etlin, *Limited Partners' Liability for Impermissible Control Activity Under the Revised California Limited Partnership Statute, 16 Sw. U.L. Rev. 535 (1986)*

Comment, *The Substantial Compliance Doctrine: Preserving Limited Liability Under The Uniform Limited Partnership Act, 13 U.C. Davis L. Rev. 924 (1980)*

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§ 405.34 Text References

Witkin, Summary of California Law, vol. 9, *Partnerships*, § 76 (10th ed. 2005)

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PART IV. FORMS

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§ 405.40 Complaint for Damages Under ULPA '08--For Reliance on Misstatement in Filed Record [Corp. Code § 15902.08(a) (ULPA '08)]--Against General Partners and Persons Signing or Causing Record To Be Signed

[1] FORM Complaint for Damages Under ULPA '08--For Reliance on Misstatement in Filed Record [Corp. Code § 15902.08(a) (ULPA '08)]--Against General Partners and Persons Signing or Causing Record To Be Signed

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff, vs. _____ [*names*],	)	COMPLAINT FOR DAMAGES
Defendants.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges as follows:

1. _____ [*Allege residence of defendant(s), e.g.,* Defendant(s) _____ (*name(s)*) is/are, and at all times herein mentioned was/were, (a) resident(s) of _____ County, California].

2. [*Allege capacity of defendant(s), e.g.,* Defendant(s) _____ (*name(s)*) is/are, and at all times herein mentioned was/were, _____ (general *and/or* limited) partner(s) in the limited partnership known as _____ (*name of limited partnership*)].

3. On or about _____[*date*], [defendant(s)] _____[*name(s) of defendant(s) who signed record*] signed and filed, or caused another person to sign and file on _____ [his *or* her *or* their] behalf, a _____ [*identify record, e.g.,* certificate of limited partnership] with the Secretary of State,

hereinafter referred to as the record. A copy of the record, certified by the Secretary of State, is attached to this complaint as Exhibit _____ and incorporated by reference.

4. The record states that _____ [*specify, e.g.*, _____ (*name*) is a general partner in the partnership]. That statement is false, in that _____ [*specify, e.g.*, _____ (*name*) is not, and never was, a general partner in the partnership, and is not, and never was, associated with the partnership].

[*EITHER*]

5. The statement described in Paragraph 4 was false at the time it was made, and defendant(s) knew or should have known that the statement was false at the time the certificate was filed. No amendment to the record or certificate of correction was filed under *Corporations Code Section 15902.02(c)* or *15902.07*.

[*OR*]

5. The statement described in Paragraph 4 became false on or about _____ [*date*]. On or before _____ [*date*], defendant(s) _____ [*name(s) of general partner(s)*] had notice that the statement was false and knew or should have known that the statement became false. No amendment to the record or certificate of correction was filed under *Corporations Code Section 15902.02(c)* or *15902.07*.

[*CONTINUE*]

6. Plaintiff, acting in reliance on the statement in the certificate, _____ [*specify action in reliance, e.g.*, extended credit to the partnership on _____ [*date*] in the sum of $_____, to be paid _____ (*specify terms of payment*) (for the following goods sold and delivered: _____ [*specify*])]. Plaintiff would not have done so had he/she/it known that the statement was false.

7. As a result of plaintiff's action in reliance on the misstatement, plaintiff has suffered losses in that _____ [*specify damage, e.g.*, no part of that sum has been paid, although demand for the sum has been made, and there is now due, owing, and unpaid to plaintiff from defendants, and each of them, the sum of $_____, with interest on that amount at the rate of _____ percent per year, from _____ (*date*)].

WHEREFORE, plaintiff prays judgment against defendant(s), [and each of them,] as follows:

1. For general damages in the sum of $_____, plus interest at the legal rate from _____ [*date*];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____[*name*], am the plaintiff in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____

_____ [*signature*]

[2] Use of Form

This complaint is for use by a person suffering a loss as a result of relying on a misstatement in a limited partnership certificate or other record filed for a partnership governed by the ULPA '08 [*see Corp. Code § 15901.02(ac)* (ULPA '08) ("record" defined)]. Generally, signing a record constitutes an affirmation under the penalties of perjury that the facts stated in the record are true [*Corp. Code § 15902.08(b)* (ULPA '08)]. If a record delivered to the Secretary of State for filing under the ULPA '08 and filed by the Secretary of State contains false information, a person that suffers loss by reliance on the information may recover damages for the loss from both of the following [*Corp. Code § 15902.08(a)* (ULPA '08)]:

- A person that signed the record, or caused another to sign it on the person's behalf, and knew the information to be false at the time the record was signed.

- A general partner that has notice that the information was false when the record was filed or has become false because of changed circumstances, if the general partner has notice for a reasonably sufficient time before the information is relied upon to enable the general partner to effect an amendment [*see Corp. Code § 15902.02*], seek a court order for a proper filing [*see Corp. Code § 15902.05*], or deliver to the Secretary of State for filing a certificate of correction [*see Corp. Code § 15902.07* (ULPA '08)].

[3] Allegations

This complaint alleges the following:

- The capacity of defendant(s) as general or limited partner(s) in a limited partnership (Paragraph 2) [*Corp. Code §§ 15903.03, 15904.02-15904.04* (ULPA '08)].

- That a record was signed and filed for the limited partnership (Paragraph 3) [*see Corp. Code §§ 15901.02(ac), 15902.06* (ULPA '08)].

- That a specified statement was made in the record, and that the statement is false (Paragraph 4) [*Corp. Code § 15902.08(a)* (ULPA '08)].

- Either that the statement was false at the time the record was filed, or that the statement became false and no amendment to the record or certificate of correction was filed (Paragraph 5) [*Corp. Code §*

15902.08(a) (ULPA '08); *see Corp. Code §§ 15902.02, 15902.07* (ULPA '08)].

- Plaintiff's reliance on the misstatement (Paragraph 6) [*see Corp. Code § 15902.08(a)* (ULPA '08)].

- The loss incurred by plaintiff as a result of his or her reliance on the misstatement (Paragraph 7) [*Corp. Code § 15902.08(a)* (ULPA '08)].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, unless the action is a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial, except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

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Volume 35: Partition thru Paternity-Chs. 397-412
Chapter 405 PARTNERSHIPS: ACTIONS BETWEEN LIMITED PARTNERS OR PARTNERSHIPS AND THIRD PARTIES
PART IV. FORMS

35-405 California Forms of Pleading and Practice--Annotated § 405.41

§ 405.41 Complaint for Damages Under CRLPA--For Reliance on Misstatement in Limited Partnership Certificate [Corp. Code § 15624(c) (CRLPA)]--Against Partners Executing Certificate

[1] FORM Complaint for Damages Under CRLPA--For Reliance on Misstatement in Limited Partnership Certificate [Corp. Code § 15624(c) (CRLPA)]--Against Partners Executing Certificate

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff, vs. _____ [*names*],	)	COMPLAINT FOR DAMAGES
Defendants.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges as follows:

1. _____ [*Allege capacity and residence of defendant(s), e.g.,* Defendant(s) _____ (*name(s) of general or limited partner(s)*) is/are, and at all times herein mentioned was/were, (a) resident(s) of _____ County, California].

2. Defendant(s) _____ [*name(s)*] is/are, and at all times herein mentioned was/were, _____ [general *and/or* limited] partner(s) in the limited partnership known as _____ [*name of partnership*].

3. On or about _____ [*date*], [defendant(s)] _____ [*name(s) of partner(s) who executed certificate*] executed and filed a certificate of limited partnership with the Secretary of State, hereinafter

referred to as the certificate. A copy of the certificate, certified by the Secretary of State, is attached to this complaint as Exhibit _____ and incorporated by reference.

4. The certificate states that _____ [*specify, e.g.*, _____ (*name*) is a general partner in the partnership]. That statement is false, in that _____ [*specify, e.g.*, _____ (*name*) is not, and never was, a general partner in the partnership, and is not, and never was, associated with the partnership].

[*EITHER*]

5. The statement was false at the time it was made, and defendant(s) _____ [knew *or* should have known] that the statement was false at the time the certificate was filed. No amendment to the certificate was filed, though one was required by *Corporations Code Section 15624(c)*.

[*OR*]

5. On or about _____ [*date*], _____ [defendant] _____ [*name of limited partner who executed and filed certificate*] sent a copy of the certificate to defendant _____ [*name of general partner*]. The statement in the certificate that _____ [*specify, e.g.*, _____ (*name*) was a general partner] became false on or about _____ [*date*]. Defendant _____ [*name of general partner*] _____ [knew *or* should have known] that the statement became false. No amendment to the certificate was filed, though one was required by *Corporations Code Section 15624(c)*.

[*CONTINUE*]

6. Plaintiff, acting in reliance on the statement in the certificate, _____ [*specify action in reliance, e.g.*, extended credit to the partnership in the sum of $_____, to be paid _____ (*specify terms of payment*) (for the following goods sold and delivered: _____ [*specify*])]. Plaintiff would not have done so had he/she/it known that the statement was false.

7. As a result of plaintiff's action in reliance on the misstatement, plaintiff has suffered losses in that _____ [*specify damage, e.g.*, no part of that sum has been paid, although demand for the sum has been made, and there is now due, owing, and unpaid to plaintiff from defendants, and each of them, the sum of $_____, with interest on that amount at the rate of _____ percent per year, from _____ (*date*)].

WHEREFORE, plaintiff prays judgment against defendant(s), [and each of them,] as follows:

1. For general damages in the sum of $_____, plus interest at the legal rate from _____ [*date*];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 405.40[1].*]

[2] Use of Form

This complaint is for use by a person suffering a loss as a result of relying on a misstatement in a limited partnership certificate filed for a partnership governed by the CRLPA. The action may be brought against the partner or partners, whether general or limited, who executed the partnership certificate and who knew, or should have known, of the misstatement at the time the certificate was filed and failed to file an amendment to the certificate. A general partner may be liable even if he or she did not execute the certificate. A general partner may also be liable for failing to file an amendment if he or she knew or should have known that a statement in the certificate became inconsistent with the partnership agreement or false [*see Corp. Code § 15624(c)* (CRLPA), discussed in Ch. 404, *Partnerships: Actions Between Limited Partners and Partnership*].

Although a limited partner may file a certificate of limited partnership pursuant to *Corp. Code § 15625* (CRLPA) (discussed in Ch. 404, *Partnerships: Actions Between Limited Partners and Partnership*), a limited partner is liable under *Corp. Code § 15624(c)* only if he or she filed the certificate of limited partnership pursuant to *Corp. Code § 15633(a)* (CRLPA) [*see Corp. Code § 15624(c)* (CRLPA)]. *Corp. Code § 15633(a)* (CRLPA) provides that a person who makes a contribution to a limited partnership believing that he or she has become a limited partner and later learns that no certificate of partnership has been filed may do so if the general partners fail to file one within a reasonable time [*Corp. Code § 15633(a)* (CRLPA)].

[3] Allegations

This complaint alleges the following:

- The capacity of defendant(s) as general or limited partner(s) in a limited partnership (Paragraph 2) [*Corp. Code § 15624(c)* (CRLPA)].

- That a certificate of limited partnership was filed, either by a general partner or partners or by a limited partner pursuant to *Corp. Code § 15633* (Paragraph 3) [*see Corp. Code §§ 15624(c), 15633(a)* (CRLPA)].

- That a specified statement was made in the certificate, and that the statement is false (Paragraph 4) [*Corp. Code § 15624(c)* (CRLPA)].

- Either that the statement was false at the time the certificate was filed or that it became false and an amendment to the certificate was not filed (Paragraph 5) [*Corp. Code § 15624(c)* (CRLPA)].

- Plaintiff's reliance on the misstatement (Paragraph 6) [*Corp. Code § 15624(c)* (CRLPA)].

- The loss incurred by plaintiff as a result of his or her reliance on the misstatement (Paragraph 7) [*Corp. Code § 15624(c)* (CRLPA)].

[4] Persons Executing Certificates of Limited Partnership and Certificates of Amendment

The general partners are required to execute and file a certificate of limited partnership [*Corp. Code §§ 15621(a), 15624(a)(1)* (CRLPA)]. If a certificate of limited partnership has not been filed, however, and if the general partners fail to comply within a reasonable time after request, a certificate may be filed by a limited partner [*see Corp. Code §§ 15624(a)(1), 15633* (CRLPA)] or by any person authorized to do so under *Corp. Code § 15625* [*Corp. Code § 15624(a)(1)* (CRLPA)]. Any other partner or any person appointed by a court of competent jurisdiction is authorized to execute and file a certificate of limited partnership [*Corp. Code § 15625(a)* (CRLPA)]. Furthermore, if the general partners refuse to execute the certificate, or fail to file it within a reasonable time after demand, any partner may petition the superior court to direct the execution and filing of the certificate [*Corp. Code § 15625(b)* (CRLPA)].

Normally a certificate of amendment must be executed by all general partners (or fewer than all, as may be provided in the certificate of limited partnership) and by each general partner designated in the certificate as a new general partner [*Corp. Code § 15624(a)(2)*]. If the amendment states that a general partner ceases to be a general partner, it need not be signed by that general partner. However, the certificate of amendment may be executed by that former general partner if the remaining general partners fail after demand to do so within a reasonable time, or refuse to do so, or if there are no remaining general partners and the limited partners winding up the limited partnership's affairs fail after demand to execute the amendment within a reasonable time, or refuse to do so [*Corp. Code § 15624(a)(2)*]. If the amendment is filed in accordance with *Corp. Code § 15622(c)*, concerning when a person other than a general partner is authorized to wind up the affairs of a limited partnership, the certificate of amendment must be executed by each person authorized to wind up the limited partnership's affairs and need not be signed by any former general partner or any general partner not winding up the limited partnership's affairs [*Corp. Code § 15624(a)(2)*]. Further, if the general partners refuse to execute and file a certificate, or fail to file one within a reasonable time after demand, or if there is any dispute concerning the filing of the certificate of amendment, any partner may petition the superior court to direct the execution of the certificate [*see Corp. Code § 15625(b)* (CRLPA)].

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Chapter 405 PARTNERSHIPS: ACTIONS BETWEEN LIMITED PARTNERS OR PARTNERSHIPS AND THIRD PARTIES
PART IV. FORMS

35-405 California Forms of Pleading and Practice--Annotated § 405.42

§ 405.42 Complaint for Damages Under ULPA '08 or CRLPA Against Limited Partnership and Partners--Based on Transaction Occurring Before Filing Certificate of Limited Partnership--Reasonable Belief That Partner Was General Partner [Corp. Code § 15633(b) (CRLPA); Corp. Code § 15903.06(b) (ULPA '08)]

[1] FORM Complaint for Damages Under ULPA '08 or CRLPA Against Limited Partnership and Partners--Based on Transaction Occurring Before Filing Certificate of Limited Partnership--Reasonable Belief That Partner Was General Partner [Corp. Code § 15633(b) (CRLPA); Corp. Code § 15903.06(b) (ULPA '08)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff, vs. _____ [*names*],	)	COMPLAINT FOR DAMAGES
Defendants.	)	(Transaction With Partnership Prior to Filing of Certificate of Limited Partnership)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges as follows:

1. Defendant _____ [*name of partnership*] is, and at all times herein mentioned was, a limited partnership, sued herein under the name _____ [it has assumed *or* by which it is known], with its principal place of business located in _____ [*city*], _____ County, California. Defendant(s) _____ [*name(s)*] is/are, and at all times herein mentioned was/were, [a] member(s) of the foregoing partnership and is/are sued herein both individually and as [a] partner(s) in defendant _____ [*name of partnership*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by those fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

3. On or about _____ [*date*], plaintiff entered into a[n] _____ [oral *or* written] agreement with defendants. _____ [A copy of the agreement is attached as Exhibit _____ and incorporated by reference *or* The terms of the agreement were that _____ (*set forth essential terms of agreement, e.g.*, plaintiff agreed to extend credit to the partnership in the amount of $_____, and defendants were to repay plaintiff _____ (*specify terms of repayment*))].

4. Plaintiff has performed all conditions, covenants, and promises required to be performed on his/her part in accordance with the terms and conditions of the contract[, except _____ (*specify conditions not performed*), the performance of which was excused on the ground that _____ (*specify*)].

5. On or about _____ [*date*], defendants breached the agreement by _____ [*specify, e.g.*, failing to pay plaintiff under the terms of the agreement, and informing plaintiff that they would not repay plaintiff].

6. As a proximate result of defendants' breach of the agreement, _____ [*specify damages proximately caused by breach, e.g.*, plaintiff suffered damage in that he/she paid $_____ to the partnership business, none of which has been repaid, and there is now due, owing and unpaid to plaintiff from defendants, and each of them, the sum of $_____, with interest thereon at the rate of _____ percent per annum, from _____ (*date*)].

7. At the time of the transaction, plaintiff believed that defendant _____ [*name*] was a general partner in the partnership. Plaintiff's belief was reasonable, in that it was based on _____ [*specify, e.g.*, the fact that all the defendants represented themselves as equal partners, and signed the contract as partners, without representing to plaintiff that defendant _____ (*name*) was a limited partner].

8. At the time of the transaction, the certificate of limited partnership had not been filed with the Secretary of State. The certificate was not filed until _____ [*date*]. A copy of the certificate, certified by the Secretary of State, is attached as Exhibit _____ and incorporated by reference.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For damages in the sum of $_____, plus interest at the legal rate from _____ [*date*];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 405.40[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by a party who seeks to recover damages based on a transaction with a limited partnership governed by the ULPA '08 or the CRLPA. It is for use against the partnership, the general partners, and a limited partner, based on a transaction entered into prior to the time that the certificate of limited partnership was filed. A partner in such a partnership is liable for partnership transactions when, although the partner may be a limited partner, the third party transacting with the partnership reasonably believed that the partner was a general partner at the time of the transaction [*Corp. Code § 15633(b)* (CRLPA); *Corp. Code § 15903.06(b)* (ULPA '08)]. Although the complaint assumes an agreement with the partnership, such a partner is liable for any business transaction of the partnership under these circumstances [*see Corp. Code § 15633(b)* (CRLPA); *Corp. Code § 15903.06(b)* (ULPA '08)].

[3] Allegations

The complaint in [1], *above*, alleges the following:

- The capacity of defendants as a partnership and as individual partners (Paragraph 1) [*see Corp. Code §§ 15632, 15633, 15643* (CRLPA); *Corp. Code §§ 15903.03, 15904.02-15904.04* (ULPA '08)].

- The agreement between plaintiff and defendants (Paragraph 3) [*see Corp. Code § 15633(b)* (CRLPA); *Corp. Code § 15903.06(b)* (ULPA '08); *Reichert v. General Ins. Co. of Am. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377*].

- Plaintiff's performance or excusable nonperformance of the contract (Paragraph 4) [*see Reichert v. General Ins. Co. of Am. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377*].

- Defendants' breach (Paragraph 5) [*see Reichert v. General Ins. Co. of Am. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377*].

- Damages proximately caused by the breach (Paragraph 6) [*Civ. Code § 3300*; *Nelson v. Reisner (1958) 51 Cal. 2d 161, 171, 331 P.2d 17* ; *see Corp. Code § 15633(b)* (CRLPA); *Corp. Code § 15903.06(b)* (ULPA '08)].

- Plaintiff's reasonable belief that a specific partner was a general partner at the time of the transaction (Paragraph 7) [*Corp. Code § 15633(b)* (CRLPA); *Corp. Code § 15903.06(b)* (ULPA '08)].

- That the transaction occurred prior to the filing of the certificate of limited partnership (Paragraph 8) [*Corp. Code § 15633(b)* (CRLPA); *Corp. Code § 15903.06(b)* (ULPA '08)].

[4] Liability of Mistaken Limited Partner

[a] ULPA '08

Generally, a person that makes an investment in a business enterprise that would otherwise be governed by the ULPA '08, and erroneously but in good faith believes that the person has become a limited partner in the enterprise, is not liable for the enterprise's obligations by reason of making the investment, receiving distributions from the enterprise, or exercising any rights of or appropriate to a limited partner, if, on ascertaining the mistake, the person does one of the following [*Corp. Code § 15903.06(a)* (ULPA '08)]:

- Causes an appropriate certificate of limited partnership, amendment, or certificate of correction to be signed and delivered to the Secretary of State for filing.

- Withdraws from future participation as an owner in the enterprise by signing a certificate of withdrawal, on a form prescribed by the Secretary of State, and delivering the certificate to the Secretary of State for filing.

If a person makes a diligent effort in good faith to comply with the first option listed above and is unable to cause the appropriate certificate of limited partnership, amendment, or certificate of correction to be signed and delivered to the Secretary of State for filing, the person has the right to withdraw from the enterprise pursuant to the second option listed above even if the withdrawal would otherwise breach an agreement with others that are or have agreed to become co-owners of the enterprise [*Corp. Code § 15903.06(c)* (ULPA '08)].

[b] CRLPA

A person who contributes to a partnership for which a certificate of limited partnership has not been filed, and who in good faith believes that he or she is a limited partner, may avoid liability as a general partner. In order to do so, such a partner, on ascertaining that the certificate has not been filed and after failure of the general partners to file it within a reasonable time after request, must promptly file the certificate himself or herself and send a copy of the certificate to each general partner at the partner's last known address [*Corp. Code § 15633(a)* (CRLPA)].

A person who makes a contribution to the purported limited partnership and in good faith believes that he or she has become a limited partner is liable only to third parties who transacted business with the purported limited partnership before the certificate was filed and who reasonably believed that the person was a general partner at the time of the transaction [*Corp. Code § 15633(b)* (CRLPA)].

[5] Applicability to Partnership Governed by ULPA

The complaint in [1], above, may be used against a partner in a partnership governed by the ULPA. Nevertheless, a partner in such a partnership who erroneously believes that he or she is a limited partner may escape liability to third parties if, when he or she discovers his or her mistake, he or she promptly renounces his or her interest in the profits of the partnership or other compensation by way of income [*Corp. Code § 15511* (ULPA)]. It is unclear what form the renunciation is required to take.

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35-405 California Forms of Pleading and Practice--Annotated § 405.43

§ 405.43 Allegations for Complaint Under ULPA '08 or CRLPA for Damages Against Limited Partnership and Partners--Limited Partner Participated in Control of Business [Corp. Code § 15632(a) (CRLPA); Corp. Code § 15903.03(a) (ULPA '08)]

[1] FORM Allegations for Complaint Under ULPA '08 or CRLPA for Damages Against Limited Partnership and Partners--Limited Partner Participated in Control of Business [Corp. Code § 15632(a) (CRLPA); Corp. Code § 15903.03(a) (ULPA '08)]

[7]. Defendant _____ [*name of limited partner*], [does now, and] at all times herein mentioned did[,] participate in the control of the business of the limited partnership known as _____ [*name of partnership*], and is therefore liable as a general partner, in that he/she _____ [*specify, e.g.,* negotiated with plaintiff on behalf of defendant limited partnership and signed the agreement between plaintiff and defendants on behalf of defendant limited partnership].

[8]. Plaintiff knew of defendant _____ [*name*]'s participation in the control of the partnership business at the time of the transaction, and at that time believed that defendant _____ [*name*] was a general partner. Plaintiff's belief was reasonable in that _____ [*specify, e.g.,* defendant _____ (*name*) was the only partner who dealt with plaintiff on behalf of the limited partnership, and defendant _____ (*name*) represented to plaintiff that he/she had authority to make decisions regarding partnership transactions].

[2] Use of Form

These allegations are for use in a complaint against a limited partnership and against a limited partner who participated in the control of the partnership business. Such a limited partner may be liable for obligations of the partnership to a person who had actual knowledge of the limited partner's participation in control of the partnership business and reasonably believed, based on the limited partner's conduct, that the limited partner was a general partner [*Corp. Code § 15632(a)* (CRLPA); *Corp. Code § 15903.03(a)* (ULPA '08)]. If used in a complaint based on the *form in § 405.42[1],* the allegations should be inserted in place of paragraphs 7 and 8 of that form.

The allegations in [1], *above*, are for use against a partner in a limited partnership governed by the ULPA '08 or the CRLPA. For a complaint for use against a limited partner in a partnership governed by the ULPA, see *§ 405.45*. Although these allegations may be used against a partner in a limited partnership governed by the ULPA, the standards governing when a limited partner is liable under the ULPA are broader. Under the ULPA, a limited partner may be held liable for partnership obligations if he or she takes part in the control of the business, but unlike the ULPA '08 or the CRLPA, the ULPA does not impose a requirement that the plaintiff have been aware of the limited partner's participation or that the plaintiff have had a reasonable belief that the limited partner was in fact a general partner [*compare Corp. Code § 15507(a)* (ULPA) *with Corp. Code § 15632(a)* (CRLPA) *and Corp. Code § 15903.03(a)* (ULPA '08)]. Thus, the second paragraph in the form in [1], *above*, would be unnecessary in an action against a limited partner under the ULPA.

For further discussion of limited partners' liability, see *§ 405.16*.

[3] Limited Partner's Liability for Controlling Business

Except for liability for his or her participation in tortious conduct, a limited partner generally is not liable for any obligation of a limited partnership unless he or she is either named as a general partner in the certificate or, in addition to the exercise of the rights and powers of a limited partner, he or she participates in the control of the business. If a limited partner participates in control of the business, he or she may be held liable as a general partner only to persons who transact business with the limited partnership with actual knowledge of that limited partner's participation in control and with a reasonable belief, based on the limited partner's conduct, that the partner is a general partner at the time of the transaction [*Corp. Code § 15632(a)* (CRLPA); *Corp. Code § 15903.03(a)* (ULPA '08)].

A limited partner may exercise certain rights with respect to the partnership without having participated in control of the partnership business for the purpose of liability as a general partner [*see Corp. Code § 15632(b),(c)* (CRLPA); *Corp. Code § 15903.03(b),(c)* (ULPA '08)]. For a list of activities that do not constitute participation in control of the partnership business, see *§ 405.16[2][a]* (ULPA '08) and § 405.16[2][b] (CRLPA).

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35-405 California Forms of Pleading and Practice--Annotated § 405.44

§ 405.44 Allegations in Complaint Under ULPA '08 or CRLPA for Damages Against Limited Partnership and Partners--Surviving Limited Partnership Succeeded to Liabilities of Disappearing Limited Partnership After Merger [Corp. Code § 15678.6 (CRLPA); Corp. Code § 15911.16 (ULPA '08)]

[1] FORM Allegations in Complaint Under ULPA '08 or CRLPA for Damages Against Limited Partnership and Partners--Surviving Limited Partnership Succeeded to Liabilities of Disappearing Limited Partnership After Merger [Corp. Code § 15678.6 (CRLPA); Corp. Code § 15911.16 (ULPA '08)]

On or about _____ [*date after cause of action accrued*], a certificate of merger was filed with the Secretary of the State of California evidencing that defendant _____ [*name of limited partnership that exists at time action is filed*] was the "surviving" limited partnership within the meaning of _____ [*Corporations Code Section 15911.01*(*l*) *or Corporations Code Section 15611(ad)*], and that defendant _____ [*name of limited partnership that engaged in transaction giving rise to liability*] was the "disappearing" limited partnership within the meaning of _____ [*Corporations Code Section 15911.01(h) or Corporations Code Section 15611(h)*]. [The certificate provided that the merger took effect on _____ (*date*).] A copy of the certificate, certified by the Secretary of State, is attached to this complaint as Exhibit "_____" and incorporated by reference.

[2] Use of Form

The allegation in [1], *above*, is for use in a complaint, such as the one in § 405.42, against a limited partnership that merged pursuant to the ULPA '08 or the CRLPA [*see Corp. Code § 15678.1 et seq.* (CRLPA); *Corp. Code § 15911.10 et seq.* (ULPA '08)] with the limited partnership that engaged in the transaction giving rise to plaintiff's cause of action [*Corp. Code § 15678.6* (CRLPA); *Corp. Code § 15911.16* (ULPA '08)].

For detailed coverage of the effect of merger on the surviving and disappearing limited partnerships, including the surviving partnership's liability for obligations of the constituent partnerships, see *§ 405.15* and Ch 404, *Partnerships: Actions Between Limited Partners and Partnership* .

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Chapter 405 PARTNERSHIPS: ACTIONS BETWEEN LIMITED PARTNERS OR PARTNERSHIPS AND THIRD PARTIES
PART IV. FORMS

35-405 California Forms of Pleading and Practice--Annotated § 405.45

§ 405.45 Complaint for Damages--Against Limited Partnership and Partners Governed by ULPA--Liability of Limited Partner Controlling Partnership Business [Corp. Code § 15507 (ULPA)]

[1] FORM Complaint for Damages--Against Limited Partnership and Partners Governed by ULPA--Liability of Limited Partner Controlling Partnership Business [Corp. Code § 15507 (ULPA)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff, vs. _____ [*names*],	)	COMPLAINT FOR DAMAGES
Defendants.	)	(Limited Partner Controlling Partnership Business)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff asllege s as follows:

1. _____ [*Capacity and residence of defendants partnership and partners. See § 405.42[1], Paragraph 1.*]

[2. *Fictitious name allegations, if appropriate. See § 405.42[1], Paragraph 2.*]

3. On or about _____ [*date*], plaintiff executed a[n] _____ [oral *or* written] agreement with defendants. _____ [A copy of the agreement is attached as Exhibit _____ and incorporated by reference *or* The terms of the agreement were that _____ (*set forth essential terms of agreement, e.g.,* plaintiff was to deliver to the partnership goods for which the partnership

was to pay plaintiff the amount of $_____)].

4. _____ [*Plaintiff's performance or excusable nonperformance of agreement. See § 405.42[1], Paragraph 4.*]

5. _____ [*Defendants' breach of agreement. See § 405.42[1], Paragraph 5.*]

6. _____ [*Damages proximately caused by breach. See § 405.42[1], Paragraph 6.*]

7. Defendant _____ [*name of limited partner*], [does now, and] at all times herein mentioned did[,] take part in the control of the business of the limited partnership known as _____ [*name of partnership*], and is therefore liable as a general partner, in that he/she _____ [*specify, e.g.,* negotiated with plaintiff on behalf of defendant limited partnership and signed the agreement between plaintiff and defendants on behalf of defendant limited partnership].

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For damages in the sum of $_____, plus interest at the legal rate from _____ [*date*];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 405.40[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by a party who seeks to recover damages based on a transaction with a limited partnership governed by the ULPA. It is also for use against a limited partner in such a partnership who took part in the control of the partnership business, subjecting him or her to liability as a general partner [*see Corp. Code § 15507(a)* (ULPA)].

A limited partner may exercise certain rights with respect to the partnership without being deemed to have taken part in control of the partnership business for the purpose of liability as a general partner [*see* Corp. Code § 15407(b) (ULPA)]. For a list of activities that do not constitute taking part in control of the partnership business, see *§ 405.16[2][c]*.

For allegations for use against a limited partnership and limited partner controlling the business when the partnership is governed by the ULPA '08 or the CRLPA, see *§ 405.43*. For discussion of the application of ULPA and CRLPA generally, see Ch. 404, *Partnerships: Actions Between Limited Partners and Partnerships* .

[3] Allegations

The complaint in [1], *above*, alleges the following:

- The capacity of defendants as a partnership and as individual partners (Paragraph 1) [*see Corp. Code §§ 15507(a), 15509(1)* (ULPA)].

- The agreement between plaintiff and defendants (Paragraph 3) [*Reichert v. General Ins. Co. of Am. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377*].

- Plaintiff's performance or excusable nonperformance of the contract (Paragraph 4) [*see Reichert v. General Ins. Co. of Am. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377*].

- Defendants' breach (Paragraph 5) [*see Reichert v. General Ins. Co. of Am. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377*].

- Damages proximately caused by the breach (Paragraph 6) [*Civ. Code § 3300*; *Nelson v. Reisner (1958) 51 Cal. 2d 161, 171, 331 P.2d 17*].

- A limited partner's control of the partnership business, subjecting him or her to liability as a general partner (Paragraph 7) [*Corp. Code § 15507(a)* (ULPA)].

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PART IV. FORMS

35-405 California Forms of Pleading and Practice--Annotated § 405.46

§ 405.46 Affirmative Defense Allegation Under ULPA '08, CRLPA, or ULPA--To Action Based on Obligation of Limited Partnership--Defendant Is Limited Partner [Corp. Code § 15507(a) (ULPA); Corp. Code § 15632(a) (CRLPA); Corp. Code § 15903.03(a) (ULPA '08)]

[1] FORM Affirmative Defense Allegation Under ULPA '08, CRLPA, or ULPA--To Action Based on Obligation of Limited Partnership--Defendant Is Limited Partner [Corp. Code § 15507(a) (ULPA); Corp. Code § 15632(a) (CRLPA); Corp. Code § 15903.03(a) (ULPA '08)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. At all times during the existence of defendant partnership, defendant _____ [*name of limited partner*] was, and now is, a limited partner only, and therefore is not liable for debts or obligations of the defendant partnership.

[2. On or about _____ (*date*), a certificate of limited partnership for defendant partnership was filed with the Secretary of State, naming defendant as a limited partner only. A copy of the certificate is attached as Exhibit _____ and incorporated by reference.]

[2] Use of Form

The affirmative defense allegations in [1], *above*, are for use by a limited partner who has been sued in an action based on the obligation of a limited partnership. The general rule in all limited partnerships, whether governed by the ULPA '08, the CRLPA, or the ULPA, is that a limited partner is not liable for partnership obligations [*see Corp. Code § 15507(a)* (ULPA); *Corp. Code § 15632(a)* (CRLPA); *Corp. Code § 15903.03(a)* (ULPA '08)].

A limited partner may be liable for obligations of the limited partnership under certain circumstances, such as when the limited partner is also named as a general partner in the limited partnership certificate, or when the limited partner participates in control of the partnership business [*see Corp. Code § 15507* (ULPA); *Corp. Code § 15632* (CRLPA);

Corp. Code § 15903.03 (ULPA '08)]. For discussion of the circumstances in which a limited partner may be liable for the partnership's obligations, see *§§ 405.12* and *405.16*.

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Volume 35: Partition thru Paternity-Chs. 397-412
Chapter 406 PARTNERSHIPS: DISSOLUTION

35-406 California Forms of Pleading and Practice--Annotated 406.syn

§ 406.syn Synopsis to Chapter 406: PARTNERSHIPS: DISSOLUTION

§ 406.01 Scope of Chapter

§ 406.02 Cross References

§§ 406.03-406.09 [Reserved]

§ 406.10 Governing Law

§ 406.11 Distinction Between Dissolution and Termination

§ 406.12 Causes of Dissolution

[1] UPA'94

[a] Effect of Dissociation; Partnership Agreement

[b] Partnership at Will

[i] By Express Will of Partners

[ii] Dissociating Partners

[iii] Partnership Agreement May Vary Statutory Rule

[c] Partnership for a Definite Term or Particular Undertaking

[i] By Agreement, Expiration of Term or Undertaking

[ii] By Dissociation of Partner

[d] All Partnerships

[i] Event Specified in Partnership Agreement

[ii] Event Makes Continuation of Partnership Business Unlawful

[2] Pre-'97 Act

[a] Definition

[b] Dissolution Without Court Decree

§ 406.13 Dissolution by Judicial Decree

[1] Bases for Dissolution

[a] UPA'94

[b] Pre-'97 Act

[2] Dissolution Is Mandatory

[a] Generally

[b] Equitable Principles Apply

[3] Judgment of Dissolution Is Interlocutory

[4] Effective Date of Dissolution

[5] Partners' Rights to Judicial Dissolution

[6] Transferee's Rights to Compel Dissolution

§ 406.14 Procedural Matters

[1] Parties

[2] Statute of Limitations and Other Defenses

[3] Sale of Partnership Property

[4] Partnership Creditor Must Be Paid First

[5] Combined With Other Relief Under Pre-'97 Act

§ 406.15 Rights and Liabilities of Partnership and Partners

[1] Waiver of Dissolution

[2] Partnership's Liability for Partners' Post-Dissolution Acts

[a] UPA'94

[b] Pre-'97 Act

[i] Partner's Authority

[ii] Creditors Without Notice

[3] Limiting Partners' Authority to Bind Partnership by Statement of Dissolution

[a] UPA'94

[b] Pre-'97 Act

[4] Partners' Liability for Post-Dissolution Acts

[a] UPA'94

[i] Liability for Acts of Others

[ii] Liability for Partner's Own Act

[iii] Rules Do Not Apply to Registered Limited Liability Partnerships

[b] Pre-'97 Act

[i] Generally

[ii] Third Party Rights

[iii] Discharge From Personal Liability

[iv] Deceased Partner

§ 406.16 Winding Up Partnership Affairs

[1] Persons Authorized to Wind Up Business

[2] Scope of Authority of Person Winding Up Business

[a] UPA'94

[b] Pre-'97 Act

[i] Generally

[ii] Duty of Liquidating Partner

[3] Duty of Partners During Winding Up

[4] Order of Distribution of Partnership Assets and Settlement of Accounts

[a] UPA'94

[b] Pre-'97 Act

[i] Distribution Generally

[ii] Partnership Assets

[iii] Distribution Among Partners

[iv] Division of Partnership Property

[v] Interest

[vi] Costs

[vii] Agreement Between Partners

[viii] Contribution

[5] Treatment of Unfinished Partnership Business

[6] Allocation of Unfinished Business Receipts

§ 406.17 Continuing Partnership Business Under Pre-'97 Act

[1] Expiration of Fixed Term

[2] After Dissolution

[3] Agreement Not to Compete

§ 406.18 Deceased or Retired Partner Under Pre-'97 Act

[1] Dissolving Partnership

[2] Rights in Continuing Partnership Business

[3] Right of Survivor to Partnership Business

[4] Right to Specific Partnership Property

[5] Duty of Survivor to Account

[6] Actions Against Surviving Partner

§ 406.19 Accounting Action Under Pre-'97 Act

[1] When Available

[2] Ancillary Remedies

[a] Receiver

[b] Referee

[c] Preliminary Injunction

[3] Parties

[4] Statute of Limitations

[5] Venue

[6] Judgment

§§ 406.20-406.29 [Reserved]

§ 406.30 Governing Law

§ 406.31 Causes of Dissolution

[1] ULPA '08

[2] CRLPA

[3] ULPA

[a] Generally

[b] Limited Partners

§ 406.32 Dissolution by Decree

[1] ULPA '08

[a] Application for Judicial Dissolution

[b] Avoidance of Dissolution by Purchase of Interests

[2] CRLPA

§ 406.33 Winding Up Partnership Affairs

[1] ULPA '08

[2] CRLPA and ULPA

§ 406.34 Disposition of Claims Against Dissolved Partnership

[1] Notice to Known Claimants

[2] Published Notice

§ 406.35 Settling Accounts After Dissolution

[1] ULPA '08

[2] CRLPA

[3] ULPA

§ 406.36 Dissolution and Certificates

[1] Certificate of Dissolution

[2] Certificate of Continuation

[3] Certificate of Cancellation

[a] ULPA '08

[b] CRLPA

[4] Restated Certificate of Limited Partnership

[5] Execution of Certificates

[a] ULPA '08

[b] CRLPA

[6] Partnerships in Existence on July 1, 1984

§ 406.37 Authority of General Partner

[1] ULPA '08

[2] CRLPA

[3] ULPA

§§ 406.38-406.49 [Reserved]

§ 406.50 Related Matthew Bender Publications

§ 406.51 State Statutes

[1] UPA'94

[2] Pre-'97 Act

[a] Accounting and Settlement

[b] Assignee of Partner's Interest

[c] Continuation of Partnership Business

[d] Death of Partner

[e] Dissolution Generally

[f] Partners' Powers, Rights, and Liabilities After Dissolution

[2A] ULPA '08 effective January 1, 2008.

[3] CRLPA repealed January 1, 2010; until then applicable to limited partnerships created on or after July 1, 1984, and before January 1, 2008, not electing to be governed by ULPA '08.

[a] Authority of Partner After Dissolution

[b] Certificates of Dissolution, Cancellation, or Continuation

[c] Dissolution and Winding Up

[d] Distribution of Assets After Dissolution

[4] ULPA repealed January 1, 2010; until then applicable to limited partnerships existing on July 1, 1984, not electing to be governed by CRLPA or ULPA '08.

[a] Cancellation or Amendment of Certificate

[b] Dissolution

[c] Settling Accounts

[5] Related California Statutes

[a] Covenant Not to Compete

[b] Discharging Partner From Existing Partnership Liabilities on Receivers

§ 406.52 Decisions

[1] Accounting

[a] Generally

[b] Action Improper

[c] Costs and Fees

[d] Default Judgment

[e] Injunction

[f] Interest

[g] Judgment

[h] Partnership Assets

[i] Profits and Losses

[j] Referee

[k] Settlement Among Partners

[i] Generally

[ii] Settling Account and Dividing Property

[2] Action for Contribution

[3] Actions Generally

[4] Assignment

[5] Continuing Business

[6] Death or Retirement of Partner

[a] Actions by Remaining Partner

[b] Partnership Creditors

[c] Rights and Duties of Retiring Partner or Legal Representative of Deceased Partner

[d] Rights and Duties of Remaining Partner

[7] Dissolution Improper

[8] Dissolution Proper

[9] Dissolution by Partners

[10] Dissolution Decree

[11] Effect of Dissolution

[a] Generally

[b] Notice of Dissolution

[12] Expulsion of Partner

[13] Judicial Dissolution

[14] Liquidating Partner

[15] Parties

[16] Partnership Creditors

[17] Partnership for Fixed Term

[18] Receiver

[19] Res Judicata

[20] Statute of Limitations

[21] Unfinished Business

[22] Venue

§ 406.53 Law Reviews

§ 406.54 Text References

§§ 406.55-406.59 [Reserved]

§ 406.60 Complaint for Partnership Dissolution, Accounting, and Appointment of Receiver--By Partner [Corp. Code §§ 16405(b), 16801; former Corp. Code §§ 15022, 15032, 15043]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction and Venue

[5] Verification

[6] Receiver

[7] Referee

[8] Injunction

[9] Cross References

§ 406.61 Ex Parte Application and Supporting Declaration for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction; Certification re Notice [Code Civ. Proc. § 527]--Action for Dissolution of Partnership and Accounting [Corp. Code §§ 16405(b)(2)(C), 16801, 16807(b)]

[1] FORM

[2] Use of Form

[3] Temporary Restraining Order and Order to Show Cause

[4] Contents of Application

[5] Notice Requirement

[6] Accompanying Papers

[7] Local Court Rules

[8] Service of Papers

[9] Personal Appearance Requirements

§ 406.62 Order to Show Cause re Preliminary Injunction and Temporary Restraining Order--Action for Dissolution of Partnership and Accounting [Corp. Code §§ 16405(b), 16801(5)]

[1] FORM

[2] Use of Form

[3] Undertaking

§ 406.63 Interlocutory Judgment for Partnership Dissolution, Order to Account [Corp. Code §§ 16405(b), 16801(5), 16807(b); former Corp. Code §§ 15022, 15032, 15043], and Reference [Code Civ. Proc. § 639(b)]

[1] FORM

[2] Use of Form

§ 406.64 Interlocutory Judgment for Partnership Dissolution and Accounting [Corp. Code § 16405(b), 16801(5), 16807(b); former Corp. Code §§ 15022, 15032, 15043]--Without Reference

[1] FORM

[2] Use of Form

[3] Judgment of Accounting Without Reference

§ 406.65 Complaint for Contribution--By Partner Satisfying Partnership Liability After Dissolution Against

Noncontributing Copartner [Corp. Code § 16807(c); former Corp. Code § 15040(f)]]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Action for Contribution

[5] Venue

[6] Cross References

§ 406.66 Complaint for Damages, Temporary Restraining Order, Preliminary Injunction and Permanent Injunction for Breach of Agreement Not to Compete Made by Partners on Dissolution [Bus. & Prof. Code § 16602]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Agreement Not to Compete

[5] Cross References

§ 406.67 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Partnership Accounting [Corp. Code § 16405; former Corp. Code § 15043] Existence of Partners' Agreement Settling Accounts

[1] FORM

[2] Use of Form

[3] Agreement Between Partners

§ 406.68 Complaint for Appointment of Receiver [Code Civ. Proc. § 564] to Wind Up Partnership Affairs [former Corp. Code § 15037], and for Accounting [former Corp. Code §§ 15022, 15043; Prob. Code § 9761]--By Representative of Deceased Partner Against Surviving Partner in Partnership Governed by Pre-'97 Act

[1] FORM

[2] Use of Form

[3] Allegations

[4] Rights of Deceased Partner's Representative

[5] Cross References

§ 406.69 Complaint for Partnership Accounting [former Corp. Code § 15043] and Interest or Profits Based on

Retired or Deceased Partner's Interest [former Corp. Code § 15042] by Retired Partner or Representative of Deceased Partner Against Partner(s) Continuing Business [former Corp. Code § 15042]--Partnership Governed by Pre-'97 Act

[1] FORM

[2] Use of Form

[3] Allegations

[4] Right to Accounting Before Choosing Between Interest and Profits

[5] Cross References

§§ 406.70-406.79 [Reserved]

§ 406.80 Complaint Under ULPA '08 for Limited Partnership Dissolution [Corp. Code § 15908.02] and Judicial Supervision of Winding Up [Corp. Code § 15908.03]

[1] FORM

[2] Use of Form

§ 406.81 Notice of Motion Under ULPA '08 for Stay of Dissolution and Winding Up of Limited Partnership and for Appraisal of Partnership Interests [Corp. Code § 15908.02]

[1] FORM

[2] Use of Form

§§ 406.82-406.89 [Reserved]

§ 406.90 Complaint for Limited Partnership Dissolution [Corp. Code § 15682] and Winding Up [Corp. Code §§ 15681, 15683] for Partnership Formed on or After July 1, 1984, or Otherwise Governed by CRLPA

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction and Venue

[5] Decree of Dissolution Under CRLPA

[6] Winding Up

[7] Certificates of Dissolution and Cancellation

[8] Cross References

§ 406.91 Petition for Decree Ordering Winding Up of Limited Partnership Following Dissolution [Corp. Code §

15683(b) (CRLPA)]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Designation and Compensation of Persons Winding Up

§ 406.92 Complaint for Dissolution of Limited Partnership, Winding Up, Accounting and Return of Contribution [Corp. Code § 15516(4)]--By Limited Partner in Partnership Formed Before July, 1984, and Governed by ULPA

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction and Venue

[5] Decree of Dissolution Under ULPA

[6] Cross References

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§ 406.01 Scope of Chapter

This chapter covers the dissolution of general and limited partnerships, and related actions. Part II (Legal Background) and Part IV (Forms) are subdivided into parts A and B, covering general partnerships and limited partnerships separately. This chapter contains the following forms:

- Complaints for dissolution of general partnerships, and related actions [*see* §§ 406.60-406.69].
- Complaints for dissolution of limited partnerships, and related actions [*see §§ 406.80 -406.92*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsDissolution & Winding UpGeneral OverviewBusiness & Corporate LawLimited PartnershipsGeneral OverviewBusiness & Corporate LawLimited PartnershipsDissolution & Winding Up

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§ 406.02 Cross References

- For discussion, procedural guide, and forms relating to accounting actions generally, and for a complaint for partnership accounting after dissolution, see Ch. 7, *Accounting, Action for* .

- For discussion and forms relating to actions on accounts stated and open accounts, see Ch. 8, *Accounts Stated and Open Accounts* .

- For a general discussion of the governing statutes and definitions pertaining to general and limited partnerships, see Ch. 400, *Partnerships: Governing Statutes* .

- For discussion and forms pertaining to actions by and against general and limited partners and limited partnerships, see Chs. 404, *Partnerships: Actions Between Limited Partners and Partnerships* , and 405, *Partnerships: Actions Between Limited Partners or Partnership and Third Parties* .

- For discussion and forms pertaining to actions by and against general partners and general partnerships, see Ch. 401, *Partnerships: Actions Between General Partners and Partnerships* , and Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties* .

- For discussion and forms relating to the appointment of receivers, see Ch. 486, *Receivers* .

- For discussion and forms relating to referees generally, see Ch. 38, *Reference* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsDissolution & Winding UpGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpAccountingBusiness & Corporate LawLimited PartnershipsGeneral OverviewBusiness & Corporate LawLimited PartnershipsDissolution & Winding Up

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[Reserved]

§§ 406.03[Reserved]

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PART II. LEGAL BACKGROUND
A. General Partnerships

35-406 California Forms of Pleading and Practice--Annotated § 406.10

§ 406.10 Governing Law

The dissolution and winding up of general partnerships subject to UPA'94 is governed by *Corp. Code §§ 16801-16807*. Events causing dissolution and winding up are set forth in *Corp. Code § 16801*. The rights and liabilities of the partnership and partners are governed by *Corp. Code §§ 16804* and *16806*. The authorization of partners to wind up business, and the distribution of partnership assets, are set forth in *Corp. Code §§ 16803* and *16807*.

Since January 1, 1999, all general partnerships have been governed by the Uniform Partnership Act of 1994 (UPA'94) [*Corp. Code § 16111(b)*; *see Corp. Code § 16100 et seq.*], regardless of when they were formed. Prior to that date, partnerships formed before January 1, 1997, were governed by the earlier of (1) the date when they elected to be governed by the UPA'94, or (2) January 1, 1999 [*Corp. Code § 16111*]. As of January 1, 1999, this transition period expired and the pre-1997 version of the UPA (pre-'97 Act) was repealed [Stats. 1996 ch. 1003, §§ 1.2, 18, operative Jan. 1, 1999].

Repeal of the pre-'97 Act, however, did not affect actions or proceedings commenced, or rights accrued, prior to the effective date of the UPA'94 [*Corp. Code § 16112*]. Thus, if the dissolution of a general partnership occurred prior to January 1, 1997, pending actions or proceedings pertaining to that dissolution continue to be governed by the pre-'97 Act. Similarly, the dissolution, prior to January 1, 1999, of a general partnership that was formed before January 1, 1997, and had not elected to be governed by the UPA'94 during the transition period that ended on December 31, 1998, is governed by the pre-'97 Act. For these reasons, detailed discussion of the dissolution provisions of the pre-'97 Act has been retained in this chapter. All references to *Corp. Code §§ 15001-15045* in this chapter are to the repealed provisions of the pre-'97 Act. For more detailed discussion see *§§ 400.10*, *400.11* in Ch. 400, *Partnerships: Governing Statutes* .

The rights of a deceased partner's legal representative are specified in *Prob. Code §§ 9651*, *9761*, *9763*. The partners' right to execute an agreement not to compete on dissolution is provided by *Bus. & Prof. Code § 16602*.

Legal Topics:

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

Business & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpDistribution of AssetsBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral Overview

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35-406 California Forms of Pleading and Practice--Annotated § 406.11

§ 406.11 Distinction Between Dissolution and Termination

Under both UPA'94 and the pre-'97 Act, a partnership continues after dissolution only for the purpose of winding up its affairs, and is terminatedat the conclusion of the winding up [*Corp. Code § 16802(a)*; former *Corp. Code § 15030*; *see Jewel v. Boxer (1984) 156 Cal. App. 3d 171, 176, 203 Cal. Rptr. 13* ; *Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal. App. 3d 200, 216, 194 Cal. Rptr. 180* (*disapproved on other grounds in Applied Equipment Corp. v. Litton Saudi Arabia Limited (1994) 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454*)]. "Termination" denotes the cessation of any business activity on the part of the dissolved partnership. For income tax purposes, termination occurs if no part of any business, financial operation, or venture of the partnership continues to be carried on by any ofits partners in the partnership, or within a 12-month period there is a sale or exchange of 50 percent or more of the total interest in partnership capital and profits [*see I.R.C. § 708*; *Rev. & Tax. Code § 17851*].

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PART II. LEGAL BACKGROUND
A. General Partnerships

35-406 California Forms of Pleading and Practice--Annotated § 406.12

§ 406.12 Causes of Dissolution

[1] UPA'94

[a] Effect of Dissociation; Partnership Agreement

Under UPA'94, in contrast to the pre-'97 Act, changes in the composition of a partnership do not necessarily trigger its dissolution [*see* [2], *below*, and Ch. 403, *Partnerships: Actions By and Against Dissociated Partners*]. A partner's dissociation from a partnership is treated separately from partnership dissolution, although the dissociation of a partner may cause dissolution in the case of a partnership for a definite term or particular purpose [*see Corp. Code § 16801*; *see also* [c], *below*]. Absent a judicial determination that a partnership must be dissolved and wound up [*see § 406.13*], partnerships at will subject to UPA'94 are not automatically dissolved by either the rightful or wrongful dissociation of a partner. Except in the case of a judicial determination that a partnership must be wound up, a partnership agreement may control when and if a partnership dissolves [*see Corp. Code § 16103*].

[b] Partnership at Will

[i] By Express Will of Partners

A partnership at will [*see Corp. Code § 16101(11)* (definition) and Ch. 400, *Partnerships: Governing Statutes*] may be dissolved and the partnership business wound up by the express will of at least half the partners, other than wrongfully dissociating partners [*Corp. Code § 16801(1)*].

[ii] Dissociating Partners

Wrongfully dissociating partners [*see Corp. Code § 16602(b)*] may not vote on whether to dissolve [*see* Ch. 403, *Partnerships: Actions By and Against Dissociated Partners*], but those who have rightfully dissociated within the preceding 90 days and whose dissociation is an expression of their will to dissolve and wind up the partnership business may participate in the vote [*Corp. Code § 16801(1)*].

[iii] Partnership Agreement May Vary Statutory Rule

The partnership agreement may vary the statutory rule and specify a lower or higher voting requirement and base it either on the number of partners or on the percentage of the partnership interests they own [*see Corp. Code § 16103(a)*].

[c] Partnership for a Definite Term or Particular Undertaking

[i] By Agreement, Expiration of Term or Undertaking

Absent an agreement to the contrary, a partnership for a definite term or particular undertaking is dissolved and its business wound up if [*Corp. Code § 16801(2)(B), (C)*]:

- All the partners expressly agree to do so;
- The partnership term has expired; or
- The undertaking has been completed.

The determination of whether there is a definite term or particular undertaking may be difficult if the partners have no written agreement, or the agreement is silent as to the length of the partnership's existence. A court may imply such a term or purpose from the facts and circumstances. For example, under the pre-'97 Act, a court determined that a partnership financed by a loan from one partner to be repaid from profits was intended to be continued at least until the loan was repaid, and thus was for a definite term [*Owen v. Cohen (1941) 19 Cal. 2d 147, 150, 119 P.2d 713]* .

[ii] By Dissociation of Partner

Under UPA'94, a partnership for a definite term or particular undertaking ("term partnership") is treated differently than a partnership at will. Unless there is a contrary provision in the partnership agreement, a term partnership is dissolved and its business must be wound up after the expiration of 90 days after a partner's wrongful dissociation or dissociation by death, bankruptcy or becoming subject to certain other insolvency related proceedings, incapacity, distribution of the partner's entire transferable interest in the case of a partner that is a trust or estate, or termination of a partner that is not an individual partnership, corporation, trust, or estate [*Corp. Code § 16801(2)(A)*; *see Corp. Code § 16601(6)-10*].

Dissolution can be avoided, however, if a majority in interest of the other partners agree to continue the partnership. For this purpose, "other partners" includes partners dissociating by express will but whose dissociation is not wrongful because the dissociation follows within 90 days another partner's wrongful dissociation or dissociation by death or pursuant to *Corp. Code § 16601(6)-(10)*, inclusive [*see Corp. Code § 16602(b)(2)(A)*; *see also* Ch. 403, *Partnerships: Actions by and Against Dissociated Partners*]. For example, if a partner dissociates from the partnership within 90 days after one of the partners has died, the former's dissociation is not wrongful and that partner's interest is counted in computing the requiredmajority of interests and if voted in favor of continuation, is counted in determining whether the necessary majority agreement has been obtained.

[d] All Partnerships

[i] Event Specified in Partnership Agreement

Any partnership, whether at will or term, is dissolved and its business must be wound up if there is a provision in the partnership agreement specifying an event requiring that result [*Corp. Code § 16801(3)*]. This provision is not self-executing, but UPA'94 gives partners the power to enforce their rights under the partnership agreement [*Corp. Code § 16405(b)(1), (2)(C)*].

[ii] Event Makes Continuation of Partnership Business Unlawful

Any partnership is dissolved and its business must be wound up if an event makes it unlawful for all or substantially all of the partnership business to be continued, but a cure of illegality within 90 days after notice to the partnership of the event is effective retroactively to the date of the event (*i.e.*, the cure avoids dissolution) [*Corp. Code § 16801(4)*]. The partnership agreement cannot waive illegality as a basis for compelling the dissolution and winding up of the business [*Corp. Code § 16103(b)(8)*].

[2] Pre-'97 Act

[a] Definition

The pre-'97 Act specifically defines dissolution of a partnership as a change in the relation of the partners caused by any partner ceasing to be associated in the carrying on, as distinguished from the winding up, of the business [former *Corp. Code § 15029*]. On dissolution, the partnership is not terminated, but continues until the winding up of partnership affairs is completed [former *Corp. Code § 15030*; *see also Cotten v. Perishable Air Conditioners (1941) 18 Cal. 2d 575, 577, 116 P.2d 603]* .

[b] Dissolution Without Court Decree

Under the pre-'97 Act, partners in either at will or term partnerships may cause dissolution without violating the partnership agreement under the following circumstances [former *Corp. Code § 15031(1)*]:

- By termination of the definite term or particular undertaking specified in the partnership agreement;
- By the express will of any partner when no definite term or particular undertaking is specified in the agreement;
- Before or after the termination of a specified term or undertaking, by the express will of all partners who have not assigned their interests or had their interests charged for their separate debts; or
- By the expulsion of any partner from the business bona fide in accordance with such power conferred by the partnership agreement.

A partnership will also be dissolved in contravention of the partnership agreement by the express will of any partner at any time [former *Corp. Code § 15031(2)*]. Additional circumstances causing dissolution under the pre-'97 Act include [*see* former *Corp. Code § 15031(3),(4),(5),(7)*]:

- Any event that makes carrying on the partnership business unlawful;
- The bankruptcy of any partner or of the partnership;
- The withdrawal of a partner, or the admission of a new partner unless all partners have previously agreed that the withdrawal, or admission would not cause dissolution; and
- The death of a partner, unless otherwise provided in a written agreement signed by all the partners before the death or in a court order made pursuant to *Prob. Code § 9762*.

The conveyance by a partner of his or her interest in the partnership does not of itself dissolve the partnership [former *Corp. Code § 15027(1)*]. The entire circumstances connected with the transfer, however, may be sufficient to cause

dissolution [*Chatten v. Martell (1958) 166 Cal. App. 2d 545, 551, 333 P.2d 364]* . The assignment of all the partnership assets by all the partners does dissolve the partnership, as well as implying a winding up of all partnership affairs [*Wells v. Ellis (1885) 68 Cal. 243, 244-245, 9 P. 80]* . Similarly, the transfer of one partner's interest to his or her sole copartner dissolves the partnership [*Wood v. Waterman (1929) 102 Cal. App. 516, 520, 283 P. 143]* .

Legal Topics:

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§ 406.13 Dissolution by Judicial Decree

[1] Bases for Dissolution

[a] UPA'94

Regardless of anything in the partnership agreement to the contrary, [*see Corp. Code § 16103(b)(8)*], either a partnership at will or a term partnership is dissolved and its business must be wound up if, on the application of a partner, a court determines one of the following applies [*Corp. Code § 16801(5)*; *see Corp. Code § 16405(b)*]:

- The economic purpose of the partnership is likely to be unreasonably frustrated. Under the pre-'97 Act, which provides for judicial dissolution when the partnership business can only be carried on at a loss, it was held that if the loss from a partnership's business has beenslight and a reasonable prospect exists of an immediate increase of the business and in the value of the partnership property, the partnership will not be judicially dissolved. The reasoning behind this decision may well apply under UPA'94 as well [*see Shannon v. Hudson (1958) 161 Cal. App. 2d 44, 48, 325 P.2d 1022]* .

- Another partner has engaged in conduct relating to the partnership business that makes it not reasonably practicable to carry on the business in partnership with that partner. Dissolution on the ground that a partner's conduct prejudicially affects the carrying on of the partnership business has been historically decreed when a partner misappropriated partnership funds, took secret profits, sold partnership assets without the consent of the other partners, or otherwise defrauded the other partners [*Jacoby v. Feldman (1978) 81 Cal. App. 3d 432, 443, 146 Cal. Rptr. 334 (1978)* ; *McAtee v. McAtee (1930) 105 Cal. App. 555, 559, 288 P. 114* (sale of all partnership assets by a partner)]. Misappropriation of partnership assets is not the only breach of fiduciary duty owed to other partners that can justify a dissolution. Dissolution was held to be the appropriate remedy when, for example, the managing partners used questionable accounting procedures to falsify the assets and liabilities of the partnership and a close corporation owned by the partners. "Considering the intricacy of present tax reporting requirements, it seemed essential that a partner be assured that proper accounting techniques were being employed to report partnership income to the tax authorities" [*Jacoby v. Feldman (1978) 81 Cal. App. 3d 432, 443,*

146 Cal. Rptr. 334] .

- It is not otherwise reasonably practicable to carry on the partnership business in conformity with the partnership agreement. An example, taken from a case decided under the pre-'97 Act, might be the exclusion of a partner from control of partnership property or from management [*Zeibak v. Nasser (1938) 12 Cal. 2d 1, 14, 82 P.2d 375]* .

[b] Pre-'97 Act

Under the pre-'97 Act, a partnership may be dissolved by a court decree. On application by or for a partner, the court must decree a dissolution under the following circumstances [former *Corp. Code § 15032(1)*]:

- When a partner has been declared a lunatic in any judicial proceeding, or is shown to be of unsound mind;

- When a partner becomes in any other way incapable of performing his or her part of the partnership contract;

- When a partner has been guilty of conduct that tends to affect prejudicially the carrying on of the partnership business;

- When a partner wilfully or persistently commits a breach of the partnership agreement or otherwise so conducts himself or herself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him or her;

- When the partnership business can only be carried on at a loss; or

- When other circumstances render a dissolution equitable.

A transferee of a partner's interest [former *Corp. Code § 15027*] or judgment creditor of a partner [*see* former *Corp. Code § 15028*] may apply for dissolution of a partnership under the pre-'97 Act after termination of a specified term or particular undertaking of the partnership or at any time if the partnership was at will at the time the interest was assigned or when the charging order was issued [former *Corp. Code § 15032(2)*].

[2] Dissolution Is Mandatory

[a] Generally

Under both UPA'94 and the pre-'97 Act, the grounds for a judicial dissolution serve as a mandatory direction to the court [*see Corp. Code § 16801*; former *Corp. Code § 15032*; *see Wallace v. Sinclair (1952) 114 Cal. App. 2d 220, 228, 250 P.2d 154]* . Thus, for example, under the pre-'97 Act it was held that if a partnership would continue to lose money, regardless of the measure or speed of the loss, a partner had the right to judicial dissolution under former *Corp. Code § 15032(1)(e)* [*see Wallace v. Sinclair (1952) 114 Cal. App. 2d 220, 231, 250 P.2d 154]* . Similarly, when there are bitter, antagonistic feelings between the partners. and cooperation is needed to carry on the partnership business to their mutual advantage, dissolution may be decreed pursuant to *Corp. Code § 16801(5)* or former *Corp. Code § 15032(1)(c), (d),* and *(f)* [*see Owen v. Cohen (1941) 19 Cal. 2d 147, 152, 119 P.2d 713* (decided under former Civ. Code § 2426); *Wallace v. Sinclair (1952) 114 Cal. App. 2d 220, 228, 250 P.2d 154]* .

[b] Equitable Principles Apply

It has been held that no partnership is indissoluble [*Bates v. McTammany (1938) 10 Cal. 2d 697, 701, 76 P.2d 513* ;

Wallace v. Sinclair (1952) 114 Cal. App. 2d 220, 232, 250 P.2d 154] . Nevertheless, equitable principles apply in determining the rights of partners to a dissolution. Therefore, equity may refuse to grant the premature dissolution of a partnership formed for a specific undertaking when the partner requesting it is at fault and a dissolution would cause losses to the partnership or destruction of the value of partnership assets [*Bates v. McTammany (1938) 10 Cal. 2d 697, 700-701, 76 P.2d 513* ; *Oliker v. Gershunoff (1987) 195 Cal. App. 3d 1288, 1306, 241 Cal. Rptr. 415]* . Equity, however, will not protect a partner trying to avoid dissolution if that partner acted fraudulently, regardless of whether the partnership is for a fixed term and dissolution is premature [*Cottle v. Leitch (1868) 35 Cal. 434, 439]* .

[3] Judgment of Dissolution Is Interlocutory

A judgment directing the dissolution of a partnership is an interlocutory judgment, and therefore any appeal from that judgment must be dismissed under the "one final judgment" rule [*Kinoshita v. Horio (1986) 186 Cal. App. 3d 959, 965, 231 Cal. Rptr. 241]* .

[4] Effective Date of Dissolution

The court has discretion as to the effective date of dissolution [*Vangel v. Vangel (1953) 116 Cal. App. 2d 615, 626, 254 P.2d 919]* . Generally the court will order the dissolution to be effective as of the date of its order [*Zeibak v. Nasser (1938) 12 Cal. 2d 1, 14, 82 P.2d 375]* , but the court can order dissolution to be effective as of the date of the breach of a partnership agreement, especially when the breach is serious and unequivocal [*Moore v. Moore (1961) 190 Cal. App. 2d 129, 133, 11 Cal. Rptr. 659* ; *Vangel v. Vangel (1953) 116 Cal. App. 2d 615, 626, 254 P.2d 919* ; *McAtee v. McAtee (1930) 105 Cal. App. 555, 558, 288 P. 114]* . The date of dissolution is important because it will be the date for determining the respective interests of the partners [*see Vangel v. Vangel (1953) 116 Cal. App. 2d 615, 626, 254 P.2d 919* (decided under pre-'97 Act)] and determining the extent of the partners' liabilities for pre- and post-dissolution acts [*see Corp. Code § 16804*; *see also § 406.15, below*].

[5] Partners' Rights to Judicial Dissolution

If a partnership that is dissolved under judicial dissolution does not commence proceedings for its winding up, one or more of its partners have the right to bring an action for dissolution of the partnership to protect their interests in the partnership and to compel its and the winding up of its business. These actions are usually denominated an action for dissolution and accounting (under pre-'97 Act) or an action for dissolution and winding up (under UPA'94) [*see Corp. Code § 16405(b)(2)(C)*; former *Corp. Code § 15022*; *see also* Ch. 401, *Partnerships: Actions Between General Partners and Partnership* , for discussion of a partner's right to judicial enforcement of his, her or its partnership rights generally].

[6] Transferee's Rights to Compel Dissolution

A transferee (assignee or judgment creditor) of a partner's transferable interest (*i.e.*, the partner's interest in profits, losses, and distributions) [*see Corp. Code § 16502*; former *Corp. Code § 15026*] in a term partnership (and under the pre-'97 Act, but not UPA'94, at any time for an at will partnership) may apply for a judicial determination that it is equitable to wind up the partnership business at the expiration of the term or completion of the undertaking, despite anything in the partnership agreement to the contrary [*Corp. Code § 16801(6)*; former *Corp. Code § 15032(2)*; *see Corp. Code § 16103(b)(8)*]. Under UPA'94, but not the pre-'97 Act, this right to seek winding up is dependent on the partnership's status at the time of the partner's transfer or the entry of a charging order against the partner's interest. Thus, if a partnership for a definite term or particular undertaking is continued after the expiration of the term or completion of the undertaking, it becomes a partnership at will [*see Corp. Code § 16406*]. A transfer after its change of status would not give the transferee the right to seek winding up [*see Corp. Code § 16801(6)*].

Legal Topics:

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§ 406.14 Procedural Matters

[1] Parties

Under both UPA'94 and the pre-'97 Act, an action for partnership dissolution may be brought by one or more of the partners [*see Corp. Code § 16801(5)*; former *Corp. Code § 15032*; *Behlow v. Fischer (1894) 102 Cal. 208, 216, 36 P. 509]* , and a transferee of a partner's interest may also apply for dissolution [*Corp. Code § 16801(6)*; former *Corp. Code § 15032(2)*]. Under the pre-'97 Act, a court held that a partner who disposed of his or her partnership interest is not permitted to join in an action for dissolution of the partnership [*Chatten v. Martell (1958) 166 Cal. App. 2d 545, 552, 333 P.2d 364* ; *but see Corp. Code § 16801(1), (2)* (votes of dissociating partners may be counted toward dissolution vote in certain circumstances)].

Generally, all partners are not only necessary, but indispensable parties to an action to dissolve a partnership and wind up its affairs. Without all the partners as parties, a court could not make a decree that would finally dispose of all the questions involved [*Rudnick v. Delfino (1956) 140 Cal. App. 2d 260, 267, 294 P.2d 983]* . Although this decision was made under the pre-'97 Act, it also appears to be applicable under UPA'94.

[2] Statute of Limitations and Other Defenses

The accrual of, and any time limitation on, a right of action for a remedy under both UPA'94 and the pre-'97 Act is governed by other law [*Corp. Code § 16405(c)*; *see* former *Corp. Code §§ 15004, 15005*]. Under the pre-'97 Act, it was held that a cause of action for an accounting accrues when the partnership is dissolved by the death of a partner, and that therefore the statute of limitations begins to run on the death of a partner [*Estate of Peebles (1972) 27 Cal. App. 3d 163, 166, 103 Cal. Rptr. 560* ; *see* former *Corp. Code §§ 15031, 15043*]. It was also held under the pre-'97 Act that an action for accounting based on wrongful exclusion of a partner from the partnership accrues when the partner is wrongfully excluded [*Manok v. Fishman (1973) 31 Cal. App. 3d 208, 211, 107 Cal. Rptr. 266* ; *see also Mashon v. Haddock (1961) 190 Cal. App. 2d 151, 178, 11 Cal. Rptr. 865]* .

Because an action for an accounting is essentially an equitable action, the correct statute of limitations is the four-year, catch-all statute of limitations that applies when no specific statute of limitations applies [*Code Civ. Proc. § 343*;

Manok v. Fishman (1973) 31 Cal. App. 3d 208, 213, 107 Cal. Rptr. 266] .

[3] Sale of Partnership Property

A judgment of dissolution may order the partnership property sold by a commissioner appointed by the court and may authorize some of the partners to use partnership indebtedness to them in lieu of cash at a sale to them of partnership property [*Price v. Slawter (1962) 209 Cal. App. 2d 608, 612, 26 Cal. Rptr. 227* (decided under pre-'97 Act)]. However, a partnership creditor cannot use an unliquidated debt from one partner as a part of the purchase price at such a sale on the dissolution of the partnership [*Mendelsohn v. Miller (1958) 156 Cal. App. 2d 664, 667, 320 P.2d 155]* .

[4] Partnership Creditor Must Be Paid First

Under the pre-'97 Act, it was held that it is improper to render a personal judgment against one partner in favor of another partner until the partnership creditors have been paid and the partnership assets have been converted to cash [*Rice v. Watkins (1948) 85 Cal. App. 2d 44, 51, 191 P.2d 810* ; *Olmo v. Olmo (1943) 56 Cal. App. 2d 590, 594, 133 P.2d 866]* . This appears to be the rule under UPA'94 as well [*see Corp. Code § 16807*; *see § 406.16[4]*]. It was also held under the pre-'97 Act that it is not proper to render a judgment in favor of one partner for one third of the appraised value of the partnership assets before the assets are actually sold [*Pluth v. Smith (1962) 205 Cal. App. 2d 818, 828, 23 Cal. Rptr. 550]* . This ruling does not appear to be changed by UPA'94.

[5] Combined With Other Relief Under Pre-'97 Act

Because, under the pre-'97 Act, a partner is entitled to an accounting at the time of dissolution, an action for dissolution is usually combined with an action for an accounting [*Cottle v. Leitch (1868) 35 Cal. 434, 440-441* ; *see* former *Corp. Code § 15043*]. A court will usually grant dissolution, accounting, and a decree for payment of any balance due between the partners [*see Rudnick v. Delfino (1956) 140 Cal. App. 2d 260, 264, 294 P.2d 983]* . In addition, pending the final judgment, the court will often appoint a receiver [*see Paola v. Huston (1957) 150 Cal. App. 2d 206, 212, 309 P.2d 529]* , or order a temporary injunction to preserve the status quo [*Kendall v. Foulks (1919) 180 Cal. 171, 173, 179 P. 886]* . It is also proper, under appropriate circumstances, to combine an action at law for damages with an action for dissolution and an accounting [*Prince v. Harting (1960)177 Cal. App. 2d 720, 736-737, 2 Cal. Rptr. 545* ; *see* Ch. 401, *Partnerships: Actions Between General Partners and Partnership*].

When combined with an action for an accounting, a judgment of dissolution may be interlocutory and the court may reserve jurisdiction to approve and settle the account or otherwise finally determine the rights of the partners [*Bakewell v. Bakewell (1942) 21 Cal. 2d 224, 227, 130 P.2d 975* ; *Shirley v. Cook (1953) 119 Cal. App. 2d 220, 221-222, 259 P.2d 25]* . In order to effect a proper accounting between the partners, a court may also decree dissolution of the partnership as of a date prior to the judgment, when the partners' conduct had effectively dissolved the partnership [*see Vangel v. Vangel (1953) 116 Cal. App. 2d 615, 626, 254 P.2d 919]* .

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§ 406.15 Rights and Liabilities of Partnership and Partners

[1] Waiver of Dissolution

Under UPA'94, at any time after dissolution but before winding up is completed, all of the partners, including a dissociating partner other than one who has wrongfully dissociated, can waive the right to have the business wound up and terminated and resume carrying on business as if dissolution had never occurred. In that event, any liability incurred by the partnership or a partner after dissolution and before the waiver is determined as if dissolution never occurred. Furthermore, the partnership will be bound by a partner's acts that were appropriate to winding up the business, and the rights of a third party arising out of conduct in reliance on the dissolution before the third party knew or received notification of the waiver may not be adversely affected [*Corp. Code § 16802(b)*]. This means, for example, that a third party is protected when it relies on its knowledge that the partnership is being dissolved and has no notice of a waiver of dissolution, even though the transaction would be inappropriate to a partnership that is continuing its business.

[2] Partnership's Liability for Partners' Post-Dissolution Acts

[a] UPA'94

A partnership is bound by a partner's post-dissolution acts that are either [*Corp. Code § 16804*; *see* former *Corp. Code § 15035*]:

- Appropriate for the winding up of the business; or

- Would have bound the partnership before dissolution if the other party did not have notice of the dissolution [*see* Ch. 400, *Partnerships: Governing Statutes* , for discussion of what constitutes "notice"].

A partner's act that would have bound the partnership before dissolution under *Corp. Code § 16301* [*see* Ch. 402, *Partnerships: Actions betweenGeneral Partners or Partnership and Third Parties*] is one that is apparently in the ordinary course of business, unless the partner lacked authority to act and the other party had received notification of the lack of authority. If an act is not apparently in the ordinary course of business, the partner's post-dissolution act would

only bind the partnership if it was authorized by the other partners [*Corp. Code § 16301*].

[b] Pre-'97 Act

[i] Partner's Authority

Dissolution terminates a partner's authority to act for the partnership, with respect to the partners, except so far as is necessary to wind up partnership affairs or complete unfinished partnership transactions [former *Corp. Code § 15033(1)(a)*]. When the acting partner caused the dissolution but had no notice of the dissolution, however, the other partners will be bound by his or her acts [former *Corp. Code §§ 15033(1)(b), 15034(a)*]. Similarly, when dissolution is caused by the act, death, or bankruptcy of a partner, acts by any partner who has no knowledge of the death or bankruptcy bind the other partners [former *Corp. Code §§ 15033(1)(b), 15034(b)*]. In these cases, each partner is liable to the other partners for his or her share of any liability created by any partner acting for the partnership, as if the partnership had not been dissolved [former *Corp. Code § 15034(c)*; *but see* former *Corp. Code § 15015(b)* (limitations on liability for partners in limited liability partnerships)]:

A partnership is not bound by any act of a partner after dissolution when the partnership is dissolved because it is unlawful to carry on the partnership business, unless the act is appropriate for winding up partnership affairs [former *Corp. Code § 15035(3)(a)*]. The partnership also will not be bound by the act of a partner after dissolution when the partner has become bankrupt [former *Corp. Code § 15035(3)(b)*].

[ii] Creditors Without Notice

After dissolution, a partner can bind the partnership by any transaction with a third person when the third person had extended credit to the partnership before the dissolution and had no knowledge or notice of the dissolution. A partner can also bind the partnership with respect to a third party who had known of the partnership before its dissolution and had no knowledge or notice of the dissolution, when the dissolution was not advertised in a newspaper of general circulation in the places at which the partnership business was regularly carried on. The transaction must be one that would have bound the partnership if dissolution had not taken place [former *Corp. Code § 15035(1)(b)*].

In order to bind the partnership, the creditor who had never extended credit to the partnership before its dissolution has the burden of showing that the creditor had knowledge of the partnership before its dissolution [*Vogler v. Ingrao (1954) 123 Cal. App. 2d 341, 344, 266 P.2d 826]* . With respect to notice of the dissolution, however, the partners seeking to avoid liability have the burden of showing that the creditor had such notice before the transaction [*Epley v. Hiller (1954) 128 Cal. App. 2d 100, 104, 274 P.2d 696]* . Once actual notice is shown, the partnership will not be bound, regardless of whether notice of the dissolution was published, as required by former *Corp. Code § 15035.5* [*Carvalho v. McCoy (1954) 128 Cal. App. 2d 702, 705, 276 P.2d 21]* .

[3] Limiting Partners' Authority to Bind Partnership by Statement of Dissolution

[a] UPA'94

UPA'94 provides a means to place third parties on notice of the dissolution by permitting any partner (other than a wrongfully dissociating partner) to file a statement of dissolution with the Secretary of State, stating the name of the partnership as filed with the Secretary of State, any identification number issued by the Secretary of State, and the fact that the partnership has dissolved and is winding up its business [*Corp. Code § 16805(a)*].

This statement has the effect of canceling a filed statement of partnership authority, and constitutes a limitation on the authority of partners to enter transactions on behalf of the partnership [*Corp. Code § 16805(b)*; *see Corp. Code § 16303(d)*; for a discussion of the effect of filing partnership statements of authority, *see* Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties*]. Except for transfers of real property, however, third

persons are not deemed to have notice of the dissolution or a limitation on a partner's authority until 90 days after the statement is filed [*Corp. Code § 16805(c)*]. Consequently, immediate actual notice to partnership creditors is important. This notice can be given by any means, but should be a means providing objective verification of receipt such as certified mail, courier delivery, facsimile transmission if receipt is verified and the like.

If the statement of dissolution is also recorded in the county where the partnership holds real property, it will give immediate constructive notice of the limitation on the authority of a partner to transfer that property [*Corp. Code § 16805(b)*; *see Corp. Code § 16303(e)*].

After filing and, if appropriate, recording the statement of dissolution, a dissolved partnership may file and record a new statement of partnership authority that will give one or more partners authority to act on behalf of the partnership in transactions with third parties [*Corp. Code § 16805(d)*].If such a statement is filed and recorded, it will have the effect of immediately giving constructive notice of to third persons in transactions involving the partnership's real property, whether or not those transactions are appropriate to winding up the business [*Corp. Code § 16805(d)*; *see Corp. Code § 16303(e)*].

[b] Pre-'97 Act

Although the pre-'97 Act requires that a notice of the dissolution be published at least once in a newspaper of general circulation in the place or places in which the partnership business was regularly carried on when a partnership is dissolved, there is no provision for limiting liability or giving constructive notice as there is under UPA'94. Nevertheless, an affidavit showing the publication of such notice must be filed with the county clerk within 30 days after the publication [former *Corp. Code § 15035.5*].

[4] Partners' Liability for Post-Dissolution Acts

[a] UPA'94

[i] Liability for Acts of Others

UPA'94 specifically provides that after dissolution, with the exceptions described below, each partner is liable to the other partners for that partner's share of any partnership liability that (1) was appropriate for the winding up of the business, or (2) would have bound the partnership had it been incurred before dissolution, as long as the other party had no notice of the dissolution [*Corp. Code § 16806(a)*; *see Corp. Code § 16804* and the discussion of post-dissolution acts that bind the partnership in [2], *above*]. The burden of proof to establish knowledge of the creditor is on the partner seeking to escape liability [*see Marsh Wall Products, Inc. v. Henry Marcus Building Specialties, 162 Cal. App. 2d 371, 379, 328 P.2d 259 (1958)* (decided under pre-'97 Act)].

[ii] Liability for Partner's Own Act

Partners who, with knowledge of the dissolution, bind the partnership after dissolution by acts that are not appropriate to the winding up of the business are liable to the partnership for any damage to the partnership that arises from the partnership liability they incurred [*Corp. Code § 16806(b)*].

[iii] Rules Do Not Apply to Registered Limited Liability Partnerships

The rules pertaining to a partner's liability to other partners or the partnership do not apply to partners of registered limited liability partnerships [*Corp. Code § 16806*].

[b] Pre-'97 Act

[i] Generally

The pre-'97 Act does not provide specific rules for a partner's liability for acts of other partners or his or her own acts after dissolution. However, it does provides that after dissolution a partner can bind the partnership and presumably the other partners by any act appropriate for winding up partnership affairs or completing transactions unfinished at the time of dissolution [former *Corp. Code § 15035(1)(a)*]. Therefore, for example, a partner winding up partnership affairs may bind the partnership on a promissory note, executed after dissolution, to obtain funds for paying off partnership debts [*Stump v. Tipps (1953) 120 Cal. App. 2d 418, 422, 261 P.2d 315]* . The partnership will not be bound, however, by the act of a partner who has no authority to wind up partnership affairs, unless the transaction is with a third person who extended credit to the partnership prior to dissolution and had no knowledge or notice of the partner's lack of authority, or who had no knowledge or notice of the acting partner's lack of authority when that lack of authority was not advertised in a newspaper of general circulation in the places at which the partnership business was regularly carried on [former *Corp. Code § 15035(3)(c)*].

The pre-'97 Act, however, does provide specific rules for the discharge of a partner's liability under former *Corp. Code § 15036* [*see* [ii]-[iv], *below*].

[ii] Third Party Rights

Under the pre-'97 Act, dissolution does not of itself discharge the existing liability of any partner [former *Corp. Code § 15036(1)*]. Under case law, dissolution does not affect the rights of third parties who have had dealings with the partnership without the consent of those parties [*Rassaert v. Mensch (1911) 17 Cal. App. 637, 641, 120 P. 1072]* .

[iii] Discharge From Personal Liability

Under the pre-'97 Act, a partner may be discharged from any existing liability on dissolution of the partnership by an agreement to that effect between himself or herself, the partnership creditor, and the person or partnership continuing the business. Such agreement may be inferred from the course of dealing between a creditor having knowledge of the dissolution and the person or partnership continuing the business [former *Corp. Code § 15036(2)*].

A partner also may be discharged from personal liability on an existing partnership liability by the express or implied consent of the party to whom the partnership is liable [*Redman v. Walters (1979) 88 Cal. App. 3d 448, 453, 152 Cal. Rptr. 42]* .

[iv] Deceased Partner

The pre-'97 Act specifies that the individual property of a deceased partner is liable for those obligations of the partnership incurred while he or she was a partner, and for which he or she is liable under former *Corp. Code § 15015* (joint and several liability), but subject to prior payments of his or her separate debts [former *Corp. Code § 15036(4)*].

Legal Topics:

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Volume 35: Partition thru Paternity-Chs. 397-412
Chapter 406 PARTNERSHIPS: DISSOLUTION
PART II. LEGAL BACKGROUND
A. General Partnerships

35-406 California Forms of Pleading and Practice--Annotated § 406.16

§ 406.16 Winding Up Partnership Affairs

[1] Persons Authorized to Wind Up Business

After dissolution, any partner who has not dissociated may participate in winding up the partnership's business [*Corp. Code § 16803(a)*], subject to any limitation on that partner's authority in a statement of partnership authority filed and/or recorded after a statement of dissolution has been filed [*Corp. Code § 16805(d)*; *see Corp. Code § 16303(d),(e)*]. UPA'94 does not require that all partners participate in the winding up. In a case decided under the pre-'97 Act, it was held that each partner has a duty to wind up and complete the dissolved partnership's unfinished business and, thus, each partner has an obligation to ensure that a disproportionate burden of completing the unfinished business does not fall on one partner or one group of partners, unless the partners agree otherwise [*Jewel v. Boxer (1984) 156 Cal. App. 3d 171, 179, 203 Cal. Rptr. 13* ; *Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal. App. 3d 200, 216, 194 Cal. Rptr. 180* (*disapproved on other grounds in Applied Equipment Corp. v. Litton Saudi Arabia Limited (1994) 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454*)]. Given the specification in UPA'94 of partner's duties of loyalty and care, it is not clear that these decisions will apply to partnerships governed by UPA'94. Unless otherwise agreed, a partner is entitled to reasonable compensation for services rendered in winding up the business of the partnership [*Corp. Code § 16401(h)*].

The legal representative of the last surviving partner may also wind up the partnership's business [*Corp. Code § 16803(b)*]. On the application of any partner, or a partner's legal representative, or a transferee, a court, for good cause shown, may order judicial supervision of the winding up [*Corp. Code § 16803(a)*].

[2] Scope of Authority of Person Winding Up Business

[a] UPA'94

In general, the duty of a liquidating partner is to wind up the affairs of the partnership, pay its debts out of its assets, and divide the residue, if any, among those entitled to receive it. Specifically, under UPA'94, a person winding up a partnership's business may [*Corp. Code § 16803(c)*]:

- Preserve the partnership business or property as a going concern for a reasonable time.

- Prosecute and defend actions and proceedings, whether civil, criminal, or administrative [*see Leh v. General Petroleum Corporation (1958 S.D. Cal) 165 F. Supp. 933, 938* (federal antitrust action is an act appropriate to winding up and can be brought by partner with authority to wind up, without joining other partner as a plaintiff)].

- Settle and close the partnership's business.

- Dispose of and transfer the partnership's property.

- Discharge the partnership's liabilities (borrowing funds to pay partnership debts and securing them with partnership properties may be appropriate for winding up, and if so the partnership will be bound by the acts of the partner who is winding up) [*Stump v. Tipps (1953) 120 Cal. App. 2d 418, 422, 261 P.2d 315]* .

- Distribute the assets of the partnership pursuant to *Corp. Code § 16807* [*see § 406.16[4]*].

- Settle disputes by mediation or arbitration.

- Perform other necessary acts.

[b] Pre-'97 Act

[i] Generally

Unless otherwise agreed, the partners who have not wrongfully dissolved the partnership, or the legal representative of the last surviving partner not bankrupt, have the right to wind up the partnership affairs [former *Corp. Code § 15037*]. When a partner dies, the surviving partner has the right to continue in possession of the partnership and to settle the partnership affairs [*see* former *Corp. Code §§ 15025(2)(d)* (rights in specific property on death of partner), 15037 (right to wind up partnership affairs)]. When a partner becomes bankrupt, the nonbankrupt partner has the right to wind up [*Security First Nat. Bank v. Whittaker (1966) 241 Cal. App. 2d 554, 557, 50 Cal. Rptr. 652]* . If one partner sells his or her partnership interest to a third party, the right to disposition of the partnership assets vests in the remaining partners [*Mervyn Investment Co. v. Biber (1921) 184 Cal. 637, 644, 194 P. 1037]* . Any partner or his or her legal representative or assignee may, however, obtain winding up by the court on cause shown [former *Corp. Code § 15037*].

[ii] Duty of Liquidating Partner

The winding up, or liquidating, partner has the duty to wind up the partnership affairs, pay partnership debts with partnership assets, if sufficient, and divide the residue, if any, among those entitled to it [*Glassell v. Prentiss (1959) 175 Cal. App. 2d 599, 605, 346 P.2d 895]* . He or she has the authority to bind the partnership and former partners by any act that is appropriate to the winding up of partnership affairs [former *Corp. Code § 15035(1)(a)*; *see* former *Corp. Code § 15033(1)(a)*]. He or she may also bring legal actions, including tort actions, on behalf of the dissolved partnership [*see Berson v. Ewing (1890) 84 Cal. 89, 94, 23 P. 1112]* .

A partner charged with the duty of liquidating the partnership business, if not a trustee, is at least a quasi trustee for former partners. He or she is required to act in such a manner as to conserve the interests of all the partners, and is obliged to exercise good faith. He or she must be diligent in the performance of his or her tasks, and must settle the partnership affairs within a reasonable time [*Metzenbaum v. Metzenbaum (1953) 115 Cal. App. 2d 395, 398, 399, 252 P.2d 31]* . The liquidating partner also has the duty to defend against claims adverse to the partnership [*Metzenbaum*

v. Metzenbaum (1953) 115 Cal. App. 2d 395, 399, 252 P.2d 31] .

The liquidating partner may bring an action against third parties to recover property fraudulently assigned to them by other partners. Such an action is personal to the liquidating partner, either in his or her individual capacity or as the liquidating partner of the partnership, and other partners need not be joined as parties [*see Moropoulos v. C.H. & O.B. Fuller Co. (1921) 186 Cal. 679, 687-688, 200 P. 601* (sole remaining partner need not join former partner who wrongfully withdrew as plaintiff)].

Subject to any agreement between the partners, a surviving partner is entitled to reasonable compensation for his or her services in winding up partnership affairs [former *Corp. Code § 15018(f)*]. Furthermore, although he or she derives personal benefits from defending any adverse claims to partnership assets, the liquidating partner is entitled to reimbursement from former partners for costs, such as reasonable attorney's fees, incurred in any such defenses [*see Metzenbaum v. Metzenbaum (1953) 115 Cal. App. 2d 395, 400, 252 P.2d 31]* .

[3] Duty of Partners During Winding Up

Under both UPA'94 and the pre-'97 Act, a partner's duties of loyalty and care to the partnership and the other partners continue during winding up of the partnership [*see Corp. Code § 16404*; *Laux v. Freed (1960) 53 Cal. 2d 512, 522, 2 Cal. Rptr. 265, 348 P.2d 873* ; *Oliker v. Gershunoff (1987) 195 Cal. App. 3d 1288, 1305, 241 Cal. Rptr. 415* ; *Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal. App. 3d 200, 216, 194 Cal. Rptr. 180* (*disapproved on other grounds in Applied Equipment Corp. v. Litton Saudi Arabia Limited (1994) 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454*); for discussion of a partner's duties of loyalty and care under UPA'94, *see* Ch. 401, *Partnerships: Actions Between General Partners and Partnership*]. These cases and those discussed in the remainder of this subsection were decided under the pre-'97 Act. They may continue to apply to partnerships governed by UPA'94, but, in view of the specific definitions of the duties of loyalty and care of partners contained in UPA'94, [*see Corp. Code § 16404*], their authority may be diminished.

Under the pre-'97 Act, a liquidating partner was held to have the duty to act in the highest good faith in liquidating a partnership and accounting to the other partners [*Mashon v. Haddock (1961) 190 Cal. App. 2d 151, 166, 11 Cal. Rptr. 865]* . A partner who violated fiduciary duties to the other partners with respect to the winding up and completion of unfinished business was found to be liable to the other partners for this breach [*Leff v. Gunter (1983) 33 Cal. 3d 508, 513-518, 189 Cal. Rptr. 377, 658 P.2d 740* ; *Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal. App. 3d 200, 217, 194 Cal. Rptr. 180* (*disapproved on other grounds in Applied Equipment Corp. v. Litton Saudi Arabia Limited (1994) 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454*)].

An attorney for the partnership was held to have a fiduciary obligation to all of the partners that continues until the winding up of partnership affairs is completed [*Wortham & Van Liew v. Superior Court (1987) 188 Cal. App. 3d 927, 931-932, 233 Cal. Rptr. 725]* . This decision was based not on partnership law but the ethical duties of an attorney and probably continues to be applicable. The attorney's fiduciary duty requires that the attorney disclose to all partners all matters concerning the partnership within the attorney's knowledge, including the formation of a new entity by one partner and transfer of partnership property to it [*Wortham & Van Liew (1987) 188 Cal. App. 3d 927, 931-932, 233 Cal. Rptr. 725]* .

[4] Order of Distribution of Partnership Assets and Settlement of Accounts

[a] UPA'94

The assets of the partnership, including contributions the partners must make to satisfy an excess of charges over credits to their respective accounts, must be applied to discharge the partnership obligations to creditors, including partner-creditors to the extent permitted by law. Any surplus must be applied to pay in cash the net amount distributable

to partners [*Corp. Code § 16807(a)*].

It should be remembered that the rules just stated and those following in this section, except as to the rights of third party creditors, are subject to provisions of the partnership agreement of the partnership, [*see Corp. Code § 16103* and Ch. 401, *Partnerships: Actions Between General Partners and Partnership*], and, with respect to limited liability partnerships, to the rules regarding when partners are liable for partnership obligations [*see Corp. Code § 16306(c)-(h)*].

Each partner is entitled to a settlement of all partnership accounts on winding up, with the profits and losses that result from liquidation of partnership assets being credited and charged to the partners' accounts. The partnership must distribute an amount equal to any excess of the credits over the charges in each partner's account, but a partner must contribute to the partnership any excess of charges over credits in that partner's account [*Corp. Code § 16807(b)*; *see O'Flaherty v. Belgum (2004) 115 Cal. App. 4th 1044, 1047, 1056-1061, 9 Cal. Rptr. 3d 286* (arbitrator exceeded authority by declaring forfeiture of withdrawing partners' capital accounts; forfeiture was contrary to partnership law, partnership agreement, and decisional law)]. If such a contribution is not made, then the other partners (and the estate of a deceased partner) must contribute in the proportions in which they share partnership losses, the additional amount necessary to satisfy partnership obligations for which they are liable under *Corp. Code § 16306*. Under *Corp. Code § 16306*, with some exceptions, partners are liable jointly and severally for all obligations of their partnership unless otherwise agreed by the claimant or provided by law. A partner, or a partner's personal representative may recover from other partners any amount the partner contributed to the extent it exceeds that partner's share of the joint and several obligations of the partnership [*Corp. Code § 16807(c), (e)*].

After settlement of accounts, each partner (and the estate of a deceased partner) must contribute, proportionally to that partner's share of partnership losses, the amount necessary to satisfy joint and several partnership obligations unknown at the time accounts were settled [*Corp. Code § 16807(d), (e)*].

In all the instances discussed above, an assignee for the benefit of creditors of a partnership or a partner, or a court-appointed creditor representative of a partnership or a partner, may enforce a partner's obligation to contribute to the partnership [*Corp. Code § 16807(f)*].

[b] Pre-'97 Act

[i] Distribution Generally

The debts of a partnership must be first discharged from partnership property before any distribution may be made to the partners [*Ohio Cas. Ins. Co. v. Harbor Ins. Co. (1968) 259 Cal. App. 2d 207, 216, 66 Cal. Rptr. 340]* . In settling accounts between the partners, subject to any agreement to the contrary, the partnership liabilities rank in order of payment as follows [former *Corp. Code § 15040(b)*]:

- First, Those owing to partnership creditors other than partners;
- Second, those owing to partners other than for capital and profits;
- Third, those owing to partners in respect of capital; and
- Fourth, those owing to partners in respect of profits.

Partnership assets that may be applied to discharge liabilities include partnership property and, except as provided in former *Corp. Code § 15015(b)* (exception for partners in limited liability partnership), the partners' contributions necessary for payment of the liabilities [former *Corp. Code § 15040(a)*; *see* former *Corp. Code § 15018(a)* (partner must contribute to payment of partnership liabilities according to partner's share of partnership profits)]. The partnership

assets will be applied to satisfy partnership liabilities first by the partnership property and second by partners' contributions [former *Corp. Code § 15040(c)*]. If the assets of the partnership are insufficient, the partners are required to contribute toward the partnership's losses, whether of capital or otherwise, sustained by the partnership according to their respective shares in the profits [former *Corp. Code §§ 15018(a), 15040(c), (d)*]. If one or more (but less than all) of the partners are insolvent, or are not subject to process and refuse contribute their share of the liabilities, the remaining partners must contribute, in the relative proportion in which they share the profits, the additional amount necessary to pay those liabilities [former *Corp. Code § 15040(d)*].

When partnership property and individual property of the partners is in the court's possession for distribution, partnership creditors have priority on partnership property and separate creditors have priority on separate property, except for the rights of lien or secured creditors [former *Corp. Code § 15040(h)*; *see also* former *Corp. Code § 15036(4)* (deceased partner)].

When a partner has become bankrupt or his or her estate is insolvent, the claims against his or her separate property rank in the following order [former *Corp. Code § 15040(i)*]:

- First, those owing to separate creditors;
- Second, those owing to partnership creditors; and
- Third, those owing to partners by way of contribution.

[ii] Partnership Assets

Leasehold interests, permits to do business, and goodwill are all partnership assets [*Ruppe v. Utter (1925) 76 Cal. App. 19, 24-25, 243 P. 715]* . Real property acquired by the partnership is a partnership asset, and will be treated in equity as personalty, whether the partnership was formed by a written or oral contract [*Bates v. Babcock (1892) 95 Cal. 479, 487, 30 P. 605]* . When partners contribute land to the partnership, that land becomes a partnership asset despite any agreement between the partners that each should retain his or her separate title. In such a case, the partners hold legal title to the property in trust for the partnership [*Chapman v. Hughes (1894) 104 Cal. 302, 304-305, 37 P. 1048]* . In an accounting action, the court will not inquire into the source of title of partnershipassets, whether realty or personalty [*Bates v. Babcock (1892) 95 Cal. 479, 487, 30 P. 605]* .

[iii] Distribution Among Partners

Subject to agreement between the partners, each partner must be repaid his or her contributions, whether by way of capital or advances to the partnership property. Each partner must also share equally in profits and surplus remaining after all liabilities, including those to partners, are satisfied, and, except as provided in former *Corp. Code § 15015(b)* (exception for partners in limited liability partnerships), each must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his or her share in the profits [former *Corp. Code § 15018(a)*; *see* former *Corp. Code § 15015(b), (e), (g)* (rules governing limitation of liability of partners in limited liability partnerships)]. Profits will be distributed equally even if one partner contributed more, or all, of the capital, and others merely contributed services, unless the partners have specifically agreed otherwise [*Griggs v. Clark (1863) 23 Cal. 427, 429]* . A division and distribution of profits into equal parts is erroneous, however, when made prior to returning capital to those partners who advanced it [*Tiffany v. Short (1943) 22 Cal. 2d 531, 534]* .

A partner who dissolves the partnership by abandonment of the business is entitled only to his or her share in the business at the date of dissolution, with interest from that date. He or she is not entitled to profits received by the business thereafter, when the profits were attributable to copartners' work rather than to the dissolving partner's interest [*Moore v. Moore (1961) 190 Cal. App. 2d 129, 133-134, 11 Cal. Rptr. 659]* .

[iv] Division of Partnership Property

The rules of partition are applicable to property division aspects of a partnership dissolution and accounting action [*Logoluso v. Logoluso (1965) 233 Cal. App. 2d 523, 530, 43 Cal. Rptr. 678]* . The general rule on dissolution is that after taking an accounting, the court should require partnership property to be sold and after costs, expenses, and debts are paid, should divide the balance [*Swarthout v. Gentry (1943) 62 Cal. App. 2d 68, 83, 144 P.2d 38]* . There is an exception to the rule, however, when there are no debts and division of the property in kind may be fairly and equitably made [*Hooper v. Barranti (1947) 81 Cal. App. 2d 570, 578, 184 P.2d 688]* . When there are partnership debts, the court has the authority to make distribution of partnership property in kind, conditioned on a finding that it is not necessary to hold a sale to satisfy the partnership obligations [*Logoluso v. Logoluso (1965) 233 Cal. App. 2d 523, 530, 43 Cal. Rptr. 678]* . Dividing the property in kind does not obviate the need for an accounting and complete winding up of partnership affairs, however, before partners may receive the partnership assets [*Hooper v. Barranti (1947) 81 Cal. App. 2d 570, 579, 184 P.2d 688]* .

[v] Interest

The general rule is that except when there has been a fraudulent retention or an improper application of partnership money, it is not the practice of the courts to charge a partner with interest on money in his or her hands after dissolution. In addition, under ordinary circumstances, a partner is not charged with interest on sums drawn out by him or her or advanced to him or her [*Forsyth v. Butler (1907) 152 Cal. 396, 402-403, 93 P. 90* ; *Mashon v. Haddock (1961) 190 Cal. App. 2d 151, 180, 11 Cal. Rptr. 865]* .

When a partner's conduct warrants, however, the court has discretion to penalize that partner by charging interest from the date of dissolution [*Speka v. Speka (1954) 124 Cal. App. 2d 181, 187, 268 P.2d 129]* . For example, when the partner in charge of partnership books wrongfully makes an overdraft, interest may be charged [*Luchs v. Ormsby (1959) 171 Cal. App. 2d 377, 388, 340 P.2d 702]* . As another example, when accounting and distribution of partnership assets are delayed through the fault of the partner having possession, interest may be charged from the date when the balance should have been ascertained and paid [*Chazan v. Most (1962) 209 Cal. App. 2d 519, 524, 25 Cal. Rptr. 864]* . If there is no unnecessary delay, however, the delay incidental to winding up partnership affairs is not ascribed to one partner over another and interest ordinarily is not allowable [*Speka v. Speka (1954) 124 Cal. App. 2d 181, 186, 268 P.2d 129]* .

[vi] Costs

Disposition of costs in an action for partnership dissolution and accounting is within the discretion of the court [*Speka v. Speka (1954) 124 Cal. App. 2d 181, 187, 268 P.2d 129]* . The court may tax partners proportionately for an appraiser's fee, for example [*Zeibak v Nasser (1938) 12 Cal. 2d 1, 19-20, 82 P.2d 375]* . The court may also assess a receiver's costs against the party whose conduct made appointment of the receiver necessary [*Luchs v. Ormsby (1959) 171 Cal. App. 2d 377, 389, 340 P.2d 702]* .

[vii] Agreement Between Partners

Any accounting between the partners is governed by any pertinent agreement between the partners [*see* *Mervyn Investment Co. v. Biber (1921) 184 Cal. 637, 644, 194 P. 1037]* . The partners are permitted to accomplish an accounting and final settlement of the partnership without any formal judicial proceeding. When the partners have agreed on an accounting, the court is not permitted to undo that agreement [*Pilch v. Milikin (1962) 200 Cal. App. 2d 212, 223, 19 Cal. Rptr. 334]* . An agreement between the partners completely settling partnership accounts bars an action of accounting [*Cayton v. Walker (1858) 10 Cal. 450, 456]* . When there has been a partialsettlement between the partners, the accounting by the court is limited to the unsettled portion of the partnership business [*Stretch v. Talmadge (1884) 65 Cal. 510, 511, 4 P. 513]* .

An account stated between the partners may be oral [*Fisher v. Fisher (1948) 83 Cal. App. 2d 357, 361, 188 P.2d 802]* . An account stated may also be implied from the acts of the partners. For example, when one partner purchases the interest of another, the transaction presumptively includes a final settlement of all partnership indebtedness existing between them [*Wilbur v. Wilbur (1925) 197 Cal. 1, 14, 239 P. 332* ; *Barnes v. Moore (1947) 80 Cal. App. 2d 39, 43, 180 P.2d 740]* .

An agreement between the partners to settle partnership affairs may be set aside for fraud or mistake [*Altamirano v. Cheo (1925) 72 Cal. App. 222, 225, 236 P. 960]* . However, inadequacy of consideration is not a proper ground for setting aside such an agreement [*Frank v. Dominick (1953) 122 Cal. App. 2d 45, 49-50, 264 P.2d 161]* . Partners also have a cause of action for fraud against copartners who induced the plaintiff partners to enter into a dissolution agreement by false representations as to how partnership assets would be divided [*Zimmerman v. Straus (1954) 124 Cal. App. 2d 141, 143, 268 P.2d 186]* .

[viii] Contribution

Except as provided in former *Corp. Code § 15015(b)* (exception for partners in limited liability partnerships), each partner must contribute the amount necessary to satisfy the partnership liabilities according to his or her share of partnership profits. If any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners must contribute their share of the liabilities and, in relative proportions in which they share profits, the additional amount necessary to pay the liabilities [former *Corp. Code § 15040(d)*; *see* former *Corp. Code § 15018(a)*]. An assignee for the benefit of creditors or any person appointed by the court has the right to enforce those contributions [former *Corp. Code § 15040(e)*].

Any partner, or his or her legal representative, has the right to enforce the other partners' contributions to the extent of the amount that the partner has paid in excess of his or her share of the liability [former *Corp. Code § 15040(f)*]. After dissolution and full settlement of accounts, a partner may bring an action at law against his or her copartner for contribution [*Pilch v. Milikin (1962) 200 Cal. App. 2d 212, 222, 19 Cal. Rptr. 334]* . A partner also has a cause of action in assumpsit against his or her copartner for contribution, even if the plaintiff partner gave an individual note for the partnership debt and the copartner did not expressly promise to repay [*Sears v. Starbird (1889) 78 Cal. 225, 231, 20 P. 547* ; *Kazman v. Light (1921) 53 Cal. App. 732, 734, 200 P. 768]* .

[5] Treatment of Unfinished Partnership Business

After dissolution, a partnership continues only for the purpose of winding up its business [*Corp. Code § 16802(a)*]. This is also the rule under the pre-'97 Act, and has been construed to mean that the partnership continues until its unfinished business is completed [*Jewel v. Boxer (1984) 156 Cal. App. 3d 171, 174, 203 Cal. Rptr. 13]* . To determine whether the business of a dissolved partnership is unfinished, a court must look to the circumstances existing on the date of dissolution, and not to events occurring thereafter [*Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal. App. 3d 200, 217-218, 194 Cal. Rptr. 180* (*disapproved on other grounds in Applied Equipment Corp. v. Litton Saudi Arabia Limited (1994) 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454*)]. For example, the unfinished business of a law partnership is any business covered by contracts of employment between the partnership and its clients for the performance of services by the partnership that existed at the time of dissolution, and is not affected by a client's discharge of the partnership following dissolution [*Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal. App. 3d 200, 217, 194 Cal. Rptr. 180* (*disapproved on other grounds in Applied Equipment Corp. v. Litton Saudi Arabia Limited (1994) 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454*); *see also Rothman v. Dolin (1993) 20 Cal. App. 4th 755, 759, 24 Cal. Rptr. 2d 571* , defining the unfinished business of a law partnership or corporation as all matters in progress that have not been completed at the time the firm is dissolved, regardless of whether the matters were hourly rate cases or contingency fee cases].

In another case, a law partnership's unfinished business was held to include processing a lawsuit that did not actually begin until after the partnership's dissolution, but was the product of a settlement of an earlier case handled by the partnership. Since the partnership's fees were determined on the basis of its "net recovery" in the case, the later claim was held to be unfinished business of the partnership [*Grossman v. Davis (1994) 28 Cal. App. 4th 1833, 1837, 34 Cal. Rptr. 2d 355]* .

A partner cannot cut off the rights of the other partners in the partnership's unfinished business by entering into a new contract to complete that business [*Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal. App. 3d 200, 219, 194 Cal. Rptr. 180* (*disapproved on other grounds in Applied Equipment Corp. v. Litton Saudi Arabia Limited (1994) 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454*)]. A partner may take for his or her own account new business, even when this business emanates from clients of the dissolved partnership, but a partner may not seize for his or her own account the business that was in existence during the term of the partnership [*Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal. App. 3d 200, 220, 194 Cal. Rptr. 180* (*disapproved on other grounds in Applied Equipment Corp. v. Litton Saudi Arabia Limited (1994) 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454*); *see* Comment, *Winding Up Dissolved Law Partnerships: the No-Compensation Rule and Client Choice, 73 Calif. L. Rev. 1597 (1985)*; Note, *When Partnerships Dissolve It's Not Easy to Figure Out Who Gets What and Which Clients, 5 Cal. Lawyer, No. 2, p. 15 (1985)*].

Because a partnership continues after dissolution and before it is wound up, the partners who have not dissociated continue to be subject to the duties of loyalty and care [*see Corp. Code § 16404*; *see also* Ch. 401, *Partnerships: Actions Between General Partners and Partnership*]. A dissociated partner's duties of loyalty are limited to those set forth in *Corp. Code § 16404(b)(1), (2)*. These are the duties to account to the partnership and hold as trustee for it any property, profit or benefit derived by the partner in the conduct and winding up of the partnership business or derived from the use by the partner of partnership property or information, including the appropriation of a partnership opportunity and the duty to refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an adverse interest to the partnership. The duty of care, which is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law [*Corp. Code § 16404(c)*] continues in each case with respect only to matters arising and events occurring before the partner's dissociation [*Corp. Code § 16603(3)*)]. The duties of loyalty and care of partners apply to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner [*Corp. Code § 16404(g)*].

[6] Allocation of Unfinished Business Receipts

Under the pre-'97 Act, no partner, except a surviving partner, is entitled to extra compensation for services given to complete unfinished business [former *Corp. Code § 15018(f)*; *Jewel v. Boxer (1984) 156 Cal. App. 3d 171, 174, 203 Cal. Rptr. 13]* . From this, at least one court has reasoned, it follows that absent a contrary provision in a partnership agreement, any income generated through the completion of unfinished business is allocated according to the former partners' shares in the former partnership [*Jewel v. Boxer (1984) 156 Cal. App. 3d 171, 174, 203 Cal. Rptr. 13]* . Under UPA'94, however, a partner is entitled to reasonable compensation for services rendered in winding up the business of the partnership, absent an agreement to the contrary [*Corp. Code § 16401(h)*]. Whether or not a partner is entitled to compensation for winding up the business would seem irrelevant to the question of whether income from unfinished business of the partnership should be allocated according to the partnership agreement, except that such compensation would be payable out of partnership assets, including post-dissolution receipts, thereby diminishing pro tanto remaining amounts distributable to partners.

In the absence of a partnership agreement providing otherwise, attorney's fees received for cases in progress on the dissolution of a law partnership are to be shared by the former partners according to their right to fees in the dissolved partnership, regardless of which partner provides the legal services in the case after dissolution [*Jewel v. Boxer (1984) 156 Cal. App. 3d 171, 174, 203 Cal. Rptr. 13]* . The fact that the client substitutes one of the former partners as attorney

of record in place of the dissolved partnership does not affect this result [*Jewel v. Boxer (1984) 156 Cal. App. 3d 171, 174, 203 Cal. Rptr. 13]* . Furthermore, the fact that one matter is to be compensated at an hourly rate and another on a contingency basis is of no consequence in determining whether a matter is unfinished business [*Rothman v. Dolin, 20 Cal. App. 4th 755, 759, 24 Cal. Rptr. 2d 571 (1993)]* .

In an action for an accounting brought by two former partners in a law partnership that was dissolved following their withdrawal, the withdrawing partners were held entitled to use the gross amount of the percentage fee income owed to the partnership as the basis for computing their share of attorney's fees on projects negotiated by the partnership prior to its dissolution, when the remaining partners failed to differentiate between pre- and post-dissolution percentage fee income [*Rosenfeld, Meyer & Susman v. Cohen (1987) 191 Cal. App. 3d 1035, 1050-1052, 237 Cal. Rptr. 14]* . A partner has no right, however, to share in the proceeds from future business from the dissolved partnership's former clients who elected to retain the services of a new partnership formed by former copartners [*Fraser v. Bogucki (1988) 203 Cal. App. 3d 604, 611, 250 Cal. Rptr. 41]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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35-406 California Forms of Pleading and Practice--Annotated § 406.17

§ 406.17 Continuing Partnership Business Under Pre-'97 Act

[1] Expiration of Fixed Term

When a partnership for a fixed term or particular undertaking is continued, without any express agreement, after the termination of that term or undertaking, the rights and duties of the partners remain the same as they were at termination, so far as is consistent with a partnership at will [former *Corp. Code § 15023(1)*]. If there is no settlement or liquidation of partnership affairs after termination of the term or undertaking, continuation of the partnership business is prima facie evidence of a continuation of the partnership [former *Corp. Code § 15023(2)*].

[2] After Dissolution

Any partners who have not wrongfully caused the dissolution may continue the business of a dissolved partnership, for the agreed term, in the same name, either by themselves, or jointly with others, provided that they pay outgoing partners (or secure payment by bond) the value of theirpartnership interests at dissolution, less any damages for breach of the partnership agreement, and indemnify the outgoing partners against all present or future partnership liabilities [former *Corp. Code § 15038(b)(2)*].

Creditors of the partnership remain creditors of any person or any new partnership continuing the original partnership's business [*see* former *Corp. Code § 15041(1), (3), (6)*]. The liability of any third person becoming a partner in the partnership continuing the business of a dissolved partnership will be satisfied only out of partnership property. The new partner's individual property will not be reached by creditors, absent some new consideration given by them, or some prejudice suffered by them and induced by representations that the new partner would be liable to them [*see Wood v. Waterman (1929) 102 Cal. App. 516, 521, 283 P. 143]* .

If all but one of the partners retire and assign their rights in partnership property to the remaining partner, who continues the business, any creditors of the dissolved partnership are also creditors of the partner continuing the business [former *Corp. Code § 15041(2)*].

On dissolution, a partner is discharged from any existing partnership liability by an agreement to that effect among

himself or herself, the partnership creditor, and the person or partnership continuing the business. The agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business [former *Corp. Code § 15036(2)*]. When a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed will also be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of the obligations [former *Corp. Code § 15036(3)*]. A retiring partner will be liable, however, to a creditor of the continuing partnership when the partner does not give the creditor notice of his or her retirement [*Williams v. Bowers (1860) 15 Cal. 321, 321-322]* .

[3] Agreement Not to Compete

Any partner may agree, on or in anticipation of the partnership's dissolution or dissociation of the partner from the partnership, that he or she will not carry on a similar business within a specified geographic area where the partnership business has been transacted, as long as any other member of the partnership, or any person deriving title to the business or its goodwill, continues the partnership business [*Bus. & Prof. Code § 16602*]. Similarly, *Bus. & Prof. Code § 16601* allows (1) any person who sells the goodwill of a business, (2) any owner of a business entity selling or otherwise disposing of all of his or her ownership in the business entity, or (3) any owner of a business entity that sells all or substantially all of its operating assets together with the goodwill of the business entity, all or substantially all of the operating assets of a division or a subsidiary of the business entity together with the goodwill of that division or subsidiary, or all of the ownership interest of any subsidiary, to agree with the buyer to refrain from carrying on a similar business within a specified geographic area in which the business is so sold as long as the buyer, or anyone deriving title to the goodwill or from the buyer, carries on a like purpose. For purposes of that section, "business entity" includes any partnership, including a limited partnership or limited liability partnership [*Bus. & Prof. Code § 16601*]. In the case of a business entity that is a partnership (including a limited partnership or limited liability partnership),"owner of a business entity" includes any partner, and "ownership interest" includes a partnership interest [*Bus. & Prof. Code § 16601*].

The statutory allowance for agreements not to compete is an exception to the general rule that a contract that restrains any person from engaging in a lawful profession, trade, or business is void to that extent [*see Bus. & Prof. Code § 16600*]. An agreement not to carry on a similar business, within the meaning of the statute, includes an agreement not to conduct, manage, or operate such a business, wholly or in part, or as the agent of another [*Stephens v. Bean (1924) 65 Cal. App. 779, 785-786, 224 P. 1022]* .

California has a settled policy in favor of open competition [*see, e.g., Advanced Bionics Corporation v. Medtronic, Inc. (2003) 29 Cal. 4th 697, 706-708, 128 Cal. Rptr. 2d 172, 59 P.3d 231* (although California has strong interest in protecting its employees from noncompetition agreements under *Bus. & Prof. Code § 16600*, even if California court might find contractual provision void under that section, its policy interest does not necessarily justify issuance of temporary restraining order against parties pursuing action to enforce noncompetition agreement in another state's court)]. Nonetheless, it has long been the law that a partnership agreement may provide against competition by withdrawing partners in a limited geographical area. However, not every agreement between partners restraining competition is permitted. The common law "rule of reason" is applied to evaluate noncompetition agreements under *Bus. & Prof. Code § 16602* [*Howard v. Babcock (1993) 6 Cal. 4th 409, 416, 25 Cal. Rptr. 2d 80, 863 P.2d 150]* . A restraint against competition is valid to the extent reasonably necessary for the protection of the covenantee [*Swenson v. File (1970) 3 Cal. 3d 389, 396, 90 Cal. Rptr. 580, 475 P.2d 852]* . An absolute ban on competition with a former partnership would be unreasonable [*Howard v. Babcock (1993) 6 Cal. 4th 409, 425, 25 Cal. Rptr. 2d 80, 863 P.2d 150]* .

Reasonable agreements not to compete are valid as to law partnerships as well as other types of partnerships [*Howard v. Babcock (1993) 6 Cal. 4th 409, 418, 25 Cal. Rptr. 2d 80, 863 P.2d 150] . Rules of Professional Conduct, Rule 1-500,* which prohibits agreements restricting the practice of law, does not prevent law partnerships from drafting reasonable

noncompetition agreements under *Bus. & Prof. Code § 16602* as any other partnership [*Howard v. Babcock (1993) 6 Cal. 4th 409, 419-426, 25 Cal. Rptr. 2d 80, 863 P.2d 150]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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35-406 California Forms of Pleading and Practice--Annotated § 406.18

§ 406.18 Deceased or Retired Partner Under Pre-'97 Act

[1] Dissolving Partnership

Under the pre-'97 Act, the death of a partner dissolved the partnership unless otherwise provided in a written agreement signed by all the partners before the death or in a court order made pursuant to *Prob. Code § 9762* [former *Corp. Code § 15031(4)*; *see Zeibak v. Nasser (1938) 12 Cal. 2d 1, 17, 82 P.2d 375]* . Similarly, the withdrawal or retirement of a partner dissolved a partnership unless otherwise provided in an agreement in writing signed by all of the partners, including the retiring partner, before the retirement [former *Corp. Code § 15031(7)*].

[2] Rights in Continuing Partnership Business

On dissolution, a retired partner or the legal representative of a deceased partner has the right to an accounting of that partner's interest as against the winding up partners or surviving partners or against the person or partnership continuing the business [former *Corp. Code § 15043*]. When any partner retires or dies, and the partnership business is continued without any settlement of accounts, unless otherwise agreed he or she, or his or her legal representative, may have the value of that partner's interest ascertained as of the date of dissolution. He or she, or his or her legal representative, will receive as an ordinary creditor an amount equal to the value of his or her interest, with interest. In the alternative, at his or her option or the option of his or her legal representative, in lieu of interest, he or she or his or her legal representative will receive the partnership profits attributable to the use of his or her right in the property of the dissolved partnership [former *Corp. Code § 15042*]. The retiring partner or deceased partner's representative is entitled to have an accounting made before being compelled to choose between profits and interest [*see Casida v. Roberts (1959) 51 Cal. 2d 853, 857, 337 P.2d 829* (retiring partner)]. The creditors of the dissolved partnership, however, have priority over the partner's separate creditors, the retired partner, or the representative of the deceased partner on any such claim [former *Corp. Code §§ 15041(8), 15042*].

[3] Right of Survivor to Partnership Business

A court may authorize the personal representative of the deceased partner to continue as a partner in the partnership. The court order may specify any terms and conditions of participation deemed to be in the best interests of the interested

persons, but any terms and conditions inconsistent with a written partnership agreement are subject to the written consent of all of the surviving partners [*Prob. Code § 9762(a)*]. Notice of the hearing on the petition for a court order authorizing the decedent's personal representative to continue in the partnership must be given as provided in *Prob. Code § 1220*. Additionally, this notice must also be given by mail to each of the surviving general partners [*Prob. Code § 9762(d)*]. Absent court authorization, however, the surviving partner has the right to continue in possession of the partnership, and to settle its business, and the administrator or executor of a deceased partner has no power to handle partnership property or its affairs [former *Corp. Code §§ 15025(2)(d)* (rights in specific property on death of partner), 15037 (right to wind up partnership affairs); *see Minifie v. Rowley (1921) 187 Cal. 481, 483-484, 202 P. 673]* . In the event that the surviving partner fails to exercise his or her right to continue in possession of the partnership, the deceased partner's representative is required to take possession of the deceased partner's interest [*Normart v. Safer (1924) 67 Cal. App. 507, 515, 227 P. 943]* .

Because the surviving partner has authority to wind up partnership affairs, he or she has no action for an accounting against the administrator or executor of a deceased partner [*Wrightson v. Dougherty (1936) 5 Cal. 2d 257, 264, 54 P.2d 13* ; *McKay v. Joy (1886) 70 Cal. 581, 582, 11 P. 832]* . The surviving partner may, however, bring an action against the deceased partner's legal representative for claim and delivery of partnership property [*Wrightson v. Dougherty (1936) 5 Cal. 2d 257, 261-262, 54 P.2d 13]* .

[4] Right to Specific Partnership Property

On the death of a partner, his or her right in specific partnership property vests in the surviving partner or partners. If the deceased was the last surviving partner, however, his or her right in specific partnership property vests in his or her legal representative. The surviving partner or partners or legal representative has no right to possess that property for anything but partnership business [former *Corp. Code § 15025(2)(d)*].

[5] Duty of Survivor to Account

The personal representative of the deceased partner may apply to the court for an order that the surviving partner render an account. Such an order may be enforced by the court's power to punish for contempt [former *Corp. Code § 15043*; *see Prob. Code § 9761*]. The personal representative may also bring any action against the surviving partner that the deceased partner could have commenced and maintained [*Prob. Code § 9763(a)*; *see Prob. Code § 58* (definition of personal representative)].

The surviving partner may be authorized to continue the partnership business by assignment from, or consent of, the deceased partner's representative [*Jay v. Clark (1948) 85 Cal. App. 2d 88, 93, 192 P.2d 462]* . Indefinite continuation of the partnership business without the consent of the deceased's representative, however, is contrary to the surviving partner's duty to wind up, and the fact that representatives of the deceased did not object is irrelevant [*King v. Stoddard (1972) 28 Cal. App. 3d 708, 712-713, 104 Cal. Rptr. 903]* . If the business is continued, the survivingpartner continues as a trustee, subject to the obligations of a voluntary trustee [*Sibert v. Shaver (1952) 111 Cal. App. 2d 833, 840, 245 P.2d 514]* . When the surviving partner uses partnership assets without winding up the business, he or she is required to account for the profits earned subsequent to the death of his or her copartner [*Sibert v. Shaver (1952) 111 Cal. App. 2d 833, 842, 245 P.2d 514* ; *see* [2], *above*].

Expenditure of time, labor, and skill in the administration of partnership assets incident to successful termination of unfinished business entitles the surviving partner to remuneration [former *Corp. Code § 15018(f)*; *Jacobson v. Wikholm (1946) 29 Cal. 2d 24, 29, 172 P.2d 878]* . The surviving partner has the burden of proof to establish his or her compensation claim for such services [*Jacobson v. Wikholm (1946) 29 Cal. 2d 24, 32, 172 P.2d 878]* .

[6] Actions Against Surviving Partner

In actions on claims for or against the partnership, the surviving partner is permitted to sue or be sued alone, and executors, administrators, or heirs of deceased partners are not indispensable or necessary parties [*Pearson v. Norton (1964) 230 Cal. App. 2d 1, 18, 40 Cal Rptr 634* ; *see Minifie v. Rowley (1921) 187 Cal. 481, 484, 202 P. 673]* . If there are no surviving partners, the legal representative of the last surviving party is entitled to bring any actions on behalf of the partnership, and the representatives of earlier deceased partners are unnecessary parties [*see Minifie v. Rowley (1921) 187 Cal. 481, 484-485, 202 P. 673]* .

Legal Topics:

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§ 406.19 Accounting Action Under Pre-'97 Act

[1] When Available

Any partner has the right to a formal account as to partnership affairs whenever circumstances render it just and reasonable [former *Corp. Code § 15022(d)*]. Absent an agreement to the contrary, the right to an account of a partner's interest accrues, at the date of dissolution, to the partner, or his or her legal representative, as against the winding up partners, surviving partners, or partners continuing the business [former *Corp. Code § 15043*]. An accounting is a necessary incident to dissolution, following as a matter of course [*Cottle v. Leitch (1868) 35 Cal. 434, 440-441]* . In a single action, a court will often grant a dissolution, an accounting, and a decree for payment of any balance due between the partners [*see Rudnick v. Delfino (1956) 140 Cal. App. 2d 260, 264, 294 P.2d 983]* . An accounting action may be maintained separately, however, such as when the dissolution occurred earlier by mutual consent of the partners [*Lytle v. Kroenke (1945) 67 Cal. App. 2d 596, 602, 154 P.2d 919]* . An action for accounting may be barred by laches when the partnership was dissolved many years earlier [*Harris v. Hillegass (1884) 66 Cal. 79, 80, 4 P. 987* ; *Loupias v. Rosen (1951) 102 Cal. App. 2d 781, 783-784, 228 P.2d 611]* .

A cause of action for an accounting may be combined with an action at law for damages under appropriate circumstances [*Prince v. Harting (1960) 177 Cal. App. 2d 720, 736-737, 2 Cal. Rptr. 545]* . A cause of action in equity against partners to recover partnership property is properly joined with a cause of action at law against the administrator of the estate of a deceased partner to recover partnership property when the single purpose of the action is to subject all partnership property to an accounting [*Fong Sing v. O'Dell (1920) 50 Cal. App. 55, 60-62, 194 P. 745]* .

[2] Ancillary Remedies

[a] Receiver

In an action for a partnership accounting, the court may appoint a receiver to preserve partnership property pending litigation, so that the relief awarded by the court will be effective [*Code Civ. Proc. § 564(b)(1)*; *Steinberg v. Goldstein (1954) 129 Cal. App. 2d 682, 686, 278 P.2d 22* ; *see Paola v. Huston (1957) 150 Cal. App. 2d 206, 212, 309 P.2d 529]* . A partner's mere request for a receiver is insufficient; the court must be satisfied that partnership property is in danger

of being lost, removed, or materially injured [*McCaslin v. Kenney (1950) 100 Cal. App. 2d 87, 95, 223 P.2d 94* ; *see Code Civ. Proc. § 564(b)(1)*]. The receiver has power, under the control of the court, to bring and defend actions in his or her own name as receiver, to take and keep possession of the partnership property, to receive rents, collect debts, to compound for and compromise the rents and debts, to make transfers, and generally to do any acts respecting the property that the court may authorize [*Code Civ. Proc. § 568*]. The court may also direct the receiver to sell partnership assets if necessary to preserve other assets for distribution [*Steinberg v. Goldstein (1956) 145 Cal. App. 2d 692, 700, 303 P.2d 80]* . The court has the power and jurisdiction to determine the extent of the property embraced by the receivership and to determine whether particular property is or is not involved in the action [*Steinberg v. Goldstein (1954) 129 Cal. App. 2d 682, 686, 278 P.2d 22]* .

For further discussion of receivers generally, see Ch. 486, *Receivers* .

[b] Referee

The court may appoint a referee in an action for partnership dissolution and accounting to make an accounting and report back to the court [*Chapman v. Gipson (1951) 103 Cal. App. 2d 585, 588, 229 P.2d 834]* . When the parties do not consent, the court may appoint a referee pursuant to the provisions of *Code Civ. Proc. § 640(b)* regarding selection of referees upon the written motion of any party, or on its own motion whenever the taking of an account is necessary for the information of the court before judgment or for carrying a judgment or order into effect [*Code Civ. Proc. § 639(a)(2)*]. When a partner asks for an accounting and the court appointsa referee, the partner is not entitled to insist on any specific method of accounting by the referee [*Berker v. Barnes (1956) 139 Cal. App. 2d 294, 301, 293 P.2d 821]* .

For further discussion, a procedural guide, and forms relating to referees generally, see Ch. 38, *Reference* .

[c] Preliminary Injunction

In an action for partnership dissolution and an accounting, a temporary injunction is a proper ancillary remedy to preserve the status quo pending the outcome of the case on its merits [*Kendall v. Foulks (1919) 180 Cal. 171, 173, 179 P. 886]* . The preliminary injunction will be granted in the proper circumstances to assure that partnership assets remain intact pending the accounting [*Wind v. Herbert (1960) 186 Cal. App. 2d 276, 285-286, 8 Cal. Rptr. 817]* .

For discussion and forms relating to preliminary injunctions generally, see Ch. 303, *Injunctions* .

[3] Parties

In an action for dissolution and an accounting, all partners are necessary and indispensable parties [*Rudnick v. Delfino (1956) 140 Cal. App. 2d 260, 264-265, 294 P.2d 983]* . The grantee of a partner's interest in partnership property is also a necessary party in an accounting action [*Secondo v. Superior Court (1930) 105 Cal. App. 179, 181, 286 P. 1089]* .

In addition to any partner, the purchaser or assignee of a partner's interest ordinarily is entitled to a partnership accounting [former *Corp. Code § 15027(2)*; *see Chatten v. Martell (1958) 166 Cal. App. 2d 545, 551, 333 P.2d 364]* . The creditor of an individual partner, however, is not permitted to intervene in a partnership accounting action [*Isaacs v. Jones (1898) 121 Cal. 257, 262-263, 53 P. 793]* .

The heirs of a deceased partner are improper parties for bringing an accounting action [*Robertson v. Burrell (1895) 110 Cal. 568, 574, 42 P. 1086]* . Rather, the deceased partner's legal representative may bring an action to compel an accounting from the surviving partner [*Prob. Code § 9761*; *see § 406.18[5]*]. The surviving partner, on the other hand, has no cause of action for an accounting against the deceased partner's legal representative, since ordinarily the representative has no right to possession of the partnership property [*see McKay v. Joy (1886) 70 Cal. 581, 582, 11 P. 832* ; *see Prob. Code § 9761*].

For discussion and forms relating to joinder of parties and intervention, see Ch. 395, *Parties* .

[4] Statute of Limitations

An action for a partnership accounting is based not on contract, but on the relationship of the parties and their fiduciary duties. The period of limitations is therefore four years, under *Code Civ. Proc. § 343* [*Manok v. Fishman (1973) 31 Cal. App. 3d 208, 213, 107 Cal. Rptr. 266]* . The cause of action accrues as of the time of dissolution, regardless of whether or not the amount of the partners' interests can be ascertained at that time [*see* former *Corp. Code § 15043*; *Estate of Peebles (1972) 27 Cal. App. 3d 163, 169, 103 Cal. Rptr. 560]* .

[5] Venue

Venue for a partnership accounting action is governed by *Code Civ. Proc. § 395*, which provides that trial must be held in the county of the defendants' residence [*Rudnick v. Delfino (1956) 140 Cal. App. 2d 260, 265-266, 294 P.2d 983]* . The plaintiff is not permitted to deprive a defendant of this right by also seeking an order compelling the defendant to convey real property located in a different county [*Hays v. Cowles (1943) 60 Cal. App. 2d 514, 518, 141 P.2d 26* ; *see Coe v. Kessler (1956) 139 Cal. App. 2d 536, 541, 294 P.2d 83]* . A defendant partner is not permitted, however, to have venue changed to his or her county of residence when any other defendant partner resides in the county in which the suit was brought [*Rudnick v. Delfino (1956) 140 Cal. App. 2d 260, 265-266, 294 P.2d 983]* .

[6] Judgment

Equity will adjust all the differences between partners, and the accounting and decree must leave nothing open for future litigation or controversy [*Griggs v. Clark (1863) 23 Cal. 427, 429* ; *Rassaert v. Mensch (1911) 17 Cal. App. 637-642, 120 P. 1072]* . The account and judgment must include a settlement of all debts owing to partnership creditors [*Rassaert v. Mensch (1911) 17 Cal. App. 637-638, 641-642, 120 P. 1072]* . As to settling accounts between the partners, in the absence of a reference by the court a mere statement of the balance due in the court's findings is an improper disposition of the action, although any procedure of record from which it can be intelligently ascertained what the issues were as to controverted items and how those issues were disposed of is sufficient [*Whann v. Doell (1923) 192 Cal. 680, 684, 221 P. 899* ; *Davis v. California Motors (1946) 73 Cal. App. 2d 241, 246, 166 P.2d 52]* . The findings are required to set forth partnership assets, their value, and the capital balances of partners, although there is no requirement that assets be particularly described [*ABC Egg Ranch v. Abdelnour (1963) 223 Cal. App. 2d 12, 16, 35 Cal. Rptr. 487]* .

The judgment is final when no further judicial action is necessary to a final determination of the parties' asserted rights and when any unresolved issues relate solely to an ascertainment of the amount of money to be paid from the net proceeds of a sale to third parties, partnership creditors, and the receiver's and referee's expenses, with the remainder divided between the partners as the judgment specifies [*Zappettini v. Buckles (1914) 167 Cal. 27, 33-34, 138 P. 696* ; *but see Gunder v. Gunder (1929) 208 Cal. 559, 561, 282 P. 794* ; *Kinoshita v. Horio (1986) 186 Cal. App. 3d 959, 964-968, 231 Cal. Rptr. 241* (questioning Zappettini and holding interlocutory judgment that orders accounting but does not fix interests of partners or specify how expenses of winding up are to be allocated is not final for purposes of appeal)].

As a general rule, no personal judgment may be rendered against any partner until all the partnership assets have been converted into money, all partnership debts paid, and the final balance ascertained [*Hooper v. Barranti (1947) 81 Cal. App. 2d 570, 578, 184 P.2d 688* ; *Olmo v. Olmo (1943) 56 Cal. App. 2d 590, 594, 133 P.2d 866]* .

Legal Topics:

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

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[Reserved]

§§ 406.20[Reserved]

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§ 406.30 Governing Law

On and after January 1, 2010, the Uniform Limited Partnership Act of 2008 (ULPA '08) governs the dissolution of any limited partnership, regardless of the date on which the partnership was formed [*Corp. Code § 15912.06(b)* (ULPA '08); *see Corp. Code § 15908.01 et seq.* (ULPA '08) (dissolution provisions)]. However, the ULPA '08 does not affect an action commenced, proceeding brought, or right accrued before January 1, 2008 [*Corp. Code § 15912.07*]. Thus, because litigation involving California limited partnerships formed before 2008 may be governed by the ULPA or the CRLPA, this publication continues to provide forms for use in litigation under those laws as well as under the ULPA '08. All references to *Corp. Code § 15501 et seq.* (ULPA) and to *Corp. Code § 15611 et seq.* (CRLPA) in this chapter are to provisions repealed as of 2010.

Through the end of 2009, the dissolution of a limited partnership was governed by the ULPA '08 or by one of its predecessor laws, the California Revised Limited Partnership Act (CRLPA) [*Corp. Code § 15611 et seq.* (CRLPA); *see Corp. Code § 15681 et seq.* (CRLPA) (dissolution provisions)] and the Uniform Limited Partnership Act (ULPA) [*Corp. Code § 15501 et seq.*; *see Corp. Code §§ 15510, 15516, 15520, 15520.5, 15523* (ULPA) (dissolution provisions)], as follows:

- If the limited partnership was formed on or after January 1, 2008, its dissolution is governed by the ULPA '08 [*see Corp. Code § 15912.06(a)(1)* (ULPA '08)].

- If the limited partnership was formed on or after July 1, 1984, and before January 1, 2008, its dissolution was governed by the CRLPA [*see Corp. Code §§ 15711, 15714* (CRLPA); *Corp. Code § 15912.06(a)(1)* (CRLPA)] unless the partnership elected to be governed by the ULPA '08 [*see Corp. Code § 15912.06(a)(2)* (ULPA '08)].

- If the limited partnership was formed before July 1, 1984, its dissolution was governed by the ULPA [*see Corp. Code §§ 15711, 15714* (CRLPA)] unless the partnership elected to be governed by the CRLPA or the ULPA '08 [*see Corp. Code §§ 15712(b)(1)* (CRLPA), 15912.06(a)(2) (ULPA '08)]. Limited partnerships existing on July 1, 1984, were required to file new certificates of limited

> partnership in conformity with *Corp. Code § 15621(a)* (CRLPA). After filing, their certificates of dissolution, continuation, and cancellation, amendments to certificates, and formalities for executing or filing certificates were governed by *Corp. Code §§ 15621, 15628* (CRLPA). Once a certificate was filed pursuant to *Corp. Code §§ 15621-15628* (CRLPA), the limited partnership was not required to make any further filings or record any documents pursuant to the ULPA, and no one could rely on the accuracy or completeness of any information filed or recorded pursuant to the ULPA subsequent to the filing by the partnership of the certificate pursuant to *Corp. Code § 15621(a)* [*Corp. Code § 15712(b)(2)* (CRLPA)].

The ULPA '08 is a stand-alone law that does not rely on general partnership law or any other source for the rules governing limited partnerships. Thus, for the dissolution of a limited partnership governed by the ULPA '08, other laws generally need not be consulted for relevant rules. However, if the dissolution is governed by the ULPA or the CRLPA, matters not provided for by those statutes are governed by the general partnership laws, *Corp. Code §§ 16801-16807* (UPA '94) or former *Corp. Code §§ 15029-15043* (pre-'97 Act) [*see Corp. Code § 15722* (CRLPA)]. For discussion and forms relating to dissolution of general partnerships, see *§§ 406.10 -406.19, 406.60 -406.69*, respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 406.31 Causes of Dissolution

[1] ULPA '08

Unless a partner has applied to a court to dissolve the limited partnership [*see Corp. Code § 15908.02* (ULPA '08); *see also § 406.32[1]*], a limited partnership is dissolved, and its activities must be wound up, only on the occurrence of one of the following [*Corp. Code § 15908.01* (ULPA '08)]:

- The happening of an event specified in the partnership agreement.

- The consent of all general partners and of limited partners owning a majority of the rights to receive distributions as limited partners at the time the consent is to be effective.

- After the dissociation of a person as a general partner:

  - If the limited partnership has at least one remaining general partner, and a consent to dissolve the limited partnership is given within 90 days after the dissociation by partners owning a majority of the rights to receive distributions as partners at the time the consent is to be effective; or

  - If the limited partnership does not have a remaining general partner, the passage of 90 days after the dissociation, unless before the end of the period (a) consent to continue the activities of the limited partnership and admit at least one general partner is given by limited partners owning a majority of the rights to receive distributions as limited partners at the time the consent is to be effective; and (b) at least one person is admitted as a general partner in accordance with the consent.

- The passage of 90 days after the dissociation of the limited partnership's last limited partner, unless before the end of the period the limited partnership admits at least one limited partner.

[2] CRLPA

Under the CRLPA, a limited partnership is dissolved and its affairs must be wound up on the happening of the first to occur of the following [*Corp. Code § 15681* (CRLPA)]:

- At the time or on the happening of events specified in the partnership agreement;

- Except as otherwise provided in the partnership agreement, by written consent of all general partners and a majority in interest of the limited partners;

- When a general partner ceases to be a general partner under *Corp. Code § 15642* (CRLPA), unless (a) at the time there is at least one general partner and the partnership agreement permits the business of the partnership to be continued by the remaining general partner or partners, if any, and the partner or partners do so, or (b) at the time there is no remaining general partner and a majority in interest of the limited partners or the greater interest provided in the partnership agreement agree in writing to continue the business of the limited partnership and, within six months after the last remaining general partner has ceased to be a general partner, to admit one or more general partners; or

- The entry of a decree of judicial dissolution.

Absent an agreement to the contrary, limited partners have the right to vote on whether or not to dissolve the limited partnership and wind up its affairs [*Corp. Code § 15636(f)(1)(A)* (CRLPA); *see Corp. Code § 15632(b)(5)* (CRLPA)]. Unless an agreement provides otherwise, the general partners may not dissolve the partnership and wind up its affairs unless they have an affirmative vote of a majority in interest of the limited partners [*see Corp. Code § 15636(f)(3)* (CRLPA)].

[3] ULPA

[a] Generally

Under ULPA, the retirement, death, insanity, removal, or failure of reelection of a general partner dissolves the partnership, unless the business is continued by the remaining general partners and/or the replacement general partner or partners under a right to do so as stated in the certificate or with the consent of all members [*Corp. Code § 15520* (ULPA)]. Alternatively, if a partnership governed by ULPA is formed on or after November 1, 1973, or if the partnership is formed prior to that date and amends its certificate to elect to be governed by this provision, the retirement, death, or insanity of a general partner, but not the failure of the general partner's reelection, dissolves the partnership, unless the business is continued by the remaining general partners under a right to do so stated in the certificate or with the consent of all members [*see Corp. Code § 15520.5* (ULPA)].

[b] Limited Partners

A limited partner of a partnership that was in existence on July 1, 1984, and did not elect to be governed by the CRLPA has the same rights as a general partner to have dissolution and winding up by a court decree and have on demand a formal account of partnership affairs whenever circumstances render it just and reasonable [*Corp. Code § 15510(1)(b), (c)* (ULPA)]. In addition, a limited partner may have the partnership dissolved and its affairs wound up when the limited partner rightfully but unsuccessfully demands the return of his, her, or its contribution, or when the other liabilities of the partnership have not been paid or the partnership property is insufficient for their payment and the limited partner would otherwise be entitled to the return of his, her, or its contribution [*Corp. Code § 15516(4)* (ULPA)].

Legal Topics:

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§ 406.32 Dissolution by Decree

[1] ULPA '08

[a] Application for Judicial Dissolution

On application by a partner, a court of competent jurisdiction may order dissolution of a limited partnership if it is not reasonably practicable to carry on the activities of the limited partnership in conformity with the partnership agreement [*Corp. Code § 15908.02(a)* (ULPA '08)].

[b] Avoidance of Dissolution by Purchase of Interests

In any suit by a partner or partners for judicial dissolution, the other partners may avoid the dissolution of the limited partnership by purchasing for cash the partnership interests owned by the partners initiating the proceeding (the moving parties) at their fair market value. In fixing the value, the amount of any damages resulting if the initiation of the dissolution is a breach by any moving party or parties of an agreement with the purchasing party or parties, including, without limitation, the partnership agreement, may be deducted from the amount payable to the moving party or parties [*Corp. Code § 15908.02(b)* (ULPA '08)].

If the purchasing parties (1) elect to purchase the partnership interests owned by the moving parties, (2) are unable to agree with the moving parties upon the fair market value of the partnership interests, and (3) give bond with sufficient security to pay the estimated reasonable expenses, including attorney's fees, of the moving parties if the expenses are recoverable under paragraph (3), the court, on application by the purchasing parties, either in the pending action or in a proceeding initiated in the superior court of the proper county by the purchasing parties, must stay the winding up and dissolution proceeding and must proceed to ascertain and fix the fair market value of the partnership interests owned by the moving parties [*Corp. Code § 15908.02(c)* (ULPA '08)].

The court must appoint three disinterested appraisers to appraise the fair market value of the partnership interests owned by the moving parties. The court's order referring the matter to the appraisers must prescribe the time and manner of producing evidence, if evidence is required [*Corp. Code § 15908.02(d)* (ULPA '08)]. The valuation must be made as of

the date on which the action for judicial dissolution was commenced, unless the court on motion and hearing, and for good cause shown, designates some other date as the valuation date [*Corp. Code § 15908.02(f)* (ULPA '08)].

The award of the appraisers, or a majority of them, when confirmed by the court, will be final and conclusive on all parties. The court must enter a decree providing in the alternative for winding up and dissolution of the limited partnership unless payment is made for the partnership interests within the time specified by the decree. If the purchasing parties do not make payment for the partnership interests within the time specified, judgment will be entered against them and the surety or sureties on the bond for the amount of the expenses, including attorney's fees, of the moving parties. Any member aggrieved by the action of the court may appeal [*Corp. Code § 15908.02(d)* (ULPA '08)].

If the purchasing parties pay the moving parties the value of their partnership interests as decreed by the court, the moving parties must transfer their partnership interests to the purchasing parties [*Corp. Code § 15908.02(e)* (ULPA '08)].

[2] CRLPA

Pursuant to an action filed by a partner, a court of competent jurisdiction may decree the dissolution of a limited partnership whenever any of the following occurs [*Corp. Code § 15682* (CRLPA)]:

- It is not reasonably practicable to carry on the business in conformity with the partnership agreement;

- The general partners have been guilty of or have knowingly countenanced persistent and pervasive fraud or abuse of authority or persistent unfairness toward any partner or the property of the limited partnership is being misapplied or wasted by the general partners; or

- Dissolution is reasonably necessary for the protection of the rights or interests of the complaining partners.

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§ 406.33 Winding Up Partnership Affairs

[1] ULPA '08

A limited partnership continues after dissolution only for the purpose of winding up its activities [*Corp. Code § 15908.03(a)* (ULPA '08)]. In winding up its activities, the limited partnership may amend its certificate of limited partnership to state that the limited partnership is dissolved, preserve the limited partnership business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, transfer the limited partnership's property, settle disputes by mediation or arbitration, file a certificate of cancellation [*see Corp. Code § 15902.03* (ULPA '08)], and perform other necessary acts [*Corp. Code § 15908.03(b)(1)* (ULPA '08)]. The limited partnership must discharge its liabilities, settle and close its activities, and marshal and distribute its assets [*Corp. Code § 15908.03(b)(2)* (ULPA '08)].

If a dissolved limited partnership does not have a general partner, a person to wind up the dissolved limited partnership's activities may be appointed by the consent of limited partners owning a majority of the rights to receive distributions as limited partners at the time the consent is to be effective [*Corp. Code § 15908.03(c)* (ULPA '08)]. The person appointed has the powers of a general partner in winding up the partnership's activities [*Corp. Code § 15908.03(c)(1)* (ULPA '08); *see Corp. Code § 15908.04* (ULPA '08)]. The person appointed must promptly amend the certificate of limited partnership to state (1) that the limited partnership does not have a general partner, (2) the name of the person that has been appointed to wind up the limited partnership; and (3) the address of the person [*Corp. Code §§ 15902.02(b)(3), 15908.03(c)(2)* (ULPA '08)].

On the application of any partner, the appropriate court may order judicial supervision of the winding up, including the appointment of a person to wind up the dissolved limited partnership's activities, if (1) a limited partnership does not have a general partner and within a reasonable time following the dissolution no person has been appointed by consent of the limited partners, or (2) the applicant establishes other good cause [*Corp. Code § 15908.03(d)* (ULPA '08)].

Unless otherwise provided in the partnership agreement, limited partners winding up the affairs of the partnership pursuant to the foregoing procedures are entitled to reasonable compensation [*Corp. Code § 15908.03(e)* (ULPA '08)].

[2] CRLPA and ULPA

Under both CRLPA and ULPA, the affairs of a limited partnership are automatically wound up at the time of dissolution [*see Corp. Code §§ 15681, 15683* (CRLPA); *see also Corp. Code §§ 15510(1)(c), 15516(4)* (ULPA)]. CRLPA also provides for a separate decree ordering the winding up of a limited partnership. Under CRLPA, on the petition of limited partners representing 5 percent or more of the interests of the limited partners, or on the petition of three or more creditors, a court may enter a decree ordering winding up if it appears necessary for the protection of any parties in interest. The court's decree must designate the partners who are to wind up [*Corp. Code § 15683(b)* (CRLPA)]. Unless otherwise provided in the partnership agreement, the limited partners winding up the affairs of the partnership pursuant to such decree are entitled to reasonable compensation [*Corp. Code § 15683(c)* (CRLPA)].

Under CRLPA, except as provided in the partnership agreement, and subject to any court decree regarding winding up, the general partners who have not wrongfully dissolved the partnership, or if none, the limited partners, have the right to wind up partnership affairs [*Corp. Code § 15683(a)* (CRLPA)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 406.34 Disposition of Claims Against Dissolved Partnership

[1] Notice to Known Claimants

Under the ULPA '08, a dissolved limited partnership generally may dispose of known claims against it by using the following procedure [*Corp. Code § 15908.06(a)* (ULPA '08)]. First, the partnership may notify any of its known claimants of the dissolution in a written or electronic notice that includes all or the following [*Corp. Code § 15908.06(b)* (ULPA '08); *see Corp. Code § 15901.02(ac)* (ULPA '08)]:

- A specification of the information that must be included in a claim.
- The mailing address to which the claim is to be sent.
- The deadline for receipt of the claim, which may not be less than 120 days after the date the notice is received by the claimant.
- A statement that the claim will be barred if not received by the deadline.

After the foregoing notice is provided, a claim against the dissolved limited partnership will be barred if either of the following occurs [*Corp. Code § 15908.06(c)* (ULPA '08)]:

- The claim is not received by the specified deadline.
- In the case of a claim that is timely received but rejected in writing by the dissolved limited partnership, the claimant does not commence an action to enforce the claim against the limited partnership within 90 days after the receipt of a written notice of the rejection.

A claim against a dissolved limited partnership that is barred pursuant to the foregoing procedure may not be enforced against a general partner [*Corp. Code § 15908.08* (ULPA '08); *see Corp. Code § 15904.04* (ULPA '08) (liability of

general partners)].

The foregoing procedure does not apply to (1) any claim that is based on events occurring after the effective date of dissolution, or (2) any liability that is contingent on effective date of dissolution [*Corp. Code § 15908.06(d)* (ULPA '08)].

[2] Published Notice

Under the ULPA '08, a dissolved limited partnership may publish notice of its dissolution and request persons having claims against the limited partnership to present them in accordance with the notice [*Corp. Code § 15908.07(a)* (ULPA '08)]. The notice must meet be published at least once in a newspaper of general circulation in the county in which the dissolved limited partnership's principal office is located or, if it has none in California, in the county in which the limited partnership's designated office is or was last located [*Corp. Code § 15908.07(b)(1)* (ULPA '08)].

The published notice must describe the information required to be contained in a claim and provide a mailing address to which the claim is to be sent [*Corp. Code § 15908.07(b)(2)* (ULPA '08)]. The notice must also state that a claim against the limited partnership will be barred unless an action to enforce the claim is commenced within four years after publication of the notice [*Corp. Code § 15908.07(b)(3)* (ULPA '08)].

If a dissolved limited partnership publishes a notice in accordance with the foregoing requirements, the claim of each of the following claimants is barred unless the claimant commences an action to enforce the claim against the dissolved limited partnership within four years after the publication date of the notice [*Corp. Code § 15908.07(c)* (ULPA '08)]:

- A claimant that did not receive the direct written or electronic notice described in [1], *above* [*see Corp. Code § 15908.06(b)* (ULPA '08)].

- A claimant whose claim was timely sent to the dissolved limited partnership but not acted on.

- A claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.

A claim against a dissolved limited partnership that is barred pursuant to the foregoing procedure may not be enforced against a general partner [*Corp. Code § 15908.08* (ULPA '08); *see Corp. Code § 15904.04* (ULPA '08) (liability of general partners)].

A claim that is not barred may be enforced against the dissolved limited partnership, to the extent of its undistributed assets [*Corp. Code § 15908.07(d)(1)* (ULPA '08)]. If the assets have been distributed in liquidation, the claim may be enforced against a partner or transferee to the extent of that person's proportionate share of the claim or the limited partnership's assets distributed to the partner or transferee in liquidation, whichever is less, but a person's total liability for all claims may not exceed the total amount of assets distributed to the person as part of the winding up of the dissolved limited partnership [*Corp. Code § 15908.07(d)(2)* (ULPA '08)]. The claim may also be enforced against any person who was a general partner at the time the partnership incurred the obligation on which the claim is based [*Corp. Code § 15908.07(d)(3)* (ULPA '08); *see Corp. Code § 15904.04* (ULPA '08)].

Publication of a notice of dissolution of a limited partnership pursuant does not bar the collection of any tax, interest, penalty or addition to tax under the California franchise, personal income tax, and corporation tax law [*Corp. Code § 15908.07(e)* (ULPA '08); *see Rev. & Tax. Code §§ 17001 et seq., 18401 et seq., 23001 et seq.*].

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§ 406.35 Settling Accounts After Dissolution

[1] ULPA '08

In winding up a limited partnership's activities, the assets of the limited partnership must be applied to satisfy the limited partnership's obligations to creditors, including, to the extent permitted by law, partners that are creditors [*Corp. Code § 15908.09(a)* (ULPA '08)]. Any surplus remaining after paying creditors must be returned to the partners as they share in distributions [*Corp. Code § 15908.09(b)* (ULPA '08)].

If a limited partnership's assets are insufficient to satisfy all of its obligations to creditors, the following rules apply [*Corp. Code § 15908.09(c)* (ULPA '08)]:

> (1) Each person that was a general partner when the obligation was incurred and that has not been released from the obligation [*Corp. Code § 15906.07* (ULPA '08)] must contribute to the limited partnership for the purpose of enabling the limited partnership to satisfy the obligation. The contribution due from each of those persons is in proportion to the right to receive distributions in the capacity of general partner in effect for each of those persons when the obligation was incurred.
>
> (2) If a person does not contribute the full amount required under paragraph (1), the other persons required to contribute by paragraph (1) must contribute the additional amount necessary to discharge the obligation. The additional contribution due from each of those other persons is in proportion to the right to receive distributions in the capacity of general partner in effect for each of those other persons when the obligation was incurred.
>
> (3) If a person does not make the additional contribution required by paragraph (2), further additional contributions are determined and due in the same manner as provided in that paragraph.

Any person that makes an additional contribution as required *above* may recover from any person whose failure to contribute necessitated the additional contribution. In such a case, a person who made an additional contribution may

not recover more than the amount additionally contributed, and the person whose failure to contribute necessitated the additional contribution will not be liable for more than the amount the person failed to contribute [*Corp. Code § 15908.09(d)* (ULPA '08)].

The estate of a deceased individual is liable for the person's obligations to contribute when the limited partnership's assets are insufficient to satisfy all of its obligations [*Corp. Code § 15908.09(e)* (ULPA '08)].

An assignee for the benefit of creditors of a limited partnership or a partner, or a person appointed by a court to represent creditors of a limited partnership or a partner, may enforce a person's obligation to contribute [*Corp. Code § 15908.09(f)* (ULPA '08)].

[2] CRLPA

Under CRLPA, on the winding up of a limited partnership, the assets must be distributed in the following order [*Corp. Code § 15684* (CRLPA)]:

- First, to creditors, including partners who are creditors to the extent permitted by law, in satisfaction of liabilities of the partnership other than liabilities for distributions to partners of their interests in the partnership;

- Second, except as provided in the partnership agreement, to specific partners and former partners in satisfaction of specific liabilities for distributions of their interests in the partnership on withdrawal; and

- Third, to the partners in accordance with their rights under the partnership agreement and their rights to distribution generally.

Generally, no limited partner has priority over any other limited partner as to return of contributions or compensation by way of income [*Corp. Code § 15636(b)* (CRLPA)]. The profits and losses of a limited partnership must be allocated among the partners in the manner provided in the partnership agreement. If the agreement does not so provide, profits and losses are allocated in proportion to the contributions of each partner [*Corp. Code § 15653* (CRLPA)]. Distributions of partnership money or property are also made in accordance with the partnership agreement. If the agreement does not so provide, distributions that are a return of capital are made in proportion to contributions of each partner, and distributions that are a not a return of capital, are made in proportion to the allocation of profits [*Corp. Code § 15654* (CRLPA)].

[3] ULPA

Under ULPA, in settling accounts after dissolution, liabilities are paid in the following order [*Corp. Code § 15523(1)* (ULPA)]:

- First, those to creditors, in the order of priority provided by law, except those to limited partners on account of their contributions, and to general partners;

- Second, those to limited partners in respect to their share of the profits and other compensation by way of income on their contributions;

- Third, those to limited partners in respect to the capital of their contributions;

- Fourth, those to general partners other than for capital and profits;

- Fifth, those to general partners in respect to profits; and
- Sixth, those to general partners in respect to capital.

A limited partner may rightfully demand return of his, her, or its contribution on dissolution [*Corp. Code § 15516(2)(a)* (ULPA)]. Subject to any statement in the certificate or to subsequent agreement, limited partners share in the partnership assets in respect to their claims for capital, and in respect to their claims for profits or for compensation by way of income on their contributions respectively, in proportion to the respective amounts of such claims [*Corp. Code § 15523(2)*; *see Corp. Code §§ 15514, 15515* (ULPA)].

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§ 406.36 Dissolution and Certificates

[1] Certificate of Dissolution

Under CRLPA, on dissolution of the limited partnership, a certificate of dissolution must be filed with the Secretary of State, on a form prescribed by the Secretary of State [*Corp. Code § 15623(a)(1)* (CRLPA)]. The certificate must be filed by the person authorized to execute the certificate of cancellation in accordance with *Corp. Code § 15624* [*Corp. Code § 15623(a)(1)* (CRLPA); *see Corp. Code § 15624(a)(4)* (CRLPA)]. The certificate of dissolution must set forth the name of the limited partnership along with the Secretary of State's file number, the event causing the dissolution, and the date of the dissolution. It may also set forth any other information which the partners filing the certificate of dissolution determine to include [*Corp. Code § 15623(a)(2)* (CRLPA)].

The dissolution procedure under the ULPA '08 does not require the filing of a certificate of dissolution [*see Corp. Code § 15908.01 et seq.* (ULPA '08)].

[2] Certificate of Continuation

Under CRLPA, after the filing of a certificate of dissolution, the general partners may file a certificate of continuation in any of the following circumstances [*Corp. Code § 15623(c)(1)* (CRLPA)]:

- The business of the partnership is to be continued pursuant to the written consent of all the partners.

- The dissolution of the partnership was by written consent of all the partners pursuant to *Corp. Code § 15681(b)*, and each partner who consented to the dissolution has agreed in writing to revoke the partner's consent to the dissolution.

- The partnership was not in fact dissolved.

The continuation statement must set forth the name of the limited partnership, the Secretary of State's file number, and the grounds provided in *Corp. Code § 15623(c)(1)* that are the basis for the filing of the certificate of continuation [

Corp. Code § 15623(c)(2)]. On the filing of the certificate of continuation, the certificate of dissolution becomes ineffective effective as of the time the certificate of dissolution was filed, except to the extent provided in *Corp. Code § 15624(c)* [*Corp. Code § 15623(c)(3)* (CRLPA); *see* Ch. 405, *Partnerships: Actions Between Limited Partners or Partnerships and Third Parties*].

The dissolution procedure under the ULPA '08 does not provide for the filing of a certificate of continuation [*see Corp. Code § 15908.01 et seq.* (ULPA '08)].

[3] Certificate of Cancellation

[a] ULPA '08

A dissolved limited partnership that has completed winding up must deliver to the Secretary of State for filing a certificate of cancellation that states (1) the name of the limited partnership and the Secretary of State's file number, (2) the date of filing of its initial certificate of limited partnership, and (3) any other information as determined by the general partners filing the certificate or by any other person appointed to wind up the affairs of the partnership [*Corp. Code § 15902.03* (ULPA '08); *see Corp. Code § 15908.03(c), (d)* (ULPA '08) (appointment of person, in absence of general partner, to wind up affairs of limited partnership)]. The certificate of cancellation must be prepared on a form prescribed by the Secretary of State [*Corp. Code § 15902.03* (ULPA '08)].

[b] CRLPA

Once the winding up of partnership affairs has been completed, the person authorized to execute the certificate of cancellation in accordance with *Corp. Code § 15624* must file a certificate of cancellation of certificate of limited partnership. The certificate of cancellation is filed on a form prescribed by the Secretary of State [*see Corp. Code §§ 15623(b)(1), 15624(a)(4)* (CRLPA)]. The certificate of cancellation of certificate of limited partnership must set forth the name of the limited partnership along with the Secretary of State's file number and any other information the filing partners determine to include [*Corp. Code § 15623(b)(2)* (CRLPA)].

[4] Restated Certificate of Limited Partnership

Under CRLPA, if the partnership has filed several different certificates with the Secretary of State, a "restated certificate of limited partnership" that embodies in a single certificate all of the operative and in-effect provisions contained in the different certificates may be filed [*Corp. Code § 15622(e)(1)* (CRLPA)]. The restated certificate replaces the initial certificate and all amendments previously filed with the Secretary of State [*Corp. Code § 15622(e)(3)* (CRLPA)]. A restated certificate may include an amendment of the certificate of limited partnership not previously filed [*Corp. Code § 15622(e)(2)* (CRLPA)]. However, any amendment effected in connection with the restatement and integration of the certificate of limited partnership is subject to any other provision of the CRLPA, not inconsistent with this provision, that would apply if a separate certificate of amendment were filed to effect that amendment [*Corp. Code § 15622(e)(4)* (CRLPA)].

The restated certificate of limited partnership may be executed as any other certificate of amendment, as provided in *Corp. Code § 15624(a)(2)* [*Corp. Code § 15624(a)(8)* (CRLPA)]. Normally a certificate of amendment must be executed by all general partners (or fewer than all, as may be provided in the certificate of limited partnership) and by each general partner designated in the certificate as a new general partner [*Corp. Code § 15624(a)(2)*]. If the amendment states that a general partner has ceased to be a general partner, it need not be signed by that general partner. However, if the remaining general partners fail after demand to do so within a reasonable time, or refuse to do so, or if there are no remaining general partners and the limited partners winding up the limited partnership's affairs fail after demand to execute the amendment within a reasonable time, or refuse to do so, the certificate of amendment may be executed by that former general partner [*Corp. Code § 15624(a)(2)(A)*]. If the amendment is filed in accordance with *Corp. Code § 15622(c)*, concerning when a person other than a general partner is authorized to wind up the affairs of a

limited partnership, the certificate of amendment must be executed by each person authorized to wind up the limited partnership's affairs, and need not be signed by any former general partner or any general partner not winding up the limited partnership's affairs [*Corp. Code § 15624(a)(2)(B)*]. Further, if the general partners refuse to execute and file a certificate, or fail to file one within a reasonable time after demand, or if there is any dispute concerning the filing of the certificate of amendment, any partner may petition the superior court to direct the execution of the certificate [*see Corp. Code § 15625(b)* (CRLPA)].

[5] Execution of Certificates

[a] ULPA '08

A certificate of cancellation must be signed by all general partners listed in the certificate of limited partnership or, if the certificate of limited partnership of a dissolved limited partnership lists no general partners, by the person appointed to wind up the dissolved limited partnership's activities [*Corp. Code § 15902.04(a)(6)* (ULPA '08); *see Corp. Code § 15908.03(c), (d)* (ULPA '08) (appointment of person, in absence of general partner, to wind up affairs of limited partnership)].

[b] CRLPA

Certificates of dissolution, cancellation, and continuation must be executed by all general partners, or a lesser number if provided in the certificate of limited partnership [*Corp. Code § 15624(a)(3), (5)* (CRLPA)]. However, if the limited partners are winding up the partnership's affairs, the certificate of dissolution or the certificate of cancellation may only be executed by the person authorized by a majority in interest of the limited partners [*Corp. Code § 15624(a)(3), (4)*].

[6] Partnerships in Existence on July 1, 1984

Generally, a partnership in existence on July 1, 1984, is governed by ULPA, unless it elects to be governed by CRLPA [*see Corp. Code §§ 15533, 15711, 15712(b)(1)*; *see also § 406.30* and Ch. 404, *Partnerships: Actions Between Limited Partners and Partnerships*]. All partnerships in existence on July 1, 1984, however, must file a certificate of limited partnership with the Secretary of State, pursuant to *Corp. Code § 15621(a)* under the CRLPA, and are thereafter governed by those provisions of the CRLPA pertaining to the filing, cancellation, and amendment of certificates of limited partnership [*Corp. Code § 15712(b)(2)*; *but see Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd. (1993) 12 Cal. App. 4th 74, 92, 15 Cal. Rptr. 2d 585* (partnership dissolved on December 6, 1984, on expiration of terms specified in partnership agreement)]. Once a certificate has been filed pursuant to *Corp. Code §§ 15621, 15628*, the limited partnership is not required to make any further filings or record any documents pursuant to ULPA, and no one may rely on the accuracy or completeness of any information filed or recorded pursuant to ULPA subsequent to the filing by the partnership of the certificate pursuant to *Corp. Code § 15621(a)* [*Corp. Code § 15712(b)(2)* (CRLPA); *see Corp. Code §§ 15621, 15628* (CRLPA)].

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§ 406.37 Authority of General Partner

[1] ULPA '08

After dissolution, a limited partnership is bound by any act of a general partner that (1) is appropriate for winding up the limited partnership's activities; or (2) that would have bound the limited partnership before dissolution [*see Corp. Code § 15904.02* (ULPA '08)] if, at the time the other party enters into the transaction, the other party does not have notice of the dissolution [*Corp. Code § 15908.04(a)* (ULPA '08)].

If a general partner having knowledge of the dissolution causes a limited partnership to incur an obligation by an act that is not appropriate for winding up the partnership's activities, the general partner is liable to the limited partnership for any damage caused to the limited partnership arising from the obligation [*Corp. Code § 15908.05(a)(1)* (ULPA '08)]. If another general partner or a person dissociated as a general partner becomes liable for the obligation, the general partner whose act caused the obligation to be incurred is liable to that other general partner or person for any damage caused to that other general partner or person arising from the liability [*Corp. Code § 15908.05(a)(2)* (ULPA '08)].

A person dissociated as a general partner binds a limited partnership through an act occurring after dissolution if both [*Corp. Code § 15908.04(b)* (ULPA '08)]:

- At the time the other party enters into the transaction, less than two years have passed since the dissociation, and the other party does not have notice of the dissociation and reasonably believes that the person is a general partner; and

- The act (1) is appropriate for winding up the limited partnership's activities; or (2) would have bound the limited partnership before dissolution [*see Corp. Code § 15904.02* (ULPA '08)] and, at the time the other party enters into the transaction, the other party does not have notice of the dissolution.

If a person dissociated as a general partner causes a limited partnership to incur an obligation through an act occurring

after dissolution, the person is liable to the limited partnership for any damage caused to the limited partnership arising from the obligation [*Corp. Code § 15908.05(b)(1)* (ULPA '08)]. If another general partner or another person dissociated as a general partner is liable for the obligation, the person causing the obligation to be incurred is liable to the general partner or other person for any damage caused to the general partner or other person arising from the liability [*Corp. Code § 15908.05(b)(2)* (ULPA '08)].

[2] CRLPA

After dissolution, a general partner can bind the partnership by any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution. Under the CRLPA, the general partner may also bind the partnership by any transaction that would have bound the partnership if dissolution had not taken place, if the other party to the transaction either (1) had extended credit to the partnership prior to the dissolution and had no actual knowledge or notice of the dissolution, or (2) had known of the partnership prior to dissolution and had no actual knowledge or notice of the dissolution and a certificate of dissolution has not been filed [*Corp. Code § 15685* (CRLPA)].

[3] ULPA

ULPA is silent on the issue of when a general partner may bind the limited partnership after dissolution. Therefore, the law relating to generalpartnerships applies [*see* former *Corp. Code § 15006(2)* (pre-'97 Act); *Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd. (1993) 12 Cal. App. 4th 74, 91, 15 Cal. Rptr. 2d 585] . Corp. Code § 16804* and former *Corp. Code § 15035*, governing general partnerships, generally provide that a general partner may bind a partnership in transactions appropriate for winding up the partnership business or in transactions where the general partner could have bound the partnership before the dissolution and the other party had no notice of the dissolution. A partner's authority in a general partnership may be limited by filing a certificate of dissolution or under the pre-'97 Act publication of a notice of dissolution [*see Corp. Code § 16805*; former *Corp. Code § 15035(1)(b)(II)*].

Applying the pre-'97 Act, a general partner of a ULPA partnership that had dissolved on December 6, 1984, in accordance with the terms of the partnership agreement, had no authority to bind the partnership after that date for a transaction unrelated to the winding up of its affairs [*Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd. (1993) 12 Cal. App. 4th 74, 91-94, 15 Cal. Rptr. 2d 585* (general partner borrowed money for personal business and had partnership purportedly guaranty repayment)].

For discussion of a general partner's power to bind a general partnership after dissolution, see *§ 406.15[2]*.

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[Reserved]

§§ 406.38[Reserved]

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§ 406.50 Related Matthew Bender Publications

For memoranda of points and authorities relating to accounting actions generally, see California Points and Authorities, Ch. 12, *Accounting* (Matthew Bender)

For memoranda of points and authorities relating to actions involving partnerships generally, see California Points and Authorities, Ch. 170, *Partnerships and Joint Ventures* (Matthew Bender)

For forms relating to partnership dissolution, see California Legal Forms, Ch. 15, *General Partnerships*, Pt. B

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§ 406.51 State Statutes

[1] UPA'94

Partner's action to enforce rights. *Corp. Code § 16405(b)*

Events causing dissolution and winding up of general partnership. *Corp. Code § 16801*

Partnership terminates on completion of winding up of partnership business. *Corp. Code § 16802(a)*

Right of partners to waive dissolution. *Corp. Code § 16802(b)*

Partners and persons eligible to wind up partnership business. *Corp. Code § 16803*

Partner's acts that bind partnership after dissolution. *Corp. Code § 16804*

Statement of dissolution cancels statement of partnership authority. *Corp. Code § 16805*

Partner's liability for partnership liabilities incurred during winding up of partnership business. *Corp. Code § 16806(a)*

Partner's liability for acts not appropriate to winding up partnership business. *Corp. Code § 16806(b)*

Partnership assets applied to discharge creditor obligations first. *Corp. Code § 16807(a)*

Partner's entitlement to settlement of all partnership accounts on winding up partnership business. *Corp. Code § 16807(b)*

Partners' obligation to contribute when partnership obligations exceed partnership assets. *Corp. Code § 16807(c)*

Partner or representative entitled to recover amount to the extent that partner's contribution exceeds obligations for

which partner is personally liable. *Corp. Code § 16807(c)*

Estate liability for deceased partner's obligation to contribute. *Corp. Code § 16807(e)*

Right of assignee or appointed representative of creditors of partnership or partner to enforce partner's obligation to contribute. *Corp. Code § 16807(f)*

[2] Pre-'97 Act

[a] Accounting and Settlement

Partner's right to accounting generally. Former *Corp. Code § 15022*

Rules for settling accounts after dissolution. Former *Corp. Code § 15040*

Partner's right to accounting as accruing on dissolution of partnership. Former *Corp. Code § 15043*

[b] Assignee of Partner's Interest

Assignment of partner's interest does not of itself dissolve partnership. Former *Corp. Code § 15027(1)*

Partner's assignee entitled to assignor's interest on dissolution. Former *Corp. Code § 15027(2)*

[c] Continuation of Partnership Business

Continuation of partnership for fixed term. Former *Corp. Code § 15023*

Partner's assignment of partnership interest does not dissolve partnership. Former *Corp. Code § 15027(1)*

Rights of creditor generally on continuation of partnership business after dissolution. Former *Corp. Code § 15041*

Rights of retiring partner or legal representative of deceased partner on continuation of partnership business after dissolution. Former *Corp. Code § 15042*

[d] Death of Partner

Duty of last deceased partner's representative to account to partnership. Former *Corp. Code § 15021*

Rights of legal representative of deceased partner on continuation of partnership business. Former *Corp. Code § 15042*

[e] Dissolution Generally

Dissolution defined. Former *Corp. Code § 15029*

Partnership continues on dissolution until business is wound up. former *Corp. Code § 15030*

Causes of dissolution other than dissolution decreed by court. Former *Corp. Code § 15031*

Grounds for dissolution by court decree. Former *Corp. Code § 15032*

Termination of partner's authority on dissolution. Former *Corp. Code § 15033*

Notice of partnership dissolution required to be published. Former *Corp. Code § 15035.5*

[f] Partners' Powers, Rights, and Liabilities After Dissolution

Partners' rights to repayment, indemnification, and remuneration. Former *Corp. Code § 15018*

Liability of partner to copartners for partnership liability after dissolution. Former *Corp. Code § 15034*

Authority of partner to bind partnership after dissolution. Former *Corp. Code § 15035*

Effect of dissolution on partner's existing liability. Former *Corp. Code § 15036*

Right to wind up partnership affairs absent winding up by court. Former *Corp. Code § 15037*

Rights of partners on dissolution caused in any way other than by breach of partnership agreement. Former *Corp. Code § 15038(a)*

Rights of partners on dissolution caused by breach of partnership agreement. Former *Corp. Code § 15038(b)*

Partner entitled to rescind partnership contract for fraud or misrepresentation entitled to lien on partnership property, to standing as creditor, and to indemnification against partnership liabilities. Former *Corp. Code § 15039*

[2A] ULPA '08 effective January 1, 2008.
NOTE: Effective January 1, 2008.

Corp. Code § 15908.01. Causes of dissolution

Corp. Code § 15908.02. Application for dissolution; avoidance of dissolution by purchase of partnership interests

Corp. Code § 15908.03. Winding up; continuation of activities after dissolution

Corp. Code § 15908.04. Effect of general partner's and dissociated general partner's acts after dissolution

Corp. Code § 15908.05. Liability of general partner after dissolution

Corp. Code § 15908.06. Disposing of claims against dissolved partnership

Corp. Code § 15908.07. Notice of dissolution

Corp. Code § 15908.08. Barred claims

Corp. Code § 15908.09. Application of assets to satisfy obligations of creditors

[3] CRLPA repealed January 1, 2010; until then applicable to limited partnerships created on or after July

1, 1984, and before January 1, 2008, not electing to be governed by ULPA '08.

[a] Authority of Partner After Dissolution

When general partner binds partnership after dissolution. *Corp. Code § 15685*

[b] Certificates of Dissolution, Cancellation, or Continuation

Certificate of dissolution. *Corp. Code §§ 15623(a), 15624(a)(3), (b)*

Persons authorized to execute certificates of amendment, dissolution, cancellation, and continuation. *Corp. Code § 15624*

Certificate of cancellation. *Corp. Code §§ 15623(b), 15624(a)(4), (b)*

Certificate of continuation. *Corp. Code §§ 15623(c), 15624(a)(5), (b)*

Petition to court for direction to execute certificate of dissolution or cancellation. *Corp. Code § 15625*

[c] Dissolution and Winding Up

Limited partners as entitled to vote on dissolution and winding up of partnership. *Corp. Code §§ 15632(b)(5), 15636(f)(1)(A)*

Rights, powers, and liabilities of general partner as same as those of partner in general partnership. *Corp. Code § 15643*

Grounds for dissolution. *Corp. Code § 15681*

When court may decree dissolution. *Corp. Code § 15682*

Winding up by general partners or court decree. *Corp. Code § 15683(a)*

Petition by limited partners for winding up by decree. *Corp. Code § 15683(b)*

Compensation for limited partners winding up. *Corp. Code § 15683(c)*

[d] Distribution of Assets After Dissolution

Allocation of profits and losses of limited partnership. *Corp. Code § 15653*

Manner of distribution of partnership property. *Corp. Code § 15654*

Distribution of limited partner's interest on withdrawal. *Corp. Code § 15664*

General order of distribution. *Corp. Code § 15684*

[4] ULPA repealed January 1, 2010; until then applicable to limited partnerships existing on July 1, 1984, not electing to be governed by CRLPA or ULPA '08.

[a] Cancellation or Amendment of Certificate

Limited partnerships existing on July 1, 1984, are required to file certificate provided for in *Corp. Code § 15621(a)*; after so filing, certificates of limited partnership, dissolution, cancellation, and amendments to certificates governed by *Corp. Code § 15621-15628. Corp. Code § 15712(b)(2)*

[b] Dissolution

General partner has rights, powers, and liabilities of partner in general partnership. *Corp. Code § 15509*

Rights of limited and general partners to demand formal accounting and dissolution and winding up. *Corp. Code § 15510*

Alternative grounds for dissolution. *Corp. Code §§ 15520, 15520.5*

[c] Settling Accounts

Priorities among limited partners for return of contributions or compensation. *Corp. Code § 15514*

Limited partner's right to receive partnership income. *Corp. Code § 15515*

Limited partner has right to demand return of contribution on dissolution. *Corp. Code § 15516(2)(a)*

Limited partner has right to obtain dissolution and winding up on failure to receive return of contribution. *Corp. Code § 15516(4)*

Order of distribution on dissolution. *Corp. Code § 15523*

[5] Related California Statutes

[a] Covenant Not to Compete

Owner of business entity (including partnership, LLC, or corporation) disposing of entire ownership interest in entity may agree not to compete within specified geographic area as long as buyer carries on like business. *Bus. & Prof. Code § 16601*

Partner is permitted to agree not to compete on dissolution of partnership or dissociation from partnership. *Bus. & Prof. Code § 16602*

Surviving partner not appointed administrator when interested person objects. *Prob. Code § 8402*

Right of deceased partner's personal representative to compel surviving partner to render account. *Prob. Code § 9761*

Personal representative continuing partnership business of decedent on order of court. *Prob. Code § 9762*

[b] Discharging Partner From Existing Partnership Liabilities on Receivers

Appointing receiver for partnership assets. *Code Civ. Proc. § 564(b)(1)*

Powers of receiver. *Code Civ. Proc. § 568*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionBreach of Agreement & ExpulsionBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionContinuationBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionDeath & IncapacityBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpAccountingBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpDistribution of AssetsBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpDistribution of Estate PropertyBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpTerminationBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionPartnership LiabilitiesBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersTransfers of InterestsBusiness & Corporate LawLimited PartnershipsDissolution & Winding UpBusiness & Corporate LawLimited PartnershipsManagement Duties & Liabilities

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§ 406.52 Decisions

[1] Accounting

[a] Generally

Right to accounting established prima facie by dissolution of partnership. *Ferem v. Olson & Mahony (1917) 176 Cal. 652, 656, 169 P. 386*

Accounting necessary incident to dissolution, following as matter of course. *Cottle v. Leitch (1868) 35 Cal. 434, 440-441*

Equity adjusts all differences between partners; accounting and decree required to leave nothing open for future litigation or controversy. *Griggs v. Clark (1863) 23 Cal. 427, 429* ; *Rassaert v. Mensch (1911) 17 Cal. App. 637, 641-642, 120 P. 1072*

Division of partnership assets or arrangement for such division is not required to be contemporaneous with agreement for dissolution of partnership. *Fisher v. Fisher (1948) 83 Cal. App. 2d 357, 361, 188 P.2d 802*

General rule is that personal judgment cannot be entered against partner in suit for accounting and settlement until all partnership assets have been converted into money, debts paid, and final balance ascertained. *Hooper v. Barranti (1947) 81 Cal. App. 2d 570, 578, 184 P.2d 688* ; *Rassaert v. Mensch (1911) 17 Cal. App. 637, 641, 120 P. 1072*

Personal judgment is not rendered against partner until all partnership debts are paid. *Olmo v. Olmo (1943) 56 Cal. App. 2d 590, 594, 133 P.2d 866*

Grantee of partner's interest in partnership realty is necessary party to accounting. *Secondo v. Superior Court (1930) 105 Cal. App. 179, 181, 286 P. 1089*

[b] Action Improper

Heirs of deceased partner are improper parties for bringing suit for partnership accounting. *Robertson v. Burrell (1895) 110 Cal. 568, 574, 42 P. 1086*

Laches prevents partner from bringing action for accounting, when partnership had been dissolved more than twenty years earlier. *Harris v. Hillegass (1884) 66 Cal. 79, 80, 4 P. 987*

Partner does not properly plead action for accounting when complaint alleged dissolution by agreement had occurred two years earlier, and complaint did not allege any subsequent transactions or partnership assets or liabilities. *Loupias v. Rosen (1951) 102 Cal. App. 2d 781, 783-784, 228 P.2d 611*

[c] Costs and Fees

Court has discretion to tax partners proportionately for appraisers' fee. *Zeibak v. Nasser (1938) 12 Cal. 2d 1, 19-20, 82 P.2d 375*

Fee of expert accountant appointed by and acting under direction of court is chargeable cost in partnership dissolution action. *ABC Egg Ranch v. Abdelnour (1963) 223 Cal. App. 2d 12, 19, 35 Cal. Rptr. 487*

Assessment of receiver's costs, fees, and expenses is within sound discretion of trial court, and assessment of such costs against party whose conduct made appointment of receiver necessary is proper. *Luchs v. Ormsby (1959) 171 Cal. App. 2d 377, 389, 340 P.2d 702*

[d] Default Judgment

Because amount of money due cannot be specified in complaint for dissolution and accounting, plaintiff must give postcomplaint and predefault notice to defendant stating amount plaintiff will seek to prove due in case of default, with adequate time for defendant to respond before default is entered. *Ely v. Gray (1990) 224 Cal. App. 3d 1257, 1263-1264, 274 Cal. Rptr. 536*

[e] Injunction

In action for accounting and dissolution of partnership, temporary injunction to preserve status quo pending outcome of case on its merits is proper ancillary remedy. *Kendall v. Foulks (1919) 180 Cal. 171, 173, 179 P. 886*

Granting or denying of preliminary injunction does not amount to adjudication of ultimate rights in controversy, but only determines that court concludes that, pending trial, defendant should or should not be restrained from exercising rights claimed by him or her. *Kendall v. Foulks (1919) 180 Cal. 171, 175, 179 P. 886*

[f] Interest

Except when there has been fraudulent retention or improper application of partnership money, court does not charge partner with interest on partnership money in his or her hands. *Forsyth v. Butler (1907) 152 Cal. 396, 403, 93 P. 90*

When accounting and distribution of partnership assets are delayed through fault of partner having possession, interest is allowed from date when balance should have been ascertained and paid. *Chazan v. Most (1962) 209 Cal. App. 2d 519, 524, 25 Cal. Rptr. 864*

Partner is not entitled to interest on his or her capital contribution to partnership, absent special agreement among partners. *Luchs v. Ormsby (1959) 171 Cal. App. 2d 377, 387, 340 P.2d 702*

Partner is permitted to collect interest when partnership funds have been wrongfully withheld or when partner in charge of partnership books wrongfully makes overdraft. *Luchs v. Ormsby (1959) 171 Cal. App. 2d 377, 388, 340 P.2d 702*

When conduct of partner warrants, court has discretion to penalize partner by charging interest from date of dissolution. *Speka v. Speka (1954) 124 Cal. App. 2d 181, 187, 268 P.2d 129*

[g] Judgment

In absence of reference, mere statement of balance due in findings of court is improper disposition of action for accounting, although any procedure of record from which it can be intelligently ascertained what issues were as to controverted items and how issues were disposed of by court is sufficient. *Whann v. Doell (1923) 192 Cal. 680, 684, 221 P. 899* ; *Davis v. California Motors (1946) 73 Cal. App. 2d 241, 246, 166 P.2d 52*

Court should make sufficient statement of account to show main features of account and disposition of various controversies arising thereon in action for accounting. *Whann v. Doell (1923) 192 Cal. 680, 686, 221 P. 899*

In action for accounting between partners, judgment is final when no further judicial action is necessary to final determination of asserted rights of respective parties and unresolved issues relate solely to ascertainment of amount of money to be paid from net proceeds of sale to third parties, creditors of partnership, and expenses of receiver and referee, remainder to be divided between partners is specified in judgment. *Zappettini v. Buckles (1914) 167 Cal. 27, 33-34, 138 P. 696*

Interlocutory judgment that orders accounting but does not fix interests of partners or specify how expenses of winding up are to be allocated is not final for purposes of appeal. *Gunder v. Gunder (1929) 208 Cal. 559, 561, 282 P. 794* ; *Kinoshita v. Horio (1986) 186 Cal. App. 3d 959, 964-968, 231 Cal. Rptr. 241* (questioning Zappettini)

When surviving partners finished some and departing partners finished other unfinished business and other claims were litigated between surviving and departing partners, no partner required to pay claims before final adjudication of offsetting claims; proper procedure is to resolve all competing claims and then render net judgment. *Rosenfeld, Meyer & Susman v. Cohen (1987) 191 Cal. App. 3d 1035, 1049, 1063-1064, 237 Cal. Rptr. 14* (staying implementation of earlier judgments until last accounting resolved)

In suit for partnership accounting, findings of court are required to set forth partnership assets, their value, and capital balances of partners, although there is no requirement that assets be particularly described. *ABC Egg Ranch v. Abdelnour (1963) 223 Cal. App. 2d 12, 16, 35 Cal. Rptr. 487*

[h] Partnership Assets

When partners contribute land to partnership, land as partnership asset, despite agreement between partners that each should retain his or her title; partners as holding legal title in trust for partnership. *Chapman v. Hughes (1894) 104 Cal. 302, 304-305, 37 P. 1048*

Real property acquired by partnership is partnership asset, treated in equity as personalty, whether partnership was formed by oral or written contract. *Bates v. Babcock (1892) 95 Cal. 479, 487, 30 P. 605*

In action for partnership accounting, court does not inquire into source of title of partnership assets, whether realty or personalty. *Bates v. Babcock (1892) 95 Cal. 479, 487, 30 P. 605*

Although under recognized accounting principles each partner's interest in partnership's physical assets would be reflected in that partner's capital account, no double recovery results from separate allocation for payment of share of physical assets when dissolved firm's capital accounts reflected only draw entitlement for year. *Rosenfeld, Meyer & Susman v. Cohen (1987) 191 Cal. App. 3d 1035, 1053, 237 Cal. Rptr. 14*

Attorney's fees generated by cases in progress at time of dissolution of law partnership constitute unfinished business that is asset of dissolved partnership. *Jewel v. Boxer (1984) 156 Cal. App. 3d 171, 174, 203 Cal. Rptr. 13*

Goodwill is partnership asset, even in case of partnership at will. *Driskill v. Thompson (1956) 141 Cal. App. 2d 479, 484, 296 P.2d 834*

Partners are competent witnesses as to value of partnership property. *Vangel v. Vangel (1953) 116 Cal. App. 2d 615, 627, 254 P.2d 919*

Leasehold interests, permits to do business, and good will of partnership are partnership assets. *Ruppe v. Utter (1925) 76 Cal. App. 19, 24-25, 243 P. 715*

[i] Profits and Losses

In absence of special agreement between partners, each shares equally in profits and losses, despite fact that one partner may have contributed more or all of capital and others contributed merely services. *Griggs v. Clark (1863) 23 Cal. 427, 429*

[j] Referee

Court properly appoints referee in action for partnership dissolution and accounting. *Chapman v. Gipson (1951) 103 Cal. App. 2d 585, 588, 229 P.2d 834*

[k] Settlement Among Partners

[i] Generally

When there has been partial settlement between partners, accounting by court is properly limited to unsettled portion of partnership business. *Stretch v. Talmadge (1884) 65 Cal. 510, 511, 4 P. 513*

Agreement between partners settling partnership accounts bars action for accounting. *Cayton v. Walker (1858) 10 Cal. 450, 456*

Account stated between partners is permitted to be oral. *Fisher v. Fisher (1948) 83 Cal. App. 2d 357, 361, 188 P.2d 802*

[ii] Settling Account and Dividing Property

In absence of specific agreement as to division of assets on dissolution, division and distribution of assets into equal parts is improper before return of capital to partner who advanced it. *Tiffany v. Short (1943) 22 Cal. 2d 531, 534, 139*

P.2d 939

Arbitrator exceeded authority by declaring forfeiture of withdrawing partners' capital accounts; arbitration clause in partnership agreement precluded arbitrator from granting any remedy prohibited by agreement or not available in court of law; forfeiture was contrary to partnership law, partnership agreement, and decisional law. *O'Flaherty v. Belgum (2004) 115 Cal. App. 4th 1044, 1047, 1056-1061, 9 Cal. Rptr. 3d 286*

Court properly orders sale of property when dividing property in kind would have resulted in sale of property anyway. *Jacoby v. Feldman (1978) 81 Cal. App. 3d 432, 444-445, 146 Cal. Rptr. 334*

Division in kind of partnership assets on dissolution may be conditioned on satisfaction of all partnership obligations to third parties. *Logoluso v. Logoluso (1965) 233 Cal. App. 2d 523, 527, 43 Cal. Rptr. 678*

Partners' agreement to partial division in kind of partnership assets is valid and must be honored by court, as long as agreement is proved and not assailed on grounds of mistake or fraud. *Logoluso v. Logoluso (1965) 233 Cal. App. 2d 523, 528, 43 Cal. Rptr. 678*

Rules of partition apply to property division aspects of partnership dissolution action. *Logoluso v. Logoluso (1965) 233 Cal. App. 2d 523, 530, 43 Cal. Rptr. 678*

General rule on dissolution is that after taking accounting, court should require partnership property to be sold and after costs, expenses, and debts are paid, should divide balance. *Swarthout v. Gentry (1943) 62 Cal. App. 2d 68, 83, 144 P.2d 38*

For court to partition partnership assets on dissolution, partner is required to establish that partition can be made without serious loss to partners. *Swarthout v. Gentry (1943) 62 Cal. App. 2d 68, 84, 144 P.2d 38*

[2] Action for Contribution

When partner pays partnership debt existing after dissolution, he or she may maintain action in assumpsit against copartner for contribution, even if paying partner gave individual note for debt due from partnership and copartner did not expressly promise to repay partner. *Sears v. Starbird (1889) 78 Cal. 225, 231, 20 P. 547* ; *Kazman v. Light (1921) 53 Cal. App. 732, 734, 200 P. 768*

Partner who in substance made capital contributions to partnership by purchasing unsecured partnership debt from bank, as permitted by the partnership agreement, was entitled to indemnification from partnership; partnership's obligation to indemnify that partner then could be enforced against other partner personally as a matter of that partner's partnership obligations. *AB Group v. Wertin (1997) 59 Cal. App. 4th 1022, 1039, 69 Cal. Rptr. 2d 652*

After dissolution of partnership and full settlement of accounts, one partner may bring action at law against copartner for contribution. *Pilch v. Milikin (1962) 200 Cal. App. 2d 212, 222, 19 Cal. Rptr. 334*

[3] Actions Generally

Equitable principles apply in determining rights of parties to action for dissolution and accounting of partnership. *Bates v. McTammany (1938) 10 Cal. 2d 697, 700, 76 P.2d 513*

When partner filed complaint for dissolution based on partner's breach of partnership agreement and firm petitioned to compel arbitration, language of arbitration clause was held to extend to plaintiff's action which "arose out of or related

to" the partnership agreement [*Larkin v. Williams, Woolley, Cogswell, Nakazawa & Russell (1999) 76 Cal. App. 4th 227, 230-231, 90 Cal. Rptr. 2d 195* (reversing order denying petition to compel arbitration)].

Combining action at law for damages with action for partnership dissolution and accounting is proper. *Prince v. Harting (1960) 177 Cal. App. 2d 720, 736-737, 2 Cal. Rptr. 545*

When partnership is shown, court of equity may grant, in single action, dissolution, accounting, and decree for payment of any balance due. *Rudnick v. Delfino (1956) 140 Cal. App. 2d 260, 264, 294 P.2d 983*

When partnership has already been dissolved by partners, court is required only to distribute assets. *Lytle v. Kroenke (1945) 67 Cal. App. 2d 596, 602, 154 P.2d 919*

[4] Assignment

Assignment of all partnership assets by partners dissolves partnership and implies winding up of partnership affairs. *Wells v. Ellis (1885) 68 Cal. 243, 244-245, 9 P. 80*

Assignee of partnership interest entitled to remedies for settlement of partnership affairs that existed in favor of assignor, unless otherwise provided by law. *Chatten v. Martell (1958) 166 Cal. App. 2d 545, 550, 333 P.2d 364*

Sale, conveyance, transfer, or assignment by partner of his or her interest in partnership or property to copartner or third party does not of itself dissolve partnership, although entire circumstances connected with transfer may be sufficient to cause dissolution. *Chatten v. Martell (1958) 166 Cal. App. 2d 545, 551, 333 P.2d 364*

In determining what rights or interests pass under assignment, intent of parties as manifested in instrument is controlling. *Chatten v. Martell (1958) 166 Cal. App. 2d 545, 551, 333 P.2d 364*

Partner who has parted with his or her partnership interest is not permitted to join in action for dissolution of partnership. *Chatten v. Martell (1958) 166 Cal. App. 2d 545, 552, 333 P.2d 364*

Assignee is permitted to bring action on behalf of dissolved partnership. *Engleman v. Malchow (1949) 91 Cal. App. 2d 341, 344, 205 P.2d 413*

[5] Continuing Business

Partner has right to compensation for services in continuing partnership business even when he or she is at fault in causing dissolution of partnership. *Vangel v. Vangel (1955) 45 Cal. 2d 804, 810, 291 P.2d 25*

On rescission of partnership agreement for fraud and franchise law violations and dissolution of partnership, plaintiff entitled to continue to use partnership name, but defendant entitled to compensation for contributions that enhanced value of name. *Neptune Society Corp. v. Longanecker (1987) 194 Cal. App. 3d 1233, 1245-1246, 240 Cal. Rptr. 117*

Services rendered by accountants during period of continuation of partnership business after dissolution are not services rendered during winding up process, pursuant to former *Corp. Code § 15031,* and are not chargeable to partnership. *King v. Stoddard (1972) 28 Cal. App. 3d 708, 713, 104 Cal. Rptr. 903*

On dissolution of partnership, remaining partner has right to continue business under original partnership name. *Speka v. Speka (1954) 124 Cal. App. 2d 181, 190, 268 P.2d 129*

Partners permitted to agree that partnership will not be dissolved by death of partner; that interest of deceased partner may be purchased by surviving partners for stated sum or formula; or that investment of deceased partner will continue, and statutes do not control partnership liquidation under such circumstances. *Wood v. Gunther (1949) 89 Cal. App. 2d 718, 727, 201 P.2d 874*

New partner, joining with surviving partner to continue business of dissolved partnership, is not liable for obligations of old partnership, even though he or she holds himself or herself out as being liable, absent some new consideration or some prejudice suffered by creditors induced by his or her representations. *Wood v. Waterman (1929) 102 Cal. App. 516, 521, 283 P. 143*

[6] Death or Retirement of Partner

[a] Actions by Remaining Partner

Surviving partner's expenditure of time, labor, and skill in administration of partnership assets incident to successful termination of unfinished business entitles him or her to remuneration under former *Civ. Code § 2412* (*now see Corp. Code § 16401(h)*). *Jacobson v. Wikholm (1946) 29 Cal. 2d 24, 29, 172 P.2d 878*

Burden of proof is on surviving partner to establish his or her compensation claim for services in winding up partnership. *Jacobson v. Wikholm (1946) 29 Cal. 2d 24, 32, 172 P.2d 878*

Action by surviving partner against estate of deceased partner for recovery of possession of partnership property constitutes action for claim and delivery, not for accounting, and any accounting requested is incidental to demand for possession. *Wrightson v. Dougherty (1936) 5 Cal. 2d 257, 261-262, 54 P.2d 13*

Surviving partner has no action in equity for accounting against administrator of deceased partner, because statute gives him or her that power anyway. *Wrightson v. Dougherty (1936) 5 Cal. 2d 257, 264, 54 P.2d 13*

In actions on claims for or against partnership, surviving partner is permitted to sue or be sued alone, and in such actions by or against surviving partner, executors or administrators of deceased partners are not necessary parties. *Minifie v. Rowley (1921) 187 Cal. 481, 484, 202 P. 673*

Partners not permitted to bring action at law for damages against partner who has retired from partnership until accounting has been had. *Ross v. Cornell (1872) 45 Cal. 133, 136*

[b] Partnership Creditors

Retiring partner liable to creditor of continuing partnership if he or she does not give creditor notice of his or her retirement. *Williams v. Bowers (1860) 15 Cal. 321, 321*

In suit brought by creditor of partnership against partnership and surviving partner, neither executor nor heirs of deceased partner are indispensable or necessary parties. *Pearson v. Norton (1964) 230 Cal. App. 2d 1, 18, 40 Cal. Rptr. 634*

[c] Rights and Duties of Retiring Partner or Legal Representative of Deceased Partner

Retiring partner entitled to have accounting made before being compelled to choose between profits and interest pursuant to former *Corp. Code § 15042*. *Casida v. Roberts (1959) 51 Cal. 2d 853, 857, 337 P.2d 829*

Value of retiring partner's share for purpose of former *Corp. Code § 15042* must be determined as of date of partnership dissolution. *Casida v. Roberts (1959) 51 Cal. 2d 853, 856, 337 P.2d 829*

Administrator or executor of deceased partner has no power to handle partnership property or affairs because right to possession, control, and disposition of partnership property vests in surviving partner. *Minifie v. Rowley (1921) 187 Cal. 481, 483-484, 202 P. 673*

Executor of will of last surviving partner entitled to bring action for recovery of partnership property without joining executors of wills of earlier deceased partners. *Minifie v. Rowley (1921) 187 Cal. 481, 484, 202 P. 673*

Application of former *Corp. Code § 15042*, which entitled deceased partner's estate to interest or profits attributable to decedent's share in partnership "unless otherwise agreed,' is not precluded when partnership agreement sets out method for appraising value of decedent's share, but is silent on issue of payment of interests or profits. *Estate of Zucker (1990) 218 Cal. App. 3d 1198, 1204, 268 Cal. Rptr. 4*

Delay in appraising value of deceased partner's share in partnership does not justify refusal to pay estate interest on value under former *Corp. Code § 15042*, absent findings that estate either acted in bad faith or was more than partially responsible for delay. *Estate of Zucker (1990) 218 Cal. App. 3d 1198, 1204, 268 Cal. Rptr. 4*

In real estate investment partnership, profits accruing under former *Corp. Code § 15042* on retired partner's interest used by continuing partners before settlement of account does not include postdissolution appreciation of value of realty owned on date of dissolution and later sold; facts that retired partner, an attorney, joined competing business and never told continuing partners of legal consequences of failure to settle account as equitable considerations. *Oliker v. Gershunoff (1987) 195 Cal. App. 3d 1288, 1303-1307, 241 Cal. Rptr. 415*

Retiring partner who waits too long to compel liquidation and distribution of any net proceeds under former *Corp. Code § 15038* is left only with right to accounting under *Corp. Code § 15042*. *Oliker v. Gershunoff (1987) 195 Cal. App. 3d 1288, 1303-1307, 241 Cal. Rptr. 415*

Under former *Corp. Code § 15042*, departing partner is required to elect share of postdissolution profits attributable to use of his or her share of assets of former partnership or payment of prejudgment interest; claim to share profits maintained for nine years of postdissolution litigation between former partners is election barring right to prejudgment interest. *Rosenfeld, Meyer & Susman v. Cohen (1987) 191 Cal. App. 3d 1035, 1055-1056, 237 Cal. Rptr. 14*

[d] Rights and Duties of Remaining Partner

Right of surviving partner to possession of partnership property accrues at death of copartner. *Wrightson v. Dougherty (1936) 5 Cal. 2d 257, 261, 54 P.2d 13*

Surviving partner is trustee of partnership property and owes maximum of good faith and personal confidence to decedent and decedent's beneficiaries. *Sibert v. Shaver (1952) 111 Cal. App. 2d 833, 839, 245 P.2d 514*

When one partner becomes disabled and unable to participate in partnership business, copartner continuing business after dissolution appropriates good will of business and has duty to account to retired partner for value of good will. *Miller v. Hall (1944) 65 Cal. App. 2d 200, 205-206, 150 P.2d 287*

If surviving partner fails to exercise right to continue in possession of partnership for purpose of settling its business, executor or administrator of estate of deceased partner required to take possession of deceased partner's partnership

interest. *Normart v. Safer (1924) 67 Cal. App. 507, 514-515, 227 P. 943*

[7] Dissolution Improper

Equity will refuse dissolution when it will prevent loss to partnership and dissolution would require later action for breach of contract. *Bates v. McTammany (1938) 10 Cal. 2d 697, 700, 76 P.2d 513*

Although there is no such thing as indissoluble partnership, grounds for premature dissolution are required to be serious and dissolution is unjustifiable when it will cause losses to partnership or destruction of value of partnership assets or property. *Bates v. McTammany (1938) 10 Cal. 2d 697, 701, 76 P.2d 513*

[8] Dissolution Proper

Grounds exist for judicial dissolution of partnership when there were bitter, antagonistic feelings between partners, handling of partnership business required cooperation, and partners were incapable of carrying on business to their mutual advantage. *Owen v. Cohen (1941) 19 Cal. 2d 147, 152, 119 P.2d 713*

Dissolution and accounting is proper action for breach of partnership agreement. *Vaughan v. Caldwell (1927) 200 Cal. 572, 576, 253 P. 929*

On fraud of partner, copartner is entitled to judicial dissolution even if partnership was for fixed term. *Cottle v. Leitch (1868) 35 Cal. 434, 439*

Sufficient grounds for dissolving partnership under former *Corp. Code § 15032(1)(d), (f)* exist when partners engaged in questionable accounting procedures, subjecting estate of deceased partner to possible tax liability, and when representative of deceased partner's estate, as nonvoting member of partnership, had no authority to have accounting procedures changed. *Jacoby v. Feldman (1978) 81 Cal. App. 3d 432, 443, 146 Cal. Rptr. 334*

Misconduct that is injurious to partnership constitutes grounds for judicial dissolution. *Chatten v. Martell (1958) 166 Cal. App. 2d 545, 551, 333 P.2d 364*

If partnership will continue to lose money, partner entitled to insist on dissolution. *Wallace v. Sinclair (1952) 114 Cal. App. 2d 220, 231, 250 P.2d 154*

No partnership is indissoluble. *Wallace v. Sinclair (1952) 114 Cal. App. 2d 220, 232, 250 P.2d 154*

[9] Dissolution by Partners

Partner not permitted to dissolve partnership to gain benefits of business for himself or herself unless he or she fully compensates copartner for share of prospective business opportunity. *Page v. Page (1961) 55 Cal. 2d 192, 197, 10 Cal. Rptr. 643, 359 P.2d 41*

Partner has power to dissolve partnership by express notice to copartner, although if partner acts in bad faith and violates fiduciary duty by attempting to appropriate new partnership prosperity to his or her own use without compensating copartner, he or she will be liable for wrongful dissolution under former *Corp. Code § 15038(b)(1)(B). Page v. Page (1961) 55 Cal. 2d 192, 197, 10 Cal. Rptr. 643, 359 P.2d 41*

Partnership for particular undertaking not dissolved by express will of partner. *Zeibak v. Nasser (1938) 12 Cal. 2d 1,*

13, 82 P.2d 375

Death of partner does not necessarily dissolve partnership. *Zeibak v. Nasser (1938) 12 Cal. 2d 1, 17, 82 P.2d 375*

[10] Dissolution Decree

Judgment in partnership dissolution action is interlocutory and not subject to appeal when further audit of partnership books is required and receiver is directed to report to court so that court may ascertain amounts due between partners and when court did not finally determine relative rights ofpartners in partnership assets. *Bakewell v. Bakewell (1942) 21 Cal. 2d 224, 227, 130 P.2d 975*

Dissolution may be decreed under prayer for general relief if dissolution is one purpose of action and sufficient facts are stated in complaint to warrant it. *Sager v. Estergren (1937) 18 Cal. App. 2d 382, 384*

Court may decree dissolution of partnership before date of judgment. *McAtee v. McAtee (1930) 105 Cal. App. 555, 559, 288 P. 114*

[11] Effect of Dissolution

[a] Generally

Dissolution operates only with respect to future transactions; as to everything past, partnership continues until all preexisting matters are terminated. *Cotten v. Perishable Air Conditioners (1941) 18 Cal. 2d 575, 577, 116 P.2d 603*

Dissolution does not destroy authority of partner to act for his or her former partners in matters in which they still have common interest and are under common liability. *Cotten v. Perishable Air Conditioners (1941) 18 Cal. 2d 575, 577, 116 P.2d 603*

Service of process on partner pursuant to former *Code Civ. Proc. § 388* (*now see Code Civ. Proc. § 369.5*), after dissolution of partnership but before its termination, vests court with jurisdiction to render valid and binding judgment against partnership. *Cotten v. Perishable Air Conditioners (1941) 18 Cal. 2d 575, 577, 116 P.2d 603*

Law firm's conduct in breaching lease was chargeable to departing partner as act within scope of winding up firm's affairs; lease was partnership obligation that came into being before dissolution and was matter in which all partners had common interest and were under common liability. *Principal Mutual Life Insurance Company v. Vars, Pave, McCord & Freedman (1998) 65 Cal. App. 4th 1469, 1489-1490, 77 Cal. Rptr. 2d 479 , citing Cotten v. Perishable Air Conditioners (1941) 18 Cal. 2d 575, 577, 116 P. 2d 603 , above*

Individual partner's liability for existing partnership liability is not terminated on dissolution except by performance of agreement creating that liability, or by express or implied consent of other contracting party that he or she need not perform. *Redman v. Walters (1979) 88 Cal. App. 3d 448, 453, 152 Cal. Rptr. 42*

When partnership is dissolved, authority of partner to bind copartner is revoked and agency is ended. *Vogler v. Ingrao (1954) 123 Cal. App. 2d 341, 343, 266 P.2d 826*

Dissolution does not by itself affect rights of third parties who have previously dealt with partnership, unless third parties consent. *Rassaert v. Mensch (1911) 17 Cal. App. 637, 641, 120 P. 1072*

Dissolution has no effect on property of partners or their interests, except that they lose power to act for each other.

Rassaert v. Mensch (1911) 17 Cal. App. 637, 644, 120 P. 1072

[b] Notice of Dissolution

Defendant partner required to show that creditor had actual notice of partnership dissolution if creditor had prior credit dealings with partnership. *Credit Bureaus of Merced County v. Shipman (1959) 167 Cal. App. 2d 673, 678, 334 P.2d 1036*

Publication of notice of dissolution of partnership does not alone compel finding of creditor's actual knowledge of dissolution. *Credit Bureaus of Merced County v. Shipman (1959) 167 Cal. App. 2d 673, 678, 334 P.2d 1036*

Partnership is not bound if creditor had actual notice of dissolution at time of transaction, even though notice of dissolution had not been published pursuant to former *Corp. Code § 15035.5*. *Carvalho v. McCoy (1954) 128 Cal. App. 2d 702, 705, 276 P.2d 21*

Partner seeking to avoid liability has burden of showing that creditor of partnership had notice of dissolution of partnership prior to transaction. *Epley v. Hiller (1954) 128 Cal. App. 2d 100, 104, 274 P.2d 696*

Creditor required to know of existence of partnership prior to its dissolution, and has burden of proving that knowledge, in order to bind partnership for acts of partner after dissolution, pursuant to former *Corp. Code § 15035*. *Vogler v. Ingrao (1954) 123 Cal. App. 2d 341, 344, 266 P.2d 826*

[12] Expulsion of Partner

Expulsion of a partner will not cause dissolution if the partnership agreement provides for continuation in that event. *Heller v. Pillsbury, Madison & Sutro (1996) 50 Cal. App. 4th 1367, 1385 n.6, 58 Cal. Rptr. 2d 336*

[13] Judicial Dissolution

Act that is sufficient grounds for a judicial dissolution does not of itself dissolve partnership, and court decree is necessary to dissolve partnership. *Vangel v. Vangel (1953) 116 Cal. App. 2d 615, 626, 254 P.2d 919*

[14] Liquidating Partner

If one partner sells his or her interest in partnership to third party, right to control and disposition of firm assets vests in remaining partners and receiver is not appointed in absence of showing of prejudice to retiring partners in permitting remaining partners to liquidate. *Mervyn Investment Co. v. Biber (1921) 184 Cal. 637, 644, 194 P. 1037*

Liquidating partner has duty to wind up affairs of partnership, pay its debts out of assets, if sufficient, and divide residue, if any, among those entitled to it. *Glassell v. Prentiss (1959) 175 Cal. App. 2d 599, 605, 346 P.2d 895*

Surviving or liquidating partner, if not trustee, is at least quasi trustee for former partners. *Metzenbaum v. Metzenbaum (1953) 115 Cal. App. 2d 395, 398, 252 P.2d 31*

Although liquidating partner derives personal benefit from defending adverse claims to partnership assets, he or she is entitled to reimbursement from retired partner for reasonable attorney's fees incurred in defense. *Metzenbaum v. Metzenbaum (1953) 115 Cal. App. 2d 395, 400, 252 P.2d 31*

[15] Parties

Creditor of individual partner not permitted to intervene in action for partnership dissolution and accounting. *Isaacs v. Jones (1898) 121 Cal. 257, 262-263, 53 P. 793*

Action for partnership dissolution brought by partners only. *Behlow v. Fischer (1894) 102 Cal. 208, 216, 36 P. 509*

In action for dissolution of partnership and accounting, all partners are necessary and indispensable parties. *Rudnick v. Delfino (1956) 140 Cal. App. 2d 260, 264-265, 294 P.2d 983*

[16] Partnership Creditors

Debts of partnership must be settled before distributing partnership assets to partners. *Ohio Casualty Ins. Co. v. Harbor Ins. Co. (1968) 259 Cal. App. 2d 207, 216, 66 Cal. Rptr. 340*

Creditors of partnership have priority to partnership assets over creditors of individual partners. *Ohio Casualty Ins. Co. v. Harbor Ins. Co. (1968) 259 Cal. App. 2d 207, 216, 66 Cal. Rptr. 340*

[17] Partnership for Fixed Term

When partnership has leased property for purpose of carrying on particular business and no fixed period is set for duration of partnership, partnership deemed by implication to continue during term of lease and thus for fixed term. *Zeibak v. Nasser (1938) 12 Cal. 2d 1, 12-13, 82 P.2d 375*

[18] Receiver

Arbitrator had no jurisdiction to adjudicate claims of partnership in receivership, in view of receiver's objection to attorney's filing of action and counter-demand for arbitration on behalf of partnership. *O'Flaherty v. Belgum (2004) 115 Cal. App. 4th 1044, 1047, 1061-1063, 9 Cal. Rptr. 3d 286*

In action to dissolve partnership, court properly appoints receiver to carry out interlocutory decree ordering accounting. *Paola v. Huston (1957) 150 Cal. App. 2d 206, 212, 309 P.2d 529*

Court has power to direct receiver to take and keep possession of property. *Steinberg v. Goldstein (1956) 145 Cal. App. 2d 692, 698, 303 P.2d 80*

Court has authority to direct receiver to sell assets of partnership, including lease, if necessary to preserve assets for disposition under judgment on merits. *Steinberg v. Goldstein (1956) 145 Cal. App. 2d 692, 700, 303 P.2d 80*

Receiver appointed by court is agent and officer of court and property in his or her hands as under control and continuous supervision of court. *Steinberg v. Goldstein (1954) 129 Cal. App. 2d 682, 685, 278 P.2d 22*

Court has power and jurisdiction to determine extent of property embraced by receivership; court has power to determine whether particular property is or is not involved in action and receivership proceeding. *Steinberg v. Goldstein (1954) 129 Cal. App. 2d 682, 686, 278 P.2d 22*

In action for dissolution of partnership, request by partner is insufficient grounds for court appointment of receiver; to

appoint receiver, court must be satisfied that property is in danger of being lost, removed, or materially injured. *McCaslin v. Kenney (1950) 100 Cal. App. 2d 87, 95, 223 P.2d 94*

[19] Res Judicata

Claims based on same facts and theories as those asserted in other action as affirmative defense of unclean hands is barred by res judicata effect of judgment in other action. *Rosenfeld, Meyer & Susman v. Cohen (1987) 191 Cal. App. 3d 1035, 1060-1062, 237 Cal. Rptr. 14*

[20] Statute of Limitations

Partner's assertion of rights and ownership of partnership business to exclusion of copartner constitutes sufficient repudiation of latter's rights to start running of statute of limitations on personal claim or on any theory of trust. *Middleton v. Newport (1936) 6 Cal. 2d 57, 62, 56 P.2d 508*

Limitation period on former partners' cause of action against other former partners for fraud based on concealment of profit is derived from sale and rental of property to dissolved partnership is postponed by fraudulent concealment and does not commence until plaintiffs had actual or inquiry notice. *Rosenfeld, Meyer & Susman v. Cohen (1987) 191 Cal. App. 3d 1035, 1059-1060, 237 Cal. Rptr. 14*

Action for partnership accounting is based not on contract but on relationship of parties and fiduciary duties; therefore, period of limitations is four years under *Code Civ. Proc. § 343*. *Manok v. Fishman (1973) 31 Cal. App. 3d 208, 213, 107 Cal. Rptr. 266*

Cause of action for accounting accrues at death of partner, even though amount of deceased partner's interest may not then be ascertainable, giving estate representative maximum of four years after death of partner to commence action, or two years if *Code Civ. Proc. § 339* applies. *Estate of Peebles (1972) 27 Cal. App. 3d 163, 169, 103 Cal. Rptr. 560*

[21] Unfinished Business

Remaining partners' bad faith in connection with dissolution (failure to properly account for income from unfinished business, repudiation agreement settling compensation dispute) does not bar right to accounting and share of profits from unfinished business completed by withdrawing partners. *Rosenfeld, Meyer & Susman v. Cohen (1987) 191 Cal. App. 3d 1035, 1060-1062, 237 Cal. Rptr. 14*

Absent partnership agreement, attorney's fees received on cases in progress on dissolution is postdissolution income of unfinished business to be allocated to former partners according to their respective ownership interests in former partnership. *Jewel v. Boxer (1984) 156 Cal. App. 3d 171, 177-178, 203 Cal. Rptr. 13*

Court must look at circumstances existing on date of dissolution of partnership, and not to events occurring thereafter, to determine whether business of dissolved partnership is unfinished business. *Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal. App. 3d 200, 200, 217, 194 Cal. Rptr. 180* (*disapproved on other grounds in Applied Equipment Corp. v. Litton Saudi Arabia Limited (1994) 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454*)

Case in progress on date of dissolution of law partnership is unfinished business. *Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal. App. 3d 200, 200, 217,194 Cal. Rptr. 180* (*disapproved on other grounds in Applied Equipment Corp. v. Litton Saudi Arabia Limited (1994) 7 Cal. 4th 503, 28 Cal. Rptr. 2d 475, 869 P.2d 454*)

[22] Venue

Action for accounting is personal action and defendant entitled to have trial in county of his or her residence; plaintiff not permitted to deprive defendant of such right by also seeking order compelling defendant to convey real property located in different county. *Hays v. Cowles (1943) 60 Cal. App. 2d 514, 518, 141 P.2d 26* ; *see Coe v. Kessler (1956) 139 Cal. App. 2d 536, 541, 294 P.2d 83*

Venue for dissolution of partnership governed by *Code Civ. Proc. § 395*. *Rudnick v. Delfino (1956) 140 Cal. App. 2d 260, 264, 294 P.2d 983*

Defendant partner in partnership dissolution action as not permitted to have venue changed to his or her county of residence when any other defendant partner resides in county in which suit was brought. *Rudnick v. Delfino (1956) 140 Cal. App. 2d 260, 265-266, 294 P.2d 983*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionContinuationBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionDeath & IncapacityBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionWithdrawalBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpAccountingBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpDistribution of AssetsBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpDistribution of Estate PropertyBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpTerminationBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesCauses of ActionGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesFiduciary ResponsibilitiesGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesFiduciary ResponsibilitiesDuty of Good Faith & LoyaltyBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersTransfers of InterestsCivil ProcedureRemediesEquitable AccountingsGeneral OverviewCivil ProcedureRemediesEquitable AccountingsPartnerships

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35-406 California Forms of Pleading and Practice--Annotated § 406.53

§ 406.53 Law Reviews

Shayne, *Addressing Dissolution Issues in Partnership Agreements, 43(3) Prac. Law. 15 (1997)*

Comment, *The Expulsion Clause in a Partnership Agreement: A Pre-Planned Dissolution, 13 UCD L Rev 868 (1980)*

Barcal, *Liquidation of a Partnership Interest Tax Aspects, 47 L.A. Bar B. 380 (1972)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsDissolution & Winding UpGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionGeneral OverviewContracts LawTypes of ContractsPartnership AgreementsTax LawState & Local TaxesIncome TaxPartnerships

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§ 406.54 Text References

Witkin, Summary of California Law 1998, Vol. 6, Partnership, §§ 47-60 (9th ed 1988)

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35-406 California Forms of Pleading and Practice--Annotated §§ 406.55-406.59

[Reserved]

§§ 406.55[Reserved]

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A. General Partnerships

35-406 California Forms of Pleading and Practice--Annotated § 406.60

§ 406.60 Complaint for Partnership Dissolution, Accounting, and Appointment of Receiver--By Partner [Corp. Code §§ 16405(b), 16801; former Corp. Code §§ 15022, 15032, 15043]

[1] FORM Complaint for Partnership Dissolution, Accounting, and Appointment of Receiver--By Partner [Corp. Code §§ 16405(b), 16801; former Corp. Code §§ 15022, 15032, 15043]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	COMPLAINT FOR PARTNERSHIP DISSOLU-
Defendants.	)	TION, ACCOUNTING, [AND APPOINTMENT OF
	)	RECEIVER]
	)	

_____

Plaintiff alleges:

1. _____ [*Allege capacity and residence of defendant(s), e.g.,* Defendant _____ (*name of individual partner*) is, and at all times herein mentioned was, a resident of _____ County, California].

2. On or about _____[*date*], plaintiff and defendant(s) entered into _____ [a written *or* an oral] partnership agreement at _____[*city*], _____ County, California, for the purpose of carrying on the business of _____[*specify*], under the name of _____[*name of partnership*]. The partnership's principal place of business is located in _____[*city*], _____ County, California. [A copy of the agreement is attached as

Exhibit _____ and incorporated by reference.] The partnership has conducted the aforementioned business from that time.

[3. Plaintiff has performed all conditions, covenants, and promises required to be performed by him/her in accordance with the terms and conditions of the contract (, except _____[*specify conditions not performed*], the performance of which was excused on the ground that _____[*specify*]).]

4. _____ [*Set forth conduct by defendant(s) or other facts warranting dissolution under Corp. Code § 16801(5) or former Corp. Code § 15032 forpartnerships under pre-'97 Act, e.g.,* Since the commencement of the partnership, disagreements and disputes have arisen between plaintiff and defendant _____ (*name*) regarding matters of policy in the operation of the partnership business. Defendant has on several occasions appropriated sums of $_____ from partnership funds to his/her own use, without plaintiff's knowledge, approval, or consent. Feelings between plaintiff and defendant have become bitter and antagonistic].

5. Plaintiff is entitled to dissolution of the partnership by court decree, pursuant to Subdivision(s) _____ [*specify, e.g.,* (A), (B), *or* (C)] of *Corporations Code Section 16801(5)*, in that _____ [*specify, e.g.,* Defendant has engaged in conduct relating to partnership business that makes it not reasonably practicable to carry on the business in the partnership. See former *Corp. Code § 15032(c), (d), (e)* for pre-'97 Act partnerships]. [Defendant(s) has/have refused to consent to a dissolution of the partnership.]

6. Defendant(s) is/are in possession of the partnership books, assets, and accounts. The amount of partnership assets and liabilities is unknown to plaintiff and cannot be ascertained without an accounting of profits and losses that occurred during the operation of the partnership business.

[7. The partnership agreement provides that _____ (*specify, e.g.,* the profits of the partnership, as defined in the agreement attached as Exhibit _____, are to be divided between plaintiff and defendant with _____ [*set forth agreement as to division of profits, i.e* two thirds of the profits to plaintiff and one third to defendant]).]

8. Plaintiff has demanded an accounting, but defendant(s) has/have failed and refused, and continue(s) to refuse to settle accounts and divide partnership assets and liabilities with plaintiff.

[9. Unless a receiver is appointed by the court to take possession of, care for, manage, and operate the partnership assets and property, such property and assets are in danger of being lost, removed, or materially destroyed, in that _____ (*specify, e.g.,* defendant is in control of the partnership business, and was and is applying partnership funds to his/her own use, in excess of his/her interest in the partnership business)].

WHEREFORE, plaintiff prays judgment against defendant(s) [, and each of them,] as follows:

1. For an order that the partnership be dissolved;

2. For an accounting of partnership affairs from _____[*date*] to _____[*date*], that the account be settled between plaintiff and defendant(s), and that plaintiff have judgment against defendant(s) for whatever sums may be found due and owing to plaintiff under the accounting;

[3. For the appointment of a receiver to take over management and control of partnership property and assets, to wind up partnership affairs, to control partnership business until winding up is completed, and to keep partnership assets until their division between the partners;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____[*name*], am the plaintiff in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The complaint in [1], *above*, is for use by a partner seeking a decree dissolving the partnership, an accounting, and, optionally, the appointment of a receiver. On application of a partner, the court must decree a dissolution in any of the situations set forth in *Corp. Code § 16801(5)*. See former *Corp. Code § 15032* for the law applicable to partnerships governed by the pre-'97 Act. For discussion of the grounds for judicial dissolution, see *§ 406.13*.

This form seeks an accounting along with the dissolution. A partner may bring an action to compel a dissolution with or without an accounting [*Corp. Code § 16405(b)*; *see*; former *Corp. Code §§ 15022(d), 15043* and discussion in *§ 406.19* for partner actions for accounting under the pre-'97 Act]. As an option, the form also seeks the appointment of a receiver, which the court may appoint if the partner whose right to or interest in partnership property or assets is probable and the property or assets are in danger of being lost, removed, or materially injured [*Code Civ. Proc. § 564(b)(1)*].

The action for partnership dissolution and accounting may be brought against one or more partners who are winding up or otherwise in possession of the partnership assets [*see Corp. Code § 16405(b)*; former *Corp. Code §§ 15022, 15043*]. Therefore, counsel may wish to modify the form to include more than one defendant if the partnership contains more than two partners.

[3] Allegations

The complaint in [1], *above*, alleges:

- The partnership agreement and partnership relation between plaintiff and defendant (Paragraph 2) [*Greene v. Vargas (1935) 7 Cal. App. 2d 127, 129, 45 P.2d 347* ; *see Code Civ. Proc. § 564(b)(1)*];

- Plaintiff's performance or excusable nonperformance of partnership agreement (if plaintiff is alleging defendant's breach of agreement) (Optional Paragraph 3) [*see Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377]* ;

- Defendant's conduct or other factual circumstances providing grounds for dissolution (Paragraph 4) [*see Corp. Code § 16801(5)*; former *Corp. Code § 15032*];

- The reason why the conduct or facts necessitate a decree of dissolution (Paragraph 5) [*see Corp. Code § 16801(5)*; former *Corp. Code § 15032*];

- That the balance due to plaintiff is unknown and requires an accounting (Paragraph 6) [*see Whann v. Doell (1923) 192 Cal. 680, 684, 221 P. 899]* ;

- Any provisions in the partnership agreement governing division of profits or assets (Optional Paragraph 7) [*see Corp. Code §§ 16103, 16807*; former *Corp. Code §§ 15018, 15040*; *Mervyn Investment Co. v. Biber (1921) 184 Cal. 637, 644, 194 P. 1037]* ;

- That plaintiff has demanded an accounting, and that defendant refuses to account (Paragraph 8) [*see Wooster v. Nevills (1887) 73 Cal. 58, 60, 14 P. 390]* ; and

- Appointment of a receiver is necessary to avoid loss, removal of, or material injury to partnership assets or property (Optional Paragraph 9) [*Code Civ. Proc. § 564(b)(1)*; *see McCaslin v. Kenney (1950) 100 Cal. App. 2d 87, 95, 223 P.2d 94]* .

The factual examples in this form are based on the facts of *Owen v. Cohen (1941) 19 Cal. 2d 147, 119 P.2d 713* (decided under former Civ. Code § 2426).

[4] Jurisdiction and Venue

Jurisdiction for equitable actions is in the superior court [*see Cal. Const., art. VI, § 10*; *see also* Ch. 324, *Jurisdiction: Subject Matter*]. The actions are not limited civil cases unless the total assets of the partnership do not exceed $25,000 [*Code Civ. Proc. §§ 85, 86(a)(2), (b)*]. Venue for an action to dissolve a partnership and for an accounting is in the county of defendant's residence, pursuant to *Code Civ. Proc. § 395* [*Rudnick v. Delfino (1956) 140 Cal. App. 2d 260, 264, 294 P.2d 983]* . The county of defendant's residence is proper even when the accounting involves real property located in another county [*Hays v. Cowles (1943) 60 Cal. App. 2d 514, 518, 141 P.2d 26* ; *see Coe v. Kessler (1956) 139 Cal. App. 2d 536, 541, 294 P.2d 83]* . If there is more than one defendant in the action, and the suit is brought in the county of one defendant'sresidence, another defendant may not have the venue changed to his or her county of residence [*Rudnick v. Delfino (1956) 140 Cal. App. 2d 260, 265-266, 294 P.2d 983]* .

[5] Verification

If a complaint is used as an application for the appointment of a receiver, the complaint must be verified [*Cal. Rules of Ct., Rule 3.1175*]. Verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. § 446*] and precludes a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[6] Receiver

The court may appoint a receiver in an action for a partnership accounting [*see Code Civ. Proc. § 564(b)(1)*; *Paola v.*

Huston (1957) 150 Cal. App. 2d 206, 212, 309 P.2d 529] . The court must be satisfied, however, that the partnership property or assets are in danger of being lost, removed, or materially injured [*McCaslin v. Kenney (1950) 100 Cal. App. 2d 87, 95, 223 P.2d 94* [*see Code Civ. Proc. § 564(b)(1)*]. The appointment of a receiver is ancillary to and in aid of the accounting action, with the purpose of preserving property pending litigation so that relief awarded by the judgment may be effective [*Steinberg v. Goldstein (1954) 129 Cal. App. 2d 682, 686, 278 P.2d 22]* .

The court has the power and jurisdiction to determine the extent of the property subject to the receivership. The receiver is an agent and officer of the court, and property in his or her hands remains under the control and continuous supervision of the court [*Steinberg v. Goldstein (1954) 129 Cal. App. 2d 682, 685-686, 278 P.2d 22]* . The court may thus direct that the receiver take and keep possession of the partnership property, or that he or she sell the partnership assets [*Steinberg v. Goldstein (1956) 145 Cal. App. 2d 692, 698, 700, 303 P.2d 80]* .

For discussion and forms relating to the appointment of receivers generally, see Ch. 486, *Receivers* .

[7] Referee

The court may properly appoint a referee in an action for partnership dissolution and accounting, to hear evidence and render an accounting [*see Chapman v. Gipson (1951) 103 Cal. App. 2d 585, 588, 229 P.2d 834]* . A referee may be appointed by agreement of the parties or by an order of the court [*Code Civ. Proc. §§ 638, 639*]. When the court appoints a referee, no partner is entitled to insist on any particular method of accounting [*Berker v. Barnes (1956) 139 Cal. App. 2d 294, 301, 293 P.2d 821]* .

For further discussion and forms relating to references in accounting actions,see the Ch. 7, *Accounting, Action for*. For discussion and forms relating to references in general, see Ch. 38, *Reference* .

[8] Injunction

The court may also grant a preliminary injunction pending the outcome of an action for partnership dissolution and accounting, in order to preserve the status quo and prevent partnership assets from being lost [*Kendall v. Foulks (1919) 180 Cal. 171, 173, 179 P. 886* ; *see* discussion in *§ 406.19[2]*; *see also* Ch. 303, *Injunctions*].

[9] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to Fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue*

For alternative verification forms, see Ch. 572, *Verification*

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35-406 California Forms of Pleading and Practice--Annotated § 406.61

§ 406.61 Ex Parte Application and Supporting Declaration for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction; Certification re Notice [Code Civ. Proc. § 527]--Action for Dissolution of Partnership and Accounting [Corp. Code §§ 16405(b)(2)(C), 16801, 16807(b)]

[1] FORM Ex Parte Application and Supporting Declaration for Temporary Restraining Order and Order to Show Cause re Preliminary Injunction; Certification re Notice [Code Civ. Proc. § 527]--Action for Dissolution of Partnership and Accounting [Corp. Code §§ 16405(b)(2)(C), 16801, 16807(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	EX PARTE APPLICATION AND SUPPORTING
Plaintiff,	)	DECLARATION FOR TEMPORARY RESTRAIN-
vs.	)	ING ORDER AND ORDER TO SHOW CAUSE
_____ [*name*],	)	WHY PRELIMINARY INJUNCTION SHOULD
Defendant.	)	NOT BE ISSUED; CERTIFICATION RE NOTICE
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

APPLICATION

Plaintiff _____[*name*] hereby applies for a temporary restraining order restraining defendant(s) _____[*name(s)*] [, and his/her agents, servants, and employees, and each of them,] from _____ [*specify, e.g.,* collecting any of the debts of the partnership known as _____ (*name*), from assigning, transferring, or disposing of that partnership's assets, and from operating, managing, or interfering with the management of that partnership without further order of this court] and an order to show cause why a preliminary injunction should not be granted enjoining defendant(s) [and his/her agents, servants, and employees, and each of them,] from _____ [committing *or* performing] the above-described _____ [act or acts, or any of them,] during the pendency of this action. This application is made on the ground[s] that _____ [*specify one or more grounds listed in Code Civ. Proc. § 526, e.g.,* the defendant is in control of the partnership business, and was and is applyingpartnership funds to his/her own use, in excess of his/her interest in the partnership business. These acts are in violation of plaintiff's rights to the partnership assets and would rendera judgment of accounting ineffectual], and on the further ground that _____ [great *or* irreparable *or* great and irreparable] injury will result to plaintiff before the matter can be heard on notice. This application is based on the complaint on file herein, [and] on the declarations of plaintiff and plaintiff's attorney attached hereto [, and on the attached memorandum of points and authorities]. [A previous application was made on _____ (*date*) for an ex parte order _____ (*describe prior application*). The court refused that application _____ (in whole *or* in part). This application _____ (*state why this application is being made, e.g.,* a different state of facts).]
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

DECLARATION OF _____ [*name of attorney*]

I, _____[*name*], declare:

1. I am the attorney of record herein for _____[*moving party*].

2. The name, address and telephone number of the _____ [attorney for the opposing party *or* opposing party], as known to me, is _____[*set out name, address, and telephone number*].

[*EITHER*]

3. On _____[*date*], at _____[*time*], I informed _____[*name of opposing party or attorney person to whom notice was given*], the opposing _____ [party *or* party's attorney], of the date, time and place that the above application for an order _____[*specify order sought*] would be made.

_____[*Name of opposing party or attorney person to whom notice was given*] informed me that _____[*describe response to notice, including whether or not opposition is expected*].

[*OR*]

3. I attempted, in good faith, to inform _____[*name*], the opposing _____ [party *or* party's attorney], of the time and place that the above application for an order _____[*specify order sought*] would be made. I was unable to do so even though _____[*describe efforts made*].

[*OR*]

3. Notice to the _____[*name*], the opposing _____ [party *or* party's attorney], of the above application for an order _____[*specify order sought*] should not be required because _____[*specify reason*].

[*ADD, IF APPLICABLE:*]

4. Notice was provided later than 10:00 a.m. the court day before the ex parte appearance, due to _____[*specify exceptional circumstances that justify the shorter notice*].

[*CONTINUE*]

[5]. The foregoing facts are within my personal knowledge and I am competent to testify to their truth if called as a witness.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

DECLARATION OF _____ [*name of plaintiff*]

1. Defendant(s) and I are partners in the partnership known as _____ [*nam* e], by virtue of _____ [a written *or* an oral] partnership agreement executed on _____[*date*] at _____, California. [A copy of the agreement is attached as Exhibit _____ and incorporated by reference.]

2. Defendant _____[*name*] is in control of the partnership business, and _____ [*specify, e.g.,* on or about _____ (*dates*) applied partnership assets to his/her own use by making withdrawals from the partnership account without my permission or consent, in violation of the partnership agreement. I have asked defendant for an accounting, but he/she has refused.

3. _____ [*Specify effect of acts to be enjoined on plaintiff that justify a preliminary injunction, e.g.,* My rights to equal management and control of the partnership business and to a _____ (*specify, e.g.,* one-half) share of the partnership assets and profits, pursuant to the partnership agreement, have been violated by defendant's acts. The partnership assets have been, and are continuing to be, depleted by defendant].

4. Unless a temporary restraining order is granted, _____ [great *or* irreparable *or* great and irreparable] injury will result to me, in that _____ [*specify injury, e.g.,* partnership assets will be depleted and/or destroyed, and the amount of partnership assets and liabilities and any amounts found owing to me will remain unascertainable, rendering any judgment in the above-entitled actionineffectual and leaving me without any remedy against defendant].

5. The foregoing facts are within my personal knowledge and I am competent to testify to their truth if called as a witness.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The ex parte application in [1], *above*, is for use by a partner who is a plaintiff in an action for a partnership dissolution and accounting to obtain a temporary restraining order and preliminary injunction against the defendant partner or partners, in order to assure that partnership assets will remain intact pending the accounting [*see Wind v. Herbert (1960) 186 Cal. App. 2d 276, 285-286, 8 Cal. Rptr. 817]* . The form may also be used in an action for partnership accounting only. See Ch. 401, *Partnerships: Actions Between General Partners and Partnership* .

The form would be submitted with a temporary restraining order and order to show cause re preliminary injunction [*see § 406.62*].

The form may be modified for use as complaint allegations, if the plaintiff wishes to ask for a temporary restraining order and preliminary injunction in his or her complaint for dissolution and accounting [*see Code Civ. Proc. § 527*]. In this case, allegations taken from this form could be combined with those found in the form in *§ 406.60*. For a general form for a complaint seeking a temporary restraining order and preliminary injunction, see Ch. 303, *Injunctions* .

An injunction may be granted at any time before judgment on a verified complaint, or on affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]), if the complaint or affidavits show that sufficient grounds exist under *Code Civ. Proc. § 526* [*see Code Civ. Proc. § 527(a)*].

[3] Temporary Restraining Order and Order to Show Cause

No preliminary injunction or temporary restraining order will be granted without notice to the opposite party, unless it appears from facts shown by affidavit or verified complaint that great or irreparable injury would result to the plaintiff before the matter can be heard on notice. In addition, the plaintiff's attorney must certify to the court under oath: (1) that within a reasonable time prior to the application he or she informed the opposing party or his or her attorney at what time and where the application would be made, (2) that he or she in good faith attempted to inform the opposing party and his or her attorney but was unable to do so, specifying his or her efforts to do so, or (3) that for reasons specified, he or she should not be required to so inform the opposing party or his or her attorney [*Code Civ. Proc. § 527*].

[4] Contents of Application

A request for ex parte relief must be in writing and must include all of the following [*Cal. Rules of Ct., Rule 3.1201*]:

- An application containing the case caption and stating the relief requested.

- A declaration in support of the application making the factual showing required under *Cal. Rules of Ct., Rule 3.1202(c)* [discussed *below*].

- A declaration based on personal knowledge of the notice given under *Cal. Rules of Ct., Rule 3.1204* [discussed *below*].

- Accompanying papers [discussed in [6], *below*].

The first page of each paper must specify, immediately below the case number, the following information [*Cal. Rules of Court, Rule 3.1110(b)*]:

- The date, time and location, if ascertainable, of any scheduled hearing and the name of the hearing judge, if ascertainable;

- The nature or title of any attached document other than an exhibit;

- The date of filing of the action; and

- The trial date, if set.

This form contains space for all of the above information.

Although the declaration in support of the motion [*see Code Civ. Proc. §§ 2009, 2015.5*] may be set forth separately, when the application and declaration are made by the same person, they are sometimes combined into a single paper.

The application must include a full disclosure of any previous applications of the same character or for the same relief that have been refused by the court in whole or in part, even if the current application is made on an alleged different state of facts. Both the previous applications and the court's actions must be disclosed [*Cal. Rules of Ct., Rule 3.1202(b)*]. The three optional sentences enclosed in brackets in unnumbered paragraph at the end of the form should be used if there have been prior applications that must be disclosed.

The application must state the name, address, and telephone number of any attorney known to the applicant to be an attorney for any party or, if no such attorney is known, the name, address, and telephone number of any unrepresented parties, if known to the applicant [*Cal. Rules of Ct., Rule 3.1202(a)*]. Paragraph 2 of the declaration includes this information. Paragraph 2 reflects only one party. The form should be modified to list this information with respect to all parties where there is more than one that must be listed.

Every ex parte application must be accompanied by a declaration regarding notice that states the notice given, including the date, time, manner, and name of the party informed, the relief sought, any response, whether opposition is expected, and that within the applicable time under *Cal. Rules of Ct., Rule 3.1203* [*see* [5], *below*], the applicant informed the opposing party where and when the application would be made; or why notice should not be required [*Cal. Rules of Ct., Rule 3.1204(b)*]. The form includes this information in the alternative Paragraphs 3. If notice was provided later than 10:00 a.m. the court day before the ex parte appearance [*see* [5], *below*], the declaration regarding notice must explain the exceptional circumstances that justify the shorter notice [*Cal. Rules of Ct., Rule 3.1204(c)*]. The form includes this information in the alternative Paragraph 4.

The application must make an affirmative factual showing in a declaration containing competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting ex parte relief [*Cal.*

Rules of Ct., Rule 3.1202(c)]. This form contains a separate declaration by plaintiff containing this information.

[5] Notice Requirement

When notice of an ex parte application is given, the person giving notice must state with specificity the nature of the relief to be requested and the date, time, and place for the presentation of the application. That person must also attempt to determine whether the opposing party will appear to oppose the application [*Cal. Rules of Ct., Rule 3.1204(a)*].

A party seeking an ex parte order must notify all parties no later than 10:00 a.m. on the court day before the ex parte appearance, absent a showing of exceptional circumstances that justify a shorter time for notice [*Cal. Rules of Ct., Rule 3.1203(a)*]. The clerk must not reject an ex parte application for filing and must promptly present the application to the appropriate judicial officer for consideration, notwithstanding the failure of an applicant to comply with this notification requirement [*Cal. Rules of Ct., Rule 3.1205*].

An ex parte application for an order must be accompanied by an affidavit or a declaration showing [*Cal. Rules of Ct., Rule 3.1204(b)*]:

- That, within the applicable time period under Rule 3.1203, the applicant informed the opposing party when and where the application would be made; or
- That the applicant in good faith attempted to inform the opposing party but was unable to do so, specifying the efforts made to inform the opposing party; or
- That for reasons specified, the applicant should not be required to inform the opposing party.

[6] Accompanying Papers

Ex parte applications must be supported by a memorandum [*Cal. Rules of Ct., Rule 3.1201*].

The application must include a proposed order [*Cal. Rules of Ct., Rule 3.1201*]. For a sample proposed order, see *§ 406.62*.

[7] Local Court Rules

Local court rules frequently impose requirements on the manner of presenting ex parte motions and should be checked if counsel is unfamiliar with them. Any local rules relating to the form or format of the application, however, are preempted by the California Rules of Court [*Cal. Rules of Ct., Rule 3.20*].

[8] Service of Papers

Parties appearing at the ex parte hearing must serve the ex parte application or any written opposition on all other appearing parties at the first reasonable opportunity. Absent exceptional circumstances, no hearing may be conducted unless service has been made [*Cal. Rules of Ct., Rule 3.1206*].

[9] Personal Appearance Requirements

An ex parte application will be considered without an applicant's personal appearance only in the following circumstances [*Cal. Rules of Ct., Rule 3.1207*]:

- Applications to file a memorandum in excess of the applicable page limits.

- Applications for extensions of time to serve pleadings.
- Setting of hearing dates on alternative writs and orders to show cause.
- Stipulations by the parties for an order.

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35-406 California Forms of Pleading and Practice--Annotated § 406.62

§ 406.62 Order to Show Cause re Preliminary Injunction and Temporary Restraining Order--Action for Dissolution of Partnership and Accounting [Corp. Code §§ 16405(b), 16801(5)]

[1] FORM Order to Show Cause re Preliminary Injunction and Temporary Restraining Order--Action for Dissolution of Partnership and Accounting [Corp. Code §§ 16405(b), 16801(5)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER TO SHOW CAUSE RE PRELIMINARY
vs.	)	INJUNCTION AND TEMPORARY RESTRAINING
_____ [*name*],	)	ORDER
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

The motion of plaintiff for an order to show cause re preliminary injunction and temporary restraining order came on regularly for hearing by the court on _____[*date*]. Plaintiff appeared by counsel _____[*name*]; defendant appeared by counsel _____[*name*].

On proof made to the satisfaction of the court that the motion ought to be granted, IT IS ORDERED that the above-named defendant(s) [, and each of them,] appear in [_____ (Department *or* Division) _____ of] this court, located in _____[*address*], _____[*city*], on _____[*date*],

at _____[*time*], or as soon thereafter as the matter may be heard, then and there to show cause, if any, why he/she/they [and his/her/their agents, servants, employees, and representatives] should not be enjoined and restrained during the pendency of this action from _____ [*specify, e.g.,* assigning, transferring, or disposing of the assets of the partnership, and from operating, managing, or interfering with the management of the partnership without further order of this court].

IT IS FURTHER ORDERED that:

a. Plaintiff shall serve this order to show cause on defendants in the following time and manner: _____.

b. Proof of service must be delivered to the court hearing the order to show cause on: _____.

c. The parties shall adhere to the following briefing schedule _____:

[d. The temporary restraining order shall expire on: _____.]

IT IS FURTHER ORDERED that pending the hearing and determination of the order to show cause, the above-named defendant(s) [, and each of them,] [and his/her/their) officers, agents, employees, representatives, and all persons acting in concert or participating with them,] shall be and hereby is/are restrained and enjoined from engaging in or performing, directly or indirectly, _____ [*specify, e.g.,* the assignment, transfer, or disposal of the assets of the partnership, and from the operation, management, or interference with the partnership business].

[Bond on this temporary restraining order is hereby fixed in the sum of $_____.]

Let the above order issue [upon plaintiff filing a bond in the sum of $_____].
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

The order to show cause and temporary restraining order in [1], *above*, is for use by plaintiff in obtaining relief before the hearing on an order to show cause why a preliminary injunction should not be issued. It may be submitted along with the ex parte application illustrated in *§ 406.61* [*see Code Civ. Proc. § 527*].

The order to show cause and temporary restraining order must be stated separately, with the order to show cause stated first. The restraining language sought in an order to show cause and a temporary restraining order must be separately stated in the order to show cause and the temporary restraining order, and may not be incorporated by reference. The order to show cause must describe the injunction to be sought at the hearing. The temporary restraining order must describe the activities to be enjoined pending the hearing. A proposed order to show cause must contain blank spaces for the time and manner of service on responding parties, the date on which the proof of service must be delivered to the court hearing the order to show cause, a briefing schedule, and if applicable, the expiration date of the temporary restraining order [*Cal. Rules of Court, Rule 3.1150(c)*]. For additional discussion and forms, see Ch. 303, *Injunctions* .

[3] Undertaking

Although an undertaking is not required as a prerequisite to the obtaining of atemporary restraining order, it is the better practice for the court to require an undertaking during the period of effectiveness of a temporary restraining order [*Biasca v. Superior Court (1924) 194 Cal. 366, 367, 228 P. 861]* . An undertaking will be required, however, on the court grantinga preliminary injunction [*see Code Civ. Proc. § 529*]. For further discussion of bonds required for injunctions, see Ch. 303, *Injunctions* ; for discussion and forms relating to bonds and undertakings generally, see Ch. 538, *Suretyship, Bonds and Undertakings* .

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35-406 California Forms of Pleading and Practice--Annotated § 406.63

§ 406.63 Interlocutory Judgment for Partnership Dissolution, Order to Account [Corp. Code §§ 16405(b), 16801(5), 16807(b); former Corp. Code §§ 15022, 15032, 15043], and Reference [Code Civ. Proc. § 639(b)]

[1] FORM Interlocutory Judgment for Partnership Dissolution, Order to Account [Corp. Code §§ 16405(b), 16801(5), 16807(b); former Corp. Code §§ 15022, 15032, 15043], and Reference [Code Civ. Proc. § 639(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	INTERLOCUTORY JUDGMENT FOR PARTNER-
vs.	)	SHIP DISSOLUTION, ACCOUNTING, AND REF-
_____ [*name*],	)	ERENCE
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

This case came on regularly for trial on _____[*date*], in [_____ (Department *or* Division) _____ of] the above-entitled court, the Honorable _____[*name*], Judge, presiding. Plaintiff appeared by counsel _____[*name*] and defendant appeared by counsel _____[*name*].

_____ [On the stipulation of the parties filed herein, or Evidence, both oral and documentary, was introduced on behalf of both parties and the matter was argued and submitted for decision. On proof made to the satisfaction of the court,]

IT IS ORDERED, ADJUDGED, AND DECREED as follows:

1. That the partnership heretofore existing between plaintiff and defendant, and known as _____[*name*] is hereby dissolved;

2. That an accounting of all partnership affairs be had between plaintiff and defendant from _____[*date*] to _____[*date*];

3. That _____[*name*] be appointed as referee to hear evidence and render an accounting between the parties and to report his/her findings to this court;

4. That plaintiff and defendant are ordered and directed to make available to thereferee all records, documents, data, and other information, or true copies thereof, pertaining to the partnership business; and

5. That the referee is empowered to examine any of the parties and other witnesses, and to use any method of accounting he/she deems appropriate.

This judgment is interlocutory and this court retains jurisdiction over all of the matters at issue herein.
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

The interlocutory judgment in [1], *above,* is for use by the plaintiff when the court has adjudged a dissolution of the partnership, and has ordered an accounting and a reference for the purpose of effecting the accounting. It may be used either for partnership subject to UPA'94 or the pre-'97 Act.

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35-406 California Forms of Pleading and Practice--Annotated § 406.64

§ 406.64 Interlocutory Judgment for Partnership Dissolution and Accounting [Corp. Code § 16405(b), 16801(5), 16807(b); former Corp. Code §§ 15022, 15032, 15043]--Without Reference

[1] FORM Interlocutory Judgment for Partnership Dissolution and Accounting [Corp. Code § 16405(b), 16801(5), 16807(b); former Corp. Code §§ 15022, 15032, 15043]--Without Reference

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	INTERLOCUTORY JUDGMENT FOR PARTNER-
vs.	)	SHIP DISSOLUTION AND ACCOUNTING
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

This case came on regularly for trial on _____[*date*], in [_____ (Department *or* Division) _____ of] the above-entitled court, the Honorable _____[*name*], Judge, presiding. Plaintiff appeared by counsel _____[*name*] and defendant appeared by counsel _____[*name*].

_____ [On the stipulation of the parties filed herein, or Evidence, both oral and documentary, was introduced on behalf of both parties and the matter was argued and submitted for decision. On proof made to the

satisfaction of the court,]

IT IS ORDERED, ADJUDGED, AND DECREED as follows:

1. That the partnership heretofore existing between plaintiff and defendant, and known as _____[*name*] is hereby dissolved;

2. That by an accounting rendered in court, the court finds the following:

(a) The partnership assets consist of _____ [*specify*].

(b) The value of the partnership assets is $_____.

Plaintiff has contributed $_____ for the use and benefit of the partnership and defendant has contributed $_____ for the use and benefit of the partnership.

[(d) _____ (*specify resolution of any additional accounting issues*).]

3. That based on this accounting, plaintiff recover from defendant the sum of $_____; and

4. That plaintiff recover from defendant his/her costs of this action in the sum of $_____.

This decree is interlocutory, and the court will retain jurisdiction of the matter for _____ [*specify period of time, e.g.,* six months] for the purpose of having a further accounting in the event that further liabilities are incurred or paid on behalf of the partnership.
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

The interlocutory judgment in [1], *above*, is for use by a plaintiff when the court has adjudged a dissolution of the partnership and has rendered an accounting, reserving jurisdiction for any further accounting or settlement of accounts that may be necessary. The form may be used either for partnership subject to UPA'94 or the pre-'97 Act. For an interlocutory judgment ordering an accounting and a reference, see Ch. 7, *Accounting, Action For* .

[3] Judgment of Accounting Without Reference

In the absence of a reference, the mere statement of balance due in the court's findings is an improper disposition of an action for accounting. Any procedure of record, however, from which it can be intelligently ascertained what the issues were as to controverted items and how those issues were disposed of by the court is sufficient [*Whann v. Doell (1923) 192 Cal. 680, 684, 221 P. 899* ; *Davis v. California Motors (1946) 73 Cal. App. 2d 241, 246, 166 P.2d 52]* . The court should make a sufficient statement of account to show the main features of account and disposition of various controversies arising thereon [*Whann v. Doell (1923) 192 Cal. 680, 686, 221 P. 899]* . Specifically, the judgment should set forth partnership assets, their value, and the capital balances of partners, although there is no requirement that the assets be particularly described [*ABC Egg Ranch v. Abdelnour (1963) 223 Cal. App. 2d 12, 16, 35 Cal. Rptr. 487]* .

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§ 406.65 Complaint for Contribution--By Partner Satisfying Partnership Liability After Dissolution Against Noncontributing Copartner [Corp. Code § 16807(c); former Corp. Code § 15040(f)]]

[1] FORM Complaint for Contribution--By Partner Satisfying Partnership Liability After Dissolution Against Noncontributing Copartner [Corp. Code § 16807(c); former Corp. Code § 15040(f)]]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR CONTRIBUTION
_____ [*names*],	)	[Amount demanded _____
Defendants.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. _____ [*Allege capacity and residence of defendant, e.g.,* Defendant _____ (*name of individual partner*) is, and at all times herein mentioned was, a resident of _____ County, California].

2. On or about _____[*date*], plaintiff and defendant entered into _____ [a written *or* an oral] partnership agreement at _____[*city*], _____ County, California, for the purpose of carrying on the business of _____[*specify*], under the name of _____[*name of partnership*]. The partnership's principal place of business was located in

_____[*city*], _____ County, California. [A copy of the agreement is attached as Exhibit _____ and made a part hereof.] The partnership has conducted the aforementioned business from that time, until _____[*date*], the date of dissolution of the partnership.

3. On _____[*date*], as part of the settlement of accounts between plaintiff and defendant following dissolution, plaintiff and defendant were each required to contribute the amount necessary to satisfy partnership liabilities, which totaled the sum of $_____. Under _____ [*Corporations Code Section 16807(b) or, for partnerships governed by pre-'97 Act:* former *Corporations Code Section 15040*] [and by order of this court on _____ (*date*)], defendant was required to contribute _____ [*specify share, e.g.,* one-half] the amount necessary to satisfy partnership liabilities, according to his/her share of partnership profits under the partnership agreement. Defendant failed and refused to so contribute. As a result, on _____[*date*], plaintiff wasrequired to contribute _____ [*specify share, e.g.,* all] of the amount necessary to satisfy partnership liabilities, in the sum of $_____. Plaintiff has therefore contributed $_____ in excess of his/her pro rata share of the obligation.

4. Defendant has failed and refused, and continues to fail and refuse, to contribute to plaintiff defendant's share of the partnership obligation, in the sum of $_____ (amount of defendant's pro rata share to be reimbursed to plaintiff) or any part thereof, despite plaintiff's demand for the same.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For contribution in the amount of $_____;

2. For interest on the foregoing sum at _____ percent from _____[*date of plaintiff's contribution in excess of his/her required share*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification if desired. See form in § 406.60[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by a partner who, after dissolution and on settling accounts, has contributed more than his or her share of the amount necessary to satisfy partnership liabilities. This complaint may be modified for use by the legal representative of a partner [*see Corp. Code § 16807(c)*; former *Corp. Code § 15040(f)*].

[3] Allegations

This complaint alleges:

- Formation of the partnership by oral or written partnership agreement, and dissolution of the partnership (Paragraph 2) [*see Corp. Code § 16807*; former *Corp. Code § 15040*];

- Defendant's obligation to contribute his or her share to partnership liabilities, and plaintiff's contribution of more than his or her share (Paragraph 3) [*Civ. Code § 1432*; *Corp. Code §§ 15040(d), 16807(c)*; former *Corp. Code § 15040(d)*; *see Corp. Code § 16401*; former *Corp. Code § 15018(a)*]; and

- Defendant's refusal to contribute his or her share, and the amount of his or her share due to plaintiff (Paragraph 4) [*see Civ. Code § 1432*; *Corp. Code § 16807(c)*; former *Corp. Code § 15040(d),(f)*; *Hosking v. Spartan Properties, Inc. (1969) 275 Cal. App. 2d 152, 157, 79 Cal. Rptr. 893]* .

[4] Action for Contribution

A party to a joint or joint and several obligation who satisfies more than his or her share of the claim against all the parties, may require a proportionate contribution from all the parties joined with him or her [*Civ. Code § 1432*; *see Jans v. Nelson (2000) 83 Cal. App. 4th 848, 858-859, 100 Cal. Rptr. 2d 106* (in circumstance in which all limited partners execute guaranties of partnership debt and there is no other express agreement concerning rights of contribution, equity requires proportionate obligation for contribution to be based upon ownership interest of various guarantors)]. On the settlement of partnership accounts subsequent to dissolution, the partners are required, absent an agreement to the contrary, to contribute to the amount necessary to satisfy partnership liabilities. Except as provided in *Corp. Code § 16807(b)* or former *Corp. Code § 15015(b)* (exception for partner in limited liability partnership), each partner is required to contribute a share according to his or her share of the partnership profits [*Corp. Code § 16807(c)*; former *Corp. Code § 15040(d)*]. Under the pre-'97 Act, If any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners must contribute their share of the liabilities and the additional amount necessary to pay the liabilities [former *Corp. Code §§ 15040(d)*]. Under UPA'94, if a partner fails to contribute the full amount that the partner is obligated to contribute, the other partners must contribute the additional amount necessary [*Corp. Code § 16807(c)*].

Any partner or his or her legal representative has the right to enforce the contributions of other partners, to the extent of the amount that he or she or his or her estate has paid in excess of his or her share of the liability [*see Corp. Code § 16807(c)*; former *Corp. Code § 15040(f)*]. To enforce the contribution, a partner may bring an action at law against his or her copartner for contribution [*Pilch v. Milikin (1962) 200 Cal. App. 2d 212, 222, 19 Cal. Rptr. 334]* . It is also permissible for a partner to bring an equitable action for assumpsit [*see Sears v. Starbird (1889) 78 Cal. 225, 231, 20 P. 547* ; *Kazman v. Light (1921) 53 Cal. App. 732, 734, 200 P. 768]* . An action for contribution will lie even if the paying partner gave an individual note for a partnership liability, and the copartner did not expressly promise to repay the paying partner [*Sears v. Starbird (1889) 78 Cal. 225, 231, 20 P. 547* ; *Kazman v. Light (1921) 53 Cal. App. 732, 734, 200 P. 768]* .

[5] Venue

Although defendants in a contribution action may generally be sued in their place of residence, venue also lies in the county where the defendants' debt was due to the plaintiff and where, accordingly, the liability ofdefendants to contribute arose [*see Pacific Freight Lines v. Pioneer Exp. Co. (1940) 39 Cal. App. 2d 609, 615, 103 P.2d 1056]* .

[6] Cross References

For references relating to complaints generally, see *§ 404.60[9]*

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§ 406.66 Complaint for Damages, Temporary Restraining Order, Preliminary Injunction and Permanent Injunction for Breach of Agreement Not to Compete Made by Partners on Dissolution [Bus. & Prof. Code § 16602]

[1] FORM Complaint for Damages, Temporary Restraining Order, Preliminary Injunction and Permanent Injunction for Breach of Agreement Not to Compete Made by Partners on Dissolution [Bus. & Prof. Code § 16602]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	COMPLAINT FOR DAMAGES, TEMPORARY
Defendants.	)	RESTRAINING ORDER, AND PRELIMINARY
	)	AND PERMANENT INJUNCTION
	)	

Plaintiff alleges:

1. _____ [*Allege capacity and residence of defendant, e.g.,* Defendant _____ (*name of individual partner*) is, and at all times herein mentioned was, a resident of _____ County, California].

2. On or about _____[*date*], plaintiff and defendant entered into _____ [a written *or* an oral] partnership agreement at _____[*city*], _____ County, California for the purpose of carrying on the business of _____[*specify*], under the name of _____[*name of partnership*]. The partnership's principal place of business was located in

_____[*city*], _____ County, California. [A copy of the agreement is attached as Exhibit _____ and made a part hereof.] The partnership conducted the aforementioned business from that time until _____[*date*] the date of dissolution of the partnership.

3. On _____[*date*], the partnership was dissolved by mutual written agreement of the parties, and on that date defendant, by an instrument in writing and for good and valuable consideration, sold and transferred to plaintiff all of defendant's rights, title, and interest in all the assets and goodwill of the partnership to plaintiff. As a part of the agreement, defendant promised in writing, not to engage, directly or indirectly, in _____ [*specify activity of partnership business, e.g.,* the manufacture and sale of _____ (*product*)], or any similar business, in _____[*area*], California [, for the period of _____ (*time period*) or for as long as plaintiff continued to carry on the partnership business]. A copy of the agreement is attached as Exhibit _____ and made a part hereof.

4. Plaintiff has performed all conditions, covenants, and promises required to be performed on his/her part in accordance with the terms and conditions of the contract [, except _____ (*specify conditions not performed*), the performance of which was excused on the ground that _____ (*specify*)]. Plaintiff has continued to carry on the business of the partnership, specifically, to _____ [*specify partnership activity, e.g.,* manufacture and sell _____ (*product*)] from _____[*date*], to the present.

5. On or about _____[*date*], defendant, in violation of the agreement not to compete with plaintiff's business, and without plaintiff's consent, commenced to _____ [*specify competing business activity, e.g.,* manufacture and sell _____ (*product*)] in _____[*area*], California, in direct competition with plaintiff.

6. As a result of defendant's breach of the agreement not to compete, plaintiff has incurred damages due to lost profits, in the amount of $_____.

7. Defendant's breach of the agreement not to compete has detracted and continues to detract from the goodwill of plaintiff's business, and has injured and continues to injure plaintiff's business.

[8. On or about _____[*date*], (and a number of times since then,) plaintiff demanded that defendant stop his/her unfair competition. Defendant has refused, and continues to refuse, to do so.]

9. Unless defendant is restrained from continuing his/her unfair competition, it will continue to detract from the goodwill of plaintiff's business and to injure plaintiff's business, to plaintiff's irreparable injury.

10. Plaintiff has no adequate remedy at law for the injuries now being suffered and that will be suffered in the future, in that _____ [*specify, e.g.,* it will be impossible for plaintiff to determine the precise amount of damage that he/she will suffer if defendant's conduct is not restrained or plaintiff will be forced to institute a multiplicity of suits to obtain adequate compensation for his/her injuries].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For judgment for damages to plaintiff suffered as a result of defendant's breach in the amount of $_____;

2. For an order requiring defendant to show cause, if any he/she has, why he/she should not be enjoined as hereinafter set forth, during the pendency of this action;

3. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant, and his/her agents,servants, and employees, and all persons acting under, in concert with, or for him/her, from _____ [*specify, e.g.,* manufacturing and selling _____ (*product*), or engaging in any similar business, in _____ (*area*), California, for as long as plaintiff carries on his/her business as described above];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court deems proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification. See form in § 406.30.*]

[*Certification re Notice. See form in § 406.31.*]

[2] Use of Form

The complaint in [1], *above*, is for use by a partner who has continued the business of a dissolved partnership, against a former partner who has violated an agreement, made at the time of dissolution, not to compete with the partnership business. The complaint seeks damages for the breach, in addition to a temporary restraining order and preliminary and permanent injunction. This form may be used for partnerships governed by either UPA'94 or the pre-'97 Act. For discussion and forms pertaining to actions against a dissociating partner under UPA'94 when the partnership is not dissolved, see Ch. 401, *Partnerships: Actions Between General Partners and Partnership* .

[3] Allegations

This complaint alleges:

- Existence of the partnership (Paragraph 2) [*see Bus. & Prof. Code § 16602*];

- An agreement not to compete on dissolution of partnership (Paragraph 3) [*Bus. & Prof. Code § 16602*];

- Plaintiff's performance or excusable nonperformance of the dissolution agreement (Paragraph 4) [*see Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377]* ;

- Defendant's breach of the noncompetition agreement (Paragraph 5) [*see Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377]* ;

- Damages incurred as a result of defendant's breach (Paragraph 6) [*Civ. Code § 3300*];

- Past and continuing injury to plaintiff's business as the result of defendant's breach (Paragraph 7) [*see Code Civ. Proc. § 526*];

- Plaintiff's demand that defendant stop the unfair competition (Paragraph 8);

- Irreparable injury that will result if defendant's unfair competition is not enjoined or restrained (Paragraph 9) [*Code Civ. Proc. §§ 526, 527*]; and

- Plaintiff's lack of an adequate remedy at law (Paragraph 10) [*see Civ. Code § 3422(1), (3)*].

[4] Agreement Not to Compete

Any partner, on or in anticipation of a dissolution of the partnership or dissociation of the partner from the partnership, may agree that he or she will not carry on a similar business within a specified geographic area where the partnership business has been transacted, as long as any other member of the partnership, or any person deriving title to the business or its goodwill from any other member of the partnership, carries on a like business in that area [*Bus. & Prof. Code § 16602*]. An agreement not to carry on a similar business, within the meaning of the statute, includes an agreement not to conduct, manage, or operate such a business, wholly or in part, or as the agent of another [*Stephens v. Bean (1924) 65 Cal. App. 779, 785-786, 224 P. 1022]* .

Similarly, *Bus. & Prof. Code § 16601* allows (1) any person who sells the goodwill of a business, (2) any owner of a business entity selling or otherwise disposing of all of his or her ownership in the business entity, or (3) any owner of a business entity that sells all or substantially all of its operating assets together with the goodwill of the business entity, all or substantially all of the operating assets of a division or a subsidiary of the business entity together with the goodwill of that division or subsidiary, or all of the ownership interest of any subsidiary, to agree with the buyer to refrain from carrying on a similar business within a specified geographic area in which the business is so sold as long as the buyer, or anyone deriving title to the goodwill or from the buyer, carries on a like purpose. For purposes of that section, "business entity" includes any partnership, including a limited partnership or limited liability partnership [*Bus. & Prof. Code § 16601*]. In the case of a business entity that is a partnership (including a limited partnership or limited liability partnership),"owner of a business entity" includes any partner, and "ownership interest" includes a partnership interest [*Bus. & Prof. Code § 16601*].

[5] Cross References

For a form for use in alleging damages for injury to the goodwill of plaintiff's business due to loss of customers, see *Ch. 177, Damages, § 177.140 et seq.*

For discussion, procedural guide, and forms relating to injunctive relief generally, see Ch. 303, *Injunctions*

For forms for use in actions involving unfair competition or restraint of trade, see Ch. 565, *Unfair Competition*

For additional references relating to complaints, see *§ 404.60[9]*

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PART IV. FORMS
A. General Partnerships

35-406 California Forms of Pleading and Practice--Annotated § 406.67

§ 406.67 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Partnership Accounting [Corp. Code § 16405; former Corp. Code § 15043] Existence of Partners' Agreement Settling Accounts

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Partnership Accounting [Corp. Code § 16405; former Corp. Code § 15043] Existence of Partners' Agreement Settling Accounts

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [if more than one cause of action alleged, state TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

The action is barred by _____ [a written *or* an oral] agreement between plaintiff(s) and defendant(s), executed on _____[*date*], at _____, California, for the purpose of fully and finally settling partnership accounts. [A copy of the agreement is attached as Exhibit _____ and made a part hereof.] Pursuant to the agreement, on or about _____[*date*], plaintiff(s) and defendant(s) finally settled all partnership accounts _____ [between *or* among] themselves.

[2] Use of Form

The form in [1], *above*, is for use by a partner who is a defendant in an action to compel a partnership accounting under the pre-'97 Act or enforce a partner's rights under UPA'94 subsequent to dissolution of the partnership. A written agreement signed by the partners is a defense to an accounting or an enforcement of rights to an accounting [*see Corp. Code §§ 16103(a), 16807*; former *Corp. Code §§ 15040, 15043*]. Any agreement by the parties settling partnership accounts bars an action for accounting by the court [*Cayton v. Walker (1858) 10 Cal. 450, 456* ; *see Pilch v. Milikin (1962) 200 Cal. App. 2d 212, 223, 19 Cal. Rptr. 334]* .

[3] Agreement Between Partners

Partners are permitted to accomplish an accounting and final settlement of the partnership without a formal judicial proceeding [*Pilch v. Milikin (1962) 200 Cal. App. 2d 212, 223, 19 Cal. Rptr. 334]* . An account stated between the parties may be written or oral [*see Fisher v. Fisher (1948) 83 Cal. App. 2d 357, 361, 188 P.2d 802]* . If the partners

have agreed to an accounting, the court is not permitted to undo it [*Pilch v. Milikin (1962) 200 Cal. App. 2d 212, 223, 19 Cal. Rptr. 334]* . When there has been a partial settlement between the partners, an accounting by the court is limited to the unsettled portion of the partnership business [*Stretch v. Talmadge (1884) 65 Cal. 510, 511, 4 P. 513]* .

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35-406 California Forms of Pleading and Practice--Annotated § 406.68

§ 406.68 Complaint for Appointment of Receiver [Code Civ. Proc. § 564] to Wind Up Partnership Affairs [former Corp. Code § 15037], and for Accounting [former Corp. Code §§ 15022, 15043; Prob. Code § 9761]--By Representative of Deceased Partner Against Surviving Partner in Partnership Governed by Pre-'97 Act

[1] FORM Complaint for Appointment of Receiver [Code Civ. Proc. § 564] to Wind Up Partnership Affairs [former Corp. Code § 15037], and for Accounting [former Corp. Code §§ 15022, 15043; Prob. Code § 9761]--By Representative of Deceased Partner Against Surviving Partner in Partnership Governed by Pre-'97 Act

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	COMPLAINT FOR WINDING UP OF PARTNER-
Defendants.	)	SHIP BY RECEIVER AND FOR ACCOUNTING
	)	
	)	

Plaintiff alleges:

1. Plaintiff _____[*name*] is the duly appointed, qualified, and acting _____ [administrator *or* executor] of the estate of _____[*name of deceased partner*], deceased. Decedent died on _____[*date*].

2. [*Capacity and residence of defendant(s). See form in § 406.60[1], Paragraph 1.*]

3. On or about _____[*date*], decedent and defendant(s) entered into _____ [a written

or an oral] partnership agreement in _____[*city*], _____ County, California for the purpose of carrying on the business of _____[*specify*], under the name of _____[*name of partnership*]. The principal place of business of the partnership was located in _____[*city*], _____ County, California. [A copy of the agreement is attached as Exhibit _____ and made a part hereof.] The partnership, under that name, conducted the aforementioned business from that time until _____[*date*]; the decedent's death dissolved the partnership as of that date.

4. Since that date, defendant(s), as surviving partner(s), has/have failed to wind up the partnership affairs, and still continue(s) to carry on the partnership business, without plaintiff's consent. Defendant(s) has/have refused to render an account of decedent's interest, has/have failed to keeptrue accounts of the partnership business, and is/are unable to render to plaintiff full information on all matters affecting the partnership.

[5. The partnership agreement provides that _____ (*specify, e.g.,* the profits of the partnership, as defined in the agreement attached as Exhibit _____, are to be divided between plaintiff and defendant(s) with two-thirds of the profits to plaintiff and one-third to defendant(s)).]

6. Defendant(s) is/are in possession of the partnership books, assets, and accounts and the books, assets, and accounts of the continuing business. The amount of partnership assets and liabilities and the amount of decedent's interest in the partnership as of the date of dissolution is unknown to plaintiff and cannot be ascertained without an accounting of profits and losses that occurred during the operation of the partnership business. The amount of profits of the continuing business that are attributable to decedent's interest is also unknown to plaintiff and cannot be determined without an accounting of the continuing business by defendant(s).

7. A receiver should be appointed by the court to hold the partnership property and wind up partnership affairs, in order to carry into effect the judgment granting plaintiff his/her right to have the partnership wound up by the court.

WHEREFORE, plaintiff prays judgment against defendant(s) [, and each of them,] as follows:

1. For an order compelling defendant(s) to render an accounting of the partnership business;

2. For an order to sell the partnership assets and that after payment of partnership liabilities, the account be settled between plaintiff and defendant(s), dividing the surplus of partnership assets between defendant(s) and decedent's estate in shares according to the partnership agreement;

3. For the appointment of a receiver to take over management and control of partnership property and assets, to wind up partnership affairs and control partnership business until winding up is completed, and to keep partnership assets until their division between the partners;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification. See form in § 406.60.*]

[2] Use of Form

The form in [1], *above*, is for use by the legal representative of a deceased partner to obtain winding up of a partnership governed by the pre-'97 Act after dissolution, and to compel an accounting by surviving partners who have continued the partnership business.

Under the pre-'97 Act, a partnership is dissolved on the death of any partner unless the partnership agreement or other writing signed by all partners provides otherwise [former *Corp. Code § 15031(4)*]. Under UPA'94 the partnership is not dissolved by the death of a partner, but a deceased partner is dissociated from the partnership and statutory or partnership agreement buy-out provisions apply [*see Corp. Code §§ 16601(7), 16701*; Ch. 401, *Partnerships: Actions Between General Partners and Partnership*].

Under the pre-'97 Act any partner who has not wrongfully dissolved the partnership, or his or her legal representative, may obtain a winding up of the dissolved partnership by the court [former *Corp. Code § 15037*]. Any partner, or his or her legal representative, is also entitled to an accounting on dissolution of the partnership [former *Corp. Code § 15043*]. A receiver may be appointed to carry into effect the judgment for winding up [*see Code Civ. Proc. § 564(b)(3)*].

If the partnership business is continued after dissolution without any accounting, the retired partner or legal representative of a deceased partner may also recover that partner's interest in the partnership at the time of dissolution, plus interest, or, alternatively, the profits made by the continuing partnership that are attributable to that partner's interest in the dissolved partnership [*see* former *Corp. Code § 15042*; *see also Ch. 403, Partnerships: Actions by and Against Dissociated Partners, § 403.44[1]* (form)].

This form may be modified to be used when a partnership under UPA'94 is dissolved for other reasons than the death of the partner. Paragraph 3 of the form would be modified to include the reasons for dissolution [*see* form in *§ 406.60* (paragraphs 4 and 5)]. Under UPA'94 a partner's legal representative has the right to apply for judicial supervision of a partnership's winding up on a showing of good cause [*Corp. Code § 16803(a)*].

[3] Allegations

The complaint in [1], *above*, alleges:

- Plaintiff's capacity as legal representative of a deceased partner (Paragraph 1) [*see* former *Corp. Code §§ 15037, 15043*];

- Existence of the partnership and dissolution on the death of a deceased partner (Paragraph 3) [*see* former *Corp. Code § 15031(4)*];

- The surviving partner's or partners' failure to wind up or account to plaintiff (Paragraph 4) [*see* former *Corp. Code § 15043*];

- Provisions, if any, in the partnership agreement governing division of profits or assets (Optional Paragraph 5) [*see* former *Corp. Code § 15040* (statutory rules for settling accounts, applicable in absence of agreement to the contrary); *Mervyn Investment Co. v. Biber (1921) 184 Cal. 637, 644, 194 P. 1037* (accounting granted by partnership agreement)];

- That defendants control the partnership books, and that an accounting is necessary to determine

decedent's interest (Paragraph 6) [*see Whann v. Doell (1923) 192 Cal. 680, 684, 221 P. 899]* ; and

- That appointment of a receiver is necessary to effect the winding up of the partnership by the court (Paragraph 7) [*see Code Civ. Proc. § 564(b)(3)*].

[4] Rights of Deceased Partner's Representative

Under the pre-'97 Act, a personal representative of a deceased partner may apply to the court for an order that the surviving partner render an account. Such an order may be enforced by the court's power to punish for contempt [former *Corp. Code § 15043*; *see Prob. Code § 9761*]. The personal representative may also bring any action against the surviving partner that the deceased partner could have commenced and maintained [*Prob. Code § 9763(a)*; *see Prob. Code § 58*].

[5] Cross References

For references relating to complaints generally, see *§ 404.60[9]*

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35-406 California Forms of Pleading and Practice--Annotated § 406.69

§ 406.69 Complaint for Partnership Accounting [former Corp. Code § 15043] and Interest or Profits Based on Retired or Deceased Partner's Interest [former Corp. Code § 15042] by Retired Partner or Representative of Deceased Partner Against Partner(s) Continuing Business [former Corp. Code § 15042]--Partnership Governed by Pre-'97 Act

[1] FORM Complaint for Partnership Accounting [former Corp. Code § 15043] and Interest or Profits Based on Retired or Deceased Partner's Interest [former Corp. Code § 15042] by Retired Partner or Representative of Deceased Partner Against Partner(s) Continuing Business [former Corp. Code § 15042]--Partnership Governed by Pre-'97 Act

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	COMPLAINT FOR PARTNERSHIP ACCOUNT-
Defendants.	)	ING AND INTEREST OR PROFITS
	)	
	)	

Plaintiff alleges:

[1. Plaintiff _____ (*name*) is the duly appointed, qualified, and acting _____ (administrator *or* executor) of the estate of _____ (*name of deceased partner*), deceased. Decedent died on _____ (*date*).]

2. [*Capacity and residence of defendant(s). See form in § 406.60[1], Paragraph 1.*]

3. On or about _____[*date*], _____ [plaintiff *or* decedent] and defendant(s) entered into _____ [a written *or* an oral] partnership agreement at _____[*city*], _____ County, California, for the purpose of carrying on the business of _____[*specify*], under the name of _____[*name of partnership*]. The principal place of business of the partnership was located in _____[*city*], _____ County, California. [A copy of the agreement is attached as Exhibit _____ and made a part hereof.] The partnership, under that name, conducted the aforementioned business from that time until _____[*date*]; _____ [plaintiff's retirement *or* the decedent's death] dissolved the partnership as of that date.

4. Since that date, defendant(s) has/have continued to carry on the partnership business. There has been no settlement of accounts between plaintiff and defendant(s).

5. The partnership agreement provides that _____ [plaintiff *or* decedent] has a _____ [*specify, e.g.*, one-third] interest in the partnership assets.

6. Defendant(s) is/are in possession of the partnership books, assets, and accounts and the books, assets, and accounts of the continuing business. The amount of partnership assets and liabilities and the amount of _____ [plaintiff's *or* decedent's] interest in the partnership as of the date of dissolution is unknown to plaintiff and cannot be ascertained without an accounting of profits and losses that occurred during the operation of the partnership business. The amount of profits of the continuing business that are attributable to _____ [plaintiff's *or* decedent's] interest is also unknown to plaintiff and cannot be determined without an accounting of the continuing business by defendant(s).

WHEREFORE, plaintiff prays judgment against defendant(s) [, and each of them,] as follows:

1. For an order compelling defendant(s) to render an accounting of the partnership business on _____[*date*], the date of dissolution, and an accounting of the continuing business from that date;

2. For a determination of _____ [plaintiff's *or* decedent's] interest as of the date of dissolution of the partnership;

3. For judgment against defendant(s) in the amount of _____ [plaintiff's *or* decedent's] partnership interest, as determined by the court;

4. For judgment against defendant(s) for interest on _____ [plaintiff's *or* decedent's] partnership interest or, in lieu thereof, and at plaintiff's option after accounting is made, for the profits earned by the business subsequent to dissolution of the partnership that are attributable to the use of _____ [plaintiff's *or* decedent's] right in the property of the dissolved partnership.

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See form in § 406.60[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by either a retired partner or the legal representative of a deceased partner to obtain an accounting and the retired partner or deceased partner's interest in the partnership business, either with interest on that amount or with profits that were made by the continuing partnership business subsequent to the death or retirement and that are attributable to that partner's right in partnership property.

When any partner retires or dies, and the business is continued without any settlement of accounts as between that partner or his or her legal representative and the continuing partner or partners, then unless otherwise agreed, the retired or deceased partner or his or her legal representative may have the value of his or her interest ascertained as of the date of dissolution, and may receive that amount as an ordinary creditor. In addition, that partner or his or her legal representative may recover interest on that amount, or may recover in lieu of interest, at the option of that partner or his or her legal representative, profits made by the continuing business that are attributable to the use of that partner's right to the property of the dissolved partnership. Creditors of the dissolved partnership, however, have priority over separate creditors or the representative of the retired or deceased partner on any such claims [former *Corp. Code § 15042*].

For discussion and forms concerning buy-out provisions for deceased partners under UPA'94, when a partnership is not dissolved and the partner is instead treated as dissociated, see Ch. 401, *Partnerships: Actions Between General Partners and Partnership* .

[3] Allegations

The complaint in [1], *above*, alleges:

- If the action is brought by the legal representative of a deceased partner, the plaintiff's capacity as legal representative (Paragraph 1) [*see* former *Corp. Code §§ 15042, 15043*];

- The existence of the partnership, and dissolution on either the plaintiff's retirement or the decedent's death (Paragraph 3) [*see* former *Corp. Code §§ 15031(4), (7), 15042*];

- The continuance of the partnership business subsequent to dissolution, and the and lack of an accounting between plaintiff and defendant(s) (Paragraph 4) [former *Corp. Code § 15042*];

- Plaintiff's or the deceased partner's share of property of the dissolved partnership (Paragraph 5) [*see* former *Corp. Code § 15042*]; and

- The necessity of an accounting by defendant(s) of the partnership and the continuing business (Paragraph 6) [*see* former *Corp. Code § 15042*; *Casida v. Roberts (1959) 51 Cal. 2d 853, 857, 337 P.2d 829* (retiring partner)].

[4] Right to Accounting Before Choosing Between Interest and Profits

Under the pre-'97 Act, a retired or deceased partner's right to an accounting accrues as against the partner or partners continuing the business atthe date of dissolution, in the absence of any agreement to the contrary [former *Corp. Code § 15043*]. In an action against the partner or partners continuing the partnership business to obtain an accounting and to recover the retired or deceased partner's interest, the retiring partner or deceased partner's representative is entitled to have an accounting made before being compelled to choose between profits and interest pursuant to former *Corp. Code*

§ 15042 [*see Casida v. Roberts (1959) 51 Cal. 2d 853, 857, 337 P.2d 829* (retiring partner)].

[5] Cross References

For references relating to complaints generally, see *§ 404.60[9]*

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[Reserved]

§§ 406.70[Reserved]

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B. Limited Partnerships
1. Dissolution Under ULPA '08

35-406 California Forms of Pleading and Practice--Annotated § 406.80

§ 406.80 Complaint Under ULPA '08 for Limited Partnership Dissolution [Corp. Code § 15908.02] and Judicial Supervision of Winding Up [Corp. Code § 15908.03]

[1] FORM Complaint Under ULPA '08 for Limited Partnership Dissolution [Corp. Code § 15908.02] and Judicial Supervision of Winding Up [Corp. Code § 15908.03]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	No. _____
_____ [*names*],	)	COMPLAINT FOR LIMITED PARTNERSHIP
Defendants.	)	DISSOLUTION
	)	
	)	

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, a _____ [general *or* limited] partner in the limited partnership known as _____ [*name of partnership*].

2. Defendants _____ [*names*] are, and at all times herein mentioned were, general partners in the limited partnership known as _____ [*name of partnership*] and are, and at all times herein mentioned were, residents of _____ County, California.

3. Defendants _____ [*names*] are, and at all times herein mentioned were, limited partners in the

limited partnership known as _____ [*name of partnership*], and are, and at all times herein mentioned were, residents of _____ County, California.

4. On or about _____ [*date*], plaintiff and defendants executed a written limited partnership agreement at _____ [*city*], _____ County, California, for the purpose of forming a limited partnership, to carry on the business of _____ [*specify*], under the name of _____ [*name of partnership*]. The limited partnership's principal place of business is located in _____ [*city*], _____ County, California. [A copy of the agreement is attached to this complaint as Exhibit _____ and made a part hereof.] On or about _____ [*date*], defendant general partners filed a certificate of limited partnership with the Secretary of State. A copy of the certificate of limited partnership certified by the Secretary of State is attached to this complaint as Exhibit _____ and made a part hereof.

5. It is not reasonably practicable to carry on the activities of the limited partnership in conformity with the limited partnership agreement, for the following reasons: _____ [*e.g.*, the last remaining general partner dissociated from the limited partnership on _____ (*date*) *or identify provision(s) of partnership agreement that cannot be complied with, and specify circumstances that prevent compliance*].

6. Defendants have refused to consent to a dissolution of the partnership, and their refusal prevents plaintiff from obtaining the consent of _____ [all general partners *and/or* the limited partners owning a majority of the rights to receive distributions as limited partners].

7. As a result of the circumstances described in Paragraphs 5 and 6, plaintiff is entitled to an order for the dissolution of the limited partnership, pursuant to *California Corporations Code Sections 15908.01(b)* and *15908.02(a)*.

[*If judicial supervision of winding-up process is desired, add:*]

8. Plaintiff is also entitled to the appointment of a person to wind up the activities of the limited partnership, and to judicial supervision of the winding up, because _____ [*specify, e.g.*, the limited partnership has not had a general partner since _____ (*date*), and the remaining limited partners have not appointed a person to wind up the partnership's activities *or specify other good cause pursuant to Corp. Code § 15908.03(d)(2)*].

[*Continue with the following:*]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For an order that the limited partnership be dissolved;

[*If appropriate, add:*]

2. For an order that the partnership's activities affairs be wound up by _____ [plaintiff *or specify other person*];

[*Continue with the following:*]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See form in § 406.60[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by any partner seeking a decree of dissolution of a limited partnership that is subject to the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code § 15900 et seq.* (ULPA '08)]. For discussion of the application of the ULPA '08, see *§ 406.30* and Ch. 400, *Partnerships: Governing Statutes* . Grounds for obtaining a court order of dissolution are discussed in *§ 406.31[1]*, and court supervision of the winding-up process is discussed in *§ 406.33[1]*.

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1. Dissolution Under ULPA '08

35-406 California Forms of Pleading and Practice--Annotated § 406.81

§ 406.81 Notice of Motion Under ULPA '08 for Stay of Dissolution and Winding Up of Limited Partnership and for Appraisal of Partnership Interests [Corp. Code § 15908.02]

[1] FORM Notice of Motion Under ULPA '08 for Stay of Dissolution and Winding Up of Limited Partnership and for Appraisal of Partnership Interests [Corp. Code § 15908.02]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	No. _____
_____ [*name*],	)	NOTICE OF APPLICATION AND APPLICATION
Plaintiff,	)	FOR STAY OF DISSOLUTION AND FOR AP-
vs.	)	PRAISAL OF PARTNERSHIP INTERESTS
_____ [*name*] et al.,	)	Hearing Date: _____
Defendants.	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
	)	Date action filed: _____
		Trial date: _____

_____

Applicant, _____ [*name*], requests that the Court issue an order staying these partnership dissolution proceedings and appointing appraisers to ascertain the fair market value of plaintiff's partnership interest, so that applicant may purchase plaintiff's interest pursuant to *California Corporations Code Section 15908.02*. In support of this request, applicant respectfully represents:

1. Plaintiff, _____ [*name*], filed the present action seeking an order dissolving the limited partnership

known as _____ [*name of partnership*].

2. Applicant is a defendant in the present action and is a _____ [general *or* limited] partner in the limited partnership known as _____ [*name of partnership*].

3. Applicant elects and has offered, pursuant to *California Corporations Code Section 15908.02(b)*, to purchase the partnership interest owned by plaintiff, but the parties have been unable to agree on the fair market value of plaintiff's partnership interest.

WHEREFORE, applicant respectfully requests that the Court make the following orders:

1. Pursuant to *California Corporations Code Section 15908.02(c)*, an order that the present action be stayed pending the appraisal of the partnership interest owned by plaintiff.

2. Pursuant to *California Corporations Code Section 15908.02(c)*, an order setting the amount of bond that applicant will be required to give to secure the stay of proceedings.

3. Pursuant to *California Corporations Code Section 15908.02(d)*, an order:

a. Appointing three disinterested appraisers;

b. Referring the matter to them for an appraisal of the fair market value of the partnership interest owned by plaintiff; and

c. Prescribing the time and manner of producing evidence of the fair market value of the partnership interest owned by plaintiff.

4. An order for any other and further relief as the court may deem proper.

Dated: _____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Applicant _____ [*name*]

[2] Use of Form

This form may be used to request a stay of proceedings for judicial dissolution of a limited partnership that is subject to the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code § 15900 et seq.* (ULPA '08)]. The ULPA '08 allows one or more partners to prevent dissolution by purchasing the interest of the partner who is seeking dissolution [*see Corp. Code § 15908.02(b)-(f)* (ULPA '08)].

For discussion of the application of the ULPA '08, see *§ 406.30* and Ch. 400, *Partnerships: Governing Statutes* . The procedure for purchasing the interest of a partner who is seeking dissolution is discussed in *§ 406.32[1][b]*.

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[Reserved]

§§ 406.82[Reserved]

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2. Dissolution Under CRLPA and ULPA

35-406 California Forms of Pleading and Practice--Annotated § 406.90

§ 406.90 Complaint for Limited Partnership Dissolution [Corp. Code § 15682] and Winding Up [Corp. Code §§ 15681, 15683] for Partnership Formed on or After July 1, 1984, or Otherwise Governed by CRLPA

[1] FORM Complaint for Limited Partnership Dissolution [Corp. Code § 15682] and Winding Up [Corp. Code §§ 15681, 15683] for Partnership Formed on or After July 1, 1984, or Otherwise Governed by CRLPA

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*Name*],	)	
individually and on behalf of all others similarly situated,	)	NO. _____
Plaintiff, vs.	)	COMPLAINT FOR LIMITED PARTNERSHIP DISSOLUTION AND WINDING UP
_____ [*Names*],	)	
Defendants.	)	
	)	

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, a _____ [general *or* limited] partner in the limited partnership known as _____[*name of partnership*].

2. Defendants _____[*names*] are, and at all times herein mentioned were, general partners in the limited partnership known as _____[*name of partnership*] and are, and at all times herein mentioned were, residents of _____ County, California.

3. Defendants _____[*names*] are, and at all times herein mentioned were, limited partners in the

limited partnership known as _____ [name of partnership], and are, and at all times herein mentioned were, residents of _____ County, California.

4. On or about _____[*date*], plaintiff and defendants executed _____ [a written *or* an oral] partnership agreement at _____[*city*], _____ County, California for the purpose of forming a limited partnership, to carry on the business of _____[*specify*], under the name of _____[*name of partnership*]. The limited partnership's principal place of business is located in _____[*city*], _____ County, California. [Acopy of the agreement is hereto as Exhibit _____ and made a part hereof.] On or about _____[*date*], defendant general partners filed a certificate of limited partnership with the Secretary of State. A copy of the certificate of limited partnership certified by the Secretary of State is attached to this complaint as Exhibit _____ and made a part hereof.

5. _____ [*Set forth conduct by defendants or other facts warranting dissolution under Corp. Code § 15682 (CRLPA), e.g.,* Defendants _____ (*names of general partners*) have failed and refused to respond to plaintiff's requests to inspect and copy partnership records, including financial statements and tax returns and reports, and have refused to pay plaintiff income from the partnership business as required by the partnership agreement].

6. Plaintiff is entitled to dissolution of the partnership and to a winding up of its affairs, pursuant to *Corporations Code Sections 15681, subsection (d), 15682,* subsection(s) _____ [*specify, e.g.,* (b)], and *15683*, in that _____ [*specify, e.g.,* defendant general partners' have knowingly countenanced persistent unfairness towards plaintiff]. [Defendants _____ (*names*) have refused to consent to a dissolution of the partnership.]

7. Plaintiff is also entitled to a winding up of the partnership affairs and distribution of partnership assets under the terms of the partnership agreement. _____ [*If appropriate, allege facts showing necessity for any specific order regarding the winding up of partnership affairs, e.g.,* It is necessary for the protection of plaintiff's interests that the partnership affairs be wound up by the limited partners, in that the defendant general partners, on or about _____ (*date*), threatened that plaintiff will not receive any return of his/her/its capital or any payment of his/her/its share of partnership profits.]

[*EITHER, if general partners are to wind up:*]

8. Defendant general partners are in possession and control of the partnership books, assets, and accounts. The amount of partnership assets and liabilities is unknown to plaintiff and cannot be ascertained unless defendant general partners are ordered to turn over to plaintiff copies of all of the partnership books, accounts, and other financial records.

[*OR, if someone other than the general partners is to wind up:*]

8. Defendant general partners are in possession and control of the partnership books, assets, and accounts. Possession of these records is necessary in order to wind up the partnership affairs. It is therefore necessary that defendant general partners be ordered to turn over all of the financial records of the partnership to _____ [*specify, e.g.,* plaintiff] in order that he/she/they might wind up the partnership affairs.

[*CONTINUE*]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For an order that the limited partnership be dissolved;

2. For an order that partnership affairs be wound up by _____ [defendant general partners or specify other persons winding up], that the defendant general partners turn over [copies of] all the partnership's financial records, and that affairs be settled and distribution be made to the limited and general partners under the terms of the partnership agreement;

[3. *Specify any additional order regarding method of winding up;*]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[Verification, if desired. See form in *§ 406.60[1]*.]

[2] Use of Form

The complaint in [1], above, is for use by any partner seeking a decree of dissolution of a limited partnership that is governed by the CRLPA. Generally, the CRLPA governed limited partnerships formed on or after July 1, 1984, and before January 1, 2008, the operative date of the ULPA '08 [*Corp. Code §§ 15711, 15714* (CRLPA), 15912.06(a)(1) (ULPA '08); *see Corp. Code § 15900 et seq.* (ULPA '08)]. In addition, a limited partnership formed before July 1, 1984, could elect to be governed by CRLPA if all partners, or a lesser number as required by the partnership agreement, consented in writing to the election [*Corp. Code § 15712(b)(1)* (CRLPA)]. Effective January 1, 2010, CRLPA is repealed [*Corp. Code § 15724* (CRLPA)], and all limited partnerships, regardless of the date of formation, are governed by the ULPA '08, except as specified by the ULPA '08 [*Corp. Code § 15912.06(b)* (ULPA '08); *see Corp. Code § 15912.06(c)* (ULPA '08) (exceptions)]. However, the ULPA '08 does not affect an action commenced, proceeding brought, or right accrued before January 1, 2008 [*Corp. Code § 15912.07* (ULPA '08)]. For further discussion of the coverage of the CRLPA and the ULPA '08, see Ch. 400, *Partnerships: Governing Statutes* .

Under the CRLPA, effective July 1, 1984, any partner may bring an action for a decree of dissolution on specified statutory grounds [*see Corp. Code § 15682* (CRLPA)]. Winding up is decreed at the same time [*see Corp. Code §§ 15681(d), 15683(a)* (CRLPA)]. If the plaintiff seeks the appointment of a receiver to wind up partnership affairs, the allegations found in the form in *§ 406.60[1]* pertaining to the appointment of a receiver may be combined with the allegations in this form.

[3] Allegations

This complaint alleges:

- Plaintiff's capacity as a general or limited partner in a limited partnership (Paragraph 1) [*see Corp.*

Code § 15682 (CRLPA)];

- Identification of defendants as general and limited partners (Paragraphs 2 and 3);

- Formation of the partnership by execution of the partnership agreement and filing of the certificate of limited partnership with the Secretary of State (Paragraph 4) [*see Corp. Code § 15621(a), (c)* (CRLPA)];

- Factual circumstances providing grounds for decree of dissolution under *Corp. Code § 15682* (Paragraph 5) [*Corp. Code § 15682* (CRLPA)];

- The reason why these facts necessitate the decree of dissolution pursuant to *Corp. Code § 15682* (Paragraph 6);

- That the partnership be wound up and, if appropriate, the necessity that the winding up be accomplished other than by the general partners (Paragraph 7) [*see Corp. Code § 15683(a)* (CRLPA)]; and

- That the general partners in control of partnership records be compelled to turn over the records if the general partners are not winding up, or copies of the records if the general partners are winding up (Paragraph 8) [*see Corp. Code § 15683(a)* (CRLPA)].

[4] Jurisdiction and Venue

A suit for partnership dissolution is equitable in nature [*Stowe v. Matson (1949) 94 Cal. App. 2d 678, 682, 211 P.2d 591]* . Jurisdiction for equitable actions is in the superior court [*see Cal. Const., art. VI, § 10*; *see also* Ch. 324, *Jurisdiction: Subject Matter* ;]. Unless the law specifically governing limited partnerships provides otherwise, the law governing general partnerships will also apply to limited partnerships [*see* former *Corp. Code § 15006(2)*]. Venue for an action to dissolve a general partnership is in the county of defendant's residence, pursuant to *Code Civ. Proc. § 395* [*Rudnick v. Delfino (1956) 140 Cal. App. 2d 260, 264, 294 P.2d 983]* . If there is more than one defendant in the action, and the suit is brought in the county of one defendant's residence, another defendant may not have the venue changed to his or her county of residence [*Rudnick v. Delfino (1956) 140 Cal. App. 2d 260, 265-266, 294 P.2d 983]* .

[5] Decree of Dissolution Under CRLPA

Under the CRLPA, a court may decree the dissolution of a limited partnership when any of the following occur [*Corp. Code § 15682* (CRLPA); *see § 406.31[2]*]:

- It is not reasonably practicable to carry on the business in conformity with the partnership agreement;

- The general partners have been guilty of or have knowingly countenanced persistent and pervasive fraud or abuse of authority or persistent unfairness toward any partner;

- The property of the limited partnership is being misapplied or wasted by the general partners; or

- Dissolution is reasonably necessary for the protection of the rights or interests of the complaining partners.

Any partner may bring an action for dissolution of a limited partnership. Unlike an action for dissolution of a general partnership, however, the court has discretion to decree dissolution once the grounds for dissolution have been

established [*compare Corp. Code § 16801(5) and* former *Corp. Code § 15032* (dissolution of general partnerships by court decree) *with Corp. Code § 15682* (dissolution of limited partnership by court decree under CRLPA)].

[6] Winding Up

A decree ordering the winding up of the partnership is made at the same time as the decree dissolving the partnership [*see Corp. Code §§ 15681(d), 15583(a)* (CRLPA)]. Except as provided in the partnership agreement, the general partners who have not wrongfully dissolved a limited partnership or, if there are none, the limited partners, may wind up the limited partnership's affairs. If the dissolution is by court decree, however, winding up is conducted in accordance with the decree of dissolution [*Corp. Code § 15683(a)* (CRLPA)]. Therefore, the plaintiff should seek any appropriate orders regarding who should wind up at the time plaintiff seeks the decree of dissolution, including an order that the general partners turn over the financial records so that the amounts owed in settling accounts can be ascertained [*see Corp. Code § 15684* (CRLPA)]. For discussion of the limited partners' rights to inspect partnership books generally, see Ch. 404, *Partnerships: Actions Between Limited Partners and Partnership* .

[7] Certificates of Dissolution and Cancellation

On dissolution of a limited partnership, the person authorized to execute the certificate in accordance with *Corp. Code § 15624* [*see § 406.36[5][b]*] must file with the Secretary of State, on a form prescribed by the Secretary of State, a certificate of dissolution [*Corp. Code § 15623(a)(1)* (CRLPA)]. A certificate of dissolution may be expunged by filing a certificate of continuation in any of the circumstances set forth in *Corp. Code § 15623(c)(1)* [*see Corp. Code § 15623(c)(1)* (CRLPA); § 406.36[2]]. After winding up of the partnership affairs has been completed, the person authorized to execute the certificate in accordance with *Corp. Code § 15624* [*see § 406.35[6]*] must file a certificate of cancellation of certificate of limited partnership [*Corp. Code § 15623(b)(1)* (CRLPA); *see § 406.36[3][b]*].

[8] Cross References

For references relating to complaints generally, see *§ 404.60[9]*

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Volume 35: Partition thru Paternity-Chs. 397-412
Chapter 406 PARTNERSHIPS: DISSOLUTION
PART IV. FORMS
B. Limited Partnerships
2. Dissolution Under CRLPA and ULPA

35-406 California Forms of Pleading and Practice--Annotated § 406.91

§ 406.91 Petition for Decree Ordering Winding Up of Limited Partnership Following Dissolution [Corp. Code § 15683(b) (CRLPA)]

[1] FORM Petition for Decree Ordering Winding Up of Limited Partnership Following Dissolution [Corp. Code § 15683(b) (CRLPA)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*Name*],	)	
Petitioners,	)	NO. _____
vs.	)	PETITION FOR DECREE ORDERING WINDING
_____ [*Name*],	)	UP OF LIMITED PARTNERSHIP
Respondents.	)	Date of Hearing: _____
	)	Time of Hearing: _____
	)	Location of Hearing: _____

_____

Petitioners allege:

[*EITHER, if petition is brought by limited partners:*]

1. Petitioners are limited partners in the limited partnership known as _____[*name of partnership*], formed by _____ [oral *or* written] agreement on _____[*date*], as evidenced by a certificate of limited partnership filed with the Secretary of State on _____[*date*]. [A copy of the partnership agreement is attached as Exhibit _____ and incorporated by reference.] A copy of the certificate of limited partnership is attached to this complaint as Exhibit _____ and made a part hereof. Petitioners represent

_____ [five *or specify higher number*] percent of the interests of all limited partners in the partnership.

[*OR, if petition is brought by creditors of partnership:*]

1. As a result of _____ [*specify, e.g.,* promissory notes dated _____, _____, and _____, attached as Exhibits _____, _____, and _____ and incorporated by reference], petitioners are creditors of the limited partnership known as _____[*name of partnership*].

[*CONTINUE*]

2. Respondents are the general partners and the nonpetitioning limited partners of the partnership known as _____[*name of partnership*] and are, and at all times herein mentioned were, residents of _____ County, California.

3. The limited partnership _____[*name*] was dissolved on _____[*date*], by _____ [*specify, e.g.,* a written agreement of all general partners and a majority of the limited partners].

4. It is necessary for the protection of _____ [*specify interested party, e.g.,* petitioners'] interest that the partnership affairs be wound up by _____ [*specify, e.g.,* the petitioning limited partners], in that _____ [*specify, e.g.,* on or about _____ (*date*), the respondents executed several promissory notes on behalf of the partnership, thereby incurring new and additional partnership debts without the approval of a majority of limited partners, as required by the partnership agreement. On or about _____ (*date*), petitioners demanded the immediate winding up of partnership affairs, but respondents failed and refused to do so].

[*EITHER, if winding up is to be by petitioning limited partners:*]

5. Respondents have possession and control of all partnership books, records, and accounts. It is necessary that respondents be compelled to turn over all such records to petitioners immediately in order that the petitioners may promptly wind up the partnership affairs.

[*OR, if winding up is to be by respondents:*]

5. Respondents are in possession and control of partnership books, records, and accounts. It is necessary for the protection of petitioners' interests that the respondents be compelled to turn over to petitioners copies of all such records to enable petitioners to ascertain the partnership's assets and liabilities.

[*CONTINUE*]

WHEREFORE, petitioners pray judgment against respondents as follows:

1. For an order that _____ [*specify, e.g.,* petitioners] wind up the affairs of the limited partnership known as _____[*name*];

2. For an order compelling respondents to turn over to petitioners [copies of] all partnership books, financial records and accounts;

[3. For an order that petitioners be paid by the partnership a reasonable compensation (in the sum of $_____) for winding up the partnership's affairs;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____ am one of the petitioners in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The petition in [1], *above*, is for use under the CRLPA by either the limited partners representing five percent or more of the interests of limited partners or three or more creditors of the limited partnership, to obtain an order to wind up the limited partnership following dissolution. Such an order may be obtained by petition if it appears necessary for the protection of any parties in interest [*Corp. Code § 15683(b)* (CRLPA)].

The CRLPA governed limited partnerships formed on or after July 1, 1984, and before January 1, 2008, the operative date of the ULPA '08 [*Corp. Code §§ 15711, 15714* (CRLPA), 15912.06(a)(1) (ULPA '08); *see Corp. Code § 15900 et seq.* (ULPA '08)]. In addition, a limited partnership formed before July 1, 1984, could elect to be governed by CRLPA if all partners, or a lesser number as required by the partnership agreement, consented in writing to the election [*Corp. Code § 15712(b)(1)* (CRLPA)]. Effective January 1, 2010, CRLPA is repealed [*Corp. Code § 15724* (CRLPA)], and all limited partnerships, regardless of the date of formation, are governed by the ULPA '08, except as specified by the ULPA '08 [*Corp. Code § 15912.06(b)* (ULPA '08); *see Corp. Code § 15912.06(c)* (ULPA '08) (exceptions)]. However, the ULPA '08 does not affect an action commenced, proceeding brought, or right accrued before January 1, 2008 [*Corp. Code § 15912.07* (ULPA '08)]. For further discussion of the coverage of the CRLPA and the ULPA '08, see Ch. 400, *Partnerships: Governing Statutes* .

[3] Contents of Petition

The petition in [1], *above*, alleges:

- Petitioners' capacity to petition, either as limited partners representing at least 5 percent of the interests of the limited partners or as at least three creditors of the partnership (Paragraph 1) [*Corp. Code § 15683(b)* (CRLPA)];

- That respondents are general partners (Paragraph 2) [*see Corp. Code § 15683(a),(b)* (CRLPA)];

- That the limited partnership has been dissolved (Paragraph 3) [*see Corp. Code §§ 15681, 15683* (CRLPA)];

- The necessity for an order to wind up the partnership to protect any parties in interest, and designation of the person who should accomplish the winding up (Paragraph 4) [*Corp. Code § 15683(b)* (CRLPA)]; and

- The necessity for ordering the respondents to turn over the partnership records to the winding up petitioners or copies of the partnership records if the respondents are to wind up (Paragraph 5) [*see Corp. Code § 15683* (CRLPA)].

[4] Designation and Compensation of Persons Winding Up

The decree ordering winding up must designate who will accomplish the winding up [*Corp. Code § 15683(b)* (CRLPA)]. Any limited partners who areto wind up are entitled to reasonable compensation for doing so [*Corp. Code § 15683(c)* (CRLPA)].

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2. Dissolution Under CRLPA and ULPA

35-406 California Forms of Pleading and Practice--Annotated § 406.92

§ 406.92 Complaint for Dissolution of Limited Partnership, Winding Up, Accounting and Return of Contribution [Corp. Code § 15516(4)]--By Limited Partner in Partnership Formed Before July, 1984, and Governed by ULPA

[1] FORM Complaint for Dissolution of Limited Partnership, Winding Up, Accounting and Return of Contribution [Corp. Code § 15516(4)]--By Limited Partner in Partnership Formed Before July, 1984, and Governed by ULPA

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*Name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*Names*],	)	COMPLAINT FOR LIMITED PARTNERSHIP
Defendants.	)	DISSOLUTION, WINDING UP, ACCOUNTING,
	)	AND RETURN OF LIMITED PARTNER'S CON-
	)	TRIBUTION

_____

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, a limited partner in the limited partnership known as _____[*name of partnership*].

2. Defendants _____[*names*] are, and at all times herein mentioned were, general partners in the limited partnership known as _____[*name of partnership*], and are, and at all times herein mentioned were, residents of _____ County, California.

3. Defendants _____[*names*] are, and at all times herein mentioned were, limited partners in the limited partnership known as _____[*name of partnership*], and are, and at all times herein mentioned were, residents of _____ County, California.

4. On or about _____[*date*], plaintiff and defendants executed _____ [a written *or* an oral] partnership agreement in _____[*city*], _____ County, California for the purpose of forming a limited partnership, to carry on the business of _____[*specify*], under the name of _____[*name of partnership*]. The limited partnership's principal place of business is located in _____[*city*], _____ County, California. [A copy of the agreement is attached as Exhibit _____ and incorporated by reference.] On or about _____[*date*], defendant general partners filed a certificate of limited partnership with the Secretary of State, in compliance with *Corporations Code Section 15712(b)(2)*, effective July 1, 1984. A copy of the certificate of limited partnership certified by the Secretary of State is attached as Exhibit _____ and incorporated by reference.

[*EITHER*]

5. On or about _____[*date*], plaintiff demanded the return of his/her/its contribution to the partnership. That demand was made rightfully inthat _____ [*specify, e.g.,* the date specified in the partnership agreement and certificate of limited partnership for the return of plaintiff's contribution was _____]. Defendant general partners failed and refused to return plaintiff's contribution.

[*OR*]

5. Plaintiff's contribution to the partnership has not been returned. _____ [The liabilities of the partnership, other than its liability to return plaintiff's contribution, have not been paid *or* The partnership property is insufficient to pay the partnership liabilities other than its liability to return plaintiff's contribution]. Plaintiff is otherwise entitled to the return of his/her/its contribution because _____ [*specify, e.g.,* the partnership agreement and certificate of limited partnership provided that on _____ (*date*), plaintiff's contribution would be returned].

[*CONTINUE*]

6. Plaintiff is entitled to have the partnership dissolved and its affairs wound up pursuant to *Corporations Code Section 15516(4)* and applicable to this partnership under the provisions of *Corporations Code Section 15711*, because his/her/its contribution to the partnership has not been returned despite plaintiff's right to have that contribution returned.

7. Defendant general partners are in possession of the partnership books, assets, and accounts. The exact amounts of partnership assets and liabilities and amounts owed by defendant general partners to plaintiff as his/her/its share of _____ [profits *or specify other compensation by way of income*] is unknown to plaintiff and cannot be ascertained without an accounting of profits and losses that have occurred during the operation of the partnership business. Plaintiff has demanded an accounting, but defendants have failed and refused, and continue to refuse, to account to plaintiff.

8. The partnership agreement and the certificate of limited partnership provide that _____ [*specify, e.g.,* plaintiff is entitled to a 10-percent share of the partnership profits in addition to a return of his/her/its contribution].

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For an order that the limited partnership be dissolved and the partnership affairs be wound up;

2. For an accounting of partnership affairs from _____ to _____[*dates*], that the account be settled between plaintiff and defendants, and that plaintiff have judgment against defendants for the return of his/her/its contribution in the sum of $_____, and for any sum that may be found due and owing to plaintiff under that accounting;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See form in § 406.60[1].*]

[2] Use of Form

The complaint in [1], above, is for use by a limited partner in a limited partnership governed by the ULPA [*Corp. Code § 15501 et seq.* (ULPA)]. Generally, the ULPA governed limited partnerships formed before July 1, 1984, the operative date of the California Revised Limited Partnership Act (CRLPA) [*Corp. Code § 15711* (CRLPA); *see Corp. Code § 15611 et seq.* (CRLPA)]. On or after July 1, 1984, a limited partnership formed under the ULPA could elect to be governed by CRLPA [*Corp. Code § 15712(b)(1)* (CRLPA)]. Also, on or after January 1, 2008, a limited partnership originally formed under the ULPA could elect to be governed by the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code § 15912.06(a)(2)* (ULPA '08); *see Corp. Code § 15900 et seq.* (ULPA '08)]. Effective January 1, 2010, ULPA is repealed [*Corp. Code § 15534* (ULPA)], and all limited partnerships, regardless of the date of formation, are governed by the ULPA '08, except as specified by the ULPA '08 [*Corp. Code § 15912.06(b)* (ULPA '08); *see Corp. Code § 15912.06(c)* (ULPA '08) (exceptions)]. However, the ULPA '08 does not affect an action commenced, proceeding brought, or right accrued before January 1, 2008 [*Corp. Code § 15912.07* (ULPA '08)]. For further discussion of the coverage of the ULPA and the ULPA '08, see Ch. 400, *Partnerships: Governing Statutes* .

A limited partner in a partnership governed by the ULPA is entitled to have the partnership dissolved and its affairs wound up when he or she rightfully but unsuccessfully demands a return of his or her contribution to the partnership or when the other liabilities of the partnership have not been paid or the partnership property is insufficient for their payment and the limited partner would otherwise be entitled to the return of his or her contribution [*Corp. Code § 15516(4)* (ULPA)].

Under ULPA, a limited partner also has the same rights as a general partner to have a dissolution and winding up by court decree or to have a formal account of partnership affairs whenever circumstances render it just and reasonable [*Corp. Code § 15510(1)* (ULPA)]. For discussion of when a general partner may obtain a decree of dissolution, see *§ 406.31[3][a]*.

[3] Allegations

The complaint in [1], *above*, alleges:

- Plaintiff's capacity as a limited partner in a limited partnership (Paragraph 1) [*see Corp. Code § 15516(4)* (ULPA)];

- That defendants are general and limited partners of that partnership (Paragraphs 2 and 3);

- Formation of the partnership by execution of the partnership agreement and filing of the certificate of limited partnership with Secretaryof State, as required by *Corp. Code § 15712(b)(2)* (CRLPA) of all existing partnerships, effective January 1, 1984 (Paragraph 4) [*see Corp. Code § 15712(b)(2)* (CRLPA)];

- Plaintiff's demand for return of his/her/its contribution, or plaintiff's entitlement to return of his/her/its contribution but the partnership's failure or inability to pay its other liabilities first (Paragraph 5) [*Corp. Code § 15516(4)* (ULPA)];

- Plaintiff's right to have the partnership dissolved and its affairs wound up (Paragraph 6) [*Corp. Code § 15516(4)* (ULPA); *see also Corp. Code § 15510(1)(c)* (ULPA)];

- The necessity for an accounting from the defendant general partners (Paragraph 7) [*see Corp. Code § 15510(1)(b)* (ULPA)]; and

- Plaintiff's share of partnership profits or other entitlement to compensation above his, her, or its contribution to the partnership (Paragraph 8) [*see Corp. Code §§ 15510(2), 15516* (ULPA)].

[4] Jurisdiction and Venue

An action for a partnership dissolution is equitable in nature [*Stowe v. Matson (1949) 94 Cal. App. 2d 678, 682, 211 P.2d 591]* . Jurisdiction for equitable actions is in the superior court [*see Cal. Const., art. VI, § 10*; *see also* Ch. 324, *Jurisdiction: Subject Matter*]. The actions are not limited civil cases unless the total assets of the partnership do not exceed $25,000 [*Code Civ. Proc. §§ 85, 86(a)(2), (b)*]. Unless the law specifically governing limited partnerships provides otherwise, the law governing general partnerships will also apply to limited partnerships [*see* former *Corp. Code § 15006(2)* (pre-'97 Act)]. Venue for an action to dissolve a general partnership is in the county of defendant's residence, pursuant to *Code Civ. Proc. § 395* [*Rudnick v. Delfino (1956) 140 Cal. App. 2d 260, 264, 294 P.2d 983]* . If there is more than one defendant in the action, and the suit is brought in the county of one defendant's residence, another defendant may not have the venue changed to his or her county of residence [*Rudnick v. Delfino (1956) 140 Cal. App. 2d 260, 265-266, 294 P.2d 983]* .

[5] Decree of Dissolution Under ULPA

ULPA does not have specific provisions listing the grounds for dissolution of a limited partnership. Aside from a limited partner's right to have dissolution and winding up on failure to receive a return of his, her, or its contribution, the act merely provides that a limited partner has the same rights as a general partner to have dissolution and winding up of the partnership by court decree and to have a formal account of partnership affairs whenever circumstances render it just and reasonable [*Corp. Code § 15510(1)(b), (c)* (ULPA)]. The statutory provisions governing general partnerships also govern limited partnerships in the absence of conflictingprovisions relating specifically to limited partnerships [former *Corp. Code § 15006(2)* (pre-'97 Act)]. For discussion of when a general partner may obtain a decree of dissolution, see *§ 406.31[3][a]*.

[6] Cross References

For references relating to complaints generally, see *§ 404.60[9]*

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[RESERVED]

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[1] Bond

[2] Contract Requirements and Conditions

[3] Customer's Rights

[4] Invention Development Services Legislation

[5] Limitations on Invention Developer

[6] Required Disclosures, Statements, and Records

[7] Violation of Invention Development Services Law

[8] Void Contract

§§ 411.72-411.109 [Reserved]

§ 411.110 Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12; Cal. Rules of Ct., Rule 1.45(a)]--Complaint for Damages [Civ. Code § 3300] for Breach of Patent Licensing Agreement [Cal. Rules of Ct., Rule 1.45(a); Cal. Judicial Council Forms PLD-C-001, PLD-C-001(1)]--By Inventor or Assignee of Inventor--Failure to Pay Minimum Royalties

[1] FORM

[2] Judicial Council Trial Court Forms

[3] Use of Form

[4] Allegations

[5] Verification

[6] Contract Action

[7] Jurisdiction

[8] Defense--Invalidity of Patent

[9] Federal Statutes

[10] Decisions

[11] Cross References

§ 411.111 Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12; Cal. Rules of Ct., Rule 1.45(a)]--Complaint for Damages [Civ. Code § 3300] for Breach of Patent Licensing Agreement [Cal. Rules of Ct., Rule 1.45(a), (b); Cal. Judicial Council Forms PLD-C-001, PLD-C-001(1)]--Failure to Submit Accounting or Pay Royalties

[1] FORM

[2] Judicial Council Trial Court Forms

[3] Use of Form

[4] Allegations

[5] Accounting

[6] Cross References

§ 411.112 Complaint for Declaratory Relief [Code Civ. Proc. § 1060] to Determine Employer's Shop Rights to Employee's Invention Under Agreement Implied in Fact or by Law and for Damages [Civ. Code § 3300]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Action for Declaratory Relief

[5] Jurisdiction

[6] Employer's Right to Assignment of Employee's Patent

[7] State Statutes

[8] Decisions

[9] Cross References

§ 411.113 Affirmative Defense to Employer's Action for Shop Rights to Employee's Invention--Employer Rejected Invention as Impractical

[1] FORM

[2] Use of Form

[3] Cross References

§ 411.114 Affirmative Defense to Employer's Action to Enforce Employment Contract--Employment Contract Provision Requiring Assignment of Employee's Invention Rights to Employer Is Unenforceable [Lab. Code § 2870]

[1] FORM

[2] Use of Form

[3] Decisions

[4] State Statutes

[5] Cross References

§§ 411.115-411.129 [Reserved]

§ 411.130 Complaint for Statutory Damages for Violation of Invention Development Services Law [Bus. & Prof. Code § 22386]--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Damages

[5] Verification

[6] Jurisdiction

[7] Statute of Limitations

[8] Attorney's Fees

[9] State Statutes

[10] Cross References

§ 411.131 Complaint for Statutory Damages for Failure to Make Disclosures Required in Invention Development Services Contract [Bus. & Prof. Code §§ 22379, 22386]--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Cross References

§ 411.132 Complaint for Statutory Damages for False Statement or Representation [Bus. & Prof. Code § 22386]--General Form

[1] FORM

[2] Judicial Council Trial Court Forms

[3] Use of Form

[4] Alleging Fraudulent Statement Compared

[5] Action on Bond Compared

[6] Allegations

[7] Cross References

§ 411.133 Complaint for Statutory Damages for False Omission of Material Fact by Invention Developer [Bus. & Prof. Code § 22386]--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 411.134 Complaint on Invention Developer's Bond Against Invention Developer and Surety [Bus. & Prof. Code § 22389; Code Civ. Proc. §§ 996.410, 996.430] for Damages for Invention Developer's Fraud [Bus. & Prof. Code § 22390]--Fraudulent Misrepresentation

[1] FORM

[2] Judicial Council Trial Court Forms

[3] Use of Form

[a] Generally

[b] Dishonesty or Breach of Contract

[c] Special Action Against Invention Developer Only

[4] Allegations

[5] Damages

[a] In General

[b] Punitive Damages

[c] Limitation on Surety's Liability

[6] State Statutes

[7] Cross References

§ 411.135 Complaint on Invention Developer's Bond Against Invention Developer and Surety for Damages [Bus. & Prof. Code § 22389; Code Civ. Proc. §§ 996.410, 996.430] for Invention Developer's Failure to Perform Services [Bus. & Prof. Code § 22390]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 411.136 Affirmative Defense--To Action for Damages Against Invention Developer [Bus. & Prof. Code § 22386] or Against Invention Developer and Surety [Bus. & Prof. Code § 22390; Code Civ. Proc. §§ 996.410, 996.430]--Plaintiff Inventor Not Within Class Protected by Invention Development Services Law [Bus. & Prof. Code § 22371(a),(b)]--Excepted Business

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 411.137 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--To Action for Damages Against Invention Developer [Bus. & Prof. Code § 22386] or Against Invention Developer and Surety [Bus. & Prof. Code § 22390;Code Civ. Proc. §§ 996.410, 996.430]--Defendant Invention Promoter Not Within Class Regulated by Invention Development Services Law [Bus. & Prof. Code § 22371(a),(d)]--Insufficient Receipts from Invention Development Services

[1] FORM

[2] Use of Form

[3] State Statutes

§ 411.138 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--To Action by Inventor for Rescission of Invention Development Services Contract--Invention Developer's Noncompliance With Chapter 17 as Bona Fide Error [Bus. & Prof. Code § 22383]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 411.139 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--To Action by Invention Developer to Enforce Invention Development Services Contract--Contract Unenforceable for Invention Developer's Noncompliance With Invention Development Services Law [Bus. & Prof. Code § 22383]

[1] FORM

[2] Use of Form

[3] Action for Rescission

[4] State Statutes

[5] Cross References

§ 411.140 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--To Action by Invention Developer to Enforce Invention Development Services Contract--Contract Unenforceable for Misrepresentation by Invention Developer [Bus. & Prof. Code § 22384]

[1] FORM

[2] Use of Form

[3] Cross Complaint

[4] State Statutes

[5] Cross References

§ 411.141 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--To Action by Invention Developer to Enforce Invention Development Services Contract--Failure of Invention Developer in Advertisement to Disclose Requirement of Fee or Consideration [Bus. & Prof. Code §§ 22380, 22388]

[1] FORM

[2] Use of Form

[3] Cross Complaint

[4] Action for Rescission

[5] State Statutes

§ 411.142 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--To Action by Invention Developer to Enforce Invention Development Services Contract--Failure of Invention Developer to Make Precontractual Disclosures [Bus. & Prof. Code §§ 22381, 22388]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

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35-411 California Forms of Pleading and Practice--Annotated § 411.01

§ 411.01 Scope of Chapter

This chapter discusses the assignment of patent rights, patent licensing agreements, and the invention rights of employers and employees to inventions made by employees.

Forms include complaints for breach of patent licensing agreements [*see § 411.110, 411.111*], a complaint for declaratory relief adjudicating an employer's right to use an employee's invention [*see § 411.112*], and an employee's affirmative defenses against suits by employers asserting rights to the employee's invention [§§ 411.113, 411.114].

Except for a general discussion of federal patent law and its relationship to state court actions involving patent matters, this chapter does not deal with federal patent law or patent infringement actions, which are brought in federal court [*see 28 U.S.C. §§ 1338, 1400*]. Federal patent matters normally are handled by legal specialists having a technical knowledge of patents and patent law procedures, and an attorney who is not a specialist may be subject to malpractice liability for failing to refer his or her client to a specialist when it is appropriate to do so [*see Horne v. Peckham (1979) 97 Cal. App. 3d 404, 414, 415, 158 Cal. Rptr. 714]* . An adequate treatment of this complex and specialized area would be beyond the scope of this chapter. For a detailed treatment of federal patent law, see Adelman, Patent Law Perspectives (2d ed. Matthew Bender); Chisum, Chisum on Patents (Matthew Bender); and Horwitz, Patent Office Rules and Practice (Matthew Bender)

This chapter also deals with the special statutory remedies provided under Bus. & Prof. Code Chapter 17 (*Bus. & Prof. Code §§ 22370-22394*), regulating invention development services. It includes discussion of the scope and coverage of *Bus. & Prof. Code §§ 22370-22394*, requirements imposed on invention developers and invention development contracts, and remedies available to customers and other injured persons on an invention developer's violation of Bus. & Prof. Code Chapter 17. It also includes forms of complaints by a customer or injured person for special action for statutory damages [*see §§ 411.130 -411.133*], forms of complaints by a customer against the invention developer and the in vention developer's surety under an action on a bond [§§ 411.134, 411.135], and affirmative defenses that the plaintiff is not a "customer" within the meaning of Chapter 17 [*see § 411.136*], that the defendant is not an "invention developer" within the meaning of Chapter 17 [*see § 411.137*], that the invention development services contract is void for noncompliance with Chapter 17 [§§ 411.139, 411.140], and that the invention development services contract is voidable by the customer on the failure of the invention developer to make required disclosures [§§ 411.141, 411.142].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionEmployee InventionsPatent LawInfringement ActionsGeneral OverviewPatent LawInfringement ActionsInfringing ActsGeneral OverviewPatent LawOwnershipGeneral OverviewPatent LawOwnershipConveyancesAssignmentsPatent LawOwnershipConveyancesLicensesPatent LawOwnershipEmployee Inventions & Shop RightsPatent LawRemediesGeneral OverviewPatent LawRemediesDeclaratory Relief

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§ 411.02 Cross References

For forms of complaints, affirmative defenses, and demurrers in contract actions generally, see Ch. 140, *Contracts* .

For discussion and forms of allegations of jurisdiction in federal courts, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

For discussion and forms relating to reformation of contracts generally, see Ch. 488, *Reformation of Instruments* .

For discussion and forms relating to rescission of contracts generally, see Ch. 490, *Rescission and Restitution* .

For discussion and forms relating to specific performance generally, see Ch. 528, *Specific Performance* .

For discussion and forms relating to trademark registration and infringement, see Ch. 549, *Trademarks and Trade Names* .

For discussion and forms relating to unfair competition, restraint of trade, trade secrets, and interference with economic relations, see Ch. 565, *Unfair Competition* .

For discussion and forms relating to other types of consumer protection actions, see Ch. 127, *Consumer Contracts and Loans* , and Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* .

For discussion and forms relating to contract actions generally, see Ch. 140, *Contracts* .

For discussion and forms relating to fraud generally, see Ch. 269, *Fraud and Deceit* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersContracts LawDefensesFraud &

MisrepresentationGeneral OverviewContracts LawRemediesGeneral OverviewContracts LawRemediesSpecific PerformanceContracts LawTypes of ContractsGeneral OverviewTrade Secrets LawFederal & State RegulationGeneral OverviewTrade Secrets LawFederal & State RegulationAntitrust LawTrade Secrets LawMisappropriation ActionsUnfair CompetitionTrademark LawFederal Unfair Competition LawGeneral OverviewTrademark LawInfringement ActionsGeneral OverviewTrademark LawSpecial MarksTrade NamesInfringementTrademark LawSpecial MarksTrade NamesRegistration

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[Reserved]

§§ 411.03[Reserved]

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35-411 California Forms of Pleading and Practice--Annotated § 411.10

§ 411.10 Governing Law

Federal patent law, dealing with the issuance of patents, the rights of patent owners against infringement, and the enforcement of those rights, is set forth in *35 U.S.C. § 1 et seq.* Transactions involving patents, including patent licensing agreements, are governed generally by California contract law. California law regulating employment contracts with respect to employees' invention rights is found in *Lab. Code § 2870 et seq.* Rights of an inventor of an unpatented invention or design are governed by *Civ. Code § 980 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionEmployee InventionsPatent LawOwnershipGeneral OverviewPatent LawOwnershipConveyancesLicenses

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35-411 California Forms of Pleading and Practice--Annotated § 411.11

§ 411.11 Patent Rights

[1] Overview of Federal Patent Law

The United States Constitution grants Congress the power to promote the progress of science and useful arts by giving inventors exclusive rights to their inventions for a limited time [U.S. *Const., art. I, § 8, cl 8*]. Under federal patent law, whoever invents or discovers any new and useful process, machine, manufacture or composition of matter, or any new and useful improvement thereof, may obtain a patent, with certain specified exceptions [*35 U.S.C. § 101*; *see 35 U.S.C. § 102*]. A patent grants the patentee and his or her heirs and assigns the right to exclude others from making, selling, or using the patented article throughout the United States for a term of 17 years [*35 U.S.C. § 154*].

Except as otherwise provided in *35 U.S.C. § 1 et seq.*, whoever, without authorization, makes, uses, or sells any patented invention within the United States during the term of the patent, infringes the patent [*35 U.S.C. § 271*]. A patent holder may bring a civil action in federal court for infringement of the patent [*35 U.S.C. § 281*; *see 28 U.S.C. § 1338(a)*]. Remedies for patent infringement include injunction, compensatory damages, and attorney's fees [*35 U.S.C. §§ 283-285*].

[2] Federal Preemption

Under the Supremacy Clause of the Constitution [U.S. Const., art. VI], federal law controls the field of patents. A state may not pass laws that encroach directly on federal patent laws, nor may it pass laws, such as those forbidding unfair competition, that give protection that clashes with the objectives of federal patent law [*Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 229, 231, 84 S. Ct. 784, 11 L. Ed. 2d 661]* . Therefore, a plaintiff cannot bring an action based on a state unfair competition statute if the statute endows the plaintiff with rights against the world, similar in scope and operation to the rights accorded a patent holder [*Bonito Boats v. Thunder Craft Boats (1989) 489 U.S. 141, 109 S. Ct. 971, 103 L. Ed. 2d 118, 130, 139* (striking Florida unfair competition statute that paralleled *Bus. & Prof. Code § 17300*)]. Nevertheless, the states may regulate the area of patents to the extent that such regulation does not conflict with the operation of federal patent law [*Kewanee Oil Co. v. Bicron Corp. (1974) 416 U.S. 470, 479, 94 S. Ct. 1879, 40 L. Ed. 2d 315]* . For example, a state may control the labeling and trademarks of an invention, whether patented or not, but it may not prohibit the copying of an unpatented invention or award damages for such copying [*Sears,*

Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 232-233, 84 S. Ct. 784, 11 L. Ed. 2d 661] .

Federal law does not govern nonpatentable subject matter, which the states are free to regulate [*Kewanee Oil Co. v. Bicron Corp. (1974) 416 U.S. 470, 482-483, 94 S. Ct. 1879, 40 L. Ed. 2d 315]* . Federal law also does not preempt a state's trade secret laws or contract laws governing patent licensing agreements [*Aronson v. Quick Point Pencil Co. (1978) 440 U.S. 257, 262, 265-266, 99 S. Ct. 1096, 59 L. Ed. 2d 296* ; *Kewanee Oil Co. v. Bicron Corp. (1974) 416 U.S. 470, 474, 94 S. Ct. 1879, 40 L. Ed. 2d 315]* . A state statute, however, cannot provide patent-like protection for subject matter for which patent protection has been denied or has expired, or for designs that have been freely revealed to the consuming public and therefore are no longer patentable [*Bonito Boats v. Thunder Craft Boats (1989) 489 U.S. 141, 109 S. Ct. 971, 103 L. Ed. 2d 118, 140, 145]* .

[3] Jurisdiction Over Patent Rights

The U.S. district courts have original and exclusive jurisdiction in cases in which a well-pleaded complaint establishes that federal patent law creates the cause of action--for instance, the plaintiff sues on a claim of patent infringement or seeks a declaratory judgment on the validity of a patent--or establishes that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims [*28 U.S.C. § 1338(a)*; *Christianson v. Colt Indus. Operating Corp. (1988) 486 U.S. 800, 808-809, 108 S. Ct. 2166, 100 L. Ed. 2d 811*]. For instance, patent law was a necessary element of an inventor's claims in a complaint alleging malicious prosecution, intentional interference with prospective economic relations, fraudulent misrepresentations, and unfair competition, because all of the inventor's claims were based on the defendant's request to the U.S. Patent and Trademark Office for reexamination of the validity of two of the inventor's patents, on the ground that the claims of the patents were anticipated by prior patents or publications. Therefore, the case was within the exclusive jurisdiction of the federal courts [*Lockwood v. Sheppard, Mullin, Richter & Hampton (2009) 173 Cal. App. 4th 675, 678, 93 Cal. Rptr. 3d 220*].

An action for damages based on breach of a patent licensing agreement [*see § 411.12*] has usually been considered as arising under state law, notwithstanding the potential for adjudication of patent issues [*H.J. Heinz Co. v. Superior Court (1954) 42 Cal. 2d 164, 173, 266 P.2d 5*]. While it could be possible for such a case to fall within the exclusive jurisdiction of federal courts [*see* *Applera Corp. v. MP Biomedicals, LLC (2009) 173 Cal. App. 4th 769, 782, 93 Cal. Rptr. 3d 178*], a case does not arise under the patent laws merely because questions of patent law may arise in the course of interpreting a contract [*Linear Tech. Corp. v. Applied Materials, Inc. (2007) 152 Cal. App. 4th 115, 125, 61 Cal. Rptr. 3d 221*]. The jurisdictional issue comes down to whether, looking at only the essential allegations in the complaint, it is possible to conclude that the plaintiff could be entitled to the requested relief for a reason completely unrelated to the provisions and purposes of the patent laws. If so, then a state court can have jurisdiction because, although patent law issues conceivably could arise in the action, relief would not necessarily depend on the resolution of those issues [*Applera Corp. v. MP Biomedicals, LLC (2009) 173 Cal. App. 4th 769, 783-785, 93 Cal. Rptr. 3d 178* (right to collect royalties owed under patent licensing agreement can be validly assigned under *Civ. Code §§ 954* and *1044* without also assigning underlying patent rights, and state court had jurisdiction of assignee's action for contract damages based on alleged failure to pay royalties on products sold under patent licensing agreement)].

[4] Assignability of Patent Rights

Patents have the attributes of personal property. Applications for patents, or any interests in patents are assignable in law by an instrument in writing. A patent applicant, patent holder, or his or her assigns or legal representatives may grant and convey an exclusive right under the application or patent itself. That right may extend to the whole or any specified part of the United States [*35 U.S.C. § 261*]. Any assignment less than an exclusive right or an undivided part or share of an exclusive right conveys a license only, giving the licensee no title in the patent and no right to sue for a patent infringement [*Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal. App. 2d 748, 759, 258 P.2d 852* ; see discussion § 411.12].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsExclusive JurisdictionCivil ProcedureRemediesDamagesCompensatory DamagesConstitutional LawCongressional Duties & PowersGeneral OverviewConstitutional LawSupremacy ClauseGeneral OverviewConstitutional LawSupremacy ClauseFederal PreemptionPatent LawGeneral OverviewPatent LawInequitable ConductGeneral OverviewPatent LawInfringement ActionsGeneral OverviewPatent LawInfringement ActionsExclusive RightsGeneral OverviewPatent LawInfringement ActionsExclusive RightsManufacture, Sale & UsePatent LawInfringement ActionsInfringing ActsGeneral OverviewPatent LawInfringement ActionsInfringing ActsSalePatent LawInfringement ActionsInfringing ActsUsePatent LawJurisdiction & ReviewGeneral OverviewPatent LawOwnershipGeneral OverviewPatent LawOwnershipConveyancesGeneral OverviewPatent LawOwnershipConveyancesAssignmentsPatent LawOwnershipConveyancesLicensesPatent LawOwnershipPatents as PropertyPatent LawRemediesGeneral OverviewPatent LawRemediesCollateral AssessmentsAttorney FeesPatent LawSubject MatterProcessesGeneral OverviewPatent LawSubject MatterProductsMachinesPatent LawU.S. Patent & Trademark Office ProceedingsContinuation ApplicationsGeneral OverviewTrade Secrets LawBreach of ContractLicensing AgreementsTrade Secrets LawFederal & State RegulationFederal PreemptionTrade Secrets LawFederal & State RegulationPatent LawTrademark LawConveyancesGeneral OverviewTrademark LawProtection of RightsGeneral Overview

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§ 411.12 Patent Licensing Agreements

[1] Generally

A patent holder may grant a license to make, sell, or use the patented invention [*Pendleton v. Ferguson (1940)15 Cal. 2d 319, 323* ; *Braun, Bryant & Austin v. McGuire (1927) 201 Cal. 134, 141, 255 P. 808]* . An inventor applying for a patent may also make a contract granting a license to make, sell, or use the invention although the patent has not yet been issued [*see Kittle Mfg. Co. v. Davis (1935) 8 Cal. App. 2d 504, 506-511, 47 P.2d 1089* ; *Fenn v. Pickwick Corp. (1931) 117 Cal. App. 236, 238, 243, 4 P.2d 215]* . If a patent is jointly owned, one co-owner may make an agreement with a third party, granting the third party a license to make, sell, or use the article, without the consent of the other co-owner [*Ragan v. Sirigo (1958) 160 Cal. App. 2d 832, 833-834, 326 P.2d 26]* .

The fundamental difference between a license and an assignment by a patent holder is that in granting a license, the patent holder retains title to the patent, but by an assignment, the patent holder transfers title to the patent. While the federal patent statutes unequivocally deal with assignments, those statutes contain no provisions governing licenses [*SuperBrace, Inc. v. Tidwell (2004) 124 Cal. App. 4th 388, 393, 21 Cal. Rptr. 3d 404]* .

The license conferred by a licensing agreement may be limited to a right to make the article, or it may be the right to make and use the article without the right to sell it, or it may be only the right to sell the article [*see Braun, Bryant & Austin v. McGuire (1927) 201 Cal. 134, 142, 255 P. 808* ; *Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal. App. 2d 748, 759, 258 P.2d 852]* . If the license conveyed is the right to sell the patented article, the terms of the licensing agreement may limit the methods and prices of sale, and the patent holder may retain for himself or herself a right to sell the article also [*Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal. App. 2d 748, 759, 258 P.2d 852]* .

A licensee may be bound under the terms of the licensing agreement to pay royalties to the patent holder or he or she may be required to perform some other condition, such as manufacturing a specified number of articles per year [*see Fenn v. Pickwick Corp. (1931) 117 Cal. App. 236, 239, 240, 4 P.2d 215]* .

Whenever a person who owns a patent transfers that patent to another person so that the transferee can make and sell a product embodying that patent, the value of the patent interest is exempt from sales and use tax under *Rev. & Tax. Code §§ 6011(c)(10)* and *6012(c)(10)* [*see Preston v. State Bd. of Equalization (2001) 25 Cal. 4th 197, 214, 105 Cal. Rptr. 2d 407, 19 P.3d 1148* (construction and application of those code sections, which apply to both patents and copyrights, in case involving copyright in works of art)].

[2] Assignability of Benefits or Obligations Under Agreement

Because the federal patent statutes contain no provisions governing licenses, federal courts have fashioned a rule of federal common law to apply in cases concerning transfers of patent licenses. However, in California, the Supreme Court has determined that state law, not federal common law, should be applied in deciding whether a patent license is assignable [*SuperBrace, Inc. v. Tidwell (2004) 124 Cal. App. 4th 388, 394, 21 Cal. Rptr. 3d 404* (extensive review of *Dopplmaier* opinion, cited *below*, and more-recent federal cases invites conclusion that *Dopplmaier* remains controlling)].

The rights or benefits under a patent licensing contract are freely transferable by assignment unless the contract terms indicate another intent or unless assignment would materially impair the nonassigning party's chance of obtaining performance [*Farmland Irrigation Co. v. Dopplmaier (1957) 48 Cal. 2d 208, 222, 308 P.2d 732]* . Although the benefits of a licensing agreement are generally assignable, a licensee's duties or obligations are nonassignable if the duties are of such a personal nature thattheir performance by someone else would deprive the other party of his or her bargain [*Farmland Irrigation Co. v. Dopplmaier (1957) 48 Cal. 2d 208, 222, 308 P.2d 732* ; *see Fenn v. Pickwick Corp. (1931) 117 Cal. App. 236, 242, 4 P.2d 215]* .

[3] Actions on Licensing Agreements

Rights under patent licensing agreements arise from contract law, rather than from the fact that patent rights are involved [*Farmland Irrigation Co. v. Dopplmaier (1957) 48 Cal. 2d 208, 220, 308 P.2d 732]* . Therefore, the usual contract remedies apply, and a party to the contract may bring an action in state court to set aside, specifically enforce, or recover royalties on the contract [*see Farmland Irrigation Co. v. Dopplmaier (1957) 48 Cal. 2d 208, 217, 308 P.2d 732]* . For example, if the licensee fails to pay royalties as required under the agreement, the patentee elects either to treat the contract as terminated and sue for damages, or to sue for the royalties under the terms of the contract [*Kittle Mfg. Co. v. Davis (1935) 8 Cal. App. 2d 504, 511, 47 P.2d 1089* ; *see §§ 411.110, 411.111*]. A licensing agreement may be reformed when, for example, there has been a mutual mistake of the contracting parties [*Holmes v. Anderson (1928) 90 Cal. App. 276, 281, 282, 265 P. 1010]* .

Other remedies may also apply. For example, when a licensee uses a patented article after the contract has been cancelled, the patentee may seek an injunction in state court on the theory of liability under an implied contract [*Seagren v. Smith (1944) 63 Cal. App. 2d 733, 738* .

For discussion and forms relating to contract remedies generally, see Ch. 140, *Contracts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawIntellectual PropertyOwnership & Transfer of RightsLicensesCivil ProcedureAppealsCase TransfersContracts LawThird PartiesGeneral OverviewContracts LawTypes of ContractsGeneral OverviewPatent LawInequitable ConductGeneral OverviewPatent LawOwnershipGeneral OverviewPatent LawOwnershipConveyancesGeneral OverviewPatent LawOwnershipConveyancesAssignmentsPatent LawOwnershipConveyancesEquitable Assignments & Joint OwnershipPatent LawOwnershipConveyancesLicensesPatent LawRemediesGeneral OverviewPatent LawRemediesEquitable

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§ 411.13 Inventions by Employees

[1] Employer's Rights to Invention

An employer who discovers or conceives of a new principle or improvement in a machine is the owner of the resulting invention and is entitled to the patent, even if he or she is required to employ others to perfect the details or make improvements, as long as those improvements do not depart from the original principle and purpose of the employer [*Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 659-660, 3 Cal. Rptr. 421* ; *Famous Players-Lasky Corp. v. Ewing (1920) 49 Cal. App. 676, 679-680, 194 P. 65]* .

Even if the employee's improvements do depart from the original invention conceived by the employer, the employee may have contracted away his or her rights to his or her invention by an employment contract [*Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 658-659, 3 Cal. Rptr. 421]* . An employment contract may expressly require the employee to assign patent rights in his or her inventions to the employer, with certain specific exceptions [*see Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 659, 3 Cal. Rptr. 421* ; but see *Lab. Code § 2870* and discussion § 411.13[2]]. When the agreement incorporates the employer's separately stated policy on dividing royalty payments between the employer and employees, the employer may not subsequently change that policy unilaterally to the employee's detriment [*Shaw v. Regents of the University of California (1997) 58 Cal. App. 4th 44, 53-56, 67 Cal. Rptr. 2d 850]* .

When no express agreement exists requiring an employee to assign his or her invention rights to an employer, a court may infer one from the circumstances of the employment. If the employee is hired to invent, such an agreement is implied, but if the employee is hired merely to design, construct, or devise methods of manufacture no such agreement is implied [*see Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 658-659, 3 Cal. Rptr. 421]* .

An employer may also have a shop right or nonexclusive license to use an employee's invention. Like assignments of patent rights, a license may be granted by an express agreement, or it may be implied from the circumstances of the employment, either on the theory of an implied agreement to be determined by the intention of the parties or on the theory of an implication of law from the existing facts [*Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643,*

655, 3 Cal. Rptr. 421] . A shop right will be inferred by a court when an employee during his or her hours of employment, working with the employer's materials and appliances, conceives, and perfects an invention for which the employee obtains a patent [*Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 661, 3 Cal. Rptr. 421* ; *see § 411.112*]. An employer has no rights to an employee's invention, however, when the employer has rejected the invention as impractical [*Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 660-661, 3 Cal. Rptr. 421* ; *see § 411.113*].

[2] Employee's Rights

Any provision in an employment agreement that provides that an employee must assign, or offer to assign, any of his or her rights in an invention to his or her employer does not apply to an invention that the employee developed entirely on his or her own time, without using the employer's equipment, supplies, facilities, or trade secret information, except for inventions that either (1) relate at the time of conception or reduction to practice of the invention to the employer's business, or actual or demonstrably anticipated research or development of the employer or (2) result from any work performed by the employee for the employer [*Lab. Code § 2870(a)*; *see* *Cubic Corp. v. Marty (1986) 185 Cal. App. 3d 438, 452, 229 Cal. Rptr. 828* (construing former *Lab. Code § 2870*)]. To the extent a provision in an employment agreement purports to require an employee to assign an invention otherwise excluded from being requiredto be assigned under *Lab. Code § 2870(a)*, the provision is against public policy and is unenforceable [*Lab. Code § 2870(b)*; *see § 411.114*].

An employer may not require such a provision as a condition of employment or continued employment. Nevertheless, an employer may include in an employment contract provisions requiring disclosure of all of an employee's inventions, made solely or jointly with others, during the term of his or her employment, so long as these disclosures are received in confidence. An employer may also provide for a review process to determine these issues that may arise regarding the inventions, and may provide for full title to certain patents and inventions to be in the United States as required by contracts between the employer and the United States or any of its agencies [*Lab. Code § 2871*].

Any employment agreement that requires the employee to assign or offer to assign to the employer the employee's rights to any invention must also contain a written notification to the employee that the agreement does not apply to an invention qualifying under the terms of *Lab. Code § 2870*. In any action arising from the provisions of *Lab. Code § 2870* the burden of proof is on the employee claiming the benefits of those provisions [*Lab. Code § 2872*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionEmployee InventionsPatent LawInfringement ActionsExclusive RightsGeneral OverviewPatent LawOwnershipGeneral OverviewPatent LawOwnershipConveyancesGeneral OverviewPatent LawOwnershipConveyancesAssignmentsPatent LawOwnershipConveyancesLicensesPatent LawOwnershipEmployee Inventions & Shop Rights

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§ 411.14 Unpatented Inventions Generally

Under California law, the inventor of an invention or design has exclusive ownership of it and of the representation or expression of it, which continues so long as the invention or design and representations or expressions remain in his or her possession [*Civ. Code § 980(b)*]. Such an inventor is entitled to injunctive relief and compensatory and punitive damages against anyone who misappropriates the protected invention, but the inventor's rights are lost once he or she intentionally makes the invention public [*see Zachary v. Western Publishing Co. (1977) 75 Cal. App. 3d 911, 918, 143 Cal. Rptr. 34* (decided prior to amendment of *Civ. Code §§ 980-983* deleting references to literary property governed by Federal Copyright Act of 1976 (*17 U.S.C. §§ 101-702*); *see also Civ. Code § 983*]. Because California legislation protects only inventions that are in the inventor's possession and not inventions that are made public, it is outside the purview and objectives of federal patent law [*see Kewanee Oil Co. v. Bicron Corp. (1974) 416 U.S. 470, 479, 94 S. Ct. 1879, 40 L. Ed. 2d 315* ; *Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 229, 231, 84 S. Ct. 784, 11 L. Ed. 2d 661* ; *see also § 411.11[2]*].

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[Reserved]

§§ 411.15[Reserved]

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35-411 California Forms of Pleading and Practice--Annotated § 411.30

§ 411.30 Governing Statutes

Bus. & Prof. Code §§ 22370-22394 contain the law regulating invention development services, including customers' remedies for invention developers' noncompliance with such regulation. *Code Civ. Proc. §§ 996.410-996.495* govern actions on bonds and liability of a surety generally.

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35-411 California Forms of Pleading and Practice--Annotated § 411.31

§ 411.31 Subject of Regulation

[1] Invention Developer

Chapter 17 of the Business and Professions Code (*Bus. & Prof. Code §§ 22370-22394*), enacted in 1975, regulates the business and transactions of invention developers. An invention developer is a person, firm, corporation, or association, and his, her, or its agents, employees, or representatives, that develops or promotes or offers to develop or promote an invention [*Bus. & Prof. Code § 22371(d)*]. An invention developer generally offers his, her, or its services for sums ranging from $500 to $5,000, plus either a percentage of the income derived from marketing the invention or a partial ownership interest in the invention [*see Bus. & Prof. Code § 22370(a)*].

The term "invention developer" does not include any government department or agency, any charitable, scientific, educational, religious, or other nonprofit organization, any person or business entity whose gross receipts from invention development services do not exceed 10 percent of its total gross receipts during the fiscal year preceding the year in which any invention development services contract is signed, or any person or business entity that does not charge a fee for invention development services [*Bus. & Prof. Code § 22371(d)*]. The Legislature also expressly stated that it did not intend Chapter 17 to interfere with or further regulate persons who provide researching, marketing, surveying, or other consulting services to professional manufacturers, marketers, publishers, or others, as an adjunct to the traditional commercial enterprises in which they engage as a livelihood [*Bus. & Prof. Code § 22370(b)*].

[2] Protected Customer

For the purposes of *Bus. & Prof. Code §§ 22370-22394*, a customer is any person, firm, corporation, or other entity that is solicited by, inquires about or seeks the services of, or enters into a contract for invention development services with an invention developer. The term "customer," as used in Chapter 17, however, does not include any government agency, any charitable, scientific, educational, religious, or other nonprofit organization, or any person or entity regularly engaged in a trade, business, or profession that has either a net worth of $100,000 or more, or grossreceipts from any source of $50,000 or more during the calendar year in which any invention development services contract is signed [*Bus. & Prof. Code § 22371(b)*].

[3] Contract for Invention Development Services

A contract for invention development services, for the purposes of *Bus. & Prof. Code §§ 22370-22394*, includes a contract by which an invention developer undertakes to develop or promote an invention for a customer [*Bus. & Prof. Code § 22371(a)*]. An "invention," as used in Chapter 17, means an invention, an idea, a concept, or any combination thereof [*Bus. & Prof. Code § 22371(c)*]. The term "invention development services" includes acts required or promised to be performed, or acts actually performed, or both, by an invention developer for a customer [*Bus. & Prof. Code § 22371(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewPatent LawOwnershipGeneral Overview

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§ 411.32 Legislative Intent in Regulating Invention Development Services

The Legislature expressly stated its finding that in California there are members of the general public who are inventors, who do not have the resources or expertise necessary to develop, manufacture, or market their ideas or inventions, and who generally do not earn their livelihood by developing, manufacturing, promoting, or marketing ideas or inventions. The Legislature has also found that there is a significant number of persons who, realizing that such inventors are willing to expend substantial sums for services represented to promote their ideas or inventions, offer invention development services, but who rarely effectively promote or market the inventions. These invention developers have worked fraud, deceit, imposition, and financial hardship on many people. The Legislature stated that legal protection to consumers prior to 1975 has been inadequate to prevent such abuses [*Bus. & Prof. Code § 22370(a)*].

The purpose of Chapter 17, as stated by the Legislature, is to safeguard the public against fraud and to foster and encourage competition, fair dealing, and prosperity in the field of invention development services, by prohibiting false and misleading advertising, onerous contract terms, harmful financial practices, and other unfair or dishonest practices in connection with invention development services [*Bus. & Prof. Code § 22370(b)*].

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35-411 California Forms of Pleading and Practice--Annotated § 411.33

§ 411.33 Statutory Disclosure Requirements

[1] Prior to Contract for Invention Development Services

Chapter 17 requires invention developers to make certain disclosures prior to entering into a contract for invention development services [*see Bus. & Prof. Code §§ 22380, 22381*]. Failure to make these disclosures will render any contracts subsequently entered into between the customer and the invention developer voidable by the customer [*Bus. & Prof. Code § 22388*].

[2] Fees

[a] In General

Any invention developer who charges a fee or requires any consideration for his, her, or its invention development services must clearly and conspicuously disclose the required fee or consideration in every advertisement of such services [*Bus. & Prof. Code § 22380*]. In the first written or oral communication with a customer, other than for the purpose of arranging an appointment, the invention developer is required to disclose to the customer (1) a statement of the fee or approximate range of fees charged, (2) if applicable, a statement that a portion of the charged fee will be paid as a commission to the person inducing the customer to contract for the invention developer's services, and (3) a statement of the approximate portion of the charged fee, if any, that will be expended for services relating to patent matters [*Bus. & Prof. Code § 22381(a)*].

[b] Other Required Disclosures

In the first written or oral communication with a customer, other than to arrange an appointment, the invention developer must include, in addition to disclosures regarding fees, the following:

- A statement that the invention developer does not intend to expend more for the invention development services than the fee charged the customer, or, if the invention developer does intend to expend more than the fee charged, a statement of estimated expenditures in excess of the fee received [

Bus. & Prof. Code § 22381(b)];

- A single statement setting forth the total number of customers who have contracted with the invention developer excluding those contracting within the last 30 days, and the number of customers that have received money in excess of the amount paid to the invention developer as a result of the invention developer's services [*Bus. & Prof. Code § 22381(c)*]; and

- The following statement: "Your potential patent rights may be adversely affected by any attempt to commercialize your idea or invention before a patent application covering it is filed. Nonconfidential disclosures of your idea or invention may also trigger certain statutory deadlines for filing a patent application in the United States and would prevent you from obtaining valid patent rights in countries whose law provides that patent applications must be filed before there is a public disclosure. Any contract for inventiondevelopment services between you and our firm will be regulated by law. Our firm is not qualified or permitted to advise you whether protection of your idea or invention is available under the patent, copyright or trademark laws of the United States or any other law. The contract does not provide any patent, copyright or trademark protection for your idea or invention. If your idea or invention is patentable, copyrightable or subject to trademark protection, or infringes an existing valid patent, copyright or trademark or a patent, copyright or trademark for which application has been made, your failure to inquire into these matters may affect your rights to your idea or invention."

[3] On Contract Cover Sheet

A distinctive and conspicuous cover sheet is required on every contract for invention development services. The cover sheet is required to contain a specific statement, set forth in the statute, disclosing that the customer has an unconditional right to cancel the contract within seven days, the method for cancelling the contract, that the invention developer is required to return the customer's money by mail within five days of cancellation, and that the contract is unrelated to patent, copyright, or trademark protection for the customer's invention or idea [*Bus. & Prof. Code § 22374*].

The cover sheet is also required to disclose that the customer's potential patent rights may be adversely affected by the customer's attempt to commercialize the idea or invention before a patent application is filed. A disclosure is also required stating that nonconfidential disclosures could trigger statutory deadlines for filing patent applications [*Bus. & Prof. Code § 22374*].

[4] In Contract

Every contract for invention development services is required to contain, among other information, disclosures regarding the following [*Bus. & Prof. Code § 22379*]:

- Specific acts or services intended to be performed on the customer's behalf;

- Any intention by the invention developer to construct or sell prototypes or models of the invention or idea;

- The invention developer's address, agent for service of process and custodian of records;

- Fees charged and expenditures related to fees;

- The basis for any projected or estimated customer earnings;

- Information regarding prior customers and income received by them;

- That the invention developer is required to maintain all records relating to the invention for three years after the contract expires;

- Availability of records and correspondence regarding the invention;

- Expected date of completion of invention development services; and

- A specified statement, set forth by statute, that the contract is unrelated to patent, copyright, or trademark protection, and that the customer's potential patent rights could be affected by attempts to commercialize the idea or invention and by nonconfidential disclosures made to the invention developer.

The contract is also required to inform the customer of his or her cancellation rights and the method of cancellation, and is required to contain a specific statement, set forth by statute, informing the customer of the expiration date for the period of cancellation [*Bus. & Prof. Code §§ 22373, 22379(a)*]. A copy of the contract must be given to the customer at the time he or she signs the contract [*Bus. & Prof. Code § 22372(a)*].

[5] Notification of Subsequent Contracts

If the invention developer plans one or more subsequent contracts with the customer, a written statement to that effect must be supplied to the customer, together with a copy of the subsequent contract or a written summary of the general terms of every such subsequent contract, including the amount of fees required from the customer. The written statement must be given to the customer at the time he or she signs the first contract [*Bus. & Prof. Code § 22372(b)*].

[6] After Contract

With respect to every invention development services contract, the invention developer is required to deliver to the customer, at the address specified in the contract, a written quarterly statement of the services performed to date. The first such statement need not be delivered until 180 days after the contract is executed [*Bus. & Prof. Code § 22378*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Patent LawDate of Invention & PriorityGeneral OverviewPatent LawInequitable ConductGeneral OverviewPatent LawU.S. Patent & Trademark Office ProceedingsContinuation ApplicationsGeneral Overview

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§ 411.34 Confidentiality

An invention developer must maintain as confidential all disclosures made to it by a customer seeking invention development services, except for [*Bus. & Prof. Code § 22395*]:

- Information that at the time of disclosure is in the public domain.

- Information that, after disclosure, becomes part of the public domain by publication or otherwise, independently of any act or omission by the invention developer.

- Information that the invention developer can establish by competent proof was in its possession at the time of disclosure by the customer, and was not acquired, directly or indirectly, from the customer.

- Information that the invention developer receives from a third party; provided, however, that such information was not obtained in confidence by said third party, directly or indirectly, from the customer.

This duty of confidentiality includes the duty on the part of the invention developer to take reasonable steps to prevent disclosure of confidential information to third parties. This confidential relationship cannot be waived by a customer without an express written waiver by the customer of the invention developer's obligation of confidentiality, and no waiver may be entered into until after the disclosures described in *Bus. & Prof. Code § 22381* have been made [*Bus. & Prof. Code § 22395*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Patent LawInequitable ConductGeneral Overview

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§ 411.35 Other Requirements

[1] Bond

Every invention developer in California is required to maintain a bond issued by a surety company admitted to do business in California [*Bus. & Prof. Code § 22389*]. The principal sum of the bond must be five percent of the invention developer's gross income from the invention development business in the state during the developer's last fiscal year, and must not be less than $25,000 in any year of operation. A copy of the bond must be filed with the Secretary of State before the time the invention developer first commences business in California. The invention developer has 90 days after the end of each fiscal year within which to change the bond to conform to these requirements [*Bus. & Prof. Code § 22389*].

The required bond must be in favor of the state, for the benefit of any person who, after contracting with the invention developer, is damaged by fraud, dishonesty, or failure to provide the services of the invention developer under the contract [*Bus. & Prof. Code § 22390*].

Under statutory provisions governing bonds generally, the beneficiary under a bond may bring a civil action to enforce a bond against the surety and the principal [*Code Civ. Proc. §§ 996.410, 996.430*]. The surety's liability may not exceed the amount of the bond [*Code Civ. Proc. § 996.470*].

For further discussion and forms relating to bonds generally, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[2] Deposit in Lieu of Bond

Until 1999, in lieu of maintaining a bond, the invention developer could make a deposit with the Secretary of State in the same amount as required for the bond [*see Code Civ. Proc. § 995.710(a)*]. The deposit could be made in cash, maintained by the Secretary of State in an interest-bearing trust account, bearer bonds or bearer notes of the United States or the State of California, certificates of deposit, savings accounts assigned to the Secretary of State, investment certificates or share accounts assigned to the Secretary of State issued by savings and loan associations, and certificates for funds or share accounts assigned to the Secretary of State issued by a credit union [*Code Civ. Proc. § 995.710(a)*].

Any invention developer who made a deposit before 1999 may continue to use that deposit in lieu of a bond. However, the deposit cannot be renewed [*Code Civ. Proc. § 995.710(e)*].

If an invention developer made a deposit in lieu of a bond, a person asserting a claim against the deposit must, in lieu of the provisions of *Code Civ. Proc. § 996.430*, establish the claim by furnishing evidence to the Secretary of State of a money judgment entered by a court together with evidence that the claimant is a person described in *Bus. & Prof. Code § 22390* [*Bus. & Prof. Code § 22391(a)*]. When the established claim has been approved by the Secretary of State, if it is the first claim to be asserted, it must be paid from the deposit after the expiration of 240 days. Any subsequent claim approved within that 240-day period must be paid at the end of that 240-day period. Payment will be either in full or proportional in view of other claims if the deposit is insufficient to pay them all [*Bus. & Prof. Code § 22391(c)*]. A new claim made after the expiration of the 240-day period will start a new 240-day period and apply to the amount remaining in the deposit account [*Bus. & Prof. Code § 22391(d)*]. After a deposit account is exhausted, no further claims can be paid. Claimants who have received payment may not be required to make a contribution back to the deposit account for the benefit of other claimants [*Bus. & Prof. Code § 22391(e)*]. Attachment, garnishment, and execution against the amount of the deposit are restricted [*Bus. & Prof. Code § 22391(f)*].

For further discussion of deposits generally, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[3] Maintenance of Records

The invention developer is required to maintain all records and correspondence relating to performance of each invention development services contract for a period of not less than three years after expiration of the term of the contract [*Bus. & Prof. Code § 22392*]. The invention developer must disclose this requirement to the customer in the contract, along with a disclosure that the records and correspondence will be available to the customer or his or her representative for review and copying [*Bus. & Prof. Code § 22379*(*l*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Patent LawClaims & SpecificationsClaim LanguageGeneral OverviewPatent LawInequitable ConductGeneral Overview

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§ 411.36 Prohibited Activity

[1] Interest in Title to Invention

The invention developer is prohibited from acquiring any interest in the title to the customer's invention, unless the developer contracts to manufacture the invention and acquires such interest for that purpose, at or about the time the contract for manufacture is executed. An invention developer is not prohibited, however, from contracting with a customer to receive a portion of proceeds accruing to the customer as a result of the performance of the invention development services [*Bus. & Prof. Code § 22375*].

[2] Note Cutting Off Third Party's Rights

The contract must not require or entail the execution of any note or series of notes by the customer that, when separately negotiated, will cut off a third party's right to action or defense against the invention developer [*Bus. & Prof. Code § 22376*].

[3] Advertisement of Compliance

An invention developer may not make, or authorize the making of, any reference to the invention developer's compliance with *Bus. & Prof. Code § 22370 et seq.* in any advertisement [*Bus. & Prof. Code § 22393*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Patent LawInequitable ConductGeneral Overview

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§ 411.37 Customer's Remedies

[1] Unenforceable Contract or Waiver

A contract for invention development services that does not comply with *Bus. & Prof. Code § 22370 et seq.* is void and unenforceable, unless the invention developer proves that the noncompliance was unintentional and resulted from a bona fide error notwithstanding the use of reasonable procedures adopted to avoid such errors, and corrects the error [*Bus. & Prof. Code § 22383*; *see §§ 411.138*, 411.139]. (Although *Bus. & Prof. Code § 22383* does not explicitly remove mistakes of law from the scope of the "bona fide error" defense--whereas some other statutes allowing the same defense do exclude mistakes of law--the defense probably does not cover a violation that arose from the defendant's mistaken interpretation of statutory requirements [*cf. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA (2010) -- U.S. --, 130 S. Ct. 1605, 176 L. Ed. 2d 519, 2010 U.S. LEXIS 3480, at *15-*59* (such defense allowed by Fair Debt Collection Practices Act, *15 U.S.C. § 1692k(c)*, in same language as *Bus. & Prof. Code § 22383*, did not cover debt-collecting attorney's mistake of law as to Act's requirements)].) Any waiver by the customer of the provisions of *Bus. & Prof. Code § 22370 et seq.* is void and unenforceable [*Bus. & Prof. Code § 22385*]. An invention development services contract is also void and unenforceable if it is entered into by the customer in reliance on any willful and false, fraudulent, or misleading representation by the invention developer [*Bus. & Prof. Code § 22384*; *see § 411.140*].

[2] Special Action for Damages

Any person injured by the invention developer's violation of the terms of *Bus. & Prof. Code § 22370 et seq.*, false or fraudulent statement, representation, or omission of material fact, or failure to make disclosures required to be included in the contract, may bring a civil action against the invention developer. The plaintiff may seek recovery of either $3,000 or three times the amount of actual damages, if any, sustained by the plaintiff, whichever is greater, and the court may award reasonable attorney's fees to the plaintiff [*Bus. & Prof. Code § 22386*; *see §§ 411.130 -411.133*].

[a] Joint Action Against Invention Developer and Surety

The invention developer's bond is for the benefit of any person who, after entering into an invention development services contract, is damaged by fraud, dishonesty, or failure to provide the services of the invention developer in

performance of the contract [*Bus. & Prof. Code § 22390*]. A beneficiary claiming against the bond may maintain an action against the invention developer and the surety [*Code Civ. Proc. §§ 996.410, 996.430*]. The aggregate liability of the surety for all breaches of conditions of the bond will in no event exceed the amount of the bond [*Code Civ. Proc. § 996.470*; *see §§ 411.134, 411.135*].

[b] Choice of Actions

[i] Plaintiff

A customer of an invention developer may bring either a special action for damages against the invention developer only, or an action on the bond against the invention developer and the surety, depending on the grounds for the action. Although the action on the bond may be brought only by a customer who has entered into a contract with an invention developer, the special action for damages may be brought by any person, whether or not a customer, who has been injured by some conduct of the invention developer [*Bus. & Prof. Code § 22386*; *see Bus. & Prof. Code § 22390*; *Code Civ. Proc. §§ 996.410, 996.430*].

[ii] Injury or Damage

The special statutory action for damages against the invention developer may be brought by any person who has been injured by the invention developer. The statute provides that the injured person may bring an action for the greater of either $3,000 or three times the amount of actual damages incurred, if any, in addition to attorney's fees [*Bus. & Prof. Code § 22386*]. The statutory language therefore suggests that the plaintiff need not have sustained actual money damages in order to recover from the invention developer. Thus for example, a plaintiff who lost the opportunity to have his or her invention developed or promoted because of the invention developer's conduct, but who could not prove the worth of his or her invention, could bring a special action against the invention developer under *Bus. & Prof. Code § 22386*. The joint action on the bond, however, requires not only that the plaintiff have entered into a contract with the invention developer, but that the plaintiff have suffered actual damage as a result [*see Bus. & Prof. Code § 22390*; *Code Civ. Proc. §§ 996.410, 996.430*].

[iii] Grounds

The precise area of overlap between the grounds for the special statutory action against invention developers and for the joint action on the surety bond is unclear. It would seem that both types of actions provide remedies for fraudulent statements, representations, or omissions of material fact by the invention developer. Nevertheless, while the special action permits recovery for a violation of *Bus. & Prof. Code § 22370 et seq.*, generally, forfalse or fraudulent statement, representation, or omission of material fact, and for failure of the invention developer to make required disclosures in the contract, the bond action permits recovery for fraud, dishonesty, or failure of the invention developer to provide services in performance of the contract [*see Bus. & Prof. Code §§ 22386, 22390*; *Code Civ. Proc. §§ 996.410, 996.430*]. Whether "dishonesty" is meant to encompass more than fraud, and thus to provide an independent ground for the bond action is not clear, since the term "dishonesty" has no one precise definition, and its meaning depends on the circumstances of a particular case [*see Cvrcek v. State Personnel Bd. (1967) 247 Cal. App. 2d 827, 830, 56 Cal. Rptr. 84* (appeal of state employee's dismissal for "dishonesty"); *Wayne v. Bureau of Private Investigators & Adjusters (1962) 201 Cal. App. 2d 427, 436, 20 Cal. Rptr. 194* (administrative proceeding to suspend or revoke license of private investigator for act constituting "dishonesty or fraud")].

It would appear that when the invention developer's conduct does not involve fraud, the customer's choice of action is clearer. If the invention developer violated *Bus. & Prof. Code § 22370 et seq.*, for example, if it did not advertise its fees, or if the invention developer did not make the disclosures in the contract required by statute, the customer would bring the special action for $3,000 or treble damages [*Bus. & Prof. Code §§ 22380, 22386*; *see § 411.130*]. On the other hand, if the invention developer did not perform the services it promised to perform in the contract, the customer would bring an action on the bond against the invention developer and the surety [*Bus. & Prof. Code § 22390*; *Code Civ. Proc.*

§§ 996.410, 996.430; *see § 411.135*].

[iv] Time of Injury

The bond action is authorized by statute to apply to a customer who, after entering into a contract for invention development services, is injured by the invention developer's conduct [*see Bus. & Prof. Code § 22390*]. If a customer is damaged before executing the contract, it appears that the customer would not bring the joint action, but instead bring a special action for damages under *Bus. & Prof. Code § 22386* against the invention developer only, since *Bus. & Prof. Code § 22386* has no stated limitation as to the time of damage [*see Bus. & Prof. Code §§ 22386, 22390*; *Code Civ. Proc. §§ 996.410, 996.430*]. Such a situation could arise, for example, if the customer presents an invention to the invention developer, but the invention developer falsely states to the customer that the invention is worthless and proceeds to promote the invention without the customer's knowledge.

Legal Topics:

For related research and practice materials, see the following legal topics:
Patent LawInequitable ConductGeneral OverviewPatent LawInfringement ActionsGeneral OverviewPatent LawRemediesGeneral OverviewPatent LawRemediesDamages

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B. INVENTION DEVELOPMENT SERVICES

35-411 California Forms of Pleading and Practice--Annotated § 411.38

§ 411.38 Misdemeanor; Government Action for Injunction

Any invention developer who willfully violates any provision of *Bus. & Prof. Code § 22370 et seq.*, or who willfully enters an invention development contract that omits any duty or disclosure required by *Bus. & Prof. Code § 22370 et seq.*, is guilty of a misdemeanor. In addition, any state superior court has jurisdiction in equity to enjoin such violations, and the duty to institute an action for such an injunction is vested in the attorney general, district attorneys, county counsels, and city attorneys [*Bus. & Prof. Code § 22387*].

The prosecution of a misdemeanor action or a suit in equity for injunction does not preclude an action for damages against the invention developer by a customer or other injured person [*see Bus. & Prof. Code § 22387*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Patent LawInequitable ConductGeneral OverviewPatent LawInfringement ActionsGeneral OverviewPatent LawRemediesGeneral OverviewPatent LawRemediesDamagesPatent LawRemediesEquitable ReliefInjunctions

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35-411 California Forms of Pleading and Practice--Annotated §§ 411.39-411.49

[Reserved]

§§ 411.39[Reserved]

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A. Patent Rights And Agreements

35-411 California Forms of Pleading and Practice--Annotated § 411.50

§ 411.50 Related Matthew Bender Publications

For agreements relating to the ownership of computer software, see California Legal Forms, Ch. 57, *Computer-Related Contracts* (Matthew Bender)

For a form of employment contract provisions relating to inventions by employees, see California Legal Forms, Ch. 85, *Employment Contracts* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Computer & Internet LawTrade Secret ProtectionEmployee InventionsLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionEmployee InventionsPatent LawOwnershipGeneral Overview

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35-411 California Forms of Pleading and Practice--Annotated § 411.51

§ 411.51 Federal Constitution

Congress has power to promote progress of science by giving inventors exclusive rights to their inventions for limited time. U.S. *Const., Art I, § 8*

Federal law is supreme and controlling when conflict exists with state law.U.S. Const., Art VI

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawCongressional Duties & PowersGeneral Overview

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A. Patent Rights And Agreements

35-411 California Forms of Pleading and Practice--Annotated § 411.52

§ 411.52 Federal Statutes

Jurisdiction and venue in actions for infringement of patent. *28 U.S.C. §§ 1338, 1400*

Remedies against government for patent infringement. *28 U.S.C. § 1498*

Person not recognized to practice before United States Patent and Trademark Office, who holds himself or herself out as authorized to so practice, can be fined for each such offense. *35 U.S.C. § 32*

Patentability of inventions. *35 U.S.C. §§ 100-104*

Application for patent is generally required to be made by inventor. *35 U.S.C. § 111*

Procedure for application for patent. *35 U.S.C. §§ 111-146*

Patent provides exclusive right to make, sell, or use patented article for 17 years from issuance of patent, and anyone else making, selling, or using patented article during that time is guilty of infringement. *35 U.S.C. §§ 154, 271*

Remedies for patent infringement. *35 U.S.C. §§ 281, 283*-285

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueSpecial VenuePatent LawInfringement ActionsGeneral OverviewPatent LawInfringement ActionsExclusive RightsGeneral OverviewPatent LawInfringement ActionsExclusive RightsManufacture, Sale & UsePatent LawInfringement ActionsInfringing ActsGeneral OverviewPatent LawJurisdiction & ReviewGeneral Overview

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35-411 California Forms of Pleading and Practice--Annotated § 411.53

§ 411.53 State Statutes

Property rights as applied to products of mind. *Civ. Code §§ 980-987*

Inventor has exclusive ownership in invention or expression of invention so long as it remains in his or her possession. *Civ. Code § 980(b)*

If several persons are involved with invention, unless they agree otherwise, invention is jointly owned. *Civ. Code § 981(b)*

Ownership of invention as transferable. *Civ. Code § 982(b)*

Once owner of invention intentionally makes invention public, any person is permitted to make copy or reproduction of it without responsibility to owner under state law. *Civ. Code § 983*

Employment agreement provision requiring employee to assign rights in invention is void and unenforceable when applied to inventions unrelated to employment itself. *Lab. Code § 2870*

Employee's invention rights. *Lab. Code §§ 2870-2872*

Employer not permitted to require agreement provision void under *Lab. Code § 2870* as condition of employment or continued employment, but is permitted to require disclosure by employee of inventions made during employment. *Lab. Code § 2871*

Employment agreements entered into after January 1, 1980 requiring employee to assign or offer to assign invention rights is required to be accompanied by written notification of application of *Lab. Code § 2870*. *Lab. Code § 2872*

Legal Topics:

For related research and practice materials, see the following legal topics:
Patent LawInequitable ConductGeneral OverviewPatent LawInfringement ActionsExclusive RightsGeneral OverviewPatent LawOwnershipGeneral OverviewPatent LawOwnershipConveyancesGeneral OverviewPatent LawOwnershipEmployee Inventions & Shop Rights

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35-411 California Forms of Pleading and Practice--Annotated § 411.54

§ 411.54 Federal Administrative Regulations

Procedural rules for patent application. *37 C.F.R. § 1.1 et seq.*

Person representing patent applicant must be authorized to practice before United States Patent and Trademark Office. *37 C.F.R. §§ 1.31, 1.32*

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§ 411.55 Decisions

[1] Actions Between Co-owners of Patent

Under terms of agreement between co-owners of patent, forfeiture provision is not favored by law and is considered waived by conduct of nonforfeiting co-owner. *Haserot v. Keller (1924) 67 Cal. App. 659, 669-670, 228 P. 383*

One co-owner of patent who fraudulently obtains entire ownership of patent from co-owner and who then grants manufacturing rights to innocent licensees is held accountable to defrauded co-owner for profits from licensing agreements. *Haserot v. Keller (1924) 67 Cal. App. 659, 668, 228 P. 383*

[2] Assignment of Patent Rights

35 U.S.C. § 261 requires patent assignment to be in writing. *United States v. Solomon (9th Cir. 1987) 825 F.2d 1292, 1296 , cert. denied, 484 U.S. 1046 (1988)*

Owner of patent is permitted to assign it to another and convey exclusive rights to invention, or to assign any undivided part or share of exclusive rights to invention, or to assign exclusive rights within specified part of United States; any lesser assignment or transfer conveys license only. *Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal. App. 2d 748, 758-759, 258 P.2d 852*

Fraud is ground for rescission of assignment of patent rights. *Haserot v. Keller (1924) 67 Cal. App. 659, 673, 228 P. 383* ; *Bechtold v. Coney (1919) 42 Cal. App. 563, 564-566, 183 P. 841*

[3] Creditor's Action

Action against patentee in court of equity acting in personam to compel patentee to make assignment is only method

whereby creditor may subject patent rights to satisfaction of judgment against patentee; patent rights are not advertised and sold under common execution. *Peterson v. Sheriff of San Francisco (1896) 115 Cal. 211, 213, 46 P. 1060*

[4] Federal Patent Law

[a] Generally

Objective of federal patent laws is promoting progress of science and useful arts. *Kewanee Oil Co. v. Bicron Corp. (1974) 416 U.S. 470, 480, 94 S. Ct. 1879, 40 L. Ed. 2d 315*

Enforceable patent rights do not exist until patent is issued. *Durham v. Seymour (1896) 161 U.S. 235, 238, 16 S. Ct. 452, 40 L. Ed. 682*

[b] Preemption

Federal patent law does not preempt state contract law so that enforcement of contract to pay royalties to patent applicant is not precluded. *Aronson v. Quick Point Pencil Co. (1978) 440 U.S. 257, 262, 265-266, 99 S. Ct. 1096, 59 L. Ed. 2d 296*

Federal patent law does not preempt state's trade secret laws. *Kewanee Oil Co. v. Bicron Corp. (1974) 416 U.S. 470, 474, 94 S. Ct. 1879, 40 L. Ed. 2d 315*

Only limitation on states in regulating area of patents and copyrights is that they do not conflict with operation of laws in such areas passed by *Congress. Kewanee Oil Co. v. Bicron Corp. (1974) 416 U.S. 470, 479, 94 S. Ct. 1879, 40 L. Ed. 2d 315*

Because federal law does not regulate nonpatentable subject matter no reason exists why states should not be free to regulate it. *Kewanee Oil Co. v. Bicron Corp. (1974) 416 U.S. 470, 482-483, 94 S. Ct. 1879, 40 L. Ed. 2d 315*

Under Supremacy Clause (U.S. Const., art VI), federal law controls field of patents and state law is not permitted, directly or indirectly, to encroach on federal patent law. *Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 229, 231, 84 S. Ct. 784, 11 L. Ed. 2d 661*

State is permitted to control labeling and trademarks but not copying of unpatented or uncopyrighted articles. *Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 232-233, 84 S. Ct. 784, 11 L. Ed. 2d 661*

Federal policies favoring early adjudication of patent validity prevail over state law right of licensee under invalid patent; licensee was required to pay royalties that accrued under invalid patent before licensee notified licensor of challenge to patent, notwithstanding contrary state law [*Civ. Code § 1689*]. *Rite-Nail Packaging Corp. v. Berryfast, Inc. (9th Cir. 1983) 706 F.2d 933, 936-937*

Federal patent law is preemptive, and state is not allowed to encroach on federal patent laws either directly or through another theory, such as unfaircompetition. *National Subscription Television v. Formula International, Inc. (1984) 153 Cal. App. 3d 308, 313, 200 Cal. Rptr. 213*

Appropriation by copying of unpatented or uncopyrighted material is lawful under federal patent law and does not create cause of action for misappropriation under state law. *Sammons & Sons v. Ladd-Fab, Inc. (1982) 138 Cal. App. 3d 306, 310, 187 Cal. Rptr. 874*

[5] Invalidity of Patent as Defense in Action on Licensing Agreement

Licensee is permitted to assert invalidity of patent as defense. *Lear v. Adkins (1969) 395 U.S. 653, 674, 89 S. Ct. 1902, 23 L. Ed. 2d 610*

Licensee was required to pay royalties that accrued under invalid patent before licensee notified licensor of challenge to patent, notwithstanding contrary state law [*Civ. Code § 1689*]. *Rite-Nail Packaging Corp. v. Berryfast, Inc. (9th Cir. 1983) 706 F.2d 933, 936-937*

[6] Injunction

Decision whether to grant or deny injunctive relief rests within equitable discretion of trial court, and that discretion must be exercised consistently with traditional principles of equity, in patent disputes no less than in other cases governed by those standards. *eBay Inc. v. MercExchange, L.L.C. (2006) 547 U.S. 388, 126 S. Ct. 1837, 164 L. Ed. 2d 641, 647-648*

In contempt proceeding, court-ordered destruction of goods produced in violation of injunction and another's patent rights is proper method of preventing further violation. *H.J. Heinz Co. v. Superior Court (1954) 42 Cal. 2d 164, 176, 266 P.2d 5*

Grant of injunctive relief to employer permanently restraining employee from exploiting any rights under patent did not violate *28 U.S.C. § 1498* (permitting patent owner to bring action against government for reasonable royalty) because trial court properly ruled that patent did not belong to employee; injunction therefore properly directed employee to recognize employer's ownership of patent and not to exploit or infringe patent. *Cubic Corp. v. Marty (1986) 185 Cal. App. 3d 438, 456, 229 Cal. Rptr. 828*

In action against former licensee of patented article for continued use of article after cancellation of licensing contract, injunction is proper remedy. *Seagren v. Smith (1944) 63 Cal. App. 2d 733,*

[7] Interpretation of Patent at Trial

Meaning, scope, and validity of patent are issues for court to decide, even though infringement is jury question. *Markman v. Westview Instruments, Inc. (1996) 517 U.S. 370, 116 S. Ct. 1384, 134 L. Ed. 2d 577, 583*

Expert testimony interpreting patent is no substitute for language of patent itself in determining scope of patent. *Rogers v. Hensley (1961) 194 Cal. App. 2d 486, 491, 14 Cal. Rptr. 870*

Duty to construe patent resides with court and court is not permitted to delegate such duty to expert witness. *Rogers v. Hensley (1961) 194 Cal. App. 2d 486, 491, 14 Cal. Rptr. 870*

[8] Inventions Made by Employees

In employer's action against employee for specific enforcement of invention and secrecy agreement that required employee to assign invention rights toemployer, agreement was condition of employment and employment, together with employee's raise and promotion arising out of invention, was adequate consideration for agreement. *Cubic Corp. v. Marty (1986) 185 Cal. App. 3d 438, 448, 229 Cal. Rptr. 828*

Even though invention and secrecy agreement requiring employee to assign invention rights to employer was adhesive because employer drafted agreement, gave employee no opportunity to negotiate agreement's terms, and made agreement condition of employment, agreement was enforceable and not unconscionable because employee's position encompassed inventive duties and employee was adequately compensated by terms of employment. *Cubic Corp. v. Marty (1986) 185 Cal. App. 3d 438, 449-450, 229 Cal. Rptr. 828*

Employer did not breach implied covenant of good faith and fair dealing in employment contract by discouraging submission and consideration of employee's invention under employee suggestion program when program was intended to cover only noncreative side of the business and when compensation for inventions was provided by salary and through employer's program granting employee bonuses for patent applications executed and patents obtained. *Cubic Corp. v. Marty (1986) 185 Cal. App. 3d 438, 454-455, 229 Cal. Rptr. 828*

Lab. Code §§ 2870-2872 are not intended to award invention to employee who presents invention to employer, represents that invention is for employer's benefit, actively seeks and obtains company funding to refine invention, and uses company time and funding to develop invention, meanwhile secretly intending to patent invention for himself or herself. *Cubic Corp. v. Marty (1986) 185 Cal. App. 3d 438, 453, 229 Cal. Rptr. 828* (construing *Lab. Code § 2870* prior to its 1986 amendment)

Employee is bound to assign rights to invention by terms of employment contract. *Treu v. Garrett Corp. (1968) 264 Cal. App. 2d 432*

Employer has right to assignment of employee's invention rights either when employee is hired to invent or when employment contract contains provision requiring assignment. *Aero Bolt & Screw Co. v. Iaia (1960) 180 Cal. App. 2d 728, 736, 5 Cal. Rptr. 53*

Employer has power to contract away shop right to employee's invention. *Aero Bolt & Screw Co. v. Iaia (1960) 180 Cal. App. 2d 728, 739-740, 5 Cal. Rptr. 53*

Employee does not give up rights to his or her invention merely by entering employment, even if employment furnishes him or her with opportunity for conception of idea leading to invention or if he or she invents patentable article that improves device or process used by employer. *Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 654, 3 Cal. Rptr. 421*

One who discovers new principle or improvement in machine or device is not deprived of discovery if he or she employs others to perfect details, so long as such improvements do not depart from original principle. *Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 659-660, 3 Cal. Rptr. 421* ; *Famous Players-Lasky Corp. v. Ewing (1920) 49 Cal. App. 676, 679-680, 194 P. 65*

Employer has right to employee's invention by implied agreement if employee is hired to invent, but not if employee is hired to design, construct, or devise methods of manufacture. *Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 658-659 3 Cal. Rptr. 421*

Employer has nonexclusive right to use invention of employee by express agreement, agreement implied in fact, or agreement implied by law. *Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 655, 3 Cal. Rptr. 421*

Shop rights doctrine is applied when employee (1) during his or her hours of employment, (2) working with employer's materials and appliances (3) conceives, and (4) perfects invention for which employee obtains patent, so that employee must accord employer with nonexclusive right to practice invention. *Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 661, 3 Cal. Rptr. 421* ; *see also Aero Bolt & Screw Co. v. Iaia (1960) 180 Cal. App. 2d 728, 736-737, 5 Cal. Rptr. 53*

[9] Jurisdiction of Patent Matters

[a] Generally

Action involving United States patent is not for that reason governed exclusively by federal law. *Farmland Irrigation Co. v. Dopplmaier (1957) 48 Cal. 2d 208, 216, 308 P.2d 732*

Action to set aside, specifically enforce, or recover royalties on patent license contract is action not arising under United States patent laws, and state courts have jurisdiction over such action, inabsence of diversity of citizenship. *Farmland Irrigation Co. v. Dopplmaier (1957) 48 Cal. 2d 208, 217, 308 P.2d 732*

Existence of federal cases establishing rule of construction of patent licenses is not indication of federal policy excluding state law on subject. *Farmland Irrigation Co. v. Dopplmaier (1957) 48 Cal. 2d 208, 219, 308 P.2d 732*

Federal courts have exclusive jurisdiction over actions arising under patent laws, but state courts have jurisdiction over actions to enforce patent licensing agreements or interpret agreements conveying title to patents. *Pendleton v. Ferguson (1940) 15 Cal. 2d 319, 326*

Jurisdiction of state court founded on contract or tort is not defeated because existence, validity, or construction of patent is involved. *Miller v. Lucas (1975) 51 Cal. App. 3d 774, 776, 124 Cal. Rptr. 500* (dictum)

State courts have broad jurisdiction over matters affecting patents, and federal courts have exclusive jurisdiction only over cases arising under federal patent laws, not cases merely involving patent questions. *Miller v. Lucas (1975) 51 Cal. App. 3d 774, 777, 124 Cal. Rptr. 500* (dictum)

Patent matters primarily concerned with either consensual relations, such as actions to enforce patent licensing agreements, or tortious wrongdoing are permitted to be tried in state courts, and when such case a is brought, a state court has jurisdiction to decide on meaning, scope, or validity of patent or its infringement. *Miller v. Lucas (1975) 51 Cal. App. 3d 774, 776, 124 Cal. Rptr. 500* ; *Rogers v. Hensley (1961) 194 Cal. App. 2d 486, 491, 14 Cal. Rptr. 870*

[b] Specific Examples

Licenses have no statutory basis and rights under them arise from contract rather than from fact that patent rights are involved. *Farmland Irrigation Co. v. Dopplmaier (1957) 48 Cal. 2d 208, 220, 308 P.2d 732*

Assignability of license contract is issue for state court. *Farmland Irrigation Co. v. Dopplmaier (1957) 48 Cal. 2d 208, 220, 308 P.2d 732*

Federal court does not have jurisdiction when action involves licensing contract or restoring unclouded title to patent, even if complainant also seeks injunction to prevent future patent infringement. *H.J. Heinz Co. v. Superior Court (1954) 42 Cal. 2d 164, 173, 266 P.2d 5* (quoting fromLuckett v. *Delpark (1926) 270 U.S. 496, 510, 46 S. Ct. 397, 70 L. Ed. 703*)

State court has jurisdiction to determine invalidity of license and grant injunction against infringement of patent. *H.J. Heinz Co. v. Superior Court (1954) 42 Cal. 2d 164, 172, 266 P.2d 5*

No subject matter jurisdiction in state court when, although complaint alleged tort causes of action, only act alleged against defendant was filing patent applications in United States Patent and Trademark Office which conflicted with and cast doubt on patent previously issued to plaintiff, and when proceedings were still pending in patent office involving

same issues of fact and law. *Miller v. Lucas (1975) 51 Cal. App. 3d 774, 777, 124 Cal. Rptr. 500*

In action against licensee who cancels contract for royalties pursuant to contract terms, reassigns patent rights to patentee, and subsequently uses patented article, state court has jurisdiction on theory of liability on implied contract rather than federal court having jurisdiction on theory of patent infringement. *Seagren v. Smith (1944) 63 Cal. App. 2d 733,*

[10] Licensing Agreements

[a] Generally

Rights under patent licensing contract are freely transferable by assignment unless contract terms indicate other intent or unless assignment would materially impair nonassigning party's chance of obtaining performance. *Farmland Irrigation Co. v. Dopplmaier (1957) 48 Cal. 2d 208, 222, 308 P.2d 732* ; *Fenn v. Pickwick Corp. (1931) 117 Cal. App. 236, 242, 4 P.2d 215*

Duties under licensing agreement are not permitted to be delegated if of such personal nature that performance by someone else would deprive other party of his or her bargain. *Farmland Irrigation Co. v. Dopplmaier (1957) 48 Cal. 2d 208, 222, 308 P.2d 732* ; *see Fenn v. Pickwick Corp. (1931) 117 Cal. App. 236, 242, 4 P.2d 215*

Rights to make, sell, or use patent are permitted to be granted or conferred. *Pendleton v. Ferguson, (1940) 15 Cal. 2d 319, 323 Braun, Bryant & Austin v. McGuire (1927) 201 Cal. 134, 140-141, 255 P. 808*

Right to make patented article is separate from right to use so that right to make does not pass by assignment of right to use unless license to use would otherwise not benefit licensee. *Braun, Bryant & Austin v. McGuire (1927) 201 Cal. 134, 142, 255 P. 808*

Joint owner of patent is permitted to make licensing agreement with third party without consent of co-owner. *Ragan v. Sirigo (1958) 160 Cal. App. 2d 832, 833-834, 326 P.2d 26*

Patentee is permitted to grant license to make and use patented article without license to sell it. *Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal. App. 2d 748, 759, 258 P.2d 852*

Patentee is permitted to license right to sell patented articles, limiting methods and prices of sales. *Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal. App. 2d 748, 759, 258 P.2d 852*

[b] Consideration

Minimum royalties are good consideration supporting patent licensing contract. *Brawley v. Crosby Research Foundation, Inc. (1946) 73 Cal. App. 2d 103, 112, 166 P.2d 392*

[c] Remedies in Action on Licensing Agreement

Patentee is permitted to rescind provision in licensing contract to pay royalties to third-party beneficiary, while retaining remainder of contract terms. *Simmons v. Cal. Institute of Technology (1949) 34 Cal. 2d 264, 275-276, 209 P.2d 581*

Specific performance is proper action to enforce contract to convey patent rights. *Hercules Glue Co. v. Littooy (1938)*

25 Cal. App. 2d 182, 186, 76 P.2d 700 ; *Coleman v. Dawson (1930) 110 Cal. App. 201, 211, 294 P. 13*

When licensee fails to pay royalties under patent licensing contract, patentee is permitted either to treat contract as terminated and sue for damages or seek to enforce the contract and recover royalties due, but patentee is not permitted to do both. *Kittle Mfg. Co. v. Davis (1935) 8 Cal. App. 2d 504, 511, 47 P.2d 1089*

Patentee seeking to enforce licensing agreement is not excused for nonperformance of contract. *Kittle Mfg. Co. v. Davis (1935) 8 Cal. App. 2d 504, 511, 47 P.2d 1089*

Licensee is bound under terms of contract to manufacture stated number of patented articles each year for specified number of years. *Fenn v. Pickwick Corp. (1931) 117 Cal. App. 236, 239, 4 P.2d 215*

Complaint states facts sufficient to constitute cause of action by alleging that due to mutual mistake patent licensing contract should be reformed to include word "exclusive" with regard to license. *Holmes v. Anderson (1928) 90 Cal. App. 276, 281, 282, 265 P. 1010*

[d] Defense to Contract Action

Failure of licensor to prosecute patent application, when required to do so by terms of contract, excuses performance of contract by licensee. *Fenn v. Pickwick Corp. (1931) 117 Cal. App. 236, 243, 4 P.2d 215*

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawIntellectual PropertyOwnership & Transfer of RightsAssignmentsAntitrust & Trade LawIntellectual PropertyOwnership & Transfer of RightsLicensesCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsExclusive JurisdictionComputer & Internet LawInternet BusinessLicensingTrademark Assignments & TransfersComputer & Internet LawTrade Secret ProtectionEmployee InventionsComputer & Internet LawTrademark ProtectionCivil Infringement ActionsGeneral OverviewComputer & Internet LawTrademark ProtectionProtection of RightsFederal RegistrationConstitutional LawSupremacy ClauseGeneral OverviewContracts LawConsiderationAdequate ConsiderationContracts LawContract InterpretationGeneral OverviewContracts LawPerformanceAssignmentGeneral OverviewContracts LawRemediesEquitable ReliefInjunctive ReliefContracts LawSales of GoodsForm, Formation & ReadjustmentFormationAssignment of RightsGovernmentsState & Territorial GovernmentsLicensesLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawWrongful TerminationBreach of ContractExpress & Implied Conditions & CovenantsLabor & Employment LawWrongful TerminationBreach of ContractFormationLabor & Employment LawWrongful TerminationBreach of ContractImplied ContractsPatent LawGeneral OverviewPatent LawInequitable ConductGeneral OverviewPatent LawInequitable ConductEffect, Materiality & ScienterGeneral OverviewPatent LawInfringement ActionsGeneral OverviewPatent LawInfringement ActionsClaim InterpretationScopePatent LawInfringement ActionsDefensesGeneral OverviewPatent LawInfringement ActionsDefensesEstoppel & LachesGeneral OverviewPatent LawInfringement ActionsDefensesPatent InvalidityGeneral OverviewPatent LawInfringement ActionsExclusive RightsGeneral OverviewPatent LawInfringement ActionsInfringing ActsGeneral OverviewPatent LawJurisdiction & ReviewGeneral OverviewPatent LawOwnershipGeneral OverviewPatent LawOwnershipConveyancesGeneral OverviewPatent LawOwnershipConveyancesAssignmentsPatent LawOwnershipConveyancesEquitable Assignments & Joint OwnershipPatent LawOwnershipConveyancesLicensesPatent LawOwnershipConveyancesRoyaltiesPatent LawOwnershipEmployee Inventions & Shop RightsPatent LawPreclusionGeneral OverviewPatent LawRemediesGeneral OverviewPatent

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Chapter 411 PATENTS AND INVENTIONS
PART III. RESEARCH GUIDE
A. Patent Rights And Agreements

35-411 California Forms of Pleading and Practice--Annotated § 411.56

§ 411.56 Law Reviews

Note, *Patentability of Computer Software After State Street Bank & Trust Co. v. Signature Financial Group, Inc.: Evisceration of the Subject Matter Requirement, 33 U.C. Davis L. Rev. 491 (2000)*

Kulik, *The Idea Submission Case: When Is an Idea Protected Under California Law?* 32 Bev. Hills B.A.J. 99 (1998)

Go, *Patent Attorneys and the Attorney-Client Privilege, 35 Santa Clara L. Rev. 611 (1995)*

Landry, *Certainty and Discretion in Patent Law: The On Sale Bar, the Doctrine of Equivalents, and Judicial Power in the Federal Circuit, 67 S. Cal. L. Rev. 1151 (1994)*

Comment, *The Exemption From Patent Infringement and Declaratory Judgments: Misinterpretation of Legislative Intent? 31 San Diego L. Rev. 1057 (1994)*

Golant, *A Seventeen Year Monopoly for a Financial Product? Welcome to the Wonderful World of Patents,* 27 Bev. Hills B.A.J. 24 (Winter 1993)

Note, *The Court of Appeals for the Federal Circuit: Independent Review of Patent Decisions and the Constitutional Facts Doctrine, 67 S. Cal. L. Rev. 187 (1993)*

Comment, *Venue in Patent Infringement Actions: Johnson Gas Fouls the Air, 25 Loy. L.A. L. Rev. 1107 (1992)*

Note, *An Economic Analysis of Biotechnology Patent Protection, 102 Yale L.J. 777 (1992)*

Note, *Experimental Use as Patent Infringement: The Impropriety of a Broad Exception, 100 Yale L.J. 2169 (1991)*

Comment, *The Patenting of MIS Computer Programs: One Step Beyond, 21 Pac. L.J. 761 (1990)*

Smith, *The Federal Circuit's Modern Doctrine of Equivalents in Patent Infringement, 29 Santa Clara L. Rev. 901 (1989)*

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Note, *The Works Made for Hire Doctrine Under the Copyright Act of 1976--A Misinterpretation: Aldon Accessories Ltd. v. Spiegel, Inc., 20 U.S.F. L. Rev. 649 (1986)*

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Charney, *Patent infringement and validity: A guide for the general practitioner,* 55 State B.J. 202 (1980)

Colman, *The Danger of Developing an Invention Without a Patent,* 26(2) The Practical Lawyer 83 (1980)

Pretty, *Advice for the Nonspecialist on Prospective Litigation Involving Patent Rights,* 13 Bev. Hills B.J. 211 (1979); 6 Orange Co. B.J. 473 (1979)

Pretty, *Making the evaluation whether to enforce a patent believed infringed,* 53 State B.J. 396 (1978)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureAppealsStandards of ReviewDe Novo ReviewComputer & Internet LawPatent ProtectionSubject MatterPatent LawInfringement ActionsGeneral OverviewPatent LawInfringement ActionsDefensesExperimental Use & TestingPatent LawInfringement ActionsDoctrine of EquivalentsGeneral OverviewPatent LawInfringement ActionsInfringing ActsGeneral OverviewPatent LawJurisdiction & ReviewSubject Matter JurisdictionAppealsPatent LawRemediesCollateral AssessmentsAttorney FeesPatent LawRemediesDeclaratory ReliefPatent LawSubject MatterProcessesComputer Software & Mental Steps

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35-411 California Forms of Pleading and Practice--Annotated § 411.57

§ 411.57 Text References

Dunner, Gambrell, Kayton, and White, Patent Law Perspectives (2d ed.) (Matthew Bender)

Einhorn, Patent Law And Practice, *Patent Licensing Transactions* (Matthew Bender)

White, Patent Law And Practice, *Patent Litigation: Procedures and Tactics* (Matthew Bender)

Legal Topics:

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

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[Reserved]

§§ 411.58[Reserved]

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B. Invention Development Services

35-411 California Forms of Pleading and Practice--Annotated § 411.70

§ 411.70 Related Matthew Bender Publications

For disclosure statements, cover sheet, contract, statement as to subsequent contracts, notices of cancellation of contract, quarterly statements, and surety bond for use in invention development services transactions, see California Legal Forms, Ch. 103, *Invention Development Services* (Matthew Bender)

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B. Invention Development Services

35-411 California Forms of Pleading and Practice--Annotated § 411.71

§ 411.71 State Statutes

[1] Bond

Invention developer is required to maintain surety bond; amount of bond required; amendment of bond. *Bus. & Prof. Code § 22389*

Bond for protection of customer damaged by invention developer's fraud, dishonesty, or failure to perform services under contract. *Bus. & Prof. Code § 22390*

[2] Contract Requirements and Conditions

Invention development contracts are required to be written, and contemplation of subsequent contracts is required to be disclosed to customer. *Bus. & Prof. Code § 22372*

Right of cancellation of contract within seven days is unconditional and is required to be disclosed in contract. *Bus. & Prof. Code § 22373*

Disclosure requirements for cover sheet of contract. *Bus. & Prof. Code § 22374*

Note by customer cutting off any third party rights as condition of contract is prohibited. *Bus. & Prof. Code § 22376*

Print size and contents required for invention development services contract. *Bus. & Prof. Code § 22379*

[3] Customer's Rights

Waiver by customer of any provision of *Bus. & Prof. Code § 22370 et seq.* is void. *Bus. & Prof. Code § 22385*

Customer is permitted to bring civil action for damages on developer's violation of *Bus. & Prof. Code § 22370 et seq.*, fraud, or failure to make required disclosures. *Bus. & Prof. Code § 22386*

Action by beneficiary of bond against surety and principal. *Code Civ. Proc. §§ 996.410, 996.430*

[4] Invention Development Services Legislation

Invention development services law. *Bus. & Prof. Code § 22370 et seq.*

Legislative intent. *Bus. & Prof. Code § 22370*

Definitions of contract, customer, invention developer, invention development services. *Bus. & Prof. Code § 22371*

Provisions of *Bus. & Prof. Code § 22370 et seq.* are not exclusive. *Bus. & Prof. Code § 22382*

Any application of *Bus. & Prof. Code § 22370 et seq.* that is held unconstitutional does not affect other application of Bus. & Prof. Code *§ 22370 et seq. Bus. & Prof. Code* § 22394

[5] Limitations on Invention Developer

Invention developer is not permitted to have interest in title of invention except for manufacturing purposes. *Bus. & Prof. Code § 22375*

Assignee of invention developer is subject to equities and defenses of customer. *Bus. & Prof. Code § 22377*

Invention developer's reference in advertisement to compliance with *Bus. & Prof. Code § 22370 et seq.* is prohibited. *Bus. & Prof. Code § 22393*

[6] Required Disclosures, Statements, and Records

Quarterly written statement of services by invention developer is required. *Bus. & Prof. Code § 22378*

Invention developer's fee or consideration is required to be disclosed in advertisement of services. *Bus. & Prof. Code § 22380*

Disclosures to customer required before contract. *Bus. & Prof. Code § 22381*

Invention developer is required to maintain records of invention for three years after contract with customer expires. *Bus. & Prof. Code § 22392*

[7] Violation of Invention Development Services Law

Developer's violation of *Bus. & Prof. Code § 22370 et seq.* is misdemeanor and subjects developer to suit by government for injunction. *Bus. & Prof. Code § 22387*

[8] Void Contract

Contract is void on noncompliance with *Bus. & Prof. Code § 22370 et seq.* unless unintentional bona fide error is corrected. *Bus. & Prof. Code § 22383*

Contract is void if customer relies on developer's misrepresentation. *Bus. & Prof. Code § 22384*

Failure of developer to make required disclosures renders void any subsequent contracts with customer. *Bus. & Prof. Code § 22388*

Legal Topics:

For related research and practice materials, see the following legal topics:
Patent LawInequitable ConductGeneral Overview

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[Reserved]

§§ 411.72[Reserved]

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35-411 California Forms of Pleading and Practice--Annotated § 411.110

§ 411.110 Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12; Cal. Rules of Ct., Rule 1.45(a)]--Complaint for Damages [Civ. Code § 3300] for Breach of Patent Licensing Agreement [Cal. Rules of Ct., Rule 1.45(a); Cal. Judicial Council Forms PLD-C-001, PLD-C-001(1)]--By Inventor or Assignee of Inventor--Failure to Pay Minimum Royalties

[1] FORM Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12; Cal. Rules of Ct., Rule 1.45(a)]--Complaint for Damages [Civ. Code § 3300] for Breach of Patent Licensing Agreement [Cal. Rules of Ct., Rule 1.45(a); Cal. Judicial Council Forms PLD-C-001, PLD-C-001(1)]--By Inventor or Assignee of Inventor--Failure to Pay Minimum Royalties

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VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Judicial Council Trial Court Forms

Code Civ. Proc. § 425.12 (Stats. 1979, ch. 843) requires that the Judicial Council develop and approve official forms for use in California trial courts for any complaint, cross complaint, or answer in any action based on personal injury, property damage, wrongful death, unlawful detainer, breach of contract, or fraud. Use of these forms is optional [*see*

Code Civ. Proc. § 425.12].

These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. Noninteractive versions in PDF format also are available at www.lexisone.com at no charge. For general information relating to the use of Judicial Council complaint forms, see Ch. 123, *Complaints and Cross Complaints* .

[3] Use of Form

This form is a filled in sample complaint for use by a patentee who has entered into a patent licensing agreement containing provisions for fixed minimum royalties by the licensee, to recover damages for the licensee's failure to pay under the terms of the contract. The form may be used by the inventor, or the inventor's assignee, who holds title to the patent on the invention.

This form is the Judicial Council contract complaint to which a Judicial Council breach of contract cause of action has been attached [*see Code Civ. Proc. § 425.12*; *Cal. Rules of Ct., Rule 1.45(a), (b)*; Cal. Judicial Council Forms PLD-C-001, PLD-C-001(1)]. In this example, the form also provides for the attachment of the patent licensing contract as an exhibit. It also provides for the attachment of a verification, for a total of five pages.

[4] Allegations

Allegations in this complaint include:

- The existence of the patent (Paragraph 8).
- The existence of the written patent licensing agreement (Paragraph BC-1).
- Defendant's breach of the patent licensing agreement by failing to pay minimum royalties (Paragraph BC-2).
- The resulting damage to plaintiff (Paragraph BC-4).

For more complete instructions on filling out the Judicial Council contract complaint form with breach of contract attachment generally, see *Ch. 140, Contracts, § 140.100[3]*.

[5] Verification

Counsel may attach the verification to this complaint, if desired. Verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], but verification will require that any answer also be verified, if the action is an unlimited civil case in superior court [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[6] Contract Action

Patent licensing agreements have no statutory basis. The rights under such agreements arise from contract law, rather than from the fact that patent rights are involved [*Farmland Irrigation Co. v. Dopplmaier (1957) 48 Cal. 2d 208, 220, 308 P.2d 732]* . Therefore, the usual contract remedies apply, including a breach of contract action for the recovery of royalties due [*see Kittle Mfg. Co. v. Davis (1935) 8 Cal. App. 2d 504, 511, 47 P.2d 1089]* . As with other contract actions, the measure of damages is the amount which will compensate the party aggrieved for all detriment proximately caused by the breach, or which, in the ordinary course of things, would be likely to result therefrom [*see Civ. Code §*

3300]. For discussion and forms relating to actions for breach of contract generally, see Ch. 140, *Contracts* .

[7] Jurisdiction

Although federal courts have exclusive jurisdiction over actions arising under patent laws, state courts have jurisdiction over actions to enforce patent licensing agreements or interpret agreements conveying title to patents [*Pendleton v. Ferguson (1940) 15 Cal. 2d 319, 323* . In addition, once such an action is brought in state court, the state court also has jurisdiction to decide on the meaning, scope, validity, or infringement of the patent [*Rogers v. Hensley (1961) 194 Cal. App. 2d 486, 491, 14 Cal. Rptr. 870]* .

[8] Defense--Invalidity of Patent

A licensee is permitted to avoid the payment of royalties on a patent licensing agreement if he or she can prove the invalidity of the patent [*Lear v. Adkins (1969) 395 U.S. 653, 674, 89 S. Ct. 1902, 23 L. Ed. 2d 610]* . Although the invalidity of a patent is a question of federal law, a state court has jurisdiction to determine the issue when the action arises under the patent licensing agreement [*Rogers v. Hensley (1961) 194 Cal. App. 2d 486, 491, 14 Cal. Rptr. 870]* .

For discussion relating to the validity of patents, see Dunner, Gambrell, Adelman, and Lipsey, Patent Law Perspectives (2d Ed.) Ch. 2, *Validity*, §§ 2.1-2.10.

[9] Federal Statutes

Presumption of patent validity; defenses. *35 U.S.C. § 282*

[10] Decisions

Assignability of patent rights. *Fruit Machinery Co. v. F.M. Ball & Co. (1953) 118 Cal. App. 2d 748, 758-759, 258 P.2d 852*

Minimum royalties are good consideration in support of patent licensing agreement. *Brawley v. Crosby Research Foundation, Inc. (1946) 73 Cal. App. 2d 103, 112, 166 P.2d 392*

Action to recover minimum royalties for breach of patent licensing agreement. *Fenn v. Pickwick Corp. (1931) 117 Cal. App. 236, 239, 4 P.2d 215*

[11] Cross References

For alternative fictitious name allegations and allegations of capacity and residence, see Ch. 20, *Allegations Commonly Used*

For discussion and allegations relating to assignments generally, see Ch. 60, *Assignments*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion of contract remedies and forms of complaint and defenses in contract actions generally, see Ch. 140, *Contracts*

For discussion and allegations relating to damages in a contract action, see Ch. 177, *Damages*

For alternative forms for prayers and verification, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively

For memoranda of points and authorities relating to actions for breach of contract, see California Points and Authorities, Ch. 50, *Contracts* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionFederal QuestionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsExclusive JurisdictionCivil ProcedurePleading & PracticePleadingsAnswersContracts LawBreachGeneral OverviewContracts LawContract InterpretationGeneral OverviewContracts LawRemediesGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral OverviewPatent LawDate of Invention & PriorityGeneral OverviewPatent LawInequitable ConductGeneral OverviewPatent LawInequitable ConductEffect, Materiality & ScienterGeneral OverviewPatent LawInfringement ActionsGeneral OverviewPatent LawInfringement ActionsDefensesGeneral OverviewPatent LawInfringement ActionsDefensesPatent InvalidityValidity PresumptionPatent LawInfringement ActionsInfringing ActsGeneral OverviewPatent LawOwnershipGeneral OverviewPatent LawOwnershipConveyancesGeneral OverviewPatent LawOwnershipConveyancesAssignmentsPatent LawOwnershipConveyancesLicensesPatent LawOwnershipConveyancesRoyaltiesPatent LawRemediesGeneral OverviewPatent LawRemediesDamagesGeneral OverviewTortsDamagesGeneral Overview

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35-411 California Forms of Pleading and Practice--Annotated § 411.111

§ 411.111 Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12; Cal. Rules of Ct., Rule 1.45(a)]--Complaint for Damages [Civ. Code § 3300] for Breach of Patent Licensing Agreement [Cal. Rules of Ct., Rule 1.45(a), (b); Cal. Judicial Council Forms PLD-C-001, PLD-C-001(1)]--Failure to Submit Accounting or Pay Royalties

[1] FORM Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12; Cal. Rules of Ct., Rule 1.45(a)]--Complaint for Damages [Civ. Code § 3300] for Breach of Patent Licensing Agreement [Cal. Rules of Ct., Rule 1.45(a), (b); Cal. Judicial Council Forms PLD-C-001, PLD-C-001(1)]--Failure to Submit Accounting or Pay Royalties

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[2] Judicial Council Trial Court Forms

Code Civ. Proc. § 425.12 (Stats. 1982, ch. 272) requires that the Judicial Council develop and approve official forms for use in California trial courts for any complaint, cross complaint, or answer in any action based on personal injury, property damage, wrongful death, unlawful detainer, breach of contract, or fraud. Use of these forms is optional [*see Code Civ. Proc. § 425.12*].

These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. Noninteractive versions in PDF format also are available at www.lexisone.com at no charge. For general information relating to the use of Judicial Council complaint forms, see Ch. 123, *Complaints and Cross Complaints* .

[3] Use of Form

This form is a filled in sample complaint for use by a patentee who has entered into a patent licensing agreement containing provisions for payment of royalties by the licensee, when the licensee is required to submit regular reports or statements to the patentee containing information on amounts received by the licensee from sales of the invention. The patentee in such a case does not know the amount of damages suffered, because without the accounting or report, he or

she does not know the amount of royalties owed. In a case in which the amounts owed were known, plaintiff would file a modified version of the complaint *set out in § 411.110*.

[4] Allegations

Allegations in this complaint include:

- The existence of the patent, and its issuance to plaintiff (Paragraph 8).
- The existence of the written patent licensing agreement (Paragraph BC-1).
- Defendant's breach of the patent licensing agreement by failing to submit the required accounting or report, and by failing to pay any royalties due (Paragraph BC-2).
- The resulting damage to plaintiff (Paragraph BC-4).

The prayer requests that the court order the defendant to submit a report or accounting to plaintiff, and that damages be awarded in an amount to be determined from such accounting or report (Paragraph 10).

[5] Accounting

An accounting may be sought in a prayer as an auxiliary remedy to the main action [*see Hays v. Cowles, 60 Cal. App. 2d 514, 60 Cal. App. 2d 514, 516-517, 141P.2d 26*]. An accounting will not be ordered, however, when allegations in the complaint indicate a known amount of damages sought to be recovered [*Kinley v. Thelen (1910) 158 Cal. 175, 182, 110 P. 513* ; *St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 359, 287 P.2d 387]* .

[6] Cross References

For a related form, see *§ 411.110*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Computer & Internet LawCivil ActionsDamagesPatent LawInequitable ConductGeneral OverviewPatent LawInequitable ConductEffect, Materiality & ScienterGeneral OverviewPatent LawOwnershipGeneral OverviewPatent LawOwnershipConveyancesGeneral OverviewPatent LawOwnershipConveyancesLicensesPatent LawOwnershipConveyancesRoyaltiesPatent LawRemediesGeneral OverviewPatent LawRemediesEquitable ReliefAccountings

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35-411 California Forms of Pleading and Practice--Annotated § 411.112

§ 411.112 Complaint for Declaratory Relief [Code Civ. Proc. § 1060] to Determine Employer's Shop Rights to Employee's Invention Under Agreement Implied in Fact or by Law and for Damages [Civ. Code § 3300]

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. § 1060] to Determine Employer's Shop Rights to Employee's Invention Under Agreement Implied in Fact or by Law and for Damages [Civ. Code § 3300]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DECLARATORY RELIEF
_____ [*name*],	)	(Employer's Shop Rights to Employee's Invention)
Defendant.	)	
	)	
	)	

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was a resident of _____ County, California.

2. On or about _____ [*date*], defendant _____ [*employee*], while employed by plaintiff, conceived and perfected an invention, _____ [*specify invention, e.g.,* a machine that could simultaneously measure, cut, mark, and stack piping material]. Defendant made the invention during his/her hours of employment with plaintiff and while working with plaintiff's materials and appliances. Defendant subsequently obtained a patent on the invention, on or about _____ [*date*], Patent No. _____.

[*EITHER, if implied in fact contract*]

3. Defendant perfected the invention as part of his/her job, _____ [*specify, e.g.,* which included devising methods for storing pipes and other equipment,] and with the understanding that his/her salary was consideration for any such invention he/she might make.

[*OR, if contract implied by law*]

3. Defendant, by working on the invention during his/her hours of employment, while being paid by plaintiff, and by extensively using plaintiff's materials, appliances, and working space, has been unjustly enriched, at plaintiff's expense. As a result, a contract should be implied by law, imposing on defendant the obligation of granting plaintiff a license to use the invention.

[*CONTINUE:*]

4. An actual controversy has arisen and now exists between plaintiff and defendant concerning their respective rights and duties in that plaintiffcontends that he/she/it is entitled to an exercise of his/her/its shop right to use defendant's invention by virtue of _____[the implied contract between plaintiff and defendant *or* the obligation imposed on defendant by law, arising from a contract implied by law], whereas defendant disputes these contentions, and contends that plaintiff has no shop right, or license to use that invention, as imposed by any agreement implied _____ [in fact *or* by law].

5. Plaintiff desires a judicial determination of his/her/its rights and duties, and a declaration as to whether plaintiff has a shop right to the use of plaintiff's invention, by virtue of a contract _____ [implied in fact *or* implied by law], imposing on defendant the obligation to grant plaintiff such a license.

6. A judicial interpretation is necessary and appropriate at this time under the circumstances in order that plaintiff may ascertain his/her/its rights with respect to the use of such patented invention. [_____ (*Allege any financial or other burden being caused plaintiff by the unsettled state of affairs, e.g.,* plaintiff is being forced to use methods for cutting and storing piping that are slower and that require more employee time, space, and equipment than is required by defendant's invention, which is a considerable financial burden to plaintiff).]

[7. As a result of defendant's refusal to grant plaintiff a license to use defendant's invention, plaintiff has _____ (*specify damages, e.g.,* been forced to make unnecessary expenditures of money, employee time, and equipment, to measure, cut, mark, and stack piping material without the benefit of the cheaper method in using defendant's invention) to plaintiff's damage in the sum of $_____.]

WHEREFORE, plaintiff prays judgment as follows:

1. For a declaration that plaintiff has a shop right in defendant's invention, by virtue of a contract _____ [implied in fact *or* implied by law] and thereby has a license to use that invention;

[2. For damages in the sum of $_____;]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification. See § 411.110[1].*]

[2] Use of Form

This form is for use by an employer seeking an adjudication of his, her, or its shop right in an employee's invention. A shop right is a nonexclusive license to use the invention, and when it has not been expressly granted by written agreement, such a right will be implied by a court from the circumstances of the employment, either on a theory of a contract implied in fact, or a contract implied by law [*Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 654-655, 3 Cal. Rptr. 421]* . A shop right arises when the employee (1) during his or her hours of employment (2) working with the employer's materials and appliances, (3) conceives and (4) perfects an invention for which he or she obtains a patent [*Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 661, 3 Cal. Rptr. 421]* .

[3] Allegations

This complaint alleges:

- That defendant, while an employee of plaintiff conceived and perfected an invention during working hours, with plaintiff's materials, or appliances, for which defendant obtained a patent [*Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 661, 3 Cal. Rptr. 421] (Paragraph 2)* .

- Circumstances from which a contract could be implied, in fact or at law, that imposes on defendant the obligation to grant plaintiff a license to use the invention [*Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 655, 3 Cal. Rptr. 421] (Paragraph 3)* .

- Facts showing the existence of an actual controversy between the parties, setting forth the parties' conflicting contentions with regard to plaintiff's shop right [*see Code Civ. Proc. § 1060*] (Paragraph 4).

- That plaintiff desires a declaration of his, her, or its rights under the circumstances [*see Code Civ. Proc. § 1060*] (Paragraph 5).

- Facts showing why the declaration is necessary and appropriate at the time (Paragraph 6).

- Damages suffered by plaintiff, if damages are sought in addition to declaratory relief (Paragraph 7).

Although the theories of implied in fact contract and implied at law contract are presented as alternatives in this form, counsel may wish to plead them both in one complaint, as separate counts for the same cause of action. For discussion of and forms for use in pleading separate theories and counts in a complaint, see Ch. 123, *Complaints and Cross Complaints* .

[4] Action for Declaratory Relief

Any person who desires a declaration of his or her rights or duties with respect to another, may in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action for a declaration of his or her rights and duties, including a determination of any question of construction or validity arising under a contract. He or she may ask for a declaration of rights or duties, either alone or with other relief, and thecourt may make a binding

declaration of these rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such a declaration has the force of a final judgment. Such a declaration may be had before there has been any breach of the obligation in respect to which such declaration is sought [*Code Civ. Proc. § 1060*].

For further discussion and forms relating to declaratory relief actions in general, see Ch. 182, *Declaratory Relief* .

[5] Jurisdiction

An original action or cross complaint for declaratory relief may be brought in the superior court as an unlimited civil case. The action may only be brought as a limited civil case in a few situations [*see Code Civ. Proc. §§ 86(a)(7), 1060*]. For further discussion of jurisdiction in declaratory relief actions, see Ch. 182, *Declaratory Relief* .

[6] Employer's Right to Assignment of Employee's Patent

Under the appropriate circumstances, an employer might compel an employee to assign his or her patent rights to the employer by a complaint for breach of express or implied contract. When an employee is hired to invent, and does make an invention, the employee is bound to assign to his or her employer any patent obtained in the invention, either by an express employment contract, or by a contract implied by the terms and nature of the employment [*Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 654, 658, 3 Cal. Rptr. 421]* . Courts are reluctant to infer contracts compelling such assignment, however, and will not do so when an employee is hired to design, construct, or devise methods of manufacture, rather than to invent, or when the employee invents something that departs in principle from the invention he or she was hired to make [*Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 658, 659-660, 3 Cal. Rptr. 421]* .

[7] State Statutes

Action for declaratory relief. *Code Civ. Proc. § 1060*

[8] Decisions

Action on contract implied in fact distinguished from action on contract implied by law. *Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 794, 256 P.2d 947*

[9] Cross References

For discussion of and complaint forms for declaratory relief generally, see Ch. 182, *Declaratory Relief* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewContracts LawBreachGeneral OverviewContracts LawTypes of ContractsImplied-in-Fact ContractsContracts LawTypes of ContractsImplied-in-Law ContractsLabor & Employment LawEmployment RelationshipsEmployment ContractsBreachLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionEmployee InventionsPatent LawDate of Invention & PriorityGeneral OverviewPatent LawDate of Invention & PriorityConception DatePatent LawInequitable ConductGeneral OverviewPatent LawInequitable ConductEffect, Materiality & ScienterGeneral OverviewPatent LawJurisdiction & ReviewSubject Matter

JurisdictionDeclaratory Judgment ActionsPatent LawOwnershipGeneral OverviewPatent LawOwnershipConveyancesAssignmentsPatent LawOwnershipEmployee Inventions & Shop RightsPatent LawRemediesGeneral OverviewPatent LawRemediesDamagesGeneral OverviewPatent LawRemediesDeclaratory ReliefPatent LawSubject MatterProcessesPrinciples & Results

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Chapter 411 PATENTS AND INVENTIONS
PART IV. FORMS
B. Patent Rights And Agreements

35-411 California Forms of Pleading and Practice--Annotated § 411.113

§ 411.113 Affirmative Defense to Employer's Action for Shop Rights to Employee's Invention--Employer Rejected Invention as Impractical

[1] FORM Affirmative Defense to Employer's Action for Shop Rights to Employee's Invention--Employer Rejected Invention as Impractical

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that at and subsequent to the time defendant perfected the invention alleged in the complaint in the above-entitled action, plaintiff rejected such invention as worthless and impractical, despite demonstrations by defendant of the value of such invention. Plaintiff is therefore not entitled to shop rights or any other rights in defendant's invention.

[2] Use of Form

This affirmative defense is for use by a defendant employee inventor against whom the employer has filed a complaint asserting shop rights to the invention [*see § 411.112*]. An employer has no rights to an employee's invention when the employer has rejected the invention as impractical [*Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 660-661, 3 Cal. Rptr. 421]* .

[3] Cross References

For a related form, see *§ 411.112*.

For discussion and forms for answers generally, see Ch. 26, *Answers* .

Legal Topics:

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

Computer & Internet LawTrade Secret ProtectionEmployee InventionsPatent LawDate of Invention & PriorityGeneral OverviewPatent LawInfringement ActionsDefensesGeneral Overview

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Chapter 411 PATENTS AND INVENTIONS
PART IV. FORMS
B. Patent Rights And Agreements

35-411 California Forms of Pleading and Practice--Annotated § 411.114

§ 411.114 Affirmative Defense to Employer's Action to Enforce Employment Contract--Employment Contract Provision Requiring Assignment of Employee's Invention Rights to Employer Is Unenforceable [Lab. Code § 2870]

[1] FORM Affirmative Defense to Employer's Action to Enforce Employment Contract--Employment Contract Provision Requiring Assignment of Employee's Invention Rights to Employer Is Unenforceable [Lab. Code § 2870]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that the contractual assignment of rights to defendant's invention on which plaintiff bases the cause(s) of action in the complaint in the above-entitled action is unenforceable under *Labor Code Section 2870* insofar as it purports to apply to defendant's invention because (1) no equipment, supplies, facilities, or trade secret information belonging to plaintiff was used for the invention, (2) the invention was developed entirely on defendant's own time, and (3) the invention _____ [did not relate, at the time of its conception or reduction to practice, to plaintiff's business or to plaintiff's actual or demonstrably anticipated research or development *or* does not result from any work performed by defendant for plaintiff].

[2] Use of Form

This affirmative defense is for use by a defendant employee in any action by the employer to enforce the employer's rights to the employee's invention, pursuant to the terms of an express employment contract. Any provision in an employment contract that provides that an employee must assign, or offer to assign, any of his or her rights in an invention to his or her employer does not apply to an invention that the employee developed entirely on his or her own time, without using the employer's equipment, supplies, facilities, or trade secret information, except for inventions that either (1) relate at the time of conception or reduction to practice of the invention to the employer's business, or actual or demonstrably anticipated research or development of the employer or (2) result from any work performed by the employee for the employer [*Lab. Code § 2870(a)*]. To the extent a provision in an employment contract purports to require an employee to assign an invention otherwise excluded from being required to be assigned under *Lab. Code § 2870(a)*, the provision is against public policy and is unenforceable [*Lab. Code § 2870(b)*].

If an employment agreement entered into after January 1, 1980, contains a provision requiring the employee to assign or offer to assign any of his or her rights in any invention to his or her employer, the employer must also, at the time the agreement is made, provide a written notification to the employee that the agreement does not apply to an invention which qualifies fully under the provisions of *Lab. Code § 2870*. In any action arising from the provisions of *Lab. Code § 2870* the burden of proof is on the employee claiming the benefits of those provisions [*Lab. Code § 2872*].

[3] Decisions

Under *Lab. Code § 2872*, employee bears burden of establishing that invention comes within *Lab. Code § 2870*. *Cubic Corp. v. Marty (1986) 185 Cal. App. 3d 438, 451, 229 Cal. Rptr. 828*

Invention not entirely developed on employee's own time was not within *Lab. Code § 2870* when portions of invention were developed by another employee on employer's time under program funded by employer. *Cubic Corp. v. Marty (1986) 185 Cal. App. 3d 438, 452-453, 229 Cal. Rptr. 828* (construing *Lab. Code § 2870* before its 1986 amendment)

[4] State Statutes

Employer's rights to invention made by employee. *Lab. Code §§ 2870-2872*

[5] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers* .

For discussion and forms for affirmative defenses in contract actions, see Ch. 140, *Contracts* .

For forms of employment contracts containing provisions regarding employees' inventions, see California Legal Forms, Ch. 85, *Employment Contracts* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersContracts LawPerformanceAssignmentGeneral OverviewPatent LawDate of Invention & PriorityReduction to PracticePatent LawInequitable ConductGeneral OverviewPatent LawInfringement ActionsDefensesGeneral OverviewPatent LawOwnershipGeneral OverviewPatent LawOwnershipConveyancesGeneral OverviewPatent LawOwnershipEmployee Inventions & Shop Rights

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[Reserved]

§§ 411.115[Reserved]

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C. Invention Development Services

35-411 California Forms of Pleading and Practice--Annotated § 411.130

§ 411.130 Complaint for Statutory Damages for Violation of Invention Development Services Law [Bus. & Prof. Code § 22386]--General Form

[1] FORM Complaint for Statutory Damages for Violation of Invention Development Services Law [Bus. & Prof. Code § 22386]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Violation of Invention Development Services Law)
Defendant.	)	Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

[*EITHER, for defendant individual*]

1. Defendant _____ [*name of invention developer*] is, and at all times herein mentioned was, a resident of _____ [*city, town, or area*], _____ County, California.

[*OR, for defendant corporation*]

1. Defendant _____ [*name of invention developer*] is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California with its principal place of business in _____ [*city, town, or area*], _____ County, California.

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by their conduct.)]

[3. (Plaintiff is informed and believes and thereon alleges that) (A)t all times herein mentioned each of the defendants sued herein as DOES I-_____, inclusive, was the agent and employee of each of the remaining defendants and was at all times acting within the course and scope of that agency and employment.]

[*EITHER, if violation prior to entering into contract*]

4. Defendant is, and at all times herein mentioned was, an invention developer, within the meaning of *Section 22371(d) of the Business and Professions Code*.

5. As a result of his/her/its identity as an invention developer, defendant was required by statute, Section _____ [*specify, e.g.,* 22380] of the Business and Professions Code, to _____ [*describe obligation, e.g.,* clearly and conspicuously disclose the consideration he/she/it requires for his/her/its services in every advertisement of his/her/its services].

[*OR, if violation occurred after entering into contract*]

4. On or about _____ [*date*], at _____ [*city, town, or area*], _____ County, California, plaintiff and defendant entered into a written contract by which defendant, who was an invention developer within the meaning of *Section 22371(d) of the Business and Professions Code*, agreed to perform certain services on plaintiff's behalf for the purpose of developing and promoting plaintiff's invention, a[n] _____ [*describe invention, e.g.,* erasable fountain pen], in return for which plaintiff agreed to pay $_____ [*specify additional consideration, if any*]. A copy of the contract is attached as Exhibit _____ and made a part hereof.

5. As a result of entering into the contractual relationship with plaintiff, defendant was required by statute, Section _____ [*specify, e.g.,* 22378] of the Business and Professions Code, to _____ [*describe obligation, e.g.,* deliver to plaintiff no later than 180 days after execution of the contract, and at quarterly intervals thereafter, a written statement of invention development services performed to date].

[*CONTINUE*]

6. Defendant violated the requirements of the above statute in that _____ [*specify violation, e.g.,* he/she/it failed to advertise the fees normally charged for invention development services, *or* he/she/it failed to send plaintiff a written statement of services performed within 180 days after execution of the contract or to send plaintiff any quarterly report thereafter *or specify other violation*].

7. The violation of statute by defendant injured plaintiff in that _____ [*describe injury, e.g.,* had

plaintiff known, by an advertisement disclosure, of the consideration defendant requires for its services, namely a particular portion of the proceeds received by plaintiff on the sale of his/her invention, plaintiff would not have spent time and money in phone calls and travel expenses, in arranging meetings with defendant, but would have sought an invention developer who charged a flat fee for his/her/its services *or* a written statement of services performed would have revealed that defendant had not performed any services in promoting plaintiff's invention, and plaintiff would have stopped manufacturing models of the invention for display purposes, which plaintiff continued to do for two years after execution of the contract *or specify other injury*].

[*EITHER, if alleging actual damages*]

8. As a proximate result of defendant's above-described violation of the invention development services law, plaintiff _____ [*allege injury or damages, e.g.,* was induced to make monetary expenditures in telephone calls and travel expenses in arranging to meet with defendant *or* was induced to make monetary expenditures in fees and materials in constructing extra models of plaintiff's invention *or specify other injury or damages*], without reimbursement [or advantage under the contract], by reason of which plaintiff has suffered actual damages in the amount of $_____.

[*OR, if alleging entitlement to statutory damages*]

8. Because of the above-described violations by defendant of the invention development services law and the resulting injury to plaintiff, plaintiff is entitled under *Section 22386 of the Business and Professions Code* to recover statutory damages in the amount of $3,000.

WHEREFORE, plaintiff prays judgment as follows:

[*EITHER, if no actual damages alleged*]

1. For damages, as permitted by *Section 22386 of the Business and Professions Code*, in the amount of $3,000;

[*OR, if actual damages alleged*]

1. For three times the amount of actual damages suffered by plaintiff, which treble amount is $_____ [but in no event less than $3,000, as permitted by *Section 22386 of the Business and Professions Code*];

2. For costs of suit herein incurred, including reasonable attorney's fees, as permitted by *Section 22386 of the Business and Professions Code*; and

3. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

VERIFICATION

[*Verification, if desired. See § 411.110[1].*]

[2] Use of Form

This complaint may be used to bring a special action for damages against an invention developer, as authorized by *Bus. & Prof. Code § 22386*. The action may be brought by any person who was injured, either before or after entering into a contract with the defendant, because an invention developer committed any of the following acts [*see Bus. & Prof. Code § 22379*]:

- Violated the statutory provisions governing invention development services [*see Bus. & Prof. Code § 22370 et seq.*] (this complaint);

- Failed to make all disclosures required by statute to be included in an invention development services contract [*see § 411.131*];

- Made a false or fraudulent statement or representation [*see § 411.132*]; or

- Fraudulently omitted a material fact [*see § 411.133*].

[3] Allegations

The complaint must allege the following [*see Bus. & Prof. Code § 22386*]:

- The defendant's status as an invention developer within the meaning of *Bus. & Prof. Code § 22371(d)* and, if the violation occurred after entering into the contract, the existence of a contract by which the defendant agreed to perform invention development services (Paragraph 4).

- A particular duty imposed by statute on the defendant as an invention developer (Paragraph 5).

- Breach of that statutory duty by the defendant's violation of the invention development services law [*see Bus. & Prof. Code § 22370 et seq.*] (Paragraph 6).

- Resulting injury to the plaintiff (Paragraph 7).

- Actual damages or entitlement to statutory damages (Paragraph 8).

[4] Damages

The plaintiff may bring an action for either $3,000 or three times the amount of actual damages suffered, if any, whichever amount is greater [*Bus. & Prof. Code § 22386*]. The plaintiff is required to have been injured but is not required to have suffered actual damages [*see Bus. & Prof. Code § 22386*]. For example, the plaintiff may have lost the opportunity to sell his or her invention because of the invention developer's conduct, and although the plaintiff could not prove the worth of the invention, the plaintiff could recover the statutory damages. For a discussion of pleading compensatory damages generally, see Ch. 177, *Damages* .

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case in the superior court [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch.

26, *Answers* .

[6] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive ofinterest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[7] Statute of Limitations

Bus. & Prof. Code § 22386, which provides for the type of action alleged in this complaint, does not prescribe a particular period of limitation within which the action must be brought. Generally, an action by an individual on a statute for a penalty or forfeiture must be brought within one year, unless the statute prescribes a different limitation period [*Code Civ. Proc. § 340(a)*]. The general statute of limitations for an action on a liability created by statute, other than a penalty or forfeiture, is three years from the time the cause of action accrues [*Code Civ. Proc. §§ 312, 338(a)*].

Therefore, whether the period of limitation is one year or three years depends on whether or not the recovery of a flat fee or three times the amount of actual damages, as provided in the statute, constitutes a penalty. There have as yet been no cases interpreting *Bus. & Prof. Code § 22386*. Nevertheless, in considering other statutes that provide for specific damages, at least one case has held that a penalty includes any law compelling a defendant to pay the plaintiff other than what is necessary to compensate for actual damage [*see Miller v. Municipal Court (1943) 22 Cal. 2d 818, 837-840, 142 P.2d 297]* . Therefore, since *Bus. & Prof. Code § 22386* provides for recovery of the greater of either $3,000 or three times the amount of actual damages, it would appear to provide for a penalty, and the statute of limitations would be one year. Although it is not certain that the one-year period of limitation would apply, a safer practice would be to bring an action within one year of its accrual.

[8] Attorney's Fees

The statute under which this action may be brought permits the recovery of reasonable attorney's fees to the plaintiff [*Bus. & Prof. Code § 22386*]. When attorney's fees are awarded pursuant to a statute, they are recoverable as costs [*see T.E.D. Bearing Co. v. Walter E. Heller & Co. (1974) 38 Cal. App. 3d 59, 62, 112 Cal. Rptr. 910* ; *see also Civ. Code § 1717*]. Therefore, although no cases have interpreted *Bus. & Prof. Code § 22386*, it would appear that attorney's fees would properly be listed as costs, and that it would be unnecessary to plead and prove them as damages. For a more detailed discussion of attorney's fees as costs generally, see Ch. 174, *Costs and Attorney's Fees* .

[9] State Statutes

Invention development services law. *Bus. & Prof. Code § 22370 et seq.*

Special action for damages against invention developer for violation of invention development services law for fraudulent statement, representation, or omission of material fact, or for failure to make required disclosures in invention development services contract. *Bus. & Prof. Code § 22386*

[10] Cross References

For alternative allegations of capacity and residence, see Ch. 20, *Allegations Commonly Used* .

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions* .

For alternative allegations of damages, see Ch. 177, *Damages* .

For alternative forms for prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification* .

For an invention development services contract, cover sheet, and required disclosure statements to customer, see California Legal Forms, Ch. 103, *Invention Development Services* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionEmployee InventionsPatent LawDate of Invention & PriorityGeneral OverviewPatent LawInequitable ConductGeneral OverviewPatent LawInfringement ActionsExclusive RightsGeneral OverviewPatent LawOwnershipGeneral OverviewPatent LawRemediesCollateral AssessmentsGeneral OverviewPatent LawRemediesDamagesGeneral Overview

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35-411 California Forms of Pleading and Practice--Annotated § 411.131

§ 411.131 Complaint for Statutory Damages for Failure to Make Disclosures Required in Invention Development Services Contract [Bus. & Prof. Code §§ 22379, 22386]--General Form

[1] FORM Complaint for Statutory Damages for Failure to Make Disclosures Required in Invention Development Services Contract [Bus. & Prof. Code §§ 22379, 22386]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Failure to Make Disclosures Required in Contract)
Defendant.	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 411.130[1], Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 411.130[1], Paragraph 2.*]

3. [*Agency allegation, if appropriate. See § 411.130[1], Paragraph 3.*]

4. [*Defendant's standing as invention developer and existence of contract for invention development services between plaintiff and defendant. See § 411.130[1], Paragraph 4, second alternative paragraph.*]

5. In entering into such a contract, defendant was required by Subdivision _____ [*specify, e.g.,* (k)] of *Section 22379 of the Business and Professions Code*, to set forth in the contract, in at least 10-point boldface type, or equivalent size if handwritten, the disclosure(s) _____ [*specify required disclosure, e.g.,* of a single statement setting forth both the total number of customers who had contracted with the defendant as invention developer, except for the last 30 days, and the number of customers that had received, by virtue of the performance of invention development services by the defendant, an amount of money in excess of the amount of money paid by those customers to defendant.]

6. Defendant failed to make the required disclosure(s) in that _____ [*describe, e.g.,* no disclosure regarding previous customers appeared in the contract in any form].

7. [On plaintiff's information and belief,] [T]he true state of facts that would have been revealed, had defendant complied with the statutorydisclosure requirement, is that _____ [*describe, e.g.,* in 10 years of being in the invention development business, defendant had contracted with 3,000 customers, of whom only three had received proceeds beyond the amounts they had invested in defendant's services].

8. Defendant's failure to make the required disclosure(s) injured plaintiff in that _____ [*describe, e.g.,* plaintiff would not have entered into the contract with defendant, and would not have made subsequent expenditures in connection with the contract, had plaintiff been aware of the information contained in the disclosure].

9. [*Allege actual damages to plaintiff or entitlement to statutory damages. See § 411.130[1], alternative Paragraphs 8.*]

[*Prayer. See § 411.130[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification if desired. See § 411.110[1].*]

[2] Use of Form

This complaint may be used by any person to bring a special action for damages against an invention developer, as authorized by *Bus. & Prof. Code § 22386*. This form is for use when the plaintiff has been injured by the defendant's failure to make some disclosure required to be contained in the contract for invention development services [*Bus. & Prof. Code §§ 22379, 22386*].

[3] Allegations

This complaint alleges:

- The existence of the invention development services contract (Paragraph 4).

- The specific disclosure(s) that defendant was required to make in the contract [*see Bus. & Prof. Code § 22379*] (Paragraph 5).

- Defendant's failure to make the required disclosure(s) (Paragraph 6).

- What the disclosure(s) would have revealed had it or they been made (Paragraph 7).
- The resulting injury to plaintiff (Paragraph 8).
- Actual damage sustained by plaintiff or entitlement to statutory damages [*Bus. & Prof. Code § 22386*] (Paragraph 9).

[4] State Statutes

Required disclosures in invention development services contract. *Bus. & Prof. Code § 22379*

[5] Cross References

For a related form, see *§ 411.130*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewPatent LawInfringement ActionsGeneral OverviewPatent LawRemediesDamagesGeneral Overview

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35-411 California Forms of Pleading and Practice--Annotated § 411.132

§ 411.132 Complaint for Statutory Damages for False Statement or Representation [Bus. & Prof. Code § 22386]--General Form

[1] FORM Complaint for Statutory Damages for False Statement or Representation [Bus. & Prof. Code § 22386]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(False Statement or Representation by Invention Developer)
Defendant.	)	
	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 411.130[1], Paragraph 1*].

2. [*Fictitious name allegation, if appropriate. See § 411.130[1], Paragraph 2.*]

3. [*Agency allegation, if appropriate. See § 411.130[1], Paragraph 3.*]

4. [*Defendant's standing as invention developer and, if appropriate, existence of contract for invention development services between plaintiff and defendant. See § 411.130[1], Paragraph 4.*]

5. On or about _____ [*date*], defendant falsely _____ [stated *or* represented] to plaintiff that _____ [*specify misstatement or misrepresentation of material fact, e.g.,* defendant knew of several manufacturers who would be interested in an invention such as plaintiff's invention, and that plaintiff's invention would be in great demand after it had been demonstrated to manufacturers].

6. The _____ [statement *or* representation] made by defendant was in fact false. The true material facts were that _____ [*specify, e.g.,* defendant had contacted several manufacturers, none of whom expressed any interest in plaintiff's invention].

7. Plaintiff, at the time the _____ [statement *or* representation] was made by defendant, and at the time plaintiff took action in reliance on defendant's _____ [statement *or* representation], was ignorant of its falsity, and believed it to be true. In reliance on defendant's _____ [statement *or* representation], plaintiff was induced to and did _____[*specify e.g.,* enter into a contract for invention development services with defendant, pay money for services promised by defendant under the contract, and expend a large sum of money to purchase materials to construct models of the invention]. Had plaintiff known the actual facts, plaintiff would not have taken that action.

8. [*Allege actual damages to plaintiff or entitlement to statutory damages. See § 411.130[1], alternative Paragraphs 8.*]

WHEREFORE, plaintiff prays judgment as follows:

[*Prayer. See § 411.130[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification if desired. See § 411.110[1].*]

[2] Judicial Council Trial Court Forms

Counsel should note that *Code Civ. Proc. § 425.12* (Stats. 1979, ch. 843) requires that the Judicial Council develop and approve official forms for use in California trial courts for any complaint, cross complaint, or answer in any action based on fraud. It is possible that an action under *Bus. & Prof. Code § 22386* or an action based on *Bus. & Prof. Code § 22390* would be considered an action based on fraud for the purpose of *Code Civ. Proc. § 425.12*. In that case, the Judicial Council complaint form could be used [*see Cal. Rules of Ct., Rule 1.30 et seq.*; Cal. Judicial Council Form PLD-C-001(3)]. Use of the Judicial Council form is optional [*Code Civ. Proc. § 425.12*].

These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. Noninteractive versions in PDF format also are available at *www.lexisone.com* at no charge. For general information relating to the use of Judicial Council complaint forms, see Ch. 123, *Complaints and Cross Complaints* .

[3] Use of Form

This complaint is for use in the special statutory action for damages for a false statement or representation of material fact by an invention developer. This form may be used by any person who is injured by such a statement or

representation, whether or not the person has entered into a contract with the invention developer [*Bus. & Prof. Code § 22386*]. For a complaint based on an omission of material fact, *see § 411.133*.

[4] Alleging Fraudulent Statement Compared

Bus. & Prof. Code § 22386 provides that a special action for damages may be brought when a person is injured by an invention developer's false or fraudulent statement, representation, or omission of material fact. This form alleges a false, rather than a fraudulent statement or representation. If a fraudulent statement or representation is alleged, the invention developer's intent to deceive plaintiff and the plaintiff's justifiable reliance on the statement or representation must apparently be alleged as elements of a cause of action for fraud [*see Civ. Code § 1709*; *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 811, 94 Cal. Rptr. 796, 484 P.2d 964* ; *Harazim v. Lynam (1968) 267 Cal. App. 2d 127, 130, 72 Cal. Rptr. 670]* . If alleging a false statement, however, it is unclear whether or not allegations of fraudulent intent or justifiable reliance are required. It appears that those allegations are not required, since the statute treats a false statement as a separate alternative to a fraudulent statement [*see Bus. & Prof. Code § 22386*].

In an action based on the invention developer's fraudulent statement or representation, punitive damages may be available, as long as the plaintiff could allege and prove by clear and convincing evidence the invention developer's knowing misrepresentation, made with the intent of causing injury to the plaintiff [*see Civ. Code § 3294(a),(c)(3)*].

[5] Action on Bond Compared

An action under *Bus. & Prof. Code § 22386* may be brought when the invention developer makes either a false or a fraudulent statement or representation [*see § 411.132[4]*]. A joint action against the invention developer and its surety based on the damages described in *Bus. & Prof. Code § 22390*, however, requires an allegation of the invention developer's fraud or dishonesty. It also requires that the invention developer has maintained a bond [*see Bus. & Prof. Code §§ 22389, 22390*; *Code Civ. Proc. §§ 996.410, 996.430*; *see also § 411.134*]. In addition, the joint action may only be brought by a customer of an invention developer who, after entering into a contract with the invention developer, has suffered damage, whereas the special action on which this complaint is based may be brought by any person who is injured by the invention developer, whether or not that person has entered into a contract or has suffered actual damage [*see Bus. & Prof. Code §§ 22386, 22390*].

In some circumstances, the plaintiff might wish to sue under the authority of both statutes. Thus, for example, when the plaintiff is a customer who entered into a contract, and has suffered actual damages as a result of the invention developer's fraudulent statement, plaintiff may wish to bring an action under both *Bus. & Prof. Code §§ 22386* and *22390*. In such a case, counsel may wish to combine the allegations of this complaint with those of § 411.134.

[6] Allegations

This complaint alleges [*see Bus. & Prof. Code § 22386*]:

- That defendant is an invention developer within the meaning of *Bus. & Prof. Code § 22371(d)* and, if plaintiff executed a contract with the invention developer, the existence of a contract by which defendant agrees to perform invention development services (Paragraph 4).
- Defendant's false statement or representation (Paragraph 5).
- The falsity of the statement or representation (Paragraph 6).
- Plaintiff's reliance, resulting in his or her injury (Paragraph 7).

[7] Cross References

For a related form, see *§ 411.130*.

For general discussion of fraud, and for alternative allegations of misrepresentation and suppression of fact, see Ch. 269, *Fraud and Deceit* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Patent LawInequitable ConductEffect, Materiality & ScienterGeneral OverviewPatent LawRemediesDamagesGeneral Overview

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35-411 California Forms of Pleading and Practice--Annotated § 411.133

§ 411.133 Complaint for Statutory Damages for False Omission of Material Fact by Invention Developer [Bus. & Prof. Code § 22386]--General Form

[1] FORM Complaint for Statutory Damages for False Omission of Material Fact by Invention Developer [Bus. & Prof. Code § 22386]--General Form

[*Caption. See § 411.132[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 411.130[1], Paragraph 1*].

2. [*Fictitious name allegation, if appropriate. See § 411.130[1], Paragraph 2.*]

3. [*Agency allegation, if appropriate. See § 411.130[1], Paragraph 3.*]

4. [*Defendant's standing as invention developer and, if appropriate, existence of contract for invention development services between plaintiff and defendant. See § 411.130[1], Paragraph 4.*]

[*EITHER*]

5. On or about _____ [*date*], defendant _____ [stated *or* represented] to plaintiff that _____ [*specify matter constituting partial truth, e.g.,* a particular manufacturer, contacted by defendant, had stated that to manufacture any product such as plaintiff's invention, the manufacturer would have to have several models of plaintiff's invention]. That disclosure was rendered false, however, by virtue of the omission of certain material facts.

6. At the time of making the above _____ [statement *or* representation], defendant knew [or, in the exercise of reasonable diligence, should have known] that _____ [*specify material fact(s) omitted, e.g.,* the manufacturer was committed to developing the device of another inventor which was similar to plaintiff's, and therefore would not be able to manufacture plaintiff's invention]. Nevertheless, defendant omitted such material fact(s) in making the above _____ [statement *or* representation] to plaintiff.

[*OR*]

5. On or about _____ [*date*], defendant learned [or, in the exercise of reasonable diligence, should have learned] that _____ [*specify material fact(s), e.g.,* a particular manufacturer had announced that it was looking to manufacture new inventions of the same general type as plaintiff's invention and was requesting that inventors or promoters submit designs or samples to it for consideration]. That information would have been important for plaintiff to know in order to _____ [*specify, e.g.,* prepare samples of its invention for presentation to the manufacturer]. Nevertheless, in defendant's subsequent communications with plaintiff defendantfalsely omitted such material fact(s) and did not in any way communicate such fact(s) to plaintiff.

[*CONTINUE*]

6. Plaintiff, at the time of the omission, and at the time of plaintiff's reliance on the omission, was ignorant of the true state of the facts, and relied on defendant's omission. In reliance on the omission, plaintiff was induced to and did _____ [*specify act or failure to act, e.g.,* enter into a contract with defendant in the belief that defendant would promote plaintiff's invention to a manufacturer who would be willing to manufacturer it *or* nothing to prepare additional models of the invention, in the belief that defendant had not yet learned of any interested manufacturer *or other act or failure to act*].

7. [*Allege actual damages to plaintiff or entitlement to statutory damages. See § 411.130[1], alternative Paragraphs 8.*]

[*Prayer. See § 411.130[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 411.110[1].*]

[2] Use of Form

This complaint is for use in the special statutory action for damages for a false omission of material fact by an invention developer [*Bus. & Prof. Code § 22386*]. It is for use by any person who has been injured, whether or not he or she has entered into a contract, by such omission.

For discussion relating to modifying this complaint to allege a fraudulent omission, *see § 411.132[4]*. For discussion comparing the special action for damages with a joint action against the invention developer and the surety for fraud, *see § 411.132[3]*.

[3] Allegations

This complaint alleges [*see Bus. & Prof. Code § 22386*]:

- That the defendant is an invention developer within the meaning of *Bus. & Prof. Code § 22371(d)*, and, if the plaintiff has executed such a contract with defendant, the existence of a contract by which defendant agrees to perform invention development services (Paragraph 4).

- Defendant's false omission of material fact (Paragraph 5).

- Plaintiff's reliance resulting in injury (Paragraph 6).

[4] Cross References

For a related form, see *§ 411.132*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Patent LawDate of Invention & PriorityGeneral OverviewPatent LawInfringement ActionsGeneral OverviewPatent LawRemediesGeneral OverviewPatent LawU.S. Patent & Trademark Office ProceedingsContinuation ApplicationsGeneral Overview

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35-411 California Forms of Pleading and Practice--Annotated § 411.134

§ 411.134 Complaint on Invention Developer's Bond Against Invention Developer and Surety [Bus. & Prof. Code § 22389; Code Civ. Proc. §§ 996.410, 996.430] for Damages for Invention Developer's Fraud [Bus. & Prof. Code § 22390]--Fraudulent Misrepresentation

[1] FORM Complaint on Invention Developer's Bond Against Invention Developer and Surety [Bus. & Prof. Code § 22389; Code Civ. Proc. §§ 996.410, 996.430] for Damages for Invention Developer's Fraud [Bus. & Prof. Code § 22390]--Fraudulent Misrepresentation

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AGAINST IN-
_____ [*names*],	)	VENTION DEVELOPER AND SURETY
Defendants.	)	(Invention Developer's Fraud)
	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant invention developer. See § 411.130[1], Paragraph 1.*]

2. Defendant _____ [*name of surety*] is, and at all times mentioned herein was, a corporation duly organized and existing under the laws of the State of _____, authorized to engage in the surety insurance business in the State of California with its principal place of business in this state in _____County.

3. [*Fictitious name allegation, if appropriate. See § 411.130[1], Paragraph 2.*]

4. [*Agency allegation, if appropriate. See § 411.130[1], Paragraph 3.*]

5. On or about _____ [*date*], and before the execution of the contract described herein, there was filed pursuant to law with the Secretary of State a bond, designated as an invention development services bond, with defendant _____ [*surety*] as surety thereunder, in favor of the State of California and for the benefit of any person who, after entering into a contract for invention development services with defendant _____ [*invention developer*], is damaged by fraud or dishonesty or failure to provide the services of the invention developer in performance of the contract, and which bond is in the amount of $_____. [A copy of That bond is attached as Exhibit _____ incorporated by reference.]

6. [*Defendant's standing as invention developer and existence of contract for invention development services between plaintiff and defendant invention developer. See § 411.130[1], Paragraph 4, second alternative paragraph.*]

7. Thereafter, on or about _____ [*date*], defendant _____ [*invention developer*] falsely and fraudulently represented to plaintiff that _____ [*specify misrepresentation, e.g.,* several manufacturers in the area were interested in plaintiff's invention].

8. [*Allege falsity of misrepresentation. See § 411.132[1], Paragraph 6.*]

9. Defendant made that _____ [statement *or* representation] _____ [knowing it to be false *or* with no reasonable ground for believing it to be true] and with the intent to induce plaintiff to act in the manner hereafter alleged.

10. Plaintiff, at the time the _____ [statement *or* representation] was made by defendant, and at the time plaintiff took action in reliance on that _____ [statement *or* representation], was ignorant of its falsity, and believed it to be true. In reliance on such _____ [statement *or* representation], plaintiff was induced to and did _____ [*specify e.g.,* enter into a contract for invention development services with defendant, pay money for services promised by defendant under the contract, and expend a large sum of money to purchase materials to construct models of the invention]. Had plaintiff known the actual facts, plaintiff would not have taken that action. Plaintiff's reliance was justified because _____ [*specify, e.g.,* defendant's business was to communicate with manufacturers, and to promote inventions to them on plaintiff's behalf].

11. As a proximate result of defendant _____ [*invention developer*]'s fraud and the facts herein alleged, plaintiff was _____[*show damage, e.g.,* induced to make monetary expenditures in fees and materials to construct models of plaintiff's invention] without any reimbursement or advantage under the contract, by reason of which plaintiff has suffered damage in the sum of $_____.

12. In doing the acts herein alleged, defendant _____ [*invention developer*] committed fraud on plaintiff, for which plaintiff is also permitted to recover punitive damages in the sum of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages against defendants _____ [*invention developer and surety*] in the amount of $_____.

2. For punitive damages against defendant _____ [*invention developer*]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 411.130[1].*]

[2] Judicial Council Trial Court Forms

Counsel should note that *Code Civ. Proc. § 425.12* (Stats. 1979, ch. 843) requires that the Judicial Council develop and approve official forms for use in California trial courts for any complaint, cross complaint, or answer in any action based on fraud. It is possible that an action under *Bus. & Prof. Code § 22386* or an action based on *Bus. & Prof. Code § 22390* would be considered an action based on fraud for the purpose of *Code Civ. Proc. § 425.12*. In that case, the Judicial Council complaint form could be used [*see Cal. Rules of Ct., Rule 1.45(a), (b)*; Cal. Judicial Council Form PLD-C-001(3)]. Use of the Judicial Council form is optional [*Code Civ. Proc. § 425.12*].

These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. Noninteractive versions in PDF format also are available at www.lexisone.com at no charge. For general information relating to the use of Judicial Council complaint forms, see Ch. 123, *Complaints and Cross Complaints* .

[3] Use of Form

[a] Generally

This complaint is for use by the customer of a bonded invention developer who, after entering into a contract with the invention developer, suffers damage as a result of the invention developer's fraud in making a fraudulent misreprentation. The customer, as the beneficiary of the bond, is authorized by statute to enforce the liability on the bond, which covers the damages, against both the invention developer and the surety, who must both be joined as parties to the action [*see Bus. & Prof. Code §§ 22389, 22390*; *Code Civ. Proc. §§ 996.410, 996.430*].

An invention developer doing business in California is required to maintain a bond [*Bus. & Prof. Code § 22389*; *see generally Ch. 538, Suretyship, Bonds, and Undertakings, § 538.40* et seq.]. Before 1999 an invention developer could make a cash deposit with the Secretary of State in lieu of a bond [*see Code Civ. Proc. §§ 995.160, 995.710*]. A customer may make a claim for enforcement of liability on a deposit by providing the Secretary of State with evidence of a money judgment against the invention developer, along with evidence that the claimant is a person described in *Bus. & Prof. Code § 22390* [*Bus. & Prof. Code § 22391*].

[b] Dishonesty or Breach of Contract

The joint action on the bond is also permitted by statute on the invention developer's dishonesty, or failure to perform under the contract for invention development services [*see Bus. & Prof. Code § 22390*; *see also § 411.135*]. Whether or not "dishonesty" is meant to encompass more than fraud, and thus to provide an independent ground for the bond action is not clear, since the term "dishonesty" has no one precise definition, and its meaning depends on the circumstances of a particular case [*see Cvrcek v. State Personnel Bd. (1967) 247 Cal. App. 2d 827, 830, 56 Cal. Rptr. 84* ; *Wayne v. Bureau of Private Investigators & Adjusters (1962) 201 Cal. App. 2d 427, 436, 20 Cal. Rptr. 194]* . This form could be

modified to allege dishonesty by the invention developer, rather than fraud.

[c] Special Action Against Invention Developer Only

When the invention developer has made a false or fraudulent statement, representation, or omission of material fact, a person injured thereby may also bring an special action for damages against the invention developer for the greater of $3,000 or three times the amount of actual damages. The special action for damages, unlike the bond action on which the foregoing complaint is based, does not require that the plaintiff have entered into a contract with the invention developer [*see Bus. & Prof. Code § 22386*].

The special action for damages also differs from the bond action in several other respects: (1) it allows a cause of action for a false statement by the invention developer, in which case fraudulent intent and the plaintiff's justifiable reliance need not be alleged [*see § 411.132[4]*], (2) actual damages are not required, and (3) attorney's fees are available [*see Bus. & Prof. Code § 22386*].

A plaintiff who qualifies to bring either a special action for damages or a joint action on the bond may wish to combine the two actions. In such a case, the allegations in this form may be combined with those in § 411.132.

[4] Allegations

This complaint alleges:

- Existence of invention developer's bond and condition to pay on bond in the event of invention developer's fraud [*see Bus. & Prof. Code § 22390*] (Paragraph 5).
- Execution of a contract for invention development services, which is a prerequisite to maintaining an action on the bond [*see Bus. & Prof. Code § 22390*] (Paragraph 6).
- Invention developer's fraud, subsequent to entering into contract with plaintiff (Paragraph 7).
- Falsity of developer's representation (Paragraph 8).
- Invention developer's intent to defraud plaintiff (Paragraph 9).
- Plaintiff's justifiable reliance (Paragraph 10).
- Damages (Paragraph 11).
- Punitive damages (Paragraph 12).

[5] Damages

[a] In General

One who willfully deceives another with the intent to induce him or her to alter his or her position to his or her injury or risk is liable for any damages which the injured party thereby suffers [*Civ. Code § 1709*]. In addition, for the breach of an obligation not arising from a contract, the measure of damages, except where otherwise expressly provided by the Civil Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not [*Civ. Code § 3333*].

[b] Punitive Damages

In an action for fraud, the plaintiff may recover punitive damages in addition to actual damages [*see Civ. Code § 3294*]. Punitive damages may not be awarded, however, unless actual damages are suffered [*Mother Cobb's Chicken Turnovers, Inc. v. Fox (1937) 10 Cal. 2d 203, 206, 73 P.2d 1185* ; *Esparza v. Specht (1976) 55 Cal. App. 3d 1, 6, 127 Cal. Rptr. 493]* . For further discussion of punitive damages, and for alternative allegations of punitive damages, see Ch. 177, *Damages* .

[c] Limitation on Surety's Liability

The aggregate liability of a surety to all persons for all breaches of the condition of a bond is limited to the amount of the bond [*Code Civ. Proc. § 996.470(a)*].

[6] State Statutes

Bond or cash deposit required for invention developers. *Bus. & Prof. Code § 22389*; *Code Civ. Proc. § 995.710*

Conditions of required bond. *Bus. & Prof. Code § 22390*

Claims against deposit made in lieu of bond. *Bus. & Prof. Code § 22391*

Action on bond against surety and principal. *Code Civ. Proc. §§ 996.410, 996.430*

[7] Cross References

For a related form, see *§ 411.130*.

For discussion and forms for alleging general and punitive damages, see Ch. 177, *Damages* .

For general discussion of the elements of fraud, and for alternative allegations for use in actions for fraud, see Ch. 269, *Fraud and Deceit* .

For discussion and forms relating to sureties' obligations and bonds, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

For an invention developer's bond, see California Legal Forms, Ch. 103, *Invention Development Services*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesDamagesPunitive DamagesContracts LawBreachNonperformanceContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesPunitive DamagesPatent LawDate of Invention & PriorityGeneral OverviewPatent LawInequitable ConductGeneral OverviewPatent LawRemediesDamagesGeneral Overview

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35-411 California Forms of Pleading and Practice--Annotated § 411.135

§ 411.135 Complaint on Invention Developer's Bond Against Invention Developer and Surety for Damages [Bus. & Prof. Code § 22389; Code Civ. Proc. §§ 996.410, 996.430] for Invention Developer's Failure to Perform Services [Bus. & Prof. Code § 22390]

[1] FORM Complaint on Invention Developer's Bond Against Invention Developer and Surety for Damages [Bus. & Prof. Code § 22389; Code Civ. Proc. §§ 996.410, 996.430] for Invention Developer's Failure to Perform Services [Bus. & Prof. Code § 22390]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AGAINST IN-
_____ [*name*],	)	VENTION DEVELOPER AND SURETY
Defendant.	)	(Failure to Perform Services)
	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant invention developer. See § 411.130[1], Paragraph 1.*]

2. [*Capacity and principal office of defendant surety. See § 411.134[1], Paragraph 2.*]

3. [*Fictitious name allegation, if appropriate. See § 411.130[1], Paragraph 2.*]

4. [*Agency allegation, if appropriate. See § 411.130[1], Paragraph 3.*]

5. [*Existence of surety bond and condition for payment on bond. See § 411.134[1], Paragraph 5.*]

6. [*Defendant's standing as invention developer and existence of contract for invention development services between plaintiff and defendant invention developer. See § 411.130[1], Paragraph 4, second alternative paragraph.*]

7. Plaintiff has performed all conditions, covenants, and promises under the contract that plaintiff was required to perform [except _____ (*specify reasons why plaintiff's performance of any conditions or covenants is excused, e.g.,* continous furnishing of models of plaintiff's invention after the date of _____ [*date*], the performance of which was excused on the ground that plaintiff as of that date became aware that defendant _____ (*invention developer*) was not performing under the contract)].

8. On or about _____ [*date*], defendant _____ [*invention developer*] breached the contract by failing to provide invention services under the contract [specifically, by failing to _____ (*specify, e.g.,* contact or communicate with manufacturers of products of the same type as plaintiff's invention)].

9. As a result of defendant's breach of contract and failure to provide services, plaintiff has _____ [*specify damages, e.g.,* lost expenditures made on fees under the contract as well as on materials and procurement of services in construction of models of plaintiff's invention, without any reimbursement or advantage under the contract], to plaintiff's damage in the sum of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For compensatory damages from defendants _____ [*invention developer and surety*] in the sum of $_____;

2. For interest from defendants _____ [*invention developer and surety*] on the sum of $_____ from and after _____, 19_____;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 411.110[1].*]

[2] Use of Form

This complaint is for use by the customer of a bonded invention developer who, after entering into a contract with the invention developer, suffers damage as a result of the invention developer's failure to provide invention development services under the contract. The customer, as the beneficiary of the bond, is authorized by statute to enforce the liability on the bond, which covers such damages, against both the invention developer and the surety, who must both be joined as parties to the action [*see Bus. & Prof. Code §§ 22389, 22390*; *Code Civ. Proc. §§ 996.410, 996.430*; *see also §§ 411.134, 411.135*].

[3] Allegations

This complaint alleges:

- Existence of the invention developer's bond and the condition to pay in event of failure to provide invention development services [*see Bus. & Prof. Code § 22390*] (Paragraph 5).

- Execution of invention development services contract between plaintiff and invention developer, which gives rise to duty to performservices and which is prerequisite to maintaining action on bond [*see Bus. & Prof. Code § 22390*] (Paragraph 6)

- Performance of obligations by plaintiff, or excused nonperformance (Paragraph 7).

- Defendant invention developer's failure to perform services under the contract (Paragraph 8).

- Plaintiff's damages as a result of the failure to perform (Paragraph 9). The requirements for pleading a cause of action for breach of contract are further discussed in Ch. 140, *Contracts* .

[4] Cross References

See also *§§ 411.130* and *411.134*.

For discussion of breach of contractual obligation to perform, see Ch. 140, *Contracts* .

For discussion and allegations of damages recoverable in a contract action, see Ch. 177, *Damages* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesLiabilityContracts LawRemediesCompensatory DamagesGeneral OverviewPatent LawDate of Invention & PriorityGeneral OverviewPatent LawInequitable ConductGeneral Overview

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35-411 California Forms of Pleading and Practice--Annotated § 411.136

§ 411.136 Affirmative Defense--To Action for Damages Against Invention Developer [Bus. & Prof. Code § 22386] or Against Invention Developer and Surety [Bus. & Prof. Code § 22390; Code Civ. Proc. §§ 996.410, 996.430]--Plaintiff Inventor Not Within Class Protected by Invention Development Services Law [Bus. & Prof. Code § 22371(a),(b)]--Excepted Business

[1] FORM Affirmative Defense--To Action for Damages Against Invention Developer [Bus. & Prof. Code § 22386] or Against Invention Developer and Surety [Bus. & Prof. Code § 22390; Code Civ. Proc. §§ 996.410, 996.430]--Plaintiff Inventor Not Within Class Protected by Invention Development Services Law [Bus. & Prof. Code § 22371(a),(b)]--Excepted Business

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

Plaintiff, during the calendar year in which the document attached as Exhibit _____ to the complaint in the above-entitled action was signed, was not a "customer" within the meaning of the invention development services law, in that plaintiff was then regularly engaged in a _____ [trade *or* business *or* profession] which had _____ [a net worth of $100,000 *or* gross receipts from any source of $50,000] or more. Therefore, such plaintiff was not within the class of persons designated for protection under such law, and such document is not properly an invention development services contract as contemplated under such law.

[2] Use of Form

This affirmative defense is for use by an invention developer either in a special action for damages [*Bus. & Prof. Code § 22386*] or in an action on the invention developer's bond [*see Bus. & Prof. Code § 22390*; *Code Civ. Proc. §§ 996.410, 996.430*], or by the surety in an action on the invention developer's bond, when the plaintiff has alleged the existence of an invention development services contract [*see §§ 411.131 -411.135*]. This affirmative defense alleges that the plaintiff does not qualify as one to receive protection under Bus. & Prof. Code Chapter 17 (*Bus. & Prof. Code § 22370 et seq.*), and therefore is not entitled to bring the cause of action against the defendant.

To bring an action on an invention developer's bond, the plaintiff must have entered into an invention development services contract [*see Bus. & Prof. Code § 22390*]. And although the special action for damages may be brought by any person injured by the invention developer's conduct, the action would often depend on the existence of an invention development services contract or invention development services [*see Bus. & Prof. Code § 22386*]. Such a contract or such services are defined as being entered into with or for the benefit of a customer [*Bus. & Prof. Code § 22371(a),(e)*]. A customer, for the purposes of Bus. & Prof. Code Chapter 17, does not include any person, firm, corporation, or other entity regularly engaged in a trade, business, or profession that has either a net worth of $100,000or more or gross receipts from any source of $50,000 or more during the calendar year in which any contract for invention development services is signed [*Bus. & Prof. Code § 22371(b)*].

[3] State Statutes

Definitions of "contract for invention development services," "customer," and "invention development services" under invention development services law. *Bus. & Prof. Code § 22371(a),(b),(e)*

[4] Cross References

For discussion and forms of answers generally, see Ch. 26, *Answers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesLiabilityPatent LawDate of Invention & PriorityGeneral OverviewPatent LawInfringement ActionsDefensesGeneral Overview

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35-411 California Forms of Pleading and Practice--Annotated § 411.137

§ 411.137 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--To Action for Damages Against Invention Developer [Bus. & Prof. Code § 22386] or Against Invention Developer and Surety [Bus. & Prof. Code § 22390;Code Civ. Proc. §§ 996.410, 996.430]--Defendant Invention Promoter Not Within Class Regulated by Invention Development Services Law [Bus. & Prof. Code § 22371(a),(d)]--Insufficient Receipts from Invention Development Services

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--To Action for Damages Against Invention Developer [Bus. & Prof. Code § 22386] or Against Invention Developer and Surety [Bus. & Prof. Code § 22390;Code Civ. Proc. §§ 996.410, 996.430]--Defendant Invention Promoter Not Within Class Regulated by Invention Development Services Law [Bus. & Prof. Code § 22371(a),(d)]--Insufficient Receipts from Invention Development Services

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

Defendant was not an invention developer within the meaning of the invention development services law at the time of execution of the document attached as Exhibit _____ to the complaint in the above-entitled action, in that during the fiscal year preceding the year in which such document was signed, defendant's gross receipts from contracts for invention development services did not exceed 10 percent of gross receipts from all sources. Therefore, de fendant was not within the class of persons designated for regulation under such law, and such document is not properly an invention development services contract as contemplated under such law.

[2] Use of Form

This affirmative defense is for use by an invention developer in a special action for damages [*Bus. & Prof. Code § 22386*], or in a joint action against the invention developer and its surety [*Bus. & Prof. Code § 22390*; *Code Civ. Proc. §§ 996.410, 996.430*], when the plaintiff has alleged the existence of an invention development services contract [*see § 411.131*]. The foregoing form alleges that the defendant does not qualify as one designated to be regulated under Bus. & Prof. Code Chapter 17 (*Bus. & Prof. Code §§ 22370-22394*), and that therefore plaintiff is not entitled to bring the cause of action against the defendant.

The special action for damages may be brought against an "invention developer," and is often based on an invention development services contract [*see Bus. & Prof. Code § 22386*]. The joint action aginst the "invention developer" and and the surety requires the existence of the invention development services contract [*see Bus. & Prof. Code § 22390*]. Such a contract is defined as including a contract between an invention developer and a customer [*see Bus. & Prof. Code § 22371(a)*]. An "invention developer," for the purposes of Chapter 17, however, does not include a person, firm, corporation, association, or other entity whose gross receiptsfrom contracts for invention development services do not exceed 10 percent of its gross receipts from all sources during the fiscal year preceding the year in which any such contract is signed. Governmental agencies, charitable organizations, or persons or entities that do not charge a fee for invention development services also do not qualify as "invention developers." A "fee" includes any customer payment, including reimbursements for expenditures or costs, but does not include payments made from a portion of income the customer might receive by virtue of invention development services performed [*Bus. & Prof. Code § 22371(d)*].

[3] State Statutes

Definition of "contract for invention development services" and "invention developer." *Bus. & Prof. Code § 22371(a),(d)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesLiabilityPatent LawDate of Invention & PriorityGeneral OverviewPatent LawInfringement ActionsDefensesGeneral OverviewPatent LawOwnershipGeneral Overview

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35-411 California Forms of Pleading and Practice--Annotated § 411.138

§ 411.138 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--To Action by Inventor for Rescission of Invention Development Services Contract--Invention Developer's Noncompliance With Chapter 17 as Bona Fide Error [Bus. & Prof. Code § 22383]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--To Action by Inventor for Rescission of Invention Development Services Contract--Invention Developer's Noncompliance With Chapter 17 as Bona Fide Error [Bus. & Prof. Code § 22383]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

The noncompliance with *Sections 22370-22394 of the Business and Professions Code*of the contract attached as Exhibit _____ to the complaint in the above-entitled action, such noncompliance specifically being _____ [*specify, e.g.,* the absence of a statement of the expected date of completion of the invention development services required by *Section 22379 of the Business and Professions Code*], was unintentional on the defendant's part, and was the result of defendant's bona fide error. Such error was made notwithstanding the normal procedure(s) used by defendant to avoid such errors, specifically, _____ [*specify defendant's reasonable procedures, e.g.,* two persons other than the person preparing the contract reading the entire contract and checking its contents to insure that all required information is included]. In addition, defendant _____ [has made *or* is willing and able to make] the appropriate correction of the error by _____ [*specify acts constituting correction of error, e.g.,* preparing an addendum to the contract, to be signed by both parties to the contract, stating the expected date of completion of the invention development services]. Therefore, the contract attached as Exhibit _____ to the complaint in the above-entitled action is not void or unenforceable as alleged in such complaint.

[2] Use of Form

This affirmative defense is for use by an invention developer in an action by an inventor customer to rescind the invention development services contract on the grounds that the contract is void and unenforceable because it does not

comply with Chapter 17 [*see Bus. & Prof. Code § 22383*]. The foregoing defense alleges that the contract is not void and unenforceable because defendant's noncompliance was the unintentional result of a bona fide error notwithstanding the use of reasonable procedures used by de fendant to avoid the error, and defendant has made or will make the appropriate correction [*Bus. & Prof. Code § 22383*].

[3] State Statutes

Invention development services contracts as void and unenforceable if not in compliance withBus. & Prof. Code §§ 22370-22394; exception wheninvention developer's noncompliance is unintentional, bona fide error. *Bus. & Prof. Code § 22383*

[4] Cross References

For discussion and forms relating to defenses generally, see Ch. 26, *Answers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersPatent LawDate of Invention & PriorityGeneral OverviewPatent LawInequitable ConductEffect, Materiality & ScienterGeneral OverviewPatent LawInfringement ActionsDefensesGeneral Overview

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35-411 California Forms of Pleading and Practice--Annotated § 411.139

§ 411.139 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--To Action by Invention Developer to Enforce Invention Development Services Contract--Contract Unenforceable for Invention Developer's Noncompliance With Invention Development Services Law [Bus. & Prof. Code § 22383]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--To Action by Invention Developer to Enforce Invention Development Services Contract--Contract Unenforceable for Invention Developer's Noncompliance With Invention Development Services Law [Bus. & Prof. Code § 22383]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

_____ [The contract on which plaintiff bases the cause(s) of action in the complaint *or* The document attached to the complaint as Exhibit _____] does not comply with the applicable provision(s) of the invention development services law, specifically Business and Professions Code Section(s) _____ [*specify, e.g.,* 22373 and 22374] which require(s) that _____ [*specify, e.g.,* the contract for invention development services contain information relating to the customer's right to cancel the contract and that such information be printed in boldface type of at least 10-point size, both above the signatory section of the contract and on a cover sheet accompanying the contract]. As a result, such alleged contract is void and unenforceable as contrary to public policy.

[2] Use of Form

This affirmative defense is for use by the customer of an invention developer, when the invention developer is suing the cus tomer to enforce or make a claim under an invention development services contract. This form alleges that because the plaintiff's contract for invention development services does not comply with the applicable provisions of the invention development services law, it is void and unenforceable as contrary to public policy. The contract is not void and unenforceable, however, if the noncompliance resulted from the invention developer's bona fide error, notwithstanding the use of reasonable procedures adopted to avoid such errors, and was corrected.

This affirmative defense may also be used as the grounds for a demurrer to a complaint by the invention developer, provided that the invention developer's noncompliance appears on the face of the complaint [*see Code Civ. Proc. § 430.30*].

[3] Action for Rescission

Bus. & Prof. Code §§ 22383 and *22384*, providing that contracts for invention development services are void and unenforceable on the invention developer's noncompliance with Chapter 17 or fraud, may also providethe inventor or customer with the basis for an action to rescind the contract and obtain restitution of any amounts paid under the contract [*see Civ. Code §§ 1689, 1692*]. Fraud is also a separate ground for rescission of a contract [*see Civ. Code § 1689(b)(1)*; see also Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* , and Ch. 490, *Rescission and Restitution*].

[4] State Statutes

Contract for invention development services failing to comply with invention development services law as void and unenforceable as contrary to public policy. *Bus. & Prof. Code § 22383*

[5] Cross References

For discussion and forms of demurrers generally, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePretrial JudgmentsJudgment on the PleadingsContracts LawDefensesGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewPatent LawDate of Invention & PriorityGeneral OverviewPatent LawInequitable ConductGeneral OverviewPatent LawInfringement ActionsDefensesGeneral Overview

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35-411 California Forms of Pleading and Practice--Annotated § 411.140

§ 411.140 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--To Action by Invention Developer to Enforce Invention Development Services Contract--Contract Unenforceable for Misrepresentation by Invention Developer [Bus. & Prof. Code § 22384]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--To Action by Invention Developer to Enforce Invention Development Services Contract--Contract Unenforceable for Misrepresentation by Invention Developer [Bus. & Prof. Code § 22384]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

On or about _____ [*date*], plaintiff in the above-entitled action made the willful and _____ [false *and/or* fraudulent *and/or* misleading] representation that _____ [*specify, e.g.,* the contract for invention development services would result in complete patent protection for defendant's invention], whereas in fact _____ [*specify, e.g.,* plaintiff's services and contract were not designed to provide, and could not provide, patent protection for defendant's invention]. Plaintiff made the representation, _____ [knowing it to be _____ (false *and/or* fraudulent *and/or* misleading) *or* without having any reasonable ground for believing it to be true], and with the intent to induce defendant to enter the contract attached to the complaint as Exhibit _____. Defendant entered into such contract in reliance on such representation, ignorant of its nature as a misrepresentation, and believing it to be true. As a result, such contract is void and unenforceable.

[2] Use of Form

This affirmative defense is for use by the customer of an invention developer, when the invention developer is suing the customer to enforce or make a claim under an invention development services contract. This form alleges that the defendant entered into the contract in reliance on a willful and false, fraudulent, or misleading representation by the plaintiff. As a consequence, the contract is void and unenforceable [*Bus. & Prof. Code § 22384*].

[3] Cross Complaint

When an invention developer makes a false or fraudulent statement, representation, or omission of material fact, any person injured thereby may bring an action for damages, whether or not a contract has been entered into [*Bus. & Prof. Code § 22386*; *see §§ 411.132* and *411.133*]. In addition, if a customer has entered into a contract with an invention developer and is subsequently injured by the invention developer's fraud, the customer may bring an action for damages against the invention developer and the invention developer's surety [*Bus. & Prof. Code § 22390*; Code*Civ. Proc. §§ 996.410, 996.430*; *see § 411.134*]. Therefore, under appropriate circumstances, the customer might have grounds for a cross complaint [*see Code Civ. Proc. §§ 426.30, 428.10*].

[4] State Statutes

Contract for invention development services, entered into in reliance on willful and false, fraudulent, or misleading representation of invention developer is void and unenforceable. *Bus. & Prof. Code § 22384*

[5] Cross References

See also *§ 411.139*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersContracts LawDefensesGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewPatent LawInfringement ActionsDefensesGeneral Overview

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35-411 California Forms of Pleading and Practice--Annotated § 411.141

§ 411.141 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--To Action by Invention Developer to Enforce Invention Development Services Contract--Failure of Invention Developer in Advertisement to Disclose Requirement of Fee or Consideration [Bus. & Prof. Code §§ 22380, 22388]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--To Action by Invention Developer to Enforce Invention Development Services Contract--Failure of Invention Developer in Advertisement to Disclose Requirement of Fee or Consideration [Bus. & Prof. Code §§ 22380, 22388]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

On or about _____, [*date*], plaintiff advertised invention development services by _____ [*specify, e.g.,* placing an advertisement in the classified pages of the telephone directory for _____ (*name of city*)]. A copy of such advertisement is attached hereto as Exhibit _____. Although plaintiff was required by law clearly and conspicuously to disclose the fact of charging a fee or requiring any consideration for his/her/its invention development services, plaintiff failed to make such disclosure in such advertisement. Subsequent to viewing the advertisement, plaintiff contacted defendant, under the impression from the advertisement that no fee was involved and that _____ [*specify belief, e.g.,* that plaintiff would be paid by manufacturers to whom plaintiff promoted the inventions]. Thereafter, on or about _____, [*date*], defendant signed the document attached to the complaint as Exhibit _____. [Defendant notified plaintiff on or about _____, [*date*], that defendant had elected to treat such document as void.] Defendant hereby elects to treat such document as void, as is defendant's option under *Section 22388 of the Business and Professions Code*.

[2] Use of Form

This affirmative defense is for use by the customer of an invention developer, when the invention developer is suing the customer to enforce or make a claim under an invention development services contract. This form alleges that the invention developer failed to disclose, in an advertisement of his, her, or its services, that he, she, or it charges a fee or

other consideration for invention development services. When such disclosure is not made, any contract subsequently entered into between the customer and the invention developer is voidable by the customer [*Bus. & Prof. Code §§ 22380, 22388*]. The applicable statute refers to a remedy by "the customer," rather than "any customer," which might suggest that the customer would have to plead his or her personal reliance on the advertisement, in addition to the failure to disclose by the invention developer.

[3] Cross Complaint

When an invention developer commits some violation of the invention development services law (*Bus. & Prof. Code §§ 22370-22394*), any person injured thereby may bring an action for damages, whether or not a contract has been entered into [*see § 411.130*]. Therefore the customer might have grounds for a cross complaint as well [*see Code Civ. Proc. §§ 426.30, 428.10*].

[4] Action for Rescission

Bus. & Prof. Code § 22388may also provide the basis for an action by the inventor to rescind the invention development services contract and to obtain restitution of any amounts paid under the contract [*see Civ. Code §§ 1689, 1692*; *see also* Ch. 490, *Rescission and Restitution*].

[5] State Statutes

Fact that invention developer charges fee or requires consideration as required disclosure in advertisement of invention development services. *Bus. & Prof. Code § 22380*

Failure to make disclosure in advertisement, that fee or consideration required, as rendering subsequent contract voidable by customer. *Bus. & Prof. Code § 22388*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersContracts LawRemediesGeneral OverviewPatent LawDate of Invention & PriorityGeneral OverviewPatent LawInfringement ActionsDefensesGeneral Overview

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35-411 California Forms of Pleading and Practice--Annotated § 411.142

§ 411.142 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--To Action by Invention Developer to Enforce Invention Development Services Contract--Failure of Invention Developer to Make Precontractual Disclosures [Bus. & Prof. Code §§ 22381, 22388]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--To Action by Invention Developer to Enforce Invention Development Services Contract--Failure of Invention Developer to Make Precontractual Disclosures [Bus. & Prof. Code §§ 22381, 22388]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

1. On or about _____, [*date*], defendant _____ [was in oral communication with plaintiff by virtue of _____ (*specify, e.g.,* a telephone call placed by defendant to plaintiff) *or* received a first written response to an inquiry made to plaintiff by defendant _____ (*specify, e.g.,* by letter on or about _____, [*date* date])]. The subject of such _____ [communication *or* written response] was _____ [*specify, e.g.,* the nature of plaintiff's invention development services], and the primary purpose of such _____ [communication *or* written response] was not to arrange an appointment with plaintiff for presentation of plaintiff's invention development services. Plaintiff was obligated under *Section 22381 of the Business and Professions Code* at the time of such _____ [communication *or* written response] to make certain disclosures to defendant regarding fees, expenditures, past customers, and patent rights, but plaintiff failed to make _____ [any of such disclosures *or specify particular disclosure(s) not made, e.g.,* a disclosure setting forth (1) the total number of past customers, excluding those who contracted with plaintiff within the preceding 30 days, and (2) the number of customers that had received, by virtue of the invention developer's performance of invention development services, an amount of money in excess of the amount of money paid by such customers to the invention developer].

2. Thereafter, defendant consulted plaintiff to retain the latter for invention development services, ignorant of the facts involved in the matters required to have been disclosed, and on or about _____, [*date*], signed the

document attached to the complaint herein as Exhibit _____. [Defendant notified plaintiff on or about _____, [*date*], that defendant had elected to treat such document as void.] Defendant hereby elects to treat such document as void, as is defendant's option under *Section 22388 of the Business and Professions Code*.

[2] Use of Form

This affirmative defense is for use by the customer of an invention developer, when the invention developer is suing the customer to enforce or make a claim under an invention development services contract. Thisaffirmative defense alleges that because the invention developer did not make one or more required disclosures in the first substantive communication with defendant, the contract subsequently entered into is voidable by defendant [*see Bus. & Prof. Code §§ 22381, 22388*].

The invention developer must disclose to each customer, in the first substantive oral or written communication with the customer, all of the following [*Bus. & Prof. Code § 22381*]]

- Fees charged, including what portion will be commission to any agent and what portion will be spent on patent matters;

- Whether or not the invention developer intends to expend more for services than the customer is charged, and if so, a statement of such estimated expenditures;

- A single statement setting forth the total number of the invention developer's customers, excluding those who have contracted with the invention developer within the past 30 days, and the number of such past customers who received more money as a result of the invention developer's services, than they paid to the invention developer; and

- A specific statement, set forth by statute, that the invention development services contract is unrelated to patent rights for the customer's invention.

Failure to make the above disclosures renders any subsequent contract voidable by the customer [*Bus. & Prof. Code § 22388*].

[3] State Statutes

Specified disclosures as required on first substantive communication with customer. *Bus. & Prof. Code § 22381*

Failure to make precontractual disclosures by invention developer as rendering subsequent contracts voidable by customer. *Bus. & Prof. Code § 22388*

[4] Cross References

See also *§ 411.141*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersPatent LawDate of Invention & PriorityGeneral OverviewPatent LawInfringement ActionsDefensesGeneral OverviewPatent LawInfringement ActionsExclusive RightsGeneral

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§§ 412.90-412.109 [Reserved]

§ 412.110 California Points and Authorities

§ 412.111 California Family Law

§ 412.112 State Statutes

[1] Blood/Genetic Tests

[2] Guardian ad Litem

[3] Protective Orders

[4] Inheritance Rights

[5] Issuance of Birth Certificate

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[7] Parent and Child Relationship

[8] Presumptions Regarding Paternity

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[11] Venue

§ 412.113 Decisions

[1] Actions Brought by Alleged Father to Establish Paternity

[2] Actions Prosecuted by District Attorney

[a] Action for Support Prosecuted in Name of County

[b] Child Not Receiving Public Assistance

[3] Blood Tests

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[5] Confidentiality of Procedures and Documents

[6] Construction of Uniform Parentage Act With Other Laws

[7] Establishment of Parent and Child Relationship Under Uniform Parentage Act

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[b] Paternity

[8] Equal Protection and Due Process Considerations

[9] Fees and Costs

[10] Guardian ad Litem

[11] Mother's Sexual Relations With Other Men

[12] Pendente Lite Orders

[13] Personal Jurisdiction

[14] Presumptions of Paternity

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[17] Right to Counsel

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[19] Support of Child

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§ 412.114 Attorney General Opinions

§ 412.115 Law Reviews

§ 412.116 Text References

§ 412.117 Annotations

§§ 412.118-412.129 [Reserved]

§ 412.130 Petition to Establish Parental Relationship and Summons With Standard Restraining Order [Fam. Code § 7630]--Cal. Judicial Council Forms FL-200, FL-210

[1] FORMS

[2] Use of Forms

[3] Jurisdiction and Venue

[4] When Petition Should Be Filed

[5] Child Support

[6] Service

§ 412.131 Petition to Establish Nonpaternity--By Presumed Father of Child Born During Marriage [Fam. Code §§ 7611(a), 7630(a)(2)]

[1] FORM

[2] Use of Form

[3] Parties

[4] When Action Must Be Brought

[5] Verification

§ 412.132 Response to Petition to Establish Parental Relationship--Cal. Judicial Council Form FL-220

[1] FORM

[2] Use of Form

§ 412.133 Affirmative Defenses to Petition to Establish Paternity--Mother Cohabiting With Husband at Time of Conception [Fam. Code § 7540]

[1] FORM

[2] Use of Form

§ 412.134 Affirmative Defenses to Petition to Establish Paternity--Sexual Intercourse With Other Men

[1] FORM

[2] Use of Form

§ 412.135 Notice of Paternity Action [Fam. Code §§ 7635(b), 7666]

[1] FORM

[2] Use of Form

[3] Manner of Giving Notice

[4] Nonparty's Response

§ 412.136 Proceedings for Order to Require Parties to Submit to Genetic Tests [Fam. Code § 7551]--Notice of Motion

[1] FORM

[2] Use of Form

[3] Time for Making Motion and Service

§ 412.137 Proceedings for Order to Require Parties to Submit to Genetic Tests [Fam. Code § 7551]--Supporting Declaration

[1] FORM

[2] Use of Form

§ 412.138 Order for Genetic (Parentage) Testing--Cal. Judicial Council Form FL-627

[1] FORM

[2] Use of Form

§ 412.139 Declaration in Support of Motion for Pendente Lite Support, Hospital and Medical Expenses, Attorney's Fees, and Costs

[1] FORM

[2] Use of Form

[3] Judicial Council Forms

[4] Income and Expense Declaration

[5] Amount of Child Support

[6] California Points and Authorities

[7] Cross References

§ 412.140 Judgment Establishing Parentage, With Support, Custody, and Other Orders--Cal. Judicial Council Form FL-250

[1] FORM

[2] Use of Form

[3] Orders Included in Judgment

[4] Statement of Decision

§ 412.141 Declaration for Default or Uncontested Judgment--Cal. Judicial Council Form FL-230

[1] FORM

[2] Use of Form

§ 412.142 Stipulation for Entry of Judgment and Advisement and Waiver of Rights re Establishment of Parental Relationship--Cal. Judicial Council Forms FL-235, FL-240

[1] FORM

[2] Use of Forms

§ 412.143 Request for Hearing and Application to Set Aside Voluntary Declaration of Paternity [Fam. Code § 7575; Code Civ. Proc. § 473]--Cal. Judicial Council Form FL-280

[1] FORM

[2] Use of Form

§ 412.144 Responsive Declaration to Application to Set Aside Voluntary Declaration of Paternity [Fam. Code § 7575; Code Civ. Proc. § 473]--Cal. Judicial Council Form FL-285

[1] FORM

[2] Use of Form

§ 412.145 Order After Hearing on Motion to Set Aside Voluntary Declaration of Paternity [Fam. Code § 7575; Code Civ. Proc. § 473]--Cal. Judicial Council Form FL-290

[1] FORM

[2] Use of Form

§ 412.146 Notice of Motion to Set Aside Judgment of Paternity; Declaration in Support of Motion to Set Aside Judgment of Paternity; Information Sheet for Completing Notice of Motion to Set Aside Judgment of Paternity [Fam. Code § 7646]--Cal. Judicial Council Forms FL-272, FL-273, FL-274

[1] FORM

[2] Use of Form

§ 412.147 Response to Notice of Motion to Set Aside Judgment of Paternity [Fam. Code § 7646]--Cal. Judicial Council Form FL-276

[1] FORM

[2] Use of Form

§ 412.148 Order After Hearing on Motion to Set Aside Judgment of Paternity [Fam. Code § 7646]--Cal. Judicial Council Form FL-278

[1] FORM

[2] Use of Form

§ 412.149 Application and Order for Appointment of Guardian Ad Litem of Minor--Family Law [Fam. Code § 7635]--Cal. Judicial Council Form FL-935

[1] FORM

[2] Use of Form

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§ 412.01 Scope of Chapter

This chapter discusses the establishment of the parent-child relationship, with focus on the Uniform Parentage Act (UPA) [*Fam. Code § 7600 et seq.*]. The Introduction is divided into four parts.

§ 412.10 et seq. presents an overview of the UPA and the other actions in which parentage may be established. It also discusses the effect of the UPA on intestate succession.

§ 412.30 et seq. covers the statutory presumptions of paternity.

§ 412.50 et seq. discusses the subject of the scientific evidence to prove parentage, including blood testing and other genetic testing.

§ 412.70 et seq. presents the procedures for establishing parentage under the UPA.

This chapter includes the following forms:

- Illustration of the Judicial Council form of petition to establish parental relationship, with summons and standard restraining order [*see § 412.130*].

- Petition to establish nonpaternity [*see § 412.131*].

- Illustration of the Judicial Council form of response to petition to establish parental relationship [*see § 412.132*].

- Affirmative defenses to a paternity action [*see* Forms 4, 5].

- Notice of a paternity action [*see § 412.135*].

- Notice of motion, declaration, and an illustration of the Judicial Council form of order for genetic

(parentage) testing [*see* §§ 412.136-412.138].

- Declaration in support of motion for pendente lite support [*see § 412.139*].

- Judicial Council form of judgment establishing parentage, with support, custody, and other orders [*see § 412.140*].

- Judicial Council form of declaration for default or uncontested judgment [*see § 412.141*].

- Judicial Council forms of stipulation for entry of judgment and for advisement and waiver of rights regarding establishment of a parental relationship [*see § 412.142*].

- Judicial Council forms to set aside a voluntary declaration of paternity [*see* §§ 412.143-412.145].

- Judicial Council forms to set aside a judgment of paternity [*see* §§ 412.146-412.148].

- Judicial Council form to appoint a guardian ad litem to represent a minor in a paternity action [*see § 412.149*].

The rights and duties arising from the parent-child relationship are discussedgenerally in Ch. 394, *Parent and Child.* The use of the UPA's presumptions of paternity in other areas of law, including constitutionalissues, is discussed generally in that chapter; and is discussed specifically with regard to termination of parental rights and adoption in Ch. 12A, *Adoptions: Termination of Parental Rights* .

Proceedings to establish paternity and establish and enforce child support obligations by district attorneys and other support agencies are discussed in Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessSummonsContent & FormEvidenceInferences & PresumptionsExceptionsStatutory PresumptionsEvidenceScientific EvidenceGeneral OverviewFamily LawChild SupportGeneral OverviewFamily LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsTerminationGeneral OverviewFamily LawParental Duties & RightsGeneral OverviewFamily LawParental Duties & RightsDutiesGeneral OverviewFamily LawParental Duties & RightsTermination of RightsGeneral OverviewFamily LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage ActFamily LawPaternity & SurrogacyProof of PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityDefensesGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityEvidenceGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityEvidenceBlood TestsFamily LawPaternity & SurrogacyProof of PaternityEvidenceGenetic TestsFamily LawPaternity & SurrogacyProof of PaternityPresumptionsGeneral Overview

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§ 412.02 Cross References

For discussion and forms for use in adoption of child when consent of mother and natural father is necessary, or when parental rights of father must be determined, see Ch. 12A, *Adoptions: Termination of Parental Rights* .

For discussion and forms for use in proceedings relating to child support and custody and visitation rights, see Ch. 223, *Dissolution of Marriage: Child Custody* , and Ch. 224, *Dissolution of Marriage: Child Support* .

For discussion and forms for use in paternity proceedings brought by a district attorney or other child support agency, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* .

For discussion and forms for use in obtaining appointment of guardian ad litem, see Ch. 291, *Guardians ad Litem* .

For discussion and forms relating to the rights and obligations arising from the parent-child relationship, including the duty of support, see Ch. 94, *Parent and Child* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawAdoptionConsentGeneral OverviewFamily LawChild CustodyVisitationGeneral OverviewFamily LawChild SupportGeneral OverviewFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsTerminationGeneral OverviewFamily LawChild SupportProceduresFamily LawGuardiansAppointmentFamily LawParental Duties & RightsGeneral OverviewFamily LawParental Duties & RightsConsentGeneral OverviewFamily LawParental Duties & RightsDutiesGeneral OverviewFamily LawParental Duties & RightsTermination of RightsGeneral OverviewFamily LawPaternity & SurrogacyGeneral Overview

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[Reserved]

§§ 412.03[Reserved]

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§ 412.10 Illegitimacy Abolished

The concept of illegitimacy was abolished in California on January 1, 1976, when the original Uniform Parentage Act (UPA) was adopted [Stats. 1975, ch. 1244]. The current version of the Uniform Parentage Act [*see Fam. Code § 7600 et seq.*] sets forth a procedure for determining the existence or nonexistence of the parent-child relationship and replaces illegitimacy with presumptions of paternity [*see Fam. Code § 7611*, discussed in *§ 412.30 et seq.*].

The UPA broadly states that the parent-child relationship extends equally to every child and to every parent, regardless of the marital status of the parents [*Fam. Code § 7602*]. With regard to rights of children, California law does not substantively differentiate between children on the basis of the marital status of their parents [*cf. Prob. Code § 6453*, discussed in *§ 412.14* (different evidentiary burden under intestacy law)]. However, with regard to parents, the broad proclamation of *Fam. Code § 7602* is not consistently carried forth in the UPA and other California law. All parents do not have the same rights, regardless of marital status and regardless of gender. There are a number of areas of California law in which the statutory rights of unmarried fathers may be less than those of mothers and married fathers. For further discussion, see General Applicability and Constitutionality of Presumptions of Paternity in Part B, *below*.

The elimination of the concept of illegitimacy is consistent with United States Supreme Court cases that have held that state and federal statutes conferring economic rights on legitimate children while denying them to illegitimate children are unconstitutional as denying due process, equal protection of the laws, or both [*see, e.g., Trimble v. Gordon (1977) 430 U.S. 762, 769-776, 97 S. Ct. 1459, 52 L. Ed. 2d 31* (Illinois intestate succession statute, *see § 412.14*); *see also Jimenez v. Weinberger (1974) 417 U.S. 628, 634-638, 94 S. Ct. 2496, 41 L. Ed. 2d 363* (federal Social Security Act); *but see Mathews v. Lucas (1976) 427 U.S. 495, 497-516, 96 S. Ct. 2755, 49 L. Ed. 2d 651* (distinguishing *Jimenez, above*, and holding there is no unconstitutional discrimination under federal Social Security Act in presuming legitimate children were dependent on decedent but requiring illegitimate children in certain cases to prove dependency)]. The Supreme Court has also held that an Illinois statute that deprived the father of a right to custody of his illegitimate child after the death of the mother, without notice, hearing, or proof of neglect, violated both the due process and *equal protection clauses of the Fourteenth Amendment* to the United States Constitution [*Stanley v. Illinois (1972) 405 U.S. 645, 656-659, 92 S. Ct. 1208, 31 L. Ed. 2d 551]* . For further discussion of the constitutional protections of the parent-child relationship, see Ch. 394, *Parent and Child* , Pt. I.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawEqual ProtectionParentageFamily LawChild CustodyGeneral OverviewFamily LawParental Duties & RightsGeneral OverviewFamily LawParental Duties & RightsNonmarital ChildrenGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act

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§ 412.11 Actions to Determine Parentage

[1] Biological Children

The UPA provides for a judicial action to establish the existence or nonexistence of the father-child relationship [*Fam. Code § 7610(b)*; *see Fam. Code § 7630 et seq.*; *In re Jesusa V. (2004) 32 Cal. 4th 588, 604-606, 10 Cal. Rptr. 3d 205, 85 P.3d 2* ; *In re Nicholas H. (2002) 28 Cal. 4th 56, 58-59, 120 Cal. Rptr. 2d 146, 46 P.3d 932]* or the mother-child relationship [*Fam. Code § 7610(a)*; *see Fam. Code § 7650*, discussed in *§ 412.13*]. Paternity may also be established by the district attorney or other local child support agency, representing the public interest, in a child support enforcement action [*Fam. Code § 17400*; *see* Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*]. The district attorney or other local child support agency may also enter into an agreement with a putative father for entry of a judgment of paternity without action [*see Fam. Code § 17416*]. Whether or not a married person is the legal parent of a child of his or her spouse has been determined in a proceeding for dissolution of the marriage [*see In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1418, 1421, 72 Cal. Rptr. 2d 280* ; *In re Marriage of Groner (1972) 23 Cal. App. 3d 115, 116-117, 99 Cal. Rptr. 765]* , and statutory authority exists for such a determination [*see Fam. Code § 2330.1* (dissolution petition may list children born before marriage to same parties and, pursuant to UPA, a determination of paternity may be made)]. Paternity may also be established in a juvenile court proceeding [*see Welf. & Inst. Code §§ 316.2, 903.41(b)(2)*].

A previous determination of paternity made by another state must be given full faith and credit by California courts, whether the determination was established through voluntary acknowledgment procedures or an administrative or judicial process. It has the same effect as a paternity determination made in California, and may be enforced and satisfied in the same manner [*Fam. Code § 5604*].

This chapter sets forth the procedures of the UPA; the procedures for district attorney paternity and support actions are discussed in Ch. 259, *Family Law Enforcement: Special Remedies for Law Enforcement* . Many of the substantive considerations in establishing paternity, including presumptions and scientific evidence, are equally applicable in paternity determinations in a district attorney proceeding [*see County of Orange v. Leslie B. (1993) 14 Cal. App. 4th 976, 17 Cal. Rptr. 2d 797]* .

[2] Adopted Children

The status of parent-child between a child and an adoptive parent must be established by proof of adoption [*Fam. Code § 7610(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceScientific EvidenceGeneral OverviewFamily LawAdoptionGeneral OverviewFamily LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityPresumptionsGeneral Overview

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§ 412.12 Purposes for Bringing Parentage Action

In many cases, there may never be any need for a formal adjudication of parentage, particularly if the parents and child are cohabiting as a family unit [*see Fam. Code § 7611(d)*, presumption of paternity arising from cohabitation, discussed in *§ 412.32[4]*]. However, in any area of law in which rights depend on whether a given person is or is not the legal parent of a particular child, a judgment of parentage may be important.

The most common reason historically for bringing a parentage action has been to establish paternity as a basis for obtaining child support from the defendant father [*see, e.g., Everett v. Everett (1976) 57 Cal. App. 3d 65, 69, 129 Cal. Rptr. 8* ; *Van Buskirk v. Todd (1969) 269 Cal. App. 2d 680, 685-687, 75 Cal. Rptr. 280* (both decided under predecessor statutes)]. Today, most paternity actions to obtain child support are brought by the public agency responsible for establishing and enforcing support obligations. Historically, this has been the family support division of county district attorney offices, but this responsibility is now being transferred to separate, local child support agencies under the State Department of Child Support Services, as discussed in Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* . Criminal enforcement will remain with district attorneys. The responsible support agency is required to take action to establish, modify, and enforce child support orders when a child is receiving public assistance. The agency may also take the same actions on behalf of a child who is not receiving public assistance [*Fam. Code § 17400*].

A UPA paternity action may also be brought by a man who alleges that he is the father of a child as a way of obtaining parental rights, including custody and visitation, with the child [*see Fam. Code § 7630*]. The action may even be brought by a man who has stipulated to his paternity in another action in order to obtain an adjudication of visitation rights [*County of San Joaquin v. Woods (1989) 210 Cal. App. 3d 56, 61, 258 Cal. Rptr. 110* (visitation may not be litigated in action initiated by district attorney to establish parentage and fix child support obligation)].

Following is a list of other types of cases in which the issue of parentage may be relevant:

> (1) A proceeding for dissolution of marriage, in which the court's jurisdiction is limited to children of the marriage, including children born to the same parties before marriage [*see Fam. Code §§ 2010(b),*

2330.1; *see also In re Marriage of Valle (1975) 53 Cal. App. 3d 837, 840-843, 126 Cal. Rptr. 38]* .

(2) A proceeding to determine rights of intestate succession, in which establishment of the parent-child relationship may be a condition precedent to the right to inherit [*see Prob. Code § 6453*; *Estate of Chambers (2009) 175 Cal. App. 4th 891, 895-897, 96 Cal. Rptr. 3d 651* ; *Estate of Burden (2007) 146 Cal. App. 4th 1021, 1029-1031, 53 Cal. Rptr. 3d 390* ; *Estate of Sanders (1992) 2 Cal. App. 4th 462, 465, 3 Cal. Rptr. 2d 536* ; § 412.14].

(3) A juvenile court dependency proceeding under *Welf. & Inst. Code § 300 et seq.*, in which numerous rights are afforded those who can establish that they are the parents of the dependent child [*see, e.g., In re Jesusa V. (2004) 32 Cal. 4th 588, 603-608, 10 Cal. Rptr. 3d 205, 85 P.3d 2* (involving competing rebuttable presumptions of paternity); *In re R. (1975) 13 Cal. 3d 636, 640, 644, 647-651, 119 Cal. Rptr. 475, 532 P.2d 123* (involving conclusive presumption of paternity); *In re J.O. (2009) 178 Cal. App. 4th 139, 146-151, 100 Cal. Rptr. 3d 276* ; *In re A.A. (2003) 114 Cal. App. 4th 771, 779-784, 7 Cal. Rptr. 3d 755* ; *In re Salvador M. (2003) 111 Cal. App. 4th 1353, 1357-1359, 4 Cal. Rptr. 3d 705* ; *In re Sarah C. (1992) 8 Cal. App. 4th 964,971-973, 11 Cal. Rptr. 2d 414]* .

(4) Any proceeding in which the custody of a child is at issue [*see, e.g., Prob. Code § 1514* (guardianship); *In re Reyna (1976) 55 Cal. App. 3d 288, 295, 126 Cal. Rptr. 138* (habeas corpus)] in which a parent has a preferential right to the custody of his or her child [*see Fam. Code § 3041*]. Child custody jurisdiction is discussed in Ch. 394, *Parent and Child ;* the parental preference doctrine is discussed in Ch. 223, *Dissolution of Marriage: Child Custody* .

(5) An adoption proceeding, in which whether one's consent to the adoption is required depends on determination of parentage [*see Fam. Code § 7660 et seq., 8604, 8605*; *In re Kyle F. (2003) 112 Cal. App. 4th 538, 542, 5 Cal. Rptr. 3d 190* (unwed father's rights regarding adoption of child depend on whether he is presumed or natural father); *but see Adoption of Michael D. (1989) 209 Cal. App. 3d 122, 129-132, 256 Cal. Rptr. 884* (judgment of paternity, alone, does not entitle father to veto adoption by withholding consent)]. Termination of parental rights is discussed in Ch. 12A, *Adoptions: Termination of Parental Rights* .

(6) A criminal prosecution for failure to support a child [*see In re Clarke (1957) 149 Cal. App. 2d 802, 808, 309 P.2d 142* ; *see also Lyons v. Municipal Court (1977) 75 Cal. App. 3d 829, 836-837, 142 Cal. Rptr. 449]* .

(7) A proceeding under the Uniform Interstate Family Support Act (UIFSA) [*see Fam. Code § 4965*]. UIFSA is discussed in Ch. 260, *Family Law Enforcement: Foreign Judgment* .

(8) A proceeding under the Domestic Violence Prevention Act [*see Fam. Code §§ 6200 et seq.*] that includes the issuance of orders regarding custody and visitation of minor children [*see Fam. Code § 6323(a)* (court may make ex parte orders regarding temporary custody and visitation of minor children when party establishes parent-child relationship); *Gonzalez v. Munoz (2007) 156 Cal. App. 4th 413, 422-423, 67 Cal. Rptr. 3d 317* (when court has issued ex parte custody and visitation orders at request of one party, it must elicit evidence under *Fam. Code § 6340(a)* as to whether other party can demonstrate parent-child relationship with minor children and, if so, whether earlier custody and visitation orders should be modified to ensure mutual safety of children and party having custody)].

(9) A deportation proceeding involving a person born out of wedlock and abroad to a citizen father and a noncitizen mother [*see Tuan Anh Nguyen v. INS (2001) 121 S. Ct. 2053, 2057-2058, 150 L. Ed. 2d 115* (noncitizen adult child was deportable under federal statute, when citizen father failed to formally

establish parentage during child's minority)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionForeign JudgmentsFamily LawAdoptionProceduresGeneral OverviewFamily LawChild CustodyProceduresFamily LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsEnforcementCriminal PenaltiesFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Interstate Family Support ActFamily LawParental Duties & RightsDutiesGeneral OverviewFamily LawParental Duties & RightsTermination of RightsGeneral OverviewFamily LawParental Duties & RightsTermination of RightsInvoluntary TerminationNonsupportFamily LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityPresumptionsGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityPresumptionsRebuttalsPublic Health & Welfare LawSocial SecurityAssistance to FamiliesGeneral Overview

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§ 412.13 Establishing Maternity

[1] Action to Establish Mother-Child Relationship

Any interested party may bring an action to determine the existence or nonexistence of a mother-child relationship [*Fam. Code § 7650*; *see* *Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 113, 33 Cal. Rptr. 3d 46, 117 P.3d 660* (district attorney had standing to bring action to establish that former lesbian partner of child's birth mother was child's presumed mother and thus obligated to pay support for child); *K.M. v. E.G. (2005) 37 Cal. 4th 130, 142-144, 33 Cal. Rptr. 3d 61, 117 P.3d 673* (woman who provides ova to her lesbian partner so that partner can bear child who will be raised in their joint home is also child's mother based on her genetic relationship to child); *Wynn v. Superior Court (2009) 176 Cal. App. 4th 346, 350, 353-355, 98 Cal. Rptr. 3d 86* (child is necessarily interested party in proceeding to determine biological mother and may bring action to adjudicate parentage); *Charisma R. v. Kristina S. (2009) 175 Cal. App. 4th 361, 367-377, 96 Cal. Rptr. 3d 26* ; *Charisma R. v. Kristina S. (2006) 140 Cal. App. 4th 301, 307-308, 44 Cal. Rptr. 3d 332* (registered domestic partner of birth mother is entitled to bring petition to establish parental relationship with child born to birth mother by artificial insemination from anonymous donor); *see also* *Kristine H. v. Lisa R. (2005) 37 Cal. 4th 156, 166, 33 Cal. Rptr. 3d 81, 117 P.3d 690* (lesbian mother of child is estopped from challenging validity of stipulated judgment declaring that she and her lesbian partner were child's parents); *but see Scott v. Superior Court (2009) 171 Cal. App. 4th 540, 544-547, 89 Cal. Rptr. 3d 843* (woman who had intimate relationship with father of minor children did not have standing to join parents' UPA action to seek custody and visitation rights as presumed or de facto mother when parental rights of natural mother had not been terminated); *Robert B. v. Susan B. (2003) 109 Cal. App. 4th 1109, 135 Cal. Rptr. 2d 785* (intended recipient of embryos mistakenly implanted into another woman lacked standing to seek maternity); *Prato-Morrison v. Doe (2002) 103 Cal. App. 4th 222, 229-230, 126 Cal. Rptr. 2d 509* (alleged genetic mother, lacked standing to bring parentage action)].

Insofar as practicable, the provisions of the Uniform Parentage Act apply in such an action [*Fam. Code § 7650*; *Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 116, 33 Cal. Rptr. 3d 46, 117 P.3d 660* ; *In re Salvador M. (2003) 111 Cal. App. 4th 1353, 1357, 4 Cal. Rptr. 3d 705* (legal principles concerning presumed father apply equally to woman seeking presumed mother status); *see* *Johnson v. Calvert (1993) 5 Cal. 4th 84, 89, 19 Cal. Rptr. 2d 494, 851 P.2d 776* (surrogacy); *see also* *In re Karen C. (2002) 101 Cal. App. 4th 932, 938, 124 Cal. Rptr. 2d 677* (presumed mother under

Fam. Code § 7611(d))].

The mother-child relationship may be established by proof of the natural mother's having given birth to the child [*Fam. Code § 7610(a)*]. Because childbirth in modern society is almost always attended and witnessed by medical professionals, there has been little need for judicial determinations of maternity. However, technological advances have created a need for such determination, where none previously existed [*see Prato-Morrison v. Doe (2002) 103 Cal. App. 4th 222, 232 n.10, 126 Cal. Rptr. 2d 509]* . For example, the California Supreme Court has held that when a woman provides ova to her lesbian partner so that the partner can bear a child who will be raised in their joint home, both women are considered to be the child's parents [*K.M. v. E.G. (2005) 37 Cal. 4th 130, 134, 33 Cal. Rptr. 3d 61, 117 P.3d 673]* . The egg donor's genetic relationship with the resulting child constitutes evidence of a mother and child relationship under the UPA, and the circumstances that her partner gave birth to the child also constitutes evidence of a mother and child relationship. Thus, both women are mother of the child under the UPA [*K.M. v. E.G. (2005) 37 Cal. 4th 130, 142-143, 33 Cal. Rptr. 3d 61, 117 P.3d 673*]. *Fam. Code § 7613(b)*, which creates an exception to the usual rules governing parentage that applies when a man donates semen to inseminate a woman who is not his wife [*see [3], below*], does not apply when a woman supplies ova to impregnate her lesbian partner in order to produce a child who would be raised in their joint home [*K.M. v. E.G. (2005) 37 Cal. 4th 130,143, 33 Cal.Rptr. 3d 61, 117 P.3d 673*].

The legal principles concerning presumed fathers apply equally to women seeking presumed mother status [*Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 113, 33 Cal. Rptr. 3d 46, 117 P.3d 660]* . Under *Fam. Code § 7611(d)*, a woman may be a presumed mother of a child of her lesbian partner if they agree to raise the child together, she receives the child into her home, and she holds the child out as her natural child [*Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 113, 33 Cal. Rptr. 3d 46, 117 P.3d 660* (as child's presumed mother, she has obligation to support child)]. Although a child can have only one natural mother, this does not mean that a child cannot have two parents, both of whom are mothers [*Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 117-118, 33 Cal. Rptr. 3d 46, 117 P.3d 660]* . This result is now possible under the domestic partnership statutes, specifically *Fam. Code § 297.5(d)*, which provides that the rights and obligations of registered domestic partners with respect to a child of either of them are the same as those of spouses. The California Supreme Court has also recognized in an adoption case that a child can have two mothers [*Sharon S. v. Superior Court (2003) 31 Cal. 4th 417, 2 Cal. Rptr. 3d 699, 73 P.3d 554]* . The Court held in Elisa B. that this action--an action by the district attorney to establish that the former lesbian partner of the child's birth mother was the child's presumed mother and thus obligated to pay support for the child--was not an appropriate action in which to rebut the presumption of presumed motherhood with proof that the former partner was not the child's biological parent. The former partner had actively consented to, and participated in, the artificial insemination of the birth mother with the understanding that the resulting child would be raised by both of them as coparents, they did, in fact, act as coparents for a substantial time period, and there were no competing claims to her being the child's second parent. Because she had helped to cause the child to be born and had raised the child as her own, the former partner was not permitted to abandon the child merely because her relationship with the birth mother had dissolved [*Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 122-125, 33 Cal. Rptr. 3d 46, 117 P.3d 660]* .

A registered domestic partner of the birth mother is entitled to bring a petition under *Fam. Code § 7611(d)* to establish her parental relationship with a child born to the birth mother by artificial insemination from an anonymous donor. The court must determine first, whether the petitioner is a presumed parent of the child under *Fam. Code § 7611(d)*, and then, whether this is an appropriate action in which to rebut the presumption that the petitioner is the child's parent [*Charisma R. v. Kristina S. (2006) 140 Cal. App. 4th 301, 309, 44 Cal. Rptr. 3d 332]* . Presumed parent status depends on affirmative findings that the petitioner received the child into her home and openly held the child out as her natural child. If the trial court finds that the petitioner is a presumed parent, then it should determine (1) whether the petitioner actively participated in causing the child to be conceived with the understanding that she would raise the child as her own with the birth mother, (2) whether she voluntarily accepted the rights and obligations of parenthood after the child was born, and (3) whether anyone else claims to be the child's second parent [*Charisma R. v. Kristina S. (2006) 140 Cal. App. 4th 301, 309-310, 44 Cal. Rptr. 3d 332]* . Evidence that the petitioner has no biological tie to the child does not rebut the presumption of the petitioner's parenthood [*Charisma R. v. Kristina S. (2006) 140 Cal. App. 4th 301,*

310, 44 Cal. Rptr. 3d 332] . Moreover, the fact that the birth mother opposes presumed parent status for the petitioner does not control the determination of whether presumed parent status arises under *Fam. Code § 7611(d)*. Such a rule would be contrary to the public policy in favor of a child having two parents rather than one, and might implicate the constitutional rights of the person seeking presumed parent status and of the child in the establishment of the parent-child relationship [*Charisma R. v. Kristina S. (2006) 140 Cal. App. 4th 301, 310, 44 Cal. Rptr. 3d 332]* .

The plaintiff is not required to receive the child in her home for a "significant period of time" to be considered a presumed parent under *Fam. Code § 7611(d)* [*Charisma R. v. Kristina S. (2009) 175 Cal. App. 4th 361, 370-374, 96 Cal. Rptr. 3d 26]* . The "receiving" requirement of *Fam. Code § 7611(d)* is a necessary formality, but not one that requires "receipt" for any particular duration [*Charisma R. v. Kristina S. (2009) 175 Cal. App. 4th 361, 372, 96 Cal. Rptr. 3d 26]* . Instead, the plaintiff's receipt of the child in her home must be sufficiently unambiguous as to constitute a clear declaration regarding the nature of their relationship, but it need not continue for any specific duration. Although cohabitation for an extended period may strengthen a claim for presumed parent status, *Fam. Code § 7611(d)* does not require that cohabitation or coparenting continue for any particular period of time [*Charisma R. v. Kristina S. (2009) 175 Cal. App. 4th 361, 374, 96 Cal. Rptr. 3d 26]* .

When a woman provides ova to her lesbian partner so that the partner can bear a child who will be raised in their joint home, both women are considered to be the child's parents [*K.M. v. E.G. (2005) 37 Cal. 4th 130, 134, 33 Cal. Rptr. 3d 61, 117 P.3d 673]* . An egg donor's genetic relationship with the resulting child constitutes evidence of a mother-child relationship under the Uniform Parentage Act and the circumstance that her partner gave birth to the child also constitute evidence of a mother-child relationship. Thus, both women are mothers of the child under the UPA [*K.M. v. E.G. (2005) 37 Cal. 4th 130, 142-143, 33 Cal. Rptr. 3d 61, 117 P.3d 673]* . *Fam. Code § 7613(b)*, which creates an exception to the usual rules governing parentage that applies when a man donates semen to inseminate a woman who is not his wife [*see* [3], *below*], does not apply when a woman supplies ova to impregnate her lesbian partner in order to produce a child who would be raised in their joint home [*K.M. v. E.G. (2005) 37 Cal. 4th 130, 143, 33 Cal. Rptr. 3d 61, 117 P.3d 673]* .

The lesbian mother of a child is estopped from challenging the validity of a stipulated judgment declaring that she and her lesbian partner are the child's parents. Because the mother invoked the jurisdiction of the court to determine the child's parentage under the UPA, stipulated to the issuance of a judgment, and enjoyed the benefits of that judgment, it would be unfair to the partner and the child to permit the mother to challenge the validity of that judgment. It would also contravene the public policy that favors a child having two parents rather than one [*Kristine H. v. Lisa R. (2005) 37 Cal. 4th 156, 166, 33 Cal. Rptr. 3d 81, 117 P.3d 690]* .

In a mother's action for custody and visitation rights to her biological child, who has been raised by the biological father and his wife, the wife is not entitled to be joined as a party nor is she entitled to bring a separate action to be declared the child's presumed mother. The wife is not the child's presumed mother under either *Fam. Code § 7611(a)* by virtue of being married to the child's father, or under *Fam. Code § 7611(d)* because she received the child into her home and held him out as her own child. The presumptions set forth in *Fam. Code § 7611* do not apply in maternity cases when the child's birth mother is present and asserts legal parenthood. Because the child's natural father was known and present in the action, the child could have only one additional parent. Cases in which the courts have applied *Fam. Code § 7611* to recognize a presumed mother have all involved circumstances in which there was no competing claim to be the child's mother or second parent. When both the child's biological father and biological mother have identified themselves and come forward to assert their legal parentage, it is not appropriate to invoke a gender-neutral readingof the paternity presumptions to provide the child with another mother [*Amy G. v. M.W. (2006) 142 Cal. App. 4th 1, 47 Cal. Rptr. 3d 297]* .

When a mother's parental rights over her biological child have been terminated in a dependency action, the mother cannot bring a subsequent motion under *Fam. Code § 7611(d)* to be declared the child's presumed mother because the child continued to live with her and she held the child out as her biological child. *Welf. & Inst. Code § 366.26(i)(1)*

provides that any order permanently terminating parental rights is conclusive and binding, and the court lacks jurisdiction to modify or revoke the order once it has become final. *Fam. Code § 7630(b)* does not give a court jurisdiction to reconsider the termination of parental rights, merely because it provides that any interested person may bring an action *at any time* for the purpose of determining the existence or nonexistence of the parent and child relationship presumed under *Fam. Code § 7611(d)*. Proceedings under *Fam. Code § 7630(b)* may be brought at any time before parental rights have been terminated under *Welf. & Inst. Code § 366.26*. If *Fam. Code § 7630(b)* were interpreted to allow a parent to seek presumed parent status after termination of parental rights, *Welf. & Inst. Code § 366.26(i)(1)* would be meaningless, and the goals of stability and finality within a reasonable time would be substantially undermined [*In re Cody B. (2007) 153 Cal. App. 4th 1004, 1009-1011, 63 Cal. Rptr. 3d 652]* .

Even though a child has been adopted, a court still has the authority to adjudicate facts concerning a possible biological relationship between the birth mother and the child in an action to adjudicate the child's parentage for purposes of correcting the child's original birth certificate to state the actual names of the birth parents in place of the fictitious names the birth mother used when the original certificate was prepared [*Wynn v. Superior Court (2009) 176 Cal. App. 4th 346, 350, 354-355, 98 Cal. Rptr. 3d 86]* .

[2] *In Vitro* Fertilization and Gestational Surrogacy

In vitro fertilization is the fertilization of a human egg outside the human body in a laboratory. Through this process, an egg can be removed from one woman, fertilized with the intended father's sperm in a petri dish, and then implanted into the uterus of a different woman who carries the fetus and gives birth to the child [*see* *Johnson v. Calvert (1993) 5 Cal 4th 84, 105-106, 19 Cal. Rptr. 2d 494, 851 P.2d 776* (opinion of Kennard, J., dissenting)].

Thus, if one woman is unable to give birth to a child, another can contribute the component of the birth process that the first is unable to achieve. For example, a woman who wants a child might be unable to carry the fetus; in which case, her fertilized egg is implanted in the uterus of a gestational surrogate. Conversely, the woman desiring the child might be unable to ovulate; in which case, the fertilized egg of another woman would be implanted in her uterus [*see Johnson v. Calvert (1993) 5 Cal. 4th 84, 93 n.10, 19 Cal. Rptr. 2d 494, 851 P.2d 776]* .

Another variation on the *in vitro* procedure, which arose in at least one reported decision, involves implantation into a surrogate of fertilized ovum in which both sperm and egg come from anonymous donors. In such a case, although neither the couple contracting for the child nor the surrogate mother are genetically related to the child, the couple will be deemed the child's parents [*In re Marriage of Buzzanca (1998) 61 Cal. App. 4th 1410, 1421, 1428, 72 Cal. Rptr. 2d 280]* .

In vitro fertilization must be distinguished from a surrogacy arrangement in which the surrogate provides all of the female reproductive roles of childbirth, including egg and womb [*see, e.g.,* *In re Marriage of Moschetta (1994) 25 Cal. App. 4th 1218, 1221-1222, 30 Cal. Rptr. 2d 893* ; *Adoption of Matthew B. (1991) 232 Cal. App. 3d 1239, 284 Cal. Rptr. 18]* . In the latter case, the surrogate is uncontestably the biological mother of the child, and the legal issue is usually whether she can be compelled to perform her contractual promise to consent to the adoption of the child by the intended mother. This kind of surrogacy arrangement necessarily involves an adoption [*see* *In re Marriage of Moschetta (1994) 25 Cal. App. 4th 1218, 1221-1222, 30 Cal. Rptr. 2d 893]* and is discussed in Ch. 12, *Adoptions: Nature and Effect* . *In vitro* fertilization involves the even more basic question of whether the egg donor or the child bearer is the biological mother of the child.

In *Johnson v. Calvert (1993) 5 Cal 4th 84, 19 Cal. Rptr. 2d 494, 851 P.2d 776* , the California Supreme Court resolved this question by looking first to the maternity action under the UPA [*Fam. Code § 7650*; *see § 412.32[1]*)], and then considering the effect of the contract. The court found statutory authority under the UPA supporting the claim of both the egg donor and the child bearer to biological maternity. In support of the child bearer is the provision that the mother-child relationship may be established between a child and the natural mother by proof of her having given birth

to the child [*Fam. Code § 7610(a)*; *Johnson v. Calvert (1993) 5 Cal 4th 84, 89-90, 19 Cal. Rptr. 2d 494, 851 P.2d 776]* . However, proof of giving birth is not the exclusive fact that proves maternity; the relationship may also be established by other means provided for in the UPA [*see Fam. Code § 7610(a)*]. Thus, the court held that blood test evidence, which is admissible to prove the biological fact of paternity under the Uniform Act on Blood Tests to Determine Paternity [*Fam. Code § 7550 et seq.*; *see § 412.50 et seq.*], is also admissible to establish maternity [*Johnson v. Calvert (1993) 5 Cal 4th 84, 91-92, 19 Cal. Rptr. 2d 494, 851 P.2d 776* ; *see Fam. Code § 7554*; *see also § 412.33*]. Genetic test evidence (including certain blood-based evidence) will obviously point to the egg donor as the mother, and often will exclude the child bearer [*see Fam. Code § 7555*, discussed in *§ 412.33*. However, the policy-based presumptions of paternity of *Fam. Code § 7611* do not apply to the determination of maternity [*Johnson v. Calvert (1993) 5 Cal. 4th 84, 90-91, 19 Cal. Rptr. 2d 494, 851 P.2d 776]* . These presumptions are discussed in *§ 412.32*.

Given that there is statutory support for considering the claims of both women, the court first rejected the suggestion that a child may have two natural mothers [*Johnson v. Calvert (1993) 5 Cal 4th 84, 92 n.8, 19 Cal. Rptr. 2d 494, 851 P.2d 776]* . It then resolved the conflict by looking to the intent of surrogacy arrangement. If genetic consanguinity and child bearing do not coincide in one woman, the parties' intention, as expressed in the surrogacy contract, is determinative. She who was intended to rear the child as her own (in this case the egg donor) is the natural mother under California law. This rule affirms the essential validity and enforceability of the surrogacy contract [*Johnson v. Calvert (1993) 5 Cal 4th 84, 93, 19 Cal. Rptr. 2d 494, 851 P.2d 776]* .

In reaching this result, the court rejected arguments that such surrogacy arrangements are unenforceable as in violation of public policy. Instead, the court broadly upheld the right of a woman to knowingly and intelligently agree to gestate and deliver a baby for intending parents. It stated that to hold otherwise would be to both foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their owngenes [*Johnson v. Calvert (1993) 5 Cal 4th 84, 97, 19 Cal. Rptr. 2d 494, 851 P.2d 776]* . The court also rejected all constitutional challenges to the determination that the child bearer was not the natural mother [*Johnson v. Calvert (1993) 5 Cal 4th 84, 98-100, 19 Cal. Rptr. 2d 494, 851 P.2d 776]* .

[3] Artificial Insemination of Unmarried Woman

Fam. Code § 7613(b), a part of California's Uniform Parentage Act, provides that the donor of semen provided to a licensed physician and surgeon or to a licensed sperm bank for use in artificial insemination or in vitro fertilization of a woman other than the donor's wife is not the legal father of the child. The Uniform Act restricts the effect of the statute to *married* women. By omitting this restriction in California, the legislature has indicated that the state has no public policy bar to the artificial insemination of an unmarried woman [*Hecht v. Superior Court (1993) 16 Cal. App. 4th 836, 852-855, 20 Cal. Rptr. 2d 275* ; *Jhordan C. v. Mary K. (1986) 179 Cal. App. 3d 386, 392, 397-398, 224 Cal. Rptr. 530]* . Therefore, whether or not the procedures of the statute are followed to avoid paternal rights in the sperm donor [*see Jhordan C. v. Mary K. (1986) 179 Cal. App. 3d 386, 389, 224 Cal. Rptr. 530]* , the reproductive technology of artificial insemination is available to all women in California regardless of marital status [*Hecht v. Superior Court (1993) 16 Cal. App. 4th 836, 854, 861, 20 Cal. Rptr. 2d 275* (testamentary disposition of sperm deposited in sperm bank for use in post mortem artificial insemination of unmarried woman not in violation of public policy)].

Fam. Code § 7613(b) applies even if the sperm donor and the woman who conceives the child are known to each other and the woman acknowledges that the donor is the child's father. This statute does not make an exception for known sperm donors or for cases in which the parties have an intimate relationship [*Steven S. v. Deborah D. (2005) 127 Cal. App. 4th 319, 324-326, 25 Cal. Rptr. 3d 482]* .

For further discussion of the effect of this statute on the paternity of the sperm donor, see *§ 412.35*. For discussion of the possible effect of this statute on surrogate birth arrangements, see Ch. 12, *Adoptions: Nature and Effect* .

An agreement between an unmarried man and woman to conceive a child by artificial insemination with an anonymous donor, and to provide the man with parentage, custody, and visitation rights to the child, is a valid and enforceable agreement to the extent of an action by the man against the woman for *unjust enrichment*, even though the man does not qualify as either a presumed or a natural father of the child under the Uniform Parentage Act (*Fam. Code § 7600 et seq.*). After entering into such a contractual arrangement, although the man does not acquire custody or visitation rights, he can seek compensation under a theory of unjust enrichment: essentially, restitution for benefits the man conferred by reason of the contract [*Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 186-190, 195-198, 98 Cal. Rptr. 2d 44]* .

[4] Child *In Utero* at Death

A woman is presumed to be the natural mother of a child if the child is *in utero* after the woman's death and the following conditions are satisfied [*Fam. Code § 7650(b)*; *Prob. Code § 249.5*]:

(a) The woman, in writing, specified that her genetic material would be used for the posthumous conception of a child of hers, subject to the following:

(1) The specification was signed by the woman and at least one competent witness.

(2) The specification could be revoked or amended only by a writing, signed by the woman and at least one competent witness.

(3) The person designated by the woman to use the genetic material was either of the following:
(A) Her spouse or registered domestic partner, as of her date of death.

(B) Some other person named in the specification as approved by the woman to be the person designated by her to use the genetic material for posthumous conception.

(b) The child or the child's representative has given written notice by certified mail, return receipt requested, that the woman's genetic material was available for the purpose of posthumous conception. The notice must have been given to a person who had the power to control the distribution of either the woman's property or death benefits payable by reason of her death, within four months of the date of issuance of a certificate of the death or entry of a judgment determining the fact of the death, whichever event occurred first.

(c) The child was *in utero* using the woman's genetic material and was *in utero* within two years of the date of issuance of a certificate of her death or entry of a judgment determining the fact of the death, whichever event occurred first. This does not apply to a child who shares all of his or her nuclear genes with the person donating the implanted nucleus as a result of the application of somatic nuclear transfer technology commonly known as human cloning.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewConstitutional LawEqual ProtectionParentageFamily LawCohabitationDomestic PartnersDuties & RightsFamily LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage ActFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage ActFamily LawPaternity & SurrogacyProof of PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityEvidenceBlood TestsFamily LawPaternity & SurrogacyProof of PaternityPresumptionsGeneral OverviewFamily LawPaternity & SurrogacySurrogacyAgreementsFamily LawPaternity & SurrogacySurrogacyAssisted Reproduction ParentageHealthcare LawTreatmentReproductive TechnologyArtificial Insemination

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Chapter 412 PATERNITY
PART II. LEGAL BACKGROUND
A. Overview of Parentage Determinations

35-412 California Forms of Pleading and Practice--Annotated § 412.14

§ 412.14 Establishing Parent-Child Relationship for Purpose of Intestate Succession

For decedents dying on or after January 1, 1985, *Prob. Code § 6450 et seq.* set forth the rules for determining whether there is a parent-child relationship between the decedent and another person for purposes of inheritance by intestate succession [*see Prob. Code § 6414(a)*].

With the exception of situations involving adoption [*see Prob. Code § 6451*, discussed in the General Introduction to Ch. 12, *Adoptions: Nature and Effect*], the parent-child relationship exists between a person and his or her natural parents, regardless of the marital status of the natural parents [*Prob. Code § 6450(a)*; *see Trimble v. Gordon (1977) 430 U.S. 762, 770-773, 97 S. Ct. 1459, 52 L. Ed. 2d 31* (total statutory disinheritance of children born out of wedlock violates equal protection); *see also Lozano v. Scalier (1996) 51 Cal. App. 4th 843, 846, 59 Cal. Rptr. 2d 346* (distinction between legitimate and illegitimate children has been eliminated)].However, the difficult issue is determining who is the natural father of a child. Historically, there has been a problem with persons claiming to be the natural child of a decedent only after the person's death solely for the purpose of claiming inheritance [*see Estate of Chambers (2009) 175 Cal. App. 4th 891, 896, 96 Cal. Rptr. 3d 651* ; *Estate of Sanders (1992) 2 Cal. App. 4th 462, 474 n.15, 3 Cal. Rptr. 2d 536]* .

For this reason, *Prob. Code § 6453* contains rules for determining who is a "natural parent" based on the Uniform Parentage Act. A natural parent and child relationship is established if the relationship is presumed and not rebutted under the UPA [*Prob. Code § 6453(a)*]. Most of the presumptions of paternity under the UPA arise from the marital status of the parents [*see Fam. Code § 7611*, discussed in *§ 412.32*]. If the relationship is based on a presumption of paternity, no formal adjudication during the decedent's lifetime of paternity based on the presumption is required; the relationship exists before death even though no use is made of it until afterwards [*see Gabehart v. Simonsen (1986) 176 Cal. App. 3d 672, 677, 222 Cal. Rptr. 336* (construing prior law)].

The parent-child relationship may also be established under any other provision of the UPA, as well as by the res judicata effect of a dissolution judgment in which a finding of parentage was made [*Prob. Code § 6453(b)*; *Weir v. Ferreira (Estate of Kelm) (1997) 59 Cal. App. 4th 1509, 1515-1521, 70 Cal. Rptr. 2d 33]* . However, it may not be established by an action to determine parentage brought under *Fam. Code § 7630(c)* (to determine the existence of the

father-child relationship with regard to a child who has no presumed father) unless at least one of the following conditions exists [*Prob. Code § 6453(b)*; *Cheyanna M. v. A.C. Nielsen Co. (1998) 66 Cal. App. 4th 855, 874, 78 Cal. Rptr. 2d 335* ; *cf. Hecht v. Superior Court (1993) 16 Cal. App. 4th 836, 856-857 n.8, 859-860, 20 Cal. Rptr. 2d 275* (involving children conceived from frozen sperm after decedent's death)]:

(1) A court order declaring paternity was entered during the father's lifetime;

(2) Paternity is established by clear and convincing evidence that the father has openly held out the child as his own [*see Estate of Chambers (2009) 175 Cal. App. 4th 891, 895-897, 96 Cal. Rptr. 3d 651* (parent-child relationship must be shown by clear and convincing evidence, not preponderance of evidence; higher burden of proof is to discourage dubious paternity claims made after man's death for sole purpose of inheritance); *Estate of Burden (2007) 146 Cal. App. 4th 1021, 1029-1031, 53 Cal. Rptr. 3d 390* (*Prob. Code § 6453(b)(2)*, which permits child born out of wedlock to establish father-child relationship for intestate succession purposes by providing clear and convincing evidence that father has openly held out child as his own, is satisfied by evidence of father's acknowledgments of child as his own during his lifetime)]; or

(3) It was impossible for the father to hold out the child as his own, and paternity is established by clear and convincing evidence.

A natural parent and child relationship may also be established pursuant to *Prob. Code § 249.5*, which provides that for purposes of determining rights to property to be distributed upon the death of a decedent, a child of the decedent conceived after the death of the decedent from the decedent's genetic material is deemed to have been born in the lifetime of the decedent, and after the execution of all of the decedent's testamentary instruments, if the child or his or her representative proves by clear and convincing evidence that specified conditions are satisfied [*Prob. Code § 249.5*].

Thus, while the inheritance rights of children do not directly depend on the marital status of their parents, the evidentiary burden that a child mustbear to establish the father-child relationship depends on whether paternity is presumed under the UPA, a determination as to which the marital status of the parents is highly significant [*see Fam. Code §§ 7540, 7611*, discussed in *§ 412.31* and*§ 412.32[1]*]. This evidentiary distinction has been upheld on equal protection grounds against the argument that it impermissibly discriminates between legitimate and illegitimate children [*Estate of Sanders (1992) 2 Cal. App. 4th 462, 476-477, 3 Cal. Rptr. 2d 536* (construing former *Prob. Code § 6408*); *see Lalli v. Lalli (1978) 439 U.S. 259, 268-276, 99 S. Ct. 518, 58 L. Ed. 2d 503]* .

Despite the permissive "may" in the statute, it provides the exclusive grounds for considering claims of paternity in heirship proceedings. One alleging to be the child (or father) of the decedent is not entitled to the administration of blood/genetic tests to determine paternity in probate proceedings unless one of the conditions of *Prob. Code § 6453(b)* applies [*Estate of Sanders (1992) 2 Cal. App. 4th 462, 469-478, 3 Cal. Rptr. 2d 536* (construing former *Prob. Code § 6408*; *see* stats. 1993, ch. 529)].

It should be noted that the legitimate public policy concern behind the limitations of *Prob. Code § 6453* have been ameliorated significantly by technological advances in the area of DNA testing to determine paternity (*see* Pt. C). It is no longer necessary to rely on dubious testimony (that the decedent cannot rebut) to establish paternity post-mortem [*see Estate of Sanders (1992) 2 Cal. App. 4th 462, 477 n.22, 3 Cal. Rptr. 2d 536]* . Nevertheless, one court has refused to modify the statutory rule judicially, finding that the argument is more appropriately addressed to the legislature [*Estate of Sanders (1992) 2 Cal. App. 4th 462, 476-477, 3 Cal. Rptr. 2d 536* (construing former *Prob. Code § 6408*)].

There are additional limitations that apply if the child is the decedent. If a child is born out of wedlock, neither a parent nor a relative of a parent inherits from or through the child on the basis of the parent-child relationship unless (1) the parent or a relative of the parent acknowledged the child; and (2) the parent or a relative of the parent contributed to the

support or the care of the child [*Prob. Code § 6452*; *see Prob. Code § 6414(a)*]. For this purpose, the acknowledgment may be oral; it need not be made in a witnessed writing [*Lozano v. Scalier (1996) 51 Cal. App. 4th 843, 848, 59 Cal. Rptr. 2d 346* (oral acknowledgment to family and friends made before child's birth was sufficient)].

A child who is conclusively presumed to be the child of a marriage under *Fam. Code § 7540* cannot inherit by intestacy from a man who (rather than the mother's husband) is alleged to be the actual biological father of the child [*Estate of Cornelious (1984) 35 Cal. 3d 461, 464-467, 198 Cal. Rptr. 543, 674 P.2d 245]* .

For decedents who died before January 1, 1985, rights to intestate succession, including the rules for determining the parent-child relationship, are to be determined under former *Prob. Code § 255* [*see Prob. Code§ 6414(a)*]. For a discussion of intestate succession in the case of adopted children, *see* General Introduction to Ch. 12, *Adoptions: Nature and Effect*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Forms of Pleading and Practice--Annotated

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Volume 35: Partition thru Paternity-Chs. 397-412
Chapter 412 PATERNITY
PART II. LEGAL BACKGROUND
A. Overview of Parentage Determinations

35-412 California Forms of Pleading and Practice--Annotated §§ 412.15- 412.29

[Reserved]

§§ 412.15[Reserved]

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Volume 35: Partition thru Paternity-Chs. 397-412
Chapter 412 PATERNITY
PART II. LEGAL BACKGROUND
B. Presumptions of Paternity

35-412 California Forms of Pleading and Practice--Annotated § 412.30

§ 412.30 General Applicability and Constitutionality of Presumptions of Paternity

At various places in the Family Code, certain "presumptions of paternity" are set forth [*see Fam. Code §§ 7540* (presumption arising from marriage and cohabitation during conception), 7555 (presumption arising from genetic tests), 7611 (presumptions under UPA); *see also Fam. Code § 7576* (presumption arising from declaration; executed on or before December 31, 1996); *cf. Fam. Code § 7573* (effect of declaration executed on and after January 1, 1997)]. In a paternity action, these presumptions have an evidentiary function; that is, they affect the burden of proof as to whether a particular man is or is not the father of the child [*Fam. Code § 7612(a)*; *see § 412.32[7]*].

However, in paternity and in other areas of the law, some presumptions of paternity also have a substantive classification function. Certain rights are extended to, or withheld from a man who alleges that he is, or is alleged to be, the biological father of a child depending on whether he can qualify as a presumed father under one of the presumptions of *Fam. Code § 7611*. For example, the presumptions of paternity are used to create statutory substantive classes of fathers with regard to custodial rights [*Fam. Code § 3010*; *see In re Zacharia D. (1993) 6 Cal. 4th 435, 449, 451, 24 Cal. Rptr. 2d 751, 862 P.2d 751]* , rights to a child's services and earnings [*Fam. Code § 7500*], standing to bring a paternity action to establish one's own paternity [*Fam. Code §§ 7630, 7631*; *Michael M. v. Giovanna F. (1992) 5 Cal. App. 4th 1272, 1278, 7 Cal. Rptr. 2d 460]* , the determination of the parent-child relationship for purposes of intestate succession [*Prob. Code § 6453*], a father's rights with regard to termination of parental rightsand adoption [*Fam. Code §§ 7660, 7662, 8604, 8605*; *Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 844-850, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* ; *In re Kyle F. (2003) 112 Cal. App. 4th 538, 542, 5 Cal. Rptr. 3d 190]* , and the right to custody and reunification services with regard to a child adjudged a dependent of the juvenile court [*In re Jesusa V. (2004) 32 Cal. 4th 588, 604-606, 10 Cal. Rptr. 3d 205, 85 P.3d 2* ; *In re Zacharia (1993) 6 Cal. 4th 435, 447-454, 24 Cal. Rptr. 2d 751, 862 P.2d 751* ; *see Welf. & Inst. Code §§ 361.2, 361.5*].

This substantive classification function has made the presumptions of paternity the subject of constitutional scrutiny on several occasions because, as such, they can conflict with the constitutional right of a fatherto rear his own biological children [*see Stanley v. Illinois (1972) 405 U.S. 645, 649-659, 92 S. Ct. 1208, 31 L. Ed. 2d 551* ; *In re Jesusa V. (2004) 32 Cal. 4th 588, 604-608, 612, 10 Cal. Rptr. 3d 205, 85 P.3d 2]* . These constitutional issues are discussed generally in Ch. 394, *Parent and Child*, Pt. I, and specifically in Ch. 394, *Parent and Child*, Pt. II (custody); Ch. 12A,

Adoption: Termination of Parental Rights ; Ch. 328, *Juvenile Courts: Dependency Proceedings* (reunification); and in *§ 412.70[1]* (standing under UPA).

The presumptions of paternity of *Fam. Code § 7611* are reflective of public policy as to which fathers should be legally favored [*see In re Jesusa V. (2004) 32 Cal. 4th 588, 603, 10 Cal. Rptr. 3d 205, 85 P.3d 2* (though more than one person may fulfill criteria for presumption of paternity under *Fam. Code § 7611*, there can be only one presumed father; competing presumptions of paternity must be reconciled under *Fam. Code § 7612*)]. They are unaffected by the biological realities. A man's parentage of a child may be undisputed and legally proven, but he may nevertheless fail to be a presumed father [*see In re A.A. (2003) 114 Cal. App. 4th 771, 788-789, 7 Cal. Rptr. 3d 755* (determination in dependency case that one man is child's biological father does not necessarily defeat another man's presumed father status under *Fam. Code § 7611*)]. Conversely, even if biological paternity is denied and legally disproved, a man may still be deemed to be a presumed father [*Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 823 n.3, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* ; *see In re Jesusa V. (2004) 32 Cal. 4th 588, 604-606, 10 Cal. Rptr. 3d 205, 85 P.3d 2* ; *In re Nicholas H. (2002) 28 Cal. 4th 56, 58-59, 63-64, 120 Cal. Rptr. 2d 146, 46 P.3d 932* ; *see also Dawn D. v. Superior Court (1998) 17 Cal. 4th 932, 942-944, 72 Cal. Rptr. 2d 871, 952 P.2d 1139* (mother who lived with biological father when child conceived but returned to live with husband before child's birth deprived father of chance to be "presumed father"); *see also In re Zacharia (1993) 6 Cal. 4th 435, 450 n.18, 453, 24 Cal. Rptr. 2d 751, 862 P.2d 751]* . Courts are not bound to accord determinative weight to biology, but must weigh all relevant factors in determining which of two rebuttably presumed fathers will qualify as the child's presumed father [*In re Jesusa V. (2004) 32 Cal. 4th 588, 607-608, 612, 10 Cal. Rptr. 3d 205, 85 P.3d 2* ; *Librers v. Black (2005) 129 Cal. App. 4th 114, 123, 28 Cal. Rptr. 3d 188* (after *Jesusa V.*, it is absolutely clear that biology is not determinative factor in resolving paternity disputes under Uniform Parentage Act); see *Lisa I. v. Superior Court (2005) 133 Cal. App. 4th 605, 611, 34 Cal. Rptr. 3d 927* (child's biological father who has no relationship with child and who has failed to make substantial efforts to establish parent-child relationship or to provide for child's support has no constitutional liberty interest in opportunity to develop relationship with child)].

Neither the evidentiary presumption of paternity arising from genetic test evidence [*see Fam. Code § 7555*, discussed in *§ 412.33*], nor a judgment of paternity in a paternity action bestow general presumed-father status on a man proven to be the biological father because they are not included in the presumptions of *Fam. Code § 7611* [*see Adoption of Michael D. (1989) 209 Cal. App. 3d 122, 129-132, 256 Cal. Rptr. 884]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawPaternity & SurrogacyProof of PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityBurdens of ProofFamily LawPaternity & SurrogacyProof of PaternityEvidenceGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityEvidenceGenetic TestsFamily LawPaternity & SurrogacyProof of PaternityPresumptionsGeneral Overview

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35-412 California Forms of Pleading and Practice--Annotated § 412.31

§ 412.31 Presumption That Husband Is Father of Child Conceived During Marriage and Cohabitation

[1] Scope of Presumption

Fam. Code § 7540 provides that the child of a wife cohabiting with her husband who is not impotent or sterile is "conclusively" presumed to be a child of the marriage. This presumption is incorporated into *Fam. Code § 7611*, and therefore confers a favored status on married men and their children whenever the presumptions of *Fam. Code § 7611* are used to create a statutory substantive classification (*see § 412.30*).

The presumption applies if marriage and cohabitation coexist at the time of *conception*, not the time of birth [*see Brian C. v. Ginger K. (2000) 77 Cal. App. 4th 1198, 1203, 92 Cal. Rptr. 2d 294* ; *City and County of San Francisco v. Strahlendorf (1992) 7 Cal. App. 4th 1911, 1914, 9 Cal. Rptr. 2d 817* ; *see In re Elijah V. (2005) 127 Cal. App. 4th 576, 586-587, 25 Cal. Rptr. 3d 774* (husband was child's presumed father under *Fam. Code § 7540* when child was born within 276 days of his parents' last physical cohabitation)], and the husband is not impotent or sterile [*see Jackson v. Jackson (1967) 67 Cal. 2d 245, 247-248, 60 Cal. Rptr. 649, 430 P.2d 289* ; *§ 412.31[2]*].

The presumption was once truly conclusive for all purposes, and as such, it has been treated as a substantive rule of law rather than simply as an evidentiary presumption [*see Brian C. v. Ginger K. (2000) 77 Cal. App. 4th 1198, 1203-1204, 92 Cal. Rptr. 2d 294* ; *Vincent B. v. Joan R. (1981) 126 Cal. App. 3d 619, 623, 179 Cal. Rptr. 9]* . It now is subject to a limited statutory right of rebuttal by blood/genetic-test evidence [*see Fam. Code § 7541* (still referring to "blood tests," but incorporating by reference statutes now requiring "genetic" tests);*§ 412.31[2]*].

[2] Rebutting Presumption With Blood/Genetic-Test Evidence

Notwithstanding the use of the word "conclusive" in *Fam. Code § 7540*, if the court finds that the conclusions of all the experts, as disclosed by evidence based on tests performed under the Uniform Act on Blood Tests to Determine Paternity [*see Fam. Code § 7550 et seq.*; Pt. C] are that the husband is not the father of the child, the question of the husband's paternity must be resolved accordingly [*Fam. Code § 7541(a)*]. California's version of the Uniform Act now provides for "genetic" rather than simply "blood" testing in such cases [*see, e.g., Fam. Code § 7551*] but *Fam. Code § 7541*, which incorporates the Act by reference, still refers only to "blood" testing. *Section 7541* further provides that a

notice of motion for "blood tests"--which presumably now includes the genetic tests authorized by the Act--may be brought, within the statutory period, by one of the following persons:

- The husband, who is the otherwise conclusively presumed father of the child [*Fam. Code § 7541(b)*];

- The mother of the child, but only if another man has filed an affidavit with the court acknowledging paternity of the child [*Fam. Code § 7541(c)*];

- A man who qualifies as a presumed father under one of the other presumptions of *Fam. Code § 7611*, but only for the purpose of establishing his paternity [*Fam. Code § 7541(b)*]; or

- The child through or by his or her guardian ad litem [*Fam. Code § 7541(b)*].

Therefore, the presumption is not conclusive for all purposes, but is actually rebuttable, but only by blood/genetic-test evidence, authorized by statute (as opposed to tests simply ordered at a court's request), and only by those (above) who are granted standing by statute to move for the tests [*see Dawn D. v. Superior Court (1998) 17 Cal. 4th 932, 937 n.4, 72 Cal. Rptr. 2d 871, 952 P.2d 1139* (discussing presumption in general, which did not apply to that case because married couple was not cohabiting at time of conception); *Miller v. Miller (1998) 64 Cal. App. 4th 111, 119, 74 Cal. Rptr. 2d 797* ; *Rodney F. v. Karen M. (1998) 61 Cal. App. 4th 233, 240, 71 Cal. Rptr. 2d 399* (court-ordered blood test that was not authorized by the statute could not rebut presumption)]. The presumption remains conclusive with regard to other persons, such as a local child support agency attempting to establish paternity and a child support obligation [*see Fam. Code § 7634*; *Fam. Code §§ 17400, 17402, 17404* (discussed in *§ 412.31[3]*]. A man alleging himself to be the actual biological father of a child born to a married woman, but who cannot meet any of the presumptions of paternity [*see In re R. (1975) 13 Cal. 3d 636, 647-651, 119 Cal. Rptr. 475, 532 P.2d 123* ; *In re Elijah V. (2005) 127 Cal. App. 4th 576, 585-586, 25 Cal. Rptr. 3d 774]* also lacks standing to challenge the presumption. Such an alleged father may only have his paternity established by blood/genetic tests with the cooperation of someone who has standing: for example, the husband, the mother, or the child's guardian ad litem.

Rebuttal by blood/genetic test evidence is also not available if conception was by artificial insemination [*see Fam. Code § 7613*] or if the wife, with the consent of the husband, conceived by means of a surgical procedure [*Fam. Code § 7541(e)*].

The motion for tests must be brought no later than two years from the child's date of birth [*Fam. Code § 7541(b),(c)*]. It must be supported by a declaration stating the factual basis for placing the issue of paternity before the court [*Fam. Code § 7541(d)*]. This limitation period has been ignored in cases in which courts have found constitutional reasons not to apply the presumption [*see, e.g., Alicia R. v. Timothy M. (1994) 29 Cal. App. 4th 1232, 1236-1238, 34 Cal. Rptr. 2d 868* ; *County of Orange v. Leslie B. (1993) 14 Cal. App. 4th 976, 980 n.3, 17 Cal. Rptr. 2d 797* ; *In re Melissa G. (1989) 213 Cal. App. 3d 1082, 1084* ; *§ 412.31[3]*].

[3] Constitutionality

The conclusive presumption of *Fam. Code § 7540* has been subjected to numerous constitutional attacks because it deprives some alleged biological fathers and their children of the opportunity to establish aparent-child relationship unless a third person contests the husband's paternity [*see Fam. Code § 7541(b),(c)*;*§ 412.31[2]*]. The constitutional challenges are based on the due process and *equal protection clauses* of the *U.S. Const., amend. XIV*, which have been held to protect the essential rights to conceive and to rear one's children [*Stanley v. Illinois (1972) 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551* ; *In re R. (1975) 13 Cal. 3d 636, 647-649, 119 Cal. Rptr. 475, 532 P.2d 123]* .

In a decision without a majority opinion, the United States Supreme Court has upheld the constitutionality of the statute [*see Michael H. v. Gerald D. (1989) 491 U.S. 110, 109 S. Ct. 2333, 105 L. Ed. 2d 91* (alleged biological father and

guardian ad litem for child sought determination of paternity over opposition of mother and husband, who were still married and living together and with child in family unit)]. However, five justices refused to foreclose the possibility that a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married to and cohabiting with another man at the time of the child's conception and birth [*see Michael H. v. Gerald D. (1989) 491 U.S. 110, 133-136, 156-163, 109 S. Ct. 2333, 105 L. Ed. 2d 91* (opinions of Stevens, J., concurring in judgment, Brennan, J., joined by Blackmun, J. and Marshall, J., dissenting, and White, J., dissenting); *see also Michael M. v. Giovanna F. (1992) 5 Cal. App. 4th 1272, 1284-1285 n.8, 7 Cal. Rptr. 2d 460* (concluding that opinion of Scalia, J., is not majority opinion and notcontrolling on question of scope of constitutionally protected interest in parent-child relationship)]. However, one justice concurred in the judgment of constitutionality as applied to the facts of the case because, under his view of California law that is now found in *Fam. Code § 3100*, the alleged biological father could still pursue visitation rights [*see Michael H. v. Gerald D. (1989) 491 U.S. 110, 133-136, 109 S. Ct. 2333, 105 L. Ed. 2d 91* (opinion of Stevens, J., concurring in judgment); *see* former *Civ. Code § 4601, now Fam. Code § 3100(a)* (reasonable visitation rights may be granted to nonparent having interest in welfare of child); *but see White v. Jacobs (1988) 198 Cal. App. 3d 122, 124, 243 Cal. Rptr. 597* (former *Civ. Code § 4601* applies only to proceedings in which custody of minor child is at issue, and thus provides no general authority for action by grandparent for visitation rights; decided before grandparents were given right to proceed with their own separate action under *Fam. Code § 3104*); *Vincent B. v. Joan R. (1981) 126 Cal. App. 3d 619, 627-628, 179 Cal. Rptr. 9* (visitation by alleged biological father as not in best interests of child)].

The California Supreme Court has also had occasions to address the constitutionality of the conclusive presumption of *Fam. Code § 7540* against due-process challenges. The Court's approach has been to balance the interests of the biological father and child in establishing the parent-child relationship against the legitimate interests of the state in family stability and the welfare of the child. Under this balancing test, the Court has found the conclusive presumption to be constitutional as applied toan action by the alleged biological father and guardian ad litem for the child over the opposition of the conclusively presumed father. The mother was married to and living with the presumed father at the time of conception and birth, but subsequently was divorced from him and married the alleged biological father. The alleged biological father sought to establish his paternity in order to terminate the presumed father's visitation rights [*Michelle W. v. Ronald W. (1985) 39 Cal. 3d 354, 358-359, 216 Cal. Rptr. 748, 703 P.2d 88]* . Under these facts, the Court found that the interests of the biological father were overridden by the state's interests [*Michelle W. v. Ronald W. (1985) 39 Cal. 3d 354, 362-363, 216 Cal. Rptr. 748, 703 P.2d 88]* . The Court has also upheld the presumption as applied to the inheritance rights of one claiming to be the biological child of the deceased parent [*Estate of Cornelious (1984) 35 Cal. 3d 461, 466-467, 198 Cal. Rptr. 543, 674 P.2d 245* ; *see § 412.14*].

However, the California Supreme Court held the presumption to be an unconstitutional violation of due process as conclusively applied to a child who was a ward of the juvenile court and whose mother and her husband were both deceased. Under these circumstances, the Court found that there was no legitimate state interest of preserving the family unit at issue, and that the alleged biological father could not constitutionally be precluded from attempting to establish a parent-child relationship [*In re R. (1975) 13 Cal. 3d 636, 647-651, 119 Cal. Rptr. 475, 532 P.2d 123]* .

Appellate courts have also applied this balancing test with varying results. The presumption has been found to be unconstitutional as applied to the biological father of a child who had no ongoing, or any, relationship with her mother's husband. The mother and her husband had separated only eight days after the child's birth, and the mother subsequently married the biological father. The child had lived in that family household with a sister with whom she was emotionally and psychologically bonded. Recognition of the conclusive presumption might have had the effect of separating the custody of the sisters. Under these circumstances, the interest of the state in preserving the family relationship was best served by the nonapplication of the presumption [*In re Melissa G. (1989) 213 Cal. App. 3d 1082, 1089, 261 Cal. Rptr. 894]* . Similary, an appellate court found that application of the conclusive presumption violated the due process clause of the federal constitution with respect to a biological father whose child was not born into an "extant marital family," but into a family that consisted of himself, the child, and her mother for the first year of the child's life, and who visited the child thereafter following his breakup with the child's mother. In that instance, even though the child's mother was

cohabiting with her husband at the time of the child's conception and was still legally married to him at and after the child's birth, the estrangement of the spouses shortly after the child's conception and during her first year, the husband's nonassertion of any paternity interest until seeking to reunite with his wife, and the biological father's assumption of parentalresponsibilities and receipt of the child into his home militated against applying the conclusive presumption [*Brian C. v. Ginger K. (2000) 77 Cal. App. 4th 1198, 1217-1218, 92 Cal. Rptr. 2d 294]* .

In contrast, the presumption has been upheld to preserve the husband's relationship with the child, even though his nonpaternity was conclusively shown by blood tests, and the marriage to the mother had been dissolved. The court stressed that the familial relationship between the presumed father and the child does not necessarily terminate on dissolution of the marriage [*Susan H. v. Jack S. (1994) 30 Cal. App. 4th 1435, 1442-1444, 37 Cal. Rptr. 2d 120]* .

Courts have even refused to apply the presumption conclusively in cases in which nobody's constitutional rights appear to have been raised. In *County of Orange v. Leslie B.* [*County of Orange v. Leslie B. (1993) 14 Cal. App. 4th 976, 17 Cal. Rptr. 2d 797]* , the alleged biological father attempted to *rely* on the conclusive presumption to *defend* a district attorney's action to establish his paternity and for child support. The mother had been married to another man at the time of conception, but they had long been divorced, the ex-husband had not known of the existence of the child until he was made a defendant to the action, and he was excluded from possible paternity by blood tests. On these facts, the court refused to apply the conclusive presumption, finding that the public interest was best served by avoiding the presumption [*County of Orange v. Leslie B. (1993) 14 Cal. App. 4th 976, 979-983, 17 Cal. Rptr. 2d 797* ; *see also Comino v. Kelley, (1994) 25 Cal. App. 4th 678, 683-685, 30 Cal. Rptr. 2d 728* (in which court undertook balancing test and then "refused to apply" conclusive presumption without mentioning any constitutional basis for refusal)]. The court undertook the constitutional balancing test to reach its result, even though no individual party asserted a constitutional violation [*County of Orange v. Leslie B. (1993) 14 Cal. App. 4th 976, 979-983, 17 Cal. Rptr. 2d 797* ; *see Welf. & Inst. Code § 11478.2* ("public interest," not child, is district attorney's client in paternity and support proceeding); *see also Alicia R. v. Timothy M. (1994) 29 Cal. App. 4th 1232, 1237, 34 Cal. Rptr. 2d 868* (noting language in *County of Orange v. Leslie B.* that balancing test should be use to determine whether *not* applying presumption violates due process rights of putative father (court's emphasis)). But the due process right protected by the balancing test is the right of biological parent and child to a relationship with each other. A due process right *not* to have a parent-child relationship with one's biological offspring is a novel proposition]. The court stated that although the presumption is "conclusive," it should not be applied if its underlying policies would not be furthered by its application [*County of Orange v. Leslie B. (1993) 14 Cal. App. 4th 976, 980, 17 Cal. Rptr. 2d 797* ; *see also Alicia R. v. Timothy M. (1994) 29 Cal. App. 4th 1232, 1237-1238, 34 Cal. Rptr. 2d 868]* .

It also appears that, if the presumption does not apply, the time and standing limitations of *Fam. Code § 7541(b)* and*(c)* (*§ 412.31[2]*) on motions for blood/genetic tests also do not apply. Courts have ignored the statutory limitations on when and by whom a motion for such tests may be brought to rebut the presumption if application of the presumption is not supported by the balancing test [*see Alicia R. v. Timothy M. (1994) 29 Cal. App. 4th 1232, 1236-1238, 34 Cal. Rptr. 2d 868* ; *In re Melissa G. (1989) 213 Cal. App. 3d 1082, 1084* ; *cf. County of Orange v. Leslie B. (1993) 14 Cal. App. 4th 976, 980 n.3, 17 Cal. Rptr. 2d 797* (blood tests administered [voluntarily] long after statutory limitation period [two years] in action brought by party [district attorney] who has no statutory standing to move for blood testing; court didn't reach issue because limitation period had run before statute was enacted)].

In another case, the court avoided the constitutional issues and held that a husband may be estopped from relying on the presumption if he has at all times asserted his nonpaternity and recognized the paternity of another man, and has allowed the child to reside with the other man and to form bonds with him and his extended family [*Guardianship of Ethan S. (1990) 221 Cal. App. 3d 1403, 1415-1417, 271 Cal. Rptr. 121]* .

[4] Establishing Marriage and Cohabitation

A presumption is an assumption of fact that the law requires to be made from another fact or group of facts established

in the action [*Evid. Code § 600(a)*]. Therefore, the presumption of paternity of *Fam. Code § 7540* does not apply until the preliminary facts of marriage and cohabitation at the time of conception are established [*see County of San Diego v. Brown (1978) 80 Cal. App. 3d 297, 303, 145 Cal. Rptr. 483* ; *Louis v. Louis (1970) 7 Cal. App. 3d 851, 854-855, 86 Cal. Rptr. 834]* . The person alleging the nonapplication of the presumption has the burden of proving the preliminary fact of impotence or sterility, which would defeat the presumption [*see Vincent B. v. Joan R. (1981) 126 Cal. App. 3d 619, 624, 179 Cal. Rptr. 9]* . "Sterility" has been given a strict interpretation in at least one reported decision. In that instance, the appellate court limited a finding of sterility to cases in which, by a preponderance of the evidence, a party can demonstrate that the presumed father could not produce live sperm at the time of conception. Thus, although a husband's sperm count was shown to be so low that there was only a remote possibility he could have fathered the subject child, the court held that as long as there was any sperm count at all, the husband did not meet the definition of being "sterile" [*In re Marriage of Freeman (1996) 45 Cal. App. 4th 1437, 1449, 53 Cal. Rptr. 2d 439]* .

If the parties were married but were not cohabiting during the entire period of possible conception, evidence is admissible to establish that conception during the limited period of cohabitation was impossible [*Jackson v. Jackson (1967) 67 Cal. 2d 245, 247-248, 60 Cal. Rptr. 649, 430 P.2d 289* ; *see Louis v. Louis (1970) 7 Cal. App. 3d 851, 854-855, 86 Cal. Rptr. 834* ; *see also Brian C. v. Ginger K. (2000) 77 Cal. App. 4th 1198,1204-1205, 92 Cal. Rptr. 2d 294* (conclusive presumption not applied when there has been no substantive cohabitation)]. In this situation, the presumption that the husband is the father of a child born during, or within 300 days after termination of, the marriage may apply [*see Fam. Code § 7611(a),* discussed in *§ 412.32[1]*].

"Cohabiting" means living together in a marital household and sharing day-to-day life [*Steven W. v. Matthew S. (1995) 33 Cal. App. 4th 1108, 1115, 39 Cal. Rptr. 2d 535* ; *see Kusior v. Silver (1960) 54 Cal. 2d 603, 612-613 n.3, 7 Cal. Rptr. 129, 354 P.2d 657]* . Evidence of lack of sexual relations is irrelevant [*Vincent B. v. Joan R. (1981) 126 Cal. App. 3d 619, 623, 179 Cal. Rptr. 9]* . Conversely, the fact that the spouses, though not living together, continued to have sexual relations, is insufficient to establish cohabitation and invoke the presumption [*Kusior v. Silver (1960) 54 Cal. 2d 603, 612, 7 Cal. Rptr. 129, 354 P.2d 657* ; *Steven W. v. Matthew S. (1995) 33 Cal. App. 4th 1108, 1114-1115, 39 Cal. Rptr. 2d 535]* .

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§ 412.32 Presumptions of Family Code Section 7611

[1] Child Born During or Within 300 Days of Marriage

A man is presumed to be the natural father of a child if he and the child's natural mother are or have been married to each other, and the child is born during the marriage or within 300 days after the marriage was terminated by death,annulment, declaration of invalidity, or decree of dissolution of marriage or legal separation [*Fam. Code § 7611(a)*; *see Fuss v. Superior Court (1991) 228 Cal. App. 3d 556, 561, 279 Cal. Rptr. 46* ; *see also Adoption of Marie R. (1978) 79 Cal. App. 3d 624, 628, 145 Cal. Rptr. 122]* . This presumption differs from the conclusive presumption of *Fam. Code § 7540* in that it does not require cohabitation by the parties during the period of possible conception [*see Michael M. v. Giovanna F. (1992) 5 Cal. App. 4th 1272* ; 1282 n.6, *7 Cal. Rptr. 2d 460]* . Therefore, this presumption appears to apply if the parties were married but not cohabiting at the time of conception, so long as the child is born during the marriage or within 300 days of termination [*see generally Dawn D. v. Superior Court (1998) 17 Cal. 4th 932, 937, 72 Cal. Rptr. 2d 871, 952 P.2d 1139]* .

When a mother and her husband have allegedly permitted the child's biological father to receive the child into his home and hold the child out as his child, the presumption of *Fam. Code § 7540* is not "conclusive." Instead, the biological father may assert the rebuttable presumption of paternity provided by *Fam. Code § 7611(d)*, the husband may assert the rebuttable presumption of paternity provided by *Fam. Code § 7611(a)*, and the court must decide under *Fam. Code § 7612* which presumption shall prevail [*Craig L. v. Sandy S. (2004) 125 Cal. App. 4th 36, 45-53, 22 Cal. Rptr. 3d 606]* .

[2] Invalid Marriage Before Birth

A man is presumed to be the natural father of a child if, before the child's birth, he and the child's natural mother attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid and either of the following is true:

- If the attempted marriage is voidable only by court order [*see Fam. Code § 2210*], the child is born during the attempted marriage or within 300 days after its termination by death, annulment, declaration

of invalidity, or decree of dissolution of marriage [*Fam. Code § 7611(b)(1)*]; or

- If the attempted marriage is void and invalid without a court order [*see Fam. Code §§ 2200, 2201*], the child is born within 300 days after termination of cohabitation [*Fam. Code § 7611(b)(2)*].

Validity of marriage and void and voidable marriages are discussed in Ch. 25, *Annulment (Nullity) of Marriage and Related Spousal Rights* .

[3] Valid or Invalid Marriage After Birth

A man is presumed to be the natural father of a child if, after the child's birth, he and the child's natural mother have married or attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is void or voidable, and either of the following is true:

- With his consent he is named as the child's father on the child's birth certificate [*Fam. Code § 7611(c)(1)*; *see In re Kiana A. (2001) 93 Cal. App. 4th 1109, 1116, 113 Cal. Rptr. 2d 669]* ; or

- He is obligated to support the child under a written voluntary promise or by court order [*Fam. Code § 7611(c)(2)*].

[4] Reception Into Home

A man is presumed to be the natural father if he receives the child into his home and openly holds out the child as his natural child [*Fam. Code § 7611(d)*; *see In re Nicholas H. (2002) 28 Cal. 4th 56, 58, 120 Cal. Rptr. 2d 146, 46 P.3d 932* ; *Brian C. v. Ginger K. (2000) 77 Cal. App. 4th 1198, 1221, 92 Cal. Rptr. 2d 294* ; *see also Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 113, 33 Cal. Rptr. 3d 46, 117 P.3d 660* (any interested party may also bring action at any time for purpose of determining existence or nonexistence of mother-child relationship presumed under *Fam. Code § 7611(d)*; *Kevin Q. v. Lauren W. (2009) 175 Cal. App. 4th 1119, 1133, 95 Cal. Rptr. 3d 477* (there are no time limits or standing requirements for challenging or asserting *Fam. Code § 7611(d)* presumption); *Librers v. Black (2005) 129 Cal. App. 4th 114, 124-127, 28 Cal. Rptr. 3d 188* (mother's live-in boyfriend was child's presumed father based on his receipt of child into his home and his openly holding her out as his natural child); *In re Salvador M. (2003) 111 Cal. App. 4th 1353, 1357-1359, 4 Cal. Rptr. 3d 705* (admission of child's sister that she was not child's biological mother did not rebut presumption of maternity in her favor); *In re Kiana A. (2001) 93 Cal. App. 4th 1109, 1116-1117, 113 Cal. Rptr. 2d 669* (evidence demonstrated rebuttable presumption that man was child's presumed father under *Fam. Code § 7611(d)*, when man took child into his home, held her out as his natural child, provided necessities of life, and acted toward her as parent); *but cf. Scott v. Superior Court (2009) 171 Cal. App. 4th 540, 544-547, 89 Cal. Rptr. 3d 843* (woman who had intimate relationship with father of minor children did not have standing to join parents' UPA action to seek custody and visitation rights as presumed or de facto mother when parental rights of natural mother had not been terminated); *In re Tanis H. (1997) 59 Cal. App. 4th 1218, 1229, 69 Cal. Rptr. 2d 380* (plaintiff who lived with mother while pregnant, but in whose home child never lived after birth, did not qualify as presumed father on basis of "receipt of child into his home")].

The father must actually receive the child in his home, although it may be that the child's physical presence in the home for any period, no matter how brief, is sufficient [*see Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 828, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* ; *In re M. (1975) 14 Cal. 3d 783, 795, 122 Cal. Rptr. 531, 537 P.2d 363* ; *Charisma R. v. Kristina S. (2009) 175 Cal. App. 4th 361, 370-374, 96 Cal. Rptr. 3d 26* (domestic partner of birth mother is not required to receive child in her home for "significant period of time" to be considered presumed mother under *Fam. Code § 7611(d)*); *but see Miller v. Miller (1998) 64 Cal. App. 4th 111, 118, 74 Cal. Rptr. 2d 797* (plaintiff's marriage to child's mother after child was born and living with them were insufficient to show reception into home); *In re Spencer W. (1996) 48 Cal. App. 4th 1647, 1653, 56 Cal. Rptr. 2d 524* (plaintiff male was unemployed and supported by the mother,

who paid for apartment where they resided); *In re Sarah C. (1992) 8 Cal. App. 4th 964, 972-973, 11 Cal. Rptr. 2d 414* (refusing to find reception)].

For example, a father meets the elements of the statutory presumption when the child lives part-time with the father and part-time with the mother, the father has been involved with the child since birth and has bonded with the child, and the father has provided financially for the child's needs and has held himself out as the child's father [*In re A.A. (2003)7 Cal. Rptr. 3d 755]* .

Other factors courts look at is whether the man actively helped the mother in prenatal care, paid pregnancy and birth expenses commensurate with his ability to do so, promptly took legal action to obtain custody of the child, and sought to have his name placed on the birth certificate. Courts also consider whether and how long the man cared for the child, whether there is unequivocal evidence that he acknowledged the child, the number of people to whom he acknowledged the child, whether he provided for the child after the child no longer resided with him, whether he pursued completion of the required paperwork if the child needed public benefits, and whether his care was merely incidental [*In re T.R. (2005) 132 Cal. App. 4th 1202, 1211, 34 Cal. Rptr. 3d 215]* .

There is no doctrine of "constructive receipt," by which the presumption would be established without actual receipt if the father is prevented from receiving the child into his home by the mother's acts, such as placing the child for adoption [*Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 825-830, 823 P.2d 1216* ; *In re Kyle F. (2003) 112 Cal. App. 4th 538, 542, 5 Cal. Rptr. 3d 190]* . However, a father in this situation may have certain constitutional protections [*see In re Jerry P. (2002) 95 Cal. App. 4th 793, 795, 116 Cal. Rptr. 2d 123]* . For discussion, see*§ 412.30* and Ch. 12, *Adoptions: Nature and Effect* .

A valid declaration of paternity signed and filed by the biological father has the force of a judgment under *Fam. Code § 7573*, which trumps another man's presumed father status under Section 7611(d) [*Kevin Q. v. Lauren W. (2009) 175 Cal. App. 4th 1119, 1124, 1133, 1136-1141, 95 Cal. Rptr. 3d 477]* . A court does not have the discretion to ignore or treat as a rebuttable presumption a voluntary declaration of paternity [*Kevin Q. v. Lauren W. (2009) 175 Cal. App. 4th 1119, 1138, 95 Cal. Rptr. 3d 477]* ; it is not a mere presumption that may be weighed against competing Section 7611 presumptions under *Fam. Code § 7612(b)* [*Kevin Q. v. Lauren W. (2009) 175 Cal. App. 4th 1119, 1141, 95 Cal. Rptr. 3d 477]* .

[5] Vietnamese Refugee Child

A man is presumed to be the natural father of a child if the child was born and resides in a nation with which the United States engages in an Orderly Departure Program, or a successor program, and the man acknowledges that he is the father of the child in a declaration under penalty of perjury as specified in *Code Civ. Proc. § 2015.5* [*Fam. Code § 7611(e)* (operative only until January 1, 1997)]. The Orderly Departure Program was developed by an informal agreement with Vietnam under the aegis of the United Nations. It does not appear that this presumption would apply to children from any other country.

[6] Child *In Utero* After Death

A man is presumed to be the natural father of a child if the child is *in utero* after his death and the following conditions are satisfied [*Fam. Code § 7611(f)*; *Prob. Code § 249.5*]:

(a) The man, in writing, specified that his genetic material would be used for the posthumous conception of a child of his, subject to the following:

(1) The specification was signed by the man and at least one competent witness.

(2) The specification could be revoked or amended only by a writing, signed by the man and at least one competent witness.

(3) The person designated by the man to use the genetic material was either of the following:
(A) His spouse or registered domestic partner, as of his date of death.

(B) Some other person named in the specification as approved by the man to be the person designated by him to use the genetic material for posthumous conception.

(b) The child or the child's representative has given written notice by certified mail, return receipt requested, that the man's genetic material was available for the purpose of posthumous conception. The notice must have been given to a person who had the power to control the distribution of either the man's property or death benefits payable by reason of his death, within four months of the date of issuance of a certificate of the death or entry of a judgment determining the fact of the death, whichever event occurred first.

(c) The child was *in utero* using the man's genetic material and was *in utero* within two years of the date of issuance of a certificate of the man's death or entry of a judgment determining the fact of the death, whichever event occurred first. This does not apply to a child who shares all of his or her nuclear genes with the person donating the implanted nucleus as a result of the application of somatic nuclear transfer technology commonly known as human cloning.

[7] Rebutting Presumptions

Although more than one individual may fulfill the statutory criteria that give rise to a presumption of paternity under *Fam. Code § 7611*, there can be only one presumed father [*In re Jesusa V. (2004) 32 Cal. 4th 588, 603, 10 Cal. Rptr. 3d 205, 85 P.3d 2]* . How the competing presumptions are to be reconciled is set forth in *Fam. Code § 7612(b)*, which provides that when two or more presumptions arise under *Fam. Code § 7610* or *Fam. Code § 7611* that conflict with each other, or if the presumption under *Fam. Code § 7611* conflicts with a claim under *Fam. Code § 7610*, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.

The presumptions set forth in *Fam. Code § 7611* affect the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence [*Fam. Code § 7612(a)*; *see Comino v. Kelley (1994) 25 Cal. App. 4th 678, 685, 30 Cal. Rptr. 2d 728* (burden is on party opposing operation of presumption)]. However, the plaintiff has the burden of proving the elements or foundational facts with respect to each presumption. The opponent may introduce evidence tending to prove the foundational facts are not present or that the presumed fact is not true, or both [*In re Spencer W. (1996) 48 Cal. App. 4th 1647, 1653, 56 Cal. Rptr. 2d 524]* .

The presumptions are rebutted by a judgment establishing paternity of the child by another man [*Fam. Code § 7612(c)*; *Barkaloff v. Woodward (1996) 47 Cal. App. 4th 393, 399, 55 Cal. Rptr. 2d 167* ; *see In re A.A. (2003) 114 Cal. App. 4th 771, 788-789, 7 Cal. Rptr. 3d 755* (determination in dependency case that one man is child's biological father does not necessarily defeat another man's presumed father status under *Fam. Code § 7611*)]. But the presumptions are not necessarily rebutted by blood test results that exclude the presumed father as the actual biological father [*see In re Jesusa V. (2004) 32 Cal. 4th 588, 604-606, 10 Cal. Rptr. 3d 205, 85 P.3d 2* (nonbiological father's presumption of paternity under *Fam. Code § 7611(d)* not necessarily defeated by biological father's competing claim to be child's presumed father); *In re Nicholas H. (2002) 28 Cal. 4th 56, 70, 120 Cal. Rptr. 2d 146, 46 P.3d 932* (man's presumed father status under *Fam. Code § 7611(d)* not necessarily rebutted under *Fam. Code § 7612(a)* by admission that he is not biological father); *see also In re Raphael P. (2002) 118 Cal. Rptr. 2d 610* (when there is only one man seeking to establish paternity based on having received child into his home, genetic evidence that man is not child's biological father will not necessarily rebut presumption)]. Moreover, *Fam. Code § 7612* does not contemplate a "reflexive rule that biological paternity [will] rebut the *Fam. Code § 7611* presumption[s] in all cases, without concern for whether rebuttal

[is] appropriate in the particular circumstances" [*In re Jesusa V. (2004) 32 Cal. 4th 588, 607-608*].

With respect to the presumption arising under *Fam. Code § 7611(d)*--for reception of a child into a man's home and openly holding the child out as his own--the California Supreme Court has held that this presumption is not necessarily rebutted when a presumed father seeks parental rights but admits that he is not the child's biological father. In particular, the rebuttal provision of *Fam. Code § 7612(a)* was not intended to apply when no other man claims parental rights and the child would be rendered fatherless by rebuttal of the presumption. Those circumstances are not "an appropriate action" in which to apply the rebuttal provision. Instead, the Supreme Court has suggested, the Legislature intended for the rebuttal provision to apply in an action in which "another candidate is vying for parental rights and seeks to rebut a [*Fam. Code] section 7611(d)* presumption in order to perfect his claim, or in which a court decides that the legal rights and obligations of parenthood should devolve upon an unwilling candidate" [*In re Nicholas H. (2002) 28 Cal. 4th 56, 70, 120 Cal. Rptr. 2d 146, 46 P.3d 932* (man does not lose status as presumed father by admitting he is not biological father); *see In re Kiana A. (2001) 93 Cal. App. 4th 1109, 1118-1119, 113 Cal. Rptr. 2d 669* (though results of genetic testing constitute clear and convincing evidence, it does not follow that evidence will rebut presumption in every case; rather, *Fam. Code § 7611* seeks to protect presumptions of paternity once they have arisen, from being set aside except on clear and convincing evidence and only in appropriate case); *cf. In re Karen C. (2002) 101 Cal. App. 4th 932, 938, 124 Cal. Rptr. 2d 677* (mother does not lose status as presumed mother by admitting she is not biological mother)]. The Court has clarified that biological paternity by a competing presumed father does not necessarily defeat a nonbiological father's presumption of paternity under *Fam.Code § 7612(a)* [*In re Jesusa V. (2004) 32 Cal. 4th 588, 606*]. The court must consider whether rebuttal of the presumption is appropriate given the circumstances of the case. For related discussion, § 412.32[8].

The party seeking to rebut one or more of these presumptions must have standing to do so [*see generally Fam. Code § 7630*; *Dawn D. v. Superior Court (1998) 17 Cal.4th 932, 937-938, 72 Cal. Rptr. 2d 871, 952 P.2d 1139* (unwed, alleged biological father who was not presumed father lacked standing to rebut presumption arising from birth of child during marriage, and had no due process right to establish personal relationship with child)]. For discussion of scientific evidence to establish paternity or nonpaternity, see Part C, § 412.50 et seq.

For discussion of the use of other evidence, see Evidence in Part D, § 412.70 et seq.

[8] Conflicting Presumptions

When the evidence shows that more than one man satisfies criteria giving rising to a presumption of paternity, the trial court must weigh the competing presumptions [*see Fam. Code § 7612(b)*]. Thus, if two or more conflicting presumptions under *Fam. Code § 7610* or § 7611 arise, the presumption that on the facts is founded on the weightier considerations of policy and logic controls [*Fam. Code § 7612(b)*; *see In re Nicholas H. (2002) 28 Cal. 4th 56, 63, 120 Cal. Rptr. 2d 146, 46 P.3d 932* (court's conclusion that man does not lose status as presumed father by admitting he is not biological father is supported by *Fam. Code § 7612(b)*); *Brian C. v. Ginger K. (2000) 77 Cal. App. 4th 1198, 1220, 92 Cal. Rptr. 2d 294]* . In determining the weightier considerations of policy and logic, an existing father-child relationship is to be preserved over biological ties. Thus, a man who receives the child into his home and openly holds out the child as his own should be adjudged the father, even if another man is indisputably the child's actual biological father [*In re Jesusa V. (2004) 32 Cal. 4th 588, 607-608, 612, 10 Cal. Rptr. 3d 205, 85 P.3d 2* (award of presumed father status to stepfather, rather than biological father, best comported with state's interest in preserving integrity of family and child's welfare); *In re Kiana A. (2001) 93 Cal. App. 4th 1109, 1118-1121, 113 Cal. Rptr. 2d 669* (in applying paternity presumptions, extant father-child relationship is to be preserved at cost of biological ties); *Steven W. v. Matthew S. (1995) 33 Cal. App. 4th 1108, 1116-1117, 39 Cal. Rptr. 2d 535]* . The presumption based on public acknowledgment and reception into the home has also been found to be based on weightier considerations of public policy than the presumption based on birth during marriage [*Steven W. v. Matthew S. (1995) 33 Cal. App. 4th 1108, 1115-1117, 39 Cal. Rptr. 2d 535* ; *see Adoption of Marie R. (1978) 79 Cal. App. 3d 624, 636-637, 145 Cal. Rptr. 122* (dissenting opinion), or than the presumption based on marriage to the child's mother after the child's birth and being

consensually named on the child's birth certificate [*In re Kiana A. (2001) 93 Cal. App. 4th 1109, 1117-1118, 113 Cal. Rptr. 2d 669* (evidence clearly supported conclusion that presumption of man who received child into his home was entitled to greater weight than that of man who married child's mother after child's birth)].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceInferences & PresumptionsGeneral OverviewEvidenceInferences & PresumptionsConflicting PresumptionsEvidenceInferences & PresumptionsExceptionsStatutory PresumptionsEvidenceInferences & PresumptionsRebuttal of PresumptionsFamily LawPaternity & SurrogacyProof of PaternityPresumptionsGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityPresumptionsRebuttals

California Forms of Pleading and Practice--Annotated

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Volume 35: Partition thru Paternity-Chs. 397-412
Chapter 412 PATERNITY
PART II. LEGAL BACKGROUND
B. Presumptions of Paternity

35-412 California Forms of Pleading and Practice--Annotated § 412.33

§ 412.33 Presumption Arising From Blood/Genetic Test Results

The Uniform Act on Blood Tests to Determine Paternity is codified in California in *Fam. Code § 7550 et seq.* Operative January 1, 1998, except for the name of the act, which remains the same, the provisions of the Act, including those concerning presumptions, now refer to the broad term "genetic," rather than simply "blood," testing. Under the Act, there is a rebuttable presumption of paternity based on blood test results, affecting the burden of proof, if the court finds that the paternity index, as calculated by the experts qualified as examiners of genetic markers, is 100 or greater [*Fam. Code § 7555(a)*]. This presumption is not included in *Fam. Code § 7611*; therefore, it does not entitle the man toward whom the presumption points to presumed father status under other laws that substantively distinguish presumed fathers from other fathers (*see § 412.30*).

"Genetic markers" mean separate genes or complexes of genes identified as a result of genetic tests [*Fam. Code § 7555(b)(1)*]. "Paternity index" means the commonly accepted indicator for denoting the existence of paternity. It expresses the relative strength of the test results for and against paternity. The paternity index, computed using results of various paternity tests following accepted statistical principles, must be in accordance with the method of expression accepted at the International Conference on Parentage Testing at Airlie House, Virginia, May 1982, sponsored by the American Association of Blood Banks [*Fam. Code § 7555(b)(2)*].

The paternity index is not the probability that the man tested is the father. Rather, it involves the probability that a cross between the man and the mother would produce an offspring with the child's phenotypes and the corresponding probability for a random selection of genes from the male population [*County of El Dorado v. Misura (1995) 33 Cal. App. 4th 73, 79, 38 Cal. Rptr. 2d 908]* .

In enacting the original version of this uniform act, the Legislature stated its intention to standardize the process by which paternity is established in order to achieve a greater degree of equity and consistency in paternity determinations. It found that the science of genetic testing had advanced to the degree that paternity determinations resulting from this testing are so reliable that the burden of proof should be shifted to the putative father [*see* Stats. 1986, ch. 629, § 1].

The presumption may be rebutted by a preponderance of the evidence [*Fam. Code § 7555(a)*; *see County of Sonoma v.*

Grant W. (1986) 232 Cal. Rptr. 471] . The statute does not specify what classes of evidence may be used to rebut the presumption. However, both scientific and nonscientific evidence has been approved. For example, the opponent of the presumption may attack the testing procedure or attempt to prove a paternity index of below 100. Or the man may attempt to show that he is infertile or did not have sex with the mother during the period of conception [*City and County of San Francisco v. Givens (2000) 85 Cal. App. 4th 51, 56, 101 Cal. Rptr. 2d 859* (defendant successfully rebutted presumption by presenting "clear and convincing" evidence that he did not have access to mother during period of conception)]. Or he might attempt to prove that another man had sex with the mother and also has a high paternity index, which would raise a competing or inconsistant presumption. However, evidence that the mother had multiple sexual partners during the time of conception, without any blood-test evidence that does not exclude one or more other men, does nothing to rebut the presumption [*County of El Dorado v. Misura (1995) 33 Cal. App. 4th 73, 83-84, 38 Cal. Rptr. 2d 908]* .

For further discussion of genetic-test evidence, see Part C, *§ 412.50 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceInferences & PresumptionsGeneral OverviewEvidenceInferences & PresumptionsRebuttal of PresumptionsEvidenceScientific EvidenceBlood & Bodily FluidsFamily LawPaternity & SurrogacyProof of PaternityEvidenceBlood TestsFamily LawPaternity & SurrogacyProof of PaternityEvidenceGenetic TestsFamily LawPaternity & SurrogacyProof of PaternityPresumptionsGeneral Overview

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35-412 California Forms of Pleading and Practice--Annotated § 412.34

§ 412.34 Presumption of Paternity by Declaration

[1] Federal Compulsion

Federal law requires states to have in effect, as a condition of receiving federal funds for certain public assistance programs benefiting dependent children [*see 42 U.S.C. §§ 601, 654(20)* (as amended by Pub. L. No. 105-33)], a hospital-based program for the voluntary acknowledgment of paternity during the period immediately before or after the birth of a child [*42 U.S.C. § 666(a)(5)(C)*; *see* P.L. 103-66, § 13721(c) (effective date)]. Voluntary acknowledgment must create a presumption of paternity [*see 42 U.S.C. § 666(a)(5)(D)*] that forms a basis for obtaining a child support order without further proceedings to establish paternity [*see 42 U.S.C. § 666(a)(5)(E)*].

[2] Legislative Findings and Declaration of Purpose

The California Legislature initially crafted a voluntary paternity declaration in its 1993 and 1994 sessions. Subject to a provision for rebuttal by means of blood or genetic testing, the child of a woman and man who executed the declaration (on and after January 1, 1995) was "conclusively presumed" to be the man's child; and this express presumption had "the same force and effect as the presumption under [*Fam. Code § 7540*]" [Stats. 1993, ch. 1240; Stats. 1994, ch. 1269; former *Fam. Code §§ 7571(d)* (*now see Fam. Code § 7576(a)*), *7574* (form), *7575* (rebuttal)].

In enacting this presumption, the Legislature the following findings and declarations:

> There is a compelling state interest in establishing paternity for all children. Establishing paternity is the first step toward a child support award, which, in turn, provides children with equal rights and access to benefits, including, but not limited to, social security, health insurance, survivors' benefits, military benefits, and inheritance rights. Knowledge of family medical history is often necessary for correct medical diagnosis and treatment. Additionally, knowing one's father is important to a child's development [*Fam. Code § 7570(a)*].
>
> A simple system allowing for establishment of voluntary paternity will result in a significant increase in the ease of establishing paternity, a significant increase in paternity establishment, an increase

> in the number of children who have greater access to child support and other benefits, and a significant decrease in the time and money required to establish paternity due to the removal of the need for a lengthy and expensive court process to determine and establish paternity and is in the public interest [*Fam. Code § 7570(b)*].

Later legislation, operative January 1, 1997, recast the provisions for the voluntary paternity declaration by removing the express "conclusive presumption" language. Instead, with limited exception, a voluntary declaration that is executed on after that date and that has been filed with the Department of Child Support Services is simply deemed to "establish the paternity of a child and shall have the same force and effect as a judgment of paternity issued by a court of competent jurisdiction" [*Fam. Code § 7573*]. However, as discussed in *§ 412.34[7]*, the new legislation authorizes a motion for genetic tests in order to set aside the declaration, and a special "rebuttable presumption" provision applies to minors who execute the declaration. In addition, declarations executed on or before December 31, 1996, are still subject to a formulation of the law that includes the "conclusive presumption" language [*Fam. Code §§ 7575, 7576, 7577*]. The discussion hereafter makes reference to both current and former law, accordingly.

[3] Declaration of Paternity

On and after January 1, 1995, voluntary declarations of paternity must be made available for all live births to unmarried mothers in California [*Fam. Code § 7571(a)*]. Before the mother leaves the birth facility, the person responsible for registering live births [*see Health & Safety Code § 102405*] must provide the declaration form to her, and must attempt to provide it to the man identified by her as the natural father, together with the written materials described in *Fam. Code § 7572*. Hospital staff must witness the signatures of the parents signing a voluntary declaration of paternity, and must forward the signed declaration to the Department of Child Support Services within 20 days of the date the declaration was signed. A copy of the declaration must be made available to each of the attesting parents [*Fam. Code § 7571(a)*].

A showing that the name of a man claiming to be a child's father is on the birth certificate is prima facie proof that he signed a voluntary declaration of paternity. Once this man provides such prima facie proof of having signed a voluntary declaration of paternity, he is entitled to rely on the presumption of *Evid. Code § 664* that official duty has been regularly performed, namely, the hospital staff's witnessing of the parents signing of the declaration, to establish that the document was properly filed. It is then the burden of the party contesting the existence of the declaration to disprove this fact [*In re Raphael P. III (2002) 97 Cal. App. 4th 716, 736-738, 118 Cal. Rptr. 2d 610]* .

If the declaration is not registered by the person responsible for registering live births at the hospital, it may be completed by the attesting parents, notarized, and mailed to the Department of Child Support Services at any time after the child's birth [*Fam. Code § 7571(d)*]. The declaration form must be made available without charge at all local child support agency offices, offices of local registrars of births and deaths, courts, and county welfare departments in the state [*Fam. Code § 7571(f)*]. Staff in these offices must witness the signatures of parents who wish to sign a voluntary declaration of paternity, and are responsible for forwarding the signed declaration to the Department of Child Support Services within 20 days of the date the declaration was signed [*Fam. Code § 7571(f)*]. In addition, publicly funded or licensed health clinics, pediatric offices, Head Start programs, child care centers, social services providers, prisons, and schools may offer parents the opportunity to sign a voluntary declaration of paternity, provided that the requirements of *Fam. Code § 7571* are met [*Fam. Code § 7571(j),(k)*].

Any agency or organization that is required to offer parents the opportunity to sign a voluntary declaration of paternity must also identify parents who are willing to sign, but were unavailable when the child was born. It must contact these parents within 10 days and offer the parent the opportunity to sign [*Fam. Code § 7571(k)*].

The local child support agency must pay $10 to birthing hospitals and other entities providing prenatal services for each completed declaration of paternity that is filedwith the Department of Child Support Services, as long as the local child

support agency and the entity have entered into a written agreement that specifies the terms and conditions for the payment as required by federal law [*Fam. Code § 7571(c)*]. To be paid for their services, prenatal clinics must ensure that the voluntary declaration of paternity form is witnessed and forwarded to the Department of Child Support Services within 20 days of the date the declaration was signed [*Fam. Code § 7571(e)*].

The Department of Child Support Services and local child support agencies must publicize the availability of these voluntary declarations of paternity. The local agency must make the declaration and written materials prescribed by *Fam. Code § 7572(a)* available on request to any parent and to any agency or organization that is required to offer parents the opportunity to sign a voluntary declaration of paternity. The agency must provide qualified staff to answer parents' questions about the declaration and the process of establishing paternity [*Fam. Code § 7571(h)*].

Copies of a declaration and any recissions filed with the Department of Child Support Services may be made available only to the parents, the child, the local child support agency, the county welfare department, the county counsel, the State Department of Health Services, and the courts [*Fam. Code § 7571(i)*].

The Department of Child Support Services must develop written materials to assist providers and parents in complying with the requirements regarding the voluntary declaration of paternity [*Fam. Code § 7572(a)*]. The written materials for parents must be attached to the declaration and contain the following information [*Fam. Code § 7572(b)*]:

> (1) A signed voluntary declaration of paternity that is filed with the Department of Child Support Services legally establishes paternity.
>
> (2) The legal rights and obligations of both parents and the child that result from the establishment of paternity.
>
> (3) An alleged father's constitutional rights to have the issue of paternity decided by a court, to notice of any hearing on the issue of paternity, to have an opportunity to present his case to the court (including a right to present and cross-examine witnesses), to have an attorney represent him, and to have an attorney appointed to represent him if he cannot afford one in a paternity action filed by a local child support agency.
>
> (4) That by signing the declaration, the father is voluntarily waiving his constitutional rights.

Parents must also be given oral notice of these rights and responsibilities. This notice may be given by use of audio- or video-recorded programs developed by the Department of Child Support Services, to the extent permitted by federal law [*Fam. Code § 7572(c)*]. The Department must make available, free of charge, to hospitals, clinics, local registrars of births and deaths, and other places of birth any and all informational and training materials for the program provided for under *Fam. Code § 7570 et seq.*, as well as the paternity declaration form [*Fam. Code § 7572(d)*]. The Department may adopt regulations necessary to implement these provisions [*Fam. Code § 7572(e)*].

[4] Effect of Declaration

Except as discussed here and in *§ 412.34[7]*, a completed voluntary declaration of paternity (executed on or after January 1, 1997) that has been filed with the Department of Child Support Services establishes a child's paternity and has the same force and effect as a judgment for paternity issued by a court of competent jurisdiction. The voluntary declaration must be recognized as a basis for establishing an order for child custody, visitation, or child support [*Fam. Code § 7573*; *see § 412.34[5]*; *cf. In re Liam L. (2000) 84 Cal. App. 4th 739, 101 Cal. Rptr. 2d 13* (voluntary declaration of paternity gives male signatory presumed father status in dependency proceeding); *but see County of Los Angeles v. Pattinson (2002) 102 Cal. App. 4th 1337, 1343, 126 Cal. Rptr. 2d 350* (voluntary declaration of paternity may be basis for child custody order, but underlying statutory scheme does not in and of itself determine child custody);

Fam. Code §§ 7575, 7576, 7577 (rescission, motion to set aside, blood/genetic testing; declaration executed on or before December 31, 1996, declaration of minors)].

Either parent may rescind the declaration by filing a rescission form with the Department of Child Support Services within 60 days of the date of execution of the declaration by the attesting father or attesting mother, whichever signature is later, unless a court order for custody, visitation, or child support has been entered in an action in which the parent seeking to rescind was a party. The form must include a declaration under penalty of perjury completed by the person filing the form certifying that a copy of the form was sent by mail requiring a return receipt to the other person who signed the voluntary declaration of paternity. A copy of the return receipt must be attached to the rescission form when filed with the Department of Child Support Services [*Fam. Code § 7575(a)*].

A declaration that is signed by a parent who is a minor does not establish paternity until 60 days after both parents have reached the age of 18 years or are emancipated, whichever occurs first [*Fam. Code § 7577(a)*]. A parent who signs a declaration when he or she is a minor may rescind the declaration at any time up to 60 days after reaching the age of 18 or becoming emancipated, whichever occurs first [*Fam. Code § 7577(b)*]. Such a declaration creates a rebuttable presumption of paternity until the date that it conclusively establishes paternity [*Fam. Code § 7577(c)*], and is admissible as evidence in any civil action to establish the paternity of the minor parent named in it [*Fam. Code § 7577(d)*].

Special provisions apply to declarations signed on or before December 31, 1996. The child of a man and a woman who executed such a declaration is conclusively presumed to be the man's child, and the declaration must be recognized as the basis for establishing an order for child custody or support [*Fam. Code § 7576(a), (b)*; *see § 412.34[5]*]. The presumption may be rebutted by any person by requesting blood or genetic tests [*Fam. Code § 7576(d)*; *see § 412.34[7]*]. Other provisions for blood testing in connection with persons executing a declaration on or after January 1, 1997, are discussed in *§ 412.34[7]*.

[5] Proceedings Involving Declaration

The UPA now contains special provisions for an action based on the declaration [*see Fam. Code § 7644*]. The Judicial Council form of petition to establish parental relationship includes an allegation that parentage has been established by voluntary declaration [*see* Cal. Judicial Council Form FL-200 (formerly prescribed by Cal. Rules of CL., Rule 1296.60]; *see § 412.130*]. In addition, the Judicial Council has created a separate form by which to petition for child custody, visitation, and child support (without seeking a parentage judgment) that may be used either by parents who have signed a voluntary declaration of paternity, or who are married and have not brought another family law action [Cal. Judicial Council Form FL-260; *see* Ch. 394, *Parent and Child*]. The district attorney or other local child support agency may also bring an action for child support based on the declaration, and the Judicial Council is required to develop forms and procedures to bring the action [*see Fam. Code § 17412*].

Also, in any action filed a district attorney or other local child support agency ("the local child support agency") to establish paternity and a child support obligation [*see Fam. Code §§ 17400, 17404*], the agency must provide the mother and the alleged father the opportunity to voluntarily acknowledge paternity by signing a paternity declaration before the hearing or trial in which paternity is at issue. The agency may afford the defendant an opportunity to enter into a stipulation for judgment of paternity after an action for paternity has been filed in place of the voluntary declaration of paternity [*Fam. Code § 17410* (discussed in Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*)].

[6] Contents of Declaration

The voluntary declaration of paternity must be executed on a form developed by the Department of Child Support Services [*Fam. Code § 7574(a)*]. It must contain the mother's and father's names and signatures, the child's name and

birthdate, and the name and signature of the person who witnessed the mother's and father's signatures [*Fam. Code § 7574(b)(1)-(4), (7)*].

It must also contain a statement by the mother that she has read and understands the written materials described in *Fam. Code § 7572*, that the man who has signed the declaration is the only possible father, and that she consents to establishing paternity by signing the declaration [*Fam. Code § 7574(b)(5)*]. It must contain a statement by the father that he has read and understands the written materials described in Section 7572, that he understands that by signing the declaration he is waiving his rights as described in those materials, that he is the child's biological father, and that he consents to establishing paternity by signing the declaration [*Fam. Code § 7574(b)(6)*].

[7] Rebutting Presumption

[a] Declaration Signed in 1997 or Later

With respect to voluntary declarations signed on or after January 1, 1997, a local child support agency, the child's mother or the man who signed the declaration as the child's father may file a notice of motion for genetic tests in an action to determine the existence or nonexistence of the father and child relationship pursuant to *Fam. Code § 7630*, or in an action to establish an order for child custody, visitation, or child support based on the voluntary declaration of paternity. The notice of motion must be filed within two years of the child's date of birth [*Fam. Code § 7575(b)(3)(A)*; *see In re J.L. (2008) 159 Cal. App. 4th 1010, 1019-1025, 72 Cal. Rptr. 3d 27* (man claiming to be child's biological father had standing under *Fam. Code § 7575(b)(3)(A)* to seek paternity test and to move to set aside voluntary declaration of paternity filed by mother's boyfriend); *see also § 412.31[2]*]. The local child support agency's authority to file a motion for genetic tests is limited to those circumstances in which there is a conflict between a voluntary acknowledgement of paternity or a conflict between two or more voluntary acknowledgements of paternity [*Fam. Code § 7575(b)(3)(B)*]. The notice of motion must be supported by a declaration under oath submitted by the moving party, stating the factual basis for putting the issue of paternity before the court [*Fam. Code § 7575(b)(4)*].

If a court finds that the conclusions of all of the experts based on the results of genetic tests performed pursuant to *Fam. Code § 7550 et seq.* are that the man who signed the voluntary declaration of paternity is not the child's father, the court may set aside the declaration, unless the court determines that denial of the action to set aside the voluntary declaration of paternity is in the best interest of the child, after consideration of all of the following factors [*Fam. Code § 7575(b)(1)*; *see In re William K. (2008) 161 Cal. App. 4th 1, 10-11, 73 Cal. Rptr. 3d 737* (court refused to set aside voluntary declaration of paternity filed by one man on motion of another man who was shown by genetic testing to be child's biological father when court found that setting aside declaration was not in child's best interests and that the biological father was not a presumed father because he had done nothing to assert his parental responsibilities or to secure child's custody)]:

(A) The age of the child.

(B) The length of time since the execution of the voluntary declaration of paternity by the man who signed the voluntary declaration.

(C) The nature, duration, and quality of any relationship between the man who signed the voluntary declaration and the child, including the duration and frequency of any time periods during which the child and the man who signed the voluntary declaration resided in the same household or enjoyed a parent-child relationship.

(D) The request of the man who signed the voluntary declaration that the parent-child relationship continue.

(E) Notice by the biological father of the child that he does not oppose preservation of the relationship between the man who signed the voluntary declaration and the child.

(F) The benefit or detriment to the child in establishing the biological parentage of the child.

(G) Whether the conduct of the man who signed the voluntary declaration has impaired the ability to ascertain the identity of, or get support from, the biological father.

(H) Additional factors deemed by the court to be relevant to its determination of the best interest of the child.

If the court denies the action, the court must state on the record the basis for the denial of the action and any supporting facts [*Fam. Code § 7575(b)(2)*].

[b] Pre-1997 Declarations

Special provisions apply to declarations signed on or before December 31, 1996. The "conclusive" presumption that a man executing such a declaration is the child's father may be rebutted by requesting blood or genetic tests. The notice of motion for these tests must be supported by a declaration under oath submitted by the moving party, stating the factual basis for placing the issue of paternity before the court. The motion must be made within three years from the date of execution of the declaration by the attesting father or the attesting mother, whichever signature is later. The two-year statute of limitations specified in *Fam. Code § 7541(b)* is not applicable for purposes of this provision [*Fam. Code § 7576(d)*]. In any action to rebut the presumption, a voluntary declaration of paternity is admissible as evidence to determine the paternity of the child named in the declaration [*Fam. Code § 7576(c)*].

[8] Action or Motion to Set Aside Declaration

The mother, the man who signed the declaration, or a local child support agency may also file an action or motion to set aside the declaration on any of the grounds described in, and within the time limits specified by, *Code Civ. Proc. § 473* [*see County of Los Angeles v. Pattinson (2002) 102 Cal. App. 4th 1337, 1345-1346, 126 Cal. Rptr. 2d 350* (county has standing to bring motion to set aside voluntary declaration)]. The man who signed the declaration must be made a party to any proceeding to set the voluntary declaration aside [*County of Los Angeles v. Pattinson (2002) 102 Cal. App. 4th 1337, 1343-1345, 126 Cal. Rptr. 2d 350]* . If the action or motion is based on fraud or perjury, the act must have induced the defrauded parent to sign the declaration [*Fam. Code § 7575(c)(1)*]. If the action or motion to set aside a judgment is required to be filed within a specified time period under *Code Civ. Proc. § 473*, the period within which the action or motion to set aside a voluntary declaration of paternity must be filed will commence on the date that the court makes an initial order for custody, visitation, or child support based on a voluntary declaration of paternity [*Fam. Code § 7575(c)(1)*].

Hearing procedures to set aside a voluntary declaration of paternity are described in *Cal. Rules of Ct., Rule 5.350*. Under that rule, a person who has signed a voluntary declaration of paternity and who seeks to set it aside must file a completed Judicial Council form of Request for Hearing and Application to Set Aside Voluntary Declaration of Paternity [*Cal. Rules of Ct., Rule 5.350(b)*; *see* Cal. Judicial Council Form FL-280; *see § 412.143*]. The court clerk, on receipt of the completed form, must assign a case number and schedule a court date, which must be no earlier than 31 days after the filing date, and no later than 45 days after the filing date [*Cal. Rules of Ct., Rule 5.350(c)*]. The moving party must serve, either by personal service or mail, the request for hearing and a blank Judicial Council form of Responsive Declaration to Application to Set Aside Voluntary Declaration of Paternity on the other person who signed the paternity declaration [*Cal. Rules of Ct., Rule 5.350(d)*; *see* Cal. Judicial Council Form FL-285; *see § 412.144*]. If a local child support agency is providing services in the case, the moving party must also serve a copy of the request for hearing on the agency [*Cal. Rules of Ct., Rule 5.350(d)*]. A court's decision on the set aside action or motion is required

to be set forth on the Judicial Council form of Order After Hearing on Motion to Set Aside Voluntary Declaration of Paternity. If the court orders the declaration set aside, the court clerk must mail a copy of the order to the Department of Child Support Services in order to ensure that the paternity declaration is purged from the records [*Cal. Rules of Ct., Rule 5.350(e)*; *see* Cal. Judicial Council Form FL-290; *see § 412.145*].

The parent seeking to set aside the declaration has the burden of proof [*Fam. Code § 7575(c)(2)*]. Any order for custody, visitation, or child support remains in effect until the court determines that the declaration should be set aside, subject to the court's power to modify these orders as otherwise provided by law [*Fam. Code § 7575(c)(3)*].

If the declaration is thus set aside (pursuant to *Family Code Section 7575(c)(1)*), the court must order the mother, child, and alleged father to submit to blood or genetic tests. If it finds that the conclusions of all the experts, as disclosed by the evidence based on the blood or genetic tests, are that the alleged father is not the child's father, it must resolve the question of paternity accordingly. If the alleged father is not excluded as a possible father, the court must resolve the question of paternity as otherwise provided by law. If the alleged father is ultimately determined to be the child's father, any child support that accrued under an order based on the declaration remains due and owing [*Fam. Code § 7575(c)(5)*]. These statutory provisions do not restrict a court from acting as a court of equity [*Fam. Code § 7575(c)(4)*]. Note that pleadings in any such subsequent proceedings that involve the parties and child named in a voluntary declaration of paternity must be filed in the court file that was initiated by the filing of the Request for Hearing and Application to Set Aside Voluntary Declaration of Paternity [*Cal. Rules of Ct., Rule 5.350(f)*].

[9] Limits on Health Care Provider Liability

No health care provider is subject to any civil, criminal, or administrative liability for any negligent act or omission relative to the accuracy of the information provided, or for filing a declaration of paternity with the appropriate state or local agencies [*Fam. Code § 7571(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceInferences & PresumptionsGeneral OverviewEvidenceInferences & PresumptionsRebuttal of PresumptionsFamily LawPaternity & SurrogacyEstablishing PaternityFather's AcknowledgmentFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage ActFamily LawPaternity & SurrogacyProof of PaternityPresumptionsGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityPresumptionsRebuttals

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B. Presumptions of Paternity

35-412 California Forms of Pleading and Practice--Annotated § 412.35

§ 412.35 Child Conceived by Artificial Insemination

If a woman is artificially inseminated with the semen of a man who is not her husband, her husband is treated in law as the natural father of the child thereby conceived [*Fam. Code § 7613(a)*]. The objective of the artificial insemination statute is to establish two legal parents for the child [*Alexandria S. v. Pacific Fertility Medical Center, Inc. (1997) 55 Cal. App. 4th 110, 126, 64 Cal. Rptr. 2d 23]* . The artificial insemination must have been conducted under the supervision of a licensed physician and surgeon and with the consent of the woman's husband [*Fam. Code § 7613(a)*]. As discussed futher below, the husband's written consent is sufficient to establish his paternity, even if his signature on the consent form has not been certified [*AlexandriaS. v. Pacific Fertility Medical Center, Inc. (1997) 55 Cal. App. 4th 110, 126, 64 Cal. Rptr. 2d 23]* .

The donor of semen provided to a licensed physician or to a licensed sperm bank for use in artificial insemination or in vitro fertilization of a woman other than the donor's wife is treated as if he were not the natural father of the child [*Fam. Code § 7613(b)*]. To be a donor under section 7613(b), a man must provide semen to a physician to artificially inseminate a woman other than his wife. If the man provides his semen for the exclusive use of himself and his wife, section 7613(b) does not apply to exclude him as the child's natural father [*Robert B. v. Susan B. (2003) 109 Cal. App. 4th 1109, 1113-1114, 135 Cal. Rptr. 2d 785]* .

These rules operate as a conclusive presumption of the husband's and not the donor's paternity of a child born as a result of artificial insemination if the conditions are met [*see Fam. Code § 7541(e)(2),(3)* (rebuttal of husband's paternity by blood test evidence does not apply to artificial insemination)].

The husband's consent must be in writing and signed by both the husband and wife [*Fam. Code § 7613(a)*]. The physician and surgeon must certify the signatures and the date of the insemination and retain the husband's consent as part of the medical record. The consent must be kept confidential in a sealed file. However, the physician's failure to follow these procedures does not affect the father-child relationship [*Fam. Code § 7613(a)*; *Alexandria S. v. Pacific Fertility Medical Center, Inc. (1997) 55 Cal. App. 4th 110, 126, 64 Cal. Rptr. 2d 23* ; *cf. Shin v. Kong (2000) 80 Cal. App. 4th 498, 504-506, 95 Cal. Rptr. 2d 304* (husband does not have tort cause of action against his former wife's physician who performed artificial insemination without husband's consent; *Fam. Code § 7613* is inapplicable because

it is limited to determination of identity of child's father, and does not address physician's liability)]. Certification of the signatures is immaterial to the issue of *consent* of the husband, but may be relevant if a party claims a signature is not authentic [*Alexandria S. v. Pacific Fertility Medical Center, Inc. (1997) 55 Cal. App. 4th 110, 126, 64 Cal. Rptr. 2d 23]* . All papers and records pertaining to the insemination, whether part of the permanent record of a court or held by the supervising physician or elsewhere, are subject to inspection only by order of the court on good cause shown [*Fam. Code § 7613(a)*; *see Johnson v. Superior Court (2000) 80 Cal. App. 4th 1050, 1067-1069, 95 Cal. Rptr. 2d 864* (parentswere entitled to order compelling sperm donor's deposition and to order for production of donor's medical records in parents' action against sperm bank arising from alleged transmission of serious disease to child from sperm donor)].

The requirements that the semen be donated to and the insemination be under the supervision of a licensed physician and surgeon must be met. If the semen is provided and the woman inseminated privately, the presumption does not operate and the donor may establish his paternity of the child [*Jhordan C. v. Mary K. (1986) 179 Cal. App. 3d 386, 391-397, 224 Cal. Rptr 530* (rejecting constitutional challenge to physician requirement)].

For discussion of the artificial insemination of an unmarried woman, see*§ 412.13[3]*. For discussion of the applicability of *Fam. Code § 7613* to surrogacy birth arrangements in which a surrogate mother is artificially inseminated with the sperm of the intended father, see Ch. 12, *Adoptions: Nature and Effect* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityEvidenceGeneral OverviewFamily LawPaternity & SurrogacySurrogacyAssisted Reproduction Parentage

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[Reserved]

§§ 412.36[Reserved]

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35-412 California Forms of Pleading and Practice--Annotated § 412.50

§ 412.50 Order for Blood/Genetic Tests

[1] Governing Law

The Uniform Act on Blood Tests to Determine Paternity is codified in California in *Fam. Code § 7550 et seq.* and governs the use of scientific tests to determine parentage. Operative January 1, 1998, except for the name of the Act, which remains the same, the provisions of the Act now refer to the broad term "genetic," rather than simply, "blood," testing [*see, e.g., Fam. Code § 7551*]. "Genetic tests" means any genetic test that is generally acknowledged as reliable by accreditation bodies designated by the United States Secretary of Health and Human Services [*Fam. Code § 7551*].

[2] Court Order for Testing

In any civil action or proceeding in which paternity is a relevant fact, the court must order the mother, child, and alleged father to submit to genetic tests on the motion of any party to the action made at a time so as not to delay the proceedings unduly. Also, the court may order such tests on its own initiative, or on suggestion made by or on behalf of any person who is involved [*Fam. Code § 7551*].

The court may only order tests of the persons specifically mentioned in the statute; that is, the mother, the child, and the alleged father. Tests of other persons may not be ordered [*William M. v. Superior Court (1990) 275 Cal. Rptr. 103* (in decision under predecessor statute, parents of deceased putative father not subject to order for blood tests); *Estate of Sanders (1992) 2 Cal. App. 4th 462, 468, 3 Cal. Rptr. 2d 536* (mothers of deceased putative father's other children not subject to order for blood tests); *see Fam. Code § 7551*].

Taken in its context, the term "alleged father" as used in the statute appears to mean the man actually charged by the petition or complaint with being the father of the child, rather than any other man later injected into the case as one with whom the mother had sexual intercourse during the period of possible conception. On the other hand, the statutes do not expressly exclude tests of other men, and that evidence is therefore admissible [*Huntingdon v. Crowley (1966) 64 Cal. 2d 647, 652, 51 Cal. Rptr. 254, 414 P.2d 382* (construing substantively identical predecessor statute)].

The request for an order for genetic tests must be made within a reasonable time before the hearing. What constitutes a

reasonable time is left to the discretion of the trial court, which should take into consideration the facilities for examination. The requirement of early application for the test is intended to permit the results to become known before the trial. Early application also permits the taking of additional tests if the accuracy of the first test is questioned [*Huntingdon v. Crowley (1966) 64 Cal. 2d 647, 651-652, 51 Cal. Rptr. 254, 414 P.2d 382]* . In one case, by waiting until his petition for presumptive father status was denied and requesting genetic testing on appeal, a man waived the right to request genetic testing [*In re Kiana A. (2001) 93 Cal. App. 4th 1109, 1118, 113 Cal. Rptr. 2d 669]* .

For forms for use with regard to a motion for genetic testing, see§§ 412.136-412.138.

[3] Administrative Order by Local Child Support Agency

When support enforcement services are being provided by the local child support agency in a support enforcement action (*see* Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*), the support agency may issue an administrative order requiring the mother, child, and alleged father to submit to genetic testing in any civil action or proceeding in which paternity is a relevant fact and the issue of paternity is contested [*Fam. Code § 7558(a),(b)*].

The order may be issued only if one of the following conditions exists [*Fam. Code § 7558(b)*]:

- The person alleging paternity has signed a statement under penalty of perjury that contains facts establishing a reasonable possibility of the requisite sexual conduct between the mother and the alleged father;

- The person denying paternity has signed a statement under penalty of perjury that contains facts establishing a reasonable possibility of the nonexistence of the requisite sexual contact between the parties;

- The alleged father has filed an answer in the action or proceeding and has requested that genetic tests be performed; or

- The mother and the alleged father agree, in writing, to submit to genetic tests.

The support agency may not order an individual to submit to genetic tests if that individual has been found to have good cause for failing to cooperate in the determination of paternity pursuant to statute [*Fam. Code § 7558(c)* (referring to *Welf. & Inst. Code § 11477*)].

The support agency must pay the costs of any genetic tests that the agency orders. The county may obtain a court order for reimbursement from the alleged father if paternity is established [*Fam. Code § 7558(d)*].

Any person who has been ordered by the support agency to submit to genetic tests may file a noticed motion with the court in the action or proceeding in which paternity is a relevant fact, seeking relief from the agency's order. The court must resolve the issue of whether genetic tests should be ordered as provided in *Fam. Code § 7551* [*Fam. Code § 7558(e)*].

If a person refuses to submit to the tests after receiving the support agency's order and fails to seek the court's relief from the order either before the scheduled tests or within 10 days after the tests are scheduled, the court may resolve the question of paternity against that person or may enforce the support agency's order if the rights of others or the interest of justice so require [*Fam. Code § 7558(e)*]. The person's refusal to submit to the tests is admissible in evidence in any proceeding to determine paternity if a noticed motion for relief is not filed with the court within the timeframe specified. This rule does not apply if the person had good cause for failing to cooperate in determining paternity as provided by

statute [*Fam. Code § 7558(c),(e)* (referring to *Welf. & Inst. Code § 11477*)].

If the original test result creates a rebuttable presumption of paternity under *Fam. Code § 7555* and the result is contested, the support agency must order an additional test only on request of and advance payment by the contestant [*Fam. Code § 7558(f);§ 412.30*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityEvidenceBlood TestsFamily LawPaternity & SurrogacyProof of PaternityEvidenceGenetic TestsFamily LawPaternity & SurrogacyProof of PaternityPresumptionsGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityPresumptionsRebuttals

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§ 412.51 Exclusionary and Inclusionary Functions; Probability of Paternity

Blood or genetic tests can conclusively exclude a particular person as the biological parent of the child [*see Jackson v. Jackson (1967) 67 Cal. 2d 245, 248, 60 Cal. Rptr. 649, 430 P.2d 289* ; *Everett v. Everett (1984) 150 Cal. App. 3d 1053, 1065, 201 Cal. Rptr. 351]* . This function is called the exclusionary factor. However, blood or genetic testing cannot conclusively establish paternity [*County of El Dorado v. Misura (1995) 33 Cal. App. 4th 73, 78, 38 Cal. Rptr. 2d 908]* . The obverse of the exclusionary factor, sometimes referred to as the inclusionary result, is the finding that an individual cannot be excluded as the father of the child. Among those not excluded, blood or genetic testing yields a "probability of paternity" result, which is the statistical finding that there is a given numerical probability that the man is actually the child's father. The probability of paternity is expressed as a percent of 100 [*see County of Sonoma v. Grant W. (1986) 187 Cal. App. 3d 1439, 1446]* . However, the probability of paternity must take into account the nongenetic or "soft" evidence in the case [*see County of El Dorado v. Misura (1995) 33 Cal. App. 4th 73, 80, 38 Cal. Rptr. 2d 908* (explanation of how laboratories convert soft evidence into statistics based on number of mother's sexual partners during possible period of conception)]. Therefore, an expert is unqualified to state that any single figure is a man's probability of paternity because such a statement requires an estimation of the strength of the other evidence in the case, an estimation that the expert is in no better position to make than the trier of fact [*County of El Dorado v. Misura (1995) 33 Cal. App. 4th 73, 81, 38 Cal. Rptr. 2d 908]* . For further discussion of the relationship between scientific evidence and other evidence, see*§ 412.84[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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C. Blood and Genetic Testing for Parentage

35-412 California Forms of Pleading and Practice--Annotated § 412.52

§ 412.52 What Tests Must Be Ordered

[1] The Human Leukocyte Antigen (HLA) Test

There are many different kinds of scientific tests that have been used to determine paternity. The development of paternity testing technology as of 1984 is discussed in some detail in *Everett v. Everett* [*see Everett v. Everett (1984) 150 Cal. App. 3d 1053, 1062-1075, 201 Cal. Rptr. 351* ; *see also* D Isputed Paternity Proceedings, chs. 5-8 (Matthew Bender)].

The Uniform Act on Blood Tests to Determine Paternity does not name any particular genetic test or specify which tests may be ordered but does define "genetic tests" as "any test that is generally acknowledged as reliable by accreditation bodies designated by the United States Secretary of Health and Human Services" [*Fam. Code § 7551*]. One test that has been scientifically and legally accepted, and that is most commonly used currently in California is blood test known as the Human Leukocyte Antigen (HLA) test [*see Cramer v. Morrison (1979) 88 Cal. App. 3d 873, 877-878, 153 Cal. Rptr. 865 (HLA test briefly explained)]* . This test must be ordered if a timely request is made by a party [*Everett v. Everett (1984) 150 Cal. App. 3d 1053, 1066-1067, 201 Cal. Rptr. 351* ; *County of Fresno v. Superior Court (1979) 92 Cal. App. 3d 133, 137, 138, 154 Cal. Rptr. 660* ; *see § 412.50*].

[2] Additional Blood Tests

The HLA test can exclude 78 percent of males wrongfully accused as fathers. When it is combined with six other blood group systems [*see Everett v. Everett (1984) 150 Cal. App. 3d 1053, 1065, 201 Cal. Rptr. 351* (explaining blood grouping systems)], the exclusionary factor increasesto 93 percent, depending on racial distinctions and variations [*County of Sonoma v. Grant W. (1986) 187 Cal. App. 3d 1439, 1445-1446]* . Therefore, the possibility that a man can be excluded as the father is increased if additional tests are performed; conversely, the failure of additional tests to result in exclusion increases the probability of paternity [*see Everett v. Everett (1984) 150 Cal. App. 3d 1053, 1067, 201 Cal. Rptr. 351]* .

Additional testing must be ordered by the court on proper motion absent extreme hardship [*Everett v. Everett (1984) 150 Cal. App. 3d 1053, 1064, 201 Cal. Rptr. 351]* . This is true whether the test is one that has obtained general

scientific acceptance or one that has yet to be developed or fully accepted in the scientific community [*Everett v. Everett (1984) 150 Cal. App. 3d 1053, 201 Cal. Rptr. 351* ; *but see Fam. Code § 7551* (now providing that "genetic" tests that may be ordered means any genetic test that is generally acknowledged as reliable by accreditation bodies designated by Secretary of U.S. Health and Human Services)].

However, because of the number of possible tests that might be ordered, the court must strike a balance between the costs involved, the danger of harassment, the inconvenience to the parties on the one hand, and the increased ability to determine paternity based on the cumulative effect of the results from a number of tests on the other hand. If an objection is made to a request for a specific test, the party seeking the test must make a minimal showing that the probative value of the result will outweigh the financial burden and inconvenience to the party sought to be tested. If the showing is not made, the trial court may properly reject the request. Repeated requests for additional blood tests that are designed to annoy, harass, or embarrass a party, rather than to produce reliable scientific evidence, may also be denied by the court [*Everett v. Everett (1984) 150 Cal. App. 3d 1053, 1067, 201 Cal. Rptr. 351]* .

[3] DNA Testing

In the not-too-distant future, the HLA blood test may be supplanted by the DNA (deoxyribonucleic acid) typing process as the primary scientific tool to establish paternity. Some counties in California have already replaced the HLA tests with DNA tests for paternity determinations.

DNA typing is based on the principle that each individual (except for identical twins) has a unique configuration of DNA in virtually every nucleated cell in his or her body. Half of the DNA in these cells is inherited from each parent. In a paternity dispute, the identity of the mother is usually known. DNA is taken from the child, the mother, and the alleged father. If half of the child's DNA pattern matches the mother, the other half must match the alleged father for paternity to be possible [*see In re Paternity of J.L.K. (1989) 151 Wis. 2d 566, 445 N.W. 2d 673, 674]* .

If the alleged father does match half of the child's DNA, the frequency of the alleged parent's matching pattern is determined by reference to major racial group databases. Probability of paternity and paternity index calculations are then performed [*see People v. Barney (1992) 8 Cal. App. 4th 798, 805, 10 Cal. Rptr. 2d 731]* . The science of DNA testing is explained further in *People v. Barney* [*People v. Barney (1992) 8 Cal. App. 4th 798, 806-810, 10 Cal. Rptr. 2d 731]* , *People v. Axell* [*People v. Axell (1991) 235 Cal. App. 3d 836, 844-848, 1 Cal. Rptr. 2d 411]* , and in, D Isputed Paternity Proceedings, Ch. 13 (Matthew Bender).

Unlike the HLA test, DNA testing can be performed on any human tissue or fluid that contains cells with nuclei [*see People v. Barney (1992) 8 Cal. App. 4th 798, 806, 10 Cal. Rptr. 2d 731* ; *People v. Axell (1991) 235 Cal. App. 3d 836, 845 n.1, 1 Cal. Rptr. 2d 411]* , not just on blood. However, it is commonly performed on blood. Note that amendments to the Uniform Act on Blood Tests to Determine Paternity, operative January, 1998, require "genetic testing," [*Fam. Code § 7551*] and while the amendments make no express reference to DNA testing, it appears likely that the Act requires the court to order DNA testing in a paternity action on a timely motion by a proper party [*but see Estate of Sanders (1992) 2 Cal. App. 4th 462, 468-478, 3 Cal. Rptr. 2d 536* discussed in *§ 412.14* (post-mortem DNA testing may not be ordered in heirship proceeding)].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceScientific EvidenceDNAFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityEvidenceBlood TestsFamily LawPaternity & SurrogacyProof of PaternityEvidenceGenetic Tests

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§ 412.53 Court-Appointed Expert Examiners

Under the Uniform Act on Blood Tests to Determine Paternity [*Fam. Code § 7550 et seq.*], the required "genetic tests" must be performed by a laboratory approved by an accreditation body that has been approved by the Secretary of the United States Department of Health and Human Services [*Fam. Code § 7552*]. This general statement of expert qualifications, operative January 1, 1998, replaced the provision that "experts qualified as examiners of blood types shall be appointed by the court" [*See* prior version of *Fam. Code § 7552*]. However, the operative section, *Fam. Code § 7552*, still provides that any party or person at whose suggestion the tests were ordered may demand that other experts, qualified as examiners of blood types, perform independent tests under order of the court, the results of which may be offered in evidence. The number and qualifications of the experts are determined by the court [*Fam. Code § 7552*].

Nothing in the Uniform Act prevents any party to the action from producing other expert evidence on blood tests [*Fam. Code § 7557*]. However, if the physician making the tests was not appointed by the court, the tests are not conclusive proof of nonpaternity [*Lyons v. Scott (1960) 181 Cal. App. 2d 787, 788, 5 Cal. Rptr. 529]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceScientific EvidenceBlood & Bodily FluidsEvidenceTestimonyExpertsCourt-Appointed ExpertsGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityEvidenceBlood Tests

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§ 412.54 Blood/Genetic Test Results

[1] Service and Declaration of Custodian

A copy of the results of all genetic tests performed under *Fam. Code § 7552* or *Fam. Code § 7558* must be served on all parties, by any methodof service authorized under *Code Civ. Proc. § 1010 et seq.*, except personal service, no later than twenty days before any hearing in which the test results may be admitted into evidence. The test results must be accompanied by a declaration under penalty of perjury of the custodian of records or other qualified employee of the laboratory that conducted the tests, stating in substance each of the following [*Fam. Code § 7552.5(a)*]:

(1) The declarant is the duly authorized custodian of the records or other qualified employee of the laboratory, and has authority to certify the records.

(2) A statement that establishes in detail the chain of custody of all genetic samples collected, including the date on which the sample was collected, the identity of each person from whom a genetic sample was collected, the identity of the person who performed or witnessed the collecting of the genetic samples and packaged them for transmission to the laboratory, the date on which the genetic samples were received by the laboratory, the identity of the person who unpacked the samples and forwarded them to the person who performed the laboratory analysis of the genetic sample, and the identification and qualifications of all persons who performed the laboratory analysis and published the results.

(3) A statement that establishes that the procedures used by the laboratory to conduct the tests for which the test results are attached are used in the laboratory's ordinary course of business to ensure accuracy and proper identification of genetic samples.

(4) The genetic test results were prepared at or near the time of completion of the genetic tests by personnel of the business qualified to perform genetic tests in the ordinary course of business.

If a genetic test reflects a paternity index of 100 or greater, the copy of the test results mailed to the parties must be

accompanied with a voluntary declaration of paternity form and information prepared according to *Fam. Code § 7572* [*Fam. Code § 7552.5(d)*].

[2] Objection to Admissibility

The fact that a particular genetic test must be ordered does not make its results automatically admissible as evidence. The results are still subject to the rules of evidence, and their admissibility depends on a showing of relevance and the laying of an adequate foundation in the forum of a pretrial evidentiary hearing [*Everett v. Everett (1984) 150 Cal. App. 3d 1053, 1068, 201 Cal. Rptr. 351* ; *cf. County of Alameda v. Risby (1994) 28 Cal. App. 4th 1425, 1428-1430, 34 Cal. Rptr. 2d 333* (stipulation to admissibility of blood tests not violative of public policy); § 412.54[3]].

However, the genetic test results must be admitted into evidence at the hearing or trial to establish paternity, without the need for foundation testimony of authenticity and accuracy, unless any party files a written objection to the test results with the court and serves it on all other parties. Filing and service must be accomplished no later than five days before the hearing or trial at which paternity is at issue [*Fam. Code § 7552.5(b)*]. If a written objection is filed and served within the specified time, the experts appointed by the court must be called by the court as witnesses to testify to their findings and are subject to cross-examination by the parties [*Fam. Code § 7552.5(c)*].

[3] Scientific Foundation

The standard for admissibility of evidence based on developing scientific technology in California is the *Kelly-Frye* test [*Estate of Sanders (1992) 2 Cal. App. 4th 462, 476 n.18, 3 Cal. Rptr. 2d 536* ; *see People v. Kelly (1976) 17 Cal. 3d 24, 130 Cal. Rptr. 144, 549 P.2d 1240* ; *Frye v. United States (D.C. Cir. 1923) 293 F. 1013* ; *see People v. Leahy (1994) 8 Cal. 4th 587, 591, 34 Cal. Rptr. 2d 663, 882 P.2d 321* (*Kelly-Frye* test reaffirmed)]. This test requires a preliminary showing of general acceptance of a new technology in the relevant scientific community; the witness furnishing the testimony must be properly qualified as an expert to give an opinion on the subject; and the proponent of the evidence must demonstrate that correct procedures were used in the particular case [*People v. Kelly (1976) 17 Cal. 3d 24, 30, 130 Cal. Rptr. 144, 549 P.2d 1240]* . The HLA test is well established under this standard [*see County of Sonoma v. Grant W. (1986) 187 Cal. App. 3d 1439, 1445-1446, 232 Cal. Rptr. 471]* . If a particular test is admissible, the Uniform Act on Blood Tests to Determine Paternity makes the statistical probability of paternity admissible to show the probability of the alleged father's paternity [*see Fam. Code § 7554(b)*]. For further discussion, see*§ 412.52*.

To date, no California court has directly addressed the admissibility of DNA testing in the paternity context [*cf. In re Paternity of J.L.K. (1989) 151 Wis. 2d 566, 445 N.W. 2d 673* (finding DNA testing admissible under state statute; no *Frye* foundational hearing required); *Alexander v. Alexander (1988) 42 Ohio Misc. 2d 30, 34, 537 N.E. 2d 1310* (DNA tests admitted in heirship proceeding; judicial notice that accuracy and infallibility of DNA test are "nothing short of remarkable")]. One court of appeal has at least suggested that DNA testing has sufficiently advanced to be used in paternity proceedings, but, in the absence of legislative action, declined to apply it in an heirship proceeding brought by one alleging to be the child of the deceased [*Estate of Sanders (1992) 2 Cal. App. 4th 462, 476, n. 18, 3 Cal. Rptr. 2d 536]* . However, operative January 1, 1998, the Uniform Act requires "genetic testing" [*Fam. Code § 7551*], and while the Act makes no express reference to DNA testing, it seems highly probable--subject to further construction of this term by courts or clarification by statute--that DNA testing would be included within the ambit of the Act's permissible standard, namely, "any genetic test that is generally acknowledged asreliable by accreditation bodies designated by the United States Secretary of Health and Human Services" [*Fam. Code § 7551*].

Under preexisting case law, a defendant may stipulate to the admissibility of blood tests, even if not represented by counsel at the time of the stipulation. By so stipulating, the defendant waives any right to object to the admissibility of the test results under the *Kelly-Frye* test. However, the defendant may still present foundation evidence to attack the weight to be given to the test results [*County of Alameda v. Risby (1994) 28 Cal. App. 4th 1425, 1428-1430, 34 Cal. Rptr. 2d 333]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceAuthenticationChain of CustodyEvidenceScientific EvidenceBlood & Bodily FluidsEvidenceScientific EvidenceDaubert StandardEvidenceScientific EvidenceDNAEvidenceTestimonyExpertsKelly-Frye ProcessFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityEvidenceGenetic Tests

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§ 412.55 Effect of Experts' Conclusions

If the court finds that the conclusions of all the experts, as disclosed by the evidence based on the tests, are that the alleged father is not the father of the child, the question of paternity must be resolved accordingly [*Fam. Code § 7554(a)*]. However, the case law has held that trier of fact cannot make a finding of paternity based solely on expert testimony and blood test results [*County of El Dorado v. Misura (1995) 33 Cal. App. 4th 73, 79, 38 Cal. Rptr. 2d 908]* . If the tests show a probability of paternity (*see* Exclusionary and Inclusionary Functions; Probability of Paternity), or if the experts disagree in their findings or conclusions, the question of the alleged father's paternity must be submitted on all the evidence [*Fam. Code § 7554(b)*]. The court has the discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will require undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury [*Fam. Code § 7554(b)*; *see Evid. Code. § 352*].

The results of genetic tests may produce a paternity index of such significance so as to give rise to a rebuttable presumption that the man tested is the father of the child [*see Fam. Code § 7555*]. This presumption is discussed further in *§ 412.33*.

The statistical result of the test, expressed as the probability of paternity in relation to 100 percent (*see* Exclusionary and Inclusionary Functions; Probability of Paternity, *above*) may not be admitted through the testimony of a laboratory technologist whose knowledge is limited to blood typing [*Alinda V. v. Alfredo V. (1981) 125 Cal. App. 3d 98, 101, 177 Cal. Rptr. 839* ; *see County of El Dorado v. Misura (1995) 33 Cal. App. 4th 73, 81]* . For discussion of the other evidence that may be presented in a paternity action, see*§ 412.84*.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceRelevanceConfusion, Prejudice & Waste of TimeFamily LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityEvidenceBlood TestsFamily LawPaternity & SurrogacyProof of PaternityEvidenceGenetic Tests

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35-412 California Forms of Pleading and Practice--Annotated § 412.56

§ 412.56 Refusal to Comply With Order for Tests

If a party refuses to submit to court-ordered genetic tests, the court may resolve the question of paternity against that party or enforce its order if the rights of others and the interests of justice so require [*Fam. Code § 7551*; *see County of El Dorado v. Schneider (1987) 191 Cal. App. 3d 1263, 1269-1283, 237 Cal. Rptr. 51* (predecessor statute found constitutional against father's contentions that it violated due process and right to trial by jury)]. In addition, a party's refusal to submit to court-ordered genetic tests is admissible in evidence in any proceeding to determine paternity [*Fam. Code § 7551*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityEvidenceGenetic Tests

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35-412 California Forms of Pleading and Practice--Annotated § 412.57

§ 412.57 Compensation of Experts

The compensation of each expert witness appointed by the court must be fixed at a reasonable amount and paid as the court orders. The court may order that it be paid by the parties in such proportions and at such times as it prescribes, or that the proportion of any party be paid by the county and that, after payment by the parties or the county or both, all or part or none of it be taxed as costs in the action [*Fam. Code § 7553*].

If the defendant is indigent and the child and mother are receiving public assistance, the compensation of the appointed experts must be fixed by the court and ordered paid by the county. The court cannot order prepayment by the indigent because a required prepayment could lead to serious deprivation of defenses available to the indigent defendant. The costs of the test may be later taxable to either party or the county, as discussed above [*Michael B. v. Superior Court (1978) 86 Cal. App. 3d 1006, 1010, 150 Cal. Rptr. 586* ; *see also Little v. Streater (1981) 452 U.S. 1, 9-17, 101 S. Ct. 2202, 68 L. Ed. 2d 627]* .

Fees of experts not appointed by the court, but called by the parties, are paid by the party calling them, and in such case, only ordinary witness fees may be taxed as costs in the action [*Fam. Code § 7557*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsWitnessesEvidenceTestimonyExpertsCourt-Appointed ExpertsGeneral OverviewEvidenceTestimonyExpertsCourt-Appointed ExpertsCompensation

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§ 412.58 Effect of Stipulations

The parties may stipulate as to the taking of blood/genetic tests to avoid the necessity of a motion. However, a stipulation that the conclusions of two out of three experts will be binding on the court is not to be given effect without prior court approval, even if it is agreed to by the child's guardian ad litem. Such a stipulation has the effect of depriving the child of his or her day in court, and therefore, is beyond the power of the guardian ad litem to make. It also deprives the court of jurisdiction given to it by law to admit all evidence applicable to a cause and to render judgment accordingly [*Berry v. Chaplin (1946) 74 Cal. App. 2d 652, 657-660, 169 P.2d 442* ; *see Robinson v. Wilson (1974) 44 Cal. App. 3d 92, 100-106, 118 Cal. Rptr. 569* (discussing *Berry* and cases cited therein)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawPaternity & SurrogacyProof of PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityEvidenceBlood TestsFamily LawPaternity & SurrogacyProof of PaternityEvidenceGenetic Tests

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[Reserved]

§§ 412.59[Reserved]

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D. The Parentage Action

35-412 California Forms of Pleading and Practice--Annotated § 412.70

§ 412.70 Who May Bring Paternity Action

[1] For Child With Presumed Father

An action to declare the existence of the father-child relationship based on a presumption that arises from the parents' marriage or attempted marriage [*see Fam. Code § 7611(a)-(c)*, discussed in *§ 412.30 et seq.*] may be brought at any time by the child, the child's natural mother, the presumed father, an adoption agency to whom the child has been relinquished, or a prospective adoptive parent of the child [*Fam. Code § 7630(a)(1)*]. Those same parties may also bring an action to declare the nonexistence of the father-child relationship based on those presumptions, but only within a reasonable time after obtaining knowledge of the relevant facts. If the presumption is rebutted, paternity of the child by another man may be determined in the same action if the other man has been made a party [*Fam. Code § 7630(a)(2)*; *see Robert J. v. Leslie M. (1997) 51 Cal. App. 4th 1642, 1646, 59 Cal. Rptr. 2d 905* (under *Fam. Code § 7630(a)(2)*, only presumed father may seek declaration of nonpaternity); *but see Said v. Jegan (2007) 146 Cal. App. 4th 1375, 1382-1385, 53 Cal. Rptr. 3d 661* (man's status as alleged father, because he was named as father on child's birth certificate, gives him standing to bring action to determine nonexistence of paternity; specifically disagreeing with *Robert J. v. Leslie M.*)].

The child's mother has standing to claim that a man is the child's presumed father under *Fam. Code § 7611(c)* or*(d)*, even if the man is not a party to the action [*Gabriel P. v. Suedi D. (2006) 141 Cal. App. 4th 850, 862, 46 Cal. Rptr. 3d 437]* . A man who is not the child's presumed father through marriage lacks standing to bring a paternity action to challenge the presumed father status of the birth mother's husband under *Fam. Code § 7611(c)* [*Gabriel P. v. Suedi D. (2006) 141 Cal. App. 4th 850, 858, 46 Cal. Rptr. 3d 437]* .

Any interested party may bring an action for the purpose of determining the existence or nonexistence of the father-child relationship presumed under *Fam. Code § 7611(d)*, which involves receipt of the child into the father's home and acknowledgment of paternity [*Fam. Code § 7630(b)*; *Brian C. v. Ginger K. (2000) 77 Cal. App. 4th 1198, 1221, 92 Cal. Rptr. 2d 294* ; *see* discussion in *§ 412.32[4]*]. Thus, for example, when a child was not "born into" an "extant marital family" and the biological father, mother, and child lived as a family for approximately one year after the child's birth, the biological father had attained presumed father status on the basis of "receiving the child into the

father's home," and therefore had statutory standing under *Fam. Code § 7630(b)* to bring an action to establish his paternity of the child [*Brian C. v. Ginger K. (2000) 77 Cal. App. 4th 1198, 1221, 92 Cal. Rptr. 2d 294]* . If the mother has placed the child for adoption, a man who alleges that he, rather than the presumed father, is the father of the child may bring an action for the purpose of declaring that he is the natural father of the child [*Fam. Code § 7631* (inapplicable in case of presumption arising from marriage and cohabitation under *Fam. Code § 7540*)]. Paternity actions in the context of adoption proceedings are discussed further in Ch. 12A, *Adoptions: Termination of Parental Rights* .

Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship presumed under *Fam. Code § 7611(f)*, which involves a child conceived with the man's genetic material and *in utero* after the man's death [*Fam. Code § 7630(b)*; *see Prob. Code § 249.5* (prescribing conditions under which presumption arises)].

Except in the situations discussed above, a man who alleges that he and not the presumed father is the actual father of the child has no statutory standing to bring a paternity action under the UPA for a declaration of his own paternity [*see Michael M. v. Giovanna F. (1992) 5 Cal. App. 4th 1272, 1278, 7 Cal. Rptr. 2d 460]* . However, this limitation on standing has been found to be constitutionally inadequate on some facts. An unwed biological father who attempts to create a relationship with his child promptly on the child's conception or birth has a constitutionally protected interest in that relationship [*Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 838, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* ; *In re J.L. (2008) 159 Cal. App. 4th 1010, 1023-1025, 72 Cal. Rptr. 3d 27* ; *Gabriel P. v. Suedi D. (2006) 141 Cal. App. 4th 850, 859-860, 46 Cal. Rptr. 3d 437* ; *In re Baby Boy V. (2006) 140 Cal. App. 4th 1108, 1118, 45 Cal. Rptr. 3d 198* ; *Michael M. v. Giovanna F. (1992) 5 Cal. App. 4th 1272, 1278-1280, 7 Cal. Rptr. 2d 460* ; *but see Dawn D. v. Superior Court (1998) 17 Cal. 4th 932, 937-938, 72 Cal. Rptr. 2d 871, 952 P.2d 1139* (unwed, alleged biological father who was not presumed father lacked standing to rebut presumption arising from birth of child during marriage, and had no due process right to establish personal relationship with child)]. If the child has not been placed for adoption but is being reared in an existing family unit, the alleged biological father's rights must be balanced against the interests of the family and the state in preserving family integrity. If the child is conceived by a married woman who is cohabiting with her husband at the time of the child's conception, the presumption of *Fam. Code § 7540* (that the husband is the father of the child) outweighs the rights of another man who alleges that he is actually the father, and a bar to standing is appropriate [*see Michael M. v. Giovanna F. (1992) 5 Cal. App. 4th 1272, 1282-1284, 7 Cal. Rptr. 2d 460* ; *see also* cases construing constitutionality of this presumption, discussed in *§ 412.31[3]*]. However, if the mother marries another man after conception, it is the presumption of *Fam. Code § 7611(a)* that applies (husband is father of child born during marriage). The husband is in the same position as any stepfather, being married to a woman who has had children by another man. This common situation offends no public policy that would protect the marriage from interference by the actual parent. In this case, the balance swings the other way, and the alleged biological father may not be denied standing to bring an action to establish his paternity and right to a parent-child relationship [*Michael M. v. Giovanna F. (1992) 5 Cal. App. 4th 1272, 1284-1285, 7 Cal. Rptr. 2d 460]* .

By contrast, an unwed, alleged biological father who is not a presumed father may not seek to rebut the presumption of *Fam. Code § 7611(a)* (husband is father of child born during marriage) when a child is born to a married woman who remains married both when the child is conceived and when it is born, and who lives with the alleged father only for a matter of weeks, even if conception occurs during that interval andthe man later desires to establish a relationship with the child. In such a circumstance,the alleged father has neither legal standing nor any constitutionally protected due process "liberty" interest in establishing a relationship with the child, despite his desire to do so [*Dawn D. v. Superior Court (1998) 17 Cal. 4th 932, 942-944, 72 Cal. Rptr. 2d 871, 952 P.2d 1139* ; *but cf. Brian C. v. Ginger K. (2000) 77 Cal. App. 4th 1198, 1221, 92 Cal. Rptr. 2d 294* (alleged biological father who was *presumed* father based on receipt of child into home had standing to establish paternity, despite facts that child's mother cohabited with husband at time of child's conception and remained married to him)].

[2] For Child With No Presumed Father

An action to determine the existence of the father-child relationship with respect to a child who has no presumed father (*see* Part B) or whose presumed father is deceased may be brought by the following [*Fam. Code § 7630(c)*]:

- The child or personal representative of the child;
- The state Department of Child Support Services;
- The mother or the personal representative or parent of the mother if the mother has died or is a minor; or
- A man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor [*see, e.g., Librers v. Black (2005) 129 Cal. App. 4th 114, 124-127, 28 Cal. Rptr. 3d 188* (mother's live-in boyfriend had standing under *Fam. Code § 7630* to bring paternity proceeding, based on presumption that he was child's natural father, which was established by his receipt of child into his home and his openly holding her out as his natural child; *but see Lisa I. v. Superior Court (2005) 133 Cal. App. 4th 605, 610-611, 34 Cal. Rptr. 3d 927* (man's claim that he is child's biological father is insufficient to give him statutory standing under *Fam. Code § 7630* to establish his paternity when he does not qualify as a presumed father under any provision of *Fam. Code § 7611*)].

A party to an assisted reproductive agreement may bring an action at any time to establish a parent-child relationship consistent with the intent expressed in that agreement [*Fam. Code § 7630(e)*]. For purposes of this provision, an "assisted reproduction agreement" means a written contract that includes a person who intends to be the legal parent of a child or children born through assisted reproduction and that defines the terms of the relationship between the parties to the contract [*Fam. Code § 7606(b)*].

The action must be consolidated with a proceeding under *Fam. Code § 7662* (termination of parental rights of alleged father over child who is subject of adoption proceeding) [*Fam. Code § 7630(d)(2)*]. One court has construed this language to permit termination of parental rights under *Fam. Code § 7630(c)*, even if there is no adoption proceeding pending and no proceeding has been filed for termination of parental rights under *Fam. Code § 7662* [*In re Shereece B. (1991) 231 Cal. App. 3d 613, 621, 282 Cal. Rptr. 430* (decided under predecessor statute)]. The parental rights of the alleged natural father are determined as set forth in *Fam. Code § 7664*. The consolidated action must be heard in the court in which the termination proceeding is filed, unless the court in which the paternity action is filed finds, by clear and convincing evidence, that transferring the action to the other court poses a substantial hardship to the petitioner. Mere inconvenience does not constitute a sufficient basis for a finding of substantial hardship. If the court determines there is a substantial hardship, the consolidated action must be heard in the court in which the paternity action is filed [*Fam. Code § 7630(d)(3)*]. For further discussion of termination of parental rights under the UPA, see Ch. 12A, *Adoptions: Termination of Parental Rights* .

If any prospective adoptive parent who has physical custody of the child, or any licensed California adoption agency that has legal custody of the child, has not been joined as a party to an action to determine the existence of a father-child relationship, or an action for custody by the alleged natural father, the court must join the prospective adoptive parent or licensed California adoption agency as a party on application or on its own motion, without the necessity of a motion for joinder [*Fam. Code § 7630(e)(1)*].

If a man brings an action to determine paternity and custody of a child who he has reason to believe is in the physical or legal custody of an adoption agency, or of one or more persons other than the child's mother who are prospective adoptive parents, then he must serve his entire pleading on and give notice of all proceedings to the adoption agency or the prospective adoptive parents, or both [*Fam. Code § 7630(e)(2)*].

If a child has no presumed father when the action is brought by a man alleging himself to be the father, the mother's marriage to another man before the child is born does not require that the action be dismissed [*see Fam. Code § 7633* (action may be brought before birth of child); *see also § 412.73*]. However, the rebuttable presumption that a child born during the marriage is the child of the husband [*Fam. Code § 7611(a)*] then attaches, and the plaintiff is required to carry the burden of rebutting the presumption [*Fuss v. Superior Court (1991) 228 Cal. App. 3d 556, 561-563, 279 Cal. Rptr. 46]* .

[3] Local Child Support Agency

The local child support agency may bring an action under the UPA to determine the existence or nonexistence of the father-child relationship in any case in which it believes the action to be appropriate [*Fam. Code § 7634*]. The agency might proceed, for example, in a case of criminal nonsupport for a child. The responsible support agency is required to take action to establish, modify, and enforce child support orders when a child is receiving public assitance, in the context of which a final determination of parentage may be made as an incident to obtaining an order for support [*see Fam. Code §§ 17400(a), 17404(a)*]. Further, in any action or proceeding brought by a local child support agency to establish parentage, the court must enter a judgment establishing parentage if the parties file a written stipulation that is accompanied by a written advisement and waiver of rights signed by the defendant [*Fam. Code § 17414*]. A judgment establishing paternity entered in such an action is determinative of the paternity issue. Parties to the litigation and those in privity with them areprecluded by the principles of res judicata and collateral estoppel from relitigating the issue [*see Robert J. v. Leslie M. (1997) 51 Cal. App. 4th 1642, 1647-1648, 59 Cal. Rptr. 2d 905]* . Once paternity has been established by a judgment, the public policies of maintaining parent-child relationships and ensuring the finality of paternity judgments have been held significantly important to preclude persons, other than the child, who were not parties or privies to the paternity action, from relitigating the paternity issue [*see Guardianship of Claralyn S. (1983) 148 Cal. App. 3d 81, 85, 195 Cal. Rptr. 646]* .

An action brought by the responsible child support agency for the support of a minor child may be prosecuted in the name of the county on behalf of the minor [*Fam. Code § 17406(a)*]. However, the support agency represents the public interest in bringing an action under the Uniform Parentage Act. No attorney-client relationship is created between the agency and any person (such as the mother or child) by virtue of the acts of the agency in carrying out the statutory duties [*Fam. Code § 17406*]. For further discussion of actions brought by the local child support agencies, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewEvidenceInferences & PresumptionsGeneral OverviewEvidenceInferences & PresumptionsRebuttal of PresumptionsFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage ActFamily LawPaternity & SurrogacyProof of PaternityPresumptionsGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityPresumptionsRebuttals

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§ 412.71 Other Parties to Action

[1] Child Whose Parentage Is at Issue

By statute, a child 12 years of age or older must be made a party to the action [*Fam. Code § 7635(a)*]. Therefore, if a child who is 12 or older is not joined, the failure to join the indispensable party deprives the court of jurisdiction, and a judgment made under these circumstances is void [*Perez v. Department of Health (1977) 71 Cal. App. 3d 923, 927, 138 Cal. Rptr. 32]* .

Joinder is not mandatory for a child under 12 years of age [*Fam. Code § 7635(a)*]. However, the subsequent judgment may not be res judicata with regard to the child [*County of Shasta v. Caruthers (1995) 31 Cal. App. 4th 1838, 1843-1844, 38 Cal. Rptr. 2d 18* ; *see Ruddock v. Ohls (1979) 91 Cal. App. 3d 271, 276-277, 154 Cal. Rptr. 87* , discussed in *§ 412.72*; *see also Weir v. Ferreira (Estate of Kelm) (1997) 59 Cal. App. 4th 1509, 1516, 70 Cal. Rptr. 2d 33* (if parentage determination was made as part of marital dissolution, it may be challenged by subject child)]. Therefore, consideration should always be given to making the child a party regardless of the nonmandatory language [*compare Fam. Code § 7570(a)* (Legislature's declaration of policy favoring child's right to know who is actual biological father) *with Comino v. Kelley (1994) 25 Cal. App. 4th 678, 30 Cal. Rptr. 2d 728* (in which judgment of paternity was entered despite absence of any scientific evidence of paternity)]. One court has gone so far as to question whether a child's interests can ever be adequately represented if the child is not a party to the action [*County of Shasta v. Caruthers (1995) 31 Cal. App. 4th 1838, 1847, 38 Cal. Rptr. 2d 18]* .

[2] Other Parties

The natural mother, each man presumed to be the father under *Fam. Code § 7611*, and each man alleged to be the natural father may be made parties to a paternity action, and must be given notice of the action and an opportunity to be heard [*Fam. Code § 7635(b)*]. The court has discretion to align the parties as plaintiffs and defendants [*Fam. Code § 7635(c)*].

Whether the provision permitting any alleged natural father to be made a party authorizes the defendant in a paternity action brought by the mother or child or both to file a cross-complaint against another man alleging that man to be the

father is not clear. Under prior law, it was held that such a cross-complaint was improper because the defendant had no cause of action against the other man [*Alexander v. Superior Court (1959) 170 Cal. App. 2d 54, 56-57, 338 P.2d 502]* .

In addition to the potential parties discussed above, de facto parents are proper parties to paternity actions [*Perez v. Department of Health (1977) 71 Cal. App. 3d 923, 926-927, 138 Cal. Rptr. 32* ; *see also In re Reyna (1976) 55 Cal. App. 3d 288, 305, 126 Cal. Rptr. 138]* . A "de facto parent" is a person who, on a day-to-day basis, assumes the role of parent, seeking to fulfill both the child's physical needs and his or her psychological need for affection and care [*In re B.G. (1974) 11 Cal. 3d 679, 692 n.18, 114 Cal. Rptr. 444, 523 P.2d 244* ; *Perez v. Department of Health (1977) 71 Cal. App. 3d 923, 926, 138 Cal. Rptr. 32]* .

In any proceeding in which child support is at issue, a county that has provided financial assistance to a custodial parent is an indispensable party [*In re Marriage of Mena (1989) 212 Cal. App. 3d 12, 19, 260 Cal. Rptr. 314* ; *In re Marriage of Lugo (1985) 170 Cal. App. 3d 427, 430, 432-433, 217 Cal. Rptr. 74* ; *see Fam. Code § 7637* (support orders in paternity judgment)]. For a discussion of support orders in general, see Ch. 224, *Dissolution of Marriage: Child Support* . For a discussion of the parties to a paternity action brought by the district attorney or other child support agency, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* .

The parents of a deceased alleged father may not be made parties defendant to a paternity action [*William M. v. Superior Court (1990) 225 Cal. App. 3d 447, 451-452, 275 Cal. Rptr. 103]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderIndispensable PartiesFamily LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityEvidenceGeneral OverviewPublic Health & Welfare LawSocial SecurityAssistance to FamiliesGeneral Overview

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§ 412.72 Effect of Prior Agreement of Parents or Judgment of Nonpaternity

A child has rights independent of the mother to establish a parent-child relationship with the father and to enforce the father's duty of support [*County of Shasta v. Caruthers (1995) 31 Cal. App. 4th 1838, 1841, 38 Cal. Rptr. 2d 18]* . Therefore, the UPA provides that regardless of its terms, an agreement between an alleged or presumed father and the mother or child does not bar an action under the Uniform Parentage Act to establish the existence or nonexistence of a parent-child relationship [*Fam. Code § 7632*].

The interests of a parent in proving paternity may be, but are not necessarily coextensive with the interests of a child to have paternity determined and child support provided. Therefore, a prior judgment of nonpaternity, or a prior dismissal with prejudice, is not necessarily res judicata with regard to a child who was not a party to the prior action [*County of Shasta v. Caruthers (1995) 31 Cal. App. 4th 1838, 1841-1849, 38 Cal. Rptr. 2d 18* (agreement effected by dismissal with prejudice of UPA action does not bar child's rights and subsequent paternity action initiated by district attorney under *Welfare and Institutions Code); Ruddock v. Ohls (1979) 91 Cal.App. 3d 271, 277-279, 154 Cal. Rptr. 87* (involving judgment of nonpaternity in dissolution proceeding); *Everett v. Everett (1976) 57 Cal. App. 3d 65, 69, 129 Cal. Rptr. 8* (stipulated judgment under prior paternity law)]. The person asserting the binding effect of the judgment has the burden of showing that the child was a party to the action or that the child's interests were adequately advanced and protected in the prior proceeding [*Ruddock v. Ohls (1979) 91 Cal. App. 3d 271, 277-279, 154 Cal. Rptr. 87* ; *Everett v. Everett (1976) 57 Cal. App. 3d 65, 69, 129 Cal. Rptr. 8]* .

A minor's paternity claim is not a claim that may be compromised by the minor's parents. Therefore, a court-approved compromise between the alleged father and the minor's mother is not a bar to a later action to establish paternity [*Ernest P. v. Superior Court (1980) 111 Cal. App. 3d 234, 236-238, 168 Cal. Rptr. 438* (involving release of alleged father from all claims relating to paternity of minor in exchange for one-time cash payment); *but see Everett v. Everett (1976) 57 Cal. App. 3d 65, 69, 129 Cal. Rptr. 8* (dicta that court approval would have cured defect in judgment of nonpaternity entered in action to which child was not party)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGeneral OverviewFamily LawParental Duties & RightsDutiesGeneral OverviewFamily LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage ActFamily LawPaternity & SurrogacyProof of PaternityDefensesRes Judicata

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§ 412.73 When Action May Be Brought

An action to declare the existence or nonexistence of a father-child relationship may be brought before the birth of the child [*Fam. Code § 7633*; *see Civ. Code § 43.1* (child conceived but not yet born deemed existing person as necessary to protect its interests in event of its subsequent birth)]. An order or judgment may be entered in that action before the child's birth, but enforcement of that order or judgment is stayed until the child's birth [*Fam. Code § 7633*].

An action to declare the existence of a presumed father-child relationship after the birth of the child may be brought at any time [*Fam. Code § 7630(a)(1)*], but an action to declare the nonexistence of the relationship may only be brought within a reasonable time after obtaining knowledge of the relevant facts [*Fam. Code § 7630(a)(2)*; *see 42 U.S.C. § 666(a)(5)(A)* (federal law effectively prohibits states from imposing limitation period before child reaches age 18)]. There are no express statutory limitations on when an action to declare the existence or nonexistence of the mother-child relationship may be brought, but the above rules probably apply by analogy [*see Fam. Code § 7650* (insofar as practical, father-child rules apply to mother-child relationship)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityDefensesStatutes of Limitations

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§ 412.74 Jurisdiction and Venue

[1] Subject-Matter Jurisdiction and Venue

Jurisdiction of any proceeding under the Family Code is in the superior court [*Fam. Code § 200*]. An action under the Uniform Parentage Act must be brought in any county in which the child resides or is found, in which a licensed California adoption agency maintains an office if that agency brings the action, or if the father is deceased, in any county in which proceedings for probate of his estate have been or could be commenced [*Fam. Code § 7620(b)*].

Rules for venue for paternity actions brought as part of a support enforcement proceeding by a child support agency (*see* Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*) are set forth in *Fam. Code § 17400(n)* [*see Code Civ. Proc. § 394* (no right to change of venue)].

Jurisdiction of misdemeanor criminal actions for nonsupport under *Penal Code § 270* is in the superior court of the county within which the actions giving rise to the charge were committed [*Penal Code § 1462.2*]. It has been held that the fact that parentage is an issue that may have to be determined in such a case does not deprive these courts of their jurisdiction [*In re Clarke (1957) 149 Cal. App. 2d 802, 808, 309 P.2d 142* ; *see Lyons v. Municipal Court (1977) 75 Cal. App. 3d 829, 836-837, 142 Cal. Rptr. 449]* .

[2] Personal Jurisdiction

The court must have personal jurisdiction in any action that seeks to fasten a parent-child relationship on the defendant, as opposed to one that seeks to declare the nonexistence of the relationship [*Hartford v. Superior Court (1956) 47 Cal. 2d 447, 453-457, 304 P.2d 1* (construing prior law)]. Further, personal jurisdiction is required in order to impose a child support obligation on a defendant [*see, e.g., Kulko v. California Superior Court (1977) 19 Cal. 3d 514, 520, 138 Cal. Rptr. 586, 564 P.2d 353 , overruled on other grounds, Kulko v. Superior Court (1978) 436 U.S. 84, 101, 98 S. Ct. 1690, 56 L. Ed. 2d 132* ; *Titus v. Superior Court (1972) 23 Cal. App. 3d 792, 799, 100 Cal. Rptr. 477]* .

The UPA provides that a person who has sexual intercourse in California, or causes conception with the intent to become a legal parent by assisted reproduction in California, thereby submits to the jurisdiction of its courts as to an

action brought under the UPA with respect to a child who may have been conceived by that act of intercourse or assisted reproduction [*Fam. Code 7620(a)*; *see County of Humboldt v. Harris (1988) 206 Cal. App. 3d 857, 861-864, 254 Cal. Rptr. 49* (predecessor statute upheld as meeting constitutional minimum-contacts requirement)]. For purposes of this provision, "assisted reproduction" means conception by any means other than sexual intercourse [*Fam. Code § 7606(a)*]. If personal jurisdiction over the defendant is to be established on the basis of intercourse, the complaint should allege that the child was conceived in California or conceived by an act of sexual intercourse that took place in California.

The following acts have been found to be insufficient contact to subject a nonresident to jurisdiction in a parentage action [*Bartlett v. Superior Court (1978) 86 Cal. App. 3d 72, 75-77, 150 Cal. Rptr. 25* ; *but see In re Marriage of Hattis (1987) 196 Cal. App. 3d 1162, 1174 n.9, 242 Cal. Rptr. 410* (disagreeing with *Bartlett's* rejection of "effects test")]:

- Causing a California resident to become pregnant;
- Traveling to California and visiting with the mother during courtship and pregnancy;
- Sending the alleged mother to California when she was pregnant;
- Paying a doctor bill in California in connection with the pregnancy.

[3] Juvenile Court Jurisdiction

In proceedings to declare a child a dependent of the juvenile court, the court has a duty to inquire about the identity and address of all presumed or alleged fathers of the child. The inquiry is to be made at the detention hearing, or as soon thereafter as practicable, and the fact that a man claiming to be the father is present at the hearing will not relieve the court of its duty. If a man appears in the dependency action after receiving the notice described below, and files a parentage action under *Fam. Code § 7630* or *7631*, the juvenile court must determine if he is the father. The juvenile court's jurisdiction to hear the parentage action is *exclusive* after a dependency petition has been filed and until the time the petition is dismissed, dependency is terminated, or parental rights are terminated under *Welf. & Inst. Code § 366.26* or *Fam. Code § 7800 et seq.* [*Welf. & Inst. Code § 316.2(a),(d),(e)*].

The juvenile court's inquiry regarding paternity must include at least all of the following, as the court deems appropriate [*Welf. & Inst. Code § 316.2(a)*]:

1. Whether a judgment of paternity already exists;

2. Whether the mother was married or believed she was married at the time of conception of the child or at any time thereafter;

3. Whether the mother was cohabiting with a man at the time of conception or birth of the child;

4. Whether the mother has received support payments or promises of support with respect to the child or in connection with her pregnancy;

5. Whether any man has formally or informally acknowledged or declared his possible paternity of the child, including by signing a voluntary declaration of paternity;

6. Whether paternity tests have been administered and the results, if any; and

7. Whether any man otherwise qualifies as a presumed father under *Fam. Code § 7611*, or any other provision of the Family Code.

If, after the court inquiry, one or more men are identified as an alleged father, each of these men must be provided notice at his last and usual place of residence by certified mail (return receipt requested) alleging that he is or could be the father of the child. The notice must state that the child is the subject of dependency proceedings [*Welf. & Inst. Code § 300 et seq.*] and that the proceedings could result in the termination of parental rights and adoption of the child. The Judicial Council form designated by statute must be included with the notice [*Welf. & Inst. Code § 316.2(b)* (requiring use of Judicial Council form Paternity-Waiver of Rights (JV-505))]. The court may determine that the failure of an alleged father to return the certified mail receipt is not good cause to continue a hearing [*see Welf. & Inst. Code § 316.2(c)* (referring to *Welf. & Inst. Code §§ 355, 358, 360, 366.21*, or *366.22*)].

Note that nothing in *Welf. & Inst. Code § 316.2* precludes the juvenile court from terminating a father's parental rights even if he appears at the hearing and files an action under under *Fam. Code § 7630* or *7631* [*Welf. & Inst. Code § 316.2(b)*].

For further discussion of dependency proceedings, see Ch. 328, *Juvenile Courts: Dependency Proceedings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsMinimum ContactsFamily LawChild SupportVenueFamily LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act

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§ 412.75 Guardian ad Litem

[1] Appointment for Any Minor Party

A minor who is a party to a paternity action must be represented by a guardian ad litem appointed by the court [*Fam. Code § 7635(a)*; *see Code Civ. Proc. §§ 372-373*; *see also § 412.149* (Application and Order for Appointment of Guardian Ad Litem of Minor)]. This rule applies whether the minor is the child whose paternity or nonpaternity is sought to be established, or a parent or alleged parent [*Jeffrey S. II v. Jeffrey S. (1977) 76 Cal. App. 3d 65, 69-70, 142 Cal. Rptr. 625* ; *see Poaster v. Superior Court (1993) 20 Cal. App. 4th 948, 950, 24 Cal. Rptr. 2d 582]* . The fact that a minor's parent purports to act as the minor's guardian in the proceeding does not eliminate the need to appoint a guardian ad litem to represent the minor's interests [*Berg v. Traylor (2007) 148 Cal. App. 4th 809, 821, 56 Cal. Rptr. 3d 140* ; *In re D.D. (2006) 144 Cal. App. 4th 646, 653, 50 Cal. Rptr. 3d 578* (as matter of law, guardian ad litem must be appointed for minor who is party to proceeding)].

A guardian ad litem who is a relative of the child need not be represented by counsel [*Fam. Code § 7635(a)*; *cf. J.W. v. Superior Court (1993) 17 Cal. App. 4th 958, 962, 968-969, 22 Cal. Rptr. 2d 527* (under pre-1995 version of statute, nonattorney parent-party who was proceeding in propria persona could be appointed guardian ad litem for child, but could not proceed in pro per in that capacity)]. The county public guardian may be appointed for a minor defendant, and presumably also for a minor child whose paternity is at issue [*see Poaster v. Superior Court (1993) 20 Cal. App. 4th 948, 952-954, 24 Cal. Rptr. 2d 582* ; *see also Prob. Code § 2920* (notice requirements)]. When the parent's personal interests in the proceeding differ from the minor's interests, the court should appoint a guardian ad litem [*Berg v. Traylor (2007) 148 Cal. App. 4th 809, 821-822, 56 Cal. Rptr. 3d 140; Williams v. Superior Court (2007) 147 Cal. App. 4th 36, 50-53, 54 Cal. Rptr. 3d 13* (minor's parent does not have right to select guardian ad litem when parent has conflict of interest with minor)]. If more than one individual seeks appointment as guardian ad litem, the court must select the guardian who will best protect the minor's interests [*Williams v. Superior Court (2007) 147 Cal. App. 4th 36, 54, 54 Cal. Rptr. 3d 13*].

[2] Role of Guardian ad Litem

A guardian ad litem is not a party to an action, but is the representative of a party [*Williams v. Superior Court (2007)*

147 Cal. App. 4th 36, 54, 54 Cal. Rptr. 3d 13 ; *J.W. v. Superior Court (1993) 17 Cal. App. 4th 958, 964, 22 Cal. Rptr. 2d 527]* . Although the court is, in effect, the guardian of the minor party, and the person appointed as guardian ad litem is an officer and agent of the court, appointment of a guardian ad litem is more than a bare technicality. The guardian is bound to protect or defend the action and to protect the rights of the minor. He or she may not make admissions against the minor or waive any of the minor's material rights, and the minor is not bound by the admissions of the guardian that sacrifice the minor's property or legal rights. Thus, any acts or concessions that apparently waive or surrender any materialright of the minor will be set aside unless they are shown to be beneficial, or at least nonprejudicial, to the rights and interests of the minor [*Robinson v. Wilson (1974) 44 Cal. App. 3d 92, 100-101, 118 Cal. Rptr. 569* ; *see In re Christina B. (1993) 19 Cal. App. 4th 1441, 1452-1454, 23 Cal. Rptr. 2d 918]* .

Once a guardian ad litem is appointed, the action may not thereafter be compromised, settled, or dismissed without court approval [*see Prob. Code § 3500* (minors' compromises)]. Thus, the appointment of a guardian ad litem is to ensure that the interests of the child will be fully and fairly considered [*County of Shasta v. Caruthers (1995) 31 Cal. App. 4th 1838, 1847, 38 Cal. Rptr. 2d 18]* .

The child's guardian ad litem may move for blood/genetic tests to rebut the otherwise conclusive presumption of *Fam. Code § 7540*, that a child born to a woman who was married and cohabiting with her husband at the time of conception is a child of the marriage [*see Fam. Code § 7541(b)*; *see also Fam. Code § 7575(c)*]. For further discussion, see*§ 412.31*.

A minor, accompanied by a duly appointed guardian ad litem, may appear without counsel (*see § 412.76[1]*) for the limited purpose of obtaining domestic violence protective orders [*Cal. Rules of Ct., Rule 3.1153*; *see § 412.81[5]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawGuardiansGeneral OverviewFamily LawGuardiansAppointmentFamily LawPaternity & SurrogacyEstablishing PaternityGeneral Overview

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§ 412.76 Representation by Counsel

[1] Indigent Parents

As a matter of due process, an indigent defendant in a paternity action is entitled to appointed counsel if the state is appearing as a party or appearing on behalf of the mother or child. It is fundamentally unfair for the state to intervene on behalf of the mother and child and not protect the rights of the father [*Salas v. Cortez (1979) 24 Cal. 3d 22, 26-34, 154 Cal. Rptr. 529, 593 P.2d 226* ; *County of Tulare v. Ybarra (1983) 143 Cal. App. 3d 580, 582, 192 Cal. Rptr. 49]* . However, if given notice of the right to appointed counsel, an indigent who permits entry of default waives the right [*County of Mendocino v. Ted S. (1990) 217 Cal. App. 3d 1202, 1206-1207, 266 Cal. Rptr. 452]* .

In a reverse paternity action (that is, one in which the plaintiff alleges that he is the father of the child), due process may require that an indigent defendant, whose father-child relationship will be severed if the plaintiff is successful, be provided with counsel. However, any right to counsel must be determined on a case-by-case basis, balancing the defendant's interests and possible adverse consequences against the interests of the state [*Guardianship of Ethan S. (1990) 221 Cal. App. 3d 1403, 1412-1414, 271 Cal. Rptr. 121* (finding no right to counsel if defendant has had no actual parent-child relationship, but relies only on presumption that issue of wife cohabiting with her husband is child of the marriage)].

Alternatively, indigent parties may be referred to the local child support agency for proceedings to establish paternity and child support as provided by statute [*J.W. v. Superior Court (1993) 17 Cal. App. 4th 958, 972-973, 22 Cal. Rptr. 2d 527* ; *see Fam. Code § 17400 et seq.*, discussed in Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*].

Even though the paternity defendant is entitled to appointed counsel, the issue of compensation for his counsel remains unresolved. Several courts of appeal have refused to require compensation of appointed counsel for indigent civil litigants at public expense [*see County of Los Angeles v. Superior Court (1980) 102 Cal. App. 3d 926, 929, 162 Cal. Rptr. 636* (in action for reimbursement of welfare benefits brought under former *Welf. & Inst. Code § 11350*, Legislature did not authorize expenditure of public monies for appointment of counsel); *Littlefield v. Superior Court*

(1979) 160 Cal. Rptr. 175 (no statutory authority under *Gov. Code § 27706* for appointment of public defender to represent paternity defendant)]. Thus, it has been held that appointed counsel for a paternity defendant must serve gratuitously (pro bono publico) absent legislative authorization of payment of fees from public funds [*County of Tulare v. Ybarra (1983) 143 Cal. App. 3d 580, 586, 192 Cal. Rptr. 49]* . However, at least one court of appeal has held that counsel may not be involuntarily conscripted to represent indigent paternity defendants pro bono on the ground that it is a denial of equal protection of the law. The court distinguished some of the previous cases on the basis that they had not discussed the constitutionality of a specific plan to conscript counsel [*Cunningham v. Superior Court (1986) 177 Cal. App. 3d 336, 340-352, 356, 222 Cal. Rptr. 854* (action both to establish paternity and to recoup public assistance payments)].

If the indigent defendant later appeals the court's determination of paternity and reimbursement obligations, the defendant is entitled to a *Wende* review [*see People v. Wende (1979) 25 Cal. 3d 436, 158 Cal. Rptr. 839, 600 P.2d 1071]* . Under a *Wende* review, the appellate court must conduct an independent review of the trial record to determine whether any arguable factual or legal issues exist, even though the defendant's appointed counsel submits a brief that raises no specific issues or describes the appeal as frivolous [*County of Madera v. Jacobson (1987) 194 Cal. App. 3d 569, 571, 573, 239 Cal. Rptr. 602]* .

[2] For Child

In any initial or subsequent proceeding, if custody of, or visitation with, the child is at issue, the court may appoint private counsel to represent the interests of the child, if it determines that it would be in the best interests of the child [*Fam. Code § 7635(d)*; *see Fam. Code § 3150 et seq.* (appointment of counsel in custody proceedings, discussed in *§ 412.75[1] above*]. Appointment of counsel is now discretionary rather than mandatory for a child-party [*see Fam. Code § 7635(d)*]. Also, although the statute is limited to custody and visitation disputes [*see Fam. Code § 7635(d)*], presumably the court may still appoint counsel if paternity is at issue, and the other parties have interests that may be in conflict with the child's.

Counsel appointed to represent the child must be compensated in an amount to be determined by the court [*Fam. Code § 3153(a)*; *see Fam. Code § 7635(d)*; *J.W. v. Superior Court (1993) 17 Cal. App. 4th 958, 971-972, 22 Cal. Rptr. 2d 527]* . The amount is to be paid by the parties, in proportions as the court deems just [*Fam. Code § 3153(a)*], or by the county if both parties together are financially unable to pay all or a portion of the cost [*Fam. Code § 3153(b)*].

[3] Orders for Attorney's Fees and Costs

The court may order reasonable fees for counsel, experts, and the child's guardian ad litem, and other costs of the action and pretrial proceedings,including blood tests, to be paid by the parties (except a government entity) in proportion and at times determined by the court [*Fam. Code § 7640*]. Such an order may be made even after a notice of appeal is filed [*see Sherry H. v. Thomas B. (1988) 203 Cal. App. 3d 1500, 1502-1503, 250 Cal. Rptr. 830]* .

Bills for pregnancy, childbirth, and genetic testing are admissible as evidence without third-party foundation testimony, and constitute prima facie evidence of the costs incurred for those services [*Fam. Code § 7604.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselAppointmentsFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityGeneral Overview

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§ 412.77 Application for Change of Child's Name

An application to change the of name of the child for whom a parent-child relationship is established under the UPA may be included with the petition filed under the UPA. The application and procedure for change of name must conform to the provisions of *Code Civ. Proc. § 1275 et seq.*, which govern proceedings for a change of name [*Fam. Code § 7638*]. Notice of and hearing on the application for the name change must be conducted in accord with the notice and hearing provisions of the UPA [*Code Civ. Proc. §§ 1277(d), 1278(c)*; *see Fam. Code § 7638*]. For discussion and forms for use to apply for a change of name, see Ch. 377, *Name, Change of.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawName ChangesProceduresFamily LawPaternity & SurrogacyEstablishing PaternityGeneral Overview

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35-412 California Forms of Pleading and Practice--Annotated § 412.78

§ 412.78 Notice of Action

[1] Notice To Respondents or Defendants

Formal notice of the action is given a respondent or defendant by serving him or her with a copy of the summons and a copy of the petition or complaint [*see Code Civ. Proc. § 413.10 et seq.*]. The Judicial Council has adopted a mandatory proof of service form for use when serving the Judicial Council Petition to Establish the Parental Relationship [*see* Cal. Judicial Council Form FL-200], which is also used in other family law and domestic violence proceedings (Form DV-140), as discussed in Ch. 293, *Harassment and Domestic Violence* .

[2] Notice to Nonparties

[a] Persons Entitled to Notice

The natural mother, each man presumed to be the father under *Fam. Code § 7611*, and each man alleged to be the natural father must be given notice of the action and an opportunity to be heard [*Fam. Code § 7635(b)*]. Each of these persons may or may not be made parties to the action, but they must be given notice even if they are not made parties [*see Fam. Code § 7635(b)*]. If the child is receiving public assistance, the district attorney of the county providing support must be given notice [*In re Marriage of Mena (1989) 212 Cal. App. 3d 12, 18-19, 260 Cal. Rptr. 314* ; *In re Marriage of Lugo (1985) 170 Cal. App. 3d 427, 432-434, 217 Cal. Rptr. 74* ; *§ 412.71[2]*].

[b] Who Must Give Notice

The Uniform Parentage Act does not specify who is to give the required notice to nonparties. It appears that the logical person to give notice would be the party who injects the name of the nonparty into the case. Thus, if the petition or complaint alleges that a named person other than a party to the action is the child's natural mother, presumed father, or alleged father, notice to the nonparty of the action should be given by the plaintiff. Conversely, if a person is named for the first time in the answer, it would appear that defendant should give the notice to him or her. But if a man not a party to the action is presumed to be the father under the provisions of *Fam. Code § 7611* and for some reason is not named in either pleading, it is unclear as to who must give that party notice of the action.

[c] Manner of Giving Notice

The notice to a nonparty of a petition or complaint to establish a parental relationship must be given in accordance with the provisions of the Code of Civil Procedure for service of process in a civil action, except that publication or posting of the notice of the proceeding is not required. Proof of service must be filed with the court before the petition is heard [*Fam. Code §§ 7635(b), 7666*; *see Code Civ. Proc. § 417.10 et seq.* (proof of service)]. Service of process is governed by *Code Civ. Proc. § 412.10 et seq.* Those sections suggest that the notice to a nonparty be in writing, contain the title of the court and the names of the parties to the action, and be reasonably calculated to give actual notice to the party to be served that an action has been filed [*see Code Civ. Proc. §§ 412.20* (contents of summons), *413.30* (manner of service in cases not otherwise covered)]. The notice should be attached to a copy of the petition, and should be served on the person in the same manner as a summons and complaint [*see Code Civ. Proc. § 415.10 et seq.* (manner of service of summons)]. An illustrative notice is set forth in *§ 412.135*.

If a person identified as the natural father or possible natural father cannot be located or his whereabouts is unknown or cannot be ascertained, the court may issue an order dispensing with notice to such person [*Fam. Code § 7666(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProceduresPleading & PracticeService of ProcessMethodsPublicationFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage ActPublic Health & Welfare LawSocial SecurityAssistance to FamiliesGeneral Overview

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§ 412.79. Response of Nonparties Wishing to Be Heard

Fam. Code § 7635(b) requires that the natural mother, each man presumed to be the father under *Fam. Code § 7611*, and each man alleged to be the natural father be given an opportunity to be heard, in a paternity action, even if they are not made parties to the action. However, the UPA does not provide any vehicle by which a nonparty may be heard.

A man who alleges that he, and not the plaintiff or defendant is the father of the child and wishes to establish his own paternity should either move for joinder as a party under *Code Civ. Proc. § 389* or request leave to intervene under *Code Civ. Proc. § 387*. A nonparty who wishes to be heard, for example, as to the best interests of the child, but does not seek any affirmative relief in his or her own right might move for an order requiring that he or she be given notice of all subsequent proceedings in the action.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureParties Joinder General OverviewFamily LawPaternity & Surrogacy General OverviewFamily LawPaternity & Surrogacy Establishing Paternity General Overview

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§ 412.80 Submission of Child's Birth Certificate to Court

In proceedings under the Uniform Parentage Act, the requirements of *Fam. Code § 3140* apply [*Fam. Code § 7603*]. Under that section, if one or both of the parents have not appeared, and there is no proof of personal service on the absent parent or parents, a certified copy of the child's birth certificate must be submitted to the court [*Fam. Code § 3140*]. The court must forward the birth certificate to the appropriate law enforcement agency to determine whether the child has been reported missing or abducted [*Fam. Code § 3140(a)*]. The court may waive these requirements for good cause [*Fam. Code § 3140(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyBirth CertificatesGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act

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§ 412.81 Pendente Lite Orders

[1] Child Support and Expenses of Birth

[a] Power to Order

Under paternity cases decided before the enactment of the Uniform Parentage Act in 1976 [Stats. 1075, ch. 1244], it was permissible for a court to make pendente lite orders for support and medical expenses incident to the child's birth if the plaintiff made a preliminary showing by a preponderance of the evidence that the defendant was the father of the child [*Carbone v. Superior Court (1941) 18 Cal. 2d 768, 770-772, 117 P.2d 872* (decided under former *Civ. Code § 196a*, which formerly was basis of paternity action); *see Thurmond v. Superior Court (1967) 66 Cal. 2d 836, 837-838, 59 Cal. Rptr. 273, 427 P.2d 985* (involving motion for order for expenses of birth)]. Although such an order implied a finding of the existence of the father-child relationship, it was not considered res judicata, and thus not determinative of the issue of paternity at trial, because the proceeding and the evidence presented on a motion for a pendente lite order is not as complete as that required at trial [*Carbone v. Superior Court (1941) 18 Cal. 2d 768, 772, 117 P.2d 872* ; *see Guay v. Superior Court (1957) 147 Cal. App. 2d 764, 768, 305 P.2d 990* (also decided under former *Civ. Code § 196a*)].

If a defendant denies paternity and no evidence is presented at the hearing on the issue, support pendente lite may not be ordered; there is no preponderance of the evidence in the plaintiff's favor. An order that is made solely because the defendant cannot be excluded as the father by blood tests is improper [*Hodge v. Gould (1969) 274 Cal. App. 2d 806, 808, 79 Cal. Rptr. 245]* .

Under the UPA, there is no express provision for a pendente lite support order [*see Fam. Code § 7637* (support order may be included in judgment or order that determines parent-child relationship)]. Thus, it appears that the continued validity of a right to a pendente lite support order based on a preliminary showing of paternity by a preponderance of the evidence is open to question under the UPA. Nevertheless, courts have continued to issue temporary support orders before final adjudication of the issue of paternity [*see, e.g., Thomas B. v. Superior Court (1985) 175 Cal. App. 3d 255, 259, 220 Cal. Rptr. 577* ; *City and County of San Francisco v. Superior Court (1978) 86 Cal. App. 3d 87, 89-91, 150 Cal. Rptr. 45* (decided after enactment of UPA, but based on prior law and without consideration of effect of UPA)].

Under a provision of the Domestic Violence Prevention Act [*Fam. Code § 6200 et seq.*], the court may, after notice and hearing, order a respondent in a domestic violence proceeding who is a presumed father to pay any amount necessary for the support and maintenance of a child who is in the custody of the petitioner, if such an order would otherwise be authorized in an action under the UPA [*Fam. Code § 6341(a)*; *see Fam. Code § 7611* (presumption of paternity), discussed in Pt. B]. A domestic violence support order is without prejudice in any UPA action [*Fam. Code § 6341(b)*]. Thus, because the domestic violence support order may be issued without an adjudication of paternity, it may be argued by implication that the legislature recognizes the validity of temporary support orders preliminary to a final paternity determination.

For discussion of the factors that determine the amount of child support under the statewide uniform child support guideline [*Fam. Code § 4050 et seq.*], and for forms for use in obtaining child support, see Ch. 224, *Dissolution of Marriage: Child Support* .

[b] Limitations on Discovery of Alleged Father's Financial Information

Fam. Code § 3552 requires parties in proceedings involving child support to produce income tax returns for the purpose of awarding child support. In construing prior law [*see* former *Civ. Code § 4700.7, 4721(d)*], one appellate court held that the right to discovery of tax returns in a paternity action does not attach until the issue of paternity is finally adjudicated [*Thomas B. v. Superior Court (1985) 175 Cal. App. 3d 255, 264-265, 220 Cal. Rptr. 577]* . For this purpose, "final adjudication" refers to the determination made at trial, notwithstanding any appeal [*Sherry H. v. Thomas B. (1988) 203 Cal. App. 3d 1500, 1503, 250 Cal. Rptr. 830]* . Further, no financial records are discoverable for the purpose of orderingpendente lite support in a paternity action until a prima facie showing of paternity has been made [*Thomas B. v. Superior Court (1985) 175 Cal. App. 3d 255, 265, 220 Cal. Rptr. 577]* .

[c] Bifurcation of Temporary and Permanent Support and Paternity Issues

The court must bifurcate the issue of paternity, both prima facie and the final adjudication, from the issue of support, both temporary and permanent. Thus, the paternity action must be conducted in four stages [*Thomas B. v. Superior Court (1985) 175 Cal. App. 3d 255, 265, 220 Cal. Rptr. 577]* :

- A prima facie showing of paternity for purposes of pendente lite support.
- A determination of an appropriate temporary support order.
- The final adjudication of paternity.
- A determination of permanent support.

Each of these issues must be determined at a separate hearing [*Thomas B. v. Superior Court (1985) 175 Cal. App. 3d 255, 265, 220 Cal. Rptr. 577]* .

[2] Temporary Custody and Visitation Orders

During the pendency of any proceeding under the UPA, the court may make an order determining the temporary custody of the child who is the subject of the proceeding [*Fam. Code § 3022*; *see Fam. Code § 3021(f)* (applicability of general custody provisions of Family Code to proceedings under UPA)]. The court may also issue an order determining the right of a party to visit with the child on the conditions that the court determines [*Fam. Code § 6323(a)(1)*; *see Fam. Code §§ 7710, 7720(a)* (incorporating Domestic Violence Prevention Act temporary custody and visitation statutes into UPA); *see also* *Gadbois v. Superior Court (1981) 126 Cal. App. 3d 653, 656-657, 179 Cal. Rptr. 19* (finding right to

pendente lite visitation under what is now *Fam. Code § 3100*, which applies in UPA action through *Fam. Code § 3021(e)*)]. The order may be issued either ex parte [*Fam. Code §§ 6323(a)(1), 7710*; *see Fam. Code § 240*] or after notice and hearing [*Fam. Code §§ 6340(a), 6346, 7720(a)*].

A court may also order pendente lite relief consisting of an award of custody or the grant of reasonable visitation rights if it finds:

- Based on blood/genetic tests authorized by *Fam. Code § 7541*, a parent-child relationship exists between the child and a man other than the mother's husband [*Fam. Code § 7604(a)*; *see Fam. Code § 7540*].

- Custody or visitation would be in the best interests of the child [*Fam. Code § 7604(b)*].

For further discussion of the procedures for obtaining custody orders, including investigation and mediation, and for forms for use in obtaining custody and visitation orders, see Ch. 223, *Dissolution of Marriage: Child Custody* .

[3] Mutual Restraining Orders on Removing Child From State

In any action under the Uniform Parentage Act, the summons must contain a temporary restraining order restraining all parties from removing any child for whom the action seeks to establish a parent-child relationship from the state without the prior written consent of the other party or an order of the court [*Fam. Code § 7700*; *see Fam. Code § 231 et seq.*]. The restraining order is set forth in the Judicial Council Summons.

Under this provision, a parent may not remove the child from the state *once the petition* has been filed, without a court order or the written permission of the other party; but it does not provide that a child who is already residing in another state when the petition is filed must be returned to California [*Sarah B. v. Floyd B. (2008) 159 Cal. App. 4th 938, 944, 71 Cal. Rptr. 3d 923*]. This form is included in *§ 412.130*.

[4] Orders Restraining Domestic Violence

During the pendency of the proceeding, the court may issue ex parte domestic violence protective orders [*see Fam. Code § 6218*] and any other ex parte order authorized under the Domestic Violence Prevention Act [*Fam. Code § 7710*; *see Fam. Code § 6320 et seq.* (ex parte domestic violence orders)]. Domestic violence protective and restraining orders may also be issued after notice and hearing [*Fam. Code § 7720(a)*; *see Fam. Code § 6340 et seq.*]. Mutual protective orders may not be issued unless the standards of *Fam. Code § 6305* are met [*Fam. Code § 7720(b)*]. For further discussion of domestic violence protective orders, including mutual protective orders, see Ch. 293, *Harassment and Domestic Violence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportGeneral OverviewFamily LawChild SupportObligationsGeneral OverviewFamily LawChild SupportProceduresFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act

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§ 412.82 Privilege Against Self-Incrimination

Penal Code § 270 makes parents criminally liable for willful child neglect. Whether the crime is a misdemeanor or a felony depends on whether there has been a final adjudication of paternity of which the defendant has notice [*Penal Code § 270*]. Therefore, a parent may be prosecuted for acts done before paternity is judicially established [*Smith v. Superior Court (1980) 110 Cal. App. 3d 422, 425, 168 Cal. Rptr. 24]* .

For this reason, in the absence of a tender of use immunity for past conduct [*see People v. Superior Court (Kaufman) (1974) 12 Cal. 3d 421, 428, 115 Cal. Rptr. 812, 525 P.2d 716]* , the alleged father in a paternity action cannot be required, because of the privilege against self-incrimination, to answer questions through discovery that might establish the element of parenthood for purposes of a subsequent criminal prosecution. The admissions would be a link in the chain of evidence tending to establish guilt of a criminal offense [*Gonzales v. Superior Court (1980) 117 Cal. App. 3d 57, 64-72, 178 Cal. Rptr. 358* (questions concerning sexual relations with mother and prior earnings); *Smith v. Superior Court (1980) 110 Cal. App. 3d 422, 425, 168 Cal. Rptr. 24* (questions about facts that would give rise to conclusive presumption of paternity of *Fam. Code § 7540*)]. The same privilege undoubtedly extends to any testimony at trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureInterrogationMiranda RightsSelf-Incrimination PrivilegeFamily LawPaternity & SurrogacyGeneral Overview

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§ 412.83 Trial

[1] Trial by Jury

In older cases, courts have stated that paternity is a legal issue to be tried by a jury, while the amount of support should be tried by the court [*Van Buskirk v. Todd (1969) 269 Cal. App. 2d 680, 685-686, 75 Cal. Rptr. 280* ; *Kyne v. Kyne (1940) 38 Cal. App. 2d 122, 133, 100 P.2d 806]* . One court, in dictum, stated that a jury trial is a matter of right [*Van Buskirk v. Todd (1969) 269 Cal. App. 2d 680, 685, 75 Cal. Rptr. 280]* . However, more recently, several courts have rejected this proposition and held that there is no constitutional or statutory right to a jury trial in a paternity action [*County of Sutter v. Davis (1991) 234 Cal. App. 3d 319, 322-332, 285 Cal. Rptr. 736* ; *County of Butte v. Superior Court (1989) 210 Cal. App. 3d 555, 557-559, 258 Cal. Rptr. 516* ; *County of El Dorado v. Schneider (1987) 191 Cal. App. 3d 1263, 1278-1283, 237 Cal. Rptr. 51* (actions by district attorney under Welf. & Inst. Code)].

[2] Burden of Proof

In a disputed paternity action, the burden of proving the defendant to be the father of the child is on the plaintiff. But proof need only be by a preponderance of the evidence [*Walsh v. Palma (1984) 154 Cal. App. 3d 290, 293, 201 Cal. Rptr. 142* ; *see Rivera v. Minnich (1987) 483 U.S. 574, 575, 107 S. Ct. 3001, 97 L. Ed. 2d 473* , (Pennsylvania statute requiring application of "preponderance of evidence" standard as complying with *Fourteenth Amendment Due Process Clause*); *see also Evid. Code § 500* (party has burden of proof as to facts essential for his or her claim)]. While the unsupported testimony of the mother is sufficient for this purpose [*Huntingdon v. Crowley (1966) 64 Cal. 2d 647, 651, 51 Cal. Rptr. 254, 414 P.2d 382]* , blood or genetic test results now are most commonly presented to carry to burden of proof (*see* Part C and § 412.84[1]). If the mother is unable to testify, paternity may be proved by circumstantial evidence alone [*Foster v. Gray (1962) 203 Cal. App. 2d 434, 436-437, 21 Cal. Rptr. 429]* . The preponderance of evidence standard applies equally if the paternity action is prosecuted by the district attorney for the benefit of a public entity [*Walsh v. Palma (1984) 154 Cal. App. 3d 290, 295, 201 Cal. Rptr. 142]* .

If there is a rebuttable presumption that a man is a presumed father [*see Fam. Code § 7611*, discussed in Part B], the burden is on the party opposing operation of the presumption to rebut it by clear and convincing evidence [*Comino v. Kelley (1994) 25 Cal. App. 4th 678, 685, 30 Cal. Rptr. 2d 728* ; *see Fam. Code § 7612(a)*]. However, if the presumed

father is opposing operation of the presumption, the presumption has the affect of both shifting the burden of proof and raising the standard of proof. For example, if the plaintiff proves that the mother and the defendant were married at the time of birth, the defendant is the presumed father [*see Fam. Code § 7611(a)*] and has the burden of proving nonpaternity by clear and convincing evidence [*Fam. Code § 7612(a)*].

If the defendant establishes by a preponderance of evidence that some other man is presumed to be the father, by, for instance, establishing that the plaintiff and the other man were married at the time of birth, the burden of proof will then be on the plaintiff to establish, by clear and convincing evidence, that the other man is not the father. If the plaintiff meets this burden, the plaintiff must then prove that the defendant is the father by a preponderance of the evidence [*Walsh v. Palma (1984) 154 Cal. App. 3d 290, 294, 201 Cal. Rptr. 142]* . In this case, there is no shift of the burden of proof to the defendant, but rather different standards that must be borne by the plaintiff to prove the different issues in the case.

If a defendant denying paternity relies on the conclusive presumption that another man is the father because he was married to and cohabiting with the wife at the time of the conception [*see Fam. Code § 7540*; *see also County of Orange v. Leslie B. (1993) 14 Cal. App. 4th 976, 17 Cal. Rptr. 2d 797]* , the defendant does not have the burden of establishing that the husband was not impotent or sterile at the time of conception [*S.D.W. v. Holden (1969) 275 Cal. App. 2d 313, 315-317, 80 Cal. Rptr. 269]* . Rather, the burden is on the plaintiff to rebut the presumption by motion for blood test evidence under *Fam. Code § 7541* [*see Fam. Code § 7541(a)* (court may determine husband's nonpaternity based on blood-test evidence)].

[3] Closed Proceedings; Confidential Records

Notwithstanding any other law concerning public hearings and records, any hearing or trial under the UPA may be held in closed court without the admission of any person other than those necessary to the action or proceeding [*Fam. Code § 7643(a)*]. The party who wants the hearing closed should so move the court.

All papers and records, other than the final judgment, pertaining to the action or proceeding, whether part of the permanent record of the court or of a file in any public agency or elsewhere, are subject to inspection only in exceptional cases on order of the court for good cause shown [*Fam. Code § 7643(a)*]. However, all papers and records pertaining to the action or proceeding that are part of the permanent record of the court are subject to inspection by the parties to the action and their attorneys [*Fam. Code § 7643(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewConstitutional LawBill of RightsFundamental RightsCriminal ProcessRight to Jury TrialEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofAllocationFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityBurdens of ProofFamily LawPaternity & SurrogacyProof of PaternityEvidenceBlood TestsFamily LawPaternity & SurrogacyProof of PaternityEvidenceGenetic Tests

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§ 412.84 Evidence

[1] Relationship Between Blood/Genetic Tests and Other Evidence

Today, most paternity cases are resolved on the basis of the results of blood/genetic tests alone (*see* Part C). Unless the defendant elects to attack the scientific validity of the test and its results, a test showing a highpaternity index may really be dispositive [*see Fam. Code § 7555*, discussed in *§ 412.33*].

However, no matter how high the paternity index, the results of such tests, alone, cannot support a judgment of paternity [*County of El Dorado v. Misura (1995) 33 Cal. App. 4th 73, 79, 38 Cal. Rptr. 2d 908]* . The plaintiff must first prove the fact of intercourse between the mother and the defendant-alleged father within the time period of possible conception. Unless the trier of fact finds that intercourse occurred, the scientific evidence has no probative value and may be discounted [*see Everett v. Everett (1984) 150 Cal. App. 3d 1053, 1064, 1068-1073, 201 Cal. Rptr. 351* ; *see also Evid. Code § 403*]. For this reason, the question of paternity must be resolved on the basis of all of the evidence presented, and not just on the results of blood/genetic tests [*see Fam. Code § 7554*].

[2] Mother's Sexual Intercourse With Other Men

In an action to establish that the defendant is the father of a child, the defendant may introduce evidence that the mother had sexual intercourse with another man or other men during the period in which, in the ordinary course of nature, the child must have been conceived. This evidence is admissible to prove affirmatively that someone other than the defendant is the child's father and not just for the purpose of impeaching the testimony of the mother [*Huntingdon v. Crowley (1966) 64 Cal. 2d 647, 650-651, 51 Cal. Rptr. 254, 414 P.2d 382* ; *see Crosat v. Paige (1957) 147 Cal. App. 2d 385, 389, 305 P.2d 121]* . However, evidence of intercourse with other men, without any blood/genetic test evidence not excluding one or more other men as the father, does not rebut the presumption of paternity arising from an paternity index of 100 or higher established by such tests [*County of El Dorado v. Misura (1995) 33 Cal. App. 4th 73, 83-84, 38 Cal. Rptr. 2d 908* ; *see Fam. Code § 7555*, discussed in *§ 412.33*].

Proof of the fact that the mother had sexual intercourse with a man other than defendant during the probable period of conception does not, of course, require a judgment for the defendant as a matter of law. Rather, it is merely a

circumstance to be considered in determining the child's parentage. Paternity, like any other fact, must be proved by the evidence [*Girardin v. Hall (1958) 156 Cal. App. 2d 709, 711-712, 320 P.2d 163]* .

Unless admitted by the mother or the alleged partner, the evidence necessary to establish intercourse will obviously be circumstantial. In such a case, two circumstances must be established [*Huntingdon v. Crowley (1966) 64 Cal. 2d 647, 657-660, 51 Cal. Rptr. 254, 414 P.2d 382]* :

- An opportunity for sexual intercourse between the mother and the other man.
- A disposition or inclination on their part to engage in intercourse.

However, it is an invasion of the mother's right to privacy to seek to discover the mother's sexual relations with other men for periods other than three months before, through three months after, the likely date of conception. There is no governmental interest that outweighs the mother's right of privacy even though the information sought may be relevant for discovery purposes [*Fults v. Superior Court (1979) 88 Cal. App. 3d 899, 902-905, 152 Cal. Rptr. 210* ; *see also Gallina v. Antonelli (1963) 220 Cal. App. 2d 63, 65, 33 Cal. Rptr. 570* (evidence of mother's conduct during period before conception is inadmissible)]. Similarly, whether the alleged father was involved with other women at the time the child was conceived is immaterial, and objections to questions to establish the fact are properly sustained [*Felts v. Betts (1957) 153 Cal. App. 2d 812, 819, 315 P.2d 73]* .

[3] Normal Duration of Pregnancy

Expert evidence or judicial notice as to the normal duration of pregnancy is admissible to establish the likelihood that the child was conceived as a result of an act of intercourse on a specific day [*see Louis v. Louis (1970) 7 Cal. App. 3d 851, 855, 86 Cal. Rptr. 834* ; *see also Estate of McNamara (1919) 181 Cal. 82, 89-91, 183 P. 552]* .

[4] Polygraph Tests

Evidence obtained by polygraph tests of the alleged father or mother is normally inadmissible in a paternity action. However, a stipulation to admit polygraph evidence was upheld in one case in which the parties and the court decided that the trial would probably depend on which party was believed, with little corroborating evidence on either side [*see Robinson v. Wilson (1974) 44 Cal. App. 3d 92, 102, 118 Cal. Rptr. 569]* .

[5] View of Child

It is proper for the trier of fact to view the child in a paternity action to detect any resemblance to the alleged father. However, the court, as trier of fact, has the discretion to refuse to view the child if it does not believe the view would be probative [*Gallina v. Antonelli (1963) 220 Cal. App. 2d 63, 66, 33 Cal. Rptr. 570]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceScientific EvidenceBlood & Bodily FluidsEvidenceScientific EvidencePolygraphsFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityEvidenceGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityEvidenceGenetic TestsFamily LawPaternity & SurrogacyProof of PaternityPresumptionsGeneral Overview

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§ 412.85 Effect of Judgment

The judgment or order of the court in a parentage action under the UPA determining the existence or nonexistence of the parent-child relationship is determinative for all purposes except for actions brought for child neglect under *Penal Code § 270* [*Fam. Code § 7636*].

A judgment establishing paternity entered in an action brought by the county for reimbursement of public assistance is determinative of the issue of parentage even regarding persons who are not parties or privies in theaction [*Guardianship of Claralyn S. (1983) 148 Cal. App. 3d 81, 85, 195 Cal. Rptr. 646]* . And a prior judgment declaring paternity that is issued by the court of a sister state having jurisdiction over the parties is res judicata and protected by the full faith and credit clause of the United States Constitution from collateral attack in the courts of another state. Therefore, if such a judgment exists, the defense of nonpaternity cannot be raised subsequently in a California paternity action [*County of San Diego v. Hotz (1985) 168 Cal. App. 3d 605, 608-610, 214 Cal. Rptr. 658* ; *Craig v. Superior Court (1975) 45 Cal. App. 3d 675, 680-682, 119 Cal. Rptr. 692]* .

However, res judicata arising from a prior judgment of *nonpaternity* is not a favored defense in a paternity action because the establishment of a parent-child relationship is the most fundamental right a child possesses. A future action is not barred unless the record demonstrates, without doubt, that another court previously intended to and actually did adjudicate the issue of paternity [*D.P. v. Stewart (1987) 189 Cal. App. 3d 244, 249, 234 Cal. Rptr. 420]* . Further, a judgment of nonpaternity is not necessarily res judicata with regard to a child who is not a party to the action [*Ruddock v. Ohls (1979) 91 Cal. App. 3d 271, 277-279, 154 Cal. Rptr. 87* (involving judgment of nonpaternity in dissolution proceeding); *see § 412.72*].

For a form for use as a judgment of paternity, see*§ 412.140*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataConstitutional LawRelations Among

GovernmentsFull Faith & CreditFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityDefensesRes Judicata

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§ 412.86. Orders in Judgment

[1] All Orders in Best Interests of Child, Including Support, Custody, and Visitation

The judgment or order, in addition to determining parentage, may contain any other provision directed against the appropriate party to the proceeding, concerning the duty of support, the custody and guardianship of the child, visitation privileges with the child, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child. The judgment or order may direct the father to pay the reasonable expenses of the mother's pregnancy and confinement [*Fam. Code § 7637*; *see Adoption of Rebecca B. (1977) 68 Cal. App. 3d 193, 198 n.4, 137 Cal. Rptr. 100* ; *In re Reyna (1976) 55 Cal. App. 3d 288, 295-296, 126 Cal. Rptr. 138* ; *but see Louden v. Olpin (1981) 118 Cal. App. 3d 565, 567-569, 173 Cal. Rptr. 447* (child has no right to compel parent to visit)]. The court may order support payments to be made to the mother; the clerk of the court; or a person, corporation, or agency designated to administer them for the benefit of the child under the court's supervision [*Fam. Code § 7641(b)*].

In cases in which the local child support agency is not providing child support services pursuant to *Fam. Code § 17400*, and to the extentrequired by federal law, and subject to applicable confidentiality provisions of state or federal law, any judgment for paternity or order for child support must include a provision requiring the child support obligor and obligee to file with the court the following information [*Fam. Code § 4014(b)*]:

- Residential and mailing address;
- Social Security number;
- Telephone number;
- Driver's license number;
- Name, address, and telephone number of the employer; and

- Any other information prescribed by the Judicial Council.

The judgment or order must specify that each parent is responsible for providing his or her own information, that the information must be filed with the court within 10 days of the order, and that new or different information must be filed with the court within 10 days after any event that causes a change in the previously provided information [*Fam. Code § 4014(b)*]. The Judicial Council is required to develop forms for providing this information [*Fam. Code § 4014(d)* (forms must be developed so as not to delay implementation of statewide child support registry, and be available no later than 30 days before its implementation)]. In cases in which the local child support agency is not providing child support services pursuant to *Fam. Code § 17400*, once the state child support registry is operational, any judgment for paternity and any order for child support must include a provision requiring the obligor and obligee to file and keep updated this information with the child support registry [*Fam. Code § 4014(c)*].

[2] Attorney's Fees and Costs

The judgment may include orders for the payment of attorney's fees and costs, including the costs of blood tests, experts and the child's guardian ad litem, to be paid by the parties (except a government entity) in proportions and at times determined by the court [*Fam. Code § 7640*; § 412.86[2]; *see also White v. Marciano (1987) 190 Cal. App. 3d 1026, 1034, 235 Cal. Rptr. 779* ; *Stebbins v. Imerman (1971) 21 Cal. App. 3d 942, 947-948, 98 Cal. Rptr. 865]* . Under *Fam. Code § 7640*, the court has the discretion to award attorney's fees for proceedings on the issues of custody, visitation, and support that occur after paternity has been established and/or after judgment [*Robert J. v. Catherine D. (2005) 134 Cal. App. 4th 1392, 37 Cal. Rptr. 3d 104]* .

[3] Orders Restraining Domestic Violence

A judgment entered in a proceeding under the UPA may include a protectiveorder [*see Fam. Code § 6218*] and any other restraining order as provided by the Domestic Violence Prevention Act [*Fam. Code § 7730*; *see Fam. Code § 6360 et seq.*]. For further discussion of orders under the Domestic Violence Prevention Act, see Ch. 293, *Harassment and Domestic Violence* .

[4] New Birth Certificate; Change of Child's Name

If judgment or order is issued in the paternity proceeding that is at variance with the child's birth certificate, the court must order that a new birth certificate be issued, as prescribed in (what is now) *Health & Safety Code § 102725 et seq.* [*Fam. Code § 7639*]. The statute continues to refer to former *Health & Safety Code § 10450 et seq.*, which were renumbered in the reorganization of the Health and Safety Code operative January 1, 1996 [*see* Stats. 1995, ch. 415]. If an application for change of the child's name has been filed with the petition [*see Fam. Code § 7638*, discussed in *§ 412.77*], the decree changing the child's name may be included in or entered along with the judgment of paternity [*see Code Civ. Proc. § 1275 et seq.*].

[5] Termination of Parental Rights

One court has stated, in dicta, that the language that is now found in *Fam. Code § 7637(a)*, that a judgment or order may contain any provision in the best interests of the child, authorizes termination of parental rights in any judgment or order determining the existence or nonexistence of the parent-child relationship [*In re Shereece B. (1991) 231 Cal. App. 3d 613, 621, 282 Cal. Rptr. 430]* . Whether termination of parental rights is authorized in any UPA action other than one in support of a pending adoption [*see Fam. Code § 7660 et seq.*] is open to question. For a discussion of termination of parental rights, see Ch. 12A, *Adoptions: Termination of Parental Rights* .

Legal Topics:

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

Civil ProcedureJudgmentsGeneral OverviewFamily LawChild CustodyVisitationGeneral OverviewFamily LawChild CustodyVisitationAwardsStandardsBest Interests of ChildFamily LawPaternity & SurrogacyBirth CertificatesGeneral OverviewFamily LawPaternity & SurrogacyBirth CertificatesAlterationsFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityPaternity Registries

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§ 412.87 Modification of Judgment or Order

The court has continuing jurisdiction to modify a judgment or order made under the Uniform Parentage Act [*Fam. Code § 7642*]. Thus, a child support order made in a paternity action is modifiable after judgment, as is any other child support order [*County of Los Angeles v. Patrick (1992) 11 Cal. App. 4th 1246, 1250, 14 Cal. Rptr. 2d 665* (order modifying child support is appealable as order after final judgment under *Code Civ. Proc. § 904.1(b)*)]. However, the doctrine of res judicata prevents relitigation of the issue of parentage in a proceeding to modify a support order [*De Weese v. Unick (1980) 102 Cal. App. 3d 100, 104, 162 Cal. Rptr. 259]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataFamily LawChild SupportObligationsModificationGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage ActFamily LawPaternity & SurrogacyProof of PaternityDefensesRes Judicata

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§ 412.88 Enforcement of Support Obligation

If existence of the father-child relationship is declared, or paternity or a duty of support has been acknowledged or adjudicated under the UPA, the obligation of the father may be enforced in the same or other proceedings by any of the following: (1) the mother; (2) the child; (3) the public authority that has furnished or may furnish the reasonable expenses of pregnancy, confinement, education, support, or funeral; or (4) any other person, including a private agency, to the extent that the person has furnished or is furnishing these expenses [*Fam. Code § 7641(a)*; *see Van Buskirk v. Todd (1969) 269 Cal. App. 2d 680, 686, 75 Cal. Rptr. 280]* .

Willful failure to obey the judgment or order of the court is a civil contempt of the court. All remedies for the enforcement of judgments, including imprisonment for contempt, apply [*Fam. Code § 7641(c)*]. For further discussion, see Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* .

An unmarried man who expends funds to support a child in reliance on the mother's representation that he is the child's father, may not sue the mother on an unjust enrichment theory for the return of the funds after discovering that the child is not his biological offspring [*McBride v. Boughton (2004) 123 Cal. App. 4th 379, 391, 20 Cal. Rptr. 3d 115]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 412.89 Vacating Judgment of Paternity

A judgment establishing paternity may be set aside or vacated on motion by the previously established mother of a child, the previously established father of a child, the child, or the legal representative of any of these persons if genetic testing indicates that the previously established father of the child is not the child's biological father [*Fam. Code § 7646(a)*]. This provision does not apply if the child is presumed to be a child of the marriage under *Fam. Code § 7540* [*Fam. Code § 7646(b)*].

The motion must be brought within a two-year period, commencing with the date on which the previously established father knew or should have known of a judgment that established him as the child's father, or commencing with the date the previously established father knew or should have known of the existence of an action to adjudicate the issue of paternity, whichever is first [*Fam. Code § 7646(a)(1)*]. The motion must be brought within a two-year period, commencing with the date of the child's birth if paternity was established by a voluntary declaration of paternity [*Fam. Code § 7646(a)(2)*]. A court may not order genetic testing to determine whether to set aside a paternity judgment when the request to set aside the judgment is time-barred. A court does, however, have equitable power to order genetic testing after the expiration of the two-year period, but only if extrinsic fraud is shown [*County of Orange v. Superior Court (2007) 155 Cal. App. 4th 1253, 1260-1262, 66 Cal. Rptr. 3d 689*].

Any genetic testing used to support the motion must be conducted in accordance with *Fam. Code § 7552*. The court may order genetic testing to assist it in determining whether the previously established father is the child's biological father, either at the request of any person authorized to make the motion or on the court's own motion [*Fam. Code § 7647.7*].

The court may appoint a guardian ad litem for the child to represent the child's best interests [*Fam. Code § 7647.5*].

If the court finds that the conclusions of all of the experts, based on the results of the genetic tests, indicate that the previously established father is not the child's biological father, it may, nevertheless, deny the motion if it determines that denial is in the child's best interests after considering (1) the child's age; (2) the length of time since entry of the judgment establishing paternity; (3) the nature, duration, and quality of any relationship between the previously

established father and the child, including the duration and frequency of any time periods during which the child and thepreviously established father resided in the same household or enjoyed a parent-child relationship; (4) the request of the previously established father that the parent-child relationship continue; (5) notice by the child's biological father that he does not oppose preservation of the relationship between the previously established father and the child; (6) the benefit or detriment to the child in establishing the child's biological parentage; (7) whether the conduct of the previously established father has impaired the ability to ascertain the identity or, or get support from, the biological father; and (8) additional factors the court deems relevant to its determination of the child's best interest [*Fam. Code § 7648*]. If the court denies the motion, it must state on the record the basis for the denial and any supporting facts [*Fam. Code § 7648.1*].

A court may not issue an order setting aside or vacating a judgment establishing paternity if (1) the judgment was made or entered by a tribunal of another state, even if enforcement of that judgment is sought in this state, or (2) the judgment was made or entered in this state and genetic tests were conducted before entry of judgment that did not exclude the previously established biological father as the child's biological father [*Fam. Code § 7648.3*].

If the court grants a motion to set aside or vacate a paternity judgment, it must also vacate any order for child support and arrearages issued on the basis of that judgment. However, the previously established father has no right to reimbursement for any amount of support paid before the motion was granted [*Fam. Code § 7648.4*].This provision enables a declared father to challenge a paternity decree, but also safeguards the child. Allowing a declared father to seek reimbursement from the mother might adversely affect the mother's ability to provide financially for the child. In enacting this provision, the legislature was aware of the harm that paternity fraud inflicts on a declared father, but sought to balance the competing interests of a declared father and a child, and concluded that a right of reimbursement should not be permitted [*County of Los Angeles v. James (2007) 152 Cal. App. 4th 253, 258-259, 60 Cal. Rptr. 3d 880*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions to VacateFamily LawChild SupportObligationsGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityGeneral Overview

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[Reserved]

§§ 412.90[Reserved]

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§ 412.110 California Points and Authorities

For memoranda relating to appointment of guardian ad litem, see California Points and Authorities, Ch. 106, *Guardianship and Conservatorship*

For memoranda relating to use of temporary restraining orders, see California Points and Authorities, Ch. 116, *Injunctions*

For memoranda relating to proceedings under Uniform Parentage Act, see California Points and Authorities, Ch. 171, *Paternity*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawGuardiansAppointmentFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act

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§ 412.111 California Family Law

For further discussion and forms relating to parentage actions, see California Family Law Practice and Procedure 2d ed., Ch. 31, *Establishing Parentage* (Matthew Bender)

For discussion and forms relating to child custody and visitation rights, see California Family Law Practice and Procedure 2d ed., Ch. 33, *Custody and Visitation Orders* (Matthew Bender)

For discussion and forms relating to orders for child support, see California Family Law Practice and Procedure 2d ed., Ch. 41, *Child Support Orders* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyVisitationGeneral OverviewFamily LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityGeneral Overview

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§ 412.112 State Statutes

[1] Blood/Genetic Tests

Discovery statute authorizing physical examination as not affecting blood tests to determine paternity under Uniform Act on Blood Tests to Determine Paternity. *Code Civ. Proc. § 2032.010(a)*

Use of blood/genetic test to rebut presumption that husband is father of child conceived by wife while cohabiting with husband. *Fam. Code § 7541(b), (c)*

Uniform Act on Blood Tests to Determine Paternity. *Fam. Code § 7550 et seq.*

[2] Guardian ad Litem

Guardian ad litem generally. *Code Civ. Proc. §§ 372-374.5*

Appointment of guardian ad litem for child who is party to action to establish parental relationship. *Fam. Code § 7635(a)*

[3] Protective Orders

Standard mutual restraining orders against removal of child from state. *Fam. Code § 7700*

Use of ex parte protective orders to prevent domestic violence. *Fam. Code § 7710*

Use of noticed protective orders to prevent domestic violence. *Fam. Code § 7720*

Inclusion of protective orders in judgment. *Fam. Code § 7730*

Violation of restraining orders or exclusion orders obtained pursuant to Family Code as misdemeanor. *Penal Code § 273.6*

[4] Inheritance Rights

Ruled determining who is natural parent for purposes of intestate succession. *Prob. Code § 6453*

[5] Issuance of Birth Certificate

Issuance of birth certificate in conformance with judgment or order of court. *Fam. Code § 7639*

Amendment of birth certificate. *Health & Safety Code §§ 102725, 102750, 102755*

[6] Jurisdiction

Jurisdiction of superior court in Family Code proceedings. *Fam. Code § 200*

Jurisdiction of state courts over person having sexual intercourse in state, or causing conception with intent to become legal parent by assisted reproduction in state, with respect to action to establish parental relationship. *Fam. Code § 7620(a)*

Jurisdiction of juvenile court to decide paternity issues. *Welf. & Inst. Code §§ 316.2, 903.41(b)*

[7] Parent and Child Relationship

Unborn child as person. *Civ. Code § 43.1*

Mother and presumed father of minor child as equally entitled to custody of child. *Fam. Code § 3010*

Uniform Parentage Act. *Fam. Code § 7600 et seq.*

[8] Presumptions Regarding Paternity

Circumstances under which man presumed to be natural father. *Fam. Code § 7611*

Child of wife cohabiting with husband who is not impotent or sterile as presumed to be child of marriage. *Fam. Code § 7540*

Establishment of paternity by declaration. *Fam. Code § 7570 et seq.*

[9] Custody of Child

Application of *Fam. Code § 3140*, requiring submission of child's birth certificate in certain custody matters, to proceedings under Uniform Parentage Act. *Fam. Code § 7603*

[10] Support of Child

Parental duty to support minor child. *Fam. Code § 3900*

Parent's duty of support as extending to unmarried child who has attained age 18, is full-time high school student, and is not self-supporting, until child either completes high school or turns 19. *Fam. Code § 3901(a)*

Action for support of minor child. *Fam. Code § 4000*

Judgment for payment of child support in paternity proceeding. *Fam. Code § 7637*

Obligation of father to pay child support when existence of father and child relationship declared; failure to obey order for payment of support as civil contempt. *Fam. Code § 7641*

Father's written promise to support child. *Fam. Code § 7614*

Criminal liability for willful failure to support minor child. *Penal Code § 270*

Determination of paternity in action initiated by district attorney to enforce duty of child support. *Welf. & Inst. Code §§ 11350, 11350.1, 11475.1*

Enforcement by district attorney of duty of child support; administration of state plan for securing child support and determining paternity. *Welf. & Inst. Code §§ 11475-11489*

Child Support Delinquency Reporting Act. *Fam. Code § 4700 et seq.*

[11] Venue

County in which child resides, in which licensed California adoption agency maintains an office if agency brings action, or in which probate proceedings of deceased father brought as proper county for trial. *Fam. Code § 7620*

County in which child resides as proper county for trial in action to enforce obligation of support under *Fam. Code § 3900. Code Civ. Proc. § 395(a)*

Legal Topics:

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

[1] Actions Brought by Alleged Father to Establish Paternity

Former *Civ. Code §§ 7006(c)* and *7010* as granting natural father right to bring action to establish parent and child relationship and on determination of that relationship to secure order compelling visitation privileges provided visitation in best interests of child. *Griffith v. Gibson (1977) 73 Cal. App. 3d 465, 471, 142 Cal. Rptr. 176*

[2] Actions Prosecuted by District Attorney

[a] Action for Support Prosecuted in Name of County

Welf. & Inst. Code § 11350 as not violating noncustodial parent's constitutional right to equal protection of the law. *City and County of San Francisco v. Thompson (1985) 172 Cal. App. 3d 652, 659, 218 Cal. Rptr. 445*

An agreement for entry of judgment or stipulated agreement for paternity or support between unrepresented defendant and district attorney as voidable if unrepresented defendant can establish that he or she was not advised by district attorney of right to trial on questions of paternity and ability to support and that he or she was unaware of these rights and would not otherwise have executed agreement. *Countyof Los Angeles v. Soto (1984) 35 Cal. 3d 483, 492, 198 Cal. Rptr. 779, 674 P.2d 750* ; *County of Alameda v. Mosier (1984) 154 Cal. App. 3d 757, 759, 201 Cal. Rptr. 550*

In action brought by county on behalf of child under *Welf. & Inst. Code § 11350.1* to determine paternity, to obtain support and reimbursement of public assistance, child as not indispensable party and failure to join child as formal party to action as not rendering default judgment against defendant void. *County of Tulare v. Boggs (1983) 146 Cal. App. 3d 236, 240-243, 194 Cal. Rptr. 80*

[b] Child Not Receiving Public Assistance

District attorney as authorized by *Welf. & Inst. Code § 11475.1* to oppose modification of child and spousal support order on behalf of spouse not receiving public assistance. *Worth v. Superior Court (1989) 207 Cal. App. 3d 1150, 1154-1155, 255 Cal. Rptr. 304*

[3] Blood Tests

HLA test results indicating that there was 85.95 percent probability of defendant's paternity as totally indecisive and as determining little more than that defendant not excluded as possible father; it was equally valid to infer that defendant was not father as to infer that he was father. *County of Ventura v. Marcus (1983) 139 Cal. App. 3d 612, 618-619, 189 Cal. Rptr. 8*

In action brought against defendant for child support and to establish paternity, results of HLA blood test as admissible to show biologically that defendant could not be father or that defendant biologically within class that could be father, but not admissible to show that defendant is father. *Alinda V. v. Alfredo V. (1981) 125 Cal. App. 3d 98, 101, 177 Cal. Rptr. 839*

In action brought against defendant for child support and to establish paternity, statistical result of HLA blood test stating there was 98.95 percent probability of defendant's paternity as inaccurate and not entitled to any substantial evidentiary weight when evidence presented by medical technologist whose knowledge of case limited to blood typing, and when technologist did not know extent or nature of other evidence to be introduced at trial and was unable to weigh evidence and make mathematical determination of probability of paternity. *Alinda V. v. Alfredo V. (1981) 125 Cal. App. 3d 98, 101, 177 Cal. Rptr. 839*

Amendment to former *Evid. Code § 621,* which permits use of blood tests in certain cases to rebut otherwise conclusive presumption that issue of wife cohabiting with husband, who is not impotent or sterile, is child of marriage, as constitutional and not violating due process of law or equal protection. *In re Marriage of B. (1981) 124 Cal. App. 3d 524, 531-533, 177 Cal. Rptr. 429*

Use of HLA blood test to determine paternity in criminal prosecution for welfare fraud as approved because of scientifically reliable results. *Shults v. Superior Court (1980) 113 Cal. App. 3d 696, 699, 170 Cal. Rptr. 297*

Trial court in civil paternity action as having no discretion to deny additional, independent blood tests (HLA analysis) on timely demand pursuant to former *Evid. Code § 893,* and moving party as not required to show good cause for more sophisticated and exact test. *County of Fresno v. Superior Court (1979) 92 Cal. App. 3d 133, 137-138, 154 Cal. Rptr. 660*

In civil paternity action, blood test result showing 47 percent probability that defendant is father of child as not legally excluding paternity and not meaning that plaintiffs had failed to prove paternity by preponderance of evidence. *County of Fresno v. Superior Court (1979) 92 Cal. App. 3d 133, 136-137, 154 Cal. Rptr. 660*

Human Leukocyte Antigen (HLA) test results showing very high probability that defendant was father of child as relevant evidence not made inadmissible by any statute and as admissible to prove paternity, provided (1) plaintiff proves general medical acceptability of test results for such purpose, and (2) probative value of such evidence not

outweighed by prejudicial effect, if any, of admitting it. *Cramer v. Morrison (1979) 88 Cal. App. 3d 873, 879-888, 153 Cal. Rptr. 865*

Motion to compel mother and child to submit to blood test by purported father seeking to contest paternity 10 years after divorce, as improper without some showing of facts revealing extrinsic fraud or mistake. *Brown v. Superior Court (1979) 98 Cal. App. 3d 633, 636, 159 Cal. Rptr. 604*

In paternity action brought by district attorney against indigent defendant on behalf of mother and child receiving public assistance, compensation of court-appointed expert on blood tests as to be fixed by court and to be paid by county subject to being later taxable to parties as costs pursuant to former *Evid. Code § 894* and court as unable to order prepayment for blood tests by indigent defendant. *Michael B. v. Superior Court (1978) 86 Cal. App. 3d 1006, 1010, 150 Cal. Rptr. 586*

In paternity action brought by district attorney against indigent defendant on behalf of mother and child receiving public assistance, trial court as in error in failing to appoint experts on defendant's motion for blood tests, when trial court ordered district attorney to make arrangements for blood tests and, on defendant's objection, ordered counsel for defendant to make arrangements for defendant's blood tests. *Michael B. v. Superior Court (1978) 86 Cal. App. 3d 1006, 1010, 150 Cal. Rptr. 586*

[4] Burden of Proof

Pennsylvania statute requiring application of "preponderance of evidence" standard of proof in civil paternity cases as complying with Due Process Clause of *U.S. Const., amend. XIV*. *Rivera v. Minnich (1987) 483 U.S. 574, 576, 107 S. Ct. 3001, 97 L. Ed. 2d 473*

Preponderance of evidence as standard of proof whether or not burden of proof has shifted by effect of rebuttable presumption or action is prosecuted by district attorney for benefit of public entity. *Walsh v. Palma (1984) 154 Cal. App. 3d 290, 293, 295, 201 Cal. Rptr. 142*

[5] Confidentiality of Procedures and Documents

Former judge in paternity action, who had filed declaration of prejudice, as having jurisdiction to order file designated confidential under former *Civ. Code § 7014*, because purpose of statute is to protect privacy of parties, and child protected rather than prejudiced by order. *Louden v. Olpin (1981) 118 Cal. App. 3d 565, 569, 173 Cal. Rptr. 447*

[6] Construction of Uniform Parentage Act With Other Laws

In action brought by county to establish paternity and obtain reimbursement for child support (*Welf. & Inst. Code § 11350.1*), when district attorney obtained appointment of guardian ad litem under former *Civ. Code § 7008*, complaint treated as action for support under *Welf. & Inst. Code § 11350.1* and not converted to action for declaration of parentage under Uniform Parentage Act. *D.G. v. Superior Court (1979) 100 Cal. App. 3d 535, 542, 161 Cal. Rptr. 117*

[7] Establishment of Parent and Child Relationship Under Uniform Parentage Act

[a] Maternity

Under *Fam. Code § 7611(d)*, woman may be presumed mother of child of her lesbian partner if they agree to raise child together, she receives child into her home, and she holds child out as her natural child; as child's presumed mother, she has obligation to support child. *Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 113, 33 Cal. Rptr. 3d 46, 117 P.3d 660*

When woman provides ova to her lesbian partner so that partner can bear child who will be raised in their joint home, both women are considered to be child's parents. K.M. v. E.G. *(2005) 37 Cal. 4th 130, 134, 33 Cal. Rptr. 3d 61, 117 P.3d 673*

Registered domestic partner of birth mother is entitled to bring petition under *Fam. Code § 7611(d)* to establish her parental relationship with child born to birth mother by artificial insemination from anonymous donor; fact that birth mother opposes presumed parent status for petitioner does not control determination of whether presumed parent status arises under *Fam. Code § 7611(d)*. *Charisma R. v. Kristina S. (2006) 140 Cal. App. 4th 301, 310, 44 Cal. Rptr. 3d 332*

[b] Paternity

Child's mother has standing to claim that man is child's presumed father under *Fam. Code § 7611(c)* or*(d)*, even if man is not party to action. *Gabriel P. v. Suedi D. (2006) 141 Cal. App. 4th 850, 862, 46 Cal. Rptr. 3d 437*

[8] Equal Protection and Due Process Considerations

Former *Prob. Code § 255* (child's intestate succession rights dependent on establishment of parent and child relationship) as valid constitutional means of encouraging marriage and discouraging birth of illegitimate children. *Estate of Ginochio (1974) 43 Cal. App. 3d 412, 415, 418-419, 117 Cal. Rptr. 565*

[9] Fees and Costs

After jury found defendant to be father of plaintiff's child, and plaintiff then applied for additional child support and attorney fees, trial court as having continuing jurisdiction to award child support and attorney's fees under former *Civ. Code § 7013*; jury trial as determining paternity only and issue of child support and attorney's fees as still remaining. *Silva v. Weiss (1982) 137 Cal. App. 3d 214, 215, 186 Cal. Rptr. 846*

[10] Guardian ad Litem

Court as not abusing its discretion in denying parent's motion to vacate appointment of present guardian ad litem and appoint parent as guardian ad litem in action to establish paternity. *D.G. v. Superior Court (1979) 100 Cal. App. 3d 535, 538-546, 161 Cal. Rptr. 117*

Order of preference for appointment of guardian ad litem under Code Civ. Proc. § 372 or former *Civ. Code § 7006* as left to discretion of trial court, and mother of child as not statutorily entitled to special preference. *D.G. v. Superior Court (1979) 100 Cal. App. 3d 535, 545-546, 161 Cal. Rptr. 117*

[11] Mother's Sexual Relations With Other Men

In action brought by county to establish paternity of defendant, testimony of mother that defendant and other man were

only two possible fathers as impeached by mother's former sworn statement on welfare application that other man was only possible father, and court as not required to credit her testimony as to lack of intercourse with anyone else. *County of Ventura v. Marcus (1983) 139 Cal. App. 3d 612, 617, 189 Cal. Rptr. 8*

In paternity action, interrogatories asking mother about sexual relationships for period of one year before and one year after time of conception, when mother's answer stated she had no sexual relations with anyone other than defendant for three-month period both before and after date of conception, and there was no showing that interrogatories likely to turn up material information, as constitutionally overbroad because their utility did not outweigh mother's right of privacy. *Fults v. Superior Court (1979) 88 Cal. App. 3d 899, 904-905, 152 Cal. Rptr. 210*

In paternity action, interrogatories asking mother about sexual relationships for period of one year before and one year after time of conception as not objectionable on grounds of relevancy because answers might enable defendant to establish that mother had relationships with men other than alleged father. *Fults v. Superior Court (1979) 88 Cal. App. 3d 899, 902, 152 Cal. Rptr. 210*

[12] Pendente Lite Orders

In paternity action brought by man alleging paternity and seeking pendente lite order for child visitation rights pursuant to former *Civ. Code § 4601*, denial of visitation rights as error when trial court had not make preliminary determination of paternity or nonpaternity or whether visitation would be detrimental to best interests of child. *Gadbois v. Superior Court (1981) 126 Cal. App. 3d 653, 657, 179 Cal. Rptr. 19*

In action to establish paternity of illegitimate child, court as permitted to make pendente lite orders for support, medical and hospital expenses, and attorney's fees, but plaintiff as first required to establish defendant to be father of child by preponderance of evidence. *Hodge v. Gould (1969) 274 Cal. App. 2d 806, 808, 79 Cal. Rptr. 245*

During pendency of paternity action, on proper showing, court as having power to order alleged father to pay reasonable sums for medical expenses of mother and child support, even though parentage denied by defendant. *Thurmond v. SuperiorCourt (1967) 66 Cal. 2d 836, 838, 59 Cal. Rptr. 273, 427 P.2d 985* ; *Richter v. Superior Court (1963) 214 Cal. App. 2d 821, 823, 29 Cal. Rptr. 826* ; *Carbone v. Superior Court (1941) 18 Cal. 2d 768, 770, 117 P.2d 872*

[13] Personal Jurisdiction

Necessity for personal jurisdiction over defendant in paternity action. *Hartford v. Superior Court (1956) 47 Cal. 2d 447, 453, 304 P.2d 1*

[14] Presumptions of Paternity

Legislative declaration contained in former *Evid. Code § 621*, that issue of wife cohabiting with husband who is not impotent or sterile is conclusively presumed to be child of marriage, as really not a presumption but rule of substantive law. *Ferguson v. Ferguson (1981) 126 Cal. App. 3d 744, 746, 179 Cal. Rptr. 108*

In county action to compel nonimpotent black defendant to pay child support for child conceived by defendant's

Caucasian wife while living with defendant, trial court as not in error in refusing to recognize racial impossibility exception to conclusive presumption of child's legitimacy under former *Evid. Code § 621* because theory unsupported by scientific evidence and racial difference dicta no longer followed in California. *County of San Diego v. Brown (1978) 80 Cal. App. 3d 297, 301-302, 145 Cal. Rptr. 483*

Social policy considerations such as upholding integrity of family, protecting child from stigma of illegitimacy, protecting welfare of child, and keeping child off welfare as enabling Legislature to enact conclusive presumption under former *Evid. Code § 621*. *County of San Diego v. Brown (1978) 80 Cal. App. 3d 297, 303, 145 Cal. Rptr. 483*

Conclusive presumption of paternity as not violating due process because there is rational connection between ultimate fact presumed and facts actually proved, and because social policy interests of state override private interests of defendant seeking to deny paternity. *County of San Diego v. Brown (1978) 80 Cal. App. 3d 297, 304-308, 145 Cal. Rptr. 483*

Conclusive presumption of paternity as not violating due process rights of defendant alleged to be father of child conceived by defendant's wife while living with him when blood tests are inconclusive and there are no reasonable alternative means to determine paternity. *County of San Diego v. Brown (1978) 80 Cal. App. 3d 297, 305-306, 145 Cal. Rptr. 483*

[15] Effect of Presumptions Relating to Paternity

One presumed to be father as presumptively entitled to custody for purposes of *Penal Code § 278*, prohibiting child abduction by one not entitled to custody, without judicial determination of paternity. *People v. Johnson (1984) 151 Cal. App. 3d 1021, 1025-1026, 199 Cal. Rptr. 231*

[16] Res Judicata

Doctrines of res judicata and collateral estoppel pertaining to issue of child's paternity as not properly invoked against grandparent who was party or privy in prior actions; public policies of maintaining parent-child relationships and ensuring finality of paternity judgments as properly prevailing over doctrines of res judicata and collateral estoppel. *Guardianship of Claralyn S. (1983) 148 Cal. App. 3d 81, 85, 195 Cal. Rptr. 646*

Judgments of paternity and child support obtained pursuant to statute later held unconstitutional because it permitted entry of final judgment against noncustodial parent based on out-of-court agreement, without notice and opportunity to be heard, and in absence of voluntary and intelligent waiver of parent's constitutional rights (*Welf. & Inst. Code § 11476.1*) as res judicata because of strong public interest in finality of such judgments. *County of Los Angeles v. Superior Court (1981) 123 Cal. App. 3d 988, 992-993, 177 Cal. Rptr. 70*

Compromise of minor's paternity claim entered into by mother and alleged father as not effective to bar later action to establish paternity. *Ernest P. v. Superior Court (1980) 111 Cal. App. 3d 234, 240, 168 Cal. Rptr. 438*

Doctrine of res judicata as preventing relitigation of issue of paternity in proceeding to modify support order. *De Weese v. Unick (1980) 102 Cal. App. 3d 100, 104, 162 Cal. Rptr. 259*

Paternity determination made during dissolution proceedings as res judicata, in absence of extrinsic fraud or extrinsic mistake, when father aware of true facts but failed to contest paternity at time of dissolution. *Brown v. Superior Court (1979) 98 Cal. App. 3d 633, 636, 159 Cal. Rptr. 604*

[17] Right to Counsel

When county public defender refused indigent defendant's case and no private attorney offered to represent defendant gratuitously, court as in error for not appointing counsel and for dismissing case. *County of Tulare v. Ybarra (1983) 143 Cal. App. 3d 580, 582, 192 Cal. Rptr. 49*

[18] Statutes of Limitation

In action brought by mother to establish paternity and for child support, child as real party in interest and laches not imputed to child during minority; statute of limitations on paternity aspect of action as tolled during minority and father's duty of support as continuing obligation not affected by statute of limitations. *Perez v. Singh (1971) 21 Cal. App. 3d 870, 872, 97 Cal. Rptr. 920*

[19] Support of Child

Liability for support of illegitimate child as mutual obligation of both father and mother. *Stargell v. Stargell (1968) 263 Cal. App. 2d 504, 507, 69 Cal. Rptr. 715*

[20] Visitation Rights

Fact that child was conceived out of wedlock while father was adult and mother was minor and father's subsequent admission of paternity implied his admission of statutory rape as insufficient grounds for denial of visitation on basis of clean hands doctrine. *In re Brandie W. (1984) 157 Cal. App. 3d 110, 114, 203 Cal. Rptr. 537*

Natural father whose paternity is not presumed under the provisions of former *Civ. Code § 7004* as still entitled to visitation rights provided such visitation in bestinterests of child. *Griffith v. Gibson (1977) 73 Cal. App. 3d 465, 469, 471, 142 Cal. Rptr. 176*

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceInferences & PresumptionsRebuttal of PresumptionsEvidenceScientific EvidenceBlood & Bodily FluidsFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage ActFamily LawPaternity & SurrogacyProof of PaternityBurdens of ProofFamily LawPaternity & SurrogacyProof of PaternityDefensesRes JudicataFamily LawPaternity & SurrogacyProof of PaternityDefensesStatutes of LimitationsFamily LawPaternity & SurrogacyProof of PaternityEvidenceBlood TestsHealthcare LawTreatmentReproductive TechnologyArtificial Insemination

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§ 412.114 Attorney General Opinions

County as not required to pay costs of providing court-appointed counsel for indigent defendants in paternity actions. *64 Ops. Cal. Att'y Gen. 257 (1981)*

Under former *Civ. Code § 248* and *Welf. & Inst. Code § 11350.1*, county as permitted to be named plaintiff in bringing action to obtain child support, whether or not case involves welfare funds. *59 Ops. Cal. Att'y Gen. 18 (1976)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawPaternity & SurrogacyGeneral OverviewPublic Health & Welfare LawSocial ServicesLegal Aid

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35-412 California Forms of Pleading and Practice--Annotated § 412.115

§ 412.115 Law Reviews

Comment, *Father Knows Best--But Which Father? California's Presumption of Legitimacy Loses Its Conclusiveness: "Michael H. v. Gerald D." and Its Aftermath, 25 Loy. L.A.L. Rev. 275 (1991)*

Kaye, *DNA Paternity Possibilities*, 24 Fam. L.Q. 279 (1990)

Comment, *DNA Fingerprinting and Paternity Testing, 2 U.C. Davis L. Rev. 609 (1989)*

Kopytoff, *Surrogate Motherhood: Questions of Law and Values, 22 U.S.F. L. Rev. 205 (1988)*

Comment, *Protecting the Opportunity Interest of the Unwed Fathers of Newborn Infants Placed for Adoption: Does California's Statute Go Far Enough? 25 Cal. W.L. Rev. 123 (1988-1989)*

Carbone, *The Role of Contract Principles in Determining the Validity of Surrogacy Contracts, 28 Santa Clara L. Rev. 581 (1988)*

Wheeler, *A Father's Right to Know His Child: Can it Be Denied Simply Because the Mother Married Another Man? 20 Loy. L.A.L. Rev. 705 (1987)*

Survey, *Women and California Law, Part I, B: Child Custody, 16 Golden Gate U.L. Rev. 555 (1986)*

Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies, 96 Yale L.J. 187 (1986)*

Comment, *In Vitro Fertilization: Third Party Motherhood and the Changing Definition of Legal Parent, 17 Pac. L.J. 231 (1985)*

Bird, *Surrogate Parenthood: Hers? Yours? Ours?* 2(2) Cal. St. B.J. 20 (1982)

Peterson, *A Few Things You Should Know About Paternity Tests (But Were Afraid to Ask*), *22 Santa Clara L. Rev. 667 (1982)*

Comment, *Surrogate Motherhood in California: Legislative Proposals, 18 San Diego L. Rev. 341 (1981)*

Note, *Eugenic Artificial Insemination: A Cure for Mediocrity? 94 Harv. L. Rev. 1850 (1981)*

Sutton, *The Lesbian Family: Rights in Conflict Under the California Uniform Parentage Act*, 10 GGU L Rev 1007 (1980)

Comment, *Paternity Testing With the Human Leukocyte Antigen System: A Medicolegal Breakthrough, 20 Santa Clara L Rev 511 (1980)*

Annas, *Fathers Anonymous: Beyond the Best Interests of the Sperm Do* nor, 14 Fam. L.Q. 1 (1980)

Schmidt, *Immigration Benefits for Children Born Out of Wedlock and for Their Natural Fathers: A Survey of the Law, 16 San Diego L. Rev. 11 (1978)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawParental Duties & RightsGeneral OverviewFamily LawParental Duties & RightsNonmarital ChildrenGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacySurrogacyAgreementsFamily LawPaternity & SurrogacySurrogacyAssisted Reproduction ParentageHealthcare LawTreatmentReproductive TechnologyArtificial Insemination

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§ 412.116 Text References

Disputed Paternity Proceedings (5th ed)

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawPaternity & SurrogacyGeneral Overview

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§ 412.117 Annotations

"Admissibility, weight, and sufficiency of Human Leukocyte Antigen (HLA) tissue typing tests in paternity cases," 37 A.L.R.4th 167 (1985)

"Right of indigent defendant in paternity suit to have assistance of counsel at state expense," 4 A.L.R.4th 363 (1981)

"Proof of husband's impotency or sterility as rebutting presumption of legitimacy," 84 A.L.R.3d 495 (1978)

"Posthumous illegitimate child as 'child' entitled to survivor's benefits under § 216 of the Social Security Act (*42 USCS § 416*)," *36 A.L.R. Fed. 166 (1978)*

"Determination of paternity of child as within scope of proceeding under Uniform Reciprocal Enforcement of Support Act," 81 A.L.R.3d 1175 (1977)

"Legitimation by marriage to natural father of child born during mother's marriage to another," 80 A.L.R.3d 219 (1977)

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsEnforcementGeneral OverviewFamily LawChild SupportObligationsEnforcementInterstate EnforcementUniform Reciprocal Enforcement of Support ActFamily LawParental Duties & RightsNonmarital ChildrenGeneral OverviewFamily LawParental Duties & RightsNonmarital ChildrenSocial Security BenefitsFamily LawPaternity & SurrogacyGeneral Overview

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[Reserved]

§§ 412.118[Reserved]

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35-412 California Forms of Pleading and Practice--Annotated § 412.130

§ 412.130 Petition to Establish Parental Relationship and Summons With Standard Restraining Order [Fam. Code § 7630]--Cal. Judicial Council Forms FL-200, FL-210

[1] FORMS Petition to Establish Parental Relationship and Summons With Standard Restraining Order [Fam. Code § 7630]--Cal. Judicial Council Forms FL-200, FL-210

Click here to view image.

[2] Use of Forms

These forms are illustrative versions of the Judicial Council forms of Petition to Establish Parental Relationship and Summons (with standard restraining order), for use in a proceeding to establish a parental relationship under the Uniform Parentage Act [Cal. Judicial Council Forms FL-200, FL-210; *see Fam. Code §§ 7630* (father-child relationship), 7650 (mother-child relationship)]. The Summons form is designated as "adopted," and therefore is mandatory for use. The Petition form is designated as "approved," and therefore is optional. However, former Cal. Rules of Ct., Rule 1215(b) provided that the only pleading permitted by a petitioner to establish a parental relationship was the petition prescribed by former Cal. Rules of Ct., Rule 1296.60 (now Cal. Judicial Council Form FL-200), except for an action filed by the district attorney or other local child support agency in actions filed under *Fam. Code § 17400 et seq.* Effective January 1, 2003, Rule 1215 was amended, and the replacement rule [*Cal. Rules of Ct., Rule 5.108*] dropped this language. However, for all practical purposes, the "mandatory" use of both the forms of Summons and Petition has been established, except in public agency actions to establish parentage and support, which are discussed in Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* . These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The Judicial Council form of Summons with standard restraining order [Cal. Judicial Council Form FL-210] prohibits either party from removing the child from the state without the prior written consent of the other parent or an order of the court [*see Fam. Code § 7700*, discussed in *§ 412.81[3]*; *see also Fam. Code § 231 et seq.*].

This form is filled out to illustrate the situation in which the petition is filed by a man who alleges that he is the father of

the child and is entitled to parental rights, including custody and visitation [*see Fam. Code § 7630(c)*, discussed in *§ 412.70[2]*].

The petition may also be brought by the mother against a man whom she alleges is the father of the child for a determination of paternity and child support, or by an adoption agency to whom the child has been relinquished or a prospective adoptive parent of the child [*see Fam. Code § 7630(a)*, discussed in *§ 412.70[1]*]. However, a mother in such a situation should consider contacting the public support agency who is authorized to bring the proceeding, whether or not the child is receiving public assistance [*see Fam. Code § 17400 et seq.*]. Paternity actions brought by the district attorney or other support agency are discussed in Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* .

If the basis for the petitioner's claim is that a voluntary declaration of paternity has been signed, the box in Paragraph 5 must be marked (Item5(c)), and a copyof the declaration must be attached. For discussion of the effect of a voluntary declaration of paternity, see§ 4112.34 [*see Fam. Code § 7571*].

For a form of petition for child custody, visitation, and child support that does not seek to establish a parentage judgment, but which may be used either by parents who have signed a voluntary declaration of paternity, or who are married and have not brought another family law action, see Ch. 394, *Parent and Child* [Cal. Judicial Council Form FL-260]. The Summons form illustrated above must also be used with that petition [*see* Cal. Judicial Council Form FL-210].

[3] Jurisdiction and Venue

The petition must be filed in the superior court [*see Fam. Code § 200*] of the county where the child resides or in which a licensed California adoption agency maintains an office if that agency brings the action [*Fam. Code § 7620(b)(1),(2)*]. If the father is deceased, the petition may be filed in any county where proceedings for probate of his estate have been or could be commenced [*Fam. Code § 7620(b)(3)*].

[4] When Petition Should Be Filed

The action may be filed before the child is born [*see Fam. Code § 7633*], and indeed, should definitely be filed before birth if the mother has stated her intention to place the child for adoption [*see Adoption of Kelsey S. (1992) 1 Cal. 4th 816, 849, 4 Cal. Rptr. 2d 615, 823 P.2d 1216* , discussed in *Ch. 12A, Adoptions: Termination of Parental Rights, § 12A.15*]. The Judicial Council form of Declaration Under Uniform Child Custody Jurisdiction and Enforcement Act [*see Fam. Code § 3429*] must be attached (*see* item 6).

[5] Child Support

If paternity is determined, a child support order will be issued according to the statewide uniform child support guideline [*see Fam. Code § 4050 et seq.*, discussed in Ch. 224, *Dissolution of Marriage: Child Support*]. Therefore, the plaintiff should complete and attach the Judicial Council form of Income and Expense Declaration [*see* Cal. Judicial Council Form FL-150] (item 12). For an example, see Ch. 221, *Dissolution of Marriage: Master Procedural Guide* .

[6] Service

The petition is to be served on the respondent together with the illustrated Summons with restraining order on the reverse side [*Fam. Code §§ 7635(b), 7666(a)*; *see Code Civ. Proc. § 413.10 et seq.* (service of summons)]. In addition, a blank Response to Petition to Establish Parental Relationship must be served with the complaint [*see* Cal. Judicial Council Form FL-220; *see § 412.132*].

The entire package--complaint, summons, standard restraining order, blank answer, and supporting documents--should

be served on the defendant, and a Judicial Council Proof of Service filed with the clerk [*see* Cal. Judicial Council Form DV-140]. A copy of the Petition and its attachments, Summons, all supporting documents, and blank Response, should be served on the respondent. Proof of service should be made using Cal. Judicial Council Form DV-140, Proof of Service (Family Law, Domestic Violence Prevention, Uniform Parentage). An illustrated version of this form is set forth in Ch. 293, *Harassment and Domestic Violence* . For further discussion of notice, see*§ 412.78*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueIndividual DefendantsCivil ProcedureVenuePublic OfficialsFamily LawAdoptionGeneral OverviewFamily LawChild CustodyEnforcementUniform Child Custody Jurisdiction & Enforcement ActFamily LawChild SupportObligationsComputationGeneral OverviewFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawParental Duties & RightsTermination of RightsGeneral OverviewFamily LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage ActFamily LawPaternity & SurrogacyProof of PaternityGeneral OverviewPublic Health & Welfare LawSocial SecurityAssistance to FamiliesGeneral Overview

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Volume 35: Partition thru Paternity-Chs. 397-412
Chapter 412 PATERNITY
PART IV. FORMS

35-412 California Forms of Pleading and Practice--Annotated § 412.131

§ 412.131 Petition to Establish Nonpaternity--By Presumed Father of Child Born During Marriage [Fam. Code §§ 7611(a), 7630(a)(2)]

[1] FORM Petition to Establish Nonpaternity--By Presumed Father of Child Born During Marriage [Fam. Code §§ 7611(a), 7630(a)(2)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	
_____ [*name of mother*],	)	
_____ [*name of alleged father, if any*],	)	NO. _____
	)	PETITION TO ESTABLISH NONPATERNITY
and	)	
	)	
_____ [*name of child*],	)	
Respondents.	)	
	)	
	)	

Petitioner alleges:

1. Respondent _____ [*name of mother*] and the child reside together at _____ [*street address and city*], California.

2. Petitioner and respondent _____ [*name of mother*] were married on or about

_____ [*date*], and were separated on or about _____ [*date*], and a final judgment of dissolution in proceeding number _____ [*case number of dissolution proceeding*] was entered on _____ [*date*], in [*name of court where judgment of dissolution entered, e.g.,* the Superior Court of _____County, California].

3. On _____ [*date during marriage or within 300 days of entry of judgment of dissolution*], respondent _____ [*name of mother*] gave birth to respondent _____ [*name of child*] hereinafter referred to as "the child."

4. Without petitioner's knowledge or consent, respondent _____ [*name of mother*] had petitioner's name listed as the father on the child's birth certificate.

5. By virtue of the provisions of *Section 7611, Subdivision (a) of the Family Code*, petitioner is the presumed father of the child but is, in fact, not the father of the child.

6. During the period of conception, petitioner and respondent _____ (*name of mother*) were separated. Respondent _____ (*name of mother*) was cohabiting with respondent _____ (*name of alleged father*) at _____ (*street address and city*), California. Petitioner is informed and believes and thereon alleges that respondent _____ (*name of alleged father*) is, in fact, the father of the child.

7. Petitioner is informed and believes and thereon alleges that respondent _____ (*name of alleged father*) has denied, and continues to deny, his paternity of the child, has refused, and continues to refuse, to accept the child into his home or acknowledge the child as his, and has refused, and continues to refuse, to provide respondent _____ (*name of mother*) with any funds for the support, maintenance, and education of the child.

8. With full knowledge of the above-alleged facts, respondent _____ (*name of mother*) has nevertheless demanded from petitioner funds with which to provide for the support, maintenance, and education of the child and has stated that unless petitioner pays, she will "turn the matter over to the District Attorney."]

WHEREFORE, Petitioner prays judgment:

1. Declaring that he is not the father of the child.

[2. Declaring that respondent _____ [*name of alleged father*] is the father of the child, if the evidence so establishes.]

3. For costs of suit herein incurred.

4. For such other and further relief as the court may deem proper.
_____ [*date*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Use of Form

This form is a petition for use to initiate a proceeding under the Uniform Parentage Act to declare the nonexistence of a parent-child relationship [*see Fam. Code §§ 7630(a)(2)* (action to determine nonexistence of father-child relationship),

7650 (action to determine nonexistence of mother-child relationship)]. The Judicial Council has not yet adopted a form for use in bringing such an action, and therefore this form should be used until it does so. Because the Judicial Council has recast its general (non-district attorney) form for bringing a parentage action as a petition, instead of a complaint, as of January 1, 1999 (*see § 412.130*), this form is also cast as a petition.

The form alleges that the petition and the respondent petitioner were marriedbut separated before the child was conceived. But because the child was born before their marriage was dissolved, the respondent petitioner must rebut the presumption, based on the marriage, that he is the father of the respondent mother's child [*see Fam. Code § 7611(a)*, discussed in *§ 412.32[1]*]. The form may be adapted for use to rebut other presumptions of paternity arising from other facts. For further discussion of considerations relevant to actions under the UPA, see the Comments to *see § 412.130*.

[3] Parties

In addition to the mother, an alleged father and the child have been named as respondents in the proceeding [*see Fam. Code § 7635(a)* (child may be party to action)]. The child should be made a party so that a judgment of nonpaternity will have res judicata effect with regard to any subsequent paternity proceeding that may be brought by the child [*see Ruddock v. Ohls (1979) 91 Cal. App. 3d 271, 277-279, 154 Cal. Rptr. 87* , discussed in *§ 412.72*].

If an alleged father has been identified, he may be made a party, but must be given notice of the action [*Fam. Code § 7635(b)*; *see § 412.135*]. His paternity may be adjudged in the action if he has been made a party [*Fam. Code § 7630(a)(2)*].

[4] When Action Must Be Brought

An action to declare the nonexistence of a parent-child relationship that is presumed by virtue of the marriage or attempted marriage of the parents may be brought only within a reasonable time after obtaining knowledge of the relevant facts [*Fam. Code § 7630(a)(2)*]. However, an action to determine the nonexistence of a relationship that is presumed because thealleged father has received the child into his home may be brought at any time [*Fam. Code § 7630(b)*; *see Fam. Code § 7611(d)*].

[5] Verification

All complaints or petitions brought under the Family Code must be verified [*Fam. Code § 212*; *see Code Civ. Proc. § 446*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawParental Duties & RightsConsentGeneral OverviewFamily LawPaternity & SurrogacyBirth CertificatesGeneral OverviewFamily LawPaternity & SurrogacyBirth CertificatesNamed FatherFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityFather's AcknowledgmentFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage ActFamily LawPaternity & SurrogacyProof of PaternityDefensesRes JudicataFamily LawPaternity & SurrogacyProof of PaternityPresumptionsGeneral Overview

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35-412 California Forms of Pleading and Practice--Annotated § 412.132

§ 412.132 Response to Petition to Establish Parental Relationship--Cal. Judicial Council Form FL-220

[1] FORM Response to Petition to Establish Parental Relationship--Cal. Judicial Council Form FL-220

Click here to view image.

[2] Use of Form

This form is an illustration of the Judicial Council form of Response to Petition to Establish Parental Relationship under the Uniform Parentage Act [Cal. Judicial Council Form FL-220; *see Fam. Code § 7630* (action to determine father-child relationship), 7650 (action to determine mother-child relationship)]. The Response form is designated as "approved," and therefore is optional. However, former Cal. Rules of Ct., Rule 1215(c) provided that the only pleading permitted by a respondent to respond to an action to establish a parental relationship was this response form [former Cal. Judicial Council Form 1296.65 (now Cal. Judicial Council Form FL-220)], except for an action filed by the district attorney or other local child support agency in actions filed under *Fam. Code § 17400 et seq.* Effective January 1, 2003, Rule 1215 was amended, and the replacement rule [*Cal. Rules of Ct., Rule 5.108*] dropped this language. However, for all practical purposes, the "mandatory" use of the form has been established in private actions. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The response may be used to deny the allegations of the petition, to assert affirmative defenses, or to admit the parental relationship and either request or agree to child custody, visitation, or support. Possible affirmative defenses are set forth in *see §§ 412.133* and *412.134*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyGeneral OverviewFamily LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act

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35-412 California Forms of Pleading and Practice--Annotated § 412.133

§ 412.133 Affirmative Defenses to Petition to Establish Paternity--Mother Cohabiting With Husband at Time of Conception [Fam. Code § 7540]

[1] FORM Affirmative Defenses to Petition to Establish Paternity--Mother Cohabiting With Husband at Time of Conception [Fam. Code § 7540]

AS A [*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE, respondent alleges that:

1. _____ [Petitioner mother *or name of mother if she is not Petitioner*] was cohabiting with her husband _____ [*name of husband*], during the period from_____ [*date*], through _____ [*date*], the period of time during which the child who is the subject of this action could have been conceived.

2. During all of the above-mentioned period, _____ [*name of husband*] was not impotent or sterile.

3. _____ [*Name of husband*] is conclusively presumed to be the father of the child referred to in the Petition herein.

[2] Use of Form

This form is a defense for use in respondent's response to a Petition to establish a father and child relationship brought under the UniformParentage Act (*Fam. Code § 7600 et seq.*) [*see Fam. Code § 7630* (action to determine father-child relationship)]. The defense sets up the facts necessary to establish the conclusive presumption that the husband is the father of a child born to a married woman, if the spouses were cohabiting at the time of conception and the husband is not impotent or sterile [*see Fam. Code § 7540*, discussed in *§ 412.31*.

This affirmative defense may be inserted in Item 7 of the Judicial Council form of Response to Petition to Establish Parental Relationship [*see* Cal. Judicial Council Form FL-220]. An illustrative form of the Response is *set forth in § 412.132*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage ActFamily LawPaternity & SurrogacyProof of PaternityDefensesGeneral Overview

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35-412 California Forms of Pleading and Practice--Annotated § 412.134

§ 412.134 Affirmative Defenses to Petition to Establish Paternity--Sexual Intercourse With Other Men

[1] FORM Affirmative Defenses to Petition to Establish Paternity--Sexual Intercourse With Other Men
AS A [*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE, respondent alleges that between _____ [*date*] and _____ [*date*], the period of time during which the child who is the subject of this action could have been conceived, petitioner mother engaged in acts of sexual intercourse with _____ [*name or names of persons; or if names are not known,* a certain person or persons, the names of whom respondent is ignorant, but petitioner mother well knows].

[2] Use of Form

This form is a defense for use in respondent's response to a petition to establish a father and child relationship brought under the Uniform Parentage Act (*Fam. Code § 7600 et seq.*) [*see Fam. Code § 7630* (action to determine father-child relationship)]. The defense alleges that someone other than himself is the child's father.

This affirmative defense may be inserted in Item 7 of the Judicial Council form of Response to Petition to Establish Parental Relationship [*see* Cal. Judicial Council Form FL-220]. An illustrative form of the Response is set forth in *§ 412.132*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage ActFamily LawPaternity & SurrogacyProof of PaternityDefensesGeneral Overview

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§ 412.135 Notice of Paternity Action [Fam. Code §§ 7635(b), 7666]

[1] FORM Notice of Paternity Action [Fam. Code §§ 7635(b), 7666]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	
Petitioner,	)	
	)	
vs.	)	NO. _____
	)	NOTICE OF PATERNITY ACTION
_____ [*name*],	)	
Respondent.	)	
	)	
	)	

_____

To:_____ [*name of person being given notice*]
YOU ARE HEREBY NOTIFIED that on _____ [*date*], a petition was filed in the above-entitled court by _____ [*name of plaintiff*] as petitioner against_____ [*name of respondent*] as respondent, for the purpose of seeking a declaration that respondent is the natural father of the minor child therein named. A copy of that petition is attached to this notice.
You are served with this notice as the_____ [*specify status of person being noticed e.g.*, presumed father of the minor child therein named], and are entitled to an opportunity to be heard in the case.

This notice is given under the provisions of *Section 7635(b) of the California Family Code*.
_____ [*date*]

_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Use of Form

This form is a notice to a nonparty that a proceeding has been filed to determine the existence or nonexistence of a parent-child relationship under the Uniform Parentage Act. Notice of the action must be given to the natural mother, each man presumed to be the father under *Fam. Code § 7611*, and each man alleged to be the natural father, whether or not they are parties to the action [*Fam. Code § 7635(b)*, discussed in *§ 412.78[2]*].

[3] Manner of Giving Notice

Notice of the proceeding must be given in accordance with the provisions of the Code of Civil Procedure for the service of process in a civil actionin California, except that publication or posting of the notice is not required [*Fam. Code § 7666(a)*]. Provisions for service of process are found in *Code Civ. Proc. §§ 413.10-417.40*.

The notice should be accompanied by a copy of the petition [*see Code Civ. Proc. §§ 415.10-415.40*].

Proof of giving notice must be filed with the court [*Fam. Code § 7666(a)*]. Provisions for proof of service are found in *Code Civ. Proc. §§ 417.10-417.40*. If a person identified as the natural father or possible natural father cannot be located, or his whereabouts are unknown or cannot be ascertained, the court may issue an order dispensing with notice to such person [*Fam. Code § 7666(b)*].

For a general discussion and forms relating to service of process and proof of service, see Ch. 518, *Service of Summons and Papers* .

[4] Nonparty's Response

Fam. Code § 7635(b) requires that a nonparty be given an opportunity to be heard in the action but does not specify the manner in which this requirement can be met. Therefore, a nonparty could file a notice of motion for an order requiring that he or she be joined as a petitioner or respondent under *Code Civ. Proc. § 389*, or seek to intervene under *Code Civ. Proc. § 387*. For discussion and forms relating to joinder of parties and intervention, see Ch. 395, *Parties* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProceduresPleading & PracticeService of ProcessMethodsPublicationCivil ProceduresPleading & PracticeService of ProcessProofGeneral OverviewCivil ProceduresPartiesJoinderGeneral OverviewFamily LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act

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35-412 California Forms of Pleading and Practice--Annotated § 412.136

§ 412.136 Proceedings for Order to Require Parties to Submit to Genetic Tests [Fam. Code § 7551]--Notice of Motion

[1] FORM Proceedings for Order to Require Parties to Submit to Genetic Tests [Fam. Code § 7551]--Notice of Motion

_____ [*name*],	)	NO. _____
Petitioner,	)	NOTICE OF MOTION AND MOTION FOR ORDER REQUIRING GENETIC TESTS
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Respondent.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

To _____ [*identify party, e.g.,* respondent] _____ [*name*] and to his/her attorney of record:
NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division)] _____ of this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* petitioner] will, and hereby does, move for an order appointing experts to examine the blood or other genetic material of the following persons:
1. _____ [*Name of child*], the minor whose paternity is in issue;

2. Petitioner; and

3. Respondent

for the purpose of determining the _____ [blood groupings *or specify other genetic indicia acknowledged as reliable by accreditation bodies designated by the United States Secretary of Health and Human Services*] of these persons in connection with the claim that _____ [petitioner *or* respondent] is the father of the minor and to require those persons to submit to the collection from them of blood or other genetic material for testing on dates, times, and places as the court may direct. The motion will be made on the ground that these tests are reasonably necessary to resolve the paternity issue and are authorized by statute.
The motion will be based on this notice of motion, [on the declaration(s) of _____ [*name(s)*] and] the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
_____ [*date*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This form is a notice of motion for an order for genetic tests in a civil action or proceeding in which paternity is at issue [*see Fam. Code § 7551* (order for genetic tests), discussed in *§ 412.50*]. The motion is for use by either the petitioner or the respondent in the action. It requests tests for the child whose paternity is the subject of the action, the mother, and the alleged father.

This form is captioned for use in a paternity proceeding under the Uniform Parentage Act. It may be adapted for use in another kind of proceeding by a party who is moving for genetic tests to rebut the presumption that the husband is the father of a child born to a married woman, if the spouses were cohabiting at the time of conception and the husband was not then impotent or sterile [*Fam. Code § 7540*, discussed in *§ 412.31*]. The presumption is subject to a limited right of rebuttal [*see Fam. Code § 7541(a),(e)*, discussed in *§ 412.31[2]*]; however, the right to rebut, if it exists, is not limited to UPA paternity proceedings, but may be raised in other contexts in which the husband's paternity may be relevant. For example, the husband himself might make such a motion in a proceeding for dissolution of marriage in which he contests that he is actually the father of a child conceived during marriage [*see Fam. Code § 7541(b)*].

[3] Time for Making Motion and Service

The motion must be made at a time so as not to delay the proceedings unduly, and presumably in time to have the tests completed before trial [*Fam. Code § 7551*]. If it is made to rebut the presumption of *Fam. Code § 7540*, it must be made not later than two years from the child's birth [*Fam. Code § 7541(b),(c)*].

The notice of motion must be filed and served at least 16 court days before the hearing [*Code Civ. Proc. § 1005(b)*]. If service is by mail, the 16-day period is increased by five calendar days if the place of mailing and the address are within California, 10 calendar days if the address is outside California but within the United States, and 20 calendar days if the address is outside of the United States [*Code Civ. Proc. § 1005(b)*]. If service is by facsimile transmission, express mail, or other method of overnight delivery, the 16-day period is increased by two calendar days [*Code Civ. Proc. § 1005(b)*]. The 16-day period may be shortened by court order made on the court's own motion, or on application for an order shortening time supported by a declaration showing good cause [*Cal. Rules of Ct., Rule 3.1300(b)*].

Proof of service of the moving papers must be filed no later than five calendar days before the hearing [*Cal. Rules of Ct., Rule 3.1300(c)*]. The moving papers may not be rejected for filing on the ground that they were not submitted in a timely manner. If the court, in its discretion, refuses to consider a late-filed paper, the minutes or order must indicate that fact [*Cal. Rules of Ct., Rule 3.1300(d)*]. A paper that is submitted before the close of the clerk's office to the public

on the day the paper is due is considered to be timely filed [*Cal. Rules of Ct., Rule 3.1300(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewEvidenceInferences & PresumptionsRebuttal of PresumptionsFamily LawMarital Termination & Spousal SupportGeneral OverviewFamily LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage ActFamily LawPaternity & SurrogacyProof of PaternityEvidenceGenetic TestsPublic Health & Welfare LawSocial SecurityAssistance to FamiliesGeneral Overview

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35-412 California Forms of Pleading and Practice--Annotated § 412.137

§ 412.137 Proceedings for Order to Require Parties to Submit to Genetic Tests [Fam. Code § 7551]--Supporting Declaration

[1] FORM Proceedings for Order to Require Parties to Submit to Genetic Tests [Fam. Code § 7551]--Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

	)	
	)	NO. _____
_____ [*name*],	)	DECLARATION OF_____ [*name*]
Petitioner,	)	IN SUPPORT OF MOTION FOR GENETIC TESTS
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Respondent.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

I,_____ [*name*], declare:
1. I am the _____ [petitioner *or* respondent] in the above-entitled action. I am seeking an order requiring genetic tests based on the following facts.
2. I had sexual intercourse on numerous occasions with respondent _____ [*name of alleged father*] during the period from _____ [*date*], to _____ [*date*], and I conceived the child _____ [*name of child*] on or about _____ [*date of conception*] as a result of this sexual intercourse.
3. During the above period, I did not have sexual intercourse with any man other than respondent _____ [*name of alleged father*].
2. During the period from _____ [*date*], to _____ [*date*], when the child

_____ [*name of child*] was conceived by my [former] wife _____ [*name of mother*], I was living with my [former] wife _____ [*name of mother*] at _____ [*address*]. During the above-mentioned period, [*state factual basis for placing issue of paternity before the court, e.g.,* I did not have sexual intercourse with my wife *or* I was told by my wife that she was participating in an extramarital affair with another man (whose identity she would not reveal) and that she believed that she was pregnant by this man].
2. During the period from _____ [*date*] to _____ [*date*], when the child _____ [*name of child*] was conceived by _____ [*name of mother*], I did not engage in any act of sexual intercourse with _____ [*name of mother*]. [I have not had sexual intercourse with _____ [*name of mother*] since _____ [*date*] *or* I have never had sexual intercourse with _____ [*name of mother*].
3. During the period from _____ [*date*] to _____ [*date*], when the child _____ [*name of child*] was conceived by _____ [*name of mother*], I observed _____ [*name of mother*] in the company of _____ [*name(s) of other man or men*] on numerous occasions, and I was told by _____ [*name of informant*], _____ [*identity of informant, e.g.,*, sister of _____ (*name of mother*)] that _____ [*name of mother*] was sexually involved with the above-mentioned man/men. I therefore believe that _____ [*name(s) of other man or men*] may be the father of the child _____ [*name of child*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form is a declaration for use in support of a motion for an order requiring genetic tests in a civil action or proceeding in which paternity is at issue [*see Fam. Code § 7550 et seq.* (Uniform Act on Blood Tests to Determine Paternity)].

The declaration is required in any proceeding concerning the presumption of paternity under *Fam. Code § 7540*. In such a case, a notice of motion for the test must be supported by a declaration under oath submitted by the moving party that states the factual basis for placing the issue of paternity before the court [*Fam. Code § 7541(d)*].

The form contains sample fact situations that may be used by a petitioner mother seeking to prove respondent is the father, by a respondent who is an alleged father seeking to prove he is not the father, or by a husband or ex-husband of a mother seeking to prove he is not the father.

For general forms of supporting declarations, see Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 372, *Motions and Orders* . See also Comments to*§ 412.136*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawPaternity & SurrogacyProof of PaternityEvidenceBlood TestsFamily LawPaternity & SurrogacyProof of PaternityEvidenceGenetic TestsFamily LawPaternity & SurrogacyProof of PaternityPresumptionsGeneral Overview

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35-412 California Forms of Pleading and Practice--Annotated § 412.138

§ 412.138 Order for Genetic (Parentage) Testing--Cal. Judicial Council Form FL-627

[1] FORM

Order for Genetic (Parentage) Testing--Cal. Judicial Council Form FL-627

Click here to view image.

[2] Use of Form

This form is the Judicial Council form of order requiring genetic tests. Because the form is "adopted" rather than "approved," its use is mandatory [*see* Introductory Statement to California Rules of Court; *Gov. Code § 68511*]. It may be used in any proceeding in which paternity is at issue [*see Fam. Code § 7551* (order for genetic tests), discussed in *§ 412.50*].

The order appoints the experts who are to conduct the tests, and lists their names and addresses (line 2). On line 4 ("Other"), it sets the date by which the test results are to be reported to the court and to the parties [*see Fam. Code § 7551* (motion for genetic tests must be made at a time so as not to delay proceedings unduly)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityEvidenceGenetic Tests

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35-412 California Forms of Pleading and Practice--Annotated § 412.139

§ 412.139 Declaration in Support of Motion for Pendente Lite Support, Hospital and Medical Expenses, Attorney's Fees, and Costs

[1] FORM Declaration in Support of Motion for Pendente Lite Support, Hospital and Medical Expenses, Attorney's Fees, and Costs

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

	)	
	)	NO. _____
_____ [*name*],	)	DECLARATION OF_____ [*name*]
Petitioner,	)	IN SUPPORT OF MOTION FOR PENDENTE LITE
vs.	)	SUPPORT, HOSPITAL AND MEDICAL EX-
_____ [*name*],	)	PENSES, ATTORNEY'S FEES AND COSTS
Respondent.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am the petitioner in the above-entitled action. I am seeking an order requiring respondent, pending determination of this action, to pay (1) hospital and medical expenses incurred in giving birth to _____ [*name of child*], hereinafter referred to as "the child," in the sum of $_____; (2) child support to be determined under the statewide uniform child support guideline; and (3) attorney's fees and court costs incurred to date in the sums of $_____ and $_____, respectively. In support of this application, I declare:

1. I have incurred hospital and medical expenses in connection with the birth of the child in the sum of $_____[, of which I have paid the sum of $_____ (*amount*), leaving a balance due

in the sum of $_____].
2. The child is in my custody, and resides with me at _____ [*street address and city*], California.
3. A current Income and Expense Declaration _____ [is currently on file in this matter *or* will be filed not less than 15 days before the above-noted hearing date].
4. Petitioner has incurred attorney's fees and court costs to date in the sums of $_____ and $_____, respectively, [none of which has been paid].
5. I am informed and believe, and thereon state that respondent has a net monthly disposable income, as computed under the statewide uniform child support guideline, in excess of $_____ per month and is financially well able to pay the expenses, child support, fees, and costs herein requested.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]
Petitioner

[2] Use of Form

This form is a declaration for use in obtaining a pendente lite order requiring the respondent in a proceeding under the Uniform Parentage Act [*Fam. Code § 7600 et seq.*] to pay pendente lite child support, medical and hospital expenses incurred by the mother during pregnancy, and attorney's fees and costs. For discussion of the availability of pendente lite orders under the Uniform Parentage Act and the preliminary showing of probable paternity that is required [*see Carbone v. Superior Court (1941) 18 Cal. 2d 768, 770-772, 117 P.2d 872]* , see*§ 412.81[1][a]*.

[3] Judicial Council Forms

A request for a pendente lite order is made by an application for an order to show cause if the defendant has not appeared in the action. If the defendant already has appeared in the action, a request for temporary support may be made by noticed motion, rather than order to show cause.

Judicial Council forms adopted for use in proceedings under the Family Code (including UPA proceedings) should be used [*see* Cal. Judicial Council Form FL-300 (Order to Show Cause), Cal. Judicial Council Form FL-301 (Notice of Motion), and Cal. Judicial Council Form FL-310 (Application for order and Supporting Declaration)]. Examples of these forms are set forth in Ch. 220, *Dissolution of Marriage: Master Procedural Guide* . These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

There is also a Judicial Council form of Attached Declaration for use to set forth lengthier declarations, such as the one in this form [*see* Judicial Council form MC-031]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[4] Income and Expense Declaration

The Judicial Council form of Income and Expense Declaration [Cal. Judicial Council Form FL-150] should be filed in any proceeding at which child support is at issue. For a illustrative filled-in form of income andexpense declaration, see Ch. 220, *Dissolution of Marriage: Master Procedural Guide* . A copy of the income and expense declaration is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may

be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[5] Amount of Child Support

The amount of support will be determined under the statewide uniform child support guideline [*Fam. Code § 4055 et seq.*] based on the information for the parties' respective income and expense declarations. For discussion of the guideline, see Ch. 224, *Dissolution of Marriage: Child Support* , and Kirkland, Lurvey Richmond and Wagner, California Family Law Practice and Procedure, Vol. 2, Ch. 41, 2d Ed. (Matthew Bender).

[6] California Points and Authorities

For a memorandum of points and authorities in support of pendente lite orders for support, medical and hospital expenses, and attorney's fees and costs in a paternity action, see California Points and Authorities, Ch. 171, *Paternity*

[7] Cross References

For additional discussion and forms of notice of motion and orders to show cause, see Ch. 372, *Motions and Orders*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild SupportObligationsComputationGuidelinesFamily LawChild SupportObligationsTypesGeneral OverviewFamily LawChild SupportObligationsTypesMedical SupportFamily LawChild SupportObligationsTypesTemporary SupportFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act

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35-412 California Forms of Pleading and Practice--Annotated § 412.140

§ 412.140 Judgment Establishing Parentage, With Support, Custody, and Other Orders--Cal. Judicial Council Form FL-250

[1] FORM

Judgment Establishing Parentage, With Support, Custody, and Other Orders--Cal. Judicial Council Form FL-250

Click here to view image.

[2] Use of Form

This form an illustrative version of the mandatory Judicial Council form of Judgment, for use in an action under the Uniform Parentage Act [*Fam. Code § 7630*; Cal. Judicial Council Form FL-250]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Orders Included in Judgment

The judgment may contain provisions relating to any matter in the best interests of the child, including support, custody, visitation, and payment of pregnancy-related expenses [*Fam. Code § 7637*, discussed in *§ 412.86*]. This judgment form contemplates the use of a variety of other Judicial Council forms to set forth these other provisions. If the judgment contains original or modified personal conduct restraining orders, counsel should check the appropriate box in Paragraph 1, as well as listing their expiration date [*see generally Fam. Code § 6200 et seq.*]. The orders must be set out in a Judicial Council form designed for use in connection with transmission of information to the California Law Enforcement Telecommunications System (CLETS). Accordingly, it is suggested that form DV-130, Restraining Order After Hearing (CLETS) be attached to the judgment form [*see* ch. 293, *Harassment and Domestic Violence*]. In addition, in Paragraph 1 of the judgment, counsel must specify which section or sections of the attachment contain the personal conduct restraining orders.

When provisions for child custody or visitation are contained in the judgment, the box for Paragraph 4(a) must be

marked, and counsel must attach a completed Judicial Council form of Child Custody and Visitation Order Attachment [Cal. Judicial Council Form FL-341], Stipulation for Order for Child Custody and/or Visitation of Children [Cal. Judicial Council Form FL-355], along with any other appropriate documents as specified. If provisions for child support are contained in the judgment, the box for Paragraph 5(a) must be marked, and counsel must attach a completed Judicial Council form of Child Support Information and Order Attachment [Cal. Judicial Council Form FL-342] or Stipulation to Establish or Modify Child Support and Order [Cal. Judicial Council Form FL-350], along with any other appropriate documents. In addition, the Judicial Council forms of Notice of Rights and Responsibilities--Health Care Costs and Reimbursement Procedures and Information Sheet on Changing a Child Support Order must be attached to the judgment [Cal. Judicial Council Form FL-192]; and, within 10 days of the issuance of the judgment, both parties must complete and file with the court a Child Support Case Registry Form [Cal. Judicial Council Form FL-191].

If either party signed a Voluntary Declaration of Paternity, or if there is a prior judgment of parentage against either party in a family support, juvenile, or adoption court case, those must also be attached.

Finally, if either party appeared in the action and waived essential due process rights in order to conclude the action, after being advised of those rights, the Judicial Council form of Advisement and Waiver of Rights re Establishment of Parental Relationship must be attached for each waiving party [*see* Cal. Judicial Council Form FL-235; *see § 412.142*].

To the extent that the court has made orders that are contained in the preprinted provisions of the form, they may be listed under Paragraph 3(i), and continued on an attachment if there is insufficient space on the form to set them forth.

For related discussion of the use of Judicial Council forms in giving notice of the entry of judgment, see Ch. 220, *Dissolution of Marriage: Master Procedural Guide* [*see* Cal. Judicial Council Form FL-190 (notice of entry of judgment form)].

[4] Statement of Decision

On the request of any party appearing at trial, the court must issue a statement of decision explaining the factual and legal basis for its decision as to each of the controverted issues at trial specified in the request [*Code Civ. Proc. § 632*]. For further discussion and forms, see Ch. 529, *Statement of Decision* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewFamily LawChild CustodyVisitationAwardsStandardsBest Interests of ChildFamily LawChild SupportObligationsGeneral OverviewFamily LawChild SupportObligationsModificationGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityPaternity RegistriesFamily LawPaternity & SurrogacyEstablishing PaternityUniform Parentage Act

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35-412 California Forms of Pleading and Practice--Annotated § 412.141

§ 412.141 Declaration for Default or Uncontested Judgment--Cal. Judicial Council Form FL-230

[1] FORM

Declaration for Default or Uncontested Judgment--Cal. Judicial Council Form FL-230

Click here to view image.

[2] Use of Form

This form is an illustrative version of the mandatory Judicial Council form of Declaration for Default or Uncontested Judgment, for use in uncontested parentage proceedings [Cal. Judicial Council Form FL-230]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Use of this form contemplates that the party seeking judgment will not appear before the court unless ordered to do (*see* Paragraph 2). It may be used both in the situation in which a respondent has defaulted, or in which a respondent has filed a response but the parties have stipulated that the matter may proceed as uncontested. Paragraph 6 contains check-off boxes to indicate which situation applies. Any stipulation to proceed as an uncontested matter must be attached to the form. Although the form does not currently make reference to it, the Judicial Council form of Stipulation for Entry of Judgment re Establishment of Parental Relationship would apparently be appropriate to attach [Cal. Judicial Council Form FL-240; *see § 412.142*]. In addition, if this form is used pursuant to a stipulation of the parties, the Judicial Council form of Advisement and Waiver of Rights re Establishment of Parental Relationship must be attached [Cal. Judicial Council Form FL-235; *see § 412.142*].

The Judicial Council form of Judgment (Uniform Parentage), including any required attachments for that form [Cal. Judicial Council Form FL-250; *see § 412.140*], must be submitted with this form. Check-off boxes in this form for Paragraphs 7-12, which identify various types of orders, should be marked to correspond with orders proposed in the Judgment form. If child support is being requested, counsel must also attach a completed Income and Expense Declaration or Financial Statement (Simplified), unless a current version is on file with the court [Cal. Judicial Council

Forms FL-150, FL-155]. In addition, if a voluntary declaration of paternity has been signed, the appropriate box in Paragraph 5 should be marked and a copy of the declaration, if available, should be attached to this form.

For a general discussion of procedures in default or other uncontested proceedings under the Family Code, including the requirements for submitting self-addressed, postage paid envelopes, see Ch. 220, *Dissolution of Marriage: Master Procedural Guide* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPretrial JudgmentsDefaultGeneral OverviewCivil ProceduresPretrial JudgmentsDefaultDefault JudgmentsFamily LawPaternity & SurrogacyGeneral Overview

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35-412 California Forms of Pleading and Practice--Annotated § 412.142

§ 412.142 Stipulation for Entry of Judgment and Advisement and Waiver of Rights re Establishment of Parental Relationship--Cal. Judicial Council Forms FL-235, FL-240

[1] FORM

Stipulation for Entry of Judgment and Advisement and Waiver of Rights re Establishment of Parental Relationship--Cal. Judicial Council Forms FL-235, FL-240

Click here to view image.

[2] Use of Forms

Illustrated above are reproductions of the Judicial Council forms of Stipulation for Entry of Judgment re Establishment of Parental Relationship and of Advisement and Waiver of Rights re Establishment of Parental Relationship, for use in uncontested parentage proceedings [Cal. Judicial Council Forms FL-235, FL-240]. Although only the Stipulation form is designated as "Adopted," and therefore mandatory (while the Advisement is merely "approved") both forms should be used, without substitution of other forms. These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

These forms are designed for use in connection with the Judicial Council forms of Judgment (Uniform Parentage) and Declaration for Default or Uncontested Judgment (Uniform Parentage) [Cal. Judicial Council Forms FL-230, FL-250]; *see* §§ 412.140-412.141]. Accordingly, if the parties have stipulated regarding specific issues, the corresponding orders in the Judgment would need to be completed (along with all required attachments for the judgment), and counsel would mark the check-off boxes for those orders on the Stipulation form (Paragraphs 3-8). Any additional orders that are the subject of a stipulation may be referenced under Paragraph 9 of the Stipulation form, and set out there (if space permits), or by an attachment. See also the Comments to*§ 412.141*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsFamily LawParental Duties & RightsGeneral OverviewFamily LawPaternity & SurrogacyGeneral Overview

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35-412 California Forms of Pleading and Practice--Annotated § 412.143

§ 412.143 Request for Hearing and Application to Set Aside Voluntary Declaration of Paternity [Fam. Code § 7575; Code Civ. Proc. § 473]--Cal. Judicial Council Form FL-280

[1] FORM Request for Hearing and Application to Set Aside Voluntary Declaration of Paternity [Fam. Code § 7575; Code Civ. Proc. § 473]--Cal. Judicial Council Form FL-280

Click here to view image.

[2] Use of Form

This form is a reproduction of the Judicial Council form of Request for Hearing and Application to Set Aside Voluntary Declaration of Paternity that has been adopted for mandatory use [Cal. Judicial Council Form FL-280]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is for use in setting up a hearing for the purpose of obtaining a court order to set aside a voluntary declaration of paternity and to order genetic tests to determine parentage [*see Cal. Rules of Ct., Rule 5.350*]. The basis for the set aside would be any of the grounds specifically described in *Code Civ. Proc. § 473*--such as, for example, mistake of fact or of law--and including fraud or perjury [*see Fam Code § 7575(c)*; *Code Civ. Proc. § 473*].

The form requires that the grounds for relief be stated (Paragraph 8), and that specific facts in support of the relief requested be set out (Paragraph 12). Note that particular attention should be paid to whether or not there is already on file a judgment or order of paternity, child support, visitation or child custody based on the voluntary declaration of paternity. If there is, then the items in Paragraph 10 must be addressed; but if there is no such order or judgment, Paragraph 10 would be left blank and the items in Paragraph 11 addressed. Detailed instructions for completing the form are set forth in pages 3-5 of the form.

The court clerk, on receipt of the completed form, must assign a case number and schedule a court date, which must be no earlier than 31 days after the filing date, and no later than 45 days after the filing date [*Cal. Rules of Court, Rule 5.350(c)*]. The moving party must serve, either by personal service or mail, the request for hearing and a blank Judicial

Council form of Responsive Declaration to Application to Set Aside Voluntary Declaration of Paternity on the other person who signed the paternity declaration [*Cal. Rules of Court, Rule 5.350(d)*; *see* Cal. Judicial Council Form FL-285; *see § 412.144*]. If a local child support agency is providing services in the case, the moving party must also serve a copy of the request for hearing on the agency [*Cal. Rules of Court, Rule 5.350(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeFamily LawChild SupportGeneral OverviewFamily LawChild SupportObligationsGeneral OverviewFamily LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityEvidenceGenetic Tests

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35-412 California Forms of Pleading and Practice--Annotated § 412.144

§ 412.144 Responsive Declaration to Application to Set Aside Voluntary Declaration of Paternity [Fam. Code § 7575; Code Civ. Proc. § 473]--Cal. Judicial Council Form FL-285

[1] FORM Responsive Declaration to Application to Set Aside Voluntary Declaration of Paternity [Fam. Code § 7575; Code Civ. Proc. § 473]--Cal. Judicial Council Form FL-285

Click here to view image.

[2] Use of Form

This form is a reproduction of the Judicial Council form of ResponsiveDeclaration to Application to Set Aside Voluntary Declaration of Paternity that has been adopted for mandatory use [Cal. Judicial Council Form FL-285; *see Cal. Rules of Ct., Rule 5.350*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is for use by a person who signed a voluntary declaration of paternity to respond to an application to set aside the declaration by the other person who signed the declaration. It is also for use by a district attorney or other local child support agency who is providing services in the case to respond to an application to set aside a voluntary declaration of paternity. This form provides check-off boxes by which the responding party may indicate either consent or refusal to consent to setting aside the voluntary declaration of paternity. Note that in *either* case, the responding party must also set out facts in support of the response made (Paragraph 4).

According to the form instructions, the responding party must file the completed form and any attachments with the court clerk at least 10 court days before the hearing. A copy of the completed form must be served on the moving party. The Judicial Council form of Information Sheet for Service of Process [Cal. Judicial Council Form FL-611] is referred to in this form for its explanation of service of process.

Legal Topics:

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

Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityGeneral Overview

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35-412 California Forms of Pleading and Practice--Annotated § 412.145

§ 412.145 Order After Hearing on Motion to Set Aside Voluntary Declaration of Paternity [Fam. Code § 7575; Code Civ. Proc. § 473]--Cal. Judicial Council Form FL-290

[1] FORM Order After Hearing on Motion to Set Aside Voluntary Declaration of Paternity [Fam. Code § 7575; Code Civ. Proc. § 473]--Cal. Judicial Council Form FL-290

Click here to view image.

[2] Use of Form

This form is a reproduction version of the Judicial Council form of Order After Hearing on Motion to Set Aside Voluntary Declaration of Paternity that has been adopted for mandatory use [Cal. Judicial Council Form FL-290; *see Cal. Rules of Ct., Rule 5.350*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is for use in setting forth a court's order after a hearing on the issue of whether or not a voluntary declaration of paternity should be set aside under *Fam Code § 7575(c)*--which permits a motion or action to set aside the declaration for any of the causes specifically enumerated in *Code Civ. Proc. § 473*, and including fraud or perjury. If the voluntary declaration is set aside, the specific grounds for the set aside must be set forth on the form (Paragraph 3), and genetic testing ordered (Paragraph 4). If genetic testing is ordered, the date by which the testing is to be completed must be set forth (Paragraph 4), as well as a court date for further hearing on the test results (Paragraph 6). Note that if a preexisting order for child support, custody, or visitation based on the voluntary declaration existed in the matter, the court must indicate whether such an order remains in effect or is modified (Paragraph 7). Any additional orders may be set forth in Paragraph 9, "Other."

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawChild CustodyVisitationGeneral OverviewFamily LawChild SupportObligationsGeneral OverviewFamily LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityGeneral Overview

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35-412 California Forms of Pleading and Practice--Annotated § 412.146

§ 412.146 Notice of Motion to Set Aside Judgment of Paternity; Declaration in Support of Motion to Set Aside Judgment of Paternity; Information Sheet for Completing Notice of Motion to Set Aside Judgment of Paternity [Fam. Code § 7646]--Cal. Judicial Council Forms FL-272, FL-273, FL-274

[1] FORM Notice of Motion to Set Aside Judgment of Paternity; Declaration in Support of Motion to Set Aside Judgment of Paternity; Information Sheet for Completing Notice of Motion to Set Aside Judgment of Paternity [Fam. Code § 7646]--Cal. Judicial Council Forms FL-272, FL-273, FL-274

Click here to view image.

[2] Use of Form

This form is a reproduction of the Judicial Council forms of Notice of Motionto Set Aside Judgment of Paternity, Declaration in Support of Motion to Set Aside Judgment of Paternity, and Information Sheet for Completing Notice of Motion to Set Aside Judgment of Paternity, which have been adopted for mandatory use [Cal. Judicial Council Forms FL-272, FL-273, FL-274]. These forms are available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

These forms are for use in requesting an order setting aside a judgment of paternity when genetic testing indicates that the previously established father of a child is not the child's biological father [*see Fam. Code § 7646(a)*]. The motion may be filed by the previously established mother of the child, the previously established father of the child, or the child [*see Fam. Code § 7646(a)*].

The motion must specify the child's legal name, age, county of residence, and residence address [*Fam. Code § 7647(a)(2)(A)*; see Paragraph 1 of Declaration]. It must also specify the names, mailing addresses, and counties of residence, or, if deceased, the date and place of death of, the previously established father, the previously established mother, the biological mother and father, the child's guardian (if any), the person who has physical custody of the child, and the child's guardian ad litem if one has been appointed [*Fam. Code § 7647(a)(2)(B)*; *see* Paragraph 2 of Declaration].

The motion must be supported by a declaration stating that the person filing the motion believes the previously established father is not the child's biological father and the specific reasons for this belief [*Fam. Code § 7647(a)(2)(C)*; *see* Paragraph 3 of Declaration]. The moving party is not required to present evidence of a paternity test indicating that the previously established father is not the child's biological father in order to bring the motion [*Fam. Code § 7647(a)(2)(C)*]. However, in order to grant the motion, the court must find that the conclusions of the expert under *Fam. Code § 7552*, as supported by the evidence, are that the previously established father is not the child's biological father [*Fam. Code § 7647(a)(3)*]. Any genetic testing used to support the motion must be conducted in accordance with *Fam. Code § 7552* [*Fam. Code § 7647.7*].

The motion must include a proof of service on the previously established mother, the previously established father, the local child support agency that is providing services to the child, and the child's guardian ad litem (if any) [*Fam. Code § 7647(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewFamily LawGuardiansAppointmentFamily LawPaternity & SurrogacyProof of PaternityEvidenceGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityEvidenceGenetic Tests

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35-412 California Forms of Pleading and Practice--Annotated § 412.147

§ 412.147 Response to Notice of Motion to Set Aside Judgment of Paternity [Fam. Code § 7646]--Cal. Judicial Council Form FL-276

[1] FORM Response to Notice of Motion to Set Aside Judgment of Paternity [Fam. Code § 7646]--Cal. Judicial Council Form FL-276

Click here to view image.

[2] Use of Form

This form is a reproduction of the Judicial Council form of Response to Noticeof Motion to Set Aside Judgment of Paternity, which has been adopted for mandatory use [Cal. Judicial Council Form FL-276]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form may be used by the previously established mother, the previously established father, or a local child support agency that is providing services to the child, to respond to a motion to set aside a judgment, order, or decree previously entered in a court of this state that establishes paternity [*see Fam. Code §§ 7645(b)-(d), 7647(b)*].

Paragraph 4 of the form should be checked if the motion is incomplete, for example, because it is not supported by the required declaration or does not include all of the information that must be specified for the child, the parents of the child, the child's guardian, and any person who has physical custody of the child [*see Fam. Code § 7647(a)*].

Paragraph 5 of the form should be checked if the motion is untimely. The motion must be brought within a two-year period, commencing with the date on which the previously established father knew or should have known of a judgment that established him as the child's father, or commencing with the date the previously established father knew or should have known of the existence of an action to adjudicate the issue of paternity, whichever is first [*Fam. Code § 7646(a)(1)*]. The motion must be brought within a two-year period, commencing with the date of the child's birth if paternity was established by a voluntary declaration of paternity [*Fam. Code § 7646(a)(2)*].

Paragraph 6 of the form should be checked if the motion is improper. For example, a motion to set aside a judgment of paternity may not be used to terminate an adoption [*see Fam. Code § 7648.8*] or to set aside a judgment establishing paternity with regard to a child conceived by artificial insemination under *Fam. Code § 7613* or a child conceived under a surrogacy agreement [*see Fam. Code § 7648.9*]. It also may not be used to set aside a judgment entered in an action for marital dissolution, legal separation, or nullity [*see Fam. Code § 7645(b)*].

The appropriate boxes in Paragraph 7 should be checked to indicate the facts in support of the Response.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsFamily LawPaternity & SurrogacyGeneral OverviewFamily LawPaternity & SurrogacyEstablishing PaternityGeneral Overview

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35-412 California Forms of Pleading and Practice--Annotated § 412.148

§ 412.148 Order After Hearing on Motion to Set Aside Judgment of Paternity [Fam. Code § 7646]--Cal. Judicial Council Form FL-278

[1] FORM Order After Hearing on Motion to Set Aside Judgment of Paternity [Fam. Code § 7646]--Cal. Judicial Council Form FL-278

Click here to view image.

[2] Use of Form

This form is a reproduction of the Judicial Council form of Order After Hearingon Motion to Set Aside Judgment of Paternity, which has been adopted for mandatory use [Cal. Judicial Council Form FL-276]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Paragraph 1 should be completed to indicate the persons who were present at the hearing. Box (j) of Paragraph 5 should be checked if a judgment of nonpaternity is granted. Box (k) of Paragraph 5 should be checked if the motion is denied, and the reasons for the denial should be specified in Paragraphs 6 and 7. Any additional orders should be specified in Paragraph 9.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewFamily LawPaternity & SurrogacyGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 35: Partition thru Paternity-Chs. 397-412
Chapter 412 PATERNITY
PART IV. FORMS

35-412 California Forms of Pleading and Practice--Annotated § 412.149

§ 412.149 Application and Order for Appointment of Guardian Ad Litem of Minor--Family Law [Fam. Code § 7635]--Cal. Judicial Council Form FL-935

[1] FORM Application and Order for Appointment of Guardian Ad Litem of Minor--Family Law [Fam. Code § 7635]--Cal. Judicial Council Form FL-935

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[2] Use of Form

This form is a reproduction of the Judicial Council form of Application and Order for Appointment of Guardian Ad Litem of Minor--Family Law, which has been approved for optional use [Cal. Judicial Council Form FL-935]. This form is available in an interactive, electronic format in *LexisNexis[(R)] Automated California Judicial Council Forms,* which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format is also available at *www.lexisone.com* at no charge.

This form should be used to apply for the appointment of a guardian ad litem for a minor who is a party to a paternity action [*see Fam. Code § 7635(a)*; *see also § 412.75[1]*]. A child who is 12 years of age or older must be made a party to the action, and a child who is under 12 years of age may be made a party to the action [*Fam. Code § 7635(a)*].

The court may appoint a guardian ad litem for a minor on an ex parte application [*Williams v. Superior Court (2007) 147 Cal. App. 4th 36, 47, 54 Cal. Rptr. 3d 13*].

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 413 PERSONAL PROPERTY LEASES

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[1] FORM

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[5] Decisions

[6] Cross References

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[1] FORM

[2] Use of Form

[3] Allegations

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[1] FORM

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[3] Allegations

[4] State Statutes

[5] Decisions

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[7] Cross References

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[1] FORM

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[1] FORM

[2] Use of Form

[3] Allegations

[4] California Points and Authorities

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[7] Cross References

§ 413.317 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] for Breach of Personal Property Lease--By Lessee (Hirer) Against Lessor (Letter)--Covenant of Quiet Enjoyment [Civ. Code §§ 1927, 1955]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Caption

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Caption

[5] State Statutes

[6] Decisions

[7] Cross References

§ 413.319 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] for Breach of Personal Property Lease--By Lessee (Hirer) Against Lessor (Letter)--Recovery of Cost of Necessary Repairs [Civ. Code § 1957]--Property Not Restored to Operation

[1] FORM

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[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

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[1] FORM

[2] Use of Form

[3] Allegations

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[1] FORM

[2] Use of Form

[3] Caption

[4] Allegations

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[6] State Statutes

[7] Cross References

§ 413.342 Complaint [Code Civ. Proc. § 425.10] for Recovery of Rent and of Security Paid [Com. Code § 10508(a)(2)] and for Damages [Com. Code §§ 10508(a)(3), 10518-10520]--By Lessee Against Lessor--After Lessee's Justifiable Revocation of Acceptance [Com. Code §§ 10515-10517]

[1] FORM

[2] Use of Form

[3] Caption

[4] Allegations

[5] State Statutes

[6] Cross References

§ 413.343 Complaint for Specific Performance [Com. Code § 10521(a)] and for Damages [Com. Code §§ 10520, 10521(b)]--By Lessee Against Lessor--After Lessor's Repudiation or Failure to Deliver Conforming Goods [Com. Code § 10508(b)(2)]

[1] FORM

[2] Use of Form

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[5] Cross References

§ 413.344 Complaint [Code Civ. Proc. § 425.10] for Damages for Breach of Implied Warranty [Com. Code §§ 10508(d), 10519(d), 10520]--Fitness for Particular Purpose [Com. Code § 10213]--By Lessee Against Lessor

[1] FORM

[2] Use of Form

[3] Caption

[4] Allegations

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[7] Cross References

§ 413.345 Complaint [Code Civ. Proc. § 425.10] for Damages for Breach of Express Warranty [Com. Code §§ 10519(d), 10520]--Based on Description of Goods [Com. Code §§ 2313(1)(b), 10210(a)(2)]--By Lessee Under Finance Lease Against Supplier [Com. Code § 10209]

[1] FORM

[2] Use of Form

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[1] FORM

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[5] Revocation of Firm Offer for Consumer Lease

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[5] State Statutes

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 413 PERSONAL PROPERTY LEASES
PART I. SCOPE

36-413 California Forms of Pleading and Practice--Annotated § 413.01

§ 413.01 Scope of Chapter

This chapter discusses and contains forms for use in actions involving hirings of personal property, also called bailments for hire and personal property leases. This chapter covers both hirings or personal property leases entered into or first effective between the parties before January 1, 1990, which are governed by the Civil Code [*see Civ. Code § 3300 et seq.*; *see also §§ 413.30 -413.38, 413.310 -413.321*], and personal property lease effective after that date, which are governed by Division 10 of the California Commercial Code [*see Com. Code 10101 et seq.*; *see also §§ 413.50 -413.251, 413.340 -413.348*].

For a discussion and forms relating to deposits and discussion and forms relating to loans for use, see Ch. 93, *Bailments* . For discussion and forms relating to actions by third parties involving bailments, see Ch. 93, *Bailments* , or, if the liability of an automobile owner for the negligence of an operator under *Veh. Code § 17150 et seq.* is involved, see *Ch. 82, Automobiles: Causes of Action § 82.16*.

This chapter includes analysis for Division 10 actions involving formation and construction of lease contracts [*see § 413.70* et seq.], finance leases [*see § 413.90* et seq.], warranties [*see § 413.110* et seq.], identification of goods to lease and risk of loss [*see § 413.130* et seq.], effect of lease contracts on third parties [*see § 413.150* et seq.], repudiated, substituted, and excused performance [*see § 413.170* et seq.], remedies in general [*see § 413.190* et seq.], lessor remedies on default by lessor [*see § 413.220* et seq.], and lessor remedies on default by lessee [*see § 413.250* et seq.]. Forms are included for these actions [*see* 413.380 et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)General OverviewContracts LawThird PartiesGeneral OverviewContracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsLease AgreementsGeneral OverviewTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligenceGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal VehiclesTortsVicarious LiabilityBailees

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Chapter 413 PERSONAL PROPERTY LEASES
PART I. SCOPE

36-413 California Forms of Pleading and Practice--Annotated § 413.02

§ 413.02 Cross References

For discussion and forms concerning leases subject to the Vehicle Leasing Act (*Civ. Code § 2985.7-2990*), the federal Consumer Leasing Act (*15 U.S.C. §§ 1667-1667e*) or Regulation M (12 C.F.R. Part 213), see Ch. 90, *Automobiles: Vehicle Leasing Act*

For discussion of the measure of damages for unlawful motor vehicle subleasing, see Ch. 90, *Automobiles: Vehicle Leasing Act*

For discussion and forms relating to deposits, see Ch. 93, *Bailments* ,

For discussion and forms relating to loans for use, see Ch. 93, *Bailments* ,

For discussion and forms relating to actions by third parties involving bailments, see Ch. 93, *Bailments* , or if liability of automobile owner for negligence of operator under *Veh. Code §§ 17150-17159* is involved, see *Ch. 82, Automobiles: Causes of Action § 82.16*

For discussion and forms relating to automobile rentals for less than 30 days entered into on or after January 1, 1989, see Ch. 93, *Bailments* ,

For discussion of advertising practices prohibited by *Bus. & Prof. Code § 17500 et seq.*, see Ch. 14, *Advertising*

For discussion of the federal Consumer Leasing Act (*15 U.S.C. § 1667 et seq.*) and Regulation M (12 C.F.R. Part 213), the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*), and the Vehicle Leasing Act (*Civ. Code § 2985.7 et seq.*) and related forms, see Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* and Ch. 90, *Automobiles: Vehicle Leasing Act*

For discussion and a form relating to rental of passenger vehicles for periods of less than 30 days, see Ch. 93, *Bailments* ,

For discussion of Division 9 of the Commercial Code and related forms, see Ch. 503, *Sales: Secured Transactions*

For discussion of the Consumers Legal Remedies Act (*Civ. Code § 1750 et seq.*), see Ch. 504, *Sales: Consumers Legal Remedies Act*

For discussion of *Bus. & Prof. Code § 17200 et seq.* (unfair competition) and related forms, see Ch. 565, *Unfair Competition* ,

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionConsumer LeasingGeneral OverviewBanking LawConsumer ProtectionConsumer LeasingLiabilityCommercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewContracts LawTypes of ContractsBailmentsTortsTransportation TortsMotor VehiclesPersonal VehiclesTortsVicarious LiabilityBailees

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 413 PERSONAL PROPERTY LEASES
PART I. SCOPE

36-413 California Forms of Pleading and Practice--Annotated §§ 413.03-413.09

[Reserved]

§§ 413.03[Reserved]

California Forms of Pleading and Practice--Annotated

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 413 PERSONAL PROPERTY LEASES
PART II. LEGAL BACKGROUND
A. In General

36-413 California Forms of Pleading and Practice--Annotated § 413.10

§ 413.10 Scope of Analysis

This chapter discusses and contains forms for use by the parties to personal property leases.

The first analysis discusses bailments for hire [*see § 413.30* et seq.].

The second analysis discusses Division 10 of the Commercial Code (*Com. Code § 10101 et seq.* [*see § 413.50* et seq.]).

Generally, a personal property lease made or first effective between the parties before January 1, 1990, is considered a bailment for hire [*see* U.C.C. Comment to *Com. Code § 10103(a)(10)*], while a lease contract first made or effective between the parties on or after January 1, 1990, is governed by Division 10. However, the parties to a lease contract made or first effective between them prior to January 1, 1990, can agree in writing that the lease contract, or any extension, amendment, modification, renewal, or supplement, be governed by Division 10 [*Com. Code § 10600*].

This chapter does not address the following consumer protection laws, although they also govern personal property leases:

- *Civ. Code § 1936*, which governs automobile rentals for less than 30 days and is discussed in Ch. 93, *Bailments* .

- The Vehicle Leasing Act (*Civ. Code § 2985.7 et seq.*), which is discussed in Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* .

- The federal Consumer Leasing Act (*15 U.S.C. § 1667 et seq.*) and related Regulation M (12 C.F.R. Part 213), both of which are discussed in Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* .

However, automobile rentals and vehicle leases first made or effective on or after January 1, 1990, are subject to both the applicable consumer protection laws and Division 10 of the Commercial Code [*Com. Code § 10104(a)(3)*; *see Com.*

Code § 10104(b) (in event of conflict, consumer protection law prevails)]. In addition, consumers leases, whether bailments or subject to Division 10, are also subject to the federal Consumer Leasing Act (*15 U.S.C. § 1667 et seq.*) and related Regulation M (12 C.F.R. Part 213), if the lease [*15 U.S.C. § 1667(1), (3)*]:

- Is made by a lessor who is regularly engaged in making, offering, or arranging consumer leases;
- Imposes a total contractual obligation of $25,000 or less on the lessee; and
- Has a term in excess of four months.

For discussion, see *§ 413.51[3]*.

For discussion of a lessor's strict liability in tort [*see Price v. Shell Oil Co. (1970) 2 Cal. 3d 245, 253-254, 85 Cal. Rptr. 178, 466 P.2d 722* (doctrine applicable to commercial lessors of personal property in the same manner as it is applicable to sellers)], see Ch. 460, *Products Liability* .

Other types of bailments, specifically deposits and loans for use, are addressed in Ch. 93, *Bailments*. Chapter 93 also addresses third parties' rights and actions involving bailments, and Ch. 82, *Automobiles: Causes of Action* addresses the liability of an automobile owner for the negligence of an operator under *Veh. Code § 17150 et seq.*

Transactions that appear to be personal property leases may be disguised security interests or installment sales contracts. Security interests governed by Division 9 of the Commercial Code are discussed in Ch. 503, *Sales: Secured Transactions* . Installment sales governed by Division 2 of the Commercial Code are discussed in Ch. 500, *Sales: Sales Under the Commercial Code* [*see Com. Code § 2612(1)* (defining "installment contract" within Division 2)]. Retail installment sales of goods for family, personal, or household purposes are governed by the Unruh Act, also known as the Retail Installment Sales Act (*Civ. Code § 1801 et seq.*) and by provisions of the federal Truth in Lending Act (*15 U.S.C. § 1601 et seq.*), both of which are discussed in Ch. 501, *Sales: Retail Installment Sales* . Cases pointing out the distinctions between true leases, installment sales, and security interests are collected in the Research Guide in § 413.270 et seq. [*see also § 413.50[3]*; and Ch. 500, *Sales: Sales Under the Commercial Code* , and Ch. 503, *Sales: Secured Transactions*].

For a discussion and forms relating to the bailment of personal property with common carriers and warehousemen, see Ch. 109, *Carriers* , and Ch. 213, *Documents of Title* . The innkeepers' lien is covered in Ch. 297, *Hotels and Motels* . The topic of liens is covered generally in Ch. 342, *Liens and Wage Preferences*. The mechanics' lien is covered in Ch. 361, *Mechanics' Liens* . Lost or unclaimed property is covered in Ch. 355, *Lost and Unclaimed Property* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionConsumer LeasingGeneral OverviewCommercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)DefaultGeneral OverviewContracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsLease AgreementsGeneral OverviewContracts LawTypes of ContractsPersonal PropertyTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligenceGeneral OverviewTortsTransportation TortsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal VehiclesTortsVicarious LiabilityBailees

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36-413 California Forms of Pleading and Practice--Annotated § 413.11

§ 413.11 Governing Law

Bailments for hire, sometimes called "hirings," are governed by *Civ. Code §§ 1925 et seq.* and *1955 et seq.*

Division 10 of the Commercial Code (*Com. Code § 10101 et seq.*) governs lease contracts that are first made or that first become effective between the parties on or after January 1, 1990. Division 10 also governs any lease contract first made or that first became effective between the parties prior to January 1, 1990, or to any extension, amendment, modification, renewal, or supplement of or to the lease contract, if the parties to that leasespecifically agree in writing that the lease contract, as extended, amended, modified, renewed, or supplemented, will be governed by Division 10 [*Com. Code § 10600*].

The federal Consumer Leasing Act (*15 U.S.C. § 1667 et seq.*) and Regulation M (12 C.F.R. Part 213) govern consumer leases within that Act's definition [*see § 413.10*].

A particular lease may also be governed by other consumer protection laws or may involve questions governed by a particular certificate-of-title law. These other laws are *set forth in § 413.51*, although most of them are equally applicable whether the lease is governed by Division 10 or is a bailment [*see § 413.10*].

Legal Topics:

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

§§ 413.12[Reserved]

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36-413 California Forms of Pleading and Practice--Annotated § 413.30

§ 413.30 Governing Statutes

Hirings are governed by *Civ. Code §§ 1925 et seq.* and *1955 et seq.*

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36-413 California Forms of Pleading and Practice--Annotated § 413.31

§ 413.31 Terminology Used in This Part

Civ. Code § 1925 et seq. refer to "hirings," the "letter," and the "hirer." *Civ. Code § 1955 et seq.* refer to "personal property leases," the "lessor," and the "lessee." A letter is the lessor; and the hirer is the lessee. In this chapter, when discussing a particular statute or duty or relationship based on that statute, the terminology of that statute will be used. Otherwise, the terms lessor and lessee will be used.

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36-413 California Forms of Pleading and Practice--Annotated § 413.32

§ 413.32 "Hiring" Defined

A hiring is a contract by which one gives to another the temporary possession and use of property, other than money for reward, and the latter agrees to return it to the former at a future time [*Civ. Code § 1925*; *see Credit Managers' Assn. v. Brubaker (1991) 233 Cal. App. 3d 1587, 1592-1593, 285 Cal. Rptr. 417* (money loaned by chief executive officer to company for its use in automated teller machines it operated could not be "hiring" but was regular loan as defined by *Civ. Code § 1914*)].

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36-413 California Forms of Pleading and Practice--Annotated § 413.33

§ 413.33 Duties of Hirer/Lessee

[1] Care, Repair, and Expenses

The hirer (lessee) of a thing must use ordinary care for its preservation in safety and in good condition [*Civ. Code § 1928*]. The hirer of a thing must repair all deteriorations or injuries to the thing hired occasioned by his or her want of ordinary care [*Civ. Code § 1929*]. Except as otherwise agreed by the lessor and lessee, a lessee of personal property must bear all expenses concerning the thing that might naturally be foreseen to attend it during its use by the lessee. All other expenses must be borne by the lessor [*Civ. Code § 1956*].

For a form of complaint for use by a letter against a hirer that includes causes of action for nonrepair and misuse of a thing hired, *see § 413.313*.

[2] Use for Particular Purpose

When a thing is let for a particular purpose, the hirer must not use it for any other purpose. A hirer who uses the thing let for another purpose is liable to the letter for all damages resulting from that use, or the letter may treat the contract as rescinded by the unauthorized use [*Civ. Code § 1930*].

[3] Return

At the expiration of the term for which personal property is leased, the lessee must return it to the lessor at the place contemplated by the parties at the time of leasing; or, if no particular place was contemplated by them, at the place at which it was at that time [*Civ. Code § 1958*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsLease Agreements

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36-413 California Forms of Pleading and Practice--Annotated § 413.34

§ 413.34 Duties of Letter/Lessor

[1] In General

Except as otherwise agreed by the lessor (letter) and the lessee in lease agreements for a term of more than 20 days, one who leases personal property must deliver it to the lessee, secure his or her quiet enjoyment of the property against all lawful claimants, put it into a condition fit for the purpose for which he or she leases it, and repair all deteriorations of the property not occasioned by the fault of the lessee and not the natural result of its use [*Civ. Code § 1955*; *see Civ. Code § 1927* (quiet enjoyment); *see also Baker v. Gibson (1939) 14 Cal. 2d 59, 65, 92 P.2d 796]* .

For a form of complaint for use by a lessee against a lessor for breach of the covenant of quiet enjoyment, *see § 413.317*.

[2] Strict Liability or Warranty

If a lessor or letter who is in the business of leasing supplies a defective product, the doctrine of strict liability in tort applies, which has generally supplanted older actions based on warranty and negligence [*Price v. Shell Oil Co. (1970) 2 Cal. 3d 245, 253-254, 85 Cal. Rptr. 178, 466 P.2d 722* ; *Fakhoury v. Magner (1972) 25 Cal. App. 3d 58, 63-64, 101 Cal. Rptr. 473]* . For forms and discussion of strict products liability, see Ch. 460, *Products Liability* . The theory of express warranty may be applicable in somesituations [*see, e.g., Pau v. Yosemite Park and Curry Co. (9th Cir. 1991) 928 F.2d 880, 887* (statements in brochure advertising rental bikes and stating that particular trail was safe cycling area as express warranty that bikes were safe, and became part of bargain); *see generally* Ch. 502, *Sales: Warranties*].

Under the former standard, still applicable to a lessor or letter who is not in the business of leasing, *Civ. Code § 1955* required the lessor to exercise reasonable care to inspect a chattel manufactured by a third person before turning it over to lessee and to make it safe for its intended use or disclose its actual condition to the bailee [*McNeal v. Greenberg (1953) 40 Cal. 2d 740, 742, 255 P.2d 810]* . The lessor's warranty was not an absolute one, but rather a warranty that he or she had exercised reasonable care to ascertain that the chattel was safe and suitable for the purpose for which it was hired [*McNeal v. Greenberg (1953) 40 Cal. 2d 740, 742, 255 P.2d 810* ; *Tierstein v. Licht (1959) 174 Cal. App. 2d 835, 841, 345 P.2d 341* ; *but see Triple C Leasing, Inc. v. All-American Mobile Wash (1976) 64 Cal. App. 3d 244, 250,*

134 Cal. Rptr. 328 (lessor permitted, in accordance with *Com. Code § 2316*, to provide in lease that no warranties of merchantability or fitness for particular purpose, express or implied, are created)]. The warranty that the article furnished was safe and suitable applied to the article itself and to incidental articles connected with it and necessary to its proper use [*Fisher v. Pennington (1931) 116 Cal. App. 248, 251, 2 P.2d 518]* . The standard required the lessor from time to time to inspect the articles it kept for hire in the same manner that any reasonably careful person would in view of nature of article and use to which it is to be put [*McNeal v. Greenberg (1953) 40 Cal. 2d 740, 742, 255 P.2d 810]* .

For complaints for use to recover damages for personal injury from a lessor, *see §§ 413.315* and *413.316*. For discussion and forms relating to warranties by a lessor under Commercial Code, Division 10, which may be adapted for application to a lease entered into before January 1, 1989, see *§ 413.50* et seq. For forms relating to warranties of merchantability and fitness for particular purpose under Commercial Code, Division 2, see Ch. 502, *Sales: Warranties* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-413 California Forms of Pleading and Practice--Annotated § 413.35

§ 413.35 Recovery on Lessor's Default

If a lessor fails to fulfill his or her obligations, as prescribed by *Civ. Code § 1955*, the lessee, after giving the lessor notice to do so, if this notice can conveniently be given, may expend any reasonable amount necessary to make good the lessor's default, and may recover this amount from the lessor [*Civ. Code § 1957*]. The hirer in this situation may also terminate the hiring [*see Civ. Code § 1932(1)* (discussed in *§ 413.37[3]*)].

For complaints for use by a lessee against a lessor to recover the cost of necessary repairs, *see §§ 413.318* and *413.319*. For related affirmative defenses for use by the lessor, *see §§ 413.320* and *413.321*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-413 California Forms of Pleading and Practice--Annotated § 413.36

§ 413.36 Products of Thing Hired

The products of a thing hired, during the hiring, belong to the hirer [*Civ. Code § 1926*].

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36-413 California Forms of Pleading and Practice--Annotated § 413.37

§ 413.37 Termination of Hiring

[1] In General

The hiring of a thing terminates (1) at the end of the term agreed on; (2) by the mutual consent of the parties; (3) by the hirer acquiring a title to the thing hired superior to that of the letter; or (4) by the destruction of the thing hired [*Civ. Code § 1933*].

If the hiring of a thing is terminable at the pleasure of one of the parties, it is terminated by notice to the other of his or her death or incapacity to contract. In other cases it is not terminated thereby [*Civ. Code § 1934*].

[2] Premature Termination by Letter/Lessor

The letter (lessor) of a thing may terminate the hiring and reclaim the thing before the end of the term agreed on (1) when the hirer uses or permits a use of the thing hired in a manner contrary to the agreement of the parties, or (2) when the hirer does not, within a reasonable time after request, make repairs that he or she is bound to make [*Civ. Code § 1931*].

[3] Premature Termination by Hirer/Lessee

The hirer (lessee) of a thing may terminate the hiring before the end of the term agreed on when the letter does not, within a reasonable time after request, fulfill his or her obligations, if any, to place and secure the hirer in the quiet possession of the thing hired, or to put it into good condition, or to repair it [*Civ. Code § 1932(1)*]. The hirer of a thing may also terminate the hiring before the end of the term agreed on when the greater part of the thing hired, or that part which was and which the letter had at the time of the hiring reason to believe was the material inducement to the hirer to enter into the contract, perishes from any other cause than the want of ordinary care of the hirer [*Civ. Code § 1932(2)*].

[4] Hirer's Obligation on Premature Termination

When the hiring of a thing is terminated before the time originally agreed on, the hirer must pay the due proportion of

the hire for the use he or she has actually made of the thing, unless this use is merely nominal, and of no benefit to the hirer [*Civ. Code § 1935*].

The parties to a personal property lease may provide in the lease agreement that if the lessor terminates the lease because of a breach by the lessee, the lessor is entitled to recover from the lessee the worth at the timeof the termination (i.e., the present value), of the excess, if any, of the amount of rent and charges equivalent to the rent reserved in the lease for the balance of the stated term, or any shorter period of time over the reasonable rental value of the property for the same period [*Civ. Code § 3308*; *Newco Leasing, Inc. v. Hull (1985) 167 Cal. App. 3d Supp. 1, 4-5 , 213 Cal. Rptr. 202* ; *see Puritan Leasing Co. v. August (1976) 16 Cal. 3d 451, 456, 128 Cal. Rptr. 175, 546 P.2d 679* (acceleration without discounting rent for unexpired term is invalid)]. The lease may also provide that unless this remedy is exercised by the lessor within a specified time, the right to exercise it is barred [*Civ. Code § 3308*].

The lessor's rights under the lease agreement are cumulative to all other rights or remedies now or hereafter given to the les sor by law, or by the terms of the lease; provided, however, that the election of the lessor to exercise the remedy described in the foregoing paragraph is binding on the lessor and excludes recourse thereafter to any other remedy for rental or charges equivalent to rental or damages for breach of covenant to pay rent or charges accruing after the termination [*Civ. Code § 3308*; *see Puritan Leasing Co. v. August (1976) 16 Cal. 3d 451, 460, 128 Cal. Rptr. 175, 546 P.2d 679* (*Civ. Code § 3308* by its own terms is not exclusive)].

For a form of complaint by a letter against a hirer for rent due after premature termination by the hirer, *see § 413.311*. For a related form of affirmative defense for use by the hirer, *see § 413.314*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)Contracts LawPerformanceDischarges & TerminationsContracts LawRemediesGeneral OverviewContracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsLease AgreementsTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligenceGeneral Overview

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36-413 California Forms of Pleading and Practice--Annotated § 413.38

§ 413.38 Lessor's Options on Lessee's Default

Although a provision in a lease allowing the lessor, on the lessee's default in payment to accelerate payments due under the lease, with or without cancelling the lease, and to hold the lessee for the entire rent for the unexpired term are invalid as an attempt to fix liquidated damages, clauses that allow the lessor to repossess the chattel, to sell it or to relet it, and then to recover any deficiency between the proceeds of sale or reletting and the present value of the rent due for the unexpired term are valid because they are not unjust. The measure of recovery under the approved type of clause is the same as that allowed to a lessor of real property or to a secured party under Division 9 of the Commercial Code [*Puritan Leasing Co. v. August (1976) 16 Cal. 3d 451, 456-462, 128 Cal. Rptr. 175, 546 P.2d 679* ; *Triple C Leasing, Inc. v. All-American Mobile Wash (1976) 64 Cal. App. 3d 244, 251, 134 Cal. Rptr. 328]* . Also, if an action for recovery under the approved type of clause is commenced after the property has been sold or relet, damages by then are liquidated [*Puritan Leasing Co. v. August (1976) 16 Cal. 3d 451, 462-463, 128 Cal. Rptr. 175, 546 P.2d 679]* .

A lessor of real property faced with a lessee's repudiation or abandonment may (1) accept the surrender and terminate further obligations of either party to the lease; (2) rest on the lease and sue for each installment as it becomes due; or (3) on notice to the lessee, reenter or repossess the premises, relet it for the lessee's account, and sue to recover the excess of the total rent reserved over the amount realized by the reletting [*Puritan Leasing Co. v. August (1976) 16 Cal. 3d 451, 457, 128 Cal. Rptr. 175, 546 P.2d 679]* . Even if the lease does not expressly provide for them, the same options are available to a lessor of personal property based on traditional principles governing breach of a lease [*Industrial Leasing Corp. v. Lawson (1983) 149 Cal. App. 3d 1098, 1102, 197 Cal. Rptr. 291* (lease provision at issue authorized repossession and sale, but not recovery of deficiency remaining thereafter; relying on *Puritan Leasing Co. v. August (1976) 16 Cal. 3d 451, 457-458, 128 Cal. Rptr. 175, 546 P.2d 679* , which implied the same result as dicta in upholding a lease provision)].

When goods subject to a lease are surrendered, abandoned, or repossessed and sold by the lessor, the standards of commercially reasonable conduct in the sale of repossessed goods applicable under Divisions 2 and 9 of the Commercial Code do not apply [*Industrial Leasing Corp. v. Lawson (1983) 149 Cal. App. 3d 1098, 1103, 197 Cal. Rptr. 291]* . However, traditional principles obligating the lessor to mitigate its damages do apply, and thus require some effort to expose the goods to a market [*Industrial Leasing Corp. v. Lawson (1983) 149 Cal. App. 3d 1098,*

1102-1103, 197 Cal. Rptr. 291] .

For a form of complaint for use by a lessor to recover a deficiency or damages based on rents for the unexpired lease term, *see § 413.312*. For a general form of complaint for use by a letter against a hirer for rent due, *see § 413.310*. For a related form of affirmative defense for use by the hirer, *see § 413.314*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§§ 413.39[Reserved]

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36-413 California Forms of Pleading and Practice--Annotated § 413.50

§ 413.50 Leases Governed by Division 10

[1] Date of Lease Contract

Division 10 [*Com. Code § 10101 et seq.*] applies to all lease contracts that are first made or that first become effective between the parties on or after January 1, 1990. Division 10 does not apply to any lease contract first made or that first became effective between the parties prior to January 1, 1990, or to any extension, amendment, modification, renewal, or supplement of or to the lease contract, unless the parties to the lease contract specifically agree in writing that the lease contract, as extended, amended, modified, renewed, or supplemented, shall be governed by Division 10 [*Com. Code § 10600*].

As used in Division 10, "lease contract" means the total legal obligation that results from the lease agreement as affected by Division 10 and any other applicable rules of law. It includes a sublease contract [*Com. Code § 10103(a)(12)*]. The term "lease agreement" is used in Division 10 to mean the bargain, with respect to the lease, of the lessor and the lessee in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in Division 10. Unless the context clearly indicates otherwise, the term includes a sublease agreement [*Com. Code § 10103(a)(11)*].

At common law, a lease of personal property is a bailment for hire [*see* U.C.C. Comment to *Com. Code § 10103(a)(10)*]. Bailments for hire and thus personal property leases entered into before January 1, 1990, are governed by *Civ. Code §§ 1925 et seq.* and *1955 et seq.*, discussed in *§ 413.30* et seq. Moreover, those provisions also apply to leases that are subject to Division 10 and, in the event of a conflict, will prevail over Division 10 [*see Com. Code § 10104(a)(3), (b)*].

[2] Form of Lease; "Lease" and "Goods" Defined

Division 10 applies to any transaction, regardless of form, that creates a lease [*Com. Code § 10102*; *see* discussions in *§§ 413.50[4]* and *413.51[3]*]. Unless the context otherwise requires, for purposes of Division 10, "lease" means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on

approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease [*Com. Code § 10103(a)(10)*; *see Com. Code § 1201(36)* (defining "security interest," discussed in *§ 413.50[3]*)].

Unless the context otherwise requires, "goods" in Division 10 means all things that are movable at the time of identification to the lease contract, or are fixtures, but the term does not include money, documents, instruments, accounts, chattel paper, general intangibles, or minerals or the like, including oil and gas, before extraction. The term also includes the unborn young of animals [*Com. Code § 10103(a)(8)*; *see Com. Code § 10309*, discussed in *§ 413.157*].

[3] Security Interests Excepted

Retention or creation of a security interest is not a lease within the purview of Division 10 [*Com. Code § 10103(a)(10)*]. A security interest is defined generally as an interest in personal property or fixtures that secures payment or performance of an obligation [*Com. Code § 1201(b)(35)*]. Security interests, including leases intended as security and security interests disguised as leases, are governed by Division 9 of the Commercial Code (*Com. Code § 9101 et seq.*) [*see* U.C.C. Comment to *Com Code §§ 10101, 10103(a)(10)*]. Division 9 is discussed in Ch. 503, *Sales: Secured Transactions* .

Whether a transaction creates a lease or security interest is determined by the facts of each case [*Com. Code § 1203(a)*; *see, e.g., Interpool Ltd. v. Char Yigh Marine (Panama) S.A. (9th Cir. 1989) 890 F.2d 1453, 1459-1461* (applying California law; discussing all criteria, of which intent of parties was most important)]. However, the facts and circumstances must be reexamined at each renewal of the lease, because it is possible for a transaction that first creates a lease to later create a security interest [U.C.C. Comment to *Com. Code § 10103(a)(10)*].

A transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and one or more of the following apply [*Com. Code § 1203(b)*; *see Com. Code § 1203(e)* (remaining economic life of goods is to be determined with reference to facts and circumstances at time transaction is entered into)]:

- The original term of the lease is equal to or greater than the remaining economic life of the goods;

- The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;

- The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration on compliance with the lease agreement; or

- The lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration on compliance with the lease agreement.

For purposes of *Com. Code § 1203*, additional consideration is not nominal if (1) when the option to renew the lease is granted to the lessee, the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed, or (2) when the option to become the owner of the goods is granted to the lessee, the price is stated to be the fair market value of the goods determined at the time the option is to be performed. Additional consideration is nominal if it is less than the lessee's reasonably predictable cost of performing under the lease agreement if the option is not exercised [*Com. Code § 1203(d)*]. "Reasonably predictable" is to be determined with reference to the facts and circumstances at the time the transaction is entered into [*Com. Code § 1203(e)*].

A transaction does not create a security interest merely because it provides for one or more of the following [*Com. Code*

§ 1203(c)]:

- The present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantiallyequal to or is greater than the fair market value of the goods at the time the lease is entered into [*see Com. Code § 1201(b)(28)*; *see also Com. Code § 10103(a)(21)* ("present value" defined, discussed in *§ 413.52[11]*)];

- The lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods;

- The lessee has an option to renew the lease or to become the owner of the goods;

- The lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed; or

- The lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

In the case of a motor vehicle or trailer [*see Veh. Code §§ 415, 630* (definitions)] that is not to be used primarily for personal, family, or household purposes, a transaction does not create a security interest merely because it provides that the amount of rental payments may be increased or decreased by reference to the amount realized by the lessor on sale or disposition of the vehicle or trailer [*Com. Code § 1203(c)(7)*].

[4] Finance Leases Included

Division 10 applies to finance leases, but they are subject to many separate rules and considerations, which are discussed in Subpart C [*see Com. Code § 10103(a)(7)* (defining "finance lease")]. Finance leases differ from leases disguised as security interests in that they are the product of a three-party transaction between the supplier or manufacturer, the lessee, and the lessor. The manufacturer and the lessee may negotiate their transaction first, as a sale or as a lease. The three-party transaction may be structured as a sale and finance lease or as a lease and sublease [U.C.C. Comment to *Com. Code § 10103(a)(7)*]. In other contexts, such as tax and accounting, the term finance lease has been used to connote different types of lease transactions, including some that would be excluded from the purview of Division 10 as disguised secured transactions [U.C.C. Comment to *Com. Code § 10103(a)(7)*]. The definition of a finance lease is *set forth in § 413.90* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)PerformanceCommercial Law (UCC)Secured Transactions (Article 9)General OverviewContracts LawSecured TransactionsGeneral OverviewContracts LawSecured TransactionsApplication & ConstructionLeasesContracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsLease AgreementsGeneral Overview

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36-413 California Forms of Pleading and Practice--Annotated § 413.51

§ 413.51 Other Laws Applicable to Leases Within Division 10

[1] In General

The general definitions and principles of construction and interpretation in Division 1 [*Com. Code § 1101 et seq.*] apply throughout Division 10 [*Com. Code § 10103(d)*].

A lease, although subject to *Com. Code § 10101 et seq.*, also is subject to any of the following that apply to that lease [*Com. Code § 10104(a)*]:

- California certificate of title statute, including the provisions of the Vehicle Code that require registration of a vehicle or boat and provisions of the Health and Safety Code that require registration of a mobilehome or commercial coach.

- Certificate of title statute of another jurisdiction [*see § 413.51[2]*].

- Consumer law of California, both decisional and statutory, including, to the extent that they apply to a consumer lease transaction, *Bus. & Prof. Code § 17200 et seq.* (unfair competition, discussed in Ch. 565, *Unfair Competition* ,), *Bus. & Prof. Code § 17500 et seq.* (prohibited advertising practices, discussed in Ch.14, *Advertising*), and Pt. 4 of Division 3 of the Civil Code (*Civ. Code § 1738 et seq.*).

In case of conflict between the provisions of Division 10, other than *Com. Code §§ 10105, 10304(c)* (discussed in *§ 413.153[1]*), and 10305(c) (discussed in Buyer or Sublessee from Lessee *§ 413.153[1]*), and any law referred to in *Com. Code § 10104(a)*, the provisions of that law control [*Com. Code § 10104(b)*].

Failure to comply with any applicable law has only the effect specified in that law [*Com. Code § 10104(c)*].

[2] Certificate of Title Laws

A lease that is subject to *Com. Code § 10101 et seq.* also is subject to the certificate of title laws of California or any other applicable jurisdiction [*Com. Code § 10104(a)(1), (2)*]. Subject to the provisions of *Com. Code §§ 10304(c)* and *10305(c)* (discussed in *§§ 413.152[1]* and *413.153[1]*), with respect to goods covered by a certificate of title issued under a statute of California or of another jurisdiction, compliance and the effect of compliance or noncompliance with a certificate of title statute are governed by the law (including the conflict of laws rules) of the jurisdiction issuing the certificate until the earlier of (1) surrender of the certificate or (2) four months after the goods are removed from that jurisdiction and thereafter until a new certificate of title is issued by another jurisdiction [*Com. Code § 10105*]. *Com. Code §§ 10105, 10304(c)*, and *10305(c)* are exceptions to the general conflict rule of Division 10 that when there is aconflict between Division 10 and another law mentioned in *Com. Code § 10104(a)*, the other law prevails [*Com. Code § 10104(b)*].

[3] Consumer Protection Laws Applicable to Consumer Leases

For purposes of Division 10, unless the context otherwise requires, "consumer lease" means a lease that a lessor regularly engaged in the business of leasing or selling makes to a lessee who is a natural person and takes under the lease primarily for a personal, family, or household purpose [*Com. Code § 10103(a)(5)*]. Note that the California definition of consumer lease differs from the Uniform Commercial Code definition, which like the federal Consumer Leasing Act [*15 U.S.C. § 1667 et seq.*] excludes leases with a total contractual obligation in excess of $25,000.

A consumer lease that is subject to Division 10 is also subject to California consumer protection laws [*Com. Code § 10104(a)(3)*], as well as federal consumer protection laws. Federal law includes the Consumer Leasing Act, which is a part of the federal Truth in Lending Act and applies to lessors who are regularly engaged in leasing, offering to lease, or arranging to lease under a consumer lease [*15 U.S.C. § 1667(3)*]. A consumer lease under the federal Consumer Leasing Act is a contract in the form of a lease or bailment for the use of personal property by a natural person for a period of time exceeding four months and for a total contractual obligation not exceeding $25,000, primarily for personal, family or household purposes, whether or not the lessee has the option to purchase or otherwise become the owner of the property at the expiration of the lease [*15 U.S.C. § 1667(1)*]. However, a consumer lease does not include a credit sale as defined in *15 U.S.C. § 1602(g)*, nor does it include a lease for agricultural, business, or commercial purposes or to a government or governmental agency or instrumentality or to an organization [*15 U.S.C. § 1667(1)*]. Pursuant to authority of *15 U.S.C. § 1604*, the Board of Governors of the Federal Reserve promulgated Regulation M (12 C.F.R. Part 213) to implement the federal Consumer Leasing Act. The federal Consumer Leasing Act and Regulation M are discussed in Ch. 90, *Automobiles: Vehicle Leasing Act* .

In addition to the unfair competition and advertising statutes [*Bus. & Prof. Code §§ 17200 et seq.* (unfair competition, discussed in *Ch. 565, Unfair Competition, § 565.10* et seq.), *Bus. & Prof. Code § 17500 et seq.* (prohibited advertising practices, discussed in Ch. 14, *Advertising*)], California consumer law that might be applicable in a particular situation includes the following [*Com. Code § 10104(a)(3)*]:

- The Consumers Legal Remedies Act (*Civ. Code § 1750 et seq.*), which is discussed in Ch. 504, *Sales: Consumers Legal Remedies Act* .

- *Civ. Code § 1936*, which governs rental, lease, or hire of a passenger vehicle from a rental company for a period of less than 30 days and is discussed in Ch. 93, *Bailments* .

- The Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*) and the Vehicle Leasing Act (*Civ. Code § 2985.7 et seq.*), both of which are discussed in Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* .

A choice of law provision in a consumer lease is not enforceable unless it provides for the lease to be governed by the law of a jurisdiction in which (1) the lessee resides at the time the lease agreement becomes enforceable or within 30

days thereafter, (2) the goods are to be used, or (3) the lease is executed by the lessee [*Com. Code § 10106(a)*]. Similarly, a judicial forum chosen by the parties to a consumer lease is not enforceable unless it is in a county in which (1) the lessee in fact signed the lease, (2) the lessee resides at the commencement of the action or resided at the time the lease contract became enforceable, or (3) the goods are permanently stored [*Com. Code § 10106(b)*].

Consumer contracts and consumer contract guaranties are governed by the Consumer Contract Awareness Act of 1990 (*Civ. Code § 1799.200 et seq.*) and by *Fin. Code § 757*. A consumer contract is one signed by a natural person and prepared by the seller either [*Civ. Code § 1799.201(a), (b)*]:

- For the sale of goods or services that are purchased primarily for personal, family, or household purposes; or

- For extension of credit, the proceeds of which are used primarily for personal, family, or household purposes [*Civ. Code § 1799.201(a), (b)*].

For discussion of the Act as applied to depository and banking services, including safe deposit rentals and personal property safekeeping or storage agreements, see Ch. 95, *Banks, Deposits, and Checks* . For discussion of the Act as applied to consumer contract guaranties, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[4] Fraudulent Conveyance Laws

Except as otherwise provided in Division 10 [*see, e.g., Com. Code § 10308* (discussed in *§ 413.156*)], each provision of Division 10 applies whether the lessor or a third party has title to the goods, and whether the lessor, the lessee, or a third party has possession of the goods, notwithstanding any statute or rule of law that possession or the absence of possession is fraudulent [*Com. Code § 10302*; *see Civ. Code § 3440.1(k)* (excepting from *Civ. Code § 3440 et seq.* transfers pursuit to leases); *Com. Code § 6103(c)(14)* (excepting from *Com. Code § 6101 et seq.* transfers of property immediately leased back to transferor)].

[5] Division 9 of the Commercial Code

Division 9 of the Commercial Code [*Com. Code § 9101 et seq.*] applies tosecurity interests created by contract, including a lease, intended as security [*Com. Code 9109(a)(1)*].

A security interest arising under *Com. Code § 10508(e)* (see discussion in *§ 413.221*) is subject to Division 9; however, until the debtor obtains possession of the goods, all of the following apply [*Com. Code § 9110*]:

- The security interest is enforceable, even if *Com. Code § 9203(b)(3)* has not been satisfied (setting conditions that generally must be satisfied in order to enforce a security interest against the debtor and third parties with respect to collateral).

- Filing is not required to perfect the security interest.

- The rights of the secured party after default by the debtor are governed by Division 2 [*see Com. Code § 2101 et seq.*; for discussion, see Ch. 500, *Sales: Sales Under the Commercial Code*] or Division 10.

- The security interest has priority over a conflicting security interest created by the debtor.

Division 9 is discussed in Ch. 503, *Sales: Secured Transactions* .

[6] Civil Code Governs Unconscionability

California did not enact the Uniform Commercial Code section governing unconscionability. In *California, Civ. Code § 1670.5* (discussed in Ch. 140, *Contracts*) applies to all contracts including commercial ones [*see A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473, 484-485, 186 Cal. Rptr. 114* (applying *Civ. Code § 1670.5* to transaction otherwise governed by Division 2)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionConsumer LeasingGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral OverviewCommercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)DefaultGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)General OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionChoice of LawCertificates of TitleCommercial Law (UCC)Secured Transactions (Article 9)PriorityGeneral OverviewContracts LawDebtor & Creditor RelationsContracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsLease AgreementsGeneral OverviewTransportation LawPrivate VehiclesVehicle RegistrationGeneral Overview

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36-413 California Forms of Pleading and Practice--Annotated § 413.52

§ 413.52 Definitions

[1] "Buyer in Ordinary Course of Business"

Unless the context otherwise requires, "buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him or her is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind, but does not include a pawnbroker [*Com. Code § 10103(a)(1)*].

[2] "Buying"

Unless the context otherwise requires, "buying" may be for cash or by exchange of other property or on secured or unsecured credit, and includes acquiring goods or documents of title under a preexisting contract for sale, but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt [*Com. Code § 10103(a)(1)*].

[3] "Conforming"

Unless the context otherwise requires, "conforming" goods or performance under a lease contract means goods or performance that are in accordance with the obligations under the lease contract [*Com. Code § 10103(a)(4)*].

[4] "Fault"

Unless the context otherwise requires, "fault" means wrongful act, omission, breach, or default [*Com. Code § 10103(a)(6)*].

[5] "Installment Lease Contract"

Unless the context otherwise requires, "installment lease contract" means a lease contract that authorizes or requires the delivery of goods in separate lots to be separately accepted, even though the lease contract contains a clause "each

delivery is a separate lease" or its equivalent [*Com. Code § 10103(a)(9)*].

[6] "Leasehold Interest"

Unless the context otherwise requires, "leasehold interest" means the interest of the lessor or the lessee under a lease contract [*Com. Code § 10103(a)(13)*].

[7] "Lessee"

Unless the context otherwise requires, "lessee" means a person who acquires the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessee [*Com. Code § 10103(a)(14)*].

[8] "Lessee in Ordinary Course of Business"

Unless the context otherwise requires, "lessee in ordinary course of business" means a person who in good faith and without knowledge that the lease to him or her is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods leases in ordinary course from a person in the business of selling or leasing goods of that kind; but "lessee in ordinary course of business" does not include a pawnbroker [*Com. Code § 10103(a)(15)*]. "Leasing" may be for cash or by exchange of other property or on secured or unsecured credit, and includes acquiring goods or documents of title under a preexisting lease contract, but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt [*Com. Code § 10103(a)(15)*].

[9] "Lessor"

Unless the context otherwise requires, "lessor" means a person who transfers the right to possession and use of goods under a lease. Unless the context clearly indicates otherwise, the term includes a sublessor [*Com. Code § 10103(a)(16)*].

[10] "Lessor's Residual Interest"

Unless the context otherwise requires, "lessor's residual interest" means the lessor's interest in the goods after expiration, termination, or cancellation of the lease contract [*Com. Code § 10103(a)(17)*].

[11] "Present Value"

Unless the context otherwise requires, "present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate was not manifestly unreasonable at the time the transaction was entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into [*Com. Code §§ 1201(b)(28), 10103(a)(21)*].

[12] "Purchase"

Unless the context otherwise requires, "purchase" includes taking by sale, lease, mortgage, security interest, pledge, gift, or any other voluntary transaction creating an interest in goods [*Com. Code § 10103(a)(22)*].

[13] "Sublease"

Unless the context otherwise requires, "sublease" means a lease of goods the right to possession and use of which was acquired by the lessor as a lessee under an existing lease [*Com. Code § 10103(a)(23)*].

Legal Topics:

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

§§ 413.53[Reserved]

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36-413 California Forms of Pleading and Practice--Annotated § 413.70

§ 413.70 Offer and Acceptance

Unless otherwise unambiguously indicated by the language or circumstances, an offer to make a lease contract must be construed as inviting acceptance in any manner and by any medium that is reasonable in the circumstances [*Com. Code § 10206(a)*]. If the beginning of a requested performance is a reasonable mode of acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance [*Com. Code § 10206(b)*; *see Com. Code § 1202(d)* (for the definition of "notify," *see § 413.340*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentOffer & Acceptance

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36-413 California Forms of Pleading and Practice--Annotated § 413.71

§ 413.71 Firm Offers

An offer by a merchant to lease goods to or from another person in a signed writing that by its terms gives assurance it will be held open is not revocable, for lack of consideration, during the time stated or, if no time is stated, for a reasonable time, but in no event may the period of irrevocability exceed three months [*Com. Code § 10205*]. Any term of assurance on a form supplied by the offeree must be separately signed by the offeror [*Com. Code § 10205*].

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36-413 California Forms of Pleading and Practice--Annotated § 413.72

§ 413.72 Sufficiency of Lease Contract

A lease contract may be made in any manner sufficient to show agreement, including conduct by both parties that recognizes the existence of a lease contract [*Com. Code § 10204(a)*]. An agreement sufficient to constitute a lease contract may be found although the moment of its making is undetermined [*Com. Code § 10204(b)*].

Although one or more terms are left open, a lease contract does not fail for indefiniteness if the parties have intended to make a lease contract and there is a reasonably certain basis for giving an appropriate remedy [*Com. Code § 10204(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-413 California Forms of Pleading and Practice--Annotated § 413.73

§ 413.73 Statute of Frauds for Leases

[1] Writing Generally Required

A consumer lease is not enforceable by way of action or defense unless it is in writing [*Com. Code § 10201(a)(2)*; *see Com. Code § 10103(a)(5)* (discussed in *§ 413.51[3], above,* defining "consumer leases")]. A lease contract that is not a consumer lease, and under which payments, excluding payments for options to renew or buy, total $1,000 or more is not enforceable by way of action or defense unless it is in writing [*see Com. Code § 10201(a)(1)*].

The writing must be signed by the party against whom enforcement is sought or by that party's authorized agent, sufficient to indicate that a lease contract has been made between the parties and to describe the goods leased and the lease term [*Com. Code § 10201(a)(2)*]. Any description of leased goods, or of the lease term, is sufficient and satisfies *Com. Code § 10201(a)(2),* whether or not it is specific, if it reasonably identifies what is described [*Com. Code § 10201(b)*]. A writing is not insufficient because it omits or incorrectly states a term agreed on, but the lease contract is not enforceable under *Com. Code § 10201(a)(2)* beyond the lease term and the quantity of goods shown in the writing [*Com. Code § 10201(c)*].

[2] Substitutes for Writing

[a] Part Performance

A lease contract that does not satisfy the requirements of *Com. Code § 10201(a),* but which is valid in other respects, is enforceable if the goods are to be specially manufactured or obtained for the lessee and are not suitable for leaseor sale to others in the ordinary course of the lessor's business, and the lessor, before notice of repudiation is received and under circumstances that reasonably indicate that the goods are for the lessee, has made either a substantial beginning of their manufacture or commitments for their procurement [*Com. Code § 10201(d)(1)*].

A lease contract that does not satisfy the requirements of *Com. Code § 10201(a),* but which is valid in other respects, is enforceable with respect to goods that have been received and accepted by the lessee [*Com. Code § 10201(d)(3)*].

[b] Judicial or Testimonial Admission

A lease contract that does not satisfy the requirements of *Com. Code § 10201(a)*, but which is valid in other respects, is enforceable if the party against whom enforcement is sought admits in that party's pleading, testimony, or otherwise in court that a lease contract was made. Then, the lease contract is enforceable to the extent of the quantity of goods admitted [*Com. Code § 10201(d)(2)*].

[3] Determining Term of Lease Subject to Exception

If enforcement of a lease contract is sought pursuant to one of the exceptions in *Com. Code § 10201(d)*, and there is a writing signed by the party against whom enforcement is sought, or by that party's authorized agent, specifying the lease term, the term of the lease contract is the term specified [*Com. Code § 10201(e)(1)*].

If enforcement of a lease contract is sought pursuant to *Com. Code § 10201(d)*, and the party against whom enforcement is sought admits a lease term in pleading, testimony, or otherwise in court, the term of the lease contract is the term admitted [*Com. Code § 10201(e)(2)*].

If enforcement of a lease contract is sought pursuant to one of the exceptions in *Com. Code § 10201(d)*, and there is no writing or admission relating to the lease term, the lease contract is enforceable for a reasonable term [*Com. Code § 10201(e)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-413 California Forms of Pleading and Practice--Annotated § 413.74

§ 413.74 Parol Evidence to Interpret Lease Contact

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to the terms included in that writing may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement, but they may be explained or supplemented as follows [*Com. Code § 10202*]:

- By course of dealing or usage of trade or by course of performance; and

- By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)General Provisions (Article 1)Application & ConstructionGap-Filler ProvisionsCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentParol EvidenceGeneral OverviewContracts LawContract InterpretationParol EvidenceGeneral OverviewContracts LawSales of GoodsForm, Formation & ReadjustmentParol EvidenceEvidenceDocumentary EvidenceParol Evidence

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36-413 California Forms of Pleading and Practice--Annotated § 413.75

§ 413.75 Course of Performance as Aid to Interpretation

If a lease contract involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is relevant to determine the meaning of the lease agreement [*Com. Code § 1303(a), (d)*]. The express terms of a lease agreement and any course of performance, as well as any course of dealing and usage of trade, must be construed whenever reasonable as consistent with each other, but if that construction is unreasonable, express terms control course of performance, course of performance controls both course of dealing and usage of trade, and course of dealing controls usage of trade [*Com. Code § 1303(e)*].

Subject to the provisions of *Com. Code §§ 2209* and *10208* on modification and waiver, course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance [*Com. Code § 1303(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-413 California Forms of Pleading and Practice--Annotated § 413.76

§ 413.76 Modification, Rescission, and Waiver

[1] In General

An agreement modifying a lease contract needs no consideration to be binding [*Com. Code § 10208(a)*]. A signed lease agreement that excludes modification or rescission except by a signed writing may not be otherwise modified or rescinded, but, except as between merchants, such a requirement on a form supplied by a merchant must be separately signed by the other party [*Com. Code § 10208(b)*]. Although an attempt at modification or rescission does not satisfy the requirements of *Com. Code § 10208(b)*, it may operate as a waiver [*Com. Code § 10208(c)*].

[2] Retraction of Waiver Regarding Executory Portion

A party who has made a waiver affecting an executory portion of a lease contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver [*Com. Code § 10208(d)*].

[3] Waiver or Renunciation of Rights After Default

Any claim or right arising out of an alleged default or breach of warranty maybe discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party [*Com. Code § 10107*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsExceptionsMerchant RuleContracts LawFormationExecutionContracts LawTypes of ContractsExecutory ContractsContracts LawTypes of ContractsLease AgreementsGeneral Overview

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[Reserved]

§§ 413.77[Reserved]

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 413 PERSONAL PROPERTY LEASES
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3. Provisions Applicable Only To Finance Leases

36-413 California Forms of Pleading and Practice--Annotated § 413.90

§ 413.90 "Finance Lease," "Supplier," and "Supply Contract" Defined

Unless the context otherwise requires, "finance lease" means a lease in which the following occurs [*Com. Code § 10103(a)(7)*; *see also § 413.50[4]*]:

- The lessor does not select, manufacture, or supply the goods;

- The lessor acquires the goods or the right to possession and use of the goods in connection with the lease; and

- One of the following occurs:

  - The lessee receives a copy of the contract by which the lessor acquired the goods or the right to possession and use of the goods before signing the lease contract;

  - The lessee's approval of the contract by which the lessor acquired the goods or the right to possession and use of the goods is a condition to effectiveness of the lease contract;

  - The lessee, before signing the lease contract, receives an accurate and complete statement designating the promises and warranties, and any disclaimers of warranties, limitations or modifications of remedies, or liquidated damages, including those of a third party, such as the manufacturer of the goods, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods; or

  - The lessor, before the lessee signs the lease contract, informs the lessee in writing (1) of the identity of the person supplying the goods to the lessor, unless the lessee has

> selected that person and directed the lessor to acquire the goods or the right to possession and use of the goods from that person, (2) that the lessee is entitled under this division to the promises and warranties, including those of any third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods, and (3) that the lessee may communicate with the person supplying the goods to the lessor and receive an accurate and complete statement of those promises and warranties, including any disclaimers and limitations of them or of remedies.

In Division 10 unless the context otherwise requires, "supplier" means a person from whom a lessor buys or leases goods to be leased under a finance lease [*Com. Code § 10103(a)(24)*]. Additionally, "supply contract" means a contract under which a lessor buys or leases goods to be leased [*Com. Code § 10103(a)(25)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSales of GoodsDamages & RemediesSeller's Damages & RemediesLimitation & ModificationGeneral OverviewContracts LawThird PartiesGeneral OverviewContracts LawTypes of ContractsLease AgreementsGeneral OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral Overview

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36-413 California Forms of Pleading and Practice--Annotated § 413.91

§ 413.91 Lessee as Beneficiary of Warranties Under Supply Contract

The benefit of a supplier's promises to the lessor under the supply contract and of all warranties, whether express or implied, including those of any third party provided in connection with or as part of the supply contract, extends to the lessee to the extent of the lessee's leasehold interest under a finance lease related to the supply contract, but is subject to the terms of the warranty and of the supply contract and all defenses or claims arising from the supply contract [*Com. Code § 10209(a)*]. However, this extension of a benefit of the supplier's promises and of warranties to the lessee does not modify the rights and obligations of the parties to the supply contract, whether arising from the contract or otherwise [*Com. Code § 10209(b)(1)*]. Nor does the extension of the benefit of a supplier's promises and of warranties to the lessee impose any duty or liability under the supply contract on the lessee [*Com. Code § 10209(b)(2)*].

Any modification or rescission of the supply contract by the supplier and the lessor is effective between the supplier and the lessee unless, before the modification or rescission, the supplier has received notice that the lessee has entered into a finance lease related to the supply contract [*Com. Code § 10209(c)*]. If the modification or rescission is effective between the supplier and the lessee, the lessor is deemed to have assumed, in addition to the obligations of the lessor to the lessee under the lease contract, promises of the supplier to the lessor and warranties that were so modified or rescinded as they existed and were available to the lessee before modification or rescission [*Com. Code § 10209(c)*].

In addition to the foregoing extension of the benefit of the supplier's promises and warranties to the lessee under a finance lease, the lessee retains all rights that the lessee may have against the supplier that arise from any agreement between the lessee and the supplier or from any other law [*Com. Code § 10209(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsExpress WarrantiesContracts LawTypes of ContractsLease AgreementsGeneral Overview

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36-413 California Forms of Pleading and Practice--Annotated § 413.92

§ 413.92 Warranties by Lessor Are Limited

By definition, a finance lease is one in which, before signing the lease contract, the lessee must have been informed in writing of any and all promises and warranties, and any disclaimers of warranties, limitations or modifications of remedies, or liquidated damages, including those of a third party, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods [*Com. Code § 10103(a)(7)*]. The statutory implied warranties of merchantability and fitness for a particular purpose do not apply to a finance lease [*Com. Code §§ 10212(a), 10213*].

In a finance lease, the lessor does not make the warranty against infringement otherwise provided for by *Com. Code § 10211(b)* [*Com. Code § 10211(b)*]. Furthermore, a lessee who furnishes specifications to a lessor or a supplier, as is generally the case in a finance lease [*see Com. Code § 10103(a)(7)*] must hold the lessor and the supplier harmless against any claim by the way of infringement or the like that arises out of compliance with the specifications [*Com. Code § 10211(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)General Provisions (Article 1)Application & ConstructionDamagesContracts LawSales of GoodsDamages & RemediesBuyer's Damages & RemediesLimitation & ModificationGeneral OverviewContracts LawSales of GoodsDamages & RemediesSeller's Damages & RemediesLimitation & ModificationGeneral OverviewContracts LawSales of GoodsWarrantiesMerchantabilityContracts LawTypes of ContractsLease AgreementsPersonalty LeasesDamagesGeneral OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesDamagesLiquidated DamagesContracts LawTypes of ContractsLease AgreementsPersonalty LeasesWarranties

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36-413 California Forms of Pleading and Practice--Annotated § 413.93

§ 413.93 Finance Lease Gives Lessee Risk of Loss

In most other leases, unless otherwise agreed by the parties, the risk of loss remains with the lessor. In a finance lease, risk of loss passes to the lessee [*Com. Code § 10219(a)*; *see § 413.293[9]*]. In the case of delivery or tender of nonconforming goods that gives rise to a right of rejection, under a finance lease the risk of loss will remain with the supplier, until cure or acceptance [*Com. Code § 10220(a)(1)*; *see § 413.133*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSales of GoodsPerformanceRisk of LossContracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesRisk of Loss

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36-413 California Forms of Pleading and Practice--Annotated § 413.94

§ 413.94 Finance Lease as Irrevocable After Acceptance of Goods

In the case of a finance lease that is not a consumer lease, the lessee's promises under the lease contract become irrevocable and independent on the lessee's acceptance of the goods [*Com. Code § 10407(a)*; *but see Com. Code § 10407*, Official UCC Comment; *see also § 413.342* (lessee may still have right to revoke acceptance)]. Except under a consumer finance lease, *Com. Code § 10407* requires the lessee to perform even if the lessor's performance after acceptance is not in accordance with the lease contract [*see, e.g., 15 U.S.C. § 1666i* (barring consumer obligation to pay for defective goods)]. The lessee may, however, have and pursue a cause of action against the lessor, such as one for breach of certain limited warranties under *Com. Code §§ 10210* and *10211(a)* [*Com. Code § 10407*, Official UCC Comment]. Generally, *Com. Code § 10407* also negates any right of set-off the lessee might otherwise have with respect to rent still due under the lease contract [*see Com. Code § 10508(f) (set-off)*; *Com. Code § 10407*, Official UCC Comment].

A promise that has become irrevocable and independent under *Com. Code § 10407(a)* is effective and enforceable between the parties, and by or against third parties including assignees of the parties [*Com. Code § 10407(b)(1)*]. Once a promise has become irrevocable and independent under *Com. Code § 10407(a)*, it is not subject to cancellation, termination, modification, repudiation, excuse, or substitution without the consent of the party to whom the promise runs [*Com. Code § 10407(b)(2)*].

The effect of *Com. Code § 10407* is that lease promises do not become irrevocable until acceptance of the goods, and only then may the promises be enforced by an assignee. However, when a lease is assigned, it becomes subject to *Com. Code § 9403*, which governs the rights of an assignee meeting its requirements and allows enforcement of a waiver-of-defenses clause in the lease even if the clause would not otherwise be enforceable under *Com. Code § 10407*. In other words, once there is an assignment to one who qualifies for holder in due course status under *Com. Code § 9403*, that section imposes additional rules beyond those of *Com. Code § 10407*. Thus, the lessee, like the maker of a negotiable instrument, bears the risk of putting into the stream of commerce documents that appear regular on their face but have underlying flaws [*Wells Fargo Bank Minn. v. B.C.B.U. (2006) 143 Cal. App. 4th 493, 499-501, 49 Cal. Rptr. 3d 324* (lease was enforceable by assignee against lessee that signed acknowledgment of acceptance of leased goods

before goods actually were delivered, even though lease subsequently was rescinded and goods never were delivered)]. For additional discussion of the effect of *Com. Code § 9403* generally, see *Ch. 503, Sales: Secured Transactions, § 503.28[3]*.

Com. Code § 10407 does not affect the validity under any other law of a covenant in any lease contract making the lessee's promises irrevocable and independent on the lessee's acceptance of the goods [*Com. Code § 10407(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionWarrantiesCommercial Law (UCC)Leases (Article 2A)PerformanceContracts LawTypes of ContractsLease AgreementsGeneral OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesWarranties

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36-413 California Forms of Pleading and Practice--Annotated §§ 413.95-413.109

[Reserved]

§§ 413.95[Reserved]

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36-413 California Forms of Pleading and Practice--Annotated § 413.110

§ 413.110 Creation of Express Warranties by Lessor

Express warranties by the lessor are created as follows: (1) any affirmation of fact or promise made by the lessor to the lessee that relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods will conform to the affirmation or promise; (2) any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods will conform to the description; or (3) any sample or model that is made part of the basis of the bargain creates an express warranty that the whole of the goods will conform to the sample or model [*Com. Code § 10210(a)*].

It is not necessary to the creation of an express warranty that the lessor use formal words, such as "warrant" or "guarantee," or that the lessor have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the lessor's opinion or commendation of the goods does not create a warranty [*Com. Code § 10210(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionWarranties

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36-413 California Forms of Pleading and Practice--Annotated § 413.111

§ 413.111 Warranties Given by Lessor

[1] Against Interference or Infringement

There is in a lease contract a warranty that for the lease term no person holds a claim to or interest in the goods that arose from an act or omission of the lessor, other than a claim by way of infringement or the like, which will interfere with the lessee's enjoyment of its leasehold interest [*Com. Code § 10211(a)*].

Except in a finance lease, there is in a lease contract by a lessor who is a merchant regularly dealing in goods of the kind, a warranty that the goods are delivered free of the rightful claim of any person by way of infringement or the like [*Com. Code § 10211(b)*].

A lessee who furnishes specifications to a lessor or a supplier shall hold the lessor and the supplier harmless against any claim by the way of infringement or the like that arises out of compliance with the specifications [*Com. Code § 10211(c)*].

[2] Implied Warranty of Merchantability

Except in a finance lease, a warranty that the goods will be merchantable is implied in a lease contract if the lessor is a merchant with respect to goods of that kind [*Com. Code § 10212(a)*]. To be merchantable, goods must be at least such as [*Com. Code § 10212(b)*]:

- Pass without objection in the trade under the description in the lease agreement;
- In the case of fungible goods, are of fair average quality within the description;
- Are fit for the ordinary purposes for which goods of that type are used;
- Run, within the variation permitted by the lease agreement, of even kind, quality, and quantity within

each unit and among all units involved;

- Be adequately contained, packaged, and labeled as the lease agreement may require; and

- Conform to any promises or affirmations of fact made on the container or label [*Com. Code § 10212(b)*].

Other implied warranties may arise from course of dealing or usage of trade [*Com. Code § 10212(c)*].

[3] Implied Warranty of Fitness for Particular Purpose

Except in a finance lease, if the lessor at the time the lease contract is made has reason to know of any particular purpose for which the goods are required and that the lessee is relying on the lessor's skill or judgment to select or furnish suitable goods, there is in the lease contract an implied warranty that the goods will be fit for that purpose [*Com. Code § 10213*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionWarrantiesContracts LawTypes of ContractsLease AgreementsGeneral OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesWarranties

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36-413 California Forms of Pleading and Practice--Annotated § 413.112

§ 413.112 Disclaimer or Modification of Warranties

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit a warranty must be construed wherever reasonable as consistent with each other [*Com. Code § 10214(a)*]. However, subject to the provisions of *Com. Code § 10202* on parol or extrinsic evidence, negation or limitation is inoperative to the extent that the construction is unreasonable [*Com. Code § 10214(a)*].

Subject to *Com. Code § 10214(c)*, to exclude or modify the implied warranty of merchantability or any part of it the language must mention "merchantability," be by a writing, and be conspicuous [*Com. Code § 10214(b)*]. Subject to *Com. Code § 10214(c)*, to exclude or modify any implied warranty of fitness the exclusion must be by a writing and be conspicuous [*Com. Code § 10214(b)*]. Language to exclude all implied warranties of fitness is sufficient if it is in writing, is conspicuous, and states, for example, "There is no warranty that the goods will be fit for a particular purpose" [*Com. Code § 10214(b)*].

Notwithstanding *Com. Code § 10214(b)*, but subject to *Com. Code § 10214(d)*, unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," or "with all faults," or by other language that in common understanding calls the lessee's attention to the exclusion of warranties and makes plain that there is no implied warranty, if in writing and conspicuous [*Com. Code § 10214(c)(1)*]. Notwithstanding *Com. Code § 10214(b)*, but subject to *Com. Code § 10214(d)*, if the lessee before entering into the lease contract has examined the goods or the sample or model as fully as desired or has refused to examine the goods, there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed [*Com. Code § 10214(c)(2)*]. Also, notwithstanding *Com. Code § 10214(b)*, but subject to *Com. Code § 10214(d)*, an implied warranty may also be excluded or modified by course of dealing, course of performance, or usage of trade [*Com. Code § 10214(c)(3)*].

To exclude or modify a warranty against interference or against infringement, or part of it, the language must be specific, be by a writing, and be conspicuous, unless the circumstances, including course of performance, course of dealing, or usage of trade, give the lessee reason to know that the goods are being leased subject to a claim or interest of any person [*Com. Code § 10214(d)*; *see Com. Code § 10211* (warranty against infringement or interference)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSales of GoodsForm, Formation & ReadjustmentFormationModification, Rescission & WaiverContracts LawSales of GoodsWarrantiesMerchantabilityContracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesWarranties

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36-413 California Forms of Pleading and Practice--Annotated § 413.113

§ 413.113 Rule of Construction Applicable to Warranties

Warranties, whether express or implied, must be construed as consistent with each other and as cumulative, but if that construction is unreasonable, the intention of the parties determines which warranty is dominant [*Com. Code § 10215*]. In ascertaining that intention the following rules apply [*Com. Code § 10215*]:

- Exact or technical specifications displace an inconsistent sample or model or general language of description.

- A sample from an existing bulk displaces inconsistent general language of description.

- Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)WarrantiesFitnessCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionWarrantiesContracts LawSales of GoodsWarrantiesFitness

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36-413 California Forms of Pleading and Practice--Annotated § 413.114

§ 413.114 Notices Required to Be Given by Lessee

[1] Breach of Warranty of Infringement

If tender has been accepted under a lease other than a consumer lease and the lessee receives notice of litigation for infringement or the like, the lessee, within a reasonable time after receipt of the notice, must notify the lessor or be barred from any remedy over for liability established by the litigation [*Com. Code § 10516(c)(2), (f)*; *see Com. Code § 10211* (warranty against infringement)]. *Com. Code § 10516(c)* applies to any obligation of a lessee to hold the lessor or the supplier harmless against infringement or the like [*Com. Code § 10516(e)*].

[2] Breach of Warranty for Which Lessor Is Answerable

If a lessee is sued for breach of a warranty or other obligation for which a lessor or a supplier is answerable, the lessee may give the lessor or the supplier, or both, written notice of the litigation [*Com. Code § 10516(d)(1)*]. If the notice states that the person notified may come in and defend and that if the person notified does not do so, then that person will be bound in any action against that person by the lessee by any determination of fact common to the two litigations, and unless the person notified after seasonable receipt of the notice does come in and defend, that person is so bound [*Com. Code § 10516(d)(1)*].

If a lessee is sued for breach of a warranty or other obligation for which a lessor or a supplier is answerable over, the lessor or the supplier may demand in writing that the lessee turn over control of the litigation, including settlement, if the claim is one for infringement or the like or else be barred from any remedy over [*Com. Code § 10516(d)(2)*]. If the demand states that the lessor or the supplier agrees to bear all expense and to satisfy any adverse judgment, then unless the lessee after seasonable receipt of the demand does turn over the control the lessee is so barred [*Com. Code § 10516(d)(2)*].

Com. Code § 10516(d) applies to any obligation of a lessee to hold the lessor or the supplier harmless against infringement or the like [*Com. Code § 10516(e)*].

For forms for notice that may be adapted for use by lessees, see Ch. 502, *Sales: Warranties* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionWarrantiesContracts LawBreachGeneral OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesWarranties

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36-413 California Forms of Pleading and Practice--Annotated §§ 413.115-413.129

[Reserved]

§§ 413.115[Reserved]

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5. Identification Of Goods To Lease And Risk Of Loss

36-413 California Forms of Pleading and Practice--Annotated § 413.130

§ 413.130 Identification of Goods to Lease

Identification of goods as goods to which a lease contract refers may be made at any time and in any manner explicitly agreed to by the parties [*Com. Code § 10217*]. In the absence of explicit agreement, identification occurs at the following times [*Com. Code § 10217*]:

- If the lease contract is for a lease of goods that are existing and identified, when the lease contract is made.

- If the lease contract is for a lease of goods that are not existing and identified, when the goods are shipped, marked, or otherwise designated by the lessor as goods to which the lease contract refers.

- If the lease contract is for a lease of unborn young of animals, when the young are conceived.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionContracts LawTypes of ContractsLease AgreementsGeneral OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral Overview

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36-413 California Forms of Pleading and Practice--Annotated § 413.131

§ 413.131 Insurable Interests

A lessee obtains an insurable interest when existing goods are identified to the lease contract even though the goods identified are nonconforming and the lessee has an option to reject them [*Com. Code § 10218(a)*]. If a lessee has an insurable interest only by reason of the lessor's identification of the goods, the lessor, until default or insolvency or notification to the lessee that identification is final, may substitute other goods for those identified [*Com. Code § 10218(b)*; *see Com. Code § 1202(d)* (definition of "notify"; *see also § 413.340*)].

Notwithstanding a lessee's insurable interest under *Com. Code §§ 10218(a)* and *(b)*, the lessor retains an insurable interest until an option to buy has been exercised by the lessee and risk of loss has passed to the lessee [*Com. Code § 10218(c)*].

Nothing in *Com. Code § 10218* impairs any insurable interest recognized under any other statute or rule of law [*Com. Code § 10218(d)*].

The parties may agree that one or more of them has an obligation to obtain and pay for insurance covering the goods and may also agree which of them shall be the beneficiary of the proceeds of the insurance [*Com. Code § 10218(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionCasualty & Risk of LossContracts LawSales of GoodsPerformanceInsurable Interest & Identification

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36-413 California Forms of Pleading and Practice--Annotated § 413.132

§ 413.132 Risk of Loss

Except in the case of a finance lease, risk of loss is retained by the lessor and does not pass to the lessee [*Com. Code § 10219(a)*]. In the case of a finance lease, risk of loss passes to the lessee [*Com. Code § 10219(a)*].

Subject to the provisions on the effect of default on risks of loss [*see, e.g., Com. Code § 10220*], if risk of loss is to pass to the lessee and the time of passage is not stated, the following rules apply:

- If the lease contract requires or authorizes the goods to be shipped by carrier and it does not require delivery at a particular destination, the risk of loss passes to the lessee when the goods are duly delivered to the carrier [*Com. Code § 10219(b)(1)(A)*].

- If the lease contract requires or authorizes the goods to be shipped by carrier and it does require delivery at a particular destination and the goods are duly tendered there while in the possession of the carrier, the risk of loss passes to the lessee when the goods are duly so tendered there as to enable the lessee to take delivery [*Com. Code § 10219(b)(1)(B)*].

- If the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the lessee on acknowledgment by the bailee of the lessee's right to possession of the goods [*Com. Code § 10219(b)(2)*].

- In any case not covered by the foregoing, the risk of loss passes to the lessee on the lessee's receipt of the goods if the lessor, or, in the case of a finance lease, the supplier, is a merchant; otherwise the risk passes to the lessee on tender of delivery [*Com. Code § 10219(b)(3)*].

Legal Topics:

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

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36-413 California Forms of Pleading and Practice--Annotated § 413.133

§ 413.133 Effect of Default on Risk of Loss

If risk of loss is to pass to the lessee, the time of passage is not stated, and a tender or delivery of goods that fail to conform to the lease contract gives a right of rejection, the risk of their loss remains with the lessor, or, in the case of a finance lease, the supplier, until cure or acceptance [*Com. Code § 10220(a)(1)*].

If risk of loss is to pass to the lessee, the time of passage is not stated, and the lessee rightfully revokes acceptance, he or she, to the extent of any deficiency in his or her effective insurance coverage, may treat the risk of loss as having remained with the lessor from the beginning [*Com. Code § 10220(a)(2)*].

Whether or not risk of loss is to pass to the lessee, if the lessee as to conforming goods already identified to a lease contract repudiates or is otherwise in default under the lease contract, the lessor, or, in the case of a finance lease, the supplier, to the extent of any deficiency in his or her effective insurance coverage may treat the risk of loss as resting on the lessee for a commercially reasonable time [*Com. Code § 10220(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionCasualty & Risk of LossContracts LawSales of GoodsPerformanceRisk of LossContracts LawTypes of ContractsLease AgreementsPersonalty LeasesRisk of Loss

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36-413 California Forms of Pleading and Practice--Annotated § 413.134

§ 413.134 Casualty to Identified Goods

If a lease contract requires goods identified when the lease contract is made, and the goods suffer casualty without fault of the lessee, the lessor, or the supplier before delivery, or the goods suffer casualty before risk of loss passes to the lessee pursuant to the lease agreement or *Com. Code § 10219*, the lease contract is avoided if the loss is total [*Com. Code § 10221(1)*]. However, if, under the foregoing circumstances, the loss is partial or the goods have deteriorated to the extent that they no longer conform to the lease contract, the lessee may demand inspection and at his or her option either treat the lease contract as avoided or, except in a finance lease, accept the goods with due allowance from the rent payable for the balance of the lease term for the deterioration or the deficiency in quantity but without further right against the lessor [*Com. Code § 10221(2)*]. The Uniform Commercial Code allows a lessee under a consumer finance lease to accept part of the goods with allowance for the destroyed or deteriorated goods. This right was deleted from the California version at the request of leasing associations [*see* Standby Committee on Uniform Commercial Code Article 2A, California State Bar Assoc., The California Amendments to U.C.C. Article 2A (1987) (hereinafter cited as "State Bar Report")].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)DefaultLessee & Lessor DefaultCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionCasualty & Risk of LossContracts LawTypes of ContractsLease AgreementsPersonalty LeasesRisk of Loss

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36-413 California Forms of Pleading and Practice--Annotated §§ 413.135-413.149

[Reserved]

§§ 413.135[Reserved]

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36-413 California Forms of Pleading and Practice--Annotated § 413.150

§ 413.150 Lease Generally Effective Against Purchasers and Creditors

Except as otherwise provided in Division 10 [*see, e.g., Com. Code §§ 10307, 10308* (discussed in *§§ 413.155* and *413.156*)], a lease contract is effective and enforceable according to its terms between the parties, against purchasers of the goods, and against creditors of the parties [*Com. Code § 10301*; *see also Com. Code § 10407(d)* (finance leases, discussed in *§ 413.94*)]. Generally, Division 10 applies whether the lessor or a third party has title to, or possession of, the goods and notwithstanding the fraudulent conveyance statutes [*see Com. Code § 10302*, discussed in *§ 413.51[4]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSales of GoodsTitle, Creditors & Good Faith PurchasersGeneral OverviewContracts LawTypes of ContractsLease AgreementsGeneral OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral Overview

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36-413 California Forms of Pleading and Practice--Annotated § 413.151

§ 413.151 Transfer of Interests Under Lease

[1] When Permitted

Except as provided in *Com. Code § 9407* (generally permitting assignments and transfers of interests under leases; for discussion, *see* Ch. 60, *Assignments*) and *Com. Code § 10303(c)* (discussed *below*), a provision in a lease agreement that (1) prohibits the voluntary or involuntary transfer of an interest of a party under the lease contract or of the lessor's residual interest in the goods, or (2) makes such a transfer an event of default, gives rise to the rights and remedies provided in *Com. Code § 10303(d)* (discussed in *§ 413.151[2]*), but a transfer that is prohibited or is an event of default under the lease agreement is otherwise effective [*Com. Code § 10303(b)*; *see also Com. Code § 10407(b)* (finance leases, discussed in *§ 413.94*)]. A voluntary or involuntary transfer includes a transfer by sale, sublease, creation or enforcement of a security interest, or attachment, levy, or other judicial process [*Com. Code § 10303(b)*; *see Com. Code § 10303(a)* (defining "creation of a security interest")]. Transfers prohibited by the lease contract give rise to specified rights and remedies, including, if applicable, damages, cancellation of the lease contract, or an injunction against the transfer [*Com. Code § 10303(d)(1), (2)*; *see also Com. Code § 10501*].

In a consumer lease, to prohibit the transfer of an interest of a party under a lease contract, or to make a transfer an event of default, the language of prohibition must be specific, in writing, and conspicuous [*Com. Code § 10303(g)*]. A provision in the lease agreement is not enforceable if it either (1) prohibits a transfer of a right to damages for default with respect to the whole lease contract or of a right to payment arising out of the transferor's due performance of the transferor's entire obligation, or (2) makes such a transfer an event of default. For purposes of *Com. Code § 10303(d)* (discussed in *§ 413.151[2]*), such a transfer is not a transfer that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract [*Com. Code § 10303(c)*].

[2] Other Party's Remedies

If a transfer is made, and the making of the transfer is an event of default under a lease agreement, then the party to the lease contract not making the transfer, unless that party waives the default or otherwise agrees to the transfer, has the

rights and remedies provided in Division 10 of the Commercial Code and, except as limited by Division 10, the rights and remedies provided in the lease agreement [*Com. Code §§ 10303(d)(1), 10501(b)*].

In any other case, if a transfer is made that either (1) is prohibited under a lease agreement, or (2) materially impairs the prospect of obtaining returnperformance by, materially changes the duty of, or materially increases the burden or risk imposed on, the other party to the lease contract, and the party not making the transfer does not agree at any time to the transfer in the lease contract or otherwise, then except as limited by contract, both of the following consequences ensue [*Com. Code §§ 10303(d)(2)*]:

- The transferor is liable to the party not making the transfer for damages caused by the transfer to the extent that the damages could not reasonably be prevented by the party not making the transfer.

- A court having jurisdiction may grant other appropriate relief, including cancellation of the lease contract or an injunction against the transfer.

[3] Construing Scope of Transfer

A transfer of "the lease" or of "all my rights under the lease" or a transfer in similar general terms is a transfer of rights. Unless the language or the circumstances, such as a transfer for security, indicate the contrary, the transfer is a delegation of duties by the transferor to the transferee; and acceptance by the transferee constitutes a promise by the transferee to perform those duties. This promise is enforceable by either the transferor or the other party to the lease contract [*Com. Code § 10303(e)*].

Unless otherwise agreed by the lessor and the lessee, a delegation of performance does not relieve the transferor as against the other party of any duty to perform or any liability for default [*Com. Code § 10303(f)*]. A right to damages for default with respect to the whole lease contract or a right arising out of the transferor's due performance of the transferor's entire obligation can be assigned despite agreement otherwise [*see Com. Code § 10303(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-413 California Forms of Pleading and Practice--Annotated § 413.152

§ 413.152 Subsequent Lessee From Lessor

[1] Extent of Interest Acquired

Subject to the provisions of *Com. Code § 10303* (discussed in *§ 413.151*), a subsequent lessee from a lessor of goods under an existing lease contract obtains, to the extent of the leasehold interest transferred, the leasehold interest in the goods that the lessor had or had power to transfer, and, except as provided in *Com. Code §§ 10304(b)* and *10527(d)*, takes subject to the existing lease contract [*Com. Code § 10304(a)*]. A lessor with voidable title has power to transfer a good leasehold interest to a good faith subsequent lessee for value, but only to the extent set forth in the preceding sentence [*Com. Code § 10304(a)*]. When goods have been delivered under a transaction of purchase the lessor has that power even though (1) the lessor's transferor was deceived as to the identity of the lessor; (2) the delivery was in exchange for a check that is later dishonored; (3) it was agreed that the transaction was to be a "cash sale"; or (4) the delivery was procured through fraud punishable as larcenous under the criminal law [*Com. Code § 10304(a)*].

A subsequent lessee from the lessor of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a California statute or one of another jurisdiction takes no greater rights than those provided both by *Com. Code § 10304* and by the certificate-of-title statute [*Com. Code § 10304(c)*; *see also § 413.51[2]*].

[2] Subsequent Lessee in Ordinary Course of Business

A subsequent lessee in the ordinary course of business from a lessor who is a merchant dealing in goods of that kind to whom the goods were entrusted by the existing lessee of that lessor before the interest of the subsequent lessee became enforceable against that lessor obtains, to the extent of the leasehold interest transferred, all of that lessor's and the existing lessee's rights to the goods and takes free of the existing lease contract [*Com. Code § 10304(b)*].

Legal Topics:

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

Contracts LawNegotiable InstrumentsNegotiationDeliveryContracts LawNegotiable InstrumentsTransfersContracts LawTypes of ContractsLease AgreementsGeneral OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesGeneral Overview

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36-413 California Forms of Pleading and Practice--Annotated § 413.153

§ 413.153 Buyer or Sublessee From Lessee

[1] Extent of Interest Acquired

Subject to the provisions of *Com. Code § 10303* (discussed in *§ 413.151*), a buyer or sublessee from the lessee of goods under an existing lease contract obtains, to the extent of the interest transferred, the leasehold interest in the goods that the lessee had or had power to transfer and, except as provided in *Com. Code §§ 10305(b)* and *10511(d)*, takes subject to the existing lease contract [*Com. Code § 10305(a)*]. A lessee with a voidable leasehold interest has power to transfer a good leasehold interest to a good faith buyer for value or a good faith sublessee for value, but only to the extent set forth in the preceding sentence [*Com. Code § 10305(a)*]. When goods have been delivered under a transaction of lease the lessee has that power even though (1) the lessor was deceived as to the identity of the lessee; (2) the delivery was in exchange for a check that is later dishonored; or (3) the delivery was procured through fraud punishable as larcenous under the criminal law [*Com. Code § 10305(a)*].

A buyer or sublessee from the lessee of goods that are subject to an existing lease contract and are covered by a certificate of title issued under a California statute or one of another jurisdiction takes no greater rights than those provided both by *Com. Code § 10305* and by the certificate-of-title statute [*Com. Code § 10305(c)*; *see also § 413.51[2]*].

[2] Buyer or Sublessee in Ordinary Course of Business

A buyer in the ordinary course of business or a sublessee in the ordinary course of business from a lessee who is a merchant dealing in goods of that kind to whom the goods were entrusted by the lessor obtains, to theextent of the interest transferred, all of the lessor's and lessee's rights to the goods, and takes free of the existing lease contract [*Com. Code § 10305(b)*; *see Mercedes-Benz Credit Corporation v. Johnson (2003) 110 Cal. App. 4th 53, 58-59, 1 Cal. Rptr. 3d 396* (because lessor did not "entrust" car to auto dealer who leased it for personal use only, purchaser did not acquire superior title as good faith purchaser); *see also Com. Code § 10103(a)(1)* discussed in *§ 413.52[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-413 California Forms of Pleading and Practice--Annotated § 413.154

§ 413.154 Lien of Repairer of Leased Goods

If a person in the ordinary course of his or her business furnishes services or materials with respect to goods subject to a lease contract, a lien on those goods in the possession of that person given by statute or rule of law for those materials or services takes priority over any interest of the lessor or lessee under the lease contract or Division 10 unless the lien is created by statute and the statute provides otherwise or unless the lien is created by rule of law and the rule of law provides otherwise [*Com. Code § 10306*]. As used in Division 10, and unless the context otherwise requires, "lien" means a charge against or interest in goods to secure payment of a debt or performance of an obligation, but the term does not include a security interest [*Com. Code § 10103(a)(18)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-413 California Forms of Pleading and Practice--Annotated § 413.155

§ 413.155 Rights of Lessee's Creditors

Except as otherwise provided in *Com. Code § 10306* (repairer's lien), a creditor of a lessee takes subject to the lease contract [*Com. Code § 10307(a)*].

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36-413 California Forms of Pleading and Practice--Annotated § 413.156

§ 413.156 Rights of Lessor's and Seller's Creditors

Except as otherwise provided in *Com. Code § 10306* (repairer's lien) and *Com. Code §§ 10307(c)* and *10308* (discussed *below*), a creditor of a lessor takes subject to the lease contract unless the creditor holds a lien that attached to the goods before the lease contract became enforceable [*Com. Code § 10307(b)*].

Except as otherwise provided in *Com. Code §§ 9317, 9321*, and *9323* (concerning priorities of secured parties; for discussion, *see* Ch. 503, *Sales: Secured Transactions*), a lessee takes a leasehold interest subject to a security interest held by a creditor of the lessor [*Com. Code § 10307(c)*].

A creditor of a lessor in possession of goods subject to a lease contract may treat the lease contract as void if as against the creditor retention of possession by the lessor is fraudulent or void under any statute or rule of law. Retention of possession in good faith and current course of trade by the lessor for a commercially reasonable time after the lease contract becomes enforceable is not fraudulent or void [*Com. Code § 10308(a)*]. The word "void" does not appear in the Uniform Commercial Code version, but was added to conform to California law [*see* State Bar Report 8]. Nothing in Division 10 impairs the rights of creditors of a lessor if the lease contract is made under circumstances that, under any statute or rule of law apart from Division 10, would constitute the transaction a fraudulent transfer or voidable preference [*Com. Code § 10308(b)*].

A creditor of a seller may treat a sale or an identification of goods to a contract for sale as void if as against the creditor retention of possession by the seller is fraudulent under any statute or rule of law. Retention of possession of the goods pursuant to a lease contract entered into by the seller as lessee and the buyer as lessor in connection with the sale or identification of the goods is not fraudulent if the buyer bought for value and in good faith [*Com. Code § 10308(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityLiensCommercial Law (UCC)Secured Transactions

(Article 9)PriorityPurchasers & Perfected Secured PartiesGeneral OverviewContracts LawDebtor & Creditor RelationsContracts LawDefensesGeneral OverviewContracts LawSecured TransactionsAttachment of Security InterestsEnforceabilityContracts LawSecured TransactionsPerfection & PriorityPriorityCreditor PrioritiesGeneral Overview

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36-413 California Forms of Pleading and Practice--Annotated § 413.157

§ 413.157 Leased Goods as Fixtures

[1] Permitted; Exceptions

Under Division 10 no lease exists of ordinary building materials incorporated into an improvement on land. But a lease governed by Division 10 may be of goods that are fixtures or may continue in goods that become fixtures [*Com. Code § 10309(b)*]. Division 10 does not prevent creation of a lease of fixtures pursuant to real estate law [*Com. Code § 10309(c)*]. In *Com. Code § 10309*, goods are "fixtures" when they become so related to particular real estate that an interest in them arises under real estate law [*Com. Code § 10309(a)(1)*].

[2] Priority of Lessor's Interest

The interest of a lessor of fixtures has priority over a conflicting interest of an encumbrancer or owner of the real estate in the following situations [*Com. Code § 10309(d)*; *see Com. Code § 10309(a)(1), (5)* (defining "fixture filing" and "encumbrance")]:

- If the lease is a purchase money lease [*see Com. Code § 10309(a)(3)* (defining "purchase money lease")], the conflicting interest of the encumbrancer or owner arises before the goods become fixtures, a fixture filing covering the fixtures is filed before the goods become fixtures or within 20 days thereafter, and the lessee has an interest of record in the real estate or is in possession of the real estate [*but see Com. Code § 10309(e)* (discussed in *§ 413.157[3]*)].

- If a fixture filing covering the fixtures is filed before the interest of the encumbrancer or owner is of record, the lessor's interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the lessee has an interest of record in the real estate or is in possession of the real estate [*see Com. Code § 10309(a)(2)* (defining "fixture filing")].

- If the fixtures are readily removable factory or office machines, readily removable equipment that is not primarily used or leased for use in the operation of the real estate, or readily removable replacements

of domestic appliances that are goods subject to a consumer lease.

- If the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the lease contract is enforceable.

- If the encumbrancer or owner has consented in writing to the lease or has disclaimed an interest in the goods as fixtures.

- If the lessee has a right to remove the goods as against the encumbrancer or owner. If the lessee's right to remove terminates, the priority of the interest of the lessor continues for a reasonable time.

In *Com. Code § 10309*, a "fixture filing" is the filing, in the office where a record of a mortgage on the real estate would be recorded, of a financing statement covering goods that are or are to become fixtures and conforming to the requirements of *Com. Code § 9502(a), (b)* [*Com. Code § 10309(a)(2)*]. A lease is a "purchase money lease" unless the lessee has possession or use of the goods or the right to possession or use of the goods before the lease agreement is enforceable [*Com. Code § 10309(a)(3)*]. "Encumbrance" includes real estate mortgages and other liens on real estate and all other rights in real estate that are not ownership interests [*Com. Code § 10309(a)(5)*].

Com. Code § 10309 reflects changes from the Uniform Commercial Code version to conform to former *Com. Code § 9313* (*now see Com. Code § 9501 et seq.*) [*see* State Bar Report 8].

[3] Lessor's Interest Subordinate to Construction Loan

Notwithstanding *Com. Code § 10309(d)(1)* but otherwise subject to *Com. Code § 10309(d)*, the interest of a lessor of fixtures, including the lessor's residual interest, is subordinate to the conflicting interest of an encumbrancer of the real estate under a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction [*Com. Code § 10309(e)*]. In *Com. Code § 10309*, a mortgage is a "construction mortgage" to the extent it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded writing so indicates [*Com. Code § 10309(a)(4)*]. To the extent given to refinance a construction mortgage, the conflicting interest of an encumbrancer of the real estate under a mortgage has this priority to the same extent as the encumbrancer of the real estate under the construction mortgage [*Com. Code § 10309(e)*].

[4] Determination of Priority in Other Situations

In situations not within *Com. Code § 10309(d)* or *(e)*, priority between the interest of a lessor of fixtures, including the lessor's residual interest, and the conflicting interest of an encumbrancer or owner of the real estate who is not the lessee is determined by the priority rules governing conflicting interests in real estate [*Com. Code § 10309(f)*]. For a form of complaint seeking declaratory relief regarding the removability of fixtures, see Ch. 332, *Landlord and Tenant: The Tenancy* .

It should be noted, also, that nothing in Division 10 prevents subordination by agreement by any person entitled to priority [*Com. Code § 10311*].

[5] Lessor's or Lessee's Right to Remove Fixtures

If the interest of a lessor has priority over all conflicting interests of all owners and encumbrancers of the real estate, the lessor or the lessee may (1) on default, expiration, termination, or cancellation of the lease agreement but subject to the lease agreement and Division 10, or (2) if necessary to enforce his or her other rights and remedies under Division 10, remove the goods from the real estate, free and clear of all conflicting interests of all owners and encumbrancers of the

real estate [*Com. Code § 10309(g)*]. A lessor or lessee who removes fixtures pursuant to *Com. Code § 10309* must reimburse any encumbrancer or owner of the real estate who is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation [*Com. Code § 10309(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsCollateralGoodsFixturesCommercial Law (UCC)Secured Transactions (Article 9)PriorityAccessions & FixturesGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PriorityLiensContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesFixtures & CropsContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesMechanics' LiensTortsPremises Liability & PropertyLessees & LessorsGeneral Overview

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36-413 California Forms of Pleading and Practice--Annotated § 413.158

§ 413.158 Leased Goods as Accessions

[1] When Lessor's or Lessee's Interest Superior

Goods are "accessions" when they are installed in or affixed to other goods [*Com. Code § 10310(a)*]. The interest of a lessor or a lessee under a lease contract entered into before the goods became accessions is superior to all interests in the whole except as stated in *Com. Code § 10310(d)* [*Com. Code § 10310(b)*].

The interest of a lessor or a lessee under a lease contract entered into at the time or after the goods became accessions is superior to all subsequently acquired interests in the whole except as stated in *Com. Code § 10310(d)*, but is subordinate to interests in the whole existing at the time the lease contract was made unless the holders of those interests in the whole have in writing consented to the lease or disclaimed an interest in the goods as part of the whole [*Com. Code § 10310(c)*].

[2] When Lessor's and Lessee's Interests Are Subordinate

The interest of a lessor or a lessee under a lease contract described in *Com. Code § 10310(b)* or *(c)* is subordinate to the interest of a buyer in the ordinary course of business or a lessee in the ordinary course ofbusiness of any interest in the whole acquired after the goods became accessions [*Com. Code § 10310(d)(1)*]. The interest of a lessor or a lessee under a lease contract described in *Com. Code § 10310(b)* or *(c)* is also subordinate to the interest of a creditor with a security interest in the whole perfected before the lease contract was made to the extent that the creditor makes subsequent advances without knowledge of the lease contract [*Com. Code § 10310(d)(2)*].

[3] Removal of Accessions

When under *Com. Code § 10310(b)* or *(c)* and *(d)* a lessor or a lessee of accessions holds an interest that is superior to all interests in the whole, the lessor or the lessee may (1) on default, expiration, termination, or cancellation of the lease contract by the other party but subject to the provisions of the lease contract and Division 10, or (2) if necessary to enforce his or her other rights and remedies under Division 10, remove the goods from the whole, free and clear of all

interests in the whole [*Com. Code § 10310(e)*]. A lessor or lessee who removes fixtures pursuant to *Com. Code § 10310(e)* must reimburse any holder of an interest in the whole who is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury but not for any diminution in value of the whole caused by the absence of the goods removed or by any necessity for replacing them. A person entitled to reimbursement may refuse permission to remove until the party seeking removal gives adequate security for the performance of this obligation [*Com. Code § 10310(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PriorityAccessions & FixturesGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityAccessions & FixturesAccessionsContracts LawSecured TransactionsPerfection & PriorityPriorityCreditor PrioritiesGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityPurchasers & Perfected Secured PartiesGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityPurchasers & Perfected Secured PartiesBuyers & Lessees in Ordinary Course of Business

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6. Effect Of Lease Contract On Third Parties

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[Reserved]

§§ 413.159[Reserved]

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36-413 California Forms of Pleading and Practice--Annotated § 413.170

§ 413.170 Right to Assurances

A lease contract imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired [*Com. Code § 10401(a)*]. If reasonable grounds for insecurity arise with respect to the performance of either party, the insecure party may demand in writing adequate assurance of due performance. Until the insecure party receives that assurance, if commercially reasonable the insecure party may suspend any performance for which he or she has not already received the agreed return [*Com. Code § 10401(b)*].

A repudiation of the lease contract occurs if assurance of due performance adequate under the circumstances of the particular case is not provided to the insecure party within a reasonable time, not to exceed 30 days after receipt of a demand by the other party [*Com. Code § 10401(c)*].

Between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered must be determined according to commercial standards [*Com. Code § 10401(d)*]. Acceptance of any nonconforming delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance [*Com. Code § 10401(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)Lease ContractsPriority & Rights in GoodsContracts LawTypes of ContractsLease AgreementsGeneral Overview

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36-413 California Forms of Pleading and Practice--Annotated § 413.171

§ 413.171 Anticipatory Repudiation

[1] Aggrieved Party's Options

If either party repudiates a lease contract, other than a consumer lease, with respect to a performance not yet due under the lease contract, the loss of which performance will substantially impair the value of the lease contract to the other, the aggrieved party may (1) for a commercially reasonable time, await retraction of repudiation and performance by the repudiating party; (2) make demand for adequate assurance pursuant to *Com. Code § 10401* and await assurance of future performance adequate under the circumstances of the particular case; or (3) resort to any right or remedy for default under the lease contract or Division 10, even though the aggrieved party has notified the repudiating party that the aggrieved party would await the repudiating party's performance and assurance and has urged retraction [*Com. Code § 10402(a)*]. In addition, whether or not the aggrieved party is pursuing one of the foregoing remedies, the aggrieved party may suspend performance or, if the aggrieved party is the lessor, proceed in accordance with the provisions of Division 10 on the lessor's right to identify goods to the lease contract notwithstanding default or to salvage unfinished goods [*Com. Code § 10402(a)(3)*; *see Com. Code § 10524* (disposition of goods)].

The rights and remedies of the parties to a consumer lease in connection with a repudiation of that lease shall be determined under other laws, and *Com. Code § 10402* shall not affect the applicability or interpretation of those laws [*Com. Code § 10402(b)*; *see § 413.51[3]*]. *Com. Code § 10402(b)* has no counterpart in the Uniform Commercial Code [*see* State Bar Report 9].

[2] Retraction

Until the repudiating party's next performance is due, the repudiating party can retract the repudiation unless, since the repudiation, the aggrieved party has canceled the lease contract or materially changed the aggrieved party's position, or otherwise indicated that the aggrieved party considers the repudiation final [*Com. Code § 10403(a)*]. Retraction may be by any method that clearly indicates to the aggrieved party that the repudiating party intends to perform under the lease contract and includes any assurance demanded under *Com. Code § 10401* [*Com. Code § 10403(b)*].

Retraction reinstates a repudiating party's rights under a lease contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation [*Com. Code § 10403(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAnticipatory RepudiationCommercial Law (UCC)Leases (Article 2A)PerformanceContracts LawBreachAnticipatory RepudiationGeneral OverviewContracts LawPerformanceSubstantial Performance

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36-413 California Forms of Pleading and Practice--Annotated § 413.172

§ 413.172 Substituted Performance When Agreed Performance Impracticable

If without fault of the lessee, the lessor, and the supplier, the agreed berthing, loading, or unloading facilities fail or the agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable, but a commercially reasonable substitute is available, the substitute performance must be tendered and accepted [*Com. Code § 10404(a)*].

If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the lessor may withhold or stop delivery or cause the supplier to withhold or stop delivery unless the lessee provides a means or manner of payment that is commercially a substantial equivalent [*Com. Code § 10404(b)(1)*]. If delivery has already been taken and the agreed means or manner of payment fails because of domestic or foreign governmental regulation, payment by the means or in the manner provided by the regulation discharges the lessee's obligation unless the regulation is discriminatory, oppressive, or predatory [*Com. Code § 10404(b)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseSubstituted PerformanceCommercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)PerformanceContracts LawBreachAnticipatory RepudiationGeneral Overview

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36-413 California Forms of Pleading and Practice--Annotated § 413.173

§ 413.173 Impossibility

Subject to *Com. Code § 10404* on substituted performance, delay in delivery or nondelivery in whole or in part by a lessor or a supplier who complies with *Com. Code § 10405(2)* and *(3)* is not a default under the lease contract if performance as agreed has been made impracticable by the occurrence of a contingency the nonoccurrence of which was a basic assumption on which the lease contract was made, or by compliance in good faith with any applicable foreign or domestic governmental regulation or order, whether or not the regulation or order later proves to be invalid [*Com. Code § 10405(1)*].

If the causes mentioned in *Com. Code § 10405(1)* affect only part of the lessor's or the supplier's capacity to perform, the lessor or supplier must allocate production and deliveries among its customers but at its option may include regular customers not then under contract for sale or lease as well as its own requirements for further manufacture [*Com. Code § 10405(2)*]. The lessor or supplier may so allocate in any manner that is fair and reasonable [*Com. Code § 10405(2)*].

The lessor must notify the lessee seasonably and in the case of a finance lease the supplier must seasonably notify the lessor and the lessee, if known, that there will be delay or nondelivery and, if allocation is required under *Com. Code § 10405(2)*, of the estimated quota thus made available for the lessee [*Com. Code § 10405(3)*; *see Com. Code § 1202(d)* (definition of "notify"; *see also § 413.340*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseExcuse From PerformanceContracts LawPerformanceImpossibility of PerformanceGeneral OverviewContracts LawPerformanceImpossibility of PerformanceImpracticabilityContracts LawSales of GoodsBreach, Repudiation & ExcuseExcuse From Performance

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36-413 California Forms of Pleading and Practice--Annotated § 413.174

§ 413.174 Lessee's Rights on Receipt of Notice of Delay or Allocation

If the lessee receives notification of a material or indefinite delay or an allocation justified under *Com. Code § 10405* (discussed in *§ 413.173*), the lessee may by written notification to the lessor as to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired, (1) terminate the lease contract, or, (2) except in a finance lease, modify the lease contract by accepting the available quota in substitution, with due allowance from the rent payable for the balance of the lease term for the deficiency but without further right against the lessor [*Com. Code § 10406(a)*; *see Com. Code § 10510* (substantial impairment in installment lease)]. On termination of a lease contract, all obligations that are still executory on both sides are discharged but any right based on prior default or performance survives [*Com. Code § 10505(b)*]. The Uniform Commercial Code allows a lessee under a consumer finance lease to modify the lease for delay or allocation [*see Com. Code § 10406*, Official UCC Comment]. This consumer option was deleted from the California version at the request of leasing associations [*see* State Bar Report 9].

If the lessee, after receipt of a notification from the lessor under *Com. Code § 10405*, fails to modify the lease agreement within a reasonable time not exceeding 30 days, the lease contract lapses with respect to any deliveries affected [*Com. Code § 10406(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)PerformanceContracts LawContract ModificationsGeneral OverviewContracts LawTypes of ContractsExecutory ContractsContracts LawTypes of ContractsInstallment Contracts

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36-413 California Forms of Pleading and Practice--Annotated §§ 413.175-413.189

[Reserved]

§§ 413.175[Reserved]

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36-413 California Forms of Pleading and Practice--Annotated § 413.190

§ 413.190 Determining Whether Default Exists

Whether the lessor or the lessee is in default under a lease contract is determined by the lease agreement and Division 10 [*Com. Code § 10501(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)DefaultRemediesContracts LawRemediesGeneral Overview

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36-413 California Forms of Pleading and Practice--Annotated § 413.191

§ 413.191 Remedies

[1] Governed by Agreement and Division 10

If the lessor or the lessee is in default under the lease contract, the party seeking enforcement has rights and remedies as provided in Division 10, and, except as limited by Division 10, as provided in the lease agreement [*Com. Code § 10501(b)*]. Except as otherwise provided in Division 10, the lease agreementmay include rights and remedies for default in addition to or in substitution for those provided in Division 10, and may limit or alter the measure of damages recoverable under Division 10 [*Com. Code § 10503(a)*].

[2] Various Remedies Available

If the lessor or the lessee is in default under the lease contract, the party seeking enforcement may reduce the party's claim to judgment, or otherwise enforce the lease contract by self-help or any available judicial procedure or nonjudicial procedure, including administrative proceedings, arbitration, or the like, in accordance with Division 10 [*Com. Code § 10501(c)*]. The scope of procedures listed in *Com. Code § 10501(c)* is consistent with the scope of procedures available to a foreclosing secured party under former *Com. Code § 9501(1)* (*now see Com. Code § 9601 et seq.*) [*Com. Code § 10501*, Official UCC Comment].

Rights and remedies for material misrepresentation or fraud include all rights and remedies available under Division 10 for default [*Com. Code § 10505(d)*].

Rights and remedies on default by the lessor or the lessee with respect to any obligation or promise collateral or ancillary to the lease contract are not impaired by Division 10 [*Com. Code § 10503(d)*].

[3] Not Barred by Rescission, Rejection, or Return

Neither rescission nor a claim for rescission of the lease contract nor rejection or return of the goods may bar or be deemed inconsistent with a claim for damages or other right or remedy [*Com. Code § 10505(e)*].

[4] Cumulative and Optional

Except as otherwise provided in *Com. Code § 1305*, Division 10, or the lease agreement, the rights and remedies referred to in *Com. Code § 10501(b)* and *(c)* are cumulative [*Com. Code § 10501(d)*].

Resort to a remedy provided under Division 10 or in the lease agreement is optional unless the remedy is expressly agreed to be exclusive. If circumstances cause an exclusive or limited remedy to fail in its essential purpose, or provision for an exclusive remedy is unconscionable, remedy may be had as provided in Division 10 [*Com. Code § 10503(b)*].

[5] Under Lease Covering Real Property and Goods

If the lease agreement covers both real property and goods, the party seeking enforcement may proceed under *Com. Code § 10501 et seq.* as to the goods, or under other applicable law as to both the real property and the goods in accordance with that party's rights and remedies in respect of the real property, in which case *Com. Code § 10501 et seq.* do not apply [*Com. Code § 10501(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)DefaultGeneral OverviewContracts LawDefensesFraud & MisrepresentationMaterial MisrepresentationContracts LawSales of GoodsDamages & RemediesSeller's Damages & RemediesLimitation & ModificationUnconscionable LimitationsContracts LawTypes of ContractsLease AgreementsGeneral Overview

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36-413 California Forms of Pleading and Practice--Annotated § 413.192

§ 413.192 Notices of Default or Enforcement Not Required

Except as otherwise provided in Division 10 [*see, e.g., Com. Code § 10517(d)*] or the lease agreement, the lessor or lessee in default under the lease contract is not entitled to notice of default or notice of enforcement from the other party to the lease agreement [*Com. Code § 10502*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)DefaultRemediesContracts LawRemediesGeneral OverviewContracts LawTypes of ContractsLease AgreementsGeneral Overview

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36-413 California Forms of Pleading and Practice--Annotated § 413.193

§ 413.193 Permissible Limitations on Damages

Consequential damages may be liquidated under *Com. Code § 10504*, or may otherwise be limited, altered, or excluded unless the limitation, alteration, or exclusion is unconscionable [*Com. Code § 10503(c)*]. Limitation, alteration, or exclusion of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable, but limitation, alteration or exclusion of damages when the loss is commercial is not prima facie unconscionable [*Com. Code § 10503(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)General Provisions (Article 1)Application & ConstructionDamagesCommercial Law (UCC)Sales (Article 2)RemediesLimitation & ModificationUnconscionable LimitationsContracts LawSales of GoodsDamages & RemediesGeneral OverviewContracts LawSales of GoodsDamages & RemediesBuyer's Damages & RemediesLimitation & ModificationGeneral OverviewContracts LawSales of GoodsDamages & RemediesSeller's Damages & RemediesLimitation & ModificationGeneral OverviewContracts LawSales of GoodsDamages & RemediesSeller's Damages & RemediesLimitation & ModificationLiquidated DamagesContracts LawSales of GoodsDamages & RemediesSeller's Damages & RemediesLimitation & ModificationUnconscionable Limitations

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36-413 California Forms of Pleading and Practice--Annotated § 413.194

§ 413.194 Liquidated Damages

Damages payable by either party for default, or any other act or omission, including indemnity for loss or diminution of anticipated tax benefits or loss or damage to the lessor's residual interest, may be liquidated in the lease agreement subject to and in compliance with *Civ. Code § 1671* [*Com. Code § 10504(a)*]. If the liquidated damage provision in the lease agreement does not comply with *Com. Code § 10504(a)*, remedy may be had as provided in Division 10 [*Com. Code § 10504(b)*]. For further discussion of *Civ. Code § 1671*, see Ch. 177, *Damages* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-413 California Forms of Pleading and Practice--Annotated § 413.195

§ 413.195 Lessee's Right of Reimbursement for Justified Nondelivery

If the lessor justifiably withholds or stops delivery of goods because of the lessee's default or insolvency [*see Com. Code §§ 10525, 10526*, discussed at *§ 413.250[3] -[5]*], the lessee is entitled to restitution of any amount by which the sum of his or her payments exceeds (1) the amount to which the lessor is entitled by virtue of a liquidated damage provision in the lease agreement, or (2) in the absence of a liquidated damage provision, 20 percent of the then present value of the total rent the lessee was obligated to pay for the balance of the lease term, or, in the case of a consumer lease, that amount or $500, whichever is less [*Com. Code § 10504(c)*].

A lessee's right to restitution under *Com. Code § 10504(c)* is subject to offset to the extent the lessor establishes a right to recover damages under the provisions of Division 10, other than *Com. Code § 10504(a)* (validity of liquidated damage provision) [*Com. Code § 10504(d)(1)*]. A lessee's right to restitution is also subject to offset to the extent of the amount or value of any benefits received bythe lessee directly or indirectly by reason of the lease contract [*Com. Code § 10504(d)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)General Provisions (Article 1)Application & ConstructionDamagesContracts LawTypes of ContractsLease AgreementsGeneral OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesDamagesGeneral Overview

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36-413 California Forms of Pleading and Practice--Annotated § 413.196

§ 413.196 Right of the Parties on Cancellation, Termination, or Rescission

Unless the context requires otherwise, in Division 10, "cancellation" occurs when either party puts an end to the lease contract for default by the other party [*Com. Code § 10103(a)(2)*]. On cancellation of the lease contract, all obligations that are still executory on both sides are discharged, but any right based on prior default or performance survives, and the cancelling party also retains any remedy for default of the whole lease contract or any unperformed balance [*Com. Code § 10505(a)*].

Unless the context requires otherwise, in Division 10, "termination" occurs when either party pursuant to a power created by agreement or law puts an end to the lease contract otherwise than for default [*Com. Code § 10103(a)(26)*]. On termination of the lease contract, all obligations that are still executory on both sides are discharged but any right based on prior default or performance survives [*Com. Code § 10505(b)*].

Unless the contrary intention clearly appears, expressions of "cancellation," "rescission," or the like of the lease contract may not be construed as a renunciation or discharge of any claim in damages for an antecedent default [*Com. Code § 10505(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)DefaultRemediesContracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawTypes of ContractsLease AgreementsGeneral Overview

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36-413 California Forms of Pleading and Practice--Annotated § 413.197

§ 413.197 Statute of Limitations

An action for default under a lease contract, including breach of warranty or indemnity, must be commenced within four years after the cause of action accrued [*Com. Code § 10506(a)*]. In a lease contract that is not a consumer lease, by the original lease contract the parties may reduce the period of limitation to not less than one year [*Com. Code § 10506(a)*]. The prohibition on reduction of the limitation period in a consumer lease is not part of the Uniform Commercial Code, but only appears in the California version [State Bar Report 9]. *Com. Code § 10506(a)* is similar to *Com. Code § 2725(1)*, except that it does not incorporate the prohibition on the parties' extension of the limitation period [*Com. Code § 10506(a)*, Official UCC Comment].

A cause of action for default accrues when the act or omission on which the default or breach of warranty is based is or should have been discovered by the aggrieved party, or when the default occurs, whichever is later [*Com. Code § 10506(b)*]. A cause of action for indemnity accrues when the act or omission on which the claim for indemnity is based is or should have been discovered by the indemnified party, whichever is later [*Com. Code § 10506(b)*].

If an action commenced within the time limited by *Com. Code § 10506(a)* is terminated in a manner that leaves available a remedy by another action for the same default or breach of warranty or indemnity, the other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute [*Com. Code § 10506(c)*].

Com. Code § 10506 does not alter the law on tolling of the statute of limitations [*Com. Code § 10506(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)DefaultGeneral OverviewContracts LawDefensesStatutes of LimitationsContracts LawTypes of ContractsLease AgreementsPersonalty LeasesBreachGeneral

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36-413 California Forms of Pleading and Practice--Annotated § 413.198

§ 413.198 Market Rent

[1] Formula for Calculation

Damages based on market rent are determined according to the rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the times specified in *Com. Code §§ 10519* and *10528* [*Com. Code § 10507(a)*; *see Com. Code §§ 10519(b), 10528*; *§ 413.251[3]* (damages based on market rent)]. If evidence of rent for the use of the goods concerned for a lease term identical to the remaining lease term of the original lease agreement and prevailing at the times or places described in Division 10 is not readily available, the rent prevailing within any reasonable time before or after the time described, or at any other place, or for a different lease term that in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described, may be used, making any proper allowance for the difference, including the cost of transporting the goods to or from the other place [*Com. Code § 10507(b)*].

[2] Evidence to Establish

Evidence of a relevant rent prevailing at a time or place or for a lease term other than the one described in Division 10 offered by one party is not admissible unless and until he or she has given the other party notice the court finds sufficient to prevent unfair surprise [*Com. Code § 10507(c)*]. If the prevailing rent or value of any goods regularly leased in any established market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of that market are admissible in evidence. The circumstances of the preparation of the report may be shown to affect its weight but not its admissibility [*Com. Code § 10507(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-413 California Forms of Pleading and Practice--Annotated § 413.199

§ 413.199 Action Against Third Party Who Injures Goods Identified to Lease

If a third party so deals with goods that have been identified to a lease contract as to cause actionable injury to a party to the lease contract, the lessor has a rightof action against the third party [*Com. Code § 10531(a)(1)*].

The lessee has a right of action against a third party if that third party so deals with goods that have been identified to a lease contract as to cause actionable injury to the lessee and if the lessee (1) has a security interest in the goods; (2) has an insurable interest in the goods; or (3) bears the risk of loss under the lease contract or has since the injury assumed that risk as against the lessor and the goods have been converted or destroyed [*Com. Code § 10531(a)(2)*].

If at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the lease contract and there is no arrangement between them for disposition of the recovery, his or her suit or settlement, subject to his or her own interest, is as a fiduciary for the other party to the lease contract [*Com. Code § 10531(b)*]. Either party with the consent of the other may sue for the benefit of whom it may concern [*Com. Code § 10531(c)*].

Legal Topics:

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

§§ 413.200[Reserved]

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36-413 California Forms of Pleading and Practice--Annotated § 413.220

§ 413.220 Lessee's Remedies for Rejected Goods or Repudiation

If a lessor fails to deliver the goods in conformity to the lease contract [*see Com. Code § 10509*] or repudiates the lease contract [*see Com. Code § 10402*], or a lessee rightfully rejects the goods [*see Com. Code § 10509*] or justifiably revokes acceptance of the goods [*see Com. Code § 10517*], then with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired [*see Com. Code § 10510*], the lessor is in default under the lease contract and the lessee may do the following [*Com. Code § 10508(a)*]:

- Cancel the lease contract;
- Recover so much of the rent and security as has been paid and is just under the circumstances;
- Cover and recover damages as to all goods affected whether or not they have been identified to the lease contract, or recover damages for nondelivery [*see Com. Code §§ 10519, 10520* (damages for nondelivery)]; and
- Exercise any other rights or pursue any other remedies provided in the lease contract.

The foregoing remedies are cumulative. Division 10 rejects any doctrine of election of remedy. Determining if one remedy bars another in a particular case is a function of whether the lessee has been put in as good a position as if the lessor had fully performed the lease agreement [U.C.C. Comment to *Com. Code § 10508(a)*].

Note that a special rule has been created regarding the lessee's recovery of rent and security that have been paid under an installment lease. Recovery is limited to what is just under the circumstances [U.C.C. Comment to *Com. Code § 10508(a)*].

If a lessor fails to deliver the goods in conformity to the lease contract or repudiates the lease contract, the lessee may

also (1) recover goods that have been identified, or (2) in a proper case, obtain specific performance or replevy the goods [*Com. Code § 10508(b)*; *see Com. Code § 10521* (specific performance, detention, and replevin)]. Each of the lessee's alternative remedies for recovery of goods is cumulative with respect to the remedies listed in *Com. Code § 10508(a)* [*Com. Code § 10508(b)*, Official UCC Comment].

Subject to the provisions of *Com. Code § 10407* (discussed in *§ 413.94*), a lessee, on notifying the lessor of the lessee's intention to do so, may deduct all or any part of the damages resulting from any default under the lease contract from any part of the rent still due under the same lease contract [*Com. Code § 10508(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsRevocation of AcceptanceGeneral OverviewCommercial Law (UCC)Leases (Article 2A)Formation & ConstructionFormationCommercial Law (UCC)Leases (Article 2A)PerformanceContracts LawRemediesGeneral OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesDamagesGeneral Overview

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36-413 California Forms of Pleading and Practice--Annotated § 413.221

§ 413.221 Lessee's Security Interest in Rejected Goods

On rightful rejection or justifiable revocation of acceptance, a lessee has a security interest in goods in the lessee's possession or control for any rent and security that has been paid and any expenses reasonably incurred in their inspection, receipt, transportation, and care and custody, and may hold those goods and dispose of them in good faith and in a commercially reasonable manner, subject to the provisions of *Com. Code § 10527(e)* [*Com. Code § 10508(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-413 California Forms of Pleading and Practice--Annotated § 413.222

§ 413.222 Lessee's Remedies for Breach of Warranty

If a lessor has breached a warranty, whether express or implied, the lessee may recover damages [*Com. Code § 10508(d)*]. Except as otherwise agreed, the measure of damages for breach of warranty is the present value at the time and place of acceptance of the difference between the value of the use of the goods accepted and the value if they had been as warranted for the lease term, unless special circumstances show proximate damages of a different amount, together with incidental and consequential damages, less expenses saved in consequence of the lessor's default or breach of warranty [*Com. Code § 10519(d)*].

For discussion of notices that the lessee is required to give the lessor if the lessee is sued for breach of warranty or other obligation for which the lessor or supplier is answerable, see *§ 413.114*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-413 California Forms of Pleading and Practice--Annotated § 413.223

§ 413.223 Lessee's Remedies for Other Defaults of Lessor

If a lessor is otherwise in default under a lease contract, the lessee may exercise the rights and pursue the remedies provided in the lease contract, which may include a right to cancel the lease, and in *Com. Code § 10519(c)* (discussed in *§ 413.220*) [*Com. Code § 10508(c)*].

For discussion of notices that the lessee is required to give the lessor if the lessee is sued for breach of warranty or other obligation for which the lessor or supplier is answerable, see discussion in *§ 413.114*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-413 California Forms of Pleading and Practice--Annotated § 413.224

§ 413.224 Requirements for Lessee's Rejection

[1] Timeliness

Subject to the provisions of *Com. Code § 10510* on default in installment lease contracts, if the goods or the tender or delivery fail in any respect to conform to the lease contract, the lessee may reject or accept the goods or accept any commercial unit or units and reject the rest of the goods [*Com. Code § 10509(a)*]. Rejection of goods is ineffective unless it is within a reasonable time after tender or delivery of the goods and the lessee seasonably notifies the lessor [*Com. Code § 10509(b)*; *see Com. Code § 1202(d)* (definition of "notify"); *see also § 413.340*].

In Division 10 unless the context otherwise requires, "commercial unit" means a unit of goods that by commercial usage is a single whole for purposes of lease and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article, as a machine, or a set of articles, as a suite of furniture or a line of machinery, or a quantity, as a gross or carload, or any other unit treated in use or in the relevant market as a single whole [*Com. Code § 10103(a)(3)*].

[2] Particularity

In rejecting goods, a lessee's failure to state a particular defect that is ascertainable by reasonable inspection precludes the lessee from relying on the defect to justify rejection or to establish default if the lessor or the supplier could have cured the defect if the lessee stated it seasonably [*Com. Code § 10514(a)(1)*; *see Com. Code § 10513* (cure by lessor)]. A lessee's failure to particularize a defect precludes the lessee's reliance on that defect between merchants if the lessor or the supplier after rejection has made a request in writing for a full and final written statement of all defects on which the lessee proposes to rely [*Com. Code § 10514(a)(2)*].

A lessee's failure to reserve rights when paying rent or other consideration against documents precludes recovery of the payment for defects apparent in the documents [*Com. Code § 10514(b)*].

[3] Installment Contract

Under an installment lease contract, a lessee may reject any delivery that is nonconforming if the nonconformity substantially impairs the value of that delivery and cannot be cured or the nonconformity is a defect in the required documents. However, if the nonconformity does not fall within *Com. Code § 10510(b)* and the lessor or the supplier gives adequate assurance of its cure, the lessee must accept that delivery [*Com. Code § 10510(a)*].

Whenever nonconformity or default with respect to one or more deliveries substantially impairs the value of the installment lease contract as a whole there is a default with respect to the whole. But the aggrieved party reinstates the installment lease contract as a whole if the aggrieved party accepts a nonconforming delivery without seasonably notifying of cancellation or brings an action with respect only to past deliveries or demands performance as to future deliveries [*Com. Code § 10510(b)*; *see Com. Code § 1202(d)* (definition of "notify"); *see also § 413.340*].

[4] Duties Toward Rejected Goods

[a] Lessee's General Duties

Except as otherwise provided with respect to goods that threaten to decline in value speedily [*see Com. Code § 10511*, discussed in *§ 413.224[4][b]*], and subject to any security interest of a lessee, the lessee, after rejection of goods in the lessee's possession, must hold them with reasonable care at the lessor's or the supplier's disposition for a reasonable time after the lessee's seasonable notification of rejection [*Com. Code § 10512(a)(1)*; *see Com. Code § 1202(d)* (definition of "notify"); *see § 413.340*)]. If the lessor or the supplier gives no instructions within a reasonable time after notification of rejection, the lessee may store the rejected goods for the lessor's or the supplier's account, or ship them to the lessor or the supplier, or dispose of them for the lessor's or the supplier's account with reimbursement in the manner provided in *Com. Code § 10511*, but the lessee has no further obligations with regard to goods rightfully rejected [*Com. Code § 10512(a)(2), (3)*]. Action by the lessee pursuant to *Com. Code § 10512(a)* is not acceptance or conversion [*Com. Code § 10512(b)*].

[b] Merchant Lessee's Duties

In Division 10 unless the context otherwise requires, "merchant lessee" means a lessee that is a merchant with respect to goods of the kind subject to the lease [*Com. Code § 10103(a)(20)*]. A person may satisfy the requirement of dealing in goods of the kind subject to the lease as lessor, lessee, seller, or buyer [*Com. Code § 10103(a)(20)*, Official UCC Comment].

Subject to any security interest of a lessee, if a lessor or a supplier has no agentor place of business at the market of rejection, a merchant lessee, after rejection of goods in his or her possession or control, must follow any reasonable instructions received from the lessor or the supplier with respect to the goods [*Com. Code § 10511(a)*; *see Com. Code § 10508(e)* (lessee's security interest)]. In the absence of those instructions, a merchant lessee must make reasonable efforts to sell, lease, or otherwise dispose of the goods for the lessor's account if they threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming [*Com. Code § 10511(a)*].

[c] Good Faith Standard

In complying with *Com. Code § 10511* or *10512*, the lessee is held only to good faith. Good faith conduct in this context is neither acceptance or conversion nor the basis of an action for damages [*Com. Code § 10511(c)*].

[d] Reimbursement for Expenses

If a merchant lessee or any other lessee disposes of goods, he or she is entitled to reimbursement either from the lessor or the supplier or out of the proceeds for reasonable expenses of caring for and disposing of the goods and, if the

expenses include no disposition commission, to any commission that is usual in the trade, or if there is none, to a reasonable sum not exceeding 10 percent of the gross proceeds [*Com. Code § 10511(b)*].

[e] Rights of Purchaser

A purchaser who purchases in good faith from a lessee pursuant to *Com. Code §§ 10511* or *10512* takes the goods free of any rights of the lessor and the supplier even though the lessee fails to comply with one or more of the requirements of Division 10 [*Com. Code § 10511(d)*].

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§ 413.225 Lessor's Right to Cure

If any tender or delivery by the lessor or the supplier is rejected because it is nonconforming and the time for performance has not yet expired, the lessor or the supplier may seasonably notify the lessee of the lessor's or the supplier's intention to cure and may then make a conforming delivery within the time provided in the lease contract [*Com. Code § 10513(a)*]. If the lessee rejects a nonconforming tender that the lessor or the supplier had reasonable grounds to believe would be acceptable with or without money allowance, the lessor or the supplier may have a further reasonable time to substitute a conforming tender if he or she seasonably notifies the lessee [*Com. Code § 10513(b)*].

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36-413 California Forms of Pleading and Practice--Annotated § 413.226

§ 413.226 Lessee's Revocation of Acceptance

[1] When Acceptance Occurs

Acceptance of goods occurs after the lessee has had a reasonable opportunity to inspect the goods and the lessee signifies or acts with respect to the goods in a manner that signifies to the lessor or the supplier that the goods are conforming or that the lessee will take or retain them in spite of their nonconformity [*Com. Code § 10515(a)(1)*]. Acceptance also occurs after the lessee has had a reasonable opportunity to inspect the goods and the lessee fails to make an effective rejection of the goods [*Com. Code § 10515(a)(2)*; *see Com. Code § 10509(b)* (rejection)].

Acceptance of a part of any commercial unit is acceptance of that entire unit [*Com. Code § 10515(b)*; *see Com. Code § 10103(a)(3)* (defining "commercial unit"), discussed in *§ 413.224[1]*].

[2] Effect of Acceptance

A lessee must pay rent for any goods accepted in accordance with the lease contract, with due allowance for goods rightfully rejected or not delivered [*Com. Code § 10516(a)*]. A lessee's acceptance of goods precludes rejection of the goods accepted. In the case of a finance lease, other than a consumer lease in which the supplier assisted in the preparation of the lease contract or participated in negotiating the terms of the lease contract with the lessor, acceptance made with knowledge of a nonconformity cannot be revoked because of it [*Com. Code § 10516(b)*]. The exception in *Com. Code § 10516(b)* for finance leases that are consumer leases is not found in the Uniform Commercial Code, and was added to conform to existing California law [State Bar Report 9]. The exception preventing revocation of acceptance made with knowledge of a nonconformity with respect to a finance lease is not inequitable because the lessee still has a direct claim against the supplier [*Com. Code § 10516(b)*, Official UCC Comment; *see Com. Code § 10209(a), (d)* (benefit of supplier's promises and warranties to lessor inuring to lessee); *see also Com. Code § 10517(a)(2)* (revocation of acceptance made without knowledge of nonconformity to finance lease)].

In the case of a lease that is not a finance lease, acceptance made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably

cured. Acceptance does not of itself impair any other remedy provided by Division 10 or the lease agreement for nonconformity [*Com. Code § 10516(b)*].

If a tender has been accepted under a lease other than a consumer lease, within a reasonable time after the lessee discovers or should have discovered any default, the lessee must notify the lessor and the supplier, if any, or be barred from any remedy against the party not notified [*Com. Code § 10516(c)(1), (f)*].

In a lease other than a consumer lease, once tender has been accepted, the burden is on the lessee to establish any default [*Com. Code § 10516(c), (f)*].

[3] Requirements for Revocation of Acceptance

Except in the case of a finance lease, a lessee may revoke acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to the lessee if he or she has accepted it on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured [*Com. Code § 10517(a)(1)*; *see Com. Code § 10103(a)(3)* (defining "commercial unit"), discussed in *§ 413.224[1]*]. A lessee may also revoke acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to the lessee if he or she has accepted it without discovery of the nonconformity if the lessee's acceptance was reasonably induced either by the lessor's assurances or, except in the case of a finance lease, by the difficulty of discovery before acceptance [*Com. Code § 10517(a)(2)*; *see Com. Code § 1202(c)* (definition of "discover"); *see also § 413.340*]. In Division 10, unless the context otherwise requires, "lot" means a parcel or a single article that is the subject matter of a separate lease or delivery, whether or not it is sufficient to perform the lease contract [*Com. Code § 10103(a)(19)*].

Except in the case of a finance lease that is not a consumer lease, a lessee may revoke acceptance of a lot or commercial unit if the lessor defaults under the lease contract and the default substantially impairs the value of that lot or commercial unit to the lessee [*Com. Code § 10517(b)*].

If the lease agreement so provides, the lessee may revoke acceptance of a lot or commercial unit because of other defaults by the lessor [*Com. Code § 10517(c)*].

Revocation of acceptance must occur within a reasonable time after the lessee discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by the nonconformity [*Com. Code § 10517(d)*]. Revocation is not effective until the lessee notifies the lessor [*Com. Code § 10517(d)*; *see Com. Code § 1202(d)* (definition of "notify"); *see also § 413.340*].

A lessee who revokes acceptance has the same rights and duties with regard to the goods involved as if the lessee had rejected them [*Com. Code § 10517(e)*].

Legal Topics:

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36-413 California Forms of Pleading and Practice--Annotated § 413.227

§ 413.227 Cover

After default by a lessor under the lease contract of the type described in *Com. Code § 10508(a)*, or, if agreed, after other default by the lessor, the lessee may cover by making any purchase or lease of or contract to purchase or lease goods in substitution for those due from the lessor [*Com. Code § 10518(a)*; *see Com. Code § 10508(a)*, discussed in *§ 413.220*]. Except as otherwise provided with respect to damages liquidated in the lease agreement or otherwise determined pursuant to agreement of the parties [*see Com. Code §§ 1302(a), 10503*], if a lessee's cover is by a lease agreement substantially similar to the original lease agreement, and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessee may recover from the lessor as damages (1) the present value, as of the date of the commencement of the term of the new lease agreement, of the rent under the new lease agreement applicable to that period of the new lease term that is comparable to the then-remaining term of the original lease agreement minus the present value as of the same date of the total rent for the then remaining lease term of the original lease agreement, and (2) any incidental or consequential damages less expenses saved in consequence of the lessor's default [*Com. Code § 10518(b)*].

If a lessee's cover is by lease agreement that for any reason does not qualify for treatment under *Com. Code § 10518(b)*, or is by purchase or otherwise, the lessee may recover from the lessor as if the lessee had elected not to cover and *Com. Code § 10519* governs [*Com. Code § 10518(c)*].

Legal Topics:

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36-413 California Forms of Pleading and Practice--Annotated § 413.228

§ 413.228 Lessee's Measure of Damages

Except as otherwise provided with respect to damages liquidated in the lease agreement or determined by agreement of the parties [*see Com. Code §§ 1302(a), 10503*], if a lessee elects not to cover or a lessee elects to cover and the cover is by lease agreement that for any reason does not qualify for treatment under *Com. Code § 10518(b)* (discussed in *§ 413.227*), or is by purchase or otherwise, the measure of damages for nondelivery or repudiation by the lessor or for rejection or revocation of acceptance by the lessee is the present value as of the date of the default of the then market rent minus the present value as of the same date of the original rent, computed for the remaining lease term of the original lease agreement together with incidental and consequential damages, less expenses saved in consequence of the lessor's default [*Com. Code § 10519(a)*; *see Com. Code § 10508(a)* (default by lessor, discussed in *§ 413.220*)].

Market rent is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival [*Com. Code § 10519(b)*].

Except as otherwise agreed, if the lessee has accepted goods and given notification [*see Com. Code § 10516(c)* (discussed in *§ 413.226[2]*)], the measure of damages for nonconforming tender or delivery or other default by a lessor is the loss resulting in the ordinary course of events from the lessor's default as determined in any manner that is reasonable together with incidental and consequential damages, less expenses saved in consequence of the lessor's default [*Com. Code § 10519(c)*]. This measure of damages applies if the goods have beenaccepted and acceptance is not revoked [*Com. Code § 10519(c)*, Official UCC Comment].

Legal Topics:

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36-413 California Forms of Pleading and Practice--Annotated § 413.229

§ 413.229 Lessee's Incidental Damages

Incidental damages resulting from a lessor's default include expenses reasonably incurred in inspection, receipt, transportation, and care and custody of goods rightfully rejected or goods the acceptance of which is justifiably revoked, any commercially reasonable charges, expenses, or commissions in connection with effecting cover, and any other reasonable expense incident to the default [*Com. Code § 10520(a)*].

Legal Topics:

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36-413 California Forms of Pleading and Practice--Annotated § 413.230

§ 413.230 Lessee's Consequential Damages

Consequential damages resulting from a lessor's default include any loss resulting from general or particular requirements and needs of which the lessor at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise [*Com. Code § 10520(b)(1)*].

Consequential damages resulting from a lessor's default also include injury to person or property proximately resulting from any breach of warranty [*Com. Code § 10520(b)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-413 California Forms of Pleading and Practice--Annotated § 413.231

§ 413.231 Lessee's Right to Specific Performance or Related Remedy

Specific performance may be decreed if the goods are unique or in other proper circumstances [*Com. Code § 10521(a)*]. A decree for specific performance may include any terms and conditions regarding payment of the rent, damages, or other relief that the court deems just [*Com. Code § 10521(b)*].

A lessee has a right of replevin, detinue, sequestration, claim and delivery, or the like for goods identified to the lease contract if after reasonable effort the lessee is unable to effect cover for those goods or the circumstances reasonably indicate that the effort will be unavailing [*Com. Code § 10521(c)*; *see Com. Code § 10217* (identification of goods to contract)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific PerformanceCommercial Law (UCC)Leases (Article 2A)DefaultRemediesContracts LawRemediesGeneral OverviewContracts LawRemediesSpecific PerformanceContracts LawSales of GoodsDamages & RemediesBuyer's Damages & RemediesReplevin & Specific Performance

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36-413 California Forms of Pleading and Practice--Annotated § 413.232

§ 413.232 Lessee's Rights on Lessor's Insolvency

Subject to *Com. Code § 10522(b)* and even though the goods have not been shipped, a lessee who has paid a part or all of the rent and security for goods identified to a lease contract on making and keeping good a tender of any unpaid portion of the rent and security due under the lease contract may recover the goods identified from the lessor if the lessor becomes insolvent within 10 days after receipt of the first installment of rent and security [*Com. Code § 10522(a)*]. A lessee acquires the right to recover goods identified to a lease contract only if they conform to the lease contract [*Com. Code § 10522(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)DefaultRemediesContracts LawRemediesGeneral OverviewContracts LawSales of GoodsPerformanceInsurable Interest & IdentificationContracts LawTypes of ContractsLease AgreementsPersonalty LeasesInstallment Lease Contracts

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[Reserved]

§§ 413.233[Reserved]

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§ 413.250 Lessor's Remedies

[1] In General

If a lessee wrongfully rejects or revokes acceptance of goods or fails to make a payment when due or repudiates with respect to a part or the whole, then, with respect to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired [*see Com. Code § 10510*], the lessee is in default under the lease contract and the lessor may (1) cancel the lease contract [*see Com. Code § 10505(a)*]; (2) proceed respecting goods not identified to the lease contract [*see Com. Code § 10524*]; (3) withhold delivery of the goods and take possession of goods previously delivered [*see Com. Code § 10525*]; (4) stop delivery of the goods by any bailee [*see Com. Code § 10526*]; (5) dispose of the goods and recover damages [*see Com. Code § 10527*], or retain the goods and recover damages [*see Com. Code § 10528*], or in a proper case recover rent [*see Com. Code § 10529* (recovery of rent)]; and (6) exercise any other rights or pursue any other remedies provided in the lease contract [*Com. Code § 10523(a)*].

The foregoing remedies are cumulative. Division 10 rejects any doctrine of election of remedy. To determine if one remedy bars another in a particular case is a function of whether the lessee has been put in as good a position as if the lessor had fully performed the lease agreement [U.C.C. Comment to *Com. Code § 10523(a)*].

If a lessor does not fully exercise a right or obtain a remedy to which the lessor is entitled under *Com. Code § 10523(a)*, the lessor may recover the loss resulting in the ordinary course of events from the lessee's default as determined in any reasonable manner, together with incidental damages, less expenses saved in consequence of the lessee's default [*Com. Code § 10523(b)*].

If a lessee is otherwise in default under a lease contract, the lessor may exercise the rights and pursue the remedies provided in the lease contract, which may include a right to cancel the lease. In addition, unless otherwise provided in the contract, if the default substantially impairs the value of the lease contract to the lessor, the lessor may exercise the rights and pursue the remedies provided in *Com. Code § 10523(a)* or *(b)*. Alternatively, if the default does not

substantially impair the value of the contract to the lessor, the lessor may recover as provided in *Com. Code § 10523(b)* [*Com. Code § 10523(c)*; *see also Com. Code§ 10501(a)-(c)* (contract may provide for different or additional defaults and remedies)].

[2] Goods Not Previously Identified to Lease Contract

A lessor aggrieved under *Com. Code § 10523(a)* or *(c)(1)* or, if agreed, by other default by the lessee, may (1) identify to the lease contract conforming goods not already identified if at the time the lessor learned of the default they were in the lessor's or the supplier's possession or control, and (2) dispose of goods [*see Com. Code § 10527(a)*] that demonstrably have been intended for the particular lease contract even though those goods are unfinished [*Com. Code § 10524(a)*]. If the goods are unfinished, in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization, an aggrieved lessor or the supplier may either complete manufacture and wholly identify the goods to the lease contract or cease manufacture and lease, sell, or otherwise dispose of the goods for scrap or salvage value or proceed in any other reasonable manner [*Com. Code § 10524(b)*].

[3] Take Possession of Goods Previously Delivered

After a default by the lessee under the lease contract [*see Com. Code §§ 10523(c)(1), 10525(a)*] or, if agreed, after other default by the lessee, the lessor has the right to take possession of the goods [*Com. Code § 10525(b)*]. If the lease contract so provides, the lessor may require the lessee to assemble the goods and make them available to the lessor at a place to be designated by the lessor that is reasonably convenient to both parties [*Com. Code § 10525(b)*]. Without removal, the lessor may render unusable any goods employed in trade or business, and may dispose of goods on the lessee's premises [*Com. Code § 10525(b)*; *see Com. Code § 10527* (lessor's right to dispose of goods)].

The lessor may proceed under *Com. Code § 10525(b)* without judicial process if that can be done without breach of the peace, or the lessor may proceed by action [*Com. Code § 10525(c)*].

[4] Refuse Delivery on Lessee's Insolvency

If a lessor discovers the lessee to be insolvent, the lessor may refuse to deliver the goods [*Com. Code § 10525(a)*].

[5] Stopping Delivery of Goods in Transit

A lessor may stop delivery of goods in the possession of a carrier or other bailee if the lessor discovers the lessee to be insolvent and may stop delivery of carload, truckload, planeload, or larger shipments of express or freight if the lessee repudiates or fails to make a payment due before delivery, whether for rent, security, or otherwise under the lease contract, or for any other reason the lessor has a right to withhold or take possession of the goods [*Com. Code § 10526(a)*].

In pursuing its remedies under *Com. Code § 10526(a)*, the lessor may stop delivery until (1) receipt of the goods by the lessee; (2) acknowledgment to the lessee by any bailee of the goods, except a carrier, that the bailee holds the goods for the lessee; or (3) such an acknowledgment to the lessee by a carrier via reshipment or as a warehouse [*Com. Code § 10526(b)*].

To stop delivery, a lessor must notify the bailee in a manner that enables the bailee by reasonable diligence to prevent delivery of the goods [*Com. Code § 10526(c)(1)*]. After notification, the bailee must hold and deliver the goods according to the directions of the lessor, but the lessor is liable to the bailee for any ensuing charges or damages [*Com. Code § 10526(c)(2)*]. A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor [*Com. Code § 10526(c)(3)*].

[6] Disposing of Goods

After a default by a lessee under the lease contract [*see Com. Code § 10523(a), (c)(1)*] or after the lessor refuses to deliver or takes possession of goods [*see Com. Code §§ 10525, 10526*], or, if agreed, after other default by a lessee, the lessor may dispose of the goods concerned or the undelivered balance of those goods by lease, sale, or otherwise [*Com. Code § 10527(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Leases (Article 2A)DefaultRemediesCommercial Law (UCC)Documents of Title (Article 7)Application & ConstructionCommercial Law (UCC)Documents of Title (Article 7)Bills of LadingContracts LawRemediesGeneral OverviewContracts LawSecured TransactionsApplication & ConstructionLeasesContracts LawTypes of ContractsInstallment ContractsTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsGeneral OverviewTortsVicarious LiabilityBaileesTransportation LawCarrier Duties & LiabilitiesDamages

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36-413 California Forms of Pleading and Practice--Annotated § 413.251

§ 413.251 Lessor's Measure of Damages

[1] Lessor's Election

If the lessor's disposition is by lease agreement that for any reason does not qualify for treatment under *Com. Code § 10527(b)*, or is by sale or otherwise, the lessor may recover from the lessee as if the lessor had elected not to dispose of the goods and *Com. Code § 10528* governs [*Com. Code § 10527(c)*].

[2] After Disposing of Goods

Except as otherwise provided with respect to damages liquidated in the lease agreement [*see Com. Code § 10504*] or as otherwise determined pursuant to agreement of the parties [*see Com. Code §§ 1302(a), 10503*], if the disposition is by lease agreement substantially similar to the original lease agreement and the new lease agreement is made in good faith and in a commercially reasonable manner, the lessor may recover all of the following from the lessee as damages [*Com. Code § 10527(b)*]:

- Accrued and unpaid rent as of the date of the commencement of the term of the new lease agreement;

- The present value, as of the same date, of the total rent for the then remaining lease term of the original lease agreement minus the present value, as of the same date, of the rent under the new lease agreementapplicable to that period of the new lease term that is comparable to the then remaining term of the original lease agreement; and

- Any incidental damages allowed under *Com. Code § 10530*, less expenses saved in consequence of the lessee's default.

A subsequent buyer or lessee who buys or leases from the lessor in good faith for value as a result of a disposition under *Com. Code § 10527* takes the goods free of the original lease contract and any rights of the original lessee even though

the lessor fails to comply with one or more of the requirements of Division 10 [*Com. Code § 10527(d)*].

The lessor is not accountable to the lessee for any profit made on any disposition. A lessee who has rightfully rejected or justifiably revoked acceptance shall account to the lessor for any excess over the amount of the lessee's security interest [*Com. Code § 10527(e)*; *see Com. Code § 10508(e)*].

[3] When Lessor Retains Goods

Except as otherwise provided with respect to damages liquidated in the lease agreement [*see Com. Code § 10504*] or as otherwise determined pursuant to agreement of the parties [*see Com. Code §§ 1302(a), 10503*], if a lessor elects to retain the goods or a lessor elects to dispose of the goods and the disposition is by lease agreement, that for any reason does not qualify for treatment under *Com. Code § 10527(b)*, or is by sale or otherwise, the lessor may recover the following from the lessee as damages for a default [*see Com. Code § 10523(a), (c)(1)*], or, if agreed, for other default of the lessee [*Com. Code § 10528(a)*]:

- Accrued and unpaid rent as of the date of default if the lessee has never taken possession of the goods, or, if the lessee has taken possession of the goods, as of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor;

- The present value as of the date determined under *Com. Code § 10523(c)(1)* of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date of the market rent at the place where the goods are located computed for the same lease term; and

- Any incidental damages allowed under *Com. Code § 10530*, less expenses saved in consequence of the lessee's default.

If the measure of damages provided in *Com. Code § 10528(a)* is inadequate to put a lessor in as good a position as performance would have, the measure of damages is the present value of the profit, including reasonable overhead, the lessor would have made from full performance by the lessee, together with any incidental damages allowed under *Com. Code § 10530*, due allowance for costs reasonably incurred and due credit for payments or proceeds of disposition [*Com. Code § 10528(b)*].

[4] Recovery of Rent

After default by the lessee under the lease contract [*see Com. Code § 10523(a), (c)(1)*] or, if agreed, after other default by the lessee, if the lessor complies with *Com. Code § 10529(b)*, the lessor may recover rent from the lessee as damages [*Com. Code § 10529(a)*]. For goods accepted by the lessee and not repossessed by or tendered to the lessor and for conforming goods lost or damaged after risk of loss passes to the lessee [*see Com. Code § 10219*], the lessor may recover all of the following [*Com. Code § 10529(a)(1)*]:

- Accrued and unpaid rent as of the date of entry of judgment in favor of the lessor;

- The present value as of the same date of the rent for the then remaining lease term of the lease agreement; and

- Any incidental damages allowed under *Com. Code § 10530*, less expenses saved in consequence of the lessee's default.

For goods identified to the lease contract when the lessor has never delivered the goods or has taken possession of them, or the lessee has tendered them to the lessor, if the lessor is unable after reasonable effort to dispose of them at a

reasonable price or the circumstances reasonably indicate that that effort will be unavailing, the lessor may recover all of the following [*Com. Code § 10529(a)(2)*]:

- Accrued and unpaid rent as of the date of entry of judgment in favor of the lessor;

- The present value as of the same date of the rent for the then remaining lease term of the lease agreement; and

- Any incidental damages allowed under *Com. Code § 10530*, less expenses saved in consequence of the lessee's default.

Except as provided in *Com. Code § 10529(c)*, the lessor must hold for the lessee for the remaining lease term of the lease agreement any goods that have been identified to the lease contract and are in the lessor's control [*Com. Code § 10529(b)*]. The lessor may dispose of the goods at any time before collection of the judgment for damages obtained pursuant to *Com. Code § 10529(a)*. If the disposition is before the end of the remaining lease term of the lease agreement, the lessors' recovery against the lessee for damages is governed by *Com. Code §§ 10527* or *10528*, and the lessor will cause an appropriate credit to be provided against a judgment for damages to the extent that the amount of the judgmentexceeds the recovery available pursuant to *Com. Code §§ 10527* or *10528* [*Com. Code § 10529(c)*].

Payment of the judgment for damages obtained pursuant to *Com. Code § 10529(a)* entitles the lessee to the use and possession of the goods not then disposed of for the remaining lease term of the lease agreement and in accordance with [*Com. Code § 10529(d)*].

After a default by the lessee under the lease [*see Com. Code § 10523(a), (c)(1)*] or, if agreed, after other default by the lessee, a lessor who is held not entitled to rent under *Com. Code §§ 10529* must nevertheless be awarded damages for nonacceptance under *Com. Code § 10527* or *10528* [*Com. Code § 10529(e)*].

[5] Lessor's Incidental Damages

Incidental damages to an aggrieved lessor include any commercially reasonable charges, expenses, or commissions incurred in stopping delivery, in the transportation, care, and custody of goods after the lessee's default, in connection with return or disposition of the goods, or otherwise resulting from the default [*Com. Code § 10530*].

[6] Loss of or Damage to Residual Interest

In addition to any other recovery permitted by Division 10, the lessor shall be entitled to recover from the lessee an amount that will fully compensate the lessor for any loss of or damage to the lessor's residual interest in the goods caused by the default of the lessee [*Com. Code § 10532*]. *Com. Code § 10532* has no counterpart in the Uniform Commercial Code, although the Official UCC Comment to *Com. Code § 10525* acknowledge a lessor's common law right to protect its reversionary interest.

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-413 California Forms of Pleading and Practice--Annotated §§ 413.252-413.269

[Reserved]

§§ 413.252[Reserved]

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§ 413.270 State Statutes

[1] Nature of Contract for Hiring

Hiring defined. *Civ. Code § 1925*

Products of thing hired during term of hiring as belonging to hirer. *Civ. Code § 1926*

When hiring of thing terminates. *Civ. Code § 1933*

When death or incapacity of party to hiring effects termination thereof. *Civ. Code § 1934*

[2] Prohibited Transactions

Unlawful motor vehicle subleasing, damages for, defined. *Civ. Code § 3343.5, Pen. Code §§ 570-574*

[3] Rights and Duties of Hirer/Lessee

Hirer of thing is required to use ordinary care. *Civ. Code § 1928*

Hirer of thing is required to repair all deteriorations or injuries occasioned by his or her want of ordinary care. *Civ. Code § 1929*

Hirer of thing hired for particular purpose is bound thereby. *Civ. Code § 1930*

Hirer of thing is permitted to prematurely terminate hiring. *Civ. Code § 1932*

Hirer is required to pay apportioned rent on premature termination of hiring. *Civ. Code § 1935*

Lessee of personal property is required to bear expenses concerning it as might naturally be foreseen to attend it during its use. *Civ. Code § 1956*

Lessee is entitled to be reimbursed for expenditures necessitated by lessor's failure to meet his or her duties. *Civ. Code § 1957*

Place where lessee of personal property is required to return object leased. *Civ. Code § 1958*

[4] Rights and Duties of Letter/Lessor

Letter is bound to hirer by warranty of quiet possession. *Civ. Code § 1927*

Letter of thing for hire may prematurely terminate hiring. *Civ. Code § 1931*

Duties of lessor. *Civ. Code § 1955*

Legal Topics:

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

[1] In General

Bailment generally is defined as delivery of thing to another for some special purpose or object, on contract, express or implied, to conform to objects or purposes of delivery. *Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 850, 88 Cal. Rptr. 39* ; *Greenberg Bros., Inc. v. Ernest W. Hahn, Inc. (1966) 246 Cal. App. 2d 529, 531, 54 Cal. Rptr. 770* ; *H.S. Crocker Co., Inc. v. McFaddin (1957) 148 Cal. App. 2d 639, 643, 307 P.2d 429* ; *compare Rochester Capital Leasing Corp. v. K & L Litho Corp. (1970) 13 Cal. App. 3d 697, 702, 91 Cal. Rptr. 827* (defining loan)

Hiring creates contract of bailment. *Dickson v. Southern Cal. Edison Co. (1955) 136 Cal. App. 2d 85, 87, 288 P.2d 310*

Hold over doctrine of real estate leases does not apply to hiring of personalty, and mere act of retaining possession of personal property does not imply renewal of contract in absence of agreement thereto by parties. *Hayward Lbr. & Inv. Co. v. Const. Prod. Corp. (1953) 117 Cal. App. 2d 221, 228, 255 P.2d 473*

[2] Characterization of Transaction

Determination whether transaction was installment sale or lease is unnecessary because resale and deficiency clause gave lessee/buyer same rights it would have under Division 2 of Commercial Code or under *Civ. Code § 3308*. *W W Leasing Unlimited v. Torok Exploration, Etc. (9th Cir. 1978) 575 F.2d 1259, 1261* (applying California law)

When initial negotiations were between lessee and manufacturer, which recommended financing lessor to lessee to arrange financing, transaction was financing lease; whether there is privity between manufacturer and lessee sufficient to establish privity for purposes of warranties is question of fact to be determined from totality of circumstances, not just from "paper transaction." *U. S. Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal. App. 3d 1431, 1441-1442, 1445, 279 Cal. Rptr. 533* (upholding jury verdict finding privity and lessee's revocation of acceptance after reasonable

repairs failed to achieve conformity)

If financing lessor validly disclaimed all warranties and lessee revoked acceptance as to manufacturer for defects [*see Com. Code §§ 2608, 2711*], lessee's consequential damages recoverable from manufacturer [*Com. Code § 2715*] include amount of deficiency it owed to financing lessor that repossessed equipment and sold it. *U. S. Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal. App. 3d 1431, 1454, 279 Cal. Rptr. 533*

Lease that gives lessee option to purchase at price that is more than nominal is a true lease rather than security interest; trial court's finding that option price was more than nominal had to be upheld when evidence was equivocal. *Triple C Leasing, Inc. v. All-American Mobile Wash (1976) 64 Cal. App. 3d 244, 249, 134 Cal. Rptr. 328*

Substance rather than form or terminology is determinative of transaction; lease that was part of sale and leaseback was actually loan from buyer/lessor to seller/lessee at usurious (11.5% then) rates. *Rochester Capital Leasing Corp. v. K & L Litho Corp. (1970) 13 Cal. App. 3d 697, 702, 91 Cal. Rptr. 827*

Loan is delivery of money to another under contract to return at future time some equivalent amount with or without additional sum agreed for its use. *Rochester Capital Leasing Corp. v. K & L Litho Corp. (1970) 13 Cal. App. 3d 697, 702, 91 Cal. Rptr. 827*

[3] Duties and Responsibilities of Letter/Lessor

Lessor is required to mitigate its damages. *W W Leasing Unlimited v. Torok Exploration, Etc. (9th Cir. 1978) 575 F.2d 1259, 1261* (applying California law); *Industrial Leasing Corp. v. Lawson (1983) 149 Cal. App. 3d 1098, 1103, 197 Cal. Rptr. 291*

Disclaimer of warranties by financing lessor is not per se unconscionable, but is to be tested under *Com. Code § 2316*; if financing lessor has validly disclaimed all warranties and goods conform to lease, lessee cannot revoke acceptance as to lessor, but must look to manufacturer or supplier for its remedy. *U. S. Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal. App. 3d 1431, 1450-1451, 1452-1453, 279 Cal. Rptr. 533*

Lessor of automobile has right under *Civ. Code §§ 1929* and *3268* to make lessee liable by contract for loss or damage to automobile from any cause. *Truta v. Avis Rent A Car System, Inc. (1987) 193 Cal. App. 3d 802, 817, 238 Cal. Rptr. 806* ; *but see Civ. Code § 1936* (specifying limits to renter's liability under agreements entered into on or after January 1, 1989 and discussed in *Ch. 93, Bailments, § 93.100* et seq.)

[4] Duties of Hirer/Lessee

Civ. Code § 1955 is inapplicable to damage caused by collisions other than collisions caused by defective leased chattel. *Truta v. Avis Rent A Car System, Inc. (1987) 193 Cal. App. 3d 802, 817, 238 Cal. Rptr. 806* ; *see Civ. Code § 1936* (governing vehicle rentals entered into on or after January 1, 1989)

Hirer of crane and operator was liable for damage to crane at job site by flood waters during nonworking hours when hirer was negligent in failing to notify operator of peril until it was too late to save equipment. *Bigge Drayage Co. v. Frazier-Davis Constr. Co. (1969) 269 Cal. App. 2d 403, 407-409, 74 Cal. Rptr. 827*

Civ. Code § 1955 (duties of letter) becomes part of hiring contract if it can be reasonably so construed. *Sproul v. Cuddy (1955) 131 Cal. App. 2d 85, 93, 280 P.2d 158* (case interpreting disclaimer of liability on bailment for hire)

No possible conflict found between *Civ. Code §§ 1714* (liability for negligence or tort) and 1955 (duties of letter), each

of which defines different obligations of owner of property; each of them has equal force and dignity, and both must be read together. *Monroe v. East Bay Rental Service (1952) 111 Cal. App. 2d 574, 576, 245 P.2d 9*

[5] Liablity of Successors

Whether or not party who took possession of leased equipment and made lease payments intended to assume lease obligation is question of fact to be determinedby intent of parties; express assumption is not required. *Enterprise Leasing Corp. v. Shugart Corp. (1991) 231 Cal. App. 3d 737, 745-747, 282 Cal. Rptr. 620*

Lessor stated claim for restitution (to avoid unjust enrichment) against defendant that had taken possession of equipment and was making lease payments when lessor's lack of knowledge prevented it from asserting its rights regarding assignment of lease. *Enterprise Leasing Corp. v. Shugart Corp. (1991) 231 Cal. App. 3d 737, 748-749, 282 Cal. Rptr. 620*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 413.272 Law Reviews

Mooney, *Personal Property Leasing: A Challenge, 36 Bus. Law. 1605 (1981)*

Comment, *Selected Problems in California Chattel Leasing, 13 UCLA L. Rev. 125 (1965)*

Note, *Air Law--Liability of Bailee of Aircraft for Negligent Destruction--Application of Federal Civil Air Regulations, 25 S. Cal. L. Rev. 119 (1951)*

Goldin, *The Doctrine of Res Ipsa Loquitur in Aviation Law, 18 S. Cal. L. Rev. 124 (1944)* (bailments)

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 413 PERSONAL PROPERTY LEASES
PART III. RESEARCH GUIDE
A. Bailments For Hire

36-413 California Forms of Pleading and Practice--Annotated § 413.273

§ 413.273 Text References

Witkin, Summary of California Law, vol. 13, *Personal Property*, §§ 156-167, 187-194 (10th ed. 2005)

California Forms of Pleading and Practice--Annotated

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36-413 California Forms of Pleading and Practice--Annotated §§ 413.274-413.289

[Reserved]

§§ 413.274[Reserved]

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36-413 California Forms of Pleading and Practice--Annotated § 413.290

§ 413.290 California Legal Forms

For discussion and forms for personal property leases, see California Legal Forms, Ch. 53, *Personal Property Leasing* (Matthew Bender)

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§ 413.291 Federal Statutes

Consumer Leasing Act. *15 U.S.C. § 1667 et seq.*

Consumer lease defined. *15 U.S.C. § 1667(1)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionConsumer LeasingGeneral Overview

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Regulation M; consumer leasing. 12 C.F.R. Part 213

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36-413 California Forms of Pleading and Practice--Annotated § 413.293

§ 413.293 State Statutes

[1] Applicable Law

Unconscionability of lease terms. *Civ. Code § 1670.5*

Consumers Legal Remedies Act. *Civ. Code § 1750 et seq.*; *see Com. Code § 10104(a)(3)*

Bailments for hire and personal property leases entered into before January 1, 1990. *Civ. Code §§ 1925 et seq., 1955 et seq.*; *see Com. Code § 10104(a)(3)*

Rental, lease, or hire of passenger vehicle from rental company for period of less than 30 days. *Civ. Code §§ 1936, 1936.1*; *see Com. Code § 10104(a)(3)*

Rees-Levering Motor Vehicle Sales and Finance Act. *Civ. Code § 2981 et seq.*; *see Com. Code § 10104(a)(3)*

Vehicle Leasing Act. *Civ. Code § 2985.7 et seq.*; *see Com. Code § 10104(a)(3)*

Security interests are governed by Division 9, not Division 10. *Com. Code §§ 1201(b)(35)* (defining "security interest"), 10103(a)(10) (defining "lease")

Division 9 (*Com. Code § 9101 et seq.*) applies to security interests created by contract, including lease, intended as security. *Com. Code § 9109(a)(1)*

Lessee's security interest in rejected goods under *Com. Code § 10508(e)* is subject to Division 9. *Com. Code § 9110*

Finance leases are governed by Division 10. *Com. Code § 10103(a)(7)* (defining "finance lease")

California certificate of title statutes, including Vehicle Code and Health and Safety Code provisions that require

registration of vehicles, boats, and mobilehomes, also apply to leases within Division 10. *Com. Code §§ 10104(a)(1), 10105*

Certificate of title statutes of other jurisdictions also apply to leases within Division 10. *Com. Code §§ 10104(a)(2), 10105*

Consumer protection laws (such as *Bus. & Prof. Code §§ 17200 et seq., 17500 et seq.*; *Civ. Code § 1738 et seq.*) apply to consumer leases within Division 10. *Com. Code § 10104(a)(3)*

In case of conflict between Division 10 (other than *Com. Code §§ 10105, 10304(c)*, and *10305(c)*) and any other law referred to in *Com. Code § 10104(a)*, other law is controlling. *Com. Code § 10104(b)*

Time for which compliance and effect of compliance or noncompliance with certificate of title statute are governed by law of jurisdiction issuing certificate. *Com. Code § 10105*

Enforceability of choice of law and choice of forum provisions in consumer leases. *Com. Code § 10106*

Except as provided in *Com. Code § 10308*, Division 10 applies notwithstanding other law holding that possession or absence of possession is fraudulent. *Com. Code § 10302*

Division 10 governs leases first made or effective on or after January 1, 1990, and others if parties agree to be governed by Division 10. *Com. Code § 10600*

[2] Definitions

"Buyer" defined. *Com. Code §§ 2103(1)(a), 10103(c)*

"Good faith" defined. *Com. Code § 1201(b)(20)*

"Receipt of goods" defined. *Com. Code §§ 2103(1)(c), 10103(c)*

"Seller" defined. *Com. Code §§ 2103(1)(d), 10103(c)*

"Merchant" defined. *Com. Code §§ 2104(1), 10103(c)*

"Between merchants" defined. *Com. Code §§ 2104(3), 10103(c)*

"Sale" defined. *Com. Code §§ 2106(1), 10103(c)*

"Sale on approval" defined. *Com. Code §§ 2326, 10103(c)*

"Sale or return" defined. *Com. Code §§ 2326, 10103(c)*

"Entrusting" defined. *Com. Code §§ 2403(3), 10103(c)*

"Account" defined. *Com. Code §§ 9102(a)(2), 10103(c)*

"Chattel paper" defined. *Com. Code §§ 9102(a)(11), 10103(c)*

"Consumer goods" defined. *Com. Code §§ 9102(a)(23), 10103(c)*

"Document" defined. *Com. Code §§ 9102(a)(30), 10103(c)*

"General intangible" defined. *Com. Code §§ 9102(a)(42), 10103(c)*

"Instrument" defined. *Com. Code §§ 9102(a)(47), 10103(c)*

"Mortgage" defined. *Com. Code §§ 9102(a)(55), 10103(c)*

"Pursuant to commitment" defined. *Com. Code §§ 9102(a)(68), 10103(c)*

"Buyer in ordinary course of business" defined. *Com. Code § 10103(a)(1)*

"Buying" defined. *Com. Code § 10103(a)(1)*

"Cancellation" defined. *Com. Code § 10103(a)(2)*

"Commercial unit" defined. *Com. Code § 10103(a)(3)*

"Conforming" defined. *Com. Code § 10103(a)(4)*

"Consumer lease" defined. *Com. Code § 10103(a)(5)*

"Fault" defined. *Com. Code § 10103(a)(6)*

"Finance lease" defined. *Com. Code § 10103(a)(7)*

"Goods" defined. *Com. Code § 10103(a)(8)*

"Installment lease contract" defined. *Com. Code § 10103(a)(9)*

"Lease" defined. *Com. Code § 10103(a)(10)*

"Lease agreement" defined. *Com. Code § 10103(a)(11)*

"Lease contract" defined. *Com. Code § 10103(a)(12)*

"Leasehold interest" defined. *Com. Code § 10103(a)(13)*

"Lessee" defined. *Com. Code § 10103(a)(14)*

"Lessee in ordinary course of business" defined. *Com. Code § 10103(a)(15)*

"Lessor" defined. *Com. Code § 10103(a)(16)*

"Lessor's residual interest" defined. *Com. Code § 10103(a)(17)*

"Lien" defined. *Com. Code § 10103(a)(18)*

"Lot" defined. *Com. Code § 10103(a)(19)*

"Merchant lessee" defined. *Com. Code § 10103(a)(20)*

"Present value" defined. *Com. Code § 10103(a)(21)*

"Purchase" defined. *Com. Code § 10103(a)(22)*

"Sublease" defined. *Com. Code § 10103(a)(23)*

"Supplier" defined. *Com. Code § 10103(a)(24)*

"Supply contract" defined. *Com. Code § 10103(a)(25)*

"Termination" defined. *Com. Code § 10103(a)(26)*

"Fixtures" defined. *Com. Code § 10309(a)(1)*

"Fixture filing" defined. *Com. Code § 10309(a)(2)*

"Purchase money lease" defined. *Com. Code § 10309(a)(3)*

"Construction mortgage" defined. *Com. Code § 10309(a)(4)*

"Encumbrance" defined. *Com. Code § 10309(a)(5)*

"Accessions" defined. *Com. Code § 10310(a)*

[3] Finance Leases

Lessee under finance lease is beneficiary of warranties under supply contract. *Com. Code § 10209*

Limitations on warranties by lessor under finance lease. *Com. Code §§ 10210(b), 10213*

Lessee who furnishes specifications is required to hold lessor and supplier harmless against any claim by way of infringement or like that arises out of compliance with specifications. *Com. Code § 10211(c)*

Finance lease places risk of loss on lessee; or, on delivery or tender of nonconforming goods, risk of loss remains with supplier until cure or acceptance. *Com. Code §§ 10219(a)* (on lessee), 10220(a)(1) (on supplier)

Finance lease is irrevocable after acceptance of goods. *Com. Code § 10407*

[4] Formation and Construction of Lease Contract

Course of performance is aid to interpretation of lease contact. *Com. Code § 1303*

Waiver or renunciation of rights after default. *Com. Code § 10107*

Statute of frauds applicable to leases. *Com. Code § 10201*

Parole evidence to interpret lease contact. *Com. Code § 10202*

Sufficiency of lease contract. *Com. Code § 10204*

Offers, firm offers, and acceptance. *Com. Code § 10205, 10206*

Modification, rescission, and waiver. *Com. Code § 10208*

[5] Remedies in General

Determining whether default exists. *Com. Code § 10501(a)*

Various remedies available. *Com. Code §§ 10501(c), 10503(d), 10505(d)*

Remedies are cumulative and optional. *Com. Code §§ 10501(d), 10503(b)*

Remedies under lease covering real property and goods. *Com. Code § 10501(e)*

Notices of default or enforcement not required. *Com. Code § 10502*

Remedies are governed by agreement and Division 10. *Com. Code § 10503(a)*

Permissible limitations on damages. *Com. Code § 10503(c)*

Liquidated damages. *Com. Code § 10504(a), (b)*

Lessee's right of reimbursement for justified nondelivery. *Com. Code § 10504(c), (d)*

Right of parties on cancellation, termination, or rescission. *Com. Code § 10505*

Remedies are generally not barred by rescission, rejection, or return. *Com. Code § 10505(e)*

Statute of limitations. *Com. Code § 10506*

Market rent. *Com. Code § 10507*

Action against third party who injures goods identified to lease. *Com. Code § 10531*

[6] Remedies of Lessee on Default by Lessor

Lessee's remedies for rejected goods or repudiation. *Com. Code § 10508(a), (b), (f)*

Lessee's remedies for other defaults of lessor. *Com. Code § 10508(c)*

Lessee's remedies for breach of warranty. *Com. Code §§ 10508(d), 10519(4)*

Lessee's security interest in rejected goods. *Com. Code § 10508(e)*

Requirements for lessee's rejection; lessee's duties with respect to rejected goods. *Com. Code §§ 10509-10512, 10514*

Lessor's right to cure. *Com. Code § 10513*

What constitutes acceptance. *Com. Code § 10515*

Requirements for and effect of lessee's revocation of acceptance. *Com. Code §§ 10516, 10517*

Cover. *Com. Code § 10518*

Lessee's measure of damages; incidental and consequential damages. *Com. Code §§ 10519, 10520*

Lessee's right to specific performance or related remedy. *Com. Code § 10521*

Lessee's rights on lessor's insolvency. *Com. Code § 10522*

[7] Remedies of Lessor on Default by Lessee

Lessor's remedies in general. *Com. Code § 10523*

Lessor's right to identify goods to lease contract. *Com. Code § 10524*

Lessor's right to refuse delivery to insolvent lessee. *Com. Code § 10525(a)*

Lessor's right to take possession of goods previously delivered. *Com. Code § 10525(b), (c)*

Lessor's right to stop delivery of goods in transit. *Com. Code § 10526*

Lessor's right to dispose of goods. *Com. Code § 10527*

Lessor's measures of damages; election; recovery of rent; incidental damages; loss of or damage to residual interest. *Com. Code §§ 10528-10530, 10532*

[8] Repudiated, Substituted, and Excused Performance

Right to assurances. *Com. Code § 10401*

Anticipatory repudiation; retraction of anticipatory repudiation. *Com. Code §§ 10402, 10403*

Substituted performance when agreed performance impracticable. *Com. Code § 10404*

Impossibility defined; lessor's or supplier's duty to allocate. *Com. Code § 10405*

Lessee's rights on receipt of notice of delay or allocation. *Com. Code § 10406*

[9] Risk of Loss

Identification of goods to lease. *Com. Code § 10217*

Insurable interests. *Com. Code § 10218*

Risk of loss. *Com. Code § 10219*

Effect of default on risk of loss. *Com. Code § 10220*

Casualty to identified goods. *Com. Code § 10221*

[10] Sales and Use Tax

"Acquisition sale and leaseback," as defined, executed on or after January 1, 1991, and before January 1, 1995, is neither sale nor purchase for purposes of sales and use tax. *Rev. & Tax. Code § 6010.65*

[11] Third Parties Affected by Lease

Lease generally effective against purchasers and creditors. *Com. Code §§ 10301, 10302*

Transfer of interests under lease generally permitted. *Com. Code §§ 10303(b), (c), 10307*

Other party's remedies after transfer. *Com. Code § 10303(d)*

Assignment of rights and delegation of duties. *Com. Code §§ 10303(e), (f)*

Extent of interest acquired from lessor by subsequent lessee. *Com. Code § 10304*

Extent of interest acquired from lessee by buyer or sublessee. *Com. Code § 10305*

Lien of repairer of leased goods. *Com. Code § 10306*

Rights of creditors of parties to lease. *Com. Code § 10307*

Rights of lessor's and seller's creditors. *Com. Code § 10308*

Leased goods as fixtures. *Com. Code § 10309*

Leased goods as accessions. *Com. Code § 10310*

[12] Warranties

Creation of express warranties by lessor. *Com. Code § 10210*

Lessor gives warranties against interference or infringement. *Com. Code § 10211*

Implied warranty of merchantability. *Com. Code § 10212*

Implied warranty of fitness for particular purpose. *Com. Code § 10213*

Disclaimer or modification of warranties. *Com. Code § 10214*

Rule of construction applicable to warranties. *Com. Code § 10215*

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)General Provisions (Article 1)Application & ConstructionDamagesCommercial Law (UCC)Secured Transactions (Article 9)PerfectionChoice of LawGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionChoice of LawCertificates of TitleContracts LawBreachAnticipatory RepudiationGeneral OverviewContracts LawBreachCauses of ActionBreach of WarrantyContracts LawContract InterpretationParol EvidenceGeneral OverviewContracts LawDebtor & Creditor RelationsContracts LawFormationOffersIrrevocable OffersContracts LawPerformanceTender & DeliveryContracts LawRemediesSpecific PerformanceContracts LawSales of GoodsDamages & RemediesGeneral OverviewContracts LawSales of GoodsPerformanceGeneral OverviewContracts LawSales of GoodsPerformanceRisk of LossContracts LawSales of GoodsWarrantiesFitnessContracts LawSecured TransactionsApplication & ConstructionLeasesContracts LawSecured TransactionsDefaultForeclosure & RepossessionEnforcementContracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsLease AgreementsGeneral OverviewEvidenceProcedural ConsiderationsRule Application & InterpretationInsurance LawMotor Vehicle InsuranceCancellation & RenewalEstoppel & Waiver of InsurersTransportation LawWater TransportationLicensing & RegistrationTransportation LawWater TransportationMaintenance & Safety

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§ 413.294 Law Reviews

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Alces, *Surreptitious and Not-So-Surreptitious Adjustment of the UCC: An Introductory Essay, 39 Ala. L. Rev. 559 (1988)*

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Benfield, *Lessor's Damages Under Article 2A After Default by the Lessee as to Accepted Goods, 39 Ala. L. Rev. 915 (1988)*

Boss, *The History of Article 2A: A Lesson For Practitioner and Scholar Alike, 39 Ala. L. Rev. 575 (1988)*

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Gordon, *Flying Into Blue Sky: Aircraft Leasebacks as Securities, 35 UCLA L. Rev. 779 (1988)*

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Huddleson, *Old Wine in New Bottles: UCC Article 2A--Leases, 39 Ala. L. Rev. 615 (1988)*

Kripke, *Some Dissonant Notes About Article 2A, 39 Ala. L. Rev. 791 (1988)*

Miller, *Consumer Leases Under Uniform Commercial Code 2A , 39 Ala. L. Rev. 957 (1988)*

Mooney, *The Mystery and Myth of "Ostensible Ownership" and Article 9 Filing: A Critique of Proposals to Extend Filing Requirements to Leases, 39 Ala. L. Rev. 683 (1988)*

Rapson, *Deficiencies and Ambiguities in Lessors' Remedies Under Article 2A: Using Official Comments to Cure Problems in the Statute, 39 Ala. L. Rev. 875 (1988)*

Sigman and Turner, *Preface to the California Report on Article 2A (With Some Thoughts About Participation in the Legislative Process), 39 Ala. L. Rev. 975 (1988)*

Report of the Uniform Commercial Code Committee of the Business Law Section of the State Bar of California on Proposed California Commercial Code Division 10 (Article 2A) (Senate Bill 1580, as Amended September 11, 1987), 39 Ala. L. Rev. 979 (1988)

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)General Provisions (Article 1)General OverviewCommercial Law (UCC)Leases (Article 2A)General OverviewCommercial Law (UCC)Leases (Article 2A)DefaultLessee & Lessor DefaultCommercial Law (UCC)Leases (Article 2A)DefaultRemediesContracts LawTypes of ContractsLease AgreementsGeneral OverviewSecurities LawBlue Sky LawsGeneral OverviewTortsBusiness TortsGeneral Overview

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§§ 413.295[Reserved]

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PART IV. FORMS
A. Bailments For Hire

36-413 California Forms of Pleading and Practice--Annotated § 413.310

§ 413.310 Complaint for Damages [Civ. Code § 3300] for Breach of Contract of Bailment [Civ. Code § 1925]--By Letter (Lessor) Against Hirer (Lessee)--For Rent Due on Thing Hired--General Form

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Contract of Bailment [Civ. Code § 1925]--By Letter (Lessor) Against Hirer (Lessee)--For Rent Due on Thing Hired--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Breach of Contract)
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. Plaintiff is, and at all times herein mentioned was, a corporation organized and existing under the laws of the state of _____ (authorized to transact, and transacting, intrastate business in California), with its principal place of business (in California) in _____ County (*or allege other capacity and residence of plaintiff as appropriate*).]

2. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence*].

[3. Plaintiff is ignorant of the true names and capacities of defendant sued herein as DOES I through

_____, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by the acts or omissions of each of them.)]

[4. At all times herein mentioned, defendants DOES I through _____ were the agents, servants, and employees of their codefendants, and in doing the things hereinafter alleged were acting in the scope of their authority as such agents, servants, and employees, and with the permission and consent of their codefendants.]

[5. Defendant entered into the hiring that is the subject of this action in order to use the _____ (*specify type of goods, e.g.,* piano) primarily for personal, family, or household purposes. (Thus, this action is subject to the venue provisions of Section _____ [*specify any applicable consumer venue provision, e.g., 1812.10 of the Civil Code*].)]

[*EITHER, if agreement is oral*]

6. On _____ [*date*], defendant hired from plaintiff _____ [*describe chattel hired, e.g.,* a piano] for _____ [the period between _____ (*date*) and _____ (*date*) *or* a period of _____ (*specify, e.g.,* six months)] for which defendant orally promised to pay plaintiff _____ [a total rental of $_____ *or* the sum of $_____ (per _____ (*specify, e.g.,* month)) as rental *or* a reasonable rental]. [*Add any other relevant terms, e.g.,* In addition, defendant also promised to pay personal property taxes on the thing let and to maintain insurance on it.]

[*OR, if agreement is written*]

6. On or about _____ [*date*], plaintiff and defendant entered into a contract in writing, a copy of which is attached as Exhibit "A" and incorporated by reference. In accordance with the terms of this contract, defendant hired from plaintiff _____ [*describe chattel hired, e.g.,* a piano] for _____ [the period between _____ (*date*) and _____ (*date*) *or* a period of _____ (*specify, e.g.,* six months)] for which defendant promised to pay plaintiff _____ [a total rental of $_____ *or* the sum of $_____ (per _____ (*specify, e.g.,* month)) as rental *or* a reasonable rental]. [*Add any other relevant terms, e.g.,* In addition, defendant also promised to pay personal property taxes on the thing let and to maintain insurance on it.]

[*CONTINUE*]

[7. The reasonable rental value of the property hired by defendant is the sum of $_____ (per _____ [*specify, e.g.,* month]).]

8. Defendant [has] had possession of the _____ [*describe chattel hired, e.g.,* a piano] for _____ [*specify, e.g.,* six months], and has paid no rent to plaintiff [except the sum of $_____, for which credit on the account was given] [*add any other sums in addition to rent, e.g.,* nor has defendant paid the personal property taxes or maintained the insurance. Plaintiff was required to pay taxes in the sum of $_____ and to buy insurance at a cost of$_____]. There is now due, owing, and unpaid from defendant to plaintiff the sum of $_____.

9. On or about _____ [*date*], demand was made on defendant for payment of the aforementioned sum, but defendant has failed, refused, and neglected, and continues to fail, refuse, and neglect, to pay the same, all to plaintiff's damage in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For compensatory damages in the sum of $_____;

2. For interest on the sum of $_____ at [the legal rate *or* the rate of _____ percent per annum] from and after _____ [*date on which amount of damages was capable of being made certain or date on which action was filed, whichever is appropriate*];

3. For costs of suit herein incurred [including reasonable attorney's fees as authorized by *Section 1717 of the Civil Code*]; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

CAUTION:

In all actions and proceedings that are subject to *Civ. Code § 1812.10* (Unruh Act) or 2984.4 (Rees-Levering Motor Vehicle Sales and Finance Act), and in all limited civil cases that are subject to *Code Civ. Proc. § 395(b)* (consumer obligations for goods, services, loans, or extensions of credit intended primarily for personal, family, or household use), facts showing that the action has been commenced in the proper court for the trial of the action or proceeding, and showing that the action is subject to the provisions of *Civ. Code § 1812.10* or *2984.4*, or *Code Civ. Proc. § 395(b)*, must be set forth in the complaint, verified by the oath of the plaintiff or of his or her attorney, or in an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) of the plaintiff or of his or her attorney filed with the complaint. When the affidavit or declaration is filed with the complaint, a copy of it must be served with the summons. If the complaint, affidavit, or declaration is not so filed, unless the court permits a later filing of the affidavit or declaration, the action must be dismissed without prejudice [*Civ. Code §§ 1812.10(c), 2984.4(c)*; *Code Civ. Proc. § 396a(a)*; *see also* Ch. 20, *Allegations Commonly Used* , Ch. 89, *Automobiles: Sales and Financing Under the*

Rees-Levering Act , and Ch. 501, ***Sales: Retail Installment Sales***].

[2] Use of Form

This complaint is for general use by a lessor in an action against the hirer (lessee) to recover damages for the breach of a contract of bailment after the hirer has failed to pay the agreed rent for the thing hired. The terms "hiring" and "hired" in the form may be changed to "lease" and "leased."

[3] Allegations

The complaint alleges:

- Plaintiff's capacity and principal place of business, if necessary (optional Paragraph 1).
- Defendant's residence and capacity (Paragraph 2).
- The hiring and the agreed rent (alternative Paragraphs 6) [*see Civ. Code § 1925* (hiring defined)].
- The amount due (Paragraph 8).
- Defendant's failure to pay that rent (Paragraph 8).
- Plaintiff's demand for the rent (Paragraph 9).
- The fact that defendant did not respond to plaintiff's demand (Paragraph 9).

Paragraph 5 is only necessary in an action that is subject to a special venue provision [*see, e.g., Civ. Code §§ 1812.10* (Unruh Act), 2984.4 (Rees-Levering Motor Vehicle Sales and Finance Act); *Code Civ. Proc. § 395(b)*].

Paragraph 7 is necessary only if no rental rate was specified by the parties [*see Caron v. Andrew (1955) 133 Cal. App. 2d 412, 417, 284 P.2d 550]* .

If plaintiff or defendant is doing business under a fictitious name, *see § 413.340* for an allegation regarding the capacity to sue under that name.

[4] Interest on Damages

The prayer includes a request for interest on damages, although failure to request interest does not preclude interest from being awarded [*Sanders v. City of Los Angeles (1970) 3 Cal. 3d 252, 263, 90 Cal. Rptr. 169, 475 P.2d 201]* . Interest may accrue at a rate specified in the contract or at the legal rate [*Civ. Code §§ 3287, 3289*]. Interest accrues from the date when the amount of damages was certain, or capable of being made certain [*Civ. Code § 3287(a)*].

[5] Attorney's Fees

In an action on a contract that specifically provides for the award of attorney's fees and costs incurred to enforce the contract, the prevailing party may recover reasonable attorney's fees as an element of the costs of suit, not as damages [*Civ. Code § 1717*; *see* Ch. 174, *Costs and Attorney's Fees*].

[6] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in

controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[7] Venue

Subject to *Code Civ. Proc. § 395(b)*, an action founded on a contractual obligation may be brought in the county where any defendant resides at the commencement of the action. If a defendant has contracted to perform the obligation in a particular county, the action may be brought in the county where the obligation is to be performed or in the county where the contract in fact was entered into. The county in which the obligation is incurred is deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary [*Code Civ. Proc. § 395(a)*].

In an action arising from an offer or provision of goods, services, loans or extensions of credit intended primarily for personal, family or household use, other than an obligation described in *Civ. Code § 1812.10* (in the Unruh Retail Installment Sales Act [*Civ. Code § 1801 et seq.*]; for discussion, see Ch. 501, *Sales: Retail Installment Sales*) or *Civ. Code § 2984.4* (in the Rees Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 2981 et seq.*]; for discussion, see Ch. 89, *Automobiles: Sales and Financing Under the Rees Levering Act*), or in an action arising from a transaction consummated as a proximate result of either an unsolicited telephone call made by a seller engaged in the business of consummating transactions of that kind or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller, the superior court in the county where the buyer or lessee in fact signed the contract, or where the buyer or lessee resided at the time the contract was entered into, or where the buyer or lessee resides at the commencement of the action, is the proper court for the trial of the action [*Code Civ. Proc. § 395(b)*; see *Fontaine v. Superior Court (CashCall, Inc.) (2009) 175 Cal. App. 4th 830, 838-840, 96 Cal. Rptr. 3d 607* (statute applies to action by or against consumer, and if any defendant in consumer's action is individual, that is irrelevant to application of statute)].

A corporation or association may be sued in the county where the contract is made or is to be performed, where the obligation or liability arises or where the breach arises, or in the county where the corporation's principal place of business is situated, subject to the power of the court to change the place of trial as in other cases [*Code Civ. Proc. § 395.5*]. The last act necessary to the validity of a contract, usually the act constituting acceptance, or the place where the obligation arises, is the place the contract is made for purposes of *Code Civ. Proc. § 395.5* [*Jhirmack Enterprises, Inc. v. Superior Court (1979) 96 Cal. App. 3d 715, 723, 158 Cal. Rptr. 192]* .

[8] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will alsopreclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[9] Cross References

For alternative allegations of agency, capacity, residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion of damages recoverable in contract actions generally, see Ch. 140, *Contracts* ; and Ch. 177, *Damages*

For forms and discussion involving hiring of real property, see Ch. 334, *Landlord and Tenant: Claims for Damages*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

[10] State Statutes

Hirings in general. *Civ. Code §§ 1925-1935*

Bailment of personalty. *Civ. Code §§ 1955-1959*

[11] Decisions

Liability of bailee for rental value of bailed chattel when no agreed amount specified as reasonable rental value. *Caron v. Andrew (1955) 133 Cal. App. 2d 412, 417, 284 P.2d 550* (case of bailment contract implied in fact)

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PART IV. FORMS
A. Bailments For Hire

36-413 California Forms of Pleading and Practice--Annotated § 413.311

§ 413.311 Complaint for Damages [Civ. Code § 3300] for Breach of Contract of Bailment [Civ. Code § 1925]--By Letter (Lessor) Against Hirer (Lessee)--Rent Due on Thing Hired--Hiring Terminated Before Agreed Time [Civ. Code § 1935]

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Contract of Bailment [Civ. Code § 1925]--By Letter (Lessor) Against Hirer (Lessee)--Rent Due on Thing Hired--Hiring Terminated Before Agreed Time [Civ. Code § 1935]

[*Caption. See § 413.310.*]

[1. *Capacity and residence of plaintiff. See § 413.310, Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 413.310, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 413.310, Paragraph 3.*]

[4. *Agency allegation, if appropriate. See § 413.310, Paragraph 4.*]

[5. *Consumer lease and venue, if appropriate. See § 413.310, Paragraph 5.*]

6. On _____ [*date*], at _____ [*city*], _____ County, California, plaintiff as letter and defendant as hirer entered into a written agreement of hiring by which defendant hired of plaintiff and plaintiff let to defendant a _____ [*describe thing hired, e.g.,* hospital bed], for a period of _____ [*number*] days, for the purpose of _____ [*describe use contemplated, e.g.,* defendant's caring for his mother, who was ill]. [The agreed rental for the _____-day term was $_____.] [Either party had the right to terminate the hiring prior to the agreed term by giving the other party _____ -days notice.] Defendant further agreed _____ [*specify other provisions of hiring agreement relative to termination of agreement prior to term, e.g.,* that if the hiring was terminated prior to the end of

the _____-day term, he/she would pay the proportionate amount of the agreed rental]. A copy of the agreement is attached as Exhibit "A" and made a part of this complaint.

7. On _____ [*date*], and before the termination date agreed on, the hiring was terminated by reason of _____ [*specify, e.g.,* the fact that defendant's mother died and the parties mutually agreed to terminate the hiring]. During the period between _____ [*date of agreement*] and _____ [*date of premature termination of hiring*], defendant actually used the _____ [*describe thing hired, e g.,* bed], and received benefit from it; defendant's use was not merely nominal.

8. At the time of termination of the hiring plaintiff requested of defendant that he/she pay the sum of $_____ per day for the hire, for the period of _____ [*number*] days during which the _____ [*describe thing hired, e.g.,* bed] was actually beneficially used by defendant. The sum is a reasonable sum to be paid for the use of _____ [*describe thing hired, e.g.,* bed] during that period. Defendant failed and refused to pay this sum, or any sum for the use, and continues to fail and refuses to do so althoughplaintiff has made due demand on him/her for payment. By reason thereof plaintiff has been damaged in the sum of $_____.

[*Prayer. See § 413.310.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 413.310.*]

[2] Use of Form

This form of complaint is for use by a letter in an action against a hirer to recover damages based on the proportion of the term for which the hirer actually used the thing hired [*Civ. Code § 1935* (discussed in the Introduction under--Hirer's Obligation on Premature Termination)] before the hiring was terminated prior to the end of the term originally specified [*see Civ. Code §§ 1931-1934* (*see § 413.37*)].

The terms "hiring," "hirer," "letter," and "hired" in the foregoing form may be changed to "lease," "lessee," "lessor," and "leased."

[3] Allegations

The complaint alleges:

- The hiring and its relevant terms (Paragraph 6) [*see Civ. Code § 1925* ("hiring" defined)].
- The early termination of the hiring (Paragraph 7) [*see Civ. Code §§ 1931-1934*].
- Defendant's beneficial use of the thing hired prior to the early termination, and the fact that the use was not nominal (Paragraph 7) [*Civ. Code § 1935*].
- The basis for calculation and demand for the proportionate rent being sought (Paragraph 8).

- Defendant's continued failure to pay the proportionate rent (Paragraph 8).

[4] State Statutes

Premature termination of hiring by letter as permissible. *Civ. Code § 1931*

Hirer of thing as permitted to prematurely terminate hiring. *Civ. Code § 1932*

Termination of hiring by mutual consent of the parties. *Civ. Code § 1933(2)*

Termination of hiring by hirer's acquisition of title to thing hired superior to that of the letter. *Civ. Code § 1933(3)*

Termination of hiring by destruction of the thing hired. *Civ. Code § 1933(4)*

Termination of hiring that is terminable at pleasure of one party. *Civ. Code § 1934*]

Apportionment of rent on premature termination of hiring. *Civ. Code § 1935*

[5] Decisions

Regardless of its expressed terms, any contract of bailment as permitted to be terminated at any time by mutual consent of parties. *Rackliff v. Coronet Construction Co. (1958) 157 Cal. App. 2d 419, 424, 321 P.2d 50*

[6] Cross References

For a related form, *see § 413.310*.

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A. Bailments For Hire

36-413 California Forms of Pleading and Practice--Annotated § 413.312

§ 413.312 Complaint for Damages [Civ. Code §§ 3300, 3308] for Breach of Personal Property Lease--By Lessor Against Lessee--Rent Due and for Prospective Rent for Balance of Original Term [Civ. Code § 3308]

[1] FORM Complaint for Damages [Civ. Code §§ 3300, 3308] for Breach of Personal Property Lease--By Lessor Against Lessee--Rent Due and for Prospective Rent for Balance of Original Term [Civ. Code § 3308]

[*Caption. See § 413.310.*]

[1. *Capacity and residence of plaintiff. See § 413.310, Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 413.310, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 413.310, Paragraph 3.*]

[4. *Agency allegation, if appropriate. See § 413.310, Paragraph 4.*]

[5. *Consumer lease and venue, if appropriate. See § 413.310, Paragraph 5.*]

6. On _____ [*date*], at _____ [*city*], _____ County, California, plaintiff as lessor and defendant as lessee entered into a written lease agreement, a copy of which is attached as Exhibit "A" and made a part hereof. In accordance with the terms of this lease, plaintiff was to lease _____ [*specify type of goods, e.g.,* approximately $25,000 worth of restaurant equipment, which is listed with particularity in Appendix A of the lease agreement,] to defendant for a[n initial] term of _____ [*specify time period, e.g.,* three years], commencing on _____ [date], at a monthly rent of $_____. The first month's rent was payable on or before _____ [*date*]. Thereafter monthly rental payments were due on or before the _____ day of each month. [*Add any relevant terms, other than provisions regarding lessor's remedies, e.g.,* In addition, defendant also promised to pay personal property taxes on the thing let and to maintain insurance on it.]

7. Plaintiff performed all obligations that he/she was required to perform under the lease agreement in that on _____ [*date*], plaintiff _____ [*allege facts showing plaintiff's performance up to the time of defendant's default, e.g.,* delivered the goods to defendant's business premises on _____ (*date*). Defendant accepted the goods].

8. On or about _____ [*date*], defendant defaulted in its obligations under the lease agreement by _____ [*describe nature of defendant's breach, e.g.,* failing and refusing to make any further payments required by the lease agreement].

[9. The lease agreement provides that when defendant is in default, plaintiff _____ (*specify any lease provision on which plaintiff is relying to authorize the actions taken or recovery sought, e.g.,* may terminate the lease if defendant does not cure an event of default within 30 days after demand to do so. Further, the lease provides, at Paragraph _____ that if plaintiff terminates the lease because of a breach by defendant, plaintiff is entitled to recover from defendant the worth at the time of the termination, of the excess, if any, of the amount of rent and charges equivalent to the rent reserved in the lease for the balance of the stated term, or any shorter period of time over the reasonable rental value of the property for the same period).]

[10. On _____ (*date*), plaintiff notified defendant that defendant was in default under the lease for failure to make the rental payments due _____ (*dates*), and demanded that defendant pay the arrearages, which amounted to $_____, by _____ (date), or plaintiff would terminate the lease and take further actions authorized by the lease agreement. A copy of that notice is attached hereto marked Exhibit "B" and made a part hereof. On _____ (*date*), defendant had not paid the arrearages, and plaintiff terminated the lease by notice to defendant. A copy of the notice of termination (along with the acknowledgment of receipt of that notice signed by defendant on _____ (date),) is attached hereto marked Exhibit "C" and made a part hereof.]

[11. On or about _____ (*date*), _____ (*describe plaintiff's repossession, if any, and what disposition plaintiff made of the goods, e.g.,* plaintiff took possession of the goods after causing them to be removed from defendant's premises. After publishing advertisements in local papers for three months, and inquiring of five brokers in used restaurant equipment, plaintiff _____ (sold *or* relet) the goods that were the subject of the lease to a third party for (*if relet, specify terms, e.g.,* three years, commencing on _____ (*date*), at a monthly rent of) $_____.]

12. _____ [At the time plaintiff terminated the lease defendant had *or* Defendant has] paid no rent to plaintiff [except the sum of $_____, for which credit on account was given] [*add any other sums in addition to rent, e.g.,*; nor has defendant paid the personal property taxes or maintained the insurance. Plaintiff was required to pay taxes in the sum of $_____ and to buy insurance at a cost of $_____]. There is now due, owing, and unpaid from defendant to plaintiff the sum of $_____ [and plaintiff will continue to suffer damages based on unpaid rentals].

13. As a direct and proximate result of defendant's breach of the lease, plaintiff has suffered damages in the amount of $_____ [*specify basis for calculation, if desired, e.g.,* which is the present value, at the time plaintiff terminated the lease, calculated using a discount rate of 11.7 percent, of the excess of the amount of rent and charges reserved in the lease for the balance of the stated term, over the reasonable rental value of the property for the same period].

[*Prayer. See § 413.310.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 413.310.*]

[2] Use of Form

This form of complaint is for use by a lessor in an action against a lessee to recover damages based on the *Civ. Code § 3308* formula (discussed in the Introduction under § 413.37[4]), or pursuant to some other provision in a lease [*see Puritan Leasing Co. v. August (1976) 16 Cal. 3d 451, 457-458, 128 Cal. Rptr. 175, 546 P.2d 679]* , or pursuant to traditional leasing principles [*see Industrial Leasing Corp. v. Lawson (1983) 149 Cal. App. 3d 1098, 1102, 197 Cal. Rptr. 291* ; *see also § 413.38*].

[3] Allegations

The complaint alleges:

- The formation of the lease and its relevant terms (Paragraphs 6 and 9).
- Plaintiff's performance under the lease (Paragraph 7) [*see Civ. Code § 1955* (duties of lessor)].
- Defendant's breach of the lease (Paragraph 8).
- The amount of damages based on unpaid rent that accrued prior to termination of the lease or that rental arrearages will continue to accrue (Paragraph 12) [*see Civ. Code § 3308*].
- Other damages, based on rent for the balance of the stated term (Paragraph 13) [*see Civ. Code § 3308*; *Puritan Leasing Co. v. August (1976) 16 Cal. 3d 451, 457-458, 128 Cal. Rptr. 175, 546 P.2d 679* ; *Newco Leasing, Inc. v. Hull (1985) 167 Cal. App. 3d Supp. 1, 4-5* , *213 Cal. Rptr. 202]* .

The calculation of damages used in the bracketed portion of Paragraph 13 is based on *Civ. Code § 3308*, but other measures, such as the present value of the rent for the remaining lease term less the proceeds of sale, could be used instead [*see, e.g., Industrial Leasing Corp. v. Lawson (1983) 149 Cal. App. 3d 1098, 1102-1103, 197 Cal. Rptr. 291]* .

A lease provision supporting damages for the balance of the lease term (Paragraph 9) is not necessary [*see Industrial Leasing Corp. v. Lawson (1983) 149 Cal. App. 3d 1098, 1102, 197 Cal. Rptr. 291]* . Nor is it necessary, unless the lease agreement so provides, that the lessor have terminated the lease (Paragraph 10) [*see Puritan Leasing Co. v. August (1976) 16 Cal. 3d 451, 457-458, 462-463, 128 Cal. Rptr. 175, 546 P.2d 679]* .

Paragraph 11 is only necessary if defendant surrendered the goods or plaintiff repossessed them and sold or relet the goods in question [*see Industrial Leasing Corp. v. Lawson (1983) 149 Cal. App. 3d 1098, 1102-1103, 197 Cal. Rptr. 291* (sale)].

[4] State Statutes

Recovery of present value of excess rent reserved for balance of stated term remaining after lessor's termination for lessee's breach of lease over reasonable rental value of property for same period as authorized by provision in lease. *Civ. Code § 3308*

[5] Decisions

Lessor required to mitigate its damages. *W W Leasing Unlimited v. Torok Exploration, Etc. (9th Cir. 1978) 575 F.2d 1259, 1261* (applying California law); *Industrial Leasing Corp. v. Lawson (1983) 149 Cal. App. 3d 1098, 1103, 197 Cal. Rptr. 291*

Interest saved by lessor that prepaid loan with which it financed purchase of leased property as required to be deducted from deficiency owed by lessee after lessor's repossession and resale of lease property. *W W Leasing Unlimited v. Torok Exploration, Etc. (9th Cir. 1978) 575 F.2d 1259, 1261* (applying California law)

Not sale price, but market price of leased property that lessor repossessed and resold as required to be used to calculate deficiency owed by lessee. *W W Leasing Unlimited v. Torok Exploration, Etc. (9th Cir. 1978) 575 F.2d 1259, 1261* (applying California law)

Lease provision allowing lessor to repossess chattel, to sell it or to relet it, and then to recover any deficiency between proceeds of sale or reletting and present value of rent due for unexpired term as valid. *Puritan Leasing Co. v. August (1976) 16 Cal. 3d 451, 457, 460, 128 Cal. Rptr. 175, 546 P.2d 679* ; *Triple C Leasing, Inc. v. All-American Mobile Wash (1976) 64 Cal. App. 3d 244, 251, 134 Cal. Rptr. 328*

On termination of personal property lease before end of term, damages under *Civ. Code § 3308* equivalent to rent reserved for remainder of term as required to be discounted to their present value as of date of termination. *Newco Leasing, Inc. v. Hull (1985) 167 Cal. App. 3d Supp. 1, 4-5 , 213 Cal. Rptr. 202*

When goods subject to lease are repossessed and sold by lessor, standards of commercially reasonable conduct in sale of repossessed goods applicable under Divisions 2 and 9 of Commercial Code are not applicable; however, traditional principles obligating lessor to mitigate its damages do apply. *Industrial Leasing Corp. v. Lawson (1983) 149 Cal. App. 3d 1098, 1102-1103, 197 Cal. Rptr. 291*

Notice of sale of repossessed goods under former *Com. Code § 9504(3)* (*now see Com. Code §§ 9611-9614*) was not required to be given if transaction was true lease rather than security interest. *Triple C Leasing, Inc. v. All-American Mobile Wash (1976) 64 Cal. App. 3d 244, 248, 134 Cal. Rptr. 328*

[6] Text References

Witkin, Summary of California Law, vol. 13 *Personal Property*, § 192 (10th ed. 2005)

[7] Cross References

See also Comments and References to § 413.310.

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§ 413.313 Complaint for Damages [Civ. Code § 3300] for Breach of Contract of Bailment [Civ. Code § 1925]--By Letter (Lessor) Against Hirer (Lessee)--Nonrepair of [Civ. Code § 1929], Misuse of [Civ. Code § 1930], Nonpayment of Rent Due on, and Nondelivery of Thing Hired [Civ. Code § 1958]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] for Breach of Contract of Bailment [Civ. Code § 1925]--By Letter (Lessor) Against Hirer (Lessee)--Nonrepair of [Civ. Code § 1929], Misuse of [Civ. Code § 1930], Nonpayment of Rent Due on, and Nondelivery of Thing Hired [Civ. Code § 1958]

[*Caption. See § 413.310.*]

Plaintiff alleges:

[1. *Capacity and residence of plaintiff. See § 413.310, Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 413.310, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 413.310, Paragraph 3.*]

[4. *Agency allegation, if appropriate. See § 413.310, Paragraph 4.*]

[5. *Consumer lease and venue, if appropriate. See § 413.310, Paragraph 5.*]

6. [*Oral or written agreement for hiring. See § 413.310, Paragraph 6.*]

[7. *Reasonable rental rate. See § 413.310, Paragraph 7.*]

8. As part of this agreement defendant promised _____ [*use as many of the following as are applicable:* to maintain the _____ (*describe thing hired, e.g.,* motor scraper with rubber tires) in a

good state of repair, to properly use, store, and care for it, and to return it to plaintiff at the expiration of that time in the same condition in which it was received, reasonable wear excepted; *and/or* not to use or to permit the use of the _____ (*describe thing hired, e.g.,* scraper) for any purpose other than _____ (*specify limitation on use, e.g.,* scraping dirt off rocks to prepare them for blasting); *and/or* to return the _____ (*describe thing hired, e.g.,* scraper) to plaintiff at _____ (*specify location*)].

9. Defendant received the _____ [*describe thing hired, e.g.,* motor scraper] from plaintiff in good condition of repair on _____ [*date*] and thereafter used it continuously to and includ ing _____ [*date*], when _____ [defendant returned it to plaintiff as required by the agreement *or* plaintiff discovered the misuse hereinafter alleged, rescinded the agreement and retook possession of the _____ (*describe thing hired, e.g.,* scraper) *or* plaintiff terminated the agreement for defendant's failure to make repairs demanded by plaintiff as hereinafter alleged and retook possession of the _____ (*describe thing hired, e.g.,* scraper) *or* defendant notified plaintiff that it was no longer needed, informed plaintiff that the _____ (*describe thing hired, e.g.,* scraper) was located at _____ (*specify place different from the place at which parties had agreed the scraper was to be redelivered*), and demanded that plaintiff arrange to take possession from there].

10. Defendant, in disregard of the agreement, did not take reasonable or proper care of the _____ [*describe thing hired, e.g.,* scraper], or use it in a careful, reasonable, or proper manner during the term, but so carelessly and negligently cared for the property that it became broken, damaged, and otherwise injured and deteriorated, and specifically _____ [*describe nature of damage or deterioration, e.g.,* the water pumps were damaged, the heads were cracked, seals and gaskets were damaged, the cutting bits were completely worn down and ruined, the tires were badly torn and cut, the rotor bits were broken and worn, and the motor was damaged by reason of failure to change the oil and oil filters]. All these deteriorated and unrepaired parts were in a good state of repair and operating condition when the _____ [*describe thing hirerd, e.g.,* scraper] was delivered to defendant.

11. During the term of the hiring, defendant, used the _____ [*describe thing hired, e.g.,* scraper] in a manner and for a purpose other than for _____ [*specify purpose for which let, e.g.,* scraping dirt off rocks], to wit: _____ [*describe type of misuse, e.g.,* defendant used it to break up rocks]. _____ [*If deterioration and disrepair have been previously alleged:* Part of the deterioration and bad state of repair resulted from defendant's misuse of the _____ (*describe thing hired, e.g.,* scraper) for a purpose other than the purpose agreed on *or, specify consequences of misuse:* As a result of defendant's misuse of the _____ (*describe thing hired, e.g.,* scraper) it became broken, damaged, and otherwise injured and deteriorated, and specifically _____ (*describe nature of damage or deterioration, as alleged in Paragraph 10*)].

12. Plaintiff demanded of defendant [both orally and in writing] that defendant _____ [repair the _____ (*describe thing hired, e.g.,* scraper) and put it in as good state of repair and condition as it was when defendant received it, save for normal wear (that would have occurred had it been used only for the agreed purpose) *and/o*r return the _____ (*describe thing hired, e.g.,* scraper) to _____ (*specify agreed place of return*) (in as good a condition of repair as when received by defendant)]. Defendant failed and refused to comply with this/these demand(s). On _____ [*date*], plaintiff took possession of the _____ [*describe thing hired, e.g.,* scraper] at _____ [*specify location*] [and expended the sum of $_____ to transport it to _____ (*the place where defendant agreed to return it*). $_____ is a reasonable sum for transportation].

[*EITHER, if damage or deterioration was repaired and plaintiff lost use of thing during repairs, include Paragraphs 13 and 14*]

13. Because of defendant's failure and refusal to repair the _____ [*describe thing hired, e.g.,* scraper], or to cause it to be repaired, plaintiff was forced to have the repairs made, and to transport the _____ [*describe thing hired, e.g.,* scraper] to and from the place of repair. As a result, plaintiff necessarily incurred an indebtedness of $_____ for the repairs, and expended the further sum of $_____ for transportation, all to plaintiff's damage in the sum of $_____. $_____ is a reasonable sum for transportation.

14. As a further result of defendant's _____ [misuse of *and/or* failure to maintain and repair] the _____ [*describe thing hired, e.g.,* scraper], and the damage caused thereby and repairs made necessary thereby, plaintiff lost the use of the _____ [*describe thing hired, e.g.,* scraper] for a period of _____ (*number*] days while it was being repaired. The reasonable value of the use of the _____ [*describe thing hired, e.g.,* scraper] to plaintiff was and is the sum of $_____ per day. The period of _____ [*number*] days was a reasonable period within which to make the repairs. As a result of the loss of use plaintiff was further damaged in the sum of $_____.

[*OR, if damages or deterioration was not repaired*]

13. Had defendant _____ [used the _____ (*describe object hired, e.g.,* scraper) as promised *and/or* maintained the _____ (*describe object hired, e.g.,* scraper) in a good state of repair, as promised], the value of it would now be $_____. The value of the _____ [*describe object hired, e.g.,* scraper] has now been deteriorated and depreciated to the sum of $_____ [*specify amount substantially less due to misuse or nonrepair*].

[*CONTINUE*]

15. Defendant failed and refused to pay plaintiff the rental for the _____ [*describe thing hire, e.g.,* scraper] for the period of the hiring as heretofore alleged, in the sum of $_____, for the period commencing on _____ [*date*] and ending on _____ [*date*], the day on which plaintiff took possession thereof, and still fails and refuses to pay the rental, or any part thereof, although demand for payment has been duly made, to plaintiff's further damage in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages for nonrepair of the thing hired in the sum of $_____ [and interest on that sum at _____ (the legal rate *or* the rate of _____ percent per annum) from and after _____(*date on which amount of damages was capable of being made certain or date on which action was filed, whichever is appropriate*)];

2. For damages for misuse of the thing hired in the sum of $_____ [and interest on that sum at _____ (the legal rate *or* the rate of _____ percent per annum) from and after _____(*date on which amount of damages was capable of being made certain or date on which action was filed, whichever is appropriate*)];

3. For damages for nonpayment of the rent due on the thing hired in the sum of $_____ [and interest on that sum at _____ (the legal rate *or* the rate of _____ percent per annum) from and after _____ (*date on which amount of damages was capable of being made certain or date on which action was filed, whichever is appropriate*)];

4. For damages for nondelivery of the thing hired in the sum of $_____ [and interest on that sum at _____ (the legal rate *or* the rate of _____ percent per annum) from and after _____(*date on which*

amount of damages was capable of being made certain or date on which action was filed, whichever is appropriate)];

5. For costs of suit [,including reasonable attorney's fees as authorized by *Section 1717 of the Civil Code*,] herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 413.310.*]

[2] Use of Form

This complaint is for use by a letter in an action against a hirer for the recovery of damages for the breach of a contract of bailment occasioned by the letter's nonrepair of the thing hired [*Civ. Code § 1929*], and/or misuse of the thing hired [*Civ. Code § 1930*], and/or nonpayment of the rent due on the thing hired, and/or failure of the letter to return the thing hired to the place contemplated by the parties at the time of the hiring [*Civ. Code § 1958*].

The terms "hiring," "hirer," "letter," and "hired" in the foregoing form may be changed to "lease," "lessee," "lessor," and "leased."

[3] Allegations

This complaint alleges:

- The specific terms of the agreement of the parties, if any, with respect to repair [*see Civ. Code § 1929*], limitations on the use of the thing hired [*see Civ. Code § 1930*], and the place of return (Paragraph 8) [*see Civ. Code § 1958*].

- Plaintiff's delivery of the thing hired to defendant in good condition [*see Civ. Code § 1955*] and defendant's continuous use of it until its return at the end of the term or other earlier abandonment or termination (Paragraph 9) [*see Civ. Code §§ 1930-1931, 1033, 1935* (grounds for lessor's rescission or early termination)].

- Defendant's nonrepair (Paragraph 10).

- Defendant's misuse of the property (Paragraph 11).

- Plaintiff's demands for repair and return to the agreed location (Paragraph 12).

- Defendant's failure to comply with the demand for return to the agreed location and expenditures required to be incurred by plaintiff to have the property transported there (Paragraph 12).

- Defendant's refusal to comply with the demand for repairs (Paragraphs 12) [*see Pugh-Miller Drilling Co. v. Main Oil Co. (1929) 98 Cal. App. 297, 300, 276 P. 1043]* . Either (1) the cost of repairs made by plaintiff (first alternative paragraph 13) and the rental income lost during the repair period (Paragraph 14), or (2) the depreciation in value of the property due to the misuse or nonrepair (second alternative paragraph 13).

- The reasonable or agreed rental still owed by defendant to plaintiff (Paragraph 15).

If repairs included replacement parts, first alternative Paragraph 13 and Paragraph 14 should be modified accordingly [*see Awalt v. Mercer, Fraser Co. (1955) 130 Cal. App. 2d 853, 858-859, 279 P.2d 1001]* .

[4] State Statutes

Hirer is required to repair deteriorations occasioned by his or her want of ordinary care. *Civ. Code § 1929*

Hirer is liable for misuse of thing hired. *Civ. Code § 1930*

Lessee is required to return thing hired at end of lease. *Civ. Code § 1958*

[5] Decisions

When bailee fails to return chattel to agreed place, bailor as entitled to rent until it takes possession. *Rackliff v. Coronet Construction Co. (1958) 157 Cal. App. 2d 419, 423-424, 321 P.2d 50*

In every bailment, whether lucrative or not, bailor as entitled, and bailee as bound, to carry out purpose of bailment within terms expressly or impliedly agreed on by parties; bailee who departs from those terms as liable to bailor for any loss or damage in respect of thing bailed which occurs as result thereof, irrespective of any want of due care on his part, in absence of any ratification on part of bailor. *Sperisen v. Heynemann (1957) 149 Cal. App. 2d 228, 231, 308 P.2d 436*

Bailee for hire as required to use ordinary care for safety and preservation of thing hired; when hired chattel is damaged due to hirer's neglect and repair is not possible, bailor as entitled to recover cost of replacement. *Awalt v. Mercer, Fraser Co. (1955) 130 Cal. App. 2d 853, 858-859, 279 P.2d 1001*

Hirer as required to show that letter failed to make repairs after letter was given notice that repairs were necessary before he or she is able to recover amount expended therefor under *Civ. Code §§ 1955-1957*. *Pugh-Miller Drilling Co. v. Main Oil Co. (1929) 98 Cal. App. 297, 300, 276 P. 1043*

Measure of compensation to which plaintiff bailor is entitled, in absence of proof of negligence, as reasonable value of use of thing bailed in work contemplated by parties and to which it was in fact put by defendant bailee, taking into consideration its condition and capacity and character of such work. *McFayden v. Town of Calistoga (1925) 74 Cal. App. 378, 382, 240 P. 523*

[6] Text References

Witkin, Summary of California Law, vol. 13, *Personal Property*, §§ 159, 161, 162, 164-166, 189, 191 (10th ed. 2005)

[7] Cross References

For discussion and case relating to other type of bailments that may amplify the duties of care and measures of damage, see Ch. 93, *Bailments*

See also Comments and References to § 413.310.

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36-413 California Forms of Pleading and Practice--Annotated § 413.314

§ 413.314 Affirmative Defense--Leased Property Had No Rental Value and Was Unfit for Purpose for Which Leased [Civ. Code § 1955]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Leased Property Had No Rental Value and Was Unfit for Purpose for Which Leased [Civ. Code § 1955]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant admits, denies, and alleges:

1. Answering Paragraph(s) _____ [*number(s)*] of plaintiff's complaint, defendant admits that the _____ [*describe property leased*] referred to was leased on or about _____ [*date*], and alleges that the _____ [*describe property leased*] was not in a condition to perform the work for which it was leased, a condition which was unknown to defendant and could not be ascertained by a reasonable examination; immediately on learn ing of the condition of the _____ [*describe property leased*], defendant notified plaintiff of its unfitness for use.

2. Answering Paragraph(s) _____ [*number(s)*] of plaintiff's complaint, defendant denies that the rental value of the property leased by him/her is or was the sum of $_____ per month; and alleges that the _____ [*describe property leased*] had no rental value whatsoever.

[2] Use of Form

This affirmative defense is for use in an answer to an action brought by a lessor of personal property against a lessee for breach of the lease. The ground of the affirmative defense is that the consideration for the lease contract failed because the thing leased was unfit for the use intended and, therefore, had no rental value [*see Civ. Code § 1955* (*see § 413.34*)].

[3] State Statutes

Party seeking to avoid contract as having burden of proving failure of consideration. *Civ. Code § 1615*

Duties of lessor. *Civ. Code § 1955*

[4] Cross References

See also Comments and References to §§ 413.310 and 413.313.

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36-413 California Forms of Pleading and Practice--Annotated § 413.315

§ 413.315 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 1955]--By Lessee Against Lessor--Dangerous Chattel Leased

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 1955]--By Lessee Against Lessor--Dangerous Chattel Leased

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Negligence)
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of _____ (, authorized to transact, and transacting, intrastate business in California), with its principal place of business (in California) in _____ County, California [*or allege other capacity and residence*].

[2. *Fictitious name allegation, if appropriate. See § 413.310, Paragraph 3.*]

[3. *Agency allegation, if appropriate. See § 413.310, Paragraph 4.*]

4. On or about _____ [*date*], and for a long time prior thereto, defendant operated a business for profit in _____ [*city*], _____ County, California; in the operation of this business, defendant, among other things, let, rented, and leased to the general public, for hire, certain items of mechanical equipment, including _____ [*describe dangerous instrumentalities leased, e.g.,* rotary plows], hereinafter described.

5. A _____ [*describe device leased, e.g.,* rotary plow] is a mechanical device _____ [*describe parts and functions, e.g.,* with a gasoline driven motor; affixed to this device is a series of prongs to which are attached blades, the purpose of which is to dig into and plow the ground on which the device is being operated].

6. On or about _____ [*date*], in _____ [*city*], _____ County, California, plaintiff leased and received from defendant a _____ [*describe device, e.g.,* rotary plow], and at that time and place paid to defendant the amount of money demanded by him for the rental of the _____ [*describe device, e.g.,* rotary plow].

7. A _____ [*describe device, e.g.,* rotary plow] of the type supplied by defendant to plaintiff is a dangerous device when placed in the hands and control of persons unskilled in the proper management and control thereof, which fact defendant well knew and of which fact plaintiff was ignorant.

8. When plaintiff leased the _____ [*describe device, e.g.,* rotary plow] he/she was ignorant of the dangerous character of the device and presumed, and had a right to presume, that defendant would not permit him/her to get in harm's way, or be injured or killed, or that defendant would not do or fail to do anything likely to cause injury or death. Defendant negligently and carelessly leased the _____ [*describe device, e.g.,* rotary plow] to plaintiff without proper inquiry or investigation concerning plaintiff's competency or ability to safely operate the device, and without any warning to plaintiff that the device was a dangerous instrumentality when operated by a person ignorant of the proper management and control thereof.

9. While plaintiff was operating the device to the best of his/her skill and ability on or about _____ [*date*], and because of plaintiff's ignorance of the proper operation of the device and because of plaintiff's lack of skill and knowledge as to the proper management thereof, and because of the negligence and carelessness of defendant in failing to warn plaintiff of the dangerous qualities of the device, plaintiff was unable to control the device and as a result thereof it went out of control and inflicted on plaintiff the following injuries: _____ [*describe*].

10. As a proximate result of the negligence of defendant plaintiff was injured in his/her health, strength, and activity, sustaining injury to his or her body and shock and injury to his or her nervous system, all of which injuries have caused and continue to cause plaintiff great mental, physical, and nervous pain and suffering, all to his or her damage and detriment.

11. As a further proximate result of the negligence of defendant, plaintiff has incurred, and will continue to incur, medical and related expenses. The full amount of medical expenses is not known to plaintiff at this time, and plaintiff will amend this complaint to state the full amount when it becomes known, or on proof thereof.

12. At the time of the injuries, plaintiff was _____ [employed *or* employable] in his or her usual occupation [as a _____ (*specify*)]. As a further proximate result of the negligence of defendant, and by reason of the injuries suffered by him/her, plaintiff was prevented from attending to that occupation from _____ [*date*] through _____ [_____ (*date*) *or* the present], and thereby lost earnings. Plaintiff is informed and believes, and on that information and belief alleges, that he/she will continue to be prevented from attending to _____ [that occupation *or* any occupation] for a period in the future, and will thereby lose further earnings.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages;

2. For damages for past and future medical expenses;

3. For damages for past and future loss of earnings;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 413.310.*]

[2] Use of Form

This complaint is for use by a lessee against a lessor to recover damages for personal injuries caused by the lessor's negligence in leasing a dangerous chattel [*see Civ. Code §§ 1714(a), 1955*; *see also § 413.34[2]*].

[3] Allegations

The form alleges the following:

- Defendant's residence and capacity (Paragraph 1).
- That defendant is in the business of leasing this type of equipment, and has been for some time (Paragraph 4).
- The type of instrumentality leased (Paragraph 5).
- That plaintiff leased the device from plaintiff and paid the rent (Paragraph 6).
- That the item leased is dangerous in the hands of unskilled persons (Paragraph 7).
- That defendant knew of the danger (Paragraph 7).
- That plaintiff did not know of the danger (Paragraph 7).
- Plaintiff's reliance that defendant would warn of any dangers and defendant's failure to do so (Paragraph 8).
- That the leased property caused plaintiff injury because it was dangerous (Paragraph 9).
- Plaintiff's physical injuries (Paragraph 10).

- Plaintiff's medical expenses (Paragraph 11).
- Plaintiff's lost wages (Paragraph 12).

[4] Specifications of Damages

In an action brought to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages must be alleged [*Code Civ. Proc. § 425.10(a)(2)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see *Ch. 177, Damages, § 177.40* et seq., and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[5] Venue

A personal injury action based on negligence may be brought in the county where the injury occurs or where the defendants, or some of them, reside at the commencement of the action [*Code Civ. Proc. § 395(a)*].

[6] State Statutes

Duties of lessor. *Civ. Code § 1955*

[7] Decisions

Letter as not responsible for damage caused by the negligence or other wrongful acts of third persons who are not its agents or employees nor acting as independent contractors of its choice in carrying out work that letter had contracted to perform on bailed property. *Continental Mfg. Corp. v. Underwriters at Lloyds London (1960) 185 Cal. App. 2d 545, 550, 9 Cal. Rptr. 115*

Tortfeasor as liable notwithstanding existence of contract; basis of this liability as superior knowledge possessed by owner of dangerous character of leased chattel. *Monroe v. East Bay Rental Service (1952) 111 Cal. App. 2d 574, 576, 578, 245 P.2d 9* ; *Fisher v. Pennington (1931) 116 Cal. App. 248, 250-251, 2 P.2d 518*

[8] Text References

Witkin, Summary of California Law, vol. 13, *Personal Property*, §§ 187-190 (10th ed. 2005)

42 Cal. Jur. 3d Leases of Personal Property §§ 20-22

8 C.J.S., Bailments, §§ 41-45, 97

[9] Cross References

For discussion of damages recoverable in tort actions generally, see *Ch. 177, Damages, § 177.40* et seq.

For discussion and alternative forms of allegations of negligence and personal injuries, see Ch. 380, *Negligence*

For a discussion of strict liability in tort for defective products, see Ch. 460, *Products Liability*

See also Comments and References to §§ 413.310 and 413.316.

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36-413 California Forms of Pleading and Practice--Annotated § 413.316

§ 413.316 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 1955]--By Lessee Against Lessor--Defective Invalid Walker

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code §§ 1714(a), 1955]--By Lessee Against Lessor--Defective Invalid Walker

[*Caption. See § 413.315.*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 413.315, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 413.310, Paragraph 3.*]

[3. *Agency allegation, if appropriate. See § 413.310, Paragraph 4.*]

4. _____ [*Describe plaintiff's prior medical condition, e.g.,* Prior to the times herein mentioned plaintiff had undergone an operation for fusion of the head of the right femur and was confined to his/her home convalescing from the operation; because of the condition, plaintiff was unable to bear any weight on his/her right leg].

5. On _____ [*date*], defendant furnished to plaintiff an invalid walker in consideration of an agreed monthly charge. The walker was in an unsafe and dangerous condition, and the unsafe and dangerous condition of the walker was the proximate consequence of the carelessness and negligence of defendant, its agents, and employees. As a result and consequence of that carelessness and negligence, plaintiff, while exercising due care and caution, and while attempting to use the walker for the purpose and in the manner for which it was intended, was caused to and did fall on the floor.

6. As a proximate result of the neglect and carelessness on the part of defendant, and the fall, plaintiff suffered the

following injuries: _____ [*describe*]. By reason of the above plaintiff has suffered damages [in the sum of $_____].

7. Plaintiff is a _____ [*employment of plaintiff*] and was so employed at the time of the operation referred to and earning a salary of $_____ per _____ [*specify period, e.g.,* month] and, is capable of earning that sum as a _____ [*describe employment of plaintiff*]. As a result of the injuries referred to plaintiff's temporary disability will be extended for a period of at least _____ [*specify*] and he or she will be unable to engage in any gainful employment during this period of time. Plaintiff will be damaged on account of this disability in a sum that cannot be determined at this time, and plaintiff asks leave of court to insert the correct amount when ascertained.

8. By reason of these injuries, it was necessary for plaintiff to, and he or she did, employ physicians and surgeons to diagnose and treat the injuries for which plaintiff has incurred reasonable and necessary expense[of $_____], and it will be necessary for plaintiff to continue to employ physicians and surgeons to treat these injuries for a long time to come, to plaintiff's damage in a sum that cannot be determined at this time, and plaintiff asks leave of court to insert the correct amount when ascertained. By reason of these injuries, it was necessary for plaintiff to have x-rays taken, and to obtain medical and surgical supplies, and plaintiff thereby incurred reasonable and necessary expenses [of $_____] for the x-rays and medical and surgical supplies. By reason of these injuries it will be necessary for plaintiff to employ a nurse for a period of _____ [*specify*]; there will be a reasonable and necessary expense of employing the nurse; plaintiff will be damaged on account of the employment of the nurse in a sum that cannot be determined at this time, and plaintiff asks leave of court to insert the correct amount when ascertained.

[*Prayer. See § 413.315.*]

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 413.310.*]

[2] Use of Form

This complaint is for use by a lessee in an action against a lessor to recover damages for personal injuries caused by the lessor's negligence in renting a defective chattel. This form is appropriate if the defendant is not a commercial lessor. The doctrine of strict liability in tort applies to a commercial lessor or letter in the business of leasing who supplies a defective product [*Price v. Shell Oil Co. (1970) 2 Cal. 3d 245, 253-254, 85 Cal. Rptr. 178, 466 P.2d 722* ; *Fakhoury v. Magner (1972) 25 Cal. App. 3d 58, 63-64, 101 Cal. Rptr. 473]* , and has generally supplanted the older actions on warranty and negligence. For forms and discussion of strict products liability, see Ch. 460, *Products Liability* .

[3] Allegations

This form alleges:

- plaintiff's particular condition (Paragraph 4).
- That plaintiff leased the equipment from defendant (Paragraph 5).
- That the equipment was unsafe (Paragraph 5); (4) that the dangerous condition of the equipment was caused by defendant's negligence (Paragraph 5).

- That the equipment malfunctioned while plaintiff was using it in the manner and for the purpose for which it was intended (Paragraph 5).

- plaintiff's injury (Paragraph 6).

- Plaintiff's loss of earning capacity (Paragraph 7); and (8) plaintiff's medical treatment and expenses (Paragraph 8).

[4] California Points and Authorities

For memoranda of points and authorities related to products liability, see California Points and Authorities , Ch. 190, *Products Liability*

[5] State Statutes

Duties of lessor. *Civ. Code § 1955*

[6] Decisions

Failure of brakes to operate on newly purchased tractor as sufficient basis for inference that brakes were defective at time of delivery of vehicle and that reasonable inspection would have discovered defect. *McNeal v. Greenberg (1953) 40 Cal. 2d 740, 745, 255 P.2d 810*

Supplier of scaffold as liable for injuries resulting from defect therein when there is breach of duty to use ordinary care in supplying equipment. *Hyde v. Russell & Russell, Inc. (1959) 176 Cal. App. 2d 578, 582-583, 1 Cal. Rptr. 631*

[7] Cross References

For forms and discussion involving products liability, see Ch. 460, *Products Liability*

See also Comments and References to §§ 413.310, 413.315.

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36-413 California Forms of Pleading and Practice--Annotated § 413.317

§ 413.317 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] for Breach of Personal Property Lease--By Lessee (Hirer) Against Lessor (Letter)--Covenant of Quiet Enjoyment [Civ. Code §§ 1927, 1955]

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Personal Property Lease--By Lessee (Hirer) Against Lessor (Letter)--Covenant of Quiet Enjoyment [Civ. Code §§ 1927, 1955]

[*Caption. See § 413.310.*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 413.315, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 413.310, Paragraph 3.*]

[3. *Agency allegation, if appropriate. See § 413.310, Paragraph 4.*]

4. On _____ [*date*], at _____ [*city*], _____ County, California, plaintiff and defendant entered into _____ [an oral *or* a written] agreement by which plaintiff leased from defendant a _____ [*describe thing leased, e.g.,* tractor], for _____ [the period between _____ (*date*) and _____ (*date*) *or* a period of _____ [*specify, e.g.,* six months] for which plaintiff agreed to pay defendant _____ [a total rental of $_____ *or* the sum of $_____ (per _____ [*specify, e.g.,* month]) as rental *or* a reasonable rental]. [Attached hereto marked Exhibit "A" and made a part hereof is a copy of that agreement.]

5. By the terms of the agreement defendant undertook to secure to plaintiff the quiet possession of the _____ [*describe thing leased, e.g.,* tractor] during the term of the lease against all persons lawfully claiming the same.

[6. Plaintiff leased the _____ (*describe thing leased, e.g.,* tractor) from defendant to use it _____ (*describe purpose, e.g.,* in the performance of certain construction work plaintiff had contracted to do). Defendant knew that this was the purpose for which plaintiff leased the _____ (*describe thing leased, e.g.,* tractor)].

7. Pursuant to the agreement, on _____ [*date*], plaintiff took possession of the _____ [*describe thing leased, e.g.,* tractor], and endeavored to use it pursuant to the agreement.

8. Plaintiff was not able to use or possess the _____ [*describe thing leased, e.g.,* tractor], but on and after _____ [*date*], was prevented from doing so by _____ [*describe act interfering with or preventing quiet enjoyment of subject of lease, e.g.,* the seizure of the _____ (*describe thing leased, e.g.,* tractor) pursuant to a writ of execution against defendant, as judgment creditor].

9. As a result of defendant's failure to secure to plaintiff the quiet possession of the _____ [*describe thing leased, e.g.,* tractor] during the term of the lease, plaintiff _____ [*describe damages, e.g.,* had to lease another tractor at a cost of $_____].

[10. As a further result of defendant's failure to secure to plaintiff the quiet possession of the _____ (*describe thing leased, e.g.,* tractor), and the damage caused thereby and substitute lease made necessary thereby, plaintiff lost the use of the _____ (*describe thing leased, e.g.,* tractor) for a period of _____ (*number*) days while a replacement was being sought. The reasonable value of the use of the _____ (*describe thing leased, e.g.,* tractor) to plaintiff was and is the sum of $_____ per day. The period of _____ (*number*) days was a reasonable period within which to find and obtain possession of a replacement. As a result of the loss of use plaintiff was further damaged in the sum of $_____ during the period after plaintiff lost possession of the _____ (*describe thing leased, e.g.,* tractor) and before a replacement was obtained, representing net income lost on the contracts under which plaintiff was obligated to others.]

[*Prayer. See § 413.310.*]

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 413.310.*]

[2] Use of Form

This complaint is for use by a lessee or hirer in an action against a lessor or letter to recover damages for the breach of contract occasioned by the lessor's or letter's failure to perform its covenant of quiet enjoyment [*Civ. Code §§ 1927, 1955*].

[3] Allegations

This form alleges:

- The formation of the agreement (Paragraph 4).
- The covenant of quiet enjoyment (Paragraph 5) [*Civ. Code §§ 1927, 1955*].

- That plaintiff took possession of the property (Paragraph 7).

- That plaintiff was deprived of possession and/or use of the property in a manner that was a breach of the covenant of quiet enjoyment (Paragraph 8).

- Plaintiff's damages (Paragraphs 9 and 10). Paragraphs 6 and 10 are optional and may be used to allege any consequential damages [*see Civ. Code § 3300*].

[4] Caption

The caption in *see § 413.310* may be adapted for use in the foregoing form by changing the statutes cited beneath the title of the form to *Civ. Code §§ 1927, 1955, 3300*.

[5] State Statutes

Warranty of quiet possession. *Civ. Code § 1927*

Lessor's duty to secure quiet possession. *Civ. Code § 1955*

[6] Text References

Witkin, Summary of California Law, vol. 13, *Personal Property*, §§ 187, 188 (10th ed. 2005)

[7] Cross References

See also Comments and References to § 413.310.

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36-413 California Forms of Pleading and Practice--Annotated § 413.318

§ 413.318 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] for Breach of Personal Property Lease--By Lessee (Hirer) Against Lessor (Letter)--Recovery of Cost of Necessary Repairs [Civ. Code § 1957]--Property Restored to Operation

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] for Breach of Personal Property Lease--By Lessee (Hirer) Against Lessor (Letter)--Recovery of Cost of Necessary Repairs [Civ. Code § 1957]--Property Restored to Operation

[*Caption. See § 413.310.*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 413.315, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 413.310, Paragraph 3.*]

[3. *Agency allegation, if appropriate. See § 413.310, Paragraph 4.*]

4. On or about _____ [*date*], plaintiff leased from defendant a _____ [*describe personal property, e.g.,* backhoe] to be used in certain construction work being done by plaintiff.

5. Immediately after plaintiff took possession of the _____ [*describe personal property, e.g.,* backhoe], plaintiff discovered that it was defective and in a state of disrepair to the extent that it would not perform the work for which it was leased.

6. Plaintiff immediately advised defendant of the unfitness of the _____ [*describe personal property, e.g.,* backhoe] and demanded that it be repaired, but defendant failed and refused to do so.

7. Plaintiff undertook to and did make the repairs necessary to make the _____ [*describe personal property, e.g.,* backhoe] suitable for the purpose for which it was leased and in so doing expended the sum of $_____.

8. Thereafter plaintiff demanded reimbursement of that sum from defendant, but defendant has at all times refused to pay the sum, or any amount, to plaintiff.

9. Because of defendant's failure to pay for the cost of the repairs, or to repair the _____ [*describe personal property, e.g.,* backhoe], plaintiff has been damaged in the sum of $_____.

[10. *Consequential damages. See § 413.317, Paragraph 10.*]

[*Prayer. See § 413.310.*]

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 413.310.*]

[2] Use of Form

This complaint is for use by a lessee or hirer in an action against a lessor or letter for damages for breach of a personal property lease occasioned by defendant's failure to repair the chattel rented and refusal to reimburse plaintiff for the costs of necessary repairs [*Civ. Code § 1957*].

[3] Allegations

This complaint alleges:

- That plaintiff leased the chattel from defendant and the purpose for which plaintiff leased it (Paragraph 4).
- Plaintiff's discovery of the chattel's unfitness (Paragraph 5).
- That plaintiff notified defendant of the problem and demanded that defendant repair it (Paragraph 6) [*see Civ. Code § 1957*].
- Defendant's refusal or failure to make the repairs (Paragraph 6) [*see Civ. Code § 1957*].
- That plaintiff made the necessary repairs (Paragraph 7).
- That plaintiff demanded reimbursement from defendant (Paragraph 8) [*see Civ. Code § 1957*].
- Defendant's failure or refusal to reimburse plaintiff (Paragraph 8).
- Plaintiff's damages (Paragraphs 9 and 10).

[4] Caption

The caption in *see § 413.310* may be adapted for use in this form by changing the statutes cited beneath the title of the form to *Civ. Code §§ 1957, 3300*.

[5] State Statutes

Lessor's duty of fitness. *Civ. Code § 1955*

Reimbursement of lessee advancing amount necessary to cover lessor's default. *Civ. Code § 1957*

[6] Decisions

Sole remedy for breach of warranty provided for in *Civ. Code § 1955* (duties of lessor), in cases involving unfitness of chattel to perform work or purpose for which leased, as that contained in *Civ. Code § 1957*. *Holmes Packaging Mach. Corp. v. Bingham (1967) 252 Cal. App. 2d 862, 869, 60 Cal. Rptr. 769*

Hirer who repairs chattel without first giving letter chance to do so and who pays rent for period during which it lost use of thing hired while repairs were being made as waiving any claim to compensation for "down time" during repairs. *Rackliff v. Coronet Construction Co. (1958) 157 Cal. App. 2d 419, 425-426, 321 P.2d 50*

[7] Cross References

See also Comments and References to §§ 413.310, 413.313.

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A. Bailments For Hire

36-413 California Forms of Pleading and Practice--Annotated § 413.319

§ 413.319 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] for Breach of Personal Property Lease--By Lessee (Hirer) Against Lessor (Letter)--Recovery of Cost of Necessary Repairs [Civ. Code § 1957]--Property Not Restored to Operation

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Personal Property Lease--By Lessee (Hirer) Against Lessor (Letter)--Recovery of Cost of Necessary Repairs [Civ. Code § 1957]--Property Not Restored to Operation

[*Caption. See § 413.310.*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 413.315, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 413.310, Paragraph 3.*]

[3. *Agency allegation, if appropriate. See § 413.310, Paragraph 4.*]

4. On or about _____ [*date*], at _____ [*city*], _____ County, California, plaintiff leased from defendant a _____ [*describe personal property leased, e.g.,* crane] for _____ [*describe purpose of hiring, e.g.,* moving, lifting, and loading material at _____ (*name*) shipyard].

5. Plaintiff on or about that date caused the _____ [*describe personal property leased, e.g.,* crane] to be removed from defendant's place of business at _____ [*city*], _____ County, California, to the _____ [*e.g.,* shipyard] for use.

6. Immediately after moving the _____ [*describe personal property leased, e.g.,* crane] to the site of

the operation, plaintiff [through his agents and employees], endeavored to put it in operation. The _____ [*describe personal property leased, e.g.,* crane] at all times failed to operate properly. After giving defendant notice and opportunity to repair, and on request of defendant, plaintiff made repeated efforts to repair _____ [*describe personal property leased, e.g.,* crane] in order to make it operate properly.

7. Plaintiff expended the approximate sum of $_____ in time and materials in his or her attempt to put the _____ [*describe personal property leased, e.g.,* crane] in operation. Despite plaintiff's efforts, the _____ [*describe personal property leased, e.g.,* crane] was in such a condition of disrepair that it would still not operate properly, so that it had to be removed from the job site at which it was rented to perform. [This removal was made on orders of the contractor supervising the work.]

8. Plaintiff has been damaged in the sum of $_____ for the time and materials expended as aforesaid.

[*Prayer. See § 413.310.*]

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 413.310.*]

[2] Use of Form

This complaint is for use by a lessee/hirer in an action against a lessor/letter for damages for the breach of a personal property lease occasioned by defendant's failure to maintain the chattel in a proper state of repair, and when plaintiff has expended sums of money in unsuccessfully attempting to repair the chattel [*see Civ. Code § 1957*].

[3] Cross References

For related forms, *see §§ 413.310, 413.313,* and *413.318*.

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36-413 California Forms of Pleading and Practice--Annotated § 413.320

§ 413.320 Affirmative Defense--Repairs Necessitated by Misuse of Bailed Chattel [Civ. Code § 1930]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Repairs Necessitated by Misuse of Bailed Chattel [Civ. Code § 1930]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

When plaintiff removed the _____ [*describe object leased, e.g.,* crane] from defendant's place of business it operated properly and was in a condition of good repair; and if it later failed to operate properly or later came into a state of disrepair, this failure to operate properly and state of disrepair were wholly caused by the careless, negligent, and improper use and treat ment of the _____ [*describe object leased, e.g.,* crane] by the plaintiff.

[2] Use of Form

This affirmative defense is for use in an answer to a complaint by a lessee/hirer against a lessor/letter for recovery of the cost of repairs. The lessor alleges in the answer that the repairs were necessitated by the lessee's misuse of the bailed chattel [*see Civ. Code § 1930*].

[3] Cross References

For related forms, *see §§ 413.310, 413.313, 413.318 -413.319*.

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36-413 California Forms of Pleading and Practice--Annotated § 413.321

§ 413.321 Affirmative Defense--Repairs Incidental to Use of Leased Chattel [Civ. Code § 1956]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Repairs Incidental to Use of Leased Chattel [Civ. Code § 1956]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

If any work was done and time and materials used, or any of them furnished in connection with the use of the _____ [*describe property leased, e.g.,* crane], they were of a minor nature, and only as incidental maintenance and service that is reasonably consequent in the normal use of that equipment. [Plaintiff agreed to perform all incidental maintenance and servicing of the _____ (*describe property leased, e.g.,* crane) at his/her own cost and expense.]

[2] Use of Form

This affirmative defense is for use in an answer to a complaint by a lessee against a lessor for recovery of the cost of repairs. The lessor alleges in the answer that the repairs were merely incidental to the use of the bailed chattel, and thus the responsibility of the lessee [*see Civ. Code § 1956*].

[3] State Statutes

Lessee's liability for ordinary expense in connection with use of bailed property. *Civ. Code § 1956*

[4] Cross References

For related forms, *see §§ 413.310, 413.313, 413.318 -413.319.*

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[Reserved]

§§ 413.322[Reserved]

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B. Personal Property Leases Under The Commercial Code

36-413 California Forms of Pleading and Practice--Annotated § 413.340

§ 413.340 Complaint for Recovery of Rent and of Security Paid [Com. Code § 10508(a)(2)] and for Damages [Com. Code §§ 10508(a)(3), 10518-10520]--By Lessee Against Lessor--After Lessee's Rightful Rejection of Defective Goods [Com. Code §§ 10509-10514]

[1] FORM Complaint for Recovery of Rent and of Security Paid [Com. Code § 10508(a)(2)] and for Damages [Com. Code §§ 10508(a)(3), 10518-10520]--By Lessee Against Lessor--After Lessee's Rightful Rejection of Defective Goods [Com. Code §§ 10509-10514]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
[doing business under the fictitious name of	)	
_____ (*name*),]	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	[Amount demanded _____
_____ [*name*],	)	(exceeds *or* does not exceed) $10,000]
[a corporation,]	)	[LIMITED CIVIL CASE]
[and DOES I through _____,]	)	
Defendant(s).	)	
	)	

Plaintiff alleges:

[1. Plaintiff is, and at all times herein mentioned was, an individual residing in _____ County, California and therein doing business doing under the fictitious name of _____ (*name*), and, with

respect to that name, has filed the statement and published the notice as required by *Sections 17910 through 17919 of the Business and Professions Code* (*or allege other capacity and residence of plaintiff as appropriate*).]

[2. At all times herein mentioned, defendant _____ (*name*) is, and was, a corporation organized and existing under the laws of the state of _____(, authorized to transact, and transacting, intrastate business in California), with its principal place of business (in California) in _____ County (*or allege other capacity and residence of defendant as appropriate*).]

[3. Plaintiff is ignorant of the true names and capacities of defendant sued herein as DOES I through _____, and therefore sues these defendants by those fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of such fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by the acts or omissions of each of them.)]

[4. At all times herein mentioned, defendants DOES I through _____ were the agents, servants, and employees of their codefendants, and in doing the things hereinafter alleged were acting in the scope of their authority as agents, servants, and employees, and with the permission and consent of their codefendants.]

[5. Plaintiff is a merchant engaged in the _____ (*describe type of goods that are subject of lease and plaintiff's status in dealing with them as buyer, seller, lessor, or lessee, e.g.,* retail sale and lease of computer equipment).]

[6. Defendant is a merchant engaged in _____ (*specify type of business and type of good, e.g.,* the development, manufacture, sale, and lease of computer hardware and software for business, governmental, and personal applications).]

7. On _____ [*date*], plaintiff and defendant entered into a written agreement for the lease of _____ [*specify type of goods, e.g.,* one mainframe and 23 desktop computers, and software] for an initial lease term of _____ [*specify time period, e.g.,* three years], commencing on _____ [*date*]. A copy of the lease agreement is attached as Exhibit "A" and made a part of this complaint. That lease agreement required _____ [*describe method of shipment or delivery and any special provision in the contract specifying what constitutes acceptance, e.g.,* defendant to deliver and install the computers and the software at plaintiff's place of business and to make one of its representatives available for three business days after delivery for testing and instructional purposes. Delivery under the contract was not to occur until the completion of successful installation and testing of the equipment and software]. The only performance required of plaintiff under the lease agreement prior to _____ [*state triggering event, e.g.,* completion of successful installation, testing, and instruction] was _____ [*describe, e.g.,* the payment of the sum of $_____ to defendant as security and for the first month's rent].

[*If lease involved is a consumer lease, ADD*]

8. Plaintiff entered into the lease agreement with defendant to use the _____ [*specify type of goods, e.g.,* security and alarm system] primarily for personal, family, or household purposes.

[*CONTINUE*]

9. Plaintiff performed all obligations that he/she/it was obligated to perform under the lease agreement [prior to

_____ (*relevant time, usually time lessee discovered lessor's default, e.g.,* discovery of the defects in the goods)] in that on _____ [*date*], plaintiff _____ [*allege facts showing plaintiff's performance, e.g.,* paid defendant the sum of $_____ as security and for the first month's rent].

10. On or about _____ [*date*], defendant _____ [*allege facts showing delivery or nondelivery and describe nonconformity, e.g.,* delivered all the equipment and software to plaintiff's business premises, and installed it, but on testing, the equipment would not perform many of the functions it was required by the lease agreement to be capable of performing. Without the ability to perform those functions, the equipment could not be used by plaintiff for the purposes for which it was leased].

11. On or about _____ [*date*], plaintiff notified defendant _____ [*show means of notification, e.g.,* by phone, and then by confirming letter dated _____ (*date*), a copy of which is attached hereto marked Exhibit "B" and made a part hereof,] of the defects described in Paragraph 10, specifically that _____ [*describe defects with particularity required by Com. Code § 10514, e.g.,* the computers would not perform any of the bookkeeping and accounting functions; they could not be used to compose documents of more than 20 pages in length; and significant document damage occurred without explanation].

12. Defendant _____ [*state whether or not defendant made any attempts to cure; describe any attempts by lessor to cure and extent of their failure, e.g.,* acknowledged the defects previously alleged, but after several attempts over a two-week period commencing one week after the delivery date specified in the lease agreement, failed to cure them within a reasonable time].

13. By _____ [*show means of notification, e.g.,* letter dated _____ (*date*), a copy of which is attached hereto marked Exhibit "C" and made a part hereof], plaintiff notified defendant that plaintiff was invoking his/her/its right to reject the goods described in Paragraph 7 on the basis of the defects described in Paragraph 10 and defendant's failure to cure those defects or deliver substitute goods within a reasonable time.

[14. Plaintiff _____ (*describe a merchant plaintiff's compliance with duties regarding rightfully rejected goods required by Com. Code § 10511(a) , e.g.,* received no instructions from defendant or any representative or agent of defendant with respect to the rejected goods in plaintiff's possession. Plaintiff had no duty to attempt in good faith to sell, lease, or otherwise dispose of those goods because they are not perishable and do not threaten to decline in value speedily).]

15. Plaintiff _____ [*describe what plaintiff did with the goods and any proceeds of their disposition, e.g.,* stored the equipment for three weeks awaiting instructions from defendant. When no instruction were forthcoming, plaintiff disposed of the goods through a broker in goods of that kind. Plaintiff has retained the net proceeds on disposition as partial satisfaction its security interest].

[*EITHER, if plaintiff covered by lease*]

16. On _____ [*date*], [*if plaintiff claims cover lease is substantially similar to original lease, add:* in good faith and in a commercially reasonable manner,] plaintiff entered into a new lease agreement with a third party for _____ [*describe brand name, model number, capacity, weight, or other characteristics to be compared to determine substantial similarity or commercially reasonable substitute. If lease of same goods was not possible, continue with explanation, e.g.,* 23 IBM desktop computers, model 1200, two IBM 6300 mainframe computers, and accompanying software(. At the time of defendant's default, the computers that were the subject of the lease between plaintiff and defendant were the most advanced and "user friendly" models on the market. The IBM models were the most nearly comparable capacity)]. The new lease is for a term _____ [of _____ (*specify, e.g.,* three years) *or* equal to the term of the lease between plaintiff and defendant] [,

and contains _____ (the same options to renew *or specify number and term, e.g,* options to renew for a total of three more years)]. [The new lease contains an option to purchase.] The new lease commenced on _____ [*date*] and provides for rent of $_____ per _____ [*specify interval, e.g.,* month].

[*OR, if plaintiff covered by purchase*]

16. On _____ [*date*], plaintiff entered into an agreement with a third party to purchase _____ [*describe type and quantity of goods subject to purchased, e.g.,* a used mainframe computer and software] as [partial] cover for the goods described in Paragraph 7.

[*OR, if plaintiff has not covered*]

16. Plaintiff has not obtained substitute goods by lease or purchase or contract to purchase or otherwise.

[*CONTINUE*]

17. As a direct and proximate result of defendant's breach of the lease, plaintiff has suffered damages in the amount of $_____. _____ [That amount reflects expenses saved as a consequence of the default *or* Defendant's breach of the lease did not result in any saving of expenses to plaintiff].

[18. As a further direct result of defendant's breach of the lease, plaintiff was caused to incur the following commercially reasonable charges, expenses, and commissions (in connection with effecting cover and) incident to the default: _____ (*list, e.g.,*

Storage for 21 days	$_____
Transportation for substitute goods	$_____
Disposition commission	$_____
Total	$_____

_)]

[19. As a further direct result of defendant's breach of the lease, plaintiff suffered consequential loss and damage in the sum of $_____, representing _____ (*describe, e.g.,* fees paid to outside contractors, until substitute goods were delivered, for the work that would have been done byplaintiff's employees if the leased goods had not been defective). Defendant knew at the time the lease agreement was executed that plaintiff _____ (*specify, e.g.,* would have to make alternative arrangements to have these functions performed (until plaintiff obtained cover) if defendant did not deliver conforming goods by _____ (*date*)), and these expenditures could not reasonably be prevented.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For actual damages in the sum of $_____;

2. For return of rent and security paid to defendant in the sum of $_____ [less $_____ realized on disposition of the goods];

[3. For incidental damages in the sum of $_____;]

[4. For consequential damages in the sum of $_____;]

5. For interest at the _____ [rate of _____ percent per annum *or* legal rate] on the sum of $_____ from and after _____ [*date on which amount of damages was capable of being made certain or date on which action was filed, whichever is appropriate*];

6. For costs of suit herein incurred [including reasonable attorney's fees as authorized by *Section 1717 of the Civil Code*]; and

7. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 413.310.*]

[2] Use of Form

This form is a complaint for damages and return of rent and security paid is for use by a lessee who has rightfully rejected nonconforming goods [*Com. Code §§ 10508, 10509-10514, 10518-10520*]. This complaint is only applicable if the lessee had not accepted the goods when he or she discovered their defects [*see Com. Code § 10515* (acceptance occurs after lessee has had reasonable opportunity to inspect goods)]. Acceptance of goods by the lessee precludes resort to the remedy of rejection [*Com. Code § 10516(b)*]. For discussion of lessee's remedies with regard to accepted goods, see *§ 413.226*; see also *§ 413.342*.

[3] Allegations

This complaint alleges (1) plaintiff's capacity to sue (Paragraph 1). This allegation is not necessary if plaintiff is a natural person who is not using a fictitious business name; but if plaintiff is a legal entity or is doing business under a fictitious name, failure to allege capacity to sue or compliance with *Bus. & Prof. Code § 17910 et seq.* is grounds for demurrer to the complaint [*see Code Civ. Proc. § 430.10(b)*; *Rivers v. Beadle (1960)183 Cal. App. 2d 691, 700-701, 7 Cal. Rptr. 170* (fictitious name)]. Similarly, the allegation of (2) defendant's capacity and residence (Paragraph 2) may not be necessary if defendant is a natural person and defendant's residence or place of business is not used as the basis for venue [*see Code Civ. Proc §§ 395(a), 395.5*; *see also § 413.310*].

Also included are allegations regarding fictitious defendants and their agency relationship with the named defendant (Paragraphs 3, 4).

Paragraphs 5 and 6 are for use only if plaintiff or defendant, respectively, is a merchant with respect to goods of the kind subject to the lease [*see Com. Code § 10103(a)(20)*]. A lessee's status as a merchant may derive from its dealing in goods of the kind subject to the lease as lessor, lessee, seller, or buyer [U.C.C. Comment to *Com. Code § 10103(a)(20)*]. A merchant lessee has specific duties with respect to rejected goods [*Com. Code §§ 10511(a), 10514(a)(2)*; *see* discussions in *§ 413.224[2]* and *[4]*]. The lessor's status as merchant is mainly germane in the contexts of firm offers [

see Com. Code § 10205,; *see § 413.71*; *see also § 413.346*] and consumer leases.

If counsel uses optional Paragraph 8 to allege that the lease involved is a consumer lease, Paragraph 6 must also be used [*see Com. Code § 10103(a)(5)* (defining consumer lease as one from lessor regularly engaged in business of leasing or selling)]. A party who is a merchant is also charged with the amount of knowledge or skill particular to the practices or goods involved [*Com. Code §§ 2104(1), 10103(c)* (applicable definition of "merchant")].

This form then alleges:

- The execution of a written lease agreement and gives details pertinent to the goods involved and to any relevant provisions for delivery and acceptance (Paragraph 7) [*see Com. Code § 10201(a)(1)* (all consumer leases and other leases under which payments, excluding payments for options to renew or buy, total $1,000 or more must be in writing)].

- Plaintiff's performance and payment of rent and security (Paragraph 9) [*see Com. Code § 10508(a)(2)*].

- Delivery of nonconforming goods and discovery of the defects (Paragraph 10) [*Com. Code § 10509(a)*; *see Com. Code § 10510* (additional requirements for rightful rejection of nonconforming delivery under installment lease)].

- Plaintiff's seasonable notification to defendant of the existence of the defects, describing those defects in detail (Paragraph 11) [*see Com. Code § 10514*].

- Whether defendant made any attempt to cure the defects, and if so, the extent to which those attempts proved unsuccessful within a reasonable period of time (Paragraph 12) [*see Com. Code §§ 10510, 10513*].

- Plaintiff's seasonable notification to defendant of its rejection of the nonconforming goods (Paragraph 13) [*see Com. Code §§ 10509, 10510*].

Paragraph 14, alleging compliance with instructions or disposal of perishable goods, will only be necessary if plaintiff is a merchant in goods of the kinds subject to the lease, but it must be modified if the goods involved are perishable [*see Com. Code § 10511(a)*]. Paragraph 15 describes what plaintiff did with the rejected goods and any proceeds from their disposition [*see Com. Code §§ 10508(e), 10511(b), (c), 10512, 10527(e)*].

Alternative Paragraphs 16 allege whether or not plaintiff arranged for substitute goods, and if so, what those arrangements were. The decision to cover is a commercial judgment, not a statutory mandate [*see Com. Code § 10503(b)* (remedies optional unless expressly stated otherwise); *see also Com. Code § 10518(a)*, Official UCC Comment]. Whether a cover lease is substantially similar is ultimately a question of fact [*see* U.C.C. Comment to *Com. Code § 10518(b)* (discussed in *§ 413.340[6]*)].

Paragraph 17 alleges plaintiff's actual damages. If plaintiff covered by a qualifying substantially similar lease, actual damages will be the present value, as of the date of commencement of the new lease, of the rent under the new lease agreement applicable to that period of the new lease term that is comparable to the then-remaining term of the original lease agreement minus the present value as of the same date of the total rent for the then remaining term of the original lease [*Com. Code § 10518(b)*]. In all other situations, or if plaintiff elects that measure, actual damages will be the present value, as of the date of default, of the difference between the then market rent and the original rent, computed for the remaining term of the original lease. Market rent is determined as of the place for tender, or in the case of rejection after arrival or revocation of acceptance, as of the place of arrival [*see Com. Code §§ 10518(c)* (election),

10519(a), (b) (formula)]. For purposes of calculating damages pursuant to *Com. Code § 10519(a)*, the date of default must be distinguished from the date of an event of default. An event of default under a lease agreement becomes a default only after the expiration of any relevant time period and compliance with any notice requirements imposed by Division 10 or the lease agreement [*Com. Code § 10519(a)*, Official UCC Comment]. Similarly, it must be determined whether, as a matter of fact or law, the event of default was waived, cured, or suspended [*Com. Code § 10519(a)*, Official UCC Comment]. Because the determination whether a cover lease is substantially similar is a question of fact [*see Com. Code § 10518(b)*, Official UCC Comment (discussed in *§ 413.340[6]*)], if plaintiff covered by lease and there is some question whether it will be held substantially similar or not, the amount of actual damages alleged should be based on the measure that will result in the greater recovery.

Paragraphs 18 and 19 allege plaintiff's incidental and consequential damages, respectively [*see Com. Code § 10520*]. Paragraphs 17-19 may be inappropriate in a particular case if the lease agreement involved has a liquidated damage provision or limits consequential damages [*see Com. Code §§ 10503(c), 10504* (*see §§ 413.193* and *413.194*)].

If the claim is payable in a foreign currency, or calculable by conversion to or from a foreign currency, additional allegations should be added setting forth that fact. Otherwise, the claim is made in United States dollars [*Code Civ. Proc. § 676.6(a)*; for discussion of and a form for a judgment applicable to the Uniform Foreign-Money Claims Act (*Code Civ. Proc. § 676 et seq.*), *see* Ch. 177, *Damages* , and Ch. 318, *Judgments*].

[4] "Discovery" and "Notify" Defined

The general definitions and principles of construction and interpretation in Division 1 (*Com. Code § 1101 et seq.*) apply throughout Division 10 [*Com. Code § 10103(d)*].

"Discover" or "learn" or a word or phrase of similar import refers to knowledge rather than to reason to know. A person "knows" or has "knowledge" of a fact when he or she has actual knowledge of it [*Com. Code § 1202(b), (c)*]. A person has "notice" of a fact when any of the following occurs [*Com. Code § 1202(a)*]:

- He or she has actual knowledge of it;
- He or she has received a notice or notification of it; or
- From all the facts and circumstances known to him or her at the time in question, he or she has reason to know that it exists.

A person "notifies" or "gives" a notice or notification to another by taking such steps as may be reasonably required to inform the other in ordinary course whether or not the other actually comes to know of it [*Com. Code § 1202(d)*]. A person "receives" a notice or notification either when (a) it comes to his or her attention, or when (b) it is duly delivered at the place of business through which the contract was made or at any other place held out by him or her as the place for receipt of such communications [*Com. Code § 1202(e)*; *see also Com. Code § 1202(f)* (receipt of notice by person within organization who is conducting particular transaction)].

[5] Limitations on Choice of Venue in Consumer Lease

If a consumer lease is involved, a judicial forum chosen by the parties to that lease is not enforceable unless it is in a county in which (1) the lessee in factsigned the lease, (2) the lessee resides at the commencement of the action or resided at the time the lease contract became enforceable,or (3) the goods are permanently stored [*Com. Code § 10106(b)*; *see also § 413.310* for discussion of other venue requirements of consumer protection statutes].

[6] Substantially Similar Lease

The term "substantially similar lease" is not defined in Division 10. Whether or not a lease is substantially similar must be determined on a case by case basis from the totality of the circumstances. Factors for comparison include (1) the term of the new lease; (2) the presence or absence of options to purchase or renew; (3) the lessor's representations, warranties, and covenants to the lessee, as well as those provided by the lessee to the lessor; and (4) the services, if any, to be provided by the lessor or by the lessee. All these factors allocate cost and risk between the lessor and the lessee and thus affect the amount of rent to be paid [U.C.C. Comment to *Com. Code §§ 10518(b), 10527(b)*]. In the case of a lessee seeking cover, the similarity of the goods must also be considered. If the same goods are not available for lease in the market place, for instance because lessor's equipment was the most modern of its type at the time of default, a new lease of a commercially reasonable substitute could still qualify as substantially similar [U.C.C. Comment to *Com. Code § 10518(b)*].

The goods and each element of the agreement are not to be compared separately. Rather, after examining the similarity of the goods and the agreement, and taking the factors as a whole, the finding of whether a lease is substantially similar is to be made, not with scientific precision, but as a function of economics and a sense of commercial judgment [U.C.C. Comment to *Com. Code §§ 10518(b), 10527(b)*].

[7] Statute of Limitations

An action for default under a lease contract, including breach of warranty or indemnity, must be commenced within four years after the cause of action accrued [*Com. Code § 10506(a)*]. In a lease contract that is not a consumer lease, by the original lease contract the parties may reduce the period of limitation to not less than one year [*Com. Code § 10506(a)*]. A cause of action for default accrues when the act or omission on which the default or breach of warranty is based is or should have been discovered by the aggrieved party, or when the default occurs, whichever is later [*Com. Code § 10506(b)*].

Com. Code § 10506 does not alter the law on tolling of the statute of limitations, nor does it apply to causes of action that have accrued before January 1, 1990, the operative date of Division 10 [*Com. Code § 10506(d)*; Stats. 1988, ch. 1368, § 18; *see* Stats. 1988, ch. 1359, § 11 (operative date)].

[8] State Statutes

Requirements for discharge, in whole or in part, of claim or right arising out of an alleged default without consideration. *Com. Code § 10107*

Determining whether default exists. *Com. Code § 10501(a)*

Lease contract as permitted to vary remedies available under Division 10. *Com. Code §§ 10501(b), 10503(a)*

Various remedies available. *Com. Code §§ 10501(c), 10503(d), 10505(d)*

Remedies as cumulative and optional. *Com. Code §§ 10501(d), 10503(b)*

Remedies as governed by agreement and Division 10. *Com. Code § 10503(a)*

Permissible limitations on damages. *Com. Code § 10503(c)*

Liquidated damages. *Com. Code § 10504(a), (b)*

Lessee's right of reimbursement for justified nondelivery. *Com. Code § 10504(c), (d)*

Right of parties on cancellation, termination, or rescission. *Com. Code § 10505*

Statute of limitations. *Com. Code § 10506*

Market rent. *Com. Code § 10507*

Lessee's remedies for failure to deliver conforming goods or repudiation. *Com. Code § 10508(a), (b), (e), (f)*

Lessee's remedies for breach of warranty. *Com. Code §§ 10508(d), 10519(d)*

Lessee's security interest in rejected goods or goods with respect to which acceptance has been revoked. *Com. Code § 10508(e)*

Requirements for lessee's rejection; lessee's duties with respect to rejected goods. *Com. Code §§ 10509-10512, 10514*

Lessor's right to cure. *Com. Code § 10513*

Lessee as required to pay for goods accepted in accordance with lease contract with due allowance for goods rightfully rejected or not delivered. *Com. Code § 10516(a)*

Acceptance of goods as precludes their rejection. *Com. Code § 10516(b)*

Cover. *Com. Code § 10518*

Lessee's measure of damages; incidental and consequential damages. *Com. Code §§ 10519, 10520*

[9] Cross References

For discussion and forms relating to the Division 2 provisions from which the Division 10 provisions were mainly derived, see Ch. 500, *Sales: Sales Under the Commercial Code* .

See also Comments and References to §§ 413.310 and 413.341.

California Forms of Pleading and Practice--Annotated

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 413 PERSONAL PROPERTY LEASES
PART IV. FORMS
B. Personal Property Leases Under The Commercial Code

36-413 California Forms of Pleading and Practice--Annotated § 413.341

§ 413.341 Complaint for Recovery of Rent and of Security Paid [Com. Code § 10508(a)(2)] and for Damages [Com. Code §§ 10508(a)(3), 10518-10520]--By Lessee Against Lessor--After Lessor's Repudiation [Com. Code § 10402]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Recovery of Rent and of Security Paid [Com. Code § 10508(a)(2)] and for Damages [Com. Code §§ 10508(a)(3), 10518-10520]--By Lessee Against Lessor--After Lessor's Repudiation [Com. Code § 10402]

[*Caption. See § 413.340.*]

Plaintiff alleges:

[1. *Capacity and residence of plaintiff, if necessary. See § 413.340, Paragraph 1.*]

[2. *Capacity and residence of defendant, if necessary. See § 413.340, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 413.340, Paragraph 3.*]

[4. *Agency allegation, if appropriate. See § 413.340, Paragraph 4.*]

[5. *Plaintiff's status as merchant with respect to kind of goods that are subject of lease. See § 413.340, Paragraph 5.*]

[6. *Defendant's status as merchant with respect to kind of goods that are subject of lease. See § 413.340, Paragraph 6.*]

7. [*Formation of lease and relevant obligations of each party. See § 413.340, Paragraph 7*].

8. [*Plaintiff's performance. See § 413.340, Paragraph 8*].

9. On or about _____ [*date*], defendant _____ [*allege facts showing defendant's repudiation, e.g.,* informed plaintiff by telephone that it would not deliver the goods in accordance with the lease].

[10. On or about _____ (*date*), plaintiff _____ (*state means of communication, e.g.,* spoke with defendant's _____ (*title and name of person*) by phone, and then sent the letter dated _____ (*date*), a copy of which is attached hereto marked Exhibit "B" and made a part hereof,) _____ (urging defendant to retract its repudiation *and/or* notifying defendant that plaintiff would await defendant's performance).]

[11. On or about _____ (*date*), by _____ (*show means of notification, e.g.,* letter dated _____ (*date*), a copy of which is attached hereto marked Exhibit "B" and made a part hereof,) plaintiff demanded that defendant supply adequate assurances that defendant would perform its obligations under the lease in a timely manner. (Defendant acknowledged receipt of Exhibit "B" on _____ (*date*). A copy of the signed acknowledgment is attached hereto marked Exhibit "C" and made a part hereof.)]

[12. On or about _____ (*date*), (by the letter dated _____ (*date*), a copy of which is attached hereto marked Exhibit "D" and made a part hereof,) plaintiff notified defendant that plaintiff was cancelling the lease because of defendant's repudiation (and failure to provide adequate assurances).]

13. [*Other actions taken by plaintiff to cover or not. See § 413.340, alternative Paragraphs 16*].

14. [*Damages calculated under Com. Code § 10518(b) or Com. Code § 10519. See § 413.340, Paragraph 17*].

[15. *Incidental damages. See § 413.340, Paragraph 18.*]

[16. *Consequential damages. See § 413.340, Paragraph 19.*]

[*Prayer. See § 413.340.*]

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 413.310.*]

[2] Use of Form

This form is a complaint for damages and recovery of rent and security paid is for use by a lessee after the lessor has repudiated the lease agreement [*Com. Code §§ 10402, 10508, 10518-10520*]. The measure of damage (Paragraph 14) will vary depending on whether plaintiff covered by substantially similar lease, or did not cover or covered other than by a substantially similar lease, or just choose the "market" measure of damages (Paragraph 13) [*Com. Code §§ 10518-10519*].

This form is not applicable if the lease involved is a consumer lease, because the rights and remedies of the parties to a consumer lease in connection with a repudiation of that lease are determined under other laws, and *Com. Code § 10402* shall not affect the applicability or interpretation of those laws [*Com. Code § 10402(b)*; *see § 413.51[3]*].

[3] Caption

The caption from *see § 413.340* may be used in this complaint, except that the statutes cited in the brackets beneath the

title of the form must be changed to *Com. Code §§ 10508, 10518-10520, 10402*.

[4] Allegations

Paragraph 9 alleges defendant lessor's repudiation of the lease [*see Com. Code § 10402*]. This gives the plaintiff lessee several options, including (1) waiting for retraction of the repudiation and the lessor's performance (Paragraph 10); (2) demanding adequate assurance pursuant to *Com. Code § 10401* and awaiting assurance of future performance adequate under the circumstances of the particular case (Paragraph 11); or (3) resorting to any right or remedy for default under the lease contract or Division 10 (Paragraphs 12-13) [*see Com. Code § 10505* (rights of parties after cancellation)], even though the aggrieved party has notified the repudiating partythat the aggrieved party would await the repudiating party's performance and assurance and has urged retraction [*Com. Code § 10402(a)*; *see* § 413.17[1]].

[5] Modification for Lessor's Revocation of Firm Offer

By using Paragraph 6, deleting Paragraphs 7-9, and replacing them with Paragraphs 3-5 and 8 of *see § 413.346*, this form may be modified for use when a merchant lessor has revoked a firm offer [*Com. Code § 10205*; *see* also Comments and References to *see § 413.346*]. Paragraphs 7 and 9 of *see § 413.346* (regarding acceptance, commencement of performance, or detrimental reliance) may or may not be appropriate in a particular situation [*see § 413.346*].

[6] State Statutes

"Cancellation" defined. *Com. Code § 10103(a)(2)*

Waiver or renunciation of rights after default. *Com. Code § 10107*

Modification, rescission, and waiver. *Com. Code § 10208*

Right to assurances. *Com. Code § 10401*

Anticipatory repudiation; retraction of anticipatory repudiation. *Com. Code §§ 10402, 10403*

Determining whether default exists. *Com. Code § 10501(a)*

Various remedies available. *Com. Code §§ 10501(c), 10503(d), 10505(d)*

Right of parties on cancellation, termination, or rescission. *Com. Code § 10505*

Remedies as generally not barred by rescission, rejection, or return. *Com. Code § 10505(e)*

Lessee's remedies for rejected goods or repudiation. *Com. Code § 10508(a), (b), (f)*

[7] Cross References

See also Comments and References to §§ 413.310 and 413.340.

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 413 PERSONAL PROPERTY LEASES
PART IV. FORMS
B. Personal Property Leases Under The Commercial Code

36-413 California Forms of Pleading and Practice--Annotated § 413.342

§ 413.342 Complaint [Code Civ. Proc. § 425.10] for Recovery of Rent and of Security Paid [Com. Code § 10508(a)(2)] and for Damages [Com. Code §§ 10508(a)(3), 10518-10520]--By Lessee Against Lessor--After Lessee's Justifiable Revocation of Acceptance [Com. Code §§ 10515-10517]

[1] FORM Complaint for Recovery of Rent and of Security Paid [Com. Code § 10508(a)(2)] and for Damages [Com. Code §§ 10508(a)(3), 10518-10520]--By Lessee Against Lessor--After Lessee's Justifiable Revocation of Acceptance [Com. Code §§ 10515-10517]

[*Caption. See § 413.340.*]

Plaintiff alleges:

[1. *Capacity and residence of plaintiff, if necessary. See § 413.340, Paragraph 1.*]

[2. *Capacity and residence of defendant, if necessary. See § 413.340, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 413.340, Paragraph 3.*]

[4. *Agency allegation, if appropriate. See § 413.340, Paragraph 4.*]

[5. *Plaintiff's status as merchant with respect to kind of goods that are subject of lease. See § 413.340, Paragraph 5.*]

[6. *Defendant's status as merchant with respect to kind of goods that are subject of lease. See § 413.340, Paragraph 6.*]

7. [*Formation of lease and relevant obligations of each party. See § 413.340, Paragraph 7*].

[8. *Consumer lease. See § 413.340, Paragraph 8.*]

[9. This lease is a "finance lease" within the meaning of *Section 10103(a)(7) of the Commercial Code* in that defendant neither selected, manufactured, nor supplied the goods, and acquired the goods or the right to possession and use of the goods in connection with the lease. In addition, _____ (*complete with applicable alternative under Com. Code § 10103(a)(7)(C), e.g.,* plaintiff selected the supplier and directed defendant to purchase the goods from the supplier; defendant informed plaintiff in writing that she may have rights under the contract evidencing defendant's purchase of the goods, and advised plaintiff in writing to contact the supplier for a description of any such rights). (*If true for consumer finance lease involved, continue:* The supplier _____ (assisted in the preparation of the lease contract *and/or* participated in negotiating the terms of the lease contract with defendant).)]

10. On or about _____ [*date*], plaintiff accepted the _____ [*specify type of goods, e.g.,* bus] at _____ [*place of arrival, e.g.,* defendant's plant in Fresno, California].

[*EITHER, if lease is not a finance lease (other than a consumer finance lease in which supplier assisted in preparing or participated in negotiating the lease contract) and lessee knew of nonconformity at time of acceptance, but accepted goods on reasonable assumption that nonconformity would be seasonably cured (see Com. Code §§ 10516(b), 10517(a)(1)*)]

11. When plaintiff took delivery of the _____ [*specify type of goods, e.g.,* bus], he/she/it knew that the gas tank leaked, but plaintiff accepted delivery because _____ [*describe basis for reasonable assumption that nonconformity would be seasonably cured e.g.,* defendant told plaintiff that defendant would repair the leak free of charge if plaintiff would bring the bus in to defendant's service department any time within the following two weeks. Plaintiff has purchased or leased several buses from defendant over a six-year period and defendant had always corrected problems that arose on or shortly after delivery without charging plaintiff for the repairs. Plaintiff assumed defendant's conduct with respect to this leak would conform to its past practice].

[*OR, if lessee did not know of nonconformity at time of acceptance because acceptance was reasonably induced by lessor's assurances (see Com. Code § 10517(a)(2)*)]

11. Plaintiff did not make an inspection of the _____ [*specify type of goods, e.g.,* bus] prior to accepting it. Plaintiff did not make any inspection because _____ [*state reason, e.g.,* defendant assured plaintiff the bus had been inspected by defendant's personnel the day before and was free of any defects].

[*OR, if lease is not a finance lease and lessee did not know of nonconformity at time of acceptance because of difficulty of discovering it (see Com. Code § 10517(a)(2)*)]

11. At the time of acceptance, plaintiff made a reasonable inspection of the _____ [*specify type of goods, e.g.,* bus]. The inspection consisted of _____ [*describe, e.g.,* driving the bus on city streets and highways for approximately 30 minutes]. No defects, malfunctions, or abnormalities were apparent from the inspection].

[*OR, if lessor defaulted under the lease contract and the default substantially impaired the value of that lot or commercial unit to the lessee (see Com. Code § 10517(b))*]

11. On or about _____ [*date of notice of revocation alleged in Paragraph 17*], defendant defaulted under the lease contract in that _____ [*describe act(s) constituting default, including contract provision(s) violated*].

[*AND/OR, if lease agreement provides for revocation because of other defaults by lessor (see Com. Code § 10517(c))*]

12. The lease contract provides that plaintiff may revoke acceptance of the _____ [*describe good(s) subject to lease, e.g.,* bus] because of the defendant's default as follows: _____ [*state specific contract provision(s) permitting plaintiff to revoke acceptance because of certain defaults of lessor*]. On or about _____ [*date of notice of revocation alleged in Paragraph 17*], defendant defaulted under the lease contract in that _____ [*describe act(s) constituting default, including contract provision(s) violated*].

[*CONTINUE*]

[*EITHER, if plaintiff discovered nonconformity and notified lessor, and if finance lease or supplier is involved*]

13. On or about _____ [*date*], plaintiff _____ [*describe nonconformity and plaintiff's discovery of it, e.g.,* filled the gas tank for the first time. The tank ruptured when it was filled]. [*If not finance lease, add:* On or about _____ (*date*), plaintiff notified defendant _____ (*show means of notification, e.g.,* by letter, a copy of which is attached hereto marked Exhibit "B" and made a part hereof,) of the existence of the defect.] [*If finance lease, add:* On _____ (*date*), plaintiff also notified _____ (*name of supplier*) by _____ (*show means of notification, e.g.,* letter, a copy of which is attached hereto marked Exhibit "B" and made a part hereof,) of the existence of the defect.]

[*AND/OR*]

14. [*Defendant's failure to seasonably cure. See § 413.340, Paragraph 12.*]

[*CONTINUE*]

15. The _____ [*describe defect, e.g.,* weakness in the gas tank *or other default*] substantially impaired the value of the _____ [*good(s) subject to lease, e.g.,* bus] to plaintiff, in that _____ [*allege facts establishing that nonconformity or other default substantially impaired value, e.g.,* it made the bus unsafe and/or impossible to drive].

16. [*Plaintiff's performance to this point. See § 413.340, Paragraph 9.*]

17. On or about _____ [*date of notice of revocation alleged in Paragraph 18*], there had been no substantial change in the condition of the _____ [*specify type of goods subject to lease, e.g.,* bus] compared to the condition it was in when plaintiff accepted it, other than that caused by the nonconformity, in that _____ [*describe primary characteristics of substantially same condition or limited use of goods by plaintiff, e.g.,* it had only been driven at moderate speeds on city streets and highways for 350 miles].

18. By _____ [*show means of notification, e.g.,* letter dated _____ (*date*), a copy of which is attached hereto marked Exhibit "C" and made a part hereof], plaintiff notified defendant that plaintiff was invoking his/her right to revoke acceptance of the _____ [*specify type of goods, e.g.,* bus] [*continue if goods were in defendant's possession:* and informed defendant that plaintiff would not accept possession of the bus after defendant's latest attempt to repair it]. [Defendant acknowledged receipt of Exhibit "C" on _____ (*date*

). A copy of the signed acknowledgment is attached as Exhibit "D" and incorporated by reference]

[19. *Merchant plaintiff's compliance with duties required by Com. Code § 10511(a). See § 413.340, Paragraph 14.*]

20. [*Plaintiff's disposition of goods and any proceeds of their disposition. See § 413.340, Paragraph 15*].

21. [*Whether or not plaintiff covered, and if so, how. See § 413.340, alternative Paragraphs 16*].

22. [*Plaintiff's actual damages. See § 413.340, Paragraph 17.*]

[23. *Incidental damages. See § 413.340, Paragraph 18.*]

[24. *Consequential damages. See § 413.340, Paragraph 19.*]

[*Prayer. See § 413.340.*]

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 413.310.*]

[2] Use of Form

This form is a complaint for damages and return of rent and security paid is for use by a lessee who has justifiably revoked acceptance because of nonconforming goods or other default that substantially impairs the value of a lot or commercial unit to the lessee, or if the lease agreement so provides, for other defaults by the lessor [*Com. Code §§ 10508, 10515-10520*]. The lessee under a finance lease, other than a consumer finance lease that the supplier assisted in preparing or participated in negotiating (Paragraph 9), has only one ground for revocation of acceptance: that he or she did not know of the nonconformity at the time of acceptance because acceptance was reasonably induced by the lessor's assurances [*see Com. Code §§ 10516(b), 10517(a)(2)*]. The nonconformity referred to here is with respect to the lease agreement, as opposed to the supply contract [*see Com. Code § 10516(b)*, Official UCC Comment]. If this ground exists for revocation of acceptance under a finance lease, revocation of acceptance is not prohibited by *Com. Code § 10407*, at least when the finance lease involved does not also create a security interest [*Com. Code §§ 10407, 10516*, Official UCC Comment (citing *General Elec. Credit Corp. v. Ger-Beck Mach. Co. (3rd Cir. 1986) 806 F.2d 1207, 1208-1211* , with respect to possible exception when lease creates security interest); *but see Com. Code § 10407(c)* (validity of provision in lease barring revocation of acceptance)]. Limiting the right of a lessee under a finance lease to revoke acceptance to one ground is not considered inequitable because the lessee still has a direct claim against the supplier [*see Com. Code § 10209(a)*;Comment to *Com. Code § 10516(b)*]. The lessee may also have a cause of action against the lessor based on other principles of law or equity, such as fraud, duress, and the like [*see Com. Code § 1103(b), 10103(d)*; U.C.C. Comment to *Com. Code § 10407*]. More often, a lessee under a finance lease will prefer to pursue its remedies against the supplier for any defects in the leased goods [*see § 413.345*].

This form should not be used or should be modified if the lease agreement provides different remedies for nonconformity [*see Com. Code §§ 10501(b), 10503(a), 10516(b)*].

[3] Caption

The caption from *see § 413.340* may be used in this complaint, except that the statutes cited in the brackets beneath the title of the form must be changed to *Com. Code §§ 10508, 10515-10520*.

[4] Allegations

See *§ 413.347* or the discussion in *§ 413.90* for discussion of what constitutes a finance lease.

In addition to the allegations incorporated by reference from *see § 413.340*, this complaint alleges:

- Plaintiff's acceptance of the goods (Paragraph 10) [*see Com. Code § 10519(b)* (market rent after revocation of acceptance is determined at place of arrival)]; and

- Whether or not plaintiff knew of the nonconformity at the time of acceptance (first alternative Paragraph 11) [*Com. Code §§ 10516(b), 10517(a)(1)*], and if not, why not (second and third alternative Paragraphs 11) [*Com. Code § 10517(a)(2)*]. If plaintiff did not discover the nonconformity until after acceptance.

Paragraph 12 should be used to allege discovery of the nonconformity and plaintiff's notification to the lessor, and, in the case of a finance lease, to the supplier, of the existence of the nonconformity [*Com. Code § 10516(c)(1), (f)*; *see Com. Code § 10103(a)(24)*; U.C.C. Comment to *Com. Code § 10516(c)(1)* (supplier is one from whom lessor buys or leases goods to be leased under finance lease; thus not all sellers or lessors of goods to be leased are required to be given notice of default as suppliers)]. If plaintiff revoked acceptance because of lessor's default under the lease contract, as opposed to accepting nonconforming goods, this complaint alleges that the lessor has defaulted under the lease contract (third alternative Paragraph 11) [*Com. Code § 10517(b)*]. If applicable, the complaintalso alleges that the lease agreement provides that lessee may revoke acceptance of a lot or commercial unit because of other defaults by the lessor (Paragraph 12) [*Com. Code § 10517(c)*].

This complaint also alleges:

- That the nonconformity or other default substantially impairs the value of the lease to the lessee (Paragraph 14) [*Com. Code § 10517(a), (b)*].

- That there had been no substantial change in the condition of the goods that is not caused by the nonconformity (Paragraph 16) [*Com. Code § 10517(d)*].

- The lessee's formal notification to the lessor of revocation (Paragraph 18) [*Com. Code § 10517(d)*; *see also § 413.340*].

- A merchant lessee's duties with respect to the goods, which must be modified if the goods involved are perishable (Paragraph 19) [*see Com. Code §§ 10511, 10512* (lessee's duties and options with respect to rejected goods), 10517(e) (lessee who revokes acceptance has same rights and duties with respect to goods involved as if lessee had rejected them)].

[5] State Statutes

Benefit of supplier's promises and warranties to lessor under supply contract inures to lessee under finance lease. *Com. Code § 10209(a), (d)*

When acceptance occurs. *Com. Code § 10515(a)*

Acceptance of part of commercial unit is acceptance of that entire unit. *Com. Code § 10515(b)*

Acceptance of goods under finance lease (other than consumer finance lease that supplier assisted in preparing or participated in negotiating) with knowledge of nonconformity bars revocation. *Com. Code § 10516(b)*

Acceptance made with knowledge of nonconformity under lease that is not finance lease is revocable if based on reasonable assumption that nonconformity would be seasonably cured. *Com. Code § 10516(b)*

Acceptance itself does not bar any other remedy provided by Division 10 or lease agreement for nonconformity. *Com. Code § 10516(b)*

Except under consumer lease, lessee who accepted tender is required to notify lessor and supplier with reasonable time after lessee discovers or should have discovered default, or else remedy against party not notified is barred. *Com. Code § 10516(c)(1), (f)*; *see Com. Code § 1202(c)* (defining "discover")

Except under consumer lease, lessee who has accepted tender has burden of proving lessor's default. *Com. Code § 10516(c)(3), (f)*

Except in case of finance lease, lessee is entitled to revoke acceptance of lot or commercial unit whose nonconformity substantially impairs its value to lessee if acceptance was made on reasonable assumption that nonconformity would be seasonably cured and it has not been seasonably cured. *Com. Code § 10517(a)(1)*

Lessee is entitled to revoke acceptance of lot or commercial unit whose nonconformity substantially impairs its value to lessee if acceptance was made without discovery of nonconformity and was reasonably induced by lessor's assurances. *Com. Code § 10517(a)(2)*

Except in case of finance lease, lessee is entitled to revoke acceptance of lot or commercial unit whose nonconformity substantially impairs its value to lessee if acceptance was made without discovery of nonconformity and was reasonably induced by difficulty of discovery before acceptance. *Com. Code § 10517(a)(2)*

Lessee is entitled to revoke acceptance of lot or commercial unit if lessor defaults under the lease contract and default substantially impairs value of lot or commercial unit to lessee. *Com. Code § 10517(b)*

Lessee is entitled to revoke acceptance of lot or commercial unit because of other defaults of lessor if lease agreement so provides. *Com. Code § 10517(c)*

Revocation must be made within reasonable time after lessee discovers or should have discovered ground for it, and before any substantial change in condition of goods that is not caused by nonconformity. *Com. Code § 10517(d)*

Revocation is not effective until lessee notifies lessor. *Com. Code § 10517(d)*; *see Com. Code § 1202(d)* (defining "notify")

Lessee who revokes acceptance has same rights and duties with respect to goods involved as if lessee had rejected them. *Com. Code § 10517(e)*

[6] Cross References

See also Comments and References to §§ 413.310, 413.340, 413.347.

California Forms of Pleading and Practice--Annotated

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 413 PERSONAL PROPERTY LEASES
PART IV. FORMS
B. Personal Property Leases Under The Commercial Code

36-413 California Forms of Pleading and Practice--Annotated § 413.343

§ 413.343 Complaint for Specific Performance [Com. Code § 10521(a)] and for Damages [Com. Code §§ 10520, 10521(b)]--By Lessee Against Lessor--After Lessor's Repudiation or Failure to Deliver Conforming Goods [Com. Code § 10508(b)(2)]

[1] FORM Complaint for Specific Performance [Com. Code § 10521(a)] and for Damages [Com. Code §§ 10520, 10521(b)]--By Lessee Against Lessor--After Lessor's Repudiation or Failure to Deliver Conforming Goods [Com. Code § 10508(b)(2)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
[doing business under the fictitious name of	)	
_____ (*name*),]	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR SPECIFIC PERFORMANCE
_____ [*name*],	)	AND DAMAGES
[a corporation,]	)	
[and DOES I through _____,]	)	
Defendant(s).	)	
	)	

Plaintiff alleges:

[1. *Capacity and residence of plaintiff, if necessary. See § 413.340, Paragraph 1.*]

[2. *Capacity and residence of defendant, if necessary. See § 413.340, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 413.340, Paragraph 3.*]

[4. *Agency allegation, if appropriate. See § 413.340, Paragraph 4.*]

[5. *Plaintiff's status as merchant with respect to kind of goods that are subject of lease. See § 413.340, Paragraph 5.*]

[6. *Defendant's status as merchant with respect to kind of goods that are subject of lease. See § 413.340, Paragraph 6.*]

7. [*Formation of lease and relevant obligations of each party. See § 413.340, Paragraph 7*].

[8. *Consumer lease. See § 413.340, Paragraph 8.*]

[*EITHER, if defendant repudiated lease*]

9. On or about _____ [*date*], defendant _____ [*allege facts showing defendant's repudiation, e.g.,* informed plaintiff by telephone that it would not deliver the goods in accordance with the lease].

[10. *Plaintiff's request that defendant retract repudiation and/or plaintiff's notification that it will await defendant's performance. See § 413.341, Paragraph 10.*]

[*OR, if defendant failed to perform*]

9. Under the terms of the lease, the goods were to be delivered to plaintiff on or before _____ [*date*]. When delivery had not been made by _____ (*date*) plaintiff telephoned defendant['s _____ (*title of officer and name*)] and demanded delivery of the goods in accordance with the terms of the lease. By letter dated _____ (date), a copy of which is attached as Exhibit "B," plaintiff again demanded delivery of the goods in accordance with the terms of the lease.

[*CONTINUE*]

[11. *Plaintiff's demand for adequate assurances. See § 413.341, Paragraph 11.*]

12. Defendant has failed and refused and continues to fail and refuse to deliver the goods to plaintiff in accordance with the terms of the lease.

13. [*Plaintiff's performance. See § 413.340, Paragraph 9.*]

14. At all times herein mentioned, defendant was, and is now, able to complete its performance under the lease contract in that _____ [*allege specific facts establishing defendant's ability to perform, e.g.,* defendant is the owner and in possession of all materials necessary to complete the manufacture of the goods described in Paragraph 7. Defendant is not experiencing any labor unrest or work stoppage that would interfere with its performance of the lease contract].

15. Plaintiff is able and willing to perform [the balance of] its obligations under the lease contract in that _____ [*allege specific facts establishing plaintiff's ability to perform, e.g.,* plaintiff has obtained the

insurance it is required to provide covering the goods that are the subject of the lease. Plaintiff has sufficient funds on hand to pay its rental obligations under the lease contract for the two months after delivery and according to projected income analysis, plaintiff will earn net income every month sufficient to pay the following month's rental].

16. Plaintiff has not obtained substitute goods by lease or purchase or contract to purchase or otherwise because _____ [*allege facts showing the uniqueness of the goods or other circumstances warranting specific performance and inadequacy of plaintiff's remedy at law, e.g.,* although plaintiff has contacted five other manufacturers in the last month in an attempt to find substitute goods of comparable quality and reliability, no comparable goods are available]; therefore, plaintiff has no plain, speedy, or adequate remedy in the ordinary course of law, and damages, if awarded, cannot be properly ascertained and would be inadequate as compensation to plaintiff for the detriment suffered as a result of defendant's breach.

17. At the time the lease contract described in Paragraph 7 was entered into, the goods that are the subject of the lease _____ [*set forth criteria establishing that the lease is just, fair, and reasonable, e.g.,* were reasonably worth $_____, and the present value on that date of the total rental payments that plaintiff is obligated to make to defendant during the initial term of the lease is $_____]; thus, the lease agreement is just, fair, and reasonable as to the defendant, and the consideration therefor accruing to defendant is adequate.

[18. *If plaintiff wishes to allege damages in lieu of specific performance, which in this case would amount to the present value as of the date of default of the then market rent minus the present value as of the same date of the original rent, computed for the remaining term of the original lease (see Com. Code § 10519(a), (b)), see § 413.340, Paragraph 17, but add allegation at beginning that those damages are being sought in the event specific performance is denied*.]

[19. *Plaintiff's incidental damages. See § 413.340, Paragraph 18.*]

[20. *Plaintiff's consequential damages. See § 413.340, Paragraph 19.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. That the court decree specific performance of the agreement described in Paragraph 7 [or, in the alternative, for actual damages in the sum of $_____ and for return of rent and security paid to defendant in the sum of $_____];

2. That defendant be ordered to [complete the manufacture of, and] deliver to plaintiff the goods described in Paragraph 7;

[3. For incidental damages in the sum of $_____;]

[4. For consequential damages in the sum of $_____;]

5. For interest at the _____ [rate of _____ percent per annum *or* legal rate] on the sum of $_____ from and after _____ [*date on which amount of incidental and consequential damages were capable of being made certain or date on which action was filed, whichever is appropriate*];

6. For costs of suit herein incurred [including reasonable attorney's fees as authorized by *Section 1717 of the Civil Code*]; and

7. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification. See § 413.310.*]

[2] Use of Form

This form is a complaint for use by a lessee to seek specific performance after the lessor's repudiation or failure to deliver conforming goods [*Com. Code §§ 10508(b)(2), 10521*]. The goods need not have been identified to the lease contract in order for the lessee to obtain specific performance, but they must be unique or there must be "other proper circumstances" [*Com. Code § 10521(a)*]. If the goods have been identified to the lease contract, and after reasonable effort the lessee is unable to effect cover for those goods or the circumstances reasonably indicate that the effort will be unavailing, the lessee has a right of replevin, detinue, sequestration, claim and delivery, or the like [*Com. Code § 10521(c)*; *see Com. Code § 10217* (identification of goods to contract)]. This form uses a factual example in which the goods are not yet completely manufactured, so in the absence of a lease provision specifying otherwise, it is not likely that they have been identified to the lease [*see Com. Code § 10217*]. This form has used the criteria of *Com. Code § 10521(c)*, that after reasonable effort the lessee is unable to effect cover, as a way of demonstrating that the goods are unique or that other proper circumstances exist for granting specific performance (Paragraph 16). Cases interpreting *Com. Code § 2716*, from which *Com. Code § 10521* is derived, seem to support that interpretation [*see, e.g., Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists (1971) 14 Cal. App. 3d 209, 220, 92 Cal. Rptr. 111]* .

[3] Allegations

In addition to the allegations incorporated by reference from *see §§ 413.340* and *413.341*, this form is a complaint alleges:

- Defendant's repudiation and plaintiff's response to it (first alternative Paragraph 9 and Paragraph 10), or defendant's failure to deliver the goods at the time required by the lease (second alternative Paragraph 9).

- That at the time the complaint was filed, defendant still had not delivered the goods (Paragraph 12).

- Defendant's ability to specifically perform (Paragraph 14) [*see Civ. Code §§ 3390(3)* (specific performance will not be granted if defendant cannot lawfully perform), 3394 (specific performance of sale of property will not be granted unless defendant can give clear title); *Dixon v. Salvation Army (1983) 142 Cal. App. 3d 463, 467, 191 Cal. Rptr. 111]* .

- Plaintiff's present ability to perform its obligations under the lease (Paragraph 15).

- The uniqueness of the goods or other proper circumstances for specific performance [*Com. Code § 10521(a)*] and the inadequacy of plaintiff's remedy at law (Paragraph 16) [*see Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist. (1976) 65 Cal. App. 3d 121, 133, 135 Cal. Rptr. 192* ; *Korabek v. Weaver Aircraft Corp. (1944) 65 Cal. App. 2d 32, 40, 149 P.2d 876]* .

- That the lease agreement is just, fair, and reasonable as to the defendant, and the consideration accruing to defendant is adequate (Paragraph 17) [*see Civ. Code § 3391*].

For further discussion and cases relating to the necessary allegations in a complaint for specific performance, see Ch. 528, *Specific Performance* .

[4] State Statutes

Identification of goods to lease contract as may be made at any time and in any manner explicitly agreed to by parties. *Com. Code § 10217*

In absence of agreement, if lease contract is for goods that are existing and identified, identification occurs when lease contract is made. *Com. Code § 10217(1)*

In absence of agreement, if lease is for goods that are not existing and identified, identification occurs when the goods are shipped, marked, or otherwise designated by lessor as goods to which lease contract refers. *Com. Code § 10217(2)*

In absence of agreement, if lease is for unborn young of animals, identification occurs when young are conceived. *Com. Code § 10217(3)*

Lessee as entitled to specific performance after lessor's repudiation or failure to deliver conforming goods if goods are unique or under other proper circumstances. *Com. Code §§ 10508(b)(2), 10521(a)*

Decree for specific performance as properly including any terms and conditions regarding payment of rent, damages, or other relief that the court deems just. *Com. Code § 10521(b)*

Lessee as entitled to right of replevin, detinue, sequestration, claim and delivery, or like for goods identified to lease contract if after reasonable effort lessee is unable to effect cover for those goods or circumstances reasonably indicate that effort will be unavailing. *Com. Code § 10521(c)*

Even though goods have not been shipped, lessee who has paid part or all of rent and security for conforming goods that have been identified to lease, on making and keeping good tender of unpaid rent and security due under lease, as entitled to recover identified goods from lessor who becomes insolvent within 10 days after receipt of first installment of rent and security. *Com. Code § 10522*

[5] Cross References

For discussion and forms relating to claim and delivery, which is the equivalent of replevin, see Ch. 119, *Claim and Delivery*

See also Comments and References to §§ 413.310, 413.340, and 413.341.

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 413 PERSONAL PROPERTY LEASES
PART IV. FORMS
B. Personal Property Leases Under The Commercial Code

36-413 California Forms of Pleading and Practice--Annotated § 413.344

§ 413.344 Complaint [Code Civ. Proc. § 425.10] for Damages for Breach of Implied Warranty [Com. Code §§ 10508(d), 10519(d), 10520]--Fitness for Particular Purpose [Com. Code § 10213]--By Lessee Against Lessor

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages for Breach of Implied Warranty [Com. Code §§ 10508(d), 10519(d), 10520]--Fitness for Particular Purpose [Com. Code § 10213]--By Lessee Against Lessor

[*Caption. See § 413.340.*]

Plaintiff alleges:

[1. *Capacity and residence of plaintiff, if necessary. See § 413.340, Paragraph 1.*]

[2. *Capacity and residence of defendant, if necessary. See § 413.340, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 413.340, Paragraph 3.*]

[4. *Agency allegation, if appropriate. See § 413.340, Paragraph 4.*]

[5. *Plaintiff's status as merchant with respect to kind of goods that are subject of lease. See § 413.340, Paragraph 5.*]

[6. *Defendant's status as merchant with respect to kind of goods that are subject of lease. See § 413.340, Paragraph 6.*]

7. On or about _____ [*date*], at [_____ (plaintiff's *or* defendant's) _____ (*describe place, e.g.,* equipment yard in] _____ [*city*], California, plaintiff negotiated with defendant for the lease of _____ [*describe goods, e.g.,* a water well drilling rig]. Plaintiff informed defendant that he/she _____ [*describe plaintiff's particular needs, e.g.,* was acting as contractor on a job for which he/she expected to have to drill to a depth of 1800 feet, and expected to have to drill through some rock]. Plaintiff asked defendant which of defendant's _____ [*describe goods, e.g.,* rigs]

would be suitable for that job. Defendant showed plaintiff the _____ [*describe goods, e.g.,* Model H2FST drilling rig], which later became the subject of the lease.

8. [*Formation of lease and relevant obligations of each party. See § 413.340, Paragraph 7*].

[9. *Consumer lease. See § 413.340, Paragraph 8.*]

10. At the time the lease was executed by the parties, defendant knew of the particular purpose for which plaintiff required the goods that were subject to the lease because plaintiff had expressly informed defendant of that purpose in requesting the goods. Defendant also knew that plaintiff was relying on defendant's _____ [skill *or* judgment *or both*] to _____ [select *or* furnish *or both*] suitable goods. Thus, there was created an implied warranty that the goods were fit for plaintiff's particular purpose.

11. Defendant breached the implied warranty in that plaintiff did not receive suitable goods, and the goods plaintiff received were not fit for the particular purpose for which they were required, specifically _____ [*describe breach, e.g.,* the drill would not function at depths in excess of 1400 feet, and the bits furnished by defendant broke often when drilling through rock].

12. Plaintiff discovered the breach of warranty on or about _____ [*date*]. On _____ [*date*], plaintiff notified defendant of the breach by _____ [*show means of notification, e.g.,* phone, and then by confirming letter dated _____ (*date*), a copy of which is attached hereto marked Exhibit "B" and made a part hereof]. [Plaintiff demanded that defendant _____ (repair the goods so that they *or* replace the goods with ones that) conformed to the warranty.]

[13. *Description and failure of any attempts by defendant to repair or replace the goods. See § 413.340, Paragraph 12.*]

14. As a proximate result of the breach of warranty by defendant, plaintiff has been damaged in the amount of $_____ [, which is the present value at the time and place plaintiff accepted the goods of the difference between the value of the goods accepted and the value if they had been as warranted for the lease term].

[15. *Incidental damages. See § 413.340, Paragraph 18.*]

[16. *Consequential damages. See § 413.340, Paragraph 19.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For actual damages in the sum of $_____;

[2. For incidental damages in the sum of $_____;]

[3. For consequential damages in the sum of $_____;]

[4. For interest at the _____ (rate of _____ percent per annum *or* legal rate) on the sum of $_____ from and after _____ (*date on which amount of damages was capable of being made certain or date on which action was filed, whichever is appropriate*)];

5. For costs of suit herein incurred [including reasonable attorney's fees as authorized by *Section 1717 of the Civil Code*]; and

6. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 413.310.*]

[2] Use of Form

This form is a complaint for use by a lessee to recover damages from a lessor for breach of an implied warranty of fitness for a particular purpose, and is not appropriate if the lease involved is a finance lease [*see Com. Code § 10213*].

[3] Caption

The caption from *see § 413.340* may be used in this complaint, except that the statutes cited in the brackets beneath the title of the form must be changed to *Com. Code §§ 10213, 10508, 10519-10520*.

[4] Allegations

In addition to the allegations incorporated by reference from *see § 413.340*, this form alleges:

- That plaintiff informed defendant of his or her special requirements for the goods and relied on defendant to select or furnish suitable goods (Paragraphs 7, 10).

- The conclusion that this resulted in the creation of an implied warranty of fitness for a particular purpose (Paragraph 10) [*Com. Code §§ 10204(a), 10213*].

- Breach of the warranty (Paragraph 11) [*see* U.C.C. Comment to *Com. Code § 10508(c)* (breach of warranty may not rise to level of default unless breach is material or unless otherwise provided in lease agreement)].

- The date of plaintiff's discovery of the breach of the warranty and plaintiff's notification to defendant (Paragraph 12) [*Com. Code § 10516(c)(1)*].

- Plaintiff's damages (Paragraph 14) [*Com. Code § 10519(d)*]. The measure of damages alleged in Paragraph 14 is the present value at the time and place of acceptance of the difference between the value of the use of the goods accepted and the value if they had been as warranted for the lease term. However, that measure may be displaced if special circumstances show proximate damages of a different amount. In addition, plaintiff may have incidental and consequential damages, less expenses saved in consequence of the lessor's default or breach of warranty [*Com. Code § 10519(d)*].

[5] Other Remedies to Consider

The nonconformity may be substantial enough to justify revocation of acceptance [*see Com. Code §§ 10515-10517* (*see § 413.226*; *see also § 413.342*].

Rights and remedies for material misrepresentation or fraud include all rights and remedies available under Division 10 for default [*Com. Code § 10505(d)*].

[6] State Statutes

Requirements for discharge, in whole or in part, of claim or right arising out of an alleged breach of warranty without consideration. *Com. Code § 10107*

Creation of express warranties by lessor. *Com. Code § 10210*

Warranty of quiet possession. *Com. Code § 10211(a)*

Warranty against infringement in lease other than finance lease. *Com. Code § 10211(b)*

Lessee under finance lease who furnishes specifications to lessor is required to hold lessor and supplier harmless from against claims of infringement. *Com. Code § 10211(c)*

Implied warranty of merchantability in lease other than finance lease. *Com. Code § 10212(a), (b)*

Course of dealing or usage of trade may give rise to other implied warranties. *Com. Code § 10212(c)*

Implied warranty of fitness for particular purpose in lease other than finance lease. *Com. Code § 10213*

Construction and interpretation of disclaimer or modification of warranties. *Com. Code § 10214(a)*

Rules of construction applicable to warranties. *Com. Code § 10215*

Notices required to be given by lessee regarding breach of warranties. *Com. Code § 10516(c)-(f)*

[7] Cross References

For discussion and forms relating to the Division 2 provisions from which the warranty provisions of Division 10 were mainly derived, see Ch. 502, *Sales: Warranties*

See also Comments and References to §§ 413.310 and 413.340.

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B. Personal Property Leases Under The Commercial Code

36-413 California Forms of Pleading and Practice--Annotated § 413.345

§ 413.345 Complaint [Code Civ. Proc. § 425.10] for Damages for Breach of Express Warranty [Com. Code §§ 10519(d), 10520]--Based on Description of Goods [Com. Code §§ 2313(1)(b), 10210(a)(2)]--By Lessee Under Finance Lease Against Supplier [Com. Code § 10209]

[1] FORM Complaint for Damages for Breach of Express Warranty [Com. Code §§ 10519(d), 10520]--Based on Description of Goods [Com. Code §§ 2313(1)(b), 10210(a)(2)]--By Lessee Under Finance Lease Against Supplier [Com. Code § 10209]

[*Caption. See § 413.340.*]

Plaintiff alleges:

[1. *Capacity and residence of plaintiff, if necessary. See § 413.340, Paragraph 1.*]

[2. *Capacity and residence of defendant, if necessary. See § 413.340, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 413.340, Paragraph 3.*]

[4. *Agency allegation, if appropriate. See § 413.340, Paragraph 4.*]

[5. *Plaintiff's status as merchant with respect to kind of goods that are subject of lease. See § 413.340, Paragraph 5.*]

[6. *Defendant's status as merchant with respect to kind of goods that are subject of lease. See § 413.340, Paragraph 6.*]

7. On or about _____ [*date*], plaintiff and _____ [*name*], hereinafter referred to as "Lessor," negotiated for the lease of _____ [*describe goods, e.g.,* a water well drilling rig], which Lessor would purchase and lease to plaintiff. Lessor neither selected, manufactured, or supplied the _____ [*describe goods, e.g.,* rig]. [Plaintiff selected defendant as the supplier and directed Lessor to

purchase the _____ (*describe goods, e.g.,* rig) from defendant.] Plaintiff described his/her requirements [and furnished specifications] to Lessor. Specifically, plaintiff informed Lessor that he/she _____ [*describe plaintiff's particular needs, e.g.,* was acting as contractor on a job for which he/she expected to have to drill to a depth of 1800 feet, and expected to have to drill through some rock].

8. On or about _____ [*date*], _____ [plaintiff *and/or* Lessor] negotiated with defendant for Lessor's purchase of _____ [*describe goods, e.g.,* the water well drilling rig]. Defendant showed _____ [plaintiff *and/or* Lessor] the _____ [*describe goods, e.g.,* Model H2FST drilling rig], which eventually became the subject of the lease. During the course of the negotiations, a particular description of the goods was made part of the basis of the bargain between defendant and Lessor as a result of _____ [*allege how description was incorporated, e.g.,* defendant's showing plaintiff and Lessor] a _____ [*describe form and contents of description, e.g.,* brochure of the manufacturer available at defendant's premises. The brochure stated that the Model H2FST drilling rig wasreliable to a depth of 2100 feet, and could drill through all types of rock encountered in California]. Thus, that description constituted an express warranty. A true copy of that description is attached hereto marked Exhibit "A" and made a part hereof.

9. On _____ [*date*], Lessor acquired the _____ [*describe goods, e.g.,* Model H2FST drilling rig] from defendant in connection with the lease. A copy of the contract between Lessor and defendant, hereinafter referred to as "the supply contract," is attached hereto marked Exhibit "B" and made a part hereof.

10. _____ [*Allege manner in which Com. Code § 10103(a)(7)(C) was satisfied, e.g.,* Plaintiff received a copy of the supply contract before signing the lease contract.]

11. On _____ [*date*], Lessor entered into a written lease agreement with plaintiff for the lease of the _____ [*specify type of goods, e.g.,* drilling rig] for an initial lease term of _____ [*specify time period, e.g.,* three years], commencing on _____ [date]. A copy of the lease agreement is attached hereto marked Exhibit "C" and made a part hereof.

[12. *Consumer lease allegation, if appropriate. See § 413.340, Paragraph 8.*]

13. Defendant breached the express warranty in that _____ [*describe breach, e.g.,* the drill would not function at depths in excess of 1400 feet, and the bits furnished by defendant broke often when drilling through rock]. As a result of this breach, plaintiff did not in fact receive goods as warranted by defendant.

14. Plaintiff discovered the breach of warranty on or about _____ [*date*]. On _____ [*date*], plaintiff notified defendant of the breach by _____ [*show means of notification, e.g.,* phone, and then by confirming letter dated _____ (*date*), a copy of which is attached hereto marked Exhibit "D" and made a part hereof]. [Plaintiff demanded that defendant _____ (repair the goods so that they *or* replace the goods with ones that) conformed to the warranty.] [On _____ (*date*), plaintiff also notified Lessor of the breach by _____ (*show means of notification, e.g.,* letter dated _____ (*date*), a copy of which is attached hereto marked Exhibit "E" and made a part hereof).]

[15. *Description and failure of any attempts by defendant to repair or replace the goods. See § 413.340, Paragraph 12.*]

[16. *Plaintiff's actual damages. See § 413.344, Paragraph 14.*]

[17. *Incidental damages. See § 413.340, Paragraph 18.*]

[18. *Consequential damages. See § 413.340, Paragraph 19.*]

[*Prayer. See § 413.344.*]

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 413.310.*]

[2] Use of Form

This form is a complaint for use by a lessee under a finance lease to recover damages from the supplier for breach of an express warranty arising from a description that was made the basis of the bargain [*see Com. Code § 10209(a)* (supplier's warranties and promises to lessor as inuring to benefit of lessee); *see also Com. Code §§ 2313(1)(b), 10210(a)(2)* (warranties based on description)]. The lessor is not a defendant. This form is not appropriate, or will have to be modified, if the supply contract limits, modifies, or excludes any warranties or remedies or contains a provision liquidating damages [*see Com. Code § 10209(a)* and U.C.C. Comment thereto].

The rights asserted by this form may not be the only rights the lessee has against the supplier, because in addition to the extension of the benefits under the supply contract, the lessee retains all rights and remedies that the lessee may have against the supplier that arise from any agreement between the lessee and the supplier or from any other law [*Com. Code § 10209(d)*].

[3] Continuing Obligations to Lessor

In the case of a finance lease that is not a consumer lease, once the lessee has accepted the goods, the lessee must continue to perform its obligations to the lessor under the lease [*see Com. Code § 10407* (*see § 413.94*; *see also § 413.342*].

[4] Caption

The caption from *see § 413.340* may be used in this complaint, except that the statutes cited in the brackets beneath the title of the form must be changed to *Com. Code §§ 10209, 10210, 10213, 10519, 10520*.

[5] Allegations

This form alleges:

- The negotiations between plaintiff and the lessor (Paragraph 7).

- The fact that the lessor neither selected, manufactured, nor supplied the goods (Paragraph 7) [*Com. Code § 10103(a)(7)(A)*].

- That plaintiff selected defendant as supplier and directed the lessor to purchase the goods from defendant (Paragraph 7, optional bracketed allegation) [*Com. Code § 10103(a)(7)(C)(iv)*].

- The negotiations between the lessor and defendant for the supply contract (Paragraph 8).

- The description of the goods that provides the basis for the express warranty (Paragraph 8) [*Com. Code §§ 2313(1)(b), 10210(a)(2)*].

- The lessor's acquisition of the goods in connection with the lease (Paragraph 9) [*Com. Code § 10103(a)(7)(B)*].

- The execution of the supply contract (Paragraph 9).

- The remaining criteria to establish that the lease involved is a finance lease (Paragraph 10) [*see Com. Code § 10103(a)(7)(C)* (*see § 413.347* and *§ 413.90*)].

- The execution of the lease (Paragraph 11).

- Defendant's breach of the express warranty (Paragraph 13).

- Plaintiff's discovery of the breach of the warranty and notification to defendant (Paragraph 14) [*Com. Code §§ 2607(3), 10516(c)(1)*].

- Plaintiff's damages (Paragraphs 16-18) [*Com. Code §§ 2714(2), (3), 2715, 10519(d), 10520*]. Note that the measure of damages alleged in Paragraph 16 may be displaced if special circumstances show proximate damages of a different amount [*Com. Code §§ 2714(2), 10519(d)*].

[6] Modification of Allegations for Lease and Sublease

A lessor under a finance lease need not become owner of the goods that are the subject of the lease. The lease will still qualify as a finance lease if the lessor leases the goods from the supplier and then subleases them to the plaintiff [*see Com. Code § 10103(a)(7)(B), (24), (25)*; U.C.C. Comment to *Com. Code § 10103(a)(7)*]. If plaintiff's lessor is the defendant's lessee, the allegations of this form will have to be modified to reflect that fact.

[7] Cross References

See also Comments and References to §§ 413.310, 413.340, and 413.344.

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B. Personal Property Leases Under The Commercial Code

36-413 California Forms of Pleading and Practice--Annotated § 413.346

§ 413.346 Allegation--Lessor's Extension and Revocation of Firm Offer to Lease [Com. Code § 10205]

[1] FORM Allegation--Lessor's Extension and Revocation of Firm Offer to Lease [Com. Code § 10205]

[1. *Plaintiff's status as merchant with respect to kind of goods that are subject of lease. See § 413.340, Paragraph 5.*]

[2. *Defendant's status as merchant with respect to kind of goods that are subject of the firm offer. See § 413.340, Paragraph 6.*]

3. On or about _____ [*date*], _____ [*describe course of negotiations leading up to extension of firm offer, e.g.,* defendant's sales representative met with plaintiff and discussed plaintiff's requirements for _____ (*describe goods that will be subject of lease, e.g.,* buses or passenger vans to be used in plaintiff's airport shuttle business). Defendant's representative took the information regarding plaintiff's requirements and told plaintiff that he/she would forward a formal offer to lease the necessary equipment to plaintiff].

4. On or about _____ [*date*], defendant _____ [*allege facts showing making and terms of firm offer, e.g.,* sent plaintiff a document, a copy of which is attached hereto marked Exhibit "A" and made a part hereof, which listed the _____ (*describe goods that are subject of firm offer, e.g.,* passenger vans and buses) defendant was willing to lease to plaintiff for three years, with the right to renew the lease annually for three consecutive years, and giving plaintiff the option to purchase the _____ (*describe goods, e.g.,* equipment) after the fourth year for $_____. Annual lease payments would be $_____. Page 3 of the document states that in order for plaintiff to take delivery of the vehicles by _____ (*date*), plaintiff would have to accept the offer on or before _____ (*date*)].

5. _____ [*Allege that firm offer was signed by defendant and describe assurances that it was not revocable, e.g.,* Exhibit "A" was signed by defendant('s _____ (*title and name of officer*) and stated that it _____ (was not revocable *or* would be held open (*if offer stated time period for which or date until which it would be held open, add here, e.g.,* for 30 days))].

[*If lease involved is a consumer lease, ADD*]

[6. _____ (Defendant was aware *or* Plaintiff told defendant) that plaintiff intended to use the _____ (*specify type of goods, e.g.,* car) for personal, family, or household purposes.]

[*CONTINUE*]

[7. On _____ (*date*), plaintiff _____ (*allege facts showing plaintiff's expressions of acceptance, commencement of performance, and/or detrimental reliance, e.g.,* wrote defendant that he/she would acceptdefendant's offer as soon as he/she had found drivers for the increased service and had obtained permission from the Airport Commission for the increased service. Between _____ (*date*) and _____ (*date*), plaintiff expended $_____ in application and licensing fees to the Airport Commission to increase its service at the Los Angeles Airport. By _____ (*date*), plaintiff had entered into contracts with six additional drivers, had paid $_____ to place those drivers on its insurance policy, and had paid an additional $_____ to properly include the new drivers under its licenses and bonds. Plaintiff had also expended $_____ in advertising and promotions introducing its expanded service).]

8. On _____ [*date*], and _____ [prior to _____ (*date*), the date on which defendant's offer described in Paragraphs 3 and 4 became revocable *or* within a reasonable time after defendant's assurances that the offer described in Paragraphs 3 and 4 would be held open], defendant withdrew its offer to lease the goods described in Paragraphs 3 and 4 _____ [*describe any special consequences of revocation, e.g.*; the goods were necessary for plaintiff to commence its expanded service on the dates advertised].

[9. On _____ (*date*), and _____ (prior to the date on which defendant's offer became revocable *or* within a reasonable time after defendant's assurances that the offer would be held open), plaintiff accepted defendant's offer to lease _____ (*describe goods that will be subject of lease, e.g.,* three buses and two passenger vans) in accordance with the terms of Exhibit "A" by _____ (*specify means of acceptance, e.g.,* mailing a letter of acceptance, a copy of which is attached hereto marked Exhibit "B" and made a part hereof, to defendant's Fresno office).]

[2] Use of Form

This form is for use by a plaintiff lessee to allege that defendant, a merchant lessor, extended a firm offer to lease to plaintiff and then withdrew that offer [*see Com. Code § 10205*].

For a discussion of how a complaint by a lessee for recovery of rent, security paid, and damages after the lessor's repudiation may be modified to allege revocation of a firm offer, see *§ 413.341*.

The firm offer allegations (Paragraphs 1-5, 8) may be used in place of the lease contract formation allegations in any of the lessee's complaints. For instance, they could be used in *see § 413.341* (lessor's repudiation) or *see § 413.343* (specific performance) [*see, e.g., § 413.341*]. The other allegations from this form may be used in any other form whenever it is appropriate in a particular case.

[3] Allegations

This form alleges:

- Defendant's status as a merchant (Paragraph 2) [*see Com. Code § 10205*].

- The primary negotiations of the parties (Paragraph 3).
- The making of the firm offer and its terms (Paragraph 4).
- That the firm offer was signed by defendant and stated that it would not be revoked (Paragraph 5) [*see Com. Code § 10205*].
- Defendant's revocation of the offer before its expiration (Paragraph 8).

Plaintiff's detrimental reliance on the irrevocability of the offer (Paragraph 7) is not necessary to establish a firm offer under *Com. Code § 10205*. It is added here in case plaintiff also wants to rely on the theory of promissory estoppel [*Allied Grape Growers v. Bronco Wine Co (1989) 203 Cal. App. 3d 432, 442, 249 Cal. Rptr. 872* (considering statute of frauds issue, but holding promissory estoppel applicable to transaction governed Commercial Code by virtue of *Com. Code § 1103*); *see* Duesenberg & King, BENDER'S U.C.C. SERVICE, SALES & BULK TRANSFERS, § 4.03[2] (1988) (noting that *Com. Code § 2205*, on which *Com. Code § 10205* is based, has not displaced doctrine of promissory estoppel, and discussing different requirements of each)]. Paragraph 9 is also optional, except when plaintiff lessee seeks specific performance rather than damages [*see Civ. Code § 3384 et seq.*].

[4] Offer by Merchant Lessee

Although this form involves a firm offer extended by a merchant lessor to a lessee who may or may not be a merchant, merchant lessees can also make firm offers to lease [*Com. Code § 10205*].

[5] Revocation of Firm Offer for Consumer Lease

It is not clear what the consequences of a merchant lessor's revocation of a firm offer for a consumer lease are (Paragraph 6). Revocation seems akin to repudiation; and under California law the rights and remedies of the parties to a consumer lease in connection with a repudiation of that lease are determined under the applicable consumer law, not under Division 10 [*see Com. Code § 10402(b)*; *see § 413.51[3]*].

California Forms of Pleading and Practice--Annotated

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 413 PERSONAL PROPERTY LEASES
PART IV. FORMS
B. Personal Property Leases Under The Commercial Code

36-413 California Forms of Pleading and Practice--Annotated § 413.347

§ 413.347 Affirmative Defense--Lease Is Finance Lease [Com. Code § 10103(a)(7)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Lease Is Finance Lease [Com. Code § 10103(a)(7)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. The lease described in Paragraph _____ of the complaint herein is a "finance lease" within the meaning of *Section 10103(a)(7) of the Commercial Code* in that defendant neither selected, manufactured, nor supplied the goods that are the subject of the lease, and acquired _____ [those goods *or* the right to possession and use of those goods] in connection with that lease. In addition,

[*CHOOSE one or more of the following, as applicable (see Com. Code § 10103(a)(7)(C)(i)-(iv))*]

plaintiff received a copy of the contract evidencing defendant's _____ [purchase *or* lease] of the goods on or before signing the lease contract [described in the complaint].

[*AND/OR*]

plaintiff's approval of the contract evidencing defendant's _____ [purchase *or* lease] of the goods was a condition to effectiveness of the lease contract [described in the complaint].

[*AND/OR*]

before signing the lease contract [described in the complaint], plaintiff received an accurate and complete statement designating the promises and warranties, and any disclaimers of warranties, limitations or modifications of remedies, or liquidated damages, including those of a third party provided to defendant by the person supplying the goods in connection with or as part of the contract by which defendant _____ [purchased *or* leased] the goods.

[*AND/OR*]

before signing the lease contract [described in the complaint], _____ [plaintiff selected the supplier and directed defendant to _____ (purchase *or* lease) the goods from that supplier *or* defendant informed plaintiff in writing of the identity of the supplier]; defendant informed plaintiff in writing that he/she is entitled to the promises and warranties, including those of any third party, provided to defendant by the person supplying the goods in connection with or as part of the contract by which defendant _____ [purchased *or* leased] the goods; and defendant advised plaintiff in writing that plaintiff may contact the supplier for a description of any such rights.

[*CONTINUE, if appropriate*]

[2. The supplier did not assist in the preparation of the lease contract (between plaintiff and defendant). Nor did the supplier participate in negotiating the terms of that lease contract with defendant.]

[2] Use of Form

This form is for use by a lessor to invoke the defense that the lease involved is a finance lease [*see Com. Code § 10103(a)(7)*]. It is phrased as if the lessee is the plaintiff and the lessor alone is the defendant. It will have to be modified if the supplier is also the defendant to make clear which defendant is being referred to by a particular allegation. For Uniform Commercial Code Comments that may aid in construing the definition of a finance lease, see the discussions in *§§ 413.50[4]* and *413.90*.

This affirmative defense would most likely be asserted by a lessor in response to a lessee's action based on revocation of acceptance [*see § 413.342*], or to an action in which the lessee claims the lessor has breached a warranty that lessors do not give in finance leases [*see, e.g., Com. Code § 10211(b), (c)* (warranty against infringement); *see also § 413.344* (complaint for breach of implied warranty of fitness for particular purpose)].

[3] Allegations

This form is based on the components of the definition of "finance lease." That definition has three requirements. The initial sentence of Paragraph 1 alleges the requirements of *Com. Code § 10103(a)(7)(A)* and *(B)*. The last sentence tracks the four alternatives for meeting the third requirement, that of *Com. Code § 10103(a)(7)(C)* [*see Com. Code § 10103(a)(7)(C)(i)-(iv)*]. The fourth alternative, *Com. Code § 10103(a)(7)(C)(iv)*, itself imposes two requirements if the lessee selected the supplier and directed the lessor to purchase the goods from that supplier. If the lessee has not selected the supplier in this manner, the following requirements must be satisfied:

- The lessor must inform the lessee in writing of the identity of the supplier [*Com. Code § 10103(a)(7)(C)(iv)(aa)*];

- The lessor must inform the lessee in writing that the lessee may have rights under the contract by which the lessor acquired the goods or the right to possession and use of the goods [*Com. Code § 10103(a)(7)(C)(iv)(bb)*]; and

- The lessor must advise the lessee in writing that the lessee may contact the supplier for a description of any such rights [*Com. Code § 10103(a)(7)(C)(iv)(cc)*].

Optional Paragraph 2 is for use only with *see § 413.342*. It relates to *Com. Code § 10516(b)*, and is appropriate only if plaintiff is a lessee under a finance lease that is also a consumer lease and has revoked acceptancethat was made with knowledge of the nonconformity [*see Com. Code § 10516(b)*; *see § 413.226[2]*].

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36-413 California Forms of Pleading and Practice--Annotated § 413.348

§ 413.348 Complaint for Rent and Damages [Com. Code §§ 10527-10530, 10532] for Default [Com. Code § 10523]--By Lessor Against Lessee

[1] FORM Complaint for Rent and Damages [Com. Code §§ 10527-10530, 10532] for Default [Com. Code § 10523]--By Lessor Against Lessee
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
[a corporation,]	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR DEFAULT
_____ [*name*],	)	[Amount demanded _____
[doing business under the fictitious name of	)	(exceeds *or* does not exceed) $10,000]
_____ (*name*),]	)	[LIMITED CIVIL CASE]
[and DOES I through _____,]	)	
Defendant(s).	)	
	)	

Plaintiff alleges:

[1. At all times herein mentioned, plaintiff _____ (*name*) is, and was, a corporation organized and existing under the laws of the state of _____, (authorized to transact, and transacting, intrastate business in California) with its principal place of business (in California) in _____ County (*or allege other capacity and residence of plaintiff as appropriate*).]

[2. Defendant is, and at all times herein mentioned was, an individual residing in _____ County, California and therein doing business under the fictitious name of _____ (*name*), and, with respect to that name, has filed the statement and published the notice as required by *Sections 17910 through 17919 of the Business and Professions Code* (*or allege other capacity and residence of defendant as appropriate*).]

[3. *Fictitious name allegation, if appropriate. See § 413.340, Paragraph 3.*]

[4. *Agency allegation, if appropriate. See § 413.340, Paragraph 4.*]

[5. Plaintiff is a merchant engaged in _____ (*specify type of business and type of good, e.g.,* the business of buying, selling, and leasing new and used restaurant equipment).]

[6. Defendant is a merchant engaged in the _____ (*describe type of goods that are subject of lease and plaintiff's status in dealing with them as buyer, seller, lessor, or lessee, e.g.,* retail sale and lease of office furniture and cafeteria equipment).]

[*If lease involved is a consumer lease, ADD*]

7. Defendant entered into the lease agreement that is the subject of this action in order to use the _____ [*specify type of goods, e.g.,* computer] primarily for personal, family, or household purposes. [Thus, this action is subject to the provisions of Section _____ (*specify any applicable consumer venue provision, e.g.* 395(b) of the Code of Civil Procedure).]

[*CONTINUE*]

8. On _____ [*date*], plaintiff and defendant entered into a written agreement under the terms of which plaintiff was to lease _____ [*specify type of goods, e.g.,* approximately $25,000 worth of restaurant equipment, which is listed with particularity in Appendix A of the lease agreement,] to defendant for a[n initial] term of _____ [*specify time period, e.g.,* three years], commencing on _____ [date], at a monthly rent of $_____. The lease agreement required to pay to defendant by _____ [*date*], the sum of $_____ as security for the performance of his/her obligations under the lease and to pay the first month's rent by _____ [*date*]. Thereafter monthly rental payments were due on or before the _____ day of each month. A copy of the lease agreement is attached as Exhibit "A" and made a part of this complaint.

[9. The lease provided for the goods to be delivered to defendant in _____ (*number*) installments _____ (*describe quantity and type of goods to be delivered in any installments due to be delivered before the date of default or otherwise relevant, e.g.*: the freezers, ovens, and tables were to be delivered first on _____ (*date*).]

10. Plaintiff performed all obligations that he/she was required to perform under the lease agreement in that on _____ [*date*], plaintiff _____ [*allege facts showing plaintiff's performance up to the time of defendant's default, and if relevant, facts from which it can be determined whether or not the goods had been identified to the lease at the time the default or casualty occurred, e.g.,* entered into a contract with _____ (*name*) for the manufacture of the goods. Plaintiff performed all obligations that he/she was required to perform under the manufacturing contract and instructed the manufacturer to deliver the finished goods to defendant's restaurant. The first installment of goods was delivered to(, and accepted by,) defendant on

_____ (*date*)].

[11. When defendant notified plaintiff on _____ (*date*) of the _____ (defects in *or* nonconformity of) the _____ (goods *or specify commercial lot or item, e.g.,* freezer), plaintiff caused it to be repaired; and at the time of defendant's default it was functioning properly when maintained and operated in accordance with the manufacturer's instructions for the purpose for which it was intended.]

12. On or about _____ [*date*], defendant defaulted in its obligations under the lease agreement by _____ [*describe nature of defendant's breach, e.g.,* failing and refusing to make any further payments required by the lease agreement].

[13. Defendant employed the leased goods in its _____ (trade *or* business).]

[14. The lease agreement provides that when defendant is in default and plaintiff so demands, defendant, at his/her expense, is required to assemble the goods and deliver them to a reasonably convenient location designated in plaintiff's demand. By letter dated _____ (*date*), a copy of which, along with the acknowledgment of its receipt signed by plaintiff on _____ (*date*), is attached hereto marked Exhibit "B," plaintiff demanded that defendant assemble the goods and deliver them to _____ (address).]

15. On or about _____ [*date*], _____ [*describe how and whether manufacture, goods in transit, or deliveries were stopped and whether and how possession was returned to plaintiff (see Com. Code §§ 10524-10527), e.g.,* plaintiff took possession of the (first installment of the) goods after causing them to be removed from defendant's premises (and instructed the manufacturer to complete the manufacture of the remaining goods, but to deliver them to plaintiff, rather than to defendant)].

[*If lessor retained or regained possession of the goods, allege whether and what disposition the lessor made of the goods: EITHER, if plaintiff relet the goods*]

16. Plaintiff [*if plaintiff claims cover lease is substantially similar to original lease, add:* in good faith and in a commercially reasonable manner,] disposed of the goods that were the subject of the original lease between plaintiff and defendant by leasing them to a third party for a lease term _____ [equal to the term of the lease between plaintiff and defendant *or specify term, e.g.,* two years] [, and granting the new lessee _____ (the same renewal options *or specify number and term, e.g.,* options to renew for a total of three more years)]. [The new lease grants the new lessee an option to purchase.] The new lease commenced on _____ [*date*] and provides for rent of $_____ per _____ [*specify interval, e.g.,* month]. [The other terms and conditions of the new lease are substantially the same as those of the original lease (and it was negotiated based on plaintiff's standard lease form)].

[*OR, if plaintiff sold the goods*]

16. _____ [After identifying the goods to the lease, on *or* On] _____ [*date*], plaintiff sold the [completed] [unfinished] goods that were _____ [the subject of *or* identified to] the lease between plaintiff and defendant to a third party[,even though they were unfinished,] [as _____ (scrap *or* salvage)] for $_____.

[*OR, if plaintiff elected not to dispose of the goods*]

16. Plaintiff has not disposed of the goods[; they remain part of plaintiff's inventory] [; and plaintiff continues to hold them for defendant].

[*OR, if plaintiff was unable to dispose of the goods*]

16. Although plaintiff _____ [*describe attempts to dispose of goods, e.g.,* showed the goods to 12 prospective buyers, lessees, and agents over a nine-month period], plaintiff has been unable to dispose of the goods [*add reasons if known and desired, e.g.,* because they were made to defendant's specifications and are not readily convertible to other settings]; plaintiff continues to hold the goods for defendant.

[*CONTINUE*]

17. As a direct and proximate result of defendant's breach of the lease, plaintiff has suffered damages in the amount of $_____[, which sum reflects deduction of _____ (the security deposit paid by defendant *and/or* expenses saved as a consequence of the default)] [and will continue to suffer damages based on unpaid rent for the remaining term of the lease]. [Defendant's breach of the lease did not result in any saving of expenses to plaintiff.]

[18. As a further direct result of defendant's breach of the lease, plaintiff was caused to incur the following commercially reasonable charges, expenses, and commissions (in connection with effecting the return and/or disposition of the goods) incident to the default: _____ (*list, e.g.,*

Penalty paid to manufacturer	$_____
Transportation for return of goods	$_____
Disposition commission	$_____
Total	$_____

)]

[19. As a further direct result of defendant's default in performance of its obligations under the lease(, specifically its obligation to repair and maintain them in good condition, subject only to normal wear and tear), plaintiff suffered _____ (loss of *and/or* damage to) the value of its residual interest in the good in the sum of $_____.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For actual damages in the sum of $_____ or according to proof;

[2. For incidental damages in the sum of $_____;]

3. For interest at the _____ [rate of _____ percent per annum *or* legal rate] on the sum of $_____ from and after _____ [*date on which amount of damages was*

capable of being made certain or date on which action was filed, whichever is appropriate];

4. For costs of suit herein incurred [including reasonable attorney's fees as authorized by *Section 1717 of the Civil Code*]; and

5. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification. See § 413.310.*]

[2] Use of Form

This form is a complaint for use by a lessor to recover damages and/or rent from a defaulting lessee. The default may consist of wrongful rejection or revocation of acceptance of goods, failure to make a payment when due, repudiation, or any other default specified by the lease agreement. The lessor's remedies are cumulative, up to the point at which the lessor has been put in as good a position as if the lessee had fully performed the lease agreement [*Com. Code § 10523*; *see Com. Code § 10523*, Official UCC Comment; *see also Com. Code § 10501(a)-(c)* (contract may provide for different or additional defaults and remedies)]. In terms of a lessor's remedies, finance leases are not treated any differently under Division 10 than other leases [*see Com. Code § 10523*, Official UCC Comment, No. 16].

The applicable measure of damages will depend on whether the goods were completed, identified to the lease, or accepted by the lessee at the time of the default (Paragraphs 9-12) [*see Com. Code § 10523(a)(2)-(4), 10524-10526*]; whether the lessee retained possession or the lessor had or obtained possession of the goods (Paragraphs 13-15) [*see Com. Code §§ 10525, 10526*], and finally, whether the lessor disposed of the goods, and if so, how (Paragraphs 16) [*see Com. Code §§ 10527-10529*]. The lessor is not required to dispose of the goods. That is a function of commercial judgment to which no sanctions are attached [*Com. Code § 10523(a)*, Official UCC Comment]. The damage allegations of this form will not be appropriate if the lease agreement involved has a liquidated damage provision [*see Com. Code §§ 10503(c), 10504* (*see §§ 413.193* and *413.194*, respectively)].

[3] Allegations

This form alleges:

- Plaintiff's capacity as a domestic corporation or a foreign corporation authorized to transact intrastate business in California (Paragraph 1) [*see Corp. Code §§ 191, 2105, 2203(c)*];

- Defendant's capacity and residence (Paragraph 2).

- Allegations regarding fictitious defendants and their agency relationshipwith the named defendant (Paragraphs 3, 4).

Paragraphs 5 and 6 are for use only if plaintiff or defendant, respectively, is a merchant with respect to goods of the kind subject to the lease [*see Com. Code § 10103(a)(20)*]. The lessor's status as merchant is mainly germane in the contexts of firm offers [*see Com. Code § 10205, see § 413.71*)]. A party who is a merchant is also charged with the amount of knowledge or skill particular to the practices or goods involved [*Com. Code §§ 2104(1), 10103(c)* (applicable definition of "merchant"); *see also § 413.310*]. If counsel uses optional Paragraph 7 to allege that the lease involved is a consumer lease, Paragraph 5 must also be used, because a consumer lease by definition is one from lessor regularly engaged in business of leasing or selling [*Com. Code § 10103(a)(5)*]. For discussion of venue in actions against

consumer lessees, see *§§ 413.310* and *413.340*.

This form further alleges:

- The execution of a written lease agreement and pertinent details to the goods involved and to any relevant provisions (optional Paragraph 7) [*see Com. Code § 10201(a)(1)* (all consumer leases and other leases under which payments, excluding payments for options to renew or buy, total $1,000 or more must be in writing)].

- That the lease is an installment lease, with a description of the installments (optional Paragraph 9) [*Com. Code § 10103(a)(9)*; *see Com. Code §§ 10510(b), 10523(a)* (default as to whole of installment lease)].

- Plaintiff's performance of any obligations required of it prior to the time of defendant's default (Paragraph 10 and optional Paragraph 11).

- Defendant's default (Paragraph 12) [*see Com. Code § 10523*; *see also Com. Code § 10525(a)* (discovery of lessee's insolvency as entitling lessor to refuse to deliver goods)].

Optional Paragraph 11 is necessary only if plaintiff wishes to rebut some claim of defendant's with respect to a nonconformity or its cure [*see, e.g., Com. Code § 10513*].

Optional Paragraph 13 is only necessary if plaintiff is using Paragraph 15 to allege that without removing the goods from defendant's premises, he or she rendered them unusable. The lessor has the right to do that only to goods employed in trade or business [*Com. Code § 10525(b)*].

Optional Paragraph 14 is only necessary if the lease had a "crate and delivery" clause, and plaintiff made demand pursuant to it [*Com. Code § 10525(b)* and U.C.C. Comment; *see also Clark Equipment Co. v. Armstrong Equipment Co. (5th Cir. 1970) 431 F.2d 54, 57 , cert. denied, 402 U.S. 909 (1971)* (enforcing such clause by injunction when goods were in five states)].

Paragraph 15 alleges the status and possession of all the goods that were to be the subject of the lease, and how that possession and status were achieved. In addition to the options whose initiation is reflected in the allegations of optional Paragraphs 13 and 14, possible allegations in Paragraph 15 include:

- The lessor's identifying to the lease conforming goods not already identified. This option is only available if, at the time the lessor learned of the default, the goods were in the lessor's or the supplier's possession or control [*Com. Code § 10524(a)(1)*; *see Com. Code § 10217* (*see § 413.130*)];

- If the goods are unfinished, the lessor's completing or ceasing their manufacture [*Com. Code § 10524(b)*];

- The lessor's refusal to deliver goods after learning of the lessee's insolvency [*Com. Code § 10525(a)*];

- The lessor's taking possession of the goods without judicial process if that can be done without breach of the peace, or initiating judicial action for possession [*Com. Code § 10525(c)*; *see* U.C.C. Comment to *Com. Code § 10523(a)*, No. 13 (action for possession does not bar later recovery of damages)];

- The lessor's stopping delivery of goods in transit [*Com. Code § 10526*; *see § 413.250[5]*];

- The lessee's compliance with a "crate and delivery" clause or other effective tender back to the lessor [*see Com. Code §§ 10525(b), 10529(a)*];

- The lessee's retention of possession, whether or not after failure to comply with a demand or instructions for return [*see Com. Code § 10529(a)*]; and/or

- Some loss of or damage to the goods after risk of loss had passed to the lessee [*see Com. Code § 10529(a)*; *see also Com. Code §§ 10219-10221* (*see § 413.293[9]*), 10525(b) (lessor's right to retake possession on lessee's default)].

Paragraph 16 is not appropriate if the lessee retained possession of the leased goods. Otherwise, alternative Paragraphs 16 allege plaintiff's disposition, if any, of the goods, that were identified to or the subject of the lease [*see Com. Code §§ 10523(a)(5), 10524(a)(2), (b), 10525(b), 10527(a)*]. The manner of disposition of the goods, as described below, will determine what measure of damages (Paragraph 17) applies:

(1) If plaintiff relet the goods (first alternative Paragraph 16) under a lease thatwas substantially similar to defendant's lease and that lease was made in good faith and in a commercially reasonable manner, the measure of damages is (a) accrued and unpaid rent as of the date of the commencement of the term of the new lease agreement, plus (b) the present value, as of the same date, of the total rent for the then remaining lease term of the original lease agreement minus the present value, as of the same date, of the rent under new lease agreement applicable to that period of the new lease term that is comparable to the then-remaining term of the original lease agreement, and (c) any incidental damages allowed under *Com. Code § 10530*, less expenses saved in consequence of the lessee's default [*Com. Code § 10527(b)*]. Note that this measure of damages does not require the lessor to account to the lessee for any profit the lessor makes on the disposition of the goods [*Com. Code § 10527(d)*]. This rule is consistent with the fact that the lessee has no equity of redemption to be protected [*Com. Code § 10527(d)*, Official UCC Comment].

(2) If the new lease is not substantially similar (first alternative Paragraph 16), if the lessor disposes of the goods by sale or otherwise (second alternative Paragraph 16), if the lessor does not dispose of the goods but does not hold them for the lessee (third alternative Paragraph 16), or if lessor relets under a substantially similar lease but nevertheless elects "market damages," the lessor's measure of damages is (a) accrued and unpaid rent as of the date of default if the lessee has never taken possession of the goods, or, if the lessee has taken possession of the goods, as of the date the lessor repossesses the goods or an earlier date on which the lessee makes a tender of the goods to the lessor, (b) the present value as of the date determined under Paragraph 1 of the total rent for the then remaining lease term of the original lease agreement minus the present value as of the same date of the market rent at the place where the goods are located computed for the same lease term, and (c) any incidental damages allowed under *Com. Code § 10530*, less any expenses saved in consequence of the lessee's default [*Com. Code § 10528(a)*]. If this measure of damages is not adequate to put the lessor in as good a position as performance would have, lessor may recover the present value of the profit, including reasonable overhead, the lessor would have made from full performance by the lessee, together with any incidental damages allowed under *Com. Code § 10530*, less due allowance for costs reasonably incurred and due credit for payments or proceeds of disposition [*Com. Code § 10528(b)*].

(3) If the lessee accepted the goods and they were neither repossessed by nor effectively tendered back to the lessor or if conforming goods were lost or damaged after risk of loss passes to the lessee (Paragraph 15), the applicable measure of the lessor's damages is (a) accrued and unpaid rent as of the date of entry of judgment in favor of the lessor, (b) the present value as of the same date of the rent for the then remaining lease term of the lease agreement, and (c) any incidental damages allowed under *Com. Code § 10530*, less expenses saved in consequence of the lessee's default [*Com. Code § 10529(a)(1)*]. If any of the damaged goods remain in lessor's possession, the lessor must hold them for the lessee for the remaining lease term in order to recover the rental measure of damages [*Com. Code § 10529(b)*].

(4) If goods identified to the lease contract were never delivered to the lessee or the lessor or has taken possession of them or the lessee has effectively tendered them back to the lessor and the lessor is unable after reasonable effort to dispose of them at a reasonable price or the circumstances reasonably indicate that such an effort will be unavailing and holds them for the lessee for the remaining term of the lease (fourth alternative Paragraph 16), the lessor's damages are (a) accrued and unpaid rent as of the date of entry of judgment in favor of the lessor, (b) the present value as of the same date of the rent for the then remaining lease term of the lease agreement, and (c) any incidental damages allowed under *Com. Code § 10530*, less any expenses saved in consequence of the lessee's default [*Com. Code § 10529(a)(2), (b)*].

With respect to subparagraphs (1) and (2), *above*, note that whether a new lease is substantially similar is ultimately a question of fact [*see* U.C.C. Comment to *Com. Code § 10527(b)*; *see also § 413.340*]. Under subparagraphs (3) and (4), *above*, the lessor may dispose of the goods before collecting a judgment for damages pursuant to those measures. If that disposition occurs before the end of the original lease term, an adjustment is made [*see Com. Code § 10529(c)*; *see also § 413.251[4]*].

Paragraph 19 alleges any incidental damages the lessor may have [*Com. Code § 10530*]; and Paragraph 19 alleges any damage to the lessor's residual interest in the leased goods [*Com. Code § 10532*].

[4] Lessor's Action for Possession of Goods

The lessor's resort to judicial process to recover possession of the leased goods does not bar it from later recovering damages [*Com. Code § 10525(c)*; *see Com. Code § 10523(a)*, Official UCC Comment, No. 13]. If the lessee has possession of the goods, the lessor may still recover a judgment based on the rental measure of damages [*see Com. Code § 10529(a)*; *see also § 413.348[3]*, Paragraph (3)], but because of the lessee's insolvency, or in order to relet the goods at a higher return, the lessor may still prefer to recover possession of the leased goods. Ordinarily, claim and delivery would be the appropriate form of action for return of possession; however, if the property must be assembled or has become accessions or fixtures, an injunction requiring the lessee to remove or assemble or disassemble the goods and return them may be a more appropriate form of relief [*see Clark Equipment Co. v. Armstrong Equipment Co. (5th Cir. 1970) 431 F.2d 54, 57 , reh'g denied, 402 U.S. 909 (1971)* (decided under *U.C.C. § 9503*; granting injunction in diversity action even though detinue action would havebeen proper under law of forum state because property was situated in five states)].

A lessor may use the first 15 paragraphs of this complaint as part of a complaint for claim and delivery or for an injunction. For forms for use in those actions, see Ch. 119, *Claim and Delivery* , and Ch. 303, *Injunctions* .

[5] State Statutes

Lessor's remedies in general. *Com. Code § 10523*

Lessor's right to identify goods to lease contract. *Com. Code § 10524*

Lessor's right to dispose of goods. *Com. Code §§ 10524(a)(2), (b), 10525(b), 10527*

Lessor's right to complete or cease manufacture of unfinished goods. *Com. Code § 10524(b)*

Lessor's right to refuse delivery to insolvent lessee. *Com. Code § 10525(a)*

Lessor's right, without removal, to render unusable any goods employed in trade or business and to dispose of them on lessee's premises. *Com. Code § 10525(b)*

Lessor's right to take possession of goods previously delivered. *Com. Code § 10525(b), (c)*

Lessor's right to stop delivery of goods in transit. *Com. Code § 10526*

Lessor's measures of damages; election; recovery of rent; incidental damages; loss of or damage to residual interest. *Com. Code §§ 10528-10530, 10532*

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[1] FORM

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36-414 California Forms of Pleading and Practice--Annotated § 414.01

§ 414.01 Scope of Chapter

This chapter discusses the licensing of physicians and surgeons [*see § 414.10 et seq., § 414.30* et seq.]. It includes discussion of the requirement of having a license in order to practice medicine and exemptions to that requirement, as well as discussion of the requirements for obtaining a license.

This chapter includes a petition for a writ of mandate to review the administrative decision of the relevant authorities to deny an application for a physician's and surgeon's certificate or for admission to the licensing examination [*see § 414.150*]. For allegations stating reasons why action against a petitioner for unprofessional conduct is improper, *see §§ 414.170 -414.172*.

This chapter also discusses the grounds and procedures for disciplining holders of a physician's and surgeon's certificate for unprofessional conduct [*see § 414.60* et seq.]. It includes a petition for a writ of mandate to review a decision to discipline a medical licensee for unprofessional conduct [*see § 414.170*], as well as specific allegations in support of this petition [*see §§ 414.171 -414.173*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-414 California Forms of Pleading and Practice--Annotated § 414.02

§ 414.02 Cross References

For forms alleging entitlement to treble damages when defendant is not licensed, see *Ch. 177, Damages, § 177.10* et seq.

For discussion, forms amd a procedural checklist relating to ordinary mandate, see Ch. 358, *Mandate and Prohibition*

For discussion and forms relating to administrative hearings conducted under the Administrative Prodedure Act (*Gov. Code § 11500 et seq.*) and judicial review of such hearing by mandate, see Ch. 473, *Public Agency Adjudication* , et seq., and Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

Legal Topics:

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

§§ 414.03[Reserved]

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A. In General

36-414 California Forms of Pleading and Practice--Annotated § 414.10

§ 414.10 Governing Statutes

Statutory provisions governing the practice of medicine are set out in *Bus. & Prof. Code §§ 2000-2521*, which collectively are known and cited as the Medical Practice Act [*see Bus. & Prof. Code § 2000*]. Provisions relating to the administration of the Medical Practice Act are set out in *Bus. & Prof. Code §§ 2000-2022*. General definitions and provisions relating to the practice of medicine are set out in *Bus. & Prof. Code §§ 2030-2041*. Requirements for licensing as a physician and surgeon are set out in *Bus. & Prof. Code §§ 2050-2154* and *2170-2186*. Provisions relating to causes and proceedings against physicians and surgeons or applicants for licensing as physicians and surgeons for unprofessional conduct are set out in *Bus. & Prof. Code §§ 2220-2337*. Other statutes relevant to proceedings for unprofessional conduct are the provisions governing administrative trials generally, as set out in *Gov. Code § 11500 et seq.*, which are explicitly made applicable to unprofessional conduct proceedings by *Bus. & Prof. Code § 2230*. Provisions relating to judicial review of administrative trials by means of mandate proceedings are set out in *Code Civ. Proc. § 1094.5*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-414 California Forms of Pleading and Practice--Annotated § 414.11

§ 414.11 Medical Board of California

Bus. & Prof. Code § 2001 provides that there is within the Department of Consumer Affairs a Medical Board of California, which consists of 15 members, seven of whom are public members. The Governor appoints 13 members to the board, subject to confirmation by the Senate, five of whom must be public members. The Senate Rules Committee and the Speaker of the Assembly each appoint a public member [*Bus. & Prof. Code § 2001*]. *Bus. & Prof. Code § 2001* becomes inoperative on July 1, 2010, and, as of January 1, 2011, is repealed, unless a later enacted statute, which becomes effective on or before January 1, 2011, deletes or extends the dates on which it becomes inoperative and is repealed [*Bus. & Prof. Code § 2001*]. On and after January 1, 2006, any reference to an investigation by the Board or one of its divisions will be deemed to refer to an investigation directed by employees of the Department of Justice [*Bus. & Prof. Code § 2006* (inoperative on July 1, 2010, and as of January 1, 2011, repealed, unless later enacted statute, that becomes operative on or before January 1, 2011, deletes or extends dates on which it becomes inoperative and is repealed)].

Unless otherwise expressly provided, the term "board" as used in the Medical Practice Act means the Medical Board of California [*Bus. & Prof. Code § 2002*]. This part follows the statutory usage in referring to the Medical Board of California. Thus, unless otherwise indicated, whenever the term "board" appears in this Part, it means Medical Board of California.

Protecting the public is the Board's highest priority in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, protecting the public is paramount [*Bus. & Prof. Code § 2001.1*].

The Medical Board of California formerly consisted of a Division of Medical Quality and a Division of Licensing [former *Bus. & Prof. Code § 2003*]. The authority and responsibilities of the former Division of Licensing are discussed in *§ 414.30* et seq. As of January 1, 2008, the Divisions of Medical Quality and Licensing are folded into the Medical Board [*see Bus. & Prof. Code § 2002*].

The Attorney General acts as legal counsel for the board for judicial and administrative proceedings [*Bus. & Prof. Code*

§ 2020, inoperative on July 1, 2010, and, as of January 1, 2011, repealed, unless later enacted statute, which becomes effective on or before January 1, 2011, deletes or extends dates on which it becomes inoperative and is repealed].

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-414 California Forms of Pleading and Practice--Annotated §§ 414.12-414.29

[Reserved]

§§ 414.12[Reserved]

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B. Licensing

36-414 California Forms of Pleading and Practice--Annotated § 414.30

§ 414.30 Governing Statutes

The licensing and regulation of physicians is governed by *Bus. & Prof. Code §§ 2000-2433*. License requirements for practicing medicine and exemptions to those requirements are governed by *Bus. & Prof. Code § 2050 et seq.* The qualifications for receiving a license, and the licensing examination, are governed by *Bus. & Prof. Code §§ 2080-2186*.

Special requirements for graduates of foreign medical schools are governed by *Bus. & Prof. Code §§ 2100-2120* and requirements for a reciprocity certificate are governed by *Bus. & Prof. Code §§ 2135-2153*.

Instances of unprofessional conduct and rules governing proceedings against persons accused of unprofessional conduct are set out in *Bus. & Prof. Code §§ 2220-2319*. Authorization of the Board to deny a physician's and surgeon's certificate for unprofessional conduct as provided in *Bus. & Prof. Code §§ 2220-2319* is set out in *Bus. & Prof. Code § 2221*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-414 California Forms of Pleading and Practice--Annotated § 414.31

§ 414.31 Division of Licensing

As of January 1, 2008, the Division of Licensing was folded into the Medical Board [*see Bus. & Prof. Code § 2002*].

The Division of Licensing was a division of the Medical Board of California [former *Bus. & Prof. Code § 2003*; *see § 414.11*]. The Division of Licensing had the responsibility for the following: (1) approving graduate and undergraduate medical education programs; (2) approving clinical internship and special programs and hospitals for such programs; (3) developing and administering the physician's and surgeon's licensure examination; (4) issuing licenses and certificates under the board's jurisdiction; (5) administering the board's continuing medical education program; and (6) administering the student loan program [former *Bus. & Prof. Code § 2005*]. The Board now has responsibility for all of the following:

- Approving undergraduate and graduate medical education programs [*Bus. & Prof. Code § 2004(f)*].

- Approving clinical clerkship and special programs and hospitals for undergraduate and graduate medical education programs [*Bus. & Prof. Code § 2004(g)*].

- Issuing licenses and certificates under the Board's jurisdiction [*Bus. & Prof. Code § 2004(h)*].

- Administering the Board's continuing medical education program [*Bus. & Prof. Code § 2004(i)*].

References to the former Division of Licensing in the statutes and regulations, and in this chapter should now be read to refer to the Board. (References throughout this chapter will be changed as pages are replaced in the future.)

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-414 California Forms of Pleading and Practice--Annotated § 414.32

§ 414.32 The Physician's and Surgeon's Certificate

The Board is required to issue one form of certificate to all physicians and surgeons licensed by the board, which is designated as a physician's and surgeon's certificate [*Bus. & Prof. Code § 2050*]. The terms "license" and "certificate" as used in the Medical Practice Act are deemed to be synonymous [*Bus. & Prof. Code § 2040*]. The term "licensee," as used in the Medical Practice Act, means the holder of a physician's and surgeon's certificate or podiatrist's certificate, as the case may be, who is engaged in the professional practice authorized by the certificate under the jurisdiction of the appropiate board, [*Bus. & Prof. Code § 2041*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-414 California Forms of Pleading and Practice--Annotated § 414.33

§ 414.33 Conduct Authorized by Physician's and Surgeon's Certificate

The physician's and surgeon's certificate authorizes the holder to use drugs or devices in or on human beings and to sever or penetrate the tissues of human beings and to use any or all other methods in the treatment of diseases, injuries, deformities, and other physical and mental conditions [*Bus. & Prof. Code § 2051*]. A person properly licensed to practice in the healing arts is entitled to use natural healing methods, despite the fact that there is no statutory provision for licensing naturopaths [*Oosterveen v. Board of Medical Examiners (1952) 112 Cal. App. 2d 201, 205-206, 246 P.2d 136* (interpreting former *Bus. & Prof. Code § 2137, now Bus. & Prof. Code § 2051*)].

Notwithstanding any other provision of law, a person issued a physician's and surgeon's certificate by the Medical Board of California pursuant to the provisions of the Medical Practice Act is entitled to the use of the initials M.D. [*Bus. & Prof. Code § 2055*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-414 California Forms of Pleading and Practice--Annotated § 414.34

§ 414.34 Conduct Prohibited Without Proper Certificate

[1] Practice of Healing Arts

Practicing, attempting to practice, advertising, or holding oneself out as practicing any system or mode of treating the sick or afflicted, or diagnosing, treating, operating for, or prescribing for any ailment, blemish, deformity, disease, disfigurement disorder, injury, or other mental or physical condition of any person without a valid certificate entitling the practitioner to engage in such practice is a public offense. [*Bus. & Prof. Code § 2052*].

The reference to any other mental or physical condition in the prohibition against unlicensed diagnosing, treating, operating, or prescribing for specified conditions was held not to be unconstitutionally overbroad in context of the rest of the language of the statute and the entire statutory scheme governing the healing arts [*Bowland v. Municipal Court (1976) 18 Cal. 3d 479, 494, 134 Cal. Rptr. 630, 556 P.2d 1081* (decided under former *Bus. & Prof. Code § 2141*; *now see Bus. & Prof. Code § 2052*)]. The use of drugs without a proper license is not an essential element of the crime of practicing medicine without a license [*People v. Cochran (1922) 56 Cal. App. 394, 396, 205 P. 473* (decided under former Medical Practice Act of 1913, *now see Bus. & Prof. Code § 2052*)].

The fact that an unlicensed person has had training rendering him or her competent to practice does not render such practice proper [*Magit v. Board of Medical Examiners (1961) 57 Cal. 2d 74, 85, 17 Cal. Rptr. 488, 366 P.2d 816* (disciplinary action against licensee who employed unlicensed persons; decided under former *Bus. & Prof. Code § 2392, now see Bus. & Prof. Code § 2264*)]. Nor is practice by an unlicensed person rendered proper by supervision by a licensee or consultation with a licensee [*O'Reilly v. Board of Medical Examiners (1967) 66 Cal. 2d 381, 388, 58 Cal. Rptr. 7, 426 P.2d 167 , cert. denied, 390 U.S. 944, 88 S. Ct. 1019, 19 L. Ed. 2d 1132* ; *Magit v. Board of Medical Examiners (1961) 57 Cal. 2d 74, 84, 17 Cal. Rptr. 488, 366 P.2d 816* (supervision) (both cases decided under former *Bus. & Prof. Code § 2392*; *now see Bus. & Prof. Code § 2264*, which defines employment of unlicensed persons to practice medicine as unprofessional conduct)].

It is possible for a person to violate *Bus. & Prof. Code § 2052* even if the person never sets foot in California--for example, by prescribing medication over the Internet [*see Hageseth v. Superior Court (2007) 150 Cal. App. 4th 1399,*

1405-1424, 59 Cal. Rptr. 3d 385] .

For a discussion of the legal consequences to a licensee of employing or aiding and abetting an unlicensed person in the practice of medicine, see *§ 414.113[3][b]*.

[2] Representing Self as Physician

In addition to prohibiting specified conduct constituting the actual performance of a healing art without a proper certificate, the Medical Practice Act also provides that any person who uses in any sign, business card, or letterhead, or in an advertisement, the words "doctor" or "physician," the letters or prefix "Dr.," the initials "M.D.," or any other terms or letters indicating or implying that he or she is a physician, surgeon, or practitioner under the Medical Practice Act or any other law, or that he or she is entitled to practice under any law, or who represents or holds himself or herself out as a physician and surgeon, physician, surgeon, or practitioner under the terms of the Medical Practice Act or any other law, without having at the time a valid, unrevoked, and unsuspended certificate as a physician and surgeon under the Medical Practice Act is guilty of a misdemeanor [*Bus. & Prof. Code § 2054(a)*; *see also Bus. & Prof. Code §§ 2274-2278* (use of initials without proper authorization as unprofessional conduct)]. Thus, for instance, a graduate of a foreign medical school who had practiced medicine in other states but was not licensed in California had no *first amendment* right to use the initials M.D. in advertising material for a school for physicians and dental assistants which he conducted [*Lawton v. Board of Medical Examiners (1956) 143 Cal. App. 2d 256, 261-262, 299 P.2d 362* (decided under former *Bus. & Prof. Code § 2142, now see Bus. & Prof. Code § 2054*)].

However, the holder of a valid, unrevoked and unsuspended certificate to practice podiatric medicine may use the phrases "doctor of podiatric medicine," "doctor of podiatry," and "podiatric doctor," or the initials "D.P.M." without being in violation of *Bus. & Prof. Code § 2054(a)* [*Bus. & Prof. Code § 2054(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRequirements

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36-414 California Forms of Pleading and Practice--Annotated § 414.35

§ 414.35 Exemptions to Certification Requirement

[1] Out-of-State or Otherwise Unlicensed Physicians

Unless otherwise required by federal law or regulation, no board under *Bus. & Prof. Code §§ 500-4979* (healing arts) that licenses physicians and surgeons may require a person to obtain or maintain any license to practice a profession or render services in the State of California if one of the following applies [*Bus. & Prof. Code § 715*]:

- The person practices a profession or rendering services exclusively as an employee of a department, bureau, office, division, or similarly constituted agency of the federal government, and provides medical services exclusively on a federal reservation or at any facility wholly supported and maintained by the United States government.

- The person practices a profession of rendering services solely pursuant to a contract with the federal government on a federal reservation or at any facility wholly supported and maintained by the United States government.

- The person practices a profession or rendering services pursuant to, or as part of a program or project conducted or administered by a department, bureau, office, division, or similarly constituted agency of the federal government which by federal statute expressly exempts persons practicing a profession or rendering services as part of the program or project for state laws requiring licensure.

Notwithstanding any other provision of law, the Division of Licensing or the Division of Medical Quality may deny issuance of a license to an applicant or take disciplinary action against the holder of a California license for acts or omissions committed by the applicant or licensee in the course of professional practice or rendering services described in *Bus. & Prof. Code § 715* if the acts or omissions committed by the applicant or licensee constituted ground for denial or discipline under California law governing licensees or applicants for licensure and were not authorized, exempted, or rendered inconsistent by federal statute [*see Bus. & Prof. Code § 716*].

Subject to the provisions of the State Civil Services Act, a person licensed to practice medicine in another state who meets the statutory requirements for application (discussed *below*) and who registers with and is approved by the Division of Licensing, may be appointed to the medical staff in a state institution and, under the supervision of a California-licensed physician and surgeon, may engage in the practice of medicine on persons under the jurisdiction of a state institution [*Bus. & Prof. Code § 2072*]. When an adequate number of qualified resident physicians cannot be recruited from intern staffs in California, a person licensed to practice medicine in another state who meets the statutory requirements for application (discussed *below*) and who registers with and is approved by the Division of Licensing, may be employed on the resident medical staff within a county general hospital and, under the supervision of a California-licensed physician and surgeon may engage in the practice of medicine on persons within the county institution [*Bus. & Prof. Code § 2073*]. The person may not be so employed for more than two years, and at the end of the two-year period, the person must have been issued a physician's and surgeon's certificate by the board to continue the employment [*Bus. & Prof. Code §§ 2072, 2073*].

A practitioner licensed in another state or country who is engaged in actual consultation with a California licensee, as an invited guest of the California Medical Association or the California Podiatric Medical Association, or one of their component county societies, or of an approved medical or podiatric medical school or college for the sole purpose of engaging in professional education through lectures, clinics, or demonstrations, if the physician is, at the time of the consultation, lecture, or demonstration a licensed physician and surgeon or a licensed doctor of podiatric medicine in the state or country in which he or she resides. The practitioner may not open an office, appoint a place to meet patients, receive calls from patients within the limits of this state, give orders, or have ultimate authority over the care or primary diagnosis of a patient who is located in California [*Bus. & Prof. Code § 2060*].

A person licensed to practice medicine in another jurisdiction who is academically eminent may engage in a limited practice of medicine in a medical school under a special faculty permit provided specific eligibility requirements are met [*see Bus. & Prof. Code § 2168 et seq.*].

[2] Commissioned Officer in Armed Forces

A physician and surgeon who is not licensed in California but who is a commissioned officer on active duty in the medical corps of any branch of the United States armed forces may engage in the practice of medicine as part of a residency, fellowship, or clinical training program if all the following conditions are met [*Bus. & Prof. Code § 718*]:

- The residency, fellowship, or clinical training program is conducted by a branch of the armed forces at a health facility on a federal reservation and limited in enrollment to military physicians on active duty in the medical corps of a branch of the United States armed forces.

- The residency, fellowship, or clinical training program, as part of its program, contracts with or affiliates with a similar program in or at a health facility not on a federal reservation to offer specific courses or training not available at the facility located on the federal reservation.

- The officers enrolled in the program restrict their practice only to patients who are seen as part of their duties in the program.

- The compensation received by the officers enrolled in the program is limited to their regular pay and allowances as commissioned officers.

- The officers enrolled in the training programs or portions of training programs not conducted on a federal reservation must register with the Division of Licensing of the Medical Board of California on a form provided by the division.

[3] Limited Exemptions for Holders of Certificates in Allied Healing Arts

The practice of a person who is licensed, certified, or registered under any provision of law relating to the healing arts other than the practice of medicine is not limited by the Medical Practice Act as long as such person is engaged in his or her authorized practice [*Bus. & Prof. Code § 2061*]. Thus, for instance, a chiropractic license entitles the holder to perform certain acts of the chiropractic healing art without holding a physician's and surgeon's certificate. Such a license, however, does not authorize treatment without a physician's and surgeon's certificate beyond the scope of the license [*Crees v. Board of Medical Examiners (1963) 213 Cal. App. 2d 195, 210, 28 Cal. Rptr. 621* (decided under former *Bus. & Prof. Code § 2141*; *now see Bus. & Prof. Code § 2052*)].

A chiropractor who performs acts outside the scope of his or her chiropractic license without a physician's and surgeon's certificate is guilty of practicing medicine without a license even if he or she did not hold himself or herself out as a doctor of medicine [*Crees v. Board of Medical Examiners (1963) 213 Cal. App. 2d 195, 211, 28 Cal. Rptr. 621* (decided under former *Bus. & Prof. Code § 2141*; *now see Bus. & Prof. Code § 2052*)].

[4] Modes of Treatment Not Requiring Certification

A number of other modes of practice are specifically exempt from the licensing requirements of the Medical Practice Act. These are:

- Giving nutritional advice, as long as giving such advice does not amount to conduct of the sort prohibited without a license [*Bus. & Prof. Code § 2068*; *see Bus. & Prof. Code § 2052* (specifying practice prohibited without certificate)];

- Testing and guidance programs in schools, colleges, and universities, and physical fitness tests given by public and private agencies in connection with employment or renewal of licenses or permits [*Bus. & Prof. Code § 2062*];

- Treatment by prayer [*Bus. & Prof. Code § 2063*];

- Domestic administration of home remedies [*Bus. & Prof. Code § 2058*]; and

- Obtaining blood specimens by skin puncture to perform blood glucose testing as part of monitoring a minor child in accordance with *Health & Safety Code § 1241(b)(6)* [*Bus. & Prof. Code § 2058(b)*].

Unlicensed medical assistants who have received an instructor's certificate showing satisfactory completion of appropriate training may engage in certain specified treatments on written specific authorization and under supervision of a licensed physician who is physically present in the treatment facility during administration of the treatment [*Bus. & Prof. Code §§ 2069, 2070*].

[5] Practice of Medicine as Part of Medical or Postgraduate Training

Nothing in the Medical Practice Act may be construed to prevent a regularly matriculated student undertaking a course of professional instruction in an approved medical school, or to prevent a foreign medical student who is enrolled in an approved medical school and clinical training program in this state, or to prevent students enrolled in a program of supervised clinical training under the direction of an approved medical school pursuant to *Bus. & Prof. Code § 2104* (*discussed under § 414.38[3]*) from engaging in the practice of medicine whenever and wherever prescribed as a part of his or her course of study [*Bus. & Prof. Code § 2064*].

Unless otherwise provided by law, no postgraduate trainee, intern, resident, postdoctoral fellow, or instructor may

engage in the practice of medicine, or receive compensation for it, or offer to engage in the practice of medicine unless he or she holds a valid, unrevoked, and unsuspended physician's and surgeon's certificate issued by the Medical Board of California [*Bus. & Prof. Code § 2065*].

A graduate of an approved medical school, who is registered with the Division of Licensing and who is enrolled in a postgraduate training program approved by the Division of Licensing, however, may engage in the practice of medicine whenever and wherever required as part of the program under the following conditions [*Bus. & Prof. Code § 2065*]:

- A graduate enrolled in an approved first-year postgraduate training program may engage in the practice of medicine for a period not to exceed one year whenever and wherever required as part of the training program, and may receive compensation for that practice.

- A graduate who has completed the first year of postgraduate training may, in an approved residency or fellowship, engage in the practice of medicine whenever and wherever required as part of that residency or fellowship, and may receive compensation for that practice. The resident or fellow can qualify for, take, and pass the next succeeding written examination for licensure given by the Division of Licensing, or qualify for and receive a physician's and surgeon's certificate by one of the other methods specified by the Medical Practice Act (*see* discussion in *§§ 414.38, 414.39*). If the resident or fellow fails to receive a license to practice medicine under the Medical Practice Act within one year from the commencement of the residency or fellowship, or if the Division of Licensing denies his or her application for licensure, all privileges and exemptions under *Bus. & Prof. Code § 2065* automatically cease.

A foreign medical graduate may engage in the practice of medicine whenever and wherever required as part of a clinical service program when the graduate is registered with the Division for clinical service and is participating in the program as part of an approved postgraduate training program [*Bus. & Prof. Code § 2066(a)*]. A graduate may so practice until the receipt of his or her physician's and surgeon's certificate. If the graduate fails to pass the examination and receive a certificate by the end of the graduate's third year of postgraduate training, or if the Division of Licensing denies his or her application for licensure, all privileges and exemptions under *Bus. & Prof. Code § 2066* automatically cease [*Bus. & Prof. Code § 2066(b)*]. *Bus. & Prof. Code § 2066* does not preclude a foreign graduate from qualifying under other exemptions [*Bus. & Prof. Code § 2066(c)*].

[6] Service in Case of Emergency

[a] General Exemption From License Requirement

Service in case of emergency is not prohibited by the Medical Practice Act [*Bus. & Prof. Code § 2058*]. An emergency situation for the purpose of this exemption is defined as a case in which ordinary medical practitioners of the schools provided for by statute who have proper diplomas and have submitted themselves to proper examinations are not readily available [*People v. Lee Wah (1886) 71 Cal. 80, 82, 11 P. 851* (interpreting former Stats. 1875-1876, p. 792, as amended Stats. 1877-1878, p. 918, *now Bus. & Prof. Code § 2058*); *Newhouse v. Board of Osteopathic Examiners (1958) 159 Cal. App. 2d 728, 735, 324 P.2d 687* (interpreting former *Bus. & Prof. Code § 2144, now Bus. & Prof. Code § 2058*)]. Services of an emergency character have also been defined as services rendered to afford temporary relief until services of a regular practitioner can be secured. An emergency situation does not exist when there is time and opportunity to summon a qualified physician [*People v. Mangiagli (1950) 97 Cal. App. 2d Supp. 935* (interpreting former *Bus. & Prof. Code § 2144, now Bus. & Prof. Code § 2058*)]. A case in which a patient's condition was given up as hopeless by established schools of practice does not constitute an emergency for purpose of exemption from the licensing requirement [*People v. Lee Wah (1886) 71 Cal. 80, 82, 11 P. 851* (interpreting former Stats. 1875-1876 p. 792, as amended Stats. 1877-1878 p. 918, *now Bus. & Prof. Code § 2058*)].

[b] Natural Disaster Exemption

Nothing in *Bus. & Prof. Code § 700 et seq.*, the statutes regulating and licensing health care practitioners, applies to a health care practitioner licensed in another state or territory of the United States who offers or provides health care for which he or she is licensed, provided that the following circumstances exist [*Bus. & Prof. Code § 900(a)*]:

- The health care is provided only during a state of emergency as defined in *Gov. Code § 8558(b)*;
- The emergency overwhelms the response capabilities of California health care practitioners; and
- The Director of the Emergency Medical Services Authority has requested the practitioner to provide emergency medical services.

A "state of emergency" exists for purposes of this exemption when there are duly proclaimed conditions constituting extreme peril to public safety. Examples of possible causes include the following [*Gov. Code § 8558(b)*]:

- Air pollution.
- Fire.
- Flood.
- Storm.
- Epidemic.
- Riot.
- Drought.
- Sudden and severe energy shortage.
- Plant or animal infestation or disease.
- The Governor's warning of an earthquake or volcanic prediction.
- Earthquake.

[7] Physician Traveling With Sports Team

A physician and surgeon licensed to practice medicine in another state or country is exempt from licensure requirements while practicing medicine in California if both of the following conditions are met [*Bus. & Prof. Code § 2076(a)*]:

- The physician has an oral or written agreement with a sports team to provide general or emergency medical care to the team members, coaching staff, and families traveling with the team for a specific sporting event to take place in California.
- Except as provided in *Bus. & Prof. Code §§ 2058* or *2060*, the physician may not provide care or consultation to any person residing in California, other than a team member, member of the coaching staff or member of a family traveling with the team.

The exemption remains in force while the physician is traveling with the team, but no longer than 10 days per individual sporting event [*Bus. & Prof. Code § 2076(b)*; *see Bus. & Prof. Code § 2076(c)* regarding granting of additional time for exemption].

A physician exempt from licensure requirements under *Bus. & Prof. Code § 2076* is not authorized to practice medicine at a health care clinic or facility, including an acute care facility [*Bus. & Prof. Code § 2076(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsLicensesHealthcare LawBusiness Administration & OrganizationGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRequirements

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36-414 California Forms of Pleading and Practice--Annotated § 414.36

§ 414.36 Unauthorized Practice of Medicine Involving Religious Aspect

Nothing in the Medical Practice Act is to be construed to interfere in any way with the practice of religion [*Bus. & Prof. Code § 2063*]. Nevertheless, the Medical Board of California may regulate bona fide religious practices that constitute the practice of medicine when those practices are dangerous [*see Board of Medical Quality Assurance v. Andrews (1989) 211 Cal. App. 3d 1346, 1355-1358, 260 Cal. Rptr. 113* ("healing church" that offered medical therapy involving long-term fasting enjoined from providing further medical treatments, notwithstanding fact that bodily purification through fasting was purportedly major tenet of church's religion); *but see Northrup v. Superior Court (1987) 192 Cal. App. 3d 276, 283, 237 Cal. Rptr. 255* (upholding practice of midwifery without certificate on ground that midwifery was pursuant to bona fide tenet of religious faith)].

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36-414 California Forms of Pleading and Practice--Annotated § 414.37

§ 414.37 Basic Requirements for Certification

[1] Written Examination

All applicants for the physician's and surgeon's certificate must take the examination provided for in *Bus. & Prof. Code § 2170 et seq.*, unless provisions of the Medical Practice Act provide otherwise [*Bus. & Prof. Code § 2170(a)*].

The licensing examinations must be designed to ascertain the applicant's fitness to practice medicine [*Bus. & Prof. Code § 2171*]. Applicants for a physician's and surgeon's certificate must pass an examination in biomedical sciences and clinical sciences, as determined by the Division of Licensing. Applicants must also pass an examination designed to test biomedical sciences and clinical sciences determined by the Division to be essential for the unsupervised practice of medicine [*Bus. & Prof. Code § 2183*; *see Marquez v. Medical Bd. of California (2010) 182 Cal. App. 4th 548, 556-560, 105 Cal. Rptr. 3d 835* (Board had duty to establish passing score)]. The examination must be in writing, unless otherwise provided [*Bus. & Prof. Code § 2171*].

The examination must be conducted in the English language. On submission of satisfactory proof from the applicant that he or she is unable to meet the requirements of the examination in English, the Division of Licensing may allow the use of an interpreter, either to be present in the examination room or thereafter to interpret and transcribe the answers of the applicant. The Division in its discretion may select an examinee's interpreter or approve the selection of an interpreter by the examinee. The expenses of the interpreter will be paid by the examinee [*Bus. & Prof. Code § 2173*].

Examinations for a physician's and surgeon's certificate may be conducted by the Division of Licensing under a uniform examination system, and the Division may make arrangements with organizations furnishing examination material as it may deem desirable [*Bus. & Prof. Code § 2176*]. The Division may, in its discretion, designate other written examinations for a physician's and surgeon's certificate that the division determines are equivalent to any other written examination for a physician's and surgeon's certificate conducted by the division [*Bus. & Prof. Code § 2176*].

[2] Requirements for Admission to Examination

The Division of Licensing may approve every school that substantially complies with the requirements of *Bus. & Prof.*

Code § 2000 et seq. Graduates of approved medical schools are deemed to meet the medical curriculum requirements of *Bus. & Prof. Code § 2089* [*Bus. & Prof. Code § 2084*].

To show that he or she has met the requirements for certification, the applicant must document that he or she has successfully completed all of the following:

- A curriculum extending over a period of at least four academic years, or 32 months of actual instruction, in a medical school located in the United States or Canada approved by the Division of Licensing, or in a medical school located outside those territories that otherwise meets the requirements of *Bus. & Prof. Code § 2089* [*Bus. & Prof. Code § 2089*; *see also Bus. & Prof. Code § 2082* (contents of application for licensure)].

- A postgraduate training program, approved by the Division, that lasts at least one year and includes at least four months of general medicine [*Bus. & Prof. Code § 2096*].

If an applicant has matriculated in more than one medical school, the applicant must have matriculated in the medical school awarding the degree of doctor of medicine or its equivalent for at least the last full academic year of medical education received prior to the granting of the degree [*Bus. & Prof. Code § 2089*].

An applicant need not have completed the first year of postgraduate training required by *Bus. & Prof. Code § 2096* before issuance of a license in another state, however, if the applicant has completed this requirement before application is made to the Division of Licensing for a reciprocity certificate [*Bus. & Prof. Code § 2143*].

[3] Approval of Medical Schools

The Division of Licensing may approve every school that complies with the requirements for resident courses of professional instruction [*Bus. & Prof. Code § 2084*; *see, e.g., Lopez v. Board of Medical Quality Assurance (1992) 6 Cal. App. 4th 693, 696-697, 8 Cal. Rptr. 2d 22* (Department of Licensing may but need not approve substantially complying school); *see also Bus. & Prof. Code § 2063* (licensing and regulatory provisions of Medical Practice Act not to be construed so as to discriminate against any school of medicine or surgery)]. The medical curriculum for all applicants must provide adequate instruction in the areas specified by statute [*Bus. & Prof. Code § 2089*]. *Bus. & Prof. Code § 2089.5* sets forth the standards of adequate clinical instruction in the subjects specified by *Bus. & Prof. Code § 2089*. The Division may consider the quality of the resident courses of instruction required for certification [*Bus. & Prof. Code § 2084*].

Nothing in the Medical Practice Act is to be construed to discriminate against any particular school of medicine or surgery, school or college of podiatric medicine, or any other treatment [*Bus. & Prof. Code § 2063*]. This applies primarily to the administration of the provisions governing the licensing and regulation of medicine, however, and does not modify any other specific sections that do not call for interpretation [*Oosterveen v. Board of Medical Examiners (1952) 112 Cal. App. 2d 201, 210, 246 P.2d 136* (interpreting former *Bus. & Prof. Code § 2146*; *now see Bus. & Prof. Code § 2063*)].

Graduates of colleges of osteopathy or osteopathic medicine that meet the standards for approval as professional training courses are entitled to be certified as physicians and surgeons. The refusal to certify graduates of osteopathic colleges as physicians and surgeons regardless of their individual qualifications constitutes a denial of the equal protection of the laws as guaranteed by the federal and state constitutions [*D'Amico v. Board of Medical Examiners (1974) 11 Cal. 3d 1, 24, 112 Cal. Rptr. 786* P.2d 10; *see also Bus. & Prof. Code § 2064.2* (medical school or clinical training program prohibited from denying access to elective clerkships or preceptorships solely on basis that student is enrolled in osteopathic medical school)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-414 California Forms of Pleading and Practice--Annotated § 414.38

§ 414.38 Special Requirements for Graduates of Foreign Medical Schools

[1] Applicability in General

The provisions of *Bus. & Prof. Code § 2100 et seq.* (discussed *below*) apply to all applications of graduates of medical schools located outside the United States or Canada. These applicants must otherwise comply with the provisions of the Medical Practice Act, except when those provisions are in conflict with, or inconsistent with, the provisions of *Bus. & Prof. Code § 2100 et seq.* [*Bus. & Prof. Code § 2100*].

[2] Noncitizens Wishing to Participate in Certain Programs

Provisions for graduates of foreign medical schools who are not citizens of the United States but are legally admitted to the United States and who wish to participate in postgraduate studies in approved medical schools, or fellowship programs in medical specialties at approved hospitals, or who wish to become faculty members of medical schools in this state are set forth in *Bus. & Prof. Code §§ 2111-2115*.

[3] United States Citizens or Prospective Citizens

Alternative means of licensure for United States citizens who have graduated from foreign medical schools are set out in *Bus. & Prof. Code §§ 2102, 2103* [*see Review of Selected 1974 California Legislation, 6 Pac. L.J. 142* (former *Bus. & Prof. Code § 2193.71* (*now see Bus. & Prof. Code § 2103*) provided new means of licensing graduates of medical schools located outside United States and Canada who are American citizens, in addition to means provided under former *Bus. & Prof. Code § 2193.5* (*now see Bus. & Prof. Code § 2102*))]. However, only U.S. citizens may be licensed under *Bus. & Prof. Code § 2103*, whereas those who may be licensed under *Bus. & Prof. Code § 2102* include both applicants who are U.S. citizens and those who have filed a declaration of intention to become U.S. citizens, a petition for naturalization, or a comparable document [*See Bus. & Prof. Code §§ 2102, 2103*].

The requirements for these applicants to be certified are as follows [*see Bus. & Prof. Code § 2102(a)-(d)*]:

- Completion in a medical school of a resident course of professional instruction equivalent to that

required by *Bus. & Prof. Code § 2089* [*see § 414.37[2]*] and documentation showing final and successful completion of the course. The Division need not, however, evaluate for equivalency any course work obtained at a medical school disapproved by it.

- Certification by the Educational Commission for Foreign Medical Graduates, or its equivalent. This requirement applies to all subject applicants who did not pass the written examination before June 1, 1986.

- Satisfactory completion of the postgraduate training required by *Bus. & Prof. Code § 2096*. An applicant must have:

  - Substantially completed the required professional instruction.

  - Made application to the Division.

  - Passed steps 1 and 2 of the written examination in specific subjects before commencing any postgraduate training in California. The Division has some discretion in authorizing remedial training.

- Pass the written examination as provided in *Bus. & Prof. Code § 2170* (*see* --Basic Requirements for Certification--Written Examination, *above*). If an applicant has not satisfactorily completed at least two years of approved postgraduate training, the applicant must also pass the clinical competency written examination.

Alternative special certification requirements set out in *Bus. & Prof. Code § 2103* for United States citizens who have graduated from a medical school outside the United States or Canada include [*see Bus. & Prof. Code § 2103(d)* (qualifying examination), (e) (supervised clinical training)]:

- Attainment of a score satisfactory to an approved medical school on a qualifying examination acceptable to the Division.

- Successful completion of one academic year of supervised clinical training in a program approved by the Division pursuant to *Bus. & Prof. Code § 2104* (approved supervised clinical training programs in hospitals for students intending to apply for licensure under *Bus. & Prof. Code § 2103*) or successful completion of a one-year supervised clinical internship operated by a medical school pursuant to Stats. 1972, ch. 85, as amended Stats. 1973, ch. 888 (supervised clinical internship programs by medical schools; provisions now repealed).

The requirement of completing a one-year supervised clinical training program set out in *Bus. & Prof. Code § 2103(e)* appears to be separate from the requirement of satisfactory completion of one-year clinical service in a hospital in the United States or Canada which the Division approves for first-year postgraduate training set out in *Bus. & Prof. Code § 2103(f)*, discussed *below*.

Training received in the academic year of supervised clinical training approved pursuant to *Bus. & Prof. Code § 2104* will be considered as part of the total academic curriculum for purposes of meeting the requirements of *Bus. & Prof. Code §§ 2089* and *2089.5* (curriculum, clinical instruction, and affiliation requirements) [*Bus. & Prof. Code § 2103(e)(1)*].

An applicant who has passed the basic science and English language examinations required for certification by the Educational Commission for Foreign Medical Graduates may present evidence of those passing scores along with a

certificate of completion of one academic year of supervised clinical training in a program approved by the Division pursuant to *Bus. & Prof. Code § 2104* in satisfaction of the formal certification requirements of *Bus. & Prof. Code 2102(b)* [*Bus. & Prof. Code § 2103(e)(2)*].

Bus. & Prof. Code § 2103 sets out no special requirement that the applicant pass an oral and comprehensive clinical examination in addition to the normal written licensure examination.

[4] Substitute Credit for Postgraduate Education and Training

To meet the requirements for licensure set forth in *Bus. & Prof. Code §§ 2089* and *2089.5*, the Division of Licensing may require the applicant to successfully complete additional education and training [*Bus. & Prof. Code § 2107(b)*]. In determining the content and duration of the required additional education and training, the division considers the applicant's medical education and performance on standardized national examinations, and may substitute approved postgraduate training in lieu of specified undergraduate requirements [*Bus. & Prof. Code § 2107(b)*]. Postgraduate training substituted for undergraduate training is in addition to the year of postgraduate training required by *Bus. & Prof. Code §§ 2102* and *2103* [*Bus. & Prof. Code § 2107(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawInstructionCurriculaGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewImmigration LawNaturalizationAdministrative ProceedingsApplications

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36-414 California Forms of Pleading and Practice--Annotated § 414.39

§ 414.39 Certification Based on Reciprocity

[1] In General

Bus. & Prof. Code §§ 2135-2153 provide for the granting of certificates based on reciprocity to applicants who are already certified to practice medicine and surgery in another state or Canada and who meet those additional requirements specified in *Bus. & Prof. Code §§ 2135-2154*. There is no provision requiring an applicant who meets the conditions set forth in *Bus. & Prof. Code § 2135 et seq.* to take the entire written examination required under *Bus. & Prof. Code § 2170 et seq.* (*discussed under § 414.37[1]*) in order to receive a certificate based on reciprocity. However, *Bus. & Prof. Code § 2135* requires that an applicant who is not a graduate of a properly accredited medical school take and pass the clinical competency written examination, be certified by a specialty board approved by the American Board of Medical Specialties or approved by the Division pursuant to *Bus. & Prof. Code § 651(h)*, or satisfactorily completed at least two years of approved postgraduate training [*Bus. & Prof. Code § 2135(d)*].

[2] Reciprocity Requirements

An application received from an applicant who has practiced medicine with an unrestricted license in a state or states or in Canada, or as a member of the active military, United States Public Health Services, or other federal program for four or more years, is reviewed and processed pursuant to the reciprocity requirements of *Bus. & Prof. Code § 2135* [*Bus. & Prof. Code § 2135(f)*; *but see Bus. & Prof. Code § 2151* (different requirements applicable if applicant is diplomate of National Board of Medical Examiners)].

The Division of Licensing must issue a physician's and surgeons's certificate on reciprocity to an applicant who meets all of the following requirements [*Bus. & Prof. Code § 2135*]:

- The applicant holds an unlimited license as a physician and surgeon in another state or states, or in a Canadian province or Canadian provinces, issued after successful completion of a resident course of professional instruction equivalent to that required in California and after passing a written examination recognized as equivalent in content to that administered in California;

- The applicant held an unrestricted license to practice medicine in another state or a Canadian province, or as a member of the active military, United States Public Health Services, or other federal program, for at least four years, not including time spent in an approved postgraduate training program or clinical fellowship;

- The applicant has not been the subject of disciplinary action by any medical licensing authority or the subject of adverse judgments or settlements resulting from a medical practice evidencing a pattern of negligence or incompetence;

- The applicant is certified by a specialty board approved by the American Board of Medical Specialties or approved by the Division pursuant to *Bus. & Prof. Code § 651(h)*, or satisfactorily completes at least two years of approved postgraduate training, or passes the clinical competency written examination; and

- The applicant has not committed acts forbidden by *Bus. & Prof. Code § 475 et seq.* or *Bus. & Prof. Code § 2220 et seq.*

The California Supreme Court found a former version of *Bus. & Prof. Code § 2135* unconstitutional as a denial of equal protection [*D'Amico v. Board of Medical Examiners (1974) 11 Cal. 3d 1, 23-24, 112 Cal. Rptr. 786, 520 P.2d 10* (provisions precluding graduates of colleges of osteopathy from licensure despite individual qualifications improper classification)]. Apparently, the present version of *Bus. & Prof. Code § 2135* has resolved the constitutional infirmity by not precluding any class of graduates from licensure.

[3] Investigation of Educational Qualifications

The Division of Licensing may make an independent investigation of the educational qualifications and the ability and standing of the applicant. If, after this investigation and any other or further examination or investigation the Division may see fit to make on its own part, it is found that the applicant does not meet the requirements for medical licensure, then the Division may deny licensure [*Bus. & Prof. Code § 2144*].

[4] Diplomate Certificate by National Board of Medical Examiners

Nothwithstanding any other provision of law, the Division of Licensing may issue a physician's and surgeon's certificate to a diplomate of the National Board of Medical Examiners provided the following requirements are met [*Bus. & Prof. Code § 2151*]:

- The standard of the National Board of Medical Examiners on the date the diplomate certificate was issued was in no degree or particular less than that which was required for a physician's and surgeon's certificate under the provisions of the Medical Practice Act on the same date.

- The applicant files an application in compliance with *Bus. & Prof. Code § 2080 et seq.* (setting out basic requirement for licensure). The applicant may not, however, be required to comply with any provision of *Bus. & Prof. Code § 2080 et. seq., above*, inconsistent with *Bus. & Prof. Code § 2151*.

- The application is accompanied by the fee required in *Bus. & Prof. Code § 2435* (fee schedule).

- The applicant satisfies the division that the diplomate certificate was procured without fraud or misrepresentation.

- The applicant has not committed any acts or crimes constituting grounds for denial of a certificate

under *Bus. & Prof. Code §§ 480* or *2220 et seq.* [*see* discussion in *§ 414.63*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationGeneral OverviewHealthcare LawBusiness Administration & OrganizationAccreditationHealthcare LawBusiness Administration & OrganizationLicensesRequirements

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36-414 California Forms of Pleading and Practice--Annotated § 414.40

§ 414.40 Causes and Procedure for Denial of License

[1] In General

For a discussion of the conduct of proceedings against an applicant for licensure, see *§ 414.69[1]*.

For a discussion of the procedure governing the conduct of administrative trials, see Ch. 473, *Public Agency Adjudication* , et seq.

[2] Causes Justifying Revocation or Suspension of License

The Board may deny a physician's and surgeon's license to any applicant guilty of any cause that would subject a licensee to revocation or suspension of license [*Bus. & Prof. Code § 2221(a)*]. For a full discussion of the provisions specifying when a licensee's certificate may be revoked or suspended, see the discussion in *§ 414.63*.

[3] For Unprofessional Conduct

The Board may deny a license to any applicant found guilty of unprofessional conduct [*Bus. & Prof. Code § 2221(a)*]. *Bus. & Prof. Code § 2087* (*discussed under § 414.92[4]*) similarly provides that the provisions governing enforcement of professional standards set forth in *Bus. & Prof. Code § 2220 et seq.* apply to review by the court of the division's decision in any case in which an applicant is denied admittance to an examination or a certificate on grounds of unprofessional conduct [*see Bus. & Prof. Code § 2087*].

Notwithstanding *Bus. & Prof. Code § 2221(a)*, the Board may issue a certificate to an applicant who has committed minor violations that the Board deems, in its discretion, do not merit the denial of a certificate or require probationary status, and may concurrently issue a public letter of reprimand [*Bus. & Prof. Code § 2221.05(a)*]. The public letter of reprimand must be purged three years from the date of issuance [*Bus. & Prof. Code § 2221.05(b)*].

For a more detailed discussion of the provisions applicable to the enforcement of professional standards, see the discussion in *§ 414.63*.

[4] For Registration as Sex Offender

The Board must deny a license to an applicant required to register as a sex offender pursuant to *Penal Code § 290*, except for an applicant required to register as a sex offender pursuant to *Penal Code § 290* solely because of a misdemeanor conviction under *Pen. Code § 314* [*Bus. & Prof. Code § 2221(d)*].

[5] For Subverting or Attempting to Subvert Licensing Examination

Bus. & Prof. Code § 496 provides that a board may deny, suspend, revoke, or otherwise restrict a license on the ground that an applicant or licensee has violated *Bus. & Prof. Code § 123* pertaining to subversion of licensing examinations [*see Bus. & Prof. Code § 477(a)* ("board" as including "division"); *see also Bus. & Prof. Code § 123* (subversion or attempted subversion of examination as misdemeanor and as ground for civil liability)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedurePostconviction ProceedingsSex OffendersGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRevocation & Suspension

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36-414 California Forms of Pleading and Practice--Annotated § 414.41

§ 414.41 Probationary Certificate

The Board in its sole discretion, may issue a probationary certificate to an applicant subject to terms and conditions, including, but not limited to, any of the following conditions of probation [*Bus. & Prof. Code § 2221(a)*]:

- Practice limited to a supervised, structured environment where the licensee's activities are supervised by another physician.
- Total or partial restrictions on drug prescribing privileges for controlled substances.
- Continuing medical or psychiatric treatment.
- Ongoing participation in a specified rehabilitation program.
- Enrollment and successful completion of a clinical training program.
- Abstention from the use of alcohol or drugs.
- Restrictions from engaging in certain types of medical practice.
- Compliance with all provisions of the Medical Practice Act.
- Payment of the cost of probation monitoring.

The Board may modify or terminate the terms and conditions imposed on the probationary license on receipt of a petition from the licensee [*Bus. & Prof. Code § 2221(b)*].

Enforcement and monitoring of the probationary conditions are under the jurisdiction of the Board in conjunction with the administrative hearing procedures established pursuant to *Gov. Code §§ 11371, 11372, 11373*, and *11529* and the

review procedures set forth in Gov. Code § 2335 [*Bus. & Prof. Code § 2221(c)*].

Notwithstanding *Bus. & Prof. Code § 2221(a)*, discussed *above*, the Board may issue a certificate to an applicant who has committed minor violations that the Board deems, in its discretion, do not merit the denial of a certificate or require probationary status, and may concurrently issue a public letter of reprimand [*Bus. & Prof. Code § 2221.05(a)*]. The public letter of reprimand must be purged three years from the date of issuance [*Bus. & Prof. Code § 2221.05(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRequirements

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36-414 California Forms of Pleading and Practice--Annotated § 414.41A

§ 414.41A Reapplication After Denial

An applicant is not eligible to reapply for a physician' s and surgeon's certificate for a minimum of three years from the effective date of the final decision or action regarding the denial of the application. However, the Board, in its discretion and for good cause demonstrated, may permit reapplication after not less than one year has elapsed from the effective date of the final decision or action regarding the denial [*Bus. & Prof. Code § 2221(e)*].

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36-414 California Forms of Pleading and Practice--Annotated § 414.42

§ 414.42 Judicial Review of Adverse Action by Division of Licensing

[1] In General

If any medical school is not approved by the Division of Licensing or any applicant for censure is rejected by it, then the school or the applicant may commence an action in the superior court, as provided in *Bus. & Prof. Code § 2019* (venue for legal proceedings against board), against the division to compel it to approve the school or to issue the applicant a certificate or for any other appropriate relief. If the applicant is denied a certificate on the grounds of unprofessional conduct, the provisions contained in *Bus. & Prof. Code § 2220 et seq.* (governing causes and procedures for imposing discipline for unprofessional conduct) apply. In such an action, the court proceeds under *Code Civ. Proc. § 1094.5* (providing for review of administrative decisions by writ of mandate), except that the court may not exercise its independent judgment on the evidence. The action must be speedily determined by the court and takes precedence over all pending matters except criminal cases, applications for injunction, or other matters to which special precedence may be given by law [*Bus. & Prof. Code § 2087*].

The provision prohibiting the trial court from exercising an independent judgment on the evidence requires a court reviewing an action by the Division of Licensing to apply the substantial evidence test, which is ordinarily applied by the appellate courts [*Savelli v. Board of Medical Examiners (1964) 229 Cal. App. 2d 124, 131-132, 40 Cal. Rptr. 171 , cert. denied, 380 U.S. 934, 85 S. Ct. 940, 13 L. Ed. 2d 821* (interpreting former *Bus. & Prof. Code § 2174*; *now see Bus. & Prof. Code § 2087*)].

One court of appeal reviewing the denial of a physician's and surgeon's certificate to a petitioner has stated categorically that when the administrative action under review is the denial of a permit, license, or certificate, as distinguished from the suspension or revocation of a permit, license, or certificate previously granted, the trial court should not reweigh the evidence, and its sole function is to determine from a review of the record whether there is sufficient evidence to sustain the ruling of the board [*see Akopiantz v. Board of Medical Examiners (1956) 146 Cal. App. 2d 331, 334, 304 P.2d 52* (case decided under former *Bus. & Prof. Code § 2174*; *now see Bus. & Prof. Code § 2087*)].

[2] Action by Applicant in Case of Failure to Approve School

The proper recourse for an applicant denied a license because he or she did not graduate from a medical school approved by the Division of Licensing is an action to compel the division to approve the school [*Mann v. Board of Medical Examiners (1947) 31 Cal. 2d 30, 41-42, 187 P.2d 1* ; *Savelli v. Board of Medical Examiners (1964) 229 Cal. App. 2d 124, 138-139, 40 Cal. Rptr. 171* , *cert. denied*, *380 U.S. 934, 85 S. Ct. 940, 13 L. Ed. 2d 821* (cases interpreting former *Bus. & Prof. Code § 2174*; *now see Bus. & Prof. Code § 2087*)].

An applicant cannot argue on seeking a review by mandate that occasional isolated admissions of graduates from a school which had previously been disapproved constitutes a de facto approval of the school by the division. The formal and deliberate action by the division in disapproving a school can only be nullified by an equally formal and deliberate action of approval, which action must be established by a clear, convincing and unequivocal showing [*Mann v. Board of Medical Examiners (1947) 31 Cal. 2d 30, 39, 187 P.2d 1]* .

For a more detailed discussion of administrative mandate proceedings, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq. See also the discussion in *§ 414.133*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRevocation & Suspension

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36-414 California Forms of Pleading and Practice--Annotated §§ 414.43-414.59

[Reserved]

§§ 414.43[Reserved]

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36-414 California Forms of Pleading and Practice--Annotated § 414.60

§ 414.60 Governing Statutes

Statutory provisions relating to the enforcement of professional standards, including the imposition of discipline for unprofessional conduct, are set out in *Bus. & Prof. Code §§ 2220-2319*. Provisions specifying causes for discipline for unprofessional conduct are set out in *Bus. & Prof. Code §§ 2234-2291* and *2305*. Provisions relating to types of action that may be taken against a licensee for unprofessional conduct are set out in *Bus. & Prof. Code §§ 2306*, *2311*, *2312*, *2314*, and *2315*. Provisions relating to types of action that may be taken against a licensee in case of mental or physical illness are set out in *Bus. & Prof. Code §§ 820-828*. Provisions for reinstatement of a license or modification of a penalty after discipline has been imposed for unprofessional conduct are set out in *Bus. & Prof. Code § 2307*. Provisions relating to the conduct of disciplinary investigations and proceedings are set out in *Bus. & Prof. Code §§ 2225*, *2230*, *2330-2337*, and *Gov. Code §§ 11370 et seq.* and *11529*. Provisions setting forth the consequences of the suspension or revocation of a physician and surgeon's license to practice medicine by another state or a federal government agency, which is reported to the National Practitioners Data Bank, are set forth in *Bus. & Prof. Code § 2310*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsFederal GovernmentClaims By & AgainstHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRevocation & Suspension

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36-414 California Forms of Pleading and Practice--Annotated § 414.61

§ 414.61 Division of Medical Quality

As of January 1, 2008, the Division of Medical Quality was folded into the Medical Board [*see Bus. & Prof. Code § 2002*]. The Division of Medical Quality formerly had responsibility for the following [former *Bus. & Prof. Code § 2004*]:

- The enforcement of the disciplinary and criminal provisions of the Medical Practice Act (*Bus. & Prof. Code § 2000 et seq.*).

- The administration and hearing of disciplinary actions.

- Carrying out disciplinary actions appropriate to findings made by a medical quality review committee [*see § 414.62*], the Division, or an administrative law judge.

- Suspending, revoking, or otherwise limiting certificates after the conclusion of disciplinary actions.

- Reviewing the quality of medical practice carried out by physician's and surgeon's certificate holders under the jurisdiction of the Board [*see Bus. & Prof. Code § 2220 et seq.* (defining unprofessional conduct and providing for disciplinary proceedings against licensees guilty of unprofessional conduct)].

- Regulating the practice of medicine from California into another state or country without meeting the legal requirements of that state or country for the practice of medicine. This becomes operative on the implementation of a proposed registration program described in *Bus. & Prof. Code § 2052.5* [*Bus. & Prof. Code § 2234(g)*].

The Medical Board now has responsibility for all of the following:

- Enforcement of the disciplinary and criminal provisions of the Medical Practice Act [*Bus. & Prof. Code § 2004(a)*].

- Administration and hearing of disciplinary actions [*Bus. & Prof. Code § 2004(b)*].

- Carrying out disciplinary actions appropriate to findings made by a panel or an administrative law judge [*Bus. & Prof. Code § 2004(c)*].

- Suspending, revoking, or otherwise limiting certificates after the conclusion of disciplinary actions [*Bus. & Prof. Code § 2004(d)*].

- Reviewing the quality of medical practice carried out by physician and surgeon certificate holders under the Board's jurisdiction [*Bus. & Prof. Code § 2004(e)*].

References to the former Division of Medical Quality in the statutes and regulations, and in this chapter, should now be read to refer to the Board. (References throughout this chapter will be changed as pages are replaced in the future.)

The Medical Board of California is the only licensing board authorized to investigate or commence disciplinary actions related to licensed physicians and surgeons [*Bus. & Prof. Code § 2220.5*]. On and after January 1, 2006, any reference in the statutes to an investigation by the Board or one of its divisions, including the Division of Medical Quality, will be deemed to refer to an investigation directed by employees of the Department of Justice [*Bus. & Prof. Code § 2006* (inoperative on July 1, 2010, and as of January 1, 2011, repealed, unless later enacted statute, that becomes operative on or before January 1, 2011, deletes or extends dates on which it becomes inoperative and is repealed)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-414 California Forms of Pleading and Practice--Annotated § 414.62

§ 414.62 Medical Quality Review Committees and Panels

The Legislature has created a system of medical quality review committees under the jurisdiction of the Board to initiate a continuing review of the quality of medical practice by physician's and surgeon's certificate holders and to undertake such remedial or disciplinary functions as are specified by the Legislature and as appropriate for the public and the licensee [*see Bus. & Prof. Code § 2330 et seq.*; *Gov. Code § 11529*].

Unless otherwise indicated, the term "committee" is used in this subpart to mean a medical quality review committee and the expression "panel" is used to mean a panel of a medical quality review committee.

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36-414 California Forms of Pleading and Practice--Annotated § 414.63

§ 414.63 Causes for Discipline

[1] In General

A general statement of what constitutes unprofessional conduct for which a licensee may be disciplined is contained in *Bus. & Prof. Code § 2234*. In addition to other provisions of *Bus. & Prof. Code § 2220 et seq.*, unprofessional conduct includes, but is not limited to, the following [*Bus. & Prof. Code § 2234*]:

- Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violation of, or conspiring to violate, any provision of the Medical Practice Act;
- Gross negligence;
- Repeated negligent acts;
- Incompetence;
- The commission of any act involving dishonesty or corruption that is substantially related to the qualifications, functions, or duties of a physician and surgeon; and
- Any action or conduct that would have warranted the denial of a certificate.

A physician and surgeon is not subject to discipline pursuant to *Bus. & Prof. Code § 2234(b), (c)*, or *(d)* solely on the basis that the treatment or advice rendered to a patient is alternative or complementary medicine, including the treatment of persistent Lyme Disease, if that treatment or advice meets all of the following requirements [*Bus. & Prof. Code § 2234.1(a)*]:

(1) It is provided after informed consent and a good-faith prior examination of the patient, and medical indication exists for the treatment or advice, or it is provided for health or well-being.

(2) It is provided after the physician and surgeon has given the patient information concerning conventional treatment anddescribing the education, experience, and credentials of the physician and surgeon related to the alternative or complementary medicine he or she practices.

(3) It does not cause a delay in, or discourage traditional diagnosis of, a condition of the patient.

(4) It does not cause death or serious bodily injury to the patient.

For these purposes, "alternative or complementary medicine" means health care methods of diagnosis, treatment, or healing not generally used but which provide a reasonable potential for therapeutic gain in a patient's medical condition that is not outweighed by the risk of the health care method [*Bus. & Prof. Code § 2234.1(b)*].

The fact that former *Bus. & Prof. Code § 2361* (*now see Bus. & Prof. Code § 2234*) does not limit instances of unprofessional conduct to those that are specified in the Business and Professions Code does not render the statute unconstitutionally vague or overbroad, since a physician as a medical expert can be expected to know what sort of conduct is unbecoming to a member of his or her profession even without the guidance of a code that specifies proscribed behavior [*Shea v. Board of Medical Examiners (1978) 81 Cal. App. 3d 564, 574-575, 146 Cal. Rptr. 653]* .

Unprofessional conduct within the meaning of *Bus. & Prof. Code § 2234* must relate to conduct that indicates an unfitness to practice medicine. Accordingly, physician participation in executions is not unprofessional conduct [*Thorburn v. Department of Corrections (1998) 66 Cal. App. 4th 1284, 1291-1293, 78 Cal. Rptr. 2d 584]* .

[2] Criminal Conviction as Unprofessional Conduct

Conviction of the following types of offenses constitutes unprofessional conduct:

- Any offense substantially related to the qualifications, functions, or duties of a physician or surgeon [*Bus. & Prof. Code §§ 490, 2236(a)*; *see also 16 Cal. Code Reg. § 1360* (substantial relationship criteria)];

- Violation of any federal or state statute or regulation regulating dangerous drugs or controlled substances [*Bus. & Prof. Code § 2237(a)*]; and

- One felony or more than one misdemeanor conviction involving specified narcotic drugs, dangerous drugs, controlled substances, or alcohol [*Bus. & Prof. Code § 2239(a)*].

For a discussion of the types of criminal offenses for which discipline may be imposed if the accused has sustained a conviction, see *§ 414.63[3]* and *[4]*.

A guilty plea or plea of nolo contendere is deemed a conviction within the meaning of the statutes defining conviction as unprofessional conduct [*see Bus. & Prof. Code §§ 2236(d), 2237(a), 2239(b)*]. Thus, discipline maybe imposed based on a plea of guilty, despite later expungement of the criminal record. The focus is on the physician's conduct, not the criminal consequences of that conduct [*Krain v. Medical Board (1999) 71 Cal. App. 4th 1416, 1420-1422, 84 Cal. Rptr. 2d 586]* .

Appropriate discipline may be ordered, or a license denied, by the Division of Licensing for unprofessional conduct based on a conviction of any of the offenses set out in *Bus. & Prof. Code §§ 2236(a), 2237(a)*, and *2239(a)* when the time for appeal has elapsed or the judgment ordering conviction has been affirmed on appeal. Discipline may also be ordered when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent

order under *Penal Code § 1203.4* (authorizing court to permit withdrawal of guilty plea after successful completion of court imposed probation) allowing the licensee to withdraw his or her plea of guilty and enter a plea of not guilty, setting aside the verdict, or dismissing the accusation, complaint, information, or indictment [*Bus. & Prof. Code §§ 2236.1(d)(1), 2237(b), 2239(b)*].

Thus, intentional dishonesty in committing a crime demonstrates moral unfitness to practice medicine that satisfies both the constitutional nexus requirement and the substantial relatedness requirement set out by *Bus. & Prof. Code § 490*, which is identical to that set out by *Bus. & Prof. Code § 2236(a)* [*Windham v. Board of Medical Quality Assurance (1980) 104 Cal. App. 3d 461, 469-471, 163 Cal. Rptr. 566]* . The fact that the intentional dishonesty was directed against the government in a setting unrelated to the practice of medicine rather than against patients does not negate the existence of the required nexus [*Windham v. Board of Medical Quality Assurance (1980) 104 Cal. App. 3d 461, 470, 163 Cal. Rptr. 566]* .

[3] Conviction of Offense Substantially Related to Practice of Medicine

[a] In General

The conviction of any offense substantially related to the qualifications, functions, or duties of a physician and surgeon constitutes unprofessional conduct within the meaning of the Medical Practice Act [*Bus. & Prof. Code § 2236(a)*].

The California Code of Regulations provides that a crime is substantially related to the qualifications, functions, or duties of a licensed physician or surgeon if to a substantial degree it evidences present or potential unfitness of a licensed physician or surgeon inconsistent with the public health, safety, or welfare [*16 Cal. Code Reg. § 1360*]. Neither statutory nor case law give a precise definition of what constitutes substantial relatedness to the qualifications, functions, or duties of a physician and surgeon. However, *Bus. & Prof. Code § 2236(a)* appears to set forth a requirement of a nexus between the crime of which the accused was convicted and thepractice of medicine; this requirement is similar to the constitutional nexus requirement. For a discussion of the constitutional nexus requirement, see *discussion under § 414.113[3][h]* [*see Windham v. Board of Medical Quality Assurance (1980) 104 Cal. App. 3d 461, 469-471, 163 Cal. Rptr. 566* (interpreting *Bus. & Prof. Code § 490*, which permits suspension or revocation of professional license on ground of conviction of crime only if crime is substantially related to qualifications, functions, and duties of profession for which license was issued, and noting that *Bus. & Prof. Code § 2236(a)* now has comparable nexus requirement)]. For a full treatment of the relationship between acts showing the licensee's moral character and the licensee's fitness to practice, see the *discussion under § 414.113[3][g]*.

[b] Scope of Inquiry After Conviction Is Established

The record of conviction of an offense substantially related to the practice of medicine but not involving narcotics, dangerous drugs, controlled substances, or alcohol is conclusive evidence only of the fact that the conviction occurred [*Bus. & Prof. Code § 2236(a)*].

The Division may inquire into the circumstances surrounding the commission of the crime to determine if the conviction is for an offense substantially related to the qualifications, functions, or duties of a physician and surgeon, or to fix the degree of discipline [*Bus. & Prof. Code § 2236(b)*; *see also 16 Cal. Code Reg. § 1360.1* (rehabilitation criteria for suspensions or revocations)].

[4] Conviction Involving Drugs or Alcohol

[a] In General

The conviction of a charge of violating any federal statutes or regulations or any statute or regulation of the State of California regulating dangerous drugs or controlled substances constitutes unprofessional conduct [*Bus. & Prof. Code §*

2237(a)]. Similarly, more than one misdemeanor or any felony involving the use, consumption, or self-administration of any controlled substance, any of the dangerous drugs specified in *Bus. & Prof. Code § 4211* (defining dangerous drugs), alcoholic beverages, or any combination thereof, constitutes unprofessional conduct [*Bus. & Prof. Code § 2239(a)*].

[b] Effect of Record of Conviction

The record of conviction of any of the offenses specified in *Bus. & Prof. Code §§ 2237(a)* and *2239(a)* is deemed conclusive evidence of unprofessional conduct within the meaning of the Medical Practice Act [*see Bus. & Prof. Code §§ 2237(a), 2239(b)*]. In disciplinary proceedings based on conviction of a drug violation, there is no constitutional requirement that an independent nexus be shown between the conviction and the accused'sfitness to practice medicine [*Weissbuch v. Board of Medical Examiners (1974) 41 Cal. App. 3d 924, 929, 116 Cal. Rptr. 479* (interpreting former *Bus. & Prof. Code § 2384*; *now see Bus. & Prof. Code § 2237*); *see § 414.113[3][h]*].

Because the record of conviction is conclusive evidence of unprofessional conduct, a physician's petition for a writ of mandate to review a board order imposing discipline on this ground will be denied when the petition does no more than challenge the conviction [*Leslie v. Board of Medical Quality Assurance (1991) 234 Cal. App. 3d 117, 119-120, 285 Cal. Rptr. 501]* . The physician's appeal of the order denying the writ may result in the imposition of sanctions against appellant by the court of appeal for bringing a frivolous and meritless appeal if the appeal, like the writ petition, merely challenges the conviction [*Leslie v. Board of Medical Quality Assurance (1991) 234 Cal. App. 3d 117, 121-122, 285 Cal. Rptr. 501]* .

The legislative classification involving dangerous drugs and controlled substances that sets physicians apart from other professionals is immune from a claim of denial of equal protection because special treatment of physicians by the Legislature as regarding narcotics abuse is justified by the central role that physicians play in the state's drug regulating scheme [*see Weissbuch v. Board of Medical Examiners (1974) 41 Cal. App. 3d 924, 928-929, 116 Cal. Rptr. 479]* .

[5] Unprofessional Conduct Involving Drugs or Alcohol Not Requiring Conviction

[a] In General

In addition to providing that a criminal conviction involving drug abuse constitutes unprofessional conduct [*see Bus. & Prof. Code §§ 2237(a), 2239(a)*], the Medical Practice Act sets forth a number of specific types of conduct involving the use of drugs that it defines as unprofessional conduct without requiring a criminal conviction [*see Bus. & Prof. Code §§ 2238, 2241, 2242*].

[b] Violation of Statute or Regulation Regulating Dangerous Drugs or Controlled Substances

The violation of any federal or state statute or regulation regulating dangerous drugs or controlled substances is defined as unprofessional conduct, without a requirement that there have been a criminal conviction [*see Bus. & Prof. Code § 2238*].

[c] Prescribing or Furnishing Regulated Drugs to Addicts

A physician and surgeon may prescribe, dispense, or administer prescription drugs, including prescription controlled substances, to an addict under the physician's treatment for a medical condition for a purpose other than maintenance on, or detoxification from, prescription drugs or controlled substances [*Bus. & Prof. Code § 2241(a)*], and for purposes of maintenance on, or detoxification from, prescription drugs or controlled substances only as prescribed by statute [*Bus. & Prof. Code § 2241(b)*; *see Bus. & Prof. Code § 2241(c)*; *Health & Safety Code §§ 11215, 11217, 11217.5, 11218, 11219, 11220*]. Nothing in *Bus. & Prof. Code § 2241(b)* authorizes a physician and surgeon to prescribe, dispense, or administer dangerous drugs or controlled substances to a person he or she knows or reasonably believes is using or will use the drugs or substances for a nonmedical purpose [*Bus. & Prof. Code § 2241(b)*].

For these purposes, "addict" is defined as a person whose actions are characterized by craving in combination with one or more of the following [*Bus. & Prof. Code § 2241(d)(1)*]:

- Impaired control over drug use.
- Compulsive use.
- Continued use despite harm.

However, a person whose drug-seeking behavior is primarily due to the inadequate control of pain is not an addict [*Bus. & Prof. Code § 2241(d)(2)*].

Prescription drugs or controlled substances may be administered or applied by a physician and surgeon, or by a registered nurse acting under his or her instruction and supervision, under the following circumstances:

- Emergency treatment of a patient whose addiction is complicated by the presence of incurable disease, acute accident, illness, or injury, or the infirmities attendant upon age [*Bus. & Prof. Code § 2241(c)(1)*].
- Treatment of addicts in state-licensed institutions where the patient is kept under restraint and control, or in city or county jails or state prisons [*Bus. & Prof. Code § 2241(c)(2)*].
- Treatment of addicts as provided for by *Health & Safety Code § 11217.5* [*Bus. & Prof. Code § 2241(c)(3)*; *White v. Board of Medical Quality Assurance (1982) 128 Cal. App. 3d 699, 709, 180 Cal. Rptr. 516]* .

The requisite elements for addiction to a drug, as contemplated by former *Bus. & Prof. Code § 2391* (*now see Bus. & Prof. Code § 2241*) are [*Elder v. Bd. of Medical Examiners (1966) 241 Cal. App. 2d 246, 276, 50 Cal. Rptr. 304* , *cert. denied, 385 U.S. 1001 (1967)]* :

- Emotional dependence on the drug in the sense that the user experiences a compulsive need to continue using the drug;
- Tolerance to the effects of the drug, leading the user to require increasingly larger and more potent doses; and
- Physical dependence so that the user suffers withdrawal symptoms if deprived of his or her dosage.

[d] Dispensing or Prescribing Dangerous Drugs Without Examination or Medical Indication

Prescribing, dispensing, or furnishing dangerous drugs, as defined in *Bus. & Prof. Code § 4022* (discussed *below*) without a good-faith prior examination and medical indication constitutes unprofessional conduct [*Bus. & Prof. Code § 2242(a)*]. No licensee, however, will be found to have committed unprofessional conduct within the meaning of *Bus. & Prof. Code § 2242* if, at the time the drugs were prescribed, dispensed, or furnished, any of the following applies [*Bus. & Prof. Code § 2242(b)*]:

- The licensee was a designated physician and surgeon or podiatrist serving in the absence of the patient's physician and surgeon or podiatrist, as the case may be, provided that the drugs were prescribed,dispensed, or furnished only as necessary to maintain the patient until the return of his or her

practitioner, but in any case no longer than 72 hours;

- The licensee transmitted the order for the drugs to a registered nurse or to a licensed vocational nurse in an inpatient facility if (A) the practitioner had consulted with the registered nurse or licensed vocational nurse who had reviewed the patient's records, and (B) the practitioner was designated as the practitioner to serve in the absence of the patient's physician and surgeon or podiatrist, as the case may be;

- The licensee was a designated practitioner serving in the absence of the patient's physician and surgeon or podiatrist, as the case may be, and was in possession of or had utilized the patient's records and ordered the renewal of a medically indicated prescription for an amount not exceeding the original prescription in strength or amount or for more than one refilling.

- The licensee was acting in accordance with *Health & Safety Code § 120582*, regarding providing antibiotics to the sexual partner of a patient with a chlamydia infection.

A dangerous drug is defined as any drug unsafe for self-use in humans or animals. A dangerous drug includes any drug or device that bears the legend: "Caution: Federal law prohibits dispensing without prescription," "Rx only," or words of similar import, as well as any drug that by federal or state law can be lawfully dispensed only on prescription or furnished pursuant to *Bus. & Prof. Code § 4006* [*Bus. & Prof. Code § 4022*].

Medical indication for prescribing a drug, for the purposes of former *Bus. & Prof. Code § 2399.5* (*now see Bus. & Prof. Code § 2242*), means the existence of symptoms or the presence of satisfying evidence that suggests to the physician the need for or advisability of prescribing the use of a dangerous drug [*Whitlow v. Board of Medical Examiners (1967) 248 Cal. App. 2d 478, 482, 56 Cal. Rptr. 525]* .

Both a good faith prior examination and medical indication are required before prescribing or dispensing a dangerous drug, and the licensee may be disciplined for prescribing, dispensing, or furnishing dangerous drugs if either one of the requirements is not met [*White v. Board of Medical Quality Assurance (1982) 128 Cal. App. 3d 699, 704, 180 Cal. Rptr. 516* (statutory amendment substituting phrase "prior examination and medical indication" for "prior examination or medical indication" negated earlier case law)].

The language of former *Bus. & Prof. Code § 2399.5* (*now see Bus. & Prof. Code § 2242*) is sufficiently definite to provide a constitutionally satisfactory standard of conduct for the medical profession [*Whitlow v. Board of Medical Examiners (1967) 248 Cal. App. 2d 478, 482, 56 Cal. Rptr. 525]* .

For discussion of administration of controlled substances in treatment for intractable pain, see *§ 414.63[5][g]*.

[e] Personal Misuse of Drugs or Alcohol

The use of, prescribing for, or administering to himself or herself of any controlled substance, or the use of any of the drugs specified in *Bus. & Prof. Code § 4022* (defining dangerous drugs, *discussed under § 414.63[5][d]*), or of alcoholic beverages to the extent or in such manner as to be dangerous or injurious to the licensee or to any other person or to the public, or to the extent that such use impairs the ability of the licensee to practice medicine safely, constitutes unprofessional conduct [*Bus. & Prof. Code § 2239(a)*].

Driving an automobile while under the influence of alcohol constitutes use of alcohol in such manner as to be dangerous to the licensee or to any other person or to the public and may therefore be the basis of disciplinary action against a licensee under *Bus. & Prof. Code § 2239(a)* if the conduct is shown to have a possible effect on the quality of the licensee's medical practice. The felony conviction or two misdemeanor convictions involving alcohol that Section 2239

also defines as unprofessional conduct is not required [*see Grannis v. Board of Medical Examiners (1971) 19 Cal. App. 3d 551, 560-562, 96 Cal. Rptr. 863* (interpreting former *Bus. & Prof. Code § 2390*; *now see Bus. & Prof. Code § 2239*)].

No licensee may practice medicine while under the influence of any narcotic drug or alcohol to such an extent as to impair his or her ability to conduct the practice of medicine with safety to the public and his or her patients. Such conduct constitutes unprofessional conduct and is a misdemeanor [*Bus. & Prof. Code § 2280*; *see also Bus. & Prof. Code 2315* (punishment for misdemeanors)]. For discussion of *Bus. & Prof. Code § 2315*, see *§ 414.66[8]*.

Business and Professions Code section 2354 does not permit disciplinary action against a physician's license to practice medicine based solely on the physician's failure to complete a substance abuse diversion program successfully. When a physician "flunks out" of a diversion program, the Medical Board is authorized to file an accusation charging any acts committed before, during, or after the physician"s agreed-upon participation in the diversion program [*Bus. & Prof. Code § 2354*] (inoperative on July 1, 2008, and, as of January 1, 2009, is repealed, unless a later enacted statute enacted before January 1, 2009, deletes or extends the dates on which it becomes inoperative and is repealed [*see Bus. & Prof. Code § 2358*]); *see Medical Bd. of Cal. v. Superior Court (2003) 111 Cal. App. 4th 163, 172, 4 Cal. Rptr. 3d 403]* . It must then prove impairment or unprofessional conduct by clear and convincing evidence. Where the circumstances of the physician's termination from the diversion program do not otherwise evidence unprofessional conduct or impairment by this standard, the Board does not have authority to revoke or suspend a license based on the failure to complete the diversion program [*Medical Bd. of Cal. v. Superior Court (2003) 111 Cal. App. 4th 163, 172-183, 4 Cal. Rptr. 3d 403]* .

[f] Excessive Prescribing or Administering of Drugs or Treatment

Repeated acts of clearly excessive prescribing, furnishing, dispensing, or administering of drugs or treatment, repeated acts of clearly excessive use of diagnostic procedures, or repeated acts of clearly excessive use of diagnostic or treatment facilities as determined by the standard of the community of licensed physicians and surgeons is unprofessional conduct [*Bus. & Prof. Code § 725(a)*]. That conduct may be the basis for disciplinary action [*see Glover v. Board of Medical Quality Assurance (1991) 231 Cal. App. 3d 203, 205, 282 Cal. Rptr. 137* (license revoked for excessive prescribing and gross negligence)]. However, pursuant to *Bus. & Prof. Code § 2241.5*, no physician and surgeon in compliance with the California Intractable Pain Treatment Act will be subject to disciplinary action for lawfully prescribing or administering controlled substances in the course of treatment of a person for intractable pain [*Bus. & Prof. Code § 725(d)*; *see § 414.63[5][g]*]. Further, a physician or surgeon who has a medical basis for prescribing, furnishing, dispensing, or administering dangerous drugs or prescription controlled substances is not subject to disciplinary action or prosecution under *Bus. & Prof. Code § 725* [*Bus. & Prof. Code § 725(c)*]. In addition, a physician who engages in repeated acts of clearly excessive prescribing or administering of drugs or treatment is guilty of a misdemeanor and is subject to a fine and imprisonment [*Bus. & Prof. Code § 725(b)* (prescribing fine of $100 to $600 and/or imprisonment of 60-180 days)].

[g] Intractable Pain Treatment Exception

Under the Intractable Pain Treatment Act (*Bus. & Prof. Code § 2241.5*; hereinafter referred to as "the Act"), a physician and surgeon may prescribe for, or dispense or administer to, a person under his or her treatment for a medical condition dangerous drugs or prescription controlled substances for the treatment of pain or a condition causing pain, including, but not limited to, intractable pain [*Bus. & Prof. Code § 2241.5(a)*]. No physician and surgeon will be subject to disciplinary action for prescribing, dispensing, or administering dangerous drugs or prescription controlled substances in accordance with *Bus. & Prof. Code § 2241.5* [*Bus. & Prof. Code § 2241.5(b)*].

However, *Bus. & Prof. Code § 2241.5* does not affect the power of the Board to take disciplinary action described in Section 2227 against a physician and surgeon who does any of the following [*Bus. & Prof. Code § 2241.5(c)*; *see Bus.*

& Prof. Code § 2227 (permitted disciplinary actions by Board)]:

- Violates *Bus. & Prof. Code § 2234(b), (c),* or *(d)* regarding gross negligence, repeated negligent acts, or incompetence.

- Violates *Bus. & Prof. Code § 2241* regarding treatment of an addict [*see* [c], *above*].

- Violates *Bus. & Prof. Code § 2242* regarding performing an appropriate prior examination and the existence of a medical indication for prescribing, dispensing, or furnishing dangerous drugs [*see* [d], *above*].

- Violates *Bus. & Prof. Code § 2242.1* regarding prescribing on the Internet.

- Fails to keep complete and accurate records of purchases and disposals of substances listed in the California Uniform Controlled Substances Act [*Health & Safety Code § 11000 et seq.*] or controlled substances scheduled in the federal Comprehensive Drug Abuse Prevention and Control Act of 1970 [*21 U.S.C. § 801 et seq.*], or pursuant to the federal Comprehensive Drug Abuse Prevention and Control Act of 1970. A physician and surgeon must keep records of purchases and disposals of these controlled substances or dangerous drugs, including the date of purchase, the date and records of the sale or disposal of the drugs by the physician and surgeon, the name and address of the person receiving the drugs, and the reason for the disposal or the dispensing of the drugs to the person, and must otherwise comply with all state record keeping requirements for controlled substances.

- Writes false or fictitious prescriptions for controlled substances listed in the California Uniform Controlled Substances Act or scheduled in the federal Comprehensive Drug Abuse Prevention and Control Act of 1970.

- Prescribes, administers, or dispenses in violation of *Bus. & Prof. § 2000 et seq.*, or in violation of *Health & Safety Code §§ 11150 et seq.* or *11210 et seq.*

A physician and surgeon must exercise reasonable care in determining whether a particular patient or condition, or the complexity of a patient's treatment, including, but not limited to, a current or recent pattern of drug abuse, requires consultation with, or referral to, a more qualified specialist [*Bus. & Prof. Code § 2241.5(d)*.

Nothing in *Bus. & Prof. Code § 2241.5* prohibits the governing body of a hospital from taking disciplinary actions against a physician and surgeon pursuant to *Bus. & Prof. Code §§ 809.05, 809.4,* and *809* regarding peer review [*Bus. & Prof. Code § 2241.5(e)*].

[6] Failure to Follow Infection Control Guidelines

The Board and the Board of Podiatric Medicine must investigate and may take disciplinary action, including, but not limited to, revocation or suspension of licenses, against certain physicians and surgeons and all others licensed or regulated by the board, or by the Board of Podiatric Medicine, whichever is applicable. These include health care providers, who, except for good cause, knowingly fail to protect patients by failing to follow infection control guidelines of the applicable board, thereby risking transmission of blood-borne infectious diseases. In so doing, the boards must consider referencing the standards, regulations, and guidelines of the State Department of Health Services developed pursuant to *Health & Safety Code § 1250.11*, and the standards, guidelines, and regulations pursuant to the California Occupational Safety and Health Act of 1973 (*Lab. Code § 6300 et seq.*) for preventing the transmission of HIV, Hepatitis B, and other blood-borne pathogens in health care settings. As necessary, the Board and the Board of Podiatric Medicine must consult with the Board of Dental Examiners, the Board of Registered Nursing, and the Board

of Vocational Nursing and Psychiatric Technicians to encourage appropriate consistency in the implementation of this statute [*Bus. & Prof. Code § 2221.1(a)*].

[7] Sexual Abuse of Patient

The commission of any act of sexual abuse, misconduct, or relations with a patient that is substantially related to the qualifications, functions, or duties of a physician constitutes unprofessional conduct and grounds for disciplinary action [*see Bus. & Prof. Code § 726*; *see also Gromis v. Medical Board (1992) 8 Cal. App. 4th 589, 595 n.3, 10 Cal. Rptr. 2d 452* (*Bus. & Prof. Code § 726* does not violate due process)]. However, Section 726 does not apply to sexual contact between a physician and surgeon and his or her spouse or person in an equivalent domestic relationship when that physician and surgeon provides medical treatment, other than psychotherapeutic treatment, to his or her spouse or person in an equivalent domestic relation [*Bus. & Prof. Code § 726*].

A physician-patient sexual relationship, by itself, is insufficient to merit discipline [*Gromis v. Medical Board (1992) 8 Cal. App. 4th 589, 599, 10 Cal. Rptr. 2d 452]* . The appropriateness of discipline under *Bus. & Prof. Code § 726* must be determined on a case-by-case basis [*Gromis v. Medical Board (1992) 8 Cal. App. 4th 589, 597-598, 10 Cal. Rptr. 2d 452]* . The key issue is whether under the circumstances the physician's sexual conduct bears some relationship to the physician's qualifications, functions, or duties [*Gromis v. Medical Board (1992) 8 Cal. App. 4th 589, 597-598, 10 Cal. Rptr. 2d 452* ; *but see Atienza v. Taub (1987) 194 Cal. App. 3d 388, 394 n.3, 239 Cal. Rptr. 454* (malpractice case suggesting in dictum that only sexual conduct under guise of treatment would serve as grounds for discipline under the statute)]. Mere findings that an intimate relationship arose out of the physician-patient relationship and that the relationship caused injury to the patient are insufficient, by themselves, to support the legal conclusion that a physician-patient sexual relationship had a bearing on the physician's functions and duties [*see Gromis v. Medical Board (1992) 8 Cal. App. 4th 589, 598, 10 Cal. Rptr. 2d 452]* . Discipline might be appropriate, however, if the physician took advantage of his or her status as the patient's physician to induce the patient into the relationship, or if the sexual relationship caused the physician's judgment to be compromised [*see Gromis v. Medical Board (1992) 8 Cal. App. 4th 589, 598-600, 10 Cal. Rptr. 2d 452* (remanding case for determination of these issues)].

The provisions of former *Evid. Code § 1103(2)* (*now see Evid. Code § 1103(b)*), concerning use of evidence regarding a complaining witness' reputation and sexual conduct, apply in disciplinary proceedings brought against a physician for acts in violation of *Bus. & Prof. Code § 726* [*see Bus. & Prof. Code § 727*].

[8] Insurance Fraud

A licensee is subject to professional discipline, including license suspension or revocation, for fraudulent misconduct relating to insurance claims [*see Bus. & Prof. Code § 810(a)*]. Knowingly presenting or causing to be presented a false or fraudulent insurance claim constitutes unprofessional conduct [*Bus. & Prof. Code § 810(a)(1)*]. In addition, it is unprofessional conduct to knowingly prepare, make, or subscribe any writing, with intent to present or use the writing, or to allow it to be presented or used in support of, a false or fraudulent insurance claim [*Bus. & Prof. Code § 810(a)(2)*].

Engaging in any conduct prohibited by *Ins. Code § 1871.4* (workers' compensation fraud) or *Penal Code § 550* (insurance fraud) constitutes cause for revocation or suspension of a license to practice medicine [*Bus. & Prof. Code § 810(b)*].

[9] Gross Negligence

Gross negligence constitutes unprofessional conduct [*see Bus. & Prof. Code § 2234(b)*]. Gross negligence is shown by either extreme departure from ordinary medical practice or want of even scant care. Willful misconduct is not required. Testimony by a medical expert may be used to establish extreme departure from ordinary medical practice [*Yellen v.*

Board of Medical Quality Assurance (1985) 174 Cal. App. 3d 1040, 1058, 220 Cal. Rptr. 426 ; *Gore v. Board of Medical Quality Assurance (1980) 110 Cal. App. 3d 184, 196, 167 Cal. Rptr. 881* (interpreting former *Bus. & Prof. Code § 2361*; *now see Bus. & Prof. Code § 2234*)].

Expert opinion testimony evaluating the negligent conduct of another physician who treated the licensee's patient may be precluded as irrelevant to the issue of the licensee's own negligence, because such testimony cannot prove or disprove the licensee's own competence [*see Glover v. Board of Medical Quality Assurance (1991) 231 Cal. App. 3d 203, 208-209, 282 Cal. Rptr. 137* (licensee attempted to introduce expert testimony concerning other physician's conduct to establish standard of practice)].

[10] Violations of Cosmetic and Outpatient Protection Act

Under the Cosmetic and Outpatient Surgery Patient Protection Act [*Bus. & Prof. Code § 2216 et seq.*], effective July 1, 2000, it is unprofessional conduct for a physician and surgeon to perform procedures in any outpatient setting except in compliance with *Bus. & Prof. Code § 2216*, unless the setting has a minimum of two staff persons on the premises, one of whom must either be a licensed physician and surgeon or a licensed health care professional with current certification in advanced cardiac life support (ACLS), as long as a patient is present who has not been discharged from supervised care [*Bus. & Prof. Code § 2216.1*].

Furthermore, it is unprofessional conduct for a physician and surgeon to fail to provide adequate security by liability insurance, or by participation in an interindemnity trust, for claims by patients arising out of surgical procedures performed outside of a general acute care hospital as defined in subdivision (a) of *Section 1250 of the Health and Safety Code* [*Bus. & Prof. Code § 2216.2(a)*].

Finally, failure to comply with the administrative mandates listed in *Business & Professions Code § 2240* constitutes unprofessional conduct [*Bus. & Prof. Code § 2240(f)*].

[11] Cloning Human Beings

A violation of *Health & Safety Code § 24185*, relating to human cloning, constitutes unprofessional conduct [*Bus. & Prof. Code § 2260.5*]. *Health & Safety Code § 24185* provides that:

- No person may clone a human being or engage in human reproductive cloning.

- No person may purchase or sell an ovum, zygote, embryo, or fetus for the purpose of cloning a human being.

For the purposes of *Health & Safety Code § 24185*, "clone" means the practice of creating or attempting to create a human being by transferring the nucleus from a human cell from whatever source into a human egg cell from which the nucleus has been removed for the purpose of, or to implant, the resulting product to initiate a pregnancy that could result in the birth of a human being [*Health & Safety Code § 24185(c)*]. "Human reproductive cloning" means the creation of a human fetus that is substantially genetically identical to a previously born human being [*Health & Safety Code § 24185(c)(3)*].

[12] Falsifying Medical Documents

Knowingly making or signing any certificate or other document directly or indirectly related to the practice of medicine or podiatry that falsely represents the existence or nonexistence of a state of facts constitutes unprofessional conduct [*Bus. & Prof. Code § 2261*]. Intent to deceive is not a necessary element of a violation of *Bus. & Prof. Code § 2261*. All that is required is that the licensee knew that the facts represented in the document were false. Thus, a mistaken belief

by a licensee that there was no impropriety in representing facts in an official document that he or she knew to be false is not a defense to a violation of *Bus. & Prof. Code § 2261* [*see Brown v. State Department of Health (1978) 86 Cal. App. 3d 548, 558-559, 150 Cal. Rptr. 344* (licensee believed pursuant to erroneous advice that he was entitled to bill for certain services under Medi-Cal program that he did not in fact perform; case decided under former *Bus. & Prof. Code § 2411*, recodified at *Bus. & Prof. Code § 2261*)].

Presentation of fabricated evidence of malpractice insurance to a hospital requiring such insurance, in order to maintain a position on the hospital's staff, is a violation of *Bus. & Prof. Code § 2261* [*see Foster v. Board of Medical Quality Assurance (1991) 227 Cal. App. 3d 1606, 1610, 278 Cal. Rptr. 117]* .

Altering or modifying the medical record of any person with fraudulent intent, or creating any false medical record with fraudulent intent, constitutes unprofessional conduct. The Division may impose a civil penalty of $500 for such conduct, in addition to any other disciplinary action [*Bus. & Prof. Code § 2262*].

The provisions of *Bus. & Prof. Code §§ 580-585* relating to frauds of medical records, degrees, certificates, and transcripts are not affected by the provisions of *Bus. & Prof. Code § 2220-2319* (enforcement of professional standards), including the provisions of *Bus. & Prof. Code §§ 2261* and *2262*. Insofar as any act is a crime within the scope of *Bus. & Prof. Code §§ 580-585*, such provisions control over the provisions of *Bus. & Prof. Code § 2220 et seq.*, including the provisions set out in *Bus. & Prof. Code §§ 2261* and *2262* [*Bus. & Prof. Code § 2290*].

[13] Fraud or Deception Concerning Identity or Professional Credentials

A board may revoke, suspend, or otherwise restrict a license on the ground that the licensee secured the license by fraud, deceit, or knowing misrepresentation of a material fact or by knowingly omitting to state a material fact [*Bus. & Prof. Code § 498*]. On referral from the Division, the Senior Assistant Attorney General of the Health Quality Enforcement Section is required to initiate action against any licensee who obtains a certificate by fraud or misrepresentation, including a reciprocity certificate that is based on a certificate that was obtained by fraud or mistake [*Bus. & Prof. Code § 2235*; *see also Bus. & Prof. Code §§ 2135-2153* (reciprocity certificates); *see § 414.39[1]*].

The following conduct in connection with obtaining or aiding another in obtaining fraudulent documentation of the right to practice is also unprofessional conduct:

- The purchase, sale, or barter of any medical or podiatric degree, diploma, certificate, affidavit, transcript, or other evidence made or purported to be made, pursuant to any laws regulating the licensure of persons under the Medical Practice Act or any preceding medical practice act, or for use in connection with the granting of any certificate or diplomas, or attempting to or conspiring to violate *Bus. & Prof. Code § 2287* [*Bus. & Prof. Code § 2287*];

- The purchase, procurement, or altering in any material regard, with fraudulent intent, a diploma, certificate, affidavit, transcript, or other evidence required for the issuing of any certificate or diploma that has been purchased, fraudulently issued, counterfeited, or materially altered, or attempting to or conspiring to violate *Bus. & Prof. Code § 2287* [*Bus. & Prof. Code § 2287*];

- Signing or issuing or causing to be signed or issued any certificate authorized by the Medical Practice Act by any licensee not a member or authorized official of the board [*Bus. & Prof. Code § 2291*];

- The impersonation of, or acting as proxy for, any applicant in any examination required under the Medical Practice Act for a certificate [*Bus. & Prof. Code § 2288*; *see § 414.37[1]*]; and

- The impersonation of another licensed practitioner or the permitting or allowing another person to use one's certificate to engage in the practice of medicine or podiatric medicine [*Bus. & Prof. Code § 2289*].

[14] Failure to Use Own or Approved Fictitious Name

Both anonymous advertising of practice of medicine and advertising or holding oneself out as a medical practitioner under an unapproved assumed name are prohibited by the Medical Practice Act [*see Bus. & Prof. Code §§ 2272, 2285*].

Any advertising of the practice of medicine in which the licensee fails to use his or her own name or approved fictitious name constitutes unprofessional conduct [*Bus. & Prof. Code § 2272*]. The requirement in Bus. & Prof. Code. § 2272 to use one's "own" name requires use of the name under which the physician was licensed. A physician may be disciplined for using another name without notifying the Medical Board, even if adoption of the new name is adopted through nonfraudulent usage [*Lin v. Medical Bd. of California (1997) 52 Cal. App. 4th 39, 43-44, 60 Cal. Rptr. 2d 221* ($250 fine reasonable)].

The use of any fictitious, false, or assumed name, or any name other than his or her own by a licensee either alone, in conjunction with a partnership or group, or as the name of a professional corporation, in any public communication, advertisement, sign, or announcement of his or her practice without a fictitious name permit obtained pursuant to *Bus. & Prof. Code § 2415* constitutes unprofessional conduct [*Bus. & Prof. Code § 2285*; *see Bus. & Prof. Code § 2415* (governing issuance and revocation of physician's fictitious name permit)]. However, *Bus. & Prof. Code § 2285* does not apply to licensees who contract with, are employed by, or are on the staff of any clinic licensed by the State Department of Health Services under *Health & Safety Code § 1200 et seq.* or any medical school approved by the Division or a faculty practice plan connected with such a medical school [*Bus. & Prof. Code § 2285*]. A person licensed in the healing arts who is employed by an entity that does business under a fictitious name is subject to discipline for practicing under an assumed name [*Garvai v. Board of Chiropractic Exmrs. (1963) 216 Cal. App. 2d 374, 378, 31 Cal. Rptr. 187* (decided under the Chiropractic Initiative Act, § 10(a), proscribing use of fictitious names by chiropractors, but language specifically made applicable to physicians)].

[15] Misuse of Title Indicating Right to Practice

The use by a licensee of any certificate, letter, letters, word, words, term, or terms either as a prefix, affix, or suffix indicating that he or she is entitled to engage in a medical practice for which he or she is not licensed constitutes unprofessional conduct [*Bus. & Prof. Code § 2274(a)*]. Nothing in *Bus. & Prof. Code § 2274* can be construed to prohibit a physician and surgeon from using the designations specified in section 2274 if the physician and surgeon has been issued a retired license under *Bus. & Prof. Code § 2439* [*Bus. & Prof. Code § 2274(b)*].

Unless a person authorized under the Medical Practice Act to use the title "Doctor" or the prefix "Dr." holds a physician's and surgeon's certificate, the use of such title, letters, or prefix, without further indicating the type of certificate held, constitutes unprofessional conduct [*Bus. & Prof. Code § 2278*].

Any person who held a physician's and surgeon's certificate under the jurisdiction of the of Osteopathic Medical Board of California and a degree of Doctor of Medicine issued by a medical school located in the state at any time prior to September 30, 1962, and approved by either the Osteopathic Medical Board of California or the Medical Board of California at the time that such degree was issued, who applied in writing to the Medical Board of California for permission to utilize his or her degree of doctor of medicine, will be authorized to use the term of suffix "M.D.," and such use will not constitute unprofessional conduct, as long as such person advised both boards, in writing, that he or she has elected to use such term or suffix and further has elected not to use the term or suffix "D.O." In the event of such an election, the use of the term or suffix "D.O." constitutes unprofessional conduct [*Bus. & Prof. Code § 2275*].

Unless the holder of any certificate provided for under the Medical Practice Act has been granted the degree of doctor of osteopathy after the completion of a full course of study as prescribed by an approved osteopathic medical school in accordance with the applicable provisions of the Business and Professions Code, the use of the term or suffix "D.O." constitutes unprofessional conduct [*Bus. & Prof. Code § 2276*].

[16] False Advertising or Procurement

Bus. & Prof. Code § 17500 generally prohibits any advertising that is untrue or misleading and that is known or in the exercise of reasonable care should have been known to be untrue or misleading to the disseminator of the advertising. This statute is set forth and discussed generally in Ch. 14, *Advertising*.

Any advertising in violation of *Bus. & Prof. Code § 17500* constitutes unprofessional conduct [*Bus. & Prof. Code § 2271*; *see also Bus. & Prof. Code § 651* (restricting content of advertisements)]. A licensee who uses an expression with a double meaning in advertising may not escape the charge of misleading or deceptive advertising by claiming that since he or she meant them, the words were true [*Smulson v. Board of Dental Examiners (1941) 47 Cal. App. 2d 584, 590, 118 P.2d 483* (decided under former *Bus. & Prof. Code § 1680(11), now see Bus. & Prof. Code § 1680(h),* proscribing deceptive advertising by dentists)].

The employment of runners, cappers, steerers, or other persons to procure patients constitutes unprofessional conduct, except as otherwise allowed by law [*Bus. & Prof. Code § 2273*]. This unprofessional conduct is a public offense, subject to stringent criminal penalties (*discussed under § 414.66[8]*) [*see Bus. & Prof. Code §§ 2314(b), 2315(b)*].

[17] Employing, Aiding, or Abetting Unlicensed Persons in Medical Practice

The employing, directly or indirectly, the aiding, or the abetting of any unlicensed person or any suspended, revoked, or unlicensed practitioner to engage in the practice of medicine or any other mode of treating the sick or afflicted that requires a license to practice constitutes unprofessional conduct [*Bus. & Prof. Code § 2264*; *see also § 414.92[2]*]. A licensee must have known that a person whom he or she employed was engaging in practice that requires a license in order to be guilty of unprofessional conduct [*Barrett v. Board of Osteopathic Exmrs. (1935) 4 Cal. App. 2d 135, 138-139, 40 P.2d 923* (decided under former Medical Practice Act § 14(7a); *now see Bus. & Prof. Code § 2264*)].

The fact that the unlicensed persons whom the accused employed or aided and abetted in practicing medicine were physicians who, though they lacked California licenses, had training that enabled them to practice competently, does not exculpate the accused licensee [*Magit v. Board of Medical Examiners (1961) 57 Cal. 2d 74, 85, 17 Cal. Rptr. 488, 366 P.2d 816* (decided under former *Bus. & Prof. Code 2392*; *now see Bus. & Prof. Code § 2264*)].

The fact that a licensee supervised unlicensed persons whom he or she is accused of employing or aiding or abetting in practice or that such unlicensed persons consulted with the licensee does not render the unauthorized medical practice proper [*Magit v. Board of Medical Examiners (1961) 57 Cal. 2d 74, 84, 17 Cal. Rptr. 488, 366 P.2d 816* (supervision of unlicensed persons); *O'Reilly v. Board of Medical Examiners (1967) 66 Cal. 2d 381, 388, 58 Cal. Rptr. 7, 426 P.2d 167 , cert. denied, 390 U.S. 944 (1968)* (decided under former *Bus. & Prof. Code § 2392*; *now see Bus. & Prof. Code § 2264*)].

Although former *Bus. & Prof. Code § 2665* (*now see Bus. & Prof. Code § 2630*) provides that a physical therapist's aide may engage in certain practices that would otherwise require a license under the orders, directions, and supervision of a licensee, a hospital director is subject to discipline for employing an unlicensed practitioner when he or she does not attempt to provide the supervision required for unlicensed persons engaging in such practices [*O'Reilly v. Board of Medical Examiners (1967) 66 Cal. 2d 381, 388, 58 Cal. Rptr. 7, 426 P.2d 167 , cert. denied, 390 U.S. 944 (1968)* (decided under former *Bus. & Prof. Code § 2392*; *now see Bus. & Prof. Code § 2264*)].

[18] Employment of Fee Arrangements With Acupuncturists

A licensed physician and surgeon or a licensed podiatrist, or a group of physicians and surgeons or podiatrists, or a medical or podiatry corporation must not share in any fee charged by an acupuncturist or receive any consideration from or on behalf of such acupuncturist for any referral or diagnosis [*Bus. & Prof. Code § 2284(a)*].

A licensed physician and surgeon or podiatrist must not employ more than one acupuncturist, and a group of physicians and surgeons or podiatrists, or a medical or podiatry corporation must not employ more than one acupuncturist for every 20 practitioners in such a group or corporation [*Bus. & Prof. Code § 2284(b), (c)*].

[19] Unprofessional Conduct Involving Treatment or Referral of Patients

Violation of any provision of *Health & Safety Code § 1400 et seq.*, relating to the unlawful referral of patients to extended care facilities, constitutes unprofessional conduct [*Bus. & Prof. Code § 2255*]. Intentional violation of *Welf. & Inst. Code §§ 5326.2-5326.8*, inclusive, relating to the rights of involuntarily confined inpatients, also constitutes unprofessional conduct [*Bus. & Prof. Code § 2256*].

The following types of conduct relating to the treatment of cancer constitute unprofessional conduct:

(1) The violation of any provisions of *Health & Safety Code § 1700 et seq.*, relating to the treatment of cancer, or any violation of an injunction or a cease and desist order issued under such provisions [*Bus. & Prof. Code § 2252*];

(2) Failure to inform a patient by means of a standardized written summary, as developed by the Department of Public Health on the recommendation of the Cancer Advisory Council, in layman's language and in a language understood by the patient, of alternative efficacious methods of treatment that may be medically viable, including surgical, radiological, or chemotherapeutic treatments or combinations thereof, when the patient is being treated for any form of breast cancer [*see Bus. & Prof. Code § 2257*; *Health & Safety Code § 1704.5*]. Prior to the performance of a biopsy, it must be noted on the patient's chart that the patient has been given the written summary [*Health & Safety Code § 1704.5*]; and

(3) The violation of former *Health & Safety Code § 1708.5* (repealed by its own terms on January 1, 1985) relating to the use of laetrile or amygdalin with respect to cancer therapy [*Bus. & Prof. Code § 2258*].

Failure to comply with the Reproductive Privacy Act, *Health & Safety Code § 123460 et seq.* in performing, assisting, procuring or aiding, abetting, attempting, agreeing, or offering to procure an illegal abortion constitutes unprofessional conduct [*Bus. & Prof. Code § 2253(a)*].

It is unprofessional conduct to violate *Health & Safety Code § 25956*, which provides that it is unlawful for any person to use any aborted product of human conception, other than fetal remains, for any type of scientific or laboratory research or for any other kind of experimentation or study, except to protect or preserve the life and health of the fetus. "Fetal remains" as used in *Health & Safety Code § 25956* means a lifeless product of conception regardless of the duration of pregnancy. A fetus will not be deemed to be lifeless for the purposes of *Health & Safety Code § 25956* unless there is an absence of a discernible heartbeat [*see Bus. & Prof. Code § 2254*; *Health & Safety Code § 25956*].

Willful failure to comply with the requirements of *Welf. & Inst. Code § 14191 et seq.* and the regulations promulgated thereunder, relating to informed consent for sterilization procedures, constitutes unprofessional conduct [*Bus. & Prof. Code § 2250*].

The willful, unauthorized violation of professional confidence constitutes unprofessional conduct [*Bus. & Prof. Code § 2263*]. The willfulness requirement of this rule requires some design or intent to do injury, or a conscious disregard of

duty. The rule was never intended to seal the lips of the physician against any and all disclosure regardless of harmless character, nor was it intended to embrace disclosure of facts not connected with the practice of the profession [*McPheeters v. Board of Medical Examiners (1930) 103 Cal. App. 297, 301, 284 P. 938* (interpreting former Medical Practice Act § 14(2); *now see Bus. & Prof. Code § 2263*)].

[20] Regular Practice in Hospitals Not Having Certain Rules

The regular practice of medicine in a licensed general or specialized hospital having five or more physicians and surgeons on the medical staff constitutes unprofessional conduct if the hospital does not have rules, established by the board of directors thereof, that govern the operation of the hospital and that include all of the following provisions [*Bus. & Prof. Code § 2282*]:

(1) Provision for the organization of physicians and surgeons licensed to practice in California who are permitted to practice in the hospital into a formal medical staff with appropriate officers and bylaws and with staff appointments on an annual or biennial basis;

(2) Provision that membership on the medical staff must be restricted to physicians and surgeons and other licensed practitioners competent in their respective fields and worthy in professional ethics. In this respect, the division of profits from professional fees in any manner will be prohibited and any such division will be cause for exclusion from the staff;

(3) Provisions that the medical staff will be self-governing with respect to the professional work performed in the hospital, that the medical staff will meet periodically and review and analyze at regular intervals their clinical experience, and that the medical records of patients will be the basis for such review and analysis; and

(4) Provision that adequate and accurate medical records be prepared and maintained for all patients.

The regular practice of medicine in a licensed general or specialized hospital having fewer than five physicians and surgeons on the medical staff constitutes unprofessional conduct if the hospital does not have rules, established by the board of directors thereof, that govern the operation of the hospital and that include, among other provisions, all of the provisions stated in *Bus. & Prof. Code § 2282(b), (d)*, listed *above* [*Bus. & Prof. Code § 2283*].

The Division of Medical Quality or the Senior Assistant Attorney General of the Health Quality Enforcement Section may inspect a licensed general or specialized hospital and require reports therefrom to determine if the hospital has adopted and is complying with the provisions of *Bus. & Prof. Code §§ 2282* and *2283*, discussed *above*. They may inspect medical staff and patient hospital medical records subject to the provisions of *Bus. & Prof. Code § 2225* (physician-patient privilege does not apply to investigations or proceedings under Medical Practice Act; names of patients affected as required to be kept confidential until proceedings are instituted). Notwithstanding *Bus. & Prof. Code § 2224* (delegation of authority by Division), the Division's authority under *Bus. & Prof. Code § 2226* must be delegated only to a licensed physician and surgeon [*Bus. & Prof. Code § 2226*].

[21] Violating Moscone-Knox Professional Corporation Act

It will constitute unprofessional conduct for any licensee to violate, to attempt to violate, directly or indirectly, to assist in or abet the violation of, or to conspire to violate any provision or term of *Corp. Code § 13400 et seq.* (Moscone-Knox Professional Corporation Act) or of any rules and regulations duly adapted under those sections [*Bus. & Prof. Code § 2286*].

[22] Testimony as Expert Witness in Medical Malpractice Action

The Board may discipline a physician for unprofessional conduct even though the actual misconduct does not constitute

the practice of medicine or cause harm to individual patients, as long as the misconduct relates to the physician's fitness or competence to practice medicine. Conceivably, such misconduct would include court testimony given on behalf of a plaintiff or defendant as to the appropriate standard of medical care and whether the defendant has breached that standard [*see Austin v. American Ass'n of Neurological Surgeons (7th Cir. 2001) 253 F.3d 967, 971-974* ; *Joseph v. D.C. Bd. of Medicine (D.C. App. 1991) 587 A.2d 1085, 1086-1091]* . Whether the court testimony in a particular malpractice suit may be found to constitute misconduct would depend upon all the relevant circumstances *[87 Ops. Cal. Atty. Gen. 48 (2004)]* .

[23] Discipline Against a Licensee in Another State

The revocation, suspension, or other discipline by another state of a license or certificate to practice medicine issued by the state, or the revocation, suspension, or restriction of the authority to practice medicine by any agency of the federal government, to a licensee under the Medical Practice Act will constitute grounds for disciplinary action for unprofessional conduct against the licensee in California [*Bus. & Prof. Code § 2305*]. *Bus. & Prof. Code § 141(a)* permits state licensing boards generally to impose discipline based on a disciplinary action taken by another state, a federal agency or another country. *Bus. & Prof. Code § 2305*, which is the more specific statute, did not impliedly repeal § 141. The two can be reconciled by treating § 2305 as an exception to, but not a replacement of, § 141. Since § 2305 requires disciplinary action against a licensee based on discipline imposed by another state, but only if the other jurisdiction's action would have been grounds for discipline in California. When the basis of the other state's action would not have been grounds for discipline in California, then § 141 can be applied [*Medical Board v. Superior Court (2001) 88 Cal. App. 4th 1001, 1004-1005, 106 Cal. Rptr. 2d 381]* .

The broad language of the *Bus. & Prof. Code § 2305* does not limit its application only to professional discipline imposed after a full hearing on the merits. The statue applies by its terms to any discipline imposed by another state on the holder of a license or certificate to practice medicine issued by that state, and thus includes acquiescence by signing a consent decree to disciplinary action without any admission of the charges brought by the foreign jurisdiction [*Marek v. Board of Podiatric Medicine (1993) 16 Cal. App. 4th 1089, 1096, 20 Cal. Rptr. 2d 474]* .

[24] Moral Turpitude

[a] In General

In amending the Medical Practice Act in 1980, the Legislature repealed former *Bus. & Prof. Code § 2383* (conviction of felony or of misdemeanor involving moral turpitude) and replaced it with *Bus. & Prof. Code § 2236* (conviction of crime substantially related to practice of medicine as unprofessional conduct; *see § 414.63[3]*). Thus, there are no longer any provisions in the Medical Practice Act that require a finding of moral turpitude to support a finding that a licensee is guilty of unprofessional conduct. A showing that the accused demonstrated moral turpitude in committing a crime, however, may satisfy the substantial relatedness requirement of *Bus. & Prof. Code § 2236(a)* by showing that the licensee is morally unfit to practice medicine [*Windham v. Board of Medical Quality Assurance (1980) 104 Cal. App. 3d 461, 469-471, 163 Cal. Rptr. 566* (interpreting *Bus. & Prof. Code § 490*, which provides that professional license may only be suspended for conviction of crime substantially related to practice of profession for which license was granted, and noting that former *Bus. & Prof. Code § 2383* (*now see Bus. & Prof. Code § 2236*) contains identical provisions regarding practice of medicine)].

Similarly, there is no constitutional requirement that conduct by a licensee involve moral turpitude in order to be the basis for discipline [*Windham v. Board of Medical Quality Assurance (1980) 104 Cal. App. 3d 461, 466, 163 Cal. Rptr. 566]* . A showing of moral turpitude that establishes the licensee's moral unfitness to practice medicine, however, may establish the constitutionally required nexus between the accused's conduct and the practice of medicine, just as it may establish the nexus with regard to conviction of a crime required by *Bus. & Prof. Code § 2236(a)* [*see Windham v. Board of Medical Quality Assurance (1980) 104 Cal. App. 3d 461, 470, 163 Cal. Rptr. 566* (intentional dishonesty as

showing lack of moral character and satisfying finding of unfitness to practice); *Matanky v. Board of Medical Examiners (1978) 79 Cal. App. 3d 293, 305, 144 Cal. Rptr. 826* ; *see also § 414.113[3][h]*].

A finding of moral turpitude made in addition to the finding that the accused was guilty of unprofessional conduct may also be used as a factor in determining the appropriate penalty to be imposed [*see Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 69, 75, 64 Cal. Rptr. 785, 435 P.2d 553* ; *Matanky v. Board of Medical Examiners (1978) 79 Cal. App. 3d 293, 301-302, 144 Cal. Rptr. 826]* .

[b] Establishing Moral Turpitude

Determination of whether or not certain conduct involves moral turpitude is an ultimate conclusion to be drawn from undisputed facts. It is therefore a question of law, which may be independently taken up by the appellate courts [*Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 74 n.7, 64 Cal. Rptr. 785, 435 P.2d 553* ; *Matanky v. Board of Medical Examiners (1978) 79 Cal. App. 3d 293, 303, 144 Cal. Rptr. 826]* .

Moral turpitude has variously been defined in such broad terms as baseness, vileness, or depravity. However, the question of whether an accused's acts involved moral turpitude cannot be determined in the abstract, but depends on whether such acts demonstrate the accused's unfitness to practice [*Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 73 n.5, 64 Cal. Rptr. 785, 435 P.2d 553* ; *see § 414.113[3][h]*].

The physician's motivation in engaging in the misconduct of which he or she is accused is crucial for a finding of moral turpitude. Thus, the Supreme Court has found that the furnishing of dangerous drugs without a prescription did not involve moral turpitude when surrounding circumstances showed that the accused was not acting for personal gain [*Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 73-74, 64 Cal. Rptr. 785, 435 P.2d 553* (decided under former *Bus. & Prof. Code § 2391.5*; *now see Bus. & Prof. Code § 2238* (violation of drug law as unprofessional conduct))].

Conviction of a criminal offense by itself, without evidence concerning the circumstances surrounding the offense, is evidence of moral turpitude only if the minimum elements for conviction of the offense necessarily involve moral turpitude, so that a conviction cannot be had without proof of facts involving moral turpitude. Investigation into the circumstances surrounding the committing of an offense that does not necessarily involve moral turpitude, however, may show that it was committed by acts involving moral turpitude [*Lorenz v. Board of Medical Examiners (1956) 46 Cal. 2d 684, 687, 298 P.2d 537* ; *Matanky v. Board of Medical Examiners (1978) 79 Cal. App. 3d 293, 302, 144 Cal. Rptr. 826]* .

Crimes involving fraud or intentional dishonesty for personal gain involve moral turpitude, whatever other sorts of conduct the concept may include [*Matanky v. Board of Medical Examiners (1978) 79 Cal. App. 3d 293, 303, 144 Cal. Rptr. 826]* .

[25] Failure to Provide Service Under National Health Services Corps Program

On referral by the National Health Services Corps to the Attorney General of the United States of any physician or surgeon who fails to provide service as a general practitioner or physician and surgeon as required pursuant to the grant agreement entered into between the physician and surgeon and the National Health Services Corps program [*see 42 U.S.C.S. § 254d*] or the federal loan insurance program [*see 42 U.S.C.S. § 294*], the Medical Licensing Board must review the facts and circumstances of the default and take appropriate disciplinary action when the board determines that the licensee has committed unprofessional conduct in violation of *Bus. & Prof. Code § 2234* [*Bus. & Prof. Code § 2430*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesSex CrimesGeneral OverviewHealthcare LawActions Against FacilitiesGeneral OverviewHealthcare LawActions Against Healthcare WorkersSurgeonsHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRevocation & SuspensionHealthcare LawBusiness Administration & OrganizationPeer ReviewGeneral OverviewHealthcare LawTreatmentFailures to Disclose & WarnTreatment OptionsInsurance LawMalpractice InsuranceGeneral OverviewTortsNegligenceGeneral OverviewTortsNegligenceStandards of CareGeneral Overview

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§ 414.64 Practice in Profession as Not Controlling Standard

When the law sets a standard for proper professional conduct, the standard exacted by law is controlling over practice in the profession [*Brown v. State Department of Health (1978) 86 Cal. App. 3d 548, 556, 150 Cal. Rptr. 344* (decided under former *Bus. & Prof. Code § 2411*; *now see Bus. & Prof. Code § 2261*)]. Testimony regarding the practice in the profession is not material to the standard exacted by law [*see Stevenson v. State Bd. of Medical Examiners (1970) 10 Cal. App. 3d 433, 438, 88 Cal. Rptr. 815* (decided under former *Bus. & Prof. Code § 2392*; *now see Bus. & Prof. Code § 2264*); *but see Gore v. Board of Medical Quality Assurance (1980) 110 Cal. App. 3d 184, 196, 167 Cal. Rptr. 881* (testimony by medical expert may be used to establish extreme departure from ordinary medical practice in gross negligence case, interpreting former *Bus. & Prof. Code § 2361*; *now see Bus. & Prof. Code § 2234*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-414 California Forms of Pleading and Practice--Annotated § 414.65

§ 414.65 Requirement of Nexus With Practice of Medicine

[1] In General

The state has plenary power to regulate the practice of medicine [*Mann v. Board of Medical Examiners (1947) 31 Cal. 2d 30, 41, 187 P.2d 1]* . However, this power is subject to constitutional limits. The right to practice medicine is a property right of the highest character [*Rinaldo v. Board of Medical Exmrs. (1935) 5 Cal. App. 2d 345, 352, 42 P.2d 724]* . It is a right that is sufficiently precious to surround it with a panoply of legal protections [*Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 75, 64 Cal. Rptr. 785 . 435 P.2d 553]* .

The purpose of revoking a physician's license is to protect the public, not to punish the physician. The board can achieve a legitimate punitive purpose only by seeking criminal prosecution [*Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 73 n.6, 64 Cal. Rptr. 785, 435 P.2d 553* ; *Watson v. Superior Court (2009) 176 Cal. App. 4th 1407, 1416, 98 Cal. Rptr. 3d 715]* .

Thus, one court has held that when a physician's professional development is unaffected and the patient community is not placed in jeopardy, private acts of a physician are his or her own business and may not be the basis of discipline [*Grannis v. Board of Medical Examiners (1971) 19 Cal. App. 3d 551, 561-562, 96 Cal. Rptr. 863 , disapproved by Watson v. Superior Court (2009) 176 Cal. App. 4th 1407, 1422, 98 Cal. Rptr. 3d 715* ; *see Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 239, 82 Cal. Rptr. 175, 461 P.2d 375*]. Similarly, the question of whether a licensee's conduct demonstrated moral turpitude is limited to the effect of the licensee's actions on the quality of his or her services [*Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 73 n.6, 64 Cal. Rptr. 785, 435 P.2d 553* ; *see § 414.113[3][g][i]*; *see also Watson v. Superior Court (2009) 176 Cal. App. 4th 1407, 1424, 98 Cal. Rptr. 3d 715* (driving while intoxicated demonstrates unwillingness to obey laws against such conduct and constitutes serious breach of duty to society)].

Statutes declaring a specific course of conduct to be unprofessional conduct are similarly subject to the nexus requirement in their application. Thus, the proscription against the use or administration of alcoholic beverages to an extent dangerous to himself or herself, to any person and to the public in former *Bus. & Prof. Code § 2390* (*now see*

Bus. & Prof. Code § 2239(a)) is only a linguistic abstraction until given content by reference to fitness for the performance of the vocation of medicine [*Grannis v. Board of Medical Examiners (1971) 19 Cal. App. 3d 551, 561-562, 96 Cal. Rptr. 863]* . However, the existence of a nexus does not require a finding of an actual, adverse impact on the past day-to-day practice of medicine, but may be satisfied by a *potential* for such adverse impact in the future [*Watson v. Superior Court (2009) 176 Cal. App. 4th 1407, 1416, 98 Cal. Rptr. 3d 715*].

The California Code of Regulations provides that for the purposes of denial, suspension, or revocation of a license, certificate, or permit, a crime or act will be considered to be substantially related to the qualifications, functions, or duties of a person holding a license, certificate or permit under the Medical Practice Act if to a substantial degree it evidences present or potential unfitness of the person to perform the functions authorized by the license, certificate, or permit in a manner consistent with the public health, safety, or welfare [*16 Cal. Code Reg. § 1360*].

[2] Limits to Nexus Requirement

The fact that a physician's technical competence or skill has not been impeached will not prevent the physician from being subject to disciplinary action when his or her moral character is in dispute [*Matanky v. Board of Medical Examiners (1978) 79 Cal. App. 3d 293, 305, 144 Cal. Rptr. 826]* . Thus, intentional dishonesty demonstrates a lack of moral character and satisfies a finding of unfitness to practice medicine, in view of the extent to which the relationship between physician and patient is based on trust and confidence in the physician's honesty and integrity [*Foster v. Board of Medical Quality Assurance (1991) 227 Cal. App. 3d 1606, 1610, 278 Cal. Rptr. 117* ; *Windham v. Board of Medical Quality Assurance (1980) 104 Cal. App. 3d 461, 470, 163 Cal. Rptr. 566]* .

Filing intentionally false income tax returns and filing intentionally fraudulent medicare claims alleging services not performed have both been found to satisfy the nexus requirement by showing moral unfitness to practice medicine [*Windham v. Board of Medical Quality Assurance (1980) 104 Cal. App. 3d 461, 469, 163 Cal. Rptr. 566* ; *Matanky v. Board of Medical Examiners (1978) 79 Cal. App. 3d 293, 305-306, 144 Cal. Rptr. 826]* . In addition, the submission of false proof of malpractice insurance to a hospital that required all of its physicians to be insured has been found to satisfy the nexus requirement [*see Foster v. Board of Medical Quality Assurance (1991) 227 Cal. App. 3d 1606, 1610, 278 Cal. Rptr. 117]* . Similarly, a physician's plea of guilty to solicitation of subornation of perjury, which has as its hallmark an act of dishonesty, has been found substantially related to the individual's qualifications as a physician [*see Krain v. Medical Board (1999) 71 Cal. App. 4th 1416, 1425, 84 Cal. Rptr. 2d 586]* .

Similarly, an instance of unprofessional conduct need not be related to present unfitness to practice to warrant imposing discipline. One court of appeal upheld imposition of discipline for abuse of alcohol to such an extent as to be dangerous to the public, as manifested by two drunk driving violations, when expert testimony during the hearing showed that the accused suffered from a condition of alcoholism that might at some future date render him unfit to practice [*see Grannis v. Board of Medical Examiners (1971) 19 Cal. App. 3d 551, 562-563, 96 Cal. Rptr. 863]* .

Another court of appeal has held that a misdemeanor conviction resulting from the accused's having made a homosexual proposition in a public restroom was sufficiently related to the practice of an internist, many of whose patients were male, to warrant the imposition of discipline [*see McLaughlin v. Board of Medical Examiners (1973) 35 Cal. App. 3d 1010, 1014-1016, 111 Cal. Rptr. 353]* .

No independent nexus need be shown between the practice of medicine and a criminal conviction involving drugs to warrant the imposition of discipline, since the Legislature was constitutionally permitted to determine that in light of the crucial role played by physicians in the distribution of drugs, misuse of drugs by physicians represents a particular danger to the public that justifies special regulation [*Weissbuch v. Board of Medical Examiners (1974) 41 Cal. App. 3d 924, 929, 116 Cal. Rptr. 479]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 414.66 Types of Disciplinary Action

[1] In General

A licensee whose matter has been heard by an administrative law judge of the Medical Quality Hearing Panel as designated in *Gov. Code § 11371*, or whose default has been entered, and who is found guilty may suffer any of the following, in accordance with the provisions of the Medical Practice Act [*Bus. & Prof. Code § 2227*]:

- Have his or her license revoked on order of the Board;
- Have his or her right to practice suspended for a period not to exceed one year on order of the Board [§ 414.66[2]];
- Be placed on probation on order of the Board [§ 414.66[3]];
- Be publicly reprimanded by the Board; or
- Have any other action taken in relation to discipline as part of an order of probation, as the Board or administrative judge may deem proper.

[2] Suspension

If a person's right to practice medicine is suspended, he or she must not engage in the practice of medicine during the term of the suspension. On the expiration of the term of suspension, the certificate will be reinstated, unless the licensee during the term of suspension is found to have engaged in the practice of medicine in California. In that event the Board will revoke the licensee's certificate to engage in the practice of medicine [*Bus. & Prof. Code § 2306*].

[3] Probation and Conditional Stay of Penalty

The authority of the California Medical Board, or the California Board of Podiatric Medicine to discipline a licensee by

placing him or her on probation includes, but is not limited to, the following [*Bus. & Prof. Code § 2228*]:

- Requiring the licensee to obtain additional professional training and to pass an examination on the completion of the training. The examination may be written or oral, or both, and may be a practical or clinical examination, or both, at the option of the Board or administrative law judge.

- Requiring the licensee to submit to a complete diagnostic examination by one or more physicians and surgeons appointed by the Board. If such an examination is ordered, the Board will receive and consider any other report of a complete diagnostic examination given by one or more physicians and surgeons of the licensee's choice.

- Restricting or limiting the extent, scope, or type of practice of the licensee, including requiring notice to applicable patients that the licensee is unable to perform the indicated treatment, when appropriate.

- Providing the option of alternative community service in cases other than violations relating to quality of care, as defined by the Board.

Each physician and surgeon placed on probation by the Board will be subject to the Board's Probation Surveillance Compliance Program and will be required to fully cooperate with representatives of the Board and its investigative personnel. Cooperation includes submission to laboratory testing for the purpose of determining the existence of alcohol, narcotics, other controlled substances, and/or dangerous drugs in his or her system. The tests will be made at the times and places required by the Board or its duly authorized representative. Any monetary fees incurred as a result of the laboratory tests will be borne by the physician-probationer [*16 Cal. Code Reg. § 1358*].

One court of appeal upheld an order by the Board imposing the taking of an educational course as a condition of staying the suspension of a physician's license [*Gore v. Board of Medical Quality Assurance (1980) 110 Cal. App. 3d 184, 189-190, 199, 167 Cal. Rptr. 881]* .

[4] Public Letter of Reprimand

The Board by stipulation or settlement with the affected physician and surgeon, may issue a public letter of reprimand after it has conducted an investigation or inspection, rather than filing or prosecuting a formal accusation. The public letter of reprimand, at the discretion of the Board, may include a requirement for specified training or education. The affected physician and surgeon must indicate agreement or nonagreement in writing within 30 days of formal notification by the Board of its intention to issue the letter. The Board, at its option, may extend the response time. Use of a public reprimand is limited to minor violations and is issued under guidelines established by regulations of the Board. A public letter of reprimand may be disclosed to an inquiring member of the public [*Bus. & Prof. Code § 2233*].

[5] Interim Discipline

The administrative law judge of the Medical Quality Hearing Panel established pursuant to *Gov. Code § 11371*, sitting alone, may issue an interim order suspending a license, or imposing drug testing, continuing education, supervision of procedures, or other license restrictions when it appears that the licensee has violated, or is about to violate, the provisions of the Medical Practice Act or is unable to practice safely due to a mental or physical condition, and that permitting a licensee's continued practice of medicine may endanger the public health, safety, or welfare [*Gov. Code § 11529(a)*]. These orders may be issued ex parte, under specified circumstances [*see Gov. Code § 11529(b)*]. For discussion of interim orders, see *§ 414.69[5]*.

[6] Protection of Public and Rehabilitation as Factors in Assessment of Discipline

Protection of the public is the highest priority for the Medical Board of California, the California Board of Podiatric Medicine, and administrative law judges of the Medical Quality Hearing Panel in exercising its disciplinary authority [*Bus. & Prof. Code § 2229(a)*].

In exercising his or her disciplinary authority, an administrative law judge of the Medical Quality Hearing Panel, whenever possible, must take action that is calculated to aid in the rehabilitation of the licensee, or when, due to a lack of continuing education or other reasons, restrictions on scope of practice is indicated, to order restrictions as are indicated by the evidence [*Bus. & Prof. Code § 2229(b)*; *see also Kenneally v. Lungren (9th Cir. 1992) 967 F.2d 329, 334* (Division of Medical Quality was not obligated under *Bus. & Prof. Code § 2229(b)* to accept physician's settlement offer)].

It is the intent of the Legislature that the Medical Board of California, the California Board of Podiatric Medicine, and the enforcement program will seek out those licensees who have demonstrated deficiencies in competency and then take those actions as are indicated, with priority given to those measures, including further education, restrictions from practice, or other means that will remove those deficiencies. When rehabilitation and protection are inconsistent, protection must be paramount [*Bus. & Prof. Code § 2229(c)*].

[7] Severity of Discipline Not Dependent on Injury to Patient

The severity of the discipline that may be imposed on the physician does not depend on whether patients have been injured by the physician's illegal medical practices [*Bryce v. Board of Medical Quality Assurance (1986) 184 Cal. App. 3d 1471, 1475, 229 Cal. Rptr. 483]* .

[8] Criminal Penalties

Unless it is otherwise expressly provided, any person, whether licensed under the Medical Practice Act or not, who violates any provision of *Bus. & Prof. Code § 2220 et seq.* (unprofessional conduct and discipline) is guilty of a misdemeanor [*Bus. & Prof. Code § 2314(a)*]. Except as otherwise provided by law, any person found guilty of a misdemeanor for violation of the Medical Practice Act will be punished by a fine of $200 to $1200, or by imprisonment of 60 to 180 days, or by both [*Bus. & Prof. Code § 2315(a)*].

A person, whether licensed under the Medical Practice Act or not, who violates *Bus. & Prof. Code § 2273* (employment of runners, cappers, steerers, or other persons to procure patients) is punishable on a first conviction by imprisonment in the county jail for up to one year. A second or subsequent conviction is punishable by imprisonment in the county jail for not more than one year or by imprisonment in the state prison for 16 months or 2 or 3 years, or by a fine not exceeding $10,000, or by both the fine and imprisonment [*Bus. & Prof. Code §§ 2314(b), 2315(b)*].

The Supreme Court has held that notwithstanding the provisions now contained in *Bus. & Prof. Code §§ 2314* and *2315*, violations of *Bus. & Prof. Code § 2220 et seq.* are not criminal violations, unless the statute violated expressly so provides. The Court reasoned that former *Bus. & Prof. Code § 2426*, which contained the provisions now contained in *Bus. & Prof. Code §§ 2314* and *2315*, discussed above, was meant only to set the proper punishment for those violations that are expressly described ascriminal violations, and does not mean that violations that are merely described as unprofessional conduct are misdemeanors [*People v. Superior Court (Douglass) (1979) 24 Cal. 3d 428, 432, 434-435, 155 Cal. Rptr. 704, 595 P.2d 139* (prescribing, administering, or furnishing dangerous drugs without prior examination or medical indication as not constituting misdemeanor)]. It is not clear, however, how the 1980 amendments to the Medical Practice Act, pursuant to which provisions for punishment are no longer obtained in the same section that declares that violation of *Bus. & Prof. Code §§ 2220-2319* constitutes a misdemeanor, but are set forth in a separate section, affects the validity of this holding [*see Bus. & Prof. Code §§ 2314(a)* (violation of statute as misdemeanor), 2315(a) (punishment for misdemeanor)].

[9] Injunctive Relief

Bus. & Prof. Code § 2311 provides that the superior court of any county may issue an injunction or other appropriate restraining order on application of the Board or of 10 persons licensed as physicians and surgeons or podiatrists in California whenever any person has engaged in or is about to engage in any acts or practices that constitute or will constitute an offense against the provisions of the Medical Practice Act. Proceedings for obtaining such relief under *Bus. & Prof. Code § 2311* are governed by *Code Civ. Proc. § 525 et seq.*

The Board is required to seek an injunction against any physician and surgeon within its jurisdiction if it has reasonable cause to believe that allowing that person to continue to engage in the practice of medicine would endanger the public safety, health, or welfare [*Bus. & Prof. Code § 2312*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPresiding OfficersDuties & PowersGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsLicensesHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawBusiness Administration & OrganizationLicensesRevocation & SuspensionHealthcare LawBusiness Administration & OrganizationPeer ReviewGeneral Overview

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 414 PHYSICIANS: LICENSING AND DISCIPLINE
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36-414 California Forms of Pleading and Practice--Annotated § 414.67

§ 414.67 Public Nature of Disciplinary Proceedings

Any matter heard pursuant to *Bus. & Prof. Code § 2227(a)* (*see § 414.66[1]*), except for warning letters, medical review or advisory conferences, professional competency examinations, continuing education activities, and cost reimbursement associated with them agreed to with the Board and successfully completed by the licensee, or other matters made confidential or privileged by existing law, is deemed public, and will be made available to the public by the board pursuant to *Bus. & Prof. Code § 803.1* [*Bus. & Prof. Code § 2227(b)*; *see, e.g., Fulton v. Medical Bd. of Cal., 183 Cal. App. 4th 1510, 1514-1517, 2010 Cal. App. LEXIS 555, **6-12* (Board required to publish information about actions initiated while individual licensed to practice in California, and update disclosures even if person no longer licensed in California)].

Bus. & Prof. Code § 2027 requires the Board to post on the Internet any information required to be disclosed pursuant to *Bus. & Prof. Code § 803.1*. Thus, pursuant to their plain language, former *Bus. & Prof. Code § 2027(a)(8)* [*now see Bus. & Prof. Code § 2027(a)(9)*] and *Bus. & Prof. Code § 803.1(a)(3)* require the Board to post on the Internet information regarding periods of probation imposed by the Board on a licensee [*Szold v. Medical Bd. of Cal. (2005) 127 Cal. App. 4th 591, 595-599, 25 Cal. Rptr. 3d 665]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRevocation & Suspension

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36-414 California Forms of Pleading and Practice--Annotated § 414.68

§ 414.68 Action in Case of Mental or Physical Illness

[1] In General

The Medical Practice Act no longer provides specifically for action regarding physicians who are suffering from debilitating mental or physical illness. Instead, *Bus. & Prof. Code §§ 820-828* provide generally for action by the appropriate licensing agency in case of debilitating mental or physical illness by any licensed practitioner of the healing arts. As used in *Bus. & Prof. Code § 820 et seq.* with reference to persons holding licenses as physicians and surgeons, licensing agency means a panel of the Division of Medical Quality [*Bus. & Prof. Code § 825*].

[2] Proceedings Available

Bus. & Prof. Code §§ 820 and *822* set out the proceedings for acting in case a licentiate is suffering from debilitating mental or physical illness. The licensing agency may proceed against a licentiate under either *Bus. & Prof. Code § 820* or *822*, or under both sections [*Bus. & Prof. Code § 824*].

[3] Diagnostic Examination

Whenever it appears that any person holding a license, certificate, or permit in the healing arts regulated by the Business and Professions Code may be unable to practice his or her profession safely because the licentiate's ability to practice is impaired due to mental illness, or to physical illness affecting competency, the licensing agency may order the licentiate to be examined by one or more physicians and surgeons or psychologists designated by the agency. The report of the examiners must be made available to the licentiate and may be received as direct evidence in proceedings conducted pursuant to *Bus. & Prof. Code § 822* (*discussed under § 414.68[5]*) [*Bus. & Prof. Code § 820*; *Kees v. Medical Board (1992) 7 Cal. App. 4th 1801, 1802-1814, 10 Cal. Rptr. 2d 112* (upholding constitutionality of *Bus. & Prof. Code § 820* with respect to right to privacy); *Alexander D. v. State Bd. of Dental Examiners (1991) 231 Cal. App. 3d 92, 98, 99, 282 Cal. Rptr. 201* (upholding constitutionality of *Bus. & Prof. Code § 820* with respect to due process rights)]. The licentiate's failure to comply with an order issued under *Bus. & Prof. Code § 820* constitutes grounds for the suspension or revocation of the licentiate's certificate or license [*Bus. & Prof. Code § 821*].

A court order for more than one psychiatric examination may be an invasion of the licentiate's constitutional right to privacy unless the Board makes a showing of good cause for the additional examination [*Kees v. Medical Board (1992) 7 Cal. App. 4th 1801, 1814-1815, 10 Cal. Rptr. 2d 112]* .

[4] Proceedings in Closed Session

Notwithstanding the provisions of *Gov. Code § 11120 et seq.* relating to public meetings, the licensing agency may convene in closed session to consider any evidence relating to the licentiate's mental or physical illness obtained pursuant to the proceedings under *Bus. & Prof. Code § 820* (examination procedure). The licensing agency may only convene in closed session to the extent that it is necessary to protect the privacy of a licentiate [*Bus. & Prof. Code § 827*].

[5] Restriction of Right to Practice

If a licensing agency determines that its licentiate's ability to practice his or her profession safely is impaired because the licentiate is mentally ill, or physically ill to an extent that affects competency, the licensing agency may take action by one of the following methods [*Bus. & Prof. Code § 822*]:

- Revoking the licentiate's certificate or license.
- Suspending the licentiate's right to practice.
- Placing the licentiate on probation.
- Taking such other action in relation to the licentiate as the licensing agency in its discretion deems proper.

[6] Procedure if Proceedings to Restrict Right to Practice Not Initiated After Examination

If the licensing agency determines, pursuant to proceedings conducted under *Bus. & Prof. Code § 820* (diagnostic examination), that there is insufficient evidence to bring an action against the licentiate pursuant to *Bus. & Prof. Code § 822* (restriction of right to practice), then all licensing agency records of the proceedings, including the order for the examination, investigative reports, if any, and the report of the physicians and surgeons or psychologists, must be kept confidential and are not subject to discovery or subpoena. If no further proceedings are conducted to determine the licentiate's fitness to practice during a period of five years from the date of the determination of the licensing agency of the proceeding pursuant to *Bus. & Prof. Code § 820*, then the licensing agency must purge and destroy all records pertaining to the proceedings. If new proceedings are instituted during the five-year period against the licentiate by the licensing agency, the records, including the report of the physicians and surgeons or psychologists, may be used in the proceedings and must be available to the respondent pursuant to the provisions of *Gov. Code § 11507.6* (request for discovery in administrative proceedings) [*Bus. & Prof. Code § 828*].

The proceedings under *Bus. & Prof. Code §§ 821* and *822* (*discussed under § 414.68[5]*) must be conducted in accordance with *Gov. Code § 11500 et seq.* (administrative trials), and the licensing agency and the licentiate have all the rights and powers granted by these provisions [*Bus. & Prof. Code § 826*]. Analogous statutory provisions contained in *Bus. & Prof. Code § 2230* are discussed in *§ 414.69[1]*. For detailed discussion of the Administrative Procedure Act, see Ch. 473, *Public Agency Adjudication* et seq.

[7] Reinstatement of Right to Practice

Notwithstanding any other provisions of law, reinstatement of a licentiate against whom action has been taken pursuant to *Bus. & Prof. Code § 822* (*discussed under § 414.68[5]*) is governed by the procedures set out in *Bus. & Prof. Code §*

820 et seq. [*Bus. & Prof. Code § 823*]. For a discussion of reinstatement or modification of penalty after discipline has been imposed for unprofessional conduct rather than for debilitating illness, see the *discussion under § 414.74*.

In reinstating a certificate or license that has been revoked or suspended under *Bus. & Prof. Code § 822*, the licensing agency may impose terms and conditions to be complied with by the licentiate after the certificate or license has been reinstated. The authority of the licensing agency to impose terms and conditions includes, but is not limited to, the following [*Bus. & Prof. Code § 823*]:

- Requiring the licentiate to obtain additional professional training and to pass an examination on the completion of the training.

- Requiring the licentiate to pass an oral, written, practical, or clinical examination, or any combination thereof to determine his or her present fitness to engage in the practice of his or her profession.

- Requiring the licentiate to submit to a complete diagnostic examination by one or more physicians and surgeons or psychologists appointed by the licensing agency. If the licensing agency requires the licentiate to submit to such an examination, the licensing agency must receive or consider any other report of a complete diagnostic examination given by one or more physicians and surgeons or psychologists of the licentiate's choice.

- Requiring the licentiate to undergo continuing treatment.

- Restricting or limiting the extent, scope, or type of practice of the licentiate.

The licensing agency may not reinstate a revoked or suspended certificate or license until it has received competent evidence of the absence or control of the condition that caused its action and until it is satisfied that with due regard for the public health and safety the person's right to practice his or her profession may be safely reinstated [*Bus. & Prof. Code § 822*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewHealthcare LawBusiness Administration & OrganizationGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRevocation & Suspension

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36-414 California Forms of Pleading and Practice--Annotated § 414.69

§ 414.69 Disciplinary Proceedings for Unprofessional Conduct

[1] Application of Administrative Procedure Act

All proceedings against a licensee or applicant for licensure for unprofessional conduct must be conducted in accordance with *Gov. Code § 11500 et seq.*, which govern administrative trials generally [*Bus. & Prof. Code § 2230(a)*; *see Gov. Code § 11373(a)*]. For a general discussion of administrative trials, see Ch. 473, *Public Agency Adjudication* , et seq.

[2] Prosecuting Authority

Proceedings against a licensee or applicant for licensure for unprofessional conduct will be prosecuted by the Senior Assistant Attorney General of the Health Quality Enforcement Section [*Bus. & Prof. Code § 2230*; *Gov. Code § 12529(a)*].

[3] Authority and Duties of Board

[a] In General

Except as otherwise provided by law, the Board may take action against all persons guilty of violating the provisions of the Medical Practice Act. The Board must enforce the provisions of *Bus. & Prof. Code § 2220 et seq.*, which define instances of unprofessional conduct and provide for disciplinary action (*see discussions under §§ 414.111[2]* and *414.113[5]*) against physician's and surgeon's certificate holders. The Board also has all the powers granted by the Medical Practice Act for this purpose [*Bus. & Prof. Code § 2220*]. The Board is required to take action against any licensee who is charged with unprofessional conduct [*Bus. & Prof. Code § 2234*].

[b] Investigation of Possible Unprofessional Conduct

The powers granted to the Board for the purpose of enforcing and administering the provisions of *Bus. & Prof. Code § 2220 et seq.* include, but are not limited to, the following [*Bus. & Prof. Code § 2220*]:

- Investigating complaints from the public, from other licensees, from health care facilities, or from a division of the board, that a physician and surgeon may be guilty of unprofessional conduct.

- Investigating the circumstances of practice of any physician and surgeon when there have been any judgments, settlements, or arbitration awards requiring the physician and surgeon or his or her professional liability insurer to pay an amount in damages in excess of a cumulative total of $30,000 with respect to any claim that injury or damage was proximately caused by the physician's and surgeon's error, negligence, or omission.

- Investigating the nature and causes of injuries when an unusually high number of judgments, settlements, or arbitration awards is reported against a physician and surgeon.

Board investigators have the authority of peace officers while engaged in exercising the powers granted or performing the duties imposed on them in investigating the laws or commencing any criminal prosecution arising from any such investigation [*Bus. & Prof. Code § 160*; *Bradley v. Medical Board (1997) 56 Cal. App. 4th 445, 457-458, 65 Cal. Rptr. 2d 483]* . When a physician is suspected of improperly prescribing drugs, an investigation may be surreptitious and include undercover operatives posing as "patients" making false representations [*Bradley v. Medical Board (1997) 56 Cal. App. 4th 445, 458, 65 Cal. Rptr. 2d 483* ; *see also § 414.63[5][d]*].

On and after January 1, 2006, any reference to an investigation by the Board or one of its divisions, including the Division of Medical Quality, will be deemed to refer to an investigation directed by employees of the Department of Justice [*Bus. & Prof. Code § 2006* (inoperative on July 1, 2010, and as of January 1, 2011, repealed, unless later enacted statute, that becomes operative on or before January 1, 2011, deletes or extends dates on which it becomes inoperative and is repealed)]. As of January 1, 2008, the Division of Medical Quality was folded into the Medical Board [*see Bus. & Prof. Code § 2002*]. References to the former Division of Licensing in statutes and regulations, and in this chapter, should now be read to refer to the Board. (References throughout this chapter will be changed as pages are replaced in the future.)

[4] Professional Competency Examination

[a] Reasonable Cause to Doubt Ability to Practice Skillfully and Safely

A physician may be ordered to undergo a professional competency examination if, after investigation and review by a medical expert designated by the Board, there is reasonable cause to believe that the physician is unable to practice medicine with reasonable skill and safety to patients. Reasonable cause is demonstrated by one or more of the following [*Bus. & Prof. Code § 2292(a)*]:

- A single incident of gross negligence.

- A pattern of inappropriate prescribing.

- An act of incompetence or negligence causing death or serious bodily injury.

- A pattern of substandard care.

[b] Procedure for Ordering Examination

On referral from the Board, the matter of requiring a physician to take a professional competency examination will be drafted and presented by the Senior Assistant Attorney General of the Health Quality Enforcement Section, or by his or

her designee, by way of a written petition detailing the reasonable cause. The petition must contain all conclusions and facts on which the presumption of reasonable cause is based. A copy of the petition will be served on the physician, who may file written opposition to the petition within 45 days after service. Service of the petition and any orders must be in accordance with the methods of service authorized by *Gov. Code § 11505(c)* [*Bus. & Prof. Code § 2292(b)*]. For discussion of *Gov. Code § 11505(c)*, see *Ch. 473A, Commencing Agency Adjudication, § 473A.11[9]*.

The panel will review the petition and any opposition paper from the physician, or the panel may hold a hearing in accordance with the provisions of the Administrative Procedure Act to determine if reasonable cause exists regarding the circumstances specified in *Bus. & Prof. Code § 2292(a)* (*discussed under § 414.69[4][a]*). The physician may be represented at the hearing by the person of his or her choice. If the panel is satisfied that reasonable cause exists concerning the circumstances specified in *Bus. & Prof. Code § 2292(a)*, the panel must issue an order compelling the physician to undergo an examination of professional competence as measured by community standards. "Community standards" means the statewide standards of the community of licensees. Failure to comply with the order duly served on the physician constitutes unprofessional conduct for purposes of disciplinary proceedings [*Bus. & Prof. Code § 2292(d)*; *see Smith v. Board of Medical Quality Assurance (1988) 202 Cal. App. 3d 316, 320-329, 248 Cal. Rptr. 704* (upholding constitutionality of *Bus. & Prof. Code § 2292*].

[c] Administration of Examination

The professional competency examination is in the form of an oral clinical examination, and is administered by three physician examiners selected by the Board or its designee, who must test for medical knowledge specific to the physician's specialty or specific suspected deficiency. The examination must be audio recorded [*Bus. & Prof. Code § 2293(a)*].

Competency examinations must be conducted under a uniform examination system, and for that purpose, the Board may make arrangements with organizations furnishing examination material as deemed desirable [*Bus. & Prof. Code § 2293(g)*].

[d] Action on Completion of Examination

A failing grade from two of the examiners constitutes the failure of an examination. In the event of a failure, the board must supply a true and correct copy of the audio recording of the examination to the unsuccessful examinee [*Bus. & Prof. Code § 2293(b)*].

Within 45 days following receipt of the audio recording of the examination, a physician who fails the examination may request a hearing before the administrative law judge as designated in *Gov. Code § 11371* [*see § 414.69[6][b]*] to determine whether he or she is entitled to take a second examination [*Bus. & Prof. Code § 2293(c)*]. If the physician timely requests a hearing concerning the right to reexamination, the hearing will be held in accordance with the Administrative Procedure Act. On a finding that the examination or procedure is unfair or that one or more of the examiners manifested bias toward the examinee, a reexamination will be ordered [*Bus. & Prof. Code § 2293(d)*].

If the examinee fails the examination and is not afforded the right to reexamination, the Board may take action pursuant to *Bus. & Prof. Code § 2230* (disciplinary proceedings as governed by *Gov. Code § 11500*, which set out procedures for administrative trials generally) by directing that an accusation be filed charging the examinee with incompetency under *Bus. & Prof. Code § 2234(d)* [*see § 414.111[2]*]. The modes of discipline are set out in *Bus. & Prof. Code §§ 2227* (discussed in *§ 414.66[1]*) and 2228 (*discussed under § 414.66[3]*) [*Bus. & Prof. Code § 2293(e)*]. Findings and conclusions reported by the examiners may be received in the administrative hearing on the accusation. The passing of the examination will constitute prima facie evidence of present competence in the area of coverage of the examination [*Bus. & Prof. Code § 2293(f)*].

If the Board proceeds pursuant to *Bus. & Prof. Code §§ 2292* and *2293*, and the physician passes the professional competency examination, the Board is precluded from filing an accusation of incompetency based solely on the circumstances giving rise to the reasonable cause for the examination [*Bus. & Prof. Code § 2294(a)*]. If the Board determines there is insufficient cause to file an accusation based on the examination results, then all agency records of the proceedings, including the petition and order for the examination, investigative reports, if any, reports of staff or outside medical consultants, and reports of examiners, must be kept confidential and are not subject to discovery or subpoena [*Bus. & Prof. Code § 2294(b)*]. If no further proceedings are conducted to determine the physician's fitness to practice during a period of five years from the date of the petition under *Bus. & Prof. Code § 2292*, the agency must purge and destroy all records pertaining to the proceedings [*Bus. & Prof. Code § 2294(c)*].

[5] Proceedings for Interim Order

[a] In General

The administrative law judge as designated in *Gov. Code § 11371(a)* [§ 414.69[6][b]] may issue an interim order suspending a license, or imposing drug testing, continuing education, supervision of procedures, or other license restrictions. Interim orders may be issued only if the affidavits in support of the petition show that the licensee has engaged in, or is about to engage in, acts or omissions constituting a violation of the Medical Practice Act or the appropriate practice act governing each allied health profession, or is unable to practice safely due to a mental or physical condition, and that permitting the licensee to continue to engage in the profession for which the license was issued will endanger the public health, safety, or welfare [*Gov. Code § 11529(a)*].

Interim disciplinary orders will be issued only after a hearing, unless it appears from the facts shown by affidavit that serious injury would result to the public before the matter can be heard on notice [*Gov. Code § 11529(b)*].

The interim order provided for by *Gov. Code § 11529* does not limit the authority to seek injunctive relief provided for in the Business and Professions Code [*Gov. Code § 11529(i)*; *see Bus. & Prof. Code §§ 2311* (injunction to restrain violation of Medical Practice Act), 2312 (injunction to prevent endangerment of public health, safety, or welfare)].

[b] Notice Requirements

Except as provided in *Gov. Code § 11529(c)* (discussed *below*), the licensee must receive at least 15 days' prior notice of the hearing, which notice must include affidavits and all other information in support of the order [*Gov. Code § 11529(b)*].

If an interim order is issued without notice, the administrative law judge, who issued the order must cause the licensee to be notified of the order, including affidavits and all other information in support of the order by 24-hour delivery service. That notice must include the date of the hearing on the order, which must not be later than 20 days from the date of issuance. The order will be dissolved unless the requirements of *Gov. Code § 11529(a)* are satisfied [*Gov. Code § 11529(c)*].

[c] Hearing on Petition for Interim Order

At the hearing conducted pursuant to *Gov. Code § 11529*, the licentiate, at a minimum, must have the following rights [*Gov. Code § 11529(d)*]:

- To be represented by counsel;

- To have a record made of the proceedings, copies of which may be obtained by the licentiate on payment of any reasonable charges associated with the record;

- To present written evidence in the form of relevant declarations, affidavits, and documents; the administrative law judge's discretion to permit testimony is identical to a superior court judge's discretion at an injunction hearing under *Code Civ. Proc. § 527*; and

- To present oral argument.

Consistent with the burden and standards of proof applicable to a preliminary injunction entered under *Code Civ. Proc. § 527*, the court must grant the interim order when, in the exercise of its discretion, it concludes the following [*Gov. Code § 11529(e)*]:

- There is a reasonable probability that the petitioner will prevail in the underlying action; and

- The likelihood of injury to the public in not issuing the order outweighs the likelihood of injury to the licensee in issuing the order.

The Legislature intended to substitute the standard governing the issuance of a preliminary injunction under *Code Civ. Proc. § 527* for the "clear and convincing evidence" standard as the standard for granting an interim order [Stats. 1993, ch. 1267, § 58 (expressly overturning *Silva v. Superior Court (1993) 14 Cal. App. 4th 562, 17 Cal. Rptr. 2d 577*)]. However, the Legislature also intended that the standard of proof applicable to an accusation filed in connection with a petition for an interim order continue to be clear and convincing evidence [Stats. 1993, ch. 1267, § 58].

[d] Accusation

If an interim order is issued, an accusation must be filed and served pursuant to *Gov. Code §§ 11503* and *11505* within 15 days of the date on which the parties to the hearing on the interim order have submitted the matter; otherwise, the interim order will be dissolved [*Gov. Code § 11529(f)*]. For discussion of the requirements of *Gov. Code §§ 11503* and *11505*, see Ch. 473A, *Commencing Agency Adjudication* .

On service of the accusation, the licensee will have all of the rights and privileges available under *Gov. Code § 11500 et seq.* If the licensee requests a hearing on the accusation, the Board must provide the licensee with a hearing within 30 days of the request, unless the licensee stipulates to a later hearing, and a decision within 15 days of the date the decision is received from the administrative law judge, or the Board will nullify the interim order previously issued, unless good cause can be shown by the Division for a delay [*Gov. Code § 11529(f)*].

Any accusation filed against a licensee pursuant to *Gov. Code § 11503* must be filed within three years after the Board, or a division of the board, discovers the act or omission alleged as the ground for disciplinary action, or within seven years after the act or omission alleged as the ground for disciplinary action occurs, whichever occurs first [*Bus. & Prof. Code § 2230.5(a)*]. However, an accusation filed against a licensee pursuant to *Gov. Code § 11503* alleging the procurement of a license by fraud or misrepresentation is not subject to this limitation period [*Bus. & Prof. Code § 2230.5(b)*].

An accusation alleging unprofessional conduct based on incompetence, gross negligence or repeated negligent acts is not subject to this limitation period on proof the licensee intentionally concealed the incompetence, gross negligence, or repeated negligent acts [*Bus. & Prof. Code § 2230.5(c)*]. If the alleged act or omission involves a minor, the seven-year limitations period and the 10-year limitations period are tolled until the minor reaches the age of majority [*Bus. & Prof. Code § 2230.5(d)*]. The limitations period is also tolled during any period if material evidence necessary for prosecuting or determining whether a disciplinary action would be appropriate is unavailable to the Board due to an ongoing criminal investigation [*Bus. & Prof. Code § 2230.5(f)*]. An accusation alleging sexual misconduct must be filed within three years after the Board or a division of the board discovers the act or omission, or within 10 years after the act or omission occurs, whichever occurs first. This applies to a complaint alleging sexual misconduct received by the Board

on and after January 1, 2002 [*Bus. & Prof. Code § 2230.5(e)*].

[e] Written Decision

When an interim order is issued, a written decision will be prepared within 15 days of the hearing by the administrative law judge, including findings of fact and a conclusion articulating the connection between the evidence produced at the hearing and the decision reached [*Gov. Code § 11529(g)*].

[f] Relief From Interim Order

Notwithstanding the fact that interim orders issued pursuant to *Gov. Code § 11529* are not issued after a hearing as otherwise required by *Gov. Code § 11500 et seq.*, interim orders so issued will be subject to judicial review pursuant to *Code Civ. Proc. § 1094.5*. The relief that may be ordered is limited to a stay of the interim order [*Gov. Code § 11529(h)*]. For discussion of proceedings under *Code Civ. Proc. § 1094.5*, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

Interim orders issued pursuant to *Gov. Code § 11529* are final interim orders and, if not dissolved pursuant to *Gov. Code § 11529(c)* or *(f)* [§ 414.69[5][b] and [d]], may only be challenged administratively at the hearing on the accusation [*Gov. Code § 11529(h)*; *see Bus. & Prof. Code § 2335(b)*].

[6] Proceedings to Impose Final Discipline

[a] In General

All adjudicative hearings and proceedings relating to the discipline or reinstatement of licensees of the Medical Board of California, including licensees of allied health agencies within the jurisdiction of the Board, that are heard pursuant to the Administrative Procedure Act must be conducted by an administrative law judge as designated in *Gov. Code § 11371*, sitting alone if the case is so assigned by the agency filing the charging pleading. [*Gov. Code § 11372(a)*]. Proceedings relating to interim orders are heard in accordance with *Gov. Code § 11529* [*Gov. Code § 11372(b)*; *see also § 414.69[5]*].

All adjudicative hearings and proceedings conducted by an administrative law judge must be conducted under the terms and conditions set forth in the Administrative Procedure Act, except as provided in the Medical Practice Act [*Gov. Code § 11373*].

[b] Delegation of Authority by Board

The Board may delegate the authority under the Medical Practice Act to conduct investigations and inspections and to institute proceedings to the executive director of the Board or other personnel as set forth in *Bus. & Prof. Code § 2020* (enabling Board to appoint executive director, investigators, legal counsel, medical consultants, and other assistance as deemed necessary to carry provisions of Medical Practice Act into effect, and designating Attorney General as legal counsel for Board for any judicial and administrative proceedings). Section 2020 becomes inoperative on July 1, 2010, and is repealed as of January 1, 2011, unless a later enacted statute, which becomes effective on or before January 1, 2011, deletes or extends the dates on which it becomes inoperative and is repealed. The Board, however, may not delegate its authority to take final disciplinary action against a licensee as provided in *Bus. & Prof. Code § 2227* (providing for types of discipline of licensees) and other provisions of *Bus. & Prof. Code § 2220 et seq.*, and may not delegate any authority of the Senior Assistant Attorney General of the Health Quality Enforcement Section, and may not delegate any powers vested in the administrative law judges Office of Administrative Hearings, as designated in *Gov. Code § 11371* [*Bus. & Prof. Code § 2224*]. Disciplinary hearings may be conducted by a panel of the Board or an administrative law judge as designated in *Gov. Code § 11371* [*see § 414.69[6]*].

[c] Assistance of Experts

The Board or the Health Quality Enforcement Section of the Office of the Attorney General may establish panels or lists of experts as necessary to assist them in their respective duties. When the Board or the Health Quality Enforcement Section seeks expert assistance or witnesses, and the use of voluntary services is impractical, they may retain experts to assist them, and to prepare and present testimony as appropriate, at prevailing market rates. The Board is responsible for establishing policies and procedures for the selection and use of those experts [*Bus. & Prof. Code § 2332(a)*].

[d] Division of Medical Quality Panels

[i] In General

As of January 1, 1994, any reference to a medical quality review committee was deemed a reference to a panel of the Division of Medical Quality [*Bus. & Prof. Code § 2332(c)*]. As of January 1, 2008, any reference to the Division of Medical Quality is deemed a reference to the California Medical Board [*Bus. & Prof. Code § 2002*]. For purposes of exercising disciplinary authority, the term "agency itself," as used in the Administrative Procedure Act, means any panel appointed by the Board pursuant to *Bus. & Prof. Code § 2008* [*Bus. & Prof. Code § 2230(b)*]. The decision or order of a panel imposing any disciplinary action pursuant to the Medical Practice Act and the Administrative Procedure Act is final [*Bus. & Prof. Code § 2230(b)*].

[ii] Medical Quality Hearing Panel

There is within the Office of Administrative Hearings a Medical Quality Hearing Panel, consisting of no fewer than five full-time administrative law judges [*Gov. Code § 11371(a)*]. When the medically related case workload exceeds the capacity of the members of the panel, additional judges are requested to be added to the panels as appropriate. When this workload overflow occurs on a temporary basis, the Director of the Office of Administrative Hearings supplies judges from the Office of Administrative Hearings to adjudicate the cases [*Gov. Code § 11371(b)*].

[iii] Assistance by Experts

The administrative law judges of the panel have panels of experts available. The panels of experts are appointed by the Director of the Office of Administrative Hearings, with the advice of the Medical Board of California. These panels of experts may be called as witnesses by the administrative law judges of the panel to testify on the record about any matter relevant to a proceeding and are subject to cross examination by all parties. The administrative law judge may award reasonable expert witness fees to any person or persons serving on a panel of experts, to be funded from the Contingent Fund of the Medical Board of California [*Gov. Code § 11371(c)*].

[iv] Transmittal of Proposed Decisions or Interim Orders

All proposed decisions and interim orders of the Medical Quality Hearing Panel designated in *Gov. Code § 11371* must be transmitted to the executive director of the board, or the executive director of the Board of Podiatric Medicine as to the licensees of that board, within 48 hours of filing [*Bus. & Prof. Code § 2335(a)*]. All interim orders are final when filed [*Bus. & Prof. Code § 2335(b)*]. A proposed decision must be acted on by the Medical Board or any panel appointed pursuant to *Bus. & Prof. Code § 2008*, or the Board of Podiatric Medicine, as the case may be, in accordance with *Gov. Code § 11517*, except that all of the following apply to proceedings against licensees [*Bus. & Prof. Code § 2335(c)*]:

- When considering a proposed decision, the Board or panel and the California Board of Podiatric Medicine will give great weight to the findings of fact of the administrative law judge, except to the extent those findings of fact are controverted by new evidence.

- The Board's staff or the staff of the California Board of Podiatric Medicine will poll the members of the Board or panel or of the California Board of Podiatric Medicine by written mail ballot concerning the proposed decision. The mail ballot must be sent within 10 calendar days of receipt of the proposed decision, and poll each member on whether the member votes to approve the decision, to approve the decision with an altered penalty, to refer the case back to the administrative law judge for the taking of additional evidence, to defer final decision pending discussion of the case by the panel or Board as a whole, or not to adopt the decision. No party to the proceeding, including employees of the agency that filed the accusation, and no person who has a direct or indirect interest in the outcome of the proceeding or who presided at a previous stage of the decision, may communicate directly or indirectly, upon the merits of a contested matter while the proceeding is pending, with any member of the panel or board, without notice and opportunity for all parties to participate in the communication. The votes of a majority of the Board or of the panel, and a majority of the California Board of Podiatric Medicine, are required to approve the decision with an altered penalty, to refer the case back to the administrative law judge for the taking of further evidence, or to nonadopt the decision. The votes of two members of the panel or Board are required to defer final decision pending discussion of the case by the panel or board as a whole. If there is a vote by the specified number to defer final decision pending discussion of the case by the panel or Board as a whole, provision must be made for that discussion before the 90-day period specified in *Bus. & Prof. Code § 2335(c)(3)* expires, but in no event will that 90-day period be extended.

- If a majority of the Board or of the panel, or a majority of the California Board of Podiatric Medicine vote to do so, the Board or the panel or the California Board of Podiatric Medicine must issue an order of nonadoption of a proposed decision within 90 calendar days of the date it is received by the Board. If the Board or the panel or the California Board of Podiatric Medicine does not refer the case back to the administrative law judge for the taking of additional evidence or issue an order of nonadoption within 90 days, the decision will be final and subject to review under *Bus. & Prof. Code § 2337*. Members of the Board or of any panel or of the California Board of Podiatric Medicine who review a proposed decision or other matter and vote by mail as provided in *Bus. & Prof. Code § 2335(c)(2)* must return their votes by mail to the board within 30 days from receipt of the proposed decision or other matter.

- The Board or the panel or the California Board of Podiatric Medicine must afford the parties the opportunity to present oral argument before deciding a case after nonadoption of the administrative law judge's decision.

- A vote of a majority of the Board or of a panel, or a majority of the California Board of Podiatric Medicine, are required to increase the penalty from that contained in the proposed administrative law judge's decision. No member of the Board or panel or of the California Board of Podiatric Medicine may vote to increase the penalty except after reading the entire record and personally hearing any additional oral argument and evidence presented to the panel or board.

For discussion of actions authorized under *Gov. Code § 11517*, see Ch. 473, *Public Agency Adjudication* , et seq.

[v] Complainant's Statement

Complainants against licensees of the board, including licensees of allied health boards within the jurisdiction of the board, and of the Board of Podiatric Medicine, who are subject to formal disciplinary proceedings must be notified of the actions proposed to be taken against the licensee. This notification is provided only to complainants who are known to the boards [*Bus. & Prof. Code § 2330*].

Complainants must be given an opportunity to provide a statement to the deputy attorney general from the Health Quality Enforcement Section who is assigned the case. These statements may not be considered by a panel of the

division, the Board of Podiatric Medicine, or other board for purposes of adjudicating the case to which the statement pertains, but may be considered by the division or those boards after the case is finally adjudicated for purposes of setting generally applicable policies and standards [*Bus. & Prof. Code § 2330*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsHealthcare LawActions Against FacilitiesGeneral OverviewHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawActions Against Healthcare WorkersSurgeonsHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewInsurance LawMalpractice InsuranceSettlementsTortsNegligenceActionsGeneral OverviewTortsProcedureStatutes of LimitationsGeneral OverviewTortsProcedureStatutes of LimitationsAccrual of ActionsContinuous TortsTortsProcedureStatutes of LimitationsTollingDisabilities

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§ 414.70 Procedural Rights of Accused

[1] Criminal Precedents Not Governing

Disciplinary proceedings are civil in nature, without overhanging criminal penalties [*White v. Board of Medical Quality Assurance (1982) 128 Cal. App. 3d 699, 707, 180 Cal. Rptr. 516]* . Thus, such proceedings are not subject to criminal precedents [*Lax v. Board of Medical Quality Assurance (1981) 116 Cal. App. 3d 669, 676, 172 Cal. Rptr. 258]* .

The double jeopardy provisions of the *U.S. Const., amend. V*, do not prohibit the board from charging previous criminal violations in a disciplinary accusation based on a statute that a criminal conviction constitutes unprofessional conduct [*Petrucci v. Board of Medical Examiners (1975) 45 Cal. App. 3d 83, 88, 117 Cal. Rptr. 735]* . Nor does the acquittal of a licensee on criminal charges bar a subsequent disciplinary proceeding against the licensee based on the same or similar acts as those on which the criminal charges were based [*Stuck v. Board of Medical Examiners (1949) 94 Cal. App. 2d 751, 757-758, 211 P.2d 389]* .

The rule regarding compulsory joinder in criminal cases, which states that, when the prosecution was or should have been aware of more than one offense involving the same course of action, all such offenses must be prosecuted in a single proceeding unless good cause is shown for doing otherwise, and does not apply in disciplinary proceedings [*Petrucci v. Board of Medical Examiners (1975) 45 Cal. App. 3d 83, 87-88, 117 Cal. Rptr. 735* (alternate ground that offenses in question were separate and therefore not subject to compulsory joinder rule in any case)].

The prohibition against ex post facto laws is not applicable to medical disciplinary proceedings [*Furnish v. Board of Medical Examiners (1957) 149 Cal. App. 2d 326, 331, 308 P.2d 924, 309 P.2d 493 , cert. denied, 355 U.S. 827, 78 S. Ct. 37, 2 L. Ed. 2d 40]* .

[2] Essential Fairness and Due Process Requirements

[a] In General

Despite the fact that criminal precedents are not applicable at an administrative hearing, a disciplinary hearing by the board is required to conform to essential fairness and due process standards [*White v. Board of Medical Quality Assurance (1982) 128 Cal. App. 3d 699, 705, 180 Cal. Rptr. 516]* . The courts have recognized that whatever its purpose, a disciplinary proceeding has a punitive character, since the agency can prohibit the accused from practicing his or her profession [*Shively v. Stewart (1966) 65 Cal. 2d 475, 480, 55 Cal. Rptr. 217, 421 P.2d 65* (case's specific holding that accused is entitled to same right as criminal defendant to prehearing discovery invalidated by subsequent enactment of *Gov. Code §§ 11507.5-11507.7*, governing discovery in administrative proceedings); *see also Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 73 n.6, 64 Cal. Rptr. 785, 435 P.2d 553* (unavoidable punitive effect of disciplinary procedure)].

At the hearing the licensee has the right to present legal and factual issues in a deliberate and orderly manner, to call witnesses and present exhibits, and to rebut evidence presented [*White v. Board of Medical Quality Assurance (1982) 128 Cal. App. 3d 699, 705, 180 Cal. Rptr. 516* ; *see King v. Board of Medical Examiners (1944) 65 Cal. App. 2d 644, 651-652, 151 P.2d 282* (denial of licensee's right to present defense at proceedings before Board; order by Board revoking license made on little or no evidence as abuse of discretion)]. The Board has the burden of proof in disciplinary matters [*Sunseri v. Board of Medical Examiners (1964) 224 Cal. App. 2d 309, 317, 36 Cal. Rptr. 553 , disapproved on other grounds in Kirby v. Alcoholic Bev. etc. Appeals Bd. (1970) 8 Cal. App. 3d 1009, 1020, 87 Cal. Rptr. 908]* .

[b] Personal Jurisdiction and Notice Requirements

A citation to appear at the time and place of the hearing, reasonable notice of the hearing, and opportunity to be heard, is sufficient to confer jurisdiction over the licensee's person on the disciplinary authority. The licensee's actual presence at the hearing is not necessary [*Rinaldo v. Board of Medical Exmrs. (1935) 5 Cal. App. 2d 345, 351, 42 P.2d 724* (case decided before enactment of *Gov. Code § 11500 et seq.*, relating to administrative trials)]. Under the Administrative Procedure Act, these requirements are met and the Medical Board thus acquires personal jurisdiction over the licensee by serving the licensee with the accusation pursuant to *Gov. Code § 11505* and with the notice of defense form pursuant to *Gov. Code § 11506*. The licensee can then file the latter with the board to, among other things, request a hearing [*Vo v. Board of Medical Quality Assurance (1991) 235 Cal. App. 3d 820, 825-826, 1 Cal. Rptr. 2d 127* ; *Stuck v. Board of Medical Examiners (1949) 94 Cal. App. 2d 751, 755, 211 P.2d 389* ; *see Gov. Code §§ 11505, 11506*].

Gov. Code § 11503 provides that a hearing to determine whether a right, authority, license, or privilege should be revoked, suspended, limited, or conditioned must be initiated by filing an accusation. The accusation must be a written statement of charges that sets forth in concise ordinary language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his or her defense. It must specify the statutes and rules that the respondent is alleged to have violated, but may not consist merely of charges phrased in the language of such statutes and rules. *Gov. Code § 11505* governs service of the accusation and *Gov. Code § 11509* governs the notice required for an administrative hearing. *Gov. Code §§ 11503, 11505* and *11509* are explicitly made applicable to disciplinary proceedings against physicians through *Bus. & Prof. Code § 2230* [*see Bus. & Prof. Code § 2230, discussed under § 414.69[1]*)].

For a discussion of notice requirements at administrative hearings generally, see Ch. 473A, *Commencing Agency Adjudication* .

Under the liberal rules of administrative pleading, notice to the licensee need only inform him or her of the substance of the charge and afford the basic, appropriate elements of due process. An accusation informing the licensee of the statute that the licensee is charged with violating, and the conduct for which the licensee is charged with violating it, sufficiently informs the licensee of the substance of the charge [*Shea v. Board of Medical Examiners (1978) 81 Cal. App. 3d 564, 576, 146 Cal. Rptr. 653]* . When the statute under which the licensee is accused is necessarily general in scope, such as a statute mandating discipline for conviction of a crime involving moral turpitude, the licensee is entitled

to have the accusation supplemented with a specific charge [*see Bernstein v. Board of Medical Examiners (1962) 204 Cal. App. 2d 378, 382, 22 Cal. Rptr. 419* (case decided under former *Bus. & Prof. Code § 2383*; *now see Bus. & Prof. Code 2236*)].

Prior to the enactment of *Gov. Code §§ 11503, 11505*, and *11509* (discussed *above*), the courts had established the rule that an accusation that follows the language of the statute under which the licensee is accused is sufficient to give the disciplinary authority jurisdiction, provided that the language of the statute is specific enough to advise the accused of the particular kind of unprofessional conduct of which he or she is accused [*Smulson v. Board of Dental Examiners (1941) 47 Cal. App. 2d 584, 589, 118 P.2d 483* ; *Anderson v. Board of Medical Examiners (1931) 117 Cal. App. 113, 114-115, 3 P.2d 344* (violation of statute proscribing licensee's aiding and abetting unlicensed person in practicing medicine)]. Under this rule, an accusation based on conduct that constitutes a criminal offense need not allege all facts necessary to a criminal complaint if it follows the wording of a sufficiently specific statute [*Suckow v. Alderson (1920) 182 Cal. 247, 251, 187 P. 965* (criminal abortion); *Tapley v. Abbott (1931) 111 Cal. App. 397, 399, 295 P. 911* (cases decided before enactment of *Gov. Code §§ 11500-11529*)].

It is not clear whether the traditional rule with respect to the sufficiency of an accusation phrased in terms of a statute proscribing specific conduct is still valid in view of the provision contained in *Gov. Code § 11503* that the accusation may not consist merely of charges phrased in the language of the statute under which it is brought. However, *Gov. Code § 11503* also states that the accusation is a statement of charges that must set forth in ordinary and concise language the acts or omissions with which the respondent is charged. Further, the basic notice requirement under the liberal rules of administrative pleading is satisfied if the accused is informed of the substance of the charges against him or her [*see Gov. Code § 11503*; *Shea v. Board of Medical Examiners (1978) 81 Cal. App. 3d 564, 576, 146 Cal. Rptr. 653]* . Thus, an accusation phrased in the language of a statute that is specific enough to inform a licensee of the conduct of which he or she is accused is probably still sufficient under present law.

The accused may also submit himself or herself to the jurisdiction of the Division or committee if that forum has jurisdiction of the subject matter. Subject matter jurisdiction over unprofessional conduct by physicians and surgeons is vested in the Division by the Medical Practice Act [*see Stuck v. Board of Medical Examiners (1949) 94 Cal. App. 2d 751, 755-756, 211 P.2d 389]* . Subject matter jurisdiction over unprofessional conduct by physicians and surgeons is similarly vested in the medical quality review committees by *Bus. & Prof. Code § 2330 et seq.* (discussed in *§ 414.69[6][d][i]*).

Since the Division is a tribunal of special jurisdiction, the accusation should set forth the Division's jurisdiction [*see Stuck v. Board of Medical Examiners (1949) 94 Cal. App. 2d 751, 755, 211 P.2d 389]* .

[c] Right to Counsel

The licensee has a due process right to be represented by counsel at disciplinary proceedings, but this does not give the licensee the right to have a decision imposing discipline overturned because of retained counsel's alleged incompetence, as in a criminal proceeding [White v. Board of Medical *Quality Assurance (1982) 128 Cal. App. 3d 699, 707, 180 Cal. Rptr. 516]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingGeneral OverviewAdministrative LawAgency AdjudicationHearingsRight to HearingDue ProcessConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessDouble JeopardyConstitutional LawBill of RightsFundamental RightsCriminal ProcessAssistance of CounselHealthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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§ 414.71 Evidence at Hearing

[1] In General

Rules relating to evidence at administrative hearings are set out in *Gov. Code § 11513*. For a discussion of these rules, see Ch. 473F, *Agency Adjudication Hearings* .

[2] Criminal Limitations of Evidence Not Applicable

The rules of pleading and the rules limiting the effect of evidence in criminal cases do not apply to medical disciplinary proceedings [*Suckow v. Alderson (1920) 182 Cal. 247, 251, 187 P. 965]* . Thus, the hearing authority may rely on admissions of a party, even in absence of independent evidence, to support a finding with respect to charges of unprofessional conduct [*Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 110, 62 Cal. Rptr. 274 , appeal dismissed, 390 U.S. 410 (1968)]* .

The prohibition on conviction based on uncorroborated testimony of accomplices is also not applicable to medical disciplinary proceedings [*Suckow v. Alderson (1920) 182 Cal. 247, 251, 187 P. 965* ; *Marlo v. Board of Medical Examiners (1952) 112 Cal. App. 2d 276, 282, 246 P.2d 69]* .

The Division has no due process duty to produce key prosecution witnesses at the prior criminal trial for the licensee to cross examine in a proceeding to discipline the licensee for a criminal conviction that constitutes unprofessional conduct [*Lax v. Board of Medical Quality Assurance (1981) 116 Cal. App. 3d 669, 676, 172 Cal. Rptr. 258]* .

Polygraph evidence offered to prove the truthfulness of controverted testimony by the licensee is properly excluded from administrative disciplinary hearings [*Aengst v. Board of Medical Quality Assurance (1980) 110 Cal. App. 3d 275, 282-283, 167 Cal. Rptr. 796]* .

[3] Seizure of Patients' Medical Records as Evidence

[a] In General

There is no privilege under *Evid. Code § 990 et seq.* (physician-patient privilege) in a proceeding brought by a public entity to determine whether a right, authority, license, or privilege should be revoked, suspended, terminated, limited, or conditioned [*Evid. Code § 1007*; *see Evid. Code § 994* (establishing privilege)].

Notwithstanding *Bus. & Prof. Code § 2263* (willful violation of professional confidence as unprofessional conduct) and any other provision of law making a communication between a physician and surgeon or podiatrist and his or her patients a privileged communication, these provisions will not apply to investigations or proceedings conducted under the Medical Practice Act. Members of the Medical Board of California, the Senior Assistant Attorney General of the Health Quality Enforcement Section, members of the California Board of Podiatric Medicine, and deputies, employees, agents, and representatives of the board or the Board of Podiatric Medicine and the Senior Assistant Attorney General of the Health Quality Enforcement Section must keep in confidence during the course of investigations the names of any patients whose records are reviewed and may not disclose or reveal, except as is necessary during the course of the investigation, those names unless and until proceedings are instituted. The board's, the Board of Podiatric Medicine's and the Senior Assistant Attorney General of the Health Quality Enforcement Section's authority to examine records of patients in the office of a physician and surgeon or podiatrist is limited to records of patients who have complained to the board or the Board of Podiatric Medicine about the licensee [*Bus. & Prof. Code § 2225(a)*].

One court of appeal, however, has held that the physician-patient privilege established by *Evid. Code § 990 et seq.* creates a zone of privacy that is protected by *Cal. Const., art. I, § 1*, and has set out certain procedural requirements that the board must meet before it can subpoena patient medical records from a hospital pursuant to a medical disciplinary investigation [*see Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 680-681, 156 Cal. Rptr. 55]* . Another court of appeal held that when the constitutionally protected privacy interests of absent patients coincide with the interests of the doctor, the doctor must be permitted to speak for them. Thus, when the interests of the physician are also implicated, he or she has standing to assert the patients' privacy interests [*Wood v. Superior Court (1985) 166 Cal. App. 3d 1138, 1145, 212 Cal. Rptr. 811* (investigation of alleged improper prescription practices)]. To safeguard patients' rights, certain constraints on the Board's actions must be made. [*Wood v. Superior Court (1985) 166 Cal. App. 3d 1138, 1149-1150, 212 Cal. Rptr. 811]* :

- The patient must be notified of any proposed examination of the patient's medical records.

- If the patient does not waive his or her privacy interest, the Board must demonstrate that the particular records are relevant and material to its inquiry.

- The Board must specify the factual justification for its action, so that the court can independently assess the substantiality of the likelihood of improper practices by the physician.

[b] Documents Subject to Inspection

Notwithstanding any other provision of law, the Attorney General and his or her investigative agents, and investigators and representatives of the board or the Board of Podiatric Medicine, may inquire into any alleged violation of the Medical Practice Act or any other federal or state law, regulation, or rule relevant to the practice of medicine or podiatric medicine, whichever is applicable, and may inspect documents relevant to those investigations in accordance with the following procedures [*Bus. & Prof. Code § 2225(b)*]:

- Any document relevant to an investigation may be inspected, and copies may be obtained, when patient consent is given;

- Any document relevant to the business operations of a licensee, and not involving medical records attributable to identifiable patients, may be inspected and copied when relevant to an investigation of a

licensee.

In all cases in which documents are inspected or copies of those documents are received, their acquisition or review must be arranged so as not to unnecessarily disrupt the medical and business operations of the licensee or of the facility where the records are kept or used [*Bus. & Prof. Code § 2225(c)*]. Searches conducted of the office or medical facility of any licensee may not interfere with the recordkeeping format or preservation needs of any licensee necessary for the lawful care of patients [*Bus. & Prof. Code § 2225(e)*].

[c] Deadline for Providing and Returning Requested Documents

If documents are requested from licensees in accordance with Section 2225 by the Attorney General or his or her agents or deputies, or investigators of the Board or the Board of Podiatric Medicine, they must be provided within 15 days of receipt of the request, unless the licensee is unable to provide the documents within this time period for good cause, including, but not limited to, physical inability to access the records in the time allowed due to illness or travel. Failure to produce requested documents or copies, after being informed of the required deadline, constitutes unprofessional conduct. The Board may use its authority to cite and to fine a physician and surgeon for any violation of Section 2225, which remedy is in addition to any other authority of the Board to sanction a licensee for a delay in producing requested records [*Bus. & Prof. Code § 2225(d)*].

The Board, the California Board of Podiatric Medicine, and the Attorney General must return any original documents to the licensee from whom they were obtained within seven calendar days [*Bus. & Prof. Code § 2225.3*].

[d] Penalties for Failure to Comply With Request

A licensee who fails or refuses to comply with a request for medical records of a patient, which is accompanied by that patient's written authorization for release of records to the Board, within 15 days of receiving the request and authorization must pay to the Board a civil penalty of $1,000 per day for each day that the documents have not been produced after the 15th day, unless the licensee is unable to provide the documents within this time period for good cause [*Bus. & Prof. Code § 2225.5(a)*]. A licensee who fails or refuses to comply with a court order issued in the enforcement of a subpoena, mandating the release of records to the Board must pay to the board a civil penalty of $1,000 per day for each day that the documents have not been produced after the date by which the court order requires the documents to be produced, unless it is determined that the order is unlawful or invalid. [*Bus. & Prof. Code § 2225.5(b)(1)*]. The licensee is guilty of a misdemeanor punishable by a fine payable to the Board not to exceed $5000. The fine will be added to the licensee's renewal fee if it is not paid by the next succeeding renewal date [*Bus. & Prof. Code § 2225.5(b)(2)*]. Any statute of limitations applicable to the filing of an accusation by the Board will be tolled during the period the licensee is out of compliance with the court order and during any related appeals [*Bus. & Prof. Code § 2225.5(b)*].

Multiple acts by a licensee in failing to comply with the court order for release of records are punishable by a fine of up to $5000, imprisonment in county jail for up to six months, or by both fine and imprisonment [*Bus. & Prof. Code § 2225.5(c)*].

A failure or refusal by the licensee to comply with a court order, issued in the enforcement of a subpoena, mandating the release of records to the Board constitutes unprofessional conduct and is grounds for suspension or revocation of his or her license [*Bus. & Prof. Code § 2225.5(d)*]. Imposition of these civil penalties must be in accordance with the Administrative Procedure Act [*Bus. & Prof. Code § 2225.5(e)*].

[4] Applicability of Exclusionary Rule

Since Proposition 8 was enacted by means of a voters' initiative in June 1982, it is not clear to what extent the

exclusionary rule is still applicable in California [*see Cal. Const., art. I, § 28(d)*]. For a discussion of the overall effect of Proposition 8 on the applicability of the exclusionary rule, see 1 Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Division III, *Search and Seizure* (Matthew Bender). Even if the exclusionary rule is still viable in California overall, it is not clear to what extent it is applicable to medical disciplinary cases. In a case involving disbarment of an attorney, the Supreme Court has held that whether or not the exclusionary rule should be applied must be worked out on a case by case basis, by applying a balancing test that gives consideration to the social consequences of applying the exclusionary rule and the effects thereof on the integrity of the judicial process [*Emslie v. State Bar (1974) 11 Cal. 3d 210, 229, 113 Cal. Rptr. 175, 520 P.2d 991]* . One court of appeal has applied the test set out in *Emslie* to a medical disciplinary proceeding and declined to apply the exclusionary rule. This court held in the same case that under the facts before it the accused licensee would not be able to assert the exclusionary rule vicariously on behalf of his patients even if the rule were applicable [*see Pating v. Board of Medical Quality Assurance (1982) 130 Cal. App. 3d 608, 621-625, 182 Cal. Rptr. 20]* .

[5] Right to Present Mitigating Evidence

All relevant evidence is admissible to an administrative hearing, including mitigating evidence to be considered for purposes of setting the penalty [*White v. Board of Medical Quality Assurance (1982) 128 Cal. App. 3d 699, 705, 180 Cal. Rptr. 516* ; *see Gov. Code § 11513(b), (c)* (admissibility of evidence at administrative proceedings)].

However, a licensee who is accused of having been convicted of a crime pursuant to *Bus. & Prof. Code §§ 2237* (drug conviction), 2239 (drug or alcohol related conviction), or any other statute that provides that a conviction constitutes a sufficient basis for disciplinary action may not present evidence attacking the conviction on which the accusation is based [*Lax v. Board of Medical Quality Assurance (1981) 116 Cal. App. 3d 669, 675, 172 Cal. Rptr. 258]* .

If the licensee is charged with being convicted of a crime substantially related to the qualifications, functions, and duties of a physician under *Bus. & Prof. Code § 2236*, the record of conviction is conclusive evidence only that the conviction occurred and the Division is expressly authorized to consider the circumstances surrounding the crime in order to determine the degree of discipline to be imposed, or to determine whether the conviction is for an offense that meets the substantial relation requirement set forth in *Bus. & Prof. Code § 2236(b)* [*Bus. & Prof. Code § 2236(b)*]. One appellate court, however, has held that the ostensible attempt of a licensee to show that his conduct had not demonstrated moral turpitude, by giving testimony as to the circumstances of his criminal offense that substantially contradicted the facts alleged in the information on which he was convicted, was merely an attempt to improperly impeach the judgment in which he had been convicted under the guise of presenting mitigating evidence [*Matanky v. Board of Medical Examiners (1978) 79 Cal. App. 3d 293, 302, 144 Cal. Rptr. 826* (decided under former *Bus. & Prof. Code § 2383*, now *Bus. & Prof. Code § 2236*)]. Furthermore, if the penalty actually imposed is mild in relation to the offense charged, the licensee may have no basis for complaining that evidence in mitigation was not considered [*White v. Board of Medical Quality Assurance (1982) 128 Cal. App. 3d 699, 706, 180 Cal. Rptr. 516* (straight probation for prescribing drugs to addicts without medical indication)].

[6] Use of Compelled Diagnostic Examination as Evidence

If the Division orders a licensee to be examined by a psychiatrist because of apparent mental illness to such an extent as to impair the licensee's ability to practice medicine safely, the report of the examining psychiatrist may be received as direct evidence in a proceeding to determine fitness to practice. The report must also be made available to the licensee [*see Bus. & Prof. Code § 820*].

If the Division orders a complete diagnostic examination by one or more physicians appointed by the Division as a condition of probation or of reinstatement of a licensee previously found to be mentally ill to such an extent as to impair his or her ability to practice medicine safely, the Division must receive and consider any other report of a complete diagnostic examination given by one or more physicians of the licensee's choice [*Bus. & Prof. Code §§ 823(c)*

(reinstatement after finding of debilitating mental illness), 2228(b) (probation)].

[7] Failure of Accused to Call Witness

Indulgence of any presumption unfavorable to the accused because the accused has failed to call any witnesses is not permissible [*Sunseri v. Board of Medical Examiners (1964) 224 Cal. App. 2d 309, 317, 36 Cal. Rptr. 553* , disapproved on other grounds in *Kirby v. Alcoholic Bev. etc. Appeals Bd. (1970) 8 Cal. App. 3d 1009, 1020, 87 Cal. Rptr. 908]* .

[8] Expert Testimony

Notwithstanding any other provision of law, no expert testimony in matters brought by the Medical Board may be permitted by any party unless the following information is exchanged in written form with counsel for the other party, as ordered by the Office of Administrative Hearings [*Bus. & Prof. Code § 2334(a)*]:

(1) A curriculum vitae setting forth the expert's qualifications.

(2) A brief narrative statement of the general substance of the testimony the expert is expected to give, including any opinion testimony and its basis.

(3) A representation that the expert has agreed to testify at the hearing.

(4) A statement of the expert's hourly and daily fee for providing testimony and for consulting with the party who retained the expert's services.

This exchange of the information must be completed at least 30 calendar days before the commencement date of the hearing [*Bus. & Prof. Code § 2334(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewEvidenceDocumentary EvidenceWritingsGeneral OverviewEvidencePrivilegesDoctor-Patient PrivilegeGeneral OverviewEvidencePrivilegesDoctor-Patient PrivilegeScopeEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral OverviewEvidenceScientific EvidencePolygraphsEvidenceTestimonyGeneral OverviewEvidenceTestimonyExpertsGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRevocation & SuspensionHealthcare LawBusiness Administration & OrganizationPatient ConfidentialityGeneral OverviewHealthcare LawBusiness Administration & OrganizationPeer ReviewGeneral Overview

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36-414 California Forms of Pleading and Practice--Annotated § 414.72

§ 414.72 Defenses

[1] Entrapment

A licensee may raise the defense of entrapment, as long as the defense does not amount to an attempt to impeach a conviction when a statute provides that the conviction constitutes a sufficient basis for administrative disciplinary action [*Patty v. Board of Medical Examiners (1973) 9 Cal. 3d 356, 364, 107 Cal. Rptr. 473, 508 P.2d 1121* ; *Lax v. Board of Medical Quality Assurance (1981) 116 Cal. App. 3d 669, 675, 172 Cal. Rptr. 258* ; *see Matanky v. Board of Medical Examiners (1978) 79 Cal. App. 3d 293, 302, 144 Cal. Rptr. 826* (licensee as not entitled to present evidence impeaching judgment in which licensee was convicted when statute provides that record of conviction is evidence only of fact that conviction occurred and does not provide that conviction is per se sufficient basis for discipline; decided under former *Bus. & Prof. Code § 2383*; *now see Bus. & Prof. Code § 2236*)]. However, the defense of entrapment does not apply when the licensee harbored a preexisting intent to commit the act of which he or she is accused, even though he or she may have committed the act because of solicitation of a decoy [*Kolnick v. Board of Medical Quality Assurance (1980) 101 Cal. App. 3d 80, 86, 161 Cal. Rptr. 289]* .

The fact that a duly authorized undercover police officer made verbal misrepresentations in soliciting a licensee to engage in unprofessional conduct does not provide a basis for overturning imposition of discipline, nor is there any requirement that the officer obtain specific authorization from his or her superior before making such verbal misrepresentations [*Kolnick v. Board of Medical Quality Assurance (1980) 101 Cal. App. 3d 80, 85, 161 Cal. Rptr. 289]* .

For a discussion of the law relating to entrapment, see Erwin, Millman, Monroe, Sevilla, and Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications* (Matthew Bender).

[2] Laches

There is no statute of limitations as such that is applicable to disciplinary proceedings [*Windham v. Board of Medical Quality Assurance (1980) 104 Cal. App. 3d 461, 474, 163 Cal. Rptr. 566]* . If the licensee raises the defense of laches, criticism of delay by the board in commencing disciplinary proceedings is to be premised on the time when the board

learned or should have learned of the facts on which the accusation is based [*Gore v. Board of Medical Quality Assurance (1980) 110 Cal. App. 3d 184, 193, 167 Cal. Rptr. 881* (date of court approval of malpractice settlement as measuring date in disciplinary action based on gross negligence under former *Bus. & Prof. Code § 2361*; *now see Bus. & Prof. Code § 2234*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureDefensesEntrapmentGovernmentsLegislationStatutes of LimitationsGeneral OverviewHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawBusiness Administration & OrganizationLicensesRevocation & SuspensionTortsProcedureStatutes of LimitationsAccrual of ActionsDiscovery Rule

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§ 414.73 Evidentiary and Procedural Irregularities as Curable on Mandamus

The failure of any of the hearing authorities within the Medical Board of California to properly consider relevant evidence, and other procedural irregularities, may be cured if the licensee received a full and fair hearing before the superior court, in which the court reached an independent judgment based on the relevant evidence [*see Cooper v. State Bd. of Medical Examiners (1950) 35 Cal. 2d 242, 246-247, 217 P.2d 630* ; *Bernstein v. Board of Medical Examiners (1962) 204 Cal. App. 2d 378, 385, 22 Cal. Rptr. 419* (alternate grounds for finding licensee's contentions of procedural irregularities meritless are discussed in both cases); *see also § 414.133*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawBusiness Administration & OrganizationLicensesRevocation & Suspension

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§ 414.74 Reinstatement of Certificate or Modification of Penalty

[1] In General

A physician found guilty of unprofessional conduct whose license has been revoked or suspended, or who has been placed on probation, may petition the Division of Medical Quality for reinstatement or modification of penalty, including modification or termination of probation, after a period of not less than the following minimum periods have elapsed from the effective date of the decision ordering the disciplinary action [*Bus. & Prof. Code § 2307*]:

(1) At least three years for reinstatement of a license revoked for unprofessional conduct, except that the division may, for good cause shown, specify in a revocation order that a petition for reinstatement may be filed after two years;

(2) At least two years for early termination of probation of three years or more; or

(3) At least one year for modification of a condition, or reinstatement of a license revoked for mental or physical illness, or termination of probation of less than three years.

A petition for modification or termination of probation or a petition for reinstatement of a revoked certificate must be filed on a form provided by the Division [*16 Cal. Code Reg. § 1359(a)*]. Consideration will be given to the petition only when a formal request for the petition has been filed in the Division's office in Sacramento at least 30 days before a regular meeting of the division or appropriate medical quality review panel [*16 Cal. Code Reg. § 1359(b)*].

The petition may be heard by a panel of the division. The division may assign the petition to an administrative law judge designated in *Gov. Code § 11371*. After a hearing on the petition, the administrative law judge provides a proposed decision to the division of the California Board of Podiatric Medicine, as applicable. The proposed decision must be acted on in accordance with *Bus. & Prof. Code § 2335* [*Bus. & Prof. Code § 2307*; *see § 414.69[6][d][iv]*].

For discussion of reinstatement of a licentiate against whom disciplinary action has been taken pursuant to *Bus. & Prof. Code § 822*, based on the licentiate's physical or mental illness, see *§ 414.68[7]*.

[2] Petition and Hearing

The petition must be accompanied by at least two verified recommendations from physicians and surgeons licensed by the board who have personal knowledge of the activities of the petitioner since the disciplinary penalty was imposed, and must state such facts as may be required by the Division [*Bus. & Prof. Code § 2307*]. The authority hearing the petition may consider all activities of the petitioner since the disciplinary action was taken, the offense for which the petitioner was disciplined, the petitioner's activities during the time the certificate was in good standing, and the petitioner's rehabilitative efforts and general reputation for truth and professional ability [*Bus. & Prof. Code § 2307*; *see also 16 Cal. Code Reg. § 1360.2* (rehabilitation criteria)]. The hearing may be continued from time to time as the administrative law judge designated in *Gov. Code § 11371* finds necessary [*Bus. & Prof. Code § 2307*].

[3] Granting Reinstatement or Modification

The hearing authority reinstating a certificate or modifying a penalty may recommend the imposition of any terms and conditions as it deems necessary [*Bus. & Prof. Code § 2307*].

[4] Restrictions on Authority to Grant Reinstatement or Modification

No petition may be considered while the petitioner is under sentence for any criminal offense, including any period during which the petitioner is on court-imposed probation or parole [*Bus. & Prof. Code § 2307*]. Furthermore, no petition may be considered while there is an accusation or petition to revoke probation pending against the person [*Bus. & Prof. Code § 2307*].

[5] New Petition Within Two Years of Denial of Reinstatement or Modification

Any petition for reinstatement filed within a period of two years from the effective date of the prior decision, following a hearing of such a petition, may be denied by the Division without hearing or argument [*Bus. & Prof. Code § 2307*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 414.75 Judicial Review

[1] Mandate as Proper Procedure

Gov. Code § 11523, which is made applicable to disciplinary proceedings against physicians and surgeons by *Bus. & Prof. Code § 2230*, provides that judicial review of a decision of an administrative agency may be had by filing a petition for writ of mandate in accordance with the provisions of the Code of Civil Procedure [*Gov. Code § 11523*; *see Bus. & Prof. Code § 2230(a)* (*Gov. Code § 11500 et seq.* as governing physicians' disciplinary procedures)]. *Code Civ. Proc. § 1094.5* explicitly provides for judicial review of a final administrative order or decision made as the result of a proceeding in which a hearing is required to be given. In enacting *Code Civ. Proc. § 1094.5*, the Legislature in effect ratified the remedy of administrative mandamus, which the courts had previously created to meet the need for judicial review of state agencies [*Grant v. Board of Medical Examiners (1965) 232 Cal. App. 2d 820, 826, 43 Cal. Rptr. 270]* . In framing this judicial remedy, the Supreme Court has declared and adhered to the proposition that a mandate proceeding is the proper method of inquiring into the propriety of the official acts of a board such as the Medical Board of California [*see Dare v. Board of Medical Examiners (1943) 21 Cal. 2d 790, 795, 136 P.2d 304]* .

For a complete discussion of review of administrative decisions or orders by mandate, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

[2] Calendar Preference on Review

Notwithstanding any other provision of law, superior court review of a decision revoking, suspending, or restricting a license takes preference over all other civil actions in the matter of setting the case for hearing or trial. The hearing or trial must be set no later than 180 days from the filing of the action. Further continuance are granted only on a showing of good cause [*Bus. & Prof. Code § 2337*].

[3] Independent Review by Reviewing Court

The trial court's duty in reviewing the disciplinary decision of the appropriate hearing authority is to undertake an independent review of the evidence on which the finding of unprofessional conduct is based [*Yakov v. Board of*

Medical Examiners (1968) 68 Cal. 2d 67, 69, 64 Cal. Rptr. 785, 435 P.2d 553] .

[4] Limited Right to Introduce New Evidence

Although the trial court reviewing a decision of the board may exercise its independent judgment on the evidence and is not bound by the record before the board, the scope of review on mandate is not equivalent to an unqualified trial de novo wherein the litigant may present a skeleton showing in the lower forum and reserve the real showing on the merits in the superior court [*Dare v. Board of Medical Examiners (1943) 21 Cal. 2d 790, 795, 136 P.2d 304* (decided before enactment of *Code Civ. Proc. § 1094.5*, governing administrative mandate); *Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 111, 62 Cal. Rptr. 274 , appeal dismissed, 390 U.S. 410, 88 S. Ct. 1112, 19 L. Ed. 2d. 1272 (1968)]* . Thus the petitioner may introduce additional evidence for the court's consideration in a mandate proceeding only if it appears that the petitioner could not in the exercise of reasonable diligence have obtained or introduced such evidence to the authority that made the decision, or if the evidence was improperly excluded at the hearing [*Code Civ. Proc. § 1094.5(e)*; *Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 110-111, 62 Cal. Rptr. 274 , appeal dismissed, 390 U.S. 410, 88 S. Ct. 1112, 19 L. Ed. 2d. 1272 (1968)]* .

[5] Restricted Standard of Review of Decision Imposing Penalty

The trial court's independent review is limited to a review of the findings that would justify discipline in the first instance. Propriety of the penalty imposed by the Division once discipline is found to be warranted is vested in the discretion of the Division, to be overturned only in case of manifest abuse [*Magit v. Board of Medical Examiners (1961) 57 Cal. 2d 74, 87, 17 Cal. Rptr. 488, 366 P.2d 816* ; *Williamson v. Board of Medical Quality Assurance (1990) 217 Cal. App. 3d 1343, 1347, 266 Cal. Rptr. 520]* . Thus, consideration of evidence of rehabilitation by the licensee since he or she engaged in the conduct for which discipline was imposed is within the discretion of the Division when such evidence was used to determine the penalty [*Windham v. Board of Medical Quality Assurance (1980) 104 Cal. App. 3d 461, 472, 163 Cal. Rptr. 566* (decided under former *Bus. & Prof. Code § 2383*, conviction of felony as unprofessional conduct; *now see Bus. & Prof. Code § 2236*)].

Revocation of a physician's license for employing trained but unlicensed physicians to practice medicine, in violation of former *Bus. & Prof. Code § 2392* (*now see Bus. & Prof. Code § 2264*) was overturned with language suggesting that any penalty more severe than probation would be excessive, when the accused had acted in the good faith belief that such employment was proper [*see O'Reilly v. Board of Medical Examiners (1967) 66 Cal. 2d 381, 388, 58 Cal. Rptr. 7, 426 P.2d 167 , cert. denied, 390 U.S. 944, 88 S. Ct. 1019, 19 L. Ed. 2d 1132 (1968)* ; *Magit v. Board of Medical Examiners (1961) 57 Cal. 2d 74, 88, 17 Cal. Rptr. 488, 366 P.2d 816]* .

A case may also be remanded to the Division for redetermination of penalty when the Division has imposed a single penalty for more than one count of misconduct and a significant number of the counts are found not to be supported by the evidence. The cases that were remanded in this manner involved the severe penalties of revocation or suspension of the accused's license [*see O'Reilly v. Board of Medical Examiners (1967) 66 Cal. 2d 381, 389, 58 Cal. Rptr. 7, 426 P.2d 167 , cert. denied, 390 U.S. 944, 88 S. Ct. 1019, 19 L. Ed. 2d 1132 (1968)* (remand after penalty found too severe for one of two counts); *Cooper v. State Bd. of Medical Examiners (1950) 35 Cal. 2d 242, 252, 217 P.2d 630]* . However, the case need not be remanded for redetermination of penalty even when some of the counts for which the penalty was imposed were vacated on appeal when the Division imposed a separate penalty for each of the counts [*Grannis v. Board of Medical Examiners (1971) 19 Cal. App. 3d 551, 563, 96 Cal. Rptr. 863* (penalty of revocation, stayed by Board subject to conditions)].

The Supreme Court remanded a case to the Board for redetermination of penalty even though the underlying finding that the accused was guilty of providing dangerous drugs without a prescription was supported by the evidence when the board's additional finding of moral turpitude, not required for the unprofessional conduct finding, was not supported by the evidence, and it was not clear to what extent the board's decision to revoke the accused's license was based on the

overturned finding [*Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 69, 74, 64 Cal. Rptr. 785, 435 P.2d 553* (case decided under former *Bus. & Prof. Code § 2399.5*; *now see Bus. & Prof. Code § 2242*)]. However, a court may not remand a case, when a physician's license has been revoked, for redetermination of penalty on it own finding that the physician had shown no moral turpitude when the Division did not make and rely on an affirmative finding of moral turpitude in making its decision to revoke the accused's license [*see Collins v. Board of Medical Examiners (1972) 29 Cal. App. 3d 439, 444-445, 105 Cal. Rptr. 634]* .

[6] Stay of Operation of Division's Order

A court may stay any administrative order or decision of an agency that issues licenses pursuant to those sections of the Business and Professions Code that concern the healing arts pending the judgment of the Court in an administrative mandate proceeding, or until either notice of appeal from the Court's judgment has been filed or the time for filing such notice has expired, whichever comes first. However, to issue such a stay, the court must be satisfied that (1) the public interest will not suffer thereby, and (2) the agency is unlikely to prevail ultimately on the merits [*Code Civ. Proc. § 1094.5(h)(1)*].

A mere prima facie showing of a possible viable defense, which, if accepted by the reviewing court would cause that court to reach a different decision, does not satisfy the requirement that the agency must be unlikely to prevail on the merits. There must be a preliminary assessment of the merits of the licensee's petition and a conclusion that the licensee is likely to obtain relief therein [*Board of Medical Quality Assurance v. Superior Court (1980) 114 Cal. App. 3d 272, 276, 170 Cal. Rptr. 468* ; *see Medical Bd. of California v. Superior Court (1991) 227 Cal. App. 3d 1458, 1461-1462, 278 Cal. Rptr. 247* ; *see Medical Bd. of California v. Superior Court (1991) 227 Cal. App. 3d 1458, 1461-1462, 278 Cal. Rptr. 247]* .

The fact that *Code Civ. Proc. § 1094.5(h)* imposes a stricter standard for staying the decision of an agency that regulates the healing arts than *Code Civ. Proc. § 1094.5(g)* imposes for staying decisions of other agencies does not constitute an unconstitutional denial of equal protection. Such a stricter standard bears a rational relationship to the unusually sensitive relationship between the physician and the public and his or her patients [*Board of Medical Quality Assurance v. Superior Court (1980) 114 Cal. App. 3d 272, 276, 278, 170 Cal. Rptr. 468]* .

[7] Review of Superior Court's Decision

Notwithstanding any other provision of law, review of the superior court's decision on revocation, suspension, or restriction of a license must be by petition for an extraordinary writ [*Bus. & Prof. Code § 2337*; *Leone v. Medical Board (2000) 22 Cal. 4th 660, 663-670, 94 Cal. Rptr. 2d 61, 995 P.2d 191* (*Bus. & Prof. Code § 2337* is only method of obtaining appellate court review of superior court decision and does not violate *Cal. Const., art. VI, § 11*)].

[8] Application for Injunction in Federal Court

A physician may bring a civil rights action in federal district court to enjoin an administrative license revocation proceeding if the proceeding violates the physician's federal constitutional rights. In such a case, however, the federal court may invoke the *Younger* abstention doctrine and dismiss the civil rights action if all three prongs of the test set forth in *Middlesex County Ethics Committee v. Garden State Bar Ass'n (1982) 457 U.S. 423, 425, 102 S. Ct. 2515, 73 L. Ed. 2d 116* , are met, unless one of the recognized exceptions to *Younger* is present [*Kenneally v. Lungren (9th Cir. 1992) 967 F.2d 329, 331* , *cert. denied, 506 U.S. 1054, 113 S. Ct. 979, 122 L. Ed. 2d 133 (1993)* ; *see Younger v. Harris (1971) 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669]* . The three-part *Middlesex* test requires federal courts to examine (1) the nature of the state proceedings in order to determine whether the proceedings implicate important state interests, (2) the timing of the request for federal relief in order to determine whether there are ongoing state proceedings, and (3) the ability of the federal plaintiff to litigate its federal constitutional claims in the state proceedings [*Middlesex County Ethics Committee v. Garden State Bar Ass'n (1982) 457 U.S. 423, 435, 102 S. Ct. 2515, 73 L. Ed.*

2d 116 ; *Kenneally v. Lungren (9th Cir. 1992) 967 F.2d 329, 331 , cert. denied, 506 U.S. 1054, 113 S. Ct. 979, 122 L. Ed. 2d 133 (1993)]* . To determine whether an exception to *Younger* is present, the court must also examine whether the proceeding demonstrates bad faith, harassment, or some other extraordinary circumstances that would make abstention inappropriate [*Kenneally v. Lungren (9th Cir. 1992) 967 F.2d 329, 331 , cert. denied, 506 U.S. 1054, 113 S. Ct. 979, 122 L. Ed. 2d 133 (1993)]* .

In the context of a California physician's challenge to a federal district court's abstention under *Younger,* the Ninth Circuit Court of Appeals, analyzing the third prong of the *Middlesex* test, rejected a claim that California's procedural framework for review of agency decisions denies physicians a meaningful opportunity for review of federal constitutional claims. The court determined that under the administrative mandate procedure provided by *Code Civ. Proc. § 1094.5,* a p hysician has a meaningful opportunity to present constitutional claims for independent judicial review before the Medical Board's decision becomes effective [*Kenneally v. Lungren (9th Cir. 1992) 967 F.2d 329, 333 , cert. denied, 506 U.S. 1054, 113 S. Ct. 979, 122 L. Ed. 2d 133 (1993)]* . Notwithstanding the validity of the procedural framework, however, demonstrated bias by the Board might provide an exception making *Younger* abstention improper [*see Kenneally v. Lungren (9th Cir. 1992) 967 F.2d 329, 334-335 , cert. denied, 506 U.S. 1054, 113 S. Ct. 979, 122 L. Ed. 2d 133 (1993)* (no bias found under facts of case)].

For discussion of civil rights actions, see Ch. 112, *Civil Rights: Government-Funded Programs and Activities* . For discussion of the *Younger* abstention doctrine, see Moore' S FEDERAL PRACTICE, Ch. 122 (3rd ed. Matthew Bender).

Legal Topics:

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

§§ 414.76[Reserved]

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§ 414.90 California Points and Authorities

For memoranda for use in proceedings concerning the licensing and regulation of physicians, see California Points and Authorities, Ch. 176, *Physicians and Surgeons: Licensing and Professional Discipline* (Matthew Bender)

For memoranda for use in mandate proceedings generally, see California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender)

For memoranda for use in mandate proceedings to review administrative decisions made as the result of an adjudicatory hearing, see California Points and Authorities, Ch. 195, *Public Administrative Law* (Matthew Bender)

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§ 414.91 State Statutes

[1] Denial of License

Noncompliance with child or family support order as ground for nonissuance or nonrenewal of professional license. *Bus. & Prof. Code §§ 31, 6143.5(a)*

Judicial review. *Bus. & Prof. Code § 2087*

Unprofessional conduct. *Bus. & Prof. Code § 2221 et seq.*

[2] Qualifying for License

Graduates of domestic medical schools. *Bus. & Prof. Code § 2080 et seq.*

Graduates of foreign medical schools. *Bus. & Prof. Code § 2100 et seq.*

Reciprocity certificate. *Bus. & Prof. Code § 2135 et seq.*

Licensing examination. *Bus. & Prof. Code § 2170 et seq.*

[3] Requirement of License and Exemptions

Issuance of oral and maxillofacial surgery permit to licensed physician and surgeon. *Bus. & Prof. Code § 1638*

Form of certificate. *Bus. & Prof. Code § 2050*

Requirement of license and practice authorized. *Bus. & Prof. Code §§ 2051-2055*

Exemptions from licensing requirement. *Bus. & Prof. Code § 2059 et seq.*

For verification of license, entitlement to rely on licensing information as displayed on Board's Internet web site, including issuance and expiration dates of any license issued by Board. *Bus. & Prof. Code § 3779*

Recovery of treble damages, and costs and attorney's fees at discretion of court, when unlicensed person causes injury or damage to another while providing goods or performing services for which specified licenses are required. *Code Civ. Proc. § 1029.8*

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36-414 California Forms of Pleading and Practice--Annotated § 414.92

§ 414.92 Decisions

[1] Conduct Authorized by Physician's and Surgeon's Certificate

Physicians and surgeons, osteopaths, chiropractors, and licensed drugless practitioners are entitled to use natural healing methods despite statute forbidding licensing of naturopaths. *Oosterveen v. Board of Medical Examiners (1952) 112 Cal. App. 2d 201, 205, 246 P.2d 136* (interpreting former *Bus. & Prof. Code § 2137*; *now see Bus. & Prof. Code § 2051*)

[2] Conduct Prohibited Without Proper Certificate

[a] Practice of Healing Arts

Prohibition of former *Bus. & Prof. Code § 2141* (*now see Bus. & Prof. Code § 2052*) against diagnosis, treatment of operating, or prescribing for any physical or mental condition without certificate was not unconstitutionally overbroad in context of entire section and scheme for regulating healing arts. *Bowland v. Municipal Court (1976) 18 Cal. 3d 479, 494, 134 Cal. Rptr. 630, 556 P.2d 1081*

Practice of medicine by unlicensed person is not rendered proper by consultation with licensed physician. *O'Reilly v. Board of Medical Examiners (1967) 66 Cal. 2d 381, 388, 58 Cal. Rptr. 7, 426 P.2d 167 , cert. denied, 390 U.S. 944, 88 S. Ct. 1019, 19 L. Ed. 2d 1132* (decided under former *Bus. & Prof. Code § 2392*; *now see Bus. & Prof. Code § 2264*; employing unlicensed person to practice medicine is unprofessional conduct)

Practice of medicine by unlicensed person is not made proper by fact that such person had training making him or her competent to practice medicine, or fact that unlicensed person was supervised by licensed physician. *Magit v. Board of Medical Examiners (1961) 57 Cal. 2d 74, 85, 17 Cal. Rptr. 488, 366 P.2d 816* (decided under former *Bus. & Prof. Code § 2392*, now *Bus. & Prof. Code § 2264*)

California had jurisdiction to prosecute physician who resided in Colorado under *Bus. & Prof. Code § 2052* for practicing medicine in California without California license based on facts that physician prescribed medication over Internet and medication was sent to California resident. *Hageseth v. Superior Court (2007) 150 Cal. App. 4th 1399, 1405-1424, 59 Cal. Rptr. 3d 385*

Former *Bus. & Prof. Code § 2053* clearly created criminal liability for one whose unlicensed and unlawful diagnosis willfully causes risk of great bodily harm. *People v. Brown (1991) 234 Cal. App. 3d 918, 932, 285 Cal. Rptr. 824*

Preoperative and postoperative care were capable of putting patient at risk of great bodily harm and serious illness for purposes of former *Bus. & Prof. Code § 2053* [*now see Bus. & Prof Code § 2052*]. *People v. Brown (1991) 234 Cal. App. 3d 918, 926-931, 285 Cal. Rptr. 824*

Allegation that defendant used drugs is unnecessary to state offense of practicing medicine without license, since use of drugs is not an essential element of statutory violation. *People v. Cochran (1922) 56 Cal. App. 394, 396, 205 P. 473* (decided under provisions of former Medical Practice Act of 1913, contained in *Bus. & Prof. Code § 2052*)

[b] Representing Oneself as Physician

Graduate of out-of-state medical school who had practiced in other state and conducted school for medical and dental assistants in California, but who was not licensed as physician and surgeon in California, improperly used M.D. initial in advertising material by school, and had no *First Amendment* right to use M.D. initials without California physician's certificate. *Lawton v. Board of Medical Examiners (1956) 143 Cal. App. 2d 256, 261-262, 299 P.2d 362* (decided under former *Bus. & Prof. Code § 2142*; *now see Bus. & Prof. Code § 2054*)

[3] Exemptions to Certification Requirement

[a] Limited Exemption for Holders of Certificates in Allied Healing Arts

Chiropractic license entitles holder to perform certain acts in practice of his or her particular healing art without holding physician's and surgeon's certificate, but does not authorize treatment beyond scope of chiropractic license without physician's and surgeon's certificate. *Crees v. Board of Medical Examiners (1963) 213 Cal. App. 2d 195, 210, 28 Cal. Rptr. 621* (decided under former *Bus. & Prof. Code § 2141*; *now see Bus. & Prof. Code § 2052*)

Chiropractor who has no physician's and surgeon's certificate and who performs procedure or does act forbidden by Medical Practice Act except by one holding physician's license violated act even though he or she does not hold himself or herself out as doctor of medicine. *Crees v. Board of Medical Examiners (1963) 213 Cal. App. 2d 195, 211, 28 Cal. Rptr. 621* (decided under former *Bus. & Prof. Code § 2141*; *now see Bus. & Prof. Code § 2052*)

Creation of limited defense to former *Bus. & Prof. Code § 2141* (*now see Bus. & Prof. Code § 2052* (prohibiting practice of medicine without license)) by Chiropractic Act does not make basic prohibition in that statute unconstitutionally vague. *Crees v. Board of Medical Examiners (1963) 213 Cal. App. 2d 195, 215, 28 Cal. Rptr. 621*

Chiropractor is not entitled under Chiropractic Act to use drugs or medical preparations or sever or penetrate human tissue; plasma transfusion and hypodermic injection done for purpose of treatment of ailment are not within permissible practice of chiropractor. *People v. Mangiagli (1950) 97 Cal. App. 2d Supp. 935*

[b] Service in Case of Emergency

Emergency situation in which treatment without license warranted is defined as a case in which ordinary medical practitioners of schools provided for by statute who have proper diplomas and have submitted themselves to proper examinations are not readily available. *People v. Lee Wah (1886) 71 Cal. 80, 82, 11 P. 851* (interpreting former Stats. 1875-1876, p. 792, as amended Stats. 1877-1878, p. 98; *now see Bus. & Prof. Code § 2058*); *Newhouse v. Board of Osteopathic Examiners (1958) 159 Cal. App. 2d 728* (interpreting former *Bus. & Prof. Code § 2144*; *now see Bus. & Prof. Code § 2058*)

Case in which patient's condition was given up by established schools did not constitute emergency situation so as to permit practice by unlicensed person. *People v. Lee Wah (1886) 71 Cal. 80, 81-82, 11 P. 851* (interpreting former Stats. 1875-1876, p. 792, as amended Stats. 1877-1878, p. 918; *now see Bus. & Prof. Code § 2058*)

Emergency situation justifying practice of medicine without license did not exist when time and opportunity to summon qualified physician existed. *People v. Mangiagli (1950) 97 Cal. App. 2d Supp. 935* (decided under former *Bus. & Prof. Code § 2144*; *now see Bus. & Prof. Code § 2058*)

Services of emergency character are services rendered to afford temporary relief until services of regular practitioner could be secured. *People v. Mangiagli (1950) 97 Cal. App. 2d Supp. 935* (decided under former *Bus. & Prof. Code § 2144*; *now see Bus. & Prof. Code § 2058*)

[4] Judicial Review of Adverse Action by Division of Licensing

Action to compel board to approve school from which applicant graduated was proper action for applicant who has been denied license due to failure to graduate from approved school. *Mann v. Board of Medical Examiners (1947) 31 Cal. 2d 30, 41-42, 187 P.2d 1* ; *Savelli v. Board of Medical Examiners (1964) 229 Cal. App. 2d 124, 138, 40 Cal. Rptr. 171 , cert. denied, 380 U.S. 934, 85 S. Ct. 940, 13 L. Ed. 2d 821* (cases decided under former *Bus. & Prof. Code § 2174*; *now see Bus. & Prof. Code § 2087*)

Formal and deliberate action of board in disapproving school was not nullified by occasional isolated admission of graduates of school, mostly under exceptional circumstances; such nullification was required to be by action as formal and deliberate as action of disapproval and established by strongest kind of showing--clear, convincing, and unequivocal; no such thing as de facto or qualified approval. *Mann v. Board of Medical Examiners (1947) 31 Cal. 2d 30, 39, 187 P.2d 1*

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36-414 California Forms of Pleading and Practice--Annotated § 414.93

§ 414.93 Attorney General Opinions

Lawful limitations on medical services and orders performable by physician's assistant. *71 Ops. Cal. Att'y Gen. 296 (1988)*

Homecare companions are not lawfully authorized to administer controlled substances or engage in nasogastric tube or gastrostomy feeding. *71 Ops. Cal. Att'y Gen. 190 (1988)*

Certified Acupuncturist is not permitted to use initials "O.M.D." or the title "Oriental Medical Doctor," without more, in advertising acupuncture practice. *71 Ops. Cal. Att'y Gen. 54 (1988)*

Marriage, family, and child counselors have statutory authority to construct, administer, and interpret "psychological tests" within course of practice and in fields of competence as established by education, training, and experience. *67 Ops. Cal. Att'y Gen. 278 (1984)*

Certified registered nurse anesthetist is permitted by law to administer regional anesthetic when ordered by physician, dentist, podiatrist, or clinical psychologist acting within scope of license, but not pursuant to "standardized procedure." *67 Ops. Cal. Att'y Gen. 122 (1984)*

Reciprocity provisions of the Medical Practice Act. 67 Cal. Op. Att'y Gen. 98 (1984)

Registered nurses are not authorized to prescribe, furnish, or administer medications under standardized procedure. *64 Ops. Cal. Att'y Gen. 240 (1981)*

Vocational nurses working in blood banks are permitted to perform skin puncture and venipuncture for collecting whole blood on authorization from any physician and surgeon or dentist provided that nurses have had instructions from physician and surgeon or prescribed course and have demonstrated competence in blood withdrawal procedure. *59 Ops. Cal. Att'y Gen. 112 (1976)*

Chiropractor is not entitled to practice art of anything but chiropractic, but as entitled to use concepts of anatomy, bacteriology, diagnosis, physiology, chemistry, hygiene, physiotherapy, and dietetics in limited and circumscribed manner, as long as employment of such concepts does not exceed limits of chiropractic practice. *59 Ops. Cal. Att'y Gen. 420 (1976)*

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For related research and practice materials, see the following legal topics:
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§ 414.94 Law Reviews

Comment, *Unnecessary Hysterectomy: The Lack of Informed Consent, 13 Golden Gate U.L. Rev. 573 (1983)*

Mizuno, *The Physician's Assistant and the Problem of Statutory Authorization, 7 U.C. Davis L. Rev. 413 (1974)*

Legal Topics:

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[Reserved]

§§ 414.95[Reserved]

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§ 414.110 California Points and Authorities

For memoranda for use in mandate proceedings generally, see California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender)

For memoranda for use in proceedings concerning licensing and regulation of physicians, see California Points and Authorities, Ch. 176, *Physicians and Surgeons: Licensing and Professional Discipline* (Matthew Bender)

For memoranda for use in mandate proceedings to review administrative decisions made as the result of adjudicatory hearings, see California Points and Authorities, Ch. 195, *Public Administrative Law* (Matthew Bender)

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§ 414.111 State Statutes

[1] Administrative Law Judges

Official or judicial notice of matters by administrative law judge. *Bus. & Prof. Code § 2231*

Designation of administrative law judge to hear disciplinary proceedings. *Gov. Code § 11371*

[2] Causes for Discipline

Noncompliance with child or family support order as ground for nonissuance or nonrenewal of professional license. *Bus. & Prof. Code §§ 31, 6143.5*; Welf & Ins. Code § 11350.6

Mental illness or physical illness affecting competency. *Bus. & Prof. Code §§ 820, 822*

Unprofessional conduct in general. *Bus. & Prof. Code § 2234*

Conditions under which alternative or complementary medicine is not cause for discipline. *Bus. & Prof. Code § 2234.1*

Specific instances of unprofessional conduct. *Bus. & Prof. Code §§ 2234-2291, 2305*

[3] Conduct of Proceedings

Reinstatement. *Bus. & Prof. Code §§ 823, 2307*

Conduct of proceedings under Administrative Procedure Act. *Bus. & Prof. Code § 2230*; *Gov. Code § 11500 et seq.*

Professional competency examination required in case of reasonable doubt concerning ability to practice. *Bus. & Prof. Code §§ 2292-2294*

Authorities presiding at disciplinary hearing. *Gov. Code § 11372(a)*

[4] Duties and Powers of Relevant Authority

Duties of Medical Board with regard to discipline. *Bus. & Prof. Code § 2004*

Delegation of authority by Board. *Bus. & Prof. Code § 2224*

[5] Reporting Misconduct to Medical Board

Report by coroner on discovery of potential gross negligence or incompetence by physician. *Bus. & Prof. Code § 802.5*

Reports by prosecuting authorities and other court officials concerning felony proceedings against physician. *Bus. & Prof. Code §§ 803.5, 803.6*

Any medical or podiatric society, licensed or certified health facility, defined state agency, or local government agency that receives complaints or other adverse information about physician and surgeon or podiatric doctor from public must inform complainant that Medical Board of California or Board of Podiatric Medicine is only authority that may take disciplinary action against license of named licensee, and provide address and toll-free telephone number of applicable state board. *Civ. Code § 43.96(a)*

Immunity of *Bus. & Prof. Code § 2318* and *Civ. Code § 47* applies to complaints and information made or provided to board pursuant to *Civ. Code § 43.96(a). Civ. Code § 43.96(b)*

[6] Review of Disciplinary Action

Trial preference for superior court review of imposition of discipline. *Bus. & Prof. Code § 2337*

Judicial review of imposition of discipline. *Code Civ. Proc. § 1094.5*

Review of proposed decision. *Bus. & Prof. Code § 2335(c)*

[7] Types of Discipline

[a] Criminal and Injunctive Action by Division

Enjoining unprofessional conduct. *Bus. & Prof. Code §§ 2311, 2312*

Criminal penalties for unprofessional conduct. *Bus. & Prof. Code §§ 2314, 2315*

[b] Discipline Affecting Right to Practice

Types of discipline. *Bus. & Prof. Code §§ 2227, 2228*

Rehabilitative and protective policies underlying discipline. *Bus. & Prof. Code § 2229*

Effect of practicing with suspended license. *Bus. & Prof. Code § 2306*

Interim discipline. *Gov. Code § 11529*

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§ 414.112 Administrative Regulations

(Former) Division of Medical Quality. *16 Cal. Code Reg. §§ 1355-1356.3*

Impaired Physician Program. *16 Cal. Code Reg. §§ 1357-1357.8*

Probation and reinstatement of suspended or revoked certificates. *16 Cal. Code Reg. §§ 1358-1360.2*

Disciplinary guidelines. *16 Cal. Code Reg. § 1361*

Advertising and standards of practice. *16 Cal. Code Reg. §§ 1363, 1364*

Citations and fines. *16 Cal. Code Reg. § 1364.10 et seq.*

Public letters of reprimand. *16 Cal. Code Reg. § 1364.20 et seq.*

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§ 414.113 Decisions

[1] Evidence at Hearing

[a] Applicability of Exclusionary Rule

Exclusionary rule was not applicable to disciplinary proceeding when board investigator showed no bad faith in accepting evidence that was given voluntarily by division. *Pating v. Board of Medical Quality Assurance (1982) 130 Cal. App. 3d 608, 625, 182 Cal. Rptr. 20*

Vicarious right physician might have to assert patients' privacy rights under exclusionary rule in face of seizure of medical records without subpoena was extinguished when patients consent to introduction of records into evidence; extinguishment of physician's vicarious right applied retroactively to seizures before patients consented. *Pating v. Board of Medical Quality Assurance (1982) 130 Cal. App. 3d 608, 621, 182 Cal. Rptr. 20*

[b] Diagnostic Examination

Federal pleadings filed by physician were available for use against physician to illustrate physician's abnormal state of mind, for purposes of establishing cause for diagnostic examination under *Bus. & Prof. Code § 820*. *Alexander D. v. State Bd. of Dental Examiners (1991) 231 Cal. App. 3d 92, 98-99, 282 Cal. Rptr. 201*

[c] Expert Testimony

Medical board's disqualification of experts offered at disciplinary hearing to revoke license of physician who employed alternative therapies for children suffering from attention deficit and hyperactivity disorder (ADHD) or adults suffering from wide assortment of hard-to-diagnose symptoms rendered his disciplinary hearing fundamentally unfair, particularly when standard of care was obfuscated by *Kelly-Frye* standards of admissibility, and required remand to board. *Sinaiko v. Superior Court (2004) 122 Cal. App. 4th 1133, 1140-1146, 19 Cal. Rptr. 3d 371*

[d] Seizure of Patients' Medical Records

Pursuant to *Evid. Code § 1007*, physician-patient privilege was inapplicable to investigative proceeding to determine whether medical license should be revoked, suspended, terminated, limited, or conditioned. *Board of Medical Quality Assurance v. Hazel Hawkins Memorial Hospital (1982) 135 Cal. App. 3d 561, 566, 185 Cal. Rptr. 405*

In investigation of professional conduct of doctor whose clinical and admitting privileges had been revoked by hospital, denial of petition of Division of Medical Quality to compel hospital and its administrator to comply with Division's subpoena of patient medical records was improper because (1) Division had authority to make inquiry, (2) demand was specific and limited, (3) patients' medical records were relevant, and (4) patients' right to privacy was safeguarded. *Board of Medical Quality Assurance v. Hazel Hawkins Memorial Hospital (1982) 135 Cal. App. 3d 561, 565, 185 Cal. Rptr. 405*

Investigator's acceptance without subpoena of medical records of patients of accused, which were voluntarily offered by accused's former associates, was not unreasonable seizure of records. *Pating v. Board of Medical Quality Assurance (1982) 130 Cal. App. 3d 608, 623, 182 Cal. Rptr. 20*

Physician-patient privilege established by *Evid. Code § 990 et seq.* created zone of privacy protected by California Constitution; showing of (1) waiver and (2) good cause as required to be shown before subpoena may be issued compelling disclosure of medical records. *Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 680-681, 156 Cal. Rptr. 55*

[2] Findings Supporting Decision

Decision by former Board of Medical Quality Assurance (now Medical Board of California) not required to include findings as to penalty imposed. *Williamson v. Board of Medical Quality Assurance (1990) 217 Cal. App. 3d 1343, 1346, 266 Cal. Rptr. 520* (construing *Gov. Code § 11518*)

[3] Grounds for Discipline

[a] In General

Board was unable to revoke physician's certificate, or otherwise discipline physician, unless it could prove by clear and convincing evidence that physician's conduct was so unprofessional that he or she had to be disciplined to protect public. *Bonner v. Sisters of Providence Corp. (1987) 194 Cal. App. 3d 437, 445, 239 Cal. Rptr. 530*

[b] Employing, Aiding, or Abetting Unlicensed Persons in Medical Practice

Employing unlicensed person to practice medicine violative of *Bus. & Prof. Code § 2264*; additional finding of aiding and abetting licensed person unnecessary to establish violation. *Khan v. Medical Board (1993) 12 Cal. App. 4th 1834, 1841-1843, 16 Cal. Rptr. 2d 385*

Physician subject to discipline for allowing person in family practice clinic to give injections. *Bryce v. Board of Medical Quality Assurance (1986) 184 Cal. App. 3d 1471, 1474-1476, 229 Cal. Rptr. 483*

Physician subject to discipline for authorizing physician assistants to prescribe medication on presigned, blank prescription forms. *Bryce v. Board of Medical Quality Assurance (1986) 184 Cal. App. 3d 1471, 1474-1476, 229 Cal.*

Rptr. 483

[c] False Advertising

Placing names of unlicensed medical personnel on office door of physician violated *Bus. & Prof. Code § 17500*; violation of statute was misdemeanor not requiring finding of criminal intent, therefore physician's negligence in causing false public statement was sufficient to establish violation. *Khan v. Medical Board (1993) 12 Cal. App. 4th 1834, 1845-1846, 16 Cal. Rptr. 2d 385*

[d] Falsifying Medical Documents

Mistake of law was no defense when certification made assertions that were false and known by licensee to be false. *Brown v. State Department of Health (1978) 86 Cal. App. 3d 548, 558-559, 150 Cal. Rptr. 344*

Intent to deceive not necessary element for violation of former *Bus. & Prof. Code § 2411, now see Bus. & Prof. Code § 2261* (providing that knowingly signing any certificate or document related to practice of medicine that represents as true facts known to be false), as long as signer had knowledge of falsity of document. *Brown v. State Department of Health (1978) 86 Cal. App. 3d 548, 554-555, 150 Cal. Rptr. 344*

[e] Gross Negligence

Uncontradicted expert testimony of two physicians unequivocally indicating that licensee's treatment constituted extreme departure from acceptable standard of medical care provided sufficient basis for professional discipline. *Glover v. Board of Medical Quality Assurance (1991) 231 Cal. App. 3d 203, 207-208, 282 Cal. Rptr. 137*

In proceeding for suspension of medical license, based on death of patient under anesthesia, failure of surgeon to take and record patient's vital signs every five minutes when it was common practice in most hospitals do so constituted gross negligence, even though some hospitals allowed recordation every 15 minutes. *Kearl v. Board of Medical Quality Assurance (1986) 189 Cal. App. 3d 1040, 1053-1054, 236 Cal. Rptr. 526*

Gross negligence is defined as want of even scant care or extreme departure from ordinary standard of conduct; use of disjunctive indicates alternative elements of gross negligence, that is, both need not be present to establish gross negligence. *Kearl v. Board of Medical Quality Assurance (1986) 189 Cal. App. 3d 1040, 1052-1053, 236 Cal. Rptr. 526*

[f] Incompetence

Incompetence does not arise from single, honest failing in performance of duties; however, finding of incompetence was supportable based on actions involving only one patient, when there were several acts or decisions by physician that were improper. *Kearl v. Board of Medical Quality Assurance (1986) 189 Cal. App. 3d 1040, 1055, 1056, 236 Cal. Rptr. 526*

[g] Moral Turpitude

[i] Establishing Moral Turpitude

Moral turpitude includes crimes involving fraud or intentional dishonesty for personal gain, whatever else it may mean;

no moral distinction exists between defrauding individual and defrauding government. *Matanky v. Board of Medical Examiners (1978) 79 Cal. App. 3d 293, 303, 144 Cal. Rptr. 826* (filing fraudulent medicare claims for services not rendered)

[ii] Relevance of Moral Turpitude

Moral turpitude in committing crime showed moral unfitness to practice medicine, thus establishing nexus with practice of medicine. *Windham v. Board of Medical Quality Assurance (1980) 104 Cal. App. 3d 461, 469-471, 163 Cal. Rptr. 566* (interpreting nexus requirement and *Bus. & Prof. Code § 490*)

Finding of moral turpitude not required to impose discipline for unprofessional conduct as defined by those sections of the Business and Professions Code describing specific instances of unprofessional conduct without requiring a finding of moral turpitude. *Collins v. Board of Medical Examiners (1972) 29 Cal. App. 3d 439, 444, 105 Cal. Rptr. 634* (various drug violations)

[h] Requirement of Nexus With Practice of Medicine

Driving while intoxicated demonstrates unwillingness to obey laws against such conduct and constitutes serious breach of duty to society, thereby constituting nexus to practice of medicine. *Watson v. Superior Court (2009) 176 Cal. App. 4th 1407, 1424, 98 Cal. Rptr. 3d 715*

Nexus exists between two or more misdemeanor convictions involving consumption of alcoholic beverages and physician's fitness to practice medicine, so that imposing discipline on physician's license pursuant to *Bus. & Prof. Code § 2239(a)* does not violate due process and *equal protection clauses* of state and federal constitutions. Further, conclusive presumption of unprofessional conduct from convictions in *Bus. & Prof. Code § 2239(a)* does not violate licensee's right to due process of law. *Griffiths v. Superior Court (2002) 96 Cal. App. 4th 757, 117 Cal. Rptr. 2d 445*

Trial court erred in granting writ of mandamus directing Medical Board to set aside disciplinary action imposed against physician under *Bus. & Prof. Code § 141*, based on disciplinary action against physician in Wisconsin, on ground that Board exceeded its jurisdiction by imposing discipline on basis of *Bus. & Prof. Code § 141* and could only impose discipline based on Wisconsin action under *Bus. & Prof. Code § 2305*, which is more specialized statute and mandates disciplinary action after discipline by another state only when discipline would be grounds for discipline in California, only after finding that Wisconsin action would be grounds for discipline in California; *Bus & Prof. Code § 2305* should not be construed to impliedly repeal *Bus & Prof. Code § 141*, but only prevails over *Bus & Prof. Code § 141* when both apply; and when *Bus & Prof. Code § 141* can apply when § 2305 does not, as it did not in instant case. *Medical Board v. Superior Court (2001) 88 Cal. App. 4th 1001, 106 Cal. Rptr. 2d 381*

Intentional dishonesty, especially involving moral turpitude, satisfies finding of unfitness to practice; physician subject to disciplinary action notwithstanding technical competence or skill when moral character is in dispute. *Matanky v. Board of Medical Examiners (1978) 79 Cal. App. 3d 293, 305, 144 Cal. Rptr. 826* (alternate ground that filing of intentionally false medicare claims for personal gain related to professional activities of physician in any case)

Right to practice medicine is property right of highest character, entitled to protection by safeguards as law has thrown around it, but Legislature has authority under general police power to protect public health, safety, or morals, and to provide for dismissal from medical profession of all persons whose principles, practices, and character render them unfit to remain in it with this object in view. *Rinaldo v. Board of Medical Exmrs. (1935) 5 Cal. App. 2d 345, 352, 42 P.2d 724*

[4] Judicial Review

[a] Appellate Court Review of Superior Court Decision

Bus. & Prof. Code § 2337 makes petition for extraordinary writ only method for obtaining appellate review of superior court decisions in administrative mandate proceedings reviewing physician discipline decisions by Medical *Board of California. Leone v. Medical Board (2000) 22 Cal. 4th 660, 663-664, 94 Cal. Rptr. 2d 61, 995 P.2d 191*

[b] Restricted Standard for Review of Decision Imposing Penalty

Case remanded to board for redetermination of penalty when board imposed single penalty of 90 days' suspension for two violations, and Supreme Court determined that penalty for one violation was too severe and it was impossible to determine to what extent board relied on overturned violation to impose penalty. *O'Reilly v. Board of Medical Examiners (1967) 66 Cal. 2d 381, 389, 58 Cal. Rptr. 7, 426 P.2d 167 , cert. denied, 390 U.S. 944, 88 S. Ct. 1019, 19 L. Ed. 2d 1132 (1968)*

Uncertainty as to questions of federal preemption and good faith of accused licensee in employing practitioners not licensed in State of California but working in California under federal exchange program precluded any punishment greater than probation by board. *O'Reilly v. Board of Medical Examiners (1967) 66 Cal. 2d 381, 388, 58 Cal. Rptr. 7, 426 P.2d 167 , cert. denied, 390 U.S. 944, 88 S. Ct. 1019, 19 L. Ed. 2d 1132 (1968)* (decided under former *Bus. & Prof. Code § 2392* (*now see Bus. & Prof. Code § 2264*), employing unlicensed person to practice medicine)

Case remanded to board for redetermination of penalty when board had originally imposed severe penalty of license revocation pursuant to finding of two instances of unprofessional conduct, and one finding was not supported by evidence. *Cooper v. State Bd. of Medical Examiners (1950) 35 Cal. 2d 242, 252, 217 P.2d 630*

Propriety of penalty imposed by board is matter vested in board's discretion; board's decision regarding penalty not disturbed by reviewing court unless manifest abuse of discretion has taken place. *Williamson v. Board of Medical Quality Assurance (1990) 217 Cal. App. 3d 1343, 1347, 266 Cal. Rptr. 520*

[c] Statute of Limitations

Licensee whose untimely petition for writ of mandate to review revocation proceeding failed to survive demurrer based on *Gov. Code § 11523* (30-day statute of limitations) could not attack revocation collaterally by later petition challenging conditions on license reinstatement; licensee's claim that underlying revocation hearing was unconstitutional was still barred by *Gov. Code § 11523*, whether or not order sustaining demurrer had res judicata or collateral estoppel effect. *Miller v. Board of Medical Quality Assurance (1987) 193 Cal. App. 3d 1371, 1376-1377, 238 Cal. Rptr. 915*

[d] Substantial Evidence Test Applied by Appellate Courts

Appellate court's review of trial court's decision on mandamus was limited to determining whether credible, competent evidence supports trial court's judgment. Conflicts in evidence required to be resolved in favor of trial court's decision. *Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 69, 72, 64 Cal. Rptr. 785, 435 P.2d 553*

On appeal from judgment in administrative mandate proceeding, appellate court required to determine, after independent judgment review, whether trial court's findings are supported by substantial evidence and are correct on matters of law. *Yellen v. Board of Medical Quality Assurance (1985) 174 Cal. App. 3d 1040, 1058, 220 Cal. Rptr. 426*

Court of appeal on review is not bound by characterization given to evidence by ALJ or agency, but looks to entire record to determine if basis for permissibly imposing discipline exists. *Brown v. State Department of Health (1978) 86 Cal. App. 3d 548, 557, 150 Cal. Rptr. 344*

[5] Types of Disciplinary Action

[a] Penalties

Board did not abuse its discretion in permanently revoking license of physician based on factual findings citing seven individual instances of illegally prescribing drugs, three incidences of falsifying medical records to cover up illegal prescribing, personal abuse of drugs by physician, and prior instances of discipline. *Williamson v. Board of Medical Quality Assurance (1990) 217 Cal. App. 3d 1343, 1347-1348, 266 Cal. Rptr. 520*

Board did not abuse its discretion in permanently revoking license, because in determining what discipline to impose, Board may take into account defendant's attitude toward offense and his or her character as evidenced by his or her behavior and demeanor at trial. *Yellen v. Board of Medical Quality Assurance (1985) 174 Cal. App. 3d 1040, 1059-1060, 220 Cal. Rptr. 426*

[b] Probation or Conditional Stay of Penalty

Imposition of condition that physician pass oral clinical examination prior to reinstatement of license was within discretion of *Board of Medical Quality Assurance. Bryce v. Board of Medical Quality Assurance (1986) 184 Cal. App. 3d 1471, 1475-1476, 229 Cal. Rptr. 483*

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesDoctor-Patient PrivilegeGeneral OverviewEvidencePrivilegesDoctor-Patient PrivilegeScopeEvidencePrivilegesDoctor-Patient PrivilegeWaiverHealthcare LawBusiness Administration & OrganizationLicensesRevocation & SuspensionHealthcare LawBusiness Administration & OrganizationPatient ConfidentialityGeneral OverviewHealthcare LawBusiness Administration & OrganizationPeer ReviewGeneral OverviewTortsNegligenceActionsGeneral OverviewTortsNegligenceProofCustomExpert TestimonyTortsNegligenceProofCustomMedical CustomsTortsNegligenceStandards of CareGeneral OverviewTortsProcedureStatutes of LimitationsAccrual of ActionsDiscovery Rule

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PART III. RESEARCH GUIDE
B. Professional Discipline

36-414 California Forms of Pleading and Practice--Annotated § 414.114

§ 414.114 Attorney General Opinions

Performance of contract between group of radiologists and physicians for imaging services when agreement provides that (1) group will charge each patient a fee, (2) fees will be transmitted to physicians, (3) physicians will pay stipulated amounts to the group for the services, and (4) total amounts paid by physicians will be independent of, but increase will be proportionately less than, total fees collected from patients violated *Bus. & Prof. Code § 650*. *73 Ops. Cal. Att'y Gen. 321 (1990)*

Payment of fee by professional corporation to which physicians refer patients for performance of pulmonary and cardiac stress tests, to referring physician for preparing evaluation report of patient's test data violated *Bus. & Prof. Code § 650*, when no legitimate reason existed for report. *70 Ops. Cal. Att'y Gen. 65 (1987)*

Physician may refer patients to clinical laboratory in which he or she owns limited partnership interest if several requirements are fulfilled. *68 Ops. Cal. Att'y Gen. 28 (1985)*

Board of Medical Quality Assurance may retain complaint found to be without merit that is required to be purged from licensee's central file pursuant to *Bus. & Prof. Code § 800(b)* in separate files. *59 Ops. Cal. Att'y Gen. 363 (1976)*

Licensed physician and surgeon who is principal officer, sole shareholder, or owner of business supplying womens' face creams and cosmetics was not engaged in unprofessional conduct; licensed physician and surgeon is entitled to engage in any legitimate business except pharmacy. *55 Ops. Cal. Att'y Gen. 117 (1972)*

Agreement in which hospital received fifty percent of physician's net income was illegal [*Bus. & Prof. Code § 650*]; physician working under direct control of hospital was not able to practice under fictitious name. *55 Ops. Cal. Att'y Gen. 103 (1972)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRequirementsHealthcare LawBusiness Administration & OrganizationLicensesRevocation & Suspension

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36-414 California Forms of Pleading and Practice--Annotated § 414.115

§ 414.115 Law Reviews

Comment, *Professional-Client Sex: Is Criminal Liability an Appropriate Means of Enforcing Professional Responsibility*, *40 UCLA L. Rev. 1275 (1993)*

Sax, *Curbing Health Care Fraud*, 6(10) Cal. Law. 25 (1986)

Goldberg, *The Physician-Patient Privilege--An Impediment to Public Health*, *16 Pac. L.J. 787 (1985)*

Note, *The State of California Law in Hospital Peer Review Cases*, *13 Sw. U.L. Rev. 337 (1982)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRequirementsHealthcare LawBusiness Administration & OrganizationLicensesRevocation & SuspensionHealthcare LawBusiness Administration & OrganizationPeer ReviewGeneral OverviewHealthcare LawBusiness Administration & OrganizationPeer ReviewStatutes

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36-414 California Forms of Pleading and Practice--Annotated §§ 414.116-414.129

[Reserved]

§§ 414.116[Reserved]

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36-414 California Forms of Pleading and Practice--Annotated § 414.130

§ 414.130 Investigation by Panel of Division of Medical Quality

1. Investigation may be triggered by:

a. Complaints from the public, from other licensees, from health care facilities, or from any division of the Medical Board of California [*Bus. & Prof. Code § 2220(a)*].

b. Malpractice judgment, settlement, or arbitration award in which the physician is required to pay more than $30,000 [*Bus. & Prof. Code § 2220(b)*].

c. An unusually high number of claims for compensation filed against any one licensee [*Bus. & Prof. Code § 2220(c)*].

2. No statute of limitations as such [*Windham v. Board of Medical Quality Assurance (1980) 104 Cal. App. 3d 461, 474, 163 Cal. Rptr. 566]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral OverviewHealthcare LawActions Against FacilitiesGeneral OverviewHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRequirementsHealthcare LawBusiness Administration & OrganizationLicensesRevocation & SuspensionTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsProcedureAlternative Dispute Resolution

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36-414 California Forms of Pleading and Practice--Annotated § 414.131

§ 414.131 Hearing

1. Conducted by Panel of Board or by administrative law judge in accordance with *Gov. Code § 11500 et seq.* (administrative trials) and prosecuted by Senior Assistant Attorney General of Health Quality Enforcement Section [*see Bus. & Prof. Code § 2230(a)*; *see § 414.69[1]*].

2. Transmittal of proposed decision to executive director of board after filing; deadline for action by panel or board [*see Bus. & Prof. Code § 2335(a)*; *see also* § 414.[6][d][iv]].

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36-414 California Forms of Pleading and Practice--Annotated § 414.132

§ 414.132 Reinstatement of Certificate or Modification of Penalty

1. Petition for reinstatement of revoked or suspended certificate, or modification of penalty, may be made to Board within applicable period specified in *Bus. & Prof. Code § 2307*, but no such petition considered while petitioner is under criminal sentence, or while there is an accusation or petition to revoke probation pending against the person [*Bus. & Prof. Code § 2307*].

2. Hearing by panel of division or administrative law judge; hearing authority may consider petitioner's activities since discipline was imposed, petitioner's rehabilitative efforts, petitioner's general reputation for truth and professional ability, and nature of offense for which petitioner was disciplined [*Bus. & Prof. Code § 2307*].

3. Petition for reinstatement, or modification of penalty, that is filed within two years after a previous petition was denied may be denied without hearing or argument by Board [*Bus. & Prof. Code § 2307*].

For further discussion of reinstatement or modification of penalty after discipline has been imposed, see *§ 414.132*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPresiding OfficersDuties & PowersGovernmentsLegislationStatutes of LimitationsTime LimitationsHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRequirementsHealthcare LawBusiness Administration & OrganizationLicensesRevocation & Suspension

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PART IV. PROCEDURAL CHECKLIST

36-414 California Forms of Pleading and Practice--Annotated § 414.133

§ 414.133 Judicial Review

1. Petition for writ of mandate is proper procedure to obtain judicial review [*Grant v. Board of Medical Examiners (1965) 232 Cal. App. 2d 820, 826, 43 Cal. Rptr. 270* ; *Bus. & Prof. Code § 2230(a)* (*Gov. Code § 11500 et seq.* applicable to proceedings for unprofessional conduct); *see Code Civ. Proc. § 1094.5*; (administrative mandate); *Gov. Code § 11523* (review of administrative adjudicatory decisions under applicable provisions of Code of Civil Procedure)].

2. Standard of review.

Imposition of discipline.

a. Determination that discipline is appropriate--independent judgment test [*Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 69, 64 Cal. Rptr. 785, 435 P.2d 553]* .

b. Imposition of particular penalty--discretion of relevant hearing authority will not be overturned unless manifest abuse [*Magit v. Board of Medical Examiners (1961) 57 Cal. 2d 74, 87, 17 Cal. Rptr. 488, 366 P.2d 816* ; *Windham v. Board of Medical Quality Assurance (1980) 104 Cal. App. 3d 461, 473, 163 Cal. Rptr. 566]* .

For further discussion of judicial review of action by the Board, see *§ 414.133*.

3. Appellate court review of superior court decision in administrative mandate proceedings reviewing physician discipline decisions by Medical Board can only be had by petition for extraordinary writ [*Bus. & Prof. Code § 2337*; *Leone v. Medical Board (2000) 22 Cal. 4th 660, 94 Cal. Rptr. 2d 61, 995 P.2d 191]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewEnvironmental LawLitigation & Administrative ProceedingsJudicial ReviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesRequirementsHealthcare LawBusiness Administration & OrganizationLicensesRevocation & Suspension

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[Reserved]

§§ 414.134[Reserved]

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PART V. FORMS
A. Licensing

36-414 California Forms of Pleading and Practice--Annotated § 414.150

§ 414.150 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Set Aside Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Medical Board of California [Bus. & Prof. Code §§ 2087, 2230(a)]--Denial of License or Admission to Licensing Examination

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Set Aside Administrative Decision [Code Civ. Proc. § 1094.5Gov. Code § 11523] of Medical Board of California [Bus. & Prof. Code §§ 2087, 2230(a)]--Denial of License or Admission to Licensing Examination
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION FOR WRIT OF MANDATE TO SET
_____ California Medical	)	ASIDE
Board,	)	_____ [*specify, e.g.,*
Respondent.	)	DENIAL OF LICENSE]
	)	

Petitioner respectfully represents:

1. Petitioner is, and at all times herein-mentioned was, a resident of _____ County, California.

2. On or about _____ [*date*], petitioner _____ [successfully took the examination required for licensure as a physician and surgeon *or* applied to respondent Division of Licensing for admission to the examination for a physician's and surgeon's certificate]. _____ [A copy of petitioner's application is

included in the transcript of the hearing subsequently held by petitioner (see item no. 6, below) which is attached as Exhibit A and incorporated by reference *or* A copy of petitioner's application is attached as Exhibit A and incorporated by reference].

[*EITHER, if petitioner is seeking licensure as a new physician*]

2. Petitioner meets all of the requirements for _____ [admission to the certification examination *or* receiving a physician's and surgeon's certificate] in that petitioner has successfully completed the courses of preprofessional and professional training required for licensure as a physician and surgeon at schools approved by respondent division and has satisfactorily completed a one-year postgraduate training program at a hospital approved by respondent division.

[*OR, if petitioner is seeking a certificate based on reciprocity*]

2. Petitioner is presently licensed to practice medicine in the state of _____ [*specify state*] and meets all requirements for _____ [receiving a certificate based on reciprocity *or* admission to the oral and comprehensive examination administered to applicants for a reciprocity certificate who are not exempt from such examination].

3. Respondent is the Medical Board of California, and is an administrative agency of the State of California charged by law with the duty of implementing the provisions of *Business and Professions Code Sections 2050 through 2075*, and Sections 2220 through 2317, insofar as they relate to the granting or denial of a physician's and surgeon's certificate, and of determining eligibility of applicants for receiving a physician's and surgeon's certificate.

4. Under *Business and Professions Code Sections 2004, 2084, 2087*, and *2221*, respondent has discretion to determine whether on the facts cause exists for _____ [denying a physician's and surgeon's certificate *or* rejecting an application for admission to the certification examination], and particularly whether _____ [*specify alleged facts constituting cause for denial of license or of admission to the examination, e.g.,* that an applicant has been convicted of a crime substantially related to the practice, qualifications, and functions of a physician and surgeon].

5. Pursuant to Business and Professions Code Section 2230, Government Code Sections 11500 and 11529, and the decisional law of this state, respondent division is required to hold a hearing and take evidence in its proceedings for the determination of those facts.

6. On _____ [*date*], at _____ [*specify place of hearing*], a hearing was held to receive evidence on the issue of whether or not cause exists for _____ [denying petitioner a physician's and surgeon's certificate *or* rejecting petitioner's application for admission to the certification examination]. Petitioner attended the hearing.

7. On _____ [*date*], petitioner received respondent's decision and order finding that _____ [*specify findings, e.g.,* petitioner was guilty of unprofessional conduct in that petitioner has been convicted of a crime substantially related to the practice, qualifications, and functions of a physician]. Pursuant to its findings respondent ordered that _____ [petitioner be denied a physician's and surgeon's certificate *or* petitioner's application for admission to the certifying examination be rejected *or* petitioner be granted a physician's and surgeon's certificate subject to the following conditions _____ (*specify conditions to which certification is subject*)]. A copy of the notice of decision is attached as Exhibit _____ and incorporated by reference.

8. _____ [A verbatim transcript of the record of the hearing, containing the evidence received, is contained in Exhibit A *or* The substance of the evidence at the hearing is as follows: _____ (*describe substance of evidence*)].

9. Respondent's decision and order are invalid for the following reasons:

[*In subparagraphs that follow, state reasons why decision is invalid, such as the following*]

a. At the hearing the _____ [committee *or* panel *or* hearing officer *or* administrative law judge] found that _____ [*state all findings*]. Respondent does not have authority to deny petitioner _____ [admission to the examination *or* an unrestricted physician's and surgeon's certificate] based on any of these findings because such findings do not show that _____ [*specify statutory ground for action taken, e.g.,* the crime of which petitioner was convicted was substantially related to the practice, qualifications, or functions of a physician and surgeon] or that any other grounds exist for respondent's action.

b. The evidence received at the hearing does not support the finding for the following reasons: _____ [*specify, e.g.,* the evidence as to the circumstances surrounding the committing of the crime do not show that the crime was one which is substantially related to the practice, qualifications, and functions of a physician and surgeon].

c. _____ [*In this and following subparagraphs, allege any other reasons for invalidity of decision under Code Civ. Proc. § 1094.5, such as action by respondent without or in excess of authority, denial of a fair hearing, or abuse of discretion established by a failure to proceed as required by law or failure of the findings to support the decisions. For examples of such allegations, see the petition for writ of mandate to review an administrative decision in Ch. 474C, Procedures in Reviewing Agency Decisions*].

[10. *If appropriate, add:* Petitioner has relevant evidence which _____ (petitioner could not in the exercise of reasonable diligence produce at the hearing because _____ (*specify why evidence could not be produced*) *or* was excluded from the hearing on the purported ground that _____ (*specify*). Exclusion of this evidence from the hearing was improper in that _____ (*specify why exclusion was improper*)). The substance of this evidence is as follows: _____ (*summarize evidence*). This evidence shows that _____ (*state what evidence will show, e.g.,* the criminal offenses of which petitioner was convicted were mere youthful indiscretions and that petitioner's subsequent record shows that petitioner is not unfit to practice medicine by reason of having committed such youthful indiscretions).]

[11. *If petitioner is claiming attorney's fees under Gov. Code § 800, add:* As an incident of bringing and maintaining this proceeding, petitioner has become, and is, obligated personally to pay to his or her attorney, _____ (*name*), attorney's fees _____ (exceeding $7,500 *or* in the sum of $_____).]

12. Petitioner has exhausted all of his or her administrative remedies, as alleged above, and the decision of respondent has become final insofar as respondent is presently concerned.

13. Petitioner has no plain, speedy, or adequate remedy in the ordinary course of law in that the law provides no other means by which petitioner can require respondent to set aside its decision.

WHEREFORE, petitioner prays judgment as follows:

[1. *If alternative writ procedure is used, add:* For an alternative writ of mandate directing respondent to set aside its order of _____ (*date*), denying petitioner _____ (a physician's and surgeon's certificate *or* admission to the certification examination) and to _____ (reconsider whether petitioner

is entitled to be _____ (certified as a physician and surgeon *or* admitted to the certification examination) *or* _____ (issue petitioner a physician's and surgeon's certificate *or* admit petitioner to the certification examination)) or in the alternative to show cause why a peremptory writ of mandate to the same effect should not be issued.]

2. For a peremptory writ of mandate _____ [*set out terms of proposed peremptory writ at length as in Paragraph 1 of this prayer, omitting words relating to order to show cause*];

[3. For reasonable attorney's fees, in addition to any other relief granted or other costs awarded;]

4. For costs of suit herein incurred [*add, if appropriate:* including $_____ for preparation of administrative record]; and

5. For such other further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

CAUTION:

This petition must be verified [*Code Civ. Proc. § 1086*]. If an alternative writ is sought proof of service of a copy of the petition on each respondent and real party in interest must accompany the petition when it is offered for filing, except when, in its discretion and for good cause, the court has granted the application for the writ ex parte [*Code Civ. Proc. § 1107*]. When no alternative writ is sought, such proof of service need not accompany the application for a writ at the time of filing, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*]. Memoranda also customarily accompany a petition for writ of mandate filed in superior court, although the statutes do not contain any language expressly requiring them [*see Cal. Rules of Ct., Rule 3.1113(a)* (re notices of motion); *see also* discussion and forms in Ch. 417, *Points and*

Authorities].

[2] Use of Form

This form is a petition for a writ of mandate for use by an applicant for a physicians's and surgeon's certificate to obtain judicial review of an administrative decision to deny the applicant admission to the examination or a physician's and surgeon's certificate.

In an action by an applicant who has been denied a license for unprofessional conduct or has been denied admission to the licensing examination, the court proceeds under *Code Civ. Proc. § 1094.5*, which provides for administrative mandate to inquire into the validity of any final administrative order or decision made as the result of a proceeding in which a hearing was required [*see Bus. & Prof. Code § 2087*; *Savelli v. Board of Medical Examiners (1964) 229 Cal. App. 2d 124, 132, 40 Cal. Rptr. 171 , cert. denied, 380 U.S. 934, 85 S. Ct. 940, 13 L. Ed. 2d 821]* .

The petitioner may proceed by either the alternative writ procedure or the noticed application procedure, as described below.

For a more detailed discussion of petitions for writs of mandate to review administrative decisions, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

[3] Alternative Writ Procedure

If petitioner proceeds by the alternative writ procedure, he or she should prepare a petition, an order for issuance of an alternative writ (if local rules and practice so require), and an alternative writ of mandate. He or she must serve a copy of the petition on each respondent and real party in interest, and file the petition along with proof of service [*see Code Civ. Proc. § 1107*]. At the time of filing the petition, the alternative writ is deposited, but not filed, with the clerk of the court. Five days after the filing of the petition, the court must examine the papers on file and either issue or decline toissue the alternative writ. During the five-day period, the respondent or real party in interest may file a memorandum of points and authorities in opposition to the issuance of the writ, and serve a copy of the memorandum on the petitioner [*see Code Civ. Proc. § 1107*].

If the court decides to issue the alternative writ, the judge either signs the order for issuance or signs the writ itself. A copy of the writ is then served on respondent and real party in interest in the same manner as a summons [*see Code Civ. Proc. § 1096*]. The alternative writ commands the respondent to either do the specified act or to appear at a time and place specified in the writ and show cause why a peremptory writ of mandate ordering respondent to do the act should not be issued [*see Code Civ. Proc. § 1087*].

For a form for an alternative writ of mandate, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[4] Noticed Application Procedure

If petitioner follows the noticed application procedure, he or she should prepare a petition and a notice fixing a time, at least 10 days after the notice, and a place for hearing the petition [*see Code Civ. Proc. § 1088*]. Copies of these papers are then served on the respondent and real party in interest and the petition and notice are then filed along with proof of service [*see Code Civ. Proc. § 1107*]. Respondent or real party in interest may file points and authorities in opposition to the petition within five days after the filing of the petition [*see Code Civ. Proc. § 1107*]. No alternative writ is issued under the noticed application procedure. Instead, the court hears the petition and respondent's answer, if any, on the date fixed by the notice for the hearing. If the court determines that issuance of a writ of mandate is proper, it issues or orders issued, the peremptory writ [*see Code Civ. Proc. §§ 1086, 1088, 1089, 1094*].

For a form for a notice of application for a writ of mandate, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[5] Allegations

The petition alleges:

- Capacity and residence of petitioner (Paragraph 1).

- Facts showing petitioner's beneficial interest in administrative decision by respondent which petitioner is questioning [*Code Civ. Proc. § 1086*; *see Grant v. Board of Medical Examiners (1933) 232 Cal. App. 2d 820, 828, 43 Cal. Rptr. 270]. (Paragraph 2)* .

- Capacity of respondents (Paragraph 3).

- The discretionary authority of respondent to determine whether cause exists to refuse to admit petitioner to the physician's and surgeon's licensing examination [*see Code Civ. Proc. § 1094.5(a)*; *Bus. & Prof. Code §§ 2004, 2084, 2087, 2221*] (Paragraph 4).

- That a hearing was required to be held and evidence taken [*see Code Civ. Proc. § 1094.5(a)*; *Bus. & Prof. Code § 2230*; *Gov. Code §§ 11500-11528*] (Paragraph 5).

- Facts regarding the holding of the hearing (Paragraph 6).

- Reasons for the invalidity of the decision [*see Code Civ. Proc. § 1094.5(b)*; *discussion under § 414.150[6]*] (Paragraph 9).

- When appropriate, the nature of any additional relevant evidence that could not, in the exercise of reasonable diligence, have been produced at the administrative hearing, or was improperly excluded from the hearing by respondents [*see Code Civ. Proc. § 1094.5(e)*] (Paragraph 10).

- When appropriate, the amount of attorney's fees claimed under *Gov. Code § 800* [*see discussion under § 414.150[12]*] (Paragraph 11).

- Exhaustion of administrative remedies [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 291-296, 109 P.2d 942] (Paragraph 12)* .

- Petitioner's lack of a speedy, plain, or adequate remedy in the ordinary course of law [*see Code Civ. Proc. § 1086*] (Paragraph 13).

For a detailed discussion of the essential allegations of a petition for writ of mandate to review an administrative decision, see *Ch. 474C, Procedures in Reviewing Agency Decisions, § 474C.90[2]* et seq.

[6] Grounds for Finding Decision Invalid

The decision of an administrative agency made as a result of an evidentiary hearing required by law may be invalid under *Code Civ. Proc. § 1094.5* for any of the following reasons [*see Code Civ. Proc. § 1094.5(b)*; *see also* Paragraph 9]:

- The agency proceeded without, or in excess of, jurisdiction, as for instance when a division of the Division of Licensing acted to the detriment of a licensee or applicant for licensure as a physician and

surgeon for reasons other than those prescribed by law.

- Petitioner was denied a fair hearing [*see King v. Board of Medical Examiners (1944) 65 Cal. App. 2d 644, 651, 151 P.2d 282]* .

- The agency abused its discretion. Abuse of discretion by the agency is established if (1) the agency did not proceed in the manner required by law, (2) the decision is not supported by the findings made by the agency at the hearing, or (3) the findings are not supported by the evidence received at the hearing.

[7] Standard of Review

The trial court may not exercise its independent judgment in reviewing the decision to deny the applicant a license or refuse to admit petitioner to the licensing examination for cause, but must apply the substantial evidence test [*Bus. & Prof. Code § 2087*; *Savelli v. Board of Medical Examiners (1964) 229 Cal. App. 2d 124, 132, 40 Cal. Rptr. 171 , cert. denied, 380 U.S. 934, 85 S. Ct. 940, 13 L. Ed. 2d 821]* .

The determination of whether or not petitioner's conduct showed moral turpitude, however, is a question of law, to be decided on the basis of undisputed facts, which may be independently decided by the courts regardless of which standard is applicable in reviewing fact findings of the division [*see Yakov v. Board of Medical Examiners (1968) 64 Cal. Rptr. 785 n.7, 435 P.2d 553]* .

[8] Evidence Not Produced at Hearing

Code Civ. Proc. § 1094.5(e) provides that when the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before respondent, it may enter judgment remanding the case to be reconsidered in light of such evidence, or in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit such evidence at the hearing on the writ without remanding the case. *Bus. & Prof. Code § 2087* provides that in cases of license denial, the trial court is not authorized to exercise its independent judgment on the evidence in a mandate proceeding. Thus, although there are no cases on the point, it appears that a petitioner who has evidence that was not produced at the hearing but that satisfies the requirements of *Code Civ. Proc. § 1094.5(e)* is entitled only to a remand of the case to the division, and may not introduce the evidence at the hearing before the trial court.

[9] Time for Filing Petition

When judicial review pursuant to *Code Civ. Proc. § 1094.5* is sought of a decision made pursuant to a proceeding conducted under *Gov. Code §§ 11500 et seq.* (governing administrative proceedings), the petition for writ of mandate must be filed within 30 days after the last day on which reconsideration can be ordered [*Gov. Code § 11523*; *see Gov. Code § 11521* (reconsideration)].

[10] Venue

Legal proceedings against the Medical Board of California must be instituted in Sacramento, San Francisco, Los Angeles, or San Diego. The office of the board is required to be in Sacramento, and the board is authorized to establish suboffices in San Francisco, Los Angeles, and San Diego, or the environs of these cities. The board may also establish such suboffices as it deems necessary [*Bus. & Prof. Code § 2019*].

[11] Verification

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*].

[12] Attorney's Fees

If the action of respondents was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof, in his or her official capacity, petitioner may collect reasonable attorney's fees, computed at $100 per hour, but not to exceed $7,500, from the public entity, if petitioner is personally obligated to pay such fees, in addition to any other relief granted or other costs awarded [*see Gov. Code § 800*] (Paragraph 11).

[13] Cross References

For discussion, forms, and a procedural checklist guide relating to ordinary mandate proceedings, see Ch. 358, *Mandate and Prohibition*

For discussion and forms relating to administrative hearings conducted under the Administrative Procedure Act and judicial review of such hearing by writ of mandate, see Ch. 473, *Public Agency Adjudication* , et seq.

[14] California Points and Authorities

For memoranda for use in mandate proceedings generally, see California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender)

For memoranda for use in mandate proceedings to review administrative decisions made by a division of the Medical Board of California concerning licensing of physicians, see California Points and Authorities, Ch. 176, *Physicians and Surgeons: Licensing and Professional Discipline* (Matthew Bender)

For memoranda for use in mandate proceedings to review an administrative decision made as the result of an adjudicatory hearing, see California Points and Authorities, Ch. 195, *Public Administrative Law* (Matthew Bender)

[15] State Statutes

Review of denial of physician's and surgeon's certificate or admission to licensing examination. *Bus. & Prof. Code § 2087*

Denial of physician's and surgeon's certificate for unprofessional conduct. *Bus. & Prof. Code §§ 2220 et seq.*

Proceedings for denial of physician's and surgeon's certificate governed by *Gov. Code § 11500 et seq.* (administrative trials). *Bus. & Prof. Code § 2230*

Issuance of writ of mandate generally. *Code Civ. Proc. §§ 1084-1086*

Form of writ. *Code Civ. Proc. § 1087*

Alternative writ and notice procedure. *Code Civ. Proc. § 1088*

Answer to alternative writ or notice. *Code Civ. Proc. § 1089*

Administrative mandate. *Code Civ. Proc. § 1094.5*

Service of writ. *Code Civ. Proc. § 1096*

Proof of service of petition; opposing points and authorities. *Code Civ. Proc. § 1107*

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 414 PHYSICIANS: LICENSING AND DISCIPLINE
PART V. FORMS
A. Licensing

36-414 California Forms of Pleading and Practice--Annotated §§ 414.151-414.169

[Reserved]

§§ 414.151[Reserved]

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 414 PHYSICIANS: LICENSING AND DISCIPLINE
PART V. FORMS
B. Professional Discipline

36-414 California Forms of Pleading and Practice--Annotated § 414.170

§ 414.170 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Set Aside Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523; Bus. & Prof. Code §§ 2230(a), 2337]--Discipline for Unprofessional Conduct

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Set Aside Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523; Bus. & Prof. Code §§ 2230(a), 2337]--Discipline for Unprofessional Conduct

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	
Petitioner,	)	
vs.	)	NO. _____
California Medical Board,	)	PETITION FOR WRIT OF MANDATE TO SET
Respondent(s).	)	ASIDE ORDER IMPOSING DISCIPLINE
	)	
	)	

Petitioner respectfully represents:

1. Petitioner is, and at all times herein mentioned was, a resident of _____ County, California.

2. Petitioner is now, and at all times herein mentioned was, the holder of a valid physician's and surgeon's certificate duly issued by the Medical Board of California.

3. Respondent is the Medical Board of California, and is an administrative agency of the State of California charged by law with the duty of implementing the provisions of *Business and Professions Code Sections 2220 through 2319* and of investigating and hearing cases of possible unprofessional conduct by holders of the physician's and surgeon's certificate and imposing discipline, including suspension or revocation of the certificate, on holders of the certificate who have been found guilty of unprofessional conduct.

4. Under *Business and Professions Code Sections 2004* and *2220*, respondent has discretion to determine on the facts whether or not cause exists for imposing discipline on a physician for unprofessional conduct, and particularly whether _____ [*specify alleged facts constituting cause for imposition of discipline, e.g.,* a licensee has been convicted of a crime substantially related to the practice, qualifications, and functions of a physician and surgeon].

5. [*Requirement of a hearing. See § 414.150, Paragraph 5.*]

6. On _____ [*date*], at _____ [*specify place of hearing*], a hearing was held to receive evidence on the issue of whether or not cause exists for disciplining petitioner for unprofessional conduct. Petitioner attended the hearing.

7. On _____ [*date*], petitioner received respondent's decision and order finding petitioner guilty of unprofessional conduct on the ground that _____ [*specify ground for finding of guilt, e.g.,* petitioner was convicted of a crime substantially related to the practice, qualifications, and functions of a physician]. Pursuant to its findings of fact, respondent ordered that _____ [*specify nature of penalty, e.g.,* petitioner be placed on probation for _____ (*state duration of probation*), subject to the following conditions _____ (*specify conditions of probation, including any restrictions on extent, type, or scope of practice*)]. A copy of the notice of decision is attached as Exhibit A and incorporated by reference.

8. [*Transcript of hearing record or statement of substance of evidence. See § 414.150, Paragraph 8.*]

9. Respondent's decision and order are invalid for the following reasons:

[*In subparagraphs that follow, state reasons why decision is invalid, such as the following:*]

a. The _____ [*identify, e.g.,* administrative law judge] found that _____ [*state all findings*]. Respondent does not have the authority to impose professional discipline on petitioner based on any of these findings because such findings do not show that _____ [*specify statutory basis for action taken, e.g.,* the crime for which petitioner was convicted was substantially related to the practice, qualifications, or functions of a physician and surgeon] or that any other grounds exist for respondent's action.

b. [*Allegation that evidence does not support findings. See § 414.150, Paragraph 9(b).*]

c. [*Other allegations of invalidity under Code Civ. Proc. § 1094.5. See § 414.150, Paragraph 9(c).*]

10. [*Offer of additional evidence not introduced at hearing. See § 414.150, Paragraph 10. If seeking to introduce additional evidence before the trial court on review, state reasons why evidence cannot be heard by respondent on reconsideration.*]

[11. *If petitioner seeks a stay of operation of the order or decision, add:* For the reasons stated in Paragraph 9 of this petition (*if appropriate, add* and in light of the additional evidence summarized in Paragraph 10 of this petition) it is unlikely that respondent will prevail ultimately on the merits in this proceeding, and the public interest would not be hurt by a stay of the operation of respondent's decision and order pending the outcome of this proceeding in that

_____ (*specify reasons why public interest would not be hurt by stay, e.g.,* petitioner's continuing to practice medicine during the course of these proceedings would not represent a danger to his/her patients or to the public).]

12. [*Allegation supporting claim of attorney's fees. See § 414.150, Paragraph 11.*]

13. [*Allegation that petitioner has exhausted all administrative remedies. See § 414.150, Paragraph 12.*]

14. [*Allegation that petitioner has no adequate remedy in the ordinary course of law. See § 414.150, Paragraph 13.*]

WHEREFORE, petitioner prays judgment as follows:

1. [*If alternative writ procedure is used add,* For an alternative writ of mandate directing respondent to set aside its order of _____ (*date*), _____ (revoking *or* suspending *or* restricting *or describe any other conditions imposed on petitioner's right to practice medicine*) petitioner's right to practice medicine and to _____ (reconsider whether petitioner's right to practice medicine should be _____ (revoked *or* suspended *or* restricted *or* subject to _____ (*describe conditions*)) *or* reinstate petitioner's full rights to practice medicine as they existed before that order was issued) or in the alternative to show cause why a peremptory writ of mandate to the same effect should not be issued.]

2. For a peremptory writ of mandate _____ [*set out terms of proposed peremptory writ at length as in Paragraph 1 of this prayer, omitting words relating to order to show cause*];

[3. *If petitioner seeks a stay of operation of the administrative order or decision, state:* For an order restraining respondent from giving effect to its order of _____ (*date*), _____ (*specify effect of order, as in Paragraph 1*) until further order of this court and to show cause why operation of that order should not be stayed pending judgment in this proceeding;]

4. For reasonable attorney's fees, in addition to any other relief granted or other costs awarded;

5. For costs of suit herein incurred [*add if appropriate:* including $_____ for preparation of administrative record]; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 414.150.*]

[2] Use of Form

This form is a petition for writ of mandate for use by a holder of a physician's and surgeon's certificate to obtain review of an administrative decision by the Medical Board to revoke or suspend the holder's certificate, or otherwise discipline

the holder for unprofessional conduct. Administrative mandate is the procedure to be used when the decision to impose discipline for unprofessional conduct is the result of an evidentiary hearing required by law. For further discussion, see *§ 414.75[1]*.

The petitioner may proceed by either the alternative writ procedure or the noticed application procedure, *see § 414.150*.

For a detailed discussion of petitions for writ of mandate to review administrative decisions, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

Bus. & Prof. Code § 2337 mandates review of final decisions by the superior court through use of a petition for an extraordinary writ.

[3] Allegations

This petition alleges:

- Capacity and residence of petitioner (Paragraph 1).

- Facts showing petitioner's beneficial interest in the administrative decision by respondent of which petitioner is complaining [*see Code Civ. Proc. § 1086*; *Grant v. Board of Medical Examiners (1965) 232 Cal. App. 2d 820, 827, 43 Cal. Rptr. 270] (Paragraph 2)* .

- Capacity of respondents (Paragraph 3).

- The discretionary authority of respondent Medical Board to determine whether cause exists to discipline petitioner for unprofessional conduct [*Bus. & Prof. Code §§ 2004, 2220*; *see Code Civ. Proc. § 1094.5(a)*] (Paragraph 4).

- That a hearing was required to be held and evidence taken [*Bus. & Prof. Code § 2230(a)*; *see Code Civ. Proc. § 1094.5(a)*; *Gov. Code § 11500 et seq.*] (Paragraph 5).

- Facts regarding the holding of the hearing (Paragraph 6).

- Reasons for the invalidity of the decision [*see Code Civ. Proc. § 1094.5(b)*; discussion under *see § 414.150[6]*] (Paragraph 9).

- When appropriate, the nature of any additional relevant evidence that could not, in the exercise of reasonable diligence, have been produced at the administrative hearing, or was improperly excluded from the hearing by respondents [*see Code Civ. Proc. § 1094.5(e)*; *Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 110-111, 62 Cal. Rptr. 274 , appeal dismissed, 390 U.S. 410, 88 S. Ct. 1112, 19 L. Ed. 2d 1272 (1968)]* (Paragraph 10).

- If petitioner seeks a stay, an allegation that respondent is unlikely to prevail on the merits and that sty of respondent's decision will not harm the public interest [*see Code Civ. Proc. § 1094.5(h)(1)*] (Paragraph 11).

- When appropriate, the amount of attorney's fees claimed under *Gov. Code § 800* [*see see § 414.150[12]*] (Paragraph 12).

- Exhaustion of administrative remedies [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d*

280, 291-296, 109 P.2d 942] (Paragraph 12) .

- Petitioner's lack of a speedy, plain, or adequate remedy in the ordinary course of law [*see Code Civ. Proc. § 1086*] (Paragraph 14).

For a more detailed discussion of the essential allegations of a petition for writ of mandate to review an administrative decision, see *Ch. 474C, Procedures in Reviewing Agency Decisions, § 474C.90[2]* et seq.

[4] Evidence Not Produced at Hearing

The trial court may hear evidence that was not presented at the hearing only if (1) petitioner could not have produced the evidence at the hearing in the exercise of reasonable diligence, or (2) the evidence was improperly excluded from the hearing by the Division or hearing authority [*see Code Civ. Proc. § 1094.5(e)*; *Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 110-111, 62 Cal. Rptr. 274 , appeal dismissed, 390 U.S. 410, 88 S. Ct. 1112, 19 L. Ed. 2d 1272 (1968)* ; Paragraph 11].

The court may also remand the case to the Board for consideration of any evidence not presented at the hearing that satisfied requirements (1) and (2), *above* [*see Code Civ. Proc. § 1094.5(e)*].

[5] Standard of Review

The trial court reviewing the decision of the Medical Board to discipline the holder of a physician's and surgeon's certificate for unprofessional conduct must exercise its independent judgment of the evidence in determining whether petitioner was properly subject to discipline in the first instance [*see Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 69, 64 Cal. Rptr. 785, 435 P.2d 553* ; discussion in *§ 414.75[3]*]. However, if it finds that petitioner was properly subject to discipline, the trial court may not overturn the penalty imposed by the Board unless the Board has shown a manifest abuse of discretion in determining the penalty [*Magit v. Board of Medical Examiners (1961) 57 Cal. 2d 74, 87, 17 Cal. Rptr. 488, 366 P.2d 816* ; *Windham v. Board of Medical Quality Assurance (1980) 104 Cal. App. 3d 461, 473, 163 Cal. Rptr. 566* ; *see § 414.113[4][b]*].

[6] Stay of Operation

Code Civ. Proc. § 1094.5(h)(1) provides that a stay of an order by an agency charged with regulating the healing arts may not be imposed or continued unless the court is satisfied that (1) the public interest shall not suffer, and (2) the agency is unlikely to prevail ultimately on the merits [*see Code Civ. Proc. § 1094.5(h)(1), (2)*; *Board of Medical Quality Assurance v. Superior Court (1980) 114 Cal. App. 3d 272, 276, 170 Cal. Rptr. 468]* . More than a mere showing that the accused has a possible viable defense is needed to meet the requirement of satisfying the court that the Board is unlikely to prevail on the merits [*Board of Medical Quality Assurance v. Superior Court (1980) 114 Cal. App. 3d 272, 276, 170 Cal. Rptr. 468* ; *see Medical Bd. of California v. Superior Court (1991) 227 Cal. App. 3d 1458, 1461-1462, 278 Cal. Rptr. 247]* .

The requirements for a stay of an order or decision by the Medical Board of California are more stringent than those for a stay of orders or decisions of most other agencies. Thus, *Code Civ. Proc. § 1094.5(g)* provides only that no stay of the order or decision of an agency not covered by *Code Civ. Proc. § 1094.5(h)* may be issued if the court is satisfied that it is against the public interest. This disparity of requirements was held not to be a violation of the equal protection principles of either the California or federal constitutions [*see Board of Medical Quality Assurance v. Superior Court (1980) 114 Cal. App. 3d 272, 276, 170 Cal. Rptr. 468* (construing powers of Board of Medical Quality Assurance, the predecessor of Medical Board of California)].

Proof of service of a copy of the application for a stay on the respondent must accompany the application [*see Code Civ.*

Proc. § 1094.5(h)(1)].

[7] Trial Setting Preference

Notwithstanding any other provision of law, superior court review of a decision revoking, suspending, or restricting a license will take preference over all other civil actions in the matter of setting the case for hearing or trial. The hearing or trial in the matter may be set no later than 180 days from the filing of the action. A showing of good cause is required for the granting of a further continuance [*Bus. & Prof. Code § 2337*].

[8] State Statutes

Causes for discipline and types of discipline that may be imposed. *Bus. & Prof. Code § 2221 et seq.*

Disciplinary proceedings by medical quality panels. *Bus. & Prof. Code §§ 2330-2337*; *Gov. Code §§ 11371 et seq., 11529*

Introduction on mandate of evidence not presented at administrative hearing. *Code Civ. Proc. § 1094.5(e)*

[9] Decisions

Trial court has duty on mandate to undertake independent review of evidence before disciplinary authority. *Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 69, 64 Cal. Rptr. 785, 435 P.2d 553*

Independent review of evidence before disciplinary authority by trial court in reviewing disciplinary authority's decision on mandate does not amount to full trial de novo in which litigant may present skeleton case before lower tribunal and save full case for relitigation on review. *Dare v. Board of Medical Examiners (1943) 21 Cal. 2d 790, 795, 136 P.2d 304* (decided before enactment of *Code Civ. Proc. § 1094.5*); *Shakin v. Board of Medical Examiners (1967) 254 Cal. App. 2d 102, 110-111, 62 Cal. Rptr. 274 , appeal dismissed, 390 U.S. 410, 88 S. Ct. 1112, 19 L. Ed. 2d 1272 (1968)*

Trial court's independent review of disciplinary decision of Division by trial court limited to review of findings that would justify discipline in first instance; propriety of penalty imposed once discipline found to be justified as vested in discretion of Division, subject to be overturned in case of manifest abuse. *Windham v. Board of Medical Quality Assurance (1980) 104 Cal. App. 3d 461, 473, 163 Cal. Rptr. 566*

[10] Cross References

For a related form, *see § 414.150*.

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B. Professional Discipline

36-414 California Forms of Pleading and Practice--Annotated § 414.171

§ 414.171 Allegation--For Petition of Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Set Aside Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523; Bus. & Prof. Code §§ 2230(a), 2337]--Discipline for Unprofessional Conduct--Remand for Redetermination of Penalty Proper Because Board's Findings Partially Overturned

[1] FORM Allegation--For Petition of Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Set Aside Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523; Bus. & Prof. Code §§ 2230(a), 2337]--Discipline for Unprofessional Conduct--Remand for Redetermination of Penalty Proper Because Board's Findings Partially Overturned

If _____ [any of the counts for which respondent found petitioner guilty of unprofessional conduct *or* any findings that respondent made, regardless of whether such findings were necessary for respondent's decision] are found to be invalid, this case should be remanded to respondent for redetermination of penalty, even if respondent's basic decision that petitioner was guilty of some unprofessional conduct is found to be valid because [*if appropriate, state:* respondent imposed its penalty for all of the counts together and] it is impossible to determine the extent to which respondent relied on those findings which have been found to be invalid in determining which penalty to impose on petitioner.

[2] Use of Form

This allegation is for use in a petition for writ of mandate to review the administrative decision of the Medical Board to revoke or suspend a physician's license or impose other discipline. It may be inserted as a subparagraph of Paragraph 9 in *see § 414.170*.

This allegation states that the case should be remanded to the Board for redetermination of penalty if any of the findings of the Board are found to be invalid, even if enough findings are found valid to support the Board's basic decision that petitioner is guilty of some unprofessional conduct, because it is impossible to determine the extent to which the Board relied on the invalid findings in determining the penalty [*see O'Reilly v. Board of Medical Examiners (1967) 66 Cal. 2d 381, 389, 58 Cal. Rptr. 7, 426 P.2d 167 , cert. denied, 390 U.S. 944, 88 S. Ct. 1019, 19 L. Ed. 2d 1132 (1968)* ; *Cooper v. State Bd. of Medical Examiners (1950) 35 Cal. 2d 242, 252, 217 P.2d 630]* . The allegation may be made to

support an argument for remand stated in the alternative, along with more direct attacks on the Board's finding that petitioner was guilty of unprofessional conduct.

For a discussion of the restricted standard of review of the penalty imposed once the basic decision to impose discipline has been upheld, see *§ 414.172[3]*.

[3] Remand if Decision Partially Overturned

Cases have been remanded for redetermination of penalty in the following circumstances: (1) when the findings of guilt as to some but not all of the counts of unprofessional conduct with which petitioner was charged were found to be invalid, and the Board had imposed the penalty for all of the counts taken together [*Cooper v. State Bd. of Medical Examiners (1950) 35 Cal. 2d 242, 252, 217 P.2d 630]* ; and (2) when the Board, in addition to finding that petitioner had engaged in unprofessional conduct, made a finding that petitioner's conduct showed moral turpitude and the additional finding of moral turpitude was found to be invalid [*Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 69, 75, 64 Cal. Rptr. 785, 435 P.2d 553]* .

However, remand was not required, even though some of the counts on which the respondent had found petitioner guilty were overturned, when the respondent had imposed a separate penalty for each count [*Grannis v. Board of Medical Examiners (1971) 19 Cal. App. 3d 551, 563, 96 Cal. Rptr. 863]* . Nor may a trial court remand the case for redetermination of penalty on its own finding that petitioner has shown no moral turpitude when the board had made no affirmative finding that petitioner had shown moral turpitude in making its decision [*Collins v. Board of Medical Examiners (1972) 29 Cal. App. 3d 439, 444-445, 105 Cal. Rptr. 634]* .

[4] Cross References

For a related form, *see § 414.172*.

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36-414 California Forms of Pleading and Practice--Annotated § 414.172

§ 414.172 Allegation--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Set Aside Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523; Bus. & Prof. Code §§ 2230(a), 2337]--Discipline for Unprofessional Conduct--Penalty Imposed as Excessive

[1] FORM Allegation--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Set Aside Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523; Bus. & Prof. Code §§ 2230(a), 2337]--Discipline for Unprofessional Conduct--Penalty Imposed as Excessive

If any findings that are supported by evidence do show that _____ [*specify statutory ground for action taken, e.g.,* petitioner employed or aided and abetted unlicensed persons in practicing medicine] respondents' imposing the penalty of _____ [*specify penalty, e.g.,* _____ (revocation *or* suspension) of petitioner's physician's and surgeon's certificate *or other penalty*] was a manifest abuse of discretion because such penalty is clearly excessive in light of _____ [*specify circumstances which show penalty to be excessive, e.g.,* petitioner's good faith belief that he/she was entitled to employ such unlicensed physicians under existing law].

[2] Use of Form

This allegation is for use in a petition for writ of mandate to review the administrative decision of the Medical Board to revoke or suspend a physician's license or impose other discipline. It may be inserted as a subparagraph of Paragraph 9 in *see § 414.170*.

This allegation states that even if petitioner was guilty of the unprofessional conduct with which he or she was charged, the penalty imposed is excessive, and that imposition of such an excessive penalty was manifest abuse of discretion [*see O'Reilly v. Board of Medical Examiners (1967) 66 Cal. 2d 381, 388, 58 Cal. Rptr. 7, 426 P.2d 167 , cert. denied, 390 U.S. 944, 88 S. Ct. 1019, 19 L. Ed. 2d 1132 (1968)* ; *Magit v. Board of Medical Examiners (1961) 57 Cal. 2d 74, 88, 17 Cal. Rptr. 488, 366 P.2d 816]* . This allegation may be made to support an argument for remand stated in the alternative along with more direct attacks on the finding that petitioner was guilty of unprofessional conduct.

[3] Restricted Standard of Review for Penalty Determination

Unlike the determination of whether petitioner is guilty of unprofessional conduct in the first place, determination of the penalty once guilt has been established is within the discretion of the Medical Board. The penalty imposed will be overturned only in case of manifest abuse of discretion by the Board [*see Magit v. Board of Medical Examiners (1961) 57 Cal. 2d 74, 87, 17 Cal. Rptr. 488, 366 P.2d 816]* .

[4] Penalty Excessive in Light of Good Faith

The Supreme Court has overturned orders suspending a physician's license and held that any penalty more severe than probation would be inappropriate when the physician, although guilty of unprofessional conduct in employing qualified but unlicensed persons to practice medicine, had believed in good faith that he was permitted to employ such persons [*O'Reilly v. Board of Medical Examiners (1967) 66 Cal. 2d 381, 388, 58 Cal. Rptr. 7, 426 P.2d 167 , cert. denied, 390 U.S. 944, 88 S. Ct. 1019, 19 L. Ed. 2d 1132 (1968)* ; *Magit v. Board of Medical Examiners (1961) 57 Cal. 2d 74, 88, 17 Cal. Rptr. 488, 366 P.2d 816]* .

For a further discussion of judicial review of the penalty imposed by the Division, see *§ 414.75[5]*.

[5] Cross References

For a related form, *see § 414.171*.

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 414 PHYSICIANS: LICENSING AND DISCIPLINE
PART V. FORMS
B. Professional Discipline

36-414 California Forms of Pleading and Practice--Annotated § 414.173

§ 414.173 Allegation--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Set Aside Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523; Bus. & Prof. Code §§ 2230(a), 2337]--Discipline for Unprofessional Conduct [Bus. & Prof. Code § 2230]--Failure to Show That Conduct Is Related to Practice of Medicine

[1] FORM Allegation--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Set Aside Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523; Bus. & Prof. Code §§ 2230(a), 2337]--Discipline for Unprofessional Conduct [Bus. & Prof. Code § 2230]--Failure to Show That Conduct Is Related to Practice of Medicine

Respondent has ordered that _____ [petitioner's physician's and surgeon's certificate be _____ (revoked *or* suspended) *or specify other penalty*] for _____ [*specify statutory grounds, e.g.,* use of alcohol to an extent dangerous to himself/herself, to the public, or to any other person]. Respondent has no authority to discipline petitioner on this ground because there has been no showing that the quality of petitioner's services to his/her patients is, or will in the future be, affected by such conduct, and such conduct is neither of such a nature as to call petitioner's moral character into question nor otherwise related to the practice of medicine.

[2] Use of Form

This allegation is for use in a petition for writ of mandate to review the administrative decision of the Medical Board to discipline a physician. It may be inserted as a subparagraph of Paragraph 9 in *see § 414.170*.

It alleges that the Board is without authority to discipline petitioner because there was no showing that petitioner's alleged misconduct affects his or her qualification or ability to practice medicine. A physician cannot be disciplined for unprofessional conduct unless the physician's conduct affects his or her qualification or ability to practice medicine [*Grannis v. Board of Medical Examiners (1971) 19 Cal. App. 3d 551, 561-562, 96 Cal. Rptr. 863* ; *see 16 Cal. Code Reg. § 1360*; *Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 73, 64 Cal. Rptr. 785, 435 P.2d 553]* . However, the requirement of showing relatedness to qualification or ability to practice may be satisfied by a showing of moral unfitness in view of the importance of integrity and trust to the physician-patient relationship as well as by a showing of technical incompetence or unfitness [*see Matanky v. Board of Medical Examiners (1978) 79 Cal. App. 3d*

293, 305, 144 Cal. Rptr. 826] . The requirement may also be satisfied by a finding that a possible future unfitness to practice may result from petitioner's conduct [*see Grannis v. Board of Medical Examiners (1971) 19 Cal. App. 3d 551, 563, 96 Cal. Rptr. 863]* . There need be no separate showing of relatedness to petitioner's qualification or ability to practice medicine if petitioner is found guilty of violating any of the statutes defining unprofessional conduct involving drugs, since in view of the importance of physicians in the dissemination of drugs the Legislature was entitled to conclude that sanctions of physicians for drug related offenses is warranted [*see Weissbuch v. Board of Medical Examiners (1974) 41 Cal. App. 3d 924, 929, 116 Cal. Rptr. 479]* .

For further discussion of the requirement that the physician's conduct be related to the physician's fitness to practice medicine in order to be the basis for imposing discipline, see § 414.[3][h].

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36-415 California Forms of Pleading and Practice--Annotated 415.syn

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[2] Res Ipsa Loquitur

[3] Standard of Care

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[b] Specialists Versus General Practitioners

[c] Expert Testimony

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[b] To Third Persons

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[1] Basis for Battery or Negligence Action

[2] Scope of Disclosure

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[b] Changes in Applicable Law Effective July 1, 2000

[c] Requirements for Nonliability Applicable Before July 1, 2000

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[b] Rescue Teams

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[11] Compliance With Competent Adult Patient's Refusal of Medical Treatment

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§ 415.42 Actions by Minors: Preference in Setting Trial Date

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§ 415.46 Claims Arising Under Medicare Act

§ 415.47 Statute of Limitations

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[2] Effect of Notice Requirement on Statute of Limitations

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[5] Contract Actions

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[4] Periodic Payment of Future Damages

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§ 415.51 Arbitration

§ 415.52 Fees by Plaintiffs' Attorneys

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§ 415.71 California Deposition and Discovery Practice

§ 415.72 California Rules of Court

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[1] Arbitration

[2] Attorney's Fees

[3] Consent to Medical Treatment

[a] Emergencies

[b] Medical Experimentation

[c] Minors and Incompetents

[4] Damages

[5] Declaratory Relief

[6] Emergency Medical Services

[7] Independent Contractor

[8] Judgment Lien

[9] Limitations on Liability

[a] Emergencies

[b] Non-Emergencies

[10] Negligence

[a] Generally

[b] Res Ipsa Loquitur

[c] Violation of Statute

[d] Professional Negligence

[e] Statutory Duties

[11] Notice of Intent to Commence Action

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[6] Damages

[7] Duty of Care

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[8] Emotional Distress

[9] Evidence

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[11] Informed Consent

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[a] Generally

[b] Causation

[c] Pleading Medical Negligence

[d] Selection of Method of Diagnosis or Treatment

[e] Standard of Care

[i] Generally

[ii] Specialists Versus General Practitioner

[f] Violation of Statute

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[15] Paramedics

[16] Patient Instruction

[17] Psychotherapists

[18] Res Ipsa Loquitur

[a] In General

[b] Requirement of Expert Testimony

[19] Special Verdicts

[20] Statute of Limitations

[a] In General

[b] Commencement of Limitation Period

[i] One-Year Period

[ii] Three-Year Period

[c] Minors

[d] Notice of Intention to Commence Action

[e] Public Entities

[f] Retroactivity

[g] Tolling

[i] In General

[ii] Foreign Body Exception

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§ 415.77 Text References

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[2] Use of Form

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[4] Method of Service

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[6] Unnamed Defendants

[7] Effect of Failure to Comply

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§ 415.91 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Medical Negligence [Civ. Code § 1714]--By Patient Against Physician--Judicial Council Complaint for Personal Injury with General Negligence Attachment--Cal. Judicial Council Forms PLD-PI-001, PLD-PI-001(2)

[1] FORM

[2] Use of Form

[3] Notice Requirements

[4] Filling Out Complaint Form

[a] In General

[b] Specification of Amount of Damages

[5] Filling Out General Negligence Attachment

[6] Verification

[7] Cross References

[8] State Statutes

[a] Commencing Action

[b] Damages

[c] Health Care Provider

[d] Professional Negligence

[9] Decisions

§ 415.92 Complaint for Damages [Civ. Code § 3333] Based on Medical Negligence [Civ. Code § 1714(a)]--Personal Injury--By Patient Against Physicians and Physicians' Employees--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Notice Requirement

[5] Specification of Amount of Damages

[6] Decisions

[7] Cross References

§ 415.93 Complaint for Damages [Civ. Code § 3333] Based on Medical Negligence [Civ. Code § 1714(a)]--Combined Wrongful Death Action [Code Civ. Proc. § 377.60] and Survival Action [Code Civ. Proc. § 377.30]--By Personal Representative of Decedent Against Physician--General Form

[1] FORM

[2] Use of Form

[3] Wrongful Death Action

[4] Survival of Actions

[5] Joinder or Consolidation of Actions

[6] Allegations

[7] State Statutes

[8] Decisions

[9] Cross References

§ 415.94 Proceedings for Order Permitting Filing of Amended Pleading Seeking Punitive Damages Against Health Care Provider [Code Civ. Proc. § 425.13]--Notice of Motion [Code Civ. Proc. § 1010] and Supporting Declaration [Code Civ. Proc. § 2015.5]

[1] FORM

[2] Use of Form

[3] Time for Making Motion

[4] Supporting Declarations and Affidavits

[5] State Statutes

[6] Decisions

[7] Cross References

§ 415.95 Proceedings for Order Permitting Filing of Amended Pleading Seeking Punitive Damages Against Health

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[1] FORM

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[3] Cross References

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[1] FORM

[2] Use of Form

[3] Pleading Punitive Damages

[4] State Statutes

[5] California Rules of Court

[6] Cross References

§ 415.97 Allegation--Physician's Duty to Warn Patient of Treatment--Related Hazards Ascertained After Treatment Rendered

[1] FORM

[2] Use of Form

[3] Duty to Warn

[4] Statute of Limitations

[5] State Statutes

§ 415.98 Allegation--Physician's Failure to Obtain Patient's Informed Consent--Action in Negligence

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[2] Use of Form

[3] Causation

[4] State Statutes

[5] Decisions

§ 415.99 Allegations for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714]--By Patient Against Physician, Physician's Employees, Hospital and Hospital Employees--Injury to Patient While

Under Anesthesia--Res Ipsa Loquitur

[1] FORM

[2] Use of Form

[3] Judicial Council Pleading Forms

[4] Res Ipsa Loquitur

[5] State Statutes

[6] Decisions

§ 415.100 Allegations--Personal Injury Caused by Physician's Performance of Unauthorized Treatment

[1] FORM

[2] Use of Form

[3] Judicial Council Pleading Forms

[4] Notice of Intent to Commence Action

[5] Damages

[6] State Statutes

§ 415.101 Allegation--Plaintiff's Failure to Discover Negligent Cause of Injury Due to Continuing Physician-Patient Relationship With Defendant

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

§ 415.102 Answer to Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Medical Negligence [Civ. Code § 1714]--Plaintiff's Comparative Negligence--Cal. Judicial Council Form PLD-PI-003

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

§ 415.103 Request for Judgment Ordering That Future Damages Be Paid in Periodic Payments [Code Civ. Proc. § 667.7]

[1] FORM

[2] Use of Form

[3] Timeliness

[4] Definitions

[5] State Statutes

[6] Decisions

§ 415.104 Judgment Ordering Payment of Future Damages by Periodic Payments [Code Civ. Proc. § 667.7]

[1] FORM

[2] Use of Form

§ 415.105 Petition to Modify Judgment Ordering That Future Damages Be Paid in Periodic Payments--Death of Judgment Creditor [Code Civ. Proc. § 667.7(c)]

[1] FORM

[2] Use of Form

§ 415.106 Order Modifying Payment of Future Damages After Death of Judgment Creditor [Code Civ. Proc. § 667.7(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 415.107 Complaint for Damages [Civ. Code § 3333] for Sexual Contact [Civ. Code § 43.93]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Procedure

[5] Therapeutic Deception

[6] Cross References

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Chapter 415 PHYSICIANS: MEDICAL MALPRACTICE
PART I. SCOPE

36-415 California Forms of Pleading and Practice--Annotated § 415.01

§ 415.01 Scope of Chapter

This chapter discusses and contains forms for use in actions against physicians and other health care providers for professional negligence, and against physicians in particular for rendering services without consent or for breach of contract regarding a particular result of treatment. This chapter includes a form of notice required prior to commencement of actions based on professional negligence [*see § 415.90*]. It also includes a sample of the Judicial Council form of complaint for personal injury with an attachment for general negligence [*see § 415.91*], a general form of complaint for malpractice based on negligence [*see § 415.92*], a form of complaint based on negligence for wrongful death combined with a survival action [*see § 415.93*], forms for use in securing a court order granting leave to amend a complaint to allege punitive damages [*see §§ 415.94 -415.92*.7], and forms of allegations pertaining to the physician's failure to warn the patient of dangers ascertained subsequent to treatment [*see § 415.97*], to the physician's failure to obtain informed consent to treatment [*see § 415.98*], to use of the res ipsa loquitur doctrine to prove defendant's negligence [*see § 415.99*], and to the physician's performance of unauthorized treatment [*see § 415.100*], and to relief from the one-year statute of limitations based on the continuing physician-patient relationship [*see § 415.101*].

This chapter also contains a sample of the Judicial Council form of answer alleging plaintiff's comparative negligence [*see § 415.102*], and forms relating to the option of periodic rather than lump-sum payment of future damages [*see §§ 415.103 -415.106*].

For forms for use in actions against hospitals for medical malpractice, see Ch. 295, *Hospitals* . For forms for use in actions against dentists for medical malpractice, see Ch. 209, *Dentists* .

The discussion and forms in this chapter refer primarily to malpractice on the part of physicians and surgeons. However, current statutes enacted pursuant to the Medical Injury Compensation Reform Act of 1975 (Stats. 1975, 2d Ex. Sess., chs. 1, 2) which govern procedural aspects of medical negligence actions, apply equally to all health care providers as defined by these statutes. For an enumeration of the statutes enacted or amended pursuant to the 1975 act that relate to medical negligence actions, and for a definition of "health care provider," see *§ 415.10*.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesDoctor-Patient PrivilegeWaiverGovernmentsLegislationStatutes of LimitationsGeneral OverviewHealthcare LawActions Against Healthcare WorkersGeneral OverviewHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawActions Against Healthcare WorkersSurgeonsHealthcare LawTreatmentPatient ConsentInformed ConsentTortsMalpractice & Professional LiabilityGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsNegligenceProofGeneral OverviewTortsWrongful Death & Survival ActionsGeneral Overview

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36-415 California Forms of Pleading and Practice--Annotated § 415.02

§ 415.02 Cross References

For discussion and forms relating to abortion and sterilization operations, see Ch. 4, *Abortion and Birth Control Methods* .

For discussion and forms relating to arbitration, see Ch. 30, *Using Alternative Dispute Resolution* , et seq..

For discussion and forms relating to informed consent and battery by a physician, see Ch. 58, *Assault and Battery* .

For discussion and forms relating to medical malpractice actions against dentists, see Ch. 209, *Dentists* .

For discussion and forms relating to wrongful death actions, see Ch. 181, *Death and Survival Actions* .

For discussion and forms relating to actions against owners and operators of ambulances, see Ch. 246, *Emergency Vehicles* .

For discussion and forms relating to medical malpractice actions against hospitals and hospital employees, see Ch. 295, *Hospitals* .

For discussion and forms relating to the confinement and medical treatment of mentally disordered persons, see Ch. 304, *Insane and Other Incompetent Persons* .

For discussion and forms related to insurance for hospital and medical expenses, see Ch. 308, *Insurance* .

For forms relating to civil actions by minors, proceedings under Prob. Code § 1444 (court consent to medical care of minor when parent or guardian whose consent is required for such care is unavailable) and actions by parents for personal injuries of a minor child, see Ch. 367A, *Minors: Tort Actions* , and Ch. 394, *Parent and Child* , respectively.

For discussion and forms relating to negligence actions generally, see Ch. 380, *Negligence* .

For discussion and forms relating to ostensible agency and the liability of a principal for the acts of an agent, see Ch. 427, *Principal and Agent* .

For discussion, a procedural guide, and forms relating to actions against public health care facilities and employees under the California Tort Claims Act, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

For discussion and forms relating to the use of expert witnesses, see Ch. 551, *Trial* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActApparent AuthorityGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsGeneral OverviewHealthcare LawActions Against FacilitiesGeneral OverviewHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawTreatmentPatient ConsentGeneral OverviewHealthcare LawTreatmentPatient ConsentInformed ConsentTortsIntentional TortsAssault & BatteryGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsWrongful Death & Survival ActionsGeneral Overview

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PART I. SCOPE

36-415 California Forms of Pleading and Practice--Annotated §§ 415.03-415.09

[Reserved]

§§ 415.03[Reserved]

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Chapter 415 PHYSICIANS: MEDICAL MALPRACTICE
PART II. LEGAL BACKGROUND
A. Liability

36-415 California Forms of Pleading and Practice--Annotated § 415.10

§ 415.10 Governing Law and Definitions

The substantive principles of medical malpractice actions based on negligence are governed, as in other negligence actions, by *Civ. Code § 1714(a)*. Certain immunities from actions based on negligent rendering of medical services are provided by *Bus. & Prof. Code §§ 2395-2398*, *2727.5*, and *2861.5*; *Civ. Code §§ 43.9* and *1714.8*; *Gov. Code §§ 845.6*, *855.6*, *855.8*, and *856.6*; *Health & Safety Code §§ 429.36*, *1317*, and *7190.5*; and *Veh. Code § 165.5*.

Reporting requirements pertaining to arbitration or settlement awards are set forth by *Bus. & Prof. Code §§ 801-803.2*.

In 1975, the Medical Injury Compensation Reform Act was passed in response to escalating malpractice premium costs [Stats. 1975, 2d Ex. Sess., chs. 1, 2]. Several statutes governing procedural aspects of medical professional negligence actions against physicians and other health care providers were enacted or amended pursuant to the act. These include *Bus. & Prof. Code § 6146*, limiting attorney's fees; *Civ. Code §§ 3333.1* and *3333.2*, relating to proof and recovery of damages; *Code Civ. Proc. § 340.5*, the statute of limitations; *Code Civ. Proc. § 364*, providing a 90 day notice period before commencing the action; *Code Civ. Proc. § 667.7*, governing the periodic payment of future damages; *Code Civ. Proc. § 674.7*, pertaining to judgment liens; and *Code Civ. Proc. § 1295*, governing the arbitration of medical malpractice claims. In addition, *Code Civ. Proc. § 425.13*, enacted in 1987 [Stats. 1987, ch. 1498, § 7], forbids including a claim for punitive damages in a complaint or other pleading against a health care provider and prescribes the procedure for claiming such damages.

The statutes in the Medical Reform Act define the terms "health care provider" and "professional negligence" as follows:

"Health care provider" means any person licensed or certified pursuant to *Bus. & Prof. Code §§ 500-4905* (practitioners of healing arts, including veterinarians), or licensed pursuant to the Osteopathic Act [Stats. 1923, p. xciii, Deering's Bus. & Prof. Code Appendix II, West's *Bus. & Prof. Code §§ 3600-1-3600-5*], or the Chiropractic Initiative Act [Stats. 1923, p. lxxxviii, Deering's Bus. & Prof. Code Appendix I, West's *Bus. & Prof. Code §§ 1000-1-1000-20*], or licensed pursuant to *Health & Safety Code § 1200 et seq.* (health facilities, including hospitals). "Health care provider" includes the legal representative of a health care provider. Medical students and other medical professionals who are authorized

to practice in California, but who are specifically exempt from license or certificate requirements, are considered health care providers subject to MICRA [*Chosak v. Alameda County Medical Center (2007) 153 Cal. App. 4th 549, 567, 63 Cal. Rptr. 3d 184* (MICRA statute of limitations applicable to action against optometry student)]. Similarly, an unlicensed social worker who is registered with the appropriate agency and working toward licensure is a health care provider under MICRA [*Prince v. Sutter Health Central (2008) 161 Cal. App. 4th 971, 974, 74 Cal. Rptr. 3d 750*].

"Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that the services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital. For these purposes, "personal injury" covers only injury that impairs the well-being or mental or physical health of the plaintiff, and the term does not cover purely economic injury [*Vazquez de Mercado v. Superior Court (2007) 148 Cal. App. 4th 711, 715-716, 55 Cal. Rptr. 3d 889]* .

The provisions of MICRA do not apply to a judgment rendered in an action based on failure to summon medical assistance pursuant to *Gov. Code § 845.6* (prisoner in need of immediate medical care) and medical malpractice, even though plaintiff's case also included theories of professional negligence, if plaintiff pleaded and pursued the failure to summon medical care theory [*Flores v. Natividad Med. Ctr. (1987) 192 Cal. App. 3d 1106, 1116, 238 Cal. Rptr. 24]* .

In addition to the statutes noted above, *Bus. & Prof. Code §§ 801-803.2* govern reporting requirements for reporting judgments or arbitration awards of any amount, as well as settlements in excess of $30,000, arising from any type of medical malpractice action.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsHealthcare LawActions Against Healthcare WorkersGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewTortsMalpractice & Professional LiabilityGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceGeneral OverviewTortsWrongful Death & Survival ActionsCausation

California Forms of Pleading and Practice--Annotated

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 415 PHYSICIANS: MEDICAL MALPRACTICE
PART II. LEGAL BACKGROUND
A. Liability

36-415 California Forms of Pleading and Practice--Annotated § 415.11

§ 415.11 Negligence

[1] Pleading Medical Negligence

Medical negligence, like other negligence actions, may be pleaded in general terms. It is sufficient, at least with respect to withstanding a general demurrer, to allege that certain treatment was negligently administered by defendant to plaintiff's damage without alleging in what respect the treatment may have been deficient [*Stafford v. Shultz (1954) 42 Cal. 2d 767, 774, 270 P.2d 1]* .

The essential allegations in a medical negligence action which should be pleaded are the physician-patient relationship giving rise to the physician's duty of care, defendant's act or omission which breached the duty of care, the element of causality between that act or omission and plaintiff's resultant injury, and actual damages [*see Stafford v. Shultz (1954) 42 Cal. 2d 767, 774-775, 270 P.2d 1* ; *Keene v. Wiggins (1977) 69 Cal. App. 3d 308, 312, 138 Cal. Rptr. 3]* .

Any distinction that may exist between professional and ordinary negligence has no bearing on the substantive standard of conduct governing a health care provider's actions. A health care provider's medical expertise and skill is merely a factor that affects the standard of care governing a negligence action, and a single set of facts therefore cannot give rise to separate and distinct claims for ordinary and professional negligence [*Flowers v. Torrance Mem'l Hosp. Med. Ctr. (1994) 8 Cal. 4th 992, 998-1001 35 Cal. Rptr. 2d 685, 884 P.2d 142]* .

[2] Res Ipsa Loquitur

In order to recover in a medical negligence action, the plaintiff must establish that defendant's act or omission was the actual and proximate cause of the injuries complained of [*Keen v. Prisinzano (1972) 23 Cal. App. 3d 275, 279, 100 Cal. Rptr. 82]* . It is common in malpractice actions that plaintiff is unable to testify directly as to the defendant's conduct due to partial or total unconsciousness. In such cases, the doctrine of res ipsa loquitor may be applied to create an inference that the proximate cause of plaintiff's injury was some negligence on the part of the defendant [*see Clark v. Gibbons (1967) 66 Cal. 2d 399, 410, 58 Cal. Rptr. 125, 426 P.2d 525]* .

The doctrine of res ipsa loquitur applies when the plaintiff establishes that (1) his or her injury is the kind that would not

ordinarily occur in the absence of someone's negligence, (2) the injury was caused by an agency or instrumentality in the exclusive control of the defendant, and (3) no voluntary conduct by plaintiff was a responsible cause of the injury [*Evid. Code § 646*; *Bardessono v. Michels (1970) 3 Cal. 3d 780, 788, 788 n. 5, 91 Cal. Rptr. 760, 478 P.2d 480]* .

For a general discussion of the res ipsa loquitur doctrine, see Ch. 380, *Negligence* . For a thorough discussion of the doctrine's application in medical malpractice actions, see Ch. 295, *Hospitals* .

For a form of allegation relating to the use of the res ipsa loquitur doctrine in proving medical negligence, *see § 415.99*.

[3] Standard of Care

[a] Generally

Physicians are held to that degree of skill, knowledge, and care ordinarily possessed and exercised by members of the medical profession under similar circumstances [*Bardessono v. Michels (1970) 3 Cal. 3d 780, 788, 91 Cal. Rptr. 760, 478 P.2d 480]* . This standard applies equally to both the diagnosing and treatment of a patient's condition [*Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 975, 95 Cal. Rptr. 381]* .

[b] Specialists Versus General Practitioners

Specialists are held to the standard of care ordinarily exercised by other specialists in the same field of medicine [*Quintal v. Laurel Grove Hosp. (1964) 62 Cal. 2d 154, 159-160, 41 Cal. Rptr. 577, 397 P.2d 161* ; *Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 975-976, 95 Cal. Rptr. 381]* .

Accordingly, a general practitioner's conduct is analyzed by the standard of care exercised by other prudent general practitioners. In the event that the general practitioner attempts a specialized diagnosis or treatment, his or her conduct is first evaluated by whether or not a reasonable general practitioner, taking into consideration such factors as the patient's mental and emotional condition and known financial situation, would have brought in a specialist [*Sinz v. Owens (1949) 33 Cal. 2d 749*]. If so, the general practitioner may then be found liable for negligence in failing to refer, and the treatment of the patient is then analyzed according to the standard of care required of specialists in the field [*Simone v. Sabo (1951) 37 Cal. 2d 253, 257-258, 231 P.2d 19]* . The standard of care which would have been applied by a reasonable general practitioner under the circumstances must be established by expert testimony [*Seneris v. Haas (1955) 45 Cal. 2d 811, 829, 291 P.2d 915]* .

[c] Expert Testimony

The appropriate standard of care in a malpractice action must be established by expert testimony unless the conduct required by the particular circumstances is within common lay knowledge [*Folk v. Kilk (1975) 53 Cal. App. 3d 176, 185, 126 Cal. Rptr. 172]* . However, when a duty to disclose is imposed by statute or regulation, it is prejudicial error to require a jury to determine the standard of care governing that duty exclusively from expert testimony [*Daum v. SpineCare Med. Group, Inc. (1997) 52 Cal. App. 4th 1285, 1294, 61 Cal. Rptr. 2d 260]* . The defendant's own testimony may be used to establish a prima facie case of negligence [*Robinson v. Pediatric Affiliates Med. Group, Inc. (1979) 98 Cal. App. 3d 907, 910, 159 Cal. Rptr. 791]* .

To testify as an expert, a witness need not be a medical doctor or a specialist in the particular area of medicine under inquiry. The test for qualification is whether or not the witness has sufficient professional knowledge, learning, and experience pertaining to the subject and the applicable standard of care to allow him or her to testify with authority [*Seneris v. Haas (1955) 45 Cal. 2d 811, 833, 291 P.2d 915* ; *Chadock v. Cohn (1979) 96 Cal. App. 3d 205, 208-209, 157 Cal. Rptr. 640]* . For example, a psychiatrist with some clinical experience in surgery and infectious diseases was held competent to give expert testimony on the issue of whether or not a plastic surgeon was negligent in failing to administer antibiotics to a patient receiving a breast implant [*Miller v. Silver (1986) 181 Cal. App. 3d 652, 659-661,*

226 Cal. Rptr. 479] .

An expert need not be practiced in the same geographic area as the defendant to be qualified to testify, so long as he or she can testify to the practice in a similar community [*Sinz v. Owens (1949) 33 Cal. 2d 749, 753, 205 P.2d 3* ; *see, e.g., Avivi v. Centro Medico Urgente Medical Center (2008) 159 Cal. App. 4th 463, 470-472, 71 Cal. Rptr. 3d 707* (doctor in Israel could testify in suit brought in Southern California as to standard of care for treating broken arm)].

For further discussion of the qualifications and testimony of expert witnesses, see Ch. 551, *Trial* .

[4] Duty of Care

[a] To Patient

The existence of an express or implied physician-patient relationship gives rise to the physician's duty to exercise reasonable care toward the patient. This duty is determined on a case-by-case basis and varies with the relationship of the parties, the foreseeability of harm stemming from the physician's conduct, and the degree of reliance the patient may reasonably be expected to place on the physician's opinion. For example, no physician-patient relationship and resultant duty of care arise when a physician examines a person solely for the purpose of making a report to a workers' compensation insurance carrier and does not offer or intend to treat the person examined [*Keene v. Wiggins (1977) 69 Cal. App. 3d 308, 313, 138 Cal. Rptr. 3* ; *see also Felton v. Schaeffer (1991) 229 Cal. App. 3d 229, 234-235, 238, 279 Cal. Rptr. 713* (physician hired by employer to examine job applicant solely for purposes of preemployment physical examination had no duty of care to patient with regard to misdiagnosis that resulted in lost job opportunity)].

For discussion regarding a psychotherapist's duty of care to suicidal patients, see Ch. 304, *Insane and Other Incompetent Persons* .

[b] To Third Persons

Because a physician's duty of care usually extends only to the physician's patient, a party who is not a patient of the physician, but is seeking to recover from the physician for negligence, must establish some basis for imposing a duty on the physician that extends to that party [*see Shin v. Kong (2000) 80 Cal. App. 4th 498, 503-504, 95 Cal. Rptr. 2d 304]* . In one case, for example, the husband of a patient was unable to establish a legal basis for recovering from the patient's physician for his actions in artificially inseminating the patient without the husband's consent, because the husband was not the physician's patient and there was no other cognizable basis for imposing a duty on the physician that would extend to the husband [*see Shin v. Kong (2000) 80 Cal. App. 4th 498, 504-512, 95 Cal. Rptr. 2d 304]* .

Under limited circumstances, a duty of care may extend beyond the physician-patient relationship. A physician may be liable to a third party for the failure to warn the patient or the third party about a health condition of the patient that might bring about a lapse of consciousness [*Myers v. Quesenberry (1983) 144 Cal. App. 3d 888, 890, 894, 193 Cal. Rptr. 733* (person injured by driver in diabetic coma may recover from physician who failed to warn diabetic not to drive while medically uncontrolled)]. Physicians and surgeons are required by statute to report the names of patients 14 years of age or older who have been diagnosed as having a disorder that may bring about a lapse of consciousness [*Health & Safety Code § 410(a)*]. A violation of the statute creates a rebuttable presumption of negligence and may give rise to liability to third parties for injury caused by the patient's affliction [*see Lopez v. Southern Cal. Permanente Med. Group (1981) 115 Cal. App. 3d 673, 680, 171 Cal. Rptr. 527]* .

Several cases have discussed whether a psychotherapist may be liable for professional negligence to a person who is not the therapist's patient. In one case, for example, the court of appeal held that a psychotherapist owes no duty of care to the parent of an adult patient arising from the therapist's treatment of the patient regarding allegedly false recovered memories of childhood sexual abuse [*Trear v. Sills (1999) 69 Cal. App. 4th 1341, 1343, 82 Cal. Rptr. 2d 281]* .

Absent an assumption of duty, the duty of psychotherapists to exercise due care generally runs to the patients who hire them [*Trear v. Sills (1999) 69 Cal. App. 4th 1341, 1348, 1350, 82 Cal. Rptr. 2d 281]* . Although the court in that case recognized that harm to a falsely accused abuser would be foreseeable [*see Trear v. Sills (1999) 69 Cal. App. 4th 1341, 1346-1348, 82 Cal. Rptr. 2d 281]* , the court concluded that foreseeability alone was insufficient and that imposing a duty that runs to the parent would create a divided loyalty in the therapist, who would be unable to properly explore the possibility that the patient's problems were related to repressed memories of childhood abuse for fear of liability to the alleged abuser [*Trear v. Sills (1999) 69 Cal. App. 4th 1341, 1350-1352, 82 Cal. Rptr. 2d 281]* . The court also stressed, however, that its holding was limited to treatment of adult patients, because treatment of a minor child raises additional concerns as to who actually hired the therapist and whether a duty might run to a parent on that basis [*Trear v. Sills (1999) 69 Cal. App. 4th 1341, 1344 n.4, 82 Cal. Rptr. 2d 281]* . Other cases have imposed a duty on psychotherapists that runs to third parties. For discussion of a psychotherapist's duty to warn third persons of a patient's violent behavior, see Ch. 304, *Insane and Other Incompetent Persons* .

One California court of appeal has held that a health care provider who treats a patient with a communicable disease has a duty to warn the patient or the patient's family of the dangers of contagion [*Reisner v. Regents of Univ. of Cal. (1995) 31 Cal. App. 4th 1195, 1197-1198, 37 Cal. Rptr. 2d 518]* . In that case, a 12-year-old girl was given a blood transfusion and the following day her doctor learned that the blood had been tainted with the HIV virus. The doctor failed to notify the girl or her family, however, even though he continued to treat her. Three years later, the girl started dating the plaintiff and the two began having sex. Two years after that, the doctor told the girl that she had AIDS, and the girl then told her boyfriend. One month later, the girl died, and shortly thereafter the plaintiff learned he was HIV-positive. The plaintiff sued the doctor and others for negligence, but the trial court granted summary judgment for the defendants on the grounds that they owed no duty to the plaintiff [*Reisner v. Regents of Univ. of Cal. (1995) 31 Cal. App. 4th 1195, 1197-1198, 37 Cal. Rptr. 2d 518]* . The court of appeals reversed, concluding that because of the special relationship between a physician and patient, a doctor has a duty to control the conduct of a patient or warn the patient or members of the patient's family of the risks of certain behavior when harm to a third person is reasonably foreseeable [*Reisner v. Regents of Univ. of Cal. (1995) 31 Cal. App. 4th 1195, 1198-1199, 37 Cal. Rptr. 2d 518]* . Under the facts of that case, it made no difference to the court that the identity of the third party was unknown and in fact unknowable at the time the tainted blood was discovered. It was reasonably foreseeable that as the girl grew into maturity she would engage in intimate relations that would pose a great health risk to her partners, whoever those partners happened to be [*Reisner v. Regents of Univ. of Cal. (1995) 31 Cal. App. 4th 1195, 1200-1201, 37 Cal. Rptr. 2d 518]* .

The Supreme Court has held that a physician may owe a duty to a nonpatient who suffers emotional distress as a direct victim of the physician's negligence toward a patient, if injury to that person as a result of the negligence is reasonably foreseeable [*Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 923, 167 Cal. Rptr. 831, 616 P.2d 813* (husband may recover for emotional distress suffered because of misdiagnosis by physician that wife had venereal disease); *see also Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989) 48 Cal. 3d 583, 590-591, 257 Cal. Rptr. 98, 770 P.2d 278* (mother may recover for emotional distress suffered as result of son's molestation by therapist, when therapist had been hired to counsel both mother and son regarding family emotional problems); for general discussion of negligent infliction of emotional distress and specific discussion of who is a direct victim, see Ch. 362, *Mental Suffering and Emotional Distress*]. However, a health care provider has no duty to third persons for economic damages suffered because of the provider's negligence toward a patient [*St. Francis Med. Ctr. v. Superior Court (1987) 194 Cal. App. 3d 668, 239 Cal. Rptr. 765* (mother of deceased patient who is not entitled to bring wrongful death action may not recover from health care provider for economic loss incurred because of need to care for deceased's children); *see Martinez v. County of Los Angeles (1986) 186 Cal. App. 3d 884, 231 Cal. Rptr. 96]* .

When a physician's advice and care to a patient is directly related to the delivery of a healthy child, that child is tantamount to a foreseeable third party beneficiary of the contract between physician and patient to whom the courts have found that a duty of care is owed. Arguably, it would ignore the realities of modern obstetrical practice to deny an infant, as the intended beneficiary of that contractual relationship, independent protection against that same incompetent

medical advice and care. Therefore, because the failure to properly diagnose, test, or disclose alternatives and reasonably foreseeable risks and benefits of treatment will usually result in physical injury to the fetus alone, as opposed to the mother, it is reasonable that a cause of action for negligence belong to the infant [*see Hegyes v. Unjian Enters., Inc. (1991) 234 Cal. App. 3d 1103, 1118-1119, 286 Cal. Rptr. 85* (dictum; minor's unsuccessful action for damages for preconception negligence against tortfeasor responsible for injuries to plaintiff's mother before plaintiff's conception)]. For discussion of causes of action for wrongful life and wrongful birth, see *§ 415.17*.

A physician may also be liable to a person who is not a patient of the physician, if the person is examined by the physician, and in the course of the examination the person is injured due to the negligence of the physician [*Mero v. Sadoff (1995) 31 Cal. App. 4th 1466, 1478, 37 Cal. Rptr. 2d 769]* . In one case, for example, the plaintiff had suffered a workers'compensation injury and was examined by a non-treating doctor at the request of the self-insured employer. During the course of the examination, the plaintiff alleged that she was injured when she was strapped into a mechanism that caused her body to be contorted into damaging positions [*Mero v. Sadoff (1995) 31 Cal. App. 4th 1466, 1470, 37 Cal. Rptr. 2d 769]* . Although no patient-physician relationship was established, the court of appeals held that the doctor could be liable to the plaintiff for negligence in causing injuries to the plaintiff, just as the doctor would be liable to a person who was a paying customer of the doctor [*Mero v. Sadoff (1995) 31 Cal. App. 4th 1466, 1477, 37 Cal. Rptr. 2d 769]* .

[5] Selection of Method of Diagnosis or Treatment

In the absence of an express agreement regarding the outcome of treatment, a physician is not required to guarantee specific results or a cure [*Custodio v. Bauer (1967) 251 Cal. App. 2d 303, 312, 59 Cal. Rptr. 463* ; *see § 415.23*]. Therefore, an error of judgment in choosing among various approved methods of diagnosis or treatment does not give rise to liability for negligence as long as reasonable care was exercised in making the selection [*Barton v. Owen (1977) 71 Cal. App. 3d 484, 502, 139 Cal. Rptr. 494]* . Similarly, the existence of variance in medical opinion regarding the desirability of one particular procedure over another does not establish that the determination to use one of the procedures is negligence [*Meier v. Ross Gen. Hosp. (1968) 69 Cal. 2d 420, 434, 71 Cal. Rptr. 903, 445 P.2d 519]* . However, despite the presence of multiple treatment options, a physician may be liable for performing a surgery that was unnecessary under the appropriate standard of care [*see Tortorella v. Castro (2006) 140 Cal. App. 4th 1, 13, 43 Cal. Rptr. 3d 853* (unnecessary surgery is inherently injurious)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Relationships & TortsTort LiabilityGeneral OverviewHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansTortsNegligenceGeneral OverviewTortsNegligenceDutyAffirmative Duty to ActFailure to ActTortsNegligenceDutyForeseeability of InjuryTortsNegligenceProofGeneral OverviewTortsNegligenceProofCustomMedical CustomsTortsNegligenceProofElementsTortsNegligenceProofViolations of LawStatutesTortsNegligenceStandards of CareGeneral OverviewTortsNegligenceStandards of CareAppropriate StandardGeneral OverviewTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsNegligenceStandards of CareSpecial CareGeneral OverviewTortsNegligenceStandards of CareSpecial CareHighly Skilled Professionals

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§ 415.12 Violation of Statute

Specific duties on the part of physicians and other health care providers have been created by statute. For example, *Health & Safety Code § 103900*(*l*) requires physicians to report persons diagnosed as having disorders marked by lapses of consciousness, *Health & Safety Code § 120250* requires the reporting of infectious disease, *Penal Code § 11161* creates a duty to report injuries inflicted in violation of a penal statute, and *Penal Code § 11166* requires health care practitioners or other persons suspecting an incidence of child abuse to contact a police department, sheriff's department, county probation department (if designated to receive mandated reports), or county welfare department.

In addition to certain criminal penalties that attach to a physician's violation of these statutes, civil liability may also arise pursuant to *Evid. Code § 669*, which provides that violation of a statute may give rise to a rebuttable presumption of a failure to exercise due care under certain circumstances [*see Landeros v. Flood (1976) 17 Cal. 3d 399, 413, 131 Cal. Rptr. 69, 551 P.2d 389* (failure to report child abuse)].

Evid. Code § 669 provides that the failure of a person to exercise due care is presumed if: (1) the person violated a public statute, ordinance, or regulation; (2) the violation proximately caused death or injury; (3) the death or injury resulted from an occurrence the nature of which the law was designed to prevent; and (4) the victim belongs to the class of persons for whose protection the law was adopted [*Evid. Code § 669(a)*]. The plaintiff propounding a jury instruction based on the rebuttable presumption must demonstrate that the four elements of *Evid. Code § 669* are met. The first and second elements, although normally questions of fact for the jury, may be resolved by the court as a matter of law when reasonable minds could not differ as to whether a violation of the law actually occurred or whether the violation proximately caused the plaintiff's injuries. The third and fourth elements must be determined by the court as a matter of law [*see Traxler v. Varady (1993) 12 Cal. App. 4th 1321, 1328, 1329, 16 Cal. Rptr. 2d 297* (request for jury instruction under *Evid. Code § 669* properly denied if proximate cause not established)].

A trial court commits reversible error if an applicable statute, ordinance, or regulation designed to protect the plaintiff establishes a duty of care that was breached, but the trial court refuses to instruct the jury on that statute, ordinance, or regulation and the application of the negligence per se doctrine and requires them to rely only on expert opinion testimony [*Galvez v. Frields (2001) 88 Cal. App. 4th 1410, 1423-1424, 107 Cal. Rptr. 2d 50* (in wrongful life action,

trial court committed reversible error by refusing to instruct jury on regulations governing alpha-fetoprotein testing, which detects neural tube defects in fetus)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationTypes of StatutesHealthcare LawActions Against Healthcare WorkersGeneral OverviewTortsNegligenceProofViolations of LawGeneral OverviewTortsNegligenceProofViolations of LawOrdinancesTortsNegligenceProofViolations of LawStatutes

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36-415 California Forms of Pleading and Practice--Annotated § 415.13

§ 415.13 Informed Consent

[1] Basis for Battery or Negligence Action

Subject to certain exceptions, a physician has the duty to inform the patient in lay terms of the dangers inherently and potentially involved in a proposed medical procedure and to obtain the patient's informed consent prior to performing the procedure [*Cobbs v. Grant (1972) 8 Cal. 3d 229, 243, 104 Cal. Rptr. 505, 502 P.2d 1]* . When a duty to disclose is imposed by statute or regulation, it is prejudicial error to require a jury to determine the standard of care governing that duty exclusively from expert testimony [*Daum v. SpineCare Med. Group, Inc. (1997) 52 Cal. App. 4th 1285, 1294, 61 Cal. Rptr. 2d 260]* . Depending on the facts, the failure to obtain such consent may give rise to either an action for battery or professional negligence.

The physician's performance of a treatment which is substantially different from that for which consent was obtained, or the physician's intentional misrepresentation of the treatment to be performed, gives rise to a battery action [*see Nelson v. Gaunt (1981) 125 Cal. App. 3d 623, 635, 178 Cal. Rptr. 167]* .

For further discussion of the battery theory, see *§ 415.20*. For forms relating to a medical battery action, *see §§ 415.92* and *415.98*.

On the other hand, the physician's failure to use due care in evaluating what information to disclose to the patient, or in determining whether or not the patient has comprehended the explanation, gives rise to an action for negligence [*Cobbs v. Grant (1972) 8 Cal. 3d 229, 240-241, 104 Cal. Rptr. 505, 502 P.2d 1]* .

An action based on lack of informed consent may not be brought against a consultant specialist who never examined the patient personally and whose professional function was confined to rendering advice and guidance to a clinician who consulted the specialist on the patient's behalf [*Townsend v. Turk (1990) 218 Cal. App. 3d 278, 283-287, 266 Cal. Rptr. 821]* . A consultant's violation of the duty to provide adequate information to a treating physician would, however, fall within a cause of action based on basic negligence [*see Townsend v. Turk (1990) 218 Cal. App. 3d 278, 287, 266 Cal. Rptr. 821]* .

A physician is not necessarily immune from liability for failure to obtain informed consent merely because the physician eventually refers a patient to another physician for treatment. In one case, for example, a physician who examined the plaintiff and recommended her for surgery to be performed by another doctor was liable for failing to obtain informed consent. However, the referring physician in that case was more than merely a referring physician, because he was also the owner of the surgical medical group that performed the surgery, which effectively made him the employer of the doctor who actually performed the surgery. In addition, the referring physician was the one who made the diagnosis and discussed the treatment options with the patient, and he was the one who informed the performing surgeon of which procedures to perform [*Quintanilla v. Dunkelman (2005) 133 Cal. App. 4th 95, 118-119, 34 Cal. Rptr. 3d 557* ; *see also Wilson v. Merritt (2006) 142 Cal. App. 4th 1125, 1135-1137, 48 Cal. Rptr. 3d 630* (question of fact existed as to whether physician who evaluated and advised patient owed duty to obtain informed consent for procedure to be performed by another doctor)].

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For specific disclosure and consent requirements relating to treatment of a patient with a DMSO preparation, see *Bus. & Prof. Code § 4211.5*.

For a form of allegation relating to the physician's failure to obtain an informed consent, see *§ 415.100*.

[2] Scope of Disclosure

The scope of required disclosure is measured by the amount of knowledge each patient needs to make an informed choice. All facts which are not commonly appreciated and which are material to the patient's decision should be explained [*McKinney v. Nash (1981) 120 Cal. App. 3d 428, 440, 174 Cal. Rptr. 642]* . Thus, the physician need not discuss relatively minor risks inherent in common procedures when it is common knowledge that such risks rarely occur, other than to determine whether or not the treatment is contraindicated for the particular patient [*Cobbs v. Grant (1972) 8 Cal. 3d 229, 244, 104 Cal. Rptr. 505, 502 P.2d 1]* .

In a medical malpractice action based on lack of informed consent, the plaintiff must prove that the undisclosed information was material [*see Mathis v. Morrissey (1992) 11 Cal. App. 4th 332, 345-347, 13 Cal. Rptr. 2d 819* (rejecting jury instruction shifting burden to defendant)]. The test of materiality is objective; that is, whether or not a reasonable person in the patient's position would regard the information as significant when deciding whether to accept or reject the recommended procedure. Materiality may be expanded beyond the objective standard if the physician

knows or should know of a patient's unique concerns or lack of familiarity with medical procedure which requires further explanation [*Truman v. Thomas (1980) 27 Cal. 3d 285, 291, 165 Cal. Rptr. 308, 611 P.2d 902]* . Whether or not the minimal disclosure of objectively material information has been made may be determined by the jury without expert testimony. Therefore, expert testimony is not required at trial to establish the duty to disclose risks of death, serious injury, or serious complications [*Betterton v. Leichtling (2002) 101 Cal. App. 4th 749, 754, 124 Cal. Rptr. 2d 644]* . Whether or not proper exercise of care would require disclosure beyond the minimal level, however, must be analyzed by expert witnesses [*Jamison v. Lindsay (1980) 108 Cal. App. 3d 223, 230, 166 Cal. Rptr. 443* ; *see also Betterton v. Leichtling (2002) 101 Cal. App. 4th 749, 755-756, 124 Cal. Rptr. 2d 644* (if beyond knowledge of lay witnesses, expert testimony required to demonstrate that additional, particular risk existed under particular facts)].

When a patient alleges that a physician had a heightened duty of disclosure because the patient suffered from a medical condition which made surgery more risky, expert testimony is necessary to establish that the patient in fact suffered from that condition [*Jambazian v. Borden (1994) 25 Cal. App. 4th 836, 849, 30 Cal. Rptr. 2d 768]* . The *Jambazian* court affirmed a summary judgment in favor of a surgeon who failed to disclose that diabetes heightened the risk of harm associated with post-surgical infection, since the surgeon's evidence indicated that the patient was not diabetic, and the patient's evidence to the contrary consisted solely of his own declaration that he suffered from the disease [*Jambazian v. Borden (1994) 25 Cal. App. 4th 836, 849, 30 Cal. Rptr. 2d 768]* .

The duty to disclose material information may require the physician to reveal the existence of various schools of thought regarding a specific course of treatment. A physician, however, need not discuss various schools of thought if such information is not material. It is error for a trial court to give jury instructions that would impose liability on a physician as a matter of law for the failure to anticipate and reveal the fact that some medical care providers may later disagree with the treating physician's medical recommendation [*see* *Mathis v. Morrissey (1992) 11 Cal. App. 4th 332, 344-345, 13 Cal. Rptr. 2d 819* ; *see also* *Parris v. Sands (1993) 21 Cal. App. 4th 187, 193, 25 Cal. Rptr. 2d 800* (trial court properly refused jury instruction that stated physician had duty to disclose existence of differing schools of thought regarding diagnosis and treatment); *Traxler v. Varady (1993) 12 Cal. App. 4th 1321, 1332, 1329, 16 Cal. Rptr. 2d 297* (instruction properly refused when plaintiff did not show that there were divergent schools of thought concerning any of the decisions made by her treating physicians)].

Regardless of whether a procedure involves treatment or a diagnostic test, the patient must be apprised not only of the risks inherent in the procedure prescribed, but also the risks of a decision not to undergo the treatment, and the probability of a successful outcome of the treatment. If the procedure is risk-free, the physician need only conform to competent medical practice to obtain the patient's consent. If the patient declines the risk-free procedure, the physician must also advise the patient of all material risks of which a reasonable person would want to be informed before deciding not to undergo the procedure. If the test or treatment is risky, the physician should always explain the potential consequences of declining to follow the recommended course of action [*Truman v. Thomas (1980) 27 Cal. 3d 285, 292, 165 Cal. Rptr. 308, 611 P.2d 902* ; *see also* *Moore v. Preventive Medicine Medical Group, Inc. (1986) 178 Cal. App. 3d 728, 223 Cal. Rptr. 859]* .

A physician who recommends a particular treatment must disclose an alternative treatment only if disclosure of that particular alternative procedure is required to meet the standard of care established within the medical profession [*Spann v. Irwin Memorial Blood Centers (1995) 34 Cal. App. 4th 644, 658, 40 Cal. Rptr. 2d 360]* . Moreover, a physician is not liable for failing to disclose the existence of a treatment that cannot legally be administered in the state of California, because an illegal alternative is not "available" within the meaning of the rule given in *Cobbs v. Grant* [*Schiff v. Prados (2001) 92 Cal. App. 4th 692, 694, 112 Cal. Rptr. 2d 171]* .

The duty to inform a patient concerning the risks and benefits of treatment or nontreatment is only triggered when the physician actually recommends treatment or diagnostic tests [*Munro v. Regents of Univ. of Cal. (1989) 215 Cal. App. 3d 977, 986, 263 Cal. Rptr. 878* ; *Scalere v. Stenson (1989) 211 Cal. App. 3d 1446, 1449-1450, 260 Cal. Rptr. 152]* . If a physician believes that a patient is progressing satisfactorily and requires no treatment, there can be no liability under

a theory that the physician failed to disclose material facts necessary for the patient to evaluate his or her condition properly and to seek appropriate care [*see Scalere v. Stenson (1989) 211 Cal. App. 3d 1446, 1449-1453, 260 Cal. Rptr. 152]* . Negligent failure to advise a patient to pursue a potentially necessary course of treatment, however, is actionable under ordinary medical negligence standards [*Vandi v. Permanente Med. Group, Inc. (1992) 7 Cal. App. 4th 1064, 1069-1070, 9 Cal. Rptr. 2d 463* ; *Scalere v. Stenson (1989) 211 Cal. App. 3d 1446, 1453, 260 Cal. Rptr. 152* ; *Jamison v. Lindsay (1980) 108 Cal. App. 3d 223, 231, 166 Cal. Rptr. 443]* .

Prior to the performance of a nonemergency hysterectomy, physicians and surgeons must provide specific information to the patient and obtain verbal and written consent for the procedure [*Health & Safety Code § 1690*]. The information required to be given includes advice that the patient may withhold or withdraw consent to the procedure at any time before the hysterectomy without affecting her right to future care or treatment, and without jeopardizing any right to federal or state funded program benefits; a description of the surgery involved in the procedure and any available alternatives; advice that the procedure is considered irreversible and results in infertility; and a description of the benefits and advantages, as well as the discomforts and risks involved [*see Health & Safety Code § 1690(a)(1)-(5)*]. Failure of a physician or surgeon to follow the informed consent procedures constitutes unprofessional conduct within the meaning of *Bus. & Prof. Code § 2000 et seq.* [*Health & Safety Code § 1691*].

[3] Causation

Plaintiff must establish a causal relation between the physician's failure to inform and the injury suffered. This element is established if a reasonable person in plaintiff's position would have refused to consent to treatment had he or she been properly informed of the risks [*Cobbs v. Grant (1972) 8 Cal. 3d 229, 245, 104 Cal. Rptr. 505, 502 P.2d 1]* . Therefore, it is not plaintiff's burden to establish that he or she would not have consented to the surgery even if adequately informed; this assertion is a defense as to which the defendant has the burden of proof [*Warren v. Schecter (1997) 57 Cal. App. 4th 1189, 1207, 67 Cal. Rptr. 2d 573* ; *see also Cobbs v. Grant (1972) 8 Cal. 3d 229, 245, 104 Cal. Rptr. 505, 502 P.2d 1]* . Plaintiff does not have the burden to establish that he or she would not have consented to the surgery even if adequately informed; this assertion is a defense as to which the defendant has the burden of proof [*Warren v. Schecter (1997) 57 Cal. App. 4th 1189, 1207, 67 Cal. Rptr. 2d 573* (citing *Cobbs v. Grant (1972) 8 Cal. 3d 229, 245, 104 Cal. Rptr. 505, 502 P.2d 1*)].

[4] Continuing Duty to Warn

A physician has a duty to warn a patient of dangerous effects of treatment when, subsequent to treatment, the physician obtains actual knowledge of the danger. Thus, a physician who places a prosthetic device such as a contraceptive shield in a patient has a continuing duty to warn the patient about dangers regarding the device that are ascertained subsequent to insertion [*Tresemer v. Barke (1978) 86 Cal. App. 3d 656, 669, 672, 150 Cal. Rptr. 384* ; *see § 415.97*].

[5] Medical Experimentation

No person may be subjected to any medical experiment unless an informed consent is first obtained from the subject [*Health & Safety Code § 24175(a)*]. Thus, if a patient agrees to the implantation of a fixation device in his back, the defendant's failure to inform the patient of the experimental nature of the device and of the implantation surgery may amount to negligence per se [*Daum v. SpineCare Med. Group, Inc. (1997) 52 Cal. App. 4th 1285, 1294, 61 Cal. Rptr. 2d 260* (trial court erred in refusing plaintiff's request for jury instruction on negligence per se where plaintiff presented sufficient evidence that injury resulted from the kind of occurrence the Protection of Human Subjects in Medical Experimentation Act, *Health & Safety Code § 24170 et seq.*, was designed to prevent; where plaintiff, as patient in clinical investigation, was within class of persons for whose protection laws were enacted; and where plaintiff's evidence of three different statutory and regulatory violations was substantial]. Under certain circumstances, consent may be given by an authorized person other than the subject [*Health & Safety Code § 24175(b)-(e)*]. Specific guidelines for obtaining consent are contained in *Health & Safety Code § 24173*. The statute provides for civil liability up to

$25,000 for willful failure to obtain consent prior to experimentation, and up to $10,000 for negligent failure, in addition to a subject's rights to recover damages under any other applicable law [*Health & Safety Code § 24176*].

Informed consent conforming to the requirements of *Health & Safety Code § 24173* must also be obtained from any patient prior to the administration of experimental drugs [Health & Safety Code §§ 11525, *11530*].

[6] Disclosure of Physician's Personal Interests

A physician seeking a patient's consent for a medical procedure must, to satisfy his or her duty to the patient and to obtain the patient's informed consent, disclose personal interests unrelated to the patient's health, whether research or economic, that may affect his or her medical judgment [*Moore v. Regents of Univ. of Cal. (1990) 51 Cal. 3d 120, 129, 131-132, 271 Cal. Rptr. 146, 793 P.2d 479]* .

A physician's failure to disclose personal interests may give rise to a cause of action for performing medical procedures without informed consent or breach of fiduciary duty [*Moore v. Regents of Univ. of Cal. (1990) 51 Cal. 3d 120, 129, 132, 271 Cal. Rptr. 146, 793 P.2d 479]* . For example, a physician who made a medically indicated decision to recommend removal of a patient's spleen, and who knew that he would reap financial benefit from the scientific use of the removed spleen, was held to be subject to an action for breach of fiduciary duty, or lack of informed consent, based on the physician's failure to disclose that fact when he recommended the splenectomy to the patient [*see Moore v. Regents of Univ. of Cal. (1990) 51 Cal. 3d 120, 132, 271 Cal. Rptr. 146, 793 P.2d 479]* .

[7] Limitations on Duty to Obtain Consent

[a] In General

Although the law regards a patient's right to make an intelligent decision about medical treatment as paramount, there are situations in which the physician's duty to disclose is reduced or eliminated. Disclosure is not required when it is evident that the patient cannot evaluate the data, such as in emergencies or when the patient is a minor or incompetent [*Cobbs v. Grant (1972) 8 Cal. 3d 229, 243, 104 Cal. Rptr. 505, 502 P.2d 1]* .

[b] Emergencies

Emergency situations provide an exception to the requirement of obtaining informed consent. Pursuant to *Bus. & Prof. Code § 2397*, a licensed health care provider is not liable for civil damages for injury or death caused in an emergency situation occurring in the licensee's office or in a hospital, on account of a failure to inform a patient of possible risks if the failure is caused by either (1) the patient's unconsciousness [*Bus. & Prof. Code § 2397(a)(1)*]; (2) a need for immediate treatment and insufficient time to inform the patient fully [*Bus. & Prof. Code § 2397(a)(2)*]; or (3) a need for immediate treatment, a patient's legal incapacity to consent, and insufficient time to obtain consent from a person authorized to give such consent [*Bus. & Prof. Code § 2397(a)(3)*].

The term "emergency situation occurring in the licensee's office" as used in *Bus. & Prof. Code § 2397* is defined as a situation occurring in an office used by a licensee for the examination and treatment of patients that, if not immediately diagnosed and treated, would lead to serious disability or death [*Bus. & Prof. Code § 2397(c)(2)*].

The term "emergency situation occurring in a hospital" as used in *Bus. & Prof. Code § 2397* means a situation occurring in any part of the hospital that requires immediate services for alleviation of severe pain, or immediate diagnosis and treatment of unforseeable medical conditions that would lead to serious disability or death [*Bus. & Prof. Code § 2397(c)(3)*].

Bus. & Prof. Code § 2397 applies only to actions for damages for injuries or death arising from a failure to inform, and not to actions arising from negligence in rendering or failing to render treatment [*Bus. & Prof. Code § 2397(b)*]. For a

discussion of immunity from negligence in diagnosing and treatment in emergency situations, see *§ 415.15[10]*.

[c] Discretion to Withhold Disturbing Information

A patient's particular emotional and mental state may be taken into consideration by a physician in determining the scope of disclosure. Disclosure may thus be limited when the physician reasonably determines that the information would upset the patient to the extent that the patient would be unable to weigh dispassionately the risks of refusing treatment [*Cobbs v. Grant (1972) 8 Cal. 3d 229, 246, 104 Cal. Rptr. 505, 502 P.2d 1* ; *Slater v. Kehoe (1974) 38 Cal. App. 3d 819, 826, 113 Cal. Rptr. 790]* .

[d] Patient's Request Not to Be Informed

A patient's request that he or she not be informed regarding a medical procedure relieves the physician of the duty to disclose [*Cobbs v. Grant (1972) 8 Cal. 3d 229, 245, 104 Cal. Rptr. 505, 502 P.2d 1]* . However, the physician is not obligated to comply with such a request [*Aden v. Younger (1976) 57 Cal. App. 3d 662, 675, 129 Cal. Rptr. 535]* .

[8] Effectiveness of Signed Consent Form

Although a physician may defend on the grounds of a signed consent form, a signed consent form is not necessarily conclusive proof of informed consent. The adequacy of a written consent form is a factual issue for the jury [*Quintanilla v. Dunkelman (2005) 133 Cal. App. 4th 95, 115-116, 34 Cal. Rptr. 3d 557]* .

In one case, for example, a Spanish-speaking patient had signed a pre-surgery consent form written in Spanish. She testified that she did not read Spanish, that she was rushed through the pre-surgery admissions procedures and told to "sign here" and "initial there," and that neither the examining physician nor the surgeon had adequately explained what procedures were going to be performed. Under those circumstances, the court upheld a jury verdict for the plaintiff [*Quintanilla v. Dunkelman (2005) 133 Cal. App. 4th 95, 115-118, 34 Cal. Rptr. 3d 557]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersGeneral OverviewHealthcare LawTreatmentFailures to Disclose & WarnGeneral OverviewHealthcare LawTreatmentPatient ConsentGeneral OverviewHealthcare LawTreatmentPatient ConsentInformed ConsentHealthcare LawTreatmentPatient ConsentRight to Refuse TreatmentTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceActionsGeneral OverviewTortsNegligenceProofCustomMedical Customs

California Forms of Pleading and Practice--Annotated

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 415 PHYSICIANS: MEDICAL MALPRACTICE
PART II. LEGAL BACKGROUND
A. Liability

36-415 California Forms of Pleading and Practice--Annotated § 415.14

§ 415.14 Vicarious Liability of Physicians for Acts of Agents

Under the doctrine of respondeat superior, a physician may be liable for the independent negligence of medical personnel assisting the physician during treatment or surgery. This liability may be imposed even when such personnel are not employees of the physician, but rather are employees of the hospital in which the medical procedure is taking place, when there is proof that the physician exercised actual control or direction over the conduct causing the injury [*see Truhitte v. French Hosp. (1981) 128 Cal. App. 3d 332, 348, 180 Cal. Rptr. 152]* . For discussion of the standard of care applicable in actions for malpractice of hospital employees and forms for use in such actions, see Ch. 295, *Hospitals* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesApparent Agency & Respondeat SuperiorGeneral OverviewHealthcare LawActions Against FacilitiesApparent Agency & Respondeat SuperiorRespondeat SuperiorHealthcare LawActions Against FacilitiesFacility LiabilityGeneral OverviewHealthcare LawActions Against FacilitiesFacility LiabilityHospitalsTortsVicarious LiabilityAgentsNegligence

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36-415 California Forms of Pleading and Practice--Annotated § 415.15

§ 415.15 Statutory Limitations on Liability

[1] Natural Course of Condition or Treatment

No health care provider is liable for professional negligence or malpractice for any occurrence or result solely on the basis that the occurrence or result was caused by the natural course of a disease or condition, or was the natural or expected result of reasonable treatment rendered for the disease or condition. However, this rule does not limit liability for a failure to inform of the risks of treatment or risks of declining treatment, or for negligent diagnosis or treatment or negligent failure to diagnose or treat [*Civ. Code § 1714.8(a)*].

For definitions of health care provider and professional negligence, see *§ 415.10*.

[2] Nonaction on Unsolicited Referral From Diagnostic Clinic

A health care provider who receives an unsolicited referral arising from a test performed by a multiphasic screening unit is not liable for any act of professional negligence as the result of such a referral, including the failure to refer, examine, or treat the person referred by the screening unit [*Civ. Code § 43.9(a)*]. The health care provider receives such immunity, however, only if he or she either notifies the screening unit of the desire not to evaluate the results or to take further action on them or returns the results within 21 days. Furthermore, if the health care provider determines that the results indicate a substantial risk of serious illness or death, the provider must make a reasonable effort to notify the person tested of the presumptive finding within 14 days of receipt of the results [*Civ. Code § 43.9(c)*].

Civ. Code § 43.9 does not provide immunity if, at the time of the unsolicited referral, there exists either a physician-patient relationship or health care contract between the provider and the person referred, or if a provider-patient relationship is established following receipt of the unsolicited referral [*Civ. Code § 43.9(b)*].

A "multiphasic screening unit," as used in *Civ. Code § 43.9*, means a facility that does not prescribe or treat patients but performs diagnostic testing only.

For definitions of "health care provider" and "professional negligence," see *§ 415.10*.

[3] Emergency Obstetrical Services

A physician who serves on an on-call basis to a hospital emergency room and who in good faith renders emergency obstetrical services to a woman while serving on-call is not liable for any civil damages as a result of any negligent act or omission by him or her in rendering the emergency obstetrical services. However, this immunity does not apply to acts or omissions constituting gross negligence, recklessness, or willful misconduct [*Bus. & Prof. Code § 2395.5(a)*].

The protection of *Bus. & Prof. Code § 2395.5(a)* does not apply to a physician in any of the following cases [*Bus. & Prof. Code § 2395.5(b)*]:

- Consideration, in any form, was provided to the physician for serving, or the physician was required to serve, on an on-call basis to the hospital emergency room. In either event, the protection of *Bus. & Prof. Code § 2395.5(a)* does not apply unless the hospital expressly, in writing, accepts liability for the physician's negligent acts or omissions.

- The physician had provided prior medical diagnosis or treatment to the same patient for a condition having a bearing on or relevance to the treatment of the obstetrical condition that required emergency services.

- Before rendering emergency obstetrical services, the physician had a contractual obligation or agreement with the patient, another physician, or a third-party payer on the patient's behalf to provide obstetrical care for the patient, or the physician had a reasonable expectation of payment for the emergency services provided to the patient.

Except as provided in *Bus. & Prof. Code § 2395.5(b)*, nothing in *Bus. & Prof. Code § 2395.5* will be construed to affect or modify the liability of the hospital for ordinary or gross negligence [*Bus. & Prof. Code § 2395.5(c)*].

[4] Good Faith Reliance on Health Care Decision

[a] Nonliability

Subject to any limitations stated in a durable power of attorney for health care, and subject to certain Probate Code provisions, a health care provider is not subject to criminal prosecution, civil liability, or professional disciplinary action for relying on a health care decision of a patient's attorney-in-fact under certain circumstances.

For complete discussion of durable powers of attorney, see Ch. 427, *Principal and Agent* .

[b] Changes in Applicable Law Effective July 1, 2000

The Health Care Decisions Law [*Prob. Code § 4600 et seq.*], effective July 1, 2000, repealed, revised, and renumbered many provisions regarding durable powers of attorney for health care under the Power of Attorney Law. For example, until July 1, 2000, the limitations of reliance on a health care decision are found in *Probate Code §§ 4722*, *4723*, *4724*, *4725*, and *4726*. On or after July 1, 2000, the limitations are found in *Probate Code §§ 4680-4690*. Also, until July 1, 2000, the definition of "health care decision" can be found at *Prob. Code § 4612*. On or after July 1, 2000, the definition can be found at *Prob. Code § 4617*.

[c] Requirements for Nonliability Applicable Before July 1, 2000

Until July 1, 2000, a health care provider is not subject to criminal prosecution, civil liability, or professional disciplinary action, if the health care provider relies on a health care decision and both of the following requirements are satisfied [*Prob. Code § 4750(a)*]:

- The health care provider believes in good faith that the attorney-in-fact who made the decision is authorized under *Prob. Code § 4700 et seq.* to make that decision; and

- The health care provider believes in good faith that the decision is not inconsistent with the desires of the patient as expressed in the durable power of attorney for health care or otherwise made known to the health care provider, and, if the decision is to withhold or withdraw health care necessary to keep the patient alive, the health care provider has made a good faith effort to determine the desires of the patient to the extent that the patient is able to convey those desires to the health care provider and the results of the efforts are made a part of the patient's medical records.

However, even if these requirements are met, a health care provider may be subject to criminal prosecution, civil liability, or professional disciplinary action for relying on a health care decision to the same extent as would be the case if the patient, having had the capacity to give informed consent, had made the health care decision on his or her own behalf under like circumstances [*Prob. Code § 4750(a)*].

Nothing in *Prob. Code § 4700 et seq.* authorizes a health care provider to do anything illegal [*Prob. Code § 4750(b)*]. Notwithstanding the health care decision of the attorney-in-fact designated by a durable power of attorney for health care, the health care provider is not subject to criminal prosecution, civil liability, or professional disciplinary action for failing to withdraw health care necessary to keep the patient alive [*Prob. Code § 4750(c)*].

[d] Requirements for Nonliability Applicable on or After July 1, 2000

On or after July 1, 2000, a health care provider acting in good faith and in accordance with generally accepted health care standards applicable to the health care provider is not subject to civil or criminal liability or to discipline for unprofessional conduct for any actions in compliance with the Health Care Decisions Law, including, but not limited to, any of the following [*Probate Code § 4740*]:

- Complying with a health care decision of a person apparently having authority to make a health care decision for a patient, including a decision to withhold or withdraw health care;

- Declining to comply with a health care decision of a person based on a belief that the person then lacked authority to make that decision;

- Complying with an advance health care directive and assuming that the directive was valid when made and had not been revoked or terminated; and

- Declining to comply with an individual health care instruction or health care decision, in accordance with *Probate Code §§ 4734-4736*.

[e] Continued Validity of Forms Valid Under Prior Law

Nothing in the Health Care Decisions Law affects the validity of any durable power of attorney for health care executed on a printed form that was valid under the prior law, regardless of whether the execution occurred before, on, or after July 1, 2000 [*Prob. Code § 4665(e)*].

[5] Immunity of Medical Professional Society

No monetary liability arises against any medical professional society or its members, agents, and employees for referring a member of the public to any professional member of the society, or for acts of negligence committed by a

professional to whom the person was referred, so long as no malice was present in the referral and the referral was made at no cost added to the initial referral fee [*Civ. Code § 43.95(a)*]. However, this immunity is not available if the medical society, while making a referral to a professional member of that society, fails to disclose the nature of any disciplinary decision or pending action of which it has actual or constructive knowledge taken by a state licensing agency. This duty of disclosure does not operate if the proceeding results in no disciplinary action being taken [*Civ. Code § 43.95(b)*]. A medical professional society, for the purposes of *Civ. Code § 43.95*, includes a medical organization having as members at least 25 percent of the eligible persons or licentiates in the geographic area served by the particular society, and medical organizations that have been established to provide free assistance to needy patients. If the professional society has less than 100 members, it must have as members at least a majority of the eligible persons or licentiates in the geographic area served by the particular society [*Civ. Code § 43.95(a)*].

[6] Immunity of Hospital

No monetary liability or cause of action for damages, other than economic or pecuniary damages, arises against any hospital for any action taken on the recommendation of its medical staff, or against any other person or organization for any action taken or restriction imposed that is required to be reported pursuant to *Bus. & Prof. Code § 805* (reporting denial, removal, or restriction of staff privileges), provided that the action or restriction is reported in accordance with *Bus. & Prof. Code § 805*. This immunity does not apply to an action knowingly and intentionally taken for the purpose of injuring a person affected by the action or infringing on a person's rights [*Civ. Code § 43.97*].

[7] Natural Death Act

The Natural Death Act (*Health & Safety Code § 7185 et seq.*) recognizes the right of adults to control decisions regarding the use of life-sustaining procedures in instances of a terminal condition or permanent unconscious condition [*Health & Safety Code § 7185.5(a)*]. The Natural Death Act was repealed by the Health Care Decisions Law, effective July 1, 2000 [*see § 415.15[8]*]. However, nothing in the Health Care Decisions Law affects the validity of an advance health care directive that was executed before July 1, 2000, and was valid under the Natural Death Act. [*Prob. Code § 4665(d), (e)*].

Pursuant to the Natural Death Act, adults may execute a declaration authorizing the withdrawal or withholding of life-sustaining treatment in a terminal situation [*Health & Safety Code § 7186.5(a)*; *see Health & Safety Code §§ 7186.5(b)* (required form of declaration), 7193.5(a) (instrument executed before January 1, 1992, must "substantially" comply with *Health & Safety Code § 7186.5(a)*)].

In the absence of knowledge to the contrary, a physician or other health care provider may presume that a declaration complies with the Natural Death Act and is valid [*Health & Safety Code § 7192*]. No physician or health care provider who acts in accordance with a properly executed directive and withdraws life-sustaining procedures is subject to civil or criminal liability for so doing [*see Health & Safety Code § 7190.5*].

A physician or other health care provider who is unwilling to comply with the terms of a patient's declaration under the Natural Death Act must take all reasonable steps as promptly as practicable to transfer care of the patient to another physician or health care provider who is willing to comply with the terms of the declaration [*Health & Safety Code § 7190*; *see also Health & Safety Code § 7191(a)* (willful failure to transfer patient as required by *Health & Safety Code § 7190* is misdemeanor)].

The provisions of the Natural Death Act do not provide immunity for any affirmative act or omission to end life other than the allowance of the natural process of dying as provided in the Act [*see Health & Safety Code § 7191.5(g)*; *see also Health & Safety Code § 7191* (specified misconduct concerning preparation and execution of declaration as basis for criminal prosecution)]. It is not clear, however, that any civil or criminal liability will attach even in the absence of a properly executed directive, because the Natural Death Act does not represent the exclusive basis for terminating life

support equipment in California [*see Barber v. Superior Court (1983) 147 Cal. App. 3d 1006, 1016-1022, 195 Cal. Rptr. 484* (physician who removed respirator, and subsequently withdrew intravenous tubes providing hydration and nourishment, from comatose patient after family's request held not subject to prosecution for murder)].

[8] Health Care Decisions Law

The Health Care Decisions Law (*Probate Code § 4600 et seq.*), effective July 1, 2000, was enacted to replace the Natural Death Act (former *Health & Safety Code § 7185 et seq.*) [*see § 415.15[7]*] and provisions regarding durable powers of attorney for health care under the Power of Attorney Law. This law recognizes the right of adults to control decisions regarding the use of life-sustaining procedures [*Probate Code § 4650(a)*]. Pursuant to the Uniform Health Care Decisions Act (*Probate Code § 4670 et seq.*), adults having capacity may give an individual health care instruction, oral or written [*Probate Code § 4670*]. A written advance health care directive may also include individual health care instructions [*Probate Code §§ 4670, 4672*]. A written advance health care directive must include a date of execution, a signature, and an acknowledgement by a notary public or two witnesses [*Probate Code § 4673(a)*]. A directive or power of attorney may be created electronically, but to be effective it must be acknowledged by a notary public and otherwise meet the requirements for a written directive, and if it contains a digital signature, that signature must meet certain statutory specifications [*Prob. Code § 4673(b)*].

As an alternative to creating a power of attorney, a patient may designate an adult as a surrogate to make health care decisions by personally informing the supervising health care provider [*Probate Code § 4711*]. The designation of a surrogate must be promptly recorded in the patient's health care record and is effective only during the course of treatment or illness or during the stay in the health care institution during which the designation is made, or for 50 days, whichever period is shorter [*Probate Code § 4711*].

A physician or health care provider who withdraws life-sustaining procedures in accordance with such an individual health care instruction is not subject to civil or criminal liability for doing so [see *Probate Code §§ 4656, 4740*].

A health care provider or health care institution that declines to comply with an individual health care instruction or health care decision must promptly so inform the patient, if possible, and any person then authorized to make health care decisions for the patient. Unless the patient or the person then authorized to make health care decisions for the patient refuses assistance, the health care provider or health care institution must immediately make all reasonable efforts to assist in the transfer of the patient to another health care provider or institution that is willing to comply with the instruction or decision [*Probate Code § 4736(b)*].

Nothing in the Health Care Decisions Law affects the validity of an advance health care directive that was executed before July 1, 2000, and was valid under prior law. Also, nothing in the Health Care Decisions Law affects the validity of any durable power of attorney for health care executed on a printed form that was valid under the prior law, regardless of whether the execution occurred before, on, or after July 1, 2000 [*Prob. Code § 4665(d), (e)*].

[9] Administration of Immunizing Agents

Any licensed health professional voluntarily participating in the National Influenza Program of 1976 is shielded from civil liability for negligence in the administration of the vaccine. This immunity extends to injuries caused by any residual effects of the vaccine [*Gov. Code § 856.6*].

Similarly, *Health & Safety Code § 120455* provides that no person may be held liable for any injury caused by ordinary negligence in the administration of a vaccine or other immunizing agent to a minor, including injuries from residual effects, if the immunization is either required by state law or given as part of an outreach program pursuant to *Health & Safety Code § 3395 et seq.*, and the act or omission do es not constitute willful misconduct or gross negligence. Thus, a court of appeal has held that a physician who administered a DPT vaccine to an infant could only be held liable for

gross negligence or willful misconduct under former *Health & Safety Code § 429.36* (now *Health & Safety Code § 120455*) [*Salasguevara v. Frye (1995) 31 Cal. App. 4th 330, 341-342, 37 Cal. Rptr. 2d 40]* . The court of appeal concluded that the statutes governing childhood vaccinations clearly evidenced a legislative intent that all pre-school children receive immunizations and that such was sufficient to meet the criteria that the immunization be "required by law" [*Salasguevara v. Frye (1995) 31 Cal. App. 4th 330, 341-342, 37 Cal. Rptr. 2d 40]* .

[10] Emergency Situations

[a] Scene of Emergency

No licensed health care provider who in good faith renders emergency care at the scene of an emergency shall be civilly liable as a result of any negligent acts or omissions in rendering such care [*Bus. & Prof. Code § 2395*].

"The scene of an emergency" as used in *Bus. & Prof. Code § 2395* includes but is not limited to the emergency rooms of hospitals in the event of a medical disaster [*Bus. & Prof. Code § 2395*].

"Medical disaster" as used in *Bus. & Prof. Code § 2395* means a duly proclaimed state of emergency or local emergency declared pursuant to the California Emergency Services Act (*Gov. Code §§ 8550-8668*) [*Bus. & Prof. Code § 2395*].

For purposes of emergency immunity, an "emergency" is an exigency of so pressing a character that some kind of action must be taken [*Bryant v. Bakshandeh (1991) 226 Cal. App. 3d 1241, 1247, 277 Cal. Rptr. 379* ; *Kearns v. Superior Court (1988) 204 Cal. App. 3d 1325, 1328, 252 Cal. Rptr. 4]* . The test for determining the existence of an emergency is an objective one of whether the facts establish the existence of an emergency under this definition [*Breazeal v. Henry Mayo Newhall Mem'l Hosp. (1991) 234 Cal. App. 3d 1329, 1341, 286 Cal. Rptr. 207]* . In determining whether a patient's condition constitutes an emergency, the trier of fact must consider the gravity, the certainty, and the immediacy of the consequences to be expected if no action is taken. Beyond observing that these are the relevant considerations, however, the variety of situations that would qualify as emergencies under any reasonable set of criteria is too great to admit of anything approaching a bright line rule as to just how grave, how certain, and how immediate these consequences have to be [*Breazeal v. Henry Mayo Newhall Mem'l Hosp. (1991) 234 Cal. App. 3d 1329, 1338, 286 Cal. Rptr. 207]* .

Bus. & Prof. Code § 2395, by its terms, immunizes from liability only emergency care that has been rendered "in good faith." In some cases, the treating physician's "good faith" must be resolved before it can be determined whether the immunity applies. In such cases, the trier of fact must determine whether the physician asserting the immunity had a reasonable, good faith belief that he or she was responding to an emergency situation when he or she performed the requested procedures, or whether, under the circumstances, a physician acting in good faith would have reasonably concluded his or her immediate assistance was not required because no emergency existed [*Bryant v. Bakshandeh (1991) 226 Cal. App. 3d 1241, 1247, 277 Cal. Rptr. 379* (reversing summary judgment because issue of good faith was material and unresolved)]. However, the good faith belief that an emergency existed extends only to the subjective belief of the physician while actually providing treatment to the patient. The physician is not required to prove that prior to arriving at the scene, the physician held a good faith belief that he or she was responding to an emergency [*Reynoso v. Newman (2005) 126 Cal. App. 4th 494, 500, 24 Cal. Rptr. 3d 5]* .

Bus. & Prof. Code § 2395 does not preclude the application of immunity in general hospital emergency situations occurring outside the emergency room, but, in such situations, immunity is limited to voluntary physicians who owe no legal duty to aid the patient [*McKenna v. Cedars of Lebanon Hosp. (1979) 93 Cal. App. 3d 282, 286, 155 Cal. Rptr. 631* ; *Colby v. Schwartz (1978) 78 Cal. App. 3d 885, 892, 144 Cal. Rptr. 624]* . Thus, on the one hand, immunity applies to a physician if the physician did not have a preexisting duty of professional care to the patient [*Perkins v. Howard (1991) 232 Cal. App. 3d 708, 714-715, 283 Cal. Rptr. 764* (construing *Bus. & Prof. Code § 2396*)]. Immunity

does not require that the injured party be a complete stranger to the assisting physician; all it requires is that there be no current patient-physician relationship [*Perkins v. Howard (1991) 232 Cal. App. 3d 708, 718, 283 Cal. Rptr. 764]* . On the other hand, immunity does not apply to physicians who render emergency aid as part of their normal course of practice [*Breazeal v. Henry Mayo Newhall Mem'l Hosp. (1991) 234 Cal. App. 3d 1329, 1333 n.3, 286 Cal. Rptr. 207* (construing *Bus. & Prof. Code §§ 2395* and *2396*)]. The statutory immunity also applies to a physician who happens to be in the hospital and available to provide intraoperative assistance if unexpected complications arise during surgery being performed by another physician [*Kearns v. Superior Court (1988) 204 Cal. App. 3d 1325, 1329, 252 Cal. Rptr. 4]* .

Immunity under *Bus. & Prof. Code § 2395* does not apply to a physician who is the owner of a medical facility and who renders emergency aid to a scheduled patient at that facility. Such a physician has a preexisting professional, ethical, and pecuniary interest in the patient's care, even if the physician is not directly responsible for the patient's treatment; the physician in such a situation is not a volunteer for purposes of the Good Samaritan statutes [*Street v. Superior Court (1990) 224 Cal. App. 3d 1397, 1403, 274 Cal. Rptr. 595]* .

[b] Rescue Teams

Immunity against liability arising from the acts or omissions of rescue teams making a good faith effort to resuscitate a person in immediate danger of death is provided by two separate statutes. *Veh. Code § 165.5* provides such immunity when rescue teams operate in conjunction with an emergency vehicle [*see Veh. Code § 165* for definition of emergency vehicle], shielding the operators of the vehicle and the rescue team itself. *Health & Safety Code § 1317* applies to rescue teams operating in health care facilities, and protects the team and the health care facility and its officers, nurses, employees, and staff members. "Rescue team" as used in both *Health & Safety Code § 1317* and *Veh. Code § 165.5* means a special group of physicians and surgeons, nurses and employees who have been trained in cardiopulmonary resuscitation and have been designated to attempt resuscitation of persons in immediate danger of loss of life in emergency situations [*see Health & Safety Code § 1317*; *Veh. Code § 165.5*]. Under *Veh. Code § 165.5*, volunteers are also included in the definition.

[c] Athletic Events or Contests

No licensed health care provider who in good faith and without compensation provides voluntary emergency medical assistance to a participant in a community college or high school athletic event or contest, at the site of the event or contest, or during transportation to a health care facility, for an injury suffered in the course of such event or contest, shall be civilly liable for any ordinarily negligent acts or omissions in rendering the services [*Bus. & Prof. Code § 2398*].

[d] Emergency Care for Complications on Request of Another Licensee

A licensed health care provider is not civilly liable for negligence in the good faith rendering of emergency medical care at the request of another licensee for medical complications arising from prior care by another licensee [*Bus. & Prof. Code § 2396*]. Immunity under *Bus. & Prof. Code § 2396* does not apply to a physician who is the owner of a medical facility and who renders emergency aid to a scheduled patient at that facility [*Street v. Superior Court (1990) 224 Cal. App. 3d 1397, 1403, 274 Cal. Rptr. 595]* .

For general discussion of emergency care immunity, see § 415.[10][a].

[e] Refusal to Render Emergency Treatment

Emergency care must be provided to any person requesting such care for any condition in which the person is in danger of loss of life or serious injury or illness, at any health care facility licensed under *Health & Safety Code § 1250 et seq.* that maintains an emergency department for treatment of the public, when such health facility has appropriate facilities

and qualified personnel available to provide the emergency treatment [*Health & Safety Code § 1317(a)*].

However, no health facility, its employees, nor any physician and surgeon, dentist, clinical psychologist, or podiatrist will be held liable in any action arising out of a refusal to render those emergency services if the refusal is based on the determination, exercising reasonable care, that the person seeking the services is not suffering from an emergency medical condition or that the health facility does not have the appropriate facilities or qualified personnel available to render the services [*Health & Safety Code § 1317(c)*].

In no event can the provision of emergency services and care be based on, or affected by, a patient's ethnicity, citizenship, age, preexisting medical condition, insurance status, economic status, or ability to pay for medical services, or any other characteristic listed or defined in *Civ. Code § 51(b)* or *(e)*, except to the extent that a circumstance such as age, sex, preexisting medical condition, or physical or mental disability is medically significant to the provision of appropriate medical care to the patient [*Health & Safety Code § 1317(b)*; *see also Health & Safety Code § 1317.3(c)* (licensed hospital must require that its "on call" physicians cannot refuse emergency calls on discriminatory basis)].

[11] Compliance With Competent Adult Patient's Refusal of Medical Treatment

An adult person of sound mind has the right, in the exercise of control over his or her own body, to determine whether or not to submit to lawful medical treatment [*Bouvia v. Superior Court (1986) 179 Cal. App. 3d 1127, 1137, 225 Cal. Rptr. 297* ; *Bartling v. Superior Court (1984) 163 Cal. App. 3d 186, 193-195, 209 Cal. Rptr. 220]* . The right to control one's own medical treatment predates the Natural Death Act [*Health & Safety Code § 7185 et seq.*, repealed and replaced, effective July 1, 2000, by the Health Care Decisions Law (*Probate Code § 4600 et seq.*)], and does not depend on it [*Bartling v. Superior Court (1984) 163 Cal. App. 3d 186, 195, 209 Cal. Rptr. 220]* . Rather, the right to refuse medical treatment is basic and fundamental and recognized as a part of the right of privacy protected by both the state (*Cal. Const. art. I, § 1*) and federal constitutions [*Bouvia v. Superior Court (1986) 179 Cal. App. 3d 1127, 1137, 225 Cal. Rptr. 297* ; *see Donaldson v. Lungren (1992) 2 Cal. App. 4th 1614, 1619-1620, 4 Cal. Rptr. 2d 59]* . This right also derives from the legal doctrine of informed consent to medical treatment, a logical corollary of which is that a patient possesses the right not to consent and to refuse treatment [*see Donaldson v. Lungren (1992) 2 Cal. App. 4th 1614, 1620, 4 Cal. Rptr. 2d 59* ; *see also § 415.13*]]. Consequently, neither criminal nor civil liability will attach to treating physicians and hospitals that honor a competent, informed patient's refusal of medical service in whole or in part [*see Bouvia v. Superior Court (1986) 179 Cal. App. 3d 1127, 1145, 225 Cal. Rptr. 297* ; *Bartling v. Superior Court (1984) 163 Cal. App. 3d 186, 197, 209 Cal. Rptr. 220]* . Indeed, a hospital or physician may be subject to civil liability for failure to comply with a competent adult patient's instruction to terminate life-sustaining treatment [*see Bartling v. Glendale Adventist Med. Ctr. (1986) 184 Cal. App. 3d 961, 966-967, 229 Cal. Rptr. 360* (action dismissed because hospital's legal right to follow patient's instruction was not clear at time of patient's hospitalization)].

A patient may refuse treatment even though withholding of treatment creates a life-threatening situation. Moreover, the right to refuse treatment or life-sustaining measures is not limited to those who are terminally ill [*see Donaldson v. Lungren (1992) 2 Cal. App. 4th 1614, 1620, 4 Cal. Rptr. 2d 59]* . However, an individual has no constitutional, statutory, or common law right to a death assisted by private individuals or the state [*Donaldson v. Lungren (1992) 2 Cal. App. 4th 1614, 1622-1623, 4 Cal. Rptr. 2d 59* (affirming dismissal of action for declaratory and injunctive relief relating to dying plaintiff's desire for premortem cryogenic suspension that would render him, in statutory effect, dead)].

[12] Immunity for Reporting Child Abuse

No health practitioner who reports a known or suspected instance of child abuse will be civilly or criminally liable for any report required or authorized by the Child Abuse and Neglect Reporting Act (*Penal Code § 11164 et seq.*) [*Penal Code § 11172(a)*]. This immunity applies even if the practitioner acquired the knowledge or reasonable suspicion of child abuse or neglect outside of his or her professional capacity or outside the scope of employment [*Penal Code § 11172(a)*]. Thus, medical practitioners enjoy absolute immunity from civil liability for reporting suspected child abuse

or neglect [*Storch v. Silverman (1986) 186 Cal. App. 3d 671, 675-679, 231 Cal. Rptr. 27]* . The fact that a particular report was "authorized," rather than "required," by the Child Abuse and Neglect Act does not diminish the immunity conferred by *Penal Code § 11172(a)* [*Ferraro v. Chadwick (1990) 221 Cal. App. 3d 86, 95, 270 Cal. Rptr. 379]* .

Immunity under *Penal Code § 11172(a)* extends even to situations in which the medical practitioner maliciously and knowingly submits a false report of child abuse or neglect with the intent to vex, annoy, and harass an innocent party [*Storch v. Silverman (1986) 186 Cal. App. 3d 671, 681, 231 Cal. Rptr. 27]* . The immunity also protects hospitals from suit under a respondeat superior theory when employee physicians report child abuse [*Storch v. Silverman (1986) 186 Cal. App. 3d 671, 681-682, 231 Cal. Rptr. 27]* .

The immunity for reporting child abuse or neglect extends to conduct giving rise to the obligation to report, such as the collection of data, or the observation, examination, or treatment of the suspected victim or perpetrator of child abuse, performed in a professional capacity or within the scope of employment, as well as for the act of reporting [*Krikorian v. Barry (1987) 196 Cal. App. 3d 1211, 1223, 242 Cal. Rptr. 312]* . In addition, the immunity extends to activity after the report of suspected child abuse is made, such as subsequent contact with child protective or law enforcement agencies that are statutorily entitled to receive and investigate reports of child abuse [*Ferraro v. Chadwick (1990) 221 Cal. App. 3d 86, 92, 95, 270 Cal. Rptr. 379]* .

[13] Indemnity Provided by Hospital to Nonemployees for Peer Review Activities

The board of directors of a local hospital district has the authority to agree to indemnify a nonemployee member of the medical staff for damages and costs associated with being named a defendant in a civil action directly arising out of opinions rendered, statements made, or actions taken as a necessary part of participation in the medical peer review activities of the hospital district [*Health & Safety Code § 32128(b)*]. However, this indemnification cannot generally extend to indemnification for punitive or exemplary damages. In addition, if the nonemployee incurs liability for punitive or exemplary damages, the nonemployee is liable to the hospital for any costs incurred in providing legal representation to the nonemployee [*Health & Safety Code § 32128(b)*].

Despite this provision generally precluding indemnification for punitive damages, a hospital district may agree to pay a judgment for punitive or exemplary damages if the board of directors, in its discretion, determines that: (1) the judgment is based on opinions rendered, statements made, or actions taken as a necessary part of participation in the medical peer review activities of the district; (2) when the nonemployee staff member rendered the opinions, made the statements, or took the actions giving rise to the liability, the nonemployee staff member was acting in good faith, without actual malice, and in the apparent best interests of the district; and (3) payment of the claim or judgment against the nonemployee staff member would be in the best interests of the hospital district [*Health & Safety Code § 32128(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesEmergency Care NegligenceGeneral OverviewHealthcare LawActions Against FacilitiesFacility LiabilityGeneral OverviewHealthcare LawGood Samaritan LawsHealthcare LawInsurancePreexisting ConditionsHealthcare LawTreatmentEnd-of-Life DecisionsGeneral OverviewHealthcare LawTreatmentEnd-of-Life DecisionsAdvance DirectivesHealthcare LawTreatmentEnd-of-Life DecisionsLife SupportHealthcare LawTreatmentEnd-of-Life DecisionsLifesaving TreatmentHealthcare LawTreatmentPatient ConsentGeneral OverviewHealthcare LawTreatmentPatient ConsentInformed ConsentHealthcare LawTreatmentPatient ConsentRight to Refuse TreatmentTortsNegligenceProofCustomMedical Customs

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§ 415.16 Comparative Negligence

Under the doctrine of comparative negligence, a plaintiff's failure to follow the reasonable advice and instructions of the physician regarding the patient's condition may result in a reduction of the damages award in a negligence action against the physician to the extent that the failure contributed to the plaintiff's injuries [*see LeMons v. Regents of Univ. of Cal. (1978) 21 Cal. 3d 869, 874 n.5, 875, 148 Cal. Rptr. 355, 582 P.2d 946* ; *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226* (establishing the comparative negligence doctrine)]. Expert testimony is required regarding the proximate effect of a plaintiff's actions on the aggravation of a medical condition except when plaintiff's negligence is obvious as a matter of common sense [*Barton v. Owen (1977) 71 Cal. App. 3d 484, 506, 139 Cal. Rptr. 494]* .

For further discussion of comparative negligence, see Ch. 380, *Negligence* . For a form of answer alleging the affirmative defense of the plaintiff's comparative negligence, *see § 415.102*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersGeneral OverviewHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansTortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsNegligenceProofGeneral Overview

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§ 415.17 Wrongful Life/Wrongful Birth Actions

Wrongful life actions, which are brought by a child, and wrongful birth actions, brought by the parents, are based on identical allegations of damages incurred as the result of a defendant's negligent or intentional conduct that causes the birth of an unwanted or damaged child. Nationally, the law governing such actions is unsettled. In California, courts have cautiously allowed both types of actions but have restricted the recovery in wrongful life cases to special medical damages that are readily ascertainable and clearly traceable to a defendant's negligence [*see Turpin v. Sortini (1982) 31 Cal. 3d 220, 237, 182 Cal. Rptr. 337, 643 P.2d 954* ; *Johnson v. Superior Court (2002) 101 Cal. App. 4th 869, 889, 124 Cal. Rptr. 2d 650* (neither general damages nor damages for lost earnings recoverable in action against sperm bank and screening physicians); *see also Gami v. Mullikin Medical Center (1993) 18 Cal. App. 4th 870, 881-883 22 Cal. Rptr. 2d 819* (recovery of special damages in wrongful life action permitted regardless of whether negli gence occurred before or after conception)].

In actions for wrongful birth, however, lower courts have allowed parents of both healthy and damaged children to recover the usual damages allowable under established tort principles on a proper finding of medical malpractice [*Stills v. Gratton (1976) 55 Cal. App. 3d 698, 709, 127 Cal. Rptr. 652* ; *Custodio v. Bauer (1967) 251 Cal. App. 2d 303, 325, 59 Cal. Rptr. 463]* . Under the same tort principles, defendants may prove any offsets for benefits conferred and amounts chargeable to plaintiffs under the duty to mitigate damages [*Stills v. Gratton (1976) 55 Cal. App. 3d 698, 709, 127 Cal. Rptr. 652]* .

Wrongful life cases should be distinguished from actions in which damages are sought for injuries to the mother resulting from a physician's malpractice in performing contraceptive procedures, abortions, prenatal care, or delivery [*see, e.g., Seneris v. Haas (1955) 45 Cal. 2d 811, 291 P.2d 915* ; *Tresemer v. Barke (1978) 86 Cal. App. 3d 656, 150 Cal. Rptr. 384* ; *Kritzer v. Citron (1950) 101 Cal. App. 2d 33, 224 P.2d 808]* .

Wrongful life and wrongful birth cases are also distinguishable from actions brought by a child for prenatal or birth-related injuries [*see, e.g., Segura v. Brundage (1979) 91 Cal. App. 3d 19, 153 Cal. Rptr. 777]* .

For a form of complaint for a wrongful life action based on defendant's failure to inform of a substantial risk that the

child would be born with genetic defects, see Ch. 367A, *Minors: Tort Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Relationships & TortsWrongful LifeHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawTreatmentWrongful BirthTortsNegligenceActionsWrongful BirthGeneral OverviewTortsNegligenceActionsWrongful BirthRemedies

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§ 415.18 Strict Liability Inapplicable to Medical Malpractice

The rule that strict liability does not apply to transactions in which the primary purpose is the provision of services applies to cases based on the negligent rendering of medical services as well. There is no strict liability for damages if the patient's injuries result from ingestion of a medication prescribed by the physician, as long as the drug was prescribed in connection with the medical services rendered and not for the purpose of sale alone [*Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 978-979, 95 Cal. Rptr. 381]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityHealthcare ProvidersTortsStrict LiabilityGeneral Overview

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§ 415.19 Conversion

A patient generally does not have an ownership interest in biological materials excised from his or her body by a physician, and an action for conversion based on the appropriation of such materials for use in research without the patient's prior consent will not lie [*Moore v. Regents of Univ. of Cal. (1990) 51 Cal. 3d 120, 136-137, 271 Cal. Rptr. 146, 793 P.2d 479]* . Use of organic materials without informed consent, however, may be actionable in tort on a "lack of informed consent" or "breach of fiduciary duty" theory. For further discussion, see *§ 415.13[6]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawTreatmentPatient ConsentGeneral OverviewHealthcare LawTreatmentPatient ConsentInformed ConsentTortsIntentional TortsConversionDefenses

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§ 415.20 Battery

A physician's performance of treatment to which the patient has not consented constitutes a battery. The consent required under this rule must be a properly informed consent to the treatment that is performed [*Nelson v. Gaunt (1981) 125 Cal. App. 3d 623, 634-635, 178 Cal. Rptr. 167]* . For an analysis of informed consent, see *§ 415.13*.

The basis of a medical malpractice action based on battery is the physician's intentional deviation from the consent of the patient. This intent is demonstrated when the physician obtains consent to one type of treatment and subsequently performs a substantially different treatment for which consent was not obtained [*Cobbs v. Grant (1972) 8 Cal. 3d 229, 239, 104 Cal. Rptr. 505, 502 P.2d 1* ; *Ashcraft v. King (1991) 228 Cal. App. 3d 604, 613, 278 Cal. Rptr. 900]* . A physician's withholding of material information or misrepresentation regarding a proposed treatment will also support a battery action if the patient is thereby prevented from comprehending the full scope of the treatment actually performed [*Nelson v. Gaunt (1981) 125 Cal. App. 3d 623, 635, 178 Cal. Rptr. 167]* . The availability of a battery action based on withholding of information, however, depends on the extent of the nondisclosure. The failure to disclose a remote risk inherent to the treatment to which the patient consented and which was actually performed does not demonstrate the requisite intentional deviation from consent, and the action should be brought for negligence rather than battery [*Cobbs v. Grant (1972) 8 Cal. 3d 229, 240-241, 104 Cal. Rptr. 505, 502 P.2d 1]* .

Because performing a medical procedure without informed consent is not the same thing as performing that procedure with no consent at all, and the latter forms the basis for an action for battery, a party seeking to hold a physician liable for battery must obtain a specific jury finding that no consent was given if a special verdict form is used at trial. A finding that no informed consent was given is insufficient, as such a finding does not preclude the conclusion that *uninformed* consent was given [*Saxena v. Goffney (2008) 159 Cal. App. 4th 316, 326-327, 71 Cal. Rptr. 3d 469*].

Failure to obtain express consent to each particular act which may be included in a treatment does not constitute battery if the acts performed are customary aspects of the treatment or operation. Thus consent to an operation is deemed to include consent to the removal of an organ or body tissue which is a normal incident to the procedure [*Rainer v. Community Mem'l Hosp. (1971) 18 Cal. App. 3d 240, 256, 95 Cal. Rptr. 901]* .

Actions that are within the scope of a patient's consent, even if the patient expected the physician to do more, cannot be the basis of a battery action. The patient's sole remedy under those circumstances is to attempt to prove medical negligence [*Conte v. Girard Orthopaedic Med. Group, Inc. (2003) 107 Cal. App. 4th 1260, 1268-1269, 132 Cal. Rptr. 2d 855]* . In one case, for example, a physician performing shoulder surgery on the plaintiff decided during the surgery not to insert a biodegradable screw needed to properly correct the condition, fearing that the screw would cause the damaged bone fragments to fall apart. The plaintiff claimed that because surgery to repair the condition had to be performed within a few weeks if it was going to be performed at all, he consented only to shoulder surgery that would repair his shoulder condition, not to surgery that turned out to be diagnostic without repair. However, the court of appeals concluded that because the doctor did less, rather than more, than that to which the plaintiff had consented, the plaintiff had no action for battery [*Conte v. Girard Orthopaedic Med. Group, Inc. (2003) 107 Cal. App. 4th 1260, 1268, 132 Cal. Rptr. 2d 855]* .

Although a patient or his or her representative may give consent to a general course of treatment, it is possible for that consent to be made conditional, but a physician is not personally liable for battery for failing to abide by the condition unless the physician knows of the condition [*Piedra v. Dugan (2004) 123 Cal. App. 4th 1483, 1498, 21 Cal. Rptr. 3d 36]* . In one case, for example, the parents of an infant signed a hospital admission form that included general consent to treatment for their child, but the child's mother specified that no drugs were to be administered without her knowledge and consent. However, a physician who administered drugs to the child without obtaining further consent from the child's parents was not liable for battery, because neither the parents nor the hospital staff had informed the physician of the condition the parents had placed on their consent to the child's treatment. Because battery is an intentional tort, the physician could not have the requisite intent without knowledge of the condition [*Piedra v. Dugan (2004) 123 Cal. App. 4th 1483, 1498, 21 Cal. Rptr. 3d 36]* .

To be liable for performing a medical procedure while failing to abide by a known condition imposed by the patient, the doctor must have intended to perform the procedure without abiding by the condition. Negligent failure to abide by the condition is an insufficient basis for liability for battery [*Dennis v. Southard (2009) 174 Cal. App. 4th 540, 544, 94 Cal. Rptr. 3d 559* (approving intent requirement imposed in CACI No. 530B)].

When it is impracticable to obtain consent during an emergency in which immediate action is necessary to prevent death or serious harm to the patient, the physician may perform unauthorized treatment or extend the scope of surgery without incurring liability for battery [*see Bus. & Prof. Code §§ 2395-2397*; *Cobbs v. Grant (1972) 8 Cal. 3d 229, 243, 104 Cal. Rptr. 505, 502 P.2d 1* ; *Wheeler v. Barker (1949) 92 Cal. App. 2d 776, 781,208 P.2d 68]* . For further analysis of a physician's immunity from liability in emergency situations, see *§ 415.15*.

For forms relating to medical battery, see *§§ 415.92* and *415.98*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawParental Duties & RightsConsentGeneral OverviewHealthcare LawTreatmentPatient ConsentGeneral OverviewHealthcare LawTreatmentPatient ConsentConsent by Guardians & ParentsHealthcare LawTreatmentPatient ConsentInformed ConsentTortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsAssault & BatteryElements of BatteryTortsIntentional TortsDefensesConsentTortsIntentional TortsDefensesIntent

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§ 415.21 Psychotherapist's Liability for Patient's Violent Acts

In some situations, a psychotherapist may have duties to third persons relating to a patient's violent acts [*see Civ. Code § 43.92*; *Barry v. Turek (1990) 218 Cal. App. 3d 1241, 1244-1246, 267 Cal. Rptr. 553* ; *see also Tarasoff v. Regents of University of Cal. (1976) 17 Cal. 3d 425, 431* (decided prior to enactment of *Civ. Code § 43.92*)]. For a discussion and form based on this duty, see Ch. 304, *Insane and Incompetent Persons* .

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§ 415.22 Sexual Contact by Psychotherapist

[1] Professional Negligence

In a case in which a physician initiated a sexual relationship with his patient during the time he was treating her for a physical disorder, the court held that because the physician did not initiate the relationship under the guise of treatment of the patient there was no cause of action for professional negligence [*Atienza v. Taub (1987) 194 Cal. App. 3d 388, 393-394, 239 Cal. Rptr. 454]* . In dicta, the court appeared to be saying that such a showing would be necessary for a psychiatrist to be liable for medical negligence as well [*Atienza v. Taub (1987) 194 Cal. App. 3d 388, 393 n. 2, 239 Cal. Rptr. 454]* . The same court subsequently reaffirmed this rule in a sexual misconduct action against a psychiatrist but held that this requirement could be satisfied without an express representation that the sexual activity was part of the patient's treatment [*McNall v. Summers (1994) 25 Cal. App. 4th 1300, 1313, 30 Cal. Rptr. 2d 914]* . Thus, the *McNall* court concluded that a patient presented a viable claim when she was alleged that a psychiatrist initiated sexual contact in response to the patient's statement that she was sad and needed someone to care for her, and the patient's expert witness testified that the psychiatrist had mishandled the so-called "transference phenomenon" by taking advantage of a vulnerable patient whose feelings for other people had been displaced onto him [*McNall v. Summers (1994) 25 Cal. App. 4th 1300, 1313, 30 Cal. Rptr. 2d 914]* . As discussed in *§ 415.22[2]*, however, such a showing is not necessary to state a cause of action against a psychotherapist under *Civ. Code § 43.93* for injury caused by sexual contact [*see Civ. Code § 43.93(b)* (providing that therapeutic deception is only one of three possible bases for liability)].

The spouse of a patient who allegedly was the victim of sexual misconduct on the part of a psychotherapist was barred from maintaining an action against the psychotherapist in *Smith v. Pust (1993) 19 Cal. App.4th 263, 23 Cal. Rptr. 2d 364* . The *Smith* court held that the patient's husband failed to state viable claims for negligence, bad faith, or intentional or negligent infliction of emotional distress. The court reasoned that the suit was, in essence, a claim for alienation of affections and criminal conversation, causes of action that were abolished long ago. The court held that a professional duty of care arises only if (1) there is a professional relationship between the plaintiff and the defendant; and (2) there is a meaningful connection between that relationship and the alleged misconduct. In this case, the court determined that the husband failed to meet either of these requirements. The court also analyzed the case under principles applicable to claims for negligent infliction of emotional distress and concluded that the husband had no cause of action because he

was neither a "bystander" to the alleged improper conduct nor a direct victim of that conduct. Finally, the *Smith* court rejected the claim for intentional infliction of emotional distress on the basis that the therapist's actions were not directed toward the patient's husband [*Smith v. Pust (1993) 19 Cal. App. 4th 263, 272-274, 23 Cal. Rptr. 2d 364]* .

[2] Statutory Liability

[a] Basis of Action

A patient or former patient has a cause of action against a psychotherapist for sexual contact under *Civ. Code § 43.93* for injury caused by sexual contact with the psychotherapist if the contact occurred [*Civ. Code § 43.93(b)*]:

- During the period the patient was receiving psychotherapy from the psychotherapist,
- Within two years following termination of therapy, or
- By means of therapeutic deception.

The patient may recover damages from a psychotherapist who is found liable for sexual contact [*Civ. Code § 43.93(c)*].

For the purposes of *Civ. Code § 43.93*, a therapeutic relationship exists during the time the patient or client is rendered professional service by the therapist [*Civ. Code § 43.93(a)(4)*], and "therapeutic deception" means a representation by a psychotherapist that sexual contact with the psychotherapist is consistent with or part of the patient's or former patient's treatment [*Civ. Code § 43.93(a)(5)*]. Because the statute provides for a cause of action for sexual contact, even without therapeutic deception, if the contact occurred during the period the patient was receiving psychotherapy or within two years following termination of therapy [*see Civ. Code § 43.93(b)(1), (2)*], it appears that therapeutic deception as an independent ground would only be necessary if the sexual contact occurred more than two years following termination of therapy.

It is not a defense to the action that sexual contact with a patient occurred outside a therapy or treatment session or that it occurred off the premises regularly used by the psychotherapist for therapy or treatment sessions [*Civ. Code § 43.93(c)*].

No cause of action under *Civ. Code § 43.93* exists between spouses within a marriage [*Civ. Code § 43.93(c)*].

[b] Sexual Contact Defined

For the purposes of *Civ. Code § 43.93*, sexual contact means the touching of an intimate part of another person. "Intimate part" and "touching" have the same meanings as defined in *Penal Code § 243.4*. *Penal Code § 243.4(f)* defines "intimate part" to mean the sexual organ, anus, groin, or buttocks of any person, and the breast of a female.

It is not entirely clear what constitutes a touching for purposes of *Civ. Code § 43.93* because there are two definitions of "touches" in *Penal Code § 243.4* [*see Penal Code § 243.4(d)(2), (e)*]. The narrower of these two definitions would seem certain to be applied under *Civ. Code § 43.93*. Under this definition, applicable in cases of felony sexual battery, "touches" means physical contact with the skin of another person, whether accomplished directly or through the clothing of the person committing the offense [*Penal Code § 243.4(e)*]. *Penal Code § 243.4* also contains a broader definition of "touches," applicable in specified sexual battery cases. This definition of "touches" includes physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the victim's clothing [*Penal Code § 243.4(d)(2)*]. This broader definition did not exist in 1987, when *Civ. Code § 43.93* was enacted, so it is somewhat doubtful that a court would apply it for purposes of *Civ. Code § 43.93*. Sexual contact under *Civ. Code § 43.93* includes sexual intercourse, sodomy, and oral copulation [*Civ. Code §*

43.93(a)(3)].

[c] Definitions of Psychotherapy and Psychotherapist

For the purposes of *Civ. Code § 43.93*, "psychotherapy" means the professional treatment, assessment, or counseling of a mental or emotional illness, symptom, or condition [*Civ. Code § 43.93(a)(1)*]. "Psychotherapist" means a physician and surgeon specializing in the practice of psychiatry, a psychologist, a psychological assistant, a marriage and family therapist, a registered marriage and family therapist intern or trainee, an educational psychologist, an associate clinical social worker, or a licensed clinical social worker [*Civ. Code § 43.93(a)(2)*].

[d] Limitations on Discovery and Admission of Evidence

In an action for sexual contact, evidence of the plantiff's sexual history is not subject to discovery and is not admissible as evidence except if either (1) the plaintiff claims damage to sexual functioning; or (2) the defendant requests a hearing prior to conducting discovery and makes an offer of proof of the relevancy of the history, and the court finds that the history is relevant and the probative value of the history outweighs its prejudicial effect [*Civ. Code § 43.93(d)*]. *Evid. Code § 1106*, prohibiting use of sexual history evidence in sexual harassment, assault, and battery cases, is inapplicable in a case arising under *Civ. Code § 43.93* [*see Patricia C. v. Mark D. (1993) 12 Cal. App. 4th 1211, 1216-1218, 16 Cal. Rptr. 2d 71* (dictum)].

The court shall allow the discovery or introduction as evidence only of specific information or examples of the plaintiff's conduct that are determined by the court to be relevant. The court's order shall detail the information or conduct that is subject to discovery [*Civ. Code § 43.93(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersGeneral OverviewHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansTortsIntentional TortsIntentional Infliction of Emotional DistressGeneral OverviewTortsIntentional TortsInterference With Personal RelationshipsGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsNegligenceActionsGeneral OverviewTortsNegligenceActionsNegligent Infliction of Emotional DistressGeneral Overview

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§ 415.23 Contract Actions

Recovery for a physician's malpractice may be allowed on a theory of breach of warranty or contract as well as negligence or battery. In order to recover in a contract action, the plaintiff must prove both the existence of an express contract in which the physician clearly promises a particular result or cure and the patient's reliance on the promise in giving consent to treatment [*Jamison v. Lindsay (1980) 108 Cal. App. 3d 223, 234, 166 Cal. Rptr. 443]* . A physician's general statement that treatment will bring a good result does not give rise to a breach of contract/warranty action if the opposite occurs [*see McKinney v. Nash (1981) 120 Cal. App. 3d 428, 442, 174 Cal. Rptr. 642]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionBreach of WarrantyContracts LawTypes of ContractsGeneral OverviewHealthcare LawActions Against Healthcare WorkersGeneral OverviewHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansTortsMalpractice & Professional LiabilityHealthcare Providers

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[Reserved]

§§ 415.24[Reserved]

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36-415 California Forms of Pleading and Practice--Annotated § 415.40

§ 415.40 Notice of Intent to Commence Action

No action based on a health care provider's professional negligence may be commenced unless the defendant has been given at least 90 days prior notice of the intention to commence the action [*Code Civ. Proc. § 364(a)*]. A plaintiff is expected to take adequate steps which would be likely to result in actual notice to the defendant. Checking a defendant's address in public records available from the Medical Board of California, current written communications from a physician to a patient bearing a letterhead showing an address, a patient's firsthand knowledge based on visits to the physician's office, current listings and advertisements in professional and telephone directories, and available on-line legal and medical research providers, are all generally reliable sources for determining where *Code Civ. Proc. § 364(a)* notice may be directed [*Derderian v. Dietrick (1997) 56 Cal. App. 4th 892, 900, 65 Cal. Rptr. 2d 800]* . For a form of notice, *see § 415.90*.

For definitions of health care provider and professional negligence, see *§ 415.10*.

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36-415 California Forms of Pleading and Practice--Annotated § 415.41

§ 415.41 Settlement Prior to Service of Complaint

Whenever, prior to the service of a complaint on a defendant in a medical malpractice action, a demand for settlement or offer to compromise is made on a patient's behalf, the demand or offer must be accompanied by an authorization to disclose medical information to persons or organizations insuring, responsible for, or defending professional liability that the medical practitioner may incur. The authorization must be in accordance with *Civ. Code § 56.11* and must authorize disclosure of that information necessary to investigate issues of liability and extent of potential damages in evaluating the merits of the demand for settlement or offer to compromise. Notice of any request for medical information made pursuant to this authorization must be given to the patient or to his or her legal representative. The notice must describe the inclusive subject matter and the dates of the materials requested and shall authorize the patient or the patient's legal representative to receive, on request, copies of the information at his or her own expense. The required authorization does not waive or limit any applicable privileges set forth in the Evidence Code except for the disclosure of medical information subject to the patient's authorization, nor does it authorize a representative of any person from whom settlement has been demanded to communicate in violation of the physician-patient privilege with a treating physician except for the medical information request. These requirements are independent of the requirements of *Code Civ. Proc. § 364* [*Civ. Code 56.105*]. For discussion of the requirements of *Civ. Code § 56.11*, see Ch. 429, *Privacy* . For discussion and forms relating to settlement in general, see Ch. 520, *Settlement and Release* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewHealthcare LawActions Against Healthcare WorkersGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsProcedureSettlementsGeneral Overview

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§ 415.42 Actions by Minors: Preference in Setting Trial Date

A civil action to recover damages for wrongful death or personal injury is entitled to preference on the motion of any party to the action who is under the age of 14 years unless the court finds that the party does not have a substantial interest in the case as a whole [*Code Civ. Proc. § 36(b)*]. On the granting of a motion for preference under *Code Civ. Proc. § 36(b)*, a party in an action based on a health care provider's alleged professional negligence, as defined in *Code Civ. Proc. § 364*, must receive a trial date not sooner than six months and not later than nine months from the date that the motion is granted [*Code Civ. Proc. § 36(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawFamily Relationships & TortsWrongful Death & SurvivalChildrenHealthcare LawActions Against FacilitiesGeneral OverviewHealthcare LawActions Against Healthcare WorkersGeneral Overview

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[Reserved]

§§ 415.43[Reserved]

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36-415 California Forms of Pleading and Practice--Annotated § 415.44

§ 415.44 Security for Costs

Whenever a personal injury complaint is filed against a licensed health care provider in an action for either professional negligence or performance of professional services without consent, the defendant may move the court within six months after service of summons for an order requiring the plaintiff to furnish security for costs of defense. The security may take the form of a written undertaking with at least two sufficient sureties in a sum not to exceed $500, or a deposit of such sum or equivalent security approved by the court with the court clerk [*Code Civ. Proc. § 1029.6*].

When more than one defendant is named, the undertaking shall be increased up to $500 for each additional defendant in whose favor the undertaking is ordered, not to exceed a total of $1,000 [*Code Civ. Proc. § 1029.6(c)*].

The motion for security precludes a motion for summary judgment [*Code Civ. Proc. § 1029.6(e)*]. Conversely, any party filing a motion for summary judgment is barred from moving for security for costs [*Code Civ. Proc. § 1029.6(f)*].

Code Civ. Proc. § 1029.6 does not apply to actions commenced in small claims court [*Code Civ. Proc. § 1029.6(b)*].

For a complete discussion of the procedural requirements and the hearing of the motion relating to security for costs, see Ch. 295, *Hospitals* . For forms relating to security for costs, see Ch. 174, *Costs and Attorney's Fees* .

For definitions of health care provider and professional negligence, see *§ 415.10*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesGeneral OverviewHealthcare LawActions Against Healthcare WorkersGeneral OverviewHealthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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§ 415.45 Declaratory Relief

Code Civ. Proc. § 1062.5 provides for an action for a declaration of rights and duties under the Medical Injury Compensation Reform Act of 1975 (*see § 415.10*) by any insurer who issues liability policies for professional negligence to health care providers, by any health care provider covered by such a policy, or any potentially aggrieved person. Such actions are given precedence over all others except those in which the state is a party, whether in trial court or on appeal [*Code Civ. Proc. § 1062.5*]. The remedy provided is cumulative, and is not to be construed as restricting any remedy established for the benefit of any party to the action by any other provision of law, or as precluding any party from obtaining additional relief based on the same facts [*Code Civ. Proc. § 1062.5*].

For definitions of health care provider and professional negligence, see *§ 415.10*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesGeneral OverviewHealthcare LawActions Against FacilitiesFacility LiabilityGeneral OverviewHealthcare LawActions Against Healthcare WorkersGeneral OverviewInsurance LawClaims & ContractsDeclaratory ReliefGeneral Overview

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36-415 California Forms of Pleading and Practice--Annotated § 415.46

§ 415.46 Claims Arising Under Medicare Act

If a claim brought against a health care provider or health maintenance organization arises under the Federal Medicare Act [*see 42 U.S.C.S. § 1395 et seq.*], that claim must first go through a multilevel administrative review process in accordance with the regulations of the Secretary of Health and Human Services, after which judicial review may be pursued in federal district court [*see 42 U.S.C.S. §§ 405(g), 1395ff(b)*; *42 C.F.R. § 405.701 et seq.*; *McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal. 4th 412, 416-417, 106 Cal. Rptr. 2d 271, 21 P.3d 1189]* . A claim "arises under" the Medicare Act if both the standing and substantive basis for the presentation of the claim is the Medicare Act or if the claim is "inextricable intertwined" with a claim for Medicare benefits [*Heckler v. Ringer (1984) 466 U.S. 602, 615, 104 S. Ct. 2013, 80 L. Ed. 2d 622* ; *McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal. 4th 412, 417, 106 Cal. Rptr. 2d 271, 21 P.3d 1189]* . However, a claim that is "wholly collateral" to a claim for benefits under the Act is not subject to the administrative process, and a claimant need not exhaust administrative remedies if the claimant makes a colorable showing that an erroneous denial of benefits would cause injury that could not be remedied by the later payment of benefits [*Heckler v. Ringer (1984) 466 U.S. 602, 618, 104 S. Ct. 2013, 80 L. Ed. 2d 622* ; *McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal. 4th 412, 417-418, 106 Cal. Rptr. 2d 271, 21 P.3d 1189]* .

Because the Medicare Act provides for reimbursement of covered claims for services that are reasonable and necessary to diagnose or treat illness or injury, a claim that, at bottom, seeks reimbursement or payment for medical services is "inextricably intertwined" with a Medicare claim and is subject to the Medicare administrative process [*McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal. 4th 412, 425, 106 Cal. Rptr. 2d 271, 21 P.3d 1189]* . However, a Medicare provider may violate state common law or statutory duties owed to Medicare beneficiaries in a way that is unrelated to Medicare coverage determinations. A claim under state law that does not seek such reimbursement or payment under the Act, but only incidentally refers to a denial of benefits, is not preempted by the Medicare procedures [*McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal. 4th 412, 425, 106 Cal. Rptr. 2d 271, 21 P.3d 1189]* .

For example, a health care provider may negligently fail to use ordinary care in treating a Medicare beneficiary, fail to advise the beneficiary properly about his or her condition or appropriate treatment options, whether or not those treatment options are covered by Medicare, or fail to provide appropriate referrals to a specialist. Thus, without regard to the issue of coverage under the Act, a beneficiary may be prevented from seeking appropriate treatment even at his or

her own expense. Claims brought under state law for these negligent acts or omissions, none of which necessarily implicates a coverage determination or falls within the scope of the Medicare administrative review process, are not preempted [*McCall v. PacifiCare of Cal., Inc. (2001) 25 Cal. 4th 412, 425-426, 106 Cal. Rptr. 2d 271, 21 P.3d 1189* , *disapproving Redmond v. Secure Horizons, PacifiCare, Inc. (1997) 60 Cal. App. 4th 96, 70 Cal. Rptr. 2d 174* ; *see also Zolezzi v. PacifiCare of Cal. (2003) 105 Cal. App. 4th 573, 585-587, 129 Cal. Rptr. 2d 526* (application of state arbitration disclosure statute to dispute between patient and health care plan regarding plan's failure to authorize surgery was not preempted)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawManaged HealthcareHealth Maintenance OrganizationsPublic Health & Welfare LawSocial SecurityMedicareGeneral OverviewPublic Health & Welfare LawSocial SecurityMedicareProvidersReimbursementGeneral Overview

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§ 415.47 Statute of Limitations

[1] Professional Negligence

An action against a health care provider for professional negligence must be commenced within three years after the date of injury, or one year after the plaintiff discovers, or through the use of reasonable diligence should discover, the injury, whichever occurs first [*Code Civ. Proc. § 340.5*; *Steingart v. Oliver (1988) 198 Cal. App. 3d 406, 412, 243 Cal. Rptr. 678]* . The three-year period is tolled on proof of fraud, intentional concealment, or the presence of a foreign body inserted into the injured person that has no therapeutic or diagnostic purpose or effect [*Code Civ. Proc. § 340.5*; *see Graham v. Hansen (1982) 128 Cal. App. 3d 965, 974, 180 Cal. Rptr. 604]* .

Unlike the three-year maximum limitations period, which may be tolled only under one of these three specified statutory provisions, the one-year discovery limitations period may be tolled by non-MICRA statutory tolling provisions [*Belton v. Bowers Ambulance Serv. (1999) 20 Cal. 4th 928, 930-935, 86 Cal. Rptr. 2d 107, 978 P.2d 591]* . For example, *Code Civ. Proc. § 352.1*, which provides a two-year extension for filing a suit that accrues while a plaintiff is incarcerated, applies to the one-year MICRA limitations period, although it cannot be used to extend the three-year limitations period [*Belton v. Bowers Ambulance Serv. (1999) 20 Cal. 4th 928, 930-935, 86 Cal. Rptr. 2d 107, 978 P.2d 591* (disapproving *Hollingsworth v. Kofoed (1996) 45 Cal. App. 4th 423, 52 Cal. Rptr. 2d 808* to extent it suggests otherwise)]. Similarly, the tolling provision for insanity found in *Code Civ. Proc. § 352* applies to the one-year limitations period [*Alcott Rehab. Hosp. v. Superior Court (2001) 93 Cal. App. 4th 94, 101, 112 Cal. Rptr. 2d 807]* , as does the tolling provision of *Code Civ. Proc. § 351* applicable when a defendant is out of the state [*Kaplan v. Mamelak (2008) 162 Cal. App. 4th 637, 643, 75 Cal. Rptr. 3d 861*].

The foreign body exception delays the start of the medical malpractice statute of limitations until the patient discovers, or through reasonable diligence should have discovered, the foreign body itself and its role as the negligent cause of his or her suffering [*Ashworth v. Mem'l Hosp. (1988) 206 Cal. App. 3d 1046, 1051, 1062, 254 Cal. Rptr. 104]* . This tolling continues even though the plaintiff has filed an earlier action based on other forms of malpractice occurring during the same medical treatment when the earlier action has been dismissed without prejudice [*Ashworth v. Mem'l Hosp. (1988) 206 Cal. App. 3d 1046, 1051, 1063-1064, 254 Cal. Rptr. 104]* . One court of appeal has held that the

foreign body exception applies only to medically inserted objects that have no therapeutic or diagnostic purpose and that are left in the patient's body. Thus, the exception does not apply when a doctor fails to remove an entire foreign body that causes a puncture wound for which the patient is seeking treatment [*Wallace v. Hibner (1985) 171 Cal. App. 3d 1042, 1047, 217 Cal. Rptr. 748]* .

The intentional-concealment exception applies when the defendant is guilty of fraudulently concealing facts that would inform a patient of his or her injury or its negligent cause. The exception does not come into play, whatever the lengths to which a defendant has gone to conceal its wrongs, if a plaintiff is on notice of a potential claim. Furthermore, the exception cannot be stretched to encompass a nonparty expert witness' refusal voluntarily to give counsel an opinion on a party's conduct [*Barber v. Superior Court (1991) 234 Cal. App. 3d 1076, 1083, 285 Cal. Rptr. 668]* .

The three-year period is triggered by the beginning of the harmful effect of the wrongful act, rather than the date when the act occurred [*Steingart v. White (1988) 198 Cal. App. 3d 406, 412, 243 Cal. Rptr. 678* ; *Tresemer v. Barke (1978) 86 Cal. App. 3d 656, 665, 672, 150 Cal. Rptr. 384]* . Damage may be manifested, for the purpose of commencing the three-year period, without concurrent recognition or understanding of the damage by the plaintiff [*Marriage & Family Ctr. v. Superior Court (1991) 228 Cal. App. 3d 1647, 1654-1655, 279 Cal. Rptr. 475]* . Moreover, it is not necessary that the plaintiff have discovered the negligent cause of the injury at the time the injury first manifests [*Arredondo v. Regents of Univ. of Cal. (2005) 131 Cal. App. 4th 614, 618-619, 31 Cal. Rptr. 3d 800* ; *see Garabet v. Superior Court (2007) 151 Cal. App. 4th 1538, 1549-1551, 60 Cal. Rptr. 3d 800]* . A cause of action for failure to obtain informed consent accrues not when a disclosed inherent complication occurs, but when a undisclosed complication occurs [*Warren v. Schecter (1997) 57 Cal. App. 4th 1189, 1202, 67 Cal. Rptr. 2d 573* (citing *Cobbs v. Grant (1972) 8 Cal. 3d 229, 240-241, 104 Cal. Rptr. 505, 502 P.2d 1*)]. However, as noted, this rule only applies in failure to inform cases and does not apply in other types of malpractice cases. For example, the occurrence of complications that had been discussed prior to the treatment can trigger the running of the statute of limitations in cases in which the patient alleges that the treatment was performed negligently or should not have been performed at all [*Garabet v. Superior Court (2007) 151 Cal. App. 4th 1538, 1550-1551, 60 Cal. Rptr. 3d 800]* .

The one-year period begins when the plaintiff discovers, or with reasonable diligence should discover, the injury, meaning in this instance the discovery of both the harmful effect and the fact that it was caused by someone's negligence [*Steingart v. Oliver (1988) 198 Cal. App. 3d 406, 412, 243 Cal. Rptr. 678* ; *Christ v. Lipsitz (1979) 99 Cal. App. 3d 894, 897, 160 Cal. Rptr. 498]* . The one-year period begins to run no later than the time the plaintiff learns, or should have learned, the facts, as opposed to the legal theories and remedies, relevant to the claim [*Gutierrez v. Mofid (1985) 39 Cal. 3d 892, 898, 218 Cal. Rptr. 313, 705 P.2d 886]* . In addition, the limitations period begins running as to all potential defendants when the plaintiff suspects medical negligence on the part of someone. It is not necessary that the plaintiff suspect a particular physician for the statute to begin running as to that physician or any other physician who may have been negligent [*Knowles v. Superior Court (2004) 118 Cal. App. 4th 1290, 1298-1301, 13 Cal. Rptr. 3d 700]* .

The degree of diligence required by a plaintiff is reduced during continuance of the physician-patient relationship [*Stafford v. Shultz (1954) 42 Cal. 2d 767, 778, 270 P.2d 1* ; *see Unjian v. Berman (1989) 208 Cal. App. 3d 881, 886-887, 256 Cal. Rptr. 478]* . For example, the fact that a patient realizes that he or she is apparently not recovering normally from a medical procedure does not, as a matter of law, cause the one-year period to commence, at least if the physician-patient relationship is continuing [*Gilbertson v. Osman (1986) 185 Cal. App. 3d 308, 317-318, 229 Cal. Rptr. 627]* . Moreover, the statute does not begin to run merely because the plaintiff seeks a second opinion based on suspicions that the plaintiff's treating physician may have been doing something wrong, if the second opinion physician allays the plaintiff's concerns, by indicating that the medical treatment the plaintiff has been receiving is fine, and the plaintiff then continues to be treated by the original physician [*Kitzig v. Nordquist (2000) 81 Cal. App. 4th 1384, 1392-1396, 97 Cal. Rptr. 2d 762]* .

However, the limitations period may begin to run if, despite reliance on the physician's judgment during the

professional relationship, the plaintiff obtains actual knowledge of the injury and its negligent cause [*Sanchez v. South Hoover Hosp. (1976) 18 Cal. 3d 93, 96, 99, 132 Cal. Rptr. 657, 553 P.2d 1129]* . Moreover, when a plaintiff has actual or constructive knowledge of the facts underlying a malpractice claim, the one-year limitation period is not delayed, suspended, or tolled on the basis that an attorney told the plaintiff that there was no legal remedy [*Gutierrez v. Mofid (1985) 39 Cal. 3d 892, 896-902, 218 Cal. Rptr. 313, 705 P.2d 886]* .

At trial on the issue, it is not entirely clear which party bears the burden of proving when a plaintiff in a medical malpractice suit discovered, or through the use of reasonable diligence should have discovered, the facts constituting the alleged malpractice for purposes of applying the one-year limitations period of *Code Civ. Proc. § 340.5*. Traditionally, most courts applying discovery provisions have held that the plaintiff bears the burden of showing that the suit was brought within the requisite time after discovery occurred, and that has been the case when applying the one-year limitations period of *Code Civ. Proc. § 340.5* [*see, e.g., Christ v. Lipsitz (1979) 99 Cal. App. 3d 894, 898, 160 Cal. Rptr. 498]* . However, the California Supreme Court held in 1999 that when applying a similar discovery provision of *Code Civ. Proc. § 340.6(a)* to an attorney malpractice action, the burden or proof falls on the defendant [*Samuels v. Mix (1999) 22 Cal. 4th 1, 5, 91 Cal. Rptr. 2d 273, 989 P.2d 701]* . The Supreme Court in that opinion held that although the burden of proving discovery usually falls on the plaintiff when applying other discovery rules, such as the common law discovery rule, the burden when applying *Code Civ. Proc. § 340.6(a)* falls instead on the defendant. The Court reached this conclusion primarily because that particular statutory discovery rule is technically an element of the affirmative statute of limitations defense, rather than an exception used by a plaintiff to argue for a delay in accrual of the applicable limitations period [*Samuels v. Mix (1999) 22 Cal. 4th 1, 10, 91 Cal. Rptr. 2d 273, 989 P.2d 701* ; *see Evid. Code § 500* (party generally has burden of proof as to each essential fact of claim or deense that party asserts)]. Although the Supreme Court in that case did not specifically address the medical malpractice statute of limitations, the pertinent language of the two statutes is virtually identical, suggesting that the Court would reach the same conclusion and impose the burden of proof on a medical malpractice defendant that asserts that the action was barred by the one-year limitations period.

If a patient states a cause of action against a physician that is not based on professional negligence, *Code Civ. Proc. § 340.5* is not the controlling statute of limitations [*Nelson v. Gaunt (1981) 125 Cal. App. 3d 623, 635-636, 178 Cal. Rptr. 167]* . In one case, for example, plaintiffs brought suit after doctors in a fertility clinic allegedly stole human genetic materials from plaintiffs, such as eggs that had been frozen for future use, and sold the materials without authorization. The court of appeal held that the statute of limitations provided in *Code Civ. Proc. § 340.5* did not apply to plaintiffs' causes of action alleging the intentional torts of fraud, intentional infliction of emotional distress, and conversion. The court, noting that the Legislature had specifically limited application of *Code Civ. Proc. § 340.5* to occasions of "professional negligence," concluded that the intentional and malicious conduct alleged by plaintiffs was qualitatively different from mere negligence [*Unruh-Haxton v. Regents of University of California (2008) 162 Cal. App. 4th 343, 355-356, 76 Cal. Rptr. 3d 146*].

Similarly, if a complaint is based on allegations that a health care provider was convicted of felony elder abuse under *Pen. Code § 368*, the applicable statute of limitations is *Code Civ. Proc. § 340.3*, the special statute for crime victims, rather than *Code Civ. Proc. § 340.5*. The willful nature of criminal conduct in violation of *Pen. Code § 368* means that the actionable conduct goes beyond the scope of professional negligence and therefore beyond the scope of MICRA [*Guardian N. Bay, Inc. v. Superior Court (2001) 94 Cal. App. 4th 963, 977-978, 114 Cal. Rptr. 2d 748]* .

Different limitation time periods may be applicable if the malpractice action is brought against a public employee. Under these circumstances, both *Gov. Code § 945.6* (the statute of limitations for actions against public entities under the Tort Claims Act) and *Code Civ. Proc. § 340.5* (the statute of limitations for medical malpractice actions) apply with equal force. Thus, for example, if the plaintiff files a claim under the Tort Claims Act against the physician, and the plaintiff receives notice of rejection of that claim pursuant to *Gov. Code § 913*, a court action must be filed within six months or the action will be barred under *Gov. Code § 945.6*, even though the action is filed within the one-year limitation period of *Code Civ. Proc. § 340.5* [*Anson v. County of Merced (1988) 202 Cal. App. 3d 1195, 1199, 1202,*

249 Cal. Rptr. 457 ; *see also* discussion in Ch. 464, *Public Entities and Officers: California Tort Claims Act*]. Similarly, a plaintiff suing a public entity or employee for medical malpractice must meet the three-year limitations period of *Code Civ. Proc. § 340.5*, and failure to do so will provide a limitations defense for the defendant even if the plaintiff's action is otherwise timely under the Government Claims Act [*Roberts v. County of Los Angeles (2009) 175 Cal. App. 4th 474, 481, 96 Cal. Rptr. 3d 60*].

The limitations period of *Code Civ. Proc. § 340.5* is also inapplicable to an equitable indemnity action brought by an insurance company against physicians being sued for medical malpractice by the party to whom the insurance company paid a claim [*Preferred Risk Mut. Ins. Co. v. Reiswig (1999) 21 Cal. 4th 208, 213 n.2, 87 Cal. Rptr. 2d 187, 980 P.2d 895]* .

[2] Effect of Notice Requirement on Statute of Limitations

Code Civ. Proc. § 364(d) provides that, if the notice of intention to commence an action required under *Code Civ. Proc. § 364(a)* is served within 90 days of the expiration of the applicable statute of limitations, the time for commencement of the action is extended 90 days from the service of the notice [*Code Civ. Proc. § 364(d)*]. The required notice, and therefore the 90-day extension, apply only in negligence causes of action [*Noble v. Superior Court (1987) 191 Cal. App. 3d 1189, 1192-1194, 237 Cal. Rptr. 38* (*Code Civ. Proc. § 364(d)* does not extend limitation period for battery cause of action)]. However, the extension may be applied even if the applicable statute of limitations is a statute of limitations that falls outside of MICRA, so long as the action is based on a health care provider's professional negligence [*Preferred Risk Mut. Ins. Co. v. Reiswig (1999) 21 Cal. 4th 208, 211-212, 87 Cal. Rptr. 2d 187, 980 P.2d 895]* .

For example, the Supreme Court, in applying the general one-year personal injury limitations period of former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 335.1* (two-year statute of limitations)) in an equitable indemnity action against a health care provider, held that the non-MICRA limitations period may be tolled for 90 days pursuant to the notice provisions of *Code Civ. Proc. § 364(d)*, if the claim for indemnity is based on the health care provider's professional negligence [*Preferred Risk Mut. Ins. Co. v. Reiswig (1999) 21 Cal. 4th 208, 218, 87 Cal. Rptr. 2d 187, 980 P.2d 895]* .

The notice requirement in *Code Civ. Proc. § 364* and its relationship to the statute of limitations have posed interpretive problems for the courts. Following the adoption of *Code Civ. Proc. § 364* in 1975, appellate courts began to take differing positions on the operation of *Code Civ. Proc. § 364(d)*. All of the courts concluded that the limitation period was tolled during *Code Civ. Proc. § 364(a)*'s 90-day waiting period regardless of when during the limitation period the notice of intent to sue was served [*Woods v. Young (1991) 53 Cal. 3d 315, 330, 279 Cal. Rptr. 613, 807 P.2d 455]* . The courts disagreed, however, on the length of the extended time. One line of authority held that the period could be extended by 180 days [*see* *Gomez v. Valley View Sanitorium (1978) 87 Cal. App. 3d 507, 509-510, 151 Cal. Rptr. 97* ; *see also* *Estrella v. Brandt (9th Cir. 1982) 682 F. 2d 814, 818-819* ; *Paxton v. Chapman Gen. Hosp., Inc. (1986) 186 Cal. App. 3d 110, 115, 230 Cal. Rptr. 355]* . The other line of authority maintained that the period could be extended only 90 days [*see* *Braham v. Sorenson (1981) 119 Cal. App. 3d 367, 371, 174 Cal. Rptr. 39* ; *see also* *Grimm v. Thayer (1987) 188 Cal. App. 3d 866, 870, 233 Cal. Rptr. 687* ; *Gilbertson v. Osman (1986) 185 Cal. App. 3d 308, 317, 229 Cal. Rptr. 627* ; *Hilburger v. Madsen (1986) 177 Cal. App. 3d 45, 52, 222 Cal. Rptr. 713* ; *Banfield v. Sierra View Local Dist. Hosp. (1981) 124 Cal. App. 3d 444, 459-460, 177 Cal. Rptr. 290]* . The two lines of authority diverged on the issue of whether plaintiffs were entitled to a 90-day tolling period, under *Code Civ. Proc. § 356*, reflecting the time during which *Code Civ. Proc. § 364(a)* prohibited the commencement of the action, in *addition* to the 90-day extension explicitly provided under *Code Civ. Proc. § 364(d)* [*see* *Woods v. Young (1991) 53 Cal. 3d 315, 322, 279 Cal. Rptr. 613, 807 P.2d 455]* .

In *Woods v. Young*, the California Supreme Court resolved the split concerning interpretation of *Code Civ. Proc. § 364* by formulating a new rule: service of the notice of intent to sue pursuant to *Code Civ. Proc. § 364(a)* tolls the one-year

statute of limitations only when the notice is served during the last 90 days of the one-year period [*Woods v. Young (1991) 53 Cal. 3d 315, 330, 279 Cal. Rptr. 613, 807 P.2d 455]* .

The Court in *Woods* stated that this construction of *Code Civ. Proc. § 364(d)* was necessary to effectuate legislative intent. The Court noted that the Legislature's goal in enacting *Code Civ. Proc. § 364* was to encourage negotiated resolution of medical malpractice disputes outside the formal litigation process [*Woods v. Young (1991) 53 Cal. 3d 315, 325, 279 Cal. Rptr. 613, 807 P.2d 455]* . *Code Civ. Proc. § 364(d)*, literally applied, would require a medical malpractice plaintiff serving notice in the last 90 days of the statute of limitations to commence the lawsuit in the same period of time during which *Code Civ. Proc. § 364(a)* precluded the plaintiff from filing suit [*Woods v. Young (1991) 53 Cal. 3d 315, 325, 279 Cal. Rptr. 613, 807 P.2d 455]* . The *Woods* court opined that such a literal construction of *Code Civ. Proc. § 364(d)* would produce incongruous results, and would not be the best way to effectuate the purpose of the statute [*see* *Woods v. Young (1991) 53 Cal. 3d 315, 325, 279 Cal Rptr. 613, 807 P.2d 455]* . The Court concluded that the legislative purpose of the statute would be best served by construing *Code Civ. Proc. § 364(d)* as *tolling* (rather than extending) for 90 days the one-year statute of limitations under *Code Civ. Proc. § 340.5* when the notice of intent to sue is served during, but not before, the last 90 days of the limitation period [*Woods v. Young (1991) 53 Cal. 3d 315, 325, 328, 279 Cal. Rptr. 613, 807 P.2d 455]* .

For purposes of calculating the time for bringing the action, the day of service of the notice is excluded from consideration [*see* *Woods v. Young (1991) 53 Cal. 3d 315, 326 n.3, 279 Cal. Rptr. 613, 807 P.2d 455]* . Thus, for example, if a plaintiff serves the notice of intent to sue on the last day of the one-year limitation period (day 365), the plaintiff has one day after the 90-day waiting period to file the complaint [*Woods v. Young (1991) 53 Cal. 3d 315, 326 n.3, 279 Cal. Rptr. 613, 807 P.2d 455]* . By way of further example, if a plaintiff serves the notice of intent to sue on the 300th day of the one-year period, the plaintiff has 66 days after the 90-day waiting period to file the complaint [*see* *Woods v. Young (1991) 53 Cal. 3d 315, 326, 326 n.3, 279 Cal. Rptr. 613, 807 P.2d 455]* .

The Court in *Woods* addressed the one-year limitation period set forth in *Code Civ. Proc. § 340.5*, without commenting on the possible effects of *Code Civ. Proc. § 364(d)* on the three-year period of *Code Civ. Proc. § 340.5* [*Woods v. Young (1991) 53 Cal. 3d 315, 319 n.1, 279 Cal. Rptr. 613, 807 P.2d 455]* . That issue was subsequently addressed in *Russell v. Stanford Univ. Hosp. (1997) 15 Cal. 4th 783, 785, 791, 64 Cal. Rptr. 2d 97, 937 P.2d 640* , in which the court held that the three-year statute of limitations, *Code Civ. Proc. § 340.5*, is "tolled" rather than "extended" for 90 days whenthe plaintiff gives notice of intent to sue in the last 90 days of the statutory period. The *Russell* court concluded that the same rule applies to the three year statute of limitations as applies to the one year statute for the reasons expressed in *Woods*, and as a matter of statutory construction. According to the court, this construction of *Code Civ. Proc. § 364(d)* effectuates the legislative purpose of the provision and avoids the possibility that plaintiffs' attorneys will confront the professional dilemma addressed in *Woods*--that is, choosing between (1) preserving the plaintiff's cause of action by violating the 90-day notice period under *Code Civ. Proc. § 364(d)*, thereby invoking potential disciplinary proceedings by the State Bar, and (2) forfeiting the client's cause of action, without significant impact on the legislative goal of establishing a strict outside time limit for commencing negligence actions against health care providers. While the court acknowledged that one effect of this decision might conceivably be to extend the time for commencing a claim 90 days beyond the tree year statute of limitations, it ruled that on balance the legislative interest in promoting negotiated resolution of medical malpractice disputes must be deemed overriding [*Russell v. Stanford Univ. Hosp. (1997) 15 Cal. 4th 783, 790, 64 Cal. Rptr. 2d 97, 937 P.2d 640]* .

In ruling on the construction of *Code Civ. Proc. § 364(d)*, the California Supreme Court stated that, out of considerations of public policy and fairness to litigants who might have relied on contrary rules announced in prior appellate cases, its holding would only apply prospectively to complaints filed 90 days after the case became final [*Woods v. Young (1991) 53 Cal. 3d 315, 330-331, 279 Cal. Rptr. 613, 807 P.2d 455]* . Apparently, then, the rule only applies to complaints filed on or after August 3, 1991 [*see* *Woods v. Young (1991) 53 Cal. 3d 315, 331, 279 Cal. Rptr. 613, 807 P.2d 455* (decided April 4, 1991)]. With respect to cases in which the complaint was filed on or before August 2, 1991, plaintiffs will have the benefit of the former rule that permitted extension of the one-year limitation period if

the notice of intent to sue was served at *any* time during the one-year limitation period. Consequently, even in cases in which the notice of intent was filed more than 90 days before the end of the one-year limitation period, the plaintiff will have the advantage of 90-day tolling [*Woods v. Young (1991) 53 Cal. 3d 315, 331, 279 Cal. Rptr. 613, 807 P.2d 455]* .

The prospectivity directive of *Woods* has been interpreted to apply only to *Woods*' primary holding that the extension allowed by *Code Civ. Proc. § 364(d)* is available only when the notice of intention to sue is served during the final 90 days of the applicable limitation period. Under this interpretation, the prospectivity directive does not apply to the secondary holding in *Woods*, which limits the maximum filing period to the period of limitation plus 90 days [*Barber v. Superior Court (1991) 234 Cal. App. 3d 1076, 1081-1082, 285 Cal. Rptr. 668* ; *see Woodsv. Young (1991) 53 Cal. 3d 315, 330 n.6, 331, 279 Cal. Rptr. 613, 807 P.2d 455]* .

If a 90-day notice of intent to sue is given prior to the final 90 days of the limitations period, the plaintiff cannot toll the statute of limitations by giving a second notice of intent to sue within the final 90 days of the limitations period [*Bennett v. Shahhal (1999) 75 Cal. App. 4th 384, 390, 89 Cal. Rptr. 2d 272]* . In such a case, the original notice, although it does not extend the limitations period, fully achieves the legislative objective of providing time for the negotiated settlement of disputes [*Bennett v. Shahhal (1999) 75 Cal. App. 4th 384, 390, 89 Cal. Rptr. 2d 272]* . A second notice does not toll the limitations period even if the plaintiff may have experienced or discovered additional injuries after the first notice was given [*Bennett v. Shahhal (1999) 75 Cal. App. 4th 384, 391-392, 89 Cal. Rptr. 2d 272]* .

If a defendant is sued as a Doe because his or her name is unknown to plaintiff at the time of filing the complaint, the provisions of *Code Civ. Proc. § 364* do not apply to the defendant [*Code Civ. Proc. § 364(e)*]. Therefore, if the identity of a Doe defendant is not actually known, a plaintiff is not required to file a notice of intent to sue with that defendant prior to amending a timely-filed complaint to name that defendant [*Camarillo v. Vaage (2003) 105 Cal. App. 4th 552, 566-568, 130 Cal. Rptr. 2d 26]* . In addition, if a plaintiff has filed a timely notice of intent to sue with known codefendants, a plaintiff is not additionally required to file an actual complaint against other unknown Doe defendants within the applicable limitations period to preserve the right to sue those defendants [*Camarillo v. Vaage (2003) 105 Cal. App. 4th 552, 570-571, 130 Cal. Rptr. 2d 26* (attorneys who filed timely notice of intent did not commit malpractice by failing to also file complaint against doctor whose identity was unknown)]. If the plaintiff properly serves a named codefendant with a notice of intent to sue, the time for commencement of suit against a Doe defendant is extended for the same period as for suit against the named defendant [*Grimm v. Thayer (1987) 188 Cal. App. 3d 866, 870-871, 233 Cal. Rptr. 687 , disapproved on other grounds, Woods v. Young (1991) 53 Cal. 3d 315, 328 n.4, 279 Cal. Rptr. 613, 807 P.2d 455*)].

If a defendant is actually known to the plaintiff and is served with a notice of intent to sue, the limitations period is extended by 90 days even if that defendant is not named in the original complaint, but is instead subsequently substituted in for a Doe defendant. If the amendment naming that defendant is made before expiration of the limitations period as extended by the 90 days, the amendment is timely as to that defendant [*Davis v. Marin (2000) 80 Cal. App. 4th 380, 386-387, 94 Cal. Rptr. 2d 896]* .

If a plaintiff has actual knowledge of the identities of the treating physician or physicians, a notice under *Code Civ. Proc. § 364(a)* given to the hospital where the medical care was provided is insufficient to extend the limitation period under *Code Civ. Proc. § 364(d)* as to the unnamed physicians [*Godwin v. City of Bellflower (1992) 5 Cal. App. 4th 1625, 1632, 7 Cal. Rptr. 2d 524]* . Furthermore, notice to the hospital is insufficient to extend the limitation period governing claims against the treating physicians even if the notice identifies those physicians [*Hanooka v. Pivko (1994) 22 Cal. App. 4th 1553, 1560, 28 Cal. Rptr. 2d 70]* .

Although actual notice of the intent to sue may be required by a court if the issue is whether or not the plaintiff took reasonable steps to provide a particular defendant with notice by providing notice to defendant's purported principal,

actual notice is not required, as a general rule, to toll a limitations period under *Code Civ. Proc. § 364(d)* [*Silver v. McNamee (1999) 69 Cal. App. 4th 269, 285-286]* . In one case, for example, the court of appeal ruled that a plaintiff giving notice under *Code Civ. Proc. § 364* had tolled the statute of limitations for 90 days when he complied with statutory requirements governing service of process by mail prior to expiration of the limitations period. The court in that case held that the notices were effectively served when properly addressed to the out-of-state defendant and placed in the mail in compliance with the applicable statutes. Under those circumstances, actual notice to the defendant within the limitations period was not required [*Silver v. McNamee (1999) 69 Cal. App. 4th 269, 279-286* (rejecting argument that *Code Civ. Proc. § 1013(a)* delayed effective date of mailed service by 10 days)].

The one-year limitations period contained in *Code Civ. Proc. § 340.5* may not be extended on the basis of an attorney's excusable neglect in providing the notice of intention to sue required by *Code Civ. Proc. § 364* [*Hanooka v. Pivko (1994) 22 Cal. App. 4th 1553, 1560, 1563, 28 Cal. Rptr. 2d 70]* .

The notice provision of *Code Civ. Proc. § 364* is discussed in *§ 415.40*.

For definitions of health care provider and professional negligence, see *§ 415.10*.

[3] Actions by Minors for Prenatal Injuries

[a] In General

As a general rule, actions brought by or on behalf of minors for prenatal injuries or injuries sustained in the course of birth must be brought within six years of the minor's birth [*Code Civ. Proc. § 340.4*]. The limitation period set forth in *Code Civ. Proc. § 340.5* allowing a complaint to be filed prior to a child's eighth birthday is extended by *Code Civ. Proc. § 12a* if the child's eighth birthday occurs on a day following a holiday [*Tran v. Fountain Valley Cmty. Hosp. (1997) 51 Cal. App. 4th 1464, 1466, 60 Cal. Rptr. 2d 91]* . However, in a medical malpractice action for prenatal injuries, the limitation period is governed by *Code Civ. Proc. § 340.5* rather than by Civ. Code § 340.4 [*Young v. Haines (1986) 41 Cal. 3d 883, 894, 226 Cal. Rptr. 547, 718 P.2d 909]* .

Actions by minors must be commenced within three years from the date of the alleged wrongful act except for actions by minors under the full age of six years, which must be commenced within three years or prior to the minor's eighth birthday, whichever provides a longer period [*Code Civ. Proc. § 340.5*; *see also* *Young v. Haines (1986) 41 Cal. 3d 883, 897-901, 226 Cal. Rptr. 547, 718 P.2d 909* (noting that minors may have equal protection challange to *Code Civ. Proc. § 340.5*); *Aronson v. Superior Court (1987) 191 Cal. App. 3d 294, 296, 236 Cal. Rptr. 347]* . Service of a *Code Civ. Proc. § 364(a)* intent to sue notice during the last 90 days of this three-year limitations period will toll the statute of limitations for 90 days [*Newman v. Burnett (1997) 62 Cal. Rptr. 2d 175]* .

The time limitation is also tolled for any period during which the minor's parent or guardian and insurer or health care provider have committed fraud or collusion in the failure to bring the professional negligence action [*Code Civ. Proc. § 340.5*].

In addition, minors may invoke the general tolling provisions of *Code Civ. Proc. § 340.5* under which the three-year period may be tolled by proof of fraud, intentional concealment, or the presence of a foreign body that had no theraputic or diagnostic purpose [*Young v. Haines (1986) 41 Cal. 3d 883, 897-901, 226 Cal. Rptr. 547, 718 P.2d 909]* . Although the statute does not expressly say so, it is clear that in order to toll the three-year period the intentional concealment must be by the health-care provider [*Aronson v. Superior Court (1987) 191 Cal. App. 3d 294, 296 n.2, 236 Cal. Rptr. 347]* .

A claim that a physician negligently failed to report suspected child abuse is a claim for professional negligence that is governed by *Code Civ. Proc. § 340.5* and is not subject to the general tolling rule that would otherwise apply during a

person's minority [*David M. v. Beverly Hosp. (2005) 131 Cal. App. 4th 1272, 1278-1279, 32 Cal. Rptr. 3d 649]* .

As noted above, when a medical malpractice action is brought against a public entity, the action is subject to the provisions of the Tort Claims Act. Thus, when the plaintiff is a minor and a timely claim has been filed with and rejected by the public entity, the six-month period for filing a medical malpractice action under *Gov. Code § 945.6* applies even when a longer period for bringing the action against a non-public health care provider might be allowed under *Code Civ. Proc. § 340.5* [*Martell v. Antelope Valley Hosp. Med. Ctr. (1998) 67 Cal. App. 4th 978, 981-983, 79 Cal. Rptr. 2d 329]* . In one case, for example, a tort action brought on behalf of a minor was untimely when brought over seven years after the claim against the public entity was filed and rejected, even though the action may have been timely under *Code Civ. Proc. § 340.5*, and even though plaintiffs had earlier filed a timely action that had later been dismissed without prejudice [*Martell v. Antelope Valley Hosp. Med. Ctr. (1998) 67 Cal. App. 4th 978, 981-983, 79 Cal. Rptr. 2d 329]* .

As noted in § 415.47[1], a medical malpractice action brought against a public entity is subject to the provisions of the Tort Claims Act. Therefore, if the plaintiff is a minor and a timely claim has been filed with and rejected by the public entity, the six-month period for filing a medical malpractice action under *Gov. Code § 945.6* applies even if a longer period for bringing the action against a non-public health care provider might be allowed under *Code Civ. Proc. § 340.5* [*Martell v. Antelope Valley Hosp. Med. Ctr. (1998) 67 Cal. App. 4th 978, 981-983, 79 Cal. Rptr. 2d 329]* . In one case, for example, a tort action brought on behalf of a minor was untimely because it was brought over seven years after the claim against the public entity was filed and rejected, even though the action may have been timely under *Code Civ. Proc. § 340.5* and even though the plaintiffs had earlier filed a timely action that had later been dismissed without prejudice [*Martell v. Antelope Valley Hosp. Med. Ctr. (1998) 67 Cal. App. 4th 978, 981-983, 79 Cal. Rptr. 2d 329]* .

[b] Constitutionality of Statutory Accrual Date

One California court of appeal has held that *Code Civ. Proc. 340.5* violates a minor's right to equal protection because it contains different accrual dates for minors' and adults' causes of action, without a rational basis for so doing [*Torres v. County of Los Angeles (1989) 209 Cal. App. 3d 325, 334, 257 Cal. Rptr. 211]* . Under *Code Civ. Proc. § 340.5*, an adult's cause of action may accrue either from the "date of injury" or from the time "the plaintiff discovers, or through the use of reasonable diligence should have discovered the injury." A minors' cause of action, by contrast, accrues from the date of the "wrongful act," rather than from the injury, and *Code Civ. Proc. § 340.5* contains no comparable provision permitting accrual when the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury [*Code Civ. Proc. § 340.5*].

The court's finding of unconstitutionality arose in a case involving the application of the accrual date in *Code Civ. Proc. § 340.5* to determine when the 90-day (now six-month) period for tort claims commenced against a governmental health care provider [*see Gov. Code § 911.2* (tort claim for injury must be brought within 6 months after accrual of cause of action); *see also Gov. Code § 901* (for determining time limit prescribed by *Gov. Code § 911.2*, date of accrual is date on which cause of action would be deemed to have accrued within meaning of statute of limitations that would be applicable if there were no special government tort claims requirement)]. The plaintiff in the case was a minor who allegedly suffered harm before and during childbirth.

The application of the *Code Civ. Proc. § 340.5* accrual date placed minors such as the plaintiff in *Torres* at a disadvantage, because accrual for minors on the "date of the alleged wrongful act" would in many cases take place earlier than accrual for adults on the "date of injury." The court noted that when harm occurs prenatally or in childbirth, the "wrongful act" may only be revealed to have caused an injury to the minor months or even years later, as the child grows and develops [*Torres v. County of Los Angeles (1989) 209 Cal. App. 3d 325, 334, 257 Cal. Rptr. 211]* .

The court of appeal found it difficult to see how discrimination against minor malpractice plaintiffs vis-'a-vis adults through different accrual dates would rationally relate to any ascertainable legislative goal [*Torres v. County of Los*

Angeles (1989) 209 Cal. App. 3d 325, 334, 257 Cal. Rptr. 211] . It refused to apply the "wrongful act" accrual provision of *Code Civ. Proc. § 340.5* to determine the starting point for the (then) 90-day government tort claims period under *Gov. Code 911.2*. Instead, the court held that for purposes of the government tort claim statutes, a minor's medical malpractice cause of action against a government defendant would accrue when the minor's parent or guardian knew or should have known through the exercise of reasonable diligence that a negligent wrongful act of medical care caused the child's injuries [*Torres v. County of Los Angeles (1989) 209 Cal. App. 3d 325, 335, 257 Cal. Rptr. 211]* .

Although it is not clear that the court of appeal's finding of unconstitutionality concerning the different accrual dates would prevent a court from applying the accrual dates in a case directly involving *Code Civ. Proc. § 340.5*, rather than a government tort claims statute, it seems unlikely that the difference between the statute of limitations and the claims statute is sufficient to serve as a basis for distinguishing the result in *Torres*. The Supreme Court denied review in the court of appeal case, and has, in the past, generally declined to address the issue of whether *Code Civ. Proc. § 340.5* unconstitutionally favors adults over minors [*see* *Young v. Haines (1986) 41 Cal. 3d 883, 897 n.10, 226 Cal. Rptr. 547, 718 P.2d 909* ; *Steketee v. Lintz, Williams & Rothberg (1985) 38 Cal. 3d 46, 54 n.4, 210 Cal. Rptr. 781, 694 P.2d 1153]* .

Code Civ. Proc. § 340.5's constitutionality was also called into question in the Ninth Circuit decision of *Katz v. Children's Hosp. of Orange County (9th Cir. 1994) 28 F.3d 1520* . The *Katz* court concurred in the *Torres* court's equal protection analysis and found no basis for limiting *Torres* to cases involving *Gov. Code § 911.2*. In order to avoid the constitutional problem concerning the different accrual dates, the *Katz* court interpreted the words "wrongful act" in *Code Civ. Proc. § 340.5* as "injury" for purposes of applying the statute's three-year limitations period. This ruling allows a minor's claim to be brought within the three years of the date of injury, but prevents the limitations period from being extended by the discovery rule [*Katz v. Children's Hosp. of Orange County (9th Cir. 1994) 28 F.3d 1520, 1533]* .

[4] Battery Actions

Code Civ. Proc. § 340.5 was amended by the Medical Injury Compensation Reform Act, and now applies only to actions based on professional negligence. Since professional negligence refers to negligent acts or omissions, *Code Civ. Proc. § 340.5* probably does not apply to actions based on battery. The statute of limitations in a battery action is one year and commences immediately on the commission of the battery [*Code Civ. Proc. § 340.3*; *see* Ch. 58, *Assault and Battery*].

[5] Contract Actions

Actions against physicians or other medical personnel based on breach of contract or warranty are governed by *Code Civ. Proc. § 337*, which creates a four-year limitation period for actions based on written instruments, or *Code Civ. Proc. § 339(1)*, creating a two-year period for agreements not based on a writing.

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Forms of Pleading and Practice--Annotated

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 415 PHYSICIANS: MEDICAL MALPRACTICE
PART II. LEGAL BACKGROUND
B. Procedure

36-415 California Forms of Pleading and Practice--Annotated § 415.48

§ 415.48 Separate Trial of Statute of Limitations Defense

In an action against a physician or surgeon, dentist, registered nurse, dispensing optician, optometrist, registered physical therapist, podiatrist, licensed psychologist, osteopath, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, veterinarian, or a licensed hospital as the employer of such person, based on such person's alleged professional negligence, or for rendering professional services without consent, or for error or omission in such person's practice, if the answer pleads a statute of limitations defense, a separate trial on that issue must be granted prior to trial on other issues. If the statute of limitations issue is resolved in favor of plaintiff, the remaining issues are then tried. The motion for separate trial may be made by any party or by the court itself [*Code Civ. Proc. § 597.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSeparate TrialsGovernmentsLegislationStatutes of LimitationsGeneral OverviewHealthcare LawActions Against FacilitiesDefensesGeneral OverviewTortsProcedureStatutes of LimitationsGeneral Overview

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§ 415.49 Damages

[1] In General

The general measure of damages for the breach of an obligation not arising from contract, except when otherwise provided by statute, is the amount that will compensate for all the detriment proximately caused by the breach, whether anticipated or not [*Civ. Code § 3333*]. In actions based on failure to obtain informed consent, a plaintiff is entitled to recover not only for the undisclosed complications but also for the disclosed complications, on the theory that plaintiff would not have consented to any surgery had the true risk been disclosed, and therefore would not have suffered those complications either [*Warren v. Schecter (1997) 57 Cal. App. 4th 1189, 1204, 67 Cal. Rptr. 2d 573]* .

In actions based on professional medical negligence, however, certain statutory restrictions apply to the amount of damages recoverable [*see Civ. Code § 3333.2*].

[2] Noneconomic Losses

In any action for injury against a health care provider based on professional negligence, the injured plaintiff is entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damage [*Civ. Code § 3333.2(a)*]. Recovery for noneconomic losses in such actions, however, may not exceed $250,000 [*Civ. Code § 3333.2(b)*].

The $250,000 recovery limit in *Civ. Code § 3333.2(b)* does not constitute a single aggregate limit on a defendant's liability for all legal proceedings arising from a single act of professional negligence. Instead, the $250,000 limit applies to each separate and independent claim based on a negligent act. For example, when a claim for loss of consortium, a separate and independent claim from a spouse's claim for personal injury, is joined with a spouse's claim for physical injuries in an action for medical malpractice, each spouse is entitled to recover up to $250,000 for his or her separate noneconomic losses [*Atkins v. Strayhorn (1990) 223 Cal. App. 3d 1380, 1394-1396, 273 Cal. Rptr. 231]* .

The $250,000 limit on noneconomic damages applies in actions brought by survivors of malpractice victims who initiate suits for wrongful death [*Yates v. Pollock (1987) 194 Cal. App. 3d 195, 199, 239 Cal. Rptr. 383]* . In such

actions, the wrongful death claim is merely derivative of the deceased patient's claim for personal injuries, and is joint, single, and indivisible; consequently, the total aggregate recovery of noneconomic damages by all wrongful death plaintiffs in a single action cannot exceed $250,000 [*Yates v. Pollock (1987) 194 Cal. App. 3d 195* ; *see Atkins v. Strayhorn (1990) 223 Cal. App. 3d 1380, 1395, 273 Cal. Rptr. 231]* .

The court of appeal has held that the $250,000 limit on noneconomic damages does not apply to a plaintiff who recovers for a common law battery based on the physician's performing a surgery to which the plaintiff expressly did not consent. This type of battery is an intentional tort that is not a species of negligence and falls outside the scope of *Civ. Code § 3333.2* [*Perry v. Shaw (2001) 88 Cal. App. 4th 658, 661, 668-670, 106 Cal. Rptr. 2d 70* ; *see generally § 415.20*].

If an employer entity, such as a medical partnership group, is vicariously liable for the professional malpractice of a physician employed by the entity, the cap on noneconomic damages applies to any damages awarded against the employer [*Lathrop v. HealthCare Partners Med. Group (2004) 114 Cal. App. 4th 1412, 1424, 8 Cal. Rptr. 3d 668]* . Under the doctrine of respondeat superior, regardless of whether the employee is also sued, the vicarious liability of the employer is wholly derived from the liability of the employee, and any defenses available to the employee also inure to the benefit of the employer [*Lathrop v. HealthCare Partners Med. Group (2004) 114 Cal. App. 4th 1412, 1423, 8 Cal. Rptr. 3d 668]* .

If an award of noneconomic damages includes future noneconomic damages to be paid according to a periodic payment schedule, the statutory cap applies only to the present value of the award for future damages [*Salgado v. County of Los Angeles (1998) 19 Cal. 4th 629, 643, 80 Cal. Rptr. 2d 46, 967 P.2d 585]* . For discussion of the periodic payment of a future damages award, see *§ 415.49[4]*.

The $250,000 limit on noneconomic damages applies to an action for equitable indemnity brought against a health care provider by a third party [*Western S.S. Lines, Inc. v. San Pedro Gen. Hosp. (1994) 8 Cal. 4th 100, 111, 32 Cal. Rptr. 2d 263, 876 P.2d 1062]* . Thus, the damage cap applied in an action against a hospital by a ship owner, in which the ship owner had settled a maritime worker's claim for substandard medical care by the ship's medical staff and sought indemnity based on aggravation of the worker's injuries when he was later admitted to the defendant hospital. The ship owner argued unsuccessfully that the damages sought were economic in nature because they would provide reimbursement for money paid out in settling the worker's claim.

Civ. Code § 3333.2 may also apply to a claim brought under the federal Emergency Medical Treatment and Active Labor Act (EMTALA), a statute that is designed generally to prevent hospitals that have entered into Medicare provider agreements from inappropriately transferring or refusing to treat patients requiring emergency medical treatment [*see 42 U.S.C.S. § 1395dd*; *see also Barris v. County of Los Angeles (1999) 20 Cal. 4th 101, 113, 83 Cal. Rptr. 2d 145, 972 P.2d 966]* . Under EMTALA, a civil claim may be brought based either on the failure to provide an appropriate medical screening examination within the capabilities of the hospital's emergency department or, if the patient is determined to have an emergency medical condition, on the failure to provide medical treatment required to stabilize the patient's condition. A hospital may not transfer or discharge a patient unless the patient's condition has stabilized or other statutory requirements have been met [*see 42 U.S.C.S. § 1395dd(b), (c), (d)(2)(A)*]. When a successful suit is brought, the statute also specifically provides for recovery of "those damages available for personal injury under the law of the State in which the hospital is located" [*42 U.S.C.S. § 1395dd(d)(2)(A)*].

Based on the damage provision and the intent of Congress when enacting the statute, the California Supreme Court has held that the cap on noneconomic damages of *Civ. Code § 3333.2* applies to actions brought under EMTALA when the cap would apply if the claim were brought under state law [*Barris v. County of Los Angeles (1999) 20 Cal. 4th 101, 113, 83 Cal. Rptr. 2d 145, 972 P.2d 966]* . Since a plaintiff bringing a failure to stabilize claim under EMTALA must necessarily prove that "the hospital did not, within its available staff and facilities, provide a patient known to be suffering from an emergency medical condition with medical treatment necessary to assure, within reasonable medical

probability, that no deterioration of the condition would likely occur," these claims are "based on professional negligence" and therefore subject to the provisions of *Civ. Code § 3333.2* [*Barris v. County of Los Angeles (1999) 20 Cal. 4th 101, 113-114, 20 Cal. 4th 101, 114, 83 Cal. Rptr. 2d 145, 972 P.2d 966]* . For further discussion of EMTALA and analogous state statutes, see Ch. 295, *Hospitals* .

Special methods for computing noneconomic damages must be employed if the jury finds the plaintiff to be comparatively negligent, or if multiple defendants are held liable for noneconomic damages. If the plaintiff is comparatively negligent, the court must, before applying *Civ. Code § 3333.2*, reduce the jury's noneconomic damage award by the percentage of the plaintiff's fault. If what remains exceeds $250,000, the award is further reduced to that amount [*Atkins v. Strayhorn (1990) 223 Cal. App. 3d 1380, 1391-1393, 273 Cal. Rptr. 231* ; *McAdory v. Rogers (1989) 215 Cal. App. 3d 1273, 1276-1281, 264 Cal. Rptr. 71]* . With respect to multiple defendants, Proposition 51 (*Civ. Code §§ 1431-1431.5*) requires, in actions for personal injury and wrongful death, that noneconomic damages be apportioned severally, according to comparative fault; consequently, for defendants whose liability is limited by MICRA, the $250,000 cap on noneconomic damages under *Civ. Code § 3333.2* must be applied to an noneconomic damage award before reduction of noneconomic damages based on each defendant's share of comparative fault [*Mayes v. Bryan (2006) 139 Cal. App. 4th 1075, 1101, 44 Cal. Rptr. 3d 14* ; *Gilman v. Beverly Cal. Corp. (1991) 231 Cal. App. 3d 121, 126-130, 283 Cal. Rptr. 17* ; *see Civ. Code § 1431.2(a)*]. However, when adjusting damages to account for the comparative fault of nonparties who are not subject to MICRA, a noneconomic damage award should be reduced prior to applying the $250,000 cap [*Francies v. Kapla (2005) 127 Cal. App. 4th 1381, 1387-1389, 26 Cal. Rptr. 3d 501]* .

One appellate court has developed a hypothetical to illustrate the interrelationship between comparative fault principles, Proposition 51, and *Civ. Code § 3333.2*. In this hypothetical, a jury awards a plaintiff $1 million in noneconomic damages and apportions fault 25 percent to plaintiff, 25 percent to a drug company that is not a "health care provider" under MICRA, 40 percent to Dr. A, and 10 percent to Dr. B. Applying comparative fault principles, plaintiff's negligence reduces the $1-million verdict to $750,000. Then, applying Proposition 51, the drug company is severally liable for 25 percent of the verdict, or $250,000. Finally, applying *Civ. Code § 3333.2*, the health care providers' total liability is $250,000, with 80 percent being apportioned to Dr. A and 20 percent to Dr. B [*Gilman v. Beverly Cal. Corp. (1991) 231 Cal. App. 3d 121, 129 n.10, 283 Cal. Rptr. 17]* .

For definitions of health care provider and professional negligence, see *§ 415.10*.

[3] Evidence of Collateral Benefits and Subrogation

In an action for personal injury against a health care provider based on professional negligence, the defendant may elect to introduce evidence of any amount payable as a benefit to the plaintiff as the result of the injurypursuant to the United States Social Security Act, any state or federal income disability or workers' compensation act, any health, sickness, or income-disability insurance, accident insurance that provides health care benefits or income-disability insurance, or any contract or agreement of any group, organization, partnership, or corporation to cover the costs of any health care services [*Civ. Code § 3333.1(a)*].

If defendant so elects, the plaintiff may introduce evidence of any amount that plaintiff has paid or contributed toward any benefits introduced by the defendant [*Civ. Code § 3333.1(a)*].

No source of collateral benefits introduced pursuant to *Civ. Code § 3333.1(a)* may recover any amount against the plaintiff, nor may it be subrogated to the rights of the plaintiff against a defendant [*Civ. Code § 3333.1(b)*]. However, this is not always the case, because some benefit providers, such as the Medi-Cal program, have a statutory right to recover from third-party tortfeasors [*see, e.g.,* *Hernandez v. California Hosp. Med. Ctr. (2000) 78 Cal. App. 4th 498, 506, 93 Cal. Rptr. 2d 97]* . For further discussion of these lien rights, see Ch. 177, *Damages* .

A defendant's evidence of collateral benefits presented pursuant to *Civ. Code § 3333.1*, even collateral payment of *all* damages, does not constitute summary judgment proof that the plaintiff sustained no damages such that the plaintiff may not prosecute the action. Instead, it is for the jury to decide how to apply the evidence of collateral payments when calculating damages [*Hernandez v. California Hosp. Med. Ctr. (2000) 78 Cal. App. 4th 498, 506, 93 Cal. Rptr. 2d 97]* .

Although evidence of the amount of any insurance or disability benefits received by the plaintiff is admissible under *Civ. Code § 3333.1*, that statute does not provide a right to introduce evidence of the taxability of those benefits. Allowing such evidence would invite undue jury speculation on how tax liability might affect the plaintiff's future income [*Cox. v. Superior Court (2002) 98 Cal. App. 4th 670, 675, 120 Cal. Rptr. 2d 45]* .

For definitions of health care provider and professional negligence, see *§ 415.10*.

[4] Periodic Payment of Future Damages

Professional negligence actions against health care providers are governed by *Code Civ. Proc. § 667.7*, which provides that either party may request the superior court to enter a judgment ordering that money damages or the equivalent for future damages be paid in whole or in part by periodic payments rather than by a lump-sum payment, if the future damages portion of the award equals or exceeds $50,000 [*Code Civ. Proc. § 667.7(a)*].

A party's request for periodic payment of future damages pursuant to *Code Civ. Proc. § 667.7* must be made prior to the entry of any judgment in the action [*Craven v. Crout (1985) 163 Cal. App. 3d 779, 784, 209 Cal. Rptr. 649* ; *see Fein v. Permanente Med. Group (1985) 38 Cal. 3d 137, 156, 211 Cal. Rptr. 368, 695 P.2d 665]* . If the defendant has put the plaintiff on notice at the pleading stage of his or her intention to seek periodic future damages and requested the trial court to instruct the jury to designate the portion of the damages that was attributable to future damages, a formal request for periodic payment of future damages made following delivery of the verdict is not untimely [*see Gorman v. Leftwich (1990) 218 Cal. App. 3d 141, 152-153, 266 Cal. Rptr. 671]* . A jury award of lump-sum damages in a malpractice award cannot be modified by the court to allow periodic payment of future damages under *Code Civ. Proc. § 667.7* if the jury has not identified the amount of damages subject to periodic payment and the defendant's request for periodic payment was not made until after the judgment was entered [*Craven v. Crout (1985) 163 Cal. App. 3d 779, 783-785, 209 Cal. Rptr. 649]* .

A court is not required to order periodic payments of damages for future loss of earnings attributable to the period by which plaintiff's life expectancy was diminished as result of defendant's negligence [*Hurlbut v. Sonora Cmty. Hosp. (1989) 207 Cal. App. 3d 388, 405-406, 254 Cal. Rptr. 840]* . For example, if a plaintiff's expected work life without the injury would be from ages 18 to 65 years and the negligence of the defendant shortens that expected work life to ages 18 to 30 years, the court could order the "future loss of earnings" damages for years 31 to 65 to be paid out in a lump sum [*see Hurlbut v. Sonora Cmty. Hosp. (1989) 207 Cal. App. 3d 388, 406, 254 Cal. Rptr. 840]* .

The court's periodic payment schedule is not dependent on, nor need it directly correspond to, a plaintiff's life expectancy. Instead, life expectancy is one of several factors for the court to consider in structuring a periodic payment schedule [*Atkins v. Strayhorn (1990) 223 Cal. App. 3d 1380, 1397, 273 Cal. Rptr. 231* ; *see also Salgado v. County of Los Angeles (1998) 19 Cal. 4th 629, 650, 80 Cal. Rptr. 2d 46, 967 P.2d 585* (trial court did not abuse discretion in ordering that periodic payments be made in equal installments over period corresponding to average life expectancy of plaintiff); *but see Holt v. Regents of Univ. of Cal. (1999) 73 Cal. App. 4th 871, 882-883, 86 Cal. Rptr. 2d 752* (error for trial court to structure payment schedule that did not conform to evidence of plaintiff's expected losses)]. The court may also consider, for example, the plaintiff's immediate needs and the likelihood that the plaintiff's anticipated future expenses or losses will be incurred in a period of time shorter than the plaintiff's projected life expectancy [*see Atkins v. Strayhorn (1990) 223 Cal. App. 3d 1380, 1397-1398, 273 Cal. Rptr. 231* ; *cf. Holt v. Regents of Univ. of Cal. (1999) 73 Cal. App. 4th 871, 882, 86 Cal. Rptr. 2d 752* (abuse of discretion to order payment schedule for medical expenses

that was 15 years shorter than life expectancy because all evidence indicated that medical expenses would be constant throughout plaintiff's life)].

When periodic payment of future damages will be utilized, the plaintiff is entitled to receive, over time, the equivalent in current dollars of the amount plaintiff would have received in an immediate lump-sum award at the time of judgment, including the amount the award would have yielded if prudently invested [*Salgado v. County of Los Angeles (1998) 19 Cal. 4th 629, 646, 80 Cal. Rptr. 2d 46, 967 P.2d 585* ; *Hrimnak v. Watkins (1995) 38 Cal. App. 4th 964, 973-974, 45 Cal. Rptr. 2d 514* ; *see also Atkins v. Strayhorn (1990) 223 Cal. App. 3d 1380, 1398-1400, 273 Cal. Rptr. 231* (present value is basis for evaluating plaintiff's entitlement to prejudgment interest and expert witness fees); *Schneider v. Kaiser Found. Hosps. (1989) 215 Cal. App. 3d 1311, 1314, 1320, 264 Cal. Rptr. 227* (present value is basis for determining attorney's contingency fee)]. Thus, if the award of future damages is $240,000, the plaintiff is entitled to receive periodic payments totaling $240,000 plus the amount $240,000 would yield if prudently invested at the time of judgment [*Salgado v. County of Los Angeles (1998) 19 Cal. 4th 629, 646, 80 Cal. Rptr. 2d 46, 967 P.2d 585]* . To eliminate confusion, when future damages are sought, juries should be instructed to determine the amount in current dollars paid at the time of judgment, and absent such an instruction, awards of future damages are considered to be stated in terms of their present or current value unless the record clearly establishes otherwise [*Salgado v. County of Los Angeles (1998) 19 Cal. 4th 629, 646-647, 80 Cal. Rptr. 2d 46, 967 P.2d 585]* .

If a defendant against whom a judgment has been rendered must post an undertaking to stay the judgment pending appeal under *Code Civ. Proc. § 917.1*, the amount of the undertaking is calculated under that statute using the lump sum present value of the entire judgment, not using some lesser amount based on the payments that might otherwise actually be payable during the appeal under a periodic payment schedule created under *Code Civ. Proc. § 667.7* [*Leung v. Verdugo Hills Hospital (2008) 168 Cal. App. 4th 205, 208-209, 85 Cal. Rptr. 3d 203*].

If a pre-trial settlement is reached with some defendants, a trial court, in applying the settlement amount to offset the amount recovered at trial from nonsettling defendants, may allocate the entire settlement amount to past damages. The court is not required to apportion the settlement amount between past damages and future damages that will be paid in periodic payments under *Code Civ. Proc. § 667.7* [*Deocampo v. Ahn (2002) 101 Cal. App. 4th 758, 772-773, 125 Cal. Rptr. 2d 79]* .

For definitions and forms relating to periodic payment of future damages, *see §§ 415.103 -415.106*.

As a condition to authorizing periodic payments, the court must require the judgment debtor who is not adequately insured to post security adequate to assure full payment of such damages awarded by the judgment. On termination of the periodic payments, the court must order the return of this security, or as much as remains, to the judgment debtor [*Code Civ. Proc. § 667.7(a)*]. Although a defendant may purchase an annuity to fund the periodic payments for which the defendant is liable, the defendant may not obtain an immediate satisfaction of judgment for doing so. A defendant is entitled to an immediate satisfaction of judgment only by paying the present cash value of the judgment [*Holt v. Regents of Univ. of Cal. (1999) 73 Cal. App. 4th 871, 880-881, 86 Cal. Rptr. 2d 752]* .

If the court finds that the judgment debtor has exhibited a continuing pattern of failing to make the payments as specified by the court in the order, the judgment debtor will be held in contempt of court and, in addition to the periodic payments, be ordered to pay the judgment creditor all damages caused by the failure to make the payments, including court costs and attorney's fees [*Code Civ. Proc. § 667.7(b)(2)*].

[5] Punitive Damages

No claim for punitive damages against a health care provider may be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed [*Code Civ. Proc. § 425.13*]. The court may allow the filing of an amended pleading claiming punitive damages on a motion by

the party seeking the amended pleading and on the basis of the supporting and opposing affidavits presented, if the plaintiff has established that there is a substantial probability that he or she will prevail on the punitive damages claim under *Civ. Code § 3294* [*Code Civ. Proc. § 425.13*].

In determining whether a plaintiff has satisfied this standard, a trial court may not independently assess the evidence supporting the punitive damage claim in order to determine whether the claim should go to the jury. Instead, the statutory standard is met if the plaintiff states a viable claim for punitive damages and shows that the claim is supported by competent, admissible evidence [*College Hosp. Inc. v. Superior Court (1994) 8 Cal. 4th 704, 719, 34 Cal. Rptr. 2d 898, 882 P.2d 894]* .

The court may not grant a motion allowing the filing of an amended pleading that includes a claim for punitive damages if the motion for such an order is not filed within the earlier of either (1) two years after the complaint or initial pleading is filed, or (2) nine months before the date the matter is first set for trial [*Code Civ. Proc. § 425.13(a)*; *see Code Civ. Proc. § 425.13(b)* (definition of health care provider); *see also §§ 415.94 -415.96*]. The "date the matter is first set for trial" is the initial trial date, not the date of the trial setting conference [*Brown v. Superior Court (1990) 224 Cal. App. 3d 989, 992-994, 274 Cal. Rptr. 442]* .

There is an implied exception to nine-month limitation of *Code of Civ. Proc. § 425.13* when it is necessary to protect a plaintiff's right to a preferential trial date, and the defendant received or had a reasonable opportunity to conduct discovery regarding the punitive damages claim [*Looney v. Superior Court (1993) 16 Cal. App. 4th 521, 536, 20 Cal. Rptr. 2d 182]* . A similar exception has been allowed when a "fast track" trial court sets trial to begin in less than nine months [*see Goodstein v. Superior Court (1996) 42 Cal. App. 4th 1635, 1645, 50 Cal. Rptr. 2d 459]* . In those cases, a trial court may relieve a plaintiff from complying with the nine-month limitation period if the plaintiff can show by a preponderance of the evidence that: (1) plaintiff was unaware of facts or evidence necessary to make a proper motion under *Code Civ. Proc. § 425.13* more than nine months prior to the first trial date; (2) plaintiff made a diligent, reasonable, and good-faith effort to discover such necessary facts or evidence more than nine months prior to the first assigned trial date; (3) after the trial date was assigned, plaintiff made a diligent, reasonable, and good-faith effort to complete necessary discovery; (4) plaintiff filed a motion under *Code Civ. Proc. § 425.13* as soon as reasonably practicable after completing such discovery, but within two years after filing the original complaint; and (5) defendant will suffer no surprise or prejudice by reason of the shortened time period and will be given every reasonable opportunity to complete all necessary discovery in order to prepare to meet the punitive damages allegations [*Goodstein v. Superior Court (1996) 42 Cal. App. 4th 1635, 1645, 50 Cal. Rptr. 2d 459]* . In order to apply this narrow exception, a trial court must make specific findings showing that plaintiff has met each of the five steps [*Goodstein v. Superior Court (1996) 42 Cal. App. 4th 1635, 1645, 50 Cal. Rptr. 2d 459* ; *see, e.g., Freedman v. Superior Court (2008) 166 Cal. App. 4th 198, 206-207, 82 Cal. Rptr. 3d 563* (assuming test applied, plaintiff failed to meet either of first two steps)].

The language in *Code Civ. Proc. § 425.13(a)* making the provisions of the section applicable to actions "arising out of the professional negligence of a health care provider" does not make the provisions inapplicable to causes of action identified as intentional torts rather than as negligence. If an injured party seeks punitive damages for an injury that is directly related to the professional services provided by a health care provider acting in its capacity as such, the action is one arising out of professional negligence, and the party must comply with *Code Civ. Proc. § 425.13(a)* [*Central Pathology Serv. Med. Clinic, Inc. v. Superior Court (1992) 3 Cal. 4th 181, 191-192, 10 Cal. Rptr. 2d 208, 832 P.2d 924 , disapproving, Bommareddy v. Superior Court (1990) 222 Cal. App. 3d 1017, 272 Cal. Rptr. 246]* .

For example, a cause of action against a health care provider for fraud or intentional infliction of emotional distress predicated on the manner in which the health care provider performed and communicated the results of medical tests is governed by *Code Civ. Proc. § 425.13* because the injury arose out of the manner in which professional services are provided [*Central Pathology Serv. Med. Clinic, Inc. v. Superior Court (1992) 3 Cal. 4th 181, 192-193, 10 Cal. Rptr. 2d 208, 832 P.2d 924]* .

Similarly, a cause of action predicated on a physician's alleged fraud in conspiring with an employer to deprive employees of workers' compensation benefits by providing substandard medical treatment and advice is governed by *Code Civ. Proc. § 425.13*, because the alleged fraud related directly to the manner in which the physician rendered professional services [*Davis v. Superior Court (1994) 27 Cal. App. 4th 623, 627, 33 Cal. Rptr. 2d 6]* .

An allegation of sexual battery in the course of rendering gynecological services is also directly related to the manner in which the gynecological services were rendered, and so *Code Civ. Proc. § 425.13* requires a motion for leave to amend supported by evidence before a claim for punitive damages may be pleaded [*Cooper v Superior Court (1994) 56 Cal. App. 4th 744, 751-752, 65 Cal. Rptr. 2d 674* (not in conflict with arguably contradictory dictum in *Central Pathology Serv. Med. Clinic, Inc. v. Superior Court (1992) 3 Cal. 4th 181, 10 Cal. Rptr. 2d 208, 832 P.2d 924*)].

Because MICRA only applies to professional negligence that causes personal injury or wrongful death, *Code Civ. Proc. § 425.13* only applies when the claim seeks damages for such injury or death [*Vazquez de Mercado v. Superior Court (2007) 148 Cal. App. 4th 711, 715-716, 55 Cal. Rptr. 3d 889* ; *see, e.g., Code Civ. Proc. § 340.5(2)*]. For these purposes, "personal injury" covers only injury that impairs the well-being or mental or physical health of the plaintiff, and the term does not cover purely economic injury [*Vazquez de Mercado v. Superior Court (2007) 148 Cal. App. 4th 711, 715-716, 55 Cal. Rptr. 3d 889]* .

An actual doctor-patient relationship is not required to enforce application of the procedural requirements of *Code Civ. Proc. § 425.13*, so long as the defendant was acting in the capacity of a health care provider at the time of the allegedly tortious acts. Therefore, the statute applied to a claim brought against a sperm bank and the doctors that performed the genetic screening on the donor, because the collection, processing, and testing of sperm for use in artificial insemination requires the exercise of professional expertise and judgment [*Johnson v. Superior Court (2002) 101 Cal. App. 4th 869, 885-886, 124 Cal. Rptr. 2d 650]* . Similarly, the statute applied to claims against a medical group made up of licensed physicians that provided health facility outpatient services under contract with a health care service plan, even though the allegedly actionable conduct occurred while the medical group was reviewing the medical necessity of the plaintiff's request for new prosthetics. The court rejected the plaintiff's argument that the medical group's conduct did not arise out of professional negligence because it was performing its contractual duties as a utilization review organization for the health care service plan at the time, noting that the group was required to exercise medical judgment and apply clinical standards in performing those duties [*Palmer v. Superior Court (2002) 103 Cal. App. 4th 953, 966-967, 972, 127 Cal. Rptr. 2d 252]* .

In *College Hosp. Inc. v. Superior Court (1994) 8 Cal. 4th 704, 719, 34 Cal. Rptr. 2d 898, 882 P.2d 894* , the California Supreme Court articulated the standard of proof for a plaintiff to amend a complaint to state a punitive damages claim under *Code Civ. Proc. § 425.13(a)*. According to the Court, the plaintiff must state facts in the proposed amended complaint that are legally sufficient to support a punitive damages claim and must produce evidence in the form of supporting affidavits that reveals the actual existence of a triable claim. The Court further stated that substantiation of a proposed punitive damages claim occurs only when the factual recitals are made under penalty of perjury and set forth competent admissible evidence within the personal knowledge of the declarant. The Court noted that its approach was largely consistent with the "prima facie" approach formulated by the courts of appeal in *Hung v. Wang (1992) 8 Cal. App. 4th 908, 931, 11 Cal. Rptr. 2d 113* , and other cases that have followed its analysis [*College Hosp., Inc. v. Superior Court (1994) 8 Cal. 4th 704, 719-720 n.6, 34 Cal. Rptr. 2d 898, 882 P.2d 894]* .

For a general discussion of the availability of punitive damages in tort actions, see Ch. 177, *Damages* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 415.50 Judgment Lien

A certified copy of a money judgment issued pursuant to *Code Civ. Proc. § 667.7*, if recorded with the county recorder, creates a judgment lien on the judgment debtor's real property [*Code Civ. Proc. § 697.320(a)(2)*]. Unless the money judgment is satisfied or the judgment lien is released, a judgment lien created under *Code Civ. Proc. § 697.320* continues for 10 years from the date of its creation. Its duration may be extended any number of times by recording during the time it is in existence a certified copy of the judgment in the manner provided for its initial recording. This rerecording extends the duration of the judgment lien until 10 years from the date of the rerecording [*Code Civ. Proc. § 697.320(b)*].

A judgment lien created under *Code Civ. Proc. § 697.320* is a lien for the amount of the installments as they mature under the terms of the judgment, plus accrued interest and the costs as they are added to the judgment pursuant to *Code Civ. Proc. §§ 685.010-685.110*, and less the amount of any partial satisfactions, but does not become a lien for any installment until it becomes due and payable under the terms of the judgment [*Code Civ. Proc. § 697.350(c)*].

For additional discussion of liens based on and satisfaction of installment judgments, see Ch. 318, *Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewHealthcare LawActions Against FacilitiesGeneral OverviewHealthcare LawActions Against Healthcare WorkersGeneral OverviewReal Property LawNonmortgage LiensJudgment Liens

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§ 415.51 Arbitration

Pursuant to *Code Civ. Proc. § 1295*, contracts for medical services may contain provisions binding the parties to arbitration of any dispute as to the professional negligence of a health care provider in providing services pursuant to the contract. Specific language requirements and a boldface notice of the arbitration provision to be placed above the patient's signature line are designated by *Code Civ. Proc. § 1295(a), (b)*. The United States Supreme Court's decision in *Allied-Bruce Terminix Cos., Inc. v. Dobson* [*Allied-Bruce Terminix Cos., Inc. v. Dobson (1995) 513 U.S. 265, 115 S. Ct. 834, 130 L. Ed. 2d 753* (Federal Arbitration Act preempts state law that seeks to invalidate arbitration agreements)] throws into question whether a contract lacking the warning required by *Code Civ. Proc. § 1295(c)* is unenforceable. For further discussion, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

Once signed by the parties, such contracts govern all subsequent open-book account transactions for medical services for which the contract was signed until or unless rescinded by written notice within 30 days of signature [*Code Civ. Proc. § 1295(c)*]. Such contracts are not limited to covering treatment provided contemporaneously to their signing; the agreements may also apply to future treatment of similar problems over the course of the physician-patient relationship [*Gross v. Recabaren (1988) 206 Cal. App. 3d 771, 777-778, 253 Cal. Rptr. 820]* . The opened or closed nature of a book account turns on the parties' expectations of further transactions between them [*Gross v. Recabaren (1988) 206 Cal. App. 3d 771, 778, 253 Cal. Rptr. 820]* .

An arbitration agreement signed by one physician may be invoked by a second physician who treated the first physician's patient, but never signed the agreement [*Michaelis v. Schori (1993) 20 Cal. App. 4th 133, 139, 24 Cal. Rptr. 2d 380]* . The *Michaelis* court held that an arbitration agreement that a patient signed during prenatal treatment rendered by one doctor applied to the patient's malpractice claim against another doctor who allegedly was negligent during the patient's delivery.

If the patient is a minor child, a parent may bind both the child and the other parent to arbitrate claims related to medical service for the child [*see* *Bolanos v. Khalatian (1991) 231 Cal. App. 3d 1586, 1591, 283 Cal. Rptr. 209* (mother, by signing agreement, bound unborn child and child's nonsignatory father); *see also* *Pietrelli v. Peacock (1993) 13 Cal. App. 4th 943, 948, 16 Cal. Rptr. 2d 688* (arbitration agreement signed by obstetrical patient is binding upon

subsequently conceived child)]. If the patient is a minor who receives treatment relating to pregnancy, she is bound by an arbitration agreement that she signed, even if the agreement was not signed by her parents [*Michaelis v. Schori (1993) 20 Cal. App. 4th 133, 138, 24 Cal. Rptr. 2d 380]* .

Contracts complying with the requirements set forth in *Code Civ. Proc. § 1295(a)-(c)* may not be voided as adhesive, unconscionable, or otherwise improper [*see Code Civ. Proc. § 1295(e)*]. However, a patient who has signed a properly constructed agreement may attack its binding effect on the limited ground that the contract was not entered into knowingly and voluntarily [*Ramirez v. Superior Court (1980) 103 Cal. App. 3d 746, 755-756, 163 Cal. Rptr. 223]* .

A retroactive agreement to arbitrate malpractice claims arising out of past medical treatment is not entitled to the presumption of validity contained in *Code Civ. Proc. § 1295(e)*. However, such an agreement may be enforced if it is not unconscionable and does not contain terms that are beyond the reasonable expectations of an ordinary person [*Coon v. Nicola (1993) 17 Cal. App. 4th 1225, 1234, 21 Cal. Rptr. 2d 846]* . Applying this test, the *Coon* court determined that an arbitration agreement was binding when its retroactive provision had to be separately initialed by the patient and was signed during a post-operative office visit under circumstances in which the patient had an opportunity to question its terms.

A contract that is not subject to the requirements of *Code Civ. Proc. § 1295(a)-(c)* because the organization is one described in *Code Civ. Proc. § 1295(f)* is still enforceable if the notice requirements of *Code Civ. Proc. § 1295(f)* have been complied with [*Herbert v. Superior Court (1985) 169 Cal. App. 3d 718, 726-727, 215 Cal. Rptr. 477]* . If a patient expressly contracts to submit to arbitration any dispute concerning medical malpractice, and the agreement fully complies with *Code Civ. Proc. § 1295*, it is deemed to apply to all medical malpractice claims arising out of the services contracted for, whether the claims are asserted by the patient or by a third party [*Gross v. Recabaren (1988) 206 Cal. App. 3d 771, 781, 253 Cal. Rptr. 820* (loss of consortium claim by patient's spouse subject to arbitration agreement); *Mormile v. Sinclair (1994) 21 Cal. App. 4th 1508, 1514, 26 Cal. Rptr. 2d 725* (same); *Michaelis v. Schori (1993) 20 Cal. App. 4th 133, 138, 24 Cal. Rptr. 2d 380* (arbitration agreement signed by obstetrical patient is binding upon unborn child's nonsignatory father)].

Court of appeal opinions are in disagreement over whether a person before his or her death may legally bind other family members to arbitrate subsequent wrongful death claims. One line of cases holds that an enforceable agreement requiring the arbitration of claims, if covering the tortious act that is the basis of the wrongful death action, requires that the wrongful death action be submitted to arbitration even if the plaintiffs were not signatories to the arbitration agreement [*see, e.g.,* *Herbert v. Superior Court (1985) 169 Cal. App. 3d 718, 722-727, 215 Cal. Rptr. 477* ; *Hawkins v. Superior Court (1979) 89 Cal. App. 3d 413, 416-419, 152 Cal. Rptr. 491*]. However, another line of cases holds that, while a person may have the authority to bind minor children to arbitrate claims brought after the person's death, a person does not generally have the authority to bind a spouse or adult children to arbitrate his or her claims, including wrongful death claims [*see, e.g.,* *Ruiz v. Podolsky (2009) 175 Cal. App. 4th 227, 238-247, 95 Cal. Rptr. 3d 828* (*review granted* Oct. 14, 2009; adult children not bound); *Rhodes v. California Hospital Medical Center (1978) 76 Cal. App. 3d 606, 608-610, 143 Cal. Rptr. 59* (spouse not bound); *see also* *Baker v. Birnbaum (1988) 202 Cal. App. 3d 288, 291-294, 248 Cal. Rptr. 336* (husband's loss of consortium claim not subject to arbitration)]. Those cases note that a wrongful death action in California is separate and distinct from any cause of action that the decedent may have had had he or she survived, and a decedent generally has no authority to bind adult family members to arbitrate their personal claims [*see, e.g.,* *Ruiz v. Podolsky (2009) 175 Cal. App. 4th 227, 238-247, 95 Cal. Rptr. 3d 828* (*review granted* Oct. 14, 2009)]. The issue is currently pending before the California Supreme Court [*see* *Ruiz v. Podolsky (2009) 175 Cal. App. 4th 227, 95 Cal. Rptr. 3d 828* (*review granted* Oct. 14, 2009)].

As noted above, in order to allow a patient sufficient time to confirm that a waiver of the right to a jury trial is made knowingly and voluntarily, *Code Civ. Proc. § 1295(c)* requires that the patient be given 30 days after signing the agreement to decide whether to rescind an agreement to arbitrate [*Code Civ. Proc. § 1295(c)*]. However, if the patient dies within this 30-day period, the agreement to arbitrate will generally be unenforceable as the person signing the

agreement did not have the full statutory period to reconsider whether to rescind [*Rodriguez v. Superior Court (2009) 176 Cal. App. 4th 1461, 1469-1470, 98 Cal. Rptr. 3d 728*]. Although not entirely settled, an exception to that rule might be available if an arbitration agreement expressly provides a procedure for rescission on behalf of a nonpatient minor child who might otherwise be bound by a parent's signature. Thus, for example, if an agreement expressly states that a guardian appointed for a minor child following the death of the child's parent may exercise the right to rescind, the arbitration agreement might be enforceable in the event the child's guardian does not timely exercise this right. Under those circumstances, the equitable tolling doctrine might be used to extend the time for the guardian to act to exclude any period before the guardian was appointed, as well as any additional time between the appointment and the time the guardian learned or reasonably should have learned of the arbitration agreement [*see Rodriguez v. Superior Court (2009) 176 Cal. App. 4th 1461, 1472, 98 Cal. Rptr. 3d 728*].

If the arbitration agreement meets the requirements of *Code Civ. Proc. § 1295*, the parties may agree to arbitrate all future claims, even those stemming from treatment for different injuries [*Reigelsperger v. Siller (2007) 40 Cal. 4th 574, 579, 53 Cal. Rptr. 3d 887, 150 P.3d 764]* . A doctor's communications with a patient's insurer about the patient's medical records, done at the request of the patient, comes within the provision of medical services, and disputes about the propriety and scope of the communications are covered by an arbitration agreement meeting the requirements of *Code Civ. Proc. § 1295* [*Titolo v. Cano (2007) 157 Cal. App. 4th 310, 317-319, 68 Cal. Rptr. 3d 616*].

Awards under arbitration agreements are not necessarily bound by the limits of *Civ. Code § 3333.2(b)*, which places a $250,000 cap on noneconomic damages in medical malpractice suits. The Fourth Appellate District Court of Appeal has held that *Civ. Code § 3333.2* does not preclude an arbitration award of punitive damages when the patient's claim is based on fraud, willful neglect, and malicious acts, and that punitive damages that may be asserted in court may also be asserted under the arbitration clauses in *Code Civ. Proc. § 1295(a)* and *(b)* when the issue is submitted by the patient or with the consent of both parties [*Baker v. Sadick (1984) 162 Cal. App. 3d 618, 627, 208 Cal. Rptr. 676]* . The First Appellate District has gone even further, and has held that unless specifically required under the terms of the arbitration agreement to act in conformity with rules of law, an arbitration award may be based on broad principles of justice and equity, without regard to any limit imposed by *Civ. Code § 3333.2(b)*, and generally will be immune from judicial review [*Nogueiro v. Kaiser Found. Hosps. (1988) 203 Cal. App. 3d 1192, 1194-1195, 250 Cal. Rptr. 478]* .

Certain reporting requirements pertaining to judgments, arbitration awards, and settlement agreements have been established by *Bus. & Prof. Code § 801 et seq.* For example, insurers must send to the Medical Board of California, the Osteopathic Medical Board, or the California Board of Podiatric Medicine a complete report if a licensee of the particular board is involved in a settlement of over $30,000 or an arbitration award or civil judgment of any amount, whether or not vacated by a settlement after entry of a judgment that was not reversed on appeal, of a claim or action for damages for death or personal injury caused by the licensee's alleged negligence, error, or omission in practice, or by his or her rendering of unauthorized professional services [*Bus. & Prof. Code § 801.01(a)(1), (b)(1)*; *see also Bus. & Prof. Code § 801.01(a)(2)*]. Awards or settlements exceeding $3,000 must be reported by any insurer issuing a professional liability policy to certain other health care providers [*see Bus. & Prof. Code § 801(a)*]. Similar reports are required from uninsured health care providers [*see Bus. & Prof. Code §§ 801.01(b)(2), 802*].

The period of limitation to enforce an agreement to arbitrate a medical malpractice claim is the four-year period of *Code Civ. Proc. § 337* [*Meyer v. Carnow (1986) 185 Cal. App. 3d 169, 173-174, 229 Cal. Rptr. 617* (noting that action must be brought within shorter period if provided for by agreement or if reasonable to require shorter period)].

The Knox-Keene Health Care Service Plan Act of 1975, codified beginning at *Health & Safety Code § 1340*, has separate arbitration provisions that apply to health care service plans [*see Health & Safety Code § 1363*]. However, the provisions of that Act do not apply to separate arbitration agreements between a participating physician and his or her patient if the physician is neither an agent nor an employee of the health care service plan [*Hollister v. Benzl (1999) 71 Cal. App. 4th 582, 587, 83 Cal. Rptr. 2d 903* (participating physician was independent contractor of medical group that was itself contractor of health care service plan)].

For forms relating to arbitration clauses and the stay or dismissal of actions based on such clauses, see Chs. 30-39, *Alternative Dispute Resolution* . For further discussion of arbitration clauses in medical services contracts, see Ch. 209, *Dentists* , and Ch. 295, *Hospitals* , respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsFederal Arbitration ActArbitration AgreementsContracts LawContract Conditions & ProvisionsArbitration ClausesInsurance LawClaims & ContractsArbitrationInternational Trade LawDispute ResolutionArbitrationTortsProcedureAlternative Dispute Resolution

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§ 415.52 Fees by Plaintiffs' Attorneys

An attorney may not contract for or collect a contingency fee for representing any person seeking damages in connection with an action for injury or damages against a health care provider based on such person's alleged professional negligence in excess of the following limits [*Bus. & Prof. Code § 6146(a)*]:

- Forty percent of the first $50,000 recovered,
- Thirty-three and one-third percent of the next $50,000 recovered,
- Twenty-five percent of the next $500,000 recovered, and
- Fifteen percent of any amount on which the recovery exceeds $600,000.

These limitations apply regardless of whether the recovery is by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind [*Bus. & Prof. Code § 6146(a)*]. A trial court does not have the power to award extraordinary attorney's fees under *Bus. & Prof. Code § 6146* [*Hathaway v. Baldwin Park Cmty. Hosp. (1986) 186 Cal. App. 3d 1247, 1253, 231 Cal. Rptr. 334]* . Furthermore, a client may not waive the provisions of *Bus. & Prof. Code § 6146* by agreeing to pay fees in excess of the statutory limits [*Fineberg v. Harney & Moore (1989) 207 Cal. App. 3d 1049, 1055, 255 Cal. Rptr. 299]* . An attorney who, knowing that a waiver is illegal, nevertheless obtains a waiver of the statutory fee limits from a client may be subject to an action for malpractice, fraud, or to recover money had and received [*see Schultz v. Harney (1994) 27 Cal. App. 4th 1611, 1620-1624* (although attorney's actions were taken before court adjudication that waiver of statutory limits was ineffectual, client had malpractice cause of action against attorney for obtaining waiver from client, as well as action to recover money had and received, and although not pleaded properly, a fraud cause of action may also have been available)].

An attorney representing several plaintiffs in a wrongful death case based on professional negligence must apply the fee scale in *Bus. & Prof. Code § 6146(a)* to the judgment as a whole. The attorney may not compute fees separately on each

plaintiff's share of the award [*Yates v. Law Offices of Samuel Shore (1991) 229 Cal. App. 3d 583, 590, 280 Cal. Rptr. 316]* .

Bus. & Prof. Code § 6146 fixes the maximum allowable contingent fee for a medical malpractice action as a whole, including an appeal, and the limitation may not be avoided by charging separate fees for segments of the case or by charging both contingent and hourly fees [*see Yates v. Law Offices of Samuel Shore (1991) 229 Cal. App. 3d 583, 591-592, 280 Cal. Rptr. 316* (attorney is prohibited from charging in excess of statutory formula for hourly fees of attorney he associated to handle appeal)].

The 1987 amendment to *Bus. & Prof. Code § 6146*, which increased the maximum contingency fee in medical malpractice lawsuits resulting in recoveries greater than $200,000, operates prospectively only. The original 1975 version of *Bus. & Prof. Code § 6146*, not the 1987 amendment to *Bus. & Prof. Code § 6146*, sets the maximum fee in cases in which the contingency-fee agreement for legal representation was entered into before the effective date of the 1987 amendment (January 1, 1988), even if settlement and fee distribution took place after the effective date of the amendment [*Wienholz v. Kaiser Found. Hosps. (1989) 217 Cal. App. 3d 1501, 1503, 267 Cal. Rptr. 1* ; *see also* former *Bus. & Prof. Code § 6146* (allowing fee of 10 percent on recoveries over $200,000)].

The constitutionality of the contingency fee limitations of *Bus. & Prof. Code § 6146* has been upheld by the California Supreme Court, which rejected the contentions that the limitations constituted a denial of due process, violation of equal protection, or violation of the separation of powers doctrine [*Roa v. Lodi Med. Group, Inc. (1985) 37 Cal. 3d 920, 933, 211 Cal. Rptr. 77, 695 P.2d 164* ; *see also Fineberg v. Harney & Moore (1989) 207 Cal. App. 3d 1049, 1054-1055, 255 Cal. Rptr. 299* (*Bus. & Prof. Code § 6146* does not deprive client of right to counsel)].

"Professional negligence" within the meaning of *Bus. & Prof. Code § 6146* may include conduct that is an intentional departure from professional standards. In addition to an action for professional malpractice or negligence, that conduct might be the basis for a tort action not within the scope of *Bus. & Prof. Code § 6146*. For example, when a psychiatrist purposefully abuses the therapist-patient relationship to satisfy his or her own personal desires, the patient may maintain both an action for professional malpractice or negligence and an action for an intentional tort [*see Waters v. Bourhis (1985) 40 Cal. 3d 424, 433-435, 220 Cal. Rptr. 666, 709 P.2d 469]* .

The fee limitations of *Bus. & Prof. Code § 6146* do not apply when a plaintiff knowingly chooses to proceed under two or more causes of action, including one that is not within the professional negligence definition of *Bus. & Prof. Code § 6146*, and obtains a recovery that is based on the cause of action not grounded in professional negligence. An attorney representing a client with both types of causes of action who seeks to collect a larger attorney fee than is authorized by *Bus. & Prof. Code § 6146* must specifically advise the client of the pros and cons of alternative litigation strategies, including potential attorney fees, and obtain the client's consent to pursue the claims under both causes of action [*Waters v. Bourhis (1985) 40 Cal. 3d 424, 436-438, 220 Cal. Rptr. 666, 709 P.2d 469]* .

As used in *Bus. & Prof. Code § 6146*, "recovered" means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. Costs of medical care incurred by plaintiff and the attorney's office-overhead costs or charges are not deductible disbursements or costs for such purpose [*Bus. & Prof. Code § 6146(c)(1)*].

A contingency fee contract for representation against a health care provider in connection with an action for professional negligence must be in writing and must contain a statement of the maximum limits set forth by *Bus. & Prof. Code § 6146*, and must also state that the attorney and client may negotiate a lower rate [*Bus. & Prof. Code § 6147(a), (a)(5)*].

If the award is to be made in periodic payments pursuant to *Code Civ. Proc. § 667.7*, the court shall place a total value on the payments based on the projected life expectancy of the plaintiff and include this amount in computing the total

award from which attorney's fees are calculated [*Bus. & Prof. Code § 6146(b)*]. The appropriate measure of the recovery, for purposes of determining the contingent fee, is the present value of the future periodic payments, not the arithmetical sum of all future payments required by the award [*Schneider v. Kaiser Found. Hosps. (1989) 215 Cal. App. 3d 1311, 1314, 1320, 264 Cal. Rptr. 227]* . If the future periodic payments are to be made from an annuity purchased by the defendant from a third-party insurance company, the cost of this annuity to the defendant typically is the best measure of present value [*see Schneider v. Kaiser Found. Hosps. (1989) 215 Cal. App. 3d 1311, 1314, 1319-1320, 264 Cal. Rptr. 227]* . If a plaintiff will recover both a lump-sum award and future periodic payments, the preferable approach is to satisfy the attorney's fee out of the lump-sum payment if possible, rather than out of the future periodic payments [*Deocampo v. Ahn (2002) 101 Cal. App. 4th 758, 774-775, 125 Cal. Rptr. 2d 79]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsTortsDamagesCosts & Attorney FeesGeneral OverviewTortsDamagesCosts & Attorney FeesContingent Fees

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[Reserved]

§§ 415.53[Reserved]

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§ 415.70 Forms of Discovery

For forms of interrogatories for use in malpractice actions, see Bender's Forms of Discovery, Ch. 128, *Medical History*, and Ch. 147, *Physicians* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesForm

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§ 415.71 California Deposition and Discovery Practice

For discussion relating to discovery in medical malpractice actions, see DeMeo, California Deposition and Discovery Practice, Vol. 1, §§ 24.31, 24.40, 28.05[5]; Vol. 3, § 62.20[4] (Matthew Bender)

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36-415 California Forms of Pleading and Practice--Annotated § 415.72

§ 415.72 California Rules of Court

Use of Judicial Council trial court pleading form in complaint for personal injury, property damage, or wrongful death.
Cal. Rules of Ct., Rule 1.45

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§ 415.73 State Statutes

[1] Arbitration

Duty of malpractice liability insurer or uninsured physician to report arbitration awards of any amount or settlements exceeding specified amounts from malpractice claims. *Bus. & Prof. Code §§ 801-802*

Requirements for and validity of arbitration provision in contract between patient and licensed health care provider for medical services. *Code Civ. Proc. § 1295*

[2] Attorney's Fees

Limitation of attorney's contingency fee in action against health care provider for professional negligence. *Bus. & Prof. Code § 6146*

[3] Consent to Medical Treatment

[a] Emergencies

Abrogation of consent requirement in emergency situations. *Bus. & Prof. Code § 2397*

[b] Medical Experimentation

Informed consent to medical experimentation by human subject. *Health & Safety Code § 24173*

Informed consent to administration of experimental drugs. *Health & Safety Code §§ 111525, 11530*

[c] Minors and Incompetents

Parent or guardian's authorization of adult to whom minor is entrusted to consent to medical treatment of minor. *Fam. Code § 6910*

Consent by minor 15 years of age or older living apart from parent or guardian and managing own financial affairs to medical treatment. *Fam. Code § 6922*

Consent of minor 12 years of age to mental health treatment or counseling. *Fam. Code § 6924(b)*

Consent by unmarried minor to furnishing of medical treatment related to prevention or treatment of pregnancy. *Fam. Code § 6925*

Consent by minor 12 years of age or older to medical treatment for infectious, contagious, or communicable disease. *Fam. Code § 6926*

Consent by minor rape victims to medical diagnosis and treatment. *Fam. Code § 6927*

Consent by sexually assaulted minors to medical treatment. *Fam. Code § 6928*

Consent by minor to furnishing of medical treatment and counseling relating to drug or alcohol-related problem. *Fam. Code § 6929*

Consent by married minor to furnishing of medical care. *Fam. Code §§ 7002(a), 7050(e)(1)*

Consent by minor on active duty with armed services to furnishing of medical care. *Fam. Code §§ 7002(b), 7050(e)(1)*

Authorization of physician to take skeletal X-rays of minor without obtaining consent for purpose of diagnosing child abuse or neglect syndrome. *Penal Code § 11171*

Consent by legal guardian to medical treatment and performance of surgery on ward. *Prob. Code § 2353*

Consent to medical treatment of conservatee not adjudicated to lack capacity to give informed consent. *Prob. Code § 2354*

Consent to medical treatment of conservatee adjudicated to lack capacity to give informed consent. *Prob. Code § 2355*

Court ordered medical treatment of ward or conservatee on petition of guardian or conservator. *Prob. Code § 2357*

Authorization of medical treatment for incompetent adults without conservators. *Prob. Code §§ 3200-3211*

[4] Damages

Measure of damages for breach of obligation not arising from contract is amount which will compensate plaintiff for all detriment proximately caused by defendant's conduct whether or not such detriment was anticipated. *Civ. Code § 3333*

Admissibility of amount payable to plaintiff under insurance plan or disability or compensation act in personal injury action based on professional negligence of health care provider. *Civ. Code § 3333.1*

Limitation of plaintiff's recovery for noneconomic losses in action for personal injury based on professional negligence

of health care provider. *Civ. Code § 3333.2*

Provision for payment of future damages exceeding or equaling $50,000 in periodic installments in action for personal injury based on professional negligence of health care provider. *Code Civ. Proc. § 667.7*

[5] Declaratory Relief

Action for declaration of rights and duties arising from the rendering of professional health care services is provided for any malpractice insurer, insured physician, or other medical personnel. *Code Civ. Proc. § 1062.5*

[6] Emergency Medical Services

Matters to be considered by trier of fact and requirements of expert medical witnesses testifying in action for damages involving claim of negligence against physician and surgeon providing emergency medical coverage for general acute-care hospital emergency department. *Health & Safety Code § 1799.110*

[7] Independent Contractor

Rebuttable presumption that physician under contract to nonprofit community care clinic is independent contractor. *Lab. Code § 2750.6*

[8] Judgment Lien

Judgment pursuant to *Code Civ. Proc. § 667.7* (providing for periodic payment of future damages) is lien on real property of judgment debtor. *Code Civ. Proc. § 674.7*

[9] Limitations on Liability

[a] Emergencies

Good-faith rendering of professional medical services at the scene of an emergency creates immunity from liability for negligence. *Bus. & Prof. Code § 2395*

Immunity from liability for emergency treatment for medical complications arising from treatment by another health care provider rendered at request of such other health care provider. *Bus. & Prof. Code § 2396*

Immunity from liability for emergency treatment rendered to participant in community college or high school athletic event or contest. *Bus. & Prof. Code § 2398*

Immunity from liability for negligence for licensed nurses rendering treatment at scene of emergency. *Bus. & Prof. Code § 2727.5*

Immunity from liability for negligence for licensed vocational nurses rendering medical treatment at scene of emergency. *Bus. & Prof. Code § 2861.5*

Immunity granted to health care facility and its owners, operators, staff, and employees against liability arising from negligence of rescue team operating on premises to resuscitate persons in immediate danger of death. *Health & Safety*

Code § 1317

Immunity from liability granted to health care facility, its employees, and any physician, dentist, clinical psychologist, or podiatrist for refusal to render emergency treatment when due care is exercised in determining that patient is not suffering from emergency medical condition or that appropriate facilities or qualified personnel are unavailable. *Health & Safety Code § 1317(c)*

Immunity from liability for emergency services provided in state of emergency pursuant to request by public official. Bus. & Prof. Code *§ 900, Gov. Code* § 8659

Immunity granted to owners and operators of emergency vehicles, and rescue teams operating in conjunction with the vehicles, against liability for negligent acts and omissions by such rescue team while attempting to resuscitate person in immediate danger of death. *Veh. Code § 165.5*

[b] Non-Emergencies

Immunity against actions arising from health care provider's receipt of unsolicited referral from multiphasic screening unit, including the failure to examine or treat on basis of such referral. *Civ. Code § 43.9*

Immunity granted to hospital against actions arising from hospital's negligence in taking action upon the recommendation of its medical staff. *Civ. Code § 43.97*

Immunity against actions arising as result of any occurrence or result caused solely by natural course of disease or condition. *Civ. Code § 1714.8*

Limited immunity from liability resulting from good faith reliance on health care decision of patient's attorney in fact. *Prob. Code § 4750(a)* (repealed and replaced by *Prob. Code § 4740*, effective July 1, 2000)

Immunity of public entity or public employee against liability for injury caused by failure to make any or adequate physical or mental examination of any person for purpose of determining whether such person has condition constituting hazard to health and safety. *Gov. Code § 855.6*

Immunity of public entity or public employee against liability for injury resulting from diagnosing or failing to diagnose mental illness or addiction. *Gov. Code § 855.8*

Immunity from liability for negligence of licensed health professionals voluntarily participating in National Influenza Program of 1976. *Gov. Code § 856.6*

Immunity from liability of any person for negligent acts or omissions in administering vaccine or other immunizing agents to a minor as required by state law or given as part of an outreach program pursuant to *Health & Safety Code § 120400*. *Health & Safety Code § 120455*

Immunity of physician against liability for withholding or withdrawing life support devices in accordance with patient directive. *Health & Safety Code § 7190.5* (repealed as of July 1, 2000); *Probate Code §§ 4665(e), 4740* (effective July 1, 2000)

Immunity from civil or criminal liability for physician or surgeon who discloses results of AIDS test to person believed to be spouse of patient. *Health & Safety Code § 121015*

Immunity of physician or surgeon for reporting patient diagnosed as having disorder characterized by lapses of consciousness. *Health & Safety Code § 103900(f)*

[10] Negligence

[a] Generally

General principles of liability for negligence. *Civ. Code § 1714(a)*

[b] Res Ipsa Loquitur

Operation of res ipsa loquitur presumption. *Evid. Code § 646*

[c] Violation of Statute

Rebuttable presumption of failure to exercise due care arising from violation of statute. *Evid. Code § 669*

[d] Professional Negligence

Definitions of health care provider and professional negligence for purpose of medical malpractice actions. *Bus. & Prof. Code § 6146*; *Civ. Code §§ 1714.8, 3333.1-3333.2*; *Code Civ. Proc. §§ 340.5, 364, 667.7, 1029.6, 1295*

[e] Statutory Duties

Duty of physician or surgeon to report patients 14 years of age or older diagnosed as having disorders marked by lapses of consciousness. *Health & Safety Code § 103900(a)*

Duty of physician, nurses, and other persons learning of an outbreak of a communicable, infectious, or contagious disease to report that fact to public health officer. *Health & Safety Code § 120245*

Duty of physician to report any person under his or her care who is suffering from any self-inflicted wound, or a wound or injury inflicted by a deadly weapon or in violation of penal law. *Penal Code § 11161*

Duty of physician to report known or reasonably suspected instances of child abuse or neglect ascertained while acting in a professional capacity. *Penal Code § 11164 et seq.*

Duty of physician to make specified disclosures and obtain written consent before treating patient with DMSO preparation. *Bus. & Prof. Code § 4211.5*

Duty of physician to provide information about available prostate cancer diagnostic procedures to patients possessing certain risk factors. *Bus. & Prof. Code § 2248*.

[11] Notice of Intent to Commence Action

Notice of intention to commence against health care provider based on professional negligence. *Code Civ. Proc. § 364*

Service of notice in medical malpractice actions. *Code Civ. Proc. §§ 1010-1020*

[12] Punitive Damages

Prohibition against claiming punitive damages in complaint or other pleading against health care provider, and procedure for claiming. *Code Civ. Proc. § 425.13*

[13] Security for Costs

Plaintiff is required to furnish security for costs of defense in action against health care provider for professional negligence. *Code Civ. Proc. § 1029.6*

[14] Settlement Offer

Demand for settlement or offer to compromise in medical malpractice action prior to service of complaint is required to be accompanied by authorization to disclose medical information to those insuring or defending defendant. *Civ. Code § 56.105*

[15] Sexual Contact

Cause of action against psychotherapist for sexual contact. *Civ. Code § 43.93*

[16] Statute of Limitations

Statute of limitations in action by minor against physician for prenatal injuries or injuries suffered in course of birth. Civ. Code § 340.4

Statute of limitations governing battery action. *Code Civ. Proc. § 340.3*

Statute of limitations in actions against health care providers for professional negligence. *Code Civ. Proc. § 340.5*

Separate trial of statute of limitations defense prior to other issues in professional negligence actions against health care providers. *Code Civ. Proc. § 597.5*

[17] Summary Judgment

Motion for summary judgment by defendant in action based on professional negligence precludes, or is precluded by, motion for security for costs of defense pursuant to *Code Civ. Proc. § 1029.6. Code Civ. Proc. § 1029.6(e), (f)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesEmergency Care NegligenceGeneral OverviewHealthcare LawActions Against FacilitiesEmergency Care NegligenceDefenses & LiabilitiesHealthcare LawActions Against FacilitiesFacility LiabilityGeneral OverviewHealthcare LawActions Against FacilitiesGovernmental & Nonprofit LiabilityGeneral OverviewHealthcare LawActions Against FacilitiesIndependent Contractor LiabilityHealthcare LawActions Against

Healthcare WorkersGeneral OverviewHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawActions Against Healthcare WorkersSurgeonsHealthcare LawTreatmentEnd-of-Life DecisionsLife SupportHealthcare LawTreatmentFailures & Refusals to TreatGeneral OverviewHealthcare LawTreatmentPatient ConsentGeneral OverviewHealthcare LawTreatmentPatient ConsentInformed ConsentTortsDamagesCosts & Attorney FeesContingent FeesTortsMalpractice & Professional LiabilityGeneral OverviewTortsNegligenceActionsGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 415 PHYSICIANS: MEDICAL MALPRACTICE
PART III. RESEARCH GUIDE

36-415 California Forms of Pleading and Practice--Annotated § 415.74

§ 415.74 Decisions

[1] Arbitration

Wife of physician was bound to arbitration provision in husband's contract for professional liability insurance when prosecuting claims against insurer, because wife had accepted insurer's defense of claims brought against her in conjunction with defense provided to husband in malpractice claim, had affirmatively agreed to insurer's settlement of malpractice claims, and had, through attorney, initially invoked arbitration clause herself, although had subsequently withdrawn request for arbitration. *NORCAL Mut. Ins. Co. v. Newton (2000) 84 Cal. App. 4th 64, 81-82, 100 Cal. Rptr. 2d 683*

Arbitration agreement signed by patient was binding on patient's nonsignatory spouse. *Mormile v. Sinclair (1994) 21 Cal. App. 4th 1508, 1514, 26 Cal. Rptr. 2d 725*

Arbitration agreement signed by obstetrical patient was binding on unborn child's nonsignatory father. *Michaelis v. Schori (1993) 20 Cal. App. 4th 133, 139, 24 Cal. Rptr. 2d 380*

Arbitration agreement signed by one physician could not be invoked by second physician who treated first physician's patient but never signed agreement. *Michaelis v. Schori (1993) 20 Cal. App. 4th 133, 139, 24 Cal. Rptr. 2d 380*

Minor who receives treatment relating to pregnancy was bound by arbitration agreement that she signed, even if agreement was not signed by her parents. *Michaelis v. Schori (1993) 20 Cal. App. 4th 133, 138, 24 Cal. Rptr. 2d 380*

Retroactive agreement to arbitrate malpractice claims arising out of past medical treatment is enforceable if it is not unconscionable and does not contain terms that are beyond reasonable expectations of ordinary person. *Coon v. Nicola (1993) 17 Cal. App. 4th 1225, 1234, 21 Cal. Rptr. 2d 846*

Failure by signatory to read arbitration agreement does not make agreement invalid, in absence of fraud, coercion, or excusable neglect. *Bolanos v. Khalatian (1991) 231 Cal. App. 3d 1586, 1590, 283 Cal. Rptr. 209*

Malpractice plaintiff, who had asserted rights and benefits under group prepaid health plan after she had apparently withdrawn from plan, was estopped from denying application of binding arbitration required by health plan; medical provider was not required to challenge and examine continuing eligibility of each purportedly covered member to maintain arbitration rights. *Avina v. Cigna Healthplans of Cal. (1989) 211 Cal. App. 3d 1, 3, 259 Cal. Rptr. 105*

In medical malpractice claim against physician and hospital, physician who, as hospital employee, accepted patients through enrollments in hospital's prepaid health care plan was bound to arbitration agreement between hospital and enrollees even though he had not signed that agreement. *Harris v. Superior Court (1986) 188 Cal. App. 3d 475, 477-479, 233 Cal. Rptr. 186*

[2] Attorney's Fees

Attorney's fees limitations of *Bus. & Prof. Code § 6146* are not applicable when plaintiff knowingly chooses to proceed under two or more causes of action, including one that is not within professional negligence definition of *Bus. & Prof. Code § 6146*, and obtains recovery based on cause of action not grounded in professional negligence. *Waters v. Bourhis (1985) 40 Cal. 3d 424, 436-437, 220 Cal. Rptr. 666, 709 P.2d 469*

Attorney representing client with multiple causes of action, including one not based on *Bus. & Prof. Code § 6146* definition of professional negligence, who seeks to collect larger fee than authorized by *Bus. & Prof. Code § 6146*, is required specifically to advise client of pros and cons of alternative litigation strategies, including potential attorney fees, and obtain client's consent to pursue both types of causes of action. *Waters v. Bourhis (1985) 40 Cal. 3d 424, 437-438, 220 Cal. Rptr. 666, 709 P.2d 469*

Constitutionality of *Bus. & Prof. Code § 6146*, with respect to contingency fee limitations on attorneys representing medical malpractice plaintiffs, was upheld against attack on grounds of denial of due process, violation of equal protection, and violation of separation of powers doctrine. *Roa v. Lodi Med. Group, Inc. (1985) 37 Cal. 3d 920, 933, 211 Cal. Rptr. 77, 695 P.2d 164*

Attorney who gets waiver from client for attorney's fee limits found in *Bus. & Prof. Code § 6146* for representation in medical malpractice claim knowing that waiver is illegal may be subject to action for malpractice, for fraud, or to recover money had and received. *Schultz v. Harney (1994) 27 Cal. App. 4th 1611, 1620-1624, 33 Cal. Rptr. 2d 276*

[3] Battery

Liability for battery arises when physician either fails to properly explain proposed procedure or performs substantially different treatment from that for which consent was obtained. *Cobbs v. Grant (1972) 8 Cal. 3d 229, 239-241, 104 Cal. Rptr. 505, 502 P.2d 1* ; *Cline v. Lund (1973) 31 Cal. App. 3d 755, 768, 107 Cal. Rptr. 629*

Physician committed battery by performing breast augmentation, to which plaintiff had expressly not consented, during surgery for excess skin removal following weight loss. *Perry v. Shaw (2001) 88 Cal. App. 4th 658, 662, 106 Cal. Rptr. 2d 70*

Trial court's refusal to instruct jury on tort of battery was harmless error if jury by its verdict on plaintiff's informed consent theory must have found either that plaintiff consented to treatment or that plaintiff's consent was implied under circumstances. *Traxler v. Varady (1993) 12 Cal. App. 4th 1321, 1334, 16 Cal. Rptr. 2d 297*

Defendant physician who had permission to operate on plaintiff on condition that he used family-donated blood, but who violated condition and used blood from hospital's general supply, was liable for battery; plaintiff's condition for treatment was not merely "collateral." *Ashcraft v. King (1991) 228 Cal. App. 3d 604, 613-614, 278 Cal. Rptr. 900*

For purposes of battery action, patient's consent to administration of drug prescribed for therapeutic purpose was not vitiated by fact that prescribing physician intentionally misrepresented to patient that drug was designed for different therapeutic purpose. *Freedman v. Superior Court (1989) 214 Cal. App. 3d 734, 738-739, 263 Cal. Rptr. 1*

Consent to tubal ligation after birth only on condition that baby was born without any abnormalities was conditional consent sufficient to support cause of action for battery when tubal ligation performed after birth of child with genetic disorder. *Grieves v. Superior Court (1984) 157 Cal. App. 3d 159, 165, 203 Cal. Rptr. 556*

Consent to administration of violence by psychiatrists for therapeutic purpose was vitiated by allegations that violence was in fact administered for improper nontherapeutic purposes. *Rains v. Superior Court (1984) 150 Cal. App. 3d 933, 941, 198 Cal. Rptr. 249*

Performance of unauthorized surgery due to mistake of fact as to identity of patient constituted technical battery but did not support award of punitive damages when no malice demonstrated. *Ebaugh v. Rabkin (1972) 22 Cal. App. 3d 891, 895, 99 Cal. Rptr. 706*

[4] Comparative Negligence

Instruction to jury that physician not liable for injuries proximately resulting from negligent failure of patient to follow reasonable instructions regarding treatment was prejudicial error when no evidence indicated such negligence by plaintiff. *LeMons v. Regents of Univ. of Cal. (1978) 21 Cal. 3d 869, 874-875, 148 Cal. Rptr. 355, 582 P.2d 946* (severed facial nerve resulting in paralysis); *Bolen v. Woo (1979) 96 Cal. App. 3d 944, 952, 158 Cal. Rptr. 454* (treatment of infected foot)

Expert testimony is required to establish contributory negligence by plaintiff in medical malpractice cases. *Barton v. Owen (1977) 71 Cal. App. 3d 484, 506, 139 Cal. Rptr. 494*

[5] Contract Actions

Recovery for malpractice is allowed on theory of breach of warranty or contract when plaintiff proves existence of express contract in which physician promises particular result or cure and patient relies on promise in giving consent to treatment. *McKinney v. Nash (1981) 120 Cal. App. 3d 428, 442, 174 Cal. Rptr. 642* ; *Jamison v. Lindsay (1980) 108 Cal. App. 3d 223, 234, 166 Cal. Rptr. 443* (dicta)

In malpractice action based on breach of warranty, jury instruction that an element of physician's contract to perform tubal ligation was physician's affirmation of characteristic result of sterility was prejudicially erroneous; discussion of characteristics of procedure did not constitute express promise necessary to support breach of warranty action. *Depenprock v. Kaiser Found. Health Plan, Inc. (1978) 79 Cal. App. 3d 167, 171, 144 Cal. Rptr. 724*

Complaint alleging physician's breach of contract was able to withstand general demurrer when complaint permitted finding that physician and plaintiff agreed in writing physician would sterilize plaintiff in return for reasonable fee, and that physician failed to perform resulting in actual damages to plaintiff. *Custodio v. Bauer (1967) 251 Cal. App. 2d 303, 315-316, 59 Cal. Rptr. 463*

[6] Damages

Cap on noneconomic damages provided by *Civil Code § 3333.2* applies to claim for failure to provide stabilizing

treatment brought under federal Emergency Medical Treatment and Active Labor Act, *42 U.S.C.S. § 1395dd*. *Barris v. County of Los Angeles (1999) 20 Cal. 4th 101, 116-117, 83 Cal. Rptr. 2d 145, 972 P.2d 966*

Code Civ. Proc. § 425.13's threshold requirement for punitive damages claims against health care providers requires plaintiff to show that claim is supported by competent, admissible evidence, but not giving trial court authority to independently assess evidence. *College Hosp. v. Superior Court (1994) 8 Cal. 4th 704, 719, 722-727, 34 Cal. Rptr. 2d 898, 882 P.2d 894*

Damages ceiling contained in *Civ. Code § 3333.2(b)* applies to third-party action against health care provider for equitable indemnity. *Western Steamship Lines, Inc. v. San Pedro Peninsula Hosp. (1994) 8 Cal. 4th 440C*

Claim for punitive damages in action against health care provider is subject to *Code Civ. Proc. § 425.13(a)* if injury that is basis for claim was caused by conduct that was directly related to rendition of professional services. *Central Pathology Serv. Med. Clinic, Inc. v. Superior Court (1992) 3 Cal. 4th 181, 191-193, 10 Cal. Rptr. 2d 208, 832 P.2d 924* ; *see also* *Delaney v. Baker, 20 Cal. 4th 23, 82 Cal. Rptr. 2d 610, 971 P.2d 986 (1999)*

Civ. Code §§ 3333.1, 3333.2 not unconstitutional denial of due process or equal protection; periodic payment of future damages is mandatory under *Code Civ. Proc. § 667.7*, but reversal is not required if defendant failed to request special findings designating damages as prior to award or future. *Fein v. Permanente Med. Group (1985) 38 Cal. 3d 137, 155-178, 211 Cal. Rptr. 368, 695 P.2d 665*

Code Civ. Proc. § 667.7 (future payments of future damages) is not unconstitutional denial of due process or equal protection. *American Bank & Trust Co. v. Community Hospital (1984) 36 Cal. 3d 359, 369-370, 373, 204 Cal. Rptr. 671, 683 P.2d 670*

Code Civ. Proc. § 667.7 (future payments of future damages) requires jury to determine what portion of damages award constitutes future damages, but authorizing court to fashion periodic payment schedule; courts well advised to use special verdict procedure of *Code Civ. Proc. § 625* to fashion payment schedule. *American Bank & Trust Co. v. Community Hospital (1984) 36 Cal. 3d 359, 376-377, 204 Cal. Rptr. 671, 683 P.2d 670*

Damages for fear of contracting AIDS from surgeon not available absent evidence that patient will probably develop disease. *Kerins v. Hartley (1994) 27 Cal. App. 4th 1062, 1074, 33 Cal. Rptr. 2d 172*

Fraud claim against physician was covered by *Code Civ. Proc. 425.13*, requiring special court order to seek punitive damages in action against health care provider. *Davis v. Superior Court (1994) 27 Cal. App. 4th 623, 627, 33 Cal. Rptr. 2d 6*

Motion by defendant for periodic payment, made after delivery of general verdict by jury, is timely if defendant has provided in responsive pleadings notice that enables plaintiffs to plan evidence on issue of future damages. *Gorman v. Leftwich (1990) 218 Cal. App. 3d 141, 152-153, 266 Cal. Rptr. 671*

Trial court's unexplained refusal to provide special verdict form requested by defendant to obtain jury verdict regarding gross amount of future medical, hospital, surgical, and rehabilitation damages sustained by plaintiff was abuse of discretion. *Gorman v. Leftwich (1990) 218 Cal. App. 3d 141, 150, 266 Cal. Rptr. 671*

Trial court may consider trial testimony and supplementary post-verdict testimony to determine gross damages and to fashion schedule of periodic payments based thereon if jury returns only present value verdict. *Gorman v. Leftwich (1990) 218 Cal. App. 3d 141, 150, 266 Cal. Rptr. 671*

Hospital's failure to exercise reasonable care in reviewing competency of its staff physicians was "professional

negligence" within meaning of *Civ. Code § 3333.2(c)(2)*; noneconomic damages recoverable for such negligence was therefore limited to *$250,000. Bell v. Sharp Cabrillo Hosp. (1989) 212 Cal. App. 3d 1034, 1051, 260 Cal. Rptr. 886*

Trial court was required to grant defendant's request for postverdict interrogatory on allocation of damages, pursuant to *Civ. Code § 3333.2. Semsch v. Henry Mayo Newhall Mem'l Hosp. (1985) 171 Cal. App. 3d 162, 169-170, 216 Cal. Rptr. 913*

Although *Civ. Code § 3333.1* was not applicable to medical malpractice action because injury occurred prior to effective date of section 3333.1, trial court's ruling admitting evidence of plaintiff's receipt of Social Security disability benefits was within its discretion given its careful weighing of potential prejudicial effect of evidence against its relevance and probative value. *Lafayette v. County of Los Angeles (1984) 162 Cal. App. 3d 547, 552-553, 208 Cal. Rptr. 668*

Trial court did not abuse discretion in medical malpractice action by admitting evidence that plaintiff's illegitimate child was born two months before surgery at issue, because existence and cause of plaintiff's depression, allegedly caused by surgery, were contested damage issues. *Lafayette v. County of Los Angeles (1984) 162 Cal. App. 3d 547, 553, 208 Cal. Rptr. 668*

Allegation of intentional tort of battery is insufficent to warrant award of punitive damages; allegation and occurrence of oppression, fraud, or malice is necessary to support punitive damages. *Grieves v. Superior Court (1984) 157 Cal. App. 3d 159, 166-168, 203 Cal. Rptr. 556*

In medical malpractice action, imposition of Medi-Cal lien by State Department of Health Services for costs of treatment furnished to plaintiffs was not prohibited by *Civ. Code § 3333.1*, relating to admissibility of evidence and recovery of amount payable to plaintiff from certain collateral sources in personal injury actions against health care providers. *Brown v. Stewart (1982) 129 Cal. App. 3d 331, 333-340, 181 Cal. Rptr. 112*

Inadequacy of damages award was proper basis for granting new trial based on trial judge's analysis of plaintiff-patient's continuing medical problems, current and future pain for which no treatment was prescribed, and drastic change in lifestyle of plaintiff and her family due to physical suffering. *Truhitte v. French Hosp. (1981) 128 Cal. App. 3d 332, 351, 180 Cal. Rptr. 152*

Punitive damages are not recoverable in malpractice action based on battery when physician acted under good-faith mistake of fact. *Ebaugh v. Rabkin (1972) 22 Cal. App. 3d 891, 895, 99 Cal. Rptr. 706*

[7] Duty of Care

[a] To Patient

Obstetrician owes duty to both mother and fetus such that injury to fetus due to obstetrician's negligence during delivery may breach duty to mother, permitting her to recover damages for emotional distress as "direct victim" rather than as "bystander." *Burgess v. Superior Court (1992) 2 Cal. 4th 1064, 1075-1076, 9 Cal. Rptr. 2d 615, 831 P.2d 1197*

Essential element of malpractice action is establishment of physician's duty to patient. *Stafford v. Shultz (1954) 42 Cal. 2d 767, 774, 270 P.2d 1* ; *Keene v. Wiggins (1977) 69 Cal. App. 3d 308, 313, 138 Cal. Rptr. 3*

Physician owes no duty of care to patient concerning physician's evaluation of patient's medical condition if evaluation was solely for purposes of preemployment physical examination, examination was conducted at request of employer,

patient did not seek medical treatment or advice from physician, and patient did not seek or decline medical treatment in reliance on evaluation. *Felton v. Schaeffer (1991) 229 Cal. App. 3d 229, 234-235, 279 Cal. Rptr. 713*

Duty of care owed by physician to patient arises in context of physician's effort to accomplish purpose for which physician is employed. *Atienza v. Taub (1987) 194 Cal. App. 3d 388, 391, 239 Cal. Rptr. 454*

Pathologists have no duty to disclose pathological analyses or conflicting pathology reports directly to patient or treating physician, but only to physician who refers tissue specimen. *Mahannah v. Hirsch (1987) 191 Cal. App. 3d 1520, 1527-1528, 237 Cal. Rptr. 140*

Physician is not under duty to continue heroic life support measures once proven ineffective. *Barber v. Superior Court (1983) 147 Cal. App. 3d 1006, 1017-1019, 195 Cal. Rptr. 484*

[b] To Third Persons

Psychotherapist has duty of care to mother of minor patient if therapist undertakes to treat mother and minor patient for their intra-family difficulties by providing psychotherapy to both; duty of care is breached if therapist sexually molests child. *Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989) 48 Cal. 3d 583, 590-591, 257 Cal. Rptr. 98, 770 P.2d 278*

Psychotherapist has duty to diagnose and warn third person of risk of danger of harm by psychotherapist's patient; duty extends to child of woman harmed by patient, who witnessed event and was mentally distressed by it. *Hedlund v. Superior Court (1983) 34 Cal. 3d 695, 700-701, 705-706, 194 Cal. Rptr. 805, 669 P.2d 41* (decided before 1985 enactment of *Civ. Code § 43.92*, limiting duties of therapists)

Physician's duty of care extends to husband of woman negligently misdiagnosed as having venereal disease, when reasonably forseeable that husband would suffer distress as result of negligence. *Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 923, 930, 167 Cal. Rptr. 831, 616 P.2d 813*

Professional practitioner incurs duty to protect third person threatened by practitioner's patient when practitioner determines, or should determine, existence of serious risk to such third person. *Tarasoff v. Regents of Univ. of Cal. (1976) 17 Cal. 3d 425, 431, 131 Cal. Rptr. 14, 551 P.2d 334* (decided before 1985 enactment of *Civ. Code § 43.92*, limiting duties of therapists)

Physician is liable to person who is not patient of physician, if person is examined by physician and, in course of examination, person is injured due to negligence of physician. *Mero v. Sadoff (1995) 31 Cal. App. 4th 1466, 1477, 37 Cal. Rptr. 2d 769*

Health care provider who treats patient with communicable disease has duty to warn patient or patient's family of dangers of contagion. *Reisner v. Regents of Univ. of Cal. (1995) 31 Cal. App. 4th 1195, 1198-1199, 37 Cal. Rptr. 2d 518*

Fact that patient had on several occasions displayed inappropriate and offensive sexual behavior toward hospital workers was insufficient to put psychotherapist on notice, for purposes of defeating therapist's statutory immunity under *Civ. Code § 43.92*, that patient presented serious threat of physical violence. *Barry v. Turek (1990) 218 Cal. App. 3d 1241, 1246, 267 Cal. Rptr. 553*

Cause of action for negligent infliction of emotional distress resulting from defendant's malpractice is permitted for father of stillborn child; father is direct victim to whom physician owed duty of care. *Sesma v. Cueto (1981) 129 Cal.*

App. 3d 108, 116, 181 Cal. Rptr. 12

[8] Emotional Distress

Parent stated cause of action for negligent infliction of emotional distress against therapist who molested son in course of professional relationship involving parent and child. *Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc. (1989) 48 Cal. 3d 583, 592, 257 Cal. Rptr. 98, 770 P.2d 278*

Husband of patient erroneously diagnosed as having venereal disease was allowed to maintain action for negligent infliction of emotional distress; physician's duty of care extended to husband when it was reasonably forseeable that he would suffer distress as result of negligent diagnosis. *Molien v. Kaiser Found. Hosps. (1980) 27 Cal. 3d 916, 923, 930, 167 Cal. Rptr. 831, 616 P.2d 813*

Damages for fear of contracting AIDS from surgeon are not available absent evidence that patient will probably develop disease. *Kerins v. Hartley (1994) 27 Cal. App. 4th 1062, 1074, 33 Cal. Rptr. 2d 172*

Patient's spouse not able to maintain action for negligent or intentional infliction of emotional distress against psychotherapist who engaged in sexual relations with patient. *Smith v. Pust (1993) 19 Cal. App. 4th 263, 272, 273-274, 23 Cal. Rptr. 2d 364*

Doctor or hospital was potentially liable to parents of psychiatric patient for negligent infliction of emotional distress damages caused by breach of duty to parents arising out of physician-patient relationship or assumed by hospital or doctor; assumed duty to parents possibly arose from use of parents as active instrumentalities in patient's treatment. *Jacoves v. United Merch. Corp. (1992) 9 Cal. App. 4th 88, 109, 11 Cal. Rptr. 2d 468*

No cause of action for negligent infliction of emotional distress accrues based on "bystander" theory of liability unless plaintiff is present at scene of injury-producing event at time it occurs and is then aware that it is causing injury to victim. *Wright v. City of Los Angeles (1990) 219 Cal. App. 3d 318, 350, 268 Cal. Rptr. 309*

No cause of action for negligent infliction of emotional distress accrues in absence of contemporaneous observance by plaintiff of infliction of injury. *Hurlbut v. Sonora Cmty. Hosp. (1989) 207 Cal. App. 3d 388, 396-397, 254 Cal. Rptr. 840*

Trial court properly sustained physician's demurrer to patient's cause of action for intentional infliction of emotional distress alleging physician had initiated sexual relations while he was treating patient for physical disorder because sexual relationship between them was outside scope of patient-physician relationship and patient's allegation that physician seduced her into having sexual relations and an affair was barred by *Civ. Code § 43.5(c)*, which abolishes any cause of action for seduction of person over age of legal consent. *Atienza v. Taub (1987) 194 Cal. App. 3d 388, 394-395, 239 Cal. Rptr. 454*

No cause of action for negligent infliction of emotional distress accrues if infant suffers injuries at birth because of physicians' purportedly negligent prenatal treatment and infant's parents fail to allege that physicians' conduct was directed at parents and elicited serious emotional response. *Martinez v. County of Los Angeles (1986) 186 Cal. App. 3d 884, 893, 231 Cal. Rptr. 96*

Evidence of physician's custom and habits concerning willingness to provide care without payment was admissible in action alleging that physician had performed unnecessary surgery only for purposes of payment and had thereby intentionally inflicted emotional distress. *Tillery v. Richland (1984) 158 Cal. App. 3d 957, 968-969, 205 Cal. Rptr. 191*

Negligent misdiagnosis of child by health professional may as matter of law cause forseeable emotional distress to parent, but parent must plead circumstances of knowledge of seriousness of improperly diagnosed condition. *Accounts Adjustment Bureau v. Cooperman (1984) 158 Cal. App. 3d 844, 848, 204 Cal. Rptr. 881*

Whether or not fetus is person for purposes of bringing wrongful death action is not determinative of issue of whether or not prospective mother has relationship with fetus sufficient to sustain action for emotional distress arising from witnessing medically caused stillbirth. *Sesma v. Cueto (1981) 129 Cal. App. 3d 108, 115, 181 Cal. Rptr. 12*

Mother's sensory perception of birth of fetus during labor states cause of action for emotional distress based on malpractice of attending physician. *Johnson v. Superior Court (1981) 123 Cal. App. 3d 1002, 1006, 177 Cal. Rptr. 63*

Father of stillborn infant had cause of action for negligent infliction of emotional distress when he learned of death by his own observation of cessation of life in the fetus. *Austin v. Regents of Univ. of Cal. (1979) 89 Cal. App. 3d 354, 358, 152 Cal. Rptr. 420*

Failure of diagnosis leading to death of child did not constitute "event" causing death for purposes of supporting mother's action for infliction of emotional distress under rule of *Dillon v. Legg (1968) 68 Cal. 2d 728, 69 Cal. Rptr. 72, 441 P.2d 912* ; witnessing of death alone was insufficient. *Jansen v. Children's Hosp. Med. Ctr. (1973) 31 Cal. App. 3d 22, 24, 106 Cal. Rptr. 883*

[9] Evidence

In medical malpractice action claiming injury and damages from psychologist-patient sexual contact, trial court has discretion to admit evidence of plaintiff's sexual history for purpose of determining proximate cause, but only to limited extent history is relevant and its probative value outweighs its prejudicial effect. *Patricia C. v. Mark D. (1993) 12 Cal. App. 4th 1211, 1213, 16 Cal. Rptr. 2d 71*

Evidence of medical malpractice defendant's competence or skill (or lack thereof), whether proven by reputation, opinion, or specific acts, is not admissible to prove defendant was negligent on particular occasion. *Hinson v. Clairemont Cmty. Hosp. (1990) 218 Cal. App. 3d 1110, 1120, 1122, 267 Cal. Rptr. 503*

In malpractice action in which defendant admitted negligence at some time during treatment of plaintiff, defendant's inability to produce plaintiff's medical records created inference of guilt which had probative value outweighing possible prejudicial effect. *Thor v. Boska (1974) 38 Cal. App. 3d 558, 565-567, 113 Cal. Rptr. 296*

Evidence of physician's taking a course on performing a diagnostic procedure which he had omitted to perform on plaintiff was related to plaintiff's probable condition at time of treatment and thus admissible under exception to rule excluding evidence of subsequent precautions. *Wilson v. Gilbert (1972) 25 Cal. App. 3d 607, 615, 102 Cal. Rptr. 31*

[10] Expert Testimony

[a] In General

Hospitalized patient who was considered fall risk and required walker and assistance to walk fell after nurse assisted plaintiff out of hospital bed and onto walker, but then left plaintiff standing there in order to do something else; plaintiff was not required to present expert testimony on standard of care or breach of duty, as plaintiff's risk of falling due to his physical limitations was within sphere of common knowledge and obvious to laymen, and nurse was engaged in routine, nontechnical task of assisting plaintiff with short walk to bathroom. *Massey v. Mercy Medical Center Redding*

(2009) 180 Cal. App. 4th 690, 696-697, 103 Cal. Rptr. 3d 209

In medical malpractice action, when considering declarations of medical experts in order to rule on defendant's motion for summary judgment, declarations of plaintiff's experts are to be liberally construed and any doubts as to propriety of granting motion are to be resolved in favor of plaintiff. *Powell v. Kleinman (2007) 151 Cal. App. 4th 112, 125-126, 59 Cal. Rptr. 3d 618*

Patient must present expert testimony to establish existence of medical condition that gave rise to heightened duty of disclosure on part of surgeon. *Jambazian v. Borden (1994) 25 Cal. App. 4th 836, 849, 30 Cal. Rptr. 2d 768*

Jury may rely on its own common knowledge in determining whether failure to remove foreign object from patient's body during surgery violated standard of care. *Gannon v. Elliot (1993) 19 Cal. App. 4th 1, 6, 23 Cal. Rptr. 2d 86*

Fact that defendant's expert witness has same malpractice insurer as defendant did not disqualify witness; witness's direct or indirect pecuniary interest in litigation did not provide basis for disqualification. *Mathis v. Morrissey (1992) 11 Cal. App. 4th 332, 348, 13 Cal. Rptr. 2d 819*

Designation of defendant as expert witness pursuant to *Code Civ. Proc. § 2034.210* is precondition to discovering current medical opinion of defendant concerning care provided. *County of Los Angeles v. Superior Court (1990) 224 Cal. App. 3d 1446, 1455, 274 Cal. Rptr. 712*

Test for whether expert witness has sufficient medical expertise to offer competent medical testimony on causation in particular case is whether witness has sufficient skill or experience in particular field so that testimony would be likely to assist jury in search for truth. *Salasguevara v. Wyeth Labs., Inc. (1990) 222 Cal. App. 3d 379, 385* , 271 Cal. Rtpr. 780

Party in malpractice case is permitted to call as witness expert designated by another party who has been deposed. *Salasguevara v. Wyeth Labs., Inc. (1990) 222 Cal. App. 3d 379, 387, 271 Cal. Rptr. 780*

Test used in determining whether medical expert is qualified to testify to standard of care of community. *Jutzi v. County of Los Angeles (1987) 196 Cal. App. 3d 637, 651-652, 242 Cal. Rptr. 74*

In medical malpractice action by breast implant patient, psychiatrist, by virtue of medical education and internship training, possessed ability to research role that prophylactic antibiotics play in implant patients, even though psychiatrist lacked credentials to permit giving expert testimony concerning surgical techniques in highly specialized field of plastic surgery. *Miller v. Silver (1986) 181 Cal. App. 3d 652, 661, 226 Cal. Rptr. 479*

Podiatrist was qualified to testify in malpractice action despite different medical background from defendant when he demonstrated extensive education, training, and experience regarding particular injury and medical standards at issue. *Chadock v. Cohn (1979) 96 Cal. App. 3d 205, 208-209, 157 Cal. Rptr. 640*

Opinion of duly licensed and practicing physician who is not specialist in field under inquiry, but who has knowledge of appropriate standard of care, is competent expert witness. *Evans v. Ohanesian (1974) 39 Cal. App. 3d 121, 128, 112 Cal. Rptr. 236* ; *Cline v. Lund (1973) 31 Cal. App. 3d 755, 766, 107 Cal. Rptr. 629*

[b] Emergency Medical Coverage

Because proper standard of care in medical malpractice action is standard existing at time alleged malpractice occurred, requirement of *Health & Safety Code § 1799.110(c)* that testifying medical expert have substantial experience in

emergency medical coverage within "last five years" is measured from date of alleged malpractice, not from date of trial. *Petrou v. South Coast Emergency Group (2004) 119 Cal. App. 4th 1090, 1094, 15 Cal. Rptr. 3d 64 .*

Physician ws not qualified to testify regarding diagnosis and treatment rendered by emergency room physician because proposed expert witness was not emergency room physician and had not acted as such within last five years. *Zavala v. Board of Trs. (1993) 16 Cal. App. 4th 1755, 1762-1763, 20 Cal. Rptr. 2d 768*

Admission to evidence, over party's objection, of expert testimony by nonemergency physician concerning standard of care in provision of emergency services does not constitute reversible error if party's objection was on general competency grounds, rather than on specific statutory ground set forth in *Health and Safety Code § 1799.110*, and if independent and competent evidence from other witnesses, substantially similar to expert's testimony, made admission of expert testimony harmless error in any event. *Atkins v. Strayhorn (1990) 223 Cal. App. 3d 1380, 1390-1391, 273 Cal. Rptr. 231*

Health & Safety Code § 1799.110 is strictly construed, following statute's literal and plain meaning; testimony of expert is properly excluded if expert does not have requisite experience in emergency care. *Sigala v. Goldfarb (1990) 222 Cal. App. 3d 1450, 1455-1456, 266 Cal. Rptr. 96*

Fact that expert may have intimate knowledge of emergency room physician's duties was insufficient to qualify expert for purposes of *Health & Safety Code § 1799.110*, which requires expert to have actual experience in emergency care. *Sigala v. Goldfarb (1990) 222 Cal. App. 3d 1450, 1455-1456, 266 Cal. Rptr. 96*

Action that does not implicate negligent care by emergency physician (for example, action based on hospital's alleged failure to provide essential hospital services) is not subject to expert testimony restrictions set forth in *Health & Safety Code § 1799.110(c)*. *Baxter v. Alexian Bros. Hosp. (1989) 214 Cal. App. 3d 722, 726, 262 Cal. Rptr. 867*

Erroneous bar on expert witness's testimony, made pursuant to misapplication of *Health & Safety Code § 1799.110(c)* by trial court, justified reversal of entire judgment if bar was sole cause of entry of judgment against party who sought to call witness. *Baxter v. Alexian Bros. Hosp. (1989) 214 Cal. App. 3d 722, 726, 262 Cal. Rptr. 867*

In action against county for alleged medical malpractice in rendering emergency medical services in treating plaintiff's injury, trial court's preclusion of plaintiff's expert medical witnesses, who did not have recent experience working in hospital emergency room, from testifying that emergency room physician in treating plaintiff's injury fell below standard of care was proper under *Health & Safety Code § 1799.110(c)*. *Jutzi v. County of Los Angeles (1987) 196 Cal. App. 3d 637, 646, 242 Cal. Rptr. 74*

Health & Safety Code § 1799.110(c) (standard for expert testimony in action for damages involving claim of negligence against physician and surgeon providing emergency medical coverage) applys to any suit involving claim of negligent emergency treatment by hospital emergency room physician, whether or not that physician is named as defendant. *Jutzi v. County of Los Angeles (1987) 196 Cal. App. 3d 637, 646-647, 649, 651, 242 Cal. Rptr. 74*

"Emergency medical coverage," although not defined in *Health & Safety Code § 1799.110(c)*, is apparently synonymous with term "emergency medical care," defined in *Health & Safety Code § 1799.110(b)* as those medical services required for immediate diagnosis and treatment of medical conditions that, if not immediately diagnosed and treated, could lead to serious physical or mental disability or death; "could," as used in statute, requires only possibility, not certainty, that serious physical or mental disability or death will result. *Jutzi v. County of Los Angeles (1987) 196 Cal. App. 3d 637, 647, 648, 242 Cal. Rptr. 74*

In determining whether witness is qualified to testify as medical expert concerning claim of negligent treatment rendered by emergency room physician, trial court is required under *Evid. Code §§ 400* and *405* to determine as

"preliminary fact" whether treatment given constituted emergency medical coverage. *Jutzi v. County of Los Angeles (1987) 196 Cal. App. 3d 637, 647-648, 651, 242 Cal. Rptr. 74*

In action against county for alleged medical malpractice in rendering emergency medical services in treating plaintiff's injury, trial court did not err in allowing defense expert witness, a specialist in emergency medicine who had supervised a hospital's emergency department and who was aware of standard of care in community through professional contacts with other emergency room specialists, including contacts through his membership in American College of Emergency Physicians, to testify that it was consistent with community standard of care for emergency room physician to treat fracture like plaintiff's if physician was qualified to do so by particular training and experience and justifiably felt comfortable in undertaking treatment; although policy of hospitals at which expert had worked was to refer injury like plaintiff's to orthopedic specialist, expert testified that this was not uniform practice throughout county. *Jutzi v. County of Los Angeles (1987) 196 Cal. App. 3d 637, 651-653, 242 Cal. Rptr. 74*

[11] Informed Consent

[a] Generally

Duty to inform includes advising patient of risks involved in declining test or treatment when patient indicates intent to decline risk-free procedure. *Truman v. Thomas (1980) 27 Cal. 3d 285, 292, 165 Cal. Rptr. 308, 611 P.2d 902* ; *Jamison v. Lindsay (1980) 108 Cal. App. 3d 223, 230, 166 Cal. Rptr. 443*

Expert testimony is required to determine whether or not proper exercise of care requires disclosure beyond explanation of known serious risk. *Cobbs v. Grant (1972) 8 Cal. 3d 229, 244, 104 Cal. Rptr. 505, 502 P.2d 1* ; *Jamison v. Lindsay (1980) 108 Cal. App. 3d 223, 230, 166 Cal. Rptr. 443*

Patient is required to present expert testimony to establish existence of medical condition that gave rise to heightened duty of disclosure on part of surgeon. *Jambazian v. Borden (1994) 25 Cal. App. 4th 836, 849, 30 Cal. Rptr. 2d 768*

Trial court properly refused jury instruction that stated physician had duty to disclose existence of differing schools of thought regarding diagnosis and treatment. *Parris v. Sands (1993) 21 Cal. App. 4th 187, 193, 25 Cal. Rptr. 2d 800*

Doctrine of informed consent was inapplicable as matter of law to physician who acted as consultant specialist, who never examined patient personally, and whose professional function was confined to rendering advice and guidance to clinician who consulted him on plaintiff's behalf. *Townsend v. Turk (1990) 218 Cal. App. 3d 278, 287, 266 Cal. Rptr. 821*

Duty to inform patient of potential risks in refusing to undergo diagnostic tests applies to physician who recommends patient see a specialist if physician will have no further contact with patient. *Moore v. Preventive Med. Med. Group, Inc. (1986) 178 Cal. App. 3d 728, 223 Cal. Rptr. 859*

Knowing and intentional representation by physician that substance can be safely administered when in fact substance was illegal and dangerous gave rise to action in fraud as well as malpractice. *Nelson v. Gaunt (1981) 125 Cal. App. 3d 623, 636, 178 Cal. Rptr. 167*

No duty to disclose material information relating to postoperative care if that care did not involve any particular treatment or test. *Jamison v. Lindsay (1980) 108 Cal. App. 3d 223, 230-231, 166 Cal. Rptr. 443*

Physician's failure to disclose low probability risk inherent to cosmetic surgery gave rise to cause of action in negligence rather than intentional misrepresentation when risk occurred. *Stone v. Foster (1980) 106 Cal. App. 3d 334,*

347, 164 Cal. Rptr. 901

Court properly refused to instruct jury that physician had failed to obtain informed consent as matter of law when substantial evidence demonstrated that plaintiff's injury was due to remote risk which had not been disclosed, and jury had been informed properly regarding standard governing disclosure of such risks. *Slater v. Kehoe (1974) 38 Cal. App. 3d 819, 826-827, 113 Cal. Rptr. 790*

Physician is not permitted to minimize known dangers of procedure in order to induce patient's consent. *Berkey v. Anderson (1969) 1 Cal. App. 3d 790, 803-804, 82 Cal. Rptr. 67*

[b] Causation

Causal connection between physician's failure to disclose and patient's injury is required to support negligence action; causality established if reasonable person in patient's situation would have refused consent if properly informed. *Cobbs v. Grant (1972) 8 Cal. 3d 229, 245, 104 Cal. Rptr. 505, 502 P.2d 1*

[c] Continuing Duty to Warn

Physician has continuing duty to warn patient of risks arising from treatment performed by physician of which physician subsequently becomes aware. *Tresemer v. Barke (1978) 86 Cal. App. 3d 656, 669-672, 150 Cal. Rptr. 384*

[d] Release from Duty to Disclose

Disclosure is not required when physician can demonstrate to reasonable person that disclosure would so upset patient as to render patient unable to objectively weigh risks of refusing treatment. *Cobbs v. Grant (1972) 8 Cal. 3d 229, 246, 104 Cal. Rptr. 505, 502 P.2d 1* ; *Slater v. Kehoe (1974) 38 Cal. App. 3d 819, 826, 113 Cal. Rptr. 790* (dicta)

Patient's request to remain uninformed provides defense in malpractice action for nondisclosure. *Aden v. Younger (1976) 57 Cal. App. 3d 662, 675, 129 Cal. Rptr. 535*

Physician is allowed to withhold information when patient obviously lacks capacity to evaluate; rule is applicable to minors and incompetents. *Slater v. Kehoe (1974) 38 Cal. App. 3d 819, 825-826, 113 Cal. Rptr. 790*

[12] Liability

Neither criminal nor civil liability attaches to physician or hospital in honoring competent, informed adult patient's refusal of medical services. *Bouvia v. Superior Court (1986) 179 Cal. App. 3d 1127, 1145, 225 Cal. Rptr. 297*

[13] Negligence

[a] Generally

"Professional negligence" under *Bus. & Prof. Code § 6146(c)(3)* is negligent act or omission to act by health care provider in rendering of professional services that is proximate cause of personal injury or wrongful death, provided that services are within scope of service for which provider is licensed and not within any restriction imposed by licensing agency or licensed hospital; restriction imposed by licensing agency or licensed hospital refers to acts outside capacity for which health care provider is licensed. *Waters v. Bourhis (1985) 40 Cal. 3d 424, 435-436, 220 Cal. Rptr. 666, 709*

P.2d 469 (psychiatrist performing open heart surgery is example of act outside license capacity)

Act by health care provider that violates a professional rule of conduct created by licensing agency or hospital is not necessarily restricted act within meaning of *Bus. & Prof. Code § 6146(c)(3).* *Waters v. Bourhis (1985) 40 Cal. 3d 424, 435-436, 220 Cal. Rptr. 666, 709 P.2d 469*

Definition of "professional negligence" in *Bus. & Prof. Code § 6146(c)(3)* includes certain intentional departures from professional standards; psychiatrist's purposefully abusing therapist-patient relationship by initiating sexual relationship with patient is basis for action for professional negligence; conduct serving as basis for action for professional negligence also serves as basis for action for intentional tort. *Waters v. Bourhis (1985) 40 Cal. 3d 424, 433-435, 220 Cal. Rptr. 666, 709 P.2d 469*

Because legislature has defined professional negligence of health care providers as negligent act or omission to act in rendering professional services, which act or omission is proximate cause of personal injury or wrongful death, provided that services are within scope of services for which provider is licensed (*Bus. & Prof. Code § 6146(c)(3)* [*see also Civ. Code §§ 3333.1(c)(2), 3333.2(c)(2); Code Civ. Proc. §§ 340.5(2), 364(f)(2), 667.7(e)(4)*]), action for professional negligence of physician is required to arise out of breach of duty of care owed to patient by physician within scope of patient-physician relationship. *Atienza v. Taub (1987) 194 Cal. App. 3d 388, 392, 239 Cal. Rptr. 454*

Physician who induces patient to enter sexual relationship is liable for professional negligence medical malpractice only if physician engaged in sexual conduct on pretext that it was necessary part of treatment for which patient had sought out physician; complaint alleging that physician initiated sexual relationship with patient while treating her for industrial injury, but not alleging that she was induced to have sexual relations with physician in furtherance of her treatment, fails to state cause of action for professional negligence medical malpractice. *Atienza v. Taub (1987) 194 Cal. App. 3d 388, 391-394, 239 Cal. Rptr. 454*

Physician or nurse may err in judgment or to be unsuccessful in treatment of patient without incurring liability for malpractice if due care otherwise exercised. *Fraijo v. Hartland Hosp. (1979) 99 Cal. App. 3d 331, 341 n. 8, 343, 160 Cal. Rptr. 246*

Liability for negligence is properly based on inference that more prompt diagnosis and treatment could have prolonged patient's life even if no cure could have resulted. *Pulvers v. Kaiser Found. Health Plan, Inc. (1979) 99 Cal. App. 3d 560, 565-566, 160 Cal. Rptr. 392*

[b] Causation

In action based on failure to warn of risk of developing aseptic necrosis from prednisone, district court erred in concluding that doctor's duty to warn depended on whether doctors in community would have customarily provided warnings in same situation; whether or not prednisone use was prevalent in treatment of asthma was not directly relevant to whether or not reasonable person in plaintiff's position would have consented to treatment with it after considering risk; on remand, district court must resolve issues of what risk plaintiff faced and whether or not reasonable person would have consented to treatment. *Hutchinson v. United States (9th Cir. 1988) 841 F.2d 966, 967*

Damages for fear of contracting AIDS from surgeon are not available in absence of evidence that patient will probably develop disease. *Kerins v. Hartley (1994) 27 Cal. App. 4th 1062, 1074, 33 Cal. Rptr. 2d 172*

Lack of probable causal relationship bars recovery for recurrence of cancer following negligently administered chemotherapy, but patient may recover for impairment of bone marrow that precluded use of chemotherapy to treat recurrence. *Duarte v. Zachariah (1994) 22 Cal. App. 4th 1652, 1658, 1664, 28 Cal. Rptr. 2d 88*

Physician whose malpractice causes injury requiring further medical treatment is subject to liability for malpractice of subsequent treating physician. *Maxwell v. Powers (1994) 22 Cal. App. 4th 1596, 1607, 28 Cal. Rptr. 2d 62*

Civ. Code § 1714.8(a), creating liability for negligent failure to diagnose or treat medical condition, does not undermine requirement of Wrongful Death Act (former *Code Civ. Proc. § 377*; *now see Code Civ. Proc. § 377.60 et seq.*) that wrongful death must be caused by defendants's conduct; thus, defendant's negligent conduct after plaintiff had survival rate of less than 50 percent due to cancer di not cause wrongful death. *Bromme v. Pavitt (1992) 5 Cal. App. 4th 1487, 1507-1509, 7 Cal. Rptr. 2d 608*

"Lost chance" causation standard is unavailable in California because incompatible with traditional and more rigorous "more probable than not" proximate causation standard and with public policy considerations. *Dumas v. Cooney (1991) 235 Cal. App. 3d 1593, 1606-1613, 1 Cal. Rptr. 2d 584* (delayed diagnosis of preexisting medical condition)

If defendant's negligent treatment of injured person is proximate cause of person's subsequent death, failure of others to protect person from harm does not supersede cause of death and protect defendant from liability. *Wright v. City of Los Angeles (1990) 219 Cal. App. 3d 318, 348, 268 Cal. Rptr. 309*

Medical care provider's negligence is proximate cause of patient's injuries if provider negligently fails to perform diagnostic procedures indicated by patient's condition and thus fails to properly diagnose and treat patient, and patient's resulting injuries are more extensive or severe than they would have been if prompt diagnosis and treatment had been given. *Wright v. City of Los Angeles (1990) 219 Cal. App. 3d 318, 347-348, 268 Cal. Rptr. 309*

Less than 50 percent probability that defendant's omission caused patient's harm did not meet reasonable medical probability test of proximate cause. *Simmons v. West Covina Med. Clinic (1989) 212 Cal. App. 3d 696, 702-703, 260 Cal. Rptr. 772*

Defendant physician has burden of proving, by preponderance of evidence, extent of damages resulting from his malpractice as opposed to innocent cause when injury is not readily susceptible to allocation between two causes. *Stone v. Foster (1980) 106 Cal. App. 3d 334, 347, 164 Cal. Rptr. 901*

Plaintiff is required to present expert testimony that injury resulting from treatment of foot injury would not have occurred but for defendant's negligence. *Bolen v. Woo (1979) 96 Cal. App. 3d 944, 956, 158 Cal. Rptr. 454*

Causal connection between physician's conduct and plaintiff's injury from negligent injection was not present when physician did not administer or supervise injection and was not informed of complications in time to prevent ensuing injury. *Frantz v. San Luis Med. Clinic (1978) 81 Cal. App. 3d 34, 40, 146 Cal. Rptr. 146*

Expert testimony is required to prove that alleged failure to exercise due care was proximate cause of condition underlying patient's complaint unless result is matter within common knowledge of layman. *Keen v. Prisinzano (1972) 23 Cal. App. 3d 275, 279, 100 Cal. Rptr. 82* ; *Deckard v. Sorenson (1960) 177 Cal. App. 2d 305, 308, 2 Cal. Rptr. 121*

Refusal to instruct jury that plaintiff must prove exact cause of injury when more than one probable cause is present is proper when action is not based on res ipsa loquitur doctrine. *Wilson v. Gilbert (1972) 25 Cal. App. 3d 607, 612, 102 Cal. Rptr. 31*

Physician's erroneous interpretation of X rays resulting in improper treatment of fracture was proximate cause of patient's resultant disability. *Keen v. Prisinzano (1972) 23 Cal. App. 3d 275, 281, 100 Cal. Rptr. 82*

[c] Pleading Medical Negligence

In medical malpractice action, plaintiff must allege professional relationship giving rise to duty of care, governing standard of care, defendant's act or omission breaching standard, causality, and damages. *Frantz v. San Luis Med. Clinic (1978) 81 Cal. App. 3d 34, 39, 146 Cal. Rptr. 146*

[d] Selection of Method of Diagnosis or Treatment

Variance in medical opinion concerning desirability of one procedure over another does not establish that choice of one such treatment is negligence. *Meier v. Ross Gen. Hosp. (1968) 69 Cal. 2d 420, 434, 71 Cal. Rptr. 903, 445 P.2d 519* ; *Clemens v. Regents of Univ. of Cal. (1970) 8 Cal. App. 3d 1, 13, 87 Cal. Rptr. 108*

Absent expert testimony showing that defendant's method of diagnosis was medically accepted alternative method of diagnosing patient with plaintiff's medical history and symptoms, trial court's instruction to jury on *CACI No. 506* was given in error, although error was harmless as evidence supported finding that doctor was not negligent. *Ayala v. Arroyo Vista Family Health Center (2008) 160 Cal. App. 4th 1350, 1359-1362, 73 Cal. Rptr. 3d 486*

Jury instruction that physician may select one method of diagnosis over another without incurring liability when there is no universally accepted method, was inapplicable to situation in which physician is choosing among actual diagnoses based on alternative beliefs concerning patient's condition. *Jamison v. Lindsay (1980) 108 Cal. App. 3d 223, 233, 166 Cal. Rptr. 443*

Incorrect choice among several approved methods of diagnosis or treatment does not constitute negligence if physician exercised reasonable care in making decision. *Barton v. Owen (1977) 71 Cal. App. 3d 484, 502, 139 Cal. Rptr. 494*

[e] Standard of Care

[i] Generally

Health care provider is not subject to separate and distinct claims for professional and ordinary negligence based on same conduct. *Flowers v. Torrance Mem'l Hosp. Med. Ctr. (1994) 8 Cal. 4th 992, 995, 35 Cal. Rptr. 2d 685, 884 P.2d 142*

In applying usual physician malpractice rules to veterinarian malpractice case, testimony that another veterinarian would not have treated horse with Oxytetracycline, as did defendants, did not establish that defendants acted below standard of care. *Williamson v. Prida (1999) 75 Cal. App. 4th 1417, 1425-1426, 89 Cal. Rptr. 2d 868*

In achieving purpose for which physician is employed, physician must have degree of learning and skill ordinarily possessed by practitioners of medical profession in same locality and exercise ordinary care in applying that learning and skill to treatment of patient. *Atienza v. Taub (1987) 194 Cal. App. 3d 388, 391, 239 Cal. Rptr. 454*

Physician or surgeon must possess degree of learning and skill ordinarily possessed by practitioners of medical profession in same locality and exercise ordinary care in applying that learning and skill to treatment of patient. *Keen v. Prisinzano (1972) 23 Cal. App. 3d 275, 279, 100 Cal. Rptr. 82*

Taping of child's hand for intravenous fluids breached proper standard of care when taping impaired circulation and resulted in partial amputation. *Robinson v. Pediatric Affiliates Med. Group, Inc. (1979) 98 Cal. App. 3d 907, 910-911, 159 Cal. Rptr. 791*

Instruction that physician's conduct should be found to constitute negligence if not approved by respectable minority of neurosurgeons in same year as actions took place was prejudicial error; proper standard is that degree of skill, knowledge, and care ordinarily possessed and exercised by members of medical profession under similar circumstances. *Hubbard v. Calvin (1978) 83 Cal. App. 3d 529, 532, 147 Cal. Rptr. 905*

Physician's failure to timely administer test for plaintiff's sinusitis condition which led to brain abcess did not constitute negligence as matter of law when expert testimony differed on whether failure was breach of standard practice. *Barton v. Owen (1977) 71 Cal. App. 3d 484, 499, 139 Cal. Rptr. 494*

Testimony by expert witness (vascular surgeon) that defendant physician had failed to follow standard medical practice in county at time of treatment by improperly performing vascular surgery and by failing to administer an arteriogram prior to surgery was sufficient to support verdict of professional negligence. *Wilson v. Gilbert (1972) 25 Cal. App. 3d 607, 612, 102 Cal. Rptr. 31*

[ii] Specialists Versus General Practitioner

Duty of care owed by general practitioner is determined by reference to conduct of other general practitioners under similar circumstances; due care includes duty to refer if reasonable general practitioner would have done so. *Seneris v. Haas (1955) 45 Cal. 2d 811, 829, 291 P.2d 915* ; *Sinz v. Owens (1945) 33 Cal. 2d 749, 758-759, 205 P.2d 3*

Specialist is only required to exercise in diagnosis and treatment that reasonable degree of skill and knowledge possessed and exercised by other specialists under same or similar circumstances. *Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 975-976, 95 Cal. Rptr. 381*

[f] Violation of Statute

Failure to report diagnosis of epilepsy as required by former *Health & Safety Code § 410(1)* (*now see Health & Safety Code § 103900(a)*) creates rebuttable presumption of negligence under *Evid. Code § 669(b)*; presumption is rebutted by proof that person violating statute acted with ordinary prudence. *Lopez v. Southern Cal. Permanente Med. Group (1981) 115 Cal. App. 3d 673, 680, 171 Cal. Rptr. 527*

[14] Notice of Intent to Commence Action

Counterclaim of malpractice which exceeds jurisdictional amount of small claims court gave original defendant right to continuance of small claims action in order to comply with 90 day notice requirement of *Code Civ. Proc. § 364*. *Clark v. Superior Court (1980) 113 Cal. App. 3d 865, 869, 169 Cal. Rptr. 898*

[15] Paramedics

Paramedic, arriving at location of fight and finding patient lying on ground, has duty to make examination sufficient to determine whether patient has symptoms of any serious injuries that may likely result from fight, and to treat those symptoms or to take patient to hospital for treatment. *Wright v. City of Los Angeles (1990) 219 Cal. App. 3d 318, 346, 268 Cal. Rptr. 309*

Paramedic has duty to provide medical services in manner that is not grossly negligent or performed in bad faith. *Wright v. City of Los Angeles (1990) 219 Cal. App. 3d 318, 345, 268 Cal. Rptr. 309*

[16] Patient Instruction

Neither hospital nor treating physician is liable for following competent patient's instruction to withdraw treatment; no prior judicial approval is necessary. *Bartling v. Superior Court (1984) 163 Cal. App. 3d 186, 197, 209 Cal. Rptr. 220*

[17] Psychotherapists

Patient was able to maintain sexual misconduct action against psychotherapist in absence of express representation by psychotherapist that sexual activity was part of treatment. *McNall v. Summers (1994) 25 Cal. App. 4th 1300, 1313, 30 Cal.Rptr. 2d 914*

Psychiatrist has duty to warn subsequent treating therapist that patient presented suicide risk. *Gross v. Allen (1994) 22 Cal. App. 4th 354, 362, 27 Cal. Rptr. 2d 429*

Patient's spouse was unable to bring tort action against psychotherapist who engaged in sexual relations with patient. *Smith v. Pust (1993) 19 Cal. App. 4th 263, 272, 273-274, 23 Cal. Rptr. 2d 364*

[18] Res Ipsa Loquitur

[a] In General

Res ipsa loquitur doctrine in medical malpractice actions is applicable when (1) accident is of kind that does not ordinarily occur in absence of negligence; (2) accident is caused by instrumentality or agency in exclusive control of defendant; and (3) accident is not due to any voluntary conduct on part of plaintiff. *Bardessono v. Michels (1970) 3 Cal. 3d 780, 788 n.5, 91 Cal. Rptr. 760, 478 P.2d 480* ; *Ybarra v. Spangard (1944) 25 Cal. 2d 486, 489, 154 P.2d 687*

Special responsibility owed to patient by physician and patient's necessary dependence on physician are policy considerations supporting application of res ipsa loquitur doctrine. *Bardessono v. Michels (1970) 3 Cal. 3d 780, 789, 91 Cal. Rptr. 760, 478 P.2d 480* ; *Cline v. Lund (1973) 31 Cal. App. 3d 755, 762, 107 Cal. Rptr. 629*

In action tried under res ipsa loquitur theory, jury was able to rely on its own common knowledge in determining whether failure to remove foreign object from patient's body during surgery violated standard of care. *Gannon v. Elliot (1993) 19 Cal. App. 4th 1, 6, 23 Cal. Rptr. 2d 86*

Res ipsa loquitur doctrine is applicable even when cause of injury is unknown and when there is no direct evidence of defendant's conduct, so long as there is reasonable and logical inference that defendant was negligent and that such negligence caused the injury. *Hale v. Venuto (1982) 137 Cal. App. 3d 910, 919-920, 187 Cal. Rptr. 357*

Res ipsa was inapplicable in action against anesthesiologist for atrophy of testicle following hernia surgery when vascular damage caused solely by surgeon was probable cause of condition. *McKinney v. Nash (1981) 120 Cal. App. 3d 428, 440, 174 Cal. Rptr. 642*

In medical negligence cases, defendant may remove consideration of res ipsa presumption from case by introducing evidence establishing that treatment administered by defendant was not proximate cause of injury. *Frantz v. San Luis Med. Clinic (1978) 81 Cal. App. 3d 34, 44, 146 Cal. Rptr. 146*

Fact that harmful consequence of treatment is rare is not sufficient in itself to establish that when such rare event occurs it is result of negligence by defendants. *Contreras v. St. Luke's Hosp. (1978) 78 Cal. App. 3d 919, 931, 144 Cal. Rptr.*

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Res ipsa doctrine was not applicable when uncontradicted evidence established that physician's failure to run additional throat culture tests before performance of tonsillectomy was not breach of good medical practice. *Folk v. Kilk (1975) 53 Cal. App. 3d 176, 187, 126 Cal. Rptr. 172*

Application of res ipsa loquitur in cases where uncommon complication develops is proper only when demonstrated, in light of past experience, that such occurrence is more likely the result of negligence than not. *Slater v. Kehoe (1974) 38 Cal. App. 3d 819, 831, 113 Cal. Rptr. 790*

[b] Requirement of Expert Testimony

Procedure was commonplace and did not require expert testimony to establish negligence as cause. *Kerr v. Bock (1971) 5 Cal. 3d 321, 323-324, 95 Cal. Rptr. 788, 486 P.2d 684* (failure to warn patient not to lift leg after operation removing part of bone); *Bardessono v. Michels (1970) 3 Cal. 3d 780, 790, 91 Cal. Rptr. 760, 478 P.2d 480* (injections of cortisone and anesthetic); *Wolfsmith v. Marsh (1959) 51 Cal. 2d 832, 833-834, 337 P.2d 70* (injections of sodium pentathol)

Expert testimony is required to establish negligence element of res ipsa loquitur doctrine unless procedure is relatively commonplace and simple. *Bardessono v. Michels (1970) 3 Cal. 3d 780, 790, 91 Cal. Rptr. 760, 478 P.2d 480*

Procedure was complex and required expert testimony to establish negligence as only possible cause. *Tomei v. Henning (1967) 67 Cal. 2d 319, 322, 62 Cal. Rptr. 9, 431 P.2d 633* (hysterectomy); *McKinney v. Nash (1981) 120 Cal. App. 3d 428, 436, 174 Cal. Rptr. 642* (hernia repair); *O'Connor v. Bloomer (1981) 116 Cal. App. 3d 385, 391, 172 Cal. Rptr. 128* (duties of assistant surgeons during heart surgery)

[19] Special Verdicts

Judgment was properly entered for defendant on special verdict in which jury failed to find on defendant's negligence, but found absence of proximate cause. *Contreras v. Goldrich (1992) 10 Cal. App. 4th 1431, 1434, 13 Cal. Rptr. 2d 394*

[20] Statute of Limitations

[a] In General

Statute of limitations is not tolled by complaint to state disciplinary board. *Kleefeld v. Superior Court (1994) 25 Cal. App. 4th 1680, 1685, 31 Cal. Rptr. 2d 12*

Code Civ. Proc. § 340.5 creates two separate statutes of limitations, both of which must be satisfied if plaintiff is to timely file medical malpractice action: plaintiff must file within one year after first discovering injury and negligent cause of injury; and plaintiff must file within three years after first experiencing harm from injury. *Dolan v. Borelli (1993) 13 Cal. App. 4th 816, 824-825, 16 Cal. Rptr. 2d 714* (affirming dismissal)

Code Civ. Proc. § 340.5, statute of limitations applicable to medical malpractice claims, does not violate equal protection rights guaranteed by *U.S. Const. amend. XIV*, and *Cal. Const. art. I, § 7*. *Donabedian v. Manzer (1986) 187 Cal. App. 3d 1021, 1027, 232 Cal. Rptr. 325*

Provisions of *Code Civ. Proc. § 340.5*, that time for commencement of medical malpractice action shall be three years after date of injury or one year after plaintiff discovers, or through use of reasonable diligence should have discovered, injury, whichever occurs first, applies generally to adults and minors alike and fixes outside limit for suit to three years after date of injury; common law delayed-discovery rule was not retained in *Code Civ. Proc. § 340.5*. *Donabedian v. Manzer (1986) 187 Cal. App. 3d 1021, 1026, 232 Cal. Rptr. 325*

Medical malpractice action must satisfy both limitations periods under *Code Civ. Proc. § 340.5*; action is barred either if brought more than one year after plaintiff becomes aware of physical manifestation of injury and its negligent cause, or if brought more than three years after plaintiff becomes aware of physical manifestation of injury regardless of awareness of negligent cause, except when one or more of three specified exceptions apply to toll three-year period. *Hills v. Aronsohn (1984) 152 Cal. App. 3d 753, 757-762, 758 n.3, 199 Cal. Rptr. 816*

Statute of limitations period for medical malpractice actions is governed exclusively by three-year/one-year periods under *Code Civ. Proc. § 340.5*; plaintiff's incompetence does not provide exception to statute. *Fogarty v. Superior Court (1981) 117 Cal. App. 3d 316, 319-320, 172 Cal. Rptr. 594*

[b] Commencement of Limitation Period

[i] One-Year Period

Physician's failure to disclose facts pertaining to negligent treatment did not affect one-year discovery limitation period under tolling provision of *Code Civ. Proc. § 340.5* when plaintiff had actual knowledge of injury despite nondisclosure. *Sanchez v. South Hoover Hosp. (1976) 18 Cal. 3d 93, 96, 99, 132 Cal. Rptr. 657, 553 P.2d 1129*

One-year limitations period of *Code Civ. Proc. § 340.5* began to run only after exploratory surgery determined negligent cause of plaintiff's throat pain, despite earlier suspicions that pain may have been caused by anesthetic intubation during pelvic surgery. *Artal v. Allen (2003) 111 Cal. App. 4th 273, 280-281, 3 Cal. Rptr. 3d 458*

Reasonableness of plaintiff's belated discovery of defendant's negligence is question of law when reasonable minds can draw only one conclusion from evidence. *Rose v. Fife (1989) 207 Cal. App. 3d 760, 770, 255 Cal. Rptr. 440*

In malpractice action arising from injuries caused by plaintiff's use of intrauterine birth control device (IUD), one-year statute of limitations began to run when plaintiff had reasonable suspicion that she had been harmed by defendant physician's prescribed use of *IUD. Rose v. Fife (1989) 207 Cal. App. 3d 760, 768-770, 255 Cal. Rptr. 440*

Statute of limitations begins to run when plaintiff has notice or information of circumstances to put reasonable person on inquiry, or has opportunity to obtain knowledge from sources open to investigation. *Enfield v. Hunt (1984) 162 Cal. App. 3d 302, 308, 208 Cal. Rptr. 584* ; *Christ v. Lipsitz (1979) 99 Cal. App. 3d 894, 898, 160 Cal. Rptr. 498*

Excessive pain from surgery and physician's statement that he should have performed different type of operation did not put patient on actual or constructive notice of basis for malpractice. *Kilburn v. Pineda (1982) 137 Cal. App. 3d 1046, 1049-1050, 187 Cal. Rptr. 548*

Dismissal for failure to file claim within one year after discovery of injury pursuant to *Code Civ. Proc. § 340.5* was proper despite plaintiff's contention that she was not aware viable cause of action existed until 24 months after malpractice, when plaintiff had discovered injury within days of its occurrence; knowledge of injury, rather than its legal significance, begins running of limitations period. *Graham v. Hansen (1981) 128 Cal. App. 3d 965, 972-973, 180 Cal. Rptr. 604*

Trial court properly granted defendant's motion for nonsuit on ground that action was barred by one-year statute of limitations prescribed by *Code Civ. Proc. § 340.5* when plaintiff offered no evidence regarding time of discovery of negligence. *Burgon v. Kaiser Found. Hosps. (1979) 93 Cal. App. 3d 813, 821, 155 Cal. Rptr. 763*

[ii] Three-Year Period

Damage is manifested for purposes of commencing three-year limitations period when damage has become evidenced in some significant fashion, whether or not patient actually becomes aware of injury. *Marriage & Family Ctr. v. Superior Court (1991) 228 Cal. App. 3d 1647, 1654, 279 Cal. Rptr. 475*

Entry of summary judgment, based on plaintiff's purported failure to commence action within three years after date of injury, was improper when nothing in record established date of plaintiff's injury as matter of law; injury occurred when "appreciable harm" first suffered by plaintiff. *Mason v. Marriage & Family Ctr. (1991) 228 Cal. App. 3d 537, 542-546, 279 Cal. Rptr. 51*

Three-year limitation period begins when patient observes some significant physical manifestation of harm. *Hills v. Aronsohn (1984) 152 Cal. App. 3d 753, 759, 199 Cal. Rptr. 816*

[c] Minors

Differing accrual dates for malpractice actions brought by minors and those brought by adults violate constitutional right to equal protection. *Katz v. Children's Hosp. of Orange County (9th Cir. 1994) 28 F.3d 1520, 1529, 1533*

Minor's malpractice claim accrues on date of injury. *Katz v. Children's Hosp. of Orange County (9th Cir. 1994) 28 F.3d 1520, 1529, 1533*

Minor has at least three years from date of wrongful act to bring action, pursuant to *Code Civ. Proc. § 340.5*, regardless of when he or she attains majority or discovers injury. *Steketee v. Lintz, Williams & Rothberg (1985) 38 Cal. 3d 46, 57, 210 Cal. Rptr. 781, 694 P.2d 1153*

Whether plaintiff is minor or adult under *Code Civ. Proc. § 340.5* (limiting actions for medical malpractice) is determined by his or her age at time of wrongful act. *Steketee v. Lintz, Williams & Rothberg (1985) 38 Cal. 3d 46, 52-53, 210 Cal. Rptr. 781, 694 P.2d 1153*

Medical malpractice action based on negligent treatment of minor accrues on discovery of negligence by minor's parents, rather than on later discovery by minor. *Whitfield v. Roth (1974) 10 Cal. 3d 874, 885, 112 Cal. Rptr. 540, 519 P.2d 588*

Code Civ. Proc. § 340.5, not former *Civ. Code § 29* (*now see Code Civ. Proc. § 340.4*), was statute of limitations governing action by 10-year-old quadriplegic boy who alleged that his physical disability was proximately caused by professional negligence in and about circumstances of his birth. *Donabedian v. Manzer (1986) 187 Cal. App. 3d 1021, 1023-1025, 232 Cal. Rptr. 325*

Three-year period of limitation in *Code Civ. Proc. § 340.5* is applicable whether minor brings action as victim of medical malpractice or brings wrongful death action as heir of one whose death was caused by medical malpractice. *Ferguson v. Dragul (1986) 187 Cal. App. 3d 702, 707-708, 232 Cal. Rptr. 79*

Limitation period of *Code Civ. Proc. § 340.5* for minors, permitting action before eighth birthday, was not applicable to action against drug manufacturer. *Dillashaw v. Ayerst Labs., Inc. (1983) 141 Cal. App. 3d 35, 41-42, 190 Cal. Rptr.*

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Malpractice action based on negligence during birth process, which allegedly caused minor plaintiff's cerebral palsy, is governed by *Code Civ. Proc. § 340.5*, the later and more specific statute applicable to medical malpractice actions, rather than former *Civ. Code § 29* (*now see Code Civ. Proc. § 340.4*). *Knox v. Superior Court (1983) 140 Cal. App. 3d 782, 784-785, 189 Cal. Rptr. 800*

Statute of limitations in action by minor based on physician's failure to administer prenatal test for Down's Syndrome is tolled by parent's failure to exercise reasonable care in discovering injury. *Call v. Kezirian (1982) 135 Cal. App. 3d 189, 195-196, 185 Cal. Rptr. 103*

[d] Notice of Intention to Commence Action

Non-treating, non-consulting physicians who are independent contractors of corporate medical group are not vicariously liable for injuries sustained by patient of corporation while being treated by physician assistant, regardless of whether names of physicians may have been included on door or appointment cards of corporation. *Armato v. Baden (1999) 71 Cal. App. 4th 885, 896, 84 Cal. Rptr. 2d 294*

Notic e to hospital was insufficient to extend limitation period governing claims against individual treating physicians. *Hanooka v. Pivko (1994) 22 Cal. App. 4th 1553, 1560, 28 Cal. Rptr. 2d 70*

One-year limitations period contained in *Code Civ. Proc. § 340.5* is not extended on basis of attorney's excusable neglect in providing notice of intention to sue required by Civ. Code § 364. *Hanooka v. Pivko (1994) 22 Cal. App. 4th 1553, 1560, 1563, 28 Cal. Rptr. 2d 70*

Although *Gov. Code § 945.6* rather than *Code Civ. Proc. § 340.5* controlled in medical malpractice action against county doctor, action is not barred even though not filed within six months from rejection of claim if notice of intention to commence action was timely served under *Code Civ. Proc. § 364(d)*, thus extending expiration of limitation period. *Anson v. County of Merced (1988) 202 Cal. App. 3d 1195, 1204-1205, 249 Cal. Rptr. 457*

[e] Public Entities

Code Civ. Proc. § 340.5 does not relieve litigant of duty to comply with time limits and requirements imposed by *Government Tort Claims Act. Torres v. County of Los Angeles (1989) 209 Cal. App. 3d 325, 333, 257 Cal. Rptr. 211*

Medical malpractice action against county doctor brought after claim rejected under *Gov. Code § 913* was required to be filed within six-month limitation period of *Gov. Code § 945.6*, even though action would be timely under one-year limitation period of *Code Civ. Proc. § 340.5* for medical malpractice actions. *Anson v. County of Merced (1988) 202 Cal. App. 3d 1195, 1199, 1202, 249 Cal. Rptr. 457*

Time for commencement of statutory period for filing claim under *Gov. Code § 911.2* against public entity (hospital district) for medical malpractice is coextensive with that for commencement of period of limitation under *Code Civ. Proc. § 340.5*. *Donabedian v. Manzer (1986) 187 Cal. App. 3d 1021, 1028, 232 Cal. Rptr. 325*

[f] Retroactivity

Statutes of limitations, being procedural, are normally applied retroactively to accrued causes of action, but court must inquire whether, in given case, retrospective application violates due process; if time left to file suit is reasonable, no

such constitutional violation occurs, and statute is applied as enacted; if no time is left, or only unreasonably short time remains, statute cannot be applied at all; whether time left in which to sue is reasonable is question of law. *Aronson v. Superior Court (1987) 191 Cal. App. 3d 294, 297-298, 236 Cal. Rptr. 347*

[g] Tolling

[i] In General

Tolling provisions of *Code Civ. Proc. § 340.5* (suspending limitation period on proof of fraud, intentional concealment, or presence of therapeutically useless foreign object in plaintiff) are applicable only to three-year period, not to one-year period. *Sanchez v. South Hoover Hosp. (1976) 18 Cal. 3d 93, 102, 132 Cal. Rptr. 657, 553 P.2d 1129* ; *Graham v. Hansen (1981) 128 Cal. App. 3d 965, 974, 180 Cal. Rptr. 604*

[ii] Foreign Body Exception

"Foreign body" tolling provision of *Code Civ. Proc. § 340.5* is inapplicable when object intentionally inserted for therapeutic purpose, even though object has no therapeutic effect and results in injury to plaintiff. *Trantafello v. Medical Ctr. of Tarzana (1986) 182 Cal. App. 3d 315, 320, 227 Cal. Rptr. 84*

Foreign body exception of *Code Civ. Proc. § 340.5* is applicable only to medically inserted objects that have no therapeutic or diagnostic purpose and that are left in patient's body. *Wallace v. Hibner (1985) 171 Cal. App. 3d 1042, 1047, 217 Cal. Rptr. 748*

Silicone intentionally injected into plaintiff for therapeutic purpose, with her consent, did not toll three-year limitation period in *Code Civ. Proc. § 340.5*; "foreign body" exception in that section is applicable only to situation in which defendant negligently leaves nontherapeutic foreign body in plaintiff's person without plaintiff's awareness. *Hills v. Aronsohn (1984) 152 Cal. App. 3d 753, 763-765, 199 Cal. Rptr. 816*

[iii] Intentional Concealment

Under *Code Civ. Proc. § 340.5*, intentional concealment of negligence by defendant doctor, medical clinic, and hospital district, tolled outer time limit for initiating action by either adult or minor. *Donabedian v. Manzer (1986) 187 Cal. App. 3d 1021, 1027, 232 Cal. Rptr. 325*

"Intentional concealment" tolling provision of *Code Civ. Proc. § 340.5* requires more than lack of informed consent or mere continuation of prior nondisclosure. *Trantafello v. Medical Ctr. of Tarzana (1986) 182 Cal. App. 3d 315, 321, 227 Cal. Rptr. 84*

[h] Wrongful Death

Amended complaint filed by decedent's husband for wrongful death based on medical malpractice of defendants related back to original complaint for loss of consortium filed by both husband and wife. *Lamont v. Wolfe (1983) 142 Cal. App. 3d 375, 379-380, 190 Cal. Rptr. 874*

[21] Statutory Duty

Child Abuse and Neglect Reporting Act (*Penal Code § 11164 et seq.*), requiring medical practitioners to report known

or suspected cases of child abuse, takes precedence over physician-patient or psychotherapist-patient privilege. *People v. Stritzinger (1983) 34 Cal. 3d 505, 512-514, 194 Cal. Rptr. 431, 668 P.2d 738*

[22] Statutory Limitations on Liability

Physician who administered childhood vaccinations to infant was liable only for gross negligence and willful misconduct under former *Health & Safety Code § 429.36* (*now see Health & Safety Code § 120455*). *Salasguevara v. Frye (1995) 31 Cal. App. 4th 330, 340-342, 37 Cal. Rptr. 2d 40*

Good Samaritan statute (*Bus. & Prof. Code § 2395*) extends immunity to staff physician of hospital who treats another doctor's patient at same hospital in response to medical emergency. *Burciaga v. St. John's Hosp. (1986) 187 Cal. App. 3d 710, 712, 232 Cal. Rptr. 75*

Definition of scene of emergency under *Bus. & Prof. Code § 2395* (former *Bus. & Prof. Code § 2144*) includes nonemergency room areas of hospital, but immunity for emergency treatment in hospital is limited to physicians volunteering services. *McKenna v. Cedars of Lebanon Hosp. (1979) 93 Cal. App. 3d 282, 286, 155 Cal. Rptr. 631*

Good Samaritan statute (*Bus. & Prof. Code § 2395*, formerly *Bus. & Prof. Code § 2144*) limits immunity to physicians called on to render emergency services in absence of preexisting duty to aid patient. *Colby v. Schwartz (1978) 78 Cal. App. 3d 885, 892, 144 Cal. Rptr. 624*

[23] Treatment Generally

Adult patient of sound mind has right to refuse any medical treatment or service, even if treatment may save or prolong patient's life. *Bouvia v. Superior Court (1986) 179 Cal. App. 3d 1127, 1137, 225 Cal. Rptr. 297*

[24] Vicarious Liability

Vicarious liability of physician for acts of nurses or other assistants is question of fact to be determined by general rules of agency. *Quintal v. Laurel Grove Hosp. (1964) 62 Cal. 2d 154, 166-168, 41 Cal. Rptr. 577, 397 P.2d 161* ; *Truhitte v. French Hosp. (1981) 128 Cal. App. 3d 332, 348, 180 Cal. Rptr. 152*

Non-treating, non-consulting physicians who are independent contractors of corporate medical group are not vicariously liable for injuries sustained by patient of corporation while being treated by physician assistant, regardless of whether names of physicians may have been included on door or appointment cards of corporation. *Armato v. Baden (1999) 71 Cal. App. 4th 885, 896, 84 Cal. Rptr. 2d 294*

Private surgeon was not vicariously liable for negligence of hospital nurses occurring during preoperative procedure when surgeon exercised no control or supervision over nurses. *Truhitte v. French Hosp. (1981) 128 Cal. App. 3d 332, 346, 180 Cal. Rptr. 152*

Negligence of anesthesiologist did not give rise to vicarious liability of surgeon. *Marvulli v. Elshire (1972) 27 Cal. App. 3d 180, 184-187, 103 Cal. Rptr. 461* ; *Kennedy v. Gaskell (1969) 274 Cal. App. 2d 244, 247-250, 78 Cal. Rptr. 753*

Surgeon was not vicariously liable for negligence of nurses occuring during post or preoperative care. *Sherman v. Hartman (1955) 137 Cal. App. 2d 589, 596, 290 P.2d 894*

[25] Wrongful Birth and Wrongful Life Actions

Child may recover special damages in wrongful life action regardless of whether negligence occurred before or after conception. *Gami v. Mullikin Med. Ctr. (1993) 18 Cal. App. 4th 870, 881, 22 Cal. Rptr. 2d 819*

Physician's failure to provide expectant mother with genetic test that would, according to expert medical testimony, have had only a 20-percent probability of detecting risk of particular birth defect was insufficient basis for wrongful birth action by mother and wrongful life action by child born with defect; 20-percent probability fell far short of requisite reasonable medical probability standard of causation. *Simmons v. West Covina Med. Clinic (1989) 212 Cal. App. 3d 696, 702-703, 260 Cal. Rptr. 772*

Trial court properly sustained demurrer to wrongful life action by child of incompetent and institutionalized mother when plaintiff suffered no legally cognizable injury as consequence of defendant's failure to supervise mother's sexual activity or prevent her pregnancy. *Foy v. Greenblott (1983) 141 Cal. App. 3d 1, 14, 190 Cal. Rptr. 84*

To recover damages for wrongful birth action based on physicians' failure to provide contraceptive devices and failure to diagnose pregnancy in time for an abortion, plaintiff must prove that she would have consented to contraceptive care and abortion had such care been offered, and that care would have been effective. *Foy v. Greenblott (1983) 141 Cal. App. 3d 1, 13, 190 Cal. Rptr. 84* (dicta)

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Application of *Health & Safety Code § 410* (*now see Health & Safety Code § 103900*) reporting requirements to state physicians. *67 Ops. Cal. Att'y Gen. 256 (1984)*

Medical and nonmedical practitioners are required by child abuse reporting law to report care for specified conditions, such as pregnancy in child under 14. *67 Ops. Cal. Att'y Gen. 235 (1984)*

Providers of services under federally funded state alcohol and drug abuse programs are precluded by federal law from reporting child abuse information except on the conditions specified by federal law. *67 Ops. Cal. Att'y Gen. 225 (1984)*

Private physician is not liable in medical malpractice suit for breach of confidential physician-patient relationship if physician reports to county health department the occurrence of communicable disease in a patient who is a food handler, even if patient is subsequently stopped from working. *58 Ops. Cal. Att'y Gen. 904 (1975)*

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Chapter 415 PHYSICIANS: MEDICAL MALPRACTICE
PART IV. FORMS

36-415 California Forms of Pleading and Practice--Annotated § 415.90

§ 415.90 Notice of Intention to Commence Action Against Health Care Provider [Code Civ. Proc. § 364]

[1] FORM Notice of Intention to Commence Action Against Health Care Provider [Code Civ. Proc. § 364]

_____ [*name of physician or other health care provider*]
_____ [*address*]
_____ [*date*]

Dear _____ [*name*]:

This letter shall serve as notice, in accordance with *Section 364 of the Code of Civil Procedure*, that _____ [*name of plaintiff*] will file suit against you for damages resulting from the _____ [personal injury *or* wrongful death] of _____ [*name of patient*]. The legal basis of this action will be _____ [*specify basis, e.g.,* the negligent failure to properly diagnose and treat _____ (*name of patient*) for infectious hepatitis].

_____ [*Name of plaintiff*] will allege and provide the following losses and injuries as a proximate result of the aforementioned professional negligence: _____ [*specify facts regarding the injuries and damages suffered*].

Sincerely,
_____ [*name*]
Attorney for _____ [*name*]

[2] Use of Form

This form of notice may be used to inform a physician or other health care provider of a plaintiff's intent to commence an action against him or her for professional negligence, in accordance with *Code Civ. Proc. § 364*.

For definitions of health care provider and professional negligence, see *§ 415.10*.

[3] Form of Notice

No particular form of notice is required, but the notice must inform the defendant of the legal basis of the claim and the type of loss sustained, specifying the nature of the injuries suffered. [*Code Civ. Proc. § 364(b)*].

[4] Method of Service

The notice may be served in the manner prescribed by *Code Civ. Proc. §§ 1010-1020* [*Code Civ. Proc. § 364(c)*]. Although compliance with these provisions for manner of service is not mandatory, a plaintiff who does not comply with those provisions must show that defendant received actual notice [*Jones v. Catholic Healthcare West (2007) 147 Cal. App. 4th 300, 307-308, 54 Cal. Rptr. 3d 148]* . For discussion relating to service of papers, see Ch. 518, *Service of Summons and Papers* .

[5] Time for Service

The notice must be served 90 days prior to the commencement of the action [*Code Civ. Proc. § 364(a)*]. If the plaintiff provides the notice in the last 90 days of the applicable statute of limitations, that statute is tolled for 90 days [*see Russell v. Stanford Univ. Hosp. (1997) 15 Cal. 4th 783, 791, 64 Cal. Rptr. 2d 97, 937 P.2d 640* (three year statute of limitations); *Woods v. Young (1991) 53 Cal. 3d 315, 328, 279 Cal. Rptr. 613, 807 P.2d 455* ; *see also Code Civ. Proc. § 364(d)*]. For discussion of the effect of the notice requirement on the statute of limitations, see *§ 415.47[2]*.

[6] Unnamed Defendants

The 90-day notice need not be given to defendants whose names are unknown to plaintiff at the time of filing the complaint and who are identified in it by a fictitious name as provided in *Code Civ. Proc. § 474* [*Code Civ. Proc. § 364(e)*]. For purposes of the statute of limitations, however, if plaintiff properly serves notice on named codefendants, the time for commencing the action against any "Doe" defendant is tolled 90 days just as it is for suit against the named codefendants [*Code Civ. Proc. § 364(d)*; *Grimm v. Thayer (1987) 188 Cal. App. 3d 866, 870-871, 233 Cal. Rptr. 687* ; *see Woods v. Young (1991) 53 Cal. 3d 315, 328, 328 n.4, 279 Cal. Rptr. 613, 807 P.2d 455* (disapproving *Grimm* to extent that it is inconsistent with holding that *Code Civ. Proc. § 364(d)* tolls, rather than extends, statutory period if plaintiff gives notice in last 90 days of statutory period)].

If the identity of a Doe defendant is not actually known, a plaintiff is not required to file a notice of intent to sue with that defendant prior to amending a timely-filed complaint to name that defendant [*Camarillo v. Vaage (2003) 105 Cal. App. 4th 552, 566-568, 130 Cal. Rptr. 2d 26]* . In addition, if a plaintiff has filed a timely notice of intent to sue with known codefendants, a plaintiff is not additionally required to file an actual complaint against other unknown Doe defendants within the applicable limitations period to preserve the right to sue those defendants [*Camarillo v. Vaage (2003) 105 Cal. App. 4th 552, 570-571, 130 Cal. Rptr. 2d 26* (attorneys who filed timely notice of intent did not commit malpractice by failing to also file complaint against doctor whose identity was unknown)].

If, however, a plaintiff has actual knowledge of the identities of the treating physician or physicians, a notice under *Code Civ. Proc. § 364(a)* given to the hospital where the medical care was provided is insufficient to extend the limitation period under *Code Civ. Proc. § 364(d)* as to the unnamed physicians [*Godwin v. City of Bellflower (1992) 5 Cal. App. 4th 1625, 1632, 7 Cal. Rptr. 2d 524]* .

[7] Effect of Failure to Comply

Failure to comply with *Code Civ. Proc. § 364* does not invalidate any proceedings of any court in California, nor does it affect the jurisdiction of the court to render a judgment therein. However, failure to comply with the notice requirement by any attorney at law is grounds for professional discipline. The State Bar of California must investigate and take appropriate action in any such cases brought to its attention [*Code Civ. Proc. § 365*].

Because failure to comply with the notice requirement is not jurisdictional, the failure to allege each injury suffered in the notice does not prevent a plaintiff from including that injury as a basis for a cause of action in the lawsuit subsequently filed, if the cause of action is not otherwise barred by the statute of limitations [*Edwards v. Superior Court (2001) 93 Cal. App. 4th 172, 180, 112 Cal. Rptr. 2d 838]* .

[8] State Statutes

90 days' notice is prerequisite to medical malpractice action based on professional negligence. *Code Civ. Proc. § 364*

Attorney's failure to serve 90 days' notice is grounds for professional discipline. *Code Civ. Proc. § 365*

[9] Decisions

Code Civ. Proc. § 364(d) tolls three-year statute of limitations for 90 days if notice of intent to sue is given in last 90 days of three-year period. *Russell v. Stanford Univ. Hosp. (1997) 15 Cal. 4th 783, 791, 64 Cal. Rptr. 2d 97, 937 P.2d 640*

Code Civ. Proc. § 364(d) tolls one-year statute of limitations for 90 days if notice of intent to sue is given in last 90 days of one-year period. *Woods v. Young (1991) 53 Cal. 3d 315, 328, 330-331, 279 Cal. Rptr. 613, 807 P.2d 455* (holding applies prospectively only, to actions filed on or after August 3, 1991; older actions governed by rule that 90-day tolling applies regardless of when notice was given)

Notice pursuant to *Code Civ. Proc. § 364* that discloses claim that, if not paid or otherwise resolved, will result in litigation, activates notice and defense-waiver provisions of Tort Claims Act (*Gov. Code §§ 910.8, 911, 911.3*). *Phillips v. Desert Hosp. Dist. (1989) 49 Cal. 3d 699, 701-702, 707-708, 709, 263 Cal. Rptr. 119, 780 P.2d 349*

Although *Gov. Code § 945.6* rather than *Code Civ. Proc. § 340.5* controlled in medical malpractice action against county doctor, action was not barred even though not filed within six months from rejection of claim because notice of intention to commence action was timely served under *Code Civ. Proc. § 364(d)*, thus extending expiration of limitation period 90 days from service of notice. *Anson v. County of Merced (1988) 202 Cal. App. 3d 1195, 1204-1205, 249 Cal. Rptr. 457*

Code Civ. Proc. § 364(d), affording 90-day extension of limitation period in actions based on health care provider's professional negligence, was not applicable in action for battery. *Noble v. Superior Court (1987) 191 Cal. App. 3d 1189, 1192-1194, 237 Cal. Rptr. 38*

Filing notice of intention to commence action based on health care provider's professional negligence pursuant to *Code Civ. Proc. § 364(a)* did not constitute filing late claim for purposes of invoking waiver of defense of untimely filing of claim under *Gov. Code § 911.3*, at least when notice of intention does not include or set forth any matters required by *Gov. Code § 910* to be enumerated on face of claim. *Lutz v. Tri-City Hosp. (1986) 179 Cal. App. 3d 807, 812, 224 Cal. Rptr. 787*

Failure to give notice as required by *Code Civ. Proc. § 364* does not invalidate cause of action, but is grounds for professional discipline of attorney. *Toigo v. Hayashida (1980) 103 Cal. App. 3d 267, 269, 162 Cal. Rptr. 874*

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36-415 California Forms of Pleading and Practice--Annotated § 415.91

§ 415.91 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Medical Negligence [Civ. Code § 1714]--By Patient Against Physician--Judicial Council Complaint for Personal Injury with General Negligence Attachment--Cal. Judicial Council Forms PLD-PI-001, PLD-PI-001(2)

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Medical Negligence [Civ. Code § 1714]--By Patient Against Physician--Judicial Council Complaint for Personal Injury with General Negligence Attachment--Cal. Judicial Council Forms PLD-PI-001, PLD-PI-001(2)

Click here to view image.

[2] Use of Form

This complaint is for use by a patient seeking damages based on negligence from a physician. It consists of the Judicial Council approved form of complaint for personal injury, property damage, and wrongful death combined with the form of attachment for a cause of action for general negligence [*see Code Civ. Proc. § 425.12*; *Cal. Rules of Ct., Rule 1.45*]. The current forms were revised effective January 1, 2007. Use of these forms is optional [*see Code Civ. Proc. § 425.12*].

These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. Noninteractive versions in PDF format also are available at www.lexisone.com at no charge. For general information relating to the use of Judicial Council complaint forms, see Ch. 123, *Complaints and Cross Complaints* .

[3] Notice Requirements

An action based on a health care provider's professional negligence may not be commenced until the plaintiff has given defendants 90 days notice of the intent to commence such an action [*Code Civ. Proc. § 364*]. For a form of notice complying with this requirement, *see § 415.90*. A copy of the notice may be attached to the complaint.

For definitions of health care provider and professional negligence as used in *Code Civ. Proc. § 364*, see *§ 415.10*.

[4] Filling Out Complaint Form

[a] In General

This three-page Judicial Council complaint form must always be filed with one or more cause of action attachments. The Judicical Council approved cause of action attachment based on general negligence is included in this form. When counsel seeks exemplary damages in addition to compensatory damages, the exemplary damages attachment must also be included [*see* Ch. 177, *Damages*].

For complete instructions on filling out this complaint form, see Ch. 380, *Negligence* .

[b] Specification of Amount of Damages

In an action for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

The pleading of punitive damages in a complaint or other pleading against a health care provider is restricted [*see Code Civ. Proc. § 425.13*; *see also Civ. Code § 3295(e)* (no claim for punitive damages may state an amount sought)]. For discussion of these restrictions and the procedure for claiming punitive damages, see *§§ 415.49[5], 415.94 -415.96*.

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[5] Filling Out General Negligence Attachment

The rule that negligence may be pleaded in general terms applies to medical malpractice actions [*Landeros v. Flood (1976) 17 Cal. 3d 399, 408, 131 Cal. Rptr. 69, 551 P.2d 389]* . It is thus sufficient, at least with respect to a general demurrer, to allege that certain treatment was negligently administered by the defendant to the plaintiff's damage without having to allege in what respect the treatment may have been deficient [*Stafford v. Shultz (1954) 42 Cal. 2d 767, 774, 270 P.2d 1]* .

The complaint alleges:

- The existence of a physician-patient relationship, express or implied, that gives rise to the physician's duty to exercise that degree of skill and care deemed proper by other reasonable practitioners under similar circumstances (Paragraph GN-1a). [*see Keene v. Wiggins (1977) 69 Cal. App. 3d 308, 313, 138 Cal. Rptr. 3* ; *see also Felton v. Schaeffer (1991) 229 Cal. App. 3d 229, 234-235, 279 Cal. Rptr. 713]* .

- Negligence on the part of defendant in rendering professional services to plaintiff (Paragraph GN-1b) [*see Civ. Code §§ 1714, 3333, 3333.2(c)(2)*].

- Plaintiff's injuries caused by defendants' negligence [*see Civ. Code §§ 3282, 3283, 3333*].

- Plaintiff's damages [*see Civ. Code §§ 3281, 3333, 3333.2*; *Myers v. Stephens (1965) 233 Cal. App. 2d 104, 120, 43 Cal. Rptr. 420* ; for a discussion of general and special damages in tort actions generally, *see* Ch. 177, *Damages*].

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[7] Cross References

For forms and discussion relating to actions against dentists based on medical malpractice, see Ch. 209, *Dentists*

For forms and discussion relating to actions against hospitals based on medical malpractice, see Ch. 295, *Hospitals*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter* ,

For forms relating to negligence actions generally, see Ch. 380, *Negligence*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For alternative forms of verification, see Ch. 572, *Verification*

For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch.2, *Procedural Guide for Civil Actions*

[8] State Statutes

[a] Commencing Action

Statute of limitations in actions against health care providers based on professional negligence. *Code Civ. Proc. § 340.5*

Notice of intention to file professional negligence action against health care provider. *Code Civ. Proc. § 364*

Security for costs in medical malpractice actions. *Code Civ. Proc. § 1029.6*

[b] Damages

"Damages," as used in law, means money compensation for detriment suffered by person from unlawful act or omission of another. *Civ. Code § 3281*

"Detriment" means loss or harm suffered in person or property. *Civ. Code § 3282*

Measure of damages in noncontractual action. *Civ. Code § 3333*

Evidence of collateral benefits in medical malpractice action. *Civ. Code § 3333.1*

Limitations on recovery of noneconomic losses. *Civ. Code § 3333.2*

Statement of amount of damages claimed in complaint. *Code Civ. Proc. § 425.10(b)*

Request for and statement of damages in cases in which amount of damages claimed must not be stated. *Code Civ. Proc. § 425.11*

[c] Health Care Provider

Defined. *Civ. Code §§ 3333.1(c)(1), 3333.2(c)(1)*; *Code Civ. Proc. §§ 340.5(1), 364(f)(1)*

[d] Professional Negligence

Defined. *Civ. Code §§ 3333.1(c)(2), 3333.2(c)(2)*; *Code Civ. Proc. §§ 340.5(2), 364(f)(2)*

[9] Decisions

Health care provider is not subject to separate and distinct claims for professional and ordinary negligence based on same conduct. *Flowers v. Torrance Mem'l Hosp. Med. Ctr. (1994) 8 Cal. 4th 992, 995, 35 Cal. Rptr. 2d 685, 884 P.2d 142*

Standard of care and skill required of physicians. *McCurdy v. Hatfield (1947) 30 Cal. 2d 492, 495, 183 P.2d 269* ; *Lawless v. Calaway (1944) 24 Cal. 2d 81, 86, 147 P.2d 604* ; *Lamb v. Moore (1960) 178 Cal. App. 2d 819, 823, 3 Cal. Rptr. 507* ; *Norden v. Hartman (1955) 134 Cal. App. 2d 333, 337, 285 P.2d 977*

Professional negligence is limited to negligence occurring during physician's rendering of professional services. *Murillo v. Good Samaritan Hosp. (1979) 99 Cal. App. 3d 50, 56-57, 160 Cal. Rptr. 33*

Foundation of all liability for person's willful and negligent acts is *Civ. Code § 1714* (now *Civ. Code § 1714(a)*), declaring that everyone is responsible, not only for result of his or her willful acts, but also for injury occasioned to another by his or her want of ordinary care or skill in management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury on himself or herself. *Tresemer v. Barke (1978) 86 Cal. App. 3d 656, 667, 150 Cal. Rptr. 384*

In medical malpractice action, plaintiff is required to establish duty owed by defendant, breach of that duty, proximate cause of injury and damages. *Frantz v. San Luis Med. Clinic (1978) 81 Cal. App. 3d 34, 39, 146 Cal. Rptr. 146*

Causal connection between physician's failure to exercise proper standard of care and plaintiff's injury is required in medical malpractice actions. *Marvin v. Talbott (1963) 216 Cal. App. 2d 383, 385-386, 30 Cal. Rptr. 893*

Witkin, California Procedure, vol. 4, *Pleading*, §§ (4th ed. 1997)

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36-415 California Forms of Pleading and Practice--Annotated § 415.92

§ 415.92 Complaint for Damages [Civ. Code § 3333] Based on Medical Negligence [Civ. Code § 1714(a)]--Personal Injury--By Patient Against Physicians and Physicians' Employees--General Form

[1] FORM Complaint for Damages [Civ. Code § 3333] Based on Medical Negligence [Civ. Code § 1714(a)]--Personal Injury--By Patient Against Physicians and Physicians' Employees--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*], and DOES 1	)	(Medical Malpractice)
through _____,	)	[Amount demanded _____
Defendants.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes, and thereon alleges that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by the negligence of these defendants.]

2. At all times herein mentioned, defendant(s) _____ [*name* (*s*)] and DOES 1-10, and each of them, were physicians and surgeons licensed to practice medicine and perform surgery under the laws of the State of California and were engaged in the practice of medicine in _____ [*city*], California.

3. At all times herein mentioned, defendant(s) _____ [*name* (*s*)] and DOES 11-20, and each of them, were the agents and employees of defendants _____ [*named physician* (*s*)] and DOES 1-10, and, in doing the things hereinafter alleged, were acting in the scope of their agency and employ ment and with the permission and consent of defendants _____ [*named physician* (*s*)] and DOES 1-10.

[*EITHER*]

4. _____ [*Specify nature of plaintiff's employment of physician, e.g.,* On or about _____ [*date*], plaintiff employed defendant _____ (*name*) to diagnose and treat a medical complaint then suffered by plaintiff]. Pursuant to this employment, defendants rendered professional services in the diagnosis, treatment, and care of plaintiff [for his/her condition].

[*OR*]

4. On or about _____ [*date*], plaintiff employed defendant _____ [*name*] to give plaintiff a physical examination for the purpose of ascertaining the state of plaintiff's health and diagnosing any possible diseases or physical conditions. Pursuant to this employment, defendant rendered professional services in examining plaintiff.

[*CONTINUE*]

5. From and after the time of the employment, defendants, and each of them, so negligently failed to exercise the proper degree of knowledge and skill in examining, diagnosing, treating, and caring for plaintiff that plaintiff was caused to suffer the injuries and damages hereinafter alleged.

6. As a proximate result of the negligence of defendants, and each of them, plaintiff suffered _____ [*specify plaintiff's injuries, including exacerbation of the original malady and the need for subsequent remedial treatment, if any e.g.,* an exacerbation of plaintiff's asbestosis to the point that hospitalization was required to treat it due to defendant's failure to render a timely diagnosis], and as a result suffered great physical and emotional pain and suffering.

7. As a proximate result of the negligence of defendants, and each of them, plaintiff has sustained injury to his/her health, strength, and activity, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has sustained general damages.

8. As a further proximate result of the negligence of defendants, and each of them, plaintiff has incurred [and will continue to incur] medical, hospital, and related expenses, all to his/her special damage.

[9. As a further proximate result of the negligence of the defendants, and each of them, plaintiff was prevented from attending to his/her usual occupation as _____ (*specify occupation*) from _____ [*date*] _____ (*specify, e.g.,* to _____ [*date*] *or* through the present, and will continue to be so prevented for an indefinite time in the future), all to his/her further damage.]

10. On _____ [*date*], plaintiff, pursuant to the provisions of *Section 364 of the Code of Civil Procedure*, caused to be served on defendants a notice of plaintiff's intention to commence this action. A copy of the notice is attached hereto as Exhibit A and made a part hereof.

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages according to proof.

2. For medical, hospital, and related expenses according to proof.

3. For loss of earnings according to proof.

4. For costs of suit herein incurred.

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. see § 415.91*.]

CAUTION:
No complaint or other pleading against a health care provider may include a claim for punitive damages [*Code Civ. Proc. § 425.13(a)*; *see Code Civ. Proc. § 425.13(b)* (definition of health care provider)]. For the procedure for making a claim for punitive damages, see *§§ 415.49[5], 415.94 -415.96*.

[2] Use of Form

This form of complaint may be used by a patient in an action against a physician and the physician's employees to recover damages for personal injuries caused by the negligent rendering of medical services.

[3] Allegations

The rule that negligence may be pleaded in general terms applies to medical malpractice actions [*Landeros v. Flood (1976) 17 Cal. 3d 399, 408, 131 Cal. Rptr. 69, 551 P.2d 389]* . It is thus sufficient, at least with respect to a general demurrer, to allege that certain treatment was negligently administered by the defendant to the plaintiff's damage without having to allege in what respect the treatment may have been deficient [*Stafford v. Shultz (1954) 42 Cal. 2d 767, 774, 270 P.2d 1]* .

The complaint alleges:

- The existence of a physician-patient relationship, express or implied, which gives rise to the physician's duty to exercise that degree of skill and care deemed proper by other reasonable practitioners under similar circumstances (Paragraph 4) [*see Keene v. Wiggins (1977) 69 Cal. App. 3d 308, 313, 138 Cal. Rptr. 3* ; *see also Felton v. Schaeffer (1991) 229 Cal. App. 3d 229, 234-235, 279 Cal. Rptr. 713]* ,

- Negligence on the part of defendants in rendering professional services to plaintiff (Paragraph 5) [*see Civ. Code §§ 1714, 3333, 3333.2(c)(2)*],

- Plaintiff's injuries as proximately caused by defendants' negligence (Paragraph 6) [*see Civ. Code §§ 3282, 3283, 3333*],

- Plaintiff's damages (Paragraphs 7-9) [*see Civ. Code §§ 3281, 3333, 3333.2*; *Myers v. Stephens (1965) 233 Cal. App. 2d 104, 120, 43 Cal. Rptr. 420* ; for a discussion of general and special damages in tort actions generally, see Ch. 177, *Damages*], and

- Service of the 90-day notice of intention to file suit (Paragraph 10) [*see Code Civ. Proc. § 364*; and discussion in *§ 415.92[4]*].

[4] Notice Requirement

An action based on a health care provider's professional negligence may not be commenced until the plaintiff has given defendants 90 days notice of the intent to commence such an action [*Code Civ. Proc. § 364*]. For a form of notice complying with this requirement, *see § 415.90*. A copy of the notice may be attached to the complaint.

The terms "health care provider" and "professional negligence," as used in *Code Civ. Proc. § 364*, are defined in *Code Civ. Proc. § 364(f)*, discussed in *§ 415.10*.

[5] Specification of Amount of Damages

For a discussion of the specification of damages in a complaint, see *§ 415.91*.

For forms and discussion of procedures relating to use in ascertaining the specific amount of damages sought in personal injury or wrongful death actions, see Ch. 177, *Damages* .

[6] Decisions

Sufficiency of general allegations of negligence in malpractice actions. *Rannard v. Lockheed Aircraft Corp. (1945) 26 Cal. 2d 149, 157, 157 P.2d 1* ; *Guilliams v. Hollywood Hosp. (1941) 18 Cal. 2d 97, 100-101, 114 P.2d 1* ; *Abos v. Martyn (1939) 31 Cal. App. 2d 705, 707, 88 P.2d 797*

[7] Cross References

For alternative allegations as to capacity and residence of parties, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For alternative forms of prayers, see Ch. 420, *Prayers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For a related form, *see § 415.91*.

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§ 415.93 Complaint for Damages [Civ. Code § 3333] Based on Medical Negligence [Civ. Code § 1714(a)]--Combined Wrongful Death Action [Code Civ. Proc. § 377.60] and Survival Action [Code Civ. Proc. § 377.30]--By Personal Representative of Decedent Against Physician--General Form

[1] FORM Complaint for Damages [Civ. Code § 3333] Based on Medical Negligence [Civ. Code § 1714(a)]--Combined Wrongful Death Action [Code Civ. Proc. § 377.60] and Survival Action [Code Civ. Proc. § 377.30]--By Personal Representative of Decedent Against Physician--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
as _____ [*specify capacity, e.g.,*	)	NO. _____
Personal Representative of the Estate] of	)	COMPLAINT FOR DAMAGES
_____ [*name*], Deceased,	)	(Wrongful Death and Negligence)
Plaintiff,	)	[Amount demanded _____
vs.	)	(exceeds *or* does not exceed) $10,000]
_____ [*name*], [and DOES 1	)	[LIMITED CIVIL CASE]
through _____,]	)	
Defendant(s).		

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Wrongful Death)

1. The person(s) listed below is/are entitled to bring an action for the wrongful death of _____ [*name of decedent*] (hereinafter "decedent") pursuant to *Code of Civil Procedure Section 377.60*, based on his/her/their relationship to decedent, as follows:

Name(s)	Relationship(s) to Decedent
_____	_____
_____	_____
_____	_____

[_____ (*If one or more persons are required by statute to establish additional facts, such as that there is no surviving spouse, domestic partner, child, or issue of deceased child, or that the person was dependent on decedent, in order to be entitled to bring a wrongful death action, specify facts that satisfy applicable requirement*).]

2. Plaintiff _____ [*name of personal representative*] is the duly appointed, qualified, and acting personal representative of the estate of decedent, and brings this action on behalf of all of the above-listed persons entitled to bring a cause of action for the wrongful death of decedent.

[3. *Fictitious name allegation. See § 415.92, Paragraph 1*.]

4. At all times herein mentioned, defendant _____ [*name*] was a physician and surgeon licensed to practice medicine and perform surgery under the laws of the State of California, and was engaged in the practice of medicine in _____ [*city*], California.

5. On or about _____ [*date*], the decedent _____ [*state facts establishing creation of physician-patient relationship, e.g.,* was experiencing great physical pain and suffering and on that date visited defendant in his/her office and employed him/her to diagnose and treat the decedent's medical complaint. Pursuant to this employment, defendant undertook to diagnose the decedent's illness and to treat and care for the decedent].

6. From and after the time of the employment, defendant negligently failed to exercise the proper degree of knowledge and skill in examining, diagnosing, treating, and caring for the decedent as hereinafter described.

7. _____ [*Specify what decedent's illness or condition was and generally how it was misdiagnosed or improperly treated, e.g.:* At all times herein mentioned, the decedent was suffering _____ (*specify illness or condition, e.g.,* from cancer of the uterus). Defendant nevertheless incorrectly diagnosed the decedent's condition as _____ (*specify, e.g.,* a tubal pregnancy)].

8. As a proximate result of the negligence of the defendant [and of his/her subsequent failure and refusal to treat and care for, and his/her abandonment of, the decedent with knowledge of the decedent's worsening condition,] as herein alleged, the decedent died on or about _____ [*date*] from _____ [*specify, e.g.,* cancer of the uterus].

9. _____ [*Describe relationship of decedent and entitled person(s), e.g.,* At and prior to the time of the decedent's death, the _____ [*name(s)*] lived with the decedent and was/were totally dependent on him/her for his/her/their support and maintenance. At all times prior to his/her death, the decedent was a faithful, loving, and dutiful _____ (*specify relationship, e.g.,* husband and father *or* wife and mother)].

10. As a proximate result of the negligence of the defendant as herein alleged, and of the decedent's death, the _____ [*name(s)*] has/have been deprived of the decedent's society, comfort, attention, services, and support to his/her/their damage.

11. As a further proximate result of the negligence of the defendant, as herein alleged, and of the death of the decedent, _____ [plaintiff *or state name of person incurring expense*] has incurred funeral and burial expenses.

12. On _____ [*date*], plaintiff gave defendant(s) written notice of his/her intention to commence this action. A copy of the notice is attached hereto as Exhibit A and made a part hereof.

SECOND CAUSE OF ACTION
(Survival Action Based on Negligence)

13. Plaintiff incorporates Paragraphs 2-8 inclusive, and 12 of the First Cause of Action.

14. As a further proximate result of the negligence of the defendant as herein alleged, the decedent incurred expenses prior to his/her death for medical treatment and related expenses to his/her damage.

15. As a further proximate result of the negligence of the defendant as herein alleged, the decedent incurred a loss of earnings prior to his/her death to his/her damage.

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages according to proof;

2. For funeral and burial expenses according to proof;

3. For medical and related expenses according to proof;

4. For loss of earnings incurred prior to death according to proof;

5. For interest on all economic damages in the legal amount from _____ [*date of decedent's death*] to the date of judgment;

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

CAUTION:
No complaint or other pleading against a health care provider may include a claim for punitive damages [*Code Civ. Proc. § 425.13(a)*; *see Code Civ. Proc. § 425.13(b)* (definition of health care provider)]. For the procedure for making a claim for punitive damages, see *§§ 415.49[5], 415.94 -415.96*.

[2] Use of Form

This form of complaint is for use in a wrongful death action against a physician brought by the personal representative of a deceased patient, on behalf of persons entitled to bring such an action [*see Code Civ. Proc. § 377.60 et seq.*]. The wrongful death cause of action may also be modified for use in an action brought directly by the statutorily specified persons.

The form also includes a cause of action for negligence, which cause of action survives the decedent's death, to recover the damages that the decedent would have been entitled to recover had he or she lived [*see Code Civ. Proc. § 377.30 et seq.*].

[3] Wrongful Death Action

When the death of a person is caused by the wrongful act or negligence of another, certain persons, or the decedent's personal representative on their behalf, may bring an action for damages against the person causing the death and any other person responsible (or against the personal representatives of such persons) [*Code Civ. Proc. § 377.60*]. *Code Civ. Proc. § 377.60* permits decedent's surviving spouse, domestic partner, children, and issue of deceased children to bring a wrongful death action without qualification, and permits others to bring an action under specified circumstances. For forms of allegations establishing that specific classes of persons are entitled to bring a wrongful death action, including allegations that are required of plaintiffs who are not the decedent's surviving spouse, domestic partner, children, or issue of deceased children, see Ch. 181, *Death and Survival Actions* .

In a wrongful death action, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under *Code Civ. Proc. § 377.34* (survival actions). The court must determine the respective rights in an award of the persons entitled to assert the cause of action [*Code Civ. Proc. § 377.61*; *see Canavin v. Pacific Sw. Airlines (1983) 148 Cal. App. 3d 512, 529-537, 196 Cal. Rptr. 82]* . For further discussion of wrongful death actions, see Ch. 181, *Death and Survival Actions* .

[4] Survival of Actions

A cause of action that survives the death of the person entitled to commence an action or proceeding passes to the decedent's successor in interest, subject to *Prob. Code § 7000 et seq.* (governing succession to property of decedents), and an action may be commenced by the decedent's personal representative or, if none, by the decedent's successor in interest [*Code Civ. Proc. § 377.30*]. In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement [*Code Civ. Proc. § 377.34*]. For further discussion of survival actions, see Ch. 181, *Death and Survival Actions* .

[5] Joinder or Consolidation of Actions

A survival action under *Code Civ. Proc § 377.30* may be joined with a wrongful death action arising out of the same wrongful act or neglect [*Code Civ. Proc. § 377.62(a)*]. In addition, a wrongful death action and a survival action under *Code Civ. Proc § 377.31* (survival of pending actions) arising out of the same wrongful act or neglect may be consolidated for trial as provided in *Code Civ. Proc. § 1048* [*Code Civ. Proc. § 377.62(b)*].

[6] Allegations

For purposes of both causes of action, the complaint alleges:

- The capacity of the plaintiff, as personal representative, to maintain the action on behalf of the

entitled persons (First Cause of Action) and the estate (Second Cause of Action) (Paragraphs 2 and 13) [*Code Civ. Proc. §§ 377.30, 377.60*];

- The identity of defendant as a physician and surgeon and the city in which he or she practices medicine (Paragraphs 4 and 13) [*see Code Civ. Proc. § 395(a)* and Ch. 571, *Venue* (if the wrongful act or omission occurred in a county or judicial district other than that in which the defendant practices medicine and the complaint is to be filed in the other county or district, or if venue is to be based on defendant's residence, the location in which the act or omission occurred or defendant lives should be alleged to show that venue has been properly laid)];

- The creation of the physician-patient relationship which gave rise to the defendant's duty to use due care in diagnosing, treating, and caring for the decedent (Paragraphs 5 and 13) [*see Civ. Code § 3333*];

- Defendant's breach of duty (Paragraphs 6 and 13) [*see Civ. Code § 3333*];

- The actual illness or condition from which the decedent was suffering and generally how it was misdiagnosed or improperly treated (Paragraphs 7 and 13);

- Decedent's death as a proximate result of the defendant's breach of duty (Paragraphs 8 and 13) [*see Code Civ. Proc. § 377(a)*]; and

- Service of the 90-day notice of intention to file suit (Paragraphs 12 and 13) [*see Code Civ. Proc. § 364*].

With respect only to the wrongful death action, the complaint further alleges:

- The identity of persons entitled to bring a wrongful death cause of action and the basis for entitlement (Paragraph 1) [*see Code Civ. Proc. § 377.60*];

- Additional facts regarding the relationship between the entitled persons and the decedent, such as the dependency of these persons on the decedent for financial and emotional support (Paragraph 9) [*see Code Civ. Proc. § 377.60*];

- The detriment suffered by the entitled persons as a proximate result of defendant's breach of duty (Paragraphs 8 and 10) [*see Civ. Code §§ 3281, 3282, 3333*; *see also Bond v. United Railroads of San Francisco (1911) 159 Cal. 270, 286, 113 P. 366* ; *Canavin v. Pacific Sw. Airlines (1983) 148 Cal. App. 3d 512, 520-521, 527, 196 Cal. Rptr. 82]* ; and

- Funeral and burial expenses (these expenses are recoverable in wrongful death actions provided this does not result in double recovery) (Paragraph 11) [*see Patterson v. Sharp (1970) 10 Cal. App. 3d 990, 1000, 89 Cal. Rptr. 396* ; *Francis v. Sauve (1963) 222 Cal. App. 2d 102, 124, 34 Cal. Rptr. 754* ; *see also* Ch. 181, *Death and Survival Actions*].

With respect only to the survival action, the complaint further alleges damage and loss sustained by decedent prior to death as proximate result of defendant's negligence (Paragraphs 14 and 15) [*see Civ. Code §§ 3281, 3282, 3333*; *Code Civ. Proc. § 377.34*].

In addition, the prayer seeks prejudgment interest under *Civ. Code § 3288*, which provides that in an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given at the discretion of the jury. *Civ. Code § 3288* permits discretionary prejudgment interest for unliquidated tort

claims, and such interest in a wrongful death action may be awarded in the discretion of the jury on economic damages, such as loss of household services or earning capacity, as well as funeral and related expenses sustained prior to the date of the verdict or judgment, but not on intangible noneconomic damages such as mental and emotional injury [*Canavin v. Pacific Sw. Airlines (1983) 148 Cal. App. 3d 512, 525-528, 196 Cal. Rptr. 82]* .

[7] State Statutes

Survival of actions. *Code Civ. Proc. § 377.30 et seq.*

Actions for wrongful death. *Code Civ. Proc. § 377.60 et seq.*

[8] Decisions

Allegation of official capacity as administrator is sufficient if it states that plaintiff is duly appointed, qualified, and acting administrator of decedent's estate. *Collins v. O'Laverty (1902) 136 Cal. 31, 33, 68 P. 327*

Allegation of official capacity as executor is sufficient if it states that letters testamentary were issued to executor who is duly qualified and acting executor of decedent's will. *Vragnizan v. Savings Union Bank & Trust Co. (1916) 31 Cal. App. 709, 715*

Personal representative must plead that there are persons entitled to wrongful death action under statute in order to maintain wrongful death action. *Guidera v. Lapiana (1921) 52 Cal. App. 460, 462, 199 P. 557*

Nature of judgment and division among entitled persons. *Canavin v. Pacific Sw. Airlines (1983) 148 Cal. App. 3d 512, 529-537, 196 Cal. Rptr. 82*

Right to trial by jury in wrongful death action. *Canavin v. Pacific Sw. Airlines (1983) 148 Cal. App. 3d 512, 531-532, 196 Cal. Rptr. 82*

Admission by doctor that prescribed treatment was useless. *Smith v. Shankman (1962) 208 Cal. App. 2d 177, 186, 25 Cal. Rptr. 195*

Incorrect diagnosis of pregnancy resulting in delay of necessary operation for removal of tumor. *Stephenson v. Kaiser Found. Hosps. (1962) 203 Cal. App. 2d 631, 635-636, 21 Cal. Rptr. 646* ,

[9] Cross References

For alternative forms of captions, introduction, and allegations when the action is brought by the decedent's personal representative or by all of the decedent's heirs, see Ch. 181, *Death and Survival Actions*

For related forms, *see §§ 415.91* and *415.92*.

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 415 PHYSICIANS: MEDICAL MALPRACTICE
PART IV. FORMS

36-415 California Forms of Pleading and Practice--Annotated § 415.94

§ 415.94 Proceedings for Order Permitting Filing of Amended Pleading Seeking Punitive Damages Against Health Care Provider [Code Civ. Proc. § 425.13]--Notice of Motion [Code Civ. Proc. § 1010] and Supporting Declaration [Code Civ. Proc. § 2015.5]

[1] FORM Proceedings for Order Permitting Filing of Amended Pleading Seeking Punitive Damages Against Health Care Provider [Code Civ. Proc. § 425.13]--Notice of Motion [Code Civ. Proc. § 1010] and Supporting Declaration [Code Civ. Proc. § 2015.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO AMEND PLEADING, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM OF POINTS AND AUTHORITIES
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Dept.: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To defendant _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], plaintiff will, and hereby does, move for an order allowing him/her to file _____ [a _____ (*specify number to differentiate from any other amendments, e.g.,* first) amended complaint *or* an amendment to the complaint], a copy of which is attached hereto, for the purpose of adding a claim for punitive damages as authorized by *Civil Code Section 3294*. The motion will be made on the ground that in doing the things alleged in the complaint herein, defendant acted with _____ [malice *or* oppression *or* fraud *or any combination of these*] as _____ [that term is *or* those terms are] defined in *Civil Code Section 3294(c)* and that if the amendment is allowed there is a substantial probability that plaintiff will prevail on his/her claim for punitive damages.

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s)*] and the memorandum of points and authorities set forth below, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for plaintiff *or other statement as appropriate*].

2. This is an action _____ [*specify the subject matter and issues of the action, specifically referring to pleadings or other documents on file, and summarizing or attaching portions of those pleadings or documents as exhibits, when appropriate*].

3. _____ [*Set forth evidentiary facts or sources establishing a substantial probability that plaintiff will prevail on his or her claim for punitive damages, e.g.,* On _____ [*date*], plaintiff received answers to his/her first set of interrogatories to defendant _____ (*name*), and on _____ [*date*], plaintiff received responses to his/her first set of requests for admissions to defendant _____ (*name*). Answers to interrogatories 20-25 of that first set (attached hereto as Exhibit A and made a part hereof), and responses to requests for admissions 10-25 of that second set (attached hereto as exhibit B and made a part hereof) show that defendant _____ (*specify despicable conduct that is admitted by the answers and responses and which shows malice, oppression, or fraud, e.g.,* willfully and in conscious disregard of plaintiff's rights, without any warning or explanation, totally abandoned his/her treatment of plaintiff after plaintiff was bedridden and unable to seek other medical treatment on his/her own)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES
[*Add memorandum of points and authorities supporting motion*]

[2] Use of Form

This form of notice of motion and supporting declaration is for use by a plaintiff to move to amend the complaint to add a claim for punitive damages against a health care provider. No claim for punitive damages against a health care provider may be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed [*Code Civ. Proc. § 425.13(a)*; *see Code Civ. Proc. § 425.13(b)* (definition of health care provider)].

A memorandum of points and authorities is required to be served with this form [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*].

[3] Time for Making Motion

To claim punitive damages against a health care provider, a plaintiff must file a motion for an order to amend the complaint to add the punitive damage claim within two years after the complaint or initial pleading is filed, or not less than nine months before the date the matter is first set for trial, whichever is earlier [*Code Civ. Proc. § 425.13(a)*].

[4] Supporting Declarations and Affidavits

This motion must be supported by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. 425.13(a)*]. The example of supporting declaration in this form is by the plaintiff's attorney, identifying parts of the record that support the claim for punitive damages. The motion may also be supported by additional or other declarations, given by plaintiff and potential witnesses, if any, and setting forth facts showing that defendant's conduct was malicious, oppressive, or fraudulent within the meaning of *Civ. Code § 3294(c)* and, hence, that there is a substantial probability that plaintiff will prevail on the punitive damages claim. The argument that the facts which are set forth constitute malice, oppression, or fraud, which are the grounds for an award of punitive damages [*see Civ. Code § 3294*], would be made in the accompanying memorandum of points and authorities.

[5] State Statutes

Procedure for claiming punitive damages from health care provider. *Code Civ. Proc. § 425.13(a)*

Definition of health care provider. *Code Civ. Proc. § 425.13(b)*

[6] Decisions

Code Civ. Proc. § 425.13's threshold requirement for punitive damage claims against health care providers requires plaintiff to show that claim is supported by competent, admissible evidence, but does not give trial court authority to assess evidence independently. *College Hosp. v. Superior Court (1994) 8 Cal. 4th 704, 719, 722-727, 34 Cal. Rptr. 2d 898, 882 P.2d 894*

Claim for punitive damages in action against health care provider is subject to *Code Civ. Proc. § 425.13(a)* if injury that is basis for claim was causedby conduct that was directly related to rendition of professional services. *Central Pathology Serv. Med. Clinic, Inc. v. Superior Court (1992) 3 Cal. 4th 181, 191-193, 10 Cal. Rptr. 2d 208, 832 P.2d 924*

Identifying cause of action as "intentional tort" as opposed to "negligence" does not itself remove claim from

requirements of *Code Civ. Proc. § 425.13(a)*; allegations identifying nature and cause of plaintiff's injury must be examined to determine whether nature and cause of injury are directly related to manner in which professional services provided. *Central Pathology Serv. Med. Clinic, Inc. v. Superior Court (1992) 3 Cal. 4th 181, 192, 10 Cal. Rptr. 2d 208, 832 P.2d 924*

Causes of action against physicians for fraud and intentional infliction of emotional distress are subject to requirements of *Code Civ. Proc. § 425.13(a)* when plaintiff's claim emanates from manner in which physicians performed and communicated results of medical tests. *Central Pathology Serv. Med. Clinic, Inc. v. Superior Court (1992) 3 Cal. 4th 181, 192-193, 10 Cal. Rptr. 2d 208, 832 P.2d 924*

To prevail on punitive damages claim, plaintiff must establish, pursuant to *Civ. Code § 3294*, malice, oppression, or fraud by clear and convincing evidence; any prima facie case required by *Code of Civ. Proc. § 425.13* as required to meet that standard. *Looney v. Superior Court (1993) 16 Cal. App. 4th 521, 539, 20 Cal. Rptr. 2d 182*

[7] Cross References

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion, procedures, and forms for use in making motions generally, see Ch. 372, *Motions and Orders*

For related forms,see *§§ 415.95* and *415.96*.

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36-415 California Forms of Pleading and Practice--Annotated § 415.95

§ 415.95 Proceedings for Order Permitting Filing of Amended Pleading Seeking Punitive Damages Against Health Care Provider [Code Civ. Proc. § 425.13]--Order [Code Civ. Proc. § 1003] Granting Motion

[1] FORM Proceedings for Order Permitting Filing of Amended Pleading Seeking Punitive Damages Against Health Care Provider [Code Civ. Proc. § 425.13]--Order [Code Civ. Proc. § 1003] Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

_____

The motion of plaintiff for an order authorizing plaintiff to file an amended complaint against defendant _____ [*name*] to add a claim for punitive damages came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to *Civil Code Section 3294*,

IT IS ORDERED that the motion be, and it hereby is, granted and that plaintiff _____ [*name*] be allowed to file an amended complaint which includes a claim for punitive damages against defendant _____ [*name*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use when the court has granted plaintiff's motion for an order allowing plaintiff to file an amended pleading that adds a claim for punitive damages against a health care provider [*see Code Civ. Proc. § 425.13(a)*; *see Code Civ. Proc. § 425.13(b)* (definition of health care provider)].

[3] Cross References

For related forms,see *§§ 415.94* and *415.96*

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36-415 California Forms of Pleading and Practice--Annotated § 415.96

§ 415.96 Amendment to Complaint [Code Civ. Proc. §§ 425.10, 425.13, 471.5] for Damages [Civ. Code §§ 3281, 3333] for Personal Injuries [Civ. Code § 3282] Based on Medical Negligence [Civ. Code § 1714(a)]--To Claim Punitive Damages [Civ. Code § 3294; Code Civ. Proc. § 425.13]

[1] FORM Amendment to Complaint [Code Civ. Proc. §§ 425.10, 425.13, 471.5] for Damages [Civ. Code §§ 3281, 3333] for Personal Injuries [Civ. Code § 3282] Based on Medical Negligence [Civ. Code § 1714(a)]--To Claim Punitive Damages [Civ. Code § 3294; Code Civ. Proc. § 425.13]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	AMENDMENT TO COMPLAINT
_____ [*name*],	)	[Amount demanded _____
[and DOES 1 through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendants.	)	[LIMITED CIVIL CASE]
	)	
	)	

Plaintiff amends his/her complaint herein by _____ [*specify, e.g.,* deleting and adding paragraph 6 on page _____, lines _____, and adding paragraph 16 on page _____, line _____, and adding to the prayer a request for an award of punitive damages, as follows:

[*SET FORTH amendments, for example:*]

Paragraph 6 of the complaint is deleted and the following is substituted in its place:

6. From and after the time of the employment, defendant negligently failed to exercise the proper degree of knowledge and skill in examining, diagnosing, treating, and caring for _____ [plaintiff *or* the decedent], as hereinafter alleged, and did thereafter, with notice and knowledge of _____ [plaintiff's *or* the decedent's] worsening and critical condition, refuse to give _____ [plaintiff *or* the decedent] treatment and care, and did in fact abandon _____ [plaintiff *or* the decedent] after he/she was bedridden and helpless, notwithstanding the employment and notice and knowledge of _____ [plaintiff's *or* the decedent's] condition.

Paragraph 16 is added as follows:

16. In refusing to treat and care for _____ [plaintiff *or* the decedent], after having undertaken to do so and with notice and knowledge of _____ [plaintiff's *or* the decedent's] worsening and critical condition, and in the abandonment of _____ [plaintiff *or* the decedent], defendant acted both maliciously, in that defendant's conduct was despicable and was carried on with a willful and conscious disregard of the _____ [plaintiff's *or* decedent's] rights and safety, and oppressively in that defendant's conduct was despicable and subjected _____ [plaintiff *or* the decedent] to cruel and unjust hardship in conscious disregard of the _____ [defendant's *or* decedent's] rights, thereby entitling plaintiff to an award of punitive damages.

The prayer is amended to add a new paragraph 6 as follows and to renumber existing paragraphs 6 and 7 to 7 and 8, respectively:

6. Exemplary or punitive damages.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Use of Form

This form is for use to amend a complaint in a medical malpractice action to allege and pray for punitive damages when the court grants the motion to amend [*Code Civ. Proc. § 425.13(a)*; *see § 415.92*.5], and does not, in its order granting the motion [*Code Civ. Proc. § 425.13(a)*; *see § 415.92*.6], order the filing of an amended complaint [*see Code Civ. Proc. § 471.5*]. If an amended complaint is required, the complaint should be entirely redrafted and the amendments incorporated in the amended pleading. An amendment to a complaint should be executed in the same manner as the complaint and, hence, if the complaint was verified, the amendment to the complaint should also be verified.

[3] Pleading Punitive Damages

No claim for punitive damages may state an amount or amounts [*Civ. Code § 3295(e)*].

[4] State Statutes

When punitive damages may be allowed. *Civ. Code § 3294*

Punitive damage claims in actions against health care providers. *Code Civ. Proc. § 425.13(a)*

Definition of health care provider. *Code Civ. Proc. § 425.13(b)*

Requirements of amended complaint or amendment to complaint. *Code Civ. Proc. § 471.5*

[5] California Rules of Court

Requirements for amending pleadings. *Cal. Rules of Ct., Rule 3.1324*

[6] Cross References

For discussion, procedures, and forms for use in amending pleadings generally, see Ch. 21, *Amended and Supplemental Pleadings*

For related forms,see *§§ 415.94* and *415.95*

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36-415 California Forms of Pleading and Practice--Annotated § 415.97

§ 415.97 Allegation--Physician's Duty to Warn Patient of Treatment--Related Hazards Ascertained After Treatment Rendered

[1] FORM Allegation--Physician's Duty to Warn Patient of Treatment--Related Hazards Ascertained After Treatment Rendered

On or about _____ [*date*], defendant _____ [*name of physician*] treated plaintiff by _____ [*specify treatment rendered, e.g.,* inserting a contraceptive intrauterine device for the purpose of birth control]. Subsequent to treatment, defendant learned that _____ [*specify risk ascertained by defendant, e.g.,* the intrauterine device used by plaintiff had been found to cause pelvic inflammatory disease] and that this risk constituted a hazard to plaintiff's health and safety, but defendant negligently failed to warn plaintiff of the hazard.

[2] Use of Form

This form of allegation may be incorporated into either the general form of complaint for negligence *set forth in § 415.92*, or the general negligence attachment to the Judicial Council form of complaint for personal injury *set forth in § 415.91*. The allegation may be used by a plaintiff who has suffered injury as the result of a physician's failure to warn of a health hazard related to treatment or services rendered by the physician of which the physician acquires knowledge after such treatment or services are rendered.

[3] Duty to Warn

A physician owes a duty of care to a patient to warn of dangerous effects of a medical procedure when, subsequent to the performance of the procedure, the physician acquires actual knowledge of the danger. This duty arises from the imposed continuing status of the physician-patient relationship when the risk stems from services rendered pursuant to that relationship [*see Tresemer v. Barke (1978) 86 Cal. App. 3d 656, 669, 672, 150 Cal. Rptr. 384]* .

[4] Statute of Limitations

Medical malpractice actions are governed by the statute of limitations provisions of *Code Civ. Proc. § 340.5* [*see §*

415.47]. In an action brought for personal injuries resulting from the use of an intrauterine device, for example, the one-year statute of limitations period relating to discovery of the injury does not commence to run upon insertion of the device, but rather upon plaintiff's discovery that the placement of the device by defendant is the cause of the injury [*see Tresemer v. Barke (1978) 86 Cal. App. 3d 656, 664-665, 150 Cal. Rptr. 384]* .

[5] State Statutes

Statute of limitations period in actions against health care providers for professional negligence. *Code Civ. Proc. § 340.5*

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36-415 California Forms of Pleading and Practice--Annotated § 415.98

§ 415.98 Allegation--Physician's Failure to Obtain Patient's Informed Consent--Action in Negligence

[1] FORM Allegation--Physician's Failure to Obtain Patient's Informed Consent--Action in Negligence

On or about _____ [*date*], defendant proposed to treat plaintiff by [*specify treatment proposed by defendant, e.g.,* performing a bilateral hernioplasty]. Defendant negligently failed to disclose a material risk of the procedure to plaintiff which was [*specify risk, e.g.,* that postoperative swelling of the testicles might occur due to bleeding], and thus plaintiff's consent to the procedure was not a fully informed one. Had plaintiff been adequately informed of all material risks of _____ [*specify the procedure*], he/she would not have consented to the procedure.

[2] Use of Form

This form of allegation may be incorporated as Paragraph 5 of the complaint *set forth in § 415.92*. It may be used by a plaintiff in an action for professional negligence to recover for injuries incurred during a procedure which was performed without plaintiff's having been fully informed of the material risk of harm which did occur. An action based on lack of informed consent should be brought in negligence rather than battery when the physician's failure to inform the patient of material risks does not prevent the patient from comprehending the nature of the procedure, but rather prevents a complete weighing of the risks of the treatment [*see § 415.13*].

[3] Causation

In order to state a cause of action in negligence based on a physician's failure to disclose the risks inherent in a proposed treatment, the plaintiff must allege that such undisclosed information was material to his or her decision whether to undergo or refuse the treatment. Materiality is defined as that information which would be regarded as significant to the decision by a reasonable person in similar circumstances [*Truman v. Thomas (1980) 27 Cal. 3d 285, 292, 165 Cal. Rptr. 308, 611 P.2d 902]* . Furthermore, the plaintiff must establish a causal connection between the physician's failure to disclose and plaintiff's injuries by alleging that, had an adequate disclosure been made, plaintiff would have refused the treatment which caused the injury [*Cobbs v. Grant, (1972) 8 Cal. 3d 229, 245, 104 Cal. Rptr. 505, 502 P.2d 1]* .

[4] State Statutes

Duty of physician to make certain disclosures and obtain written consent before treating patient with DMSO preparation. *Bus. & Prof. Code § 4211.5*

[5] Decisions

In action based on failure to warn of risk of developing aseptic necrosis from prednisone, district court erred in concluding that doctor's duty to warn depended on whether doctors in community would have customarily provided warnings in same situation; whether or not use of prednisone was prevalent in treatment of asthma was not directly relevant to whether or not reasonable person in plaintiff's position would have consented to treatment with it after considering risk; on remand, district court must resolve issues of what risk plaintiff faced and whether or not reasonable person would have consented to treatment. *Hutchinson v. United States (9th Cir. 1988) 841 F.2d 966, 967*

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36-415 California Forms of Pleading and Practice--Annotated § 415.99

§ 415.99 Allegations for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714]--By Patient Against Physician, Physician's Employees, Hospital and Hospital Employees--Injury to Patient While Under Anesthesia--Res Ipsa Loquitur

[1] FORM Allegations for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714]--By Patient Against Physician, Physician's Employees, Hospital and Hospital Employees--Injury to Patient While Under Anesthesia--Res Ipsa Loquitur

1. At all times herein mentioned, defendants _____ [*names of physicians employed by hospital*], _____ [*name of plaintiff's private physician*], and DOES 1-20, and each of them, were physicians and surgeons licensed to practice medicine under the laws of the State of California.

2. At all times herein mentioned, defendants _____ [*names of physicians employed by hospital*] and DOES 1-20 were employed by defendant _____ [*name of hospital operator*] at _____ [*name of hospital*] and were acting within the course and scope of their employment with the permission and consent of defendant _____ [*name of hospital*].

3. On or about _____ [*date*], plaintiff was admitted to the hospital as a patient for _____ [*specify surgical procedure, e.g.,* a tonsillectomy] to be performed by defendant _____ [*name of plaintiff's physician*]. At that time and place, defendant _____ [*name of hospital operator*] undertook to care for plaintiff and to provide the operating room, surgical equipment, and surgical assistants for plaintiff's operation.

4. On or about _____ [*date*], defendant _____ [*plaintiff's physician*] performed the _____ [*specify surgical procedure, e.g.,* tonsillectomy] on plaintiff with the assistance of defendants _____ [*names of assisting physicians, nurses, and operating room personnel employed by hospital*] and DOES 1-20. During the entire course of the surgery, plaintiff was rendered unconscious by an anesthetic administered to plaintiff by defendant _____ [*name of anesthesiologist employed by hospital*] and DOES 1-20. Defendants, and each of them, had exclusive control and custody of plaintiff's person and all instrumentalities used during the surgery.

5. Defendants, and each of them, failed to exercise the degree of knowledge and skill proper in their profession and so negligently and unskillfully performed and assisted during plaintiff's _____ [*specify surgical procedure, e.g.,* tonsillectomy] and so negligently and unskillfully cared for plaintiff during surgery that, as a proximate result, _____ [*specify adverse result, e.g.,* plaintiff's vocal chords, which functioned normally prior to the surgery, were paralyzed].

[*If defendant hospital operator is a public entity and/or defendant physicians and nurses employed by the hospital are public employees, add Paragraphs 6 and 7*]

6. On or about _____ [*date*], plaintiff presented to _____ [*name of governmental entity*] by _____ [delivering *or* mailing] a claim to the _____[clerk *or* secretary *or* auditor] for the injuries, disability, losses and damages suffered and incurred by him/her by reason of the above-described occurrence, all in compliance with the requirements of *Section 905 of the Government Code*. A copy of the claim is attached hereto as Exhibit A and made a part hereof.

7. On or about _____ [*date*], _____ [*name of governmental entity*] _____ [rejected the claim in its entirety *or* allowed the claim in the amount of $_____ and rejected it as to the remainder *or* failed to act on the claim within the period of 45 days after its presentation, and the claim was thus deemed rejected under the provisions of *Section 912.4 of the Government Code* at the expiration of the 45-day period, to wit, on _____ (*date*)].

[2] Use of Form

These allegations are for use by a plaintiff alleging negligence on the part of a physician, hospital, and medical assistants under the theory of res ipsa loquitur. Court decsions have relied on and upheld res ipsa loquitur in situations in which the patient's injuries occurred while he or she was under anesthesia during surgery [*see Ybarra v. Spangard (1944) 25 Cal. 2d 486, 490-491, 154 P.2d 687]* . Therefore these allegations have been designed to describe such circumstances. For further discussion, see *§ 415.99[4]*.

[3] Judicial Council Pleading Forms

Code Civ. Proc. § 425.12 requires that the Judicial Council develop and approve official forms for use in California trial courts for any complaint, cross complaint, or answer in any action based on personal injury, property damage, wrongful death, unlawful detainer, breach of contract, or fraud. Use of these forms is optional [*see Code Civ. Proc. § 425.12*]. If counsel is using the Judicial Council complaint form for negligence, the allegations in this form may be adapted for use in an attachment to that form [*see § 415.92*].

[4] Res Ipsa Loquitur

In situations in which plaintiff is unable to offer direct proof of defendants' negligence due to unconsciousness or other lack of awareness of defendants' conduct, the doctrine of res ipsa loquitur is traditionally employed to create a presumption that defendants' negligence proximately caused plaintiff's injuries. The doctrine is applicable when plaintiff establishes that [*Bardessono v. Michels (1970) 3 Cal. 3d 780, 788, 788 n. 5, 91 Cal. Rptr. 760, 478 P.2d 480]* :

- The injuries are the type which do not ordinarily occur in the absence of negligence,

- The injuries were caused by an agency or instrumentality in the exclusive control of the defendant, and

- No voluntary conduct on plaintiff's part was a cause of the injuries.

When plaintiff is unable to identify the particular instrumentality or person in control of the instrumentality which caused the injuries due to unconsciousness at the time of injury, he or she may invoke the res ipsa presumption against all persons who had actual control or the right to control over the plaintiff's body or an instrumentality which might have caused the injuries [*Ybarra v. Spangard (1944) 25 Cal. 2d 486, 492-494, 154 P.2d 687]* . For further discussion of the operation and application of the doctrine of res ipsa loquitur in medical malpractice actions, see *§ 415.11[2]* and Ch. 295, *Hospitals* .

[5] State Statutes

Judicial doctrine of res ipsa loquitur is presumption affecting burden of producing evidence. *Evid. Code § 646*

[6] Decisions

Res ipsa loquitur is applicable in cases where patient is partially as well as totally unconscious. *Clark v. Gibbons (1967) 66 Cal. 2d 399, 411, 58 Cal. Rptr. 125, 426 P.2d 525*

Inference of negligence arising under res ipsa doctrine is dispelled with regard to a particular physician only when evidence establishes as matter of law that physician is free from negligence. *Leonard v. Watsonville Community Hosp. (1956) 47 Cal. 2d 509, 514, 305 P.2d 36*

Required elements of res ipsa loquitur. *McKinney v. Nash (1981) 120 Cal. App. 3d 428, 435, 174 Cal. Rptr. 642* ; *Frantz v. San Luis Med. Clinic (1978) 81 Cal. App. 3d 34, 43, 146 Cal. Rptr. 146*

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36-415 California Forms of Pleading and Practice--Annotated § 415.100

§ 415.100 Allegations--Personal Injury Caused by Physician's Performance of Unauthorized Treatment

[1] FORM Allegations--Personal Injury Caused by Physician's Performance of Unauthorized Treatment

1. On or about _____ [*date*], plaintiff underwent _____ [*specify treatment, e.g.,* surgery to remove plaintiff's uterus] [at _____ (*name of hospital*)].

[*EITHER*]

2. During performance of _____ [*specify treatment, e.g.,* the hysterectomy], defendant, without the consent or knowledge of plaintiff, _____ [*specify acts which constituted intentional deviation from plaintiff's consent, e.g.,* removed plaintiff's appendix, an organ which is not removed as a normal incident to a hysterectomy].

[*OR*]

2. Defendant failed to inform plaintiff of the nature of the proposed treatment specifically, _____ [*specify facts demonstrating defendant's failure to inform and/or misrepresentation of the nature of the treatment, e.g.,* by failing to inform plaintiff that a hysterectomy involved removal of the uterus resulting in sterility].

[2] Use of Form

These allegations are for use by a plaintiff in a medical battery action against a physician based on performance of unauthorized treatment. Lack of authorization may be based on either the physician's performance of a procedure which was substantially different from that to which the patient consented, on the physician's failure to disclose significant inherent risks of the procedure, or on misrepresentation of the risks [*see Cobbs v. Grant (1972) 8 Cal. 3d 229, 239-241, 104 Cal. Rptr. 505, 502 P.2d 1]* . For further discussion of medical battery, see *§ 415.20*.

When the action is based on the physician's failure to inform of inherent risks of treatment rather than performance of a

procedure different than that consented to, the trial court may consider that the facts pleaded give rise to a negligence rather than battery action. Therefore, counsel should consider including these allegations in a complaint based on negligence if the facts indicate this to be appropriate. For further discussion of the distinction between negligence and battery theories arising from a failure to inform, see *§ 415.13*.

[3] Judicial Council Pleading Forms

Use of the Judicial Council forms for any complaint, cross complaint, or answer in any action based on personal injury, property damage, or wrongful death is optional [*see Code Civ. Proc. § 425.12*]. These allegations may be incorporated into a standard form of complaint for medical malpractice [*see § 415.92*]. Alternatively, the allegations may be incorporated into either an intentional tort or general negligence attachment to a Judicial Council form for personal injury as appropriate [*see § 415.100[2]*].

For a filled-out example of the Judicial Council intentional tort attachment, see Ch. 58, *Assault and Battery* . For general information regarding the use of Judicial Council complaint forms, see Ch. 123, *Complaints and Cross Complaints* .

These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. Noninteractive versions in PDF format also are available at www.lexisone.com at no charge.

[4] Notice of Intent to Commence Action

Battery actions are not governed by *Code Civ. Proc. § 364*, which requires 90 days notice to a health care provider of the plaintiff's intent to sue, since the statute applies only to actions brought for professional negligence [*see Code Civ. Proc. § 364*]. It may be advisable to file such notice, however, since the trial court may consider that the facts pleaded give rise to an action for negligence rather than battery. This is particularly true when the case is based on the physician's failure to inform the patient of the nature of the treatment proposed, since it is only the degree of significance of the undisclosed information which determines whether the action sounds in battery or negligence [*see Cobbs v. Grant (1972) 8 Cal. 3d 229, 239-240, 104 Cal. Rptr. 505, 502 P.2d 1* ; *see also § 415.20*]].

Failure to comply with the notice provision of *Code Civ. Proc. § 364* does not invalidate the proceedings of the court, although it does provide grounds for professional discipline [*Code Civ. Proc. § 365*].

Because failure to comply with the notice requirement is not jurisdictional, the failure to allege each injury suffered in the notice does not prevent a plaintiff from including that injury as a basis for a cause of action in the lawsuit subsequently filed, if the cause of action is not otherwise barred by the statute of limitations [*Edwards v. Superior Court (2001) 93 Cal. App. 4th 172, 180, 112 Cal. Rptr. 2d 838]* .

[5] Damages

In an action based on technical battery, the defendant is liable for all damages proximately resulting from the battery, regardless of whether or not the procedure was performed in accordance with the proper standard of care or whether or not the damages could have been anticipated [*Berkey v. Anderson (1969) 1 Cal. App. 3d 790, 803, 82 Cal. Rptr. 67]* . Furthermore, the defendant may be liable for punitive damages on proof of malice, fraud, or oppression [*Civ. Code § 3294*]. However, a physician is not liable for punitive damages when he or she performs unauthorized surgery due to a good-faith mistake of fact; for example, an accidental error as to the identity of the patient [*see Ebaugh v. Rabkin (1972) 22 Cal. App. 3d 891, 895, 99 Cal. Rptr. 706]* .

The $250,000 limit on noneconomic damages imposed by *Civ. Code § 3333.2* does not apply to a plaintiff who recovers

for a common law battery based on the physician's performing a surgery to which the plaintiff expressly did not consent. This type of battery is an intentional tort that is not a species of negligence and falls outside the scope of *Civ. Code § 3333.2* [*Perry v. Shaw (2001) 88 Cal. App. 4th 658, 661, 668-670, 106 Cal. Rptr. 2d 70* ; *see § 415.20*].

[6] State Statutes

Duty of physician to make certain disclosures and obtain written consent before treating patient with DMSO preparation. *Bus. & Prof. Code § 4211.5*

Exemplary damages in actions based on battery. *Civ. Code § 3294*

Statute of limitations governing battery. *Code Civ. Proc. § 340.3*

Judicial Council trial court pleading forms. *Code Civ. Proc. § 425.12*

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36-415 California Forms of Pleading and Practice--Annotated § 415.101

§ 415.101 Allegation--Plaintiff's Failure to Discover Negligent Cause of Injury Due to Continuing Physician-Patient Relationship With Defendant

[1] FORM Allegation--Plaintiff's Failure to Discover Negligent Cause of Injury Due to Continuing Physician-Patient Relationship With Defendant

On or about _____ [*date*], plaintiff discovered that the cause of his/her injuries was _____ [*specify negligent acts or omissions of defendant physician which caused the injury, e.g.,* a failure to properly diagnose plaintiff's ulcer]. Plaintiff made this discovery _____ [*specify circumstances surrounding discovery, e.g.,* during emergency treatment for stomach bleeding]. Until the time of the discovery, plaintiff was under the professional care of _____ [*name of defendant*] and, as a result of plaintiff's justifiable reliance on defendant's judgment and care, plaintiff failed to seek other medical advice or treatment to ascertain the true cause of his/her condition. The failure to discover the negligent cause of the injuries prior to _____ [*date of discovery*] was therefore reasonable and not due to any lack of diligence on the part of plaintiff.

[2] Use of Form

This form of allegation may be incorporated into the complaint *set forth in § 415.92*. It may be used by a plaintiff in an action based on professional negligence in order to raise the issue of justifiable belated discovery extending the one-year statute of limitations period under *Code Civ. Proc. § 340.5* [*see § 415.47[1]*].

The issue of delayed discovery is also applicable to actions brought on behalf of minors for personal injuries suffered before or during birth [*see* Civ. Code § 340.4; *see also § 415.47[3]*]. For a form and discussion of actions brought on behalf of minors for such injuries, see Ch. 295, *Hospitals* , and Ch. 367A, *Minors: Tort Actions* .

[3] State Statutes

Statute of limitations governing actions brought on behalf of minors for prenatal injuries or injuries suffered during birth. Civ. Code § 340.4

Statute of limitations governing actions brought against health care providers for professional negligence. *Code Civ. Proc. § 340.5*

[4] Decisions

Degree of diligence required of plaintiff to discover negligent cause of injury is diminished during continuance of physician-patient relationship. *Sanchez v. South Hoover Hosp. (1976) 18 Cal. 3d 93, 102, 132 Cal. Rptr. 657, 553 P.2d 1129*

In order to raise issue of delayed discovery, plaintiff's complaint must state when discovery was made, circumstances surrounding the discovery, andfacts which demonstrate that failure to make earlier discovery was reasonable and not result of plaintiff's failure to act. *Dujardin v. Ventura County Gen. Hosp. (1977) 69 Cal. App. 3d 350, 356, 138 Cal. Rptr. 20*

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36-415 California Forms of Pleading and Practice--Annotated § 415.102

§ 415.102 Answer to Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Medical Negligence [Civ. Code § 1714]--Plaintiff's Comparative Negligence--Cal. Judicial Council Form PLD-PI-003

[1] FORM Answer to Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Medical Negligence [Civ. Code § 1714]--Plaintiff's Comparative Negligence--Cal. Judicial Council Form PLD-PI-003

Click here to view image.

[2] Use of Form

This Judicial Council form of answer may be used in response to a complaint seeking damages based on a physician's negligence in rendering professional services. The answer sets forth the affirmative defense of a plaintiff's comparative negligence in causing the injuries complained of.

For a discussion of the use of the comparative negligence doctrine in medical malpractice cases, see *§ 415.16*.

For discussion relating to the comparative negligence doctrine generally, and for detailed instructions on completing the Judicial Council form of answer, see Ch. 380, *Negligence* .

These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. Noninteractive versions in PDF format also are available at www.lexisone.com at no charge. For general information relating to the use of Judicial Council complaint forms, see Ch. 123, *Complaints and Cross Complaints* .

[3] State Statutes

Use of Judicial Council forms of pleading. *Code Civ. Proc. § 425.12*

[4] Decisions

Comparative negligence is possible defense to liability for medical negligence when proximate cause between plaintiff's own conduct and ensuing injuries established. *LeMons v. Regents of Univ. of Cal. (1978) 21 Cal. 3d 869, 874-875, 148 Cal. Rptr. 355, 582 P.2d 946* ; *Bolen v. Woo (1979) 96 Cal. App. 3d 944, 952, 158 Cal. Rptr. 454*

Election to have future damages, if any, paid out in periodic payments under *Code Civ. Proc. § 667.7* is properly pleaded as affirmative defense in answer. *Gorman v. Leftwich (1990) 218 Cal. App. 3d 141, 152, 266 Cal. Rptr. 671*

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36-415 California Forms of Pleading and Practice--Annotated § 415.103

§ 415.103 Request for Judgment Ordering That Future Damages Be Paid in Periodic Payments [Code Civ. Proc. § 667.7]

[1] FORM Request for Judgment Ordering That Future Damages Be Paid in Periodic Payments [Code Civ. Proc. § 667.7]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	REQUEST THAT FUTURE DAMAGES BE PAID
_____ [*name*],	)	BY PERIODIC PAYMENTS
Defendant.	)	[*Code Civ. Proc. § 667.7*]
	)	
	)	

_____

TO THE HONORABLE _____ [*name of judge*], JUDGE OF THE ABOVE ENTITLED COURT:

_____ [*Name of plaintiff or defendant*], as the _____ [*plaintiff or defendant*] in the above-entitled action, respectfully requests that the court enter a judgment ordering that money damages or its equivalent for future damages of _____ [*name of plaintiff*] be paid in whole or in part by periodic payments rather than by a lump-sum payment.

[_____ (*Name of plaintiff or defendant*) also requests that the court stay the clerk's entry of judgment until a periodic payment schedule has been formulated.]

_____ [*signature*]
Attorney for _____

[Plaintiff *or* Defendant]

[2] Use of Form

This form is for use by either plaintiff or defendant in an action against a health care provider based on professional negligence to request that the court enter a judgment ordering that the future damages of the judgment creditor be paid by periodic payments rather than by a lump-sum payment [*see Code Civ. Proc. § 667.7(a)*]. Periodic payments may not be ordered for future damages amounting to less than $50,000 [*Code Civ. Proc. § 667.7(a)*]. The form includes an optional request, which may be used in a jury trial, that the court stay entry of judgment until a periodic payment schedule has been formulated [*see Craven v. Crout (1985) 163 Cal. App. 3d 779, 784, 209 Cal. Rptr. 649* (trial court lacks jurisdiction to grant motion for periodic payment after jury's lump-sum judgment has been entered)].

[3] Timeliness

The request for periodic payment of future damages pursuant to *Code Civ. Proc. § 667.7* must be made prior to the entry of any judgment in the action. In a jury trial, whether a party moves for periodic payment of future damages before or immediately after the rendition of the jury verdict, the party should at the same time request that the court stay the clerk's entry of judgment until a periodic payment schedule has been formulated [*Craven v. Crout (1985) 163 Cal. App. 3d 779, 784, 209 Cal. Rptr. 649]* .

If the defendant has put the plaintiff on notice at the pleading stage of his or her intention to seek periodic payment of future damages and requested the trial court to instruct the jury to designate the portion of the damages that was attributable to future damages, a formal request for periodic payment of future damages made following delivery of the verdict is not untimely [*see Gorman v. Leftwich (1990) 218 Cal. App. 3d 141, 152-153, 266 Cal. Rptr. 671]* .

[4] Definitions

As used in the statute, "future damages" include damages for future medical treatment, care or custody, loss of future earnings, loss of bodily function, or future pain and suffering of the judgment creditor [*Code Civ. Proc. § 667.7(e)(1)*].

As used in the statute, "periodic payments" means the payment of money or delivery of other property to the judgment creditor at regular intervals [*Code Civ. Proc. § 667.7(e)(2)*].

For definitions of "health care provider" and "professional negligence," see *§ 415.10*.

[5] State Statutes

Request for periodic payment of future damages in actions against health care providers based on professional negligence is authorized when future damages award equals or exceeds $50,000. *Code Civ. Proc. § 667.7*

[6] Decisions

Lump-sum jury award of damages in malpractice action is not modifiable by court to allow periodic payments for future damages pursuant to *Code Civ. Proc. § 667.7* if jury did not identify amount of damages subject to periodic payment and defendant's request for periodic payment was made after entry of judgment. *Craven v. Crout (1985) 163 Cal. App. 3d 779, 783-785, 209 Cal. Rptr. 649* ,

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36-415 California Forms of Pleading and Practice--Annotated § 415.104

§ 415.104 Judgment Ordering Payment of Future Damages by Periodic Payments [Code Civ. Proc. § 667.7]

[1] FORM Judgment Ordering Payment of Future Damages by Periodic Payments [Code Civ. Proc. § 667.7]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	JUDGMENT THAT FUTURE DAMAGES BE
_____ [*name*],	)	PAID IN PERIODIC PAYMENTS
Defendant.	)	[*Code Civ. Proc. § 667.7*]
	)	
	)	

The request of _____ [*name of plaintiff or defendant*] for a judgment ordering that payment of future damages be made by periodic payments rather than by a lump-sum payment came before this court on _____ [*date*].

The court finds that the award of future damages in the above-entitled action _____ [equals *or* exceeds] the amount of $50,000 provided by *Section 667.7 of the Code of Civil Procedure* as a prerequisite for a judgment of periodic payments.

IT IS ORDERED as follows:

1. That $_____ is the dollar amount of each periodic payment to be paid to _____ [*name* (*s*) *of judgment creditor* (*s*)] the judgment creditor(s) in the above-mentioned action, to compensate for future damages.

2. The interval between payments shall be _____ [*specify interval, e.g.,* one month].

[*EITHER*]

3. The total number of payments shall equal _____.

[*OR*]

3. The period of time over which the payments shall be made is _____ [*specify time, e.g.,* 20 years].

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of judgment is for use in an action against a health care provider for professional negligence when the award for future damages equals or exceeds $50,000. Either party in the action may request the payment of such damages to be paid in periodic payments rather than by a lump-sum payment [*Code Civ. Proc. § 667.7*].

In entering such a judgment, the court must make a specific finding as to the dollar amount of periodic payments which will compensate the judgment creditor for such future damages [*Code Civ. Proc. § 667.7(a)*]. The judgment must specify the recipient or recipients of the payments, the dollar amounts of the payments, the intervals between payments, and the number of payments or the period of time over which payments shall be made [*Code Civ. Proc. § 667.7(b)(1)*].

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36-415 California Forms of Pleading and Practice--Annotated § 415.105

§ 415.105 Petition to Modify Judgment Ordering That Future Damages Be Paid in Periodic Payments--Death of Judgment Creditor [Code Civ. Proc. § 667.7(c)]

[1] FORM Petition to Modify Judgment Ordering That Future Damages Be Paid in Periodic Payments--Death of Judgment Creditor [Code Civ. Proc. § 667.7(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	PETITION FOR MODIFICATION OF JUDGMENT
_____ [*name*],	)	[*Code Civ. Proc. § 667.7(c)*]
Defendants.	)	
	)	
	)	

TO THE HONORABLE _____ [*name of judge*], JUDGE OF THE ABOVE ENTITLED COURT:

_____ [*Name of petitioner*] respectfully represents:

1. On _____ [*date*], the above-entitled court entered a judgment ordering the payment of future damages by periodic payments to _____ [*name of deceased judgment creditor*], a copy of which is attached hereto as Exhibit "A".

2. On or about _____ [*date*], _____ [*name of deceased judgment creditor*] died at _____ [*city*], _____ [*state*]. A copy of the death certificate is attached hereto as Exhibit "B".

3. At the time of the death of _____ [*name of deceased judgment creditor*], there remained a balance of $_____ in money damages for loss of future earnings to be paid by _____ [*name of judgment debtor*], the judgment debtor in the above-entitled action.

4. At the time of the death of _____ [*name of deceased judgment creditor*], _____ [*name of petitioner*] was owed a legal duty of support by _____ [*name of deceased judgment creditor*] by virtue of the fact that _____ [*specify relation of petitioner to judgment creditor, e.g.*, petitioner is the surviving minor child of _____ (*name of deceased judgment creditor*)].

WHEREFORE, _____ [*name of petitioner*] hereby petitions the court to order that the balance of the above-mentioned judgment be paid to _____ [*name of petitioner*].
Dated: _____ [*date*].

_____ [*signature*]
Petitioner
_____[*signature*]
Attorney for Petitioner

[2] Use of Form

This form of petition is for use in requesting that a judgment ordering the periodic payment of future damages be modified due to the death of the judgment creditor. The modification is allowed to require continued payment of money damages awarded for loss of future earnings only, to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately prior to death [*Code Civ. Proc. § 667.7(c)*].

The petition may be filed by any such party in interest [*Code Civ. Proc. § 667.7(c)*].

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Chapter 415 PHYSICIANS: MEDICAL MALPRACTICE
PART IV. FORMS

36-415 California Forms of Pleading and Practice--Annotated § 415.106

§ 415.106 Order Modifying Payment of Future Damages After Death of Judgment Creditor [Code Civ. Proc. § 667.7(c)]

[1] FORM Order Modifying Payment of Future Damages After Death of Judgment Creditor [Code Civ. Proc. § 667.7(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER MODIFYING JUDGMENT OF PAY-
Defendant.	)	MENT OF FUTURE DAMAGES
	)	
	)	

The petition of _____ [*name of petitioner*] came on regularly for hearing before this court on _____ [*date*]. Petitioner appeared by counsel _____ [*name of attorney*] [*Specify other appearance, if any*].

On proof made to the satisfaction of the court that the petition ought to be granted,

IT IS ORDERED that the judgment awarding future damages in the above-entitled action be modified and that the unpaid future damages for loss of earnings be awarded [and apportioned] as follows: _____ [*specify parties to whom payments are awarded and the amount of payment to each party*].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form of order is for use in modifying a judgment ordering the periodic payment of future damages.

[3] State Statutes

Modification of order awarding periodic payment of damages for loss of future earnings upon death of judgment creditor. *Code Civ. Proc. § 667.7(c)*

California Forms of Pleading and Practice--Annotated

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PART IV. FORMS

36-415 California Forms of Pleading and Practice--Annotated § 415.107

§ 415.107 Complaint for Damages [Civ. Code § 3333] for Sexual Contact [Civ. Code § 43.93]

[1] FORM Complaint for Damages [Civ. Code § 3333] for Sexual Contact [Civ. Code § 43.93]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff(s),	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR SEXUAL CONTACT
_____ [*name*], [and DOES 1	)	
through _____,]	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
Defendant(s).	)	
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. At all times mentioned herein, defendant _____ [*name*] and DOES 1-10, and each of them, were _____ [*specify profession considered to be a psychotherapist under Civ. Code § 43.93, e.g.,* physician and surgeon specializing in the practice of psychiatry] with offices at _____ [*street address*] _____ County, California.

2. Defendants DOES 1 through _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein.

[3. (Plaintiff is informed and believes and thereon alleges that) (A)t all times herein mentioned each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged was acting within the course and scope of such agency and employment.]

4. Plaintiff was receiving psychotherapy from defendants _____ [*names*] and DOES 1-10, and each of them from _____ [*date*] until _____ [*date*].

5. On or about _____ [*date*], [and thereafter _____ (*specify*)] defendant _____ [*name*] made sexual contact with plaintiff in that _____ [*specify form of sexual contact as defined in Civ. Code § 43.93, e.g.,* defendant had sexual intercourse with plaintiff].

[6. Defendant represented to plaintiff that the sexual contact was _____ (consistent with *or* part of) plaintiff's treatment.]

7. As a proximate result of the acts of defendant[s, and each of them], plaintiff suffered emotional distress and mental suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has suffered general damages.

[8. As a further proximate result of the acts of defendant(s, and each of them), plaintiff has incurred and will continue to incur medical and related expenses.]

[9. As a further proximate result of the acts of defendant(s, and each of them), plaintiff's earning capacity has been greatly impaired, both in the past and present.]

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages,

[2. For medical and related expenses according to proof,]

[3. For loss of earnings according to proof,]

4. For costs of suit herein incurred, and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired, see § 415.91*.]

[2] Use of Form

This form of complaint is for use by a patient or former patient of a psychotherapist in an action pursuant to *Civ. Code § 43.93* for damages against the psychotherapist for sexual contact. Under this section, "psychotherapist" means a physician and surgeon specializing in the practice of psychiatry, a psychologist, a psychological assistant, a marriage and family therapist, a registered marriage and family therapist intern or trainee, an educational psychologist, an associate clinical social worker, or a licensed clinical social worker [*Civ. Code § 43.93(a)(2)*]. For further discussion, see *§ 415.22*.

[3] Allegations

The complaint alleges:

- The defendant is a psychotherapist within the meaning of *Civ. Code § 43.93(a)(2)* (Paragraph 1);

- The plaintiff was receiving psychotherapy from the defendant (Paragraph 4) [*Civ. Code § 43.93(a)(2)*];

- The psychotherapist had sexual contact, as defined in *Civ. Code § 43.93(a)(3)*, with the plaintiff (Paragraph 5);

- If applicable, there was therapeutic deception--that is, the defendant represented that the sexual contact was consistent with or part of the plaintiff's treatment (Paragraph 6) [*Civ. Code § 43.93(a)(5)*; *see § 415.22[2][a]*];

- The plaintiff's general damages (Paragraph 7); and

- Special damages, if any (Paragraphs 7-9).

[4] Procedure

Because the various procedural requirements of MICRA (such as filing a notice of intention to commence an action against a health care provider and the restriction on alleging punitive damages) apply to actions for professional negligence [*see Code Civ. Proc. §§ 364(a)* (notice of intention) and 425.13 (punitive damages); for discussion of the procedure required in medical malpractice actions, *see §§ 415.40 et seq., 415.92*], it is not clear whether those procedures would have to be followed by an attorney filing an action for sexual contact unless the action is combined with an action for professional negligence and the defendant falls within the MICRA definition of a health care provider [*see* definitions in *Code Civ. Proc. § 364(f)(1), 411.30(a)*; *see also Waters v. Bourhis (1985) 40 Cal. 3d 424, 433-435, 220 Cal. Rptr. 666, 709 P.2d 469* (possible bases for action against psychiatrist based on sexual conduct before enactment of *Civ. Code § 43.93*); for discussion of the actions covered by MICRA, *see generally § 415.10*].

On one hand, the cause of action provided for by *Civ. Code § 43.93* does not require any allegation of negligent conduct, and seems essentially to impose strict liability [*see Civ. Code § 43.93(b)*]. However, the California Supreme Court has noted that out-of-state decisions have held that sexual conduct may give rise to a medical malpractice action based on negligence as well as on intentional misconduct [*see Waters v. Bourhis (1985) 40 Cal. 3d 424, 433, 220 Cal. Rptr. 666, 709 P.2d 469]* .

Until it is clear whether or not such actions are subject to MICRA, counsel may be wel-advised to comply with the procedural requirements to avoid any procedural challenges to the action. A more appropriate context in which to challenge the applicability of MICRA to such actions may be in the limitations on recovery of damages and on the amounts of attorney's fees available [*see Waters v. Bourhis (1985) 40 Cal. 3d 424, 436-438, 220 Cal. Rptr. 666, 709 P.2d 469* (discussing effect of recovery in action seeking recovery under both MICRA and non-MICRA causes of action, and concluding that recovery under non-MICRA theories eliminates limitation on amount of attorney's fees recoverable imposed by *Bus. & Prof. Code § 6146*)].

[5] Therapeutic Deception

Civ. Code § 43.93 lists therapeutic deception as one of three alternative conditions under which a cause of action for sexual contact may arise [*see Civ. Code § 43.93(b)*]. Therapeutic deception is defined as a representation by the psychotherapist that sexual contact with the psychotherapist is consistent with or part of the patient's or former patient's

treatment [*Civ. Code § 43.93(a)(5)*]. Because the statute provides for a cause of action for sexual contact, even without therapeutic deception, if it occurred during the period the patient was receiving psychotherapy or within two years following termination of therapy [*see Civ. Code § 43.93(b)(1), (2)*], it appears that therapeutic deception as an independent ground would only be necessary if the sexual contact occurred more than two years following termination of therapy.

[6] Cross References

For related forms, *see §§ 415.92, 415.95,* and *415.96*.

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36-416 California Forms of Pleading and Practice--Annotated 416.syn

§ 416.syn Synopsis to Chapter 416: PHYSICIANS: MEMBERSHIP ON HOSPITAL STAFFS OR IN PROFESSIONAL ORGANIZATIONS

§ 416.01 Scope of Chapter

§ 416.02 Cross References

§§ 416.03-416.09 [Reserved]

§ 416.10 Governing Law

§ 416.11 Arbitrary Deprivation of Membership Prohibited

[1] Common Law Fair Procedure Requirement

[2] Right to Practice Profession Fully

[3] Substantive and Procedural Aspects of Common Law Fair Procedure Requirement

§ 416.12 Exhaustion of Administrative Remedies

§ 416.13 Fair Procedure

[1] Statutory Requirements for Public Hospitals

[2] Fair Procedure Requirements for Private Institutions

[a] Notice and Hearing

[b] Formal Proceedings Not Required

[c] Discovery

[d] Voir Dire

[e] Limited Right to Confront Accusers

[f] Right to Attorney at Board's Discretion

[g] Separation of Investigative and Adjudicatory Functions

[h] Notice and Hearing Not Required if Not Requested

[i] Decision May Not Rest on Ex Parte Evidence

[j] Bylaws May Allocate Burden of Proof

[3] Hearing on Review No Substitute for Fair Procedure

§ 416.14 Substantive Rationality

[1] Right to Membership Subject to Reasonable Rules

[2] General Requirement That Rules Be Substantively Reasonable

[a] Requirement of Medical Malpractice Insurance Permitted

[b] Discrimination Based on Type of Professional Degree Prohibited

[c] Requirement of Nexus

[d] Vague and Ambiguous Rules

[i] In General

[ii] Official Interpretation of Ambiguous Rule

[e] Rules That Are Contrary to Public Policy

[3] Standards for Qualification or Competence

[a] In General

[b] Ability to Work With Others as Necessary Qualification

[4] Requirement of Existing Cause

§ 416.15 Hospital Peer Review Proceedings Under Bus. & Prof. Code § 809 et seq.

[1] Purpose; Applicability

[2] Notice

[3] Hearing Panel

[4] Discovery

[5] Continuances

[6] Hearing

[7] Exhaustion of Remedies

§ 416.16 Proceedings to Obtain Relief From Membership Decision

[1] Exhaustion of Internal Remedies as Prerequisite

[2] When Exhaustion of Internal Remedies Excused

[3] Appropriate Proceedings for Obtaining Judicial Review

[4] Standard of Review

[a] Hospital Review Boards

[b] Other Professional Organizations

[c] Scope of Judicial Review of Institution's Rules

[5] Types of Relief Available

§ 416.17 Damages for Intentional Interference With Right to Practice Profession

[1] In General

[2] Justification of Interference

[3] Requirement of Exhaustion of Internal Remedies

[4] Requirement of Prior Favorable Determination

[a] In General

[b] Prior Favorable Determination Not Required When Basic Due Process Denied

[5] Immunities From Tort Actions

[a] Qualified Immunity for Members of Staff or Committee

[b] Qualified Immunity for Professional Society

[6] Privileged Communications

[7] Statute of Limitations

§ 416.18 Exculpatory Clause Not Enforceable

§ 416.19 Antitrust Liability for Interference With Right to Practice Medicine

§ 416.40 Related Matthew Bender Publications

§ 416.41 State Statutes

[1] Grounds for Exclusion or Expulsion

[2] Immunities

[3] Mandate Action

[4] Public Hospitals

[a] Generally

[b] Procedural Requirements for Membership Determinations

[c] Rules and Standards

§ 416.42 Decisions

[1] Antitrust

[2] Arbitrary Deprivation of Membership Prohibited

[a] Basis of Common Law Right to Procedural Fairness

[b] Right to Fully Practice Profession

[c] Substantive and Procedural Aspects of Common Law Procedural Fairness

[3] Damages for Intentional Interference With Right to Practice Profession

[a] In General

[b] Immunities From Tort Actions

[i] Qualified Immunity for Members of Staff or Committee

[ii] Privileged Communications

[iii] Malice

[c] Justification of Interference

[d] Requirement of Exhaustion of Internal Remedies

[e] Requirement of Prior Favorable Determination

[i] In General

[ii] Prior Favorable Determination Not Required When Due Process Denied

[f] Statute of Limitations

[4] Evidence

[5] Exculpatory Clause Not Enforceable

[6] Fair Procedure

[a] Exhaustion of Internal Remedies as Prerequisite

[b] Formal Procedures Not Needed

[c] Limited Right to Confront Accusers

[d] Notice and Hearing

[e] Right to Attorney at Board's Discretion

[f] Right to Copy Medical Records

[g] Substantial Evidence Requirement

[h] Hearing on Review No Substitute for Fair Procedure

[7] Federal Civil Rights Claims

[8] Peer-Review Process

[9] Proceedings to Obtain Relief From Membership Decision

[a] Appropriate Actions to Obtain Judicial Review

[b] Scope of Judicial Review of Institution's Rules

[c] Standard of Review

[d] Statute of Limitations

[e] Types of Relief Available

[10] Substantive Rationality

[a] General Requirement That Rules Be Substantively Reasonable

[i] In General

[ii] Rules That Are Contrary to Public Policy

[iii] Vague and Ambiguous Rules

[iv] Official Interpretation of Ambiguous Rule

[b] Requirement of Existing Cause

[c] Right to Memership Subject to Reasonable Rules

[d] Standards for Qualification or Competence

[i] In General

[ii] Ability to Work With Others as Necessary Qualification

§ 416.43 Law Reviews

§ 416.60 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Health Care Facility or Professional Society to Revoke or Deny Membership Privileges

[1] FORM

[2] Use of Form

[3] Alternative Writ Procedure

[4] Noticed Application Procedure

[5] Allegations

[6] Allegation of Exhaustion of Internal Remedies

[7] Review of Hearing Decision Under Code Civ. Proc. § 1094.5

[8] Simple Mandate Proceedings if No Hearing Provided

[9] Attorney's Fees

[10] Venue

[11] Verification

[12] State Statutes

[13] Decisions

[14] Cross References

§ 416.61 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Intentional Interference With Right to Practice Profession

[1] FORM

[2] Use of Form

[3] Allegations

[4] Lack of Justification for Defendant's Conduct

[5] Allegation of Exhaustion of Internal Remedies

[6] Allegation That Adverse Membership Decision Was Previously Set Aside by Court

[7] Statute of Limitations

[8] Venue

[9] Punitive Damages

[10] Prayer

[11] Verification

[12] State Statutes

[13] Decisions

[a] Damages for Intentional Interference With Right to Practice Profession

[b] Exculpatory Clause Not Enforceable

[c] Immunity From Tort Actions for Members of Staff or Committee

[d] Justification for Interference

[e] Requirement of Exhaustion of Internal Remedies

[f] Requirement of Prior Favorable Determination

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PART I. SCOPE

36-416 California Forms of Pleading and Practice--Annotated § 416.01

§ 416.01 Scope of Chapter

This chapter discusses and contains forms for use in actions involving exclusion or expulsion of physicians from membership on hospital staffs or other professional organizations. The forms in this part include a petition for writ of administrative mandate for use by a physician who has been wrongfully excluded or expelled from membership on a hospital medical staff or professional association [*see § 416.60*] and a complaint for use by a physician who has been wrongfully excluded or expelled from membership on a hospital staff or professional association in an action for damages for intentional interference with the physician's right to practice his or her profession [*see § 416.61*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesGeneral OverviewHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawBusiness Administration & OrganizationHospital PrivilegesGeneral Overview

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36-416 California Forms of Pleading and Practice--Annotated § 416.02

§ 416.02 Cross References

For discussion and forms regarding physician licensing and discipline, see Ch. 414, *Physicians: Licensing and Discipline* .

For discussion and forms regarding physicians and medical malpractice, see Ch. 415, *Physicians: Medical Malpractice* .

For discussion and forms relating to due process rights in cases involving deprivation of membership in associations and clubs generally, see Ch. 61, *Associations and Clubs* .

For discussion and forms relating to hospitals generally, see Ch. 295, *Hospitals* .

For discussion and forms relating to actions for injunctions, see Ch. 303, *Injunctions* .

For discussion, forms, and a procedural checklist relating to ordinary mandate proceedings, see Ch. 358, *Mandate and Prohibition* .

For discussion and forms relating to judicial review of administrative decisions under administrative mandate, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewRemediesInjunctive ReliefHealthcare LawActions Against Healthcare WorkersGeneral OverviewHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare Providers

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36-416 California Forms of Pleading and Practice--Annotated §§ 416.03-416.09

[Reserved]

§§ 416.03[Reserved]

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PART II. LEGAL BACKGROUND

36-416 California Forms of Pleading and Practice--Annotated § 416.10

§ 416.10 Governing Law

The subject of a physician's right to procedural and substantive protections from arbitrary exclusion or expulsion from membership on a hospital staff or professional organization is governed primarily by case law. Specific points, however, are covered by statute. The statutory rules governing administrative mandate are set out in *Code Civ. Proc. § 1094.5*. Specific grounds on which hospitals are either expressly permitted to or prohibited from excluding or expelling a physician from membership on a hospital medical staff are set out in *Health & Safety Code §§ 1316* and *1319*. The authorization of a public hospital to establish reasonable rules and standards, including standards for admission of a physician onto its medical staff is set out in *Health & Safety Code § 32128*. Statutory requirements for procedures in a public hospital to exclude or expel a physician from the public hospital's medical staff are set out in *Health & Safety Code §§ 32150-32155*. Qualified immunity from monetary liability for individual members of a hospital or professional society's committee charged with determining whether a physician should be excluded or expelled from membership is provided in *Civ. Code §§ 43.7* and *43.91(a)*. Qualified immunity from monetary damages for any communication of information to a hospital or professional organization or an appropriate committee of such an institution that is intended to aid in evaluation of the qualification, fitness, character or insurability of a physician is set out in *Civ. Code §§ 43.8* and *43.91(b)*. An absolute privilege for publications made in any legally authorized proceeding that is reviewable by mandate is set out in *Civ. Code § 47(b)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawBusiness Administration & OrganizationHospital PrivilegesGeneral OverviewHealthcare LawBusiness Administration & OrganizationHospital PrivilegesProfessional Review

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PART II. LEGAL BACKGROUND

36-416 California Forms of Pleading and Practice--Annotated § 416.11

§ 416.11 Arbitrary Deprivation of Membership Prohibited

[1] Common Law Fair Procedure Requirement

A physician's right to practice his or her profession fully is subject to reasonable rules and regulations promulgated by hospitals and professional associations, pursuant to which such institutions may deny or expel a physician from membership [*see* *Kronen v. Pacific Coast Society of Orthodontists (1965) 237 Cal. App. 2d 289, 307, 46 Cal. Rptr. 808* (private assoication); *Wyatt v. Tahoe Forest Hospital Dist. (1959) 174 Cal. App. 2d 709, 714, 345 P.2d 93* (public hospitals)]. However, hospital staffs and professional associations must render their decisions concerning membership rights of physicians in accordance with minimal requisites of fair procedure dictated by established common law principles when denial of such membership rights would impair the physician's right to fully practice his or her profession [*see* *Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 549-550, 554, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*); *Ascherman v. Saint Francis Memorial Hosp. (1975) 45 Cal. App. 3d 507, 511, 119 Cal. Rptr. 507* (*Ascherman II*)].

In the case of a public hospital, the obligation to adhere to fair procedures in making membership determinations rests on the public nature itself of the hospital. A public hospital's character as a public institution imposes an actual, although implied,limitation on its authority to restrict arbitrarily the use of the hospital by the public, whether physician or patient [*Wyatt v. Tahoe Forest Hospital Dist. (1959) 174 Cal. App. 2d 709, 714, 345 P.2d 93]* . In addition, the procedures by which public hospitals may make a determination to deny membership to or expel a physician from membership are governed by *Health & Safety Code §§ 32150-32155*, while the substantive grounds on which an adverse membership determination may be made by a public hospital must be authorized by the broad powers granted to such public hospitals under *Health & Safety Code § 32128* to establish regulations and standards. For a discussion of the procedural protections that public hospitals are required to provide for physicians before rendering an adverse membership determination, see *§ 416.13*.

In the case of private hospitals and private professional organizations who by virtue of their position in the profession have the power to deprive a physician of the right to fully practice his or her profession by depriving the physician of membership, the obligation to adhere to the principles of common law fair procedure is based on the theory that such institutions have fiduciary responsibilities growing out of their public service functions [*Pinsker v. Pacific Coast*

Society of Orthodontists (1974) 12 Cal. 3d 541, 550-554, 116 Cal. Rptr. 245, 526 P.2d 253 (*Pinsker II*) (professional organizations); *see Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 626-627, 166 Cal. Rptr. 826, 614 P.2d 258* (requirements extended to private hospitals)]. Dismissal from a residency at a private hospital has also been held to come under the common law fair procedure requirement when the residency is a prerequisite for entrance into a specialty, although the requirement has not been extended to denial of an application for a private hospital residency [*Ezekial v. Winkley (1977) 20 Cal. 3d 267, 272-278, 142 Cal. Rptr. 418, 572 P.2d 32]* .

[2] Right to Practice Profession Fully

A physician has a legally defensible interest in membership on a hospital staff or in a professional society when deprivation of membership would deprive the physician of the right to practice his or her profession fully [*Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 554, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*)]. The courts have generally spoken of impairment of the physician's right to fully practice his profession in terms of impairment of a substantial economic interest [*Ezekial v. Winkley (1977) 20 Cal. 3d 267, 272, 142 Cal. Rptr. 418, 572 P.2d 32]* . However, it need not be shown that membership is economically necessary for the physician. The Supreme Court has held that a practitioner's right to practice his or her profession fully was denied, even though the practitioner would have been able to make a good living in his field of practice without the membership, when the membership of which the practitioner was deprived was necessary for the practitioner to reach maximum potential achievement and recognition in his field of practice [*Pinsker v. Pacific Coast Soc. of Orthodontists (1969) 1 Cal. 3d 160, 166, 81 Cal. Rptr. 623, 460 P.2d 495* (*Pinsker I*)]. One court of appeal has upheld a physician's interest in being admitted to a hospital staff despite the fact that the physician had staff privileges at other hospitals and made no showing of substantial, significant, or irreparable injury to his practice as a result of the fact that his application for membership was denied, but rath er admitted that he was seeking admission to membership largely for reasons of personal convenience. The court held that under the circumstances of the case the requirement that denial of membership would impair the physician's right to fully practice his profession was satisfied. The court's only comment on the evidence of impairment of the complaining physician's right to fully practice his profession in the case before it was that the mere existence of other hospitals may not be sufficient to prevent impairment of a substantial economic interest with the advent of comprehensive health planning [*Ascherman v. Saint Francis Memorial Hosp. (1975) 45 Cal. App. 3d 507, 509, 511, 119 Cal. Rptr. 507* (*Ascherman II*)]. It need not be shown that the affected institution has monopoly power over professional opportunities in order to establish an interest in membership [*Ascherman v. San Francisco Medical Society (1974) 39 Cal. App. 3d 623, 650, 114 Cal. Rptr. 681* (*AschermanI*)]. However, the fact that denial of membership would effectively preclude thephysician from either entering or realizing his or her full potential achievement and recognition in a specialty may establish an interest in membership [*Ezekial v. Winkley (1977) 20 Cal. 3d 267, 272-278, 142 Cal. Rptr. 418, 572 P.2d 32* ; *Pinsker v. Pacific Coast Soc. of Orthodontists (1969) 1 Cal. 3d 160, 166, 81 Cal. Rptr. 623, 460 P.2d 495* (*Pinsker I*)].

A partial exclusion from staff privileges at a hospital that substantially effects a physician's income merits procedural protection just as does revocation of full staff membership [*Applebaum v. Board of Directors (1980) 104 Cal. App. 3d 648, 658, 163 Cal. Rptr. 831]* . Similarly, a physician may not be summarily excluded from participation on an emergency room call roster, while being permitted to exercise other staff privileges. The essential nature of a qualified physician's right to use hospital facilities is a property interest directly related to the pursuit of his or her livelihood, and is a fundamental interest requiring due process and fair procedure [*Bergeron v. Desert Hospital Corp. (1990) 221 Cal. App. 3d 146, 150-152, 270 Cal. Rptr. 397* (whether attribute of staff membership is property right depends on whether, and to what extent, attribute benefits staff member, not on label hospital has given it)].

Further, "delistment" from the roster of a managed care provider's network of health care providers entitles a physician to procedural protections, including the right not to be expelled from membership for reasons that are arbitrary, capricious or contrary to public policy, since managed care providers control substantial economic interests [*Ambrosino v. Metropolitan Life Ins. Co. (N.D. Cal. 1995) 899 F. Supp. 438* ; *see Potvin v. Metropolitan Life Ins. Co. (1997) 54 Cal. App. 4th 936, 947-948, 63 Cal. Rptr. 2d 202* (petition for review pending as this release goes to press)].

[3] Substantive and Procedural Aspects of Common Law Fair Procedure Requirement

The courts have come to use the expression "common law fair procedure" to designate the obligations imposed on hospitals and professional organizations when making adverse membership determinations, rather than using the expression "due process" as was done in earlier cases, in order to emphasize the nonconstitutional character of these obligations. However, the obligations constituting "common law fair procedure," when the expression is used in this sense, include not only the requirement that the procedure by which the adverse membership decision was arrived at be fair, but also the requirement that that a decision to exclude or expel a physician be substantively rational and based on cause [*Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 550, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*) (procedural fairness); *Pinsker v. Pacific Coast Soc. of Orthodontists (1969) 1 Cal. 3d 160, 166, 81 Cal. Rptr. 623, 460 P.2d 495* (*Pinsker I*) (substantive cause for rejection)]. Thus, when a private association is legally required to refrain from arbitrary action, the association's action must be both substantively rational and procedurally fair. The essence of the concept is that the action cannot be arbitrary or capricious. It is more appropriate to refer to this standard in terms of "fair procedure" in a nonconstitutional sense rather than due process in the constitutional sense. The essence of the right is one of fairness. But, essentially, there is no real difference between fair procedure and due process rights. The distinction lies in the origin, rather than in the extent, of the protection afforded to the individual [*Gill v. Mercy Hospital (1988) 199 Cal. App. 3d 889, 897, 903, 245 Cal. Rptr. 304]* . The requirements of fair procedure and of substantive rationality are discussed separately under §§ 416.13, 416.14.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewHealthcare LawBusiness Administration & OrganizationHospital PrivilegesGeneral OverviewHealthcare LawBusiness Administration & OrganizationHospital PrivilegesRestrictions

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§ 416.12 Exhaustion of Administrative Remedies

A doctor who challenges the propriety of a hospital's denial or withdrawal of staff privileges must pursue internal remedies afforded by the hospital to a final decision on the merits before resorting to the courts for relief. The exhaustion doctrine is not a matter of judicial discretion; the remedy must be exhausted before the courts will act [*Sahlolbei v. Providence Healthcare, Inc. (2003) 112 Cal. App. 4th 1137, 1146, 5 Cal. Rptr. 3d 598* ; *Unnamed Physician v. Board of Trustees (2001) 93 Cal. App.4th 607, 619-620, 113 Cal. Rptr. 2d 309]* . However, the remedies must be provided the physician before the physician's privileges can be terminated, and the failure to provide a pre-termination hearing renders the internal remedies inadequate and makes it unnecessary for the physician to exhaust them [*Sahlolbei v. Providence Healthcare, Inc. (2003) 112 Cal. App. 4th 1137, 1146-1155, 5 Cal. Rptr. 3d 598]* .

These requirements apply for physicians suspended or terminated from networks of medical providers as well [*see, e.g., Lee v. Blue Shield of California (2007) 154 Cal. App. 4th 1369, 1373, 65 Cal. Rptr. 3d 612* (exhaustion of administrative remedy under *Bus. & Prof. Code § 809 et seq.*, commonly referred to as "809 hearing," was prerequisite to physician's recovery of damages for wrongful suspension and termination as physician for medical provider network)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityExhaustion of RemediesCivil ProcedureJusticiabilityExhaustion of RemediesAdministrative RemediesHealthcare LawBusiness Administration & OrganizationHospital PrivilegesRestrictionsHealthcare LawBusiness Administration & OrganizationJudicial ReviewExhaustion of Remedies

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36-416 California Forms of Pleading and Practice--Annotated § 416.13

§ 416.13 Fair Procedure

[1] Statutory Requirements for Public Hospitals

The board of directors of a public hospital must adopt reasonable rules and regulations, or bylaws, providing for appellate review of any action, decision, or recommendation of the medical staff affecting the professional privileges of any member of, or applicant for membership on, the medical staff. This appellate review must be conducted consistent with the requirements of *Bus. & Prof. Code § 809.4*. The board's decision rendered after appellate review is final. Nothing in this section abrogates the obligation of the hospital and the medical staff to comply with the requirements of *Bus. & Prof. Code § 809 et seq.* The board of directors may order that the hearing held pursuant to *Health & Safety Code §§ 32150-32155* (hearing procedures in membership determinations) be held in private or executive sessions, provided that an applicant or medical staff member whose staff privileges are a direct subject of a hearing may request a public hearing. Deliberations of the board of directors with respect to matters pertaining to *Health & Safety Code §§ 32150-32155* may be held in executive session [*Health & Safety Code § 32155*; for discussion of *Bus. & Prof. Code § 809 et seq., see § 416.15, below*].

[2] Fair Procedure Requirements for Private Institutions

[a] Notice and Hearing

A basic ingredient of the fair procedure required under the common law is that an individual who will be adversely affected by a decision be afforded some meaningful opportunity to be heard in his or her defense [*Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 555, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*)]. Fair hearing includes ample notice, opportunity to hear and cross examine witnesses and to present evidence [*Gill v. Mercy Hospital (1988) 199 Cal. App. 3d 889, 897, 904, 245 Cal. Rptr. 304]* . One court of appeal articulated the elements of the legal protections that a private hospital must provide before depriving a physician of staff privileges as follows [*Ascherman v. San Francisco Medical Society (1974) 39 Cal. App. 3d 623, 648-649, 114 Cal. Rptr. 681* (*Ascherman I*) (dicta)]:

- A hearing before the board must be provided.

- The physician should be given notice that a hearing is available to him or her.

- He or she should be given notification far enough in advance of the hearing to allow him or her to prepare an adequate defense.

- In conjunction with such notice, a physician whose privileges are being revoked or who is being denied reappointment should be provided a written statement of the charges against him or her. Such statement should be sufficient to apprise the physician of the specific charges against him or her.

- A physician who is being denied initial appointment to a hospital staff should be provided a written statement specifying the reasons his or her application is being denied.

- The physician should have the right to call his or her own witnesses.

The articulation of the elements of the common law fair procedure requirement adopted by the court of appeal in *Ascherman I* was subsequently quoted in its entirety by the Supreme Court in support of the Court's holding that membership determinations by private hospitals are of such a nature as to be subject to judicial review under *Code Civ. Proc. § 1094.5* (administrative mandate) [*Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 815-816 n. 12, 140 Cal. Rptr. 442, 567 P.2d 1162* (*Anton I*) (holding abrogated on unrelated point by legislative enactment of *Code Civ. Proc. § 1094.5(d)* in 1978)]. Since neither the *Anton I* nor the *Ascherman I* cases dealtspecifically with all of the elements of required procedural fairness set out in the statement adopted by those cases, it is not clear to what extent this statement represents binding authority and to what extent it represents dicta. However, the courts in both cases apparently intended the statement to serve as a persuasive guideline as to the procedures that a private hospital must follow in making a membership determination.

A professional society was held not to have satisfied the common law fair procedure requirements by merely investigating a physician's case and denying the physician's application for membership on the basis of information disclosed by the investigation, when this process did not give the physician an opportunity to respond [*Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 555, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*)]. A threshold requirement for application for hospital staff membership based on which a hospital declined to consider a physician's application without formally rejecting it, thus denying the physician the opportunity to respond normally provided for by the hospital bylaws in case of rejection, constituted a denial of fair procedure [*Ascherman v. Saint Francis Memorial Hosp. (1975) 45 Cal. App. 3d 507, 509, 514, 119 Cal. Rptr. 507* (*Ascherman II*)]. A statement of reasons for denying membership may fall short of satisfying the notice requirement with respect to subsequent inquiry into matters outside of the scope of the reasons stated [*see Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 628, 632-634, 166 Cal. Rptr. 826, 614 P.2d 258]* .

[b] Formal Proceedings Not Required

The hearing that must be provided need not encompass all of the aspects of a formal judicial or quasi-judicial trial [*Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 815-816 n.12, 140 Cal. Rptr. 442, 567 P.2d 1162* (*Anton I*) (holding abrogated on unrelated point by legislative enactment of *Code Civ. Proc. § 1094.5(d)* in 1978); *but see* Huang v. Board of Directors *(1990) 220 Cal. App. 3d 1286, 1295, 270 Cal. Rptr. 41* (procedure must afford affected party with fair opportunity to present his or her position)]. Rather, initial responsibility is placed on the hospital or professional organization to devise practical methods of providing notice and an opportunity to defend. When these methods are devised, the nature of the tendered issue should determine whether mere written response by the adversely affected physician is sufficient to provide a meaningful opportunity to respond to charges, or whether an appearance by the physician and a more extensive hearing are required [*Ezekial v. Winkley (1977) 20 Cal. 3d 267, 278-279, 142 Cal. Rptr. 418, 572 P.2d 32]* . The courts remain available to afford relief, however, if the hospital or professional organization abuses its discretion in devising methods of providing notice and an opportunity to respond [*Pinsker v.*

Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 556, 116 Cal. Rptr. 245, 526 P.2d 253 (*Pinsker II*)]. Some instances in which methods of procedure established by hospitals or professional organizations were found to be inadequate are set out under § 416.13[2][a].

[c] Discovery

No formal right to discovery exists in an administrative hearing not subject to the Administrative Procedure Act. However, "fair procedure" requires disclosure of all evidence forming the basis of the charges and any other evidence made available to the hearing panel [*Gill v. Mercy Hospital (1988) 199 Cal. App. 3d 889, 907, 245 Cal. Rptr. 304]* .

[d] Voir Dire

The right to fair procedure includes the right to impartial adjudicators [*Rosenblit v. Superior Court (1991) 231 Cal. App. 3d 1434, 1448, 282 Cal. Rptr. 819]* . A physician is entitled to a meaningful opportunity through voir dire to determine the potential bias of members of the hearing panel [*Rosenblit v. Superior Court (1991) 231 Cal. App. 3d 1434, 1448-1449, 282 Cal. Rptr. 819* (secret unreported voir dire conducted by panel members themselves is inadequate)].

[e] Limited Right to Confront Accusers

According to persuasive dicta by the Supreme Court and one court of appeal, since a private hospital board has no subpoena power, a physician applying for or seeking to retain staff privileges at a private hospital has no right to confront and cross examine persons who have made adverse statements pertaining to the physician unless those persons testify at the hearing. However, in making its decision, the board cannot rely on evidence that was not produced at the hearing, and it cannot rely on ex parte communications that were not made known to the physician [*Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 815-816 n.12, 140 Cal.Rptr. 442, 567 P.2d 1162* (*Anton I*) (holding abrogated on unrelated point by legislative enactment of *Code Civ. Proc. § 1094.5(d)* in 1978); *Ascherman v. San Francisco Medical Society (1974) 39 Cal. App. 3d 623, 648-649, 114 Cal. Rptr. 681* (*Ascherman I*); § 416.13[2][a], for discussion of the legal import of this dicta]. This point is illustrated by the procedures followed by the hospital in *Goodstein v. Cedars-Sinai Medical Center* [*Goodstein v. Cedars-Sinai Medical Center (1998) 66 Cal. App. 4th 1257, 78 Cal. Rptr. 2d 577]* . Although the peer review committee had a firm policy not to disclose to the physician the sources of information that first led it to investigate and meet with the physician, the initial complaint merely triggered a review by the committee. Only after the committee determined that there is a legitimate cause for concern did it request a meeting with the physician. At that meeting the physician had ample opportunity to respond. Only after the committee concluded that there was cause for concern that psychiatric evaluation and drug testing were requested, based on its evaluation of the information gleaned dring that meeting [*Goodstein v. Cedars-Sinai Medical Center (1998) 66 Cal. App. 4th 1257, 1264-1267, 78 Cal. Rptr. 2d 577* (physician's refusal to comply with request resulted in suspension of hospital privileges)].

Public hospitals, unlike private hospitals or professional organizations, do have subpoena power [*see Health & Safety Code § 32154*]. Thus, although there is no case on point, it appears that the right of a physician who has been denied or expelled from staff membership in a public hospital to confront his or her accuser is not limited as is that of a physician who has been deprived of membership by a private institution.

[f] Right to Attorney at Board's Discretion

According to persuasive dicta by the Supreme Court and one court of appeal, the hospital board has discretion to determine whether counsel may attend the hearing andparticipate in the proceedings. The courts in those cases stated in further dicta that participation of counsel would probably not be necessary unless the hospital's attorney is used in the proceedings or the extreme nature of the charges involved indicated that representation by an attorney would be advantageous. The courts further stated that such a limitation would not preclude the physician from consulting an

attorney prior to a hearing even though the attorney was not allowed to participate in the hearing itself [*Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 815-816 n.12, 140 Cal. Rptr. 442, 567 P.2d 1162* (*Anton I*) (holding abrogated on unrelated point by legislative enactment of *Code Civ. Proc. § 1094.5(d)* in 1978); *Ascherman v. San Francisco Medical Society (1974) 39 Cal. App. 3d 623, 648-649, 114 Cal. Rptr. 681* (*Ascherman I*); *see § 416.13[2][a]*, for discussion of the legal import of this dicta].

[g] Separation of Investigative and Adjudicatory Functions

A party is not denied an impartial adjudicator merely because an administrative entity performs both the functions of prosecutor and judge. Overlapping investigatory, prosecutorial, and adjudicatory functions do not necessarily deny a fair hearing and are common before most administrative boards. By the very nature of internal administrative peer review process, a hospital or one of its representatives is likely to be involved in the initiation and prosecution of charges, including any appeal process [*Hongsathavij v. Queen of Angels etc. Medical Center (1998) 62 Cal. App. 4th 1123, 1142-1143, 73 Cal. Rptr. 2d 695* ; *see Weinberg v. Cedars-Sinai Medical Center (2004) 119 Cal. App. 4th 1098, 1112-1114, 15 Cal. Rptr. 3d 6* (private hospital); *Applebaum v. Board of Directors (1980) 104 Cal. App. 3d 648, 658, 163 Cal. Rptr. 831]* . In *Applebaum* the court found that the facts showed sufficient probability of foreclosure of fairness to overturn the hospital's membership determination when the accusing physician was included in the investigatory panel, there was a substantial overlap of membership between the investigatory committee and the committee charged with adjudicating the membership determination, and the relationships among the various committees involved in the proceedings made an impartial determination by the appeal committee unlikely [*Applebaum v. Board of Directors (1980) 104 Cal. App. 3d 648, 659-660, 163 Cal. Rptr. 831]* . However, the existence of an overlap of membership between the original investigatory committee and an ad hoc committee later formed to review an adverse membership determination made by an independent committee does not constitute grounds for overturning the hospital's membership determination [*Miller v. National Medical Hospital (1981) 124 Cal. App. 3d 81, 90-91, 177 Cal. Rptr. 119* ; *see also Hongsathavij v. Queen of Angels etc. Medical Center (1998) 62 Cal. App. 4th 1123, 1142, 73 Cal. Rptr. 2d 695* (fact that no one involved in process hd any overlapping membership in both adjudicatory body and reviewing appeal board was indication of lack of bias or practical probability of unfairness)].

[h] Notice and Hearing Not Required if Not Requested

In setting out the minimal fair hearing requirement, the Supreme Court in *Pinsker II* added in dicta that a professional association need not engage in a meaningless procedure if the physician does not care to know the reasons for or to contest the institution's decision. Thus, the Court stated that it is permissible for an association to initially reject an applicant without explanation, as long as the association clearly indicates that it will inform the applicant of the reasons for the exclusion and afford an opportuntity to respond if the applicant desires it [*Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 555 n.13, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*)].

[i] Decision May Not Rest on Ex Parte Evidence

According to persuasive dicta by the Supreme Court and one court of appeal, the basis for the decision must come from substantial evidence that was produced at the hearing. Thus, the board cannot rely on ex parte communications that were not made known to the physician [*Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 815-816 n.12, 140 Cal. Rptr. 442, 567 P.2d 1162* (*Anton I*) (holding abrogated on unrelated point by legislative en actment of *Code Civ. Proc. § 1094.5(d)* in 1978); *Ascherman v. San Francisco Medical Society (1974) 39 Cal. App. 3d 623, 648-649, 114 Cal. Rptr. 681* (*Ascherman I*); § 416.13[2], for discussion of the legal import of this dicta *see also Goodstein v. Cedars-Sinai Medical Center (1998) 66 Cal. App. 4th 1257, 1266-1267, 78 Cal. Rptr. 2d 577* (emphasizing notice and opportunity given to physician before suspending his privileges for possible substance abuse problems in dismissing physician's charge that hospital's policy of nondisclosure of source or substance of complaints that triggered investigation was unfair)].

[j] Bylaws May Allocate Burden of Proof

An institution may set out bylaws placing on the applicant both the burden of coming forward with evidence of his or her qualification and the ultimate burden of proof at the institutional hearing on the application for membership, as long as the bylaws taken as a whole contemplate a substantial showing by the charging committee in support of its allegations, and provide adequate notice of charges and a fair opportunity to respond to them [*Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 828-830, 140 Cal. Rptr. 442, 567 P.2d 1162* (*Anton I*) (holding abrogated on unrelated point by legislative enactment of *Code Civ. Proc. § 1094.5(d)* in 1978); *see Rosenblit v. Superior Court (1991) 231 Cal. App. 3d 1434, 1449, 282 Cal. Rptr. 819]* .

[3] Hearing on Review No Substitute for Fair Procedure

A full hearing on the merits on review by the trial court of a professional association's determination to reject an application for membership is no substitute for fair procedure that has been found lacking in the association's initial determination [*Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 557, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingGeneral OverviewAdministrative LawAgency AdjudicationHearingsRight to HearingStatutory RightAdministrative LawAgency InvestigationsScopeSubpoenasEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewHealthcare LawBusiness Administration & OrganizationHospital PrivilegesProfessional ReviewHealthcare LawBusiness Administration & OrganizationHospital PrivilegesRestrictionsHealthcare LawBusiness Administration & OrganizationJudicial ReviewGeneral OverviewHealthcare LawBusiness Administration & OrganizationPeer ReviewOrganizationsHealthcare LawBusiness Administration & OrganizationPeer ReviewStatutes

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§ 416.14 Substantive Rationality

[1] Right to Membership Subject to Reasonable Rules

A licensed practitioner may be excluded from a professional society if he or she fails to fulfill reasonable requirements of the society [*see Kronen v. Pacific Coast Soc. of Orthodontists (1965) 237 Cal. App. 2d 289, 305-307, 46 Cal. Rptr. 808]* . These requirements may include standards of profesional qualification [*see Pinsker v. PacificCoast Society of Orthodontists (1974) 12 Cal. 3d 541, 560, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*)]. An association may expel members for (1) violation of established rules of the association that have been subscribed or assented to by members and that provide for expulsion as penalty, or (2) conduct that clearly violates the objects of the asociation, which would thwart those objects or bring the association into disrepute if the conduct were persisted in [*Smith v. Kern County Medical Asso. (1942) 19 Cal. 2d 263, 270, 120 P.2d 874]* . Similarly, the right to practice in a hosptial has been held to be subject to reasonable rules [*Wyatt v. Tahoe Forest Hospital Dist. (1959) 174 Cal. App. 2d 709, 714, 345 P.2d 93]* .

[2] General Requirement That Rules Be Substantively Reasonable

Expulsion or exclusion from public or private hospital staff may not rest on a rule that is substantively capricious, contrary to public policy, or unreasonably susceptible of arbitrary or discriminatory application [*Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 626, 627, 166 Cal. Rptr. 826, 614 P.2d 258* ; *Gaenslen v. Board of Directors (1986) 185 Cal. App. 3d 563, 568, 232 Cal. Rptr. 239]* .

A hospital's requirement that an applicant for staff membership submit three letters of recommendation from current staff members has been held to be substantively unreasonable [*Ascherman v. Saint Francis Memorial Hosp. (1975) 45 Cal. App. 3d 507, 509, 512-514, 119 Cal. Rptr. 507* (*Ascherman II*)]. However, operation of a closed staff for a hospital's radiology department has been held to be both reasonable and within the authority of a public hospital district pursuant to *Health & Safety Code § 32121(i)* (granting broad powers to public hospital districts in running of health care facilities), despite the fact that such a policy necessarily denies radiologists who do not have an exclusive contract with the hospital the right to use the hospitals radiological facilities [*Centeno v. Roseville Community Hospital (1979) 107 Cal. App. 3d 62, 70-72, 167 Cal. Rptr. 183]* . Similarly, violation of a local medical society rule proscribing continued practice at a specific hospital has been held to justify expulsion [*Smith v. Kern County Medical Asso. (1942) 19 Cal. 2d 263, 266, 269-270, 120 P.2d 874]* .

[a] Requirement of Medical Malpractice Insurance Permitted

The rules of a health facility may include provisions that require every member of the medical staff to have professional liability insurance as a condition to being on the medical staff of the health facility [*Health & Safety Code § 1319* (abrogating prior case law to contrary)].

[b] Discrimination Based on Type of Professional Degree Prohibited

The rules of a health facility may not discriminate on the basis of whether the staff member holds an M.D. (allopatic medicine), D.O. (osteopathic medicine) or D.P.M. (podiatry) degree [*Health & Safety Code § 1316(a)*].

[c] Requirement of Nexus

A hospital's bylaws must be read so as to require a demonstrable nexus between the activities or professional conduct cited as the basis for the adverse membership decision and established professional standards or aims of the hospital's medical staff [*Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 628, 166 Cal. Rptr. 826, 614 P.2d 258* ; *Miller v. National Medical Hospital (1981) 124 Cal. App. 3d 81, 93, 177 Cal. Rptr. 119]* . Thus, a hospital's bylaw requirement that a staff member be able to work with others is substantively rational only when it is so construed that a denial of staff membership to a physician based on this rule requires a showing that the physician's inability to work with others in a hospital setting is such as to present a real and substantial danger that patients treated by the physician might receive other than high quality medical care at the hospital [*Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 628, 629, 166 Cal. Rptr. 826, 614 P.2d 258]* . The hospital must come forward with evidence of a concrete and specific nature directed toward establishing a link between the applicant's conduct and an effect on the quality of the applicant's patient care [*Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 629, 632-633, 166 Cal. Rptr. 826, 614 P.2d 258]* . It appears, however, that the required nexus need not always be between the conduct complained of and the quality of medical care provided by the physician. Thus, a hospital can properly suspend the staff privileges of a physician who has been convicted of conspiracy to murder his wife because such a crime is incompatible with the aims and goals of the hospital as well as with a physician's responsibility to alleviate suffering and uphold the dignity and sanctity of human life [*Miller v. National Medical Hospital (1981) 124 Cal. App. 3d 81, 93, 177 Cal. Rptr. 119]* .

[d] Vague and Ambiguous Rules

[i] In General

Hospital districts may not adopt standards for exclusion of physicians from use of their hospitals that are so vague and ambiguous as to provide substantial danger of arbitrary discrimination in their application [*Rosner v. Eden Township Hospital Dist. (1962) 58 Cal. 2d 592, 598, 25 Cal. Rptr. 551, 375 P.2d 431]* . A rule that only physicians whose background and training assures that patients receive the best possible medical care has been held to be too vague and uncertain to be permissibly used as a basis for exclusion of an applicant from hospital staff privileges [*Wyatt v. Tahoe Forest Hospital Dist. (1959) 174 Cal. App. 2d 709, 715, 345 P.2d 93]* . On the other hand, a rule requiring physicians to provide "high quality" patient care is not void for vagueness [*Gaenslen v. Board of Directors (1986) 185 Cal. App. 3d 563, 569, 232 Cal. Rptr. 239]* . A requirement for granting hospital staff privileges that is reasonable in itself may be impermissible as a basis for excluding a physician from such privileges when it is couched in such vague and ambiguous terms that it sets out no adequate standards for application, and authorizes the hospital to apply the requirement in a manner going beyond the scope of the reasonable basis for the requirement [*see* *Martino v. Concord Community Hosp. District (1965) 233 Cal. App. 2d 51, 58, 60, 43 Cal. Rptr. 255]* .

However, the effect of ambiguity in a professional association's rule may be cured if the association gives an applicant for membership a timely and adequate explanation of the rule [*see* *Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 559-560, 560 n.19, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*)].

[ii] Official Interpretation of Ambiguous Rule

When an association gives a timely and adequate explanation of a rule that is ambiguous on its face, the physician may not challenge the association's official interpretation [*Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 560, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*)]. Despite the seemingly absolute wording of this holding, it seems unlikely that the court meant to say that a timely and adequate explanation would render a rule immune from any attack at all, even if the rule as interpreted in the hospital or society's explanation is substantively irrational. The precise issue of what effect, if any, a timely and adequate explanation would have on an attack for substantive irrationality was not before the court in *Pinsker II*, since in other parts of the opinion the court had held that the rule as interpreted by the society was substantively rational. In a later case, the Supreme Court declined to follow a hospital's official interpretation of a rule which would have rendered the rule irrational, without addressing the effect of timely and adequate explanation by the hospital [*see Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 628, 630-633, 166 Cal. Rptr. 826, 614 P.2d 258]* . The most reasonable interpretation of the holding in *Pinsker II* seems to be that a timely and adequate explanation by the hospital or professional association merely resolves a rule's ambiguity, and therefore entitles the hospital or professional organization to defend that rule as it has interpreted it, without having to defend against alternative interpretations offered by the physician.

[e] Rules That Are Contrary to Public Policy

A hospital or association rule may apparently be denied enforcement if it is contrary to public policy; the court may, however, enforce the rule if it can be construed in such a manner that it does not violate public policy [*see Bernstein v. Alameda etc., Med. Assn. (1956) 139 Cal. App. 2d 241, 246-247, n.5, 293 P.2d 862]* .

[3] Standards for Qualification or Competence

[a] In General

Professional associations may impose standards of qualification for membership that are higher than those imposed for obtaining a license to practice the profession generally. In particular, an association devoted to a professional specialty may require an applicant to have taken courses that concentrate on the specialty in question [*Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 560, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*)]. Requiring an applicant for staff membership in a hospital to take an examination as a condition of acceptance of the application is a reasonable method of determining the applicant's competence, provided that the requirement is drawn up with sufficient specificity to permit the identification of standards by which the requirement may be reviewed, and is limited to those areas of medicine in which the applicant will practice at the hospital [*Martino v. Concord Community Hosp. District (1965) 233 Cal. App. 2d 51, 58, 60, 43 Cal. Rptr. 255* ; *see also § 416.14[2][d]*]. An expert supervisor's judgment as to a resident's competence is entitled to be given great weight on judicial review [*Ezekial v. Winkley (1977) 20 Cal. 3d 267, 278-279, 142 Cal. Rptr. 418, 572 P.2d 32]* .

[b] Ability to Work With Others as Necessary Qualification

A hospital may set out a requirement for admission to staff membership that an applicant be temperamentally able to work with others, provided that the requirement is so construed that denial of membership on that basis requires some positive evidence of a connection between the inability to work with others and the quality of medical care that the applicant would provide to the hospital's patients [*Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 628, 629, 166 Cal. Rptr. 826, 614 P.2d 258]* . Exclusion or expulsion of a physician from membership on the grounds of inability to get along with others may be particularly suspect when the finding that the physician was unable to get along with others was based on evidence that the physician frequently criticized the quality of medical care provided in his community [*see Rosner v. Eden Township Hospital Dist. (1962) 58 Cal. 2d 592, 598, 25 Cal. Rptr. 551, 375 P.2d 431* (scope of overall holding narrowed by *Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 628, 629, 166 Cal. Rptr. 826, 614 P.2d 258* ; *see also § 416.14[2][c]*]. It may be possible to satisfy the requirement of a connection

between the physician's inability to work with others and the quality of medical care provided by the physician by showing that a derogation of quality of medical care may result in the future even without a showing that any particular patient suffered [*Marmion v. Mercy Hospital and Medical Center (1983) 145 Cal. App. 3d 72, 87-88, 193 Cal. Rptr. 225* (involving medical resident and not clarifying whether broad statement of rule could be applied to hospital staff member)].

The requirement of showing a connection between inability to work with others and the quality of medical care delivered by the physician does not apply in the case of a medical resident dismissed from a hospital [*Marmion v. Mercy Hospital and Medical Center (1983) 145 Cal. App. 3d 72, 86-87, 193 Cal. Rptr. 225* (alternate ground that requirement was satisfied in any case)].

[4] Requirement of Existing Cause

Exclusion of a physician from the staff of a public hospital must be for existing cause. Thus, a public hospital may not exclude a physician with an unrevoked license who is in good standing merely because of past misconduct that made the physician subject to professional discipline [*Wyatt v. Tahoe Forest Hospital Dist. (1959) 174 Cal. App. 2d 709, 714, 345 P.2d 93]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationVaguenessHealthcare LawBusiness Administration & OrganizationHospital PrivilegesGeneral OverviewHealthcare LawBusiness Administration & OrganizationHospital PrivilegesRestrictionsHealthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 416 PHYSICIANS: MEMBERSHIP ON HOSPITAL STAFFS OR IN PROFESSIONAL ORGANIZATIONS
PART II. LEGAL BACKGROUND

36-416 California Forms of Pleading and Practice--Annotated § 416.15

§ 416.15 Hospital Peer Review Proceedings Under Bus. & Prof. Code § 809 et seq.

[1] Purpose; Applicability

The California Legislature enacted *Bus. & Prof. Code § 809 et seq.* for the purpose of opting out of federal legislation passed to encourage physicians to engage in effective peer review. These sections delegate to the private sector the responsibility to provide fairly conducted peer review in accordance with due process, including notice, discovery and hearing rights and defines what constitutes minimum due process requirements for the review [*Mileikowsky v. Tenet Healthsystem (2005) 128 Cal. App. 4th 531, 557, 27 Cal. Rptr. 3d 171* ; *Unnamed Physician v. Board of Trustees (2001) 93 Cal. App. 4th 607, 622, 113 Cal. Rptr. 2d 309]* . These rights and requirements applyto hospitals extending privileges to doctors, and also apply to health care service plans [*Lee v. Blue Shield of California (2007) 154 Cal. App. 4th 1369, 1373-1374, 65 Cal. Rptr. 3d 612*].

Bus. & Prof. Code § 809 provides generally that peer review, fairly conducted, is essential to preserving the highest standards of medical practice and peer review not conducted fairly results in harm both to patients and healing arts practitioners by limiting access to care. It recognizes not only the balance between the rights of the physician to practice his or her profession and the duty of the hospital to ensure quality care, but also the importance of a fair procedure, free of arbitrary and discriminatory acts [*Mileikowsky v. Tenet Healthsystem (2005) 128 Cal. App. 4th 531, 557, 27 Cal. Rptr. 3d 171* ; *Unnamed Physician v. Board of Trustees (2001) 93 Cal. App. 4th 607, 616-617, 113 Cal. Rptr. 2d 309]* .

Bus. & Prof. Code § 809.1 et seq. deal with the right of a physician to a hearing after adverse action has been proposed. The procedural rights in these sections apply whether the adverse action is initiated by a peer review body or by a governing body [*Sahlolbei v. Providence Healthcare, Inc. (2003) 112 Cal. App. 4th 1137, 1147-1148, 5 Cal. Rptr. 3d 598*]. These hearings, known as "809 hearings," apply only to proposed terminations and suspensions taken for a medical disciplinary cause or reason [*Lee v. Blue Shield of California (2007) 154 Cal. App. 4th 1369, 1374, 65 Cal. Rptr. 3d 612* ; *see Bus. & Prof. Code § 809.1(a)*], which is defined as that aspect of a physician's competence or professional conduct that is reasonably likely to be detrimental to patient safety or to the delivery of patient care [*Bus. & Prof. Code § 805(a)(6)*].

The procedure in *Bus. & Prof. Code § 809.1 et seq.* only applies to final proposed actions for which a report is required

to be filed under *Bus. & Prof. Code § 805* [*Bus. & Prof. Code § 809.1(a)*]. A report must be filed with the state agency having jurisdiction over a practitioner whose staff privileges are terminated for a medical disciplinary cause or reason [*Bus. & Prof. Code § 805(b)(2)*]. "Medical disciplinary cause or reason" is conduct reasonably likely to be detrimental to patient safety or to the delivery of patient care [*Bus. & Prof. Code 805(a)(6)*].

[2] Notice

A physician who is the subject of a final proposed action of a peer review body, i.e., a body composed of members of the hospital medical staff [*Bus. & Prof. Code § 805(a)(1)(A)*], is entitled to written notice of the action [*Bus. & Prof. Code § 809.1(a)*]. A peer review body includes a health care service plan [*Bus. & Prof. Code § 805(a)(1)(B)*]. Further, if a peer review body proposes to terminate a physician's membership in the organization for "a medical disciplinary cause or reason" [*Bus. & Prof. Code § 805(b)(1)*], or if it immediately suspends the physician on the ground that its failure to do so may result in "an imminent danger to the health" of a patient [*Bus. & Prof. Code § 809.5(a)*], the physician is entitled to notice and an administrative hearing [*Bus. & Prof. Code § 809.1(b)*]. The notice must inform the physician of the right to request a hearing on the action [*Bus. & Prof. Code § 809.1(b)(3)*]. "Final proposed action" is "the final decision or recommendation of the peer review body after informal investigatory activity or prehearing meetings, if any" [*Bus. & Prof. Code § 809.1(a)*].

Providing a hearing after a decision to terminate staff privileges rather than before is a failure to comply with *Bus. & Prof. Code § 809.1 et seq.* [*Sahlolbei v. Providence Healthcare, Inc. (2003) 112 Cal. App. 4th 1137, 1148-1151, 5 Cal. Rptr. 3d 598* (hospital's termination of physician's staff privileges without hearing failed to comply with § 809.1 et seq. even though hospital provided hearing later)].

[3] Hearing Panel

The hearing must be held, as determined by the hospital or plan, before a trier of fact, which must be an arbitrator or arbitrators selected by a process mutually acceptable to the physician and the hospital or plan, or before a panel of unbiased individuals who gain no direct financial benefit from the outcome, who have not acted as an accuser, investigator, fact-finder, or initial decision-maker in the same matter. The panel must include, when feasible, an individual practicing the same specialty as the physician [*Bus. & Prof. Code § 809.2(a)*].

The panel may select a hearing officer to preside at the hearing, but is not required to do so [*Bus. & Prof. Code § 809.2(b)*]. If a hearing officer is selected to preside at a hearing held before a panel, the hearing officer must gain no direct financial benefit from the outcome, may not act as a prosecuting officer or advocate, and is not entitled to vote [*Bus. & Prof. Code § 809.2(b)*].

The physician may voir dire panel members and challenge the impartiality of the members. Challenges are to be ruled on by the presiding officer, who is the hearing officer, if one has been selected [*Bus. & Prof. Code § 809.2(c)*].

[4] Discovery

The parties have discovery rights and remedies if either party fails to comply with the discovery process.

The parties have the right to inspect and copy any documentary information relevant to the charges in the opposing party's possession or control, subject to specified restrictions. The hearing panel considers and rules on any request for access to information, and may impose any safeguards the protection of the peer review process and justice requires. A party's failure to provide the requested information at least 30 days before the hearing constitutes good cause for a continuance [*Bus. & Prof. Code § 809.2(d)*]. The statute provides for the right to "inspect and copy," but does not state that there is a duty to produce the requested documents.

At the request of either side, the parties will exchange lists of witnesses expected to testify and copies of all documents expected to be introduced at the hearing. A party's failure to exchange witness lists and copies of documents at least 10 days before the hearing begins constitutes good cause for a continuance [*Bus. & Prof. Code § 809.2(f)*].

The only procedural consequence of failure to provide information requested under *Bus. & Prof. Code § 809.2(d)* is that it constitutes good cause for a continuance. Thus, while the failure to provide requested documentation may have also substantive consequences, the only procedural sanction specifically allowed is a continuance of the hearing. There is no authority to terminate a hearing prematurely for failure to producerequested documentation. A physician's noncooperation in discovery is not a reason for the hospital or plan to terminate the proceeding or to terminate the physician [*Lee v. Blue Shield of California (2007) 154 Cal. App. 4th 1369, 1377, 65 Cal. Rptr. 3d 612* (terminating physician's provider status for failing to cooperate in discovery was equivalent to terminating him for medical incompetency because effect of termination sanction was to let stand plan's proposed termination or suspension based on alleged medical incompetency, which was the cause of request for hearing in first place)]. The decision as to when to terminate the 809 hearing must be made by the hearing panel in the course of the 809 hearing itself, after affording the physician notice and an opportunity to be heard [*Lee v. Blue Shield of California (2007) 154 Cal. App. 4th 1369, 1377, 65 Cal. Rptr. 3d 612*].

[5] Continuances

Continuances may be granted by the presiding officer on a showing of good cause [*Bus. & Prof. Code § 809.2(g)*]. However, a hearing must commence within 60 days after receipt of a request for hearing and be completed within a reasonable time, after a physician receives notice of a final proposed action or an immediate suspension or restriction of clinical privileges, unless the presiding officer issues a written decision finding that the licentiate failed to comply with discovery [*see Bus. & Prof. Code § 809.2(d), (e)*; *see also* [4], *above*] in a timely manner or consented to the delay [*Bus. & Prof. Code § 809.2(g)*]. The parties are bound by any additional notice and hearing provisions contained in any applicable professional society or medical staff bylaws which are not inconsistent with *Bus. & Prof. Code § 809.1 et seq.* [*Bus. & Prof. Code § 809.6(a)*].

[6] Hearing

In the hearing, the parties have the following procedural rights [*Bus. & Prof. Code § 809.3(a)(1)-(5)*]:

- To be provided with all of the information made available to the trier of fact.
- To have a record made of the proceedings, copies of which may be obtained by the physician on payment of any reasonable charges associated with the preparation of the record.
- To call, examine, and cross-examine witnesses.
- To present and rebut evidence determined by the arbitrator or presiding officer to be relevant.
- To submit a written statement at the close of the hearing.

When the hearing is requested by a physician, the hospital or plan bears the burden of persuading the hearing panel by a preponderance of the evidence that the action or recommendation is reasonable and warranted [*Bus. & Prof. Code § 809.3(b)(3)*]. At the conclusion of the hearing, the parties have the right to a written decision and to be informed of the procedure for appealing the decision, if one exists [*Bus. & Prof. Code § 809.4(a)(1), (2)*]. If a peer review body fails to take action in response to a direction from the hospital's or health care plan's governing body, the governing body itself can take action against a physician. Any such action must comply fully with the procedures and rules applicable to peer review proceedings established by *Bus. & Prof. Code §§ 809.1-809.6*, inclusive [*Bus. & Prof. Code § 809.05(c)*].

A decision to prematurely terminate a hearing convened under the authority of *Bus. & Prof. Code § 809.2* lets stand the final proposed action of the peer review body that was the cause of the request for a hearing, which is a decision on the merits. A decision on the merits is consigned to the trier of fact, and the hearing officer may not vote on the merits [*see Bus. & Prof. Code § 809.2(a), (b)*; *see* discussion in [3], *above*].

[7] Exhaustion of Remedies

Before a physician can seek damages for the wrongful suspension or wrongful termination of hospital staff privileges or a provider contract, the physician must exhaust the 809 hearing remedy, including seeking judicial review of the hearing decision should the suspension or termination be upheld [*Lee v. Blue Shield of California (2007) 154 Cal. App. 4th 1369, 1376, 1378, 65 Cal. Rptr. 3d 612* (trial court should have treated physician's cause of action for declaratory relief as petition requesting court to issue writ of mandate ordering provider network to vacate its decision terminating his provider status for failure to cooperate with 809 hearing and to reinstate 809 proceedings)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawAgency AdjudicationImpartialityGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewHealthcare LawBusiness Administration & OrganizationPeer ReviewGeneral Overview

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36-416 California Forms of Pleading and Practice--Annotated § 416.16

§ 416.16 Proceedings to Obtain Relief From Membership Decision

[1] Exhaustion of Internal Remedies as Prerequisite

The general California rule is that a party must exhaust all available and adequate internal remedies offered by a public agency or private association with fiduciary duties that has excluded a party from membership before seeking relief in the courts [*see* *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 292, 109 P.2d 942* (public agencies); *Holderby v. Internat. Union etc. Engrs. (1955) 45 Cal. 2d 843, 846, 291 P.2d 463* (private associations)]. The applicability of this requirement has generally been aknowledged in cases in which physicians sought relief from an adverse membership decision that was allegedly made in violation of common law fair procedure requirements [*see Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 476-477, 131 Cal. Rptr. 90, 551 P.2d 410* (dicta that requirement applies to private associations and hospitals in review of membership decision); *Martino v. Concord Community Hosp.District (1965) 233 Cal. App. 2d 51, 56, 43 Cal. Rptr. 255* (but holding rule excused with respect to public hospital under facts before it)].

Moreover, even when the physician has exhausted the appropriate administrative remedies, if, on review of the final administrative decision, the court sets aside that decision because of unfair hearing practices and remands the case for further proceedings, the physician must proceed again to a final administrative decision before seeking redress in the courts [*Kumar v. National Medical Enterprises, Inc. (1990) 218 Cal. App. 3d 1050, 1055-1056, 267 Cal. Rptr. 452]* .

A physician who has exhausted the internal remedies provided by the hospital that made the adverse membership determination but who has failed to raise the issue of denial of fair procedure at his or her hearing despite the fact that the hospital's bylawsprovided for means of raising this issue in an internal appeal from the hearing is precluded from raising the issue during judicial revew of the hospital's determination [*Anton v. San Antonio Community Hospital (1982) 132 Cal. App. 3d 638, 648, 183 Cal. Rptr. 423* (*Anton II*)].

[2] When Exhaustion of Internal Remedies Excused

The requirement that a physician exhaust internal remedies before seeking judicial review is excused when the remedies are not available or when the institution has failed to inform the physician of the availability of the remedy [*Martino v. Concord Community Hosp. District (1965) 233 Cal. App. 2d 51, 56, 43 Cal. Rptr. 255* (unavailability of remedy); *see*

Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 478, 131 Cal. Rptr. 90, 551 P.2d 410 (failure to inform as to existence of remedy in damage action after adverse membership decision)]. So, too, a physician need not exhaust administrative remedies against a hospital when further pursuit is futile [*Joel v. Valley Surgical Center (1998) 68 Cal. App. 4th 360, 369, 80 Cal. Rptr. 2d 247* (resolution of dispute after commencement of administrative process, but prior to its completion, through settlement awarding physician maximum benefit he or she could have been afforded administratively)].

A physician is not precluded from attacking the validity of the institution's procedural bylaws for the first time in his or her action for judicial review of the institution's adverse membership determination when the institution's internal appeal procedure provided no authority for the panel hearing the appeal to invalidate institutional bylaws [*Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 828-829, 140 Cal. Rptr. 442, 567 P.2d 1162* (*Anton I*)]. By contrast, exhaustion of administrative remedies will not be excused if the physician's challenge is merely based on the ground that the institution did not follow its procedural bylaws [*Bollengier v. Doctors Medical Center (1990) 222 Cal. App. 3d 1115, 1127-1128, 1129-1130, 272 Cal. Rptr. 273]* .

An ambiguous statement to the physician that the institution's action could be appealed, when the physician had never been given a hearing, does not, as a matter of law, constitute sufficient notice of the availability of an adequate internal remedy, so as to sustain a demurrer to the petition for mandate for failure to exhaust internal remedies. Furthermore, a physician need not engage in an idle pursuit of internal remedies, even if procedures for these remedies are available and have been properly noticed, when the organization has made it clear at the outset that it will rule against the physician. A physician who has requested a hearing and received no response to his or her request need not pursue further internal remedies in order to invoke the court's jurisdiction [*Haller v. Burbank Community Hospital Foundation (1983) 149 Cal. App. 3d 650, 657-658, 197 Cal. Rptr. 45]* .

[3] Appropriate Proceedings for Obtaining Judicial Review

A physician who has been deprived of staff or association membership without due process by an institution that is required by law to provide due process may seek relief in administrative mandamus proceedings [*see Bus. & Prof. Code § 809.8* (nothing in Sections 809 to 809.7, inclusive, affects availability of judicial review under *Code Civ. Proc. § 1094.5*)]. If the physician has received a hearing before the adverse determination, administrative mandate pursuant to *Code Civ. Proc. § 1094.5* is the proper proceeding for seeking relief [*Anton v. San Antonio Community Hospital (1977) 19 Cal. 3d 802, 813-817, 140 Cal. Rptr. 442, 567 P.2d 1162* (*Anton I*; holding abrogated on unrelated point by 1978 legislative enactment of *Code Civ. Proc. § 1094.5(d)*); *Avol v. Hawthorne Community Hospital (1982) 135 Cal. App. 3d 101, 108-109, 184 Cal. Rptr. 914* ; *but see* *Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 618, 166 Cal. Rptr. 826, 614 P.2d 258* (pre-*Anton* case brought as ordinary mandate proceeding)]. If the professional organization has not provided a hearing, simple mandate under *Code Civ. Proc. § 1085* is the appropriate procedure [*Haller v. Burbank Community Hospital Foundation (1983) 149 Cal. App. 3d 650, 655, 658, 197 Cal. Rptr. 45]* . If the petitioner has petitioned for the wrong type of mandate under the circumstances of the case, the court should treat the petition as if it were the correct type [*Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 813-814, 140 Cal. Rptr. 442, 567 P.2d 1162* (*Anton I*; petition improperly asking for *Code Civ. Proc. § 1085* mandate treated as petition for *Code Civ. Proc. § 1094.5* mandate); *Haller v. Burbank Community Hospital Foundation (1983) 149 Cal. App. 3d 650, 655, 197 Cal. Rptr. 45* (petition improperly asking for *Code Civ. Proc. § 1094.5* mandate treated as petition for *Code Civ. Proc. § 1085* mandate)].

Actions to enjoin a physician's exclusion from membership have also been upheld as proper [*see* *Ascherman v. San Francisco Medical Society (1974) 39 Cal. App. 3d 623, 114 Cal. Rptr. 681* (*Ascherman I*)]. However, the holding of the *Supreme Court in Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d802, 813-817, 140 Cal. Rptr. 442, 567 P.2d 1162* (*Anton I*) (holding abrogated on unrelated point by legislative enactment of *Code Civ. Proc. § 1094.5(d)* in 1978) (discussed *above*) and language in *Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 484, 485, 131 Cal. Rptr. 90, 551 P.2d 410* , indicate that mandamus is now the preferred procedure. In holding that a physician

must have the institution's determination to exclude him or her from membership set aside before he or she may file an action for damages against the institution, the Court in *Westlake* refers only to mandamus as the proper proceeding for setting aside the institution's determination.

For discussion, procedural guides, and forms pertaining to administrative mandate and injunctions generally, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq., and Ch. 303, *Injunctions* , respectively. For discussion and forms for use in mandate proceedings generally, see Ch. 358, *Mandate and Prohibition* . For discussion of actions to review membership decisions of unincorporated associations generally, see Ch. 61, *Associations and Clubs* .

[4] Standard of Review

[a] Hospital Review Boards

Code Civ. Proc. § 1094.5(d) states that notwithstanding the provisions of *Code Civ. Proc. § 1094.5(c)* (governing standard of review for administrative mandate generally), in cases arising from private hospit al boards, or boards of directors of districts organized pursuant to the Local Health Care District Law, set out in *Health & Safety Code §§ 32000-32492*, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the whole record. Under this standard, a reviewing court must uphold a hospital review committee's decision unless the findings are so lacking in evidentiary support as to render them unreasonable [*Gaenslen v. Board of Directors (1986) 185 Cal. App. 3d 563, 569, 232 Cal. Rptr. 239* ; *see* *Hongsathavij v. Queen of Angels Hollywood Presbyterian Medical Center (1998) 62 Cal. App. 4th 1123, 1135-1136, 73 Cal. Rptr. 2d 695* (review cannot focus exclusively on judicial review committee's decision when hospital's bylaws provide that committee's decision be reviewed by governing board that issues final administrative decision)]. However, in all cases in which the petition alleges discriminatory actions prohibited by *Health & Safety Code § 1316* (discrimination based on type of degree prohibitied; *see § 416.14[2][b]*) and the plaintiff makes a preliminary showing of substantial evidence in support of allegation, the court must exercise its independent judgment on the evidence, and abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence.

In examining a hospital board's decision, the superior court must determine two issues [*Weinberg v. Cedars-Sinai Medical Center (2004) 119 Cal. App. 4th 1098, 1106-1107, 15 Cal. Rptr. 3d 6* ; *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center (1998) 62 Cal. App. 4th 1123, 1136, 73 Cal. Rptr. 2d 695* ; *see also Code Civ. Proc. § 1094.5(b)-(d)*]:

- First, the court must determine whether the governing body applied the correct standard in conducting its review.

- Second, after determining as a preliminary matter that the governing body used the correct standard, the court must determine whether there was substantial evidence to support the governing body's decision.

When an appellate court is reviewing a quasi-judicial decision of a governing body of a private hospital, the function of the appellate court is the same as that of the trial court in conducting the review. Hence, in applying the substantial evidence standard, the appellate court should review the entire record to determine whether the decision is supported by substantial evidence [*Gill v. Mercy Hospital (1988) 199 Cal. App. 3d 889, 897, 245 Cal. Rptr. 304]* .

When reviewing a finding by the trial court that a physician received a fair hearing, an appellate court exercises its independent judgment. The ultimate determination of whether administrative proceedings were fundamentally fair is a question of law to be decided on appeal. The appellate court must conduct a de novo review of the administrative record in order to evaluate fairness [*Rosenblit v. Superior Court (1991) 231 Cal. App. 3d 1434, 1442-1444, 282 Cal. Rptr.*

819] .

[b] Other Professional Organizations

Since *Code Civ. Proc. § 1094.5(d)* applies only to decisions by hospital boards, the scope of review of decisions by other types of professional organizations is governed by *Code Civ. Proc. § 1094.5(c)*, which provides that in cases in which the court is authorized to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the whole record. Although there is no case dealing directly with the standard to be applied in reviewing a membership decision by a professional organization other than a hospital board, the general rule is that when an administrative decision affects a right which has been legitimately acquired or is vested, and when that right is of a fundamental nature, the court is required to exercise its independent judgment on the evidence [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 32, 112 Cal. Rptr. 805, 520 P.2d 29]* . A vested right is one already posessed by the individual. Thus, in cases involving an agency's initial determination whether an individual qualifies to enter a profession or trade the courts have generally upheld the agency decision unless it lacks substantial evidentiary support. However, once the agency has initially exercised its expertise and determined that an individual fulfills the requirements to practice his or her profession, the agency's subsequent revocation of the license calls for an independent judicial review of the factsunderlying any such administrative decision [*Bixby v. Pierno (1971) 4 Cal. 3d 130, 136, 93 Cal. Rptr. 234, 481 P.2d 242* (citing *Pinsker v. Pacific Coast Soc. of Orthodontists (1969) 1 Cal. 3d 160, 166-167, 81 Cal. Rptr. 623, 460 P.2d 495* (*Pinsker I*), which affirms common law right to procedural fairness in case involving membership in professional organization as example of initial agency decision as to whether person qualifies to enter profession)]. It is probable that this distinction applies also to membership decisions by private professional organizations, so that a decison to exclude a physician who is applying for membership will be reviewed under the substantial evidence test, while a decision to expel a physician who is already a member from membership will be reviewed under the independent judgmenttest.This assumption is supported by *Ezekial v. Winkley (1977) 20 Cal. 3d 267, 272-273, 142 Cal. Rptr. 418, 572 P.2d 32* , which holds in connection with an issue unrelated to the scope of judicial review, that membership in an association once attained is a valuable interest that cannot be arbitrarily withdrawn and notes that the character of an existing membership as a valuable interest comports with the broader rule stated in *ixby* that one on whom an important privilege has already been conferred may enjoy legal protections not available to an applicant for the same benefit. The assumption is also supported by the holding in *Anton v. San Antonio Community Hosp. 19 Cal. 3d 802, 825, 140 Cal. Rptr. 442, 567 P.2d 1162* (*Anton I*), that membership on a hospital staff is both fundamental and vested within the meanings of *Bixby* and *Strumsky* and that denial of a normally routine reappointment to such membership must be reviewed under the independent judgment test. Although the specific holding of *Anton I* was abrogated by the enactment of *Code Civ. Proc. § 1094.5(d)* (*discussed under § 416.16[4][a]*) *Code Civ. Proc. § 1094.5(d)* applies only to hospitals and would not prevent an application of the reasoning supporting the *Anton I* holding to cases involving expulsion from membership in a professional organization.

[c] Scope of Judicial Review of Institution's Rules

When a professional society rule on the basis of which a physician's application for membership was rejected is challenged as arbitrary, the scope of judicial review is limited to determining whether the standard or rule is reasonable, comports with the legitimate goals of the society and the rights of the individual and public, and is not contrary to established public policy [*Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 558, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*)]. Matters of policy involved in the adoption of bylaws, codes of ethics, and resolutions of rules in conformity with established codes of ethics are questions for the membership itself and are not debatable in court absent a showing that the policy is in violation of the law [*Smith v. Kern County Medical Asso. (1942) 19 Cal. 2d 263, 270-271, 120 P.2d 874]* .

[5] Types of Relief Available

If the court determines that the institution's membership determination was substantively irrational, the physician may be entitled to an order compelling his or her admission or reinstatement to membership [*see Rosner v. Eden Township Hospital Dist. (1962) 58 Cal. 2d 592, 599, 25 Cal. Rptr. 551, 375 P.2d 431]* . However, if in a case of denial rather than expulsion from membership the court finds that procedural fairness was denied, relief may be limited to an order requiring the institution to reconsider the physician's membership in accord with fair procedure [*Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 557, n.17, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*)]. If a physician has been expelled from membership in a hospital in which he or she had previously held membership pursuant to a hearing that is held to have been unfair, however, the court may order him or her to be reinstated pending a proper hearing [*Applebaum v. Board of Directors (1980) 104 Cal. App. 3d 648, 660-661, 163 Cal. Rptr. 831]* .

Cases have been remanded to the institution for reconsideration of the membership decision in the following circumstances:

- When a physician was expelled from a local medical association based on a finding that he had committed seven separate rules violations, but five of these findings were overturned during subsequent review, and the institution had imposed only one penalty for all of the original seven findings of violation [*Bernstein v. Alameda, etc. Med. Assn. (1956) 139 Cal. App. 2d 241, 252-253, 293 P.2d 862]* .

- When the main evidence considered by the hospital in denying a physician's application for staff membership did not support the hospital's determination and real doubt existed as to whether the hospital would have made the same determination based on some peripheral evidence that was also considered [*Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 628, 634-635, 166 Cal. Rptr. 826, 614 P.2d 258]* .

Code of Civil Procedure Section 425.16 sets out a procedure for striking complaints in harassing lawsuits that are commonly known as SLAPP suits (strategic lawsuits against public participation), which are brought to challenge the exercise of constitutionally protected free speech rights. This procedure may be available in a lawsuit brought by a hospital staff physician arising out of a disciplinary recommendation by the hospital's peer review committee under *Bus. & Prof. Code § 809 et seq.* [*See Kibler v. N. Inyo County Local Hosp. Dist. (2006) 39 Cal. 4th 192, 197-203, 46 Cal. Rptr. 3d 41, 138 P.3d 193* (hospital was entitled under *Code Civ. Proc. § 425.16(e)(2)* to file special motion to strike plaintiff's complaint as SLAPP suit)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawJudicial ReviewRemediesInjunctive ReliefAdministrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewReviewabilityExhaustion of RemediesAdministrative LawJudicial ReviewStandards of ReviewSubstantial EvidenceCivil ProcedureJusticiabilityExhaustion of RemediesGeneral OverviewCivil ProcedureJusticiabilityExhaustion of RemediesAdministrative RemediesHealthcare LawBusiness Administration & OrganizationJudicial ReviewGeneral OverviewHealthcare LawBusiness Administration & OrganizationJudicial ReviewExhaustion of RemediesHealthcare LawBusiness Administration & OrganizationJudicial ReviewSubstantial EvidenceHealthcare LawBusiness Administration & OrganizationPeer ReviewGeneral Overview

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36-416 California Forms of Pleading and Practice--Annotated § 416.17

§ 416.17 Damages for Intentional Interference With Right to Practice Profession

[1] In General

An institution that arbitrarily deprives a physician of the right to membership may be liable for damages in an action based on intentional interference with the physician's right to pursue his or her profession [*Willis v. Santa Ana etc. Hospital Assn. (1962) 58 Cal. 2d 806, 810, 26 Cal. Rptr. 640, 376 P.2d 568]* . In order to establish liability in such an action, the physician must show that the intentional interference with his or her right to pursue the practice of medicine was done unlawfully or by lawful means without sufficient justification. The existence of such justificationis determined by balancing the importance of the activity interfered with to society and the parties involved against the importance of permitting the interference, rather than by applying precise standards [*Willis v. Santa Ana etc. Hospital Assn. (1962) 58 Cal. 2d 806, 810, 26 Cal. Rptr. 640, 376 P.2d 568* (allegations that defendants conspired to deny physician of highest qualifications access to hospital facilities in order to restrain competition and deprive physician of practice stated valid cause of action); *Mateo-Woodburn v. Fresno Community Hospital & Medical Center (1990) 221 Cal. App. 3d 1169, 1184, 270 Cal. Rptr. 894]* .

The Cartwright Act, *Bus. & Prof. Code § 16720 et seq.*, which proscribes unlawful restraint of trade, applies to professions [*Cianci v. Superior Court (1985) 40 Cal. 3d 903, 916-925, 221 Cal. Rptr. 575, 710 P. 2d 375* , overruling *Willis v. Santa Ana etc. Hospital Assn. (1962) 58 Cal. 2d 806, 26 Cal. Rptr. 640, 376 P. 2d 568]* . For discussion of the Cartwright Act, see Ch. 565, *Unfair Competition* .

[2] Justification of Interference

Interference with a physician's right to practice medicine does not give rise to liability, even if it is intentional, if the interference is reasonable and justified [*Letsch v. Northern San Diego County Hosp. Dist. (1966) 246 Cal. App. 2d 673, 677, 55 Cal. Rptr. 118]* . For example, a hospital's determination to operate its radiology department on a closed staff basis, thus depriving physicians who had no exclusive contract with the hospital of the right to use the hospital's radiology facilities, was held to be reasonable and therefore did not give rise to liability on the part of the hospital [*Letsch v. Northern San Diego County Hosp. Dist. (1966) 246 Cal. App. 2d 673, 677, 55 Cal. Rptr. 118* ; *see also Mateo-Woodburn v. Fresno Community Hospital & Medical Center (1990) 221 Cal. App. 3d 1169, 1182-1188, 270 Cal. Rptr. 894* (similar situation involving anesthesiologists)]. The vested rights of a staff physician in an adjudicatory

one-on-one setting, in which his or her professional or ethical qualifications for staff privileges are in question, take on a different quality and character when considered in light of a rational, justified policy decision by a hospital to reorganize the method of delivery of certain medical services. This is true even though the structural change results in the exclusion of particular physicians from certain services. If the justification is sufficient, the physician's vested rights give way to public and patient interest in improving the quality of medical services [*Mateo-Woodburn v. Fresno Community Hospital & Medical Center (1990) 221 Cal. App. 3d 1169, 1185, 270 Cal. Rptr. 894]* . A judicial determination on mandamus review or in an action for injunction ordering the hospital or professional organization to admit or reinstate the physician would necessarily entail a finding that the institution's action was not justified. Although there is no case on point, it would appear that if the physician has satisfied the requirement set out under § 416.17[4], and obtained a court order setting aside the institution's determination beforeinitiating the tort action, the finding of lack of justification entailed in such an order would be binding in the subsequent tort action under the doctrine of collateral estoppel.

[3] Requirement of Exhaustion of Internal Remedies

The requirement that the physician exhaust available and adequate internal remedies offered by the institution that made the adverse membership decision before seeking relief in the courts, which is *discussed under § 416.16[1]*, applies to actions for damages for interference with the right to practice a profession as well as actions to have the institution's membership decision set aside [*Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 476-477, 131 Cal. Rptr. 90, 551 P.2d 410* (but requirement excused under facts before court); *Bartschi v. Chico Community Memorial Hospital (1982) 137 Cal. App. 3d 502, 508, 187 Cal. Rptr. 61]* .

[4] Requirement of Prior Favorable Determination

[a] In General

If the hospital or professional organization informed the physician of its reasons for excluding him or her from membership and of his or her right to respond, the institution's action will be considered proper for purposes of an action by the physician for damages unless the determination has been set aside in an appropriate judicial review proceeding [*Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 483, 484, 131 Cal. Rptr. 90, 551 P.2d 410]* . Thus, a physician seeking damages for exclusion or expulsion from membership must ordinarily pursue a successful mandamus action or action for injunction to have the exclusion or expulsion set aside before initiating the tort action. This prior action need not actually result in an order compelling the affected institution to admit or reinstate the physician. Thus, for instance, an order compelling the institution to grant a proper hearing will remove the presumption that the institution's determination was proper and enable the physician to pursue his or her tort action without further delay [*Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 484, 131 Cal. Rptr. 90, 551 P.2d 410* ; *see discussion under § 416.16[5]*]. When a physician has filed an action for damages without first satisfying the requirement of having the hospital's action set aside on review, the complaint in such an action could conceivably be treated as a petition for mandamus to review the hospital's action [*Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 484, 131 Cal. Rptr. 90, 551 P.2d 410* (dictum); *see § 416.16[5]*].

[b] Prior Favorable Determination Not Required When Basic Due Process Denied

When the institution denies the physician the basic procedural protection to which he or she is entitled in making the determination to exclude or expel, the physician need not first seek to have the determination set aside, but may immediately initiate an action for damages. Denial by a hospital of a physician's application for membership without either informing the physician of the reasons for its action or notifying the physician of a right to respond to charges against him or her constitutes a denial of basic procedural protection that discharges the requirement that the determination be judicially set aside before the physician may sue for damages [*Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 478, 131 Cal. Rptr. 90, 551 P.2d 410]* . However, the *Westlake* court also suggested in dicta that in cases in which the hospital has failed to provide a proper hearing the physician must at least

obtain a court order compelling the hospital to hold a proper hearing before he or she may proceed in tort [*Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 484-485 n.9, 131 Cal. Rptr. 90, 551 P.2d 410* ; *see § 416.17[4][a]*]. Although it is not entirely clear from the case, it appears that whether a failure on the part of the hospital to provide proper procedural protections will excuse the prior favorable termination requirement for a subsequent tort action depends on whether the denial is sufficiently basic to deprive the hospital's action of its quasi-judicial character.

[5] Immunities From Tort Actions

[a] Qualified Immunity for Members of Staff or Committee

Civ. Code § 43.7(b) provides, in part, that there shall be no monetary liability on the part of, and no cause of action shall arise against any of the following types of committee or board members for any of the actions included in the list that follows, if such committee or board member acts without malice, has made a reasonable effort to obtain the facts of the matter as to which he or she acts, and acts in the reasonable belief that the action taken by him or her is warranted by the facts known to him or her after such reasonable effort to obtain the facts [*see Civ. Code § 43.7(b)*]:

- Any professional society, any member of a duly appointed committee of a medical specialty society, any member of a duly appointed committee of a state or local professional society, or any duly appointed member of a committee of a professional staff of a licensed hospital (provided that the staff operates pursuant to written bylaws that have been approved by the governing board of the hospital), for any act or proceeding undertaken or performed within the scope of the functions of any such committee that is formed to maintain the professional standards of the society established by its bylaws, or

- Any member of any peer review committee composed chiefly of physicians and surgeons whose purpose is to review the quality of medical services rendered by physicians and surgeons, for any act or proceeding undertaken or performed in reviewing the quality of medical services rendered by physicians and surgeons, or

- Any member of the governing board of a hospital in reviewing the quality of medical services rendered by its staff members.

"Medical specialty society" as the term is used in *Civ. Code § 43.7(b)* means an organization having as members at least 25 percent of the eligible physicians within a given professionally recognized medical specialty in the geographic area served by the particular society. "Professional society" as the term is used in *Civ. Code § 43.7(b)* includes medical organizations having as members at least 25 percent of the eligible persons or licentiates in the geographic area served by the particular society or, if the society has less than 100 members, having as members at least a majority of the eligible persons or licentiates in the geographic area served [*Civ. Code § 43.7(b)*]. *Civ. Code § 43.7(b)* may not be construed to confer immunity from liability on any quality assurance committee established in compliance with *Welf. & Inst. Code § 4070* or hospital [*Civ. Code § 43.7(e)*; *Axline v. St. John's Hospital & Health Center (1998) 63 Cal. App. 4th 907, 913, 74 Cal. Rptr. 2d 385]* . The immunities afforded by *Civ. Code § 43.7* do not affect the availability of an absolute privilege that may be afforded by *Civ. Code § 47* (*discussed under § 416.17[6]*) [*Civ. Code § 43.8*]. In addition to the absolute immunity set out in *Civ. Code § 43.7(b)*, a qualified immunity for members of professional society committees formed to maintain established professional standards of the society is set out in [*Civ. Code § 43.91*]. When the institution has failed to provide the accused physician with a hearing, particularly when the insititution's bylaws called for such a hearing, and made no real effort to investigate the accused pysician's qualifications for membership, questions of fact may be raised as to whether the qualified privilege set out in *Civ. Code § 43.7* may be lost because the individuals protected by the privilege were not acting pursuant to written bylaws or without malice, and had not made reasonable efforts to ascertain the facts [*Ascherman v. San Francisco Medical Society (1974) 39 Cal. App. 3d 623, 663, 114 Cal. Rptr. 681* (*Ascherman I*)].

The qualified immunity conferred on those charged with the investigation of the competence of applicants for membership and of existing members of a hospital staff furthers the interest of the public and hospitals in having competent physicians and surgeons on the hospital staff. Therefore, for example, a physician acting as a proctor during surgery is not liable for failing to intervene in an operation in which a patient suffers injuries as a result of the negligence of the surgeons [*Clarke v. Hoek (1985) 174 Cal. App. 3d 208, 220-221, 219 Cal. Rptr. 845* ; *see* Ch. 295, *Hospitals* , Ch. 380, *Negligence*].

[b] Qualified Immunity for Professional Society

Civ. Code § 43.7(b) provides for qualified immunity for professional societies in the same terms and under the same conditions as those set out in that statute for qualified immunity for staff or committee members. See the *discussion under § 416.17[5][a]*.

[6] Privileged Communications

Under *Civ. Code § 47(b)*, a privileged publication includes a publication made, inter alia, in the initiation or course of any proceeding authorized by law and reviewable pursuant to *Code Civ. Proc. §§ 1084-1097* (mandate) [*Civ. Code § 47(b)*]. Since proceedings by a hospital or professional organization concerning membership are reviewable under mandamus proceedings, the privilege set out in *Civ. Code § 47(b)* applies to such proceedings [*see Long v. Pinto (1981) 126 Cal. App. 3d 946, 950, 179 Cal. Rptr. 182* ; *see also Slaughter v. Friedman (1982) 32 Cal. 3d 149, 156, 185 Cal. Rptr. 244, 649 P.2d 886* (former clause 4 as perhaps added to *Civ. Code § 47(b)* to abrogate prior case law holding absolute privilege not applicable to private hospital proceedings under previously exisitng language of *Code Civ. Proc. § 47(b)*; *Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 941-943, 242 Cal. Rptr. 259]* . For a discussion of the appropriateness of mandate proceedings to provide judicial review of membership determinations by hospitals and professional associations, see *discussion under § 416.16[3]*.

The absolute privilege set out in *Civ. Code § 47(b)* does not apply to any actions taken by the hospital or its staff members, and therefore does not insulate individual staff members from liability for the membership determination itself [*Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 482, 131 Cal. Rptr. 90, 551 P.2d 410]* . The privilege also does not apply to a communication made in a judicial proceeding knowingly concealing the existence of an insurance policy [*Civ. Code § 47(b)(3)*].

The privilege applies to a communication concerning job performance or qualifications of an applicant for employment, based on credible evidence, and made without malice, by a current or former employer of the applicant to, and at the request of, a prospective employer, provided that the communication does not relate to constitutionally protected speech or other activity, or protected acts relating to labor disputes [*Civ. Code § 47(c)*; *see Code Civ. Proc. § 527.3*].

Civ. Code § 47(c) grants a privilege to any publication or broadcast made, without malice, to a person interested therein (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give such information [*see Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 941-943, 242 Cal. Rptr. 259* (communication concerning physician'spersonnel records made by administrator of hospital at which physician had previously worked to another hospital, pursuant to its request, interested in assessing qualifications and fitness of physician as proposed staff member)].

In addition to the privilege afforded by *Civ. Code § 47* (discussed *above*), there is no monetary liability on the part of, and no cause of action for damages may arise against, any person or professional society on account of the communication of information in the possession of the person or professional society to any hospital, hospital medical staff, or professional society when such communication is intended to aid in the evaluation of the qualification, fitness, character, or insurability of a practitioner of the healing arts. The immunities afforded by *Civ. Code § 43.8* do not affect

the availability of any absolute privilege that may be afforded by *Civ. Code § 47* (discussed *above*) [*Civ. Code § 43.8*; *see Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 943-944, 242 Cal. Rptr. 259* ; *see also Civ. Code § 43.91(b)* (qualified immunity for communication of information intended to aid in evaluation of qualification, fitness or character of member or applicant to member of professional society committee)].

[7] Statute of Limitations

An action for damages for intentional interference with the right to practice medicine is an action on a property right, and is therefore governed by the two year statute of limitations set out in *Code Civ. Proc. § 339(1)* [*Edwards v. Fresno Community Hosp. (1974) 38 Cal. App. 3d 702, 705, 706, 113 Cal. Rptr. 579]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewCivil ProcedureJusticiabilityExhaustion of RemediesGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawBusiness Administration & OrganizationHospital PrivilegesGeneral OverviewHealthcare LawBusiness Administration & OrganizationJudicial ReviewGeneral OverviewHealthcare LawBusiness Administration & OrganizationPeer ReviewGeneral OverviewHealthcare LawBusiness Administration & OrganizationPeer ReviewOrganizationsLabor & Employment LawWrongful TerminationRemediesReinstatement

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§ 416.18 Exculpatory Clause Not Enforceable

An exculpatory clause in an institution's bylaws purporting to provide that a member or applicant waives his or her rights to personal redress is contrary to public policy and unenforceable [*Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 480, 131 Cal. Rptr. 90, 551 P.2d 410]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsExculpatory ClausesHealthcare LawBusiness Administration & OrganizationHospital PrivilegesJudicial ReviewHealthcare LawBusiness Administration & OrganizationHospital PrivilegesProfessional ReviewHealthcare LawBusiness Administration & OrganizationHospital PrivilegesRestrictionsTortsNegligenceDefensesExculpatory ClausesGeneral Overview

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36-416 California Forms of Pleading and Practice--Annotated § 416.19

§ 416.19 Antitrust Liability for Interference With Right to Practice Medicine

Because trade or commerce within the meaning of the Cartwright Act includes professions, a physician may recover damages under *Bus. & Prof. Code §§ 16700-16770* for unlawful restraint of his or her right to practice medicine [*Cianci v. Superior Court (1985) 40 Cal. 3d 903, 916-925, 221 Cal. Rptr. 575, 710 P.2d 375* , *overruling Willis v. Santa Ana etc. Hospital Assn. (1962) 58 Cal. 2d 806, 809-810, 26 Cal. Rptr. 640, 376 P.2d 568]* . The type of activity prohibited by the Cartwright Act includes agreements not to make referrals or exclusion of a physician from a local corporateclinic that effectively prevent the excluded physician from practicing medicine in a local market [*see Cianci v. Superior Court (1985) 40 Cal. 3d 903, 221 Cal. Rptr. 575, 710 P.2d 375]* . However, if the basis of the Cartwright claim is a quasi-judicial decision, such as the decision of a review committee to deny hospital privileges, the state antitrust action is barred unless and until the quasi-judicial decision has been overturned by the grant of a writ of mandate [*Mir v. Little Co. of Mary Hosp. (9th Cir. 1988) 844 F.2d 646, 651* (considering pendent state claim, and relying on *Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 484, 131 Cal. Rptr. 90, 551 P.2d 410*)].

If there is a sufficient nexus between the local activity and interstate commerce, a federal antitrust claim may be stated [*McLain v. Real Estate Bd. of New Orleans, Inc. (1980) 444 U.S. 232, 242, 100 S. Ct. 502, 62 L. Ed. 2d 441* ; *Pinhas v. Summit Health, Ltd. (9th Cir. 1989) 894 F.2d 1024, 1031-1033* , *aff'd, 500 U.S. 322, 111 S. Ct. 1842, 114 L. Ed. 2d 366, 376-377 (1991)* ; *see Mitchell v. Frank R. Howard Memorial Hosp. (1989) 853 F.2d 762, 764-766* (factors necessary to establish interstate impact); *see also Mir v. Little Co. of Mary Hosp. (9th Cir. 1988) 844 F.2d 646, 649-650* (four-year limitation period for federal antitrust claim as not tolled during pendency of state court action for mandate, injunction, and damages)].

Use of the peer-review process to prevent a physician from competing in a particular market may also give rise to antitrust liability on the part of the physicians initiating and taking part in the process [*Patrick v. Burget (1988) 486 U.S. 94, 104-106, 108 S. Ct. 1658, 100 L. Ed. 2d 83* ; *Pinhas v. Summit Health, Ltd. (9th Cir. 1989) 894 F.2d 1024, 1031-1033* , *aff'd on other grounds, 500 U.S. 322, 111 S. Ct. 1842, 114 L. Ed. 2d 366, 376-377 (1991)]* . However, federal law immunizes peer-review action taken in the reasonable belief that it was in the furtherance of quality health care [*42 U.S.C.S. § 11112(a)*; *see Patrick v. Burget (1988) 486 U.S. 94, 105 n.8, 108 S. Ct. 1658, 100 L. Ed. 2d 83* (considering Oregon peer-review statutes; actions complained of occurred before enactment of *42 U.S.C.S. § 11112(a),*

but also consisted of anticompetitive behavior in addition to peer review)]. The Health Care Quality Improvement Act (*42 U.S.C.S. §§ 11101-11152*; hereinafter "HCQIA") became effective on November 14, 1986. Any "injury" caused by a peer review investigation for purposes of modifying a physician's staff privileges is in the action taken in light of the investigation [*see 42 U.S.C.S. § 11151(10)(c)*]. If the action is immune, any claims based on the investigation from which it derives are also immune [*Austin v. McNamara (9th Cir. 1992) 979 F.2d 728, 737]* . In *Austin*, the plaintiff's staff privileges were summarily suspended three days after HCQIA became effective, based on results of an investigation completed several months before, that had recommended only a 6-month monitoring. The action was held immunized [*Austin v. McNamara (9th Cir. 1992) 979 F.2d 728, 737]* . A simiar standard would immunize peer-review actions from liability under the Cartwright Act [*see Civ. Code § 43.7* (*discussedunder § 416.17[5][a]*); *see also 42 U.S.C.S. § 11115(a)* (preserving other immunities)].

Restraints of trade are discussed in Ch. 565, *Unfair Competition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGeneral OverviewHealthcare LawAntitrust ActionsPhysiciansHealthcare LawBusiness Administration & OrganizationHospital PrivilegesGeneral OverviewHealthcare LawBusiness Administration & OrganizationHospital PrivilegesProfessional ReviewHealthcare LawBusiness Administration & OrganizationPeer ReviewGeneral OverviewHealthcare LawBusiness Administration & OrganizationPeer ReviewStatutes

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§ 416.40 Related Matthew Bender Publications

For memoranda of points and authorities for use in actions involving deprivation of membership in associations and clubs, see California Points and Authorities, ch. 22, *Associations and Clubs*

For memoranda of points and authorities for use in actions for injunctive relief, see California Points and Authorities, ch. 116, *Injunctions*

For memoranda of points and authorities for use in mandate proceedings, see California Points and Authorities, ch. 150, *Mandate and Prohibition* (Matthew Bender)

For memoranda of points and authorities for use in administrative mandate proceedings, see California Points and Authorities, ch. 195, *Public Administrative Law* (Matthew Bender)

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36-416 California Forms of Pleading and Practice--Annotated § 416.41

§ 416.41 State Statutes

[1] Grounds for Exclusion or Expulsion

Licensed health facility rules and regulations as prohibited from discriminating on basis of whether staff member holds M.D. (allopathic medicine), D.O. (osteopathy) or D.P.M. (podiatry) degree, within scope of staff member's licensure. *Health & Safety Code § 1316(a)*

Licensed health facility as permitted to require every staff member to carry professional liability insurance. *Health & Safety Code § 1319* (abrogating prior case law to contrary)

[2] Immunities

Qualified immunity from monetary liability of members of professional or specialty society, hospital staff, or peer review committee. *Civ. Code § 43.7(b)*

Qualified immunity for communication of information evaluating practitioner of healing arts. *Civ. Code § 43.8*

Immunity from defamation actions for publications made in quasi-judicial proceedings. *Civ. Code § 47(b)*

Immunity from liability for communication made without malice to interested person (1) by one who is also interested, or (2) by one who stands in such relation to person interested as to afford reasonable ground for supposing motive for communication innocent, or (3) who is requested by person interested to give information. *Civ. Code § 47(c)*

[3] Mandate Action

Administrative mandate procedure. *Code Civ. Proc. § 1094.5*

Standard of judicial review of administrative decisions by hospital boards. *Code Civ. Proc. § 1094.5(d)*

[4] Public Hospitals

[a] Generally

Creation and administration of public hospitals. *Health & Safety Code §§ 32000-32492*

[b] Procedural Requirements for Membership Determinations

Hearing required to make final decision on public hospital's membership determination. *Health & Safety Code §§ 32150, 32155*

Subpoena power of public hospital review board or hearing officer in staff membership hearing. *Health & Safety Code § 32154*

[c] Rules and Standards

Authorizations for public hospitals to set out rules and standards. *Health & Safety Code § 32128*

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawBusiness Administration & OrganizationJudicial ReviewGeneral OverviewHealthcare LawBusiness Administration & OrganizationPeer ReviewGeneral OverviewHealthcare LawBusiness Administration & OrganizationPeer ReviewOrganizationsHealthcare LawBusiness Administration & OrganizationPeer ReviewStatutes

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36-416 California Forms of Pleading and Practice--Annotated § 416.42

§ 416.42 Decisions

[1] Antitrust

Statute requiring hospitals to maintain peer-review system does not involve sufficiently active state supervision to confer state action immunity from federal antitrust liability on physician participants who used review process to reduce competition from plaintiff; state court review of hospital committee's decision as falling far short of satisfying active supervision requirement. *Patrick v. Burget (1988) 486 U.S. 94, 104-106, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (Oregon statute)* ; *Pinhas v. Summit Health, Ltd. (9th Cir. 1989) 894 F.2d 1024, 1028-1030 , aff'd on other grounds, 500 U.S. 322, 111 S. Ct. 1842, 114 L. Ed. 2d 366, 376-377 (1991)* (*Bus. & Prof. Code §§ 805, 2001-2006*; *Code Civ. Proc. §§ 1085, 1094.5*)

Physician seeking to state federal antitrust cause of action was not required to prove that absence of his or her services would have drastic effect on interstate commerce, but only that peer-review proceedings affect entire staff and thus hospital's interstate commerce. *Pinhas v. Summit Health, Ltd. (9th Cir. 1989) 894 F.2d 1024, 1032 , aff'd, 500 U.S. 322, 111 S. Ct. 1842, 114 L. Ed. 2d 366, 376-377 (1991)*

Physicians' "refusal to cover" for other staff and alleged public attacks was insufficient to state cause of action for conspiracy to restrain trade [*15 U.S.C.S. § 1*]; even if acts did state claim for conspiracy, standard for determining violation as rule of reason, not "per se" rule. *Austin v. McNamara (9th Cir. 1992) 979 F.2d 728, 738*

Physicians' "refusal to cover" for other staff and alleged public attacks on plaintiff amounted only to limited and informal restraint against single competitor in single hospital and did not cause any injury to competition, which is required to state claim under §§ 1 and 2 of Sherman Act [*15 U.S.C.S. § 1* (restraint of trade); maintenance of monopoly over neurosurgical practice in Santa Barbara]. *Austin v. McNamara (9th Cir. 1992) 979 F.2d 728, 739*

Physician's claim for violation of § 2 of Sherman Act [*15 U.S.C.S. § 2*] by maintaining monopoly over neurosurgical practice in Santa Barbara is insufficient if based only on defendants' "refusal to cover" for plaintiff and alleged public attacks on plaintiff, because acts caused no injury to competition. *Austin v. McNamara (9th Cir. 1992) 979 F.2d 728, 739*

If basis of Cartwright claim is quasi-judicial decision, such as decision of review committee to deny hospital privileges, state antitrust action is barred unless and until quasi-judicial decision has been overturned by grant of writ of mandate. *Mir v. Little Co. of Mary Hosp. (9th Cir. 1988) 844 F.2d 646, 651* (considering pendent state claim); *Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 484, 131 Cal. Rptr. 90, 551 P.2d 410*

Trade or commerce within meaning of Cartwright Act includes professions; thus, physician may recover under *Bus. & Prof. Code §§ 16700-16770* for unlawful restraint of his or her right to practice medicine. *Cianci v. Superior Court (1985) 40 Cal. 3d 903, 916-925, 221 Cal. Rptr. 575, 710 P.2d 375* (*overruling Willis v. Santa Ana etc. Hospital Assn. (1962) 58 Cal. 2d 806, 809-810, 26 Cal. Rptr. 640, 376 P.2d 568*)

[2] Arbitrary Deprivation of Membership Prohibited

[a] Basis of Common Law Right to Procedural Fairness

Common law fair procedure requirement as applying to private as well as public hospitals. *Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 626-627, 166 Cal. Rptr. 826, 614 P.2d 258* (applying requirement to private hospitals, but stating that in applying fair procedure requirement, court was not holding that rules for staff admission to public hospitals apply equally to private hospitals); *Wyatt v. Tahoe Forest Hospital Dist. (1959) 174 Cal. App. 2d 709, 714, 345 P.2d 93* (public hospitals)

Dismissal by private hospital from residency that is prerequisite for entrance into specialty as coming under common law fair procedure requirement; but requirement as not extended to denial of an application for a private hospital residency. *Ezekial v. Winkley (1977) 20 Cal. 3d 267, 272-274, 142 Cal. Rptr. 418, 572 P.2d 32*

Hospital staffs and professional associations as required to comply with common law principles of fair procedure in rendering decisions concerning membership rights of physicians when denial of such membership rights would impair physician's right to fully practice profession. *Pinsker v. Pacific Coast Soc. of Orthodontists (1974) 12 Cal. 3d 541, 550, 554, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*); *Ascherman v. Saint Francis Memorial Hosp. (1975) 45 Cal. App. 3d 507, 511512, 119 Cal. Rptr. 507* (*Ascherman II*)

Requirements of common law fair procedure apply to cases involving membership decisions by professional societies when association has fiduciary responsibility by virtue of important public role. *Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 549, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*)

[b] Right to Fully Practice Profession

Life insurance company-managed care provider may not delist physician from networks of health care providers without providing fair procedure, since managed care provider controls substantial economic interest affecting physician. *Ambrosino v. Metropolitan Life Ins. Co. (N.D. Cal. 1995) 899 F. Supp. 438*

Impairment of physician's right to fully practice his profession is understood in terms of impairment of a substantial economic interest. *Ezekial v. Winkley (1977) 20 Cal. 3d 267, 272, 142 Cal. Rptr. 418, 572 P.2d 32*

Fact that denial of membership would effectively preclude physician from either entering or realizing full potential achievement and recognition in specialty establishes interest in membership. *Ezekial v. Winkley (1977) 20 Cal. 3d 267, 272-278, 142 Cal. Rptr. 418, 572 P.2d 32* ; *Pinsker v. Pacific Coast Society of Orthodontists (1969) 1 Cal. 3d 160, 166, 81 Cal. Rptr. 623, 460 P.2d 495* (*Pinsker I*)

Deprivation of physician's right to membership in private organization without adhering to requirements of common law fair procedure is improper when deprivation impairs physician's right to fully practice profession. *Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 554, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*)

Showing that membership is economically necessary for physician, or even that denial of membership will deprive the physician of an opportunity to make good living, is not necessary to establish physician's protected interest when physician will not be able to realize maximum potential achievement and recognition in field of practice if membership is denied. *Pinsker v. Pacific Coast Society of Orthodontists (1969) 1 Cal. 3d 160, 166, 81 Cal. Rptr. 623, 460 P.2d 495* (*Pinsker I*)

Depriviation of right to fully practice medicine was shown despite fact that physician had staff privileges at other hospitals and made no showing of substantial, significant, or irreparable injury to practice resulting from denial of application for membership. *Ascherman v. Saint Francis Memorial Hosp. (1975) 45 Cal. App. 3d 507, 509, 511, 119 Cal. Rptr. 507* (*Ascherman II*)

Mere existence of other hospitals where physician may practice is not necessarily sufficient to prevent impairment of a substantial economic interest with advent of comprehensive health planning. *Ascherman v. Saint Francis Memorial Hospital (1975) 45 Cal. App. 3d 507, 509, 511, 119 Cal. Rptr. 507* (*Ascherman II*)

Showing that hospital or professional organization has monopoly power over professional opportunities is not necessary to establish interest in membership. *Ascherman v. San Francisco Medical Society (1974) 39 Cal. App. 3d 623, 650, 114 Cal. Rptr. 681* (*Ascherman I*)

[c] Substantive and Procedural Aspects of Common Law Procedural Fairness

Common law procedural fairness requirement imposed on hospitals and private organizations involved with public interest entails two separaterequirements: (1) procedure by which adverse membership decision was arrived at be fair, and (2) decision to exclude or expel a physician be substantively rational and based on cause. *Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 550, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*) (procedural fairness); *Pinsker v. Pacific Coast Society of Orthodontists (1969) 1 Cal. 3d 160, 166, 81 Cal. Rptr. 623, 460 P.2d 495* (*Pinsker I*) (substantive cause for rejection)

Trial court erroneously denied physician's petition for writ of mandate to set aside revocation of staff membership and clinical privileges at hospital, where presiding officer at fair hearing had fatal appearance of bias caused by financial conflict of interest resulting from long-standing and continuous relationship with hospital, even though he did not serve as fact finder, participate in deliberations, or issue decision recommending action by administrative board, because, as permitted in bylaws, he provided key rulings on admissibility of evidence and access to information and ruled on challenge to his own appointment as hearing officer, which was upheld by board itself. However, hearing panel which rendered decision was not improperly constituted because its members had all served on hearing panel in physician's suspension proceeding, because all panel members were subjected to voir dire and were confident in their ability to decide revocation issue fairly and independently of previous decision, even if physician had challenged practicability and fairness of that decision, and absent additional evidence that panel members could not be impartial, their service in prior matter did not, standing alone, disqualify them from participating in proceeding. *Yaqub v. Salinas Valley Memorial Healthcare System (2004) 122 Cal. App. 4th 474, 483-486, 18 Cal. Rptr. 3d 780*

Physicians not entitled to due process prior to termination of their medical staff privileges, where hospital's policy decision to change system of delivery of certain services from open staff system to closed system with exclusive provider was quasi-legislative and not adjudicative. *Major v. Memorial Hospitals Association (1999) 71 Cal. App. 4th 1380, 1399-1411, 84 Cal. Rptr. 2d 510* (systemic and organization problems associated with anesthesiology department

motivated closure, rather than intent to specifically exclude any particular physician or group of physicians)

Hospital's primary duty is to its patients to ensure competence of its medical staff and, therefore, hospital is free to establish and enforce selection and review procedures so long as they do not result in arbitrary or discriminatory practices. *Rhee v. El Camino Hospital Dist. (1988) 201 Cal. App. 3d 477, 489, 501, 247 Cal. Rptr. 244*

Violation of hospital's bylaws concerning physician discipline is not denial of due process unless violation in some way deprived physician of adequate notice or opportunity to be heard before impartial judges. *Rhee v. El Camino Hospital Dist. (1988) 201 Cal. App. 3d 477, 497, 247 Cal. Rptr. 244*

[3] Damages for Intentional Interference With Right to Practice Profession

[a] In General

Action for intentional interference with right to practice lawful profession by unlawful means or by lawful means absent sufficient justification. *Willis v. Santa Ana Community Hospital Asso. (1962) 26 Cal. Rptr. 640, 376 P.2d 568*

Existence of justification for purposes of action for intentional interference with right to practice lawful calling is determined by balancing importance to society and party of activity interfered with against importance of permitting interference; determination is not made by applying precise standards. *Willis v. Santa Ana etc. Hospital Assn. (1962) 58 Cal. 2d 806, 810, 26 Cal. Rptr. 640, 376 P.2d 568*

Allegation stating that defendants denied physician of highest qualifications access to hospital as result of conspiracy designed to restrain competition and deprive physician of practice in order to benefit competing members of conspiracy stated valid cause of action for intentional interference with right to pursue lawful profession. *Willis v. Santa Ana etc. Hospital Assn. (1962) 58 Cal. 2d 806, 810, 26 Cal. Rptr. 640, 376 P.2d 568*

Trial court properly granted hospital's motion for summary judgment that no triable issues of fact existed as to physician's cause of action for intentional interference with practice of profession based on hospital's failure to grant him staff privileges in cardiology, where evidence did not support conclusion that hospital failed to deal with physician's application for staff membership in fair, good faith manner, where there was no evidence of conspiracy intended to interfere with plaintiff's right to practice his profession, and where there was no evidence of actual interference with physician's right or ability to pursue his profession. *O'Byrne v. Santa Monica-UCLA Medical Center (2001) 94 Cal. App. 4th 797, 812-814, 114 Cal. Rptr. 2d 575*

[b] Immunities From Tort Actions

[i] Qualified Immunity for Members of Staff or Committee

Civ. Code § 43.8 affords qualified privilege to any communication of information intended to aid in evaluating physician's qualifications, character, and fitness to institutions such as hospitals and peer-review committees who have strong interest in receiving such information. *Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 943-944, 242 Cal. Rptr. 259*

Fact questions as to whether qualified privilege for staff and governing board members set out in *Civ. Code § 43.7* may have been lost because individuals protected by privilege were not acting pursuant to written bylaws or without malice, and had not made reasonable efforts to ascertain facts, presented when institution failed to provide accused physician with a hearing as provided for by bylaws and made no real effort to investigate accused physician's qualifications for membership. *Ascherman v. San Francisco Medical Society (1974) 39 Cal. App. 3d 623, 663, 114 Cal. Rptr. 681* (

Ascherman I)

[ii] Privileged Communications

Absolute privilege to commit libel or slander in official proceeding set out in former *Civ Code § 47(2)* (*now see Civ. Code § 47(b)*) is limited to statements and communications not applying to actions taken by hospital inquasi-judicial proceedings. *Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 482, 131 Cal. Rptr. 90, 551 P.2d 410*

Privilege conferred by former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*) is absolute and unaffected by existence of malice. *Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 941, 242 Cal. Rptr. 259*

Any publication in connection with Board of Medical Quality Assurance proceedings is clothed with absolute privilege set forth in former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*) as having been made in course of official proceeding, and proceedings are reviewable by writ of mandate. *Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 941, 242 Cal. Rptr. 259*

Privilege conferred by former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*) is not defeated by asserting different tort theory to libel or slander based on same protected communication. *Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 943, 242 Cal. Rptr. 259*

[iii] Malice

Once qualified privilege is shown to be applicable, plaintiff in defamation action has burden or producing evidence of malice. *Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 944, 242 Cal. Rptr. 259*

Malice is established by showing that publication was motivated by hatred or ill will towards plaintiff or by showing that defendant lacked reasonable grounds for belief in truth of publication and therefore acted in reckless disregard of plaintiff's rights. *Dorn v. Mendelzon (1987) 196 Cal. App. 3d 933, 945, 242 Cal. Rptr. 259*

[c] Justification of Interference

Interference with physician's right to practice medicine does not give rise to liability, even though intentional, if interference is reasonable and justified. *Letsch v. Northern San Diego County Hosp. Dist. (1966) 246 Cal. App. 2d 673, 677, 55 Cal. Rptr. 118*

Hospital's determination to operate radiology department on closed staff basis, thereby depriving physicians who had no exclusive contract with hospital of right to use hospital's radiology facilities, is reasonable and therefore does not give rise to liability on part of hospital. *Letsch v. Northern San Diego County Hosp. Dist. (1966) 246 Cal. App. 2d 673, 677, 55 Cal. Rptr. 118*

[d] Requirement of Exhaustion of Internal Remedies

Physicians who sought consolidated hearing, rather than separate hearings, to contest recommendation of medical executive committee of hospital to terminate their clinical privileges and medical staff membership, failed to exhaust internal remedies when bylaws of medical executive committee provided for appeal to hospital board of directors if judicial review committee hearing did not go in physicians' favor, physicians did not make such an appeal, and

physicians failed to demonstrate likelihood of irreparable harm if separate hearings were held. *Eight Unnamed Physicians v. Medical Executive Committee (2007) 150 Cal. App. 4th 503, 510-515, 59 Cal. Rptr. 3d 100*

Requirement that physician exhaust available and adequate internal remedies before seeking relief in courts applies to actions for damages for interference with right to practice profession as well as actions to have the institution's membership decision set aside. *Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 476-477, 131 Cal. Rptr. 90, 551 P.2d 410* (but requirement excused under facts); *Bartschi v. Chico Community Memorial Hospital (1982) 137 Cal. App. 3d 502, 508, 187 Cal. Rptr. 61*

Physician was entitled to seek an injunction to secure his statutory right to a pre-termination hearing under *Bus. & Prof. Code § 809.1 et seq.* without first pursuing hospital's internal remedy, which was post-termination hearing, because hospital's failure to afford him pre-termination hearing did not comply with § 809.1 et seq., which required hearing before his staff privileges were revoked. *Sahlolbei v. Providence Healthcare, Inc. (2003) 112 Cal. App. 4th 1137, 1146-1155, 5 Cal. Rptr. 3d 598*

[e] Requirement of Prior Favorable Determination

[i] In General

Order requiring hospital to reinstate wrongfully terminated member is not required for subsequent action for damages as long as hospital's decision to expel member has been set aside in appropriate judicial review proceeding. *Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 484 n.9, 131 Cal. Rptr. 90, 551 P.2d 410* (dictum)

Setting aside of quasi-judicial action adverse to applicant or member by hospital on appropriate review by courts is prerequisite to action for damages for allegedly wrongful expulsion or exclusion. *Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 484, 131 Cal. Rptr. 90, 551 P.2d 410*

[ii] Prior Favorable Determination Not Required When Due Process Denied

Prior favorable termination of action to set aside defendant's adverse decision was not required for action seeking damages for allegedly wrongful dismissal from hospital staff when hospital took its action without stating reasons to aggrieved person and failed to inform aggrieved person of existing right to respond to charges. *Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 478, 131 Cal. Rptr. 90, 551 P.2d 410*

[f] Statute of Limitations

Damages action for intentional interference with right to practice medicine governed by two year statute of limitations set out in *Code Civ. Proc. § 339(1)*, since right to practice profession is property right. *Edwards v. Fresno Community Hosp. (1974) 38 Cal. App. 3d 702, 705, 706, 113 Cal. Rptr. 579*

[4] Evidence

Although uncorroborated hearsay evidence, by itself, cannot support administrative finding, hearsay evidence together with other reliable evidence does so. *Gill v. Mercy Hospital (1988) 199 Cal. App. 3d 889, 910, 245 Cal. Rptr. 304*

Evidence admissible in administrative mandamus proceeding by doctor to reinstate his provisional nephrology privileges at private hospital. *Bonner v. Sisters of Providence Corp. (1987) 194 Cal. App. 3d 437, 444, 239 Cal. Rptr. 530*

In administrative mandamus proceeding by doctor to reinstate his provisional nephrology privileges at private hospital, trial court erred in admitting into evidence record of disciplinary proceedings by Board of Medical Quality Assurance, which determined that no cause for disciplinary action against doctor existed, because facts in dispute before trial court were whether doctor's patient care met standard required by hospital, whereas board's proceedings had not been concerned with doctor's ability to meet and maintain those standards; because administrative law judge conducting those proceedings did not hear same witnesses or have before him all evidence considered by hospital's committees, board's proceedings were irrelevant to issue of doctor's ability or fitness to comply with or meet hospital's standards for medical staff privileges and were therefore inadmissible. *Bonner v. Sisters of Providence Corp. (1987) 194 Cal. App. 3d 437, 444, 446, 239 Cal. Rptr. 530*

[5] Exculpatory Clause Not Enforceable

Exculpatory clause in hospital bylaws providing that each member or applicant waived right of personal redress violates public policy and therefore does not bar aggrieved person's access to courts. *Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 480, 131 Cal. Rptr. 90, 551 P.2d 410*

[6] Fair Procedure

[a] Exhaustion of Internal Remedies as Prerequisite

Physician need not exhaust administrative remedies against hospital when parties' dispute is resolved after commencement, but prior to completion, of administrative process through settlement awarding physician maximum benefit he or she could have been afforded administratively. *Joel v. Valley Surgical Center (1998) 68 Cal. App. 4th 360, 369, 80 Cal. Rptr. 2d 247*

"Futility" exception to exhaustion of remedies requirement is inapplicable if governing board has not taken position on physician's challenges to alleged procedural defects and factual disputes prevent resolution of challenges as matter of law. *Bollengier v. Doctors Medical Center (1990) 222 Cal. App. 3d 1115, 1130-1131, 272 Cal. Rptr. 273*

Aggrieved person must exhaust internal remedies before seeking judicial relief. *Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 476-477, 131 Cal. Rptr. 90, 551 P.2d 410* (but requirement excused under facts); *Anton v. San Antonio Community Hospital (Anton II) (1982) 132 Cal. App. 3d 638, 648, 183 Cal. Rptr. 423*

Association or hospital that failed to inform aggrieved person of existence of internal remedies barred from relying on failure to exhaust remedies in court action following decision to take adverse action. *Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 478, 131 Cal. Rptr. 90, 551 P.2d 410*

[b] Formal Procedures Not Needed

Common law fair hearing requirement of some meaningful opportunity to be heard in defense does not require formal proceedings, but places initial responsibility on hospital or professional organization to devise practical methods of providing notice and opportunity to defend; nature of tendered issue determines whether mere written response or appearance by aggrieved person and more extensive hearing required. *Ezekial v. Winkley (1977) 20 Cal. 3d 267, 278-279, 142 Cal. Rptr. 418, 572 P.2d 32*

Fair procedure in professional society action to exclude or expel does not compel procedures with formality of court trial, and minimum requirements depend on action contemplated and effect of action on the individual. *Hackethal v.*

California Medical Assn. (1982) 138 Cal. App. 3d 435, 442, 187 Cal. Rptr. 811

[c] Limited Right to Confront Accusers

Physician has no right to confront and cross examine persons who have made adverse statements of a physician unless they testify at hearing since hospital board has no subpoena power. *Ascherman v. San Francisco Medical Society (1974) 39 Cal. App. 3d 623, 648, 114 Cal. Rptr. 681* (*Ascherman I*) (citing sister state case as persuasive dicta)

Board not permitted to rely on evidence not produced at hearing, or on ex parte communications not made known to the physician in making its decision. *Ascherman v. San Francisco Medical Society (1974) 39 Cal. App. 3d 623, 648-649, 114 Cal. Rptr. 681* (*Ascherman I*) (citing sister state case as persuasive dicta)

[d] Notice and Hearing

Opportunity to be heard in defense is basic ingredient of fair procedure required under common law. *Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 555, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*)

Statement of reasons for rejecting application for membership in association and opportunity to respond is not required if not sought by applicant; rejection permissible as long as association indicates it will provide reasons and opportunity to respond on request. *Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 555 n. 13, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*)

Investigation of applicant's case and basing of denial of application on information disclosed by investigation, without affording applicant opportunity to respond, does not satisfy requirements of procedural fairness. *Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d, 541* (*Pinsker II*)

Whether letter of rejection referring to items in applicant's application materials is reason for rejection fully satisfied requirement of proper notice with respect to inquiry at subsequent hearing regarding matters outside scope of matters stated in letter as doubtful. *Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 628, 632-634, 166 Cal. Rptr. 826, 614 P.2d 258*

Fact that physician was able to present lengthy defense at hearing did not excuse hospital's failure to provide adequate notice of charges against physician. *Rosenblit v. Superior Court (1991) 231 Cal. App. 3d 1434, 1446, 282 Cal. Rptr. 819*

Failure to give probationary physician formal notice of issue included in review committee's decision to deny hospital privileges did not violate due process when committee's finding on that issue was not necessary to its decision. *Rhee v. El Camino Hospital Dist. (1988) 201 Cal. App. 3d 477, 487, 496-497, 247 Cal. Rptr. 244*

Adequate notice of charges and reasonable opportunity to respond, to confront and cross examine accusers, to examine and refute evidence, and to present defense, is basic to due process and fair procedure in expulsion proceeding against member of professional medical society. *Hackethal v. California Medical Assn. (1982) 138 Cal. App. 3d 435, 442, 187 Cal. Rptr. 811*

[e] Right to Attorney at Board's Discretion

Whether counsel may attend the hearing and participate in proceedings is within discretion of hospital board. *Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 815-816 n.12, 827, 140 Cal. Rptr. 442, 567 P.2d 1162* (*Anton I*

) (holding abrogated on unrelated point by legislative enactment of *Code Civ. Proc. § 1094.5(d)* in 1978)

Neither due process nor requirement of fair hearing is violated when hospital does not permit doctor to be represented by counsel at factual peer-review hearing. *Gill v. Mercy Hospital (1988) 199 Cal. App. 3d 889, 901, 245 Cal. Rptr. 304* .

Purpose of peer-review process is to resolve intraprofessionally matters bearing on physician's competency and conduct; to this end, affected physician is entitled to be represented at peer-review committee meeting by another physician on medical staff or from local professional society; purpose of peer-review proceeding is to review highly technical documents and medical reports dealing with doctor's performance in area in which experts in same field can arrive at decision without controversial and contentious atmosphere that would likely be created by participation of attorneys. *Gill v. Mercy Hospital (1988) 199 Cal. App. 3d 889, 902, 245 Cal. Rptr. 304*

[f] Right to Copy Medical Records

Physician has right to make copies of medical records relating to those cases for which his or her professional judgment is at issue. *Rosenblit v. Superior Court (1991) 231 Cal. App. 3d 1434, 1446-1447, 282 Cal. Rptr. 819*

[g] Substantial Evidence Requirement

Court declined to uphold hospital's adverse membership determination on basis of evidence brought up at administrative hearing but clearly outside main thrust of administrative inquiry, when main evidence on which determination was based was held inadequate to support determination. *Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 628, 634-635, 166 Cal. Rptr. 826, 614 P.2d 258*

Basis of decision must come from substantial evidence produced at hearing. *Ascherman v. San Francisco Medical Society (1974) 39 Cal. App. 3d 623, 648-649, 114 Cal. Rptr. 681* (*Ascherman I*) (citing sister state case as persuasive dicta)

[h] Hearing on Review No Substitute for Fair Procedure

Hearing on merits at trial reviewing association's decision does not cure failure by association to provide opportunity to be heard since trial judge lacks association's expertise and courts should not routinely undertake to interfere in internal affairs of private associations in first instance. *Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 557, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*)

[7] Federal Civil Rights Claims

Claim for violation of *42 U.S.C.S. § 1983, 1985*, or *1986* based on denial of hospital privileges by review committee was barred by res judicata effect of denial of petition for writ of mandate because same primary right was subject of both actions. *Mir v. Little Co. of Mary Hosp. (9th Cir. 1988) 844 F.2d 646, 651-652*

[8] Peer-Review Process

Trial court properly sustained health care service plan's demurrer to physician's action in contract and tort for damages against plan for allegedly wrongfully suspending him from its network of medical providers on grounds of medical incompetency, when physician concededly failed to exhaust administrative remedy under *Bus. & Prof. Code § 809 et*

seq., but court erred in sustaining demurrer to cause of action for declaratory relief and should have treated it as petition requesting court to issue writ of mandate ordering plan to vacate its decision terminating physician's provider status for physician's alleged failure to cooperate with 809 hearing, and reinstate 809 proceedings. *Lee v. Blue Shield of California (2007) 154 Cal. App. 4th 1369, 1376-1379, 65 Cal. Rptr. 3d 612*

In action challenging hospital hearing officer's authority to suspend peer review proceedings that resulted in termination of physician's staff privileges, trial court properly denied physician's writ upholding hearing officer's authority under *Bus. & Prof. Code § 809.2* and hospital's bylaws adding further detail to statutory procedures, where hearing officer's conclusion that he had power to suspend hearing based on physician's conduct was in line with relevant statutes and bylaws as interpreted by hospital's appellate review body, and his decision that rules permitted termination of hearing when practitioner was repeatedly disruptive, disdainful of hearing officer's authority, and flagrantly violated rules pertaining to discovery and documentary exhibits was not clearly erroneous or unreasonable, and was affirmed by appellate review body; and where hearing officer did not abuse his discretion in terminating hearing, because by time hearing officer imposed terminating sanction, less severe sanctions had already been tried and failed with respect to discovery and exhibits, hearing officer could not disregard physician's disdain for his authority forever or permit physician to continue to prolong proceedings unnecessarily. *Mileikowsky v. Tenet Healthsystem (2005) 128 Cal. App. 4th 531, 557-566, 27 Cal. Rptr. 3d 171*

Health Care Quality Improvement Act of 1986 (*42 U.S.C.S. § 11111 et seq.*), which establishes national clearing house of medical peer-review and malpractice information and provides qualified immunity from certain federal and state laws for peer-review actions taken in good faith, was inapplicable to peer-review hearing that occurred long before its effective date and was not intended to modify existing California peer-review hearing procedures. *Gill v. Mercy Hospital (1988) 199 Cal. App. 3d 889, 903-904, 245 Cal. Rptr. 304*

[9] Proceedings to Obtain Relief From Membership Decision

[a] Appropriate Actions to Obtain Judicial Review

Administrative mandamus, governed by *Code Civ. Proc. § 1094.5*, is proper procedure for seeking judicial review of adverse membership decision byhospital. *Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 813-817, 140 Cal. Rptr. 442, 567 P.2d 1162* (*Anton I*) (holding abrogated on unrelated point by legislative enactment of *Code Civ. Proc. § 1094.5(d)* in 1978); *Avol v. Hawthorne Community Hospital (1982) 135 Cal. App. 3d 101, 108-109 n. 4, 184 Cal. Rptr. 914*

[b] Scope of Judicial Review of Institution's Rules

Scope of court's review in adjudicating challenge to society's rule or standard by which aggrieved person was rejected or excluded is arbitrary as limited to determination whether standard is reasonable, comports with legitimate goals of society and rights of individual and public, and is not contrary to established public policy. *Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 558, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*)

Matters of policy involved in adoption of bylaws, code of ethics, and resolution in conformity with code of ethics are question for membership itself and not debatable in court absent showing that policy is in violation of law. *Smith v. Kern County Medical Asso. (1942) 19 Cal. 2d 263, 270-271, 120 P.2d 874*

Trial court's order to reinstate expelled member of professional medical society pending proper administrative hearing was based on proper inquiry as to whether there was prejudicial abuse of discretion by organization; trial court was allowed to examine record to determine whether errors of law were committed. *Hackethal v. California Medical Assn. (1982) 138 Cal. App. 3d 435, 448, 187 Cal. Rptr. 811*

[c] Standard of Review

Hospital board of directors applied correct standard under *Bus. & Prof. Code § 809.05(a)* in not accepting recommendation of hospital's medical executive committee (MEC) and in deciding to terminate physician's staff privileges, where according to Board, majority of MEC had not assessed cumulative or aggregate weight of evidence and failed to recognize entrenched hazards posed by physician to his patients and colleagues given overall pattern of his conduct, which determination fell within Board's delegated authority to protect patients and was entitled to deference, so that Board properly accorded great weight to actions of hearing committee and MEC under *Bus. & Prof. Code § 809.05(a).* *Weinberg v. Cedars-Sinai Medical Center (2004) 119 Cal. App. 4th 1098, 1106-1112, 15 Cal. Rptr. 3d 6*

In administrative mandamus proceeding by doctor to reinstate his provisional nephrology privileges at private hospital, standard of review of hospital's decisions by trial court under *Code Civ. Proc. § 1094.5(d)* is substantial evidence test, and standard of review for appellate court is same; appellate court also reviews administrative record to determine whether its findings are supported by substantial evidence in light of whole record, its object being to ascertain whether trial court ruled correctly as matter of law. *Bonner v. Sisters of Providence Corp. (1987) 194 Cal. App. 3d 437, 443-444, 239 Cal. Rptr. 530*

Function of reviewing courts under substantial evidence test is not to resolve differences of medical judgment. *Bonner v. Sisters of Providence Corp. (1987) 194 Cal. App. 3d 437, 447, 239 Cal. Rptr. 530*

Substantial evidence test of *Code Civ. Proc. § 1094.5(d)* applied to judicial review of hospital board's denial of physician's application for hospital privileges; decision did not affect fundamental vested right because license to practice was unaffected, plaintiff retained full rights and privileges to practice medicine, and plaintiff's right to practice at hospital not vested. *Smith v. Vallejo General Hospital (1985) 170 Cal. App. 3d 450, 455, 216 Cal. Rptr. 189*

Trial court review of hospital administrative hearing in which hospital privileges of physician were suspended required application of substantial evidence test, in which administrative decision will be upheld unless, viewed in light of entire record, decision was so lacking in evidentiary support as to render it unreasonable. *Cipriotti v. Board of Directors (1983) 147 Cal. App. 3d 144, 155, 196 Cal. Rptr. 367*

[d] Statute of Limitations

Proceeding in administrative mandamus by doctor to reinstate his provisional nephrology privileges at private hospital was governed by four-year period of limitation set forth in *Code Civ. Proc. § 343*, governing actions not otherwise provided, and not three-year period set forth in *Code Civ. Proc. § 338(1)* (*now see Code Civ. Proc. § 338(a)*), governing actions on liability created by statute. *Bonner v. Sisters of Providence Corp. (1987) 194 Cal. App. 3d 437, 441-443, 239 Cal. Rptr. 530*

[e] Types of Relief Available

Code Civ. Proc. § 425.16 procedure for striking complaints in harassing lawsuits commonly known as SLAPP suits (strategic lawsuits against public participation), which are brought to challenge exercise of constitutionally protected free speech rights, was available in lawsuit brought by hospital staff physician arising out of disciplinary recommendation by hospital's peer review committee under *Bus. & Prof. Code § 809 et seq.* Thus, hospital was entitled under *Code Civ. Proc. § 425.16(e)(2)* to file its special motion to strike physician's complaint as SLAPP suit. *Kibler v. N. Inyo County Local Hosp. Dist. (2006) 39 Cal. 4th 192, 197-203, 46 Cal. Rptr. 3d 41, 138 P.3d 193*

Case was properly remanded to hospital for redetermination of decision to deny application for staff membership when

main evidence considered by hospital did not support determination and real doubt existed as to whether hospital would have made determination to deny application on some peripheral evidence that was also presented. *Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 628, 634-635, 166 Cal. Rptr. 826, 614 P.2d 258*

Judicial finding that hearing has been improperly denied in membership decision entitles aggrieved applicant only to order that proper hearing be held, and not to order compelling immediate admission to membership. *Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 557 n. 17, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*)

Court remanded case for redetermination of penalty of expulsion when findings of seven separate rules violations by physician were reduced to two in course of review and appeal process, and association had imposed only one penalty for allseven violations. *Bernstein v. Alameda etc., Med. Assn. (1956) 139 Cal. App. 2d 241, 252-253, 293 P.2d 862*

[10] Substantive Rationality

[a] General Requirement That Rules Be Substantively Reasonable

[i] In General

Expulsion or exclusion from public or private hospital staff cannot rest on rule that is substantively capricious, contrary to public policy, or unreasonablysusceptible of arbitrary or discriminatory application. *Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 626, 627, 166 Cal. Rptr. 826, 614 P.2d 258*

Hospital's restriction of clinical privileges to physicians with high level of training was not substantively irrational, notwithstanding fact that other hospitals granted similar privileges to physicians with less training; physician's demonstrated competency did not guarantee clinical privileges. *Hay v. Scripps Memorial Hospital (1986) 183 Cal. App. 3d 753, 761-762, 228 Cal. Rptr. 413*

Hospital's requirement that applicant for staff membership submit three letters of recommendation from current staff members is substantively unreasonable. *Ascherman v. Saint Francis Memorial Hosp. (Ascherman II) (1975) 45 Cal. App. 3d 507, 509, 512-514, 119 Cal. Rptr. 507*

Operation of closed staff for hospital's radiology department is both reasonable and within authority of public hospital district pursuant to *Health & Safety Code § 32121(i)* (granting broad powers to public hospital districts in running of health care facilities). *Letsch v. Northern San Diego County Hosp. Dist. (1966) 246 Cal. App. 2d 673, 677, 55 Cal. Rptr. 118*

Violation of local medical society rule proscribing continued practice at specific hospital justifies expulsion. *Smith v. Kern County Medical Asso. (1942) 19 Cal. 2d 263, 266, 269-270, 120 P.2d 874*

[ii] Rules That Are Contrary to Public Policy

Hospital's restriction of clinical privileges to physicians with high level of training was not violative of public policy, despite fact that other hospitals granted similar privileges to physicians with less training; physician's demonstrated competency did not guarantee clinical privileges. *Hay v. Scripps Memorial Hospital (1986) 183 Cal. App. 3d 753, 761-762, 228 Cal. Rptr. 413*

Canon of American Medical Society's code of ethics that proscribed criticism by physician of diagnosis of another physician is unenforceable as contrary to public policy if applied to comments made in affidavit filed in official judicial proceeding, since affidavit was privileged statement under former *Civ Code § 47(2)* (*now see Civ. Code § 47(b)*)

(absolute privilege for statements made in official judicial proceeding). *Bernstein v. Alameda etc. Med. Assn. (1956) 139 Cal. App. 2d 241, 246-247, 293 P.2d 862* (court construed rule not to apply to comments in affidavit)

[iii] Vague and Ambiguous Rules

Hospital districts are not permitted to adopt standards for exclusion of physicians from use of their hospitals that are so vague and ambiguous as to provide substantial danger of arbitrary discrimination in their application. *Rosner v. Eden Township Hospital Dist. (1962) 58 Cal. 2d 592, 598, 25 Cal. Rptr. 551, 375 P.2d 431*

Rule that only physicians whose background and training assures that patients receive best possible medical care is too vague and uncertain to be permissibly used as basis for exclusion of applicant from hospital staffprivileges. *Wyatt v. Tahoe Forest Hospital Dist. (1959) 174 Cal. App. 2d 709, 715, 345 P.2d 93*

Requirement for granting hospital staff privileges that is reasonable in itself may be impermissible as basis for excluding physician from privileges when couched in such vague and ambiguous terms that it sets out no adequate standards for application, and authorizes hospital to apply requirement in manner going beyond scope of reasonable basis for the requirement. *Martino v. Concord Community Hosp. District (1965) 233 Cal. App. 2d 51, 58, 60, 43 Cal. Rptr. 255*

[iv] Official Interpretation of Ambiguous Rule

Applicant for membership in professional society is not entitled to question society's interpretation of ambiguous rule when society provided timely and adequate explanation of rule. *Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 559-560, 560 n. 19, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*)

[b] Requirement of Existing Cause

Exclusion of physician from staff of public hospital must be for existing cause; public hospital is not entitled to exclude physician with unrevoked license who is in good standing merely because of past misconduct that made physician subject to professional discipline. *Wyatt v. Tahoe Forest Hospital Dist. (1959) 174 Cal. App. 2d 709, 714, 345 P.2d 93*

[c] Right to Memership Subject to Reasonable Rules

Professional society may exclude licensed practitioner if practitioner fails to fulfill reasonable requirements of society. *Kronen v. Pacific Coast Society of Orthodontists (1965) 237 Cal. App. 2d 289, 305-307, 46 Cal. Rptr. 808*

Right of associations to expel members is based on (1) violation of established rules of association that have been subscribed or assented to by members and that provide for expulsion as penalty or (2) conduct clearly violating the object of asociation, which would thwart those objects or bring association into disrepute if conduct were persisted in. *Smith v. Kern County Medical Asso. (1942) 19 Cal. 2d 263, 270-271, 120 P.2d 874*

Right to practice in hospital is subject to reasonable rules. *Wyatt v. Tahoe Forest Hospital Dist. (1959) 174 Cal. App. 2d 709, 714, 345 P.2d 93*

[d] Standards for Qualification or Competence

[i] In General

Expert supervisor's judgment as to resident's competence is entitled to great weight on judicial review of hospital's dismissal of resident. *Ezekial v. Winkley (1977) 20 Cal. 3d 267, 278-279, 142 Cal. Rptr. 418, 572 P.2d 32*

Professional associations may impose standards of qualification for membership higher than those imposed for obtaining a license to practice profession generally. *Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 560, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*)

Association devoted to professional specialty may require applicant to have taken courses that concentrate on specialty in question. *Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 560, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*)

So long as there is rational basis for requirements of medical staff of private hospital for clinical privileges, hospital may make its requirements as stringent as it deems reasonably necessary to assure adequate patient care. *Bonner v. Sisters of Providence Corp. (1987) 194 Cal. App. 3d 437, 446, 239 Cal. Rptr. 530*

Requiring applicant for staff membership in hospital to take examination as condition of acceptance is reasonable method of determining the applicant's competence, if requirement is not too vague. *Martino v. Concord Community Hosp. District (1965) 233 Cal. App. 2d 51, 58, 60, 43 Cal. Rptr. 255*

[ii] Ability to Work With Others as Necessary Qualification

Hospital bylaw requirement that staff member be able to work with others is substantively rational only when construed so that denial of staff membership to physician based on this rule would require showing that physician's inability to work with others presents real and substantial danger that patients treated by physician might receive other than high quality of medical care at hospital. *Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 628, 629, 166 Cal. Rptr. 826, 614 P.2d 258*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewAdministrative LawJudicial ReviewReviewabilityExhaustion of RemediesAdministrative LawJudicial ReviewReviewabilityFactual DeterminationsCivil ProcedureJusticiabilityExhaustion of RemediesAdministrative RemediesContracts LawContract Conditions & ProvisionsExculpatory ClausesGovernmentsLegislationStatutes of LimitationsTime LimitationsHealthcare LawAntitrust ActionsFacilitiesHealthcare LawAntitrust ActionsPhysiciansHealthcare LawBusiness Administration & OrganizationEmployment DiscriminationHealthcare LawBusiness Administration & OrganizationHospital PrivilegesJudicial ReviewHealthcare LawBusiness Administration & OrganizationHospital PrivilegesProfessional ReviewHealthcare LawBusiness Administration & OrganizationHospital PrivilegesRestrictionsHealthcare LawBusiness Administration & OrganizationJudicial ReviewGeneral OverviewHealthcare LawBusiness Administration & OrganizationJudicial ReviewSubstantial EvidenceHealthcare LawBusiness Administration & OrganizationPeer ReviewGeneral OverviewHealthcare LawBusiness Administration & OrganizationWrongful TerminationGeneral OverviewLabor & Employment LawWrongful TerminationDefensesGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 416 PHYSICIANS: MEMBERSHIP ON HOSPITAL STAFFS OR IN PROFESSIONAL ORGANIZATIONS
PART III. RESEARCH GUIDE

36-416 California Forms of Pleading and Practice--Annotated § 416.43

§ 416.43 Law Reviews

Note, *Medical Staff Peer Review: Qualifying the Qualified Privilege Provision, 27 Loy. L.A. L. Rev. 357 (1993)*

Note, *California Civil Code Section 47(2): Do Remedies Exist for Those Injured by the Privilege? 18 Sw. U.L. Rev. 127 (1988)*

Comment, *Antitrust Implications of Medical Peer Review: Balancing the Competing Interests, 15 Pepperdine L. Rev. 111 (1987)*

Comment, *Anatomy of the Conflict Between Hospital Medical Staff Peer Review Confidentiality and Medical Malpractice Plaintiff Recovery: A Case for Legislative Amendment, 24* Santa Clara Law. 661 (1984)

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesGeneral OverviewHealthcare LawAntitrust ActionsFacilitiesHealthcare LawBusiness Administration & OrganizationGeneral OverviewHealthcare LawBusiness Administration & OrganizationPeer ReviewGeneral Overview

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 416 PHYSICIANS: MEMBERSHIP ON HOSPITAL STAFFS OR IN PROFESSIONAL ORGANIZATIONS
PART IV. FORMS

36-416 California Forms of Pleading and Practice--Annotated § 416.60

§ 416.60 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Health Care Facility or Professional Society to Revoke or Deny Membership Privileges

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Health Care Facility or Professional Society to Revoke or Deny Membership Privileges

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR WRIT OF MANDATE
Respondent.	)	
	)	
	)	

Petitioner respectfully represents:

1. Petitioner is, and at all times herein mentioned was, a physician and surgeon certified to practice in the state of California, and a resident of _____ County, California.

[*EITHER, if petitioner seeks review of expulsion from membership*]

2. Petitioner was until _____ [*state date of expulsion*] and at all other relevant times, a member of _____ [the staff of _____ (*name of respondent health care facility*) *or* respondent organization], which membership entitled petitioner to the following privileges: _____ [*specify privileges included with membership*].

[*OR, if petitioner seeks review of denial of membership*]

2. On or about _____ [*date*], petitioner applied to _____ [*respondent health care facility or professional organization*] for admission _____ [to its medical staff *or* as a member] in compliance with all of the requirements for such applications that are set out in respondent's bylaws. Petitioner meets all of the qualifications for admission.

[*CONTINUE*]

3. Respondent is a _____ [public health care district established under and subject to *Sections 32000 through 32592 of the Health and Safety Code or* private health care facility accredited by the Joint Commission on Accreditation of Hospitals *or* private professional association _____ (*if appropriate, add facts concerning respondent's status in profession, e.g.,* that holds itself out to the public as the only source forvalid certification for practice in petitioner's specialty)], governed by _____ [*title of bylaws*], which were adopted by it and relevant portions of which are attached hereto as Exhibit _____. Respondent is located in _____ County, California.

4. Under the decisional law of this state, respondent has discretion to establish reasonable standards for determining whether or not a physician should be _____ [admitted to *or* expelled from] membership, and to determine the facts as to whether or not under these standards a ground exists for [denying an application for admission to membership (on its staff) *or* expelling a member (from its staff)] and particularly whether _____ [*specify facts alleged by respondent on which decision to deny or expel from staff membership was made; e.g.,* petitioner is temperamentally unable to work with others and this inability would jeopardize the quality of medical care provided to patients at respondent health care facility]. Respondent further has discretion under the decisional authority of this state to establish internal procedures for making such a determination.

5. Pursuant to [*if respondent is a public health care facility or health care district, add: Section 32150 of the Health and Safety Code* and] the decisional law of the State of California, respondent's internal procedures for making membership decisions are required to include provisions for a hearing at which evidence is taken for the determination of facts on which respondent's membership decision is to be based. Respondent's provisions for holding a hearing on the facts relating to a membership decision are set out in _____ [*specify provisions that set out hearing procedures*], which are included in the bylaw provisions attached hereto as Exhibit _____.

6. On _____ [*date*], petitioner was informed by respondent that _____ [petitioner's application for admission to membership of _____ (respondent's staff *or* respondent organization) had been denied *or* action would be commenced to expel petitioner from _____ (respondent's staff *or* respondent organization)].

[*EITHER, if petitioner was given no reasons for respondent's action*]

7. Respondent has to date given petitioner no reason for its action, nor has it informed petitioner that he/she may request a statement of reasons.

[*OR, if petitioner was given reasons for respondent's action*]

7. _____ [In informing petitioner of its adverse membership decision *or* Pursuant to petitioner's request, made on _____ (*date*), for a statement of reasons for respondent's action], respondent stated its position that petitoner was not qualified for _____ [admission to *or* continued] membership on the ground that _____ [*specify grounds, e.g.,* petitioner is temperamentally incapable of working with others]. A copy of the statement by which respondent informed petitioner of its determination is attached hereto as Exhibit _____ and made a part thereof.

[*CONTINUE*]

8. On _____ [*date*], petitioner requested to be given a hearing on respondent's determination [*if respondent's bylaws provide for hearing add:* pursuant to _____ (*specify bylaw provision providing for hearing*)]. A copy of petitioner's request is attached hereto as Exhibit _____ and made a part thereof.

[*EITHER, if respondent failed to provide petitioner with a hearing*]

9. Respondent has not provided petitioner with a hearing or opportunity to respond [*if appropriate, add:* nor has respondent informed petitioner of any opportunity that might exist under its bylaws for responding to its membership determination].

[*OR, if respondent has provided a hearing*]

9. On _____ [*date*], at _____ [*specify meeting place*], a hearing was held to receive evidence on the issue of whether or not a ground exists for _____ [denial of petitioner's application for admission to _____ (respondent's staff *or* respondent organization) *or* expulsion of petitioner from _____ (respondent's staff *or* respondent organization), of which petitioner was then a member in good standing]. _____ [*If appropriate, add:* Petitioner attended the hearing.]

10. On _____ [*date*], petitioner received respondent's decision and order affirming respondent's determination to _____ [deny petitioner's application for admission to membership _____ (on respondent's staff *or* in respondent organization) *or* expel petitioner from _____ (respondent's staff *or* respondent organization)]. _____ [A verbatim transcript of the record of the hearing, containing the evidence received, is attached hereto as Exhibit _____ and made a part thereof *or* The substance of the evidence received at the hearing is as follows: _____ (*describe substance of evidence*)].

11. [*If respondent provided an internal appeal procedure, or other internal remedy available after adverse hearing decision, add:* After receiving respondent's hearing decision, petitioner in timely fashion _____ (*set out exhaustion of any internal remedies still available to petitioner after adverse hearing decision*). On _____ (*date*), petitioner received respondent's _____ (determination of appeal *or specify other determination of internal remedy*) upholding the decision made at the hearing. In following these procedures, petitioner has exhausted all of his/her administrative remedies and the decision of respondent has become final insofar as respondent is presently concerned].

12. Respondent's determination is invalid for the following reasons: _____ [*in subparagraphs that follow, state reasons why decision is invalid, e.g.,*

a. Respondent has abused its discretion in that it failed to proceed according to law and failed to provide petitioner a fair trial in that theinternal provisions established by respondent for making its membership determination do not satisfy the minimal requirements for fair procedure because _____ (*specify reasons why respondent's procedures are inadequate, e.g.,* respondents's mere statement to petitioner that petitioner could appeal the adverse decision without either informing petitioner of or providing in its bylaws for any concrete procedure according to which such an appeal would be conducted did not provide petitioner with a meaningful opportunity to respond).

b. Respondent has abused its discretion in that it failed to proceed according to law and failed to provide petitioner a fair trial in that the manner in which respondent carried out its procedures for making its membership determination denied petitioner a meaningful opportunity to respond and a fair hearing because _____ (*specify reasons why respondent's manner of proceeding denied meaningful opportunity to respond, e.g.,* the person making the original accusation against petitioner served on the panel charged with investigating the accusation and _____ (*number of members*) members of the panel charged with investigating the accusation also served on the _____ (*number of members*) member panel which held the above-alleged hearing, thus compromising the impartiality of respondent's membership determination).

c. Respondent based its decision on _____ (*specify rule on which decision based*), which provides that _____ (*specify, e.g.,* a physician may be denied membership on the hospital staff if the admissions review committee finds that he or she is unable to work with others). (As shown, by the record, respondent interpreted this rule to mean that _____ (*specify, e.g.,* respondent could deny petitioner's application for hospital staff membership on a showing that petitioner was temperamentally incapable of getting along with others, without any showing that such inability would adversely affect the quality of medical care provided by the hospital or by petitioner).) Respondent's rule (, as interpreted by respondent,) is substantively irrational, and therefore not a valid basis for respondent's decision, in that _____ (*specify, e.g.,* the rule is not rationally related to respondent's stated purpose of protecting the quality of medical care provided by the hospital, or to any other legitimate purpose of respondent). In applying a substantively irrational rule, respondent abused its discretion by failing to proceed according to law.

d. At the hearing it was found that _____ (*state all findings, e.g.,* petitioner has frequently criticized the quality of patient care delivered to petitioner by other physicians in the community). Respondents may not _____ (deny petitioner's application for *or* expel petitioner from) membership in respondent's staff based on any of these findings because such findings do not support a conclusion that _____ (*specify ground for action taken as stated in original notice, e.g.,* petitioner is temperamentally unable to work with others and that such inability would jeopardize the quality of care he/she would deliver to patients at respondent hospital) or any other substantively rational ground for respondent's determination.

e. The evidence received at the hearing does not support the findings for the following reasons: _____ (*specify*).

f. _____ (*In this and following subparagraphs, allege any other reasons for invalidity of respondent's determination, as provided in Code Civ. Proc. § 1094.5. For further examples of such allegations, see the petition for writ of mandate to review an administrative decision in the Ch. 474C, Procedures in Reviewing Agency Decisions.*)

[13. *If appropriate, add:* Petitioner has the following relevant evidence that was not produced at the hearing: _____ (*describe evidence completely*). _____ (This evidence could not be produced at the hearing because _____ (*specify rea sons why, in the excercise of reasonable diligence, petitioner could not produce evidence*) *or* This evidence was improperly excluded when petitioner attempted to introduce it at the hearing). This evidence tends to show that _____ (*state what evidence will prove*).]

14. As a result of the fact that petitioner has been deprived of membership _____ [on respondent's

medical staff *or* in respondent organization], petitioner has been denied the right to fully practice the profession of medicine and has suffered a detriment to a substantial economic interest in that _____ [*specify, e.g.,* petitioner's lack of opportunity to avail himself/herself and his/her patients of respondent's facilities has made it difficult for respondent to maintain his or her practice].

[15. *If attorney's fees are claimed under Gov. Code § 800, add:* As an incident of bringing and maintaining this proceeding, petitioner has become, and is obligated personally to pay to his/her counsel _____ (*name of attorney*), attorney's fees _____ (exceeding $7,500 *or* in the sum of $_____).]

16. Petitioner has no plain, speedy, or adequate remedy in the ordinary course of law.

WHEREFORE, petitioner prays judgment as follows:

[1. *If alternative writ procedure is used:* For an alternative writ of mandate directing respondent to set aside its determination to _____ (deny petitioner's application for *or* expel petitioner from) membership _____ (on respondent's medical staff *or* in respondent organization) and to _____ (reconsider its determination _____ (according to the requirements of fair procedure *or* in light of any findings this court may make) *or* _____ (accept *or* reinstate) petitioner as a member of respondent's staff), or in the alternative to show cause why a peremptory writ of mandate to the same effect should not be issued;]

[2. *If petitioner seeks a stay of operation of the respondent's determination to expel him or her from membership pending judgment, state:* For an order restraining respondent from giving effect to its determination to expel petitioner from its staff until further order of the court and to show cause why operation of that determination should not be stayed pending judgment in this proceeding;]

3. For a peremptory writ of mandate _____ [*set out terms of proposed peremptory writ at length as in Paragraph 1 of this Prayer, omitting words relating to order to show cause*];

[4. *If attorney's fees sought under Gov. Code § 800, add:* For reasonable attorney's fees, in addition to any other relief granted or other costs awarded;]

5. For costs of suit herein incurred [*add, if appropriate:* including $_____ for preparation of the administrative record]; and

6. For such other and further relief as the court may deem proper.

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

CAUTION:

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Proof of service on each respondent and real party in interest of a copy of a petition that seeks an alternative writ must accompany the petition when it is offered for filing except when, in its discretion and for good cause, the court has granted the application for the writ ex parte [*Code Civ. Proc. § 1107*; for a discussion of serving the petition, *see* Ch. 358, *Mandate and Prohibition*]. Points and authorities also customarily accompany a petition filed in a superior court, although they do not appear to be expressly required by statute. When no alternative writ is sought, proof of service of a copy of the petition need not accompany the application, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

[2] Use of Form

This petition for a writ of mandate is for use by a physician whose application for staff membership at a hospital has been denied or who has been expelled from an existing staff membership at a hospital. A writ of mandate of the sort petitioned for in this form may be issued by any court, except a municipal court [*Code Civ. Proc. § 1085*]. Thus, this petition would ordinarily be submitted to a superior court having venue in the action [*see § 416.60[10]*]. For complete discussion of petitions for writs of mandate to review administrative decisions, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

The petitioner may proceed by either the alternative writ procedure or the noticed application procedure, as described *below*.

[3] Alternative Writ Procedure

If the petitioner proceeds by the alternative writ procedure, he or she should prepare a petition, an order for issuance of an alternative writ (if local rules or practice so require), and an alternative writ of mandate. He or she must serve a copy of the petition on each respondent and real party in interest, and file the petition along with proof of service [*see Code Civ. Proc. § 1107*]. At the time of filing the petition, the alternative writ is deposited, but not filed, with the clerk of the court. Five days after the filing of the petition, the court must examine the papers on file and either issue or decline to issue the alternative writ. During the five-day period, the respondent or real party in interest may file a memorandum of points and authorities in opposition to the issuance of the writ, and serve a copy of the memorandum on the petitioner [*see Code Civ. Proc. § 1107*]. If the court decides to issue the alternative writ, the judge either signs the order for issuance or signs the writ itself. A copy of the writ is then served on respondent and real party in interest in the same manner as a summons [*see Code Civ. Proc. § 1096*]. The alternative writ commands the respondent to either do the specified act or to appear at a time and place specified in the writ and show cause why a peremptory writ of mandate ordering respondent to do the act should not be issued [*see Code Civ. Proc. § 1087*].

For a form of alternative writ of mandate, see Ch. 474C, *Procedures in Reviewing Agency Decisions* , et seq.

[4] Noticed Application Procedure

If the petitioner follows the noticed application procedure, he or she should prepare a petition and a notice fixing a time (at least 10 days afterthe notice) and place for hearing the petition [*see Code Civ. Proc. § 1088*]. Since no alternative writ is sought under this procedure, proof of service need not accompany the petition when it is filed. However, proof of service of a copy of the filed petition must be lodged with the court before a hearing or any action by the court [*see Code Civ. Proc. §§ 1088.5, 1107*]. Respondent or real party in interest may file points and authorities in opposition to the petition within five days after the filing of the petition [*see Code Civ. Proc. § 1107*]. No alternative writ is issued under the noticed application procedure. Instead, the court hears the petition and respondent's answer, if any, on the date fixed by the notice for the hearing. If the court determines that issuance of a writ of mandate is proper, it issues, or orders issued, the peremptory writ [*see Code Civ. Proc. §§ 1086, 1088, 1089, 1094*].

For a form of notice of application for a writ of mandate, see *Ch. 474C, Procedures in Reviewing Agency Decisions, § 474C.96*.

[5] Allegations

This petition alleges the following:

- Capacity and residence of petitioner (Paragraph 1).

- Petitioner's beneficial interest in the respondent's decision to exclude or expel him or her from membership and therefore in the issuance of the writ (Paragraph 2) [*Code Civ. Proc. § 1086*].

- Capacity and location of respondent (Paragraph 3).

- The discretionary authority of the respondent institution to set out standards and procedures for making membership determinations and determine whether grounds exist to exclude or expel a physician from membership (Paragraph 4) [*see Code Civ. Proc. § 1094.5(a)*; *Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 560, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II); Kronen v. Pacific Coast Society of Orthodontists (1965) 237 Cal. App. 2d 289, 305-307, 46 Cal. Rptr. 808]* .

- That a hearing is required to be held and evidence taken [*see Code Civ. Proc. § 1094.5(a)*; *Health & Safety Code §§ 32150, 32153*; *Anton v. San Antonio Community Hosp.(1977) 19 Cal. 3d 802, 815-816 n. 12, 140 Cal. Rptr. 442, 567 P.2d 1162* (*Anton I*) (holding abrogated on unrelated point by legislative enactment of *Code Civ. Proc. § 1094.5(d)* in 1978)] and respondent's actual provisions for the hearing (Paragraph 5).

- The date on which the petitioner was informed that the membership application was denied or that action to expel petitioner from membership would be taken (Paragraph 6).

- Reasons given by respondent for adverse membership action, or failure to give reasons (Paragraph 7).

- Petitioner's request for a hearing on respondent's adverse membership action (Paragraph 8).

- The holding of the hearing, or respondent's failure to provide a hearing (Paragraph 9).

- Respondent's decision following the hearing (Paragraph 10).

- Further action by petitioner to exhaust internal remedies provided by respondent, exhaustion of those remedies, and finality of respondent's decision (Paragraph 11) [*see Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 476-477, 131 Cal. Rptr. 90, 551 P.2d 410]* .

- Reasons for the invalidity of the decision (Paragraph 12) [*see Code Civ. Proc. § 1094.5(b)*].

- Where appropriate, the nature of any additional relevant evidence and reasons why the evidence could not, in the exercise of reasonable diligence, have been produced at the administrative hearing (Paragraph 13) [*Code Civ. Proc. § 1094.5(e)*].

- That respondent's action deprives petitioner of the right to fully practice medicine (Paragraph 14) [*see Pinsker v. Pacific Coast Society of Orthodontists (1974) 12 Cal. 3d 541, 554, 116 Cal. Rptr. 245, 526 P.2d 253* (*Pinsker II*)].

- When appropriate, the amount of attorney's fees claimed under *Gov. Code § 800* (Paragraph 15) [*see § 416.60[9]*].

- Petitioner's lack of a plain, speedy, or adequate remedy in the ordinary course of law (Paragraph 16) [*Code Civ. Proc. § 1086*].

[6] Allegation of Exhaustion of Internal Remedies

Exhaustion of internal remedies offered by the hospital or professional organization is a prerequisite to seeking to have the hospital or organization's membership determination set aside in court [*Anton v. San Antonio Community Hospital (Anton II) (1982) 132 Cal. App. 3d 638, 648, 183 Cal. Rptr. 423]* . This exhaustion requirement is excused if internal remedies were unavailable or inadequate, or the hospital or organization failed to inform the physician of the availability of the remedies [*see Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 478, 131 Cal. Rptr. 90, 551 P.2d 410* (physician not informed of remedy; damage action); *Martino v. Concord Community Hosp. District (1965) 233 Cal. App. 2d 51, 56, 43 Cal. Rptr. 255* (remedy unavailable)]. Thus, exhaustion of available internal remedies or facts showing a proper excuse for failure to exhaust remedies should be alleged in the petition for writ of mandate.

[7] Review of Hearing Decision Under Code Civ. Proc. § 1094.5

Under the review procedures set out in *Code Civ. Proc. § 1094.5*, a court may find an administrative agency decision that was required by law to be made at an evidentiary hearing to be invalid for any of the following reasons [*see Code Civ. Proc. § 1094.5(b)*]:

- The agency proceeded without, or in excess of, its jurisdiction;

- Petitioner was denied a fair trial at the agency level; or

- The agency abused its discretion in one of the following three ways: (a) it did not proceed in the manner required by law; (b) the decision is not supported by the findings resulting from the administrative hearing; or (c) the findings are not supported by the evidence received at the hearing.

Allegations that the determination made at the respondent's hearing was invalid should state how the decision was invalid on one or more of the above-stated grounds when measured against the requirements of the law governing deprivation of hospital staff membership or membership in a professional organization. The governing deprivation of hospital staff membership or membership in a professional organization is *set out in § 416.10* et seq.

[8] Simple Mandate Proceedings if No Hearing Provided

Although *Code Civ. Proc. § 1094.5* requires only that the decision reviewed under its terms have been made as a result of a proceeding for which a hearing was required by law, and does not explicitly require that a hearing actually have been held, it appears that the procedures set out by *Code Civ. Proc. § 1094.5* presuppose that there has been a hearing, with an administrative record, that may be reviewed by the court. An ordinary writ of mandate pursuant to *Code Civ. Proc. § 1085* has been held to be the correct procedure in a case in which the defendant organization had not provided a hearing [*Haller v. Burbank Community Hospital Foundation (1983) 149 Cal. App. 3d 650, 655, 658, 197 Cal. Rptr. 45]* . It therefore appears that if the defendant organization has not provided the petitioner with a hearing, counsel should proceed under *Code Civ. Proc. § 1085* rather than under *Code Civ. Proc. § 1094.5*.

Because administrative mandate under *Code Civ. Proc. § 1094.5* is essentially a special adaption of general mandate principles to the special purpose of reviewing final administative determinations when a hearing is required, the basic requirements for a mandate proceeding are the same for ordinary mandate as they are for administrative mandate, except that a petition for writ of simple mandate need not include allegations pertaining to the propriety of the decision made at the hearing [*see Grant v. Board of Medical Examiners (1965) 232 Cal. App. 2d 820, 826-827, 43 Cal. Rptr. 270]* . In a case in which an adverse membership decision has been made without providing either a hearing or an opportunity to obtain one, it should furthermore not be necessary to allege exhaustion of internal remedies, since those remedies would clearly be unavailable [*see Martino v. Concord Community Hosp. District (1965) 233 Cal. App. 2d 51, 56, 43 Cal. Rptr. 255* (requirement to exhaust administrative remedy excused when remedy unavailable)]. A petition for writ of mandate in a case in which no hearing or opportunity to obtain one was provided should therefore include the first alternative for Paragraph 9 in the form, and need not include Paragraphs 10 through 13. For forms and discussion concerning ordinary mandate proceedings, see Ch. 358, *Mandate and Prohibition* .

[9] Attorney's Fees

In any civil action to appeal or review the award, finding, or other determination of any administrative proceedings under the Government Code or under any other provision of state law, except action by the State Board of Control, if it is shown that the award, finding, or other determination was the result of arbitrary or capricious action or conduct by a public entity or officer in his or her official capacity, the prevailing complainant may collect reasonable attorney's fees, computed at $100 per hour, but not to exceed $7,500, from the public entity, if he or she is personally obligated to pay the fees, in addition to any other relief granted or other costs awarded [*Gov. Code § 800*].

[10] Venue

Venue in a mandate proceeding brought under *Code Civ. Proc. § 1094.5* is governed by *Code Civ. Proc. § 393(b)* [*Lynch v. Superior Court (1970) 7 Cal. App. 3d 929, 930-931, 86 Cal. Rptr. 925]* . *Code Civ. Proc. § 393(b)* provides that the county in which the cause of action, or some part of it, arose is the proper county for the trial of an action against a public officer or person especially appointed to execute his or her duties for an act done by him or her by virtue of the public office, or against a person who does anything touching the duties of the public officer by the officer's command or in his or her aid. However, *Code Civ. Proc. § 393(b)* refers to public officers, and *Lynch* dealt with an administrative mandate action against a state agency. Thus, it appears that *Code Civ. Proc. § 393(b)* would probably not govern venue in a mandate action against a private hospital or professional society. Venue in a mandamus action against a private hospital or professional society appears to be governed by *Code Civ. Proc. § 395.5*, which states that a corporation or association may be sued in the county where the contract is made, or where the obligation or liability arises, or where the breach occurs; or in the county where the principal place of business of such corporation or association is situated [*see Code Civ. Proc. § 395.2* (unincorporated association that filed statutory statement listing principal place of business as treated as if it were corporation for venue purposes)].

[11] Verification

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Proof of service on each respondent and real party in interest of a copy of a petition that seeks an alternative writ must accompany the petition when it is offered for filing except when, in its discretion and for good cause, the court has granted the application for the writ ex parte [Code Civ. Proc.§ 1107; for a discussion of serving the petition, *see* Ch. 358, *Mandate and Prohibition*]. Points and authorities also customarily accompany a petition filed in a superior court, although they do not appear to be expressly required by statute. When no alternative writ is sought, proof of service of a copy of the petition need not accompany the application, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

[12] State Statutes

Administrative mandate procedure. *Code Civ. Proc. § 1094.5*

Standard of judicial review of decisions by institutions other than hospitals. *Code Civ. Proc. § 1094.5(c)*

Standard of judicial review of decisions by hospital boards. *Code Civ. Proc. § 1094.5(d)*

[13] Decisions

Administrative mandamus, governed by *Code Civ. Proc. § 1094.5*, is proper procedure for seeking judicial review of adverse membership decision by private hospital or professional society. *Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 813-817, 140 Cal. Rptr. 442, 567 P.2d 1162 (Anton I)* (holding abrogated on unrelated point by legislative enactment of *Code Civ. Proc. § 1094.5(d)* in 1978)

Standard of review of private hospital board decision to suspend physician's staff membership and privileges by both trial and appellate courts is determination of whether board's findings are supported by substantial evidence. *Huang v. Board of Directors (1990) 220 Cal. App. 3d 1286, 1293, 270 Cal. Rptr. 41*

[14] Cross References

For discussion, forms, and a procedural checklist relating to ordinary mandate proceedings, see Ch. 358, *Mandate and Prohibition* .

For discussion and forms relating to judicial review of administrative decisions under administrative mandate, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

For memoranda of points and authorities for use in mandate proceedings generally, see California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender).

For memoranda of points and authorities for use in actions for administrative mandate, see California Points and Authorities, Ch. 195, *Public Administrative Law* (Matthew Bender).

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 416 PHYSICIANS: MEMBERSHIP ON HOSPITAL STAFFS OR IN PROFESSIONAL ORGANIZATIONS
PART IV. FORMS

36-416 California Forms of Pleading and Practice--Annotated § 416.61

§ 416.61 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Intentional Interference With Right to Practice Profession

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Intentional Interference With Right to Practice Profession

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Intentional Interference With Right to Practice Pro-
Defendant.	)	fession)
	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
		(exceeds *or* does not exceed) $10,000]

_____

1. Plaintiff is, and at all times herein mentioned was, a physician and surgeon certified to practice as such in the state of California, and a resident of _____ County, California.

2. Defendant _____ [*name of defendant health care facility or professional organization*] is a _____ [public health care district established under and subject to *Sections 32000 through 32492 of the Health and Safety Code or* private health care facility accredited by the Joint Commission on Accreditation of Hospitals *or* a private professional association] located in _____ County and governed by _____ [*title of bylaws*], which were adopted by defendant relevant portions of which are attached hereto as Exhibit _____.

3. [*If plaintiff wishes to join individuals responsible for the adverse membership decision as defendants, state the name*

and capacity of each defendant, and allege defendants' responsibility for making membership determinations, e.g., Defendants _____ (*names*) are and were at all relevant times members of the _____ (governing board *or* staff *or* peer review committee *or* _____ (*specify any other membership or position that gave defendants responsibility in making the adverse membership determination*)) of _____ (*name of defendant health care facility or professional organization*), and as such were charged with making a determination as to plaintiff's eligibility for membership in _____ (the staff of _____ (*name of defendant health care facility*) *or* _____ (*name of defendant association or society*)), and in exercise of this responsibility intentionally caused defendant _____ (*name of health care facility or professional organization*) to take all of the actions alleged herein].

[4. Plaintiff is ignorant of the true names and capacities of defendants sued herein as Does I through _____, inclusive, and therefore sues thesedefendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when these names and capacities are ascertained. Plaintiff is informed and believes and thereon alleges that each of these defendants is responsible in some manner for intentionally interfering with plaintiff's right to practice his/her profession and that plaintiff's damages as herein alleged were proximately caused by that intentional interference.]

[5. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned each of the defendants was the agent and employee of each of the remaining defendants, and that the actions of each of the defendants as herein alleged were approved and ratified by each of the other defendants as principals and employers, and that in engaging in the actions herein alleged, each of the defendants conspired with all of the other defendants to achieve an unlawful purpose benefiting some or all of the defendants.]

[*EITHER*]

6. On _____ [*date*], plaintiff applied for membership _____ [on the staff of _____ (*defendant hospital*) *or* in _____ (*defendant organization*)].

[*OR*]

6. Plaintiff has been a member in good standing _____ [of the staff of _____ (*defendant health care facility*) *or* of _____ (*defendant organization*)] from _____ [*date*], until _____ [*date*].

[*CONTINUE*]

7. On _____ [*date*], plaintiff was informed by defendant that _____ [plaintiff's application for admission to membership _____ (on defendant's staff *or* in defendant organization) had been denied *or* action would be commenced to expel plaintiff from _____ (defendant's staff *or* defendant organization)].

[*EITHER, if plaintiff was given no reasons for defendant's action*]

8. Defendant has to date given plaintiff no reason for its action, nor has it informed plaintiff that he/she may request a statement of reasons.

[*OR, if plaintiff was given reasons for defendant's action*]

8. _____ [In informing plaintiff of its adverse membership decision *or* Pursuant to plaintiff's request, made on _____ (*date*), for a statement of reasons for defendant's action], defendant stated its position that plaintiff was not qualified for _____ (admission to *or* continued) membership on the ground that _____ (*specify grounds, e.g.,* plaintiff is temperamentally incapable of working with others). A copy of the statement by which defendant informed plaintiff of its determination is attached hereto as Exhibit _____ and made a part thereof.

[*CONTINUE*]

9. On _____ [*date*], plaintiff requested to be given a hearing on defendant's determination [*if defendant's bylaws provide for hearing add:* pursuant to _____ (*specify bylaw provision providing for hearing*)]. A copy of plaintiff's request is attached hereto as Exhibit _____ and made a part thereof.

[*EITHER, if defendant failed to provide plaintiff with a hearing*]

10. Defendant has not provided plaintiff with a hearing or opportunity to respond [*if appropriate, add:* nor has defendant informed plaintiff of any opportunity that might exist under its bylaws for responding to its membership determination].

[*OR, if defendant has provided a hearing*]

10. On _____ [*date*], at _____ [*specify meeting place*], a hearing was held to receive evidence on the issue of whether or not a ground exists for _____ [denial of plaintiff's application for admission to defendant's staff or expulsion of plaintiff from defendant's staff, of which plaintiff was then a member in good standing]. _____ [*If appropriate, add:* Plaintiff attended the hearing.]

[*CONTINUE*]

11. On _____ [*date*], plaintiff received defendant's decision and order affirming defendant's determination to _____ [deny plaintiff's application for admission to membership of defen dant's staff *or* expel plaintiff from defendant's staff]. _____ [A verbatim transcript of the record of the hearing, containing the evidence received, is attached hereto as Exhibit _____ and made a part thereof *or* The substance of the evidence received at the hearing is as follows: _____ (*describe substance of evidence*)].

12. _____ [*If defendant provided an internal appeal procedure, or other internal remedy available after adverse hearing decision, add:* After receiving defendant's hearing decision, plaintiff in timely fashion _____ (*set out exhaustion of any internal remedies still available to plaintiff after adverse hearing decision*). On _____ (*date*), plaintiff received defendant's _____ (determination of appeal *or specify other determination of internal remedy*) upholding the decision made at the hearing. In following these procedures, plaintiff has exhausted all of his/her administrative remedies and the decision of defendant has become final insofar as defendant is presently concerned].

13. All of defendant _____ [*name of health care facility or professional organization*]'s actions alleged herein were intentional and have prevented plaintiff from fully practicing the profession of medicine.

14. Defendant _____ [*name of health care facility or professional organization*]'s actions herein alleged were not justified because _____ [*state reasons why defendant's membership determination wasunjustified, e.g.,* in making the determination to _____ (exclude *or* expel) plaintiff from membership, defendant(s) (and each of them) acted from motives not legitimately related to plaintiff's right to or qualification for membership _____ (on the staff of _____ (*defendant health care facility*) *or*_____*in defendant organization*) in that _____ (*specify improper motives, e.g.,* defendant(s) (and each of them) acted to restrict competition by causing harm to plaintiff's medical practice)].

15. Despite any findings purported to have been made by defendant(s) [and each of them], plaintiff is and was at all times herein mentioned fully qualified under all reasonable standards for membership _____ [on the staff of _____ (*defendant health care facility*) *or* in _____ (*defendant organization*)], and access to such membership is important to plaintiff's ability to fully practice his/her profession.

16. By reason of the importance of membership _____ [on the staff of _____ (*defendant health care facility*) *or* in _____ (*defendant organization*)] to plaintiff's ability to fully practice his/her profession as stated above, plaintiff has a strong interest in such membership; while by reason of plaintiff's qualifications, as stated above, the public has an interest in the unrestricted availability of plaintiff's medical services, which would be curtailed by the _____ [exclusion *or* expulsion] of plaintiff from such membership. On the other hand, by reason of plaintiff's qualifications as stated above, neither defendant(s) [and each of them] nor the public have any legitimate interest in _____ [excluding *or* expelling] plaintiff from such membership.

17. _____ [*If defendant provided plaintiff with notice of charges and informed plaintiff of procedures for responding to charges, add:* On _____ (*date*), in the case of _____ (*specify title and number of case*), plaintiff petitioned the superior court in and for the County of _____ for a writ of mandate pursuant to *Section 1094.5 of the Code of Civil Procedure* setting aside defendant's membership determination. A copy of plaintiff's petition for writ of mandate is attached hereto as Exhibit _____ and made a part hereof].

18. _____ [*If defendant provided plaintiff with notice of charges and informed plaintiff of procedures for responding to charges, add:* On _____ (*date*), plaintiff received the superior court's order granting a writ of mandate, setting aside defendant's membership determination and ordering that defendant _____ (provide plaintiff with proper procedure for determining whether defendant's adverse membership decision was correct *or* _____ (restore plaintiff's *or* admit plaintiff to) membership). A copy of the superior court's order _____ (*if appropriate, add:* and statements of decision giving the ground on which the court made its order) granting the writ of mandate is attached hereto as Exhibit _____ and made a part hereof. (*If appropriate, add:* A verbatim transcript of the record of the hearing on plaintiff's petition for writ of mandate is attached hereto as Exhibit _____ and made a part hereof.)]

[*EITHER*]

[19. *If plaintiff is suing individual members of defendant health care facility's staff or defendant organization, add:* In making their determination as to plaintiff's membership rights, _____ (*name(s) of individual defendant(s)*) acted in disregard of and in excess of the authority granted by defendant _____ (health care facility's *or* association's) by laws, as set set out in _____ (*specify bylaws which defendants*

disregarded or exceeded).]

[*OR*]

[19. *If plaintiff is suing individual members of defendant health care facility's staff or defendant organization, add:* In making their determination as to plaintiff's membership rights, _____ (*name(s) of individual defendant(s)*) acted maliciously in that _____ (*allege facts showing malice e.g.,* they did not make a reasonable effort to obtain the facts pertaining to the membership determination herein alleged in that _____ (*allege facts showing lack of reasonable effort to ascertain facts of case, e.g.,* defendants acted without giving plaintiff a reasonable opportunity to respond to the charges made by defendants)).]

[*OR*]

[19. *If plaintiff is suing individual members of defendant health care facility's staff or defendant organization, add:* In making their determination as to plaintiff's membership rights, _____ (*name(s) of individual defendant(s)*) did not act in a reasonable belief that the action taken by defendants as herein alleged was warranted by the facts known to defendants after making reasonable efforts to obtain such facts.]

[*CONTINUE*]

20. Plaintiff's medical practice has suffered as a proximate result of defendant(s') actions as herein alleged in that _____ [*specify manner in which practice has suffered, e.g.,* since defendant professional organization holds itself out as the sole recognized organization to determine standards for the practice and certification of practitioners in plaintiff's chosen medical specialty of _____ (*specify*), and as a practical matter it is impossible for a physician to limit his or her practice to the specialty of _____ (*specify*) without active membership in defendant organization, plaintiff has not been able to limit his or her practice to this specialty soley by reason of exclusion from such membership *or* plaintiff has lost the patronage of patients who had previously sought his/her services and has been unable to obtain the patronage of new patients because of plaintiff's inability to procure treatment and care for his/her patients at defendant hospital]. Because of the harm thus done to plaintiff's medical practice, plaintiff has suffered a loss of earnings and attendant damages _____ [in the sum of $_____ *or* in an amount to be proved at trial].

[21. *If plaintiff seeks punitive damages in an amended complaint, after court has entered order allowing plaintiff to claim such damages, allege:* _____(Defendant's *or* Defendants') conduct herein alleged was malicious and oppressive in that _____ (*specify conduct showing malice or oppression, e.g.,* defendant(s) (, and each of them,) acted with intent to curtail plaintiff's medical practice and harass plaintiff, from motives of revenge for public comments made by plaintiff on _____ (*date*) at _____ (*specify setting and occasion of public comments*) questioning the qualifications and credentials of _____ (*specify individuals or organizations criticized*), thus causing plaintiff unjust hardship in conscious disregard of plaintiff's right to practice his/her profession), and thus entitling plaintiff to exemplary and punitive damages.]

WHEREFORE, plaintiff prays judgment against defendant(s) [, and each of them,] as follows:

1. For loss of earnings in the sum of $_____;

2. For damages incidental to harm caused to plaintiff's medical practice _____ [according to proof *or* in the sum of $_____];

[3. For exemplary damages;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The foregoing complaint form may be used to obtain damages for injuries or losses proximately caused by an intentional, unjustified interfer ence with a physician's right to practice medicine, caused by a health care facility or professional association's unjustified determination to deny the plaintiff's application for or to expel the plaintiff from membership.

When the plaintiff has a cause of action for intentional interference with the right to practice his or her profession, the plaintiff may also be able to state a cause of action under the Cartwright Act (*Bus. & Prof. Code §§ 16700-16770*) or under federal antitrust law [*Patrick v. Burget (1988) 486 U.S. 94, 104-105, 108 S. Ct. 1658, 100 L. Ed. 2d 83* ; *Cianci v. Superior Court (1985) 40 Cal. 3d 903, 916-925, 221 Cal. Rptr. 575, 710 P.2d 375* ; *see* discussion in *§ 416.19* and Ch. 565, *Unfair Competition*].

[3] Allegations

The complaint alleges:

(1) capacity and residence of plaintiff (Paragraph 1);

(2) capacity and location of defendant health care facility or professional association (Paragraph 2);

(3) capacity and residence of individual defendants, if any (Paragraph 3);

(4) responsibility of and ignorance as to names of doe defendants (Paragraph 4);

(5) agency relationship, employer-employee relationship, and conspiracy among defendants (Paragraph 5);

(6) plaintiff's application for membership or status as member before expulsion (Paragraph 6);

(7) notification of adverse membership determination by defendant institution; (Paragraph 7);

(8) reasons given by defendant institution for adverse membership determination or failure to give such reasons (Paragraph 8);

(9) plaintiff's request for hearing (Paragraph 9);

(10) conduct and date of hearing, or failure to hold hearing (Paragraph 10);

(11) hearing decision, if hearing was held (Paragraph 11);

(12) exhaustion by plaintiff of internal remedies (Paragraph 12) [*Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 476-477, 131 Cal. Rptr. 90, 551 P.2d 410]* ;

(13) intentional nature of defendant's or defendants' conduct (Paragraph 13) [*see Willis v. Santa Ana etc. Hospital Assn. (1962) 58 Cal. 2d 806, 810, 26 Cal. Rptr. 640, 376 P.2d 568]* ;

(14) lack of justification for adverse membership determination (Paragraph 14) [*see Letsch v. Northern San Diego County Hosp. Dist. (1966) 246 Cal. App. 2d 673, 677, 55 Cal. Rptr. 118]* ;

(15) qualification of plaintiff for membership, and interference with plaintiff's medical practice (Paragraph 15) [*see Willis v. Santa Ana etc. Hospital Assn. (1962) 58 Cal. 2d 806, 810, 26 Cal. Rptr. 640, 376 P.2d 568]* ;

(16) plaintiff's and public's interest in plaintiff's access to membership, and defendants' and public's lack of legitimate interest in plaintiff's being deprived of membership (Paragraph 16) [*see Willis v. Santa Ana etc. Hospital Assn. (1962) 58 Cal. 2d 806, 810, 26 Cal. Rptr. 640, 376 P.2d 568]* ;

(17) plaintiff's action seeking judicial relief from defendant institution's adverse membership decision and court order granting such relief, if fundamental fair procedure requirements were adhered to by defendants (Paragraphs 17, 18) [*see Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 484, 131 Cal. Rptr. 90, 551 P.2d 410]* ;

(18) conduct on part of individual defendants placing them outside scope of qualified statutory immunity for members of health care facility or professional society review (Paragraph 19) [*see Civ. Code § 43.7*]; and

(19) damages suffered as result of defendants' action (Paragraph 20); behavior constituting malice and oppression [*see Civ. Code § 3294*; *Code Civ. Proc. § 425.13(a)*] (Paragraph 21).

[4] Lack of Justification for Defendant's Conduct

Although there has been no case that addresses this point, it would appear that reasons that warrant the court's setting aside a health care facility or organization's adverse membership decision in a mandate or other judicial review proceeding would also show that the defendant's conduct was unjustified in an action for damages for intentional interference with a physician's right to practice his or her profession. In establishing that the defendant's conduct was not justified, counsel should therefore allege facts that show, or would have shown, that the defendant's decison was subject to being set aside in a mandate proceeding. For a discussion of the law concerning facts that would warrant the court in setting aside a health care facility or professional organization's decision, see *§§ 416.13, 416.14*. For examples of allegations of facts showing that a health care facility or professional organization's decision should be set aside on mandate, see *§ 416.60*.

[5] Allegation of Exhaustion of Internal Remedies

Exhaustion of internal remedies made available by the health care facility or professional organization is a prerequisite to an action for damages flowing from an unjustified adverse membership decision, unless such exhaustion is excused by the fact that internal remedies are unavailable or the institution has failed to inform the physician of the existence of such remedies [*Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 476-477, 131 Cal. Rptr. 90, 551 P.2d 410]* . Thus, exhaustion of internal remedies or facts showing a proper excuse for failure to exhaust such remedies should be alleged in the complaint.

[6] Allegation That Adverse Membership Decision Was Previously Set Aside by Court

A physician must seek to have an adverse membership decision set aside in an appropriate review proceeding before initiating an action for damages flowing from the adverse determination, unless the health care facility or professional organization denied the physician basic due process in making the determination. Basic due process is denied when the health care facility or professional organization failed to provide the physician with reasons for its action or to inform the physician of the availability of a right to respond. An order directing the health care facility or professional organization to give the physician a proper hearing, but not directing the institution to immediately admit or restore the physician to membership, is sufficient to satisfy this requirement [*Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 483, 484, 131 Cal. Rptr. 90, 551 P.2d 410]* .

The complaint should allege that the plaintiff has obtained a court order setting aside the defendant institution's adverse membership decision before initiating the action for damages or that the institution has denied the plaintiff basic due process so as to excuse the requirement for such an order.

[7] Statute of Limitations

An action for damages for intentional interference with the right to practice medicine is an action on a property right and is therefore gov erned by the two year statute of limitations set out in *Code Civ. Proc. § 339(1)* [*Edwards v. Fresno Community Hosp. (1974) 38 Cal. App. 3d 702, 705, 706, 113 Cal. Rptr. 579]* .

[8] Venue

An action or proceeding against a local agency may be brought in the county in which the local agency is located [*Code Civ. Proc. § 394(a)*]. Since for purposes of *Code Civ. Proc. § 394* the term "local agency" includes local districts, *Code Civ. Proc. § 394(a)* probably applies to actions against a local health care district [*see Code Civ. Proc. § 394(b)*].

Venue in an action against a private health care facility appears to be governed by *Code Civ. Proc. §§ 395.2* and *395.5*. *Code Civ. Proc. § 395.5* provides that a corporation or association may be sued in the county where the contract is made, or where the obligation or liability arises, or where the breach occurs, or in the county where the principal place of business of such corporation or association is situated. *Code Civ. Proc. § 395.2* provides that if an unincorporated

association has filed a statement with the Secretary of State pursuant to *Corp. Code § 24003* listing its principal office in this state, the proper county for the trial of an action against suchunincorporated association is the same as it would be if the unincorporated association were a corporation and, for the purpose of determining such county, the principal place of business of the unincorporated association shall be deemed to be the principal office in this state listed in the statement.

Venue in an action against individual members of a private health care facility staff or governing board or a professional association is apparently governed by the general provisions of *Code Civ. Proc. § 395(a)*, which state that except as otherwise provided by law, the county in which the defendants or some of them reside at the commencement of the action is the proper county for the trial of the action. An action of the sort set out here does not come under the special rule set out in *Code Civ. Proc. § 395(a)* which increases the number of counties that are proper venue for actions for injury to person or personal property from a wrongful act, since this rule was intended to apply only to physical or corporeal injuries [*see Lucas v. Lucas Ranching Co. (1937) 18 Cal. App. 2d 453, 64 P.2d 160]* . However, an action against a member of the staff or governing board of a public health care facility is probably covered by *Code Civ. Proc. § 393(b)*, which provides that the county in which the cause or some part thereof arose is the proper county for the trial of actions against a public officer or person especially appointed to execute his or her duties, for an act done by him in virtue of his office; or against a person who, by his command or in his aid, does anything touching the duties of such officer.

[9] Punitive Damages

No claim for punitive damages against a health care provider may be included in a complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed [*Code Civ. Proc. § 425.13(a)*]. Consequently, the paragraphs in the foregoing complaint referring to punitive damages (Paragraph 21 and prayer Paragraph 3) may only be included in an amended complaint filed pursuant to a court order.

The court may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits presented that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to *Civ. Code § 3294*. The court may not grant a motion allowing the filing of an amended pleading that includes a claim for punitive damages if the motion for that order is not filed within two years after the complaint or initial pleading is filed or not less than nine months before the date the matter is first set for trial, whichever is earlier [*Code Civ. Proc. § 425.13(a)*]. For discussion of the availability of punitive damages, see Ch. 177, *Damages* .

[10] Prayer

A complaint must contain a demand for the amount of money or damages sought [*Code Civ. Proc. § 425.10(a)(1)*]. However, no claim for exemplary damages may state an amount or amounts [*Civ. Code § 3295(e)*].

[11] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (repealed January 1, 2006, unless later-enacted statute deletes or extends repeal date)], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[12] State Statutes

Qualified immunity from monetary liability for members of professional society or hospital staff or peer review

committees. *Civ. Code § 43.7(b)*

[13] Decisions

[a] Damages for Intentional Interference With Right to Practice Profession

"Trade" or "commerce" as used in the Cartwright Act, *Bus. & Prof. Code § 16700 et seq.*, includes professions. *Cianci v. Superior Court (1985) 40 Cal. 3d 903, 916-925, 221 Cal. Rptr. 575, 710 P. 2d 375 , overruling Willis v. Santa Ana Community Hospital Asso. (1962) 58 Cal. 2d 806, 810, 26 Cal. Rptr. 640, 376 P.2d 568*

Action for intentional interference with right to practice lawful profession by unlawful means or by lawful means absent sufficient justification. *Willis v. Santa Ana etc. Hospital Assn. (1962) 58 Cal. 2d 806, 810, 26 Cal. Rptr. 640, 376 P.2d 568*

Existence of justification for purposes of action for intentional interference with right to practice lawful calling as determined by balancing importance to society and party of activity interfered with against importance of permitting interference; determination not made by applying precise standards. *Willis v. Santa Ana etc. Hospital Assn. (1962) 58 Cal. 2d 806, 810, 26 Cal. Rptr. 640, 376 P.2d 568*

Allegation stating that defendants denied physician of highest qualifications access to hospital as result of conspiracy designed to restrain competition and deprive physician of practice in order to benefit competing members of conspiracy as stating valid cause of action for intentional interference with right to pursue lawful profession. *Willis v. Santa Ana etc. Hospital Assn. (1962) 58 Cal. 2d 806, 810, 26 Cal. Rptr. 640, 376 P.2d 568*

Records of hospital staff review committee as not discoverable by physician bringing action against hospital for damages allegedly caused by its pastwrongful restriction of his staff privileges by monitoring his operating procedures; exception of *Evid. Code § 1157(c)* as only applicable to person requesting hospital staff privileges; action for damages allegedly caused by wrongful restriction of staff privileges as distinct from action for administrative mandamus seeking to currently become or remain hospital staff member. *California Eye Institute v. Superior Court (1989) 215 Cal. App. 3d 1477, 1481, 264 Cal. Rptr. 83*

[b] Exculpatory Clause Not Enforceable

Exculpatory clause in hospital bylaws provding that each member or applicant waived right of personal redress as transgressing public policy and therefore not barring aggrieved person's access to courts. *Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 480, 131 Cal. Rptr. 90, 551 P.2d 410*

[c] Immunity From Tort Actions for Members of Staff or Committee

Fact questions as to whether qualified privilege for staff and governing board members set out in *Civ. Code § 43.7* may have been lost because individuals protected by privilege were not acting pursuant to written bylaws or without malice, and had not made reasonable efforts to ascertain facts when the institution has failed to provide the accused physician with a hearing as provided for by bylaws and made no real effort to investigate accused physician's qualifications for membership. *Ascherman v. San Francisco Medical Society (1974) 39 Cal. App. 3d 623, 663, 114 Cal. Rptr. 681* (*Ascherman I*)

[d] Justification for Interference

Interference with physician's right to practice medicine as not giving rise to liability, even though intentional, if interference is reasonable and justified. *Letsch v. Northern San Diego County Hosp. Dist. (1966) 246 Cal. App. 2d 673, 677, 55 Cal. Rptr. 118*

Hospital's determination to operate radiology department on closed staff basis, thereby depriving physicians who had no exclusive contract with hospital of right to use hospital's radiology facilities, as reasonable and therefore not giving rise to liability on part of hospital. *Letsch v. Northern San Diego County Hosp. Dist. (1966) 246 Cal. App. 2d 673, 677, 55 Cal. Rptr. 118*

[e] Requirement of Exhaustion of Internal Remedies

Requirement that physician exhaust available and adequate internal remedies before seeking relief in courts as applying to actions for damages for interference with right to practice profession as well as actions to have the institution's membership decision set aside. *Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 476-477, 131 Cal. Rptr. 90, 551 P.2d 410* (but court as holding requirement excused under facts before it)

[f] Requirement of Prior Favorable Determination

Order requiring hospital to reinstate wrongfully terminated member as not required for subsequent action for damages as long as hospital's decision to expel member has been set aside in appropriate judicial review proceeding. *Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 484 n.9, 131 Cal. Rptr. 90, 551 P.2d 410* (dictum)

Setting aside of quasi-judical action adverse to applicant or member by hospital on appropriate review by courts as prerequisite to action for damages for allegedly wrongful expulsion or exclusion. *Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 484, 131 Cal. Rptr. 90, 551 P.2d 410*

Prior favorable termination of action to set aside defendant's adverse decision as not required for action seeking damages for allegedly wrongful dismissal from hospital staff when hospital took its action without stating reasons to aggrieved person and failed to inform aggrieved person of existing right to respond to charges. *Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 478, 131 Cal. Rptr. 90, 551 P.2d 410*

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36-417 California Forms of Pleading and Practice--Annotated 417.syn

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§ 417.syn Synopsis to Chapter 417: POINTS AND AUTHORITIES

§ 417.01 Scope of Chapter

§ 417.02 Cross References

§§ 417.03-417.09 [Reserved]

§ 417.10 Governing Law

§ 417.11 Nature and Purpose of Points and Authorities

§ 417.12 Points and Authorities Compared With Briefs

[1] Trial Brief

[2] Appellate Brief

§ 417.13 Impact of Statewide Rules of Court

§ 417.14 When Supporting Points and Authorities Are Used

[1] Points and Authorities Are Usually Required

[a] To Support Demurrer or Notice of Motion

[b] To Support Motion for New Trial

[c] To Support Petition for Extraordinary Writ

[d] To Support Ex Parte Application

[2] Types of Proceedings for Use of Supporting Memoranda

[3] When Memorandum Specifically Not Required But May Be Filed or Ordered

[4] Effect of Failure to File Required Supporting Memorandum

§ 417.15 When Opposing Points and Authorities Are Used

§ 417.16 When Reply Points and Authorities Are Used

§ 417.17 Time for Filing Memoranda

[1] Supporting Memoranda

[2] Opposing Memoranda

[3] Reply Memoranda

[4] Late-Filed Papers

§ 417.18 Time for Service of Memoranda

§ 417.19 Format Requirements for Memoranda of Points and Authorities

[1] Format Requirements Specifically Applicable to Memoranda

[a] Applicability of Rule 3.1113 Requirements

[b] Contents of Memoranda

[c] Limits on Length of Memoranda

[i] General Rule

[ii] Procedure for Leave to File Longer Memorandum

[d] Citation Requirements

[i] Citation Style

[ii] Citing to Case Authority

[iii] When Attachment of Copies of Cited Authorities Are Required

[e] References to Declarations and Exhibits

[f] Requests for Judicial Notice

[g] Attaching or Combining the Memorandum With Other Papers

[h] Proposed Orders

[2] Format Requirements Applicable to All Law and Motion Papers

[a] Applicability of General Rules

[b] First Page

[c] Reference to Previously Filed Papers

[d] Binding and Pagination

[e] Exhibits

[f] Footer With Title of Paper Required on Each Page

§ 417.20 Drafting Considerations

[1] Introduction or Summary of Argument

[2] Statement of Facts

[3] Statement of Law, Evidence, and Arguments

[a] The Argument Relating Facts and Law

[b] Reliance on Authorities

[i] General Considerations

[ii] Unpublished and "Depublished" Opinions

[4] Conclusion

§ 417.21 Supporting Evidence

[1] Preparing Supporting Evidence

[2] Declarations or Affidavits

[3] Documentary Evidence

[4] Discovery Products

[5] Matters Subject to Judicial Notice

§§ 417.22-417.29 [Reserved]

§ 417.30 Matthew Bender Publications

§ 417.31 State Statutes

§ 417.32 California Rules of Court

§ 417.33 Rules of Professional Conduct

§ 417.34 Text References

§§ 417.35-417.49 [Reserved]

§ 417.50 Memorandum--Skeletal Form

[1] FORM

[2] Use of Form

§ 417.51 Ex Parte Application for Leave to File Memorandum in Excess of Page Limits

[1] FORM

[2] Use of Form

[3] Requirements Governing Ex Parte Applications Generally

[4] Cross References

§ 417.52 Order Granting Application For Leave to File Memorandum in Excess of Page Limits

[1] FORM

[2] Use of Form

[3] Cross References

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FOOTNOTES:
(n87)Footnote *. Mr. Grillo, a graduate of Harvard Law school and a civil litigation expert in San Francisco, helped to draft the statewide law and motion rules adopted in 1997 as a member of the State Bar Committee on Rules and Procedures of Court, 1993-1996. He is currently a member of the State Bar Committee for Administration of Justice.

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PART I. SCOPE

36-417 California Forms of Pleading and Practice--Annotated § 417.01

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§ 417.01 Scope of Chapter

This chapter discusses memoranda and their use in civil pretrial practice. It includes the following forms:

- A skeletal form of a memorandum [§ 417.50].

- Forms for use in an ex parte proceeding to obtain leave to file a memorandum that exceeds the page limits set by statewide court rule [§ 417.51].

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36-417 California Forms of Pleading and Practice--Annotated § 417.02

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§ 417.02 Cross References

For discussion and forms relating to preparing and filing motions generally, see Ch. 372, *Motions and Orders* .

For discussion of the use of affidavits or declarations in support of noticed motions, see Ch. 15, *Affidavits, Certificates, and Declarations* .

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions* .

For discussion of general format requirements for pleading and papers, see Ch. 123, *Complaints and Cross Complaints* .

For discussion and forms related to service of papers and electronic filing and service, see Ch. 518, *Service of Summons and Papers* .

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers* .

For discussion and forms for use in applications for orders shortening or extending time, see Ch. 524, *Shortening and Extension of Time* .

For discussion and forms relating to the procedures for preparing and filing particular motions, demurrers, and petitions, beyond the procedures relating specifically to memoranda, see the chapters covering the specific proceeding. See, for example, the following:

- Ch. 38, *Reference*.
- Ch. 125, *Consolidation, Severance, and Coordination of Actions*.
- Ch. 136, *Continuances*.

- Ch. 174, *Costs and Attorney's Fees*.
- Ch. 190, *Depositions and Discovery*.
- Ch. 303, *Injunctions*.
- Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*.
- Ch. 303, *Injunctions*.
- Ch. 314, *Interpleader*.
- Ch. 318, *Judgments*.
- Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances*.
- Ch. 324, *Jurisdiction: Subject Matter Jurisdiction*.
- Ch. 324, *Jurisdiction: Subject Matter*.
- Ch. 358, *Mandate and Prohibition*.
- Ch. 371, *Motions After Trial*.
- Ch. 373, *Motions in Limine*.
- Ch. 374, *Motions to Reconsider and Renewed Motions*.
- Ch. 375 *Motions to Strike: Pleadings*.
- Ch. 376 *Motions to Strike: Anti-SLAPP*.
- Ch. 389 *Nonsuit and Motions for Judgment*.
- Ch. 486, *Receivers*.
- Ch. 518, *Service of Summons and Papers*.
- Ch. 537, *Summary Judgment*.
- Ch. 571, *Venue*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime

LimitationsExtensionsCivil ProcedurePleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsElectronic MeansCivil ProcedurePretrial JudgmentsNonsuitsGeneral Overview

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36-417 California Forms of Pleading and Practice--Annotated §§ 417.03-417.09

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[Reserved]

§§ 417.03[Reserved]

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36-417 California Forms of Pleading and Practice--Annotated § 417.10

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

§ 417.10 Governing Law

The form and content of memoranda are governed by *Cal. Rules of Ct., Rules 1.200, 3.1113, 3.1114,* and more generally by *Cal. Rules of Ct., Rules 3.1100, 3.1103, 3.1110, 3.1112, 3.1350,* and *3.1200-3.1207*. Memoranda are also subject to the general rules governing papers served and filed with the court [*see Cal. Rules of Ct., Rule 1.20 et seq., 2.100 et seq.,* and 3.101 et seq.].

To promote statewide uniformity, the rules of court adopted by the Judicial Council preempt local court rules dealing with the form and format of papers, as well as local court rules relating to pleadings, demurrers, ex parte applications, motions, discovery, and provisional remedies [*Cal. Rules of Ct., Rule 3.20*; *see § 417.13*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticePleadingsGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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36-417 California Forms of Pleading and Practice--Annotated § 417.11

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§ 417.11 Nature and Purpose of Points and Authorities

A memorandum is a brief that is required to be submitted to the court in support of most motions, applications and petitions to the court for relief.

The memorandum

- States the facts;
- Identifies the issues;
- Summarizes the arguments in short, argumentative headings;
- Presents the argument in regular paragraphs; and
- States a conclusion.

Memoranda are required for a variety of trial court motions including motions to dismiss, motions for summary judgment, motions for new trials, and other motions in superior court [*see* discussion in *§ 417.14*].

The purpose of a memorandum is to persuade the court to adopt the legal and factual arguments in support of a party's position on a particular motion, petition, application, discovery, or other matter. The points and authorities is usually submitted with other moving papers, such as a notice of motion, a petition, or an ex parte application, and a proposed order [*see* discussion in *§ 417.18*]. A memorandum is often supported by declarations or affidavits that may also authenticate evidentiary exhibits. Declarations, exhibits, or other papers may also accompany an opposing memorandum when the opposing party needs to rely on facts not previously of record in the case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticePleadingsGeneral OverviewCivil ProceduresSummary JudgmentOppositionGeneral OverviewCivil ProceduresSummary JudgmentSupporting MaterialsMemoranda of LawCivil ProceduresJudgmentsRelief From JudgmentGeneral Overview

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36-417 California Forms of Pleading and Practice--Annotated § 417.12

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§ 417.12 Points and Authorities Compared With Briefs

[1] Trial Brief

Memoranda, like appellate briefs, are designed to seek or oppose a specific ruling or request for relief based on a fixed record of evidence provided to the court, whether in the form of affidavits, exhibits, evidence subject to judicial notice, or the record of a prior court proceeding.

By contrast, trial briefs serve a different purpose altogether. Generally a trial brief is not supported by evidence, and is submitted to the trial judge shortly before or at the commencement of trial to provide that judge with a "road map" of the trial. It summarizes and anticipates evidence to be presented at the trial. It alerts the judge to the legal and evidentiary issues expected to arise during the trial. Optimally, whether the judge presides over a jury or sits as the finder of fact, a trial brief educates the judge concerning the issues to be resolved and also guides the judge persuasively in making all the rulings or findings that he or she will be expected to decide during the trial.

[2] Appellate Brief

Memoranda in support a motion or an appellate brief both seek or oppose a request for specific relief based on the record that is before the court. The memorandum is the trial court equivalent of the appellate brief, though the memorandum is usually shorter and less elaborate. Memoranda are written to support a variety of trial court motions, some of which may be quite important and some of which are not. An appeal, however, is a major undertaking and will usually involve more work and more imaginative argument than a memorandum of points and authorities.

A writer can make a novel argument in a memorandum, but is more likely to do so in an appellate brief, knowing that a high appellate tribunal is ready to consider broader questions of law and policy. The breadth and innovation in argument therefore increases from the points and authorities to the brief along with the significance of the questions and the level of the court.

The memorandum also differs from the appellate brief in that the brief requires many features usually absent in the

memorandum of points and authorities, such as a cover page, a table of contents, a table of authorities, a jurisdictional statement, and a statement of questions presented. Note, however, that a memorandum longer than 10 pages must have a table of contents and a table of authorities [*Cal Rules of Ct. Rule 3.1113(f)*].

For discussion and forms relating to appellate briefs, see Ch. 50, *Appeal: Briefs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresJudicial OfficersJudgesGeneral OverviewCivil ProceduresAppealsBriefs

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36-417 California Forms of Pleading and Practice--Annotated § 417.13

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§ 417.13 Impact of Statewide Rules of Court

The California Rules of Court and various statutes specify when a memorandum of points and authorities must be filed [*see* discussion in *§ 417.14*]. The rules also set out statewide requirments relating to the form and format of both papers generally and memoranda specifically [*see Cal. Rules of Ct., Rules 2.100-2.119* (papers to be filed), 3.1100 et seq. (format of motion papers), 3.1200 et seq. (ex parte applications), 3.1300 et seq. (particular motions)].

The Judicial Council has preempted the field with respect to the form and format of papers, as well as with respect to requirements for pleadings, demurrers, ex parte applications, motions, discovery, and provisional remedies [*Cal. Rules of Ct., Rule 3.20*]. The intent is to establish statewide uniformity in the requirements governing these areas, and thus local rules attempting to impose additional requirements in these areas may not be enacted or enforced.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeContent & FormCivil ProceduresPleading & PracticePleadingsGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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36-417 California Forms of Pleading and Practice--Annotated § 417.14

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§ 417.14 When Supporting Points and Authorities Are Used

[1] Points and Authorities Are Usually Required

[a] To Support Demurrer or Notice of Motion

A supporting memorandum is recommended, and, in almost all cases now, is required, for motions, applications, or petitions that may be made or opposed by any party in an action [*see also* discussion of examples in [2], *below*, and discussion relating to the use of opposing memoranda in § 417.15].

One of the main rules regarding supporting memorandum is that set out in *Cal. Rules of Ct., Rule 3.1113*, which requires that a supporting memorandum accompany a demurrer or a notice of motion [*Cal. Rules of Ct., Rules 3.1113(a)*; *see also Cal. Rules of Ct., Rules 3.1112(a)* (papers filed in support of a motion must consist, at least, of a notice of hearing on the motion, the motion itself, and a memorandum in support of the motion); for discussion of when a notice of motion is required, see discussion of *Code Civ. Proc. § 1005* in Ch. 372, *Motions and Orders*].

The requirements of *Cal. Rules of Ct., Rule 3.1113(a)*, as well as the other requirements set out in *Cal. Rules of Ct., Rule 3.1100 et seq.*, apply to all proceedings in civil law and motion, as defined in *Cal. Rules of Ct., Rules 3.1103(a)*, and also to discovery conducted in family law and probate proceedings [*Cal. Rules of Ct., Rule 3.1100*].

Cal. Rules of Ct., Rule 3.1103(a) defines "law and motion" to include the following proceedings:

- On application before trial for an order, except for causes arising under the Welfare and Institutions Code, the Probate Code, the Family Code, or *Code Civ. Proc., §§ 527.6, 527.7*, and *527.8* (injunctive relieffrom harassment, domestic violence, gang violence, and violence to employees) [*Cal. Rules of Ct., Rule 3.1103(a)(1)*].

- On application for an order regarding enforcement of judgments, attachment, appointment of receivers, obtaining or setting aside default judgments, writs of review, mandate, and prohibition,

petitions to compel arbitration, and enforcement of arbitration awards [*Cal. Rules of Ct., Rule 3.1103(a)(2)*].

[b] To Support Motion for New Trial

A party seeking a new trial is required to file a memorandum in support of the motion within 10 days of filing the notice of intention to move for a new trial [*Cal. Rules of Ct., Rule 3.1600(a)*; *see also* further discussion and forms in Ch. 371, *Motions After Trial*].

[c] To Support Petition for Extraordinary Writ

The requirement that a memorandum be filed in support of a petition for a writ of mandate, prohibition, or review may reasonably be inferred from the fact that such petitions are subject to the requirements of *Cal. Rules of Ct., Rule 3.1100 et seq.*, including *Cal. Rules of Ct., Rule 3.1113(a)* (discussed in [a], *above*) [*see Cal. Rules of Ct., Rule 3.1103(a)(2)*; *see also* [a], *above*], and from statututory references and requirements that render such petitions equivalent to a "notice of motion" [*see Code Civ. Proc. § 1003* ("motion" as application for an order), *Code Civ. Proc. §§ 1088, 1089, 1090, 1107* (all referring to petition as "motion" or "application" and including minimum notice requirements)].

[d] To Support Ex Parte Application

A memorandum must be included with an ex parte application [*Cal. Rules of Ct., Rule 3.1201*]. One exception to this rule is that a memorandum is not required, but may be included, when filing an application for an order extending time to serve pleadings and the application is filed on a Judicial Council form [*Cal. Rules of Ct., Rule 3.1114(a)(2), (b)*]. For discussion of this application, see Ch. 518, *Service of Summons and Papers* .

The personal appearance of an applicant is required for all ex parte applications, with few exceptions, one of them being that a personal appearance is not required for an application to file a memorandum in excess of the applicable page limit as permitted by *Cal. Rules of Ct., Rule 3.1113(e)* [Cal. Rules of Ct., Rule 3.120(1)]. For a form of an ex parte application for leave to file a memorandum in excess of the applicable page limit, including supporting declaration and proposed order, see *§ 417.51*.

For further discussion and forms relating to ex parte applications in general, see Ch. 372, *Motions and Orders* .

[2] Types of Proceedings for Use of Supporting Memoranda

The motions, applications, or petitions in which a memorandum must be used range from prediscovery to post trial and can be grouped roughly as follows:

- Motions on the pleadings: Motions that are usually made before discovery and include demurrers [*see Code Civ. Proc. § 430.40*], motions to strike [*see Code Civ. Proc. § 435*], motions for judgment on the pleadings [*see Code Civ Proc. § 438*; *Hibernia S. & L. Soc. v. Thornton (1897) 117 Cal. 481, 482, 49 P. 573* ; *Coyne v. Krempels (1950) 36 Cal. 2d 257, 262, 223 P. 2d 244]* , and motions for leave to amend [*see Code Civ. Proc. §§ 472, 473(a)*].

- Procedural motions: These may be made pretrial or, in some cases, throughout the litigation and include interpleader [*see Code Civ. Proc. § 386*] and motions for change of venue [*see Code Civ. Proc. § 397*], to add parties [*see Code Civ. Proc. § 389*], to sever or to consolidate [*see Code Civ. Proc. § 1048*], to certify or decertify a class [*see Code Civ. Proc. § 382*], to advance or continue [*see Code Civ. Proc. §§ 594 et seq., 1054*], to stay the action [*see Code Civ. Proc. § 410.30*], and motions for trial preferences [*see Code. Civ. Proc. § 36*].

- Temporary restraining orders, injunctions; and motions for appointment of a receiver. Injunctive relief and applications for appointment of a receiver require quick work under heavy time pressure for counsel as well as the court. In addition, the moving party has the difficult burden of showing a likelihood of success in order to obtain injunctive relief [*see Code Civ. Proc § 526*]. Similarly, the burden for appointment of a receiver may also be difficult [*Code Civ. Proc § 564*]. Thus, in proceedings in which injunctive relief or a receivership is sought, the memorandum takes on special significance.

- Applications for other provisional remedies: An application for writ of attachment, for example, requires a memorandum if the Judicial Council form of request for writ is used as a notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rules 3.1103(a)(2)*, 3.1113(a)].

- Discovery motions: Motions for protective orders and motions to compel some form of discovery such as protective orders [*see Code Civ. Proc. § 2017(c)* (*Code Civ. Proc. § 2017.020* operative July 1, 2005); *Code Civ. Proc. § 2018* (*Code Civ. Proc. § 2018.030* operative July 1, 2005); *Code Civ. Proc. § 2019(b)* (*Code Civ. Proc. § 2019.030* operative July 1, 2005)], motions to compel [*see Code Civ. Proc. § 2025(o)* (*Code Civ. Proc. § 2025.480* operative July 1, 2005); *Code Civ. Proc. § 2030(k)* (*Code Civ. Proc. § 2030.290* operative July 1, 2005)], and motions for monetary and issue and evidentiary sanctions [*see Code Civ. Proc. § 2023* (*Code Civ. Proc. §§ 2023.020, 2023.030, 2023.040* operative July 1, 2005)].

- Summary judgment and summary adjudication motions: Important, time-consuming, and often costly motions that may dispose of large parts of an action if successful [*see Code Civ. Proc. § 437c*]. Because these motions can be complex, the supporting and opposing memoranda may be longer than other memoranda [*Cal. Rules of Ct., Rule 3.1113(e)*; *see* discussion in *§ 417.19[1][c]*].

- Motions in limine: Motions that are usually made on the day of trial or a few days before trial at the last pretrial conference and are designed to obtain rulings on key evidence questions so as to preclude reference to highly prejudicial evidence or to ensure that particular evidence is admissible [*see Akins v. County of Sonoma (1967) 67 Cal. 2d 185, 60 Cal. Rptr. 499, 430 P.2d 57* ; *Code Civ. Proc. §§ 128(a)(3), 128(a)(8), Evid. Code §§ 350, 352*].

- Other strategic pretrial motions: Strategic motions not listed in other categories that may arise under the particular circumstances of a case that include motions to limit the number of experts or the scope of an expert's testimony [*see Horn v. General Motors Corp. (1976) 17 Cal. 3d 359, 371, 131 Cal. Rptr. 78, 551 P.2d 398]* and motions for reconsideration [*see Code Civ. Proc. § 1008*].

- Post-trial motions: Motions that include those for judgment notwithstanding the verdict [*see Code Civ. Proc. § 629*], for new trial [*see Code Civ. Proc. § 657*], to tax costs [*Cal. Rules of Ct., Rule 3.1700(b)(1)*], and for entry of judgment by stipulation [*Code Civ. Proc. § 664.6*].

- Petitions for writs of mandate and prohibition: Petitions that may constitute the equivalent of appellate briefs in importance, especially when the petition is used to obtain review of nonappealable interlocutory orders [*see Code Civ. Proc. § 1084 et seq.* (mandate), *Code Civ. Proc. § 1102 et seq.* (prohibition)].

The foregoing list is not exhaustive. For a list of chapters discussing particular motions and proceedings in which points and authorities are used, see *§ 417.02*.

Note that a trial brief is not listed among the categories above because its function is different from that of a memorandum of points and authorities [*see § 417.12[1]*].

[3] When Memorandum Specifically Not Required But May Be Filed or Ordered

Civil motions, applications, and petitions filed on Judicial Council forms do not require a supporting memorandum in the following circumstances [*Cal. Rules of Ct., Rule 3.1114(a)*]:

- Application for appointment of guardian ad litem in a civil case.
- Application for an order extending time to serve pleading.
- Motion to be relieved as counsel.
- Motion filed in small claims case.
- Petition for change of name or gender.
- Petition for declaration of emancipation of minor.
- Petition for injunction prohibiting harassment.
- Petition for protective order to prevent elder or dependent adult abuse.
- Petition of employer for injunction prohibiting workplace violence.
- Petition for order prohibiting abuse (transitional housing).
- Petition to approve compromise of claim of a minor or an incompetent person.
- Petition for withdrawal of funds from blocked account.

If it would further the interests of justice, a party may submit, or the court may order the submission of, a memorandum in support of any motion, application, or petition; and the memorandum must comply with *Cal. Rules of Ct., Rule 3.1113* [*Cal. Rules of Ct., Rule 3.1114(b)*].

[4] Effect of Failure to File Required Supporting Memorandum

The absence of a memorandum in support of a demurrer or notice of motion, when required under *Cal. Rules of Ct., Rule 3.1113(a)* (discussed in [1][a], *above*), may be construed by the court as an admission that the motion or special demurrer is not meritorious and cause for its denial and, in the case of a demurrer, as a waiver of all grounds not supported [*Cal. Rules of Ct., Rule 3.1113(a)*].

Absent a memorandum in support of a motion for new trial, required under *Cal. Rules of Ct., Rule 3.1600* (discussed in [1][b], *above*), the court may deny the motion without a hearing on the merits [*Cal. Rules of Ct., Rule 3.1113(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProceduresPleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProceduresPartiesInterpleadersGeneral OverviewCivil ProceduresDiscoveryGeneral OverviewCivil ProceduresSummary

JudgmentOppositionGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 417 POINTS AND AUTHORITIES
PART II. LEGAL BACKGROUND

36-417 California Forms of Pleading and Practice--Annotated § 417.15

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

§ 417.15 When Opposing Points and Authorities Are Used

Opposing memoranda are generally permitted, but not mandatory [*see, e.g., Cal. Rules of Ct., Rule 3.1600* (permitting memoranda in opposition to motion for new trial to be served and filed within 10 days after service of supporting memorandum)]. Opposing memoranda are, however, strongly recommended.

As a courtesy to the court, a party not opposing a motion or other application should file a statement of nonopposition on or before the date on which a written opposition is due.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresJudgmentsRelief From JudgmentGeneral OverviewCivil ProceduresJudgmentsRelief From JudgmentMotions for New Trials

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 417 POINTS AND AUTHORITIES
PART II. LEGAL BACKGROUND

36-417 California Forms of Pleading and Practice--Annotated § 417.16

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

§ 417.16 When Reply Points and Authorities Are Used

A reply memorandum should be used only when an opposing memorandum raises issues or evidence that were not been sufficiently addressed in the supporting memorandum. In some instances it is sound strategy not to anticipate issues in the supporting memorandaum. For example, a plaintiff submitting a memorandum in support of a motion for summary judgment may not wish to give the opposition ammunition by anticipating an affirmative defenses that might be available to the defendant, but address such a defense in a reply memorandum only in the event that it is in fact raised by the defendant in his or her opposing papers.

Reply memoranda should be concisely tailored to this one purpose, of presenting argument to the opposing papers not already addressed in the supporting memorandum [*see, e.g., Bergman v. Rifkind & Sterling, Inc. (1991) 227 Cal. App. 3d 1380, 1384, 1386-1387, 278 Cal. Rptr. 583* (distinguishing between reply to opposition and document that merely provided procedural update for the court's convenience)]. A reply memoranda should not attempt to raise issues not previously raised in the either the supporting or oppossing memoranda. Thus, for example, an entirely new issue based on evidence not previously presented or put into issue should only be presented by way of a separate, subsenquent motion for reconsideration [*see* Ch. 374, *Motions to Reconsider and Renewed Motions*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentSupporting MaterialsGeneral Overview

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 417 POINTS AND AUTHORITIES
PART II. LEGAL BACKGROUND

36-417 California Forms of Pleading and Practice--Annotated § 417.17

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

§ 417.17 Time for Filing Memoranda

[1] Supporting Memoranda

The supporting memorandum must be filed along with the moving papers [*see Code Civ. Proc. §§ 1005, 1010*; *see also* discussion in *§ 417.19[1][g]*; *but see, e.g.,* Cal. Rules of Ct., Rule 3.160 (memorandum supporting motion for new trial to be served and filed within 10 days after filing notice of intention to move for new trial)].

Unless otherwise ordered or specifically provided by law, moving and supporting papers in law and motion proceedings must be served and filed in accordance with *Code Civ. Proc. § 1005* [Cal. Rules of Ct., Rule 3.130(a)], that is, at least 16 court days before the hearing, with specified additions to this period when the notice of motion is served by mail, facsimile transmission, express mail, or other method of overnight delivery [*Code Civ. Proc. § 1005(b)*; for further discussion, *see* Ch. 372, *Motions and Orders*]. The time for serving and filing supporting papers is, in fact, otherwise specified in certain types of motions [*see, e.g., Code Civ. Proc. § 437c(a)* (motion for summary judgment requiring 75 days notice)]. For a list of chapters discussing the deadlines for serving and filing particular motions, applications, and petitions, see *§ 417.02*.

Service and filing deadlines for moving papers are generally subject to court orders shortening or extending time [*see, e.g.,* Cal. Rules of Ct., Rule3.1300(b) (procedure for order shortening time)]. For further discussion, see Ch. 524, *Shortening and Extension of Time* .

[2] Opposing Memoranda

As discussed in [1], *above*, most moving papers in law and motion proceedings are subject to the notice requirements of *Code Civ. Proc. § 1005(b)*. All papers opposing a motion noticed under *Code Civ. Proc. § 1005(b)* must be filed, and a copy served on each party, at least 9 court days before the hearing [*Code Civ. Proc. § 1005(b)*].

One exception is any opposition to a motion for summary judgment, which must be filed 14 days before hearing [*Code Civ. Proc. § 437c(b)*]. These filing deadlines are subject to court orders shortening or extending time [*see* Ch. 524,

Shortening and Extension of Time].

Papers opposing motions, demurrers, applications, and petitions are typically filed in the clerk's office. Counsel should, however, check local practices.

[3] Reply Memoranda

Generally, reply papers must be filed, and a copy served on each party, at least five court days before the hearing [*Code Civ. Proc. § 1005(b), (c)*; *see also Code Civ. Proc. § 437c(b)(4)* (reply in summary judgment proceeding must be served and filed not less than five days preceding the hearing)].

[4] Late-Filed Papers

A paper submitted before the close of the clerk's office to the public on the day the paper is due is deemed timely filed [*Cal. Rules of Ct., Rule 3.1300(e)*].

Nonetheless, no paper may be rejected for filing on the ground that it was submitted for filing after the time set forth in *Cal. Rules of Ct., Rule 3.1300*. If the court, in its discretion, refuses to consider a late-filed paper, the minutes or order must so indicate [*Cal. Rules of Ct., Rule 3.1300(d)*].

PRACTICE TIP:

File All Papers on Time. Do not use Rule 3.1300 as a crutch. Notwithstanding *Rules of Court, Rule 3.1300*, which requires the clerk to accept late filed papers, some clerks will refuse to do so. Such refusal may necessitate counsel filing an ex parte application to file a late brief--a time consuming task. *Evelio M. Grillo, Esq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresPleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProceduresPleading & PracticePleadingsTime LimitationsExtensionsCivil ProceduresSummary JudgmentNoticesCivil ProceduresSummary JudgmentOppositionGeneral OverviewCivil ProceduresSummary JudgmentSupporting MaterialsGeneral OverviewCivil ProceduresSummary JudgmentTime LimitationsCivil ProceduresJudgmentsRelief From JudgmentMotions for New Trials

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Chapter 417 POINTS AND AUTHORITIES
PART II. LEGAL BACKGROUND

36-417 California Forms of Pleading and Practice--Annotated § 417.18

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

§ 417.18 Time for Service of Memoranda

Papers are generally required to be served on or about the date on which they must be filed [*see, e.g., Code Civ. Proc. § 1005(b)* (moving papers tobe filed *and* served 16 court days before hearing)]. Papers supporting a motion must accompany the written notice of motion and must be served as provided in *Code Civ. Proc. § 1011 et seq.* [*Code Civ. Proc. § 1010*]. The papers served, including any supporting memorandum, must be a copy of those that have been or are to be filed with the court [*Code Civ. Proc. § 1005(b)*].

Counsel should consult local rules for additional requirements relating to service of papers.

PRACTICE TIP:

Avoid Malpractice and Check Filing Deadlines. Do not assume that all memoranda are to be filed within the time limits proscribed by *Code Civ. Proc., §§ 1005* and *1010*, as some supporting and opposing pleadings for motions and petitions (including the memoranda of points and authorities) are required by statute to be filed with more or less notice as, for example, motions for summary judgment [*Code Civ. Proc., § 437c* (opposition due 14 days before the hearing date)]; and petitions to compel arbitration [*Code Civ. Proc., § 1290.6* (opposition due ten days after service of petition)]. In the case of an opposition to a petition to compel arbitration, the ten-day time limit for filing the opposition is *jurisdictional*! Unless you are absolutely sure of the time limits for filing supporting and opposing the pleadings for a particular motion or petition, *always* confirm the applicable time limits for filing the opening and responsive pleadings. *Evelio M. Grillo, Esq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticePleadingsGeneral OverviewCivil ProceduresSummary JudgmentNoticesCivil ProceduresSummary JudgmentOppositionGeneral Overview

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 417 POINTS AND AUTHORITIES
PART II. LEGAL BACKGROUND

36-417 California Forms of Pleading and Practice--Annotated § 417.19

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

§ 417.19 Format Requirements for Memoranda of Points and Authorities

[1] Format Requirements Specifically Applicable to Memoranda

[a] Applicability of Rule 3.1113 Requirements

A memorandum filed in support of a motion must comply with the requirements of *Cal. Rules of Ct., Rule 3.1113* (as discussed in [b]-[h], *below*).

[b] Contents of Memoranda

A memorandum filed in support of a motion must comply with the requirements. A memorandum of points and authorities must contain the following [*Cal. Rules of Ct., Rule 3.1113(b)*]:

- A statement of facts.
- A concise statement of the law.
- Evidence and arguments upon which the memorandum relies.
- A discussion of the statutes, cases, and textbooks cited in support of the position advanced.

A memorandum that exceeds 10 pages must also include a table of contents and a table of authorities [*Cal. Rules of Ct., Rule 3.1113(f)*]. Any table of authorities should list, in alphabetical order, federal cases first, and then state cases. The page or pages on which each case is cited should appear directly opposite each case name in the table. Cases should be followedby statutes, also in alphabetical order by code title, with federal statutes preceding state statutes. Secondary sources, such as law review articles, treatises, or textbooks, should be included after statutes. This order is not, however, established in stone or by rule: it is accepted practice, for example, to cite the more relevant state authority before federal authority in memoranda filed in state trial courts. The tabling of statutory authority priot to case authority is also

sometimes used, as it is the more logical arrangement of primary authority.

A memorandum that exceeds 15 pages must also include an opening summary of argument [*Cal. Rules of Ct., Rule 3.1113(f)*].

[c] Limits on Length of Memoranda

[i] General Rule

An opening (supporting) or responding (opposing) memorandum must not exceed 15 pages, except in the case of memorandum supporting or opposing a motion for summary judgment or summary adjudication, which must not exceed 20 pages. A closing (reply) memorandum must not exceed 10 pages [*Cal. Rules of Ct., Rule 3.1113(d)*].

These page limits do not include the following elements of a memorandum [*Cal. Rules of Ct., Rule 3.1113(d)*]:

- A table of contents or table of authorities.
- Exhibits.
- Declarations (or affidavits).
- Any attachment other than an exhibit or declaration.
- Proof of service.

If a memorandum includes a table of contents and table of authorities, the caption page also appears to be excluded in calculating the page length of a memorandum. Pagination requirements provide that, when a memorandum includes such tables, the caption page is not to be numbered, the tables are to be numbered separately using lower-case Roman numerals, and the consecutive numbering of the memorandum itself is to begin, using Arabic numerals, on the first page of the text [*see Cal. Rules of Ct., Rule 3.1113(h)* and discussion in [2][d], *below*].

Counsel should avoid any temptation to circumvent the page-limit requirements by way of utilizing any format "sleight of hand," as distinguished from the procedure for obtaining leave to file a longer memorandum (discussed in [ii], *below*). Such practices have been condemned by courts when used to circumvent similar page limits on briefs [*see Marriage of Green (1989) 213 Cal. App. 3d 14, 28, 261 Cal. Rptr. 294* (appellate brief deemed an "insult" to the court when it included an unpaginated "Introduction", unpaginated "exhibits" that contained discussion which was properly a part of the brief, and an excessive use of single-spaced footnotesthat also included discussion and text other than citations)]. See also the discussion in *§ 417.20[3][a]*, relating to concise writing a brevity as a drafting consideration.

Any memorandum filed in excess of the applicable page limits, without leave (discussed in [ii], *below*), is filed and considered in the same manner as a late filed paper [*Cal. Rules of Ct., Rule 3.1113(g)*]. In other words, the trial court has discretion to refuse to consider the memorandum, but must so indicate in its minutes or order [*see Cal. Rules of Ct., Rule 3.1300(e)* and discussion in *§ 417.17[4]*].

[ii] Procedure for Leave to File Longer Memorandum

A party may apply to the court, ex parte but with written notice of the application to the other parties, at least 24 hours before the memorandum is due, for permission to file a longer memorandum. This application must state reasons why the argument cannot be made within the standard limits [*Cal. Rules of Ct., Rule 3.1113(e)*].

It is advisable to apply well in advance of the 24-hour deadline, in order to allow time to bring a overly long memorandum into compliance if the application is denied.

For forms of ex parte application and supporting declaration for leave to file a memorandum in excess of these page limits, see *§ 417.51*.

[d] Citation Requirements

[i] Citation Style

Citations to cases and other authorities in all documents filed in the courts must be in the style established by either [*Cal. Rules of Ct., Rule 1.200*]:

- *California Style Manual*, prepared by the Reporter of Decisions and used by California appellate courts in both their published and unpublished opinions.

- *The Bluebook: Uniform System of Citation*.

A party may choose to use either citation style, but once chosen that style must be used consistently throughout a memorandum [*see Cal. Rules of Ct., Rule 1.200*].

[ii] Citing to Case Authority

A case citation must include the official report volume, page number, and year of decision, and no other citations are required [*Cal. Rules of Ct., Rule 3.1113(c)*]. This presumes, of course, that a cited case has been published in the official reports. When citing to an unpublished case or case not yet published in the official reports, cite the case as recommend bythe citation style manual being used for the memorandum (as discussed in [i], *above*), and attach a copy of the case as discussed in [iii], *below*.

The page number of a case citation, as required under *Cal. Rules of Ct., Rule 3.1113(c)*, should always include not only the first page of the particular opinion, but also the specific page or pages that contain the particular discussion or point of law for which the case is being cited. Some local court rules require or recommend such "point page" citation. While local requirements of this type are no longer controlling, in the sense that the statewide court rules have preempted the field of "form and format" [*see Cal. Rules of Ct., Rule 3.20*, and discussion in *§ 417.13*], the use of "point page" references is nevertheless useful to the courts and a sound practice that is highly recommended. Moreoever, although *Cal. Rules of Ct., Rule 3.1113(c)*, may be construed so as not to require the inclusion of point pages, parallel citations, or other standard case citation elements not expressly mentioned in the rule, it certainly does not prohibit their inclusion.

[iii] When Attachment of Copies of Cited Authorities Are Required

If a memorandum cites any authority other than California cases, statutes, constitutional provisions or state or local rules, a copy of that authority must be lodged with the memorandum and tabbed as an exhibit as required by *Cal. Rules of Ct., Rule 3.1110(f)* [*Cal. Rules of Ct., Rule 3.1113(i)*; for discussion of requirements applicable to exhibits under *Cal. Rules of Ct., Rule 3.1110(f), see* [2][e], *below*]. The same requirement applies to any California case cited as authority, when that case has not yet been published in the Advance Sheets of the Official Reports [*Cal. Rules of Ct., Rule 3.1113(i)*].

The requirement of *Cal. Rules of Ct., Rule 3.1113(i)*, appears to include not only non-California authority but California autority not expressly included in *Cal. Rules of Ct., Rule 3.1113(i)*, such as California administrative regulations, local charter provisions, or other unusual matter.

If a California case is cited before the time it is published in the advance sheets of the Official Reports, a copy of that case must also be lodged and tabbed as required by *Cal. Rules of Ct., Rule 3.1110(f)* [*Cal. Rules of Ct., Rule 3.1113(i)*].

Note also that, if a memorandum cites to an unpublished California case, under the limited circumstances permitted under *Cal. Rules of Ct., Rule 8.1115(b)*, or if it cites to an opinion of any court that is available only a computer-based source of decisional law, a copy of such case or opinion must be furnished to the court and all parties by attaching it to the memorandum [*Cal. Rules of Ct., Rule 8.1115(c)*; for discussion of citing to unpublished cases under *Cal. Rules of Ct., Rule 8.1115(b), see § 417.20[3][b][ii]*]. It is recommended that a copy of the unpublished case by lodged with the court and tabbed as an exhibit as required by *Cal. Rules of Ct., Rule 3.1110(f)*.

If counsel's memorandum does not cite a case pursuant to *Cal. Rules of Ct., Rule 8.1115(c)*, but counsel expects to do so orally, for example, in a subsequent hearing to which the memorandum relates, he or she must furnish a copy to the court and to all parties within a reasonable time in advance of the oral citation [*Cal. Rules of Ct., Rule 8.1115(c)*].

[e] References to Declarations and Exhibits

References in a memorandum to a declaration, affidavit, or exhibit must include the number or letter of the exhibit, the specific page, and, if applicable, the paragraph or line number [*Cal. Rules of Ct., Rule 3.1113(k)*].

[f] Requests for Judicial Notice

If a memorandum relies on evidence or matters that subject to judicial notice, such judicial notice must be requested in a separate document that lists the specific items for which notice is requested, and the document must comply with the requirements of Cal. Rules of Ct., Rule 3.1301(c) [*Cal. Rules of Ct., Rule 3.1113(l)*; *see also* discussion of matters subject to judicial notice in § 417.21[5]]. For further discussion of the requirements of *Cal. Rules of Ct., Rule 3.1306(c)* and a form of request for judicial notice, see Ch. 321, *Judicial Notice* .

[g] Attaching or Combining the Memorandum With Other Papers

To the extent practicable, all supporting memoranda, declarations, and affidavits must be attached to the notice of motion [*Cal. Rules of Ct., Rule 3.1113(j)*].

A supporting memorandum may also be actually combined in a single document with the motion itself, with the notice of hearing on the motion, or withboth [*Cal. Rules of Ct., Rule 3.1112(a), (c)*]. If a supporting memorandum is combined with a motion and the notice of hearing, the caption of the combined document must specify the supporting memorandum as one of the separate items included in the combined document [*Cal. Rules of Ct., Rule 3.1112(c)*; for a general form of motion combined with the notice of hearing and supporting memorandum, see Ch. 372, *Motions and Orders*]. In this instance, declarations and affidavits would then be attached to the combined document, to the extent practicable, under *Cal. Rules of Ct., Rule 3.1113(j)*.

PRACTICE TIP:

Combining the Memorandum With the Motion and Notice of Motion. Before the adoption of *Cal. Rules of Ct., Rule 3.1112* (formerly Rule 312) in 1997, the common practice was to file a notice of motion with a supporting memorandum and supporting declarations (if applicable); in most instances the notice of motion was also considered to be written motion as well. The notice of motion and supporting memorandum were commonlycombined or attached, together with any supporting declarations. Now, rather than prepare the motion and notice of motion (or hearing) as separate documents, it is likely that most practitioners will combine the two as permitted under *Cal. Rules of Ct., Rule 3.1112(c)*. Under *Cal. Rules of Ct., Rule 3.1112(c)* and *Cal. Rules of Ct., Rule 3.1113(j)*, practitioners may then either combine or attach the supporting memorandum with the motion and notice of motion, although it appears that supporting declarations must be prepared as separate documents to be attached if practicable. Combining

the memorandum with the motion and notice of motion should prove to be a common practice so long as practitioners take care to use an appropriate caption that specifies all combined elements. *Evelio M. Grillo, Esq.*

If a supporting memorandum is prepared as a separate document, it much conform to the caption requirements discussed in [2][b], *below*, even when it is ultimately attached to the notice of motion.

For a skeletal form of memorandum prepared as a separate document, see *§ 417.50*.

[h] Proposed Orders

If a party prepares a proposed order or judgment, it must be lodged and served with, but not attached to, a supporting memorandum and other moving papers [*Cal. Rules of Ct., Rule 3.1113(m)*]. For further discussion and forms relating to proposed orders generally, see Ch. 372, *Motions and Orders* .

[2] Format Requirements Applicable to All Law and Motion Papers

[a] Applicability of General Rules

The format of a memorandum is subject to the general format requirements applicable generally to papers filed in trial courts, including the requirements of *Cal. Rules of Ct., Rules 2.100-2.119* and the requirements of *Cal. Rules of Ct., Rule 3.1110* [*see Cal. Rules of Ct., Rules 3.1100, 3.1103(a), 3.20*; *see also § 417.13*]. For detailed discussion of the requirements of *Cal. Rules of Ct., Rules 2.101-2.106*, dealing with such things as size of papers, type style, pagination, use of recycled paper, etc., see [d], *below*, and Ch. 123, *Complaints and Cross Complaints*. For discussion of the requirements of *Cal. Rules of Ct., Rule 3.1110*, see [b]-[e], *below*.

[b] First Page

The first page of the memorandum, if the memorandum is prepared as a separate document (*see* [1][g], *above*), must be in the following form [Cal. Rules of Ct., Rule 2.1111; *see also* Ch. 108, *Captions and Introductions*]:

- In the space commencing with line 1, to the left of the center of the page, the name, office address or, if none, residence address, telephone number, fax number and e-mail address (if available), and State Bar membership number of the attorney for the party in whose behalf the paper is presented, or of the party if he or she is appearing in person. Inclusion of a fax number and e-mail address on any document is not deemed to be consent to service by either fax or e-mail unless otherwise provided by law.

- The space between lines 1 and 7 to the right of the center of the page must be left blank for the use of the clerk.

- On or below line 8, the title of the court.

- Below the title of the court, in the space to the left of the center of the page, the title of the case.

- To the right of and opposite the title, the case number.

- Below the case number, the nature of the paper, such as, *e.g.*, "MEMORANDUM SUPPORTING DEMURRER TO SECOND AMENDED COMPLAINT."

- Below the nature of the paper or the character of the action or proceeding, the name of the judge and department, if any, to which the case is assigned.

- Below the case number, if the paper is filed in a case pending before a referee appointed under *Code Civ. Proc. § 638* or *639*, the word "Referee:" followed by the referee's name.

- If a limited civil case, in the caption the words: "Limited Civil Case" as required by *Code Civ. Proc. § 422.30(b)*.

In addition, the first page must specify immediately below the case number, (1) the date, time, and location, if ascertainable, of any scheduled hearing and the name of the hearing judge, if ascertainable; (2) the nature or title of any attached document other than an exhibit; and (3) the date of filing of the action, and (4) the trial date, if set [*Cal. Rules of Ct., Rule 3.1110(b)*].

The first page, and all other pages, must be used on one side only, and the lines on the page must generally be one and one-half or double spaced and numbered consecutively [*see Cal. Rule of Ct., Rules 2.102, 2.108*].

[c] Reference to Previously Filed Papers

Any paper previously filed must be referred to by date of execution and title [*Cal. Rules of Ct., Rule 3.1110(d)*].

[d] Binding and Pagination

All pages of the memorandum and each exhibit must be attached together at the top by a method that permits pages to be easily turned and the entire content of each page to be read [*Cal. Rules of Ct., Rules 3.1110(e)*].Documents bound together must be numbered consecutively at the bottom [*Cal. Rules of Ct., Rule 2.109*; *see also* [f], *below*, regarding descriptive footers required to be placed under each page number].

If a memorandum includes a table of contents and table of authorities, it must be paginated as follows notwithstanding any other rule: the caption page or pages is not to be numbered, the pages of the tables are to be numbered consecutively using lower-case Roman numerals starting on the first page of the tables, and the pages of the text of the memorandum are to be numbered consecutively using Arabic numerals starting on the first page of the text [*Cal. Rules of Ct., Rule 3.1113(h)*].

[e] Exhibits

If the memorandum has exhibits, each must be separated by a hard 81/2 by 11 inch sheet with hard paper or plastic tabs extending below the bottom of the page, bearing the designation of the exhibit. An index to exhibits must be provided. Pages from a single deposition and associated exhibits must be designated as a single exhibit. Exhibits in a foreign language must be accompanied by an English translation, certified under oath by a qualified interpreter [*Cal. Rules of Ct., Rule 3.1110(f)*].

[f] Footer With Title of Paper Required on Each Page

Each paper filed with the court, except for exhibits, must bear on each page a footer in the bottom margin. The footer must be placed below the page number and separated from the rest of the page by a printed horizontal line. The footer is required to include the title of the paper or some clear and concise abbreviation of the title [*Cal. Rules of Ct., Rule 2.110(h)* (also providing two examples of abbreviations: "Complaint" and "XYZ Corp.'s Motion for Summary Judgment")]. The footer may be single-spaced [*Cal. Rules of Ct., Rule 2.108*]. The title or abbreviated title given in the footer must be in at least 10-point type [*Cal. Rules of Ct., Rule 2.110(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresPleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProceduresSummary JudgmentSupporting MaterialsMemoranda of LawGovernmentsCourtsRule Application & Interpretation

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 417 POINTS AND AUTHORITIES
PART II. LEGAL BACKGROUND

36-417 California Forms of Pleading and Practice--Annotated § 417.20

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

§ 417.20 Drafting Considerations

[1] Introduction or Summary of Argument

Although not required by statute or rule, it is usually a good idea to include an introduction of one to two sentences in the memorandum. The introduction helps the court focus on which parties' brief the court is reading, the nature of the motion, and whether the brief is supporting or opposing the pending motion. An example of a simple introduction would be as follows: "This memorandum is submitted on behalf of plaintiff Jones and against defendant Smith in support of plaintiff Jones' Motion for Summary Judgment."

A memorandum that exceeds 15 pages must include an opening summary of argument [Cal. Rules of Ct., Rule § 3.1113(f)].An opening summary of argument should precede the statement of facts and may be combined with the Introduction.

[2] Statement of Facts

A memorandum must contain a statement of facts [*Cal. Rules of Court, Rule 3.1113(b)*]. The statement should be complete and accurate, setting forth all important facts and sufficient additional facts to give the court a sense of the equities favoring the party's position.

The facts are derived either from the pleadings, from evidence presented with the moving or opposing papers, or matters subject to judicial notice [*see* discussion in *§ 417.21*].

[3] Statement of Law, Evidence, and Arguments

[a] The Argument Relating Facts and Law

The memorandum must contain a concise statement of the law, evidence, and arguments relied on, and a discussion of the statutes, cases, and textbooks cited in support of the position advanced [*Cal. Rules of Court, Rule 3.1113(b)*]. This

section is usually entitled "Argument" or "Discussion" in the points and authorities.

Depending on the complexity of the issues presented and the length of the memorandum, these elements may be organized in a number of ways. One of the clearest ways is in sections lettered consecutively and preceded by argumentative headings that make strong, affirmative statements supporting the party's position.

There is no requirement in the rules of court that a memorandum in support of a motion for summary judgment or summary adjudication be organized by cause of action [*Hope Int'l Univ. v. Superior Court (2004) 119 Cal. App. 4th 719, 723, 14 Cal. Rptr. 3d 643]* .

PRACTICE TIP:

Consider Your Audience and Be Concise. One of the most common mistakes made by counsel when submitting a memorandum to the trial court is counsel's failure to consider the audience. The memorandum should be crafted with due consideration given to the practical realities faced by the court. For example, a voluminous brief supported by an extensive record may be well received by an appellate court considering a policy issue of substantial significance with unlimited time to scour the record and conduct supplemental research. The same brief submitted in support of a simple discovery or law an motion matter can work to counsel disadvantage because of the time constraints and burdens imposed on law and motion judges by busy calendars. Limiting the evidence presented and the discussion of the legal points necessary to decide the motion before the judge will often work to counsel's advantage.

Another common mistake made by counsel when preparing a memorandum is to make the points and authorities too long. Most routine motions should not require a points and authorities in excess of five to ten pages if the motion is well thought out, well written, and to the point. Some motions, of necessity, must be of greater length. Do not spend an inordinate amount of time reciting page after page a legal standard of which the court is aware (for example, demurrers decide questions of law and not facts). Do not waste space and the court's time by engaging in invective and personal attacks on opposing counsel. The most effective briefs are short, well-crafted and to the point pleading. Counsel will incur the displeasure of the court if, after, seeking relief from the page limitation requirement, a brief is submitted which contains page after page of personal attack, extended discussion of a legal standard which could be handled in a paragraph, or the recitation of irrelevant, nondispositive facts. *Evelio M. Grillo, Esq.*

[b] Reliance on Authorities

[i] General Considerations

In citing cases, it is most effective and economical to follow these guidelines:

- Cite to the highest legal authority that is binding and supports the party's position.

- Cite to the most recent case for a particular legal proposition. If the highest authority for the proposition is not a recent one, cite that authority and a lower but more recent authority to show the proposition remains valid.

- Cite court of appeal cases from the appellate district in which the action is pending when possible because authority from the district in which any appeal will be heard will likely be more persuasive to the trial judge.

- Avoid string citations when one case is dispositive. A string of citations dealing with a single legal proposition may be useful only when contrary authority exists among various appellate courts: in this

situation listing the pertinent cases with explanation acknowledges contrary cases and indicates the weight of authority for a proposition.

- Cite all relevant legal authority, even that which may not necessarily be favorable to one's position [*see Cal. Rules Prof. Conduct, Rule 5-200*]. Acknowledge contrary legal authority by distinguishing those cases on the facts or on the law. These cases will likely be identified either in the opposing papers or by the court's research attorneys. Thus, to ignore contrary cases will lead to losing credibility with the court.

- Verify that the cited case law is current and valid. The easiest way to do this is to check the status of all cases cited in Shepard'sCalifornia Citations, or the Shepard's volume for the relevant jurisdiction, just before filing the memorandum.

- Avoid excessive use of headnotes. Do not rely exclusively on case headnotes or treatise interpretations of a case, because headnotes and treatises can be wrong and do not give the reader the full context of the decision.

[ii] Unpublished and "Depublished" Opinions

An opinion of the court of appeal or the appellate division of a superior court that is not certified for publication or ordered published generally may not be cited or relied on by a court or a party in any other action or proceeding [*Cal. Rules of Ct., Rule 8.1115(a)*]. Unpublished opinions include those that have been superseded by a grant of revision, rehearing, or other action (unless the California Supreme Court orders otherwise) [*see Cal. Rules of Ct., Rule 8.1105(d)*; *see also Cal. Rules of Ct., Rules 8.264* (finality), 8.268 (rehearing), 8.500 (petition for review)].. Unpublished opinions also include decisions of the court of appeal or the appellate departments of the superior court that have been certified by those courts for publication, but which the Supreme Court has subsequently ordered not to be published [*see Cal. Rules of Ct., Rule 8.1105(b), (d)*].

An opinion may be certified for partial publication. All material, factual and legal, including the disposition, that aids in the application or interpretation of the published part must be published, and for purposes of *Cal. Rules of Ct., Rules 8.1105, 8.1115, 8.1120*, the published part of the opinion is treated as a published opinion and the unpublished part as an unpublished opinion [*Cal. Rules of Ct., Rule 8.1110*].

By "depublishing" or "decertifying" a court of appeal opinion, the Supreme Court lets the decision stand with regard to the parties but eliminates its precedential value [*see Cal. Rules of Ct., Rule 8.1115(a)*]. Depublication of an opinion should not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any of the law set forth in the opinion [*Cal. Rules of Ct., Rule 8.1125(d)*; *but see People v. Dee (1990) 222 Cal. App. 3d 760, 764, 272 Cal. Rptr. 208* (acknowledging in dicta that appellate courts seek guidance from denial of review and depublication, and stating, "it is generally accepted that most depublication occurs because the court considers the opinion to be wrong in some significant way, usually in reasoning and sometimes in result as well")].

An unpublished or depublished opinion may be cited either when it is relevent under the doctrines of law of the case, res judicata, or collateral estoppel, or when the opinion is relevant to a disciplinary (or criminal) proceeding because it states reasons for a decision affecting the same defendant or respondent in another such proceeding [*Cal. Rules of Ct., Rule 8.1115(d)*].

[4] Conclusion

A conclusion is not a required element of a memorandum [*see Cal. Rules of Ct., Rule 3.1113(b)*]. But it is a good practice to include a conclusion that succinctly summarizes the party's contentions as to how the trial court should

resolve the legal issues raised in the memorandum. The conclusion should also state the relief requested from the court.

PRACTICE TIP:

Consistency in All Papers. Ideally, if counsel has given due consideration to the notice of motion, the summary of argument and the conclusion in the points and authorities, as well as the proposed order, a law and motion judge reviewing any of these documents or sections of these documents should have a good idea of the party who is seeking or opposing relief, the basis for the party's position, and the specific relief requested. *Evelio M. Grillo, Esq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeContent & FormCivil ProceduresPleading & PracticePleadingsGeneral OverviewCivil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProceduresSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProceduresSummary JudgmentSupporting MaterialsMemoranda of Law

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 417 POINTS AND AUTHORITIES
PART II. LEGAL BACKGROUND

36-417 California Forms of Pleading and Practice--Annotated § 417.21

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

§ 417.21 Supporting Evidence

[1] Preparing Supporting Evidence

The notice of motion, motion, and supporting memorandum is normally accompanied by some form of evidence on which the motion is based, usually in the form of affidavits or declarations under penalty of perjury setting forth evidentiary facts [*see generally* Ch. 372, *Motions and Orders*]. If a memorandum refers to evidence that is not yet before the court, a copy of such evidence, again, usually in the form of an affidavit or declaration, must accompany the memorandum [*see Code Civ. Proc. § 1010*; *see also Code Civ. Proc. § 1005(b)*].

While evidentiary facts are usually set out in an affidavit or declaration, they may also be set out in documentary evidence, presented as an exhibits that is authenticated by an affidavit or declaration attached to the exhibit, or in discovery products (for example, deposition testimony and interrogatories). Evidentiary facts may also be matters subject to judicial notice. When submitting evidence discussed in a memorandum, counsel must be cognizant of the foundational requirements for the court to consider the evidence, as well as the limitations on the Court's consideration of particular forms of evidence.

PRACTICE TIP:

Develop Evidence for Motion First. One of the common problems encountered by counsel when preparing a memorandum is to prepare legal arguments first before the evidentiary basisof the motion is fully understood. Except in cases of very simple motions which require very little evidentiary support, counsel should attempt to develop the evidence for the motion before expending substantial time and effort on drafting the legal argument section of the points and authorities. A brilliant legal argument, without supporting facts, will not prevail over a less complex, straight forward legal argument supported by one or two critical facts. Prepare the legal argument section of the points and authorities with due consideration to the evidence available to support the motion. *Evelio M. Grillo, Esq.*

Note that some motions may not be supported by extrinsic evidence (for example, a motion for judgment on the pleadings under *Code Civ. Proc. § 438*) or a statutory motion to strike under *Code Civ. Proc. §§ 435-437*), and in these

instances the supporting or opposing memorandum must rely on pleadings or judicially noticed matters.

[2] Declarations or Affidavits

An affidavit is (1) a written declaration under oath made without notice to the adverse party [*Code Civ. Proc. § 2003*]; (2) one of the three modes of taking the testimony of a witness [*see Code Civ. Proc. § 2002(1)*]; and (3) expressly authorized for use "on a motion" [*Code of Civ. Proc. § 2009*]. A declaration under penalty of perjury may be used in lieu of an affidavit [*Code Civ. Proc. § 2015.5*]. For all practical purposes, declarations under penalty of perjury have replaced affidavits as the mode of presenting the evidence of a witness on a motion. For discussion and forms relating to affidavits and declarations generally, see Ch. 15, *Affidavits, Certificates, and Declarations* .

[3] Documentary Evidence

Evidentiary exhibits may accompany a memorandum in support of or in opposition to a motion or a reply memorandum, and usually set out documentary evidence such as a contract central to the action. If the motion or petition is based on an exhibit that requires authentication in order to be admissible, the exhibit should be attached to the declaration or affidavit of the person authenticating it.

PRACTICE TIP:

Using Documentary Evidence. One common mistake made when submitting documentary evidence to the court in support of a factual statement in a points and authorities is to attach the exhibit to the points and authorities, or to submit it with an attorney declaration which inadequately authenticates the document. When submitting the document in support of the factual proposition asserted in a points and authorities, provide sufficient foundation and authentication to overcome any evidentiaryobjections so that the court may properly consider the evidence in conjunction with your motion. *Evelio M. Grillo, Esq.*

[4] Discovery Products

Discovery products may support factual propositions asserted in a memorandum. Discovery products include responses to interrogatories, requests for admissions, deposition testimony, and documents obtained through discovery. Discovery products are, like documentary evidence, presented as exhibits that must be authenticated by an attorney or other declaration when being presented to the court. It is not enough for counsel simply to attach interrogatory responses or deposition testimony to a brief without the appropriate authentication.

[5] Matters Subject to Judicial Notice

If a memorandum is based all or in part on evidentiary facts that are subject to judicial notice under *Evid. Code § 450 et seq.*, the moving or opposing papers of which the memorandum is part must include a separate request for judicial notice [*see § 417.19[1][f]*; *see also* Ch. 321, *Judicial Notice*].

The evidentiary material, such as statutes or pleadings, of which the party wishes the court to take judicial notice should be attached to the motion in some admissible form (for example, certified copies from the court or authenticated by declaration). Alternatively, the party requesting judicial notice should provide copies of the evidentiary material to the court and each party and arrange for the original documents to be in the courtroom at the time of hearing [*Cal. Rules. of Ct., Rule 3.1306(c)*].

PRACTICE TIP:

Judicial Notice. Judicial notice can be a formidable device to present evidence to the court when the evidence presented meets the statutory requirement for judicial notice. Facts which are subject to dispute are not subject to judicial notice and are poor candidates for inclusion in an request for judicial notice.

Conversely, prior judgments, prior verified complaints, and certified copies of deeds and other official government actions, when incorporated into a request for judicial notice, provide a sound evidentiary basis for a motion. Do not attempt to use judicial notice to present facts which are not properly judicially noticeable.

One good practice in complex law and motion matters is for counsel to include copies with any request for judicial notice of any relevant pleadings, papers, or orders in the proceedings. By incorporating such copies with the request, the court will be able to rely on the request for judicial notice rather than rummaging through five or ten volumes of files attempting to locate the documents cited in a memorandum. *Evelio M. Grillo, Esq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresPleading & PracticePleadingsGeneral OverviewCivil ProceduresDiscoveryMethodsGeneral OverviewCivil ProceduresDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProceduresPretrial JudgmentsJudgment on the PleadingsEvidenceAuthenticationGeneral OverviewEvidenceDocumentary EvidenceGeneral OverviewEvidenceDocumentary EvidenceWritingsGeneral Overview

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 417 POINTS AND AUTHORITIES
PART II. LEGAL BACKGROUND

36-417 California Forms of Pleading and Practice--Annotated §§ 417.22-417.29

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

[Reserved]

§§ 417.22[Reserved]

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Chapter 417 POINTS AND AUTHORITIES
PART III. RESEARCH GUIDE

36-417 California Forms of Pleading and Practice--Annotated § 417.30

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

§ 417.30 Matthew Bender Publications

For a discussion of techniques for drafting memoranda and other briefs, see California Points and Authorities, Ch. 1, *Writing Legal Memoranda and Briefs* (Matthew Bender)

For discussion and forms for use relating to motions to compel discovery, see J.N. DeMeo, California Deposition and Discovery Practice (Matthew Bender)

For discussion and forms for use relating to motions on evidentiary issues, trial motions, and post trial motions, see E. Johnson, California Trial Guide (Matthew Bender)

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36-417 California Forms of Pleading and Practice--Annotated § 417.31

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

§ 417.31 State Statutes

Motion to strike based on judicially noticed matters as requiring supporting memorandum. *Code Civ. Proc. § 437(b)*

Filing and serving papers in support of or opposition to motion for summary judgment or summary adjudication. *Code Civ. Proc. § 437c(a), (b)*

Sanctions for noncompliance with local rules. *Code Civ. Proc. § 575.2*

"Motion" includes application for an order. *Code Civ. Proc. § 1003*

Filing and serving of moving papers 21 calendar days, opposition papers 10 calendar days, and reply papers five calendar days, before hearing. *Code Civ. Proc § 1005(b)*

Court may shorten time for filing pleading. *Code Civ. Proc. § 1005(b)*

Papers on which motion is based, but not previously been served or filed, as required to accompany the notice of motion. *Code Civ. Proc. § 1010*

Petition for writ of mandate or prohibition as "motion." *Code Civ. Proc. §§ 1088, 1089, 1090, 1107*

Affidavit authorized for use "on a motion." *Code of Civ. Proc. § 2009*

Declaration under penalty of perjury in lieu of affidavit. *Code Civ. Proc. § 2015.5*

Judicial notice. *Evid Code § 450 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentSupporting MaterialsGeneral Overview

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PART III. RESEARCH GUIDE

36-417 California Forms of Pleading and Practice--Annotated § 417.32

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

§ 417.32 California Rules of Court

Form of papers presented for filing. *Cal. Rule of Ct., Rules 2.100-2.119*

Requirement of supporting memorandum. *Cal. Rules of Ct., Rules 3.1600* (motion for new trial), *Cal. Rules of Ct., Rules 3.1113(a)* (demurrer or notice of motion), *Cal. Rules of Ct., Rules 3.1201* (ex parte application)

Time for filing memoranda in support of or in opposition to motion for new trial. *Cal. Rules of Ct., Rule 3.1600*

Sanctions for failure to comply with California Rules of Court or local rules. *Cal. Rules of Ct., Rule 2.30*

Format rules applicable to all civil law and motion matters; local format rules preempted. *Cal. Rules of Ct., Rules 3.1100, 3.1103(a), 3.2*

General format requirements for first page, binding, exhibits, etc. *Cal. Rules of Ct., Rule 3.1110(b)-(e)*

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Case citation format in memoranda. *Cal. Rules of Ct., Rule 3.1113(c)*

Page limitations of memorandum. *Cal. Rules of Ct., Rule 3.1113(d)*

Citation style of memorandum; attachment of copies of certain authorities cited in memorandum. *Cal. Rules of Ct., Rules 3.1113(c), 1.200(c), (j)*

Attachment of memoranda and declarations. *Cal. Rules of Ct., Rule 3.1113(j)*

References to exhibits and declarations. *Cal. Rules of Ct., Rule 3.1113(k)*

Request for judicial notice. *Cal. Rules of Ct., Rule 3.1113(l)*

Proposed orders. *Cal. Rules of Ct., Rule 3.1113(m)*

Declarations and affidavits. *Cal. Rules of Ct., Rule 3.1115*.

Time for filing and service of motion papers. *Cal. Rules of Ct., Rule 3.1300(a)*

Procedure for shortening time periods for service and filing of law and motion papers. *Cal. Rules of Ct., Rule 3.1300(b)*

Time for filing proof of service of moving papers in law and motion proceeding no less than five calendar days before hearing. *Cal. Rules of Ct., Rule 3.1300(c)*

Filing of late papers. *Cal. Rules of Ct., Rule 3.1300(d)*

Computation of time for filing papers. *Cal. Rules of Ct., Rule 3.1300(e)*

Judicially noticed matters at hearing. *Cal. Rules of Ct., Rule 3.1306(c)*

Unpublished opinions defined. *Cal. Rules of Ct., Rule 8.1105*

Citation of unpublished opinions; copies of unpublished or computer-based decisions. *Cal. Rules of Ct., Rule 8.1115*

Requesting publication of unpublished opinion. *Cal. Rules of Ct., Rule 8.1125*

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Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeSupporting MemorandaCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsComputationCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsGovernmentsCourtsRule Application & Interpretation

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36-417 California Forms of Pleading and Practice--Annotated § 417.33

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

§ 417.33 Rules of Professional Conduct

Duty to cite all relevant legal authority, even if not favorable to position. *Cal. Rules Prof. Conduct, Rule 5-200*

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36-417 California Forms of Pleading and Practice--Annotated § 417.34

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

§ 417.34 Text References

California Style Manual (WestGroup 4th ed. 2000)

The Bluebook: A Uniform System of Citation (Harvard Law Review Ass'n, 17th ed. 2000)

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36-417 California Forms of Pleading and Practice--Annotated §§ 417.35-417.49

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

[Reserved]

§§ 417.35[Reserved]

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
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PART IV. FORMS

36-417 California Forms of Pleading and Practice--Annotated § 417.50

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

§ 417.50 Memorandum--Skeletal Form

[1] FORM Memorandum--Skeletal Form

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MEMORANDUM _____ [*specify, e.g.,* IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS]
Plaintiff,	)	
v.	)	
_____ [*name*],	)	[TELEPHONE APPEARANCE]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Hearing Judge: _____]
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

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[*LIST statutes in alphabetical order by code and page(s) on which they appear*]

Texts

[*LIST texts cited and page(s) on which they appear*]

Law Reviews

[*LIST law reviews or journals cited and page(s) on which they appear*]

[*INCLUDE opening summary if memorandum exceeds 15 pages*]

I. SUMMARY OF ARGUMENT

[*SUMMARIZE the arguments set forth in the memorandum*]

II. STATEMENT OF FACTS

_____ [*State facts relevant to the determination of the motion, e.g.,* Plaintiff seeks recovery of damages for personal injuries sustained in an automobile accident that occurred on _____ (*date*). As shown by the records of this court, the complaint was filed on _____ (*date*)].

[*SET FORTH each point of law supporting your position, anticipating and, if desired, defusing the major arguments that the opposition will raise. The following points and authorities set forth as an example illustrate the manner in which points and authorities in support of a motion for judgment on the pleadings on the ground the action is barred by the statute of limitations might be set forth. Counsel should also insert argument between paragraphs when appropriate, showing the relationship between the facts of the present case and the point of law stated. If appropriate, the letter and introductory phrase or paragraph heading of each point should be included in the table of contents if one is required.*]

III. A MOTION FOR JUDGMENT ON THE PLEADINGS IS PROPER TO RAISE THE BAR OF THE STATUTE OF LIMITATIONS AND MAY BE MADE AT ANY TIME BEFORE FINAL JUDGMENT IS ENTERED.

A. Nature of Motion. A motion for judgment on the pleadings is made on the same grounds and decided on the same basis as a general demurrer, and judgment on the pleadings for defendant is proper when the complainton its face fails to state a cause of action (*Pierson v. Sharp Memorial Hospital, Inc. (1989) 216 Cal. App. 3d 340, 342, 264 Cal. Rptr. 673*).

B. Failure of Complaint to State Cause of Action. A complaint that shows on its face that the cause of action is barred by the statute of limitations does not state facts sufficient to constitute a cause of action and is subject to a general demurrer (*Code Civ. Proc. § 430.10(e)*), but the defect (bar of the statute) must be alleged (*see Jessica H. v. Allstate Ins. Co. (1984) 155 Cal. App. 3d 590, 592, 202 Cal. Rptr. 239* (involving a demurrer)).

C. When Motion Can Be Made. A motion for judgment on the pleadings can be made at any time before final judgment is rendered (*Shabrick v. Moore (1961) 195 Cal. App. 2d 56, 59, 15 Cal. Rptr. 310*).

IV. THE COMPLAINT SHOWS ON ITS FACT THAT THIS ACTION IS BARRED BY THE STATUTE OF LIMITATIONS.

A. When Cause of Action Accrues. A cause of action accrues when there is a remedy available (*Heyer v. Flaig (1969) 70 Cal. 2d 223, 230, 74 Cal. Rptr. 225, 449 P.2d 161*).

B. When Period of Limitation Starts. The period of limitation begins to run when a suit may be maintained (*Osborn v. Hopkins (1911) 160 Cal. 501, 506, 117 P. 519*). In this action, the period of limitation began to run on _____ [*date*], the date on which the automobile accident occurred.

C. Limitation on When Action Can Be Commenced. With exceptions not here applicable, civil actions can only be

commenced within the periods prescribed in *Code of Civil Procedure sections 312-365* (*Code Civ. Proc. § 312*).

D. Period of Limitation on Personal Injury Action. The period prescribed for the commencement of an action for injury to one caused by the wrongful act or neglect of another is two years (*Code Civ. Proc. §§ 335, 335.1*). Thus, to be timely in this case, the action would need to have been commenced before _____ [*date*].

E. When Is Action Commenced. An action is commenced, within the meaning of *Code of Civil Procedure section 312 et seq.*, when the complaint is filed (*Code Civ. Proc. § 350*). Here, the complaint was filed on _____ [*date*], _____ [*specify number of days*] after the limitation period expired.

[CONCLUSION *if desired*]

Based on the foregoing authorities, defendant respectfully requests an order granting his/her motion for judgment on the pleadings and dismissing the action.
Dated: _____.

_____ [*signature*]

Attorney for _____ [*moving party*]

[2] Use of Form

This skeletal form outlines the form and content of a memorandum. The example provided supports a motion for judgment on the pleadings. With appropriate modifications, it may be used by the moving party to support a petition or application or as a reply memorandum, or by the opposing party to challenge a motion, petition, or application. For the time when points and authorities must be served and filed, see discussion in *§§ 417.17* and *417.18*.

A caption is included only if the memorandum is served and filed separately. If the memorandum is combined or attached to the notice of motion and motion, the caption of the notice of motion and motion will refer to the memorandum, and the caption here may be omitted and replaced with a title, e.g.: MEMORANDUM.

If a caption is used, and counsel will appear by telephone, the optional line reflecting telephone appearance should be included [*see Cal. Rules of Ct., Rule 3.670(g)*; *see* further discussion in Ch. 372, *Motions and Orders*].

For further discussion of other items in the caption, and other requirements relating to the form, format, content, and page limits, see *§ 417.19*.

For drafting considerations, see *§ 417.20*. For discussion of declarations, exhibits, and papers generally designed to provide the evidentiary basis for a memorandum, see *§ 417.21*. For discussion of when memoranda are required or recommended, see *§§ 417.14 -417.16*.

For additional detailed discussion of points and authorities use, form, content, and drafting, see California Points and Authorities, Ch. 1, *Writing Legal Memoranda and Briefs* (Matthew Bender). For memoranda supporting and opposing specific motions, see the appropriate chapter in California Points and Authorities (Matthew Bender).

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 417 POINTS AND AUTHORITIES
PART IV. FORMS

36-417 California Forms of Pleading and Practice--Annotated § 417.51

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

§ 417.51 Ex Parte Application for Leave to File Memorandum in Excess of Page Limits

[1] FORM Ex Parte Application for Leave to File Memorandum in Excess of Page Limits

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	EX PARTE APPLICATION FOR LEAVE TO FILE
vs.	)	MEMORANDUM IN EXCESS OF PAGE LIMITA-
_____ [*name*],	)	TION, SUPPORTING DECLARATION(S) of
Defendant.	)	_____ [*name(s)*], AND SUP-
	)	PORTING MEMORANDUM
	)	[LIMITED CIVIL CASE]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Hearing Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

APPLICATION

_____ [*Identify party, e.g.,* Defendant] _____ [*name*] hereby applies for an order, pursuant to *California Rules of Court, Rule 3.1113(e),* granting leave to file a memorandum in _____ [*purpose of points and authorities, e.g.,* support of motion to dismiss for lack of jurisdiction] that is in excess of _____ [*specify page limitation, e.g.,* 15] pages in length.

[*EITHER, if proposed supporting memorandum is attached*]

The memorandum that _____ [*identify party, e.g.,* defendant] seeks leave to file consists of _____ [*specify number, e.g.,* 22] pages, and is attached as an exhibit to the declaration of _____ [*name of declarant attorney*] in support of and attached with this application.

[*OR, if proposed points and authorities is unavailable to present for evaluation*]

_____ [*Identify party, e.g.,* Defendant] seeks leave to file a memorandum not exceeding _____ [*specify number of pages anticipated, e.g.,* 22] pages in length.

[*CONTINUE*]

This application is made on the grounds that good cause exists to permit a longer memorandum, and is based on the attached declaration of _____ [*name of declarant attorney*].
Dated: _____.

_____ [*signature*]

Attorney for _____ [*moving party*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*State facts showing reasons why the argument cannot be made within the page limit, e.g.,* The argument in support of defendant's motion to dismiss for lack of jurisdiction is an issue of first impression in this jurisdiction. An adequate analysis of this issue requires discussion of numerous authorities both inside and outside California. Unless the court grants leave to file a memorandum in support of this motion that exceeds 15 pages, defendant will be denied the opportunity to present to the court a complete analysis of an issue central to the entire action.

[3. A copy of the drafted memorandum is attached hereto and made a part hereof.]

4. On _____ [*date*], at _____ [*time*], I provided written notice to _____ [*name*], attorney for _____ [*specify party, e.g.,* plaintiff] of _____ [*specify applicant's party, e.g.,* defendant's] intention to make this application for leave to file the memorandum specified above in excess of the applicable page limit, that the notice provided the date, time, and manner of the application as noted above, _____[*specify facts demonstrating means of written notice, e.g.,* as set forth in the attached proof of personal service].

5. I _____ [have *or* have not] received a response to this application, and I _____ [do *or* do not] expect opposition to this application.

6. *California Rules of Court, Rule 3.1113(e)* provides the basis for granting ex parte relief as requested in this application, rather than setting this matter for hearing on notice motion.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

_____ [*name of declarant*]

SUPPORTING MEMORANDUM

I. AN EX PARTE APPLICATION TO FILE A MEMORANDUM IN EXCESS OF THE APPLICABLE PAGE LIMITATION IS PROPER AND SHOULD BE GRANTED WHEN SUPPORTED BY REASONS WHY THE ARGUMENT CANNOT BE MADE WITHIN THE STATED LIMIT.

A. Ex Parte Relief. A party may apply to the court ex parte for permission to file a memorandum in excess of the applicable page limits when written notice of the application is given to other parties at least 24 hours before the memorandum is due [*Cal. Rules of Ct., Rule 3.1113(e)*]. Written notice of this ex parte application was given to _____ [*name*], attorney for _____ [*specify party*] on _____ [*date*] and this application is presented on _____ [*date*].

B. Reasons to Exceed Page Limits. An application to file a memorandum in excess of the applicable page limits must state the reasons why the argument cannot be made within the stated limit [*Cal. Rules of Ct., Rule 3.1113(e)*]. The supporting declaration incorporated in this application provides sufficient reasons to exceed the page limit so the court is properly informed of the issues before it.

[2] Use of Form

The form of application in [1], *above,* is for use to seek an order granting leave to file a memorandum in excess of the page limitations prescribed by *Cal. Rules of Ct., Rule 3.1113(e)* [*see also Cal. Rules of Ct., Rule 3.1201-3.1207* (requirement for ex parte applications)]. For discussion of the ex parte procedure for obtaining leave to file a longer memorandum, see *§ 417.19[1][c][ii]*.

The form includes a declaration is for use in setting forth facts supporting ex parte application for leave to file a memorandum in excess of page limitations [*Cal. Rules of Ct., Rule 3.1113(e)*].

The form, in both the application and declaration, sets forth alternative paragraphs depending on whether the proposed

points and authorities is available for the court's evaluation. A court is more likely to grant an application for leave to file an existing points and authorities, which presumably represents the party's best efforts to present its position in as few pages as possible, than an application for leave to file a memorandum of undetermined length not yet in existence. Therefore, when possible, counsel should attach as an exhibit the proposed points and authorities.

The form contains within the same document a form of order granting the application. If the application is denied, the court may elect either to cross out the existing language on the proposed order and insert the word "DENIED" or the like, or to rely on its own record of minute order denying the application.

If the application is granted, the applying party must give notice to all other parties [*see Code Civ. Proc. § 1019.5(a)*; for discussion, *see* Ch. 372, *Motions and Orders*].

[3] Requirements Governing Ex Parte Applications Generally

Ex parte applications are governed generally by *Cal. Rules of Ct., Rules 3.1200-3.1207*.

Under the requirements of *Cal. Rules of Ct., Rule 3.1201*, for example, an ex parte application must be in writing and must include the following [*Cal. Rules of Ct., Rule 3.1201*]:

- An application containing the case caption and stating the relief requested.

- A declaration in support of the application.

- A declaration, competent and based on personal knowledge regarding notice provided to other parties, pursuant to *Cal. Rules of Ct., Rule 3.1204*. Under *Cal. Rules of Ct., Rule 3.1204*, the party seeking an ex parte order must state with specificity the nature of the relief to be requested and the date, time, and place for the presentation of the application, and must attempt to determine whether the opposing party will appear to oppose the application. Every ex parte application must be accompanied by a declaration regarding notice that states: (A) the notice given, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected; or (B) why notice should not be required. If notice was provided later than 10:00 a.m. the court day before the ex parte appearance, the declaration regarding notice must explain: (A) the exceptional circumstances that justify the shorter notice, or (B) in unlawful detainer proceedings, why the notice given is reasonable.

- A memorandum of points and authorities.

- A proposed order.

Moreoever, the declarations must include competent testimony based on personal knowledge of irreparable harm, immediate danger, or any other statutory basis for granting relief ex parte [*Cal. Rules of Ct., Rule 3.1202(c)*].

Every ex parte application must be accompanied by a declaration regarding notice that states [*Cal. Rules of Ct., Rule 3.1204(b)*]:

- The notice given, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected; or

- Why notice should not be required.

- If notice was provided later than 10:00 a.m. the court day before the ex parte appearance, the declaration regarding notice must explain the exceptional circumstances that justify the shorter notice, or in unlawful detainer proceedings, why the notice given is reasonable.

The declaration in the form set out in [1], *above*, includes statements showing that written notice was provided as required under Cal. Rules of Rules 3.1113(e), 3.1201, 3.1203, and also that *Cal. Rules of Ct., Rule 3.1113(e)* provides the basis for granting relief ex parte. This would appear to satisfy both the requirement for a declaration regarding notice under *Cal. Rules of Ct., Rule 3.1204* and the requirement of showing a "statutory basis" for ex parte relief under *Cal. Rules of Ct., Rule 3.1202(c)*.

An ex parte application to file a memorandum in excess of the applicable page limit is one of the few ex parte motions that may be considered without the personal appearance of the applicant [*Cal. Rules of Ct., Rule 3.1207*]. However, if opposition to the application is expected, it is prudent to attend the hearing to present argument and answer questions of the court.

For detailed discussion of all requirements under *Cal. Rules of Ct., Rule 3.1200-3.1207* governing ex parte applications in general, together with a general form of ex parte application, see Ch. 372, *Motions and Orders* .

[4] Cross References

For a form of order granting an application for leave to file memorandum in excess of page limits, see *§ 417.52*.

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 417 POINTS AND AUTHORITIES
PART IV. FORMS

36-417 California Forms of Pleading and Practice--Annotated § 417.52

AUTHOR: Evelio M. Grillo, Esq., Editorial Consultant

§ 417.52 Order Granting Application For Leave to File Memorandum in Excess of Page Limits

[1] FORM Order Granting Application For Leave to File Memorandum in Excess of Page Limits

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER GRANTING APPLICATION FOR LEAVE
_____ [*name*],	)	TO FILE MEMORANDUM IN EXCESS OF PAGE
Defendant.	)	LIMITS
	)	

[*EITHER, if proposed points and authorities was attached to application*]

Good cause appearing, IT IS HEREBY ORDERED that:

The application of _____ [*identify party, e.g.,* defendant] for leave to file the memorandum in _____ [*specify purpose of points and authorities, e.g.,* support of motion to dismiss for lack of jurisdiction], and attached to the declaration of _____ [*name of declarant attorney*] dated _____ [*date*] in support of the application, is GRANTED.

[*OR, if the proposed points and authorities was unavailable for the court's evaluation at the time of the application*]

Good cause appearing, IT IS HEREBY ORDERED that:

The application of _____ [*identify party, e.g.,* defendant] for leave to file a memorandum in _____ [*specify purpose of points and authorities, e.g.,* support of motion to dismiss for lack of jurisdiction] that is in excess of _____ [*specify number, e.g.,* 15] pages is GRANTED; and the memorandum may not exceed _____ [*leave blank for court to fill in or specify number of pages anticipated, e.g.,* 22] pages in length.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form of proposed order in [1], *above*, is for use by a party filing an ex parte application for leave to file memorandum in excess of page limits [*Cal. Rules of Ct., Rule 3.1113(e)*]. It is modified depending on whether a copy of the proposed memorandum was submitted with the application. If no proposed memorandum was filed, you may leave the portion blank regarding the number of anticipated pages, but be sure to provide the court with an estimate of the anticipated pages in the declaration supporting the application.

[3] Cross References

For a form of ex parte application for leave to file memorandum in excess of page limits, see *§ 417.51*.

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 418 POLLUTION AND ENVIRONMENTAL MATTERS

36-418 California Forms of Pleading and Practice--Annotated 418.syn

AUTHOR: By Roger Beers

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[2] Standing to Seek Writ of Mandate

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§ 418.13 Exhaustion of Administrative Remedies

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[3] Paying Costs of Record Preparation

§ 418.15 Statutes of Limitation

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§ 418.16 Laches

§ 418.17 Governmental Immunity

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[3] Alternative Procedure for Petitions for Writs of Mandate

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§ 418.21 SLAPP Suit Provisions

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§ 418.32 Key CEQA Concepts

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[2] Significant Effect on Environment

[3] Feasible

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§ 418.34 Determination of Necessity for Environmental Impact Report or Negative Declaration

§ 418.35 Contents of Environmental Impact Report

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[2] Scope of Environmental Impacts Required to Be Considered

[3] Discussion of Feasible Alternatives

[4] Different Kinds of EIRs

§ 418.36 Procedural Requirements for Preparation of Environmental Impact Reports

§ 418.37 Judicial Review of Agency Decisions Under CEQA

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[2] Scope of Review

[3] Time Limits for Commencement of Action

[4] Timing for Request of Hearing

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§ 418.50 Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65)

[1] Overview of Proposition 65

[a] Background of Proposition 65

[b] Application of Proposition 65 and Persons Who May Bring Suits

[c] Notices and Reports to Attorney General

[d] Constitutionality of Proposition 65

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[3] Definitions of Terms Used in Act

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[b] Person in the Course of Doing Business

[c] Significant Amount

[d] Source of Drinking Water

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[4] Chemicals Known to State to Cause Cancer or Reproductive Toxicity

[5] Prohibitions and Exceptions

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[c] Significant Risk Defense

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§ 418.52 Suits for "Unlawful Business Practices"

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[1] Definition of Nuisance

[2] Public or Private Nuisance

[3] Permanent or Continuing Nuisance

[4] Nuisances Created or Not Abated by Prior Property Owners

[5] Nuisance Actions Against Public Entities

[6] Types of Pollution Constituting Nuisances

[7] Defenses

[a] Activities Expressly Authorized by Statute or Zoning

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[1] Elements of Cause of Action

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[1] Injunctive Relief

[2] Property and Other Damages

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§ 418.80 Prohibitions on Discharges

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[2] Under Water Quality Control Act

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§§ 418.83-418.89 [Reserved]

§ 418.90 National Environmental Policy Act

§ 418.91 Air Pollution

[1] California Emission Standards

[2] State Air Resources Board--State Implementation Plan

[3] Pollution Control Districts

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§ 418.92 Water Pollution

[1] California's Porter-Cologne Water Quality Control Act

[a] Purpose of Act

[b] Authority of State Water Resources Control Board

[i] Formulation and Adoption of State Policies

[ii] Regulatory Responsibilities

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[i] Adoption of Plans and Guidelines

[ii] Waste Discharge Requirements

[iii] Issuance of Cease and Desist and Other Orders

[iv] Pollution Prevention Plans

[2] Federal Water Pollution Control Act

[3] Pollution From Oil or Hazardous Substances

[4] Marine Protection, Research, and Sanctuaries Act

[5] Other Related Federal Legislation

[a] Fish and Wildlife Coordination Act

[b] Coastal Zone Management Act

[c] Safe Drinking Water Act

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[e] Submerged Lands Act

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§ 418.93 Noise Pollution

[1] State Law--California Noise Control Act

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§ 418.94 Hazardous Substances

[1] Federal Resource Conservation and Recovery Act

[2] Superfund Act

§§ 418.95-418.99 [Reserved]

§ 418.100 Related Matthew Bender Publications

[1] California Environmental Law and Land Use Practice

[2] California Points and Authorities

[3] Treatise on Environmental Law

[4] Environmental Law Practice Guide, State and Federal Law

§ 418.101 State Statutes

[1] Jurisdiction and Venue

[2] Statutes of Limitation

§ 418.102 Decisions

[1] Jurisdiction and Venue

[2] Standing

[3] Ripeness

[4] Exhaustion of Administrative Remedies

[5] Statutes of Limitation

[6] Laches

[7] Class Action

[8] SLAPP Suit Provisions

[9] Attorney's Fees and Costs

§§ 418.103-418.109 [Reserved]

§ 418.110 Related Matthew Bender Publications

[1] California Environmental Law and Land Use Practice

[2] California Real Estate

§ 418.111 California Statutes and Regulations

§ 418.112 Decisions

[1] Key CEQA Concepts

[2] Exemptions From Act

[3] Determination of Necessity for EIR or Negative Declaration

[4] Procedural Requirements for Preparation of Environmental Impact Reports

[5] Contents of EIR

[6] Limitations Period

[7] Judicial Review of Agency Decisions Under CEQA

§§ 418.113-418.119 [Reserved]

§ 418.120 Related Matthew Bender Publications

[1] Environmental Law Practice Guide, State and Federal Law

[2] The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation

§ 418.121 State Statutes

[1] Safe Drinking Water and Toxic Enforcement Act of 1986

[2] Unlawful Business Practices

§ 418.122 Decisions

[1] Safe Drinking Water and Toxic Enforcement Act of 1986

§§ 418.123-418.129 [Reserved]

§ 418.130 Related Matthew Bender Publications

[1] California Environmental Law and Land Use Practice

[2] Environmental Law Practice Guide, State and Federal Law

§ 418.131 State Statutes

§ 418.132 Decisions

[1] Nuisance

[a] Nuisance Actions Generally

[b] Public or Private Nuisance

[c] Permanent or Continuing Nuisance

[d] Nuisance Actions Against Public Entities

[2] Trespass

[3] Negligence

§§ 418.133-418.139 [Reserved]

§ 418.140 Related Matthew Bender Publications

[1] California Environmental Law and Land Use Practice

[2] Treatise on Environmental Law

[3] Environmental Law Practice Guide, State and Federal Law

[4] The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation

§ 418.141 State Statutes

[1] Air Pollution

[a] General Provisions

[b] Air Basins

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[4] Hazardous Substances

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§ 418.150 Petition for Writ of Mandate [Code Civ. Proc. §§ 1060, 1085, 1094.5]--Inadequate EIR [Pub. Res. Code §§ 21168, 21168.5]

[1] FORM

[2] Use of Form

[3] Checklist for Filing CEQA Actions

[4] Cross References

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§ 418.152 Order Directing Issuance of Alternative Writ of Mandate

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[3] When Stay Is Appropriate

[4] Is a Bond Required?

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[2] Use of Form

[3] Using the Administrative Record in CEQA Actions

§ 418.155 Petitioners' Notice of Election to Prepare Administrative Record [Pub. Res. Code § 21167.6(b)(2)]

[1] FORM

[2] Use of Form

[3] Election

§ 418.156 Notice of Availability of Administrative Record

[1] FORM

[2] Use of Form

§ 418.157 Notice of Settlement Meeting [Pub. Res. Code § 21167.8]

[1] FORM

[2] Use of Form

[3] Settlement Meetings

§ 418.158 Notice of Hearing on Writ of Mandate [Pub. Res. Code § 21167.4]

[1] FORM

[2] Use of Form

§ 418.159 Final Judgment for Petitioner

[1] FORM

[2] Use of Form

§§ 418.160-418.169 [Reserved]

§ 418.170 Petition for Writ of Mandate--Judicial Review of Administrative Agency Action

[1] FORM

[2] Use of Form

§ 418.171 60-Day Notice of Intent to Sue Under Proposition 65

[1] FORM

[2] Use of Form

[3] Checklist for Contents of Proposition 65 Notice

[4] Certificate of Merit

[5] Service of Proposition 65 Notice

§§ 418.172-418.179 [Reserved]

§ 418.180 Complaint for Damages, Declaratory Relief, Equitable Indemnity, Preliminary and Permanent Injunction (Negligence, Nuisance, Trespass) for Contamination of Property

[1] FORM

[2] Use of Form

[3] Cross References

[4] California Points and Authorities

§§ 418.181-418.189 [Reserved]

§ 418.190 Complaint for Recovery of Response Costs

[1] FORM

[2] Use of Form

[3] Discharge of Pollutants Into Waters of State

[4] California's Hazardous Substance Account Act and the Federal Comprehensive Environmental Response, Compensation and Liability Act

§ 418.191 Affirmative Defenses

[1] FORM

[2] Use of Form

[3] Use of Affirmative Defenses

[4] Cross References

§ 418.192 Allegations for Cross-Complaint for Contribution

[1] FORM

[2] Use of Form

§ 418.193 Allegations for Cross-Complaint for Comparative Equitable Indemnity

[1] FORM

[2] Use of Form

[3] Indemnity Claims

§ 418.194 Allegations for Cross-Complaint for Declaratory Relief Regarding Response Costs

[1] FORM

[2] Use of Form

§ 418.195 Allegations for Prayer for Relief in Cross-Complaint

[1] FORM

[2] Use of Form

By Roger Beers n*

FOOTNOTES:
(n89)Footnote *. Roger Beers graduated magna cum laude from Harvard Law School in 1968. From 1968 to 1973, he was associated respectively with Dewey, Ballantine, Bushby, Palmer & Wood in New York, and Heller, Ehrman, While & McAuliffe in San Francisco. From 1973 to 1980, he was a staff attorney with the National Resources Defense Council in Palo Alto, and since then has been in private practice, now in Oakland, where he continues his emphasis on environmental and land use litigation.

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 418 POLLUTION AND ENVIRONMENTAL MATTERS
PART I. SCOPE

36-418 California Forms of Pleading and Practice--Annotated § 418.01

AUTHOR: By Roger Beers

§ 418.01 Scope of Chapter

This chapter covers civil actions relating to pollution and other environmental matters. The Legal Background discusses procedural issues applicable generally in environmental cases, including the forms of action used, jurisdiction and venue, standing, ripeness, the administrative record, statutes of limitation, laches, and attorneys fees and costs [*see §§ 418.10 -418.22*]. Also covered in the Legal Background is (1) the California Environmental Quality Act (CEQA) [*Pub. Res. Code § 21000 et seq.*], including the requirement for an environmental impact report and actions and proceedings to enforce the Act [*see §§ 418.30 -418.37*], (2) citizen suits which are specifically authorized by statute, including discussion of Proposition 65 and the Safe Drinking Water and Toxic Enforcement Act of 1986 [*see §§ 418.50 -418.52*], and (3) environmental common law tort actions, such as nuisance, trespass, and negligence [*see §§ 418.60 -418.65*]. Lastly, the Legal Background covers civil actions for recovering the costs of investigating and cleaning up sites contaminated with hazardous wastes [*see §§ 418.80 -418.82*] and other state and federal statutory schemes that seek to regulate pollution and protect the environment [*see §§ 418.90 -418.94*], such as the National Environmental Policy Act [*42 U.S.C. § 4321 et seq.*], air, water, and noise pollution standards, the federal Resources Conservation and Recovery Act [*42 U.S.C. § 6901 et seq.*], and the Superfund Act [*42 U.S.C. § 9601 et seq.*].

The chapter also includes numerous forms for use in proceedings related to litigating issues in the environmental field [*see §§ 418.150 -418.195*]:

- Forms applicable to litigating under CEQA [*see §§ 418.150 -418.159*], such as a Petition for Writ of Mandate [*see § 418.150*] or an Alternative Writ of Mandate and Order [*see § 418.151*], a Request for Preparation of the Administrative Record [*see § 418.154*], a Notice of Settlement Meeting [*see § 418.157*], a Notice of Hearing on a Writ of Mandate [*see § 418.158*], and a sample Final Judgment [*see § 418.159*].

- Citizen suit forms [*see §§ 418.170* -418.172], including a Petition for Writ of Mandate to review an administrative agency's action [*see § 418.170*] and a 60-day Notice of Intent to Sue Under Proposition 65 [*see § 418.171*].

- A Complaint for Damages, Declaratory Relief, Equitable Indemnity, and an Injunction [*see § 418.180*] for causes of action in negligence, nuisance, and trespass.

- Forms applicable to recovering the costs of cleanups [*see §§ 418.190 -418.195*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityRipenessCivil ProcedureVenueGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCitizen SuitsNotice RequirementsEnvironmental LawLitigation & Administrative ProceedingsNegligenceEnvironmental LawLitigation & Administrative ProceedingsNuisances, Trespasses & Strict LiabilityEnvironmental LawLitigation & Administrative ProceedingsToxic TortsEnvironmental LawWater QualitySafe Drinking Water ActEnforcementReal Property LawTortsNuisanceRemediesInjunctionsGeneral OverviewTortsPremises Liability & PropertyTrespassRemediesInjunctions

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PART I. SCOPE

36-418 California Forms of Pleading and Practice--Annotated § 418.02

AUTHOR: By Roger Beers

§ 418.02 Cross References

For specific coverage of other environment related subjects, see the following chapters:

- Ch. 315, *Irrigation*.
- Ch. 350, *Logs and Timber*.
- Ch. 363, *Mining*.
- Ch. 393, *Oil and Gas*.
- Ch. 575, *Waters*.
- Ch. 579, *Zoning and Planning*.

For discussion and forms related to common law causes of action that often arise in the environmental context, see the following chapters:

- Ch. 380, *Negligence*.
- Ch. 391, *Nuisance*.
- Ch. 550, *Trespass*.

For discussion and forms applicable to recovering attorney's fees and costs of litigation, see Ch. 174, *Costs and Attorney's Fees* .

For discussion and forms for use in obtaining declaratory relief, see Ch. 182, *Declaratory Relief* .

For discussion and forms for use in obtaining injunctive relief, see Ch. 303, *Injunctions* .

For discussion and forms related to traditional mandate proceedings, see Ch. 358, *Mandate and Prohibition* .

For discussion and forms relating to administrative mandate under *Code Civ. Proc. § 1094.5*, see Chs. 474B, *Standards in Reviewing Agency Decisions* , and 474C, *Procedures in Reviewing Agency Decisions* . For complete coverage and forms applicable to public administrative law issues, see Chs. 470, *Overview of Public Administrative Law* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewEnvironmental LawLitigation & Administrative ProceedingsNegligenceEnvironmental LawNatural Resources & Public LandsCoastal Zone ManagementGeneral OverviewEnvironmental LawNatural Resources & Public LandsMineral Resources & MiningTortsDamagesCosts & Attorney FeesGeneral Overview

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36-418 California Forms of Pleading and Practice--Annotated §§ 418.03-418.09

AUTHOR: By Roger Beers

[Reserved]

§§ 418.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Procedural Issues in Environmental Cases

36-418 California Forms of Pleading and Practice--Annotated § 418.10

AUTHOR: By Roger Beers

§ 418.10 Different Forms of Environmental Actions

Litigation of environmental matters under California law usually arises in the context of (1) petitions for writs of administrative mandamus to review decisions of administrative agencies, (2) actions for injunctive or declaratory relief, and (3) suits for damages against public and private parties. The typical form of action for seeking judicial review of governmental agency decisions on environmental issues is the petition for writ of mandate [*Code Civ. Proc. §§ 1085, 1094.5*]. Private enforcement of environmental statutes may occur through "citizen suits" which are expressly authorized by statutes [*see §§ 418.50 -418.52*]. Common law claims such as negligence or nuisance may be used as a basis for either damages or injunctive relief in response to environmental insults [*see §§ 418.60 -418.65*]. Finally, there is a significant amount of environmental litigation over the allocation of the costs of cleaning up hazardous waste sites [*see §§ 418.80 -418.82*].

The procedures required for environmental litigation, both before and after the suit is filed, tend to be very specialized and often vary depending on the nature of the claim being asserted. The statutes of limitation are often extremely short [*see, e.g., Pub. Res. Code § 21167(c)* (30 days for challenging environmental impact reports)]. There are special notice and hearing requirements that must be strictly followed [*see, e.g., Pub. Res. Code § 21167.4* (hearing on merits of CEQA action must be set within 90 days of filing complaint)]. The subject of the litigation often involves complicated administrative proceedings, with their own set of procedures and remedies which may have to be exhausted before suit may be filed. The price for failing to strictly observe these kinds of requirements may be dismissal of the action [*see, e.g., McCormick v. Board of Supervisors (1988) 198 Cal. App. 3d 352, 243 Cal. Rptr. 617* (dismissed for failure to comply with *Pub. Res. Code § 21167.4*); *see also Fiorentino v. City of Fresno (2007) 150 Cal. App. 4th 596, 604, 59 Cal. Rptr. 3d 30* (dismissal was proper even though request for hearing was filed one day late and before a motion to dismiss)].

Typically, environmental litigation is commenced in the superior court, California's principal trial court. The superior court has unlimited subject matter jurisdiction (except when jurisdiction is expressly granted to other courts) in actions involving $25,000 or more in controversy [*Cal. Const., art. VI, §§ 4, 10*; *Code Civ. Proc. § 86(a)(1)*; *Gov. Code §§*

69504-70148], including actions in the nature of mandamus, certiorari, and prohibition [*Cal. Const., art. VI, § 10*] and petitions for writs of mandate [*Code Civ. Proc. § 1085*]. For venue, "local" actions involving real property, such as a claim involving a governmental "taking" or environmental damage to real property, are tried in the county in which the subject real property islocated [*Code Civ. Proc. § 392(a)(1)*]. "Transitory" or "personal" actions are triable in the county where the injury occurred or the defendant resides [*Code Civ. Proc. § 395(a)*]. An action against a public officer or his or her agent for performing an official act is triable where the cause of action arises [*Code Civ. Proc. § 393(b)*].

Finally, to avoid local prejudice, actions by one California city, county, or local agency against another or against a resident of another such governmental entity, must be transferred to a neutral county (that is, not the county of the plaintiff or the defendant) on the motion of a party [*Code Civ. Proc. § 394(a)*]. For further coverage of jurisdiction and venue, see *California Environmental Law and Land Use Practice, Ch. 11, Preliminary Litigation Issues, §§ 11.02* and *11.03* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureVenueGeneral OverviewEnvironmental LawLitigation & Administrative ProceedingsGeneral OverviewEnvironmental LawLitigation & Administrative ProceedingsJudicial ReviewEnvironmental LawLitigation & Administrative ProceedingsJurisdiction & ProcedureEnvironmental LawLitigation & Administrative ProceedingsNuisances, Trespasses & Strict LiabilityEnvironmental LawNational Environmental Policy ActGeneral OverviewGovernmentsLocal GovernmentsClaims By & AgainstReal Property LawTortsNuisanceRemediesInjunctionsGeneral Overview

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36-418 California Forms of Pleading and Practice--Annotated § 418.11

AUTHOR: By Roger Beers

§ 418.11 Standing

[1] Standing as Essential to Cause of Action

A plaintiff's standing to sue is essential to his or her cause of action [*Parker v. Bowron (1953) 40 Cal. 2d 344, 351*]. A plaintiff who lacks standing cannot state a valid cause of action; therefore, objections based on a plaintiff's lack of standing may not be waived and may be raised at any time in the proceeding [*McKinny v. Board of Trustees (1982) 31 Cal. 3d 79, 90, 181 Cal. Rptr. 549, 642 P.2d 460* ; *Sherwyn v. Department of Social Services (1985) 173 Cal. App. 3d 52, 58, 218 Cal. Rptr. 778]* . California's constitutional standing requirements are derived from the separation of powers doctrine [*Cal. Const., art. III, § 3*], which has been interpreted as prohibiting advisory opinions [*People ex rel. Lynch v. Superior Court (1970) 1 Cal. 3d 910, 912, 83 Cal. Rptr. 670, 464 P.2d 126]* . In individual cases, standing is determined according to the relevant statutory provisions.

Standing under California law generally depends on whether the plaintiff is (1) a "beneficially interested" person under the writ of mandate standard [*Code Civ. Proc. § 1086*; *see* [2], *below*] or (2) an "aggrieved" person under statutes authorizing judicial review of particular agencies' actions [*see, e.g., Pub. Res. Code § 30801* (actions under the California Coastal Act)]. A comparison with the more restrictive standing requirements under federal law is contained in *California Environmental Law and Land Use Practice, Ch. 11, Preliminary Litigation Issues, § 11.04[2]* (Matthew Bender).

PRACTICE TIP:

One of the most important principles for protecting the plaintiffs' standing is the rule applied in the federal cases that only one plaintiff need have standing for the action to proceed [*Watt v. Energy Action Educational Foundation (1981) 454 U.S. 151, 159-169, 102 S. Ct. 205, 70 L. Ed. 2d 309]* . The plaintiffs' counsel who anticipates that his or her client may have standing problems should encourage the client to solicit participation by others who will not face the same standing hurdles.

[2] Standing to Seek Writ of Mandate

The petitioner in a writ of mandate action must be "beneficially interested" in the action [*Code Civ. Proc. § 1086*]. This test requires the plaintiff to show some special interest to be served or some particular right to be preserved over that of the general public [*see Carsten v. Psychology Examining Com. (1980) 27 Cal. 3d 793, 796-797, 166 Cal. Rptr. 844, 614 P.2d 276]* . However, if a party is permitted by statute to appear and take part in the administrative hearing and has done so, he or she is *ipso facto* sufficiently interested to seek a writ of mandate to review the administrative decision or disposition [*Santiago County Water Dist. v. County of Orange (1981) 118 Cal. App. 3d 818, 832-833, 173 Cal. Rptr. 602]* .

Moreover, in a case involving a question of public right and the enforcement of a public duty, the plaintiff need not demonstrate any legal or special interest in the result of the litigation. The plaintiff's interest as a citizen in having the laws executed and the duty in question enforced is sufficient to establish his or her standing [*Bd. of Soc. Welfare v. County of L.A. (1945) 27 Cal. 2d 98, 100-101, 162 P.2d 627]* . Such "relaxed" standing is available, for example, in actions to force the preparation of, or to challenge the adequacy of, environmental impact reports under the California Environmental Quality Act (CEQA) [*Pub. Res. Code § 21000 et seq.*; *see Kane v. Redevelopment Agency (1986) 179 Cal. App. 3d 899, 904, 224 Cal. Rptr. 922* ; *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo (1985) 172 Cal. App. 3d 151, 158-159, 217 Cal. Rptr. 893* ; *Santiago County Water Dist. v. County of Orange (1981) 118 Cal. App. 3d 818, 829, 173 Cal. Rptr. 602]* . Nevertheless, while the cases countenance suit brought by persons with little more than an ideological interest in the subject matter, no case has been found in which the relaxed standing doctrine has been made available to a plaintiff whose motivations were decidedly different from the ostensible purpose of the suit--for example, a competitor of a challenged development project seeking to enforce environmental concerns.

In one case, the court formulated the relaxed standing doctrine essentially as a balancing test between the importance of the public duty and the plaintiff's personal interest, rather than automatically granting standing on a showing of a "public interest" [*McDonald v. Stockton Met. Transit Dist. (1973) 36 Cal. App. 3d 436, 440, 111 Cal. Rptr. 637]* :

> The exercise of jurisdiction in mandamus rests to a considerable extent in the wise discretion of the court. In exercising this discretion the courts balance the applicant's need for relief (*i.e.*, his beneficial interest) against the public need for enforcement of the official duty. When the duty is sharp and the public need weighty, the courts will grant a mandamus at the behest of an applicant who shows no greater personal interest than that of a citizen who wants the law enforced. When the public need is less pointed, the courts hold the petitioner to a sharper showing of personal need.

A further limitation on citizen/taxpayer standing is the requirement, articulated by at least one court, that the plaintiff establish "a geographic nexus with the site of the challenged project" [*Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo (1985) 172 Cal. App. 3d 151, 158-159, 217 Cal. Rptr. 893]* . A plaintiff who does not allege that he or she is the owner or has any interest in any property within the area affected by the challenged project will not be considered beneficially interested in the litigation, and will thus be denied standing unless he or she presents an especially compelling public interest argument [*see, e.g., Silva v. City of Cypress (1962) 204 Cal. App. 2d 374, 376-377, 22 Cal. Rptr. 453]* . For a further discussion of beneficial interest and relaxed standing, see *California Environmental Law and Land Use Practice, Ch. 11, Preliminary Litigation Issues, § 11.04[3][a]* and *[b]*, respectively (Matthew Bender).

[3] Associational Standing

Many environmental suits are brought by environmental groups, neighborhood coalitions, or trade associations on behalf of their members [*see, e.g., Sea & Sage Audubon Society, Inc. v. Planning Com. (1983) 34 Cal. 3d 412, 194 Cal. Rptr. 357, 668 P.2d 664* ; *Friends of Mammoth v. Board of Supervisors (1972) 8 Cal. 3d 247, 104 Cal. Rptr. 761, 502 P.2d 1049]* . The California courts have adopted a liberal approach towards "associational standing" for such groups. For example, a nonprofit corporation not owning land or paying taxes may sue on behalf of its members who

live in the affected area and who would suffer harm if the challenged project were allowed to proceed [*Residents of Beverly Glen, Inc. v. City of Los Angeles (1973) 34 Cal. App. 3d 117, 121-122, 109 Cal. Rptr. 724]* . For further discussion of associational standing, see *California Environmental Law and Land Use Practice, § 11.04[4]* (Matthew Bender).

[4] Statutory Standing to Review Agency Actions or Enforce Particular Laws

Standing requirements for judicial review of certain agencies' actions or for citizens suits to enforce certain environmental laws are specified by statute. For example, an action seeking judicial review of a decision or action of the Coastal Commission may be maintained by writ of mandamus by "any person aggrieved" by the decision or action [*Pub. Res. Code § 30801*]. In addition, "any person" may maintain an action for declaratory or equitable relief to restrain any violation of the Coastal Act [*Pub. Res. Code § 30803*]. Proposition 65, the toxics initiative adopted by California voters in November 1986, includes a broad grant of standing to private persons to enforce the initiative's warning requirements and prohibitions on release or discharge of chemicals known to cause cancer or "reproductive toxicity" [*Health & Safety Code § 25249.7*].

[5] Private Rights of Action

When there is no "citizen suit" provision and a suit seeks to enforce a statute against a private party or seeks a remedy not expressly authorized by statute, the plaintiffs may have to convince a court not only that they have standing but also that there is an implied private right of action under the statute. There is a substantial body of federal case law dealing with this issue [*see California v. Sierra Club (1981) 451 U.S. 287, 101 S. Ct. 1775, 68 L. Ed. 2d 101* ; *Middlesex County Sewerage Authority v. National Sea Clammers Association (1981) 453 U.S. 1, 101 S. Ct. 2615, 69 L. Ed. 2d 435]* . The issue has not yet arisen in any California environmental case. In other contexts of California law, the general approach of California courts has been to inquire (1) whether the statute was adopted to protect a certain class of individuals, and (2) whether enforcement by those individuals would further the legislative purpose in enacting the statute [*see, e.g., R.M. Sherman Co. v. W.R. Thomason, Inc. (1987) 191 Cal. App. 3d 559, 567-568, 236 Cal. Rptr. 577* ; *Greenberg v. Equitable Life Assur. Society (1973) 34 Cal. App. 3d 994, 1001, 110 Cal. Rptr. 470]* . For further coverage of private rights of action, see *California Environmental Law and Land Use Practice, Ch. 11, Preliminary Litigation Issues, § 11.04[6]* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityStandingCivil ProcedureJusticiabilityGeneral OverviewCivil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureJusticiabilityStandingPersonal StakeConstitutional LawThe JudiciaryCase or ControversyGeneral OverviewConstitutional LawThe JudiciaryCase or ControversyAdvisory OpinionsEnvironmental LawLitigation & Administrative ProceedingsJurisdiction & Procedure

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36-418 California Forms of Pleading and Practice--Annotated § 418.12

AUTHOR: By Roger Beers

§ 418.12 Ripeness

The doctrine of "ripeness" focuses on whether the issues in a particular case are ready for judicial review. Although the federal doctrine of ripeness is rooted in the constitutional "case or controversy" requirement [U.S. Const., art. III], California cases have drawn on analogous concepts developed as part of the common law of judicial review, including the admonition against issuing purely advisory opinions [*see People ex rel. Lynch v. Superior Court of Los Angeles County (1970) 1 Cal. 3d 910, 912* The leading California case [*Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal. 3d 158, 188 Cal. Rptr. 104, 655 P.2d 306]* involved a general, facial challenge to guidelines adopted by the California Coastal Commission interpreting the Coastal Act's public access provisions. In ruling that the action was unripe, the Court applied the federal test for ripeness enunciated by the United States Supreme Court [*Abbott Laboratories v. Gardner (1967) 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681]* .

The *Abbott Laboratories* test involves a two part inquiry into: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration [*Abbott Laboratories v. Gardner (1967) 387 U.S. 136, 148-149, 87 S. Ct. 1507, 18 L. Ed. 2d 681* ; *see Gardnerv. Toilet Goods Assoc. (1967) 387 U.S. 167, 87 S. Ct. 1526, 18 L. Ed. 2d 704* (companion case to *Abbott Laboratories* in which claims held unripe)]. In *Pacific Legal Foundation v. California Coastal Commission* [*Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal. 3d 158, 188 Cal. Rptr. 104, 655 P.2d 306]* , the California Supreme Court held that the case was not ripe for judicial review because the plaintiffs were challenging the guidelines in the abstract without application to particular developments. The Court noted that the plaintiffs were "in essence inviting [the Court] to speculate as to the types of developments for which the access conditions might be imposed, and then to express an opinion on the validity and proper scope of such hypothetical exactions" [*Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal. 3d 158, 172, 188 Cal. Rptr. 104, 655 P.2d 306]* .

In *San Mateo County Coastal Landowners' Association v. County of San Mateo* [*San Mateo County Coastal Landowners' Assn. v. County of San Mateo (1995) 38 Cal. App. 4th 523, 545, 45 Cal. Rptr. 2d 117]* , the court reviewed the distinction between constitutional challenges to an ordinance "as applied" and "facial" challenges. The court held

that the measure's requirement that landowners dedicate easements was not subject to a challenge *as applied* because the plaintiffs had not submitted a subdivision plan or applied for a permit or variance from the local authority which had been conclusively denied or in this instance subjected to the easement requirement [*see Kinzli v. City of Santa Cruz (9th Cir. 1987) 818 F.2d 1449, 1453]* . The court denied the *facial* challenge because "[a]ppellants have not shown that unconstitutional application of these policies by the county is unavoidable" [*San Mateo County Coastal Landowners' Assn. v. County of San Mateo (1995) 38 Cal. App. 4th 523, 547, 45 Cal. Rptr. 2d 117]* . The case also failed the hardship test of *Abbott Laboratories* since coastal landowners were not immediately facing the dilemma of either complying with the guidelines or risking penalties for violating them. The landowners could wait until they applied for a development permit and then challenge any invalid imposition of dedication conditions. Although the possibility that they would have to comply with access conditions might tend to inhibit property owners from planning improvements on their land, hardship was not "imminent or significant enough" to compel resolution of the land use regulation controversy [*Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal. 3d 158, 172-173, 188 Cal. Rptr. 104, 655 P.2d 306]* .

In determining the ripeness of a controversy under the *Pacific Legal Foundation* and *Abbott Laboratories* standard, courts may consider the existence and importance of any public interest in the controversy. The fact of "widespread public interest" may tip the balance in a doubtful case, and cause the court to find that adjudication of the controversy is not premature [*Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal. 3d 158, 170, 188 Cal. Rptr. 104, 655 P.2d 306* ; *but see Sherwyn v. Department of Social Services (1985) 173 Cal. App. 3d 52, 58, 218 Cal. Rptr. 778* (holding plaintiffs lacked standing and case not ripe despite "widespread public interest")]. For a further discussion of ripeness, see *California Environmental Law and Land Use Practice, Ch. 11, Preliminary Litigation Issues, § 11.05* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityRipenessCivil ProcedureJusticiabilityRipenessGeneral OverviewCivil ProcedureJusticiabilityRipenessTestsConstitutional LawThe JudiciaryCase or ControversyAdvisory OpinionsConstitutional LawThe JudiciaryCase or ControversyRipeness

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36-418 California Forms of Pleading and Practice--Annotated § 418.13

AUTHOR: By Roger Beers

§ 418.13 Exhaustion of Administrative Remedies

[1] Exhaustion Doctrine

It is settled in California law that a court is without jurisdiction to hear a claim until all available administrative remedies have been exhausted [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 293, 109 P.2d 942* ; *Environmental Law Fund, Inc. v. Town of Corte Madera (1975) 49 Cal. App. 3d 105, 111, 122 Cal. Rptr. 282* ; *Morton v. Superior Court (1970) 9 Cal. App. 3d 977, 981, 88 Cal. Rptr. 533]* , even if the parties to litigation stipulate or agree to circumvent administrative remedies. This "exhaustion" doctrine may also bar the defendant from asserting an affirmative defense to an agency's enforcement action when the defendant could have sought an exemption or a permit exception from the agency before the commencement of the enforcement proceeding [*South Coast Regional Com. v. Gordon (1977) 18 Cal. 3d 832, 836-838, 135 Cal. Rptr. 781, 558 P.2d 867]* .

California courts require that a litigant not only have availed itself of an administrative process before suing, but also that the particular grounds of suit have been presented to the agency in that process [*see, e.g.,* *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo (1985) 172 Cal. App. 3d 151, 163, 217 Cal. Rptr. 893]* . However, courts have been unclear as to the degree of specificity with which issues must be raised at the administrative level to satisfy the exhaustion requirement. In one case, the court required that the "exact issue" raised in the lawsuit must have been presented to the administrative agency. The court reasoned that this strict requirement was necessary to provide the agency with the opportunity to render the litigation unnecessary [*Resource Defense Fund v. Local Agency Formation Com. (1987) 191 Cal. App. 3d 886, 894, 236 Cal. Rptr. 794]* . At the other end of the spectrum, a court stated that, although parties must "make known what facts are contested," the fact that parties are generally not represented by counsel in administrative proceedings should absolve them of the requirement to make technical legal objections [*Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo (1985) 172 Cal. App. 3d 151, 163, 217 Cal. Rptr. 893]* . For a further discussion of the exhaustion doctrine, see *California Environmental Law and Land Use Practice, Ch. 11, Preliminary Litigation Issues, § 11.06* (Matthew Bender).

PRACTICE TIP:

Specifying Objections to Agency. Commentators suggest that the safest course, given the range of case law, is for the petitioner to raise the issues with enough specificity that the administrative agency has a fair opportunity to consider the legal and factual questions before the petitioner raises those questions in court [Hoffman, Patterson & Shute, *Mandate Proceedings Under the California Environmental Quality Act* (Cal. C.E.B. 1987)].

[2] Exceptions to Exhaustion Doctrine

A party need not exhaust administrative remedies before filing suit when the agency lacks jurisdiction over the subject matter of the suit. The exhaustion requirement is also inapplicable when an effective administrative remedy is wholly lacking [*see* Ch. 472B, *Review of Agency Rulemaking*]. For example, this is true in a case challenging the validity of an agency's determination that it was exempt from CEQA, since there were no administrative procedures to be followed to challenge the Notice of Exemption [*Castaic Lake Water Agency v. City of Santa Clarita (1995) 41 Cal. App. 4th 1257, 1265, 49 Cal. Rptr. 2d 79* ; *see City of Pasadena v. California (1993) 14 Cal. App. 4th 810, 821, 17 Cal. Rptr. 2d 766]* .

A party is also not required to pursue futile administrative remedies to invoke the jurisdiction of the courts. The condition of futility is met when it is clear that the administrative agency's decision would be adverse to the plaintiff if the remedy were pursued [*Doyle v. City of Chino (1981) 117 Cal. App. 3d 673, 683, 172 Cal. Rptr. 844* ; *Gantner & Mattern Co. v. California E. Com. (1941) 17 Cal. 2d 314, 318, 109 P.2d 932]* . An exception is sometimes recognized when irreparable injury to a litigant would result from requiring him or her to pursue an administrative remedy [*Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 7, 95 Cal. Rptr. 329, 485 P.2d 529* (conflict of federal and state statutes placed petitioners in position of incurring penalty under whichever law they chose to disobey); *Greenblatt v. Munro (1958) 161 Cal. App. 2d 596, 607, 326 P.2d 929* (risk of revocation of license which was source of plaintiff's livelihood)].

When the relevant statute provides both an administrative remedy and an alternative judicial remedy, the exhaustion of administrative remedies requirement has no application [*City of Susanville v. Lee C. Hess Co. (1955) 45 Cal. 2d 684, 689, 290 P.2d 520]* . In *State of California v. Superior Court (Veta)* [*State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 115 Cal. Rptr. 497, 524 P.2d 1281]* , the California Supreme Court held that the petitioner could challenge the constitutionality of the California Coastal Act [*Pub. Res. Code § 30000 et seq.*] without first presenting the claim to the Coastal Commission for determination. The Court noted that it would be "heroic indeed to compel a party to appear before an administrative body to challenge its very existence and to expect a dispassionate hearing before its preponderantly lay membership on the constitutionality of the statute establishing its status and functions" [*State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 251, 115 Cal. Rptr. 497, 524 P.2d 1281]* .

Finally, nonparties to administrative land use decisions may be permitted to seek judicial review of such decisions without first exhausting administrative remedies, if they (1) are acting to vindicate "public rights," and (2) neither received notice of nor attended the public hearing on the matter. The rationale for this exception is that requiring the exhaustion of administrative remedies by nonparties in these situations could have the effect of permanently insulating illegal actions from review, which would be contrary to the public interest [*Environmental Law Fund, Inc. v. Town of Corte Madera (1975) 49 Cal. App. 3d 105, 114, 122 Cal. Rptr. 282]* . For further discussion of exceptions to the exhaustion doctrine, see *California Environmental Law and Land Use Practice, Ch. 11, Preliminary Litigation Issues, § 11.06[4]* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityExhaustion of RemediesCivil ProcedureJusticiabilityExhaustion of RemediesGeneral OverviewCivil ProcedureJusticiabilityExhaustion of RemediesAdministrative RemediesCivil

ProcedureJusticiabilityExhaustion of RemediesExceptionsEnvironmental LawLitigation & Administrative ProceedingsJurisdiction & Procedure

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A. Procedural Issues in Environmental Cases

36-418 California Forms of Pleading and Practice--Annotated § 418.14

AUTHOR: By Roger Beers

§ 418.14 Preparation and Use of Administrative Record

[1] Requesting Administrative Record

In proceedings for review of an agency's decision based on an administrative record, the petitioner's counsel should assume responsibility for requesting that the agency prepare the record and for ensuring that it is timely filed with the court. Some statutes, like CEQA, may require that a request for the preparation of the record be filed contemporaneously with the action or within a certain period of time thereafter, and served on the agency within a certain period of time [*see Pub. Res. Code § 21167.6(a)*]. There may also be time limits on the agency's preparation of the record [*see, e.g., Pub. Res. Code § 21167.6(b)(1)* (60 days in CEQA action); *Code Civ. Proc. § 1094.6(c)*; *Gov. Code § 11523*]. Finally, the defendants' or real parties' time to answer or otherwise respond to the petition may be extended until a period after the completion of the record and its filing with the court [*see, e.g., Code Civ. Proc. § 1089.5*]. CEQA contains a special provision which allows the petitioner to elect to prepare the administrative record [*see Pub. Res. Code § 21167.6(b)(2)*].

To preserve the statutory scheme and purpose of *Pub. Res. Code § 21167.6(b)*, a public agency that has been asked to prepare the administrative record must itself incur and seek recovery of the costs of record preparation. Thus, a city's delegation to the developer of its responsibility to prepare the administrative record was improper, and the developer could not recover the costs it incurred in preparing the record [*Hayward Area Planning Ass'n v. City of Hayward (2005) 128 Cal. App. 4th 176, 185, 26 Cal. Rptr. 3d 783]* .

For a sample Request for Preparation of the Administrative Record, see *§ 418.154*.

PRACTICE TIP:

Petitioner's Preparation of the Administrative Record. Counsel who choose this option should be careful to make the request in a timely manner and be prepared to demonstrate the ability to prepare the record in fact. Thus, in cases involving a voluminous administrative record, the petitioner should make a request under the Public Records Act for the right to inspect and copy "the administrative record." If

these kinds of formalities are not observed, the agency may refuse to grant certification of the record's accuracy, as required by *Pub. Res. Code § 21167.6*, or may prepare the record itself. As discussed in *§ 418.14[3]*, the outcome of this process may determine whether the petitioner is able to avoid a sizable cost bill.

[2] Determining Whether Record Is Complete

For agency decisions subject to the state's Administrative Procedures Act [*Gov. Code § 11500 et seq.*], the content of the administrative record is prescribed by *Gov. Code § 11523*. In CEQA actions, the content is also prescribed (but not limited) by *Pub. Res. Code § 21167.6(e)* [*see Protect Our Water v. County of Merced (2003) 110 Cal. App. 4th 362, 373, 1 Cal. Rptr. 3d 726* (inadequacy of administrative record required reversal of approval of EIR for mining project)]. In general, there is no statutory or case law that specifies the appropriate content of the administrative record in other cases. One court has stated that "the determination whether the decision was arbitrary, capricious or entirely lacking in evidentiary support must be based on the 'evidence' considered by the administrative agency" [*Shapell Industries v. Governing Board (1991) 1 Cal. App. 4th 218, 233, 1 Cal. Rptr. 2d 818]* . Another case questioned whether there could be an "administrative record" when "no public or evidentiary hearings were conducted or required to be conducted in connection with the issuance of the challenged order, the building permit" [*Miller v. City of Hermosa Beach (1993) 13 Cal. App. 4th 1118, 1133, 17 Cal. Rptr. 2d 408]* .

Two court of appeal decisions have addressed the scope of the administrative record in CEQA cases. One case held that the inadequacy of the administrative record required reversal of the approval of an EIR for a mining project, because the court could not discern the required findings from the record [*Protect Our Water v. County of Merced (2003) 110 Cal. App. 4th 362, 373, 1 Cal. Rptr. 3d 726]* . In that case, the court stated that it was nearly impossible to locate the pertinent documents in the 14-volume administrative record, because the majority of the relevant documents were neither properly indexed nor coherently organized [*Protect Our Water v. County of Merced (2003) 110 Cal. App. 4th 362, 372, 1 Cal. Rptr. 3d 726]* . In addition, it was impossible to identify many of the documents because the county failed to properly label them. Furthermore, some documents appeared incomplete, and it was difficult to differentiate between documents and attachments to those documents. The court noted that it was the county's responsibility to ensure the adequacy of the administrative record, and stated that if it did not hold the county to this responsibility, it would be defeating one of the basic purposes of CEQA--to disclose to the public the reasons for a project's approval if the project has significant environmental effects [*Protect Our Water v. County of Merced (2003) 110 Cal. App. 4th 362, 372-373, 1 Cal. Rptr. 3d 726]* .

Another CEQA decision ruled that the administrative record should contain all material related to CEQA compliance, not just material related to the final EIR [*County of Orange v. Superior Court (2003) 113 Cal. App. 4th 1, 11, 6 Cal. Rptr. 3d 286]* . In that case, following litigation the county prepared a new, revised EIR for a housing development. In a court challenge to the revised EIR, the project opponents sought to exclude from the record an addendum prepared for the initial EIR. The court of appeal held that the addendum was properly included in the record. The court stated that *Pub. Res. Code § 21167.6(e)* sets forth an inclusive view of the record and "contemplates that the administrative record will include pretty much everything that ever came near a proposed development or to the agency's compliance with CEQA in responding to that development," including "*[a]ny other written materials* relevant to the respondent public agency's *compliance with this division* or to its decision on the merits of the project..." [*County of Orange v. Superior Court (2003) 113 Cal. App. 4th 1, 8, 6 Cal. Rptr. 3d 286* (emphasis in original)].

One court has held that the disclosure requirements set forth in *Pub. Res. Code § 21167.6(e)* do not constitute an abrogation of the attorney client privilege or work product doctrine [*California Oak Foundation v. County of Tehama (2009) 174 Cal. App. 4th 1217, 1221, 94 Cal. Rptr. 3d 902]* . Thus, in a challenge to the county's approval of a specific plan for residential and commercial development and an associated EIR, the court of appeal upheld the trial court's denial of plaintiff's motion to include in the administrative record documents the county claimed were subject to attorney client privilege and work product protection. Those documents had been sent to the county by an outside law

firm retained to provide advice on CEQA compliance issues. In addition, the county did not waive the privilege by disclosing the documents to counsel for the developer [*California Oak Foundation v. County of Tehama (2009) 174 Cal. App. 4th 1217, 1222-1223, 94 Cal. Rptr. 3d 902]* .

The California Supreme Court has held that "extra-record evidence can never be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision" [*Western States Petroleum Assn. v. Superior Court (1995) 9 Cal. 4th 559, 579, 38 Cal. Rptr. 2d 139, 888 P.2d 1268]* . The Court acknowledged that there were potential exceptions in which extra-record evidence could continue to be received in traditional mandamus actions, including its admissibility "only for background information... or for the limited purposes of ascertaining whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision" [*Western States Petroleum Assn. v. Superior Court (1995) 9 Cal. 4th 559, 579, 38 Cal. Rptr. 2d 139, 888 P.2d 1268]* . The Court did not decide whether such extra-record evidence is admissible when it is "relevant to (1) issues other than the validity of the agency's quasi-legislative decision, such as the petitioner's standing and capacity to sue, (2) affirmative defenses such as laches, estoppel and res judicata, (3) the accuracy of the administrative record, (4) procedural unfairness, and (5) agency misconduct" [*Western States Petroleum Assn. v. Superior Court (1995) 9 Cal. 4th 559, 575 n.5, 38 Cal. Rptr. 2d 139, 888 P.2d 1268]* .

PRACTICE TIP:

Resolving Disputes as to Scope of Record. Invariably, in cases involving an administrative record, counsel confront questions of whether the evidence in the case will be confined to the record, and whether the record is complete. These questions arise because a party believes that there is material important to its case that may not be contained in the record. They should be resolved at the earliest opportunity, particularly if disputed material appears pivotal to the outcome of the case. This is an issue which can appropriately be considered between the parties at the mandatory settlement conference in CEQA actions [*see Pub. Res. Code § 21167.8*. For a sample Notice of Settlement Meeting, *see § 418.157*]. Otherwise, motions may be made to augment the record or to limit its scope.

If there is a dispute as to the content or "accuracy" of the administrative record in both traditional and administrative mandamus actions, the *Western States Petroleum Association* case does not foreclose reliance on extra-record evidence for this purpose. Presumably, counsel could therefore argue for a right to conduct discovery into the scope of the administrative record or whether there are documents missing from it. While there is little authority for such discovery under California law, there is ample precedent in federal cases. Thus, discovery will be permitted to determine if the administrative record submitted by the agency is "self-serving, incomplete or unclear" [*Conservation Law Foundation of New England v. Clark (D. Mass. 1984) 590 F. Supp. 1467, 1474* ; *see Camp v. Pitts (1973) 411 U.S. 138, 142, 93 S. Ct. 1241, 36 L. Ed. 2d 106* ; *Citizens to Preserve Overton Park, Inc. v. Volpe (1971) 401 U.S. 402, 419-420, 91 S. Ct. 814, 28 L. Ed. 2d 136]* . For further discussion of matters relating to the administrative record, see *California Environmental Law and Land Use Practice, Ch. 12, Judicial Review of Administrative Decisions, § 12.22[4]* (Matthew Bender).

[3] Paying Costs of Record Preparation

The costs of preparing the administrative record may be assessed against the losing party. There is little guidance in the case law about how the costs claimed for the preparation of the record should be measured. In one case, the court held that the trial court must determine in response to a motion to tax costs whether the costs were "reasonable" [*Citizens for Quality Growth v. City of Mt. Shasta (1988) 198 Cal. App. 3d 433, 448, 243 Cal. Rptr. 727]* . In that case, the agency's use of an outside law firm's more expensive paralegals to prepare the record in lieu of city employees was remanded to the trial court to determine whether it was necessary to employ these people because of their allegedly greater expertise in putting together such records and the reasonableness of the cost.

When necessary to preserve the statutory purposes of cost-containment and expediting CEQA litigation, the prevailing party in a CEQA action may recover "reasonable costs or fees imposed for the preparation" of the record [*Pub. Res. Code § 21167.6(b)(1)*] even if the nonprevailing party elected to prepare the record pursuant to *Pub. Res. Code § 21167.6(b)(2)*. To hold otherwise would reward litigants who elected to prepare the record but then ignored the concomitant statutory duty to restrain costs in doing so [*St. Vincent's School for Boys, Catholic Charities CYO v. City of San Rafael (2008) 160 Cal. App. 4th 1426, 1439, 73 Cal. Rptr. 3d 512*]. Thus, in a case where the losing plaintiff in a CEQA action had opted to prepare the record, and its broad and apparently nonessential discovery demands caused city to expend considerable time and resources to respond, plaintiff's actions reflected a complete abandonment of its statutory responsibility to "strive to [prepare the record] at reasonable cost" [*Pub. Res. Code § 21167.6(f)*] and the ensuing delay to the CEQA litigation process undermined the statutory purpose of expediting CEQA litigation, the trial court properly taxed the costs to reflect what costs would have been incurred if the city had prepared the record itself [*St. Vincent's School for Boys, Catholic Charities CYO v. City of San Rafael (2008) 160 Cal. App. 4th 1426, 1437, 73 Cal. Rptr. 3d 512*].

It is unclear the extent to which the more general provision controlling costs in litigation [*Code Civ. Proc. § 1033.5*] is applicable to the question of the reasonableness of the cost of preparing the administrative record and providing the court with a copy. *Code Civ. Proc. § 1033.5* requires that the costs set forth must be reasonable, necessary, and actually incurred. One court held that the indirect costs of retrieving records for production under the California Public Records Act were not appropriate charges, but that case dealt with express statutory authority for an agency to charge the "full direct costs of duplication" [*North County Parents Organization v. Department of Education (1994) 23 Cal. App. 4th 144, 147, 28 Cal. Rptr. 2d 359]* .

PRACTICE TIP:

The Risk of Paying Costs. Counsel advising a client whether to pursue environmental litigation based on an administrative record should advise the client of the risk that the costs of preparing the record may be assessed against the client if the agency ultimately prevails. These costs can be considerable. When the agency prepares the administrative record, it may rightfully demand that the petitioners pay the cost of a copy of the record for the court before its filing. More often, the agency may defer the submission of a cost bill to the proceeding's conclusion to expedite the process of getting the matter heard and decided. In these circumstances, the petitioners may find themselves presented with a sizable, unanticipated cost bill.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewAdministrative RecordGeneral OverviewAdministrative LawJudicial ReviewAdministrative RecordDisclosure & DiscoveryEnvironmental LawAssessment & Information AccessPublic ParticipationEnvironmental LawLitigation & Administrative ProceedingsGeneral OverviewEnvironmental LawLitigation & Administrative ProceedingsDefenses

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36-418 California Forms of Pleading and Practice--Annotated § 418.15

AUTHOR: By Roger Beers

§ 418.15 Statutes of Limitation

[1] Significance in Environmental Suits

The applicable statute of limitations can be extraordinarily short in environmental cases (for example, 30 days from an agency's decision that is being challenged) [*see, e.g., Pub. Res. Code § 21167(c)*]. In addition, all necessary and indispensable parties must be named in the suit before the statute of limitations expires [*see Sierra Club, Inc. v. California Coastal Com. (1979) 95 Cal. App. 3d 495, 502, 157 Cal. Rptr. 190]* . In toxic tort actions for personal injury or property damage, statutes of limitation may be particularly problematic when the pollution exposure or release occurred long ago or over a number of years.

[2] Writ Proceedings

The California Environmental Quality Act (CEQA) [*Pub. Res. Code § 21000 et seq.*; *see §§ 418.30 -418.37*] contains unusually short statutes of limitations. Suits challenging an agency's negative declaration, environmental impact report (EIR) certification, or other act or omission under CEQA must be filed within 30 days (35 days for determinations that a project is not subject to CEQA) following the agency's filing of notice of its decision [*Pub. Res. Code § 21167(a)-(d)*; *see Pub. Res. Code §§ 21108(a), (b), 21152(a), (b)*; *Committee for Green Foothills v. Santa Clara County (2010) 48 Cal. 4th 32, 39, 105 Cal. Rptr. 3d 181, 224 P.3d 920* (filing of notice of decision triggers 30-day statute of limitations for all CEQA challenges to decision announced in notice); *Stockton Citizens for Sensible Planning v. City of Stockton (2010) 48 Cal. 4th 481, 489, 106 Cal. Rptr. 3d 858, 227 P.3d 416* (35-day statute of limitations runs from filing of notice of exemption, whether or not NOE is substantively or procedurally flawed)]. If the agency does not properly file notice of its decision, or begins a project without determining whether it will have a significant effect on the environment, the statute of limitations period is 180 days from either the decision to carry out or approve the project, or after commencement of the project if it is undertaken without a formal decision [*Pub. Res. Code §§ 21167(a), (d), 21080.5(g), (h)*; *14 Cal. Code Reg. § 15112*; *see Committee for Green Foothills v. Santa Clara County Bd. of Supervisors (2008) 161 Cal. App. 4th 1204, 1237, 75 Cal. Rptr. 3d 112* (reasonable possibility that plaintiff in CEQA action could allege facts sufficient to bring proceeding within purview of *Pub. Res. Code § 21167(a)* by alleging that

county board of supervisors approved changes and subsequent activities with respect to trail development and maintenance that might have a significant effect on the environment without having determined whether the project might have a significant effect on the environment; thus, trial court erred in sustaining demurrer without leave to amend on ground the proceedings, commenced more than 30 days after notice of determination was filed, were necessarily time-barred)]. With limited exceptions, an EIR is conclusively presumed to be valid for purposes of use by the responsible agency if it is not challenged within the appropriate limitations period [*Pub. Res. Code §§ 21167, 21167.2*].

Ninety-day statutes of limitation exist for actions challenging local agency decisions to adopt or amend a zoning ordinance or general or specific plan, or decisions concerning a subdivision map or variances or use permits [*Gov. Code §§ 65009(c), 66499.37*]. In addition, a 90-day statute of limitations applies to administrative mandamus actions for review of final decisions of local agencies revoking or denying permits [Code *Civ. Proc. § 1094.6*]. This section prevails over any conflicting provision in any otherwise applicable law relating to the subject matter, unless the conflicting provision is a state or federal law that provides a shorter statute of limitations [*Code Civ. Proc. § 1094.6(g)*]. Finally, the enabling statute for an agency rendering an environmental decision should be consulted to determine if there are special limitations periods established for review of that agency's decisions. If there is no applicable special limitations period, a more general statute of limitations will apply [*Wind River Min. Corp. v. U.S. (9th Cir. 1991) 946 F.2d 710, 713]* . For further discussion of statutes of limitations in writ proceedings, see *California Environmental Law and Land Use Practice, Ch. 11, Preliminary Litigation Issues, § 11.07[2][c]* (Matthew Bender)].

[3] Damage Actions

The statute of limitations for injury to real property is three years from the date of injury [*Code Civ. Proc. § 338(b)*]. The statute of limitations for personal injury is two years from the date of injury [*Code Civ. Proc. § 335.1*]. In tort actions, court commonly apply a "discovery rule" whereby the statute of limitations does not begin to run until the aggrieved party discovers--or should have discovered in the exercise of reasonable diligence--the injury and its negligent cause. Two cases dealing with contaminated property applied the discovery rule at the pleading stage to bar causes of action for negligence and permanent nuisance, holding that even extending commencement of the statute of limitations until discovery of the harm to the property, the limitations period had run [*Mangini v. Aerojet General Corp. (1991) 230 Cal. App. 3d 1125, 1152, 281 Cal. Rptr. 827* ; *CAMSI IV v. Hunter Technology Corp. (1991) 230 Cal. App. 3d 1525, 1533, 282 Cal. Rptr. 80* ; *see McCoy v. Gustafson (2009) 180 Cal. App. 4th 56, 110, 103 Cal. Rptr. 3d 37* (petroleum contamination of soil and groundwater); *see also Ch. 345, Limitation of Actions, § 345.19[3]* (Matthew Bender)].

A "continuing nuisance" claim avoids these statute of limitations problems and applies to all contamination situations in which the nuisance is abatable [*Capogeannis v. Superior Court (1993) 12 Cal. App. 4th 668, 676, 15 Cal. Rptr. 2d 796* ; *but see McCoy v. Gustafson (2009) 180 Cal. App. 4th 56, 90, 103 Cal. Rptr. 3d 37* (because plaintiffs failed to establish that contamination was reasonably abatable, nuisance was permanent, and action was barred by three-year statute of limitations for injury to real property)]. However, damages are limited to the recovery for actual injury suffered within the limitations period immediately preceding the complaint's filing. For a further discussion of the application of statutes of limitations in environmental damage actions, see *California Environmental Law and Land Use Practice, Ch. 11, Preliminary Litigation Issues, § 11.07[3][a]* (Matthew Bender).

For detailed coverage of statutes of limitations, see *Guide to Toxic Torts, Ch. 9, Defenses and Offset, § 9.01* (Matthew Bender). For a discussion of the time for commencing an action against public entities and public employees for nuisance or other injury to person or property, see California Torts, Ch. 62, *Claims and Actions Against Public Entities and Employees* (Matthew Bender).

PRACTICE TIP:

Using Indemnity Claims to Avoid Statutes of Limitation. One way of avoiding the statute of limitations problems when the remedy for pollution is the recovery of the costs of cleanup is by a cause

of action for indemnity. There are two kinds of indemnity--contractual or equitable. The advantage of relying on an indemnity claim is that the cause of action does not come into existence until the indemnitee has suffered loss through payment [*Mangini v. Aerojet-General Corp. (1991) 230 Cal. App. 3d 1125, 1154, 281 Cal. Rptr. 827]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawLitigation & Administrative ProceedingsDefensesGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawTortsNuisanceDefensesStatutes of LimitationsTortsProcedureStatutes of LimitationsGeneral OverviewTortsProcedureStatutes of LimitationsAccrual of ActionsDiscovery RuleTortsPublic Entity LiabilityLiabilityClaim PresentationTime Limitations

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36-418 California Forms of Pleading and Practice--Annotated § 418.16

AUTHOR: By Roger Beers

§ 418.16 Laches

Although delay and prejudice do not amount to a bar in legal actions if the statute of limitations has not yet run, a plaintiff in an equitable action (such as administrative mandamus) who has unduly delayed seeking relief to the prejudice of a defendant may be barred by his or her laches. However, the defense of laches is rarely successful in environmental cases, due to the strong public policy considerations served by judicial review of these cases on their merits [*see, e.g., Santiago County Water Dist. v. County of Orange (1981) 118 Cal. App. 3d 818, 834, 173 Cal. Rptr. 602]* .

The defense of laches has been upheld when a plaintiff has unreasonably delayed in challenging the administrative action and the developer has justifiably relied on the administrative approval through substantial monetary investment in his or her project [*Holt v. County of Monterey (1982) 128 Cal. App. 3d 797, 800-802, 180 Cal. Rptr. 514* (*citing People v. Department of Housing & Community Dev. (1975) 45 Cal. App. 3d 185, 195, 119 Cal. Rptr. 266* and *Gutknecht v. Paul (1948) 83 Cal. App. 2d 356, 188 P.2d 764*); *see Concerned Citizens of Palm Desert, Inc. v. Board of Supervisors (1974) 38 Cal. App. 3d 257, 265-266, 113 Cal. Rptr. 328* (in the nine-month period between granting a conditional use permit and commencing the action, the fact that the developer incurred financial liabilities of $700,000 in relying on the use permit constituted showing of unreasonable delay plus prejudice resulting from delay)]. For further discussion of laches, see *California Environmental Law and Land Use Practice, Ch. 11, Preliminary Litigation Issues, § 11.08* (Matthew Bender).

PRACTICE TIP:

Necessity for Pleading Excuse for Delay. When there has been a prolonged delay in the bringing of the suit, the petitioner should be prepared to affirmatively plead the reasons for the delay in the complaint or for negating prejudice to the defendant--just as the reasons for "delayed discovery" must be affirmatively pleaded to protect against demurrers on statute of limitations grounds [*see Kleinclaus v. Dutard (1905) 147 Cal. 245, 250, 81 P. 516* ; Witkin, California Procedure, vol. 5, *Pleading* §§ 916, 1051 (4th ed. 1997)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusEnvironmental LawLitigation & Administrative ProceedingsDefensesGovernmentsLegislationStatutes of LimitationsGeneral Overview

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36-418 California Forms of Pleading and Practice--Annotated § 418.17

AUTHOR: By Roger Beers

§ 418.17 Governmental Immunity

The California Tort Claims Act [*Gov. Code § 810 et seq.*] provides that public entities are not liable for any injury caused by their adoption of or failure to adopt any enactment [*Gov. Code § 818.2*] including the issuance, denial, suspension, or revocation of governmental permits [*Gov. Code § 818.4*], or their failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, other than their own property. However, the Act does not preclude an action for inverse condemnation for actions by a public entity that result in damage to private property for public use [*Cal. Const., art. I, § 19*].

A public entity may be liable for maintaining a nuisance [*Phillips v. City of Pasadena (1945) 27 Cal. 2d 104, 106, 162 P.2d 625]* . However, for the purpose of nuisance actions against governmental agencies, nothing which is done or maintained under the express authority of a statute can be deemed a nuisance [*Civ. Code § 3482*]. For example, it has been held that the State of California was immune from liability for damaging automobile paint finishes during emergency pesticide spraying to eliminate the Medfly, since the spraying was expressly authorized by statute [*Farmers Ins. Exchange v. State of California (1985) 175 Cal. App. 3d 494, 503, 221 Cal. Rptr. 225]* . However, activities authorized by generally worded statutes are not considered "express" authorizations providing statutory immunity. For example, in *Varjabedian v. City of Madera*, a municipally owned sewage treatment plant was assessed damages for its unpleasant odors even though municipalities are generally authorized by statute to operate sewage treatment plants [*Varjabedian v. City of Madera (1977) 20 Cal. 3d 285, 142 Cal. Rptr. 429, 572 P.2d 43]* . For a further discussion of governmental immunity, see *California Environmental Law and Land Use Practice, Ch. 11, Preliminary Litigation Issues, § 11.09* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims

ActsExclusions From LiabilityTortsPublic Entity LiabilityLiabilityState Tort Claims ActsRemedies

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36-418 California Forms of Pleading and Practice--Annotated § 418.18

AUTHOR: By Roger Beers

§ 418.18 Compliance With Notice Requirements

[1] Claims for Damages Against Governmental Entities

Before instituting a court action, a party seeking damages against a local government agency must file a claim with that agency [*Gov. Code §§ 905-906*]. However, a claim need not be filed in an action for the taking of, or damage to, private property pursuant to *Cal. Const., art. I, § 19*. As a general rule, claims relating to causes of action for death or for injury to personal property or growing crops must be presented to the governmental agency no later than six months after the cause of action accrues [*Gov. Code § 911.2*]. For a discussion of the notice requirements for claims for damages against government entities, see *California Environmental Law and Land Use Practice, Ch. 11, Preliminary Litigation Issues, § 11.10[1]* (Matthew Bender).

[2] CEQA Notice Requirements

The California Environmental Quality Act (CEQA) [*Pub. Res. Code § 21000 et seq.*] requires that the petitioner [*see Pub. Res. Code § 21167.6(a)*]:

- Give notice of the intent to sue an agency before the suit's filing;
- Provide notice of the suit's filing and a copy of the complaint to the Attorney General; and
- Personally serve a request for the preparation of the record served on the agency within 10 days thereafter.

Not less than 10 business days following service of the petition or the complaint on the public agency, the public agency must provide the petitioner or plaintiff with a list of responsible agencies and any public agency having jurisdiction over a natural resource affected by the project [*Pub. Res. Code § 21167.6*.5(b)]. Within 15 days of receiving that list, the petitioner or plaintiff must provide those agencies with notice of the action or proceeding [*Pub. Res. Code § 21167.6*

.5(c)].

For further coverage of CEQA generally, see *§§ 418.30 -418.37*. For additional discussion of CEQA's notice requirements, see *California Environmental Law and Land Use Practice, Ch. 11, Preliminary Litigation Issues, § 11.10[2]* (Matthew Bender).

[3] Citizen Suit Notices of Intent to Sue

Other statutes may also require that a citizen give notice of intent to sue before the suit's filing. *Civ. Code § 1368.5* requires that a homeowners' association intending to sue a developer of a common interest development for design or construction defects in the common areas must provide advance notice to the homeowners in the development and hold a meeting with the homeowners to discuss the problems and options available to address the problem. In addition, *Civ. Code § 1375* [inoperative on July, 2017, and repealed as of January 1, 2018; *Civ. Code § 1375(s)*], requires that the association provide the developer with written notice before bringing suit, stating the alleged defects and other information, and within 180 days of the notice must attempt to resolve the dispute through a mandatory dispute resolution process. Proposition 65, the toxics initiative adopted by California voters in November 1986, allows citizen suits only if (1) the complainant has previously given more than 60 days notice of the violation to the alleged violator and to the Attorney General, the district attorney, and any city attorney in whose jurisdiction the alleged violation has occurred; and (2) none of these public prosecutors has commenced and is diligently prosecuting such an action against the violator [*Health & Safety Code § 25294*]. There is a substantial body of case law in the federal courts construing similar 60-day notice provisions in federal statutes [*see, e.g., Hallstrom v. Tillamook County (1989) 493 U.S. 20, 110 S. Ct. 304, 107 L. Ed. 2d 237]* .

For further coverage of citizen suits, see *§§ 418.50 -418.52* and *California Environmental Law and Land Use Practice, Ch. 11, Preliminary Litigation Issues, § 11.10[3]* (Matthew Bender). For a sample 60-day notice of intent to sue under Proposition 65, see *§ 418.171*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawGeneral OverviewEnvironmental LawLitigation & Administrative ProceedingsGeneral OverviewGovernmentsLocal GovernmentsClaims By & Against

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36-418 California Forms of Pleading and Practice--Annotated § 418.19

AUTHOR: By Roger Beers

§ 418.19 The Complaint or Petition

[1] Practical Consideration When Drafting the Complaint or Petition

Special care should be taken in drafting the complaint or petition in environmental cases. If grounds for challenging agency action are omitted from the complaint, the plaintiff may be foreclosed from arguing these matters on the merits. Thus, it may be useful to allege grounds more broadly than initially anticipated as the basis for challenge. The complaint should allege not only the violations of law, but also the plaintiffs' standing, the court's jurisdiction, the basis for venue, the plaintiffs' exhaustion of administrative remedies, and, when necessary, the reasons for the plaintiffs' delayed discovery of the cause of action to avoid statutes of limitations defenses. Counsel should also determine whether there are any parties who are "indispensable" to the prosecution of the action [*see Pub. Res. Code § 21167.6*.5 (any recipient of approval that is subject of action or proceeding alleging noncompliance with CEQA must be named as real party in interest)]. Satisfaction of the various procedural prerequisites that are discussed in preceding sections of this chapter, for example, standing [*see § 418.11*], exhaustion of administrative remedies [*see § 418.13*], and compliance with applicable notice requirements [*see § 418.18*], should also be alleged. When notices are required to be given to agencies or private parties before or contemporaneously with the filing of the complaint, copies of those notices should be attached to the complaint and incorporated by reference.

For a more in-depth discussion of the considerations that should be made when drafting a complaint or petition in environmental cases, see *California Environmental Law and Land Use Practice, Ch. 11, Preliminary Litigation Issues, § 11.11* (Matthew Bender).

[2] Fast Track Rules

Before filing a complaint or petition, counsel should determine whether the proceeding will be subject to the Fast Track Rules. The Trial Court Delay Reduction Act is set forth at *Gov. Code § 68600 et seq.* In general, the Fast Track Rules set the following goals [*Cal. Rules of Court, Rule 3.714*]:

- For unlimited civil cases, 75 percent should be disposed of within 12 months, 85 percent within 18 months, and 100 percent within 24 months.

- For limited civil cases, 90 percent should be disposed of within 12 months, 98 percent within 18 months, and 100 percent within 24 months.

For further coverage of fast track rules generally, see Ch. 552, *Trial Court Delay Reduction* .

[3] Alternative Procedure for Petitions for Writs of Mandate

Ordinarily, copies of the summons and complaint should be served on each of the defendants. An alternative procedure for filing and serving petitions for writs of mandate consists of using an "alternative writ of mandate" in lieu of a summons. The petition, together with the alternative writ, is presented to a Judge ex parte, who orders the clerk of the court to issue the alternative writ, specifying a return date for the response. The petition and alternative writ are then served on the defendants and real parties in interest. For a sample alternative writ of mandate and additional discussion of using this procedure, see *§ 418.151*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityExhaustion of RemediesCivil ProcedureJurisdictionJurisdictional SourcesGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePartiesReal Parties in InterestGeneral OverviewEnvironmental LawGeneral OverviewEnvironmental LawLitigation & Administrative ProceedingsGeneral OverviewGovernmentsCourtsRule Application & InterpretationGovernmentsLegislationStatutes of LimitationsGeneral Overview

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36-418 California Forms of Pleading and Practice--Annotated § 418.20

AUTHOR: By Roger Beers

§ 418.20 Class Actions

Class actions in California courts are governed generally by *Code Civ. Proc. § 382*, and in federal courts by *Fed. R. Civ. P., Rule 23*. When a question is one of a common or general interest of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all [*Code Civ. Proc. § 382*]. Although *Code Civ. Proc. § 382* appears to speak in the alternative, it has generally been held that two requirements must be met to sustain any class action [*Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 704, 63 Cal. Rptr. 724, 433 P.2d 732]* :

- There must be an ascertainable class; and
- There must be a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented.

The use of the class action in environmental lawsuits is subject to these requirements. Thus, a class action complaint which fails to allege that plaintiff is a member of the interested class is defective [*Greater Westchester Homeowners Assn., Inc. v. City of Los Angeles (1970) 13 Cal. App. 3d 523, 526, 91 Cal. Rptr. 720* (class action by homeowners' association on behalf of homeowners residing near airport for damages caused by airport noise as defective)]. In *Diamond v. General Motors Corporation*, the court refused to accord class action treatment to an action brought on behalf of all residents of Los Angeles County against hundreds of defendants for polluting the air, *inter alia*, because of the difficulty of resolving the liability issues on an individual basis against each defendant [*Diamond v. General Motors Corp. (1971) 20 Cal. App. 3d 374, 379-383, 97 Cal. Rptr. 639]* .

When it appears that a class action cannot be stated, numerous plaintiffs may be joined as individuals [*Code Civ. Proc. § 378*], or separately filed actions involving common questions of law or fact may be consolidated for trial [*Code Civ. Proc. § 1048*]. For coverage of class actions in toxic tort cases, see *Guide to Toxic Torts, Ch. 2, Effective Case Management, § 2.03* (Matthew Bender). For further discussion and forms relating to class actions generally, see Ch.

120, *Class Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureClass ActionsPrerequisitesNumerosityEnvironmental LawLitigation & Administrative ProceedingsGeneral OverviewEnvironmental LawLitigation & Administrative ProceedingsToxic Torts

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36-418 California Forms of Pleading and Practice--Annotated § 418.21

AUTHOR: By Roger Beers

§ 418.21 SLAPP Suit Provisions

In 1992 the Legislature enacted *Code Civ. Proc. § 425.16*, creating a special motion to strike actions brought to chill participation by the public in matters of public significance through abuse of the judicial process. The object of the legislation was a phenomenon known as the "SLAPP suit"--that is, "Strategic Lawsuits Against Public Participation." The name was coined by Canan & Pring, *Strategic Lawsuits Against Political Participation* [35 SoC. PrOBS. 506, 506 (1988)]. SLAPPs may also be described as "public interest intimidation suits" [*see* Brecher, *The Public Interest and Intimidation Suits: A New Approach, 28 Santa Clara L. Rev. 105 (1988)*].

Code Civ. Proc. § 425.16 allows for the filing of a motion to strike the complaint within 30 days after its service. The filing of the motion automatically stays all discovery. On a showing by the defendant that his or her conduct comes within the statute's protection, the burden then shifts to the plaintiff to make a *prima facie* showing that he or she will probably prevail in the action [*see Wilcox v. Superior Court (1994) 27 Cal. App. 4th 809, 823, 33 Cal. Rptr. 2d 446* . A prevailing defendant is entitled to recover the attorneys fees and costs incurred in the motion. Since the statute is considered to be merely "a procedural screening mechanism" for the plaintiff's demonstration of a *prima facie* case to permit the matter to go to a trier of fact, it has been held retroactively applicable to actions filed before its effective date [*see Robertson v. Rodriguez (1995) 36 Cal. App. 4th 347, 360-362, 42 Cal. Rptr. 2d 464]* .

An order granting or denying a special motion to strike is immediately appealable [*Code Civ. Proc. § 425.16(j)*].

For further coverage of SLAPP suits, see Ch. 376, *Motions to Strike: Anti-SLAPP* , and *California Environmental Law and Land Use Practice, Ch. 11, Preliminary Litigation Issues, § 11.15* (Matthew Bender).

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36-418 California Forms of Pleading and Practice--Annotated § 418.22

AUTHOR: By Roger Beers

§ 418.22 Attorney's Fees and Costs

Except as specifically provided by statute, attorney's fees are recoverable only under the express or implied agreement of the parties [*Code Civ. Proc. § 1021*]. The principal exceptions to the general rule are the private attorney general theory, the substantial benefit principle, the common fund principle, and the vexatious litigant theory [*Serrano v. Priest (1977) 20 Cal. 3d 25, 26, 34-35, 38, 43, 141 Cal. Rptr. 315, 569 P.2d 1303]* .

The private attorney general exception is codified in *Code Civ. Proc. § 1021.5* [*see Woodland Hills Residents Assn., Inc. v. City Council (1979) 23 Cal. 3d 917, 943, 154 Cal. Rptr. 503, 593 P.2d 200]* . On motion, the court may award attorney's fees to a successful party, who is not a public entity, against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if [*Code Civ. Proc. § 1021.5*]:

- A significant benefit has been conferred on the general public or a large class of persons;
- The necessity and financial burden of private enforcement are such as to make the award appropriate; and
- The attorney's fees should not in the interest of justice be paid out of the recovery, if any.

The important rights that justify a private attorney general claim for attorney's fees include environmental protection [*Woodland Hills Residents Assn., Inc. v. City Council (1979) 23 Cal. 3d 917, 935, 154 Cal. Rptr. 503, 593 P.2d 200]* .

The substantial benefit theory applies when a litigant, proceeding in a representative capacity, obtains a decision resulting in the conferral of a substantial benefit of a pecuniary or nonpecuniary nature [*Serrano v. Priest (1977) 20 Cal. 3d 25, 33-34, 141 Cal. Rptr. 315, 569 P.2d 1303]* . However, when the substantial benefit is the effectuation of a statutory policy, the private attorney general theory is the more appropriate basis for evaluating a request for attorney's fees [*see Woodland Hills Residents Assn., Inc. v. City Council (1979) 23 Cal. 3d 917, 945-948, 154 Cal. Rptr. 503,*

593 P.2d 200] . The substantial benefit theory may be applied, however, in a successful action to prevent an illegal expenditure of public funds [*Friends of "B" Street v. City of Hayward (1980) 106 Cal. App. 3d 988, 996-997, 165 Cal. Rptr. 514]* .

The vexatious litigant theory applies against an opponent who has maintained an unfounded action or defense in bad faith, vexatiously, wantonly, or for oppressive reasons [*Serrano v. Priest (1977) 20 Cal. 3d 25, 26, 141 Cal. Rptr. 315, 569 P.2d 1303* ; *see Residents Ad Hoc Stadium Com. v. Board of Trustees (1979) 89 Cal. App. 3d 274, 292-293, 152 Cal. Rptr. 585]* . Attorneys fees may also be awarded when a challenged award, finding, or determination was the result of arbitrary or capricious action by a public entity or officer [*Gov. Code § 800*], but courts have declined to award attorney's fees under *Gov. Code § 800* unless the public agency failed even to attempt compliance with the law [*see, e.g., Whitman v. Board of Supervisors (1979) 88 Cal. App. 3d 397, 418, 151 Cal. Rptr. 866]* .

For a general discussion and forms relating to obtaining an award of attorney's fees in public interest litigation, see Ch. 174, *Costs and Attorney's Fees* . For detailed coverage of the attorney's fees issue in the environmental context, see California Environmental Law and Land Use Practice, Ch. 13, *Attorneys' Fees and Other Costs* (Matthew Bender), and Treatise on Environmental Law, Ch. 14, *Attorneys' Fees in Environmental Litigation* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-418 California Forms of Pleading and Practice--Annotated §§ 418.23-418.29

AUTHOR: By Roger Beers

[Reserved]

§§ 418.23[Reserved]

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36-418 California Forms of Pleading and Practice--Annotated § 418.30

AUTHOR: By Roger Beers

§ 418.30 Scope

This subpart discusses the California Environmental Quality Act (CEQA) [*Pub. Res. Code § 21000 et seq.*], including the statute's purpose, the projects and activities to which it applies, the requirements for preparation of an environmental impact report (EIR) or a negative declaration, and actions brought to enforce compliance with CEQA. The discussion in this subpart covers basic elements of an action under CEQA. For sample forms typically involved in CEQA litigation, see *§§ 418.150 -418.159*. For detailed coverage of all aspects of CEQA, see California Environmental Law and Land Use Practice, Chs. 20-23 (Matthew Bender).

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36-418 California Forms of Pleading and Practice--Annotated § 418.31

AUTHOR: By Roger Beers

§ 418.31 Overview of Act

CEQA states that the maintenance of a quality environment for the people of California now and in the future is a matter of statewide concern. CEQA also declares that it is state policy that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available that would substantially lessen the significant environmental effects of the projects [*Pub. Res. Code §§ 21002, 21002.1(c)*; *see 14 Cal. Code Reg. §§ 15126(f), 15126.6* (requirement for inclusion of alternatives)]. It establishes procedures for the consideration and mitigation of the environmental impacts of all projects approved or undertaken by state and local agencies. A key feature of CEQA is the requirement that an environmental impact report (EIR) be prepared for any proposed project that may have a significant effect on the environment [*see Pub. Res. Code §§ 21100, 21151*].

CEQA was modeled on the federal National Environmental Policy Act (NEPA) [*42 U.S.C. § 4321 et seq.*], and therefore judicial interpretations of similar NEPA concepts are persuasive authority in interpreting the state act [*No Oil, Inc. v. City of Los Angeles (1974) 13 Cal. 3d 68, 86 n.21, 118 Cal. Rptr. 34, 529 P.2d 66* . For a comparison of NEPA and CEQA, see California Environmental Law and Land Use Practice, Ch. 20, *Background and Implementation of CEQA*, § 20.02[6] (Matthew Bender)]. However, the procedural requirements and exemptions in CEQA are far more complicated than NEPA, and CEQA must be carefully consulted to determine its precise application.

CEQA Guidelines have been adopted by the State Resources Agency [*14 Cal. Code Reg. § 15000 et seq.*]. Provisions in the Guidelines indicating when a project is likely to have a significant effect on the environment are found in *14 Cal. Code Reg. § 15065*, Appendix G. Actions to enforce CEQA are brought as traditional mandate proceedings under *Code Civ. Proc. §§ 1085* and *1086*, and administrative mandate is authorized by *Code Civ. Proc. § 1094.5*. For a sample petition for writ of mandate, see *§ 418.150*.

For a further introduction to CEQA, see California Environmental Law and Land Use Practice, Ch. 20, *Background and Implementation of CEQA*, § 20.02 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusEnvironmental LawNational Environmental Policy ActGeneral OverviewEnvironmental LawNational Environmental Policy ActEnvironmental Impact StatementsReal Property LawZoning & Land UseState & Regional Planning

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36-418 California Forms of Pleading and Practice--Annotated § 418.32

AUTHOR: By Roger Beers

§ 418.32 Key CEQA Concepts

[1] Project

CEQA applies to "projects" [*Pub. Res. Code § 21080(a)*]. As a general rule, all discretionary projects of public agencies that will have a direct or ultimate impact on the environment constitute a project within the meaning of *Pub. Res. Code § 21065* [*City of Livermore v. Local Agency Formation Com. (1986) 184 Cal. App. 3d 531, 537-538, 230 Cal. Rptr. 867]* . This includes an activity directly undertaken by any public agency; or supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance; or approved through the issuance of a lease, permit, license, certificate, or other entitlement for use [*Pub. Res. Code § 21065*].

Projects rejected by a public agency are specifically exempted from CEQA requirements [*Pub. Res. Code § 21080(b)(5)*; *Sunset Sky Ranch Pilots Assn. v. County of Sacramento (2009) 47 Cal. 4th 902, 905, 102 Cal. Rptr. 3d 894, 220 P.3d 905]* . A county's decision not to renew a conditional use permit for a privately owned airport was not a "public project" under CEQA because the county did not "directly undertake" to close the airport [*Pub. Res. Code § 21065(a)*; *Sunset Sky Ranch Pilots Assn. v. County of Sacramento (2009) 47 Cal. 4th 902, 908, 102 Cal. Rptr. 3d 894, 220 P.3d 905]* . Instead, the county decided not to reauthorize a private activity that required "the issuance ... of a ... permit" [see *Pub. Res. Code § 21065(c)*]. The private airport operation was the "project" in question, and private action is not subject to CEQA unless the action involves governmental participation, financing, or approval [*Sunset Sky Ranch Pilots Assn. v. County of Sacramento (2009) 47 Cal. 4th 902, 908, 102 Cal. Rptr. 3d 894, 220 P.3d 905* ; *see 14 Cal. Code. Reg. § 15002(c)*].

[2] Significant Effect on Environment

An environmental impact report (EIR) must be prepared under CEQA on any project which will have a "significant effect on the environment," defined as a substantial, or potentially substantial, adverse change in the environment [*Pub. Res. Code § 21068*; *14 Cal. Code Reg. §§ 15360, 15382*]. For additional guidelines regarding the definition and evaluation of a significant effect on the environment, see *14 Cal. Code Reg. § 15064*. In addition, special findings must

be made by an agency in approving a project which has significant effects even after mitigation [*Pub. Res. Code § 21081*].

[3] Feasible

In preparing EIRs, agencies are required to consider all "feasible" alternatives to the project and to adopt all "feasible" mitigation measures necessary to mitigate the project's effects to insignificant levels. The term "feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors [*Pub. Res. Code § 21061.1*].

[4] Lead Agency and Responsible Agency

The term "lead agency" means the public agency that has the principal responsibility for carrying out or approving a project that may have a significant effect on the environment [*Pub. Res. Code § 21067*; *14 Cal. Code Reg. §§ 15051, 15367*]. The term "responsible agency" means a public agency, other than the lead agency, which has other responsibilities for carrying out or approving a project [*Pub. Res. Code § 21069*; *14 Cal. Code Reg. § 15381*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawLitigation & Administrative ProceedingsGeneral OverviewEnvironmental LawNational Environmental Policy ActGeneral Overview

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AUTHOR: By Roger Beers

§ 418.33 Exemptions From Act

Projects and activities that are exempt from the requirements of CEQA, and thus do not require an EIR, include ministerial projects, emergency repairs to public service facilities, and a variety of other projects described in *Pub. Res. Code § 21080(b)* and *14* Cal. Code Reg. § 15261 et seq. In addition, development projects that consist of the construction, conversion, or use of residential housing of not more than 100 units in an urbanized area that is affordable to low-income households and residential projects on infill sites in urban areas are also exempt from CEQA if they meet certain conditions [*see Pub. Res. Code §§ 21159.23, 21159.24*]. The agency or the person undertaking an exempt project may--but is not required to--file a notice of exemption for the project with the Office of Planning and Research, in the case of a state agency, or with the county clerk, in the case of a local agency [*see Pub. Res. Code §§ 21108(b)* (state agency), 21152(b) (local agency); *14 Cal. Code Reg. § 15062*]. However, when a local agency determines that a project is not subject to CEQA under exemptions applicable to agricultural housing, affordable housing, and residential infill projects [*Pub. Res. Code §§ 21159.22-21159.24*; *14* Cal. Code Reg. §§ 15192-15195] and it approves or determines to carry out that project, the local agency or person seeking project approval is required to file a notice of the determination with OPR [*Pub. Res. Code § 21152.1*; *14* Cal. Code Reg. § 15062(e)].

For discussion of all the exemptions under CEQA, see *California Environmental Law and Land Use Practice, Ch. 21, Preliminary Review, Exemptions, and Negative Declarations, § 21.06* (Matthew Bender).

In addition, certain environmentally oriented state agencies, in the course of their regulatory activities, are already required to consider environmental effects and issue plans or other documents containing environmental information, which they may submit in lieu of an EIR. The Secretary of the Resources Agency is authorized to exempt these agencies from EIR requirements if they meet certain criteria [*see Pub. Res. Code § 21080.5(a), (d)*]. Agencies with certified regulatory programs are nonetheless subject to the remaining CEQA requirements. For a list of regulatory programs that have been certified as meeting the requirements of *Pub. Res. Code § 21080.5*, see *14 Cal. Code Reg. § 15251*. For further discussion of certified regulating programs under CEQA, see *California Environmental Law and Land Use Practice, Ch. 21, Preliminary Review, Exemptions, and Negative Declarations, § 21.07* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-418 California Forms of Pleading and Practice--Annotated § 418.34

AUTHOR: By Roger Beers

§ 418.34 Determination of Necessity for Environmental Impact Report or Negative Declaration

If a project is subject to CEQA requirements, the lead agency must prepare an initial study to determine whether a negative declaration or an environmental impact report (EIR) must be prepared for the project. The initial study may identify environmental effects by using a checklist [*see 14 Cal. Code Reg. § 15063(d)-(f)*; *14 Cal. Code Reg. § 15000 et seq.*, Appendix G (Environmental Checklist Form)], but must also disclose the data or evidence relied on. If the initial study shows that no significant environmental effects would occur, the agency then prepares a negative declaration--a written statement briefly explaining the reasons for the conclusion that no EIR is required [*Pub. Res. Code § 21080(c)*]. If otherwise significant effects can be mitigated to levels of insignificance, a "mitigated negative declaration" may be prepared [*Pub. Res. Code § 21064*]. If the project would still result in one or more significant effects even after mitigation, an EIR must be prepared [*see 14 Cal. Code Reg. § 15063(b)*]. At various stages of the process, the lead agency is required to consult with, or provide notice to responsible agencies and others [*Pub. Res. Code §§ 21080.3(a), 21080.4(a)*; *14 Cal. Code Reg. §§ 15063(g), 15386*].

The standard for determining whether an EIR is required is the "fair argument" test. "If there is substantial evidence of significant environmental impact, evidence to the contrary does not dispense with the need for an EIR if it still can be 'fairly argued' that the project may have a significant impact" [*City of Livermore v. Local Agency Formation Com. (1986) 184 Cal. App. 3d 531, 540, 230 Cal. Rptr. 867]* . For detailed discussion of negative declarations, see *California Environmental Law and Land Use Practice, Ch. 21, Preliminary Review, Exemptions, and Negative Declarations, § 21.09* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: By Roger Beers

§ 418.35 Contents of Environmental Impact Report

[1] General Topics

The general topics that must be considered in an environmental impact report (EIR) are set forth in *Pub. Res. Code § 21100(b)*. Among these are the identification of the project's significant effects on the environment, mitigation measures proposed to minimize such significant effects, any such effects that cannot be avoided, alternatives to the proposed project, and the project's growth-inducing impact. For additional requirements contained in the guidelines relating to the contents of EIRs, see *14 Cal. Code Reg. §§ 15120-15132*. For detailed coverage of EIR contents, see *California Environmental Law and Land Use Practice, Ch. 22, Environmental Impact Reports, § 22.04* (Matthew Bender).

[2] Scope of Environmental Impacts Required to Be Considered

In applying CEQA, courts have invalidated EIRs that did not contain an accurate, stable, and finite project description [*Mira Monte Homeowners Assn. v. County of Ventura (1985) 165 Cal. App. 3d 357, 365, 212 Cal. Rptr. 127]* . Similarly, when there is a series of smaller projects or phases that are intended to be completed as a whole, the EIR must cover the complete, integrated plan [*Environmental Defense Fund, Inc. v. Coastside County Water Dist. (1972) 27 Cal. App. 3d 695, 706*].

Consideration must also be given to the cumulative effects of proposed projects in connection with other projects in the affected area. An EIR must include an analysis of the environmental effects of future expansion or other action if (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will likely change the scope or nature of the initial project or its environmental effects [*Laurel Heights Improvement Ass'n v. Regents of University of California (1988) 47 Cal. 3d 376, 396*]. However, when future development is unspecified and uncertain, no purpose can be served by requiring an EIR to engage in speculation as to the future environmental consequences of that development [*No Oil, Inc. v. City of Los Angeles (1974) 13 Cal. 3d 68, 77 n.5, 118 Cal. Rptr. 34, 529 P.2d 66* (EIR dealing with exploratory drilling must discuss impact of commercial development which may result only when meaningful inquiry into consequences of such development can be made)].

[3] Discussion of Feasible Alternatives

EIRs are required to consider a reasonable range of feasible alternatives [*Laurel Heights Improvement Ass'n v. Regents of University of California (1988) 47 Cal. 3d 376, 400*]. It is the responsibility of the lead agency--not the project opponents--to identify and discuss the alternatives. In *Laurel Heights*, the California Supreme Court held an EIR deficient for its failure to analyze the alternative locations for proposed research facilities and the reasons why they were infeasible [*Laurel Heights Improvement Ass'n v. Regents of University of California (1988) 47 Cal. 3d 376, 416*]. However, in another case, the Court held that an EIR's failure to discuss certain alternative sites for a hotel did not make the EIR inadequate when the agency had determined that a hotel was inconsistent with the local plan for the sites and the sites were not owned by the developer [*Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal. 3d 553, 572-574, 276 Cal. Rptr. 410, 801 P.2d 1161]* . For further discussion on the treatment of alternatives in EIRs, see *California Environmental Law and Land Use Practice, Ch. 22, Environmental Impact Reports, § 22.04[8]* (Matthew Bender).

[4] Different Kinds of EIRs

In addition to EIRs on individual development projects, CEQA also allows an agency to prepare EIRs at a more general level of action--such as the adoption of a general plan. These kinds of EIRs include program EIRs, tiered EIRs, and Master EIRs. The distinctions among them are not always clear. The preparation of these kinds of general EIRs may allow for more limited CEQA review of subsequent projects covered in the general EIR [*see, e.g., Pub. Res. Code § 21157.1*]. If the subsequent project will have no additional significant impact not identified in the prior EIR and no new or additional mitigation or alternatives may be required, no new environmental document is required [*see, e.g., Pub. Res. Code § 21157.1(c)*].

On the other hand, a subsequent project not within the scope of the project covered by the prior EIR will require either a mitigated negative declaration or an EIR [*see, e.g., Pub. Res. Code § 21157.1(d)*]. One kind of EIR prepared on a subsequent project is a "focused" EIR, that is, one prepared for a subsequent project identified in a "master" environmental impact report [*see Pub. Res. Code § 21158*]. Similarly, "tiering" means the coverage of general matters and environmental effects in an EIR prepared for a policy, plan, program, or ordinance followed by narrower or site-specific EIRs that incorporate by reference the discussion in any prior EIR and that concentrate on the environmental effects that (1) are capable of being mitigated, or (2) were not analyzed as significant effects on the environment in the prior EIR [*Pub. Res. Code § 21068.5*]. For a discussion of different types of EIRs, see *California Environmental Law and Land Use Practice, Ch. 22, Environmental Impact Reports, § 22.02* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawGeneral OverviewEnvironmental LawNational Environmental Policy ActGeneral OverviewEnvironmental LawNational Environmental Policy ActEnvironmental Impact StatementsEnvironmental LawZoning & Land UseComprehensive & General PlansReal Property LawZoning & Land UseJudicial Review

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PART II. LEGAL BACKGROUND
B. California Environmental Quality Act (CEQA)

36-418 California Forms of Pleading and Practice--Annotated § 418.36

AUTHOR: By Roger Beers

§ 418.36 Procedural Requirements for Preparation of Environmental Impact Reports

When an environmental impact report (EIR) is required for a project, the lead agency must immediately send notice of its determination to each responsible agency, the Office of Planning and Research, and to those public agencies having jurisdiction by law over natural resources affected by the project which are held in trust for the people of California [*Pub. Res. Code § 21080.4(a)*]. Those agencies in turn must provide the lead agency with written information regarding the scope and content of the environmental information which is germane to those agencies' responsibilities in connection with the proposed project and which must be included in the EIR [*Pub. Res. Code § 21080.4(a)*; *14 Cal. Code Reg. §§ 15082(b), 15375*]. Before completing the EIR, the lead agency must consult with, and obtain comments from, these agencies and any city or county that borders on a city or county within which the project is located and in the case of certain types of projects, consultation is also needed with transportation planning agencies, the State Air Resources Board, and the Department of Water Resources [*Pub. Res. Code §§ 21104* (state agencies), 21153 (local agencies); *14 Cal. Code Reg. § 15086*]. Any lead agency that is preparing an EIR or a negative declaration must also provide public notice of the availability of the draft EIR or negative declaration and specify the period during which comments will be received thereon [*Pub. Res. Code § 21092*].

The public review period for a draft EIR must be not less than 30 days. When it is submitted to the State Clearinghouse for review, the period must be not less than 45 days [*Pub. Res. Code § 21091(a)*]. CEQA does not require formal public hearings, but the Guidelines require a meaningful opportunity for public participation in the process [*14 Cal. Code Reg. § 15087(g)*]. The agency must respond to the comments received in the final EIR [Pub. Res. Code. § 21091(d)(2)(A)]. However, an EIR must be recirculated for public comment when new information added to the EIR discloses that the draft EIR was so fundamentally and basically inadequate and conclusory in nature that public comment on the draft was in effect meaningless [*Laurel Heights Improvement Assn. v. Regents of University of California (1993) 6 Cal. 4th 1112, 1130, 26 Cal. Rptr. 2d 231, 864 P.2d 502]* . For discussion of other notices or supplementation that may be required for new information added to an EIR, see *California Environmental Law and Land Use Practice, Ch. 22, Environmental Impact Reports, § 22.03[4][i]* (Matthew Bender).

If the EIR identifies environmental impacts that remain significant after investigation, the agency must make one or more of the following findings with regard to each significant effect:

- Changes or alterations have been required in, or incorporated into, the project that mitigate or avoid the significant effects on the environment;

- Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency; or

- Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportuni ties for highly trained workers, make infeasible the mitigation measures or alternatives identified in the EIR.

In the latter case, the agency must also find that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment [*14 Cal. Code Reg. § 15093(a)*]. A statement of overriding considerations must make a good faith effort to inform the public and decisionmakers about the consequences of environmental decisions, and the reasons for and against them [*Woodward Park Homeowners Association Inc. v. City of Fresno (2007) 150 Cal. App. 4th 683, 718, 58 Cal. Rptr. 3d 102]* .

The agency must also adopt a mitigation monitoring program, to ensure compliance with mitigation measures imposed by the agency during project implementation [*Pub. Res. Code § 21081.6(a)(1)*].

Finally, when an agency approves or determines to carry out a project that is subject to the provisions of CEQA, the agency must file notice of its approval or determination [*Pub. Res. Code § 21108(a)* (state agencies), *Pub. Res. Code § 21152(a)* (local agencies); *14 Cal. Code Reg. §§ 15094(a), 15096(i)* (notice of determination regarding project for which EIR prepared); *14 Cal. Code Reg. §§ 15075(a), 15096(i)* (notice of determination regarding project for which negative declaration prepared)]. The filing of the notice of determination starts the 30-day statute of limitations on court challenges to the approval of a project [*Pub. Res. Code § 21167(c)*; *see § 418.37[3]* (time limits for commencing action)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawAssessment & Information AccessPublic ParticipationEnvironmental LawNational Environmental Policy ActGeneral OverviewEnvironmental LawNational Environmental Policy ActEnvironmental Impact StatementsGovernmentsLegislationStatutes of LimitationsTime Limitations

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36-418 California Forms of Pleading and Practice--Annotated § 418.37

AUTHOR: By Roger Beers

§ 418.37 Judicial Review of Agency Decisions Under CEQA

[1] Review by Writ of Mandate

An action or proceeding may be brought to attack, review, set aside, void, or annul acts or decisions of public agencies on the grounds of noncompliance with CEQA [*see Pub. Res. Code § 21167*]. CEQA provides for relief through writ of mandate [*see Pub. Res. Code §§ 21168, 21168.5*]. Mandamus is not the exclusive procedure by which the validity of a governmental action may be challenged for alleged violation of CEQA [*see Hills For Everyone v. Local Agency Formation Com. (1980) 105 Cal. App. 3d 461, 468, 164 Cal. Rptr. 420* (declaratory and injunctive relief)]. For a sample Petition for Writ of Mandate, see *§ 418.150*.

[2] Scope of Review

CEQA requires a two-pronged inquiry as to (1) whether or not there is any substantial evidence in light of the whole record to support the administrative decision; and (2) whether or not the agency making the decision abused its discretion by failing to proceed in the manner required by law [*see Pub. Res. Code §§ 21168, 21168.5*; *Long Beach Sav. & Loan Assn. v. Long Beach Redevelopment Agency (1986) 188 Cal. App. 3d 249, 259-260, 232 Cal. Rptr. 772* ; *Dehne v. County of Santa Clara (1981) 115 Cal. App. 3d 827, 835, 171 Cal. Rptr. 753] . Pub. Res. Code § 21168* applies to agencies required by law to hold hearings, and *Pub. Res. Code § 21168.5* applies to agencies that are not required to hold hearings. In determining which section applies, however, the critical issue to be resolved is not whether the public agency was required by law to hold a hearing, but whether the administrative action was quasi-legislative or quasi-judicial in nature--challenged respectively in traditional mandamus proceedings and in administrative mandamus proceedings [*Western States Petroleum Assn. v. Superior Court (1995) 9 Cal. 4th 559, 567-568, 38 Cal. Rptr. 2d 139, 888 P.2d 1268]* .

For further discussion and forms relating to traditional mandate proceedings, see Ch. 358, *Mandate and Prohibition* . For further discussion and forms relating to the use of administrative mandamus, see Ch. 474, *Availability of Judicial Review of Agency Decisions* . For coverage of the standards of review under CEQA, see *California Environmental Law*

and Land Use Practice, Ch. 23, CEQA Litigation, § 23.04[3] (Matthew Bender).

PRACTICE TIP:

Standard of Review Virtually the Same. For all practical purposes, the standard of judicial review in CEQA actions is virtually the same under either ordinary or administrative mandamus, and review in both forms of action is largely confined to the administrative record compiled by the agency.

[3] Time Limits for Commencement of Action

An action or proceeding alleging that a public agency is carrying out or has approved a project that may have a significant effect on the environment without having determined whether the project may have a significant effect on the environment must be commenced within 180 days from the date of the public agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days from the date of commencement of the project [*Pub. Res. Code § 21167(a)*]. Any action or proceeding alleging that a public agency has improperly determined whether a project may have a significant effect on the environment, or alleging that an EIR does not comply with CEQA, or alleging that any other act or omission of a public agency does not comply with CEQA, must be commenced within 30 days from the date of the filing of the notice of approval or determination to carry out the project [*Pub. Res. Code § 21167(b), (c), (e)*; *see Committee for Green Foothills v. Santa Clara County (2010) 48 Cal. 4th 32, 39, 105 Cal. Rptr. 3d 181, 224 P.3d 920* (filing of notice of decision triggers 30-day statute of limitations for all CEQA challenges to decision announced in notice)]. Any action or proceeding alleging that a public agency has improperly determined that a project is not subject to CEQA must be commenced within 35 days from the date of the filing of the notice of approval or determination to carry out the project [*Pub. Res. Code § 21167(d)*; *see Stockton Citizens for Sensible Planning v. City of Stockton (2010) 48 Cal. 4th 481, 489, 106 Cal. Rptr. 3d 858, 227 P.3d 416* (35-day statute of limitations runs from filing of notice of exemption, whether or not NOE is substantively or procedurally flawed)].

The 90-day service of summons requirement of *Gov. Code § 66499.37* (action seeking review of a public decision concerning a subdivision under the Subdivision Map Act) applies to CEQA causes of action concerning a subdivision [*Friends of Riverside's Hills v. City of Riverside (2008) 168 Cal. App. 4th 743, 754, 85 Cal. Rptr. 3d 695*]. The two statutory schemes are not in conflict, because a plaintiff can comply with the SMA service of summons requirement as well as CEQA service requirements. Thus, in a case challenging a city's approval of tract maps for a development project, the plaintiff's CEQA cause of action concerned a subdivision because it overlapped with other SMA causes of action in the writ petition and could have been brought under the SMA. The trial court therefore did not err when it dismissed the entire petition for failure to comply with Section 66499.37 [*Friends of Riverside's Hills v. City of Riverside (2008) 168 Cal. App. 4th 743, 755-756, 85 Cal. Rptr. 3d 695*].

[4] Timing for Request of Hearing

In any action or proceeding alleging noncompliance with CEQA, the petitioner must request a hearing within 90 days from the date of filing the petition or be subject to dismissal on the court's own motion or on the motion of any interested party [*Pub. Res. Code § 21167.4(a)*]. To avoid dismissal, the request for hearing must be in writing [*County of Sacramento v. Superior Court (2009) 180 Cal. App. 4th 943, 949, 103 Cal. Rptr. 3d 449]* . In the absence of good cause, briefing must be completed within 90 days from the date the request is filed and the hearing, if feasible, must be held within 30 days thereafter. The parties may stipulate to a different briefing schedule or hearing date if approved by the court [*Pub. Res. Code § 21167.4(c)*].

The requirement that the petitioner file a request for a hearing within 90 days from the date of filing the petition does not mean that the petitioner must take other affirmative steps sufficient to place the matter on the court's docket within the 90-day period. Rather, under the statute, any party may file an application for a hearing date after the request for a hearing has been filed [*Association for Sensible Development at Northstar, Inc. v. Placer County (2004) 122 Cal.*

App. 4th 1289, 1294-1295, 19 Cal. Rptr. 3d 440 , declining to follow *McCormick v. Board of Supervisors (1988) 198 Cal. App. 3d 352, 358, 243 Cal. Rptr. 617* (interpreting former version of § 21167.4 and holding that petitioner was required to take affirmative steps sufficient to place matter on court's docket for hearing, either by filing and serving notice of hearing or utilizing some other method authorized by local rules of court; mere advisory pleading stating that petitioner requests hearing was inadequate)].

In *Association for Sensible Development at Northstar, Inc. v. Placer County*, the court explained that under the current version of the statute, after the petitioner files a request for a hearing, "any party" may file an "application" for a hearing date, at which point in time the court must set the hearing. Thus, the petitioner controls the timing of the filing of the request for a hearing, and must file that request within 90 days of the filing of the petition. Immediately after filing that document, the petitioner must serve it on all parties. At this point, either the petitioner or the respondent can force the trial court to set a hearing by filing an "application" as soon as the petitioner completes the first step. Either party may move the petition to a hearing on the merits, satisfying the legislative intent that CEQA proceedings be conducted expeditiously [*Association for Sensible Development at Northstar, Inc. v. Placer County (2004) 122 Cal. App. 4th 1289, 1294-1295, 19 Cal. Rptr. 3d 440* ; *see also* *Leavitt v. County of Madera (2004) 123 Cal. App. 4th 1502, 1517, 20 Cal. Rptr. 3d 578*].

For additional discussion of the timing for request of a hearing, see *California Environmental Law and Land Use Practice, Ch. 23, CEQA Litigation, § 23.03[6]* (Matthew Bender).

[5] Required Service of Notice and Pleadings

Proof of prior service by mail on the public agency carrying out or approving the project of a written notice of the commencement of any action or proceeding under CEQA must be filed concurrently with the initial pleading in the action or proceeding [*Pub. Res. Code § 21167.5*]. In addition, the petitioner must furnish a copy of the pleading or a copy of any amended or supplemental pleading to the State Attorney General, and no temporary or permanent relief may be granted until the pleading is furnished to the Attorney General [*Pub. Res. Code § 21167.7*]. For a discussion of service of notice and pleadings, see *California Environmental Law and Land Use Practice, Ch. 23, CEQA Litigation, § 23.03[2], [3]* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewAdministrative RecordGeneral OverviewAdministrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewEnvironmental LawLitigation & Administrative ProceedingsJudicial ReviewEnvironmental LawNational Environmental Policy ActEnvironmental Impact StatementsEnvironmental LawZoning & Land UseJudicial ReviewGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawZoning & Land UseAdministrative Procedure

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B. California Environmental Quality Act (CEQA)

36-418 California Forms of Pleading and Practice--Annotated §§ 418.38-418.49

AUTHOR: By Roger Beers

[Reserved]

§§ 418.38[Reserved]

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PART II. LEGAL BACKGROUND
C. Citizen Suits

36-418 California Forms of Pleading and Practice--Annotated § 418.50

AUTHOR: By Roger Beers

§ 418.50 Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65)

[1] Overview of Proposition 65

[a] Background of Proposition 65

Proposition 65, a statewide initiative passed in 1986 by the California electorate, added the Safe Drinking Water and Toxic Enforcement Act of 1986 [*Health & Safety Code § 25249.5 et seq.*]. Proposition 65 also amended *Health & Safety Code § 25189.5(d)* (relating to the disposal of hazardous waste at a facility lacking a permit to receive it or at an unauthorized point) to increase the upper limit of the daily penalty imposed from $50,000 to $100,000 and added *Health & Safety Code § 25180.7* (defining "designated government employee" and prescribing duties) [Proposition 65 (Nov. 1986), §§ 3, 4]. Both of these statutes are found in the enforcement provisions [*Health & Safety Code §§ 25180-25196*] of the Hazardous Waste Control Law [*Health & Safety Code § 25100 et seq.*].

[b] Application of Proposition 65 and Persons Who May Bring Suits

The Act applies to chemicals that are "known to the state to cause cancer or reproductive toxicity," which are required to be compiled in an official list [*Health & Safety Code § 25249.8(b)*]. For any chemicals listed, the Act prohibits:

- The knowing discharge of such chemicals into sources of drinking water [*Health & Safety Code § 25249.5*]; and

- The knowing and intentional exposure of any individual to such chemicals without giving advance warning [*Health & Safety Code § 25249.6*].

There are a number of exemptions from these prohibitions [*see* [5], *below*]. In addition, suits against violators may be brought by:

- The Attorney General, a district attorney, or a city attorney or city prosecutor [*Health & Safety Code § 25249.7(c)*]; and

- "[B]y any person in the public interest" if a 60-day notice is given and if none of the governmental officials listed in the first bulleted item "has commenced and is diligently prosecuting an action against the violation" [*Health & Safety Code § 25249.7(d)*]. For a sample 60-day notice of intent to sue under Proposition 65, and a checklist of the information that must be included in the notice, see *§ 418.171*.

[c] Notices and Reports to Attorney General

Any person bringing an action in the public interest, or any private person bringing an action in which a violation of the Act is alleged, must notify the Attorney General that such an action has been filed. The plaintiff, or any private person settling a violation of the Act alleged in a 60-day notice [*see § 418.171*], must also submit to the Attorney General a reporting form that includes the results of settlement or judgment of the action or violation, including financial terms, and the final disposition of the case, even if dismissed [*Health & Safety Code § 25249.7(e), (f)*]. If there is a settlement of an action brought by a person in the public interest, the plaintiff must submit the settlement to the court for approval on noticed motion [*Health & Safety Code § 25249.7(f)(4)*]. This requirement does not apply to a voluntary dismissal in which no consideration is received from the defendant. The court may approve the settlement only if (1) it finds that any warning required by the settlement complies with the Act, (2) any award of attorneys' fees is reasonable under California law, an d (3) any penalty amount is reasonable [*Health & Safety Code § 25249.7(f)(4)*]. The plaintiff has the burden of producing evidence sufficient to sustain each required finding [*Health & Safety Code § 25249.7(f)(5)*]. The plaintiff must serve the motion and all supporting papers on the Attorney General, who may appear and participate in any proceeding without intervening in the case [*Health & Safety Code § 25249.7(f)(5)*].

At the time judgment is filed, the plaintiff must file an affidavit verifying that the report was accurately completed and submitted to the Attorney General [*Health & Safety Code § 25249.7(f)*]. In addition, the plaintiff must submit a report that includes information on any corrective action being taken as a part of the settlement or resolution of the action [*Health & Safety Code § 25249.7(f)*]. All of the information submitted to the Attorney General must be made available to the public [*Health & Safety Code § 25249.7(g)*].

[d] Constitutionality of Proposition 65

Private citizen enforcement provisions of the Act have been held not to violate separation of powers and due process principles. The California Constitution does not specify, as does the United States Constitution, that a state's judicial power extends only to "cases and controversies." Thus, the Act's grant of standing to sue to "any person in the public interest" is not unconstitutional and federal cases interpreting standing under the United States Constitution do not purport to impose the same requirements in cases arising under the California Constitution. California authority supports the conclusion that a suit by citizens in the undifferentiated public interest is justiciable, or appropriate for decision in a California court [*National Paint & Coatings Assn. v. State of California (1997) 58 Cal. App. 4th 753*

[2] Purpose of Act

The purpose of the Act is to further the rights of the people:

- To protect themselves and the water they drink against chemicals with harmful effects;

- To be informed about exposures to chemicals that cause cancer, birth defects, or other reproductive harm;

- To secure strict enforcement of the laws controlling hazardous chemicals and deter actions that

threaten public health and safety; and

- To shift the cost of hazardous waste cleanups more onto offenders and less onto law-abiding taxpayers.

The initiative was the result of the people's findings that [Proposition 65 (Nov. 1986), § 1]:

- Hazardous chemicals pose a serious potential threat to the health and well-being of the people of California;

- State government agencies have failed to provide the people with adequate protection; and

- These failures have been serious enough to lead to investigations by federal agencies of the administration of California's toxic protection programs.

[3] Definitions of Terms Used in Act

[a] Person

"Person" means an individual, trust, firm, joint stock company, corporation, company, partnership, limited liability company, and association [*Health & Safety Code § 25249.11(a)*].

[b] Person in the Course of Doing Business

"Person in the course of doing business" means a person employing 10 or more employees in his or her business [*see Health & Safety Code § 25249.11(b)*]. The term does not include [*Health & Safety Code § 25249.11(b)*]:

- Any person employing fewer than 10 employees in his or her business;

- Any city, county, or district or any department or agency thereof, or the state or any department or agency thereof, or the federal government or any department or agency thereof; or

- Any entity in its operation of a public water system as defined in *Health & Safety Code § 116275*.

[c] Significant Amount

"Significant amount" means any detectable amount except an amount which would meet the exemption test in *Health & Safety Code § 25249.10(c)* [*see* [5][b] and [c], *below*] if an individual were exposed to such an amount in drinking water [*Health & Safety Code § 25249.11(c)*].

[d] Source of Drinking Water

"Source of drinking water" means a present source of drinking water or water which is identified or designated in a water quality control plan adopted by a regional board as being suitable for domestic or municipal uses [*Health & Safety Code § 25249.11(d)*]. In *People ex rel. Lungren v. Superior Court*, the California Supreme Court held that faucets containing lead constituted a source of drinking water [*People ex rel. Lungren v. Superior Court (1996) 14 Cal. 4th 294, 307-308, 58 Cal. Rptr. 2d 855, 926 P.2d 1042]* .

[e] Threaten to Violate

"Threaten to violate" means to create a condition in which there is a substantial probability that a violation will occur [

Health & Safety Code § 25249.11(e)].

[4] Chemicals Known to State to Cause Cancer or Reproductive Toxicity

A chemical is known to the state to cause cancer or reproductive toxicity if [*Health & Safety Code § 25249.8(b)*]:

- In the opinion of the state's qualified experts the chemical has been clearly shown through scientifically valid testing according to generally accepted principles to cause cancer or reproductive toxicity;

- A body considered to be authoritative by the state's qualified experts has formally identified the chemical as causing cancer or reproductive toxicity; or

- An agency of the state or federal government has formally required that the chemical be labeled or identified as causing cancer or reproductive toxicity.

Listed chemicals are contained in regulations adopted by the Health & Welfare Agency [*see 22 Cal. Code Reg. § 12000*].

[5] Prohibitions and Exceptions

[a] Discharge of Chemical

Except as provided in *Health & Safety Code § 25249.9*, the Act prohibits any person in the course of doing business from knowingly discharging or releasing a listed chemical into water or onto or into land when such chemical passes or probably will pass into any source of drinking water [*Health & Safety Code § 25249.5*]. *Health & Safety Code § 25249.9* excepts from this provision:

- Any discharge or release that takes place less than 20 months after the inclusion of the chemical in question on the list required to be published under *Health & Safety Code § 25249.8(a)*; and

- Any discharge or release that (1) will not cause any significant amount of the discharged or released chemical to enter any source of drinking water and (2) is in conformity with all other laws and with every applicable regulation, permit, requirement, and order [*Health & Safety Code § 25249.9(b)*].

In any action to enforce the provisions of *Health & Safety Code § 25249.5*, the burden of showing that the discharge or release meets the requirements of *Health & Safety Code § 25249.9(b)* is on the defendant [*Health & Safety Code § 25249.9(b)*].

[b] Exposure of Others to Chemical Without Warning

Except as provided in *Health & Safety Code § 25249.10*, no person in the course of business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to this individual [*Health & Safety Code § 25249.6*]. *Health & Safety Code § 25249.10* excepts from this provision:

- An exposure for which federal law governs warning in a manner that preempts state authority [*Health & Safety Code § 25249.10(a)*];

- An exposure that takes place less than 12 months after the inclusion of the chemical in question on the list required to be published under *Health & Safety Code § 25249.8(a)* [*Health & Safety Code §*

25249.10(b)]; and

- An exposure for which the person responsible can show that the exposure poses no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer, and that the exposure will have no observable effect assuming exposure at 1,000 times the level in question for substances known to the state to cause reproductive toxicity, based on evidence and standards of comparable scientific validity to the evidence and standards which form the scientific basis for the listing of the chemical under *Health & Safety Code § 25249.8(a)* [*Health & Safety Code § 25249.10(c)*]. In any action to enforce the provisions of *Health & Safety Code § 25249.6*, the burden of showing that an exposure meets this exception is on the defendant [*Health & Safety Code § 25249.10(c)*].

The warning required by *Health & Safety Code § 25249.6*, may be provided by general methods such as labels on consumer products, inclusion of notices in mailings to water customers, posting of notices, placing notices in public news media, and the like, provided that the warning accomplished is clear and reasonable. To minimize the burden on retail sellers of consumer products, including foods, regulations implementing *Health & Safety Code § 25249.6* must to the extent practicable place the obligation to provide any warning materials (such as labels) on the producer or packager rather than on the retail seller [*Health & Safety Code § 25249.11(f)*]. However, when the retail seller itself is responsible for introducing a chemical known to the state to cause cancer or reproductive toxicity into the consumer product in question, the retail seller is then required to provide the warning [*Health & Safety Code § 25249.11(f)*].

[c] Significant Risk Defense

The person responsible for the discharge or exposure of a listed chemical has a defense if it can be shown that it "poses no significant risk assuming lifetime exposure at the level in question" [*Health & Safety Code § 25249.10(c)*]. The defendant has the burden of proof on this defense. In the case of discharges into drinking water, this defense is available only if the discharge is "in conformity with all other laws, and with every applicable regulation, permit requirement and order" [*Health & Safety Code § 25249.9(b)(2)*].

[6] Scienter Requirements

Liability under the Act occurs only if the discharge or exposure is done "knowingly." The regulations define "knowingly" as the "knowledge of the fact that a discharge of, release of, or exposure to a chemical listed pursuant to *Health & Safety Code § 25249.8(a)* is occurring. No knowledge that the discharge, release, or exposure is unlawful is required" [22 Cal. Code Reg. § 12102(n)]. The exposure prohibition in *Health & Safety Code § 25249.6* adds the condition that exposure be done "intentionally."

[7] Penalties and Enforcement

Any person violating or threatening to violate *Health & Safety Code § 25249.5* or *25249.6* may be enjoined from doing so [*Health & Safety Code § 25249.7(a)*] and may be liable for a civil penalty not to exceed $2,500 per day for each violation in addition to any other penalty established by law [*Health & Safety Code § 25249.7(b)*]. Actions for relief may be brought in any court of competent jurisdiction.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawThe JudiciaryCase or ControversyStandingGeneral OverviewEnvironmental LawAssessment & Information AccessPublic ParticipationEnvironmental LawWater QualitySafe Drinking Water ActGeneral OverviewEnvironmental LawWater QualitySafe Drinking Water ActCoverageEnvironmental LawWater QualitySafe Drinking Water ActEnforcementGovernmentsLocal GovernmentsClaims By & Against

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36-418 California Forms of Pleading and Practice--Annotated § 418.51

AUTHOR: By Roger Beers

§ 418.51 Other Private Enforcement and Tort Actions Based on Statutes

Environmental statutes may expressly confer the right to bring a civil action. For example, "any person" may maintain an action for declaratory or equitable relief to restrain any violation of the California Coastal Act [*Pub. Res. Code § 30803*]. In one case involving a citizen's suit under this provision, the court noted that it was the intent of the Coastal Act to allow broad citizen participation in enforcing the provisions of the Act, and not to limit standing to those with an actual financial stake in the outcome [*Sanders v. Pacific Gas & Elec. Co. (1975) 53 Cal. App. 3d 661, 673, 126 Cal. Rptr. 415]* . Such "citizen suit" provisions are more common under federal environmental statutes [*see, e.g., 42 U.S.C. § 7604* (Clean Air Act conferring right to bring civil action on private party)]. Violation of a statute may trigger the presumption of failure to use due care [*see Evid. Code § 669*; *see also § 418.62[3]*]. Violation of a statute may also, in itself, constitute a tort [*see Czap v. Credit Bureau of Santa Clara Valley (1970) 7 Cal. App. 3d 1, 6, 86 Cal. Rptr. 417]* . For further discussion and a form relating to recovery based on statutory liability generally, see Ch. 531, *Statutes and Ordinances* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawAir QualityEnforcementGeneral OverviewEnvironmental LawAir QualityEnforcementCitizen SuitsTortsNegligenceProofViolations of LawGeneral OverviewTortsNegligenceProofViolations of LawStatutes

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36-418 California Forms of Pleading and Practice--Annotated § 418.52

AUTHOR: By Roger Beers

§ 418.52 Suits for "Unlawful Business Practices"

The Business and Professions Code prohibitions against "unfair competition"--defined as "any unlawful, unfair or fraudulent business act or practice" [*Bus. & Prof. Code § 17200*]--create a right to sue for violations of other statutes even when those statutes do not themselves confer any standing for private actions or, perhaps, even when they create more limited standing for actions. *Bus. & Prof. Code § 17204* formerly granted standing in "[a]ctions for any relief pursuant to this chapter to any person acting for the interests of itself, its members or the general public." However, in 2004, the electorate approved Proposition 64, which amended *Bus. & Prof. Code § 17204* to limit standing to persons who have suffered injury in fact and have lost money or property as a result of unfair competition. Proposition 64 stated that its intent was to prohibit private attorneys from filing lawsuits for unfair competition when they do not have clients who have been injured in fact under the standing requirements of the United States Constitution [Proposition 64, § 1(h) (2004)]. As a result, a person may now pursue representative claims or relief on behalf of others only if the claimant has suffered injury in fact and has lost money or property as a result of such unfair competition [*see Bus. & Prof. Code §§ 17203, 17204, 17535*].

The remedies under *Bus. & Prof. Code § 17203* include injunctive relief, the appointment of a receiver, or such orders or judgments "as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." This provision does not create a private right of action for "damages," but it has been construed to allow for the remedy of "restitution" [*see Fletcher v. Security Pacific Bank (1979) 23 Cal. 3d 442, 449, 153 Cal. Rptr. 28, 591 P.2d 51]* . When the action is brought for the "general public," restitution in favor of the general public is available [*People v. Thomas Shelton Powers, M.D., Inc. (1992) 2 Cal. App. 4th 330, 339-344, 3 Cal. Rptr. 2d 34]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureJusticiabilityStandingInjury in

FactEnvironmental LawNational Environmental Policy ActEnvironmental Impact StatementsTortsBusiness TortsUnfair Business PracticesGeneral Overview

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AUTHOR: By Roger Beers

[Reserved]

§§ 418.53[Reserved]

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36-418 California Forms of Pleading and Practice--Annotated § 418.60

AUTHOR: By Roger Beers

§ 418.60 Nuisance

[1] Definition of Nuisance

"Nuisance" is defined as anything that is injurious to health, and includes anything which is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable water body, or any public park, square, street, or highway [*Civ. Code § 3479*]. There are two kinds of nuisance, public and private [*see Civ. Code §§ 3480, 3481*].

For detailed coverage and forms relating to nuisance generally, see Ch. 391, *Nuisance* .

[2] Public or Private Nuisance

A public nuisance is one that affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted on individuals may be unequal [*Civ. Code § 3480*]. A private person may maintain an action for a public nuisance only if it is specially injurious to the plaintiff's private property, or to a private right incidental thereto [*Civ. Code § 3493*; *Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 124, 99 Cal. Rptr. 350]* . Thus, the special injury must be different in kind from that suffered by the general public [*Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 124, 99 Cal. Rptr. 350]* . Proximity to the source of a public nuisance may constitute the special injury required to bring an action under *Civ. Code § 3493* [*Wade v. Campbell (1962) 200 Cal. App. 2d 54, 60, 19 Cal. Rptr. 173* (persons living near dairy who were affected by odors, unpleasant sights and sounds, excessive mosquitoes and flies, and pollution of creek, suffered special injury apart from that suffered by general public)].

The essence of a private nuisance is an interference with the plaintiff's use and enjoyment of land [*Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 124-125, 99 Cal. Rptr. 350]* . Plaintiffs who fail to allege any perceptible injury to their individual property interests apart from that associated with the community at large do

not have a cause of action for private nuisance [*Brown v. Petrolane, Inc. (1980) 102 Cal. App. 3d 720, 727, 162 Cal. Rptr. 551* (operation of liquefied petroleum facilities within 2,000 feet of plaintiffs' homes as insufficient allegation of private nuisance)].

[3] Permanent or Continuing Nuisance

A nuisance is considered permanent when it is of such a character that it will presumably continue indefinitely and, as a practical matter, cannot be abated [*Phillips v. City of Pasadena (1945) 27 Cal. 2d 104, 107, 162 P.2d 625]* . The clearest case of a permanent nuisance occurs when the offending structure or condition is maintained as a necessary part of the operations of a public utility [*Spaulding v. Cameron (1952) 38 Cal. 2d 265, 267, 239 P.2d 625]* . A nuisance is considered continuing, rather than permanent, if it may be abated or discontinued at any time. Every repetition of a continuing nuisance is a separate wrong for which the injured person may bring successive actions for damages until the nuisance is abated, even though an action based on the original wrong may be barred by the statute of limitations [*Phillips v. City of Pasadena (1945) 27 Cal. 2d 104, 107-108, 162 P.2d 625]* . The courts have recognized that in doubtful cases plaintiff should have an election to treat the nuisance as either permanent or not [*Spaulding v. Cameron (1952) 38 Cal. 2d 265, 268, 239 P.2d 625* ; *Kafka v. Bozio (1923) 191 Cal. 746, 752, 218 P. 753]* .

PRACTICE TIP:

The Impact of Distinction Between Permanent and Continuing Nuisance. The important distinctions between continuing and permanent nuisances are the statutes of limitations and the scope of damages. If the statute of limitations has run on a permanent nuisance claim, the plaintiff will be relegated to a claim for continuing nuisance. However, permanent property damages are not recoverable under a claim for continuing nuisance, the plaintiff being limited to the damages incurred during the continuance of the nuisance before the trial, such as lost rentals. In *Mangini v. Aerojet-General Corporation* [*Mangini v. Aerojet-General Corp. (1996) 12 Cal. 4th 1087, 1090, 51 Cal. Rptr. 2d 272, 912 P.2d 1220]* , the California Supreme Court held that proof of a continuing nuisance requires the plaintiff to present substantial evidence that the contaminated condition is one that is both subject to remediation (or cleanup) and that the cost of cleanup is "reasonable." If plaintiff cannot prove that the contamination is capable of being abated at a reasonable cost, the nuisance is a permanent one, which may be barred by the statute of limitations [*see* *McCoy v. Gustafson (2009) 180 Cal. App. 4th 56, 90, 103 Cal. Rptr. 3d 37* (because plaintiffs failed to establish that soil and groundwater contamination from neighboring property was reasonably abatable, nuisance was permanent, and action was barred by three-year statute of limitations for injury to real property)].

[4] Nuisances Created or Not Abated by Prior Property Owners

Civ. Code § 3483 provides that "[e]very successive owner of property who neglects to abate a continuing nuisance upon, or in the use of, such property, created by a former owner, is liable therefore in the same manner as the one who first created it." In *Mangini v. Aerojet-General Corporation* [*Mangini v. Aerojet-General Corp. (1991) 230 Cal. App. 3d 1125, 281 Cal. Rptr. 827]* , the court allowed an action for continuing nuisance against a former lessee of property by the current owner of property for the lessee's deposit of hazardous waste on the property.

[5] Nuisance Actions Against Public Entities

Public entities are not immune from liability based on nuisance [*Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 936-937, 101 Cal. Rptr. 568, 496 P.2d 480]* . A municipality may be found liable for creating or maintaining a nuisance even though a governmental activity is involved [*Phillips v. City of Pasadena (1945) 27 Cal. 2d 104, 106, 162 P.2d 625]* . For further discussion, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* . For coverage of governmental immunity, see *§ 418.17.*

[6] Types of Pollution Constituting Nuisances

Claims for nuisance may arise from the deposit of hazardous waste or other contamination on property [*see, e.g., Mangini v. Aerojet-General Corp. (1991) 230 Cal. App. 3d 1125, 281 Cal. Rptr. 827]* . An act of pollution, obstruction, or diversion of water may constitute a nuisance under *Civ. Code § 3479* [*Helix Land Co. v. City of San Diego (1978) 82 Cal. App. 3d 932, 949, 147 Cal. Rptr. 683]* . Thus, a landowner with riparian water rights may have a claim for nuisance for pollution of that watercourse [*Peterson v. City of Santa Rosa (1897) 119 Cal. 387, 392, 51 P. 557* ; for discussion and forms relating to the various types of water rights, see Ch. 575, *Waters*]. Similarly, the pollution of air by the emission of offensive airborne matter may constitute a nuisance [*see, e.g., Eaton v. Klimm (1933) 217 Cal. 362, 366* (smoke from asphalt mixing plant); *Guttinger v. Calaveras Cement Co. (1958) 160 Cal. App. 2d 460, 463, 325 P.2d 145* (cement dust); *Miles v. Arena & Co. (1937) 23 Cal. App. 2d 680, 683, 73 P.2d 1260* (dust carried over plaintiff's land, poisoning his bees)].

Complaints for property and personal injury damages caused by operation of an airport and the resulting fumes, vibration, and noise from jet aircraft have been held to state a cause of action for nuisance [*Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 937, 101 Cal. Rptr. 568, 496 P.2d 480]* . However, abatement of potential nuisance conditions from properly zoned airports is restricted by *Code Civ. Proc. § 731a*. In addition, proof that an airport has been in existence for three years constitutes a rebuttable presumption that the airport is not a nuisance [*Code Civ. Proc. § 731b*]. For further discussion and forms relating to airports, see Ch. 16, *Airplanes and Airports* .

Noise and odors that unreasonably interfere with neighbors' comfortable enjoyment of life and property constitute a nuisance [*see, e.g., Wilson v. Interlake Steel Co. (1982) 32 Cal. 3d 229, 232-233, 185 Cal. Rptr. 280, 649 P.2d 922* (noise from steel plant kept plaintiffs from sleeping and interfered with daily use and enjoyment of their property); *Varjabedian v. City of Madera (1977) 20 Cal. 3d 285, 293-294, 142 Cal. Rptr. 429, 572 P.2d 43* (sewage treatment plant)].

For further coverage of nuisance in the environmental context, see California Environmental Law and Land Use Practice, Ch. 1, *Nuisance, Trespass, and Strict Liability for Ultrahazardous Activities* (Matthew Bender), *Guide to Toxic Torts, Ch. 3, Theories of Liability, § 3.06* (Matthew Bender), and Environmental Law Practice Guide, Ch. 16, *Common-Law Controls*, § 16.02 (Matthew Bender).

[7] Defenses

[a] Activities Expressly Authorized by Statute or Zoning

Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance [*Civ. Code § 3482*]. The requirements of *express* statutory authorization has been narrowly construed to sanction only actions where it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury [*Varjabedian v. City of Madera (1977) 20 Cal. 3d 285, 291, 142 Cal. Rptr. 429, 572 P.2d 43* ; *Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 938, 101 Cal. Rptr. 568, 496 P.2d 480]* .

No person or corporation may be enjoined in a private action from the reasonable and necessary operation of any use expressly permitted in certain local zoning, and the use may not be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation [*see Code Civ. Proc. § 731a*]. However, *Code Civ. Proc. § 731a* does not apply to actions to abate a public nuisance brought by public authorities, or to the regulation and working hours of refineries and similar establishments whose operation produces offensive odors, or to bar a recovery for damages [*McNeill v. Redington (1944) 67 Cal. App. 2d 315, 317* .

[b] Other Defenses

Other defenses that may be used in a nuisance action are the doctrine of balancing of conveniences, comparative

negligence, and failure to mitigate damages. For further discussion and forms relating to these defenses, see Ch. 380, *Negligence* , and Ch. 391, *Nuisance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawLitigation & Administrative ProceedingsNegligenceEnvironmental LawLitigation & Administrative ProceedingsNuisances, Trespasses & Strict LiabilityReal Property LawTortsNuisanceGeneral OverviewReal Property LawTortsNuisanceDefensesGeneral OverviewReal Property LawTortsNuisanceDefensesImmunityReal Property LawTortsNuisanceDefensesStatutory AuthorizationReal Property LawTortsNuisanceElementsReal Property LawTortsNuisanceRemediesGeneral OverviewReal Property LawTortsNuisanceRemediesDamagesGeneral OverviewReal Property LawTortsNuisanceTypesContinuing NuisanceReal Property LawTortsNuisanceTypesPermanent NuisanceReal Property LawTortsNuisanceTypesPrivate NuisanceReal Property LawTortsNuisanceTypesPublic NuisanceReal Property LawZoning & Land UseOrdinancesTortsPremises Liability & PropertyLessees & LessorsNuisance

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36-418 California Forms of Pleading and Practice--Annotated § 418.61

AUTHOR: By Roger Beers

§ 418.61 Trespass

A complaint for damages caused by pollution may be brought under a trespass theory, which requires a wrongful interference with the plaintiff's possession of property [*see MacLeod v. Fox West Coast T. Corp. (1937) 10 Cal. 2d 383, 387, 74 P.2d 276]* . There is no liability for trespass unless the trespass is intentional, the result of recklessness or negligence, or the result of injuries in an extrahazardous activity [*Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 784, 56 Cal. Rptr. 128* ; *Gallin v. Poulou (1956) 140 Cal. App. 2d 638, 645, 295 P.2d 958]* .

For example, trespass actions will lie when pollutants are deposited on plaintiff's property [*see Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 270-271, 288 P.2d 507* (cotton dust and lint from cotton gin damaging plaintiff's property); *Roberts v. Permanente Corp. (1961) 188 Cal. App. 2d 526, 529, 10 Cal. Rptr. 519* (dust from operation of cement plant settling on plaintiffs' property)]. Although noise-caused vibrations that result in damage or injury to property may constitute a trespass, ordinarily noise, odor, or light intrusion alone, without damage to property, will not support a tort action for trespass but must be dealt with as a nuisance [*Wilson v. Interlake Steel Co. (1982) 32 Cal. 3d 229, 232-233, 185 Cal. Rptr. 280, 649 P.2d 922]* .

The same distinctions exist between a continuing and permanent trespass as between a continuing and permanent nuisance [*Mangini v. Aerojet-General Corp. (1991) 230 Cal. App. 3d 1125, 1136, 281 Cal. Rptr. 827* ; *see § 418.60[3]*]. However, there is a split of authority as to whether a prior property owner or tenant can commit trespass--for example, by deposit of hazardous wastes--actionable by a subsequent owner [*compare Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App. 4th 334, 346, 23 Cal. Rptr. 2d 377* (action against prior landowner) *with Capogeannis v. Superior Court (1993) 12 Cal. App. 4th 668, 674, 15 Cal. Rptr. 2d 796* (court held that "one cannot commit an actionable interference with one's own possessory right")].

For detailed coverage and forms relating to trespass generally, see Ch. 550, *Trespass* . For further discussion of a cause of action for trespass in the environmental context, see California Environmental Law and Land Use Practice, Ch. 1, *Nuisance, Trespass, and Strict Liability for Ultrahazardous Activities* (Matthew Bender), and Environmental Law

Practice Guide, Ch. 16, *Common-Law Controls*, § 16.03 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawLitigation & Administrative ProceedingsNuisances, Trespasses & Strict LiabilityReal Property LawTortsTrespass to Real PropertyTortsPremises Liability & PropertyTrespassGeneral OverviewTortsPremises Liability & PropertyTrespassDefensesGeneral OverviewTortsPremises Liability & PropertyTrespassRemediesDamagesGeneral Overview

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36-418 California Forms of Pleading and Practice--Annotated § 418.62

AUTHOR: By Roger Beers

§ 418.62 Negligence

[1] Elements of Cause of Action

Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury on himself or herself [*Civ. Code § 1714(a)*]. The elements of actionable negligence which plaintiff has the burden of pleading and proving are [*see Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 513-514, 150 Cal. Rptr. 1, 585 P.2d 851]* :

- A legal duty of care owed by defendant to plaintiff or to the class of which plaintiff is a member;
- An act or omission of defendant constituting a breach of the duty owed plaintiff;
- Injury and damages to plaintiff; and
- Defendant's breach as a proximate cause of plaintiff's injury and damages.

Negligence actions may be brought to recover damages for injuries caused by polluting activities [*see, e.g., Hagy v. Allied Chemical & Dye Corp. (1953) 122 Cal. App. 2d 361, 368, 265 P.2d 86* (negligent operation of chemical plant resulting in release of sulphurous fumes that aggravated plaintiff's preexisting medical condition)]. However, the mere presence of pollution on property, for example, does not establish negligence in the absence of a showing of a violation of a standard of care, or through the doctrine of *res ipsa loquitur* [*see* [2], *below*] or negligence per se [*see* [3], *below*].

For complete coverage and forms relating to causes of action for negligence generally, see Ch. 380, *Negligence* . More detailed coverage of a negligence cause of action in the environmental context can be found in California Environmental Law and Land Use Practice, Ch. 3, *Toxic Torts and Environmental Litigation* (Matthew Bender),

Environmental Law Practice Guide, Ch. 16, *Common-Law Controls*, § 16.04 (Matthew Bender), and *Guide to Toxic Torts, Ch. 3, Theories of Liability, § 3.02* (Matthew Bender).

[2] Res Ipsa Loquitur

The problem of proving causation between defendant's acts or omissions and the damage to plaintiff may be lessened by employing the doctrine of *res ipsa loquitur*. The doctrine is applicable when the accident is of such a nature that it can be said, in light of past experience, that the accident probably was the result of negligence by someone and that defendant is probably the one responsible [*Newing v. Cheatham (1975) 15 Cal. 3d 351, 359* . The doctrine will not be applied when it is equally probable that the negligence causing the accident was that of someone other than defendant [*Zentz v. Coca Cola Bottling Co. (1952) 39 Cal. 2d 436, 443, 247 P.2d 344]* . For further discussion of the doctrine of *res ipsa loquitur* generally, see Ch. 380, *Negligence* .

[3] Negligence Per Se

The discharge of pollutants or other contaminants in such a manner as to violate a statute, ordinance, or regulation of a public entity, and cause injury to person or property, may be sufficient to constitute negligence per se under *Evid. Code § 669*. Under *Evid. Code § 669(a)* the failure of a person to exercise due care is presumed if:

- The person violated a statute, ordinance, or regulation of a public entity;
- The violation proximately caused death or injury to person or property;
- The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
- The person suffering the death or the injury to his or her person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

The presumption of negligence under *Evid. Code § 669(a)* may be rebutted by proof, *inter alia*, that the person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law [*Evid. Code § 669(b)(1)*].

For further discussion of negligence per se generally, see Ch. 380, *Negligence* . For further coverage of this cause of action in the environmental context, see California Environmental Law and Land Use Practice, Ch. 3, *Toxic Torts and Environmental Litigation* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawLitigation & Administrative ProceedingsNegligenceTortsNegligenceActionsGeneral OverviewTortsNegligenceDutyAffirmative Duty to ActFailure to ActTortsNegligenceProofViolations of LawGeneral OverviewTortsNegligenceProofViolations of LawOrdinancesTortsNegligenceProofViolations of LawStatutesTortsNegligenceStandards of CareReasonable CareReasonable Person

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36-418 California Forms of Pleading and Practice--Annotated § 418.63

AUTHOR: By Roger Beers

§ 418.63 Ultrahazardous Activity

If plaintiff can show that the polluting activity of defendant is so dangerous and uncommon as to be ultrahazardous, strict liability is imposed. An activity is ultrahazardous if it (1) necessarily involves a risk of serious harm to the person, land, or chattels of others that cannot be eliminated by the exercise of the utmost care, and (2) is not a matter of common usage. Whether an activity is ultrahazardous is a question of law to be determined by the court [*Luthringer v. Moore (1948) 31 Cal. 2d 489, 496, 190 P.2d 1]* . The rationale for the imposition of strict liability is that the allocation of a more or less inevitable loss is charged to the party best able to shoulder it, such as a defendant who is engaged in an enterprise for profit [*Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 785, 56 Cal. Rptr. 128]* . Plaintiff's assumption of risk may operate as a complete or partial bar to recovery in a strict liability action [*Lipson v. Superior Court (1982) 31 Cal. 3d 362, 375, 182 Cal. Rptr. 629, 644 P.2d 822* ; *Luthringer v. Moore (1948) 31 Cal. 2d 489, 499, 190 P.2d 1]* .

Activities that have found to be ultrahazardous include:

- Fumigation with a poisonous gas [*Luthringer v. Moore (1948) 31 Cal. 2d 489, 500, 190 P.2d 1]* ;

- Oil drilling in a field where the gas pressure is tremendously high [*Green v. General Petroleum Corp. (1928) 205 Cal. 328, 334, 270 P. 952]* ; and

- The storage and maintenance of toxic chemicals on a business premises [*Lipson v. Superior Court (1982) 31 Cal. 3d 362, 377, 182 Cal. Rptr. 629, 644 P.2d 822]* .

The Supreme Court in *Lipson* did not decide if the manufacturing of toxic chemicals by the defendant amounted to an ultrahazardous activity [*Lipson v. Superior Court (1982) 31 Cal. 3d 362, 377 n.11, 182 Cal. Rptr. 629, 644 P.2d 822]* .

For further discussion of abnormally dangerous activities, see California Environmental Law and Land Use Practice, Ch. 1, *Nuisance, Trespass, and Strict Liability for Ultrahazardous Activities* (Matthew Bender), Environmental Law Practice Guide, Ch. 16, *Common-Law Controls*, § 16.04 (Matthew Bender), and *Guide to Toxic Torts, Ch. 3, Theories of Liability, § 3.07* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawLitigation & Administrative ProceedingsToxic TortsReal Property LawTortsInherently Dangerous ActivitiesTortsStrict LiabilityAbnormally Dangerous ActivitiesGeneral OverviewTortsStrict LiabilityAbnormally Dangerous ActivitiesDefensesTortsStrict LiabilityAbnormally Dangerous ActivitiesDeterminations

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AUTHOR: By Roger Beers

§ 418.64 Inverse Condemnation

Damages to private property caused by the polluting acts of public entities may, in appropriate circumstances, be recovered under the theory of inverse condemnation. Private property may not be damaged or taken for public use without just compensation [*Cal. Const., art. I, § 19*; *see U.S. Const. amend. V*]. In such a case, the private property owner may recover just compensation for the value of the property taken by the public entity by bringing an action for inverse condemnation [*Griggs v. Allegheny County (1962) 369 U.S. 84, 88, 82 S. Ct. 531, 7 L. Ed. 2d 585* ; *United States v. Causby (1946) 328 U.S. 256, 261-262, 66 S. Ct. 1062, 90 L. Ed. 1206]* . If plaintiff can establish that his or her property has suffered a direct and peculiar and substantial burden as a result of the government action, and that he or she has been in effect singled out to suffer the detrimental environmental effects of the enterprise, then the policy favoring distribution of the resulting loss of market value is strong and the likelihood that compensation will impede necessary public construction is relatively slight [*Varjabedian v. City of Madera (1977) 20 Cal. 3d 285, 298, 142 Cal. Rptr. 429, 572 P.2d 43* (noxious odors from municipal sewage treatment plant blown directly onto plaintiff's farm); *see Richards v. Washington Terminal Co. (1914) 233 U.S. 546, 551, 557, 34 S. Ct. 654, 58 L. Ed. 1088* (no taking under *5th amendment* when gas and smoke from railway tunnel fanned onto plaintiff's property)].

As distinct from tort causes of action, no claim is required to be filed under the California Tort Claims Act [*Gov. Code § 810 et seq.*] to maintain an action against a public entity for a taking of, or damage to, private property in the exercise of the eminent domain power under *Cal. Const., art. I, § 19*. For a discussion of the requirements of the California Tort Claims Act, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

For further discussion and forms of complaints and affirmative defenses for use in inverse condemnation actions, see Ch. 247, *Eminent Domain* . Detailed coverage of inverse condemnation actions can also be found in California Environmental Law and Land Use Practice, Ch. 65, *Takings and Other Constitutional Controls* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseConstitutional LimitsGovernmentsLocal GovernmentsClaims By & AgainstReal Property LawInverse CondemnationGeneral OverviewReal Property LawInverse CondemnationConstitutional ViolationsReal Property LawInverse CondemnationDefensesReal Property LawInverse CondemnationRemediesTortsPublic Entity LiabilityLiabilityClaim PresentationGeneral Overview

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AUTHOR: By Roger Beers

§ 418.65 Remedies

[1] Injunctive Relief

Injunction is an equitable remedy that may be used to abate a nuisance or trespass or violation of an environmental statute when an action at law would not suffice. The person seeking an injunction must also show that the threatened injury would be irreparable [*Harmon v. DeTurk (1917) 176 Cal. 758, 762, 169 P. 680* ; *Uptown Enterprises v. Strand (1961) 195 Cal. App. 2d 45, 52, 15 Cal. Rptr. 486]* . For further discussion and forms relating to injunctive relief generally, see Ch. 303, *Injunctions* .

[2] Property and Other Damages

Damages for the diminution in value of plaintiff's property caused by any of the common law torts may be recovered [*Alphonzo E. Bell Corp. v. Listle (1946) 74 Cal. App. 2d 638, 650, 169 P.2d 462]* . In general, the damages for injury to property are the lesser of the cost to abate or repair the injury or the permanent devaluation of the property [*see Raven's Cove Townhomes, Inc. v. Knuppe Development Co. (1981) 114 Cal. App. 3d 783, 802, 171 Cal. Rptr. 334* ; *Mozzetti v. City of Brisbane (1977) 67 Cal. App. 3d 565, 136 Cal. Rptr. 751]* . Lost profits may also be recovered under some causes of action [*Natural Soda Prod. Co. v. Los Angeles (1943) 23 Cal. 2d 193, 199, 143 P.2d 12]* . Nominal damages only may be obtained in the case of a trespass without injury [*Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 136, 95 Cal. Rptr. 728]* . Exemplary and punitive damages are also available for intentional torts when defendant is guilty of oppression, fraud, or malice [*see Civ. Code § 3294(a)*].

[3] Damages for Mental Suffering

Mental distress may provide an additional element of damages when it results from the commission of an intentional or negligent tort [*see Capelouto v. Kaiser Foundation Hospitals (1972) 7 Cal. 3d 889, 892, 103 Cal. Rptr. 856, 500 P.2d 880]* . The injured party may recover for all detriment proximately caused by the tort whether it could have been anticipated or not [*Civ. Code § 3333*; *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 579, 108 Cal. Rptr. 480, 510*

P.2d 1032] . California also allows recovery for negligent infliction of emotional distress when the sole damage is mental suffering, without requiring that the mental distress result directly from, or manifest itself in, physical injury [*Molien v. Kaiser Foundation Hospitals (1980) 27 Cal. 3d 916, 930-931, 167 Cal. Rptr. 831, 616 P.2d 813]* .

Under nuisance or trespass theories, damages for mental distress may be awarded when the tortious conduct is an interference with property rights without any personal injuries apart from the mental distress [*Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 579, 108 Cal. Rptr. 480, 510 P.2d 1032]* . Thus, the plaintiff may recover damages for the discomfort, inconvenience, and annoyance proximately caused by an invasion of a protectible interest in real property [*Acadia California, Ltd. v. Herbert (1960) 54 Cal. 2d 328, 337, 5 Cal. Rptr. 686, 353 P.2d 294* ; *Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 272-273, 288 P.2d 507]* .

A plaintiff in a negligence or nuisance action may not recover damages for fear of cancer or fear of other serious physical illness or injury following exposure to a carcinogen or other toxic substances unless the plaintiff proves either (1) that the fear stems from knowledge, corroborated by reliable medical and scientific opinion, that it is "more likely than not" that the feared cancer will develop in the future due to the toxic exposure [*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 974, 25 Cal. Rptr. 2d 550, 863 P.2d 795]* , or (2) that the defendant's conduct in causing the exposure amounted to "oppression, fraud, or malice" as defined in *Civ. Code § 3294*. In the latter instance, the plaintiff must also show that his or her fear of cancer stems from a knowledge, corroborated by reliable medical or scientific opinion, that the toxic exposure caused by the defendant's breach of duty has significantly increased the plaintiff's actual risk of cancer [*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 999-1000, 25 Cal. Rptr. 2d 550, 863 P.2d 795]* .

For further discussion and forms relating to causes of action for infliction of mental distress and to damages for mental suffering generally, see Ch. 362, *Mental Suffering and Emotional Distress* , and California Environmen TAL LAW AND LAND USE PRACTICE, Ch. 3, *Toxic Torts and Environmental Litigation* (Matthew Bender).

[4] Medical Monitoring Costs

Expenditures for prospective medical testing and evaluation that would have been unnecessary if the particular plaintiff had not been wrongfully exposed to pollutants are a recoverable item of damages in a toxic exposure action [*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 1005, 25 Cal. Rptr. 2d 550, 863 P.2d 795* ; *see Civ. Code § 3333*; *Miranda v. Shell Oil Co. (1993) 15 Cal. Rptr. 2d 569]* . To recover medical monitoring costs, the plaintiff must show, through reliable expert testimony, that the need for monitoring is a reasonably certain consequence of an exposure to toxic chemicals, and that the recommended monitoring is reasonable [*Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 1009, 25 Cal. Rptr. 2d 550, 863 P.2d 795]* . For further discussion of medical monitoring costs, see California Environmental Law and Land Use Practice, Ch. 3, *Toxic Torts and Environmental Litigation* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsElementsGeneral OverviewReal Property LawTortsNuisanceRemediesDamagesGeneral OverviewReal Property LawTortsNuisanceRemediesInjunctionsGeneral OverviewTortsDamagesGeneral OverviewTortsDamagesCompensatory DamagesMedical ExpensesTortsPremises Liability & PropertyTrespassRemediesGeneral OverviewTortsPremises Liability & PropertyTrespassRemediesDamagesGeneral OverviewTortsPremises Liability & PropertyTrespassRemediesDamagesAward CalculationsTortsPremises Liability & PropertyTrespassRemediesInjunctions

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[Reserved]

§§ 418.66[Reserved]

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36-418 California Forms of Pleading and Practice--Annotated § 418.80

AUTHOR: By Roger Beers

§ 418.80 Prohibitions on Discharges

California law prohibits discharges of wastes, hazardous substances, or petroleum products into the waters of the state. For example, *Health & Safety Code § 5411* prohibits the discharge of "sewage or other waste ... in any manner which will result in contamination, pollution, or a nuisance." The statute defines "waste" to include "any and all other waste substances, liquid, solid, gaseous, or radioactive ... from any producing, manufacturing, or processing operation of whatever nature" [*Health & Safety Code § 5410(a)*]. *Health & Safety Code § 5410(e)* and *(f)* broadly defines "pollution" and "nuisance." *Water Code § 13350(a)(3)* and *Fish & Game Code § 5650* create liability for or make unlawful the deposit of "any residuary product of petroleum" into the waters of the state, except in accordance with waste discharge requirements or other federal or state permits. Proposition 65 [*see § 418.50*] also prohibits discharges of certain chemicals into sources of drinking water.

In 1983, California enacted the Sher Bill in part "to establish orderly procedures that will ensure that ... existing [underground storage] tanks be properly maintained, inspected, tested, and upgraded so that the health, property, and resources of the people of the state will be protected" [*Health & Safety Code § 25280(b)*]. The Sher Bill set requirements for the maintenance, reporting of releases, and closure of underground storage tanks.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesUnderground Storage TanksEnvironmental LawLitigation & Administrative ProceedingsGeneral OverviewEnvironmental LawLitigation & Administrative ProceedingsNuisances, Trespasses & Strict LiabilityEnvironmental LawLitigation & Administrative ProceedingsToxic Torts

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36-418 California Forms of Pleading and Practice--Annotated § 418.81

AUTHOR: By Roger Beers

§ 418.81 Reporting and Disclosure Requirements

Under *Water Code § 13260(a)(1), "[a]*ny person discharging waste ... within any region that could affect the quality of waters of the state, other than into a community sewer system," must report the discharge to the Regional Water Quality Control Board. *Water Code § 13272(a)* provides that "any person who, without regard to intent or negligence, causes or permits any oil or petroleum product to be discharged in or on any waters of the state, or discharged or deposited where it is, or probably will be, discharged in or on any waters of the state, shall, as soon as (1) such person has knowledge of the discharge, (2) notification is possible, and (3) notification can be provided without substantially impeding cleanup or other emergency measures, immediately notify the Office of Emergency Services of the discharge in accordance with the spill reporting provision of the California oil spill contingency plan." Also, *Civ. Code § 1102.6*, the Real Estate Transfer Disclosure Statement, requires the seller to disclose to the buyer whether the seller is aware of any "[s]ubstances, materials, or products which may be an environmental hazard such as ... contaminated soil or water on the subject property" [*Civ. Code § 1102.6(a)(II)(C)(1)*].

Health & Safety Code § 25359.7(a) provides that "[a]ny owner of nonresidential real property who knows, or has reasonable cause to believe, that any release of hazardous substance has come to be located on or beneath that real property shall, prior to the sale, lease, or rental of the real property by that owner, give written notice of that condition to the buyer, lessee, or renter of the real property."

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundRecordkeeping & ReportingEnvironmental LawHazardous Wastes & Toxic SubstancesEmergency Planning & Community Right to KnowEnvironmental LawWater QualityClean Water ActRecordkeeping & ReportingReal Property LawEnvironmental RegulationGeneral Overview

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36-418 California Forms of Pleading and Practice--Annotated § 418.82

AUTHOR: By Roger Beers

§ 418.82 Recovery of Response Costs

[1] Under Hazardous Substance Account Act

California has state counterparts to many of the liability provisions of the federal "Superfund" statute, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) [*42 U.S.C. § 9601 et seq.*]. Thus, the Carpenter-Presley-Tanner Hazardous Substance Account Act (HSAA) authorizes actions for the recovery of the costs of cleaning up contamination. *Health & Safety Code § 25363(e)* provides that "[a]ny person who has incurred removal or remedial action costs in accordance with this chapter or [CERCLA] may seek contribution or indemnity from any person who is liable pursuant to this chapter. ... "

In addition, in 1999, the Legislature created the Orphan Share Reimbursement Trust Fund within the HSAA [*Health & Safety Code §§ 25390-25390.9*]. When the Fund becomes operative, a potentially responsible party may, under certain circumstances, file a claim for reimbursement of any part of an orphan share that party has paid [*Health & Safety Code §§ 25390.4, 25390.7*]. "Orphan share" is defined as "the share of liability for cleanup costs that is attributable to persons who are 'defunct or insolvent' " [*Health & Safety Code § 25390(b)*]. The article creating the program does not become operative until the operative date of a statute that either appropriates the necessary money to the Fund or establishes a revenue source for the Fund, or both [*Health & Safety Code § 25390.9*].

[2] Under Water Quality Control Act

The Porter-Cologne Water Quality Control Act authorizes the Regional Water Quality Control Boards to "perform any cleanup, abatement, or remedial work" that "is required by the magnitude of endeavor or urgency of prompt action needed to prevent substantial pollution, nuisance, or injury to any waters of the state" [*Water Code § 13304(b)(1)*]. The Regional Boards are authorized to enlist the aid of "any other governmental agency" in the cleanup [*Water Code § 13304(b)(2)*], and a governmental agency may bring a civil action against "the person or persons who discharged the waste, discharges the waste, or threatened to cause or permit the discharge of the waste" to recover "the reasonable costs actually incurred in cleaning up the waste, abating the effects of the waste, supervising cleanup or abatement activities,

or taking other remedial action" [*Water Code § 13304(c)(1)*]. For a further discussion of the Porter-Cologne Water Quality Control Act, see California Environmental Law and Land Use Practice, Ch. 31, *Water Quality Control Planning, Regulation, and Enforcement* (Matthew Bender).

[3] For Expenses Incurred During Emergency

Health & Safety Code § 13009.6(a)(1) provides that "[t]hose expenses of an emergency response necessary to protect the public from a real and imminent threat to health and safety by a public agency to confine, prevent, or mitigate the release, escape, or burning of hazardous substances described in subdivision (c) [of this section] are a charge against any person whose negligence causes the incident" if either "[e]vacuation beyond the property where the incident originates is necessary to prevent loss of life or injury" or "[t]he incident results in the spread of hazardous substances or fire posing a real and imminent threat to public health and safety beyond the property of origin." A public agency involved in the emergency response may recover its expenses from the person liable under *Health & Safety Code § 13009.6(a)(1)* [*Health & Safety Code § 13009.6(a)(2), (5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementAbatementEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCleanup CostsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementContribution ActionsOrphan SharesEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundHazardous Substance SuperfundEnvironmental LawHazardous Wastes & Toxic SubstancesCleanupEnvironmental LawLitigation & Administrative ProceedingsToxic Torts

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36-418 California Forms of Pleading and Practice--Annotated §§ 418.83-418.89

AUTHOR: By Roger Beers

[Reserved]

§§ 418.83[Reserved]

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36-418 California Forms of Pleading and Practice--Annotated § 418.90

AUTHOR: By Roger Beers

§ 418.90 National Environmental Policy Act

The National Environmental Policy Act (NEPA) [*42 U.S.C. § 4321 et seq.*] establishes procedures for the environmental review of projects similar to that required by the California Environmental Quality Act (CEQA) [*Pub. Res. Code § 21000 et seq.*; *see §§ 418.30 -418.37* for coverage of CEQA]. Regulations adopted by the federal Council of Environmental Quality (CEQ) implementing NEPA are set forth at 40 C.F.R. § 1500 et seq. NEPA applies to all "major federal actions significantly affecting the quality of the human environment" [*42 U.S.C. § 4332*]. For these actions, it requires the agency to prepare an Environmental Impact Statement (EIS), which evaluates the environmental impacts of the action and alternatives and mitigation measures. Actions which do not significantly affect the environment may be the subject of the agency's Finding of No Significant Effect or "FONSI" [40 C.F.R. § 1501.4(e)(2)]. For projects subject to both federal and state agency action, joint documentation complying with both NEPA and CEQA may be prepared, and CEQA contains procedures for this [*Pub. Res. Code §§ 21083.5, 21083.6, 21083.7*; *14 Cal. Code Reg. §§ 15221, 15222, 15224* (implementing regulations)].

For detailed coverage of NEPA, see Treatise on Environmental Law (Matthew Bender) and Environmental Law Practice Guide, State and Federal Law (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNational Environmental Policy ActGeneral OverviewEnvironmental LawNational Environmental Policy ActEnvironmental AssessmentsEnvironmental LawNational Environmental Policy ActEnvironmental Impact StatementsGovernmentsFederal GovernmentClaims By & Against

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36-418 California Forms of Pleading and Practice--Annotated § 418.91

AUTHOR: By Roger Beers

§ 418.91 Air Pollution

[1] California Emission Standards

California regulates the emission of air pollutants through a network of agencies operating on a local, regional, and statewide level. Air resources are generally regulated and protected by *Health & Safety Code § 39000 et seq.* Basic general limitations on such emissions, however, are set forth in *Health & Safety Code § 41700*. *Health & Safety Code § 41700* prohibits discharges of air contaminants or other material that:

- Cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public;
- Endanger the comfort, repose, health, or safety of any such persons or the public; or
- Cause, or have a natural tendency to cause, injury or damage to business or property.

Additionally, the discharge into the atmosphere of smoke or other opaque air contaminants (as defined), for more than three minutes in any one hour is prohibited [*Health & Safety Code § 41701*]. However, *Health & Safety Code §§ 41700* and *41701* do not apply to odors emanating from agricultural operations necessary for the growing of crops or the raising of fowl or animals [*Health & Safety Code §§ 41704(g), 41705*]. In addition, *Health & Safety Code § 41700* does not apply to odors emanating from composting operations [*Health & Safety Code § 41705(a)(2), (3)* (inoperative on April 1, 2003, unless California Integrated Waste Management Board adopts and submits regulations governing operation of organic composting sites to Office of Administrative Law on or before that date)]. Further exemptions to *Health & Safety Code § 41701* are listed in *Health & Safety Code § 41704*.

For specific provisions dealing with lead compound emissions from nonvehicular sources, portable internal combustion engines, agricultural and nonagricultural burning, sandblasting, gasoline vapor control, gasoline cargo tanks, and

incineration of toxic waste materials, see *Health & Safety Code §§ 41706-41983*.

In 2006, the California Legislature passed landmark legislation relating to greenhouse gas (GHG) emissions. The California Global Warming Solutions Act of 2006 [2006 Stats., ch. 488 (AB 32); *Health & Safety Code § 38500 et seq.*] establishes the first comprehensive GHG regulatory program in the United States. The legislation defines "greenhouse gas" as including carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, and other gases [*see Health & Safety Code § 38505(g)*]. The legislation requires California's GHG emissions to be reduced to 1990 levels by 2020 [*Health & Safety Code § 38550*]. The method for achieving this reduction is through an enforceable statewide cap on GHG emissions, which is planned to be phased in beginning 2012 [*see Health & Safety Code § 38562(a)*]. The legislation also sets out steps in furtherance of the 2020 goal, and charges the state Air Resources Board (ARB) with responsibility for monitoring and regulating sources of GHG emissions that cause global warming [*see Health & Safety Code § 38510*]. On October 16, 2006, Governor Schwarzenneger announced an Executive Order to begin implementation of the Act. The Order gives a leading role to the Secretary of Environmental Protection rather than the ARB in implementing the Act, and promotes a market-based compliance program [*see* http://gov.ca.gov/index.php?/press-release/4447/ for text of order].

For detailed coverage of California's emission standards, see California Environmental Law and Land Use Practice, Ch. 41, *Stationary and Other Nonvehicular Sources of Pollution* , and Ch. 42, *Federal and State Regulation of Motor Vehicles* (Matthew Bender). For coverage of greenhouse gas reduction and other climate change issues, see California Environmental Law and Land Use Practice, Ch. 85, *Climate Change* (Matthew Bender).

[2] State Air Resources Board--State Implementation Plan

The State Air Resources Board is the designated air pollution control agency for all purposes set forth in federal law [*see Health & Safety Code § 39510*], and is responsible for the preparation of the state implementation plan ("SIP") required by the Clean Air Act [*42 U.S.C. § 7401 et seq.*]. To this end, the board coordinates the activities of all districts necessary to comply with that Act [*Health & Safety Code § 39602*]. Notwithstanding any other provision of *Health & Safety Code § 39000 et seq.* (division dealing with air resources), the state implementation plan is only able to include those provisions necessary to meet the requirements of the federal Clean Air Act [*Health & Safety Code § 39602*]. For detailed coverage of the State Air Resources Board, see California Environmental Law and Land Use Practice, Ch. 40, *Federal Requirements and the Goals and Structure of California's Air Regulatory Program* (Matthew Bender).

For a discussion of the preparation of plans to attain state ambient air quality standards, see California Environmental Law and Land Use Practice, Ch. 41, *Stationary and Other Nonvehicular Sources of Pollution* (Matthew Bender).

[3] Pollution Control Districts

Local and regional air pollution control districts have the primary responsibility for the control of air pollution in California from all sources except the emissions from motor vehicles [*Health & Safety Code § 40000*]. These districts are the county air pollution control districts [*see Health & Safety Code § 40100 et seq.*], the unified air pollution control districts [*see Health & Safety Code § 40150 et seq.*], the Bay Area Air Quality Management District [*see Health & Safety Code § 40200 et seq.*], the regional air pollution control districts [*see Health & Safety Code § 40300 et seq.*], and the South Coast Air Quality Management District [*see Health & Safety Code § 40400 et seq.*].

[4] Federal Clean Air Act

Under the federal Clean Air Act [*42 U.S.C. § 7401 et seq.*] each state has the primary responsibility for assuring air quality within its boundaries by submitting an implementation plan which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in the state [*42 U.S.C. § 7407(a)*; *see § 418.91[2]* (state implementation plan)]. The air quality control regions

are designated by the Administrator of the Environmental Protection Agency (EPA), and by the governor of the state with the approval of the administrator [*42 U.S.C. § 7407(c), (e)*].

The federal Clean Air Act also provides standards for emissions from cars and engines [*see 42 U.S.C. § 7521 et seq.*; *40 C.F.R. pts. 85, 86*]. The Act preempts state control in the field, although EPA may waive application of the preemptive provision in a state with equally strict or stricter standards [*see 42 U.S.C. § 7543(a), (b)*]. There has been such a waiver with respect to California [*see 40 C.F.R. § 52.220 et seq.*; *13 Cal. Code Reg. § 1900 et seq.*]. For a further discussion of the federal Clean Air Act, see California Environmental Law and Land Use Practice, Ch. 40, *Federal Requirements and the Goals and Structure of California's Air Regulatory Program* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawAir QualityGeneral OverviewEnvironmental LawAir QualityEmission StandardsMobile SourcesEnvironmental LawAir QualityEmission StandardsStationary SourcesGeneral OverviewEnvironmental LawAir QualityNational Ambient Air Quality StandardsEnvironmental LawAir QualityState Implementation PlansTransportation LawCommercial VehiclesEmission Control

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36-418 California Forms of Pleading and Practice--Annotated § 418.92

AUTHOR: By Roger Beers

§ 418.92 Water Pollution

[1] California's Porter-Cologne Water Quality Control Act

[a] Purpose of Act

The basic legislation controlling water pollution in California is the Porter-Cologne Water Quality Control Act [*Water Code § 13000 et seq.*]. The Act seeks to attain the highest water quality which is reasonable by regulating activities and factors which may affect the water quality [*see Water Code § 13000*].

[b] Authority of State Water Resources Control Board

[i] Formulation and Adoption of State Policies

The State Water Resources Control Board (State Board) is charged with formulation and adoption of state policy for water quality control [*Water Code § 13140*]. It is also designated as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act [*33 U.S.C. § 1251 et seq.*] and any other federal act [*Water Code § 13160*]. State policies are to consist of water quality principles and guidelines for long range resource planning, water quality objectives at key locations for planning and operation of water resource development projects and for water quality control activities, and any other principles and guidelines deemed essential by the state board for water quality control [*Water Code § 13142*]. *Water Code § 13142.5* establishes guidelines for state policy with regard to water quality as it relates to the coastal marine environment, and the State Board is required to adopt a water quality control plan for ocean waters [*Water Code § 13170.2(a)*]. A public hearing must be held before state policy for water quality control is adopted by the State Board [*Water Code § 13147*].

[ii] Regulatory Responsibilities

The State Board also has regulatory responsibility for the siting, operation, and closure of waste disposal sites. Except

for sewage treatment plants or those sites which primarily contain fertilizer or radioactive material, the State Board [*Water Code § 13172*]:

- Classifies wastes according to the risk of impairment to water quality;

- Classifies the types of disposal sites according to the level of protection provided for water quality; and

- Adopts standards and regulations to implement *Water Code §§ 13226* and *13227* (relating to review and classification of waste disposal sites and review of facility closure and postclosure plans).

In addition, the State Board adopts standards and regulations that apply and ensure compliance with the federal Resource Conservation and Recovery Act of 1976 (RCRA) [*42 U.S.C. § 6901 et seq.*], and any more stringent requirements necessary to implement *Water Code § 13000 et seq.* (water quality) and *Health & Safety Code § 25208 et seq.* (surface impoundments). For discussion of federal hazardous waste disposal law, see *§ 418.94*.

The State Board also establishes general procedures for the adoption and implementation by regional boards of water quality control plans [*Water Code § 13164*; *see* [c], *below*]. Approval by the State Board is required before any plan becomes effective [*Water Code § 13245*]. For further discussion of the State Water Resources Control Board, see California Environmental Law and Land Use Practice, Ch. 30, *Agencies Regulating Water Quality* (Matthew Bender).

[c] Authority of Regional Boards

[i] Adoption of Plans and Guidelines

For the purpose of administering the Porter-Cologne Act, a regional water quality control board was established for each of nine regions of the state to formulate and adopt a water quality plan for all areas within the region [*Water Code §§ 13220, 13201, 13240*]. The plan is required to comply with state policy formulated by the State Board [*Water Code § 13240*]. It must include such water quality objectives as will insure the reasonable protection of beneficial uses and the prevention of nuisance [*Water Code § 13241*]. In addition, each regional board may adopt guidelines, which do not become effective unless and until approved by the State Board [*Water Code § 13245.5*]. The requirements for the program of implementation to achieve water quality objectives are stated in *Water Code § 13242*. A public hearing must be held before the adoption of any plan [*Water Code § 13244*].

[ii] Waste Discharge Requirements

The regional boards prescribe waste discharge requirements regarding any proposed discharge, or change in the nature of a discharge, except discharges into a community sewer system [*see Water Code § 13263(a)*]. Waste includes sewage and any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing manufacturing, or processing operation, including waste placed within containers of whatever nature for disposal purposes [*Water Code § 13050(d)*]. Any person discharging or proposing to discharge waste within any region that could affect the quality of the state's waters, other than into a community sewage system, must file a report of the discharge with the regional board [*Water Code § 13260(a)(1)*].

[iii] Issuance of Cease and Desist and Other Orders

A regional board may issue a cease and desist order when the board finds that a discharge of waste is taking place or threatening to take place in violation of requirements or discharge prohibitions prescribed or issued by a regional board or the State Board [*Water Code § 13301*]. The regional board may order a violator to clean up the waste discharge or abate the effects of the discharge, or the state may take remedial action and charge the violator for the reasonable cleanup costs [*see Water Code § 13304(a)*]. If the regional board determines there is a threatened or continuing

violation of any cleanup or abatement order, cease and desist order, or any order issued under *Water Code §§ 13267* or *13383*, the regional board may issue an order establishing a time schedule and prescribing a civil penalty that becomes due if compliance is not achieved in accordance with that time schedule [*Water Code § 13308(a)*].

[iv] Pollution Prevention Plans

The State Water Board, a regional board, or a publicly-owned treatment works (POTWs) may require a discharger to complete and implement a pollution prevention plan if the discharger is determined by the State Board to be a chronic violator of water quality requirements and (1) the State Board, regional board, or POTW determines that pollution prevention could assist in achieving compliance; (2) the discharger significantly contributes, or has the potential to significantly contribute, to the creation of a toxic hot spot [*Water Code § 13391.5*]; (3) the State Board, regional board, or POTW determines that pollution prevention is necessary to achieve a water quality objective [*Water Code § 13263.3(d)*]; or (4) the discharger is subject to a cease and desist order [*Water Code § 13301*] or a time schedule order [*Water Code §§ 13300, 13308*; *see* [iii], *above* (Issuance of Cease and Desist and Other Orders)]. A discharger who fails to complete a pollution prevention plan, submits a plan that does not comply with statutory requirements, or does not implement the plan, is subject to civil liability [*Water Code § 13263.3(g), (h)*].

[2] Federal Water Pollution Control Act

The Federal Water Pollution Control Act [*33 U.S.C. § 1251 et seq.*] is administered by the Administrator of the Environmental Protection Agency (EPA). The objective of the Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters [*33 U.S.C. § 1251(a)*]. The scheme of the Act allows the states to adopt water quality standards for both interstate and intrastate waters which must be filed with and approved by the Administrator [*see 33 U.S.C. § 1313(a)*]. If the state does not adopt adequate standards, the Administrator will do so [*see 33 U.S.C. § 1313(a)(3)(C)*]. The Administrator, after consultation with appropriate federal and state agencies and other interested persons, develops and publishes criteria for water quality and other information and guidelines relating to water pollution [*see 33 U.S.C. § 1314(a)(1)*].

The Act also establishes the National Pollutant Discharge Elimination System (NPDES), which requires that anyone discharging pollutants into navigable waters obtain an NPDES permit, which establishes limits for discharges for particular pollutants [*33 U.S.C. § 1342*]. In California, the EPA has delegated responsibility to administer the NPDES permit system to the State Water Resources Control Board and the Regional Water Quality Control Boards [*see 40 C.F.R. § 123.24*]. For discussion of California's implementation of the NPDES program, see California Environmental Law and Land Use Practice, Ch. 31, *Water Quality Control Planning, Regulation, and Enforcement* (Matthew Bender).

[3] Pollution From Oil or Hazardous Substances

Section 1321 of the Federal Water Pollution Control Act [*33 U.S.C. § 1251 et seq.*] deals specifically with discharges of oil or hazardous substances into or on the navigable water of the United States, adjoining shorelines, or into or on the waters of the contiguous zone, or in connection with activities under the Outer Continental Shelf Lands Act [*43 U.S.C. § 1331 et seq.*], or the Deepwater Port Act of 1974 [*33 U.S.C. § 1501 et seq.*], or which may affect natural resources of the United States [*33 U.S.C. § 1321(b)(1)*]. Discharge of oil or hazardous substances in those areas in quantities determined by the President to be harmful is in most cases prohibited [*see 33 U.S.C. § 1321(b)(3)*]. A person in charge of a vessel or of an onshore facility or an offshore facility must report any discharge of oil or hazardous substances from the vessel or facility which violates the Act to the appropriate agency of the United States government. Failure to report subjects the person to a fine and imprisonment, or both [*see 33 U.S.C. § 1321(b)(5)*]. The Act also provides for the assessment of civil penalties for unlawful discharges of oil or hazardous substances [*33 U.S.C. § 1321(b)(6)(A)*]. The President is authorized to undertake cleanup of the oil or hazardous substance [*33 U.S.C. § 1321(c)(1)*] and the owner or operator responsible for the discharge may be liable for the amount of the cleanup costs [*see 33 U.S.C. § 1321(f)*].

[4] Marine Protection, Research, and Sanctuaries Act

The Marine Protection, Research, and Sanctuaries Act of 1972 [*16 U.S.C. § 1431 et seq.*; *33 U.S.C. § 1401 et seq.*] regulates the dumping of all types of material into ocean waters. The Act declares it to be United States policy to prevent or strictly limit the dumping into ocean waters of any material that would adversely affect human health, welfare, or amenities, or the marine environment, ecological systems, or economic potentialities [*see 33 U.S.C. § 1401*]. Violators of the Act are liable for civil and criminal penalties, and the Administrator of the Environmental Protection Agency may request the Attorney General to bring an action for appropriate relief [*see 33 U.S.C. § 1415(a)-(c)*]. The Attorney General may also bring an action for injunctive relief [*33 U.S.C. § 1415(d)*].

[5] Other Related Federal Legislation

[a] Fish and Wildlife Coordination Act

The Fish and Wildlife Coordination Act [*16 U.S.C. § 661 et seq.*] establishes a national policy recognizing the vital contribution of wildlife resources to the nation and providing that wildlife conservation receive equal consideration and be coordinated with other features of water-resource development programs [*see 16 U.S.C. § 661*].

[b] Coastal Zone Management Act

The Coastal Zone Management Act of 1972 [*16 U.S.C. § 1451 et seq.*] encourages the states to develop, in cooperation with federal and local government, programs for more effective protection and use of the land and water resources of the coastal zone [*see 16 U.S.C. § 1452(2)-(4)*]. The Act provides for partial matching of federal funds to states for development and administration of these coastal zone management programs [*see 16 U.S.C. §§ 1454-1455a*]. California's federally-approved Coastal Zone Management Program is administered by the State Coastal Commission under the authority of the California Coastal Act of 1976 [*Pub. Res. Code § 30000 et seq.*]. For detailed coverage of the California Coastal and the federal Coastal Zone Management Act, see California Environmental Law and Land Use Practice, Ch. 66, *Coastal Zone Regulation* (Matthew Bender). For general coverage of the federal Coastal Zone Management Act, see Environmental Law Practice Guide, Ch. 23, *Oceans and Coasts* (Matthew Bender).

[c] Safe Drinking Water Act

The Safe Drinking Water Act [*42 U.S.C. § 300f et seq.*] requires the Administrator of the Environmental Protection Agency (EPA) to establish mandatory drinking water standards for public water supplies, for both bacterial and chemical contaminants, and to regulate underground injection of wastes to protect groundwater quality. The states have the primary enforcement responsibility for public water systems and underground injection control programs [*42 U.S.C. §§ 300g-1, 300h-1*]. If a state fails to adequately enforce the national standards, however, the Administrator of the EPA may commence a civil action in the appropriate federal district court to require compliance [*see 42 U.S.C. §§ 300g-3, 300h-2*]. In addition, any person may commence a civil action against any person (including the United States) who is alleged to be in violation of the Act or against the Administrator when the plaintiff alleges that the Administrator failed to perform any nondiscretionary act or duty under the Act [*see 42 U.S.C. § 300j-8(a), (b)*].

For a further discussion of the Safe Drinking Water Act, see California Environmental Law and Land Use Practice, Ch. 50, *Administration of Hazardous Waste Laws: Federal /State Interrelationship* (Matthew Bender), Environmental Law Practice Guide, Ch. 20, *Safe Drinking Water Act* (Matthew Bender), and The Law of Hazardous Waste, Ch. 15, *Non-CERCLA Statutory Liability for Environmental Contamination* (Matthew Bender).

[d] Refuse Act of 1899

The Refuse Act of 1899 [*33 U.S.C. § 407*] prohibits the discharge into any navigable water of the United States of any refuse matter other than that flowing in a liquid state from streets and sewers. The Act also prohibits placing material on the bank of any navigable water where it is liable to be washed into the water and impede or obstruct navigation [*33*

U.S.C. § 407].

[e] Submerged Lands Act

The Submerged Lands Act [*43 U.S.C. § 1301 et seq.*] declares that title and ownership of the lands beneath navigable waters within the boundaries of each state, and the natural resources within those lands and waters, and the right and power to manage, administer, lease, develop, and use these resources, is vested in each of the states in which the land is located, and their respective grantees, lessees, or successors in interest [*see 43 U.S.C. § 1311(a)*].

[f] Outer Continental Shelf Lands Act

The Outer Continental Shelf Lands Act [*43 U.S.C. § 1331 et seq.*] defines the "Outer Continental Shelf" as all submerged lands lying seaward and outside of the area of lands beneath navigable waters, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control [*43 U.S.C. § 1331(a)*]. The Secretary of the Interior administers the provisions of the Act relating to the leasing of the outer Continental Shelf and is authorized to prescribe and amend rules and regulations that are necessary and proper for the prevention of waste and conservation of natural resources of the area [*43 U.S.C. § 1334(a)*]. The Secretary is required to conduct environmental studies of any area or region included in any oil and gas lease sale to assess the impact of oil and gas development on the human, marine, and coastal environments [*see 43 U.S.C. § 1346*].

For a general discussion of laws relating to the outer continental shelf, see Treatise on Environmental Law, Ch. 12, *Public Lands and Conservation* (Matthew Bender).

[g] International Agreement for Prevention of Pollution From Ships

The 1973 International Convention for the Prevention of Pollution from Ships, as modified by the MARPOL Protocol of 1978, is implemented in the United States by *33 U.S.C. § 1901 et seq.* These statutes generally apply to ships of United States registry or nationality, except government vessels in noncommercial service, and to other ships within the navigable waters of the United States [*33 U.S.C. § 1902(a), (b)*]. Both criminal and civil penalties may be imposed for violations of the MARPOL Protocol [*33 U.S.C. §§ 1907, 1908*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawWater QualityClean Water ActGeneral OverviewEnvironmental LawWater QualityClean Water ActCoverage & DefinitionsGeneral OverviewEnvironmental LawWater QualityClean Water ActCoverage & DefinitionsNavigable WatersEnvironmental LawWater QualityClean Water ActEnforcementGeneral OverviewEnvironmental LawWater QualityClean Water ActEnforcementCivil PenaltiesEnvironmental LawWater QualityClean Water ActEnforcementGovernment Civil ActionsEnvironmental LawWater QualityClean Water ActEnforcementInjunctive ReliefEnvironmental LawWater QualitySafe Drinking Water ActGeneral OverviewEnvironmental LawWater QualitySafe Drinking Water ActEnforcementEnvironmental LawWater QualitySafe Drinking Water ActNational Drinking Water RegulationsEnvironmental LawWater QualitySafe Drinking Water ActUnderground Sources

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F. Other State and Federal Environmental Laws

36-418 California Forms of Pleading and Practice--Annotated § 418.93

AUTHOR: By Roger Beers

§ 418.93 Noise Pollution

[1] State Law--California Noise Control Act

The California Noise Control Act [*Health & Safety Code § 46000 et seq.*] provides for the coordination of state activities necessary to provide an environment for all Californians free from noise that jeopardizes their health or welfare [*see Health & Safety Code § 46000(g)*]. The Act establishes the Office of Noise Control [*Health & Safety Code § 46040*]. The duties of the office are set forth in *Health & Safety Code §§ 46050* and *46050.1*. No provision of the Act or ruling of the Office of Noise Control is a limitation or expansion of the authority of governments or the State Attorney General to control noise or abate nuisances [*Health & Safety Code § 46001*]. Noise standards have been set specifically for motor vehicles [*see Veh. Code §§ 27150, 27150.2, 27151*], aircraft and aircraft engines [*see Pub. Util. Code § 21669*], and pneumatic tires [*see Veh. Code §§ 27502, 27503*]. For a further discussion of the California Noise Control Act, see California Environmental Law and Land Use Practice, Ch. 83, *Controls on Noise* (Matthew Bender).

[2] Federal Law

The Office of Noise Abatement and Control is established within the Environmental Protection Agency (EPA) to carry out a full and complete investigation and study of noise and its effect on public health and welfare [*42 U.S.C. § 7641(a)*]. The Administrator of the EPA consults with any federal department or agency carrying out or sponsoring any activity resulting in noise that is a public nuisance or otherwise objectionable to determine possible means of abating the noise [*42 U.S.C. § 7641(c)*]. For further coverage of federal legislation regarding noise, see California Environmental Law and Land Use Practice, Ch. 83, *Controls on Noise* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawLitigation & Administrative ProceedingsNuisances, Trespasses & Strict LiabilityEnvironmental LawNoiseReal Property LawTortsNuisanceTypesPublic NuisanceTransportation LawAir TransportationNoise Control

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36-418 California Forms of Pleading and Practice--Annotated § 418.94

AUTHOR: By Roger Beers

§ 418.94 Hazardous Substances

[1] Federal Resource Conservation and Recovery Act

Subchapter III [*42 U.S.C. § 6921 et seq.*] of the Resource Conservation and Recovery Act of 1976 [*42 U.S.C. § 6901 et seq.*] deals with hazardous waste management. The Administrator of the Environmental Protection Agency has authority to set standards for and regulate the transportation, treatment, storage, and disposal of hazardous wastes [*see 42 U.S.C. § 6921 et seq.*]. For detailed coverage of RCRA, see California Environmental Law and Land Use Practice, Chs. 50, *Administration of Hazardous Waste Laws: Federal /State Interrelationship*, and 90, *Solid Waste Management and Planning* (Matthew Bender), Guide to Toxic Torts, Ch. 16, *Hazardous Waste Legislation and Superfund--An Overview* (Matthew Bender), and The Law of Hazardous Waste, Ch. 1, *Introduction to Hazardous Waste Management* (Matthew Bender).

[2] Superfund Act

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) [*42 U.S.C. § 9601 et seq.*], popularly known as the Superfund Act, imposes liability for cleanup costs, response costs, and damages on persons who release or threaten to release hazardous substances into the environment [*see 42 U.S.C. § 9607*]. The Act establishes procedures for the cleanup of hazardous substances released into the environment and for emergency response to threatened releases of hazardous substances into the environment [*see 42 U.S.C. §§ 9604-9606*]. The Act establishes trust funds to be used to satisfy claims made for damages caused by the release of hazardous substances, including the cleanup of hazardous substances from inactive hazardous waste disposal sites [*see 42 U.S.C. §§ 9611-9612*, 9634 et seq.]. For further discussion of CERCLA, see California Environmental Law and Land Use Practice, Ch. 50, *Administration of Hazardous Waste Laws: Federal /State Interrelationship* (Matthew Bender), Treatise on Environmental Law, Ch. 4A, *Disposal of Hazardous Waste--The "Superfund Law"* (Matthew Bender), Guide to Toxic Torts, Ch. 16, *Hazardous Waste Legislation and Superfund--An Overview* (Matthew Bender), and The Law of Hazardous Waste, Ch. 12, *Introduction to Hazardous Substance Cleanup and Liability* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCleanup CostsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost Recovery ActionsPotentially Responsible PartiesTransportersEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundHazardous Substance SuperfundEnvironmental LawHazardous Wastes & Toxic SubstancesResource Conservation & Recovery ActGeneral OverviewEnvironmental LawSolid WastesDisposal PlanningEnvironmental LawSolid WastesDisposal Standards

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[Reserved]

§§ 418.95[Reserved]

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36-418 California Forms of Pleading and Practice--Annotated § 418.100

AUTHOR: By Roger Beers

§ 418.100 Related Matthew Bender Publications

[1] California Environmental Law and Land Use Practice

For discussion of state administrative law, see Ch. 10, *State Administrative Law Issues*

For discussion of preliminary litigation issues, see Ch. 11, *Preliminary Litigation Issues*

For discussion of judicial review of administrative decisions, see Ch. 12, *Judicial Review of Administrative Decisions*

For discussion of attorneys' fees and costs, see Ch. 13, *Attorneys' Fees and Other Costs*

[2] California Points and Authorities

For memoranda of points and authorities relating to costs and attorney's fees, see Ch. 60, *Costs*

For memoranda of points and authorities relating to actions for declaratory relief, see Ch. 67, *Declaratory Relief*

For memoranda of points and authorities relating to actions for injunctive relief, see Ch. 116, *Injunctions*

For memoranda of points and authorities relating to judicial review by traditional mandamus, see Ch. 150, *Mandate and Prohibition*

For memoranda of points and authorities relating to judicial review by administrative mandamus, see Ch. 195, *Public Administrative Law*

[3] Treatise on Environmental Law

For discussion of attorney's fees, see Ch. 14, *Attorneys' Fees in Environmental Litigation*

[4] Environmental Law Practice Guide, State and Federal Law

For coverage of issues involved in environmental litigation, including sample complaints, answers, and discovery pleadings, see Ch. 11B, *Environmental Litigation*

For discussion of attorney's fees, see Ch. 13, *Attorney's Fees and Conflicts of Interest*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewRemediesDeclaratory JudgmentsAdministrative LawJudicial ReviewRemediesInjunctive ReliefAdministrative LawJudicial ReviewRemediesMandamusCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsEnvironmental LawLitigation & Administrative ProceedingsGeneral OverviewEnvironmental LawLitigation & Administrative ProceedingsJudicial ReviewReal Property LawZoning & Land UseJudicial Review

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36-418 California Forms of Pleading and Practice--Annotated § 418.101

AUTHOR: By Roger Beers

§ 418.101 State Statutes

[1] Jurisdiction and Venue

Local actions are tried in superior court of county in which subject real property is located. *Code Civ. Proc. § 392(a)*

Action against public officer or his or her agent for performing an official act is triable where cause of action arises. *Code Civ. Proc. § 393(b)*

Actions that may be tried in Sacramento may alternatively be commenced and tried in any California city in which the Attorney General has an office. *Code Civ. Proc. § 401(1)*

Superior Courts have jurisdiction over petitions for writs of mandate. *Code Civ. Proc. § 1085*

[2] Statutes of Limitation

Actions challenging decision of a legislative body to adopt, amend, or modify a development agreement must be brought within 90 days after the decision. *Gov. Code § 65009(c)(1)(D)*

Certain actions in support of housing and housing projects must be commenced within one year and cannot be maintained until 60 days have expired following notice to the city specifying deficiencies in the general plan, specific plan, or zoning ordinance. *Gov. Code § 65009(d)*

Actions attacking imposition of fees, dedications, and other exactions imposed on residential housing developments must be commenced within 180 days after establishment of the imposition, and a protest must be filed within 90 days after date of establishment of the exaction. *Gov. Code § 66020(d)*

Actions to contest or question San Francisco Bay Conservation and Development Commission's denial of a permit application or attachment of conditions to a permit approval must be commenced within 90 days following the date of the Commission's action. *Gov. Code § 66632(i)*

Aggrieved persons must seek judicial review of decision of the Energy Conservation and Development Commission within 30 days after Commission issues its determination. *Pub. Res. Code § 25901*

Any aggrieved person can challenge any decision or action of the California Coastal Commission by filing a petition for a writ of administrative mandamus within 60 days after decision becomes final. *Pub. Res. Code § 30801*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityStandingCivil ProcedureVenueGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusEnvironmental LawZoning & Land UseComprehensive & General PlansGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLocal GovernmentsClaims By & Against

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36-418 California Forms of Pleading and Practice--Annotated § 418.102

AUTHOR: By Roger Beers

§ 418.102 Decisions

[1] Jurisdiction and Venue

Action for declaratory relief was appropriate to challenge Coastal Zone Conservation Act as facially unconstitutional but was not proper for the purpose of challenging application of the Act to complainants, who were denied a permit and were in essence seeking review of the validity of that administrative action. *State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 251, 115 Cal. Rptr. 497, 524 P.2d 1281*

In actions to enforce public rights under CEQA, venue is proper under *Code Civ. Proc. § 393(b)* where some or all of the cause of action arose. *California State Parks Found. v. Superior Court (2007) 150 Cal. App. 4th 826, 834, 58 Cal. Rptr. 3d 715*

Landowner's sole remedy for review of the denial of a zoning variance was administrative mandamus and landowner therefore had no right to declaratory relief. *PMI Mortgage Ins. Co. v. City of Pacific Grove (1981) 128 Cal. App. 3d 724, 732, 179 Cal. Rptr. 185*

Higher courts take original jurisdiction over writ of mandate petitions only in cases involving issues of statewide impact which require prompt judicial review. *Planned Parenthood Affiliates v. Van de Kamp (1986) 181 Cal. App. 3d 245, 264, 226 Cal. Rptr. 361*

Actions for declaratory relief under *Code Civ. Proc. § 1060* are within superior court's jurisdiction regardless of amount of claim. *Mills v. Mills (1956) 147 Cal. App. 2d 107, 116, 305 P.2d 61*

[2] Standing

Citizen suit provision of the Endangered Species Act, *16 U.S.C. § 1540(g)*, does not confer standing to raise a generalized grievance; to have standing to bring suit under that provision, plaintiffs must have suffered distinct, concrete harm. *Lujan v. Defenders of Wildlife (1992) 504 U.S. 555, 572, 112 S. Ct. 2130, 119 L. Ed. 2d 351*

Federal "case or controversy" requires that plaintiff show he or she has personally suffered some actual or threatened injury that can be traced to defendant's putatively illegal conduct and is likely to be redressed by a favorable decision. *Valley Forge College v. Americans United (1982) 454 U.S. 464, 472, 102 S. Ct. 752, 70 L. Ed. 2d 700* ; *Lujan v. Defenders of Wildlife (1992) 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351*

Federal courts will not generally adjudicate claims based on the legal rights or interests of third parties or on abstract questions of wide public significance that amount to generalized grievances most appropriately addressed in the representative branches, or claims that fall outside "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Valley Forge College v. Americans United (1982) 454 U.S. 464, 474-475, 102 S. Ct. 752, 70 L. Ed. 2d 700*

It was sufficient to establish standing that plaintiffs were seeking to procure enforcement of a public duty. *Bozung v. Local Agency Formation Com. (1975) 13 Cal. 3d 263, 272, 118 Cal. Rptr. 249, 529 P.2d 1017*

Nonresident owners of land adjoining the city had standing to challenge city's zoning decisions that affected their property. *Scott v. City of Indian Wells (1972) 6 Cal. 3d 541, 549, 99 Cal. Rptr. 745, 492 P.2d 1137*

A plaintiff's standing to sue is essential to his or her cause of action. *Parker v. Bowron (1953) 40 Cal. 2d 344, 351*

Safe Drinking Water and Toxic Enforcement Act's [*Health & Safety Code § 25249.5 et seq.*] grant of standing to sue to "any person in the public interest" is not unconstitutional as violating separation of powers and due process principles; California Constitution does not specify, as does United States Constitution, that state's judicial power extends only to "cases and controversies." *National Paint & Coatings Assn. v. State of California (1997) 58 Cal. App. 4th 753, 760, 68 Cal. Rptr. 2d 360*

Geographical nexus for standing can extend beyond city limits since the effects of environmental abuse "are not contained by political lines." *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo (1985) 172 Cal. App. 3d 151, 158-159, 217 Cal. Rptr. 893*

Standing was granted to residents seeking to exclude a residential care facility from their neighborhood by attacking the constitutionality of a state statute that invalidated restrictive covenants prohibiting such facilities. *McCaffrey v. Preston (1984) 154 Cal. App. 3d 422, 431 n.4, 201 Cal. Rptr. 252*

Petitioner lacked beneficial interest because order sought would not provide an effective remedy. *De La Cuesta v. Superior Court (1984) 152 Cal. App. 3d 945, 950, 200 Cal. Rptr. 1*

Sufficient causal relationship for standing exists in plaintiffs' allegations that city's zoning practices had excluded them from residency in the city or had raised their housing costs outside the city by adversely affecting the regional housing market. *Stocks v. City of Irvine (1981) 114 Cal. App. 3d 520, 532, 170 Cal. Rptr. 724*

In granting standing to an unincorporated association the court relied on the fact that association's primary organizational purpose was to protect the unique environment of a park, and that its members included property owners living on the park's edge. *Simons v. City of Los Angeles (1979) 100 Cal. App. 3d 496, 500-501, 161 Cal. Rptr. 67*

Court rejected contentions that pine trees blocking a neighbor's scenic easement could not be cut down because they possessed independent legal rights and standing to assert them. *Ezer v. Fuchsloch (1979) 99 Cal. App. 3d 849,*

863-864, 160 Cal. Rptr. 486

Local residents who were not landowners were sufficiently "aggrieved" to challenge issuance of construction permit under *Coastal Act. Pillsbury v. South Coast Regional Com. (1977) 71 Cal. App. 3d 740, 749, 139 Cal. Rptr. 760*

The intent of the Coastal Act is to allow broad citizen participation in enforcing the provisions of the Act, and not to limit standing to those with an actual financial stake in the outcome. *Sanders v. Pacific Gas & Elec. Co. (1975) 53 Cal. App. 3d 661, 673, 126 Cal. Rptr. 415*

Landowners adjacent to proposed development were aggrieved for purposes of *Code Civ. Proc. § 663* and had right of appeal from lower court's ruling regarding exemption from Coastal Act's permit requirements. *Aries Dev. Co. v. California Coastal Zone Conservation Com. (1975) 48 Cal. App. 3d 534, 541, 122 Cal. Rptr. 315*

California beneficial interest criterion applied without regard to petitioner's standing to maintain an equity action in a federal court. *McDonald v. Stockton Met. Transit Dist. (1973) 36 Cal. App. 3d 436, 440 n.4, 111 Cal. Rptr. 637* ; *City & County of San Francisco v. Western Air Lines, Inc. (1962) 204 Cal. App. 2d 105, 121-126, 22 Cal. Rptr. 216*

The societal importance of environmental issues justified the application of the relaxed standing doctrine to suits seeking the protection of environmental concerns. *Residents of Beverly Glen, Inc. v. City of Los Angeles (1973) 34 Cal. App. 3d 117, 122, 109 Cal. Rptr. 724*

California authority grants citizens or taxpayers standing to challenge government action on environmental and other issues. *Taschner v. City Council (1973) 31 Cal. App. 3d 48, 55-56, 107 Cal. Rptr. 214*

[3] Ripeness

"Hardship factor" satisfied when manufacturers were forced to choose at once between complying with the regulations of questionable validity and risking civil and criminal penalties. *Abbott Laboratories v. Gardner (1967) 387 U.S. 136, 148-149, 87 S. Ct. 1507, 18 L. Ed. 2d 681*

In action challenging general validity of public access guidelines adopted by California Coastal Commission, when no specific application of guidelines involved, ripeness requirement that is prerequisite to judicial review of administrative acts was not met. *Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal. 3d 158, 169-171, 188 Cal. Rptr. 104, 655 P.2d 306*

[4] Exhaustion of Administrative Remedies

If party fails in its attempts to obtain permit from or block project approval by subordinate agency, party must exhaust any right of appeal to appellate body that oversees its functioning before seeking judicial review. *Sea & Sage Audubon Society, Inc. v. Planning Com. (1983) 34 Cal. 3d 412, 417-418, 194 Cal. Rptr. 357, 668 P.2d 664*

No exhaustion required when superior court had concurrent original jurisdiction with State Water Resources Board over certain water rights claims. *National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419, 448-451, 189 Cal. Rptr. 346, 658 P.2d 709* ; *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist. (1980) 26 Cal. 3d 183, 200, 161 Cal. Rptr. 466, 605 P.2d 1*

Property owner's claim of exemption from coastal zone regulations because of preexisting vested rights must be raised with California Coastal Commission before courts will consider matter, since Commission has established administrative procedure for determining such exemptions. *South Coast Regional Com. v. Gordon (1977) 18 Cal. 3d*

832, 834-835, 135 Cal. Rptr. 781, 558 P.2d 867

Although particular issues included in CEQA suits must have been raised in proceedings before agency sued, the issues need not have been contested by particular plaintiffs involved in suit. *Friends of Mammoth v. Board of Supervisors (1972) 8 Cal. 3d 247, 267-268, 104 Cal. Rptr. 761, 502 P.2d 1049*

Futility exception to exhaustion doctrine is narrow and cannot be raised unless petitioner can positively establish that administrative agency has declared what its ruling will be in particular case. *Gantner & Mattern Co. v. California E. Com. (1941) 17 Cal. 2d 314, 318, 109 P.2d 932* ; *People ex rel. State Pub. Wks. Bd. v. Superior Court (1979) 91 Cal. App. 3d 95, 102, 154 Cal. Rptr. 54*

Plaintiffs challenging adoption of mitigated negative declaration under CEQA were excused from exhaustion of administrative remedies requirement by county's failure to provide Department of Fish and Game notice of its intent to adopt mitigated negative declaration, pursuant to *Pub. Res. Code § 21177(e)* (exemption to exhaustion requirement when agency failed to give notice required by law). *Fall River Wild Trout Foundation v. County of Shasta (1999) 70 Cal. App. 4th 482, 489, 82 Cal. Rptr. 2d 705*

Pub. Res. Code § 21177 allows any alleged grounds for noncompliance with CEQA to be raised by any person before close of public hearing on project before issuance of notice of determination; therefore any party may bring action under *Pub. Res. Code § 21167* if it has raised objection to adequacy of EIR before certification. *Galante Vineyards v. Monterey Peninsula Water Management Dist., 57 Cal. App. 4th 13, 66 Cal. Rptr. 2d 547*

Suits brought by persons who did not appear in administrative proceedings at all or who seek to raise issues not raised in administrative proceedings during court proceedings will be dismissed. *Resource Defense Fund v. Local Agency Formation Com. (1987) 191 Cal. App. 3d 886, 894-895, 236 Cal. Rptr. 794* ; *Kane v. Redevelopment Agency (1986) 179 Cal. App. 3d 899, 904, 224 Cal. Rptr. 922* ; *Coalition for Student Action v. City of Fullerton (1984) 153 Cal. App. 3d 1194, 1197, 200 Cal. Rptr. 855*

Exhaustion requirement met by objections to City Council despite lack of participation before *Planning Commission. Browning-Ferris Industries v. City Council (1986) 181 Cal. App. 3d 852, 859-861, 226 Cal. Rptr. 575*

Court held that "less specificity is required to preserve issue for appeal in an administrative proceeding than in a judicial proceeding." *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo (1985) 172 Cal. App. 3d 151, 163, 217 Cal. Rptr. 893*

Exhaustion requirement satisfied when petitioners raised objections before Board of Supervisors but had not participated in earlier environmental review board hearings. *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino (1984) 155 Cal. App. 3d 738, 748, 202 Cal. Rptr. 423*

Landowners are required to apply for zoning variances, building permits, or conditional use permits before filing action attacking the validity of zoning ordinance itself. *Pan Pacific Properties, Inc. v. County of Santa Cruz (1978) 81 Cal. App. 3d 244, 249, 146 Cal. Rptr. 428* ; *Igna v. City of Baldwin Park (1970) 9 Cal. App. 3d 909, 914, 88 Cal. Rptr. 581*

Petitioners had brought dilemma of losing use of billboards on themselves by not applying for administrative variances and thus no exception existed from exhaustion requirement. *Mountain View Chamber of Commerce v. City of Mountain View (1978) 77 Cal. App. 3d 82, 90-91, 143 Cal. Rptr. 441*

Developer failed to exhaust remedies before filing takings claim because he withdrew permit application after regional coastal commission imposed challenged permit conditions and he did not appeal to the *State Coastal Commission. Frisco Land & Mining Co. v. State of California (1977) 74 Cal. App. 3d 736, 754, 141 Cal. Rptr. 820*

Exhaustion was not required for parties who had no notice and did not attend public hearings, despite failure to appeal to town council. *Environmental Law Fund v. Town of Corte Madera (1975) 49 Cal. App. 3d 105, 113, 122 Cal. Rptr. 282*

[5] Statutes of Limitation

Although county landfill built on leased property was "improvement" within meaning of *Code Civ. Proc. § 337.15*, statute did not bar lessor's contractual and indemnification claims or claims to recover remediation costs arising out of contamination from landfill. *San Diego Unified School Dist. v. County of San Diego (2009) 170 Cal. App. 4th 288, 309-311, 87 Cal. Rptr. 3d 796*

Ninety-day limitations period (*Gov. Code § 65009(c)*) applied to proceeding challenging decision of Board of Supervisors granting conditional use permit on ground one supervisor had conflict of interest in violation of *Political Reform Act. Ching v. San Francisco Bd. of Permit Appeals (1998) 60 Cal. App. 4th 888, 891, 70 Cal. Rptr. 2d 700*

Injury to property that starts statute of limitations running is release of hazardous substances and not diminution in property value that occurs when contamination becomes evident. *CAMSI IV v. Hunter Technology Corp. (1991) 230 Cal. App. 3d 1525, 1534-1535, 282 Cal. Rptr. 80*

Administrative mandamus petition is timely if filed within 30 days after agency's delivery of administrative record and petitioner requested that agency prepare administrative record within 10 days after last day on which reconsideration can be ordered. *Liberty v. California Coastal Com. (1980) 113 Cal. App. 3d 491, 498, 170 Cal. Rptr. 247*

Cause of action for injury to property does not accrue until "the point in time when plaintiff becomes aware of defendant's negligence as a cause, or could have become so aware through the exercise of reasonable diligence." *Leaf v. City of San Mateo (1980) 104 Cal. App. 3d 398, 408, 163 Cal. Rptr. 711*

Challenge to agency decision to approve private development that is filed within limitations period may still be dismissed if private developer is not named within that period and is determined to be necessary and indispensable party. *Sierra Club, Inc. v. California Coastal Com. (1979) 95 Cal. App. 3d 495, 502, 157 Cal. Rptr. 190*

In actions "based on progressively developing or continuing wrongs where nature, extent or permanence of the harm are difficult to discover" running of statute is postponed "until the time of discovery of (or opportunity to discover) the facts." *Bradler v. Craig (1969) 274 Cal. App. 2d 466, 471-472, 79 Cal. Rptr. 401*

[6] Laches

Whether claim is barred by laches is ordinarily question of fact, and trial court exercises considerable discretion in determining whether defense should be sustained. *Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 624, 166 Cal. Rptr. 826, 614 P.2d 258* ; *Conti v. Board of Civil Service Commissioners (1969) 1 Cal. 3d 351, 366, 82 Cal. Rptr. 337, 461 P.2d 617*

To support laches defense, prejudice to defendant from delay must be affirmatively proved and will not be presumed. *Conti v. Board of Civil Service Commissioners (1969) 1 Cal. 3d 351, 360-362, 82 Cal. Rptr. 337, 461 P.2d 617*

Laches barred taxpayers from raising environmental questions related to alternative locations for building. *Bresnahan v. City of Pasadena (1975) 48 Cal. App. 3d 297, 305-306, 121 Cal. Rptr. 750*

Delay resulting in economic expense to Department of Highways did not result in any legally cognizable prejudice since Legislature had clearly subordinated economy in government to environmental considerations through adoption of *CEQA. People ex rel. Dept. Pub. Wks. v. Bosio (1975) 47 Cal. App. 3d 495, 525-526, 121 Cal. Rptr. 375*

Administrative mandamus is proceeding in which equitable doctrines are applicable and in which defense of laches may be invoked; in nine-month period between granting conditional use permit and commencing action, fact that developer incurred financial liabilities of $700,000 in relying on use permit constituted showing of unreasonable delay plus prejudice resulting from delay. *Concerned Citizens of Palm Desert, Inc. v. Board of Supervisors (1974) 38 Cal. App. 3d 257, 265, 113 Cal. Rptr. 328*

[7] Class Action

Class action was not allowed as method of asserting claims of numerous persons against polluters, when objective sought was beyond capability of court. *Diamond v. General Motors Corp. (1971) 20 Cal. App. 3d 374, 381-383, 97 Cal. Rptr. 639*

Homeowners' association was improper party to bring class action when it was not member of the interested class of residents who sustained damage from aircraft flights. *Greater Westchester Homeowners Assn., Inc. v. City of Los Angeles (1970) 13 Cal. App. 3d 523, 526*

[8] SLAPP Suit Provisions

Evidence submitted by plaintiff in response to motion to dismiss action as SLAPP suit must be legally sufficient; declaration submitted on information and belief, or hearsay statements, will not suffice for plaintiff to carry his or her burden. *Evans v. Unkow (1995) 38 Cal. App. 4th 1490, 1497-1498, 45 Cal. Rptr. 2d 624*

SLAPP suit provisions are not limited to environmental or other public interest groups, including newspaper publisher or reporters. *Lafayette Morehouse, Inc. v. Chronicle Publishing Co. (1995) 37 Cal. App. 4th 855, 862-864, 44 Cal. Rptr. 2d 46*

SLAPP suit provisions apply to defendant's prior initiation of lawsuit and encouragement or funding by defendant of lawsuits filed by third parties. *Ludwig v. Superior Court (1995) 37 Cal. App. 4th 8, 18, 43 Cal. Rptr. 2d 350*

SLAPP suit provisions apply because defendant's challenged statements were made in connection with public review process. *Dixon v. Superior Court (1994) 30 Cal. App. 4th 733, 743-744, 36 Cal. Rptr. 2d 687*

[9] Attorney's Fees and Costs

Prevailing party in CEQA action may be entitled to attorney's fees under *Code Civ. Proc. § 1021.5*, which provides specific statutory authority for court-awarded attorney's fees under private attorney general theory. *Woodland Hills Residents Assn., Inc. v. City Council (1979) 23 Cal. 3d 917, 925-926, 935-936, 154 Cal. Rptr. 503, 593 P.2d 200* ; *Friends of "B" Street v. City of Hayward (1980) 106 Cal. App. 3d 988, 996-997, 165 Cal. Rptr. 514*

In action challenging approval of permit and mitigated negative declaration for expansion of parochial school, real party in interest, a nonprofit organization that owned and operated the school, was not entitled to award of attorneys' fees under *Code Civ. Proc. § 1021.5* because its pecuniary interest in expansion of school facilities outweighed any public benefit it might have conveyed in defending action. *Jobe v. City of Orange (2001) 88 Cal. App. 4th 412, 419, 105 Cal. Rptr. 2d 782*

Litigant's environmental and aesthetic interests may be taken into account when weighing financial burden against the litigant's personal stake in matter in determining entitlement to award of private attorney general fees under *Code Civ. Proc. § 1021.5*. *Families Unafraid to Uphold Rural El Dorado County (2000) 79 Cal. App. 4th 505, 514, 94 Cal. Rptr. 2d 205*

Prevailing defendant in CEQA action is not entitled to attorney's fees under *Code Civ. Proc. §§ 998* and *1021.1* when relief sought by plaintiff was essentially injunctive in nature. *McDowell v. Watson (1997) 59 Cal. App. 4th 1155, 1160, 69 Cal. Rptr. 2d 692*

Plaintiff who has successfully challenged adequacy of EIR is not entitled to award of attorney's fees under vexatious litigant theory when there is no finding of defendant's bad faith. *County of Inyo v. City of Los Angeles (1978) 78 Cal. App. 3d 82, 91-93, 144 Cal. Rptr. 71*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityExhaustion of RemediesAdministrative LawJudicial ReviewReviewabilityRipenessCivil ProcedureVenueGeneral OverviewCivil ProcedureClass ActionsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawThe JudiciaryCase or ControversyStandingGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundRecordkeeping & ReportingEnvironmental LawLitigation & Administrative ProceedingsDefensesEnvironmental LawLitigation & Administrative ProceedingsJudicial ReviewEnvironmental LawLitigation & Administrative ProceedingsJurisdiction & ProcedureEnvironmental LawWater QualitySafe Drinking Water ActEnforcementEnvironmental LawZoning & Land UseConstitutional LimitsGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsProcedureStatutes of LimitationsAccrual of ActionsContinuous Torts

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A. Procedural Issues in Environmental Cases

36-418 California Forms of Pleading and Practice--Annotated §§ 418.103-418.109

AUTHOR: By Roger Beers

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§ 418.110 Related Matthew Bender Publications

[1] California Environmental Law and Land Use Practice

For detailed coverage of CEQA, see Chs. 20-23

[2] California Real Estate

For discussion of the preparation and use of environmental impact reports, see California Real Estate Law and Practice, Ch. 303, *Requirements of the California Environmental Quality Act* (Matthew Bender)

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§ 418.112 Decisions

[1] Key CEQA Concepts

Federal judicial interpretations of NEPA are relevant to state judicial interpretations of CEQA; however, such interpretations are relevant only to extent that provisions of federal Act may be fairly said to parallel state *Act. Wildlife Alive v. Chickering (1976) 18 Cal. 3d 190, 201-202, 132 Cal. Rptr. 377, 553 P.2d 537*

CEQA is interpreted broadly so as to afford fullest possible protection to environment within reasonable scope of statutory language. *Friends of Mammoth v. Board of Supervisors (1972) 8 Cal. 3d 247, 259, 104 Cal. Rptr. 761, 502 P.2d 1049* ; *City of Antioch v. City Council (1986) 187 Cal. App. 3d 1325, 1330, 232 Cal. Rptr. 507* ; *People ex rel. Younger v. Local Agency Formation Com. (1978) 81 Cal. App. 3d 464, 476, 146 Cal. Rptr. 400*

[2] Exemptions From Act

Exemption for measures submitted to voters for approval [*14 Cal. Code Reg. § 15378(b)(3)*] applies only to voter-sponsored measures placed on ballot as ministerial act required by law; measures proposed and placed on ballot by public agency are subject to CEQA requirements. *Friends of Sierra Madre v. City of Sierra Madre (2001) 25 Cal. 4th 165, 191, 105 Cal. Rptr. 2d 214, 19 P.3d 567*

Airport land use compatibility plan that could potentially result in displaced development due to effect on local land use planning came within common sense exemption [*14 Cal. Code Reg. § 15061(b)(3)*] because record showed that local agencies had already restricted residential development to same extent. *Muzzy Ranch Co. v. Solano County Airport Land Use Com. (2007) 41 Cal. 4th 372, 383, 60 Cal. Rptr. 3d 247, 160 P.3d 116*

Approval of design plan application for large warehouse distribution facility on former military base for which master

EIR had been prepared was ministerial act exempt from CEQA review. *Health First v. March Joint Powers Authority (2009) 174 Cal. App. 4th 1135, 1144, 96 Cal. Rptr. 3d 290*

City improperly relied on categorical exemption for minor alteration to land use limitation [*14 Cal. Code. Reg. § 15305*] in approving specific plan exception for wooden fence constructed by homeowner atop historic granite wall in Hollywoodland housing tract. *Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles (2008) 161 Cal. App. 4th 1168, 1187, 74 Cal. Rptr. 3d 665*

Categorical exemption for urban in-fill projects [*14 Cal. Code Reg. § 15332*] applied to proposed development of 14-story residential building near Balboa Park in San Diego. *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego (2006) 139 Cal. App. 4th 249, 270, 42 Cal. Rptr. 3d 537*

Exemption for government funding mechanisms or other government fiscal activities that do not involve commitment to specific project [*14 Cal. Code Reg. § 15378(b)(4)*] applied to Memorandum of Understanding between city and Native American Tribe concerning funding of possible public improvements for proposed casino on tribal land. *Citizens to Enforce CEQA v. City of Rohnert Park (2005) 131 Cal. App. 4th 1594, 1600, 33 Cal. Rptr. 3d 208*

Public agency may not rely on mitigation measures to grant categorical exemption from CEQA; only projects having no significant effect on environment may be categorically exempt. *Salmon Protection & Watershed Network v. County of Marin (2004) 125 Cal. App. 4th 1098, 1107, 23 Cal. Rptr. 3d 321*

CEQA emergency exemption applied to application for permit to build seawall on bluff that was in danger of collapsing; to qualify for exemption, an emergency need not be unexpected when the project's purpose is to prevent the emergency. *CalBeach Advocates v. City of Solana Beach (2002) 103 Cal. App. 4th 529, 537, 127 Cal. Rptr. 2d 1*

Legislation creating large, residents-only permit parking district came within CEQA categorical exemption applicable to activities involving operation, repair, maintenance, or minor alteration of existing facilities [*14 Cal. Code Reg. § 15301(c)*]. *Santa Monica Chamber of Commerce v. City of Santa Monica (2002) 101 Cal. App. 4th 786, 793, 124 Cal. Rptr. 2d 731*

City properly determined that housing code enforcement program requiring inspection and repair of residential rental units was categorically exempt under city's CEQA guideline exempting projects consisting of "restoration or rehabilitation of deteriorated or damaged structures, facilities or mechanical equipment systems to meet current standards of public health, safety and environmental protection." Further, once agency determines, based on substantial evidence in record, that project falls within categorical exemption, burden shifts to challenging party to produce substantial evidence that project has potential for substantial adverse environmental impa ct. *Apartment Assn. of Greater Los Angeles v. City of Los Angeles (2001) 90 Cal. App. 4th 1162, 1174-1175, 109 Cal. Rptr. 2d 504*

CEQA exemption for small commercial buildings as amended in 1998 [*14 Cal. Code Reg. § 15303(c)*] applied retroactively by court of appeal to hold retail/office building project exempt. *Fairbank v. City of Mill Valley (1999) 75 Cal. App. 4th 1243, 1251, 89 Cal. Rptr. 2d 233*

Exemption for actions taken by regulatory agencies to maintain, restore, or enhance natural resource [*14 Cal. Code Reg. § 15307*] was not applicable to decision to remove species from threatened species list under *California Endangered Species Act. Mountain Lion Federation v. Fish & Game Com. (1996) 44 Cal. App. 4th 241, 254, 51 Cal. Rptr. 2d 408*

Emergency exemption from EIR requirement [*Pub. Res. Code § 21080(b)(3), (4)*] was inapplicable to recovery plan adopted after Northridge Earthquake that provided for redevelopment and economic revitalization of project area. *Castaic Lake Water Agency v. City of Santa Clarita (1996) 41 Cal. App. 4th 1257, 1265-1266, 49 Cal. Rptr. 2d 79*

Approval of building permit for large hotel adjacent to public beach is discretionary, not ministerial, when approval of project could not be legally compelled without changes in design that might alleviate adverse environmental consequences and public agency shaped project in ways that might be identified in EIR. *Miller v. City of Hermosa Beach (1993) 13 Cal. App. 4th 1118, 1138-1141, 17 Cal. Rptr. 2d 408*

EIR was not required for special election called by city council on zoning change. *Lee v. City of Lompoc (1993) 14 Cal. App. 4th 1515, 1518*

Proposed harvesting plan prepared under the Forest Practice Act of 1973 [*Pub. Res. Code § 4511 et seq.*] is exempt under *Pub. Res. Code § 21080.5* from the EIR requirement; nevertheless, Department of Forestry was still required to undertake environmental inquiry into the plan, including consideration of plan's significant cumulative impacts. *Laupheimer v. State of California (1988) 200 Cal. App. 3d 440, 462, 246 Cal. Rptr. 82*

Adoption of sphere of influence that is virtually coextensive with city's existing boundaries, with exception of addition of one tract area, is exempt under *Pub. Res. Code §§ 21080(b)(10), 21083,* and *21084,* and *14* Cal. Code Reg. § 15378. *City of Agoura Hills v. Local Agency Formation Com. (1988) 198 Cal. App. 3d 480, 493-496, 243 Cal. Rptr. 740*

Building permit process was discretionary if city has discretion to require changes that would mitigate environmental problems that EIR might conceivably uncover. *Friends of Westwood, Inc. v. City of Los Angeles (1987) 191 Cal. App. 3d 259, 273, 235 Cal. Rptr. 788*

EIR was not required in connection with timber harvesting operations when regulation of operations by Department of Forestry was certified as exempt from EIR requirements under *Pub. Res. Code § 21080.5*; such certification exempts regulatory program from EIR requirements imposed by local as well as state public entities. *Seghesio v. County of Napa (1982) 135 Cal. App. 3d 371, 376-377, 185 Cal. Rptr. 224*

EIR was not required for demolition of building in redevelopment area when EIR was already prepared for entire redevelopment area and demolition was ministerial. *Environmental Law Fund, Inc. v. City of Watsonville (1981) 124 Cal. App. 3d 711, 714-716, 177 Cal. Rptr. 542*

Replacement of cement plant on same site with same capacity was entitled to categorical exemption from EIR requirements for replacement of existingstructure. *Dehne v. County of Santa Clara (1981) 115 Cal. App. 3d 827, 837-842, 171 Cal. Rptr. 753*

Discretionary act of public official, for purposes of CEQA, was act which requires personal deliberation, decision, and judgment, while ministerial act amounts only to performance of duty in which official left no personal choice. *Natural Resources Defense Council, Inc. v. Arcata Nat. Corp. (1976) 59 Cal. App. 3d 959, 969, 131 Cal. Rptr. 172*

[3] Determination of Necessity for EIR or Negative Declaration

CEQA is construed as requiring agency to render written determination whether project requires EIR before giving final approval to project, and as requiring preparation of either EIR if project may have significant effect on environment, or negative declaration if it will not; failure of city council to render written determination of environmental impact before approving drilling project violated CEQA. *No Oil, Inc. v. Los Angeles (1974) 13 Cal. 3d 68, 79-81, 118 Cal. Rptr. 34, 529 P.2d 66*

City's conditional agreement to sell land for private development, coupled with financial support, public statements, and other actions by its officials committing city to development, constituted project approval that was required under

CEQA to have been preceded by preparation of EIR. *Save Tara v. City of West Hollywood (2008) 45 Cal. 4th 116, 133-134, 84 Cal. Rptr. 3d 614, 194 P.3d 344*

Agency not required to complete CEQA review before rejecting project; if agency at any time decides not to proceed with a project, CEQA is inapplicable from that time forward. *Las Lomas Land Co. LLC v. City of Los Angeles (2009) 177 Cal. App. 4th 837, 850-851, 99 Cal. Rptr. 3d 503*

Payment of mitigation pursuant to county ordinance did not entitle developer to negative mitigated declaration; to satisfy duty to mitigate, in-lieu fee system must either be evaluated under CEQA (two-tier approval for later, more specific, projects) or on project-specific basis. *California Native Plant Society v. County of El Dorado (2009) 170 Cal. App. 4th 1026, 1055, 88 Cal. Rptr. 3d 530*

City council abused its discretion in failing to consider whether 90-year-old apartment buildings were historical resources for purposes of CEQA, even though it had previously denied application to list buildings in city's historic register. *Valley Advocates v. County of Fresno (2008) 160 Cal. App. 4th 1039, 1062-1063, 72 Cal. Rptr. 3d 690*

Potential significant impact from construction of high density senior project was not merely obstruction of views of a few adjacent homeowners; project created change in the aesthetic environment and interfered with scenic views of the public in general by introducing into the primarily single-family, residential neighborhood a large, high-density residential building that included mixed two-story and three-story structures. *Citizens for Responsible and Open Government v. City of Grand Terrace (2008) 160 Cal. App. 4th 1323, 1337, 73 Cal. Rptr. 3d 202*

Subsequent EIR required for subdivision project that was initially approved with mitigated negative declaration but languished in litigation for so long its tentative map expired; subdivision was not a new project for purposes of CEQA but additional environmental review was required based on new information about potentially significant impacts on water supply and protected species. *Moss v. County of Humboldt (2008) 162 Cal. App. 4th 1041, 1057-1058, 76 Cal. Rptr. 3d 428*

Comments by neighbors without supporting evidence or expertise did not raise fair argument that there was substantial evidence that development project could have significant effects on environment. *Porterville Citizens for Responsible Hillside Development v. City of Porterville (2007) 157 Cal. App. 4th 885, 890, 69 Cal. Rptr. 3d 105*

When large commercial real estate development was modified to include residential use, city properly prepared addendum to EIR for original project because substantial evidence supported conclusion that changes would lessen many impacts that had been deemed significant and unavoidable; however, subsequent EIR was required on issue of police services. *Mani Brothers Real Estate Group v. City of Los Angeles (2007) 153 Cal. App. 4th 1385, 1403-1404, 64 Cal. Rptr. 3d 79*

Further environmental review required when Wal-Mart Supercenter was substituted for smaller retail stores in proposed development for which mitigated negative declaration had been prepared; city failed to proceed as required by law when it refused to consider urban decay effects that might result from store closures in neighboring cities caused by economic competition. *American Canyon Community United for Responsible Growth v. City of American Canyon (2006) 145 Cal. App. 4th 1062, 1082, 52 Cal. Rptr. 3d 312*

New information occurring after final EIR is released but before certification need not be included in EIR before agency determines whether such information is significant enough to trigger revision and recirculation. Western Placer Citizens for an *Agricultural & Rural Environment v. County of Placer (2006) 144 Cal. App. 4th 890, 902, 50 Cal. Rptr. 3d 799*

Independent environmental review rather than addendum to previous mitigated negative declaration required for new

project with many of same characteristics as earlier project approved for same site. *Save Our Neighborhood v. Lishman (2006) 140 Cal. App. 4th 1288, 1301, 45 Cal. Rptr. 3d 306*

Although initial study was inadequate, existing administrative record did not contain evidence supporting fair argument that project may have significant effect on environment; thus, once informational requirements of complete initial study had been met, city could determine whether EIR was required. *Lighthouse Field Beach Rescue v. City of Santa Cruz (2005) 131 Cal. App. 4th 1170, 1202, 31 Cal. Rptr. 3d 901*

City's adoption of mitigated negative declaration for residential development was improper because substantial evidence in form of comments by local residents supported fair argument that project would have significant, unmitigated environmental impacts on animal wildlife and traffic. *Mejia v. City of Los Angeles (2005) 130 Cal. App. 4th 322, 340-341, 29 Cal. Rptr. 3d 788*

Comments by neighbors concerning proposed housing development's aesthetic impacts and inconsistency with city's land use policies and regulations constituted substantial evidence to support fair argument project may have significant effect on environment requiring preparation of EIR. *Pocket Protectors v. City of Sacramento (2004) 124 Cal. App. 4th 903, 936-937, 21 Cal. Rptr. 3d 791*

County properly approved negative declaration for reclamation plan for surface mining that included expansion of the mining operation, even though negative declaration did not address effects of expansion; negative declaration properly addressed only impacts from reclamation activity. *El Dorado County Taxpayers for Quality Growth v. County of El Dorado (2004) 122 Cal. App. 4th 1591, 1595, 20 Cal. Rptr. 3d 224*

Demolition of historic building is substantial adverse impact requiring preparation of EIR; impact not mitigated by archival documentation or placement of plaque. *Architectural Heritage Assn. v. County of Monterey (2004) 122 Cal. App. 4th 1095, 1113* ; *League for Protection of Oakland's etc. Historic Resources v. City of Oakland (1997) 52 Cal. App. 4th 896, 908-909, 60 Cal. Rptr. 2d 821*

Opinions of neighbors that project was "out of character" with neighborhood did not constitute substantial evidence requiring preparation of EIR; in enacting CEQA, Legislature did not intend to require EIR when sole environmental impact is aesthetic merit of building in highly developed area. *Bowman v. City of Berkeley (2004) 122 Cal. App. 4th 572, 592-593, 18 Cal. Rptr. 3d 814*

Construction of 21 hillside houses constituted single project for which EIR was required; developer could not avoid environmental review by filing serial permit applications for two or three houses at a time. *Arviv Enterprises, Inc. v. South Valley Planning Commission (2002) 101 Cal. App. 4th 1333, 1346, 125 Cal. Rptr. 2d 140*

County required to prepare EIR rather than negative declaration with regard to general plan amendments; project description erroneously characterized amendments as mere clarifications of existing general plan provisions and initial study failed to consider reasonably anticipated growth and development resulting from amendments. *City of Redlands v. County of San Bernardino (2002) 96 Cal. App. 4th 398, 407-408, 414, 117 Cal. Rptr. 2d 582*

After action was remanded for preparation of full EIR, trial court erred in severing mitigation bank portion of project without making findings on severability as required by *Pub. Res. Code § 21168.9(b)* and by allowing rest of project to continue without requiring preparation of EIR. *San Bernardino Valley Audubon Society v. Metropolitan Water Dist. (2001) 89 Cal. App. 4th 1097, 1106, 109 Cal. Rptr. 2d 108*

Social and economic effects of Borders bookstore tenancy is not potentially significant change in environment requiring preparation of supplemental or subsequent EIR. *Friends of Davis v. City of Davis (2000) 83 Cal. App. 4th 1004, 1019, 100 Cal. Rptr. 2d 413*

Department of Water Resources, as state agency charged with responsibility for State Water Project, should have been lead agency for purposes of environmental review of Monterey Agreement (concerning revision of long-term contracts between Department and local water contractors) rather than a local agency. *Planning and Conservation League v. Department of Water Resources (2000) 83 Cal. App. 4th 892, 904-905, 100 Cal. Rptr. 2d 173*

Mitigated negative declaration for mitigation banking project was improper because there was a fair argument that there would be significant environmental effects as to every aspect of project and mitigated negative declaration did not ensure a direct correlation between impacts and mitigation measures. *San Bernardino Valley Audubon Society v. Metropolitan Water Dist. (1999) 71 Cal. App. 4th 382, 390*

During initial study, lead agency was required only to determine whether project's incremental contribution of cumulative impacts is considerable and was not required to fully evaluate cumulative impact of such projects unless agency concludes that EIR is required. *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus (1996) 42 Cal. App. 4th 608, 623-624, 49 Cal. Rptr. 2d 494*

Deferred mitigation measures are permissible in mitigated negative declaration if agency commits itself to devising measures that will satisfy specific performance criteria articulated at time of project approval. *Gentry v. City of Murrieta (1995) 36 Cal. App. 4th 1359, 1396-1397, 43 Cal. Rptr. 2d 170*

Negative declaration for general plan amendment was proper when it provided that specific developments would have to mitigate traffic effects. *Schaeffer Land Trust v. San Jose City Council (1989) 215 Cal. App. 3d 612, 625-626, 263 Cal. Rptr. 813*

CEQA does not require recirculation for public review and comment of negative declaration after addition of two mitigation measures proposed in response to comments by opponents of project. *Long Beach Sav. & Loan Assn. v. Long Beach Redevelopment Agency (1986) 188 Cal. App. 3d 249, 263, 232 Cal. Rptr. 772*

Agency is required to prepare EIR whenever it perceives some substantial evidence that project may have significant environmental effect or action arguably will have adverse environmental impact. *Citizens for Non-Toxic Pest Control v. Department of Food & Agriculture (1986) 187 Cal. App. 3d 1575, 1583, 232 Cal. Rptr. 729*

Conformity of public works project with general plan for area does not insulate project from EIR requirement when it may be fairly argued that project will generate significant environmental effects. *City of Antioch v. City Council (1986) 187 Cal. App. 3d 1325, 1331, 232 Cal. Rptr. 507*

Local agency is required to compare newly authorized land use with actually existing conditions in assessing whether EIR is required for general plan amendment changing land use designation; comparison of potential impacts under amendment with potential impacts under existing general plan was insufficient. *Christward Ministry v. Superior Court (1986) 184 Cal. App. 3d 180, 190, 228 Cal. Rptr. 868*

Lead agency's division of shopping center project into two parts, for which two separate environmental documents for same project were then filed, was prejudi cial abuse of discretion with regard to agency's determination of whether or not EIR was required, because action was inconsistent with CEQA's mandate that large project not be divided into little ones that can result in improper submergence of aggregate environmental considerations of total project. *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo (1985) 172 Cal. App. 3d 151, 165-168, 217 Cal. Rptr. 893*

Agency decision to issue "mitigated negative declaration" (statement that project as mitigated after initial proposal would have no significant environmental impact) rather than require EIR was proper when significant effects of project

identified in initial study are mitigated so that no significant environmental effects will occur. *Perley v. Board of Supervisors (1982) 137 Cal. App. 3d 424, 431, 187 Cal. Rptr. 53*

[4] Procedural Requirements for Preparation of Environmental Impact Reports

Consultant hired by county to prepare EIR for development project could not be held liable to project applicant on theories of breach of contract (third-party beneficiary) or negligence, based on failure to timely prepare *EIR. Lake Almanor Associates L.P. v. Huffman Broadway Group Inc. (2009) 178 Cal. App. 4th 1194, 1201-1203, 101 Cal. Rptr. 3d 71*

Mandatory relief from dismissal under *Code Civ. Proc. § 473(b)* for failure to timely request hearing under *Pub. Res. Code § 21167.4* is unavailable when failure is due to attorney's inexcusable neglect. *Nacimiento Regional Water Management Advisory Committee v. Monterey County Water Resources Agency (2004) 122 Cal. App. 4th 961, 968, 18 Cal. Rptr. 3d 921*

Amended CEQA guidelines invalidated. *Communities for a Better Enviroment v. California Resources Agency (2002) 103 Cal. App. 4th 98, 108, 126 Cal. Rptr. 2d 441*

Tiering of EIRs is authorized only when previous EIR has been certified; thus, EIR that tiered to program EIR that was decertified was fatally defective and had to be decertified. *Friends of the Santa Clara River v. Castaic Lake Water Agency (2002) 95 Cal. App. 4th 1373, 1384, 116 Cal. Rptr. 2d 54*

Allegations that agency failed to issue initial studies within time required by CEQA Guidelines is not sufficient to state cause of action for "deemed approval" of billboard permit applications. *Eller Media Co. v. City of Los Angeles (2001) 87 Cal. App. 4th 1217, 1221, 105 Cal. Rptr. 2d 262*

Appeal from certification of EIR by unelected planning commission must be decided by majority vote of elected body; thus, county Board of Supervisors could not validly certify EIR by tie vote. *Vedanta Society of Southern California v. California Quartet, Ltd. (2000) 84 Cal. App. 4th 517, 530, 100 Cal. Rptr. 2d 889*

Lead agency's failure to certify EIR within one year of accepting application as complete does not result in automatic certification of environmental document under "deemed approved" provisions of Permit Streamlining Act [*Gov. Code § 65950*]. *Riverwatch v. County of San Diego (1999) 76 Cal. App. 4th 1428, 1440-1441, 91 Cal. Rptr. 2d 322*

Mandamus was proper remedy for city's failure to complete process of preparing and certifying EIR within one year from date on which development application was accepted as complete [*Pub. Res. Code § 21151.5(a)(1)*]. *Sunset Drive Corp. v. City of Redlands (1999) 73 Cal. App. 4th 215, 222, 86 Cal. Rptr. 2d 209*

[5] Contents of EIR

EIR for development project may satisfy CEQA if it (1) acknowledges degree of uncertainty involved with regard to future water sources, (2) discusses reasonably foreseeable alternatives including alternative water sources and option of curtailing development, and (3) discloses significant foreseeable environmental effects of each alternative as well as mitigation measures to minimize adverse impacts. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal. 4th 412, 434, 53 Cal. Rptr. 3d 821, 150 P.3d 709*

Voluntary payment of funds by state university to mitigate offsite impacts of expansion not infeasible. *City of Marina v. Bd. of Trs. (2006) 39 Cal. 4th 341, 359-362, 46 Cal. Rptr. 3d 355, 138 P.3d 692*

EIR was required to contain facts and analysis, not only agency's bare conclusions or opinions, to enable decisionmakers and public to make independent, reasoned judgment about proposed project. *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Ass'n (1986) 42 Cal. 3d 929, 932 , 231 Cal. Rptr. 748, 727 P.2d 1029*

EIR dealing with exploratory drilling was only required to discuss impact of commercial development which may result when meaningful inquiry into consequences of such development can be made. *No Oil, Inc. v. City of Los Angeles (1974) 13 Cal. 3d 68, 77 n.5, 118 Cal. Rptr. 34, 529 P.2d 66*

Revision of site development plan to expand size of retail space to "superstore" did not require subsequent or supplemental EIR; inclusion in project of retail store called "supercenter" does not automatically trigger requirement that project's EIR include examination of possible urban decay effects. *Melom v. City of Madera (2010) 183 Cal. App. 4th 41, 54, 106 Cal. Rptr. 3d 755*

City did not improperly defer mitigation when it identified habitat loss as impact of project and identified specific measure to mitigate that impact--preservation or creation of replacement habitat offsite in specific ratio to habitat lost as result of project; city was not required to identify any proposed specific mitigation site. *California Native Plant Society v. City of Rancho Cordova (2009) 172 Cal. App. 4th 603, 622, 91 Cal. Rptr. 3d 571*

City did not fail to proceed in lawful manner when it relied on California Building Energy Efficiency Standards [Title 24, Part 6, Cal. Code. Reg.] in determining that project would not have significant energy impact, as required by *Pub. Res. Code § 21100(b)(3)*. *Tracy First v. City of Tracy (2009) 177 Cal. App. 4th 912, 933-934, 99 Cal. Rptr. 3d 621*

Groundwater supplier has substantial discretion in determining how to measure groundwater sufficiency for purposes of water supply assessment to be included in EIR; supplier not required to analyze groundwater pumping by all users in entire basin. *O.W.L. Foundation v. City of Rohnert Park (2008) 168 Cal. App. 4th 568, 592, 86 Cal. Rptr. 3d 1*

Combined EIR/supplemental EIR for development of 6,800 acres into four planned communities adequately discussed water quality impacts in technical documents contained in appendices to EIR. *Sierra Club v. City of Orange (2008) 163 Cal. App. 4th 523, 540, 78 Cal. Rptr. 3d 1*

EIR for large-scale development adequately identified and analyzed future water supplies. *Santa Clarita Organization for Planning the Environment v. County of Los Angeles (2007) 157 Cal. App. 4th 149, 162-163, 68 Cal. Rptr. 3d 449*

Statement of overriding considerations engaged in serious misrepresentation by claiming that proposed project would have economic benefits superior to three alternatives considered in EIR because those alternatives "generally propose no development or development to a lesser degree"; in reality, alternatives were as large as or larger than proposed project, and record contained no reason to think their economic benefits would be smaller. *Woodward Park Homeowners Association Inc. v. City of Fresno (2007) 150 Cal. App. 4th 683, 691, 58 Cal. Rptr. 3d 102*

Description of environmental baseline was inadequate when EIR measured commercial development project's impacts by comparing it to maximum buildout under existing zoning instead of to vacant land that actually existed at project site. *Woodward Park Homeowners Association Inc. v. City of Fresno (2007) 150 Cal. App. 4th 683, 708-709, 58 Cal. Rptr. 3d 102*

No substantial evidence supported conclusion that alternatives based on restoration of historic dwelling were economically infeasible; homeowner declined to provide plans or specifications of new residence and without knowing cost of new construction it was not possible to determine whether cost of renovating existing historic structure was reasonable or feasible. *Uphold Our Heritage v. Town of Woodside (2007) 147 Cal. App. 4th 587, 598-599, 54 Cal. Rptr. 3d 366*

Mitigation by community college district of off-campus impacts on traffic from expansion of college campus not legally infeasible. *County of San Diego v. Grossmont-Cuyamaca Cmty. Coll. Dist. (2006) 141 Cal. App. 4th 86, 103-104, 45 Cal. Rptr. 3d 674*

EIR for Wal-Mart Supercenter not required to consider urban decay when issue was adequately considered in prior EIR for development area. *Gilroy Citizens for Responsible Planning v. City of Gilroy (2006) 140 Cal. App. 4th 911, 933-934, 45 Cal. Rptr. 3d 102*

EIR for development of industrial park in Santa Clarita Valley failed to adequately consider availability of water supplies for project. *California Oak Found. v. City of Santa Clarita (2005) 133 Cal. App. 4th 1219, 1226-1227, 35 Cal. Rptr. 3d 434*

Lead agency could eliminate previously adopted mitigation conditions from EIR only after conducting another CEQA review and then adopting finding that conditions were no longer feasible. *Lincoln Place Tenants Assn. v. City of Los Angeles (2005) 130 Cal. App. 4th 1491, 1508*

EIR for commercial development project that included Wal-Mart supercenter adequately evaluated impact of urban decay. *Anderson First Coalition v. City of Anderson (2005) 130 Cal. App. 4th 1173, 1186, 30 Cal. Rptr. 3d 738*

Fair-share mitigation fee imposed on project in connection with improvements to freeway interchange was inadequate; city was required to make fee part of reasonable, enforceable plan or program tied to actual mitigation of traffic impacts at issue. *Anderson First Coalition v. City of Anderson (2005) 130 Cal. App. 4th 1173, 1189, 30 Cal. Rptr. 3d 738*

EIRs for proposed shopping centers located less than four miles apart that included Wal-Mart supercenters as main tenants were inadequate because they failed to consider projects' individual and cumulative potential to indirectly cause urban/suburban decay. *Bakersfield Citizens for Local Control v. City of Bakersfield (2004) 124 Cal. App. 4th 1184, 1204, 22 Cal. Rptr. 3d 203*

EIR satisfied requirements of *14 Cal. Code Reg. § 15148* (lead agency must "cite all documents" used in preparation of EIR), even though it did not specifically reference each of technical studies and reports by title, author, and date, but instead referred to them only by general subject matter. *El Morro Community Assn. v. California Dept. of Parks & Recreation (2004) 122 Cal. App. 4th 1341, 19 Cal. Rptr. 3d 445*

Economic feasibility of alternatives need not be discussed in EIR, so long as discussion and supporting evidence are present somewhere in administrative record. *Sierra Club v. County of Napa (2004) 121 Cal. App. 4th 1490, 1502-1503, 19 Cal. Rptr. 3d 1*

CEQA does not require disclosure of name of project's end user; town did not violate CEQA by certifying EIR that did not identify Wal-Mart as end user of proposed distribution center. *Maintain Our Desert Environment v. Town of Apple Valley (2004) 120 Cal. App. 4th 396, 419*

Program EIR for general plan amendment and zone change for 7,000-acre development adequately addressed effects of project on housing/job ratio, agricultural resources, and biological resources on site and properly deferred mitigation of those effects. *Defend the Bay v. City of Irvine (2004) 119 Cal. App. 4th 1261, 15 Cal. Rptr. 3d 176*

Agency abused its discretion in certifying EIR for project to replace irrigation canal with pipeline, because EIR did not contain statement indicating why resulting reduction in surface flow of local streams would not be significant as required by *Pub. Res. Code § 21100(c)* and *14* Cal. Code Reg. § 15128. *Protect the Historic Amador Waterways v. Amador Water Agency (2004) 116 Cal. App. 4th 1099, 1112, 11 Cal. Rptr. 3d 104*

EIR description of environmental setting for increased withdrawal of water from Russian River was deficient because it did not disclose either impact on salmonid species of diverting water from Eel River, part of water supply system, or fact that FERC was considering proposals to curtail those diversions; incomplete description of environmental setting failed to set stage for discussion of cumulative impacts of FERC proceeding and project. *Friends of the Eel River v. Sonoma County Water Agency (2003) 108 Cal. App. 4th 859, 134 Cal. Rptr. 2d 322*

CEQA does not compel compliance with any particular survey methods or protocols, thus county was not required to conduct protocol level study following methodologies established by Department of Fish and Game in determining effects on protected species of construction and operation of large commercial dairy. *Association of Irritated Residents v. County of Madera (2003) 107 Cal. App. 4th 1383, 1396, 133 Cal. Rptr. 2d 718*

Fact that EIR includes more than one project is not violation of CEQA. *Neighbors of Cavitt Ranch v. County of Placer (2003) 106 Cal. App. 4th 1092, 1103, 131 Cal. Rptr. 2d 379*

EIR that used state water project "entitlements" to calculate available water supply for large development violated CEQA; draft EIR did not consider differences between entitlement and actual supply, and final EIR contained inadequate response to concerns about reliability of water supply. *Santa Clarita Org. for Planning the Environment v. County of Los Angeles (2003) 106 Cal. App. 4th 705, 721-722, 131 Cal. Rptr. 2d 186*

EIR for airport expansion (1) failed to analyze adequately noise impacts from planned additional nighttime flights; (2) erred in using outdated information in assessing emissions of toxic air contaminants (TACs) from jet aircraft; and (3) failed to support decision not to evaluate health risks associated with emission of TACs with meaningful analysis. *Berkeley Keep Jets Over the Bay Committee v. Board of Commissioners (2001) 91 Cal. App. 4th 1344, 1350, 111 Cal. Rptr. 2d 598*

EIR for updated specific plan for area around Napa County airport was inadequate in failing to identify and analyze alternative sources for water and resources for treatment of wastewater. *Napa Citizens for Honest Government v. Napa County Board of Supervisors (2001) 91 Cal. App. 4th 342, 373-374, 110 Cal. Rptr. 2d 579*

Baseline determination must be first rather than last step in environmental review process, but date for establishing baseline cannot be rigid, because environmental conditions may vary from year to year and in some cases it may be necessary to consider conditions over range of time periods. *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors (2001) 87 Cal. App. 4th 99, 125, 104 Cal. Rptr. 2d 326*

City violated CEQA when it adopted transportation mitigation measures but did not require they be implemented as condition of development and made no provision to ensure they would actually be implemented or be "fully enforceable." *Federation of Hillside & Canyon Associations v. City of Los Angeles (2000) 83 Cal. App. 4th 1252, 1261, 100 Cal. Rptr. 2d 301*

EIR for Monterey Agreement (statement of principles to be incorporated into revision of long-term contracts between Department of Water Resources and local water contractors governing supply of water under State Water Project) was inadequate because it failed to discuss existing mechanisms for addressing permanent water shortage as a "no project" alternative. *Planning and Conservation League v. Department of Water Resources (2000) 83 Cal. App. 4th 892, 916, 100 Cal. Rptr. 2d 173*

EIR failed to describe environmental setting adequately because it failed to discuss volume of groundwater in aquifer underlying proposed landfill site, particularly potable water, a valuable and relatively scarce resource in region. *Cadiz Land Co. v. Rail Cycle, L.P. (2000) 83 Cal. App. 4th 74, 92, 99 Cal. Rptr. 2d 378*

EIR for development of new water supplies did not satisfy CEQA because it was predicated on population projections in draft general plan that had not been adopted and was subsequently held to be judicially inadequate. *County of Amador v. El Dorado County Water Agency (1999) 76 Cal. App. 4th 931, 948*

General "conceptual" description of water diversion structures in EIR for expansion of surface mining operation was adequate because it provided sufficient information to understand environmental impacts of proposed project. *Dry Creek Citizens Coalition v. County of Tulare (1999) 70 Cal. App. 4th 20, 36, 82 Cal. Rptr. 2d 398*

EIR properly used environmental setting and baseline consisting of future environmental conditions at surface mining operation if existing conditional use permit was extended. *Fairview Neighbors v. County of Ventura (1999) 70 Cal. App. 4th 238, 242-243, 82 Cal. Rptr. 2d 436*

EIR was not required to discuss alternatives when no other feasible site existed in area that project was to serve. *Save Our Residential Environment v. City of West Hollywood (1992) 9 Cal. App. 4th 1745, 1751-1754, 12 Cal. Rptr. 2d 308*

EIR that failed to consider cumulative impact of all regional energy projects was inadequate; projects had significant collective impact even though specific project had limited impact. *Kings County Farm Bureau v. City of Hanford (1990) 221 Cal. App. 3d 692, 718-723, 270 Cal. Rptr. 650*

EIR was not required to consider all possible alternatives of proposed project; statutory requirements for consideration of alternatives is judged against rule of reason. *Long Beach Sav. & Loan Assn. v. Long Beach Redevelopment Agency (1986) 188 Cal. App. 3d 249, 263-264, 232 Cal. Rptr. 772* ; *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors (1982) 134 Cal. App. 3d 1022, 1028-1029, 185 Cal. Rptr. 41* ; *Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco (1980) 106 Cal. App. 3d 893, 910, 165 Cal. Rptr. 401*

EIR that fails to analyze cumulative air pollution impact of proposed addition to coast shore oil refinery impeded meaningful public discussion and skewed decisionmaker's perspective regarding environmental consequences of project, necessity for mitigation measures, and appropriateness of project approval. *Citizens to Preserve the Ojai v. County of Ventura (1985) 176 Cal. App. 3d 421, 431-432, 222 Cal. Rptr. 247*

EIR does not have to resolve disagreement between experts if it discloses disagreement and responds to arguments. *Greenebaum v. City of Los Angeles (1984) 153 Cal. App. 3d 391, 412-415, 200 Cal. Rptr. 237*

EIR was inadequate in treatment of cumulative impacts of probable downtown development because it did not consider cumulative impacts of projects undergoing environmental review but not approved. *San Franciscans for Reasonable Growth v. City and County of San Francisco (1984) 151 Cal. App. 3d 61, 72-81, 198 Cal. Rptr. 634*

CEQA does not mandate choice of environmentally best feasible project if through imposition of feasible mitigation measures alone public agency has reduced environmental damage from project to acceptable level. *Laurel Hills Homeowners Assn. v. City Council (1978) 83 Cal. App. 3d 515, 521, 147 Cal. Rptr. 842*

Accurate, stable, and finite project description was essential to informative and legally sufficient *EIR. County of Inyo v. Los Angeles (1977) 71 Cal. App. 3d 185, 199, 139 Cal. Rptr. 396*

When scope of larger project was unknown until initial smaller project was completed, and when initial project does not commit responsible agency tolarger project, EIR for initial project was not required to address itself to scope of larger project. *Lake County Energy Council v. County of Lake (1977) 70 Cal. App. 3d 851, 854, 139 Cal. Rptr. 176*

[6] Limitations Period

If lead agency makes substantial changes to a project after EIR approval, and fails to prepare a subsequent EIR, a lawsuit may be filed under CEQA within 180 days after petitioner "knew or reasonably should have known that the project differs substantially from the one described in the EIR." *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Ass'n (1986) 42 Cal. 3d 929, 939* ; *Citizens for Non-Toxic Pest Control v. Department of Food & Agriculture (1986) 187 Cal. App. 3d 1575, 1580-1581, 232 Cal. Rptr. 729*

Challenge to Coastal Commission approval of coastal development permits were timely under *Pub. Res. Code § 21080.5(g)* (action must be filed within 30 days after notice of approval is filed with California Resources Agency) to extent plaintiffs challenged Commission's alleged noncompliance with CEQA requirements for certified regulatory programs, even though challenge was untimely under *Coastal Act. Strother v. California Coastal Commission (2009) 173 Cal. App. 4th 873, 881-882, 92 Cal. Rptr. 3d 831*

Action five months after city adopted mitigated negative declaration (MND) and disposition and development agreement (DDA) was untimely as challenge to MND because adoption of DDA was a "project" under CEQA; action therefore was governed by *Pub. Res. Code § 21166* (subsequent and supplemental environmental impact reports) and the "substantial evidence" standard applied. *Citizens for a Megaplex-Free Alameda v. City of Alameda (2007) 149 Cal. App. 4th 91, 108-109, 56 Cal. Rptr. 3d 728*

Petition challenging issuance of conditional use permit on CEQA grounds must be personally served on agency within 90 days after challenged action pursuant to *Gov. Code § 65009(c)(1)(E).* *Royalty Carpet Mills, Inc. v. City of Irvine (2005) 125 Cal. App. 4th 1110, 1123, 23 Cal. Rptr. 3d 282*

Notice of exemption whose wording was too vague to start the 35-day limitation period under CEQA had to be challenged within the 180-day period applicable to defective notices. *City of Chula Vista v. County of San Diego (1994) 23 Cal. App. 4th 1713, 1720, 29 Cal. Rptr. 2d 89*

180-day limitations period under CEQA was applicable notwithstanding the agency's proper filing of notice to invoke 30-day limitations period, because the county clerk failed to properly post the notice. *Lewis v. Seventeenth Dist. Agricultural Assn. (1985) 165 Cal. App. 3d 823, 834-835, 211 Cal. Rptr. 884*

30-day limitations period under CEQA does not start running until notice ofdetermination is posted in office of county clerk. *Citizens of Lake Murray Area Assn. v. City Council (1982) 129 Cal. App. 3d 436, 439-440, 181 Cal. Rptr. 123*

[7] Judicial Review of Agency Decisions Under CEQA

Water Supply Assessment prepared for inclusion in an EIR is a technical, informational, advisory opinion; it therefore is not "final" act or determination subject to direct mandamus review, and must be challenged as part of CEQA review. *California Water Impact Network v. Newhall County Water District (2008) 161 Cal. App. 4th 1464, 1477-1478, 75 Cal. Rptr. 3d 393*

In actions to enforce public rights under CEQA, venue is proper under *Code Civ. Proc. § 393(b)* where some or all of the cause of action arose. *California State Parks Found. v. Superior Court (2007) 150 Cal. App. 4th 826, 834, 58 Cal. Rptr. 3d 715*

City improperly delegated to developer its responsibility to prepare administrative record pursuant to *Pub. Res. Code § 21167.6(b)(1).* *Hayward Area Planning Assn. v. City of Hayward (2005) 128 Cal. App. 4th 176, 186*

Inadequacy of administrative record required reversal of EIR approval for mining project. *Protect Our Water v.*

County of Merced (2003) 110 Cal. App. 4th 362, 373, 1 Cal. Rptr. 3d 726

Corporation in the business of solid waste disposal lacked standing to raise CEQA challenge to modification of competitor's permit; its interests in the litigation were competitive and commercial and therefore did not come within the zone of interests protected by CEQA. *Waste Management of Alameda County, Inc. v. County of Alameda (2000) 79 Cal. App. 4th 1223, 1234-1235, 94 Cal. Rptr. 2d 740*

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawAir QualityEnforcementCitizen SuitsEnvironmental LawAssessment & Information AccessPublic ParticipationEnvironmental LawLitigation & Administrative ProceedingsJudicial ReviewEnvironmental LawLitigation & Administrative ProceedingsJurisdiction & ProcedureEnvironmental LawNational Environmental Policy ActEnvironmental AssessmentsEnvironmental LawNational Environmental Policy ActEnvironmental Impact StatementsEnvironmental LawNatural Resources & Public LandsEndangered Species ActRecovery PlansEnvironmental LawNatural Resources & Public LandsMineral Resources & MiningEnvironmental LawSolid WastesDisposal StandardsEnvironmental LawZoning & Land UseComprehensive & General PlansTransportation LawAir TransportationNoise Control

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B. California Environmental Quality Act (CEQA)

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C. Citizen Suits

36-418 California Forms of Pleading and Practice--Annotated § 418.120

AUTHOR: By Roger Beers

§ 418.120 Related Matthew Bender Publications

[1] Environmental Law Practice Guide, State and Federal Law

For a sample citizen suit complaint for injunctive relief and civil penalties, see Ch. 11B, *Environmental Litigation*, § 11B.11

[2] The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation

For discussion of citizen suits applicable in hazardous waste litigation, see *Ch. 16, Statutory Liability for Private Party Cleanup of Hazardous Waste, § 16.03*

Legal Topics:

For related research and practice materials, see the following legal topics:
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36-418 California Forms of Pleading and Practice--Annotated § 418.121

AUTHOR: By Roger Beers

§ 418.121 State Statutes

[1] Safe Drinking Water and Toxic Enforcement Act of 1986

Prohibition against contaminating drinking water with chemicals known to cause cancer or reproductive toxicity. *Health & Safety Code § 25249.5*

Warnings required. *Health & Safety Code § 25249.6*

Enforcement of prohibitions. *Health & Safety Code § 25249.7*

Publication of chemicals known to cause cancer or reproductive toxicity. *Health & Safety Code § 25249.8*

Exemptions from prohibitions. *Health & Safety Code § 25249.9*

Exemptions from warning requirement. *Health & Safety Code § 25249.10*

Definition of terms. *Health & Safety Code § 25249.11*

Implementation of Act. *Health & Safety Code § 25249.12*

Preservation of existing rights, obligations, and penalties. *Health & Safety Code § 25249.13*

[2] Unlawful Business Practices

Unfair competition defined. *Bus. & Prof. Code § 17200*

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§ 418.122 Decisions

[1] Safe Drinking Water and Toxic Enforcement Act of 1986

Notice of intention to file citizen suit under Proposition 65 must state specific facts to enable alleged violators and appropriate governmental agencies to undertake meaningful investigations and remedy alleged violations before citizen intervention. *Yeroushalmi v. Miramar Sheraton (2001) 88 Cal. App. 4th 738, 745*

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawWater QualitySafe Drinking Water ActGeneral OverviewEnvironmental LawWater QualitySafe Drinking Water ActEnforcement

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PART III. RESEARCH GUIDE
C. Citizen Suits

36-418 California Forms of Pleading and Practice--Annotated §§ 418.123-418.129

AUTHOR: By Roger Beers

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§§ 418.123[Reserved]

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36-418 California Forms of Pleading and Practice--Annotated § 418.130

AUTHOR: By Roger Beers

§ 418.130 Related Matthew Bender Publications

[1] California Environmental Law and Land Use Practice

For discussion of common law environmental causes of action, see Ch. 1, *Nuisance, Trespass, and Strict Liability for Ultrahazardous Activities*

For coverage of the public trust doctrine, see Ch. 2, *Public Trust Doctrine*

For coverage of toxic tort causes of action, including strict products liability, negligence, and abnormally dangerous activities, see Ch. 3, *Toxic Torts and Environmental Litigation*

[2] Environmental Law Practice Guide, State and Federal Law

For discussion and forms relating to common law causes of action, see Ch. 16, *Common-Law Controls*

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawLitigation & Administrative ProceedingsGeneral OverviewEnvironmental LawLitigation & Administrative ProceedingsNegligenceEnvironmental LawLitigation & Administrative ProceedingsNuisances, Trespasses & Strict LiabilityEnvironmental LawLitigation & Administrative ProceedingsToxic TortsReal Property LawTortsInherently Dangerous Activities

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36-418 California Forms of Pleading and Practice--Annotated § 418.131

AUTHOR: By Roger Beers

§ 418.131 State Statutes

Nuisance defined. *Civ. Code § 3479*

Public nuisance defined. *Civ. Code § 3480*

Private nuisance defined. *Civ. Code § 3481*

Abatement of nuisance does not prejudice right to recover damages. *Civ. Code § 3484*

Remedies against public nuisance. *Civ. Code § 3491*

Private person is allowed to maintain action for public nuisance only if it is speciallyinjurious to him or her. *Civ. Code § 3493*

Right of private person to abate public nuisance. *Civ. Code § 3495*

Remedies for private nuisance. *Civ. Code §§ 3501-3503*

Persons entitled to bring actions for damages, injunction, and abatement of nuisance. *Code Civ. Proc. § 731*

No injunction for nuisance resulting from certain manufacturing, commercial, or airport uses when districts are expressly zoned for such uses. *Code Civ. Proc. § 731a*

Operation of airport for three years creates rebuttable presumption that airport is not a nuisance. *Code Civ. Proc. § 731b*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsNuisanceDefensesStatutory AuthorizationReal Property LawTortsNuisanceRemediesGeneral OverviewReal Property LawTortsNuisanceRemediesDamagesGeneral OverviewReal Property LawTortsNuisanceRemediesInjunctionsGeneral OverviewReal Property LawTortsNuisanceTypesPrivate NuisanceReal Property LawTortsNuisanceTypesPublic Nuisance

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36-418 California Forms of Pleading and Practice--Annotated § 418.132

AUTHOR: By Roger Beers

§ 418.132 Decisions

[1] Nuisance

[a] Nuisance Actions Generally

Action for private nuisance based on odors emitted from neighboring hog farm is not barred by fact that odors affected others in community in same manner. *Johnson v. V.D. Reduction Co. (1917) 175 Cal. 63, 65-66, 164 P. 1119*

Landlord is not liable to third party for continuing nuisance created by tenant unless landlord engaged in some form of negligence. *Resolution Trust Corp. v. Rossmoor Corp. (1995) 34 Cal. App. 4th 93, 100, 40 Cal. Rptr. 2d 328*

Plaintiffs' allegations that air pollution created by the defendant caused plaintiffs and the general public to suffer from the same kind of ailments, but that plaintiffs suffered from the air pollution to a greater degree, merely allege damages different in degree, but not in kind, from those shared by the general public, and thus do not support an action based on public nuisance. *Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 125, 99 Cal. Rptr. 350*

Fact that others contribute to pollution is no defense. *Ingram v. City of Gridley (1950) 100 Cal. App. 2d 815, 819-820, 224 P.2d 798*

[b] Public or Private Nuisance

Allegations of maintenance of liquified petroleum gas storage facilities near plaintiff's home is not sufficient to state cause of action for public nuisance when no showing is made of special damage to plaintiff different than toothers in vicinity. *Brown v. Petrolane, Inc. (1980) 102 Cal. App. 3d 720, 726-727, 162 Cal. Rptr. 551*

Essence of private nuisance is interference with use and enjoyment of land; mere fact of personal injury or of interference with some purely personal right is not sufficient for private nuisance. *Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 124-125, 99 Cal. Rptr. 350*

[c] Permanent or Continuing Nuisance

Recovery is allowed for contamination of property under continuing nuisance theory when statute of limitations has run on permanent nuisance claim; plaintiff is required to show that contamination is subject to remediation or cleanup and that cost of cleanup is reasonable. *Mangini v. Aerojet-General Corp. (1996) 12 Cal. 4th 1087, 1097*

Nuisance is considered permanent when it is of such a character that it will presumably continue indefinitely. *Phillips v. City of Pasadena (1945) 27 Cal. 2d 104, 107, 162 P.2d 625*

Nuisance is continuing if it may be discontinued at any time; every repetition of continuing nuisance is considered a separate wrong for which injured person may bring successive actions for damages until nuisance is abated, even though action based on original wrong may be barred. *Phillips v. City of Pasadena (1945) 27 Cal. 2d 104, 107-108, 162 P.2d 625*

[d] Nuisance Actions Against Public Entities

Gov. Code § 815 (immunity of public entity) does not bar nuisance actions against public entities to extent founded on *Civ. Code § 3479* (defining nuisance) or other applicable statutory provision. *Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 937, 101 Cal. Rptr. 568, 496 P.2d 480*

Municipality may be held liable for creating or maintaining nuisance even though governmental activity was involved. *Phillips v. City of Pasadena (1945) 27 Cal. 2d 104, 106, 162 P.2d 625*

[2] Trespass

Intangible intrusions such as noise, odor, or light alone, without damage to property, do not support action for trespass; such intrusions are treated as nuisance actions. *Wilson v. Interlake Steel Co. (1982) 32 Cal. 3d 229, 233, 185 Cal. Rptr. 280, 649 P.2d 922, 160 Cal. Rptr. 733, 603 P.2d 1329* ; *Greater Westchester Homeowners Asso. v. Los Angeles (1979) 26 Cal. 3d 86, 94*

In action to recover damages for groundwater and soil contamination caused by leakage of gasoline from pipeline, jury improperly awarded $14,275,237 to plaintiff pursuant to *Civ. Code § 3334* (recovery of benefits obtained by person wrongfully occupying property); trespass must result in something advantageous for trespasser or it does not qualify as a "benefit," and pipeline leakage and resulting contamination could not be considered advantageous to defendant. *Watson Land Co. v. Shell Oil Co. (2005) 130 Cal. App. 4th 69, 79, 29 Cal. Rptr. 3d 343*

Deposit of particulate matter on plaintiffs' property constitutes a trespass. *Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 266, 288 P.2d 507* ; *Roberts v. Permanente Corp. (1961) 188 Cal. App. 2d 526, 529, 10 Cal. Rptr. 519*

Noise-caused vibrations resulting in damage or injury constitutes a trespass. *Gallin v. Poulou (1956) 140 Cal. App. 2d 638, 641-642, 295 P.2d 958* ; *McNeill v. Redington (1944) 67 Cal. App. 2d 315, 316, 319, 154 P.2d 428*

[3] Negligence

Under negligence per se doctrine, violation of statute gives rise to presumption ofnegligence in absence of justification or excuse, provided that person suffering injury is member of class of persons for whose protection statute was adopted. *Walters v. Sloan (1977) 20 Cal. 3d 199, 206-207, 142 Cal. Rptr. 152, 571 P.2d 609*

Administrative code safety orders have been given same effect as statutes as basis for finding negligence per se. *Solgaard v. Guy F. Atkinson Co. (1971) 6 Cal. 3d 361, 366-367, 99 Cal. Rptr. 29, 491 P.2d 821*

Doctrine of *res ipsa loquitur* was successfully used as basis for liability in action brought to recover damages for personal injuries caused by poisoning from fluorides emanating from industrial plant. *Reynolds Metals Co. v. Yturbide (1958) 258 F.2d 321, 330*

Doctrine of *res ipsa loquitur* was denied application in action alleging damage to a well due to noise and vibration from rocket testing. *Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 782, 56 Cal. Rptr. 128* (liability based on ultrahazardous activity instead)

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCleanup CostsReal Property LawTortsNuisanceGeneral OverviewReal Property LawTortsNuisanceDefensesImmunityReal Property LawTortsNuisanceElementsReal Property LawTortsNuisanceRemediesGeneral OverviewReal Property LawTortsNuisanceTypesPermanent NuisanceTortsPremises Liability & PropertyLessees & LessorsNuisanceTortsPremises Liability & PropertyTrespassGeneral Overview

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36-418 California Forms of Pleading and Practice--Annotated §§ 418.133-418.139

AUTHOR: By Roger Beers

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36-418 California Forms of Pleading and Practice--Annotated § 418.140

AUTHOR: By Roger Beers

§ 418.140 Related Matthew Bender Publications

[1] California Environmental Law and Land Use Practice

For discussion of water quality control, including coverage of the agencies that regulate water quality, water quality control planning, and ground water cleanups, see Chs. 30-33

For discussion of air quality control, including coverage of vehicular and nonvehicular (i.e., stationary) sources of air pollution, see Chs. 40-43

For discussion of hazardous waste and toxic substances, see Chs. 50-59

For discussion of noise pollution, see Ch. 83, *Controls on Noise*

[2] Treatise on Environmental Law

For coverage of air pollution, see Ch. 2, *Air Pollution*

For coverage of water pollution, see Ch. 3, *Water Pollution*

For coverage of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), see Ch. 4A, *Disposal of Hazardous Waste --The "Superfund Law"*

For coverage of noise pollution, see Ch. 5, *Noise*

For discussion of the National Environmental Policy Act ("NEPA"), see Ch. 9, *The National Environmental Policy Act*

of 1969 and Related Provisions

[3] Environmental Law Practice Guide, State and Federal Law

For discussion relating to procedures involved when practicing environmental law, including the use of environmental impact statements and practice before the Environmental Protection Agency, see Chs. 1-15

For coverage and forms relating to environmental quality generally, including air, water, and noise pollution, see Chs. 16-24

For coverage and forms relating to hazardous waste and other waste issues, see Chs. 25-40

[4] The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation

For discussion of hazardous waste management, see Chs. 1-11

For discussion of hazardous waste cleanup and liability, including liability under CERCLA, see Chs. 12-20

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesCleanupEnvironmental LawNational Environmental Policy ActGeneral OverviewEnvironmental LawNational Environmental Policy ActEnvironmental Impact Statements

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36-418 California Forms of Pleading and Practice--Annotated § 418.141

AUTHOR: By Roger Beers

§ 418.141 State Statutes

[1] Air Pollution

[a] General Provisions

General provisions and definitions relating to air resources. *Health & Safety Code § 39000 et seq.*

State Air Resources Board. *Health & Safety Code § 39500 et seq.*

Air Pollution Control Districts. *Health & Safety Code § 40000 et seq.*

Air pollution control officer. *Health & Safety Code §§ 40750-40753*

Inventory of air toxic emissions and health risk assessment of emitting facilities; civil penalties. *Health & Safety Code § 44300 et seq.*

Regulations of Air Pollution Control and Air Quality Management Boards. *Health & Safety Code §§ 40725-40728*

Identification and regulation of toxic air contaminants. *Food & Agric. Code §§ 14021-14027*; *Health & Safety Code § 39650 et seq.*

[b] Air Basins

Creation of air basins. *Health & Safety Code § 39606*

Basinwide air pollution control council. *Health & Safety Code § 40900*

Basinwide mitigation for cogeneration and resource recovery projects. *Health & Safety Code § 41600 et seq.*

[c] Emissions Standards

California Global Warming Solutions Act of 2006. *Health & Safety Code § 38500 et seq.*

Stricter standards than those set by law or state board are permitted to be established by local or regional authorities. *Health & Safety Code § 41508*

Discharge of air contaminants causing injury, detriment, nuisance, or annoyance to or endangering of others are prohibited. *Health & Safety Code § 41700*

Nonvehicular emissions standards generally. *Health & Safety Code § 41700 et seq.*

Prohibition of contaminant discharge darker than specified shade. *Health & Safety Code § 41701*

Limitations on emissions from agricultural and nonagricultural burning, sandblasting, stationary and cargo gasoline vapor control, and incineration of toxic waste materials. *Health & Safety Code § 41800 et seq.*

California Climate Action Registry for registration of voluntary greenhouse gas emission reductions. *Health & Safety Code § 42800 et seq.* (repealed on January 1, 2008, unless later-enacted statute deletes or extends that date; *Health & Safety Code § 42871*)

[d] Enforcement Powers

Enforcement powers generally. *Health & Safety Code § 41500 et seq.*

State board review of local and regional air pollution control. *Health & Safety Code §§ 41500-41505*

Additional remedies are not limited by provisions relating to air pollution control. *Health & Safety Code § 41509*

Establishment of permit system for attainment and maintenance of air quality standards. *Health & Safety Code § 42300 et seq.*

Variances. *Health & Safety Code § 42350 et seq.*

Penalties for violation of any provision of *Health & Safety Code § 41500 et seq.* (nonvehicular air pollution control). *Health & Safety Code § 42400 et seq.*

Civil penalties and injunctive relief for violation of vehicular air pollution control statute, order, rule, or regulation. *Health & Safety Code §§ 43016, 43017*

[e] Smoke

California Indoor Clean Air Act. *Health & Safety Code § 118875 et seq.*

[f] Vehicular Air Pollution

Vehicular air pollution control. *Health & Safety Code § 43000 et seq.*

Waiver of air pollution laws for disabled vehicle. *Health & Safety Code § 43002.2*

Right of entry on premises of new or used car dealer to inspect vehicles for emissions standards compliance; civil penalties. *Health & Safety Code § 43012*

Prohibition of sale of new motor vehicles not meeting required emission standards. *Health & Safety Code § 43105*

Civil penalty for sale of new motor vehicle not meeting emission standards. *Health & Safety Code § 43211*

Certification of devices required for used motor vehicles. *Health & Safety Code § 43600 et seq.*

Biennial motor vehicle inspection program. *Health & Safety Code § 44000 et seq.*

Inspection of commercial vehicles for smoke emissions. *Veh. Code §§ 2813, 2813.5*

Inspection by highway patrol for correct installation of air pollution device. *Veh. Code § 2814*

Compliance with state motor vehicle air pollution laws is prerequisite to registration or transfer of ownership of vehicle. *Veh. Code §§ 4000-4000.2, 24007(b)*

Motor vehicle exhaust systems. *Veh. Code § 27150 et seq.*

[2] Water Pollution

[a] Porter-Cologne Water Quality Control Act

Porter-Cologne Water Quality Control Act. *Water Code § 13000 et seq.*

State policy for water quality control. *Water Code § 13140 et seq.*

Regional water quality control. *Water Code § 13200 et seq.*

Regional water quality control plans. *Water Code § 13240 et seq.*

Waste discharge requirements. *Water Code § 13260 et seq.*

Penalties for violation of Act. *Water Code §§ 13265, 13271, 13272*

Enforcement. *Water Code § 13300 et seq.*

Liability for violation of Act. *Water Code § 13350*

No private action to enforce Act. *Water Code § 13361*

Municipal waste water treatment. *Water Code § 13625 et seq.*

Discharges from houseboats into state waters. *Water Code § 13900 et seq.*

Minor violations subject to notice to comply. *Water Code § 13399 et seq.*

Water quality control plan for ocean waters, to be known as California Ocean Plan. *Water Code § 13170.2*

State Board and regional board notice to record owners of fee title before considering cleanup or site closure proposals from primary or active responsible discharger, issuing closure letter, or making determination that no further action is required with respect to site subject to cleanup or abatement order under *Water Code § 13304*. *Water Code § 13307.1(a)*

State Board and regional board accommodation of responsible landowner participation in cleanup or site closure process. *Water Code § 13307.1(b)*

Recordation of land use restriction before issuance of closure letter or determination that no further action is required with regard to site that is subject to cleanup or abatement order pursuant to *Water Code § 13304*. *Water Code § 13307.1(c)*

Administrative civil liability for violation of Act. *Water Code § 13323 et seq.*

Notification requirements for unauthorized discharges of recycled water. *Water Code § 13529 et seq.*

[b] Miscellaneous Provisions

Prohibition on unauthorized deposit of any substance deleterious to fish, plant, mammal, or bird life in state waters. *Fish & Game Code § 5650(a)(6)*

Prohibition on deposit of garbage, motor vehicles, and animal carcasses in state waters. *Fish & Game Code § 5652*

Prevention of pesticide pollution in groundwater supplies. *Food & Agric. Code § 13141 et seq.*

Prevention of contamination of water from underground injection of waste. *Health & Safety Code § 25159.10 et seq.*

Cleanup of methyl tertiary-butyl ether (MTBE) discharges posing contamination threat to drinking water, groundwater, or surface water that may reasonably be used for drinking water, or to coastal waters. Health & Safety Code §§ 25232.5, *116366*; *Water Code § 13285*

Prohibition of lead content in pipe joints and fittings used in potable water supply systems. *Health & Safety Code §§ 116875, 116880*

Pollution of waters and public places. *Health & Safety Code § 117475 et seq.*

Drainage from abandoned mines. *Water Code § 13397 et seq.*

[3] Noise Pollution

Noise Control Act. *Health & Safety Code § 46000 et seq.*

[4] Hazardous Substances

Environmental Responsibility Acceptance Act cleanup agreements and mediation program. *Civ. Code § 850 et seq.*

Oil spill contingency plan. *Gov. Code § 8574.1 et seq.*

Solid Waste Disposal Site Hazard Reduction Act. *Gov. Code § 66799 et seq.*

Solid waste management and resource recovery. *Pub. Res. Code § 40000 et seq.*; *Health & Safety Code § 117575 et seq.*; *Health & Safety Code §§ 25143.5, 25143.6*

Expenses of emergency response necessary to protect public from threat to health and safety from release, escape, or burning of hazardous substance as recoverable from negligent person. *Health & Safety Code § 13009.6*

Hazardous waste control regulations. *Health & Safety Code § 25100 et seq.*

Regulation of storage of hazardous substances in underground containers. *Health & Safety Code §§ 25150.1, 25280-25299.5*

Use of Toxic Substances Control Account to ameliorate damages caused by hazardous substances. *Health & Safety Code § 25173.6*

Hazardous Waste Treatment Reform Act of 1995. *Health & Safety Code § 25179.1 et seq.*

Civil actions for violation of regulations brought by city attorney, district attorney, or state Attorney General. *Health & Safety Code § 25182*

Surface impoundments of liquid hazardous wastes. *Health & Safety Code § 25208.1 et seq.*

Lead plumbing monitoring and compliance testing. Health & Safety Code § 24214.4.3

Hazardous waste disposal land use. *Health & Safety Code § 25220 et seq.*

Toxics Information Clearinghouse. *Health & Safety Code § 25251 et seq.*

Chemicals of concern. *Health & Safety Code § 25252 et seq.*

Oversight cost recovery program. *Health & Safety Code § 25269 et seq.*

Notice to record owners of fee title before local agency, State Water Resources Control Board, or Regional Water Quality Control Board may consider cleanup or site closure proposals from the primary or active responsible party, issue a closure letter, or make a determination that no further action is required with respect to a site on which there was an unauthorized release of hazardous substances or petroleum from an underground storage tank. *Health & Safety Code §§ 25297.15, 25299.37*.2

Information that must be provided to Department of Toxic Substances Control by person requesting preliminary endangerment assessment or letter stating that no further action is necessary with regard to property. *Health & Safety Code § 25355.8*

Liability of nonresidential real property owner for failure to provide buyers, lessees, or renters with written notice of presence of hazardous substance on or beneath property; civil penalty. *Health & Safety Code § 25359.7*

Orphan Share Reimbursement Trust Fund. *Health & Safety Code §§ 25390-25390.9*

"Cleanup Loans and Environmental Assistance to Neighborhoods Program" for financing of response actions at brownfields and other underutilized property. *Health & Safety Code §§ 25395.20-25395.32*

Financial Assurance and Insurance for Redevelopment Program (environmental insurance to stimulate redevelopment of brownfields). *Health & Safety Code § 25395.40 et seq.*

California Land Environmental Restoration and Reuse Act (authorizing local governments to compel investigation and cleanup of brownfields sites). *Health & Safety Code § 25401 et seq.*

Liability of lenders and fiduciaries for hazardous material contamination. *Health & Safety Code § 25548 et seq.*

County health emergency as created by accidental release of hazardous waste. *Health & Safety Code § 101075 et seq.*

[5] Radioactive Materials

Radiation Control Law. *Health & Safety Code § 25800 et seq.*

Program for controlling radioactive contamination of environment administered by State Department of Health Services. *Health & Safety Code § 114705 et seq.*

Prevention of dumping radioactive waste in Pacific Ocean. *Health & Safety Code § 114780*

Radiation monitoring devices for nuclear powerplants. *Health & Safety Code § 114785 et seq.*

Transportation of radioactive materials. *Health & Safety Code § 114820 et seq.*; *Veh. Code §§ 33000, 33002*

[6] Herbicides and Pesticides

Manufacture, sale, and registration of pesticides, defoliating agents, or other economic poisons. *Food & Agric. Code § 12751 et seq.*

Pesticides and worker safety. *Food & Agric. Code §§ 12980-12982*

Violations in use, handling, delivery, or sale of economic poisons. *Food & Agric. Code §§ 13101-13102*

Agricultural use of restricted materials. *Food & Agric. Code § 14001 et seq.*

Identification and regulation of pesticides which are toxic air contaminants. *Food & Agric. Code § 14021 et seq.*

Agricultural use of environmentally harmful materials. *Food & Agric. Code §§ 14101-14103*

[7] Land Conservation

Open Space Maintenance Act. *Gov. Code § 50575 et seq.*

Open space easements. *Gov. Code § 51050 et seq.*

California Land Conservation Act of 1965. *Gov. Code § 51200 et seq.*

California Coastal Act of 1976. *Pub. Res. Code § 30000 et seq.*

California Coastal Conservancy. *Pub. Res. Code § 31000 et seq.*

[8] Natural Resources

Geothermal resources. *Pub. Res. Code §§ 3700 et seq., 6901-6925.2*

Z'berg-Nejedly Forest Practices Act of 1973. *Pub. Res. Code § 4511 et seq.*

Energy conservation and development. *Gov. Code § 4217.10 et seq.*; *Pub. Res. Code § 25000 et seq.*

[9] Oil Pollution

Department of Fish and Game is authorized to clean up, abate, or cause to be cleaned up or abated petroleum spill in waters and to recover any costs incurred from responsible party. *Fish & Game Code § 5655*

Civil penalty for deposit of oil in state waters; violator liable for cleanup costs to appropriate state agency. *Harb. & Nav. Code § 151*

Civil penalty for deposit of oil in state marine waters; violator liable for damages and cleanup costs. *Harb. & Nav. Code § 294*

Control of oil sumps. *Pub. Res. Code § 3780 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawAir QualityEnforcementGovernment Civil ActionsEnvironmental LawHazardous Wastes & Toxic SubstancesRadioactive SubstancesFederal & State Regulatory AuthorityEnvironmental LawNatural Resources & Public LandsOil Pollution ActGeneral OverviewEnvironmental LawNatural Resources & Public LandsOil Pollution ActOil Spill Liability Trust FundEnvironmental LawWater QualityClean Water ActDischarge PermitsState Water Quality CertificationsEnvironmental LawWater QualityClean Water ActEnforcementGeneral OverviewEnvironmental LawWater QualityClean Water ActEnforcementCivil PenaltiesEnvironmental LawWater QualityClean Water ActEnforcementGovernment Civil ActionsEnvironmental LawWater QualityOcean DumpingReal Property LawEnvironmental RegulationGeneral OverviewReal Property LawEnvironmental RegulationUnderground Storage TanksReal Property LawZoning & Land UseState & Regional Planning

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36-418 California Forms of Pleading and Practice--Annotated § 418.142

AUTHOR: By Roger Beers

§ 418.142 Federal Statutes

Fish and Wildlife Coordination Act. *16 U.S.C. § 661 et seq.*

Coastal Zone Management Act of 1972. *16 U.S.C. § 1451 et seq.*

Obstruction of navigable waters generally. *33 U.S.C. § 403* (Rivers and Harbors Appropriation Act of 1899)

Prohibition against discharge of refuse into or on banks of navigable waters of United States. *33 U.S.C. § 407* (Refuse Act of 1899)

Federal Water Pollution Control Act. *33 U.S.C. § 1251 et seq.*

Prohibition against discharge of oil or hazardous substances, in harmful quantities, into or on navigable waters of United States, adjoining shorelines, or waters of contiguous zone, or which may affect natural resources of United States. *33 U.S.C. § 1321*

Marine Protection, Research, and Sanctuaries Act of 1972. *33 U.S.C. § 1401 et seq.*

International Agreement for Prevention of Pollution from Ships. *33 U.S.C. § 1901 et seq.*

Safe Drinking Water Act. *42 U.S.C. § 300f et seq.*

Resource Conservation and Recovery Act of 1976. *42 U.S.C. § 6901 et seq.*

Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund Act). *42 U.S.C. § 9601*

et seq.

Clean Air Act. *42 U.S.C. § 7401 et seq.*

Title to lands beneath navigable waters of states, and natural resources within such lands as vested in states (Submerged Lands Act). *43 U.S.C. § 1301 et seq.*

Outer Continental Shelf Lands Act. *43 U.S.C. § 1331 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundHazardous Substance SuperfundEnvironmental LawNatural Resources & Public LandsOil Pollution ActGeneral OverviewEnvironmental LawSolid WastesResource Recovery & RecyclingEnvironmental LawWater QualityOcean DumpingInternational Trade LawTrade AgreementsEnvironmental ProvisionsGeneral OverviewTransportation LawWater TransportationState & Local Regulation

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36-418 California Forms of Pleading and Practice--Annotated §§ 418.143-418.149

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Chapter 418 POLLUTION AND ENVIRONMENTAL MATTERS
PART IV. FORMS
A. California Environmental Quality Act

36-418 California Forms of Pleading and Practice--Annotated § 418.150

AUTHOR: By Roger Beers

§ 418.150 Petition for Writ of Mandate [Code Civ. Proc. §§ 1060, 1085, 1094.5]--Inadequate EIR [Pub. Res. Code §§ 21168, 21168.5]

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1060, 1085, 1094.5]--Inadequate EIR [Pub. Res. Code §§ 21168, 21168.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR WRIT OF MANDATE
Respondents.	)	
	)	
	)	

_____

[*EITHER*]

1. Petitioner(s) _____ [*name(s)*] is _____ [*set forth legal capacity, e.g.,* a California nonprofit membership corporation duly organized and existing under and by virtue of the laws of the State of California which has approximately _____ (*insert number*) members who reside in _____ (*identify locality affected by decision or project*)].

[*AND/OR*]

2. Petitioner(s) _____ [*name(s) of individual petitioner*] is a citizen and taxpayer of the State of California who resides in _____.

[*CONTINUE*]

3. Petitioners bring this action on their own behalf and on behalf of the _____ [*name of organization*] members, and/or supporters who are citizens and taxpayers in the State of California. Petitioner _____ [*name(s) of individual petitioners*] and members and/or supporters of the _____ [*name of organization*] live, engage in recreational activities, and/or travel in the vicinity of the proposed _____ [*identify project or development challenged*]. Petitioners and their members and/or supporters would suffer adverse impacts from the respondents' actions in approving this development. Such adverse impacts would include _____ [*set forth facts, e.g.,* loss of productive agricultural land, increased urbanization of a rural area, impacts on the air quality in the air basin, impacts on ground water resources, impacts on wildlife habitat, impacts on the floodplain and riparian habitat along the river, and serious growth inducement in this rural, agricultural portion of the County.]

4. The _____ [*name of City, County, or State agency*] is a government agency of the State of California.

5. The _____ [*board of supervisors or city council*] is the governing body of the _____ [*name of City, County, or State agency*] and is authorized and required by law to hold public hearings and to determine the adequacy of and certify environmental documents under the California Environmental Quality Act (CEQA) and to take other actions with respect to the approval of the development within its jurisdiction.

6. Real Party in Interest _____ [*name*] is _____ [*state legal capacity, e.g.,* a California corporation] and is the project applicant for _____ [*name of project*].

7. The true names and capacities of DOES 1 through _____, inclusive, are unknown to petitioners. Petitioners will amend this complaint to set forth the true names and capacities of said DOE real parties in interest as soon as the same have been ascertained. Plaintiffs are informed and believe and thereon allege that each of said DOE parties 1 through _____ has jurisdiction by law over one or more aspects of the Project and its approval, and that each of said DOE parties _____ through _____ claims an ownership interest in the property which is the subject of this action, or an interest in its development or the actions of the defendants challenged herein.

8. _____ [*Describe project, e.g.,* Project would be a major residential development on land previously used for agriculture and open space. The Project would consist of 700 single family homes on a 200 acre site and would increase the area's population by approximately 2,800.]

9. The project will have the following environmental impacts: _____ [*describe environmental impacts of project, e.g.,* reduction of already diminished agricultural lands, increased traffic and air pollution, and impacts on groundwater, wildlife, and soil erosion.]

10. Approval of the Project is inconsistent _____ [*list any inconsistencies with an adopted agency plan, e.g.,* with the County's plan to reduce air pollution and improve air quality].

11. On or about _____ [*date*], the _____ [*name of City, County, or State agency*] issued a Notice of Preparation notifying all other responsible agencies, interested parties, and surrounding landowners

that it was going to prepare an Environmental Impact Report (EIR) to analyze the environmental impacts of the Project.

12. On or about _____ [*date*], the _____ [*name of City, County, or State agency*] issued a Draft EIR on the Project. Petitioner(s) _____ [*name(s)*] and others submitted written and/or oral comments on the Draft EIR.

13. On or about _____ [*date*], the _____ [*name of City, County, or State agency*] issued its "response to comments" on the Draft EIR, which purported to respond to the comments received on the Draft EIR. That document, along with the Draft EIR, constitutes the Final EIR.

14. The EIR and the various actions necessary for approval of the Project were considered by the _____ [*name of City, County, or State agency*] at a public hearing on _____ [*date*]. Petitioner(s) and others presented detailed testimony concerning the inadequacy of the EIR and the Project's inconsistency with _____ [*identify any adopted plan with which Project claimed to be inconsistent*].

15. On or about _____ [*date*], the _____ [*name of City, County, or State agency*] certified the EIR as legally adequate and approved the Project, including _____ [*describe request for action made to respondent, e.g.,* the General Plan Amendment, rezoning, and tentative subdivision map]. The _____ [*name of City, County, or State agency*] adopted finding relative to the Project. Its findings included a Statement of Overriding Consideration and other findings in purported compliance with CEQA.

16. On or about _____ [*date*], the _____ [*name of City, County, or State agency*] caused a Notice of Determination regarding the approval of the Project to be filed.

17. This action has been brought within 30 days of the filing of the Notice of Determination as required by *Public Resources Code Section 21167(c)*.

18. On _____ [*date*], before the commencement of this action, petitioners served written notice of the commencement of this action on respondents in accordance with the requirements of *Public Resources Code Section 21167.5*.

19. On _____ [*date*], petitioners notified the Attorney General of the State of California of the filing of this complaint and petition and furnished him/her with a copy of the complaint and petition in accordance with the requirements of *Public Resources Code Section 21167.7*.

20. The action of the respondents in approving the Project, including _____ [*describe request for action made to respondent, e.g.,* the General Plan Amendment, rezoning, and tentative subdivision map] and purporting to comply with CEQA constitute a prejudicial abuse of discretion because the respondents failed to proceed in a manner required by law and made findings which are not supported by substantial evidence, in each of the respects enumerated below.

21. Petitioners have exhausted all administrative remedies in that these determinations by the respondent are final and no further administrative appeal procedures are provided by state or local law. Petitioners and other members of the public presented orally and/or in writing their specific objections to the decisions of _____ [*name of City, County, or State agency*] at the public meetings and hearings, including but not limited to the matters set forth in paragraphs _____ of this Complaint and Petition below.

22. Petitioners do not have a plain, speedy, and adequate remedy in the ordinary course of law because the petitioners [and their members] and the public will be irreparably harmed by the ensuing environmental damage and by the respondents' violations of CEQA and state planning and zoning laws.

FIRST CAUSE OF ACTION
[California Environmental Quality Act]

23. Petitioners incorporate by this reference paragraphs _____ through _____ as though they were set forth in full herein.

[Inadequate Description of the Environmental Setting]

24. *14 California Code of Regulations Section 15125* requires that EIRs "must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective."

25. The subject EIR failed to include an adequate description of the Project's environmental setting in that _____ [*set forth facts, e.g.,* it failed to discuss the existence of a major wetlands and wildlife preservation area in the immediate vicinity, failed to discuss the Project's location within the Pacific Flyway for migratory waterfowl, and failed to discuss existing and planned wildlife refuges in the project vicinity.]

26. These failures precluded the EIR from meaningfully analyzing the impacts of the Project on the existing environmental setting, including those features of the existing environment described above, and deprived the public, including petitioners [and petitioner's members], of an opportunity to meaningfully comment on the Project and its impacts on the existing environment.

[Inadequate Project Description]

27. *Public Resources Code Sections 21151* and *21065* and *14* California Code of Regulations Section 15378(a) requires that EIRs fully disclose and analyze projects, meaning "the whole of an action." In addition, according to *14 California Code of Regulations Section 15378(c),* " 'Project' does not mean each separate government approval."

28. An integral part of the Project is the _____ [*identify feature of project, e.g.,* expansion of the existing sewage treatment plant]. The EIR does not describe the scope of that expansion, its impacts, or any way to mitigate those impacts.

29. The plan for _____ [*identify feature of project*] has shifted over the course of the Project approval and remains uncertain. This shifting description is particularly unacceptable since the proposed park is located in an especially environmentally sensitive portion of the Project site.

30. These deficiencies and shifts in the project description deprived the public, including petitioners [and petitioner's members], of an opportunity to understand and meaningfully comment on the Project and its impacts, and rendered the analyses in the EIR of the Project and its impacts inadequate.

[Inadequate Evaluation of Project Impacts]

31. *Public Resources Code Section 21100(a)* and *14* California Code of Regulations Sections 15126(a) and 15126.2 provide that an EIR must identify and focus on the significant environmental effects of a proposed project, giving due

consideration to both short- and long-term effects. *14 California Code of Regulations Section 15151* provides that an EIR must contain a "sufficient degree of analysis to provide decision makers with information which allows them to make a decision which intelligently takes account of environmental consequences."

32. The subject EIR fails to adequately consider the significant impacts of the Project including but not limited to the respects identified in this Petition.

[*EITHER*]

a. Land Use and Zoning. *14 California Code of Regulations Section 15125(d)* provides that EIRs must discuss any inconsistencies between a proposed project and the applicable _____ [*identify plan adopted by agency*]. The EIR fails to analyze whether and to what extent the Project is inconsistent with important goals and policies contained in the _____ [*identify plan adopted by agency*]. It does not recognize or evaluate the adverse impacts that stem from such inconsistencies.

[*AND/OR*]

b. Agricultural Land Conversion. The EIR fails to adequately analyze the impacts of the loss of productive agricultural land, and fails to adequately consider the impacts of the proposed Project on the continued viability of agriculture in the area due to growth inducement and conflicts between development and agricultural practices.

[*AND/OR*]

c. Air Quality. The EIR fails to analyze the impacts that the Project would have on the policies and goals contained in the existing Air Quality Plan adopted by _____ [*specify administrative agency*] adopted pursuant to the Federal and State Clean Air Acts.

[*AND/OR*]

d. Impacts to Wildlife and Wildlife Habitat. The EIR fails to adequately address the Project's impacts on wildlife and habitat, particularly wetland and riparian habitat within the area adjacent to the Project site. The EIR also fails to adequately address the Project's impacts on endangered species and species of special concern.

[*AND/OR*]

e. Impacts on Ground Water. The EIR fails to adequately analyze the Project's impacts on the supply and quality of ground water.

[*AND/OR*]

f. Impacts on Surface Water Quality. The EIR fails to adequately consider the impacts on surface water quality stemming from run off from the Project.

[*AND/OR*]

g. Traffic. The EIR fails to adequately address the traffic impacts that would be caused by the Project.

[*CONTINUE*]

33. Growth Inducing Impacts. *Public Resources Code Section 21100 (g)* and *14* California Code of Regulations Section 15126(g) also require that an EIR must disclose and analyze a project's growth inducing impacts. The subject EIR fails to adequately consider the growth inducing impacts of the Project or of the extension of public services necessary to serve the Project.

34. Cumulative Impacts. *14 California Code of Regulations Section 15130* also specifically requires that an EIR must discuss significant cumulative impacts in conjunction with other planned or proposed projects. The subject EIR violates CEQA in that it does not adequately discuss cumulative impacts of the proposed Project in connection with other development projects which are foreseeable, planned, approved or have been recently constructed, including but not limited to _____ [*identify other related development*].

[Inadequate Analysis of Alternatives]

35. *Public Resources Code Section 21100(b)(4)* and *14* California Code of Regulations Sections 15126(f) and 15126.6 require that EIRs must describe a range of alternatives to the proposed project which could feasibly attain the project's basic objectives, and evaluate the comparative merits of the alternatives.

36. The subject EIR's analysis of alternatives is inadequate because it fails to adequately describe alternatives so that an adequate evaluation of the comparative merits of those alternatives could be conducted. [*Describe inadequacy of alternative analysis, e.g.,* The purported alternatives are vague and uncertain, which allows for only a cursory consideration of their comparative environmental impacts, or the EIR fails to identify or analyze any alternative sites for the Project which could mitigate the Project's impacts].

37. Further, the EIR fails to identify an environmentally superior alternative as required by *14 California Code of Regulations Section 15126.6(e)(2)*, and fails to consider other reasonable alternatives, such as _____ [*insert description*], that would have reduced the Project's adverse impacts.

[Inadequate Consideration of Mitigation Measures]

38. *Public Resources Code Section 21100(c)* and *14* California Code of Regulations Sections 15126(e) and 15126.4 require that EIRs contain adequate evaluations of measures to mitigate adverse environmental impacts. In addition, *14 California Code of Regulations Section 15092(b)* provides that a public agency shall not approve or carry out a project which has one or more significant environmental effects unless it has "[e]liminated or substantially lessened all significant effects on the environment where feasible."

39. The EIR's discussion of mitigation measures is inadequate in numerous respects, including but not limited to the following:

[*EITHER*]

a. The EIR does not include any evaluation of the likelihood that the mitigation measures for _____ [*insert description of impact*] will actually be adopted, and even if they are adopted, whether or not they will be effective in mitigating _____ [*insert description of impact*].

[*AND/OR*]

b. A number of the measures discussed in the EIR as a means of mitigating _____ [*insert description of impact*] are not in fact "mitigation measures" at all, since they merely consist of further study of an impact or are too vague and conclusory to qualify as mitigation measures for the purposes of CEQA.

[*AND/OR*]

c. Respondents refused to consider in the EIR other measures which were within respondents' jurisdiction to impose and which could have achieved substantially greater mitigation of _____ [*insert description of impact*].

[*CONTINUE*]

[Inadequate Response to Comments on the EIR]

40. *14 California Code of Regulations Section 15088(c)* provides that agencies must provide a "good faith, reasoned analysis in response" to comments received on the EIR and "conclusory statements unsupported by factual information will not suffice." Agencies must address recommendations and objections in detail and explain why specific comments and suggestions were not accepted.

41. The EIR violates CEQA because respondents failed to adequately respond to comments, suggestions, and recommendations made by petitioners and others with regard to _____ [*insert facts, e.g.,* the Project's description, impacts, mitigation measures, alternatives, and other matters, as alleged above].

[Inadequacy of Respondents' CEQA Findings]

42. Respondents were required by CEQA to determine in written findings whether each of the Project's impacts are significant or not, and whether any significant effects can be avoided. With respect to any significant environmental effects which could not be avoided or mitigated, respondents were further required by *14 California Code of Regulations Section 15091* to make findings that the mitigation measures necessary to reduce project impacts are either (1) solely within the responsibility and jurisdiction of another public agency which can and should adopt those measures, or (2) are made infeasible, along with any alternatives which could reduce impacts, by specific economic, social or other consideration. In such circumstances, *14 California Code of Regulations Sections 15092* and *15093* further requires respondents to find that the benefits of the proposed project outweigh the unavoidable adverse environmental effects.

43. Respondents' actions certifying the EIR and approving the Project constitute an abuse of discretion in addressing the above-described subjects, are not supported by substantial evidence in the record, and fail to comply with CEQA and CEQA Guidelines. Specifically, respondents' actions are invalid because they failed to make proper written findings as required by CEQA, including but not limited to the following:

[*EITHER*]

a. The findings are conclusory, internally inconsistent, and fail to bridge the analytic gap between the raw evidence and the findings, including but not limited to _____ [*insert facts, e.g.,* respondents' findings regarding the community's purported need for this Project, although the EIR contains no information whatsoever on the existing condition of the community].

[*AND/OR*]

b. Respondents found that the Project's impacts on _____ [*describe environmental impacts, e.g.,* air quality] were not significant when there was not substantial evidence in the record supporting the finding.

[*AND/OR*]

c. Respondents found that the Project's impacts on _____ [*describe environmental impacts, e.g.,* air quality] were considered mitigatable to insignificance without actually adopting any mitigation measures.

[*AND/OR*]

d. Respondents failed to even adopt all of the mitigation measures that were identified as feasible in the final EIR to address the Project's impacts on _____ [*describe environmental impacts, e.g.,* air quality].

[*AND/OR*]

e. Respondents failed to make any findings at all concerning the Project's impacts on _____ [*describe environmental impacts, e.g.,* air quality].

[*AND/OR*]

f. Respondents failed to make an adequate statement of overriding considerations as required by CEQA for any unavoidable impacts, because their purported findings as to which impacts were unavoidable were not based on substantial evidence in the record, and because the statement which sets forth the alleged benefits of the Project is not supported by an adequate statement of facts explaining the benefits based on substantial evidence in the EIR or other substantial evidence in the record.

[*CONTINUE*]

44. In each of the respects enumerated above, respondents have violated their duties under CEQA, abused their discretion, failed to proceed in a manner required by law, and have decided the matters complained of without the support of substantial evidence. Accordingly, the certification of the EIR and the approval of the Project must be set aside.

[SECOND CAUSE OF ACTION]

[Declaratory Relief]

45. Petitioners incorporate by reference paragraphs _____ through _____ as though they were set forth in full herein.

46. An actual controversy exists between the parties. Petitioners contend that respondents have acted in violation of CEQA and state planning law and must vacate and set aside their certification of the EIR and approval of the Project and prepare, circulate, and consider a new and adequate EIR. Respondents dispute these contentions. A judicial resolution of this controversy is necessary and appropriate.

[THIRD CAUSE OF ACTION]
[Injunctive Relief]

47. Petitioners incorporate by reference paragraphs _____ through _____ as though they were set forth in full herein.

48. Petitioners have exhausted their administrative remedies.

49. Unless petitioners are granted injunctive relief they will suffer irreparable harm in that the implementation of the Project will cause permanent harm to petitioners and will create adverse environmental impacts previously described in this Petition, to the detriment of petitioners [and the members of petitioner].

50. Petitioners lack an adequate remedy at law because monetary damages cannot be ascertained and petitioners [and the members of petitioner] cannot be compensated for the environmental degradation caused by this project.

WHEREFORE, petitioners pray as follows:

1. As to all Causes of Action herein, that this court enter judgment determining or declaring that the approval of Project by respondents was illegal and therefore is null and void;

2. As to the First Cause of Action herein, that this court enter judgment determining or declaring that respondents failed to comply with CEQA and therefore the approval of the Project was illegal and is null and void;

3. As to the Second Cause of Action, that this court enter a declaratory judgment in the respects stated in paragraphs 1 and 2 of this prayer.

4. As to the Third Cause of Action, that this court enter a temporary restraining order and a preliminary injunction (a) restraining respondents from granting any permits for or executing any agreements relating to the Project, or otherwise approving any development, demolition, construction, or other activities or undertaking pursuant to or in furtherance of the Project, pending the court's judgment on the matters raised herein; and (b) restraining Real Parties in Interest from commencing or undertaking any development, demolition, construction, or other activities or undertaking pursuant to or in furtherance of the Project, pending the court's judgment on the matters raised herein;

5. That petitioners be awarded their costs of suit herein, including reasonable attorneys fees; and

6. For such other and further relief as the court may deem just and proper.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____ [*name of petitioner*] am one of the Petitioners in this action. I have read the foregoing Petition for Writ of Mandate. I am informed and believe that the matters in it are true, and on that ground allege that the matters stated in the Petition are true, and that the documents attached hereto are true and correct copies.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a petition for a writ of mandate. It should be used when filing an action under the California Environmental Quality Act (CEQA) [*Pub. Res. Code § 21000 et seq.*] to set aside the approval of a proposed development project. With modification of the project's description, this form could also be used in a CEQA action to set aside other governmental actions, for example, the adoption of a plan. This petition is a general form--in this case alleging that the environmental impact report prepared by the respondent agency was inadequate. Because the issues will necessarily vary from one case to another, the inadequacies alleged in this form may not be applicable, and care should be taken to ensure that the details alleged fit the particular circumstances of the case. In addition, because a petition may be denied summarily, care must be taken in adapting the form to make certain that no essential allegations are inadvertently omitted.

A petition for writ of mandate must be verified [*Code Civ. Proc. § 1086*]. There are two methods of commencing the action: (1) obtaining an alternative writ from the court [*see § 418.151*] or (2) service of this petition with a summons. Unless required by a local rule, it is not typical for practitioners to file points and authorities with the petition.

[3] Checklist for Filing CEQA Actions

CEQA has its own distinctive filing requirements (in addition to those applicable to writs of mandate or other civil actions in general). The CEQA requirements are as follows:

- **Ascertain Applicable Statute of Limitations:** Immediately on being contacted by the client, counsel should determine the applicable statute of limitations, which can be as short as 30 days from the date that the respondent filed a notice of determination that the EIR had been certified and the project approved [*see Pub. Res. Code § 21167(c)*].

- **Identify Real Parties in Interest:** Counsel should also ensure that all real parties in interest (*e.g.*, the project applicant for the permit or approval which was the subject of the CEQA action) have been

properly identified and that they are named as such in the complaint. Otherwise, the court may treat them as indispensable parties and dismiss the action for failure to name them within the period of the statute of limitations [*see Sierra Club, Inc. v. California Coastal Com. (1979) 95 Cal. App. 3d 495, 502, 157 Cal. Rptr. 190]* .

- **Personally Serve Notice of Suit:** A notice that the respondent has been sued under CEQA must be served on the respondent preceding the suit's filing [*Pub. Res. Code § 21167.5*]. This is usually done by mailing a letter to the respondent advising it of the parties suing, the action challenged, and the court in which the action will be filed.

- **Serve Complaint:** A copy of the complaint must be served by mail on the Attorney General after the suit's filing [*Pub. Res. Code § 21167.7*].

- **Allege Service of Notices:** The service of the above two notices should be alleged in the complaint, preferably with the notice letters attached as exhibits to the complaint.

- **Serve Petition:** The petition, together with a request for preparation of the administrative record, must be served on the respondent within 10 days of the complaint's filing [*Pub. Res. Code § 21167.6(a)*].

- **Obtain Date for Hearing:** The petitioner must obtain a date for the hearing on the merits of the petition within 90 days of the petition's filing [*Pub. Res. Code § 21167.4(a)*]. Although the hearing date itself need not fall within that 90 days, the failure to obtain a hearing date within that period may lead to an automatic dismissal of the petition [*McCormick v. Board of Supervisors (1988) 198 Cal. App. 3d 352, 357, 243 Cal. Rptr. 617]* .

[4] Cross References

For discussion, procedural guide, and forms related to writ of mandate proceedings, see Ch. 358, *Mandate and Prohibition*

For discussion, procedural guide, and forms related to proceedings seeking declaratory relief, see Ch. 182, *Declaratory Relief*

For discussion, procedural guide, and forms for use in petitioning a court to review a decision of a public administrative agency through the use of administrative mandate under *Code Civ. Proc. § 1094.5*, see Chs. 474B, *Standards in Reviewing Agency Decisions* , and 474C, *Procedures in Reviewing Agency Decisions*

California Forms of Pleading and Practice--Annotated

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Chapter 418 POLLUTION AND ENVIRONMENTAL MATTERS
PART IV. FORMS
A. California Environmental Quality Act

36-418 California Forms of Pleading and Practice--Annotated § 418.151

AUTHOR: By Roger Beers

§ 418.151 Alternative Writ of Mandate and Order

[1] FORM Alternative Writ of Mandate and Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	ALTERNATIVE WRIT OF MANDATE; ORDER
Respondents.	)	
	)	
	)	

TO: RESPONDENTS _____ [*name(s)*]

Good cause appearing from the verified petition of _____ [*name(s)*] for a writ of mandate on file herein,

YOU ARE COMMANDED, on receipt of this writ, to vacate the _____ [*describe the decision or action to be vacated*], or

IN THE ALTERNATIVE, to show cause before this court on _____, at _____ in Department _____ of this court at the _____ [*address of court*], why you have not done so.

Dated: _____.

_____, Clerk

_____, Deputy

[*seal*]

ORDER

Let the foregoing writ issue.

IT IS FURTHER ORDERED that a copy of this alternative writ and a copy of the Petition for Writ of Mandate and supporting memorandum of points and authorities be served on Respondent on or before _____ and that Respondent's return and any papers opposing issuance of a peremptory writ shall be due on or before _____.

Dated: _____.

_____ [*signature*]
JUDGE OF THE SUPERIOR COURT

[2] Use of Form

The form in [1], *above*, is an alternative writ of mandate for use when a CEQA action is commenced by application to the court for issuance of an alternative writ. It is similar in effect to an Order to Show Cause [*see § 418.153*], which commands the respondent to either take or vacate certain action or show cause why it has not done so on a specified hearing date. This form is used in conjunction with the Petition for Writ of Mandate [*see § 418.150*]. Its purpose is similar to that of a summons; that is, it serves to assert the court's jurisdiction over the respondent and to bring the respondent before the court. It is issued by the clerk of the court, just as a summons is. It differs from a summons in that a summons specifies only the period in which an answer must be filed by the respondent, while the Alternative Writ of Mandate specifies a hearing date for the court's consideration of the merits of the Petition for Writ of Mandate. It also differs from a summons in that the Alternative Writ of Mandate will not typically be issued by the clerk of the court without an order of the court to do so.

Typically, counsel presents to a judge of the superior court the petition [*see § 418.150*], points and authorities, the alternative writ, and an application (which may be in the form of a declaration of counsel) for an ex parte order requiring the issuance of the writ. Usually, the application for the ex parte order simply states the nature of the action challenged in the petition, the circumstances justifying the dates set in the alternative writ for a hearing (and the briefing schedule if requested), and compliance with local rules governing such ex parte applications. The local rules must be consulted to determine whether and how this procedure may be employed in commencing a CEQA action. However, although a court is authorized to issue the writ ex parte [*Code Civ. Proc. § 1107*], a party seeking an ex parte order must notify all parties no later than 10:00 a.m. the court day before the ex parte appearance [*see Cal. Rules of Ct., Rule 3.1203(a)*]. The safest course is to serve the respondent and the real party in interest or their counsel well in advance of the application with a full set of the papers to be filed, and provide the court with proof of this service.

This form contains an order at the end by which the court directs the clerk of the court to issue the Alternative Writ and establishes the briefing schedule for the hearing. In some instances, the local rules may specify that the Order to issue the writ must be on a separate document and the next form below has been included for that purpose.

[3] Alternative Procedure of Service With Summons and Setting Hearing With a Noticed Motion

The main advantage of getting an alternative writ of mandated issued is that it affords an opportunity for the setting of an earlier hearing date than might otherwise occur in the ordinary course. However, the method is cumbersome compared to the typical method of commencing an action--that is, filing the complaint, obtaining a summons, and serving the complaint with the summons. This latter method is expressly authorized by statute [*see Code Civ. Proc. § 1088.5*]. For a form noticing a hearing on the merits after service of the petition, see *§ 418.158*.

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Chapter 418 POLLUTION AND ENVIRONMENTAL MATTERS
PART IV. FORMS
A. California Environmental Quality Act

36-418 California Forms of Pleading and Practice--Annotated § 418.152

AUTHOR: By Roger Beers

§ 418.152 Order Directing Issuance of Alternative Writ of Mandate

[1] FORM Order Directing Issuance of Alternative Writ of Mandate

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER DIRECTING ISSUANCE OF ALTERN-
Plaintiff,	)	ATIVE WRIT OF MANDATE
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

Good cause appearing on the face of the verified petition on file in this action,

IT IS ORDERED that an alternative writ of mandate issue under the seal of this court directed to the _____ [*name(s)*], respondents in this action, commanding then immediately on receipt of the alternative writ to desist and refrain from taking any further action to implement the _____ [*name of project*] including but not limited to, _____ [*specify action, e.g.,* performing any demolition,

construction, improvement work, or initiating the bidding process for such work] until further order of this court, or

IN THE ALTERNATIVE, to show cause before this court on _____, at _____ in Department _____ of this court at the _____ County Superior Courthouse [*address of court*] why they have not done so.

IT IS FURTHER ORDERED that a copy of the alternative writ and a copy of this order be served at least _____ days before the hearing on the above Order to show cause.

Dated: _____.

_____ [*signature*]
JUDGE OF THE SUPERIOR COURT

[2] Use of Form

The form in [1], *above*, is an order directing the issuance of an alternative writ of mandate for use in an action under CEQA. In those circumstances when the court requires that the order directing issuance of the alternative writ be separate from the writ itself, this form should be used for the order. That portion of the *form in § 418.151* before the order would be used as the Alternative Writ of Mandate separate from the order in the form in [1], *above*. The local rules should be consulted to determine if the order requiring issuance of the alternative writ must be separate from the alternative writ itself. To be safe, counsel should check with the clerk of the court to determine what practice is acceptable in that office, since it is the clerk who must issue the Alternative Writ of Mandate. It should be noted that there is no difference between the practices applicable to CEQA cases in this regard and all other writs of mandate proceedings.

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PART IV. FORMS
A. California Environmental Quality Act

36-418 California Forms of Pleading and Practice--Annotated § 418.153

AUTHOR: By Roger Beers

§ 418.153 Stay, Temporary Restraining Order, and Order to Show Cause

[1] FORM Stay, Temporary Restraining Order, and Order to Show Cause

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*],	)	
Petitioners,	)	
vs.	)	
_____ [*name(s)*],	)	
and DOES I through _____	)	NO. _____
Respondents,	)	STAY, TEMPORARY RESTRAINING ORDER,
and	)	AND ORDER TO SHOW CAUSE
_____ [*name(s)*],	)	
Real Parties in Interest.	)	
	)	
	)	

_____

On reading the verified Petition in the above-entitled action, the Memorandum of Points and Authorities in Support of Stay, Temporary Restraining Order and Preliminary Injunction, the supporting declarations, and the exhibits filed therewith, and it appearing that this is a proper case for issuance of a stay and a temporary restraining order, and that unless a stay and temporary restraining order issue, Petitioner(s) will suffer irreparable injury before this matter can be heard on notice.

ORDER TO SHOW CAUSE

IT IS HEREBY ORDERED that Respondents and Real Parties in Interest _____ [*name(s)*] appear before Department _____ [*insert department number*] of this court, located at _____ [*address*] on _____ [*date and time*], or as soon thereafter as counsel can be heard, then and there to show cause why _____ [*describe the government action to be stayed, e.g.,* the permit for the project and all proceedings and activities thereunder] should not be stayed, and why a preliminary injunction should not be issued restraining Respondents and Real Parties in Interest, their agents and employees, and any persons acting for them, at their direction, in concert with them, or on their behalf, from entering into binding commitments to construct, constructing, or organizing any other activity directed at construction or further planning of, the proposed _____ [*name of project*], including but not limited to:

[*EITHER*]

1. Demolishing any existing structures of any kind on the site of the proposed _____ [*name of project*];

[*AND/OR*]

2. Site preparation;

[*AND/OR*]

3. Destroying or removing any trees or vegetation;

[*AND/OR*]

4. Preparing notices, or awarding any notice of bid contracts concerning any aspect of the proposed _____ [*name of project*] or any activity related to such project;

[*AND/OR*]

5. Evicting, attempting to evict, ending the tenancy, or in any other way interfering with or affecting the possession of tenants in any buildings located on the site of the proposed _____ [*name of project*].

[*CONTINUE*]

STAY AND TEMPORARY RESTRAINING ORDER

IT IS FURTHER ORDERED that pending determination of the Order to Show Cause, _____ [*describe the action to be stayed, e.g.,* the permit issued by Respondents for the project and all proceedings and activities thereunder] is hereby stayed, and Respondents and Real Parties in Interest, their agents and employees, and any persons acting for them, at their direction, in concert with them, or on their behalf, are enjoined from:

1. Demolishing any existing structures of any kind on the site of the proposed _____ [*name of project*];

[*AND/OR*]

2. Site preparation;

[*AND/OR*]

3. Destroying or removing any trees or vegetation;

[*AND/OR*]

4. From soliciting bids concerning any aspect of the proposed _____ [*name of project*] or any activity related to such project unless all prospective bidders are given written notice of the pendency of this lawsuit;

[*AND/OR*]

5. Evicting, attempting to evict, ending the tenancy of tenants in any buildings located on the site of the proposed _____ [*name of project*].

[*CONTINUE*]

IT IS FURTHER AND FINALLY ORDERED that copies of the Petition, Memorandum of Points and Authorities in Support of Stay, Temporary Restraining Order and Preliminary Injunction, the supporting declarations, and the exhibits filed therewith, shall be served on Respondents and Real Parties in Interest not later than _____ [*date*]. A copy of this Stay, Temporary Restraining Order and Order to Show Cause shall be served on Respondents and Real Parties in Interest not later than _____ [*date*]. Any opposition to the motion for preliminary injunction must be served and filed in Department _____ [*number of department*] five court days before the hearing. Any reply papers must be served and filed two court days before the hearing.

Dated: _____.

_____ [*signature*]
JUDGE OF THE SUPERIOR COURT

[2] Use of Form

The form in [1], *above*, is a sample stay, temporary restraining order, and order to show cause for use when litigating under CEQA. It should be used to preserve the status quo pending the court's determination of the merits of the Petition for Writ of Mandate [*see § 418.150*]. For example, if the agency action challenged by the Petition for Writ of Mandate is the issuance of a permit for the construction of a private development, the construction of that development may commence and even be completed before the court acts on the Petition for Writ of Mandate. If that happened, then environmental damage that the Petition for Writ of Mandate sought to avert may become a reality in advance of the

court's adjudication of the petition. A "stay" of the government permit for the project may be sought to suspend the authority of the agency to issue any further permits that may be required for the project (for example, a grading permit) and otherwise to suspend the authority for the developer to proceed with construction of the project, pending the court's judgment.

The relief sought in this form also includes a temporary restraining order directed specifically at preventing the construction, for example. The issuance of the temporary restraining order would have the additional effect of making any further construction in this example a contempt of the court's order, whereas the stay means only that the construction would be undertaken without proper governmental authorization. If petitioner's counsel is concerned that construction may proceed even in the face of a stay, the temporary restraining order should also be requested.

The Order to Show Cause serves to set a hearing date for the court to determine whether the stay should be made permanent and a preliminary injunction issued.

[3] When Stay Is Appropriate

Under *Code Civ. Proc. § 1094.5(g)*, a stay of a government agency's action may be issued unless "it is against the public interest." The California Supreme Court has articulated the strong "public interest" served by stay orders during judicial review of government actions affecting the environment--to preserve the status quo and so ensure that the petitioners can be granted effective judicial relief if they prevail [*People ex rel. San Francisco Bay Conservation and Development Commission v. Town of Emeryville (1968) 69 Cal. 2d 533, 537, 72 Cal. Rptr. 790, 446 P.2d 790]* .

[4] Is a Bond Required?

When granting a preliminary injunction, courts must require that an undertaking or "bond" be posted by the person seeking the injunction that indemnifies the person enjoined from damages resulting from the injunction in the event the court later reaches a final decision that the injunction should not have been granted [*see Code Civ. Proc. § 529(a)*]. In the case of a stay, *Code Civ. Proc. § 1094.5(g)* does not require a bond, although the court has discretion in appropriate circumstances to require one. In cases involving preliminary injunctive relief to preserve the environmental status quo pending the determination of the merits of allegations of serious violations of statutes enacted to protect the environment, there is a well-established judicial practice of requiring a nominal bond, if any bond is required at all [*see Wilderness Soc. v. Tyrrel, 701 F. Supp. 1473, 1492 (1988)* (in suit by four nonprofit citizens organizations to enjoin timber sales pending compliance with environmental protection statute, court set injunction bond at $100 dollars, expressing unwillingness "to close the courthouse door in public interest litigation by imposing a burdensome security requirement"); *see also* cases cited in *Wilderness Society v. Tyrrel, 701 F. Supp. 1473, 1492 (1988)*].

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PART IV. FORMS
A. California Environmental Quality Act

36-418 California Forms of Pleading and Practice--Annotated § 418.154

AUTHOR: By Roger Beers

§ 418.154 Petitioners' Request for Preparation of Administrative Record

[1] FORM Petitioners' Request for Preparation of Administrative Record

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*],	)	
Petitioners,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	PETITIONERS' REQUEST FOR PREPARATION
and DOES I through _____	)	OF ADMINISTRATIVE RECORD
Respondents.	)	
	)	
	)	

_____

To Respondents _____ [*name(s)*]:

Petitioners _____ [*name(s)*] hereby request that Respondent _____ [*name(s)*] prepare the record of proceedings relating to the subject matter of this action, _____ [*list action(s), e.g.,* the certification of the Final Environmental Impact Report] regarding _____ [*describe the Project and government approvals for the project*]. The Final EIR was certified and the Project was approved on _____ [*date*] and the Notice of Determination was filed on _____ [*date*].

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Use of Form

The form in [1], *above*, is a request to the respondent agency to prepare the administrative record. It should be used by the petitioners in litigation under CEQA to request that the respondent agency prepare the administrative record underlying the action challenged. Although the request is not required to be filed as a formal pleading, this is recommended in view of the CEQA requirement that a copy of the request must be personally served on the respondent within 10 days of the filing of the Petition for Writ of Mandate [*Pub. Res. Code § 21167.6(a)*; *see § 418.150*]. Filing of a copy of the request with a proof of service provides documentation of fulfillment of the requirement.

For a sample notice that the administrative record is available for lodging with the court, see *§ 418.156*. For a sample notice of election to prepare the administrative record, see *§ 418.155*.

[3] Using the Administrative Record in CEQA Actions

The Petition for Writ of Mandate, like a complaint, describes the nature of the action challenged and the grounds for relief against that action. Since the government action challenged will usually be based on a record of the proceedings before the agency--the "administrative record"--it is necessary that the record be prepared before the court has an appropriate basis for reviewing the petitioners' challenge to that action.

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A. California Environmental Quality Act

36-418 California Forms of Pleading and Practice--Annotated § 418.155

AUTHOR: By Roger Beers

§ 418.155 Petitioners' Notice of Election to Prepare Administrative Record [Pub. Res. Code § 21167.6(b)(2)]

[1] FORM Petitioners' Notice of Election to Prepare Administrative Record [Pub. Res. Code § 21167.6(b)(2)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*],	)	
Petitioners,	)	
vs.	)	
_____ [*name(s)*],	)	
and DOES I through _____	)	NO. _____
Respondents,	)	PETITIONERS' NOTICE OF ELECTION TO PRE-
and	)	PARE ADMINISTRATIVE RECORD
_____ [*name(s)*],	)	
Real Parties in Interest.	)	
	)	
	)	

_____

Petitioners in this case hereby give notice of their election to prepare the record of proceedings herein in accordance with *Public Resources Code Section 21167.6(b)(2)*. As part of that election, petitioners have requested that the Respondent _____ [*name*] provide certified copies of the _____ [*specify relevant documents, e.g.,* Final EIR] and all documents pertaining to the subject matter of this case.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Use of Form

The form in [1], *above*, is a notice of election to prepare the administrative record in an action under CEQA. It should be used to give notice to the respondent agency that the petitioner intends to prepare the administrative record rather than requesting that it be prepared by the respondent [*see § 418.154*]. Typically, the petitioner may choose to prepare the administrative record to save the anticipated cost that the agency may charge if it prepares the administrative record. Also, when the record is very short and the petitioner wants to seek an early disposition of the matter in court, the petitioner may elect to prepare the administrative record to avoid the delay that may accompany the agency's preparation of the record. The attorney should note that this election may not be available in non-CEQA actions.

[3] Election

CEQA provides that "[t]he plaintiff or petitioner may elect to prepare the record of proceedings ... subject to certification of its accuracy by the public agency, within the time limit specified in this subdivision" [*Pub. Res. Code § 21167.6(b)(2)*]. CEQA does not specify how the petitioner is supposed to make that election, but since petitioner is required to personally serve a copy of a request to prepare the administrative record on the respondent agency within 10 days after filing of the petition [*Pub. Res. Code § 21167.6(a)*], the respondent should be served with the Notice of Election to Prepare Administrative Record within that period of time. Since the administrative record prepared by the petitioner is "subject to certification of its accuracy by the public agency" [*Pub. Res. Code § 21167.6(b)(2)*], the petitioner must ensure that the documents compiled conform to the agency's understanding of the scope of the record.

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A. California Environmental Quality Act

36-418 California Forms of Pleading and Practice--Annotated § 418.156

AUTHOR: By Roger Beers

§ 418.156 Notice of Availability of Administrative Record

[1] FORM Notice of Availability of Administrative Record

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*],	)	
Petitioners,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	NOTICE OF AVAILABILITY OF ADMINIS-
and DOES I through _____,	)	TRATIVE RECORD
Respondents.	)	
	)	
	)	

Notice to Petitioner(s) in the above-captioned case and to their attorney of record:

The Administrative Record in the above-captioned case is completed and is available for lodging with the court on payment of the costs incurred in preparation.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent _____ [*name*]

[2] Use of Form

The form in [1], *above*, is a notice to the petitioner in an action under CEQA for use by the respondent to notify the other parties that the administrative record has been completed and is available for lodging with the court. The form specifies that it will be lodged on the payment of certain costs. In some circumstances, the respondent may choose simply to lodge the administrative record with the court to expedite the proceeding.

For a sample request to prepare the administrative record, see *§ 418.154*. For a sample notice of election to prepare the administrative record, see *§ 418.155*.

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A. California Environmental Quality Act

36-418 California Forms of Pleading and Practice--Annotated § 418.157

AUTHOR: By Roger Beers

§ 418.157 Notice of Settlement Meeting [Pub. Res. Code § 21167.8]

[1] FORM Notice of Settlement Meeting [Pub. Res. Code § 21167.8]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*],	)	
Petitioners,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	NOTICE OF SETTLEMENT MEETING
and DOES I through _____,	)	
Respondents.	)	
	)	
	)	

_____

TO ALL PARTIES AND THEIR ATTORNEYS:

Please take notice that on _____ [*date*] at _____ [*time*] at _____ [*address*], _____ [*city*], California, all parties shall meet and attempt to settle this litigation. The failure of petitioner to participate in the settlement process set forth in *Public Resources Code Section 21167.8* without good cause may result in dismissal with prejudice of this action.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent _____ [*name*]

[2] Use of Form

The form in [1], *above*, is a notice of a settlement meeting for the respondents' use in noticing a settlement conference required under CEQA [*Pub. Res. Code § 21167.8*]. A notice of the settlement meeting is required to be filed with the court within 20 days after service of the petition [*Pub. Res. Code § 21167.8(a)*]. The meeting must be scheduled and held within 45 days of service of the petition [*Pub. Res. Code § 21167.8(a)*].

[3] Settlement Meetings

At the settlement meeting the parties must attempt in good faith to settle the litigation and the dispute that forms the basis of the litigation [*Pub. Res. Code § 21167.8(b)*]. The discussion must be comprehensive in nature and focus on the legal issues raised by the parties concerning the project that is the subject of the litigation [*Pub. Res. Code § 21167.8(c)*]. The settlement meeting may be continued without postponing or otherwise delaying other applicable time limits in the litigation [*Pub. Res. Code § 21167.8(c)*]. If the litigation is not settled, the court may in its discretion, or at the request of any party must, schedule a further settlement conference before a superior court judge [*Pub. Res. Code § 21167.8(d)*]. Any party who was notified of the settlement meeting and who fails to participate in the settlement process, without good cause, is subject to the imposition of sanctions by the court [*Pub. Res. Code § 21167.8(e)*]. However, *Pub. Res. Code § 21167.8* requires only the litigants' lawyers, and not the actual litigants themselves, to attend the settlement meeting [*McDowell v. Watson (1997) 59 Cal. App. 4th 1155, 1166, 69 Cal. Rptr. 2d 692]* .

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PART IV. FORMS
A. California Environmental Quality Act

36-418 California Forms of Pleading and Practice--Annotated § 418.158

AUTHOR: By Roger Beers

§ 418.158 Notice of Hearing on Writ of Mandate [Pub. Res. Code § 21167.4]

[1] FORM Notice of Hearing on Writ of Mandate [Pub. Res. Code § 21167.4]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*],	)	
Petitioners,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	NOTICE OF HEARING ON WRIT OF MANDATE
and DOES I through _____	)	
Defendants.	)	
	)	
	)	

_____

TO RESPONDENTS _____ [*names*] AND REAL PARTIES IN INTEREST _____ [*names*] AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter can be heard, in Department _____ of the Superior Court of _____ County, _____ [*address*], California, a hearing will be held on the merits of the Petition for Writ of Mandate. Petitioner(s) will also move the court for the issuance of a peremptory writ of mandate ordering respondent(s) to set aside their _____ [*describe decision or order sought to be vacated, e.g.,* approval of the Project], as more particularly described in the Petition for Writ of Mandate on file herein. This motion will be made in accordance with *Public Resources Code Section 21000 et seq.* and *Code of Civil Procedure Sections 1085* and *1094.5 et seq.*

This motion is based on all pleadings, papers, and records filed in this action, the subsequent briefing of the parties on the merits of the petition, the record of the proceedings, and on such evidence and argument as may be presented at the hearing.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Use of Form

The form in [1], *above*, is a notice of hearing on a petition for a writ of mandate. The form is for the petitioners' use in noticing a motion setting a hearing date for the court's consideration of the merits of the petition. Local rules may permit other means of obtaining the hearing date. In any event, the petitioner must obtain a date for the hearing on the merits of the petition within 90 days of the filing of the petition [*Pub. Res. Code § 21167.4*]. Although the hearing date itself need not fall within that 90 days, the failure to obtain a hearing date within that period may lead to the petition's automatic dismissal [*McCormick v. Board of Supervisors (1988) 198 Cal. App. 3d 352, 357, 243 Cal. Rptr. 617]* .

For a sample Petition for Writ of Mandate, see *§ 418.150*.

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A. California Environmental Quality Act

36-418 California Forms of Pleading and Practice--Annotated § 418.159

AUTHOR: By Roger Beers

§ 418.159 Final Judgment for Petitioner

[1] FORM Final Judgment for Petitioner

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*],	)	
Petitioners,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	FINAL JUDGMENT
and DOES I through _____	)	
Respondents.	)	
	)	
	)	

_____

The above-entitled action came regularly for hearing before Department _____ of the above entitled court on _____ [*date*], the Honorable _____ [*name of Judge*], Judge, presiding without a jury. _____ [*Name(s)*] appeared for petitioners. _____ [*Name(s)*] appeared for respondent _____ [*name(s)*]. _____ [*Name(s)*] appeared for real party in interest _____ [*name(s)*].

The administrative record was received by the court. After consideration of the administrative record, the briefs filed by counsel, _____ [*identify any other papers considered*], and the oral arguments of counsel,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that judgment shall be for and in favor of petitioners

_____ [*name(s)*].

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that:

1. The writ of mandate prayed for by petitioners is GRANTED. The proceedings are remanded to the respondent _____ [*name*]. Respondent _____ [*name*], you are hereby commanded immediately after receipt of this Judgment

(a) to vacate and set aside your decision of _____ [*date*] certifying the final EIR on the _____ [*name of project*].

[*AND/OR*]

(b) to vacate and set aside your decision of _____ [*date*] approving the _____ [*name of project*],

[*AND/OR*]

(c) not to recertify any environmental document or reissue _____ [*identify project approval, e.g.,* the use permit] dealing with the _____[*name of project*] until and unless a full and complete environmental impact report is prepared which fully addresses all issues set forth in _____ [*identify court opinion or order, if any, e.g.,* the Order on Writ of Mandate] issued by this court on _____ [*date*] and which fully complies with all requirements of the California Environmental Quality Act, *Public Resources Code Section 21000 et seq.*

2. Petitioners shall recover their costs in this action, as allowed by law.

Dated: _____.

_____ [*signature*]
JUDGE OF THE SUPERIOR COURT

[2] Use of Form

The form in [1], *above*, is a final judgment when the court has ruled in the petitioner's favor on a petition for writ of mandate under CEQA [*see § 418.150*]. The form contains not only the confirmation of that ruling but also a stay or injunction against the respondent's further implementation of the decision challenged. CEQA contemplates use of injunctive relief or a stay as a means of effectuating its provisions after a final determination on the merits [*see Pub. Res. Code § 21168.9(a)*]. In the case of a judgment in the defendant's favor, the form could be revised to state that the judgment is in favor of the defendant and that costs are awarded to the defendant.

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36-418 California Forms of Pleading and Practice--Annotated §§ 418.160-418.169

AUTHOR: By Roger Beers

[Reserved]

§§ 418.160[Reserved]

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PART IV. FORMS
B. Citizen Suits

36-418 California Forms of Pleading and Practice--Annotated § 418.170

AUTHOR: By Roger Beers

§ 418.170 Petition for Writ of Mandate--Judicial Review of Administrative Agency Action

[1] FORM Petition for Writ of Mandate--Judicial Review of Administrative Agency Action

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR WRIT OF MANDATE
Respondents.	)	
	)	
	)	

_____

THE PARTIES

[*EITHER*]

1. Petitioner(s) _____ [*names(s) of individual petitioners*] is a citizen and taxpayer of the State of California. Petitioner _____ [*describe interest in subject of action, e.g.,* is a life-long recreational fisherman, and engages in this and other recreational activities in areas which include the habitat of the fish species at

issue in this case]. Petitioner's interests will be adversely affected by the decision of the agency at issue herein in that _____ [*describe adverse effects, e.g.,* the population of the species will continue to decline and face extinction without the protection afforded endangered species under state law and petitioner's enjoyment of related recreational activities will be diminished].

[*AND/OR*]

2. Petitioner(s) _____ [*name(s)*] is, and at all times relevant hereto was, _____ [*set forth legal capacity, e.g.,* a national environmental group organized as a not-for-profit membership corporation under the laws of New York and registered to do business in California.] Petitioner has over _____ members who are citizens and taxpayers of the State of California and who [*describe interests, e.g.,* have a direct interest in the survival and perpetuation of their state's wildlife and wildlife habitat, including the instant fish species and its diminishing habitat, in that petitioner's members use rivers and streams that provide habitat for the instant fish species, for reasons such as recreation and wilderness experiences.] Petitioner participated in the administrative proceedings below. Petitioner brings this action on its own behalf and on behalf of its members

[*CONTINUE*]

3. Respondent _____ [*name of agency, e.g.,* California Fish and Game Commission] is, and at all times relevant hereto was, _____ [*describe legal status, e.g.,* a state administrative body entrusted with specific regulatory and adjudicatory duties relating to the protection of wildlife, including endangered species in particular.]

4. The true names and capacities of DOES 1 through _____, inclusive, are unknown to Petitioners at this time. Petitioners will amend this complaint to set forth the true names and capacities of said DOE respondents and defendants as soon as the same have been ascertained. Petitioners are informed and believe and thereon allege that each of said DOE respondents or defendants 1 through _____ has jurisdiction by law over _____ [*describe subject matter of suit, e.g.,* the fish species at issue herein] or activities affecting it, and that DOES _____ through _____ otherwise have an interest in _____ [*describe subject matter of suit, e.g.,* the fish species at issue herein] or activities affecting it.

5. The beneficiary of this Petition for Writ of Mandate is _____ [*describe subject matter of suit, e.g.,* the fish species at issue herein], which has been a major cultural, biological, and economic asset in this state but is now nearing extinction].

6. On _____ [*date*] _____ [*describe request submitted to agency, e.g.,* petitioner submitted a Petition to the California Fish and Game Commission to list the fish species as an endangered species under *Fish & Game Code Section 2074.2*].

7. On _____ [*date*] _____ [*describe agency's actions, e.g.,* the Fish and Game Commission held a hearing to consider the Petition to list the species as endangered, and voted to reject the Petition and deny the species status as a candidate for endangered species listing].

8. Petitioners have exhausted their administrative remedies by submissions to and appearances before Respondent Commission, advising it of its public duties, and requesting compliance therewith. Further exhaustion and demand would have proved futile.

9. Petitioners do not have any plain, speedy, or adequate remedy in the ordinary course of law. Petitioners' only recourse

is the relief provided by _____ [*state basis for judicial review, e.g., Fish & Game Code Section 2076*, which provides for judicial review under *Code of Civil Procedure Section 1094.5* and *Code of Civil Procedure Section 1097*].

10. Petitioners have a clear and present right and an immediate and beneficial interest in _____ [*describe subject of action, e.g.,* the Fish and Game Commission's compliance with the California Endangered Species Act].

11. If Respondent's action is allowed to stand, Petitioners will suffer irreparable harm, including _____ [*describe irreparable harm, e.g.,* the fish species' continuing decline and eventual extinction]. No money damages or other legal remedy could adequately compensate Petitioners for the harm the Respondent's conduct has caused and continues to cause.

FIRST CAUSE OF ACTION FOR ABUSE OF DISCRETION

12. Petitioner(s) reallege and incorporate by reference herein the allegations set for in Paragraphs 1 through _____ of this Petition, as though fully set forth below.

13. In its decision challenged herein, Respondent failed to base its decision on substantial evidence, to apply the proper evidentiary standard, and to comply with the procedures prescribed in the Fish & Game Code. In particular, _____ [*describe deficiencies in agency's decision, e.g.,* under the evidence presented by Petitioners and others regarding the species' condition, and the low threshold standard for acceptance of a petition for listing under the California Endangered Species Act, the Commission had a mandatory duty under *Fish & Game Code Section 2074.2* to accept the Petition because it provided "sufficient information to indicate that the petitioned action may be warranted."].

14. As a result Respondent prejudicially abused its discretion and failed to proceed in the manner required by law in _____ [*describe action challenged, e.g.,* denying the petition to list the species as endangered.]

SECOND CAUSE OF ACTION FOR INADEQUATE FINDINGS

15. Petitioners reallege and incorporate by reference herein the allegations set forth in Paragraphs 1 through _____ of this Petition, as though fully set forth below.

16. Contrary to the requirements of _____ [*identify legal authority, e.g., Fish & Game Code Section 2074.2*], the Respondent failed to make and release adequate findings supporting its decision, including but not limited to the following:

[*EITHER/OR*]

(a) There was no express finding _____ [*identify finding omitted, e.g.,* whether the Petition provided "sufficient information to indicate that the petitioned action may be warranted" in accordance with *Fish & Game Code Section 2074.2*].

[*AND/OR*]

(b) There was no finding purporting to evaluate the information presented against any of the ultimate standards required to be complied with _____ [*identify finding omitted, e.g.,* when the Petition provided "sufficient information to indicate that the petitioned action may be warranted" under *Fish & Game Code Section 2074.2*].

[*AND/OR*]

(c) Respondent applied erroneous legal standards in the findings it did make, in that _____ [*identify deficiency in findings, e.g.,* Respondent's finding that under *Fish & Game Code Section 2074.2* "there was insufficient evidence to find there was an immediate threat to the continued existence" of the species is not the proper standard for determining candidacy].

[*AND/OR*]

17. The findings are inadequate as a matter of law because they do not exhibit any weighing of the evidence, or otherwise bridge the analytical gap between the evidence and the Respondent's decision, in that _____ [*identify deficiency in findings, e.g.,* the findings do not show any consideration of the evidence presented by Petitioners and others concerning conditions and circumstances within the last 20 years which support the species' candidacy, including any of the population trends or environmental changes occurring during that period, or the opinion of the Department and the other scientific opinion supporting candidacy presented in the proceeding].

[*AND/OR*]

18. Respondent's findings are internally inconsistent in that _____ [*identify inconsistency, e.g.,* Respondent's findings present inconsistent conclusions regarding population trends].

[*CONTINUE*]

19. In each of the above respects and others, the Respondent's decision is not supported by the findings, its findings are not supported by the evidence, and its findings fail to bridge the analytic gap between the evidence and its ultimate decision. As a result, Respondent has prejudicially abused its discretion, and it has failed to proceed in the manner required by law.

THIRD CAUSE OF ACTION FOR DECLARATORY RELIEF

20. Petitioners reallege and incorporate by reference herein the allegations set forth in Paragraphs 1 through _____ of this Petition, as though fully set forth below.

21. Petitioners contend that the Respondent's decision _____ [*describe actions challenged, e.g.,* denying the species status as a candidate for endangered species listing and Respondent's failure to prepare adequate findings in support of that decision] constitute a prejudicial abuse of Respondent's lawful discretion.

22. Respondent contends that its decision above described was and is lawful and proper.

23. An actual controversy has arisen and now exists between Petitioners and Respondent concerning their respective rights and duties under _____ [*identify legal authority, e.g., Fish & Game Code Section 2074.2*].

24. Petitioners desire a judicial determination and declaration of Petitioners' and Respondent's respective rights and duties, including _____ [*state declaration sought, e.g.,* a declaration of whether the Fish & Game Commission's decision denying candidacy status to the species and its failure to make and release adequate findings in support of that decision violate *Fish & Game Code Section 2074.2* and other legal requirements]. Such a declaration is necessary and appropriate at this time.

PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully pray as follows:

1. On the First and Second Causes of Action, that the court issue a writ of mandate commanding Respondent to set aside its prejudicial action of _____ [*date*] and issue a new decision _____ [*describe new decision sought, e.g.,* advancing the instant fish species to candidacy for endangered species listing].

2. On the Third Cause of Action, that the court declare Petitioners' and Respondent's respective rights and duties;

3. On all Causes of Action, for fees and costs incurred herein, including reasonable attorney's fees; and

4. For such other and further relief as the court deems just and proper.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____ [*name of petitioner*] am one of the Petitioners in this action. I have read the foregoing Petition for Writ of Mandate. I am informed and believe that the matters in it are true, and on that ground allege that the matters stated in the Petition are true, and that the documents attached hereto are true and correct copies.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a petition for a writ of mandate for judicial review of a decision of an administrative agency--in this case a decision of the Fish & Game Commission denying a petition for a species to become a candidate

for listing under the California Endangered Species Act [*Fish & Game Code § 2074.2*]. Because the issues will necessarily vary from one case to another, the kinds of deficiencies alleged in this form in the agency's decision may not be applicable, and care should be taken to ensure that the details alleged fit the particular circumstances of the case. In addition, because a petition may be denied summarily, care must also be taken in adapting the form to make certain that no essential allegations are inadvertently omitted.

A Petition for Writ of Mandate must be verified [*Code Civ. Proc. §§ 1086, 1103*]. There are two methods of commencing the action: (1) obtaining an alternative writ from the court or (2) service of the petition with a summons. Unless required by a local rule, it is not typical for practitioners to file points and authorities with the petition.

For a sample petition for writ of mandate applicable for use in an action under the California Environmental Quality Act [*Pub. Res. Code § 21000 et seq.*], see *§ 418.150*.

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 418 POLLUTION AND ENVIRONMENTAL MATTERS
PART IV. FORMS
B. Citizen Suits

36-418 California Forms of Pleading and Practice--Annotated § 418.171

AUTHOR: By Roger Beers

§ 418.171 60-Day Notice of Intent to Sue Under Proposition 65

[1] FORM 60-Day Notice of Intent to Sue Under Proposition 65

_____ [*Letterhead*]

_____ [*date*]

_____ [*name*]

California Attorney General

_____ [*address of Attorney General*]

_____ [*name*]

District Attorney

_____ [*name of County or City and County*]

_____ [*address of District Attorney*]

_____ [*name*]

City Attorney

_____ [*name of City or City and County*]

_____ [*address of City Attorney*]

Re: 60-Day Notice for Failure to Warn Public About Chemicals Listed Under *Health & Safety Code Section 25249.6*

Dear Prosecutors:

I represent _____ [*name, address, and telephone number of person or organization intending to sue*]. This letter constitutes notification that _____ [*name of violator*] whose offices are at _____ [*address*] has violated Proposition 65, the Safe Drinking Water and Toxic Enforcement Act (commencing with *Health & Safety Code Section 25249.5*).

In particular, _____ [*name of violator*] _____ [*describe nature of violation, e.g.,* has exposed and continues to expose numerous individuals within the residential neighborhood immediately adjacent to its facility] to _____ [*identify chemical, e.g.,* lead], a chemical subject to Proposition 65 and listed as a carcinogen on _____ [*date of listing*]. The time period of this violation commenced on or about [*date*], more than one year after the listed date for _____ [*identify chemical, e.g.,* lead] and has continued to the present. The route of exposure has been _____ [*identify route of exposure, e.g.,* inhalation].

While in the course of doing business, _____ [*name of violator*] is knowingly and intentionally exposing people to this chemical which has been designated by the state to cause cancer without first giving clear and reasonable warning to such persons (*Health & Safety Code Section 25249.6*). The method of warning is specified in the regulation (22 California Code of Regulations Section 12601). The geographic location of the violation is _____ [*identify area of exposure, e.g.,* within one-half mile of the company's manufacturing facility].

Proposition 65 requires that notice and intent to sue be given to a violator 60-days before the suit is filed. With this letter, _____ [*name of person or organization intending to sue*] gives notice of the alleged violation to _____ [*name of violator*] and the appropriate governmental authorities. This notice covers all violations of Proposition 65 that are currently known to _____ [*name of person or organization intending to sue*] from information now available to us.

With the copy of this notice submitted to the _____ [*name of violator*], a copy is provided of The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary.

If you have any questions, please contact my office at your earliest convenience.

Sincerely,

_____ [*name of attorney*]

cc: _____ [*name and address of alleged violators*]

Proof of Service [*attached to the above letter*]

I, _____ [*name*], hereby declare as follows:

I am a citizen of the United States; am over the age of 18 years and am not a party to the within action. My business address is _____ [*address*].

On _____ [*date*], I served copies of the attached 60-Day Notice for Failure to Warn Public About Chemicals Listed Pursuant to *Health & Safety Code Section 25249.6* on the parties listed below by placing true and correct copies of the same in sealed envelopes with first class postage fully prepaid thereon and deposited in the U.S. Mail at _____ [*city*], California:

_____ [*name*]
California Attorney General
_____ [*address of Attorney General*]

_____ [*name*]
District Attorney
_____ [*name of County or City and County*]
_____ [*address of District Attorney*]

_____ [*name*]
City Attorney
_____ [*Name of City or City and County*]
_____ [*address of City Attorney*]

_____ [*name of violator*]
_____ [*address of violator*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a 60-day notice of intent to sue under Proposition 65 [*Health & Safety Code § 25249.6*]. It is intended for use as notice to violators of Proposition 65 and specified public prosecutors, which is required to be sent 60 days before the filing of a complaint alleging violations of Proposition 65. The above form has been styled as one from an attorney representing the person or organization sending the notice, but it could also be issued directly by that person or organization.

This form alleges violations of the warning requirement in *Health & Safety Code § 25249.6*, but it could be reworded to serve as notice of a violation of the prohibition in *Health & Safety Code § 25249.5* of discharges or releases of listed chemicals into a source of drinking water. As noted in [3], below, there are specific regulatory requirements for a notice under Proposition 65. Therefore, while this form could be modified to serve as a notice of intent to sue under other citizen suit provisions, the particular statute and regulations should be consulted for any different requirements for the content of such a notice. It is important to recognize that statutes requiring such notices have been construed as making the notice an absolute prerequisite to the filing of a suit [*Hallstrom v. Tillamook County (1989) 493 U.S. 20, 26-28, 110 S. Ct. 304, 107 L. Ed. 2d 237]* . Under the *Hallstrom* rule, the plaintiff cannot file suit and then comply with the 60-day notice requirement.

For discussion of the Safe Drinking and Toxic Enforcement Act of 1986 (Proposition 65), including coverage of the purpose of the Act and prohibitions and exceptions under the Act, see *§ 418.50*.

[3] Checklist for Contents of Proposition 65 Notice

The California Department of Health Services has established by regulation specific requirements for the contents of Proposition 65 notices. The notices must contain the following to the extent applicable to the alleged violation [22 Cal. Code Reg. § 12903]:

- The name, address, and telephone number of the noticing individual or a responsible individual within the noticing entity and the name of the entity.

- The name of the alleged violator or violators.

- The approximate time period during which the violation is alleged to have occurred;

- The name of each listed chemical involved in the alleged violation.

- For notices of violations of *Health & Safety Code § 25249.5*, a general identification of the discharge or release and of the source of drinking water into which the discharges are alleged to have occurred, to be occurring, or to be likely to occur.

- For all notices of violation of *Health & Safety Code § 25249.6*, the route of exposure by which exposure is alleged to occur (*e.g.*, by inhalation, ingestion, or dermal contact).

- For notices of violation of *Health & Safety Code § 25249.6* involving consumer product exposures, the name of the consumer product or service, or the specific type of consumer product or services, that cause the violation, with sufficient specificity to inform the recipients of the nature of the items allegedly sold in violation of the law and to distinguish those products or services from others sold or offered by the alleged violator for which no violation is alleged. The identification of a chemical under 22 Cal. Code Reg. § 12903(b)(2)(A)4 must be provided for each product or service identified in the notice.

- For notices of violation of *Health & Safety Code § 25249.6* involving occupational exposures: (1) the general geographic location of the unlawful exposure to employees, or where the exposure occurs at many locations, a description of the occupation or type of task performed by the exposed persons; (2) where the alleged violator is the manufacturer or distributor of the chemical or products causing the exposure, the notice must identify products in the same manner as set forth for consumer product exposures *above.*

- For notices of violation of *Health & Safety Code § 25249.6* involving environmental exposures as defined in 22 Cal. Code Reg. § 12601(d), the notice must identify, the location of the source of the exposure. When numerous sources of the exposure are alleged, the location need not be listed if the notice identifies each facility or source of exposure by stating those common characteristics that result in the allegedly unlawful exposure in a manner sufficient to distinguish those facilities or sources from others for which no violation is alleged. The notice must also state whether the exposure for which a warning allegedly is required occurs beyond the property owned or controlled by the alleged violators.

In addition to the above, each notice to an alleged violator must include as an attachment a copy of "The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65): A Summary" prepared by the Department of Health Services. A copy of this attachment may be obtained by writing to the Office of Environmental Health Hazard Assessment at P.O. Box 942732, Sacramento, CA 94234-7320.

[4] Certificate of Merit

If the notice of intent to sue alleges a violation of the warning requirement set forth in *Health & Safety Code § 25249.6*, it must include a certificate of merit executed by the attorney for the noticing party or by the noticing party if that party is not represented by an attorney [*Health & Safety Code § 25249.7(d)(1)*]. The certificate of merit must state that the person executing the certificate has consulted with one or more persons with relevant and appropriate experience or expertise who has reviewed facts, studies, or other data regarding the exposure to the listed chemical that is the subject of the action and that, based on that information, the person executing the certificate believes there is a reasonable and meritorious case for the private action. Factual information sufficient to establish the basis of the certificate of merit must be attached to the certificate of merit served on the Attorney General [*Health & Safety Code § 25249.7(d)(1)*]. The Attorney General may provide that factual information on request to any district attorney, city attorney, or prosecutor within whose jurisdiction the violation is alleged to have occurred, or to any other state or federal government agency, but in all other respects must maintain, and ensure that all recipients maintain, the submitted information as confidential [*Health & Safety Code § 25249.7(i)*].

The basis for the certificate of merit is not discoverable [*Health & Safety Code § 25249.7(h)(1)*]. However, if at the conclusion of the action the trial court determines that there was no actual or threatened exposure to a listed chemical, it may, on the motion of the alleged violator or on the court's own motion, review the basis for the certificate of merit. The information in the certificate, including the identity of the persons consulted with and relied on by the certifier and the facts, studies, or other data reviewed by those persons, must be disclosed to the court in an in-camera proceeding at which the moving party may not be present. If the court finds there was no credible factual basis for the certifier's belief that an exposure to a listed chemical had occurred or was threatened, the action will be deemed frivolous within the meaning of *Code Civ. Proc. § 128.6* or *128.7*, whichever is applicable to the action [*Health & Safety Code § 25249.7(h)(2)*]. Note that *Code Civ. Proc. § 128.7* applies to sanctions for frivolous tactics in actions commenced in 1995 through 2005 unless the Legislature changes the ending date [for discussion, see Ch. 510, *Sanctions*].

[5] Service of Proposition 65 Notice

Notices must be served (with a certificate of service attached) by first class mail or in any manner that would be sufficient for service of a summons and complaint under the California Code of Civil Procedure on (1) each alleged violator, (2) the Attorney General, (3) the district attorney of every county in which a violation is alleged to have occurred, and (4) on the city attorneys of any cities with populations according to the most recent decennial census of over 750,000 and in which the violation is alleged to have occurred [22 Cal. Code Reg. § 12903(c)(3)]. When the alleged violator has a current registration with the California Secretary of State that identifies a Chief Executive Officer, President, or General Counsel of the corporation, the notice must be addressed to one of those persons [22 Cal. Code Reg. § 12903(c)(4)].

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Chapter 418 POLLUTION AND ENVIRONMENTAL MATTERS
PART IV. FORMS
B. Citizen Suits

36-418 California Forms of Pleading and Practice--Annotated §§ 418.172-418.179

AUTHOR: By Roger Beers

[Reserved]

§§ 418.172[Reserved]

California Forms of Pleading and Practice--Annotated

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
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PART IV. FORMS
C. Common Law Environmental Tort Actions

36-418 California Forms of Pleading and Practice--Annotated § 418.180

AUTHOR: By Roger Beers

§ 418.180 Complaint for Damages, Declaratory Relief, Equitable Indemnity, Preliminary and Permanent Injunction (Negligence, Nuisance, Trespass) for Contamination of Property

[1] FORM Complaint for Damages, Declaratory Relief, Equitable Indemnity, Preliminary and Permanent Injunction (Negligence, Nuisance, Trespass) for Contamination of Property

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	COMPLAINT FOR DAMAGES, DECLARATORY
and DOES I through _____,	)	RELIEF, EQUITABLE INDEMNITY, PRELIMIN-
Defendants.	)	ARY AND PERMANENT INJUNCTION
	)	(Negligence, Nuisance, Trespass)
	)	

Plaintiff alleges:

1. Plaintiff _____ [*name*] is _____ [*set forth legal capacity, e.g.,* a resident of a specified County]. Plaintiff is and at all times herein mentioned was, the _____ [*specify proprietary interest, e.g.,* owner] and in possession and control of certain real property consisting of land and _____ [*describe improvements, e.g.,* a single family house] at _____ [*address*], _____ County, California, and more particularly described as follows: _____ [*give legal description*].

2. Defendant _____ [*name*] is _____ [*set forth legal capacity, e.g.,* a California corporation]. Defendant is and at all times herein mentioned was, the _____ [*specify proprietary interest or other capacity, e.g.,* owner] and in possession and control of certain real property consisting of land and _____ [*describe improvements, e.g.,* a gasoline station including underground storage tanks containing gasoline, other petroleum hydrocarbons, and benzene and other carcinogens used in the operation of its gasoline station] at _____ [*address*], _____ County, California, and more particularly described as follows: _____ [*give legal description*].

3. The true names or capacities, whether individual, corporate, associate, or otherwise, of defendants DOES 1-_____, inclusive, are unknown to plaintiff, who therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the contamination herein referred to and thereby proximately caused injuries and damages to the plaintiff as herein alleged.

4. Plaintiff is informed and believes and thereon alleges that at all times mentioned in this complaint each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things alleged below, was acting within the course and scope of such agency and employment.

5. Plaintiff's property and the property of defendants, and each of them, are _____ [*describe relative locations, e.g.,* adjoining each other at plaintiff's north and defendants' south boundaries]. Defendants' _____ [*describe business or operation which is source of contamination, e.g.,* underground storage tanks containing gasoline, other petroleum hydrocarbons, and benzene and other carcinogens used in the operation of its gasoline station] are located approximately _____ [*specify distance, e.g.,* 150 feet] from plaintiff's _____ [*describe property improvement, e.g.,* dwelling].

6. At all times mentioned in this complaint, and since _____ [*date*], defendants, and each of them, have occupied, used, and maintained their premises in such a manner that _____ [*allege facts, e.g.,* gasoline and other petroleum hydrocarbons have leaked from the underground storage tanks on defendant's property and have migrated into and contaminated the soil on plaintiff's land and the groundwater thereunder].

[*EITHER*]

7. As a proximate result of the Defendants' acts or omissions, Plaintiff has suffered damages including, but not limited to, an interference with Plaintiff's use of his/her residential property, a diminution in the property's value, and substantial other costs and expenses. Plaintiff is informed and believes and based thereon alleges that he/she has suffered damages in excess of $25,000.00 in diminution of property value as a result of the presence of the contaminants _____ [*describe location, e.g.,* in the soil of Plaintiff's property and subjacent groundwater].

[*AND/OR*]

8. As a further proximate result of Defendants' acts and omissions, Plaintiff has suffered physical damage to his/her property as a result of the contaminants _____ [*describe location, e.g.,* in the soil of Plaintiff's property and subjacent groundwater]. Such physical damage is _____ [*specify areas damaged, e.g.,* to the structures on such lot and to the lot itself,] in the respects _____ [*specify facts, e.g.,* that the presence of such contaminants makes such structure less suitable for habitation, induces build up of harmful air pollutants and potentially explosive gases in the confined spaces of such structure, and renders the lot unusable or less usable for the

normal purposes such as gardening, providing a safe play area for children, or a place for Plaintiff to relax and entertain].

[*AND/OR*]

9. As a result of purchasing the real property, Plaintiff made certain improvements on the property, the cost and reasonable value of which exceeds $_____. Were it not for the presence of contaminants in the property, the real property would have increased in its fair market value by such amount. Also, Plaintiff has incurred other expenses in the amount of $ _____ in addition to those alleged above, including, without limitation, closing costs, title insurance, casualty and liability insurance, principal and interest on obligations outstanding, taxes, fees for engineers, and moving expenses. Plaintiff will continue to incur them in an amount unknown to Plaintiff at this time. Plaintiff prays leave of court to amend this complaint to insert herein the full amount of those expenses when they are ascertained. All of these expenses were necessary, and all were made in the good faith reliance that the property was free from contamination.

[*AND/OR*]

10. As a further proximate cause of the Defendant's acts and omissions, Plaintiff has incurred great mental and nervous suffering and pain due _____ [*describe causes of emotional distress, e.g.,* to nervousness, fright, worry and anxiety about the certain and potential financial and/or health damages caused by Defendant's acts and omissions]. As a result of such injuries, Plaintiff has suffered general damages in an amount according to proof.

[*AND/OR*]

11. In engaging in the acts set forth above, Defendants each were guilty of malice, fraud, and oppression as defined in *Civil Code Section 3294*, and Plaintiff should recover, in addition to actual damages, damages to make an example of and punish Defendants, in an amount to be determined.

[*AND/OR*]

12. Plaintiff has incurred and, during the pendency of this action, will incur expenses for attorneys' fees and costs herein. Such attorneys' fees are necessary for the prosecution of this action. The exact sum of such attorneys' fees and costs is presently unascertained and Plaintiff request the court's permission to amend this claim for costs and attorneys' fees when the amounts are determined.

[*CONTINUE*]

FIRST CAUSE OF ACTION FOR NEGLIGENCE
[Damages for Negligence]

13. Plaintiff realleges and incorporates herein by reference the allegations contained in Paragraphs 1 through _____ above.

14. Defendants, while owning or occupying or conducting operations on their property, had a duty at all times to avoid

handling, storing, disposing of, or releasing the contaminants in a manner which would cause injury to plaintiff, the public, and the environment.

15. Defendants negligently failed to exercise due care in storing, using, or disposing of, or causing to be disposed of, the contaminants on its property, causing the contaminants to be released _____ [*describe location, e.g.,* onto and into the ground of plaintiff's property and into the subjacent groundwater].

16. As a direct and proximate result of the negligent acts or omissions of defendants, plaintiff has been injured incurring the costs and suffering the damages alleged in Paragraphs _____ through _____ above, and incorporate herein by this reference those allegations.

SECOND CAUSE OF ACTION FOR NUISANCE
[Damages for Private Nuisance]

17. Plaintiff realleges and incorporates herein by reference the allegations contained in Paragraphs _____ through _____ above.

18. At various times beginning in _____ [*date*] and through the present date, defendants caused or permitted the release of the contaminants on its property and failed to clean up the contamination, or otherwise remedy the situation so that the contaminants migrated _____ [*describe location, e.g.,* into the soil and subjacent groundwater of plaintiff's property] and in such a manner as to be injurious to health and property, to obstruct plaintiff's free use of _____ [*describe areas damaged, e.g.,* his/her lot and home], to obstruct plaintiff's comfortable enjoyment of life and property, thereby constituting a nuisance under *California Civil Code Sections 3479-3503*.

19. The contamination caused by such defendants, as alleged in this complaint, has continuously migrated and spread _____ [*describe location, e.g.,* in the soils of the defendants property and onto plaintiff's property] since it was initially released and its impact has varied over time.

20. Defendants have caused or permitted the nuisance on the property as a result of unnecessary, unreasonable, and injurious methods of conducting their operations and activities thereon.

21. In creating the nuisance, defendants acted with full knowledge of the consequences and damages that would foreseeably be caused by their actions, and their conduct is willful, oppressive, and malicious.

22. As a direct and proximate result of the continuing private nuisance on property caused by defendants, plaintiff has been injured, incurring the costs and suffering the damages alleged in Paragraphs _____ through _____ above.

THIRD CAUSE OF ACTION
[Damages for Trespass]

23. Plaintiff realleges and incorporates herein by reference the allegations contained in Paragraphs _____ through _____ above.

24. At various times, and through the present date, Defendants caused or permitted the release of the contaminants on the property and failed to clean up the contamination or to otherwise remove the contaminants from their property in such a manner as to cause a physical invasion of plaintiff's property and to interfere with plaintiff's possession of _____ [*describe areas damaged, e.g.,* his/her lot and home], thereby constituting a trespass.

25. The contamination caused by such defendants, as alleged herein, has continuously migrated and spread in the soils of the property since it was initially released and its impact has varied over time.

26. Defendants caused or permitted the trespass on the property as a result of unnecessary, unreasonable and injurious methods of their operations and activities thereon.

27. As a direct and proximate result of the continuing trespass on the property caused by defendants, Plaintiff has been injured, incurring the costs and suffering the damages alleged in Paragraphs _____ through _____ above.

FOURTH CAUSE OF ACTION
[Declaratory Relief and Equitable Indemnity]

28. Plaintiff realleges and incorporates herein by reference the allegations contained in Paragraphs _____ through _____ above.

29. An actual controversy has arisen and now exists between Plaintiff and Defendants concerning the parties' respective obligations and liabilities arising from the presence of the contaminants at and around the property and the hazard to the public and the environment posed by these substances.

30. Plaintiff contends and said defendants denies that:

(a) As between plaintiff and defendants, any legal liability which has been, is now, or may in the future be asserted by any individual or entity, public or private, arising from or related to the presence of the contaminants at the property is the responsibility of defendants.

(b) As between plaintiff and defendants, any violations of local, state, or federal law arising from or related to the presence of the contaminants at the property is the responsibility of defendants.

(c) As a result, defendants are obligated to indemnify plaintiff in full for all sums which plaintiff may be compelled to pay as a result of any violations, penalties, judgments, or other awards arising from or related to the presence of the contaminants at the property.

31. Unless all the rights, duties, and obligations of plaintiff and said defendants related to the presence of the contaminants at the property, whether arising out of federal, state, or local statutory or common law, are determined in this action, there would be a multiplicity of actions to determine those rights, duties, and obligations. Plaintiff is therefore entitled to a judicial declaration of the duties and obligations of said defendants to plaintiff and to all other persons, private or public, who have suffered or may suffer damages or assert claims arising from or related to the presence of the contaminants at the property.

32. Plaintiff, as a non-responsible holder of interests in land on which defendants have created a hazardous condition, is entitled to a judicial declaration that:

(a) As between plaintiff and defendants, defendants are solely liable in any legal or administrative actions which have been brought or may be brought by any private persons concerning or related to the presence of the contaminants at or around the property.

(b) As between plaintiff and defendants, defendants are solely liable in any legal or administrative actions concerning or related to the presence of the contaminants at or around the property which have been brought or may be brought by any

agencies of the United States government, the State of California, or any other governmental body.

(c) In the event that plaintiff is adjudged liable for any or all relief requested in any judicial or administrative action, arising out of or related to the presence of the contaminants at or around the property, brought against Plaintiff by any persons or entities, public or private, such liability is purely secondary, imputed, or technical. Primary and actual liability attaches to defendants and is a direct and proximate result of the acts and omissions of defendants.

(d) Defendants are liable to plaintiff to contribute to and reimburse plaintiff or, in the alternative, to indemnify plaintiff for all damages and costs suffered by plaintiff as a result of the presence of the contaminants at or around the property, such damages and costs including, but not limited to costs required to determine the extent of contamination and to eliminate or mitigate the contamination, costs or damages awarded in legal or administrative actions, costs of compliance with any judicial or administrative order, and costs of litigation including attorneys' fees.

FIFTH CAUSE OF ACTION
[Preliminary and Permanent Injunction, and Abatement of Nuisance]

33. Plaintiff realleges and incorporates herein by reference the allegations contained in Paragraphs _____ through _____ above.

34. To date, the contaminants in _____ [*describe locations, e.g.,* the soils and groundwater of the properties] have not been removed or the property remediated, and the nuisance has not been abated by defendants.

35. Plaintiff is informed and believes and based thereon alleges that said defendants may not abate such nuisance unless affirmatively required to do so by an order of this court requiring such abatement or by preliminary or permanent injunction herein.

36. Unless said defendants are so ordered by this court, it will be necessary for plaintiff to commence successive actions against defendants, to secure compensation for damages sustained, thus requiring a multiplicity of suits and plaintiff will suffer irreparable injury in that _____ [*describe injuries, e.g,* the usefulness and economic value of plaintiff's property will be substantially diminished and plaintiff will be deprived of the comfortable enjoyment of his/her property].

37. Plaintiff has no plain, speedy, or adequate remedy at law, and injunctive relief is expressly authorized by *Code of Civil Procedure Sections 526* and *731*.

WHEREFORE, Plaintiff prays judgment against defendants as follows:

1. For compensatory and consequential damages in an amount to be determined at trial, but in excess of $25,000.

2. For punitive damages.

3. For declaratory relief.

4. For preliminary and/or permanent injunctive relief requiring abatement of nuisance.

5. For costs of suit herein incurred, including reasonable attorney fees.

6. For such other relief as the court deems just and proper.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name of plaintiff*] am the Plaintiff in this action. I have read the foregoing complaint. The matters stated therein are true, except as to those matters that are alleged to be true on information and belief, and as to those matters I am informed and believe that they are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a complaint for use in seeking damages and a preliminary and permanent injunction under various common law tort causes of action, including nuisance, trespass, and negligence arising out of pollution. Not all of these causes of action may be supported by the facts of the particular case. For example, a private person may not maintain a cause of action for public nuisance unless he or she alleges facts showing special injury to himself or herself [*Civ. Code § 3493*; *Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal. App. 3d 116, 124, 99 Cal. Rptr. 350]* . In addition, trespass may be committed by consequential and indirect injury as well as by direct and forcible injury, but there is no cause of action for trespass unless defendant's activity results in direct physical infringement of plaintiff's interest in the exclusive possession of his or her property [*Wilson v. Interlake Steel Co. (1982) 32 Cal. 3d 229, 232, 185 Cal. Rptr. 280, 649 P.2d 922]* .

A cause of action for negligence may be brought in concurrence with a cause of action for nuisance or trespass [*see, e.g.,* *Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 782-784, 56 Cal. Rptr. 128* (trespass and negligence); *Bright v. East Side Mosquito etc. Dist. (1959) 168 Cal. App. 2d 7, 335 P.2d 527* (nuisance and negligence)]. It should also be noted that the plaintiff will typically be required ultimately to make an election between injunctive relief and damages to the extent that the granting of both would produce a windfall or double recovery--for example, abatement of the nuisance and permanent damages for its existence.

To obtain a preliminary injunction under the Fifth Cause of Action in this form, the complaint must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*].

For a discussion of various common law tort causes of action as they apply to environmental lawsuits, including coverage of remedies available, see *§§ 418.60 -418.65*.

[3] Cross References

For discussion and forms relating to nuisances between adjoining landowners, see Ch. 11, *Adjoining Landowners*

For discussion, procedural guide, and forms related to proceedings seeking declaratory relief, see Ch. 182, *Declaratory Relief*

For discussion, procedural guide, and forms relating to preliminary and permanent injunctions, see Ch. 303, *Injunctions*

For discussion and forms relating to negligence in general, see Ch. 380, *Negligence*

For discussion and forms relating to actions for trespass generally, see Ch. 550, *Trespass*

[4] California Points and Authorities

For memoranda of points and authorities supporting and opposing the issuance of injunctions, see California Points and Authorities, Ch. 116, *Injunctions*

For memoranda of points and authorities relating to negligence actions, see California Points and Authorities, Ch. 165, *Negligence*

For memoranda of points and authorities relating to nuisance in general, see California Points and Authorities, Ch. 167, *Nuisance*

For memoranda of points and authorities relating to actions for trespass, see California Points and Authorities, Ch. 225, *Trespass*

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 418 POLLUTION AND ENVIRONMENTAL MATTERS
PART IV. FORMS
C. Common Law Environmental Tort Actions

36-418 California Forms of Pleading and Practice--Annotated §§ 418.181-418.189

AUTHOR: By Roger Beers

[Reserved]

§§ 418.181[Reserved]

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 418 POLLUTION AND ENVIRONMENTAL MATTERS
PART IV. FORMS
D. Recovery of the Costs of Cleanup

36-418 California Forms of Pleading and Practice--Annotated § 418.190

AUTHOR: By Roger Beers

§ 418.190 Complaint for Recovery of Response Costs

[1] FORM Complaint for Recovery of Response Costs

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	COMPLAINT FOR RECOVERY OF RESPONSE
and DOES I through _____,	)	COSTS
Defendants.	)	
	)	
	)	

Plaintiff alleges:

1. Plaintiff _____ [*name*] is _____ [*set forth legal capacity, e.g.,* a resident of the

County of _____]. Plaintiff is and at all times herein mentioned was, the _____ [*specify proprietary interest, e.g.,* owner] and in possession and control of certain real property consisting of land and _____ [*describe improvements, e.g.,* a shopping center] at _____ [*address*], _____ County, California, and more particularly described as follows: _____ [*give legal description*].

2. Defendant _____ [*name*] is _____ [*set forth legal capacity, e.g.,* a California corporation]. Defendant is and at all times herein mentioned was, the _____ [*specify proprietary interest or other capacity, e.g.,* owner] and in possession and control of certain real property consisting of land and _____ [*describe improvements, e.g.,* a gasoline station including underground storage tanks containing gasoline, other petroleum hydrocarbons, and benzene and other carcinogens used in the operation of its gasoline station] at _____ [*address*], _____ County, California, and more particularly described as follows: _____ [*give legal description*].

3. The true names or capacities, whether individual, corporate, associate, or otherwise, of defendants DOES 1-_____, inclusive, are unknown to plaintiff, who therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the contamination herein referred to and thereby proximately caused injuries and damages to the plaintiff as herein alleged.

4. Plaintiff is informed and believes and thereon alleges that at all times mentioned in this complaint each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of such agency and employment.

5. Plaintiff's property and the property of defendants, and each of them, are _____ [*describe relative locations, e.g.,* adjoining each other at plaintiff's north and defendants' south boundaries]. Defendants' _____ [*describe business or operation which is source of contamination e.g.,* underground storage tanks containing gasoline, other petroleum hydrocarbons, and benzene and other carcinogens used in the operation of its gasoline station] are located approximately _____ [*specify distance, e.g.,* 150 feet] from plaintiff's _____ [*describe property improvement, e.g.,* shopping center].

6. At all times mentioned in this complaint, and since _____ [*date*], defendants, and each of them, have occupied, used, and maintained their premises in such a manner that _____ [*allege facts, e.g.,* gasoline and other petroleum hydrocarbons have leaked from the underground storage tanks on defendant's property and have migrated into and contaminated the soil on plaintiff's land and the groundwater thereunder].

7. In engaging in the acts set forth above, defendants each were guilty of malice, fraud, and oppression as defined in *Civil Code Section 3294*, and plaintiff should recover, in addition to actual damages, damages to make an example of and punish defendants, in an amount to be determined.

[*AND/OR*]

8. Plaintiff has incurred and, during the pendency of this action, will incur expenses for attorneys' fees and costs herein. Such attorneys' fees are necessary for the prosecution of this action. The exact sum of such attorneys' fees and costs is presently unascertained and plaintiff request the court's permission to amend this claim for costs and attorneys' fees when the amounts are determined.

[*CONTINUE*]

FIRST CLAIM FOR RELIEF
RECOVERY OF COSTS OF RESPONSE

9. Plaintiff incorporates by reference herein paragraphs 1 through _____ as though set forth in full.

10. Plaintiff has incurred costs in an amount exceeding $_____ for _____ [*specify items of costs incurred, e.g.,* testing, sampling, removing, cleaning up and in preventing further contamination of plaintiff's property] by hazardous materials, substances, or wastes deposited by defendants. [*If costs will continue to be incurred, add:* Plaintiff is incurring and will continue to incur such costs]. Plaintiff is entitled to recovery of these expenditures from defendants.

11. The materials are "hazardous substances" under the provisions of Health & Safety Code Section 25636(e).

12. The materials released into the environment constituted a release within the meaning of *Health & Safety Code Section 25320*. The release of said materials into the environment poses a threat to public health or to the environment.

13. Defendants are persons described in *Health & Safety Code Section 25319* and are responsible parties as described in *Health & Safety Code Section 25323.5*.

14. Defendants are jointly and severally liable to plaintiff for all costs of response, removal, and remedial action incurred by the plaintiff.

SECOND CLAIM FOR RELIEF
UNJUST ENRICHMENT

15. Plaintiff incorporates by reference herein paragraphs 1 through _____ as though set forth in full.

16. Defendants have failed to perform their duty _____ [*describe duty breached, e.g.,* to remove hazardous materials from the premises and to remedy the public nuisance there existing]. Defendants' failure to take action has forced plaintiff _____ [*describe burden to plaintiff, e.g.,* to enter into contracts to accomplish the removal and remedy the dangerous situation].

17. Plaintiff has expended in excess of $_____ and will incur additional expenditures _____ [*describe burden to plaintiff, e.g.,* for contract or other services to remedy the danger presented by defendants' hazardous materials] and has thereby conferred a benefit on defendants which would be unjust and inequitable for defendants to retain.

18. Each defendant is jointly and severally liable for all costs of removal and remedial and preventative actions at the site.

19. Plaintiff is entitled to restitution from each defendant for all costs of removal and remedial and preventive actions at that site.

THIRD CAUSE OF ACTION
DECLARATORY RELIEF

(*California Code of Civil Procedure Section 1060*)

20. Plaintiff incorporates by reference herein paragraphs _____ through _____ as though set forth in full.

21. There is and now exists an actual controversy between the plaintiff on one part and defendants on the other part relating to the liability and responsibility of these parties for costs of response necessary to abate the release of hazardous materials, substances, or wastes on the premises and protect the public health and safety and the environment. Plaintiff has asserted and asserts that defendants bear full and strict liability for response and remediation costs occasioned by the presence of hazardous materials, substances, or wastes on the premises. Defendants have refused to acknowledge their sole and entire liability for costs of response and have taken inadequate measures to initiate at their own expense implementation of a plan to remedy the hazardous condition.

22. Judicial determination of the liability of defendants is necessary and appropriate at this time in order that plaintiffs may ascertain their rights as against defendants.

23. By this cause of action for declaratory relief plaintiff seeks a declaration of this court that defendants are solely and entirely liable for all costs necessary to respond to and abate the release and threatened release of hazardous materials, substances, or wastes at the site.

FOURTH CAUSE OF ACTION
REIMBURSEMENT FOR COST OF ABATEMENT

(*California Water Code Section 13304*)

24. Plaintiff incorporates by reference herein paragraphs _____ through _____ as though set forth in full.

25. Defendants have caused or permitted waste to be discharged or deposited which may have entered into the waters of the state or where it will probably be discharged into the waters of the state and have created a condition of pollution or nuisance.

26. Plaintiff has spent funds and will spend additional funds to clean up, abate, and remedy the conditions of pollution or nuisance created by defendants.

27. Under the provisions of *California Water Code Section 13304*, defendants, and each of them, are liable to plaintiff to the extent of costs incurred in cleaning up the waste discharged by defendants, and each of them, and abating the effects thereof.

WHEREFORE, Plaintiff prays for judgment against defendants as follows:

1. For recovery from defendants of the necessary costs heretofore incurred by plaintiff in response to the release and threatened release of hazardous materials at the site in an amount subject to proof.

2. For compensatory damages for losses resulting from defendants' conduct.

3. For punitive damages, according to proof.

4. For a declaration of this court that defendants are solely and entirely liable for all costs of response necessary to

respond to and abate the release and threatened release of hazardous materials, substances, or wastes at the site.

5. For an order requiring defendants to clean up, remove, and abate the hazardous wastes handled, stored, and disposed of by defendants.

6. For retention of jurisdiction of this action by the court after entry of the requested declaratory judgment for the purpose of granting further relief as may be necessary or proper to effectuate the declaration of the court.

7. For costs of suit.

8. For attorneys' fees.

9. For such other and further relief as this court deems just and proper.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The form in [1], *above*, is a complaint to recover the costs and damages associated with investigation and clean up of hazardous substances. The causes of action are statutory ones. Typically, they are joined with common law causes of action such as nuisance, trespass, and negligence [*see § 418.180*]. Allegations for these kinds of causes of action are set forth above and could be inserted with modification into the complaint using the instant form.

The form is for use in those situations in which the plaintiff is or may be liable for cleanup of contamination on his or her property and has or will incur costs for this cleanup. Thus, these causes of action do not seek damages for any depreciation of property values, loss of the value of improvements, or emotional distress that may have been suffered by the plaintiff. To the extent that these damages have occurred they should also be alleged and appropriate causes of action included for that purpose [*see § 418.180*]. Typically, the owner of a single family dwelling which has suffered contamination as the result of another person's activities will not be expected to conduct the cleanup of the property. Rather, the regulatory agency with responsibility for overseeing the investigation and cleanup of the contamination (for example, a Regional Water Quality Control Board) will order that the cleanup be done by the responsible parties. However, in other instances, the property owner may itself be held liable for the cleanup, and this complaint will serve as a basis for recovering the costs of the cleanup from the parties most directly responsible for the contamination.

For a general discussion of actions seeking to recover costs of cleanups, see *§§ 418.80 -418.82*.

[3] Discharge of Pollutants Into Waters of State

The Fourth Cause of Action is available only when there has been a discharge of pollutants to the waters of the state, which would include both surface water and groundwater. California law prohibits discharges of wastes, hazardous substances, or petroleum products into the waters of the state. For example, *Health & Safety Code § 5411* prohibits the discharge of "sewage or other waste ... in any manner which will result in contamination, pollution, or a nuisance."

"Waste" is defined to include "any and all other waste substances, liquid, solid, gaseous, or radioactive ... from any producing, manufacturing, or processing operation of whatever nature" [*Health & Safety Code § 5410(a)*]. *Health & Safety Code § 5410(e)* and *(f)* broadly defines "pollution" and "nuisance." *Water Code § 13350(a)(3)* and *Fish & Game Code § 5650* create liability for or make unlawful the deposit of "any residuary product of petroleum" into the waters of the state, except in accordance with waste discharge requirements or other federal or state permits.

[4] California's Hazardous Substance Account Act and the Federal Comprehensive Environmental Response, Compensation and Liability Act

The provisions of the Health & Safety Code set forth in the First Cause of Action of the form are not limited to discharges to the waters of the state. This cause of action relies on the Hazardous Substance Account Act (HSAA) [*Health & Safety Code § 25300 et seq.*], which was enacted in part to expedite cleanup of contaminated properties. The HSAA includes rights of indemnification and contribution to those parties who engage in such cleanup from those parties who are responsible for the cleanup. The HSAA states that "[a]ny person who has incurred removal or remedial costs in accordance with this chapter or the federal act may seek contribution or indemnity from any person who is liable pursuant to this chapter ... " [*Health & Safety Code § 25363(e)*]. Because the HSAA is modeled after the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) [*42 U.S.C. § 9601 et seq.*], the elements in a cost recovery action generally follow those in a CERCLA cost recovery claim. In general, under CERCLA a cost recovery action requires [*42 U.S.C. § 9607(a)(1)-(4)*]:

- That the waste disposal site is a "facility" within the meaning of *42 U.S.C. § 9601(9)*;

- That a "release" or "threatened release" of a "hazardous substance" from the facility has occurred [*42 U.S.C § 9607(a)(4)*];

- That any expenditure of costs in responding to the release are consistent with the national contingency plan [*42 U.S.C. § 9607(a)(4)* and *(a)(4)(B)*]; and

- That the defendant is within the statutory classes of persons who are liable.

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36-418 California Forms of Pleading and Practice--Annotated § 418.191

AUTHOR: By Roger Beers

§ 418.191 Affirmative Defenses

[1] FORM Affirmative Defenses

[*EITHER*]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that

Plaintiffs' claims against defendant _____ [*name of defendant*] are each barred by the doctrine of laches.

[*AND/OR*]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that

Plaintiffs' claims against defendant _____ [*name of defendant*] are each barred by the doctrine of estoppel.

[*AND/OR*]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that

Plaintiffs' claims against defendant _____ [*name of defendant*] are each barred by the doctrine of waiver.

[*AND/OR*]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that

Plaintiffs' claims against defendant _____ [*name of defendant*] are each barred by the doctrine of unclean hands.

[*AND/OR*]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that

Plaintiffs' claims are barred by applicable statutes of limitations, including *California Code of Civil Procedure § 338* (injury to real property) and CERCLA § 113(g) [*42 U.S.C. § 9613(g)*].

[*AND/OR*]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that

Plaintiffs' claims against defendant _____ [*name of defendant*] are each barred because Plaintiffs have failed and refused to avoid or mitigate their alleged damages.

[*AND/OR*]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that

Defendant _____ [*name of defendant*] is informed and believes and on that basis alleges that the harm and damages alleged by Plaintiffs were directly and proximately causes and contributed to by the intentional, negligent, and/or other acts or omissions of Plaintiffs and/or by others at the direction of Plaintiffs and/or Plaintiffs' shareholders, directors, officers, employees, agents, and affiliates (collectively, "Plaintiffs and/or their agents"), over whom or which defendant _____ [*name of defendant*] had no control. Therefore, any recovery by Plaintiffs on their claims against defendant _____ [*name of defendant*] must be reduced in an amount equivalent to the

harm and damages caused by Plaintiffs and/or their agents based on the principles of comparative negligence and equitable apportionment.

[*AND/OR*]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that

There has been no release or threatened release of hazardous substances within the meaning of *42 U.S.C. Section 9607(a)*.

[*AND/OR*]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that

Defendant _____ [*name of defendant*] is informed and believes and on that basis alleges that the intentional, negligent, and/or other acts and omissions of persons and entities other than defendant _____ [*name of defendant*], and over whom defendant _____ [*name of defendant*] had no control, were intervening and/or supervening causes of the harm and damages allegedly incurred by Plaintiffs, thereby eliminating or lessening any harm allegedly caused by defendant _____ [*name of defendant*].

[*AND/OR*]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that

Plaintiffs and/or their agents knew, or in the exercise of ordinary care should have known, of the risk of the injuries or damages alleged in the Complaint, if any, and nevertheless freely and voluntarily assumed said risk, which proximately contributed to and proximately cause Plaintiffs' injuries or damages, if any.

[*AND/OR*]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that

Defendant _____ [*name of defendant*] is not liable because Plaintiffs and/or their agents consented to all of the activities of defendant _____ [*name of defendant*].

[*AND/OR*]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that

The release or threatened release of hazardous substances which is alleged in plaintiff's complaint was caused solely by one or more acts of God, an act of war, or by the acts or omissions of a third party or third parties other than an employee or agent of defendant _____ [*name of defendant*] and with whom defendant _____ [*name of defendant*] had no contractual relationship (except where the sole contractual arrangement, if any, arose from a published tariff and acceptance for carriage by a common carrier by rail) and in connection therewith defendant _____ [*name of defendant*] exercised due care and took adequate precautions against foreseeable acts and omissions by any such third parties. Thus, under *42 U.S.C. Section 9607(b)*, defendant _____ [*name of defendant*] is not liable for any of the claims asserted against such defendant.

[*AND/OR*]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that

The Complaint, insofar as the "hazardous substances" allegedly released or which threatened to be released at Plaintiffs' property are petroleum or natural gas products, fails to state a claim on which relief may be granted under CERCLA. Petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under *42 U.S.C. Section 9601(14)(A)-(F)*, is not a "hazardous substance" within the meaning of CERCLA, *42 U.S.C. Section 9601 et seq.*

[*AND/OR*]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that

The Complaint, insofar as it is purported to arise under CERCLA and apply to conduct before CERCLA's enactment, is barred on the grounds that retroactive application of CERCLA would violate rights guaranteed defendant _____ [*name of defendant*] by the United States Constitution.

[*AND/OR*]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that

Any response costs incurred by Plaintiffs were neither "necessary" nor consistent with the national contingency plan, in accordance with CERCLA, *42 U.S.C. § 9607(a)(4)(B)*.

[*AND/OR*]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that

Defendant _____ [*name of defendant*] is not jointly and severally liable for any damage alleged in the Complaint because any effect of any act or omission by defendant _____ [*name of defendant*] is divisible and distinct from any compensable damage incurred by Plaintiffs.

[*AND/OR*]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that

Defendant _____ [*name of defendant*] is not jointly and severally liable for any damage alleged in the Complaint because there is a reasonable basis on which to apportion any liability among the parties to the captioned action.

[*AND/OR*]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that

Plaintiffs' CERCLA § 107(a) claim [*42 U.S.C. § 9607(a)*] is barred because Plaintiffs are potentially responsible parties.

PRAYER FOR RELIEF

WHEREFORE, defendant _____ [*name of defendant*] prays as follows:

1. That Plaintiffs take nothing by this action, and that their Complaint be dismissed with prejudice;

2. That defendant _____ [*name of defendant*] be awarded costs, expenses, and disbursements incurred in defending this action;

3. That defendant _____ [*name of defendant*] be awarded the attorneys' fees incurred in defending this action;

4. For prejudgment interest; and

5. For such other and further relief as the court may deem just and proper.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Use of Form

The form in [1], *above*, sets forth some of the typical affirmative defenses that are asserted in an answer to a complaint for recovery of response costs. Not all of them may be applicable to the particular circumstances of the case. While in practice the affirmative defenses are often asserted in the kind of conclusory fashion used in the above form, counsel should be aware that without allegation of facts supporting the defenses in each instance, they may be subject to a demurrer for uncertainty [*see Code Civ. Proc. § 430.20*].

[3] Use of Affirmative Defenses

The Hazardous Substance Account Act (HSAA) [*Health & Safety Code § 25300 et seq.*] provides that "the defenses available to a responsible party or liable person shall be those defenses specified in ... the federal act" [*Health & Safety Code § 25323.5(b)*], referring to the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) [*42 U.S.C. § 9601 et seq.*]. Some of the principle defenses under CERCLA are the so-called "Third Party" Defenses when the damages arise from a release of a hazardous substance that is caused solely by certain specified acts or omissions of third parties [*see 42 U.S.C. § 9607(b)(3)*]. In addition, the HSAA does not specify the statutes of limitation for private cost recovery actions under *Health & Safety Code § 25363(e)*.

With regard to the traditional tort equitable defenses such as waiver, estoppel, laches, and unclean hands, many courts have held that these are not available under CERCLA [*see, e.g., Town of Munster, Ind. v. Sherwin-Williams (7th Cir. 1994) 27 F.3d 1268, 1270]* , while other courts have allowed some room for the assertion of these defenses [*see, e.g., U.S. v. Marisol, Inc. (M.D. Pa. 1989) 725 F. Supp. 833, 843]* .

[4] Cross References

For discussion of mitigation of damages, see Ch. 177, *Damages* .

For general coverage of laches and statutes of limitation, see Ch. 345, *Limitation of Actions* .

For specific coverage of laches in environmental litigation, see *§ 418.16* and *California Environmental Law and Land Use Practice, Ch. 11, Preliminary Litigation Issues, § 11.08* (Matthew Bender).

For specific coverage of the statutes of limitation as a defense in environmental litigation, see *§ 418.15* and *California Environmental Law and Land Use Practice, Ch. 11, Preliminary Litigation Issues, § 11.07* (Matthew Bender).

For discussion of the elements of negligence and defenses to a cause of action for negligence, including comparative negligence, see Ch. 380, *Negligence* .

For coverage of defenses available in hazardous waste litigation, see The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation (Matthew Bender).

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Chapter 418 POLLUTION AND ENVIRONMENTAL MATTERS
PART IV. FORMS
D. Recovery of the Costs of Cleanup

36-418 California Forms of Pleading and Practice--Annotated § 418.192

AUTHOR: By Roger Beers

§ 418.192 Allegations for Cross-Complaint for Contribution

[1] FORM Allegations for Cross-Complaint for Contribution

1. Defendant _____ [*name of defendant*] incorporates the allegations of the preceding paragraphs of these counterclaims by this reference as though fully set forth here.

2. If Plaintiffs' allegations are true, Plaintiffs own and operate a "facility," within the meaning of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (CERCLA) [*42 U.S.C. Section 9601(9)*], from which there have been and are "releases" and "threatened releases," within the meaning of CERCLA, *42 U.S.C. Section 9601(22)*, of "hazardous substances," within the meaning of CERCLA, *42 U.S.C. Section 9601(14)*.

3. As a result of the above, Plaintiffs are "covered persons" within the meaning of CERCLA, *42 U.S.C. Section 9607* and are, therefore, strictly liable for any removal, remedial, and response costs incurred by Plaintiffs or others in connection with the property.

4. Under *42 U.S.C. Sections 9607(a)* and *9613(f)(1)*, Plaintiffs are liable for all response costs and damages, if any, alleged in the Complaint.

5. If and to the extent that defendant _____ [*name of defendant*] incurs or is found liable for any response costs, defendant _____ [*name of defendant*] is entitled to total contribution from Plaintiffs or contribution in such other percentage as this court deems appropriate, pursuant to *42 U.S.C. Section 9613(f)(1)*.

[2] Use of Form

The form in [1], *above*, is a counterclaim or cross-complaint for contribution for assertion by a defendant in an action for recovery of response costs. Its principal use is to bring in third parties whom the defendant contends may be wholly or partially liable to the defendant for the damages that the defendant may be adjudged liable to the plaintiff. For

example, in an action for recovery of costs by the current owner of contaminated property against a prior owner of the property who is alleged to be responsible for the contamination, the latter might sue one of its prior tenants on the property (or yet another former owner of the property) who also contributed in some manner to the contamination. In essence the cross-complaint alleges that the cross-defendant is responsible for all or part of the damages that the cross-complainant may be forced to pay.

This form asserts causes of action for contribution under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) [*42 U.S.C. § 9601 et seq.*] for use in an action in federal court. However, with some modifications, the same allegations could be made under California's Hazardous Substance Account Act (HSAA) [Health & Safety Code § 25300 et seq.] for filing in state court. The HSAA states that "[a]ny person who has incurred removal or remedial costs in accordance with this chapter or the federal act may seek contribution or indemnity from any person who is liable pursuant to this chapter ... " [*Health & Safety Code § 25363(e)*].

For a sample complaint for recovery of response costs, see *§ 418.190*.

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36-418 California Forms of Pleading and Practice--Annotated § 418.193

AUTHOR: By Roger Beers

§ 418.193 Allegations for Cross-Complaint for Comparative Equitable Indemnity

[1] FORM Allegations for Cross-Complaint for Comparative Equitable Indemnity

1. Defendant _____ [*name of defendant*] incorporates the allegations of the preceding paragraphs of these counterclaims by this reference as though fully set forth here.

2. As a direct and proximate result of Plaintiffs' acts or omissions, defendant _____ [*name of defendant*] has been required to act in the protection of his/her own interests by defending against the Complaint filed in this action and bringing these counterclaims. Defendant _____ [*name of defendant*] is without fault with respect to the matters alleged in the Complaint, and any other claim or action arising directly or indirectly from contamination of the property or adjoining properties. If and to the extent defendant _____ [*name of defendant*] has any liability for any relief sought in any judicial or administrative proceedings brought against such defendant by any persons or entities with regard to contamination of the property or adjoining properties, including without limitation, the pending Complaint in this action, such liability is purely secondary, imputed, vicarious, or technical, and primary liability attaches to Plaintiffs, and is attributable to their acts and omissions.

3. Plaintiffs are liable to defendant _____ [*name of defendant*] for indemnity for all costs, including but not limited to, costs, expenses, and damages awarded in legal or administrative actions, clean-up costs, and consultants' and attorneys' fees and costs of litigation resulting from contamination of the property or adjoining properties.

[2] Use of Form

The form in [1], *above*, is a cross complaint for equitable indemnity for assertion by a defendant in an action for recovery of response costs. Its principal use is to bring in third parties whom the defendant contends may be wholly or partially liable to the defendant for the damages that the defendant may be adjudged liable to the plaintiff.

For a sample complaint for recovery of response costs, see *§ 418.190*.

[3] Indemnity Claims

Indemnity claims are in general available to a party who has paid a judgment or incurred a liability, and seeks "indemnity" for that liability or payment from a third party who is primarily at fault. Thus, indemnity has been defined as "a right which inures to a person who, without active fault on his part, has been compelled by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable" [*Alisal Sanitary Dist. v. Kennedy (1960) 180 Cal. App. 2d 69, 75, 4 Cal. Rptr. 379* ; *see Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 74, 38 Cal. Rptr. 490]* . The cause of action for indemnity does not come into existence until the indemnitee has suffered loss through payment [*Mangini v. Aerojet-General Corp. (1991) 230 Cal. App. 3d 1125, 1154, 281 Cal. Rptr. 827]* . One of the advantages of a claim for equitable indemnity is that it may avoid the statute of limitations problems when the remedy for pollution is the recovery of the costs of cleanup. In addition to claims for equitable indemnity there may also be specific provision for indemnity in contracts between the parties.

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36-418 California Forms of Pleading and Practice--Annotated § 418.194

AUTHOR: By Roger Beers

§ 418.194 Allegations for Cross-Complaint for Declaratory Relief Regarding Response Costs

[1] FORM Allegations for Cross-Complaint for Declaratory Relief Regarding Response Costs

1. Defendant _____ [*name of defendant*] incorporates the allegations of the preceding paragraphs of these counterclaims by this reference as though fully set forth here.

2. Defendant _____ [*name of defendant*] is informed and believes and therefore alleges that an actual controversy has arisen and now exists between defendant _____ [*name of defendant*] and Plaintiffs in that defendant _____ [*name of defendant*] contends, and Plaintiffs deny, that: (1) Defendant _____ [*name of defendant*] is not liable to Plaintiffs for costs, expenses, and damages awarded in legal or administrative actions, investigation and remediation costs, consultants' and attorneys' fees, and costs of litigation, arising directly or indirectly from any contamination of the soil and/or groundwater at or beneath the property or adjoining properties; and (2) Plaintiffs are liable to defendant _____ [*name of defendant*] for costs, expenses, and damages awarded in legal or administrative actions, investigation and remediation costs, consultants' and attorney' fees, and costs of litigation, arising directly or indirectly from any contamination of the soil and/or groundwater at or beneath the property or adjoining properties.

3. Therefore, pursuant to *28 U.S.C. Section 2201* and *42 U.S.C. Section 9613(g)(2)*, defendant _____ [*name of defendant*] is entitled to a judicial declaration of his/her rights and the obligations of Plaintiffs.

[2] Use of Form

The form in [1], *above*, is a cross complaint for declaratory relief for assertion by a defendant in an action for recovery of response costs. Its principal use is to bring in third parties whom the defendant contends may be wholly or partially liable to the defendant for the damages that the defendant may be adjudged liable to the plaintiff. It should be coupled with the forms containing allegations for a cross complaint for contribution [*see § 418.192*] and for comparative equitable indemnity [*see § 418.193*].

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36-418 California Forms of Pleading and Practice--Annotated § 418.195

AUTHOR: By Roger Beers

§ 418.195 Allegations for Prayer for Relief in Cross-Complaint

[1] FORM Allegations for Prayer for Relief in Cross-Complaint

WHEREFORE, defendant _____ [*name of defendant*] prays for judgment as follows on his/her counterclaims:

1. For a declaratory judgment that:

(a) Plaintiffs are solely liable for all costs and expenses associated with the investigation and remediation of any contamination at the property;

(b) Plaintiffs are obligated under principles of common law to indemnify, hold harmless and release defendant _____ [*name of defendant*] from and against any and all past and future claims arising out of any contamination at the property;

(c) Defendant _____ [*name of defendant*] is no liable to Plaintiffs for costs, expenses, and damages awarded in legal or administrative actions, investigation and remediation costs, consultants' and attorneys' fees, and costs of litigation, arising directly or indirectly from any contamination of the soil and/or groundwater at or beneath the property or adjoining properties; and

(d) Plaintiffs are liable to defendant _____ [*name of defendant*] for costs, expenses and damages awarded in legal or administrative actions, investigation and remediation costs, consultants' and attorneys' fees, and costs of litigation, arising directly or indirectly from any contamination of the soil and/or groundwater at or beneath the property or adjoining properties;

2. For contribution, pursuant to *42 U.S.C. Section 9613(f)* as set forth above;

3. For equitable indemnification by Plaintiffs according to principles of comparative fault and equitable allocation of loss, in an amount to be determined by the court in the event defendant is found to be liable in any amount to Plaintiffs;

4. For attorneys' fees, prejudgment interest, costs of suit (including without limitation expert and consultant fees), expenses and disbursements; and

5. For such other and further relief as the court may deem just and proper.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Use of Form

The form in [1], *above*, contains the allegations of the prayer in a cross-complaint for contribution, equitable indemnity, and declaratory relief [*see §§ 418.192, 418.193, 418.194*]. The cross-complaint and this prayer are for use by a defendant in an action for recovery of response costs. The principal use of the cross-complaint is to bring in third parties whom the defendant contends may be wholly or partially liable to the defendant for the damages that the defendant may be adjudged liable to the plaintiff.

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Chapter 420 PRAYERS

36-420 California Forms of Pleading and Practice--Annotated 420.syn

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§ 420.16 Effect of Prayer on Relief Granted

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[11] Relief Nonspecifically or Wrongly Requested

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§ 420.44 Law Reviews

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§ 420.50 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Damages, Costs, and General Relief--General Form

[1] FORM

[2] Use of Form

[3] Cross References

§ 420.51 Prayer [Code Civ. Proc. § 425.10(b)] for Damages, Costs, and General Relief--In Personal Injury or Wrongful Death Action

[1] FORM

[2] Use of Form

[3] Cross References

§ 420.52 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Damages, Costs, and General Relief--Multiple Plaintiffs or Cross Complainants Suing Single Defendant or Cross Defendant for Different Relief

[1] FORM

[2] Use of Form

[3] Cross References

§ 420.53 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Damages, Costs, and General Relief--By Single Plaintiff or Cross Complainant Against Multiple Defendants or Cross Defendants for Different Relief

[1] FORM

[2] Use of Form

[3] Cross References

§ 420.54 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Damages, Costs, and General Relief--Multiple Causes of Action

[1] FORM

[2] Use of Form

§ 420.55 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Exemplary and Punitive Damages [Civ. Code §§ 3294, 3295]--In Addition to General and Special Damages, Costs, and General Relief--General Form

[1] FORM

[2] Use of Form

§ 420.56 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Principal Amount Plus Interest [Civ. Code § 3287]--At Legal [or Agreed] Rate [Cal. Const., art. XV, § 1; Code Civ. Proc. § 685.010]--General Form

[1] FORM

[2] Use of Form

[3] Cross References

§ 420.57 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Principal Amount Plus Interest [Civ. Code § 3287]--On Each Amount From Different Dates at Legal or Agreed Rate [Cal. Const., art. XV, § 1; Code Civ. Proc. § 685.010]

[1] FORM

[2] Use of Form

§ 420.58 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Liquidated Damages According to Agreement of Parties [Civ. Code § 1671], Plus Interest [Civ. Code § 3287]

[1] FORM

[2] Use of Form

[3] Cross References

§ 420.59 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Damages Plus Interest [Civ. Code §§ 3288, 3291]--At Legal Rate [Cal. Const., art. XV, § 1; Code Civ. Proc. § 685.010]--In Personal Injury or Wrongful Death Action

[1] FORM

[2] Use of Form

§ 420.60 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Attorney's Fees in Addition to General and Special Damages, Costs, and General Relief

[1] FORM

[2] Use of Form

[3] Cross References

§ 420.61 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Declaratory Relief

[1] FORM

[2] Use of Form

[3] Cross References

§ 420.62 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Injunctive Relief

[1] FORM

[2] Use of Form

[3] Cross References

§ 420.63 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Specific Performance

[1] FORM

[2] Use of Form

[3] Cross References

§ 420.64 Prayer in Answer [Code Civ. Proc. § 431.30]

[1] FORM

[2] Use of Form

§ 420.65 Notice of Motion to Amend Prayer of Complaint or Cross Complaint [Code Civ. Proc. § 473(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 420.66 Order Granting or Denying Motion to Amend Prayer of Complaint or Cross Complaint [Code Civ. Proc. § 473(a)]

[1] FORM

[2] Use of Form

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36-420 California Forms of Pleading and Practice--Annotated § 420.01

§ 420.01 Scope of Chapter

This chapter discusses the use and effect of prayers in civil pleadings. It includes forms of prayers for use in complaints and cross complaints, including prayers for the following:

- Damages, costs, and general relief [*see §§ 420.50 -420.54*].
- Exemplary damages [*see § 420.55*].
- Principal plus interest [*see §§ 420.56, 420.57*].
- Liquidated damages [*see § 420.58*].
- Damages plus interest [*see § 420.59*].
- Attorney's fees [*see § 420.60*].
- Declaration of rights [*see § 420.61*].
- Injunctive relief [*see § 420.62*].
- Specific performance [*see § 420.63*].

The chapter also includes a form of a prayer for use in the answer to a complaint or cross complaint [*see § 420.64*], a notice of motion to amend a prayer [*see § 420.65*], and an order permitting such amendment [*see § 420.66*].

For forms of prayers for use in complaints and answers generally, see Ch. 123, *Complaints and Cross Complaints* , and Ch. 26, *Answers* , respectively.

For alternative forms of prayers for use in particular types of actions and proceedings, see the chapters pertaining to the

particular actions or proceedings.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & Amend

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§ 420.02 Cross References

For forms of prayers in specific actions, see specific chapters relating to those actions.

For discussion of the treatment of attorney's fees as costs, see Ch. 174, *Costs and Attorney's Fees* .

For a form of notice of motion to amend a complaint to increase the amount of damages sought and for a form of notice of motion for an order compelling responsive statement as to damages sought in personal injury or wrongful death action in superior court, see Ch. 177, *Damages* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewTortsDamagesCosts & Attorney FeesGeneral OverviewTortsWrongful Death & Survival ActionsRemediesAward Calculations

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36-420 California Forms of Pleading and Practice--Annotated §§ 420.03-420.09

[Reserved]

§§ 420.03[Reserved]

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36-420 California Forms of Pleading and Practice--Annotated § 420.10

§ 420.10 Governing Statutes

The requirement that a complaint or cross complaint contain a demand for judgment for the relief to which the pleader claims he or she is entitled is governed by *Code Civ. Proc. § 425.10(a)(2)*.

Remission of the amount of money in excess of the subject matter jurisdiction for a limited civil case so that an action may continue in that jurisdictional classification is governed by *Code Civ. Proc. § 403.040(f)*.

Code Civ. Proc. § 580 limits the relief granted to that demanded in the complaint, *Code Civ. Proc. § 425.11* statement of damages, or the *Code Civ. Proc. § 425.115* statement reserving the right to punitive damages.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProcedurePleading & PracticePleadingsComplaintsRequirements

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§ 420.11 Definition

The term "prayer," used in a legal sense, is the part of a pleading that "specifies the relief sought" [Webster's Third New International Dictionary, p. 1782 (1976)].

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36-420 California Forms of Pleading and Practice--Annotated § 420.12

§ 420.12 Prayer Required

A complaint or cross complaint is required to contain a demand for judgment for the relief to which the pleader claims he or she is entitled [*Code Civ. Proc. § 425.10(a)(2)* (with the exceptions discussed under Contents of Prayer, *see § 420.13*)].

Thus, one court has held that a plaintiff is entitled to prosecute a cause of action only by first pleading the nature of the relief sought and the ultimate facts by which the plaintiff deems him or herself entitled to that relief under the law [*Roberts v. Roberts (1947) 81 Cal. App. 2d 871, 185 P.2d 381]* . However, it has been said that the prayer is not essential in a contested case, that it may be corrected or supplied by amendment, and that recovery may be allowed even in the absence of a prayer [*Estate of Kalal (1981) 121 Cal. App. 3d 841, 845 n.3, 175 Cal. Rptr. 582]* .

Nevertheless, a prayer may be necessary for determining the jurisdictional classification of the case and which court has subject matter jurisdiction if jurisdiction depends on the nature of the controversy (for example, whether the action is at law or in equity) or the amount in controversy [*see § 420.15*], and it will define the scope of a default judgment [*see Code Civ. Proc. § 585(a)-(c)*; *see also* Ch. 205, *Defaults and Default Judgments*]. Consequently, the better practice is to include a prayer, whether or not it is required by statute.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProcedurePleading & PracticePleadingsRule Application & Interpretation

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§ 420.13 Contents of Prayer

The prayer shows the nature and amount of the relief sought [*Browne v. Ulrich (1948) 86 Cal. App. 2d 367, 371, 195 P.2d 804* ; *Platnauer v. Forni (1933) 131 Cal. App. 393, 397, 21 P.2d 638]* .

If the recovery of money or damages is demanded, the amount demanded must be stated [*Code Civ. Proc. § 425.10(a)(2)*], with two exceptions [*Code Civ. Proc. § 425.10(b)*; *Civ. Code § 3295(e)*].

Under the first exception, if the action is brought to recover actual or punitive damages for personal injury or wrongful death, the amount demanded may not be stated [*Code Civ. Proc. § 425.10(b)*].

In these cases, the defendant may, at any time, request a *Code Civ. Proc. § 425.11* statement of damages. If no request is made, plaintiff must give defendant notice of the amount of special and general damages sought to be recovered (1) before a default may be taken or (2) when an answer is filed, at least 60 days prior to the date set for trial [*Code Civ. Proc. § 425.11*]. For discussion of requesting and serving a statement of damages, see *Ch. 177, Damages, § 177.40* et seq. For discussion of the statement of damages in relation to defaults, see Ch. 205, *Defaults and Default Judgments* .

Under the second exception, no claim for punitive damages may state an amount [*Civ. Code § 3295(e)*]. For discussion of the *Code Civ. Proc. § 425.115* procedure for a statement reserving the right to seek punitive damages on default, see Ch. 205, *Defaults and Default Judgments* .

However, one court has held that the complaint must state the specific dollar amount sought only when a default judgment is to be entered. In any other case, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue. Hence, the absence of a specific amount from the complaint is not necessarily fatal as long as the pleaded facts entitle the plaintiff to relief [*Furia v. Helm (2003) 111 Cal. App. 4th 945, 957, 4 Cal. Rptr. 3d 357]* .

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureRemediesDamagesPunitive DamagesTortsDamagesGeneral OverviewTortsWrongful Death & Survival ActionsRemediesPunitive Damages

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36-420 California Forms of Pleading and Practice--Annotated § 420.14

§ 420.14 Effect of Prayer on Complaint and Cause of Action

The prayer is not a part of the cause of action, and the issues involved are determinable from the facts alleged rather than from the prayer [*Weber v. Superior Court (1945) 26 Cal. 2d 144, 147-148, 156 P.2d 923* ; *Berg v. Investors Real Estate Loan Co. (1962) 207 Cal. App. 2d 808, 815, 24 Cal. Rptr. 701]* . A defective prayer in a complaint, therefore, will not destroy an otherwise sufficiently stated cause of action [*Carney v. Simmonds (1957) 49 Cal. 2d 84, 96, 315 P.2d 305]* . The court may, however, if it desires, consider a statement in a prayer when determining the probability of the pleader's being able to amend an insufficient complaint to state a cause of action [*Central Surety & Ins. Corp. v. Foley (1962) 204 Cal. App. 2d 738, 22 Cal. Rptr. 504* ; *Lane v. Davis (1959) 172 Cal. App. 2d 302, 310, 342 P.2d 267]* .

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36-420 California Forms of Pleading and Practice--Annotated § 420.15

§ 420.15 Prayer as Establishing Court's Jurisdiction

[1] Nature of Action; Damages

The question of whether a particular court has jurisdiction of an action normally is determined by the demand or prayer of the complaint [*Gardiner v. Royer (1914) 167 Cal. 238, 244, 139 P. 75]* . The omission of a prayer from an otherwise sufficient complaint, however, will not destroy jurisdiction [*Hoffman v. Pacific Coast Constr. Co. (1918) 37 Cal. App. 125, 129-132, 173 P. 776]* . This is because the nature of the action and amount in controversy, for purposes of determining jurisdiction of the subject matter, may be ascertained from an examination of the complaint as a whole [*Sellery v. Ward (1942) 21 Cal. 2d 300, 305, 131 P.2d 550* ; *Davis v. Superior Court (1972) 25 Cal. App. 3d 596, 599, 102 Cal. Rptr. 238]* .

In calculating the amount of the demand to determine the existence of the court's jurisdiction based on the amount in controversy, a plea of punitive damages must be added to a plea of actual damages [*Gold v. Los Angeles Democratic League (1975) 49 Cal. App. 3d 365, 375, 122 Cal. Rptr. 732* ; *see also Block v. Tobin (1975) 45 Cal. App. 3d 214, 222, 119 Cal. Rptr. 288]* . Although punitive damages are recoverable only when there are actual damages, the actual damages need not be more than nominal; therefore, a request for punitive or exemplary damages above the superior court minimum is sufficient to establish jurisdiction, even though the actual damages sustained are comparatively slight [*James v. Public Finance Corp. (1975) 47 Cal. App. 3d 995, 1000, 121 Cal. Rptr. 670* ; *Schwartz v. Cal. Claim Service (1942) 52 Cal. App. 2d 47, 56, 125 P.2d 883]* . The actual damages need not be prayed for or awarded, they need only be proven [*Weiss v. Blumencranc (1976) 61 Cal. App. 3d 536, 542-543, 131 Cal. Rptr. 298]* .

Costs, however, like interest, are not deemed a part of the substantive demand to determine the amount in controversy for purposes of testing the jurisdiction of the court [*Henigan v. Ervin (1895) 110 Cal. 37, 40, 42 P. 457]* .

Attorney's fees may be recovered only when authorized by statute or by agreement of the parties [*Code Civ. Proc. § 1021*; *Reid v. Valley Restaurants, Inc. (1957) 48 Cal. 2d 606, 610, 311 P.2d 473* ; *In re Marriage of Reyes (1979) 97 Cal. App. 3d 876, 879, 159 Cal. Rptr. 84]* . When a statute permits the recovery of attorney's fees and by its language specifies that such fees be treated as damages, the fees may be added to other damages demanded in the prayer to bring the amount of the controversy within the superior court's jurisdictional limits [*Garcia v. Ebeling Motor Co. (1949) 89*

Cal. App. 2d 688, 694-695, 201 P.2d 854 ; *see also Woodward v. Bruner(1951) 104 Cal. App. 2d 83, 85, 86, 230 P.2d 861]* . All other attorney's fees permitted by contract, statute, or law are treated as costs [*Code Civ. Proc. § 1033.5(a)(10)*; *see also Woodward v. Bruner (1951) 104 Cal. App. 2d 83, 85, 86, 230 P.2d 861]* .

A demand for reasonable attorney's fees which are authorized by contract, providing that attorney's fees are to be awarded when incurred to enforce the provisions of that contract, are to be treated only as costs [*Civ. Code § 1717(a)*; *Moulin Electric Corp. v. Roach (1981) 120 Cal. App. 3d 1067, 1069, 175 Cal. Rptr. 111]* .

When no exact figure is specified in the pleading as a reasonable amount of attorney's fees as damages, the court can assume a figure that will support the subject matter jurisdiction of the court [*Allstate Leasing Corp. v. Smith (1965) 238 Cal. App. 2d 128, 131, 47 Cal. Rptr. 636]* .

Such items of special damage as expenses incurred in recovering converted property as authorized by *Civ. Code § 3336* may also be added to damages in determining amount for jurisdiction of the court [*Greenbaum v. Martinez (1890) 86 Cal. 459, 462, 25 P. 12]* .

The demand for relief must be made in good faith and be reasonably supported by the allegations on which it is founded [*Gardiner v. Royer (1914) 167 Cal. 238, 244, 139 P. 75]* . An assertion in bad faith of an unfounded claim will not vest jurisdiction. If, however, the plaintiff overstates his case in good faith, the court will not lose jurisdiction, but the plaintiff may be penalized by loss of costs [*see Code Civ. Proc. § 1033*; *see also Davis v. Superior Court (1972) 25 Cal. App. 3d 596, 600-601, 102 Cal. Rptr. 238* (applying prior law); for further discussion, *see* Ch. 174, *Costs and Attorney's Fees*].

Jurisdiction attaches at the commencement of the action [*Gardiner v. Royer (1914) 167 Cal. 238, 244, 139 P. 75]* . Once the court's jurisdiction attaches, the court retains jurisdiction to render a judgment for less than the jurisdictional amount even though a prayer for that amount would have lodged the action within the original jurisdiction of another court [*Sellery v. Ward (1942) 21 Cal. 2d 300, 304, 131 P.2d 550* ; *People v. Argonaut Ins. Co. (1977) 71 Cal. App. 3d 994, 996, 139 Cal. Rptr. 795]* .

For discussion of the determination of the amount in controversy, see Ch. 324, *Jurisdiction: Subject Matter* .

[2] Reclassification or Transfer of Action When Amount Demanded Exceeds Jurisdictional Limits

If an action is erroneously classified as a limited civil case or otherwise in the initial pleading, or if it later appears that the case will necessarily involve the determination of questions inconsistent with the jurisdictional classification of the case, the court on its own motion, or the motion of the defendant or cross defendant, may reclassify the case [*see Code Civ. Proc. § 403.040*]. The plaintiff, cross-complainant, or petitioner may file a motion for reclassification within the time allowed for that party to amend the initial pleading [*Code Civ. Proc. § 403.040*].

If an appeal or petition is commenced in or transferred to a superior court that lacks jurisdiction, and a court of appeal or the Supreme Court would have jurisdiction, the appeal or petition shall be transferred to the court having jurisdiction upon terms as to costs or otherwise as may be just, and proceeded with as if regularly filed in the court having jurisdiction [*Code Civ. Proc. § 396*; *see also Security Pac. Nat. Bank v. Lyon (1980) 105 Cal. App. 3d Supp. 8, 12, 165 Cal. Rptr. 95* , *105 Cal. App. 3d Supp. 8, 165 Cal. Rptr. 95* ; *Babcock v. Antis (1979) 94 Cal. App. 3d 823, 829, 156 Cal. Rptr. 673]* .

For discussion of Section 396 and 403.040 motions, see Ch. 324, *Jurisdiction: Subject Matter* .

[3] Remittance of Excess in Amount Demanded to Comply With Jurisdictional Limits

In any case where the erroneous jurisdictional classification or lack of jurisdiction is due solely to an excess in the amount of the demand, the excess may be remitted, and the action may continue as a limited civil case [*Code Civ. Proc. §§ 396, 403.040(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsCivil ProcedureRemediesDamagesPunitive DamagesCivil ProcedureRemediesDamagesSpecial DamagesTortsDamagesPunitive DamagesAward CalculationsGeneral OverviewTortsDamagesPunitive DamagesAward CalculationsJurisdictional Amounts

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§ 420.16 Effect of Prayer on Relief Granted

[1] Defaults

The relief granted to the plaintiff, if there is no answer to his or her complaint, cannot exceed that which was demanded in the complaint, the *Code Civ. Proc. § 425.11* statement of damages, or the *Code Civ. Proc. § 425.115* statement reserving the right to punitive damages [*Code Civ. Proc. § 580*; *see Becker v. S.P.V. Construction Co. (1980) 27 Cal. 3d 489, 493, 165 Cal. Rptr. 825, 612 P.2d 915* ; *Burtnett v. King (1949) 33 Cal. 2d 805, 808, 809, 205 P.2d 657]* .

A prayer for damages according to proof passes muster in a default under *Code Civ. Proc. § 580* only if a specific amount of damages is alleged in the body of the complaint [*Becker v. S.P.V. Construction Co. (1980) 27 Cal. 3d 489, 494, 165 Cal. Rptr. 825, 612 P.2d 915* ; *Furia v. Helm (2003) 111 Cal. App. 4th 945, 957, 4 Cal. Rptr. 3d 357]* . Where no specific amount of damages is requested, any amount would be in excess of that demanded [*Petty v. Manpower, Inc. (1979) 94 Cal. App. 3d 794, 798, 156 Cal. Rptr. 622]* .

For discussion of this limitation of relief on default, see Ch. 205, *Defaults and Default Judgments* .

[2] Contested Cases

[a] In General

In a contested case, the court may grant any relief justified by the allegations of the complaint and the evidence, even though the relief may be greater than or different from the relief asked for in the prayer [*Code Civ. Proc. § 580* (subject to restriction that certain relief may not be granted in limited civil cases); *see Nevada County & Sacramento Canal Co. v. Kidd (1869) 37 Cal. 282, 305]* . When, however, the pleading specifies a particular sum as damages, the court may not award an amount in excess of that sum without an amendment of the prayer [*Crofoot v. Blair Holdings Corp. (1953) 119 Cal. App. 2d 156, 195, 260 P.2d 156]* .

[b] Interest

In a contested action, interest may be awarded, if the plaintiff is entitled thereto, even though the complaint contains no

prayer for interest [*Sanders v. City of Los Angeles (1970) 3 Cal. 3d 252, 263, 90 Cal. Rptr. 169, 475 P.2d 201* ; *Sears, Roebuck & Co. v. Blade (1956) 139 Cal. App. 2d 580, 595, 294 P.2d 140* ; *Deaux v. Trinidad Bean & Elevator Co. (1935) 8 Cal. App. 2d 149, 152, 47 P.2d 535]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 420.17 Absence of Prayer

If an answer is filed, the absence of a prayer is not fatal. The prayer is no longer an essential part of the complaint as the court under *Code Civ. Proc. § 580* is charged with the duty of granting any relief consistent with the case made by the complaint and embraced within the issue [*Furia v. Helm (2003) 111 Cal. App. 4th 945, 957, 4 Cal. Rptr. 3d 357* ; *Kudokas v. Balkus (1972) 26 Cal. App. 3d 744, 755, 103 Cal. Rptr. 318* ; *Smith v. Chin Chew (1927) 81 Cal. App. 704, 707, 254 P. 599]* .

In a default situation, because *Code Civ. Proc. § 580* states that the relief granted to the plaintiff cannot exceed that which he or she shall have demanded in his or her complaint, the *Code Civ. Proc. § 425.11* statement of damages, or the *Code Civ. Proc. § 425.115* statement reserving the right to punitive damages, a default judgment that gives relief where no demand is made therefor is void as in excess of the court's jurisdiction and not res judicata [*Becker v. S.P.V. Constr. Co. (1980) 27 Cal. 3d 489, 493, 165 Cal. Rptr. 825, 612 P.2d 915, 612 P. 915* ; *Burtnett v. King (1949) 33 Cal. 2d 805, 808, 205 P.2d 657]* . If a judgment only partially exceeds the court's jurisdiction, the judgment can be modified to save that portion which is not void [*Becker v. S.P.V. Construction Co. (1980) 27 Cal. 3d 489, 495, 165 Cal. Rptr. 825, 612 P.2d 915]* .

For further discussion, see *§ 420.16[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 420.18 Amendment of Prayer

A prayer may be amended [*Miller v. Superior Court (1922) 59 Cal. App. 334, 339, 210 P. 832]* . It may be amended to conform to proof, and mistakes may be corrected before or after judgment [*Babcock v. Antis (1979) 94 Cal. App. 3d 823, 830, 156 Cal. Rptr. 673]* . It is, however, error to sustain a motion made in the presence of the jury to increase the amount of the prayer [*see Sanguinetti v. Moore Dry Dock Co. (1951) 36 Cal. 2d 812, 819, 228 P.2d 557]* .

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[Reserved]

§§ 420.19[Reserved]

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§ 420.40 Related Texts From LexisNexis Publishing

For a memorandum in support of a general demurrer to a complaint alleging negligence on the ground that it failed to allege damages, see California Points and Authorities, Ch. 65, *Damages*

For a memorandum in support of a demurrer to a complaint on the ground that the court lacks jurisdiction of the subject of the action when the prayer seeks relief exceeding the power of the court to grant, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticePleadingsComplaintsRequirementsCivil ProceduresPretrial JudgmentsGeneral OverviewCivil ProceduresPretrial JudgmentsJudgment on the Pleadings

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§ 420.41 State Statutes

Attorney's fees specifically provided for in contract treated as costs. *Civ. Code §§ 1717(a), 1717.5(a)*

Specific, injunctive, and compensatory relief. *Civ. Code §§ 3274-3423*

Motion for reclassification when it appears case will involve determination of issues inconsistent with its jurisdictional classification. *Code Civ. Proc. § 403.040*

Remission of excess of prayer over jurisdictional limit for limited civil case to allow case to retain its jurisdictional classification. *Code Civ. Proc. § 403.040(f)*

Superior court lacking jurisdiction as required to transfer appeal or petition to court of appeal or the Supreme Court having jurisdiction upon terms as to costs or otherwise as may be just, and proceeded with as if regularly filed in the court having jurisdiction. *Code Civ. Proc. § 396*

Remission of excess of prayer over jurisdictional limit of court as enabling case to continue therein. *Code Civ. Proc. § 403.040(f)*

Demand for relief as necessary part of complaint or cross complaint. *Code Civ. Proc. § 425.10(a)(2)*

Amount of money or damages demanded as required to be stated; exceptions. *Code Civ. Proc. § 425.10(b)*

Amendment of pleadings. *Code Civ. Proc. § 473(a)*

Relief as not limited to that demanded in prayer, except in case of default. *Code Civ. Proc. § 580*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 420.42 Federal Rules of Civil Procedure

Demand for relief as necessary part of claim. *Fed. R. Civ. P., Rule 8(a)(3)*

Legal Topics:

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

[1] Amendment of Prayer

Trial court as committing error by sustaining motion made in presence of jury to increase amount of prayer. *Sanguinetti v. Moore Dry Dock Co. (1951) 36 Cal. 2d 812, 819, 228 P.2d 557*

In unlawful detainer action, demand for rental value of premises for each day occupied or for other generalized damages in unenumerated amounts, which could be interpreted as potentially escalating the amount of demand above municipal court's jurisdiction, as correctable by amendment after judgment to conform to proof. *Babcock v. Antis (1979) 94 Cal. App. 3d 823, 830, 156 Cal. Rptr. 673*

Court as allowed to consider prayer when determining if pleader is able to amend insufficient complaint to state cause of action. *Lane v. Davis (1959) 172 Cal. App. 2d 302, 310, 342 P.2d 267*

Prayer as amended. *Miller v. Superior Court (1922) 59 Cal. App. 334, 339, 210 P. 832*

[2] Contested Cases

Court as allowed, in contested case, to grant any relief justified by allegations of complaint and evidence, although relief greater than or different from relief asked for in prayer. *Nevada County & Sacramento Canal Co. v. Kidd (1869) 37 Cal. 282, 305* ; *Lawrence v. Shutt (1969) 269 Cal. App. 2d 749, 767, 75 Cal. Rptr. 533*

In equitable action, prayer for general relief as providing basis for grant of relief greater than or different from that asked for in prayer. *Lawrence v. Shutt (1969) 269 Cal. App. 2d 749, 767, 75 Cal. Rptr. 533*

Court in equitable action as allowed, under prayer for general relief, to grant any relief conformable to case made by pleadings and evidence, although not relief asked by special prayer. *Lachman Bros. v. Muenzer (1956) 143 Cal. App. 2d 520, 524-525, 300 P.2d 295* ; *Knox v. Wolfe (1946) 73 Cal. App. 2d 494, 505, 167 P.2d 3*

[3] Default Judgments

Default judgment as not permitted to include award in excess of that prayed for in complaint. *Greenup v. Rodman (1986) 42 Cal. 3d 822, 826-829, 231 Cal. Rptr. 220, 726 P.2d 1295* ; *Becker v. S.P.V. Construction Co. (1980) 27 Cal. 3d 489, 493, 165 Cal. Rptr. 825, 612 P.2d 915* ; *Burtnett v. King (1949) 33 Cal. 2d 805, 808, 809, 205 P.2d 657* ; *Wilkinson v. Wilkinson (1970) 12 Cal. App. 3d 1164, 1166-1167, 91 Cal. Rptr. 372*

Inclusion of punitive damages in default judgment as error when only compensatory damages prayed for. *Gudarov v. Hadjieff (1952) 38 Cal. 2d 412, 416-417, 240 P.2d 621*

Where complaint adequately notified defendant that the amount of damages sought was $245,000--the amount of an uncollected judgment--plaintiffs were not required to reiterate that sum in the prayer in order to comply with *Code of Civ. Proc. § 580*. However, because neither the body of the complaint nor the prayer for relief identified the amount of attorney fees being sought as $15,000, that amount must be stricken from the judgment. *Hearn v. Howard (2009) 177 Cal. App. 4th 1193, 1209, 99 Cal. Rptr. 3d 642*

Reversible error to grant judgment for $20,000 on default in personal injury or wrongful death action in superior court when defendant not served with notice of damages by pleading or as required by *Code Civ. Proc. § 425.11*. *Stevenson v. Turner (1979) 94 Cal. App. 3d 315, 320, 156 Cal. Rptr. 499*

Award to putative wife of monetary sum in lieu of her interest in quasi-community property as in excess of jurisdiction and void when complaint demanded award of property and husband defaulted; relief as not permitted under *Code Civ. Proc. § 580* to exceed demand of complaint. *Wilkinson v. Wilkinson (1970) 12 Cal. App. 3d 1164, 1166-1167, 91 Cal. Rptr. 372*

Allegation of damage in sum of $10,000 plus prayer for damages according to proof and such other relief as the court may deem equitable as giving adequate notice to defendant that in addition to restitutional relief demanded, plaintiffs also requested money damages. *Thorson v. Western Development Corp. (1967) 251 Cal. App. 2d 206, 212-213, 59 Cal. Rptr. 299* (sustaining with unrelated modification denial of motion to vacate default judgment)

Default judgment granting relief not prayed for as in excess of jurisdiction and void. *Lee v. Ski Run Apartments Associates (1967) 249 Cal. App. 2d 293, 295, 57 Cal. Rptr. 496*

Rule that judgment in excess of prayer is void when default taken as inapplicable when complaint contained prayer for an accounting and judgment granted was after and in accordance with accounting. *Wyoming Pacific Oil Company v. Preston (1959) 171 Cal. App. 2d 735, 745, 341 P.2d 732*

[4] Defective Prayer

Defective prayer in complaint as not destroying otherwise sufficiently stated cause of action. *Carney v. Simmonds (1957) 49 Cal. 2d 84, 96, 315 P.2d 305*

The absence of a specific amount from the complaint is not necessarily fatal as long as the pleaded facts entitle the plaintiff to relief. *Furia v. Helm (2003) 111 Cal. App. 4th 945, 957, 4 Cal. Rptr. 3d 357*

[5] Effect on Complaint and Cause of Action

Prayer as not part of cause of action and issues involved in case as determinable from facts alleged rather than from

prayer. *Weber v. Superior Court (1945) 26 Cal. 2d 144, 147-148, 156 P.2d 923* ; *Berg v. Investors Real Estate Loan Co. (1962) 207 Cal. App. 2d 808, 815, 24 Cal. Rptr. 701*

Cause of action as stated if from facts alleged it can be determined that plaintiff is entitled to any relief even though plaintiff demanded relief other than that to which he or she was entitled. *Spurr v. Spurr (1979) 88 Cal. App. 3d 614, 617, 151 Cal. Rptr. 813*

[6] Equitable Proceeding

Court in contested case as permitted to grant any relief justified by allegations of complaint and evidence, even though relief is greater than or different from that requested. *Lawrence v. Shutt (1969) 269 Cal. App. 2d 749, 767, 75 Cal. Rptr. 533* (court granted relief in equitable proceeding under prayer for general relief)

Declaratory relief as awardable by court under prayer for general relief when justified by the case. Lachman Bros. v. Muenzer (1956) 143 Cal.C App. 2d 520, 524-525, *143 Cal. App. 2d 520, 300 P.2d 295*

[7] Exemplary Damages

Actual damages as required to be proven, but not prayed for or awarded, for punitive damages. *Weiss v. Blumencranc (1976) 61 Cal. App. 3d 536, 542-543, 131 Cal. Rptr. 298*

Complaint showing affirmatively that no actual damages can be recovered as vulnerable to demurrer despite allegation of and prayer for exemplary damages. *Kluge v. O'Gara (1964) 227 Cal. App. 2d 207, 209, 38 Cal. Rptr. 607*

[8] Interest

In contested action, interest as awardable, even if not specifically prayed for in complaint, if plaintiff entitled thereto. *Sanders v. City of Los Angeles (1970) 3 Cal. 3d 252, 263, 90 Cal. Rptr. 169, 475 P.2d 201* ; *Sears Roebuck & Co. v. Blade (1956) 139 Cal. App. 2d 580, 595, 294 P.2d 140* ; *Deaux v. Trinidad Bean & Elevator Co. (1935) 8 Cal. App. 2d 149, 152, 47 P.2d 535*

Judgment for $6,359.11 as not exceeding prayer for $6,022.71 plus interest from specified date where interest accrued amounts to more than difference between the two figures. *Boyle v. Hawkins (1969) 71 Cal. 2d 229, 240, 78 Cal. Rptr. 161, 455 P.2d 97*

[9] Jurisdiction

Mere fact that subsequent judgment rendered for lesser amount than jurisdictional minimum of court as not depriving court of jurisdiction previously acquired by virtue of prayer. *Sellery v. Ward (1921) 21 Cal. 2d 300, 304, 131 P.2d 550* ; *People v. Argonaut Ins. Co. (1977) 71 Cal. App. 3d 994, 996, 139 Cal. Rptr. 795*

Jurisdiction of superior court over subject matter of action as determinable from prayer. *Gardiner v. Royer (1914) 167 Cal. 238, 244, 139 P. 75*

Addition of special damages for expenses incurred in recovering converted property to other damages demanded in prayer as determining whether case is within superior court's jurisdiction. *Greenbaum v. Martinez (1890) 86 Cal. 459, 462, 25 P. 12*

When cross complaint filed in municipal court asking for damages in excess of jurisdictional limit, court as losing jurisdiction and any subsequent order or judgment as void unless (1) pleading was not filed in good faith or was frivolous or vexatious, (2) there has been express or implied waiver of any recovery in excess of monetary subject matter limits, or (3) allegations of pleading do not support relief prayed for. *Security Pac. Nat. Bank v. Lyon (1980) 105 Cal. App. 3d Supp. 8, 12-14, 165 Cal. Rptr. 95* , *105 Cal. App. 3d Supp. 8, 165 Cal. Rptr. 95*

Where pleadings technically vulnerable to construction that they contained potential for exceeding jurisdictional limit, failure to amend to conform to proof as not defeating jurisdiction. *Babcock v. Antis (1979) 94 Cal. App. 3d 823, 830-831, 156 Cal. Rptr. 673*

In determining existence of court's jurisdiction, plea of punitive damages as required to be added to plea of actual damages. *Gold v. Los Angeles Democratic League (1975) 49 Cal. App. 3d 365, 375, 122 Cal. Rptr. 732* ; see also *Block v. Tobin (1975) 45 Cal. App. 3d 214, 222, 119 Cal. Rptr. 288*

Request for punitive damages above jurisdiction minimum of superior court as sufficient to establish jurisdiction in that court, even though actual damages sustained are comparatively slight. *James v. Public Finance Corp. (1975) 47 Cal. App. 3d 995, 1000, 121 Cal. Rptr. 670* ; *Muller v. Reagh (1957) 150 Cal. App. 2d 99, 102, 309 P.2d 826*

Assertion in bad faith of unfounded claim as not vesting jurisdiction; overstated case as not defeating jurisdiction. *Davis v. Superior Court (1972) 25 Cal. App. 3d 596, 600-601, 102 Cal. Rptr. 238*

Addition of attorney's fees, permitted by statute, to other damages demanded in prayer as determining whether case within superior court's jurisdiction. *Garcia v. Ebeling Motor Co. (1949) 89 Cal. App. 2d 688, 694-695, 201 P.2d 854*

Omission of prayer from otherwise sufficient complaint as not destroying jurisdiction. *Hoffman v. Pacific Coast Constr. Co. (1918) 37 Cal. App. 125, 130-132, 173 P. 776*

[10] Motion to Increase Amount of Prayer

Error to sustain motion made before jury to increase amount of prayer. *Sanguinetti v. Moore Dry Dock Co. (1951) 36 Cal. 2d 812, 819, 228 P.2d 557*

Motion not made before jury to increase amount of prayer when defense counsel mentioned amount of prayer in presence of jury. *Russell v. Geis (1967) 251 Cal. App. 2d 560, 570-571, 59 Cal. Rptr. 569*

[11] Relief Nonspecifically or Wrongly Requested

Prayer seeking easement over defendants' lands as sufficient ground for finding on issue even though prescriptive easement is not specifically pleaded in complaint. *Hails v. Martz (1946) 28 Cal. 2d 775, 777-778, 172 P.2d 52*

Court in contested case as permitted to grant any relief justified by allegations of complaint and evidence even though relief is greater or different from that requested. *Lawrence v. Shutt (1969) 269 Cal. App. 2d 749, 767, 75 Cal. Rptr. 533*

Effect of plaintiff's mistake as to form of relief to which he is entitled. *Canby v. Council of City of Los Angeles (1931) 114 Cal. App. 94, 96, 299 P. 732*

[12] Uses of Prayer

Use of prayer to bring in party on cross complaint as permitted. *Eureka v. Gates (1898) 120 Cal. 54, 58, 52 P. 125*

Prayer as indicating theory of action. *Browne v. Ulrich (1948) 86 Cal. App. 2d 367, 371, 195 P.2d 804*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to EvidenceCivil ProcedurePleading & PracticePleadingsRule Application & InterpretationCivil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureRemediesDamagesPunitive DamagesReal Property LawTitle QualityAdverse Claim ActionsUnlawful DetainerTortsDamagesPunitive DamagesGeneral Overview

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§ 420.44 Law Reviews

Review of Selected 1979 California Legislation, Civil Procedure; Punitive Damages, *11 Pacific L.J. 352 (1980)*

Review of Selected 1974 California Legislation, Civil Procedure; Pleading, *6 Pacific L.J. 216 (1975)*

Note, "Default Judgments in Excess of Prayer," *4 Stan. L. Rev. 278 (1952)*

Note, "Amendment of Prayer in Jury's Presence," *4 Stan. L. Rev. 154 (1951)*

Note, "Code Pleading: Vulnerability of Default Judgment to Collateral Attack Because Relief Granted Was Not Demanded in Complaint," *38 Cal. L. Rev. 313 (1950)*

Note, "Award of Alimony in a Default Action Without Express Prayer for Such Relief," *15 So. Cal. L. Rev. 375 (1942)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureRemediesDamagesPunitive Damages

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§ 420.45 Text References

MOORE' S FEDERAL PRACTICE, Ch. 8, Ch. 54, Ch. 55 (3rd ed. Matthew Bender)

Frumer, BENDER' S FEDERAL PRACTICE FORMS, Vols. 1A, 1B

Witkin, California Procedure, Vol. 4, *Pleading*, §§ 412, 432, 456-459 (4th ed. 1997)

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[Reserved]

§§ 420.46[Reserved]

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36-420 California Forms of Pleading and Practice--Annotated § 420.50

§ 420.50 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Damages, Costs, and General Relief--General Form

[1] FORM Prayer [Code Civ. Proc. § 425.10(b)] for Damages, Costs, and General Relief--General Form

WHEREFORE, _____ [plaintiff(s) *or* cross complaint(s)] pray(s) judgment against _____ [defendant(s) *or* cross defendant(s)] [, and each of them,] as follows:

1. For general damages in the sum of $_____;

2. For _____ [*specify special damages, if any, e.g.*, damages for loss of earnings] _____ [in the sum of $_____ *or* according to proof];

3. For _____ [*specify other legal or equitable relief sought (see, e.g., §§ 420.55 -420.63)*];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

[2] Use of Form

The form of prayer in [1], *above*, is for use by plaintiff or cross complainant in a complaint or cross complaint for damages, costs, and general relief, except in personal injury or wrongful death actions [*see Code Civ. Proc. § 425.10(a)(2), (b)*].

For a form of prayer for use in an action, other than a limited civil case, brought in superior court for actual or punitive damages for personal injury or wrongful death, see *§ 420.51*.

For a general discussion of costs and damages, see Ch. 174, *Costs and Attorney's Fees* , and Ch. 177, *Damages* , respectively.

[3] Cross References

Necessity of demand for relief in complaint or cross complaint. *Code Civ. Proc. § 425.10(b)*

Amount of money or damages demanded as required to be stated. *Code Civ. Proc. § 425.10(b)*

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36-420 California Forms of Pleading and Practice--Annotated § 420.51

§ 420.51 Prayer [Code Civ. Proc. § 425.10(b)] for Damages, Costs, and General Relief--In Personal Injury or Wrongful Death Action

[1] FORM Prayer [Code Civ. Proc. § 425.10(b)] for Damages, Costs, and General Relief--In Personal Injury or Wrongful Death Action in Superior Court in Other Than Limited Civil Case

WHEREFORE, _____ [plaintiff(s) *or* cross complainant(s)] pray(s) judgment against _____ [defendant(s) *or* cross defendant(s)] [, and each of them,] as follows:

1. For general damages according to proof;

2. For _____ [*specify special damages, if any, e.g.*, damages for loss of earnings], according to proof;

3. For _____ [*specify other legal or equitable relief sought (see §§ 420.55 -420.63)*];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

[2] Use of Form

The form of prayer in [1], *above*, is for use in a a complaint or cross complaint for damages, costs, and general relief in personal injury or wrongful death actions. In an action to recover actual or punitive damages for personal injury or wrongful death, the amount demanded shall not be stated [*Code Civ. Proc. § 425.10(b)*]. Since the amount to be awarded will be determined from the evidence presented, the prayer requests relief according to proof.

A statement of the nature and amount of damages being sought may be requested by the defendant, from the plaintiff, at any time. If no request is made, the plaintiff must give the defendant notice of the amount of special and general damages sought (1) before a default may be taken; or (2) when an answer is filed, at least 60 days prior to the date set for trial [*Code Civ. Proc. § 425.11*]. For a form of request for a statement of damages, see *Ch. 177, Damages, § 177.40* et seq.

For a prayer that includes interest on damages in a personal injury or wrongful death action, see *§ 420.59*.

[3] Cross References

In actions filed after January 1, 2005, and fully adjudicated, 75% of any punitive damages awarded pursuant to a final judgment are allocated to the Public Benefit Trust Fund and 25% to the plaintiff(s) [*Civ. Code § 3294.5(b)* (in effect until July 1, 2006)]. For discussion, see *Ch. 177, Damages, § 177.40* et seq.

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36-420 California Forms of Pleading and Practice--Annotated § 420.52

§ 420.52 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Damages, Costs, and General Relief--Multiple Plaintiffs or Cross Complainants Suing Single Defendant or Cross Defendant for Different Relief

[1] FORM Prayer [Code Civ. Proc. § 425.10(b)] for Damages, Costs, and General Relief--Multiple Plaintiffs or Cross Complainants Suing Single Defendant or Cross Defendant for Different Relief

WHEREFORE, _____ [plaintiffs *or* cross complainants] pray judgment against _____ [defendant *or* cross defendant] as follows:

_____ [Plaintiff *or* Cross Complainant] _____ [*name*] prays:

1. For general damages in the sum of $_____; and

2. For _____ [*specify special damages, if any, e.g.*, damages for loss of earnings] _____ [according to proof *or* in the sum of $_____];

_____ [Plaintiff or Cross Complainant] _____ [name] prays:

3. For general damages in the sum of $_____; and

4. For _____ [*specify special damages, if any, e.g.*, damages for loss of earnings] _____ [according to proof *or* in the sum of $_____];

_____ [Plaintiffs *or* Cross Complainants] _____ [*List all plaintiffs or cross complainants*] pray:

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

[2] Use of Form

The form of prayer in [1], *above*, is for use in a complaint or cross complaint for damages, costs, and general relief when there are multiple plaintiffs or cross complainants suing a single defendant or cross defendant and some or each of the plaintiffs or cross complainants is requesting different relief from the defendant or cross defendant. For a form of prayer for use when all plaintiffs or cross complainants are requesting the same relief of the defendant or cross defendant, see *§ 420.50*.

This form may be adapted for use in personal injury or wrongful death actions by deleting the amount of money or damages [*see § 420.51*].

For a discussion of, and forms relating to, joinder of plaintiffs, see Ch. 395, *Parties* .

[3] Cross References

Permissive joinder of plaintiffs. *Code Civ. Proc. § 378*

Compulsory joinder of parties. *Code Civ. Proc. § 389*

Joinder of parties in cross complaint. *Code Civ. Proc. § 428.20*

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36-420 California Forms of Pleading and Practice--Annotated § 420.53

§ 420.53 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Damages, Costs, and General Relief--By Single Plaintiff or Cross Complainant Against Multiple Defendants or Cross Defendants for Different Relief

[1] FORM Prayer [Code Civ. Proc. § 425.10(b)] for Damages, Costs, and General Relief--By Single Plaintiff or Cross Complainant Against Multiple Defendants or Cross Defendants for Different Relief

WHEREFORE, _____ [plaintiff *or* cross complainant] prays judgment against _____ [defendants *or* cross defendants], and each of them, as follows:

1. For general damages against _____ [defendant(s) *or* cross defendant(s)] _____ [*name(s*)] in the sum of $_____;

2. For _____ [*specify special damages, if any, e.g.*, damages for loss of earnings against _____ (defendant(s) *or* cross defendant(s) _____ (*name(s*)] _____ [according to proof *or* in the sum of $_____];

3. For general damages against _____ [defendant(s) *or* cross defendant(s) _____ [*name*] in the sum of $_____;

4. For _____ [*specify special damages, if any, e.g.*, damages for loss of earnings] _____ [according to proof *or* in the sum of $_____];

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

[2] Use of Form

The form of prayer in [1], *above*, is for use in a complaint or cross complaint for damages, costs, and general relief when there is one plaintiff or cross complainant against more than one defendant or cross defendant and different relief is sought from some or each of the defendants or cross defendants. For a form of prayer for use when the same relief is

demanded of all defendants or cross defendants, see *§ 420.50*.

This form can be adapted for use in personal injury or wrongful death actions by deleting the amount of damages [*see § 420.51*].

For a discussion of, and forms relating to, joinder of defendants, see Ch. 395, *Parties* .

[3] Cross References

Permissive joinder of defendants. *Code Civ. Proc. § 379*

Compulsory joinder of parties. *Code Civ. Proc. § 389*

Joinder of parties in cross complaint. *Code Civ. Proc. § 428.20*

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36-420 California Forms of Pleading and Practice--Annotated § 420.54

§ 420.54 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Damages, Costs, and General Relief--Multiple Causes of Action

[1] FORM Prayer [Code Civ. Proc. § 425.10(b)] for Damages, Costs, and General Relief--Multiple Causes of Action

WHEREFORE, _____ [plaintiff *or* cross complainant] prays judgment against _____ [defendant(s) *or* cross defendant(s)] as follows:

On the FIRST CAUSE OF ACTION:

1. For general damages [in the sum of $_____ *or* according to proof];

2. For special damages [in the sum of $_____ *or* according to proof];

On the SECOND CAUSE OF ACTION:

3. For general damages [in the sum of $_____ *or* according to proof];

4. For special damages [in the sum of $_____ *or* according to proof];

On all CAUSES OF ACTION:

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

[2] Use of Form

The form of prayer in [1], *above*, is for use in a complaint or cross complaint for damages, costs, and general relief when more than one cause of action is alleged. This form can be adapted for use in personal injury or wrongful death

actions by deleting the amount of damages [*see § 420.51*].

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36-420 California Forms of Pleading and Practice--Annotated § 420.55

§ 420.55 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Exemplary and Punitive Damages [Civ. Code §§ 3294, 3295]--In Addition to General and Special Damages, Costs, and General Relief--General Form

[1] FORM Prayer [Code Civ. Proc. § 425.10(a)(2)] for Exemplary and Punitive Damages [Civ. Code §§ 3294, 3295]--In Addition to General and Special Damages, Costs, and General Relief--General Form

WHEREFORE, _____ [plaintiff *or* cross complainant] prays judgment against _____ [defendant *or* cross defendant] as follows:

1. For general damages in the sum of $_____;

2. For _____ [*specify special damages, if any, e.g.*, damages for loss of earnings] _____ [according to proof *or* in the sum of $_____];

3. For exemplary and punitive damages;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

[2] Use of Form

The form of prayer in [1], *above*, is for use in a complaint or cross complaint for exemplary and punitive damages in addition to general and special damages, costs, and general relief. No claim for exemplary damages may state an amount or amounts [*Civ. Code § 3295(e)*].

For discussion of exemplary damages, see *Ch. 177, Damages, § 177.40* et seq., and for discussion of the *Code Civ. Proc. § 425.115* statement reserving the right to seek punitive damages on default, see Ch. 205, *Defaults and Default Judgments* .

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§ 420.56 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Principal Amount Plus Interest [Civ. Code § 3287]--At Legal [or Agreed] Rate [Cal. Const., art. XV, § 1; Code Civ. Proc. § 685.010]--General Form

[1] FORM Prayer [Code Civ. Proc. § 425.10(a)(2)] for Principal Amount Plus Interest [Civ. Code § 3287]--At Legal [or Agreed] Rate [Cal. Const., art. XV, § 1; Code Civ. Proc. § 685.010]--General Form

WHEREFORE, _____ [plaintiff *or* cross complainant] prays judgment against _____ [defendant *or* cross defendant] as follows:

[*EITHER*]

1. For the [principal] sum of $_____;

2. For interest on that [principal] sum at _____ [*specify legal or agreed rate*] percent per annum from _____ [*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

[*OR*]

1. For the [principal] sum of $_____ with interest thereon at _____ [*specify legal or agreed rate*] percent per annum from _____ [*date*];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

[2] Use of Form

The form of prayer in [1], *above*, is for use in a complaint or cross complaint praying for prejudgment interest on damages in an action on a contract claiming liquidated [*see Civ. Code § 3287(a)*] or unliquidated [*see Civ. Code § 3287(b)*] damages.

For a discussion of interest on unliquidated claim see Ch. 177, *Damages* . For a discussion of contracting for payment of interest, see Ch. 568, *Usury* .

[3] Cross References

Contractual stipulation of legal rate of interest. *Civ. Code § 3289(a)*

Waiver of claim to interest. *Civ. Code § 3290*

Interest rates on judgments as set by Legislature at 10 percent per annum. *Code Civ. Proc. § 685.010*

Interest after breach of contract that does not stipulate legal rate. *Civ. Code § 3289(b)*

Inclusion of prejudgment interest by clerk of court in entry of judgment. *Cal. Rules of Ct., Rule 3.1802*

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36-420 California Forms of Pleading and Practice--Annotated § 420.57

§ 420.57 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Principal Amount Plus Interest [Civ. Code § 3287]--On Each Amount From Different Dates at Legal or Agreed Rate [Cal. Const., art. XV, § 1; Code Civ. Proc. § 685.010]

[1] FORM Prayer [Code Civ. Proc. § 425.10(a)(2)] for Principal Amount Plus Interest [Civ. Code § 3287]--On Each Amount From Different Dates at Legal or Agreed Rate [Cal. Const., art. XV, § 1; Code Civ. Proc. § 685.010]

WHEREFORE, _____ [plaintiff *or* cross complainant] prays judgment against _____ [defendant *or* cross defendant] as follows:

1. For the sum of $_____, with interest thereon at _____ [*specify legal or agreed rate*] percent per annum from _____ [*date*];

2. For the sum of $_____, with interest thereon at _____ [*specify legal or agreed rate*] percent per annum from _____ [*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

[2] Use of Form

The form of prayer in [1], *above*, is for use in a complaint or cross complaint for prejudgment interest on damages in an action on contract when interest is to begin on different dates.

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§ 420.58 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Liquidated Damages According to Agreement of Parties [Civ. Code § 1671], Plus Interest [Civ. Code § 3287]

[1] FORM Prayer [Code Civ. Proc. § 425.10(a)(2)] for Liquidated Damages According to Agreement of Parties [Civ. Code § 1671], Plus Interest [Civ. Code § 3287]

WHEREFORE, _____ [plaintiff *or* cross complainant] prays for judgment against _____ [defendant *or* cross defendant] as follows:

1. For liquidated damages according to the agreement of the parties in the sum of $_____;

2. For interest on those liquidated damages at _____ percent per annum from _____ [*date*];

3. For cost of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

[2] Use of Form

The form of prayer in [1], *above*, is for use in a complaint or cross complaint when liquidated damages were stipulated in the contract breached by defendant.

[3] Cross References

Note, "Damages--Liquidated Damages and Penalties," *27 So. Cal. L. Rev. 209 (1954)*

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§ 420.59 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Damages Plus Interest [Civ. Code §§ 3288, 3291]--At Legal Rate [Cal. Const., art. XV, § 1; Code Civ. Proc. § 685.010]--In Personal Injury or Wrongful Death Action

[1] FORM Prayer [Code Civ. Proc. § 425.10(a)(2)] for Damages Plus Interest [Civ. Code §§ 3288, 3291]--At Legal Rate [Cal. Const., art. XV, § 1; Code Civ. Proc. § 685.010]--In Personal Injury or Wrongful Death Action

WHEREFORE, _____ [plaintiff *or* cross complainant] prays judgment against _____ [defendant *or* cross defendant] as follows:

1. For general damages according to proof;

2. For _____ [*specify special damages, if any, e.g.*, damages for loss of earnings] _____ [according to proof];

3. For interest on the damages at _____ [*specify legal rate*] percent per annum from _____ [*date*];

4. For cost of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

[2] Use of Form

The form of prayer in [1], *above*, is for use in a complaint or cross complaint for prejudgment interest on damages in a personal injury or wrongful death action. Interest may be claimed in such an action when a plaintiff or cross complainant makes an offer pursuant to *Code Civ. Proc. § 998* which the defendant or cross defendant does not accept prior to trial and within 30 days, and the plaintiff or cross complainant subsequently obtains a more favorable judgment. Interest, pursuant to *Civ. Code § 3291*, will be calculated from the date of plaintiff's or cross complainant's first offer that was exceeded by the judgment until satisfaction of judgment [*Civ. Code § 3291*].

Interest may also be claimed when the tort involves malice [*see Civ. Code § 3288*]. It appears that interest pursuant to

Civ. Code § 3288 may be awarded at the discretion of the jury from the date of the tort until the entry of judgment [*see Morgan v. French (1945) 70 Cal. App. 2d 785, 788, 161 P.2d 800]* .

For a prayer that includes other legal or equitable relief sought in a personal injury or wrongful death actions, see § 520.51.

For further discussion, see *Ch. 177, Damages, § 177.40* et seq.

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36-420 California Forms of Pleading and Practice--Annotated § 420.60

§ 420.60 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Attorney's Fees in Addition to General and Special Damages, Costs, and General Relief

[1] FORM Prayer [Code Civ. Proc. § 425.10(a)(2)] for Attorney's Fees in Addition to General and Special Damages, Costs, and General Relief

WHEREFORE, _____ [plaintiff *or* cross complainant] prays judgment against _____ [defendant *or* cross defendant] as follows:

1. For general damages in the sum of $_____;

2. For _____ [*enumerate items of special damages, if any*] _____ [in the sum of $_____ or according to proof];

3. For reasonable attorney's fees _____ [in the sum of $_____ (pursuant to Section _____ of the _____ (*specify code).*) *or* in an amount to be determined by the court];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

[2] Use of Form

The form of prayer in [1], *above*, is for use in a complaint or cross complaint for attorney's fees, in addition to general and special damages, costs, and general relief, when an amount is known or unspecified. Attorney's fees demanded must be authorized by contract or statute [*see Code Civ. Proc. § 1021*].

This form may be adapted for use in personal injury or wrongful death actions by deleting the amount of damages requested [*see § 420.51*].

[3] Cross References

For allegation that contract specifies attorney's fees in event of breach, see Ch. 140, *Contracts*

For a discussion of attorney's fees as costs, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

Prevailing party in action on contract specifically providing for attorney's fees as entitled to same whether he or she is party specified in contract or not. *Civ. Code § 1717(a)*

Attorney's fees on contract specifically providing for attorney's fees treated as costs. *Civ. Code §§ 1717(a), 1717.5(a)*

Attorney's fees as matter of agreement, unless provided for by statute. *Code Civ. Proc. § 1021*

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36-420 California Forms of Pleading and Practice--Annotated § 420.61

§ 420.61 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Declaratory Relief

[1] FORM Prayer [Code Civ. Proc. § 425.10(b)] for Declaratory Relief

WHEREFORE, _____ [plaintiff *or* cross complainant] prays judgment against _____ [defendant *or* cross defendant] as follows:

1. For _____ [*specify declaratory relief sought, e.g.*, a declaration by the court of the rights and duties of the parties herein, and specifically for a declaration that _____ (*specify declaratory judgment sought*)];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

[2] Use of Form

The form of prayer in [1], *above*, is for use in a complaint or cross complaint for declaratory relief. This form may be adapted for incorporation into a prayer for damages when the complaint or cross complaint contains allegations stating a cause of action for damages [*see § 420.50*].

For additional forms of prayers for declaratory judgment, see Ch. 182, *Declaratory Relief* .

[3] Cross References

Declaratory relief actions generally. *Code Civ. Proc. §§ 1060-1062a*

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36-420 California Forms of Pleading and Practice--Annotated § 420.62

§ 420.62 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Injunctive Relief

[1] FORM Prayer [Code Civ. Proc. § 425.10(a)(2)] for Injunctive Relief

WHEREFORE, _____ [plaintiff *or* cross complainant] prays judgment against _____ [defendant *or* cross defendant] as follows:

1. For _____ [*specify injunctive relief sought, e.g.*, a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining _____ (defendant *or* cross defendant) and his/her/its agents, servants, and employees, and all such persons acting under, in concert with, or for him/her/it from _____ (*specify acts enjoined*)];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

[2] Use of Form

The form of prayer in [1], *above*, is for use in a complaint or cross complaint for injunctive relief. The prayer may be adapted for incorporation into a demand for damages when the complaint or cross complaint contains allegations stating a cause of action for damages [*see § 420.50*].

For additional forms of prayers for injunctive relief, see Ch. 303, *Injunctions* .

[3] Cross References

Permanent injunctions generally. *Civ. Code §§ 3420-3423*

Provisional injunctive relief generally. *Code Civ. Proc. § 525 et seq.*

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36-420 California Forms of Pleading and Practice--Annotated § 420.63

§ 420.63 Prayer [Code Civ. Proc. § 425.10(a)(2)] for Specific Performance

[1] FORM Prayer [Code Civ. Proc. § 425.10(a)(2)] for Specific Performance

WHEREFORE, _____ [plaintiff *or* cross complainant] prays judgment against _____ [defendant *or* cross defendant] as follows:

1. That defendant be ordered to _____ [*specify conduct desired, e.g.*, execute and deliver to _____ (plaintiff *or* cross complainant) the deed to the property described herein];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

[2] Use of Form

The form of prayer in [1], *above*, is for use in a complaint or cross complaint when seeking specific performance as relief. This form may be adapted for incorporation in a prayer for damages when the complaint or cross complaint contains allegations stating a cause of action for damages [*see § 420.50*].

For additional forms of prayers for specific performance, see Ch. 528, *Specific Performance* .

[3] Cross References

Specific performance generally. *Civ. Code §§ 3384-3395*

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36-420 California Forms of Pleading and Practice--Annotated § 420.64

§ 420.64 Prayer in Answer [Code Civ. Proc. § 431.30]

[1] FORM Prayer in Answer [Code Civ. Proc. § 431.30]

WHEREFORE, _____ [defendant *or* cross defendant] prays:

1. That _____ [plaintiff *or* cross complainant] _____ [be granted no relief in *or* take nothing by] this action;

2. For costs of suit incurred herein; and

3. For such other and further relief as the court may deem proper.

[2] Use of Form

The form of prayer in [1], *above*, is for use in the answer to the complaint or cross complaint to request that plaintiff not receive relief and that defendant be awarded costs and other general relief. A prayer may be included in the answer, but it is not required by statute.

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 420 PRAYERS
PART IV. FORMS

36-420 California Forms of Pleading and Practice--Annotated § 420.65

§ 420.65 Notice of Motion to Amend Prayer of Complaint or Cross Complaint [Code Civ. Proc. § 473(a)]

[1] FORM Notice of Motion to Amend Prayer of Complaint or Cross Complaint [Code Civ. Proc. § 473(a)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], _____ [Plaintiff *or* Cross Defendant]. vs. _____ [*name*], _____ [Defendant *or* Cross Defendant].	))))))))))	NO. _____ NOTICE OF MOTION AND MOTION TO AMEND PRAYER OF _____ [COMPLAINT *or* CROSS COMPLAINT] Date: _____ Time: _____ Location: _____ Judge: _____ Date Action Filed: _____ Trial Date: _____

To _____ [*specify party, e.g.*, defendant] and to _____ [*name*], his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*];, or as soon thereafter as the matter may be heard in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [*specify party, e.g.*, plaintiff] will, and hereby does, move for leave to amend the prayer of the _____

[complaint *or* cross complaint] in this action so as to _____ [*state addition, deletion, or alteration, e.g.*, include a request for attorney's fees]. The motion will be made under *Code of Civil Procedure section 473(a)* on the grounds that _____ [*state reason for amendment*].

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the supporting memorandum served and filed herewith, on the papers and records and file herein, and on such evidence as may be presented at the hearing of the motion.
Date: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [Plaintiff *or*

Cross Complainant]

[2] Use of Form

The form in [1], *above*, is for use to move to amend the prayer of a complaint or cross complaint in any type of action when any addtional relief is sought.

A supporting memorandum must be filed and a copy served with this motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[3] Cross References

For discussion and forms relating to amending a complaint generally, see Ch. 21, *Amended and Supplemental Pleadigns*

For memoranda in support of a motion to amend a complaint, see California Points and Authorities, Ch. 16, *Amended and Supplemental Pleadings* (Matthew Bender)

Amendment of pleadings. *Code Civ. Proc. §§ 473(a), 576*

Witkin, California Procedure, Vol. 4, *Pleading*, § 456-459 (4th ed. 1997)

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Chapter 420 PRAYERS
PART IV. FORMS

36-420 California Forms of Pleading and Practice--Annotated § 420.66

§ 420.66 Order Granting or Denying Motion to Amend Prayer of Complaint or Cross Complaint [Code Civ. Proc. § 473(a)]

[1] FORM Order Granting or Denying Motion to Amend Prayer of Complaint or Cross Complaint [Code Civ. Proc. § 473(a)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
_____ [Plaintiff *or* Cross Com-	)	NO. _____
plainant],	)	ORDER
vs.	)	
_____ [*name*],	)	
_____ [Defendant *or* Cross De-		
fendant].		

The motion of _____ [*name of moving party*] for an order permitting amendment of the prayer of the _____ [complaint *or* cross complaint] came on regularly for hearing by the court this date. _____ [Plaintiff *or* Cross Complainant] appeared by counsel _____ [*name*]; _____ [Defendant *or* Cross Defendant] appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be _____ [granted *or* denied],

[*EITHER*]

IT IS ORDERED that the motion be, and it hereby is, granted and that the prayer in _____ [plaintiff's *or* cross complainant's] _____ [complaint *or* cross complaint] which reads as follows: _____ [*set out original prayer*], be amended and corrected to read: _____ [*set out amended prayer*].

[*OR*]

IT IS ORDERED that the motion be, and hereby is, denied.
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

The form in [1], *above*, is for use as an order by the court to permit amendment of the prayer in the complaint or cross complaint.

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 421 PREMISES LIABILITY

36-421 California Forms of Pleading and Practice--Annotated 421.syn

§ 421.syn Synopsis to Chapter 421: PREMISES LIABILITY

§ 421.01 Scope of Chapter

§ 421.02 Cross References

§§ 421.03-421.09 [Reserved]

§ 421.10 Governing Law

§ 421.11 Liability to Persons on Premises

[1] Former Duties of Owner or Possessor

[2] Definitions of Invitee, Licensee, and Trespasser

[3] Negligence Standard

[4] Relationship Between Former Duties and Negligence Standard

[5] No Liability for Injury Incurred During or After Commission of Felony

[6] No Liability for Injuries Incurred During Gleaning

§ 421.12 Persons Liable

[1] Requirement of Control

[2] Between Owners and Contractors

[3] Condominium Owners and Associations

[a] Unit Owners

[b] Condominium Associations

[c] Directors of Condominium Associations

[4] Possessors

[5] Owners Not in Possession

[a] Landlords' Responsibility Not Abrogated by Signing Lease

[b] Landlords' Liability to Tenants

[c] Landlords' Liability to Nontenants

[6] Former Owners

[7] Owners or Possessors of Adjacent Property

[8] Owners of Easement Rights

§ 421.13 Premises

§ 421.14 Duty to Maintain Premises in Safe Condition

[1] Dangerous Condition

[2] Obvious Danger

[3] Trivial Defects

[4] Effect of Comparative Negligence

[a] Inclusion of Assumption of Risk

[b] Supreme Court's Attempt in Knight v. Jewett to Resolve Conflict Regarding Assumption of Risk

[c] Primary and Secondary Assumption of Risk Versus Consent-Based Analysis

§ 421.15 Duty to Control Conduct of Third Persons

[1] Persons to Whom Duty Owed

[2] Foreseeability and Prior Similar Incidents Rule

[a] Duty to Protect Against Reasonably Foreseeable Risks

[b] Scope of Duty to Take Precautions

[c] Increase in Plaintiff's Burden of Proof

[d] Satisfying Duty to Control Third Persons if Risk of Injury Not Highly Foreseeable

[3] No Liability if No Degree of Protection Would Prevent Conduct

[4] Duty When Responding to Presently Occurring Criminal Conduct

[5] No Liability in Residential Setting for Failure to Warn of Third Party's Past Criminal Convictions for Molestation

§ 421.16 "Firefighter's" Rule

[1] Bar to Recovery for Injuries

[2] Rule Not Applicable to Private Safety Employees

[3] Exception to Rule for Independent Act of Misconduct or Unrelated Risk

[a] Scope of Exception

[b] Exception Not Applicable to Firefighters or Police Officers Encountering Hazards by Chance

[4] Exceptions to Rule Under Civ. Code § 1714.9

§ 421.17 Duty to Persons Outside Premises

[1] No Distinction Between Artificial and Natural Conditions

[2] Distracting Activities on Premises

§§ 421.18-421.19 [Reserved]

§ 421.20 Governing Statutes

§ 421.21 Landowner's Immunity From Liability to Recreational Users

§ 421.22 Recreational Purpose Defined

§ 421.23 Exceptions to Immunity

[1] Public Entities

[2] Insufficient Ownership Interest

[3] Willful or Malicious Failure to Guard or Warn

[4] Permission to Enter Premises Granted for Consideration

[5] Persons Expressly Invited to Enter Premises

[6] Navigable Waters

[7] Property Not Suitable for Recreational Purpose

§§ 421.24-421.29 [Reserved]

§ 421.30 Governing Law

§ 421.31 Employer's Liability for Acts of General Contractor

§ 421.32 Peculiar Risk

[1] Scope of Employer's Liability

[2] Employee of Independent Contractor Cannot Recover From Hirer

§ 421.33 Nondelegable Duty to Maintain Premises in Safe Condition

§ 421.34 Collateral Negligence

§§ 421.35-421.39 [Reserved]

§ 421.40 Definitions

§ 421.41 General Rights and Duties Concerning Waters

§ 421.42 Flood Waters

§ 421.43 Surface Waters

[1] Duty of Reasonable Care

[2] Upper Landowner's Easement

[3] Lower Landowner's Duty

§ 421.44 Waters in Watercourse

[1] Discharge of Surface Waters

[2] Obstructing or Diverting Flow

§ 421.45 Escape of Impounded Waters

[1] Theory of Liability

[2] Reservoirs

§ 421.46 Diversion Through Artificial Channel

[1] Need Not Be Greater Than Natural Channel

[2] Reliance on Long-Continued Diversion

§ 421.47 Liability in Tort

§ 421.48 Determining Damages

§ 421.49 Duty to Minimize Damages

§ 421.50 Injunctive Relief

§ 421.51 Statute of Limitations

§ 421.52 Inverse Condemnation

§ 421.53 Easement to Discharge Water

§§ 421.54-421.59 [Reserved]

§ 421.60 Related LexisNexis/Matthew Bender Publications

§ 421.61 State Statutes

[1] General Principles of Liability

[a] Crimes

[b] Liability to Gleaner

[c] Liability to Public Employee

[d] Negligence

[2] Liability to Recreational Users

§ 421.62 Decisions

[1] Adjacent Property Owner or Possessor

[2] Assumption of Risk

[3] Complaints

[4] Conditions of Liability

[5] Conduct of Third Persons

[6] Dangerous Condition

[a] Generally

[b] Obvious Danger

[7] "Firefighter's" Rule

[8] Independent Contractors

[9] Invitees

[10] Liability to Persons on Premises

[11] Liability to Persons Outside Premises

[12] Licensee

[13] Persons Liable

[a] Former Owner

[b] Landlord Out of Possession

[c] Possessor

[d] Street Vendors

[14] Premises

[15] Recreational Users

[16] Trespasser

[17] Waters

[a] Damages

[b] Diversion

[c] Drainage and Drainage Systems

[d] Easement to Discharge Water

[e] Flood Waters

[f] Injunction

[g] Negligence

[h] Owner's Duties

[i] Reasonable Use Doctrine

[j] Reliance on Continued Diversion

[k] Surface Waters

[l] Watercourse

§ 421.63 Law Reviews

§§ 421.64-421.69 [Reserved]

§ 421.70 Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Person on Premises Against Owner or Possessor of Premises--Negligent Maintenance, Management, and Operation--Judicial Council Trial Court Pleading Form With Premises Liability Attachment [Cal. Judicial Council Forms PLD-PI-001, PLD-PI-001(4)]

[1] FORM

[2] Use of Form

[3] Filling Out Complaint Form

[4] Filling Out Premises Liability Attachment to Complaint Form

[a] Plaintiff's Name

[b] Description of Premises and Circumstances of Injury (Paragraph Prem.L-1.)

[c] Negligence Count (Paragraph Prem.L-2.)

[d] Liability to Recreational Users (Paragraph Prem.L-3)

[e] Dangerous Condition of Public Property (Paragraph Prem.L-4.)

[f] Agency Allegations (Prem.L-5.a.)

[g] Additional Basis of Liability (Paragraph Prem.L-5.b.)

[5] Verification

[6] Cross References

§ 421.71 Complaint for Damages for Personal Injury (and Property Damage) Based on Negligence [Civ. Code § 1714(a)]--By Person on Premises Against Owner or Possessor of Premises--Negligent Maintenance, Control, Management, and Operation of Premises--Dangerous Condition

[1] FORM

[2] Use of Form

[3] Allegations

[4] Venue

[5] Specification of Damages

[6] Cross References

§ 421.72 Allegations--By Person on Premises Against Owner or Possessor of Premises--Failure to Protect Person From Noncriminal Acts of Third Party

[1] FORM

[2] Use of Form

§ 421.73 Allegations--By Person on Premises Against Owner or Possessor of Premises--Failure to Protect Person From Criminal Acts of Third Party

[1] FORM

[2] Use of Form

[3] Prior Similar Incidents Rule

[4] Cross References

§ 421.74 Allegations--By Person on Premises Against Security Guard Retained by Owner or Possessor of Premises--Failure to Protect Person From Acts of Third Party

[1] FORM

[2] Use of Form

§ 421.75 Allegations--By Person on Premises Against Contractor Working on Premises--Negligence [Civ. Code § 1714(a)]

[1] FORM

[2] Use of Form

§ 421.76 Allegations--By Person on Premises Against Possessor or Owner Employing Independent Contractor--Negligence of Contractor--Peculiar Risk of Harm

[1] FORM

[2] Use of Form

[3] Cross References

§ 421.77 Allegations--By Person on Premises Against Owner or Possessor of Adjoining Property--Liability Arising From Control of Premises

[1] FORM

[2] Use of Form

§ 421.78 Allegations--By Person Off Premises Against Owner or Possessor of Premises--Dangerous Condition on Premises

[1] FORM

[2] Use of Form

[3] Cross References

§§ 421.79-421.89 [Reserved]

§ 421.90 Allegation of Liability to Recreational User [Civ. Code § 846]--Premises Liability Attachment to Judicial Council Complaint--Cal. Judicial Council Form PLD-PI-001(4)

[1] FORM

[2] Use of Form

[3] Filling Out Premises Liability Attachment

[a] Negligence (Paragraph Prem.L-2)

[b] Willful Failure to Warn (Paragraph Prem.L-3)

[c] Punitive Damages

§ 421.91 Complaint for Damages for Personal Injury (and Property Damage) Based on Negligence [Civ. Code § 1714(a)]--By Recreational User Against Owner of Real Property [Civ. Code § 846]

[1] FORM

[2] Use of Form

§ 421.92 Allegations--By Recreational User Against Owner of Real Property--Willful or Malicious Failure to Warn or Guard [Civ. Code § 846]

[1] FORM

[2] Use of Form

§§ 421.93-421.99 [Reserved]

§ 421.100 Affirmative Defense Allegation--Comparative Negligence of Plaintiff--Obvious Danger

[1] FORM

[2] Use of Form

[3] Pleading Comparative Negligence

[4] Cross References

§ 421.101 Affirmative Defense Allegation--Comparative Negligence of Plaintiff--Assumption of Risk

[1] FORM

[2] Use of Form

§ 421.102 Affirmative Defense Allegation--Plaintiff as Recreational User [Civ. Code § 846]

[1] FORM

[2] Use of Form

§ 421.103 Affirmative Defense Allegation--Plaintiff as Felon [Civ. Code § 847(a)]

[1] FORM

[2] Use of Form

§ 421.104 Affirmative Defense Allegation--Plaintiff as Gleaner [Civ. Code § 846.2]

[1] FORM

[2] Use of Form

§§ 421.105-421.109 [Reserved]

§ 421.110 Complaint for Damages for Property Damage Based on Negligence [Civ. Code § 1714(a)]--By Person Off Premises Against Owner or Possessor of Premises--Injury to Real Property Resulting From Condition on Premises

[1] FORM

[2] Use of Form

[3] Allegations

[4] Venue

§ 421.111 Allegations--Defendant's Negligent Impoundment of Water Flooded Plaintiff's Property

[1] FORM

[2] Use of Form

[3] Alternative Recovery on Nuisance Theory

§ 421.112 Allegations--Defendant's Unreasonable Discharge of Surface Water Onto Plaintiff's Property

[1] FORM

[2] Use of Form

[3] Alternative Recovery on Nuisance Theory

§ 421.113 Allegations--Defendant's Unreasonable Discharge of Surface Waters--Discharge Into Natural Watercourse

[1] FORM

[2] Use of Form

§ 421.114 Allegations--Changing Natural Course of Surface Water Drainage

[1] FORM

[2] Use of Form

[3] Alternative Recovery on Nuisance Theory

§ 421.115 Allegations--Obstruction of Natural Watercourse

[1] FORM

[2] Use of Form

[3] Alternative Recovery on Nuisance Theory

§§ 421.116-421.119 [Reserved]

§ 421.120 Affirmative Defense--Protection From Flood Waters

[1] FORM

[2] Use of Form

§ 421.121 Affirmative Defense--Plaintiff Unreasonably Failed to Protect Property from Watercourse Flow

[1] FORM

[2] Use of Form

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 421 PREMISES LIABILITY
PART I. SCOPE

36-421 California Forms of Pleading and Practice--Annotated § 421.01

§ 421.01 Scope of Chapter

This chapter discusses actions against owners or possessors of real property by persons on or outside the premises for personal injuries and damages due to conditions on the property, liability for injury to recreational users, liability for acts of an independent contractor, and liability for damage caused by water. The chapter contains the following forms:

- Forms of complaint for damages for personal injury based on negligence, by a person on the premises against the owner or possessor of the premises, and forms of special allegations for those complaints [*see §§ 421.70 -421.78*].

- Forms of complaint for damages for personal injury based on negligence, by a recreational user against the owner of real property, and forms of special allegations for and affirmative defenses to those complaints [*see §§ 421.90 -421.104*].

- Forms of complaint for property damages from water, and forms of special allegations for and affirmative defenses to those complaints [*see §§ 421.110 -421.121*].

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36-421 California Forms of Pleading and Practice--Annotated § 421.02

§ 421.02 Cross References

- For discussion and forms relating to the liability of an owner or operator of an airport, see Ch. 16, *Airplanes and Airports* .

- For discussion and forms relating to the liability of a tavern owner to a patron for injuries caused by intoxicated person on the premises, see Ch. 19, *Alcoholic Beverages: Civil Liability* .

- For a form of complaint against the owner of a vicious dog by a person injured on the owner's premises, see Ch. 23, *Animals: Civil Liability* .

- For a form of complaint for injuries due to the negligent maintenance of a church building, see Ch. 110, *Churches and Religious Organizations* .

- For discussion and forms relating to the liability of a possessor of premises for injuries sustained due to the negligent maintenance of an elevator or escalator, see Ch. 244, *Elevators and Escalators* .

- For discussion and a form relating to inverse condemnation based on water damage, see *Ch. 247, Eminent Domain, § 247.190* et seq..

- For discussion and forms relating to the liability of a possessor of premises for fires, see Ch. 267, *Fires* .

- For discussion of the firefighter's rule, see Ch. 267, *Fires* , and Ch. 380, *Negligence* .

- For discussion and forms relating to injuries to spectators at sporting events, see Ch. 273, *Games, Sports, and Athletics* .

- For discussion and forms relating to the liability of a service station operator to a customer for negligent maintenance of the premises see Ch. 274, *Garages and Gas Stations* .

- For discussion and forms relating to the liability of an innkeeper to a guest for negligent maintenance of the premises and negligent failure to protect from the acts of third parties, see Ch. 297, *Hotels and Motels* .

- For discussion and forms relating to a landlord's failure to provide adequate security against criminal activities and negligent maintenance of premises, see Ch. 334, *Landlord and Tenant: Claims for Damages* .

- For discussion of the law of negligence generally and forms for use in negligence actions, see Ch. 380, *Negligence* .

- For general forms of complaints for damages and injunctive relief based on private nuisance, and a form of allegations based on diversion of naturally accumulated waters, see Ch. 391, *Nuisance* .

- For discussion and forms relating to the liability of public entities and public employees for dangerous conditions of public property, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

- For discussion and forms relating to slips and falls due to the dangerous condition of premises, see Ch. 525, *Slip and Fall* .

- For discussion and forms relating to the liability of owners and operators of theaters and other public amusement places for injuries to patrons due to negligent maintenance of the premises and negligent failure to control the conduct of third parties, see Ch. 547, *Theaters, Shows, and Amusement Places* .

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PART I. SCOPE

36-421 California Forms of Pleading and Practice--Annotated §§ 421.03-421.09

[Reserved]

§§ 421.03[Reserved]

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Chapter 421 PREMISES LIABILITY
PART II. LEGAL BACKGROUND
A. General Principles of Liability

36-421 California Forms of Pleading and Practice--Annotated § 421.10

§ 421.10 Governing Law

The liability of every person for harm caused by his or her want of ordinary care is governed by *Civ. Code § 1714(a)*. The liability of a possessor of premises to persons on the premises is governed by the principles set forth in *Rowland v. Christian* [*Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561]* . The liability of an owner or possessor of premises to persons outside the premises is governed by the principles set forth in *Sprecher v. Adamson Cos.* [*Sprecher v. Adamson Cos. (1981) 30 Cal. 3d 358, 178 Cal. Rptr. 783, 636 P.2d 1121]* .

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PART II. LEGAL BACKGROUND
A. General Principles of Liability

36-421 California Forms of Pleading and Practice--Annotated § 421.11

§ 421.11 Liability to Persons on Premises

[1] Former Duties of Owner or Possessor

Prior to the Supreme Court's decision in *Rowland v. Christian* [*Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561]* , the duty of an owner or a possessor of premises to persons on the premises depended on the status of the person on the premises.

An owner or possessor of premises owed, and still owes, the following duties to an invitee: (1) to use reasonable care not to injure the invitee by any negligent activity; (2) to make the premises reasonably safe by inspecting the premises to discover any dangerous condition and remedy it or warn the invitee of any unknown dangerous condition; and (3) to control the conduct of third persons on the premises [*Chance v. Lawry's, Inc. (1962) 58 Cal. 2d 368, 373, 24 Cal. Rptr. 209, 374 P.2d 185* ; *Wingard v. Safeway Stores, Inc. (1981) 123 Cal. App. 3d 37, 41, 176 Cal. Rptr. 320* ; *see § 421.11[3]*].

Licensees and trespassers, on the other hand, were obliged to take the premises as they found them. Any liability for injuries caused by a dangerous condition was only based on willful or wanton conduct, or, in the case of licensees, on a dangerous condition that amounted to a trap. In addition, licensees were further protected by a duty on the part of the possessor to use reasonable care in active operations [*Rowland v. Christian (1968) 69 Cal. 2d 108, 114-115, 70 Cal. Rptr. 97, 443 P.2d 561]* .

[2] Definitions of Invitee, Licensee, and Trespasser

An invitee is either a business visitor or a public invitee. A business visitor is a person who is invited or permitted to enter or remain on the premises of the owner or possessor for a purpose directly or indirectly connected with the business dealings between them. A public invitee is a person who is invited to enter or remain on the premises as a member of the public for a purpose for which the land is held open to the public [*O'Keefe v. South End Rowing Club (1966) 64 Cal. 2d 729, 735-739, 51 Cal. Rptr. 534, 414 P.2d 830]* .

A licensee is a person, such as a social guest, who is not an invitee, but who is privileged to enter and remain on the

premises by virtue of the owner or possessor's consent [*Rowland v. Christian (1968) 69 Cal. 2d 108, 113-114, 70 Cal. Rptr. 97, 443 P.2d 561]* .

A trespasser is a person who enters or remains on the premises without the express or implied consent of the owner or possessor [*Hamakawa v. Crescent Wharf & Warehouse Co. (1935) 4 Cal. 2d 499, 501-503, 50 P.2d 803]* .

[3] Negligence Standard

The Supreme Court in *Rowland v. Christian* [*Rowland v. Christian (1968) 69 Cal. 2d 108, 113-114, 70 Cal. Rptr. 97, 443 P.2d 561]* was faced with a situation in which a social guest (licensee) of a tenant was injured by a broken faucet, but the tenant (who knew of the condition but failed to warn the guest) would not have been liable under common law rules. The Court held that the proper test to be applied is whether the owner or possessor of the premises has acted as a reasonable person in the management of those premises in light of the probability of injury to others. The Court stated that the fundamental principle, codified in *Civ. Code § 1714(a)*, that every person is liable for injury to another by his or her want of ordinary care should not be departed from unless clearly supported by public policy. The factors that are to be weighed in departing from this principle are: (1) the foreseeability of harm to the plaintiff; (2) the degree of certainty of injury; (3) the closeness of the connection between the defendant's conduct and the injury suffered; (4) the moral blame attached to the defendant's conduct; (5) the policy of preventing future harm; and (6) the burden to the defendant and the consequences to the community in imposing a duty and liability for breach of that duty [*Rowland v. Christian (1968) 69 Cal. 2d 108, 113, 70 Cal. Rptr. 97, 443 P.2d 561]* .

Although a possessor's liability for injuries to persons on the premises has traditionally been founded on negligence, a landlord is under certain circumstances strictly liable for injuries caused by defects in the rented premises [*see Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 464, 213 Cal. Rptr. 213, 698 P.2d 116]* . One court of appeal, however, has refuse to extend strict liability protection to a commercial invitee [*see Ernest W. Hahn, Inc. v. Superior Court (1991) 1 Cal. App. 4th 1448, 1452]* . For further discussion of strict liability in the landlord-tenant context, see Ch. 334, *Landlord and Tenant: Claims for Damages* .

[4] Relationship Between Former Duties and Negligence Standard

The effect of the Supreme Court's decision in *Rowland v. Christian* [*Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561]* is that the extent of the general duty of the owner or possessor is no longer controlled by the status of the plaintiff at the time of injury, but by the foreseeability of the risk created by the conduct of the owner or possessor in the management of his or her property [*Beard v. Atchison, Topeka & Santa Fe Ry. Co. (1970) 4 Cal. App. 3d 129, 136, 84 Cal. Rptr. 449]* .

Although the status of the plaintiff is not determinative, it has some bearing on the question of liability. For instance, using the factors enunciated in *Rowland* [*see § 421.11[3]*], the foreseeability of harm is ordinarily greater to an invitee as opposed to a trespasser, and the burden on the defendant and the consequences to the community in imposing a duty and liability for breach of that duty may be greater if a trespasser is involved rather than an invitee. In many instances, however, the conduct necessary to meet the duty to invitees will also meet the duty to trespassers [*Rowland v. Christian (1968) 69 Cal. 2d 108, 117-119, 70 Cal. Rptr. 97, 443 P.2d 561]* .

Courts after *Rowland* have used the factors set forth in that decision in determining whether or not a duty is owed by the owner or possessor of premises in the fact situation before the court [*see, e.g., Donnell v. California W. School of Law (1988) 200 Cal. App. 3d 715, 719, 725, 246 Cal. Rptr. 199* (law school had no duty to student attacked on city-owned sidewalk running alongside school building and over which school had no control or management); *Jamison v. Mark C. Bloome Co. (1980) 112 Cal. App. 3d 570, 575, 169 Cal. Rptr. 399* (no duty to passersby to control conduct of third persons); *Totten v. More Oakland Residential Hous., Inc. (1976) 63 Cal. App. 3d 538, 544-545, 134 Cal. Rptr. 29* (landlord had no duty to protect social guest of tenant from acts of third party)].

In addition, in determining whether or not a duty is owed in a particular situation, the established duties toward invitees that existed prior to *Rowland* are still pertinent. *Rowland* did not jettison them, but held that persons lacking invitee status were, under appropriate circumstances, entitled to the same protection [*Jamison v. Mark C. Bloome Co. (1980) 112 Cal. App. 3d 570, 576, 169 Cal. Rptr. 399* ; *Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 26, 77 Cal. Rptr. 914]* .

Therefore, the common law definitions of invitee, licensee, and trespasser, as well as prior case law defining the duties owed to invitees, are relevant to any determination of duty after *Rowland*. Accordingly, the specific duties discussed in this chapter are those duties that, before *Rowland*, were imposed on owners or possessors only toward invitees. If the injured person's status is other than an invitee, counsel should not only look to these duties, but should also consider the factors set forth in *Rowland* [*see § 421.11[3]*].

[5] No Liability for Injury Incurred During or After Commission of Felony

An owner (including, but not limited to, a public entity as defined in *Gov. Code § 811.2*) of any estate or any other interest in real property, whether possessory or nonpossessory, is not liable to any person for any injury or death that occurs on that property during the course of or after the commission, by the injured or deceased person, of any of the felonies set forth in *Civ. Code § 847(b)* [*Civ. Code § 847(a)*]. This statutory limitation on liability is not restricted merely to injuries related to the physical conditions, uses, structures, or activities of the property, nor is it restricted to negligent conduct [*Calvillo-Silva v. Home Grocery (1998) 19 Cal. 4th 714, 735, 80 Cal. Rptr. 2d 506, 968 P.2d 65]* .

The limitation on liability conferred by *Civ. Code § 847(a)* arises at the moment the injured or deceased person commences the felony or attempted felony and extends to the moment the injured or deceased person is no longer on the property [*Civ. Code § 847(c)*]. The limitation applies only to a felony listed in *Civ. Code § 847(b)* and the subsequent conviction of that felony, or a lesser included felony or misdemeanor arising from a charge of a felony listed in *Civ. Code § 847(b)*. During the pendency of any such criminal action, a civil action alleging this liability is abated, and the statute of limitations on the civil cause of action is tolled [*Civ. Code § 847(e)*]. The limitation on liability provided by *Civ. Code § 847(a)* is in addition to any other available defense [*Civ. Code § 847(g)*].

The limitation on liability conferred by *Civ. Code § 847(a)* applies only if the injured or deceased person's conduct in furtherance of the commission of a felony listed in *Civ. Code § 847(b)* proximately or legally causes the person's injury or death [*Civ. Code § 847(d)*]. Additionally, *Civ. Code § 847(a)* does not limit the liability of an owner or an owner's agent that otherwise exists for willful, wanton, or criminal conduct, or for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity [*Civ. Code § 847(f)*]. Although this exception for "willful" or "wanton" conduct applies to intentional conduct, it applies only to intentional conduct that is wrongful--that is, done either with a knowledge that serious injury to another will probably result or with a wanton and reckless disregard of the possible results [*Calvillo-Silva v. Home Grocery (1998) 19 Cal. 4th 714, 735, 80 Cal. Rptr. 2d 506, 968 P.2d 65]* . Thus, for example, the statutory immunity may apply to the intentional use of deadly force, if that force is justifiable [*Calvillo-Silva v. Home Grocery (1998) 19 Cal. 4th 714, 735, 80 Cal. Rptr. 2d 506, 968 P.2d 65]* .

[6] No Liability for Injuries Incurred During Gleaning

No cause of action arises against the owner, tenant, or lessee of land or premises for injuries to any person who has been expressly invited on that land or premises to glean agricultural or farm products for charitable purposes, unless the gleaner's injuries were caused by the gross negligence or willful and wanton misconduct of the owner, tenant, or lessee. However, this immunity does not apply if the owner, tenant, or lessee received any consideration for permitting the gleaning activity [*Civ. Code § 846.2*].

California Forms of Pleading and Practice--Annotated

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 421 PREMISES LIABILITY
PART II. LEGAL BACKGROUND
A. General Principles of Liability

36-421 California Forms of Pleading and Practice--Annotated § 421.12

§ 421.12 Persons Liable

[1] Requirement of Control

Liability to persons on the premises extends to owners as well as to those persons in possession or occupation of the premises who have the right to control the property. In determining who is liable in a specific situation, the crucial factor is the element of control [*Schwartz v. Helms Bakery Ltd. (1967) 67 Cal. 2d 232, 239, 60 Cal. Rptr. 510, 430 P.2d 68* ; *Marshall v. United Airlines (1973) 35 Cal. App. 3d 84, 88, 110 Cal. Rptr. 416* ; *see, e.g., Johnston v. De La Guerra Props., Inc. (1946) 28 Cal. 2d 394, 399-401, 170 P.2d 5* (landlord liable for dangerous condition on common area of leased premises and tenant liable for same dangerous condition on approach to restaurant because both exercised control over area); *Jones v. Deeter (1984) 152 Cal. App. 3d 798, 803-806, 199 Cal. Rptr. 825* (owner of sidewalk not liable for dangerous condition caused by roots of trees because sidewalk area was dedicated to city, and city had planted trees and habitually maintained them)].

The issue of who controls particular premises must be distinguished from the issue of whether a defendant is liable for injuries occurring on adjoining premises that are owned or possessed by another because the defendant has exercised some degree of control over those adjoining premises [*see § 421.12[5]*].

[2] Between Owners and Contractors

A contractor is not liable to third persons injured by dangerous conditions resulting from the contractor's negligent construction, if the owner discovers the defect after accepting the structure and if the defect is patent rather than latent [*Sanchez v. Swinerton & Walberg Co. (1996) 47 Cal. App. 4th 1461, 1471, 55 Cal. Rptr. 2d 415* ; *see also Jones v. P.S. Development Co., Inc. (2008) 166 Cal. App. 4th 707, 717-718, 82 Cal. Rptr. 3d 882]* .

[3] Condominium Owners and Associations

[a] Unit Owners

Condominium unit owners are tenants in common of the common areas [*White v. Cox (1971) 17 Cal. App. 3d 824,*

829, 95 Cal. Rptr. 259] . Typically, the individual unit owners delegate management of the common areas to a separate legal entity, such as a homeowner's association. Delegation of the control and management of the property to a separate legal entity does not, however, immunize the tenants in common, including owners of individual condominium units, from liability to third parties for tortious conduct [*Davert v. Larson (1985) 163 Cal. App. 3d 407, 412, 209 Cal. Rptr. 445* ; *see also Ruoff v. Harbor Creek Cmty. Ass'n (1992) 10 Cal. App. 4th 1624, 1628-1629, 13 Cal. Rptr. 2d 755]* .

[b] Condominium Associations

Condominium associations are generally held to the same standard of care as a landlord in areas of the premises over which they exercise control, and thus they may be liable for negligence in maintaining the common areas of the premises [*Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 499, 229 Cal. Rptr. 456, 723 P.2d 573* ; *White v. Cox (1971) 17 Cal. App. 3d 824, 830, 95 Cal. Rptr. 259]* . For example, an individual condominium owner had a cause of action against the condominium association for negligently failing to provide adequate lighting in the common areas that the association controlled and for wrongfully ordering the individual owner to remove the additional lighting that she had provided on her own initiative [*Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 501, 229 Cal. Rptr. 456, 723 P.2d 573]* .

[c] Directors of Condominium Associations

Individual directors of a condominium association who are specifically aware of a dangerous condition and unreasonably fail to take action to avoid harm while actually participating in decisions of the association are subject to liability in their personal capacity [*see Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 504-511, 229 Cal. Rptr. 456, 723 P.2d 573]* .

While a condominium association may be liable as a entity under normal negligence and premises liability principles, a stricter rule analogous to the "business judgment" rule applicable to corporate directors applies to resolve questions as to the individual liability of the condominium association directors when their conduct involves only ministerial decisions pertaining to repair and maintenance. Under this rule, if a duly constituted community association, upon reasonable investigation, in good faith, and with regard for the best interests of the association and its members, exercises discretion within the scope of its authority under the relevant statutes, covenants, and restrictions, to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise [*Lamden v. La Jolla Shores Clubdominium Homeowners Assn. (1999) 21 Cal. 4th 249, 265, 87 Cal. Rptr. 2d 237, 980 P.2d 940* ; *Ritter & Ritter, Inc. Pension & Profit Plan v. The Churchill Condominium Assn. (2008) 166 Cal. App. 4th 103, 122, 82 Cal. Rptr. 3d 389* ; *cf. Corp. Code § 7231*]. Thus, even though an association acts through its directors, the directors may escape personal liability under the rule described above even though the association may be liable for the same conduct under general negligence principles [*Ritter & Ritter, Inc. Pension & Profit Plan v. The Churchill Condominium Assn. (2008) 166 Cal. App. 4th 103, 123-124, 82 Cal. Rptr. 3d 389]* .

Under the circumstances described in *Civ. Code § 1365.7*, a volunteer officer or director of an association that manages an exclusively residential common interest development is immunized from civil tort liability in excess of specified insurance coverage. The immunity, however, is expressly limited to the volunteer officer or director and does not immunize condominium owners from liability for tortious acts or omissions in the management and control of commonly held property [*Ruoff v. Harbor Creek Cmty. Ass'n (1992) 10 Cal. App. 4th 1624, 1628-1629, 13 Cal. Rptr. 2d 755* ; *see Civ. Code §§ 1351(a), 1365.7*]. For purposes of this immunity, the scope of a volunteer officer's or director's duties includes the decision to conduct an investigation of the property for latent deficiencies before the expiration of the statute of limitations, and the decision whether to commence a civil action against a builder for design or construction defects [*Civ. Code § 1365.7(f)*]. Therefore, condominium owners may be liable to a third person who is injured as a result of a tort stemming from a defect in a common area [*Ruoff v. Harbor Creek Cmty. Ass'n (1992) 10 Cal. App. 4th 1624, 1628-1629, 13 Cal. Rptr. 2d 755* ; *Davert v. Larson (1985) 163 Cal. App. 3d 407, 412, 209 Cal.*

Rptr. 445] .

For further discussion of the statutory immunity of a volunteer officer or director of a condominium association, see Ch. 124, *Condominiums and Other Common Interest Developments* .

[4] Possessors

A possessor of land is one who occupies the premises with the intent to control those premises. Because possession brings with it the right to supervision and control, the duty owed to persons on the premises is owed by the possessor, whether the possessor is an owner or an occupier [*O'Shea v. Claude C. Wood Co. (1979) 97 Cal. App. 3d 903, 911, 159 Cal. Rptr. 125]* . A franchisee, a tenant, or a trespasser is held to the same standard of conduct toward third persons as an owner if the franchisee, tenant, or trespasser has a right to control the premises [*Rowland v. Christian (1968) 69 Cal. 2d 108, 116-119, 70 Cal. Rptr. 97, 443 P.2d 561* (tenant); *Palmquist v. Mercer (1954) 43 Cal. 2d 92, 103, 272 P.2d 26* (franchisee); *Yee Chuck v. Board of Trs. (1960) 179 Cal. App. 2d 405, 410-411, 3 Cal. Rptr. 825* (trespasser)]. However, the duty of an independent contractor working on the premises is to use reasonable care to prevent damage to persons whom the contractor may reasonably expect to be affected by his or her work [*Chance v. Lawry's, Inc. (1962) 58 Cal. 2d 368, 378, 24 Cal. Rptr. 209, 374 P.2d 185]* .

[5] Owners Not in Possession

[a] Landlords' Responsibility Not Abrogated by Signing Lease

An owner out of possession may also be liable to persons on the premises. The most prevalent examples of this are landlords who are liable to either a tenant or a third person [*Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 467, 213 Cal. Rptr. 213, 698 P.2d 116* ; *Krongos v. Pacific Gas & Elec. Co. (1992) 7 Cal. App. 4th 387, 392, 9 Cal. Rptr. 2d 124]* . Landlords cannot abrogate their responsibilities as landowners merely by signing a lease. At the time the lease is executed and on renewal, a landlord has a right to re-enter the property, has control of the property, and must inspect the premises to make the premises reasonably safe. However, the landlord's responsibility to inspect is limited to those matters that would have been disclosed by a reasonable inspection [*Mora v. Baker Commodities, Inc. (1989) 210 Cal. App. 3d 771, 781-782, 258 Cal. Rptr. 669]* .

For example, a landlord was liable for injuries suffered by a person making a delivery to a liquor store, who was attacked by a guard dog owned and kept on the premises by the tenant operating the store [*Portillo v. Aiassa (1994) 27 Cal. App. 4th 1128, 1132-1133, 32 Cal. Rptr. 2d 755]* . Before renewing the tenant's lease nearly a year before the attack, the landlord had not conducted an inspection of the premises, but knew that the tenant was keeping the dog at the store. A sign in the store warned of a guard dog on the premises, and a copy of a newspaper article about the dog's recent attack on a robber and its "rotten disposition" was posted near the door of the store [*Portillo v. Aiassa (1994) 27 Cal. App. 4th 1128, 1132-1133, 32 Cal. Rptr. 2d 755]* . Lack of actual knowledge of the dog's dangerous propensities was not a defense to liability because a reasonable inspection of the premises would have enabled the landlord to discover those propensities by, for example, asking why the sign had been posted or whether the newspaper article was accurate [*Portillo v. Aiassa (1994) 27 Cal. App. 4th 1128, 1134-1135, 32 Cal. Rptr. 2d 755]* .

The court in this case distinguished earlier cases requiring actual knowledge [*see, e.g.,* *Lundy v. California Realty (1985) 170 Cal. App. 3d 813, 821, 216 Cal. Rptr. 575* ; *Uccello v. Laudenslayer (1975) 44 Cal. App. 3d 504, 514, 118 Cal. Rptr. 741]* , because those cases involved family pets kept in single-family residences, and the risk of injury from a guard dog in a store open to the public is far greater. Moreover, although they may be necessary in some neighborhoods, guard dogs, unlike family pets, cannot be classified as "an important part of our way of life" [*Portillo v. Aiassa (1994) 27 Cal. App. 4th 1128, 1137-1138, 32 Cal. Rptr. 2d 755]* .

[b] Landlords' Liability to Tenants

The liability of a landlord to a tenant rests on general principles of negligence in the ownership and operation of property. It is no longer predicated on common law exceptions to the rule of nonliability, such as concealment of a known danger, an express covenant to repair, or a statutory duty to repair [*Golden v. Conway (1976) 55 Cal. App. 3d 948, 955, 128 Cal. Rptr. 69* ; *Brennan v. Cockrell Invs., Inc. (1973) 35 Cal. App. 3d 796, 800-801, 111 Cal. Rptr. 122]* . For further discussion and forms relating to the relationship between a landlord and tenant, see Ch. 334, *Landlord and Tenant: Claims for Damages* .

[c] Landlords' Liability to Nontenants

A landlord is liable for injuries to third persons on the premises at the invitation of a tenant if the injuries are due to a dangerous condition in an area over which the landlord exerts control. This is true whether or not the tenant also exerts control [*Johnston v. De La Guerra Props., Inc. (1946) 28 Cal. 2d 394, 399-401, 170 P.2d 5]* .

A landlord may also owe a duty to protect third persons from the acts of a tenant if the landlord has knowledge of those acts and retains some type of control over the premises. For example, a landlord owed a duty to a neighbor of a tenant to protect the neighbor from attack by the tenant's dog if the landlord knew of the dangerous propensity of the animal and could have refused to renew the month-to-month tenancy unless the tenant removed the dog [*Uccello v. Laudenslayer (1975) 44 Cal. App. 3d 504, 513-515, 118 Cal. Rptr. 741* ; *see Rosales v. Stewart (1980) 113 Cal. App. 3d 130, 135, 169 Cal. Rptr. 660* (cause of action stated if knowledge of dangerous activity preceded renewal of tenancy or tenancy could have been terminated prior to injury); *cf. Portillo v. Aiassa (1994) 27 Cal. App. 4th 1128, 1136-1138, 32 Cal. Rptr. 2d 755* (actual knowledge of dog's dangerous propensities not required if tenant commercial rather than residential and if reasonable inspection would have disclosed propensities); *Leakes v. Shamoun (1986) 187 Cal. App. 3d 772, 778, 232 Cal. Rptr. 171* (no cause of action stated if landlord was trying to evict tenants for nonpayment of rent at time of injury)]. However, evidence that a particular breed of dog generally has certain characteristics, by itself, does not establish that a landlord had actual knowledge that a tenant's dog had any dangerous propensities [*Chee v. Amanda Goldt Property Management (2006) 143 Cal. App. 4th 1360, 1371-1372, 50 Cal. Rptr. 3d 40]* .

In the absence of actual knowledge of the danger posed by a tenant's dog, a landlord cannot be held vicariously liable for an injury caused by the dog merely because the covenants, conditions, and restrictions (CC&Rs) governing the residence purport to make the landowner responsible for the acts and omissions of the owner's delegates. CC&Rs are private recorded restrictions on the use of property and, in the absence of some other established principle for imposing vicarious liability, cannot be used to impose tort liability for the conduct of another [*Chee v. Amanda Goldt Property Management (2006) 143 Cal. App. 4th 1360, 1375-1376, 50 Cal. Rptr. 3d 40]* .

Landlords who knew that their tenant both misused alcohol and possessed firearms were not liable to a visitor to the premises who was accidentally shot by the tenant. These two factors (alcohol misuse and gun possession) did not create a dangerous condition because there was no evidence that the tenant had ever harmed anyone due to either factor or had ever handled firearms unsafely while drunk [*Sturgeon v. Curnutt (1994) 29 Cal. App. 4th 301, 307, 34 Cal. Rptr. 2d 498* (rejecting analogy to tenant's vicious dog in *Uccello*)]. However, if a landlord has knowledge that a specific tenant poses a threat to others, such as when a landlord knows that the tenant has brandished firearms at others while threatening them with harm, the landlord has a duty to take reasonable precautions to prevent harm, although the precise scope of that duty will depend on the particular facts and may under the appropriate circumstances be satisfied by minimally burdensome measures such as calling the police [*see Barber v. Chang (2007) 151 Cal. App. 4th 1456, 1466-1469, 60 Cal. Rptr. 3d 760* ; *see generally § 421.15*].

A landlord's liability does not depend on the status of the third person, and the landlord may be liable to a trespasser injured on the land possessed by the tenant [*see Bisetti v. United Refrigeration Corp. (1985) 174 Cal. App. 3d 643, 648, 220 Cal. Rptr. 209]* .

A premises owner is not generally liable for an injury sustained by an employee of a tenant business that was caused by

the work conditions created by the tenant. In one case, the landowner was a large petroleum company, and the tenant was a facility that performed tests on the petroleum company's gasoline, although the tenant and the landowner were separate entities. The plaintiff alleged that he acquired a disease through toxic exposure to benzene while performing his work for the testing facility. The court of appeal held that the petroleum company could not be liable for failing to take steps to prevent the dangerous condition that caused the plaintiff's illness, a dangerous condition that did not exist independent of the tenant's business. The court pointed to the lack of evidence that the landowner had any control over the property at the time of the injury, had any knowledge of the dangerous testing methods used, had any right to inspect the premises or testing procedures, or had any ability to discover and remedy the hazard that caused the plaintiff's illness [*Laico v. Chevron U.S.A., Inc. (2004) 123 Cal. App. 4th 649, 670, 20 Cal. Rptr. 3d 307]* .

In situations in which a tenant in possession has defaulted on a lease, the tenant may lack the incentive to maintain the property in a safe condition. In recognition of this problem, a landlord that has instituted a successful unlawful detainer action has a duty to inspect the property that attaches upon entry of judgment in the unlawful detainer action, even if the tenant has not yet vacated the premises, and includes a duty to make subsequent inspections at reasonable intervals [*Stone v. Center Trust Retail Prop., Inc. (2008) 163 Cal. App. 4th 608, 613, 77 Cal. Rptr. 3d 556*]. However, the imposition of liability in such cases will still depend in part on whether reasonable inspections would have revealed the dangerous condition to the landlord [*see Stone v. Center Trust Retail Prop., Inc. (2008) 163 Cal. App. 4th 608, 614, 77 Cal. Rptr. 3d 556*].

In a case not involving a landlord-tenant relationship, the court of appeal held that a bank that purchased real property at a foreclosure sale owed no duty of care to a third party who was attacked by dogs on the property because when the attack occurred, the possessors of the property were refusing to vacate and were contesting the bank's unlawful detainer proceeding. Analogizing to existing dog-bite cases, the court concluded that under the undisputed facts in the record before it, the bank lacked actual knowledge of the danger posed by the dogs [*Martinez v. Bank of Am. (2000) 82 Cal. App. 4th 883, 891-892, 98 Cal. Rptr. 2d 576]* . Moreover, the bank also lacked the ability to prevent the attack, because the bank had no leasewith the possessors to use in leveraging removal of the dogs and would not obtain the right to directly and promptly control the premises until a judgment was obtained in the unlawful detainer action [*Martinez v. Bank of Am. (2000) 82 Cal. App. 4th 883, 892-893, 98 Cal. Rptr. 2d 576]* . The court also concluded that the bank owed no duty of care after considering the *Rowland v. Christian* factors for determining whether to impose a duty of care [*Martinez v. Bank of Am. (2000) 82 Cal. App. 4th 883, 894-897, 98 Cal. Rptr. 2d 576]* .

[6] Former Owners

As a general rule, the liability of a former owner of land ends with the transfer of possession and control of the land [*Preston v. Goldman (1986) 42 Cal. 3d 108, 110, 124-126, 227 Cal. Rptr. 817, 720 P.2d 476* ; *see Lorenzen-Hughes v. MacElhenny, Levy & Co. (1994) 24 Cal. App. 4th 1684, 1688, 30 Cal. Rptr. 2d 210]* . The rule applies even if the former owner was actively negligent in creating a dangerous condition on the land [*Preston v. Goldman (1986) 42 Cal. 3d 108, 115-119, 227 Cal. Rptr. 817, 720 P.2d 476* ; *see Lorenzen-Hughes v. MacElhenny, Levy & Co. (1994) 24 Cal. App. 4th 1684, 1687-1688, 30 Cal. Rptr. 2d 210]* .

The general rule does not apply, however, if the former owner was the contractor or builder of the entire property [*Sweeney v. Stone (1968) 265 Cal. App. 2d 693, 695-696, 71 Cal. Rptr. 497* ; *see Preston v. Goldman (1986) 42 Cal. 3d 108, 117 n.3, 227 Cal. Rptr. 817, 720 P.2d 476]* . Another exception applies if a seller knows of a dangerous condition on the land of which the buyer is unaware, and if the seller has reason to believe that the buyer will not discover this condition [*see Preston v. Goldman (1986) 42 Cal. 3d 108, 113 n.2, 126, 227 Cal. Rptr. 817, 720 P.2d 476* (approving application of Restatement (Second) of Torts § 353); *see also Lorenzen-Hughes v. MacElhenny, Levy & Co. (1994) 24 Cal. App. 4th 1684, 1688-1689, 30 Cal. Rptr. 2d 210* (applying Restatement (Second) of Torts § 353)]. Furthermore, the Supreme Court has implied that an exception to the general rule may apply in cases involving public property [*see Preston v. Goldman (1986) 42 Cal. 3d 108, 116, 227 Cal. Rptr. 817, 720 P.2d 476* (out-of-state case imposed liability on former owner of public property)].

[7] Owners or Possessors of Adjacent Property

A person is not liable for a defective or dangerous condition on property that the person does not own, possess, or control [*Isaacs v. Huntington Mem'l Hosp. (1985) 38 Cal. 3d 112, 134, 211 Cal. Rptr. 356, 695 P.2d 653]* . The concept of control is somewhat elastic and is not necessarily limited to premises that are owned or possessed by the person. Circumstances that would indicate sufficient control to make a person liable for conditions on adjacent property that the person does not possess or own include receiving a commercial advantage from the use of the adjacent property, knowing of its use, having some legal right to use it, passively encouragingits use, and attempting to affect or influence conditions on the adjacent property [*Southland Corp. v. Superior Court (1988) 203 Cal. App. 3d 656, 666-667, 250 Cal. Rptr. 57* ; *see also Swann v. Olivier (1994) 22 Cal. App. 4th 1324, 1333, 28 Cal. Rptr. 2d 23* (homeowners' association not liable to partygoer injured in ocean surf off private beach owned by association; idea of anyone's controlling seas and tides characterized as "ludicrous"); *but see Alcaraz v. Vece (1997) 14 Cal. 4th 1149, 1162-1166, 60 Cal. Rptr. 2d 448, 929 P.2d 1239* (rejecting contention that commercial benefit is required to impose liability and disapproving any contrary language in *Princess Hotels Int'l, Inc. v. Superior Court (1995) 33 Cal. App. 4th 645, 39 Cal. Rptr. 2d 457* , and *Swann v. Olivier (1994) 22 Cal. App. 4th 1324, 28 Cal. Rptr. 2d 23*)].

For example, the Supreme Court has held that a homeowner's conduct in mowing the grass on an adjoining strip of land and, after the plaintiff's injury, constructing a fence that enclosed the entire lawn, was sufficient to raise a triable issue of fact over whether the homeowner exercised control over the adjoining strip that would support a duty to protect or warn against the dangers presented by a broken cover to a utility main box [*Alcaraz v. Vece (1997) 14 Cal. 4th 1149, 1153, 60 Cal. Rptr. 2d 448, 929 P.2d 1239]* . The Court emphasized that if the defendant controlled the property on which the danger was present, the defendant could be liable even if the defendant did not own or control the instrumentality that caused the danger. Therefore, the fact that the defendant did not control the dangerous utility box did not necessarily preclude liability for failing to warn or protect persons on the land [*Alcaraz v. Vece (1997) 14 Cal. 4th 1149, 1156, 60 Cal. Rptr. 2d 448, 929 P.2d 1239]* .

In another case, a store owner may have had sufficient control over an adjoining parking lot, which the owner did not own or possess, to be liable for injuries suffered by customers attacked by loiterers in the lot, because parking space on the store's premises was inadequate and store customers regularly used the adjacent lot to park while shopping at the store, the store's lease authorized nonexclusive use of the lot for customer parking, the store owner knew that customers were parking in the adjacent lot and did not limit or discourage them from doing so, and store employees had called the police to remove the loiterers [*Southland Corp. v. Superior Court (1988) 203 Cal. App. 3d 656, 666-667, 250 Cal. Rptr. 57]* .

However, an owner or possessor of property is not liable for dangerous conditions on adjoining property if the owner or possessor has taken no action to influence or affect the condition of the adjoining property [*Donnell v. California W. Sch. of Law (1988) 200 Cal. App. 3d 715, 720, 246 Cal. Rptr. 199* ; *Lucas v. George T.R. Murai Farms, Inc. (1993) 15 Cal. App. 4th 1578, 1590-1591, 19 Cal Rptr. 2d 436]* . For example, a law school was not liable for injuries suffered by a plaintiff who left the law school's library, encountered someone breaking into a car on the street near the library, and was stabbed during a confrontation with the criminal [*Donnell v. California W. Sch. of Law (1988) 200 Cal. App. 3d 715, 720, 246 Cal. Rptr. 199]* . Similarly, farm owners were not liable to farm workers, employed by one of the farm owners, who were living in a camp on adjoining property and who were injured when their makeshift housing, which they lighted with candles, caught fire. One farm owner did not even know about the existence of the camp. Although a security service hired by the farm owners regularly patrolled the camp as well as the farm owners' property, the farm owners had never requested the service to patrol the camp. Allowing the farm workers to use water and toilet facilities at the farm owners' property and receive their mail there did not encourage the camp to exist [*Lucas v. George T.R. Murai Farms, Inc. (1993) 15 Cal. App. 4th 1578, 1590-1591, 19 Cal. Rptr. 2d 436]* .

A charter city, through a valid exercise of its police powers, may pass an ordinance that imposes a duty on landowners to keep adjacent public sidewalks in a safe condition, and it may impose liability on the property owner for injuries that

occur to a pedestrian if the landowner fails to do so [*Gonzales v. City of San Jose (2005) 125 Cal. App. 4th 1127, 1139, 23 Cal. Rptr. 3d 178* (upholding constitutionality and application of San Jose ordinance)].

For a form of allegations that the owner or possessor of property is liable for harm occurring on adjacent property, see *§ 421.77*.

[8] Owners of Easement Rights

The right of control that accompanies an easement interest in property is narrower than the right of control that accompanies fee ownership of real property. Therefore, the corresponding duty to third parties in managing the property interest that is imposed on an easement holder is also narrower in scope and must be tied to the reason for which the easement was granted [*Cody F. v. Falletti (2001) 92 Cal. App. 4th 1232, 1246, 112 Cal. Rptr. 2d 593]* . For example, an electric utility company may be liable, based on an easement granted specifically to maintain and operate power lines, if the injury is caused by the presence of the electrical fixtures for which the easement was granted [*see, e.g., Dunn v. Pacific Gas & Elec. Co. (1954) 43 Cal. 2d 265, 275, 272 P.2d 745]* .

In contrast, members of an incorporated property owners association that had an access easement over the streets within a large planned development subdivision were not liable for a dog attack that occurred on one of the streets when dogs escaped from the yard of one of the residents. In that case, the easement right of access over the roads had no relationship to the danger that caused the injury [*Cody F. v. Falletti (2001) 92 Cal. App. 4th 1232, 1242-1244, 112 Cal. Rptr. 2d 593]* .

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§ 421.13 Premises

The physical area encompassed by the term "premises" does not always coincide with the area that the invitor occupies, but is sometimes less orgreater. Premises includes such reasonable means of ingress and egress as an invitee has employed due to allurement or inducement, either express or implied [*Schwartz v. Helms Bakery Ltd. (1967) 67 Cal. 2d 232, 239, 60 Cal. Rptr. 510, 430 P.2d 68* ; *Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 25, 77 Cal. Rptr. 914]* . This is true even though the area is also used not only by invitees, but also by members of the general public [*Johnston v. De La Guerra Props., Inc. (1946) 28 Cal. 2d 394, 400-401, 170 P.2d 5]* . For example, street vendors may be liable for injuries sustained by a child in crossing the street to make a purchase if they do not exercise reasonable care for the child's safety in an area in the immediate vicinity of the truck [*Schwartz v. Helms Bakery Ltd. (1967) 67 Cal. 2d 232, 242, 243, 60 Cal. Rptr. 510, 430 P.2d 68* ; *Ellis v. Trowen Frozen Prods., Inc. (1968) 264 Cal. App. 2d 499, 503, 70 Cal. Rptr. 487* ; *but see Nevarez v. Thriftimart, Inc. (1970) 7 Cal. App. 3d 799, 806, 87 Cal. Rptr. 50* (not extending liability of street vendors to grocery store holding opening day carnival)].

Possessors, however, does not owe a duty to protect users in an area of egress and ingress against a risk that is obvious to both the possessors and the users, if the possessors can prove that they did not have sufficient control over the area to justify the imposition of the duty based on foreseeability of the type of accident suffered by the users [*see Gray v. America W. Airlines, Inc. (1989) 209 Cal. App. 3d 76, 84-85, 256 Cal. Rptr. 877]* .

The issue of what constitutes particular premises should be distinguished from the issue of whether a defendant is liable for injuries occurring on adjoining premises that are owned or possessed by another because the defendant has exercised some degree of control over those adjoining premises [*see § 421.12[7]*].

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§ 421.14 Duty to Maintain Premises in Safe Condition

[1] Dangerous Condition

An owner or possessor of premises who knows of, or by the exercise of reasonable care could discover, an artificial or natural condition on the premises that the possessor could foresee would expose invitees to an unreasonable risk, and who has no basis for believing that the invitees will discover the condition or realize the risk involved, has a duty to exercise ordinary care either to make the condition reasonably safe or to give a warning adequate to enable the invitees to avoid the harm [*Chance v. Lawry's, Inc. (1962) 58 Cal. 2d 368, 373, 24 Cal. Rptr. 209, 374 P.2d 185* ; *Austin v. Riverside Portland Cement Co. (1955) 44 Cal. 2d 225, 233, 282 P.2d 69]* .

A landlord engaged in the business of leasing dwellings is strictly liable in tort for injuries resulting from a latent defect in the premises, if the defect existed at the time the premises were let to the tenant [*Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 469, 213 Cal. Rptr. 213, 698 P.2d 116* ; for discussion of the factors involved in imposing strict liability, *see* Ch. 460, *Products Liability*]. A landlord may also be liable to a tenant for the breach of the duty to inspect for dangerous conditions that existed in the premises at the time the premises were leased [*Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 469, 213 Cal. Rptr. 213, 698 P.2d 116* ; for discussion of the factors involved in imposing liability on a landlord for the breach of this duty, *see* Ch. 334, *Landlord and Tenant: Claims for Damages*].

If the condition is brought about by natural wear and tear or by third persons, the possessor is not liable unless the possessor either has actual or constructive knowledge of the condition or has been able to discover it by the exercise of ordinary care [*Bridgman v. Safeway Stores, Inc. (1960) 53 Cal. 2d 443, 447, 2 Cal. Rptr. 146, 348 P.2d 696* ; *Olsen v. Roos-Atkins (1962) 208 Cal. App. 2d 259, 263, 25 Cal. Rptr. 190]* . An owner or possessor must make reasonable inspections of those portions of the premises open to invitees, and the absence of inspections within a particular period of time prior to an accident may warrant an inference that a person exercising reasonable care would have discovered the condition [*Ortega v. Kmart Corp. (2001) 26 Cal. 4th 1200, 1212-1213, 114 Cal. Rptr. 2d 470,36 P.3d 11* (jury question whether lack of inspection is sufficient to support liability); *Bridgman v. Safeway Stores, Inc. (1960) 53 Cal. 2d 443, 447, 2 Cal. Rptr. 146, 348 P.2d 696]* .

If a dangerous condition has been created by the negligence of the owner or possessor or his or her employee in the course of employment, knowledge of the condition is imputed to the owner or possessor [*Hatfield v. Levy Brothers (1941) 18 Cal. 2d 798, 806, 117 P.2d 841* ; *McKenney v. Quality Foods, Inc. (1957) 156 Cal. App. 2d 349, 352-353, 319 P.2d 448]* . Therefore, even though there is no failure to inspect, liability can be predicated on either negligence in creating a dangerous condition or negligence in failing to take precautions to protect an invitee from the dangerous condition [*Henderson v. McGill (1963) 222 Cal. App. 2d 256, 259, 34 Cal. Rptr. 897]* .

However, the court of appeal has specifically rejected the argument that a store is liable if the store's use of a particular business model creates a greater risk that a particular hazard will arise more frequently, but the store does not have knowledge or constructive knowledge of the dangerous condition that actually caused the injury. In that case, a department store was not liable to a patron who slipped on a french fry merely because the store leased space to a fast food restaurant and allowed patrons to take food and drink from the restaurant into the department store, absent a showing that the store knew or should have known of the french fry in time to prevent the injury [*Moore v. Wal-Mart Stores, Inc. (2003) 111 Cal. App. 4th 472, 478-479, 3 Cal. Rptr. 3d 813]* .

[2] Obvious Danger

Courts have traditionally stated that an owner or possessor is not liable for injury to an invitee resulting from a danger that is obvious or that could have been observed by the exercise of reasonable care [*Florez v. Groom Dev. Co. (1959) 53 Cal. 2d 347, 355, 1 Cal. Rptr. 840, 348 P.2d 200* ; *but see Chance v. Lawry's, Inc. (1962) 58 Cal. 2d 368, 373-374, 24 Cal. Rptr. 209, 374 P.2d 185* (invitee not obliged to make critical examination of area, but may assume possessor exercised due care in inspection and took proper precautions for safety); *Henderson v. McGill (1963) 222 Cal. App. 2d 256, 260-265, 34 Cal. Rptr. 897* (liability possible if invitee's attention is likely to be distracted from obvious danger)].

Under the negligence standard of *Rowland v. Christian*, however, it is a factual issue whether the possessor acted reasonably and whether the entrant used the property reasonably in view of the obvious danger. In other words, under the *Rowland* approach, the obviousness of the danger would appear to be only one factor in determining whether or not a duty of care was owed and whether or not that duty was breached under the circumstances [*see Rowland v. Christian (1969) 69 Cal. 2d 108, 112-113, 70 Cal. Rptr. 97, 443 P.2d 561]* .

The obviousness of a danger may obviate the duty to warn of its existence, because the condition itself serves as a warning [*see Osborn v. Mission Ready Mix (1990) 224 Cal. App. 3d 104, 122, 273 Cal. Rptr. 457* ; *Danieley v. Goldmine Ski Assocs., Inc. (1990) 218 Cal. App. 3d 111, 121-122, 266 Cal. Rptr. 749]* . Nevertheless, if it is foreseeable that the danger may cause injury despite its being obvious (for example, if necessity requires persons to encounter it), a duty to remedy the danger may exist, and the breach of that duty may in turn form the basis for liability if the breach of duty was the proximate cause of an injury [*Osborn v. Mission Ready Mix (1990) 224 Cal. App. 3d 104, 122, 273 Cal. Rptr. 457* ; *see also Martinez v. Chippewa Enters., Inc. (2004) 121 Cal. App. 4th 1179, 1184-1185, 18 Cal. Rptr. 3d 152* ; *Donohue v. San Francisco Hous. Auth. (1993) 16 Cal. App. 4th 658, 665-666]* .

For a form of affirmative defense allegation of plaintiff's comparative negligence regarding obvious danger, see *§ 421.100*.

[3] Trivial Defects

The duty of care imposed on a property owner, even one with actual notice, does not require the repair of minor defects. The trial court may determine "triviality" as a matter of law, rather than submitting the issue to a jury [*Caloroso v. Hathaway (2004) 122 Cal. App. 4th 922, 929, 19 Cal. Rptr. 3d 254* (walkway crack that created rise less than half inch high was trivial defect as matter of law); *Ursino v. Big Boy Rests. (1987) 192 Cal. App. 3d 394, 397-399, 237 Cal. Rptr. 413* (section of concrete sidewalk raised less than one inch above adjoining section was trivial defect as matter of law); *see also Gov. Code § 830.2* (trivial defect defense as applicable to governmental entity defendants)]. If determined

as a matter of law, however, a reviewing court is not bound by the trial court's conclusions [*see Kasparian v. AvalonBay Communities, Inc. (2007) 156 Cal. App. 4th 11, 28-30, 66 Cal. Rptr. 3d 885]* .

While some court opinions have treated triviality of the defect as an affirmative defense to be asserted by a landowner [*see Ursino v. Big Boy Rests. (1987) 192 Cal. App. 3d 394, 398, 237 Cal. Rptr. 413]* , other court opinions have treated the lack of triviality as an element of the cause of action to be pleaded and proved by the plaintiff [*Kasparian v. AvalonBay Communities, Inc. (2007) 156 Cal. App. 4th 11, 27, 66 Cal. Rptr. 3d 885]* . Even if treated as an element of the cause of action, a defendant may of course argue triviality of defect to defeat a plaintiff's claim.

[4] Effect of Comparative Negligence

[a] Inclusion of Assumption of Risk

The California Supreme Court has replaced the all-or-nothing rule of contributory negligence with a rule of comparative negligence, under which liability for damages is apportioned in accordance with the fault of the persons whose negligence caused the injuries. Under comparative negligence, a plaintiff's contributory negligence does not bar recovery, but damages awarded must be diminished in proportion to the amount of negligence attributable to the plaintiff [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

Assumption of the risk, as a variant of contributory negligence, has been subsumed under the general process of assessing liability in proportion to fault. A plaintiff assumes the risk if the plaintiff unreasonably undertakes to encounter a specific known risk imposed by the defendant's negligence. Although the plaintiff may encounter that risk in a prudent manner, the plaintiff's conduct is in reality a form of contributory negligence [*Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 826, 119 Cal. Rptr. 858, 532 P.2d 1226]* . Before *Li*, courts viewed as contributory negligence the failure of a user of premises to exercise ordinary care to discover obvious dangers, and they viewed as assumption of the risk the act of a user who encountered a risk despite knowing the risk and appreciating its magnitude [*see Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 33-34, 77 Cal Rptr. 914]* .

[b] Supreme Court's Attempt in *Knight v. Jewett* to Resolve Conflict Regarding Assumption of Risk

After *Li*, courts of appeal disagreed regarding the proper application of assumption-of-the-risk principles in light of the adoption of comparative fault [*compare Ordway v. Superior Court (1988) 198 Cal. App. 3d 98, 102-107, 243 Cal. Rptr. 536* (doctrine of reasonable implied assumption of risk provides complete defense to action for personal injuries); *with Segoviano v. Housing Auth. (1983) 143 Cal. App. 3d 162, 169-175, 191 Cal. Rptr. 578* (implied reasonable assumption of risk is not defense to liability nor does it reduce plaintiff's recovery under comparative fault principles)].

In *Knight v. Jewett* [*Knight v. Jewett (1992) 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* , the California Supreme Court undertook to resolve the question, but rendered a decision without a clear majority. The lead opinion in *Knight* held that if the defendant has not breached any duty of care toward the plaintiff, the plaintiff is barred from recovery under "primary assumption of the risk." If the defendant has breached a duty toward the plaintiff, the plaintiff's damages are apportioned by comparative fault principles under "secondary assumption of the risk" [*Knight v. Jewett (1992) 3 Cal. 4th 296, 315-316, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (opinion by George, J., with Lucas, C.J., and Arabian, J. concurring in the analysis, and Mosk, J. concurring "generally" with lead opinion's approach)]. Therefore, it appears that although a defendant may argue that he or she is not liable because the danger was obvious, once it has been established that the defendant has breached a duty of care toward the plaintiff, the court will apply the rule of comparative negligence under secondary assumption of the risk and reduce any damages awarded in proportion to the amount of negligence attributable to the plaintiff [*see Curties v. Hill Top Developers, Inc. (1993) 14 Cal. App 4th 1651, 1656, 18 Cal. Rptr. 2d 445* ; *see also Donohue v. San Francisco Hous. Auth. (1993) 16 Cal. App. 4th 658, 665-666]* .

Three justices who did not join in the lead opinion (Kennard, J., Baxter, J., and Panelli, J.) supported an implied consent approach based on the subjective knowledge of the plaintiff. Under this approach, a plaintiff is barred from recovery if the plaintiff is shown to have "truly appreciated" and made a "considered and deliberate choice" to encounter the risk, as demonstrated by the obvious nature of the risk. However, if the plaintiff was "merely careless and could not have truly appreciated and voluntarily consented to the risk," the plaintiff's damages are reduced in proportion to the amount of negligence attributable to the plaintiff [*see Knight v. Jewett (1992) 3 Cal. 4th 296, 332, 11 Cal. Rptr. 2d 2, 834 P.2d 696* (dissenting opinion by Kennard, J.)].

Although the lead opinion in *Knight* was a plurality opinion, a unanimous Supreme Court has subsequently reaffirmed that the basic principles of that lead opinion are the controlling law [*see Cheong v. Antablin (1997) 16 Cal. 4th 1063, 1067, 68 Cal. Rptr. 2d 859, 946 P.2d 817]* .

For further discussion, see Ch. 380, *Negligence* .

[c] Primary and Secondary Assumption of Risk Versus Consent-Based Analysis

Decisions after *Knight* have, almost without exception, adopted and applied the lead opinion's doctrine of primary versus secondary assumption of the risk. For example, an owner and operator of a ski resort was not liable to a skier who skied over the edge of a ravine and fell onto the rocks below. The skier had seen a gap between two groups of trees, thought the gap was a place to cross over to another ski run, skied toward the gap, realized too late that the run bordered a ravine filled with boulders, and was unable to stop. The court held that primary assumption of the risk barred recovery because the defendant had no duty to protect the plaintiff against risks inherent in the sport of skiing (such as trees, rocks, rough terrain, or ravines) by, in effect, changing the entire mountain to ensure the plaintiff's safety [*O'Donoghue v. Bear Mountain Ski Resort (1994) 30 Cal. App. 4th 188, 192-193, 35 Cal. Rptr. 2d 467]* .

Even under the doctrine of primary assumption of the risk, a defendant has a duty to use due care not to increase the risks to a sports participant over and above those inherent in the sport [*Knight v. Jewett (1992) 3 Cal. 4th 296, 315-316, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *see, e.g., Huffman v. City of Poway (2000) 84 Cal. App. 4th 975, 995, 101 Cal. Rptr. 2d 325* (premises owner had duty to avoid making stage with trapdoors used by actors more dangerous by failing to include proper markings or warning devices)]. However, this duty is generally imposed only on those persons who have some organized relationship with the sports participant and the sporting activity [*see Parsons v. Crown Disposal Co. (1997) 15 Cal. 4th 456, 481, 63 Cal. Rptr. 2d 291, 936 P.2d 70]* .

In one case, for example, the plaintiff was skateboarding in the driveway of the defendants' home when he tripped and impaled himself on a pipe inside a planter located in the driveway. Although the plaintiff argued that the defendants increased the risk of his injury by concealing a pipe in the planter, the court of appeal held that under the doctrine of primary assumption of the risk, the defendants did not have a duty to the plaintiff not to increase the risks to the plaintiff while he was skateboarding. Unlike a commercial facility that might provide a course for skateboarding, the defendants did not hold out their driveway as an appropriate or safe place to skateboard and did not otherwise have any organized relationship with the plaintiff's skateboarding [*Calhoon v. Lewis (2000) 81 Cal. App. 4th 108, 116-117, 96 Cal. Rptr. 2d 394]* .

A case applying secondary assumption of the risk involved the liability of the owner of an apartment complex to a tenant who slipped and fell on a sloping lawn. In that case, the court held that the plaintiff's recovery was not completely barred because the defendant had a duty of care to the plaintiff to eliminate dangerous conditions on the defendant's property [*Curties v. Hill Top Developers, Inc. (1993) 14 Cal. App 4th 1651, 1655-1656, 18 Cal. Rptr. 2d 445* ; *see also Bush v. Parents Without Partners (1993) 17 Cal. App. 4th 322, 329, 21 Cal. Rptr. 2d 178* (secondary assumption of risk applied because premises owner and dance sponsor breached duty to plaintiff by applying soap flakes to make dance floor slippery)].

For a form of affirmative defense allegation of the plaintiff's comparative negligence due to assumption of the risk, see *§ 421.101*. For further discussion of comparative negligence and assumption of the risk, see Ch. 380, Negligence.

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§ 421.15 Duty to Control Conduct of Third Persons

[1] Persons to Whom Duty Owed

An owner or possessor of premises who holds the premises out to the public for a business purpose has a duty to persons on the premises for that purpose to protect them from harm caused by the acts of third persons [*Taylor v. Centennial Bowl, Inc. (1966) 65 Cal. 2d 114, 121, 52 Cal. Rptr. 561, 416 P.2d 793* ; *Musgrove v. Ambrose Props. (1978) 87 Cal. App. 3d 44, 51, 150 Cal. Rptr. 722* ; *but see Kentucky Fried Chicken of Cal., Inc. v. Superior Court (1997) 14 Cal. 4th 814, 817, 59 Cal. Rptr. 2d 756, 927 P.2d 1260* (shopkeeper has no duty to comply with unlawful demand of armed robber to avoid increasing risk of harm to patrons)]. The effect of *Rowland v. Christian* [*Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561]* was not to abolish this duty, but merely to subsume it in the more comprehensive duty to act as a reasonable person to those coming on the premises [*Wingard v. Safeway Stores, Inc. (1981) 123 Cal. App. 3d 37, 41, 176 Cal. Rptr. 320]* . It appears that even under the factors set forth in *Rowland*, there must be a special relationship between the possessor and the injured person. Therefore, although the duty exists between the proprietor of a business and a patron of that business, and between a landlord and a tenant, at least one court has held that it does not exist between a landlord and the social guest of a tenant [*Totten v. More Oakland Residential Housing, Inc. (1976) 63 Cal. App. 3d 538, 541-542, 63 Cal. App. 3d 538, 542, 134 Cal. Rptr. 29* ; *see also Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 675, 25 Cal. Rptr. 2d 137, 863 P.2d 207* (duty of shopping mall owner extending to employees of mall tenants); *but see § 421.12[5]* for different rule concerning liability for a dangerous condition].

For a form of allegations regarding the failure of an owner or possessor of premises to protect persons on the premises from the acts of third parties, see *§§ 421.72* and *421.73*.

[2] Foreseeability and Prior Similar Incidents Rule

[a] Duty to Protect Against Reasonably Foreseeable Risks

The duty to control third persons is not absolute, because an owner or possessor of land is not an insurer of the safety of persons on the premises. It is a duty of reasonable care to protect against known or reasonably foreseeable risks. An

owner or possessor is not required to take precautions against the conduct of third persons, if there is no reason to anticipate that conduct [*Riley v. Marcus (1981) 125 Cal. App. 3d 103, 109, 177 Cal. Rptr. 827* (intruder raping tenant in apartment); *Jamison v. Mark C. Bloome Co. (1980) 112 Cal. App. 3d 570, 577, 169 Cal. Rptr. 399* (vandals overturning oil barrels)].

Criminal conduct by a third party must generally be foreseeable before a duty to take preventative measures may be imposed on a landowner or a person in possession of the premises [*see* *Delgado v. Trax Bar & Grill (2005) 36 Cal. 4th 224, 237, 30 Cal. Rptr. 3d 145, 113 P.3d 1159]* . However, the degree of foreseeability needed to impose a particular duty to prevent harm varies, depending on the burden of imposing the preventative measures suggested by the plaintiff in the particular case [*Delgado v. Trax Bar & Grill (2005) 36 Cal. 4th 224, 243-244* , *113 P.3d 1159]* . A heightened degree of foreseeability is necessary to impose a duty on a defendant to take great or onerous preventative security measures, which would include a duty to provide security guards, install bright lighting, activate and monitor security cameras, provide periodic "walk-throughs" with existing personnel, or provide stronger fencing. To establish this heightened degree of foreseeability, a plaintiff must provide evidence of prior similar criminal incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location [*Delgado v. Trax Bar & Grill (2005) 36 Cal. 4th 224, 243-244* , *113 P.3d 1159]* . By contrast, a lesser degree of foreseeability, one not requiring evidence of prior similar incidents on or near the premises, is all that is required if the plaintiff seeks to impose a duty to take preventative measures that are simple or create only a minimal burden on the defendant [*Delgado v. Trax Bar & Grill (2005) 36 Cal. 4th 224, 243-244 & n.24* , *30 Cal. Rptr. 3d 145, 113 P.3d 1159]* .

To prove foreseeability, all that is required is proof of prior similar incidents, not proof of prior identical incidents [*Claxton v. Atlantic Richfield Co. (2003) 108 Cal. App. 4th 327, 339, 133 Cal. Rptr. 2d 425]* . For example, a patron assaulted at a gas station provided substantial evidence of prior violent crime on the premises, even though his assault was racially motivated and the earlier criminal activity may not have been. The evidence showed that the gas station had been the site of many recent robberies and attacks and that violent gang activity was rampant on the premises and in the neighborhood [*Claxton v. Atlantic Richfield Co. (2003) 108 Cal. App. 4th 327, 338-339, 133 Cal. Rptr. 2d 425]* .

The requirements for establishing premises liability based on the foreseeability of third-party criminal conduct cannot be avoided by recasting the claim as one based on another theory of negligence liability, such as an action for negligent failure toproperly train employees [*Alvarez v. Jacmar Pac. Pizza Corp. (2002) 100 Cal. App. 4th 1190, 1212, 122 Cal. Rptr. 2d 890]* .

[b] Scope of Duty to Take Precautions

As described in § 421.15[2][a], the degree of foreseeability affects the scope of the duty to take precautions [*see* *Delgado v. Trax Bar & Grill (2005) 36 Cal. 4th 224, 243-244* & n.24, *30 Cal. Rptr. 3d 145, 113 P.3d 1159]* . An owner or possessor does not have a duty to provide burdensome or highly expensive protection, such as security guards, unless the risk of injury from the criminal acts of third persons is highly foreseeable. Establishing this high degree of foreseeability requires a showing of prior similar incidents of crime on the owner's or possessor's premises [*Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 679, 25 Cal. Rptr. 2d 137, 863 P.2d 207]* .

This high degree of foreseeability also applies to noncriminal acts of third persons, such as so-called "curb jumping" cases, in which a patron of a business is struck by a car that jumps a curb and comes onto the sidewalk. In these cases, the owner of the business premises generally is not liable because such accidents are insufficiently likely, as a matter of law, if all of the following conditions are met: the business has provided both curbs and wheel stops, the parking lot design is typical of most businesses and meets local standards and regulations, there were no prior similar incidents, and nothing required customers to remain in a fixed location adjacent to the parking area. For example, a convenience store whose parking lot had a raised curb and concrete wheel stops did not have a duty to install metal posts at the end of each parking space, because imposing such a duty would be unreasonably burdensome in the absence of any prior similar incidents [*Jefferson v. Qwik Korner Mkt., Inc. (1994) 28 Cal. App. 4th 990, 995-996, 34 Cal. Rptr. 2d 171]* .

The status and resources of the premises owner may also affect the scope of the duty to take precautions. For example, one court of appeal, following the reasoning in *Ann M. v. Pacific Plaza Shopping Center*, held that three family members who owned a single condominium unit and the four-member condominium association had no duty to the unit's tenant, who was raped in the unit by an intruder, to install increased security measures in the unit or the building, because no prior similar incidents made the rape foreseeable. The court noted that providing greatly increased security would be as burdensome for the defendants as providing security guards would be for the owner of a large shopping center or apartment building [*Pamela W. v. Millsom (1994), 25 Cal. App. 4th 950, 958-959, 30 Cal. Rptr. 2d 690]* .

However, in determining whether to impose a duty of care under the particular circumstances of the case, a lesser degree of foreseeability is required if simple means could prevent the harm [*Delgado v. Trax Bar & Grill (2005) 36 Cal. 4th 224, 243-244* & n.24, *30 Cal. Rptr. 3d 145, 113 P.3d 1159* ; *Vasquez v. Residential Invs., Inc. (2004) 118 Cal. App. 4th 269, 286, 12 Cal. Rptr. 3d 846* ; *see, e.g., Barber v. Chang (2007) 151 Cal. App. 4th 1456, 1466-1469, 60 Cal. Rptr. 3d 760* (landlord with knowledge that tenant had brandished shotgun while voicing threats at others on property had duty to take some protective measures, although measures required under circumstances of case was for determination of trial court on remand)].

In one case, for example, a landlord had a duty to replace a glass pane in the front door of an apartment because the burden to make the replacement was minimal and the risk of harm sufficiently foreseeable. The tenants had previously complained to the landlord that the missing pane was a security risk, an intruder had made at least one aborted attempt to enter the apartment, and there had been other reported assaults in other apartments in the building [*Vasquez v. Residential Invs., Inc. (2004) 118 Cal. App. 4th 269, 286-287, 12 Cal. Rptr. 3d 846* ; *see also Ambriz v. Kelegian (2007) 146 Cal. App. 4th 1519, 1534-1535, 53 Cal. Rptr. 3d700* (requiring apartment complex owners to maintain existing outside gates and locks in working condition)].

In another case, the court of appeal held that the owners of a large apartment complex had a duty of care either to move existing security gates so that they provided protection around the leasing office and its adjacent parking lot, which was used as an overflow lot for nightly parking by tenants, or to install a similar gate around that area, which according to evidence would require a minor gate extension over a small area [*Tan v. Arnel Management Co. (2009) 170 Cal. App. 4th 1087, 1098-1100, 88 Cal. Rptr. 3d 754]* . Because the court concluded that these security measures proposed by plaintiff would not be very burdensome, the court held that heightened foreseeability of the attempted carjacking that resulted in serious injury to plaintiff was not required. Therefore, evidence of three violent assaults in ungated parking areas on the apartment grounds in the two years prior to plaintiff's assault was sufficient to meet plaintiff's burden of showing a reasonably foreseeable risk of violent criminal assaults on the property, even though his attack involved a gun and the other violent assaults did not [*Tan v. Arnel Management Co. (2009) 170 Cal. App. 4th 1087, 1099-1101, 88 Cal. Rptr. 3d 754*].

[c] Increase in Plaintiff's Burden of Proof

The California Supreme Court described its decision in *Ann M. v. Pacific Plaza Shopping Center* as a "refinement" of an earlier decision, *Isaacs v. Huntington Memorial Hospital* [*Isaacs v. Huntington Mem'l Hosp. (1985) 38 Cal. 3d 112, 130-131, 211 Cal. Rptr. 356, 695 P.2d 653]* , which held that prior similar incidents were not required to establish any degree of foreseeability and that foreseeability was determined in light of the totality of the circumstances [*Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 678, 25 Cal. Rptr. 2d 137, 863 P.2d 207]* . It appears that the holding of *Ann M.* creates a more onerous burden of proof for plaintiffs seeking to recover from property owners for injuries caused by the criminal acts of third parties. According to the Court in *Ann M.*, assaults, purse snatchings, and bank robberies, which the plaintiff claimed had previously occurred on the premises, were not sufficiently similar to the violent rape of the plaintiff to satisfy the prior similar incidents rule, nor were the presence of transients loitering on the premises and the high statistical rate of violent crime in the area where the premises were located [*Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 679-680, 25 Cal. Rptr. 2d 137, 863 P.2d 207]* .

Subsequent to the opinion in *Ann M.*, the California Supreme Court held in *Sharon P. v. Arman, Ltd.* that neither the owner of a commercial building nor the parking services company owed a legal duty of care to prevent a sexual assault on the plaintiff in the building's underground parking garage [*Sharon P. v. Arman, Ltd. (1999) 21 Cal. 4th 1181, 1185, 91 Cal. Rptr. 2d 35, 989 P.2d 121]* . Relying extensively on their earlier opinion in *Ann M.*, the Court held as a matter of law that the occurrence of a violent third-party sexual assault was not sufficiently foreseeable to impose a duty of care under the circumstances [*Sharon P. v. Arman, Ltd. (1999) 21 Cal. 4th 1181, 1191, 91 Cal. Rptr. 2d 35, 989 P.2d 121]* . In *Sharon P. v. Arman, Ltd.*, no assaults had occurred in the parking garage in the preceding ten years, and although numerous bank robberies had occurred in the bank on the ground floor of the building, the Court concluded that these incidents were not sufficiently similar to the sexual assault on the plaintiff to establish the requisite foreseeability [*Sharon P. v. Arman, Ltd. (1999) 21 Cal. 4th 1181, 1191, 91 Cal. Rptr. 2d 35, 989 P.2d 121]* . In addition, although the plaintiff provided police statistics of criminal activity, including sexual assaults, in the surrounding 50-block area for the 15 months prior to the attack in question, she provided no evidence showing the proximity of these crimes to the parking garage [*Sharon P. v. Arman, Ltd. (1999) 21 Cal. 4th 1181, 1198, 91 Cal. Rptr. 2d 35, 989 P.2d121]* . The Court also specifically rejected the argument that underground parking garages were so inherently dangerous that a duty of care to provide security measures exists even in the absence of prior similar incidents [*Sharon P. v. Arman, Ltd. (1999) 21 Cal. 4th 1181, 1191, 91 Cal. Rptr. 2d 35, 989 P.2d 121* ; *see also Lopez v. Baca (2002) 98 Cal. App. 4th 1008, 1017, 120 Cal. Rptr. 2d 281* (plaintiff failed to provide evidence that nightclubs and bars, including those violating statutes prohibiting payment for solicitation of beverages, are inherently dangerous)].

One court of appeal, citing *Ann M. v. Pacific Plaza Shopping Center*, has held that the owners of a condominium unit and the condominium association had no duty to provide increased security measures to protect the unit's tenant, who was raped in the unit by an intruder, because neither the plaintiff nor the defendants were aware of any specific criminal acts in the vicinity, other than a daytime burglary of the unit upstairs [*Pamela W. v. Millsom (1994), 25 Cal. App. 4th 950, 953, 959, 30 Cal. Rptr. 2d 690]* .

In another case, the California Supreme Court held that neither a child care facility nor the owner of the premises owed a duty of care to protect against the criminal actions of a man who intentionally drove his car through a four-foot-high chain link fence that surrounded a playground, killing two children [*Wiener v. Southcoast Childcare Ctrs., Inc. (2004) 32 Cal. 4th 1138, 1141-1142, 12 Cal. Rptr. 3d 615, 88 P.3d 517]* . The Court in that case held that the foreseeability of the injury-causing conduct had to be analyzed under the *Ann M.* test for determining the foreseeability of third-party criminal conduct, and not under the less stringent test for foreseeability that would be used in a case of ordinary negligence involving a "curb-jumping" accident. Under the *Ann M.* standard, the Court concluded, the criminal assault that occurred was unforeseeable, given the absence of any prior acts of violence at the child care center, or at any other similar business in the area, and the complete impossibility of anticipating the driver's outrageous conduct [*Wiener v. Southcoast Childcare Ctrs., Inc. (2004) 32 Cal. 4th 1138, 1150, 12 Cal. Rptr. 3d 615, 88 P.3d 517]* .

Absent circumstances showing extraordinary foreseeability, a landlord owes no duty to existing tenants not to rent to suspected gang members, nor to screen the criminal records of suspected gang members before renting. The California Supreme Court has concluded that recognition of such a duty would place landlords in a position in which they would tend to deny rentals to those who fit a perceived profile for gang membership, likely leading to potential liability for racial, ethnic, or other types of illegal discrimination [*Castaneda v. Olsher (2007) 41 Cal. 4th 1205, 1216-1217, 63 Cal. Rptr. 3d 99, 162 P.3d 610]* . While it is unclear what evidence would support a showing of "extraordinary foreseeability," the Court concluded that mere suspicion that a potential renter was a gang member was insufficient to meet this test [*Castaneda v. Olsher (2007) 41 Cal. 4th 1205, 1218, 63 Cal. Rptr. 3d 99, 162 P.3d 610]* . Having rented to a tenant, however, a landlord may have a duty to evict when the threat of violence is highly foreseeable, although a plaintiff would have to establish that it was highly foreseeable that the particular tenant sought to be evicted, or guests of that tenant, would commit violence against other tenants, as demonstrated by the behavior of that particular tenant as reported to or observed by the landlord or his or her agents [*Castaneda v. Olsher (2007) 41 Cal. 4th 1205,*

1221, 63 Cal. Rptr. 3d 99, 162 P.3d 610] .

[d] Satisfying Duty to Control Third Persons if Risk of Injury Not Highly Foreseeable

If the risk of injury is less than highly foreseeable, an owner or possessor could satisfy the duty to control the conduct of third persons by expressly prohibiting the anticipated conduct, constructing impediments, repairing a defective condition, or giving oral or written warnings [*see, e.g.,* *Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 499-503, 229 Cal. Rptr. 456, 723 P.2d 573* (providing adequate lighting); *Vasquez v. Residential Invs., Inc. (2004) 118 Cal. App. 4th 269, 286-287, 12 Cal. Rptr. 3d 846* (replacement of missing glass pane in apartment door); *Kwaitkowski v. Superior Trading Co. (1981) 123 Cal. App. 3d 324, 333, 176 Cal. Rptr. 494* (repair of defective lock); *Musgrove v. Ambrose Props. (1978) 87 Cal. App. 3d 44, 50, 150 Cal. Rptr. 722* (posting signs prohibiting bicycle riding); *Barker v. Wah Low (1971) 19 Cal. App. 3d 710, 721, 97 Cal. Rptr. 85* (erecting barrier to prevent car from jumping guard rail); *Taylor v. Centennial Bowl, Inc. (1966) 65 Cal. 2d 114, 124, 52 Cal. Rptr. 561, 416 P.2d 793* (warning)]. However, a warning does not satisfy the duty unless it is adequate to enable the person to avoid the harmful conduct [*Taylor v. Centennial Bowl, Inc. (1966) 65 Cal. 2d 114, 118-124, 52 Cal. Rptr. 561, 416 P.2d 793* (warning patron of bar not to enter parking lot because "that goofball is out there" as not adequate to protect patron from violent assault)].

Additionally, under the appropriate circumstances, a lack of sufficient foreseeability may preclude the imposition of civil liability for the criminal acts of third parties, even in the absence of lesser security precautions such as those already discussed. For example, in a case brought by the victim of a sexual assault that occurred in an underground parking garage, the California Supreme Court refused to impose a duty on the owners and operators of the garage to provide improved lighting and maintenance, operational surveillance cameras, and periodic walk-throughs by existing personnel, because there had not been any prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that particular parking garage [*Sharon P. v. Arman, Ltd. (1999) 21 Cal. 4th 1181, 1195-1196, 91 Cal. Rptr. 2d 35, 989 P.2d 121* ; *see also* *Lopez v. Baca (2002) 98 Cal. App. 4th 1008, 1017-1018* & n.8, *120 Cal. Rptr. 2d 281* (although nightclub voluntarily provided security guard on weekends, nightclub did not have duty to provide guard on week nights in absence of prior acts of violence on premises)].

In another case, the court of appeal held that a restaurant had no duty to protect against a murder that took place on its premises, even though the murderer had gotten into a fight on the premises earlier in the evening with the patron that he eventually killed. In that case, in which the murderer and his companions had left, but made vague threats about returning, it was unforeseeable that the earlier verbal and physical altercation would lead to the departed party returning with a gun to shoot the other patron. Any duty owed to the other patron was fulfilled when, after the initial altercation, the restaurant called the police, who arrived at the scene and then left when they determined that the fight was over. Also, three earlier violent incidents on the premises in the previous two and a half years did not constitute prior similar incidents, because those incidents were dissimilar in nature to the attack on the other patron[*Alvarez v. Jacmar Pac. Pizza Corp. (2002) 100 Cal. App. 4th 1190, 1210-1212, 122 Cal. Rptr. 2d 890]* .

The court of appeal in another case held that the defendants were not liable to the plaintiff, who reported to a clerk at a fast-food restaurant, and to a mall security guard who was standing in line with her, that a man outside the restaurant had been eying her and making allegedly suggestive facial expressions. When the security guard and clerk looked toward where the man had been, however, the man could not be seen in the area. Subsequently, the man sexually assaulted the plaintiff in the restaurant's restroom. The court of appeal concluded that in the absence of a more definite threat beyond the plaintiff's vague suspicions, the defendants could not have foreseen the sexual assault and were under no duty to take further steps to protect the plaintiff under the circumstances [*Roe v. McDonald's Corp. (2005) 129 Cal. App. 4th 1107, 1119, 29 Cal. Rptr. 3d 127]* .

In another case, the court of appeal held that the owner of agricultural land used for orchards owed no duty to post a warning sign at the spot that a private farm road intersected a public road just because an unauthorized driver who was

using the farm road failed to recognize the transition to the public road, drove from the farm road to the public road at an excessive rate of speed, and caused a collision with another vehicle on the public road. The court noted that unless the owner's workers were using the farm road, access to the farm road was usually barred by a cable, there was no evidence that unauthorized drivers were using the farm road generally, let alone at unsafe speeds, and the owner's vegetation did not encroach on the right-of-way for the public road. According to the court, imposing a duty to place warning signs on defendant would essentially impose a duty to post warning signs on all such farm roads and require rural landowners to engage in constant monitoring to ensure the signs remained in place, thus placing a huge burden on rural landowners generally [*Garcia v. Paramount Citrus Assn., Inc. (2008) 164 Cal. App. 4th 1448, 1456-1460, 80 Cal. Rptr. 3d 512*].

[3] No Liability if No Degree of Protection Would Prevent Conduct

Security measures that are inadequate to protect against harm by third persons, such as rape or assault, may nonetheless not subject the owner or possessor to liability if it cannot be proved that additional or different measures would have prevented the crime. In this situation, the issue is not whether the owner or possessor had a duty or breached it, but whether the conduct of the owner or possessor was not the proximate or legal causeof the victim's injuries because the crime could have occurred no matter what measures the owner or possessor took to prevent it [*Nola M. v. University of S. Cal. (1993) 16 Cal. App. 4th 421, 426-427, 435, 20 Cal. Rptr. 2d 97* ; *see also* *Thai v. Stang (1989) 214 Cal. App. 3d 1264, 1274, 263 Cal. Rptr. 202* ; *Lopez v. McDonald's Corp. (1987) 193 Cal. App. 3d 495, 512, 238 Cal. Rptr. 436* ; *Noble v. Los Angeles Dodgers, Inc. (1985) 168 Cal. App. 3d 912, 916-918, 214 Cal. Rptr. 395]* . A plaintiff in these cases need only show that the proposed security measures would more likely than not have prevented the attack, not that they absolutely would have prevented the attack [*Sandoval v. Bank of Am. (2002) 94 Cal. App. 4th 1378, 1387, 115 Cal. Rptr. 2d 128]* .

For example, in a case involving a daytime assault and attempted rape by unknown assailants at a large apartment complex, the California Supreme Court upheld summary judgment for the owners of the apartment complex. The owners provided nighttime security personnel and daytime inspections to ensure that security gates were operating properly, but the gates were not all secured properly. The plaintiff, who had been making a delivery at the apartment complex, argued that daytime security guards would have prevented the assault. Assuming for the sake of analysis that the owners may have breached a duty to provide reasonable security measures, the Court concluded that the plaintiff could not prove that this breach was the actual cause of the assault and attempted rape. The plaintiff admitted that she could not prove the identity or background of the three men who assaulted her nor how they got on the apartment complex premises. Absent any evidence that the attackers were unauthorized intruders, rather than authorized residents, or that it was more probable than not the attack would not have occurred if there had been an increased security presence, the Court held that the plaintiff could not prove that any breach of duty on the part of the defendants actually caused the harm [*Saelzler v. Advanced Group 400 (2001) 25 Cal. 4th 763, 775-776, 107 Cal. Rptr. 2d 617, 23 P.3d 1143]* .

According to the Court, the opinion testimony of the plaintiff's expert--that the attack would not have occurred if the defendants had provided daytime securityguards and made a better effort to maintain the security gates in proper working condition--was speculation and did not raise a triable issue of fact on causation [Saelzler v. Advanced Group 400 *(2001) 25 Cal. 4th 763, 781, 107 Cal. Rptr. 2d 617, 23 P.3d 1143]* .

Similarly, three family members who owned a condominium unit and the four-member condominium association were not liable to the unit's tenant, who was raped in the unit by an intruder who had been stalking her. The court held that no level of security short of armed guards could have prevented this type of crime, and that it was unreasonable to expect this level of protection from defendants [*Pamela W. v. Millsom (1994) 25 Cal. App. 4th 950, 959, 30 Cal. Rptr. 2d 690]* .

In another case, by contrast, the court of appeal held that a woman raped in her apartment complex by a known transient

had provided sufficient evidence to show a triable issue of fact on causation. In that particular case, while there was no conclusive evidence as to how the rapist gained access to the complex, the evidence demonstrated that a number of entry gates to the complex were not closing properly or not locking, tenants had complained to the security guard about this, and this had been reported to management. In addition, there were numerous prior reports of unauthorized male intruders gaining access to the complex, apparently through these gates, and the rapist himself had been reported on the grounds numerous times. Given that the rapist was known to be an unauthorized transient, and there was no evidence of a forced entry anywhere on the premises at the time of the rape, the court held that a reasonable person could conclude that it was more likely than not that the rapist used the malfunctioning gates to gain access to the complex [*Ambriz v. Kelegian (2007) 146 Cal. App. 4th 1519, 1536-1538, 53 Cal. Rptr. 3d 700]* .

If a plaintiff is assaulted inside an individual apartment, lack of clear evidence showing exactly how the assailant gained access to the apartment complex will not defeat a claim against the landlord if there is evidence sufficient to support a claim that the landlord was negligent in securing the individual apartment and this negligence was a substantial factor in the assault [*Raven H. v. Gamette (2007) 157 Cal. App. 4th 1017, 1027-1030, 68 Cal. Rptr. 3d 897*]. In one case, for example, while the plaintiff did not know exactly how her assailant gained access to her apartment complex, the court of appeal held that the evidence was sufficient to support a finding that the landlord's failure to provide bars or locks on her first-story windows, which were provided to other tenants, and the landlord's failure to control vegetation growth around her windows, allowing the intruder to enter through a window shrouded in darkness, were a cause of plaintiff's injury [*Raven H. v. Gamette (2007) 157 Cal. App. 4th 1017, 1028, 68 Cal. Rptr. 3d 897*].

[4] Duty When Responding to Presently Occurring Criminal Conduct

Store or restaurant employees have a duty to protect invitees, including customers and potential customers who are in an area under the establishment's control, fromcriminal conduct that is presently occurring or about to occur. That duty is to take reasonable and minimally burdensome measures, such as issuing a warning or calling 911 for assistance, if those measures can be undertaken without increasing the risk of harm to the employees [*Morris v. De La Torre (2005) 36 Cal. 4th 260, 277-278, 30 Cal. Rptr. 3d 173, 113 P.3d 1182]* .

A shopkeeper does not have a duty to comply with the unlawful demands of an armed robber that property be surrendered [*Kentucky Fried Chicken of Cal., Inc. v. Superior Court (1997) 14 Cal. 4th 814, 817, 59 Cal. Rptr. 2d 756, 927 P.2d 1260]* . In reaching this result, the California Supreme Court rejected the contention that such a duty should be imposed to lessen the danger to others on the premises, stating that the existence of such a duty could in fact encourage robbers [*Kentucky Fried Chicken of Cal., Inc. v. Superior Court (1997) 14 Cal. 4th 814, 829-830, 59 Cal. Rptr. 2d 756, 927 P.2d 1260* (case before court involved only failure to obey robber's demand, not active resistance)].

[5] No Liability in Residential Setting for Failure to Warn of Third Party's Past Criminal Convictions for Molestation

Although most cases involving a landowner's duty to protect others from the criminal acts of a third person have involved commercial or public settings, the issue may arise in a nonpublic residential setting, such as a social guest's being injured by a third party. For example, in a case brought under general premises liability principles, a minor was sexually molested by his mother's boyfriend while visiting the boyfriend's relatives, who had failed to warn the mother that the boyfriend had in the past been convicted for child molestation. The court of appeal held that the relatives were not liable [*Eric J. v. Betty M. (1999) 76 Cal. App. 4th 715, 726-727, 90 Cal. Rptr. 2d 549]* . In that particular case, the relatives had no knowledge that the boyfriend was molesting the child, and even though some of the molestations took place at their residences when the boyfriend was alone with the child, the relatives did nothing to facilitate the molestations and made no representations as to the safety of the child if left alone with the boyfriend [*Eric J. v. Betty M. (1999) 76 Cal. App. 4th 715, 718-720, 729, 90 Cal. Rptr. 2d 549]* . The court of appeal concluded that the boyfriend's prior convictions did not mean that for purposes of tort liability, he should be treated as the functional equivalent of a dangerous animal, because he had been released from prison under a parole program that had as its

premise the belief that rehabilitation was possible [*Eric J. v. Betty M. (1999) 76 Cal. App. 4th 715, 725-726, 90 Cal. Rptr. 2d 549]* . The court then noted that the facts in this case did not support any of the othertraditional bases for imposing premises liability, such as the nature of the activity conducted on the property or any relationship of entrustment of the child [*Eric J. v. Betty M. (1999) 76 Cal. App. 4th 715, 727, 90 Cal. Rptr. 2d 549]* .

California Forms of Pleading and Practice--Annotated

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 421 PREMISES LIABILITY
PART II. LEGAL BACKGROUND
A. General Principles of Liability

36-421 California Forms of Pleading and Practice--Annotated § 421.16

§ 421.16 "Firefighter's" Rule

[1] Bar to Recovery for Injuries

The "firefighter's" rule bars a firefighter or police officer from recovery for injuries sustained because of the very conduct that created the situation necessitating the presence of the firefighter or police officer [*Lipson v. Superior Court (1982) 31 Cal. 3d 362, 378, 182 Cal. Rptr. 629, 644 P.2d 822]* . The rule developed in the context of premises liability as a limitation on the duty of possessors of property, under the rationale that there is no liability for a dangerous condition known to the person coming on the premises [*Walters v. Sloan (1977) 20 Cal. 3d 199, 203, 142 Cal. Rptr. 152, 571 P.2d 609]* , that a firefighter or police officer has chosen an occupation that by its very nature exposes him or her to risk and receives special benefits in consideration of doing so, and that freedom fromliability encourages those needing assistance to summon it [*Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 406, 22 Cal. Rptr. 2d 514]* .

The "firefighter's" rule bars recovery of damages from property owners for personal injuries suffered by an off-duty deputy sheriff who assumes responsibility for apprehending a criminal suspect on the property owners' premises. The rule applies to volunteer as well as paid officers. Also, no nexus is required between a law enforcement officer's presence at the scene and his or her law enforcement employment. A public safety officer's original reason for being on the premises is irrelevant; the firefighter's rule is triggered because the officer reacted as a police officer to a disturbance and deliberately encountered the danger [*Hodges v. Yarian (1997) 53 Cal. App. 4th 973, 981-984, 62 Cal. Rptr. 2d 130]* .

The "firefighter's" rule is actually not a separate concept, but instead is an example of the application of the primary versus secondary assumption of the risk doctrine set forth in *Knight v. Jewett* [*Knight v. Jewett (1992) 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* : a legal determination of whether, based on the nature of the activity involved and the relationship of the parties to that activity, the defendant owed the plaintiff a duty of care [*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 538, 34 Cal. Rptr. 2d 630, 882 P.2d 347]* .

For further discussion of the "firefighter's" rule, see Ch. 267, *Fires* , and Ch. 380, *Negligence* .

[2] Rule Not Applicable to Private Safety Employees

The California Supreme Court has distinguished between publicly employed firefighters and private safety employees and held that the "firefighter's" rule does not preclude a private safety employee from stating a cause of action against a third party who is not his or her employer for injuries caused by that third party's negligence in starting a fire [*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 534-535, 34 Cal. Rptr. 2d 630, 882 P.2d 347]* . The Court reasoned that by establishing public fire departments and taxing themselves to pay for their services, the public in effect has purchased exoneration from the duty of care and does not have to pay twice, through taxation and individual liability, for those services [*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 542-543, 34 Cal. Rptr. 2d 630, 882 P.2d 347]* .

In contrast, a defendant whose negligence injures private safety employees employed by another does not have the same relationship with those private safety employees as a member of the public has with publicly employed firefighters, because the defendant has not paid in any way to be relieved of the duty of care owed to the private employees. Another consideration supporting the distinction between publicly employed firefighters and private safety employees is that actions by publicly employed firefighters would involve costly litigation over subrogation that would ultimately be financed by the public and that would not benefit the firefighters, who receive retirement or workers' compensation benefits, whereas actions by private safety employees shift the loss from the innocent employees and their employer to the third party whose negligence caused the injuries [*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 543, 34 Cal. Rptr. 2d 630, 882 P.2d 347]* . A third distinction is that the public good is best served by a quick response to fires without questions about the fire's cause, which warrants eliminating the public's duty of care to publicly employed firefighters, but no similar concern justifies eliminating the duty of care owed by third parties to private safety employees [*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 544, 34 Cal. Rptr. 2d 630, 882 P.2d 347]* .

[3] Exception to Rule for Independent Act of Misconduct or Unrelated Risk

[a] Scope of Exception

The "firefighter's" rule does not, however, preclude liability for injuries sustained as a result of conduct that is independent of the act that created the need for the firefighter's or police officer's presence. A possessor is liable for failure to warn of a known, hidden danger on the premises or for misrepresenting the nature of the risk [*Lipson v. Superior Court (1982) 31 Cal. 3d 362, 378, 182 Cal. Rptr. 629, 644 P.2d 822* (misrepresenting nature of toxic chemicals); *Boon v. Rivera (2000) 80 Cal. App. 4th 1322, 1328-1330, 96 Cal. Rptr. 2d 276* (deceiving police officer about violent tendencies of husband barricaded in house); *Donohue v. San Francisco Hous. Auth. (1993) 16 Cal. App. 4th 658, 663* (slippery steps on property being inspected for fire code violations); *Kocan v. Garino (1980) 107 Cal. App. 3d 291, 295-296, 165 Cal. Rptr. 712* (dilapidated fence on property)].

The rationale for this exception is that firefighters or police officers who suffer injury in this situation are in the same position as anyone venturing onto the premises; their occupations compel them to face felons or fires, not faulty fences [*Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 407, 22 Cal. Rptr. 2d 514]* .

For further discussion of exceptions to the "firefighter's" rule, see Ch. 267, *Fires* , and Ch. 380, *Negligence* .

[b] Exception Not Applicable to Firefighters or Police Officers Encountering Hazards by Chance

Firefighters and police officers who have not been called to the scene of a fire or other emergency, but who have been injured while responding to a hazard that they encounter by chance in the course of their duties, have claimed that the independent act exception to the "firefighter's" rule applies to them because they were at a particular location for reasons unrelated to the hazard to which they responded. However, the courts have ruled that the exception does not apply in this situation. Firefighters and police officers who respond to perceived risks in their professional capacity in

order to protect the public cannot claim, simply because their presence at the scene was fortuitous rather than the result of a radio call or other summons, that their presence was independent of or unrelated to the cause of their injuries [*Kelhi v. Fitzpatrick (1994) 25 Cal. App. 4th 1149, 1158-1159, 31 Cal. Rptr. 2d 182* ; *Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 411, 22 Cal. Rptr. 2d 514]* .

For example, a highway patrol officer in uniform who was driving to work on his official motorcycle was barred by the "firefighter's" rule from recovering for injuries caused by tires that broke off a pickup truck on the highway ahead of him. When the officer saw the truck lose its tires, he responded by turning on his flashers, checking traffic behind him to ensure that no vehicles ran into the tires, and asking the truck's driver to move onto the shoulder. After he moved around the truck to look for the tires, which were rolling down the highway, they veered, bounced off a retaining wall, and hit him. The risk that caused his injuries, the runaway tires, was not the conduct that brought him to that highway at that moment, but it was the risk that prompted his response as a police officer. His actions were the same as those he would have taken had he been summoned to the scene, and an officer called to the scene would have been barred from recovery by the "firefighter's" rule for a similar injury. Therefore, the exception for unrelated or independent acts did not apply to allow his recovery for any negligence (on the part of the truck's owner, driver, or manufacturer) that caused the tires to come off the truck [*Kelhi v. Fitzpatrick (1994) 25 Cal. App. 4th 1149, 1152, 1158-1159, 31 Cal. Rptr. 2d 182]* .

Similarly, the "firefighter's" rule barred recovery by a police officer who brought a suspect into a hospital for examination, was doing paperwork when he heard a cry for help from a private security guard being attacked in a holding cell by a mental patient, and was injured when he went into the holding cell to assist the guard. The guard's negligence in failing to restrain the mental patient was independent of and unrelated to the conduct that brought the officer to the hospital, but it was the immediate cause of his presence in the holding cell where the patient was attacking the guard [*Seibert Security Services, Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 411, 22 Cal. Rptr. 2d 514]* .

[4] Exceptions to Rule Under Civ. Code § 1714.9

Under *Civ. Code § 1714.9*, notwithstanding statutory or decisional law to the contrary, any person is responsible not only for the results of that person's willful acts causing injury to a peace officer, a firefighter, or any emergency medical personnel employed by a public entity, but is also responsible for any injury occasioned to that person by the want of ordinary care or skill in the management of the person's property or person, in any of the following situations [*Civ. Code § 1714.9(a)*]:

- The conduct causing injury occurs after the person knows or should have known of the presence of the peace officer, the firefighter, or emergency medical personnel [*see, e.g.,* *Boon v. Rivera (2000) 80 Cal. App. 4th 1322, 1330-1333, 96 Cal. Rptr. 2d 276* (wife of man who shot police officer after wife misrepresented to officer that her husband was not violent, even though she knew otherwise, had duty under statute not to misrepresent nature of hazard, because officer relied on representations in making tactical decisions)];

- The conduct causing injury violates a statute, ordinance, or regulation, and the conduct causing injury was itself not the event that precipitated either the response or presence of the peace officer, the firefighter, or emergency medical personnel;

- The conduct causing injury was intended to injure the peace officer, the firefighter, or emergency medical personnel; or.

- The conduct causing the injury is arson as defined by *Penal Code § 451*.

Although *Civ. Code § 1714.9* uses the phrase "that person" to refer both to the person willfully injuring a peace officer,

a firefighter, or emergency medical personnel, as well as to the person injured by negligence, it was intended to create, and has been applied as creating, an exception to the "firefighter's" rule for both willful and negligent acts that fall into any of its four categories [*see, e.g.,* *Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 408-410, 22 Cal. Rptr. 2d 514* ; *Gibb v. Stetson (1988) 199 Cal. App. 3d 1008, 1014-1016, 245 Cal. Rptr. 283* ; *City of Redlands v. Sorensen (1985) 176 Cal. App. 3d 202, 208-211, 221 Cal. Rptr. 728]* .

Conduct occurring after a defendant knew or should have known of the presence of a peace officer, a firefighter, or emergency medical personnel does not include conduct that occurs before the peace officer, the firefighter, or emergency medical personnel have undertaken their duties [*Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 408-409, 22 Cal. Rptr. 2d 514]* .

For further discussion of exceptions to the "firefighter's" rule under *Civ. Code § 1714.9*, see Ch. 267, *Fires* , and Ch. 380, *Negligence* .

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§ 421.17 Duty to Persons Outside Premises

[1] No Distinction Between Artificial and Natural Conditions

Prior to the Supreme Court's decision in *Sprecher v. Adamson Cos*. [*Sprecher v. Adamson Cos. (1981) 30 Cal. 3d 358, 178 Cal. Rptr. 783, 636 P.2d 1121]* , the duty of an owner or possessor of premises to persons outside the premises turned on the distinction between artificial and natural conditions. A possessor was not liable for harm caused to persons outside the premises if the harm was caused by a natural condition on the premises [*see, e.g.,* *Boarts v. Imperial Irrigation Dist. (1947) 80 Cal. App. 2d 574, 578, 182 P.2d 246* (natural vegetation)]. If, however, the harm was caused by an artificial condition, the owner or possessor was liable if his or her conduct was negligent [*see, e.g.*, *Coates v. Chinn (1958) 51 Cal. 2d 304, 308, 332 P.2d 289* (planted row of trees); *Potter v. Empress Theatre Co. (1949) 91 Cal. App. 2d 4, 12, 204 P.2d 120* (theater marquee)].

The court in *Sprecher* held that the immunity of an owner or possessor for harm caused by natural conditions was no longer justified, because possession of premises with the attendant right to control conditions on those premises is a sufficient basis for imposition of an affirmative duty to act [*Sprecher v. Adamson Cos. (1981) 30 Cal. 3d 358, 369-371, 178 Cal. Rptr. 783, 636 P.2d 1121]* . Therefore, a possessor of premises owes a duty to persons outside the premises to exercise reasonable care in the management of the possessor's property. In imposing liability, the factors to be considered in evaluating the reasonableness of a defendant's conduct are the likelihood and the probable seriousness of injury to the plaintiff, the burden of reducing or avoiding the risk, the location of the premises, and the possessor's degree of control over the risk-creating condition [*Sprecher v. Adamson Cos. (1981) 30 Cal. 3d 358, 369-371, 178 Cal. Rptr. 783, 636 P.2d 1121]* .

[2] Distracting Activities on Premises

An owner or possessor of premises has no duty to users of adjacent public streets either to refrain from holding activities on the premises that would distract passing motorists or to erect or maintain distraction barriers to hide those activities from passing motorists. Motorists have a duty to exercise reasonable care, which includes not permitting their attention to be so distracted by sights or sounds as to interfere with the safe operation of their vehicles. If a motorist is exercising due care, events in progress on property pose no risk of harm to anyone (pedestrians, bicyclists, or motorists)

on the adjacent public streets [*Lompoc Unified Sch. Dist. v. Superior Court (1993) 20 Cal. App. 4th 1688, 1694, 1697, 26 Cal. Rptr. 2d 122* (school district not liable to bicyclist struck by car who claimed football game on district's property distracted attention of car's driver)].

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[Reserved]

§§ 421.18[Reserved]

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§ 421.20 Governing Statutes

Civ. Code § 846 sets forth the liability of an owner of an estate or any interest in real property for injuries to recreational users.

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§ 421.21 Landowner's Immunity From Liability to Recreational Users

An owner of an estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give persons any warning of hazardous conditions, structures, uses of, or activities on the premises, except as provided by *Civ. Code § 846* [*Civ. Code § 846*; *see § 421.23*]. The property interests protected by the statute are broad. For example, a homeowner's right of way to construct a driveway over an adjacent public trail fits within the definition of an "interest in real property" under the statute if someone is injured while using the trail at the point where it intersects the driveway [*Miller v. Weitzen (2005) 133 Cal. App. 4th 732, 738-739, 35 Cal. Rptr. 3d 73]* . For a discussion of the meaning of recreational purpose, see *§ 421.22*.

An owner who gives permission to another for entry or use for a recreational purpose does not extend any assurance that the premises are safe for that purpose, grant to that person the legal status of an invitee nor licensee, or assume responsibility for or incur liability for any injury to person or property caused by any act of the person to whom permission has been granted, except as provided by *Civ. Code § 846* [*Civ. Code § 846*].

The purpose of *Civ. Code § 846* is to encourage owners to allow the general public to use land for recreational purposes by relieving those owners of tort duties that might otherwise apply [*Paige v. North Oaks Partners (1982) 134 Cal. App. 3d 860, 863, 184 Cal. Rptr. 867* ; *Gerkin v. Santa Clara Valley Water Dist. (1979) 95 Cal. App. 3d 1022, 1026, 157 Cal. Rptr. 612]* . The Ninth Circuit has held that the legislative goal of encouraging property owners to open their land to the public does not mean that immunity applies only to landowners who allow anyone and everyone free access to their property. Indeed, *Civ. Code § 846* does not use the word "public" or any equivalent synonym. Therefore, the United States government could claim immunity in a case involving a picnic held at a park that was located entirely within the grounds of a military facility and was not open to the general public [*Mansion v. United States (9th Cir. 1991) 945 F.2d 1115, 1117-1118]* .

The protection afforded to landowners under *Civ. Code § 846* is not limited to dangers presented by the premises per se, but extends to the negligent conduct of persons, including dangers presented by negligent drivers [*Shipman v. Boething Treeland Farms, Inc. (2000) 77 Cal. App. 4th 1424, 1427-1431, 92 Cal. Rptr. 2d 566]* . In addition, a plaintiff

may not overcome the immunity conferred on a landowner by *Civ. Code § 846* by arguing that the landowner may nonetheless be liable as an employer because the injury is caused by the negligent conduct of an employee or the landowner's negligent supervision of an employee [*Shipman v. Boething Treeland Farms, Inc. (2000) 77 Cal. App. 4th 1424, 1431, 92 Cal. Rptr. 2d 566]* .

The immunity granted by *Civ. Code § 846* is not limited to immunity from claims based on simple negligence, but also shields a defendant from liability for negligence per se--that is, negligence presumed to exist by virtue of the defendant's violation of a statute, ordinance, or regulation [*Jackson v. Pacific Gas & Elec. Co. (2001) 94 Cal. App. 4th 1110, 1121, 114 Cal. Rptr. 2d 831]* .

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§ 421.22 Recreational Purpose Defined

The term "recreational purpose" includes fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding (including animal riding), snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contact, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites [*Civ. Code § 846*]. This list is merely illustrative of the activities included in the term "recreational purpose." Under the usual, ordinary import of the plain meaning of the section, other recreational uses similar to those listed fall within its purview [*Valladares v. Stone (1990) 218 Cal. App. 3d 362, 369, 267 Cal. Rptr. 57* (tree climbing)]. However, uses dissimilar to those listed may not be considered recreational under the meaning of the statute. For example, eating lunch in a restaurant, although arguably recreational in nature, is not a recreational purpose under this statute [*Gordon v. Havasu Palms, Inc. (2001) 93 Cal. App. 4th 244, 256-257, 112 Cal. Rptr. 2d 816]* .

An activity that falls within the provisions of the statute must be one that is commonly understood to be recreational. Therefore, a person who walks across the defendant's property in an effort to reach a destination, cannot be said to be engaging in the recreational activity of hiking as a matter of law. A determination of recreational use depends on the totality of the attendant circumstances, including the topography of the land, the previous use of the land, the length of the activity, and the intent of the user [*Gerkin v. Santa Clara Valley Water Dist. (1979) 95 Cal. App. 3d 1022, 1027, 157 Cal. Rptr. 612]* .

In addition, the purpose of use at the time of entry on the land controls, rather than the underlying purpose of the entire trip [*Smith v. Scrap Disposal Corp. (1979) 96 Cal. App. 3d 525, 529, 158 Cal. Rptr. 134* ; *see also Mattice v. United States Dep't of Interior (9th Cir. 1992) 969 F.2d 818, 821* (no liability to teenager who entered park to congregate with friends in picnic area, but was injured while taking test drive in friend's car before driving him home)].

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§ 421.23 Exceptions to Immunity

[1] Public Entities

Immunity from liability under *Civ. Code § 846* does not apply to landowners that are public entities [*Delta Farms Reclamation Dist. v. Superior Court (1983) 33 Cal. 3d 699, 710, 190 Cal. Rptr. 494, 660 P.2d 1168* ; *Nelsen v. City of Gridley (1980) 113 Cal. App. 3d 87, 96-97, 169 Cal. Rptr. 757]* .

[2] Insufficient Ownership Interest

The immunity of *Civ. Code § 846* applies to an owner of an interest in real property. Therefore, a business invitee of a landowner does not have a sufficient ownership interest to be immune under *Civ. Code § 846* [*Jenson v. Kenneth I. Mullen (1989) 211 Cal. App. 3d 653, 658, 259 Cal. Rptr. 552]* . Similarly, immunity does not extend to the agents of a landlord [*Jenson v. Kenneth I. Mullen (1989) 211 Cal. App. 3d 653, 658-659, 259 Cal. Rptr. 552* ; *but see Shipman v. Boething Treeland Farms, Inc. (2000) 77 Cal. App. 4th 1424, 1426-1429, 92 Cal. Rptr. 2d 566* (although court did not specifically address issue of applicability to agents of landowner, *Civ. Code § 846* immunized both landowner and his employee)].

[3] Willful or Malicious Failure to Guard or Warn

Although *Civ. Code § 846* provides immunity from liability for injuries caused by mere negligence [*Shipman v. Boething Treeland Farms, Inc. (2000) 77 Cal. App. 4th 1424, 1431, 92 Cal. Rptr. 2d 566]* , it does not limit liability that otherwise exists for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity [*Civ. Code § 846*]. The terms "willful" and "malicious" are given their standard tort definition [*New v. Consolidated Rock Products Co. (1985) 171 Cal. App. 3d 681, 692, 217 Cal. Rptr. 522]* . Therefore, willful or wanton misconduct is intentional wrongful conduct, done either with a knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results [*Nazar v. Rodeffer (1986) 184 Cal. App. 3d 546, 552, 229 Cal. Rptr. 209* ; *New v. Consolidated Rock Prods. Co. (1985) 171 Cal. App. 3d 681, 689-690, 217 Cal. Rptr. 522]* .

To raise a negligent act to the level of "willful" misconduct, there must be actual or constructive knowledge of the peril, actual or constructive knowledge that injury is a probable result of the peril, and conscious failure to act to avoid the peril. Constructive knowledge is measured by an objective standard, which is whether a reasonable person under the same or similar circumstances would be aware of the dangerous character of his or her conduct [*New v. Consolidated Rock Prods. Co. (1985) 171 Cal. App. 3d 681, 689-690, 217 Cal. Rptr. 522* ; *see also Termini v. United States (9th Cir. 1992) 963 F.2d 1264, 1267-1268* (reasonable person would have realized probability of accident occurring on road leading without warning to edge of cliff); *cf. Mattice v. United States Dep't of Interior (9th Cir. 1992) 969 F.2d 818, 821* (previous accidents along road did not demonstrate actual or constructive knowledge that car would crash through guardrail)]. "Malicious" conduct is not limited to situations in which a defendant acts with a subjectively culpable state of mind. Malice, for the purposes of tort law, is defined as conduct that is intended to cause injury or that is carried on with a conscious disregard for the safety of others [*New v. Consolidated Rock Prods. Co. (1985) 171 Cal. App. 3d 681, 691, 217 Cal. Rptr. 522]* .

In one case, for example, a power company attempted to refute a 13-year-old plaintiff's allegation of willful or malicious failure to maintain an electrical transmission tower or warn or guard against a dangerous condition of the tower, by presenting evidence that it placed barbed wire and a warning sign at the tower and that the sign and barriers existed at the time the plaintiff climbed the tower. Although the plaintiff argued that the warning sign and barriers were in a state of disrepair, the court determined that the evidence showed, at most, that the defendant's conduct was negligent, and negligence was insufficient to overcome immunity under *Civ. Code § 846* [*Bacon v. Southern Cal. Edison Co. (1997) 53 Cal. App. 4th 854, 859, 62 Cal. Rptr. 2d 16]* . In a similar case, an electric utility company that placed anticlimbing guards on an electric tower, even if they were installed incorrectly, did not engage in willful misconduct such that the company could be liable when a teenager was electrocuted when she climbed the tower [*Manuel v. Pacific Gas & Electric Co. (2009) 173 Cal. App. 4th 927, 947, 93 Cal. Rptr. 3d 9]* .

[4] Permission to Enter Premises Granted for Consideration

Under *Civ. Code § 846*, a landowner is not immune from liability that otherwise exists if the landowner grants permission to enter the premises for recreational purposes for a consideration other than the consideration, if any, paid to the landowner by the state, or if the landowner has received consideration from others for an entry for recreational purposes [*Civ. Code § 846*].

Both the California and federal courts have refused to interpret the term "consideration" broadly. The California court of appeal has held that the consideration must be some immediate and reasonably direct advantage, usually in the form of an entrance fee [*Miller v. Weitzen (2005) 133 Cal. App. 4th 732, 739-740, 35 Cal. Rptr. 3d 73* (exception did not apply because trail maintenance fee was not consideration for permission to enter property where injury occurred)]. It cannot be merely a potential reimbursement, but must be a present actual benefit bestowed or detriment suffered. For example, the signing of an agreement including a hold harmless clause indemnifying a landowner against claims and the costs incurred in connection with those claims was not sufficient consideration to overcome the immunity granted by *Civ. Code § 846*. Ruling otherwise would encourage an injured recreational user to claim that nearly any rule or restriction imposed by a landowner, such as being required to empty trash, was consideration, which would defeat the purpose of the statute [*Johnson v. Unocal Corp. (1993) 21 Cal. App. 4th 310, 316-317, 26 Cal. Rptr. 2d 148]* . Similarly, the Ninth Circuit rejected a plaintiff's claim that by attending the picnic at which he was injured, he was conferring the benefit of improved labor relations on his former employer and that this benefit was adequate consideration to defeat immunity [*Mansion v. United States (9th Cir. 1991) 945 F.2d 1115, 1118-1119]* .

[5] Persons Expressly Invited to Enter Premises

Under *Civ. Code § 846*, a landowner is not immune from liability that otherwise exists if the landowner expressly invited, rather than merely permitted, the injured person to come on the premises [*Civ. Code § 846*]. This statutory exception applies even if the person is not invited expressly for the purpose of engaging in the recreational activity [

Calhoon v. Lewis (2000) 81 Cal. App. 4th 108, 114, 96 Cal. Rptr. 2d 394] .

In one case interpreting this exception, the injured person was the employee of a company that held a company picnic on grounds belonging to an unrelated corporation. Employees did not need a formal invitation, but could attend the picnic by purchasing a ticket. The corporation that owned the picnic grounds permitted groups to use the property without consideration, but required each group to execute an agreement containing various rules and restrictions regarding the use of the grounds. The court of appeal rejected the injured employee's claim that execution of the agreement made him an express invitee, holding instead that execution of the agreement was not a direct, personal request from the corporation to the employee to attend the picnic [*Johnson v. Unocal Corp. (1993) 21 Cal. App. 4th 310, 313-314, 317, 26 Cal. Rptr. 2d 148* ; *see also Ravell v. United States (9th Cir. 1994) 22 F.3d 960, 963* (following *Johnson*)].

Because an easement holder cannot "expressly invite" persons onto the premises, the "landowner" that may extend an express invitation onto the premises under the statute refers only to the owner of the fee [*Jackson v. Pacific Gas & Elec. Co. (2001) 94 Cal. App. 4th 1110, 1118, 114 Cal. Rptr. 2d 831]* . However, an express invitation from the fee owner, although extinguishing the recreational use immunity of the fee owner, does not extinguish the immunity of other owners of estates in the land. Therefore, for example, the recreational use immunity of an electric utility company that possessed an easement for power lines was not extinguished by an express invitation onto the land extended by the owner of the real property [*Jackson v. Pacific Gas & Elec. Co. (2001) 94 Cal. App. 4th 1110, 1116-1119, 114 Cal. Rptr. 2d 831]* .

[6] Navigable Waters

Immunity under *Civ. Code § 846* may be qualified by the public trust doctrine in actions in which the defendant's property borders on navigable waters. The public trust doctrine refers to the public's constitutionally protected right to the free and unimpeded use of navigable waterways [*Cal. Const. art. X, § 4*; for further discussion of the public trust doctrine, *see Ch. 575, Waters, § 565.10* et seq.]. *Civ. Code § 846* does not confer immunity from negligence liability on contiguous or subjacent owners of real property fronting or underlying navigable waters if persons are injured while using the public waterways. If a person is injured while using a navigable waterway as a consequence of an affirmative act, tending to obstruct or impede the public's use of those waters, by a private owner of land underlying or adjacent to the navigable waters, the landowner is not entitled to the protection of *Civ. Code § 846* to the extent that the injured person did not trespass on the landowner's real property in pursuit of his or her recreational purposes [*Charpentier v. Von Geldern (1987) 191 Cal. App. 3d 101, 108-110, 236 Cal. Rptr. 233]* . On the other hand, a landowner has no duty to inspect or warn of natural hazards in navigable waters subject to recreational use abutting the landowner's property, or to make that water safe for recreational uses by trespassers or by those on the water by means other than access over the abutting land [*Charpentier v. Von Geldern (1987) 191 Cal. App. 3d 101, 111, 236 Cal. Rptr. 233]* .

[7] Property Not Suitable for Recreational Purpose

Prior to the Supreme Court's decision in *Ornelas v. Randolph* [*Ornelas v. Randolph (1993) 4 Cal. 4th 1095, 17 Cal. Rptr. 2d 594, 847 P.2d 560]* , several court of appeal decisions had held that immunity under *Civ. Code § 846* required that the property in question must have been "suitable" for a recreational pursuit [*see, e.g., Myers v. Atchison, Topeka & Santa Fe Ry. Co. (1990) 224 Cal. App. 3d 752, 759, 274 Cal. Rptr. 122* ; *Wineinger v. Bear Brand Ranch (1988) 204 Cal. App. 3d 1003, 1008-1010, 251 Cal. Rptr. 681]* . In other words, if a person entered land to engage in one of the enumerated recreational activities, but the court determined that the land was inappropriate for that use, the statute would not have applied, and the landowner would have been liable if the person was injured [Ornelas v. *Randolph (1993) 4 Cal. 4th 1095, 1103, 17 Cal. Rptr. 2d 594, 847 P.2d 560]* . The suitability requirement was in addition to the statutory requirements of interest in land and recreational purpose [*see Civ. Code § 846*]. In *Ornelas*, the Supreme Court disapproved of the suitability exception on the grounds that the concept was a "purely judicial construct, without any basis or support in the statutory language," was elusive and unpredictable, and had resulted in the anomaly that

landowners who made the most effort to safeguard their property were the least likely to benefit from the statute [*Ornelas v. Randolph (1993) 4 Cal. 4th 1095, 1107, 17 Cal. Rptr. 2d 594, 847 P.2d 560* ; *see also Ravell v. United States (9th Cir. 1994) 22 F.3d 960, 963* (noting breadth of immunity set forth in *Ornelas* and declining to find exception beyond express language of *Civ. Code § 846*)].

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§§ 421.24[Reserved]

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§ 421.30 Governing Law

The liability for injuries caused by the negligence of an independent contractor or his or her employees is governed by the principles set forth in two California Supreme Court decisions [*Privette v. Superior Court (1993) 5 Cal. 4th 689, 696, 21 Cal. Rptr. 2d 72, 854 P.2d 721* ; *Van Arsdale v. Hollinger (1968) 68 Cal. 2d 245, 252, 66 Cal. Rptr. 20, 437 P.2d 508]* .

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§ 421.31 Employer's Liability for Acts of General Contractor

The general rule is that one who employs an independent contractor is not liable for injuries caused by negligence of the independent contractor or his or her employees. This general rule, however, has been so riddled with exceptions that it has been termed a mere preamble to the exceptions [*Van Arsdale v. Hollinger (1968) 68 Cal. 2d 245, 252, 66 Cal. Rptr. 20, 437 P.2d 508]* . The two principal exceptions to the rule that arise in the area of premises liability involve (1) work that creates a peculiar risk of harm to others and (2) a contractor that was engaged to perform a possessor's nondelegable duty to maintain the premises in safe condition.

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§ 421.32 Peculiar Risk

[1] Scope of Employer's Liability

An employer who employs an independent contractor to do work that the employer should recognize as likely to create a peculiar risk of harm to others unless special precautions are taken is subject to liability for physical harm caused by the contractor's failure to exercise reasonable care in taking precautions [*Aceves v. Regal Pale Brewing Co. (1979) 24 Cal. 3d 502, 508-509, 156 Cal. Rptr. 41, 595 P.2d 619]* . A peculiar risk is a risk that is peculiar to the work to be done and arises out of its character or the place where it is to be done, and is one that a reasonable person would recognize as requiring the taking of precautions [*Griesel v. Dart Indus. (1979) 23 Cal. 3d 578, 586, 153 Cal. Rptr. 213, 591 P.2d 503]* . For example, although the risk in a demolition project that someone may be hurt by falling buildings is a peculiar risk that a landowner should take precautions against, a risk that a fellow employee will remove a window washer's means of attachment is collateral negligence and not a peculiar risk [*compare Aceves v. Regal Pale Brewing Co. (1979) 24 Cal. 3d 502, 510, 156 Cal. Rptr. 41, 595 P.2d 619* (demolition project); *with Salinero v. Pon (1981) 124 Cal. App. 3d 120, 137, 177 Cal. Rptr. 204* (window washer); *see § 421.34*].

[2] Employee of Independent Contractor Cannot Recover From Hirer

California was one of a minority of jurisdictions that expanded the traditional peculiar risk doctrine to permit an employee of an independent contractor to seek recovery from the nonnegligent hirer for injuries caused by the contractor's negligence [*Privette v. Superior Court (1993) 5 Cal. 4th 689, 696, 21 Cal. Rptr. 2d 72, 854 P.2d 721* ; *see also Woolen v. Aerojet Gen. Corp. (1962) 57 Cal. 2d 407, 410-411, 20 Cal. Rptr. 12, 369 P.2d 708* (case cited in *Privette* as initially expanding doctrine)]. However, in *Privette v. Superior Court*, the California Supreme Court reexamined this extension of the doctrine, in light of the policies advanced by the workers' compensation laws, and concluded that those policies supported precluding employees of negligent independent contractors from recovering damages from the hirer under the peculiar risk doctrine [*Privette v. Superior Court (1993) 5 Cal. 4th 689, 701-702, 21 Cal. Rptr. 2d 72, 854 P.2d 721]* . The courts have applied *Privette* retroactively [*see, e.g., Smith v. ACandS, Inc. (1994) 31 Cal. App. 4th 77, 94-95, 37 Cal. Rptr. 2d 457]* .

The court of appeal has held that *Privette* bars peculiar risk claims by employees of any contractor working on the

premises, not only claims by employees of the negligent contractor whose acts injured an employee [*Smith v. ACandS, Inc. (1994) 31 Cal. App. 4th 77, 95-96, 37 Cal. Rptr. 2d 457]* .

Privette and its progeny are discussed in greater detail in Ch. 248, *Employer's Liability for Employee's Torts*.

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§ 421.33 Nondelegable Duty to Maintain Premises in Safe Condition

The duty of an owner or possessor of premises to maintain the premises in reasonably safe condition is nondelegable and if an independent contractor is employed to perform that duty, the possessor is liable for harm caused by the contractor's negligent failure to do so [*Brown v. George Pepperdine Found. (1943) 23 Cal. 2d 256, 260, 143 P.2d 929* ; *Lilienthal v. Hastings Clothing Co. (1955) 131 Cal. App. 2d 343, 347, 280 P.2d 824]* .

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§ 421.34 Collateral Negligence

The liability of an owner or possessor of premises for the negligence of an independent contractor or his or her employee does not extend to collateral negligence. Collateral negligence is negligence in the operative detail of the work that is unusual or foreign to the normal contemplated risks of doing the work [*Salinero v. Pon (1981) 124 Cal. App. 3d 120, 137-138, 177 Cal. Rptr. 204* (removing window washer's means of attachment); *Smith v. Lucky Stores, Inc. (1976) 61 Cal. App. 3d 826, 830, 132 Cal. Rptr. 628* (releasing grasp on sign leaning against truck after it had been removed from building)]. For further discussion relating to an employer's liability for acts of an independent contractor, see Ch. 380, *Negligence* .

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[Reserved]

§§ 421.35[Reserved]

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§ 421.40 Definitions

"Surface waters" are those waters diffused over the surface of land, or contained in depressions in that surface, that are the result of rain, snow, or the surface risings of springs. Surface waters are distinguishable from water flowing in a fixed channel, constituting a watercourse, or water collected in an identifiable body, such as a river or lake [*Keys v. Romley (1966) 64 Cal. 2d 396, 400, 50 Cal. Rptr. 273, 412 P.2d 529]* . When surface waters gather together in a flowing channel, they lose their character as surface waters and become stream waters or waters in a watercourse [*Mogle v. Moore (1940) 16 Cal. 2d 1, 8-9, 104 P.2d 785 , opinion qualified, Everett v. Davis (1941) 18 Cal. 2d 389, 394-395, 115 P.2d 821]* .

A "watercourse" is a stream usually flowing in a particular direction, although it need not flow continually and may sometimes be dry. It must flow in a definite channel, having a bed, sides, or banks, and usually discharges itself into some other stream or body of water [*Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 374, 82 Cal. Rptr. 689]* .

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§ 421.41 General Rights and Duties Concerning Waters

Every landowner has a burden to receive on his or her land those surface waters that fall naturally on the land above it and flow naturally to it. This burden carries with it a corresponding right to have surface waters that naturally fall on or flow to the land flow freely onto lower adjoining land, as they would flow under natural conditions. The landowner may be able to recover damages for interference with natural conditions and the discharge of surface waters in greater quantity or in a different manner than would occur under natural conditions [*LeBrun v. Richards (1930) 210 Cal. 308, 313-314, 291 P. 825]* .

A landowner has no right to obstruct the flow of waters, falling on the land by precipitation or rising on the land in springs, onto his or her land. Nor may a landowner obstruct or divert the flow of a natural watercourse [*Mogle v. Moore (1940) 16 Cal. 2d 1, 10, 104 P.2d 785* , *qualified on another ground,* *Everett v. Davis (1941) 18 Cal. 2d 389, 394-395, 115 P.2d 821]* .

Additionally, a landowner has no right to disperse waters that have naturally accumulated in ponds or depressions on his or her land onto the land of a lower landowner [*Galbreath v. Hopkins (1911) 159 Cal. 297, 301-302, 113 P. 174]* .

For forms of allegations based on negligent impoundment, diversion, discharge, and obstruction of waters, see *§§ 421.111 -421.115*. For discussion and forms relating to irrigation waters, see Ch. 315, *Irrigation* .

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§ 421.42 Flood Waters

Flood waters are a common enemy, and they may be guarded against or warded off by one whose property is invaded or threatened, even to the detriment of a neighbor, by obstructions that are merely defensive in nature and are not calculated to interfere with the current of the water in its natural channel [*Everett v. Davis (1941) 18 Cal. 2d 389, 393, 115 P.2d 821* ; *Weinberg Co. v. Bixby (1921) 185 Cal. 87, 95, 196 P. 25* ; *Costello v. Bowen (1947) 80 Cal. App. 2d 621, 630, 182 P.2d 615]* . However, the common enemy doctrine does not apply to public entities. A public entity that undertakes construction or operation of a flood control project is liable for unreasonable conduct. Therefore, if the public entity's design, construction, or maintenance of a flood control project posed an unreasonable risk of harm to the plaintiffs, and that unreasonable design, construction, or maintenance was a substantial cause of the damages suffered by the plaintiffs, the plaintiffs may recover even though the project's purpose was to contain the common enemy of floodwaters [*Belair v. Riverside County Flood Control Dist. (1988) 47 Cal. 3d 550, 559-560, 253 Cal. Rptr. 693, 764 P.2d 1070]* .

In determining the reasonableness of a public flood control project, courts must balance public need against the gravity of private harm. In balancing these interests, courts must weigh the following factors [*Bunch v. Coachella Valley Water Dist. (1997) 15 Cal. 4th 432, 446, 451, 63 Cal. Rptr. 2d 89, 935 P.2d 796* (applying reasonableness rule developed in context of flood control improvements along natural watercourses to cases in which public entity diverts and re-channels water under flood control system of dikes and levees that fail in severe rainstorm, causing damage to properties historically subject to flooding); *see also* *Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 368-369, 27 Cal. Rptr. 2d 613, 867 P.2d 724* ; § 421.44[1]]:

- The overall public purpose being served by the improvement project;
- The degree to which the plaintiff's loss is offset by reciprocal benefits;
- The availability to the public entity of feasible alternatives with lower risks;
- The severity of the plaintiff's damage in relation to risk-bearing capabilities;

- The extent to which damage of the kind the plaintiff sustained is generally considered a normal risk of land ownership; and

- The degree to which similar damage is distributed at large over other beneficiaries of the project or is peculiar only to the plaintiff.

Flood waters are waters that, because of their height, escape from a stream or other body of water and overflow the adjacent territory. Implicit in the definition of flood waters is the element of abnormality: they are flood waters because of their escape from the usual channels under conditions that do not ordinarily occur [*Everett v. Davis (1941) 18 Cal. 2d 389, 393, 115 P.2d 821* ; *LeBrun v. Richards (1930) 210 Cal. 308, 318, 291 P. 825]* .

For a form of affirmative defense to an action for damage to property caused by water, based on protection from flood waters, see *§ 421.120*. For discussion regarding the overflow of reservoirs due to flooding, see *§ 421.45[2]*.

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§ 421.43 Surface Waters

[1] Duty of Reasonable Care

Every person must take reasonable care in using his or her property to avoid injury to adjacent property through the flow of surface waters, and a failure to do so may result in liability. Any person threatened with injury to his or her property by the flow of surface waters has the duty to take reasonable precautions to avoid or reduce any actual or potential injury. If the actions of both the upper and lower landowners are reasonable and necessary, then any injury resulting from a change in the natural drainage of surface waters must be borne by the upper landowner [*Keys v. Romley (1966) 64 Cal. 2d 396, 408-409, 50 Cal. Rptr. 273, 412 P.2d 529* ; *Sheffet v. County of Los Angeles (1970) 3 Cal. App. 3d 720, 728, 84 Cal. Rptr. 11* (summarizing *Keys* into three rules: (1) if upper owner is reasonable and lower owner is unreasonable, upper owner wins; (2) if upper owner is unreasonable and lower owner is reasonable, lower owner wins; (3) if both upper and lower owners are reasonable, lower owner wins); *see also Gdowski v. Louie (2000) 84 Cal. App. 4th 1395, 1402-1405, 101 Cal. Rptr. 2d 609* (reaffirming continued vitality of *Keys* rules)].

Reasonableness of conduct is not related solely to the particular landowner's interest, however legitimate. Instead, it must be weighed against the effect of that conduct on others. The issue of reasonableness is a question of fact to be determined in each case by a consideration of all the relevant circumstances, including the amount of harm caused, the foreseeability of the resulting harm, the possessor's purpose or motive, and a comparative weighing of the utility of the diversion against the gravity of the harm caused by it [*Keys v. Romley (1966) 64 Cal. 2d 396, 409-410, 50 Cal. Rptr. 273, 412 P.2d 529* ; *Marment v. Castlewood Country Club (1973) 30 Cal. App. 3d 483, 485, 105 Cal. Rptr. 853]* .

[2] Upper Landowner's Easement

An upper landowner has a natural easement or servitude permitting that landowner to discharge surface waters through the drainage mechanism of a natural swale, hollow, or depression. That easement right is limited to disposition of the water through natural channels and does not allow an increase in the volume or velocity by collecting the water in pipes or artificial ditches [*LeBrun v. Richards (1930) 210 Cal. 308, 315-316, 291 P. 825]* . If the upper landowner uses artificial devices to discharge surface waters to the damage of the lower landowner, the upper landowner may be liable if those actions are unreasonable [*Sheffet v. County of Los Angeles (1970) 3 Cal. App. 3d 720, 730, 84 Cal. Rptr. 11]* .

[3] Lower Landowner's Duty

All that is required of a lower landowner in protecting his or her property from the flow of surface waters is to act reasonably. The issue of reasonableness is a question of fact and is determined by a consideration of all the same factors that determine reasonableness generally [*Sheffet v. County of Los Angeles (1970) 3 Cal. App. 3d 720, 728-730, 84 Cal. Rptr. 11* ; see *§ 421.43[1]*].

Reasonable conduct may or may not require affirmative action by the lower landowner, depending on all the circumstances. The social utility of the upper landowner's conduct must be weighed against the burden that the conduct would impose on the lower landowner. Usually, the lower landowner's unreasonable conduct will consist not of failure to take affirmative steps to protect the property, but of affirmative conduct increasing the danger to that property, thereby permitting the land to be flooded [*Sheffet v. County of Los Angeles (1970) 3 Cal. App. 3d 720, 730, 84 Cal. Rptr. 11* ; *see also* *Keys v. Romley (1966) 64 Cal. 2d 396, 410, 50 Cal. Rptr. 273, 412 P.2d 529* (lower landowner's act of removing dirt wall, permitting land to be flooded, was weighed against upper landowners' acts in changing contours of their property)].

A landowner may make any lawful use of his or her land, and it is not contributory negligence to neglect to take precautions to avoid future injury that can only occur as the result of another's negligence. A landowner is not obliged to anticipate the negligent flooding of his or her land by another [*Western Salt Co. v. City of Newport Beach (1969) 271 Cal. App. 2d 397, 401, 76 Cal. Rptr. 322* ; *Goodwin v. Braden (1955) 134 Cal. App. 2d 34, 38-39, 285 P.2d 330]* . However, although a lower landowner's failure to take affirmative action to protect his or her property does not necessarily preclude recovery of damages against the upper landowner, that lack of action may be relevant in the computation of those damages [*Sheffet v. County of Los Angeles (1970) 3 Cal. App. 3d 720, 731 n.8, 84 Cal. Rptr. 11]* .

Although a landowner is not obliged to anticipate negligent flooding, many of the cases dealing with water discharge involve recurrent invasions resulting from continuing conduct. The first invasion may be unexpected, but the others are not, and in determining liability, a court must consider the burden on the landowner of avoiding the harm in subsequent invasions [*Western Salt Co. v. City of Newport Beach (1969) 271 Cal. App. 2d 397, 403-404, 76 Cal. Rptr. 322]* .

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§ 421.44 Waters in Watercourse

[1] Discharge of Surface Waters

A property owner may be liable if alterations or improvements on upstream property discharge an increased volume of surface water into a natural watercourse, and the increased volume or velocity of the stream waters or the method of discharge into the watercourse causes downstream property damage [*Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 337, 27 Cal. Rptr. 2d 613, 867 P.2d 724* , *overruling Archer v. City of Los Angeles (1941) 19 Cal. 2d 19, 119 P.2d 1]* . The test of liability is whether, under all the circumstances, the property owner's conduct was reasonable. The rule of reasonableness applies to both private and public landowners and also requires reasonable conduct on the part of the downstream landowners [*Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 337, 27 Cal. Rptr. 2d 613, 867 P.2d 724]* . Therefore, if the upstream landowner acts reasonably, or the lower landowner has not acted reasonably to protect his or her property, the downstream landowner must continue to accept the burden of damage caused by the stream water [*Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 360, 27 Cal. Rptr. 2d 613, 867 P.2d 724]* . The reasonableness test also applies if damage to downstream property results from improvements or alterations to the stream bed [*Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 360, 27 Cal. Rptr. 2d 613, 867 P.2d 724]* . However, an upstream landowner is not liable for any damage caused by the stream flow beyond the proportion attributable to that landowner's conduct [*Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 360, 27 Cal. Rptr. 2d 613, 867 P.2d 724]* .

[2] Obstructing or Diverting Flow

A person obstructing or diverting the flow of a natural watercourse is under a continuing duty to provide proper facilities for handling the waters of the stream so as to prevent damage to the property of others. The obstructor is under a duty not to interrupt the natural habits of the stream so as to cause an overflow beyond the overflow that would have occurred in the absence of the obstruction [*Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 374, 82 Cal. Rptr. 689]* . Even if a landowner was not liable for damage to a neighbor's land caused by an embankment built on his or her land, due to the unforeseeability of the flood that caused the damage, that landowner might be liable in the future unless that landowner takes reasonable corrective steps to prevent the damage due to flooding that the landowner now knows about [*Williams v. Pacific Coast Aggregates, Inc. (1954) 128 Cal. App. 2d 777, 783-784, 276 P.2d 28]* .

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§ 421.45 Escape of Impounded Waters

[1] Theory of Liability

The law is unclear as to whether the doctrine of strict liability applies to water escaping from reservoirs or irrigation ditches. In an early case involving the overflow of a reservoir due to a flood, the California Supreme Court limited the rule of strict liability to cases in which the very manner of the construction, maintenance, or use of a structure constitutes or works an invasion of a neighbor's property and rights and is a nuisance per se. Otherwise, the owner of the reservoir is not liable [*Sutliff v. Sweetwater Water Co. (1920) 182 Cal. 34, 36-39, 186 P. 766* (proximate cause of damage was flooding beyond human control)]. In a later case, the Court intimated that the issue was still open, but did not find it necessary to determine whether strict liability was applicable to escaping waters because the flooding in that case was caused by the plaintiff's own acts [*Rozewski v. Simpson (1937) 9 Cal. 2d 515, 520-521, 71 P.2d 72* (jury instructions on both negligence and strict liability were fair)].

No Supreme Court case since *Rozewski* has decided the specific liability for escaping waters. One appellate court, citing *Sutliff*, said that the doctrine of strict liability for escaping waters controls, with the modification that an act of God, such as extraordinary breaking of ditches and reservoirs resulting from floods and earthquakes, may be interposed as a defense. It found a tendency among the courts to give effect to this rule by finding negligence in some form and basing the decision on that finding [*Kall v. Carruthers (1922) 59 Cal. App. 555, 558, 211 P. 43]* .

However, a subsequent court of appeal decision reached a different result, noting that strict liability has been applied only in cases involving an ultrahazardous activity. Certain activities, including irrigation of farm land, may be so generally carried on as to be regarded as customary, and do not constitute an ultrahazardous undertaking or carry with them the risk of absolute liability [*Clark v. Di Prima (1966) 241 Cal. App. 2d 823, 827-829, 51 Cal. Rptr. 49]* . The court confined its finding to liability arising from the usual and ordinary transportation of irrigation water by ditch or canal and the normal and customary application of irrigation water to the land for usual irrigation procedures, specifically declining to decide whether strict liability applies to impounding waters, whether by damming the flow of a natural stream or by collecting water in a reservoir [*Clark v. Di Prima (1966) 241 Cal. App. 2d 823, 827-829, 51 Cal. Rptr. 49]* . An earlier court of appeal decision had reached the same conclusion and applied it to reservoirs [*see Smith*

v. East Bay Mun. Util. Dist. (1954) 122 Cal. App. 2d 613, 618-619, 265 P.2d 610 (plaintiff entitled to recover based on defendant's negligence in operating dam, thereby allowing excessive amounts of water to flood plaintiff's property)]. For discussion of strict liability for ultrahazardous activities, see Ch. 380, *Negligence* .

[2] Reservoirs

The owner of a reservoir may permit flood waters to flow over a reservoir in those quantities that naturally flow into the reservoir. The owner is under a duty not to worsen the condition of a downstream landowner, but is under no duty to improve that owner's situation by using the dam for flood control. Unless the reservoir owner imports water from outside the watershed that causes or substantially contributes to flooding, the owner is not liable if the flow has not been augmented beyond the flow that would have occurred in the absence of the reservoir [*Kambish v. Santa Clara Valley Water Conservation Dist. (1960) 185 Cal. App. 2d 107, 110, 8 Cal. Rptr. 215* ; *Smith v. East Bay Mun. Util. Dist. (1954) 122 Cal. App. 2d 613, 619-620, 265 P.2d 610]* .

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§ 421.46 Diversion Through Artificial Channel

[1] Need Not Be Greater Than Natural Channel

Often an artificial channel will be constructed to replace a natural channel, quite frequently for flood control purposes. If at the time of its construction the artificial channel is adequate to care for all reasonably anticipated storm or flood waters under the then-existing landscape conditions, it is adequate. There is no obligation to construct an artificial channel so large and so efficient that it will carry excess storm and flood waters that may flow into it because of subsequent artificial conditions, such as the building of cities and highways, that prevent absorption by the lands of waters and so artificially increase their flow. Through the lapse of time an artificial watercourse may come to be regarded as a natural one [*Weck v. Los Angeles County Flood Control Dist. (1951) 104 Cal. App. 2d 599, 609-611, 232 P.2d 293* (artificial channel in existence for 36 years no longer seen as diversion)].

[2] Reliance on Long-Continued Diversion

A new natural condition may be established because of a long-continued diversion of water [*see Smith v. East Bay Mun. Util. Dist. (1954) 122 Cal. App. 2d 613, 621, 265 P.2d 610]* . An owner who invests substantial expenditures in reliance on that condition has the right to have the diversion continued if that investment would otherwise be destroyed [*Natural Soda Prod. Co. v. City of Los Angeles (1943) 23 Cal. 2d 193, 197, 143 P.2d 12* ; *Kambish v. Santa Clara Valley Water Conservation Dist. (1960) 185 Cal. App. 2d 107, 111, 8 Cal. Rptr. 215]* .

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§ 421.47 Liability in Tort

Liability for interfering with surface waters is tort liability. An unjustified invasion of a possessor's interest in the use and enjoyment of his or her land through the medium of surface waters, or through any other type of waters, is as much a tort as a trespass or a private nuisance produced by smoke or smells [*Keys v. Romley (1966) 64 Cal. 2d 396, 407-408, 50 Cal. Rptr. 273, 412 P.2d 529]* . An act of obstruction or diversion of water is a nuisance under *Civ. Code § 3479* [*Helix Land Co. v. City of San Diego (1978) 82 Cal. App. 3d 932, 949-951, 147 Cal. Rptr. 683]* . No essential legal difference is usually recognized between cases involving surface overflow and cases involving direct percolation or seepage [*see* *Kall v. Carruthers (1922) 59 Cal. App. 555, 559, 211 P. 43]* . For discussion of liability for impounded waters escaping, see *§ 421.45[1]*.

For a general form of complaint for damages for injury of property off premises based on a negligent condition on premises, see *§ 421.110*. For forms of allegations based on negligent impoundment, diversion, discharge, and obstruction of waters, see *§§ 421.111 -421.115*. For a form of complaint for damages and injunctive relief to abate a private nuisance based on the diversion of naturally accumulated waters, see Ch. 391, *Nuisance* , Form 8.1.

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§ 421.48 Determining Damages

There is no fixed, inflexible rule for determining the measure of damages for injury to or destruction of property, and whatever formula is most appropriate in the particular case will be adopted. Generally, however, in a case involving property damages resulting from negligence, if the cost of repairing the injury and restoring the premises to their original condition amounts to less than the diminution in value of the property, that cost is the proper measure of damages. If the cost of restoration will exceed the diminution in value, then the diminution in value of the property is the proper measure [*Mozzetti v. City of Brisbane (1977) 67 Cal. App. 3d 565, 576, 136 Cal. Rptr. 751]* .

If the intrusion of water is the result of a trespass or a nuisance, and the facts show oppression, fraud, or malice, punitive damages are available [*Civ. Code § 3294*]. For example, punitive damages were appropriate in a case in which an individual maliciously placed hoses and drained stagnant, mosquito-infested swimming pool water onto the land of another [*Goshgarian v. George (1984) 161 Cal. App. 3d 1214, 1223-1226, 208 Cal. Rptr. 321* (trespass action)].

Damages may be apportioned between two or more defendants who acted independently in creating or maintaining a tortious invasion of a landowner's interest in the use and enjoyment of land by interfering with flowing water [*see Griffith v. Kerrigan (1952) 109 Cal. App. 2d 637, 639-641, 241 P.2d 296]* .

For discussion and forms relating to damages in tort actions generally, see Ch. 177, *Damages* .

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§ 421.49 Duty to Minimize Damages

The person who can minimize damages and fails to do so cannot recover for the excess damages that occur. The costs of reasonable acts to minimize damages may be recovered. Although failure to take affirmative action to protect property does not preclude relief, that inaction may be relevant in computing the damages [*Sheffet v. County of Los Angeles (1970) 3 Cal. App. 3d 720, 730-731, 731 n.8, 84 Cal. Rptr. 11]* . The duty to minimize damages does not extend to a duty to anticipate damages [*Lourence v. West Side Irrigation Dist. (1965) 233 Cal. App. 2d 532, 539-540, 43 Cal. Rptr. 889]* .

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§ 421.50 Injunctive Relief

One who wrongfully causes water to flow onto another's land that would not flow there naturally creates a nuisance per se. It is an injury that cannot be continued, whether the damage is great or small. The act is wrongful per se in its inception and is actionable without any special damages. A preliminary injunction restraining the flow or interference with the natural flow of water pending the litigation is appropriate [*Allen v. Stowell (1905) 145 Cal. 666, 669, 79 P. 371* (mandatory injunction compelling removal of dam); *Heil v. Sawada (1960) 187 Cal. App. 2d 633, 637-638, 10 Cal. Rptr. 61]* . Injunctive relief is equally appropriate if the intruding water is in the form of seepage rather than overflow [*see* *Fredericks v. Fredericks (1951) 108 Cal. App. 2d 242, 244, 238 P.2d 643]* . However, anything short of a reasonable probability of injury is insufficient to warrant an injunction against any proposed use of property or water on that property by the property's owner [*Galbreath v. Hopkins (1911) 159 Cal. 297, 303-304, 113 P. 174]* . Moreover, the danger must be probable and imminent, and therefore a risk of future flooding does not warrant injunctive relief [*Helix Land Co. v. City of San Diego (1978) 82 Cal. App. 3d 932, 949-951, 147 Cal. Rptr. 683]* . However, a single act of flooding may constitute a nuisance for which damages may be recovered [*Granone v. County of Los Angeles (1965) 231 Cal. App. 2d 629, 650-651, 42 Cal. Rptr. 34* (flooding destroyed crops)].

For a form of complaint for injunctive relief to abate a private nuisance based on the diversion of naturally accumulated waters, see Ch. 391, *Nuisance* , Form 8.1.

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§ 421.51 Statute of Limitations

An action for trespass or injury to real property must be brought within three years [*Code Civ. Proc. § 338(b)*]. That period of limitations runs from the date the cause of action accrues, which is the date of the injury, not the date on which the act of diversion was committed [*Polin v. Chung Cho (1970) 8 Cal. App. 3d 673, 676-677, 87 Cal. Rptr. 591* (action for damages for diversion of water)].

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§ 421.52 Inverse Condemnation

Inverse condemnation may result from invasions of water or other liquid effluents caused by a public entity [*Varjabedian v. City of Madera (1977) 20 Cal. 3d 285, 297, 142 Cal. Rptr. 429, 572 P.2d 43]* . A public entity may be liable if alterations or improvements to upstream public property discharge an increased volume of surface water into a natural watercourse, and the increased volume or velocity of the stream waters or the method of discharge into the watercourse causes downstream property damage [*Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 337, 27 Cal. Rptr. 2d 613, 867 P.2d 724* , *overruling Archer v. City of Los Angeles (1941) 19 Cal. 2d 19, 119 P.2d 1]* . However, the public agency is liable only if its conduct posed an unreasonable risk of harm and that conduct was a substantial cause of the damage to the downstream property [*Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 367, 27 Cal. Rptr. 2d 613, 867 P.2d 724]* . A public entity may also be liable in inverse condemnation for damage caused by public improvements constructed in or on a watercourse for the purpose of improving surface water drainage, if its conduct posed an unreasonable risk of harm and was a substantial cause of the damage [*Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 366-367, 27 Cal. Rptr. 2d 613, 867 P.2d 724]* . Action in inverse condemnation is available only if the taking results in property damage, destruction, or other depreciation in market value, or if it unlawfully dispossesses the owner. "Taking" requires an act, and the risk of future flooding is not an act [*Olson v. County of Shasta (1970) 5 Cal. App. 3d 336, 341, 85 Cal. Rptr. 77* ; for discussion and forms relating to inverse condemnation, see *Ch. 247, Eminent Domain, § 247.190* et seq.].

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§ 421.53 Easement to Discharge Water

The privilege of discharging imported water into a natural channel may ripen into an easement, but only if there is an interference with the rights of another, as might be indicated by substantial damage to the lower landowner [*see Phillips v. Burke (1955) 133 Cal. App. 2d 700, 704, 284 P.2d 809]* . To obtain an easement by prescription there must be a hostile and actual infringement of the owner's rights for a period of time each year, for the statutory period of five years, and the infringement must have been known or reasonably inferred by the owner [*Nelson v. Robinson (1941) 47 Cal. App. 2d 520, 526-528, 118 P.2d 350* ; for discussion and forms relating to prescriptive easements, see Ch. 13, *Adverse Possession*].

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[Reserved]

§§ 421.54[Reserved]

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§ 421.60 Related LexisNexis/Matthew Bender Publications

- For memoranda of points and authorities relating to negligence actions generally, see California Points and Authorities, *Negligence* (Matthew Bender)

- For memoranda of points and authorities relating to premises liability, see California Points and Authorities, *Premises Liability* (Matthew Bender)

- For forms of interrogatories relating to actions involving spectator injuries at sporting events, see Bender's Forms of Discovery, *Athletics, Games, and Sports* (Matthew Bender)

- For forms of interrogatories relating to actions involving plaster falling from ceiling, see Bender's Forms of Discovery, *Ceilings* (Matthew Bender)

- For forms of interrogatories relating to control and custody of premises, see Bender's Forms of Discovery, *Control and Custody* (Matthew Bender)

- For forms of interrogatories relating to actions involving the defective condition of elevators or escalators, see Bender's Forms of Discovery, *Elevators and Escalators* (Matthew Bender)

- For forms of interrogatories relating to actions involving falls in an excavation, see Bender's Forms of Discovery, *Excavations* (Matthew Bender)

- For forms of interrogatories relating to actions involving falls in an unlighted hallway, see Bender's Forms of Discovery, *Hallways and Passageways* (Matthew Bender)

- For forms of interrogatories relating to actions between innkeepers and guests for dangerous conditions and inadequate security, see Bender's Forms of Discovery, *Hotels and Motels* (Matthew Bender)

- For forms of interrogatories to determine independent contractor status, see Bender's Forms of Discovery, *Independent Contractors* (Matthew Bender)

- For forms of interrogatories to determine the status of plaintiff as an invitee, trespasser, or licensee, see Bender's Forms of Discovery, *Negligence* (Matthew Bender)

- For forms of interrogatories relating to the ownership of real property, see Bender's Forms of Discovery, *Owners and Ownership* (Matthew Bender)

- For forms of interrogatories relating to actions involving recreational areas, see Bender's Forms of Discovery, *Parks, Playgrounds and Other Recreational Areas* (Matthew Bender)

- For forms of interrogatories relating to actions involving personal injuries, see Bender's Forms of Discovery, *Personal Injuries* (Matthew Bender)

- For forms of interrogatories to establish the existence of prior accidents and conditions, see Bender's Forms of Discovery, *Prior Accidents and Conditions* (Matthew Bender)

- For forms of interrogatories relating to repairs made subsequent to an accident, see Bender's Forms of Discovery, *Repairs Subsequently Made* (Matthew Bender)

- For forms of interrogatories relating to actions involving a defective roof, see Bender's Forms of Discovery, *Roofs* (Matthew Bender)

- For forms of interrogatories relating to actions involving a fall on premises, see Bender's Forms of Discovery, *Slip and Fall* (Matthew Bender)

- For a discussion of premises liability, see California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners* (Matthew Bender)

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§ 421.61 State Statutes

[1] General Principles of Liability

[a] Crimes

Owner of property is not liable for injury or death proximately caused by conduct in furtherance of commission of felony. *Civ. Code § 847*

Failure to cover, fill, or fence abandoned excavation is misdemeanor. *Health & Safety Code § 115700*

[b] Liability to Gleaner

Owner of property is not liable for injuries to persons invited onto premises to glean agricultural or farm products. *Civ. Code § 846.2*

[c] Liability to Public Employee

Liability to peace officers, firefighters, and emergency medical personnel employed by a public entity. *Civ. Code § 1714.9*

Owner of property is not liable if employee of Fish and Game Department is injured during work on behalf of endangered or threatened species. *Fish & Game Code § 2056*

[d] Negligence

Liability for negligence. *Civ. Code § 1714(a)*

Operator of automated teller machine is required to provide lighting during hours of darkness. *Fin. Code §§ 13040, 13041*

[2] Liability to Recreational Users

Liability to recreational users. *Civ. Code § 846*

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§ 421.62 Decisions

[1] Adjacent Property Owner or Possessor

Liability for injury suffered on adjoining property may be based on control of that property, even absent control of instrumentality of danger; control does not depend on defendant obtaining commercial benefit from adjoining property. *Alcaraz v. Vece (1997) 14 Cal. 4th 1149, 1156, 1162-1166, 60 Cal. Rptr. 2d 448, 929 P.2d 1239* (disapproving any language requiring commercial benefit in *Princess Hotels Int'l, Inc. v. Superior Court (1995) 33 Cal. App. 4th 645, 39 Cal. Rptr. 2d 457* , and *Swann v. Olivier (1994) 22 Cal. App. 4th 1324, 28 Cal. Rptr. 2d 23*)

Homeowners' association is not liable to partygoer injured in ocean surf off private beach owned by association; idea of anyone's controlling seas and tides characterized as "ludicrous." *Swann v. Olivier (1994) 22 Cal. App. 4th 1324, 1333, 28 Cal. Rptr. 2d 23*

Farm owners are not liable for injuries suffered by farm workers in fire in migrant workers' camp on adjoining property, because farm owners had no control over camp; patrol of camps by farm owners' security service was conducted at service employees' own behest and without authorization or request by farm owners. *Lucas v. George T.R. Murai Farms, Inc. (1993) 15 Cal. App. 4th 1578, 1590-1591, 19 Cal. Rptr. 2d 436*

Owner of store was liable for attack by loiterer on store patron in adjoining parking lot because store owner had control over adjacent property; circumstances indicating control included knowledge that patrons were using lot and that loiterers were present, receipt of economic benefit from use of lot due to shortage of parking on store's property, authorization in lease of nonexclusive right to use lot, passive encouragement of use of lot by patrons, and complaints by store employees to police requesting removal of loiterers. *Southland Corp. v. Superior Court (1988) 203 Cal. App. 3d 656, 666-667, 250 Cal. Rptr. 57*

Mere possibility of influencing or affecting conditions on property adjacent to landowner's premises was not sufficient control to make landowner liable for dangerous condition on adjacent property; law school was not liable to student attacked on public street for failure to install lighting or monitors to give better view of street and sidewalk. *Donnell v. California W. School of Law (1988) 200 Cal. App. 3d 715, 720, 246 Cal. Rptr. 199*

[2] Assumption of Risk

Question whether defendant owed legal duty to protect plaintiff from particular risk is not answered by reference to reasonableness of plaintiff's conduct, but by reference to nature of activity in which defendant is engaged and relationship of defendant and plaintiff to that activity. *Knight v. Jewett (1992) 3 Cal. 4th 296, 309, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

Secondary assumption of risk, which is applicable if defendant owes duty of care to plaintiff and is merged as defense into comparative fault scheme, is distinguished from primary assumption of risk, which is applicable if defendant owes no duty of care to plaintiff and bars plaintiff's recovery completely. *Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

Plaintiff's walking down wet concrete steps does not completely bar plaintiff's recovery if defendant breached duty of care to maintain public areas of its building in safe condition. *Donohue v. San Francisco Hous. Auth. (1993) 16 Cal. App. 4th 658, 665-666*

Plaintiff's using sloping lawn where plaintiff knew others had slipped and fallen does not completely bar plaintiff's recovery if defendant breached its duty of care to plaintiff to eliminate dangerous conditions on its property. *Curties v. Hill Top Developers, Inc. (1993) 14 Cal. App 4th 1651, 1656, 18 Cal. Rptr. 2d 445*

[3] Complaints

Although complaint must allege (1) defendant's legal duty, (2) defendant's breach of that duty, (3) injury to plaintiff as result of breach, and (4) damage to plaintiff, no strict requirements exist for form of allegations in premises liability action. *Pultz v. Holgerson (1986) 184 Cal. App. 3d 1110, 1116-1117, 229 Cal. Rptr. 531*

[4] Conditions of Liability

Premises liability is based on ownership, possession, or control of property; landowner is not liable for defective or dangerous condition of property that landowner does not own, possess, or control; summary judgment is proper if absence of ownership, possession, or control has been unequivocally established. *Isaacs v. Huntington Mem'l Hosp. (1985) 38 Cal. 3d 112, 134, 211 Cal. Rptr. 356, 695 P.2d 653* ; *Donnell v. California W. School of Law (1988) 200 Cal. App. 3d 715, 720, 725-726, 246 Cal. Rptr. 199*

Third party's conduct is foreseeable only if it is sufficiently likely and not simply imaginable or conceivable; owner of convenience store was not liable to customer struck by curb-jumping automobile in absence of prior similar incidents. *Jefferson v. Qwik Korner Mkt., Inc. (1994) 28 Cal. App. 4th 990, 995-996, 34 Cal. Rptr. 2d 171*

Proprietor of place where intoxicating liquors are dispensed has duty to patrons to exercise reasonable care to protect them from injury from fellow patrons, whether drunk or sober; proprietor who breaches this duty is not immune from liability under *Bus. & Prof. Code § 25602* for injuries sustained as proximate result of breach, because license to sell alcoholic beverages does not confer grant of immunity to innkeeper who permits premises to be used as arena for aggressive tortfeasors. *Cantwell v. Peppermill, Inc. (1994) 25 Cal. App. 4th 1797, 1801-1803, 31 Cal. Rptr. 2d 246*

Landowner is not liable merely because its property exists next to adjoining dangerous property and it took no action to influence or affect condition of adjoining property. *Lucas v. George T.R. Murai Farms, Inc. (1993) 15 Cal.App. 4th 1578, 1590, 19 Cal. Rptr. 2d 436* ; *Donnell v. California W. School of Law (1988) 200 Cal. App. 3d 715, 720, 246 Cal. Rptr. 199*

[5] Conduct of Third Persons

Neither owner of commercial building nor parking services company owed legal duty of care to prevent sexual assault in building's underground parking garage by providing security guard, improved lighting and maintenance, operational surveillance cameras, or periodic walk-throughs by existing personnel; as matter of law, given absence of assaults in garage for extended period of years, occurrence of violent third-party sexual assault was not sufficiently foreseeable to impose duty of care under circumstances of case. *Sharon P. v. Arman, Ltd. (1999) 21 Cal. 4th 1181, 1195-1196, 91 Cal. Rptr. 2d 35, 989 P.2d 121*

Shopping mall owner has no duty to hire security guards to prevent violent criminal acts against tenants and their employees if no prior similar incidents made violent crime highly foreseeable; burdensome measures not required to satisfy landowner's duty of care absent high degree of foreseeability, and prior similar incidents required to show high degree of foreseeability. *Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 678-679, 25 Cal. Rptr. 2d 137, 863 P.2d 207* ("refining" abandonment of prior similar incidents rule in *Isaacs v. Huntington Mem'l Hosp. (1985) 38 Cal. 3d 112, 126-127, 211 Cal. Rptr. 356, 695 P.2d 653*)

Warning to bowling alley patron about "goofball" in parking lot was inadequate to discharge duty to protect against third persons because warning did not enable invitee to avoid harm. *Taylor v. Centennial Bowl, Inc. (1966) 65 Cal. 2d 114, 122-124, 52 Cal. Rptr. 561, 416 P.2d 793*

When worker was assaulted in unlit, unfenced parking lot at trucking facility, few prior sightings of nonthreatening transients on or near property were insufficient to establish reasonable foreseeability of plaintiff's injury even when security measures advocated by plaintiff would not have been unduly burdensome. *Ericson v. Federal Express Corp. (2008) 162 Cal. App. 4th 1291, 1306-1307, 77 Cal. Rptr. 3d 1*

Injury to 10-year-old member of after-school club caused by rock thrown by unidentified non-member, characterized by court as criminal assault, was not reasonably foreseeable under *Ann M.* standards, and even assuming foreseeability of attack, lack of additional supervision could not be shown to have been cause of attack. *Rinehart v. Boys & Girls Club of Chula Vista (2005) 133 Cal. App. 4th 419, 434-435, 34 Cal. Rptr. 3d 677*

Plaintiff's landlord owed duty of care to plaintiff to take steps to protect her from assault by another tenant because plaintiff had warned building manager on multiple occasions that other tenant had physically or verbally assaulted and threatened plaintiff and her mother in landlord's apartment building. *Madhani v. Cooper (2003) 106 Cal. App. 4th 412, 415-416, 130 Cal. Rptr. 2d 778*

In absence of prior similar incidents, store was not liable for clerk's rescuing person being beaten outside store by bringing him inside store, even though one attacker then fired gun into store, striking plaintiff, who was store customer. *Hassoon v. Shamieh (2001) 89 Cal. App. 4th 1191, 1195, 1199, 107 Cal. Rptr. 2d 658*

Low lighting and overgrown bushes did not make open store parking lot inherently dangerous and, absent prior similar incidents, were insufficient cause to hold store liable for attempted assault. *Nicole M. v. Sears, Roebuck & Co. (1999) 76 Cal. App. 4th 1238, 1248, 90 Cal. Rptr. 2d 922*

Owners of condominium unit and condominium association had no duty to unit's tenant, who was raped in unit by intruder, to increase securityprecautions, because lack of criminal activity in or around building, other than one burglary, made rape unforeseeable. *Pamela W. v. Millsom (1994), 25 Cal. App. 4th 950, 953, 959, 30 Cal. Rptr. 2d 690*

Public entity owes no duty to post signs warning of criminal activity if only result of requiring warnings would be to

keep people away from area. *Turner v. State of California (1991) 232 Cal. App. 3d 883, 893-895, 284 Cal. Rptr. 349*

Degree of foreseeability necessary to warrant finding of duty varies from case to case; if burden of preventing future harm is great, high degree of foreseeability may be required, but if there are strong policy reasons for preventing harm or harm can be prevented by simple means, lesser degree of foreseeability may be required. *Thai v. Stang (1989) 214 Cal. App. 3d 1264, 1271, 263 Cal. Rptr. 202*

Generally, person has no duty to control another's conduct or to warn those who may be endangered by that conduct; although existence of special relationship between landowner and invitees may give rise to duty, relationship between law school and adult law students does not constitute special relationship. *Donnell v. California W. School of Law (1988) 200 Cal. App. 3d 715, 719-720, 246 Cal. Rptr. 199*

No special relationship existed between custodian of sapphire ring for sale and insurance company from whose premises ring was stolen by third party, who pretended to be buyer and took ring from custodian for purported purpose of having it photographed, so as to impose on insurance company affirmative duty to aid custodian in summoning help; therefore, insurance company's refusal to allow custodian to use company telephone to report theft was not negligence on its part. *Stangle v. Fireman's Fund Ins. Co. (1988) 198 Cal. App. 3d 971, 974-975, 244 Cal. Rptr. 103*

Hotel proprietor has no duty to protect tenant from another tenant if proprietor has no advance warning of other tenant's dangerous propensities; noise complaints against tenant did not put hotel proprietor on notice that tenant would be dangerous. *Gray v. Kircher (1987) 193 Cal. App. 3d 1069, 1074-1075, 236 Cal. Rptr. 891*

Fast food restaurant owner owes no duty of care to patron who was shot by restaurant robber after patron chased robber, if it was not reasonably foreseeable that patron would follow robber from restaurant's premises, patron was not shot on restaurant's premises, and minimal moral blame attached to restaurant worker's cry to patron to stop the robber. *Forrand v. Foodmaker, Inc. (1986) 182 Cal. App. 3d 196, 200-202, 227 Cal. Rptr. 74*

Proprietors of rest home, like those of private hospital, are under duty to exercise reasonable care to avoid injury to residents; in action by rest home resident who was injured by fellow resident who had previously demonstrated violent behavior, principles of ordinary negligence applied to defendants. *Mast v. Magpusao (1986) 180 Cal. App. 3d 775, 778-780, 225 Cal. Rptr. 689*

Convenience store owed no duty to protect patron from injury by gang attack in store if store owners could not reasonably foresee or anticipate attack and possibility of injury resulting from the attack. *Gregorian v. Nat'l Convenience Stores, Inc. (1985) 174 Cal. App. 3d 944, 949, 220 Cal. Rptr. 302* (distinguishing *Cohen v. Southland Corp. (1984) 157 Cal. App. 3d 130, 141, 203 Cal. Rptr. 572*)

Baseball stadium owner's liability for failure to prevent injuries inflicted by patrons against other patrons in parking lot is dependent on whether stadium owner could have taken reasonable steps to prevent plaintiffs' injuries; causal connection between negligence and injury was necessary to sustain judgment for plaintiff. *Noble v. Los Angeles Dodgers, Inc. (1985) 168 Cal. App. 3d 912, 917-918, 214 Cal. Rptr. 395*

Restaurateur is not under duty to give money to armed robber to prevent robber from shooting patron. *Vandermost v. Alpha Beta Co. (1985) 164 Cal. App. 3d 771, 778-780, 210 Cal. Rptr. 613*

Security guard, hired by owner of premises in response to owner's duty to protect business customers, has special relationship with customers requiring affirmative action to protect customers while they are on business premises and is required to act reasonably in response to acts of third persons. *Marois v. Royal Investigation & Patrol, Inc. (1984) 162 Cal. App. 3d 193, 199-200, 208 Cal. Rptr. 384*

Convenience store has duty to use reasonable measures to protect patrons from injury by robbers. *Cohen v. Southland Corp. (1984) 157 Cal. App. 3d 130, 137-143, 203 Cal. Rptr. 572*

Plaintiff stated cause of action against landlord for assault on plaintiff by third parties if complaint alleged landlord was aware of crimes on premises and in neighborhood and was also aware of tenant complaints and requests for protective measures. *Penner v. Falk (1984) 153 Cal. App. 3d 858, 862-866, 200 Cal. Rptr. 661*

Minimal duty of care to provide first line of defense against criminal acts in parking garage exists if trier of fact found assault foreseeable. *Gomez v. Ticor (1983) 145 Cal. App. 3d 622, 628-632, 193 Cal. Rptr. 600*

Duty of landlords to protect tenant from criminal acts of third party arises if, despite no history of prior rapes in building, landlords were on notice of prior assault and robbery, knew that building was located in high crime area, and knew of defective lobby entrance lock. *Kwaitkowski v. Superior Trading Co. (1981) 123 Cal. App. 3d 324, 326-333, 176 Cal. Rptr. 494*

Absence of prior accidents or prior similar accidents does not dispose of question of foreseeability; test is whether reasonable person could, in light of circumstances, have foreseen accident happening. *Kwaitkowski v. Superior Trading Co. (1981) 123 Cal. App. 3d 324, 329, 176 Cal. Rptr. 494* ; *Musgrove v. Ambrose Props. (1978) 87 Cal. App. 3d 44, 52, 150 Cal. Rptr. 722* ; *Barker v. Wah Low (1971) 19 Cal. App. 3d 710, 721, 97 Cal. Rptr. 85*

Owner of shopping center has duty to protect patron from accident caused by bicyclist even though no history of prior bicycle accidents at center. *Musgrove v. Ambrose Props. (1978) 87 Cal. App. 3d 44, 52, 150 Cal. Rptr. 722*

Determination of duty to control conduct of third persons is question of law, and foreseeability is question of fact. *Musgrove v. Ambrose Props. (1978) 87 Cal. App. 3d 44, 52, 150 Cal. Rptr. 722*

Landlord is liable to tenant for negligence in failing to take adequate security precautions after several previous rapes occurred in apartment complex, in misrepresenting security precautions, and in failing to warn of likelihood of criminal conduct by suspected assailant. *O'Hara v. W. Seven Trees Corp. (1977) 75 Cal. App. 3d 798, 803-806, 142 Cal. Rptr. 487*

Duty of landlord to protect social guest of tenant from harm caused by third person does not arise if no special relationship between plaintiff and landlord and if third party conduct could not reasonably have been anticipated. *Totten v. More Oakland Residential Hous., Inc. (1976) 63 Cal. App. 3d 538, 542-544, 134 Cal. Rptr. 29*

Duty to protect against acts of third party does not arise unless possessor has reasonable cause to anticipate conduct; in absence of prior incidents landlord was not bound to anticipate criminal activities of third persons. *Totten v. More Oakland Residential Hous., Inc. (1976) 63 Cal. App. 3d 538, 543-544, 134 Cal. Rptr. 29*

Duty to control conduct of third persons is question of fact, and summary judgment not proper on question of whether proprietor of drive-in was negligent in failing to erect barriers to prevent cars from jumping guard rail. *Barker v. Wah Low (1971) 19 Cal. App. 3d 710, 723, 97 Cal. Rptr. 85*

Duty of proprietor of business to control conduct of third persons does not arise if no reason to expect that perpetrator of robbery would be in parking lot and would harm pursuing employee. *Young v. Desert View Mgmt. Corp. (1969) 275 Cal. App. 2d 294, 298-299, 79 Cal. Rptr. 848*

[6] Dangerous Condition

[a] Generally

Occupier of land may be negligent if aware of concealed condition involving unreasonable risk of harm to person on premises and fails to warn person about to come into contact with condition or repair condition. *Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561*

Invitor has duty to warn invitee of dangerous condition existing on public street or sidewalk adjoining invitor's business that creates danger because of invitor's special benefit, convenience, or use of public way. *Schwartz v. Helms Bakery, Ltd. (1967) 67 Cal. 2d 232, 239, 240, 60 Cal. Rptr. 510, 430 P.2d 68* ; *Ellis v. Trowen Frozen Prods., Inc. (1968) 264 Cal. App. 2d 499, 503, 70 Cal. Rptr. 487*

Business proprietor has duty to exercise ordinary care to discover dangerous condition and either warn business visitor or make condition reasonably safe. *Chance v. Lawry's, Inc. (1962) 58 Cal. 2d 368, 373, 24 Cal. Rptr. 209, 374 P.2d 185* ; *Bridgman v. Safeway Stores, Inc. (1960) 53 Cal. 2d 443, 446, 2 Cal. Rptr. 146, 348 P.2d 696*

Actual or constructive knowledge of dangerous condition or fact that discovery of condition could be made in exercise of reasonable care is required if third persons or ordinary wear and tear brought about condition. *Bridgman v. Safeway Stores, Inc. (1960) 53 Cal. 2d 443, 447, 2 Cal. Rptr. 146, 348 P.2d 696* ; *Olsen v. Roos-Atkins (1962) 208 Cal. App. 2d 259, 263, 25 Cal. Rptr. 190*

Reasonable inspection of premises is required and absence of inspections is inference that person exercising ordinary care would have discovered dangerous condition. *Bridgman v. Safeway Stores, Inc. (1960) 53 Cal. 2d 443, 447, 2 Cal. Rptr. 146, 348 P.2d 696* ; *Olsen v. Roos-Atkins (1962) 208 Cal. App. 2d 259, 263, 25 Cal. Rptr. 190*

Dangerous condition can be either artificial or natural. *Austin v. Riverside Portland Cement Co. (1955) 44 Cal. 2d 225, 233, 282 P.2d 69*

Knowledge of dangerous condition is imputed if condition created by possessor or employee. *Hatfield v. Levy Bros. (1941) 18 Cal. 2d 798, 806, 117 P.2d 841* ; *McKenney v. Quality Foods, Inc. (1957) 156 Cal. App. 2d 349, 352, 353, 319 P.2d 448*

Primary assumption of risk barred recovery by skier who went through gap between trees, thinking he could cross over to another ski run, and skied over edge of ravine onto rocks below; owner and operator of ski resort has no duty to protect plaintiff against risks inherent in sport of skiing (such as trees, rocks, rough terrain, or ravines) by, in effect, changing entire mountain to ensure plaintiff's safety. *O'Donoghue v. Bear Mountain Ski Resort (1994) 30 Cal. App. 4th 188, 192-193, 35 Cal. Rptr. 2d 467*

Trial court commits prejudicial error in refusing to instruct jury that business proprietor has duty either to remove dangerous condition on premises or to warn of its presence, because, without instruction, jury could not have determined if dangerous condition existed, and if so, whether warning was adequate to enable plaintiff to foresee full extent of hazard of slippery floor. *Williams v. Carl Karcher Enters., Inc. (1986) 182 Cal. App. 3d 479, 483, 488, 227 Cal. Rptr. 465*

Private road to plant heavily traveled by trucks does not constitute hazardous natural or artificial condition on property requiring signs or warning devices that would have been contrary to Vehicle Code provisions. *A. Teichert & Son, Inc. v. Superior Court (1986) 179 Cal. App. 3d 657, 663-664, 225 Cal. Rptr. 10*

In absence of agreement or special circumstances, defendant not liable for dangerous condition of premises if defendant did not own or have right to control premises. *Marshall v. United Airlines (1973) 35 Cal. App. 3d 84, 88, 110 Cal. Rptr. 416*

[b] Obvious Danger

Whether danger is obvious is question of fact; maintenance of open box in narrow foyer of restaurant is dangerous condition if foyer is likely to be crowded and patron's attention is likely to be diverted. *Chance v. Lawry's, Inc. (1962) 58 Cal. 2d 368, 373-374, 24 Cal. Rptr. 209, 374 P.2d 185*

Invitee has no duty to make critical inspection of premises and has right to assume possessor made inspection made and took reasonable precautions. *Chance v. Lawry's, Inc. (1962) 58 Cal. 2d 368, 373-374, 24 Cal. Rptr. 209, 374 P.2d 185* ; *Celli v. Sports Car Club of Am., Inc. (1972) 29 Cal. App. 3d 511, 523, 105 Cal. Rptr. 904*

Injury resulting from obvious danger is foreseeable if practical necessity of encountering danger, weighed against apparent risk involved, is such that person might choose to encounter danger; owner or possessor of land has duty of care only after court considers foreseeability of injury and other policy considerations, such as extent of burden to owner or possessor and consequences to community of imposing duty to remedy danger. *Osborn v. Mission Ready Mix (1990) 224 Cal. App. 3d 104, 118-119, 273 Cal. Rptr. 457*

No liability for injury of invitee due to obvious danger. *Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 27-28, 77 Cal. Rptr. 914* ; *Henderson v. McGill (1963) 222 Cal. App. 2d 256, 259-260, 34 Cal. Rptr. 897*

Faucet protruding from building is not obvious as matter of law if invitee's attention could have been diverted from seeing it. *Henderson v. McGill (1963) 222 Cal. App. 2d 256, 260-265, 34 Cal. Rptr. 897*

No liability for injuries sustained by neighbor checking on mail who tripped over lawnmower, because third party caused condition, landowner had no opportunity to discover it, and danger was obvious. *Holcombe v. Burns (1960) 183 Cal. App. 2d 811, 815, 7 Cal. Rptr. 366*

[7] "Firefighter's" Rule

"Firefighter's" rule did not bar recovery by private safety employees injured in fire negligently started by employees of third party; by establishing public fire departments and taxing themselves to pay for their services, public in effect purchases exoneration from duty of care and not required to pay twice, through taxation and individual liability, for those services; in contrast, defendant whose negligence injures private safety employees employed by another does not have same relationship with those private safety employees as member of public has with publicly-employed firefighters, because defendant has not paid in any way to be relieved of duty of care owed toward private employees. *Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 542-543, 34 Cal. Rptr. 2d 630, 882 P.2d 347*

"Firefighter's" rule is not separate concept, but example of application of assumption of risk doctrine set forth in *Knight v. Jewett (1992) 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; proper basis for rule is not plaintiff's voluntary acceptance of known risk of injury in course of employment, but rather public policy determination that person who negligently starts fire does not owe duty of care to protect responding firefighter from very danger that requires firefighter's presence. *Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 538, 541, 34 Cal. Rptr. 2d 630, 882 P.2d 347*

"Firefighter's" rule bars firefighter or police officer from recovery for injuries sustained due to very conduct that created risk to which police officer or firefighter responded. *Lipson v. Superior Court (1982) 31 Cal. 3d 362, 378, 182 Cal. Rptr. 629, 644 P.2d 822*

"Firefighter's" rule does not preclude liability for injuries due to conduct independent from act that created risk;

possessor liable for failure to warn of known, hidden danger on premises or for misrepresentation of nature of risk. *Lipson v. Superior Court (1982) 31 Cal. 3d 362, 378, 182 Cal. Rptr. 629, 644 P.2d 822* ; *Terhell v. American Commonwealth Assocs. (1985) 172 Cal. App. 3d 434, 437, 218 Cal. Rptr. 256* (rule does not bar statement of cause of action); *Kocan v. Garino (1980) 107 Cal. App. 3d 291, 295-296, 165 Cal. Rptr. 712*

Exception to rule for independent act of misconduct or unrelated risk is not applicable merely because firefighter or police officer encountered risk that caused injuries by chance rather than by being summoned to scene by radio call. *Kelhi v. Fitzpatrick (1994) 25 Cal. App. 4th 1149, 1152, 1158-1159, 31 Cal. Rptr. 2d 182*

"Firefighter's" rule developed in context of premises liability as limitation on duty of possessors of property, and rationale for rule is absence of liability for dangerous condition known to person coming on premises. *Walters v. Sloan (1977) 142 Cal. Rptr. 152, 571 P.2d 609*

[8] Independent Contractors

Employees of negligent independent contractors are precluded from recovering damages from hirer under peculiar risk doctrine. *Privette v. Superior Court (1993) 5 Cal. 4th 689, 701-702, 21 Cal. Rptr. 2d 72, 854 P.2d 721* ; *see also Smith v. ACandS, Inc. (1994) 31 Cal. App. 4th 77, 94-95, 37 Cal. Rptr. 2d 457* (*Privette* applied retroactively)

Risk in demolition project that someone could be hurt by falling buildings is peculiar risk. *Aceves v. Regal Pale Brewing Co. (1979) 24 Cal. 3d 502, 508-509, 156 Cal. Rptr. 41, 595 P.2d 619*

Employer is liable for failure of contractor to take special precautions if work of independent contractor likely to create peculiar risk of harm to others unless special precautions taken; peculiar risk is risk peculiar to work to be done and arising out of character of work or place where it is to be done, and one that reasonable person would recognize necessity of taking precautions to avoid. *Griesel v. Dart Indus., Inc. (1979) 23 Cal. 3d 578, 586, 153 Cal. Rptr. 213, 591 P.2d 503*

Possessor employing independent contractor is liable to persons on premises for dangerous condition on premises created by independent contractor if possessor retains control of premises. *Chance v. Lawry's, Inc. (1962) 58 Cal. 2d 368, 374, 24 Cal. Rptr. 209, 374 P.2d 185*

Employee of independent contractor is invitee, and possessor is liable for injuries to employee for failure to maintain premises in safe condition. *Austin v. Riverside Portland Cement Co. (1955) 44 Cal. 2d 225, 232-233, 282 P.2d 69*

Possessor's duty to maintain premises in reasonably safe condition is nondelegable, and possessor for negligent failure of independent contractor to do so. *Brown v. George Pepperdine Foundation (1943) 23 Cal. 2d 256, 260, 143 P.2d 929* ; *Lilienthal v. Hastings Clothing Co. (1955) 131 Cal. App. 2d 343, 347, 280 P.2d 824*

Privette bars peculiar risk claims by employees of any contractor working on premises, not only claims by employees of negligent contractor whose acts injured employee. *Smith v. ACandS, Inc. (1994) 31 Cal. App. 4th 77, 95-96, 37 Cal. Rptr. 2d 457*

Negligence of independent contractor (truck driver) in colliding with bicyclist is nothing more than ordinary failure to exercise due care in operation of motor vehicle, and thus not subject to peculiar risk doctrine. *A. Teichert & Son, Inc. v. Superior Court (1986) 179 Cal. App. 3d 657, 662, 225 Cal. Rptr. 10*

Risk that fellow employee will remove window washer's means of attachments is not peculiar risk for which employer is responsible. *Salinero v. Pon (1981) 124 Cal. App. 3d 120, 135-136, 177 Cal. Rptr. 204*

Liability of possessor of premises for negligence of independent contractor or contractor's employee does not extend to collateral negligence. *Salinero v. Pon (1981) 124 Cal. App. 3d 120, 137-138, 177 Cal. Rptr. 204* ; *Smith v. Lucky Stores (1976) 61 Cal. App. 3d 826, 830, 132 Cal. Rptr. 628*

Collateral negligence is negligence in operative detail of work that is unusual or foreign to normal contemplated risks of doing work. *Salinero v. Pon (1981) 124 Cal. App. 3d 120, 137-138, 177 Cal. Rptr. 204* ; *Smith v. Lucky Stores (1976) 61 Cal. App. 3d 826, 830, 132 Cal. Rptr. 628*

[9] Invitees

Mature, as opposed to minor, students are generally considered business invitees of school. *Donnell v. California W. School of Law (1988) 200 Cal. App. 3d 715, 719, 246 Cal. Rptr. 199*

Invitee is one who by express or implied invitation is brought or comes on to premises for possessor's advantage or for mutual or common interest of possessor and invitee. *Rowland v. Christian (1968) 69 Cal. 2d 108, 113-114, 70 Cal. Rptr. 97, 443 P.2d 561* ; *Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 27, 77 Cal. Rptr. 914*

Invitee is either business invitee or public invitee. *O'Keefe v. South End Rowing Club (1966) 64 Cal. 2d 729, 737-739, 51 Cal. Rptr. 534, 414 P.2d 830*

Public invitee is person invited to enter or remain on premises as member of public for purpose for which land is held open to public. *O'Keefe v. S. End Rowing Club (1966) 64 Cal. 2d 729, 737-739, 51 Cal. Rptr. 534, 414 P.2d 830*

Employee of independent contractor working on premises is possessor's invitee; possessor liable for injuries to employee if possessor fails to maintain premises in safe condition. *Austin v. Riverside Portland Cement Co. (1955) 44 Cal. 2d 225, 232-233, 282 P.2d 69*

Prospective tenant inquiring about availability of apartment is business visitor. *Oettinger v. Stewart (1944) 24 Cal. 2d 133, 136, 148 P.2d 19*

Business visitor is person who comes on possessor's premises for purpose connected with business conducted on premises. *Oettinger v. Stewart (1944) 24 Cal. 2d 133, 136, 148 P.2d 19*

Person checking on mail while neighbor away is invitee. *Holcombe v. Burns (1960) 183 Cal. App. 2d 811, 814, 7 Cal. Rptr. 366*

[10] Liability to Persons on Premises

Government entity owed duty to trespassers at water tank area of missile site because reasonable landowner would have been placed on notice by rampant trespassing at nearby missile test site that water tank area was also subject to unauthorized visitation; however, government entity did not owe duty to trespassers and thieves of copper wires atop power poles on site, because climbing poles to steal wires was not foreseeable. *Henderson v. United States (9th Cir. 1988) 846 F.2d 1233, 1235*

Possessor of land open to public for entry for business purposes is liable to members of public for physical harm caused by accidental, negligent, or intentionally harmful acts of third persons while members of public are on land for business purposes; possessors liable for failing to exercise reasonable care (1) to discover that those acts are being done or are likely to be done, or (2) to give warning adequate to enable visitors to avoid harm or otherwise to protect them against

it. *Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 807, 205 Cal. Rptr. 842, 685 P.2d 1193*

Proper test of liability to persons on premises is whether possessor, in management of property, acted as reasonable person in view of probability of injury to others; plaintiff's status is relevant, but not controlling. *Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561* ; *Jamison v. Mark C. Bloome Co. (1980) 112 Cal. App. 3d 570, 575, 169 Cal. Rptr. 399*

Fundamental principle codified in *Civ. Code § 1714(a)*, that every person liable for injury to another occasioned by that person's want of ordinary care, applies unless public policy clearly mandates otherwise; factors weighed in creating exception to principle are foreseeability of harm to plaintiff, degree of certainty of harm, closeness of connection between defendant's conduct and injury suffered, moral blame attached to defendant's conduct, policy of preventing future harm, and burden to defendant and consequences to community in imposing duty and liability for breach. *Rowland v. Christian (1968) 69 Cal. 2d 108, 113, 70 Cal. Rptr. 97, 443 P.2d 561*

Homeowners with swimming pool in backyard had no duty to supervise 2-year-old child who drowned after being left in front yard with child's own mother, who knew of pool and that no other adults were in yard to watch child but nonetheless left child under care of two older children and went into homeowners' house for five minutes; homeowners' failure to install self-latching mechanism on one outside gate leading into pool area could not support liability, as plaintiff could not prove that child used gate, rather than one of several other available doors, to access pool. *Padilla v. Rodas (2008) 160 Cal. App. 4th 742, 747-753, 73 Cal. Rptr. 3d 114*

Remodeling homeowner, although absent at time of attack, owed duty of care to protect construction worker from attack by pit bulls owned by another worker; with knowledge that dogs were guard dogs and could be dangerous, homeowner had specifically given dog owner permission to let dogs roam free in backyard and given plaintiff permission to retrieve boards stored in that yard. *Salinas v. Martin (2008) 166 Cal. App. 4th 404, 415-416, 82 Cal. Rptr. 3d 735*

Landlord has duty to take reasonable precautions to prevent young children from falling out of windows in common areas of apartment building; whether landlord breached duty by maintaining low, open, unguarded window in common area where children were likely to play was triable issue of fact. *Amos v. Alpha Prop. Mgmt. (1999) 73 Cal. App. 4th 895, 898, 906-907, 87 Cal. Rptr. 2d 34*

Homeowner liable to visitor claiming to have contracted Lyme disease from tick carried by homeowner's dog; homeowner had no duty to warn visitor not to allow dog to sit on her lap because evidence showed that homeowner did not know, and could not reasonably be expected to have known, that ticks carrying disease were present in area. *Butcher v. Gay (1994) 29 Cal. App. 4th 388, 405-406, 34 Cal. Rptr. 2d 771*

Landlords not liable to visitor shot accidentally by tenant, despite landlords' knowledge that tenant had drinking problem and owned firearms; shooting was not foreseeable risk because there was no evidence that tenant had ever harmed anyone due to either his drinking problem or his possession of firearms and no evidence that tenant handled firearms unsafely while drunk. *Sturgeon v. Curnutt (1994) 29 Cal. App. 4th 301, 307, 34 Cal. Rptr. 2d 498*

Landlord liable for injuries to deliveryman caused by commercial tenant's guard dog, despite no actual knowledge of dog's disposition, if landlord could have discovered dog's nature by reasonable inspection; distinction between guard dogs on commercial premises and family pets at single family residences. *Portillo v. Aiassa (1994) 27 Cal. App. 4th 1128, 1134-1135, 32 Cal. Rptr. 2d 755*

Owner of private residence has no duty of care to plaintiff to prevent injury as result of spider bite if, as matter of law, injury was unforeseeable by owner, burden on owner of preventing injury would be great, and task of defining scope of duty and measures required by homeowners would be extremely difficult. *Brunelle v. Signore (1989) 215 Cal. App.*

3d 122, 125, 263 Cal. Rptr. 415

Owner of restaurant not liable for mass-murder assault on customers by third party; restaurant's general duty to take reasonable precautions to protect patrons from reasonably foreseeable criminal conduct of unknown third parties does not encompass burden to prevent once-in-a-lifetime massacres *Lopez v. McDonald's (1987) 193 Cal. App. 3d 495, 504-512, 238 Cal. Rptr. 436*

Landowner not liable for injury caused by trivial defect on property; raised edge in walkway of no more than three fourths of inch is trivial defect as matter of law. *Ursing v. Big Boy Rests. (1987) 192 Cal. App. 3d 394, 397-399, 237 Cal. Rptr. 413*

Property owners, who had no previous knowledge of vicious nature or dangerous propensities of dog owned by their tenant, not liable for injuries suffered by cable company employee who was attacked by dog while lawfully on premises. *Lundy v. California Realty (1985) 170 Cal. App. 3d 813, 821, 216 Cal. Rptr. 575*

Landowner not liable for injuries resulting from dogs jumping against chain link fence that frightened pedestrian, causing her to run into street where she was hit by passing automobile. *Nava v. McMillan (1981) 123 Cal. App. 3d 262, 265-267, 176 Cal. Rptr. 473*

Duties toward invitees existing prior to *Rowland* as highest imposed on possessor; *Rowland* not suggesting departure from them, but instead giving persons lacking invitee status same protection under appropriate circumstances. *Jamison v. Mark C. Bloome Co. (1980) 112 Cal. App. 3d 570, 576, 169 Cal. Rptr. 399*

Attractive nuisance doctrine is no longer necessary after *Rowland. Smith v. Americania Motor Lodge (1974) 39 Cal. App. 3d 1, 7, 113 Cal. Rptr. 771* ; *Beard v. Atchison, Topeka & Santa Fe Ry. Co. (1970) 4 Cal. App. 3d 129, 136-137, 84 Cal. Rptr. 449*

Duty of care toward persons on premises after *Rowland* is controlled by foreseeability of risk and not status of plaintiff. *Beard v. Atchison, Topeka & Santa Fe Ry. Co. (1970) 4 Cal. App. 3d 129, 136, 84 Cal. Rptr. 449*

Duties existing in favor of invitees prior to *Rowland* are not jettisoned by *Rowland* and are consonant with *Civ. Code § 1714(a). Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 26, 77 Cal. Rptr. 914*

[11] Liability to Persons Outside Premises

Plaintiff stated cause of action against landowner for negligence in allowing sign and trees to obstruct view at intersection and make it unsafe. *Carson v. Facilities Dev. Co. (1984) 36 Cal. 3d 830, 846-847, 206 Cal. Rptr. 136, 686 P.2d 656*

Liability for harm caused by natural conditions is measured in terms of ordinary principles of negligence and no longer distinct from liability for harm caused by artificial conditions; plaintiff stated cause of action against defendants for damages to residence of person outside premises due to movement of landslide located on defendants' property. *Sprecher v. Adamson Cos. (1981) 30 Cal. 3d 358, 371, 178 Cal. Rptr. 783, 636 P.2d 1121*

Liability for harm to passerby due to fall of limb from planted row of trees on defendants' property is based on negligence principles, and question of reasonableness of defendants' conduct is not properly subject of nonsuit. *Coates v. Chinn (1958) 51 Cal. 2d 304, 308-309, 332 P.2d 289*

In suit brought by plaintiff who tripped over upturned, jagged piece of sidewalk, nonsuit in favor of landowner in

possession of adjacent condominium was improper because evidence showed landowner planted and maintained trees that were source of sidewalk defect, installed sprinklers on both sides of sidewalk, and had prior knowledge of sidewalk condition. *Alpert v. Villa Romano Homeowners Assn. (2000) 81 Cal. App. 4th 1320, 1335-1337, 96 Cal. Rptr. 2d 364*

Owner or possessor of premises has no duty to users of adjacent public streets either to refrain from holding activities that would distract passing motorists or to erect or maintain barriers to hide those activities from passing motorists. *Lompoc Unified Sch. Dist. v. Superior Court (1993) 20 Cal. App. 4th 1688, 1694, 1697, 26 Cal. Rptr. 2d 122*

Extent to which landowner receives exclusive benefit from construction or alteration of abutting walkway is significant in determination of whether it is reasonable to impose duty on landowner to maintain walkway in reasonably safe condition. *Seaber v. Hotel Del Coronado (1991) 1 Cal. App. 4th 481, 492, 2 Cal. Rptr. 2d 405*

Plaintiff is not required to show that condition of disrepair on defendant's property directly inflicted injury on plaintiff; connection between dilapidated fence at apartment complex and injury to child in creek on property adjacent to complex was sufficiently close to impose duty as matter of law. *McDaniel v. Sunset Manor Co. (1990) 220 Cal. App. 3d 1, 9, 269 Cal. Rptr. 196*

No liability for failure to maintain abutting sidewalk or planting strip properly, in absence of statute or ordinance, if defendant does not possess or own street easement and does not undertake maintenance of it. *Williams v. Foster (1989) 216 Cal. App. 3d 510, 521, 265 Cal. Rptr. 15*

Apartment complex owner owes no duty to provide fencing or other means of confinement to keep children on property. *Brooks v. Eugene Burger Mgmt. Corp. (1989) 215 Cal. App. 3d 1611, 1622, 264 Cal. Rptr. 756* ; *but see Barnes v. Black (1999) 71 Cal. App. 4th 1473, 1479-480, 84 Cal. Rptr. 2d 634* (apartment building owner may have duty to install fence around private sidewalk that young children were known to use for riding wheeled toys because sidewalk bordered steeply sloped driveway that emptied into busy street); *McDaniel v. Sunset Manor Co. (1990) 220 Cal. App. 3d 1, 9, 269 Cal. Rptr. 196* (once fencing is erected, duty may exist to maintain it with due care)

Supermarket owes no duty to customer who was injured by negligence of third party in public street adjacent to supermarket premises; no liability based on theories that natural or artificial condition of supermarket property had caused injuries or that customer was invitee, because customer had been injured on public street outside of supermarket's control; no liability based on "street vendor" theory, because supermarket was operating at fixed location. *Owens v. Kings Supermarket (1988) 198 Cal. App. 3d 379, 384-388, 243 Cal. Rptr. 627*

Landlord liable to motorist for shrubbery on premises obscuring traffic sign, regardless of actual knowledge of dangerous condition. *Swanberg v. O'Mectin (1984) 157 Cal. App. 3d 325, 329-332, 203 Cal. Rptr. 701*

Summary judgment improper in action involving fall on break in sidewalk allegedly due to roots of tree on defendant's property, if defendant failed to negate theory of liability under *Sprecher v. Adamson Cos. (1981) 30 Cal. 3d 358, 178 Cal. Rptr. 783, 636 P.2d 1121* . *Moeller v. Fleming (1982) 136 Cal. App. 3d 241, 245, 186 Cal. Rptr. 24*

Failure of theater operators to make marquee safe following demolition of neighboring building on which marquee was anchored is negligence creating liability for injuries to pedestrians. *Potter v. Empress Theatre Co. (1949) 91 Cal. App. 2d 4, 12-13, 204 P.2d 120*

[12] Licensee

Licensee is person like social guest who is privileged to enter or remain on land by virtue of possessor's consent. *Rowland v. Christian (1968) 69 Cal. 2d 108, 113-114, 70 Cal. Rptr. 97, 443 P.2d 561*

[13] Persons Liable

[a] Former Owner

Former owner not liable for defective or dangerous condition of property because no longer owns, possesses, or controls property; ownership of property is fundamental requirement of liability. *Preston v. Goldman (1986) 42 Cal. 3d 108, 119, 227 Cal. Rptr. 817, 720 P.2d 476* ; *see* *Lorenzen-Hughes v. MacElhenny, Levy & Co. (1994) 24 Cal. App. 4th 1684, 1688, 30 Cal. Rptr. 2d 210*

Exceptions to rule of nonliability of former owner apply to prior landowner that is contractor or builder of entire property, such as commercial developer, and to vendor who conceals or fails to disclose known dangerous condition to vendee who is unaware of condition. *Preston v. Goldman (1986) 42 Cal. 3d 108, 117 n.3, 122-123, 227 Cal. Rptr. 817, 720 P.2d 476* ; *Lorenzen-Hughes v. MacElhenny, Levy & Co. (1994) 24 Cal. App. 4th 1684, 1688-1689, 30 Cal. Rptr. 2d 210*

Former premises owner who had sold building and relinquished all control eight years earlier not liable to plaintiff injured by defective copper pipe that burst. *Lewis v. Chevron U.S.A., Inc. (2004) 119 Cal. App. 4th 690, 697-698, 14 Cal. Rptr. 3d 636*

Former owner of office building that had installed in minor remodeling project not liable to worker in building injured 9 years later when cabinet fell off wall, because no one, including former owner, could have known that cabinet had not been properly attached. *Lorenzen-Hughes v. MacElhenny, Levy & Co. (1994) 24 Cal. App. 4th 1684, 1686, 1689, 30 Cal. Rptr. 2d 210*

[b] Landlord Out of Possession

Landlord retaining control over part of premises is liable for injuries caused by dangerous condition. *Di Mare v. Cresci (1962) 58 Cal. 2d 292, 297, 23 Cal. Rptr. 772, 373 P.2d 860*

Landlord not liable for attack by residential tenant's dog, in absence of actual knowledge of dog's alleged vicious tendencies; mere fact that landlord may have observed dog barking and jumping at inside door of tenant's residence did not establish that landlord had actual knowledge of dog's vicious propensities. *Yuzon v. Collins (2004) 116 Cal. App. 4th 149, 164, 10 Cal. Rptr. 3d 18*

Landlord has no duty to warn prospective tenant of presence of vicious dog in neighborhood. *Wylie v. Gresch (1987) 191 Cal. App. 3d 412, 414, 236 Cal. Rptr. 552*

Commercial landlord not liable for shooting of third person by tenants' security guard on inadequately lit premises in high-crime neighborhood because landlord, who had instituted unlawful detainer proceedings against tenants for nonpayment of rent, had insufficient control over premises at time of shooting. *Leakes v. Shamoun (1986) 187 Cal. App. 3d 772, 776, 232 Cal. Rptr. 171*

Landlord not liable to trespasser who fell into vats containing caustic chemical maintained by tenant if trespasser unable to show that landlord was aware of existence of vats, of any prior break-ins to premises, of any prior injuries, or of any holes in fence surrounding perimeter of premises. *Bisetti v. United Refrigeration Corp. (1985) 174 Cal. App. 3d 643, 649, 220 Cal. Rptr. 209*

Landlord out of possession had no duty to protect neighbor of tenant from actions of tenant in occasionally discharging firearm, if landlord had no knowledge of conduct and no control over property other than termination of tenancy.

Rosales v. Stewart (1980) 113 Cal. App. 3d 130, 135, 169 Cal. Rptr. 660

Landlord liable for defective kitchen outlet under ordinary principles of negligence if landlord knew of defective outlet and exercised control over premises by right of re-entry contained in lease. *Evans v. Thomason (1977) 72 Cal. App. 3d 978, 985, 140 Cal. Rptr. 525*

Liability of landlord to tenant rests on principles of negligence and is no longer predicated on common law exceptions to rule of nonliability, such as concealment of known danger, express covenant to repair, or statutory duty to repair. *Golden v. Conway (1976) 55 Cal. App. 3d 948, 955, 128 Cal. Rptr. 69*

Landlord out of possession had duty to protect neighbor of tenant from injuries from attack by tenant's dog if landlord knew of vicious propensity of dog and could have conditioned renewal of month-to-month tenancy on removal of dog. *Uccello v. Laudenslayer (1975) 44 Cal. App. 3d 504, 513-515, 118 Cal. Rptr. 741*

Landlord's duty to tenant for dangerous condition of common area is based on principles of negligence. *Brennan v. Cockerell Invs., Inc. (1973) 35 Cal. App. 3d 796, 801-802, 111 Cal. Rptr. 122*

[c] Possessor

Oil company with right to maintain trestle is akin to holder of franchise and legal possessor of property with liability coextensive with that of possessor of property. *Palmquist v. Mercer (1954) 43 Cal. 2d 92, 102-103, 272 P.2d 26*

Tenant liable to business invitee for dangerous condition of common walkway that tenant exerted control over and impliedly invited invitees to use. *Johnston v. De La Guerra Props., Inc. (1946) 28 Cal. 2d 394, 399-401, 170 P.2d 5*

Stevedoring concern loading material on ship is possessor of portion of premises used. *Hamakawa v. Crescent Wharf & Warehouse Co. (1935) 4 Cal. 2d 499, 503-504, 50 P.2d 803*

Absent lessee of premises used for both residential and business purposes may be liable for injury caused by third person on premises, even though incident occurred without lessee's knowledge, if liability based on occurrence of dangerous activity on premises, lessee's knowledge of activity, and lessee's opportunity and ability to eliminate activity. *Anaya v. Turk (1984) 151 Cal. App. 3d 1092, 1103, 199 Cal. Rptr. 187*

Trespasser who takes and holds possession of another's land has same liabilities to third persons as owner. *Yee Chuck v. Board of Trs. (1960) 179 Cal. App. 2d 405, 410-411, 3 Cal. Rptr. 825*

[d] Street Vendors

Street vendor liable for injuries sustained by child in crossing street to make purchase because vendor did not exercise reasonable care for child's safety in immediate vicinity of vendor's truck. *Schwartz v. Helms Bakery, Ltd. (1967) 67 Cal. 2d 232, 242, 243, 60 Cal. Rptr. 510, 430 P.2d 68* ; *Ellis v. Trowen Frozen Products, Inc. (1968) 264 Cal. App. 2d 499, 503, 70 Cal. Rptr. 487*

Liability of street vendors does not extend to grocery store holding opening day carnival, because store owner, unlike street vendor, does not control own movement and avenues of approach, and patrons do not arrive along reasonably predictable routes of approach. *Nevarez v. Thriftimart, Inc. (1970) 7 Cal. App. 3d 799, 805-806, 87 Cal. Rptr. 50*

[14] Premises

Physical area encompassed by term "premises" does not always coincide with area for which invitor possesses title or lease, is sometimes less or greater than invitor's property, and includes reasonable means of ingress and egress. *Schwartz v. Helms Bakery, Ltd. (1967) 67 Cal. 2d 232, 239, 60 Cal. Rptr. 510, 430 P.2d 68*

Possessor owes no duty to protect user in area of egress and ingress against obvious danger if limited extent of possessor's control over area does not justify imposition of duty based on foreseeability of type of accident suffered by user. *Gray v. America W. Airlines, Inc. (1989) 209 Cal. App. 3d 76, 85, 256 Cal. Rptr. 877*

Landowner has no duty of care to invitee for injury occurring on premises landowner neither owns nor controls. *Steinmetz v. Stockton City Chamber of Commerce (1985) 169 Cal. App. 3d 1142, 1147, 214 Cal. Rptr. 405* (invitee returning to car parked off owners' premises)

[15] Recreational Users

Because purpose at time of entry controls whether immunity applies, no recovery by teenager who entered park to congregate with friends in picnic area and who was injured while taking test drive in friend's car before driving him home. Mattice v. United States Dep't of Interior (9th Cir. 1992) 969 F.2d818, 821; *see also Smith v. Scrap Disposal Corp. (1979) 96 Cal. App. 3d 525, 529, 158 Cal. Rptr. 134*

Immunity provisions of *Civ. Code § 846* apply to paved public roads within recreational land. *Mattice v. United States Dep't of Interior (9th Cir. 1992) 969 F.2d 818, 821*

Legislative goal of encouraging property owners to open their land to public does not mean that immunity applies only to owners who allow anyone and everyone free access to their property, because *Civil Code section 846* does not use word "public" or any equivalent synonym; therefore, government entity could claim immunity for injuries suffered in park located entirely within grounds of military facility and not open to general public. *Mansion v. United States (9th Cir. 1991) 945 F. 2d 1115, 1117-1118*

Consideration does not include alleged benefit of improved labor relations conferred on former employer by plaintiff's attendance at employer-sponsored picnic. *Mansion v. United States (9th Cir. 1991) 945 F. 2d 1115, 1118-1119*

Immunity is applicable to premises even if not "suitable" for recreational purposes; judicially created "suitability" exception to *Civ. Code § 846* is disapproved. *Ornelas v. Randolph (1993) 4 Cal. 4th 1095, 1108, 17 Cal. Rptr. 2d 594, 847 P.2d 560*

Holder of permit to graze livestock on federal lands in California is owner of interest in real property sufficient to come within immunity afforded by *Civ. Code § 846*. *Hubbard v. Brown (1990) 50 Cal. 3d 189, 197, 266 Cal. Rptr. 491, 785 P.2d 1183*

Kite flying, including act of entering property to retrieve wayward kite, was recreational activity covered by *Civ. Code § 846*. *Jackson v. Pacific Gas & Elec. Co. (2001) 94 Cal. App. 4th 1110, 1115, 114 Cal. Rptr. 2d 831*

Consideration necessary to deny immunity is some immediate and reasonably direct advantage, usually in form of entrance fee, that is not merely potential reimbursement, but is present actual benefit bestowed or detriment suffered; hold harmless clause indemnifying landowner against claims and costs incurred in connection with those claims is not sufficient consideration to overcome immunity granted by *Civ. Code § 846*. *Johnson v. Unocal Corp. (1993) 21 Cal. App. 4th 310, 316-317, 26 Cal. Rptr. 2d 148*

Public trust doctrine, which protects public's right to free and unimpeded use of navigable waterways, qualifies immunity of contiguous or subjacent owners of real property fronting or underlying navigable waters from liability to persons injured while using public waterways. *Charpentier v. Von Geldern (1987) 191 Cal. App. 3d 101, 108-110, 236 Cal. Rptr. 233*

Owner of property immunized by *Civ. Code § 846* from liability to person on beach subject to public easement for recreational use, who was injured by piece of gunite falling from overlooking cliff. *Collins v. Tippett (1984) 156 Cal. App. 3d 1017, 1019-1020, 203 Cal. Rptr. 366*

Immunity of *Civ. Code § 846* does not apply to owner of real property underlying navigable waterway if injuries allegedly sustained by boater were due to contact with power line overhanging water. *Pacific Gas & Elec. Co. v. Superior Court (1983) 145 Cal. App. 3d 253, 259, 193 Cal. Rptr. 336*

Purpose of *Civ. Code § 846* is to encourage owners to allow general public to use land for recreational purposes by relieving owners of tort duties that might otherwise apply. *Paige v. N. Oaks Partners (1982) 134 Cal. App. 3d 860, 863, 184 Cal. Rptr. 867* ; *Gerkin v. Santa Clara Valley Water Dist. (1979) 95 Cal. App. 3d 1022, 1026, 157 Cal. Rptr. 612*

Legislative policy underlying *Civ. Code § 846* reduces growing tendency of landowners to withdraw land from recreational access by removing risk of gratuitous tort liability that landowner might run unless landowner successfully barred any entry onto property for enumerated recreational uses. *Paige v. N. Oaks Partners (1982) 134 Cal. App. 3d 860, 863, 184 Cal. Rptr. 867*

Immunity provisions of *Civ. Code § 846* do not apply to public entities. *Delta Farms Reclamation Dist. v. Superior Court (1983) 33 Cal. 3d 699, 710, 190 Cal. Rptr. 494, 660 P.2d 1168* ; *Blakley v. State of California (1980) 108 Cal. App. 3d 971, 974-976, 167 Cal. Rptr. 1*

Willful or wanton misconduct is intentional wrongful conduct, done either with knowledge that serious bodily injury to another will probably result, or with wanton and reckless disregard of probable results. *New v. Consolidated Rock Prods. Co. (1985) 171 Cal. App. 3d 681, 689-692, 217 Cal. Rptr. 522* ; *O'Shea v. Claude C. Wood Co. (1979) 97 Cal. App. 3d 903, 912, 159 Cal. Rptr. 125* ; *Lostritto v. Southern Pac. Transp. Co. (1977) 73 Cal. App. 3d 737, 744, 140 Cal. Rptr. 905*

Defendant's declaration that defendant did not know plaintiff was using property and did not willfully or maliciously fail to guard plaintiff from or warn plaintiff of danger was sufficient to negate allegation of willful misconduct and to support partial summary judgment on issue in absence of any evidence showing such misconduct. *O'Shea v. Claude C. Wood Co. (1979) 97 Cal. App. 3d 903, 913, 159 Cal. Rptr. 125*

Applicability of *Civ. Code § 846* depends on plaintiff's purpose at time of entering defendant's land and not on underlying purpose of entire trip. *Smith v. Scrap Disposal Corp. (1979) 96 Cal. App. 3d 525, 529, 158 Cal. Rptr. 134*

Walking across bridge on property to get to store does not, as matter of law, fall within term "hiking" as used in *Civ. Code § 846*. *Gerkin v. Santa Clara Valley Water Dist. (1979) 95 Cal. App. 3d 1022, 1027, 157 Cal. Rptr. 612*

Activity required to be within commonly understood meaning of "recreational," and determination of whether or not walking is "hiking" depends on totality of circumstances, including path taken, length and purpose of journey, topography of property, prior use of land, and state of mind of plaintiff. *Gerkin v. Santa Clara Valley Water Dist. (1979) 95 Cal. App. 3d 1022, 1027, 157 Cal. Rptr. 612 , disapproved on other grounds, Delta Farms Reclamation v. Superior Court (1983) 33 Cal. 3d 699, 190 Cal. Rptr. 494, 660 P.2d 1168*

Provisions of *Civ. Code § 846* do not violate equal protection in distinguishing between recreational and nonrecreational users and between paying and nonpaying users. *Parish v. Lloyd (1978) 82 Cal. App. 3d 785, 788, 147 Cal. Rptr. 431*

In action by diver for injuries sustained in diving off trestle, evidence that defendant knew that practice of diving from trestle into popular swimming hole was common and that prior similar injuries had occurred was sufficient to support jury finding of defendant's willful misconduct. *Lostritto v. Southern Pac. Transp. Co. (1977) 73 Cal. App. 3d 737, 744-745, 140 Cal. Rptr. 905*

[16] Trespasser

Trespasser is one who enters or remains on land of another without privilege to do so. *Rowland v. Christian (1968) 69 Cal. 2d 108, 113-114, 70 Cal. Rptr. 97, 443 P.2d 561*

Status as trespasser is not determinative of landlord's liability to third person injured on premises, but is factor to be considered in determination of liability. *Bisetti v. United Refrigeration Corp. (1985) 174 Cal. App. 3d 643, 648, 220 Cal. Rptr. 209*

Attorney investigating accident in railroad yard without knowledge or consent of railroad personnel is trespasser. *Jarvis v. Southern Pac. Transp. Co. (1983) 142 Cal. App. 3d 246, 253, 191 Cal. Rptr. 29*

Court properly refused to give jury instruction that trespasser entitled to damages for injury if injury foreseeable and avoidable. *Jarvis v. Southern Pac. Transp. Co. (1983) 142 Cal. App. 3d 246, 254, 191 Cal. Rptr. 29*

Status (as trespasser, invitee, or licensee) of attorney investigating accident is relevant to issue of contributory negligence. *Jarvis v. Southern Pac. Transp. Co. (1983) 142 Cal. App. 3d 246, 253, 191 Cal. Rptr. 29*

[17] Waters

[a] Damages

Civ. Code § 3283, which permits award of damages for detriment resulting after commencement of action, applies to action to recover damages for discharge of surface water. *Keys v. Romley (1966) 64 Cal. 2d 396, 411, 50 Cal. Rptr. 273, 412 P.2d 529*

[b] Diversion

Person responsible for diversion or obstruction of natural watercourse is liable for damages resulting to property. *Granone v. County of Los Angeles (1965) 231 Cal. App. 2d 629, 646, 42 Cal. Rptr. 34*

[c] Drainage and Drainage Systems

Construction of artificial drainage systems by upper landowner is permitted to increase velocity, but not volume, of discharge. *Martinson v. Hughey (1988) 199 Cal. App. 3d 318, 328, 244 Cal. Rptr. 795*

[d] Easement to Discharge Water

Right to flood land could be appurtenant to ownership of water; physical assets of water system could be located wholly on easements and rights-of-way on lands owned by someone other than owner of water system; plaintiff was unable to recover damages for flooding of land after city had acquired easement right to flood plaintiff's land. *Security Pac. Nat'l Bank v. City of San Diego (1971) 19 Cal. App. 3d 421, 428-429, 435, 97 Cal. Rptr. 61*

Prescriptive easement right to discharge surface waters requires proof of use that is actual, open, notorious, hostile, and adverse to title of party against whom adverse claim is being made, and continuous and uninterrupted for statutory period under claim of right. *Wanders v. Nelson (1950) 98 Cal. App. 2d 267, 269-270, 219 P.2d 852*

Claim of easement cannot be predicated on draining imported water into channel of stream if there is no interference with another's rights. *Fell v. M. & T. Inc. (1946) 73 Cal. App. 2d 692, 695, 166 P.2d 642*

[e] Flood Waters

Upstream landowner has no absolute right to protect his or her land from floodwaters by constructing structures that increase downstream flow of water into its natural watercourse; instead, conduct is governed by ordinary principles of negligence. *Ektelon v. City of San Diego (1988) 200 Cal. App. 3d 804, 810, 246 Cal. Rptr. 483*

Flood water is defined as extraordinary overflow of rivers and streams. *Martinson v. Hughey (1988) 199 Cal. App. 3d 318, 325, 244 Cal. Rptr. 795*

Property owner must act reasonably under all circumstances when building barriers to protect property from damage from floodwaters; question of reasonableness presents triable factual issue precluding summary judgment. *Linvill v. Perello (1987) 189 Cal. App. 3d 195, 198-200, 234 Cal. Rptr. 392*

Injunction enjoining defendant from erecting or maintaining any obstruction to deflect flood waters is inappropriate. *Lukrich v. Rodgers (1959) 176 Cal. App. 2d 1, 6-10, 1 Cal. Rptr. 30*

[f] Injunction

Water caused to flow onto another's land onto which it would not naturally flow is invasion and injury to property right and nuisance per se; continuance or maintenance of nuisance per se is enjoinable. *Galbreath v. Hopkins (1911) 159 Cal. 297, 301-302, 113 P. 174*

Injunction enjoining defendant from erecting or maintaining any obstruction to deflect flood waters is inappropriate. *Lukrich v. Rodgers (1959) 176 Cal. App. 2d 1, 6-10, 1 Cal. Rptr. 30*

Injunction is available to prevent injury caused by irrigation waters. *Fredericks v. Fredericks (1951) 108 Cal. App. 2d 242, 244, 238 P.2d 643*

Noninjurious and reasonable use by landowner of waters imported onto lands and allowed to drain into natural watercourse is not enjoinable. *Fell v. M. & T. Inc. (1946) 73 Cal. App. 2d 692, 694-695, 166 P.2d 642*

Valid to enjoin lower riparian owner from maintaining dam and impounding water of stream resulting in injurious flooding of upper riparian owner's land. *Callison v. Mt. Shasta Power Corp. (1932) 123 Cal. App. 247, 255-256, 11 P.2d 60*

[g] Negligence

If injury is allegedly caused by natural condition, imposition of liability on nuisance theory requires finding of negligence. *Lussier v. San Lorenzo Valley Water Dist. (1988) 206 Cal. App. 3d 92, 102, 253 Cal. Rptr. 470*

To avoid answer alleging that damage was caused by sudden flood, pleading must allege some act, omission, or dereliction of duty by defendant resulting in invasion of plaintiff's property right. *Curci v. Palo Verde Irrigation Dist. (1945) 69 Cal. App. 2d 583, 584-585, 159 P.2d 674*

Landowners failure to consider injury caused by water if allowed to escape is material to question of liability for injuries from water escaping from artificial use; injury itself is evidence of negligence. *Kall v. Carruthers (1922) 59 Cal. App. 555, 559-560, 211 P. 43*

[h] Owner's Duties

Reasonableness test determines landowner's liability if alterations or improvements to upstream property discharge increased volume of surface water into natural watercourse, and increased volume or velocity of stream waters or method of discharge into watercourse caused downstream property damage. *Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 337, 27 Cal. Rptr. 2d 613, 867 P.2d 724*

Downstream riparian landowner is required to have acted reasonably in protecting property to recover for damages caused by upstream landowners' increased discharge of surface waters into natural watercourse. *Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 357-358, 27 Cal. Rptr. 2d 613, 867 P.2d 724*

Lower landowner under legal duty to receive reasonable and noninjurious amounts of runoff water from adjacent upper parcels of land is precluded from limiting rights of upslope landowners by blocking compensating ditch on lower property built by predecessor in interest after lower landowner and predecessors built berm that effectively obliterated natural watercourse by which they were bound to receive waters from above. *Martinson v. Hughey (1988) 199 Cal. App. 3d 318, 329, 244 Cal. Rptr. 795*

Rule applying to discharge of water into natural watercourse is extended to include interference with artificially created channel if substantial sums have been expended in reliance on continued presence of watercourse; if creator of artificial watercourse intended that it be permanent, and adjoining landowners or water users were allowed to adjust themselves to its presence and to rely on its continuation, new condition is then regarded as natural, and law disregards its artificial origin with respect to discharge into it of runoff waters. *Martinson v. Hughey (1988) 199 Cal. App. 3d 318, 329-330, 244 Cal. Rptr. 795*

Every person is required to take reasonable care in using property to avoid injury to adjacent property through flow of surface waters; failure to exercise reasonable care may result in liability of upper landowner to lower landowner. *Keys v. Romley (1966) 64 Cal. 2d 396, 409, 50 Cal. Rptr. 273, 412 P.2d 529* ; *Pagliotti v. Acquistapace (1966) 64 Cal. 2d 873, 874, 50 Cal. Rptr. 282, 412 P.2d 538* ; *Ektelon v. City of San Diego (1988) 200 Cal. App. 3d 804, 808, 246 Cal. Rptr. 483*

If nearby landowner is exercising right of removing and disposing of surface waters, and is doing so entirely on own land, adjoining landowner is not required to bring action to prevent that act; adjoining landowner is not thereby precluded from bringing legal action if and when act does cause injury. *Galbreath v. Hopkins (1911) 159 Cal. 297, 303-304, 113 P. 174*

Owner who causes diversion of water resulting in inundation of his or her property is guilty of contributory negligence. *Western Salt Co. v. City of Newport Beach (1969) 271 Cal. App. 2d 397, 402, 76 Cal. Rptr. 322*

Landowner may level land for agricultural purposes, but has duty to make adequate provision for natural flow of drainage waters; adjoining landowners have right to protection against changes in surface water drainage caused by interference with natural conditions. *County of Colusa v. Strain (1963) 215 Cal. App. 2d 472, 481-482, 30 Cal. Rptr. 415* ; *People v. Stowell (1956) 139 Cal. App. 2d 728, 733, 294 P.2d 474*

Owner of land is under no duty to go into natural watercourse to remove debris, sand, and boulders that interfere with free flow of waters, if owner of land has not erected or placed any obstruction to that flow in that watercourse. *Weck v. Los Angeles County Flood Control Dist. (1951) 104 Cal. App. 2d 599, 613, 232 P.2d 293*

Upper riparian owner had right to have lower riparian owner receive surface water falling on upper owner's land; lower owner was not entitled to dam up channel so as to obstruct flow of waters across upper owner's land. *Wanders v. Nelson (1950) 98 Cal. App. 2d 267, 269, 219 P.2d 852*

[i] Reasonable Use Doctrine

Reasonableness test of discharge of surface waters determines landowner's liability if alterations or improvements to upstream property discharge an increased volume of surface water into a natural watercourse, and the increased volume or velocity of the stream waters or the method of discharge into the watercourse causes downstream property damage. *Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 356-357, 27 Cal. Rptr. 2d 613, 867 P.2d 724* ; *see also* *Keys v. Romley (1966) 64 Cal. 2d 396, 410, 50 Cal. Rptr. 273, 412 P.2d 529*

Under reasonable use doctrine followed in California, issue of reasonableness of discharge of surface waters is question of fact to be determined in each case on consideration of all relevant circumstances, including amount of harm caused, foreseeability of harm that results, and purpose or motive with which possessor acted; in land development problems, proper consideration is whether utility of possessor's use of land outweighs gravity of harm that results from his or her alteration of flow of surface waters. *Keys v. Romley (1966) 64 Cal. 2d 396, 410, 50 Cal. Rptr. 273, 412 P.2d 529* ; *Martinson v. Hughey (1988) 199 Cal. App. 3d 318, 326-327, 244 Cal. Rptr. 795*

Doctrine of reasonable use is based more on concepts of tort liability than on traditional concepts of property law. *Keys v. Romley (1966) 64 Cal. 2d 396, 408-409, 50 Cal. Rptr. 273, 412 P.2d 529* ; *Martinson v. Hughey (1988) 199 Cal. App. 3d 318, 327, 244 Cal. Rptr. 795*

Civil law rule in its pure form provides servitude or easement for natural drainage so that lower landowner must accept surface water that drains onto his or her land, but upper landowner has no right to alter natural system of drainage so as to increase burden; California finds it unreasonable to apply civil law doctrine in its rigid form, and therefore has adopted civil law rule as modified by doctrine of reasonable use, which attempts to determine rights of parties with respect to disposition of surface waters by assessment of all relevant factors. *Martinson v. Hughey (1988) 199 Cal. App. 3d 318, 325-326, 244 Cal. Rptr. 795* ; *see also* *Keys v. Romley (1966) 64 Cal. 2d 396, 402, 50 Cal. Rptr. 273, 412 P.2d 529*

[j] Reliance on Continued Diversion

Apparent permanent change in stream flow usually leads to costly adjustments by interested persons; those interested persons are entitled to receive as much protection as if condition were natural. *Natural Soda Prods. Co. v. City of Los Angeles (1943) 23 Cal. 2d 193, 197, 143 P.2d 12*

One who makes substantial expenditures in reliance on long-continued diversion of water has right to have diversion continued if that investment would otherwise be destroyed. *Granone v. County of Los Angeles (1965) 231 Cal. App.*

2d 629, 646, 42 Cal. Rptr. 34

[k] Surface Waters

Reasonableness test is applicable to determine public entity liability in tort and inverse condemnation for damage to downstream property resulting from discharge of surface waters to natural watercourse from upstream public property. *Locklin v. City of Lafayette (1994) 7 Cal. 4th 327, 337-338, 27 Cal. Rptr. 2d 613, 867 P.2d 724*

Surface water is water diffused over surface of land, or contained in depressions in that land, that results from rain or snow or rises to surface in springs; surface waters are thus distinguishable from water flowing in fixed channel so as to constitute watercourse, or water collected in identifiable body such as river or lake. *Keys v. Romley (1966) 64 Cal. 2d 396, 400, 50 Cal. Rptr. 273, 412 P.2d 529* ; *Ektelon v. City of San Diego (1988) 200 Cal. App. 3d 804, 808 n.3, 246 Cal. Rptr. 483* ; *Martinson v. Hughey (1988) 199 Cal. App. 3d 318, 325, 244 Cal. Rptr. 795*

Landowner has no right to obstruct flow of surface waters onto landowner's property. *Mogle v. Moore (1940) 16 Cal. 2d 1, 10, 104 P.2d 785*

Every landowner is required to bear burden of receiving surface water naturally falling on land above property and naturally flowing to property. *LeBrun v. Richards (1930) 210 Cal. 308, 313, 291 P. 825*

[l] Watercourse

Channel is natural watercourse if it has defined banks, with characteristics causing water to flow in definite direction, and has stream bed that manifests continued action of flowing waters. *Hellman Commercial Trust & Sav. Bank. v. Southern Pac. Co. (1923) 190 Cal. 626, 632, 214 P. 46*

Person who negligently constructed obstruction to watercourse is liable if obstruction causes overflow beyond overflow that would have occurred in absence of obstruction. *Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 372-375, 82 Cal. Rptr. 689*

Injunction is appropriate remedy against downstream riparian owner whose maintenance of dam at base of river and whose impounding and releasing of stream water results in injurious flooding or drying up of water on upper riparian owner's land. *Callison v. Mt. Shasta Power Corp. (1932) 123 Cal. App. 247, 255-256, 11 P.2d 60*

Deliberate flooding through needlessly raising water level in lake and then releasing water into ditch with no legitimate or useful purpose was indicative of malice and supported punitive damages award. *Baruh v. Kuhl (1963) 213 Cal. App. 2d 266, 273-274, 28 Cal. Rptr. 573*

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§ 421.63 Law Reviews

Comment, *Extension of Premises Liability for Injuries Resulting from the Criminal Acts of Third Parties on Adjacent Land, 30 Santa Clara L. Rev. 977 (1990)*

Comment, *Vendors of Real Estate: When Does Liability for Dangerous Conditions End? 17 Sw. U.L. Rev. 23 (1987)*

Comment, *The Peculiar Risk Doctrine: High Rise Benefits for California Construction Workers, 19 Loy. L.A. L. Rev. 1495 (1986)*

Note, *The Duty of a Landlord to Exercise Reasonable Care in the Selection and Retention of Tenants, 30 Stan. L. Rev. 725 (1978)*

Comment, *Tort Liability of Agricultural Landowners to Recreational Entrants: A Critical Analysis, 11 U.C. Davis L. Rev. 367 (1978)*

Comment, *An Examination of the California Fireman's Rule, 6 Pac. L.J. 660 (1975)*

Comment, *A Landlord's Duty to Protect His Tenants from the Criminal Acts of Third Persons, 5 U.S.F. L. Rev. 378 (1971)*

Comment, *Landlord's Liability for Criminal Acts Committed Against His Tenants, 7 Cal. West L. Rev. 197 (1970)*

Comment, *Giorgi v. Pacific Gas and Electric Co.: The "Fireman's Rule" in California, an Anachronism? 4 U.S.F. L. Rev. 125 (1969)*

Comment, *California Applies Negligence Principles in Determining Liability of a Land Occupier, 9 Santa Clara Law. 179 (1969)*

Comment, *Rowland v. Christian: New Protections Afforded a Social Guest in California, 3 U.S.F. L. Rev. 170 (1968)*

Comment, *Liability of Landowners Resultant from Their Employment of Independent Contractors, 13 Hastings L.J. 147 (1961)*

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[Reserved]

§§ 421.64[Reserved]

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 421 PREMISES LIABILITY
PART IV. FORMS

36-421 California Forms of Pleading and Practice--Annotated § 421.70

§ 421.70 Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Person on Premises Against Owner or Possessor of Premises--Negligent Maintenance, Management, and Operation--Judicial Council Trial Court Pleading Form With Premises Liability Attachment [Cal. Judicial Council Forms PLD-PI-001, PLD-PI-001(4)]

[1] FORM Complaint for Damages Based on Negligence [Civ. Code § 1714(a)]--By Person on Premises Against Owner or Possessor of Premises--Negligent Maintenance, Management, and Operation--Judicial Council Trial Court Pleading Form With Premises Liability Attachment [Cal. Rules of Ct., Rule 982.1(a); Cal. Judicial Council Forms PLD-PI-001, PLD-PI-001(4)]

Click here to view image.

[2] Use of Form

These forms are a filled-in illustration of Cal. Judicial Council Form PLD-PI-001, the general form of complaint for personal injury, property damage, or wrongful death, along with Cal. Judicial Council Form PLD-PI-001(4), the one-page premises liability attachment. Use of these forms is optional [*see Code Civ. Proc. § 425.12*].

The forms have been filled out to illustrate their use by a person seeking damages from the possessor of premises for injuries and property damage sustained on the premises due to the possessor's negligent maintenance, management, and operation of the premises. The fact situation is based on *Chance v. Lawry's, Inc. (1962) 58 Cal. 2d 368, 24 Cal. Rptr. 209, 374 P.2d 185* .

These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Filling Out Complaint Form

For detailed comments regarding the completion of the complaint form, see the comments to the Judicial Council

complaint form in Ch. 380, *Negligence* . For a general discussion regarding using Judicial Council complaint forms and attachments, see Ch. 123, *Complaints and Cross Complaints* . The three-page Judicial Council complaint form must be used with the appropriate Judicial Council attachment form.

[4] Filling Out Premises Liability Attachment to Complaint Form

[a] Plaintiff's Name

The attachment states, "Use a separate cause of action form for each cause of action." If there is more than one plaintiff in the action, each plaintiff has a separate cause of action. If this direction is strictly adhered to, a separate premises liability attachment for each plaintiff would have to be attached to the complaint. It is not clear if this is what is intended by the direction at the top of the attachment, because the complaint form, although referring to "plaintiff" (singular) in the caption, seems intended for use by more than one plaintiff due to the wording of Paragraph 2. If the allegations are the same or substantially similar for all plaintiffs, using separate attachments would make the pleading longer than seems necessary.

[b] Description of Premises and Circumstances of Injury (Paragraph Prem.L-1.)

Paragraph Prem.L-1 is completed by inserting the plaintiff's name, the date of the injury, and a brief description of the premises, including its address, and the circumstances surrounding the incident.

It appears that Paragraph Prem.L-1. is directed at the liability of a possessor of property for injuries to a plaintiff while on the premises. However, the form can easily be adapted for use if the plaintiff's injuries occurred while off the premises due to a condition on the defendant's premises. The test of liability is now the same as that for injuries occurring on the premises [*see Sprecher v. Adamson Cos. (1981) 30 Cal. 3d 358, 368-372, 178 Cal. Rptr. 783, 636 P.2d 1121]* . It is therefore recommended that if the plaintiff's injuries occurred while off the premises, the words "on the following premises" be omitted.

Many practitioners prefer to plead these facts as generally as possible to avoid tying themselves down to a specific set of narrow facts at the pleading stage. By pleading the facts generally, the plaintiff may avoid the necessity of amending the complaint if additional or slightly different facts are revealed through discovery or at trial. Because the basic elements of the cause of action may be generally alleged, there is no apparent benefit to the plaintiff in pleading the facts any more specifically than in the example [*see Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 513-514, 150 Cal. Rptr. 1, 585 P.2d 851]* .

[c] Negligence Count (Paragraph Prem.L-2.)

In Paragraph Prem.L-2, if the plaintiff contends that his or her injury was proximately caused by the defendant's negligence in the ownership, maintenance, management, or operation of the premises described in Paragraph Prem.L-1., the plaintiff should check the box to the left of "Count One-Negligence" and insert the name of each defendant whose negligence may have contributed to the plaintiff's injury.

It is also recommended that the plaintiff check the box to the left of "Does" and insert a sufficient number of Doe defendants so that the complaint may be subsequently amended to include any additional defendants discovered to be potentially liable for the plaintiff's injury. For a discussion of the use of fictitious names and for forms of allegations of fictitious names see Ch. 21, *Amended and Supplemental Pleadings* , and Ch. 108, *Captions and Introductions* .

[d] Liability to Recreational Users (Paragraph Prem.L-3)

Paragraph Prem.L-3 is used if the plaintiff's injuries occurred while engaged in a recreational activity on the premises of the defendant and the plaintiff contends that the immunity provisions of *Civ. Code § 846* do notapply. For a form of

further allegation to attach in this circumstance, see *§ 421.90*.

[e] Dangerous Condition of Public Property (Paragraph Prem.L-4.)

Paragraph Prem.L-4. should be used if the plaintiff was injured as a result of the dangerous condition of public property [*see Gov. Code §§ 830-840.6*]. If this paragraph is applicable, the box to the left of "Count Three" should be checked, the names of the public entities that owned the land should be inserted, the box to the left of "Does" should be checked, and a number should be inserted for potential Doe public entities.

The boxes preceding Paragraph Prem.L-4.a., Prem.L-4.b., or both should also be checked if applicable. Paragraph Prem.L-4.a. applies if the public entity had actual or constructive notice of the dangerous condition under *Gov. Code § 835.2* a sufficient time prior to the injury to have taken measures to protect against the dangerous condition [*see Gov. Code § 835*]. In using Paragraph Prem.L-4a., counsel should also check the appropriate box for actual or constructive notice. Paragraph Prem.L-4.b. applies if a negligent or wrongful act or omission of an employee of the public entity, acting within the scope of his or her employment, created the dangerous condition [*see Gov. Code § 835*].

If the plaintiff is suing a public entity, the plaintiff must comply with the appropriate claims statute, which necessitates the completion of Paragraph 9. of the main complaint form.

For a more complete discussion of the liability of a public entity for the dangerous condition of public property and for related forms, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

[f] Agency Allegations (Prem.L-5.a.)

If individual defendants who contributed to the plaintiff's accident were acting within the scope of their employment at the time, the plaintiff should check the box to the right of Paragraph Prem.L-5.a., insert the names of the individual defendants, check the box to the left of "Does," and insert a sufficient number to be able to amend and insert the names of any other individual employees who may be subsequently discovered to have contributed to the accident. Even if the plaintiff is unaware of the contribution by any employees of any defendant to his or her accident, it is recommended that this paragraph be checked and alleged exclusively against Doe defendants as shown here.

Under the doctrine of respondeat superior, any employer is vicariously liable for the torts of its employees committed within the scope of their employment [*Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 617-618, 124 Cal. Rptr. 143* ; *see also Civ. Code § 2338*]. This is a type of vicarious liability in which the employer can be liable only if the agentor employee is liable. For a more complete discussion of this type of liability, see Ch. 380, *Negligence* .

[g] Additional Basis of Liability (Paragraph Prem.L-5.b.)

Paragraph Prem.L-5.b. should be checked and an attachment made, if necessary, to allege liability on a basis other than those already discussed.

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Cross References

For allegations commonly used in pleadings, see Ch. 20, *Allegations Commonly Used*

For a discussion and forms relating to suing defendants under fictitious names, see Ch. 21, *Amended and Supplemental Pleadings* , and Ch. 108, *Captions and Introductions*

For a discussion and alternative forms of complaints, see Ch. 123, *Complaints and Cross Complaints*

For a discussion and forms relating to liability for the dangerous condition of public land, see Ch. 464, *Public Entities and Officers: California Tort Clailms Act*

For alternative forms of verification, see Ch. 572, *Verification*

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
Chapter 421 PREMISES LIABILITY
PART IV. FORMS

36-421 California Forms of Pleading and Practice--Annotated § 421.71

§ 421.71 Complaint for Damages for Personal Injury (and Property Damage) Based on Negligence [Civ. Code § 1714(a)]--By Person on Premises Against Owner or Possessor of Premises--Negligent Maintenance, Control, Management, and Operation of Premises--Dangerous Condition

[1] FORM Complaint for Damages for Personal Injury (and Property Damage) Based on Negligence [Civ. Code § 1714(a)]--By Person on Premises Against Owner or Possessor of Premises--Negligent Maintenance, Control, Management, and Operation of Premises--Dangerous Condition

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ [*name*],

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR PERSONAL INJURY [AND
[; and DOES 1 through _____, in-	)	PROPERTY DAMAGE] (Negligence)
clusive],	)	[amount demanded _____ (exceeds
Defendant(s).	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a resident of _____ County, California *or* a corporation duly organized and existing under the laws of the State of California with its principle place of business in _____ [*city*], _____ County, California].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and based thereon alleges that each of the

fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by that negligence.)]

[3. (Plaintiff is informed and believes and thereon alleges that) (A)t all times herein mentioned each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of such agency and employment.]

4. At all times herein mentioned, defendant[s, and each of them,] _____ [*allege facts showing defendant's possession and control of the premises on which the accident occurred, e.g.,* owned, maintained, controlled, managed, and operated the business premises known as _____ (*name*), located at _____ (*street address and city*), _____ County, California].

5. On or about _____ [*date*], plaintiff was _____ [*allege facts showing status and activity of plaintiff placing him/her in class of persons to whom defendant owed a duty and the location of the accident, e.g.,* in the foyer of defendant's restaurant waiting to be seated at a table].

6. At the aforementioned time and place, defendant[s, and each of them,] negligently maintained, managed, controlled, and operated _____ [*describe premises, e.g.,* the restaurant], in that _____ [*allege acts or omissions of defendant(s) constituting breach of duty to plaintiff, e.g.,* located in the foyer of defendant's restaurant was an empty, uncovered, and unmarked planter box that defendant(s) knew, or in the exercise of reasonable care should have known, constituted a dangerous condition and unreasonable risk of harm of which plaintiff was at all times herein mentioned unaware. Defendant negligently failed to take steps to either make the condition safe or warn plaintiff of the dangerous condition, all of which caused plaintiff to trip and fall into the open planter box in the foyer and to suffer the injuries and damages hereinafter described].

7. As a proximate result of the negligence of defendant[s, and each of them], plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has suffered general damages in an amount according to proof.

8. As a further proximate result of the negligence of defendant[s, and each of them], plaintiff has incurred[, and will continue to incur,] medical and related expenses in an amount according to proof.

9. As a further proximate result of the negligence of defendant[s, and each of them], plaintiff's earning capacity has been greatly impaired, both in the past and in the present in an amount according to proof.

[10. As a further proximate result of the negligence of defendant(s, and each of them), plaintiff's _____ (*describe personal property*) was _____ (damaged *or* destroyed), all to plaintiff's damage in _____ (the sum of $_____ (, which is the reasonable value of the repairs necessitated by the damages) *or* an amount according to proof).]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

[4. For damage to personal property _____ (according to proof *or* in the sum of $_____);]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 421.70.*]

[2] Use of Form

This form is a complaint for use by a person seeking damages from the possessor of premises for injuries and property damage sustained on those premises due to the negligence of the possessor in the maintenance, management, or operation of the premises. Depending on the facts of the case, counsel may wish to delete paragraphs of the complaint that do not apply. For instance, if counsel is certain that no property damage is involved, Paragraph 10 of the complaint, as well as Paragraph 4 of the prayer, should be omitted. Paragraph 5 sets forth not only the fact of plaintiff's presence on the premises, but the reason for it. Although the status of the plaintiff as an invitee, licensee, or trespasser is no longer determinative on the issue of duty, it is relevant [*Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561]* . Therefore, counsel should allege facts showing the status of the person on the premises. A duty to warn of or remedy a dangerous condition on the premises was, under the common law rules, owed solely to an invitee. Because a possessor's liability is now based on negligence, this duty may, however, in the appropriate circumstances, apply to licensees and trespassers.

This form is based on the fact situation in *Chance v. Lawry's, Inc. (1962) 58 Cal. 2d 368, 24 Cal. Rptr. 209, 374 P.2d 185* .

For the Judicial Council form for this type of complaint, see *§ 421.70*.

[3] Allegations

This complaint alleges (1) the residence of the defendant (Paragraph 1) and the place of the accident (Paragraphs 4, 5), either one of which may be the basis for venue [*see Code Civ. Proc. § 395(a)*]; (2) the negligence and fictitious names of the defendants sued pursuant to *Code Civ. Proc. § 474* (Paragraph 2); (3) the requisite agency relationship to establish vicarious liability, if applicable (Paragraph 3); (4) facts regarding the plaintiff's status and activity on the premises (Paragraph 5) and facts showing the defendant's ownership or possession and control of the premises (Paragraph 4), both of which establish the duty owed by the defendant to the plaintiff; (6) the actions or omissions of the defendant that constitute the breach of duty and that proximately caused the plaintiff's damages (Paragraph 5); and (6) the plaintiff's damages, consisting of general damages for pain and suffering (Paragraph 7), as well as medical expenses (Paragraph 8), loss of earnings and earning capacity (Paragraph 9), and damages to personal property, if applicable (Paragraph 10). For a discussion of the elements of negligence generally, see Ch. 380, *Negligence* .

[4] Venue

In an action for injury to person or personal property or for death from wrongful act or negligence, either the county in which the injury occurs or the county in which the defendants, or some of them, reside at the commencement of the

action is a proper county for the trial of the action [*Code Civ. Proc. § 395(a)*]. If venue is based on the situs of the accident, then the allegation of the defendant's residence in Paragraph 1 is not needed.

[5] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included--for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[6] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For a discussion of the law and forms relating to damages recoverable in tort actions, see Ch. 177, *Damages*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms of prayers, see Ch. 420, *Prayers*

For a discussion of the law and forms relating to slips and falls due to the dangerous condition of premises, see Ch. 525, *Slip and Fall*

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36-421 California Forms of Pleading and Practice--Annotated § 421.72

§ 421.72 Allegations--By Person on Premises Against Owner or Possessor of Premises--Failure to Protect Person From Noncriminal Acts of Third Party

[1] FORM Allegations--By Person on Premises Against Owner or Possessor of Premises--Failure to Protect Person From Noncriminal Acts of Third Party

1. On or about _____ [*date*], plaintiff was _____ [*allege facts showing status and activity of plaintiff placing him/her in class of persons to whom defendant owed a duty and the location of the accident, e.g.,* shopping at defendant's shopping mall located at _____, California].

2. At the aforementioned time and place, defendant[s, and each of them,] _____ [*allege acts or omissions of defendant(s) constituting breach of duty to plaintiff, e.g.,* negligently maintained, controlled, managed, and operated the shopping mall, so as to fail to protect plaintiff from injury from _____ (*allege noncriminal acts of third party, e.g.,* being struck by a person riding a bicycle through the corridor of the shopping mall), in that defendant(s) _____ (*allege reasonable foreseeability of risk, e.g.* knew, or in the exercise of reasonable care, should have known that persons frequently rode bicycles through the corridors of the shopping mall while shoppers were walking through those corridors, but failed to take any precautions to avoid injury to shoppers)].

[2] Use of Form

This form contains allegations for use in a complaint for damages and personal injuries sustained by the plaintiff on the possessor's premises due to the noncriminal actions of a third party on the premises if it is contended that the possessor was negligent in failing to control the actions of the third party. These allegations are adapted from the fact situation in *Musgrove v. Ambrose Properties (1978) 87 Cal. App. 3d 44, 150 Cal. Rptr. 722* .

The allegations may be inserted in the *form in § 421.71* in place of Paragraphs 5 and 6. They may also be adapted for use in the premises liability attachment to the Judicial Council form of complaint for personal injury, property damage, or wrongful death [*see Code Civ. Proc. § 425.12*]. For a filled-in example of the Judicial Council complaint form, see *§ 421.70*. For a form of allegations involving criminal acts of third persons, see *§ 421.73*. For discussion of a defendant's duty to control the conduct of third persons, see *§ 421.15*.

Counsel should be cautious when using these allegations. Negligence need only be generally pleaded, and a pleading that is overly specific may foreclose the presentation of arguments and evidence or may create difficulties in proving particular facts.

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36-421 California Forms of Pleading and Practice--Annotated § 421.73

§ 421.73 Allegations--By Person on Premises Against Owner or Possessor of Premises--Failure to Protect Person From Criminal Acts of Third Party

[1] FORM Allegations By Person on Premises Against Owner or Possessor of Premises--Failure to Protect Person From Criminal Acts of Third Party

1. On or about _____ [*date*], plaintiff was _____ [*allege facts showing the location of the incident and the status and activity of plaintiff placing him/her in the class of persons to whom defendants owed a duty, e.g.,* in the lobby of defendant's office building located at _____, California, on her way to work in an office in that building].

2. At that time and place, defendant[s, and each of them,] _____ [*allege acts or omissions of defendant(s) constituting breach of duty to plaintiff and resulting injury, e.g.,* negligently maintained, controlled, managed, and operated the office building so as to fail to protect plaintiff from injury from criminal acts of third persons in that defendants _____ (*allege reasonable foreseeability of risk, e.g.* knew, or in the exercise of reasonable care should have known, that transients and others with no legitimate business in the building frequented the lobby, which was accessible by an unlocked door, but failed to provide adequate security measures to avoid injury to persons working in the building). As a proximate result of defendants' negligence, plaintiff was beaten and robbed at gunpoint in the lobby of the office building, thereby causing the injuries alleged below].

[2] Use of Form

This form contains allegations for use in a complaint for personal injuries, sustained by the plaintiff on premises owned or possessed by the defendant, due to the criminal acts of a third party on the premises. They may be inserted in the *form in § 421.71* in place of Paragraphs 5 and 6. They may also be adapted for use in the premises liability attachment to the Judicial Council form of complaint for personal injury, property damage, or wrongful death [*see Code Civ. Proc. § 425.12*]. For a filled-in example of the Judicial Council complaint form, see *§ 421.70*. For a form of allegations involving noncriminal acts of third persons, see *§ 421.72*. For discussion of a defendant's duty to control the conduct of third persons, see *§ 421.15*.

Counsel should be cautious when using these allegations, Negligence need only be generally pleaded, and a pleading

that is overly specific may foreclose the presentation of arguments and evidence or may create difficulties in proving particular facts [*see, e.g., § 421.73[3]*].

[3] Prior Similar Incidents Rule

A premises owner or possessor has a duty to protect persons on the premises from the criminal acts of third persons that are reasonably foreseeable [*Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 676, 25 Cal. Rptr. 2d 137, 863 P.2d 207]* . If the risk of injury from those acts is highly foreseeable, only very burdensome or expensive precautions, such as hiring security guards, may satisfy this duty. In this situation, a plaintiff will almost always be required to establish prior similar incidents of crime on the premises to show that the premises owner or possessor could have reasonably anticipated that this particular type of crime would reoccur [*Sharon P. v. Arman, Ltd. (1999) 21 Cal. 4th 1181, 1190, 91 Cal. Rptr. 2d 35, 989 P.2d 121* (prior incidents of bank robberies in ground floor bank were insufficient to impose duty on building owner and building's underground parking garage managers to prevent sexual assault in garage); *Ann M. v. Pacific Plaza Shopping Ctr. (1993) 6 Cal. 4th 666, 678-680, 25 Cal. Rptr. 2d 137, 863 P.2d 207* (prior incidents of bank robberies and purse snatching not sufficiently similar to establish foreseeability of violent rape)]. If the risk of injury is less than highly foreseeable, other less burdensome or expensive precautions, including oral or written warnings, could satisfy the owner's or possessor's duty [*see, e.g., Frances T. v. Village Green Owners Ass'n (1986) 42 Cal. 3d 490, 499-503, 229 Cal. Rptr. 456, 723 P.2d 573* (providing adequate lighting); *Kwaitkowski v. Superior Trading Co. (1981) 123 Cal. App. 3d 324, 333, 176 Cal. Rptr. 494* (repair of defective lock)].

[4] Cross References

For a form of complaint by a patron against a tavern owner for failure to protect the patron against the acts of an intoxicated patron, see Ch. 19, *Alcoholic Beverages: Civil Liability*

For a form of complaint by a tenant against a landlord for personal injuries for failure to provide adequate security against criminal activities, see Ch. 334, *Landlord and Tenant: Claims for Damages*

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36-421 California Forms of Pleading and Practice--Annotated § 421.74

§ 421.74 Allegations--By Person on Premises Against Security Guard Retained by Owner or Possessor of Premises--Failure to Protect Person From Acts of Third Party

[1] FORM Allegations--By Person on Premises Against Security Guard Retained by Owner or Possessor of Premises--Failure to Protect Person From Acts of Third Party

1. Defendant _____ [*name of security guard*] was hired by defendant _____ [*name of owner or possessor of premises*] to provide security on the premises. [(Plaintiff is informed and believes and thereon alleges that) (A)t all times mentioned herein, defendant _____ (*name of security guard*) was acting in the course and scope of his/her employment (and with the permission and consent of defendant _____ (*name of owner or possessor*)).]

2. On or about _____ [*date*], plaintiff was _____ [*allege facts showing status and activity of plaintiff placing him/her in class of persons to whom defendants owed a duty and the location of the accident, e.g.*, waiting in his car at the drive-up service window of defendant owner's fast food restaurant].

3. At the aforementioned time and place, defendant[s, and each of them,] _____ [*allege acts or omissions of defendant(s) constituting breach of duty to plaintiff, e.g.*, negligently failed to protect the customers from a situation involving third persons who defendant security guard knew, or in the exercise of reasonable care should have known, constituted a danger to plaintiff].

[2] Use of Form

This form contains allegations for use in a complaint for damages and personal injuries sustained by plaintiff on the owner's or possessor's premises due to the actions of a third party on the premises. These allegations are adapted from the fact situation in *Marois v. Royal Investigation & Patrol, Inc. (1984) 162 Cal. App. 3d 193, 208 Cal. Rptr. 384* .

The liability of the defendant security guard is based on the contention that the owner or possessor had hired a security service to protect its customers and that the security guard was negligent because he or she failed to act as a reasonable security guard would under similar circumstances [*see* *Marois v. Royal Investigation & Patrol, Inc. (1984) 162 Cal. App. 3d 193, 199-200, 208 Cal. Rptr. 384* (security guard hired by owner of premises has special relationship with

customers that requires affirmative action to protect customers while on the business premises, including reasonable actions in response to acts of third persons)]. The negligence of the security guard may also serve as the basis for the liability of the owner or possessor of the premises to the plaintiff, under the theory of respondeat superior, if the negligent security guard was acting in the scope and course of his or her employment at the time.

These allegations may be inserted in the *form in § 421.71* in place of Paragraphs 5 and 6. The allegations may also be adapted for use in the premises liability attachment to the Judicial Council form of complaint for personal injury, property damage, or wrongful death [*see Code Civ. Proc. § 425.12*]. For a filled-in example of the Judicial Council complaint form, see *§ 421.70*. For discussion of a defendant's duty to control the conduct of third persons, see *§ 421.15*.

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36-421 California Forms of Pleading and Practice--Annotated § 421.75

§ 421.75 Allegations--By Person on Premises Against Contractor Working on Premises--Negligence [Civ. Code § 1714(a)]

[1] FORM Allegations--By Person on Premises Against Contractor Working on Premises--Negligence [Civ. Code § 1714(a)]

1. On or about _____ [*date*], defendants _____ [*names of employees*] were the agents, servants, and employees of defendant _____ [*specify, e.g.,* construction company] and were acting within the course and scope of their agency, service, and employment in doing the things herein alleged.

2. At such time and place, defendants, and each of them, _____ [*allege facts showing activity of defendants on the premises that establishes a duty to persons thereon, e.g.,* were remodeling the foyer in the restaurant known as _____ (*name*), located at _____ (*street and city*), _____ County, California].

3. At the aforementioned time and place, plaintiff was _____ [*allege facts showing status and activity of plaintiff placing him/her in class of persons to whom defendants owed a duty and the location of the accident, e.g.,* walking on the pathway leading to the entrance of the restaurant to eat lunch at the restaurant].

4. At the aforementioned time and place, defendants, and each of them, _____ [*allege acts or omissions of defendants constituting breach of duty to plaintiff, e.g.,* failed to use reasonable care to prevent damage to plaintiff whom defendants knew or should have known would be affected by the work being performed by defendants, in that defendants negligently left a planter box uncovered and unguarded and negligently failed to install a warning sign at or near the planter box. As a result of the negligence of defendants, and each of them, plaintiff fell into the open planter box and sustained the injuries and damages hereinafter described].

[2] Use of Form

This form contains allegations for use in a complaint against a contractor working on the premises for injuries and damages sustained on the premises due to the contractor's negligence. These allegations are adapted from the fact situation in *Chance v. Lawry's, Inc. 58 Cal. 2d 368, 24 Cal. Rptr. 209, 374 P.2d 185* .

Although the liability of a contractor working on premises to persons on those premises is not strictly premises liability, these allegations may be inserted in the *form in § 421.71* in place of Paragraphs 4-6. Prior to the decision of *Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561* , which held that a possessor's duty of care was governed by principles of negligence, the California Supreme Court held that the duty of a contractor working on the premises was not that of a possessor of premises and was therefore not governed by the status of the person on the premises. Instead, a contractor's duty is to use reasonable care to prevent damage to persons whom the contractor may reasonably expect to be affected by the contractor's work [*Chance v. Lawry's, Inc. (1962) 58 Cal. 2d 368, 378, 24 Cal. Rptr. 209, 374 P.2d 185]* . These allegations may also be adapted for use in the general negligence attachment to the Judicial Council form of complaint for personal injury, property damage, or wrongful death [*see Code Civ. Proc. § 425.12*]. For a filled-in example of the Judicial Council complaint form, see *§ 421.70*. For discussion of liability for the acts of independent contractors, see *§§ 421.30 -421.34*.

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36-421 California Forms of Pleading and Practice--Annotated § 421.76

§ 421.76 Allegations--By Person on Premises Against Possessor or Owner Employing Independent Contractor--Negligence of Contractor--Peculiar Risk of Harm

[1] FORM Allegations--By Person on Premises Against Possessor or Owner Employing Independent Contractor--Negligence of Contractor--Peculiar Risk of Harm

1. At all times mentioned herein, _____ [*name of independent contractor*] was _____ [*allege facts showing the employment of the contractor by defendant(s) and the work the contractor was employed to perform, e.g.,* employed by defendant(s) to remodel the foyer of the restaurant and install a planter box in the foyer and was engaged in such employment].

2. At all times mentioned herein, defendant(s) knew or should have known that _____ [*describe activity of independent contractor on premises, e.g.,* the remodeling work] was likely to create during its progress a peculiar risk of harm to _____ [*specify persons on the premises, e.g.,* patrons of the restaurant] unless special precautions were taken, in that _____ [*allege facts showing that the harm to plaintiff was a peculiar risk of harm, e.g.,* during the course of the remodeling work, the planter box being installed was empty and if left unguarded or unmarked would constitute a hazard to persons in the foyer of the restaurant].

3. Defendant(s) negligently maintained, managed, controlled, and operated the premises, in that defendant(s) and _____ [*name of independent contractor*] _____ [*allege failure to take special precautions against the peculiar risk of harm and resulting harm to plaintiff, e.g.,* negligently failed to take precautions to guard against the risk of patrons of the restaurant falling into the empty planter box, because the planter box was uncovered, unguarded, and unmarked, all of which caused plaintiff to fall into the planter box, proximately causing the damages and injuries hereinafter described].

[2] Use of Form

This form contains allegations for use in a complaint against a possessor of premises employing an independent contractor to do work on the premises for injuries and damages sustained by a person on the premises due to the negligence of the independent contractor in failing to take precautions against a peculiar risk of harm [*see Griesel v. Dart Indus., Inc. (1979) 23 Cal. 3d 578, 586, 153 Cal. Rptr. 213, 591 P.2d 503]* . They may be inserted in the *form in §*

421.71 in place of Paragraph 6. They may also be adapted for use in the premises liability attachment to the Judicial Council form of complaint for damages resulting from personal injury, property damage, or wrongful death [*see Code Civ. Proc. § 425.12*]. For a filled-in example of the Judicial Council complaint form, see *§ 421.70*.

The rule in California had been that an employee of an independent contractor, who was injured due to the negligence of the contractor, could sue the hirer under the peculiar risk doctrine [*Privette v. Superior Court(1993) 5 Cal. 4th 689, 696, 21 Cal. Rptr. 2d 72, 854 P.2d 721* ; *see also Woolen v. Aerojet Gen. Corp. (1962) 57 Cal. 2d 407, 410-411, 20 Cal. Rptr. 12, 369 P.2d 708* (case initially expanding expanded doctrine)]. However, the California Supreme Court has subsequently held that an employee in this situation is limited to recovery of workers' compensation benefits and is not entitled to recover from the hirer under the peculiar risk doctrine [*Privette v. Superior Court (1993) 5 Cal. 4th 689, 701-702, 21 Cal. Rptr. 2d 72, 854 P.2d 721]* .

For further discussion of the peculiar risk doctrine, see *§ 421.32*.

[3] Cross References

For a discussion of the law relating to liability for acts of an independent contractor, see Ch. 380, *Negligence*

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36-421 California Forms of Pleading and Practice--Annotated § 421.77

§ 421.77 Allegations--By Person on Premises Against Owner or Possessor of Adjoining Property--Liability Arising From Control of Premises

[1] FORM Allegations--By Person on Premises Against Owner or Possessor of Adjoining Property--Liability Arising From Control of Premises

1. At all times mentioned herein, defendant[s, and each of them,] _____ [*allege facts showing ownership or possession by defendant(s) of property adjoining premises, e.g.*, owned, maintained, controlled, managed, and operated the premises located at _____ (street address and city), _____ County, California].

2. On _____ [*date*], plaintiff _____ [*allege facts showing the status and activity of plaintiff and the nature and location of the accident, e.g.*, drove her car into the parking lot of defendant's store. Because this lot was full, she proceeded into the adjoining lot, where she had previously observed persons parking their cars and then patronizing defendant's store. She parked her car, went into defendant's store, purchased several items, and proceeded to her car in the adjoining lot. Before she reached her car, she was attacked by an unknown person who pushed her to the ground and took her purse].

3. At all times mentioned herein, defendant[s, and each of them,] _____ [*allege facts showing control by defendant(s) of premises on which injury occurred, e.g.*, knew that customers of its store were using the adjoining lot as a parking area while patronizing the store, and also knew that persons were loitering in the lot. On several prior occasions, employees of defendant(s) had called the police to complain about the presence of these persons and to request the police to remove them. The lease for the store contained provisions authorizing nonexclusive use of the lot by defendant(s) for customer parking. Defendant(s) had neither warned customers about the persons loitering in the lot nor discouraged customers from using the lot as a parking area].

[2] Use of Form

This form contains allegations for use in a complaint by a person injured on premises against the owner or possessor of adjoining property who controlled the premises where the injury occurred. They may be inserted in the *form in § 421.71* in place of Paragraphs 4 and 5. They may also be adapted for use in the premises liability attachment to the Judicial

Council form of complaint for personal injury, property damage, or wrongful death [*see Code Civ. Proc. § 425.12*]. For a filled-in example of the Judicial Council complaint form, see *§ 421.70*.

For discussion of the premises liability of owners and possessors of adjoining property, see *§ 421.12[7]*.

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36-421 California Forms of Pleading and Practice--Annotated § 421.78

§ 421.78 Allegations--By Person Off Premises Against Owner or Possessor of Premises--Dangerous Condition on Premises

[1] FORM Allegations--By Person Off Premises Against Owner or Possessor of Premises--Dangerous Condition on Premises

1. At all times mentioned herein, defendant[s, and each of them,] _____ [*allege facts showing possession and control of the premises by defendant(s), e.g.,* owned, maintained, controlled, managed, and operated the premises located at _____ (*street address and city*), _____ County, California].

2. On or about _____ [*date*], plaintiff was _____ [*allege facts showing status and activity of plaintiff placing him/her in a class of persons to whom defendant(s) owed a duty, and nature and location of the accident, e.g.,* walking on the sidewalk past the premises described above when a limb from a tree located on the premises and overhanging the sidewalk fell on plaintiff].

3. At the aforementioned time and place, defendant[s, and each of them,] _____ [*allege acts or omissions of defendant(s) constituting breach of duty to plaintiff, e.g.,* negligently maintained, controlled, managed, and operated the premises, in that defendant(s) knew or in the exercise of reasonable care should have known that the overhanging tree, if not properly maintained, constituted an unreasonable risk of harm to passersby. Defendant(s) negligently failed to maintain the tree in safe condition, all of which proximately caused plaintiff's injuries and damages, which are described below].

[2] Use of Form

This form contains allegations are for use in a complaint against a possessor by a person injured while off the possessor's premises due to a condition on the possessor's property. They may be inserted in the *form in § 421.71* in place of Paragraphs 4 through 6. They may also be adapted for use in the premises liability attachment to the Judicial Council form of complaint for personal injury, property damage, or wrongful death [*see Code Civ. Proc. § 425.12*]. For a filled-in example of the Judicial Council complaint form, see *§ 421.70*. For discussion of the duty to persons outside the premises, see *§ 421.17*.

[3] Cross References

For discussion relating to the liability of a possessor of abutting property for the negligent maintenance of sidewalks, see Ch. 525, *Slip and Fall*

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[Reserved]

§§ 421.79[Reserved]

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36-421 California Forms of Pleading and Practice--Annotated § 421.90

§ 421.90 Allegation of Liability to Recreational User [Civ. Code § 846]--Premises Liability Attachment to Judicial Council Complaint--Cal. Judicial Council Form PLD-PI-001(4)

[1] FORM Allegation of Liability to Recreational User [Civ. Code § 846]--Premises Liability Attachment to Judicial Council Complaint--Cal. Judicial Council Form PLD-PI-001(4)

Click here to view image.

[2] Use of Form

This form is an attachment to be used together with the Judicial Council form of complaint for personal injury, property damage, or wrongful death [*see § 421.70*] if the plaintiff sustained injuries and damages on the defendant's property while engaged in a recreational use of the property and contends that theimmunity provisions of *Civ. Code § 846* do not apply to bar recovery.

The immunity provisions of *Civ. Code § 846* do not limit the liability that otherwise exists: (1) for a willful failure to warn or guard against a dangerous condition, use, structure, or activity; (2) for injury suffered in any case in which permission to enter for a recreational purpose was granted for a consideration other than the consideration, if any, paid by the state, or if consideration has been received from others for the same purpose; or (3) to any persons who are expressly invited rather than merely permitted to come on the premises by the landowner [*Civ. Code § 846*].

For discussion of liability to recreational users, see *§§ 421.20 -421.23*.

[3] Filling Out Premises Liability Attachment

[a] Negligence (Paragraph Prem.L-2)

If liability is predicated on negligence alone and not willful failure to warn, Paragraph Prem.L-2 should be checked. To predicate liability on negligence alone, either the plaintiff must be an invited guest or consideration must have been paid by the plaintiff or others for the same purpose [*see Civ. Code § 846*]. Not only are the allegations as to the status of the

plaintiff contained only in Paragraph Prem.L-3, these allegations only address the status of the plaintiff as a "paying guest" or "invited guest" and not the situation in which consideration is received from others for the same purpose. It is therefore recommended that if liability is predicated on negligence alone and only Paragraph Prem.L-2 is used, counsel should insert the appropriate allegation as to the plaintiff's status as a paying or invited guest or an allegation as to the receipt of consideration from others in Paragraph Prem.L-1, together with the description of the premises and the circumstances of the injury.

[b] Willful Failure to Warn (Paragraph Prem.L-3)

If liability is predicated on a willful failure to warn or guard against a dangerous condition, use, structure, or activity, Paragraph Prem.L-3 should be checked. A possessor may be liable for willful failure to warn or guard against a dangerous condition, use, structure, or activity, even if the plaintiff is not an invited guest and if no consideration has been paid by the plaintiff or received by others [*see Civ. Code § 846*]. Therefore, counsel need not check the boxes opposite "paying guest" or "invited guest" if Paragraph Prem.L-3 is used.

[c] Punitive Damages

It appears that if liability is predicated on malicious failure to warn or guard against a dangerous condition, use, structure, or activity, punitive damages may be recoverable in the appropriate case [*see Civ. Code § 3294*]. If so, the Judicial Council exemplary damages attachment should be used. For an example of a completed exemplary damages attachment form, see *Ch. 177, Damages, § 177.10* et seq.

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36-421 California Forms of Pleading and Practice--Annotated § 421.91

§ 421.91 Complaint for Damages for Personal Injury (and Property Damage) Based on Negligence [Civ. Code § 1714(a)]--By Recreational User Against Owner of Real Property [Civ. Code § 846]

[1] FORM Complaint for Damages for Personal Injury (and Property Damage) Based on Negligence [Civ. Code § 1714(a)]--By Recreational User Against Owner of Real Property [Civ. Code § 846]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR PERSONAL INJURY [AND
_____ [*name*]	)	PROPERTY DAMAGE] (Negligence)
[; and DOES 1 through _____, in-	)	[amount demanded _____ (exceeds
clusive],	)	*or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Capacity of defendant(s) and, if appropriate, residency allegation. See § 421.71[1], Paragraph 1*].

2. [*Fictitious name allegation, if appropriate. See § 421.71[1], Paragraph 2*].

3. [*Agency allegation, if appropriate. See § 421.71[1], Paragraph 3*].

4. On or about _____ [*date*], plaintiff was _____ [*allege facts showing status and activity of plaintiff and the location of the accident, e.g.*, hunting deer on real property located in _____ County, California, described as _____ [*describe property*], when plaintiff

_____ [*describe circumstances of injury or damage, e.g.,* fell through the wooden planks in the bridge located on the premises].

5. At the aforementioned time and place, defendant[s, and each of them,] _____ [*allege facts showing possession and control of the premises on which the accident occurred by defendant(s), e.g.,* owned, maintained, controlled, managed, and operated the premises].

6. Prior to the aforementioned _____ [*allege facts showing status of plaintiff placing him/her in class of persons to whom defendant(s) owed a duty and taking the action out of the immunity provisions of Civ. Code § 846, e.g.,* plaintiff was expressly invited by defendant(s) to enter the premises to hunt *or* plaintiff paid defendant a fee of $_____ specifically for the right to enter the premises to hunt].

7. At the aforementioned time and place, defendant[s, and each of them,] negligently maintained, controlled, managed, and operated the premises, in that _____ [*allege acts or omissions of defendant(s) constituting breach of duty to plaintiff, e.g.,* defendant(s) knew or, in the exercise of reasonable care, should have known that the wooden bridge was at all times in a dangerous condition and constituted an unreasonable risk of harm to plaintiff of which plaintiff was at all times unaware. Defendant(s) negligently failed to maintain the bridge in safe condition or warn plaintiff of its unsafe condition, so that plaintiff, in crossing the bridge, fell through the rotting wooden planks and suffered the injuries hereinafter described].

8. [*General damages allegation. See § 421.71[1], Paragraph 7*].

9. [*Allegation of medical expenses. See § 421.71[1], Paragraph 8*].

10. [*Allegation of impairment of earning capacity. See § 421.71[1], Paragraph 9*].

11. [*Allegation of property damage, if appropriate. See § 421.71[1], Paragraph 10*].

[*Prayer. See § 421.71[1]*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 421.70.*]

[2] Use of Form

This form is a complaint for use if the plaintiff, as a recreational user, sustains injuries and damages on the defendant's premises due to the negligence of the defendant and if the plaintiff contends that the immunity provisions of *Civ. Code § 846* do not apply because either the plaintiff was an invited guest or consideration was paid by the plaintiff or received by the defendant from others for permission to enter on the premises for a recreational purpose [*see Civ. Code § 846*].

For the Judicial Council form for this type of complaint, see *§ 421.70*. For special allegations to add when using the Judicial Council form, see *§ 421.90*. For discussion of liability to recreational users who are expressly invited to enter the premises or enter those premises in exchange for consideration, see *§ 421.23[4]*] and 421.23[5].

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36-421 California Forms of Pleading and Practice--Annotated § 421.92

§ 421.92 Allegations--By Recreational User Against Owner of Real Property--Willful or Malicious Failure to Warn or Guard [Civ. Code § 846]

[1] FORM Allegations--By Recreational User Against Owner of Real Property--Willful or Malicious Failure to Warn or Guard [Civ. Code § 846]

1. At the aforementioned time and place, defendant[s, and each of them,] failed to warn plaintiff of and guard against _____ [*allege dangerous condition, use, activity, or structure, e.g.,* the dangerous condition and structure of the deteriorating and rotting condition of the wooden planks on the bridge located on the premises], of which plaintiff was at all times unaware.

2. Such conduct on the part of defendant(s) was at all times willful and malicious, in that _____ [*allege facts showing willful or malicious failure to warn e.g.,* defendant(s) knew that persons hunting deer on the property were required to use the bridge in the course of hunting to cross the stream on the property, knew that on three previous occasions deer hunters had fallen through the planks on the bridge and suffered serious injuries, and knew that persons attempting to cross the bridge could not ascertain that the bridge was in a dangerous and deteriorating condition before crossing it].

[3. Notwithstanding the above-mentioned knowledge on the part defendant(s), the failure of defendant(s) to warn was done _____ (*allege facts justifying punitive damages, if appropriate, e.g.,* in willful and conscious disregard of the safety of deer hunters *or* with knowledge that serious injury to deer hunters would result).]

[2] Use of Form

This form contains allegations for use if the plaintiff, as a recreational user, sustains injuries and damages on the defendant's premises and contends that the immunity provisions of *Civ. Code § 846* do not apply because the injuries and damages were due to the defendant's willful or malicious failure to warn or guard against a dangerous condition, use, structure, or activity on the premises [*see Civ. Code § 846*]. These allegations may be inserted in the *form in § 421.91* in place of Paragraphs 5 and 6. If the plaintiff is also alleging negligence on the part of defendant, these allegations should be used in addition to the allegations in the *form in § 421.91*. These allegations may also be adapted for use in the premises liability attachment to the Judicial Council form of complaint for personal injury, property

damage, or wrongful death [*see Code Civ. Proc. § 425.12*; *see §§ 421.70, 421.90*].

In alleging that the defendant's conduct was willful and malicious (Paragraph 2), the plaintiff should be sure to allege facts demonstrating that: (1) the defendant had actual or constructive knowledge of the peril to be apprehended; (2) the defendant had actual or constructive knowledgethat injury was a probable result of the danger; and (3) the defendant exhibited a conscious failure to act to avoid the peril [*see Nazar v. Rodeffer (1986) 184 Cal. App. 3d 546, 552, 229 Cal. Rptr. 209* (plaintiff's "mere conclusory general statement that defendants acted willfully and maliciously in failing to warn about [danger]" was not sufficient pleading); *see also Termini v. United States (9th Cir. 1992) 963 F.2d 1264, 1267-1268]* .

It appears that punitive damages may also be recovered in appropriate circumstances [*see Civ. Code § 3294(a), (c)(1)*]. If plaintiff is seeking punitive damages, the allegation in Paragraph 3 should be used as well as a prayer for punitive damages.

For discussion of liability to recreational users for willful or malicious failure to guard or warn, see *§ 421.23[3]*.

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[Reserved]

§§ 421.93[Reserved]

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36-421 California Forms of Pleading and Practice--Annotated § 421.100

§ 421.100 Affirmative Defense Allegation--Comparative Negligence of Plaintiff--Obvious Danger

[1] FORM Affirmative Defense Allegation--Comparative Negligence of Plaintiff--Obvious Danger

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

Plaintiff failed to exercise reasonable and ordinary care, caution, or prudence for his/her own safety in order to avoid the alleged accident. The resulting injuries and damages, if any, sustained by plaintiff were proximately caused and contributed to by the negligence of plaintiff[, in that, among other things, _____ (*set out acts or omissions of plaintiff constituting negligence, e.g.,* the open planter box in the foyer of the restaurant and any possible danger from it was obvious to anyone using reasonable care in walking in the foyer, and plaintiff failed to look where s/he was stepping)].

[2] Use of Form

This form is an affirmative defense for insertion in an answer to a complaint based on the negligence of the defendant in the management of the defendant's property.

The Judicial Council has approved a form of an answer to the complaint for personal injury, property damage, and wrongful death. For an example of a filled-in answer form, see Ch. 380, *Negligence* . If using the answer form provided by the Judicial Council, this paragraph should be inserted in Paragraph 4.

If more than one affirmative defense is set forth in the answer, each defense must be separately stated [*Code Civ. Proc. § 431.30(g)*] and numbered [*Cal. Rules of Ct., Rule 2.112(1)*]. If the complaint sets forth more than one cause of action, the affirmative defense must refer to the cause of action it is intended to answer [*Code Civ. Proc. § 431.30(g)*].

For discussion of the effect of comparative negligence on the duty to maintain premises in a safe condition, see *§ 421.14[4]*.

[3] Pleading Comparative Negligence

Many practitioners prefer to plead facts as generally as possible to avoid tying themselves down to a specific set of narrow facts at the pleading stage. The basic elements of negligence may be generally alleged in a complaint or answer [*see Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 513-514, 150 Cal. Rptr. 1, 585 P.2d 851* ; *Singer v. Superior Court (1960) 54 Cal. 2d 318, 323, 5 Cal. Rptr. 697, 353 P.2d 305]* . Therefore, it is likely that a defendant can plead the plaintiff's comparative fault generally and omit the allegations of the specific actions of the plaintiff set out as optional language in the example.

[4] Cross References

For discussion, forms, and a list of many affirmative defenses, see Ch. 26, *Answers*

For discussion and forms relating to comparative negligence, see Ch. 380, *Negligence*

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36-421 California Forms of Pleading and Practice--Annotated § 421.101

§ 421.101 Affirmative Defense Allegation--Comparative Negligence of Plaintiff--Assumption of Risk

[1] FORM Affirmative Defense Allegation--Comparative Negligence of Plaintiff--Assumption of Risk

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

Plaintiff failed to exercise reasonable and ordinary care, caution, or prudence for his/her own safety to avoid the alleged accident. The negligence of plaintiff proximately caused and contributed to the resulting injuries and damages, if any, sustained by plaintiff, in that, among other things, _____ (*set out acts or omissions of plaintiff constituting negligence, e.g.,* plaintiff walked down the wet sloping lawn area between his/her apartment and the garbage dumpster wearing rubber-soled sandals. Plaintiff had previously lost his/her balance in this area, thought the area was dangerous, and knew that other people had previously slipped and/or fallen in this area. Plaintiff could have taken other routes to the garbage dumpster, but chose this route as most convenient to him/her)].

[2] Use of Form

This form is an affirmative defense for insertion in an answer to a complaint based on the negligence of the defendant in the management of his or her property, if it is the contention of the defendant that the plaintiff assumed the risk and comparative fault principles therefore apply.

For discussion of assumption of risk and comparative negligence as defenses to an action for failure to maintain premises in a safe condition, see *§ 421.14[4]*.

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36-421 California Forms of Pleading and Practice--Annotated § 421.102

§ 421.102 Affirmative Defense Allegation--Plaintiff as Recreational User [Civ. Code § 846]

[1] FORM Affirmative Defense Allegation--Plaintiff as Recreational User [Civ. Code § 846]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

The action is barred by the provisions of *Civil Code Section 846*, in that at the time and place of the alleged accident, plaintiff was on the property for a recreational purpose, and permission to enter on the premises was not granted for consideration nor was plaintiff expressly invited to come on the premises.

[2] Use of Form

This form is an affirmative defense for insertion in an answer to the complaint based on the negligence of a defendant in the management of his or her property, if it is the contention of the defendant that there was no duty to the plaintiff pursuant to *Civ. Code § 846*. It may also be used as a ground for demurrer to the complaint [*see Code Civ. Proc. § 430.30*; *see also* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*].

For discussion of immunity from liability to recreational users, see *§§ 421.20 -421.23*.

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36-421 California Forms of Pleading and Practice--Annotated § 421.103

§ 421.103 Affirmative Defense Allegation--Plaintiff as Felon [Civ. Code § 847(a)]

[1] FORM Affirmative Defense Allegation]--Plaintiff as Felon [Civ. Code § 847(a)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action stated, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that defendant is not liable to plaintiff pursuant to the provisions of *Civil Code Section 847(a)*, in that _____ [plaintiff was injured *or* plaintiff's decedent was killed] on defendant's property as the proximate result of _____ [plaintiff's *or* plaintiff's decedent's] conduct _____ [in the course of *or* after] the commission of a felony specified in *Civil Code Section 847(a)*. _____ [Plaintiff *or* Plaintiff's decedent] was convicted of _____ [*specify felony, or misdemeanor that is a lesser included offense arising from a charge of a felony, listed in Civ. Code § 847(b), e.g.,* burglary] on _____ [*date*], in the action entitled _____ [*specify title of criminal action in which plaintiff was convicted*] in the Superior Court of California, _____ County, Case number _____.

[2] Use of Form

This form is an affirmative defense for insertion into an answer to a complaint based on the negligence of a defendant in the management of his or her property, if it is the contention of the defendant that the plaintiff was injured during or after the commission of a felony, and that liability is therefore precluded by *Civ. Code § 847(a)*.

Although *Civ. Code § 847(a)* precludes liability for both injury and death, if the person alleged to be a felon was killed during the commission of the alleged felony, it seems unlikely that the defense will be successful because of the requirement that the person have been charged and convicted of the felony (or a lesser included crime) [*Civ. Code § 847(e)*]. The statute does not provide for any alternative means of establishing that the plaintiff's decedent was guilty of a crime specified in *Civ. Code § 847(b)* if no criminal proceeding was instituted.

For discussion of the lack of liability for injuries incurred during or after the commission of a felony, see *§ 421.11[5]*.

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36-421 California Forms of Pleading and Practice--Annotated § 421.104

§ 421.104 Affirmative Defense Allegation--Plaintiff as Gleaner [Civ. Code § 846.2]

[1] FORM Affirmative Defense Allegation--Plaintiff as Gleaner [Civ. Code § 846.2]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that he or she is not liable to plaintiff pursuant to the provisions of *Civil Code Section 846.2,* in that plaintiff was expressly invited onto defendant's property to glean _____ [agricultural *or* farm] products for charitable purposes.

[2] Use of Form

This form is an affirmative defense for insertion into an answer to a complaint based on the negligence of the defendant in the management of his or her property, if it is the contention of the defendant that the plaintiff was invited onto the defendant's property to glean agricultural or farm products, and that liability is therefore precluded by *Civ. Code § 846.2*. This immunity does not apply if the owner received any consideration for permitting the gleaning activity [*Civ. Code § 846.2*].

For discussion of the lack of liability for injuries incurred during gleaning, see *§ 421.11[6]*.

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[Reserved]

§§ 421.105[Reserved]

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36-421 California Forms of Pleading and Practice--Annotated § 421.110

§ 421.110 Complaint for Damages for Property Damage Based on Negligence [Civ. Code § 1714(a)]--By Person Off Premises Against Owner or Possessor of Premises--Injury to Real Property Resulting From Condition on Premises

[1] FORM Complaint for Damages for Property Damage Based on Negligence [Civ. Code § 1714(a)]--By Person Off Premises Against Owner or Possessor of Premises--Injury to Real Property Resulting From Condition on Premises

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR PROPERTY DAMAGE
[and DOES 1 through _____,]	)	(Negligence)
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	[amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, the owner of _____ [*describe real property, e.g.,* a residence] located at _____ [*street address*], _____ County, California.

2. [*Capacity and residence of defendant(s). See § 421.71[1], Paragraph 1.*]

[3. *Fictitious name allegation. See § 421.71[1], Paragraph 2.*]

[4. *Agency allegation. See § 421.71[1], Paragraph 3.*]

5. At all times herein mentioned, defendant[s, and each of them,] _____ [*allege facts showing possession and control of the premises by defendant(s), e.g.,* owned, maintained, controlled, managed, and operated the premises located at _____ (*street address and city*), _____ County, California].

6. On or about _____ [*date*], _____ [*allege facts showing the nature of the condition causing the damage, e.g.,* a landslide located on the premises of defendant(s) moved and caused plaintiff's residence to rotate and press against the neighboring residence located at _____ (*street address*)].

7. At the aforementioned time and place, defendant[s, and each of them,] negligently maintained, controlled, managed, and operated their premises, in that _____ [*allege acts or omissions of defendant(s) constituting breach of duty to plaintiff, e.g.,* defendant(s) knew or should have known that the landslide located on the premises constituted an unreasonable risk of harm to neighboring residences if not properly corrected or controlled. Defendant(s) negligently failed to correct or control the landslide, all of which proximately caused the damages to plaintiff which are described below].

8. As a proximate result of the negligence of defendant[s, and each of them,] plaintiff's _____ [*describe property, e.g.,* residence] has been _____ [damaged *or* destroyed], all to plaintiff's damage in _____ [an amount of $_____ *or* an amount according to proof].

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For general damages _____ [in the sum of $_____ *or* according to proof];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 421.70.*]

[2] Use of Form

This form is a complaint for use against a possessor of premises for damages to the plaintiff's real property resulting from a condition on the premises of the possessor. If the plaintiff has also sustained personal injuries from the condition, the allegations in the *form in § 421.78* may be added to the complaint.

This form is adapted from the fact situation in *Sprecher v. Adamson Cos. (1981) 30 Cal. 3d 358, 361, 178 Cal. Rptr. 783, 636 P.2d 1121* .

Counsel may also initiate the action through use of the Judicial Council form of complaint for personal injury, property damage, or wrongful death, using the premises liability attachment [*see Code Civ. Proc. § 425.12*]. For a filled-in example of a Judicial Council form of complaint, see *§ 421.70*.

[3] Allegations

This complaint alleges (1) facts showing the plaintiff's status as a property owner and the defendant's ownership or

possession and control of nearby premises (Paragraphs 4 and 5), thereby establishing a duty owed by the defendant to the plaintiff [*see § 421.17*]; (2) a description of the condition of the defendant's premises that caused the damage to the plaintiff (Paragraph 6); (3) actions or omissions of the defendant that constitute the breach of duty and that proximately caused the plaintiff's damages (Paragraph 7); and (4) damages to the plaintiff's real property (Paragraph 8) [*see Civ. Code § 3333*].

[4] Venue

Venue for actions for injuries to real property is the county in which the real property is located [*Code Civ. Proc. § 392(a)*]. For further discussion about pleading venue, see Ch. 571, *Venue* .

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36-421 California Forms of Pleading and Practice--Annotated § 421.111

§ 421.111 Allegations--Defendant's Negligent Impoundment of Water Flooded Plaintiff's Property

[1] FORM Allegations--Defendant's Negligent Impoundment of Water Flooded Plaintiff's Property

1. From _____ [*date*], to _____ [*date*], defendant[s, and each of them], _____ [*set forth facts indicating the creation, maintenance, or control of impounded waters, e.g.,* dredged a portion of a canal and pumped the water from the canal into an earthen levee adjoining plaintiff's property].

2. The aforementioned actions of defendant[s, and each of them], were negligent in that _____ [*describe the acts or omissions indicating a breach of duty to plaintiff, e.g.,* the walls of the levee rose five feet higher than the ground, noticeable seepage of water from the levee to plaintiff's land occurred as soon as the pumping began, water flowed from the levee to plaintiff's land as soon as the level of the levee water reached ground level, and pumping was continued until the water was within six inches of the top of the levee].

[2] Use of Form

This form contains allegations for use in a complaint if the condition on the defendant's premises that caused injury to the plaintiff's property is an impoundment of waters, such as a reservoir, dike, or levee. The allegations may be inserted in the *form in § 421.110* in place of Paragraphs 6 and 7. There is some case law suggesting that there may be strict liability for the escape of impounding waters [*see § 421.45[1]*].

This form is adapted from the fact situation in *Kleinclaus v. Marin Realty Co. (1949) 94 Cal. App. 2d 733, 735-736, 211 P.2d 582* .

[3] Alternative Recovery on Nuisance Theory

Injury based on impoundment of water may also support recovery on a theory of private nuisance, as well as on a theory of negligence, in which case injunctive relief may be available in addition to damages [*see, e.g., Callison v. Mt. Shasta Power Corp. (1932) 123 Cal. App. 247, 255-256, 11 P.2d 60]* . Therefore, in an appropriate case this form may be combined with a form of complaint for damages and injunctive relief based on private nuisance [*see § 421.50*]. For general forms of complaint for damages and injunctive relief to abate a private nuisance, and for a form of allegations

based on the diversion of naturally accumulated waters, see Ch. 391, *Nuisance* .

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Chapter 421 PREMISES LIABILITY
PART IV. FORMS

36-421 California Forms of Pleading and Practice--Annotated § 421.112

§ 421.112 Allegations--Defendant's Unreasonable Discharge of Surface Water Onto Plaintiff's Property

[1] FORM Allegations--Defendant's Unreasonable Discharge of Surface Water Onto Plaintiff's Property

1. From _____ [*date*], to _____ [*date*], defendant[s, and each of them], _____ [*set forth facts describing procedures by which surface waters were discharged onto plaintiff's property, e.g.,* leveled and paved the western portion of defendant's land where it adjoined plaintiff's property, resulting in a much sharper drop off to plaintiff's property, and later installed downspouts through which rainwater from defendant's entire parcel of land was collected and discharged onto plaintiff's property].

2. The aforementioned actions of defendant[s, and each of them], in discharging the surface water were unreasonable in that _____ [*describe facts indicating unreasonableness, e.g.,* the amount of surface water discharged onto plaintiff's property was increased tenfold due to the angle of the slope being changed from 30 degrees to 75 degrees, and due to the discharge of the entire amount of surface water from defendant's parcel, instead of merely that amount that would naturally flow onto plaintiff's property].

[2] Use of Form

This form contains allegations for use in a complaint if the condition on the defendant's premises causing injury to plaintiff's property is an unreasonable discharge of surface waters. Each landowner must take reasonable care in using his or her property to avoid injury to adjacent property through the flow of surface waters [*Keys v. Romley (1966) 64 Cal. 2d 396, 406-409, 50 Cal. Rptr. 273, 412 P.2d 529* ; *see § 421.43[1]*]. The allegations may be inserted in the *form in § 421.110* in place of Paragraphs 6 and 7.

This form is adapted from the fact situation in *Keys v. Romley (1966) 64 Cal. 2d 396, 398-399, 50 Cal. Rptr. 273, 412 P.2d 529* .

[3] Alternative Recovery on Nuisance Theory

Injury based on the discharge of water may also support recovery on a theory of private nuisance, as well as on a theory of negligence, in which case injunctive relief may be available in addition to damages [*see, e.g.,* *Callison v. Mt. Shasta*

Power Corp. (1932) 123 Cal. App. 247, 255-256, 11 P.2d 60 (flooding caused by impoundment of water)]. Therefore, in an appropriate case this form may be combined with a form of complaint for damages and injunctive relief based on private nuisance [*see § 421.50*]. For general forms of complaint for damages and injunctive relief to abate a private nuisance, and for a form of allegations based on the diversion of naturally accumulated waters, see Ch. 391, *Nuisance* .

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36-421 California Forms of Pleading and Practice--Annotated § 421.113

§ 421.113 Allegations--Defendant's Unreasonable Discharge of Surface Waters--Discharge Into Natural Watercourse

[1] FORM Allegations--Defendant's Unreasonable Discharge of Surface Waters--Discharge Into Natural Watercourse

1. At all times herein mentioned, _____ [*specify watercourse, e.g.,* Muddy River] was and now is a natural watercourse flowing in a generally [*specify direction, e.g.,* southerly] direction along the above-described properties of the plaintiff and the defendant.

2. From _____ [*date*], to _____ [*date*], defendant _____ [*set forth facts describing improvements and uses of defendant's upper riparian property that resulted in an increased volume of surface waters discharged into the natural watercourse, e.g.,* installed storm drains and culverts.]

3. The aforementioned actions of defendant were unreasonable in that _____ [*describe facts indicating unreasonableness, e.g.,* as a result of those actions, the volume of runoff from the Muddy River increased by _____ (*specify amount*) over the volume that normally would flow into the watercourse, the benefit to defendant from drainage of a small area of defendant's property was far outweighed by the severity of the flooding and erosion of plaintiff's property caused by the increased volume of water, and defendant could have but failed to place the drains and culverts in locations where they would have adequately drained defendant's property and created only a _____ (*specify amount*) increase in the volume of runoff volume.]

[2] Use of Form

This form contains allegations for use in a complaint if the condition on the defendant's premises causing injury to the plaintiff's property consists of improvements resulting in an increased discharge of surface waters into a natural watercourse. The allegations may be inserted in the *form in § 421.110* in place of Paragraphs 6 and 7.

For discussion of the liability of upstream owners who discharge surface waters into a natural watercourse, see *§ 421.44[1]*.

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36-421 California Forms of Pleading and Practice--Annotated § 421.114

§ 421.114 Allegations--Changing Natural Course of Surface Water Drainage

[1] FORM Allegations--Changing Natural Course of Surface Water Drainage

[1. The above-described properties of plaintiff and defendant are adjacent and abut each other along a common boundary line running generally in an _____ (*specify, e.g.,* westerly) direction to a point terminating at the bank of the _____ (*specify watercourse, e.g.,* Muddy River)].

2. The _____ [*specify, e.g.,* western] boundaries of the above-described parcels of real property belonging to the parties abut the bank of the _____ [*specify watercourse, e.g.,* Muddy River]. Plaintiff is informed and believes and thereon alleges that the natural flow of surface waters draining from the lands of the parcels of property belonging to plaintiff and defendant into the _____ [*specify watercourse, e.g.,* Muddy River] was in a _____ [*specify, e.g.,* northerly] direction across and on the property of defendant because the elevation of defendant's property was lower than that of the land of plaintiff.

3. On or about _____ [*date*], defendant caused his/her land to be elevated _____ [*describe acts changing the elevation, e.g.,* by filling his/her land with large amounts of dirt and sand], resulting in an elevation higher than that of the land of plaintiff. This changed elevation changed the natural course of the _____ [*specify watercourse, e.g.,* Muddy River] and the drainage of the surface waters thereto. [*Describe any additional action by defendant affecting the previous drainage patterns, e.g.,* Defendant constructed covered drainage pipes to collect surface waters on defendant's land and placed them to drain and open directly onto plaintiff's land.]

4. The conduct of the defendant was unreasonable in that _____ [*specify, e.g.,* it caused continuous flooding on plaintiff's property, and its only purpose, that of preventing a small amount of surface water from plaintiff's land from crossing defendant's land before draining into the Muddy River, is far outweighed by the burden to plaintiff's land caused by the continuous flooding].

[2] Use of Form

This form contains allegations for use in a complaint if the injury to plaintiff's property was caused by a lower

landowner's obstructing the flow of surface waters from his or her property. They may be inserted in the *form in § 421.110* in place of Paragraphs 6 and 7. Optional Paragraph 1 may be used if the parties are adjoining landowners.

For a discussion of landowners' duties regarding obstruction of the flow of surface waters, see *§ 421.41*.

This form is adapted from the fact situation in *Mogle v. Moore (1940) 16 Cal. 2d 1, 4-7, 104 P.2d 785* .

[3] Alternative Recovery on Nuisance Theory

Injury based on the obstruction of the flow of surface waters may also support recovery on a theory of private nuisance, as well as on a theory of negligence, in which case injunctive relief may be available in addition to damages [*see, e.g., Callison v. Mt. Shasta Power Corp. (1932) 123 Cal. App. 247, 255-256, 11 P.2d 60* (flooding caused by impoundment of water)]. Therefore, in an appropriate case this form may be combined with a form of complaint for damages and injunctive relief based on private nuisance [*see § 421.50*]. For general forms of complaint for damages and injunctive relief to abate a private nuisance, and for a form of allegations based on the diversion of naturally accumulated waters, see Ch. 391, *Nuisance* .

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36-421 California Forms of Pleading and Practice--Annotated § 421.115

§ 421.115 Allegations--Obstruction of Natural Watercourse

[1] FORM Allegations--Obstruction of Natural Watercourse

1. At all times herein mentioned, _____ [*specify watercourse, e.g.*, the Muddy River] was, and now is, a natural watercourse flowing in its natural course in a generally _____ [*specify direction, e.g.*, southerly] direction along the above-described properties of plaintiff and defendant.

2. From _____ [*date*], to _____ [*date*], defendant[s, and each of them], _____ [*set forth facts describing the obstruction of the natural watercourse and the diversion of water therefrom onto plaintiff's property, e.g.,* built a solid-fill driveway across the stream that dams the stream except for the small amount able to flow through a 1 foot-diameter pipe. During the rainy season so much water accumulates above the driveway that the excess water overflows the banks of the stream, flows over defendant's land, and continues onto plaintiff's land.]

3. The aforementioned actions of defendant[s, and each of them], were negligent in that _____ [*describe the acts or omissions to act indicating a breach of duty to plaintiff, e.g.,* the solid-fill driveway caused the water to dam up in an amount that the small discharge pipe was unable to release, resulting in an overflow onto plaintiff's land that would not have otherwise occurred].

[2] Use of Form

This form contains allegations for use in a complaint if the condition on the defendant's premises causing injury to the plaintiff's property is an obstruction of a natural watercourse. These allegations may be inserted in the *form in § 421.110* in place of Paragraphs 6 and 7.

This form is adapted from the fact situation in *Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 82 Cal. Rptr. 689* .

[3] Alternative Recovery on Nuisance Theory

Injury based on the obstruction of a watercourse may also support recovery on a theory of private nuisance, as well as

on a theory of negligence, in which case injunctive relief may be available in addition to damages [*see, e.g., Callison v. Mt. Shasta Power Corp. (1932) 123 Cal. App. 247, 255-256, 11 P.2d 60* (flooding caused by impoundment of water)]. Therefore, in an appropriate case this form may be combined with a form of complaint for damages and injunctive relief based on private nuisance [*see § 421.50*]. For general forms of complaint for damages and injunctive relief to abate a private nuisance, and for a form of allegations based on the diversion of naturally accumulated waters, see Ch. 391, *Nuisance* .

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36-421 California Forms of Pleading and Practice--Annotated §§ 421.116-421.119

[Reserved]

§§ 421.116[Reserved]

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36-421 California Forms of Pleading and Practice--Annotated § 421.120

§ 421.120 Affirmative Defense--Protection From Flood Waters

[1] FORM Affirmative Defense--Protection From Flood Waters

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that any waters that might have flowed onto plaintiff's property were flood waters, a common enemy, against which defendant has the right to protect himself/herself/itself. Any action that defendant took to protect his/her/its property from these flood waters was reasonable.

[2] Use of Form

This form is an affirmative defense for use by a defendant in an answer to a complaint for damages for intruding waters if the intruding waters were flood waters. Flood waters, which are waters escaping from a stream or other body of water and overflowing the adjacent territory, are a common enemy. Landowners may protect their land from flood waters even to the detriment of neighbors by obstructions that are merely defensive in nature and are not calculated to interfere with the current of the water in its natural channel [*Everett v. Davis (1941) 18 Cal. 2d 389, 393, 115 P.2d 821]* . Landowners may use every reasonable precaution to avert injury to their land from flood waters [*Weinberg Co. v. Bixby (1921) 185 Cal. 87, 96, 196 P. 25]* .

For discussion of flood waters, see *§ 421.42*.

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36-421 California Forms of Pleading and Practice--Annotated § 421.121

§ 421.121 Affirmative Defense--Plaintiff Unreasonably Failed to Protect Property from Watercourse Flow

[1] FORM Affirmative Defense--Plaintiff Unreasonably Failed to Protect Property from Watercourse Flow

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff must bear the burden of any damage caused by increased flow in _____ [*specify watercourse, e.g.,* the Muddy River], a natural watercourse, because plaintiff failed to act reasonably to protect plaintiff's property from damage from the stream waters.

[2] Use of Form

This form is an affirmative defense allegation for use by a defendant in an answer to a complaint alleging that improvements on the defendant's premises resulted in an increased discharge of surface waters to a natural watercourse that caused injury to the plaintiff's property.

For discussion of the liability of upstream owners who discharge surface waters into a natural watercourse, see *§ 421.44[1]*. For discussion of a landowner's duty to minimize damages, see *§ 421.49*.

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Volume 36: Personal Property Leases thru Premises Liability-Chs. 413-424
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[RESERVED]

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Volume 37: Pretrial Proceedings thru Privacy-Chs. 425-439
Chapter 425 PRETRIAL PROCEEDINGS

37-425 California Forms of Pleading and Practice--Annotated 425.syn

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.syn Synopsis to Chapter 425: PRETRIAL PROCEEDINGS

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[1] Bringing Cases to Trial Generally

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[c] Alternatives to Trial

[2] Internal Case Management

[a] Calendaring

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[c] Motion Practice

[3] Case Management Conference

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[a] Separate Trial of Special Defense

[b] Separate Trial of Issue or Part of Issue

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[b] Timing

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[3] [Reserved]

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[1] FORM

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Preparation and Contents of Order

[4] Cross References

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[1] FORM

[2] Use of Form

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[1] FORM

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

§§ 425.141-425.149 [Reserved]

§ 425.150 Notice of Motion and Declaraton for Separate Trial of Issue or Part of Issue Before Trial of Other Issues or Part of Issue in Case [Code Civ. Proc. § 598]

[1] FORM

[2] Use of Form

[3] Service and Filing

[4] Cross References

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[1] FORM

[2] Use of Form

[3] Notice of Order

[4] Cross References

§ 425.152 Order Setting Remaining Issues or Part of Issue for Trial After Separate Trial of Issue or Part of Issue

[1] FORM

[2] Use of Form

[3] Proceedings After Separate Trial

[4] Cross References

§§ 425.153-425.159 [Reserved]

§ 425.160 Notice of Motion and Supporting Declaration to Establish Precedence or Preference of Case for Case Management Conference or Trial [Cal. Rules of Ct., Rules 3.723, 3.1335]

[1] FORM

[2] Use of Form

[3] Supporting Declaration

[4] Declaration for Preference Based on Party's Age

[5] Cross References

§ 425.161 Order Establishing Precedence or Preference of Case for Case Management Conference or Trial [Cal. Rules of Ct., Rules 3.723, 3.1335]

[1] FORM

[2] Use of Form

[3] Cross References

§ 425.162 Notice of Motion and Supporting Declaration to Advance, Reset, or Specially Set Case for Case Management Conference or Trial [Cal. Rules of Ct., Rules 3.723, 3.1335]

[1] FORM

[2] Use of Form

[3] Supporting Declaration

[4] Motions to Advance, Reset, or Specially Set

[5] Cross References

§ 425.163 Order to Advance, Reset, or Specially Set Case for Case Management Conference or Trial [Cal. Rules of Ct., Rules 3.723, 3.1335]

[1] FORM

[2] Use of Form

[3] Cross References

§§ 425.164-425.169 [Reserved]

§ 425.170 Joint Request to Have Case Placed on Settlement Conference Calendar [Cal. Rules of Ct., Rule 3.1380(a)]

[1] FORM

[2] Use of Form

[3] When Settlement Conference Is Mandatory

[4] Cross References

§ 425.171 Settlement Conference Statement [Cal. Rules of Ct., Rule 3.1380(c)]

[1] FORM

[2] Use of Form

[3] Contents of Statement

[4] Cross References

§ 425.172 Notice of Settlement of Entire Case [Cal. Rules of Ct., Rule 3.1385]--Judicial Council Form CM-200

[1] FORM

[2] Use of Form

[3] Cross References

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FOOTNOTES:
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Volume 37: Pretrial Proceedings thru Privacy-Chs. 425-439
Chapter 425 PRETRIAL PROCEEDINGS
PART I. SCOPE

37-425 California Forms of Pleading and Practice--Annotated § 425.01

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.01 Scope of Chapter

This chapter covers the procedures for bringing a civil action to trial, including civil case management under the California Rules of Court as amended effective July 1, 2002. The amended rules have fundamentally changed pre-trial proceedings by eliminating many obsolete provisions relating to case management and by providing a framework for the comprehensive management of civil cases in the trial courts.

This chapter provides analysis of pretrial procedure for bringing cases to trial with specific review of initiating and responding to complaints [*see § 425.10* et seq.], the new case management system [*see § 425.30* et seq.], and issues involving trial setting, ADR, complex cases and sanctions [*see § 425.50* et seq.]. Additional pretrial procedures are addressed such as bifurcation [*see § 425.60* et seq.], motions for precedence of preference and motions to continue, advance, reset, or specially set cases [*see § 425.70* et seq.], and settlements [*see § 425.90* et seq.]. An separate part discusses pretrial considerations and strategies to effectively plan pretrial proceedings [*see § 425.100* et seq.].

Among the major changes brought about by the July 1, 2002 changes to California Rules of Court discussed in this chapter are:

- New rules prescribing the time for service of pleadings [*see § 425.10* et seq.].
- Requirements for mandatory case management by the court [*see § 425.30* et seq.].
- Requirements for the court to issue a case management order that will govern the subsequent proceedings in every case, including the pleadings and discovery phases, procedural motions, evidentiary motions, trial setting, arbitration and settlement [*see § 425.30* et seq.].

This chapter also discusses mandatory forms which must be used during the pre-trial phase, such as:

- Required Judicial Council Civil Case Cover Sheet (Form CM-010) [*see § 425.130*].

- Required Judicial Council Case Management Conference Statement (Form CM-110) [*see § 425.131*].

- Case management conference order [*see § 425.132*].

- Stipulation for amendment, correction, or modification of a case management conference order [*see § 425.133*].

- Notice of motion and order to amend a case management conference order [*see §§ 425.134, 425.135*].

- Notice of time set for trial [*see § 425.140*].

- Notice of motion and order for bifurcation, and an order setting remaining issue for trial after separate trial [*see §§ 425.150 -425.152*].

- Notice of motion and order to establish precedence of case for case management conference or trial [*see §§ 425.160, 425.161*].

- Notice of motion and order to advance, reset, or specially set a case for case management conference or trial [*see §§ 425.162, 425.163*].

- Joint request for case to be placed on the settlement conference calendar [*see § 425.170*].

- A settlement conference statement [*see § 425.171*].

- Required Judicial Council Notice of Settlement (Form CM-200) [*see 425.172*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsGeneral OverviewCivil ProceduresPretrial MattersConferencesGeneral OverviewCivil ProceduresPretrial MattersConferencesCase ManagementCivil ProceduresPretrial MattersConferencesSanctionsCivil ProceduresPretrial MattersSeparate Trials

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37-425 California Forms of Pleading and Practice--Annotated § 425.02

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.02 Cross References

- For discussion and forms for use in service of process, see Ch. 518, *Service of Summons and Papers* .

- For discussion of amendments to and amended pleadings, see Ch. 21, *Amended and Supplemental Pleadings* .

- For discussion and forms for use in securing separate trial of affirmative defenses, see *Ch. 3, Abatement of Actions, § 3.110* et seq.

- For forms for use in judicial arbitration proceedings and arbitration determination conferences, see Ch. 36, *Judicial Arbitration* .

- For a discussion of severance of actions, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

- For discussion and forms relating to continuances, see Ch. 136, *Continuances* .

- For discussion and forms relating to counsel's duty to inform the court of related litigation and of change of address, see Ch. 137, *Continuing Duties During Litigation* .

- For forms for use in discovery proceedings, see Ch. 190-200, *Discovery* .

- For discussion and forms for use in demanding jury trials, see Ch. 322, *Juries and Jury Selection* .

- For discussion and forms for use in submitting jury instructions to the court, see Ch. 326, *Jury Instructions* .

- For discussion and forms relating to compromise and settlement of actions, see Ch. 520, *Settlement and Release* .

- For a discussion of the order and other aspects of trial, see Ch. 551, *Trial* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticePleadingsGeneral OverviewCivil ProceduresAlternative Dispute ResolutionGeneral OverviewCivil ProceduresPretrial MattersSeparate Trials

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37-425 California Forms of Pleading and Practice--Annotated §§ 425.03-425.09

AUTHOR: Evelio M. Grillo Editorial Consultant

[Reserved]

§§ 425.03[Reserved]

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A. Bringing Cases to Trial
1. Initiating and Responding to a Complaint

37-425 California Forms of Pleading and Practice--Annotated § 425.10

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.10 Governing Law

Pre-trial procedure, including pleading and discovery practice, law and motion practice and trial setting is governed by the Code of Civil Procedure [*see Code Civ. Proc. §§ 575.1, 575.2*], the Government Code [*see Gov. Code §§ 68612, 68616*], the California Rules of Court [*Cal. Rules of Ct, Rules 1.1-1.150, 2.1-2.1100, 3.1-3.2120, 10.1-10.1030*], and local court rules. Amendments in 2002 to the California Rules of Court and the Code of Civil Procedure have fundamentally changed the management of civil cases in California courts. Prior to the Trial Court Delay Reduction Act ("TCDRA") and the 2002 Amendments to the Rules of Court, attorneys for civil litigants had a significant role in determining how and how fast a case proceeded through the pre-trial process, including determining when a complaint was served, the timing of discovery and motion practice, and trial setting. The TCDRA, in conjunction with the 2002 Rule changes, has changed pretrial procedure from a system of attorney management to a system of court management by imposing procedural deadlines on the litigants and specific management duties on the courts. The most significant areas of change are: initial filing and service of process requirements, case classification, and case management and requirements.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedurePretrial MattersGeneral Overview

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37-425 California Forms of Pleading and Practice--Annotated § 425.11

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.11 The Pleading Stage

[1] Overview

A civil action is commenced by filing a complaint or petition with the court. After the initial filing of the complaint or petition and payment of all applicable fees, the court issues an original and one or more copies of the summons [*Code Civ. Proc. § 412.10*]. The summons must contain the title of the court, the names of the parties, and a notice, in English and Spanish, for the defendant to file a written response to the complaint within 30 days after the summons is served on him or her, and stating that unless the defendant responds to the complaint, his or her default will be entered upon application of the plaintiff [*Code Civ. Proc. § 412.20*]. Though not required by statute, virtually all summons issued in California state courts are issued on a Judicial Council form.

[2] Initial Filing Requirements

[a] General Pleading Requirements of the Complaint

To initiate a civil action the plaintiff or petitioner must file the original complaint or petition and a civil case cover sheet [for form, *see § 425.130*]. At a minimum, the complaint must contain both a statement of the facts constituting the cause of action, in ordinary and concise language, and a demand for judgment for relief to which the pleader claims to be entitled [*Code Civ. Proc. § 425.10*]. If the recovery of money or damages is demanded, the amount demanded must be stated [*Code Civ. Proc. § 425.10*].

[b] Special Pleading Requirements of the Complaint

[i] Personal Injury

In personal injury cases and wrongful death cases, the amount of actual punitive damages may not be stated [*Code Civ.*

Proc. § 425.10(b)]. For discussion of personal injury actions, see *Ch. 177, Damages, 177.40* et seq.; Ch. 460, *Product Liability* .

[ii] Punitive Damages

Special rules of pleading apply when seeking punitive damages from a childcare provider, religious corporation or directors or officer of a non-profit corporation [*Code Civ. Proc. §§ 425.13-425.15*]. Generally, no claim for punitive damages may be included in the complaint or other pleading filed against a healthcare provider, a religious corporation, or a director or officer of a non-profit corporation unless the court first enters an order allowing the pleading to include that claim to be filed with the court [*Code Civ. Proc. §§ 425.13-425.15*]. Since a party may not obtain a court order before initiating a civil action, the procedure to be followed when seeking punitive damages against healthcare providers, religious corporations and non-profit directors and officers is to file an action first and then to amend the complaint to state a claim for punitive damages. Depending on the defendant, the standard for allowing such a motion to be granted is varied depending on whether the defendant is a healthcare provider, religious corporation or volunteer director or officer [*Code Civ. Proc. §§ 425.13-425.15*]. For additional discussion of punitive damages, see *Ch. 177, Damages, § 177.40 et seq.*

[iii] Actions Against Healthcare Providers--Prior Notice

In actions against healthcare providers, the plaintiff must give at least 90 days' prior notice of the intention to commence the action to the healthcare provider [*Code Civ. Proc. § 364*]. Failure to comply with the 90-day notice provision does not invalidate the proceeding, but it will subject an attorney to discipline by the State Bar.

[iv] Actions Against Engineers, Architects, and Land Surveyors--Certificate of Merit

In actions against engineers, architects, and land surveyors, including cross-complaints for damages or indemnity against persons holding a valid license or registration as an architect, engineer or land surveyor, the plaintiff must serve a "certificate of merit" on or before the date of service of the complaint [*Code Civ. Proc. § 411.35*]. The requirements of a certificate of merit are set forth in *Code Civ. Proc. § 411.35(a)-(d)* and generally include a statement of the attorney that the attorney has received the opinion of a licensed architect, engineer, or land surveyor that there is reasonable and meritorious cause for filing the cause, or a statement that the attorney has been unable to obtain the required opinion, or that an opinion is not required, under one of the exceptions enumerated in the statute.

The failure to file a certificate of merit is grounds for a demurrer or motion to strike [*Code Civ. Proc. § 411.35(g)*]. A violation of the certificate of merit requirement may constitute unprofessional conduct and grounds for discipline against the attorney. [*Code Civ. Proc. § 411.35(f)*].

[c] Mandatory Civil Case Cover Sheet

[i] Required When First Paper Filed

At the time the first paper is filed in an action or proceeding (most often the complaint), the plaintiff must file a Civil Case Cover Sheet on the prescribed Judicial Council Form [*see* Cal. Judicial Council Form CM-010; for form, *see § 425.130*] and the Judicial Council's civil case cover sheet is required in addition to any cover sheet required by local rule [*Cal. Rules of Ct., Rule 3.220(a)*]. The requirement of a Civil Case Cover Sheet is a fairly new development in California state courts.

[ii] Exception for Small Claims, Probate, and Family Law Cases

The California Rules of Court do not require a civil case cover sheet for cases filed under the Probate Code, Family Code, Welfare and Institutions Code or in small claims court [*Cal. Rules of Ct., Rule 3.220(b)(1)*]. Some jurisdictions

by local rule do, however, require a civil case cover sheet to be filed in one or more of these types of cases. The Judicial Council has indicated that case cover sheets will be added for use in additional areas of the law as the data collection program expands [*Cal. Rules of Ct., Rule 3.220(b)(2)*].

[iii] Information Required on Civil Case Cover Sheet

The information required in a civil cover sheet includes the name of the parties, the type of case, whether the case is limited or unlimited case, whether the case is a complex case and if so, the reasons for the complexities, the type of remedies sought, the number of causes of action and whether the case is a class action lawsuit. [*Cal. Rules of Ct., Rule 3.220(b)*; *see* Cal. Judicial Council Form CM-010; for form, *see § 425.130*].

[iv] Failure to Include Cover Sheet

If a party is required to file a civil case cover sheet or similar local rule and fails to do so or provides a defective or incomplete cover sheet, the clerk must file the paper, but the party and/or the party's counsel may be subject to sanctions under *Cal. Rules of Ct., Rule 2.30* [*Cal. Rules of Ct., Rule 3.220(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticePleadingsComplaintsFiling FeesCivil ProceduresPleading & PracticePleadingsRule Application & InterpretationCivil ProceduresRemediesDamagesPunitive DamagesTortsProceduresCommencement & ProsecutionGeneral Overview

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37-425 California Forms of Pleading and Practice--Annotated § 425.12

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.12 Obtaining the Summons

After the clerk accepts the complaint or petition and Civil Cover Sheet for filing and all fees are paid, the summons is issued by the clerk of the court [*Code Civ. Proc. § 412.10*]. The common practice in the State of California is for the summons to be prepared on a Judicial Council Form by plaintiff's counsel and for the summons to be "issued" by the clerk of the court by placing the court's seal and the clerk's initials on the summons. For additional discussion of summons, see Ch. 518, *Service of Summons and Papers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessSummonsContent & FormGovernmentsCourtsClerks of Court

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37-425 California Forms of Pleading and Practice--Annotated § 425.13

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.13 Service of Summons and Complaint--Establishing Jurisdiction Over the Defendant

[1] Effect of the Trial Court Delay Reduction Act

To obtain jurisdiction over the defendant requires service of the summons and complaint must be made on the defendant. For discussion of personal jurisdiction, see Ch. 323, *Jurisdiction: Personal Jurisdiction* .

Prior to the TCDRA, the time for serving the summons and complaint and the responsive pleading was specified by local court rule, or left to the discretion of the parties. One common practice followed by plaintiff's counsel prior to the TCDRA was to postpone service of the complaint after filing, pending counsel's completion of his or her investigation, or to grant the defendant an open extension of time to plead pending the defendant's investigation of the claim. These practices, and any other practice that delays service of the complaint or the responsive pleading are prohibited under TCDRA without leave of court.

[2] Time Requirements for Service of Summons and Complaint [Cal. Rules of Ct., Rule 3.110]

[a] 2002 Amendments to California Rules of Court

Cal. Rules of Ct., Rule 3.110 provides a complete set of time requirements that establish the outside time limitations for service of the summons and complaint, filing of a responsive pleading, the entry of default, and default judgments.

The time requirements of *Cal. Rules of Ct., Rule 3.110* apply to all civil cases except for unlawful detainer actions, proceedings under the Family Code, and other proceedings for which different service requirements are prescribed by law [*Cal. Rules of Ct., Rule 3.110(a)*]. The specific time requirements for civil cases are discussed below.

[b] Service of Complaint Required Within 60 Days

The summons and complaint must be served on all named defendants and proof of service on those defendants must be filed with the court within 60 days after the filing of the complaint [*Cal. Rules of Ct., Rule 3.110(b)*].

[c] Service of Amended Complaint Required Within 30 Days

When a complaint is amended to add a defendant, the new defendant must be served and the proof of service must be filed within 30 days of the filing of the amended Complaint [*Cal. Rules of Ct., Rule 3.110(b)*].

[d] Service of Cross-Complaint

[i] Types of Cross-Complaints

A cross-complaint is a pleading filed by a party against whom a cause of action has been filed in which the party being sued asserts a cause of action against the party suing him or her, or against third parties who may be liable to the party being sued. At the time the party answers the complaint, any compulsory cross-complaint must be filed against the party or parties who filed the complaint [*Code Civ. Proc. § 428.50*]. Cross-complaints against other parties may be filed at any time before the courts have set a trial date [*Code Civ. Proc. § 428.50*]. A compulsory cross-complaint is a cross-complaint containing a related cause of action which the defendant has against the plaintiff [*Code Civ. Proc. § 426.30(a)*]. Compulsory cross-complaints must be asserted in the action unless the court does not have jurisdiction to render a personal judgment against the person against whom the cross-complaint is asserted [*Code Civ. Proc. § 426.30(b)*]. Different rules apply to the filing and service of cross-complaints depending on the status of the cross-defendant, and are discussed below.

For additional discussion of cross-complaints, see Ch. 123, *Complaints and Cross Complaints* .

[ii] Service of Cross-Complaints Against Parties Who Have Appeared

A cross-complaint against the party who filed the complaint or against parties who have appeared in the action must be filed at the same time as the answer [*Code Civ. Proc. § 428.50(a)*; *see also Cal. Rules of Ct., Rule 3.110(c)*]. A proof of service of the cross-complaint must accompany the cross-complaint at the time it is filed. In other words, a cross-complaint against a party who has appeared must be served before it is filed, and it must be served and filed within the time allowed for filing the answer, *i.e.*, 30 days from the date of service unless otherwise extended by agreement of the parties or of the court [*Cal. Rules of Ct., Rule 3.110(c)*].

PRACTICE TIP:

Summons Not Required For Parties Who Have Appeared. Because a party who has filed a complaint has already submitted to the jurisdiction of the court, it is not necessary to obtain a summons and serve the summons with the cross-complaint [*Code Civ. Proc. § 428.60(2)*].

[iii] Service of Cross-Complaint Against New Parties

If the cross-complaint adds new parties, or names a party who has not yet appeared, the cross-complaint and a summons on cross-complaint must be served on the new party or the party who has not yet appeared, and proof of service on the new parties must be filed within 30 days of the filing of the cross-complaint [*Code Civ. Proc. § 428.60(1)*; *Cal. Rules of Ct., Rule 3.110(c)*].

PRACTICE TIP:

Summons on Cross-Complaint Required For New Parties. Because the court does not have jurisdiction over a party who has not yet appeared, it is necessary to obtain a summons on cross-complaint before the cross complaint is served. The summons on cross complaint is obtained by following the same procedure as for obtaining a summons on the complaints, *i.e.*, by filing the

cross-complaint, paying any fees and presenting the clerk with a copy of a summons containing the names of the parties for issuance by the clerk of the court.

[3] Extending Time to Serve Complaint

[a] One Extension Allowed Within 60-Day Period Without Leave of Court

Cal. Rules of Ct., Rule 3.110(d) limits the parties to a stipulation of one 15-day extension for service of a responsive pleading without leave of court. This means that if the complaint is served, the time for service of the complaint may be extended up to a maximum of 45 days within the 60-day period provided the extension does not take the date for answering beyond the 60-day period for filing a proof of service of the complaint.

[b] Leave of Court Required if Beyond 60-Day Period

Extensions of time to serve the complaint beyond the 60-day period must be by leave of court, *i.e.*, a court order [*Cal. Rules of Ct., Rule 3.110(d), (e)*]. An application for a court order extending the time to serve a pleading must be filed before the time for service has elapsed, that is before 60 days have elapsed from the filing of the complaint.

[c] Ex Parte Application for Leave of Court

In most jurisdictions, the application for an extension of time may be obtained on the plaintiff's ex parte application. Check local rules for applicable procedure.

[d] Required Showing To Obtain Additional Extension

An application for an extension must be accompanied by a declaration saying why service has not been completed, documenting the efforts that have been made to effect service, and specifying the date by which service is proposed to be effected [*Cal. Rules of Ct., Rule 3.110(e)*].

[e] Standard for Granting Additional Extensions to Serve Complaint

Neither the TCDRA nor the California Rules of Court contain a generic "good cause" standard for granting the extension of time to serve a complaint beyond the 45 days allowed by statute, *i.e.*, the 30 days allowed by *Code Civ. Proc. § 1054* plus the 15-day extension allowed as a matter of course by *Cal. Rules of Ct., Rule 3.110*. The rule instead specifies the information that must be included to obtain an extension of time, *i.e.*, that service has not been completed and that sufficient efforts have been made to effect service such that an extension is warranted under the facts and circumstances [*Cal. Rules of Ct., Rule 3.110(e)*].

PRACTICE TIP:

Avoiding Improper Disclosure. When preparing a declaration in support of an application for an extension of time to serve a complaint or file a responsive pleading, be careful not to include any statement in the declaration that could have the effect of waiving the attorney-client privilege, or disclose other information that might be prejudicial to the client.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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37-425 California Forms of Pleading and Practice--Annotated § 425.14

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.14 Methods of Service of Summons

[1] Types of Service

There are four methods for serving the summons and complaint on the defendant:

- Personal service [*Code Civ. Proc. § 415.10*].
- Substituted service [*Code Civ. Proc. § 415.20*].
- Service by mail [*Code Civ. Proc. §§ 415.30, 415.40*].
- Service by publication [*Code Civ. Proc. § 415.50*].

[2] Personal Service

Personal service is effected by personal delivery of a copy of the summons and complaint to the person to be served [*Code Civ. Proc. § 415.10*]. Service of the summons by personal service is deemed complete as of the time of such delivery. For additional discussion of service of summons, see Ch. 518, *Service of Summons and Papers* .

[3] Substituted Service

[a] In General

Substituted service is the leaving of the summons at the office or home of the person being served and mailing, by first class mail, a copy of the summons and complaint to the place where the summons and complaint were left [*Code Civ. Proc. § 415.20*]. The availability of substituted service or personal service depends in part on whether the entity to be

served is a corporation, stock company association, unincorporated association or public entity, or if an individual, whether the party is a minor, person on whom a guardian or conservator has been appointed or other persons. These topics are discussed below. For additional discussion of service of summons, see Ch. 518, *Service of Summons and Papers* .

[b] Corporations, Associations, and Public Entities

Corporations, associations, public entities and other entities described in *Code Civ. Proc. §§ 416.10-416.50* may, in lieu of personal delivery of the summons and complaint to the entity, be served by substituted service. For corporations, associations and public entities, the summons may be served without a showing of reasonable diligence, by leaving a copy of the summons and complaint during usual office hours, with the person who is apparently in charge of the office and, by mailing a copy of the summons and complaint to the person to be served at the place where the summons and complaint were left [*Code Civ. Proc. § 415.20*]. If no physical address for the office is known, the summons may be served at the usual mailing address [*Code Civ. Proc. § 415.20*].

[c] Minors, Conservatees and "Other Persons"

[i] Method of Substituted Service

Substituted service on a minor, conservatee (other than a minor) or person for whom a guardian has been appointed, or other persons may be made only if the complaint cannot, with reasonable diligence, be served on the person. If after attempting service with reasonable diligence, personal service cannot be effected, the summons may be served by leaving a copy of the summons and complaint at the person's dwelling house, usual place of abode or business, a usual mailing address other than a post office box in the presence of a competent member of the household, the person in charge of his or her office or place of business, or mailing address, and who is at least 18 years of age, and by mailing the copy of the summons and complaint to the person to be served at the place where a copy of the summons and complaint were left [*Code Civ. Proc. § 415.20(b)*].

[ii] "Reasonable Diligence" Not Defined by Statute

"Reasonable diligence" for the purpose of substituted service is not defined by statute. The appellate courts have held the "reasonable diligence" standard contemplates that a good-faith effort be made to personally serve a natural person before substitute service is attempted. Although there is no set standard, ordinarily, two or three attempts at personal service with a proper address should satisfy the requirement of reasonable diligence and allow substituted service to be made [see *Bein v. Brechtel-Jochim Group, Inc. (1992) 6 Cal. App. 4th 1387, 1391-1392, 8 Cal. Rptr. 2d 351]* .

[d] Service of Summons Effective the Tenth Day After Mailing

In the case of substituted service whether on an entity or other person, service of the summons is deemed complete on the tenth day after mailing [*Code Civ. Proc. § 415.20(b)*].

[4] Service by Mail

[a] When Authorized

Service by mail is authorized in three circumstances [*see Code Civ. Proc. §§ 415.30, 415.40, 428.60(2)*], which are:

- When a party resides out of state.
- When a party acknowledges receipt of service by mail.

- When a party has appeared.

[b] Party Residing Out of State

Parties residing out of the state may be served by sending a copy of the summons and complaint to the person to be served, first class mail, postage prepaid, requiring a return receipt [*Code Civ. Proc. § 415.40*]. Service by mail on person outside of the state is deemed to be complete on the tenth day after mailing [*Code Civ. Proc. § 415.40*].

[c] Service By Mail with Notice and Acknowledgment

A summons also may be served by mail on persons residing within the state by serving a copy of the summons and complaint by first class mail together with two copies of a Notice and Acknowledgment and a return envelope postage prepaid, addressed to the sender [*Code Civ. Proc. § 415.30(a)*]. A Notice and Acknowledgment is statutory form of notice to the defendant advising the defendant that an attempt is being made to serve the defendant by mail and that if a defendant does not accept service by mail by completing the Notice and Acknowledgment and returning it to the sender within 20 days, the party being served may be liable for the payment of any expenses served in serving the summons in any other manner permitted by law. The party to whom a Notice and Acknowledgment is directed has 20 days from the date of mailing within which to complete and return the acknowledgment form [*Code Civ. Proc. § 415.40(d)*]. Service of the summons is deemed complete on the date a written acknowledgment of receipt of summons is executed if the acknowledgment is returned to the sender [*Code Civ. Proc. § 415.30(c)*].

[d] Service by Mail When Party Has Appeared

If a party has appeared in an action, the party may be served with a cross-complaint, by service of the cross-complaint on his attorney by mail [*Code Civ. Proc. § 428.60(2)*].

[5] Service by Publication

[a] Required Showing

To obtain service by publication, the party seeking to effect service must show by affidavit the party to be served cannot, with reasonable diligence, be served personally, by mail or by substitute service and that (1) a cause of action exists against the party upon whom service is to be made or that he/she is the necessary or proper party to the action; or (2) the party to be served has or claims an interest in real or personal property in the state that is subject to the jurisdiction of the court, or the relief demanded in the action consists wholly or in part of excluding the party from any interest in the property [*Code Civ. Proc. § 415.50(a)*].

[b] Different Reasonable Diligence Standard

Reasonable diligence for the purpose of service by publication contemplates a higher standard than reasonable diligence for the purpose of substituted service. For the purpose of service by publication, the term "reasonable diligence" [d]enotes a thorough, systematic investigation and inquiry conducted in good faith by the party or his agent or attorney [*Watts v. Crawford (1995)10 Cal. 4th 743, 749, 42 Cal. Rptr. 2d 81]* .

[c] Court Order Required

To effect service by publication, the plaintiff must obtain a court order specifying that the summons is to be published in a named newspaper, published in this state that is most likely to give actual notice to the party to be served and direct that a copy of the summons and complaint and the order for publication shall be mailed to the party if his or her address is ascertained before expiration of the time required for publication of the summons [*Code Civ. Proc. § 415.50(a)*].

[d] Required Publication

For service by publication, publication of the summons and complaint must be made as provided in *Gov. Code § 6064, i.e.,* once per week for four successive weeks in a newspaper of general circulation [*Code Civ. Proc. § 415.50(b)*]. Service of the summons by publication is deemed complete the 28th day from the first publication. There must be five days between each attempt at publication. When service is effected by publication, a proof of service by the affidavit of the publisher or printer showing the time and place of publication and showing the time and place a copy of the summons was mailed to the party to be served, if in fact mailed, must be filed with the court [Code Civ. Proc. § 415.70(b)].

[6] Unlawful Detainer and Actions for Abandonment of Leased Real Property

There are special provisions for service of the summons and complaint in unlawful detainer actions and in actions for abandonment of leased real property [*see Code Civ. Proc. §§ 415.45-415.47*]. For additional discussion of these statutes, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

[7] Who May Serve Summons

A summons may be served by any person who is at least 18 years of age and not a party to the action [*Code Civ. Proc. § 414.10*].

[8] Persons Who May Be Served

The persons upon whom a summons may be served varies depending on whether a corporation, unincorporated association, public entity, minor or person for whom a guardian has been appointed is served. [*Code Civ. Proc. §§ 416.10-416.80*]. For additional discussion of these statutes, see Ch. 518, *Service of Summons and Papers* .

[9] Interplay Between Service of Process Statutes and TCDRA Rules

Under the TCDRA rules [*Cal. Rules of Ct., Rule 3.700 et seq.*], litigants must be mindful of the time required to effect service of process and take pains to make sure that service is timely effected. For example, the Code of Civil Procedure requires an answer or responsive pleading to be filed within 30 days after service is complete, irrespective of the method of the service of process utilized (personal service, service by mail, substituted service or publication) unless otherwise extended by the parties or the court. However, the date of service is different depending on the method of service used. For example, personal service is deemed complete when the complaint is personally served. Substituted service is deemed complete ten days after mailing. Service by mail with an accompanying Notice of Acknowledgment and Receipt is not deemed complete until 30 days after the Notice of Acknowledgment and Receipt is signed, and the party accepting service has 20 days from the date the Complaint was received to sign the Acknowledgment and Receipt. Service by publication requires publication not less than four times over a four week period and service is not deemed complete until the final publication or at least 28 days after publication pursuant to court order. The TCDRA requirements to serve a Complaint within 60 days may therefore conflict with the longer time allowed for service via mail with a Notice of Acknowledgment and Receipt and publication, since the time required to effect service other than personal service may be longer than the time allowed to file a proof of service under the TCDRA.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral Overview

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Chapter 425 PRETRIAL PROCEEDINGS
PART II. LEGAL BACKGROUND
A. Bringing Cases to Trial
1. Initiating and Responding to a Complaint

37-425 California Forms of Pleading and Practice--Annotated § 425.15

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.15 Responding to the Complaint

[1] Defendant's Options

After the complaint has been served, the defendant may respond to the complaint in one of four ways:

- Do nothing and allow default to be taken by the claimant.
- Object to jurisdiction.
- File a pleading or pleadings such as an answer or an answer and a cross-complaint.
- Object to the pleading by filing a demurrer, a motion to strike, or a motion for judgment on the pleadings.

[2] Entry of Default

In certain types of actions, a defendant may elect to allow a default judgment to be entered in lieu of defending a case on the merits. For example, in a limited jurisdiction case in which a fixed amount is claimed on a breach of contract claim, the cost of defending a lawsuit could exceed the amount of the judgment that could be entered on a default. In such cases, the defendant may elect to allow his or her default to be entered. Under the TCDRA rules, if a defendant has not answered the complaint or otherwise filed a responsive pleading, then unless otherwise ordered by the court, the plaintiff must take the defendant's default within 10 days, following the 60 days allowed to file a responsive pleading, *i.e.*, 70 days from the filing of the complaint [*Cal. Rules of Ct., Rule 3.110(g)*]. For additional discussion of defaults, see Ch. 205, *Defaults and Default Judgments* .

[3] Objection to Jurisdiction

[a] Motion to Quash

A defendant may elect to object to jurisdiction of the court by serving a notice of motion and motion to quash service of summons on the ground of lack of jurisdiction, or to dismiss the action on the ground of inconvenient forum or for failure to prosecute [*Code Civ. Proc. §§ 418.10(a)(1)-(3)*]. For additional discussion of objecting to jurisdiction, see Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* .

[b] Time For Objecting to Jurisdiction

A motion objecting to jurisdiction must be filed on or before the last day of the defendant's time to plead or within any further time that the court may allow for good cause. The motion must designate a time for hearing not more than 30 days after filing of the notice of motion [*Code Civ. Proc. § 418.10(a), (b)*].

[c] Time to Plead Automatically Extended

Service and filing of a notice, motion to quash, or to dismiss for inconvenient forum or lack of prosecution extends the defendant's time to plead until 15 days after service of a written notice of entry order denying the motion, or within any shorter time not exceeding 20 days allowed by the court [*Code Civ. Proc. § 418.10(b)*].

[4] Answering the Complaint

[a] Requirements of Answer

In most cases, the defendant will answer the complaint or answer the complaint and file a cross-complaint either to assert claims against the plaintiff or against third parties who should be properly brought into the action.

The answer to a complaint must contain a general or specific denial of material allegations of the complaint as worded by the defendant, and a statement of any new matter constituting a defense [Code Civ. Proc. § 418.30]. For additional discussion of answering a complaint, see Ch. 26, *Answers* .

[b] Verification

The answer to the complaint must be verified when the complaint is verified or when the plaintiff is the state, county or other public agency, or the officer of the state or public agency appointed in the official capacity [*Code Civ. Proc. § 446(a)*].

[c] Denials on Information and Belief or by Specific Reference

It is sufficient to deny allegations of the complaint on information and belief if the defendant has no information on the subject sufficient to enable the defendant to answer an allegation of the complaint. The defendant may also controvert specific paragraphs as part of the complaint, or especially admit certain allegations with a general denial of all allegations not admitted or by denying some of the allegations on information and belief [*Code Civ. Proc. § 431.30(f)*].

[d] Material Allegations Admitted If Not Denied

The material allegation of a complaint or a cross-complaint which is not controverted by the answer is for the purposes of the action taken as true [*Code Civ. Proc. § 431.20*]. A material allegation is an allegation essential to the claim or defense [*Code Civ. Proc. § 431.10*].

[e] General Denial Sufficient if Complaint Not Verified

If the complaint is not verified or is a limited jurisdiction case, a general denial may be interposed [*Code Civ. Proc. § 431.30*]. A general denial controverts all material allegations of the complaint at issue [*Code Civ. Proc. § 431.30*].

[f] Defenses Must Be Separately Stated

When the answer includes affirmative defenses, the defenses must be separately stated, and should refer to the causes of action for which they are intended to answer in a manner by which they can be intelligibly distinguished [*Code Civ. Proc. § 431.30(g)*].

[5] Objecting to the Complaint

[a] Methods for Objecting

A fourth means of response to the complaint is to file an objection to the complaint in the form of a demurrer, a motion to strike, or motion for judgment on the pleadings. For additional discussion of methods for objecting to a complaint, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 375, *Motions to Strike: Pleadings* , and Ch. 376, *Motions to Strike: Anti-SLAPP* .

[b] Demurrers

[i] Time to Demur or Move To Strike

A demurrer or a motion to strike must be filed within the time allowed to respond to a pleading, *i.e.*, 30 days after service of the complaint or the cross-complaint unless otherwise extended by the court or the parties. If a motion to strike and a demurrer are filed contemporaneously, the hearings on both motions must be set concurrently [*Code Civ. Proc. § 435(2)*].

[ii] Grounds for Demurrer--General Versus Special

The grounds for an objection to a complaint by a demurrer are contained in *Code Civ. Proc. § 430.10*. Demurrers are of two types: general demurrers, or demurrers which attack the substance of a pleading; and special demurrers, or demurrers which attack a pleading based on uncertainty [*Code Civ. Proc. § 430.10(a)-(i)*].

The grounds for a general demurrer are lack of jurisdiction, lack of legal capacity to sue, another action pending between the same parties on the same cause of action, defect or misjoinder of parties, failure to state facts sufficient to constitute a cause of action and failure to file a certificate in an action for professional negligence against an architect engineer or land surveyor [*Code Civ. Proc. § 430.10(a)-(e), (h)*].

Grounds for special demurrer are uncertainty, which includes ambiguity and unintelligibility, and in an action founded upon contract, that it may not be ascertained from the pleading whether the contract is written, oral or implied by conduct [*Code Civ. Proc. § 430.10(f), (g)*].

[iii] Ruling on Demurrer

When a demurrer to a pleading is sustained or overruled, the time to amend the answer, if given, runs from the date of the service of notice of the decision or order. If the demurrer is sustained, unless the court is otherwise, 10 days leave to amend is deemed granted. The same rule applies if a demurrer is overruled [*Code Civ. Proc. § 472(b)*].

[iv] Time to Plead Following Demurrer

Unless the court orders otherwise, the answer is due within 10 days [*Cal. Rules of Ct., Rule 3.1320(g)*]. If the demurrer

is sustained in part and overruled in part, the defendant's subsequent pleading and the remaining causes of action are due within 10 days [*Cal. Rules of Ct., Rule 3.1320(j)*].

[c] Motions to Strike

[i] Grounds for Motion to Strike

A motion to strike may be filed with the demurrer to strike out any irrelevant, false, or improper matter inserted in any pleading, or to strike out all or any part of any pleading not drawn or filed with conformity with the laws of the state, a court rule or an order of the court.

A motion to strike is most often used to attack defects in the complaint that cannot be reached by a demurrer. The failure to file an attorney's certification in a action based on professional negligence of an engineer or the failure to verify a complaint that is required by statute to be verified are two examples of pleadings not filed in conformity with the laws of this State.

[ii] Motion to Strike for SLAPP Suits

If a claim against a person is predicated on any act of that person in furtherance of a person's right of petition and free speech under the United States or California Constitution in connection with the public issue, the cause of action may be subject to a special motion to strike, otherwise known as a motion to strike a SLAPP suit (Strategic Litigation Against Public Participation) [*Code Civ. Proc. § 425.16*]. The court must grant the motion unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail in the claim [*Code Civ. Proc. § 425.16(b)*].

All discovery proceedings in an action are stayed upon the filing of the notice of motion to strike under the SLAPP suit statute. The stay of discovery remains in effect until notice of the entry of the order ruling on the motion has been served [*Code Civ. Proc. § 425.16(g)*].

For additional discussion of SLAPP suits, see Ch. 376, *Motions to Strike: Anti-SLAPP* .

[iii] Attorney's Fees Ordered to Prevailing Party

If a special motion to strike is filed, and the defendant prevails, the defendant is entitled to recover his or her attorney's fees and costs [*Code Civ. Proc. § 425.16*]. If the court finds that the special motion to strike is frivolous or solely intended to cause unnecessary delay, the court must award costs and reasonable attorney's fees to plaintiff prevailing on motion under *Code Civ. Proc. § 128.7* (sanctions for frivolous tactics in actions commenced after January 1, 1995; for discussion, *see* Ch. 510, *Sanctions*).

[iv] Time for Filing

A special motion to strike may be filed within 60 days of the service of the complaint or any later time upon the terms the court deems proper. The motion must be noticed for hearing not more than 30 days after service of the motion unless the court's calendar requires a later hearing [*Code Civ. Proc. § 425.16(f)*].

[6] Time to Respond to Complaint

[a] 30-Day Period

Service of responsive pleadings, answers, demurrers, and motions to strike is required 30 days from the date service is complete [*Code Civ. Proc. § 430.40*; *Cal. Rules of Ct., Rule 3.110*]. The defendant's failure to serve and file a

responsive pleading within 30 days from the date service is complete, unless otherwise extended by the parties or the court, will subject the defendant to having his or her default taken by the plaintiff [*Code Civ. Proc. § 585*].

[b] Time to Respond Not Increased For Service by Mail

The 30-day time limitation within which to file a responsive pleading is not increased by five days for service by mail [*Code Civ. Proc. § 413.20*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDefects of FormCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeIrrelevant MattersCivil ProceduresPleading & PracticePleadingsAnswersCivil ProceduresPartiesJoinderMisjoinderCivil ProceduresDismissalsInvoluntary DismissalsMotionsCivil ProceduresPretrial JudgmentsDefaultEntry of Default Judgments

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37-425 California Forms of Pleading and Practice--Annotated § 425.16

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.16 Filing Proof of Service

Proof of service of the summons is required to be made on the Judicial Council Form for proof of service and must comply with the requirements of the statute under which the summons was served, *i.e.*, personal service, service by mail, substituted service or publication [*Code Civ. Proc. § 417.10*]. After the summons has been served, the original summons must be returned together with proof of service, unless the defendant previously made a general appearance [*Code Civ. Proc. § 417.30*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProceduresPleading & PracticeService of ProcessProofGeneral OverviewCivil ProceduresPleading & PracticeService of ProcessSummonsIssuance

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37-425 California Forms of Pleading and Practice--Annotated § 425.17

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.17 Failure to Comply With Service and Filing Requirements

[1] Effect of 2002 Amendments

Prior to the TCDRA, there were few, if any, sanctions imposed on counsel who either failed to serve and file a complaint within 60 days, or a defendant who failed to answer within 30 days. In contrast to pre-TCRDA procedure, the Rules of Court now impose sanctions on the plaintiff's counsel if the complaint is not served and proof of service of the complaint is not filed within the 60 days required by Cal. Rul es of Ct., Rule 201.7, or if the complaint is served within 60 days and no responsive pleading has been filed within 70 days of the original filing of the complaint [*Cal. Rules of Ct., Rule 3.110(g)*]. The sanctions which may be imposed are discussed below.

[2] Sanctions For Failure to Serve Complaint and File Proof of Service

If the plaintiff fails to serve and file the pleadings within the 60-day time limitation imposed by *Cal. Rules of Ct., Rule 3.110*, then unless the plaintiff obtains an extension from the court, the court may issue an order to show cause why sanctions should not be imposed [*Cal. Rules of Ct., Rule 3.110(f)*]. Sanctions imposed by the court may include the imposition of monetary sanctions or dismissal of the case [*Cal. Rules of Ct., Rule 3.110(f)*].

[3] Sanctions for Failure to Take Defendant's Default

If the plaintiff serves the complaint and files proof of service within 60 days and a responsive pleading is not served within time limitations imposed by *Cal. Rules of Ct., Rule 3.110*, and no extension of time has been granted by the court, plaintiff must, within 10 days after the time for service has elapsed, file a request for entry of default [*Cal. Rules of Ct., Rule 3.110(g)*]. When a default has been entered, the party who requested the entry of default must obtain a default judgment against the defaulting party within 45 days after the entry of the default unless and extension from the court is obtained [*Cal. Rules of Ct., Rule 3.110(h)*]. Failure to obtain entry of a default or a default judgment within the applicable 45-day time period may result in an order to show cause why sanctions should not be imposed; and sanctions

imposed may include monetary sanctions or dismissal of the action [*Cal. Rules of Ct., Rule 3.110(g)*].

[4] Enforcement of Sanctions

[a] Issuance of Order to Show Cause

When issued by the court, an order to show cause acts as a summons to appear in court on a certain day, and as the name suggests, to show cause why a certain thing should not be done [*Morelli v. Superior Court (1968) 262 Cal. App. 2d 262, 269* , 68 Cal. Rprt. 572]. The court's authority to impose sanctions for violating local rules under California Rules of Court is contained in *Code Civ. Proc. § 177.5* and *Cal. Rules of Ct., Rule 2.30*. The issuance of an order to show cause is, therefore, notice by the court of counsel's failure to comply with the applicable rule or rules and that sanctions will be imposed if the attorney, law firm, or party cannot show why sanctions should not be imposed violating the rule [*Cal. Rules of Ct., Rule 2.30(c)*].

[b] Written Notice Required

An order to show cause must be in writing and must (1) set forth the rule that has been violated, (2) describe the specific conduct that appears to have violated the rule and (3) direct the attorney, law firm, party, witness, or other person to show cause why sanctions should not be imposed [*Cal. Rules of Ct., Rule 2.30(c)*].

[c] Limits on Court's Power

The failure to comply with court rules is the responsibility of counsel and not the party. The court may not impose a penalty upon the party that adversely affects the party's cause of action or defense [*Cal. Rules of Ct., Rule 3.110(b)*]. In such cases, the penalty shall be imposed on counsel, and not the party. The imposition of sanctions is a matter within the discretion of the trial court [Winikow v. Superior Court (2000) *82 Cal. App. 4th, 719, 726* , *98 Cal. Rptr. 2d 413]* .

[d] Response to Order to Show Cause

When a court issues an order to show cause pursuant to *Cal. Rule of Ct., Rule 3.110*, responsive papers to the order to show cause must be filed and served at least five calendar days before the hearing [*Cal. Rules of Ct., Rule 3.110(i)*]. The written response should include, at a minimum, counsel's declaration with a factual showing of why sanctions should not be imposed for violating the rule, and if applicable, a brief memorandum of points and authorities setting forth any relevant case law, statutes, and court rules.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessProofGeneral OverviewCivil ProceduresPleading & PracticeService of ProcessSummonsIssuanceCivil ProceduresPretrial JudgmentsGeneral OverviewCivil ProceduresPretrial JudgmentsDefaultDefault JudgmentsLegal EthicsSanctionsGeneral Overview

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37-425 California Forms of Pleading and Practice--Annotated §§ 425.18-425.29

AUTHOR: Evelio M. Grillo Editorial Consultant

[Reserved]

§§ 425.18[Reserved]

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37-425 California Forms of Pleading and Practice--Annotated § 425.30

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§ 425.30 Overview

This part addresses case management by the court under the Trial Court Delay Reduction Act (TCDRA) after the complaint and answer have been filed and served on the parties to the litigation. Other than scheduling, case management under the TCDRA has not changed discovery or dispositive motion practice in state court. The case management rules, however, have changed the speed with which cases move through the court, as well as non-dispositive motion practice. This section first discusses the classification of civil cases by the court for the purpose of pre-trial management, including the courts' managerial powers during the pre-trial process, the specific case management deadlines imposed by the TCDRA, and the interplay between the court's case management authority under TCDRA and procedural deadlines independently imposed by statute, such as the discovery and motion cut-offs. The final section discusses Alternative Dispute Resolution (ADR) and exceptions to the differential case management process. [*see, e.g.,* San Francisco Uniform Local Ct. Rules, Rule 3.0].

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37-425 California Forms of Pleading and Practice--Annotated § 425.31

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§ 425.31 Effect of the 2002 and 2003 Amendments

Prior to the 2002 amendments to the TCDRA rules, a civil case would be placed on the civil active list and set for trial when either the court determined the case to be at issue or when one or both parties served and filed a joint at-issue memorandum [former Cal. Rules of Ct., Rule 209]. After the filing of the at-issue memorandum or the entry of an order deeming a case to be at issue, the case would be placed on the civil active list [former Cal. Rules of Ct., Rule 210], and arranged in the order in which the at-issue memoranda and orders were filed. In most jurisdictions, the case would then be scheduled for an arbitration status conference, or be removed from the civil active list, or placed on the arbitration hearing list, or set for a trial setting conference, a pre-trial conference, or a status conference [former Cal. Rules of Ct., Rules 217-221]. These rules have been abolished. Local rules may still provide for the procedures for setting a case for trial; as these local rules are not preempted [*see Cal. Rules of Ct., Rule 3.20*], they must be consulted.

The California Rules of Court effective July 1, 2002 dispensed with the hodgepodge of local rules governing local case management, status conferences, at-issue memoranda,and pre-trial statements, in favor of a mandatory statewide standard that imposes differential case management conference requirements on the court, sets disposition time goals, and requires the court to review of all general civil actions and to issue a case management order in every case that will govern the procedural posture and establish the deadlines to be followed in the case to the trial date [*Cal. Rules of Ct., Rules 3.722* and *3.728*].

Amendments to the TCDRA rules in 2003 state that the goals of the TCDRA program are to secure the fair, timely and efficient disposition of every civil case in a fair, practical and flexible manner [*Cal. Rules of Ct., Rule 3.700*]. The 2002 amendments had set forth a plan requiring most civil cases to be classified in to one of three classifications for disposition at the time of filing. However, the 2003 amendments dispensed with the three tier classification system and instead implemented disposition time goals [*Cal. Rules of Ct., Rule 3.714*]. The goals are intended to promote prompt disposition of all cases and are not meant to create deadlines for individual cases [Cal. Rules of Ct., Stds. Jud. Admin., Std. 2.2].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementGovernmentsCourtsRule Application & Interpretation

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A. Bringing Cases to Trial
2. Case Management System

37-425 California Forms of Pleading and Practice--Annotated § 425.32

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§ 425.32 Differential Case Management Framework

[1] Mandatory Court Review--Assignment to Case Management Program or Exemption From Program Within 180 Days of Complaint

After a case is filed, the court evaluates each general civil case and assigns it to a case management program for review of disposition time goals, or exempts the case on the basis of exceptional circumstances that will prevent compliance with the program [*Cal. Rules of Ct., Rule 3.714(a), (c), (d)*]. The court must review a general civil case within 180 days after the filing of the initial complaint, unless the case is a complex case, or an exempt short cause, uninsured motorist case, a case included in a petition for coordination, exceptional case, or is classified as a simple case to be disposed of quickly under local rule [*Cal. Rules of Ct., Rule 3.721*]. Disposition time goals will be reviewed at the case management conference [*Cal. Rules of Ct., Rule 3.714(a), (b)* and *Cal. Rules of Ct., Rule 3.722*]. For expedited case disposition, the court may by local rule adopt a case management plan that establishes a goal for disposing of appropriate cases within six to nine month of filing [*Cal. Rules of Ct., Rule 3.714(d)*]. No one factor or set of factors is controlling [*Cal. Rules of Ct., Rule 3.715*].

[2] Differential Case Management Applicable to "General Civil Cases" Only

The differential case management rules are applicable only to "general civil cases." A "general civil case" for the purpose of TCDRA includes all civil cases, with the following exceptions [*Cal. Rules of Ct., Rule 3.712(b)-(d)*; see also Rule 1.6(4)]:

- Probate.
- Guardianship and conservatorship.
- Family law.

- Juvenile court.
- Small claims proceedings.
- Other civil petitions as defined by the Judicial Branch Statistical Information Data Collection Standards.
- Uninsured motorist.
- Cases included in petitions for coordination.
- Collections cases.

All courts have adopted some system of case differentiation classification based on the relative complexity of cases, which provide longer periods for the timely disposition of more complex cases [*see Gov. Code § 68603(c)*; Cal. Rules of Ct., Stds. Jud. Admin., Std. 2.2(g)].

[3] Case Disposition

[a] Disposition Time Goals

After a general civil case is filed, the court, by local rule, must evaluate each case on its own merits and assign the case to the case management program for review under *California Rules of Court, Rule 3.722* (case management conferences) for disposition under certain case disposition time goals [*Cal. Rules of Ct., Rule 3.714(a)*]. Civil cases are to be managed so as to achieve the following goals [*Cal. Rules of Ct., Rule 3.714(b)*]:

- Unlimited Civil Cases: 75 percent disposed of within 12 months; 85 percent disposed of within 18 months; 100 percent disposed of within 24 months.
- Limited Civil Cases: 90 percent disposed of within 12 months; 98 percent disposed of within 18 months; 100 percent disposed of within 24 months.

These goals are guidelines for the court's disposition of all unlimited and limited civil cases. In managing individual civil cases, the court must consider each case on its merits. Each case should be set for trial as soon as appropriate for that trial under trial setting guidelines set forth in *California Rules of Court, Rule 3.729* [*Cal. Rules of Ct., Rule 3.714(b)*]. Definitions of limited and unlimited civil cases are found in *Code of Civ. Proc. § 85 et seq.*

[b] Factors Considered

In determining how to assign the case, the court is required to consider the following factors, as well as any other relevant information [*Cal. Rules of Ct., Rule 3.715*]:

- Type and subject matter of the action.
- Number of causes of action or affirmative defenses alleged.
- Number of parties with separate interests.
- Number of cross complaints and the subject matter.

- Complexity of issues, including issues of first impression.
- Difficulty in identifying, locating, and serving parties.
- Nature and extent of anticipated discovery.
- Number and location of percipient and expert witnesses.
- Estimated length of trial.
- Whether some or all issues can be arbitrated.
- Statutory priority of the issues.
- Likelihood of review by writ or appeal.
- Amount in controversy and the type of remedy sought, including measures of damages.
- Pendency of other actions or proceedings that may affect the case.
- Nature and extent of anticipated law and motion proceedings.
- Nature and extent of the injuries and damages.
- Pendency of underinsured claims.
- Any other factor that would affect the time for disposition of the case.

In addition to the factors listed above, in determining whether an exceptional case should be exempted from the time disposition goals, the court is to be guided by *Cal. Rules of Ct., Rule 3.400* regarding complex cases [*Cal. Rules of Ct., Rule 3.714(c)*; for discussion of Rule 3.400, *see § 425.52*].

[4] Exceptions to Differential Case Management

[a] Exceptional or Complex Cases

General civil cases that involve exceptional circumstances that will prevent the court and the parties from meeting the deadlines imposed by the TCDRA, may in the interests of justice, be exempted from the case disposition/time goals. The standards for exempting an exceptional case are the TCDRA case evaluation standards in *Cal. Rules of Ct., Rule 3.715*, and complex case standards found in *Cal. Rules of Ct., Rule 3.400* that are exempted from fast-track management are, for classification purposes, often referred to as "Complex Litigation" [*see Cal. Rules of Ct., Rule 3.714(c)*; for discussion of procedure in complex cases, *see § 425.52*]. Complex cases may be handled differently from fast-track cases, including being assigned to a single judge for all or limited purposes.

[b] Short Cause Cases

A short cause case is a civil case in which the time estimated for trial by allparties or the court is five hours or less; all other civil cases are long cause cases [*Cal. Rules of Ct., Rule 3.735(a)*]. The court may order, on the stipulation of all the parties or on the court's own motion, that a case is a short cause case exempted from the requirements of case

management review and set the case for trial [*Cal. Rules of Ct., Rule 3.735(b)*]. If a short cause case is not completely tried within five hours, the judge may declare a mistrial or, in the judge's discretion, may complete the trial. In the event of a mistrial, the case will be treated as a long cause case and must promptly be set either for a new trial or for a case management conference [*Cal. Rules of Ct., Rule 3.735(c)*].

[c] Simple Cases

The TCDRA court rules permit courts to adopt a case management plan for disposing of simple cases within six to nine months [*Cal. Rules of Ct., Rule 3.714(d)*]. The TCDRA rules do not define "simple case," but instead require the court, by local rule, to establish a procedure to identify the cases to be assigned to the plan [*Cal. Rules of Ct., Rule 3.714(d)*]. The simple case designation must be used only for uncomplicated cases amenable to early disposition that do not need a case management conference or review or similar event to guide the case to early resolution [*Cal. Rules of Ct., Rule 3.714(d)*].

[d] Specified Collection Cases

Collections cases, as defined in *Cal. Rules of Ct., Rule 3.740(a)*, and in which the defendant does not file a responsive pleading, are exempt from differential case management rules [*Cal. Rules of Ct., Rules 3.712(d), 3.740(c)(1)*]. A "collections case" is an action for recovery of not more than $25,000, exclusive of interest and attorney fees, arising from a credit transaction for property, services, or money. The action may not seek [*Cal. Rules Ct, Rule 3.740(a)*]:

- Tort damages.
- Punitive damages.
- Recovery of real property.
- Recovery of personal property.
- Prejudgment writ of attachment.

For discussion of the exemption of these type of collections cases from the 60-day service of summons requirement, see *Ch. 518, Service of Summons and Papers, § 518.15[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling ConferencesGovernmentsCourtsRule Application & Interpretation

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§ 425.33 Setting Case Management Conference

[1] Initial Case Management Conference Must Be Set by Court; Scheduling and Notice

The court must review a general civil case within 180 days after the filing of the initial complaint, unless the case is a complex case, or an exempt short cause, uninsured motorist case, a case included in a petition for coordination, exceptional case, or is classified as a simple case to be disposed of quickly under local rule [*Cal. Rules of Ct., Rule 3.721*]. The review process contemplated by the statute requires an initial case management conference to be set by the court, for the parties to submit information about the case to the court in a mandatory form of case management statement, and for a case management order to be issued by the court setting forth the pretrial deadlines established by the court's review.

In each general civil case, the court must set an initial case management conference to review the case. Notice of the date of the case management conference is given to all parties no later than 45 days before the conference or as otherwise ordered by the court [*Cal. Rules of Ct., Rule 3.722(a), (b)*]. Local rules may provide the time and manner of giving notice [*Cal. Rules of Ct., Rule 3.722(b)*].

Although the statute mandates a review of each case and the setting of an initial case management conference within 180 days from the date of filing, the case management conference itself is conducted in the manner provided by Local Rule. The rules will vary from jurisdiction to jurisdiction. Case management conferences are governed by *Code Civ. Proc. §§ 575-576, Cal. Rules of Ct., Rule 3.722*, and local court rules and policies. The Code of Civil Procedure continues to refer to the conference as a pretrial conference [*see Code Civ. Proc. §§ 575, 576*]. At the initial conference, the court must review the case comprehensively and must, among other things, decide whether to assign the case to an alternative dispute resolution process and whether to set the case for trial. The initial case management conference should generally be the first case management event conducted by court order in each case, except for orders to show cause [*Cal. Rules of Ct., Rule 3.722(a)*].

For a Judicial Council form that includes an order to reschedule the case management conference upon the granting of an ex parte application for an extension of time to serve pleadings, see *§ 524.53A* in Ch. 524, *Shortening and Extension of Time.*

[2] Special Request for Case Management Conference

The court on its own motion may order, or a party or parties may request, that an aditional case management conference be held at any time [*Cal. Rules of Ct., Rule 3.723*].

PRACTICE TIP:

Requesting a Case Management Conference Date: The wording of *Cal. Rules Ct., Rule 3.723*, that a party may request "an additional case management conference be held at any time," is quite broad. However, a partyshould be required to participate at an additional conference only if an appearance is necessary for the effective management of the case [*Cal. Rules of Ct., Rule 3.723(c)*]. A motion to request a case management conference date might be brought, inter alia:

- To request a case management conference date before the date normally set by local rule, or to change the scheduled case management date, because the party will move for an order to advance, reset, or specially set the case management conference and trial date due to precedence, preference, or other grounds [*see § 425.70* et seq.].

- To request an additional case management conference due to new developments. More than one case management conference is permitted [*see Cal. Rules of Ct., Rules 3.723, 3.728(11), (12)*].

- To extend the initially scheduled case management date when a party is unable to comply with the meet-and-confer requirement 30 days before the scheduled date due to calendar conflicts [*see Cal. Rules of Ct., Rule 3.724*] or if more time is needed to adequately prepare the case management statement, which must be filed 15 days before the conference [*see Cal. Rules of Ct., Rule 3.725(a)*]. In this instance, a noticed motion to continue is theappropriate procedure, and must be supported with good cause [*see Cal. Rules of Ct., Rule 3.1332*]. When offering the later date to the court, recognize that the case management conference must be held no later than 180 days after the initial complaint is filed and the court needs at least 45 days to notice the conference unless otherwise ordered [*see Cal. Rules of Ct., Rules 3.721, 3.723*]. Check local rules for other possible restrictions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProceduresPleading & PracticePleadingsTime LimitationsExtensionsCivil ProceduresPretrial MattersGeneral OverviewCivil ProceduresPretrial MattersConferencesGeneral OverviewCivil ProceduresPretrial MattersConferencesCase Management

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§ 425.34 Preparing the Case Management Statement

[1] Case Management Statement Required

Each party must file a case management statement not later than 15 days before the date set for the case management conference or case management review [*Cal. Rules of Ct., Rule 3.725(a)*]. The case management statement must be filed with the court and served on all other parties in the case [*Cal. Rules of Ct., Rule 3.725(a)*].

[2] Mandatory Use of Judicial Council Form

Unlike the old case management conference statement which could take many forms depending on local practice and rules, under the TCDRA court rules effective July 1, 2002, the case management statement ***must*** be submitted on Cal. Judicial Council Form CM-110 [for form, *see § 425.131*]. The use of Form CM-110 is ***mandatory***, and all applicable items on the form must be completed [*Cal. Rules of Ct., Rule 3.725(c)*].

The information required to be included in the case management statement includes:

- The names of the parties.
- The status of service and of the pleadings.
- Whether a jury or non jury trial is requested.
- If a trial date has not been set, the date the case will be ready for trial.
- The estimated length of trial and counsels' availability for trial.

- Whether the case is entitled to a preference.
- ADR status.
- Whether and what types of ADR the parties are willing to participate in.
- Whether the parties are willing to participate in early settlement.
- The availability of insurance.
- Matters that affect jurisdiction.
- Whether there are related cases.
- Disclosure of motions that will or may be filed, including motions for consolidation, coordination and bifurcation.
- The status of discovery and the anticipated completion date for discovery
- Whether the case is a limited civil case and if so, whether the case should be exempted from the economic litigation procedures governing limited civil cases.
- A statement identifying any issues counsel requests to be considered or determined at the case management conference.

[3] Parties May File A Joint Statement

In lieu of filing separate case management statements, one or more parties may file a joint statement [*Cal. Rules of Ct., Rule 3.725(b)*].

[4] Meet and Confer Requirement For Case Management Statement

Not later than 30 calendar days before the date set for the first case management conference, the parties must meet and confer in person or by telephone to consider issues to be discussed during the case management conference and to consider all of the following matters [*Cal. Rules of Ct., Rule 3.724*]:

1. Resolving discovery disputes and setting the discovery schedule.

2. Identifying and if possible informally resolving anticipated motions.

3. Identifying facts and issues in the case that are uncontested and may be the subject of stipulation.

4. Identifying the facts and the issues in the case that are in dispute.

5. Determining whether the issues in the case can be narrowed by eliminating claims and defenses by motions or otherwise.

6. Possible settlement.

7. Identifying the dates on which all parties and their attorneys are available or not available for trial,

including the reasons for unavailability.

8. Any issues relating to the discovery of electronically stored information.

9. Other relevant matters.

[5] Case Management Statement Must Contain Representation Regarding Meet and Confer

The parties must include a representation in the case management statement that the parties have met and conferred on all subjects required by *Rule of Court 3.724*, or explain why the meet and confer has not taken place. If the parties agree on any of the matters which were the topic of the meet and confer session, the parties may advise the court of the areas of agreement by including a statement in the Case Management Statement.

[6] Prior Case Management Orders Must Be Attached

Any case management orders previously entered in a case must be attached to the Case Management Statement Form [Cal. Judicial Council Form CM-110].

[7] Case Management Statement Requires Representative of Authority to Enter into Stipulation

The signature of the attorney or a party on the Case Management Statement contains a representation that counsel or the party is completely familiar with the case and will be fully prepared to discuss the status of discovery and ADR, as well as other issues raised by the statement and will possess the authority to enter into stipulations on the issues raised by the statement ***including written authority of the party where required.***

Legal Topics:

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Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedurePretrial MattersConferencesScheduling ConferencesGovernmentsCourtsRule Application & Interpretation

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§ 425.35 Appearance Requirements at Case Management Conference

[1] General Rule and Excusing Appearance

As a general rule, counsel for each party and each self-represented party must appear personally or by telephone, if permitted [*see Code Civ. Proc § 367.5*; *Cal. Rules of Ct., Rule 3.670*; for detailed discussion of telephone appearance, *see § 372.21[16]*], and must be familiar with the case and be prepared to discuss and commit to the party's position on the issues [*Cal. Rules of Ct., Rule 3.722(c)*]. A party that has provided notice may appear by telephone at a case management conference, provided the party has made a good faith effort to meet and confer before the conference as required by law and has timely served and filed a case management statement [*Code Civ. Proc. § 367.5(b)(1)*]. However, if based on its review of the parties' written submissions [*see* § 425.24 (case management statement)] and other available information, the court determines that appearances at the conference are not necessary, the court may notify the parties that no appearance is required and issue a case management order without appearances [*Cal. Rules of Ct., Rule 3.722(d)*]. In addition, local rules may provide that counsel and self-represented parties are not to attend a case management conference in limited civil cases, unless ordered to do so by the court [*Cal. Rules of Ct., Rule 3.722(e)*].

[2] Personal Appearance

Personal appearances are required in the following proceedings [*Code Civ. Proc § 367.5*; *Cal. Rules of Ct., Rule 3.670(d)*]:

- Trials and hearings at which witnesses are expected to testify;
- Hearings on temporary restraining orders;
- Trial management conferences;

- Hearings on motions in limine;
- Hearings on petitions to confirm the sale of property under the Probate Code;
- Settlement conferences, unless the court orders otherwise;
- Case management conferences, unless the court permits telephone appearances at those conferences; and
- Any hearing or conference for which the court, in its discretion, determines that a personal appearance would materially assist in a determination of the proceeding or in resolution of the case; the court must make this determination on a case-by-case basis.

[3] Telephone Appearance

[a] Option of Counsel

In general civil cases [*see Cal. Rules of Ct., Rule 1.6(4)* (definition of general civil case)], unlawful detainer, and probate proceedings, counsel has the option of appearing by telephone at certain conferences, hearings, and proceedings as specified by *Code Civ. Proc. § 367.5* and *Cal. Rules of Ct., Rule 3.670*, except as noted in [2], *above* [*Cal. Rules of Ct., Rule 3.670(a), (b)*; *see Code Civ. Proc. § 367.5*. The Judicial Council Standard of Judicial Administration for teleconferencing among other provisions, recommends that a court should consider, in awarding attorney's fees under any provision of law, whether an attorney is claiming fees for appearing in person in a proceeding in which that attorney could have appeared by telephone [Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.1(c)]. For further discussion of the Standard, see Ch. 372, *Motions and Orders* . For detailed discussion of telephone appearance and forms, *see Ch. 372, Motions and Orders, §§ 372.21[16], 372.63*.

[b] Service Provider and Fees for Conference Call

A court may provide teleconferencing for court appearances by entering into a contract with a private vendor. The contract may provide that the vendor may charge the party appearing by telephone a reasonable fee, specified in the contract, for its services [*Cal. Rules of Ct., Rule 3.670(i)*]. A court may designate by local rule a particular conference call provider that must be used for telephone appearances [*Cal. Rules of Ct., Rule 3.670(l)*].

[c] Audibility

The court must ensure that the statements of participants are audible to all other participants and must also ensure that a participant's statements are identified as being made by that participant [*Cal. Rules of Ct., Rule 3.670(j)*].

[d] Recording of Proceedings

All proceedings involving telephone appearances must be reported to the same extent and in the same manner as if the participants appeared in person [*Cal. Rules of Ct., Rule 3.670(k)*].

[e] Local Procedure

Counsel should contact the clerk of the superior court in the county in which an action is brought to ascertain the court's rules and policies governing telephone appearances [*see, e.g.,* San Francisco Uniform Local Ct. Rules, Rule 8.2(A)(3)]. Each court is required to publish notice providing parties with the particular information necessary for them to appear by telephone at conferences and hearings in that court [*Cal. Rules of Ct., Rule 3.670(m)*].

[f] Notice of Telephone Appearance

A party choosing to appear by telephone at a hearing must either [*Cal. Rules of Ct., Rule 3.670(g)(1)(A), (B)*]:

- Place the phrase "Telephone Appearance" below the title of the moving papers, or

- At least three court days before the appearance, notify the court and all other parties of the party's intent to appear by telephone. If the notice is oral, it must be given either in person or by telephone. If the notice is in writing, it must be given by filing a "Notice of Intent to Appear by Telephone" with the court at least three court days before the appearance and by serving the notice at the same time on all other parties by personal delivery, fax transmission, express mail, or other means reasonably calculated to ensure delivery to the parties no later than the close of the next business day.

If after receiving notice from another party as provided above a party that has not given notice also decides to appear by telephone, the party may do so by notifying the court and all other parties that have appeared in the action, no later than noon on the court day before the appearance, of its intent to appear by telephone [*Cal. Rules of Ct., Rule 3.670(g)(2)*].

The court, on a showing of good cause, may permit a party to appear by telephone at a conference, hearing, or proceeding even if the party has not given the notice required [*Cal. Rules of Ct., Rule 3.670(g)(4)*].

For a form including a caption for use in first-filed moving or opposition papers to indicate "Telephone Appearance," see *Ch. 372, Motions and Orders, § 372.60*; for a form for a separate notice of intent to appear by telephone, see *Ch. 372, Motions and Orders, § 372.63*.

[g] Retraction of Notice of Telephone Appearance

If a party has given notice that it intends to appear by telephone subsequently chooses to appear in person, the party must so notify the court and all other parties that have appeared in the action, by telephone, at least two court days before the hearing [*Cal. Rules of Ct., Rule 3.670(g)(3)*].

[h] Court Order for Appearance in Person After Notice of Telephone Appearance Has Been Given

If, after a party has requested a telephone appearance under Rule 3.670(g), the court requires the personal appearance of the party, the court must, give reasonable notice to all parties before the hearing. If the court uses a telephonic tentative ruling system for law and motion matters, the notification that parties must appear in person may be given as part of the tentative ruling on a specific law and motion matter if the notification is given one court day before the hearing [*Cal. Rules of Ct., Rule 3.670(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPartiesSelf-RepresentationGeneral OverviewCivil ProceduresPretrial MattersConferencesCase ManagementCivil ProceduresPretrial MattersConferencesPretrial ConferencesCivil ProceduresPretrial MattersConferencesScheduling Conferences

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§ 425.36 Conduct of Case Management Conference

[1] Familiarity, Discussion, and Commitment Requirements

Whether appearing personally or by telephone, counsel for each party and each self-represented party must be familiar with the case, and must be prepared to discuss and commit to the party's position on the issues to be considered at the conference, including the meet-and-confer requirements [*Cal. Rules of Ct., Rule 3.722(c)*]. For a list of subjects that must be considered, see [2], *below.*

[2] Subjects to be Considered at Conference

The case management conference must be conducted in a manner provided by local rule. The matters that the court may consider include any matters that should be considered by the court or addressed in a case management order including the following issues [*Cal. Rules of Ct., Rule 3.727*]:

1. Whether there are related cases;

2. Whether all parties have been served, appeared, or been dismissed;

3. Whether any additional parties may be added or the pleadings may be amended;

4. If the case is a limited civil case, whether the case will be exempted from the economic litigation procedures under *Code of Civil Procedure section 90* by the court or on motion of a party;

5. Other matters (e.g., the bankruptcy of a party) that may affect the court's jurisdiction of the case;

6. Whether the parties have stipulated to, or the case should be referred to, judicial arbitration or any

other form of Alternative Dispute Resolution (ADR);

7. Scheduling an early settlement conference, if appropriate;

8. Whether discovery has been completed and, if not, the date by which it will be completed;

9. Anticipated discovery issues;

10. Bifurcation of the case;

11. Whether any cross-complaints filed are ready to be set for trial or whether they should be severed;

12. Whether the case is entitled to any statutory preferences and, if so, the statute granting the preference;

13. Whether a jury trial is demanded, and, if so, the identity of each party requesting a jury trial;

14. If the trial date has not been previously set, the date by which the case will be ready for trial and the available trial dates;

15. The estimated length of trial;

16. The nature of the injuries;

17. The amount of damages, including any special or punitive damages;

18. Any additional relief sought;

19. Whether there are any insurance coverage issues that may affect the resolution of the case; and

20. Any other matters that should be considered by the court or addressed in its case management order.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSelf-RepresentationGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersSeparate TrialsCivil ProcedureTrialsJury TrialsRight to Jury Trial

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§ 425.37 The Case Management Order

[1] Subjects Addressed

The case management order is the vehicle by which the trial date is set, cases are referred to arbitration or other alternative dispute resolution, settlement conferences are scheduled, and other pre-trial deadlines are established by the court [*see Cal. Rules of Ct., Rule 3.728*]. The case management order is issued after the court conducts the case review, at or after the case management conference is conducted, or if no case management conference is held, before the date of the case management conference and mailed to the parties by the court. The case management order controls the subsequent course of the action or proceeding unless modified by a subsequent case management order or amended case management order [*Cal. Rules of Ct., Rule 3.730*].

Subjects to be addressed in the case management order include [*Cal. Rules of Ct., Rule 3.728*]:

1. Referral of the case to judicial arbitration or some other form of Alternative Dispute Resolution;

2. A date for completion of the arbitration process or other form of Alternative Dispute Resolution process if the case has been referred to such a process;

3. In the event that a trial date has not previously been set, a date certain for trial if the case is ready to be set for trial;

4. Whether the trial will be a jury trial or a non-jury trial;

5. The identity of each party demanding a jury trial;

6. The estimated length of trial;

7. Whether all parties necessary to the disposition of the case have been served or have appeared;

8. The dismissal or severance of unserved or not appearing defendant from the action;

9. The names and addresses of the attorneys who will try the case;

10. The date, time and place for a mandatory settlement conference as provided in Rule 3.1380;

11. The date, time and place for a final case management conference before trial if such a conference is required by the court or the judge assigned to the case;

12. The date, time and place of any further case management conferences or review; and

13. Any additional orders that may be appropriate, including orders on matters listed in Rules 3.724 and 3.727.

[2] Effect of Case Management Order

Cal. Rules of Ct., Rule 3.728 affords the case management judge a high degree of control over the proceedings, including the scheduling of discovery and of dispositive and procedural motions, and other pre-trial deadlines. In some jurisdictions, the case management order will specify a specific date for completing discovery, the time for expert witness disclosure, the date by which dispositive or procedural motions must be filed, and set other pre-trial deadlines, such as the date for the exchange of trial exhibit lists, witness lists and motions in limine, and the designation of video or other audiovisual presentations that may be used at trial. In other jurisdictions, the case management order will specify the cut-offs for discovery, motion practice, expert witness disclosure and the deadlines for other dates, such as the exchange of witness lists, exhibit lists and other pre trial deadlines to be "by code," that is, the procedural deadlines to be imposed on the litigants are the deadlines that are established by statue, or the Rules of Court or local court rules, and not by the case management order. Among the critical cut-off dates that may be specified by code are the expert witness disclosure, discovery cut-off, summary judgment and other law and motion cut-offs, the deadline for statutory compromise, and the exchange of witness lists, exhibit lists, jury instructions and motions in limine.

[3] Modification of Case Management Order

[a] Order Governs Unless Modified

The order issued after the case management conference or review controls the subsequent course of the action or proceeding unless it is modified by a subsequent order [*Cal. Rules of Ct., Rule 3.730*].

[b] On Motion of Party Before or at Trial

The trial has the discretion to allow an oral amendment of a pretrial conference order at any time during the trial if the adverse party is not prejudiced by it [*Robinson v. Thornton (1969) 271 Cal. App. 2d 605, 615, 76 Cal. Rptr. 835]* . A trial court may, in effect, modify a pretrial conference order without a motion when its failure to do so would result in injustice to one party and its doing so would not cause prejudice to the other party [*see Fresno Air Serv. v. Wood (1965) 232 Cal. App. 2d 801, 804, 43 Cal. Rptr. 276* (trial court refused to give instructions on defense of assumption of risk or allow defendant to argue it, although assumption of risk was listed in pretrial conference order as issue to be tried)].

[c] Discretion of Judge

The same principles that govern the exercise of a court's discretion in allowing amendments to the pleadings under *Code Civ. Proc. § 473* apply with respect to motions to modify or amend pretrial conference orders [*Del Pino v. Gualtieri (1968) 265 Cal. App. 2d 912, 916, 71 Cal. Rptr. 716* ; *see* Ch. 21, *Amended and Supplemental Pleadings*]. The granting or denial of a motion to modify a pretrial conference order is committed to the sound discretion of the trial court and the decision will not be reversed unless an abuse of discretion is shown [*Universal Underwriters Ins. Co. v. Superior Court (1967) 250 Cal. App. 2d 722, 727, 732, 58 Cal. Rptr. 870* ; *see* *Godfrey v. Steinpress (1982) 128 Cal. App. 3d 154, 170, 180 Cal. Rptr. 95* ; *Del Pino v. Gualtieri (1968) 265 Cal. App. 2d 912, 916, 71 Cal. Rptr. 716]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProceduresPretrial MattersConferencesCase ManagementCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewEvidenceTestimonyPresentation of Evidence

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A. Bringing Cases to Trial
2. Case Management System

37-425 California Forms of Pleading and Practice--Annotated §§ 425.38-425.49

AUTHOR: Evelio M. Grillo Editorial Consultant

[Reserved]

§§ 425.38[Reserved]

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37-425 California Forms of Pleading and Practice--Annotated § 425.50

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.50 Trial Setting

[1] Calendaring System

The trial setting process differs depending on whether (1) the case is a general civil case or is a case exempted from the case management process under the TCDRA, and (2) whether the case has been assigned to one judge for all purposes (Independent (or Direct) Calendar) or is being assigned through a Master Calendar. In a Direct Calendar system, a case is assigned to a judge who hears all pre-trial motions in addition to serving the trial judge. Under a Master Calendar system, cases not assigned to a specific judge but proceed through the pre-trial process with motions being heard by the law and motion judge, the writs and receivers judge, or the presiding judge, as provided by local rules. Under the TCDRA, most jurisdictions follow a hybrid of the two systems. The system followed by most counties contain the elements of a direct calendar jurisdiction in that the case management judge may have broad responsibility for hearing motions, case management and other administrative and management duties associated with the direct calendar system, as well as elements of a master calendar system because the case is assigned a trial date, placed on a master calendar and, when the trial date arises, the case is transferred to a trial department [*see Cal. Rules of Ct., Rule 10.910*].

[2] Exempt and Non-Exempt Cases

For both exempt and non-exempt civil cases under the Trial Court Delay Reduction Act [*see § 425.13[3], [5]*], the case may be set for trial at the case management conference [*see Cal. Rules of Ct., Rule 3.728*].

[3] Short Cause and Simple Cases

The court may exempt a short cause case from case management review and set it for trial on its own initiative [*Cal. Rules of Ct., Rule 3.735*; *see* § 425.26]. The procedure for setting short cause and simple cases, varies from jurisdiction to jurisdiction. In some jurisdictions, short cause cases and simple cases are reviewed as part of the case management process and set internally for trial by the court and the parties are notified of the trial date with no further input from the

parties. The determination as to whether the case is at issue is made by the court based on the court's review of the civil case cover sheet and/or the case management statement.

[4] Complex Cases

Complex cases may be set by trial by the case management judge, or by the presiding judge depending on the local rules of the jurisidiction. The procedure varies from jurisdiction to jurisdiction. For discussion of complex cases, see *§ 425.52*.

[5] Case to Be Tried, Ordered Off Calendar, Dismissed or Reassigned

In a county employing the master calendar, each case transferred to a trial department must be tried, ordered off the calendar, or dismissed, unless for good cause arising after the commencement of the trial the judge of the trial department continues the case for further hearing or, with the consent of the judge supervising the master calendar, reassigns the case to the judge supervising the master calendar for further disposition [*Cal. Rules of Ct., Rule 10.910(a)*].

[6] Duties of Transferee Judge

The judge sitting in the department to which a cause is assigned for trial or for hearing must accept the assignment unless he or she is disqualified or, for other good cause stated to the judge supervising the master calendar, the judge supervising the master calendar determines that in the interest of justice the cause should not be tried or heard before the judge [*Cal. Rules of Ct., Rule 10.910(b)*; for discussion of disqualification, *see* Ch. 317, *Judges*].

A judge who has refused a cause and is not disqualified must state the reasons in writing unless the judge supervising the master calendar has concurred [*Cal. Rules of Ct., Rule 10.910(b)*].

When a judge finishes or continues the trial of a case or any special matter, he or she must immediately notify the judge supervising the master calendar [*Cal. Rules of Ct., Rule 10.910(b)*].

[7] Assignment to One Judge for All or Limited Purposes

The presiding judge may, on the noticed motion of a party or on the court's motion, order the assignment of any case to one judge for all or such limited purposes as will promote the efficient administration of justice. In determining the suitability of assignment, the presiding judge is to be guided by the standards recommended in Standard 3.10 of the Standards of Judicial Administration, set forth in the California Rules of Court.

[8] Trial Setting Factors

In setting a case for trial, the court, at the initial case management conference or at any other case setting proceeding, must consider all relevant facts and circumstances [*Cal. Rules of Ct., Rule 3.729*]. These factors may include the following [*Cal. Rules of Ct., Rule 3.729*]:

- Type and subject matter of the action to be tried.
- Whether the case has statutory priority.
- Number of causes of action, cross-actions, and affirmative defenses that will be tried.
- Whether any significant amendments to the pleadings have been made recently or are likely to be made before trial.

- Whether the plaintiff intends to bring a motion to amend the complaint to seek punitive damages.
- Number of parties with separate interests who will be involved in the trial.
- The complexity of the issues to be tried, including issues of first impression.
- Any difficulties in identifying, locating or serving parties.
- Whether all parties have been served and, if so, the date by which they were served.
- Whether all parties have appeared in the action and, if so, the date by which they appeared.
- How long the attorneys who will try the case have been involved in the action.
- The trial date or dates proposed by the parties and their attorneys.
- The professional and personal schedules of the parties and their attorneys, including any conflicts with previously assigned trial dates or other significant events.
- The amount of discovery, if any, that remains to be conducted in the case.
- The nature and extent of law and motion proceedings anticipated, including whether any summary judgment motions will be filed.
- Whether any other actions or proceedings that are pending may affect the case.
- The amount in controversy and the type of remedy sought.
- The nature and extent of the injuries or damages, including whether these are ready for determination.
- The court's trial calendar.
- Whether the trial will be a jury or a nonjury trial.
- The anticipated length of the trial.
- The number, availability, and locations of witnesses.
- Whether there have been any previous continuances or delays of the trial.
- The achievement of a fair, timely, and efficient dispositon of the case.
- Any other factor that would significantly affect the determination of the appropriate date for trial.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureJudicial OfficersJudgesDiscretionCivil

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37-425 California Forms of Pleading and Practice--Annotated § 425.51

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.51 Pretrial Alternative Dispute Resolution

[1] Preliminary Determinations and Requirements

Pre-trial alternative dispute resolution, either by agreement of the parties, or by order of the court, is an established part of the pre-trial process, and even if not required by statute or local rule in a particular case, is encouraged by the court. In many venues, the plaintiff is required to serve with the complaint and summons, copies of information on available ADR resources provided by the local court. The parties may, by local rule of court, be required to review the ADR materials with the client and to agree to a form of non-binding alternative dispute resolution, such as arbitration, mediation or early neutral evaluation. The Case Management Statement in fact requires the parties to specify the forms of alternative dispute resolution to which the parties are willing to stipulate, if any. The court when issuing the case management order, will consider the preferences of the parties, and specify the type of ADR and a deadline for completing ADR in the case management order. If the parties agree to use an Alternative Dispute Resolution process, they must jointly complete an ADR stipulation form and file it with the court.

[2] Private Alternative Dispute Resolution

Even in jurisdictions which may not have an ADR program suitable for all cases, the number of private mediation and arbitration providers continues to expand, and the courts often encourage the parties to stipulate to alternative dispute resolution relating to all or part of an action. For example, defendants and cross-defendants in a personal injury action may agree to settle issues raised in the cross actions through a private ADR process, so as not to "make plaintiffs' cases for them" in open court. Similarly, indemnity issues between co-defendants also lend themselves to arbitration.

Complex cases in particular lend themselves to alternative means of management. For example, it has become more common in multiparty construction defect litigation for the court to appoint a special master to meet regularly with the parties, direct phases of discovery and motion practice, find facts, and to recommend pretrial orders that are signed by the court. The appointment of a special master to supervise a phase or phases of a case, either at the request of the

parties or on the court's own motion, may be appropriately viewed as somewhat of a hybrid between more traditional forms of ADR and the normal court processes.

For discussion of the forms of arbitration which are available to assist in dispute resolution see Ch. 30, *Using Alternative Dispute Resolution* . Court programs encouraging, and in some cases mandating, participation in mediation [*Code Civ. Proc. §§ 1730 et seq.* and *1775 et seq.*], are discussed in Ch. 37, *Judicially Mandated Civil Action Mediation* .

[3] Mandatory Judicial Arbitration

[a] Overview

Civil actions filed in superior courts with 18 or more judges are subject to mandatory judicial arbitration if, in the court's opinion, the amount in controversy will not exceed $50,000 for each plaintiff [*Code Civ. Proc. § 1141.11(a)*]. Superior courts with fewer than 18 judges are authorized to adopt this mandatory judicial arbitration program [*Code Civ. Proc. § 1141.11(b)*]. All superior courts are authorized to provide by local rule that all nonexempt, limited civil cases be submitted to arbitration [*Code Civ. Proc. § 1141.11(c)*]. If the parties agree to use an Alternative Dispute Resolution process, they must jointly complete an ADR stipulation form and file it with the court. The court need not make the determination of the case's value if the parties stipulate either that the amount exceeds $50,000 [*Code Civ. Proc. § 1141.16(a)*] or that the case be submitted to arbitration regardless of the amount. [*Code Civ. Proc. § 1141.12(a)*].

[b] Determining Amount in Controversy

The determination of the amount in controversy may be made at any conference at which all parties are present or represented by counsel [*Code Civ. Proc. § 1141.16(a)*].

PRACTICE TIP:

Impact of Judicial Arbitration. Judicial arbitration impacts smaller cases in two significant ways. These are cost shifting and accelerated discovery cutoff dates. *Cal. Rules of Ct., Rule 3.822*, provides for a discovery cut-off 15 days prior to the date set for the arbitration hearing, and *Code Civ. Proc. § 1141.24* and *Code Civ. Proc. § 2024(b)* [*Code Civ. Proc. § 2024.040(a)* operative July 1, 2005] prohibit discovery, other than expert discovery, after an arbitration award has been rendered, absent a stipulation of the parties. *Cal. Rules of Ct., Rule 3.826*, and *Code Civ. Proc. § 1141.21* require the court to impose costs incurred (including the cost of experts) on the party requesting a trial de novo following judicial arbitration if the requesting party does not obtain a more favorable verdict at trial. Timely completion of discovery in cases referred to arbitration (or obtaining a stipulation from opposing counsel to keep discovery open after the arbitration award) and being realistic about the value of a case following arbitration both should be considered upon the assignment of a case to judicial arbitration. *By Evelio Grillo*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersMastersGeneral OverviewCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedurePretrial MattersConferencesCase Management

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37-425 California Forms of Pleading and Practice--Annotated § 425.52

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.52 Complex Litigation

[1] What Constitutes Complex Litigation

A "complex case" is an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and counsel [*Cal. Rules of Ct., Rule 3.400(a)*].

In deciding whether an action is a complex case under *Cal. Rules of Ct., Rule 3.400(a)*, the court must consider, among other things, whether the action is likely to involve [*Cal. Rules of Ct., Rule 3.400(b)*]:

- Numerous pretrial motions raising difficult or novel legal issues that will be time-consuming to resolve;
- Management of a large number of witnesses or a substantial amount of documentary evidence;
- Management of a large number of separately represented parties;
- Coordination with related actions pending in one or more courts in other counties, states, or countries, or in a federal court; or
- Substantial postjudgment judicial supervision.

Except as provided in *Cal. Rules of Ct., Rule 3.400(d)*, an action is provisionally a complex case if it involves one or more of the following types of claims [*Cal. Rules of Ct., Rule 3.400(c)*]:

- Antitrust or trade regulation claims;
- Construction defect claims involving many parties or structures;
- Securities claims or investment losses involving many parties;
- Environmental or toxic tort claims involving many parties;
- Claims involving mass torts;
- Claims involving class actions; or
- Insurance coverage claims arising out of any of the claims listed in above.

The exception provided by *Cal. Rules of Ct., Rule 3.400(d)* is that despite *Cal. Rules of Ct., Rule 3.400(c)*, an action is not provisionally complex if the court has significant experience in resolving like claims involving similar facts and the management of those claims has become routine. A court may declare by local rule that certain types of cases are or are not provisionally complex pursuant to Rule 3.400(d) [*Cal. Rules of Ct., Rule 3.400(d)*].

[2] Procedure for Designating Case as Complex or Not Complex

[a] Designation by Plaintiff

A plaintiff may designate an action a complex case by filing and serving with the initial complaint the Civil Case Cover Sheet [Cal. Judicial Council Form CM-010; for form, *see § 425.130*] required by rule 3.220 that is marked to indicate the action is a complex case [*Cal. Rules of Ct., Rule 3.401*].

[b] Counterdesignation

If a Civil Case Cover Sheet [Cal. Judicial Council Form CM-010; for form, *see § 425.130*] designating an action as a complex case was filed and served and the court has not previously declared the action to be a complex case, a defendant may file and serve no later than its first appearance a counter Civil Case Cover Sheet designating the action as not a complex case. The court must decide, with or without a hearing, whether the action is a complex case within 30 days after the filing of the counterdesignation [*Cal. Rules of Ct., Rule 3.402*].

[c] Joint Complex Designation

A defendant may join the plaintiff in designating an action as a complex case [*Cal. Rules of Ct., Rule 3.402*].

[d] Court Decision on Designation of Complex Case

Except when the defendant joins the plaintiff in designating an action as a complex case under *Cal. Rules of Ct., Rule 3.402*, if the Civil Case Cover Sheet [Cal. Judicial Council Form CM-010; for form, *see § 425.130*] that has been filed and served designates an action as a complex case or checks a case type described as provisionally complex civil litigation, the court must decide as soon as reasonably practicable, with or without a hearing, whether the action is a complex case [*Cal. Rules of Ct., Rule 3.403(a)*].

[e] Motion at Any Time to Redesignate Case as Complex or Not Complex

With or without a hearing, the court may decide on its own motion, or on a noticed motion by any party, that a civil action is a complex case or that an action previously declared to be a complex case is not a complex case [*Cal. Rules of*

Ct., Rule 3.403(b)].

[f] Case Assignment

The Rules of Court provide that complex litigation should be assigned to one judge for all purposes. If that is not possible, a single judge should be assigned to hear law and motion and discovery matters [Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.10].

In selecting the judges for complex litigation assignments, the presiding judge should consider the court's needs and the judge's ability, interest, training, experience, and willingness to participate in educational programs related to the management of complex cases [Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.10].

Commissioners should not be employed in any phase of complex litigation, except under the judge's direct supervision to assist in the management of the case [Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.10; *see Lu v. Superior Court (1997) 55 Cal. App. 4th 1264, 1267, 1269-1271, 64 Cal. Rptr. 2d 561* (upholding use of discovery referee and referee to conduct settlement conferences in complex case)].

[g] Early and Active Case Management by Court

The Judicial Council has adopted rules and a standard of judicial administration relating to complex litigation [*see Cal. Rules of Ct., Rule 3.400 et seq.*; Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.10(b) or (c)]. As a basic principle, judicial management should begin early and be applied continuously and actively based on knowledge of the circumstances of each case [*see* Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.10(b) or (c)].

Time limits should be regularly used to expedite major phases of complex litigation. The time limits should be established early, tailored to the circumstances of each case, firmly and fairly maintained, and accompanied by other methods of sound judicial management [Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.10(d)].

The complex litigation procedure is intended to facilitate pretrial resolution of evidentiary and other issues, and to minimize the time and expense of lengthy or multiple trials [*Rutherford v. Owens-Illinois, Inc. (1997) 16 Cal. 4th 953, 966, 67 Cal. Rptr. 2d 16, 941 P.2d 1203]* . The Judicial Council recommends that litigants in complex litigation cases be required to minimize evidentiary disputes and to organize efficiently their exhibits and other evidence before trial. The Council cautions that judges involved in such litigation should be sensitive to dilatory or abusive litigation tactics and should be prepared to invoke disciplinary procedures for violations [Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.10(g), (h)].

A case that is classified as complex under the complex litigation standard will frequently also be exempt from the time standards contained in the differential case management rules adopted by the Judicial Council under a mandate of the Trial Court Delay Reduction Act [*Lu v. Superior Court (1997) 55 Cal. App. 4th 1264, 1268, 64 Cal. Rptr. 2d 561]* . When a case is exempted from the time standards, *Cal. Rules of Ct., Rule 3.714(c)* requires the court to establish a case-progression plan and monitor the case to ensure timely disposition consistent with the case's exceptional circumstances, with a goal of disposition within three years. A detailed case management order satisfies the requirement for a case progression plan and enables the judge to comply with the requirement they monitor the case to ensure timely disposition [*Lu v. Superior Court (1997) 55 Cal. App. 4th 1264, 1268-1269, 64 Cal. Rptr. 2d 561* (listing items typically covered in a case management order)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureJudicial OfficersRefereesAppointmentsCivil

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AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.53 Sanctions for Noncompliance With Local Rules

Local rules adopted under *Code Civ. Proc. § 575.1* (basic authority for promulgation of local court rules) may provide for sanctions for failure of any counsel, party represented by counsel, or pro se party to comply with any local rule requirements [*Code Civ. Proc. § 575.2(a)*].

Sanctions are also authorized under the Trial Court Delay Reduction Act by *Gov. Code § 68608(b)*. Under that section, judges have all the powers to impose sanctions authorized by law, which can extend to dismissing actions or striking pleadings [*Gov. Code § 68608(b)*].

In addition, the failure of any person to comply with the California Rules of Court, local rules, or a court order, unless good cause is shown, or failure to participate in good faith in any conference required by the rules or by court order may result in sanctions for unlawful interference with the proceedings of the court [*Cal. Rules of Ct., Rule 2.30*]. An unlawful interference with the proceedings of the court may also subject the person to prosecution for contempt [*Code Civ. Proc. § 1209(a)(8)*].

For discussion of sanctions, including which may be imposed under these different authorities, see Ch. 510, *Sanctions* . For discussion of appealable orders, including the appealability of sanction orders, see Ch. 42, *Appeal: Notice of Appeal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§§ 425.54[Reserved]

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B. Bifurcation

37-425 California Forms of Pleading and Practice--Annotated § 425.60

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.60 Relation to Case Management Rules

The case management rules require counsel to specify in the case management statement whether a case is entitled to a preference, whether a motion for consolidation or coordination will be filed and whether a party intends to file a motion for an order bifurcating, severing or coordinating issues or causes of action [*see Cal. Rules of Ct., Rule 3.725*]. Although the court may, on its own motion, issue an order to obtain preference, coordinating or bifurcating a case, unless both parties agree to preference, consolidation or bifurcation, the motion must be filed by counsel.

Legal Topics:

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

37-425 California Forms of Pleading and Practice--Annotated § 425.61

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.61 Purpose of Bifurcation

Bifurcation refers to the procedure whereby the court allows a separate trial of an issue or issues of a case preliminary to the trial of the remaining issues in a case, if any. The ordinary order of proof at trial is regulated by the Evidence Code which generally provides the court with discretion to regulate the order of proof at trial [*Evid. Code § 320*].

Statutory exceptions to the ordinary order of proof fall into three classes:

- Statutes authorizing the prior and separate trial of certain special defenses [*see Code Civ. Proc. §§ 597, 597.5*, discussed in *§ 425.62*].

- Statutes authorizing the prior and separate trial of an issue or a part of an issue before any other issue in the case [*see Code Civ. Proc. §§ 598, 1048*; *Fam. Code §§ 3023(b), 4003*, discussed in Ch. 221, *Dissolution of Marriage: Procedure*].

- *Civil Code § 3295(d)*, which, in cases with a punitive damages claim, requires the court on a defendant's motion to preclude admission of evidence of the defendant's financial condition until such time as the trier of fact has returned a verdict finding that the defendant is liable and guilty of malice, oppression or fraud [*see Civ. Code § 3295(d)*].

In the case of true bifurcation the major objective of a bifurcated trial is to expedite and simplify the presentation of evidence [*Foreman & Clark Corp. v. Fallon (1971) 3 Cal. 3d 875, 888, 92 Cal. Rptr. 162, 479 P.2d 362]* . When a case is bifurcated under *Civil Code § 3295(d)* the purpose of bifurcation is to avoid prejudice to the defendant [*see Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal. App. 3d 1220, 1241, 1 Cal. Rptr. 2d 301]* .

For a discussion of the trial of issues of law before issues of fact and of equitable before legal issues in a jury trial, see *Ch. 551, Trial, § 551.50* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersSeparate Trials

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37-425 California Forms of Pleading and Practice--Annotated § 425.62

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.62 Separate Trial of Special Defense

[1] Statutory Authority

When the answer to a complaint or cross-complaint pleads that the action is barred by the statute of limitations or a prior judgment, or that another action is pending on the same cause, or sets up any other defense not involving the merits of the action but constituting a bar or ground of abatement to its prosecution, the court may, on its own motion or the motion of a party, proceed to the trial of the defense before the trial of any other issue in the case [*Code Civ. Proc. § 597*]. For discussion of the separate trial of the statute of limitations issue in a medical malpractice action under *Code Civ. Proc. § 597.5*, see Ch. 414, *Physicians: Medical Malpractice* . For discussion of the limitations on the admission of evidence in a punitive damages case under *Civ. Code § 3295(d)*, see *Ch. 177, Damages, § 177.40* et seq.

[2] When to Make Motion for Separate Trial of Special Defense

Neither *Code Civ. Proc. § 597* nor *597.5* states how or when the motion for separate trial of a defense not going to the merits of the action must be made. Three practices appear to be followed by litigants and the courts. The first is for counsel desiring a separate trial to make the motion before trial on written notice. In that event, the court may grant the motion, deny the motion, or deny the motion without prejudice to a party's right to have the motion heard in limine by the trial judge. The second practice is for the motion for bifurcation to be brought *in limine*, and heard by the trial judge. The third is for the court, on its own motion, to order a separate trial of the defense preliminary to the trial of any other issue in the case [*see Code Civ. Proc. §§ 597, 597.5*]. Whether a separate trial of a special defense would be appropriate, if not already decided on a pretrial motion, is a matter inquired into by the judge at the case management conference [*see Cal. Rules of Ct., Rule 3.727(10)*]. Moreover, the court may order that the issue or issues involved in a defense, whether or not the defense goes to the merits of the action, be tried first either (1) pursuant to its power to regulate the order of proof under *Evid. Code § 320* [*see Meyer Koulish Co. v. Cannon (1963) 213 Cal. App. 2d 419, 429-430, 28 Cal. Rptr. 757]* , or (2) pursuant to its power to order the separate trial of issues under *Code Civ. Proc. § 598*.

For further discussion and forms for use in moving for separate trial of a special defense not involving the merits of the

action, see *Ch. 3, Abatement of Actions, § 3.110* et seq.; for discussion of statutes of limitation and a form of notice of motion for separate trial of the defense when the action is barred by the statute of limitations, see Ch. 345, *Limitation of Actions* .

[3] Procedure When Special Defense Is Tried Separately

If the defense separately tried is that another action is pending on the same cause and the defense is sustained (and no other special defense is sustained), an interlocutory judgment is entered suspending trial of all other issues in the case until the other action is finally determined. In all other cases, for example, when the defense is that the action is barred by the statute of limitations or a prior judgment, a decision or verdict in favor of the defendant after trial of the special defense ends the action and final judgment is entered for the defendant. If the decision after trial of the special defense is in the plaintiff's favor, trial of the other issues is thereafter had either on the court's own motion or on the motion of any party; judgment is entered on such trial in the same manner and with the same effect as if all the issues in the case had been tried at one time [*see Code Civ. Proc. §§ 597, 597.5*].

[4] Right to Jury Trial

Even in an action at law for damages, there is no right to a jury trial on affirmative defenses that can be tried separately and first. Factual issues relating to these defenses are naturally tried to the court. For example, when the determination is as to whether the same parties are involved, or the same claim raised, this mixed fact-law question is properly determined by the court sitting without a jury [*Windsor Square Homeowners Assn. v. Citation Homes (1997) 54 Cal. App. 4th 547, 558, 62 Cal. Rptr. 2d 818]* . The rule that the facts underlying a res judicata defense are tried to the court, and not to a jury, even though it is a legal and not an equitable defense, is well settled. The reason for this is that the facts to be determined are fairly simple and are often mixed fact-law determinations better made by the court alone. Although the issues, such as what claims were or could have been raised in the prior action, who were the parties sued, whether the party against whom the bar is asserted was in privity with a party in the prior action, and whether the prior adjudication was on the merits, may have factual predicates, they are peculiarly legal determinations [*Windsor Square Homeowners Assn. v. Citation Homes (1997) 54 Cal. App. 4th 547, 557, 62 Cal. Rptr. 2d 818]* .

Similarly, in a statute of limitations defense, the court would seem to be in a better position to determine when a cause of action accrued than a jury, even though there are factual underpinnings to this finding [*Windsor Square Homeowners Assn. v. Citation Homes (1997) 54 Cal. App. 4th 547, 558, 62 Cal. Rptr. 2d 818* (dicta; case involved res judicata)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersSeparate TrialsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansTortsDamagesPunitive DamagesAward CalculationsGeneral Overview

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Chapter 425 PRETRIAL PROCEEDINGS
PART II. LEGAL BACKGROUND
B. Bifurcation

37-425 California Forms of Pleading and Practice--Annotated § 425.63

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.63 Separate Trial of Issues

[1] Statutory Authority

The court may, when the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted thereby, order [for a form, *see § 425.150*] that the trial of any issue or any part of an issue shall precede the trial of any other issue or part of an issue in the case, except for special defenses which may be tried first pursuant to *Code Civ. Proc. §§ 597* and *597.5* [*Code Civ. Proc. § 598*]. Additional authority for the separate trial of issues is provided by *Code Civ. Proc. § 1048* which allows the court in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, to order a separate trial of any cause of action, including a cause of action asserted in a cross complaint, or of any separate issue or of one or more causes of action or issues [*Code Civ. Proc. § 1048(b)*; *see also Finley v. Superior Court (2000) 80 Cal. App. 4th 1152, 1162, 96 Cal. Rptr. 2d 128* (even if defense did not meet *Code Civ. Proc. § 597* prerequisites for bifurcation, authority for bifurcation exists under *Code Civ. Proc. § 1048(b)*; discretion to regulate order of proof under *Evid. Code § 320* also affords sufficient authority to order separate trial of affirmative defense)].

For discussion of the preference given and separate trial of child support and child custody issues [*see Fam. Code §§ 3023, 4003*], see Ch. 221, *Dissolution of Marriage: Procedure* .

[2] Procedure for Obtaining Separate Trial of Issues

The order for a separate trial of issues is made on the motion of a party after notice [for a form *see § 425.151*] and hearing, not later than the close of the pretrial conference in cases in which a pretrial conference is held or, in other cases, not later than 30 days before the trial date [*Code Civ. Proc. § 598*].

To enable the court to make a timely order under *Code Civ. Proc. § 598* when the order is not made in the case management order, the notice of motion and its supporting papers must be served sufficiently in advance of the specified times to allow the necessary period of notice and the filing of opposition [*see Code Civ. Proc. § 1005(b)*], as

well as the hearing on the motion.

However, the court, on its own motion, may make the order at any time [*Code Civ. Proc. § 598*]. Since the court may make the order on its own motion at any time, the court may at the conference with counsel immediately before trial (or at any other time) order that the trial of an issue or part of an issue precede trial of the other issue, part of an issue, or issues in the case [*see Ch. 551, Trial, § 551.41* et seq.].

When an order for a separate trial is made on the court's own motion, no formal motion by a party is necessary. Thus, a court may order bifurcation after a party offers a "suggestion" as to the order of proof [*Grappo v. Coventry Financial Corp. (1991) 235 Cal. App. 3d 496, 503-504, 286 Cal. Rptr. 714]* .

[3] Procedure When Issue Is Tried Separately

[a] Trial of General Liability Issues

When the liability issue is tried before the other issues in the case, and the decision or verdict is in favor of the party on whom liability is sought to be imposed, judgment in favor of that party is entered. No trial of the other issues in the action is had against the party unless the judgment is reversed on appeal or otherwise set aside or vacated [*Code Civ. Proc. § 598*].

If the decision or verdict on the liability issue is against the party on whom liability is sought to be imposed, or if the decision or verdict on any other issue or part of an issue so tried does not result in a judgment being entered, trial of the other issues or parts of issues is thereafter held at a time ordered by the court either on its own motion or on the motion of any party. In the case of a jury trial, the further trial may be before the same or another jury [*Code Civ. Proc. § 598*]. Judgment is thereafter entered in the same manner and with the same effect as if all the issues in the case had been tried at one time [*Code Civ. Proc. § 598*].

[b] Trial of Liability for Punitive Damages

A bifurcated trial involving a claim for punitive damages is similar to a bifurcated trial involving general liability in that the trier of fact must first make a determination as to a liability, and then the remaining issue, damages, is tried. In the case of a punitive damages trial, however, the trial proceeds in all respects as a non-bifurcated trial *except* the only evidence excluded relates to the financial condition of the defendant. In this respect, a trial bifurcated under *Civil Code § 3295(d)* in which all relevant evidence relating to damages (other than the defendant's financial condition) is admissible, may be contrasted to a case in which the issue of general liability is tried first, in which case most evidence relating to damages would, on motion of the defendant, be excluded.

[4] Procedure for Severance

There is no procedure set forth in *Code Civ. Proc. § 1048* for a party to bring a motion to sever an issue, a cause of action or a cross-complaint. Based on analogous language in *Code Civ. Proc. § 598* it may be argued that a party who desires severance of a cause of action, issue or cross-complaint should bring the motion not later than 30 days prior to the trial date [*see Code Civ. Proc. § 598*]. In practice, however, motions to sever are routinely brought by parties to litigation to sever cross-complaints or a cause of action from the main action, and rarely to sever issues. A motion to sever should be brought at the earliest possible date in order to avoid the situation where the opposing party has conducted discovery and prosecuted a cross-complaint or cause of action, only to have the cause of action or cross-complaint severed close to the trial date. For discussion, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

PRACTICE TIP:

Bifurcation Can Be a Tool for Managing Introduction of Evidence. Bifurcation is a very powerful

tool when used properly, particularly when a case involves large damages, but questionable liability. By bifurcating the trial, counsel may set the stage for excluding evidence *in limine* which though arguably prejudicial, is not so prejudicial as to be excludable under *Evid. Code § 352*. For example, in a personal injury case involving a particularly gruesome injury or a contract case involving the loss of a family business, bifurcation of the liability issues may allow counsel to exclude very sympathetic testimony concerning pain and suffering or loss of good will which, though relevant only to damages issues, would be viewed sympathetically by the jury. *By Evelio Grillo*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersSeparate TrialsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProceduresGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsDamagesPunitive DamagesGeneral Overview

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37-425 California Forms of Pleading and Practice--Annotated §§ 425.64-425.69

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[Reserved]

§§ 425.64[Reserved]

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37-425 California Forms of Pleading and Practice--Annotated § 425.70

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.70 Governing Law

Cases entitled to precedence in trial setting as a matter of law are covered by specific statutes governing the particular action or special proceeding to which precedence is given [*see § 425.72*].

Cases that may be granted preference by court order based on the age or physical condition of a party or the interests of justice are covered by *Code Civ. Proc. §§ 36, 36.5*.

The granting of a preference to cases for damages caused by a defendant in the commission of a felony for which he or she is criminally convicted is authorized by *Code Civ. Proc. § 37*.

Motions to request a case management conference to be held at any time are governed by *Cal. Rules of Ct., Rule 3.723*. Motions before or during trial to continue a trial are governed by *Cal. Rules of Ct., Rule 3.1332*. Motions to advance, reset, or specially set cases for trial are governed by *Cal. Rules of Ct., Rule 3.1335*. *Cal. Rules of Ct., Rules 3.1322* and *3.1335* apply in all trial courts [*Cal. Rules of Ct., Rule 3.1100*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersSeparate Trials

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37-425 California Forms of Pleading and Practice--Annotated § 425.71

AUTHOR: Evelio M. Grillo Editorial Consultant

[Reserved]

§ 425.71[Reserved]

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37-425 California Forms of Pleading and Practice--Annotated § 425.72

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.72 Statutory Precedence of Cases

[1] Examples

Various statutes give specific actions and special proceedings precedence over other cases in setting the case for trial. Important examples are:

- *Code Civ. Proc. § 35* (case involving voter registration or certification of candidates or ballot measures, and election contests).
- *Code Civ. Proc. § 460.5(c)* (defamation action in which likelihood of continuous publication is shown).
- *Code Civ. Proc. § 460.7(c)* (certain actions involving defamation during political campaign).
- *Code Civ. Proc. § 526a* (taxpayer's action to enjoin public improvement project).
- *Code Civ. Proc. § 1062.3(a)* (declaratory relief action) [*see* [3], *below*].
- *Code Civ. Proc. § 1141.20* (trial de novo after judicial arbitration) [*see* [4], *below*].
- *Code Civ. Proc. § 1179a* (proceeding in unlawful detainer, forcible entry, or forcible detainer) [*see Mobil Oil Corp. v. Superior Court (1978) 79 Cal. App. 3d 486, 494, 145 Cal. Rptr. 17]* .
- *Code Civ. Proc. § 1260.010* (eminent domain proceeding).
- *Fam. Code § 7870* (proceeding to free child from parental control).

- *Gov. Code § 66499.37* (action to attack, review, set aside, void, or annul decision of advisory agency, appeal board, or legislative body under Subdivision Map Act).

- *Gov. Code § 83121* (judicial review of action of Fair Political Practices Commission relating to pending election).

- *Health & Safety Code § 42404* (action by State to recover penalties for air pollution).

- *Pub. Res. Code § 21167.1* (actions or proceedings under *Pub. Res. Code §§ 21167, 21168,* and *21168.5* to enforce compliance with the California Environmental Quality Act).

- *Rev. & Tax. Code § 5149* (action to recover, or for refund of, property taxes or assessments).

[2] Injunctive Relief

Code Civ. Proc. § 527, relating to pendente lite injunctive relief, provides that on the day on which the order to show cause is made returnable, the hearing shall take precedence of all other matters on the calendar of the day, except older matters of the same character, and matters to which special precedence may be given by law [*see Code Civ. Proc. § 527(e)*]. This provision applies only to the time for hearing specified in an order to show cause issued on ex parte application. If the plaintiff proceeds by noticed motion for pendente lite injunctive relief, the motion is heard at a time pursuant to the statutes and rules governing motions [*Mobil Oil Corp. v. Superior Court (1978) 79 Cal. App. 3d 486, 495, 145 Cal. Rptr. 17]* . *Code Civ. Proc. § 527(e)* further provides, however, that when the cause is at issue, "it shall be set for trial at the earliest possible date and shall take precedence of all other cases, except older matters of the same character, and matters to which special precedence may be given by law."

[3] Declaratory Relief

Declaratory relief actions are entitled to precedence under *Code Civ. Proc. § 1062.3(a)*. If, however, any relief is sought in addition to a declaration of rights and duties, the action does not take precedence over other cases unless the court so orders on noticed motion and a showing that the action requires a speedy trial [*Code Civ. Proc. § 1062.3(b)*]. Thus, only a conditional priority is accorded causes of action for declaratory relief when the cause of action is combined with requests for other relief [*Mobil Oil Corp. v. Superior Court (1978) 79 Cal. App. 3d 486, 494, 145 Cal. Rptr. 17]* .

[4] After Judicial Arbitration or Civil Action Mediation

After judicial arbitration under *Code Civ. Proc. § 1141.10 et seq.*, if a party elects trial de novo, the matter is to be calendared for trial, insofar as possible, so that the trial will receive the same place on the active list as it had prior to arbitration, or shall receive priority on the next setting calendar [*Code Civ. Proc. § 1141.20(b)*].

A parallel provision applies after an unsuccessful mediation under *Code Civ. Proc. § 1775 et seq.*, which is a pilot project alternative to judicial arbitration in Los Angeles and in other counties that elect to participate [*see Code Civ. Proc. § 1775.9(b)*]. For discussion, see Ch. 36, *Judicial Arbitration* , and Ch. 37, *Judicially Mandated Civil Action Mediation* .

[5] Review of Adverse Medical Licensing Decision

Notwithstanding any other provision of law, superior court review of a Division of Medical Quality or California Board of Podiatric Medicine decision revoking, suspending, or restricting a license takes preference over all other civil actions in the matter of setting the case for hearing or trial. The hearing or trial must be set not later than 180 days from the filing of the action. A continuance may be granted only on a showing of good cause [*Bus. & Prof. Code § 2337*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersSeparate TrialsCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsHealthcare LawBusiness Administration & OrganizationLicensesRevocation & Suspension

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37-425 California Forms of Pleading and Practice--Annotated § 425.73

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.73 Code Civ. Proc. § 36 Motion for Preference

[1] Statutory Authority

In addition to the cases expressly given precedence by statute [*see § 425.72*], the trial court may grant preferences in setting for trial under *Code Civ. Proc. § 36*, discussed in [2] et seq., *below*.

[2] Party 70 Years of Age or Older

[a] Availability

A civil case "shall" be entitled to preference on the petition of a party to the action who is over the age of 70 years if the court finds both [*Code Civ. Proc. § 36(a)*]:

- That the party has a substantial interest in the action as a whole.
- That the health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation.

As used in *Code Civ. Proc. § 36(a)*, "shall" is mandatory and not merely directory [*Miller v. Superior Court (1990) 221 Cal. App. 3d 1200, 1204, 270 Cal. Rptr. 766* ; *Sprowl v. Superior Court (1990) 219 Cal. App. 3d 777, 781, 268 Cal. Rptr. 592* ; *Swaithes v. Superior Court (1989) 212 Cal. App. 3d 1082, 1085, 261 Cal. Rptr. 41* (all decided under version in effect prior to January 1, 1991)].

[b] Legislative Intent

The intent of the Legislature is to safeguard litigants who qualify under *Code Civ. Proc. § 36(a)* against the acknowledged risk that death or incapacity might deprive them of the opportunity to have their case effectively tried and

to obtain the appropriate recovery [*Swaithes v. Superior Court (1989) 212 Cal. App. 3d 1082, 1085, 261 Cal. Rptr. 41]* .

[c] Impact on Power of Courts to Regulate Order of Business

The application of *Code Civ. Proc. § 36(a)* does not violate the power of trial courts to regulate the order of their business, and mere inconvenience to the court or to other litigants is irrelevant. Failure to complete discovery or other pretrial matters does not affect the absolute substantive right to trial preference for those litigants who qualify for preference under the statute, and the trial court has no power to balance the differing interests of opposing litigants in applying the statute [*Swaithes v. Superior Court (1989) 212 Cal. App. 3d 1082, 1085, 261 Cal. Rptr. 41]* . Nor does it have any discretion to strike a fair balance between the plaintiff's rights to a preferential trial and the interest of the court to avoid potentially wasteful serial trials [*Miller v. Superior Court (1990) 221 Cal. App. 3d 1200, 1204-1205, 270 Cal. Rptr. 766]* . The express legislative mandate for trial preference is a substantive public policy concern that supersedes such considerations [*Swaithes v. Superior Court (1989) 212 Cal. App. 3d 1082, 1085-1086, 261 Cal. Rptr. 41]* . Accordingly, *Code Civ. Proc. § 36(a)* is mandatory and absolute in its application in civil cases whenever the litigants are 70 years of age or older [*Swaithes v. Superior Court (1989) 212 Cal. App. 3d 1082, 1086, 261 Cal. Rptr. 41* ; *see also Sprowl v. Superior Court (1990) 219 Cal. App. 3d 777, 781, 268 Cal. Rptr. 592]* .

[d] Impact on Judicial Arbitration

The preference granted by *Code Civ. Proc. § 36(a)* controls over the conflicting provisions of *Code Civ. Proc. § 1141.11(a)*, mandating arbitration of civil actions involving $50,000 or less. Hence, arbitration under the statute is not possible if a motion for preference by a qualified litigant is filed [*Vinokur v. Superior Court (1988) 198 Cal. App. 3d 500, 503, 243 Cal. Rptr. 683]* .

[e] Applicability to Probate Cases

Code Civ. Proc. § 36(a) applies in probate proceedings under *Prob. Code § 1000* (application of rules of practice applicable to civil actions to proceedings under Probate Code) [*Swaithes v. Superior Court (1989) 212 Cal. App. 3d 1082, 1086, 261 Cal. Rptr. 41* (holding that *Code Civ. Proc. § 36(a)* applies to will contest)].

[3] Party Under Age 14 in Wrongful Death or Personal Injury Action

A civil action to recover damages for wrongful death or personal injury shall be entitled to preference on the motion of any party to the action who is under 14 years of age unless the court finds that the party does not have a substantial interest in the case as a whole [*Code Civ. Proc. § 36(b)*]. "Shall" as used in *Code Civ. Proc. § 36(b)* is mandatory [*Peters v. Superior Court (1989) 212 Cal. App. 3d 218, 224-226, 260 Cal. Rptr. 426]* (section does not violate separation of powers doctrine [*Cal. Const., art. III, § 3*] or equal protection guaranties of federal and state constitutions [*U.S. Const., amend. XIV*; *Cal. Const., art. I, § 7*] by unconstitutionally discriminating against 14-year-old to 69-year-old class)]. However, actions entitled to trial setting preference under *Code Civ. Proc. § 36(a)* must be given preference over these cases [*Code Civ. Proc. § 36(b)*]. Moreover, although *Code Civ. Proc. § 36(b)* is mandatory, it does not divest the court of its discretion to dismiss a case for delay in prosecution under *Code Civ. Proc. §§ 583.410* and *583.420(a)(2)* [*Landry v. Berryessa Union School Dist. (1995) 39 Cal. App. 4th 691, 695-697, 46 Cal. Rptr. 2d 119* ; for discussion of discretionary dismissal, see Ch. 212, *Dismissal*].

When a motion for preference pursuant to *Code Civ. Proc. § 36(b)* is granted, a party in an action based on a health provider's alleged professional negligence as defined in *Code Civ. Proc. § 364* must receive a trial date not sooner than six months and not later than nine months from the date that the motion is granted [*Code Civ. Proc. § 36(g)*; for discussion of "professional negligence" as defined in *Code Civ. Proc. § 364*, *see* Ch. 414, *Physicians: Medical Malpractice*].

[4] Party Terminally Ill or Injured

The court may in its discretion grant a motion for preference that is accompanied by clear and convincing medical documentation that concludes that one of the parties suffers from an illness or condition raising substantial medical doubt of survival of that party beyond six months, and that satisfies the court that the interests of justice will be served by granting the preference [*Code Civ. Proc. § 36(d)*].

Because *Code Civ. Proc. § 36(d)* does not limit trial preferences to cases based only on the moving party's ill health, a party may move for a trial preference due to the ill health of another party [*Heda v. Superior Court (1990) 225 Cal. App. 3d 525, 527-528, 275 Cal. Rptr. 136]* .

[5] Interests of Justice

[a] In General

Notwithstanding any other provision of law, the court may in its discretion grant a motion for preference that is supported by a showing that satisfies the court that the interests of justice will be served by granting this preference [*Code Civ. Proc. § 36(e)*].

[b] Preference to Avoid Mandatory Dismissal for Delay in Prosecution

[i] No Cause as a Matter of Law

Frequently, a plaintiff invokes *Code Civ. Proc. § 36(e)* (discussed in [a], *above*) to obtain a trial preference for the purpose of avoiding mandatory dismissal of his or her action under *Code Civ. Proc. § 583.310 et seq.*, particularly for failure to bring the action to trial within five years of its commencement [*see, e.g.,* *Dick v. Superior Court (1986) 185 Cal. App. 3d 1159, 1168, 230 Cal. Rptr. 297* (mandate proceeding to compel the lower court to set case specially for trial before the expiration of the five-year period for bringing an action to trial); *see also* *National Secretarial Service, Inc. v. Froehlich (1989) 210 Cal. App. 3d 510, 521, 258 Cal. Rptr. 506]* .

The Supreme Court has held, however, that "cause" justifying a discretionary grant of preference under *Code Civ. Proc. § 36(e)* is not established as a matter of law simply by the fact that the preference is necessary to avoid mandatory dismissal [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 440, 41 Cal. Rptr. 2d 362, 895 P.2d 469* ; *Salas v. Sears, Roebuck & Co. (1986) 42 Cal. 3d 342, 346, 228 Cal. Rptr. 504, 721 P.2d 590* (construing former *Code Civ. Proc. § 36(d)* (*now see Code Civ. Proc. § 36(e)*) and disapproving contrary holdings in *Campanella v. Takaoka (1984) 160 Cal. App. 3d 504, 206 Cal. Rptr. 745* , and *Kotoff v. Efseaff (1985) 172 Cal. App. 3d 991, 218 Cal. Rptr. 499*)].

Moreover, under *Cal. Rules of Ct., Rule 3.1335*, a motion to specially set requires a showing of good cause. A mere showing that the statutory period for bringing an action to trial would run unless the case were specially set is not enough to compel the trial court to grant the motion [Nye v. 20th *Century Ins. Co. (1990) 225 Cal. App. 3d 1041, 1045, 275 Cal. Rptr. 319]* . In this context, the fact that the delay did not prejudice the adverse party neither compels the trial court to grant a motion to specially set nor prevents it from granting a motion to dismiss [Nye v. 20th *Century Ins. Co. (1990) 225 Cal. App. 3d 1041, 1046, 275 Cal. Rptr. 319]* .

[ii] Discretionary Dismissal Criteria Applicable

In this situation, the trial court, in exercising its discretion under *Code Civ. Proc. § 36(e)*, must take the "total picture" into account, including the condition of the court calendar, dilatory conduct by plaintiff, prejudice to defendant of an accelerated trial date, and the likelihood of eventual mandatory dismissal if the early trial date is denied [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 441, 41 Cal. Rptr. 2d 362, 895 P.2d 469* ; *Salas v. Sears,*

Roebuck & Co. (1986) 42 Cal. 3d 342, 349, 228 Cal. Rptr. 504, 721 P.2d 590] . Thus, a motion to specially set to avoid the bar of the five-year statute for bringing a case to trial (*Code Civ. Proc. § 583.310*) raises the same issues as a motion for discretionary dismissal based on delay in prosecution (Code Civ. §§ 583.410, 583.420), and the court should consider the criteria listed in *Cal. Rules of Ct., Rule 3.1342(e)* when deciding a motion to specially set under *Code Civ. Proc. § 36(e)* [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 441, 41 Cal. Rptr. 2d 362, 895 P.2d 469* ; *Biondi, Flemming & Gonzales v. Braham (1990) 218 Cal. App. 3d 842, 847, 267 Cal. Rptr. 365]* .

Although the interests of justice weigh heavily against disposing of litigation on procedural grounds, the general policy in favor of trial on the merits will necessarily prevail only if a plaintiff makes some showing of excusable delay [*Salas v. Sears, Roebuck & Co. (1986) 42 Cal. 3d 342, 347, 228 Cal. Rptr. 504, 721 P.2d 590]* . On the other hand, if the plaintiff shows that he or she was diligent in prosecuting the action and the defendant makes no showing of prejudice, it may be an abuse of discretion for a trial court to refuse to grant a preference that would prevent a mandatory dismissal [*Dick v. Superior Court (1986) 185 Cal. App. 3d 1159, 1164-1169, 230 Cal. Rptr. 297* ; *see also Schmitt v. Superior Court (1989) 216 Cal. App. 3d 453, 456-457, 264 Cal. Rptr. 806]* .

When the trial to be set is a trial de novo after judicial arbitration, the motion may be characterized as a belated attempt to compel the trial court to fulfill its duty under *Code Civ. Proc. § 1141.20* to recalendar the case, rather than merely an attempt to regain time lost by plaintiff's procrastination. In this situation, the *Code Civ. Proc. § 583.130* preference for disposition of an action on the merits is reinforced by the *Code Civ. Proc. § 1141.20* mandate that plaintiffs not be penalized for undergoing arbitration [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 441-442, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* . However, although a trial may use a motion to specially set to correct its own failure to calendar or recalendar a case after arbitration, these considerations can be outweighed by the plaintiff's unreasonable delay, either before or after arbitration, as well as by prejudice to the defendant [*Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 443, 41 Cal. Rptr. 2d 362, 895 P.2d 469]* .

For further discussion and forms relating to discretionary and mandatory dismissal, see Ch. 212, *Dismissal* .

[6] Service of Notice of Motion

Unless the court orders otherwise, a party may file and serve a motion for preference supported by a declaration of the moving party that all essential parties have been served with process or have appeared [*Code Civ. Proc. § 36(c)(1)*]. At any time during the pendency of the action, a party who reaches 70 years of age may file and serve a motion for preference [*Code Civ. Proc. § 36(c)(2)*].

[7] Setting for Trial and Continuances When Motion Is Granted

On the granting of a motion for preference, the clerk must set the matter for trial not more than 120 days from that date [*Code Civ. Proc. § 36(f)*].

There may be no continuance beyond 120 days from the granting of the motion for preference except for physical disability of a party or a party's attorney, or on a showing of good cause stated in the record. No such continuance may be for more than 15 days, nor may more than one continuance for physical disability be granted to any party [*Code Civ. Proc. § 36(f)*]. These limits are mandatory [*Sprowl v. Superior Court (1990) 219 Cal. App. 3d 777, 780, 781, 268 Cal. Rptr. 592]* .

The practice of a court to give written notices of continuance to a date certain after a preference has been granted and a trial date has been set is not authorized, even though it may save the waste of attorneys' time and money that would result when attorneys appear on the date set for trial only to have the matter trail indefinitely to await an open court. *Code Civ. Proc. § 36* is mandatory, leaving no room for such courtesy and no discretion to the court [*Sprowl v. Superior Court (1990) 219 Cal. App. 3d 777, 781, 268 Cal. Rptr. 592]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedurePretrial MattersConferencesCase ManagementHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsProcedureAlternative Dispute ResolutionTortsWrongful Death & Survival ActionsGeneral Overview

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37-425 California Forms of Pleading and Practice--Annotated § 425.74

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.74 Preference for Action Brought by Victim of Crime

In addition to the preferences authorized by *Code Civ. Proc. § 36* [*see § 425.73*], a civil action is entitled to preference if the action is one in which the plaintiff is seeking damages that were alleged to have been caused by the defendant during the commission of a felony offense for which the defendant has been criminally convicted, and the court is to endeavor to try the action within 120 days of the grant of preference [*Code Civ. Proc. § 37*].

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37-425 California Forms of Pleading and Practice--Annotated § 425.75

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.75 Procedures Relating to Precedence and Preference

In certain cases in which a preference is sought, a motion is expressly required by statute [*see, e.g., Code Civ. Proc. § 36*, discussed in *§ 425.73*].

However, cases entitled to precedence in setting will normally be placed at the top of the civil active list by the court clerk. If it is clear that the case is entitled to precedence, a motion to establish it is usually unnecessary. The necessary facts and law establishing the precedence or preference are already before the court, since the case management order required to state, among other things, the nature of the case, whether it is entitled to legal preference, and, if it is, the citation of the law granting the preference [*see Cal. Rules of Ct., Rules 3.727(12), 3.728(13)*].

Moreover, a mere statement of the nature of the case will in many situations reveal whether it is entitled to legal precedence. If it does not, or when the right to preference has to be established by evidence outside the court's records, counsel may wish to use a noticed motion to seek an order establishing the preference [for a form, *see § 425.160*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial OrdersGovernmentsCourtsClerks of Court

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37-425 California Forms of Pleading and Practice--Annotated § 425.76

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.76 Motions to Continue, Advance, or Reset Trial

The power of the court to advance, reset, or specially set cases is exercised principally (1) when the case is entitled to statutory precedence or priority and (2) when the five-year period for mandatory dismissal under *Code Civ. Proc. § 583.310* and *583.360* is about to expire [*see Weeks v. Roberts (1968) 68 Cal. 2d 802, 806-807, 69 Cal. Rptr. 305, 442 P.2d 361* ; for discussion of the motion when it relates to mandatory dismissal, *see § 425.73[5][b]*].

A motion before trial to continue a trial date must be made on written notice to all other parties. The notice must be given and the motion made promptly on ascertaining the necessity for the continuance. A continuance before or during trial shall not be granted except on an affirmative showing of good cause [*Cal. Rules of Ct., Rule 3.1332*]. For further discussion and forms for use in moving for a continuance, see Ch. 136, *Continuances* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPretrial MattersConferencesCase ManagementCivil ProceduresPretrial MattersConferencesPretrial OrdersCivil ProceduresPretrial MattersContinuances

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37-425 California Forms of Pleading and Practice--Annotated § 425.77

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.77 Relationship to Other Time Limits

Granting a trial preference may make it impossible for a party to comply with other statutory time limits. When recognizing the rights under one statute can only be done at the expense of the loss or impairment of the benefits of the other, the statutes should be harmonized to avoid an absurd and clearly anomalous result. In such a situation, the court should balance the competing goals of the statutes in a way that gives recognition to both while achieving a just result [*Looney v. Superior Court (1993) 16 Cal. App. 4th 521, 535-536, 20 Cal. Rptr. 2d 182]* . For example, in *Looney*, the court resolved conflict between a *Code Civ. Proc. § 36* preference and *Code Civ. Proc. § 425.13* (requiring the motion to claim punitive damages in actions arising out of medical malpractice to be filed not less than nine months prior to the initial trial setting) by implying an exception to Section 425.13 to allow the granting of a motion brought less than nine months prior to the first assigned trial date when it is necessary to protect a plaintiff's right to a preferential trial date and the defendant receives or has had a reasonable opportunity to conduct discovery regrading the punitive damage claim [*Looney v. Superior Court (1993) 16 Cal. App. 4th 521, 536, 20 Cal. Rptr. 2d 182* ; for further discussion of Section 425.13, *see Ch. 177, Damages, § 177.40* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
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37-425 California Forms of Pleading and Practice--Annotated §§ 425.78-425.89

AUTHOR: Evelio M. Grillo Editorial Consultant

[Reserved]

§§ 425.78[Reserved]

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37-425 California Forms of Pleading and Practice--Annotated § 425.90

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.90 Settlement Conference Procedure

[1] Purpose

Settlement is an integral part of the pre-trial process. All courts attempt to facilitate settlement of civil cases either by referring civil cases to ADR, by holding a court supervised settlement conference, or both.

[2] Governing Law

Settlement conferences are governed by *Cal. Rules of Ct., Rules 3.1380, 3.1385* and by local court rules and policies. For the effect of local court rules and policies, see *§ 425.93[2]*. For general discussion relating to settling a case and discussion of enforcement of settlement agreements, see Ch. 520, *Settlement and Release* .

[3] Judge's Role at Settlement Conference

All sorts of issues are discussed in confidence at a settlement conference, including the strengths and weaknesses of each party's case and what the party is willing to pay or receive in settlement. The settlement judge does not, however, decide anything. Rather, the settlement judge uses his or her judicial status to help the parties reach a settlement if reasonably possible [*Cho v. Superior Court (1995) 39 Cal. App. 4th 113, 125, 45 Cal. Rptr. 2d 863]* .

Judicial participation often creates a climate that expedites productive negotiations for settlement. The settlement conference judge contributes the views of an outsider who usually enjoys considerable prestige. As a consequence, the settlement conference presided over by an impartial judge often constitutes a practical substitute for trial [*Mezzetti v. Superior Court (1979) 94 Cal. App. 3d 987, 992, 156 Cal. Rptr. 802* , *quoting* California Pretrial and Settlement Procedures, § 7.3 (Cal. C.E.B. 1963)].

[4] Mandatory Settlement Conferences

On the court's own motion or at the request of any party, the court may set one or more mandatory settlement conferences [*Cal. Rules of Ct., Rule 3.1380(a)*]. If a mandatory settlement conference is to be held, the court assigns a settlement conference date in the case management order [*Cal. Rules of Ct., Rule 3.728(10)* (case management order); for a form, *see § 425.131*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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37-425 California Forms of Pleading and Practice--Annotated § 425.91

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§ 425.91 Settlement Conference Statement

No later than five days before the initial date set for the settlement conference, each party must submit to the court and serve on each party a mandatory settlement conference statement containing a good faith settlement demand, an itemization of economic and non-economic damages by each plaintiff, and a good faith offer of settlement by each defendant. The statement must set forth and discuss in detail all facts and law pertinent to the issues of liability and damages involved in the case as to that party, and comply with any additional requirement imposed by local rule [*Cal. Rules of Ct., Rule 3.1380(c)*; for a form, *see § 425.171*].

Legal Topics:

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37-425 California Forms of Pleading and Practice--Annotated § 425.92

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.92 Who Must Attend Conference

Trial counsel, parties, and persons with full authority to settle the case must personally attend the conference, unless excused by the court for good cause. If any consent to settle is required for any reason, the party with that consensual authority must be personally present at the conference [*Cal. Rules of Ct., Rule 3.1380(b)*]. Local rule may provide more specific requirements regarding who must attend the conference [*see* Los Angeles Co. Super. Ct. Rules, Rule 7.9(b)(4); for discussion, *see § 425.35*].

Although a court may not compel a litigant to settle a case, it may direct the litigant to engage personally in settlement negotiations, provided the conditions for such negotiations are otherwise reasonable. The fact that the court may not force a party to be personally present at the trial of a civil action does not mean that it may not compel the party's attendance in person at a mandatory settlement conference. A civil trial may proceed expeditiously without the presence of a party, but the presence of all parties personally at settlement negotiations enhances their chances of success [*Wisniewski v. Clary (1975) 46 Cal. App. 3d 499, 505, 120 Cal. Rptr. 176* ; *Sigala v. Anaheim City Sch. Dist. (1993) 15 Cal. App. 4th 661, 669, 19 Cal. Rptr. 2d 38]* .

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37-425 California Forms of Pleading and Practice--Annotated § 425.93

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.93 Additional Considerations

[1] Sanctions

The court may impose sanctions as provided by law for failure to comply with *Cal. Rules of Ct., Rule 3.1380* regarding settlement conferences [*Cal. Rules of Ct., Rule 2.30*]. For discussion of sanctions, see Ch. 510, *Sanctions* .

[2] Local Court Rules Relating to Preparation for and Attendance at Settlement Conference

[a] Who Must Attend

Local rules may elaborate on the *Cal. Rules of Ct., Rule 3.1380(b)* requirement regarding who must attend the conference. For example, under Los Angeles County Superior Court rules, the persons with authority to settle who must attendunless expressly excused by the judge for good cause, include [Los Angeles Co. Super. Ct. Rules, Rule 7.9(d)(1)]:

- The litigants (unless consent of the particular litigant is not required for the settlement).
- An authorized representative of any insurance company that has coverage involved in the case.
- An authorized representative of a corporation or other business or government entity that is a litigant.

These persons must have full authority to make decisions or negotiate concerning the settlement of the case [Los Angeles Co. Super. Ct. Rules, Rule 7.9(d)(1)].

Los Angeles County Superior Court Rules further provide a procedure for making any request to excuse attendance of a person. Under the Los Angeles procedure, the request must be by written stipulation of the parties or by an ex parte application. Moreover, a person excused by the court must be available for telephone communication with counsel and the court at the time set for the settlement conference [Los Angeles Co. Super. Ct. Rules, Rule 7.9(d)(2); *see also* Los

Angeles Co. Super. Ct. Rules, Rule 9.9 (procedure on ex parte application)].

Attorneys for all parties appearing in the action must at tend the conference and be intimately familiar with the pertinent available evidence involving liability and damages. Each attorney must be prepared to discuss the case in depth and, except for good cause shown, must be the attorney who will try the case [Los Angeles Co. Super. Ct. Rules, Rule 7.9(d)(3)].

Los Angeles County Superior Court Rules also require the plaintiff's attorney to ascertain whether there are liens which bear on a potential settlement and, if so, request the claimants or their representatives to attend the conference or be available for telephone communication during the conference [Los Angeles Co. Super. Ct. Rules, Rule 7.9(d)(4)].

[b] Written Statement of Facts and Contentions

Los Angeles County Superior Court also requires a written statement from each party. The statement must contain a concise statement of the material facts of the case and the factual and legal contentions in dispute. It must also identify all parties and their capacities in the action and contain citations of authorities that support legal propositions important to resolution of the case. The written statement of a party claiming damages must list all special damages claimed as well as stating any amounts claimed as general and punitive damages and the total amount claimed as damages. In a personal injury action the special damages must be listed. The list must include all such expenses incurred to the time of the settlement conference. The statements must also include the general status of the case including offers for settlement in place [Los Angeles Co. Super. Ct. Rules, Rule 7.9(e)].

Each party must submit a written statement to the court and serve it on adversaries not later than five calendar days before the conference. It must be submitted directly to the courtroom in which the settlement conference is calendared, and not to the court generally or to the clerk's office. The written statements will not be filed since they are used only at the settlement conference and will be returned to counsel at the conclusion of the conference [Los Angeles Co. Super. Ct. Rules, Rule 7.9(e); for a form of statement, *see § 425.131*].

[3] Duty to Notify Court and Others If Case Is Resolved

If an entire case is settled or otherwise disposed of, each plaintiff must immediately file written notice of the settlement or other disposition with the court and serve the notice on all parties any arbitrator or other court-connected ADR neutral involved in the case. Each plaintiff must also give immediate oral notice to the court and any arbitrator or other neutral if a hearing, conference, or trial is scheduled to take place within 10 days [*Cal. Rules of Ct., Rule 3.1385*]. Failure to notify an arbitrator or other neutral of a settlement at least 2 days before a scheduled hearing or session may result in the court ordering the party to compensate the arbitrator or neutral for the scheduled hearing time [*Cal. Rules of Ct., Rule 3.1385(a)(2)*]. Although this rule is binding in all superior courts, courts by local rule frequently impose a similar duty. For example, the Los Angeles County Superior Court has provided that on reaching settlement of a case other than at a settlement conference with a judge present, each party seeking any affirmative relief in the action must immediately notify the court of the fact of settlement [Los Angeles Co. Super. Ct. Rules, Rule 7.9(f)].

An unlawful interference with the proceedings of the court may subject the attorney or party to a contempt of court proceeding [*see Code Civ. Proc. § 1209(a)(8)*]. Additional sanctions may be provided by local court rule [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 7.13]. For discussion of sanctions, see *§ 425.53* and Ch. 510, *Sanctions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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37-425 California Forms of Pleading and Practice--Annotated § 425.94

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.94 Special Procedures Relating to Settlement

[1] Two Procedures to Consider

There are two special statutory procedures relating to settlement which should always be considered by counsel during the pretrial phase of litigation. They are offers to compromise under *Code Civ. Proc. § 998*; and stipulated settlements under *Code Civ. Proc. § 664.6*. Each procedure will be discussed and distinguished below.

[2] Offers to Compromise

[a] 998 Offers

Offers to compromise under *Code Civ. Proc. § 998*, which are often referred to as "998 Offers" are a cost shifting device designed to encouragesettlement between the parties before trial. The statue operates by imposing certain of the opposing party's court costs on a litigant who does not accept a statutory offer to compromise *and* who fails to obtain a more favorable result at trial [*Code Civ. Proc. § 998(c)-(e)*]. *Code Civ. Proc. § 998* thus may operate as a severe sanction against a party who unreasonably declines to accept a statutory offer of settlement. *Code Civ. Proc. § 998* is strictly construed in favor of the party sought to be subjected to its operation [*Garcia v. Hyster Co. (1994) 28 Cal. App. 4th 724, 732, 34 Cal. Rptr. 2d 283]* .

[b] Operation of Statute

Code Civ. Proc. § 998(b) allows any party to serve on any other party to the action not less than 10 days prior to trial a written offer to allow judgment to be taken in accordance with the terms and conditions stated at that time. If the offer is accepted, the offer with proof of acceptance is filed with the court and judgment is entered in accordance with the terms of the offer [*Code Civ. Proc. § 998(b)(1)*]. If the offer is not accepted prior to trial, or within 30 days after it is made, whichever comes first, the offer is deemed withdrawn and cannot be given in evidence upon the trial [*Code Civ. Proc. § 998(b)(2)*].

[c] What Constitutes a Statutory Offer

A statutory offer to compromise must be in writing and must include a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted [*Code Civ. Proc. § 998(b)*].

For forms of an offer to compromise under *Code Civ. Proc. § 998*, see *Ch. 520, Settlement and Release, §§ 520.110, 520.110A*.

[d] When Made

A statutory offer to compromise may be made at anytime during the litigation up to ten days prior to the trial, and is deemed withdrawn as of the commencement of the trial, or within 30 days after the offer is made, whichever comes first [*Code Civ. Proc. § 998(b)*]. For the purposes of *Code Civ. Proc. § 998* the trial commences at the beginning of the opening statement of the plaintiff or counsel, or if there is no opening statement, at the time the first witness is sworn in, or the introduction of any evidence [*Code Civ. Proc. § 998(b)(3)*].

[e] Acceptance

Any acceptance of a statutory offer to compromise, whether made on the document containing the offer or on a separate document, must be in writing and signed by counsel for the accepting party or, if not represented by counsel, by the accepting party [*Code Civ. Proc. § 998(b)*].

For forms of an acceptance to an offer to compromise under *Code Civ. Proc. § 998*, see *Ch. 520, Settlement and Release, §§ 520.110A, 520.111*.

[f] Operation of Cost Shifting Provisions

[i] Different for Plaintiff and Defendants

The cost shifting provisions of *Code Civ. Proc. § 998* operate differently for plaintiffs and defendants.

[ii] Rule Applicable to Plaintiffs

If an offer made by the defendant is not accepted by the plaintiff, and the plaintiff does not obtain a more favorable judgment, then the plaintiff *shall not* recover his or her postoffer costs and *shall* pay the defendants costs from the time of the offer [*Code Civ. Proc. § 998(c)*]. The judgment obtained by the plaintiff is calculated exclusive of postoffer costs and attorney's fees [*Code Civ. Proc. § 998(c)(2)(A), (B)*]. The court in its discretion, in cases other than eminent domain, may require the plaintiff to pay a reasonable sum to cover the costs of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant [*Code Civ. Proc. § 998(c)(1)*]. If a plaintiff does not obtain a more favorable judgment following withdrawal or rejection of an offer under *Code Civ. Proc. § 998*, the defendant's costs are deducted from any damages awarded to the plaintiff, and *if the costs awarded to the defendant exceed the damages awarded to the plaintiff, the net amount is awarded to the defendant and judgment is awarded in the defendant's favor for the net amount* [*Code Civ. Proc. § 998(e)*].

[iii] Rule Applicable to Defendants

If the defendant does not accept an offer by the plaintiff, and the defendant fails to obtain a more favorable judgment, then the court in its discretion may require the defendant to pay a reasonable sum to cover the costs of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation

for trial or arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to the plaintiff's costs [*Code Civ. Proc. § 998(d)*].

[g] Special Considerations Relating to Experts

"Expert witnesses" within the meaning of *Code Civ. Proc. § 998* include police officers [*Code Civ. Proc. § 998(f)*]. The costs for services of experts for the purpose of *Code Civ. Proc. § 998(c)* and *(d)* may not exceed those specified in *Gov. Code § 68092.5* [*Code Civ. Proc. § 998(h)*].

[h] Inapplicable to Plaintiffs in Eminent Domain Cases

Code Civ. Proc. § 998 is not applicable to offers made by plaintiffs in eminent domain actions [*Code Civ. Proc. § 998(g)*].

PRACTICE TIP:

Evaluate Offer Versus Potential Judgment Carefully. Counsel should be very careful when evaluating an offer to compromise and should conduct independent research to determine how the judgment will be calculated for the purpose of determining whether the judgment exceeds the amount of the statutory offer, and also confirm whether in a case involving multiple plaintiffs or defendants, an offer must be accepted by only one or all of the parties subject to the offer. Pre-offer costs, the availability of prejudgment interest and the present value of a judgment when measured against the original offer all may impact the calculation of the size of the judgment for the purpose of applying the *Code Civ. Proc. § 998* cost shifting provisions. *By Evelio Grillo*

PRACTICE TIP: Communicate Settlement Offers to Client. Counsel should *always* communicate a 998 offer to the client *immediately* with a letter explaining the potential impact of cost shifting on the outcome of the case. Counsel's failure to do so, particularly in cases involving high costs and the extensive uses of experts, may result in an unhappy client, and could potentially result in a malpractice action against the attorney if the defendant's costs exceed the plaintiff's judgment in a case where the plaintiff has rejected an offer and receives a less favorable verdict at trial. *By Evelio Grillo*

For discussion and forms relating to *Code Civ. Proc. § 998*, see Ch. 520, *Settlement and Release* .

[3] Stipulated Settlements

If the parties agree on settlement terms before or during trial, they may stipulate, in a writing signed by the parties outside the court's presence or orally before the court, for the settlement of the case, or a part thereof [*Code Civ. Proc. § 664.6*]. The advantage to stipulating to settlement pursuant to *Code Civ. Proc. § 664.6* is twofold. First, if a party breaches the terms of the settlement, the court may, on noticed motion, enforce the settlement by entry of judgment pursuant to the terms of the settlement [*Code Civ. Proc. § 664.6*]. Second, the court may retain jurisdiction to enforce the settlement if the parties so request [*Code Civ. Proc. § 664.6*].

PRACTICE TIP:

Make Clear, Specific Record of Settlement With Client Involvement. *Code Civ. Proc. § 664.6*, when used properly, is a very powerful tool for settling cases. In order to avoid any misunderstanding, however, is important for counsel to be as specific as is practicable under the circumstances when placing a settlement on the record. Work out the specifics of all of the terms of settlement *before* the settlement is placed on the record, and *always* recite in the presence of the client that the settlement has been explained to the client, recite any disadvantageous provisions of the settlement, and allow the client to ask questions on the record. Doing so will avoid any future misunderstandings between the parties to the settlement, as well as between attorney and client. *By Evelio Grillo*

For discussion and forms relating to Section 664.6, including the requirement of the party's signature when the stipulation is written [*see Levy v. Superior Court (1995) 10 Cal. 4th 578, 584-586, 41 Cal. Rptr. 2d 878, 896 P. 2d 171* ; *Robertson v. Chen (1996) 44 Cal. App. 4th 1290, 52 Cal. Rptr. 2d 264* (mandatory settlement conference statement signed by counsel for one side, rather than one writing signed by both sides, held insufficient to allow enforcement under *Code Civ. Proc. § 664.6*)], see Ch. 520, *Settlement and Release* , and for forms for obtaining entry of judgment under Section 664.6, see Ch. 318, *Judgments* .

The time during which a settlement agreement is in effect tolls the five-year period for bringing a case to trial under *Code Civ. Proc. § 583.310* [*Canal Street, Ltd. v. Sorich (2000) 77 Cal. App. 4th 602, 608, 91 Cal. Rptr. 2d 811]* . The computation of that five-year period specifically excludes the time during which bringing the action to trial was impossible, impracticable, or futile [*Code Civ. Proc. § 583.340(c)*], and attempting to bring an action to trial when all issues have been resolved through settlement would be futile [*Canal Street, Ltd. v. Sorich (2000) 77 Cal. App. 4th 602, 608, 91 Cal. Rptr. 2d 811]* . Therefore, a motion pursuant to *Code Civ. Proc. § 664.6* to enter judgment according to the terms of the settlement agreement need not be made before five years have passed after the action was commenced to avoid dismissal for want of prosecution. For further discussion of dismissal for want of prosecution, see Ch. 212, *Dismissal* .

Even if the summary procedures of *Code Civ. Proc. § 664.6* are unavailable, a settlement agreement might be enforceable by summary judgment, a suit for breach of contract (prosecuted perhaps by way of a supplemental pleading), or a suit in equity [*Levy v. Superior Court (1995) 10 Cal. 4th 578, 586 n.5, 41 Cal. Rptr. 2d 878, 896 P. 2d 171* ; *Robertson v. Chen (1996) 44 Cal. App. 4th 1290, 1293, 52 Cal. Rptr. 2d 264]* .

Legal Topics:

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

§§ 425.95[Reserved]

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Volume 37: Pretrial Proceedings thru Privacy-Chs. 425-439
Chapter 425 PRETRIAL PROCEEDINGS
PART II. LEGAL BACKGROUND
E. Pretrial Strategy

37-425 California Forms of Pleading and Practice--Annotated § 425.100

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.100 Preliminary Considerations

Since pretrial strategy is something that requires extensive research to understand the roadmap ahead, the factors in the following sections are place here after the previous discussions of pretrial procedure.

Bringing a case to trial requires consideration of many strategic factors at each stage of the proceedings. For procedural checklists that summarize the discussion below, see *§§ 425.120, 425.121*.

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37-425 California Forms of Pleading and Practice--Annotated § 425.101

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.101 Initial Investigation

[1] Prefiling Investigation

Counsel should conduct sufficient investigation before filing either a complaint or a responsive document to ensure that the action or response warrants a legal filing. The failure to do so may result in the imposition of sanctions if the court determines that the complaint was filed primarily for an improper purpose [*see Code Civ. Proc. § 128.7* (sanctions for frivolous tactics in actions commenced after January 1, 1995. For discussion, *see* Ch. 510, *Sanctions*)]. For discussion, see Ch. 123, *Complaints and Cross Complaints* , and Ch. 26, *Answers* .

PRACTICE TIP:

Pretrial Investigation. Pretrial investigation should be conducted as a matter of course in all cases. Requesting the client to provide documents and insurance policies and to identify witness in the pretrial investigation, and interviewing witnesses as appropriate, not only helps to fulfill counsel's ethical obligations under *Code Civ. Proc. § 128.7* and the Code of Professional Responsibility, but may also aid in screening cases-an important malpractice consideration--as well as suggesting additional defenses or theories of liability or sources of recovery (such as insurance which may pay for damages or defense costs), as well as providing an early start on organizing discovery. *By Evelio Grillo*

PRACTICE TIP: Pretrial Research. Pretrial research should be conducted at the first available opportunity, preferably even before counsel agrees to representation, if for no other reason than to confirm the applicable limitations period and applicable claims statutes (for litigation potentially involving governmental agencies) for the potential causes of action. Limitations periods and substantive law constantly change. Protect your client and avoid potential malpractice claims by verifying in every case the applicable limitations periods and the substantive law applicable to the case. And do not forget that where insurance is involved, there may be internal statutes of limitations or claims procedures in the policy which bear on the right to recovery. *By Evelio Grillo*

[2] Jurisdictional Considerations

Smaller cases may be brought as limited civil cases in the superior court [*see Code Civ. Proc. §§ 85-86* (limited civil cases)]. Filing the smaller case as a limited civil case not only allows the parties to take advantage of discovery limitations and shorter trial calendars, but may also reduce the costs of litigation [*see Code Civ. Proc. §§ 93, 94*]. Filing the case with the appropriate jurisdictional classification [*see Code Civ. Proc. § 32.5*] also avoids the potential for costs to be awarded against the *prevailing party* when a judgment obtained in the superior court is $25,000 or less, i.e. less than the jurisdictional minimum for a case other than a limited civil case [*see Code Civ. Proc. § 1033(a)*; *see also Code Civ. Proc. § 85*]. For discussion, see Ch. 324, *Jurisdiction: Subject Matter* . In transitory actions, counsel should select a convenient but appropriate venue to minimize inconvenience to parties and witnesses and to avoid an unnecessary motion for change of venue which may result in the imposition of costs and attorneys fees against the party who initiated the action [*see Code Civ. Proc. §§ 395, 396b(b)*]. For discussion, see Ch. 571, *Venue* .

[3] Developing Litigation Strategy

Counsel should consider using consultants or experts early in the litigation to assist in formulating litigation and discovery plans. Consulting experts during the early stages of a litigation is often easier, more effective, and potentially less costly than retaining an expert during the later stage of a case after significant discovery has been taken.

PRACTICE TIP:

Retaining Experts. Early retention of experts is often the most cost effective means of focusing discovery, developing facts and identifying industry standards and the applicable standards of care. Experienced experts can provide a wealth of information at a nominal cost that could cost many thousands of dollars if developed independently by counsel, and if retained early, may ultimately cost less than the expert who is required to wade through voluminous deposition testimony in order to gear "up to speed." *By Evelio Grillo*

[4] Litigation Budget

A consideration that drives most litigation is cost. A budget should be developed as early in the litigation as is practical, and dialogue with the client concerning litigation strategy and issues relating to costs should be initiated at the first opportunity, preferably when the attorney-client relationship is established. Frequent and candid communication with the client minimizes problems and the potential for misunderstanding as the litigation evolves, and may help counsel identify problem areas or problem clients which may signal potential malpractice concerns.

[5] The Discovery Plan

For any size litigation, a discovery plan helps to frame the issues, reduce the chances of spoliation of evidence, and minimize costs. Whether written discovery or depositions are the most cost effective in a particular case will depend on the nature of the case as well as the type of information sought. For example, because counsel and the parties are under a duty to disclose in the answers to interrogatories all information reasonably available to the responding party, interrogatories are generally the most effective means of identifying witnesses, the location of documents and policies and practices which may bear on the location of additional evidence during the early stages of litigation [*see Code Civ. Proc. § 2030* (*Code Civ. Proc. §§ 2030.010-2030.410* operative July 1, 2005); *Deyo v. Kilbourne (1978) 84 Cal. App. 3d 771, 149 Cal. Rptr. 499]* . Similarly, in cases which involve voluminous documents and numerous witnesses, or medical records, many counsel believe written discovery such as requests for production of documents, third party subpoenas, and interrogatories must be propounded *before* the first deposition is noticed in order to be able to take an effective deposition. Conversely, when a case involves few documents, the best choice may be to notice the deposition of the plaintiff or defendant immediately, before the opposing party's theory of the case is well developed. There is no hard and fast rule of decision concerning the timing and use of discovery other than to think through how the various methods of discovery may complement each other *before* propounding the first discovery.

PRACTICE TIP:

Effective Discovery Plan. When developing your discovery plan, do not fall prey to the temptation to utilize a shotgun approach to discovery. Overly broad inspection demands or interrogatories may result in a huge volume of irrelevant material. Conversely, well-crafted interrogatories regarding the adverse party's record keeping practices, or a request for copies of documents reflecting those record keeping practices may result in a road map for subsequent written discovery or depositions. In matters of written discovery, at least during the early stages of a litigation, simpler discovery may be the most effective discovery. *By Evelio Grillo*

Finally, if there is any question in counsel's mind that data or documents may be destroyed, a letter to opposing counsel cautioning against the otherwise routine destruction or backing up of computerized data, or an appropriate interrogatory requesting identification of all documents destroyed or backed up, may prevent inadvertent loss of relevant information. For discussion, see Ch. 190-200, *Discovery* , and DeMeo, California Deposition and Discovery Practice , Ch. 2 (Matthew Bender).

[6] Anticipating Motions

When developing a litigation strategy and budget, counsel should anticipate law and motion matters [*see* Ch. 372, *Motions and Orders*]. While certain actions and issues lend themselves to active motion practice, more often the necessity for pretrial motions becomes apparent as the litigation progresses. Whether or not to bring a motion also depends on the likelihood and the relative value of a favorable ruling weighed against the costs of bringing a motion and the consequences of an unfavorable ruling. For example, a defendant may consider demurring to all or part of the complaint, but should weigh the fact that an unsuccessful demurrer precludes a later motion for judgment on the pleadings during a later stage of the litigation on the same ground absent a material change in the law [*see Code Civ. Proc § 438(g)(1)*]. Counsel must therefore evaluate the probability of an unsuccessful demurrer with due consideration given to the impact of being barred from filing a motion for judgment on the pleadings as the trial date approaches. For discussion, see Ch. 372, *Motions and Orders* , and Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

Similarly, because certain issues may lend themselves to summary proceedings such as a motion for summary judgment or summary adjudication, it is usually a good idea to evaluate the opposing party's pleading to determine whether the pleading is sufficiently clear to allow a summary judgment or adjudication motion to be framed, and if not, to file a general or special demurrer, or a motion to strike, as appropriate. Although extensive discovery is often required before a summary judgment or adjudication motion can be brought, in some instances, provided the pleadings are sufficiently clear to frame the legal issues of the case, a summary adjudication motion may be brought early, which if successful, may limit the scope of the action. Thus, counsel's failure to consider the impact of the initial pleadings on law and motion matters during the early stages of the litigation may as a practical matter limit the options for resolution of a case without trial during later stages of the litigation. For discussion, see Ch. 537, *Summary Judgment* .

[7] Bifurcation, Coordination, and Preferences

A final consideration when developing litigation strategy is to consider whether an action may lend itself to coordination or consolidation with other pending actions, to the bifurcation of issues, or is entitled to any trial preference.

As a practical matter, except in cases where the matters to be consolidated clearly arise out of the same tort or occurrence, the decision to consolidate an action may have to await the development of facts through discovery which either lend support for consolidation, or suggest that consolidation should be avoided for strategic reasons. Nevertheless, coordination and consolidation motions (as with other pretrial motions) should be given due consideration when developing a pretrial strategy. For discussion, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

Counsel should also consider early on in the case whether an action is one which may lend itself to the bifurcation of issues. Bifurcation may be strategically desirable when there appears to be a strong procedural defense to an action, such as the statute of limitations, or when a there is a strong possibility of prevailing on a substantive defense which requires minimal fact finding by the trier of fact, for example, issues such as agency, duty, or ownership or control of property. The same types of issues which lend themselves to bifurcation also tend to be prime candidates for summary adjudication and judgment. Accordingly, as with summary judgment motions, bifurcation should be considered early in the pretrial process, rather than as an afterthought.

Motions for trial preferences are another form of procedural motion which should be considered by counsel during the prefiling and earliest stages of litigation for several reasons. For some preferences, the ability to claim the preference on motion may be lost if the motion is not timely filed [*see Code Civ. Proc. § 36*]. In many cases trial preferences make good strategic sense by either bringing the case to trial sooner and thereby preserving critical testimony which is in danger of being lost, or simply forcing an earlier settlement in a clear liability case. In all events, preferences should be considered and explored early on.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedureVenueMotions to TransferConvenience of WitnessesCivil ProcedureDiscoveryGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedureSummary JudgmentStandardsAppropriatenessCivil ProcedurePretrial MattersConferencesCase ManagementEvidenceTestimonyGeneral OverviewTortsProcedureDiscovery

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37-425 California Forms of Pleading and Practice--Annotated § 425.102

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§ 425.102 Alternatives to Trial

In all cases in which the amount in controversy is $50,000 or less, counsel must consider the impact of mandatory judicial arbitration on the management of the case [*see Code Civ. Proc. § 1141.11*; for discussion, *see* [4], *below*]. Regardless of the amount in controversy, counsel may wish to consider whether, depending on the nature of the action, the case is appropriate for resolution by some other means than a trial, *even before* filing an action. Virtually all courts offer arbitration as a form of alternative dispute resolution, and increasingly, many courts offer mediation as a supplement to, or in lieu of, arbitration and, in the case of family law, participation in mediation is mandatory. For discussion of the *Code Civ. Proc. § 1775 et seq.* mediation pilot project in Los Angeles County that acts as an alternative to judicial arbitration, see Ch. 37, *Judicially Mandated Civil Action Mediation* . This program may be adopted by other jurisdictions as well [*see Code Civ. Proc. § 1775.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionMediationsCivil ProcedurePretrial MattersConferencesCase ManagementFamily LawAlternative Dispute ResolutionArbitrationFamily LawAlternative Dispute ResolutionMediation

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37-425 California Forms of Pleading and Practice--Annotated § 425.103

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.103 Internal Case Management

[1] Calendaring

Effective case management requires a dependable calendaring system. Minimally, a calendaring system must apprize the attorney of deadlines imposed by delay reduction statutes and local rules, as well as the Code of Civil Procedure. Most critical are procedural deadlines which are jurisdictional or preclude the court or the parties from further consideration of an issue if an act is not done within a statutory deadline. For example, when counsel anticipates a challenge to a judge in a single assignment case, the challenge must be brought within ten days of the notice of assignment of a single judge for all purposes, or a challenge to that judge will be precluded [*Code Civ. Proc. § 170.6(2)*]. For discussion, see Ch. 317, *Judges* . Similarly, counsel's failure to file timely motions for reconsideration is another example of a critical jurisdictional deadline which may be missed if not properly and accurately calendared [*see Code Civ. Proc. § 1008*].

A calendaring system should also do the following at a minimum:

- Flag the dates by which pretrial work, especially discovery, must be completed in order to meet court deadlines for discovery or motion cutoff.

- Identify critical trial deadlines, such as the last day for filing jury instructions and voir dire with the court (if required by local rule).

- Specify case management dates and deadlines such as status conferences, case management conferences, and the last day for making or accepting offers to compromise.

An effective calendaring system and case management will also help counsel to avoid the all-too common case management problems such as leaving too much discovery uncompleted until just before the cutoff, which may result in

multiple tracks of depositions, and require the utilization of attorneys who are unfamiliar with the case, or scrambling to retain experts. For discussion of discovery plans and deadlines, see Ch. 190, *Discovery: Scope, Regulation, and Timing* and DeMeo, California Deposition and Discovery Practice, Chs. 2 and 3 (Matthew Bender).

PRACTICE TIP:

Responsibility for Meeting Deadlines Remains on Attorney. There are several good computer generated calendaring systems available for litigation practice, at minimal cost. Some of these calendars may be upgraded to provide for variation in local rules and practice at a nominal cost. Particularly for counsel who practice in more than one venue or jurisdiction, computer generated calendaring systems are an invaluable aid in keeping counsel apprized of important deadlines. Remember, though, the responsibility for meeting important deadlines always rests with the attorney with responsibility for the case, and not the calendar clerk or secretary. *By Evelio Grillo*

[2] Timing

[a] Prefiling Timing Considerations

Considerations affecting when a complaint should be filed may include whether the action is entitled to precedence or preference [*see § 425.70* et seq.], or whether an issue or special defense should be bifurcated for trial [*see § 425.60* et seq.].

[b] Court Controls After Action Filed

Counsel exert the most control over the timing of an action before it is filed. Under the Trial Delay Reduction Act, once a complaint is filed, the courts, and not the litigants, are charged with managing the litigation process through resolution of the case [*see Gov. Code § 68607*]. Therefore, counsel should consider carefully when an action should be filed so as to maximize his or her ability to develop the case as fully as possible within the existing time constraints.

Under the Trial Court Delay Reduction Act (TCDRA) [*see § 425.10* et seq.], cases move very quickly under differential case management [*see § 425.30* et seq.]. The time to develop facts and legal theories, and to conduct discovery is shorter.

[3] Trial Setting Stage

If an action has not settled by time of the case management conference, counsel should be prepared to try the case. This includes keeping the calendar clear of other matters during the intensive, time-consuming task of trial preparation, notifying and subpoenaing witnesses, and rechecking the many crucial cutoff dates that occur at or after the trial setting stage, including the:

- Discovery cutoff.
- Deadline for hearing summary judgment motions.
- Deadlines relating to demands for compromise.
- Posting of jury fees.
- Noticing of party witnesses to appear at trial.

For checklists and organizational aids to help in trial preparation, see Johnson, California Trial Guide (Matthew Bender). For discussion, see Ch. 190-200, *Discovery* and Ch. 537, *Summary Judgment* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureSummary JudgmentHearingsGeneral OverviewCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesPretrial OrdersCivil ProcedureTrialsJury TrialsJurorsSelectionVoir DireCivil ProcedureTrialsJury TrialsJury InstructionsGeneral Overview

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37-425 California Forms of Pleading and Practice--Annotated §§ 425.104-425.109

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§§ 425.104[Reserved]

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AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.110 Related Matthew Bender Publications

For memoranda of points and authorities related to forms in this chapter, see California Points and Authorities, Ch. 180, *Pretrial Proceedings* (Matthew Bender)

For discussion and forms relating to trial procedures, see California Trial Guide (Matthew Bender).

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37-425 California Forms of Pleading and Practice--Annotated § 425.111

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.111 California Constitution

Power of Judicial Council to adopt rules for court administration, practice, and procedure not inconsistent with statute. *Cal. Const., art. VI, § 6*

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37-425 California Forms of Pleading and Practice--Annotated § 425.112

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.112 State Statutes

[1] Bringing Cases to Trial Generally

Legislative confirmation of Judicial Council's constitutional power to promulgate rules governing pretrial proceedings. *Code Civ. Proc. § 575*

Authority to adopt local court rules. *Code Civ. Proc. §§ 575.1, 575.2*; *Gov. Code §§ 68070, 68608(b)*

Definition of issues in pleadings. *Code Civ. Proc. § 588*

When issue of law arises. *Code Civ. Proc. § 589*

Bringing case to trial. *Code Civ. Proc. § 594*

Arbitration determination conference in cases subject to mandatory judicial arbitration. *Code Civ. Proc. § 1141.16*

Effective date of rules adopted by superior courts and Judicial Council. *Gov. Code §§ 68071, 68072*

[2] Superior Court Procedures

Functioning assistive listening system or computer-aided transcription system as required to be provided by court at request of any party, witness, attorney, judicial employee, judge, juror, or other participant who is hearing impaired, in any civil or criminal proceeding. *Civ. Code § 54.8*

Providing for telephone appearances at certain conferences, hearings, and proceedings. *Code Civ. Proc. § 367.5*

[3] Trial Setting

Power of courts to promulgate local rules for supervision and management of actions. *Code Civ. Proc. § 575.1*

Sanctions for noncompliance with local court rules promulgated pursuant to *Code Civ. Proc. § 575.1*. *Code Civ. Proc. § 575.2*

Notice of trial. *Code Civ. Proc. § 594*

Providing for telephone appearances at trial setting conferences, and other conferences, hearings, and proceedings. *Code Civ. Proc. § 367.5*

[4] Pretrial Conference

Legislative confirmation of power of Judicial Council to promulgate rules governing pretrial proceedings in superior courts. *Code Civ. Proc. § 575*

Power of superior courts to promulgate court rules for supervision and management of actions and for sanctions. *Code Civ. Proc. §§ 575.1, 575.2*

Providing for telephone appearances at case management conferences, arbitration or mediation status conferences, and other conferences, hearings, and proceedings. *Code Civ. Proc. § 367.5*

Amendment of pretrial conference orders. *Code Civ. Proc. § 576*

Postponement of proceeding in court, including pretrial conferences. *Code Civ. Proc. §§ 595, 595.1*

Trial Court Delay Reduction Act. *Gov. Code § 68600 et seq.*

[5] Bifurcation

Separate trial of special defenses. *Code Civ. Proc. § 597*

Special defense not going to merits of action but constituting bar or ground of abatement to prosecution. *Code Civ. Proc. §§ 597, 597.5*

Issue or part of issue before other issue or part of issue in case. *Code Civ. Proc. § 598*

Separate trial of issues. *Code Civ. Proc. § 1048(b)*

Issue of child custody. *Fam. Code § 3023(b)*

Issue of child support. *Fam. Code § 4003*

[6] Motions for Precedence or Preference and Motions to Continue, Advance, Reset, or Specially Set

Preferences in civil actions. *Code Civ. Proc. §§ 36, 37*

Postponement of proceeding in court. *Code Civ. Proc. § 595*

Motions defined. *Code Civ. Proc. § 1003*

Motions and orders generally. *Code Civ. Proc. § 1003 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProceduresPretrial MattersConferencesCase ManagementCivil ProcedureTrialsGeneral OverviewCriminal Law & ProcedureDiscovery & InspectionPretrial ConferencesGovernmentsCourtsRule Application & Interpretation

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37-425 California Forms of Pleading and Practice--Annotated § 425.113

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.113 California Rules of Court

[1] Bringing Cases to Trial Generally

Pretrial proceedings to have cases set for trial in superior courts. *Cal. Rules of Ct., Rule 3.700 et seq.* and *10.900 et seq.*

Motions and grounds for continuance and motions to advance, reset, or specially set. *Cal. Rules of Ct., Rules 3.1100, 3.1332*

Adoption, filing, distribution, and maintenance of local court rules. *Cal. Rules of Ct., Rule 10.613*

Judicial arbitration rules for civil cases. *Cal. Rules of Ct., Rules 3.810-3.830*

Differential case management rules under Trial Court Delay Reduction Act. *Cal. Rules of Ct., Rule 3.710 et seq.*

Exemption from differential case management. *Cal. Rules of Ct., Rule 3.714(c)*

Case evaluation factors for determining exemption from differential case management. *Cal. Rules of Ct., Rule 3.715*

[2] Superior Court Procedures

Proceedings for having civil case management. *Cal. Rules of Ct., Rule 3.720*-3.730

Complex litigation. Cal. Rules of Ct., *Rule 3.400, Cal. Rules of Ct*., Stds. Jud. Admin., Std. 3.10

Standard of judicial administration relating to continuances. Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.10

[3] Trial Setting

[a] Short and Long Causes

Definition of short and long causes. *Cal. Rules of Ct., Rule 3.735(a)*

Exemption from case management review for short cause on stipulation or court's own motion. *Cal. Rules of Ct., Rule 3.735(b)*

New trial or case management review if short cause is not completely tried within five hours. *Cal. Rules of Ct., Rule 3.735(c)*

[b] Case Management Conference

Initial case management review. *Cal. Rules of Court, Rule 3.721*

Notice of and attendance at case management conference. *Cal. Rules of Court, Rule 3.722*

Special order or request for case management conference. *Cal. Rules of Court, Rule 3.723*

Subjects to be considered at case management conference. *Cal. Rules of Court, Rule 3.727*

Meet and confer requirement. *Cal. Rules of Court, Rule 3.724*

Case management statement. *Cal. Rules of Court, Rule 3.725*

Case management conference order. *Cal. Rules of Ct., Rule 3.728*

Setting the trial date. *Cal. Rules of Ct., Rule 3.729*

[4] Settlement Conference

Mandatory and other settlement conferences. *Cal. Rules of Ct., Rule 3.1380*

Duty to notify court and others if case resolved. *Cal. Rules of Ct., Rule 3.1385*

Sanctions in respect to California Rules of Court, local courts, and court orders. *Cal. Rules of Ct., Rule 2.30*

[5] Motions for Precedence of Preference and Motions to Continue, Advance, Reset, or Specially Set

Grounds and motions for continuance of cases before or during trial. *Cal. Rules of Ct., Rules 3.1100*

Motions to advance, reset, or specially set cases for trial. *Cal. Rules of Ct., Rules 3.1100, 3.1335*

Motions to request case management conference to be held at any time. *Cal. Rules of Ct., Rule 3.723(c)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsStipulationsCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersContinuancesCriminal Law & ProcedurePretrial Motions & ProceduresGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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37-425 California Forms of Pleading and Practice--Annotated § 425.114

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.114 Local Rules of Court

[1] [Reserved]

[2] [Reserved]

[3] Alameda County

Initial Case Management-ADR Evaluation Conference Statement. Alameda Co. Super. Ct. Rules, Rules 4.2(1), 4.3(1)

Status and setting conference. Alameda Co. Super. Ct. Rules, Rules 4.2-4.5

Settlement in general, trial settlement conference, and notification regarding settled cases. Alameda Co. Super. Ct. Rules, Rule 4.4

[4] Contra Costa County

Case management conference procedures. Contra Costa Co. Local Ct. Rules, Rule 5(h)

Issue conferences. Contra Costa Co. Local Ct. Rules, Rule 5(j)

Settlement conferences. Contra Costa Co. Local Ct. Rules, Rule 8(b)

[5] Los Angeles County

Assignments to Central District departments. Los Angeles Co. Super. Ct. Rules, Rule 2.5

Status conferences. Los Angeles Co. Super. Ct. Rules, Rule 7.9

Attendance and excuse from attendance at mandatory settlement conference. Los Angeles Co. Super. Ct. Rules, Rule 7.9(d)

Duty of attorneys with respect to mandatory settlement conference. Los Angeles Co. Super. Ct. Rules, Rule 7.9(d)

Written statements required for all settlement conferences. Los Angeles Co. Super. Ct. Rules, Rule 7.9(e)

Court to be notified of settlement of case other than at settlement conference with judge present. Los Angeles Co. Super. Ct. Rules, Rule 7.9(f)

Sanctions for violation of Trial Court Delay Reduction rules. Los Angeles Co. Super. Ct. Rules, Rule 7.13

Assignment of a case for all purposes. Los Angeles Co. Super. Ct. Rules, Rule 7.3(i)

[6] Marin County

Administration of civil litigation. Marin Co. Rules, Civil 1.18 et seq.

Status/ADR assessment conference. Marin Co. Rules, Civil 1.25

Settlement conferences and settlement conference statements. Marin Co. Rules, Civil 1.26

Issue conference and issue conference statements and orders. Marin Co. Rules, Civil 1.27

[7] Sacramento County

Conduct and setting of settlement conference; settlement conference calendar. Sacramento Co. Super. Ct. Rules, Rules 4.00, 4.01

Setting cases for trial and trial setting conference. Sacramento Co. Super. Ct. Rules, Rule 6.00 et seq.

[8] San Bernardino County

Case management conferences. San Bernardino Co. Rules, Rule 408

Exceptional cases. San Bernardino Co. Rules, Rule 412

Trial ready lists. San Bernardino Co. Super. Ct. Rules, Rule 415

Settlement conferences. San Bernardino Co. Rules, Rule 610 et seq.

[9] San Diego County

Case management conference. San Diego Co. Super. Ct. Rules, Div. II, Rule 2.9

Cases "at issue." San Diego Co. Super. Ct. Rules, Div. II, Rule 2.10

Trial readiness conference. San Diego Co. Super. Ct. Rules, Div. II, Rule 2.15

Settlement conferences. San Diego Co. Super. Ct. Rules, Div. II, Rules 2.20-2.23

[10] San Francisco City & County

Assignment of cases to departments. San Francisco Uniform Local Ct. Rules, Rule 2.0

Counsel's duty of diligence to bring action to trial; sanctions. San Francisco Uniform Local Ct. Rules, Rule 3.0

Civil case management plans. San Francisco Uniform Local Ct. Rules, Rule 3.0, 3.1

Assignment to single trial judge for trial and other matters. San Francisco Uniform Local Ct. Rules, Rules 3.0(C), 3.5(A)

Case Management conferences. San Francisco Uniform Local Ct. Rules, Rules 3.4, 3.5

Assignment of trial date. San Francisco Uniform Local Ct. Rules, Rules 3.4(C), 6.1

Assignment for trial of default or uncontested cases. San Francisco Uniform Local Ct. Rules, Rule 8.13

Settlement conference and settlement calendar. San Francisco Uniform Local Ct. Rules, Rule 5.0

Early settlement conference program. San Francisco Uniform Local Ct. Rules, Rule 4.3

[11] Santa Clara County

Differential civil case management. Santa Clara Co. Super. Ct. Rules, Rule 1 (Civil)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementGovernmentsLocal GovernmentsGeneral OverviewLegal EthicsSanctionsGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 37: Pretrial Proceedings thru Privacy-Chs. 425-439
Chapter 425 PRETRIAL PROCEEDINGS
PART III. RESEARCH GUIDE

37-425 California Forms of Pleading and Practice--Annotated § 425.115

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§ 425.115 Decisions

[1] Pretrial Conference

[a] Pretrial Conference Order

[i] Amendment of Order

Inquiry on appeal is whether trial court abused its discretion in ruling on motion to amend pretrial conference order. *Godfrey v. Steinpress (1982) 128 Cal. App. 3d 154, 170, 180 Cal. Rptr. 95*

Pretrial conference orders as subject to amendment under *Code Civ. Proc. § 576* in furtherance of justice and on such terms as may be proper at any time before commencement of trial. *Godfrey v. Steinpress (1982) 128 Cal. App. 3d 154, 170, 180 Cal. Rptr. 95*

Trial courts have discretion to allow oral amendment of pretrial conference order at any time during trial if adverse party is not prejudiced by it. *Robinson v. Thornton (1969) 271 Cal. App. 2d 605, 615, 76 Cal. Rptr. 835*

Same principles govern exercise of court's discretion in allowing amendments to pleadings under *Code Civ. Proc. § 473* as apply with respect to motions to modify or amend pretrial conference orders. *Del Pino v. Gualtieri (1968) 265 Cal. App. 2d 912, 916, 71 Cal. Rptr. 716*

Motion for order modifying pretrial conference order to reinstate certain fictitiously named defendants and for permission to amend complaint to substitute named corporation in place of fictitiously named defendant as proper. *Gilmore v. Lick Fish & Poultry, Inc. (1968) 265 Cal. App. 2d 106, 110-111, 71 Cal. Rptr. 212*

Trial court committed reversible error in granting defendant's motion made at trial for judgment on pleadings on ground pretrial conference order specified issue involved as negligence and complaint did not state cause of action for

negligence and denying plaintiff's countermotion to amend complaint to allege negligence and to amend pretrial conference order to include strict liability in tort as issue where complaint stated cause of action based on this latter theory and defendant would not have been prejudiced by including issue in pretrial conference order. *Read v. Safeway Stores, Inc. (1968) 264 Cal. App. 2d 404, 406-409, 70 Cal. Rptr. 454*

Granting or denial of motion to modify pretrial conference order as matter committed to sound discretion of trial court whose decision will not be reversed unless abuse of discretion is shown. *Universal Underwriters Ins. Co. v. Superior Court (1967) 250 Cal. App. 2d 722, 727, 732, 58 Cal. Rptr. 870*

Modification in effect of pretrial conference order by trial judge without motion by party. *Fresno Air Service v. Wood (1965) 232 Cal. App. 2d 801, 804, 43 Cal. Rptr. 276*

Filing by stipulation of parties and court order of amended pleading as equivalent to amendment of pretrial conference order. *Arthur v. New House Building Corp. (1963) 217 Cal. App. 2d 526, 534, 31 Cal. Rptr. 868*

When pretrial conference order does not foreclose trial court from permitting amendment to pleadings, modification of order may be effectuated by amendment to pleadings raising new issues. *Feykert v. Hardy (1963) 213 Cal. App. 2d 67, 74, 28 Cal. Rptr. 510*

[ii] Effect of Order on Amendment of Pleadings

Pretrial conference order as not doing away with trial court's power to permit amendments to pleadings to conform to proof. *Lieberman v. Aetna Ins. Co. (1967) 249 Cal. App. 2d 515, 530, 57 Cal. Rptr. 453* ; *Texaco, Inc. v. Robinson (1962) 209 Cal. App. 2d 450, 452, 25 Cal. Rptr. 923* ; *Atkins v. Atkins (1960) 177 Cal. App. 2d 207, 211, 2 Cal. Rptr. 104*

[b] Purposes of Pretrial Conference

Pretrial conferences as designed to relieve members of legal profession and judiciary from legal technicalities, trivia, details, and unessentials, and to have case tried at early date on real and substantial issues in case. *Barnhouse v. City of Pinole (1982) 133 Cal. App. 3d 171, 194, 183 Cal. Rptr. 881* ; *Dell'Orto v. Dell'Orto (1959) 166 Cal. App. 2d 825, 829-830, 334 P.2d 97* ; *Baird v. Hodson (1958) 161 Cal. App. 2d 687, 689, 327 P.2d 215*

Principal purposes of pretrial as being to determine what lawsuit is about, to simplify and define issues, and to give notice of matters not necessarily revealed bypleadings when such matters are issues in case. *Estate of Cooper (1970) 11 Cal. App. 3d 1114, 1122, 90 Cal. Rptr. 283*

Principal purposes of pretrial conference as being to find out what lawsuit is about, to simplify and define issues, and to determine how trial may proceed most expeditiously. *Samuels v. Superior Court (1969) 276 Cal. App. 2d 264, 268 n.3, 81 Cal. Rptr. 216*

Purpose of pretrial conference as being to place case in focus so that defined and precise issues may be resolved as quickly as possible. *Sweeney v. Pozarelli (1964) 228 Cal. App. 2d 585, 593, 39 Cal. Rptr. 601* ; *Palmer v. Financial Indem. Co. (1963) 215 Cal. App. 2d 419, 434, 30 Cal. Rptr. 204*

Purpose of pretrial conference as being to expedite proceedings and facilitate correct determination of issues. *Mays v. Disneyland, Inc. (1963) 213 Cal. App. 2d 297, 300, 28 Cal. Rptr. 689*

Evolution of pretrial conferences as means of expediting litigation. *Cantillon v. Superior Court (1957) 150 Cal. App.*

2d 184, 186, 309 P.2d 890

[c] Review

Reviewing court in its role as parens patriae as having power to order copy of pretrial conference order made part of record on appeal when it appears that consideration of order is necessary to determination of appeal. *Patrick J. Ruane, Inc. v. Parker (1960) 185 Cal. App. 2d 488, 492, 8 Cal. Rptr. 379*

[d] Role of Pretrial Conference Judge

Judge cannot be disqualified from presiding at a case management conference. *Grant v. Superior Court (2001) 90 Cal. App. 4th 518, 526, 108 Cal. Rptr. 2d 825*

Pretrial conference judge as permitted to define issues but not to exclude competent evidence relevant to any issue in trial. *Bradbeer v. Scott (1961) 193 Cal. App. 2d 575, 577, 14 Cal. Rptr. 458*

[e] Sanctions

Plaintiff's failure to appear at case management conference regarding defendant's default or subsequent order to show cause re dismissal as warranting dismissal of case. *California Casualty Indemnity Ins. Co. v. Superior Court (1995) 36 Cal. App. 4th 678, 681, 42 Cal. Rptr. 2d 258*

Failure to prepare for, appear at, or participate in pretrial conference as subjecting counsel to contempt proceeding. *Cantillon v. Superior Court (1957) 150 Cal. App. 2d 184, 187-188, 309 P.2d 890*

Sanctions for nonappearance, or failure to prepare for or participate in pretrial conference, as constituting contempt by individual attorney only, and not by firm to which attorney belongs. *Cantillon v. Superior Court (1957) 150 Cal. App. 2d 184, 190, 309 P.2d 890*

[f] Stipulations

Stipulation to extend pretrial conference as not extending time for trial beyond five-year limit of *Code Civ. Proc. § 583* (now *Code Civ. Proc. § 583.310*), unless express extension or waiver of limit appears in it. *J.C. Penney Co. v. Superior Court (1959) 52 Cal. 2d 666, 669, 343 P.2d 919* ; *Gentry v. Nielsen (1981) 123 Cal. App. 3d 27, 31, 176 Cal. Rptr. 385*

[2] Settlement Conference

[a] Judges

Trial court may not use the threat of sanctions against counsel to coerce parties to reach settlement. *Barrientos v. City of Los Angeles (1994) 30 Cal. App. 4th 63, 72, 35 Cal. Rptr. 2d 520*

Role of judge in settlement conference. *Mezzetti v. Superior Court (1979) 94 Cal. App. 3d 987, 992, 156 Cal. Rptr. 802*

Judge against whom challenge under *Code Civ. Proc. § 170.6* (automatic disqualification) has been filed in particular

case as not disqualified from thereafter setting and conducting mandatory settlement conference in that case; however arguable that such a judge should not conduct settlement conference, and in multi-judge court problem readily avoidable but practical difficulties existed in one-judge courts. *Mezzetti v. Superior Court (1979) 94 Cal. App. 3d 987, 988, 993, 156 Cal. Rptr. 802* (one-judge court)

[b] Participants

Obligation of school board to send chairperson or authorized subcommittee to mandatory settlement conference. *Sigala v. Anaheim City School Dist. (1993) 15 Cal. App. 4th 661, 672, 19 Cal. Rptr. 2d 38*

[c] Power of Court

Cal. Rules of Ct., Rule 3.1380 as not applying to voluntary settlement conference held without use of court facilities and at no cost to county. *Raygoza v. Betteravia Farms (1987) 193 Cal. App. 3d 1592, 1595-1596, 239 Cal. Rptr. 188*

Legal profession as aware that written policies of Los Angeles County Superior Court pertaining to pretrial settlement conferences published in its civil trial manual are requirements and not guidelines, and thus, are enforceable as general court rules. *City of El Monte v. Takei (1984) 158 Cal. App. 3d 244, 247-248, 204 Cal. Rptr. 559*

Court as having no power to compel litigant to settle case at any stage of legal proceedings. *Mezzetti v. Superior Court (1979) 94 Cal. App. 3d 987, 991-992, 156 Cal. Rptr. 802* ; *People v. Cimarusti (1978) 81 Cal. App. 3d 314, 321, 146 Cal. Rptr. 421*

[3] Bifurcation of Issues for Trial

[a] Conduct of Bifurcated Trials

In case of bifurcated trial pursuant to *Code Civ. Proc. § 598*, motion for judgment notwithstanding verdict after liability phase of trial as proper if liability verdict was for defendant (that is, court may grant plaintiff's motion) but improper (court may not grant defendant's motion) if liability verdict was for plaintiff. *Meyser v. American Bldg. Maintenance, Inc. (1978) 85 Cal. App. 3d 933, 935-937, 149 Cal. Rptr. 808* ; *Walton v. Magno (1994) 25 Cal. App. 4th 1237, 1241, 30 Cal. Rptr. 2d 815*

Evidence introduced at first stage of bifurcated trial as subject to consideration at second stage without being reintroduced. *Foreman & Clark Corp. v. Fallon (1971) 3 Cal. 3d 875, 888, 92 Cal. Rptr. 162, 479 P.2d 362*

Procedure after prior trial of separate issue in bifurcated trial under *Code Civ. Proc. § 598*, relating to trial of separate issues. *Lauderdale v. U & I Equip. Co. (1969) 271 Cal. App. 2d 140, 141-143, 76 Cal. Rptr. 483*

Motion by defendant for new trial after trial on issue of liability but before trial on issue of damages as premature. *Mays v. Disneyland, Inc. (1963) 213 Cal. App. 2d 297, 298-299, 28 Cal. Rptr. 689*

[b] Entry of Judgment

Entry of judgment when plaintiff prevails on liability issue in bifurcated trial as inappropriate. *City of Huntington Beach v. Superior Court (1978) 78 Cal. App. 3d 333, 339, 144 Cal. Rptr. 236*

Code Civ. Proc. § 598, providing for bifurcated trials, as not permitting "judgment" of any sort against party on whom

liability is imposed until conclusion of damages trial. *Walton v. Magno (1994) 25 Cal. App. 4th 1237, 1240, 30 Cal. Rptr. 2d 815* ; *Plaza Tulare v. Tradewell Stores, Inc. (1989) 207 Cal. App. 3d 522, 524, 254 Cal. Rptr. 792* (applying *Code Civ. Proc. § 598* as amended in 1977); *Horton v. Jones (1972) 26 Cal. App. 3d 952, 956, 103 Cal. Rptr. 399*

Authority to enter judgment in favor of party on whom liability is sought to be imposed under *Code Civ. Proc. § 598*, relating to separate trials of issues, as extending only to parties who would be entitled to separate final judgment under one final judgment rule. *Fleuret v. Hale Constr. Co. (1970) 12 Cal. App. 3d 227, 231, 90 Cal. Rptr. 557*

[c] Liability and Damages

Mistrial on issue of damages as not requiring new trial on issue of liability when issues were tried separately. *Little v. Superior Court (1961) 55 Cal. 2d 642, 645, 12 Cal. Rptr. 481, 361 P.2d 13*

Trial court as permitted by *Code Civ. Proc. § 598* to bifurcate trial to determine liability for compensatory damages before trial as to exemplary damages. *Hilliard v. A.H. Robins Co. (1983) 148 Cal. App. 3d 374, 392-393, 196 Cal. Rptr. 117*

[d] Review

Whether there should be severance and separate trials on issues in single action as matter within discretion of trial court, whose ruling will not be disturbed on appeal absent manifest abuse of discretion; when evidence relates to both issues, and issues are not complex, denial of motion as proper. *Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co. (1987) 189 Cal. App. 3d 1072, 1086, 234 Cal. Rptr. 835*

[4] Motions for Precedence or Preference and Motions to Continue, Advance, Reset, or Specially Set

[a] Priority and Preference

[i] Age

Failure of attorney representing client who is over 70 years of age to move for trial preference pursuant to *Code Civ. Proc. § 36(a)* as subjecting attorney to malpractice suit by client's personal representative when client dies before trial; measure of damages in malpractice action as being amount client would have received had case been brought to trial while client was still alive. *Granquist v. Sandberg (1990) 219 Cal. App. 3d 181, 184-188, 268 Cal. Rptr. 109*

Eighty-year-old plaintiff as entitled to trial preference pursuant to *Code Civ. Proc. § 36(a)*, even though she had obtained preferential trial date in prior identical action but relinquished it when her counsel dismissed that action, filed present action, and sought preference solely to circumvent refusal of master calendar judge in prior action to grant one-week continuance until petitioner's physical condition improved sufficiently for her to be present at trial. *Rice v. Superior Court (1982) 136 Cal. App. 3d 81, 84, 86-87, 185 Cal. Rptr. 853*

[ii] Mandatory Dismissal

Trial court not subject to mandatory duty to set preferential trial date, even when five-year deadline for bringing case to trial is approaching; approaching limit is critical, but not exclusive, consideration in making discretionary ruling on motion for trial preference under *Code Civ. Proc. § 36(e)*. *Salas v. Sears, Roebuck & Co. (1986) 42 Cal. 3d 342, 346, 349, 228 Cal. Rptr. 504, 721 P.2d 590* ; *Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 440, 41 Cal. Rptr. 2d 362, 895 P.2d 469*

Trial court as having discretion under *Code Civ. Proc. § 36(e)* to grant motion to set case specially for trial just before five-year mandatory dismissal period runs. *National Secretarial Service, Inc. v. Froehlich (1989) 210 Cal. App. 3d 510, 521, 258 Cal. Rptr. 506*

[iii] Mistitled Action

Trial court as having power, by appropriate order or procedure, to prevent party's obtaining preference on calendar by mistitling case as one entitled to statutory preference. *Kessloff v. Pearson (1951) 37 Cal. 2d 609, 613-614, 233 P.2d 899*

[iv] Declaratory Relief

Declaratory relief action seeking relief in addition to declaratory relief as having only conditional priority in trial setting under former *Code Civ. Proc. § 1062a(b)* (*now see Code Civ. Proc. § 1062.3(b)*). *Mobil Oil Corp. v. Superior Court (1978) 79 Cal. App. 3d 486, 494, 145 Cal. Rptr. 17*

[v] Unlawful Detainer

Unlawful detainer proceeding is entitled under *Code Civ. Proc. § 1179a* to unqualified preference in trial setting. *Mobil Oil Corp. v. Superior Court (1978) 79 Cal. App. 3d 486, 494, 145 Cal. Rptr. 17*

Plaintiff's failure in unlawful detainer proceeding to pursue *Code Civ. Proc. § 1166a* (to secure immediate possession of premises) does not destroy or affect plaintiff's right to priority under *Code Civ. Proc. § 1179a*. *Kartheiser v. Superior Court (1959) 174 Cal. App. 2d 617, 622, 345 P.2d 135*

[vi] Other Bases for Preference

Delay in prosecution is possibly excusable for purposes of motion for trial preference under former *Code Civ. Proc. § 36(d)* [*now see Code Civ. Proc. § 36(e)*] (interests of justice) when delay resulted from reasonable belief, induced by mutual bona fide settlement negotiations, that trial could probably be avoided. *San Bernardino City Unified School Dist. v. Superior Court (1987) 190 Cal. App. 3d 233, 239-240, 235 Cal. Rptr. 356* (dictum)

[b] Remedy to Require Trial Court to Give Case Precedence

Mandate is appropriate remedy to require trial court to specially set dental malpractice action for trial before expiration of five-year period specified by *Code of Civ. Proc. § 583.310* when plaintiff acted with diligence to bring case to trial, but was repeatedly stymied by cumulative errors committed by the defendant. *Schmitt v. Superior Court (1989) 216 Cal. App. 3d 453, 456-457, 264 Cal. Rptr. 806*

Mandate is appropriate remedy to require trial court to give precedence on pretrial calendar to unlawful detainer proceeding in order to expedite setting it for trial. *Cohen v. Superior Court (1967) 248 Cal. App. 2d 551, 554, 56 Cal. Rptr. 813* (citing *Code Civ. Proc. § 1179a*)

[c] Motions to Specially Set

Trial court abused discretion by denying motion to specially set dental malpractice action for trial to avoid mandatory dismissal under *Code of Civ. Proc. § 583.310* when plaintiff acted with diligence to bring case to trial, but was repeatedly stymied by cumulative errors committed by the defendant. *Schmitt v. Superior Court (1989) 216 Cal. App. 3d 453, 456-457, 264 Cal. Rptr. 806*

Error to deny motion to specially set case for trial to avoid mandatory dismissal under *Code Civ. Proc. § 583.310* for failure to bring case to trial within five years on ground that insufficient time remained in which to give 15-day notice of trial required by *Code Civ. Proc. § 594* after deducting period during which statute was tolled; although less than six months remained within which to bring case to trial after subtracting time during which five-year period was tolled, *Code Civ. Proc. § 583.350* extends that period for six months. *Him v. Superior Court (1986) 184 Cal. App. 3d 35, 36-39, 228 Cal. Rptr. 839*

Order denying with prejudice plaintiff's motion to specially set case for trial is not an appealable order. *People v. Cimarusti (1978) 81 Cal. App. 3d 314,318-319, 81 Cal. App. 3d 314, 319, 146 Cal. Rptr. 421* (nevertheless, treating appeal as petition for writ of certiorari and determining issue raised on its merits)

Court is without power, in absence of grounds for dismissal, to refuse to set matter for trial entirely, although it may properly deny motion for special setting on a particular date. *People v. Cimarusti (1978) 81 Cal. App. 3d 314, 324, 146 Cal. Rptr. 421*

Order specially setting trial to commence two hours after order is valid when continuance is granted after commencement to prepare for trial. *Elliano v. Assurance Co. of America (1975) 45 Cal. App. 3d 170, 175, 119 Cal. Rptr. 653*

[d] Renewed Motions and Motions for Reconsideration

Order by second judge, on motion made before five-year period for mandatory dismissal for failure to bring action to trial had passed and granted after that period had passed, dismissing action and vacating trial date as error when first judge had granted plaintiff's motion to advance and had set case for trial within five-year period; although trial court has jurisdiction to reconsider prior ruling or to entertain renewal of previous motion, one trial court judge as not permitted to reconsider and overrule ruling of another judge absent showing that first judge is unavailable; considerations on motion for preferential trial setting as same as considerations on motion for discretionary dismissal; both as addressed to discretion of trial court; both as governed by factors set forth in *Cal. Rules of Ct., Rule 3.1342(e)*. *Curtin v. Koskey (1991) 231 Cal. App. 3d 873, 874, 876-878, 282 Cal. Rptr. 706*

[e] Other Factors to Consider

In ruling on motion to advance case for trial, court is required to consider condition of court calendar and rights of other litigants. *Salas v. Sears, Roebuck & Co. (1986) 42 Cal. 3d 342, 346, 228 Cal. Rptr. 504, 721 P.2d 590* ; *Rim Forest Lumber Co. v. Woodside Constr. Co. (1987) 190 Cal. App. 3d 454, 472, 235 Cal. Rptr. 443*

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For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsConforming Pleadings to EvidenceCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureCounselGeneral OverviewCivil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedureSanctionsGeneral OverviewCriminal Law & ProcedurePretrial Motions & ProceduresGeneral OverviewGovernmentsCourtsAuthority to AdjudicateGovernmentsCourtsJudgesLegal EthicsSanctionsGeneral

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Chapter 425 PRETRIAL PROCEEDINGS
PART III. RESEARCH GUIDE

37-425 California Forms of Pleading and Practice--Annotated § 425.116

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§ 425.116 Law Reviews

[1] Bringing Cases to Trial Generally

Steiner, *The Case Management Order: Use and Efficacy in Complex Litigation and the Toxic Tort, 6 Hastings W.-N.W. J. Envtl. L. & Pol'y 71 (1999)*

Cordray, *Settlement Agreements and the Supreme Court, 48 Hastings L.J. 9 (1996)*

Gross & Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement, 44 UCLA L. Rev. 1 (1996)*

Note, *Rule 16 and Pretrial Conferences: Have We Forgotten the Most Important Ingredient? 63 S. Cal. L. Rev. 1449 (1990)*

[2] Bifurcation

Maskin, *Litigating Claims for Punitive Damages: The View From The Front Line, 31 Loy. L.A. L. Rev. 489 (1998)*

Pepek, *TXO v. Alliance: Due Process Limits and Introducing a Defendant's Wealth When Determining Punitive Damages Awards, 25 Pac. L.J. 1191 (1994)*

Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases, 44 Hastings L.J. 499 (1993)*

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Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersSeparate TrialsTortsProcedureSettlementsGeneral Overview

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37-425 California Forms of Pleading and Practice--Annotated §§ 425.117-425.119

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[Reserved]

§§ 425.117[Reserved]

California Forms of Pleading and Practice--Annotated

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Chapter 425 PRETRIAL PROCEEDINGS
PART IV. PROCEDURAL CHECKLIST

37-425 California Forms of Pleading and Practice--Annotated § 425.120

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.120 Plaintiff's Checklist

[1] Preliminary Considerations

[a] Initial Investigation

☐ Conduct sufficient investigation and research for informed complaint [*see* Ch. 123, *Complaints and Cross Complaints*].

☐ Ascertain the presence of insurance and comply with internal policy requirements, including statutes of limitations.

☐ Select appropriate jurisdiction [*see* Ch. 324, *Jurisdiction: Subject Matter*] and venue [*see* Ch. 571, *Venue*].

☐ File and serve complaint and proof of service [*see* Ch. 123, *Complaints and Cross Complaints* , and Ch. 518, *Service of Summons and Papers*].

☐ Develop litigation strategy.

☐ Consult early with experts.

☐ Develop draft litigation budget.

☐ Develop preliminary discovery plan

☐ Communicate often and openly with client.

[b] Timing

☐ Evaluate complexity of case and probable classification for differential case management purposes [*see Cal. Rules of Ct., Rules 3.714, 3.715*].

☐ Determine whether precedence or preference [*see § 425.70* et seq.], or bifurcation [*see § 425.50* et seq.] issues may arise.

☐ Anticipate motion practice.

☐ Identify issues for potential summary disposition [*see* Ch. 537, *Summary Judgment*].

☐ Anticipate defensive motions.

☐ Evaluate potential for coordination, severance or consolidation [*see* Ch. 125, *Consolidation, Severance, and Coordination of Actions*].

[c] Alternatives to Trial

☐ Consider posturing case for alternative dispute resolution of all or some issues.

☐ Court-referred arbitration or mediation where available.

☐ Private arbitration or mediation service [*see* Ch. 37, *Judicially Mandated Civil Action Mediation*].

☐ Determine availability and expertise.

☐ Determine cost.

☐ Special master for discovery or other issues.

☐ Arbitration.

☐ Judicial arbitration [*see Code Civ. Proc. § 1141.10 et seq.*; for discussion and considerations, *see* Ch. 36, *Judicial Arbitration*].

☐ Post-dispute agreement to arbitrate [for discussion and considerations, *see* Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* , through Ch. 34, *Contractual Arbitration: Judicial Review*].

☐ Voluntary court early settlement program, where available.

☐ Determine when and how to obtain agreement of necessary parties to alternative dispute resolution.

[2] Internal Case Management

[a] Calendaring

☐ Calendar statutorily prescribed court dates.

☐ Calendar deadlines prescribed by local rule.

☐ Calendar dates by which work must be completed in order to meet court deadlines, e.g.:

☐ Service of summary judgment motion, which must be heard 30 days prior to trial, and therefore must be served not later than 105 days before trial, if service is by hand, or 110 days before trial if service is by mail [*see Code Civ. Proc. § 437c(a)*].

☐ Completion of discovery in order to notice motion for summary judgment.

☐ Completion of interviews of experts in order to exchange expert witness information.

[b] Discovery Stage

☐ Develop discovery plan [*see* Ch. 190-200, *Discovery*].

☐ Confer with experts or consultants and client.

☐ Evaluate relative costs of methods of discovery.

☐ Ensure preservation of evidence:

☐ Conventional documentary evidence.

☐ Electronic evidence.

☐ Early interrogatories.

☐ Letter to counsel cautioning against otherwise routine backup or destruction of electronic data.

☐ Witnesses.

☐ Ascertain periods of availability and unavailability.

☐ Consider best means to preserve testimony, e.g. informal interview, declaration.

[c] Motion Practice

☐ Evaluate particular motions.

☐ Determine strategic benefits of favorable ruling.

☐ Determine strategic cost of unfavorable ruling.

☐ Determine monetary cost of motion.

☐ Prepare and file motions as warranted.

[3] Case Management Conference

☐ Consult local rules regarding case management conference.

☐ Determine if case is entitled to precedence or preference or other grounds to accelerate case; if so, move to advance case management conference [*see § 425.70 et seq., Forms 425.160 -425.163*].

☐ Calendar notice of case management conference on receiving notice from court clerk.

☐ Determine if appearance has been excused from case management conference.

☐ Meet and confer as required by *Cal. Rules of Ct., Rule 3.724*.

☐ Prepare case management statement on mandatory Cal. Judicial Council Form CM-110 [*see § 425.131*, Form CM-110].

☐ Attend and participate in conference in manner provided by local rule.

☐ Evaluate case management order for accuracy and completeness.

☐ If appropriate, move for amendment of order.

☐ If appropriate, move for amendment of pleadings to conform to order.

[4] Settlement Conference

☐ Consult local rules for requirements of settlement conferences.

☐ Prepare settlement conference statement in manner provided in local rule.

☐ Serve and deliver settlement conference statement [*Cal. Rules of Ct., Rule 3.1380(c)*].

☐ Attend settlement conference with persons required by local rule.

☐ If entire case is resolved, inform court and others [*Cal. Rules of Ct., Rule 3.1385*].

[5] Bifurcation

[a] Separate Trial of Special Defense

☐ Determine whether separate trial of special defense before trial of any other issue in the case is available and desirable [*see Code Civ. Proc. §§ 597, 597.5*; for discussion, *see § 425.51*].

☐ If so, see *Ch. 3, Abatement of Actions, § 3.110* et seq., for Procedural Checklist and forms.

[b] Separate Trial of Issue or Part of Issue

☐ Determine whether separate trial of issue or part of issue before trial of other issues or part of an issue is available and desirable [*see Code Civ. Proc. § 598*; *see § 425.62*]. Consider:

☐ Whether it would promote convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation.

☐ Whether it is expressly authorized by statute [*see, e.g., Fam. Code §§ 3023, 4003*] (separate trial of child custody and child support issues).

☐ Time motion so that [*see Code Civ. Proc. § 598*]:

☐ Court may make the order no later than the close of pretrial conference, or

☐ If no pretrial conference is held, no later than 30 days before the trial date.

☐ If appropriate, prepare papers:

☐ Notice of motion and supporting declaration [for a form, *see § 425.150*].

☐ Memorandum of points and authorities.

☐ Proposed order [for a form, *see § 425.151*].

☐ Proof of service [for a form, *see* Ch. 518, *Service of Summons and Papers*].

☐ File and serve motion and supporting papers at least 16 court days before hearing on motion, with extensions depending on manner of service [*see Code Civ. Proc. § 1005(a)(13), (b)*; *see also Code Civ. Proc. § 1010.6(a)(6)* (extension that may apply in case of electronic service); for discussion and a Procedural Checklist, *see* Ch. 372, *Motions and Orders*].

☐ Lodge proposed order with court as required by local rule or practice.

NOTE:

More Detailed Checklist. For a more detailed checklist for noticed motion procedure, see Ch. 372, *Motions and Orders* .

[6] Motions for Precedence or Preference

☐ Determine whether any statute authorizes precedence for the type of case involved [*see § 425.72*].

☐ Determine whether any grounds exist for preference:

☐ Party 70 years of age or older [*Code Civ. Proc. § 36(a)*; *see § 425.73[2]*].

☐ Party under age 14 in wrongful death or personal injury action [*Code Civ. Proc. § 36(b)*; *see § 425.73[3]*].

☐ Party terminally ill or injured [*Code Civ. Proc. § 36(d)*; *see § 425.73[4]*].

☐ Warranted by interests of justice [*Code Civ. Proc. § 36(e)*; *see § 425.73[5]*].

☐ Victim of crime [*Code Civ. Proc. § 37*].

☐ Prepare papers:

☐ Notice of motion and supporting declaration [for a form, *see § 425.160*].

☐ Memorandum of points and authorities.

☐ Proposed order [for a form, *see § 425.161*].

☐ Proof of service [for a form, *see* Ch. 518, *Service of Summons and Papers*].

☐ File and serve motion and supporting papers at least 16 court days before hearing on motion, with extensions depending on manner of service [*see Code Civ. Proc. § 1005(a)(13), (b)*; *see also Code Civ. Proc. § 1010.6(a)(6)* (extension that may apply in case of electronic service); for discussion and a Procedural Checklist, *see* Ch. 372, *Motions and Orders*].

☐ Lodge proposed order with court as required by local rule or practice.

NOTE:

More Detailed Checklist. For a more detailed checklist for noticed motion procedure, see Ch. 372, *Motions and Orders* .

[7] Motions to Continue, Advance, Reset, or Specially Set

☐ Determine whether circumstances require that the trial date be continued, advanced, reset or specially set [*see § 425.76*].

☐ File and serve motion, supporting papers, and order.

☐ Prepare papers:

☐ Notice of motion and supporting declaration [for a form, *see § 425.162*].

☐ Memorandum of points and authorities.

☐ Proposed order [for a form, *see § 425.163*].

☐ Proof of service [for a form, *see* Ch. 518, *Service of Summons and Papers*].

☐ File and serve motion and supporting papers [*see Cal. Rules of Ct., Rules 3.1332, 3.1335* (not providing for any specific period of notice)].

☐ Lodge proposed order with court as required by local rule or practice.

☐ Make motion before assigned judge.

NOTE:

More Detailed Checklist. For a more detailed checklist for noticed motion procedure, see Ch. 372, *Motions and Orders* .

☐ Determine effect of granting of motion on other time limits.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedureSummary JudgmentBurdens of Production & ProofGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentNoticesCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedureAlternative Dispute ResolutionMediationsGovernmentsCourtsClerks of CourtGovernmentsLegislationStatutes of LimitationsGeneral OverviewTortsProcedureDiscovery

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Volume 37: Pretrial Proceedings thru Privacy-Chs. 425-439
Chapter 425 PRETRIAL PROCEEDINGS
PART IV. PROCEDURAL CHECKLIST

37-425 California Forms of Pleading and Practice--Annotated § 425.121

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.121 Defendant's Checklist

[1] Preliminary Considerations

[a] Initial Investigation

☐ Conduct sufficient investigation and research for informed response [*see* Ch. 26, *Answers*].

☐ Determine whether jurisdiction [*see* Ch. 324, *Jurisdiction: Subject Matter*] and venue [*see* Ch. 571, *Venue*] are proper.

☐ File and serve response (e.g., answer, demurrer, motion to quash) [*see* Ch. 518, *Service of Summons and Papers*].

☐ Develop litigation strategy.

- ☐ Consult early with experts.
- ☐ Develop rough litigation budget.
- ☐ Communicate often and openly with client.
- ☐ Develop discovery plan.

[b] Timing

☐ Determine whether precedence or preference [*see § 425.70* et seq.], or bifurcation [*see § 425.60* et seq.] issues may arise.

☐ Anticipate motion practice.

☐ Identify issues for potential summary disposition [*see* Ch. 537, *Summary Judgment*].

☐ Anticipate motions by adverse party.

☐ Evaluate potential for coordination or consolidation.

[c] Alternatives to Trial

☐ *See § 425.120[1][c]*.

[2] Internal Case Management

☐ *See § 425.120[2]*.

[3] [Reserved]

[4] Case Management Conference

☐ *See § 425.120[4]*.

[5] Settlement Conference

☐ *See § 425.120[5]*.

[6] Bifurcation

☐ *See § 425.120[6]*.

[7] Motions for Precedence or Preference

☐ *See § 425.120[7]*.

[8] Motions to Continue, Advance, Reset, or Specially Set

☐ *See § 425.120[8]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureVenueAgentsCivil ProceduresPleading & PracticeMotion PracticeTime LimitationsCivil ProceduresPleading & PracticePleadingsCross-ClaimsGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral Overview

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37-425 California Forms of Pleading and Practice--Annotated §§ 425.122-425.129

AUTHOR: Evelio M. Grillo Editorial Consultant

[Reserved]

§§ 425.122[Reserved]

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A. Bringing Cases to Trial

37-425 California Forms of Pleading and Practice--Annotated § 425.130

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.130 Civil Case Cover Sheet [Cal. Rules of Ct., Rules 3.220, 3.400-3.403]--Judicial Council Form CM-010

[1] FORM Civil Case Cover Sheet [Cal. Rules of Ct., Rules 3.220, 3.400-3.403]--Judicial Council Form CM-010

Click here to view image.

[2] Use of Form

The form in [1], *above*, Cal. Judicial Council Form CM-010 must be filed with the first papers filed in an action or proceeding; and the Judicial Council's civil case cover sheet is required in addition to any cover sheet required by local rule [*Cal. Rules of Ct., Rule 3.220(a)*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Exception for Small Claims, Probate, and Family Law Cases

The California Rules of Court do not require a civil case cover sheet for cases filed under the Probate Code, Family Code, Welfare and Institutions Code or in small claims court [*Cal. Rules of Ct., Rule 3.220(b)(1)*]. Some jurisdictions by local rule do, however, require a civil case cover sheet to be filed in one or more of these types of cases.

[4] Cross References

For further discussion of this Civil Case Cover Sheet, see *§ 425.11[2][c]*

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37-425 California Forms of Pleading and Practice--Annotated § 425.131

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.131 Case Management Conference Statement [Cal. Rules of Ct., Rule 3.725]--Judicial Council Form CM-110

[1] FORM Case Management Conference Statement [Cal. Rules of Ct., Rule 3.725]--Judicial Council Form CM-110

Click here to view image.

[2] Use of Form

The form in [1], *above*, Cal. Judicial Council Form CM-110, Case Management Conference Statement, must be used as of January 1, 2005 [*Cal. Rules of Ct., Rule 3.725*]. In lieu of each party filing a separate statement, any two or more parties may file a joint statement [*Cal. Rules of Ct., Rule 3.725(b)*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Contents of Statement

All applicable items on the form must be completed [*Cal. Rules of Ct., Rule 3.725(c)*]. The form requires a brief statement of the case, including any damages. If personal injury damages are sought, the nature of the injury and damages claimed must be specified along with estimated future medical expenses, lost earnings to date, and estimated future lost earnings. If equitable relief is sought, the statement must describe the nature of that relief [*see* item 4b of the form].

The statement must also indicate whether counsel has provided the client with the Alternative Dispute Resolution information package and reviewed ADR options with the client [*see* item 10a of the form; *see also Cal. Rules of Ct.,*

Rule 3.221 (information about Alternative Dispute Resolution)]. If the parties are willing to participate in any form of ADR, the statement must indicate that agreement [*see* [1], item 10d, *above*]. Other matters that must be disclosed include any applicable insurance, any matters that may affect the court's jurisdiction (such as bankruptcy), any intention to file a motion for an order bifurcating, severing, or coordinating any causes of action, the status of discovery, and a statement that the parties have met and conferred as required or an explanation of why they have not, along with a statement of what the parties agree on.

[4] Cross References

For further discussion of the Case Management Conference Statement see *§ 425.34*

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37-425 California Forms of Pleading and Practice--Annotated § 425.132

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.132 Case Management Conference Order [Cal. Rules of Ct., Rule 3.728]

[1] FORM Case Management Conference Order [Cal. Rules of Ct., Rule 3.728]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	CASE MANAGEMENT CONFERENCE ORDER
Defendant.	)	
	)	
	)	

A case management conference in this case was held in Department _____ of this Court on _____ [*date*]. _____ [*Specify name of each attorney appearing and party represented and name of each party appearing in person, e.g.:* (*Name*) appeared as counsel for plaintiff and _____ (*name*) appeared as counsel for defendant]. This shall constitute the case management order for this action unless superseded or amended.

[*SET FORTH nature of case and matters resolved at conference, e.g.:*]

1. Nature of Case. This is _____ [an action *or* a special proceeding] for _____ [*set forth concise and descriptive statement of case*].

2. Matters Agreed on or Admitted. The following matters have been agreed on or admitted by the parties: _____ [*specify, setting forth each matter in a separately lettered subparagraph*].

3. Exhibits. The following is a list of exhibits marked in evidence or for identification or as authenticated by consent of the parties: _____ [*specify, describing each exhibit in a separately lettered subparagraph*].

4. Witnesses. The parties stipulated that _____ [*number*] persons would be called as witnesses.

5. Disputed Issues and Contentions. The following are the issues remaining in dispute and the factual and legal contentions made by each party with respect to them: _____ [*list each disputed issue in a separately lettered subparagraph followed by factual and legal contentions of each party with respect to it*].

6. Rulings and Orders. The following rulings and orders were made at the pretrial conference: _____ [*specify, setting forth concise and descriptive statement of each ruling or order in a separately lettered subparagraph*].

7. No further case management conference or review is required.

[*EITHER*]

8. Neither plaintiff nor defendant has demanded a jury trial.

[*OR*]

8. _____ [*Identify party, e.g.,* Defendant _____ (*name*)] has demanded a jury trial.

[*CONTINUE*]

9. All parties necessary to the disposition of this case have been served or have appeared.

[10. The following _____ (unserved *or* not appearing *or* unserved and not appearing) _____ (fictitious *or* named *or* fictitious and named) defendant(s) are to be _____ (dismissed *or* severed *or* dismissed and severed) from the action (as follows: _____ [*specify*]).]

11. The names and addresses of counsel who will try this case are: _____ [*name*] for plaintiff and _____ [*name*] for defendant.

[12. This case is set for a settlement conference pursuant to *Rule 3.1380 of the California Rules of Court* on _____ (*date*) at _____ (*time*).]

13. This case is set for trial on _____ (*date*).

14. The time estimated for trial is _____ days.

[*CONTINUE, setting forth any additional matters required by local court rule*]

15. Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, outlines the format and content of the case management conference order [*see Cal. Rules of Ct., Rule 3.728*]. Local court rule may require additional matters to be contained in the order.

Optional Paragraph 12 should be included if a settlement conference will be held [*see Cal. Rules of Ct., Rule 3.1380*]. The settlement conference is discussed in *§ 425.90*.

[3] Preparation and Contents of Order

The conference judge is required to enter sign a conference order including, as appropriate, the following [*Cal. Rules of Ct., Rule 3.728*]:

- Referral of the case to judicial arbitration or some other form of Alternative Dispute Resolution;

- A date for completion of the arbitration process or other form of Alternative Dispute Resolution process if the case has been referred to such a process;

- In the event that a trial date has not previously been set, a date certain for trial if the case is ready to be set for trial;

- Whether the trial will be a jury trial or a nonjury trial;

- The identity of each party demanding a jury trial;

- The estimated length of trial;

- Whether all parties necessary to the disposition of the case have been served or have appeared;

- The dismissal or severance of unserved or not appearing defendants from the action;

- The names and addresses of the attorneys who will try the case;

- The date, time, and place for a mandatory settlement conference [*see Cal. Rules of Ct., Rule 3.1380*; *see also § 425.90[4]*];

- The date, time, and place for the final case management conference before trial if such a conference is required by the court or the judge assigned to the case;

- The date, time, and place of any further case management conferences or review; and

- Any additional orders that may be appropriate, including orders on matters considered when the parties met and conferred or at the case management conference.

[4] Cross References

For further discussion of the Case Management Order, see *§ 425.37*

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37-425 California Forms of Pleading and Practice--Annotated § 425.133

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.133 Stipulation for Amendment, Correction, or Modification of Case Management Conference Order [Code Civ. Proc. § 576] and Order

[1] FORM Stipulation for Amendment, Correction, or Modification of Case Management Conference Order [Code Civ. Proc. § 576] and Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	STIPULATION FOR ORDER
Plaintiff,	)	_____ [AMENDING *or* COR-
vs.	)	RECTING *or* MODIFYING] CASE MANAGE-
_____ [*name*],	)	MENT CONFERENCE ORDER
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

The parties hereto, by and through their respective counsel, hereby stipulate and agree that the case management conference order dated _____ [*date*], and served on _____ [*date*], be _____ [amended *or* corrected *or* modified] without further hearing in the following matters:

1. _____ [*Set forth each proposed amendment, correction, or modification in a separately numbered paragraph*].

_____ [This *or* These] _____ [amendment(s) *or* correction(s) *or* modification(s)] is/are necessary in the furtherance of justice for the following reasons: _____ [*specify*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
By_____ [*typed name*]
By Attorney for Plaintiff
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant

ORDER

IT IS SO ORDERED.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use when all the attorneys for the parties stipulate to a correction or modification of the case management conference order. A stipulation may be presented at any time before or at the trial when the amendment is sought in furtherance of justice under *Code Civ. Proc. § 576*. A stipulation at trial is, however, normally made orally. For a form of notice of motion for an order under *Code Civ. Proc. § 576* to amend or modify a case management conference order, see *§ 425.134*.

[3] Cross References

For discussion and forms relating to stipulations generally, see Ch. 533, *Stipulations*

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A. Bringing Cases to Trial

37-425 California Forms of Pleading and Practice--Annotated § 425.134

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.134 Notice of Motion and Supporting Declaration to Amend Case Management Conference Order [Code Civ. Proc. § 576]

[1] FORM Notice of Motion and Supporting Declaration to Amend Case Management Conference Order [Code Civ. Proc. § 576]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER AMENDING CASE MANAGEMENT CON-
vs.	)	FERENCE ORDER, SUPPORTING DECLARA-
_____ [*name*],	)	TION OF _____ [*name*] AND SUP-
Defendant.	)	PORTING MEMORANDUM
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.*, defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in _____ [Department *or* Room] _____ of this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* plaintiff] will, and hereby does, move the court for an order amending the case management conference order in this case as follows: _____ [*specify*]. The motion will be brought pursuant to _____ [*cite statutory authority here*] and will be made on the ground that the requested amendment is necessary in the furtherance of justice.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] [*if applicable, add:* _____ (plaintiff's *or* defendant's) request for judicial notice], and the supporting memorandum served and filed herewith, and on such further and additional evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am the _____ [*identify declarant, e.g.,* (attorney of record for) _____ (*specify moving party, e.g.,* plaintiff)] herein and make this declaration in support of _____ [*specify party, e.g.,* plaintiff's] motion for an order _____ [amending *or* modifying] the case management conference order in this case. I have personal knowledge of the facts set forth herein, and if called to testify, would and could testify competently thereto.

2. _____ [*Set forth probative facts within declarant's personal knowledge establishing that granting motion would be in furtherance of justice or would prevent manifest injustice*].

3. I hereby request _____ [*state the relief requested from the court, i.e.,* that plaintiff's or defendant's motion for an order _____ (amending or modifying) the case management conference order in this case be granted as follows: _____ (*specify*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]
_____ [*signature*]

SUPPORTING MEMORANDUM
[*Add memorandum supporting motion*]

[2] Use of Form

The form in [1], *above,* is for use by a party to move for an order amending a case management conference order in the furtherance of justice [*Code Civ. Proc. § 576*]. The motion may be made either before or after the commencement of trial, although a motion made at trial is normally made orally. For a form of stipulation that may be used when the

parties agree to the amendment, see *§ 425.133*.

[3] Cross References

For discussion and forms for use in amending pleadings, see Ch. 21, *Amended and Supplemental Pleadings*

For discussion of notices of motion and motion procedure generally, related forms, and a procedural guide, see Ch. 372, *Motions and Orders*

For manners of serving notices of motion and a form of proof of service by mail, see Ch. 518, *Service of Summons and Papers*

For discussion and forms of affidavits and declarations generally, see Ch. 15, *Affidavits, Certificates, and Declarations*

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37-425 California Forms of Pleading and Practice--Annotated § 425.135

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.135 Order to Amend Case Management Conference Order [Code Civ. Proc. § 576]

[1] FORM Order to Amend Case Management Conference Order [Code Civ. Proc. § 576]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [*identify party, e.g.,* plaintiff] for an order amending the case management conference order in this case came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

The matter having been argued and submitted, and it appearing to the satisfaction of the court that the amendment is necessary in the furtherance of justice,

IT IS ORDERED that the motion be and is granted and that the case management conference order herein be and is amended as follows: _____ [*specify*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above,* is for use when a motion for an order amending a case management conference order pursuant to *Code Civ. Proc. § 576* is granted. The form may also be used, with appropriate modifications, if the motion is denied, although orders denying motions are often in the form of a minute order only. Unless the court otherwise orders, notice of the court's order granting or denying the motion must be given by the prevailing party to all other parties or their attorneys, unless notice is waived by all parties in open court and entered in the minutes [*Code Civ. Proc. § 1019.5(a)*].

[3] Cross References

For discussion and a form of notice of the court's decision or order, see Ch. 372, *Motions and Orders*

For the notice of motion related to this order, see *§ 425.134*

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37-425 California Forms of Pleading and Practice--Annotated §§ 425.136-425.139

AUTHOR: Evelio M. Grillo Editorial Consultant

[Reserved]

§§ 425.136[Reserved]

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B. Trial Setting

37-425 California Forms of Pleading and Practice--Annotated § 425.140

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.140 Notice of Time Set for Trial [Code Civ. Proc. § 594(b)]

[1] FORM Notice of Time Set for Trial [Code Civ. Proc. § 594(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF TIME SET FOR TRIAL
Defendant.	)	
	)	
	)	

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that this action has been set for trial on _____ [*date*] at _____ [*time*] in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*].
Dated: _____.

_____ [*signature*]
Attorney for_____ [*party's status and name*]

[2] Use of Form

The form in [a], *above*, is for use by a party to an action to give the other party notice of the trial date [*see Code Civ. Proc. § 594*; and Ch. 551, *Trial*, § 551.20 et seq.]. Many courts provide their own form of notice of trial, and if provided, the local form should be used.

[3] Cross References

For discussion of trial setting, see *§ 425.50*

For points and authorities in support of motion for new trial when defendant's nonappearance resulted from failure to receive notice of trial, see California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders*

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37-425 California Forms of Pleading and Practice--Annotated §§ 425.141-425.149

AUTHOR: Evelio M. Grillo Editorial Consultant

[Reserved]

§§ 425.141[Reserved]

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C. Bifurcation

37-425 California Forms of Pleading and Practice--Annotated § 425.150

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.150 Notice of Motion and Declaraton for Separate Trial of Issue or Part of Issue Before Trial of Other Issues or Part of Issue in Case [Code Civ. Proc. § 598]

[1] FORM Notice of Motion and Declaraton for Separate Trial of Issue or Part of Issue Before Trial of Other Issues or Part of Issue in Case [Code Civ. Proc. § 598]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER GRANTING PRIOR SEPARATE TRIAL OF ISSUE OF _____ [*specify, e.g.,* LIABILITY], SUPPORTING DECLARATION OF _____ [*name*], AND SUPPORTING MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

To _____ [*identify party, e.g.,* Plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*] at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* Defendant] will, and hereby does, move for an order that the issue of _____ [*specify, e.g.,* liability] be tried before the issue of _____ [*specify, e.g.,* damages] in this case. The motion will be brought pursuant to _____ [*cite statutory authority here*] and will be made on the ground that the _____ [convenience of the witnesses *or* the ends of justice *or* the economy and efficiency of handling the litigation *or any combination of these*] will be promoted thereby.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name*(*s*)], [*if applicable, add:* _____ (plaintiff's *or* defendant's) request for judicial notice] and the supporting memorandum served and filed herewith, on the records and file herein, and on such further and additional evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for_____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*]. I have personal knowledge of the facts set forth herein, and if called to testify, would and could testify competently thereto.

[*SET FORTH, in successively numbered paragraphs, facts within declarant's personal knowledge establishing that granting the motion would promote the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation, or any combination of these, e.g.:*]

2. Plaintiff's complaint prays judgment against defendant in the sum of $ _____ for _____ [*specify, e.g.,* personal injuries therein alleged to have been sustained by plaintiff as the proximate result of defendant's negligence].

3. Defendant has filed an answer in which he/she has _____ [*specify, e.g.,* denied he/she was negligent, denied his/her alleged negligence was the proximate cause of plaintiff's alleged injuries, alleged plaintiff was negligent and that such negligence was the proximate cause of plaintiff's injuries, and denied that plaintiff's alleged injuries are of the nature and extent alleged in the complaint].

4. _____ [Plaintiff *or* Defendant] has demanded a jury trial.

5. The cause is now at issue and ready for _____ [pretrial conference *or* trial], and _____ [*e.g.,* two] major issues of fact remain to be tried as follows: _____ [*specify, e.g.,* (a) whether defendant is liable for plaintiff's alleged injuries, and (b) if defendant is liable, the amount of damages

recoverable by plaintiff].

6. The _____ [*specify ground of motion, e.g.,* convenience of the witnesses] will be promoted by trying the issue of _____ [*e.g.,* liability] before the issue of _____ [*e.g.,* damages] for these reasons:

[*SPECIFY, e.g.*]

a. I estimate the trial of this action will take approximately _____ days.

b. I estimate trial of the issue of _____ [*e.g.,* liability] will take approximately _____ days.

c. I estimate trial of the issue of _____ [*e.g.,* damages] will take approximately _____ days.

d. I know of no witnesses who are competent to testify as to _____ [*specify, e.g.,* defendant's alleged negligence or plaintiff's negligence] who are also competent to testify as to _____ [*specify, e.g.,* the nature or extent of plaintiff's alleged injuries].

e. I anticipate that _____ [*number*] witnesses will be called to testify as to the issue of _____ [*specify, e.g.,* the nature and extent of plaintiff's alleged injuries], none of whom is competent to testify as to _____ [*specify, e.g.,* defendant's alleged negligence or plaintiff's negligence].

f. I know of no special defense herein that is entitled to be tried pursuant to [*Code of Civil Procedure Section 597 or Code of Civil Procedure Section 597.5*] before trial of the issue of _____ [*e.g.,* liability] herein.

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion*]

[2] Use of Form

The form in [1], *above,* is for use by a party to move the court for an order under *Code Civ. Proc. § 598* that issues, an issue, or part of an issue in the case be tried before the other issues, issue, or part of an issue in the case. For discussion of bifurcation under Section 598, see *§ 425.60* et seq.

[3] Service and Filing

The notice of motion and its supporting papers must be served and filed and the hearing held in time to enable the court to co mply with the requirement that the order granting the motion be made no later than the close of the pretrial conference in cases in which a pretrial conference is held or 30 days before the trial date in other cases [*Code Civ. Proc. § 598*].

The court, on its own motion, as opposed to a motion of a party, may at any time make an order that the trial of an issue or part of an issue precede the trial of any other issue or part of an issue in the case [*Code Civ. Proc. § 598*].

[4] Cross References

For discussion and format requirements of notices of motion, see Ch. 372, *Motions and Orders*

For discussion and forms for use in moving for separate trial of an affirmative defense not going to the merits of the action, see *Ch. 3, Abatement of Actions, § 3.110* et seq., and Ch. 345, *Limitation of Actions*

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Volume 37: Pretrial Proceedings thru Privacy-Chs. 425-439
Chapter 425 PRETRIAL PROCEEDINGS
PART V. FORMS
C. Bifurcation

37-425 California Forms of Pleading and Practice--Annotated § 425.151

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.151 Order Granting Motion for Separate Trial of Issue or Part of Issue Before Trial of Other Issues or Part of Issue in Case

[1] FORM Order Granting Motion for Separate Trial of Issue or Part of Issue Before Trial of Other Issues or Part of Issue in Case

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [*identify party, e.g.*, defendant] for an order requiring trial of the issue of _____ [*specify, e.g.*, liability] before trial of the issue of _____ [*specify, e.g.* damages] in this case came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the _____ [convenience of the witnesses *or* ends of justice *or* economy and efficiency of handling the litigation *or any combination of these*] will be promoted thereby and that the motion ought to be granted,

IT IS ORDERED that the motion be, and it is hereby, granted and that the issue of _____ [*e.g.*, liability] shall be tried separately [_____ (by the Court *or* before a duly impaneled and sworn jury)] before trial of the issue of _____ [*e.g.*, damages] in this case.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use when the motion under *Code Civ. Proc. § 598* for separate trial of an issue or part of an issue before trial of any other issue or part of an issue in the case is granted. For additional discussion of bifurcation, see *§ 425.60* et seq.

[3] Notice of Order

When a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order must be given by the prevailing party to all other parties or their attorneys, unless notice is waived by all parties in open court and the waiver is entered in the minutes [*Code Civ. Proc. § 1019.5(a)*].

[4] Cross References

For a form of notice motion and declaration initiating the proceedings for this order, see *§ 425.150*

For discussion and format requirements of notices of motion, see Ch. 372, *Motions and Orders*

For discussion and forms for use in moving for separate trial of an affirmative defense not going to the merits of the action, see *Ch. 3, Abatement of Actions, § 3.110* et seq., and Ch. 345, *Limitation of Actions*

For discussion and a form of notice of the court's decision or order, see Ch. 372, *Motions and Orders*

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Chapter 425 PRETRIAL PROCEEDINGS
PART V. FORMS
C. Bifurcation

37-425 California Forms of Pleading and Practice--Annotated § 425.152

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.152 Order Setting Remaining Issues or Part of Issue for Trial After Separate Trial of Issue or Part of Issue

[1] FORM Order Setting Remaining Issues or Part of Issue for Trial After Separate Trial of Issue or Part of Issue

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

Pursuant to an order of this Court entered on _____ [*date*], the issue of _____ [*e.g.*, liability] in this cause came on regularly for trial before _____ [this court *or* a jury] on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*]. _____ [The Court, having rendered its decision, *or* A jury of _____ (*number*) persons, duly impaneled and sworn to try the issue, having returned a verdict] _____ [*specify*, *e.g.*, finding defendant liable on the cause of action alleged in the complaint],

IT IS ORDERED that _____ [the issue of _____ (*e.g.*, damages) *or* all other issues] in this case be and is/are set for trial on _____ [*date*] at _____ [*time*], before [_____ (the Court *or* the same jury that tried the issue of _____ (*e.g.*, liability) *or* a new jury of _____ (*number*) persons to be impaneled and sworn at that time)].

Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above,* is for use when the court on its own motion sets for trial the issues, issue, or part of an issue remaining after the prior separate trial of an issue or part of an issue pursuant to *Code Civ. Proc. § 598* that did not result in a final disposition of the action. For discussion of giving notice of the order see *Code Civ. Proc. § 1019.5(a).*

[3] Proceedings After Separate Trial

If the issue of liability as to all causes of action is tried before other issues and the court's decision or jury's verdict is in favor of any party on whom liability is sought to be imposed, judgment in that party's favor is entered [*Code Civ. Proc. § 598*].

If the court's decision or jury's verdict on the liability issue is against any party on whom liability is sought to be imposed or if the decision or verdict on the issue or part of an issue so tried does not result in a judgment being ordered, then the trial of the other issues or parts of issues will be had at a time ordered by the court. If it is a jury trial, the case may proceed before the same or another jury, as ordered by the court. The order may be made by the court on its own motion or on the motion of any party. The subsequent judgment is entered in the same manner and with the same effect as if all the issues in the case had been tried at one time [*Code Civ. Proc. § 598*].

[4] Cross References

For a form of notice motion and declaration initiating the proceedings for this order, see *§ 425.151*

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37-425 California Forms of Pleading and Practice--Annotated §§ 425.153-425.159

AUTHOR: Evelio M. Grillo Editorial Consultant

[Reserved]

§§ 425.153[Reserved]

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Chapter 425 PRETRIAL PROCEEDINGS
PART V. FORMS
D. Motions for Precedence or Preference and Motions to Continue, Advance, Reset, or Specially Set

37-425 California Forms of Pleading and Practice--Annotated § 425.160

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.160 Notice of Motion and Supporting Declaration to Establish Precedence or Preference of Case for Case Management Conference or Trial [Cal. Rules of Ct., Rules 3.723, 3.1335]

[1] FORM Notice of Motion and Supporting Declaration to Establish Precedence or Preference of Case for Case Management Conference or Trial [Cal. Rules of Ct., Rules 3.723, 3.1335]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR OR-
vs.	)	DER _____ [ESTABLISHING
_____ [*name*],	)	PRECEDENCE *or* GRANTING PREFERENCE]
Defendant.	)	AND SETTING CASE FOR _____
	)	[CASE MANAGEMENT CONFERENCE *or* TRI-
	)	AL], SUPPORTING DECLARATION OF
	)	_____ [*name*], AND SUPPORTING
	)	MEMORANDUM
		Date: _____
		Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

[*EITHER, if seeking preference based on Code Civ. Proc. § 36(a)*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], California, _____ [*specify party, e.g.,* plaintiff] will, and hereby does, move the court for an order granting this case a preference and setting it for _____ [a case management conference *or* trial] at the earliest possible date. The motion will be brought pursuant to *Code Civ. Proc. § 36(a)* and will be made on the ground(s) that _____ [*identify party, e.g.,* plaintiff] is _____ [70 *or* specify number more than 70] years of age.

[*OR, if seeking preference based on Code Civ. Proc. § 36(b)*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], California, _____ [*specify party, e.g.,* plaintiff] will move the court for an order granting this case a preference and setting it for _____ [a case management conference *or* trial] at the earliest possible date. The motion will be brought pursuant to *Code Civ. Proc. § 36(b)* and will be made on the ground(s) that this is an action to recover damages for _____ [wrongful death *or* personal injury] and _____ [*identify moving party, e.g.,* plaintiff] is _____ [*specify number under 14*] years of age.

OR, if seeking preference based on Code Civ. Proc. § 36(d)]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], California, _____ [*specify party, e.g.,* plaintiff] will move the court for an order granting this case a preference and setting it for _____ [a case management conference *or* trial] at the earliest possible date. The motion will be brought pursuant to *Code Civ. Proc. § 36(d)* and will be made on the ground(s) that _____ [*identify party, e.g.,* plaintiff] _____ suffers from an _____ [illness *or* condition] raising substantial medical doubt that he/she will survive beyond six months from now and the interests of justice will be served by the granting of the preference.

[*OR, if seeking preference based on Code Civ. Proc. § 36(e)*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], California, _____ [*specify party, e.g.,* plaintiff] will move the court for an order granting this case a preference and setting it for _____ [a case management conference *or* trial] at the earliest possible date. The motion will be brought pursuant to *Code Civ. Proc. § 36(e)* and will be made on the ground(s) that the interests of justice will be served by the granting of the preference.

[*OR, if seeking preference based on Code Civ. Proc. § 37*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], California, _____ [*specify party, e.g.,* plaintiff] will move the court for an order granting this case a preference and setting it for _____ [a case management conference *or* trial] at the earliest possible date. The motion will be brought pursuant to *Code Civ. Proc. § 37* and will be made on the ground(s) that this is an action in which plaintiff is seeking damages for personal injuries caused by defendant during the commission of a felony offense for which defendant has been criminally convicted.

[*OR, if seeking precedence under Code Civ. Proc. § 1062.3(b)* for action that seeks both declaratory and other relief]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], California, _____ [*specify party, e.g.,* plaintiff] will move the court for an order establishing that this case has precedence and setting it for _____ [a case management conference *or* trial] at the earliest possible date. The motion will be brought pursuant to *Code Civ. Proc. § 1062.3(b)* and will be made on the ground(s) that this case is an action for declaratory relief and, although judicial relief in addition to declaratory relief is sought, the action requires a speedy trial.

[*OR, to establish other statutory precedence*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], California, _____ [*specify party, e.g.,* plaintiff] will move the court for an order establishing that this case has precedence and setting it for _____ [a case management conference *or* trial] at the earliest possible date. The motion will be brought pursuant to _____ [*cite statutory authority, e.g.,*] and will be made on the ground(s) that this case is _____ [an action *or* a proceeding] _____ [*specify, e.g.,* by a taxpayer to enjoin a public improvement project] and is entitled to precedence in setting for trial pursuant to _____ [*specify code section, e.g., Code of Civil Procedure Section 526a*].

[*CONTINUE*]

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] [*if applicable, add:* _____ (plaintiff's *or* defendant's) request for judicial notice], and the supporting memorandum served and filed herewith, and on such further and additional evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for_____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am the _____ [*identify declarant, e.g.,* (the attorney of record for) _____ (*identify moving party, e.g.,* plaintiff)] herein and make this declaration in support of _____ [*identify party, e.g.,* plaintiff's] motion for an order that this case _____ [is entitled to precedence *or* be granted preference] and setting it for _____ [a case management conference *or* trial]. I have personal knowledge of the facts set forth herein, and if called to testify, would and could testify competently thereto.

[*EITHER, if seeking preference based on Code Civ. Proc. § 36(a)*]

2. As shown by the certified copy of the birth certificate attached as Exhibit A and made a part hereof, _____ [*identify party, e.g.,* plaintiff _____ (*name*)] was born on _____ [*date*] and is _____ [*70 or more*] years of age.

3. _____ [*Identify party, e.g.,* Plaintiff _____ (*name*)] has a substantial interest in the case in that _____ [*specify*].

4. In addition to advanced age, [I am informed and believe and thereon allege that] _____ [*identify party, e.g.,* plaintiff _____ (*name*)] suffers _____ [*describe state of health that requires preference to prevent prejudicing party's interest in the litigation*].

[*OR, if seeking preference based on Code Civ. Proc. § 36(b)*]

2. As shown by the complaint herein, this is an action to recover damages for _____ [wrongful death *or* personal injury], and, in addition, as shown by the certified copy of the birth certificate attached as Exhibit A and made a part hereof, _____ [*identify party, e.g.,* plaintiff] was born on _____ [*date*] and is _____ [*specify number under 14*] years of age.

3. _____ [*Identify party, e.g.,* Plaintiff _____ (*name*)] has a substantial interest in the case in that _____ [*specify*].

[*OR, if seeking preference based on Code Civ. Proc. § 37*]

2. As shown by the complaint herein, this is an action in which plaintiff is seeking to recover damages sustained on _____ [*date*] as a result of _____ [*specify, e.g.,* being shot by defendant while he/she was in the course of committing an armed robbery].

3. As shown by the Clerk's Certificate attached hereto as Exhibit A and made a part hereof, defendant was convicted of the felony of _____ [*specify*] on _____ [*date*], in the Superior Court of the State of California, County of _____, in the case of People vs. _____ [*name*], number _____. The court is hereby requested to take judicial notice of this criminal conviction.

[*OR, if seeking precedence under Code Civ. Proc. § 1062.3(b) for action that seeks both declaratory and other relief*]

2. As shown by the complaint herein, this is an action for declaratory relief in which plaintiff(s) also seeks/seek _____ [*specify additional relief sought*]. A speedy trial of this action is required for the following reason(s): _____ [*set forth probative facts within declarant's personal knowledge*].

[*OR, in other cases*]

2. _____ [*Set forth facts establishing ground for granting motion*].

[*CONTINUE*]

3. I hereby request _____ [*state the relief requested from the court, e.g.,* that the trial date be advanced *or* a preference to be granted for this action].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion*]

[2] Use of Form

The form in [1], *above,* is for use by a party to move for an order that the case is entitled to precedence or a preference in setting it for trial. The form may also be used to move for an order that the case is entitled to precedence or a preference in setting a case management conference.

In certain cases in which a preference is sought, a motion is expressly required by statute [*see, e.g., Code Civ. Proc. §§ 36* (party who is elderly, critically ill, etc.), *Code Civ. Proc. § 1062.3(b)* (declaratory relief with additional relief sought), discussed in [c], *below*]. In other cases, no motion is necessary, although counsel may wish to seek an order establishing the preference if the right to preference has to be established by evidence outside the court's records. For further discussion, see *§ 425.70* et seq.

[3] Supporting Declaration

A supporting declaration would not normally be required when the ground of the motion is that the case is entitled to statutory precedence. The nature of the action would be established by the allegations of the complaint, and the fact that the case is entitled to statutory precedence would be established by the supporting points and authorities. An exception exists when the action is for declaratory relief. Although a declaratory relief action is normally entitled to precedence under *Code Civ. Proc. § 1062.3(a),* if plaintiff seeks any relief in addition to a declaration of rights and duties, the case will take precedence only on noticed motion and a showing that the action requires a speedy trial [*see Code Civ. Proc. §*

1062.3(b)].

On the other hand, if the motion is based, for example, on the age or poor physical condition of a party, the ground would not appear from the court's records and would have to be established by extrinsic evidence set forth in a supporting declaration [*see Code Civ. Proc. §§ 36(a), (b), (d), 36.5*].

The showing should be made by a supporting affidavit [*see Code Civ. Proc. § 2009*] or declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5*], as in the form in [1], *above.*

[4] Declaration for Preference Based on Party's Age

An affidavit submitted in support of a motion for preference under *Code. Civ. Proc. § 36(a)* (party over 70 years of age) may be signed by the attorney for the party seeking preference based on information and belief as to the medical diagnosis and prognosis of any party. The affidavit is not admissible for any purpose other than a motion for preference under *Code. Civ. Proc. § 36(a)* [*Code. Civ. Proc. § 36.5*].

[5] Cross References

For a discussion of precedence in pretrial proceedings, see *§§ 425.73 -425.75*

For memoranda of points and authorities relating to this form, see *California Points and Authorities , Ch. 180, Pretrial Proceedings, §§ 180.50 -180.81*

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37-425 California Forms of Pleading and Practice--Annotated § 425.161

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.161 Order Establishing Precedence or Preference of Case for Case Management Conference or Trial [Cal. Rules of Ct., Rules 3.723, 3.1335]

[1] FORM Order Establishing Precedence or Preference of Case for Case Management Conference or Trial [Cal. Rules of Ct., Rules 3.723, 3.1335]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [*identify party, e.g.,* plaintiff] for an order _____ [establishing that this case is entitled to precedence *or* granting this case a preference] and setting it for _____ [a case management conference *or* trial] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

[*EITHER, without findings*]

On proof made to the satisfaction of the court that the motion ought to be granted,

[*OR, with findings* (*see Code Civ. Proc. § 36(a)*)]

The Court, having considered the _____ [affidavit(s) *or* declaration(s)] and other documents in support of and in opposition to the motion, having heard the arguments of counsel, and being fully advised in the matter, finds as follows:

[*SET OUT specific findings in as many paragraphs as appropriate, e.g.:*]

1. _____ (*Identify party, e.g., Plaintiff*) has a substantial interest in this action as a whole; and

2. _____'s (*Identify party, e.g., Plaintiff's*) health is such that a preference is necessary to prevent prejudicing his/her interest in this litigation.

Therefore,

[*CONTINUE*]

IT IS ORDERED that the motion be and is granted and that this case is _____ [entitled to precedence *or* granted a preference] in setting.

IT IS FURTHER ORDERED that the case be and is set for _____ [a case management conference *or* trial] on _____ [*date*], at _____ [*time*], in [_____ (Department *or* Division) _____ of] this court located at _____ [*street address*], _____ [*city*], California.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use when a motion for an order establishing the precedence of a case or granting it a preference in setting and setting it for a case management conference or trial is granted [for a form of notice of motion and discussion of grounds, *see § 425.160*].

In the case of a motion to grant a preference based on the age of a party, the court must grant the motion if it makes all of the following findings [*Code Civ. Proc. § 36(a)*]:

- The party has a substantial interest in the action as a whole; and

- The party's health is such that a preference is necessary to prevent prejudicing the party's interest in the litigation.

[3] Cross References

For a form of notice motion and declaration initiating the proceedings for this order, see *§ 425.160*

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37-425 California Forms of Pleading and Practice--Annotated § 425.162

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.162 Notice of Motion and Supporting Declaration to Advance, Reset, or Specially Set Case for Case Management Conference or Trial [Cal. Rules of Ct., Rules 3.723, 3.1335]

[1] FORM Notice of Motion and Supporting Declaration to Advance, Reset, or Specially Set Case for Case Management Conference or Trial [Cal. Rules of Ct., Rules 3.723, 3.1335]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR OR-
vs.	)	DER _____ [ADVANCING *or* RE-
_____ [*name*],	)	SETTING *or* SPECIALLY SETTING] CASE FOR
Defendant.	)	_____ [CASE MANAGEMENT
	)	CONFERENCE *or* TRIAL], SUPPORTING DE-
	)	CLARATION OF _____ [*name*],
	)	AND SUPPORTING MEMORANDUM
	)	Date: _____
		Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of

record:

NOTICE IS HEREBY GIVEN that on _____ [*date*] at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* plaintiff] will, and hereby does, move the court for an order _____ [advancing *or* resetting *or* specially setting] this case for _____ [a case management conference *or* trial] _____ [from _____ (*date*) at _____ (*time*) to _____ (*date*) at _____ (*time*) *or* on _____ (*date*) at _____ (*time*)]. The motion will be made on the ground that _____ [*specify, e.g.,* this case is entitled to precedence in setting pursuant to _____ (*specify code section*) *or* this case must be brought to trial on or before _____ (*date*) to avoid mandatory dismissal under the provisions of *Sections 583.310* and *583.360 of the Code of Civil Procedure*].

The motion will be based on this notice of motion, on the [declaration(s) of _____ (*name(s)*) and] supporting memorandum served and filed herewith, on the records and file herein, and on such further and additional evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am the _____ [*identify declarant, e.g.,* attorney of record for _____ (*specify moving party, e.g.,* plaintiff)] herein and make this declaration in support of _____ [*specify party, e.g.,* plaintiff's] motion to _____ [advance *or* reset *or* specially set] this case for _____ [a trial setting conference *or* trial]. I have personal knowledge of the facts set forth herein, and if called to testify, would and could testify competently thereto.

2. This is an action for _____ [*briefly describe the action in two or three sentences, including the parties, the basic facts and the issues pertinent to the motion*].

3. It is necessary that this case be _____ [advanced *or* reset *or* specially set] because _____ [*specify probative facts within declarant's personal knowledge*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

SUPPORTING MEMORANDUM

[*Add memorandum of points and authorities supporting motion*]

[2] Use of Form

The form in [1], *above,* is for use by a party to a case to move for an order advancing, resetting, or specially setting the case for trial. The form may also be used to move for an order advancing, resetting, or specially setting a trial setting conference [*see Cal. Rules of Ct., Rule 3.1335*].

Technically, a case would be (1) advanced when a date has already been set; (2) reset when it has been dropped from the calendar; and (3) specially set when no date has been set. These terms, however, are not always precisely used.

[3] Supporting Declaration

A declaration must be used in support of a motion to advance, reset, or specially set a case for trial [*see Cal. Rules of Ct., Rule 3.1335*].

Extrinsic evidence would not normally be required when the ground of the motion is that the case is entitled to statutory precedence. The nature of the action would be established by the allegations of the complaint; the fact the case is entitled to statutory precedence would be established by the supporting points and authorities.

On the other hand, if the motion is based, for example, on the age or poor physical condition of a party, the ground would not appear from the court's records and would have to be established by extrinsic evidence set forth in a supporting declaration [*see Code Civ. Proc. § 36(a), (b), (d)*].

If the motion is required to avoid mandatory dismissal for delay in prosecution [*see Code Civ. Proc. § 583.360*], the supporting declaration will need to show facts explaining why the case was not brought to trial at an earlier date. The factors to be developed are the same as on a motion for discretionary dismissal for failure to prosecute [*see Howard v. Thrifty Drug & Discount Stores (1995) 10 Cal. 4th 424, 441, 41 Cal. Rptr. 2d 362, 895 P.2d 469* ; for discussion, *see § 425.73*].

[4] Motions to Advance, Reset, or Specially Set

A motion to advance, reset, or specially set a case for trial in the superior court, unless the case has been assigned for all purposes to a specific judge or department, in which case the motion must be made before the assigned judge or in the assigned department [*Cal. Rules of Ct., Rules 3.1100, 3.1335*]. *Cal. Rules of Ct., Rule 3.1335* requires notice to all other parties [*Mesler v. Bragg Management Co. (1990) 219 Cal. App. 3d 983, 991, 268 Cal. Rptr. 522]* .

An ex parte application under *Cal. Rules of Ct., Rule 3.1200 et seq.* may also be brought [*Cal. Rules of Ct., Rule 3.1335*].

[5] Cross References

For discussion of advancing, resetting, or specially setting a case for trial, see *§§ 425.76, 425.77*

For memoranda relating to this form, see *California Points and Authorities , Ch. 180, Pretrial Proceedings, §§ 180.50 -180.81*

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Chapter 425 PRETRIAL PROCEEDINGS
PART V. FORMS
D. Motions for Precedence or Preference and Motions to Continue, Advance, Reset, or Specially Set

37-425 California Forms of Pleading and Practice--Annotated § 425.163

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.163 Order to Advance, Reset, or Specially Set Case for Case Management Conference or Trial [Cal. Rules of Ct., Rules 3.723, 3.1335]

[1] FORM Order to Advance, Reset, or Specially Set Case for Case Management Conference or Trial [Cal. Rules of Ct., Rules 3.723, 3.1335]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [*identify party, e.g.,* plaintiff]] for an order _____ [advancing *or* resetting *or* specially setting] this case for _____ [a case management conference *or* trial] came on regularly for hearing by the court on _____ [*date*] in Department _____ of this Court. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be and is hereby granted and the _____ [trial setting conference *or*

trial] is _____ [advanced *or* reset *or* set] _____ [from _____ (*date*) at _____ (*time*) to _____ (*date*) at _____ (*time*) *or* on _____ (*date*) at _____ (*time*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use when a motion for an order advancing, resetting, or setting the date for a case management conference or trial is granted. The form may also, with appropriate modifications, be used if the motion is denied, although orders denying motions are normally in the form of a minute order only.

[3] Cross References

For a form of notice motion and declaration initiating the proceedings for this order, see *§ 425.162*

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37-425 California Forms of Pleading and Practice--Annotated §§ 425.164-425.169

AUTHOR: Evelio M. Grillo Editorial Consultant

[Reserved]

§§ 425.164[Reserved]

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Chapter 425 PRETRIAL PROCEEDINGS
PART V. FORMS
E. Settlement

37-425 California Forms of Pleading and Practice--Annotated § 425.170

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.170 Joint Request to Have Case Placed on Settlement Conference Calendar [Cal. Rules of Ct., Rule 3.1380(a)]

[1] FORM Joint Request to Have Case Placed on Settlement Conference Calendar [Cal. Rules of Ct., Rule 3.1380(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	JOINT REQUEST TO HAVE CASE PLACED ON
Defendant.	)	SETTLEMENT CONFERENCE CALENDAR
	)	
	)	

Plaintiff and defendant jointly request that this case be placed on the court's settlement conference calendar. The case is set for trial on _____ [*date*] at _____ [*time*] [in Department _____ of the above-entitled court].

[The following date and time are open on the settlement calendar and are convenient to counsel for each party and the persons who will attend: _____ (*date*) at _____ (*time*) in (Department _____ of) the above-entitled court.]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for_____ [*party, e.g.,* Plaintiff]
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for_____ [*party, e.g.,* Defendant]

[2] Use of Form

The form in [1], *above,* is for use by the parties to jointly request that a case be placed on the settlement conference calendar [*see Cal. Rules of Ct., Rule 3.1380(a)*].

Counsel should consult the rules and policies of the court in which the case is pending to ascertain any local requirements that may be imposed on the format or content of the request. Some courts provide their own preprinted forms and if this is done the local form must be used.

[3] When Settlement Conference Is Mandatory

On the court's own motion or at the request of any party, the court may set one or more mandatory settlement conferences [*Cal. Rules of Ct., Rule 3.1380(a)*].

[4] Cross References

For discussion of settlement conference procedure, see *§ 425.90*

For discussion of offers to compromise, in general, see Ch. 520, *Settlement and Release*

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PART V. FORMS
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37-425 California Forms of Pleading and Practice--Annotated § 425.171

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.171 Settlement Conference Statement [Cal. Rules of Ct., Rule 3.1380(c)]

[1] FORM Settlement Conference Statement [Cal. Rules of Ct., Rule 3.1380(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	SETTLEMENT CONFERENCE STATEMENT
Defendant.	)	
	)	
	)	

_____ [Plaintiff *or* Cross Complainant] _____ [*name*] represents:

1. Nature of case. This is an action for _____ [*specify*, *e.g.*, damages for personal injuries and property damage sustained by _____ (*party*, plaintiff) in an automobile accident].

2. Facts. The material facts of the case are as follows: _____ [*set forth concise statement of material facts*].

3. Parties. The parties and their capacities in this action are as follows: _____ [*specify*].

4. Agreed or Admitted Matters. The parties agree or admit that the following matters are true: _____ [

specify, including matters admitted by pleadings, answers to interrogatories, or requests for admission].

5. Contentions. The factual and legal contentions in dispute are as follows: _____ [*concisely state, identifying first the party making the contention(s), then the contention(s), and lastly the party disputing the contention(s)*].

6. Legal Propositions and Authorities. _____ [*Specify each legal proposition important to resolution of the case and cite appropriate authority that supports it*].

[*ADD, if statement is filed by party claiming damages*]

7. Damages. [As of this date,] _____ [*identify party, e.g.*, plaintiff _____ (*name*)] [has] sustained damages in the total amount of $ _____. These damages consist of special and general damages as follows: _____ [*itemize special damages by category and then general damages*].

8. Punitive Damages. The amount claimed as punitive damages is $_____.]

9. Settlement Demand. _____ [*Identify party, e.g.*, Plaintiff _____ (*name*)] demands the sum of $ _____ to settle this case without trial.

10. Settlement Offers in Place. _____ [*Identify party, e.g.*, Plaintiff _____ (*name*)] has received [*no settlement offers* or *the following settlement offers:* _____ (*specify*)].

[*OR, if statement is filed by defendant*]

7. Settlement Offer. _____ [*Identify party, e.g.*, Defendant _____ (*name*)] offers the sum of $_____ to settle this case without trial.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form in [1], *above*, illustrates the kinds of matters that must or may be included in the settlement conference statement. For the purpose of illustration, the form combines the requirements imposed by *Cal. Rules of Ct., Rule 3.1380(c)* and the additional requirements imposed by the Los Angeles County Superior Court for statements filed in that court [*see* Los Angeles Co. Super. Ct. Rules, Rule 7.9(e)]. If the court in which the action is pending provides a printed form of settlement conference statement for use by the parties, the form must be used.

Each party must, no later than five days before the date set for the initial settlement conference, submit to the court and serve on each party a settlement conference statement [*Cal. Rules of Ct., Rule 3.1380(c)*].

[3] Contents of Statement

The statement must contain a good faith settlement demand and an itemization of economic and non-economic damages

by each plaintiff and a good faith offer of settlement by each defendant. In addition the statement must set forth and discuss in detail all facts and law pertinent to the issues of liability and damages as to that party and comply with any additional requirement imposed by local rule [*Cal. Rules of Ct., Rule 3.1380(c)*]. The Los Angeles County Superior Court, for example, requires that the statement identify all parties and their capacities in the action and contain the following [Los Angeles Co. Super. Ct. Rules, Rule 7.9(b)(5)]:

- A concise statement of the material facts of the case.
- A concise statement of the factual and legal contentions in dispute.
- Citations of authorities which support legal propositions important to resolution of the case.
- If the statement is filed by a party claiming damages, a list of all special damages, as well as a statement of any amounts claimed as general and punitive damages and the total amount claimed as damages.

In a personal injury action, the special damages must be listed. The list must include all such expenses incurred to the time of the settlement conference. The statements must also include the general status of the case including offers for settlement in place [Los Angeles Co. Super. Ct. Rules, Rule 7.9(e)].

[4] Cross References

For discussion of a settlement conference statement, see *§ 425.91*

For discussion of offers to compromise, in general, see Ch. 520, *Settlement and Release*

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37-425 California Forms of Pleading and Practice--Annotated § 425.172

AUTHOR: Evelio M. Grillo Editorial Consultant

§ 425.172 Notice of Settlement of Entire Case [Cal. Rules of Ct., Rule 3.1385]--Judicial Council Form CM-200

[1] FORM Notice of Settlement [Cal. Rules of Ct., Rule 3.1385]--Judicial Council Form CM-200

Click here to view image.

[2] Use of Form

The form in [1], *above*, Cal. Judicial Council Form CM-200, Notice of Settlement of Entire Case, has been adopted by the California Judicial Council as a mandatory form [*Cal. Rules Ct, Rule 1.31*] and is to be used to provide the court, all parties and any arbitrator or other court-connected ADR neutral with notice of settlement or other disposition of an entire case as required under *Cal. Rules of Ct., Rule 3.1385*. When a case is settled each plaintiff or other party seeking affirmative relief must immediately file written notice with the court and serve the notice on all parties and any arbitrator or other court-connected ADR neutral [*Cal. Rules of Ct., Rule 3.1385(a)*]. Complete all applicable items on the form.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Form* s, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Cross References

For discussion of the duty to provide notice of a settlement, see *§ 425.93[3]*

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Volume 37: Pretrial Proceedings thru Privacy-Chs. 425-439
Chapter 427 PRINCIPAL AND AGENT

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[6] Death of Principal

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§ 427.22 Liability of Principal to Third Party

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[5] Torts of Agents

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[2] Requirements for Springing Power of Attorney

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[b] Use of Commercial Printed Form

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[5] Compliance With Other Law

[6] Passage of Time

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[b] Application of Power to After-Acquired Property

[c] Printed Form or Statutory Form Power of Attorney Under Former Law

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[5] Duty to Act in Principal's Interest

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[8] Successor Attorney in Fact

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[3] Definitions

[4] Delegation of Agency

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[6] Liability of Principal and Agent to Third Parties

[7] Ratification

[8] Termination of Agency

[9] Other Specific Agencies

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[a] Attorneys in Fact

[b] Statutory Form Power of Attorney

[c] Power of Attorney for Health Care /Advance Health Care Directive

[d] Judicial Proceedings

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[a] To Agent

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[a] To Principal

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[1] FORM

[2] Use of Form

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[1] FORM

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§ 427.84 Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--Agency Not Terminable by Principal Because Coupled With Interest--By Agent Against Principal

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[6] State Statutes

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§§ 427.85-427.99 [Reserved]

§ 427.100 Complaint for Damages [Civ. Code § 3333] and Secret Profits--Agent's Breach of Fiduciary Duty--By Principal Against Agent

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction

[5] Cross References

[6] State Statutes

[7] Decisions

§ 427.101 Complaint for Accounting From Agent--By Principal Against Agent

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Decisions

[6] Cross Reference

§ 427.102 Complaint for Implied Equitable Indemnity--Principal's Payment of Third Party's Judgment Against Principal for Agent's Tort--By Principal Against Agent

[1] FORM

[2] Use of Form

[3] Allegations

[4] Decisions

§ 427.103 Complaint for Damages [Civ. Code § 3300]--Breach of Agency Agreement--By Principal Against Agent

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Decisions

[6] Cross Reference

§§ 427.104through 427.119 [Reserved]

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction

[5] State Statutes

[6] Decisions

[7] Cross Reference

§ 427.121 Allegations--Agent Liable to Third Party as Principal for Damages for Breach of Contract [Civ. Code § 3300] or for Tort [Civ. Code § 3333]--Action by Third Party Against Agent

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Decisions

§ 427.122 Allegation--Imputing Liability for Torts of Agent to Principal [Civ. Code §§ 2338, 2339]--Action by Third Party

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

[5] State Statutes

[6] Decisions

§ 427.123 Allegation--Punitive Damages [Civ. Code § 3294]--Principal Liable for Acts of Agent--Action By Third Party Against Principal

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Decisions

§ 427.124 Allegation--Principal Liable for Agent's Acts Under Ostensible Agency [Civ. Code § 2300] or Ostensible Authority [Civ. Code §§ 2317, 2334]--Action by Third Party Who Dealt With Agent

[1] FORM

[2] Use of Form

[3] Judicial Council Trial Forms

[4] Allegations

[5] State Statutes

[6] Decisions

§ 427.125 Allegation--Principal and/or Agent Liable for Agent's Acts Under Actual Authority [Civ. Code § 2316]--Action by Third Party Who Dealt with Agent

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Decisions

§ 427.126 Allegation--Undisclosed Principal Liable for Transaction Entered Into by Agent--Action by Third Party Who Dealt With Agent Without Knowledge of Agency Relationship

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Decisions

§ 427.127 Allegation--Knowledge of or Notice to Agent Imputed to Principal [Civ. Code § 2332]--Action by Third Party Against Principal and/or Agent

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Decisions

§§ 427.128through 427.139 [Reserved]

§ 427.140 Petition for Determination of Whether Power of Attorney Is in Effect [Prob. Code § 4541(a)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction

[5] Venue

[6] Ground for Petition

[7] Standing to File Petition

[8] Nonlimitable Right to Petition

[9] Elimination of Right to Petition

[10] Signature and Verification

[11] Procedure

[a] Governing Rules

[b] Service of Petition and Notice of Hearing

[c] Dismissal of Petition

[d] Right to Jury Trial

[e] Appeal

[12] Cross References

[13] State Statutes

§ 427.141 Petition for Determination of Whether Act of Attorney in Fact Is Proper [Prob. Code §§ 4541(b), 4766(c), 4770]--By Attorney in Fact

[1] FORM

[2] Use of Form

[3] Ground for Petition

[4] Nonlimitable Right to Petition

[5] Temporary Order Prescribing Health Care

[6] Appeal

[7] State Statutes

[8] Cross Reference

§ 427.142 Petition for Determination of Whether Attorney's Act Is Proper [Prob. Code §§ 4766(c), 4942(b)]--By Person Other Than Attorney in Fact

[1] FORM

[2] Use of Form

[3] Attorney in Fact Subject to Personal Jurisdiction

[4] Attorney's Fees

[5] Appeal

[6] State Statutes

[7] Cross Reference

§ 427.143 Petition for Order Compelling Attorney in Fact to Submit Accounting or Report [Prob. Code §§ 4541(c)]

[1] FORM

[2] Use of Form

[3] Ground for Petition

[4] Duty of Attorney in Fact to Submit Accounting or Report

[5] Nonlimitable Right to Petition

[6] Attorney's Fees

[7] Order Not Appealable

[8] State Statutes

[9] Cross Reference

§ 427.144 Petition for Order That Durable Power of Attorney Is Revoked or Terminated [Prob. Code §§ 4541(d), 4766(d)]

[1] FORM

[2] Use of Form

[3] Ground for Petition

[4] Nonlimitable Right to Petition

[5] Appeal

[6] Cross Reference

§ 427.145 Petition for Approval of Resignation by Attorney in Fact (Except Power of Attorney for Health Care [Advance Health Care Directive]) [Prob. Code §§ 4941(e)]

[1] FORM

[2] Use of Form

[3] Ground for Petition

[4] Nonlimitable Right to Petition

[5] Duty to Honor Commitments

[6] Appeal

[7] State Statutes

[8] Cross Reference

§ 427.146 Petition for Order Compelling Third Person to Honor Power of Attorney or Advance Health Care Directive [Prob. Code §§ 4541(f), 4766(e)]

[1] FORM

[2] Use of Form

[3] Ground for Petition

[a] Powers of Attorney Generally

[b] Statutory Form Power of Attorney

[c] Power of Attorney for Health Care or Advance Health Care Directive

[4] Nonlimitable Right to Petition

[5] Essential Allegation

[a] Principal's Rights Against Third Person

[b] Principal as Depositor or Borrower at Financial Institution

[6] Attorney's Fees

[a] Respondent's Refusal to Accept Affidavit

[b] Respondent's Refusal to Honor Statutory Form Power of Attorney

[7] Notice of Time and Place of Hearing

[8] Appeal

[9] Cross Reference

§ 427.147 Affirmative Defense--Previous Breach of Agreement by Attorney in Fact [Prob. Code § 4309]

[1] FORM

[2] Use of Form

[3] Ground for Defense

[4] Cross Reference

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§ 427.01 Scope of Chapter

This chapter covers actions by and against a principal or an agent involving issues related to the agency relationship and issues related to powers of attorney.

Topics discussed in the introduction include the nature of the relationship between a principal and an agent, the means of creating and terminating the relationship, the methods of conferring authority on an agent, and how a principal may limit an agent's authority.

The discussion includes the legal consequences when a third party who deals with an agent has incomplete knowledge of limitations on the agent's authority; the legal consequences of an agent's acts that are undertaken without disclosure to third parties of the fact that the agent is acting as an agent; and the rights and liabilities of principals, agents, and third parties that arise from dealings among them.

The introduction also provides an overview of the law governing powers of attorney, including powers of attorney for health care, also known as "advance health care directives." The introduction concludes with a brief discussion of the duties of specific types of agents such as auctioneers and factors.

Forms provided for use in actions by an agent against a principal are:

- Complaints for compensation and damages resulting from breach of the agency contract [*see §§ 427.80 -427.82*].

- A complaint for implied contractual indemnity [*see § 427.83*].

- A complaint for a declaratory judgment that the agency is not terminable, on the ground that it is coupled with an interest [*see § 427.84*].

Forms for use in actions by a principal against an agent are:

- A complaint for damages and secret profits arising from the agent's breach of fiduciary duty [*see § 427.100*].

- A complaint seeking an accounting by the agent [*see § 427.101*].

- A complaint for implied equitable indemnity because of the principal's liability for the agent's wrongful acts [*see § 427.102*].

- A complaint for damages resulting from the agent's breach of the agency agreement [*see § 427.103*].

Forms for use in actions by third persons against a principal or an agent are:

- A complaint for damages for breach of an agent's warranty of authority [*see § 427.120*].

- Allegations for holding an agent liable as a principal [*see § 427.121*].

- An allegation for use in imputing liability for the torts of an agent to the principal [*see § 427.122*].

- Allegations for holding a principal liable for punitive damages for the acts of an agent [*see § 427.123*].

- Allegations for establishing an ostensible agency and ostensible and actual authority of an agent [*see* Forms 34, 35].

- Allegations for establishing an agency relationship between an agent who contracted in the agent's own name and an undisclosed principal [*see § 427.126*].

- Allegations for imputing the knowledge of an agent to the principal [*see § 427.127*].

Forms provided for use in Probate Code proceedings concerning powers of attorney are also provided, including:

- A petition to obtain a determination of whether a power of attorney is in effect [*see § 427.140*].

- A petition for a determination of whether the acts of the attorney in fact are proper [*see §§ 427.141* and *427.142*].

- An order compelling the attorney in fact to submit an accounting or a report [*see § 427.143*].

- A peitition for a determination and order that a power of attorney is revoked or terminated [*see § 427.144*].

- A petition for approval of the resignation of the attorney in fact [*see § 427.145*].

- An order compelling a third person to honor a power of attorney other than one for health care [*see § 427.146*].

- An affirmative defense for use by the respondent to the petition for an order compelling a third person to honor a power of attorney [*see § 427.147*].

For discussion and forms relating to principals and agents in other contexts, see the following chapters: Ch. 7,

Accounting, Action for; Ch. 20, *Allegations Commonly Used*; Ch. 77, *Auctions and Auctioneers*; Ch. 103, *Brokers*; Ch. 253, *Escrows*; Ch. 308, *Insurance*; Ch. 248, *Employer's Liability for Employee's Torts*; and Ch. 464, *Public Entities and Officers: California Tort Claims Act*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityImplied AuthorityGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActApparent AuthorityGeneral OverviewBusiness & Corporate LawAgency RelationshipsCauses of Action & RemediesGeneral OverviewBusiness & Corporate LawAgency RelationshipsCauses of Action & RemediesBreach of ContractBusiness & Corporate LawAgency RelationshipsCauses of Action & RemediesCompensatory DamagesBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesIndemnityBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesKnowledge & NoticeGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesKnowledge & NoticeAgent KnowledgeBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesNegligent Acts of AgentsLiability of PrincipalsBusiness & Corporate LawAgency RelationshipsTerminationsGeneral OverviewBusiness & Corporate LawAgency RelationshipsTypesGeneral OverviewBusiness & Corporate LawAgency RelationshipsTypesEmployee & Employer

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§ 427.02 Cross References

For discussion and forms relating to accounting actions, see Ch. 7, *Accounting, Action for*.

For discussion and forms relating to actions for vicarious liability involving automobiles, see *Ch. 82, Automobiles: Causes of Action, § 82.16*.

For discussion and forms relating to real estate brokers, see Ch. 103, *Brokers* .

For discussion and forms relating to common counts, see Ch. 121, *Common Counts* .

For discussion and forms relating to the interpretation of agreements, see *Ch. 140, Contracts, § 140.30* et seq.

For discussion and forms relating to damages, see *Ch. 177, Damages, §§ 177.40 et seq., 177.140* et seq.

For discussion and forms relating to actions involving employers and employees, see Ch. 248, *Employer's Liability for Employee's Torts* ; Ch. 249, *Employment Law: Termination and Discipline* ; and Ch. 250, *Employment Law: Wage and Hour Disputes* .

For discussion and forms relating to the duties and liabilities of escrow holders, see Ch. 253, *Escrows* .

For discussion and forms relating to indemnity, see Ch. 300, *Indemnity and Contribution* .

For discussion and forms relating to insurance agents, see *Ch. 308, Insurance, § 308.10* et seq.

For discussion and forms relating to actions involving public entities and officers, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawIndustry RegulationInsurance Company OperationsRepresentativesBrokersLabor & Employment LawEmployer LiabilityThird Party InsurersReal Property LawBrokersDiscipline, Licensing & RegulationTortsPublic Entity LiabilityLiabilityGeneral Overview

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[Reserved]

§§ 427.03[Reserved]

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§ 427.10 Governing Law

Agency in general is governed by Civil Code provisions defining agency [*see Civ. Code § 2295 et seq.*]; prescribing the authority of agents [*see Civ. Code § 2304 et seq.*], principals' obligations to third parties dealing with agents [*see Civ. Code § 2330 et seq.*], and agents' obligations to third parties [*see Civ. Code § 2342 et seq.*]; and governing delegation of agents' duties [*see Civ. Code § 2349 et seq.*] and termination of an agency [*see Civ. Code § 2355 et seq.*]. Additional provisions governing the duties of agents are in *Civ. Code § 2019 et seq.* Particular provisions govern the agency relationships of auctioneers [*see Civ. Code § 2362 et seq.*], factors [*see Civ. Code §§ 2026 et seq., 2367 et seq.*], and agents in residential real property transactions [*see Civ. Code § 2079.12 et seq.*].

Powers of attorney are governed by the Power of Attorney Law [*see Prob. Code § 4000 et seq.*], the Health Care Decisions Law [*see Prob. Code § 4600 et seq.*], and, with respect to judicial proceedings, the general procedural provisions in *Prob. Code § 1000 et seq.* [*Prob. Code §§ 4505, 4750* (judicial proceedings under Power of Attorney Law and Health Care Decisions Law, respectively); *see Civ. Code § 2400*]. The Power of Attorney Law applies to applicable powers of attorney regardless of when it was executed [*Prob. Code § 4054(a)*]; however, a power of attorney may limit the application of any provision of the Power of Attorney Law [*Prob. Code § 4101(a)*], except certain provisions [*Prob. Code § 4101(b)*]. To the extent that the Power of Attorney Law does not provide a governing rule in a particular case, the general law of agency [*see Civ. Code §§ 2019 et seq., 2295 et seq.*] governs powers of attorney [*Prob. Code § 4051*]. The Power of Attorney Law applies to durable powers of attorney, other than powers of attorney for health care [*see § 427.34*], statutory form powers of attorney [*see § 427.27[4]*], and any other power of attorney that incorporates or refers to the Power of Attorney Law [*Prob. Code § 4050(a)*]. It does not apply to a power of attorney to the extent that the authority of an attorney in fact is coupled with an interest in the subject of the power of attorney; to reciprocal or interinsurance exchanges and their contracts, subscribers, attorneys in fact, agents, and representatives; or to a proxy given by an attorney in fact to another person to exercise voting rights [*Prob. Code § 4050(b)*]. The Power of Attorney Law is not intended to affect the validity of any instrument or arrangement that is not statutorily described as subject to it [*see Prob. Code § 4050(c)*].

The Multiple-Party Accounts Law [*see Prob. Code § 5100 et seq.*] authorizes a special power of attorney for accounts at financial institutions [*see Prob. Code § 5204*]. For discussion of that law, see *Ch. 95, Banks, Deposits, and Checks, § 95.180* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesCare, Good Faith & Reasonable SkillDuty of Care & Reasonable SkillReal Property LawOwnership & TransferPowers of Attorney

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§ 427.11 Definitions

[1] Agent and Agency

An agent is one who represents another, called the principal, in dealings with third persons. The representation is called agency [*Civ. Code § 2295*; *Shultz Steel Co. v. Hartford Accident & Indemnity Co. (1986) 187 Cal. App. 3d 513, 518, 231 Cal. Rptr. 715]* . An agent undertakes to transact some business or manage some affair for another, by authority of and on account of the latter, and to render an account of the transactions [*Woolley v. Embassy Suites, Inc. (1991) 227 Cal. App. 3d 1520, 1531, 278 Cal. Rptr. 719]* .

[2] Special and General Agents

An agent for a particular act or transaction is a special agent, and all other agents are general agents [*Civ. Code § 2297*].

[3] Actual Agency

An agency is actual when the agent is really employed by the principal [*Civ. Code § 2299*].

[4] Ostensible Agency

An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe that another is the principal's agent, who is not really employed by the principal [*Civ. Code § 2300*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedGeneral AgentsBusiness & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsBusiness & Corporate LawAgency RelationshipsAuthority to ActGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActApparent AuthorityGeneral OverviewBusiness & Corporate LawAgency RelationshipsEstablishmentEstoppel, Ostensible Agency

& NecessityGeneral OverviewBusiness & Corporate LawAgency RelationshipsEstablishmentEstoppel, Ostensible Agency & NecessityOstensible Agency

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§ 427.12 Nature of Agency Relationship

[1] Primary Characteristics

Three primary characteristics define an agency relationship [*Alvarez v. Felker Mfg. Co. (1964) 230 Cal. App. 2d 987, 999, 41 Cal. Rptr. 514* ; *see Woolley v. Embassy Suites, Inc. (1991) 227 Cal. App. 3d 1520, 1531, 278 Cal. Rptr. 719]* :

- First, an agent has the power to alter legal relationships between the principal and third persons, and between the principal and the agent.

- Second, the agent occupies the position of a fiduciary with respect to matters within the scope of the agency.

- Third, the principal has the right to control the agent's conduct regarding matters entrusted to the agent.

[2] Ability to Alter Principal's Legal Relationships

An agent may alter the principal's legal relationships in a number of ways, some of which are obvious. For example, an agent acting within the scope of authority may enter into a contract that will be binding on the principal and so create legal obligations that the principal must fulfill [*see Lippert v. Bailey (1966) 241 Cal. App. 2d 376, 382, 50 Cal. Rptr. 478* ; *see also CPI Builders, Inc. v. Impco Technologies, Inc. (2002) 94 Cal. App. 4th 1167, 1174, 114 Cal. Rptr. 2d 851* (offer of binding arbitration communicated by offeror's attorney acting within scope of authority to offeree's attorney resulted in formation of contract, despite failure of offeror's attorney to communicate revocation of offer before acceptance)].

A principal may be liable in tort for wrongful acts committed by an agent [*see Spahn v. Guild Industries Corp. (1979) 94 Cal. App. 3d 143, 155-157, 156 Cal. Rptr. 375]* , as an employer may be liable for wrongful acts by an employee, but with this difference: an agent acts in the principal's place, whereas an employee may only act for the employer [*Wallace v. Sinclair (1952) 114 Cal. App. 2d 220, 230, 250 P.2d 154* ; *see* discussion under *§ 427.13*].

[3] Agent Acts as Fiduciary

The second distinguishing feature of an agency is the fact that the agent acts as the fiduciary of his or her principal [*Engalla v. Permanente Medical Group (1997) 15 Cal. 4th 951, 979-980, 64 Cal. Rptr. 2d 843, 938 P.2d 903* (employer that negotiates group medical benefits for its employees acts as agent for employees during period of negotiation); *Fischer v. Machado (1996) 50 Cal. App. 4th 1069, 1072, 58 Cal. Rptr. 2d 213* ; *Michelson v. Hamada (1994) 29 Cal. App. 4th 1566, 1579, 36 Cal. Rptr. 2d 343* ; *Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 940, 175 Cal. Rptr. 81]* . A fiduciary duty exists as to all agents, regardless of the form of compensation, whether certain, contingent, or gratuitous [*Byron Culver & Associates v. Jaoudi Industrial & Trading Corp. (1991) 1 Cal. App. 4th 300, 304, 1 Cal. Rptr. 2d 680* ; *Zalk v. General Exploration Co. (1980) 105 Cal. App. 3d 786, 793, 164 Cal. Rptr. 647]* . An agent is prohibited from doing any act forbidden to trustees by *Prob. Code §§ 16002, 16004, 16005, 16009* (obligations of trustees with respect to trusts in general) [*Civ. Code § 2322(c)*]. This provision has imposed on agents the duty to act as a fiduciary with the same obligations of diligence and faithful service as a trustee [*Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 940, 175 Cal. Rptr. 81]* . Other duties of agents as fiduciaries include the duty not to act on behalf of any person whose interests are adverse to, or in competition with, those of the principal [*Zalk v. General Exploration Co. (1980) 105 Cal. App. 3d 786, 793, 164 Cal. Rptr. 647* ; *Rezos v. Zahm & Nagel Co. (1926) 78 Cal. App. 728, 731, 246 P. 564]* . In addition, the agent must make the fullest disclosure of all material facts that might affect the principal's decision making [*Byron Culver & Associates v. Jaoudi Industrial & Trading Corp. (1991) 1 Cal. App. 4th 300, 304, 1 Cal. Rptr. 2d 680* ; *Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 940, 175 Cal. Rptr. 81]* . If a principal questions his or her agent's acts, the burden of proof is on the agent to show the utmost good faith and disclosure of all facts relating to the questioned transaction[*Batson v. Strehlow (1968) 68 Cal. 2d 662, 675, 68 Cal. Rptr. 589, 441 P.2d 101]* .

An agent also has a duty of confidentiality to the principal. The agent may not use or communicate confidential information received from the principal or acquired during the course of, or on account of, the agency in violation of his or her duties as agent, in competition with or to the injury of the principal, on the agent's own account, or on behalf of another, even though the information does not relate to the transaction in which the agent is employed [*Church of Scientology v. Armstrong (1991) 232 Cal. App. 3d 1060, 1072, 283 Cal. Rptr. 917]* .

[4] Principal's Right to Control Agent

The third important factor in determining whether or not an agency exists is the principal's right to control and supervise the work of the agent. The principal must possess the right to control and supervise the agent, although this right need not actually be exercised. The mere existence of the right is sufficient for the finding of an agency [*Malloy v. Fong (1951) 37 Cal. 2d 356, 370, 232 P.2d 241* ; *Woolley v. Embassy Suites, Inc. (1991) 227 Cal. App. 3d 1520, 1531, 278 Cal. Rptr. 719* ; *Stevens v. Roman Catholic Bishop of Fresno (1975) 49 Cal. App. 3d 877, 884, 123 Cal. Rptr. 171]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedFiduciary RelationshipsFiduciary ResponsibilitiesBusiness & Corporate LawAgency RelationshipsAgents DistinguishedFiduciary RelationshipsFormationBusiness & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsLiability of PrincipalBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsScope of AuthorityBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesCare, Good Faith & Reasonable SkillGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesCare, Good Faith & Reasonable SkillDuty of Care & Reasonable SkillBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesCare, Good Faith & Reasonable SkillDuty of Loyalty, Good Faith & Fair DealingBusiness & Corporate LawAgency RelationshipsEstablishmentElementsRight to Control by Principal

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§ 427.13 Other Relationships Compared

[1] Employment

Agency may encompass the employment relationship so that an employee may also be an agent of the employer [*Estate of Levinthal (1980) 105 Cal. App. 3d 691, 699, 164 Cal. Rptr. 628]* . However, agency and employment are distinct relationships. One may be an employee but not the agent of the employer with regard to a given transaction [*Wallace v. Sinclair (1952) 114 Cal. App. 2d 220, 230, 250 P.2d 154]* . Similarly, an agency relationship that gives rise to liability of the principal for acts of the agent can exist even if the agent would not be considered as an employee of the principal under the Labor Code or other employment law [*see, e.g.,* *Gudger v. Manton (1943) 21 Cal. 2d 537, 547-550, 134 P.2d 217* (California attorney may be agent of New York attorney for purposes of collecting judgment; *disapproved on other grounds* in *Albertson v. Raboff (1956) 46 Cal. 2d 375, 381, 295 P.2d 405*); *Garton v. Title Ins. & Trust Co. (1980) 106 Cal. App. 3d 365, 376, 165 Cal. Rptr. 449* (employee of real estate broker may be agent of title company with regard to preparation of escrow documents); *Clark Equipment Co. v. Wheat (1979) 92 Cal. App. 3d 503, 523-524, 154 Cal. Rptr. 874* (attorney may be agent of client); *Gipson v. Davis Realty Co. (1963) 215 Cal App. 2d 190, 204-207, 30 Cal. Rptr. 253* (real estate salesperson is agent of broker regardless of characterization of relationship under employment law); *Clark v. Andrews (1952) 109 Cal App. 2d 193, 199,* (collection agency is agent of creditor)]. One may also be the employee of one and the agent of another with regard to a particular transaction [*Garton v. Title Ins. & Trust Co. (1980) 106 Cal. App. 3d 365, 376, 165 Cal. Rptr. 449]* .

An agent works not only for, but in the place of, the principal [*see Civ. Code § 2330*]. Agency involves representative character and derivative authority, elements that need not be present in an employer-employee relationship. It may involve the conduct of a single transaction with a third person, whereas employment is an ongoing relationship. An agent is entitled to exercise a degree of discretion in effecting the purpose of the principal. An employee remains entirely under the control and direction of the employer [*Gipson v. Davis Realty Co. (1963) 215 Cal App. 2d 190, 205-206, 30 Cal. Rptr. 253]* .

[2] Independent Contractor

The interrelationship between agents and independent contractors is the subject of considerable confusion in California. The concept of an independent contractor arises in employment law. One cannot be both an employee and an

independent contractor with regard to the same person [*City of Los Angeles v. Meyers Bros. Parking System, Inc. (1975) 54 Cal. App. 3d 135, 138, 126 Cal. Rptr. 545]* . The determination that one is an independent contractor signifies that the person is not to be treated as an employee under the Labor Code or other applicable employment law [*see Grubb & Ellis Co. v. Spengler (1983) 143 Cal. App. 3d 890, 192 Cal. Rptr. 637* (noting applicability of distinction in workers' compensation, Labor Commission jurisdiction, unemployment insurance, federal employment taxes, and minimum wage cases)]. For purposes of vicarious liability, the general rule (subject to many exceptions) is that one who hires an independent contractor is not liable for the acts or omissions of the contractor [*Schmidlin v. Alta Planing Mill Co. (1915) 170 Cal. 589, 591, 150 P. 983* ; *Anderson v. Chancellor Western Oil Dev. Corp. (1975) 53 Cal. App. 3d 235, 239, 125 Cal. Rptr. 640]* . In contrast, an employer is liable for all acts and omissions of an employee done within the scope of the employment relationship (respondeat superior) [*Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 967, 227 Cal. Rptr. 106, 719 P.2d 676* ; *Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 617-618, 124 Cal. Rptr. 143]* . For discussion of when one is acting within the scope of employment, see Ch. 248, *Employer's Liability for Employee's Torts* .

California courts have often applied the employment law standards used to determine whether or not one is an independent contractor to agency law [*see, e.g.,* *Flores v. Brown (1952) 39 Cal. 2d 622, 628-629, 248 P.2d 922* ; *Malloy v. Fong (1951) 37 Cal. 2d 356, 370-372, 232 P.2d 241* ; *Cislaw v. Southland Corp. (1992) 4 Cal. App. 4th 1284, 1288-1296, 6 Cal. Rptr. 2d 386* ; *Wickham v. Southland Corp. (1985) 168 Cal. App. 3d 49, 54-59, 213 Cal. Rptr. 825* ; *see also CACI No. 3704* (California Judicial Council jury instruction on whether employment relationship exists)]. The primarystandard is the extent of the right of the hirer or employer to control the manner and means of accomplishing the result desired [*Dorsic v. Kurtin (1971) 19 Cal. App. 3d 226, 238-239, 96 Cal. Rptr. 528* ; *see* Restatement (Second) of Agency, § 220; *see also* Ch. 248, *Employer's Liability for Employee's Torts* , for further discussion of the standards that determine whether one is an employee or independent contractor].

Under these cases, if one has sufficient control over the activities of another, an agency relationship is established, even if the parties would not be considered employer-employee under the Labor Code or other employment law [*see* *Malloy v. Fong (1951) 37 Cal. 2d 356, 370-372, 232 P.2d 241* ; *Dorsic v. Kurtin (1971) 19 Cal. App. 3d 226, 238, 96 Cal. Rptr. 528* ; *Housewright v. Pacific Far East Line, Inc. (1964) 229 Cal. App. 2d 259, 265-267, 40 Cal. Rptr. 208* ; *Shoopman v. Pacific Greyhound Lines (1959) 169 Cal App. 2d 848, 853-856, 338 P.2d 3* ; *Lewis v. Constitution Life Co. (1950) 96 Cal App. 2d 191, 193-196, 215 P.2d 55]* . Conversely, if the purported principal does not have sufficient control over the activities of the purported agent, there is no agency relationship and therefore no vicarious liability [*see Flores v. Brown (1952) 39 Cal. 2d 622, 628-629, 248 P.2d 922* ; *Cislaw v. Southland Corp. (1992) 4 Cal. App. 4th 1284, 1288-1296, 6 Cal. Rptr. 2d 386* ; *Weiss v. Chevron, U.S.A., Inc. (1988) 204 Cal. App. 3d 1094, 1100, 251 Cal. Rptr. 727* ; *Wickham v. Southland Corp. (1985) 168 Cal. App. 3d 49, 54-59, 213 Cal. Rptr. 825* ; *Rogers v. Whitson (1964) 228 Cal. App. 2d 662, 671-673, 39 Cal. Rptr. 849]* . These cases often then label the parties depending on the determination of the control issue. The courts describe the relationship as one of principal-agent if there is sufficient control or as hirer-independent contractor if there is not, and conclude that agents and independent contractors are mutually exclusive categories [*see* *Malloy v. Fong (1951) 37 Cal. 2d 356, 370-372, 232 P.2d 241* ; *Cislaw v. Southland Corp. (1992) 4 Cal. App. 4th 1284, 1288-1296, 6 Cal. Rptr. 2d 386* ; *Wickham v. Southland Corp. (1985) 168 Cal. App. 3d 49, 54-59, 213 Cal. Rptr. 825* ; *Dorsic v. Kurtin (1971) 19 Cal. App. 3d 226, 238, 96 Cal. Rptr. 528* ; *Housewright v. Pacific Far East Line, Inc. (1964) 229 Cal. App. 2d 259, 265-267, 40 Cal. Rptr. 208* ; *Rogers v. Whitson (1964) 228 Cal. App. 2d 662, 671-673, 39 Cal. Rptr. 849* ; *Shoopman v. Pacific Greyhound Lines (1959) 169 Cal App. 2d 848, 853-856, 338 P.2d 3* ; *Lewis v. Constitution Life Co. (1950) 96 Cal App. 2d 191, 193-196, 215 P.2d 55]* .

This treating of agents and independent contractors as mutually exclusive is contrary to generally accepted principles of agency law [*APSB Bancorp v. Thorton Grant (1994) 26 Cal. App. 4th 926, 930, 31 Cal. Rptr. 2d 736* ; *see* Restatement (Second) of Agency §§ 2(3), 14N (independent contractor may or may not also be agent)]. In other cases that consider whether an agency relationship exists between persons who are not employees of the principal under the Labor Code or other employment law, courts have noted that one may be both an agent and an independent contractor [

Mottola v. R. L. Kautz & Co. (1988) 199 Cal. App. 3d 98, 108,244 Cal. Rptr. 737 ; *City of Los Angeles v. Meyers Bros. Parking System, Inc. (1975) 54 Cal. App. 3d 135, 138, 126 Cal. Rptr. 545* ; *Automatic Canteen Co. v. State Board of Equalization (1965) 238 Cal. App. 2d 372, 385, 47 Cal. Rptr. 848* ; *see* Restatement (Second) of Agency §§ 1, 2, 14N]. One case has framed the issue as whether there should be a departure from the general rule of nonliability for the acts of an independent contractor based on the existence of a right to control [*Weiss v. Chevron, U.S.A., Inc. (1988) 204 Cal. App. 3d 1094, 1100, 251 Cal. Rptr. 727]* .

Whether or not these nonemployee agents are labeled as independent contractors is arguably beside the point. The important point is that the existence of sufficient control over the manner and means of accomplishing a desired result creates an agency relationship that results in liability of the principal for the torts of the agent, limited only by the requirement that there be some connection between the agent's tortious act and the principal-agent relationship [*Malloy v. Fong (1951) 37 Cal. 2d 356, 370-372, 232 P.2d 241* ; *Cislaw v. Southland Corp. (1992) 4 Cal. App. 4th 1284, 1288-1296, 6 Cal. Rptr. 2d 386* ; *Dorsic v. Kurtin (1971) 19 Cal. App. 3d 226, 238, 96 Cal. Rptr. 528* ; *see §§ 427.22[5][b], [c]*].

Some courts have also taken this approach to vicarious tort liability in analyzing the potential liability of a franchisor for the torts of its franchisee [*see* *Cislaw v. Southland Corp. (1992) 4 Cal. App. 4th 1284, 1288-1296, 6 Cal. Rptr. 2d 386* (and cases cited therein)].For example, the fact that a franchisor received a royalty based on a franchisee's gross receipts did not create a true agency relationship because the franchisor did not control the day-to-day operation of the franchisee's real estate office [*Kaplan v. Coldwell Banker Residential Affiliates, Inc. (1997) 59 Cal. App. 4th 741, 746, 69 Cal. Rptr. 2d 640* (real estate broker franchisee independently owned and operated franchise, hired and fired employees, set office wages and commissions, and determined business hours; franchise agreement recited that franchisee was an independent contractor, and required franchisee to hold real estate office out as independently owned and operated business)]. For further discussion, see N. Levy, M. Golden & L. Sacks, eds., California Torts, ch. 8 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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37-427 California Forms of Pleading and Practice--Annotated § 427.14

§ 427.14 Creation of Agency Relationship

[1] In General

Any person having the capacity to contract may appoint an agent to act for him or her, and any person may be an agent [*Civ. Code § 2296*; for discussion of capacity to contract, *see* Ch. 140, *Contracts*]. However, there is no presumption that an agency exists; rather, it is generally presumed that a person is acting for himself or herself and not as an agent for another. The burden of proving agency rests on the party asserting the existence of the agency and seeking to charge the principal with therepresentations of the agent [*Inglewood Teachers Assn. v. Public Employment Relations Bd. (1991) 227 Cal. App. 3d 767, 780, 278 Cal. Rptr. 228]* .

The existence of an agency relationship ordinarily is a question of fact, unless the evidence permits only one inference [*Pistone v. Superior Court (1991) 228 Cal. App. 3d 672, 679, 279 Cal. Rptr. 173* ; *Inglewood Teachers Assn. v. Public Employment Relations Bd. (1991) 227 Cal. App. 3d 767, 780, 278 Cal. Rptr. 228]* . In resolving the issue, the trier of fact may draw inferences from the conduct of the parties [*Rubens v. Texas Oil Corp. (1965) 239 Cal. App. 2d 78, 82, 48 Cal. Rptr. 411]* . Contract recitals of the existence or absence of agency, although relevant, are never determinative. Parties may contradict "clear" contract language and show the actual relationship [*Pistone v. Superior Court (1991) 228 Cal. App. 3d 672, 680-681, 279 Cal. Rptr. 173]* . Thus, agency may be proved by circumstantial evidence [*Whittaker v. Otto (1961) 188 Cal. App. 2d 619, 622-623, 10 Cal. Rptr. 689]* .

[2] Manner of Creation

An agency may be created by either a precedent authorization or a subsequent ratification [*Civ. Code § 2307*; *see* discussion under *§ 427.62[11]*].

An agency relationship need not be formally created; neither particular words nor consideration is necessary. In most situations, it is sufficient that the conduct of the alleged principal and agent manifests acceptance of a relationship when the agent acts for the principal [*Civ. Code § 2308*; *Malloy v. Fong (1951) 37 Cal. 2d 356, 370, 232 P.2d 241* ; *Frank Pisano & Associates v. Taggart (1972) 29 Cal. App. 3d 1, 15, 105 Cal. Rptr. 414* ; *see also* discussion of when written authorization is required § 427.62[5]]. However, a person does not become an agent of another simply by offering help or making a suggestion [*Edwards v. Freeman (1949) 34 Cal. 2d 589, 591-592, 212 P.2d 883* ; *Violette v. Shoup*

(1993) 16 Cal. App. 4th 611, 620, 20 Cal. Rptr. 2d 358 (both cases finding that one's conduct in performing favor, without being subject to any legal duty of service or assenting to right of control, does not create agency)].

The breadth of this test for determining when an agency has been created by the parties' conduct leaves few situations in which a dispute arises over whether an instrument creates an agency relationship. In virtually every case, the courts look to the actual conduct of the parties, rather than the language of any agreement between them or the parties' characterization of their relationship, when any inconsistency exists between the agreement and the parties' conduct [*see, e.g., Pacific Grove-Asilomar Operating Corp. v. County of Monterey (1974) 43 Cal. App. 3d 675, 687, 117 Cal. Rptr. 874* ; *Nichols v. Arthur Murray, Inc. (1967) 248 Cal. App. 2d 610, 613, 56 Cal. Rptr. 728]* .

When a written agreement exists between the principal and the agent a court will give it some weight as an expression of the parties' intent. If the agreement's description does not coincide with the parties' conduct, however, courts have shown themselves quite willing to look behind the agreement to discern the true intent of the parties [*Automatic Canteen Co. v. State Board of Equalization (1965) 238 Cal. App. 2d 372, 389, 47 Cal. Rptr. 848* ; *Anderson v. Badger (1948) 84 Cal. App. 2d 736, 742, 191 P.2d 768]* . For these reasons, counsel should carefully analyze not only any agreements entered into by the parties, but the manner in which the parties carried them out. If the relationship has the characteristics of agency, an agency may be found notwithstanding assertions to the contrary in the agreement. For discussion of the role of the agreement in defining the authority of an agent, see *§ 427.16*.

[3] Factual Examples

One area in which courts have examined the factors relevant to the creation of an agency relationship involves the use of an automobile belonging to the purported principal. In a typical situation, one person lets another borrow his or her car, and an accident occurs; the injured third party then sues both the driver and the owner of the car, alleging that the driver was acting as the agent of the owner.

The injured party's action ordinarily may be based on both general principal-agent theories and on the vicarious liability provisions of the Vehicle Code [*see Veh. Code §§ 17150, 17707, 17708*]. The vicarious liability statutes impose liability for damages as a matter of public policy on owners of vehicles and parents or guardians of minor drivers [*see Veh. Code §§ 17150, 17707, 17708*]. For example, an injured party seeking to recover from the vehicle owner need only prove that the driver was operating the vehicle with the owner's express or implied permission [*see Veh. Code § 17150*; *see also Veh. Code §§ 17707* (liability of person who signed and verified minor's appli cation for driver's license), 17708 (liability of minor's parents or guardians if minor was driving with express or implied permission of parent, guardian, or person having custody)]. The amount of damages that may be recovered against an owner or parent under the vicarious liability provisions, however, is specifically limited to certain statutory amounts [*see Veh. Code §§ 17151* (owner), 17709 (parent)]. In contrast, an action based on the theory that the driver acted as the agent of the vehicle owner would permit recovery against the principal-owner for all damages caused by the agent-driver in the scope of his or her authority [*see Civ. Code §§ 2338* and *2339*; *see also 427.22[5]*]. For further discussion of vicarious liability under the Vehicle Code, see *Ch. 82, Automobiles: Causes of Action § 82.16*.

A vehicle owner's or parent's liability under the principal-agent theory requires satisfaction of a more difficult standard of proof, and the courts have considered agency determinations separately from vicarious liability issues under the Vehicle Code [*see, e.g., Souza v. Corti (1943) 22 Cal. 2d 454, 455-461, 461, 139 P.2d 645* , and *Johnson v. Peterson (1974) 38 Cal. App. 3d 619, 621, 622-623, 113 Cal. Rptr. 445]* . California courts havedecided many cases in the context of actions involving use of automobiles, both finding agency and declining to find agency [*Flores v. Brown (1952) 39 Cal. 2d 622, 628-629, 248 P.2d 922* (no agency found); *Edwards v. Freeman (1949) 34 Cal. 2d 589, 591-592, 212 P.2d 883* (no agency found); *Souza v. Corti (1943) 22 Cal. 2d 454, 461, 139 P.2d 645* (agency found); *Perry v. McLaughlin (1931) 212 Cal. 1, 14, 297 P. 554* (agency found); *DeSuza v. Andersack (1976) 63 Cal. App. 3d 694, 699-700, 133 Cal. Rptr. 920* (no agency found); and *Johnson v. Peterson (1974) 38 Cal. App. 3d 619, 622-623, 113 Cal. Rptr. 445* (agency found)].

In the cases holding that an agency was created, the courts generally concluded that the principal controlled or had the legal right to control the actions of the agent [*Johnson v. Peterson (1974) 38 Cal. App. 3d 619, 623, 113 Cal. Rptr. 445* ; *see also Flores v. Brown (1952) 39 Cal. 2d 622, 628, 248 P.2d 922]* . For example, in one case the court of appeal found that an agency relationship was created when a mother suggested that her daughter drive to the store to buy shoes for another daughter, because the mother had a right to control the actions of the daughter [*Johnson v. Peterson (1974) 38 Cal. App. 3d 619, 623, 113 Cal. Rptr. 445]* .

Conversely, when the right to control the actions of the vehicle driver is absent, an agency has been held not to exist even though the purported agent was acting for the owner-principal. For example, in one case, the driver was hauling a trailer that belonged to the defendant who was sued as the driver's principal. The court held that the evidence did not support any inference that the owner of the trailer had any right to control the manner in which the trailer was hauled, and without that right of control, no agency was found [*Flores v. Brown (1952) 39 Cal. 2d 622, 628-629, 248 P.2d 922]* . The right to control the actions of the agent is a necessary prerequisite for the creation of an agency relationship; unless a showing is made that the principal has the right to control the actions of the agent, as for example by agreement between principal and agent that the latter will act at the direction of the former, no agency will be found to exist [*see Edwards v. Freeman (1949) 34 Cal. 2d 589, 592, 212 P.2d 883* ; *DeSuza v. Andersack (1976) 63 Cal. App. 3d 694, 699, 133 Cal. Rptr. 920]* .

For discussion of vicarious liability, § 427.22[1], [5].

[4] Actual Agency

The conduct of a principal is sufficient to create an actual agency if the principal intentionally, or by want of ordinary care, allows the agent to believe that he or she has the authority to act on behalf of the principal [*Civ. Code § 2316*]. Thus, if the principal's conduct causes the agent reasonably to believe that authority to act exists, an actual agency has been created and transactions entered into with third parties will bind the principal [*Tomerlin v. Canadian Indemnity Co. (1964) 61 Cal. 2d 638, 644, 39 Cal. Rptr. 731, 394 P.2d 571* ; *Mannion v. Campbell Soup Co. (1966)243 Cal. App. 2d 317, 320, 52 Cal. Rptr. 246]* . For example, when an employee purports to act for his or her employer in the belief that he or she is authorized to do so, and the employer does nothing to indicate to the employee that no such authority exists, the employer cannot later deny that an agency was created in order to avoid the consequences of the employee's acts [*see Gaine v. Austin (1943) 58 Cal. App. 2d 250, 259-260, 136 P.2d 584* ; *Tomerlin v. Canadian Indemnity Co. (1964) 61 Cal. 2d 638, 643-644, 39 Cal. Rptr. 731, 394 P.2d 571]* .

[5] Ostensible Agency

An ostensible agency is created when conduct by the principal leads a third party reasonably to believe that the agent has the authority to bind the principal [*Civ. Code § 2300*]; *Mejia v. Community Hospital of San Bernardino (2002) 99 Cal. App. 4th 1448, 1457-1458, 1460, 122 Cal. Rptr. 2d 233* (trial court erred in granting nonsuit when there was triable issue as to whether negligent doctor was ostensible agent of hospital) *Petersen v. Securities Settlement Corp. (1991) 226 Cal. App. 3d 1445, 1452, 277 Cal. Rptr. 468]* . No agreement of the parties is necessary and the acts of the principal alone are sufficient to create such an agency for the purposes of transactions between third parties and the ostensible agent [*Mannion v. Campbell Soup Co. (1966) 243 Cal. App. 2d 317, 320, 52 Cal. Rptr. 246]* . It is not necessary that the principal be in direct contact with the third party. The manifestation of the principal may be to the community at large, as for example by appointing the agent to a particular position within a corporation [*Meyer v. Ford Motor Co. (1969) 275 Cal. App. 2d 90, 102, 79 Cal. Rptr. 816]* . However, ostensible agency must be based on the acts or declarations of the principal and not on the conduct or representations of the alleged agent [*Pagarigan v. Libby Care Center, Inc. (2002) 99 Cal. App. 4th 298, 301-302, 120 Cal. Rptr. 2d 892* (person cannot become agent of another merely by representing himself or herself as such); *Lindsay-Field v. Friendly (1995) 36 Cal. App. 4th 1728, 1734, 43 Cal. Rptr. 2d 71* ; *Petersen v. Securities Settlement Corp. (1991) 226 Cal. App. 3d 1445, 1452, 277 Cal. Rptr. 468]* .

Both ostensible agency and actual agency based on the agent's reasonable belief depend on the principal's conduct. Conduct that reasonably persuades a person that he or she is authorized to act as an agent may also persuade a third party with whom the agent is dealing that the agency exists. Thus, the finding of either an actual or ostensible agency does not exclude the existence of the other [*see Tomerlin v. Canadian Indemnity Co. (1964) 61 Cal. 2d 638, 644, 39 Cal. Rptr. 731, 394 P.2d 571]* .

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§ 427.15 Equal Dignities Rule

[1] Generally

The only requirement of formality imposed in the creation of agency relationships is the "equal dignities rule," which provides that an authorityto enter into a contract required by law to be in writing can only be given by a written instrument [*Civ. Code § 2309*; *see Ripani v. Liberty Loan Corp. (1979) 95 Cal. App. 3d 603, 609, 157 Cal. Rptr. 272]* . For a discussion of *Civ. Code § 2310*, which imposes a writing requirement for ratification when a writing would have been required to confer authority originally, see *427.18*.

As with the statute of frauds generally, *Civ. Code § 2309* is construed restrictively [*Ripani v. Liberty Loan Corp. (1979) 95 Cal. App. 3d 603, 610, 157 Cal. Rptr. 272* ; *see generally* Ch. 530, *Statute of Frauds*]. *Civ. Code § 2309* requires a written authorization only when the agent enters into a contract required by law to be in writing. Thus, for example, a written lease providing that exercise of an option to extend the lease for two years must be in writing could be exercised by an agent with only an oral authorization. The lease was written as required by *Civ. Code § 1624* (requiring writing for lease longer than one year), but the lease itself, not the statute of frauds, required a written exercise of the option. Therefore, the agent who exercised the option was not entering into a contract required by law to be in writing and was not required by *Civ. Code § 2309* to have a written authorization [*Ripani v. Liberty Loan Corp. (1979) 95 Cal. App. 3d 603, 610, 157 Cal. Rptr. 272]* .

[2] Exceptions

Numerous exceptions to the equal dignities rule have been recognized, and the rule has been interpreted so restrictively that relatively few situations remain in which the rule applies. Two basic exceptions to the rule have been judicially recognized. First, no written authorization is required when the agent is not given any discretionary power but is authorized only to perform a mechanical task for the principal, such as signing a document [*Ellis v. Mihelis (1963) 60 Cal. 2d 206, 214, 32 Cal. Rptr. 415, 384 P.2d 7* ; *Dufresne v. Elite Insurance Co. (1972) 26 Cal. App. 3d 916, 923, 103 Cal. Rptr. 347]* . This is an expansion of the exception to the rule, originally recognized by the courts, that when an agent acts in the presence of, and at the direction of, the principal, a written authorization is unnecessary [*Karns v. Olney (1889) 80 Cal. 90, 97-98* ; *Lathrop v. Gauger (1954) 127 Cal. App. 2d 754, 764, 274 P.2d 730]* . In either situation, the act of the agent is deemed to be the act of the principal, and no written authorization is required [*Ellis v.*

Mihelis (1963) 60 Cal. 2d 206, 214, 32 Cal. Rptr. 415, 384 P.2d 7] .

Second, written authorization is unnecessary when an agent is an executive officer of a corporation and acts on behalf of the corporation. An executive officer is more than an agent of the corporation. He or she may be more accurately described as a representative of an entity that can only act through natural persons. Thus, no written authorization is necessary for an executive officer of a corporation to act on behalf of the corporation [*Jeppi v. Brockman Holding Co. (1949) 34 Cal. 2d 11, 17-18, 206 P.2d 847]* .

[3] Lack of Writing Not Defense to Action by Agent

The defense of the lack of a writing required by the equal dignities rule has been limited to an action brought by a third party who has dealt with the agent. The principal may not assert the rule as a defense in an action brought by the agent. Thus, a principal who has avoided liability on a contract entered into by his or her agent, because the agent did not have the required written authority, cannot successfully defend, on the ground that the equal dignities rule was violated, the agent's action for indemnity brought after the agent satisfied a judgment obtained by the third party against the agent [*Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal. 2d 834, 842-843, 36 Cal. Rptr. 741, 389 P.2d 133]* .

[4] Estoppel to Assert Rule

A principal may also be estopped from asserting the equal dignities rule as a defense if his or her own conduct lulls the third par ty into believing that the agent has written authority or that written authority is not needed [*Kerner v. Hughes Tool Co. (1976) 56 Cal. App. 3d 924, 934, 128 Cal. Rptr. 839* (estoppel found); *McGirr v. Gulf Oil Corp. (1974) 41 Cal. App. 3d 246, 258, 115 Cal. Rptr. 902* (no estoppel found)]. For example, a principal who referred all inquiries regarding contract negotiations to his agent without notifying third parties of any limitations on the agent's authority was held estopped from asserting the equal dignities rule as a defense to an action for breach of a contract entered into by the agent [*Kerner v. Hughes Tool Co. (1976) 56 Cal. App. 3d 924, 934, 128 Cal. Rptr. 839]* .

Estoppel to assert the equal dignities rule should not be confused with estoppel to rely on the statute of frauds [*see Civ. Code § 1624*]. A contract may be required by law to be in writing under *Civ. Code § 1624*, yet may be enforced without a writing because of one party's change of position in reliance on the other party's representations [*see Monarco v. Lo Greco (1950) 35 Cal. 2d 621, 625-626, 220 P.2d 737]* . Thus, an agent who negotiates with a third party a contract that would ordinarily require a writing, but who has represented to the third party that no writing will be required, may be estopped from using the statute of frauds as a defense in an action for breach of contract. But a finding that the contract is enforceable generally is insufficient to bind the principal, because under *Civ. Code § 2309* unless a writing authorizing the agent to execute the contract existed, the third party must also have relied on the principal's express or implied representations regarding the agent's authority. The principal will be estopped only if his or her own conduct lulls the third party into believing that the agent has written authority or that written authority is not needed [*McGirr v. Gulf Oil Corp. (1974) 41 Cal. App. 3d 246, 254-256, 115 Cal. Rptr. 902]* .

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§ 427.16 Authority of Agents

[1] In General

An agent has the authority the principal, actually or ostensibly, confers on him or her [*Civ. Code § 2315*]. Thus, the agent's authority depends on the conduct of the principal and in many instances, the principal has conferred both actual and ostensible authority on the agent [*see Hartong v. Partake, Inc. (1968) 266 Cal. App. 2d 942, 963-964, 72 Cal. Rptr. 722* ; discussion under *§ 427.16[2], [3]*]. The extent of authority delegated to an agent is an essential part of determining the principal's liability to third parties for acts of the agent [*see* discussion under *§ 427.22*].

The extent of the agent's authority is ordinarily a question of fact [*Inglewood Teachers Assn. v. Public Employment Relations Bd. (1991) 227 Cal. App. 3d 767, 780, 278 Cal. Rptr. 228]* . In resolving the question, the trier of fact may draw inferences from the conduct of the parties [*Rubens v. Texam Oil Corp. (1965) 239 Cal. App. 2d 78, 82, 48 Cal. Rptr. 411]* . The burden of proving the scope of the agent's authority rests on the party seeking to charge the principal with the representations of the agent [*Inglewood Teachers Assn. v. Public Employment Relations Bd. (1991) 227 Cal. App. 3d 767, 780, 278 Cal. Rptr. 228]* . Mere surmise as to the authority of an agent is insufficient to impose liability on the principal [*Inglewood Teachers Assn. v. Public Employment Relations Bd. (1991) 227 Cal. App. 3d 767, 782, 278 Cal. Rptr. 228]* .

[2] Actual

An agent's actual authority is the authority a principal intentionally confers or intentionally, or by want of ordinary care, allows the agent to believe he or she possesses [*Civ. Code § 2316*]. When the agent's authority is based on an express contract, either written or oral, the extent of the authority is determined through the use of the ordinary methods of interpreting contracts [*see Civ. Code §§ 1635, 1636*; *see also* discussion of contract interpretation in Ch. 140, *Contracts*, General Introduction, Subpt. B]. When no express contract exists, the determination of the extent of actual authority conferred depends on the conduct of the principal and the reasonable belief of the agent engendered by that conduct [*see Tomerlin v. Canadian Indemnity Co. (1964) 61 Cal. 2d 638, 643, 39 Cal. Rptr. 731, 394 P.2d 571]* .

Conduct of the principal that can be sufficient to allow the agent to believe authority exists includes apparent acquiescence in prior acts of agency, such as holding money in a personal account [*Vertex Inv. Co. v. Schwabacher*

(1943) 57 Cal. App. 2d 406, 418, 134 P.2d 891 , cert. denied, 320 U.S. 754] . Authority to exercise an option to renew a lease has also been found when the principal told the agent that a new building need not be sought because the current quarters would be retained [*Ripani v. Liberty Loan Corp. (1979) 95 Cal. App. 3d 603, 611-612, 157 Cal. Rptr. 272]* . When the principal consistently requires that a certain type of contract be executed by a certain party, however, a subordinate does not have actual authority to execute a contract without approval, even if the agent actually believes that authority exists [*South Sacramento Drayage Co. v. Campbell Soup Co. (1963) 220 Cal. App. 2d 851, 856-857, 34 Cal. Rptr. 137]* .

A finding of implied actual authority also depends on a finding that the agent believed that authority existed. When an agent must receive authorization from superiors in the company before acting to alter contracts with third parties, the agent does not have the requisite belief in his or her authority to do so unilaterally [*Columbia Outfitting Co. v. Freeman (1950) 36 Cal. 2d 216, 219, 223 P.2d 21]* .

[3] Ostensible

An agent's ostensible authority is authority that a principal, intentionally or by want of ordinary care, causes or allows a third party to believe the agent possesses [*Civ. Code § 2317*; *see C.A.R. Transp. Brokerage Co. v. Darden Restaurants, Inc. (9th Cir. 2000) 213 F.3d 474, 479-481* (finding truck drivers had ostensible authority to sign waivers of right to payment from shipper)]. The basic policy underlying the concept of ostensible authority is to prevent the principal from avoiding a contract entered into by an agent in violation of a secret agreement limiting the powers of the agent; the authority of the agent is that which the principal allowed the third party to believe it was [*see Leavens v. Pinkham & McKevitt (1912) 164 Cal. 242, 247-248, 128 P. 399* ; *Case v. McConnell & Forrester (1935) 5 Cal. App. 2d 688, 692, 44 P.2d 414]* .

For discussion of the prerequisites for holding a principal liable to a third party based on an agent's ostensible authority, see *§ 427.22[2]*.

[4] Statutory and Implied

Every agent has the authority defined in *Civ. Code § 2295 et seq.*, unless specially deprived of that authority by the principal, and even then has that authority ostensibly, except as to persons who have actual or constructive knowledge of the restriction on the agent's authority [*Civ. Code § 2318*; *see* discussion under *§ 427.62[2][d]*]. Specifically, an agent has authority to do everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of the agency [*Civ. Code § 2319(1)*]. An agent also has authority to make representations about facts on which the right to use the authority depends and which are not known to the third party to whom the representations are made. However, an agent cannot make representations about the terms of his or her authority itself [*Civ. Code § 2319(2)*].

An agent has the power to disobey instructions in dealing with the subject of the agency, when it is clearly for the interest of the principal thatthe instructions be disobeyed, and there is not time to communicate with the principal [*Civ. Code § 2320*].

The courts have also recognized an agent has implied authority, similar to the authority provided in *Civ. Code § 2319*, to use any means incidental to and reasonably proper in the performance of an assigned task [*Garber v. Prudential Ins. Co. (1962) 203 Cal. App. 2d 693, 701, 22 Cal. Rptr. 123]* . These implied powers permit an agent who is acting in the course of his or her duties to react to conditions that are not usually met in the agency. The agent does not lose the power to act when faced with unusual conditions, but may act in a manner that appears to be reasonably appropriate. If the agent was engaged strictly in an endeavor to bring about the result for which the agency was created, the act will be held to have been within the agent's implied authority [*Garber v. Prudential Ins. Co. (1962) 203 Cal. App. 2d 693, 702-703, 22 Cal. Rptr. 123]* . When acting in furtherance of the purposes of the agency, this implied authority includes, for example, the power to waive by contract the principal's right to proceed with a malpractice action by agreeing to

arbitrate all disputes arising from a medical insurance contract [*Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 707-709, 131 Cal. Rptr. 882, 552 P.2d 1178* ; *Hawkins v. Superior Court (1979) 89 Cal. App. 3d 413, 419, 152 Cal. Rptr. 491* ; for further discussion of this waiver power, *see Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.21*, Ch. 295, *Hospitals* , and Ch. 415, *Physicians: Medical Malpractice*]. An agent also has the right to delegate his or her powers to a subagent in certain circumstances unless specifically forbidden by the principal from doing so [*see Civ. Code § 2349*; *Leno v. Young Men's Christian Assn. (1971) 17 Cal. App. 3d 651, 658, 95 Cal. Rptr. 96* ; *Garber v. Prudential Ins. Co. (1962) 203 Cal. App. 2d 693, 702, 22 Cal. Rptr. 123* ; *see also* discussion § 427.16[6][a]].

[5] Specific Types of Agencies

Agents are also given specific powers by statute when exercising certain types of agencies. Thus, an agent with authority to sell personal property also has authority to warrant the title of the principal, and the quality and quantity of the property [*Civ. Code § 2323*]. An agent with authority to sell real property has authority to give the usual covenants of warranty [*Civ. Code § 2324*]. A general agent to sell, who is entrusted by the principal with the possession of the thing to be sold, has authority to receive the price [*Civ. Code § 2325*]. A special agent to sell has authority to receive the price on delivery of the thing sold, but not afterwards [*Civ. Code § 2326*; *see also* the definition of special and general agents § 427.11[2]].

[6] Delegation to Subagent

[a] Powers Delegable

An agent may delegate his or her powers to another person only when any of the following is true [*Civ. Code § 2349*; *see Seneca Ins. Co. v. Countyof Orange (2004) 117 Cal. App. 4th 611, 619-620, 13 Cal. Rptr. 3d 1* (agent of surety that had undertaken bail bond could not lawfully delegate authority to police detective to seek extension of time from court on bail forfeiture)]:

- The act to be done is purely mechanical.
- The act cannot be done by the agent but the subagent can lawfully perform it.
- It is the usage of the place to delegate these powers.
- Delegation is specially authorized by the principal.

The principal, however, may specially forbid delegation of these powers [*Civ. Code § 2349*].

[b] Authorized Delegation

A lawfully appointed subagent represents the principal in like manner as the original agent, and the original agent is not responsible to third persons for the acts of the subagent [*Civ. Code § 2351*]. Thus, for example, supervising employees are liable to third parties for the acts of their subordinates only when the supervising employees themselves act wrongfully [*see Holland v. Nelson (1970) 5 Cal. App. 3d 308, 313-314, 85 Cal. Rptr. 117* ; *Towt v. Pope (1959) 168 Cal. App. 2d 520, 530, 336 P.2d 276* ; *see also* discussion § 427.22].

[c] Effect of Unauthorized Delegation

If an agent employs a subagent without authority, the agent is a principal and the subagent is his or her agent. The principal of the agent, however, has no connection with the subagent [*Civ. Code § 2350*; *see Civ. Code § 2022* (mere agent of agent is not responsible as such to principal of agent)]. An unauthorized subagent cannot look to the original

principal for compensation [*Hasekian v. Krotz (1968) 268 Cal. App. 2d 311, 318, 74 Cal. Rptr. 410* ; *Goodwin v. Glick (1956) 139 Cal. App. 2d Supp. 936, 939-940*]. In addition, because a subagent appointed without authority has no connection with the principal, the subagent has no duty to disclose knowledge of fraud to the principal, even a fraud that is perpetrated by the original agent [*Kavanagh v. Wade (1940) 42 Cal. App. 2d 92, 97, 108 P.2d 475* ; *see Civ. Code § 2350*; *see* discussion under *§ 427.62[2][c]*]. A principal may be liable to third parties, however, for the willful fraud of an unauthorized subagent [*Eye v. Kafer, Inc. (1962) 202 Cal. App. 2d 449, 454, 20 Cal. Rptr. 841* ; *see* discussion under *§ 427.22*].

[d] Determining Effectiveness of Delegation

Courts take a rather expansive view of an agent's authority to appoint subagents when the issue of the propriety of an agent's delegation of authority arises in an action by a third party seeking damages from theprincipal. Thus, courts have held that, in addition to the agent's authority under *Civ. Code § 2349* to delegate his or her powers, an agent has authority to appoint subagents stemming from the agent's authority to use any means that are incidental to and reasonably proper in the performance of an assigned task [*Leno v. Young Men's Christian Assn. (1971) 17 Cal. App. 3d 651, 658, 95 Cal. Rptr. 96* ; *Garber v. Prudential Ins. Co. (1962) 203 Cal. App. 2d 693, 702, 22 Cal. Rptr. 123* ; *see § 427.16[6][a]*].

However, when a subagent seeks compensation from the principal, the original agent's authority is examined more closely to determine whether the agent had authority on behalf of the principal to create an agency relationship between the subagent and the principal, or whether the agent merely had the authority (express or implied) to use subagents to perform the agent's duties for the principal. The difference is between being authorized to create a contractual relationship of agency between the principal and another agent, and being authorized to contract with another, on the agent's own behalf, to assist the agent in carrying out the business of the agency. While the latter authority may readily be implied, the former requires a showing that the principal intended to allow the agent to appoint other agents who would be in a contractual relationship with the principal. Unless such a showing is made, the subagent must look to the agent rather than to the principal for compensation [*Hasekian v. Krotz (1968) 268 Cal. App. 2d 311, 318, 74 Cal. Rptr. 410* ; *Goodwin v. Glick (1956) 139 Cal. App. 2d Supp. 936, 939-940*].

[7] Limitations on Authority

An authority expressed in general terms, however broad, does not authorize an agent to do any of the following [*Civ. Code § 2322*]:

- Act in his or her own name unless it is the usual course of business to do so.
- Define the scope of the agency.
- Violate a duty to which a trustee is subject pursuant to *Prob. Code §§ 16002, 16004, 16005*, and *16009*.

Nor can an agent have authority, either actual or ostensible, to do an act that is, and is known or suspected by the person with whom he or she deals to be, a fraud on the principal [*Civ. Code § 2306*; *see Saks v. Charity Mission Baptist Church (2001) 90 Cal. App. 4th 1116, 1137-1140, 110 Cal. Rptr. 2d 45* (in real estate investor's action for breach of contract and fraud, church held not liable on promissory notes signed by pastor, when plaintiff acquiesced in scheme to wrongfully use church's name to obtain financial benefit for himself and his partners)]. Agents also must not exceed the limits of their actual authority, as defined by *Civ. Code § 2295 et seq.* [*Civ. Code § 2019*]. Finally, a principal may specially deprive an agent of certain authority [*see Civ. Code § 2318*; *see § 427.16[4]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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37-427 California Forms of Pleading and Practice--Annotated § 427.17

§ 427.17 Third Party's Duty of Inquiry

When a third party deals with an agent whose authority is unclear, the third party must attempt to clarify the extent of the agent's authority in order to bind the principal. This duty is related to the finding required to establish ostensible authority. In other words, when the agent lacks actual authority, the principal can be bound by the acts of the agent only if the third party with whom the agent deals reasonably believes that the agent possesses authority to act, and that belief is based on the conduct of the principal [*see Civ. Code § 2334*; *see also § 427.62[2][d]*]. The third party's reliance on an agent's ostensible authority must be reasonable and not negligent, and any question as to the agent's authority makes inquiry the reasonable course of action [*see Ernst v. Searle (1933) 218 Cal. 233, 240, 22 P.2d 715* ; *United States Credit Bureau, Inc. v. Cheney (1965) 235 Cal. App. 2d 357, 361, 45 Cal. Rptr. 525* ; *South Sacramento Drayage Co. v. Campbell Soup Co. (1963) 220 Cal. App. 2d 851, 858, 34 Cal. Rptr. 137* ; *Civ. Code § 2334*; *see also § 427.62[2][d]*].

The third party's failure to make an inquiry when the circumstances would lead a reasonable person to do so permits action against the principal only to the extent of the agent's actual authority [*United States Credit Bureau, Inc. v. Cheney (1965) 235 Cal. App. 2d 357, 361, 45 Cal. Rptr. 525]* . When an agent acts within his or her actual authority, no inquiry is necessary, and when the acts of the principal are sufficient to establish ostensible authority, the third party's reasonable reliance on the principal's acts in the absence of any conduct warranting inquiry will bind the principal notwithstanding any undisclosed limits on the agent's authority [*Beck v. Arthur Murray, Inc. (1966) 245 Cal. App. 2d 976, 981, 54 Cal. Rptr. 328* ; *Myers v. Stephens (1965) 233 Cal. App. 2d 104, 115, 43 Cal. Rptr. 420]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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37-427 California Forms of Pleading and Practice--Annotated § 427.18

§ 427.18 Ratification

[1] Generally

In addition to precedent authorization, an agency may be created, and an authority may be conferred by a subsequent ratification [*Civ. Code § 2307*]. Ratification assumes that no authority existed at the time of the act, but the act must have been undertaken on behalf of the principal. An act of a purported agent not acting on behalf of the principal cannot be ratified [*Jacks v. Taylor (1917) 34 Cal. App. 95, 97-98, 166 P. 858]* . For discussion of when an undisclosed principal may ratify an agent's unauthorized act, see *§ 427.26*.

[2] Acts Constituting

A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or when anoral authorization would suffice, by accepting or retaining the benefit of the act with notice thereof [*Civ. Code § 2310*; *see* discussion under *§ 427.62[5]*]. When a written authorization would not have been required by *Civ. Code § 2309*, because the principal did not confer an authority to enter into a contract required by law to be in writing, the unauthorized act of an agent may be ratified either expressly or by implication from the principal's conduct [*Union Trust and Realty Co. v. Best (1911) 160 Cal. 263, 267, 116 P. 737* ; *see* *Bescos v. Bank of America (2003) 105 Cal. App. 4th 378, 391, 129 Cal. Rptr. 2d 423* (assignee bank that financed lease but was not agent of dealer in lease transaction was not responsible as lessor for misrepresentations made by dealer that were unknown to lender and not apparent on face of lease)].

Generally, an unauthorized act of an agent may be ratified by conduct of the principal from which an intention to consent to or to adopt the act is inferable, including conduct inconsistent with any other reasonable intention [*Rakestraw v. Rodrigues (1972) 8 Cal. 3d 67, 73, 104 Cal. Rptr. 57, 500 P.2d 1401* ; *see* *Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1489-1491, 82 Cal. Rptr. 2d 359* (in tort action against employer county, former employee failed to produce evidence that employer ratified conduct of fellow employee who assaulted plaintiff by promoting and condoning work environment in which conduct was tolerated)]. For example, a principal who brought suit on a settlement agreement that his attorney as agent executed without authorization was held to have ratified not only the unauthorized settlement agreement, but the attorney's authority to receive the payment called for in the settlement [*Navrides v. Zurich Ins. Co. (1971) 5 Cal. 3d 698, 703-704, 97 Cal. Rptr. 309, 488 P.2d 637]* . Ratification

has also been found when a principal retained the benefits of an unauthorized transaction with knowledge of the source of the benefit or when the principal should have known of the source of the benefit [*Reusche v. California Pac. Title Ins. Co. (1965) 231 Cal. App. 2d 731, 737, 42 Cal. Rptr. 262]* . The principal's conduct, however, must be voluntary, and even voluntary conduct will not constitute ratification if the principal cannot rescind the transaction or merely acts to minimize losses from the agent's acts [*Rakestraw v. Rodrigues (1972) 8 Cal. 3d 67, 73, 104 Cal. Rptr. 57, 500 P.2d 1401* ; *Pacific Vinegar etc. Works v. Smith (1907) 152 Cal. 507, 511-512, 93 P. 85* ; *Pacific Bone etc. Co. v. Bleakmore (1927) 81 Cal. App. 659, 664, 254 P. 618]* .

[3] Knowledge of Principal

When an oral authorization is sufficient, a principal does not ratify an agent's unauthorized act by accepting or retaining the benefit of the act unless the principal has notice of the act [*Civ. Code § 2310*]. The notice necessary for ratification includes not only knowledge of the agent's acts, but also the legal effect of those acts. A principal is not bound by ratification unless he or she acts with knowledge of all the material facts involved in the unauthorized transaction, particularly with knowledge of the acts of the person who assumed to act as the principal's agent [*Bate v. Marsteller (1959) 175 Cal. App. 2d 573, 582-583, 346 P.2d 903* ; *Estate of Fletcher (1940) 36 Cal. App. 2d 567, 573, 97 P.2d 1039]* . If the principal's ignorance of the facts arises from a failure to investigate when a reasonable person would do so, however, ratification may be found despite a lack of full knowledge [*Reusche v. California Pac. Title Ins. Co. (1965) 231 Cal. App. 2d 731, 737, 42 Cal. Rptr. 262* ; *Volandri v. Hlobil (1959) 170 Cal. App. 2d 656, 659, 339 P.2d 218]* .

[4] Effect of Partial Ratification

Ratification of part of an indivisible transaction is a ratification of the entire transaction [*Civ. Code § 2311*; *Shultz Steel Co. v. Hartford Accident & Indemnity Co. (1986) 187 Cal. App. 3d 513, 523, 231 Cal. Rptr. 715]* . This rule precludes a principal from ratifying the beneficial parts of the agent's unauthorized transaction while disavowing the burdens of the same transaction [*Navrides v. Zurich Ins. Co. (1971) 5 Cal. 3d 698, 704, 97 Cal. Rptr. 309, 488 P.2d 637]* ; [*Friddle v. Epstein (1993) 16 Cal. App. 4th 1649, 1656, 21 Cal. Rptr. 2d 85* ; *Price v. McConnell (1960) 184 Cal. App. 2d 660, 666, 7 Cal. Rptr. 695]* . Similarly, when separate transactions are closely related, as when one would not have been agreed to without the other, a ratification of one will constitute a ratification of all [*Vanciel v. Kumle (1945) 26 Cal. 2d 732, 735, 160 P.2d 802]* .

[5] Principal's Power to Authorize

A ratification is not valid unless, at the time of ratifying the act done, the principal has power to confer authority for such an act [*Civ. Code § 2312*]. For example, if a municipality's power to award a contract is limited by a requirement that a competitive bidding process determine the contract award, the bidding requirement cannot be avoided by an unauthorized award of a contract without bidding and a later ratification of the contract [*see Los Angeles Dredging Co. v. Long Beach (1930) 210 Cal. 348, 353, 291 P. 839]* . Similarly, a lessor who has granted a lease to one party cannot later attempt to ratify a previous, unauthorized lease, because no power to lease the property existed once the lease was executed [*Borderre v. Den (1895) 106 Cal. 594, 600, 39 P. 946]* .

[6] Consent of Third Parties

An unauthorized act cannot be made valid retroactively to the prejudice of third persons without their consent [*Civ. Code § 2313*]. For example, one court held that when a bank attempted to meet the 10-day statute of limitations in *Fin. Code § 3101* by filing a lawsuit without the requisite approval of the board of directors, the ratification by the board of directors after the 10 days had expired was held ineffective under *Civ. Code § 2313*.The court noted that the superintendent of banks had the right to order the action dismissed because of the failure of the bank to file properly the action, and that the dismissal right could not be taken away by ratification without the superintendent's consent [*Dominguez v. Superior Court (1983) 139 Cal. App. 3d 692, 694-695, 189 Cal. Rptr. 5* ; *see also Malinski v. Wegman's*

Nursery & Landscaping, Inc. (1980) 102 Cal. App. 3d 282, 289-290, 162 Cal. Rptr. 287 (insurer cannot ratify insured's partial payment to plaintiff as insurer's own in order to prevent a statute of limitations from having been tolled as to plaintiff's action, to plaintiff's prejudice); *Hooker v. American Indemnity Co. (1936) 12 Cal. App. 2d 116, 123, 54 P.2d 1128* (agent's unauthorized cancellation of insurance policy cannot be ratified to prejudice of beneficiaries of policy)].

[7] Rescission of Ratification

A ratification may be rescinded only if made with imperfect knowledge of the material facts of the transaction ratified, or if made without the consent required in a contract [*Civ. Code § 2314*; *see Civ. Code §§ 1565-1590* (governing consent to contract); *see also § 427.18[3]*; Ch. 140, *Contracts* , Ch. 488, *Reformation of Instruments* , and Ch. 490, *Rescission and Restitution*]. A principal who has deliberately stayed ignorant of material facts, however, may be precluded from rescinding on the basis of imperfect knowledge [*Hutchinson Co. v. Gould (1919) 180 Cal. 356, 358, 181 P. 651]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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37-427 California Forms of Pleading and Practice--Annotated § 427.19

§ 427.19 Agent's Knowledge Imputed to Principal

[1] Generally

As against a principal, both principal and agent are deemed to have notice of whatever either has notice of and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other [*Civ. Code § 2332*; *see* Form 37 and comments]. This rule recognizes an agent's duty to communicate with his or her principal, but does not depend on the agent's exercise of that duty. The rule is not a presumption that may be rebutted, or even a presumption at all, but rather a finding that in dealings with third parties, the agent acts in place of the principal [*Columbia Pictures Corp. v. DeToth (1948) 87 Cal. App. 2d 620, 630, 197 P.2d 580* ; *but see Freeman v. Superior Court (1955) 44 Cal. 2d 533, 537-538, 282 P.2d 857* (principal's knowledge disputable presumption for purposes of criminal contempt action); *Snook v. Netherby (1954) 124 Cal. App. 2d 797, 801-802, 269 P.2d 195* (imputed knowledge insufficient when subjective knowledge is required for bad faith damages under *Civ. Code § 3306*)].

This general rule, however, does not apply when the principal must have actual knowledge. For example, with respect to *Code Civ. Proc. § 1094.6* (time for filing petition for review of local agency decisions), the 90-day limitations period applies only if the required notice is served on the party. The express language of Section 1094.6, the overall statutory context, its legislative history, and the lack of burden compel the conclusion that service on the party's lawyer does not trigger the 90-day period [*Herman v. Los Angeles County Metropolitan Transportation Authority (1999) 71 Cal. App. 4th 819, 828-830, 84 Cal. Rptr. 2d 144* (after county agency mailed letter to public employee's attorney indicating that employee was being terminated, employee filed writ petition several days beyond 90-day period)].

[2] Rule Designed to Protect Third Parties

The purpose of the rule requiring communication is to protect third parties who deal with an agent in the reasonable belief that the agent will act faithfully in carrying out the duty to communicate with his or her principal. When the third party seeking to impute knowledge is acquainted with circumstances plainly indicating that the agent will not advise the principal, the knowledge will not be imputed [*Sands v. Eagle Oil & Refining Co. (1948) 83 Cal. App. 2d 312, 319-320, 188 P.2d 782]* . The rule does not create any duty between the principal and one who has no dealings with the principal through an agent or otherwise [*Lucas v. Pollock (1992) 7 Cal. App. 4th 668, 674-675, 8 Cal. Rptr. 2d 918]* .

[3] Facts Must Relate to Subject of Agency

An agent's knowledge can be imputed to the principal only when the facts that became known to the agent relate to the subject of the agency. An agent's knowledge of facts outside the scope of his or her authority cannot be imputed to the principal [*Redman v. Walters (1979) 88 Cal. App. 3d 448, 454, 152 Cal. Rptr. 42]* . The scope of the agency, and whether a particular fact known to the agent was within that scope, are issues of fact that must be resolved in individual cases [*Lucas v. Pollock (1992) 7 Cal. App. 4th 668, 673, 8 Cal. Rptr. 2d 918* ; *Maron v. Swig (1952) 115 Cal. App. 2d 87, 90, 251 P.2d 770]* .

[4] Acquired During Course of Agency

It is usually held that to be imputable, the knowledge must be acquired by the agent in the course of the agency, as no duty to disclose information to the principal arises at any prior time [*see* *Redman v. Walters (1979) 88 Cal. App. 3d 448, 454, 152 Cal. Rptr. 42]* . However, knowledge acquired before creation of the agency may be imputed to the principal if it is shown that the knowledge was used by the agent in acting for the principal [*see* *O'Riordan v. Federal Kemper Life Assur. Co. (2005) 36 Cal. 4th 281, 288-289, 30 Cal. Rptr. 3d 507, 114 P.3d 753* ; *Lucas v. Pollock (1992) 7 Cal. App. 4th 668, 673, 8 Cal. Rptr. 2d 918* ; *Columbia Pictures Corp. v. DeToth (1948) 87 Cal. App. 2d 620, 631, 197 P.2d 580]* .

[5] Reasonable Time for Communication Allowed

Knowledge acquired by an agent is not imputed to the principal immediately on receipt by the agent. Rather, a lapse of time reasonable for the communication of the knowledge is allowed before the principal is charged [*Kelley v. British Coml. Ins. Co. (1963) 221 Cal. App. 2d 554, 561, 34 Cal. Rptr. 564]* . Thus, a principal is not affected by the knowledge of an agent until it is communicated to him or her or until the one having the knowledge has committed a fault either in transacting something for the principal or in failing to communicate the knowledge to others who are to act on it [*Civil Service Employees Ins. Co. v. Blake (1966) 245 Cal. App. 2d 196, 199-200, 53 Cal. Rptr. 701* ; *Kelley v. British Coml. Ins. Co. (1963) 221 Cal. App. 2d 554, 561, 34 Cal. Rptr. 564]* .

[6] Communication When Agent Acting Adversely to Principal

An agent acting on behalf of the principal has the duty, notwithstanding any undisclosed personal interest, to communicate with the principal [*McKenney v. Ellsworth (1913) 165 Cal. 326, 329, 132 P. 75* ; *Wagner v. Benson (1980) 101 Cal. App. 3d 27, 35, 161 Cal. Rptr. 516* ; *Maron v. Swig (1952) 115 Cal. App. 2d 87, 91, 251 P.2d 770* ; *see* discussion of agent's liability to principal for breach of duty to communicate under § 427.23[1]]. Thus, when an agent acts in a capacity adverse to the principal, the agent's knowledge will not be imputed [*Meyer v. Glenmoor Homes, Inc. (1966) 246 Cal. App. 2d 242, 264, 54 Cal. Rptr. 786, 55 Cal. Rptr. 502]* .

The courts will examine whether the third party knew or should have known that the agent occupied a position adverse to the principal and therefore would be unlikely to communicate with the principal. An adverse capacity exists when an agent does not act for the principal alone but acts in his or her own interest or for another principal as well [*People v. Park (1978) 87 Cal. App. 3d 550, 566, 151 Cal. Rptr. 146]* . For example, an adverse position may exist when the agent represents more than one party to a transaction [*People v. Park (1978) 87 Cal. App. 3d 550, 566, 151 Cal. Rptr. 146]* . It may also exist when the agent and the third party are acting collusively to defraud the principal [*see* *Sands v. Eagle Oil & Refining Co. (1948) 83 Cal. App. 2d 312, 319-320, 188 P.2d 782]* .

This is not to say that a principal cannot be bound by the knowledge of an agent secretly acting in his or her own interest. The key concept in the general rule is that of capacity; an agent acting for the principal, even if seeking to defraud the principal, has a duty to communicate with the principal, and knowledge acquired while so acting will be imputed to the principal [*McKenney v. Ellsworth (1913) 165 Cal. 326, 329, 132 P. 75]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesKnowledge & NoticeGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesKnowledge & NoticeAgent KnowledgeBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesKnowledge & NoticeExceptionsBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesKnowledge & NoticeUncommunicated InformationBusiness & Corporate LawAgency RelationshipsTerminationsNotice Requirements

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37-427 California Forms of Pleading and Practice--Annotated § 427.20

§ 427.20 Termination of Agency Relationship

[1] Generally

An agency is terminated as to every person having notice of the following [*Civ. Code § 2355*]:

- The expiration of the term of the agency;
- The extinction of the subject of the agency;
- The death of the agent;
- The agent's renunciation of the agency; or
- The incapacity of the agent to act as such.

Additionally, unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated by its revocation by the principal, the death of the principal, or the incapacity of the principal to contract [*Civ. Code § 2356(a)*; *see § 427.20[8]*]. Notwithstanding *Civ. Code § 2356(a)*, any bona fide transaction entered into with such agent by any person acting without actual knowledge of the principal's revocation, death, or incapacity is binding on the principal, his or her heirs, devisees, legatees, and other successors in interest [*Civ. Code § 2356(b)*]. For the purposes of *Civ. Code § 2356(b)* in the case of a principal who is an absentee as defined in *Prob. Code § 1403*, a person is deemed to be without actual knowledge of the following [*Civ. Code § 2357*]:

- The principal's death or incapacity while the absentee continues in missing status and until the person receives notice of the determination of the death of the absentee by the secretary concerned or the head of the department or agency concerned or the delegate of the secretary or head; and
- Revocation by the principal during the period described in *Civ. Code § 2357(a)*.

Nothing in *Civ. Code § 2356* affects the provisions of *Civ. Code § 1216*, which require that any power contained in an instrument to convey or execute instruments affecting real property can be revoked only by an instrument that is also acknowledged and proved, certified, and recorded in the same office in which the instrument containing the power was recorded [*Civ. Code § 2356(c)*]. Any California statute pertaining to a proxy given to another person relating to the exercise of voting rights that conflicts with or contravenes any provision of *Civ. Code § 2356* prevails over that provision of *Civ. Code § 2356* [*Civ. Code § 2356(d)*].

[2] Expiration of Term

When an agency is created by an agreement providing a specific term for the agency, the agency terminates when the term expires [*Civ. Code § 2355(a)*; *Preston v. Carnation Co. (1961) 196 Cal. App. 2d 43, 46, 16 Cal. Rptr. 240]* .

[3] Extinction of Subject of Agency

An example of when an agency terminates because of the extinction of its subject is an agency for the purpose of selling a parcel of real property. When the parcel is sold, the agency relationship terminates [*Civ. Code § 2355(b)*; *E.A. Strout Western Realty v. Gregoire (1950) 101 Cal. App. 2d 512, 519, 225 P.2d 585]* . For discussion of the relationship between a principal and a real estate broker, see *Ch. 103, Brokers, § 103.12*.

[4] By Actions of Parties

[a] In General

Because an agency depends on the mutual assent of the parties, it may be renounced by either the principal or the agent at any time [*Woolley v. Embassy Suites, Inc. (1991) 227 Cal. App. 3d 1520, 1529-1530, 278 Cal. Rptr. 719]* . It may be terminated by the agent's renunciation [*Civ. Code § 2355(d)*], or, except in the case of an agency "coupled with an interest," by the principal's revocation [*Civ. Code § 2356(a)(1)*; *see § 427.20[4][b]* and *§ 427.20[8]*].

The parties may also mutually abandon an agency relationship, even if the relationship is not terminable by the act of one party alone [*Preszler v. Dudley (1957) 153 Cal. App. 2d 120, 123-124, 314 P.2d 138]* . The general body of contract law applies to agency agreements as well, so that rescission is available to the same extent as it is in contract law generally [*Coleman v. Mora (1968) 263 Cal. App. 2d 137, 146, 69 Cal. Rptr. 166* ; *see Civ. Code § 1689* (grounds for rescission); *see also* discussion of rescission in Ch. 490, *Rescission and Restitution*].

[b] Revocation by Principal

Unless an agency is coupled with an interest [*see § 427.20[8]*], a principal has the power to revoke an agent's authority at any time before the agent has completed performance [*Civ. Code § 2356(1)*; *Elevator Operators etc. Union v. Newman (1947) 30 Cal. 2d 799, 807, 186 P.2d 1* ; *Woolley v. Embassy Suites, Inc. (1991) 227 Cal. App. 3d 1520, 1529, 278 Cal. Rptr. 719]* . It should always be within the power of the principal to manage his or her own business, and that includes the power of the principal to reassume the control over the business that has been delegated to the agent [*Woolley v. Embassy Suites, Inc. (1991) 227 Cal. App. 3d 1520, 1530-1531, 278 Cal. Rptr. 719]* .

[c] Contractual Limitations on Right to Terminate

If the agency was created by contract, the parties may provide that the agency will last for a particular period of time or otherwise restrict the right of either party to terminate the agency [*see, e.g., Woolley v. EmbassySuites, Inc. (1991) 227 Cal. App. 3d 1520, 1530, 278 Cal. Rptr. 719]* . However, that provision is ineffective to curtail the principal's power to revoke the agency. The principal's power of revocation is absolute and applies even if doing so is a violation of the contract, or the agency is characterized as "irrevocable." Although revocation may not be prevented by the agent, the agent's remedy for wrongful termination is damages, as in any other breach of contract action [*Woolley v. Embassy*

Suites, Inc. (1991) 227 Cal. App. 3d 1520, 1530, 278 Cal. Rptr. 719 ; *see Long Beach Drug Co. v. United Drug Co. (1939) 13 Cal. 2d 158, 174, 89 P.2d 386* ; *see also* Form 1]. A court may not order the agency reestablished [*Stoll v. Stoll (1936) 5 Cal. 2d 687, 691-693, 56 P.2d 226* ; *Woolley v. Embassy Suites, Inc. (1991) 227 Cal. App. 3d 1520, 1529-1533, 278 Cal. Rptr. 719* ; *see § 427.21*].

[5] Incapacity of Agent

An agency is terminated as to every person having notice thereof by the incapacity of the agent to act as such [*Civ. Code § 2355(e)*]. One issue raised by *Civ. Code § 2355(e)* is the effect of an agent's temporary incapacity to contract on the agent's subsequent exercise of an authority given before the incapacity. Despite apparently clear statutory language that the agent's incapacity terminates the agency, at least one court has held that an agent's temporary incapacity does not terminate the agency for all purposes. The court noted that the adjudication of the agent's incompetency was somehow collusive and relied on that fact, and the equitable nature of the quiet title action in which it was raised, to hold that the agent's incapacity did not absolutely terminate the agency relationship [*Clay v. Saute (1956) 140 Cal. App. 2d 681, 685-686, 295 P.2d 914]* . The persuasiveness of that holding may, however, be diminished by the court's reliance on the conduct of the principal and the agent, both of whom continued to act as though the agency existed after the agent was restored to capacity; it may be argued that this conduct created an implied-in-fact agency, making the court's discussion of the effect of the incapacity unnecessary to the result reached [*see Clay v. Saute (1956) 140 Cal. App. 2d 681, 686, 295 P.2d 914]* .

[6] Death of Principal

The death of the principal terminates the agency unless the power of the agent is coupled with an interest in the subject of the agency [*Civ. Code § 2356(a)(2)*; *see* discussion under *§ 427.20[8]*]. The agency terminates immediately on the principal's death, except as to bona fide transactions entered into by third parties without knowledge of the principal's death [*see Civ. Code § 2356(b)*]. For example, the principal's estate is not liable to the agent under the agency agreement for actions of the estate that violate the agreement after the principal's death [*Charles B. Webster Real Estate v. Rickard (1971) 21 Cal. App. 3d 612, 614-617, 98 Cal. Rptr. 559]* .

[7] Incapacity of Principal to Contract

Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated by the incapacity of the principal to contract [*Civ. Code § 2356(a)(3)*; *see Civ. Code §§ 1556, 1557*; *see also Civ. Code §§ 38-40*; for discussion of capacity, *see Ch. 140, Contracts, § 140.21*]. An agency not coupled with an interest is terminated immediately on the incapacity of the principal, even when the agent has contracted to continue as agent for a definite time. The contract creating the agency, however, does not necessarily terminate at the same time [*Capital Nat. Bk. of Sacramento v. Stoll (1934) 220 Cal. 260, 266, 30 P.2d 411* (incapacity of principal terminated agency but did not preclude liability for breach of agency contract); *see* discussion § 427.20[4][c]].

[8] Agency Coupled With Interest

The power of an agent coupled with an interest in the subject of the agency is not terminated by the revocation, death, or incapacity of the principal [*see Civ. Code § 2356(a)*]. This rule differentiates between the ordinary agency, instituted for the benefit of the principal, and an agency created for the benefit of the agent in order to protect some title or right of the agent, or to secure some performance to the agent [*Becket v. Welton Becket & Associates (1974) 39 Cal. App. 3d 815, 820, 114 Cal. Rptr. 531]* . For an agency agreement to be coupled with an interest, it must be *all* of the following [*Becket v. Welton Becket & Associates (1974) 39 Cal. App. 3d 815, 820, 114 Cal. Rptr. 531* , *citing* Restatement of Agency § 138; *see § 427.84* and comments to the form]:

- Held for the benefit of the agent rather than the principal.

- Created to secure the performance of a duty to the agent or to protect a title in the agent.
- Created at the same time that the duty or title is created or be created for consideration.

Perhaps the most common and clear example of a power coupled with an interest is a mortgage giving the mortgagee a power of sale. The power of sale is clearly held for the benefit of the mortgagee; it is created to protect the mortgagee's title; and it is created at the same time that the mortgage interest is created. The power is therefore not terminated by the death of the mortgagor [*see New York Life Ins. Co. v. Doane (1936) 13 Cal. App. 2d 233, 237-239, 56 P.2d 989]* .

Another type of agency coupled with an interest is one given as security for a duty, such as a debt, owed by the principal to the agent. For example, the creation of an agency relationship, by granting management of a business as security for loans made to the business, has been held irrevocable as coupled with an interest [*MacDonald v. Rosenfeld (1948) 83 Cal. App. 2d 221, 236-237, 188 P.2d 519]* . An agency to manage a building given with a 20-year lease on part of the building has also been held to be a power coupled with an interest in that the management permitted the lessee to protect itself against the potential forfeiture of the lessor's land lease [*Lane Mortgage Co. v. Crenshaw (1928) 93 Cal. App. 411, 428-429, 269 P. 672]* .

It must be emphasized that for an agency to be coupled with an interest, the interest must be a specific, present, and coexisting interest in the subject of the agency; the interest cannot be obtained by the exercise of the agency [*O'Connell v. Superior Court (1935) 2 Cal. 2d 418, 422, 41 P.2d 334* ; *Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1023, 84 Cal. Rptr. 538]* . Monetary compensation for the agent, in whatever form it may take, does not create a power coupled with an interest that would make the agency irrevocable [*Woolley v. Embassy Suites, Inc. (1991) 227 Cal. App. 3d 1520, 1532, 278 Cal. Rptr. 719]* . Thus, an agency whereby the agent is to acquire property or to collect money and take compensation from what is obtained is not coupled with an interest. The agent's interest in such a case is a future rather than present interest at the time the agency is created and is therefore revocable by the principal. Such an agency immediately terminates on the death of the principal [*see Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1023, 84 Cal. Rptr. 538]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActBusiness TransactionsGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesKnowledge & NoticeGeneral OverviewBusiness & Corporate LawAgency RelationshipsEstablishmentConsentBusiness & Corporate LawAgency RelationshipsTerminationsGeneral OverviewBusiness & Corporate LawAgency RelationshipsTerminationsConsentBusiness & Corporate LawAgency RelationshipsTerminationsExpiration of TimeBusiness & Corporate LawAgency RelationshipsTerminationsOperation of LawContracts LawPerformanceDischarges & Terminations

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37-427 California Forms of Pleading and Practice--Annotated § 427.21

§ 427.21 Liability of Principal to Agent

[1] Compensation

As with contracts of employment generally, a promise of compensation in a reasonable amount is implied in an agreement to act as an agent for the benefit of another unless the parties intended that the services were to be performed gratuitously [*see Toomy v. Dunphy (1890) 86 Cal. 639, 643, 25 P. 130* ; *Spinelli v. Tallcott (1969) 272 Cal. App. 2d 589, 595, 77 Cal. Rptr. 481* ; § 427.82 and comments to the form; *see also* Ch. 121, *Common Counts* , and Ch. 250, *Employment Law: Wage and Hour Disputes*].

If an agency agreement provides for compensation, any dispute under the agreement will be resolved by resort to the basic rules of contract interpretation [*Monroe v. Grolier Society (1929) 208 Cal. 447, 451, 281 P. 604* ; for discussion of contract interpretation, *see Ch. 140, Contracts, § 140.30* et seq.]. For discussion of the specific rules applcable to agreements for the sale of property, see Ch. 103, *Brokers* .

An agency relationship must exist between the principal and the agent for the agent to be entitled to compensation from the principal. If the purported agent is in fact only a subagent appointed by an agent who lacks authority to appoint new agents for the principal, the subagent must look to the agent for compensation [*Goodwin v. Glick (1956) 139 Cal. App. 2d Supp. 936, 938-939* ; *see* discussion under *§ 427.16[6][c]*].

[2] Wrongful Termination and Interference

If an agency agreement provides a specific term for agency, any earlier termination by the principal is within his or her power but may give rise to a cause of action for breach of contract [*Stoll v. Stoll (1936) 5 Cal. 2d 687, 691-693, 56 P.2d 226* ; *see* discussion § 427.20[4][c]]. If an agency relationship is also that of employer and employee, a growing body of law limits the situations in which an employer may discharge an employee without infringing the employee's rights. For additional discussion of the law of wrongful discharge, see Ch. 249, *Employment Law: Termination and Discipline* .

Short of termination, a principal may interfere with an agent's ability to realize the benefits of an agency agreement. An agreement that makes an agent's compensation contingent on some result that the principal can affect is especially

susceptible to the principal's interference. For example, when a principal interferes with an agent's exclusive sales contract by making sales directly, the agent has a cause of action for profits that would have been earned if the agent had made the sales [*Hacker etc. Co. v. Chapman V. Mfg. Co. (1936) 17 Cal. App. 2d 265, 267-268, 61 P.2d 944* ; *see § 427.81*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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37-427 California Forms of Pleading and Practice--Annotated § 427.22

§ 427.22 Liability of Principal to Third Party

[1] Authorized Acts of Agent

An agent represents his or her principal for all purposes within the scope of the agent's actual or ostensible agency, and all the rights and liabilities that would accrue to the agent from transactions within that limit, if they had been entered into on the agent's own account, accrue to the principal [*Civ. Code § 2330*]. This provision recognizes the basic agency concept that an agent can alter the legal relationships of the principal [*see Lippert v. Bailey (1966) 241 Cal. App. 2d 376, 382, 50 Cal. Rptr. 478* ; *see also* discussion § 427.12]. Thus, the acts of an agent within the scope of his or her authority are considered the acts of the principal, even if not specifically authorized by or known to the principal, and third parties with whom an agent deals are entitled to enforce contracts entered into by the agent on behalf of a principal [*see Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 707-709, 131 Cal. Rptr. 882, 552 P.2d 1178* ; *see* §§ 472.122, *427.124, 427.125*; *see also § 427.61[1]*].

[2] Acts Under Ostensible Authority

A principal is bound by the acts of his or her agent, under a merely ostensible authority, to those persons only who have in good faith and without want of ordinary care incurred a liability or parted with value on the faith thereof [*Civ. Code § 2334*]. In applying *Civ. Code § 2334*, courts have held that there are three requirements for holding a principal liable to a third party for the acts of an agent under an ostensible authority [*Associated Creditors' Agency v. Davis (1975) 13 Cal. 3d 374, 399, 118 Cal. Rptr. 772, 530 P.2d 1084* ; *Mejia v. Community Hospital of San Bernardino (2002) 99 Cal. App. 4th 1448, 1456-1457, 122 Cal. Rptr. 2d 233* (in action against hospital, injured patient argued there was sufficient evidence that negligent physician was ostensible agent of hospital to survive motion for nonsuit); *see Civ. Code § 2334*; *see also §§ 427.122, 427.124*; *see also § 427.17*]:

- The third party dealing with the agent must believe in the agent's authority and the belief must be reasonable.
- The belief must be generated by some act or neglect of the principal sought to be charged.
- The third person, in relying on the agent's apparent authority, must not be guilty of negligence.

Implicit in the third requirement is the necessity of reliance by the third party on the ostensible agency. Ostensible agency is based on a theory of estoppel, requiring that the third party justifiably and without negligence rely on the representation, express or by conduct, of the principal and either change position or suffer injury because of the reliance [*People v. Surety Ins. Co. (1982) 136 Cal. App. 3d 556, 562, 186 Cal. Rptr. 385* ; *Van Den Eikhof v. Hocker (1978) 87 Cal. App. 3d 900, 905-906, 151 Cal. Rptr. 456* (citing Restatement (Second) of Agency, § 265); *Kelley v. R.F. Jones Co. (1969) 272 Cal. App. 2d 113, 120-121, 77 Cal. Rptr. 170* ; *see Civ. Code § 2334*; *see also Associated Creditors' Agency v. Davis (1975) 13 Cal. 3d 374, 403, 118 Cal. Rptr. 772, 530 P.2d 1084]* .

While the representations relied on by the third party must be those of the principal rather than the agent, there need not be direct contact between the principal and the third party. The manifestation of the agent's authority by the principal may be to the community at large, as for example by appointing the agent to a particular position within a corporation [*Meyer v. Ford Motor Co. (1969) 275 Cal. App. 2d 90, 102, 79 Cal. Rptr. 816* ; *see* discussion under *§ 427.14[5]* and *427.16[3]*]. In one case, a real estate purchaser raised a triable issue of fact that a franchisor was liable for fraud allegedly committed by a franchisee under an ostensible agency theory. Although the franchisor made no specific representations to the purchaser, it did make representations to the public in general on which the purchaser reasonably relied. The purchaser did not notice the small print disclaimer on the franchisor's advertising and instead relied on the large print and believed that he was dealing with the franchisor [*Kaplan v. Coldwell Banker Residential Affiliates, Inc. (1997) 59 Cal. App. 4th 741, 747, 69 Cal. Rptr. 2d 640]* .

A third party may not attribute a corporate employee's acts to the corporation under the ostensible authority doctrine when the third party is engaged in a conspiracy with the employee to use the corporation toobtain a benefit for himself [*Saks v. Charity Mission Baptist Church (2001) 90 Cal. App. 4th 1116, 1139-1140, 110 Cal. Rptr. 2d 45]* . Thus, in an action for breach of contract and fraud, a church was held not liable on promissory notes signed by its pastor when the plaintiff, a real estate investor, acquiesced in a scheme to wrongfully use the church's name to obtain a financial benefit for himself and his partners. In this situation, the doctrines of respondeat superior, ostensible authority, and equitable estoppel did not provide a ground for imposition of liability on a fraud theory [*Saks v. Charity Mission Baptist Church (2001) 90 Cal. App. 4th 1116, 1137-1140, 110 Cal. Rptr. 2d 45]* .

A principal who knows that the agent holds himself or herself as clothed with certain authority and remains silent, may be liable for the acts of the agent within the scope of the authority [*Preis v. American Indemnity Co. (1990) 220 Cal. App. 3d 752, 761, 269 Cal. Rptr. 617]* .

[3] Unauthorized Acts of Agent

When an agent exceeds his or her authority in dealing with a third party, the principal ordinarily is not liable to the third party for the agent's unauthorized act, unless the principal's conduct created ostensible authority in the agent or the unauthorized act was later ratified by the principal [*see Grasslands etc. Assn. v. Lucky etc. Co. (1952) 112 Cal. App. 2d 776, 779, 247 P.2d 380* ; *Civ. Code § 2339*; discussion under *§ 427.22[5]*; *see also* discussion § 427.61[1]]. When an agent exceeds his or her authority, the principal is liable for the agent's authorized acts only so far as they can be plainly separated from the unauthorized acts [*Civ. Code § 2333*].

[4] Incomplete Execution of Authority

A principal is bound by an incomplete execution of an authority when it is consistent with the whole purpose and scope of the authority, but not otherwise [*Civ. Code § 2331*].

[5] Torts of Agents

[a] Liability of Principal for Acts of Employee Agents Under Respondeat Superior

If an agent is also the principal's employee [*see 427.13[1]*], the employer-principal is liable under the doctrine of respondeat superior for all of the employee-agent's torts that are done in the scope of employment [*see Perez v. Van Groningen & Sons, Inc. (1986) 41 Cal. 3d 962, 967, 227 Cal. Rptr. 106, 719 P.2d 676* ; *see also In re Exxon Valdez (9th Cir. 2001) 270 F.3d 1215, 1233-1236* (corporation could be held vicariously liable for punitive damages based on ship captain's actions resulting in ship running aground and causing oil spill)]. Under respondeat superior, if the numerous requirements for determining whether one is acting within the scope of employment are met, it is unnecessary to determine whether the employee was acting with actual or ostensible authority in doing the particular tortious act [*Johnson v. Monson (1920) 183 Cal. 149, 150-151, 190 P. 635* ; *see Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 617-618, 124 Cal. Rptr. 143* (employer liable for battery committed by employees within scope of employment; policy behind respondeat superior does not require that act be expressly authorized by employer)]. For further discussion of respondeat superior in the employer-employee context, including the rules for determining whether one is acting within the scope of employment, see Ch. 248, *Employer's Liability for Employee's Torts* .

[b] Liability of Principal for Acts of Nonemployee Agent Based on Right to Control

The line of cases that conclude that agents and independent contractors are mutually exclusive [§ 427.13[2]] stand for the proposition that if one requests the services of another and retains the right to control the manner and means of accomplishing the desired result, an agency relationship is created, whether or not the agent would be considered an employee under employment law. Pursuant to that relationship, the principal is liable for all torts of the agent committed within the scope of the relationship [*see Malloy v. Fong (1951) 37 Cal. 2d 356, 370-372, 232 P.2d 241* (church denomination is liable for acts of its financially supported mission churches); *Dorsic v. Kurtin (1971) 19 Cal. App. 3d 226, 238-239, 96 Cal. Rptr. 528* (service station owner may be agent of oil company based on pro visions of lease agreement giving company certain control over operation of station); *Shoopman v. Pacific Greyhound Lines (1959) 169 Cal App. 2d 848, 853-856, 338 P.2d 3* (ticket agent is agent of bus company); *Lewis v. Constitution Life Co. (1950) 215 P.2d 55* (general insurance agent is agent of particular insurer while conducting business for that insurer); *see also Wickham v. Southland Corp. (1985) 168 Cal. App. 3d 49, 54-59, 213 Cal. Rptr. 825* (agency between franchisee and franchisor is question of fact)].

Under this rule, if the requisite degree of control is found, the agency relationship is treated as if it were an employer-employee relationship [*Lewis v. Constitution Life Co. (1950) 96 Cal. App. 2d 191, 193, 215 P.2d 55* ; *see* Restatement (Second) of Agency § 250, comment a]. The limitation in agency law on the liability of a principal for physical harm caused by the physical conduct of a nonservant agent [*see* Restatement (Second) of Agency § 250, *see also § 427.22[5][c]*] does not apply [*see Malloy v. Fong (1951) 37 Cal. 2d 356, 370-372, 232 P.2d 241* ; *Lewis v. Constitution Life Co. (1950) 215 P.2d 55* (both finding principal liable for agent's negligent driving while on the business of the agency)].

However, whether the concept of "within the scope of agency" in that case is coterminous with "within the scope of employment" is not clear [*see Dorsic v. Kurtin (1971) 19 Cal. App. 3d 226, 238 n. 11, 96 Cal. Rptr. 528* (jury instruction affirmed that treated "scope of authority" similarly to "scope of employment")]. For example, one may be within the scope of employment without any actual or ostensible authority to do the act giving rise to liability based on a foreseeability standard [*see Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 617-618, 124 Cal. Rptr. 143* ; *see also* Ch. 248, *Employer's Liability for Employee's Torts*]. To date, no case appears to have applied a broad standard to the scope of agency arising from a right to control. But neither has any case adopted any limitations on principal liability apart from the applicable standards under employer-employee respondeat superior [*see Malloy v. Fong (1951) 37 Cal. 2d 356, 370-372, 232 P.2d 241* (minister within scope of agency for denomination while transporting bible school pupils); *Dorsic v. Kurtin (1971) 19 Cal. App. 3d 226, 238, 96 Cal. Rptr. 528* (service station owner within scope of agency for oil company with regard to premises liability); *Housewright v. Pacific Far East Line, Inc. (1964) 40 Cal. Rptr. 208* (one corporation within scope of agency for another during jointly conducted test of equipment); *Shoopman v. Pacific Greyhound Lines (1959) 169 Cal App. 2d 848, 853-856, 338 P.2d 3* (ticket agent within scope of agency for bus line with regard to false arrest over baggage dispute); *Lewis v. Constitution Life Co.*

(1950) 96 Cal App. 2d 191, 193-196, 215 P.2d 55 (insurance agent within scope of agency for insurer while on errand pursuant to instructions to tender check in exchange for receipt)].

Another uncertainty involves the question of the reliance requirement if the principal is to be charged for an act of an agent under ostensible authority [*see Civ. Code §§ 2298, 2330, 2334, see also § 427.22[2]*]. To date, no case appears to have considered whether this limitation on principal liability exists in an agency relationship arising from a right to control. Ostensible agency is a concept unique to agency law and relevant primarily to the agent's representative authority in business transactions. It does not create any limitations on employer tort liability under employer-employee respondeat superior [*see Clark Equipment Co. v. Wheat (1979) 92 Cal. App. 3d 503, 521, 154 Cal. Rptr. 874* (cases do not always distinguish between agency theories of actual and ostensible authority and tort doctrine of respondeat superior)].

[c] Limitations on Tort Liability of Principal for Acts of Nonemployee Agent

In the case of agency between a principal and a nonemployee agent based on grounds other than a right to control [*see* discussion under *§ 427.13[2]* and *427.22[5][b]*], there are limitations on the scope of the tort liability of the principal for the acts of the agent. Ordinarily, a principal is not liable for physical harm caused by the negligent physical conduct of a nonemployee agent, even if the conduct occurred during the performance of the principal's business. Liability is limited because the principal does not have the right of control over the details of the nonemployee agent's conduct [*Van Den Eikhof v. Hocker (1978) 87 Cal. App. 3d 900, 905, 151 Cal. Rptr. 456* (citing Restatement (Second) of Agency § 250 and Prosser, Torts, § 70 (West 4th ed. 1971)]. Therefore, al though an employer is liable to third persons who are injured by the employee's negligent driving within the scope of employment, a principal is not similarly liable for the acts of a nonemployee agent [*compare Van Den Eikhof v. Hocker (1978) 87 Cal. App. 3d 900, 905, 151 Cal. Rptr. 456* (principal-agent), *with Lazar v. Thermal Equipment Corp. (1983) 148 Cal. App. 3d 458, 462-467, 195 Cal. Rptr. 890* (employer-employee)].

This limitation applies only if the principal does not control or have the right to control the details of the agent's physical movements while the agent is conducting the authorized transaction. If the principal retains a right of control, the relationship is treated as that of employer-employee, and the limitation is inapplicable [*see* Restatement (Second) of Agency § 250, comment a; § 427.22[5][b]].

[d] Misrepresentation and Other Fraudulent Acts

A principal's liability for an agent's acts includes responsibility for misrepresentations or other fraudulent acts perpetrated by the agent on a third party [*see Spahn v. Guild Industries Corp. (1979) 94 Cal. App. 3d 143, 155-156, 156 Cal. Rptr. 375]* . It is not necessary that a principal be a party to the fraud or authorize an agent to make misrepresentations, although a finding that a principal authorized or ratified the misrepresentation will support a principal's liability [*Spahn v. Guild Industries Corp. (1979) 94 Cal. App. 3d 143, 155-156, 156 Cal. Rptr. 375* ; *see § 427.18*].

If the authority granted to an agent puts the agent in a position to commit a fraud while apparently acting within his or her authority, the agent's knowledge of the falsity of his or her representations will be imputed to the principal even if the agent is acting adversely to the principal. Therefore, the principal may be held liable for the fraud of his or her agent against an innocent third party, and it is immaterial that the principal received no benefits from the transaction [*Spahn v. Guild Industries Corp. (1979) 94 Cal. App. 3d 143, 155-156, 156 Cal. Rptr. 375* ; *see also* discussion § 427.62[1]]. The principal's liability is based on the fact that the agent's position facilitates the commission of the fraud, since the third person views the transaction as regular on its face and the agent appears to be acting in the ordinary course of the business confided to him or her [*Rutherford v. Rideout Bank (1938) 11 Cal. 2d 479, 484, 80 P.2d 978* ; *Spahn v. Guild Industries Corp. (1979) 94 Cal. App. 3d 143, 155-156, 156 Cal. Rptr. 375]* .

[6] Exemplary Damages

An employer is not liable for exemplary damages under *Civ. Code § 3294(a)*, based on acts of an employee of the employer, unless the employer hadadvance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights and safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice [*Civ. Code § 3294(b)*]. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation [*Civ. Code § 3294(b)*; *see White v. Ultramar, Inc. (1999) 21 Cal. 4th 563, 566-567, 573, 88 Cal. Rptr. 2d 19, 981 P.2d 944* (construing "managing agent" to include only corporate employees who exercise substantial independent authority and judgment in corporate decision making so that their decisions ultimately determine corporate policy)].

Although *Civ. Code § 3294* refers only to employers, it has been held that the 1981 amendment to *Civ. Code § 3294* that inserted the rule as to employers was based on previous judicial definitions of the liability of principals and employers for the acts of agents and employees [*Chodos v. Insurance Co. of North America (1981) 126 Cal. App. 3d 86, 102, 178 Cal. Rptr. 831* ; *see Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822-823, 157 Cal. Rptr. 482, 598 P.2d 452 , cert. denied, (1980) 445 U.S. 912, 100 S. Ct. 1271, 63 L. Ed. 2d 597* ; *Merlo v. Standard Life & Acc. Ins. Co. (1976) 59 Cal. App. 3d 5, 18, 130 Cal. Rptr. 416]* . Thus, the statute probably also applies to the principal-agent relationship outside of the employment context (*see § 427.13[1]*).

Legal Topics:

For related research and practice materials, see the following legal topics:
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37-427 California Forms of Pleading and Practice--Annotated § 427.23

§ 427.23 Liability of Agent to Principal

[1] Breach of Fiduciary Duty

An agent is the principal's fiduciary (*see* discussion under *§ 427.12[3]*). Therefore, the breach of any duty to the principal is tortious in nature, giving rise to a cause of action for the recovery of all the detriment proximately caused by the breach, whether or not it could have been anticipated. As far as possible, the court will place the principal in the position that he or she would have occupied had the fiduciary duties been performed [*Michelson v. Hamada (1994) 29 Cal. App. 4th 1566, 1579-1582, 36 Cal. Rptr. 2d 343* ; *Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 940-941, 175 Cal. Rptr. 81* ; *see Civ. Code § 3333*; *see also § 427.100* and comments to that form].

All profits that come from the subject matter of the agency belong to the principal and may be recovered either in an action for breach of fiduciary duty or in a separate action as a common count for money had and received [*Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 940-941, 175 Cal. Rptr. 81* ; *Store of Happiness v. Carmona & Allen (1957) 152 Cal. App. 2d 266, 272, 312 P.2d 1104* ; *see § 427.100*; *see also* Ch. 121, *Common Counts*]. The agent's undisclosed profits realized from an agency transaction are recoverable by the principal even if the price paid by the principal was fair [*see* *Wade v. Diamond A Cattle Co. (1975) 44 Cal. App. 3d 453, 458, 118 Cal. Rptr. 695]* . Similarly, any property acquired by an agent in violation of his or her duty of loyalty to the principal can subject the agent to liability for the failure to use the property for the benefit of the principal [*Church of Scientology v. Armstrong (1991) 232 Cal. App. 3d 1060, 1073 n.6, 283 Cal. Rptr. 917* ; *see* discussion § 427.23[2]].

[2] Accounting

All benefits and advantages received by the agent as an outgrowth of the agency are deemed to have been acquired for the benefit of the principal. The fiduciary nature of the agent's duties to the principal requires the agent to account, on demand of the principal, for all such benefits received [*Savage v. Mayer (1949) 33 Cal. 2d 548, 551, 203 P.2d 9* ; *Kennard v. Glick (1960) 183 Cal. App. 2d 246, 250-251, 7 Cal. Rptr. 88]* . Once it is established that an agent has come into possession of money or some other thing for the principal, the agent has the burden of showing that the money or other thing was delivered to the principal or disposed of in accordance with the agent's authority. The failure to keep an accurate account will result in a heavy presumption in favor of the principal [*Kennard v. Glick (1960) 183 Cal. App. 2d 246, 250-251, 7 Cal. Rptr. 88]* . It is not necessary that the agent be found guilty of any deceit for the principal to

recover; the duty to account is part of the general duty of all agents [*Savage v. Mayer (1949) 33 Cal. 2d 548, 551, 203 P.2d 9* ; *St. James Armenian Church v. Kurkjian (1975) 47 Cal. App. 3d 547, 553, 121 Cal. Rptr. 214* ; *see* Form 21 and comments to that form]. For additional discussion of accounting actions, see Ch. 7, *Accounting, Action for*.

[3] Negligence

When the principal is damaged by the agent's failure to use reasonable care, skill, and diligence in carrying out the duties of the agency, the principal may recover all damages from the agent in a negligence action [*Timmsen v. Forest E. Olson, Inc. (1970) 6 Cal. App. 3d 860, 871, 86 Cal. Rptr. 359* ; *see* discussion under *§ 427.23*; *§ 427.100* and comments to that form; *see also* Ch. 380, *Negligence*].

[4] Breach of Contract

A principal may hold an agent liable for damages for breach of the agency agreement [*Spitzer v. Pathe Exchange, Inc. (1933) 132 Cal. App. 612, 619, 23 P.2d 308* ; *see Civ. Code § 3300*; *see also § 427.20[4][c]*; *§ 427.103*]. For additional discussion relating to breach of contract actions, see *Ch. 140, Contracts, § 140.50* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
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37-427 California Forms of Pleading and Practice--Annotated § 427.24

§ 427.24 Liability of Agent to Third Party

[1] Breach of Warranty of Authority

One who assumes to act as an agent thereby warrants, to all who deal with him or her as an agent, that the authority to act as such actually exists [*Civ. Code § 2342*]. An action for breach of the warranty of authority by a third party against an agent depends on allegations that the agent acted in excess of his or her authority and that the third person was ignorant of the true limits of the agent's authority and acted on the basis of representations, either express or implied, that the agent was acting pursuant to his or her authority [*Yoakum v. Tarver (1967) 256 Cal. App. 2d 202, 206-207, 64 Cal. Rptr. 7* ; *Cheda v. Grandi (1950) 97 Cal. App. 2d 513, 518-519, 218 P.2d 97* ; *see also § 427.120* and comments to that form]. The detriment caused by a breach of a warranty of an agent's authority is the amount that could have been recovered and collected from the agent's principal had the warranty been complied with, and the reasonable expenses of legal proceedings taken in good faith to enforce the act of the agent against his or her principal [*Civ. Code § 3318*].

[2] Wrongful Delivery of Third Party's Property

An agent who receives anything for the benefit of the principal, of which a third person is entitled to possession, must on demand surrender it to that person, or surrender so much of it as the agent has under his or her control at the time of the demand. The agent must be indemnified, however, for any advance the agent made to the principal in good faith on account of the thing possessed. The agent is responsible to the third person if, after notice from the owner, the agent delivers it to the principal [*Civ. Code § 2344*].

[3] As Principal

One who assumes to act as an agent is responsible to third persons as a principal for his or her acts in the course of his or her agency in any of the following cases, but in no others [*Civ. Code § 2343*]:

- If, with his or her consent, credit is given to him or her personally in a transaction;

- If the agent enters into a written contract in the principal's name without believing in good faith that he or she has authority to do so; or

- If the agent's acts are wrongful in their nature.

If, at the time a contract is made, the identity of the principal is disclosed, it is presumed that credit was given to the principal and not to the agent and that only the principal is bound under *Civ. Code § 2343(1)*. However, disclosure does not establish the nonliability of the agent as a matter of law. It merely permits an inference to that effect, which may be overcome by proving other facts connected with the transaction, including custom and usage in an industry [*Midwest Television, Inc. v. Scott, Lancaster, Mills & Atha, Inc. (1988) 205 Cal. App. 3d 442, 449 n.4, 451, 252 Cal. Rptr. 573]* . For discussion of liability if agency is not disclosed, see *§ 427.26*.

An agent's responsibility under *Civ. Code § 2343(3)* for his or her wrongful acts in the course of the agency effectively precludes a tortfeasor from escaping liability because he or she was acting as an agent. The fact that a tortious act arises during the performance of a duty created by contract does not negate the agent's personal liability for the tort [*Bayuk v. Edson (1965) 236 Cal. App. 2d 309, 320, 46 Cal. Rptr. 49* ; *see § 427.121* and comments to that form; *see also Otanez v. Blue Skies Mobile Home Park (1991) 1 Cal. App. 4th 1521, 1526, 3 Cal. Rptr. 2d 210* (viewing acts, made wrongful by statute only if committed by landlords, as not "wrongful in nature" when committed by agents of landlord)].

[4] For Principal's Fraud

Generally, an agent is not liable to a third party for the principal's fraud unless the agent knew of or participated in the fraudulent act. To be liable, the agent would have to have excercised some degree of control over the persons responsible for the fraud [*Mars v. Wedbush Morgan Securities, Inc. (1991) 231 Cal. App. 3d 1608, 1616, 283 Cal. Rptr. 238]* .

Legal Topics:

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§ 427.25 Rights of Indemnity Between Principal and Agent

A principal who becomes vicariously liable to a third party as a result of the unauthorized act of his or her agent (*see* discussion under *§ 427.22[5]*) has a right to indemnity from the agent [*see Bradley v. Rosenthal (1908) 154 Cal. 420, 423-425, 97 P. 875* ; *Fireman's Fund Ins. Co. v. Haslam (1994) 29 Cal. App. 4th 1347, 35 Cal. Rptr. 2d 135* ; *Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 77, 38 Cal. Rptr. 490]* . Similarly, an agent who incurs personal liability to a third party in the course of carrying out the business of the agency may obtain indemnity from the principal [*see Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal. 2d 834, 837, 36 Cal. Rptr. 741, 389 P.2d 133* ; *Fidelity Mortgage Trustee Service, Inc. v. Ridgegate East Homeowners Assn. (1994) 27 Cal. App. 4th 503, 509-511, 32 Cal. Rptr. 2d 521* ; *Rimington v. General Accident Group of Ins. Cos. (1962) 205 Cal. App. 2d 394, 397, 23 Cal. Rptr. 40]* .

Many of the cases establishing indemnity rights in the principal-agent relationship were decided at a time when indemnity was an all-or-nothing proposition; if there was a right of indemnity, the entire liability was shifted from the indemnitee to the indemnitor. Under current law, all indemnity not arising from express contractual provisions is comparative; either a partial or a total shift of liability may be appropriate, depending on the circumstances of the case [*see Far West Financial Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 808, 812-813, 251 Cal. Rptr. 202, 760 P.2d 399* ; *see also Fireman's Fund Ins. Co. v. Haslam (1994) 29 Cal. App. 4th 1347, 35 Cal. Rptr. 2d 135* ; *Fidelity Mortgage Trustee Service, Inc. v. Ridgegate East Homeowners Assn. (1994) 27 Cal. App. 4th 503, 509-511, 32 Cal. Rptr. 2d 521* (both reaffirming right to total indemnity under current law)].

For further discussion, see Ch. 300, *Indemnity and Contribution* , and N. Levy, M. Golden & L. Sacks, eds., California Torts, ch. 74 (Matthew Bender). For a form of complaint for indemnity by an agent from a principal, see *§ 427.83*. For a form of complaint for indemnity by a principal from an agent, see *§ 427.102*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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37-427 California Forms of Pleading and Practice--Annotated § 427.26

§ 427.26 Undisclosed Agency

[1] Liability of Undisclosed Principal

A contract made by an agent for an undisclosed principal is, for most purposes, the contract of the principal. Unless excluded by the terms of the agreement made by the agent, the undisclosed principal may claim the benefit of the contract [*American Builder's Assn. v. Au-Yang (1990) 226 Cal. App. 3d 170, 176, 276 Cal. Rptr. 262]* . Similarly, the undisclosed principal, when discovered, is liable for the agent's authorized contracts [*Standard Oil Co. of Cal. v. Doneux (1961) 192 Cal. App. 2d 608, 611, 13 Cal. Rptr. 749* ; *see § 427.126* and Comments thereto; *see also* discussion § 427.61[1]]. The undisclosed principal may sue and be sued on the contract in the agent's own name [*American Builder's Assn. v. Au-Yang (1990) 226 Cal. App. 3d 170, 176, 276 Cal. Rptr. 262]* .

An actual agency must have existed, in order for the undisclosed principal to be liable [*Associated Creditors' Agency v. Davis (1975) 13 Cal. 3d 374, 385, 118 Cal. Rptr. 772, 530 P.2d 1084]* . However, presumably a subsequent ratification that creates an actual agency suffices to permit the third party to hold the undisclosed principal liable on the ratified contract [*see Civ. Code § 2307*; *see also* discussion § 427.62[11]].

The third party must not have relied exclusively on the agent's credit. A showing that the third party intended to rely only on the agent's credit rather than the unknown principal's credit precludes liability on the part of an undisclosed principal who has satisfied the principal's obligations to the agent in good faith before receiving notice of the third party's election to seek recovery from the principal [*see Civ. Code § 2335*; *Associated Creditors' Agency v. Davis (1975) 13 Cal. 3d 374, 385, 118 Cal. Rptr. 772, 530 P.2d 1084* ; *Rigney v. De La Salle Institute (1935) 10 Cal. App. 2d 492, 499, 52 P.2d 579]* .

Cases interpreting *Civ. Code § 2335* have focused on the exclusivity of the credit extended to the agent and have required that intervening circumstances must exist to show that the third party intended to grant credit exclusively to the agent [*compare Rigney v. De La Salle Institute (1935) 10 Cal. App. 2d 492, 498* (third party delivered final lien waivers to agent, showing intent to rely on agent's credit), *with Wahyou v. Kiernan (1956) 145 Cal. App. 2d 443, 444, 302 P.2d 638* (third party's dealings with agent were insufficient to show exclusivity of credit)]. For example, if the principal relied on lien waivers that third parties had given to the agent as evidence that the agent had paid the third

parties, and the principal paid the agent all that was due the third parties, then the principal's payment to the agent exonerates the principal from liability to the third parties under *Civ. Code § 2335* [*Rigney v. De La Salle Institute (1935) 10 Cal. App. 2d 492, 498, 52 P.2d 579]* .

[2] Third Party's Election Against Parties Liable

[a] When Required

If a third party has contracted with an agent without knowledge of the principal's existence, and later learns of the agency relationship, the third party may recover from either the agent or the principal. However, the agent and undisclosed principal are liable alternatively, not jointly and severally. Once the third party knows of the existence of the undisclosed agency relationship, the third party may enforce a judgment against one or the other but not both, and must elect whether to proceed against the agent or the undisclosed principal [*Standard Oil Co. of Cal. v. Doneux (1961) 192 Cal. App. 2d 608, 611-612, 13 Cal. Rptr. 749* ; *Klinger v. Modesto Fruit Co., Inc. (1930) 107 Cal. App. 97, 100, 290 P. 127]* . The election is not required until the third party has learned of the existence of the undisclosed principal [*see Standard Oil Co. of Cal. v. Doneux (1961) 192 Cal. App. 2d 608, 613, 13 Cal. Rptr. 749* ; *see* discussion under *§ 427.26[2][c]*].

An election is not required if the principal was in fact disclosed, at least partially, to the third party. In that situation, only a satisfied judgment against the agent will bar an action against the principal based on the same transaction [*Clifton Cattle Co. v. Thompson (1974) 43 Cal. App. 3d 11, 16-17, 117 Cal. Rptr. 500* ; *Zingheim v. Marshall (1967) 249 Cal. App. 2d 736, 747-748, 57 Cal. Rptr. 809 , cert. denied sub nom. Rogers v. Zingheim (1967) 389 U.S. 831]* .

[b] Defendant's Demand

The doctrine of election is an extension of the general principles of equitable estoppel and, like estoppel, is an affirmative defense that the defendant must plead, otherwise it will be deemed waived [*Roam v. Koop (1974) 41 Cal. App. 3d 1035, 1044, 116 Cal. Rptr. 539* ; *Klinger v. Modesto Fruit Co., Inc. (1930) 107 Cal. App. 97, 104, 290 P. 127]* .

[c] Timing of Plaintiff's Election

The election is not required until the third party has learned of the existence of the undisclosed principal. When a demand for an election ismade by a defendant, no election need be made until the court has ruled on whether the principal can be bound by the agent's acts, as when the principal argues that the agent lacked authority to act for the principal. Only when the third party knows that the agent was indeed acting on behalf of the undisclosed principal must an election be made [*Standard Oil Co. of Cal. v. Doneux (1961) 192 Cal. App. 2d 608, 614, 13 Cal. Rptr. 749]* . Therefore, a judgment obtained against the agent without knowledge of the agency does not preclude a later action against the undisclosed principal [*see Standard Oil Co. of Cal. v. Doneux (1961) 192 Cal. App. 2d 608, 613, 13 Cal. Rptr. 749]* .

[3] Action Against Agent

A third party may sue the agent of an undisclosed principal either at the election of the third party once knowledge of the agency exists or as a codefendant in an action against both the agent and the principal pending election. The agent can escape liability on the ground of having been merely an agent by showing that the principal was disclosed at the time the contract was entered into and that the acts were done on the principal's behalf, enabling the third party to have recourse against the principal only [*J & J Builders Supply v. Caffin (1967) 248 Cal. App. 2d 292, 295, 56 Cal. Rptr. 365]* .

The disclosure requirement, for the agent to avoid personal liability to the third party, is not met when the agent merely

discloses the trade name of the otherwise undisclosed principal [*W.W. Leasing Unlimited v. Commercial Standard Title Ins. Co. (1983) 149 Cal. App. 3d 792, 796, 197 Cal. Rptr. 118]* . For example, an agent may be held liable on a contract with a third party in which the agent discloses the existence of the agency and uses the principal's trade name but does not disclose the principal's true name or corporate status [*G.W. Andersen Construction Co. v. Mars Sales (1985) 164 Cal. App. 3d 326, 330-333, 210 Cal. Rptr. 409]* . It is not the third party's duty to ascertain the principal's identity; rather, it is the agent's duty to disclose the principal's identity [*W.W. Leasing Unlimited v. Commercial Standard Title Ins. Co. (1983) 149 Cal. App. 3d 792, 796, 197 Cal. Rptr. 118]* .

[4] Rights of Principal

An undisclosed principal is not limited to accepting the burdens of the agent's acts but has the rights of a contracting party [*see Civ. Code § 2330*]. Thus, an undisclosed principal may sue a third party for specific performance or damages in the event of breach of a contract entered into by an agent in the agent's name, and the suit constitutes a ratification of the agent's act [*Schader v. White (1916) 173 Cal. 441, 445, 160 P. 557* ; *Wood Bldg. Corp. v. Griffitts (1958) 164 Cal. App. 2d 559, 565, 330 P.2d 847* ; *see § 427.18*]. The principal also may take advantage of other rights created by the contract; for example, the principal may rely on a disclaimer of warranties in a contract for the sale of goods, despite the fact that the disclaimer nominally ran only to the agent who executed the contract [*Buckley v. Shell Chemical Co. (1939) 32 Cal. App. 2d 209, 215, 89 P.2d 453]* .

Conversely, a third party who deals with an agent, without knowing or having reason to believe that the agent acts as an agent in the transaction, may set off against any claim of the principal arising out of the transaction all claims that the third party might have set off against the agent before notice of the agency [*Civ. Code § 2336*].

If the third party gives exclusive credit to the agent, or relies on the agent's skill, solvency, or other personal attributes in entering into the contract, the principal is not a party to the contract and has no rights or liabilities under it [*Walton v. Davis (1913) 22 Cal. App. 456, 459-460, 134 P. 795* ; *see Civ. Code §§ 2330, 2335*; *see also § 427.26[1]* and *§ 427.24[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesLiability of PrincipalBusiness & Corporate LawAgency RelationshipsDisclosureGeneral OverviewBusiness & Corporate LawAgency RelationshipsDisclosurePartially Disclosed PrincipalBusiness & Corporate LawAgency RelationshipsDisclosureUndisclosed PrincipalBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesGeneral OverviewBusiness & Corporate LawAgency RelationshipsRatificationLiabilities

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37-427 California Forms of Pleading and Practice--Annotated § 427.27

§ 427.27 Valid Power of Attorney

[1] Basic Requirements

A power of attorney is a written instrument, however denominated, that is executed by a natural person having the capacity to contract [*Prob. Code § 4120*] (who is called the principal) and that grants authority to an attorney in fact [*Prob. Code §§ 4022, 4026*; *see Prob. Code § 4123* (authority that may be granted in power of attorney)], regardless of whether that person is known as an attorney in fact, or as an agent, or by some other term [*Prob. Code § 4014(a)*]. A power of attorney is legally sufficient if all of the following requirements are met [*Prob. Code § 4121*]:

- The power of attorney contains the date of execution.

- The power of attorney is signed either by the principal or in the principal's name by some other adult in the principal's presence and at the principal's direction.

- The power of attorney is either acknowledged before a notary public or signed by at least two qualified witnesses.

If the power of attorney is signed by witnesses, the witnesses must be adults, the attorney in fact may not act as a witness, and each witness signing the power of attorney must witness either the signing of the instrument by the principal or the principal's acknowledgment of the signature or the power of attorney [*Prob. Code § 4122*]. In the case of a durable power of attorney for health care, there are additional requirements regarding witnesses [*see* discussion under *§ 427.39[3][b]*].

For discussion and forms of instruments sufficient to create powers of attorney, see California Legal Forms, Ch. 98, *Powers of Attorney* (Matthew Bender).

The Multiple-Party Accounts Law [*see Prob. Code § 5100 et seq.*] authorizes a special power of attorney for accounts at financial institutions [*see Prob. Code § 5204*]. For discussion of that law, see *Ch. 95, Banks, Deposits, and Checks, § 95.180* et seq.

[2] Requirements for Springing Power of Attorney

A springing power of attorney is one that by its terms becomes effective at a specified future time or on the occurrence of a specified future event or contingency, including, but not limited to, the principal's subsequent incapacity [*Prob. Code § 4030*]. In a springing power of attorney, the principal may designate a person or persons who, by a written declaration under penalty of perjury, will have the power to determine conclusively that the specified event or contingency has occurred. The principal may designate the attorney in fact or another person to perform this function, either alone or jointly with other persons [*Prob. Code § 4129(a)*]. A springing power of attorney containing that designation becomes effective when the persons designated in the power of attorney execute a written declaration under penalty of perjury that the specified event or contingency has occurred. In that case, any person may act in reliance on the written declaration without liability to the principal or to any other person, regardless of whether the specified event or contingency has actually occurred [*Prob. Code § 4129(b)*]. However, this is not the exclusive method by which a power of attorney may be limited to take effect on the occurrence of a specified event or contingency [*Prob. Code § 4129(d)*].

A statutory form power of attorney can be a springing power [*see Prob. Code § 4405*; *see also § 427.27[4]*].

[3] Durable Power of Attorney

[a] Requirements

A power of attorney (including a springing power) may be durable or nondurable [*Prob. Code §§ 4022, 4030*]. A durable power of attorney is one that contains any words, similar to the examples below, showing the principal's intent that the authority conferred shall be exercisable notwithstanding the principal's subsequent incapacity. Either of the following examples is sufficient [*Prob. Code § 4124*]:

- "This power of attorney shall not be affected by subsequent incapacity of the principal."
- "This power of attorney shall become effective upon the incapacity of the principal."

A statutory form power of attorney that is otherwise legally sufficient [*see* discussion under *§ 427.27[4]*] is durable to the extent that the power of attorney contains language, such as "This power of attorney will continue to be effective even though I become incapacitated," showing the principal's intent that the power granted may be exercised notwithstanding later incapacity [*Prob. Code § 4404*].

[b] Use of Commercial Printed Form

A printed form of durable power of attorney, other than a statutory form power of attorney [*see Prob. Code § 4400 et seq.*; *see* discussion under *§ 427.27[4]*] or a durable power of attorney for health care [*see Prob. Code § 4600 et seq.*], that is sold or otherwise distributed in California for use by a person who does not have the advice of legal counsel must contain, in not less than 10-point boldface type or a reasonably equivalent type, a warning statement prescribed by statute [*Prob. Code § 4128(a)*; *see Prob. Code § 4102* (validity of printed form of durable power of attorney complying with former Civil Code provisions)]. However, noncompliance with the requirement does not invalidate any transaction in which a third person relied in good faith on the authority created by the durable power of attorney [*Prob. Code § 4128(b), (c)*].

[4] Use of Statutory Form

A power of attorney that conforms substantially to the prescribed statutory form power of attorney [*see Prob. Code § 4402(a)* (standard for substantial conformity)] is legally sufficient when the form is properly completed and the principal's signature is acknowledged [*Prob. Code §§ 4401, 4402(b), (c)*].

A statutory form power of attorney that limits the power to take effect upon the occurrence of a specified event or contingency, including, but not limited to, the principal's incapacity, may contain a provision designating a person or persons who, by a written declaration under penalty of perjury, shall have the power to determine conclusively that the specified event or contingency has occurred [*Prob. Code § 4405(a), (c)*]. A statutory form power of attorney that contains such a provision becomes effective when the persons designated in the power of attorney execute a written declaration under penalty of perjury that the specified event or contingency has occurred. In that case, any person may act in reliance on the written declaration without liability to the principal or to any other person, regardless whether the specified event or contingency has actually occurred [*Prob. Code § 4405(b)*]. However, this is not the exclusive method by which a statutory form power of attorney may be limited to take effect upon the occurrence of a specified event or contingency [*Prob. Code § 4405(d)*].

General provisions in the Power of Attorney Law regarding the authority of an attorney in fact [*see Prob. Code § 4260 et seq.*; *see also* discussion in *§ 427.33[1]*] do not apply in the case of a statutory form power of attorney [*Prob. Code § 4260*]. The authority of the attorney in fact under a statutory form power of attorney is governed by provisions in the Uniform Statutory Form Power of Attorney Act [*see Prob. Code § 4450 et seq.*].

[5] Compliance With Other Law

A power of attorney embodied in the statutory form [*see* **[4]**, *above*] but not conforming to requirements specified in the Uniform Statutory Form Power of Attorney Act [*Prob. Code § 4400 et seq.*] can be valid nevertheless if it meets general law requirements for a power of attorney [*Torres v. Torres (2006) 135 Cal. App. 4th 870, 875-877, 37 Cal. Rptr. 3d 754]*

A durable power of attorney that was executed in another state or country in compliance with the law of that state or country or the law ofCalifornia is valid and enforceable in California to the same extent as a durable power of attorney executed in California, regardless of whether the principal is a domiciliary of California [*Prob. Code § 4053*].

A power of attorney for health care (also known as an "advance health care directive" or "advance directive" effective July 1, 2000) or similar instrument that was executed in another state or country in compliance with the law of that state or country or the law of California is valid and enforceable in California to the same extent as a power of attorney for health care or advance health care directive executed in California [*Prob. Code § 4676*].

[6] Passage of Time

[a] Effect Generally

Unless a power of attorney states a time of termination, the authority of the attorney in fact is exercisable notwithstanding any passage of time since execution of the power of attorney [*Prob. Code § 4127*].

[b] Application of Power to After-Acquired Property

The powers of an attorney in fact under the statutory form power of attorney [*see Prob. Code § 4450 et seq.*; *see* discussion § 427.27[4]] are exercisable equally with respect to a property interest that the principal has when the statutory form power of attorney is executed or an interest that the principal acquires later [*Prob. Code § 4464*].

[c] Printed Form or Statutory Form Power of Attorney Under Former Law

A printed form or statutory form power of attorney that was executed in compliance with Civil Code provisions in effect on the date of execution is not rendered invalid solely by the subsequent amendment or repeal of those provisions [*cf. Prob. Code §§ 4102, 4409*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityOral & Written Authority

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37-427 California Forms of Pleading and Practice--Annotated § 427.28

§ 427.28 Modification or Revocation of Power of Attorney

[1] Minimum Sufficient Acts

A principal may modify a power of attorney in accordance with the terms of the power of attorney or by an instrument executed in the same manner as a power of attorney may be executed [*Prob. Code § 4150(a)*].

A principal may revoke a power of attorney in accordance with the terms of the power of attorney or by any writing (notwithstanding any provision to the contrary in the power of attorney) [*Prob. Code § 4151(a)*].

An attorney in fact or third person who does not have notice of the modification or revocation is protected from liability [*Prob. Code §§ 4150(b), 4151(b)*; *see* discussion under *§ 427.36[4]*].

[2] Authorization for Fiduciary to Act

If a conservator of the principal's estate is appointed by a California court, the conservator may modify or revoke a durable power of attorney only if the court in which the conservatorship proceeding is pending has first made an order authorizing or requiring the conservator to modify or revoke the durable power of attorney, and the modification or revocation is in accord with the order [*Prob. Code § 4206(b)*]. If a court of another state (that is the principal's domicile) appoints a conservator of the estate, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of the principal's property except specified exclusions, the attorney in fact under a durable power of attorney is accountable to the fiduciary as well as to the principal, and the fiduciary has the same power to modify or revoke the durable power of attorney that the principal would have had if not incapacitated, subject to any required court approval [*Prob. Code § 4206(a)*].

[3] Subsequent Execution of Power of Attorney

A valid durable power of attorney for health care or advance health care directive revokes any prior durable power of attorney for health care, unless the later power of attorney provides otherwise [*Prob. Code § 4727(d)*].

[4] Power to Execute Instruments Affecting Real Property

No power contained in an instrument to convey or execute instruments affecting real property that has been recorded is revoked by any act of the principal unless the instrument containing the revocation is also acknowledged or proved, certified, and recorded, in the same office in which the instrument containing the power was recorded [*Civ. Code § 1216*; *see Gov. Code § 27238* (recorder as required to keep index of powers of attorney)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityOral & Written Authority

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37-427 California Forms of Pleading and Practice--Annotated § 427.29

§ 427.29 Cessation of Authority of Attorney in Fact

[1] Terminating Event

The authority of an attorney in fact under a power of attorney is terminated (but the power of attorney is not necessarily revoked) by any of the following events [*Prob. Code § 4152(a)*]:

- A terminating event in accordance with the terms of the power of attorney.
- Extinction of the subject or fulfillment of the purpose of the power of attorney.
- Revocation of the authority of the attorney in fact [*see Prob. Code § 4153*; *see* discussion § 427.29[3]].
- Death of the principal, except as to specific authority permitted by statute to be exercised after the principal's death [*see, e.g., Prob. Code §§ 4236(b)(4), (c)(3), 4720(b)*].
- Removal of the attorney in fact.
- Resignation of the attorney in fact.
- Incapacity of the attorney in fact, if the power of attorney is nondurable (and notwithstanding any provision to the contrary in the power of attorney) [*Prob. Code § 4155*], except that a temporary incapacity merely suspends the authority of the attorney in fact during the period of the incapacity.
- Dissolution or annulment of the marriage of the attorney in fact and principal, in some cases [*see Prob. Code § 4154*; discussion under *§ 427.29[2]*].
- Death of the attorney in fact.

An attorney in fact or third person who does not have notice of an event that terminates the power of attorney or the authority of an attorney in fact is protected from liability [*Prob. Code §§ 4152(b), 4155*].

[2] Dissolution or Annulment of Marriage

If the principal's marriage is dissolved or annulled, the dissolution or annulment has the following effect on any designation of the former spouse as an attorney in fact:

- In the case of a durable power of attorney for health care, the designation of the former spouse to make health care decisions for the principal is revoked, unless the durable power of attorney for health care expressly provides otherwise [*Prob. Code § 4727(e)*].

- In the case of any other power of attorney, the designation of the former spouse as attorney in fact is revoked [*Prob. Code § 4154(a)*].

If spousal designation is revoked solely because the principal's marriage is dissolved or annulled, the designation is revived by the principal's remarriage to the former spouse [*Prob. Code § 4154(b)*].

When the principal is in missing status in federal military or civilian government service [*see* discussion under *§ 427.36[10]*], if the principal's spouse who is the attorney in fact commences a proceeding for dissolution or annulment of the marriage or for legal separation, or if a legal separation is ordered, the authority of the spouse as attorney in fact is revoked [*Prob. Code § 3722*].

[3] Revocation

The authority of an attorney in fact under a power of attorney may be revoked as follows (but the power of attorney is not necessarily revoked) [*Prob. Code § 4153(a)*]:

- In accordance with the terms of the power of attorney.

- If the principal informs the attorney in fact orally or in writing that the authority of the attorney in fact is revoked or when and under what circumstances it is revoked (and notwithstanding any provision to the contrary in the power of attorney).

- If the principal's legal representative, with approval of the court [*see Prob. Code § 4206*; discussion under § 428.28[2]], informs the attorney in fact in writing that the authority of the attorney in fact is revoked or when and under what circumstances it is revoked (and notwithstanding any provision to the contrary in the power of attorney).

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityOral & Written AuthorityFamily LawMarital Termination & Spousal SupportAnnulmentProcedures

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37-427 California Forms of Pleading and Practice--Annotated § 427.30

§ 427.30 Resignation of Attorney in Fact

An attorney in fact may resign by any of the following means (notwithstanding any provision to the contrary in the power of attorney) [*Prob. Code § 4207*]:

- If the principal is competent, by giving notice to the principal.
- If a conservator has been appointed, by giving notice to the conservator.
- On written agreement with a successor who is designated in the power of attorney or pursuant to the terms of the power of attorney to serve as attorney in fact.
- Pursuant to a court order [*see § 427.145*].

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37-427 California Forms of Pleading and Practice--Annotated § 427.31

§ 427.31 Succession of Attorney in Fact

A principal may designate a person or persons to act as successor attorney or attorneys in fact if the authority of a predecessor attorney in fact terminates [*Prob. Code § 4203(a)*].The principal may grant authority to another person, designated by name, by office, or by function, including the initial and any successor attorney in fact, to designate at any time a person or persons to act as successor attorney or attorneys in fact [*Prob. Code § 4203(b)*]. A successor attorney in fact is not liable for the actions of the predecessor attorney in fact [*Prob. Code § 4203(c)*].

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37-427 California Forms of Pleading and Practice--Annotated § 427.32

§ 427.32 Duties of Attorney in Fact

[1] Duty to Exercise Authority

If an attorney in fact has expressly agreed in writing to act for the principal, the attorney in fact has a duty to act pursuant to the terms of the agreement. The agreement to act on the principal's behalf is enforceable against the attorney in fact as a fiduciary regardless of whether there is any consideration to support a contractual obligation [*Prob. Code § 4230(c)*]. For discussions and forms of complaints based on contractual obligations generally, see Ch. 140, *Contracts* , and Ch. 528, *Specific Performance* .

Acting for the principal in a particular transaction or series of transactions does not obligate an attorney in fact to act for the principal in a subsequent transaction, but the attorney in fact has a duty to complete a transaction that the attorney in fact has commenced [*Prob. Code § 4230(b)*].

Except when subject to these rules, a person who is designated as an attorney in fact has no duty to exercise the authority granted in the power of attorney and is not subject to the other duties of an attorney in fact, regardless of whether the principal has become incapacitated, is missing, or is otherwise unable to act [*Prob. Code § 4230(a)*].

An attorney in fact may revocably delegate authority to perform mechanical acts to any person or persons qualified to exercise the authority delegated [*Prob. Code § 4205(a)*]. The attorney in fact making a delegation remains responsible to the principal for the exercise or nonexercise of the delegated authority [*Prob. Code § 4205(b)*].

[2] Duty to Use Special Skills

An attorney in fact with special skills has a duty to apply the full extent of those skills [*Prob. Code § 4237*].

[3] Duty of Care Respecting Principal's Property

If an attorney in fact is not compensated, the attorney in fact is not liable for a loss to the principal's property unless the loss results from the bad faith, intentional wrongdoing, or gross negligence of the attorney in fact [*Prob. Code § 4231(b)*; *see Penal Code § 507* (attorney in fact as guilty of embezzlement for converting property subject to power of

attorney)]. For discussions and forms of complaints based on wrongful conduct generally, with respect to property, see Ch. 150, *Conversion* , and Ch. 380, *Negligence* .

An attorney in fact who has special skills or expertise or was designated as an attorney in fact on the basis of representations of special skills or expertise (with respect to the principal's property) must observe the standard of care that would be observed by others with similar skills or expertise [*Prob. Code § 4231(c)*].

Except when subject to these rules, an attorney in fact dealing with the principal's property must observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any statute restricting investments by fiduciaries [*Prob. Code § 4231(a)*].

[4] Duty to Keep Principal's Property Separate

An attorney in fact must keep the principal's property separate and distinct from other property in a manner adequate to identify the property clearly as belonging to the principal [*Prob. Code § 4233(a)*]. An attorney in fact holding property for a principal complies with this standard if the property is held in the principal's name or in the name of the attorney in fact as attorney in fact for the principal [*Prob. Code § 4233(b)*].

[5] Duty to Act in Principal's Interest

An attorney in fact has a duty to act solely in the principal's interest and to avoid conflicts of interest [*Prob. Code § 4232(a)*]. An attorney in fact is not in violation of that duty solely because the attorney in fact also benefits from acting for the principal, or has conflicting interests in relation to the principal's property or affairs or the care of the principal, or acts in an inconsistent manner regarding the respective interests of the principal and the attorney in fact [*Prob. Code § 4232(b)*].

[6] Duty to Communicate With Principal and Follow Instructions

An attorney in fact has a duty to keep in regular contact with the principal, to communicate with the principal, and to follow the principal's instructions, to the extent these are reasonably practicable in the circumstances [*Prob. Code § 4234(a)*]. With court approval, the attorney in fact may disobey the principal's instructions [*Prob. Code § 4234(b)*].

[7] Duty to Keep Records and Render Accounting

The attorney in fact must keep records of all transactions entered into by the attorney in fact on the principal's behalf [*Prob. Code § 4236(a)*]. The attorney in fact does not have a duty to make an account of transactions entered into on the principal's behalf, except in the following circumstances [*Prob. Code § 4236(b)*]:

- At any time as requested by the principal.
- The power of attorney requires the attorney in fact to account and specifies to whom the account is to be made.
- On request by the conservator of the principal's estate while the principal is living.
- On request by the principal's personal representative or successor in interest after the death of the principal.
- Pursuant to court order.

Termination of the authority of an attorney in fact does not relieve the attorney in fact of any duty to render an account

of actions taken as attorney in fact [*Prob. Code § 4238(c)*].

[8] Duty to Disclose Records

The following persons are entitled to examine and copy the records kept by the attorney in fact [*Prob. Code § 4236(c)*]:

- The principal.
- The conservator of the principal's estate while the principal is living.
- The principal's personal representative or successor in interest after the death of the principal.
- Any other person, pursuant to court order.

[9] Duty to Deliver Property and Records on Termination

On termination of the authority of an attorney in fact, the attorney in fact must promptly deliver possession or control of the principal's property as follows [*Prob. Code § 4238(a)*]:

- If the principal is not incapacitated, to the principal or as directed by the principal.
- If the principal is incapacitated, to the following persons with the following priority:
  - To a qualified successor attorney in fact.
  - As to any community property, to the principal's spouse.
  - To the principal's conservator of the estate or guardian of the estate.
- In the case of the death of the principal, to the principal's personal representative, if any, or the principal's successors.

The attorney in fact also must deliver copies of any records relating to transactions undertaken on the principal's behalf that are requested by the person to whom possession or control of the property is delivered [*Prob. Code § 4238(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesCare, Good Faith & Reasonable SkillDuty of Care & Reasonable SkillBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesCare, Good Faith & Reasonable SkillDuty of Loyalty, Good Faith & Fair Dealing

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37-427 California Forms of Pleading and Practice--Annotated § 427.33

§ 427.33 Authority of Attorney in Fact

[1] Effect of Grant

The grant of authority to an attorney in fact, whether by the power of attorney, by statute, or by a court, does not in itself require or permit the exercise of the power. The exercise of authority by an attorney in fact is subject to the attorney in fact's fiduciary duties [*Prob. Code § 4266*; *see* discussion under *§ 427.32*].

[2] Grant of General Authority

If a power of attorney grants general authority to an attorney in fact and is not limited to specific actions, subjects, or purposes for which general authority is conferred, the attorney in fact has all of the authority to act that a person having the capacity to contract may carry out through an attorney in fact specifically authorized to take the action [*Prob. Code § 4261*]. For further discussion,§ 427.34[5]; see also *§ 427.27[4]*.

[3] Grant of Limited Authority

If a power of attorney grants limited authority to an attorney in fact, the attorney in fact has (1) the authority granted in the power of attorney, as limited with respect to permissible actions, subjects, or purposes, and (2) the authority incidental, necessary, or proper to carry out the granted authority [*Prob. Code § 4262*]. For further discussion,§ 427.34[5]; see also *§ 427.27[4]*.

[4] Incorporation by Reference to Statute

A power of attorney may grant authority to the attorney in fact by incorporating powers by reference to another statute, including, but not limited to, the following [*Prob. Code § 4263(a)*]:

- Powers of attorneys in fact provided by the Uniform Statutory Form Power of Attorney Act [*see Prob. Code § 4400 et seq.*].

- Powers of guardians and conservators [*see Prob. Code §§ 2350 et seq., 2400 et seq.*].

- Powers of trustees [*see Prob. Code § 16200 et seq.*].

Incorporation by reference to another statute includes any amendments made to the incorporated provisions after the date of execution of the power of attorney [*Prob. Code § 4263(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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37-427 California Forms of Pleading and Practice--Annotated § 427.34

§ 427.34 Duty to Honor Power of Attorney (Except Powers of Attorney for Health Care [Advance Health Care Directives])

[1] Scope and Limits of Duty

A third person must accord an attorney in fact acting pursuant to the provisions of a power of attorney the same rights and privileges that would be accorded the principal if the principal were personally present and seeking to act. However, a third person is not required to honor the authority of the attorney in fact or conduct business with the attorney in fact if the principal cannot require the third person to act or conduct business in the same circumstances [*Prob. Code § 4300*].

A third person may rely on, contract with, and deal with an attorney in fact with respect to the subjects and purposes encompassed or expressed in the power of attorney without regard to whether the power of attorney expressly authorizes the specific act, transaction, or decision by the attorney in fact [*Prob. Code § 4301*].

All acts done by an attorney in fact pursuant to a durable power of attorney during any period of the principal's incapacity have the same effect and inure to the benefit of and bind the principal and the principal's successors in interest as if the principal had capacity [*Prob. Code § 4125*].

[2] Right to Impose Conditions

A third person that is requested to engage in transactions with an attorney in fact may, as a condition of incurring any duty to comply withthe power of attorney, require the attorney in fact to provide identification, specimens of the signatures of the principal and the attorney in fact, and any other information reasonably necessary or appropriate to identify the principal and the attorney in fact and to facilitate the third person's actions in transacting business with the attorney in fact. A third person may require an attorney in fact to provide the principal's current and permanent residence addresses before agreeing to engage in a transaction with the attorney in fact [*Prob. Code § 4302*].

[3] Right to Refuse for Cause

Nothing in the Power of Attorney Law requires a third person to engage in any transaction with an attorney in fact if the attorney in fact has previously breached any agreement with the third person [*Prob. Code § 4309*].

[4] Financial Institution

[a] Right to Refuse

Nothing in the Power of Attorney Law requires a financial institution to open a deposit account for a principal at the request of an attorney in fact if the principal is not currently a depositor of the financial institution or to make a loan to the attorney in fact on the principal's behalf if the principal is not currently a borrower of the financial institution [*Prob. Code § 4310*].

[b] Right to Continue Dealing With Attorney in Fact

A savings and loan association has the right to continue to recognize the authority of an attorney in fact authorized in writing to manage, or to make withdrawals either in whole or in part from, the savings account of an account holder, whether the holder is a minor or an adult, until the association receives written notice or is on actual notice of the revocation of authority, whether the revocation is express or by operation of law [*Fin. Code § 6725(a)*]. Written notice of the account holder's death or an adjudication of the account holder's incompetency that is delivered to the office where the account is maintained constitutes written notice of revocation of the authority of the attorney in fact. Other means authorized in the Power of Attorney Law may be used to provide the required notice, however [*Fin. Code § 6725(b)*]. The association is not liable for damages, penalty, or tax by reason of any payment made in accordance with these rules [*Fin. Code § 6725(c)*].

[5] Acts Not Authorized

[a] Statutory Prohibitions

A power of attorney may not authorize an attorney in fact to make, publish, declare, amend, or revoke the principal's will, or to consent to any the following on the principal's behalf under a power of attorney for health care (advance health care directive): commitment to or placement in a mental health treatment facility, convulsive treatment or psychosurgery [*see Welf. & Inst. Code § 5325* (definitions)], sterilization, or abortion [*Prob. Code § 4265, 4652*].

[b] Construction of Power of Attorney

A power of attorney may not be construed to grant authority to an attorney in fact to perform any of the following acts unless expressly authorized in the power of attorney [*Prob. Code § 4264*]:

- Create, modify, or revoke a trust [*see Prob. Code § 15401(b)* (same prohibition)].

- Fund with the principal's property a trust not created by the principal or a person authorized to create a trust on the principal's behalf.

- Make or revoke a gift of the principal's property in trust or otherwise [*see Estate of Stephens v. Williams (2002) 28 Cal. 4th 665, 677-678, 678, 122 Cal. Rptr. 2d 358, 49 P.3d 1093* (amanuensis ["one who copies or writes from the dictation of another"] rule is exception to *Prob. Code § 4264*; signing of grantor's name by interested amanuensis must be presumed invalid; interested amanuensis then bears burden of showing that signature was mechanical act in that grantor intended to sign using instrumentality of amanuensis); *Estate of Huston (1997) 51 Cal. App. 4th 1721, 1726-1727, 60 Cal. Rptr. 2d 217* (gift of annuity, executed by attorney in fact, from decedent to attorney in fact was void as outside attorney in fact's authority under power of attorney, despite decedent's approval of annuity purchase)].

- Exercise the right to make a disclaimer on the principal's behalf (but without limiting the authority of

the attorney in fact to disclaim a detrimental transfer to the principal with the approval of the court).

- Create or change survivorship interests in the principal's property or in property in which the principal may have an interest.

- Designate or change the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death.

- Make a loan to the attorney in fact.

[6] Probate Court

A principal may nominate, by a durable power of attorney, a conservator of the person or estate or both, or a guardian of the person or estate orboth, for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced [*Prob. Code § 4126(a)*]. If the protective proceedings are conservatorship proceedings in California, the nomination has the effect provided in *Prob. Code § 1810* (governing nomination by a proposed conservatee), and the court must give effect to the most recent writing executed in accordance with that code section, whether or not the writing is a durable power of attorney [*Prob. Code § 4126(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityOral & Written AuthorityEstate, Gift & Trust LawPowers of AttorneyRevocation & TerminationHealthcare LawTreatmentEnd-of-Life DecisionsAdvance Directives

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37-427 California Forms of Pleading and Practice--Annotated § 427.35

§ 427.35 Duty of Third Person to Disclose Information

[1] Confidential Information Generally

If the principal becomes wholly or partially incapacitated, or if there is a question concerning the principal's capacity to give instructions to and supervise the attorney in fact, the attorney in fact may consult with a person previously designated by the principal for this purpose, and may also consult with and obtain information needed to carry out the duties of the attorney in fact, from the principal's spouse, physician, attorney, or accountant, or a member of the principal's family, or any other person, business entity, or government agency, with respect to matters to be undertaken on the principal's behalf and affecting the principal's personal affairs, welfare, family, property, and business interests. A person from whom information is requested must disclose relevant information to the attorney in fact. Disclosure under this requirement is not a waiver of any privilege that may apply to the information disclosed [*Prob. Code § 4235*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesKnowledge & NoticeGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesKnowledge & NoticeDuty of Agent to Disclose

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37-427 California Forms of Pleading and Practice--Annotated § 427.36

§ 427.36 Immunity From Liability

[1] Limitations in Power of Attorney

A power of attorney may not limit a statute concerning the protection of third persons from liability [*Prob. Code § 4101(b)*].

[2] Unqualified Attorney in Fact

Only a person having the capacity to contract is qualified to act as an attorney in fact [*Prob. Code § 4200*]. Designating an unqualified person as an attorney in fact does not affect the immunities of third persons or relieve the unqualified person of any applicable duties to the principal or the principal's successors [*Prob. Code § 4201*].

[3] Springing Power of Attorney

In a springing power of attorney [*see Prob. Code § 4030* (definition)], the principal may designate a person or persons who, by a written declaration under penalty of perjury, shall have the power to determine conclusively that the specified event or contingency has occurred. The principal may designate the attorney in fact or another person to perform this function, either alone or jointly with other persons [*Prob. Code § 4129(a)*]. A springing power of attorney containing that designation becomes effective when the persons designated in the power of attorney execute a written declaration under penalty of perjury that the specified event or contingency has occurred. Any person may act in reliance on the written declaration without liability to the principal or to any other person, regardless of whether the specified event or contingency has actually occurred [*Prob. Code § 4129(b)*].

Under the Uniform Statutory Form Power of Attorney Act [*Prob. Code § 4401 et seq.*], rules like the foregoing rules also are applied in the case of the statutory form power of attorney [*see Prob. Code § 4405(a), (b)*].

[4] Modified or Revoked Power of Attorney

A principal may modify or revoke a power of attorney [*Prob. Code §§ 4150(a), 4151(a)*; *see* discussion under *§ 427.28*]. An attorney in fact or a third person who does not have notice of the modification or revocation is generally

protected from liability [*Prob. Code §§ 4150(b), 4151(b)*].

[5] Revoked or Terminated Authority of Attorney in Fact

The authority of an attorney in fact may be terminated or revoked by various events (otherwise than by the principal's modifying or revoking the power of attorney) [*Prob. Code §§ 4152(a), 4153(a)*; *see* discussion under *§ 427.29*]. An attorney in fact or a third person who does not have notice of the termination or revocation of authority is generally protected from liability [*Prob. Code §§ 4152(b), 4153(b)*]. For further discussion, see *§ 427.36[11][b], [c]*.

[6] Termination of Authority by Principal's Incapacity

The authority of an attorney in fact under a nondurable power of attorney is terminated by the principal's incapacity to make a contract [*Prob. Code § 4155(a)*]. An attorney in fact or third person who does not have notice of the principal's incapacity is generally protected from liability [*Prob. Code § 4155(b)*]. For further discussion, see *§ 427.36[11][c]*.

[7] Two or More Attorneys in Fact or Powers of Attorney

A principal may designate more than one attorney in fact, in one or more than one power of attorney [*Prob. Code § 4202(a)*]. Authority granted to two or more attorneys in fact is exercisable only by their unanimous action [*Prob. Code § 4202(b)*]. If a vacancy occurs, the remaining attorneys in fact may exercise the authority conferred as if they are the only attorneys in fact [*Prob. Code § 4202(c)*]. If an attorney in fact is unavailable because of absence, illness, or other temporary incapacity, the other attorneys infact may exercise the authority under the power of attorney as if they are the only attorneys in fact, when that is necessary to accomplish the purposes of the power of attorney or to avoid irreparable injury to the principal's interests [*Prob. Code § 4202(d)*].

An attorney in fact is not liable for the actions of other attorneys in fact except when participating in, knowingly acquiescing in, or concealing a breach of fiduciary duty committed by another attorney in fact [*Prob. Code § 4202(e)*].

If a principal grants inconsistent authority to an attorney in fact or more than one attorney in fact in two or more powers of attorney, the authority granted last controls to the extent of the inconsistency [*Prob. Code § 4130(a)*], notwithstanding anything to the contrary in either power of attorney [*Prob. Code § 4130(b)*].

[8] Successor Attorney in Fact

A principal may designate successor attorneys in fact [*Prob. Code § 4203(a)*]. A successor attorney in fact is not liable for the actions of the predecessor attorney in fact [*Prob. Code § 4203(c)*].

[9] Uncompensated Attorney in Fact

If an attorney in fact is not compensated, the attorney in fact is not liable for a loss to the principal's property unless the loss results from the bad faith, intentional wrongdoing, or gross negligence of the attorney in fact [*Prob. Code § 4231(b)*; *see Prob. Code § 4204* (right of attorney in fact to be compensated)].

[10] Principal's Special Status

[a] Missing in Military or Civilian Government Service

A power of attorney does not expire, even though by its terms it would expire, during the period the principal is in missing status in federal military or civilian government service [*Prob. Code §§ 1403, 3700(a)*], and the power of attorney continues in effect for 30 days after the principal's missing status is terminated. Any person who acts in reliance on the power of attorney together with a copy of the certificate of missing status [*see Prob. Code § 3700(b)*] is

not liable for relying or acting on the power of attorney [*Prob. Code § 3720*].

The attorney in fact or a third person is deemed to be without actual knowledge of (1) the principal's death or incapacity while the principal is in missing status and until the attorney in fact or third person receives official notice of the determination of the principal's death and (2) revocation of the power of attorney by the principal while the principal is in missing status [*Prob. Code § 3721*]. Regarding the possibility of revocation of the power of attorney by operation of law, see the discussion under *§ 427.29[2]*.

[b] Medi-Cal Patient Admitted to Nursing Facility

In the case of a nursing facility resident who is a Medi-Cal beneficiary and whose facility care is being paid for in whole or in part by Medi-Cal, a person who signs or cosigns the nursing facility's admission agreement by virtue of being an attorney in fact under a valid durable power of attorney executed by the potential resident does not assume personal responsibility or liability for payment of any charges incurred by the resident, except to the extent that the attorney in fact manages, uses, or controls the funds or assets that are legally required to be used to pay the resident's share of the costs and other charges not paid for by the Medi-Cal program [*see Welf. & Inst. Code § 14110.8(a)(3), (4)*].

[11] Third Person

[a] Reliance on Power of Attorney

A third person may rely on, contract with, and deal with an attorney in fact with respect to the subjects and purposes encompassed or expressed in the power of attorney without regard to whether the power of attorney expressly authorizes the specific act, transaction, or decision, by the attorney in fact [*Prob. Code § 4301*].

A third person who acts in good faith reliance on a power of attorney is not liable to the principal or to any other person for so acting if all of the following conditions are satisfied [*Prob. Code § 4303(a)*]:

- The power of attorney is presented to the third person by the attorney in fact is designated in the power of attorney.
- The power of attorney appears on its face to be valid.
- The power of attorney includes a notary public's certificate of acknowledgment or is signed by two witness.

However, this immunity rule is not intended to create an implication that a third person is liable for acting in reliance on a power of attorney if the three conditions are not satisfied. Nothing in this rule affects any immunity that may otherwise exist apart from this rule [*Prob. Code § 4303(b)*].

[b] Death of Principal

The death of a person who has executed a power of attorney, whether durable or nondurable, does not revoke or terminate the agency as to the attorney in fact or a third person who, without actual knowledge of the principal's death, acts in good faith under the power of attorney. Any action so taken, unless otherwise invalid or unenforceable, binds the principal's successors in interest [*Prob. Code § 4304(a)*].

[c] Incapacity of Principal

The incapacity of a person who has previously executed a nondurable power of attorney does not revoke or terminate the agency as to the attorney in fact or a third person who, without actual knowledge of the principal's incapacity, acts in

good faith under the power of attorney. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest [*Prob. Code § 4304(b)*].

[d] Reliance on Attorney's Affidavit

An affidavit executed by the attorney in fact under a power of attorney, whether durable or nondurable, stating that, at the time of the exercise of the power, the attorney in fact did not have actual knowledge of the termination of the power of attorney or termination of the authority of the attorney in fact by revocation nor actual knowledge of the principal's death or incapacity is conclusive proof of the nonrevocation or nontermination of the power or nontermination of authority at that time, as to acts undertaken in good faith reliance on the affidavit. If the exercise of the power of attorney requires execution and delivery of any instrument that is recordable, the affidavit when authenticated for record is likewise recordable [*Prob. Code § 4305(a)*].

[e] Failure to Demand Affidavit

A third person may demand that an attorney in fact furnish an affidavit respecting authority to engage in a particular act or transaction [*see Prob. Code §§ 4305, 4306(a)*; discussion under *§ 427.36[11][d]*]. The failure of a third person to demand an affidavit from the attorney in fact does not affect the protection from liability provided to the third person by the Power of Attorney Law, and no inference as to whether a third person has acted in good faith may be drawn from the failure to demand an affidavit from the attorney in fact [*Prob. Code § 4306(b)*].

[f] Failure to Demand Certified Copy

The Power of Attorney Law allows the use of certified copies of a power of attorneys [*see Prob. Code § 4307(a)-(c)*]. The enabling provision is not intended to create an implication that a third person may be liable for acting in good faith reliance on a copy of a power of attorney that has not been duly certified [*Prob. Code § 4307(d)*].

[g] Imputation of Employee's Knowledge to Employer

A third person who conducts activities through employees is not chargeable with actual knowledge of any fact relating to a power of attorney, or of a change in the authority of an attorney in fact, unless both of the following requirements are met [*Prob. Code § 4308(a)*]:

(1) The information is received at a home office or a place where there is an employee with responsibility to act on the information.

(2) The employee has a reasonable time in which to act on the information using the procedure and facilities that are available to the third person in the regular course of operations.

The knowledge of an employee in one branch or office of an entity that conducts business through branches or multiple offices is not attributable to an employee in another branch or office [*Prob. Code § 4308(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesCompensationBusiness & Corporate LawAgency RelationshipsTerminationsGeneral OverviewBusiness & Corporate LawAgency RelationshipsTerminationsOperation of Law

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37-427 California Forms of Pleading and Practice--Annotated § 427.37

§ 427.37 Probate Code Proceedings

[1] Policy Against Judicial Intervention

A power of attorney is exercisable free of judicial intervention [*Prob. Code § 4500*], subject to Part 4 of the Power of Attorney Law, which authorizes certain judicial proceedings concerning power of attorney [*see Prob. Code § 4500 et seq.*; § 427.140 et seq.]. The remedies provided in Part 4 are cumulative and not exclusive of any other remedies provided by law [*Prob. Code § 4501*]. In many cases, an appropriate remedy would be a suit for injunctive relief. For discussion and forms, see Ch. 303, *Injunctions* .

[2] Procedural Rules

The general provisions in Division 3 of the Probate Code [*Prob. Code § 1000 et seq.*] apply to proceedings under the Power of Attorney Law, except as otherwise provided in the Power of Attorney Law [*Prob. Code § 4755*]. Generally, the rules of practice applicable to civil actions apply to, and constitute the rules of practice in, proceedings under the Probate Code, except to the extent that the Probate Code provides applicable rules [*Prob. Code § 1000*; *see* comments to § 427.140].

There is no right to a jury trial in proceedings under the Power of Attorney Law [*Prob. Code § 4754*].

[3] Grounds for Petitions

A petition may be filed under Part 4 of the Power of Attorney Law for any one or more of the following purposes [*Prob. Code § 4541*]:

- Determining whether the power of attorney is in effect or has terminated [*see § 427.140*].

- Passing on the acts or proposed acts of the attorney in fact, including approval of authority to disobey the principal's instructions [*see* Forms 51, 52; *Prob. Code § 4234(b)* (authority to disobey instructions)].

- Compelling the attorney in fact to submit the accounts or a report on acts as attorney in fact to the principal, the principal's spouse, the conservator of the person or the estate of the principal, or any otherperson as required by the court in its discretion, if the attorney in fact has failed to submit an accounting or report within 60 days after written request from the person filing the petition [*see § 427.143*].

- Declaring that the authority of the attorney in fact is revoked, on a determination by the court of all of the following [*see § 427.144*]:

  - The attorney in fact has violated or is unfit to perform the fiduciary duties under the power of attorney.

  - At the time of the determination by the court, the principal lacks the capacity to give or to revoke a power of attorney.

  - The revocation of the authority of the attorney in fact is in the best interest of the principal or the principal's estate.

- Approving the resignation of the attorney in fact [*see § 427.146*].

- Compelling a third person to honor the authority of an attorney in fact [*see § 427.147*].

For grounds for a petition under the Health Care Decisions Law,§ 427.39[3][d].

[4] Standing to File Petition

Generally, a petition may be filed under Part 4 of the Power of Attorney Law by any of the following persons [*Prob. Code § 4540*]:

- The attorney in fact.

- The principal.

- The principal's spouse.

- The principal's relative.

- The conservator of the person or estate of the principal.

- A court investigator [*see Prob. Code § 1454*] of the county where the power of attorney was executed or where the principal resides.

- The public guardian of the county where the power of attorney was executed or where the principal resides.

- The personal representative or trustee of the principal's estate.

- The principal's successor in interest.

- A person who is requested in writing by an attorney in fact to take action.

- Any other interested person or friend of the principal.

Whether one of these persons may appropriately be a petitioner depends on the purpose of the petition [*see* discussion under *§ 427.37[3]*; see also comments to § 427.140 et seq.] and the circumstances. The right of a person to be a petitioner in a particular case also could be eliminated by the power of attorney [*see Prob. Code §§ 4502, 4503*; *see also* comments to § 427.140 et seq.].

[5] Dismissal of Petition

The court may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of the principal or the principal's estate. The court must stay or dismiss the proceeding in whole or in part when required by *Code Civ. Proc. § 410.30* (on the ground that a forum outside California would be more appropriate) [*Prob. Code § 4543*]. For discussion of dismissal on the that ground, see Ch. 323, *Jurisdiction: Personal* .

An appeal may be taken from an order dismissing the petition or denying a motion to dismiss [*Prob. Code § 1302(b)*].

[6] Appeal From Final Order

An appeal may be taken from any final order in a proceeding under Part 4 of the Power of Attorney Law, except an order compelling the attorney in fact to submit an accounting or a report [*Prob. Code § 1302(a)*; *see Prob. Code §§ 4541(c)*, (ground for order compelling submission of accounting or report); discussion under *§ 427.37[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityOral & Written AuthorityEstate, Gift & Trust LawPowers of AttorneyGeneral OverviewEstate, Gift & Trust LawPowers of AttorneyRevocation & Termination

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§ 427.38 Liability for Attorney's Fees

[1] Attorney in Fact

In a proceeding under Part 4 of the Power of Attorney Law commenced by a person other than the attorney in fact, the court may in its discretion award reasonable attorney's fees to the petitioner if the court determines that the attorney in fact has clearly violated the fiduciary duties under the power of attorney or has failed without any reasonable cause or justification to submit accounts or report acts to the principal or conservator of the estate or of the person, as the case may be, after written request from the principal or conservator [*Prob. Code § 4545(b)*].

[2] Third Person

[a] Groundless Action Against Attorney in Fact

In a proceeding under Part 4 of the Power of Attorney Law commenced by a person other than the attorney in fact, the court may in its discretion award reasonable attorney's fees to the attorney in fact if the court determines that the proceeding was commenced without any reasonable cause [*Prob. Code § 4545(a)*].

[b] Refusal to Accept Affidavit

In dealing with a third person, an attorney in fact may furnish a specific affidavit in support of the authority of the attorney in fact to engage in a particular act or transaction [*see Prob. Code § 4305*; *discussion under§ 427.36[11][d]*]. If an attorney in fact duly furnishes an affidavit, whether voluntarily or on demand, a third person dealing with the attorney in fact who refuses to accept the exercise of authority referred to in the affidavit is liable for attorney's fees incurred in an action or proceeding necessary to confirm the qualifications or authority of the attorney in fact, unless the court determines that the third person believed in good faith that the attorney in fact was not qualified or was attempting to exceed or improperly exercise the authority of the attorney in fact [*Prob. Code § 4306(a)*]. For further discussion, see the comments to § 427.146.

[c] Refusal to Honor Statutory Form Power of Attorney

If a third person refuses to honor the agent's authority under a properly executed statutory form power of attorney [*see Prob. Code § 4400 et seq.* (Uniform Statutory Form Power of Attorney Act)] within a reasonable time, the third person generally may be compelled to do so in an action brought against the third person for this purpose [*Prob. Code § 4406(a)*]. The court must award attorney's fees to the attorney in fact if the court finds that the third person acted unreasonably in refusing to accept the authority of the attorney in fact under the statutory form power of attorney [*Prob. Code § 4406(b)*]. For further discussion, see the comments to § 427.146.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityOral & Written AuthorityCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory Awards

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§ 427.39 Other Specific Agencies

[1] Auctioneers

The authority of auctioneers as agents of sellers and bidders is governed by *Civ. Code § 2362 et seq.* For discussion and forms relating to auctioneers, see Ch. 77, *Auctions and Auctioneers* .

[2] Factors

[a] Defined

A factor is an agent who, in the pursuit of an independent calling, is employed by another to sell property for the principal and is vested by the principal with the possession or control of the property or is authorized to receive payment from the purchaser [*Civ. Code §§ 2026, 2367*].

[b] Duties and Authority

A factor must obey the instructions of his or her principal to the same extent as any other employee, notwithstanding any advances the factor has made to the principal on the property consigned to the factor. However, if the principal forbids the factor to sell at the market price, the factor may nevertheless sell for his or her reimbursement after giving the principal reasonable notice of his or her intention to do so, and of the time and place of sale. In making such a sale, the factor must proceed in all respects as a pledgee [*Civ. Code § 2027*].

A factor may sell property that has been consigned to him or her on such credit as is usual. Once the factor has agreed with the purchaser on the term of credit, however, the factor may not extend it [*Civ. Code § 2028*].

A factor who receives property for sale, under a general agreement or usage to guarantee the sales or the remittance of the proceeds, cannot relieve himself or herself from responsibility therefor without the principal's consent [*Civ. Code § 2030*].

In addition to the authority of agents in general, a factor has the following actual authority from his or her principal,

unless specially restricted [*Civ. Code § 2368*; *see also* discussion § 427.62[2][a]]:

- To insure property consigned to him or her uninsured;

- To sell on credit anything entrusted to him or her for sale, except those things that it is contrary to usage to sell on credit, but not to pledge, mortgage, or barter the same; and

- To delegate his or her authority to a partner or servant, but not to any person in an independent employment.

A factor has ostensible authority to deal with the property of the principal as the factor's own, in transactions with persons not having notice of the actual ownership [*Civ. Code § 2369*; *see also* discussion § 427.62[2][d]].

[c] Personal Liability

A factor who charges his or her principal with a guaranty commission on a sale thereby assumes absolutely to pay the price when it falls due, as if the factor were liable for the debt personally rather than as a guarantor for the purchaser. The factor does not, however, assume any additional responsibility for the safety of the remittance of the proceeds [*Civ. Code § 2029*].

[3] Health Care Decisions Law

[a] Purpose and Scope

The Health Care Decisions Law (Division 4.7 of the Probate Code), effective July 1, 2000, which includes the Uniform Health Care Decisions Act [*Prob. Code § 4670 et seq.*], applies to health care decisions for adults who lack the capacity to make those decisions for themselves [*Prob. Code § 4651(a)*]. The Law does not affect the right of an individual to make health care decisions while having the capacity to do so [*Prob. Code § 4651(b)(1)*].

Acknowledging a fundamental right of adults to control decisions relating to personal health care [*see Prob. Code § 4650*], a "health care decision" is defined as a decision regarding health care made either by an adult patient or by a patient's agent, conservator, or surrogate [Prob. Code§§ 4617, 4625]. Health care decisions include, for example, the following [*Prob. Code § 4617*; *see Prob. Code § 4780* (requests to forgo resuscitative measures)]:

- Selection and discharge of health care providers or institutions.

- Approval or disapproval of diagnostic tests, surgical procedures, or programs of medication.

- Directions to provide, withhold, or withdraw artificial nutrition, hydration, and all other forms of health care including cardiopulmonary resuscitation.

Except for the withholding or withdrawing of health care so as to permit the natural process of dying, however, the Health Care Decisions Law does not permit any affirmative or deliberate act or omission to end life, nor does it condone, authorize, or approve mercy killing, assisted suicide, or euthanasia [*Prob. Code § 4653*]. The law does not authorize anyone to consent to commitment or placement in a mental-health treatment facility or to convulsive treatment, psychosurgery, sterilization, or abortion [*Prob. Code § 4652*]. Death resulting from withholding or withdrawing health care in accordance with the law does not, for any purpose, constitute a suicide or homicide or legally impair or invalidate a policy of insurance or an annuity providing a death benefit, notwithstanding any term of the policy or annuity to the contrary [*Prob. Code § 4656*].

The objectives of the Health Care Decisions Law are achieved through advance health care directives and the appointment of surrogates. An advance health care directive is either an individual health care instruction or a power of attorney for health care [*Prob. Code § 4605*]. An individual health care instruction is a patient's written or oral direction concerning a health care decision [*Prob. Code § 4623*]. A power of attorney for health care is a written instrument designating an agent to make health care decisions for the adult who executes the power of attorney for health care [*Prob. Code §§ 4629, 4633*]. Alternatively, an adult patient may designate a surrogate to make health care decisions for him or her [*Prob. Code § 4711(a)*], or disqualify others including family members from acting as his or her surrogate [*Prob. Code § 4715*], by personally informing a supervising health care provider of his or her selection or disqualification. Unless the patient specifies a shorter period, a surrogate designation is effective only during the course of treatment or illness or during the stay in the health care institution when the surrogate designation is made, or for 60 days, whichever period is shorter [*Prob. Code § 4711(b)*]. If the patient has designated an agent under a power of attorney for health care, then a designated surrogate has priority over the agent for the effective period, but the designation of the surrogate does not revoke the designation of the agent [*Prob. Code § 4711(d)*] unless the patient duly communicates the intention to revoke [*see Prob. Code § 4695(a)*].

Advance health care directives by a patient, as well as health care decisions by an agent or surrogate, are effective without judicial approval [*Prob. Code § 4750*]. Health care decisions by an agent or surrogate are supposed to be in accordance with the principal's instruction or wishes to the extent known, and if not known, by way of the agent's or surrogate's determining what is in the principal's best interest considered in light of the latter's personal values to the extent known [*Prob. Code §§ 4684, 4714*]. In making these decisions, no presumption arises concerning the intention of a patient who has not made or revoked an advance health care directive [*Prob. Code § 4655(a)*], and an attempted suicide is not to be construed to indicate a patient's desire that health care be restricted or inhibited [*Prob. Code § 4655(b)*].

The Health Care Decisions Law applies to all advance health care directives including durable powers of attorney for health care authorized under repealed provisions of the Power of Attorney Law [former *Prob. Code § 4600 et seq.*] and declarations under the repealed Natural Death Act [former *Health & Safety Code § 7185 et seq.*], whenever executed [*Prob. Code § 4665(a)*]. Enactment of this law does not affect any of the following:

- The validity of an advance health care directive executed before July 1, 2000, that was valid under prior law [*Prob. Code § 4665(d)*].

- The validity of a durable power of attorney for health care executed on a printed form valid under prior law, whenever executed [*Prob. Code § 4665(e)*].

- The right of an individual to make health care decisions while having the capacity to do so [*Prob. Code § 4651(b)(1)*].

- The law governing health care in an emergency [*Prob. Code § 4651(b)(2)*].

- The law governing health care for unemancipated minors [*Prob. Code § 4651(b)(3)*].

- Any right that a person designated as an agent under a power of attorney for health care may have apart from the appointing document to make or participate in making health care decisions for the principal [*Prob. Code § 4687*].

[b] Advance Health Care Directives

An adult having capacity may give individual health care instructions orally or in writing, and the instructions may be limited so as to take effect only if specified conditions arise [*Prob. Code § 4670*]. An adult having capacity may also

execute a power of attorney for health care that authorizes a designated agent to make health care decisions or that specifies particular health care instructions or grants authority to make decisions about the personal care of the principal (for example, determining where the principal will live, who provides meals, transportation, and personal services, and arranging recreation and entertainment) [*Prob. Code § 4671*]. A written advance health care directive can also nominate a conservator or guardian of the person or estate or both, as the case may be, for courtconsideration if commencement of protective proceedings for the individual's person or estate is anticipated [*Prob. Code § 4672*].

Execution or revocation of an advance health care directive may not be required or prohibited as a condition for providing health care, admission to a facility, or furnishing insurance [*Prob. Code § 4677*]. Long-term health care facilities must encourage competent residents to execute advance health care directives [*Health & Safety Code § 1599.73(b)*].

A patient's capacity, in this context, is an ability to understand the nature and consequences of a decision and to make and communicate a decision, including, in the case of proposed health care, the ability to understand its significant benefits, risks, and alternatives [*Prob. Code §§ 4609, 4617*]. A patient is presumed to have the capacity to make a health care decision, give or revoke advance health care directives, and designate or disqualify a surrogate. This presumption affects the burden of proof [*Prob. Code § 4657*]. Unless provided otherwise, the authority of an agent under a power of attorney for health care becomes effective only on determining that the principal lacks capacity, and the authority ceases when the principal recovers capacity [*Prob. Code § 4682*]. A determination that a patient lacks or has recovered capacity, or that some condition exists affecting a health care instruction or the authority of an agent or surrogate, is made by the primary physician unless specified otherwise in a written advance health care directive [*Prob. Code § 4658*].

The Health Care Decision Law limits who may be designated to make health care decisions as an agent or a surrogate. These limitations include the following:

- The supervising health care provider of the health care institution where the patient is receiving care is disqualified [*Prob. Code § 4659(a)(1)*].

- Any other employee of the health care institution where the patient is receiving care is disqualified [*Prob. Code § 4659(a)(1)*], except for an employee who is related to the patient by blood, marriage, or adoption, or is a registered domestic partner of the patient [*Prob. Code § 4659(b)(1)*], or an employee who is employed by the same health care institution as the patient [*Prob. Code § 4659(b)(2)*].

- An operator or employee of a community care facility or residential care facility where the patient is receiving care is disqualified [*Prob. Code § 4659(a)(2)*], except for an employee who is related to the patient by blood, marriage, or adoption, or is a registered domestic partner of the patient [*Prob. Code § 4659(b)(1)*], or an employee who is employed by the same community care facility or residential care facility for the elderly as the patient [*Prob. Code § 4659(b)(2)*].

Furthermore, a conservator under the Lanterman-Petris-Short Act [*Welf. & Inst. Code § 5000 et seq.*] may not be designated as agent or surrogate unless several conditions are satisfied including certification that the principal received legal counseling regarding the advance directive [*Prob. Code § 4659(c)*].

Regarding formalities, a written advance health care directive, including a power of attorney for health care [*Prob. Code § 4680*], is legally sufficient if it contains the date of its execution, is signed either by the patient or in the patient's name by another adult in the patient's presence and at the patient's direction, and is either acknowledged before a notary public or signed by at least two witnesses who qualify and satisfy the statutory requirements [*Prob. Code § 4673(a)*; *see Prob. Code § 4673(b)* (validity of electronic advance health care directive or power of attorney that bears digital signature); *see also Prob. Code §§ 4674, 4675* (witness requirements)]. A statutory form may (but need not) be used to create a

written advance health care directive [*see Prob. Code §§ 4700, 4701*].

The application of any provision of the Health Care Decisions Law may be limited by the terms of a power of attorney for health care or advance health care directive that sets forth an express statement or inconsistent rule to that effect [*Prob. Code § 4681(a)*]; however, the power of attorney for health care or advance directive cannot limit the application of a statute specifically providing that it is not subject to limitation in a power of attorney, or of a statute that concerns statements required to be included in a power of attorney, the operative dates of statutory enactments or amendments, the formalities for execution of a power of attorney for health care, the qualifications of witnesses or agents, or the protection of third persons from liability [*Prob. Code § 4681(b)*].

Subject to any valid limitations, a designated agent can make health care decisions for the principal to the same extent the principal could do if he or she had capacity [*Prob. Code § 4683(a)*]. A designated agent is also authorized to make certain decisions effective after the principal's death, such as authorizing an anatomical gift or autopsy or otherwise directing disposition of the remains [*Prob. Code § 4683(b)*].

A patient with capacity may revoke the designation of an agent by a signed writing or by personally informing the supervising health care provider [*Prob. Code § 4695(a)*]. An advance health care directive other than the designation of an agent can be revoked at any time and in any manner by a patient with capacity who communicates an intent to revoke [*Prob. Code § 4695(b)*].

[c] Duties, Immunities, and Liabilities

A health care provider or health care institution providing care to a patient is generally obligated to comply with a patient's health care instructions, reasonable interpretations of the instructions by the person then authorized to make health care decisions for a patient, and health care decisions for a patient, to the same extent as if made by the patient while having capacity [*Prob. Code § 4733*]. In theabsence of knowledge to the contrary, a physician or other health care provider may presume that a written advance health care directive is valid [*Prob. Code § 4677*]. Healthcare providers may decline to comply with individual instructions or decisions for reasons of conscience, however, as may health care institutions if certain conditions are met [*Prob. Code § 4734*]. Either may decline to comply with an instruction or decision that requires medically ineffective or substandard health care [*Prob. Code §§ 4735, 4654*]. Declining to comply with an individual instruction or decision, however, gives rise to certain notice, patient transfer, and continuing care obligations pending transfer [*see Prob. Code § 4736*].

A health care provider or health care institution acting in good faith and in accordance with generally accepted and applicable health care standards is not subject to civil or criminal liability or to discipline for unprofessional conduct for any actions in compliance with the Health Care Decisions Law, including but not limited to [*Prob. Code § 4740*]:

- Complying with a health care decision of a person who the health care provider or health care institution believes in good faith has the authority to make a health care decision for a patient, including a decision to withhold or withdraw health care;

- Declining to comply with a health care decision of a person based on a belief that the person then lacked authority;

- Complying with an advance health care directive and assuming that the directive was valid when made and has not been revoked or terminated; and

- Declining to comply with an individual health care instruction or decision for reasons of conscience.

A person who acts as an agent or surrogate is not subject to civil or criminal liability or to discipline for unprofessional

conduct for health care decisions made in good faith [*Prob. Code § 4741*].

Civil remedies of a cumulative nature that include the recovery of attorney's fees are enforceable against health care providers and institutions that intentionally violate the Health Care Decisions Law [*Prob. Code § 4742(a)*] and persons who do certain intentional acts such as falsifying, concealing, coercing, or fraudulently inducing a health care directive or its revocation [*Prob. Code § 4742(b)*]. Homicide prosecution is explicitly allowed against persons who cause death by altering or forging written advance health care directives, or willfully concealing personal knowledge of a revocation of the same, with the intent to cause a withholding or withdrawal of needed health care contrary to the desires of the patient [*Prob. Code § 4743*].

[d] Limited Judicial Proceedings

A superior court proceeding by certain interested persons is authorized under Part 3 of the Health Care Decisions Law for the following purposes [*Prob. Code § 4766*]:

- Determining whether a patient has capacity to make health care decisions.
- Determining whether an advance health care directive is in effect or has terminated.
- Determining whether the acts or proposed acts of an agent or surrogate are consistent with the patient's desires as expressed in an advance health care directive or otherwise made known to the court or, when the patient's desires are unknown or unclear, whether the acts or proposed acts of the agent or surrogate are in the patient's best interest.
- Declaring the authority of an agent or surrogate terminated upon determining that the agent or surrogate made a health care decision for the patient that authorized anything illegal.
- Declaring the authority of an agent or surrogate terminated on determining that the agent or surrogate violated, failed to perform, or is unfit to perform the duty under an advance health care directive to act consistently with the patient's desires or, when the patient's desires are unknown or unclear, is by act or omission acting in a manner clearly contrary to the patient's best interest, and that at the time of the determination by the court, the patient lacks the capacity to execute or to revoke an advance health care directive or disqualify a surrogate.
- Compelling a third person to honor individual health care instructions or the authority of an agent or surrogate.

Potential petitioners include the following [*Prob. Code § 4765*]:

- The patient.
- A spouse.
- Relatives.
- An agent or surrogate.
- A conservator of the person of the patient.
- A court investigator or public guardian.

- The supervising health care provider or institution involved with the patient's care.
- An interested person or friend of the patient.

However, a duly executed advance health care directive may expressly eliminate the authority to petition for all these persons, excepting only, for limitedpurposes, a conservator of the person or an agent [*see Prob. Code § 4753*].

There is no right to a jury trial in judicial proceedings under the Health Care Decisions Law [*Prob. Code § 4754*]. General provisions of the Probate Code pertaining to procedural matters apply to these proceedings unless otherwise provided by the Health Care Decisions Law [*Prob. Code § 4755*]. In most cases, a proceeding is commenced by filing, and serving 15 days in advance of the time set for hearing [*Prob. Code § 4769*], a petition stating all of the following [*Prob. Code § 4767*]:

- Facts showing that the petition is authorized under Part 3 of the Health Care Decisions Law [*Prob. Code § 4750 et seq.*].
- The grounds of the petition.
- If known to the petitioner, the terms of any advance health care directive in question.

In the case of a petition to compel a third person to honor individual health care instructions or the authority of an agent or surrogate, notice of the time and place of the hearing, together with a copy of the petition, must be served on the third person in the manner provided in *Code Civ. Proc. § 413.10 et seq.* [*Prob. Code § 4769(b)*].

The court may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of the patient [*Prob. Code § 4768*]. For good cause shown, the court may issue a temporary order prescribing the health care of the patient pending a final disposition [*Prob. Code § 4770*]. A discretionary award of attorney's fees is authorized under limited circumstances [*see Prob. Code § 4771*]. An appeal may be taken from a final order under *Prob. Code § 4766* or an order dismissing the petition or denying a motion to dismiss [*Prob. Code § 1302.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesCare, Good Faith & Reasonable SkillGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesCare, Good Faith & Reasonable SkillDuty of Care & Reasonable SkillEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewHealthcare LawTreatmentEnd-of-Life DecisionsAdvance Directives

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[Reserved]

§§ 427.40[Reserved]

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§ 427.60 California Points and Authorities

For memoranda relating to forms in this chapter, see California Points and Authorities, Ch. 12, *Accounting* (Matthew Bender)

For memoranda relating to forms in this chapter, see California Points and Authorities, Ch. 31, *Brokers and Salespersons* (Matthew Bender)

For memoranda relating to forms in this chapter, see California Points and Authorities, Ch. 43, *Common Counts and Bills of Particulars* (Matthew Bender)

For memoranda relating to forms in this chapter, see California Points and Authorities, Ch. 50, *Contracts* (Matthew Bender)

For memoranda relating to forms in this chapter, see California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

For memoranda relating to forms in this chapter, see California Points and Authorities, Ch. 100, *Employer and Employee* (Matthew Bender)

For memoranda relating to forms in this chapter, see California Points and Authorities, Ch. 115, *Indemnity and Contribution* (Matthew Bender)

For memoranda relating to forms in this chapter, see California Points and Authorities, Ch. 182, *Principal and Agent*

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§ 427.61 State Statutes

[1] Authority of Agents

Acts delegable to agent. *Civ. Code § 2304*

Act that may be done by or to person under Civ. Code may be done by agent unless contrary intention clearly appears. *Civ. Code § 2305*

Agent does not have authority to defraud principal. *Civ. Code § 2306*

Authority is conferable by precedent authorization or subsequent ratification. *Civ. Code § 2307*

Authority is dependent on acts of principal. *Civ. Code § 2315*

Actual authority results from conduct of principal toward agent. *Civ. Code § 2316*

Ostensible authority results from conduct of principal toward third party. *Civ. Code 2317*

Agent has general statutory authority unless limited by principal. *Civ. Code § 2318*

Authority implied by law. *Civ. Code § 2319*

Agent's ability to disobey instructions when necessary. *Civ. Code § 2320*

Grant of specific authority limits simultaneous grant of general authority. *Civ. Code § 2321*

Limitations on authority expressed in general terms. *Civ. Code § 2322*

Authority of agents to sell property. *Civ. Code §§ 2323-2324*

Authority to receive price of agents to sell. *Civ. Code §§ 2325-2326*

[2] Creation of Agency

Consideration unnecessary to confer authority. *Civ. Code § 2308*

Equal dignities rule. *Civ. Code § 2309*

Sufficiency of oral authorization. *Civ. Code § 2309*

[3] Definitions

Agent, principal, and agency. *Civ. Code § 2295*

Capacity of principal and agent. *Civ. Code § 2296*

Special and general agents. *Civ. Code § 2297*

Kinds of agency. *Civ. Code § 2298*

Actual agency. *Civ. Code § 2299*

Ostensible agency. *Civ. Code § 2300*

[4] Delegation of Agency

Subagent of agent not responsible to principal of agent. *Civ. Code § 2022*

Powers delegable. *Civ. Code § 2349*

Effect of unauthorized delegation. *Civ. Code § 2350*

Effect of lawful appointment of subagent. *Civ. Code § 2351*

[5] Duties of Agent to Principal

Agent must adhere to authority defined by *Civ. Code §§ 2295-2357*. *Civ. Code § 2019*

Agent must inform principal of acts. *Civ. Code § 2020*

Duties of collection agent. *Civ. Code § 2021*

Fiduciary duties of agent. *Civ. Code §§ 2322, 2228-2240*

Criminal liability of agent for fraud on principal. *Penal Code § 536*

[6] Liability of Principal and Agent to Third Parties

Agent's liability for acts in restraint of trade. *Bus. & Prof. Code § 16755*

Agent's liability for unfair trade practices. *Bus. & Prof. Code §§ 17095, 17100, 17101*

Rights and liabilities incurred by agent accrue to principal. *Civ. Code § 2330*

Principal's liability for agent's incomplete execution of authority. *Civ. Code § 2331*

As against principal, principal and agent charged with notice of what should be communicated between them. *Civ. Code § 2332*

Effect of agent's unauthorized acts on principal. *Civ. Code § 2333*

Principal's liability for acts under agent's ostensible authority. *Civ. Code § 2334*

Principal's liability when exclusive credit given to agent by third party. *Civ. Code § 2335*

Third party's right of offset against undisclosed principal's claims against agent. *Civ. Code § 2336*

Principal's liability for wrongful acts of agent. *Civ. Code §§ 2338, 2339*.

Agent's implied warranty of authority. *Civ. Code § 2342*

Agent's liability as principal. *Civ. Code § 2343*

Agent's duty toward property of third party. *Civ. Code § 2344*

Provisions governing agency are subject to *Civ. Code § 38 et seq.* regarding persons entirely without understanding. *Civ. Code § 2345*

Damages recoverable for agent's breach of warranty of authority. *Civ. Code § 3318*

[7] Ratification

Required manner of subsequent ratification. *Civ. Code § 2310*

Effect of partial ratification of indivisible transaction. *Civ. Code § 2311*

Power required for subsequent ratification. *Civ. Code § 2312*

Limitation on ratification of acts prejudicial to third party. *Civ. Code § 2313*

Requirements for rescission of ratification. *Civ. Code § 2314*

[8] Termination of Agency

Methods of termination. *Civ. Code §§ 2355, 2356*

Acts or events causing termination. *Civ. Code § 2357*

[9] Other Specific Agencies

Real estate brokers. *Bus. & Prof. Code § 10130 et seq.*

Factors. *Civ. Code §§ 2026 et seq., 2367 et seq.*

Auctioneers. *Civ. Code § 2362 et seq.*

[10] Powers of Attorney

[a] In General

Power of Attorney Law. *Prob. Code § 4000 et seq.*

Definitions. *Prob. Code § 4010 et seq.*

General provisions. *Prob. Code §§ 4050 et seq., 4100 et seq.*

Creation and effect of powers of attorney. *Prob. Code § 4120 et seq.*

Modification and revocation of powers of attorney. *Prob. Code § 4150 et seq.*

Uniform Durable Power of Attorney Act. *Prob. Code §§ 4001, 4124-4127, 4206, 4304, 4305*

Uniform Statutory Form Power of Attorney Act. *Prob. Code § 4400 et seq.*

Health Care Decisions Law. *Prob. Code § 4600 et seq.*

Uniform Health Care Decisions Act. *Prob. Code § 4670 et seq.*

[a] Attorneys in Fact

Qualifications and appointment of attorneys in fact. *Prob. Code § 4200 et seq.*

Duties of attorneys in fact. *Prob. Code § 4230 et seq.*

Authority of attorneys in fact. *Prob. Code § 4260 et seq.*

Relations with third persons. *Prob. Code § 4300 et seq.*

[b] Statutory Form Power of Attorney

Uniform statutory form power of attorney. *Prob. Code § 4400 et seq.*

Powers under statutory form power of attorney. *Prob. Code § 4450 et seq.*

[c] Power of Attorney for Health Care /Advance Health Care Directive

Definitions. *Prob. Code § 4600 et seq.*

General provisions. *Prob. Code § 4650 et seq.*

Creation and effect. *Prob. Code § 4680 et seq.*

Authority of attorney in fact. *Prob. Code § 4680 et seq.*

Protections and immunities. *Prob. Code § 4740 et seq.*

Statutory form for written advance health care directive. *Prob. Code § 4701*

Registration of written advance health care directive. *Prob. Code § 4800 et seq.*

[d] Judicial Proceedings

General provisions. *Prob. Code § 4500 et seq.*

Petitions, orders, and appeals. *Prob. Code § 4540 et seq.*

Judicial proceedings under Health Care Decisions Law. *Prob. Code § 4750 et seq.*

Jurisdiction and venue. *Prob. Code § 4920 et seq.*

[e] Medi-Cal Patients

Attorney in fact who signs nursing-facility admission agreement is not personally liable for costs of nursing-facility care for principal who is Medi-Cal beneficiary. *Welf. & Inst. Code § 14110.8(a)(3), (4)*

[f] Missing Military and Civilian Personnel

Effect on power of attorney and attorney in fact when principal who is in military or civilian government service is determined to be missing. *Prob. Code § 3720 et seq.*

[g] Special Power of Attorney Under Multiple-Party Accounts Law

Special power of attorney for accounts at financial institutions authorized under Multiple-Party Accounts Law [*Prob. Code § 5100 et seq.*]. *Prob. Code § 5204*

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§ 427.62 Decisions

[1] Agent's Knowledge Imputed to Principal

Agent's knowledge imputed to principal even though knowledge is of agent's fraud perpetrated without actual knowledge of principal; principal not permitted to benefit from fraud of agent acting within scope of agency. *Powell v. Goldsmith (1984) 152 Cal. App. 3d 746, 751, 199 Cal. Rptr. 554*

Agent's knowledge not imputed to principal [*Civ. Code § 2332*] when source of knowledge knows agent will not communicate to principal. *Wagner v. Benson (1980) 101 Cal. App. 3d 27, 35, 161 Cal. Rptr. 516*

Principal chargeable with and bound by knowledge of or notice to agent [*Civ. Code § 2332*] received while agent acts within scope of authority and in reference to matter over which authority extends. *Chaplis v. County of Monterey (1979) 97 Cal. App. 3d 249, 262, 158 Cal. Rptr. 395* ; *Trane Co. v. Gilbert (1968) 267 Cal. App. 2d 720, 727, 73 Cal. Rptr. 279*

Notice to agent of facts sufficient to put reasonable person on inquiry imputed to and binding on principal. *Clark Equipment Co. v. Wheat (1979) 92 Cal. App. 3d 503, 527, 154 Cal. Rptr. 874*

Agent's knowledge of falsity of representations imputable to principal [*Civ. Code § 2332*] when agent's representations made within scope of authority. *Clark Equipment Co. v. Wheat (1979) 92 Cal. App. 3d 503, 521, 154 Cal. Rptr. 874*

Agent's knowledge of facts outside scope of authority not imputed to principal. *Redman v. Walters (1979) 88 Cal. App. 3d 448, 454, 152 Cal. Rptr. 42*

Knowledge of agent imputed to principal [*Civ. Code § 2332*] only when matters within scope of agency are learned while acting in course of agency. *Redman v. Walters (1979) 88 Cal. App. 3d 448, 454, 152 Cal. Rptr. 42*

Imputation of knowledge of agent to principal [*Civ. Code § 2332*] assertable only by third party who has dealt with principal through agent. *Redman v. Walters (1979) 88 Cal. App. 3d 448, 454, 152 Cal. Rptr. 42*

Principal deemed to have knowledge of whatever agent has notice of [*Civ. Code § 2332*] even if agent has breached duty to inform principal. *Northern Natural Gas Co. v. Superior Court (1976) 64 Cal. App. 3d 983, 992-993, 134 Cal. Rptr. 850*

Principle of imputed knowledge [*Civ. Code § 2332*] applicable between principal and authorized subagent. *Northern Natural Gas Co. v. Superior Court (1976) 64 Cal. App. 3d 983, 993, 134 Cal. Rptr. 850*

Principal charged with knowledge only when communicated by agent, or when agent breaches duty of disclosure. *Civil Service Employees Ins. Co. v. Blake (1966) 245 Cal. App. 2d 196, 199-200, 53 Cal. Rptr. 701* ; *Kelley v. British Coml. Ins. Co. (1963) 221 Cal. App. 2d 554, 561, 34 Cal. Rptr. 564*

Lapse of time reasonable for communication of knowledge allowed before principal charged with knowledge. *Kelley v. British Coml. Ins. Co. (1963) 221 Cal. App. 2d 554, 561, 34 Cal. Rptr. 564*

Scope of agency, and whether particular fact known to agent was within that scope, are issues of fact to be resolved in individual cases. *Maron v. Swig (1952) 115 Cal. App. 2d 87, 90, 251 P.2d 770*

Imputation of agent's knowledge to principal [*Civ. Code § 2332*] not presumption but rule of law; showing that principal did not learn of facts imparted to agent normally irrelevant. *Columbia Pictures Corp. v. DeToth (1948) 87 Cal. App. 2d 620, 630-631, 197 P.2d 580*

Knowledge acquired before creation of agency relationship imputable to principal [*Civ. Code § 2332*] if knowledge used by agent in acting for principal. *Columbia Pictures Corp. v. DeToth (1948) 87 Cal. App. 2d 620, 631, 197 P.2d 580*

[2] Authority of Agent

[a] Actual

Principal's conduct in allowing agent and third party to believe that agent had authority to alter terms of printed contract created both actual [*Civ. Code § 2316*] and ostensible [*Civ. Code § 2317*] authority to do so. *Thompson v. Occidental Life Ins. Co. (1973) 9 Cal. 3d 904, 913-914, 109 Cal. Rptr. 473, 513 P.2d 353*

Actual authority [*Civ. Code § 2316*] can be created by conduct of principal that causes agent reasonably to believe that authority exists. *Tomerlin v. Canadian Indemnity Co. (1964) 61 Cal. 2d 638, 643, 39 Cal. Rptr. 731, 394 P.2d 571*

Agent's belief in authority is prerequisite to finding of implied actual authority [*Civ. Code § 2316*]. *Columbia Outfitting Co. v. Freeman (1950) 36 Cal. 2d 216, 219, 223 P.2d 21*

Facts that doctor billed for services separately from hospital, maintained staff privileges at other hospitals, and had no office at hospital, did not preclude conclusion that doctor acted as hospital's actual agent in course and scope of duties as director of adolescent psychiatric unit at hospital. *Jacoves v. United Merchandising Corp. (1992) 9 Cal. App. 4th 88, 103-104, 11 Cal. Rptr. 2d 468*

Scope of agent's authority determinable by conduct of principal and agent in business relationships. *Trane Co. v. Gilbert (1968) 267 Cal. App. 2d 720, 726, 73 Cal. Rptr. 279*

Express agreement unnecessary to create actual authority. *Transport Clearings-Bay Area v. Simmonds (1964) 226 Cal. App. 2d 405, 425, 38 Cal. Rptr. 116*

Fact of agent's belief in existence of authority insufficient to create actual authority [*Civ. Code § 2316*]; conduct of principal engendering belief is necessary. *South Sacramento Drayage Co. v. Campbell Soup Co. (1963) 220 Cal. App. 2d 851, 856-857, 34 Cal. Rptr. 137*

Principal's practice of requiring approval of hauling contracts negates reasonableness of agent's belief that authority existed to negotiate hauling contract. *South Sacramento Drayage Co. v. Campbell Soup Co. (1963) 220 Cal. App. 2d 851, 856-857, 34 Cal. Rptr. 137*

[b] Implied

Wife's conduct conferred on husband implied actual authority to sign wife's name and represent it as her signature. *In re Nelson (9th Cir. 1985) 761 F.2d 1320, 1321-1323*

General agent for purposes of negotiating group medical plan had implied authority [*Civ. Code § 2319*] to agree to arbitration provision. *Madden v. Kaiser Foundation Hospitals (1976) 17 Cal. 3d 699, 706-709, 131 Cal. Rptr. 882, 552 P.2d 1178*

Agent can acquire property from principal provided full disclosure of material facts is made. *Donnellan v. Rocks (1972) 22 Cal. App. 3d 925, 929, 99 Cal. Rptr. 692*

Agent acting within authority has implied authority to appoint subagent. *Leno v. Young Men's Christian Assn. (1971) 17 Cal. App. 3d 651, 658, 95 Cal. Rptr. 96*

Agent's implied authority permits any means incidental to and reasonably proper in performance of assigned task. *Garber v. Prudential Ins. Co. (1962) 203 Cal. App. 2d 693, 701, 22 Cal. Rptr. 123*

Agent strictly engaged in endeavor to bring about result for which agency created acts within implied authority. *Garber v. Prudential Ins. Co. (1962) 203 Cal. App. 2d 693, 703, 22 Cal. Rptr. 123*

[c] Limitations

Principal cannot to avoid contract entered into by agent in violation of secret agreement limiting powers of agent; authority of agent is that which principal allowed third party to believe [*Civ. Code § 2317*]. *Leavens v. Pinkham & McKevitt (1912) 164 Cal. 242, 247-248, 128 P. 399* ; *Case v. McConnell & Forrester (1935) 5 Cal. App. 2d 688, 692, 44 P.2d 414*

[d] Ostensible

Ostensible agency requires showing sufficient to establish estoppel. *Associated Creditors' Agency v. Davis (1975) 13 Cal. 3d 374, 403, 118 Cal. Rptr. 772, 530 P.2d 1084*

Ostensible agency arises from reasonable belief of third party in agent's authority, engendered by conduct of principal [*Civ. Code §§ 2300, 2317*]. *Tomerlin v. Canadian Indemnity Co. (1964) 61 Cal. 2d 638, 643, 39 Cal. Rptr. 731, 394 P.2d 571* ; *Mannion v. Campbell Soup Co. (1966) 243 Cal. App. 2d 317, 320, 52 Cal. Rptr. 246*

Nonsuit on issue of ostensible agency was improper when injured patient sought treatment at hospital and there was no evidence she should have known that negligent physician was not agent of hospital. *Mejia v. Community Hospital of San Bernardino (2002) 99 Cal. App. 4th 1448, 1460, 122 Cal. Rptr. 2d 233*

Nursing home's attempt to enforce arbitration agreement signed by daughters of deceased resident was unsuccessful when resident did not signarbitration agreement, was mentally incompetent when her daughters signed agreement, and had not signed power of attorney; fact that daughters may have represented themselves as having power to sign agreement for resident was irrelevant, as a person cannot become agent of another merely by representing himself or herself as such. *Pagarigan v. Libby Care Center, Inc. (2002) 99 Cal. App. 4th 298, 301-302, 120 Cal. Rptr. 2d 892*

Hospital's designation of doctor as director of its adolescent psychiatric unit, and provision of releases for him on its admissions forms, created reasonable inference that hospital intentionally or unintentionally caused parents of patient to rely on its implied representations that doctor was hospital's agent; summary judgment for hospital on issue of ostensible agency was improper. *Jacoves v. United Merchandising Corp. (1992) 9 Cal. App. 4th 88, 103-104, 11 Cal. Rptr. 2d 468*

Lack of negligence by third party in relying on ostensible authority is prerequisite to recovery from principal for act of ostensible agent. *People v. Surety Ins. Co. (1982) 136 Cal. App. 3d 556, 562, 186 Cal. Rptr. 385*

Acts or declarations of principal relied on for creation of ostensible agency not required to have been made to third party directly. *Meyer v. Ford Motor Co. (1969) 275 Cal. App. 2d 90, 102, 79 Cal. Rptr. 816*

Appointment of agent to particular position is sufficient conduct by principal to create ostensible agency in appointee. *Meyer v. Ford Motor Co. (1969) 275 Cal. App. 2d 90, 102, 79 Cal. Rptr. 816*

Principal is liable for acts of ostensible agent only when elements of estoppel are present. *Kelley v. R.F. Jones Co. (1969) 272 Cal. App. 2d 113, 120-121, 77 Cal. Rptr. 170*

Elements of estoppel for purposes of ostensible agency are representation by principal, reliance by third party, and third party's change of position or injury resulting from reliance. *Kelley v. R.F. Jones Co. (1969) 272 Cal. App. 2d 113, 121, 77 Cal. Rptr. 170*

Truck drivers found to have ostensible authority to sign waivers of right to payment from shipper when drivers executed all contracts on behalf of carriers, shipper had no notice that drivers lacked authority, drivers were only representatives of carrier with whom shipper dealt, shipper did not even know which company would haul shipment until driver arrived, and truck drivers routinely bound principals to waiver agreements. *C.A.R. Transp. Brokerage Co. v. Darden Restaurants, Inc. (9th Cir. 2000) 213 F.3d 474, 479-481*

[e] Third Party's Duty of Inquiry

Third party has duty to inquire into authority of agent when no ostensible agency established. *Ernst v. Searle (1933) 218 Cal. 233, 240, 22 P.2d 715*

No additional duty on third party to investigate required once ostensible agency established. *Beck v. Arthur Murray, Inc. (1966) 245 Cal. App. 2d 976, 981, 54 Cal. Rptr. 328* ; *Myers v. Stephens (1965) 233 Cal. App. 2d 104, 115, 43 Cal. Rptr. 420*

Failure to make inquiry into extent of authority when circumstances would lead reasonable person to do so permits action against principal only to the extent of agent's actual authority. *United States Credit Bureau, Inc. v. Cheney (1965) 235 Cal. App. 2d 357, 361, 45 Cal. Rptr. 525*

[3] Creation of Agency Relationship

Website sponsor and website operator did not have principal-agent relationship when sponsor had no right to control management of web site; sponsor thus could not be held vicariously liable for operator's posting of allegedly defamatory email authored by third party. *Batzel v. Smith (9th Cir. 2003) 333 F.3d 1018, 1035-1036* .

Agency relationship is not created by favor or suggestion; lack of either legal duty or agent's assent to right of control by principal precludes finding that agency relationship existed. *Edwards v. Freeman (1949) 34 Cal. 2d 589, 591-592, 212 P.2d 883* ; *Violette v. Shoup (1993) 16 Cal. App. 4th 611, 620, 20 Cal. Rptr. 2d 358*

Agent's authority to exercise discretion unnecessary to creation of agency relationship. *Skopp v. Weaver (1976) 16 Cal. 3d 432, 439, 128 Cal. Rptr. 19, 546 P.2d 307*

No principal-agent relationship existed between franchisor and franchisee; franchisee, not franchisor, was owner of business for purposes of eminent domain proceedings. *Redevelopment Agency v. International House of Pancakes, Inc. (1992) 9 Cal. App. 4th 1343, 1350-1352, 12 Cal. Rptr. 2d 358*

No principal-agent relationship existed between automobile dealer and customer taking test drive within meaning of *Ins. Code § 11580.9(a)*, making insurer of dealer primary if motor vehicle was being operated by employee or agent of dealer. *St. Paul Ins. Co. v. Industrial Underwriters Ins. Co. (1989) 214 Cal. App. 3d 117, 122-125, 262 Cal. Rptr. 490*

Customer's deposit of securities with bank for purchase and sale pursuant to letter of instructions created special deposit with aspects of both trust and agency relationships. *Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 859-861, 251 Cal. Rptr. 530*

No principal-agent relationship was created between franchisor and franchisee as matter of law if franchisor did not have complete control over franchisee. *Wickham v. Southland Corp. (1985) 168 Cal. App. 3d 49, 55-61, 213 Cal. Rptr. 825*

Conduct of associate attorney in accepting engagement to try action and promising to keep original attorney advised of developments sufficient to establish contract of agency implied from conduct of parties. *Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 940, 175 Cal. Rptr. 81*

Right of alleged principal to control behavior of alleged agent is essential element to proof of agency relationship. *DeSuza v. Andersack (1976) 63 Cal. App. 3d 694, 699, 133 Cal. Rptr. 920*

Significant test of agency relationship is right to control activities of agent; actual exercise of right to control is unnecessary. *Stevens v. Roman Catholic Bishop of Fresno (1975) 49 Cal. App. 3d 877, 884, 123 Cal. Rptr. 171*

Daughter using family car for family business of buying shoes for sister was agent of parents. *Johnson v. Peterson (1974) 38 Cal. App. 3d 619, 623, 113 Cal. Rptr. 445*

Neither particular words nor consideration necessary to establish agency; conduct by each party manifesting acceptance is sufficient. *Frank Pisano & Associates v. Taggart (1972) 29 Cal. App. 3d 1, 15, 105 Cal. Rptr. 414*

Agency relationship requires only that parties act in manner manifesting acceptance of relationship whereby one of them is to perform work for another under other's direction. *Housewright v. Pacific Far East Line, Inc. (1964) 229 Cal. App. 2d 259, 265, 40 Cal. Rptr. 208*

Agency finding not dependent on consideration; conduct of parties and action or inaction by principal is sufficient showing. *Vargas v. Ruggiero (1961) 197 Cal. App. 2d 709, 715, 17 Cal. Rptr. 568*

[4] Delegation of Agent's Authority

Agent of surety that had undertaken bail bond could not lawfully delegate authority to police detective to seek extension of time from court on bail forfeiture. *Seneca Ins. Co. v. County of Orange (2004) 117 Cal. App. 4th 611, 619-620, 13 Cal. Rptr. 3d 1*

Unauthorized subagent [*Civ. Code § 2350*] cannot to look to original principal for compensation. *Hasekian v. Krotz (1968) 268 Cal. App. 2d 311, 318, 74 Cal. Rptr. 410* ; *Goodwin v. Glick (1956) 139 Cal. App. 2d Supp. 936, 939-940*

Authority to appoint subagent [*Civ. Code § 2349*] inferrable from nature of agency relationship in area ordinarily allowing appointment. *Trane Co. v. Gilbert (1968) 267 Cal. App. 2d 720, 726, 73 Cal. Rptr. 279*

Delegated power subject to discretion or judgment of delegatee is not delegable further by delegatee. *Schecter v. County of Los Angeles (1968) 258 Cal. App. 2d 391, 396-397, 65 Cal. Rptr. 739*

Supervising employees liable to third parties for acts of subordinates only when supervising employees act wrongfully themselves. *Towt v. Pope (1959) 168 Cal. App. 2d 520, 530, 336 P.2d 276*

Subagent has no duty to disclose to original principal fraud perpetrated by agent [*Civ. Code §§ 2022, 2350*]. *Kavanagh v. Wade (1940) 42 Cal. App. 2d 92, 97, 108 P.2d 475*

Subagent retained by agent to assist agent is not in privity of contract with principal. *Goodwin v. Glick (1956) 139 Cal. App. 2d Supp. 936, 939*

[5] Equal Dignities Rule

Rule that ratification must be made in writing when writing would have been necessary to confer original authority [*Civ. Code §§ 2309, 2310*] not applicable as between principal and agent. *Rakestraw v. Rodrigues (1972) 8 Cal. 3d 67, 76, 104 Cal. Rptr. 57, 63, 500 P.2d 1401*

Equal dignities rule [*Civ. Code § 2309*] not applicable in agent's indemnity action against principal for damages paid by agent to third party because of principal's refusal to perform contract entered into by agent. *Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal. 2d 834, 842-843, 36 Cal. Rptr. 741, 389 P.2d 133*

Delegation of purely mechanical act, such as signing document, not subject to equal dignities rule. *Ellis v. Mihelis (1963) 60 Cal. 2d 206, 214, 32 Cal. Rptr. 415, 384 P.2d 7*

Authority of executive officer of corporation not required to be in writing under equal dignities rule. *Jeppi v. Brockman Holding Co. (1949) 34 Cal. 2d 11, 17, 206 P.2d 847*

Rule [*Civ. Code § 2309*] does not require written authorization to exercise right required by agreement, but not by law, to be in writing. *Ripani v. Liberty Loan Corp. (1979) 95 Cal. App. 3d 603, 610, 157 Cal. Rptr. 272*

Written authorization unnecessary when agent is executive officer of principal corporation. *Ripani v. Liberty Loan Corp. (1979) 95 Cal. App. 3d 603, 609, 157 Cal. Rptr. 272*

Principal estopped from asserting equal dignities rule [*Civ. Code § 2309*] when principal by own conduct has lulled third party into believing that agent had or did not need written authority. *Kerner v. Hughes Tool Co. (1976) 56 Cal. App. 3d 924, 934, 128 Cal. Rptr. 839* (estoppel found); *McGirr v. Gulf Oil Corp. (1974) 41 Cal. App. 3d 246, 258, 115 Cal. Rptr. 902* (no estoppel found)

Principal's and agent's estoppel to assert defense of statute of frauds [*Civ. Code § 1624*] does not affect ability to assert equal dignities rule [*Civ. Code § 2309*]. *McGirr v. Gulf Oil Corp. (1974) 41 Cal. App. 3d 246, 256, 115 Cal. Rptr. 902*

Written authorization unnecessary when agent acts in presence of and at direction of principal. *Lathrop v. Gauger (1954) 127 Cal. App. 2d 754, 764, 274 P.2d 730*

[6] Liability of Principal

[a] To Agent

Principal obligated to indemnify agent for liability incurred in breach of contract executed for principal. *Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal. 2d 834, 837, 36 Cal. Rptr. 741, 389 P.2d 133*

Rules of contract interpretation generally applicable to construction of compensation provisions of agency agreement. *Monroe v. Grolier Society (1929) 208 Cal. 447, 451, 281 P. 604*

Principal's right to revoke agency subject to contractual limitation; revocation contrary to limitation still effective [*Civ. Code § 2356(a)(1)*] but constitutes breach of agency contract. *Roth v. Moeller (1921) 185 Cal. 415, 418-419, 197 P. 62*

Promise of compensation in reasonable amount implied from agreement to perform service for benefit of another. *Toomy v. Dunphy (1890) 86 Cal. 639, 643, 25 P. 130* ; *Spinelli v. Tallcott (1969) 272 Cal. App. 2d 589, 595, 77 Cal. Rptr. 481*

Principal obligated to compensate agent for acquisitions resulting from agent's activities. *Zalk v. General Exploration Co. (1980) 105 Cal. App. 3d 786, 794, 164 Cal. Rptr. 647*

Principal's interference with agent's exclusive sales contract, by selling to persons within agent's territory, gave agent cause of action for profits thatwould have been made had agent made sales. *Hacker etc. Co. v. Chapman V. Mfg. Co. (1936) 17 Cal. App. 2d 265, 267-268, 61 P.2d 944*

[b] To Third Party

Allegation of negligence of agent unnecessary when allegation that principal negligent. *Golceff v. Sugarman (1950) 36 Cal. 2d 152, 154, 222 P.2d 665*

Construction contract arbitration award was improperly imposed against agent of previously undisclosed principal, based on service of arbitration demand on principal only; arbitrator did not acquire personal jurisdiction over agent as result of agent's participation on behalf of principal at arbitration proceedings. *Ikerd v. Warren T. Merrill & Sons (1992) 9 Cal. App. 4th 1833, 1842-1844, 12 Cal. Rptr. 2d 398*

Civ. Code § 2338, providing in part that principal is responsible to third persons for negligence of agent in transaction of business of agency, including wrongful acts committed by agent in and as part of transaction of such business, reflects common law doctrine of respondeat superior. *Spradlin v. Cox (1988) 201 Cal. App. 3d 799, 808-809, 247 Cal. Rptr. 347*

Liability of principal for torts of agent or employee is not always based on doctrine of respondeat superior; in fraud cases, principal is liable when principal intentionally misinforms agent or withholds information from agent and agent as result innocently misrepresents. *Barrett v. Bank of America (1986) 183 Cal. App. 3d 1362, 1370, 229 Cal. Rptr. 16*

Employee drinking in employer's parking lot after work was not acting within scope of employment for respondeat superior purposes. *Harris v. Trojan Fireworks Co. (1984) 155 Cal. App. 3d 830, 835, 202 Cal. Rptr. 440*

Principal liable for fraud of agent despite having received no benefit from fraud. *Spahn v. Guild Industries Corp. (1979) 94 Cal. App. 3d 143, 155-156, 156 Cal. Rptr. 375*

Risk fairly regarded as typical of or broadly incident to principal's enterprise is reasonably foreseeable for purposes of making principal liable for acts of agent. *Clark Equipment Co. v. Wheat (1979) 92 Cal. App. 3d 503, 522, 154 Cal. Rptr. 874*

Principal liable without fault for act of agent (1) required or incident to agent's duties or (2) reasonably foreseeable by principal. *Clark Equipment Co. v. Wheat (1979) 92 Cal. App. 3d 503, 520, 154 Cal. Rptr. 874*

Principal not liable for injuries caused by negligent physical conduct of nonservant agent. *Van Den Eikhof v. Hocker (1978) 87 Cal. App. 3d 900, 905, 151 Cal. Rptr. 456*

Punitive damages for fraudulent acts of agent properly awarded against principal who ratified agent's acts. *Walker v. Signal Companies, Inc. (1978) 84 Cal. App. 3d 982, 999, 149 Cal. Rptr. 119*

Principal liable to third parties for willful wrongs of unauthorized subagent committed in course of service to principal. *Eye v. Kafer, Inc. (1962) 202 Cal. App. 2d 449, 454, 20 Cal. Rptr. 841*

Principal not liable for unauthorized act of agent unless ostensible agency shown or act ratified by principal. *Grasslands etc. Assn. v. Lucky etc. Co. (1952) 112 Cal. App. 2d 776, 779, 247 P.2d 380*

Principal liable for any wrongful act of agent specifically authorized by principal. *Maberto v. Wolfe (1930) 106 Cal. App. 202, 206, 289 P. 218*

[7] Liability of Agent

[a] To Principal

Agent must account to principal for all benefits and advantages received as outgrowth of agency. *Savage v. Mayer (1949) 33 Cal2d 548, 551, 203 P.2d 9* ; *Kennard v. Glick (1960) 183 Cal. App. 2d 246, 250-251, 7 Cal. Rptr. 88*

Principal who had no active part in wrong of agent is entitled to indemnification from agent for payment to third party of damages based on vicarious liability. *Bradley v. Rosenthal (1908) 154 Cal. 420, 423-425, 97 P. 875* ; *Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 77, 38 Cal. Rptr. 490*

Agent owes principal duties to (1) make fullest disclosure of material facts that might affect principal's decision-making, (2) use reasonable care, skill, and diligence in performing object of agency, and (3) refrain from competing with principal on matters connected with agency. *Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 940-941, 175 Cal. Rptr. 81*

Breach of agent's fiduciary duty to principal is tortious. *Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 940-941, 175 Cal. Rptr. 81*

Agent's acquisition of interest adverse to principal or misrepresentation or concealment regarding subject matter of agency and agent's interest therein breach of agent's fiduciary duty owed to principal. *Wade v. Diamond A Cattle Co. (1975) 44 Cal. App. 3d 453, 458, 118 Cal. Rptr. 695*

Undisclosed profits realized by agent from agency transaction are recoverable by principal despite fairness of price. *Wade v. Diamond A Cattle Co. (1975) 44 Cal. App. 3d 453, 458, 118 Cal. Rptr. 695* ; *Store of Happiness v. Carmona & Allen (1957) 152 Cal. App. 2d 266, 272, 312 P.2d 1104*

Agent liable to principal for negligent failure to communicate material facts to principal. *Cecka v. Beckman & Co., Inc. (1972) 28 Cal. App. 3d 5, 11, 104 Cal. Rptr. 374*

Agent who violates duty to use reasonable care, skill, and diligence liable for any damages actually sustained by principal as result of negligence or breach of duty of agent. *Timmsen v. Forest E. Olson, Inc. (1970) 6 Cal. App. 3d 860, 871, 86 Cal. Rptr. 359*

Principal entitled to damages suffered as result of agent's breach of agency contract. *Spitzer v. Pathe Exchange, Inc. (1933) 132 Cal. App. 612, 619, 23 P.2d 308*

[b] To Third Party

Action for breach of warranty of authority requires allegations that agent acted in excess of authority and that plaintiff was ignorant of true authority and relied on agent's representations of authority. *Yoakum v. Tarver (1967) 256 Cal. App. 2d 202, 206-207, 64 Cal. Rptr. 7*

Principal's liability for tort of agent does not exonerate agent for tort liability incurred while acting as agent. *Bayuk v. Edson (1965) 236 Cal. App. 2d 309, 320, 46 Cal. Rptr. 49*

[8] Nature of Principal and Agent Relationship

Agent of travelers potentially liable for failure to exercise duty to warn of dangers known to agent but not to principals. *Rookard v. Mexicoach (9th Cir. 1982) 680 F.2d 1257, 1262-1263* (applying California law)

Agency relationship does not require discretion in agent's performance of task for principal. *Skopp v. Weaver (1976) 16 Cal. 3d 432, 439, 128 Cal. Rptr. 19, 546 P.2d 307*

Principal's questioning of agent's acts casts burden on agent to show utmost good faith and disclosure of all facts relating to questioned transaction. *Batson v. Strehlow (1968) 68 Cal. 2d 662, 675, 68 Cal. Rptr. 589, 441 P.2d 101*

Travel agent has duty to disclose reasonably obtainable material information to traveler unless information is so clearly obvious and apparent to traveler that, as matter of law, travel agent would not be negligent in failing to disclose it. *McCollum v. Friendly Hills Travel Center (1985) 172 Cal. App. 3d 83, 94, 217 Cal. Rptr. 919*

Agent status and employee status are not mutually exclusive. *Lombardo v. Santa Monica Young Men's Christian Assn. (1985) 169 Cal. App. 3d 529, 541, 215 Cal. Rptr. 224* ; *Estate of Levinthal (1980) 105 Cal. App. 3d 691, 699, 164 Cal. Rptr. 628*

Agent is fiduciary with same obligations of diligence and faithful service as trustee, including duty to make fullest disclosure of all material facts that might affect decision-making of principal. *Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 940, 175 Cal. Rptr. 81*

Agent is fiduciary held to trustee's standard of loyalty and honesty [former *Civ. Code §§ 2322(3), 2228-2240* (*now see Civ. Code § 2322(c)*; *Prob. Code §§ 16002, 16004, 16005, 16009*)]; standard is same regardless of form of compensation, whether certain, contingent, or gratuitous. *Zalk v. General Exploration Co. (1980) 105 Cal. App. 3d 786, 793, 164 Cal. Rptr. 647* (also compares status of agent with middleperson)

Agent cannot act on behalf of person whose interests are adverse to, or in competition with, principal. *Zalk v. General Exploration Co. (1980) 105 Cal. App. 3d 786, 793, 164 Cal. Rptr. 647* ; *Rezos v. Zahm & Nagel Co. (1926) 78 Cal. App. 728, 731, 246 P. 564*

Agent status [*Civ. Code § 2295*] and independent contractor status not mutually exclusive. *City of Los Angeles v. Meyers Bros. Parking System, Inc. (1975) 54 Cal. App. 3d 135, 138, 126 Cal. Rptr. 545*

Agent must exercise ordinary care to communicate to principal knowledge acquired in course of agency with respect to material facts which might affect principal's decisions concerning transaction(s) entrusted to agent. *Cecka v. Beckman & Co. (1972) 28 Cal. App. 3d 5, 11, 104 Cal. Rptr. 374*

Characteristics of agency: (1) Agent has power to alter relationship between principal and third parties, and between self and principal; (2) agent is fiduciary with respect to matters within scope of agency; and (3) principal has right to control conduct of agent regarding matters entrusted to agent. *Alvarez v. Felker Mfg. Co. (1964) 230 Cal. App. 2d 987, 999, 41 Cal. Rptr. 514*

Agency is relationship resulting from act of principal authorizing agent to conduct one or more transactions with one or more third persons and to exercise a degree of discretion in effecting purpose of principal. *Store of Happiness v. Carmona & Allen (1957) 152 Cal. App. 2d 266, 269, 312 P.2d 1104* ; *Wallace v. Sinclair (1952) 114 Cal. App. 2d 220, 229, 250 P.2d 154*

[9] Other Relationships Distinguished

Although attorney may be client's agent in business sense, with authority to make binding commitments or agreements, attorney in role of trial counsel is independent contractor and client is therefore not vicariously liable for tortious conduct of attorney in role as trial counsel. *Lynn v. Superior Court (1986) 180 Cal. App. 3d 346, 349, 225 Cal. Rptr. 427*

[10] Power of Attorney

Power of attorney under former *Civ. Code § 2494* did not give attorney in fact power to appear in court or otherwise act as attorney at law for principal. *Drake v. Superior Court (1994) 21 Cal. App. 4th 1826, 1830-1831, 26 Cal. Rptr. 2d 829*

Agent's adjudicated incompetency did not necessarily terminate agency [*Civ. Code § 2355*] and acts performed after restoration of capacity were within authority of nondurable power of attorney granted before incompetency. *Clay v. Saute (1956) 140 Cal. App. 2d 681, 685-686, 295 P.2d 914*

[11] Ratification

Ratification is conduct of principal from which intention to consent to or adopt agent's act is inferrable, including conduct inconsistent with any other reasonable intention. *Rakestraw v. Rodrigues (1972) 8 Cal. 3d 67, 73, 104 Cal. Rptr. 57, 500 P.2d 1401*

Principal cannot ratify beneficial parts of unauthorized transaction while disavowing burdens of same transaction. *Navrides v. Zurich Ins. Co. (1971) 5 Cal. 3d 698, 704, 97 Cal. Rptr. 309, 488 P.2d 637* ; *Price v. McConnell (1960) 184 Cal. App. 2d 660, 666, 7 Cal. Rptr. 695*

Ratification of part of transaction is ratification of entire transaction [*Civ. Code § 2311*]. *Navrides v. Zurich Ins. Co. (1971) 5 Cal. 3d 698, 704, 97 Cal. Rptr. 309, 488 P.2d 637* ; *Price v. McConnell (1960) 184 Cal. App. 2d 660, 666, 7 Cal. Rptr. 695*

Principal's lawsuit seeking to enforce unauthorized contract entered into by agent is ratification of contract. *Navrides v. Zurich Ins. Co. (1971) 5 Cal. 3d 698, 703, 97 Cal. Rptr. 309, 488 P.2d 637*

Unauthorized act of agent ratifiable either expressly or by implication from principal's conduct. *Union Trust and Realty Co. v. Best (1911) 160 Cal. 263, 267, 116 P. 737*

Acts taken to minimize loss when rescission is impossible are not ratification. *Pacific Vinegar etc. Works v. Smith (1907) 152 Cal. 507, 511-512, 93 P. 85*

Jury's finding that movie production company ratified or authorized movie producer's wrongful conduct toward investors was supported by evidence;company did not repudiate producer's acts, and jury could determine that supposedly "special relationship" was created to give company deniability for producer's actions. *Streetscenes LLC v. ITC Entertainment Group, Inc. (2002) 103 Cal. App. 4th 233, 242-243, 126 Cal. Rptr. 2d 754*

Power of attorney (including power to ratify), executed after agent executed document on behalf of principal, was sufficient evidence to support conclusion that signing of power of attorney ratified agent's transaction. *White v. Moriarty (1993) 15 Cal. App. 4th 1290, 1295-1296, 19 Cal. Rptr. 2d 200*

Punitive damages for fraudulent acts of agent properly awarded against principal who ratified agent's acts. *Walker v. Signal Companies, Inc. (1978) 84 Cal. App. 3d 982, 999, 149 Cal. Rptr. 119*

Principal's retention of funds acquired by agent in unauthorized transaction is ratification of transaction. *Reusche v. California Pac. Title Ins. Co. (1965) 231 Cal. App. 2d 731, 737, 42 Cal. Rptr. 262*

Ratification is possible despite ignorance of facts of transaction when ignorance arises from principal's failure to investigate when reasonable person would do so. *Reusche v. California Pac. Title Ins. Co. (1965) 231 Cal. App. 2d 731, 737, 42 Cal. Rptr. 262*

Ratification made without knowledge of material facts involved in agent's acts, including the legal effect of the acts, is void. *Bate v. Marsteller (1959) 175 Cal. App. 2d 573, 582-583, 346 P.2d 903* ; *Estate of Fletcher (1940) 36 Cal. App. 2d 567, 573, 97 P.2d 1039*

[12] Termination of Agency

Principal always possesses power to discharge agent, but right to discharge depends on circumstances such as parties' contractual relationship. *Long Beach Drug Co. v. United Drug Co. (1939) 13 Cal. 2d 158, 174, 89 P.2d 386* ; *Lynch v. Gagnon (1929) 96 Cal. App. 512, 518-519, 274 P. 584*

Contract limiting termination does not prevent termination by principal, but allows agent remedy of breach of contract action. *Stoll v. Stoll (1936) 5 Cal. 2d 687, 691-693, 56 P.2d 226*

Principal's right to revoke agency [*Civ. Code § 2356*] subject to contractual limitation; revocation contrary to limitation is still effective but breach of agency contract. *Roth v. Moeller (1921) 185 Cal. 415, 418-419, 197 P. 62*

Absent instructions that cash proceeds be held in trust or as special deposit, agency relationship created by custodial securities account was terminated on sale of securities and collection of cash; once agency relationship terminated, and absent instructions regarding cash proceeds, cash proceeds could be used by agent for its own profit without requiring disclosure and without violating any duties of agent. *Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 860-862, 251 Cal. Rptr. 530*

Agency is coupled with interest, and therefore is not terminated by death of principal, only when (1) agency is held for benefit of agent and not principal; (2) agency was created to secure performance of duty to agent or to protect title in him or her; and (3) agency was created at same time duty or title was created or agency was created for consideration. *Lombardo v. Santa Monica Young Men's Christian Assn. (1985) 169 Cal. App. 3d 529, 541, 215 Cal. Rptr. 224*

Agency or power created for benefit of agent rather than for benefit of principal abrogates principal's power to terminate agency at will. *Becket v. Welton Becket & Associates (1974) 39 Cal. App. 3d 815, 820, 114 Cal. Rptr. 531*

Death of principal immediately terminates agency not coupled with interest. *Charles B. Webster Real Estate v. Rickard (1971) 21 Cal. App. 3d 612, 617, 98 Cal. Rptr. 559*

Agent must have specific, present, and coexisting interest or estate in subject of agency independently of power conferred for agency to be irrevocable as coupled with interest. *Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1023, 84 Cal. Rptr. 538*

Recital of irrevocability in grant of agency not controlling. *Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1023, 84 Cal. Rptr. 538*

Agency relationship usually depends on assent of both parties, permitting either party to terminate agency. *Preszler v. Dudley (1957) 153 Cal. App. 2d 120, 123, 314 P.2d 138*

Agency terminable by mutual abandonment even if not terminable by one party alone. *Preszler v. Dudley (1957) 153 Cal. App. 2d 120, 123-124, 314 P.2d 138*

Agent's adjudicated incompetency does not necessarily terminate agency [*Civ. Code § 2355*] and acts performed after restoration of capacity are within authority of nondurable power of attorney granted before incompetency. *Clay v. Saute (1956) 140 Cal. App. 2d 681, 685-686, 295 P.2d 914*

Sale or other disposal of subject of agency terminates relationship. *E.A. Strout Western Realty v. Gregoire (1950) 101 Cal. App. 2d 512, 519, 225 P.2d 585*

Power of sale contained in mortgage as power coupled with interest in mortgage lien, and power therefore is not revoked [*Civ. Code § 2356(a)*] by death of mortgagor. *New York Life Ins. Co. v. Doane (1936) 13 Cal. App. 2d 233, 237-239, 56 P.2d 989*

Company's agency to collect rents on building combined with 20-year lease in building creates irrevocable agency coupled with interest. *Lane Mortgage Co. v. Crenshaw (1928) 93 Cal. App. 411, 428-429, 269 P. 672*

[13] Undisclosed Agency

Agent contracting with third party deemed to be party to contract when third party has notice of agency but no notice of principal's identity. *G. W. Andersen Construction Co. v. Mars Sales (1985) 164 Cal. App. 3d 326, 330-333, 210 Cal. Rptr. 409*

Agent required to disclose principal's true identity to avoid personal liability; trade name of principal is insufficient. *W. W. Leasing Unlimited v. Commercial Standard Title Ins. Co. (1983) 149 Cal. App. 3d 792, 796, 197 Cal. Rptr. 118*

Liability of undisclosed principal for contract entered into by agent is dependent on finding of actual agency. *Associated Creditors' Agency v. Davis (1975) 13 Cal. 3d 374, 385, 118 Cal. Rptr. 772, 530 P.2d 1084*

Requirement that plaintiff elect whether to proceed against agent or principal is inapplicable when principal not undisclosed. *Clifton Cattle Co. v. Thompson (1974) 43 Cal. App. 3d 11, 16-17, 117 Cal. Rptr. 500*

Third party's election of whether to proceed against principal or against agent is unnecessary until existence of agency relationship established or refuted. *Standard Oil Co. of Cal. v. Doneux (1961) 192 Cal. App. 2d 608, 612-613, 13 Cal. Rptr. 749*

Default, but not judgment, entered against agent by third party who knew of agency relationship constitutes election to seek recovery from agent alone. *Standard Oil Co. of Cal. v. Doneux (1961) 192 Cal. App. 2d 608, 613, 13 Cal. Rptr. 749*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedSpecial AgentsBusiness & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesLiability of AgentBusiness & Corporate LawAgency RelationshipsCauses of Action & RemediesBreach of Fiduciary DutyGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesGeneral OverviewBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesAuthorized Acts of AgentsLiability of PrincipalBusiness & Corporate LawAgency RelationshipsDuties & LiabilitiesKnowledge & NoticeAgent KnowledgeBusiness & Corporate LawAgency RelationshipsEstablishmentGeneral OverviewBusiness & Corporate LawAgency RelationshipsRatificationIllegal ActsBusiness & Corporate LawAgency RelationshipsRatificationLiabilitiesBusiness & Corporate LawAgency RelationshipsTypesEmployee & Employer

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37-427 California Forms of Pleading and Practice--Annotated § 427.63

§ 427.63 Law Reviews

Sykes, "The Economics of Vicarious Liability," *93 Yale L.J. 1231 (1984)*

Review of Selected 1981 Legislation, "Uniform Durable Power of Attorney Act," *13 Pacific L.J. 561 (1982)*

Note, "An Agent's Authority to Bind a Principal to Arbitration," *65 Cal. L. Rev. 355 (1977)*

Comment, "Service Station Torts: Time for the Oil Companies to Assume Their Share of the Responsibility," *10 Cal. Western L. Rev. 382 (1974)*

Comment, "The Liability of Labor Unions for Picket Line Assaults," *21 UCLA L. Rev. 600 (1973)*

Comment, "Liability of a Franchisor for Acts of the Franchisee," *41 S. Cal. L. Rev. 143 (1967)*

Comment, "The Power of an Agent to Bind His Principal--California and the Restatement," *22 Cal. L. Rev. 392 (1934)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityOral & Written Authority

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§ 427.64 Text References

Witkin, Summary of California Law, vol. 3, *Agency and Employment*, §§ 1-4, 6, 12, 13, 43-313; vol. 12, *Real Property*, §§ 465-471; vol. 14, *Wills and Probate*, §§ 835-900 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityGeneral OverviewBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityOral & Written AuthorityEstate, Gift & Trust LawProbateGeneral Overview

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A. Actions by Agent Against Principal

37-427 California Forms of Pleading and Practice--Annotated § 427.80

§ 427.80 Complaint for Damages [Civ. Code § 3300]--Breach of Agency Contract--By Discharged Agent Against Principal

[1] FORM Complaint for Damages [Civ. Code § 3300]--Breach of Agency Contract--By Discharged Agent Against Principal

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR BREACH OF
_____ [*name*], [and DOES I	)	CONTRACT
through _____,]	)	[*Civ. Code § 3300*]
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name of principal*] is, and at all times herein mentioned was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a resident of _____ County, California, *or* a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), _____ County, California].

[2. Defendants DOES 1-_____, inclusive, are sued herein under fictitious names, their true names and capacities being unknown to plaintiff. Plaintiff will amend this complaint to allege their true names and capacities

when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged and that plaintiff's damages as herein alleged were proximately caused by those defendants.]

3. On or about _____ [*date*], plaintiff and defendant entered into _____ [a written *or* an oral *or* an implied by conduct] agreement in _____ [*city*], California, under which plaintiff agreed to serve as defendant's agent for the purpose of _____ [*state purpose of agency, e.g.,* negotiating personal appearance contracts for defendant for the period of _____ (*specify contract term, e.g.,* one year) at a fixed compensation of $_____ per _____ (*specify, e.g.,* month) (plus commissions)]. [Atrue and correct copy of the agreement is attached as Exhibit A and incorporated by reference.]

4. On or about _____ [*date*], defendant terminated the contract with plaintiff by _____ [*specify defendant's manner of termination, e.g.,* informing plaintiff that plaintiff's services would no longer be required].

5. Defendant breached the contract between plaintiff and defendant in that _____ [*describe breach of contract, e.g.,* the agency agreement still had by its terms _____ (*specify remaining duration, e.g.,* six months) to run at the time of defendant's termination, and defendant acted without cause and in violation of the agreement by terminating it before the term had expired].

[6. On the date of termination, there was due, owing, and unpaid the sum of $_____ as salary for plaintiff's services under the agreement for the period from _____ [*date*] to _____ [*date*], (together with the sum of $_____ as commissions earned by plaintiff under the terms of the agency agreement during that period).]

7. At all times mentioned herein, plaintiff was ready, willing, and able to perform all of his/her obligations under the agency agreement, and plaintiff was damaged by the breach of contract in that, had defendant not breached the contract, plaintiff was entitled to receive and would have received _____ [*specify benefits plaintiff would have received had contract not been breached, e.g.,* the sum of $_____ as salary for the _____ (*specify remaining time on contract at the time of termination, e.g.,* months of _____ [*date*] through _____ [*date*]), plus approximately $_____ in commissions during that time].

8. Plaintiff complied with all terms, covenants, and conditions of the agreement required to be performed on his/her part [except _____ (*specify condition(s) not performed*). Plaintiff did not perform these conditions because _____ (*specify facts showing excuse for nonperformance*)].

[9. Plaintiff has made demand on defendant for the sum of $_____, for salary and commissions due. Defendant has failed (and refused,) and continues to fail (and refuse), to pay to plaintiff all or any part of this sum.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages in the sum of $_____;

[2. For special damages consisting of _____ (*specify special damages, if any, e.g.,* damages for loss of earnings in the sum of $_____);]

3. For interest on the damages according to proof at the _____ [legal rate *or* rate of _____ percent per year as provided in the contract] [from _____, [*date*];

[4. For reasonable attorney's fees in the amount of $_____, as provided for in the agency agreement;]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This complaint may be used in a breach of contract action by an agent against a principal for wrongful termination of an agency agreement. This action does not challenge the power of the principal to terminate the agency, but rather seeks damages because defendant principal's termination of the agency prior to its expiration breached the agreement between the parties [*Stoll v. Stoll (1936) 5 Cal. 2d 687, 691-693, 56 P.2d 226* ; *see also* discussion in *§ 427.21[2]*]. For a complaint challenging the principal's power to terminate a specific agency because it is coupled with an interest, see *§ 427.84*. For discussion and forms relating to wrongful termination of an employee, see Ch. 249, *Employment Law: Termination and Discipline* .

[3] Allegations

The complaint alleges:

- The residence and capacity of defendant (Paragraph 1) [*see Code Civ. Proc. §§ 395, 395.2, 395.5*];

- The potential existence of additional defendants whose identities are unknown to plaintiff (Paragraph 2) [*Code Civ. Proc. § 474*];

- That the parties entered into a written, oral, or implied by conduct agency agreement for a specified period of time (Paragraph 3) [*see Long Beach Drug Co. v. United Drug Co. (1939) 13 Cal. 2d 158, 174, 89 P.2d 386* ; *Capital Nat. Bk. of Sacramento v. Stoll (1934) 220 Cal. 260, 266, 30 P.2d 411* ; *Lynch v. Gagnon (1929) 96 Cal. App. 512, 518-519, 274 P. 584* ; *see Code Civ. Proc. § 430.10(g)*];

- Defendant's breach of contract by terminating the agency (Paragraph 4) [*see Reichert v. General*

Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377] ;

- That defendants' termination of the agency before expiration of the parties' agreement and without cause breached the parties' contract (Paragraph 5) [*see Long Beach Drug Co. v. United Drug Co. (1939) 13 Cal. 2d 158, 174, 89 P.2d 386* ; *Capital Nat. Bk. of Sacramento v. Stoll (1934) 220 Cal. 260, 266, 30 P.2d 411* ; *Lynch v. Gagnon (1929) 96 Cal. App. 512, 518-519, 274 P. 584]* ;

- That defendant owed plaintiff compensation for services rendered before the termination (Paragraph 6) [*see Monroe v. Grolier Society (1929) 208 Cal. 447, 451, 281 P. 604]* ;

- That plaintiff was ready, willing, and able to perform under the agreement, the fact that plaintiff was damaged by the breach, and the approximate amount of benefit plaintiff would have received had the contract not been breached (Paragraph 7) [*see Code Civ. Proc. § 457*; *Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377]* ;

- That plaintiff performed all terms, conditions, and covenants required by the agreement, or was excused from performance because of specified facts, until the agreement was terminated by defendant (Paragraph 8) [*Code Civ. Proc. § 457*]; and

- An optional allegation that plaintiff demanded payment of the compensation that would have been due under the agreement but that the demand was refused by defendant, for use when prejudgment interest is sought on the ground that plaintiff was entitled to recover damages certain, or capable of being made certain by calculation, as of a particular day (Paragraph 9) [*see Civ. Code § 3287*; *Sackett v. Spindler (1967) 248 Cal. App. 2d 220, 240, 56 Cal. Rptr. 435]* .

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[5] Venue

In a breach of contract action, the proper venue is either in the county where the defendant resides, where the contract was to be performed, or where the contract was entered into [*Code Civ. Proc. § 395(a)*]. If the defendant is a corporation, the county where the corporation's principalplace of business is located is also a proper place to institute the action [*Code Civ. Proc. § 395.5*]. An unincorporated association may similarly be sued in the county in which the association's principal office is located [*Code Civ. Proc. § 395.2*]. If a basis for venue other than the residence of the defendant is relied on for venue purposes, it is unnecessary to allege defendant's residence. The fact relied on to establish venue, such as the place where the contract was entered into, must be alleged, however, because the county in which defendant resides is the proper county for trial except as otherwise provided by law [*see Code Civ. Proc. § 395(a)*; *see also* Ch. 571, *Venue*].

[6] Damages

The measure of damages in an action for breach of an obligation arising from contract, unless otherwise expressly provided by the Civil Code, is the amount that will compensate for all detriment proximately caused or that, in the ordinary course of things, would be likely to result therefrom [*Civ. Code § 3300*]. The damages resulting from the breach must be alleged in the complaint [*Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377]* . The proper measure of damages for the wrongful termination of an agency agreement is the benefits that plaintiff would have received had the contract not been breached, less any amount shown by the defendant to have been reasonably mitigable [*Stoll v. Stoll (1936) 5 Cal. 2d 687, 691-692, 56 P.2d 226* ; *Alderson v. Houston (1908) 154 Cal. 1, 16, 96 P. 884]* .

[7] Interest

Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover is vested in him or her on a particular day, is also entitled to recover interest thereon from that day, except during any time that the debtor is prevented by law, or by the act of the creditor, from paying the debt [*Civ. Code § 3287(a*); *see Leff v. Gunter (1983) 33 Cal. 3d 508, 519, 189 Cal. Rptr. 377, 658 P.2d 740* ; *see also Marine Terminals Corp. v. Paceco, Inc. (1983) 145 Cal. App. 3d 991, 997, 193 Cal. Rptr. 687* (fact that damages recoverable were inaccurately stated in complaint does not preclude interest award)].

Every person who is entitled under any judgment to receive damages based on a cause of action in contract when the claim was unliquidated may also recover interest on the award from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed [*Civ. Code § 3287(b*); *see A & M Produce Co. v. FMC Corp. (l982) 135 Cal. App. 3d 473, 496-497* (factors properly considered in exercise of discretion); *see also Civ.Code § 3302* (detriment for breach of obligation to pay money only includes interest on amount due)]. Any legal rate of interest stipulated by a contract entered into before January 1, 1986, remains chargeable after a breachof that contract, until the contract is superseded by a verdict or other new obligation [*Civ. Code § 3289(a)*].

If a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation must bear interest at a rate of 10 percent per annum after a breach [*Civ. Code § 3289(b)*]. For purposes of *Civ. Code § 3289(b)*, the term contract does not include a note secured by a deed of trust on real property [*Civ. Code § 3289(b)*].

When requesting interest at the legal rate, counsel should include the words "legal rate" in Paragraph 2 of the Prayer in the foregoing form of complaint [*see Code Civ. Proc. § 685.010(a)* (specifying legal rate of interest)]. When the contract provides for a rate of interest on damages, counsel should include the words "rate of _____ per year as provided in the contract" and specify the contract rate in the blank space. When requesting prejudgment interest, counsel should include the appropriate date in the bracketed language at the end of Paragraph 2 of the Prayer in this complaint.

[8] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[9] Cross References

For alternative fictitious name allegations and allegations of capacity and residence, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative complaints for breach of contract actions, see *Ch. 140, Contracts, § 140.100* et seq.

For alternative allegations of damages, see Ch. 177, *Damages*

For alternative prayers and verification, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively

For alternative allegations of venue, see Ch. 571, *Venue*

[10] Statutes

Attorney's fees when provided for by contract. *Civ. Code § 1717(a)*

Methods of terminating agency. *Civ. Code §§ 2355, 2356*

Interest as damages. *Civ. Code § 3287 et seq.*

Damages in action based on breach of contract. *Civ. Code §§ 3300-3318*

Venue in action based on breach of contract. *Code Civ. Proc. §§ 395, 395.5*

Complaint or cross complaint based on contract are objectionable if it cannot be ascertained from pleading whether contract is written, oral, or implied by conduct. *Code Civ. Proc. § 430.10(g)*

Pleading performance of conditions precedent. *Code Civ. Proc. § 457*

[11] Decisions

Principal always possesses power to discharge agent, but right to discharge without liability depends on circumstances such as parties' contractual relationship. *Long Beach Drug Co. v. United Drug Co. (1939) 13 Cal. 2d 158, 174, 89 P.2d 386* ; *Lynch v. Gagnon (1929) 96 Cal. App. 512, 518-519, 274 P. 584*

Contract limiting termination does not prevent termination by principal, but allows agent remedy of breach of contract action. *Stoll v. Stoll (1936) 5 Cal. 2d 687, 691-693, 56 P.2d 226*

Principal's right to revoke agency is subject to contractual limitation; revocation contrary to limitation is still effective but is breach of agency contract. *Roth v. Moeller (1921) 185 Cal. 415, 418-419, 197 P. 62*

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Volume 37: Pretrial Proceedings thru Privacy-Chs. 425-439
Chapter 427 PRINCIPAL AND AGENT
PART IV. FORMS
A. Actions by Agent Against Principal

37-427 California Forms of Pleading and Practice--Annotated § 427.81

§ 427.81 Allegations--Principal's Breach of Exclusive Sales Contract--Action by Agent Against Principal

[1] FORM Allegations--Principal's Breach of Exclusive Sales Contract--Action by Agent Against Principal

1. On or about _____ [*date*], plaintiff and defendant entered into _____ [a written *or* an oral *or* an implied by conduct] agreement in _____ [*city*], California. The agreement provided that _____ [*specify exclusive nature of contract, e.g.,* plaintiff would act as defendant's exclusive a t for the purpose of _____ (*specify, e.g.,* selling defendant's manufactured goods) in the _____ (*describe territory in which plaintiff was granted exclusive agency, e.g.,* state of California), and provided that plaintiff would be compensated by _____ (*specify plaintiff's compensation, e.g.,* a five percent commission on all sales made for defendant in the specified territory)]. [A true and correct copy of the agreement is attached as Exhibit A and made a part hereof by reference.]

2. Notwithstanding the exclusive nature of plaintiff's right to act as defendant's agent under the agreement between the parties, defendant _____ [*specify defendant's breach of contract, e.g.,* sold goods covered by plaintiff's exclusive sales contract to buyers within plaintiff's territory without compensating plaintiff].

3. Plaintiff has been damaged by the actions of defendant in the amount of $_____, representing the profits plaintiff would have made on sales made by defendant in plaintiff's territory.

[2] Use of Form

These allegations are for use in a complaint by an agent against a principal who breached an exclusive agency contract by competing with the agent. The principal's competition, which may arise for example when an agent is exclusively authorized to sell the principal's goods or services, gives rise to an agent's cause of action to recover the profits that the agent would have earned on sales made by the principal [*Hacker etc. Co. v. Chapman V. Mfg. Co. (1936) 17 Cal. App. 2d 265, 267-268, 61 P.2d 944* ; *see also* discussion in *§ 427.21[2]*]. These allegations may be inserted in § 427.80 in an appropriate case as an alternative cause of action, or in place of Paragraphs 3-7 of § 427.80 when the breach of the exclusivity provisions are the only actionable breach by the principal.

[3] Allegations

This form alleges [*Hacker etc. Co. v. Chapman V. Mfg. Co. (1936) 17 Cal. App. 2d 265, 271, 61 P.2d 944]* :

- The exclusive nature of the agency contract (Paragraph 1),
- Defendant's breach of the exclusivity provision of the contract (Paragraph 2), and
- Damages resulting from the principal's competition with the exclusive agent, shown by the amount of sales made by the principal (Paragraph 3).

[4] Decisions

Principal's interference with agent's exclusive sales contract, by selling to customers within agent's exclusive territory, gives agent cause of action for profits that would have been made had agent made the sales. *Hacker etc. Co. v. Chapman V. Mfg. Co. (1936) 17 Cal. App. 2d 265, 267-268, 61 P.2d 944*

[5] Cross Reference

For a related form, *see § 427.80*.

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A. Actions by Agent Against Principal

37-427 California Forms of Pleading and Practice--Annotated § 427.82

§ 427.82 Complaint for Money (Common Count)--For Compensation--By Agent Against Principal

[1] FORM Complaint for Money (Common Count)--For Compensation--By Agent Against Principal

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONEY
_____ [*name*], [and DOES I	)	(Common Count)
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 427.80, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 427.80, Paragraph 2.*]

3. _____ [Within the last _____ (two *or* four) years *or* About _____ (*date*)], at _____ [*city*], Calfornia, defendant became indebted to plaintiff for services rendered by plaintiff as agent for defendant in _____ [*specify purpose of agency, e.g.*, negotiating personal appearance contracts for defendant].

[4. The _____ (agreed sum *or* reasonable value) of the services rendered by plaintiff for the benefit of, and at the request of, defendant is/was the sum of $_____.]

5. No part of the above sum has been paid[, except the sum of $_____] [, notwithstanding that plaintiff has demanded payment therefor], and there is now due, owing, and unpaid from defendant to plaintiff the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____;

2. For interest on the damages according to proof at the _____ [legal rate *or* rate of _____ percent per year as provided in the contract] [from _____ (*date*)];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 427.80.*]

[2] Use of Form

This form of complaint may be used in an action on a common count seeking the reasonable value of the agent's services if no express contract of agency exists, but plaintiff acted as agent at the request of, and for the benefit of, defendant [*see Toomy v. Dunphy (1890) 86 Cal. 639, 643, 25 P. 130* ; *Spinelli v. Tallcott (1969) 272 Cal. App. 2d 589, 595, 77 Cal. Rptr. 481]* . This complaint may also be used on a common count for money had and received under an express contract if plaintiff has fully performed and nothing remains to be done except payment by the defendant [*see Ferro v. Citizens Nat. Trust & Sav. Bank (1955) 44 Cal. 2d 401, 409, 282 P.2d 849* ; *Rains v. Arnett (1961) 189 Cal. App. 2d 337, 344, 11 Cal. Rptr. 299]* . The substantive allegations may also be included as an alternative cause of action in a complaint for damages for breach of an express agency contract [*Haggerty v. Warner (1953) 115 Cal. App. 2d 468, 475, 252 P.2d 373* ; *see also* discussion in *§ 427.21*].

For additional discussion and forms relating to common counts, see Ch. 121, *Common Counts* . For additional discussion and forms relating to contracts and employment, see Ch. 140, *Contracts* , and Ch. 249 *Employment Law: Termination and Discipline* .

[3] Allegations

This form of complaint alleges:

- The time within which defendant's indebtedness arose (Paragraph 3).

- That the services were rendered at the request of, and for the benefit of, defendant and the agreed sum or reasonable value of the services (Paragraph 4).

- The fact that no payment has been made (Paragraph 5) [*see Haggerty v. Warner (1953) 115 Cal. App. 2d 468, 475, 252 P.2d 373]* .

✱ A demand need not be made or pleaded, however, if plaintiff seeks recovery for the reasonable value of services rendered [*see* *McDonald v. Filice (1967) 252 Cal. App. 2d 613, 623, 60 Cal. Rptr. 832* ; *see also* Ch. 121, *Common Counts*].

[4] Decisions

Rules of contract interpretation generally applicable to construction of compensation provisions of agency agreement. *Monroe v. Grolier Society (1929) 208 Cal. 447, 451, 281 P. 604*

Promise of compensation in reasonable amount is implied from agreement to perform service for benefit of another unless agreed to be gratuitous. *Toomy v. Dunphy (1890) 86 Cal. 639, 643, 25 P. 130* ; *Spinelli v. Tallcott (1969) 272 Cal. App. 2d 589, 595, 77 Cal. Rptr. 481*

Principal obligated to compensate agent for acquisitions resulting from agent's activities. *Zalk v. General Exploration Co. (1980) 105 Cal. App. 3d 786, 794, 164 Cal. Rptr. 647*

Complaint seeking alternative remedies of breach of express contract and common count for services rendered held properly pleaded. *Haggerty v. Warner (1953) 115 Cal. App. 2d 468, 475, 252 P.2d 373*

[5] Cross Reference

For a related form, *see § 427.80*.

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Volume 37: Pretrial Proceedings thru Privacy-Chs. 425-439
Chapter 427 PRINCIPAL AND AGENT
PART IV. FORMS
A. Actions by Agent Against Principal

37-427 California Forms of Pleading and Practice--Annotated § 427.83

§ 427.83 Complaint for Indemnity--Agent Held Liable on Contract Executed for Principal--By Agent Against Principal

[1] FORM Complaint for Indemnity--Agent Held Liable on Contract Executed for Principal--By Agent Against Principal

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR INDEMNITY
_____ [*name*], [and DOES I	)	[Amount demanded _____
through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 427.80, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 427.80, Paragraph 2.*]

3. On or about _____ [*date*], plaintiff and defendant entered into _____ [a written *or* an oral *or* an implied by conduct] agreement in _____ [*city*], California, under which plaintiff agreed to serve as defendant's agent for the purpose of _____ [*state purpose of agency, e.g.,* negotiating contracts for personal appearances by defendant]. Under the agreement, plaintiff was authorized _____ [*specify plaintiff's authority, e.g.,* to enter into contracts with third parties providing for public speaking appearances by

defendant]. [A true and correct copy of the agreement is attached as Exhibit A and incorporated by reference.]

4. On or about _____ [*date*], plaintiff, in his/her capacity as agent for defendant [and under defendant's instructions], entered into a contract on behalf of defendant with _____ [*name of third person*] requiring _____ [*specify contractual obligations, e.g.,* defendant to appear and speak at a banquet on _____ [*date*]. [A true and correct copy of the contract is attached hereto as Exhibit B and incorporated by reference.]

5. Defendant breached the contract between plaintiff and _____ [*name of third person sustaining damages*] by _____ [*specify defendant's breach, e.g.,* failing to appear and speak on the date specified in the contract between plaintiff and _____ (*name of third person*)].

[*EITHER*]

6. On or about _____ [*date*], a judgment was entered in _____ vs. _____, Case No. _____ in the _____ [*specify name of court*] Court, adjudging plaintiff as individually liable to _____ [*name of third person sustaining damages*] on the contract alleged in Paragraph 4, above, because of defendant's failure to perform. Plaintiff has been damaged bythis imposition of personal liability in that _____ [*specify damages sustained, e.g.,* plaintiff satisfied the judgment for $_____ entered in the above-referenced case]. [A true and correct copy of the judgment is attached hereto as Exhibit C and incorporated by reference.]

[*OR*]

6. On or about _____ [*date*], plaintiff was named as defendant in the action entitled _____ vs. _____, Case No. _____, in the _____ [*specify name of court*] Court. Plaintiff agreed to pay the reasonable sum of $_____ to _____ [*name of third person sustaining damages*] in settlement of this action once it became clear that plaintiff was liable to _____ [*name of third person sustaining damages*].

[*CONTINUE*]

7. In addition, plaintiff was required to pay the sum of $_____ in costs and the sum of $_____ as attorney's fees in the course of defending the above-referenced action.

8. The damages recovered by _____ [*name of third party sustaining damages*] against plaintiff, and the costs and attorney's fees incurred by plaintiff, were caused solely by defendant's breach of the contract entered into on defendant's behalf in that _____ [*specify defendant's breach, e.g.,* defendant failed to appear as provided for in the contract negotiated by plaintiff]. Plaintiff's liability for these damages arose not because of any fault on his/her/its part, but because of plaintiff's capacity as defendant's agent and acts taken in that capacity, namely _____ [*specify authorized acts that led to liability, e.g.,* negotiating and signing the contract breached by defendant].

[9. On or about _____ (*date*), plaintiff gave defendant written notice of the action for damages commenced by _____ (*name of third person damaged by defendant's breach*) against plaintiff, requesting a defense of the action, and indicating defendant's primary responsibility for the damages and resultant obligation to indemnify plaintiff for any loss that plaintiff might sustain as a result of the action. (A copy of this notice

is attached hereto as Exhibit D and incorporated by reference.) (Nevertheless, defendant failed to undertake the defense of the action and refused to indemnify plaintiff for any loss resulting from the action.)]

10. By reason of the foregoing, plaintiff is entitled to indemnity from defendant in the total sum of $_____, which amount includes damages paid and costs and attorney's fees incurred as set forth above, but defendant has not paid any part of this sum to plaintiff.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For indemnification in the amount of $_____;

2. For costs of suit herein incurred; and

3. For interest on the damages according to proof at the _____ [legal rate *or* rate of _____ percent per year as provided in the contract] [from _____ (*date*)];

4. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 427.80*].

[2] Use of Form

This form of complaint is for use by an agent seeking indemnity from his or her principal because of the agent's personal liability on a contract entered into by the agent for the principal. The cause of action in such a case rests on an implied promise of reimbursement and indemnity from a principal to an agent for liability incurred as a result of the performance of the agency agreement [*Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal. 2d 834, 837, 843, 36 Cal. Rptr. 741, 389 P.2d 133]* . The implied promise applies only to the actual loss, rather than to the liability incurred, so the cause of action does not arise until the agent has actually paid the obligation [*Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal. 2d 834, 837, 843, 36 Cal. Rptr. 741, 389 P.2d 133* ; *see Civ. Code §§ 2772 et seq.* (indemnity generally) *Civ. Code § 2778* (rules for construction of indemnity contracts); *see also* discussion in *§ 427.25*].

For further discussion of indemnity actions and alternative forms of complaint for indemnity, see Ch. 300, *Indemnity and Contribution* .

[3] Allegations

The complaint alleges:

- The agency agreement between plaintiff and defendant, including the authority of plaintiff agent to contract on behalf of defendant principal (paragraph 3) [*see Civ. Code §§ 2315-2326*].

- That plaintiff contracted with the third party within plaintiff's authority as agent for defendant (paragraph 4)

- Defendant's breach of the contract between plaintiff and the third person sustaining damages

(Paragraph 5)

- Alternative allegations that plaintiff either was adjudged personally liable on the contract after a trial or settled with the third person once liability became apparent (Paragraph 6) [*Rimington v. General Accident Group of Ins. Cos. (1962) 205 Cal. App. 2d 394, 397, 23 Cal. Rptr. 40* ; *see also Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal. 2d 834, 837, 36 Cal. Rptr. 741, 389 P.2d 133]* ; (5) that the plaintiff incurred costs and attorney's fees in the course of defending the third-party action (paragraph 7)

- That the loss suffered by plaintiff was caused by the defendant's breach of contract and not by the active fault of plaintiff (Paragraph 8)

- That plaintiff is entitled to indemnity in a specific amount (Paragraph 10).

Also included is an optional allegation that plaintiff notified defendant of the action brought by the third person and that defendant was given an opportunity to defend the action (Paragraph 8). An agent seeking indemnity from its principal for expenses incurred in defending a third-party action need not have tendered its defense of the action as an absolute prerequisite to indemnification. The agent's failure to notify the principal merely requires that the agent prove that she or he made a reasonable defense [*Fidelity Mortgage Trustee Service, Inc. v. Ridgegate East Homeowners Assn. (1994) 27 Cal. App. 4th 503, 511, 32 Cal. Rptr. 2d 521* ; *see Civ. Code § 2778(4)-(7)*; *Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal. 2d 834, 844, 36 Cal. Rptr. 741, 389 P.2d 133* ; *see also* Restatement (Second) of Agency, § 438, comment e].

[4] State Statutes

Authority of agents generally. *Civ. Code § 2315 et seq.*

Rights and liabilities incurred by agent accrue to principal. *Civ. Code § 2330*

Indemnity actions generally. *Civ. Code § 2772 et seq.*

[5] Decisions

All rights of indemnity except those created by express contractual provisions are subject to comparative principles, under which total or partial indemnity may be awarded depending on facts and circumstances of case; indemnitee's indemnity rights are terminated under *Code Civ. Proc. §§ 877(b)* and *877.6(c)* by good faith settlement between indemnitor and plaintiff in underlying action. *Far West Financial Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 810-814, 251 Cal. Rptr. 202, 760 P.2d 399*

Principal obligated to indemnify agent for liability incurred in contract executed for principal. *Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal. 2d 834, 837, 36 Cal. Rptr. 741, 389 P.2d 133* ; *Rimington v. General Accident Group of Ins. Cos. (1962) 205 Cal. App. 2d 394, 397, 23 Cal. Rptr. 40*

[6] Cross Reference

For a related form, *see § 427.80*.

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A. Actions by Agent Against Principal

37-427 California Forms of Pleading and Practice--Annotated § 427.84

§ 427.84 Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--Agency Not Terminable by Principal Because Coupled With Interest--By Agent Against Principal

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--Agency Not Terminable by Principal Because Coupled With Interest--By Agent Against Principal

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], [and DOES I	)	COMPLAINT FOR DECLARATORY RELIEF
through _____,]	)	
Defendant(s).	)	
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 427.80, Paragraph 1*.]

[2. *Fictitious name allegation, if appropriate. See § 427.80, Paragraph 2*.]

3. On or about _____ [*date*], plaintiff and defendant entered into _____ [a written *or* an oral *or* an implied by conduct] agreement in _____ [*city*], California, under which plaintiff and defendant agreed to establish an agency for the benefit of plaintiff _____ [*specify benefit to plaintiff agent protected by agreement, e.g.*, in order to provide security for a debt owed by defendant to plaintiff]. Under the agreement, plaintiff was to serve as agent for defendant for the purpose of _____ [*specify purpose of*

agency, e.g., selling a parcel of real property owned by defendant]. [A true and correct copy of the agreement is attached hereto as Exhibit A and made a part hereof by reference.]

4. To secure the debt owed to plaintiff, defendant created in favor of plaintiff an [interest *or* estate] in the subject of the agency by _____ [*specify manner of creation, e.g.,* deeding to plaintiff an undivided one-eighth interest in the property to be sold by plaintiff as defendant's agent] _____ [at the same time that the agency was created *or* for the separate consideration of _____ (*describe consideration*)].

5. On or about _____ [*date*], _____ [*specify facts showing dispute over termination of agency, e.g.,* defendant informed plaintiff that the agency created by the agreement alleged in Paragraph 3 above was terminated]. Plaintiff disputes this contention, believing that the agency is coupled with the interest he/she has in the property and is therefore irrevocable This dispute still exists and is an actual controversy over the respective rights and duties of the parties.

6. Plaintiff desires a judicial determination of his/her rights and duties, and a declaration as to whether or not the agency is irrevocable as coupled with an interest.

7. A judicial determination is necessary and appropriate at this time under the circumstances in order that plaintiff may ascertain his/her/its rights and duties under the agency agreement. [_____ (*Allege any financial or other burden being caused plaintiff by the unsettled state of affairs, e.g.,* Plaintiff has not received any of the proceeds that were promised as repayment by defendant).]

WHEREFORE, plaintiff prays judgment as follows:

1. For a declaration that the agency described above is coupled with an interest and therefore not terminable by act of the principal;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 427.80*].

CAUTION:

If a temporary restraining order or an injunction issued before judgment is sought on the basis of facts alleged in the complaint, the complaint must be verified [*Code Civ. Proc. § 527(a)*]. However, the facts in support of the injunction or order may also be set forth in separate affidavits or declarations rather than in the complaint [*Code Civ. Proc. §§ 527(a), 2015.5*].

[2] Use of Form

This form is a complaint for use by an agent in an action seeking a declaration that the agency is coupled with an interest in the subject of the agency and therefore is not terminable by the principal [*see Civ. Code § 2356*; *Code Civ. Proc. § 1060*; *see also* discussion in *§ 427.20[8]*].

An action for declaratory relief is appropriate when a person is interested under a deed, will, other written instrument, or contract, and desires a declaration of his or her rights or duties when an actual controversy relating to the legal rights and duties of the respective parties exists [*Code Civ. Proc. § 1060*]. The use of a declaratory relief action to obtain a declaration that an agency is coupled with an interest has been sanctioned in California [*see New York Life Ins. Co. v. Doane (1936) 13 Cal. App. 2d 233, 235, 56 P.2d 989]* . The action need not be brought against the principal. Indeed, a common situation involves an agency to sell real property and the death of the principal, with the resulting claim that the principal's death has terminated the agency [*see Charles B. Webster Real Estate v. Rickard (1971) 21 Cal. App. 3d 612, 617, 98 Cal. Rptr. 559* ; *see also* discussion in Ch. 103, *Brokers*]. For additional discussion and forms relating to declaratory relief, see Ch. 182, *Declaratory Relief* .

The allegations requesting declaratory relief in this form do not preclude a request for other relief. Thus, when a termination of the agency is alleged to have been wrongful and to have caused damage to the agent, counsel may wish to add the allegations of wrongful termination in § 427.80 as a separate count [*see Code Civ. Proc. § 1062*]. Additional pleading requirements may need to be satisfied, however, when requests for other types of relief are combined with a complaint for declaratory relief. For additional discussion of the requirements of and forms for use in declaratory relief actions, see Ch. 182, *Declaratory Relief* .

[3] Allegations

The complaint alleges:

- The agency agreement entered for the benefit of the plaintiff (Paragraph 3).

- That an interest in the subject of the agency was given to the agent, either at the same time that the agency was created or for a separate consideration, in order to secure the performance of a duty owed the agent or to protect a title in the agent (Paragraph 4) [*Becket v. Welton Becket & Associates (1974) 39 Cal. App. 3d 815, 820, 114 Cal. Rptr. 531]* .

- That an actual controversy exists over defendant's intended termination of the agency (Paragraph 5).

- That a judicial declaration of the rights and duties under the agency agreement is sought (Paragraph 6) [*Code Civ. Proc. § 1060*].

- That a judicial determination is necessary and appropriate (Paragraph 7) [*Code Civ. Proc. §§ 1060, 1061*].

The allegations must show that the agent's interest in the subject of the agency was obtained independently of the power conferred. The interest must be specific, present, and coexisting for the agency to be coupled with an interest; if the interest was obtained by the agent's exercise of the power, the agency is not coupled with an interest and is revocable by the principal [*O'Connell v. Superior Court (1935) 2 Cal. 2d 418, 422, 41 P.2d 334* ; *Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1023, 84 Cal. Rptr. 538* (*disapproved on other grounds* in *Morris v. Thogmartin (1973) 29 Cal. App. 3d 922, 930, 105 Cal. Rptr. 919*)].

[4] Jurisdiction

This action for declaratory relief must be brought in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 85, 580(b)(4), 1060*; *see Code Civ. Proc. § 86(a)(7)(A)* (restricted extent to which declaratory relief may bemaintained as limited civil case); for discussion, *see* Ch. 182, *Declaratory Relief*].

[5] Cross References

For alternative complaints and cross complaints for use in declaratory relief actions, see Ch. 182, *Declaratory Relief* .

[6] State Statutes

Terminability of agency coupled with interest. *Civ. Code § 2356*

Declaratory relief. *Code Civ. Proc. §§ 1060-1062.5*

[7] Decisions

Management agreement between hotel owners and hotel operator did not operate to give operator agency coupled with an interest. *Pacific Landmark Hotel, Ltd. v. Marriott Hotels, Inc. (1993) 19 Cal. App. 4th 615, 628, 23 Cal. Rptr. 2d 555*

Power and interest must be united in the same person. *Pacific Landmark Hotel, Ltd. v. Marriott Hotels, Inc. (1993) 19 Cal. App. 4th 615, 625-626, 628, 23 Cal. Rptr. 2d 555*

For agency to be coupled with an interest, agent must have "specific, present and coexisting" beneficial interest in the subject matter of the agency (citing *Jay v. Dollarhide, below*). *Woolley v. Embassy Suites, Inc. (1991) 227 Cal. App. 3d 1520, 1532, 278 Cal. Rptr. 719* ; *see also* *Pacific Landmark Hotel, Ltd. v. Marriott Hotels, Inc. (1993) 19 Cal. App. 4th 615, 628, 23 Cal. Rptr. 2d 555*

Monetary compensation, in whatever form it may take, does not create a power coupled with an interest so as to make the agency irrevocable; hotel operator's sole interest in management contract, consisting of a "management fee" of 5 percent of gross revenue from hotel, was therefore insufficient to create such a power. *Woolley v. Embassy Suites, Inc. (1991) 227 Cal. App. 3d 1520, 1532, 278 Cal. Rptr. 719* ; *see also* *Pacific Landmark Hotel, Ltd. v. Marriott Hotels, Inc. (1993) 19 Cal. App. 4th 615, 628, 23 Cal. Rptr. 2d 555*

Agency or power created for benefit of agent rather than for benefit of principal abrogates principal's power to terminate agency at will. *Becket v. Welton Becket & Associates (1974) 39 Cal. App. 3d 815, 820, 114 Cal. Rptr. 531*

Death of principal immediately terminates agency not coupled with interest. *Charles B. Webster Real Estate v. Rickard (1971) 21 Cal. App. 3d 612, 617, 98 Cal. Rptr. 559*

Agent required to have interest or estate in subject of agency independently of power conferred for agency to be irrevocable as coupled with interest. *Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1023, 84 Cal. Rptr. 538* (disapproved on other grounds in *Morris v. Thogmartin (1973) 29 Cal. App. 3d 922, 930, 105 Cal. Rptr. 919*)

Recital of irrevocability in grant of agency not controlling. *Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1023, 84 Cal. Rptr. 538* (disapproved on other grounds in *Morris v. Thogmartin (1973) 29 Cal. App. 3d 922, 930, 105 Cal. Rptr. 919*)

Power of sale contained in mortgage is power coupled with interest, with mortgage lien being the interest, and power therefore is not revoked by death of mortgagor. *New York Life Ins. Co. v. Doane (1936) 13 Cal. App. 2d 233, 237-239, 56 P.2d 989*

Declaratory relief action proper to establish that agency coupled with interest. *New York Life Ins. Co. v. Doane (1936) 13 Cal. App. 2d 233, 235, 56 P.2d 989*

Company's agency to collect rents on building combined with 20-year lease in building created irrevocable agency coupled with interest. *Lane Mortgage Co. v. Crenshaw (1928) 93 Cal. App. 411, 428-429, 269 P. 672*

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[Reserved]

§§ 427.85[Reserved]

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B. Actions by Principal Against Agent

37-427 California Forms of Pleading and Practice--Annotated § 427.100

§ 427.100 Complaint for Damages [Civ. Code § 3333] and Secret Profits--Agent's Breach of Fiduciary Duty--By Principal Against Agent

[1] FORM Complaint for Damages [Civ. Code § 3333] and Secret Profits--Agent's Breach of Fiduciary Duty--By Principal Against Agent

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
	)	COMPLAINT FOR DAMAGES FOR BREACH OF FIDUCIARY DUTY
vs.	)	
_____ [*name*],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. Defendant _____ [*name of agent*] is, and at all times herein mentioned was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a resident of _____ County, California, *or* a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), _____ County, California].

[2. *Fictitious name allegation, if appropriate. See § 427.80, Paragraph 2.*]

3. On or about _____ [*date*], plaintiff and defendant _____ [*name of agent*] agreed _____ [orally *or* in writing] that defendant would act as plaintiff's agent for the purpose of _____ [*specify business of agency, e.g.,* employing workers to build an addition to plaintiff's house]. [A true and correct copy of the agreement is attached hereto as Exhibit A and made a part hereof by reference.]

4. Defendant agent breached his/her fiduciary duty to plaintiff by _____ [*specify breach, e.g.,* obtaining workers to improve plaintiff's house without determining whether or not the workers were qualified for the work, falsely representing to plaintiff that all of the employees were highly skilled craft workers, and paying the workers less than what defendant charged plaintiff for their time and keeping the difference].

5. As the result of defendant's breach of fiduciary duty, plaintiff has been damaged in that _____ [*specify nature of damages, e.g.,* the unqualified workers hired by defendant agent did not seal the addition to plaintiff's house, causing extensive water damage in the season's first rain on or about _____ (*date*)]. This damage amounted to the sum of $_____.

[6. Defendant _____ (*name of agent*) used his/her position as plaintiff's agent to obtain a secret profit by _____ (*specify means by which defendant obtained secret profit, e.g.,* collecting from plaintiff $12.00 per hour per worker, but paying to the workers only $8.00 per hour each and keeping the difference). Defendant's retention of secret profits damaged plaintiff in the total sum of $ _____.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the sum of $_____;

[2. For recovery of defendant's secret profits in the sum of $ _____ or according to proof;]

3. For interest on the damages according to proof at the _____ [legal rate *or* rate of _____ percent per year as provided in the agency agreement] [from _____ (*date*)];

[4. For reasonable attorney's fees as provided for in the agency agreement, in the amount of $ _____ or according to proof;]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 427.80.*]

[2] Use of Form

This complaint may be used in an action for damages by a principal against his or her agent for breach of fiduciary duty. The complaint seeks both damages resulting from the breach and, if appropriate, recovery of the agent's secret profits obtained from the agency. Either remedy may be sought in an appropriate case; there is no requirement that both be present in a single action [*see Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 940-941, 175 Cal. Rptr. 81* ; *Civ. Code § 2322(c)*; *see also Prob. Code §§ 16002, 16004, 16005, 16009*; discussion in *§ 427.23*]. For additional discussion and forms relating to breach of fiduciary duty generally,see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

[3] Allegations

The complaint alleges:

- The formation and purpose of the agency (Paragraph 3).
- The manner in which the agent breached his or her fiduciary duty toward the principal (Paragraph 4).
- Damages resulting from the breach (Paragraph 5).
- If appropriate, secret profits acquired by the agent from the agency (Paragraph 6) [*see Civ. Code § 2322(c)*; *Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 940, 175 Cal. Rptr. 81* ; *Wade v. Diamond A Cattle Co. (1975) 44 Cal. App. 3d 453, 458, 118 Cal. Rptr. 695]* .

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[5] Cross References

For additional discussion and forms relating to common counts, see Ch. 121, *Common Counts*

[6] State Statutes

Fiduciary duties of agent. *Prob. Code §§ 16002, 16004, 16005, 16009*

[7] Decisions

Agent who is sued by principal for breach of fiduciary duty may force dispute into arbitration pursuant to agreement between principal and third person providing for arbitration of any dispute between principal and agent if agent duly elects to pursue arbitration, even though agent was not a party to that agreement. *Nguyen v. Tran (2007) 157 Cal. App. 4th 1032, 1038, 68 Cal. Rptr. 3d 906*

Agent owes principal duties (1) to make fullest disclosure of material facts that might affect principal's

decision-making, (2) to use reasonable care, skill, and diligence in performing object of agency, and (3) to refrain from competing with principal on matters connected with agency. *Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 940-941, 175 Cal. Rptr. 81*

Breach of agent's fiduciary duty to principal is tortious. *Pollack v. Lytle (1981) 120 Cal. App. 3d 931, 940-941, 175 Cal. Rptr. 81*

Agent's acquisition of interest adverse to principal or misrepresentation or concealment regarding subject matter of agency and agent's interest therein is breach of agent's duty. *Wade v. Diamond A Cattle Co. (1975) 44 Cal. App. 3d 453, 458, 118 Cal. Rptr. 695*

Undisclosed profits realized by agent from agency transaction are recoverable by principal despite fairness of price. *Wade v. Diamond A Cattle Co. (1975) 44 Cal. App. 3d 453, 458, 118 Cal. Rptr. 695* ; *Store of Happiness v. Carmona & Allen (1957) 152 Cal. App. 2d 266, 272, 312 P.2d 1104*

Agent who violates duty to use reasonable care, skill, and diligence is liable for any damages actually sustained by principal as result of negligence or breach of duty of agent. *Timmsen v. Forest E. Olson, Inc. (1970) 6 Cal. App. 3d 860, 871, 86 Cal. Rptr. 359*

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§ 427.101 Complaint for Accounting From Agent--By Principal Against Agent

[1] FORM Complaint for Accounting From Agent--By Principal Against Agent

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR ACCOUNTING
_____ [*name*], [and DOES I	)	[Amount demanded _____
through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 427.100, Paragraph 1*].

[2. *Fictitious name allegation, if appropriate. See § 427.80, Paragraph 2.*]

3. On or about _____ [*date*], plaintiff and defendant entered into _____ [a written *or* an oral *or* an implied by conduct] agreement providing that defendant would act as plaintiff's agent for the purpose of _____ [*specify, e.g.,* managing plaintiff's rental properties]. [A true and correct copy of the agency agreement is attached as Exhibit A and incorporated by reference.]

4. _____ [Between _____ (*date*), and _____ (*date*) *or* Beginning on or about _____ (*date*)], defendant _____ [*describe defendant's actions that*

necessitated accounting, e.g., collected rents from the tenants of plaintiff's rental property].

5. The _____ [*specify property that is subject of accounting, e.g.,* amount collected as rentals by defendant] is unknown to plaintiff [, but plaintiff is informed and believes and thereon alleges that the amount exceeds the sum of $_____].

[6. On or about _____ (*date*), plaintiff demanded that defendant account for and deliver to plaintiff all _____ (*specify property, e.g.,* rentals) held by defendant as agent for plaintiff, but defendant has failed and refused, and continues to fail and refuse, to render an accounting. (A true and correct copy of plaintiff's demand is attached as Exhibit B and incorporated by reference.)]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an accounting of all _____ [*specify property, e.g.,* rentals] held by defendant in his/her capacity as agent of plaintiff;

2. For payment over to plaintiff of the amount due from defendant as a result of the accounting [and interest on that amount from and after _____ [*date*];

[3. For reasonable attorneys' fees in the amount of $_____, as provided for in the agency agreement;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 427.80*]

[2] Use of Form

This complaint is for use in an action by a principal against an agent for an accounting of all money and/or property held by the agent for the principal. An accounting action is essentially based on the fiduciary relationship between principal and agent, and when appropriate, the action may be combined with an action for breach of fiduciary duty [*see Kennard v. Glick (1960) 183 Cal. App. 2d 246, 251, 7 Cal. Rptr. 88* ; *see also* discussion in *§ 427.23[2]*; *§ 427.100*]. For additional discussion and alternative forms relating to accounting actions generally, see Ch. 7, *Accounting, Action for*.

[3] Allegations

This complaint alleges:

- The agency relationship (Paragraph 3).

- Defendant's possession of money or property belonging to plaintiff, acquired in the course of the agency (Paragraph 4) [*Kritzer v Lancaster (1950) 96 Cal. App. 2d 1, 7-8, 214 P.2d 407]* .

- The property held by the agent, and either that the amount is unknown or the approximate sum that the amount exceeds (Paragraph 5).

- When appropriate, that plaintiff demanded an accounting and defendant failed to account for the money or property (Paragraph 6) [*see Burke v. Maguire (1908) 154 Cal. 456, 470, 98 P. 21* (action to follow specific property held by another)].

An accounting action invokes the equitable powers of the court and must allege facts showing the existence of the relationship requiring an accounting. The complaint must also state that some balance is due plaintiff [*Kritzer v. Lancaster (1950) 96 Cal. App. 2d 1, 6-7, 214 P.2d 407]* . The balance due plaintiff cannot be a certain amount; if plaintiff knows the amount he or she seeks to recover, there is no need for an accounting [*Tostevin v. Douglas (1958) 160 Cal. App. 2d 321, 329-330, 325 P.2d 130]* .

The requirement that a demand on the agent be alleged, to ensure that the agent has been given an opportunity to comply voluntarily with the duty to account before a lawsuit is instituted, has been applied in an action to follow specific property that came into the hands of the administrator of an estate, but was not required in a later case involving moneys paid to a stockbroker on behalf of the plaintiff principal [*compare Burke v. Maguire (1908) 154 Cal. 456, 470, 98 P. 21* (action to recover property delivered to administrator; demand required) *with Kritzer v. Lancaster (1950) 96 Cal. App. 2d 1, 6-7, 214 P.2d 407* (action for accounting against stockbroker; complaint held sufficient without allegation of demand)]. If a demand was made, it should be alleged, but it is unclear whether or not the lack of demand will preclude the action when otherwise appropriate.

[4] State Statutes

Agent as required to inform principal of conduct as agent. *Civ. Code § 2020*

Duties of agent as those of trustee. *Civ. Code § 2322(c)*; *see also Prob. Code §§ 16002, 16004, 16005, 16009*

[5] Decisions

Agent required to account for all benefits and advantages received as outgrowth of agency. *Savage v. Mayer (1949) 33 Cal. 2d 548, 551, 203 P.2d 9* ; *Kennard v. Glick (1960) 183 Cal. App. 2d 246, 250-251, 7 Cal. Rptr. 88*

Action for accounting sounds either in contract or tort. *Arcturus Mfg. Corp. v. Rork (1961) 198 Cal. App. 2d 208, 210, 17 Cal. Rptr. 758*

Burden of proof is on agent once agent's possession of property of principal is shown or admitted. *Kennard v. Glick (1960) 183 Cal. App. 2d 246, 251, 7 Cal. Rptr. 88*

[6] Cross Reference

For alternative forms for use in actions for accounting, see Ch. 7, *Accounting, Actions for*

For a related form, *see § 427.80*.

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37-427 California Forms of Pleading and Practice--Annotated § 427.102

§ 427.102 Complaint for Implied Equitable Indemnity--Principal's Payment of Third Party's Judgment Against Principal for Agent's Tort--By Principal Against Agent

[1] FORM Complaint for Implied Equitable Indemnity--Principal's Payment of Third Party's Judgment Against Principal for Agent's Tort--By Principal Against Agent

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR IMPLIED EQUITABLE IN-
_____ [*name*], [and DOES I	)	DEMNITY
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 427.100, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 427.80, Paragraph 2.*]

3. On or about _____ [*date*], plaintiff and defendant entered into _____ [a written *or* an oral *or* an implied by conduct] agreement providing that defendant would act as plaintiff's agent for the purpose of _____ [*specify purpose of agency, e.g.,* managing plaintiff's rental properties]. [A true and correct copy of the agreement is attached as Exhibit A and incorporated by reference.]

4. On or about _____ [*date*], a judgment was entered in the action entitled _____ vs. _____, Case No. _____, in the _____ Court against plaintiff requiring him/her to pay the sum of $_____ to _____ [*name of third party obtaining judgment against plaintiff*]. This judgment was not based on any wrongful act of plaintiff, but rather was based on plaintiff's [solely vicarious] liability for defendant's wrongful act in _____ [*describe wrongful act of defendant that led to the prior judgment against plaintiff, e.g.,* negligently damaging a tenant's personal property]. Plaintiff was liable for this act only because of his/her status as principal of defendant.

5. By reason of the foregoing, plaintiff is entitled to indemnity from defendant in the sum of $_____, but defendant has not paid any part of this sum to plaintiff.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. Indemnity from defendant in the sum of $_____;

2. Costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 427.80.*]

[2] Use of Form

This complaint is for use in an action by a principal seeking indemnification from an agent whose wrongful act led to a tort judgment against the principal solely because of their agency relationship. The form may also be adapted for use as a cross complaint against the agent in the original action against the principal by the injured third party seeking damages for the action(s) of the agent [*see Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 77, 38 Cal. Rptr. 490* ; *see also* discussion in *§ 427.25*]. For additional discussion of the principles involved in implied indemnity actions generally, see *Ch. 300, Indemnity and Contribution, § 300.60* et seq.

[3] Allegations

The complaint alleges:

- The agency relationship between plaintiff and defendant (Paragraph 3).

- Plaintiff's liability for the tortious acts of defendant only because of the agency relationship (Paragraph 4).

- That plaintiff is entitled to indemnity from defendant (Paragraph 5) [*Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 77, 38 Cal. Rptr. 490]* .

[4] Decisions

All rights of indemnity except those created by express contractual provisions are subject to comparative principles, under which total or partial indemnity may be awarded depending on facts and circumstances of case; indemnitee's indemnity rights are terminated under *Code Civ. Proc. §§ 877(b)* and *877.6(c)* by good faith settlement between indemnitor and plaintiff in underlying action. *Far West Financial Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 810-814, 251 Cal. Rptr. 202, 760 P.2d 399*

Principal who has no active part in wrong of agent is entitled to indemnification from agent for payment to third party of damages based on vicarious liability. *Bradley v. Rosenthal (1908) 154 Cal. 420, 423-425, 97 P. 875* ; *Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 77, 38 Cal. Rptr. 490*

Insurer is entitled to total indemnity from agent for liability to insured for breach of contract and bad-faith claims practices incurred solely on account of agent's negligent preparation of application and other documents. *Fireman's Fund Ins. Co. v. Haslam (1994) 29 Cal. App. 4th 1347, 35 Cal. Rptr. 2d 135*

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37-427 California Forms of Pleading and Practice--Annotated § 427.103

§ 427.103 Complaint for Damages [Civ. Code § 3300]--Breach of Agency Agreement--By Principal Against Agent

[1] FORM Complaint for Damages [Civ. Code § 3300]--Breach of Agency Agreement--By Principal Against Agent

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR BREACH OF
_____ [*name*], [and DOES I	)	CONTRACT
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 427.100, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 427.80, Paragraph 2.*]

3. On or about _____ [*date*], plaintiff and defendant entered into _____ [a written *or* an oral] contract providing that defendant would act as plaintiff's agent for the purpose of _____ [*specify purpose of agency, e.g.,* managing plaintiff's rental properties]. [A true and correct copy of the agreement is attached as Exhibit A and incorporated by reference.]

4. Defendant breached the contract between the parties by _____ [*specify breach, e.g.,* failing to

collect rent from plaintiff's tenants].

5. Plaintiff has performed all conditions, covenants, and promises required to be performed by him/her in accordance with the terms and conditions of the agreement[, except _____ (*specify condition(s) not performed*). The reason that plaintiff did not perform this/these condition(s) is that _____ (*specify facts showing excuse for nonperformance*)].

6. Plaintiff was damaged by defendant's breach in that _____ [*specify damages, e.g.,* plaintiff was unable to collect past due rents from plaintiff's tenants]. Plaintiff suffered damages in the sum of $_____ as a result of defendant's breach.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages in the amount of $_____;

[2. For _____ (*specify special damages, if any, e.g.,* damages for loss of earnings in the sum of $_____);]

3. For interest on the damages according to proof at the _____ [legal rate *or* rate of _____ percent per year as provided in the contract] [from _____ (*date*)];

[4. For reasonable attorney fees in the amount of $_____, as provided for in the agency agreement;]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 427.80.*]

[2] Use of Form

This complaint is for use in an action for damages by a principal against an agent for breach of an agency agreement [*see Spitzer v. Pathe Exchange, Inc. (1933) 132 Cal. App. 612, 619, 23 P.2d 308* ; *see also* discussion in *§ 427.23[4]*]. For discussion and forms relating to actions for breach of contract generally, see Ch. 140, *Contracts* . For a complaint alleging an agent's breach of fiduciary duties, see *§ 427.100*.

[3] Allegations

The form alleges:

- The existence of the agency agreement and its terms (Paragraph 3).
- Defendant's breach of the contract (Paragraph 4).
- The performance of all conditions precedent by plaintiff or plaintiff's excuse for nonperformance

(Paragraph 5) [*Code Civ. Proc. § 457*].

- The resulting damage to plaintiff (Paragraph 6) [*see Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377* ; *Civ. Code § 3300* (damages in contract actions)].

[4] State Statutes

Damages for breach of contract. *Civ. Code § 3300*

[5] Decisions

Principal entitled to damages suffered as result of agent's breach of agency contract. *Spitzer v. Pathe Exchange, Inc. (1933) 132 Cal. App. 612, 619, 23 P.2d 308*

[6] Cross Reference

For a related form, *see § 427.80*.

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37-427 California Forms of Pleading and Practice--Annotated §§ 427.104through 427.119

[Reserved]

§§ 427.104[Reserved]

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37-427 California Forms of Pleading and Practice--Annotated § 427.120

§ 427.120 Complaint for Damages [Civ. Code § 3318]--Agent's Breach of Warranty of Authority [Civ. Code § 2342]--By Third Party Against Agent

[1] FORM Complaint for Damages [Civ. Code § 3318]--Agent's Breach of Warranty of Authority [Civ. Code § 2342]--By Third Party Against Agent

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR BREACH OF
_____ [*name*], [and DOES I	)	AGENT'S WARRANTY OF AUTHORITY
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 427.100, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 427.80, Paragraph 2.*]

3. At all times mentioned herein, defendant assumed to act as the agent of _____ [*name of principal*].

4. On or about _____ [*date*], defendant, while assuming to act as agent for _____ [*name of principal*], entered into a contract with plaintiff providing that _____ [*describe contract provisions, e.g.,* plaintiff would be employed by _____ (*name of principal*) for a period of six months].

[The contract is attached as Exhibit A and incorporated by reference.]

5. In executing the above contract with plaintiff, defendant agent _____ [expressly *and/or* impliedly] represented to plaintiff that no limitation existed on his/her authority to contract on behalf of the principal _____ [*name*].

6. Plaintiff had no knowledge of any limitation on defendant's authority as agent and acted in reliance on defendant's representations of his/her authority.

7. When plaintiff attempted to enforce the above-described contract, he/she discovered that defendant did not have actual authority to bind _____ [*name of principal*] for _____ [*specify lack of authority, e.g.,* employment contracts of longer than one month]. [Plaintiff expended the sum of $_____ in legal proceedings, including attorney's fees, against _____ (*name of principal*) in an unsuccessful attempt to enforce the contract against _____ (*name of principal*) in the action entitled _____ vs. _____, Case No. _____, in the _____ (*name of court*) Court.]

8. Defendant breached his/her warranty of authority by assuming to act as agent for _____ [*name of principal*] and by _____ [expressly *and/or* impliedly] representing that he/she had authority to enter into the above-described contract with plaintiff on behalf of the principal _____ [*name*].

9. Plaintiff was damaged in the amount of $_____, which represents the amount plaintiff could have recovered and collected from _____ [*name of principal*] if defendant agent had complied with his/her warranty of authority.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the sum of $_____;

2. For interest on the damages according to proof at the _____ [legal rate *or* rate of _____ percent per year as provided in the contract] [from _____ (*date*)];

[3. For costs and attorney's fees incurred in the prior action herein referred to in the sum of $_____;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 427.80.*]

[2] Use of Form

This complaint is for use in an action by a third party against an agent who, without authority to do so, entered into a transaction with the third party on behalf of a principal. Such an action would usually be brought after the plaintiff has already attempted to enforce the contract against the principal based on the agent's actual or ostensible authority [*see*

Kohlberg v. Havens (1919) 41 Cal. App. 222, 223, 182 P. 467] . However, a prior action against the principal is not a prerequisite to a third party's action for breach of the warranty of authority [*see, e.g., Cheda v. Grandi (1950) 97 Cal. App. 2d 513, 514, 218 P.2d 97]* .

An action for the agent's breach of warranty of authority may be combined with an action against the principal if both the principal and the agent can be joined in the action on the contract [*see, e.g., Cheda v. Grandi (1950) 97 Cal. App. 2d 513, 514-515, 218 P.2d 97* ; *see also* discussion in *§ 427.24*].

[3] Allegations

This complaint alleges:

- That defendant assumed to act as an agent in dealing with plaintiff on behalf of the principal (Paragraph 3) [*see Civ. Code § 2342*].

- The contract at issue was executed on behalf of a principal (Paragraph 4).

- That defendant executed the contract with a representation, express or implied, that he or she had the authority to do so (Paragraph 5).

- That plaintiff had no knowledge of any limitation on defendant's authority and entered into the contract based on defendant's representations (Paragraph 6) [*see Yoakum v. Tarver (1967) 256 Cal. App. 2d 202, 206-207, 64 Cal. Rptr. 7]* .

- That plaintiff discovered the agent's lack of authority and, if appropriate, that plaintiff expended reasonable expenses in legal proceedings taken in good faith to enforce the contract against the principal (Paragraph 7) [*Civ. Code § 3318*].

- That the agent's conduct constituted a breach of the warranty of authority (Paragraph 8) [*Civ. Code § 2342*; *Owens v. Foundation for Ocean Research (1980) 107 Cal. App. 3d 179, 185, 165 Cal. Rptr. 571* (*disapproved on other grounds* in *Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521, 28 Cal. Rptr. 2d 475, 869 P.2d 454*)].

- Damages resulting from the breach, defined as the amount that could have been recovered had the warranty of authority been complied with (Paragraph 9) [*Civ. Code § 3318*].

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[5] State Statutes

Liability of agent for breach of implied warranty of authority. *Civ. Code § 2342*

Damages for breach. *Civ. Code § 3318*

[6] Decisions

Action for breach of warranty of authority requires allegations that agent acted in excess of authority and that plaintiff was ignorant of the true authority and relied on agent's express or implied representations of authority. *Yoakum v. Tarver (1967) 256 Cal. App. 2d 202, 206-207, 64 Cal. Rptr. 7*

Attorney's fees incurred in prior action to hold principal liable on contract of unauthorized agent are in damages for breach of warranty of agent's authority [*Civ. Code § 3318*]. *Beraksa v. Stardust Records, Inc. (1963) 215 Cal. App. 2d 708, 716, 30 Cal. Rptr. 504*

[7] Cross Reference

For a related form, *see § 427.80*.

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37-427 California Forms of Pleading and Practice--Annotated § 427.121

§ 427.121 Allegations--Agent Liable to Third Party as Principal for Damages for Breach of Contract [Civ. Code § 3300] or for Tort [Civ. Code § 3333]--Action by Third Party Against Agent

[1] FORM Allegations--Agent Liable to Third Party as Principal for Damages for Breach of Contract [Civ. Code § 3300] or for Tort [Civ. Code § 3333]--Action by Third Party Against Agent

[*EITHER*]

1. Plaintiff, in entering into _____ [*specify transaction between plaintiff third party and defendant agent, e.g.,* the contract referred to herein] with defendant _____ [*name of agent*], extended credit to defendant agent personally with the consent of defendant agent.

[*OR*]

1. [Plaintiff is informed and believes, and thereon alleges, that] [D]efendant _____ [*name of agent*], in entering into the written contract on behalf of and in the name of [defendant] _____ [*name of principal*], did not believe in good faith that he/she had the authority to do so.

[*OR*]

1. The acts of defendant _____ [*name of agent*] were wrongful in their nature, in that _____ [*specify wrongful conduct, e.g.,* they were undertaken without the ordinary care due plaintiff].

2. Defendant _____ [*name of agent*] assumed to act as agent for [defendant] _____ [*name of principal*] and defendant agent acted in the course of his/her agency at all times mentioned herein.

[2] Use of Form

These allegations may be used in an action either on a contract or in tort by a third party against an agent if the agent is liable as a principal [*Civ. Code § 2343*; *see 427.24[3]*]. The allegations against an agent may also be included in an action against the principal for breach of contract if it appears that because credit was given to the agent or because the agent lacked authority, the principal will not be liable on the contract.

The first alternative allegation of Paragraph 1 is for use if the plaintiff third party gave credit to the agent personally, with the consent of the agent [*Civ. Code § 2343(1)*; *see also § 427.24[3]*]. The second alternative form of Paragraph 1 is for use if a third party who has entered into a written contract with an agent who lacked a good faith belief in his or her authority to enter into the contract [*Civ. Code § 2343(2)*; *see also* discussion in *§ 427.24[3]*]. When alleging a principal's liability for an agent's tort, plaintiff third party may include the third alternative of Paragraph 1 of the foregoing allegation, which alleges the agent's tort liability [Civ. Code § 2343(3); *see Bayuk v. Edson (1965) 236 Cal. App. 2d 309, 320, 46 Cal. Rptr. 49* ; *see also* the discussion in *§ 427.24[3]*].

[3] Allegations

These allegations state that (1) plaintiff third party extended credit to defendant agent personally, with his or her consent (first alternative Paragraph 1) [*Civ. Code § 2343(1)*], (2) defendant agent entered into a written contract in the name of his or her principal without a good faith belief in his or her authority to do so (second alternative Paragraph 1) [*Civ. Code § 2343(2)*], or (3) the acts of defendant agent were wrongful in their nature (third alternative Paragraph 1) [*Civ. Code § 2343(3)*]. Paragraph 2 alleges that defendant assumed the role of agent and was acting in the course of the agency [*Civ. Code § 2343*].

The allegation in Paragraph 1 would be appropriate if the agent acted for a principal who was not disclosed to plaintiff third party, and plaintiff decides to seek a judgment against the agent alone. It should be noted that an action taken to judgment against the agent alone, with knowledge of the fact of the undisclosed agency, will constitute an election that precludes a later action against the undisclosed principal [*see Standard Oil Co. of Cal. v. Doneux (1961) 192 Cal. App. 2d 608, 613, 13 Cal. Rptr. 749* ; *see also* discussion in *§ 427.26[3]*].

[4] State Statutes

Agent liable as principal under specified circumstances. *Civ. Code § 2343*

[5] Decisions

Under *Civ. Code § 2343(3)*, providing that one who assumes to act as agent is responsible to third persons as principal for acts in course of agency when acts are wrongful in nature, agent is subject to liability to third party for tort, such as fraud; as long as agency is disclosed and agent commits no intentional tort, independent claims adjuster of self-insured employer (workers' compensation) has same immunity as principal does under *Lab. Code § 3602* (exclusivity of workers' compensation remedy). *Mottola v. R. L. Kautz & Co. (1988) 199 Cal. App. 3d 98, 108, 244 Cal. Rptr. 737*

Principal's liability for tort of agent does not exonerate agent for tort liability incurred while acting as agent. *Bayuk v. Edson (1965) 236 Cal. App. 2d 309, 320, 46 Cal. Rptr. 49*

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37-427 California Forms of Pleading and Practice--Annotated § 427.122

§ 427.122 Allegation--Imputing Liability for Torts of Agent to Principal [Civ. Code §§ 2338, 2339]--Action by Third Party

[1] FORM Allegation--Imputing Liability for Torts of Agent to Principal [Civ. Code §§ 2338, 2339]--Action by Third Party

1. [Plaintiff is informed and believes and thereon alleges that] [A]t all times herein mentioned defendant _____ [*name of agent*] was the agent of defendant _____ [*name of principal*], and [in doing the things hereinafter alleged] was acting within the course and scope of that agency [and with the permission and consent of _____ (*name of principal*)].

[2] Use of Form

This allegation is for use in a complaint seeking to impute liability for compensatory damages for torts committed by an agent of defendant principal [*Civ. Code §§ 2338, 2339, 3333*; *see* discussion in *§ 427.22[5]*].

[3] Allegations

The allegation in this form states generally that one or more defendants acted as agents for a specified principal or for each other. This broad allegation is routinely used by a plaintiff third party to ensure that liability will be imputed to the true principal for whose benefit the agent acted, once the true relationships among the defendants are determined in the course of trial. Such broad agency allegations have been held sufficient to withstand a general demurrer [*Meyer v. Graphic Arts International Union (1979) 88 Cal. App. 3d 176, 178, 151 Cal. Rptr. 597* ; for alternative agency allegations, *see* Ch. 20, *Allegations Commonly Used*].

[4] Cross References

For alternative forms for agency allegations, see Ch. 20, *Allegations Commonly Used*

[5] State Statutes

Rights and liabilities incurred by agent as accruing to principal. *Civ. Code § 2330*

Principal's liability for agent's incomplete execution of authority. *Civ. Code § 2331*

Effect of agent's unauthorized acts on principal. *Civ. Code § 2333*

Requirements for liability of principal for agent's acts pursuant to ostensible authority. *Civ. Code § 2334*

Liability of principal for wrongful acts of agent. *Civ. Code §§ 2338, 2339*

Damages for torts or wrongs. *Civ. Code §§ 3333-3344*

[6] Decisions

In real estate investor's action for breach of contract and fraud, church held not liable on promissory notes signed by pastor, when plaintiff acquiesced in scheme to wrongfully use church's name to obtain financial benefit for himself and his partners; doctrines of respondeat superior, ostensible authority, and equitable estoppel did not provide ground for imposition of liability on church on fraud theory. *Saks v. Charity Mission Baptist Church (2001) 90 Cal. App. 4th 1116, 1137-1140, 110 Cal. Rptr. 2d 45*

Principal liable for fraud of agent despite having received no benefit from fraud. *Spahn v. Guild Industries Corp. (1979) 94 Cal. App. 3d 143, 155-156, 156 Cal. Rptr. 375*

Principal liable without fault for act of agent (1) required or incidental to agent's duties or (2) reasonably foreseeable by principal. *Clark Equipment Co. v. Wheat (1979) 92 Cal. App. 3d 503, 520-521, 154 Cal. Rptr. 874*

Risk fairly regarded as typical of or broadly incident to principal's enterprise is reasonably foreseeable for purposes of imputing liability without fault for torts of agent. *Clark Equipment Co. v. Wheat (1979) 92 Cal. App. 3d 503, 522, 154 Cal. Rptr. 874*

Principal not liable for negligent physical conduct of nonservant agent. *Van Den Eikhof v. Hocker (1978) 87 Cal. App. 3d 900, 905, 151 Cal. Rptr. 456*

Punitive damages for fraudulent acts of agent as properly awarded against principal who ratified agent's acts. *Walker v. Signal Companies, Inc. (1978) 84 Cal. App. 3d 982, 999, 149 Cal. Rptr. 119*

Principal not liable for unauthorized act of agent unless ostensible agency shown, or act ratified by principal. *Grasslands etc. Assn. v. Lucky etc. Co. (1952) 112 Cal. App. 2d 776, 779, 247 P.2d 380*

Principal liable for any wrongful act of agent specifically authorized by principal. *Maberto v. Wolfe (1930) 106 Cal. App. 202, 206, 289 P. 218*

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37-427 California Forms of Pleading and Practice--Annotated § 427.123

§ 427.123 Allegation--Punitive Damages [Civ. Code § 3294]--Principal Liable for Acts of Agent--Action By Third Party Against Principal

[1] FORM Allegation--Punitive Damages [Civ. Code § 3294]--Principal Liable for Acts of Agent--Action By Third Party Against Principal

[*EITHER*]

1. [Plaintiff is informed and believes, and thereon alleges, that] [T]he act of defendant _____ [*name of agent*] was authorized by defendant _____ [*name of principal*] in the doing and the manner of the act.

[*OR*]

1. [Plaintiff is informed and believes, and thereon alleges, that] [D]efendant _____ [*name of agent*] was unfit and defendant _____ [*name of principal*] was reckless in employing him/her.

[*OR*]

1. [Plaintiff is informed and believes, and thereon alleges, that] [D]efendant _____ [*name of agent*] was employed in a managerial capacity for defendant _____ [*name of principal*] and was acting in the scope of employment at all times alleged herein.

[*OR*]

1. [Plaintiff is informed and believes, and thereon alleges, that] [D]efendant _____ [*name of principal*]

ratified or approved the act of defendant _____ [*name of agent*].

[2] Use of Form

These allegations are for use in a complaint for damages when plaintiff third party seeks to impute to a principal the acts of an agent that may be the basis for an award of punitive damages. Thus, these allegations may be appropriate in actions seeking damages when it is alleged that defendant agent acted with oppression, fraud, or malice [*Civ. Code § 3294*; *see Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822, 157 Cal. Rptr. 482, 598 P.2d 452* ; *see also* discussion in *Ch. 177, Damages, § 177.40* et seq.].

[3] Allegations

This form includes alternative allegations containing the facts necessary to impute liability for punitive damages to a principal based on the acts of an agent [*Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822, 157 Cal. Rptr. 482, 598 P.2d 452* ; *see Civ. Code § 3294(a)*]. The liability of an employer for punitive damages based on the act of an employee depends on a more rigid test set out in *Civ. Code § 3294(b)*, which requires that the employer had advance knowledge of the employee's unfitness and employed him or her with a conscious disregard of the rights or safety of others, or authorized or ratified the acts for which the punitive damages are awarded. It seems likely that the specific statutory requirement of *Civ. Code § 3294(b)* applies to an agent who is also an employee, but cases decided since the enactment of *Civ. Code § 3294(b)* have not distinguished between the principal/agent situation and the employer/employee situation [*see Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 136, 188 Cal. Rptr. 762* (citing only *Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822, 157 Cal. Rptr. 482, 598 P.2d 452* in permitting imputed punitive damage liability); *see also Ch. 177, Damages, § 177.40* et seq. for discussion of *Civ. Code § 3294(b)*].

[4] State Statutes

Principal's liability for wrongs of agent. *Civ. Code §§ 2338, 2339*

Exemplary damages. *Civ. Code § 3294*

[5] Decisions

Principal's liability for exemplary damages based on acts of agent. *Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal. 3d 809, 822, 157 Cal. Rptr. 482, 598 P.2d 452*

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37-427 California Forms of Pleading and Practice--Annotated § 427.124

§ 427.124 Allegation--Principal Liable for Agent's Acts Under Ostensible Agency [Civ. Code § 2300] or Ostensible Authority [Civ. Code §§ 2317, 2334]--Action by Third Party Who Dealt With Agent

[1] FORM Allegation--Principal Liable for Agent's Acts Under Ostensible Agency [Civ. Code § 2300] or Ostensible Authority [Civ. Code §§ 2317, 2334]--Action by Third Party Who Dealt With Agent

1. Plaintiff was led to believe that [defendant] _____ [*name of agent*] was acting as agent for defendant _____ [*name of principal*] because _____ [*specify acts of principal leading plaintiff to believe that agency existed, e.g.,* (defendant) _____ (*name of agent*) was appointed by defendant _____ (*name of principal*) to a position entitled "sales manager," and previous contracts negotiated and executed by (defendant) _____ (*name of agent*) were accepted as binding by defendant _____ (*name of principal*)].

2. In dealing with [defendant] _____ [*name of agent*], plaintiff was _____ [caused *or* allowed] by conduct of defendant _____ [*name of principal*] to believe that [defendant] _____ [*name of agent*] had the authority to _____ [*specify acts ostensibly authorized, e.g.,* contract for rendition of services]. The conduct of defendant _____ [*name of principal*] that _____ [caused *or* allowed] plaintiff to believe that [defendant] _____ [*name of agent*] had the authority consisted of _____ [*specify, e.g.,* previously performing contracts for the rendition of services entered into by (defendant) _____ (*name of agent*)]. Plaintiff _____ [incurred a liability, namely _____ (*specify*) *or* parted with value in the nature of _____ (*specify*)] in good faith and without negligence on the basis of the conduct of defendant _____ [*name of principal*].

[2] Use of Form

These allegations are for use in alleging the existence of an ostensible agency and/or an agent's specific ostensible authority [*Civ. Code §§ 2300, 2317*; *see* discussion in Introduction, under--Ostensible Agency and--Ostensible, *above*]. Such an allegation is appropriate when no actual agency relationship existed, but the principal acted in as manner that reasonably led plaintiff, a third party who dealt with the agent, to believe that an agency existed and that the agent had

the authority that the principal's conduct led the third party to believe the agent had [*Civ. Code §§ 2300, 2317*]. A principal may be bound by the acts of an agent under an ostensible authority only to those persons who have, in good faith, and without want of ordinary care, incurred a liability or parted with value, on the faith of the ostensible authority [*Civ. Code § 2334*].

[3] Judicial Council Trial Forms

Code Civ. Proc. § 425.12(a) requires that the Judicial Council develop and approve official forms for use in California trial courts for any complaint, cross complaint, or answer in any action based on personal injury, property damage, wrongful death, unlawful detainer, breach of contract, or fraud. *Code Civ. Proc. § 425.12(b)* requires that the Judicial Council develop and approve an official form for use as a statement of damages pursuant to *Code Civ. Proc. § 425.11* (request for statement of damages being sought) and *Code Civ. Proc. § 425.115* (statement preserving right to seek punitive damages). Use of these forms is optional [*see Code Civ. Proc. § 425.12*].

For general information relating to the use of Judicial Council answer forms, see Ch. 26, *Answers* . These forms are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. Noninteractive versions in PDF format also are available at www.lexisone.com at no charge.

If a judicial council form is used, this allegation may be used as a guide in filling out that form.

[4] Allegations

This allegation sets forth the conduct of the principal that was relied on by plaintiff third party, who dealt with the person believed to be the agent of the principal, to create an ostensible agency (Paragraph 1) [*Civ. Code § 2300*]. Also set forth is an allegation defining the agent's ostensible authority and alleging the prerequisites necessary for binding a principal based on an ostensible authority: (1) that the third party dealt with the agent with a reasonable belief in the agent's authority, (2) the belief was generated by some act or neglect of the person to be charged as principal, and (3) the reliance on the agent's apparent authority was not negligent, and (4) the third party incurred a liability or parted with value on the faith of the apparent authority [*Civ. Code §§ 2317, 2334*; *Associated Creditors' Agency v. Davis (1975) 13 Cal. 3d 374, 399, 118 Cal. Rptr. 772, 530 P.2d 1084* ; *Mejia v. Community Hospital of San Bernardino (2002) 99 Cal. App. 4th 1448, 1456-1457, 122 Cal. Rptr. 2d 233* (injured patient argued there was sufficient evidence that negligent physician was ostensible agent of hospital to survive motion for nonsuit)].

While it is the conduct of the principal rather than the agent that must be relied on, there is no requirement of direct contact with the principal. It is sufficient if the agent is appointed to a position that appears to the community as a whole to have given the agent the authority to transact business on behalf of the principal. If so, an ostensible agency relationship will be held to have been created [*Meyer v. Ford Motor Co. (1969) 275 Cal. App. 2d 90, 102, 79 Cal. Rptr. 816]* .

[5] State Statutes

Ostensible agency. *Civ. Code § 2300*

Authority of agents either actual or ostensible. *Civ. Code § 2315*

Ostensible authority. *Civ. Code § 2317*

Principal's liability for agent's acts under ostensible authority. *Civ. Code § 2334*

[6] Decisions

Truck drivers found to have ostensible authority to sign waivers of right to payment from shipper when drivers executed all contracts on behalf of carriers, shipper had no notice that drivers lacked authority, drivers were only representatives of carrier with whom shipper dealt, shipper did not know which company would haul shipment until driver arrived, and truck drivers routinely bound principals to waiver agreements. *C.A.R. Transp. Brokerage Co. v. Darden Restaurants, Inc. (9th Cir. 2000) 213 F.3d 474, 479-481*

Ostensible agency requires showing sufficient to establish estoppel. *Associated Creditors' Agency v. Davis (1975) 13 Cal. 3d 374, 403, 118 Cal. Rptr. 772, 530 P.2d 1084*

Ostensible agency arises from reasonable belief of third party in agent's authority, engendered by conduct of principal. *Tomerlin v. Canadian Indemnity Co. (1964) 61 Cal. 2d 638, 643, 39 Cal. Rptr. 731, 394 P.2d 571* ; *Mannion v. Campbell Soup Co. (1966) 243 Cal. App. 2d 317, 320, 52 Cal. Rptr. 246*

Nonsuit on issue of ostensible agency was improper when injured patient sought treatment at hospital and there was no evidence she should have known that negligent physician was not agent of hospital. *Mejia v. Community Hospital of San Bernardino (2002) 99 Cal. App. 4th 1448, 1460, 122 Cal. Rptr. 2d 233*

In real estate investor's action for breach of contract and fraud, church held not liable on promissory notes signed by pastor, when plaintiff acquiesced in scheme to wrongfully use church's name to obtain financial benefit for himself and his partners; doctrines of respondeat superior, ostensible authority, and equitable estoppel did not provide ground for imposition of liability on church on fraud theory. *Saks v. Charity Mission Baptist Church (2001) 90 Cal. App. 4th 1116, 1137-1140, 110 Cal. Rptr. 2d 45*

Acts or declarations of principal relied on for creation of ostensible agency not required to have been made to third party directly. *Meyer v. Ford Motor Co. (1969) 275 Cal. App. 2d 90, 102, 79 Cal. Rptr. 816*

Appointment to particular position sufficient conduct by principal to create ostensible authority in appointee. *Meyer v. Ford Motor Co. (1969) 275 Cal. App. 2d 90, 102, 79 Cal. Rptr. 816*

Principal liable for acts of ostensible agent only when elements of estoppel are present. *Kelley v. R.F. Jones Co. (1969) 272 Cal. App. 2d 113, 121, 77 Cal. Rptr. 170*

Estoppel requirements for ostensible agency are representation by principal, reliance by third party, and third party's change of position or injury resulting from reliance. *Kelley v. R.F. Jones Co. (1969) 272 Cal. App. 2d 113, 121, 77 Cal. Rptr. 170*

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37-427 California Forms of Pleading and Practice--Annotated § 427.125

§ 427.125 Allegation--Principal and/or Agent Liable for Agent's Acts Under Actual Authority [Civ. Code § 2316]--Action by Third Party Who Dealt with Agent

[1] FORM Allegation--Principal and/or Agent Liable for Agent's Acts Under Actual Authority [Civ. Code § 2316]--Action by Third Party Who Dealt with Agent

[*EITHER*]

1. [Plaintiff is informed and believes, and thereon alleges, that] [D]efendant _____ [*name of principal*] intentionally conferred on [defendant] _____ [*name of agent*] the authority _____ [*specify authority conferred, e.g.,* to enter into employment contracts on behalf of defendant _____ (*name of principal*)] by express _____ [oral *or* written] agreement [, a true copy of which is attached hereto as Exhibit A and made a part hereof by reference]. Plaintiff is informed and believes, and thereon alleges, that [defendant] _____ [*name of agent*] at all times mentioned herein believed that he/she was authorized to act on behalf of defendant _____ [*name of principal*].

[*OR*]

1. [Plaintiff is informed and believes, and thereon alleges, that] [D]efendant _____ [*name of principal*] _____ [intentionally *or* by want of ordinary care] allowed [defendant] _____ [*name of agent*] to believe that he/she had the authority to _____ [*specify, e.g.,* enter into employment contracts on behalf of defendant _____ (*name of principal*)]. The belief of [defendant] _____ [*name of agent*] in his/her authority was based on the conduct of defendant _____ [*name of principal*] in _____ [*specify, e.g.,* previously accepting employment contracts executed by (defendant) _____ (*name of agent*) without comment as to authority].

[2] Use of Form

This form of allegation is for use in an action alleging that the defendant principal had conferred actual authority on the agent either expressly (first alternative Paragraph 1) or by allowing the agent to believe that he or she had the authority to act in a certain manner on behalf of the principal (second alternative Paragraph 1) [*Civ. Code § 2316*]. This allegation is appropriate in any action in which the authority of an agent is relevant to determining whether or not the principal is liable for the acts of the agent [*see Civ. Code § 2330* (rights and liabilities that would accrue to agent if entered into by agent accrue to principal when agent acts within authority on behalf of principal); *see also § 427.22*]. The appropriate alternative of the foregoing allegation may also be used in conjunction with the allegations in Forms 32 or 33.

[3] Allegations

The first alternative allegation states that the defendant principal intentionally conferred a specific authority on the agent, and includes an optional allegation incorporating by reference the agreement between the principal and the agent (first alternative Paragraph 1) [*Civ. Code § 2300*]. The second alternative alleges that the principal created an actual authority by intentionally, or by want of ordinary care, allowing the agent to believe he or she possessed a specific authority (second alternative Paragraph 2) [*Civ. Code § 2316*]. Both alternatives contain the required allegation that the agent actually believed that the authority to act for the principal existed [*see Columbia Outfitting Co. v. Freeman (1950) 36 Cal. 2d 216, 219, 223 P.2d 21* ; *Ripani v. Liberty Loan Corp. (1979) 95 Cal. App. 3d 603, 611-612, 157 Cal. Rptr. 272]* .

[4] State Statutes

Agent as having authority conferred by principal either actually or ostensibly. *Civ. Code § 2315*

Definition of actual authority. *Civ. Code § 2316*

Statutory authority of agents. *Civ. Code § 2318 et seq.*

[5] Decisions

Principal's conduct in allowing agent and third party to believe that former had authority to alter terms of printed contract as creating both actual and ostensible authority to do so. *Thompson v. Occidental Life Ins. Co. (1973) 9 Cal. 3d 904, 913-914, 109 Cal. Rptr. 473, 513 P.2d 353*

Actual authority as capable of creation by conduct of principal that causes agent reasonably to believe that authority exists. *Tomerlin v. Canadian Indemnity Co. (1964) 61 Cal. 2d 638, 643, 39 Cal. Rptr. 731, 394 P.2d 571*

Agent's belief in authority as prerequisite to finding of implied actual authority. *Columbia Outfitting Co. v. Freeman (1950) 36 Cal. 2d 216, 219, 223 P.2d 21*

Scope of agent's authority as determinable by conduct of principal and agent in business relationships. *Trane Co. v. Gilbert (1968) 267 Cal. App. 2d 720, 726, 73 Cal. Rptr. 279*

Express agreement as unnecessary to create actual authority. *Transport Clearings-Bay Area v. Simmonds (1964) 226 Cal. App. 2d 405, 425, 38 Cal. Rptr. 116*

Fact of agent's belief alone as insufficient to create actual authority; conduct of principal engendering belief as necessary. *South Sacramento Drayage Co. v. Campbell Soup Co. (1963) 220 Cal. App. 2d 851, 856-857, 34 Cal. Rptr. 137*

Principal's practice of requiring approval of hauling contracts as negating reasonableness of agent's belief that authority existed to negotiate hauling contract. *South Sacramento Drayage Co. v. Campbell Soup Co. (1963) 220 Cal. App. 2d 851, 856-857, 34 Cal. Rptr. 137*

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37-427 California Forms of Pleading and Practice--Annotated § 427.126

§ 427.126 Allegation--Undisclosed Principal Liable for Transaction Entered Into by Agent--Action by Third Party Who Dealt With Agent Without Knowledge of Agency Relationship

[1] FORM Allegation--Undisclosed Principal Liable for Transaction Entered Into by Agent--Action by Third Party Who Dealt With Agent Without Knowledge of Agency Relationship

[1. *Fictitious name allegation, if appropriate. See § 427.80, Paragraph 2.*]

2. [*Actual authority of agent. See § 427.125, Paragraph 1.*]

3. On or about _____ [*date*], plaintiff entered into _____ [*specify transaction with agent, e.g.,* a contract with (defendant) _____ (*name of agent*) for _____ (*specify, e.g.,* the sale of goods to plaintiff)]. In dealing with [defendant] _____ [*name of agent*], plaintiff did not give exclusive credit to [defendant] _____ [*name of agent*].

4. Plaintiff discovered that [defendant] _____ [*name of agent*] was not acting on his/her own behalf but as agent for defendant _____ [*name of principal*] on or about _____ [*date*], when _____ [*specify facts surrounding discovery of agency, e.g.,* defendant _____ (*name of principal*) sought to enforce the contract entered into by (defendant) _____ (*name of agent*)]. [*If judgment was obtained against the agent based on the transaction at issue here, add:* This knowledge was obtained after the judgment against _____ (*name of agent*) was rendered in _____ vs. _____, Case No. _____, in the _____ Court.]

5. The acts of [defendant] _____ [*name of agent*] were taken on behalf of defendant _____ [*name of principal*] and within the authority of [defendant] _____ [*name of agent*], although plaintiff did not know of the existence of the agency at the time the transaction was entered into.

[2] Use of Form

The foregoing allegations are for use in an action by a third person who has contracted with an agent representing an

undisclosed principal if the third person seeks to hold the principal liable for the agent's transaction [*Gardiner v. Gaither (1958) 162 Cal. App. 2d 607, 618, 329 P.2d 22* ; *see also* discussion in *§ 427.62[13]*]. The allegation of an agent's actual authority in *§ 427.125* may be combined with the foregoing allegation in a complaint by a third person seeking to bind an undisclosed principal under a contract with the agent.

Ordinarily, there is no requirement that the third person elect in the complaint to seek recovery from the agent or undisclosed principal, because the doctrine of election is based on estoppel and, as such, is an affirmative defense to be raised by defendant or waived [*Roam v. Koop (1974) 41 Cal. App. 3d 1035, 1044, 116 Cal. Rptr. 539* ; *Klinger v. Modesto Fruit Co., Inc. (1930) 107 Cal. App. 97, 104, 290 P. 127]* . In fact, frequently plaintiff will not know of the agency or will not have sufficient knowledge at the complaint stage to decide intelligently whether to hold the agent orthe principal liable. However, if the plaintiff third person obtained a judgment against the agent before plaintiff knew of the undisclosed agency, an action against the principal may be maintained as long as any judgment is alternative only. In such a situation, the complaint may, although it need not, include an election that the third person proceed against the principal and will estop plaintiff from executing a judgment against the agent [*see Roam v. Koop (1974) 41 Cal. App. 3d 1035, 1044, 116 Cal. Rptr. 539]* .

[3] Allegations

The foregoing allegations state that (1) the agent had actual authority to act for the principal in the manner that he or she acted (Paragraph 2) [*Associated Creditors' Agency v. Davis (1975) 13 Cal. 3d 374, 385, 118 Cal. Rptr. 772, 530 P.2d 1084* ; *Gardiner v. Gaither (1958) 162 Cal. App. 2d 607, 618, 329 P.2d 22]* ; (2) plaintiff entered into a transaction with the agent without knowledge that the agent was acting on behalf of the principal, but did not give exclusive credit to the agent in entering into the transaction (Paragraph 3) [*Associated Creditors' Agency v. Davis (1975) 13 Cal. 3d 374, 385, 118 Cal. Rptr. 772, 530 P.2d 1084* ; *Rigney v. De La Salle Institute (1935) 10 Cal. App. 2d 492, 499, 52 P.2d 579* ; *see Civ. Code § 2335*]; (3) plaintiff discovered the agency relationship (Paragraph 4) [*see Gardiner v. Gaither (1958) 162 Cal. App. 2d 607, 618, 329 P.2d 22]* ; and (4) the transaction was made for the benefit of the principal within the agent's authority (Paragraph 5) [*see Civ. Code § 2330*].

Also included is an allegation making an election to proceed against the undisclosed principal only (Paragraph 4). Although such an election usually must be made only after a demand by defendant, it is included here for the situation in which counsel sees no tactical advantage in waiting for the defendant to demand election [*see Roam v. Koop (1974) 41 Cal. App. 3d 1035, 1044, 116 Cal. Rptr. 539]* . The election should not be made in the complaint if counsel lacks sufficient knowledge of the transaction or the relationship between the principal and agent [*see Standard Oil Co. of Cal. v. Doneux (1961) 192 Cal. App. 2d 608, 612-613, 13 Cal. Rptr. 749* ; discussion in *§ 427.26[2]*].

[4] State Statutes

Principal as bound by authorized acts of agent. *Civ. Code § 2330*

Exoneration of principal by payment to agent who has been given exclusive credit by third person. *Civ. Code § 2335*

Right of person who dealt with undisclosed agent to setoff against principal's claim against agent. *Civ. Code § 2336*

[5] Decisions

Actual authority of agent as required for reliance on doctrine of undisclosed agency. *Associated Creditors' Agency v. Davis (1975) 13 Cal. 3d 374, 385, 118 Cal. Rptr. 772, 530 P.2d 1084*

Doctrine of election as not applicable if principal is disclosed. *Clifton Cattle Co. v. Thompson (1974) 43 Cal. App. 3d 11, 16-17, 117 Cal. Rptr. 500*

Party who dealt with undisclosed agent as not required to elect whether to hold principal or agent liable until existence of agency established or disproven. *Standard Oil Co. of Cal. v. Doneux (1961) 192 Cal. App. 2d 608, 612-613, 13 Cal. Rptr. 749*

Default, but not judgment, entered by third party who knew of agency, against agent, as not constituting election to seek recovery from agent alone. *Standard Oil Co. of Cal. v. Doneux (1961) 192 Cal. App. 2d 608, 613, 13 Cal. Rptr. 749*

Third party as able to hold undisclosed principal liable for contract entered into in agent's name alone. *Gardiner v. Gaither (1958) 162 Cal. App. 2d 607, 618, 329 P.2d 22*

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37-427 California Forms of Pleading and Practice--Annotated § 427.127

§ 427.127 Allegation--Knowledge of or Notice to Agent Imputed to Principal [Civ. Code § 2332]--Action by Third Party Against Principal and/or Agent

[1] FORM Allegation--Knowledge of or Notice to Agent Imputed to Principal [Civ. Code § 2332]--Action by Third Party Against Principal and/or Agent

1. On or about _____ [*date*], [defendant] _____ [*name of agent*] _____ [was given notice *or* acquired knowledge] that _____ [*specify notice or knowledge sought to be imputed, e.g.,* the bannister on the outside stairwell of defendant's building at 123 Main Street had broken, creating a dangerous condition]. This _____ [notice *or* knowledge] was within the scope of the agency, in that _____ [*describe, e.g.,* (defendant) _____ (*name of agent*) was the manager of the properties owned by defendant _____ (*name of principal*) and received all complaints regarding those properties]. [*If relevant knowledge was acquired by agent before creation of agency, add:* (Defendant) _____ (*name of agent*) acquired that knowledge before creation of the agency relationship, but that knowledge was in (defendant) _____ (*name of agent*)'s mind while (defendant) _____ (*name of agent*) was acting for _____ (*name of principal*).]

[2] Use of Form

This allegation is for use by a third party who has dealt with an agent if the third party seeks to impute to the principal some knowledge or notice given to the agent [*Civ. Code § 2332*; *Wagner v. Benson (1980) 101 Cal. App. 3d 27, 35, 161 Cal. Rptr. 516* ; *see also* discussion in *§ 427.62[1]*]. This allegation may be included in a complaint if a principal must be shown to have notice or knowledge of some fact, but the knowledge or notice was instead given to the principal's agent.

[3] Allegations

This form alleges that the agent acquired the knowledge or received the notice and that the knowledge or notice was within the scope of the agency [*Maron v. Swig (1952) 115 Cal. App. 2d 87, 90, 251 P.2d 770]* .

The principal is charged with knowledge acquired by the agent before the commencement of the agency relationship if that knowledge can reasonably be said to be present in the mind of the agent while acting for the principal [*O'Riordan v. Federal Kemper Life Assur. Co. (2005) 36 Cal. 4th 281, 288-289, 30 Cal. Rptr. 3d 507, 114 P.3d 753* ; *Columbia Pictures Corp. v. DeToth (1948) 87 Cal. App. 2d 620, 631, 197 P.2d 580]* .

[4] State Statutes

Agent must inform principal of conduct as agent. *Civ. Code § 2020*

Both principal and agent deemed to have notice of what either has notice of, and should communicate to other. *Civ. Code § 2332*

[5] Decisions

Knowledge of 90-day limitation period for filing petition for review of local agency decisions [*Code Civ. Proc. § 1094.6*] was not imputed to principal (employee) when letter giving notice of employment termination and period for filing was sent to agent (attorney); express language of Section 1094.6, overall statutory context, legislative history, and lack of burden compel conclusion that principal must have actual knowledge. *Herman v. Los Angeles County Metropolitan Transportation Authority (1999) 71 Cal. App. 4th 819, 828-830, 84 Cal. Rptr. 2d 144*

Rule that notice to agent constitutes notice to principal applicable only to third parties dealing with principal through agent. *Lucas v. Pollock (1992) 7 Cal. App. 4th 668, 674-675, 8 Cal. Rptr. 2d 918* ; *Redman v. Walters (1979) 88 Cal. App. 3d 448, 454, 152 Cal. Rptr. 42*

Knowledge is not imputed [*Civ. Code § 2332*] if source of information knows that agent will not communicate knowledge to principal. *Wagner v. Benson (1980) 101 Cal. App. 3d 27, 35, 161 Cal. Rptr. 516*

Principal chargeable with and bound by knowledge of, or notice to, agent [*Civ. Code § 2332*] received while agent acts within scope of authority and that is in reference to matter over which authority extends [*Civ. Code § 2332*]. *Chaplis v. County of Monterey (1979) 97 Cal. App. 3d 249, 262, 158 Cal. Rptr. 395* ; *Trane Co. v. Gilbert (1968) 267 Cal. App. 2d 720, 727, 73 Cal. Rptr. 279*

Notice to agent of facts sufficient to put reasonable person on inquiry imputed to and binding on principal. *Clark Equipment Co. v. Wheat (1979) 92 Cal. App. 3d 503, 527, 154 Cal. Rptr. 874*

Agent's knowledge of falsity of representations imputed to principal if agent's representations made within scope of authority. *Clark Equipment Co. v. Wheat (1979) 92 Cal. App. 3d 503, 521, 154 Cal. Rptr. 874*

Agent's knowledge of facts outside scope of authority not imputed to principal. *Redman v. Walters (1979) 88 Cal. App. 3d 448, 454, 152 Cal. Rptr. 42*

Knowledge of agent imputed to principal only if matters within scope of agency are learned while acting in course of

agency. *Redman v. Walters (1979) 88 Cal. App. 3d 448, 454, 152 Cal. Rptr. 42*

Principal deemed to have knowledge of whatever agent has notice of [*Civ. Code § 2332*] even if agent has breached duty to inform principal. *Northern Natural Gas Co. v. Superior Court (1976) 64 Cal. App. 3d 983, 992-993, 134 Cal. Rptr. 850*

Doctrine of imputed knowledge [*Civ. Code § 2332*] applicable between principal and subagent if subagent's employment authorized or ratified. *Northern Natural Gas Co. v. Superior Court (1976) 64 Cal. App. 3d 983, 993, 134 Cal. Rptr. 850*

Principal charged with knowledge only if communicated by agent or if agent breaches duty of disclosure. *Civil Service Employees Ins. Co. v. Blake (1966) 245 Cal. App. 2d 196, 199-200, 53 Cal. Rptr. 701* ; *Kelley v. British Coml. Ins. Co. (1963) 221 Cal. App. 2d 554, 561, 34 Cal. Rptr. 564*

Lapse of time reasonable for communication of knowledge is allowed before principal is charged with knowledge. *Kelley v. British Coml. Ins. Co. (1963) 221 Cal. App. 2d 554, 561, 34 Cal. Rptr. 564*

Scope of agency and whether or not particular fact known to agent was within that scope issues of fact to be resolved in individual cases. *Maron v. Swig (1952) 115 Cal. App. 2d 87, 90, 251 P.2d 770*

Imputation of agent's knowledge [*Civ. Code § 2332*] is not presumption but rule of law; showing that principal did not learn of facts imparted to agent is normally irrelevant. *Columbia Pictures Corp. v. DeToth (1948) 87 Cal. App. 2d 620, 630-631, 197 P.2d 580*

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Volume 37: Pretrial Proceedings thru Privacy-Chs. 425-439
Chapter 427 PRINCIPAL AND AGENT
PART IV. FORMS
C. Actions by Third Party

37-427 California Forms of Pleading and Practice--Annotated §§ 427.128through 427.139

[Reserved]

§§ 427.128[Reserved]

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Volume 37: Pretrial Proceedings thru Privacy-Chs. 425-439
Chapter 427 PRINCIPAL AND AGENT
PART IV. FORMS
D. Actions Concerning Powers of Attorney

37-427 California Forms of Pleading and Practice--Annotated § 427.140

§ 427.140 Petition for Determination of Whether Power of Attorney Is in Effect [Prob. Code § 4541(a)]

[1] FORM Petition for Determination of Whether Power of Attorney Is in Effect [Prob. Code § 4541(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR
In the Matter of _____ [*name*],	)	DETERMINATION THAT
Petitioner.	)	POWER OF ATTORNEY
	)	IS [NOT] IN EFFECT
	)	

_____

Petitioner alleges:

1. _____ [*Name of principal*] is an individual and resides in _____ County, _____ [California *or other state; or specify foreign country of residence*].

2. There is in existence a document [purportedly] executed by _____ [*name of principal*] on _____ [*date*], _____ [*add, if petitioner is court investigator or public guardian:* in _____ County, California,] to create a power of attorney. _____ [*Add, if appropriate:* A copy of that document is attached to this petition.]

3. _____ [Petitioner *or name of attorney in fact, if petitioner is not attorney in fact*] is named as attorney in fact in that document _____ [*add, if venue is based on this fact:* and resides in _____ County, California].

[*Add, if petitioner is not attorney in fact:*]

4. Petitioner is _____ [the principal's spouse *or* a relative of the principal *or* the conservator of the person of the principal *or* the conservator of the principal's estate *or* a court investigator appointed in a proceeding entitled _____ [*specify*], numbered _____ [*specify*], that is pending in _____ County, California, *or* the public guardian of _____ County, California, *or* the personal representative of the principal's estate *or* the trustee of the principal's estate *or* the principal's successor in interest with respect to _____ [*specify*].

[*OR*]

4. Petitioner has been requested in writing by _____ [*name of attorney in fact*] to _____ [*specify action that attorney in fact asks petitioner to take*].

[*OR*]

4. _____ [*State facts showing petitioner's standing as friend of principal or person having other sufficient interest*].

[*CONTINUE*]

5. _____ [*State facts showing that purported power of attorney is not effective, e.g.,* The purported power of attorney was not executed in accordance with requirements of the Power of Attorney Law, *Probate Code Section 4000 et seq.*, in that _____ (*specify*)].

[*OR*]

5. The power of attorney provides, in pertinent part, that _____ [*specify terms material to issue of whether power of attorney is currently in effect*]. In fact, _____ [*state relevant facts, within petitioner's knowledge, showing that power of attorney has not come into effect, or came into effect but subsequently became terminated, or is currently in effect*].

[*OR*]

5. Petitioner does not know the terms of the power of attorney. Petitioner is informed and believes, and thereon alleges, that _____ [*state relevant facts showing that power of attorney has not come into effect, or came into effect but subsequently became terminated, or is currently in effect*].

[*CONTINUE*]

6. A judicial determination of whether the [purported] power of attorney is in effect is reasonably necessary for the protection of the _____ [principal *or* principal's estate] because _____ [*specify*].

WHEREFORE, petitioner prays for an order determining that the [purported] power of attorney _____ [is not in effect _____ (*add, if appropriate:* and cannot come into effect) *or* is no longer in effect because of having terminated *or* is in effect], and for such other orders as the court may deem proper.
Dated: _____.

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled action. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

[2] Use of Form

This form of petition may be used, under Part 4 of the Power of Attorney Law [*Prob. Code § 4500 et seq.* (governing judicial proceedings concerning powers of attorney)], to obtain a judicial determination of whether a purported power of attorney is legally effective, or whether a power of attorney is currently in effect. The attorney in fact may appropriately file this petition if the attorney in fact is not certain about whether the purported power of attorney is legally effective or whether the power of attorney is currently in effect.

Because powers of attorney for health care (also known as advance health care directives) are governed by the Health Care Decisions Law set forth in Division 4.7 of the Probate Code (not the Power of Attorney Law), the provisions pertaining to judicial proceedings under Part 3 of the Health Care Decisions Law [*Prob. Code § 4750 et seq.*] should be checked before using this form as a model for a petition regarding a power of attorney for health care or advance directive.

This petition raises the issue of whether a power of attorney is in effect or terminated according to its terms. For a form of petition raising the issue of whether a power of attorney should be judicially terminated for cause, based on an act or omission by the attorney in fact, see *§ 427.144*.

The remedies provided in Part 4 of the Power of Attorney Law are cumulative and not exclusive of any other remedies provided by law [*Prob. Code § 4501*].

[3] Allegations

A proceeding under Part 4 of the Power of Attorney Law is commenced by filing a petition stating facts showing that the petition is authorized under Part 5, the grounds of the petition, and, if known to the petitioner, the terms of the power of attorney [*Prob. Code § 4543*].

The petition alleges the following:

- The existence of a power of attorney or a purported power of attorney (Paragraphs 1-3).

- The petitioner's standing as a person authorized to file a petition under Part 4 of the Power of Attorney Law (Paragraphs 3 and 4) [*see* discussion under *§ 427.140[7]*].

- Facts showing a statutory ground for the petition (Paragraph 5) [*see* discussion under *§ 427.146[3]*].

- Either the terms of the power of attorney (Paragraph 2, through incorporating a copy of the instrument, and Paragraph 5), or the fact that the petitioner does not know the terms (Paragraph 5).

Facts on which venue may be based are included in two allegations (Paragraphs 1 and 3) [*see* discussion under *§ 427.140[5]*].

Facts are alleged showing that a judicial determination of the issue raised in the petition is reasonably necessary to protect the interests of the principal or the principal's estate (Paragraph 6) because otherwise the petition may be dismissed [*see* discussion under *§ 427.140[11][c]*].

[4] Jurisdiction

The superior court has jurisdiction in proceedings under the Power of Attorney Law [*Prob. Code § 4520(a)*].

The court in proceedings under the Power of Attorney Law is a court of general jurisdiction, and the court, or a judge of the court, has the same power and authority with respect to the proceedings as otherwise provided by law for a superior court, or a judge of the superior court, including, but not limited to, the matters authorized by *Code Civ. Proc. § 128* (enumerating the statutory powers of courts) [*Prob. Code § 4520(b)*; *see Code Civ. Proc. § 410.10* (basis of jurisdiction); *Prob. Code § 4521* (same)].

[5] Venue

The proper county for commencement of a proceeding under the Power of Attorney Law is determined in the following order of priority [*Prob. Code § 4523*]:

- The county in which the principal resides.

- The county in which the attorney in fact resides.

- A county in which property subject to the power of attorney is located.

- Any other county that is in the principal's best interest.

When venue is based on residence, venue facts may be alleged in connection with identifying the principal and the attorney in fact. If venue is based on one of the other grounds, the petitioner's attorney should take care to allege the

relevant facts.

[6] Ground for Petition

A petition may be filed under Part 4 of the Power of Attorney Law [*Prob. Code § 4500 et seq.*] for the purpose of determining whether a power of attorney is in effect or has terminated [*Prob. Code §§ 4541(a), 4542(a)*].

[7] Standing to File Petition

Generally a petition may be filed under Part 4 of the Power of Attorney Law by any of the following persons (not listed in any order of priority) [*Prob. Code § 4540*]:

- The attorney in fact.
- The principal.
- The principal's spouse.
- The principal's relative.
- The conservator of the person or estate of the principal.
- A court investigator [*see Prob. Code § 1454*] in the county where the power of attorney was executed or where the principal resides.
- The public guardian of the county where the power of attorney was executed or where the principal resides.
- The personal representative or trustee of the principal's estate.
- The principal's successor in interest.
- A person who is requested in writing by an attorney in fact to take action.
- Any other interested person or friend of the principal.

Whether one of these persons may appropriately be a petitioner depends on the purpose of the petition [*see* discussion under *§ 427.146[3]*; see also comments to § 427.141 et seq.] and the circumstances. The right of a person to be a petitioner in a particular case could be eliminated by the power of attorney [*see Prob. Code §§ 4502, 4503*; comments to § 427.141 et seq.].

[8] Nonlimitable Right to Petition

A power of attorney may not limit the authority of the attorney in fact, the principal, the conservator of the person or estate of the principal, or the public guardian, to petition under Part 4 of the Power of Attorney Law [*Prob. Code § 4503(b)*].

[9] Elimination of Right to Petition

A power of attorney may expressly eliminate the statutory authority of any person, who may otherwise be a petitioner [*see* discussion under *§ 427.140[7]*], except a person with a nonlimitable right [*see* discussion under *§ 427.146[4]*], to

file a petition under Part 4 of the Power of Attorney Law, if both of the following conditions are satisfied [*Prob. Code § 4503(a)*]:

- The principal executes the power of attorney at a time when the principal has the advice of a lawyer authorized to practice in the state where the power of attorney is executed.

- The principal's lawyer signs a certificate stating in substance: "I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time this power of attorney was executed. I have advised my client concerning his or her rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney."

[10] Signature and Verification

Normally the petitioner (and each of two or more petitioners) must sign the petition; however, a petitioner's attorney may sign for the petitioner if the petitioner is absent from the county or for some other reason is unable to sign the petition [*Prob. Code §§ 1020, 1023, 4505*].

Verification of the petition is required [*Prob. Code §§ 1021(a)(1), 4505*]. Normally the petitioner (or any of two or more petitioners) must verify it; however, a petitioner's attorney may verify for the petitioner if the petitioner is absent from the county or for some other reason is unable to verify the petition [*Prob. Code §§ 1021(b)(1), 1023, 4505*].

Verification of the petition constitutes signing it [*Prob. Code § 1020*].

[11] Procedure

[a] Governing Rules

Except as otherwise provided in the Power of Attorney Law, the provisions in Division 3 of the Probate Code [*see Prob. Code § 1000 et seq.*] (general provisions of a procedural nature) apply to judicial proceedings under the Power of Attorney Law [*Prob. Code § 4505*].

[b] Service of Petition and Notice of Hearing

At least 15 days before the time set for hearing, the petitioner must serve notice of the time and place of the hearing, together with a copy of the petition, on the attorney in fact (if not the petitioner) and the principal (if not the petitioner) [*Prob. Code § 4544(a)*; *see Prob. Code §§ 1040 et seq., 1200 et seq.* (hearings; notices)].

[c] Dismissal of Petition

The court may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of the principal or the principal's estate. The court must stay or dismiss the proceeding in whole or in part when required by *Code Civ. Proc. § 410.30* (on the ground that a forum outside California would be more appropriate) [*Prob. Code § 4543*]. For discussion of dismissal on the that ground, see Ch. 323, *Jurisdiction: Personal* .

An appeal may be taken from an order dismissing the petition or denying a motion to dismiss [*Prob. Code § 1302(b)*].

[d] Right to Jury Trial

There is no right to a jury trial in proceedings under the Power of Attorney Law [*Prob. Code § 4504*].

[e] Appeal

With respect to a power of attorney governed by the Power of Attorney Law [*Prob. Code § 4000 et seq.*], an appeal may be taken from any final order under *Prob. Code § 4541* except an accounting or reporting order under *Prob. Code § 4541(c)*, and from an order dismissing the petition or denying a motion to dismiss [*Prob. Code § 1302*]. With respect to an advance health care directive or power of attorney governed by the Health Care Decisions Law [*Prob. Code § 4600 et seq.*], an appeal may be taken from a final order under *Prob. Code § 4766* or an order dismissing the petition or denying a motion to dismiss [*Prob. Code § 1302.5*].

[12] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to FAX service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter* ,

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For allegations showing proper venue, see Ch. 571, *Venue*

For alternative verification forms, see Ch. 572, *Verification*

[13] State Statutes

Judicial proceedings concerning powers of attorney (Part 4 of Power of Attorney Law). *Prob. Code § 4500 et seq.*

Remedies under Part 4 of Power of Attorney Law are cumulative. *Prob. Code § 4501*

Judicial proceedings under Part 4 of Power of Attorney Law generally are not subject to limitation in power of attorney. *Prob. Code § 4502*

Limitations on authority to file petition. *Prob. Code § 4503*

Denial of right to jury trial. *Prob. Code § 4504*

Procedural provisions governing proceedings under Power of Attorney Law. *Prob. Code §§ 1000 et seq., 4505*

Jurisdiction. *Code Civ. Proc. §§ 128, 410.10*; *Prob. Code §§ 4520, 4521*

Venue. *Prob. Code § 4523*

Persons who may file petitions. *Prob. Code § 4540*

Purposes of petitions. *Prob. Code § 4541*

Contents and filing of petition. *Prob. Code §§ 1020 et seq., 4542*

Dismissal of petition. *Code Civ. Proc. § 410.30*; *Prob. Code § 4543*

Service of petition and notice of hearing. *Prob. Code §§ 1040 et seq., 1200 et seq., 4544*

Appeals. *Prob. Code § 1300 et seq.*

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37-427 California Forms of Pleading and Practice--Annotated § 427.141

§ 427.141 Petition for Determination of Whether Act of Attorney in Fact Is Proper [Prob. Code §§ 4541(b), 4766(c), 4770]--By Attorney in Fact

[1] FORM Petition for Determination of Whether Act of Attorney in Fact Is Proper [Prob. Code §§ 4541(b), 4766(c), 4770]--By Attorney in Fact

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR
In the Matter of _____ [*name*],	)	DETERMINATION OF
Petitioner.	)	WHETHER ACT OF
	)	ATTORNEY IN FACT
	)	IS PROPER
	)	

_____

Petitioner alleges:

1. _____ [*Name of principal*] is an individual and resides in _____ County, _____ [California *or other state; or specify foreign country of residence*].

2. _____ [*Name of principal*], on _____ [*date*], _____ [*add, if petitioner is court investigator or public guardian:* in _____ County, California,] duly executed an instrument to create a _____ [power of attorney *or* power of attorney for health care *or* advance health care directive]. _____ [*Add, if appropriate:* A copy of that instrument is attached to this petition.]

3. Petitioner is named as attorney in fact in that instrument _____ [*add, if venue is based on this fact:* and resides in _____ County, California].

4. The [power of attorney *or* advance health care directive] provides, in pertinent part, that _____ [*specify terms material to issue of whether proposed act would be proper or completed act was proper*].

5. _____ [*State what attorney in fact proposes to do or has done, as to which judicial determination of propriety is needed*].

6. A judicial determination of whether the act described in the preceding paragraph _____ [would be *or* was] proper is reasonably necessary for the protection of the _____ [principal *or* principal's estate] because _____ [*specify*].

7. _____ [*If temporary order for health care is needed, add:* A temporary order prescribing health care for the principal, for the period this petition is pending, is necessary because _____ (*specify reason and allege supporting facts*)].

WHEREFORE, petitioner prays for:

[*EITHER, if not power for health care or advance health care directive*]

1. An order determining that the act described above in this petition _____ [would be *or* was] in accord with the principal's instructions or proper even if not in accord with the principal's instructions.

2. Such other orders as the court deems proper.

[*OR, if power for health care or advance health care directive*]

1. _____ [*If temporary order prescribing health care is needed:* An order directed to any and all health care providers who may treat _____ (*name of principal*), requiring that, until further order of the court, the following measures must be taken: _____ (*specify health care that principal must receive*)].

2. An order determining that the act described above in this petition _____ [would be *or* was] consistent with the principal's desires; or, if the principal's desires cannot be clearly determined, an order determining that the act described above in this petition _____ [would be *or* was] in the principal's best interest.

2. Such other orders as the court deems proper.
Dated: _____.

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

[*Verification. See § 427.140.*]

[2] Use of Form

This petition may be used, under Part 4 of the Power of Attorney Law [*Prob. Code § 4500 et seq.* (governing judicial proceedings concerning powers of attorney)], by the attorney in fact to obtain a judicial determination that a proposed act by the attorney in fact would be proper or that a completed act was proper. In the case of a power of attorney for health care or advance health care directive, the governing law is set forth in the Health Care Decisions Law [*Prob. Code § 4600 et seq.*] and the attorney in fact may include a request for a temporary order prescribing health care for the principal, for the period while this petition is pending [*see Prob. Code § 4770*].

For a petition that may be used by some other legitimately interested person to obtain the same determination in an adversary proceeding against the attorney in fact, see *§ 427.142*.

[3] Ground for Petition

In the case of a power of attorney other than a power of attorney for health care, a petition may be filed under Part 4 of the Power of Attorney Law for the purpose of "[p]assing on the acts or proposed acts of the attorney in fact," that is, for a determination of whether a proposed act would be proper or a completed act was proper [*Prob. Code § 4541(b)*]. With court approval, the attorney in fact may disobey the principal's instructions [*Prob. Code §§ 4234(b), 4541(b)*]. In other words, a petition may be filed for a determination that a proposed act would be proper, or a completed act was proper, even if not in accord with the principal's instructions in the power of attorney.

In the case of a power of attorney for health care or an advance health care directive, a petition may be filed under Part 3 of the Health Care Decisions Law for the purpose of determining whether the acts or proposed acts of an agent or surrogate are consistent with a patient's desires as expressed in an advance health care directive or otherwise made known to the court or, when the patient's desires are unknown or unclear, whether the acts or proposed acts of the agent or surrogate are in the patient's best interest [*Prob. Code § 4766(c)*].

As a general rule, the attorney in fact may, with court approval, disobey the principal's instructions [*Prob. Code § 4234(b)*]. (While applicable to powers of attorney governed by the Powers of Attorney Law, this rule has no application to powers of attorney for health care or advance health care directives, which are governed by the Health Care Decisions Law.) The court's specific statutory authority, with respect to that kind of power of attorney, is to determine only (1) whether an act would be or was consistent with the patient's desires as expressed in the power of attorney and (2) whether an act would be or was in the patient's best interest, if the patient's desires are unknown or unclear [*see Prob. Code § 4766(c)*].

[4] Nonlimitable Right to Petition

A power of attorney may not limit the statutory authority of the following persons to petition for a determination of whether a proposed act of the attorney in fact would be proper, or a completed act was proper:

- The conservator of the person regarding a petition relating to an advance health care directive, or the agent regarding a petition relating to a power of attorney for health care or advance health care directive, for a purpose specified in *Prob. Code § 4766(b)* or *(c)* [*Prob. Code § 4753(b)*].

- The attorney in fact, the principal, the conservator of the principal's person or estate, or the public guardian, in the case of a power of attorney other than a power of attorney for health care or advance health care directive [*Prob. Code §§ 4503(b), 4541(b)*].

[5] Temporary Order Prescribing Health Care

With respect to a power of attorney for health care or advance health care directive, the court in its discretion, upon a showing of good cause, may issue a temporary order prescribing health care or advance health care directive for the patient until the disposition of the petition. If a power of attorney for health care is in effect and a conservator (including a temporary conservator) of the person is appointed for the patient, the court that appoints the conservator in its discretion, upon a showing of good cause, may issue a temporary order prescribing health care for the patient, that order to continue in effect for such time as is ordered by the court but in no case longer than the time necessary to permit the filing and determination of a petition under Part 3 of the Health Care Decisions Law [*Prob. Code § 4770*].

[6] Appeal

With respect to a power of attorney governed by the Power of Attorney Law [*Prob. Code § 4000 et seq.*], an appeal may be taken from any final order under *Prob. Code § 4541* except an accounting or reporting order under *Prob. Code § 4541(c)*, and from an order dismissing the petition or denying a motion to dismiss [*Prob. Code § 1302*]. With respect to an advance health care directive or power of attorney governed by the Health Care Decisions Law [*Prob. Code § 4600 et seq.*], an appeal may be taken from a final order under *Prob. Code § 4766* or an order dismissing the petition or denying a motion to dismiss [*Prob. Code § 1302.5*].

[7] State Statutes

Court approval for attorney in fact to disobey principal's instructions. *Prob. Code § 4234(b)*

[8] Cross Reference

For a related form, *see § 427.140*.

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§ 427.142 Petition for Determination of Whether Attorney's Act Is Proper [Prob. Code §§ 4766(c), 4942(b)]--By Person Other Than Attorney in Fact

[1] FORM Petition for Determination of Whether Attorney's Act Is Proper [Prob. Code §§ 4766(c), 4942(b)]--By Person Other Than Attorney in Fact

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Petitioner,	)	PETITION FOR
vs.	)	DETERMINATION OF
_____ [*name*],	)	WHETHER ACT OF
Respondent.	)	ATTORNEY IN FACT
	)	IS PROPER
	)	

_____

Petitioner alleges:

1. [*Identity of principal. See § 427.141, Paragraph 1.*]

2. [*Existence of power of attorney. See § 427.141, Paragraph 2.*]

3. Respondent is named as attorney in fact in that instrument _____ [*add, if venue is based on this fact:* and resides in _____ County, California].

4. [*Identity of petitioner. See § 427.140, Paragraph 4.*]

[*EITHER*]

5. The power of attorney provides, in pertinent part, that _____ [*specify terms material to issue of whether proposed act would be proper or completed act was proper*].

[*OR*]

5. Petitioner does not know the terms of the power of attorney.

[*CONTINUE*]

6. _____ [*State what attorney in fact proposes to do or has done, as to which judicial determination of propriety is needed*].

7. A judicial determination of whether the act described in the preceding paragraph _____ [would be *or* was] proper is reasonably necessary for the protection of the _____ [principal *or* principal's estate] because _____ [*specify*].

8. _____ [*Add, if act in question is completed and petitioner claims attorney's fees:* Petitioner has incurred and will incur expenses for attorney's fees in connection with this proceeding.]

WHEREFORE, petitioner prays for:

[*EITHER, if not power for health care or advance health care directive*]

1. An order determining that the act described above in this petition _____ [would not be *or* was not] in accord with the principal's instructions and _____ [would not be *or* was not] proper.

[*OR, if power of attorney for health care or advance health care directive*]

1. An order determining that the act described above in this petition _____ [would be *or* was] inconsistent with the principal's desires; or, if the principal's desires cannot be clearly determined, an order determining that the act described above in this petition _____ [would not be *or* was not] in the principal's best interest.

[*CONTINUE*]

2. _____ [*Add, if act in question is completed and petitioner claims attorney's fees:* An order determining that the act described above in this petition constituted a clear violation of the fiduciary duties of the attorney in fact under the power of attorney, and awarding petitioner reasonable attorney's fees.]

3. Such other orders as the court deems proper.
Dated: _____.

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

[*Verification. See § 427.140.*]

[2] Use of Form

This petition may be used by a person other than the attorney in fact to obtain a judicial determination, under Part 4 of the Power of Attorney Law [*Prob. Code § 4500 et seq.* (governing judicial proceedings concerning powers of attorney)], or under Part 3 of the Health Care Decisions Law [*Prob. Code § 4750 et seq.* (governing judicial proceedings concerning advance health care directives or powers of attorney for health care)], that a proposed act by the attorney in fact would be improper or that a completed act was improper. For additional discussion, see the comments to § 427.141.

In the case of a power of attorney for health care or advance health care directive, the petitioner may serve and file a notice of motion for a temporary order prescribing health care for the patient, for the period this petition is pending [*see Prob. Code § 4770*; *see* comments to Form 51]. For discussion and forms relating to notices of motion generally, see Ch. 372, *Motions and Orders* .

[3] Attorney in Fact Subject to Personal Jurisdiction

A person who acts as an attorney in fact under a power of attorney governed by the Power of Attorney Law [*see Prob. Code § 4000 et seq.*] is subject to personal jurisdiction in California with respect to matters relating to acts and transactions of the attorney in fact performed in California or affecting property or a principal in California [*Prob. Code § 4522*]. A similar jurisdictional rule applies to a person who is an agent under a power of attorney for health care or advance health care directive, or is a surrogate, with respect to matters relating to acts and transactions performed in California or affecting a patient in California [*Prob. Code § 4762*].

[4] Attorney's Fees

In a proceeding under Part 4 of the Power of Attorney Law [*Prob. Code § 4500 et seq.*] commenced by the filing of a petition by a person other than the attorney in fact, the court may in its discretion award reasonable attorney's fees to the person commencing the proceeding, if the court determines that the attorney in fact has clearly violated the fiduciary duties under the power of attorney [*Prob. Code § 4545(b)*]. On the other hand, the court may award attorney's fees to the attorney in fact if the court determines that the proceeding was commenced without any reasonable cause [*Prob. Code § 4545(a)*].

In a proceeding under Part 3 of the Health Care Decisions Law commenced by the filing of a petition by a person other than the agent or surrogate, the court may in its discretion award reasonable attorney's fees to the agent or surrogate if the proceeding was commenced without reasonable cause, or to the person commencing the proceeding if the agent or surrogate clearly violated his or her duties under the advance health care directive or power of attorney for health care [*Prob. Code § 4771*].

[5] Appeal

With respect to a power of attorney governed by the Power of Attorney Law [*Prob. Code § 4000 et seq.*], an appeal may be taken from any final order under *Prob. Code § 4541* except an accounting or reporting order under *Prob. Code § 4541(c)*, and from an order dismissing the petition or denying a motion to dismiss [*Prob. Code § 1302*]. With respect to an advance health care directive or power of attorney for health care governed by the Health Care Decisions Law [*Prob. Code § 4600 et seq.*], an appeal may be taken from a final order under *Prob. Code § 4766* or an order dismissing the petition or denying a motion to dismiss [*Prob. Code § 1302.5*].

[6] State Statutes

Attorney in fact subject to personal jurisdiction. *Prob. Code §§ 4522, 4762*

Award of attorney's fees. *Prob. Code §§ 4545, 4771* (Power of Attorney Law and Health Care Decisions Law)

[7] Cross Reference

For a related form, *see § 427.140*.

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Volume 37: Pretrial Proceedings thru Privacy-Chs. 425-439
Chapter 427 PRINCIPAL AND AGENT
PART IV. FORMS
D. Actions Concerning Powers of Attorney

37-427 California Forms of Pleading and Practice--Annotated § 427.143

§ 427.143 Petition for Order Compelling Attorney in Fact to Submit Accounting or Report [Prob. Code §§ 4541(c)]

[1] FORM Petition for Order Compelling Attorney in Fact to Submit Accounting or Report [Prob. Code §§ 4541(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Petitioner,	)	PETITION FOR ORDER
vs.	)	COMPELLING ATTORNEY
_____ [*name*],	)	IN FACT TO SUBMIT
Respondent.	)	_____ [ACCOUNTING
	)	*OR* REPORT]
	)	

Petitioner alleges:

1. _____ [Petitioner *or, if principal is not petitioner, name of principal*] is an individual and resides in _____ County, _____ [California *or other state; or specify foreign country of residence*].

2. _____ [Petitioner *or, if principal is not petitioner, name of principal*], on _____ [*date*], _____ [*add, if petitioner is court investigator or public guardian:* in _____ County, California,] duly executed an instrument to create a [power of attorney.] [*Add, if appropriate:* A copy of that instrument is attached to this petition.]

3. Respondent is named as attorney in fact in that instrument _____ [*add, if venue is based on this fact:* and resides in _____ County, California].

4. _____ [*Add, if appropriate:* On _____ (*date*), the power of attorney _____ (terminated *or* was duly revoked).]

[*Add, if petitioner is not principal:*]

5. Petitioner is _____ [the principal's spouse *or* a relative of the principal *or* the conservator of the person of the principal *or* the conservator of the principal's estate *or* a court investigator appointed in a proceeding entitled _____ [*specify*], numbered _____ [*specify*], that is pending in _____ County, California, *or* the public guardian of _____ County, California, *or* the personal representative of the principal's person or estate *or* the trustee of the principal's estate *or* the principal's successor in interest with respect to _____ [*specify*].

[*OR*]

5. _____ [*State facts showing petitioner's standing as friend of principal or person having other sufficient interest*].

[*CONTINUE*]

6. The power of attorney provides, in pertinent part, that _____ [*specify terms material to issue of whether attorney in fact should be compelled to submit accounting or report*].

[*OR*]

6 Petitioner does not know the terms of the power of attorney.

[*CONTINUE*]

7. On _____ [*date*], petitioner made a written request for the attorney in fact to submit _____ [an accounting *or* a report] with respect to _____ [*specify what items accounting should cover or what subjects report should cover*]. The attorney in fact has failed and refuses _____ [*add, if petitioner is principal or conservator and claims attorney's fees:*, without any reasonable cause or justification,] to comply with that request.

8. An order compelling the attorney in fact to submit the _____ [accounting *or* report] described in the preceding paragraph is reasonably necessary for the protection of the _____ [principal *or* principal's estate] because _____ [*specify*].

WHEREFORE, petitioner prays for:

1. An order directing the attorney in fact to submit the requested _____ [accounting *or* report] to

_____ [petitioner *or specify other person who should receive accounting or report*].

2. _____ [*Add, if petitioner is principal or conservator and claims attorney's fees:* An order determining that the attorney in fact failed without any reasonable cause or justification to submit the requested _____ [accounting *or* report], and awarding petitioner reasonable attorney's fees.]

3. Such other orders as the court deems proper.
Dated: _____.

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

[*Verification. See § 427.140.*]

[2] Use of Form

This petition may be used, under Part 4 of the Power of Attorney Law [*Prob. Code § 4500 et seq.* (governing judicial proceedings concerning powers of attorney)], by a person other than the attorney in fact to obtain an order directing the attorney in fact to submit an accounting or a report.

[3] Ground for Petition

With respect to a power of attorney other than a power of attorney for health care or advance health care directive, a petition may be filed under Part 4 of the Power of Attorney Law for the purpose of compelling the attorney in fact to submit an accounting or a report on acts as attorney in fact, to the principal, the principal's spouse, the conservator of the person or the estate of the principal, or any other person as required by the court in its discretion, if the attorney in fact has failed to submit an accounting or report within 60 days after written request from the person filing the petition [*Prob. Code § 4541(c)*].

[4] Duty of Attorney in Fact to Submit Accounting or Report

The attorney in fact must keep records of all transactions entered into by the attorney in fact on the principal's behalf [*Prob. Code § 4236(a)*]. The attorney in fact does not have a duty to make an account of transactions entered into on the principal's behalf, except in the following circumstances [*Prob. Code § 4236(b)*]:

- At any time on the principal's request.
- When the power of attorney requires the attorney in fact to account and specifies to whom the account is to be made.
- On request by the conservator of the principal's estate while the principal is living.
- On request by the personal representative of the principal's estate or the principal's successor in

interest after the death of the principal.

- Pursuant to court order.

These statutory rules are not subject to limitation in the power of attorney [*Prob. Code § 4236(d)*].

On termination of a power of attorney, the attorney in fact must deliver copies of any records relating to transactions undertaken on the principal's behalf that are requested by the person to whom the attorney in fact delivers possession or control of the principal's property [*Prob. Code § 4238(b)*]. Termination of a power of attorney does not relieve the attorney in fact of any duty to render an account of actions taken as attorney in fact [*Prob. Code § 4238(c)*].

[5] Nonlimitable Right to Petition

A power of attorney may not limit the statutory authority to petition for an order directing the attorney in fact to submit an accounting or a report to the principal, the conservator of the principal's estate, or the public guardian, in the case of a power of attorney other than a power of attorney for health care or advance health care directive [*Prob. Code §§ 4503(b), 4541(c)*].

[6] Attorney's Fees

In a proceeding under Part 4 of the Power of Attorney Law [*Prob. Code § 4500 et seq.*] commenced by the filing of a petition by a person other than the attorney in fact, the court may in its discretion award reasonable attorney's fees to the person commencing the proceeding, if the court determines that the attorney in fact has failed without any reasonable cause or justification to submit accounts or report acts to the principal or conservator of the estate or of the person, as the case may be, after written request from the principal or conservator [*Prob. Code § 4545(b)*].

On the other hand, the court may award attorney's fees to the attorney in fact if the court determines that the proceeding was commenced without any reasonable cause [*Prob. Code § 4545(a)*].

[7] Order Not Appealable

An appeal may not be taken from any final order compelling the attorney in fact to submit an accounting or a report [*Prob. Code § 1302(a)*].

[8] State Statutes

Duty of attorney in fact to keep records of transactions and render accountings. *Prob. Code § 4236*

Duty of attorney in fact to deliver property and records on termination of power of attorney. *Prob. Code § 4238*

[9] Cross Reference

For a related form, *see § 427.140*.

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D. Actions Concerning Powers of Attorney

37-427 California Forms of Pleading and Practice--Annotated § 427.144

§ 427.144 Petition for Order That Durable Power of Attorney Is Revoked or Terminated [Prob. Code §§ 4541(d), 4766(d)]

[1] FORM Petition for Order That Durable Power of Attorney Is Revoked or Terminated [Prob. Code §§ 4541(d), 4766(d)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Petitioner,	)	PETITION FOR
vs.	)	ORDER THAT POWER
_____ [*name*],	)	OF ATTORNEY IS
Respondent.	)	_____ [REVOKED
	)	*OR* TERMINATED]
	)	

Petitioner alleges:

1. [*Identity of principal. See § 427.141, Paragraph 1.*]

2. [*Existence of power of attorney. See § 427.141, Paragraph 2.*]

3. Respondent is named as attorney in fact in that instrument _____ [*add, if venue is based on this fact:* and resides in _____ County, California].

4. [*Identity of petitioner. See § 427.140, Paragraph 4.*]

[*EITHER*]

5. The power of attorney provides, in pertinent part, that _____ [*specify terms material to issue of whether cause exists for judicial declaration that power of attorney in revoked or terminated; see Paragraph 6*].

[*OR*]

5. Petitioner does not know the terms of the power of attorney.

[*EITHER, if not power for health care or advance health care directive*]

6. The attorney in fact _____ [has violated *or* is unfit to perform] the fiduciary duties under the power of attorney, in that _____ [*specify*].

[*OR, if power for health care or advance health care directive*]

6. The attorney in fact has made a health care decision for the principal that authorized _____ [*specify illegal act*].

[*AND/OR*]

6. The attorney in fact _____ [has violated *or* has failed to perform *or* is unfit to perform] the duty under the power of attorney to act consistently with the principal's desires. In particular, _____ [*specify*].

[*AND/OR*]

6. The attorney in fact _____ [*specify acts and omissions*]. This conduct is clearly contrary to the principal's best interests. The principal's desires in this regard are _____ [unknown *or* unclear].

[*CONTINUE*]

7. _____ [*Add, unless Paragraph 6 solely alleges health care decision authorizing anything illegal:* The principal lacks the capacity to revoke the power of attorney].

8. A judicial determination that the power of attorney is _____ [revoked *or* terminated] is reasonably necessary for the protection of the _____ [principal *or* principal's estate] because _____ [*specify*].

9. _____ [*Add, if petitioner claims attorney's fees:* Petitioner has incurred and will incur expenses for attorney's fees in connection with this proceeding.]

WHEREFORE, petitioner prays for:

1. An order declaring that the power of attorney is _____ [revoked *or, if power of attorney is durable power for health care,* terminated].

2. _____ [*Add, if petitioner claims attorney's fees:* An order determining that the conduct described above in this petition constituted a clear violation of the fiduciary duties of the attorney in fact under the power of attorney, and awarding petitioner reasonable attorney's fees.]

3. Such other orders as the court deems proper.
Dated: _____.

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

[*Verification. See § 427.140.*]

[2] Use of Form

This petition may be used by a person other than the principal or the attorney in fact to obtain a judicial declaration, under Part 4 of the Power of Attorney Law [*Prob. Code § 4900 et seq.* (governing judicial proceedings concerning powers of attorney)], or under Part 3 of the Health Care Decisions Law [*Prob. Code § 4750 et seq.* (governing judicial proceedings concerning advance health care directives including powers of attorney for health care)], that a power of attorney is revoked or terminated for cause, based on malfeasance or misfeasance by the attorney in fact.

In the case of a power of attorney for health care or advance health care directive, the petitioner may move for a temporary order prescribing health care for the principal, for the period this petition is pending [*see Prob. Code § 4770*; comments to § 427.142.].

[3] Ground for Petition

With respect to a power of attorney other than a power of attorney for health care or advance health care directive, a petition may be filed under Part 4 of the Power of Attorney Law [*Prob. Code § 4500 et seq.*] for the purpose of declaring that the authority of the attorney in fact is revoked on a determination by the court of all of the following [*Prob. Code § 4541(d)*]:

- The attorney in fact has violated or is unfit to perform the fiduciary duties under the power of attorney [*see Prob. Code § 4230 et seq.* (duties of attorneys in fact)].

- At the time of the determination by the court, the principal lacks the capacity to give or to revoke a power of attorney.

- The revocation of the authority of the attorney in fact is in the best interest of the principal or the

principal's estate.

With respect to a power of attorney for health care or advance health care directive, a petition may be filed under Part 3 of the Health Care Decisions Law for the purpose of declaring that the power of attorney is terminated upon a determination by the court that the attorney in fact has made a health care decision for the principal that authorized anything illegal or upon a determination by the court of both of both of the following [*Prob. Code § 4766(d)*]:

- The agent or surrogate has violated, has failed to perform, or is unfit to perform, the duty under an advance health care directive to act consistently with the patient's desires or, when the patient's desires are unknown or unclear, is acting (by action or inaction) in a manner that is clearly contrary to the patient's best interest.

- At the time of the determination by the court, the patient lacks the capacity to execute or to revoke an advance health care directive or disqualify a surrogate.

[4] Nonlimitable Right to Petition

A power of attorney may not limit the statutory authority of the following persons to petition for a declaration that the power of attorney is revoked or terminated:

- The conservator of the person in the case of an advance health care directive or power of attorney for health care [*Prob. Code §§ 4753(b)(1), 4766(d)*].

- The conservator of the principal's person or estate or the public guardian, in the case of a power of attorney other than a durable power of attorney for health care [*Prob. Code §§ 4503(b)(1), 4541(d)*].

[5] Appeal

An appeal may be taken from the court's final order disposing of the petition [*Prob. Code § 1302(a)*].

[6] Cross Reference

For a related form, *see § 427.140*.

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37-427 California Forms of Pleading and Practice--Annotated § 427.145

§ 427.145 Petition for Approval of Resignation by Attorney in Fact (Except Power of Attorney for Health Care [Advance Health Care Directive]) [Prob. Code §§ 4941(e)]

[1] FORM Petition for Approval of Resignation by Attorney in Fact (Except Power of Attorney for Health Care [Advance Health Care Directive]) [Prob. Code §§ 4941(e)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR
In the Matter of _____ [*name*],	)	APPROVAL OF
Petitioner.	)	RESIGNATION BY
	)	ATTORNEY IN FACT
	)	

_____

Petitioner alleges:

1. _____ [*Name of principal*] is an individual and resides in _____ County, _____ [California *or other state; or specify foreign country of residence*].

2. _____ [*Name of principal*], on _____ [*date*], duly executed an instrument to create a [power of attorney.] _____ [*Add, if appropriate:* A copy of that instrument is attached to this petition.]

3. Petitioner is named as attorney in fact in that instrument _____ [*add, if venue is based on this fact:* and resides in _____ County, California].

[*EITHER*]

4. The power of attorney provides, in pertinent part, that _____ [*specify terms material to resignation of attorney in fact*].

[*OR*]

4. The power of attorney makes no provision regarding resignation by the attorney in fact.

[*CONTINUE*]

5. Petitioner intends to resign as attorney in fact.

[*EITHER*]

6. There are no pending transactions in which petitioner is acting for the principal.

[*OR*]

6. Petitioner is in the process of acting for the principal with respect to _____ [*describe pending transactions*].

[*EITHER*]

7. Petitioner is not bound any written agreement to act for the principal _____ [*add, if appropriate:* other than the agreement implied by petitioner's signature on the instrument by which the power of attorney was created, indicating petitioner's acceptance of the appointment as attorney in fact].

[*OR*]

7. Petitioner expressly agreed in writing to act for the principal. A copy of that agreement is attached to this petition.

[*CONTINUE*]

8. Judicial approval of petitioner's resignation as attorney in fact is reasonably necessary for the protection of the _____ [principal *or* principal's estate] because _____

[*specify*].

WHEREFORE, petitioner prays for an order approving petitioner's resignation as attorney in fact, and for such other

orders as the court deems proper.
Dated: _____.

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

[*Verification. See § 427.140.*]

[2] Use of Form

This petition may be used by the attorney in fact to obtain judicial approval of petitioner's resignation as attorney in fact under Part 4 of the Power of Attorney Law [*Prob. Code § 4500 et seq.* (governing judicial proceedings concerning powers of attorney)].

[3] Ground for Petition

With respect to a power of attorney other than a power of attorney for health care or advance health care directive, a petition may be filed under Part 4 of the Power of Attorney Law for the purpose of approving the resignation of the attorney in fact. If the attorney in fact is subject to a duty to act [*see Prob. Code § 4230*; discussion under *§ 427.145[5]*], the court may approve the resignation, subject to any orders that the court determines are necessary to protect the principal's interests [*Prob. Code § 4541(e)(1)*]. Otherwise, the court must approve the resignation, subject to the court's discretion to require the attorney in fact to give notice to interested persons [*Prob. Code § 4541(e)(2)*].

[4] Nonlimitable Right to Petition

A power of attorney that is subject to the Power of Attorney Law may not limit the authority of the attorney in fact, the principal, the conservator of the person or estate of the principal, or the public guardian to petition for judicial approval of the resignation of the attorney in fact [*Prob. Code § 4503(b)*].

[5] Duty to Honor Commitments

Acting for the principal in any transaction does not obligate an attorney in fact to act for the principal in a subsequent transaction, but the attorney in fact has a duty to complete a transaction that the attorney in fact has commenced [*Prob. Code § 4230(b)*].

If an attorney in fact has expressly agreed in writing to act for the principal, the attorney in fact has a duty to act pursuant to the terms of the agreement. The agreement to act on the principal's behalf is enforceable against the attorney in fact as a fiduciary regardless of whether there is any consideration to support a contractual obligation [*Prob. Code § 4230(c)*].

[6] Appeal

An appeal may be taken from the court's final order disposing of the petition [*Prob. Code § 1302(a)*].

[7] State Statutes

Duty of attorney in fact to exercise authority. *Prob. Code § 4230*

[8] Cross Reference

For a related form, *see § 427.140*.

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37-427 California Forms of Pleading and Practice--Annotated § 427.146

§ 427.146 Petition for Order Compelling Third Person to Honor Power of Attorney or Advance Health Care Directive [Prob. Code §§ 4541(f), 4766(e)]

[1] FORM Petition for Order Compelling Third Person to Honor Power of Attorney or Advance Health Care Directive [Prob. Code §§ 4541(f), 4766(e)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION FOR
_____ [*name*],	)	ORDER TO HONOR
Respondent.	)	AUTHORITY OF
	)	ATTORNEY IN FACT
	)	

_____

Petitioner alleges:

1. _____ [*Name of principal*] is an individual and resides in _____ County, _____ [California *or other state; or specify foreign country of residence*].

2. _____ [*Name of principal*], on _____ [*date*], duly executed an instrument to create a _____ [power of attorney *or* durable power of attorney for health care]. _____ [*Add, if appropriate:* A copy of that instrument is attached to this petition.]

3. Petitioner is named as attorney in fact in that instrument _____ [*add, if venue is based on this fact:* and resides in _____ County, California].

4. The power of attorney provides, in pertinent part, that _____ [*specify terms material to purpose of petition*].

5. Respondent is _____ [*specify identity*].

6. On _____ [*date*], petitioner presented _____ [*add, if appropriate:* a certified copy of] the power of attorney to respondent and requested respondent to _____ [*specify act or business transaction*]. _____ [*Add, if appropriate:* Petitioner also duly furnished an affidavit, as provided by law, a copy of which is attached to this petition.]

7. Respondent refuses to honor petitioner's authority under the power of attorney to act on the principal's behalf in requiring respondent to _____ [do the act *or* engage in the transaction *or specify*] described in the preceding paragraph.

8. The principal acting directly in the same circumstances would be entitled to require the respondent to _____ [do that act *or* engage in that transaction *or specify*]. _____ [*Add, if respondent is financial institution that refuses to open account or make loan:* The principal is currently one of respondent's _____ (depositors *or* borrowers).]

9. An order compelling respondent to honor petitioner's authority as attorney in fact is reasonably necessary for the protection of the _____ [principal *or* principal's estate] because _____ [*specify*].

WHEREFORE, petitioner prays for:

(1) An order directing respondent to honor petitioner's authority as attorney in fact according to the terms of the power of attorney, and specifically to _____ [*specify*].

(2) _____ [*Add, if petitioner claims attorney's fees:* An order finding that _____ (*add, if appropriate:* petitioner duly furnished an affidavit as provided by law, and that) respondent acted unreasonably and without good faith in refusing to honor petitioner's authority, and awarding petitioner reasonable attorney's fees.]

(3) Such other orders as the court deems proper.
Dated: _____.

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

[*Verification. See § 427.140.*]

[2] Use of Form

This petition may be used by the attorney in fact to obtain an order, under Part 4 of the Power of Attorney Law [*Prob. Code § 4500 et seq.* (governing judicial proceedings concerning powers of attorney)], compelling a third person to honor the petitioner's authority as attorney in fact. Alternatively or additionally, the attorney in fact may sue for injunctive relief [*see Prob. Code §§ 4406(e), 4501* (statutory remedies under Power of Attorney Law as cumulative and nonexclusive)]. For discussion and forms, see Ch. 303, *Injunctions* .

This petition may be adapted for use to obtain an order, under Part 3 of the Health Care Decisions Law [*Prob. Code § 4750 et seq.* (governing judicial proceedings concerning powers of attorney for health care and advance health care directives)], compelling a third person to honor individual health care instructions or the authority of an agent or surrogate [*see Prob. Code § 4766(e)*].

For discussion and a form for an affirmative defense, see *§ 427.147*.

[3] Ground for Petition

[a] Powers of Attorney Generally

With respect to any power of attorney, except a power of attorney for health care or advance health care directive, a petition may be filed under Part 4 of the Power of Attorney Law for the purpose of compelling a third person to honor the authority of an attorney in fact [*Prob. Code § 4541(f)*].

[b] Statutory Form Power of Attorney

If a third person refuses to honor the authority of the attorney in fact under a properly executed statutory form power of attorney [*see Prob. Code § 4400 et seq.* (Uniform Statutory Form Power of Attorney Act)] within a reasonable time after the power of attorney is presented, the third person generally may be compelled to do so in an action brought against the third person for this purpose [*Prob. Code § 4406(a)*]. A petition under Part 4 of the Power of Attorney Law would be appropriate [*see Prob. Code § 4407*].

[c] Power of Attorney for Health Care or Advance Health Care Directive

To compel a third person to honor a power of attorney for health care or an advance health care directive, the petition must state facts showing that the petition is authorized under Part 3 of the Health Care Decisions Law [*Prob. Code § 4750 et seq.* (governing judicial proceedings concerning powers of attorney for health care and advance health care directives); *see Prob. Code § 4766(e)*], the grounds of the petition, and, if known to the petitioner, the terms of any advance health care directive in question [*Prob. Code § 4767*].

[4] Nonlimitable Right to Petition

A power of attorney subject to the Power of Attorney Law may not limit the authority of the attorney in fact, the principal, the conservator of the person or estate of the principal, or the public guardian to petition for an order compelling a third person to honor the authority of the attorney in fact [*Prob. Code §§ 4503(b), 4541(f)*].

[5] Essential Allegation

[a] Principal's Rights Against Third Person

The petition must allege that the principal could have required the third person to act or conduct business in the same circumstances. A third person is not required to honor the authority of an attorney in fact or conduct business with the attorney in fact if the principal could not require the third person to act or conduct business in the same circumstances [*Prob. Code § 4300*; *see Prob. Code § 4406(a)*].

[b] Principal as Depositor or Borrower at Financial Institution

A petition based on the refusal of a financial institution to open an account or make a loan must allege that the principal is a depositor or borrower at the financial institution. A financial institution is not required to open a deposit account for a principal at the request of an attorney in fact if the principal is not currently a depositor of the financial institution. A financial institution is not required to make a loan to the attorney in fact on the principal's behalf if the principal is not currently a borrower of the financial institution [*Prob. Code § 4310*].

[6] Attorney's Fees

[a] Respondent's Refusal to Accept Affidavit

In dealing with a third person, an attorney in fact may furnish a specific affidavit in support of the authority of the attorney in fact to engage in a particular act or transaction [*see Prob. Code § 4305*; discussion § 427.36[11][d]]. If an attorney in fact duly furnishes an affidavit, whether voluntarily or on demand, a third person dealing with the attorney in fact who refuses to accept the exercise of authority referred to in the affidavit is liable for attorney's fees incurred in an action or proceeding necessary to confirm the qualifications or authority of the attorney in fact, unless the court determines that the third person believed in good faith that the attorney in fact was not qualified or was attempting to exceed or improperly exercise the authority of the attorney in fact [*Prob. Code § 4306(a)*].

[b] Respondent's Refusal to Honor Statutory Form Power of Attorney

If a third person refuses to honor the authority of the attorney in fact under a properly executed statutory form power of attorney [*see Prob. Code § 4400 et seq.* (Uniform Statutory Form Power of Attorney Act)] within a reasonable time after being presented with the power of attorney, then in an action to compel the third person to honor the authority of the attorney in fact, the court must award attorney's fees to the attorney in fact if the court finds that the third person acted unreasonably in refusing to accept the authority of the attorney in fact under the statutory form power of attorney [*Prob. Code § 4406(b)*].

A third person will not be deemed to have acted unreasonably in refusing to accept the authority of the attorney in fact if the refusal is authorized or required by state or federal statute or regulation [*Prob. Code § 4406(c)*]. (This proviso does not preclude other grounds that may support a reasonable refusal to accept the authority of the attorney in fact.) On the other hand, a third person's refusal to accept the authority of the attorney in fact under a statutory form power of attorney must be deemed unreasonable if the only reason for the refusal is that the power of attorney is noton a form prescribed by the third person to whom the power of attorney is presented [*Prob. Code § 4406(d)*].

[7] Notice of Time and Place of Hearing

In the case of a petition to compel a third person to honor the authority of an attorney in fact, notice of the time and place of the hearing, together with a copy of the petition, must be served on the third person in the manner provided *Code Civ. Proc. § 413.10 et seq.* (governing service of process in civil actions) [*Prob. Code § 4544(b)*].

In the case of a petition to compel a third person to honor individual health care instructions or the authority of an agent or surrogate, notice of the time and place of the hearing, together with a copy of the petition, must be served on the third person in the manner provided in *Code Civ. Proc. § 413.10 et seq.* (governing service of process in civil actions) [*Prob. Code § 4769(b)*].

[8] Appeal

An appeal may be taken from the court's final order disposing of the petition [*Prob. Code §§ 1302(a)* (powers of attorney generally), 1302.5 (petition to compel third person to honor individual health care instructions or authority of

an agent or surrogate)].

[9] Cross Reference

For a related form, *see § 427.140*.

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37-427 California Forms of Pleading and Practice--Annotated § 427.147

§ 427.147 Affirmative Defense--Previous Breach of Agreement by Attorney in Fact [Prob. Code § 4309]

[1] FORM Affirmative Defense--Previous Breach of Agreement by Attorney in Fact [Prob. Code § 4309]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action is alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], respondent alleges that petitioner previously breached an agreement with respondent and that, consequently, respondent is entitled to refuse to _____ [*specify what attorney in fact demands that respondent be ordered to do*].

[2] Use of Form

This affirmative defense may be inserted in the response to a petition, under Part 4 of the Power of Attorney Law [*Prob. Code § 4500 et seq.* (governing judicial proceedings concerning powers of attorney)], by the attorney in fact to obtain an order compelling a third person to honor the petitioner's authority as attorney in fact [*see § 427.146*].

[3] Ground for Defense

A third person is not required, by any provision in the Power of Attorney Law, to engage in any transaction with the attorney in fact if the attorney in fact has previously breached any agreement with the third person [*Prob. Code § 4309*].

[4] Cross Reference

For a related form, *see § 427.146*.

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[RESERVED]

Chapter 428[RESERVED]

California Forms of Pleading and Practice--Annotated

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Volume 37: Pretrial Proceedings thru Privacy-Chs. 425-439
Chapter 429 PRIVACY

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[2] Use of Form

[3] Allegations

§ 429.506 Complaint for Damages Against Individual for Intentional Disclosure of Information Obtained From Personal Records Maintained by Government Agency [Civ. Code § 1798.53]

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Action for Both State and Federal Disclosures

[5] Remedy Not Exclusive

[6] Exemplary Damages

[7] Attorney's Fees and Costs

§ 429.507 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Exemption to Prohibition on Disclosure of Personal Information Applies [Civ. Code § 1798.24]--Law Enforcement Exemption [Civ. Code § 1798.24(o)]

[1] FORM

[2] Use of Form

[3] Other Exemptions From Disclosure Requirement

§ 429.508 Complaint for Damages [Civ. Code § 56.35], Temporary Restraining Order, Preliminary Injunction [Civ. Code § 3422; Code Civ. Proc. § 527] and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526]--For

Improper Disclosure of Medical Information by a Health Care Provider [Civ. Code § 56.10]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Punitive Damages and Attorney's Fees

[5] Cross References

§ 429.509 Complaint for Damages for Wrongful and Willful Disclosure of Results of HIV Test [Health & Safety Code § 120980]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Inapplicability of Disclosure Prohibition

[5] Amount of Damages

§ 429.510 Complaint for Damages for Wrongful and Willful Disclosure of Confidential AIDS Research Records [Health & Safety Code §§ 121075, 121110]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Remedies

§ 429.511 Consent to Disclosure of Confidential AIDS Research Records [Health & Safety Code § 121080]

[1] FORM

[2] Use of Form

§§ 429.512-429.529 [Reserved]

§ 429.530 Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. § 526] and for Damages [Penal Code § 637.2]--Wiretapping of Telephonic or Telegraphic Communications [Penal Code § 631]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Damages

[5] Injunctive Relief

[6] Verification

[7] Jurisdiction

§ 429.531 Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. § 526] and for Damages [Penal Code § 637.2]--Unlawful Eavesdropping on or Recording of Confidential Communications [Penal Code § 632(a)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Confidential Communication

[5] Participant Recording

§ 429.532 Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. § 526] and for Damages [Penal Code § 637.2]--Unlawful Eavesdropping on or Recording of Privileged Communications of Person in Custody [Penal Code § 636]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Extent of Protection Under Penal Code § 636

[5] Alternative Remedy Challenging Monitoring Practices of Persons Not Covered by Penal Code § 636

§ 429.533 Allegations--Unlawful Invasion of Privacy Against Public Utility and Its Employees--By Telephone Customer

[1] FORM

[2] Use of Form

§ 429.534 Allegations--Unlawful Invasion of Privacy Against Public Entity and Its Employees--By Telephone User

[1] FORM

[2] Use of Form

§ 429.535 Allegation--Wrongful Disclosure of Telegraphic or Telephonic Communication [Penal Code § 637]

[1] FORM

[2] Use of Form

§ 429.536 Allegations--Wrongful Obtaining of Telegraphic or Telephonic Communication Addressed to Another [Penal Code § 637.1]

[1] FORM

[2] Use of Form

§ 429.537 Allegations--Unlawful Trespassing for Purpose of Committing Invasion of Privacy [Penal Code § 634]

[1] FORM

[2] Use of Form

[3] Cross References

§ 429.538 Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. § 526] and for Damages [Penal Code § 637.2]--Unlawful Interception or Reception of Cellular Radio Telephone Communications [Penal Code § 632.5]

[1] FORM

[2] Use of Form

[3] Allegations

§ 429.539 Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. § 526] and for Damages [Penal Code § 637.2]--Unlawful Interception or Reception of Cordless Telephone Communications [Penal Code § 632.6]

[1] FORM

[2] Use of Form

[3] Allegations

§§ 429.540-429.559 [Reserved]

§ 429.560 Complaint [Fed. R. Civ. P., Rule 7] in United States District Court for Damages and Injunction [Fed. R. Civ. P., Rule 65; 28 U.S.C.S. § 1343(4)] for Deprivation of Rights Under Color of State Law [42 U.S.C.S. § 1983] for Invasion of Privacy--Against State or Local Officials

[1] FORM

[2] Use of Form

[3] Allegations

[4] Punitive Damages Against Local Governments

[5] State Remedies

[6] Demand for Jury Trial

[7] Local Government Immunity

[8] Verification

[9] Cross References

§ 429.561 Affirmative Defense Allegation--Qualified Immunity for Acting in Good Faith

[1] FORM

[2] Use of Form

[3] Cross References

§ 429.562 Complaint [Fed. R. Civ. P., Rule 7] in United States District Court for Damages for Unlawful Search and Seizure by Federal Officers Acting Under Color of Federal Authority [U.S. Const. Amend. IV]

[1] FORM

[2] Use of Form

[3] Allegations

§ 429.563 Complaint [Fed. R. Civ. P., Rule 7] in United States District Court for Wrongful Search and Seizure of Public Communication Work Product Materials by Government Officials and Employees [42 U.S.C.S. § 2000aa(a)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Work Product Materials Defined

§ 429.564 Allegation--Wrongful Search and Seizure of Public Communication Documentary Materials by Government Officials and Employees [42 U.S.C.S. § 2000aa(b)]

[1] FORM

[2] Use of Form

[3] Documentary Materials Defined

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37-429 California Forms of Pleading and Practice--Annotated § 429.01

§ 429.01 Scope of Chapter

This chapter discusses and contains forms for use in actions involving the four traditional common law torts of privacy. Included are complaint forms for invasion of privacy by a public disclosure of private facts [*see § 429.470*], by publicity that places a person in a false light in the public eye [*see § 429.471*], by physical intrusion on a person's solitude or private affairs [*see § 429.472*], by appropriation of a person's name, voice, signature, photograph or likeness under the common law [*see § 429.473*], and appropriation of a person's name or likeness under *Civ. Code § 3344* [*see § 429.474*]. Also included are forms of affirmative defenses based on the fact that plaintiff is not entitled to sue for the particular invasion alleged [*see § 429.476*], the public figure status of plaintiff [*see § 429.477*], the newsworthiness of the publication involved [*see § 429.478*], and the statutory duty of defendant to disclose the information [*see § 429.479*].

This chapter also includes discussion and forms for use in actions relating to the collection, maintenance, dissemination, confidentiality, and disclosure of information in government and private records. The discussion is broken into subparts as follows:

- § 429.120 et seq. relates to the collection, maintenance, and dissemination of information in records maintained by state and local governments, and the inspection of state and local records by individuals to whom the information pertains. For discussion of access to records by the general public, see Ch. 470C, *Public Records Act* .

- § 429.200 et seq. relates to disclosure of confidential medical information maintained by health care providers, employers, and third-party administrators.

- § 429.230 et seq. relates to disclosure of confidential information in business records, including records maintained by bookkeeping services, businesses that sell and rent video cassettes, and telephone corporations.

- § 429.250 et seq. relates to confidentiality and disclosure with regard to AIDS (acquired immune deficiency syndrome) testing and research, including general disclosure prohibitions regarding personal information in test results, confidentiality of research records, and testing and disclosure regarding

certain criminal defendants and inmates.

This analysis contains the following forms:

- Complaint to seek damages for a government entity's failure properly to maintain records that contain information concerning the plaintiff [*see § 429.500*].

- Complaint for injunctive relief to seek amendment of defective information in a government agency's records [*see § 429.502*].

- Allegations that a government agency improperly disclosed defective information [*see § 429.501*].

- Affirmative defense on the ground that there is no cause of action for a subjective personnel evaluation contained in state and local records [*see § 429.503*],

- Complaint for injunctive relief by an individual to seek access to a personal record [*see § 429.504*].

- Complaint seeking injunctive relief and damages against a government agency regarding improper disclosure of personal information [*see § 429.505*].

- Complaint seeking damages against an individual defendant for intentional disclosure of information obtained from personal records maintained by a government agency [*see § 429.506*].

- Affirmative defense alleging that the disclosure was authorized for law enforcement purposes [*see § 429.507*].

- Complaint seeking damages and injunctive relief regarding improper disclosure of medical information by a health care provider [*see § 429.508*].

- Complaint seeking damages for wrongful and willful disclosure of the results of a blood test for AIDS [*see § 429.509*].

- Complaint seeking damages for wrongful and willful disclosure of confidential AIDS research records [*see § 429.510*].

- Form of consent for the disclosure of confidential AIDS research records [*see § 429.511*].

This chapter also discusses invasion of privacy under *Penal Code §§ 630-637.5* concerning wiretapping, eavesdropping on and recording of, intercepting or receiving, and disclosure of information of private communications. Included in this chapter are forms setting forth a complaint for damages and for injunctive relief for the wrongful wiretapping and eavesdropping on or recording of private communications [*see §§ 429.530 -429.532*], for the wrongful interception or reception of cellular radio telephonic communications [*see § 429.538*], or for the wrongful interception or reception of cordless telephone communications [*see § 429.539*]; forms of allegations relating to the capacity of defendants, such as a public utility and its employees [*see § 429.533*] or a public entity and its employees [*see § 429.534*], and for the wrongful disclosure of a telegraphic or telephonic communication [*see § 429.535*]. This chapter also includes forms of allegations of wrongful obtaining of a telegraphic or telephonic communication [*see § 429.536*] and of trespassing for purpose of committing an invasion of privacy [*see § 429.537*].

This chapter also discusses and contains forms for use in actions against state officials for violations of the Civil Rights Act under *42 U.S.C.S. § 1983* for wrongful invasion of privacy [*see § 429.560*], against federal officials for violations of

the rights guaranteed by the *Fourth Amendment* to theUnited States Constitution [*see § 429.562*] and against either federal or state officials for violations of the Privacy Act under *42 U.S.C.S. §§ 2000aa-2000a-11* [*see §§ 429.563* and *429.564*]. The part also contains an affirmative defense allegation in *42 U.S.C.S. § 1983* that the defendant government official acted in good faith [*see § 429.561*].

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§ 429.02 Cross References

For forms and procedures of civil rights actions in state and federal courts, *see* Ch. 112, *Civil Rights: Government-Funded Programs and Activities* .

For jurisdictional allegations for general use in federal courts, *see* Ch. 265, *Federal Courts: Jurisdiction and Removal* .

For a discussion, forms, and procedures relating to preliminary and permanent injunctions, *see* Ch. 303, *Injunctions* .

For a discussion and forms relating to the requirement of actual malice, *see* Ch. 340, *Libel and Slander* .

For a discussion and forms relating to the retraction requirements of *Civ. Code § 48a*, *see* Ch. 340, *Libel and Slander*

For a discussion and forms relating to libel and slander in general, *see* Ch. 340, *Libel and Slander* .

For discussion relating to disclosure of information regarding medical malpractice, *see* Ch. 415, *Physicians: Medical Malpractice*

For discussion relating to public access to public records, *see* Ch. 470C, *Public Records Act* .

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[Reserved]

§§ 429.03[Reserved]

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§ 429.10 Governing Law

The right of privacy is protected by the penumbras of the Federal Constitution and by *Cal. Const. art. I, § 1*. The leading case interpreting the cause of action for invasion of privacy under the *Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 16*

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37-429 California Forms of Pleading and Practice--Annotated § 429.11

§ 429.11 Torts

The leading case governing the traditional common law torts for violations of the right of privacy is *Melvin v. Reid (1931) 112 Cal. App. 285, 297 P. 91* . Appropriation of a person's name, voice, signature, photograph, or likeness is governed in part by *Civ. Code § 3344*. Appropriation of the name, voice, signature, photograph or likeness of a deceased personality is governed by *Civ. Code § 3344.1*.

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37-429 California Forms of Pleading and Practice--Annotated § 429.12

§ 429.12 Collection of and Access to Information

The collection, dissemination, and inspection of information by the state government is governed generally by the Information Practices Act of 1977, *Civ. Code §§ 1798-1798.78*, and the Public Records Act, *Gov. Code §§ 6250-6267*. The privacy of medical records is governed by the Confidentiality of Medical Records Act, *Civ. Code §§ 56-56.37*. Disclosure of personal information in records maintained by a telephone or telegraph corporation is governed by *Pub. Util. Code § 2891*. Disclosure and confidentiality relating to AIDS testing generally are governed by *Health & Safety Code §§ 199.20-199.27*. Confidentiality of AIDS research records is governed by *Health & Safety Code §§ 199.30-199.40*. Confidentiality of AIDS public health records is governed by *Health & Safety Code §§ 199.42-199.44*. Testing for AIDS and disclosure requirements of test results relating to certain criminal defendants and inmates are governed by *Health & Safety Code § 199.95 et seq.* and by *Penal Code § 7500 et seq.* AIDS testing for certain convicted criminals is governed by *Penal Code §§ 1201* (perpetrators of certain sex crimes) and 1202.6 (persons convicted of prostitution more than once). Testing for AIDS and disclosure requirements of test results relating to persons subject to the Department of the Youth Authority are governed by *Welf. & Inst. Code § 1768.9*.

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37-429 California Forms of Pleading and Practice--Annotated § 429.13

§ 429.13 Eavesdropping

Invasion of privacy by eavesdropping and wiretapping is governed by *Penal Code §§ 630-637.5*.

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37-429 California Forms of Pleading and Practice--Annotated § 429.14

§ 429.14 Federal Civil Rights Actions

Federal civil rights actions for violations based the right of privacy are governed by *U.S. Const. amend. IV*, and by *42 U.S.C.S. § 1983*.

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37-429 California Forms of Pleading and Practice--Annotated § 429.15

§ 429.15 Federal Constitution

[1] Right of Privacy

Protection for a constitutional right of privacy is found in the penumbras emanating from the fundamental constitutional guarantees [*Griswold v. Connecticut (1965) 381 U.S. 479, 483-484, 85 S. Ct. 1678, 14 L. Ed. 2d 510]* . The right of privacy encompasses two kinds of protections [*Whalen v. Roe (1977) 429 U.S. 589, 598-600, 97 S. Ct. 869, 51 L. Ed. 2d 64]* :

- The right to make personal decisions; and
- Protection against disclosure of private information.

[2] Personal Decisions

In the arena of personal decisions, the right of privacy extends to the following:

- Use of contraceptives [*Griswold v. Connecticut (1965) 381 U.S. 479, 485-486, 85 S. Ct. 1678, 14 L. Ed. 2d 510* (married persons); *Eisenstadt v. Baird (1972) 405 U.S. 438, 453, 92 S. Ct. 1029, 31 L. Ed. 2d 349* (unmarried persons)];
- Abortions [*Planned Parenthood of Se. Pa. v. Casey (1992) 505 U.S. 833, 846-901 112 S. Ct. 2791, 120 L. Ed. 2d 674* ; *Roe v. Wade (1973) 410 U.S. 113, 153-154, 93 S. Ct. 705, 35 L. Ed. 2d 147* ; *People v. Belous (1969) 71 Cal. 2d 954, 963, 973, 80 Cal. Rptr. 354, 458 P.2d 194* ; *see generally* Ch. 4, *Abortion and Birth Control Methods*];
- Marriage [*Loving v. Virginia (1967) 388 U.S. 1, 11, 87 S. Ct. 1817, 18 L. Ed. 2d 1010]* ;
- Procreation [*Skinner v. Oklahoma (1942) 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655]* ;

- Child rearing and education [*Pierce v. Society of Sisters (1925) 268 U.S. 510, 535, 45 S. Ct. 571, 69 L. Ed. 1070]* ; and

- Private sexual conduct between consenting adults [*Lawrence v. Texas (2003) 539 U.S. 558, 578-579, 123 S. Ct. 2472, 156 L. Ed. 2d 508 , overruling Bowers v. Hardwick (1986) 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140* (state law criminalizing homosexual conduct between consenting adults violated *U.S. Const. amend. XIV*)].

In addition, the United States Supreme Court decided a case involving the "right to die," which, the Court noted, is a right that has been asserted in various jurisdictions, based solely on the common-law right to informed consent, or on both that common-law right and a constitutional privacyright [*see Cruzan v. Director, Mo. Health Dep't (1990) 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224, 237]* . In that case, the court assumed that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition, pursuant to the "liberty interest" under the Due Process Clause of the United States Constitution, *U.S. Const. amend. XIV* [*see Cruzan v. Director, Mo. Health Dep't (1990) 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224, 242]* . Proceeding on that assumption, the Court held that, based on a balancing of a person's liberty interest against relevant state interests, a state may apply a "clear and convincing" evidence standard in proceedings in which a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state [*Cruzan v. Director, Mo. Health Dep't (1990) 497 U.S. 261, 110 S. Ct. 2841, 111 L. Ed. 2d 224, 245-246]* .

On the other hand, the federal constitutional protection for the right of privacy with regard to intimate decisions does not include a right for parents to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs [*Fields v. Palmdale Sch. Dist. (9th Cir. 2005) 427 F.3d 1197, 1207-1208]* .

[3] Disclosure of Personal Information

In the area of protection against disclosure of private information, the right of privacy safeguards, for example, against overbroad disclosure of the personal financial affairs of public officers and candidates and their families [*City of Carmel-by-the-Sea v. Young (1970) 2 Cal. 3d 259, 268, 85 Cal. Rptr. 1, 466 P.2d 225]* . A right to privacy relating to the disclosure of private information, to the extent it exists at all, protects only personal information [*Whalen v. Roe (1977) 429 U.S. 589, 599, 97 S. Ct. 869, 51 L. Ed. 2d 64* ; *Russell v. Gregoire (9th Cir. 1997) 124 F.3d 1079* (information collected and disseminated by state statute subjecting sex offenders to community notification of conviction information including offender's photograph and approximate residential location is already fully available to public and is not constitutionally protected, with exception of general vicinity of offender's residence, which is published, and offender's employer, which is collected but not released to public, neither of which are generally considered private)]. In determining whether information is of such a highly personal nature that it demands constitutional protection, the party asserting the right must have a legitimate and reasonable expectation of privacy [*Rosales v. City of Los Angeles (2000) 82 Cal. App. 4th 419, 431, 98 Cal. Rptr. 2d 144]* . For a discussion of statutory regulation of the disclosure of information, see *§ 429.60* et seq.

In addition, one of the interests protected by *U.S. Const. amend. IV*, regarding the right of freedom from unreasonable searches and seizures, is the right to privacy [*see Skinner v. Railway Labor Executives' Ass'n (1989) 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639, 657]* . *Fourth Amendment* protections apply in a nongovernmental context if governmental control of some nature predicates state action on private conduct. For example, federal regulations providing for mandatory and permissive drug and alcohol testing of private railroad employees fall within the purview of the *Fourth Amendment* because the government involvement in and controlover the implementation of those regulations predicate state action on the railroads [*see Skinner v. Railway Labor Executives' Ass'n (1989) 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639, 659-660* (finding regulations allowing drug testing of railroad employees without warrant or individualized suspicion of impairment constitutional under *Fourth Amendment* "reasonableness"

criteria)].

Moreover, the *Fourth Amendment* protects individuals from unreasonable searches conducted by the government when the government acts as an employer [*see National Treasury Employees Union v. Von Raab, 489 U.S. 656, (1989)* (mandatory drug testing of certain United States Customs employees with no warrant or individualized suspicion was constitutionally reasonable); *Norman-Bloodsaw v. Lawrence Berkeley Lab. (9th Cir. 1998) 135 F.3d 1260* (employer's performance of unauthorized tests on employees involving retrieval of medical information unknown to employees may be viewed as searches in violation of *Fourth Amendment* privacy rights)]. However, a right to privacy relating to the disclosure of private information, to the extent it exists at all, protects only personal information [*Whalen v. Roe (1977) 429 U.S. 589, 599, 97 S. Ct. 869, 51 L. Ed. 2d 64* ; *Russell v. Gregoire (9th Cir. 1997) 124 F.3d 1079* (information collected and disseminated by state statute subjecting sex offenders to community notification of conviction information including offender's photograph and approximate residential location is already fully available to public and is not constitutionally protected, with exception of general vicinity of offender's residence, which is published, and offender's employer, which is collected but not released to public, neither of which are generally considered private)].

The California Supreme Court has evaluated whether a municipal employer's suspicionless drug testing of current employees and prospective applicants violated privacy rights contained in the United States and California constitutions. After reviewing *Skinner* and *Von Raab*, a majority of the court concluded that the *Fourth Amendment* prohibits a governmental employer from conducting suspicionless urinalysis drug testing of current public employees seeking promotion or transfer, without regard to the nature or duties of the position at issue [*Loder v. City of Glendale (1997) 14 Cal. 4th 846, 878-881, 900, 918 n.1, 59 Cal. Rptr. 2d 696, 927 P.2d 1200* (George, C.J.; Mosk, J., and Kennard, J., concurring and dissenting)]. However, a majority of the Court also found that a drug screening program administered in a reasonable fashion as part of a lawful preemployment medical examination required of each job applicant is constitutionally permissible under both the *Fourth Amendment* and the California Constitution [*Loder v. City of Glendale (1997) 14 Cal. 4th 846, 881-899, 922, 933 n.1, 59 Cal. Rptr. 2d 696, 927 P.2d 1200* (George, C.J.; Chin, J., and Brown, J., concurring and dissenting)]. For complete discussion of *Fourth Amendment* issues with regard to employee drug testing, see Wilcox, California Employment Law, Ch. 50 (Matthew Bender).

The *Fourth Amendment* also places limitations on a prison facility's right to search prison visitors. The government's interest in providing security and preventing criminal conduct is great in this context, however, and prison officials may subject visitors to the following administrative search procedures, within the dictates of the *Fourth Amendment* as well as *Cal. Const. art. I, § 13*, to prevent the flow of contraband such as drugs into the facility [*Estes v. Rowland (1993) 14 Cal. App. 4th 508, 528-534, 17 Cal. Rptr. 2d 901]* :

- A dog search limited to 30 minutes;

- A strip search, if based on a dog alert or if the officials find contraband that the visitor could secrete on his or her person; and

- Denial of visitation if contraband is found.

The government is required to provide visitors with adequate notice of the search procedure, and inform them of their right to refuse the search and choose not to visit the facility [*Estes v. Rowland (1993) 14 Cal. App. 4th 508, 527-528, 17 Cal. Rptr. 2d 901]* .

The United States Supreme Court has held that taxpayers have an obvious possessory interest in their tax records, and that taxpayers' privacy interest in those records is sufficiently important to merit constitutional protection under *U.S. Const. amend. IV* [*Church of Scientology of Cal. v. United States (1992) 506 U.S. 9, 12-13 n.5, 113 S. Ct. 447, 121 L. Ed. 2d 313]* . That decision concerned a church's privacy interest in tape-recordings of conversations between church

officials and their attorneys, obtained by the IRS pursuant to an unlawful IRS summons for use in an investigation of the church's founder. Although the IRS had already examined and copied the documents, the Supreme Court held that the church's appeal of a district court order enforcing the disclosure was not moot, because the court was empowered to effectuate a partial remedy by ordering the IRS to destroy or return all the copies in its possession, despite the impossibility of returning the parties to the status quo ante [*Church of Scientology of Cal. v. United States (1992) 506 U.S. 9, 15, 113 S. Ct. 447, 121 L. Ed. 2d 313* (declining to decide merits of dispute over documents)].

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§ 429.16 California Constitution

[1] Purpose and Scope

In 1972, California voters amended *Cal. Const. art. I, § 1*, to include a right of privacy among the "inalienable rights" of the people. The analysis and arguments contained in the official ballot pamphlet are indicia of the voters' intent in enacting the provision [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 20* ; *see White v. Davis (1975) 13 Cal. 3d 757, 775 n.11, 120 Cal. Rptr. 94, 533 P.2d 222]* . The courts have repeatedly construed *Cal. Const. art. I, § 1* to provideCalifornia citizens with privacy protections broader than those recognized by the federal constitution [*see, e.g., American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 327-328, 66 Cal. Rptr. 2d 210, 940 P.2d 797]* .

In *Hill v. National Collegiate Athletic Ass'n*, the leading case interpreting the cause of action for invasion of privacy based on *Cal. Const. art. I, § 1*, the California Supreme Court limited the scope of the constitutional right to specific, legally protected privacy interests. The Court identified the core values furthered by the consitutional right as informational privacy and autonomy privacy [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 26 Cal. Rptr. 2d 834, 865 P.2d 633*].

[2] Application to Minors

There is no question that minors possess a constitutional right of privacy under the California Constitution [*American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 334, 66 Cal. Rptr. 2d 210, 940 P.2d 797* (citing Ballot Pamp., Proposed Amends. to Cal. Const. with arguments to voters, Gen. Elec. (Nov. 7, 1972), argument in favor of Prop. 11, pp. 26, 27)]. Specifically, minors are "persons" under the Constitution, and are entitled to its protections. *Cal. Const. art. I, § 1* specifically declares that all people are by nature free and independent and have inalienable rights, including the right to privacy. The ballot argument accompanying the measure that added the privacy clause to article 1, § 1, expressly confirms that the constitutional right of privacy afforded by that provision was intended to apply to every Californian, including every man, woman, and child in the state.

However, though minors have privacy rights under *Cal. Const. art. I, § 1*, their privacy rights are not coextensive with those of adults. No case has suggested, for example, that the Legislature does not have greater latitude to regulate or to

proscribe voluntary sexual activity by or with a minor than it does with regard to voluntary sexual activity engaged in by an adult [*American Academy of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 335, 66 Cal. Rptr. 2d 210, 940 P.2d 797* ; *In re T.A.J. (1998) 62 Cal. App. 4th 1350, 1359, 73 Cal. Rptr. 2d 331]* . Thus, for instance, the court of appeal has held that minors do not have a constitutionally protected privacy interest in engaging in consensual sexual intercourse with another minor [*In re T.A.J. (1998) 62 Cal. App. 4th 1350, 1360, 1362, 73 Cal. Rptr. 2d 331* (upholding *Pen. Code § 261.5(b)*, which makes it a misdemeanor for "any person" to have sexual intercourse with minor no more than three years older or younger than perpetrator, as applied to defendant who was himself a minor at time of alleged offense)].

[3] Application to Private Conduct

The state constitutional right of privacy may be enforced against both governmental and private entities. References to business in the ballot arguments for the Privacy Initiative constitute evidence of drafter and voter intent to extend the right to the private sector generally [*see Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 20*

Although the California Supreme Court in *Hill* allowed the right of privacy to be enforced against private entities, it did not conclude that the relative strength and importance of the right was the same in cases of private, as opposed to government, action, because of the following [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 38-39, 26 Cal. Rptr. 2d 834, 865 P.2d 633* :

- The pervasive presence of coercive government power in basic areas of human life poses greater dangers to freedom than does private conduct;

- An individual generally has greater choice and alternatives when dealing with private entities, as opposed to the government; and

- Some private conduct, such as the activities of voluntary associations, carries its own mantle of constitutional protection in the form of freedom of association.

[4] Essential Elements of Privacy Action

In *Hill,* the California Supreme Court set forth the following three essential elements for a cause of action for invasion of the state constitutional right of privacy [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 39-40, 26 Cal. Rptr. 2d 834, 865 P.2d 633* :

- A legally protected privacy interest;

- A reasonable expectation of privacy under the circumstances; and

- Conduct by the defendant that amounts to a serious invasion of the protected privacy interest.

The plaintiff in an invasion of privacy case has the burden of establishing each element [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 39, 26 Cal. Rptr. 2d 834, 865 P.2d 633* . For a jury instruction related to the state constitutional right of privacy, see *Judicial Council of California Civil Jury Instructions, CACI No. 1806* (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

A defendant may prevail in a state constitutional privacy case by negating any of the three elements, or by pleading and proving as an affirmative defense that the invasion of privacy is justified because it substantively furthers one or more countervailing interests [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 40, 26 Cal. Rptr. 2d 834, 865*

P.2d 633 ; § 429.16[8] and [9]]. The plaintiff, in turn, may rebut a defendant's assertion of countervailing interests by showing that there are feasible and effective alternatives to defendant's conduct that have a lesser impact onprivacy interests [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 40, 26 Cal. Rptr. 2d 834, 865 P.2d 633* . For a related jury instruction, see *Judicial Council of California Civil Jury Instructions, CACI No. 1807* (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

In the lead opinion in *Loder v. City of Glendale*, two justices of the California Supreme Court asserted that the three elements articulated in *Hill* must be viewed "simply as 'threshold elements' " to be used to screen out claims not involving a significant intrusion on a privacy interest protected by the state constitutional privacy provision. The lead opinion further asserted that the *Hill* elements do not eliminate the necessity for weighing and balancing the justification for the conduct in question against the intrusion on privacy resulting from the conduct in any case that raises a genuine, nontrivial invasion of a protected privacy interest [*Loder v. City of Glendale (1997) 14 Cal. 4th 846, 893-894, 59 Cal. Rptr. 2d 696, 927 P.2d 1200* ; *but see Loder v. City of Glendale (1997) 14 Cal. 4th 846, 900, 916, 59 Cal. Rptr. 2d 696, 927 P.2d 1200* (Mosk, J., concurring and dissenting) (lead opinion's replacement of *Hill* test with balancing-of-interest test similar to that employed in *Fourth Amendment* analyses indicates there is no longer majority support for *Hill* test)].

In *American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 331, 66 Cal. Rptr. 2d 210, 940 P.2d 797* , the California Supreme Court had another opportunity to review and reaffirm the three elements articulated in *Hill*. In this 4-3 decision, the Supreme Court concluded that the state constitutional privacy claim advanced by plaintiffs, involving a statutory provision that required a pregnant minor to secure parental consent or judicial authorization before obtaining an abortion, clearly satisfied all three "threshold elements" set forth in *Hill* [*American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 331, 66 Cal. Rptr. 2d 210, 940 P.2d 797* (statute significantly intruded on fundamental autonomy privacy interest protected by state privacy clause)].

[5] Element of Specific, Legally Protected Privacy Interest

The first essential element of a state constitutional cause of action for invasion of privacy is the identification of a specific, legally protected privacy interest. This is a question of law that depends on social norms, common law developments, constitutional development, statutory enactment, and the ballot arguments for the Privacy Initiative [*see Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 35-36, 26 Cal. Rptr. 2d 834, 865 P.2d 633* (recognizing privacy interest in urination and medical information, but finding no constitutional violation); *but compare Loder v. City of Glendale (1997) 14 Cal. 4th 846, 896-899, 59 Cal. Rptr. 2d 696, 927 P.2d 1200* (recognizing privacy interest in urination and medical information, and finding violation regarding current governmental employees seeking promotion, but no violation regarding prospective governmental employees)]. Legally recognized privacy interests are generally of two classes: (1) interests in precluding the dissemination or misuse of sensitive and confidential information ("informational privacy"), and (2) interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference ("autonomy privacy") [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 35, 26 Cal. Rptr. 2d 834, 865 P.2d 633*].

An employee, for example, has a legally cognizable interest in maintaining the privacy of sensitive personal information conveyed to a psychiatrist in an employer ordered disability evaluation [*Pettus v. Cole (1996) 49 Cal. App. 4th 402, 440, 57 Cal. Rptr. 2d 46]* . And in a 4-3 decision, the California Supreme Court ruled that a statute that restricts a pregnant minor's ability to decide on her own whether to continue or terminate her pregnancy unquestionably implicates a constitutionally protected privacy interest for purposes of the initial threshold element of *Hill* [*American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 331, 66 Cal. Rptr. 2d 210, 940 P.2d 797* (right to choose whether to continue or terminate pregnancy implicates woman's fundamental interest in preservation of her personal health, her interest in retaining personal control over integrity of her own body, and her interest in deciding for herself whether to parent child)].

The zones of privacy created by the state constitutional right of privacy extend to the details of one's medical history [*Jeffrey H. v. Imai, Tadlock & Keeney (2000) 85 Cal. App. 4th 345, 353, 101 Cal. Rptr. 2d 916 , overruled in part, Jacob B. v. County of Shasta, 40 Cal. 4th 948 , overruled in part, Jacob B. v. County of Shasta, 40 Cal. 4th 948, 56 Cal. Rptr. 3d 477* ; *Jones v. Superior Court (1981) 119 Cal. App. 3d 534, 548-550, 174 Cal. Rptr. 148]* . Disclosure of HIV positive status may be entitled to protection under *Cal. Const. art. I, § 1* under appropriate circumstances [*Urbaniak v. Newton (1991) 226 Cal. App. 3d 1128, 1140, 277 Cal. Rptr. 354]* . A person's medical history falls within the legally recognized privacy interest, so that a sperm donor, whose identity is necessarily linked with his medical history, has a privacy interest in the disclosure of his identity [*Johnson v. Superior Court (2000) 80 Cal. App. 4th 1050, 1068-1069, 95 Cal. Rptr. 2d 864* (but holding that there was compelling state interest justifying invasion of privacy interest to mandate deposition of donor)].

California's constitutional privacy protection also embraces sexual relations [*Vinson v. Superior Court (1987) 43 Cal. 3d 833, 841, 239 Cal. Rptr. 292, 740 P.2d 404]* .

[6] Element of Reasonable Expectation of Privacy

The second essential element of a state constitutional cause of action for invasion of privacy is a reasonable expectation of privacy. The reasonableness of an expectation of privacy is a mixed question of law and fact. Factors affecting the extent of a privacy interest include advance notice of impending action, customs,societal norms and practices, physical settings surrounding particular activities, and the presence or absence of opportunities for voluntary consent [*see Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 36-37, 26 Cal. Rptr. 2d 834, 865 P.2d 633*] (student athletes have diminished expectation interest in privacy during urination because, unlike the general population, they undergo frequent physical examinations, reveal bodily and medical condition to coaches and trainers, and often disrobe in same-sex locker rooms)]. This element contemplates an inquiry into whether there is something in the particular circumstances in which an alleged intrusion of privacy arises that demonstrates plaintiff has no reasonable expectation of privacy in that context, so that the alleged intrusion would not violate the state Constitution, even if there were no justification for the allegedly intrusive conduct [*American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 338, 66 Cal. Rptr. 2d 210, 940 P.2d 797]* .

In a 4 to 3 decision after *Hill,* the California Supreme Court conducted such an inquiry into the context surrounding a parental consent requirement for pregnant minors seeking an abortion. The Court found that the challenged statutory requirements applied to all pregnant minors and, unlike the drug testing program in *Hill,* were not confined to a specific setting or limited context. Because the requirement impinged on a fundamental autonomy privacy interest of pregnant minors protected by the state constitutional privacy clause, and because the statute applied to all such minors, the Court determined that there was absolutely nothing in the circumstances of this case that would support a conclusion that the pregnant minors affected by this legislation did not have a reasonable expectation of privacy for purposes of the second element of the *Hill* test [*American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 338-339, 66 Cal. Rptr. 2d 210, 940 P.2d 797* (neither statutory provisions requiring parental consent for medical care nor the existence of numerous abortion/parental consent statutes in other states eliminated a minor's reasonable expectation of privacy in this context)].

A court relied on the likelihood that the information would eventually be disclosed in pending litigation brought by plaintiff has been relied on as a basis for the conclusion that no reasonable expectation of privacy existed, precluding a cause of action [*Heller v. Norcal Mut. Ins. Co. (1994) 8 Cal. 4th 30, 43-44, 32 Cal. Rptr. 2d 200, 876 P.2d 999* (discussions concerning plaintiff's medical condition between plaintiff's treating physician and defendant's insurer in medical malpractice action; because physician was expert witness in malpractice action, plaintiff could not reasonably expect that information would remain confidential)]. However, unlike the plaintiff in *Heller,* whose expectation of privacy in her medical records was substantially lowered by placing her medical condition in issue, a sexual assault victim does not place his or her mental health inissue, nor does he or she lose a right to privacy in his or her confidential

mental health records, merely by charging the assailant with sexual battery. Thus, the trial court erred in dismissing a sexual assault victim's invasion of privacy action against the assailant's attorney, who read the victim's confidential mental health records and disseminated them to the defense psychiatrist without authorization [*Susan S. v. Israels (1997) 55 Cal. App. 4th 1290, 1296-1298, 67 Cal. Rptr. 2d 42* (plaintiff had reasonable expectation of privacy in mental health records subject to court determination whether records should be disclosed to assailant and his attorney prior to disclosure)].

On the other hand, a person who commits sex offenses may have a diminished expectation of privacy in his or her psychological records and information revealed in examinations by mental health professionals in the course of evaluating whether the person is a sexually violent predator [*see* *People v. Martinez (2001) 88 Cal. App. 4th 465, 475-478, 105 Cal. Rptr. 2d 841*) (criminal defendant had substantially diminished expectation of privacy given his consent to interviews with psychiatrists to which he consented, proper disclosure to all relevant information in his psychological records to them, their discussion of information in their written reports, availability of reports to Director of Corrections, Director of Mental Health, and prosecutor, and availability of underlying psychological records to prosecutor)].

Likewise, it is reasonable for employees to expect that details of their personal lives and thoughts will be shielded from scrutiny by their employers. Thus, except for disclosures regarding plaintiff's functional limitations, it is reasonable for an employee to expect that the psychiatrists conducting a disability evaluation would maintain the confidentiality of the contents of their discussions [*Pettus v. Cole (1996) 49 Cal. App. 4th 402, 443, 57 Cal. Rptr. 2d 46]* .

Conversely, an employee may not have a reasonable expectation of privacy in otherwise private parts of his or her life if those aspects of life create a conflict of interest at work. For example, a supervisor who was terminated for refusing to end an intimate relationship with a subordinate had no reasonable expectation of privacy in that relationship. Existing court decisions had already recognized the right of employers to restrict such relationships, and that particular employer had given advance notice to the supervisor that the employer believed that the relationship presented a conflict of interest [*Barbee v. Household Auto. Fin. Corp. (2003) 113 Cal. App. 4th 525, 532-533, 6 Cal. Rptr. 3d 406]* .

[7] Element of Serious Intrusion

The third essential element of a state constitutional cause of action for invasion of privacy is that the intrusion must be serious. This issue is a mixed question of law and fact. An actionable invasion of privacy under *Cal. Const. art. I, § 1*, must be sufficiently serious in its nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right [*see* *Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 37, 26 Cal. Rptr. 2d 834, 865 P.2d 633* (direct visual observation of urination is seriousintrusion despite diminished privacy expectations of student athletes, but no violation of privacy right found due to justifying competing interests); *see also Heller v. Norcal Mut. Ins. Co. (1994) 8 Cal. 4th 30, 44, 32 Cal. Rptr. 2d 200, 876 P.2d 999* (likelihood that information communicated to insurance carrier would have been discovered during course of litigation established that intrusion on plaintiff's privacy was not "serious" and could not support constitutional cause of action)]. For example, the disclosure to an employer of information contained in psychiatrists' reports concerning an employee's past and present drinking habits, and strongly held views about racism among his coworkers and company management, is a serious intrusion into an employee's right of informational privacy [*Pettus v. Cole (1996) 49 Cal. App. 4th 402, 445, 57 Cal. Rptr. 2d 46]* .

As explained in *Loder v. City of Glendale (1997) 14 Cal. 4th 846, 895, n.22, 59 Cal. Rptr. 2d 696, 927 P.2d 1200* , this third element is intended to screen out intrusions on privacy that are de minimis or insignificant. In a case decided after *Loder*, the California Supreme Court concluded in a 4-3 opinion that the effect of a statute requiring parental consent before a minor may obtain an abortion could not by any stretch of the imagination properly be characterized as de minimis or insignificant. Rather, the statute constituted a significant intrusion on a minor's protected privacy interest [*American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 338-339, 66 Cal. Rptr. 2d 210, 940 P.2d 797* (citing to the following consequences as significant intrusions: that the statute would deny a pregnant minor control

over her own destiny, would increase the health risks posed by an abortion, and could result in a minor terminating the pregnancy herself, seeking a "back-alley" abortion or bearing an unwanted child)].

[8] Competing Interest Defense

The California Supreme Court has recognized a competing interest defense that allows defendants to justify an invasion of privacy by asserting legitimate, competing, or countervailing interests. This defense is less rigorous than the compelling interest defense, the application of which the Court limited to cases involving either "obvious government action impacting freedom of expression and association" or an "obvious invasion of aninterest fundamental to personal autonomy" [*see Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 34, 26 Cal. Rptr. 2d 834, 865 P.2d 633* ; *see generally § 429.16[9]*].

The competing interest defense involves the use of a balancing test that compares the specifically identified privacy interests of the plaintiff with legitimate, competing, and countervailing nonprivacy interests asserted by the defendant [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 37-38, 26 Cal. Rptr. 2d 834, 865 P.2d 633* (applying this test to NCAA drug testing program for student athletes and finding no violation)]. If the interests asserted by the defendant justify the invasion of privacy, the intrusion does not violate the California Constitution. The relative importance of an asserted interest depends on its proximity to the central functions of a particular public or private enterprise [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 38, 26 Cal. Rptr. 2d 834, 865 P.2d 633*]. The disclosure to an employer of highly personal information contained in psychiatrists' reports is not justified by the employer's expectation to receive a full, detailed psychiatric report when retaining the psychiatrist to evaluate the employee for disability leave, or by the employer's need for a detailed report to formulate a plan for getting the employee back to work as soon as possible [*Pettus v. Cole (1996) 49 Cal. App. 4th 402, 445, 57 Cal. Rptr. 2d 46]* .

In *Hill,* the California Supreme Court applied the competing interest defense for the first time. The drug testing program required the student athletes to provide urine samples under direct visual observation and to disclose medical information that could have caused embarrassment to individual athletes. The Court held that the athletes' privacy interest in urination was outweighed by the following two competing interests that justified the NCAA's conduct [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 43-44, 26 Cal. Rptr. 2d 834, 865 P.2d 633*]:

- Safeguarding the integrity of intercollegiate athletic competition; and
- Protecting the health and safety of student athletes.

The plaintiff may rebut the assertion of a competing interest by showing that there are feasible and effective alternatives to the defendant's conduct that would have a lesser impact on privacy interests [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 40, 26 Cal. Rptr. 2d 834, 865 P.2d 633*].

In *Loder v. City of Glendale,* the California Supreme Court applied the competing interest test to a governmental employer's use of suspicionless drug testing of all applicants and all current employees seeking promotions. The Court concluded that an employer has a substantial interest in conducting urinalysis drug tests administered as part of an otherwise lawful preemployment medical examination. The Court reasoned that because an employer is deprived of a prehiring opportunity to observe an applicant over a period of time under circumstances that would signal drug or alcohol abuse problems, drug testing is a permissible means of minimizing the problems of absenteeism, increased safety concerns, tardiness, reduced productivity, and increased risk of turnover [*Loder v. City of Glendale (1997) 14 Cal. 4th 846, 896-898, 59 Cal. Rptr. 2d 696, 927 P.2d 1200*]. However, a majority of the Court in *Loder* rejected the propriety of drug testing all promotional candidates on the grounds that the defendant's policy was overbroad and that since its creation, the provisions of the defendant's policy had been circumscribed by the United States Supreme Court's decisions in *Skinner* and *Von Raab* [*see § 429.15*] and by the enactment of the Americans with Disabilities Act, *42 U.S.C.S. § 12112 et seq.* [*Loder v. City of Glendale (1997) 14 Cal. 4th 846, 898-899, 59 Cal. Rptr. 2d 696, 927 P.2d*

1200 (George, C.J.; Mosk,J., and Kennard, J., concurring and dissenting)].

The court of appeal has also applied this balancing test to reject an invasion of privacy claim in a case in which an association that administered police officer employee benefits fired an employee who became engaged to marry an incarcerated felon. Recognizing the employee's fundamental privacy right to marry without interference from her employer, the court nonetheless balanced that right with the association's legitimate concern with protecting the confidentiality of police officer personnel records to which association employees had access. The court concluded that the association's policy, which required the employee to choose between her employment with the association and her marriage to the incarcerated felon, was a rational means of pursuing its interest in preventing the dissemination of confidential information to a convicted criminal [*Ortiz v. Los Angeles Police Relief Assn. (2002) 98 Cal. App. 4th 1288, 1312-1313, 120 Cal. Rptr. 2d 670*].

Private entities that present large public entertainment events necessarily retain primary responsibility for determining what security measures are appropriate to ensure the safety of patrons, subject to judicial review for reasonableness when those security measures substantially infringe on a privacy interest [Sheehan v. San Francisco 49ers, *Ltd. (2009) 45 Cal. 4th 992, 1003, 89 Cal. Rptr. 3d 594, 201 P.3d 472*]. In one case, the California Supreme Court reversed the sustaining of defendant's demurrer after plaintiffs had alleged in their complaint that having to submit to full-body pat down searches as a condition for entering the stadium to watch a professional football game infringed their privacy rights. Assuming that plaintiffs had alleged a serious invasion of their privacy rights, the Court noted that the case could not be decided on demurrer as defendant had not yet offered into the record any explanation or reasoned justification for the searches. Thus, further factual development was required before the alleged invasion of plaintiffs' privacy interests could be balanced against the defendant's as-yet-unstated interests [Sheehan v. San Francisco 49ers, *Ltd. (2009) 45 Cal. 4th 992, 1000-1003, 89 Cal. Rptr. 3d 594, 201 P.3d 472*]. The Court also stressed that defendant, on remand, would not be required to show that every measure implemented was absolutely necessary, merely that the measures implemented were reasonable under the circumstances [Sheehan v. San Francisco 49ers, *Ltd. (2009) 45 Cal. 4th 992, 1002, 89 Cal. Rptr. 3d 594, 201 P.3d 472*].

[9] Compelling Interest Defense

In *Hill,* the California Supreme Court rejected the blanket use of the compelling interest defense, which requires a defendant to justify an invasion of privacy by proving both a compelling interest and the absence of any alternative means of accomplishing that interest [*see, e.g., White v. Davis (1975) 13 Cal. 3d 757, 776, 120 Cal. Rptr. 94, 533 P.2d 222*]. The Court analyzed its decision in *White v. Davis,* as applying only to some aspects of the right of privacy under *Cal. Const. art. I, § 1,* such as those that implicate obvious government action impacting freedom of expression [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1*]. The Court also suggested that the compelling interest standard is applicable where cases involve an obvious invasion of an interest fundamental to personal autonomy, such as freedom from involuntary fertilization or the freedom to pursue consensual familial relationships [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 34, 26 Cal. Rptr. 2d 834, 865 P.2d 633*]. If the privacy right is less central, then the "balancing test" standard applies, and this test is less stringent than the compelling interest standard [*see § 429.16[8]*].

Hill culminates a trend that makes it clear that "not every act which has some impact on personal privacy invokes the protections of the state's Constitution and requires such justification" [*Wilkinson v. Times Mirror Corp. (1989) 215 Cal. App. 3d 1034, 1046-1048, 264 Cal. Rptr. 194* ; *see also Schmidt v. Superior Court (1989) 48 Cal. 3d 370, 375-391, 256 Cal. Rptr. 750, 769 P.2d 932* ; *Alarcon v. Murphy (1988) 201 Cal. App. 3d 1, 5, 248 Cal. Rptr. 26* (applying test of objectively reasonable expectation of privacy in finding no violation of privacy by city's disclosure of identity of murder suspect arrested by police)].

However, in *American Academy of Pediatrics v. Lungren,* the California Supreme Court concluded that a statute impinging on the fundamental autonomy privacy right of a minor or an adult must be evaluated under the compelling

interest test. The Court made clear that statutory intrusion on an autonomy privacy interest of a fundamental nature may not be justified simply by showing that the statute serves a legitimate competing interest sufficient to justify an impingement on a less central privacy interest. Although a statute's relationship to minors is properly employed in the constitutional calculus in determining whether an asserted state purpose or interest is compelling, because the statute's impact on minors is taken into account in assessing the importance of the state interest ostensibly served by the infringement, it is inappropriate additionally to lower the applicable constitutional standard under which the statute is evaluated simply because the privacy interests at stake are those of minors [*American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 341-342, 66 Cal. Rptr. 2d 210, 940 P.2d 797* (declaring unconstitutional statute requiring pregnant minor to secure either parental consent or judicial authorization before obtaining an abortion)].

[10] Consent Defense

Consent is a viable defense even in cases of serious privacy invasions. Accordingly, the requirement that a health worker perform cervical self-examinations in the presence of other females is a reasonable condition of employment, and does not violate a health worker's right to privacy where the worker's written employment agreement evidences her knowledge of the condition and agreement to be bound by it [*Feminist Women's Health Ctr. v. Superior Court (1997) 52 Cal. App. 4th 1234, 1249, 61 Cal. Rptr. 2d 187]* .

[11] Workers' Compensation Exclusive Remedy Doctrine Inapplicable

If the plaintiff is an employee suing his or her employer for invasion of the constitutional right to privacy based on actions taken at work, the employer may assert that the employee's only remedy is a recovery under workers' compensation because the injury arose out of and in the course of employment [*see Lab. Code § 3600(a)*]. However, the court of appeal has held that the exclusive remedy doctrine of the workers' compensation statute does not necessarily preclude an action against aplaintiff's employer for invasion of the constitutional right to privacy. Acknowledging that the emotional distress suffered from a violation of the right to privacy may be a personal injury sustained in the course of employment, the court held that conduct that constitutes an actionable invasion of privacy--that is, conduct that constitutes an egregious breach of the social norms underlying the privacy right--is by definition conduct that exceeds those risks reasonably encompassed within the employer-employee compensation bargain that underlies workers' compensation law. Therefore, this conduct is not subject to the exclusive remedy doctrine of workers' compensation law [Operating Eng'rs Local 3 v. *Johnson (2003) 110 Cal. App. 4th 180, 187-191, 1 Cal. Rptr. 3d 552]* .

The court also recognized, with dissatisfaction, that the determination of whether the exclusive remedy doctrine applies depends on the merits of the invasion of privacy claim. Therefore, conduct that does not meet the test for an actionable invasion of privacy may be preempted by the exclusive remedy doctrine because lesser "invasions" could be conduct falling within the employer-employee compensation bargain [Operating Eng'rs Local 3 v. *Johnson (2003) 110 Cal. App. 4th 180, 191-192, 1 Cal. Rptr. 3d 552]* .

[12] Application to Particular Activities

[a] Drug Testing

In *Hill v. National Collegiate Athletic Association,* the California Supreme Court applied a "balancing test" standard to hold that the NCAA's drug testing program did not violate the privacy rights of student athletes [*see § 429.16[8]*]. The Court made clear that the same standard applies in determining under what circumstances using drug testing to maintain a workplace free of substance abuse is permissible. The result depends on the public interest, the employer's special interests, and the employee's reasonable expectations of privacy in a particular employment setting [*see Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 55, 26 Cal. Rptr. 2d 834, 865 P.2d 633*].

The California Supreme Court later considered a facial challenge to a city employee drug testing program for job applicants and existing employees conditionally approved for promotion in *Loder v. City of Glendale (1997) 14 Cal.*

4th 846, 59 Cal. Rptr. 2d 696, 927 P.2d 1200] . The Court issued five separate opinions: a lead opinion written by Chief Justice George joined by Justice Werdegar, and four separate concurring and dissenting opinions. Nevertheless, a majority of the Court reaffirmed the *Hill* test while clarifying that the primary focus of a state constitutional privacy claim in the employee drug testing context is a reasonableness balancing test balancing the drug test's intrusion on the reasonable expectations of the employee against the drug test's promotion of the employer's legitimate interests [*Loder v. City of Glendale (1997) 14 Cal. 4th 846, 891-898, 922, 59 Cal. Rptr. 2d 696, 927 P.2d 1200* (George, C.J.; Chin, J., concurring and dissenting); *Kraslawsky v. Upper Deck Co. (1997) 56 Cal. App. 4th 179, 186-187, 65 Cal. Rptr. 2d 297* ; *see § 429.411[4]*].

Drug testing has been upheld in contexts other than the employment context. For example, the court of appeal has upheld a juvenile court order for the drug testing of a ward of the court who had a documented history of drug abuse. The drug testing order in that case was narrowly tailored to require testing only when the staff of the minor's group home believed the minor was under the influence [*In re Carmen M. (2006) 141 Cal. App. 4th 478, 494, 46 Cal. Rptr. 3d 117]* .

[b] Improper Use of Information

In the leading case interpreting the constitutional cause of action for invasion of privacy, *Hill v. National Collegiate Athletic Association,* the California Supreme Court identified informational privacy as one of the core values furthered by the constitutional right of privacy [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 35, 26 Cal. Rptr. 2d 834, 865 P.2d 633* ; *see also White v. Davis (1975) 13 Cal. 3d 757, 775, 120 Cal. Rptr. 94, 533 P.2d 222]* . Pre-*Hill* cases resolving informational privacy claims must be reanalyzed to determine whether they are consistent with the elements and standards announced in *Hill*. The Supreme Court offered no analysis of the continuing vitality of these decisions [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 255, 6 Cal. Rptr. 2d 834, 865 P.2d 633*].

However, in *Johnson v. Superior Court,* the court analyzed the competing interest balancing test articulated in *Hill* and found that because discovery orders in court proceedings involve state-compelled disclosure, the disclosure is treated as a product of state action, so that whenever the compelled disclosure treads on the constitutional right of privacy, there must be a compelling state interest [*Johnson v. Superior Court (2000) 80 Cal. App. 4th 1050, 1070-1071, 95 Cal. Rptr. 2d 864]* . In *Johnson,* the court found the following three compelling state interests justifying invasion of a sperm donor's right of privacy in his identity to allow the purchasers of his sperm to take his deposition to discover facts relevantto the alleged negligence of the sperm bank in the transmission of kidney disease to their child, born as a result of insemination with his sperm [*Johnson v. Superior Court (2000) 80 Cal. App. 4th 1050, 1071, 95 Cal. Rptr. 2d 864]* :

- The state's compelling interest in making certain that parties comply with properly served subpoenas and discovery orders to disclose relevant information to the fullest extent possible;

- The state's interest in seeking the truth in court proceedings; and

- The state's compelling interest in ensuring that those injured by the actionable conduct of others receive full redress of those injuries.

The right of privacy extends to one's confidential financial affairs as well as to the details of one's personal life. This right is not absolute and must be balanced against other considerations. However, the constitutional elevation of privacy to an inalienable right expressly protected by force of constitutional mandate compels a finding of relevancy before confidential financial information may be disclosed [*Valley Bank of Nev. v. Superior Court (1975) 15 Cal. 3d 652, 656, 125 Cal. Rptr. 553, 542 P. 2d 977* ; *Gordon v. Superior Court (1997) 55 Cal. App. 4th 1546, 1557, 65 Cal. Rptr. 2d 53]* . Thus, for example, a lawyer's clients have a right of privacy in their financial affairs requiring that records of those affairs not be disclosed to a state agency successfully obtaining a warrant to seize the records from the lawyer's

office without notice to the lawyer and a showing of relevance and good cause to invade the privacy of uninvolved clients [*Gordon v. Superior Court (1997) 55 Cal. App. 4th 1546, 1557-1558, 65 Cal. Rptr. 2d 53]* .

Informational privacy is implicated by the unauthorized disclosure of school records to third parties and is a pre-*Hill* example of prohibited conduct involving the improper use of information properly obtained for a specific purpose [*Porten v. University of S.F. (1976) 64 Cal. App. 3d 825, 830, 832, 134 Cal. Rptr. 839]* . Release of arrest records or dissemination of information about arrests was found before *Hill* to implicate the right to privacy of the arrestees [*Denari v. Superior Court (1989) 215 Cal. App. 3d 1488, 1498, 264 Cal. Rptr. 261* (upholding denial of discovery request by plaintiff in civil action arising from alleged injuries incurred while incarcerated in county jail, requesting identifying information about other arrestees incarcerated at the same time, to establish percipient witnesses)]. In another case decided before *Hill,* an appellate court held that a law enforcement agency was prohibited from forwarding unexpunged arrest records of job applicants to public employers [*Central Valley Chapter 7th Step Found. v. Younger (1979) 95 Cal. App. 3d 212, 237-238, 157 Cal. Rptr. 117* (under *Lab. Code § 432.7,* employer may obtain record of convictions of employee)].

[c] Family, Marriage, Sexual Relations

In the leading case interpreting the consitutional cause of action for invasion of privacy, *Hill v. National Collegiate Athletic Association,* the California Supreme Court identified autonomy privacy as one of the core values furthered by the constitutional right of privacy [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 35, 26 Cal. Rptr. 2d 834, 865 P.2d 633* . Pre-*Hill* cases resolving autonomy privacy claims must be reanalyzed to determine whether they are consistent with the elements and standards announced in *Hill*. The Supreme Court offered no analysis of the continuing vitality of these decisions [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 55, 26 Cal. Rptr. 2d 834, 865 P.2d 633*].

Pre-*Hill* cases interpret autonomy privacy as extending to all matters relating to family, marriage, and sexual relations [*Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 380, 193 Cal. Rptr. 422]* . Post-*Hill* cases make clear that the interest in autonomy privacy protected by the California constitutional privacy clause includes a pregnant woman's right to choose whether to continue her pregnancy [*American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 332-333, 66 Cal. Rptr. 2d 210, 940 P.2d 797]* . In the area of sexual matters, the right is not limited to the marital relationship [*Morales v. Superior Court (1979) 99 Cal. App. 3d 283, 290, 160 Cal. Rptr. 194* (pre-*Hill* case)]. Thus for example, in a post-*Hill* case, the California Supreme Court held that a minor who is pregnant has a fundamental autonomy privacy interest under the California Constitution in making the decision whether to continue or terminate her own pregnancy [*American Acad. of Pediatrics v. Lungren (1997) 16 Cal. 4th 307, 337, 66 Cal. Rptr. 2d 210, 940 P.2d 797]* . In another post-*Hill* case, the court held that under California's privacy protection embracing sexual relations, the mere fact that a plaintiff initiates an action seeking damages arising out of conduct of a sexual nature, does not ipse facto provide good cause for discovery of the plaintiff's sexual conduct other than incidents on which the legal action is based, and that the party seeking the information must show that the information is directly relevant to overcome the constitutional right of privacy by demonstrating a nexus between the incidents as to which the discovery is sought and the plaintiff's claimed injuries [*Barrenda L. v. Superior Court (1998) 65 Cal. App. 4th 794, 800-803, 76 Cal. Rptr. 2d 727* (discovery denied if defendants unable to demonstrate direct relevance of information sought)].

In cases decided before *Hill,* the constitutional right of privacy has also functioned as a bar to certain tort actions arising from misrepresentations leading to an act of consensual sexual intercourse. In a case involving misrepresentation of birth-control practices, one court refused to attach tort liability to the results of consensual sexual intercourse. The court stated that to do so would encourage unwarranted governmental intrusion into matters affecting the individual's right to privacy, and rejected any role in defining standards of conduct in the highly intimate and private relationship [*Stephen K. v. Roni L. (1980) 105 Cal. App. 3d 640, 643, 645, 164 Cal. Rptr. 618* ; *see also* *Perry v. Atkinson (1987) 195 Cal. App. 3d 14, 16-17, 240 Cal. Rptr. 402* (no liability for fraudulently inducing woman to have abortion)]. However, other courts have allowed actions arising from consensual sexual intercourse to proceed on traditional tort theories despite the

right of privacy [*see Kathleen K. v. Robert B. (1984) 150 Cal. App. 3d 992, 997, 198 Cal. Rptr. 273* (transmission of disease); *Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 193 Cal. Rptr. 422* (misrepresentation of impotency)]. The scope of the right of privacy as a bar to a tort action involving consensual sexual intercourse is currently unresolved.

In *In re Marriage Cases*, the California Supreme Court noted that the "constitutional right to marry" constitutes one aspect of the right of privacy that is embodied in *article I, section 1 of the California Constitution*, as well as a component of the liberty protected by the due process clause of *article I, section 7 of the California Constitution* [*In re Marriage Cases (2008) 43 Cal. 4th 757, 809-810, 818-819, 76 Cal. Rptr. 3d 683, 183 P.3d 384]* . This constitutional right to marry encompasses the core set of basic substantive legal rights and attributes that are traditionally associated with marriage, including the opportunity of an individual to establish, with the person with whom the individual has chosen to share his or her life, an officially recognized and protected family possessing mutual rights and responsibilities and entitled to the same respect and dignity accorded a union that is traditionally designated as marriage [*In re Marriage Cases (2008) 43 Cal. 4th 757, 809-810, 818-819, 76 Cal. Rptr. 3d 683, 183 P.3d 384]* . The Court concluded that same-sex couples have a constitutional right to "choose one's life partner and enter with that person into a committed, officially recognized, and protected family relationship that enjoys all of the constitutionally based incidents of marriage" [*In re Marriage Cases (2008) 43 Cal. 4th 757, 829, 76 Cal. Rptr. 3d 683, 183 P.3d 384]* .

One year later, the Court held in *Strauss v. Horton* that Proposition 8, passed by the voters in November 2008, which added a new section [*Cal. Const. art. I, § 7.5*] to article I of the California Constitution, providing that "[o]nly marriage between a man and a woman is valid or recognized in California," did not entirely repeal or abrogate a same-sex couple's state constitutional rights of privacy, due process, and equal protection that the Court had previously recognized in *In re Marriage Cases*. Instead, the Court concluded that Proposition 8 carves out a narrow and limited exception to these state constitutional rights by reserving the official designation of the term "marriage" for the union of opposite-sex couples as a matter of state constitutional law, while leaving undisturbed all of the other extremely significant substantive aspects of a same-sex couple's state constitutional rights to establish an officially recognized and protected family relationship with the person of one's choice and to raise children within that family [*Strauss v. Horton (2009) 46 Cal. 4th 364, 387-388, 390-391, 408-409, 411-412, 93 Cal. Rptr. 3d 591, 207 P.3d 48*]. Section 7.5 of article I that was added by Proposition 8 does not affect the continued validity of the provisions of the California Constitution that protect the familial rights of same-sex couples, except to the extent that those rights include access to the designation of "marriage" [*Strauss v. Horton (2009) 46 Cal. 4th 364, 409, 411-412, 93 Cal. Rptr. 3d 591, 207 P.3d 48]* .

[d] Breast Feeding

Civ. Code § 43.3 expressly permits a mother to breast feed a child in any location, public or private, where the mother and child are otherwise authorized to be present, except in the private home or residence of another.

[e] Medical Treatment

Every adult of sound mind has a right to determine what will be done with his or her body [*Thor v. Superior Court (1993) 5 Cal. 4th 725, 734-738, 21 Cal. Rptr. 2d 357, 855 P.2d 375* ; *Bouvia v. Superior Court (1986) 179 Cal. App. 3d 1127, 1139, 225 Cal. Rptr. 297]* . Thus, a competent, informed adult, in the exercise of self- determination and control of bodily integrity, has the right to direct the withholding or withdrawal of life-sustaining medical treatment, even at the risk of death [*Thor v. Superior Court (1993) 5 Cal. 4th 725, 744, 21 Cal. Rptr. 2d 357, 855 P.2d 375* ; *see also Bouvia v. Superior Court (1986) 179 Cal. App. 3d 1127, 1137, 225 Cal. Rptr. 297]* . The right does not depend upon the nature of the treatment refused or withdrawn, nor is it reserved to those suffering from terminal conditions. Once a patient has declined further medical intervention, the physician's duty to provide such care ceases [*Thor v. Superior Court (1993) 5 Cal. 4th 725, 744, 21 Cal. Rptr. 2d 357, 855 P.2d 375]* . The right to refuse medical treatment is basic and fundamental and is a part of the right of privacy protected by both the state (*Cal. Const. art. I, § 1*) and

federal Constitutions [*Bouvia v. Superior Court (1986) 179 Cal. App. 3d 1127, 1137, 225 Cal. Rptr. 297* ; *Bartling v. Superior Court (1984) 163 Cal. App. 3d 186, 195, 209 Cal. Rptr. 220]* .

The right to forgo medical treatment is not subject to approval by anyone, including a treating physician [*Thor v. Superior Court (1993) 5 Cal. 4th 725, 742-743, 21 Cal. Rptr. 2d 357, 855 P.2d 375* ; *Bouvia v. Superior Court (1986) 179 Cal. App. 3d 1127, 1137, 225 Cal. Rptr. 297]* . The patient's right to refuse medical treatment regardless of the doctor's judgment does not undermine the state's interest in medical ethics [*Thor v. Superior Court (1993) 5 Cal. 4th 725, 742-743, 21 Cal. Rptr. 2d 357, 855 P.2d 375]* . Moreover, the right to forego medical treatment is not qualified by the state's interest in the prevention of suicide [*Thor v. Superior Court (1993) 5 Cal. 4th 725, 741-742, 21 Cal. Rptr. 2d 357, 855 P.2d 375* ; *Bouvia v. Superior Court (1986) 179 Cal. App. 3d 1127, 1144-1145, 225 Cal. Rptr. 297]* . In reaching this conclusion, the California Supreme Court distinguished between an individual suffering from a serious life-threatening disease or debilitating injury who rejects medical intervention that only prolongs but never cures the affliction and an individual who deliberately sets in motion a course of events aimed at his or her own demise who attempts to enlist the assistance of others [*Thor v. Superior Court (1993) 5 Cal. 4th 725, 742, 21 Cal. Rptr. 2d 357, 855 P.2d 375]* .

A person alleging a violation of a civil right, such as the right to decide to refuse medical treatment, may bring an action under *42 U.S.C.S. § 1983*. *42 U.S.C.S. § 1983* prohibits conduct under color of state law that deprives an individual of a right secured by the Constitution or laws of the United States. However, thus far, the cases alleging a cause of action under *42 U.S.C.S. § 1983* for violation of a patient's right to refuse medical treatment have not been successful. For example, one court found that a private hospital was not acting under color of state law in refusing to remove artificial life-sustaining equipment, because there was no showing of a sufficiently close nexus between the state and the hospital's action, particularly when the state Department of Health, which was consulted by the hospital, declined to offer any opinion on the permissibility of removing the equipment [*McMahon v. Lopez (1988) 199 Cal. App. 3d 829, 835-837, 245 Cal. Rptr. 172]* . Another case, involving a public hospital, held that there was no cause of action because there was no showing that the physicians or hospital were motivated by a government policy or custom which sought to deprive the patient of her civil rights. The court found there were differing medical views concerning the appropriate course of treatment for a patient suffering from chronic pain [*Bouvia v. County of Los Angeles (1987) 195 Cal. App. 3d 1075, 1086-1089, 241 Cal. Rptr. 239]* . For discussion of *42 U.S.C.S. § 1983* actions, see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

For discussion of the physician's immunity from civil and criminal liability for acting on the patient's right to refuse treatment, see Ch. 415, *Physicians: Medical Malpractice* .

[f] Housing

The right to live with whomever one chooses is guaranteed by the state constitutional right of privacy. A city ordinance that requires that persons living in an area zoned for single-family houses be related by blood, marriage, or legal adoption violates the right of privacy [*City of Santa Barbara v. Adamson (1980) 27 Cal. 3d 123, 130-134, 164 Cal. Rptr. 539, 610 P.2d 436]* , as does a zoning ordinance restricting residents of second units to the property owner, dependents of the owner, or a caregiver for either [*Coalition Advocating Legal Hous. Options v. City of Santa Monica (2001) 88 Cal. App. 4th 451, 458-459, 105 Cal. Rptr. 2d 802]* .

[g] Employment

The right of privacy protects the rights of employees and job applicants from intrusions by the employer. For example, an employer may be prohibited from posting on an open bulletin board the reasons for an employee's dismissal [*Payton v. City of Santa Clara (1982) 132 Cal. App. 3d 152, 154, 183 Cal. Rptr. 17]* . Similarly, an employer may not request and then misuse private information obtained in a report of a psychiatric examination of anemployee to force the employee to enroll in an inpatient alcohol rehabilitation program, and thereafter terminate his employment because he

refused to waive those rights [*Pettus v. Cole (1996) 49 Cal. App. 4th 402, 457, 57 Cal. Rptr. 2d 46]* .

In *Hill v. National Collegiate Athletic Association,* the California Supreme Court applied a balancing test to determine whether an athletic association violated the privacy rights of student athletes. The Court indicated that the same standard will apply to determine the scope of privacy protection in an employment context [*see Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 55, 26 Cal. Rptr. 2d 834, 865 P.2d 633* ; *Hernandez v. Hillsides, Inc. (2009) 47 Cal. 4th 272, 288, 97 Cal. Rptr. 3d 274, 211 P.3d 1063* ;*see also TBG Ins. Servs. Corp. v. Superior Court (2002) 96 Cal. App. 4th 443, 445, 453, 117 Cal. Rptr. 2d 155* (given employee's consent to employer's monitoring of employer-provided work and home computers, employee had no reasonable expectation of privacy when he used home computer for personal matters); *Semore v. Pool (1990) 217 Cal. App. 3d 1087, 266 Cal. Rptr. 280* (pupillary eye test is intrusive); *Wilkinson v. Times Mirror Corp. (1989) 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194* (drug testing of job applicants is constitutional)].

The balancing test established in *Hill* was applied to the employment context in *Loder v. City of Glendale,* which considered the constitutionality of pre-employment drug testing of all applicants by the City of Glendale. The drug testing at issue was performed as a component of a physical examination required of all new applicants who had received a conditional offer of employment and of employees seeking promotions [*Loder v. City of Glendale (1997) 14 Cal. 4th 846, 853-856, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 (George, C.J.)]* .

The court first rejected the statutory challenges to the testing program, finding that an employer's requirement that an applicant or employee take an otherwise lawful drug test does not trigger the "discrimination" provisions of *Civil Code § 56.20* and does not run afoul of the Americans with Disabilities Act, *42 U.S.C.S. § 12101 et seq.* [*Loder v. City of Glendale (1997) 14 Cal. 4th 846, 859-865, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 (George, C.J.)]* .

However, the court held that suspicionless drug testing of current employees who apply for and are offered promotions, without regard to the nature of the position sought, violates the prohibition against unreasonable searches under the *Fourth Amendment of the U.S. Constitution* [*Loder v. City of Glendale (1997) 14 Cal. 4th 846, 878-881, 900, 918 n.1, 59 Cal. Rptr. 2d 696, 927 P.2d 1200* (George, C.J.; Mosk, J., and Kennard, J., concurring and dissenting); *see also Treasury Employees v. Von Raab (1989) 489 U.S. 656, 677, 109 S. Ct. 1384, 103 L. Ed. 2d 685]* . The Court concluded that the reasonableness of testing current employees turns on the nature and duties of the position in question. The Court left open the possibility that an employer may constitutionally require a current employee to submit to a drug test as a condition to employment when testing is justified by the nature of the particular position to which promotion is sought [*Loder v. City of Glendale (1997) 14 Cal. 4th 846, 880-881, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 (George, C.J.)]* .

The Court then considered the policy of drug testing new applicants. First, the court found that the testing easily overcame the threshold requirements set forth in *Hill,* reasoning that although the testing clearly intrudes on both autonomy privacy interests and informational privacy interests which are protected by the state Constitution, the actual intrusion was lessened by the fact that the drug testing was part of a pre-employment medical examination which a job applicant "reasonably must anticipate" [*Loder v. City of Glendale (1997) 14 Cal. 4th 846, 889-897, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 (George, C.J.)]* . The court then stated that this intrusion was constitutionally permissible when balanced against the employer's interest in avoiding the financial burdens and morale problems caused by an employee's abuse of drugs or alcohol and the attendant absenteeism and tardiness, decreased productivity, increased turnover and greater safety issues [*Loder v. City of Glendale (1997) 14 Cal. 4th 846, 897, 59 Cal. Rptr. 2d 696, 927 P.2d 1200 (George, C.J.)]* .

Applying these principles developed in *Loder,* the court of appeal has held that a job applicant who requests and receives a delay in submitting to a preemployment drug test until after the start of employment may not evade the employer's testing requirement on the ground that the applicant became immune from testing by becoming an "employee." Under such circumstances, and for purposes of suspicionless drug testing, the applicant must submit to testing after the start of employment [*Pilkington Barnes Hind v. Superior Court (1998) 66 Cal. App. 4th 28, 34, 77*

Cal. Rptr. 2d 596] .

Even though an employer maintains a constitutionally valid suspicion-based testing program for existing employees, the employer must still have reasonable cause for believing an employee is under the influence of drugs before it may subject the employee to a drug test. Courts evaluate the constitutionality of a drug test under the California Constitution by balancing the employee's reasonable expectation of privacy against the employer's legitimate interests in imposing the test. If a suspicion-based drug test is not triggered by a reasonable belief the employee is intoxicated, the employee may have a stronger reason to expect to maintain his or her privacy and the employer may have less need to demand the test [*Kraslawsky v. Upper Deck Co. (1997) 56 Cal. App. 4th 179, 65 Cal. Rptr. 2d 297* (summary dismissal of former employee's privacy action improperly granted; although employer made showing employee acted in intoxicated manner, employee submitted contradicting evidence, including showing that employer may have created pretext for terminating her after she refused to work overtime without pay)].

For further discussion of the right of privacy under the California Constitution as it relates to drug and alcohol testing of employees and jobapplicants, see Wilcox, California Employment Law, Ch. 50 (Matthew Bender).

A public employer violated the privacy rights of state or local government employees who were not public safety officers under *Gov. Code § 3301* by requiring them to submit to polygraph examinations as a condition of public employment. Because polygraph examinations inherently intrude on the constitutionally protected zone of individual privacy, state and local public employers may not compel their employees to undergo polygraph examinations as a condition of public employment, absent a showing of compelling government interest justifying this invasion of the employees' privacy [*Long Beach City Employees Ass'n v. City of Long Beach (1986) 41 Cal. 3d 937, 948, 956, 227 Cal. Rptr. 90, 719 P.2d 660]* . The use of the "compelling interest" standard in this setting may no longer be required now that the California Supreme Court has limited its use to certain obvious invasions of vital privacy interests [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 34, 26 Cal. Rptr. 2d 834, 865 P.2d 633* ; *see § 429.16[9]*].

Private and public employees who are public safety officers as defined in *Gov. Code § 3301* are exempt from compulsory submission to lie detector tests as a condition of employment [*Gov. Code § 3307(a)*; *see Gov. Code § 3301* (defining public safety officer); *Lab. Code § 432.2* (prohibiting non-government employers from requiring applicants or employees to take polygraph, lie detector, or similar tests as condition of employment); *Long Beach City Employees Ass'n v. City of Long Beach (1986) 41 Cal. 3d 937, 941, 948-956, 227 Cal. Rptr. 90, 719 P.2d 660* (discussing equal protection implications of distinction between classes of public employees)]. For purposes of *Gov. Code § 3307*, lie detector means a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar mechanical or electrical device used, or the results of which are used, to render a diagnostic opinion regarding an individual's honesty or dishonesty [*Gov. Code § 3307(b)*].

Likewise, employers are statutorily prohibited from making audio or video tape recordings of employees in restrooms, locker rooms, or other rooms designated by employers for changing clothes [*Lab. Code § 435(a)*]. This prohibition extends to all private and public employers except the federal government [*Lab. Code § 435(b)*]. A violation of this statute constitutes an infraction. [*Lab. Code § 435(c)*].

In 2009 the California Supreme Court has found that employees have a reasonable expectation under widely held social norms that their employer would not install video equipment capable of monitoring and recording their activities--personal and work-related--behind closed doors without their knowledge or consent. On the other hand, there was no triable issue as to whether that intrusion was highly offensive and sufficiently serious to constitute a privacy violation. Any actual surveillance was drastically limited in nature and scope (no audio, not operated during business hours), exempting plaintiffs from its reach, and defendants were motivated by strong countervailing concerns, which included providing a wholesome environment for the abused children in its care and avoiding legal liability [*Hernandez v. Hillsides, Inc. (2009) 47 Cal. 4th 272, 286-300, 97 Cal. Rptr. 3d 274, 211 P.3d 1063*]. However, the court did add the following language: "We appreciate plaintiffs' dismay over the discovery of video equipment--small,

blinking, and hot to the touch--that their employer had hidden among their personal effects in an office that was reasonably secluded from public access and view. Nothing we say here is meant to encourage such surveillance measures, particularly in the absence of adequate notice to persons within camera range that their actions may be viewed and taped" [*Hernandez v. Hillsides, Inc. (2009) 47 Cal. 4th 272, 300, 97 Cal. Rptr. 3d 274, 211 P.3d 1063*].

[h] Association

The constitutional right of privacy also protects associational privacy. Private group affiliations and activities are presumptively immune from disclosure [*Britt v. Superior Court of San Diego County (1978) 20 Cal. 3d 844, 852-856, 864-865, 143 Cal. Rptr. 695, 574 P.2d 766* . If, however, the need for disclosure outweighs the importance of the associational privacy rights, disclosure may be allowed with the privacy rights protected as fully as possible. For example, in a city's action against a private membership club, the city's need for a list of rejected applicants to show a pattern of racial discrimination outweighed the privacy interests of the rejected applicants, subject to protective measures to screen out disclosure of applicants who clearly were not excluded because of race [*Olympic Club v. Superior Court (1991) 229 Cal. App. 3d 358, 364-365, 282 Cal. Rptr. 1]* . For discussion of associations and associational rights generally, see Ch. 61, *Associations and Clubs* .

[13] Activities Not Covered

Certain activities and information are not protected by the constitutional right of privacy:

- The requirement of a photograph on a driver's license [*Stackler v. Department of Motor Vehicles (1980) 105 Cal. App. 3d 240, 247-248, 164 Cal. Rptr. 203]* .

- The right of access to drugs of unproved efficacy [*People v. Privitera (1979) 23 Cal. 3d 697, 709-710, 153 Cal. Rptr. 431, 591 P.2d 919* (laetrile)].

- The right to use certain drugs in one's own home [*National Org. for Reform of Marijuana Laws v. Gain (1979) 100 Cal. App. 3d 586, 593, 161 Cal. Rptr. 181* (marijuana); *People v. Davis (1979) 92 Cal. App. 3d 250, 260, 154 Cal. Rptr. 817* (cocaine)].

- The limited retention and dissemination of arrest records by the state for law-enforcement purposes [*Loder v. Municipal Court (1976) 17 Cal. 3d 859, 877, 132 Cal. Rptr. 464, 553 P.2d 624]* .

- The release of records of licenses to carry concealed weapons and applications for renewal of the licenses, because the information is voluntarily provided to officials and sworn to be true [*CBS, Inc. v. Block (1986) 42 Cal. 3d 646, 656, 230 Cal. Rptr. 362, 725 P.2d 470]* .

- Restriction of residence in a mobilehome park to older persons [*Schmidt v. Superior Court (1989) 48 Cal. 3d 370, 388-389, 256 Cal. Rptr. 750, 769 P.2d 932* (interpreting *Civ. Code § 798.76* permitting enforcement of age-based residency requirement in mobilehome parks limiting residency to older persons); *see* Ch. 369, *Mobilehomes and Mobilehome Parks*].

- The requirement that a person wear a helmet when riding a motorcycle on a public highway [*Buhl v. Hannigan (1993) 16 Cal. App. 4th 1612, 1625-1626, 20 Cal. Rptr. 2d 740]* .

[14] Privacy Right Inapplicable to Corporations

The right to privacy in *Cal. Const. art. I, § 1*, applies only to natural persons and does not apply to corporations. However, a corporation may still retain a general right to privacy under a combination of the Fourth, *Fifth*, and

Fourteenth Amendments to the United States Constitution [*Roberts v. Gulf Oil Corp. (1983) 147 Cal. App. 3d 770, 791, 794, 195 Cal. Rptr. 393* .

[15] Raising Right of Privacy: Cause of Action

Cal. Const. art. I, § 1, is self-executing; that is, it creates a legal and enforceable right of privacy [*White v. Davis (1975) 13 Cal. 3d 757, 775, 120 Cal. Rptr. 94, 533 P.2d 222* ; *Jeffrey H. v. Imai, Tadlock & Keeney (2000) 85 Cal. App. 4th 345, 353, 101 Cal. Rptr. 2d 916 , overruled, Jacob B. v. County of Shasta, 40 Cal. 4th 948*].

One court of appeal has opined in dictum that the California Supreme Court has not yet considered whether violation of the state constitution's privacy clause permits an action for damages [*Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE) (2007) 157 Cal. App. 4th 1056, 1066, 69 Cal. Rptr. 3d 176 , citing Katzberg v. Regents of University of California (2002) 29 Cal. 4th 300, 313 n.13, 315 n.16, 127 Cal. Rptr. 2d 482, 58 P.3d 339*]. However, other courts of appeal have held that a plaintiff may bring a cause of action for money damages for a violation of his or her right of privacy [*Payton v. City of Santa Clara (1982) 132 Cal. App. 3d 152, 153, 183 Cal. Rptr. 17* ; *Porten v. University of S.F. (1976) 64 Cal. App. 3d 825, 827, 832, 134 Cal. Rptr. 839]* . A plaintiff may apply for a declaratory judgment determining whether or not a violation of the right of privacy has occurred [*Central Valley Chapter 7th Step Found. v. Younger (1979) 95 Cal. App. 3d 212, 222, 232-234, 240, 157 Cal. Rptr. 117]* . A plaintiff may also seek an injunction to halt a claimed violation of privacy [*White v. Davis (1975) 13 Cal. 3d 757, 762, 776, 120 Cal. Rptr. 94, 533 P.2d 222]* . A class action may be brought on behalf of all persons whose right of privacy is being violated [*Hooper v. Deukmejian (1981) 122 Cal. App. 3d 987, 993, 1015, 176 Cal. Rptr. 569* ; *Central Valley Chapter 7th Step Found. v. Younger (1979) 95 Cal. App. 3d 212, 218, 227-230, 237, 157 Cal. Rptr. 117]* .

The state constitutional right to privacy does not limit the scope of preexisting statutory immunity. Thus, for example, the immunity provided by *Gov. Code § 821.6* may apply to preclude an action under *Cal. Const. art. I, § 1* for violation of the right to privacy [*Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE) (2007) 157 Cal. App. 4th 1056, 1066, 69 Cal. Rptr. 3d 176*].

[16] Challenging Requirement to Disclose Information

The right of privacy may be used as a ground to oppose a request or demand for protected information, or to challenge an adverse consequence of not providing protected information. For example, a person may bring a petition for writ of mandate to set aside an adverse administrative decision, based on his or her refusal to provide information protected by the privacy right. In one such case, a woman denied unemployment benefits obtained a favorable judgment holding that the Employment Development Department could inquire into the potential effect of her pregnancy on her health, but that her right to privacy precluded inquiry beyond the submission of her doctor's certificate of good health [*Gunn v. Employment Dev. Dep't (1979) 94 Cal. App. 3d 658, 664-665, 156 Cal. Rptr. 584]* .

[17] Resisting Disclosure in Litigation: Civil Discovery

Information not protected by statutory privilege may nonetheless be shielded from discovery, despite its relevance, when disclosure would invade an individual's right of privacy [*Hooser v. Superior Court (2000) 84 Cal. App. 4th 997, 1003, 101 Cal. Rptr. 2d 341]* . Thus, disclosure of information requested during the discovery stage of civil litigation may be resisted on the basis of the right to privacy under *Cal. Const. art. I, § 1* [*see Valley Bank of Nev. v. Superior Court (1975) 15 Cal. 3d 652, 656-658, 125 Cal. Rptr. 553, 542 P.2d 977* ; *see generally Ch. 191, Discovery: Privileges and Other Limitations, § 191.120*].

However, the right of privacy does not provide absolute protection against disclosure of personal information. In determining whether disclosure is required, the court must balance the right of a civil litigant to discover relevant facts against the right of third parties to maintain reasonable privacy regarding their sensitive personal affairs [*Hooser v.*

Superior Court (2000) 84 Cal. App. 4th 997, 1004, 101 Cal. Rptr. 2d 341] . The court must consider each of the following [*Valley Bank of Nevada v. Superior Court of San Joaquin County (1975) 15 Cal. 3d 652, 657-658, 125 Cal. Rptr. 553, 542 P.2d 977* ; *Hooser v. Superior Court (2000) 84 Cal. App. 4th 997, 1004, 101 Cal. Rptr. 2d 341]* :

- The purpose of the information sought;
- The effect disclosure will have on the affected persons and parties;
- The nature of the objections urged by the party resisting disclosure; and
- Availability of alternative, less-intrusive means for obtaining the requested information.

The more sensitive the nature of the personal information sought to be discovered, the more substantial the showing of the need for discovery required before the court will permit disclosure [*Hooser v. Superior Court (2000) 84 Cal. App. 4th 997, 1004, 101 Cal. Rptr. 2d 341]* .

[18] Criminal Cases

In criminal and disciplinary investigations, the state's legitimate interest in obtaining full and accurate information may take precedence over an individual's right of privacy [*Reynaud v. Superior Court (1982) 138 Cal. App. 3d 1, 9, 187 Cal. Rptr. 660* ; *McKirdy v. Superior Court (1982) 138 Cal. App. 3d 12, 21-22, 188 Cal. Rptr. 143]* . For example, in a criminal action against a doctor for false Medi-Cal claims, protection of the patients' right of privacy did not require a prior noticed hearing before the state could obtain the relevant medical records [*Reynaud v. Superior Court (1982) 138 Cal. App. 3d 1, 9, 187 Cal. Rptr. 660]* .

However, a crime victim was held to have stated a cause of action for invasion of her constitutional right to privacy against a criminal defense attorney who, without authorization, read and disseminated the victim's confidential mental health records. Further, the litigation privilege did not shield the defense attorney from liability for reading and disseminating the victim's private mental health records for the purpose of gathering evidence to be used in the course of a criminal proceeding [*Susan S. v. Israels(1997) 55 Cal. App. 4th 1290, 1299, 67 Cal. Rptr. 2d 42* (attorney acquired information from mental health treatment facility pursuant to subpoena duces tecum for production of plaintiff's mental health records; facilitymistakenly sent records directly to attorney, instead of to trial court)]. The court of appeal held that the plaintiff had a legally protected privacy interest in her mental health records, and had a reasonable expectation of privacy. Under the circumstances, the defendant's entitlement to inspect the plaintiff's records required a showing of good cause for their discovery, as well as a balancing of the defendant's *Sixth Amendment* right of cross-examination against the plaintiff's right to privacy in her medical records, neither of which could be established. Finally, the court determined that a stranger's unauthorized reading and dissemination of the plaintiff's mental health records was a serious invasion of her privacy. The court rejected both of the defendant's arguments: (1) that the criminal defense attorney's mere reading of the plaintiff's medical records could not support her claim of serious invasion, and (2) that there was no serious invasion because when a hearing eventually was held in the underlying criminal proceeding, the trial court permitted the defense psychiatrist to testify based on what he read in the plaintiff's records. The court concluded that the plaintiff's complaint adequately alleged the serious invasion element, in that it alleged that the criminal defense attorney read and disseminated her mental health records knowing the information contained in them could be highly sensitive and embarrassing to her, that she in fact was intimidated, embarrassed and humiliated, suffered severe emotional distress, and that her mental condition was exacerbated as a result [*Susan S. v. Israels (1997) 55 Cal. App. 4th 1290, 1299, 67 Cal. Rptr. 2d 42]* .

[19] Applicability of Litigation Privilege

The litigation privilege of *Civ. Code § 47(b)*, which generally protects from tort liability a publication made in

connection with a judicial proceeding, protects against a cause of action based on California's constitutional right to privacy [*Jacob B. v. County of Shasta (2007) 40 Cal. 4th 948, 960-962, 56 Cal. Rptr. 3d 477, 154 P.3d 1003* ; for discussion of the litigation privilege generally, *see § 429.47, below*, and *see* Ch. 340, *Libel and Slander*].

[20] Applicability of Government Tort Claims Act

Notwithstanding that the constitutional right to privacy was designed to protect against some forms of governmental intrusion, this right to privacy does not limit the scope of statutory immunities that existed when the right to privacy was added in 1972. For example, *Gov. Code § 821.6*, which is part of the California Government Tort Claims Act, immunizes a governmental employee for injury caused by instituting or prosecuting any judicial or administrative proceeding within the scope of his or her employment, regardless of malice or lack of probable cause [*Gov. Code § 821.6*]. Such immunity extends to investigatory activities and may be used to defeat a claim for violation of the constitutional right to privacy [*Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE) (2007) 157 Cal. App. 4th 1056, 1062, 1066, 69 Cal. Rptr. 3d 176* (no governmental liability for surreptitiously videotaping employee on wedding and honeymoon when taping was part of investigation into possible workers' compensation fraud)].

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[Reserved]

§§ 429.17[Reserved]

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37-429 California Forms of Pleading and Practice--Annotated § 429.30

§ 429.30 Governing Law

The right of privacy is generally governed by case law. However, an invasion of the right to privacy by the appropriation of a person's name, voice, signature, photograph, or likeness is governed in part by *Civ. Code § 3344*, which authorizes a cause of action for the commercial appropriation of these personal attributes [*see § 429.36[1]*]. Appropriation of the name, voice, signature, photograph, or likeness of a deceased personality is governed by *Civ. Code § 3344.1* [*see § 429.36[11]*]. The first case in California to recognize the right of privacy was *Melvin v. Reid (1931) 112 Cal. App. 285, 297 P. 91* . The California Supreme Court followed suit in *Gill v. Curtis Publishing Co. (1952) 38 Cal. 2d 273, 239 P.2d 630* .

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37-429 California Forms of Pleading and Practice--Annotated § 429.31

§ 429.31 Invasion of Right to Privacy

The right of privacy encompasses four distinct types of invasions of four different kinds of interests. The following torts represent these four intrusions:

- Public disclosure of embarrassing private facts;
- Publicity that places a person in a false light in the public eye;
- Physical intrusion on a person's solitude or seclusion, or into a person's private affairs; and
- Appropriation of a person's name or likeness, for defendant's advantage.

Although these four torts are diverse, they are bound together by the common element of intrusion on a person's "right to be let alone," which is the essence of the right of privacy [*Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 819*].

The following discussion lists the elements of each of these torts under corresponding headings. Following that is a discussion of the elements and principles that are common to all of the torts comprising the right of privacy.

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37-429 California Forms of Pleading and Practice--Annotated § 429.32

§ 429.32 Public Disclosure of Private Facts

The first tort actionable under the right of privacy is the public disclosure of embarrassing private facts about a person [*Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 819*]. This tort is generally deemed to consist of the following four elements [*see Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 214, 74 Cal. Rptr. 2d 843, 955 P.2d 469* ; *Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 808-809, 163 Cal. Rptr. 628, 608 P.2d 716* ; *Times-Mirror Co. v. Superior Court (1988) 198 Cal. App. 3d 1420, 1426-1427, 244 Cal. Rptr. 556]* :

- A public disclosure [*see § 429.38*];
- Of private facts [*see § 429.37*];
- That would be offensive and objectionable to a reasonable person [*see § 429.39*]; and
- That is not of legitimate public concern.

The terms "legitimate public concern" and "newsworthiness" are often used interchangeably by courts. [*See, e.g., Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 215, 74 Cal. Rptr. 2d 843, 955 P.2d 469* ; *Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 126, 188 Cal. Rptr. 762]* . For discussion of newsworthiness, see *§ 429.40*. Lack of newsworthiness is an element of the private facts tort, making newsworthiness a complete bar to common law liability [*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 215, 74 Cal. Rptr. 2d 843, 955 P.2d 469]* . Although lack of newsworthiness is an element of the private facts tort, newsworthiness is at the same time a constitutional defense to, or privilege against, liability for publication of truthful information [*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 216, 74 Cal. Rptr. 2d 843, 955 P.2d 469]* .

As the right of privacy is a personal right, in cases in which the disclosure involves the details of the life of a person who is deceased, the right of privacy protected by the cause of action for public disclosure of private facts dies along with that person [*see, e.g., James v. Screen Gems, Inc. (1959) 174 Cal. App. 2d 650, 653-654, 344 P.2d 799* (movie about deceased husband); *Hendrickson v. California Newspapers, Inc. (1975) 48 Cal. App. 3d 59, 62, 121 Cal. Rptr.*

429 (obituary revealing criminal past)]. However, the relatives of a decedent may be able to state a cause of action based on revelations about a decedent family member when defendant's conduct invades the privacy of those surviving relatives. In one case, for example, the court of appeal held that the parents and siblings of an 18-year-old girl who died when she was decapitated in an automobile accident had stated a cause of action against California Highway Patrol officers who e-mailed nine gruesome photographs of the decedent taken at the accident scene to the officers' friends and family members as a Halloween prank. This initial dissemination by the officers, which served no official investigative or public interest purpose but was done from sheer morbidity or gossip, started a chain reaction that resulted in thousands of Internet sites picking up the images and some plaintiffs receiving personal e-mails from strangers taunting them with the gruesome photographs. The court concluded that these facts supported a privacy cause of action by the family members, who had their own privacy rights in the death images of their family member [*Catsouras v. Department of California Highway Patrol (2010) 181 Cal. App. 4th 856, 870-874, 104 Cal. Rptr. 3d 352]* .

The provisions of *Civ. Code § 48a*, relating to the demand for retraction requirement in actions against media defendants, do not apply to the public disclosure of private facts tort, although they do apply to the false light publicity tort [*Kapellas v. Kofman (1969) 1 Cal. 3d 20, 35, 35 n. 17, 81 Cal. Rptr. 360, 459 P.2d 912* (disapproving any language in *Werner v. Times-Mirror Co. (1961) 193 Cal. App. 2d 111, 14 Cal. Rptr. 208* , that *Civ. Code § 48a* applies to all privacy actions); for a discussion of *Civ. Code § 48a, see § 429.471[5]*].

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§ 429.33 Publicity Placing Person in False Light

[1] Elements

The second tort included within the right of privacy concerns publicity which places a person in a false light in the public eye [*see Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 819, 160 Cal. Rptr. 323, 603 P.2d 425]* . This tort is comprised of the following elements:

- Publicity [*Werner v. Times-Mirror Co. (1961) 193 Cal. App. 2d 111, 119-121, 14 Cal. Rptr. 208* ; *see § 429.38*];

- That places a person in a false light in the public eye [*Werner v. Times-Mirror Co. (1961) 193 Cal. App. 2d 111, 119-121, 14 Cal. Rptr. 208* ; *see §§ 429.33[2], 429.37*]; and

- That would be objectionable to a reasonable person [*Gill v. Curtis Publishing Co. (1952) 38 Cal. 2d 273, 280, 239 P.2d 630* ; *see § 429.39*];

In addition, plaintiff must meet the requirements of the *First Amendment* [*see § 429.40[17]*].

The plaintiff cannot recover more than special damages unless a retraction was demanded [*see Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 543, 93 Cal. Rptr. 866, 483 P.2d 34 , overruled on other grounds, Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 696-697, 21 Cal. Rptr. 3d 663, 101 P.3d 552* & n.9, *21 Cal. Rptr. 3d 663, 101 P.3d 552* ; *see generally § 429.471[5]*].

[2] False Light Defined

The element of a false light in the public eye means a false but not necessarily defamatory position in the public's view [*see O'Hilderbrandt v. Columbia Broad. Sys., Inc. (1974) 40 Cal. App. 3d 323, 331, 114 Cal. Rptr. 826* ; *Werner v. Times-Mirror Co. (1961) 193 Cal. App. 2d 111, 119, 14 Cal. Rptr. 208]* . The mere fact that there are minor errors in an otherwise accurate disclosure does not amount to a false light invasion of privacy [*see Carlisle v. Fawcett Publ'ns, Inc.*

(1962) 201 Cal. App. 2d 733, 745, 748, 20 Cal. Rptr. 405] .

Examples of the false light element are:

- An article falsely imputing statements to the plaintiff, describing the plaintiff's appearance when she was not present, and misrepresentingthe condition of the plaintiff's home [*Cantrell v. Forest City Publ'g Co. (1974) 419 U.S. 245, 248, 253, 95 S. Ct. 465, 42 L. Ed. 2d 419]* .

- A letter that casts doubts on the plaintiff's moral character [*Kerby v. Hal Roach Studios (1942) 53 Cal. App. 2d 207, 210, 127 P.2d 577]* .

- Use of plaintiffs' photograph with accompanying text which depicts them as having only a sexual interest in each other [*Gill v. Curtis Publishing Co. (1952) 38 Cal. 2d 273, 279-281* .

Compare the following, which were found not to be false light invasions of privacy:

- Recitation of plaintiff's relationship to a murder victim in a broadcast with stories of two other heinous murders [*O'Hilderbrandt v. Columbia Broad. Sys., Inc. (1974) 40 Cal. App. 3d 323, 333-334, 114 Cal. Rptr. 826]* .

- Publication of true details of plaintiff's early marriage with gaps filled in with fictionalized conversations and thoughts [*Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 748, 20 Cal. Rptr. 405]* .

[3] Actual Malice Requirement

A false light action is, in substance, equivalent to a defamation action [*Briscoe v. Reader's Digest Ass'n (1971) 4 Cal. 3d 529, 543, 93 Cal. Rptr. 866, 483 P.2d 34* . Thus, plaintiffs must prove "actual malice" in any fact situation when it would be required under defamation law [*Johnson v. Harcourt, Brace, Jovanovich, Inc. (1974) 43 Cal. App. 3d 880, 893, 118 Cal. Rptr. 370* ; *see also Cantrell v. Forest City Publ'g Co. (1974) 419 U.S. 245, 250-251, 95 S. Ct. 465, 42 L. Ed. 2d 419* (leaving open issue of whether state may constitutionally apply less strict standard than actual malice in false light actions brought by private individuals)]. The actual malice required is that of the "New York Times Rule"--that is, proof that defendant published the material with knowledge of its falsity or with recklessdisregard for its truth [*see Time, Inc. v. Hill 385 U.S. 374, 387-388, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967)* . This actual malice is not the same as the malice required for punitive damages--that is, ill will toward plaintiff [*Cantrell v. Forest City Publ'g Co. (1974) 419 U.S. 245, 251-252, 254, 95 S. Ct. 465, 42 L. Ed. 2d 419]* . For a discussion of constitutional requirements in defamation actions, see the discussion in Ch. 340, *Libel and Slander* .

[4] Demand for Retraction Requirement

The false light tort for invasion of privacy is equivalent to an action for libel, and thus the requirements of *Civ. Code § 48a* apply [*Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 543, 93 Cal. Rptr. 866, 483 P.2d 34* , *overruled on other grounds, Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 696-697, 21 Cal. Rptr. 3d 663, 101 P.3d 552* & n.9, *21 Cal. Rptr. 3d 663, 101 P.3d 552]* .

Civ. Code § 48a essentially requires the plaintiff to make a written demand for a retraction to newspaper or radio defendants within 20 days after knowledge of the offensive publication or broadcast [*Civ. Code § 48a(1)*]. The plaintiff shall recover no more than special damages unless the retraction is demanded and is not published or broadcast [*Civ. Code § 48a(1)*].

In addition, no exemplary damages may be recovered unless the plaintiff proves that the defendant made the publication or broadcast with "actual malice," as defined in the statute [*Civ. Code § 48a(2)*]. The statute defines "actual malice" as hatred or ill will toward the plaintiff, with the proviso that a good-faith belief by the defendant in the truth of the publication or broadcast shall not constitute actual malice [*Civ. Code § 48a(4)(d)*].

Civ. Code § 48a does not apply to the public disclosure of private facts tort [*Kapellas v. Kofman (1969) 1 Cal. 3d 20, 35, 35 n.17, 81 Cal. Rptr. 360, 459 P.2d 912* (disapproving any language in *Werner v. Times-Mirror Co. (1961) 193 Cal. App. 2d 111, 14 Cal. Rptr. 208* , intimating that *Civ. Code § 48a* applies to all privacy actions)]. Moreover, if a complaint is based on both the false light and the public disclosure torts, *Civ. Code § 48a* may still not apply [*see Kinsey v. Macur (1980) 107 Cal. App. 3d 265, 275, 165 Cal. Rptr. 608]* . If the complaint does not rest upon the inaccuracy of a statement but upon the unwanted publicity resulting from a publication, the injured party gains no relief from a subsequent retraction or correction but, on the contrary, suffers additional injury by the repeated exposure [*Kinsey v. Macur (1980) 107 Cal. App. 3d 265, 275-276, 165 Cal. Rptr. 608* ; *see also Kapellas v. Kofman (1969) 1 Cal. 3d 20, 35, 81 Cal. Rptr. 360, 459 P.2d 912]* .

In the privacy field, the retraction requirement has been applied to a publication in a magazine, even though *Civ. Code § 48a* refers only to newspapers and radio broadcasts [*see Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 543, 93 Cal. Rptr. 866, 483 P.2d 34* , *overruled on other grounds, Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 696-697, 21 Cal. Rptr. 3d 663, 101 P.3d 552* & n.9, *21 Cal. Rptr. 3d 663, 101 P.3d 552]* .

For a further discussion and forms relating to the requirements of *Civ. Code § 48a*, *see* Ch. 340, *Libel and Slander* .

[5] Special Damages Requirement

The requirement under *Civ. Code § 45a* that special damages be pleaded and proven in actions involving defamatory language that is not libelous on its face also applies to a false light action based on a publication that is defamatory within the meaning of that statute [*Fellows v. National Enquirer, Inc. (1986) 42 Cal. 3d 234, 247-251, 228 Cal. Rptr. 215, 721 P.2d 97]* .

Language is libelous on its face if it is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo,or other extrinsic fact. Defamation not libelous on its face is not actionable unless the plaintiff alleges and proves that he or she has suffered special damage as a proximate result thereof [*Civ. Code § 45a*].

Civ. Code § 45a adopts the definition of "special damages" set forth in *Civ. Code § 48a*, which limits such damages to all damages that the plaintiff alleges and proves that he or she has suffered in respect to his or her property, business, trade, profession or occupation, including money expended as a result of the alleged libel [*Civ. Code § 48a*].

For further discussion of damage requirements in actions involving defamatory language, *see* Ch. 340, *Libel and Slander* .

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§ 429.34 Physical Intrusion

[1] Elements

The third tort classified under the right of privacy is physical intrusion upon a person's solitude or seclusion, or into his or her private affairs [*see Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 819*]. This tort consists of the following elements [*see Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 231, 74 Cal. Rptr. 2d 843, 955 P.2d 469]* :

- A prying or intrusion [*see § 429.34[2], [3]*];
- That is offensive or objectionable to a reasonable person [*see § 429.39*];
- Into a place or into affairs that are private and entitled to be private [*see §§ 429.34[4]* (private place), 429.37 (private affairs)].

Publication or public disclosure is not an element of the physical intrusion tort[*Dietemann v. Time, Inc. (9th Cir. 1971) 449 F.2d 245, 249]* .

[2] Intrusion Defined

In an intrusion case, courts first ask whether a defendant has intentionally intruded, physically or otherwise, on the plaintiff's solitude or seclusion--that is, into a place or conversation private to the plaintiff [*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 231, 74 Cal. Rptr. 2d 843, 955 P.2d 469* ; *Miller v. National Broad. Co. (1986) 187 Cal. App. 3d 1463, 1482, 232 Cal. Rptr. 668]* . To prove actionable intrusion, the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. Furthermore, the plaintiff proves the tort only if he or she had an objectively reasonable expectation of seclusion or solitude in the place, conversation, or data source [*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 232, 74 Cal. Rptr. 2d 843, 955 P.2d 469* ; *see also Wilkins v. National Broad. Co. (1999) 71 Cal. App. 4th 1066, 1078-1079, 84 Cal. Rptr. 2d 329* (plaintiffs had no objectively reasonable expectation of seclusion or solitudein business discussions conducted with undercover journalists during lunch at crowded public restaurant)].

Thus, there is no liability for examining a public record concerning the plaintiff, or for observing the plaintiff or even taking his or her photograph while he or she is walking in a public place [*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 231, 74 Cal. Rptr. 2d 843, 955 P.2d 469* ; *see, e.g., Aisenson v. American Broad. Co. (1990) 220 Cal. App. 3d 146, 162-163, 269 Cal. Rptr. 379* (any invasion of privacy was de minimis where judge who was subject of news story was filmed from public street as he walked from his home to his car)]. Nor is there a cause of action for invasion of privacy based on the placement of a video camera in the release office of a county jail [*see Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento (1996) 51 Cal. App. 4th 1468, 1487, 59 Cal. Rptr. 2d 834*].

An expectation of privacy need not be an expectation of complete or absolute privacy to be an objectively reasonable expectation of privacy for purposes of the tort of intrusion. The reasonableness of a person's expectation of visual or aural privacy depends not only on who might have been able to observe the relevant interaction, but also on the identity of the alleged intruder and the means of intrusion [*Sanders v. American Broadcasting Companies (1999) 20 Cal. 4th 907, 915, 923, 85 Cal. Rptr. 2d 909, 915, 923, 978 P.2d 67*]. For example, the fact that a workplace interaction could have been heard or witnessed by other workers on the premises, but not by the general public, will not necessarily preclude a finding that a participant had an objectively reasonable expectation that the conversation or interaction would not be secretly videotaped by an undercover television reporter for broadcast on a television program, at least if the workplace did not provide unfettered access to the general public and the intruder was posing as a coworker [*Sanders v. American Broadcasting Companies (1999) 20 Cal. 4th 907, 911, 922-923, 85 Cal. Rptr. 2d 909, 978 P.2d 67* (distinguishing interactions between business proprietor and customer, which may be characterized as public conversations between strangers)]. However, although a limited expectation of privacy might be found under these circumstances, the particular invasion must still be found to be highly offensive to the reasonable person to sustain an intrusion cause of action [*Sanders v. American Broadcasting Companies (1999) 20 Cal. 4th 907, 911, 85 Cal. Rptr. 2d 909, 978 P.2d 67* (court expresses no opinion on offensiveness of reporter's conduct); *see, e.g., Hernandez v. Hillsides, Inc. (2009) 47 Cal. 4th 272, 294-299, 97 Cal. Rptr. 3d 274, 211 P.3d 1063* (while employees had demonstrated intrusion into privacy at work by surreptitious placement of surveillance camera, employer's limited, after-hours use of camera, which was intended to find employee who was using computers for unauthorized viewing of pornography, was not highly offensive); *see § 429.39*]. In addition, the standard may be different if the alleged intruder is a government entity investigating criminal activity, because in that situation, constitutional rather than common law privacy concerns would frame the analysis [*see Sanders v. American Broadcasting Companies (1999) 20 Cal. 4th 907, 919, 920, 85 Cal. Rptr. 2d 909, 978 P.2d 67* ; *see generally §§ 429.310 et seq., 429.560* et seq.].

An actionable intrusion may include an encroachment by means of wiretapping [*see Dietemann v. Time, Inc. (9th Cir. 1971) 449 F.2d 245, 248* ; for a discussion and forms, *see § 429.280* et seq.]. An intrusion into privateaffairs may involve the gathering of information about a person. For a discussion and forms relating to statutory regulation of this topic, *see § 429.120* et seq.

Although a mistake of fact, such as a mistaken belief as to what is being heard or recorded, may serve as a defense to an action for intrusion, it is an affirmative defense that the defendant must plead and prove [*Marich v. MGM/UA Telecommunications, Inc. (2003) 113 Cal. App. 4th 415, 424, 7 Cal. Rptr. 3d 60*].

[3] Unreasonably Intrusive Investigation

An invasion into solitude or private affairs may take the form of an unreasonably intrusive investigation [*see Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 659-660, 109 Cal. Rptr. 269]* . This variation of the tort may involve the following types of conduct:

- Questioning by a private investigator [*Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 657, 660, 109 Cal. Rptr. 269]* ;

- Seeking information about the plaintiff, such as the plaintiff's occupation or credit report [*Emerson v. J.F. Shea Co. (1978) 76 Cal. App. 3d 579, 586, 592, 143 Cal. Rptr. 170]* ; or

- Surveillance by an insurance company adversary during litigation [*see Cain v. State Farm Mut. Auto. Ins. Co. (1976) 62 Cal. App. 3d 310, 312-313, 132 Cal. Rptr. 860]* .

This type of claim depends on the reasonableness of the investigation [*see Solis v. Southern Cal. Rapid Transit Dist (1980) 105 Cal. App. 3d 382, 392-393, 164 Cal. Rptr. 343* ; *Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654,659-660, 109 Cal. Rptr. 269]* . For example, an investigation is unreasonably intrusive when a private investigator gains admittance to a person's hospital room and, by deception, secures relevant information regarding a legal action [*Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 657, 660, 109 Cal. Rptr. 269]* . On the other hand, when investigators secure the permission of the attending doctor and nurse to talk with a person in a hospital room, wear uniforms, identify themselves, and question the person very briefly, the investigation will not be considered unreasonably intrusive [*see Solis v. Southern Cal. Rapid Transit Dist. (1980) 105 Cal. App. 3d 382, 392, 164 Cal. Rptr. 343*].

In one case, the California Supreme Court denied a motion to strike a cause of action for intrusion against an academic researcher who allegedly used deception to obtain personal and private information from the plaintiff's former foster mother. The researcher allegedly deceived the foster mother into believing that the researcher was working with a psychiatrist who plaintiff had worked with and trusted, and the foster mother would not have shared plaintiff's personalinformation had she known the truth. Recognizing that not all misrepresentations by a reporter, investigator, or scholar to obtain information would be sufficient to support an action for intrusion, the Court concluded that under the facts of that case, a jury could properly find that the scholar engaged in conduct that was highly offensive. The Court stressed that intentionally misrepresenting that one is a professional associate of a psychiatrist who has a close relationship with a person in order to obtain private information about that person is a particularly serious type of misrepresentation, especially in light of the confidentiality generally provided for information shared between persons and mental health professionals [*Taus v. Loftus (2007) 40 Cal. 4th 683, 735-740, 54 Cal. Rptr. 3d 775, 151 P.3d 1185]* .

The media may invade a plaintiff's privacy by unreasonably intrusive newsgathering activity. In contrast to the broad privilege the press enjoys for publishing truthful, newsworthy information in its possession, the press has no recognized constitutional privilege to violate generally applicable laws such as California's intrusion tort, in pursuit of material [*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 242, 74 Cal. Rptr. 2d 843, 955 P.2d 469]* .

[4] Private Place Defined

A person's home is considered a legitimate private place [*see Dietemann v. Time, Inc. (9th Cir. 1971) 449 F.2d 245, 248* (office in home); *Vescovo v. New Way Enters., Ltd. (1976) 60 Cal. App. 3d 582, 587-588, 130 Cal. Rptr. 86]* . A room in which a person has an exclusive right of occupancy may also be a protected private place [*see Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 660, 109 Cal. Rptr. 269* (hospital room)].

Although an injured plaintiff may not have an objectively reasonable expectation of privacy at the scene of an accident, he or she may have one in the interior of a rescue helicopter, which serves as an ambulance [*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 232, 74 Cal. Rptr. 2d 843, 955 P.2d 469]* .

As noted in § 429.34[2], an expectation of privacy need not be an expectation of complete or absolute privacy to be objectively reasonable. The reasonableness of a person's expectation of privacy depends on who might have been able to hear or witness the particular interaction, the identity of the alleged intruder, and the means of intrusion [*Sanders v. American Broadcasting Companies (1999) 20 Cal. 4th 907, 915, 923, 85 Cal. Rptr. 2d 909, 978 P.2d 67* .

In one case, for example, a breast cancer patient submitted to a breast examination by her oncologist, and the examination was attended by another man. Although the plaintiff knew of this other man's presence, she was not informed that he was a drug salesman. The court held that a jury could find, under the circumstances, that the plaintiff had a reasonable expectation that the examination would not be witnessed by non-medical personnel [*Sanchez-Scott v. Alza Pharm. (2001) 86 Cal. App. 4th 365, 373-376, 103 Cal. Rptr. 2d 410]* .

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37-429 California Forms of Pleading and Practice--Annotated § 429.34A

§ 429.34A Statutory Action for Physical Invasion of Privacy

[1] Scope of Protection

Civ. Code § 1708.8 provides a statutory action for the physical invasion of privacy that may supplement other legal remedies such as the common law tort for intrusion described under § 429.34 [*Civ. Code § 1708.8(a), (i)*; *see also Civ. Code § 1708.8(f)*]. The statutory cause of action covers the knowing entering onto the land of another without permission, or otherwise committing a trespass, in order to physically invade, in a manner offensive to a reasonable person, the privacy of the plaintiff with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity [*Civ. Code § 1708.8(a)*].

For these purposes, "personal and familial activity" includes, but is not limited to, intimate details of the plaintiff's personal life, interactions with the plaintiff's family or significant others, or other aspects of the plaintiff's private affairs or concerns, but excludes illegal or criminal activity [*Civ. Code § 1708.8*(*l*); *see also Civ. Code § 1708.8(g)*].

The statute also provides an action for constructive invasion of privacy if the defendant uses a visual or auditory enhancing device in attempting to capture, in a manner offensive to a reasonable person, a visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy. This action for a constructive invasion of privacy exists regardless of whether there is a physical trespass, if the image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used [*Civ. Code § 1708.8(b)*].

Beginning in 2006, an assault committed with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff is also actionable under *Civ. Code § 1708.8* [*Civ. Code § 1708.8(c)*].

Regardless of whether there is an employer-employee relationship, a person who directs, solicits, actually induces, or actually causes another person to commit a physical invasion, constructive invasion, or assault under *Civ. Code § 1708.8* may also be liable [*Civ. Code § 1708.8(e)*].

Beginning with images, recordings, or physical impressions captured or taken in California on or after January 1, 2010 [*see Civ. Code § 1708.8(f)(5)*], the transmission, publication, broadcast, sale, offer for sale, or other use of any visual image, sound recording, or other physical impression that was taken or captured in violation of *Civ. Code § 1708.8(a), (b),* or *(c)* does not constitute a violation of the statute unless the person, in the first transaction following the taking or capture of the image, recording, or physical impression, publicly transmitted, published, broadcast, sold or offered for sale the image, recording, or physical impression with actual knowledge that it was taken or captured in violation of *Civ. Code § 1708.8(a), (b),* or *(c),* and provide compensation, consideration, or remuneration, monetary or otherwise, for the rights to the unlawfully obtained image, recording, or physical impression [*Civ. Code § 1708.8(f)(1)*]. For these purposes, "actual knowledge" means actual awareness, understanding, and recognition, obtained prior to the time at which the person purchased or acquired the image, recording, or physical impression, that the image, recording, or physical impression was taken or captured in violation of *Civ. Code § 1708.8(a), (b),* or *(c)* [*Civ. Code § 1708.8(f)(2)*]. The plaintiff has the burden of establishing such actual knowledge by clear and convincing evidence [*Civ. Code § 1708.8(f)(2)*].

A person who publicly transmits, publishes, broadcasts, sells or offers for sale, in any form, medium, format or work, a visual image, sound recording, or other physical impression that was previously publicly transmitted, published, broadcast, sold or offered for sale, by another person, is exempt from liability under this statute [*Civ. Code § 1708.8(f)(3)*]. In addition, if a person's first public transmission, publication, broadcast, or sale or offer for sale, of a visual image, sound recording, or other physical impression that was taken or captured in violation of *Civ. Code § 1708.8(a), (b),* or *(c),* does not constitute a violation of this statute, that person's subsequent public transmission, publication, broadcast, sale or offer for sale, in any form, medium, format or work, of the image, recording, or physical impression also does not constitute a violation of the statute [*Civ. Code § 1708.8(f)(4)*].

It is not a defense to a claim under *Civ. Code § 1708.8* that no image, recording, or physical impression was actually captured or sold [*Civ. Code § 1708.8(j)*].

Civ. Code § 1708.8 does not generally prohibit law enforcement personnel from obtaining evidence of illegal activities. Specifically, the statute does not impair or limit any otherwise lawful activities of law enforcement personnel or employees of government agencies or other entities, either public or private, who, in the course and scope of their employment and supported by an articulable suspicion, attempt to capture any type of visual image, sound recording, or other physical impression of a person during an investigation, surveillance, or monitoring of any conduct to obtain evidence of suspected illegal activity, or other misconduct, the suspected violation of any administrative rule or regulation, a suspected fraudulent conduct, or any activity involving the violation of law or business practices or conduct of public officials adversely affecting the public welfare, health, or safety [*Civ. Code § 1708.8(g)*].

Nothing in these statutory provisions imposes liability on a governmental entity, or employee acting within the scope of his or her employment with a governmental entity, when immunity is provided under *Gov. Code § 821.6* [*Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE) (2007) 157 Cal. App. 4th 1056, 1064-1065, 69 Cal. Rptr. 3d 176*]. That provision of the California Government Claims Act immunizes a governmental employee for injury caused by instituting or prosecuting any judicial or administrative proceeding within the scope of his or her employment, regardless of malice or lack of probable cause, and such immunity extends to investigatory activities [*Gov. Code § 821.6*; *see Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE) (2007) 157 Cal. App. 4th 1056, 1062, 69 Cal. Rptr. 3d 176*].

[2] Damages Available

Damages under *Civ. Code § 1708.8* for a physical invasion, constructive invasion, or assault include up to three times the amount of any generaland special damages that are proximately caused by the violation. Punitive damages may also be recovered, subject to proof according to *Civ. Code § 3294* [*Civ. Code § 1708.8(d)*].

If the plaintiff proves that the invasion of privacy was committed for a commercial purpose, the defendant is also subject to disgorgement to the plaintiff of any proceeds or other consideration obtained as a result of the invasion [*Civ. Code § 1708.8(d)*]. For these purposes, "for a commercial purpose" means any act done with the expectation of a sale, financial gain, or other consideration. The image, recording, or physical impression must have been intended to be, or was in fact, sold, published, or transmitted [*Civ. Code § 1708.8(k)*].

A court may also grant equitable relief for a violation of *Civ. Code § 1708.8*, including but not limited to an injunction and restraining order against further violations [*Civ. Code § 1708.8(h)*].

If liability is imposed for directing, soliciting, actually inducing, or actually causing another person to commit a physical invasion, constructive invasion, or assault under *Civ. Code § 1708.8*, damages include any general, special, and consequential damages resulting from each violation, as well as punitive damages to the extent that an employer would be subject to punitive damages pursuant to *Civ. Code § 3294(b)* [*Civ. Code § 1708.8(e)*; *see Civ. Code § 3294(b)*].

A county counsel or city attorney may also bring an action to recover a civil fine of between $5,000 and $50,000 for a violation of *Civ. Code § 1708.8* [*see Civ. Code § 1708.8(d), (e), (m)*.]

For a form of complaint for an action under *Civ. Code § 1708.8, see § 429.475A*.

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§ 429.35 Appropriation Under Case Law

[1] Elements

The fourth tort encompassed within the right of privacy involves the appropriation of a person's name or likeness, for the defendant's advantage [*see Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 819*]. At common law, this tort consists of the following elements [*Eastwood v. Superior Court (1983) 149 Cal. App. 3d 409, 417, 198 Cal. Rptr. 342* ; *see Fairfield v. American Photocopy Equip. Co. (1955) 138 Cal. App. 2d 82, 86, 291 P.2d 194]* :

- The defendant's use of the plaintiff's identity [*see § 429.35[3]*];
- The appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise [*see § 429.35[4]*];
- Unauthorized use or lack of consent [*see § 429.35[2]*]; and
- Resulting injury.

It is not necessary to show that the use of a person's name or likeness was for the purpose of endorsing defendant's product or service [*Eastwood v. Superior Court (1983) 149 Cal. App. 3d 409, 198 Cal. Rptr. 342]* .

The single-publication rule developed in the context of defamation actions and as codified in *Civ. Code § 3425.3* applies to a cause of action for unauthorized commercial use of likeness [*Christoff v. Nestle USA, Inc. (2009) 47 Cal. 4th 468, 476, 97 Cal. Rptr. 3d 798, 213 P.3d 132*]. Under that rule, a person has only one cause of action for damages founded upon "any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture" [*Civ. Code § 3425.3*]. A cause of action governed by the single-publication rule accrues from the date of the first general distribution of the publication to the public, thus triggering the statute of limitations with respect to that publication, although to apply the rule, a court must first identify what constitutes a single integrated publication [

Christoff v. Nestle USA, Inc. (2009) 47 Cal. 4th 468, 477, 482, 97 Cal. Rptr. 3d 798, 213 P.3d 132 (faced with unauthorized use of plaintiff's photograph on coffee label and in related advertising, the court could not determine these issues under current factual record)]. In addition, as with the application of the single-publication rule in actions for libel, the delayed-discovery rule, under which a cause of action does not accrue until plaintiff knows or has reason to know of the actionable conduct, does not apply to publications widely disseminated to the general public, such as in books, magazines, and newspapers [*Christoff v. Nestle USA, Inc. (2009) 47 Cal. 4th 468, 482483, 97 Cal. Rptr. 3d 798, 213 P.3d 132*]. The single-publication rule is discussed more generally in the context of defamation actions in Ch. 340, *Libel and Slander*.

[2] Unauthorized Use

"Unauthorized" means without the person's consent. Using a person's name or likeness by mistake or inadvertence can still amount to an unauthorized appropriation [*see Fairfield v. American Photocopy Equip. Co. (1955) 138 Cal. App. 2d 82, 87, 291 P.2d 194* ; *see also Kerby v. Hal Roach Studios (1942) 53 Cal. App. 2d 207, 213, 127 P.2d 577]* .

The prohibited use can involve the following kinds of conduct:

- Use of a person's photograph to accompany an unrelated story [*see Gill v. Curtis Publishing Co. (1952) 38 Cal. 2d 273, 275, 282* ;

- Publication of a person's name in an advertisement falsely stating that they are a satisifed user of a product [*Fairfield v. American Photocopy Equip. Co. (1955) 138 Cal. App. 2d 82, 86, 87, 291 P.2d 194]* ;

- Use of a distinguishable characteristic of a person, implying his or her endorsement of a product [*Motschenbacher v. R.J. Reynolds Tobacco Co. (9th Cir. 1974) 498 F.2d 821, 827* (use of race car driver's racing car with modifications, but distinguishable markings still visible)]; or

- Publication of the classroom notes of a professor's lectures without his or her consent, implying his or her cooperation in the publication [*Williams v. Weisser (1969) 273 Cal. App. 2d 726, 742, 78 Cal. Rptr. 542]* .

[3] Name or Likeness Defined

The prohibited conduct can involve the use of a person's name or likeness, or the exploitation of his or her personality [*see Williams v. Weisser (1969) 273 Cal. App. 2d 726, 742, 78 Cal. Rptr. 542* (publication of classroom notes from plaintiff's lectures using plaintiff's name was appropriation of personality); *Fairfield v. American Photocopy Equip. Co. (1955) 138 Cal. App. 2d 82, 86, 87, 291 P.2d 194* (use of name in advertisement falsely stating that plaintiff was satisifed user of photocopier was appropriation of name and personality)]. Note, however, that a mere similarity or even identity of names is insufficient as a matter of law to establish that a work of fiction, such as a film, is of or concerning a real person [*Polydoros v. Twentieth Century Fox Film Corp. (1998) 67 Cal. App. 4th 318, 322-323, 79 Cal. Rptr. 2d 207* (use of similar name and actor resembling plaintiff when he was a child were not actionable appropriations in context of film that was unarguably fiction)].

When a photograph is involved, the entire picture may be examined to determine if the person is identifiable and thus entitled to sue for the appropriation [*see Motschenbacher v. R.J. Reynolds Tobacco Co. (9th Cir. 1974) 498 F.2d 821, 827* (race car driver's facial features not visible, but certain distinquishable markings peculiar to his car were visible, leading to inference that car was his and he was driving)].

Liability for appropriation is not limited strictly to situations in which a "likeness" is appropriated. It may extend to an

appropriation of the"attributes of one's identity," including voice or signs or symbols associated with a person [*Waits v. Frito-Lay, Inc., 978 F.2d 1093, 1098-1106 (1992)* (voice; applying California law); *Midler v. Ford Motor Co. (9th Cir. 1988) 849 F.2d 460, 463* (voice; applying California law); *Motschenbacher v. R.J. Reynolds Tobacco Co. (9th Cir. 1974) 498 F.2d 821, 827* (signs or symbols; applying California law)]. For example, the deliberate imitation of the widely known distinctive voice of a professional singer without consent in order to sell a product constitutes an appropriation by the seller and its advertising agency of something that is not theirs [*Midler v. Ford Motor Co. (9th Cir. 1988) 849 F.2d 460, 463* (applying California law)].

[4] User's Advantage Defined

The user's advantage usually consists of some pecuniary gain to defendant [*see, e.g.,* *Williams v. Weisser (1969) 273 Cal. App. 2d 726, 742, 78 Cal. Rptr. 542* (sale of classroom notes taken at plaintiff's lectures)]. However, the common law tort can encompass other kinds of advantages to defendant [*see, e.g.,* *Hinish v. Meier & Frank Co. (1941) 166 Ore. 482, 113 P.2d 438, 448* (signing plaintiff's name to telegram urging governor to veto bill)].

Business uses that do not constitute an advertisement or propose a commercial transaction may not be considered sufficiently "commercial" to support a cause of action for appropriation. For example, the use of the names, images, likenesses, and career statistics of former professional baseball players in League-sanctioned game programs, Web sites, and documentaries, served a public interest and was not a commercial use that could support an action for appropriation, even though this use may have provided some promotional benefit to the game of baseball [*Gionfriddo v. Major League Baseball (2001) 94 Cal. App. 4th 400, 412-415, 114 Cal. Rptr. 2d 307]* .

In a case involving a magazine feature, the court of appeal ordered that causes of action for commercial misappropriation brought under both *Civ. Code § 3344* and the common law be struck under *Code Civ. Proc. § 425.16* on the grounds that the magazine feature at issue was noncommercial speech entitled to full *First Amendment* protection. In that particular case, plaintiffs were musical groups whose names had been included in a magazine feature spotlighting independent rock bands that was published inside of a double-gatefold page layout the outside pages of which contained a multi-page cigarette advertisement. Plaintiffs argued that the design of the feature used the names of the rock bands to sell the cigarettes in the advertisement and as such constituted commercial misappropriation of their names to sell a product. The court of appeal disagreed, concluding that, despite the location of the advertisement on the outside pages of the gatefold, the feature on independent artists was noncommercial speech and plaintiffs had failed to present evidence that the magazine published the feature with actual malice [*Stewart v. Rolling Stone LLC (2010) 181 Cal. App. 4th 664, 683-689, 105 Cal. Rptr. 3d 98]* . The court also held that the constitutional right guaranteeing freedom of the press also barred plaintiffs from pursuing their causes of action, as that right traditionally protected publishers for decisions as to the content and placement of advertisements [*Stewart v. Rolling Stone LLC (2010) 181 Cal. App. 4th 664, 690-691, 105 Cal. Rptr. 3d 98]* .

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§ 429.36 Appropriation Under Civ. Code § 3344

[1] Cause of Action

The appropriation of a person's name, voice, signature, photograph, or likeness for a commercial use gives rise to a statutory cause of action under *Civ. Code § 3344*, which provides that any person who knowingly and without prior consent uses another's name, voice, signature, photograph, or likeness, in any manner, for the purpose of either advertising or soliciting purchases of products, merchandise, goods, or services is liable for any damages sustained by the person injured as a result of the unauthorized use [*Civ. Code § 3344(a)*; for discussion of statutory provisions relating to remedies and damages, see *§ 429.45, 429.46*]. In the case of a minor, the prior consent required is that of his or her parent or legal guardian [*Civ. Code § 3344(a)*]. However, *Civ. Code § 3344* will not provide relief to a person injured by another's use of an imitation of the person's voice, both because the voice used is not that of the injured person, and because the term "likeness" in *Civ. Code § 3344(a)* refers to a visual image and not to a vocal imitation [*Midler v. Ford Motor Co. (9th Cir. 1988) 849 F.2d 460, 463]* .

It is not necessary to show that the use of a person's name or likeness was for the purpose of endorsing defendant's product or service [*Eastwood v. Superior Court (1983) 149 Cal. App. 3d 409, 418-420, 198 Cal. Rptr. 342]* .

As noted in § 429.35[1], the single-publication rule developed in the context of defamation actions and as codified in *Civ. Code § 3425.3* applies to a cause of action for unauthorized commercial use of likeness [*Christoff v. Nestle USA, Inc. (2009) 47 Cal. 4th 468, 476, 97 Cal. Rptr. 3d 798, 213 P.3d 132*].

[2] Commercial Use Defined

The statute sets forth two limitations on "a use for the purposes of advertising or solicitation." First, the statute provides that a use in a commercial medium does not constitute a proscribed use solely because the material using the name, voice, signature, photograph, or likeness is commercially sponsored or contains paid advertising. Rather, it is a question of fact whether or not the use was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for the purposes of advertising or solicitation [*Civ. Code § 3344(e)*]. For example, it has been held that the reprint, in a textbook, of a magazine article about the plaintiff finding and returning a quarter of a million

dollars was not so directly connected with the sale of the textbook as to constitute the commercial use prohibited by *Civ. Code § 3344(a)* [*Johnson v. Harcourt, Brace, Jovanovich, Inc. (1974) 43 Cal. App. 3d 880, 895, 118 Cal. Rptr. 370]* .

Secondly, *Civ. Code § 3344* states that a use in connection with any news, public affairs, or sports broadcast or account, or any political campaign does not constitute a use for the purposes of advertising or solicitation [*Civ. Code § 3344(d)*; *see, e.g.,* *Gionfriddo v. Major League Baseball (2001) 94 Cal. App. 4th 400, 415, 114 Cal. Rptr. 2d 307* (use of names, images, likenesses, and career statistics of former professional baseball players in League-sanctioned game programs, Web sites, and documentaries fell within exception to consent requirement); *Dora v. Frontline Video, Inc. (1993) 15 Cal. App. 4th 536, 545, 18 Cal. Rptr. 2d 790* (summary judgment for defendant documentary filmmaker upheld in action by legendary surfer featured in movie, because surfing documentary within scope of "public affairs")]. The news account exemption of *Civ. Code § 3344(d)* does not, however, protect a publication made with actual malice, that is, with knowledge of its falsity or with reckless disregard for its truth [*Eastwood v. Superior Court (1983) 149 Cal. App. 3d 409, 425, 198 Cal. Rptr. 342* ; *see also* *Maheu v. CBS, Inc. (1988) 201 Cal. App. 3d 662, 676-677, 247 Cal. Rptr. 304* (no cause of action stated absent allegation that publication concerning matter of public interest was false and was published with knowledge or reckless disregard of its falsity)].

[3] Photograph Defined

As used in *Civ. Code § 3344*, "photograph" means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the person is readily identifiable [*Civ. Code § 3344(b)*]. A person is deemed "readily identifiable" when another person viewing the photograph with the naked eye can reasonably determine that the person depicted is the same person as the one complaining of its unauthorized use [*Civ. Code § 3344(b)(1)*].

If the photograph includes more than one readily identifiable person, then the person or persons complaining of the use shall be represented as individuals rather than solely as members of a definable group represented in the photograph. A definable group includes, but is not limited to, a crowd at any sporting event, a crowd in any street or public building, the audience at any theatrical or stage production, a glee club, or a baseball team [*Civ. Code § 3344(b)(2)*]. A person or persons will be considered members of a definable group if they are represented in the photograph solely as a result of being present when the photograph was taken and have not been singled out as individuals in any manner [*Civ. Code § 3344(b)(3)*].

[4] Knowing Use Defined

Civ. Code § 3344 imposes two limitations on the "knowing use" requirement. First, the statute provides that when a photograph or likeness of an employee of a person using the photograph or likeness appearing in an advertisement or other publication prepared by or in behalf of the user is only incidental, and not essential, to the purpose of the publication in which it appears, there arises a rebuttable presumption affecting the burden of producing evidence that the failure to obtain the employee's consent was not a knowing use of the employee's photograph or likeness [*Civ. Code § 3344(c)*].

Secondly, *Civ. Code § 3344* states that nothing in the statute applies to owners or employees of any medium used for advertising by whom any advertisement or solicitation in violation of the statute is published or disseminated, unless it is established that the owners or employees had knowledge of the unauthorized use of the persons' name, voice, signature, photograph, or likeness [*Civ. Code § 3344(f)*]. "Advertising medium" is defined as including, but is not limited to, newspapers, magazines, radio and televsion stations, billboards, and transit ads [*Civ. Code § 3344(f)*].

[5] Preemption by Federal Copyright Law

Some types of claims asserted under *Civ. Code § 3344* may be preempted by federal copyright law, because federal law

prohibits states from legislating in the area of copyright and the federal courts have exclusive jurisdiction over copyright infringement claims [*see 17 U.S.C.S. § 301*]. However, preemption does not apply unless the subject of the claim is a work fixed in a tangible medium of expression and comes within the subject matter or scope of copyright protection, and unless the right asserted under state law is equivalent to the exclusive rights contained in federal copyright law [*KNB Enters. v. Matthews (2000) 78 Cal. App. 4th 362, 369, 92 Cal. Rptr. 2d 713* .

For example, a claim asserted under *Civ. Code § 3344* that seeks only to prevent the reproduction, performance, distribution, or display of a dramatic performance captured on film is subsumed under federal copyright law and therefore preempted [*Fleet v. CBS, Inc. (1996) 50 Cal. App. 4th 1911, 1924, 58 Cal. Rptr. 2d 645* (preemption of statutory misappropriation claims made by actors against film's authorized distributor and exclusive copyright holder)]. However, a claim brought under *Civ. Code § 3344* seeking to prevent the unauthorized reproduction of a plaintiff's likeness, such as through the unauthorized reproduction of a photograph, is not preempted. Even though the plaintiff's likeness may be embodied in a copyrightable work such as a photograph, the likeness itself is not copyrightable, and a right of publicity asserted under the statute does not fall within the subject matter of copyright protection [*KNB Enters. v. Matthews (2000) 78 Cal. App. 4th 362, 374-375, 92 Cal. Rptr. 2d 713* .

[6] Enforcement of Right by Successors and Licensees

In general, the right of publicity protects against the unauthorized use of a person's name, likeness, or personality during his or her lifetime and, subject to the exceptions noted below, is not descendable [*see Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 821, 822*]. In one case, heirs of actor Bela Lugosi were held not entitled to sue for the appropriation of Lugosi's likeness as Count Dracula for various licensing agreements [*Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 821, 822*]. Likewise, in another case, the heir of actor Rudolph Valentino was held not entitled to sue for appropriation of Valentino's name, likeness and personality for television broadcasts [*Guglielmi v. Spelling-Goldberg Prods. (1979) 25 Cal. 3d 860, 861, 160 Cal. Rptr. 352, 603 P.2d 454]* .

Subsequent legislation, *Civ. Code § 3344.1*, the Astaire Celebrity Image Protection Act, however, confers a right of action against one who uses the name, voice, signature, photograph, or likeness of a deceased personality in any manner, on or in products, merchandise or goods, or who advertises, sells or solicits purchases of products, merchandise, goods or services without prior consent of the decedent's successor or successors in interest [*Civ. Code § 3344.1(a)(1)*; *see, e.g., Comedy III Prods., Inc. v. Gary Saderup, Inc. (2001) 25 Cal. 4th 387, 395, 106 Cal. Rptr. 2d 126, 21 P.3d 797* (use of celebrity likenesses on lithographs and t-shirts without permission prohibited under predecessor statute)].

[7] Definitions

[a] "Deceased Personality"

A "deceased personality" is any natural person whose name, voice, signature, photograph, or likeness has commercial value at the time of his or her death, including, without limitation, one who has died within 70 years prior to January 1, 1985. It is immaterial whether or not these attributes (name, voice, etc.) were used by the decedent for such commercial purposes during his or her lifetime [*Civ. Code § 3344.1(h)*].

[b] "Successor in Interest"

A "successor in interest" is one who acquired the right to use the decedent's name, voice, signature, photograph or likeness by contract, trust (inter vivos or testamentary), will, or descent according to the distribution plan under *Civ. Code § 3344.1(d)* [*see § 429.36[8]*], whether by the decedent personally or his or her transferees--the right being freely transferable, in whole or in part, as a property right [*Civ. Code § 3344.1(b), (c)*].

[c] "Photograph"

As used in *Civ. Code § 3344.1*, "photograph" means any photograph or photographic reproduction, still or moving, or any video recording or live television transmisssion, of any person, such that the deceased personality is readily identifiable. A deceased personality is deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine who the person depicted in the photograph is [*Civ. Code § 3344.1(i)*].

[8] Ownership of Rights

If any deceased personality does not transfer his or her rights under *Civ. Code § 3344.1* by contract, or by means of a trust or testamentary document, and there are no surviving persons as described by *Civ. Code § 3344.1(d)*, then the rights under *Civ. Code § 3344.1(a)* shall terminate [*Civ. Code § 3344.1(e)*].

The rights provided by *Civ. Code § 3344.1* are deemed to have existed at the time of death of any deceased personality who died prior to January 1, 1985, and except as noted in *Civ. Code § 3344.1(o)*, described *below*, vest in the persons entitled to these property rights under the testamentary instrument of the deceased personality effective as of the date of death [*Civ. Code § 3344.1(b)*]. In the absence of an express transfer in a testamentary instrument of the deceased personality's rights, a provision in the testamentary instrument that provides for the disposition of the residue of the deceased personality's assets is effective to transfer the rights recognized under *Civ. Code § 3344.1* in accordance with the terms of that provision. The rights established by this section are also freely transferable or descendible by contract, trust, or other testamentary instrument by any subsequent owner of the deceased personality's rights [*Civ. Code § 3344.1(b)*]. *Civ. Code § 3344.1* does not affect any contract entered into by a deceased personality during his or her lifetime by which the deceased assigned the rights, in whole or in part, to use his or her name, voice, signature, photograph or likeness [*Civ. Code § 3344.1(b)*].

If the decedent made no inter vivos or testamentary transfer of the right and left one or more survivors, the latter take the right as follows [*Civ. Code § 3344.1(d)*]:

- The surviving spouse takes the entire interest if there are no children or grandchildren of the decedent, but takes only a one-half interest if children or grandchildren survive;

- The surviving children and any child of a deceased child of the decedent take the entire interest if there is no surviving spouse of the decedent, but take only a one-half interest if there is a surviving spouse;

- The surviving parent or parents of the decedent take the entire interest if there is no surviving spouse of the decedent and there are no surviving children or grandchildren of the decedent.

The rights of the decedent's children and grandchildren are in all cases divided among them and exercisable in the manner provided in *Prob. Code § 240* according to the number of the decedent's children represented. The share of the children of a dead child of a deceased personality can be exercised only by the action of a majority of them [*Civ. Code § 3344.1(d)(4)*].

If an action was taken prior to May 1, 2007, to exercise rights recognized under *Civ. Code § 3344.1* relating to a deceased personality who died prior to January 1, 1985, by a person who acquired the rights through the statutory provisions of *Civ. Code § 3344.1(d)*, described *above*, other than a person who was disinherited by the deceased personality in a testamentary instrument, and the exercise of those rights was not challenged successfully in a court action by a person who acquired the rights through a testamentary transfer, that exercise of rights by the person who acquired the rights through the statutory provisions is unaffected by the testamentary transfer. In such a case, the rights that would otherwise vest in one or more persons through a testamentary transfer vest solely in the person or persons

described in *Civ. Code § 3344.1(d)*, other than a person disinherited by the deceased personality in a testamentary instrument, for all future purposes [*Civ. Code § 3344.1(o)*].

[9] Registration as Prerequisite to Action by Successor

Both successors in interest to the deceased personality and licensees thereof may bring an action for wrongful use (appropriation) of the former's name, voice, signature, photograph or likeness. However, no action may be brought against the wrongful user unless the person claiming to be the successor in interest or licensee thereof first registers that claim with the office of the California Secretary of State, on a prescribed form (which must be verified), including the name and date of death of the deceased personality, the name and address of the claimant, the basis of the claim and the rights claimed, and pays the required registration fee. In addition, damages may not be recovered for a use prohibited by *Civ. Code § 3344.1* that occurred prior to the registration of the claim [*Civ. Code § 3344.1(f)(1), (2)*].

Claims so registered are considered public records. The Secretary of State posts such claims along with the entire registry of persons claiming to be a successor in interest to the rights of a deceased personality or a registered licensee on the WorldWide Web, also known as the Internet [*Civ. Code § 3344.1(f)(3)*]. The claims may be microfilmed or otherwise reproduced by the Secretary of State and the originals destroyed. The reproductions are admissible in any court of law, however, and will be kept by the Secretary of State for at least 70 years after the death of the personality named in them--after which they may be destroyed [*Civ. Code § 3344.1(f)(3), (4)*].

[10] 70-Year Limitation on Right

No action may be brought under *Civ. Code § 3344.1* for wrongful uses occurring after the expiration of 70 years from the death of the deceased personality [*Civ. Code § 3344.1(g)*].

[11] Permissible and Impermissible Uses

Whether a particular use is prohibited under *Civ. Code § 3344.1* is a question of fact. That a name, voice, signature, photograph, or other likeness of a person is used in material depicted in a commercial medium which is commercially sponsored or contains paid advertising, will not solely constitute a use for which consent is required. Rather, it is a question of fact whether the use of the deceased personality's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under *Civ. Code § 3344.1(a)* [*Civ. Code § 3344.1(k)*].

However, a play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single and original work of art, work of political or newsworthy value, or an advertisement or commercial announcement for any of these works, is not considered a product, article of merchandise, good, or service if it is fictional or nonfictional entertainment, or a dramatic, literary, or musical work [*Civ. Code § 3344.1(a)(2)*]. If a work protected as such includes within it a use in connection with a product, article of merchandise, good, or service, this use shall not be exempt under *Civil Code § 3344.1* if the claimant proves that this use is so directly connected with a product, article of merchandise, good, or service as to constitute an act of advertising, selling, or soliciting purchases of that product, article of merchandise, good, or service by the deceased personality without prior consent from the person or persons specified in *Civil Code § 3344.1(c)* [*Civ. Code § 3344.1(a)(3)*]. Similarly, a use of a name, voice, signature, photograph or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under *Civ. Code § 3344.1(a)* [*Civ. Code § 3344.1(j)*].

Furthermore, the consent requirements of *Civ. Code § 3344.1* do not apply to the owners or employees of any advertising medium including, but not limited to, newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit ads, by whom any advertisement or solicitation in violation of *Civ. Code § 3344.1* is published or disseminated, unless it is established that the owners or employees had knowledge of the

unauthorized use of the deceased personality's name, voice, signature, photograph, or likeness [*Civ. Code § 3344.1(l)*].

Civil Code § 3344.1 applies to the adjudication of liability and the imposition of any damages or other remedies in cases in which the liability, damages, and other remedies arise from acts occurring directly in California. Acts giving rise to liability shall be limited to the use, on or in products, merchandise, goods, or services, or the advertising or selling, or soliciting purchases of, products, merchandise, goods, or services prohibited by *Civil Code § 3344.1* [*Civ. Code § 3344.1(n)*].

[12] Constitutional Freedom of Expression Defense

In *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, the California Supreme Court articulated a test for balancing the right of publicity with the *First Amendment* right of free expression [*Comedy III Prods., Inc. v. GarySaderup, Inc. (2001) 25 Cal. 4th 387, 407, 106 Cal. Rptr. 2d 126, 21 P.3d 797]* . In that particular case, the issue was whether, under the predecessor to *Civ. Code § 3344.1*, the *First Amendment* protected the use without permission of an illustration of the famous comedians the Three Stooges on lithographs and t-shirts sold for commercial gain. The Supreme Court concluded that if an artist is faced with a right of publicity challenge to his or her work, the artist may raise a *First Amendment* defense if the work contains significant transformative elements--that is, if the product containing the celebrity's likeness is so transformed that it has become primarily the artist's own expression rather than the celebrity's likeness--or if the market or economic value of the work does not derive primarily from the celebrity's fame [*Comedy III Prods., Inc. v. Gary Saderup, Inc. (2001) 25 Cal. 4th 387, 406-407, 106 Cal. Rptr. 2d 126, 21 P.3d 797]* .

Applying that test to the case before it, the Court concluded that the likenesses at issue, although undeniably the work of a skilled artist, were so literal as to contain no significant transformative or creative contribution, and that the marketability and economic value of the work derived primarily from the fame of the comedians depicted. Therefore, the artist was not entitled to the *First Amendment* defense [*Comedy III Prods., Inc. v. Gary Saderup, Inc. (2001) 25 Cal. 4th 387, 409, 106 Cal. Rptr. 2d 126, 21 P.3d 797]* .

By contrast, applying the same test in a subsequent suit brought by well-known musicians Johnny and Edgar Winter, the California Supreme Court held that the depiction of fictional half-human, half-worm characters named "Johnny and Edgar Autumn" in a comic book story set in the old West was entitled to *First Amendment* protection, despite the fact that the plaintiffs obviously served as the template for the two characters in the story. The Court concluded that because the depictions were distorted for purposes of lampoon, parody, or caricature, sufficient transformative elements were present to warrant constitutional protection [*Winter v. DC Comics (2003) 30 Cal. 4th 881, 890, 134 Cal. Rptr. 2d 634, 69 P.3d 473]* . The Court noted that for purposes of the test, it did not matter whether the work actually qualified as a parody rather than some other form of literary work, so long as the requisite transformative elements were present. In rejecting the plaintiffs' claim that the defendants could be liable because they used the plaintiffs' reputations to increase sales of the comic book, the Court held that the marketing for the comic book was irrelevant to application of the test [*Winter v. DC Comics (2003) 30 Cal. 4th 881, 891, 134 Cal. Rptr. 2d 634, 69 P.3d 473]* .

Applying this standard in a subsequent case, the court of appeal held that the *First Amendment* protected a video game maker from a suit for commercial appropriationof likeness brought by a singer with a distinctive stage persona. While the court agreed that there existed a triable issue of fact as to whether the use of a computer-generated character similar to plaintiff's stage persona in avideo game constituted a commercial appropriation, the court concluded that there were sufficient transformative elements in the character such that the character was not a mere likeness or literal depiction of plaintiff. The computer-generated character had an extremely tall, slender physique not shared by plaintiff, the character's typical hairstyle and primary costume were different from plaintiff's, the game in which the character appeared was set in the 25th century, unlike plaintiff's "act," and the character's dance moves were noticeably different from those of the plaintiff [*Kirby v. Sega of America, Inc. (2006) 144 Cal. App. 4th 47, 59, 50 Cal. Rptr. 3d 607]* . Because the requisite transformative elements were present, the defendant's use of plaintiff's likeness was entitled to *First Amendment* protection regardless of whether the work possessed any elements of caricature, lampoon, parody,

social commentary, or other specific form of expression [*Kirby v. Sega of America, Inc. (2006) 144 Cal. App. 4th 47, 60, 50 Cal. Rptr. 3d 607]* .

In a case involving a magazine feature, the court of appeal ordered that causes of action for commercial misappropriation brought under both *Civ. Code § 3344* and the common law be struck under *Code Civ. Proc. § 425.16* on the grounds that the magazine feature at issue was noncommercial speech entitled to full *First Amendment* protection. In that particular case, plaintiffs were musical groups whose names had been included in a magazine feature spotlighting independent rock bands that was published inside of a double-gatefold page layout the outside pages of which contained a multi-page cigarette advertisement. Plaintiffs argued that the design of the feature used the names of the rock bands to sell the cigarettes in the advertisement and as such constituted commercial misappropriation of their names to sell a product. The court of appeal disagreed, concluding that, despite the location of the advertisement on the outside pages of the gatefold, the feature on independent artists was noncommercial speech and plaintiffs had failed to present evidence that the magazine published the feature with actual malice [*Stewart v. Rolling Stone LLC (2010) 181 Cal. App. 4th 664, 683-689, 105 Cal. Rptr. 3d 98]* . The court also held that the constitutional right guaranteeing freedom of the press also barred plaintiffs from pursuing their causes of action, as that right traditionally protected publishers for decisions as to the content and placement of advertisements [*Stewart v. Rolling Stone LLC (2010) 181 Cal. App. 4th 664, 690-691, 105 Cal. Rptr. 3d 98]* .

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37-429 California Forms of Pleading and Practice--Annotated § 429.37

§ 429.37 Public Information Not Actionable

[1] In General

The general principle that there is no right of privacy in that which is already public applies to all of the torts comprising the right of privacy [*see Gill v. Hearst Pub. Co. (1953) 40 Cal. 2d 224, 230, 253 P.2d 441* . Thus, in the public disclosure of private facts tort, the disclosure must concern facts that are private and not already in the public domain. For example, a complaint based on a radio broadcast dramatizing the plaintiff's false report to the police that his dangerous animal was lost, which precipitated a citywide search, was held to concern information which was already known to the public [*Smith v. National Broad. Co. (1956) 138 Cal. App. 2d 807, 811-812, 292 P.2d 600]* .

In another case, the unauthorized republication in a newspaper of an article plaintiff had written and posted on the highly popular website MySpace.com was not an actionable public disclosure of private facts. As plaintiff herself made the information available to any person with a computer, the court concluded that no reasonable person would have maintained an expectation of privacy regarding the published material, regardless of the fact that plaintiff removed the article from the website after only six days [*Moreno v. Hanford Sentinel, Inc. (2009) 172 Cal. App. 4th 1125, 1130, 91 Cal. Rptr. 3d 858]* .

In the false light tort, however, the material may be public information and still amount to an actionable invasion of privacy because of the manner in which it is disclosed [*see Gill v. Curtis Publishing Co. (1952) 38 Cal. 2d 273, 275, 279, 239 P.2d 630* ; *but see Patton v. Royal Indus., Inc. (1968) 263 Cal. App. 2d 760, 767-768, 70 Cal. Rptr. 44]* . For example, a photograph of plaintiffs taken in a public place that was published with a caption and text that cast aspersions on the plaintiffs' moral character was found to constitute an invasion of privacy [*Gill v. Curtis Publishing Co. (1952) 38 Cal. 2d 273, 275, 279, 239 P.2d 630]* .

[2] Public Scenes

Generally, there is no right of privacy in public scenes, and the publication of a photograph of a market place, parade, or street scene is usually not actionable [*see Gill v. Hearst Pub. Co. (1953) 40 Cal. 2d 224, 230-231, 253 P.2d 441* . Thus, the mere publication of a photograph of a person taken in a public place, without more, does not constitute an

invasion of privacy, provided the photograph is not offensive to a reasonable person [*see Gill v. Hearst Pub. Co. (1953) 40 Cal. 2d 224, 230-231, 253 P.2d 441* (appropriation tort)].

[3] Matters of Public Record

There is no violation of the right of privacy for information contained in a public record [*Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 747-748, 20 Cal. Rptr. 405]* . Thus, as a matter of federal constitutional law, a state's common law or statutory law cannot allow a private civil action against a person for the accurate publication of information contained in a public record [*Cox Broad. Corp. v. Cohn (1975) 420 U.S. 469, 491, 95 S. Ct. 1029, 43 L. Ed. 2d 328* (involving identity of deceased rape victim obtained from public judicial records)].

The following have been held to be matters of public record:

- A marriage and subsequent annulment [*Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 747, 20 Cal. Rptr. 405]* ;

- Information contained in the records of a trial [*Melvin v. Reid (1931) 112 Cal. App. 285, 290-291, 297 P. 91]* or obtained from public official court records of a criminal proceeding [*Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 696, 21 Cal. Rptr. 3d 663, 101 P.3d 552]* ; and

- Incidents recorded on a police blotter [*Kapellas v. Kofman (1969) 1 Cal. 3d 20, 38, 81 Cal. Rptr. 360, 459 P.2d 912]* .

On the other hand, the following have been determined not to be matters of public record:

- The fact of a person's gender-corrective surgery; and

- A foreign country's birth certificate [*Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 132, 188 Cal. Rptr. 762]* .

Moreover, even if information is required by law to be released as a public record, its earlier publication may nevertheless result in liability for invasion of privacy [*Times-Mirror Co. v. Superior Court (1988) 198 Cal. App. 3d 1420, 1430, 244 Cal. Rptr. 556]* .

The California Supreme Court has held that at least for past criminal behavior, it was possible for the passage of time to remove, if not the fact of the crime, at least the identity of the criminal from the public realm [*Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 537-543, 93 Cal. Rptr. 866, 483 P.2d 34]* . The Court concluded that individuals who by their action were vaulted into public view could, under most circumstances, retreat into the obscurity of the lawful and unexciting life of the bulk of the community with the passage of time [*Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 538, 93 Cal. Rptr. 866, 483 P.2d 34]* . Subsequently, however, the Court, relying on United States Supreme Court precedent, overruled that holding and concluded that the passage of time did not lessen the constitutional protection afforded to the media's right to publish facts obtained from public official court records of a criminal proceeding [*Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 693-696, 21 Cal. Rptr. 3d 663, 101 P.3d 552* ; *see also Cox Broad. Corp. v. Cohn (1975) 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328]* .

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§ 429.38 Public Disclosure Requirement

[1] Defined

The common element of public disclosure or publicity means that the communication which is the basis of the invasion of privacy must be made to the public in general or to a large number of people, rather than merely to a few individuals [*Kinsey v. Macur (1980) 107 Cal. App. 3d 265, 270, 165 Cal. Rptr. 608* (false light publicity tort); *Porten v. University of S.F. (1976) 64 Cal. App. 3d 825, 828, 134 Cal. Rptr. 839* (public disclosure tort)]. For example, sending a telegram is not considered a publication to the public in general [*Mason v. Western Union Tel. Co. (1975) 52 Cal. App. 3d 429, 440, 125 Cal. Rptr. 53]* . Also, a creditor writing a letter to a plaintiff's employer informing him or her of a debt owed by the plaintiff isnot a sufficient publication to the public in general [*Timperley v. Chase Collection Serv. (1969) 272 Cal. App. 2d 697, 699-700, 77 Cal. Rptr. 782]* .

A disclosure to a limited number of people, living in several states and unconnected either professionally or socially except that they are acquainted with the plaintiff, may be a sufficient "mass exposure" to meet the public disclosure requirement [see *Kinsey v. Macur (1980) 107 Cal. App. 3d 265, 270, 165 Cal. Rptr. 608* (letters to 20 people living in several states and unconnected except for acquaintance with plaintiff sufficient public disclosure)].

[2] Method of Disclosure

The general rule is that the right of privacy can be violated only by printings, writings, pictures, or other permanent publications or reproductions, and not by word of mouth [*Grimes v. Carter (1966) 241 Cal. App. 2d 694, 698, 50 Cal. Rptr. 808* ; *Melvin v. Reid (1931) 112 Cal. App. 285, 290, 297 P. 91]* . It has, however, been held that the right of privacy can be violated by an oral communication, on the ground that since oral statements may ultimately re ceive wider coverage than printed statements in this electronic age, the test should turn on the nature of the privacy invaded and not on the means of communication [*H & M Assocs. v. City of El Centro (1980) 109 Cal. App. 3d 399, 412, 167 Cal. Rptr. 392]* .

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§ 429.39 Offensiveness to Reasonable Person

In all four of the torts for invasion of privacy, the conduct complained of will be actionable only if it is offensive and objectionable to a reasonable person of ordinary sensibilities [*Gill v. Hearst Publ'g Co. (1953) 40 Cal. 2d 224, 229, 253 P.2d 441* ; *Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 126, 188 Cal. Rptr. 762]* . If there is nothing uncomplimentary or discreditable in the disclosure, no cause of action will lie [*Gill v. Hearst Publ'g Co. (1953) 40 Cal. 2d 224, 230-231, 253 P.2d 441* (photograph of plaintiffs, with husband's arm around wife, not offensive to ordinary sensibilities); *see Miller v. National Broad. Co. (1986) 187 Cal. App. 3d 1463, 1483-1486, 232 Cal. Rptr. 668* (jury issue as to whether acts of film crew in entering plaintiff's home without her consent to film personal tragedy were sufficiently "highly offensive" to support recovery for tort of intrusion)].

For example, in the public disclosure tort, the mere mention of the plaintiff in a book was not found to be offensive because the clear import of the reference was to absolve the plaintiff of any responsibility for the murder being discussed [*Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 809, 163 Cal. Rptr. 628, 608 P.2d 716]* .

In the false light tort, a fictionalization that fills in the gaps in an otherwise factual account is not considered objectionable [*Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 748, 20 Cal. Rptr. 405* (article about plaintiff that included imaginary conversations and thoughts not objectionable)]. Also, a falsehood of a neutral nature is not sufficiently offensive [*see Werner v. Times-Mirror Co. (1961) 193 Cal. App. 2d 111, 118-119, 14 Cal. Rptr. 208* (false statement that plaintiff's wife ran his campaign for public office not objectionable)]. On the other hand, a publication dealing with the intimate and private relationships between the opposite sexes may be offensive [*see Gill v. Curtis Publishing Co. (1952) 38 Cal. 2d 273, 280, 239 P.2d 630]* .

Concerning the physical intrusion tort, an inquiry into the plaintiff's occupation was not considered offensive because the plaintiff indicated that he would have divulged the information if asked directly [*see Emerson v. J. F. Shea Co. (1978) 76 Cal. App. 3d 579, 592, 143 Cal. Rptr. 170*]. And where there is no reasonable expectation of privacy, conduct is not sufficiently offensive to support an action for invasion of privacy. Thus, there is no cause of action for invasion of privacy based on the placement of a video camera in the release office of the county jail [*see Sacramento County Deputy Sheriffs' Ass'n v. County of Sacramento (1996) 51 Cal. App. 4th 1468, 1487, 59 Cal. Rptr. 2d 834]* .

All the circumstances of an intrusion, including the motives or justification of the intruder, are pertinent to the offensiveness element [*Shulman v. Group W Productions, Inc. (1998) 18 Cal. 4th 200, 236, 74 Cal. Rptr. 2d 843, 955 P.3d 469*]. In one case, for example, the director at a facility for neglected and abused children placed a hidden camera and motion sensor in an office shared by two female employees in order to capture video evidence of which employee had been using one of the computers in that office late at night to view Internet pornography, conduct that violated employer policy and posed potential risk for the children housed at the facility. Although the two female employees were not told of the camera, the evidence indicated that the director activated the camera and sensor only three times over a three-week period and only after the women had left work for the day. Although it was possible that someone during the day could sneak into a nearby locked storage room where the monitor was located and activate the camera, there was no evidence that the camera was ever activated when the female employees were present at work, nor that they were ever videotaped. When the camera was discovered by the women, the director was very forthright about why it was placed in their office and immediately showed the brief videotape that had been recorded during the nights it had been activated.

In affirming summary judgment in favor of the employer on plaintiffs' claims for intrusion, the California Supreme Court held that while the women had shown an intrusion into their shared office space, a place in which they had a reasonable expectation of privacy [*Hernandez v. Hillsides, Inc. (2009) 47 Cal. 4th 272, 294, 97 Cal. Rptr. 3d 274, 211 P.3d 1063*], they could not demonstrate under the circumstances that the intrusion would be considered utterly unjustified and highly offensive to a reasonable person. The Court noted that the undisputed evidence demonstrated that the camera equipment was installed in order to confirm a strong suspicion, triggered by the facility's computer network tracking measures, that an employee within the facility, specifically a program director or other staff person with keys and access to the administration building, was engaging in unauthorized and inappropriate after-hours computer use that could conceivably subject the facility to legal liability or, should some of the facility children be exposed, cause harm to the children in their vulnerable states. Moreover, the facility director repeatedly assured that the equipment was installed only to acquire evidence of who was using the computer in such unauthorized fashion, an assurance that was corroborated by his subsequent actions in limiting use of the camera [*Hernandez v. Hillsides, Inc. (2009) 47 Cal. 4th 272, 298-299, 97 Cal. Rptr. 3d 274, 211 P.3d 1063*]. The Court also noted that the office setting had been selected only after an attempt to monitor the computer lab had been fruitless, and the camera's rage of vision within the office was narrow, limited only to the desk and computer workstation that had been used to access the pornography [*Hernandez v. Hillsides, Inc. (2009) 47 Cal. 4th 272, 296, 97 Cal. Rptr. 3d 274, 211 P.3d 1063*].

Motivation or justification becomes particularly important when the intrusion is by a member of the print or broadcast press in the pursuit of news material. Thus, in deciding whether a reporter's alleged intrusion into private matters is offensive and hence actionable as an invasion of privacy, courts must consider the extent to which the intrusion was, under the circumstances, justified by the legitimate motive of gathering the news. However, the mere fact that the intruder was in pursuit of a story does not generally justify an otherwise offensive intrusion; offensiveness depends as well on the particular method of investigation used [*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 236-238, 74 Cal. Rptr. 2d 843, 955 P.2d 469]* .

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§ 429.40 Newsworthy Matters

[1] Constitutional Protection

The right of privacy is not absolute; it must be balanced against the public interest in the dissemination of news and information, consistent with the constitutional guaranties of freedom of speech and of the press [*Gill v. Hearst Publ'g Co. (1953) 40 Cal. 2d 224, 228, 253 P.2d 441]* . As a general rule, constitutional defenses concerning freedom of speech and freedom of the press apply to all types of privacy actions [*Alim v. Superior Court (1986) 185 Cal. App. 3d 144, 149-150, 229 Cal. Rptr. 599* . The dividing line between the individual's right to privacy and the public's right to know is not easily drawn and must be determined by the facts of each case [*Times-Mirror Co. v. Superior Court (1988) 198 Cal. App. 3d 1420, 1425, 244 Cal. Rptr. 556* ; *Stryker v. Republic Pictures Corp. (1951) 108 Cal. App. 2d 191, 194, 238 P.2d 670]* . The general rule is that a truthfulpublication will be constitutionally protected if (1) it is newsworthy, and (2) it does not reveal facts so offensive as to shock the community's notions of decency [*Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 541, 93 Cal. Rptr. 866, 483 P.2d 34 , overruled on other grounds, Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 696-697, 21 Cal. Rptr. 3d 663, 101 P.3d 552* & n.9, *21 Cal. Rptr. 3d 663, 101 P.3d 552]* . However, the publication of truthful information that is part of the public record as a matter of law, such as information obtained from official public court records of a criminal proceeding, is constitutionally protected regardless of any claim that the information is not newsworthy [*see Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 692-697, 21 Cal. Rptr. 3d 663, 101 P.3d 552* & n.9, *21 Cal. Rptr. 3d 663, 101 P.3d 552]* .

In an action for publication of private facts, the privilege may apply even when the private facts were declared confidential by statute [*see Nicholson v. McClatchy Newspapers (1986) 177 Cal. App. 3d 509, 516-521, 223 Cal. Rptr. 58* . The burden of proving that a publication is not constitutionally protected--that is, that it is not newsworthy--is on the plaintiff [*Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 130, 188 Cal. Rptr. 762]* .

If the facts disclosed about a limited involuntary public figure bear a logical relationship to the newsworthy subject of a news broadcast and are not intrusive in great disproportion to their relevance, the broadcast is newsworthy. For example, a television broadcast of an automobile accident and the rescue and medical treatment of one of the accident

victim's did not constitute an invasion of privacy. The broadcast was newsworthy, and did not constitute a morbid and sensational prying into private lives for its own sake. Nor was the broadcast so lurid and sensational in emotional tone, or so intensely personal in content as to make its intrusiveness disproportionate to its relevance [*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 228, 74 Cal. Rptr. 2d 843, 955 P.2d 469]* .

[2] Criteria for Newsworthiness

Among the factors to consider in determining whether or not a publication is newsworthy are the following [*Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 810, 812, 163 Cal. Rptr. 628, 608 P.2d 716]* :

- The social value of the facts published;
- The depth of the publication's intrusion into an individual's private affairs;
- The extent to which the individual voluntarily acceded to a position of public notoriety [*see § 429.41*];
- The exact nature of the state's interest in preventing disclosure;
- Whether or not the information is a matter of public record [*see § 429.37*]; and
- The lapse of time between the event and the publication [*see § 429.478[4][d]*].

[3] Passage of Time

The amount of time elapsing between the event which is the subject of the unwanted publication and the disclosure of it is a factor to consider in determining newsworthiness [*Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 810, 812, 163 Cal. Rptr. 628, 608 P.2d 716]* . In most other cases, the passage of time does not per se establish that a disclosure is no longer newsworthy [*Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 812, 163 Cal. Rptr. 628, 608 P.2d 716* ; *Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 746, 20 Cal. Rptr. 405]* . For example, if there is still a continuing public interest in the matter, the individual's right to privacy may give way to the public's right to know [*see Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 812-813, 163 Cal. Rptr. 628, 608 P.2d 716* (disappearance and death of attorney in Manson Family trials still matter of public concern when subject book, Helter Skelter, was written)].

The California Supreme Court has held that, at least for past criminal behavior, it was possible for the passage of time to remove, if not the fact of the crime, at least the identity of the criminal from the public realm [*Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 537-543, 93 Cal. Rptr. 866, 483 P.2d 34]* . Subsequently, however, the Court, relying on United States Supreme Court precedent, overruled that holding and concluded that the passage of time did not lessen the constitutional protection afforded to the media's right to publish facts obtained from public official court records of a criminal proceeding [*Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 693-696, 21 Cal. Rptr. 3d 663, 101 P.3d 552* ; *see also Cox Broad. Corp. v. Cohn (1975) 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328]* .

[4] Facts Considered Newsworthy

In general, arrests and prosecutions of criminal suspects are matters of legitimate public concern [*Cox Broad. Corp. v. Cohn (1975) 420 U.S. 469, 493, 95 S. Ct. 1029, 43 L. Ed. 2d 328* ; *Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 692-693, 21 Cal. Rptr. 3d 663, 101 P.3d 552]* . The false accusation of the commission of a crime has been found to not be newsworthy [*Kinsey v. Macur (1980) 107 Cal. App. 3d 265, 275, 165 Cal. Rptr. 608* (false accusation of murder and implication that plaintiff destroyed someone's life and was prone to raping children not

newsworthy)]. Moreover, disclosure of a crime victim's name may subject the media to liability if the victim's safety is involved [*Times-Mirror Co. v. Superior Court (1988) 198 Cal. App. 3d 1420, 1426, 244 Cal. Rptr. 556]* .

Automobile accidents, as well as the rescue and medical treatment of accident victims, are newsworthy. In addition, the appearance and words of an accident victim as she was being extricated from an overturned car, placed in a helicopter and transported to a hospital are also newsworthy [*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 228, 74 Cal. Rptr. 2d 843, 955 P.2d 469]* .

Even though the general subject matter of a publication may be newsworthy, it does not necessarily follow that all information given in the account is newsworthy. If there is room for differing views whether a publication would be newsworthy, the question should be determined by the jury and not the court [*Times-Mirror Co. v. Superior Court (1988) 198 Cal. App. 3d 1420, 1429, 244 Cal. Rptr. 556* ; *see M. G. v. Time Warner, Inc. (2001) 89 Cal. App. 4th 623, 635-636, 107 Cal. Rptr. 2d 504* (trier of fact could find that photograph showing faces of Little League baseball team members was not newsworthy if used in stories about molestation that discussed team manager's sexual offenses)].

Otherwise private facts that have clear scholarly interest may be considered newsworthy. In one case, a scholar speaking at a conference dealing with repressed sexual abuse memories had made comments about an unidentified Jane Doe who was the subject of a published and widely debated case study. In those comments, the scholar had said merely that the subject had engaged in unspecified "destructive behavior" in her teen years and was currently serving in the Navy. The Supreme Court held that these comments, which were not of an intensely personal or intimate nature, were newsworthy within the debate about the reliability of repressed memory recovery. The Court noted that other commentators responding to the published case study had earlier remarked that it would be of interest from an academic standpoint to learn the effects of the events described in the case study on the subject's later development [*Taus v. Loftus (2007) 40 Cal. 4th 683, 719, 54 Cal. Rptr. 3d 775, 151 P.3d 1185]* .

[5] Offensiveness to Community

The constitutional protection for newsworthy matters does not extend to a publication of facts that are so offensive as to shock the community's notions of decency [*Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 692-693, 21 Cal. Rptr. 3d 663, 101 P.3d 552* ; *Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 541, 93 Cal. Rptr. 866, 483 P.2d 34]* . However, telling about a laudable deed done by a person is not offensive [*see Johnson v. Harcourt, Brace, Jovanovich, Inc. (1974) 43 Cal. App. 3d 880, 892, 118 Cal. Rptr. 370* (telling about plaintiff's return of quarter of a million dollars which he found in street)]. In addition, reciting the plaintiff's relationship to a murder victim in a broadcast with the stories of two other heinous murders was not found to be offensive [*O'Hilderbrandt v. Columbia Broad. Sys., Inc. (1974) 40 Cal. App. 3d 323, 334, 114 Cal. Rptr. 826]* .

The plaintiff is required to prove that the information was published with reckless disregard for its offensiveness [*see Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 543, 93 Cal. Rptr. 866, 483 P.2d 34* , *overruled on other grounds, Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 696-697, 21 Cal. Rptr. 3d 663, 101 P.3d 552* & n.9, *21 Cal. Rptr. 3d 663, 101 P.3d 552* ; *Johnson v. Harcourt, Brace, Jovanovich, Inc. (1974) 43 Cal. App. 3d 880, 891, 118 Cal. Rptr. 370]* .

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§ 429.41 Public Figures

[1] Loss of Right to Privacy

A person who is a "public figure" relinquishes a part of his or her right of privacy to the extent that the public has a legitimate interest in his or her activities [*Johnson v. Harcourt, Brace, Jovanovich, Inc. (1974) 43 Cal. App. 3d 880, 892, 118 Cal. Rptr. 370]* . A person may become a public figure either intentionally, by his or her own activities, or involuntarily, by the force of circumstances [*Werner v. Times-Mirror Co. (1961) 193 Cal. App. 2d 111, 117, 14 Cal. Rptr. 208]* . A person may attain public-figure status for all purposes, by achieving pervasive fame or notoriety; or he or she maybecome a public figure for a limited issue, relating only to the particular controversy which drew him or her into the public eye [Gertz v. Robert Welch, Inc. (74) *418 U.S. 323, 351, 94 S. Ct. 2997, 41 L. Ed. 2d 789]* .

The passage of time may be a factor in determining whether or not a person is a public figure. For example, a political assassin will probably remain a permanent fixture in the public's memory for a long time [*see Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 538, 541-542, 93 Cal. Rptr. 866, 483 P.2d 34 , overruled on other grounds, Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 696-697, 21 Cal. Rptr. 3d 663, 101 P.3d 552* & n.9, *21 Cal. Rptr. 3d 663, 101 P.3d 552]* . In addition, one's own actions regarding an event of public interest may keep one in the public eye [*see Wasser v. San Diego Union (1987) 191 Cal. App. 3d 1455, 1463, 236 Cal. Rptr. 772* (person tried and acquitted of crime who over the years maintains series of legal actions concerning trial rekindles public interest)].

A necessary corollary to the rule that public figures lose their right of privacy is that people closely related to public figures may also lose their right of privacy to some extent [*Johnson v. Harcourt, Brace, Jovanovich, Inc. (1974) 43 Cal. App. 3d 880, 891-892, 118 Cal. Rptr. 370* (family of person who returned quarter of a million dollars found on street); *Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 747-748, 20 Cal. Rptr. 405* (husband of actress)].

For further discussion of public figures, see Ch. 340, *Libel and Slander* .

[2] Limited Public Figures

Limited public figures are private individuals involved in events of public interest. To protect the privacy of limited public figures, courts require a logical nexus between the complaining individual and the matter of legitimate public interest. The contents of a publication or broadcast are protected only if they havesome substantial relevance to a matter of legitimate public interest. Thus, courts balance the public's right to know against the plaintiff's privacy interest by drawing a protective line at the point the material revealed ceases to have any substantial connection to the subject matter of the newsworthy report [*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 224, 74 Cal. Rptr. 2d 843, 955 P.2d 469* (upholding trial courts grant of summary judgment against plaintiffs in public disclosure of private facts case in which plaintiffs, victims of automobile accident, sued television producer that videotaped and broadcast documentary depicting their rescue and transport to hospital)].

[3] Public Officials and Candidates

Because of their public responsibilities, government officials and candidates for such offices are considered the paradigm case of public figures [*Kapellas v. Kofman (1969) 1 Cal. 3d 20, 36, 81 Cal. Rptr. 360, 459 P.2d 912]* . A thorough scrutiny will be permitted of any facet of their lives thatmay relate to their fitness for office [*see* *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 36-37, 81 Cal. Rptr. 360, 459 P.2d 912]* . A charge of criminal conduct is deemed relevant to a candidate's qualifications for office [*see* *Beruan v. French (1976) 56 Cal. App. 3d 825, 828, 128 Cal. Rptr. 869]* . The criminal activity of a candidate's minor children may also be considered relevant [*see* *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 38-39, 81 Cal. Rptr. 360, 459 P.2d 912]* . The fact of a person's transsexuality, however, is not pertinent to fitness for office [*Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 134, 188 Cal. Rptr. 762]* .

The loss of privacy concomitant with candidacy for public office has been extended to candidacy for secretary-treasurer of a labor union [*see* *Beruan v. French (1976) 56 Cal. App. 3d 825, 828-829, 128 Cal. Rptr. 869]* . The loss of privacy has also been recognized in the case of a student body president of a college [*Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 134, 188 Cal. Rptr. 762]* . The public arena entered by a public figure may be so small, however, that extensive exposure of that person's private life is not warranted [*Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 135, 188 Cal. Rptr. 762]* .

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§ 429.42 Standing

[1] Privacy as Personal Right

The right of privacy is a purely personal right. It cannot be asserted by anyone other than the person whose privacy has been invaded. Only the person suffering the intrusion may maintain a cause of action [*see Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 821*].

A person's relatives may not maintain an action for the invasion of that person's privacy. If the plaintiff's only relation to the asserted invasion of privacy is that he or she is a relative of the victim of the intrusion and was unwillingly brought into the limelight, no recovery is allowed [*Coverstone v. Davies (1952) 38 Cal. 2d 315, 323-324, 239 P.2d 876* (parents of minor child)]. However, if a family member's own privacy is invaded along with the original person's privacy, the family member may maintain a cause of action for the invasion of his or her own privacy [*Vescovo v. New Way Enters., Ltd. (1976) 60 Cal. App. 3d 582, 588, 130 Cal. Rptr. 86]* .

The right of privacy does not survive but dies with a person. Thus, a person's heirs may not maintain a cause of action for invasion of that person's privacy [*see Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 821* (heirs); *Hendrickson v. California Newspapers, Inc. (1975) 48 Cal. App. 3d 59, 62-63, 121 Cal. Rptr. 429* (family members); *James v. Screen Gems, Inc. (1959) 174 Cal. App. 2d 650, 653-654, 344 P.2d 799* (spouse); *Kelly v. Johnson Publ'g Co. (1958) 160 Cal. App. 2d 718, 721-722, 325 P.2d 659* (sisters)].

[2] Business Entities

There is a split of authority regarding whether or not a business entity may sue for an invasion of privacy [*see H & M Assocs. v. City of El Centro (1980) 109 Cal. App. 3d 399, 409-411, 167 Cal. Rptr. 392* (4th District; partnership may sue); *Ion Equip. Corp. v. Nelson (1980) 110 Cal. App. 3d 868, 878-879, 168 Cal. Rptr. 361* (1st District; corporation may not sue for common law tort)]. These cases may be reconciled on the basis that in *Ion* the plaintiff-corporation did not suffer any tangible loss, and the court held that since a business entity has no "feelings," it does not generally suffer the usual type of injury involved in an invasion of privacy action; while in *H & M*, in which the action was allowed, the invasion of privacy resulted in an economic loss to the plaintiff-partnership [*see Ion Equip. Corp. v. Nelson (1980) 110*

Cal. App. 3d 868, 878-879, 168 Cal. Rptr. 361 ; *H & M Assocs. v. City of El Centro (1980) 109 Cal. App. 3d 399, 410, 167 Cal. Rptr. 392* (loss of real property through foreclosure)].

A business entity may bring an action for invasion of privacy under *Penal Code §§ 632, 632.5, 637.2* (relating to actions for electronic eavesdropping) [*see Ion Equipment Corp. v. Nelson (1980) 110 Cal. App. 3d 868, 168 Cal. Rptr. 361* (corporation); *see also § 429.280* et seq.]. For discussion of the exclusion of corporations from protection of the right of privacy set out in *Cal. Const. art. I, § 1*, see *§ 429.16[4]*.

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§ 429.43 Uniform Single Publication Act

The Uniform Single Publication Act (*Civ. Code §§ 3425.1-3425.5*) provides that no person shall have more than one cause of action for damages for libel, slander, invasion of privacy, or any other tort founded upon any single publication or exhibition or utterance [*Civ. Code § 3425.3*]. The purpose of the Act is to abrogate the former rule un der which the sale of each copy of a newspaper or other publication containing objectionable matter was deemed to give rise to a separate cause of action [*see Belli v. Roberts Bros. Furs (1966) 240 Cal. App. 2d 284, 288*].

The Act gives the following examples of a single publication, exhibition, or utterance: any one issue of a newspaper, book, or magazine; any one presentation to an audience; any one broadcast over radio or television; or any one exhibition of a motion picture [*Civ. Code § 3425.3*]. As used in the statute, "issue" has been interpreted to mean all the printings of a newspaper for a single day, as opposed to each edition--that is, morning, afternoon, or evening paper--that is printed in any one day [*see Belli v. Roberts Bros. Furs (1966) 240 Cal. App. 2d 284, 288-289*]. A republication of a book in paperback form is considered a new "issue," and gives rise to a new cause of action [*see Kanarek v. Bugliosi (1980) 108 Cal. App. 3d 327, 332, 166 Cal. Rptr. 526]* .

Recovery in any action under the Act shall include all damages for any such tort suffered by the plaintiff in all jurisdictions [*Civ. Code § 3425.3*].In addition, a judgment in any jurisdiction for or against the plaintiff on the substantive merits of any action for damages founded upon a single publication, exhibition, or utterance, as described in *Civ. Code § 3425.3*, shall bar any other action for damages by the same plaintiff against the same defendant founded upon the same publication, exhibition, or utterance [*Civ. Code § 3425.4*]. For discussion and forms relating to res judicata in general, see Ch. 491, *Res Judicata* .

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§ 429.44 Statute of Limitations

The applicable statute of limitations for invasion of privacy actions is two years (one year, prior to January 1, 2003) after accrual of the cause of action [*Code Civ. Proc. §§ 312, 335.1*; *Cain v. State Farm Mut. Auto Ins. Co. (1976) 62 Cal. App. 3d 310, 313, 132 Cal. Rptr. 860* ; *Johnson v. Harcourt, Brace, Jovanovich, Inc. (1974) 43 Cal. App. 3d 880, 895-896, 118 Cal. Rptr. 370* ; *see* former *Code Civ. Proc. § 340(3)*; *see generally Ch. 345, Limitation of Actions, § 345.14*]. Generally, the limitations period runs from the date of the publication or utterance of the objectionable material [*see Wiener v. Superior Court (1976) 58 Cal. App. 3d 525, 529, 130 Cal. Rptr. 61* . In the case of a single, integrated publication, the limitations period runs from the date of the first general distribution to the public, and not necessarily from the date printed on the publication [*see Belli v. Roberts Bros. Furs (1966) 240 Cal. App. 2d 284, 289, 290*]. For example, the several editions of a newspaper for one day comprise a single integrated publication, and the first general distribution of the paper may occur on the evening of the previous day [*see Belli v. Roberts Bros. Furs (1966) 240 Cal. App. 2d 284*].

The so-called "rule of discovery" attends the statute of limitations for invasion of privacy actions [*Cain v. State Farm Mut. Auto. Ins. Co. (1976) 62 Cal. App. 3d 310, 315, 132 Cal. Rptr. 860]* . Under this rule, the cause of action does not accrue until the plaintiff knows, or should know, all material facts essential to show the elements of the cause of action [*Cain v. State Farm Mut. Auto. Ins. Co. (1976) 62 Cal. App. 3d 310, 314, 132 Cal. Rptr. 860* ; *see also Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 190, 98 Cal. Rptr. 837, 491 P.2d 421]* .

The statute of limitations is not tolled, on the grounds of fraudulent concealment, by the mere nondisclosure of the existence of a cause of action, in the absence of a fiduciary or confidential relationship. Thus, in an invasion of privacy action, the statute is not tolled when the defendant merely fails to notify the plaintiff of the publication in question [*see Johnson v. Harcourt, Brace, Jovanovich, Inc. (1974) 43 Cal. App. 3d 880, 896, 118 Cal. Rptr. 370]* .

For discussion and forms relating to the defense of the statute of limitations, see Ch. 345, *Limitation of Actions* , and Ch. 340, *Libel and Slander* .

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§ 429.45 Remedies

The remedy for an invasion of privacy may include recovery of damages [*see Fairfield v. American Photocopy Equip. Co. (1955) 138 Cal. App. 2d 82, 88, 291 P.2d 194* ; *see generally § 429.46*]. In addition, injunctive relief may be available [*see Leavy v. Cooney (1963) 214 Cal. App. 2d 496, 504, 29 Cal. Rptr. 580* (award of injunction upheld); *see also Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 817* (injunction); *Kinsey v. Macur (1980) 107 Cal. App. 3d 265, 269, 165 Cal. Rptr. 608* (injunction); *see also Civ. Code § 3422*; *Code Civ. Proc. § 526*].

In an appropriation action under *Civ. Code § 3344*, the remedies provided by that statute are cumulative and in addition to any others provided by law [*Civ. Code § 3344(g)*; *Midler v. Ford Motor Co. (9th Cir. 1988) 849 F.2d 460, 463* (*Civ. Code § 3344* as not precluding professional singer from pursuing common law action for damages for unauthorized use of imitation of her distinctive voice in commercial advertisement)].

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§ 429.46 Damages

Generally, in an invasion of privacy action, the plaintiff is entitled to damages which will compensate for all the harm proximately caused by the defendant's intrusion on the plaintiff's privacy [*see Leavy v. Cooney (1963) 214 Cal. App. 2d 496, 501, 29 Cal. Rptr. 580* ; *Fairfield v. American Photocopy Equip. Co. (1955) 138 Cal. App. 2d 82, 88-90, 291 P.2d 194* ; *Civ. Code § 3344* (compensatory damages)]. General damages are recoverable without a showing of a specific loss [*Fairfield v. American Photocopy Equip. Co. (1955) 138 Cal. App. 2d 82, 88-89, 291 P.2d 194]* . A physical injury is not required in order to recover damages [*Leavy v. Cooney (1963) 214 Cal. App. 2d 496, 502, 29 Cal. Rptr. 580]* . The injury to be compensated includes impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering [*Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 137, 188 Cal. Rptr. 762]* . Substantial damages for mental anguish or emotional distress may be recovered even though no other damage has occurred [*see Miller v. National Broad. Co. (1986) 187 Cal. App. 3d 1463, 1484-1485, 232 Cal. Rptr. 668]* . In an appropriation case, damages may include compensation for the use of the plaintiff's name or likeness [*see Clark v. Celeb Publ'g, Inc. (S.D.N.Y. 1981) 530 F. Supp. 979, 983, 984* (applying California law)].

Nominal damages may be recovered if there was no material injury caused by the invasion of privacy [*see Fairfield v. American Photocopy Equip. Co. (1955) 138 Cal. App. 2d 82, 87-88, 90, 291 P.2d 194* ; *Civ. Code § 3360* (nominal damages)].

Special damages, if any, may also be recovered [*see Fairfield v. American Photocopy Equip. Co. (1955) 138 Cal. App. 2d 82, 88, 291 P.2d 194]* . Special damages may include, for example, compensation for work thatthe plaintiff lost as a result of adverse publicity stemming from an unauthorized publication of the plaintiff's photograph [*see Clark v. Celeb Publ'g, Inc. (S.D.N.Y. 1981) 530 F. Supp. 979, 983, 984* (applying California law)].

Proof of special damages is not generally required as an element of the tort [*Kinsey v. Macur (1980) 107 Cal. App. 3d 265, 275-276, 165 Cal. Rptr. 608* (public disclosure tort); *Stilson v. Reader's Digest Assn. (1972) 28 Cal. App. 3d 270, 273, 104 Cal. Rptr. 581* (appropriation tort)]. In the false light publicity tort, however, if a retraction was required under *Civ. Code § 48a* but was not demanded, there can be no recovery unless special damages are established, and recovery is in that case limited to special damages [*see Kinsey v. Macur (1980) 107 Cal. App. 3d 265, 275, 165 Cal. Rptr. 608* ;

Werner v. Times-Mirror Co. (1961) 193 Cal. App. 2d 111, 120-121, 122-123, 14 Cal. Rptr. 208] . Only special damages are available in a false light publicity tort if a demand for a retraction was required but not made [*Civ. Code § 48a*].

Punitive damages are proper for an invasion of privacy if the required showing is made [*see Leavy v. Cooney (1963) 214 Cal. App. 2d 496, 503, 29 Cal. Rptr. 580* ; *Civ. Code § 3294* (punitive damages)]. In order to justify the imposition of punitive damages, the defendant must act with the intent to vex, injure, or annoy, or with a willful and conscious disregard of the plaintiff's rights [*Civ. Code § 3294(a), (c)*; *Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 135, 188 Cal. Rptr. 762* (decided before 1987 amendment to *Civ. Code § 3294*)].

Because the harm suffered by an invasion of privacy is not easily quantifiable, the amount of damages is usually left to the sound discretion of the trier of fact [*Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 137, 188 Cal. Rptr. 762* ; *Leavy v. Cooney (1963) 214 Cal. App. 2d 496, 501-502, 29 Cal. Rptr. 580]* . However, in an appropriation action brought under *Civ. Code § 3344*, and in an action for wrongful appropriation of a deceased personality's name, voice, signature, photograph, or likeness under *Civ. Code § 3344.1*, damages are recoverable in an amount equal to $750 or the actual damages sustained as the result of the unauthorized appropriation, whichever is greater, plus any profits from the appropriation attributable to it and not taken into account in computing actual damages. In establishing the profits, the injured party is required to present proof only of the gross revenue attributable to the unauthorized appropriation, and the misappropriator is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party under both statutes and, likewise under both, the prevailing party shall also be entitled to attorney's fees and costs [*Civ. Code §§ 3344(a), 3344.1(a)*]. The remedies provided for by both *Civ. Code § 3344* and *Civ. Code § 3344.1* are cumulative and are in addition to any other provided by law [Civ. Code *§ 3344(g), Civ. Code* § 3344.1(m)].

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37-429 California Forms of Pleading and Practice--Annotated § 429.47

§ 429.47 Defenses

[1] In General

In addition to the defenses discussed in *§ 429.47[2] -[5]*, an invasion of privacy action may be defended on the grounds of the nonexistence of one of the elements of the particular tort involved; the newsworthiness of the publication [*see § 429.40*]; the public figure status of the plaintiff [*see § 429.41*]; and the plaintiff's lack of a right to sue for the particular invasion alleged [*see § 429.42*]. For forms relating to the defense of the statute of limitations, see Ch. 345, *Limitation of Actions* , and Ch. 340, *Libel and Slander* .

Mistake or inadvertence is no defense to an action for invasion of privacy [*Fairfield v. American Photocopy Equip. Co. (1955) 138 Cal. App. 2d 82, 87, 291 P.2d 194* ; *see* *Kerby v. Hal Roach Studios (1942) 53 Cal. App. 2d 207, 213, 127 P.2d 577]* .

[2] Privilege of Creditor

A creditor has a limited privilege to disclose to others the existence of a debt in order to secure repayment, although he or she may not inform the public in general [*Timperley v. Chase Collection Serv. (1969) 272 Cal. App. 2d 697, 699-700, 77 Cal. Rptr. 782* (letter to plaintiff's employer informing of attorney's bill allegedly owed by plaintiff not sufficient publication to public in general); *see also* Ch. 127, *Consumer Contracts and Loans*].

[3] Privileges Under Civ. Code § 47

Civ. Code § 47 privileges protecting publications and broadcasts apply to defamation and other actions, excepting only those for malicious prosecution [*Ribas v. Clark (1985) 38 Cal. 3d 355, 364, 212 Cal. Rptr. 143, 696 P.2d 637* (former *Civ. Code § 47(2), (3)* (*now see Civ. Code § 47(b), (c)*) may bar action for invasion of privacy); *Kilgore v. Younger (1982) 30 Cal. 3d 770, 778, 180 Cal. Rptr. 657, 640 P.2d 793* (former *Civ. Code § 47(1)* (*now see Civ. Code § 47(a)*) applied to invasion of privacy action); *see also* *Conklin v. Sloss (1978) 86 Cal. App. 3d 241, 246, 150 Cal. Rptr. 121* (application of former *Civ. Code § 47(4)* (*now see Civ. Code § 47(d)*) assumed by parties in invasion of privacy action); *Spira v. Superior Court (1976) 62 Cal. App. 3d 33, 35-36, 133 Cal. Rptr. 24* (former *Civ. Code § 47(2)* (*now see Civ.*

Code § 47(b)) applied to invasion of privacy action)].

The litigation privilege protects against a cause of action based in California's constitutional right to privacy, as well as against a cause of action in tort for invasion of privacy [*Jacob B. v. County of Shasta (2007) 40 Cal. 4th 948, 960-962, 56 Cal. Rptr. 3d 477, 154 P.3d 1003]* .

Those who are neither participants nor litigants in judicial proceedings arenever protected from liability by the judicial privilege of *Civ. Code § 47(b)* [*Wise v. Thrifty Payless, Inc. (2000) 83 Cal. App. 4th 1296, 1304, 100 Cal. Rptr. 2d 437]* . In one case, for example, the plaintiff's estranged husband may have been protected from liability for his use of private information about the plaintiff during their marriage dissolution proceedings, but a pharmacy that was not a participant in those proceedings could not use the husband's judicial privilege as a shield from liability for the pharmacy's own tortious conduct in initially revealing the private information to the plaintiff's estranged husband [*Wise v. Thrifty Payless, Inc. (2000) 83 Cal. App. 4th 1296, 1303-1305, 100 Cal. Rptr. 2d 437]* .

In addition, the privilege for statements made in judicial proceedings applies only to communicative acts, and not to noncommunicative conduct such as the unauthorized reading of confidential records [*see, e.g.,* *Mansell v. Otto (2003) 108 Cal. App. 4th 265, 271-272, 133 Cal. Rptr. 2d 276* (privilege did not apply to privacy claim based on criminal defense counsel's unauthorized reading of criminal victim's confidential mental health records)]. However, even if the judicial privilege is inapplicable, a plaintiff seeking to recover for an invasion of privacy based on conduct during a judicial proceeding may be unable to state a cause of action if the conduct that forms the basis of the complaint was undertaken with the approval of the court [*Mansell v. Otto (2003) 108 Cal. App. 4th 265, 273-277, 133 Cal. Rptr. 2d 276* (invasion of privacy action could not be based on criminal defense counsel's unauthorized reading of criminal victim's confidential mental health records, because records were received pursuant to court order)].

For further discussion and forms relating to these privileges, see Ch. 340, *Libel and Slander* .

[4] Duty to Disclose

A defendant may also be able to assert as a defense a statutory duty to disclose the information in question [*see* *Mason v. Western Union Tel. Co. (1975) 52 Cal. App. 3d 429, 440, 125 Cal. Rptr. 53]* . For example, in an action against a telegraph company for invasion of privacy by transmitting a telegram, it was held that no cause of action was stated because the defendant was required by law to make the transmission [*Mason v. Western Union Tel. Co. (1975) 52 Cal. App. 3d 429, 440, 125 Cal. Rptr. 53* ; *see* *Wilson v. California Health Facilities Comm'n (1980) 110 Cal. App. 3d 317, 167 Cal. Rptr. 801* (California constitutional right of privacy; disclosure of financial records required to be reported to government); *Lehman v. City & County of San Francisco (1978) 80 Cal. App. 3d 309, 145 Cal. Rptr. 493* (case under California constitutional right of privacy, relating to statutory duty to disclose identity of prospective juror to parties in litigation); *see also §§ 429.16, 429.160* et seq.].

Penal Code §§ 11164-11174.1 set forth the provisions for child abuse and neglect reporting, and include immunity for compliance in reporting. Teachers, child care custodians, health care practitioners, law enforcement officers, firefighters, and animal control officers are among those designated as mandated reporters [*see Penal Code § 11165.7(a)*]. A mandated reporter who has knowledge of or observes a child in his or her professional capacity or within the scope of employment, with reasonable suspicion that the child has been the victim of child abuse or neglect, must report the known or suspected instance to a police department, sheriff's department, county probation department (if designated by the county to receive mandated reports), or the county welfare department immediately or as soon as practically possible by telephone, and must prepare and send, fax, or electronically transmit a written report thereof within 36 hours of receiving that information [*Penal Code §§ 11165.9, 11166(a)(1)*]. A child protective agency must be notified and a report must be prepared and sent even if the child has expired, regardless of whether the possible abuse was a factor contributing to the death, and even if suspected child abuse was discovered during an autopsy [*Penal Code § 11166(a)(2)*]. No person who reports an instance of child abuse or neglect pursuant to *Penal Code §§ 11164-11174.1*

is civilly or criminally liable [*Penal Code § 11172(a)*]. Immunity for mandated reporters applies even if the mandated reporter acquired the knowledge or reasonable suspicion of child abuse or neglect outside of his or her professional capacity or outside the scope of employment [*Penal Code § 11172(a)*].

For further discussion of the immunity for mandatory reporters of child abuse or neglect, see Ch. 340, *Libel and Slander* .

[5] Newsgathering Privilege

Newspersons are accorded a constitutional privilege under the *First Amendment* that protects their right to gather news [*Nicholson v. McClatchy Newspapers (1986) 177 Cal. App. 3d 509, 519, 223 Cal. Rptr. 58]* . The privilege prohibits the imposition of civil liability based on the acts of reporters in gathering the news through routine reporting techniques such as asking people questions [*Nicholson v. McClatchy Newspapers (1986) 177 Cal. App. 3d 509, 519, 223 Cal. Rptr. 58]* . For example, the privilege applied to shield a newspaper and its reporters from liability for intrusion based on the reporter's acts of gathering and publishing information, even though the confidentiality of the information was protected bystatute [*Nicholson v. McClatchy Newspapers (1986) 177 Cal. App. 3d 509, 519-521, 223 Cal. Rptr. 58]* .

However, the Constitution does not provide blanket immunity for reporters during the newsgathering process. In contrast to the broad privilege the press enjoys for publishing truthful, newsworthy information in its possession, the press has no recognized constitutional privilege to violate generally applicable laws such as California's intrusion tort, in pursuit ofmaterial. Such a justification may be available when enforcement of the tort or other law would place an impermissibly severe burden on the press [*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 242, 74 Cal. Rptr. 2d 843, 955 P.2d 469]* . For example, the newsgathering privilege does not provide immunity against a cause of action for intrusion when a newsperson enters a person's home without consent for the purpose of gathering news [*see Miller v. National Broad. Co. (1986) 187 Cal. App. 3d 1463, 1489-1493, 232 Cal. Rptr. 668]* , nor is a television producer immune from liability for placing a microphone on a medical rescuer in order to intercept what would otherwise be private conversations between an accident victim and her rescuer or for filming the victim in an air ambulance [*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 237, 74 Cal. Rptr. 2d 843, 955 P.2d 469]* .

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[Reserved]

§§ 429.48[Reserved]

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37-429 California Forms of Pleading and Practice--Annotated § 429.60

§ 429.60 Governing Statutes

Collection, maintenance, use, and disclosure of personal information contained in state records are governed by the Information Practices Act of 1977 (hereinafter referred to as Information Practices Act), which is set out in *Civ. Code §§ 1798-1798.78*. In addition, public access to public records maintained by the state is governed by the Public Records Act, which is set out in *Gov. Code § 6250 et seq.* and discussed in Ch. 470C, *Public Records Act* .

Disclosure of business records by bookkeeping services is governed by *Civ. Code §§ 1799-1799.3*. Disclosure of personal information in records maintained by a telephone or telegraph corporation is governed by *Pub. Util. Code § 2891*.

Disclosure of medical information is governed by the Confidentiality of Medical Records Act (*Civ. Code §§ 56-56.37*).

Disclosure and confidentiality relating to AIDS testing generally are governed by *Health & Safety Code §§ 199.20-199.27*. Confidentiality of AIDS research records is governed by *Health & Safety Code §§ 199.30-199.40*. Confidentiality of AIDS public health records is governed by *Health & Safety Code §§ 199.42-199.44*. Testing for AIDS and disclosure requirements of test results relating to certain criminal defendants and inmates are governed by Health & Safety Code § 121950 et seq. and by *Penal Code § 7500 et seq.* AIDS testing for certain convicted criminals is governed by *Penal Code §§ 1201* (perpetrators of certain sex crimes) and 1202.6 (persons convicted of prostitution more that once). Testing for AIDS and disclosure requirements of test results relating to persons subject to the Department of the Youth Authority are governed by *Welf. & Inst. Code § 1768.9*.

Statutes that provide protections against identity theft, including statutes that protect against the unauthorized use of computer spyware to obtain personal information from the computer's owner [*see Bus. & Prof. Code § 22947 et seq.*], and statutes that provide liability for use of the Internet or e-mail to solicit, request, or induce another to provide identifying information through the unauthorized representation that the solicitor is a particular business [*see Bus. & Prof. Code § 22948 et seq.*], are beyond the scope of this chapter.

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37-429 California Forms of Pleading and Practice--Annotated § 429.61

§ 429.61 Relationship Between State and Federal Law

5 U.S.C.S. §§ 552 and *552a* both govern only federal agencies [*see 5 U.S.C.S. § 551* (defining agency for purposes of *5 U.S.C.S. §§ 551-559*)]. The California Information Practices Act (*Civ. Code §§ 1798-1798.78*) governs only state agencies, and California's Public Records Act (*Gov. Code §§ 6250-6267*) applies only to state and local agencies [*see Civ. Code § 1798.3(c)*; *Gov. Code § 6252*; for discussion of the Public Records Act, *see* Ch. 470C, *Public Records Act*]. Thus, there is no overlap or conflict between any of the federal and state statutory schemes. However, the provisions of *5 U.S.C.S. § 552* and of California's Information Practices Act are often parallel. However, differences between the statutory schemes do occur, particularly among provisions dealing with remedies and with agency procedures.

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[Reserved]

§§ 429.62[Reserved]

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37-429 California Forms of Pleading and Practice--Annotated § 429.100

§ 429.100 Definitions Under Information Practices Act

[1] Agency

The Information Practices Act (*Civ. Code §§ 1798-1798.78*) defines the term "agency" to mean every state office, officer, department division, bureau, board, commission, or other state agency. However, the act specifically excludes from its definition the following [*see Civ. Code § 1798.3(b)*]:

- The California legislature.
- Any agency established under Cal. Const. art. VI (judicial).
- The State Compensation Insurance Fund, except as to any records which contain personal information about the employees of the State Compensation Insurance Fund.
- A local agency, as defined in *Gov. Code § 6252(a)*.

[2] Record

"Record" means any file or grouping of information about an individual that is maintained by an agency, including, but not limited to, the individual's education, financial transactions, medical or employment history and that contains the individual's name, identifying number, symbol or other identifying particular assigned to the individual, including, but not limited to, a finger or voice print or photograph and is maintained by reference to such an identifying particular [*Civ. Code § 1798.3(g)*].

The Information Practices Act applies only to institutional records that are preserved in the ordinary course of business by a single, central custodian. For example, in the university context, registration forms and transcripts would be examples of such records, while student exams not stored or maintained by the university in a central location would not

[*Moghadam v. Regents of University of California (2008) 169 Cal. App. 4th 466, 480-483, 86 Cal. Rptr. 3d 739* (noting also that exams did not contain personal information that identified or described individual author)].

[3] Individual

"Individual" means a natural person [*Civ. Code § 1798.3(d)*].

[4] System of Records

"System of records" means one or more records, which pertain to one or more individuals, which is maintained by any agency, from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual [*Civ. Code § 1798.3(h)*].

[5] Maintain

The term "maintain" includes maintain, acquire, use or disclose [*Civ. Code § 1798.3(e)*].

[6] Regulatory Agency

"Regulatory agency" means the State Banking Department, the Department of Corporations, the Department of Insurance, the Department of Savings and Loan, the Department of Real Estate, and agencies of the United States or of any other state responsible for regulating financial institutions [*Civ. Code § 1798.3(k)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.101

§ 429.101 Definitions Under Public Records Act

[1] Agency

The Public Records Act (*Gov. Code § 6250 et seq.*) defines the term "state agency" to mean every state office, officer, department, division, bureau, board, and commission or other state body or agency, except those agencies provided for in Cal. Const. art. IV (legislative; except *Cal. Const. art. IV § 20*) or Cal. Const. art. VI (judicial) [*Gov. Code § 6252(f)*]. The act defines "local agency" to include a county; city, whether general law or chartered; city and county; school district; municipal corporation; district; political subdivision; or any board, commission, or agency thereof; or other local public agency; or any entity that is a legislative body of a local agency, as defined in *Gov. Code § 54952(c)* or *(d)* [*Gov. Code § 6252(a)*]. In addition, the act defines "public agency" to mean any state or local agency [*Gov. Code § 6252(d)*]. "Member of the public" means any person, except a member, agent, officer, or employee of a federal, state, or local agency acting within the scope of his or her membership, agency, office, or employment [*Gov. Code § 6252(b)*]. However, an elected member or officer of any state or local agency is entitled to access public records of his or her agency on the same basis as any other person [*Gov. Code § 6252.5*].

[2] Public Record

The act further defines the term "public record" to include any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics [*Gov. Code § 6252(e)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.102

§ 429.102 Relationship Between Information Practices Act and Other State Law

The relationship between the Information Practices Act (*Civ. Code §§ 1798-1798.78*) and the Public Records Act (*Gov. Code § 6250 et seq.*) is discussed in *§ 429.180[7]*. Nothing in the Information Practices Act shall be construed to deny or limit any right of privacy arising under *Cal. Const. art. I, § 1* [*Civ. Code § 1798.73*]. The provisions of *Educ. Code §§ 67110-67147.5* (maintenance and disclosure of school records) prevail over the Information Practices Act with regard to school records [*Civ. Code § 1798.74*]. Apart from these exceptions, the Information Practices Act is deemed to supercede any other provision of state law [*see Civ. Code § 1798.70*].

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§ 429.103 Office of Information Practices

[1] Providing Individual Assistance

The Office of Information Practices must assist individuals in identifying records which may contain information about them and must, in accordance with *Civ. Code §§ 1798-1798.78*, assist individuals in securing access to such records [*Civ. Code § 1798.5*].

[2] Investigations and Reporting by Office

On receiving a complaint, the Office of Information Practices may investigate, determine, and report any violation of any provision of the Information Practices Act (*Civ. Code §§ 1798-1798.78*) or any regulation adopted pursuant thereto [*Civ. Code § 1798.6(a)*]. The Office of Information Practices is to report violations of the Information Practices Act, of which it hasknowledge, to the affected agency and if the violation is not corrected within 60 days, to the Office of the Governor, the legislature and the appropriate law enforcement agency [*Civ. Code § 1798.6(b)*]. The Office of Information Practices does not have access to personal information except pursuant to the written voluntary consent of the individual to whom the information pertains [*Civ. Code § 1798.6(a)*].

[3] Mediation of Disputes

The Office of Information Practices may attempt to mediate any dispute between the agency and a complaining individual regarding the provisions of the Information Practices Act (*Civ. Code §§ 1798-1798.78*). In the event that mediation fails, the Office of Information Practices shall issue a statement of its findings and recommendations to the parties [*Civ. Code § 1798.8*].

Mediation under *Civ. Code § 1798.8* is not a precondition to an individual's use of other administrative or civil remedies provided by the Information Practices Act [*Civ. Code § 1798.8*].

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[Reserved]

§§ 429.104[Reserved]

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37-429 California Forms of Pleading and Practice--Annotated § 429.120

§ 429.120 Collection of Personal Information by Government Agencies

[1] Public Notice Regarding Record Systems

Each agency maintaining a system of records containing personal information must file with the Office of Information Practices the notice specified in *Civ. Code § 1798.10*. That portion of the notices specified in *Civ. Code § 1798.20(a)* and *(b)* serves as the public directory to agency records containing personal information. The Office of Information Practices must prescribe the form for filing and methods of updating the notices required by *Civ. Code § 1798.10* [*Civ. Code § 1798.9*]. For discussion of the additional requirement that the agency filing the notice make it available to individuals inquiring as to the existence of personal records, see *§ 429.161*.

Notices must specify each of the following [*Civ. Code § 1798.10*]:

- An index or list showing each record system by name or title.

- The procedures to be followed for an individual to gain access to, and to contest the contest of, records containing personal information. The procedures must include the name or title and business address of the agency's designated contact person for each record system.

- Each known instance during the reporting period in which personal information has been distributed by the agency or obtained by any person in a manner not in accord with law.

- Each known instance during the reporting period when access to records requested under *Civ. Code § 1798 et seq.*, or the California Public Records Act (*Gov. Code § 6250 et seq.*), has been denied, and each known instance of delay in providing access to, or copies of, records beyond the statutory limits imposed by applicable provisions of *Civ. Code § 1798 et seq.* or the Public Records Act, and the

statutory basis or other reasons for such denial or delay. In addition, on the request of an individual who is identified in a record system, or on the request of the Office of Information Practices, an agency must, with respect to any personal information in the record system, explain the authority and purpose for maintaining the information, the routine or probable disclosures of the information, and the retention and disposal policies pertaining to the information.

[2] Collection Permitted Only When Necessary

Each state agency may maintain in its records only personal information which is relevant and necessary to accomplish a purpose of the agency required or authorized by the California Constitution or statute or mandated by the federal government [*Civ. Code § 1798.14*].

[3] Collection to Be Directly From Subject When Possible

Each state agency must collect personal information to the greatest extent practicable directly from the individual who is the subject of the information rather than from another source [*Civ. Code § 1798.15*].

Whenever a state agency collects personal information, the agency must maintain the source or sources of the information, unless the source is the data subject or he or she has received a copy of the source document, including, but not limited to, the name of any source who is an individual acting in his or her own private individual capacity. If the source is an agency, government entity, or other organization, such as a corporation or association, this requirement can be met by maintaining the name of the agency, government entity, or organization, as long as the smallest reasonably identifiable unit of the agency, government entity, or organization is named [*Civ. Code § 1798.16(a)*].

The state agency must maintain the source or sources of the information in a readily accessible form so as to be able to provide it to the data subject when they inspect any record pursuant to *Civ. Code § 1798.34* (personal inspection of records) [*Civ. Code § 1798.16(c)*].

Moreover, on or after July 1, 2001, unless otherwise authorized by the Department of Information Technology, when a state agency electronically collects personal information regarding any user over the Internet as defined by *Gov. Code § 11015.5*, the agency must retain the source or sources or any intermediate form of the information created or possessed by the agency, unless the subject of the data has requested that the information be discarded or has received a copy of the source document [*Civ. Code § 1798.16(b)*]. In addition, every state agency that uses any method or data base application on the Internet to electronically collect personal information about a user must prominently display that information at least one anticipated point of communication with a potential user. The agency must include in that information a notice to the user that he or she has the option of having his or her personal information discarded without reuse or distribution [*Gov. Code § 11015.5(a)*]. *Gov. Code § 11015.5* places additional limits on state agency use and dissemination of information collected over the Internet [*see Gov. Code § 11015.5*].

However, *Civ. Code § 1798.16* does not apply if the source or sources are exempt from disclosure under the provisions of the Information Practices Act (*Civ. Code §§ 1798-1798.78*) [*Civ. Code § 1798.16(c)*].

[4] Notices to Subject When Agency Requests Information

Each agency must provide the following notice on or with any form used to collect personal information from individuals. When contact with the individual is of a regularly recurring nature, an initial notice followed by a periodic notice of not more than one-year intervals satisfies the requirement. The agency may also satisfy this requirement by notifying individuals of the availability of the notice in annual tax-related pamphlets or booklets provided for them. The notice must include all of the following [*Civ. Code § 1798.17*]:

- The name of the agency and the division within the agency requesting the information; that is requesting the information;

- The title, business address, and telephone number of the agency official who is responsible for the systems of records and who shall, on request, inform an individual regarding the location of his or her records and the categories of any persons who use the information in those records;

- The authority, whether granted by statute, regulation, or executive order which authorizes the maintenance of the information;

- With respect to each item of information, whether submission is mandatory or voluntary;

- The consequences, if any, of not providing all or any part of the requested information;

- The principal purpose or purposes within the agency for which the information is to be used;

- Any known or forseeable disclosures which may be made of the information pursuant to *Civ. Code § 1798.24(e)* or *(f)* (when information may be disclosed); and

- The individual's right of access to records containing personal information maintained by the agency.

Civ. Code § 1798.17 does not apply to any enforcement document issued by an employee of a law enforcement agency in the performance of his or her duties wherein the violator is provided an exact copy of the document, or to accident reports whereby the parties of interest may obtain a copy of the report pursuant to *Veh. Code § 20012* [*Civ. Code § 1798.17*].

The notice required by *Civ. Code § 1798.17* does not apply to agency requirements that an individual provide his or her name, identifying number, photograph, address, or similar identifying information, if such information is used by the agency only to identify and communicate with the individual. However, requirements for an individual's social security number must conform with the provisions of the Federal Privacy Act of 1974 (Pub. L. No. 93-579) [*Civ. Code § 1798.17*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.121

§ 429.121 Use of Information by Government Agency

[1] Requirement to State

Each state agency must maintain all records to the maximum extent possible, with accuracy, relevance, timeliness and completeness. However, this standard need not be met except when such records are used to make any determination about the individual [*Civ. Code § 1798.18*].

[2] Duty to Assure Accuracy and Relevance Before Disseminating

When a state agency transfers a record outside of state government, it must correct, update, withhold, or delete any portion of the record that it knows or has reason to believe is inaccurate or untimely [*Civ. Code § 1798.18*].

[3] Exemption From Liability for Subjective Personnel Assessments

A civil action shall not lie under *Civ. Code § 1798.45-1798.53* (civil remedies under Information Practices Act) based on an allegation that an opinion which is subjective in nature, as distinguished from a factual assertion, about an individual's qualifications, in connection with a personnel action concerning such an individual, was not accurate, relevant, timely or complete [*Civ. Code § 1798.50*].

[4] Responsibility for Records Maintained in Storage

Each state agency record which is accepted by the Director of General Services for storage, processing, and servicing in accordance with provisions of the State Administrative Manual for the purposes of the Information Practices Act (*Civ. Code §§ 1798-1798.78*) shall be considered to be maintained by the agency which deposited the record and shall continue to be subject to the provisions of the Information Practices Act [*Civ. Code § 1798.64(a)*].

[5] Responsibility for Historical Records in Archives

Each state agency record pertaining to an identifiable individual which was or is transferred to the State Archives as a record which has sufficient historical value to warrant its continued preservation by the California state government, prior to or after July 1, 1978, shall, for the purposes of the Information Practices Act (*Civ. Code §§ 1798-1798.78*), be considered to be maintained by the archives [*Civ. Code § 1798.64(b)*].

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§ 429.122 Individual's Right to Request Amendment of Personal Records

[1] In General

Each state agency must permit an individual to request in writing an amendment of a record and must, within 30 days after the receipt of such request [*Civ. Code § 1798.35*] do one of the following:

- Make each correction in accordance with the individual's request of any portion of a record that the individual believes is not accurate, relevant, timely, or complete and inform the individual of the corrections made in accordance with that individual's request; or

- Inform the individual of its refusal to amend the record in accordance with such individual's request, the reason for the refusal, the procedures established by the agency for the individual to request a review by the head of the agency or an official specifically designated by the head of the agency of the refusal to amend, and the name, title and business address of the reviewing official.

[2] Exemption for Record Evidencing Property Rights

Civ. Code §§ 1798.35-1798.37 (relating to amendment of records at individual's request) do not apply to any record evidencing property rights [*Civ. Code § 1798.39*].

[3] Correction of Record as Not Restoring Other Rights

When a remedy other than those provided in *Civ. Code §§ 1798.30-1798.43* (access to records and administrative remedies) [*see § 429.160* et seq.] and *Civ. Code §§ 1798.45-1798.53* (civil remedies) [*see § 429.160* et seq.] is provided by law but is not available because of lapse of time an individual may obtain a correction to a record under the Information Practices Act (*Civ. Code §§ 1798-1798.78*) but such correction shall not operate to revise or restore a right

or remedy not provided by the Information Practices Act that has been barred because of lapse of time [*Civ. Code § 1798.51*].

[4] Administrative Appeal of Refusal to Amend Records

Each agency shall permit any individual who disagrees with the refusal of the agency to amend a record to request a review of such refusal by the head of the agency or an official specifically designated by the head of the agency, and, not later than 30 days from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such review period by 30 days [*Civ. Code § 1798.36*]. The agency is required to inform the person of its procedure for requesting such review and of thename, title, and business address of the reviewing official when it informs the individual of its refusal to amend the record [*see Civ. Code § 1798.35*].

[5] Individual's Statement of Disagreement if Amendment Refused

If after review of a refusal of an individual's request to amend his or her record the reviewing official refuses to amend the record in accordance with the request, the agency shall permit the individual to file with the agency a statement of reasonable length setting out the reasons for the individual's disagreement [*Civ. Code § 1798.36*]. The agency, with respect to any disclosure containing information about which the individual has filed a statement of disagreement, shall clearly note any portion of the record which is disputed and make available copies of such individual's statement and copies of a concise statement of the reasons of the agency for not making the amendment to any person or agency to whom the disputed record has been or is disclosed [*Civ. Code § 1798.37*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.123

§ 429.123 Remedies

[1] Civil Action for Improper Maintenance of Records

An individual may bring a civil action against an agency whenever such agency (1) fails to maintain any record concerning any individual with such accuracy, relevancy, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualification, character, rights, opportunities of or benefits to the individual that may be made on the basis of such record, if, as a proximate result of such failure, a determination is made which is adverse to the individual or (2) fails to comply with any other provision of the Information Practices Act (*Civ. Code §§ 1798-1798.78*), or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual [*Civ. Code § 1798.45(b), (c)*].

In any suit brought under the provisions of *Civ. Code § 1798.45(b)* or *(c)*, the agency shall be liable to the individual in an amount equal to the sum of (1) actual damages sustained by the individual, including damages for mental suffering, and (2) the costs of the action together with reasonable attorney's fees as determined by the court [*Civ. Code § 1798.48*].

If the plaintiff seeks damages from a state agency under the Information Practices Act, the plaintiff must first comply with the claims filing requirement of the Tort Claims Act and allege such compliance in the complaint [*Bates v. Franchise Tax Bd. (2004) 124 Cal. App. 4th 367, 382-387, 21 Cal. Rptr. 3d 285* ; *see Gov. Code § 905.2*].

[2] Injunctive Relief Against State Agency

Any state agency that fails to comply with any provision of the Information Practices Act (*Civ. Code §§ 1798-1798.78*) may be enjoined by any court of competent jurisdiction. The court may make such order or judgment as may be necessary to prevent the use or employment by an agency of any practices which violate the Act [*Civ. Code § 1798.47*].

The action for injunctive relief may be prosecuted by the Attorney General, or any district attorney in this state, in the

name of the people of the State of California whether on his or her own complaint, or on the complaint of the Office of Information Practices, or of a member of the general public, or by any individual acting in his or her own behalf [*Civ. Code § 1798.47*].

[3] Remedies Nonexclusive

The rights and remedies set out in *Civ. Code §§ 1798.45-1798.53* (civil remedies for violation of Information Practices Act) shall be deemed nonexclusive and are in addition to all those rights and remedies which are otherwise available under any other provision of law [*Civ. Code § 1798.49*].

[4] Venue

An action to enforce any liability created under *Civ. Code §§ 1798.45-1798.48* (civil remedies for violation of Information Practices Act) may be brought in any court of competent jurisdiction in the county in which the complainant resides, or has his or her principal place of business, or in which the defendant's records are situated [*Civ. Code § 1798.49*].

[5] Statute of Limitations

An action to enforce any liability created under *Civ. Code §§ 1798.45-1798.48* (civil remedies for violation of Information Practices Act) may be brought within two years from the date on which the cause of action arises [*Civ. Code § 1798.49*]. *Civ. Code § 1798.49* also provides, however, that if a defendant has materially and willfully misrepresented any information required "under this section" to be disclosed to an individual who is the subject of the information and the information so misrepresented is material to the establishment of the defendant's liability to that individual "under this section," the action may be brought at any time within two years after discovery by the complainant of the misrepresentation [*Civ. Code § 1798.49*]. It should be noted that *Civ. Code § 1798.49* does not itself require the disclosure of any information or establish any liability, so the term "under this section" probably refers to the Information Practices Act as a whole, rather than merely to *Civ. Code § 1798.49*.

[6] Not Retroactive

Nothing in *Civ. Code §§ 1798.45-1798.48* (civil action for violation of Information Practices Act of 1977) shall be construed to authorize any civil action by reason of any injury sustained as the result of any informationpractice covered by the Information Practices Act prior to July 1, 1978 [*Civ. Code § 1798.49*].

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37-429 California Forms of Pleading and Practice--Annotated §§ 429.124-429.139

[Reserved]

§§ 429.124[Reserved]

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37-429 California Forms of Pleading and Practice--Annotated § 429.140

§ 429.140 Public Access to Government Records

Except as provided in *Gov. Code § 6253*, every person has a right to inspect any public record. Thus, state and local agencies must make public records open to inspection at all times during their office hours [*Gov. Code § 6253(a)*]. Unless a public record is exempt from disclosure pursuant to an express provisions of law, all state or local agencies must make public records promptly available to any person on request and payment of applicable fees [*Gov. Code § 6253(b)*].

For discussion of requests for and exemptions from disclosure under the Public Records Act, see Ch. 470C, *Public Records Act* .

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37-429 California Forms of Pleading and Practice--Annotated §§ 429.141-429.159

[Reserved]

§§ 429.141[Reserved]

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37-429 California Forms of Pleading and Practice--Annotated § 429.160

§ 429.160 Individual Access to Personal Records

Except as otherwise provided, each agency must permit any individual on request and proper identification to inspect all the personal information in any record containing personal information and maintained by reference to an identifying particular assigned to such individual within 30 days of the request for active records, and within 60 days of the request for geographically dispersed or inactive records that are in central storage. Failure to respond within these time limits is deemed denial. In addition, the individual must be permitted to inspect any personal information about himself or herself if it is maintained by reference to an identifying particular other than that of the individual, if the agency knows or should know that the information exists. The individual must also be permitted to inspect the accounting made purusant to *Civ. Code §§ 1798.25-1798.28* (accounting of disclosures) [*Civ. Code § 1798.34(a)*]. The agency must present the information in the record in a form reasonably comprehensible to the general public [*Civ. Code § 1798.34(c)*]. When an individual is entitled under the Information Practices Act (*Civ. Code §§ 1798-1798.78*) to gain access to information in a record containing personal information, such information or a true copy thereof must be made available to the individual near the residence of the individual or by mail, whenever reasonable [*Civ. Code § 1798.34(e)*].

The state agency must permit the individual and, on the individual's request, another person of the individual's own choosing to inspect all the personal information in the record and to have an exact copy made of all or any portion thereof within 15 days of such inspection. It may require the individual to furnish a written statement authorizing disclosure of such individual's record to another person of the individual's choosing [*Civ. Code § 1798.34(b)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.161

§ 429.161 Right to Inquire as to Existence of Personal Records

Each individual has the right to inquire and be notified as to whether or not the agency maintains a record about himself or herself. Inquiries shall specify the name or title of the system of records as filed under *Civ. Code § 1798.9* [*see § 429.120[1]*]. Agencies shall allow individuals to review the notices that they have submitted to the Office of Information Practices pursuant to *Civ. Code § 1798.9*, and shall take other reasonable steps to assist individuals in making their requests sufficiently specific [*Civ. Code § 1798.32*].

Any notice of the sort required by *Civ. Code § 1798.32* sent to an individual which in any way indicates that the agency maintains any record about the individual shall include the title and business address of the agency official responsible for maintaining the records, the procedures to be followed to gain access to the records, and the procedures to be followed for an individual to contest the contents of such records unless the individual has received notice from the agency during the past year [*Civ. Code § 1798.32*].

Whenever an agency is unable to access a record by reference to name only, or when access by name only would impose an unreasonable administrative burden, it may require the individual to submit such other indentifying information as will facilitate access to the record [*Civ. Code § 1798.34(d)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.162

§ 429.162 Exemptions From Personal Access Requirement

[1] Confidential Source

If information, including letters of recommendation, compiled for the purpose of determining suitability, eligibility, or qualifications for employment, advancement, renewal of appointment or promotion, status as adoptive parents, or for the receipt of state contracts, or for licensing purposes, was received with the promise or, before July 1, 1978, with the understanding that the identity of the source of the information would be held in confidence and such source is not in a supervisory position with respect to theindividual to whom the record pertains, the agency shall fully inform the individual of all personal information about the individual without identification of the source [*Civ. Code § 1798.38*].

This requirement may be carried out by providing a copy of the text of such material with only such deletions as are necessary to protect the identity of the source or by providing a comprehensive summary of the substance of the material. Whichever method is used, the agency shall insure that full disclosure is made to the subject of any personal information that could reasonably in any way reflect or convey anything detrimental, disparaging, or threatening to an individual's reputation, rights, benefits, privileges, or qualifications, or be used by an agency to make a determination that would affect an individual's rights, benefits, privileges, or qualifications. In institutions of higher education, "supervisory positions" shall not include chairpersons of academic departments [*Civ. Code § 1798.38*].

[2] Law Enforcement and Official Investigations

An agency is not required to disclose personal information to the individual to whom the information pertains, if the information is any of the following [*Civ. Code § 1798.40*]:

- Compiled for the purpose of identifying individual criminal offenders and consists only of identifying data and notations or arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status;

- Compiled for the purpose of a criminal investigation of suspected criminal activities, including report of informants and investigators, and associated with an identifiable individual; or

- Maintained for the purpose of an investigation of an individual's fitness for licensure or public employment, or of a grievance or complaint, or a suspected civil offense, so long as the information is withheld only so as not to compromise the investigation, or a related investigation.

[3] Testing and Evaluation Material

An agency is not required to disclose personal information to the individual to whom the information pertains if the information would compromise the objectivity or fairness of a competitive examination for appointment or promotion in public service, or to determine fitness for licensure, or to determine scholastic aptitude [*Civ. Code § 1798.40(e)*].

[4] Personal Information Concerning Other Persons

In disclosing information contained in a record to an individual, an agency must not disclose any personal information relating to another individual that may be contained in the record. To comply, an agency must, in disclosing information, delete from disclosure the information as needed [*Civ. Code § 1798.42*]. *Civ. Code § 1798.42* does not authorize withholding the identities of sources except as provided in *Civ. Code §§ 1798.38* and *1798.40* [*Civ. Code § 1798.42*; *see also §§ 429.162[1], 429.180[1]*].

[5] Withholding of Information Required by Statute

An agency is not required to disclose personal information to the individual to whom the information pertains, if the information is required by statute to be withheld from the individual to whom it pertains [*Civ. Code § 1798.40(h)*].

[6] Medical or Psychological Material

An agency is not required to disclose personal information to the individual to whom the information pertains, if the information pertains to the physical or psychological condition of the individual, if the agency determines that disclosure would be detrimental to the individual, although the information must be disclosed to a licensed medical practitioner or psychologist designated by the individual on the individual's written authorization [*Civ. Code § 1798.40(f)*].

[7] Verification of Health Care Claims

An agency is not required to disclose personal information to the individual to whom the information pertains, if the information relates to the settlement of claims for work related illnesses or injuries and is maintained exclusively by the State Compensation Insurance Fund [*Civ. Code § 1798.40(g)*].

[8] Access to Information Allowed by Other Law

Civ. Code § 1798.40 is not to be construed to deny an individual access to information relating to him or her if access is allowed by another statute or decisional law of California [*Civ. Code § 1798.40*].

[9] Deletion of Exempt Information From Disclosure

In disclosing information contained in a record to an individual, an agency need not disclose any information pertaining to that individual that is exempt under *Civ. Code § 1798.40*. To comply, an agency may, in disclosing personal information contained in a record, delete from the disclosure any exempt information [*Civ. Code § 1798.43*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.163

§ 429.163 Exemptions From Duty to Disclose Under Public Records Act Not Applicable to Individual's Access to Personal Records

The Information Practices Act (*Civ. Code §§ 1798-1798.78*) is to be construed to supercede any other provision of state law, including Gov.Code § 6253.5 or any exemptions in *Gov. Code §§ 6254* and *6255* (exemptions to government's duty to allow public access to public records), which authorizes any agency to withhold from an individual any record containing personal information which is otherwise accessible under the provisions of the Information Practices Act [*Civ. Code § 1798.70*].

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§ 429.164 Limited to Natural Persons

Civ. Code §§ 1798.30-1798.43 (access to and correction of personal records) applies to the rights of an "individual" to whom personal information pertains and not to the authority or right of any other person, agency, other state government entity, or government entity to obtain such information [*Civ. Code § 1798.44*; *see Civ. Code § 1798.3(d)* (defining "individual" as a natural person)].

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37-429 California Forms of Pleading and Practice--Annotated § 429.165

§ 429.165 Duty to Establish Procedures for Obtaining Access to Records

Each state agency shall either adopt regulations or publish guidelines specifying procedures to be followed in order to fully implement each of the rights set out in *Civ. Code § 1798.30-1798.43* (access to and correction of personal records) [*Civ. Code § 1798.30*].

In implementing the right conferred by *Civ. Code § 1798.32* (discussed in *§ 429.161*), a state agency may specify in its rules or regulations reasonable times, places, and requirements for identifying an individual who requests access to a record, and for disclosing the contents of a record [*Civ. Code § 1798.32*].

Each state agency may establish fees to be charged, if any, to an individual for making copies of a record. Such fees shall exclude the cost of any search for and review of the records, and shall not exceed ten cents ($0.10) per page, unless the agency fee for copying is established by statute [*Civ. Code § 1798.33*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.166

§ 429.166 Remedies for Refusal of Access

An individual may bring a civil action against an agency whenever the agency refuses to comply with an individual's lawful request to inspect pursuant to *Civ. Code § 1798.34(a)* [*Civ. Code § 1798.45(a)*]. In any suit brought under *Civ. Code § 1798.45(a)* the court may enjoin the agency from withholding the records and order the production to the complainant of any records improperly withheld from the complainant. The court is to determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld as being exempt from the individual's right of access. The burden is on the agency to sustain its action [*Civ. Code § 1798.46(a)*].

For a full discussion of remedies and penalties established under California's Information Practices Act (*Civ. Code §§ 1798-1798.78*), see *§ 429.123*.

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[Reserved]

§§ 429.167[Reserved]

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V. Right To Privacy Regarding Records

37-429 California Forms of Pleading and Practice--Annotated § 429.180

§ 429.180 Disclosure of Personal Information Contained in Government Records

[1] Qualified Prohibition

No agency may disclose any personal or confidential information unless the disclosure of such information is included among the exceptions discussed in *§ 429.180[8]* [*see Civ. Code § 1798.24*].

Each state department and state agency must enact and maintain a permanent privacy policy that includes the following principles [*Gov. Code § 11019.9*]:

- Personally identifiable information is only obtained through lawful means;
- The purposes for which personally identifiable data are collected are specified at or prior to the time of collection;
- Personal data is not disclosed other than for specified purposes;
- Personal data collected is relevant to the purposes for which it is collected;
- The general means by which personal data is protected against loss, unauthorized access, use modification, or disclosure is posted unless it would compromise legitimate state department or state agency objectives or law enforcement purposes; and
- Each department or agency designates a position within the department or agency, the duties of which include responsibility for the privacy policy within that department or agency.

[2] Personal Information Defined

The term "personal information" means any information in any record about an individual that is maintained by an agency, including, but not limited to, his or her education, financial transactions, medical or employment history. It does not mean information found to be confidential or nonpersonal under *Civ. Code § 1798.3(a)* or *(c)* [*Civ. Code § 1798.3(b)*].

[3] Nonpersonal Information Defined

The term "nonpersonal information" means all of the following [*Civ. Code § 1798.3(c)*]:

- Information consisting only of names, addresses, telephone numbers and other limited factual data, which could not, in any reasonable way, (1) reflect or convey anything detrimental, disparaging, or threatening to an individual's reputation, rights, benefits, privileges or qualifications, or (2) be used by an agency to make a determination that would affect an individual's rights, benefits, privileges, or qualifications;

- An agency telephone book or directory which is used exclusively for telephone directory information;

- Any card catalog of any library, or the contents of any book listed within such card catalog;

- Any mailing list which is used exclusively for the purpose of mailing agency information;

- Records required by law to be maintained and used solely as a system of statistical records, but only if such records are maintained for statistical research or reporting purposes only and are not used in whole or in part in making any determination about an identifiable individual; and

- Records to which the individual has the right of examination pursuant to *Penal Code §§ 11120-11127* (examination of criminal records).

[4] Mailing Lists

An individual's name and address may not be distributed for commercial purposes, sold, or rented by an agency unless such ac tion is specifically authorized by law [*Civ. Code § 1798.60*]. Unlike the general prohibition on public disclosure of personal information [*see § 429.180[1]*], *Civ. Code § 1798.60* supersedes a state agency's duty to allow public access to public records [*see Civ. Code § 1798.75*; *see also § 429.140*].

Nothing in the Information Practices Act (*Civ. Code §§ 1798-1798.78*) shall prohibit the release of only names and addresses of persons possessing licenses to engage in professional occupations [*Civ. Code § 1798.61(a)*]. Nor does anything in that Act prohibit the release of only names and addresses of persons applying for licenses to engage in professional occupations for the sole purpose of providing those persons with informational materials relating to available professional educational materials or courses [*Civ. Code § 1798.61(b)*].

The State Board of Equalization may not release the names and addresses of individuals who are registered with, or hold licenses or permits issued by, the State Board of Equalization, except to the extent necessary to verify resale certificates or to administer the tax and fee provisions of the Revenue and Taxation Code [*Civ. Code § 1798.69(a)*]. However, this does not prohibit the State Board of Equalization from releasing any data collected by the board to any federal or state agency, or local government, if that release is otherwise authorized by law. Nor does it limit the use of that data by the agency to which it was released [*Civ. Code § 1798.69(b)*]. *Civ. Code § 1798.69* supersedes the Public Records Act [*see Civ. Code § 1798.75*].

On written request of any individual, any agency which maintains a mailing list shall remove the individual's name and address from such list, except that such agency need not remove the individual's name if such name is exclusively used by the agency to directly contact the individual [*Civ. Code § 1798.62*].

[5] Duty to Maintain Confidentiality

Each state agency must establish appropriate and reasonable administrative, technical, and physical safeguards to ensure the security and confidentiality of records, and to protect against anticipated threats or hazards to their security or integrity which could result in any injury [*Civ. Code § 1798.21*].

[6] Records in Storage

The state Director of General Services shall not disclose a record which is accepted for storage, processing, and servicing in accordance with provisions of the State Administrative Manual except to the agency which maintains the record, or pursuant to rules established by such agency which are not insconsistent with the provisions of the Information Practices Act (*Civ. Code §§ 1798-1798.78*) [*Civ. Code § 1798.64(a)*].

For a discussion of the law regarding which agency is deemed to be maintaining records accepted for storage, processing and servicing, see *§ 429.121[4]*.

[7] Prohibition of Disclosure as Subordinate to Public Disclosure Requirement

The prohibition of *Civ. Code § 1798.24* against disclosure of personal records by an agency [*see § 429.180*] specifically excepts disclosures made pursuant to *Gov. Code § 6250 et seq.* (Public Records Act), which is discussed in *§ 429.140* [*Civ. Code § 1798.24(g)*]. Furthermore, *Civ. Code § 1798.75* provides that the Information Practices Act (*Civ. Code §§ 1798-1798.78*) shall not be deemed to supersede the Public Records Act except as to *Civ. Code § 1798.60* [*see § 429.180[4]*], *Civ. Code § 1798.69* [*see § 429.180[4]*], and *Civ. Code § 1798.70* [*see § 429.163*].

Thus, for the prohibition on disclosure set out in *Civ. Code § 1798.24* to apply, the information must be not only personal as defined in *Civ. Code § 1798.3(a)*, but must also fit into one of the exemptions to the public disclosure requirement of the Public Records Act (*Gov. Code § 6250 et seq.*), which are set out in *Gov. Code §§ 6254, 6255*. Exemptions to the Public Records Act's disclosure requirement that are relevant to thedisclosure of personal information include those set out in *Gov. Code § 6254(c)* (personnel, medical, and similar records, when disclosure would constitute an unwarranted invasion of personal privacy), *Gov. Code § 6254(f)* (certain types of information maintained in connection with law enforcement or other official investigation), *Gov. Code § 6254(d), (i), (n)*, and *(o)* (certain types of financial information concerning individuals), and *Evid. Code § 1040* (with *Gov. Code § 6254(k)* conditionally exempts information which was obtained in confidence). For a full discussion of the exemptions to the Public Records Act's public disclosure requirement, see Ch. 470C, *Public Records Act* .

[8] Permissible Disclosure of Personal Information

[a] Pursuant to Subject's Request or Consent

Civ. Code § 1798.24, which prohibits disclosure of personal records by an agency [*see § 429.180[1]*], allows the disclosure of information in the following situations [*Civ. Code § 1798.24(a)-(c)*]:

- To the individual to whom the information pertains;

- With the prior written voluntary consent of the individual to whom the record pertains, but only if such consent has been obtained not more than 30 days before the disclosure, or in the time limit specified by the individual in the written consent; and

- To the duly appointed guardian or conservator of the individual or a person representing the individual provided that it can be proven with reasonable certainty through the possession of agency forms, documents, or correspondence that such person is the authorized representative of the individual to whom the information pertains.

[b] Intra-Agency or Other Routine Use

Civ. Code § 1798.24, which prohibits disclosure of personal records by an agency [*see § 429.180[1]*], specifically allows disclosures made in the following cases:

- To those officers, employees, attorneys, agents, or volunteers of the agency which has custody of the information if such disclosure is relevant and necessary in the ordinary course of the performance of their official duties and is related to the purpose for which the information was acquired [*Civ. Code § 1798.24(d)*];

- To a person, or to another agency when the transfer is necessary for the transferee agency to perform its constitutional or statutory duties, and such use is compatible with a purpose for which the information was collected and such use or transfer is or accounted for in accordance with *Civ. Code § 1798.25*. With respect to information transferred from a law enforcement or regulatory agency, or information transferred to another law enforcement or regulatory agency, a use is compatible if the use of the information requested is needed in an investigation of unlawful activity under the jurisdiction of the requesting agency or for licensing, certification, or regulatory purposes by that agency [*Civ. Code § 1798.24(e)*]; and

- To another person or government organization to the extent necessary to obtain information from such person or government organization as necessary for an investigation by the agency of a failure to comply with a specific state law which the agency is responsible for enforcing [*Civ. Code § 1798.24(p)*].

[c] Statistical Reports and Archives

Civ. Code § 1798.24, which prohibits disclosure of personal records by an agency [*see § 429.180[1]*], specifically allows disclosures made in the following cases:

- To a person who has provided the agency with advance adequate written assurance that the information will be used solely for statistical research or reporting purposes, but only if the information to be disclosed is in a form that will not identify any individual [*Civ. Code § 1798.24(h)*];

- To the University of Calfornia or a nonprofit educational institution conducting scientific research, provided the request for information is approved by the Committee for the Protection of Human Subjects of the California Health and Human Services Agency, following satisfaction of criteria specified in the statute [*Civ. Code § 1798.24(t)*]; and

- To the State Archives the State of California as a record which has sufficient historical or other value to warrant its continued preservation by the California state government, or for evaluation by the Director of General Services or his or her designee to determine whether the record has further administrative, legal or fiscal value [*Civ. Code § 1798.24(j)*].

[d] Law Enforcement, Licensing, Certification, and Regulation

Civ. Code § 1798.24, which prohibits disclosure of personal records by an agency [*see § 429.180[1]*], specifically allows disclosure made to a law enforcement or regulatory agency when required for an investigation of unlawful activity or for licensing, certification, or regulatory purposes, unless the disclosure is otherwise prohibited by law [*Civ. Code § 1798.24(o)*].

[e] Health and Safety

Civ. Code § 1798.24, which prohibits disclosure of personal records by an agency (*see § 429.180*), specifically allows disclosures made pursuant to a determination by the agency which maintains information that compelling circumstances exist which affect the health or safety of an individual, if on such disclosure notification is transmitted to the individual towhom the information pertains at his or her last known address. Disclosure may not be made if it is in conflict with other state or federal law [*Civ. Code § 1798.24(i)*].

[f] Emergency Medical Services

When a prehospital emergency medical care person has been exposed to a person afflicted with a disease or condition that is reportable pursuant to *Health & Safety Code § 1797.188* and *17* Cal. Code Reg. § 2500, the county health officer must notify that person, but must not disclose the name of the patient or other identifying characteristics [*Health & Safety Code § 1797.189(c)*]. Moreover, nothing in *Health & Safety Code § 1797.189* authorizes further disclosure of confidential medical information by the chief medical examiner-coroner or by any of the prehospital emergency medical care personnel described therein except as otherwise authorized by law [*Health & Safety Code § 1797.189(c)*; *see Health & Safety Code §§ 1797-1797.189* (Emergency Medical Services System and Prehospital Emergency Medical Care Personnel Act)].

[g] To Legislative Bodies

Civ. Code § 1798.24, which prohibits disclosure of personal records by an agency (*see § 429.180*), specifically allows disclosures made to a committee of the legislature or to a Member of the legislature, or his or her staff when authorized in writing by the Member, when such Member has permission to obtain the information from the individual to whom it pertains or when the Member provides reasonable assurance that he or she is acting on behalf of the individual [*Civ. Code § 1798.24(s)*].

[h] Verification and Payment of Health Care Service Claims

Civ. Code § 1798.24, which prohibits disclosure of personal records by a state agency (*see § 429.180*), specifically allows disclosure for the sole purpose of verifying and paying government health care service claims made pursuant to *Welf. & Inst. Code §§ 10000-18984* [*Civ. Code § 1798.24(n)*].

[i] Department of Motor Vehicles Records

Civ. Code § 1798.24, which prohibits disclosure of personal records by an agency (*see § 429.180*), specifically allows disclosure pursuant to *Veh. Code §§ 1800-1819* which govern records of the Department of Motor Vehicles [*Civ. Code § 1798.24(m)*]. However, under *Veh. Code § 1808.5* (records relating to physical and mental condition as confidential) and under the protective provisions of *Civ. Code §§ 1798-1798.78*, fingerprint records of the Department of Motor Vehicles may not be disclosed to third parties for purposes unrelated to motor vehicle safety because a fingerprint clearly relates to the "physical condition" of the applicant [*Perkey v. Department of Motor Vehicles (1986) 42 Cal. 3d 185, 194, 228 Cal. Rptr. 169, 721 P.2d 50]* .

[j] Disclosures Required by Law or Legal Process

Civ. Code § 1798.24, which prohibits disclosure of personal records by an agency [*see § 429.180[1]*], specifically

allows disclosures in the following cases:

- To a government entity when required by state or federal law [*Civ. Code § 1798.24(f)*];

- To any person pursuant to a subpena, court order, or other compulsory legal process if, before disclosure, the agency reasonably attempts to notify the individual to whom the record per tains, and if such notification is not prohibited by law [*Civ. Code § 1798.24(k)*]; and

- To any person pursuant to a search warrant [*Civ. Code § 1798.24(l)*].

Disclosures that are required by the Public Records Act (*Gov. Code § 6250 et seq.*) are exempt from the prohibition of disclosure set out in *Civ. Code § 1798.24* [*Civ. Code § 1798.24(g)*]. For a full discussion of the relationship between the public disclosure requirements of the Public Records Act and the disclosure prohibition of *Civ. Code § 1798.24*, see Ch. 470C, *Public Records Act* .

[k] Disclosure to Adopted Persons

Civ. Code § 1798.24, which prohibits disclosure of personal records by an agency (*see § 429.180*), specifically allows disclosures when the disclosure is to an adopted person and is limited to general background information pertaining to the adopted person's natural parents, provided that such information does not include or reveal the identity of the natural parents [*Civ. Code § 1798.24(f)*].

Civ. Code § 1798.24 also allows disclosure to a child or a grandchild of an adopted person when the disclosure is limited to medically necessary information pertaining to the adopted person's natural parents. However, the information, or the process for obtaining the information, may not include or reveal the identity of the natural parents. The State Department of Social Services shall adopt regulations governing the release of information pursuant to *Civ. Code § 1798.24(s)* by July 1, 1985. The regulations shall require licensed adoption agencies to provide the same services provided by the department as established by this subdivision [*Civ. Code § 1798.24(r)*].

[l] Disclosure to Insurers

Civ. Code § 1798.24, which prohibits disclosure of personal records by an agency [*see § 429.180[1]*], specifically allows disclosures to an insurerif authorized by *Veh. Code §§ 10900-10905* (Motor Vehicle Theft and Motor Vehicle Insurance Fraud Reporting Act) [*Civ. Code § 1798.24(u)*]. However, *Veh. Code §§ 10900-10905* have been repealed, and replaced by *Ins. Code §§ 1874-1874.4* (Motor Vehicle Theft and Motor Vehicle Insurance Fraud Reporting Act) [*see* Stats. 1989, ch. 1119, § 3].

[9] Accounting of Disclosures

Each agency must keep an accurate accounting of the date, nature, and purpose of each disclosure of a record made pursuant to *Civ. Code § 1798.24(i)* (information relating to health and safety of subject), *Civ. Code § 1798.24(k)* (pursuant to compulsory process), *Civ. Code § 1798.24(l)* (pursuant to search warrant), *Civ. Code § 1798.24(o)* (to law enforcement agency), or *Civ. Code § 1798.24(p)* (interagency disclosure in order to obtain information). Such accounting is also required for disclosures made under *Civ. Code § 1798.24(e)* (interagency disclosure for routine use) or *Civ. Code § 1798.24(f)* (disclosure to government entity required by law) unless notice of the type of disclosure has been provided pursuant to the provisions of *Civ. Code §§ 1798.9* and *1798.10* (public notice by agency maintaining records). The accounting must also include the name, title, and business address of the person or agency to whom the disclosure was made. For the purpose of an accounting of a disclosure made under *Civ. Code § 1798.24(o)*, it is sufficient for a law enforcement or regulatory agency to record the date of disclosure, the law enforcement or regulatory agency requesting the disclosure, and whether the purpose of the disclosure is for an investigation of unlawful activity

under the jurisdiction of the requesting agency, or for licensing, certification, or regulatory purposes by that agency [*Civ. Code § 1798.25*]. Routine disclosures of information pertaining to crimes, offenders, and suspected offenders to law enforcement agencies of federal, state, and local government are deemed to be disclosures pursuant to *Civ. Code § 1798.24(e)* for the purpose of meeting the requirement [*Civ. Code § 1798.25*]. For a discussion of *Civ. Code § 1798.24(e), (f), (i), (k), (l), (o),* and *(p),* see *§ 429.180[8]*.

Each state agency must retain the accounting made pursuant to *Civ. Code § 1798.25* for at least three years after the disclosure for which the accounting is made, or until the record is destroyed, whichever is shorter. Nothing in *Civ. Code § 1798.27* may be construed to require retention of the original documents for a three-year period, providing that the state agency can otherwise comply with the requirements of *Civ. Code § 1798.27* [*Civ. Code § 1798.27*].

[10] Remedies for Improper Disclosure of Personal Information

[a] Actions Against Agency

For a full discussion of remedies available against an agency for violations of the Information Practices Act (*Civ. Code §§ 1798-1798.78*), see *§ 429.123*.

[b] Civil Action Against Person Not Employed by State or Local Agency

Any person, other than an employee of the state or of a local government agency acting solely in his or her official capacity, who intentionally discloses information, not otherwise public, which they know or should reasonably know was obtained from personal information maintained by a state agency or from "records" within a "system of records" (as those terms are defined by the Federal Privacy Act of 1974 (Pub. L. No. 93-579; *5 U.S.C.S. § 552a*)) maintained by a federal government agency, is subject to a civil action, for invasion of privacy, by the individual to whom the information pertains [*Civ. Code § 1798.53*].

In any successful action under *Civ. Code § 1798.53*, the complainant, in addition to any special or general damages awarded, shall be awarded a minimum of $2,500 in exemplary damages as well as attorneys fees and other litigation costs reasonably incurred in the suit [*Civ. Code § 1798.53*].

The right, remedy, and cause of action set out in *Civ. Code § 1798.53* is nonexclusive and is in addition to all other rights, remedies, and causes of action for invasion of privacy, inherent in *Cal. Const. art. I, § 1* [*Civ. Code § 1798.53*]. Constitutional defenses apply to actions for invasion of privacy under *Civ. Code § 1798.53* [*Alim v. Superior Court (1986) 185 Cal. App. 3d 144, 149-150, 229 Cal. Rptr. 599* .

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37-429 California Forms of Pleading and Practice--Annotated § 429.181

§ 429.181 Disclosure of Breach of Data Security Regarding Personal Information

[1] Notification by Agency Owning or Licensing Data

Beginning July 1, 2003, due to concerns regarding the increased risk of identity theft, consumers must be notified of breaches of the security of data systems containing certain personal information [*Civ. Code § 1798.29(b)*].

An agency that owns or licenses computerized data that includes personal information must disclose any breach of the security of the system, following discovery or notification of the breach in the security of the data, to any resident of California whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person. The disclosure must be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement [*Civ. Code § 1798.29(a)*]. Any agency that maintains computerized data that includes personal information that the agency does not own must notify the owner or licensee of the information of any breach of the security of the data immediately following discovery of the breach, if the personal information was, or is reasonably believed to have been, acquired by an unauthorized person [*Civ. Code § 1798.29(b)*].

This notification may be delayed if a law enforcement agency determines that notification will impede a criminal investigation. Notification must then be made after the law enforcement agency determines that it will not compromise the investigation [*Civ. Code § 1798.29(c)*].

[2] Definitions

"Breach of the security of the system" means unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information maintained by the agency. Good faith acquisition of personal information by an employee or agent of the agency for the purposes of the agency is not a breach of the security of the system, if the personal information is not used for or subject to further unauthorized disclosure [*Civ. Code § 1798.29(d)*].

"Personal information" means an individual's first name or first initial and last name in combination with any one or more of the following data elements, if either the name or the data elements are not encrypted: social security number; driver's license number or California Identification Card number; account number, credit car, or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account; medical information; or health insurance information [*Civ. Code § 1798.29(e)*]. "Personal information" does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records [*Civ. Code § 1798.29(f)(1)*]. "Medical information" means any information regarding an individual's medical history, mental or physical condition, or medical treatment or diagnosis by a health care professional [*Civ. Code § 1798.29(f)(2)*]. "Health insurance information" means an individual's health insurance policy number or subscriber identification number, any unique identifier used by a health insurer to identify the individual, or any information in an individual's application and claims history, including any appeals records [*Civ. Code § 1798.29(f)(3)*].

[3] Methods of Providing Notice

Notice may be provided by any of the following methods: (1) written notice; (2) electronic notice, if it is consistent with the provisions regarding electronic records and signatures set forth in *15 U.S.C.S. § 7001*; or *(3)* substitute notice, if the agency demonstrates that the cost of providing notice would exceed two hundred fifty thousand dollars ($250,000), that the affected class of persons exceeds 500,000, or that the agency does not have sufficient contact information. Substitute notice consists of all of the following [*Civ. Code § 1798.29(g)*]:

- E-mail notice, if the agency has an e-mail address for the persons.

- Conspicuous posting of the notice on the Web site or Web page of the agency, if the agency maintains one.

- Notification to major statewide media.

However, an agency that maintains its own notification procedures as part of an information security policy for the treatment of personal information, and is otherwise consistent with the timing requirements of these provisions, is deemed to be in compliance with the notification requirements of these provisions, if the agency provides notification in accordance with its own policies in the event of a breach of security of the system [*Civ. Code § 1798.29(h)*].

[4] Remedies for Violation

Any person injured by a violation of any of these provisions may bring a civil action to recover damages [*Civ. Code § 1798.84*]. Any business that fails to comply with these provisions may be enjoined by any court of competent jurisdiction [*Civ. Code § 1798.84*].

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[Reserved]

§§ 429.182[Reserved]

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37-429 California Forms of Pleading and Practice--Annotated § 429.200

§ 429.200 Disclosure of Medical Information by Health Care Provider, Health Care Service Plan, or Contractor

[1] Authorization by Patient Generally Required

No provider of health care, health care service plan, or contractor may disclose medical information regarding a patient of the provider without first obtaining an authorization except as provided in *Civ. Code § 56.10(b)* or *(c)* [*Civ. Code § 56.10(a)*].

For discussion of disclosure of medical information in connection with a settlement or compromise of a medical malpractice case, see Ch. 415, *Physicians: Medical Malpractice* .

[2] Definitions

A "provider of health care" means the following [*Civ. Code § 56.05(j)*]:

- Any person licensed or certified pursuant to *Bus. & Prof. Code §§ 500-4998.7* (provisions regarding healing arts);

- Any person licensed pursuant to the Osteopathic Initiative Act (uncodified but set out under *Bus. & Prof. Code §§ 3600-1*-3600-5) or the Chiropractic Initiative Act (uncodified but set out under *Bus. & Prof. Code §§ 1000-1*-1000-19);

- Any person certified pursuant to *Health & Safety Code §§ 1797-1799.110* (provisions regarding emergency medical services); and

- Any clinic, health dispensary, or health facility licensed pursuant to *Health & Safety Code § 1200 et seq.* (provisions regarding licensing generally).

"Contractor" means any person or entity that is a medical group, independent practice association, pharmaceutical

benefits manager, or a medical service organization, and is not a health care service plan or provider of health care [*Civ. Code § 56.05(c)*].

"Health care service plan" means any entity regulated pursuant to the Knox-Keene Health Care Service Plan Act of 1975, pursuant to *Health & Safety Code§§ 1340-1399.64* (provisions regarding health care service plans) [*Civ. Code § 56.05(d)*].

Also, any business organized for the primary purpose of maintaining medical information in order to make the information available to the patient or to a provider of health care at the request of the patient or a provider of health care, for purposes of diagnosis or treatment of the patient, is deemed a provider of health care [*Civ. Code § 56.06*].

"Medical information" means any individually identifiable information in possession of or derived from a health care provider, health care service plan, or contractor regarding a patient's medical history, mental or physical condition, or treatment [*Civ. Code § 56.05(g)*].

"Patient" means any natural person, whether or not still living, who received health care services from a provider of health care and to whom medical information pertains [*Civ. Code § 56.05(h)*].

"Authorization" means permission granted in accordance with *Civ. Code § 56.11* or *56.21* for the disclosure of medical information [*Civ. Code § 56.05(a)*].

[3] Mandatory Disclosure

A health care provider, health care service plan, or contractor must disclose medical information if the disclosure is compelled by any of the following [*Civ. Code § 56.10(b)*]:

- By a court pursuant to an order of that court;

- By a board, commission, or administrative agency for purposes of adjudication pursuant to its lawful authority;

- By a party to a proceeding before a court or administrative agency pursuant to a subpoena, subpoena duces tecum, notice to appear served pursuant to *Code Civ. Proc. § 1987* (notice to appear in lieu of subpoena), or any provision authorizing discovery before a court or administrative agency;

- By a board, commission, or administrative agency pursuant to an investigative subpoena issued under *Gov. Code §§ 11180-11191* (investigations and hearing);

- By an arbitrator or arbitration panel, when arbitration is lawfully requested by either party, pursuant to a subpoena duces tecum issued under *Code Civ. Proc. § 1282.6* (subpoena in arbitration proceedings), or any other provision authorizing discovery in a proceeding before an arbitrator or arbitration panel;

- By a search warrant lawfully issued to a government law enforcement agency;

- By the patient or patient's representative pursuant to *Health & Safety Code § 123100 et seq.*;

- By a coroner, when requested in the course of an investigation by the coroner's office for the purpose of identifying the decedent or locating next of kin, or when investigating deaths that may involve public health concerns, organ or tissue donation, child abuse, elder abuse, suicides, poisonings, accidents, sudden infant death, suspicious deaths, unknown deaths, or criminal deaths, or when otherwise

authorized by the decedent's representative (medical information requested by the coroner is limited to information regarding the patient who is the decedent and who is the subject of the investigation and must be disclosed to the coroner without delay on request); or

- If otherwise specifically required by law.

[4] Discretionary Disclosure

A health care provider or health care service plan, may disclose medical information to the following:

- Providers of health care or other health care professionals or facilities for purposes of diagnosis or treatment of the patient, including communication of patient information in certain medical-emergency situations [*Civ. Code § 56.10(c)(1)*].

- An insurer, employer, health care service plan, hospital service plan, employee benefit plan, government authority, or any other person or entity responsible for paying for health care services rendered to the patient, to the extent necessary to allow responsibility for payment to be determined and payment to be made, including disclosure to assist another provider in obtaining payment for services. If the patient is, by reason of a comatose or other disabling medical condition, unable to consent to the disclosure of medical information and no other arrangements have been made to pay for the health care services being rendered to the patient, the information may be disclosed to a government authority to the extent necessary to determine the patient's eligibility for payment, and to obtain payment, under a government program for health care services provided to the patient. The information may also be disclosed to another health care provider or health care service plan as necessary to assist the other health care provider or health service plan in obtaining payment for health care services rendered by that provider to the patient [*Civ. Code § 56.10(c)(2)*; *see Colleen M. v. Fertility & Surgical Assocs. of Thousand Oaks (2005) 132 Cal. App. 4th 1466, 1477, 34 Cal. Rptr. 3d 439* (disclosure to person whose credit card was used to pay for another person's medical charges was permitted under *Civ. Code § 56.10(c)(2)* to ascertain whether cardholder agreed to pay for those particular services)].

- Any person or entity that provides billing, claims management, medical-data processing, or other administrative services for providers, or an insurer, employer, health care service plan, hospital service plan, employee benefit plan, government authority, or any other person or entity responsible for paying for health care services rendered to the patient, if not violative of *Civ. Code §§ 56-56.37* [*Civ. Code § 56.10(c)(3)*].

- Organized committees and agents of professional societies or of medical staffs of licensed hospitals, or licensed health care service plans, or professional-standards review organizations, or utilization and certain quality-control peer-review organizations, or persons or organizations insuring, responsible for, or defending professional liability that a provider may incur, if relevant to a review by certain entities of the competence or qualifications of health care professionals, or to the review of health care services with respect to medical necessity, level or quality of care, or justification of charges [*Civ. Code § 56.10(c)(4)*]. Under this provision, ex parte discussions concerning the medical condition of a patient who is the plaintiff in a medical malpractice action, carried on between the plaintiff's treating physician and the defendant's insurance carrier, do not violate the Act [*Heller v. Norcal Mut. Ins. Co. (1994) 8 Cal. 4th 30, 38-42, 32 Cal. Rptr. 2d 200, 876 P.2d 999]* . As a potential litigant in a malpractice action and as a provider who "may incur" malpractice liability, a physician is permitted to discuss a plaintiff's medical condition with a professional liability insurer under *Civ. Code § 56.10(c)(4)* [*Heller v. Norcal Mut. Ins. Co. (1994) 8 Cal. 4th 30, 39, 32 Cal. Rptr. 2d 200, 876 P.2d 999]* . Similarly, a physician facing a malpractice lawsuit may turn over the complaining patient's medical records to the physician's attorneys

for review without violating these provisions, even if parts of the records may not be relevant to the particular malpractice claim [*California Consumer Health Care Council v. Kaiser Found. Health Plan, Inc. (2006) 142 Cal. App. 4th 21, 28-30, 47 Cal. Rptr. 3d 593]* .

- The county coroner, in the course of an investigation by the coroner's office, if requested for all purposes not included in *Civ. Code § 56.10(b)(8)* [*Civ. Code § 56.10(c)(6)*].

- Public agencies, clinical investigators, health care research organizations, and accredited public or private nonprofit educational or health care institutions for bona fide research purposes, except that further disclosure by the recipient is prohibited if it would in any way permit identification of the patient [*Civ. Code § 56.10(c)(7)*].

- A sponsor, insurer, or administrator of a group or individual insured or uninsured plan or policy under which the patient seeks coverage or benefits, if the information was created by the health care provider as the result of services conducted at the specific prior written request and expense of the sponsor, insurer, or administrator for the purpose of evaluating the application for coverage or benefits, unless the provider is notified in writing of an agreement by the sponsor, insurer, or administrator to the contrary [*Civ. Code § 56.10(c)(9)*].

- A group-practice prepayment health care service plan by providers that contract with the plan. The information may be transferred among providers that contract with the plan, for the purpose of administering the plan; it may not otherwise be disclosed by a health care service plan except in accordance with the provisions of *Civ. Code §§ 56-56.37* [*Civ. Code § 56.10(c)(10)*].

- A tissue bank processing the tissue of a decedent for transplantation into the body of another person, but only with respect to the donating decedent, for the purpose of aiding the transplant [*Civ. Code § 56.10(c)(13)*; *see* Health & Safety Code § 635 (definitions of "tissue bank" and "tissue")].

A health care provider, service plan, or contractor may also disclose to a family member, another relative, a domestic partner, or a close personal friend of the patient, or to any other person identified by the patient, medical information directly relevant to that person's involvement with the patient's care or payment related to the patient's care [*Civ. Code § 56.1007(a)*]. In addition, a health care provider, service plan, or contractor may use or disclose medical information to notify, or assist in the notification of, any of those persons responsible for the care of the patient of the patient's location, general condition, or death [*Civ. Code § 56.1007(b)*; *see also Civ. Code § 56.1007(e)* (disclosure to assist in disaster relief efforts permitted)]. However, if the patient is present or otherwise available prior to this type of disclosure, and the patient has the capacity to make health care decisions, disclosure may only be made if one of the following conditions is satisfied [*Civ. Code § 56.1007(c)*; *see also Civ. Code § 56.1007(c)(2)* (psychotherapist must comply with one of first two conditions before disclosure)]:

- The patient agrees to the disclosure.

- The patient has been provided an opportunity to object to the disclosure and does not do so.

- The health care provider, service plan, or contractor, based on the exercise of professional judgment, reasonably infers from the circumstances that the patient does not object to the disclosure.

If the patient is not present, or the opportunity to agree or object to the use or disclosure cannot practicably be provided because of the patient's incapacity or an emergency circumstance, the provider, service plan, or contractor may, in the exercise of professional judgment, determine whether the disclosure is in the best interests of the patient and, if so, may then disclose only medical information that is directly relevant to the person's involvement with the patient's health care

[*Civ. Code § 56.1007(d)*].

A provider of health care may also disclose medical information relevant to a patient's condition, care, and treatment to a probate court investigator in the course of any investigation required or authorized in a conservatorship proceeding under the Guardianship-Conservatorship Law, as defined in *Prob. Code § 1400*, or to a probate court investigator, probation officer, or domestic relations investigator engaged in determining the need for an initial guardianship or continuation of an existing guardianship [*Civ. Code § 56.10(c)(12)*].

The information in the possession of any provider of health care may be reviewed by any private or public body responsible for licensing or accrediting the health care provider, except that patient-identifying information may not be removed from the premises unless permitted or required by law [*Civ. Code § 56.10(c)(5)*].

In addition, a provider of health care that has created medical information as a resultof employment-related health care services to an employee conducted at the specific prior written request and expense of the employer may disclose to the employee's employer that part of the information that [*Civ. Code § 56.10(c)(8)*]:

- Is relevant in a lawsuit, arbitration, grievance, or other claim or challenge to which the employer and the employee are parties and in which the patient has placed in issue his or her medical history, mental or physical condition, or treatment, provided it may only be used or disclosed in connection with that proceeding.

- Describes functional limitations of the patient that may entitle the patient to leave from work for medical reasons or limit the patient's fitness to perform his or her present employment, provided that no statement of medical cause is included in the information disclosed. The fact that an employer employs its own expert to examine an employee does not entitle it to a full report of the expert's findings and recommendations when determining an employee's eligibility for disability leave [*Pettus v. Cole (1996) 49 Cal. App. 4th 402, 433, 57 Cal.Rptr. 2d 46* (psychiatrists' disclosures to employer regarding employee's hostility toward company and coworker, drinking habits, and other details about his personal life as well beyond description of functional limitations)].

Nothing in *Civ. Code §§ 56-56.37* prevents the disclosure by a health care provider to an insurance institution, agent, or support organization, subject to *Ins. Code §§ 791-791.26* (Insurance Information and Privacy Protection Act), of medical information if the insurance institution, agent, or support organization has complied with all requirements for obtaining the information pursuant to that Act [*Civ. Code § 56.10(c)(11)*]. In addition, a provider of health care may disclose medical information when the disclosure is otherwise specifically authorized by law [*Civ. Code § 56.10(c)(14)*; *see, e.g., Shaddox v. Bertani (2003) 110 Cal. App. 4th 1406, 1412-1415, 2 Cal. Rptr. 3d 808* (city charter provisions encouraging citizens to report suspected police misconduct, and related state statute, authorized dentist's disclosure to city of police officer's suspected abuse of prescription drugs, despite lack of specific mention of medical information in charter provisions or statute)]. A provider of health care may also disclose basic information including the patient's name, city of residence, age, sex, and general condition, to a state or federally recognized disaster relief organization for the purpose of responding to disaster welfare inquiries [*Civ. Code § 56.10(c)(15)*].

For purposes of chronic disease management programs, a provider of health may also disclose information to any entity contracting with a health care service plan to monitor or administer the care of enrollees for a covered benefit, if a treating physician has authorized the disease management services and care [*Civ. Code § 56.10(c)(17)*].

A health care provider or service plan may also disclose medical information, as permitted by state and federal law or regulation, to a local health department for the purpose of preventing or controlling disease, injury, or disability, including, but not limited to, the reporting of disease, injury, vital events such as birth or death, and the conduct of public health surveillance, public health investigations, and public health interventions, as authorized or required by

state or federal law or regulation [*Civ. Code § 56.10(c)(18)*].

A psychotherapist, as defined in *Evid. Code § 1010*, may also disclose medical information consistent with applicable law and standards of ethical conduct, if the psychotherapist, in good faith, believes that disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a reasonably foreseeable victim or victims, and the disclosure is made to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat [*Civ. Code § 56.10(c)(19)*; *see also Civ. Code § 56.104(e)(2)* (additional information needed to prevent threat disclosed under *Civ. Code § 56.10(c)(19)* exempt from disclosure protections)].

A provider of health care may also disclose medical information to a county social worker, a probation officer, or any other person who is legally authorized to have custody or care of a minor for the purpose of coordinating the health care services and medical treatment provided to the minor, if the minor has been taken into temporary custody, is the subject of a court petition, or has been adjudged to be a dependent child or ward of the juvenile court pursuant to *Welf. & Inst. Code § 300* or *601* [*Civ. Code § 56.103(a), (g)*; *see Civ. Code § 56.10(c)(20)*]. In addition, if a health care provider determines that disclosure of medical information concerning the diagnosis and treatment of a mental health condition of such a minor is reasonably necessary for the purpose of assisting in coordination of the treatment and care of the minor, that information may be disclosed to a county social worker, probation officer, or any other person legally authorized to have custody or care of the minor [*Civ. Code § 56.103(e)(1)*].

Medical information may also be disclosed to an employee welfare benefit plan [*see 29 U.S.C.S. § 1002(1)*] formed under *29 U.S.C.S. § 186(c)(5)*, to the extent that the employee welfare benefit plan provides medical care, and may also be disclosed to an entity contracting with the employee welfare benefit plan for billing, claims management, medical data processing, or other administrative services related to the provision of medical care to persons enrolled in the employee welfare benefit plan for health care coverage, if all of the following conditions are met [*Civ. Code § 56.10(c)(21)*]:

- The disclosure is for the purpose of determining eligibility, coordinating benefits, or allowing the benefit plan or contracting entity to advocate on behalf of a patient or enrollee with a provider, a health care service plan, or a state or federal regulatory agency.

- The request for information is accompanied by a written authorization for the release of the information submitted in a manner consistent with *Civ. Code § 56.11(a)*.

- The disclosure is authorized by and made in a manner consistent with the Health Insurance Portability and Accountability Act of 1996.

- Any information disclosed is not further used or disclosed by the recipient in any way that would directly or indirectly violate the California Civil Code provisions protecting the confidentiality of medical information or the restrictions imposed by 45 C.F.R. Part 164, including the manipulation of the information in any way that might reveal individually identifiable medical information.

Additionally, if a patient requests it in writing, any medical information corporation described in *Civ. Code § 56.06*, or any other entity that compiles or maintains medical information for any reason, must provide the patient, at no charge, with a copy of any medical profile, summary, or information maintained by the corporation or entity with respect to the patient [*Civ. Code § 56.07(a)*]. This request by a patient is not an authorization by the patient for the release or disclosure of any information to any person or entity other than the patient [*Civ. Code § 56.07(b)*]. Patient records that are subject to inspection by the patient pursuant to *Health & Safety Code § 123110* may not be disclosed. The health care provider may also charge a fee for the preparation of a summary of patient records. These provisions only applies to medical information corporations or similar entities and not to health care service plans [*Civ. Code § 56.07(c)*].

[5] Disclosure by Provider Who Is Employer

A provider of health care that is an employer does not violate *Civ. Code § 56.10* by disclosing, in accordance with *Civ. Code §§ 56.20-56.245*, medical information possessed in connection with employing the provider's employees.Information maintained by a health care provider in connection with employing the provider's employees is not deemed to be medical information for purposes of *Civ. Code §§ 56.20-56.245* unless it would be deemed medical information if received or maintained by an employer that is not a health care provider [*Civ. Code § 56.25(c)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.201

§ 429.201 Disclosure of General Information by Health Care Provider

For disclosures not addressed by *Civ. Code § 56.1007* [*see § 429.200[4]*], unlessthere is a specific written request by the patient to the contrary, nothing in the the Confidentiality of Medical Information Act (CMIA) [*Civ. Code §§ 56-56.37*] may be construed to prevent a general acute care hospital, on an inquiry concerning a specific patient, from releasing at its discretion any of the following information: the patient's name, address, age, and sex; a general description of the reason for treatment (whether an injury, a burn, poisoning, or some unrelated condition); the general nature of the injury, burn, poisoning, or other condition; the general condition of the patient; and any information that is not medical information as defined in *Civ. Code § 56.05(g)* [*Civ. Code § 56.16*; *see, e.g., Garrett v. Young (2003) 109 Cal. App. 4th 1393, 1406-1409, 1 Cal. Rptr. 3d 134* (disclosure of general information to patient's employer was not violation of CMIA)].

Although a health care provider has the discretion to decide whether to reveal information under *Civ. Code § 56.16*, this discretion must be exercised with prudence, circumspection, and tact, and health care providers should adopt standard policies and procedures to govern the release of information under this section [*Colleen M. v. Fertility & Surgical Assocs. of Thousand Oaks (2005) 132 Cal. App. 4th 1466, 1475, 34 Cal. Rptr. 3d 439]* . Moreover, evidence of the disclosure practices of other health care providers in the same field and recommendations by health care organizations may be used as proof on the issue of whether or not disclosed information was "general" and subject to being disclosed [*Colleen M. v. Fertility & Surgical Assocs. of Thousand Oaks (2005) 132 Cal. App. 4th 1466, 1475, 34 Cal. Rptr. 3d 439]* .

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37-429 California Forms of Pleading and Practice--Annotated § 429.202

§ 429.202 Disclosure of Medical Information by Employers

[1] Confidentiality Generally Required

Each employer who receives medical information must establish appropriate procedures to ensure the confidentiality and protection from unauthorized use and disclosure of that information. The procedures may include, but are not limited to, instruction regarding confidentiality of employees and agents handling files containing medical information, and security systems restricting access to files containing medical information [*Civ. Code § 56.20(a)*].

[2] Authorization by Employee Generally Required

Generally, no employer shall use, disclose, or knowingly permit its employees or agents to use or disclose medical information that the employer possesses pertaining to its employees without the patient first having signed an authorization under *Civ. Code § 56.11* or *56.21* permitting the use or disclosure [*Civ. Code § 56.20(c)*].

Moreover, if an employer agrees in writing with one or more of its employees or maintains a written policy that provides that particular types of medical information shall not be used or disclosed by the employer in particular ways, the employer must obtain an authorization for those uses or disclosures even if an authorization would not otherwise be required by *Civ. Code § 56.20(c)* [*Civ. Code § 56.20(d)*].

[3] Exceptions to Requirement for Authorization

The general prohibition against disclosure of medical information by an employer pursuant to *Civ. Code § 56.20(c)* is subject to the following exceptions [*Civ. Code § 56.20(c)(1)-(4)*]:

- The information may be disclosed if the disclosure is compelled by judicial or administrative process or by any other specific provision of law.

- That part of the information that is relevant in a lawsuit, arbitration, grievance, or other claim or

challenge to which the employer and employee are parties and in which the patient has placed in issue his or her medical history, mental or physical condition, or treatment may be used or disclosed in connection with that proceeding.

- The information may be used only for the purpose of administering and maintaining employee-benefit plans, including health care plans and plans providing short-term and long-term disability income, workers' compensation, and the determination of eligibility for paid and unpaid leave from work for medical reasons.

- The information may be disclosed to a health care provider or other health care professional or facility to aid the diagnosis or treatment of the patient, when the patient or other person specified in *Civ. Code § 56.21(c)* is unable to authorize the disclosure.

[4] Employee's Refusal to Sign Authorization

No employee shall be discriminated against in terms or conditions of employment due to that employee's refusal to sign an authorization under *Civ. Code §§ 56-56.37*. However, nothing in those provisions prohibits an employer from taking such action as necessary in the absence of medical information due to an employee's refusal to sign the authorization [*Civ. Code § 56.20(b)*].

[5] Disclosure by Employer-Health Care Provider or by Employer's Agent or Employee

An employer that is a health care provider does not violate *Civ. Code § 56.20* by disclosing, in accordance with *Civ. Code §§ 56.10-56.16*, medical information possessed in connection with providing health care services to the provider's patients [*Civ. Code § 56.25(a)*].

Moreover, an employer does not violate *Civ. Code § 56.20* because a health care provider that is an employee or agent of the employer uses or discloses, in accordance with *Civ. Code §§ 56.10-56.16*, medical information possessed by the provider in connection with providing health care services to the provider's patients [*Civ. Code § 56.25(b)*].

[6] Inapplicability to Insurer-Employer Acting Pursuant to Insurance Code

An employer that is an insurance institution, insurance agent, or insurance support organization subject to *Ins. Code §§ 791-791.26* (Insurance Information and Privacy Protection Act) is not deemed to have violated *Civ. Code § 56.20* by disclosing medical information gathered in connection with an insurance transaction in accordance with that act [*Civ. Code § 56.27*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.203

§ 429.203 Authorization for Disclosure

[1] Format Requirements

Authorization for the release of medical information by a provider of health care or by an employer is valid if it is handwritten by the person who signs it or is in typeface no smaller than 8-point type; is clearly separate from any other language present on the same page and is executed by a signature that serves no other purpose than to execute the authorization [*Civ. Code §§ 56.11(a), (b)* (health care provider), 56.21(a), (b) (employer)].

[2] Signature

An authorization must be signed and dated by one of the following [*Civ. Code §§ 56.11(c)* (health care provider), 56.21(c) (employer)]:

- The patient, except that if the patient is a minor, the patient may only sign an authorization for the release of medical information obtained by a health care provider in the course of furnishing services to which the minor could lawfully have consented under Civ. Code § 38 et seq., Fam. Code § 6500 et seq. (regarding persons generally) or *Fam. Code § 7000 et seq.* (regarding emancipation of minors);

- The legal representative of the patient, if the patient is a minor or an incompetent, except that authorization may not be given under this provision for the disclosure of medical information obtained by thehealth care provider in the course of furnishing services to which a minor patient could lawfully have consented under Civ. Code § 38 et seq., Fam. Code § 6500 et seq. (regarding persons generally) or *Fam. Code § 7000 et seq.* (regarding emancipation of minors);

- The spouse of the patient or the person financially responsible for the patient, when the medical information is being sought for the sole purpose of processing an application for health insurance or for enrollment in a nonprofit hospital plan, a health care service plan, or an employee-benefit plan, and when the patient is to be an enrolled spouse or dependent under the policy or plan;

- The beneficiary or personal representative of a deceased patient.

For discussion and forms relating to the medical treatment of minors, *see* Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee* , and Ch. 367A, *Minors: Tort Actions* .

[3] Content With Respect to Disclosure by Health Care Providers

All authorization for release of medical information by a health care provider must state the following [*Civ. Code § 56.11(d)-(h)*]:

- The specific uses and limitations on the types of medical information to be disclosed;
- The name or functions of the health care provider that may disclose the medical information;
- The name or functions of the persons or entities authorized to receive the medical information;
- The specific uses and limitations on the use of the medical information by the persons or entities authorized to receive the medical information;
- A specific date after which the health care provider is no longer authorized to disclose the medical information.

In addition, the authorization must advise the person signing it of the right to receive a copy [*Civ. Code § 56.11(i)*].

[4] Content With Respect to Disclosure by Employer

An authorization for an employer to disclose medical information must state the following [*Civ. Code § 56.21(d)-(h)*]:

- The limitations, if any, on the types of medical information to be disclosed;
- The name or functions of the employer or person authorized to disclose the medical information;
- The names of functions of the persons or entities authorized to receive the medical information;
- The limitations, if any, on the use of the medical information by the persons or entities authorized to receive the medical information;
- A specific date after which the employer is no longer authorized to disclose the medical information.

In addition, the authorization must advise the person signing it of the right to receive a copy [*Civ. Code § 56.21(i)*].

[5] Patient's or Representative's Right to Copy of Authorization

On demand by the patient or the person who signed an authorization, a health care provider or employer possessing the authorization must furnish a true copy to that person [*Civ. Code §§ 56.12* (health care provider), 56.22 (employer)].

[6] Requirement of Authorization With Respect to Information Practices Act of 1977

Nothing in *Civ. Code §§ 1798-1798.78* (Information Practices Act of 1977) permits the acquisition or disclosure of medical information regarding a patient without an authorization, when the authorization is required by *Civ. Code §§*

56-56.37 [*Civ. Code § 56.29(a)*; for discussion regarding Information Practices Act, *see §§ 429.120 et seq., 429.160* et seq.].

The disclosure of medical information regarding a patient that is subject to *Civ. Code § 1798.24(b)* (disclosure with prior written consent of individual under Information Practices Act) requires an authorization that complies with the provisions of *Civ. Code §§ 56-56.37*. The disclosure may be made only within the time limits specified in *Civ. Code § 1798.24(b)* [*Civ. Code § 56.29(b)*].

When the acquisition or disclosure of medical information regarding a patient is prohibited or limited by any provision of *Civ. Code §§ 1798-1798.78*, the prohibition or limit is applicable in addition to the requirements of *Civ. Code §§ 56-56.37* [*Civ. Code § 56.29(c)*].

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§ 429.204 Confidentiality of Released Medical Information

A recipient of medical information released by a health care provider pursuant to an authorization as provided by *Civ. Code §§ 56.10-56.16* or pursuant to *Civ. Code § 56.10(c)* may not further disclose that medical information except in accordance with a new authorization that meets the requirements of *Civ. Code § 56.11*, or as specifically required or permitted by other provisions of *Civ. Code §§ 56.10-56.16* or by law [*Civ. Code § 56.13*].

A recipient of medical information released by an employer pursuant to an authorization as provided by *Civ. Code §§ 56.20-56.245* may not further disclose that medical information unless in accordance with a new authorization that meets the requirements of *Civ. Code § 56.21*, or as specifically required or permitted by other provisions of *Civ. Code §§ 56.20-56.245* or by law [*Civ. Code § 56.245*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.205

§ 429.205 Nonliability of Provider for Unauthorized Use of Information

A health care provider that discloses medical information pursuant to an authorization required by *Civ. Code §§ 56.10-56.16* must communicate to the person or entity to which it discloses the medical information any limitations in the authorization regarding the use of the information. No health-care provider that has attempted in good faith to comply with *Civ. Code § 56.14* is liable for any unauthorized use of the medical information by the person or entity to which the provider disclosed the information [*Civ. Code § 56.14*].

Similarly, an employer that discloses medical information pursuant to an authorization required by *Civ. Code §§ 56.20-56.245* must communicate to the person or entity to which it discloses the information any limitations in the authorization regarding the use of the information. No employer that has attempted in good faith to comply with *Civ. Code § 56.23* is liable for any unauthorized use of the medical information by the person or entity to which it disclosed the information [*Civ. Code § 56.23*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.206

§ 429.206 Cancellation or Modification of Authorization

Nothing in *Civ. Code §§ 56-56.37* prevents a person who could sign the authorization pursuant to *Civ. Code § 56.11(c)* (health care providers) or 56.21 (employers) from canceling or modifying an authorization. However, the cancellation or modification is effective only after the health care provider or employer actually receives written notice of the cancellation or modification [*Civ. Code §§ 56.15* (health care provider), 56.24 (employers)].

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37-429 California Forms of Pleading and Practice--Annotated § 429.207

§ 429.207 Prohibition Against Disclosure by Third-Party Administrators

No person or entity engaged in the business of furnishing administrative services to programs that provide payment for health care services shall knowingly use, disclose, or permit its employees or agents to use or disclose medical information possessed in connection with performing administrative functions for that program, except as reasonably necessary in connection with the administration or maintenance of the program, or as required by law, or with an authorization pursuant to *Civ. Code § 56.21* (modified to substitute "third-party administrator" for "employer") [*Civ. Code § 56.26(a), (b)*].

Civ. Code § 56.26(a) is not applicable to any person or entity that is subject to *Ins. Code §§ 791-791.26* (Insurance Information and Privacy Protection Act), to *Civ. Code §§ 56.10-56.16* (disclosure by health care providers), or to *Civ. Code §§ 56.20-56.245* (disclosure by employers) [*Civ. Code § 56.26(c)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.208

§ 429.208 Patient's Right of Access to Information

Nothing in *Civ. Code §§ 56-56.37* affects existing laws relating to (1) a patient's right of access to his or her own medical information, (2) disclosures made pursuant to *Evid. Code § 1158* (written authorization for attorney to inspect patient's records), or (3) privileges established under the Evidence Code [*Civ. Code § 56.28*]. For discussion of evidentiary privileges, *see* Ch. 191, *Discovery: Privileges and Other Discovery Limitations* .

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37-429 California Forms of Pleading and Practice--Annotated § 429.209

§ 429.209 Waivers Unenforceable

Any waiver by a patient of the provisions of *Civ. Code §§ 56-56.37* is contrary to public policy, and is unenforceable and void, except as authorized by *Civ. Code § 56.11* (disclosure by health care providers), 56.21 (disclosure by employers), or 56.26(b) (disclosure by third-party administrators) [*Civ. Code § 56.37*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.210

§ 429.210 Damages and Fees Recoverable for Unauthorized Disclosure or Use

A patient whose medical information has been used or disclosed in violation of *Civ. Code § 56.10* (disclosure by health care providers), 56.20 (disclosure by employers), or 56.26(a) (disclosure by third-party administrators), and who has sustained economic loss or personal injury from the disclosure, may recover compensatory damages, punitive damages not to exceed $3,000, attorney's fees not to exceed $1,000, and the costs of litigation, in addition to any other remedies available at law [*Civ. Code § 56.35*]. For a form of complaint for damages based on *Civ. Code § 56.35*, see *§ 429.508*.

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37-429 California Forms of Pleading and Practice--Annotated § 429.211

§ 429.211 Misdemeanor Offense

Any violation of the provisions of *Civ. Code §§ 56-56.37* that results in economic loss or personal injury to a patient is punishable as a misdemeanor [*Civ. Code § 56.36*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.212

§ 429.212 Inapplicability of Act to Certain Medical Information

The disclosure and use regarding the following medical information and records are not subject to the limitations of the Confidentiality of Medical Information Act [*Civ. Code § 56.30(a)-(f), (h), (i)*]:

- Relating to mental health and developmental disabilities, pursuant to Welf. & Inst. Code Divisions 4, 4.1, 4.5, 5, 6, 7.

- Relating to public social services subject to *Welf. & Inst. Code §§ 10850, 14124.1, 14124.2*.

- Relating to state health services, communicable diseases, and developmental disabilities, maintained pursuant to Health & Safety Code Division 1, Part 1, Chapter 2, and Division 4.

- Relating to licensing and statistics, pursuant to Health & Safety Code Divisions 2 and *9, Bus. & Prof. Code* Division 2, Chapter 3, and *Fam. Code §§ 8608, 8706, 8817, 8909*.

- Relating to medical survey and workers' safety, pursuant to *Health & Safety Code §§ 1380* and *1382*, and pursuant to Lab. Code Division 5.

- Relating to industrial accidents, pursuant to Lab. Code Divisions 1, 4, 4.5, and 4.7.

- Relating to investigations of employment accident or illness, sought as part of an investigation of an on-the-job accident or illness, pursuant to Lab. Code Division 5 or pursuant to *Health & Safety Code § 105200*.

- Relating to alcohol or drug abuse, subject to the federal alcohol and drug abuse regulations pursuant to 42 C.F.R. Chapter 1, Subchapter A, Part 2, or to *Health & Safety Code § 11977* relating to narcotic and drug abuse.

The limitations also do not apply to information and records maintained by a health facility that are sought by a law enforcement agency under Penal Code Part 2, Title 12, Chapter 3.5 [*Civ. Code § 56.30(g)*]. Nor do they apply to medical information and records disclosed to, and their use by, the Insurance Commissioner, the Commissioner of Corporations, the Division of Industrial Accidents, the Workers' Compensation Appeals Board, the Department of Insurance, or the Department of Corporations [*Civ. Code § 56.30(k)*].

Nothing in *Civ. Code §§ 56-56.37* limits, expands, or otherwise affect the authority of the California Health Facilities Commission to collect patient discharge information from health facilities pursuant to *Health & Safety Code § 441.18* [*Civ. Code § 56.30(j)*].

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[Reserved]

§§ 429.213[Reserved]

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37-429 California Forms of Pleading and Practice--Annotated § 429.230

§ 429.230 Bookkeeping Services

[1] Limitations on Disclosure of Records

No business entity that performs bookkeeping services shall disclose, in whole or in part, the contents of any record that is prepared or maintained by that business entity to any person, other than the individual or business entity that is the subject of the record, without the express written consent of that individual or business entity. The prohibition includes the disclosure of information in the record in any composite of information [*Civ. Code § 1799.1(a)*; *see also Civ. Code § 1799* (defining "bookkeeping services," "business entity," "individual," "person," and "record")].

Civ. Code § 1799.1 does not apply to the following [*Civ. Code § 1799.1(b)*]:

- A disclosure to any person pursuant to a subpoena or court order.
- A disclosure that is discoverable.
- A disclosure to any person acting pursuant to a lawful search warrant.
- A disclosure to a law enforcement agency when required for investigations of criminal activity, unless the disclosure is prohibited by law.
- A disclosure to a taxing agency for purposes of tax administration.

[2] Cause of Action for Violation of Disclosure Limitations

A person may initiate a civil action against a business entity in accordance with California law whenever a business entity violates the provisions of *Civ. Code § 1799.1* [*Civ. Code § 1799.2(a)*].

In any suit brought pursuant to the provisions of *Civ. Code § 1799.2(a)*, a business entity that has violated *Civ. Code §*

1799.1 is liable to the person in an amount equal to the actual damages sustained by the person as a result of that violation, but in no case less than $500, as well as the attendant court costs and reasonable attorney's fees [*Civ. Code § 1799.2(b)*].

An action to enforce any liability created under *Civ. Code § 1799.2* may be brought in any court of competent jurisdiction within two years from the date on which the cause of action arose [*Civ. Code § 1799.2(c)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.231

§ 429.231 Video Recording Sales or Rental Services

[1] Limitations on Disclosure of Personal Information

No person providing video recording sales or rental services shall disclose any personal information or the contents of any record, including sales or rental information, that is prepared or maintained by that person to any person other than the individual who is the subject of the record, without the written consent of that individual [*Civ. Code § 1799.3(a)*].

Civ. Code § 1799.3 does not apply to any of the following [*Civ. Code § 1799.3(b)*]:

- A disclosure to any person pursuant to a subpoena or court order.
- A disclosure that is in response to the proper use of discovery in a pending civil action.
- A disclosure to any person acting pursuant to a lawful search warrant.
- A disclosure to a law enforcement agency when required for investigations of criminal activity, unless that disclosure is prohibited by law.
- A disclosure to a taxing agency for purposes of tax administration.
- A disclosure of names and addresses only for commercial purposes.

[2] Remedies for Unauthorized Disclosure

Any willful violation of *Civ. Code § 1799.3* is subject to a civil penalty not to exceed $500 for each violation, which may be recovered in a civil action brought by the person who is the subject of the records [*Civ. Code § 1799.3(c)*; *see Civ. Code § 1799.3(d)* (action by Attorney General, district attorney, or local prosecutor to recover civil penalties for repeat offenses)].

The penalty provided by *Civ. Code § 1799.3* is not an exclusive remedy, and does not affect any other relief or remedy provided by law [*Civ. Code § 1799.3(e)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.232

§ 429.232 Telephone or Telegraph Corporation

[1] Limitations on Disclosure of Information Concerning Residential Customer or Subscriber

No telephone or telegraph corporation shall make available to any other person or corporation, without first obtaining the residential subscriber's consent, in writing, any of the following information [*Pub. Util. Code § 2891(a)*]:

- The subscriber's personal calling patterns, including any listing of the telephone or other access numbers called by the subscriber, but excluding the identification to the person called of the person calling and the telephone number from which the call was placed (subject to the restrictions in *Pub. Util. Code § 2893*), and also excluding billing information concerning the person calling that federal law or regulation requires a telephone corporation to provide to the person called.

- The residential subscriber's credit or other personal financial information, except when the corporation is ordered by the commission to provide this information to any electrical, gas, heat, telephone, telegraph, or water corporation, or centralized credit check system, for the purpose of determining the creditworthiness of the new utility subscribers.

- The services that the residential subscriber purchases from the corporation or from the independent suppliers of information services who use the corporation's telephone or telegraph line to provide service to the residential subscriber.

- Demographic information about individual residential subscribers, or aggregate information from which individual identities and characteristics have not been removed.

"Access number" means a telex, teletex, facsimile, computer modem, or any other code that is used by a residential subscriber of a telephone or telegraph corporation to direct a communication to another subscriber of the same or another telephone or telegraph corporation [*Pub. Util. Code § 2891(f)*].

[2] Disclosure Allowed Without Written Consent

Public Utilities Code § 2891 does not apply to any of the following [*Pub. Util. Code § 2891(d)*]:

- Information provided by residential subscribers for inclusion in the corporation's directory of subscribers.

- Information customarily provided by the corporation through directory assistance services.

- Postal Zip Code information.

- Information provided under supervision of the Public Utilities Commission (PUC) to a collection agency by the telephone corporation exclusively for the collection of unpaid debts.

- Information provided to an emergency service agency responding to a 911 telephone call or any other call communicating an imminent threat to life or property.

- Information provided to a law enforcement agency in response to lawful process.

- Information that is required by the PUC pursuant to its jurisdiction and control over telephone and telegraph corporations.

- Information transmitted between telephone or telegraph corporation pursuant to the furnishing of telephone service between or within service areas.

- Information required to be provided by the corporation pursuant to rules and orders of the PUC or the Federal Communications Commission regarding the provision over telephone lines by parties other than the telephone and telegraph corporations of telephone or information services.

- The name and address of the lifeline customers of a telephone corporation provided by that telephone corporation to a public utility for the sole purpose of low-income ratepayer assistance outreach efforts. The telephone corporation receiving the information request under this paragraph may charge the requesting utility for the cost of the search and release of the requested information. The commission, in its annual low-income ratepayer assistance report, will assess whether this information has been helpful in the low-income ratepayer assistance outreach efforts.

- Information provided in response to a request pursuant to *Pen. Code § 530.8(a)*, which governs requests for information from public utilityservices and others in conjunction with investigating an application filed or account opened by an unauthorized person in the name of another person.

[3] Disclosure to Subscriber of Identity of Party Receiving Information

At the written request of any residential subscriber who gives his or her written consent for the release of personal information described in *Pub. Util. Code § 2891(a)*, the telephone or telegraph corporation must inform the subscriber of the identity of each person or corporation to whom the information has been released. Additionally, the telephone or telegraph corporation must notify every residential subscriber of the subscriber's right to be informed of the identity of each person or corporation to whom the information has been released whenever consent is requested pursuant to *Pub. Util. Code § 2891(b)* [*Pub. Util. Code § 2891(b)*].

Any residential subscriber who has given written consent for the release of the personal information described in *Pub.*

Util. Code § 2891(a) may rescind this consent by submitting written notice to the telephone or telegraph corporation. The corporation must then cease to make available any personal information about the subscriber within 30 days following receipt of the subscriber's notice rescinding consent [*Pub. Util. Code § 2891(c)*].

[4] Civil Action for Unauthorized Disclosure

Every violation of *Pub. Util. Code § 2891* is grounds for a civil suit by the aggrieved residential subscriber against the telephone or telegraph corporation and its employees responsible for the violation [*Pub. Util. Code § 2891(e)*].

Notwithstanding this provision, the disclosure of any information by an interexchange telephone corporation, a local exchange telephone corporation, or a provider of commercial mobile radio service, in good faith compliance with the terms of a state or federal court warrant or order, or administrative subpoena issued at the request of a law enforcement official or other federal, state, or local government agency for law enforcement purposes, is a complete defense against any civil action brought under *Pub. Util. Code § 2871 et seq.*, or any other law, including *Penal Code § 630 et seq.* (*see* 429.28 et. seq.), for the wrongful disclosure of that information [*Pub. Util. Code § 2894(a)*].

An interexchange telephone corporation is a telephone corporation that is a long-distance carrier [*Pub. Util. Code § 2894(b)(1)*].

A local telephone corporation is a telephone corporation that provides local exchange services [*Pub. Util. Code § 2894(b)(2)*].

A commercial mobile radio service has the same meaning as the term "commercial mobile service," as defined in *47 U.S.C.S. § 332(d)* [*Pub. Util. Code §§ 216.8, 2894(a)*]. It includes mobile data service, mobile paging service, mobile satellite telephone service, and mobile telephony service [*Pub. Util. Code § 216.8*].

[5] Limitations Regarding Unlisted Access Number

[a] Prohibition Against Disclosure

A telephone corporation selling or licensing lists of residential subscribers is prohibited from including the telephone number of any subscriber assigned an unlisted or unpublished access number, notwithstanding *Pub. Util. Code § 2891* [*Pub. Util. Code § 2891.1(a)*]. A subscriber may waive all or part of the protection of *Pub. Util. Code § 2891.1* through written notice to the telephone corporation [*Pub. Util. Code § 2891.1(a)*].

"Unpublished or unlisted access number" means a telephone, telex, teletex, facsimile, computer modem, or any other code number that is assigned to a subscriber by a telephone or telegraph corporation for the receipt of communications initiated by other telephone or telegraph customers, and that the subscriber has requested that the telephone or telegraph corporation keep in confidence [*Pub. Util. Code § 2891.1(h)*].

[b] Exceptions to Disclosure Prohibition

The prohibition against disclosure under *Pub. Util. Code § 2891.1* does not apply to the provision of telephone numbers to the following parties for the purposes indicated [*Pub. Util. Code § 2891.1(f)*]:

- A collection agency, to the extent disclosures made by the agency are supervised by the Public Utilities Commission, exclusively for the collection of unpaid debts;

- Any law enforcement agency, fire protection agency, public health agency, public environmental health agency, city or county emergency services planning agency, or private for-profit agency operating under contract with, and at the direction of, one or more of these agencies, for the exclusive purpose of

responding to a 911 call or communicating an imminent threat to life or property;

- A lawful process issued under state or federal law;

- A telephone corporation providing service between service areas for the provision to the subscriber of telephone service between service areas, or to third parties for the limited purpose of providing billing services;

- A telephone corporation to effectuate a customer's request to transfer the customer's number from one telecommunications service provider toanother; or

- The Public Utilities Commission pursuant to its jurisdiction and control over telephone and telegraph corporations.

Any information or records provided to a private for-profit agency pursuant to the second exception above must be held in confidence by that agency and by any individual employed by or associated with that agency; such information or records must not be open to examination for any purpose not directly connected with the administration of specified services related to public safety [*Pub. Util. Code § 2891.1(f)(2)(B)*; *see also Pub. Util. Code §§ 2872(e), 2891.1(f)(2)(A)* (setting forth the specified services)].

[c] Civil Action for Unauthorized Disclosure of Unlisted Number

Every deliberate violation of *Pub. Util. Code § 2891.1* is grounds for a civil suit by the aggrieved subscriber against the organization or corporation and its employees responsible for the violation [*Pub. Util. Code § 2891.1(g)*].

[6] Restrictions on Publishing Mobile Phone Number

Notwithstanding *Pub. Util. Code § 2891*, a provider of mobile telephony services, or any direct or indirect affiliate or agent, may not publish the dialing number of a customer in a directory, or sell the contents of a directory database, without first receiving that customer's express permission [*Pub. Util. Code § 2891.1(b)*]. Customers may not be charged for choosing not to have their name and mobile telephony number listed in a publicly available directory assistance database [*Pub. Util. Code § 2891.1(e)*].

A mobile telephony services customer who consents to publication of the customer's number may revoke that consent at any time, and a services provider must comply with the revocation within a reasonable period of time not to exceed 60 days [*Pub. Util. Code § 2891.1(d)*].

As with the publication of an unlisted telephone number [*see § 429.232[4]*], a customer may bring a civil action against the company and its responsible employees for a deliberate violation of this statutory protection [*Pub. Util. Code § 2891.1(g)*].

The exceptions specified in § 429.232[5][b] also apply to the prohibition against publication of a mobile telephony number [*see Pub. Util. Code § 2891.1(f)*].

[7] Restrictions on Publishing Facsimile Machine Number

A telephone corporation is prohibited from listing a telephone number as the number for a facsimile machine in its alphabetical or classified directory unless requested to do so by the subscriber [*Pub. Util. Code § 728.4*; *see Bus. & Prof. Code § 22600* (commercial telephone directory publisher subject to criminal liability for wrongful publication of facsimile machine telephone number)].

[8] Notice of Disclosure of Use of 800 and 900 Telephone Numbers

Pub. Util. Code § 2891.2 requires that telephone subscribers be notified annually that use of an "800" or "900" telephone number may result in the disclosure of the subscriber's telephone number to the called party. The Public Utilities Commission must, by rule or order, impose the responsibility for the notification on telephone corporations offering the caller identification service known as "automatic number identification" [*Pub. Util. Code § 2891.2*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.233

§ 429.233 Credit Card Transactions--Prohibition Against Requiring Personal Identification Information

Except as provided in *Civ. Code § 1747.08(c)*, no person, firm, partnership, association, or corporation that accepts credit cards for the transaction of business shall do any of the following [*Civ. Code § 1747.08(a)*]:

- Request, or require as a condition to accepting the credit card as payment in full or in part for goods or services, the cardholder to write any personal identification information on the credit card transaction form or otherwise.

- Request, or require as a condition to accepting the credit card as payment in full or in part for goods or services, the cardholder to provide personal identification information, which the person, firm, partnership, association, or corporation accepting the credit card writes, causes to be written, or otherwise records on the credit card transaction form or otherwise.

- Use, in any credit card transaction, a credit card form that contains preprinted spaces specifically designated for filling in any personal identification information of the cardholder.

The prohibition provided in this statute only extends to personal identification information and does not extend to information that is not specific to the individual, such as the consumer's ZIP code [*Party City Corp. v. Superior Court (2008) 169 Cal. App. 4th 497, 519, 86 Cal. Rptr. 3d 721*]. For further discussion and a form of complaint for wrongfully requiring personal identification information in a credit card transaction, see Ch. 127, *Consumer Contracts and Loans* .

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37-429 California Forms of Pleading and Practice--Annotated § 429.234

§ 429.234 Disposal of Customer Records

Beginning in 2001, businesses must ensure the privacy of a customer's personal information contained in their records. A business must take all reasonable steps to dispose or arrange for the disposal of a customer's records within its custody or control that contain personal information that the business will no longer retain. The business must do so by (1) shredding, (2) erasing, or (3) otherwise modifying the personal information in those records to make it unreadable or undecipherable through any means [*Civ. Code § 1798.81*].

Any customer injured by a violation of these provisions is entitled to institute a civil action against the business to recover damages, obtain injunctive relief, or seek other remedies [*Civ. Code § 1798.80*]. However, a cause of action is not available against a business for disposing of abandoned records containing personal information by shredding, erasing, or otherwise modifying the personal information in the records to make it unreadable or undecipherable through any means [*Civ. Code § 1798.84(f)(1)*].

"Business" means a sole proprietorship, partnership, corporation, association, or other group, however organized and whether or not organized to operate at a profit, including a financial institution organized, chartered, or holding a license or authorization certificate. The term includes an entity that destroys records [*Civ. Code § 1798.80(a)*].

"Records" means any material, regardless of the physical form, on which information is recorded or preserved by any means, including in written or spoken words, graphically depicted, printed, or electromagnetically transmitted. Records do not include publicly available directories containing information an individual has voluntarily consented to have publicly disseminated or listed, such as name, address, or telephone number [*Civ. Code § 1798.80(b)*].

"Customer" means an individual who provides personal information to a business for the purpose of purchasing or leasing a product or obtaining a service from the business [*Civ. Code § 1798.80(c)*].

"Personal information" means any information that identifies, relates to, describes, or is capable of being associated with, a particular individual, including, but not limited to, his or her name, signature, social security number, physical

characteristics or description, address, telephone number, passport number, driver's license or state identification card number, insurance policy number, education, employment, employment history, bank account number, credit card number, debit card number, or any other financial information, medical information, or health insurance information. Information that is lawfully made available to the general public from federal, state, or local government records is not protected under these provisions [*Civ. Code § 1798.80(e)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.235

§ 429.235 Disclosure of Breach of Data Security Regarding Personal Information

[1] Notification by Business Owning or Licensing Data

Except for certain specified businesses [*see Civ. Code § 1798.81*.5(e)], a business that owns or licenses personal information about California residents is required to implement and maintain reasonable security procedures to protect the information from unauthorized access, destruction, use, modification, or disclosure. Businesses that disclose such personal information to nonaffiliated third parties must require in their contracts that these third parties also implement and maintain reasonable security procedures [*Civ. Code § 1798.81*.5(b), (c)].

Beginning July 1, 2003, due to concerns regarding the increased risk of identity theft, consumers must be notified of breaches of the security of data systems containing certain personal information [*Civ. Code § 1798.82*].

Any person or business that conducts business in California, and that owns or licenses computerized data that includes personal information, must disclose any breach of the security of the system, following discovery or notification of the breach in the security of the data, to any resident of California whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person. The disclosure must be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement [*Civ. Code § 1798.82(a)*]. Any person or business that maintains computerized data that includes personal information that the agency does not own must notify the owner or licensee of the information of any breach of the security of the data immediately following discovery of the breach, if the personal information was, or is reasonably believed to have been, acquired by an unauthorized person [*Civ. Code § 1798.82(b)*].

This notification may be delayed if a law enforcement agency determines that notification will impede a criminal investigation. Notification must then be made after the law enforcement agency determines that it will not compromise the investigation [*Civ. Code § 1798.82(c)*].

[2] Definitions

"Breach of the security of the system" means unauthorized acquisition of computerized data that compromises the security, confidentiality, or integrity of personal information maintained by the person or business. Good faith acquisition of personal information by an employee or agent of the person or business for the purposes of the person or business is not a breach of the security of the system, if the personal information is not used for or subject to further unauthorized disclosure [Civ. Code § 1798.829(d)].

"Personal information" means an individual's first name or first initial and last name in combination with any one or more of the following data elements, if either the name or the data elements are not encrypted: social security number; driver's license number or California Identification Card number; account number, credit car, or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account; medical information; or health insurance information [*Civ. Code § 1798.82(e)*]. "Personal information" does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records [*Civ. Code § 1798.82(f)(1)*]. "Medical information" means any information regarding an individual's medical history, mental or physical condition, or medical treatment or diagnosis by a health care professional [*Civ. Code § 1798.82(f)(2)*]. "Health insurance information" means an individual's health insurance policy number or subscriber identification number, any unique identifier used by a health insurer to identify the individual, or any information in an individual's application and claims history, including any appeals records [*Civ. Code § 1798.82(f)(3)*].

[3] Methods of Providing Notice

Notice may be provided by any of the following methods:

- Written notice;

- Electronic notice, if it is consistent with the provisions regarding electronic records and signatures set forth in *15 U.S.C.S. § 7001*; or

- Substitute notice, if the person or business demonstrates that the cost of providing notice would exceed two hundred fifty thousand dollars ($250,000), that the affected class of persons exceeds 500,000, or that the person or business does not have sufficient contact information.

Substitute notice consists of all of the following [*Civ. Code § 1798.82(g)*]:

- E-mail notice, if the person or business has an e-mail address for the persons.

- Conspicuous posting of the notice on the Web site or Web page of the person or business, if the person or business maintains one.

- Notification to major statewide media.

However, a person or business that maintains its own notification procedures as part of an information security policy for the treatment of personal information, and is otherwise consistent with the timing requirements of these provisions, is deemed to bein compliance with the notification requirements of these provisions, if the person or business provides notification in accordance with its own policies in the event of a breach of security of the system [*Civ. Code § 1798.82(h)*].

[4] Remedies for Violation

Any person injured by a violation of any of these provisions may bring a civil action to recover damages [*Civ. Code §*

1798.84]. Any business that fails to comply with these provisions may be enjoined by any court of competent jurisdiction [*Civ. Code § 1798.84*].

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[Reserved]

§§ 429.236[Reserved]

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37-429 California Forms of Pleading and Practice--Annotated § 429.250

§ 429.250 Definitions

[1] "AIDS"

"AIDS" means acquired immune deficiency syndrome [*Health & Safety Code § 120775(a)*].

[2] "HIV" and "HIV Test"

"HIV" or "human immunodeficiency virus" means the etiologic virus of AIDS [*Health & Safety Code § 26(b)*].

"HIV test" means any clinical test, laboratory or otherwise, used to identify HIV, a component of HIV, or antibodies or antigens to HIV [*Health & Safety Code § 26(c)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.251

§ 429.251 Prohibition Against Compelling Disclosure of Identifying Characteristics

No person shall be compelled in any state, county, city, or other local civil, criminal, administrative, legislative, or other proceedings to identify or provide identifying characteristics that would identify any individual who is the subject of a blood test to detect antibodies to HIV [*Health & Safety Code § 120975*]. The prohibition under *Health & Safety Code § 120975* does not apply to *Health & Safety Code § 1603.1* or *1603.3* (AIDS testing with respect to blood donors), nor does it apply to *Health & Safety Code § 121022* (reports by health care providers and laboratories to local health officers) [*Health & Safety Code § 120975*; *see §§ 429.255A, 429.257*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.252

§ 429.252 Unauthorized Disclosure of Blood Test Results to Third Party

[1] Definition of "Disclosed"

"Disclosed" under *Health & Safety Code § 120980* means to disclose, release, transfer, disseminate, or otherwise communicate all or any part of any record orally, in writing, or by electronic means to any person or entity [*Health & Safety Code § 120980(k)*]. The word "record" only refers to the record of a blood test. Therefore, the statutory language applies only to disclosures by persons having access to the record of the results of a blood test, and does not apply to disclosures of information learned from some other source regarding the tested person's HIV status [*Urbaniak v. Newton (1991) 226 Cal. App. 3d 1128, 1142-1143, 277 Cal. Rptr. 354* (statute inapplicable to subsequent third-party disclosure based on tested person's communication of HIV-positive status to health-care worker); *see also Jeffrey H. v. Imai, Tadlock & Keeney (2000) 85 Cal. App. 4th 345, 361-362, 101 Cal. Rptr. 2d 916 , overruled in part, Jacob B. v. County of Shasta, 40 Cal. 4th 948* (*Urbaniak* limits application of statute to disclosures made by health care providers)].

[2] Civil Penalty for Negligent Disclosure

Any person who negligently discloses results of an HIV test, as defined in *Health & Safety Code § 120775*, to any third party, in a manner that identifies or provides identifying characteristics of the person to whom the test results apply, is subject to a mandatory assessment of a civil penalty in an amount not to exceed $2,500, plus court costs, as determined by the court. The penalty and costs are payable to the subject of the test [*Health & Safety Code § 120980(a)*]. The prohibition against disclosure under *Health & Safety Code § 120980(a)* does not apply if there is written authorization under *Health & Safety Code § 120980(g)*, if the disclosure is pursuant to *Health & Safety Code § 1603.1* or *§ 1603.3* (AIDS testing with respect to blood donors), or if the disclosure is pursuant to *Health & Safety Code § 121022* (reports by health care providers and laboratories to local health officers) [*Health & Safety Code § 120980(a)*; *see §§ 429.252[6], 429.255A, 429.257*]. In addition, the prohibition does not apply if thedisclosure is pursuant to any other statute that expressly provides an exemption to *Health & Safety Code § 120980* [*Health & Safety Code § 120980(a)*]. Each disclosure in violation of *Health & Safety Code § 120980 et seq.* is a separate and actionable offense [*Health & Safety Code § 120980(e)*].

[3] Civil Penalty for Willful or Malicious Disclosure

Any person who willfully or maliciously discloses results of an HIV test, as defined in *Health & Safety Code § 120775*, to any third party, in a manner that identifies or provides identifying characteristics of the person to whom the test results apply, is subject to a mandatory assessment of a civil penalty in an amount not less than $5,000 and not more than $10,000, in addition to court costs, as determined by the court. The penalty and costs are payable to the subject of the test [*Health & Safety Code § 120980(b)*]. The prohibition against disclosure under *Health & Safety Code § 120980(b)* does not apply if there is written authorization under *Health & Safety Code § 120980(g)*, if the disclosure is pursuant to *Health & Safety Code § 1603.1* or *§ 1603.3* (AIDS testing with respect to blood donors), or if the disclosure is pursuant to *Health & Safety Code § 121022* (reports by health care providers and laboratories to local health officers) [*Health & Safety Code § 120980(b)*; *see §§ 429.252[6], 429.255A, 429.257*]. In addition, the prohibition does not apply if the disclosure is pursuant to any other statute that expressly provides an exemption to *Health & Safety Code § 120980* [*Health & Safety Code § 120980(a)*]. Each disclosure in violation of *Health & Safety Code §§ 199.21-199.27* is a separate and actionable offense [*Health & Safety Code § 199.21(e)*]. For a form of complaint under *Health & Safety Code § 120980(b)*, see *§ 429.509*.

[4] Damages Recoverable for Wrongful Disclosure

Any person who commits any act described in *Health & Safety Code § 120980(a)* or *(b)* is liable to the subject for all actual damages, including damages for economic, bodily, or psychological harm that is a proximate cause of the act [*Health & Safety Code § 120980(d)*].

Nothing under *Health & Safety Code § 120980* limits or expands the right of an injured subject to recover damages under any other applicable law [*Health & Safety Code § 120980(h)*].

[5] Misdemeanor Offense for Causing Economic, Bodily, or Psychological Harm

Any person who willfully, negligently, or maliciously discloses the results of an HIV test, as defined in *Health & Safety Code § 120775*, to a third party, in a manner that identifies or provides identifying characteristics of the person to whom the test results apply, is guilty of a misdemeanor, if that disclosure results in economic, bodily, or psychological harm to the subject of the test. The offense is punishable by imprisonment in the county jail for a period not to exceed one year or a fine not in excess of $25,000, or both [*Health & Safety Code § 120980(c)*]. Criminal liability under *Health & Safety Code § 120980(c)* does not apply if there is written authorization under *Health & Safety Code § 120980(g)*, if the disclosure is pursuant to *Health & Safety Code § 1603.1* or *1603.3* (AIDS testing with respect to blood donors), or if the disclosure is pursuant to *Health & Safety Code § 121022* (reports by health care providers and laboratories to local health officers) [*Health & Safety Code § 120980(c)*; *see §§ 429.252[6], 429.255A, 429.257*]. In addition, the prohibition does not apply if the disclosure is pursuant to any other statute that expressly provides an exemption to *Health & Safety Code § 120980* [*Health & Safety Code § 120980(a)*]. Each disclosure in violation of *Health & Safety Code § 120980 et seq.* is a separate and actionable offense [*Health & Safety Code § 120980(e)*].

[6] Written Authorization

A "written authorization," relieving a person from liability from disclosure of blood test results under *Health & Safety Code § 120980*, pertains to a disclosure by a person responsible for the care and treatment of the person subject to the test. The authorization is required for each separate disclosure, and must identify the party to whom the disclosure would be made [*Health & Safety Code § 120980(g)*].

[7] Exclusions From Liability for Disclosures

Nothing in *Health & Safety Code § 120980* imposes civil liability or criminalsanction for disclosure of the results of tests performed on cadavers to public health authorities or tissue banks [*Health & Safety Code § 120980(h)*].

Nothing in *Health & Safety Code § 120980* imposes liability or criminal sanction for disclosure of an HIV test, as defined in *Health & Safety Code § 120775*, in accordance with any reporting requirement for a diagnosed case of AIDS in accordance with any reporting requirement for a case of HIV infection, including AIDS, by the State Department of Health Services or the Centers for Disease Control and Prevention under the United States Public Health Service [*Health & Safety Code § 120980(i)*].

When the results of an HIV text, as defined in *Health & Safety Code § 120775*, are included in the medical record of the patient who is the subject of the test, the inclusion is not a disclosure for purposes of *Health & Safety Code § 120980* [*Health & Safety Code § 120980(l)*].

The provisions of *Health & Safety Code § 120980(a)-(c)* do not apply to actions taken pursuant to *Welf. & Inst. Code § 1768.9*, regarding AIDS testing of persons in custody of the Youth Authority [*Health & Safety Code § 120995*; *see § 429.261[3]*]. Those provisions also do not apply to actions taken pursuant to *Penal Code § 7500 et seq.* [*Health & Safety Code § 121000*; *see § 429.261[1]*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.253

§ 429.253 Prohibited Uses

[1] Determining Insurability or Suitability for Employment

The results of a blood test to detect HIV, which identifies or provides identifying characteristics of the person to whom the test results apply, shall not be used in any instance for the determination of insurability or suitability for employment [*Health & Safety Code § 120980(f)*].

[2] Including Identifying Information in Blood Bank Statistical Summary

The State Department of Health Services may require blood banks and plasma centers to submit monthly reports summarizing statistical data concerning the results of tests to detect the presence of viral hepatitis and HIV. This statistical summary shall not include the identity of individual donors or identifying characteristics that would identify individual donors [*Health & Safety Code § 120980(j)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.254

§ 429.254 Recording Information and Disclosure to Health Care Provider by Physician

The results of an HIV test that identifies or provides identifying characteristics of the person to whom the test results apply may be recorded by the physician who ordered the test in the test subject's medical record or otherwise disclosed without written authorization of the test subject, or the subject's representative as set forth in *Health & Safety Code § 121020*, to the test subject's health care providers, pursuant to *Civ. Code § 56.05*, for purposes of diagnosis, care, or treatment of the patient, notwithstanding *Health & Safety Code § 120980* [*Health & Safety Code § 120985(a)*]. However, "health-care providers" under *Health & Safety Code § 120985* does not include a health care service plan regulated pursuant to *Health & Safety Code §§ 1340-1399.64* [*Health & Safety Code § 120985(a)*]. Recording or disclosure of HIV test results pursuant to *Health & Safety Code § 120985(a)* does not authorize further disclosure unless otherwise permitted by law [*Health & Safety Code § 120985(b)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.255

§ 429.255 Disclosure to Spouse, Sexual Partner, or Needle Sharer

[1] By Physician

No physician and surgeon who has the results of a confirmed positive test to detect HIV infection of a patient under his or her care is criminally or civilly liable for disclosing to a person reasonably believed to be the spouse, a sexual partner, or a person withwhom the patient has shared the use of hypodermic needles, or to the county health officer, that the patient has tested positive. However, no physician and surgeon shall disclose any identifying information about the individual believed to be infected, except to the local health officer as required under *Health & Safety Code § 121022* [*Health & Safety Code § 121015(a)*; *see § 429.255A*]. The nonliability provisions of *Health & Safety Code § 121015(a)* apply notwithstanding *Health & Safety Code § 120980* or any other provision of law [*Health & Safety Code § 121015(a)*].

No physician and surgeon shall disclose the information described in *Health & Safety Code § 121015(a)* unless he or she has first discussed the test results with the patient and has offered the patient appropriate educational and psychological counseling, which must include information on the risks of transmitting the HIV to other people and methods of avoiding those risks, and has attempted to obtain the patient's voluntary consent for notification of his or her contacts. The physician and surgeon must notify the patient of his or her intent to notify the patient's contacts prior to any notification [*Health & Safety Code § 121015(b)*].

When the information is disclosed to a person reasonably believed to be a spouse, a sexual partner, or a person with whom the patient has shared the use of hypodermic needles, the physician and surgeon must refer that person for appropriate care, counseling, and follow-up. *Health & Safety Code § 121015* does not apply to disclosures made other than for the purpose of diagnosis, care, and treatment of persons notified pursuant to *Health & Safety Code § 121015*, or for the purpose of interrupting the chain of transmission [*Health & Safety Code § 121015(b)*].

Health & Safety Code § 121015 is permissive on the part of the attending physician, and all requirements and other authorization for the disclosure of test results to detect HIV are limited to the provisions contained in *Health & Safety*

Code §§ 120975 et seq. (mandated blood testing and confidentiality), 121075 et seq. (AIDS Research Confidentiality Act), and 1603.1 and 1603.3 (blood donations) [*Health & Safety Code § 121015(c)*]. No physician has a duty to notify any person of the fact that a patient is reasonably believed to be infected with HIV, except as required by *Health & Safety Code § 121022* (reports by health care providers and laboratories to local health officers) [*Health & Safety Code § 121015(c)*].

[2] By Local Health Officer

The local health officer may alert any persons reasonably believed to be a spouse, sexual partner, or partner of shared hypodermic needles of an individual who has tested positive on an HIV test about their exposure, without disclosing any identifying information about the individual believed to be infected or the physician making the report, and must refer any person to whom a disclosure is made pursuant to *Health & Safety Code § 121015(d)* for appropriate care and follow-up. On completion of the local health officer's efforts to contact any person pursuant to *Health & Safety Code§ 121015(d)*, all records regarding that person maintained by the local health officer pursuant to *Health & Safety Code § 121015(d)*, including but not limited to any individual identifying information, must be expunged by the local health officer [*Health & Safety Code § 121015(d)*].

The local health officer must keep confidential the identity and the seropositivity status of the individual tested and the identities of the persons contacted, as long as records of contacts are maintained [*Health & Safety Code § 121015(e)*].

[3] No Compelled Disclosure in Legal or Administrative Proceedings

No person shall be compelled to identify, or provide identifying characteristics that would identify, any individual reported or person contacted pursuant to *Health & Safety Code § 121015*, in any state, county, city, or local civil, criminal, administrative, legislative, or other proceedings [*Health & Safety Code § 121015(f)*]. The prohibition against disclosure under *Health & Safety Code § 121015(f)* does not apply to *Health & Safety Code § 1603.1* or *§ 1603.3* (AIDS testing with respect to blood donors) or to disclosures made under *Health & Safety Code § 121022* (reports by health care providers and laboratories to local health officers) [*Health & Safety Code § 121015(f)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.255A

§ 429.255A Disclosure to State and Local Health Officers

[1] Required Disclosure

Health care providers and laboratories are required to report cases of HIV infection to the local health officer using the patient's name. The local health officer is then required to report unduplicated HIV cases to the State Department of Health Services, also using the patient's name [*Health & Safety Code § 121022(a)*; *see also Health & Safety Code § 121023* (similar reporting requirements for CD4+ T-Cell test results)]. The stated justification for this exception to patient confidentiality is to ensure knowledge of current trends in the HIV epidemic and to assure that California remains competitive for federal HIV and AIDS funding [*Health & Safety Code § 121022(a)*]. However, the State Department of Health Services and local health officers are also required to ensure continued reasonable access to anonymous HIV testing through alternative testing cites [*see Health & Safety Code § 121022(b)*].

[2] Confidentiality Protections

Despite the required disclosure to local and state health officials described in § 429.255A[1], reported cases of HIV infection may not be disclosed, discoverable, or compelled to be produced in any civil, criminal, administrative, or other proceeding [*Health & Safety Code § 121022(d)*]. Moreover, no person is permitted to disclose identifying information reported pursuant to *Health & Safety Code § 121022(a)* to the federal government (including, but not limited to, any agency, employee, agent, contractor, or anyone else acting on behalf of the federal government), except as permitted under *Health & Safety Code § 121025(b)*, which is discussed in *§ 429.259[2]* [*Health & Safety Code § 121022(f)*].

Any willful, negligent, or malicious disclosure of a case of HIV infection reported pursuant to *Health & Safety Code § 121022(a)* is subject to the penalties provided in *Health & Safety Code § 121025*, which are discussed in *§ 429.259[4]* [*Health & Safety Code § 121022(h)*]. In addition, nothing in *Health & Safety Code § 121022* should be construed to limit other remedies and protections available under state or federal law [*Health & Safety Code § 121022(i)*].

Prior to accessing confidential HIV-related public health records, state and local health department employees and contractors are required to sign confidentiality agreements developed by the State Department of Health Services. These

agreements, renewed annually, will include information relating to the penalties for a breach of confidentiality and the procedures for reporting a breach of confidentiality [*Health & Safety Code § 121022(e)*].

The local health officer, in coordination with the State Department of Health Services if appropriate, is required to investigate any potential or actual breach of confidentiality of HIV-related public health records. The local health officer isrequired to immediately report any evidence of an actual breach of confidentiality at a city or county level to the State Department of Health Services and to the appropriate law enforcement agency [*Health & Safety Code § 121022(g)(1)*]. The State Department of Health Services is required to investigate any potential or actual breach of confidentiality at the state level and report any evidence of such a breach to an appropriate law enforcement agency [*Health & Safety Code § 121022(g)(2)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.256

§ 429.256 Testing in General

[1] Informed Consent Required

Unless a patient independently requests an HIV test, a health care provider, prior to ordering a test that identifies HIV infection, must inform the patient that the test is planned, provide information about the test, inform the patient that there are numerous treatment options available for a patient who tests positive and that a person who tests negative should continue to be routinely tested, and advise the patient that he or she has the right to decline the test [*Health & Safety Code § 120990(a), (b)*]. If the patient declines the test, the health care provider is required to note that fact in the patient's medical file [*Health & Safety Code § 120990(a)*].

Except as just noted or as detailed in [3], *below*, a person may not administer a test for HIV infection unless the person being tested, or his or her parent, guardian, conservator, or other person specified in *Health & Safety Code § 121020*, signs a written statement documenting the person's informed consent to the test [*Health & Safety Code § 120990(c)*].

[2] Consent Requirements for Incompetent Persons

When the subject of an HIV test is not competent to give consent for the test to be performed, and when the consent is necessary to render appropriate care or to practice preventative measures, written consent may be obtained from the subject's parents, guardians, conservators, or other person lawfully authorized to make health care decisions for the subject. A minor is deemed not competent to give this consent if he or she is under 12 years of age [*Health & Safety Code § 121020(a)(1), (b)*]. However, when the subject of the test is a minor adjudged to be a dependent child of the court pursuant to *Welf. & Inst. Code § 360*, written consent for the testmay be obtained from the court pursuant to its authority under *Welf. & Inst. Code § 362* or *§ 369* [*Health & Safety Code § 121020(a)(2)* (persons authorized to give consent), (b) (consent must be necessary)]. For discussion and forms regarding dependency proceedings in juvenile court, see Ch. 285, *Guardianship and Conservatorship: Care of Ward or Conservatee,* and Ch. 328, *Juvenile Courts: Dependency Proceedings* .

The person authorized to consent to the test pursuant to *Health & Safety Code § 121020(a)* is permitted to do any of the

following [*Health & Safety Code § 121020(c)*]:

- Receive the results of the test on behalf of the subject without written authorization, notwithstanding *Health & Safety Code §§ 120975* and *120980*.

- Disclose the test results on behalf of the subject in accordance with *Health & Safety Code §§ 120975* and *120980*.

- Provide written authorization for the disclosure of the test results on behalf of the subject in accordance with *Health & Safety Code §§ 120975* and *120980*.

[3] Exceptions to Consent Requirement

The requirements of *Health & Safety Code § 120990(c)* do not apply in the following situations:

- To a test performed at an alternative site, pursuant to *Health & Safety Code §§ 120890-120895* [*Health & Safety Code § 120990(c)*].

- To testing to detect HIV in a cadaver when an autopsy is performed or body parts are donated under the Uniform Anatomical Gift Act [*Health & Safety Code § 120990(d)*; *see Health & Safety Code § 7150 et seq.*].

- When blood is tested as part of a scientific investigation conducted either by medical researchers operating under institutional review board approval or by the State Department of Health Services in accordance with a protocol for unlinked testing [*Health & Safety Code § 120990(e)(1)*]. "Unlinked testing," for purposes of *Health & Safety Code § 120990*, means that blood samples are obtained anonymously or that the individual's name and other identifying information is removed in a manner that precludes the test results from ever being linked to a particular individual in the study [*Health & Safety Code § 120990(e)(2)*].

- To actions taken pursuant to *Welf. & Inst. Code § 1768.9*, regarding AIDS testing of persons in custody of the Youth Authority [*Health & Safety Code § 120995*; *see § 429.261[3]*].

- To actions taken pursuant to *Penal Code § 7500 et seq.*, regarding medical testing of prisoners [*Health & Safety Code § 121000*].

Nothing in *Health & Safety Code § 120990* is to be construed to permit any person to disclose unlawfully an individual's HIV status or otherwise to violate provisions of *Civ. Code § 54*, the federal Americans With Disabilities Act of 1990, or the California Fair Employment and Housing Act [*see Gov. Code § 12900 et seq.*], which prohibit discrimination against individuals who are living with or have tested positive for HIV or are presumed to be HIV-positive [*Health & Safety Code § 120990(f)*].

For discussion of *Health & Safety Code § 121050 et seq.*, regarding mandatory testing of certain criminal inmates and persons accused of certain crimes, see *§ 429.260*.

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37-429 California Forms of Pleading and Practice--Annotated § 429.257

§ 429.257 Blood Transfusions

[1] Required Testing for HIV

No blood or blood components shall be used *in vivo* for humans in California, unless the blood or blood components have been tested and found nonreactive for HIV, or the blood and blood components are used for research or vaccination programs pursuant to an informed consent, with certain exceptions set forth in *Health & Safety Code § 1603.1(a)* (for example, transfusions in emergency situations) [*Health & SafetyCode § 1603.1(a)*]. "Blood components" mean preparations separated from single units of whole blood or prepared for hemapheresis and intended for use as final products for transfusions [*Health & Safety Code § 1603.1(k)*].

[2] Required or Permitted Disclosures

After diagnosis, a physician, hospital, or other health care provider is required immediately to report all transfusion-associated AIDS cases to the local health officer [*Health & Safety Code § 1603.1(c)* (also requiring reporting regarding viral hepatitis)]. On receiving a report concerning any transfusion-associated HIV or AIDS case, the local health officer is required to identify which blood bank or plasma center is the source of the infectious blood or blood components and report this fact to the bank or center that issued the blood. The blood bank or plasma center is responsible for investigating to determine the donor source of the infectious blood or blood components [*Health & Safety Code § 1603.1(d)*]. Following confirmation of a positive test result, a blood bank or plasma center is responsible for notifying the donor of the result [*Health & Safety Code § 1603.3(c)*].

Local health officials are required to contact all persons who have confirmed cases of AIDS, as determined by a person responsible for the care and treatment of the person with AIDS, to suggest appropriate treatment alternatives and for the purposes of epidemiological studies and followup [*Health & Safety Code § 1603.1(e)*].

A local health officer may disclose to a blood bank or plasma center, on a confidential basis, whether blood or blood components previously transfused may have been donated by a person infected with HIV, in order to implement the blood bank's or plasma center's program to notify arecipient of blood or blood components that might have transmitted

HIV [*Health & Safety Code § 1603.1(k)*].

[3] Prohibited Disclosure by Blood Bank

With regard to a confidential disclosure by local a health officer to a blood bank, the blood bank shall not disclose information that would identify a donor and must destroy information communicated to it immediately after reviewing its records as necessary to implement the blood bank program [*Health & Safety Code § 1603.1(k)*].

[4] Disclosure to Public Health Officer in Attempt to Locate Donor

No civil liability or criminal sanction shall be imposed for disclosure of test results to a local health officer when the disclosure is necessary to locate and notify a blood donor of a reactive result if reasonable efforts by the blood bank or plasma center to locate the donor have failed. On completion of the local health officer's efforts to locate and notify a blood donor of a reactive result, all records obtained from the blood bank or maintained pursuant to these provisions including, but not limited to, any individual identifying information or test results, must be expunged by the public health officer [*Health & Safety Code § 1603.3(f)*; *see Health & Safety Code § 1603.1(g)* (definition of "plasma center")]. The nonliability provisions of *Health & Safety Code § 1603.3(f)* apply notwithstanding any other provision of law [*Health & Safety Code § 1603.3(f)*].

[5] Unintentional Disclosure by Public Entity, Private Blood Bank, or Plasma Center

No public entity, private blood bank, or plasma center shall be liable for an inadvertent, accidental, or otherwise unintentional disclosure of the results of an HIV test [*Health & Safety Code § 1603.4(a)*; *see Health & Safety Code § 1603.1(g)* (definition of "plasma center")]. The nonliability provisions of *Health & Safety Code § 1603.4(a)* apply notwithstanding *Health & Safety Code § 120975 et seq.*, or any other provision of law [*Health & Safety Code § 1603.4(a)*]. "Public entity" includes, but is not limited to, any publicly owned or operated blood bank or plasma center, local health officer, and the State Department of Health Services [*Health & Safety Code § 1603.4(a)*].

[6] Nonliability for Damages Resulting From Notification of Test Results

Neither the State Department of Health Services nor any blood bank or plasma center, including a blood bank or plasma center owned or operated by a public entity, or local health officer, is liable for any damage resulting from the notification of test results, as set forth in *Health & Safety Code § 1603.3(a)(2)* (notification that donor will be notified of test results) or (c) (notification of positive test results) [*Health & Safety Code §§ 121005, 1603.4(b)* (identical statutes)].

[7] Disclosures Allowed Without Written Consent

The results of a blood test to detect antibodies to the probable causative agent of AIDS may be disclosed to any of the following persons without written authorization of the subject of the test, notwithstanding *Health & Safety Code § 120975* or *120980* [*Health & Safety Code § 121010*]:

- To the subject of the test or the subject's legal representative, conservator, or to any person authorized to consent to the test pursuant to *Health & Safety Code § 120990*;

- To a test subject's provider of health care as defined in *Civ. Code § 56.05(i)*, except that, in this case, "provider of health care" does not include a health care service plan regulated pursuant to *Health & Safety Code §§ 1340-1399.64*;

- To an agent or employee of the test subject's health care provider who provides direct patient care and treatment;

- To a health care provider who procures, processes, distributes, or uses a human body part donated pursuant to the Uniform Anatomical Gift Act (*Health & Safety Code § 7150 et seq.*).

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37-429 California Forms of Pleading and Practice--Annotated § 429.258

§ 429.258 Confidential Research Records

[1] Prohibition Against Disclosure, Discovery, and Production Generally

Research records, in a personally identifying form, developed or acquired by any person in the course of conducting research or a research study relating to HIV or AIDS shall be confidential. These confidential research records shall not be disclosedby any person in possession of the research record, nor shall these confidential research records be discoverable, nor shall any person be compelled to produce any confidential research record, except as provided by *Health & Safety Code § 121075 et seq.* [*Health & Safety Code § 121075*; *see Health & Safety Code §§ 120775*, *121125* (definition of AIDS); *but see Health & Safety Code § 121120* (disclosure of nonconfidential information for research purposes permitted)].

No confidential research record may be compelled to be produced in any state, county, city, or other civil proceedings, except as expressly provided in *Health & Safety Code § 121075 et seq.* [*Health & Safety Code § 121100(b)*]. Generally, no confidential research record may be compelled in a criminal proceeding; and disclosure, discovery, or production of a confidential research record to effect a criminal charge must be obtained under an order to show cause [*see Health & Safety Code § 121100(a)*].

"Disclosed" under *Health & Safety Code § 121075 et seq.* means to disclose, release, transfer, disseminate, or otherwise communicate of all or any part of any confidential research record orally, in writing, or by electronic means to any person or entity, or provision of the means for obtaining the records [*Health & Safety Code § 121125(b)*].

"Confidential research record or records" means any data in a personally identifying form, including name, social security number, address, employer, or other information that could, directly or indirectly, in part or in sum, lead to the identification of the individual research subject, developed or acquired by any person in the course of conducting research or a research study relating to AIDS [*Health & Safety Code § 121125(c)*].

[2] Prior Written Consent for Disclosure Generally Required

Confidential research records may be disclosed in accordance with the prior written consent of the research subject with respect to whom the research record is maintained, but only to the extent, under the circumstances, to the persons and for the purposes the written consent authorizes. Any disclosure authorized by a research subject must be accompanied by a written statement containing substantially the same language as follows [*Health & Safety Code § 121080*]:

> This information has been disclosed to you from a confidential research record the confidentiality of which is protected by state law and any further disclosure of it without specific prior written consent of the person to whom it pertains is prohibited. Violation of these confidentiality guarantees may subject you to civil or criminal liabilities.

For a form of consent under *Health & Safety Code § 121080*, see *§ 429.511*.

[3] Disclosures Permitted Without Prior Written Consent

The content of the confidential research record may be disclosed in either of the following situations, notwithstanding *Health & Safety Code § 121080*, with or without the prior written consent of the research subject with respect to whom the record is maintained [*Health & Safety Code § 121090*]:

- To medical personnel to the extent necessary to meet a bona fide medical emergency of a research subject; or

- To the State Department of Health Services to the extent necessary to conduct a special investigation pursuant to *Health & Safety Code § 100325* (morbidity studies), in which case the confidentiality provisions of *Health & Safety Code § 121025 et seq.* (AIDS Public Health Records Confidentiality Act) apply.

[4] Mandatory Disclosure to Subject or Subject's Representative

The content of any confidential research record must be disclosed to the research subject, the legal representative of the research subject if the research subject is a minor, or the personal representative of a deceased research subject to whom the the record pertains, 30 days after written request therefor by the research subject, the legal representative, or the personal representative [*Health & Safety Code § 121095*].

[5] Use for Employment or Insurability Purposes Prohibited

In the event that the participation of an individual in a research study is disclosed, the information shall not be used to determine the employability or insurability of the research subject [*Health & Safety Code § 121115*].

[6] Civil Penalty for Disclosure

Any person who willfully or maliciously discloses the content of any confidential research record to any third party, except pursuant to *Health & Safety Code § 121075 et seq.*, is subject to a mandatory civil penalty in an amount not less than $5,000 and not more than $10,000 plus court costs, as determined by the court. The penalty and costs are payable to the subject of the test [*Health & Safety Code § 121110(b)*; *see Health & Safety Code § 121110(e)* (each violation a separate, actionable offense)].

Negligent disclosure of any such record to a third party subjects the disclosing party to a civil penalty of up to $2,500, plus court costs [*Health & Safety Code § 121110(a)*].

[7] Misdemeanor Offense for Disclosure

Any person who willfully, maliciously, or negligently discloses the content of any confidential research record to a third party, except pursuant to *Health & Safety Code § 121075 et seq.*, is guilty of a misdemeanor, if the disclosure results in economic, bodily, or psychological harm to the research subject. The offense is punishable by imprisonment in the county jail for a period not to exceed one year, or a fine not to exceed $25,000, or both [*Health & Safety Code § 121110(c)*; *see Health & Safety Code § 121110(f)* (each violation a separate, actionable offense)].

[8] Recoverable Damages for Wrongful Disclosure

Any person who commits any act described in *Health & Safety Code § 121110(a)* or *(b)* is liable to the subject for all actual damages for economic, bodily, or psychological harm that is a proximate result of the act [*Health & Safety Code § 121110(d)*; *see Health & Safety Code § 121110(f)* (each violation a separate, actionable offense)]. Nothing in *Health & Safety Code § 121110* limits or expands the right of an injured research subject to recover damages under any other applicable law [*Health & Safety Code § 121110(g)*]. For a form of complaint for damages forwrongful and willful disclosure of confidential AIDS research records, see *§ 429.510*.

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37-429 California Forms of Pleading and Practice--Annotated § 429.259

§ 429.259 Public Health Records

[1] Confidentiality

Public health records relating to HIV or AIDS that contain personally identifying information and that were developed or acquired by state or local public health agencies, or by an agent of such an agency, shall be confidential and shall not be disclosed, except as otherwise provided by law for public health purposes or pursuant to a written authorization by the person who is the subject of the record, or by his or her guardian or conservator [*Health & Safety Code § 121025(a)*]. "Disclosed" means to disclose, release, transfer, disseminate, or otherwise to communicate of all or any part of any confidential research record orally, in writing, or by electronic means to any person or entity, or provision of the means for obtaining the records [*Health & Safety Code §§ 121035(a), 121125(b)*]. "State or local public health agencies" are the State Department of Health Services, and any local entity that a health officer serves [*Health & Safety Code § 121035(b)*]. A "health officer" includes county, city, and district health officers, and city and district health boards, but does not include advisory health boards [*Health & Safety Code §§ 120100, 121035*].

No confidential public health record shall be disclosed, discoverable, or compelled to be produced in any civil, criminal, administrative, or other proceeding [*Health & Safety Code § 121025(d)*]. For these purposes, "confidential public health record" means any paper or electronic record maintained by the State Department of Health Services or a local health department or agency, or its agent, that includes data or information in a manner that identifies personal information, including, but not limited to, name, social security number, address, employer, or other information that may directly or indirectly lead to the identification of the individual who is the subject of the record [*Health & Safety Code § 121035(c)*].

[2] Permitted Disclosure

In accordance with *Health & Safety Code § 121022(f)*, state or local public health agencies, or an agent of such an agency, may disclose personally identifying information in public health records, as described in *Health & Safety Code § 121025(a)*, to other local, state, or federal public health agencies or to corroborating medical researchers when the confidential information is necessary to carry out the duties of the agency or researcher in the investigation, control, or

surveillance of disease, as determined by the state or local public health agency [*Health & Safety Code § 121025(b)*; *see § 429.255A*]. Any disclosure authorized by *Health & Safety Code § 121025(a)* or *(b)* shall include only the information necessary for the purpose of that disclosure and shall be made only on agreement that the information will be kept confidential, and will not be further disclosedwithout written authorization, as described in *Health & Safety Code § 121025(a)* [*Health & Safety Code § 121025(c)*].

[3] Use to Determine Employability or Insurability Prohibited

In the event that a public health record, as described in *Health & Safety Code § 121035(c)*, is disclosed, the information shall not be used to determine employability or insurability of any person [*Health & Safety Code § 121025(f)*].

[4] Liability for Wrongful Disclosure to Third Party

Any person who negligently discloses the content of any confidential public health record, as defined in *Health & Safety Code § 121035(c)*, to any third party, except pursuant to a written authorization or as otherwise authorized by law, is subject to a civil penalty of up to $2,500, plus court costs, as determined by the court, to be paid to the person whose record was disclosed [*Health & Safety Code § 121025(e)(1)*]. A willful or malicious disclosure is subject to a civil penalty of not less than $5,000 and not more than $10,000, plus court costs [*Health & Safety Code § 121025(e)(2)*]. Each violation is a separate and actionable offense [*Health & Safety Code § 121025(e)(5)*].

In addition, any person who commits any of these unauthorized disclosures may be liable to the person whose confidential public health record was disclosed for all actual damages for economic, bodily, or psychological harm that is a proximate result of the disclosure [*Health & Safety Code § 121025(e)(4)*]. Nothing in *Health & Safety Code § 121025* limits or expands the right of an injured person whose confidential public health record was disclosed to recover damages under any other applicable law [*Health & Safety Code § 121025(e)(6)*].

A person making a willful, malicious, or negligent disclosure that results in economic, bodily, or psychological harm to the person whose confidential public health record was disclosed is also guilty of a misdemeanor, punishable by imprisonment in the county jail for a period not to exceed one year, or a fine of not to exceed $25,000, or both, plus court costs, as determined by the court. Both the penalty and costs must be paid to the person whose confidential public health record was disclosed [*Health & Safety Code § 121025(e)(3)*].

[5] Information Regarding Mandated Blood Testing or AIDS Research

Records and information under *Health & Safety Code § 120975 et seq.* (mandated blood testing) are governed by *Health & Safety Code § 120975 et seq.* to the extent that those provisions apply to records or information that would otherwise be governed by *Health & Safety Code § 121025 et seq.* (AIDS Public Health Records Confidentiality Act) [*Health & Safety Code § 121030(a)*; *see § 429.251*].

Records and information under *Health & Safety Code § 121075 et seq.* (AIDS research) are governed by *Health & Safety Code § 121075 et seq.* to the extent that those provisions apply to records or information that would otherwise be governed by *Health & Safety Code § 121025 et seq.* (AIDS Public Health Records Confidentiality Act) [*Health & Safety Code § 121030(a)*; *see § 429.258[1]*].

[6] Information Regarding Mortality Studies

Confidentiality and disclosure requirements regarding morbidity and mortality studies under *Health & Safety Code §§ 100325* and *100330* are governed by *Health & Safety Code §§ 121025-121035* to the extent that the latter provisions apply to them [*Health & Safety Code § 121030(b)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.260

§ 429.260 Protection of Persons Exposed to Criminal Defendants and Incarcerated Persons Who Pose Threat of Transmitting AIDS-Related Diseases

[1] Disclosure of AIDS Information

Health & Safety Code §§ 121050-121070 were enacted by an initiative measure to protect the health and safety of the public, victims of sexual crimes, peace officers, firefighters, and custodial personnel who may come into contact with persons charged with certain crimes, or incarcerated in a penal institution, who are or may be infected with AIDS, and other communicable diseases [*see Health & Safety Code § 121050*].

For a complete discussion of AIDS testing with regard to criminal defendants and inmates, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 71 (Matthew Bender).

[2] Testing Persons Charged With Certain Sex Crimes

Any defendant charged in any criminal complaint filed with a magistrate or court with any violation of laws relating to certain sex crimes, and any minor with respect to whom a petition has been filed in a juvenile court alleging violation of those laws, is subject to an order of a court having jurisdiction of the complaint or petition requiring testing for medically accepted indications of exposure to or infection by AIDS, and certain communicable diseases, as determined by the court [*Health & Safety Code §§ 121055* (requirement for testing), 121065(b) (scope of testing)]. Those crimes are defined by *Penal Code §§ 261* (rape), 261.5 (rape defined), 262 (spousal rape defined), 266b (cohabitation by force), 266c (sexual intercourse by deception inducing fear), 286 (sodomy), 288 (lewd act on minor), and 288a (oral copulation) [*Health & Safety Code § 121055*].

Testing is conducted pursuant to a court order, after hearing on a petition filedby the alleged victim or the prosecuting attorney [*see Health & Safety Code §§ 121055* (petition and hearing), 121065(a), (b) (testing procedure)].

In addition to the procedures under *Health & Safety Code § 121055* for testing persons accused of sex crimes, the Penal Code provides for mandatory testing of defendants convicted of certain crimes involving sexual intercourse [*see Penal*

Code §§ 1202.1 (certain sex crimes), 1202.6 (prostitution); *see generally § 429.261[2]*].

[3] Testing Arrestee Who Exposes Police Officer, Firefighter, or Emergency Medical Personnel to Bodily Fluids

If a peace officer, firefighter, custodial officer (as defined by *Pen. Code §§ 831(a)* or *831.5(a)*), custody assistant (as defined by *Pen. Code § 831.7(a)*), non-sworn uniformed employee of a law enforcement agency whose job entails the care or control of inmates in a detention facility, or emergency medical personnel, while acting within the scope of his or her duties, is exposed to an arrestee's blood or bodily fluids [*see Health & Safety Code § 121060.1(b)* ("bodily fluids" defined)], the arrestee may be required to submit to blood testing for HIV, hepatitis B, and hepatitis C [*see Health & Safety Code § 121060(a)*]. However, prior to filing a petition with the court, a licensed health care provider must notify the arrestee of the bloodborne pathogen exposure and make a good faith effort to obtain the voluntary informed consent of the arrestee or the arrestee's authorized legal representative to perform the test. The voluntary informed consent must be in writing. Once consent is given in writing, the arrestee is required to provide three specimens of blood for testing [*Health & Safety Code § 121060(a)(1)*].

If voluntary informed consent is not given in writing, the affected peace officer, firefighter, custodial officer or assistant, uniformed detention facility employee, or emergency medical personnel may file an ex parte petition with the court to obtain an order requiring the testing. The petition must include a written certification by a health care professional that an exposure has occurred, including the nature and extent of the exposure [*Health & Safety Code § 121060(a)(2)*]. The court must promptly conduct a hearing upon a petition, and if the court finds that probable cause exists to believe that a possible bloodborne pathogen exposure [*see Health & Safety Code § 121060.1(a)* ("bloodborne pathogen exposure" defined)], took place, the court is required to order that the arrestee provide three specimens of blood for testing [*Health & Safety Code § 121060(b)*].

[4] Disclosure of Test Results

Copies of test results under *Health & Safety Code § 121055* (regarding persons charged with sex crimes) must be sent to the defendant or minor, each requesting victim, and, if the defendant or minor is incarcerated or detained, the officer in charge and the chief medical officer of the facility in which that person is incarcerated or detained [*Health & Safety Code § 121055*].

Copies of the results of tests taken pursuant to *Health & Safety Code § 121060* (regarding arrestees who expose certain public employees to bodily fluids) must generally be sent to the arrestee, each peace officer, firefighter, custodial officer or assistant, uniformed detention facility employee, and emergency medical personnel named in the petition and his or her employing agency, officer, or entity, and if the arrestee is incarcerated or detained, to the officer in charge and the chief medical officer of the facility where the person is incarcerated or detained [*Health & Safety Code § 121060(c)(1)*]. However, the person whose sample was tested must be advised that he or she will be informed of the test results only if he or she wishes to be so informed, and if the person consents to be informed of the test results, he or she must sign a form documenting that consent. Refusal to sign that form will be construed as a refusal to be informed of the test results [*Health & Safety Code § 121060(c)(2)*]. Except as just described, all confidentiality requirements regarding medical records otherwise apply to the test results [*Health & Safety Code § 121060(c)(3)*].

Copies of test results on a minor subject must also be sent to the minor's parents or guardian [*Health & Safety Code § 121065(d)(2)*].

[5] Confidentiality of Personal Identifying Data

The court is required to order all persons who receive test results pursuant to *Health & Safety Code §§ 121055, 121056*, or *121060* to maintain the confidentiality of personal identifying data relating to the test results except for disclosure

that may be necessary to obtain medical or psychological care or advice. This prohibition does not apply to the test subject [*Health & Safety Code § 121065(d)*].

[6] Immunity From Civil Liability

Any person performing tests, transmitting test results, or disclosing information pursuant to *Health & Safety Code §§ 121060-121070* is immune from civil liabilityfor any action undertaken in accordance with those provisions [*Health & Safety Code § 121065(f)*].

[7] Disclosures Regarding Exposure of Criminal Inmates to AIDS Virus or ARC

Certain medical personnel who provide services to criminal facilities are required to report information that they receive concerning an inmate's exposure to, or infection by, the AIDS virus or ARC, or any communicable disease [*see Health & Safety Code § 121070(a)* (requirement of medical personnel to report to facility officer), (b)(content of information required)]. In that case, the officer in charge of the facility is required to notify certain personnel working at the facility, and is otherwise required to maintain the confidentiality of personal identifying data contained in the information [*see Health & Safety Code § 121070(c)* (notification to personnel), (d) (confidentiality)]. Violation of the required confidentiality constitutes a misdemeanor criminal offense [*see Health & Safety Code § 121070(e)*].

[8] Construction of Initiative Provisions

In case of conflict, *Health & Safety Code §§ 121050-121070* supersedes existing statutes or case law of the subjects covered, including but not limited to the confidentiality and consent provisions contained in Health & Safety Code *§§ 120975-121020*, *Health & Safety Code* §§ 121075-121125, and *Health & Safety Code §§ 121025-121035* [*Health & Safety Code § 121050*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.261

§ 429.261 Further Provisions Regarding Testing of Criminal Defendants and Inmates

[1] Criminal Inmates Generally

Penal Code §§ 7500-7553 govern reporting and testing requirements relating to AIDS and HIV with regard to certain criminal defendants and inmates in correctional institutions. They contain provisions regarding confidentiality of information and disclosure limitations [*see, e.g., Penal Code §§ 7523* (confidentiality of information obtained by law-enforcement employee), 7531 (nondisclosure of test results)].

Actions taken pursuant to *Penal Code §§ 7500-7553* are not subject to *Health & Safety Code § 120980(a)-(c)* or *Health & Safety Code § 120985(a)* [*Penal Code § 7504*; for discussion of *Health & Safety Code §§ 120980(a), (c),* and *120985(a), see § 429.252[2]*]. However, any provisions that conflict with *Health & Safety Code §§ 121050-121070* are superseded by the latter [*Health & Safety Code § 121050*; *see § 429.260[8]*].

For a complete discussion, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 71 (Matthew Bender).

[2] Defendants Convicted of Certain Crimes Involving Sexual Intercourse

The court is required to order every person convicted of a violation of certain sex crimes to submit to a blood test for evidence of antibodies to the probable causative agent of AIDS, notwithstanding the provisions of *Health & Safety Code §§ 120975* and *120990* [*Penal Code § 1202.1(a)*]. The test is required whether or not a sentence or fine is imposed or probation is granted in the case [*Penal Code § 1202.1(a)*]. The crimes are those defined by *Penal Code §§ 261* (rape), 261.5 (statutory rape), 262 (rape of spouse), 286 (sodomy), 288a (oral copulation), and 288 (lewd acts with child) [*Penal Code § 1202.1(d)*]. Disclosure of the test results must be transmitted by the clerk of the court to the Department of Justice, notwithstanding *Health & Safety Code § 120980* [*Penal Code § 1202.1(b)*]. Disclosure must also be made to the prosecuting attorney, for limited use on request, and to the defense attorney on request, notwithstanding *Health & Safety Code § 120980* [*see Penal Code § 1202.1(c)*].

In addition, when persons are convicted of more than one violation of *Penal Code § 647(b)* (prostitution), the court is required to order testing of those persons for evidence of antibodies to the probable causative agent of AIDS. Written copies of the report on the test must be furnished to both the court in which the defendant is to be sentenced and the State Department of Health Services, notwithstanding *Health & Safety Code § 120980* [*Penal Code § 1202.6*]. For full discussion, see Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 71 (Matthew Bender).

For discussion of *Health & Safety Code §§ 120975-120990*, see *§ 429.251* et seq. For discussion of the supersession of *Health & Safety Code §§ 121050-121070* in case of conflict with other laws, see *§ 429.260[8]*.

[3] Persons Subject to Department of Youth Authority

Welf. & Inst. Code § 1768.9 provides for testing of persons under the jurisdiction or control of the Department of the Youth Authority. Specifically, if the chief medical officer of the facility determines that clinical symptoms of AIDS are present in the person, he or she must submit to a test for the probable causative agent of AIDS [*Welf. & Inst. Code § 1768.9(a)*]. *Welf. & Inst. Code § 1768.9* applies notwithstanding any other provision of law [*Welf. & Inst. Code § 1768.9(a)*].

The chief medical officer of a facility of the Department of the Youth Authority may disclose results of a test for the probable causative agent of AIDS to the superintendent or administrator of the facility where the test subject is confined, notwithstanding any other provision of law [*Welf. & Inst. Code § 1768.9(g)(1)*]. When the test results are positive, the chief medical officer may inform the test subject's known sexual partners or needle contacts in a Youth Authority facility of the positive results, provided that the test subject's identity is kept confidential [*Welf. & Inst. Code § 1768.9(g)(2)*].

Actions taken pursuant to *Welf. & Inst. Code § 1768.9* are not subject to *Health & Safety Code § 120980(a)-(c)* or *Health & Safety Code § 120990(a)* [*Penal Code § 7504*; for discussion of *Health & Safety Code §§ 120980(a), (c)*, and *120990(a), see §§ 429.252[2], [5]* and *429.256[1]*]. For discussion of the supersession of *Health & Safety Code §§ 121050-121070* in case of conflict with other laws, see *§ 429.260[8]*.

[4] Search Warrant Obtained at Request of Crime Victim

In addition to the petition provisions under *Health & Safety Code § 121055* to obtain a hearing to require a criminal defendant to undergo an AIDS test, there is a provision under the Penal Code for blood testing pursuant to a search warrant at the request of the crime victim [*see Penal Code § 1524.1*]. When a defendant is charged with a criminal complaint, information, or indictment, or a minor is the subject of juvenile court petition alleging the commission of a crime, the victim may request the court to issue a search warrant to test the accused's blood with any HIV test. After holding a hearing, the court may order the test if it finds that there is probable cause to believe that blood, semen, or other body fluid capable of transmitting HIV has been transferred from the accused to the victim. The results of the test will be disclosed to the victim and the accused, and the victim may disclose those results as necessary to protect his or her health and safety or the health and safety of his or her family andsexual partner, without incurring civil liability [*Penal Code § 1524.1*; *see* Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 71 (Matthew Bender)].

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[Reserved]

§§ 429.262[Reserved]

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37-429 California Forms of Pleading and Practice--Annotated § 429.280

§ 429.280 Governing Law

Cal. Const. art. I, § 1, guarantees all people of the state the right to pursue and obtain privacy. *Penal Code §§ 630-637.5* govern the invasion of privacy resulting from the use of devices and techniques that have for their purpose the eavesdropping on private communication.

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37-429 California Forms of Pleading and Practice--Annotated § 429.281

§ 429.281 Definitions

[1] Person

The term "person" includes an individual, business association, partnership, corporation, limited liability company, or other legal entity. It also includes an individual acting or purporting to act for or on behalf of any government, or government subdivision, whether federal, state, or local. The term does not, however, include an individual known by all parties to a confidential communication to be overhearing or recording the confidential communication [*Penal Code § 632(b)*].

[2] Confidential Communication

The term "confidential communication" includes any communication carried on in circumstances that may reasonably indicate that any party to the communication desires it to be confined to the parties having the communication. The term does not include a communication made in a public gathering or in any legislative, judicial, executive, or administrative proceeding open to the public. The term also excludes any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded [*Penal Code § 632(c)*].

The California Supreme Court has ruled that a communication is confidential for these purposes if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded, regardless of whether the party expects that the content of the communication may later be conveyed to a third party [*Flanagan v. Flanagan (2002) 27 Cal. 4th 766, 774, 117 Cal. Rptr. 2d 574, 41 P.3d 575]* .

[3] Cellular Radio Telephone

The term "cellular radio telephone" is defined under *Penal Code § 632.5* (malicious interception and receipt of communications) as a wireless telephone authorized by the FCC to operate in the frequency bandwidth reserved for cellular radio telephones. For the definition of this term under *Penal Code § 632.7* (recording of communications), see *§ 429.283[5]*.

[4] Cordless Telephone

"Cordless telephone" means a two-way low power communication system consisting of two parts: a "base" unit that connects to the public switched telephone network and a handset or "remote" unit, that are connected by a radio link and authorized by the Federal Communications Commission to operate in the frequency bandwidths reserved for cordless telephones [*Penal Code § 632.6(c)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.282

§ 429.282 Invasion of Privacy Act

The California Legislature enacted *Penal Code §§ 630-637.5* to protect the right of privacy guaranteed to the people of the state under *Cal. Const. art. I, § 1* [*see Penal Code § 630*]. In enacting *Penal Code §§ 630-637.5* the legislature recognized and declared that advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping on private communications [*Penal Code § 630*]. To protect the people of California from violations of their right to privacy by technological means, the legislature provided criminal penalties as well as the civil remedies of damages and injunctive relief [*Penal Code §§ 630-637.5*; *see § 429.292*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.283

§ 429.283 Invasions of Privacy

[1] Wiretapping of Telegraph or Telephone Communications

Any person who, by means of any machine, instrument, or contrivance, or in any other manner, intentionally taps, or makes any unauthorized connection, whether physically, electrically, acoustically, inductively, or otherwise, with any telegraph or telephone wire, line, cable, or instrument, including the wire, line, cable, or instrument of any internal telephonic communication system is subject to both criminal and civil liability. Criminal and civil liability also extends to any person who, willfully and without the consent of all parties to the telephonic or telegraphic communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the communication is in transit, or passing over any wire, line, or cable, or is being sent from, or received at any place within California, or from using or attempting to use, in any manner or for any purpose, or from communicating in any way, any information obtained through the unauthorized tapping [*Penal Code §§ 631(a), 637.2* (civil liability)]. Conduct prohibited by *Penal Code § 631(a)* includes eavesdropping by a third party on an extension telephone without permission of all parties [*Ribas v. Clark (1985) 38 Cal. 3d 355, 359-363, 212 Cal. Rptr. 143, 696 P.2d 637]* .

Penal Code § 631(a) has been held to apply only to actions by a third party and not to a recording of a communication by a participant in a conversation [*Rogers v. Ulrich (1975) 52 Cal. App. 3d 894, 898, 125 Cal. Rptr. 306]* .

[2] Eavesdropping on or Recording Confidential Communications

[a] In General

Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recordingdevice, eavesdrops on or records the confidential communication, whether or not the confidential communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, is subject to criminal and civil liabilities [*Penal Code §§ 632(a), 637.2* (civil liabilities)].

A video recorder is an instrument that, if used in the manner proscribed under *Penal Code § 632*, is a recording device for purposes of the privacy act [*People v. Gibbons (1989) 215 Cal. App. 3d 1204, 1208, 263 Cal. Rptr. 905]* . However, *Penal Code § 632* protects only the content of communications between persons and does not extend to the taking of timed, still photographs unaccompanied by sound recording, because such photographs do not convey the content of the communication [*People v. Drennan (2000) 84 Cal. App. 4th 1349, 1353, 101 Cal. Rptr. 2d 584* ; *but see People v. Gibbons (1989) 215 Cal. App. 3d 1204, 1209, 263 Cal. Rptr. 905* (statute protects non-oral communications that party intends to remain confidential and therefore prohibits nonconsensual video recording of sexual acts)].

Penal Code § 632(a) prohibits one party to a confidential communication from recording that communication without the knowledge or the consent of the other party [*Warden v. Kahn (1979) 99 Cal. App. 3d 805, 812, 160 Cal. Rptr. 471* ; *Forest E. Olson, Inc. v. Superior Court (1976) 63 Cal. App. 3d 188, 191-192, 133 Cal. Rptr. 573]* . However, the statute only protects confidential communications, and the determination of whether a communication was intended to be confidential is based on the objectively reasonable expectations of the parties [*Wilkins v. National Broad. Co. (1999) 71 Cal. App. 4th 1066, 1079-1080, 84 Cal. Rptr. 2d 329]* .

Pen. Code § 632 applies if a confidential communication takes place partly in California and partly in another state [*Kearney v. Salomon Smith Barney, Inc. (2006) 39 Cal. 4th 95, 120, 45 Cal. Rptr. 3d 730, 137 P.3d 914]* . However, California is one of a minority of states that does not permit a telephone conversation to be recorded unless all parties to that telephone conversation consent. Most states require the consent of only one party to the call [*see* *Kearney v. Salomon Smith Barney, Inc. (2006) 39 Cal. 4th 95, 122 n.14, 45 Cal. Rptr. 3d 730, 137 P.3d 914]* . Therefore, a conflict of laws can exist if a telephone conversation of a California resident talking in California is recorded without the California resident's knowledge or consent by the other party to the conversation, if the other party resides in a state in which the consent of only one party is required. The California Supreme Court has held that California law can be applied in that situation, although the Court permitted the plaintiffs to seek only injunctive relief in that particular case, due to the uncertainty that would have existed prior to the Court's decision as to which state's law would govern. No such limitation on remedies exists for conduct taking place after the Court's decision, however [*Kearney v. Salomon Smith Barney, Inc. (2006) 39 Cal. 4th 95, 125-131, 45 Cal. Rptr. 3d 730, 137 P.3d 914* (prior to California Supreme Court's decision, Georgia-based business could properly rely on Georgia law to avoid monetary liability for recording California residents); *see § 429.283[5][a]*].

On the request of a victim of domestic violence who is seeking a domestic violence restraining order, the judge issuing the order may include a provision in the order that permits the victim to record any prohibited communication made to him or her by the perpetrator [*Pen. Code § 633.6*].

[b] Privileged Communications of Persons in Custody of Public Officer or on Property of Public Agency

Eavesdropping on, or recording by means of an electronic or other device, a conversation, or any portion of a conversation, between a person who is in the physical custody of a law enforcement officer or other public officer, or who is on the property of a law enforcement agency or other public agency, and the person's attorney, religious adviser, or licensed physician is prohibited [*Penal Code § 636* (felony), *Penal Code § 637.2* (civil liability); *see* *In re Arias (1986) 42 Cal. 3d 667, 679-683, 230 Cal. Rptr. 505, 725 P.2d 664] , superseded by statute as stated in* *People v. Loyd (2000) 27 Cal. 4th 997, 1008, 119 Cal. Rptr. 2d 360, 45 P.3d 296* .

Penal Code § 632 does not expressly protect either confidential communications between spouses, or the psychotherapist-patient privilege. Relief for violations of these privileges while one or both parties were in physical custody may be available under *Penal Code § 632* (eavesdropping on or recording of confidential communications without knowledge or consent of parties) [*see §§ 429.283[2], 429.291[1]*].

Violation of this section is punishable as a felony [*Penal Code § 636*].

[3] Intercepting or Receiving Cellular Radio Telephone Communications

Every person who, maliciously and without the consent of all parties to the communication, intercepts, receives, or assists in intercepting or receiving a communication transmitted between cellular radio telephones or between any cellular radio telephone and a landline telephone is subject to both criminal and civil liabilities [*Penal Code §§ 632.5(a)* (criminal liability), 637.2 (civil liabilities)]. For a form of complaint based on the defendant's wrongful interception or reception of cellular radio telephone communications, see *§ 429.538*.

[4] Intercepting or Receiving Cordless Telephone Communications

Every person who, maliciously and without the consent of all parties to the communication, intercepts, receives, or assists in intercepting or receiving a communication transmitted between cordless telephones, between any cordless telephone and a landline telephone, or between a cordless telephone and a cellular telephone is subject to criminal and civil liability [*Penal Code §§ 632.6(a)* (criminal liability), 637.2 (civil liability)]. For a form of complaint based on the defendant's wrongful interception or reception of cordless telephone communications, see *§ 429.539*.

[5] Recording Cellular Radio, Cordless, and Landline Telephone Communications, Including Faxes

[a] Criminal and Civil Liability

Every person who, without the consent of all parties to a communication, intercepts or receives, and intentionally records, or assists in the interception or reception, and intentional recordation of, a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone anda cellular radio telephone, is subject to criminal and civil liability [*Penal Code §§ 632.7(a)* (criminal liability), 637.2 (civil liability)].

For the purpose of this provision, "cellular radio telephone" is defined as a wireless telephone authorized by the FCC to operate in the frequency bandwidth reserved for cellular radio telephones [*Penal Code § 632.7(c)(1)*].

"Cordless telephone" under this provision retains the same definition as that of *Penal Code § 632.6* [*compare Penal Code § 632.7(c)(2) with Penal Code § 632.6(c)*; *see § 429.281[4]*].

"Communication" includes, but is not limited to, communications transmitted by voice, data, or image, including facsimile [*Penal Code § 632.7(c)(3)*].

[b] Exemption for Correctional Facilities

The provisions prohibiting malicious interception and receipt, and recording of cellular radio, cordless, and landline telephone communications do not apply to any telephone communication system used for communication exclusively within a state, county, city and county, or city correctional facility [*Penal Code §§ 632.5(b)(3), 632.6(b)(3), 632.7(b)(3)*.]

[c] Public Utilities Exemption From Prohibition Against Eavesdropping and Wiretapping

The prohibitions against wiretapping (*Penal Code § 631*), eavesdropping on or recording of confidential communications (*Penal Code § 632*), intercepting or receiving cellular radio telephone communications (*Penal Code § 632.5*), intercepting or receiving cordless telephone communications (*Penal Code § 632.6*), or interception or receiving, and recording cellular radio, cordless, and landline telephone communications (*Penal Code § 632.7(b)*), do not apply to public utilities engaged in the business of providing communications services and facilities, or to the officers, employees, or agents of a public utility when the acts otherwise prohibited are for the purpose of construction, maintenance, conduct, or operation of the services and facilities of the public utility. Those provisions also do not apply

to the use of any instrument, equipment, facility, or service furnished and used pursuant to the tariffs of a public utility [*Penal Code §§ 631(b), 632(e), 632.5(b), 632.6(b), 632.7(b)*].

An employee of a public utility engaged in the business of providing service and facilities for telephone or telegraph communications is also exempt from the prohibition against eavesdropping on or recording a confidential privileged communication of a person in custody (*Penal Code § 636*) while the employee is engaged in the construction, maintenance, conduct, or operation of the service or facilities of the public utility and listens in to the privileged conversation for the limited purpose of testing or servicing the equipment [*Penal Code § 636*].

[d] Law Enforcement Exemptions

Nothing in *Penal Code § 631* (prohibitions against wiretapping), *Penal Code § 632* (eavesdropping on or recording confidential communications), *Penal Code § 632.5* (intercepting or receiving cellular radio telephone communications), *Penal Code § 632.7* (recording combinations of cellular radio, cordless, and landline telephone communications), or *Penal Code § 632.6* (intercepting or receiving cordless telephone communications), is to be construed as prohibiting the Attorney General, any district attorney, any assistant, deputy, or investigator of the Attorney General or any district attorney, any California Highway Patrol officer, any chief of police, assistant chief of police, or police officer of a city or city and county, any sheriff, under sheriff, or deputy sheriff regularly employed and paid as such of a county, any police officer of the County of Los Angeles, or any person acting pursuant to the direction of such a law enforcement officer acting within the scope of his or her authority, from overhearing or recording any communication which they could lawfully overhear or record prior to November 8, 1967 [*Penal Code § 633*].

Nothing in *Penal Code § 631, 632, 632.5, 632.6*, or *632.7* prohibits any person regularly employed as an international airport law enforcement officer, acting within the scope of his or her authority, from recording any communication that is received on an incoming telephone line, for which the person initiating the call used a telephone number known to the public to be a means of contacting airport law enforcement officers, so long as a series of electronic tones are used to place the caller on notice that the call is being recorded. The evidence obtained from the recording is not rendered inadmissible by *Penal Code § 631, 632*, or *632.5* [*Penal Code § 633.1*; *see Penal Code § 633.1(c)*; *see also Penal Code § 830.33(d)*(formerly *Penal Code § 830.4(k)*, which was repealed in 1989, but is still cited in *Penal Code § 633.1(a)*) (description of airport law enforcement officer)].

In addition to the overhearing and recording allowed by the Invasion of Privacy Act in *Penal Code § 633*, the Presley-Felando-Eaves Wiretap Act of 1988 establishes special provisions for authorizing and executing wiretaps in certain controlled substance investigations, and for using evidence derived from the wiretap [*see Penal Code §§ 629.50-629.98* (operative until Jan. 1, 2012); *see § 429.284*]. Nothing in the Presley-Felando-Eaves Wiretap Act of 1988 applies to any conduct authorized by *Penal Code § 633* [*Penal Code § 629.88* (operative until Jan. 1, 2012)].

In any action brought under the Invasion of Privacy Act (*Penal Code §§ 630-637.5*), the Presley-Felando-Eaves Wiretap Act of 1988 (*Penal Code §§ 629.50-629.98*), or any other law, the defendant has a complete defense to the action if he or she acted in good faith reliance on a court order, regardless of whether the defendant is law enforcement personnel or is an employee of a public utility, landlord, custodian, or other person furnishing information, facilities, and technical assistance as directed by the order [*Penal Code §§ 629.88, 629.91* (operative until Jan. 1, 2012)].

[e] Hearing Aid Exemption

The prohibition against eveasdropping on a confidential communication does not apply to the use of hearing aids and similar devices, by persons afflicted with impaired hearing, for the purpose of overcoming the impairment to permit the hearing of sounds ordinarily audible to the human ear [*Penal Code § 632(f)*].

[6] Trespassing for Purposes of Committing Invasion of Privacy

Trespassing on property for purpose of committing any act, or attempting any act, in violation of *Penal Code § 631* (wiretapping), 632 (eavesdropping on or recording confidential communication), or 636 (eavesdropping on or recording privileged confidential communication), *Penal Code § 632.5* (intercepting or receiving cellular radio telephone communications), *Penal Code § 632.6* (intercepting or receiving cordless telephone communications), or *Penal Code § 632.7* (recording combinations of cellular, radio, cordless, and landline telephone communications) is prohibited. Violators of *Penal Code § 634* are subject to criminal and civil liability [*Penal Code §§ 634, 637.2* (civil liability)].

However, on the request of a victim of domestic violence who is seeking a domestic violence restraining order, the judge issuing the order may include a provision in the order that permits the victim to record any prohibited communication made to him or her by the perpetrator [*Pen. Code § 633.6*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.284

§ 429.284 Presley-Felando-Eaves Wiretap Act of 1988

[1] Electronic Surveillance in Investigations of Specified Crimes

The Presley-Felando-Eaves Wiretap Act of 1988 (*Penal Code §§ 629.50-629.98*), which is operative only until January 1, 2012, authorizes specified law enforcement agencies to obtain an ex parte order authorizing interception of wire, electronic, digital, or cellular telephone communications when they have probable cause to believe an individual is committing, has committed, or is about to commit one of the following offenses [*Penal Code § 629.52(a)* (operative until Jan. 1, 2012)]:

- Importation, possession for sale, transportation, manufacture, or sale of specified controlled substances.

- Murder, solicitation to commit murder, aggravated kidnaping, or a crime involving bombing of public or private property.

- Conspiracy to commit any of the crimes listed above.

The Act includes detailed substantive and procedural requirements for, and restrictions on, obtaining the order, executing the interception, and using the content of the intercepted communication and evidence derived from it [*see Penal Code §§ 629.50-629.82* (operative until January 1, 2012)]. Violation of the Presley-Felando-Eaves Wiretap Act of 1988 is punishable by fine or imprisonment [*Penal Code § 629.86* (operative until Jan. 1, 2012)].

[2] Punishment and Civil Remedies for Violations

Any violation of *Penal Code §§ 629.50-629.98* is punishable by a fine of up to $2500, or by imprisonment for up to one year, or both [*Penal Code § 629.84*].

Any person whose wire communication is intercepted, disclosed, or used in violation of *Penal Code §§ 629.50-629.98* has a civil cause of action against any person who intercepted, disclosed, or used, or procured another person to

intercept, disclose, or use the communication. In the action, the plaintiff is entitled to recover actual damages, but not less than liquidated damages computed at the rate of $100 a day for each day of violation, or $1,000, whichever is greater. The plaintiff is also entitled to recover punitive damages, reasonable attorney's fees, and other litigation costs that are reasonably incurred [*Penal Code § 629.86* (operative until Jan. 1, 2012)].

In any action brought under *Penal Code §§ 629.50-629.98*, or under the Invasion of Privacy Act (*Penal Code §§ 630-637.6*) or any other law, the defendant has a complete defense to the action if he or she acted in good faith reliance on a court order, regardless of whether the defendant is law enforcement personnel or is an employee of a public utility, landlord, custodian, or other person furnishing information, facilities, and technical assistance as directed by the order [*Penal Code §§ 629.91*, *629.88* (operative until Jan. 1, 2012)].

[3] Relationship to Invasion of Privacy Act

The Presley-Felando-Eaves Wiretap Act of 1988 (1988 Act) expressly deals with several potential conflicts between it and the Invasion of Privacy Act (*Penal Code §§ 630-637.6*). The 1988 Act provides (1) that *Penal Code § 631* does not prohibit a peace officer from intercepting any wire communication pursuant to an order under the 1988 Act or render inadmissible in criminal or grand jury proceedings any evidence obtained by means of an order issued in accordance with the 1988 Act and (2) that *Penal Code § 637* does not prohibit disclosure of the contents of any wire communication obtained by any means authorized by the 1988 Act, if the disclosure is authorized by the 1988 Act. Conversely, the 1988 Act does not apply to limit conduct authorized by *Penal Code § 633* (providing that law enforcement officers may overhear and record conversations they could lawfully overhear or record prior to November 8, 1967) [*Penal Code § 629.88* (operative until Jan. 1, 2012)].

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37-429 California Forms of Pleading and Practice--Annotated § 429.285

§ 429.285 Manufacture, Sale, and Possession of Eavesdropping Devices

[1] Prohibited

California law prohibits the manufacture, assembly, sale, offering for sale, advertising for sale, possessing, transporting, importing, or furnishing to another any device which is primarily or exclusively designed or intended for eavesdropping on the communication of another, or any device that is primarily or exclusively designed or intended for the unauthorized interception or reception of communications between cellular radio telephones or between a cellular radio telephone and a landline telephone in violation of *Penal Code § 632.5*, or communications between cordless telephones or between a cordless telephone and a landline telephone in violation of *Penal Code § 632.6* [*Penal Code § 635*]. Violation of *Penal Code § 635* is punishable as either a misdemeanor or a felony and gives rise to civil liability [*Penal Code §§ 635, 637.2* (civil liability)].

[2] Exemptions

Penal Code § 635 does not apply to acts performed by a communication utility or the officers, employees, or agents of a communication utility, for the purpose of construction, maintenance, conduct or operation of, or otherwise incident to the use of, the services or facilities of the utility. State, county, and municipal law enforcementagencies and agencies of the federal government are also exempt [*Penal Code § 635(b)(1)*].

Also exempt are persons engaged in the selling of eavesdropping devices for use by or resale to state, county, or municipal law enforcementagencies, the federal government, communication utilities, or agencies of a foreign government under terms approved by the federal government, and possession by a communications utility service subscriber of an eavesdropping device furnished by the utility pursuant to its tariffs [*Penal Code § 635(b)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.286

§ 429.286 Wrongful Disclosure of Telegraphic or Telephonic Communication

Every person not a party to a telegraphic or telephonic communication who willfully discloses the content of a telegraphic or telephonic message, or any part of the message, addressed to another person, without the permission of that person, unless directed to do so by a lawful court order, is subject to criminal and civil penalties [*Penal Code §§ 637, 637.2* (civil liabilities)].

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37-429 California Forms of Pleading and Practice--Annotated § 429.287

§ 429.287 Wrongful Obtaining of Telegraphic or Telephonic Communication

Every person not connected with any telegraph or telephone office who, without authority or consent of the person to whom the message is directed, is prohibited from willfully opening any sealed envelope enclosing a telegraphic or telephonic message, addressed to another person, with the purpose of learning the contents of the message, or who fraudulently represents another person and thereby procures to have delivered to himself or herself any telephonic or telegraphic message directed to another person, with the intent to use, destroy or detain the message from the person entitled to receive it. Violators of *Penal Code § 637.1* are subject to criminal and civil liability [*Penal Code §§ 637.1*, *637.2* (civil liabilities)].

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37-429 California Forms of Pleading and Practice--Annotated § 429.288

§ 429.288 Use of Voice Prints or Voice Stress Analyzers

No person or entity in California shall use any system which examines or records in any manner voice prints or other voice stress patterns of another person to determine the truth or falsity of statements made by that person without his or her express written consent given in advance of the examination or recordation [*Penal Code § 637.3(a)*]. *Penal Code § 637.3* does not apply to peace officers, as defined in *Penal Code § 830*, while carrying out their official duties [*Penal Code § 637.3(b)*]. Any person who has been injured by a violator of *Penal Code § 637.3* may bring an action against the violator for his or her actual damages or $1,000, whichever is greater [*Penal Code § 637.3(c)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.289

§ 429.289 Use of Polygraph Examination as Prerequisite to Accusatory Pleading

State and local government agencies or employees of these agencies involved in the investigation or prosecution of crimes may not require or request any complaining witness, in a case involving the use of force, violence, duress, menace, or threat of great bodily harm in the commission of any sex offense, to submit to a polygraph examination as a prerequisite to filing an accusatory pleading [*Penal Code § 637.4*]. Any person who has been injured by a violator of *Penal Code § 637.4* may bring an action against the violator for his or her actual damages or $1,000, whichever is greater [*Penal Code § 637.4(b)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.290

§ 429.290 Subscriber Intrusion by Cable Television

A person who owns, controls, operates, or manages a satellite or cable television corporation, or who leases channels on a satellite or cable system, is prohibited from using any electronic device to record, transmit, or observe any events or listen to, record, or monitor any conversations which take place inside a subscriber's residence, workplace, or place of business, without obtaining the express written consent of the subscriber. A satellite or cable television corporation may, however, conduct electronic sweeps of subscriber households to monitor for signal quality [*Penal Code § 637.5(a)(1)*]. Violation of *Penal Code § 637.5* is punishable as a misdemeanor [*Penal Code § 637.5(j)*]. Any aggrieved person may commence a civil action for damages for invasion of privacy against any satellite or cable television corporaton, service provider, or person that leases a channel or channels on a satellite or cable television system that violates *Penal Code § 637.5* [*Penal Code § 637.5(i)*; *see also Penal Code §§ 637.2(a), 637.5(k)*]. For further discussion of damages for violation of this provision, see *§ 429.292[1]*.

Penal Code § 637.5 sets forth minimum state standards for protecting the privacy of satellite or cable television subscribers, and does not preempt more restrictive local standards [*Penal Code § 637.5(l)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.291

§ 429.291 Defenses

[1] No Reasonable Expectation of Privacy

Under the *Fourth Amendment of the United States Constitution*, a person has a constitutionally protected right of privacy to the extent that he or she has a reasonable expectation of privacy when engaging in a particular activity [*Katz v. United States (1967) 389 U.S. 347, 352-353, 88 S. Ct. 507, 19 L. Ed. 2d 576]* . Historically, appellate decisions in California have consistently held that a person in custody, as for example in a jail, prison, or police car, does not have a reasonable expectation of privacy. Any communication by that person, whether face to face or by telephone, is not protected by the prohibitions against wiretapping or eavesdropping on or recording of confidential communications, except as provided under *Penal Code § 636*, governing certain privileged confidential communications [*People v. Crowson (1983) 33 Cal. 3d 623, 629-630, 190 Cal. Rptr. 165, 660 P.2d 389* ; *North v. Superior Court (1972) 8 Cal. 3d 301, 311, 104 Cal. Rptr. 833, 502 P.2d 1305* ; *see also Penal Code § 636*].

The California Supreme Court, however, has held that the proposition that a person in custody could not reasonably expect the state to refrain from monitoring his or her conversations cannot properly serve to define the rights of persons in custody, whether as pretrial detainees or as sentenced prisoners, as those rights are defined by *Penal Code §§ 2600* and *2601*. These sections, the Court stated, authorize the deprivation of prisoner's rights only to the extent that is necessary in order to provide for the reasonable security of the institution and the protection of the public [*De Lancie v. Superior Court (1982) 31 Cal. 3d 865, 875, 876, 183 Cal. Rptr. 866, 647 P.2d 142 , superseded by statute as stated in People v. Lloyd (2002) 27 Cal. 4th 997* ; *see Donaldson v. Superior Court (1983) 35 Cal. 3d 24, 27, 39, 196 Cal. Rptr. 704, 672 P.2d 110* (*De Lancie* not retroactive)].

The Court also stated that the cases holding that the prisoners had no reasonable expectancy of privacy did not purport to have made a factual determination of the subjective expectations of the inmates or the reasonableness of any expectations. Rather, the Court noted, the decisions declared a legal proposition that may well be in conflict with the general rule that a state cannot curtail a person's right of privacy by announcing and carrying out a system of surveillance which diminishes that person's expectations [*De Lancie v. Superior Court (1982) 31 Cal. 3d 865, 875, n.11, 183 Cal. Rptr. 866, 647 P.2d 142] , superseded by statute as stated in People v. Lloyd (2002) 27 Cal. 4th 997* .

Defendants in an action for invasion of privacy resulting from monitoring prisoners' conversations between prisoners and visitors or between prisoners will have the burden of showing that the monitoring practices employed meet with the legitimate security needs of the jail or prison in which the monitoring occurred [*see De Lancie v. Superior Court (1982) 31 Cal. 3d 865, 874-876, 183 Cal. Rptr. 866, 647 P.2d 142] , superseded by statute as stated in People v. Lloyd (2002) 27 Cal. 4th 997* .

[2] Litigation Privilege Inapplicable to Noncommunicative Conduct

The litigation privilege under *Civ. Code § 47(b)*, which precludes recovery for tortiously inflicted injury resulting from publications or broadcasts made during the course of judicial and quasi-judicial proceedings, is unavailable to a defendant alleged to have committed noncommunicative conduct in violation of *Penal Code § 630 et seq.*, because that privilege does not bar recovery for injuries from tortious conduct, regardless of the purpose for which the conduct is undertaken [*Kimmel v. Goland (1990) 51 Cal. 3d 202, 205, 271 Cal. Rptr. 191, 793 P.2d 524* (applying former *Civ. Code § 47(2)*, renumbered to § 47(b) in 1990)]. For example, a person who tape-records a telephone conversations without the permission of all parties, in violation of *Penal Code § 632*, cannot claim immunity under *Civil Code § 47(b)* by asserting that the tape-recordings were made in anticipation of litigation, because *Civil Code § 47(b)* protects publication or broadcast of information, not tortious conduct that does not involve communication [*Kimmel v. Goland (1990) 51 Cal. 3d 202, 205, 208-212,271 Cal. Rptr. 191, 793 P.2d 524* (applying former *Civ. Code § 47(2)*, renumbered to § 47(b) in 1990)]. For discussion of *Civ. Code § 47(b), see* Ch. 340, *Libel and Slander* .

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37-429 California Forms of Pleading and Practice--Annotated § 429.292

§ 429.292 Civil Action for Invasion of Privacy

[1] Damages

Any person who has been injured by violations of *Penal Code §§ 630-637.5* may bring an action against the person who committed the violation for the greater of $5,000 or three times the amount of actual damages, if any, sustained by the plaintiff [*Penal Code § 637.2(a)*]. The "actual damages" referred to in the statute are only those damages relating directly to the act of surreptitious recording, or relating to the plaintiff learning of or trying to recover that recording, but not to any damages that may have been sustained because the recording was communicated to third parties [*Lieberman v. KCOP Television, Inc. (2003) 110 Cal. App. 4th 156, 167, 1 Cal. Rptr. 3d 536]* .

It is not a necessary prerequisite that the plaintiff suffer, or be threatened with, actual damages [*Penal Code § 637.2(c)*; *Ribas v. Clark (1985) 38 Cal. 3d 355, 364-365, 212 Cal. Rptr. 143, 696 P.2d 637* ; *Ion Equip. Corp. v. Nelson (1980) 110 Cal. App. 3d 868, 882, 168 Cal. Rptr. 361]* .

[2] Injunctive Relief

Any person may bring an action in accordance with *Code Civ. Proc. § 525 et seq.* (governing injunctions generally) to enjoin or restrain any violation of *Penal Code §§ 630-637.5*. An action for damages as provided in *Penal Code § 637.2(a)* may be sought in the same action as that for injunctive relief [*Penal Code § 637.2(b)*]. For discussion and forms relating to injunctive relief generally, *see* Ch. 303, *Injunctions* .

[3] Statute of Limitations

An action under *Penal Code §§ 630-637.5* is an action to recover a statutory penalty or forfeiture. Therefore, the one-year statute of limitations of *Code Civ. Proc. § 340(a)* applies [*Ion Equip. Corp. v. Nelson (1980) 110 Cal. App. 3d 868, 880, 168 Cal. Rptr. 361* ; *Warden v. Kahn (1979) 99 Cal. App. 3d 805, 816, n.8, 160 Cal. Rptr. 471]* . Such a cause of action does not accrue until the plaintiff discovers or should have discovered all the essential facts [*Montalti v. Catanzariti (1987) 191 Cal. App. 3d 96, 99-100, 236 Cal. Rptr. 231]* .

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37-429 California Forms of Pleading and Practice--Annotated § 429.293

§ 429.293 Right to Civil Action Under Omnibus Crime Control Act of 1968

A person who has been subjected to unlawful wire interception, interception of an oral communication, or disclosure of an oral communication hasa right to a civil cause of action under federal law. The Omnibus Crime Control and Safe Streets Act of 1968 (*18 U.S.C.S. §§ 2510-2520*) provides for a civil cause of action for damages [*18 U.S.C.S. § 2520*]. The injured person may recover actual damages, but not less than liquidated damages computed at the rate of $100 per day of violation or $1,000, whichever is higher, punitive damages, and reasonable costs, including attorney's fee [*18 U.S.C.S. § 2520*].

A good faith reliance on a court order or legislative authorization is a complete defense to any civil action brought under *18 U.S.C.S. §§ 2510-2521* [*18 U.S.C.S. § 2520*; *see 18 U.S.C.S. § 2518(7)* (emergency action by investigative or law enforcement officers)].

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[Reserved]

§§ 429.294[Reserved]

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37-429 California Forms of Pleading and Practice--Annotated § 429.310

§ 429.310 Governing Law

The *Fourth Amendment of the United States Constitution*, which prohibits unreasonable search and seizures, gives rise to a cause of action for damages against federal law enforcement officers [*Bivens v. Six Unknown Fed. Narcotics Agents (1971) 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619* ; *Burrows v. Federal Superior Court (1974) 13 Cal. 3d 238, 118 Cal. Rptr. 166, 529 P.2d 590]* . The Civil Rights Act provides for claims for damages for invasion of privacy against state officers [*42 U.S.C.S. § 1983*; *York v. Story (9th Cir. 1963) 324 F.2d 450]* . Jurisdiction of the federal district court in civil rights actions is governed by *28 U.S.C.S. § 1343*. General federal question jurisdiction of the federal discrict court relating to *Fourth Amendment* litigation is governed by *28 U.S.C.S. § 1331*.

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§§ 429.311[Reserved]

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37-429 California Forms of Pleading and Practice--Annotated § 429.330

§ 429.330 Civil Rights

[1] Action for Invasion of Privacy Under Federal Law

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, another person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the United States Constitution and laws, is liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress [*42 U.S.C.S.§ 1983*; *York v. Story (9th Cir. 1963) 324 F.2d 450, 455]* . Liability under *42 U.S.C.S. § 1983* may continue after the death of the victim of the alleged violation, because former *42 U.S.C.S. § 1988* (*now see 42 U.S.C.S. § 1988(a)*) indicates that state law is dispositive, and under former *Prob. Code § 573* (*now see Code Civ. Proc. § 377.20*) a tort claim survives the death of the victim [*Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 173-174, 216 Cal. Rptr. 661, 703 P.2d 1* ; *see Smith v. City of Fontana (9th Cir. 1987) 818 F.2d 1411, 1416-1420* (also finding that children of decedent may not maintain personal causes of action under *42 U.S.C.S. § 1983* for violation of *U.S. Const. amend. IV*, but may for violation of their substantive due process rights)]. An action for invasion of privacy is a right, privilege, or immunity covered by *42 U.S.C.S. § 1983* [*York v. Story (9th Cir. 1963) 324 F.2d 450, 455]* .

[2] Federal Court Jurisdiction

A federal district court has original jurisdiction of any civil action, authorized by law to be commenced by any person, to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom, or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of all persons within the jurisdiction of the United States [*28 U.S.C.S. 1343*]. A person seeking a redress for the constituional deprivation of his or her personal rights under color of state law is not required to first exhaust state administrative or judicial remedies [*Monroe v. Pape (1961) 365 U.S. 167, 183, 81 S. Ct. 473, 5 L. Ed. 2d 492* , *overruled on other grounds, Monell v. Department of Soc. Servs. (1978) 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611* ; *but see Parratt v. Taylor (1981) 451 U.S. 527, 543-544, 101 S. Ct. 1908, 68 L. Ed. 2d 420* , *overruled in part, Daniels v. Williams (1986) 474 U.S. 327, 329* (existence of alternative state remedy precludes *42 U.S.C.S. § 1983* claim for negligent deprivation of property by state officer)].

In order for the federal court to have jurisdiction over an action alleging a violation of the federal right to privacy, the plaintiff must have standing to bring the action [*see Fleck & Assocs. v. City of Phoenix (9th Cir. 2006) 471 F.3d 1100, 1103-1107* (complaint alleging violation by city's ban of live sex act businesses of privacy rights of corporation that operated gay men's social club failed to demonstrate that corporation suffered distinct and palpable injury to any cognizable corporate right of privacy and corporation did not have associational standing to assert rights of its customers)].

[3] State Court Jurisdiction

A person who has been deprived of his or her constitutional rights by a state or local official acting under color of state law may also bring an action under *42 U.S.C.S. § 1983* in a state court [*Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 173, 173 n.10, 216 Cal. Rptr. 661, 703 P.2d 1* ; *Williams v. Horvath (1976) 16 Cal. 3d 834, 837, 129 Cal. Rptr. 453, 548 P.2d 1125]* . A state may also allow the right to bring a comparable state action; however, any attempt to condition the rightunder state law would not apply to the federal remedy since the state may not impair federally created rights or impose conditions upon them [*Williams v. Horvath (1976) 16 Cal. 3d 834, 840-842, 129 Cal. Rptr. 453, 548 P.2d 1125]* . The case, however, may be removed from state to federal courts if the complaint sets forth facts showing a violation of the plaintiff's federal rights [*28 U.S.C.S. § 1443*].

[4] Declaratory and Injunctive Relief

Declaratory relief is available in an action arising out of a violation of civil rights under *42 U.S.C.S. § 1983* [*Gay Student Servs. v. Texas A & M Univ. (5th Cir. 1980) 612 F.2d 160]* . Injunctive relief is proper under *42 U.S.C.S. § 1983* when there has been a deprivation of civil rights [*see Schnell v. City of Chicago (7th Cir. 1969) 407 F.2d 1084, 1086]* .

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37-429 California Forms of Pleading and Practice--Annotated § 429.331

§ 429.331 Defenses and Immunities

[1] In General

Actions for damages under *42 U.S.C.S. § 1983* are limited in that only persons who were directly involved in wrongdoing may be held liable; state and local officials enjoy either an absolute or qualified immunity from damages liability [*Kostka v. Hogg (1st Cir. 1977) 560 F.2d 37, 39* ; *see also § 429.331[2], [3]*]. To incur liability under the Civil Rights Act, a state or local official need not intentionally or directly subject a person to a deprivation of his or her constitutional rights, but can be held liable if he or she negligently causes the plaintiff to be subject to deprivation of these rights [*Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) , overruled in part, Daniels v. Williams (1986) 474 U.S. 327, 329* . Whether a person is liable for the deprivation of another's constitutional rights is not dependent on the actor's state of mind [*see Baker v. McCollan (1979) 443 U.S. 137, 139-140, 99 S. Ct. 2689, 61 L. Ed. 2d 433*)]. On the other hand, a municipality or other local entity can be held strictly liable for damages under *42 U.S.C.S. § 1983* when one or more of its officials directly violates a person's constitutional rights [*Owen v. City of Independence (1980) 445 U.S. 622, 657-658, 100 S. Ct. 1398, 63 L. Ed. 2d 673]* .

The question of whether a defendant is immune, either qualifiedly or absolutely, is not a jurisdictional issue in a federal civil rights suit; rather, immunity is an affirmative defense which defendant must raise and which may defeat plaintiff's claim once subject matter jurisdiction has been established [*Robinson v. Bergstrom (7th Cir. 1978) 579 F.2d 401, 404]* .

[2] Absolute Immunity

Absolute immunity from liability for damages is accorded to judges while acting in the course of their official duties. [*Johnson v. Reagan (9th Cir. 1975) 524 F.2d 1123, 1124]* . The only exception is when the judge acts in the clear absence of all jurisdiction [*Clark v. Taylor (D.C. Cir. 1980) 627 F.2d 284, 285-287]* . Judicial immunity, however, does not bar injunctive relief [*Harris v. Harvey (7th Cir. 1979) 605 F.2d 330, 335 n.7*]. Absolute immunity from liability for damages is also accorded to states and to state government entities [*see e.g., Sykes v. State of California (Dep't of Motor Vehicles) (9th Cir. 1974) 497 F.2d 197, 201]* .

Whether a judge is acting "judicially," or in the course of his or her official duties, depends on the nature of the act itself, whether it is a function normally performed by a judge, and whether the parties were dealing with the judge in his or her official capacity [*Mireles v. Waco (1991) 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9, 14-15]* . Moreover, the scope of a judge's jurisdiction is construed broadly [*Rosenthal v. Justices of Supreme Court of Cal. (9th Cir. 1990) 910 F.2d 561, 565-566]* . It is the nature of the function performed, not the identity of the actor who performed it, that is determinative. A judge's direction to another to carry out an order does not transform an action from judicial to executive [*Mireles v. Waco (1991) 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9, 14-15]* .

[3] Qualified Immunity

A qualified immunity from damages under *42 U.S.C.S. § 1983* is available to state and local government officials, including police officers [*see* *Procunier v. Navarette (1978) 434 U.S. 555, 561, 98 S. Ct. 855, 55 L. Ed. 2d 24]* . For example, a police officer who acts in good faith and in a reasonable manner in executing a search warrant issued by a judicial officer, is not liable for damages under the Civil Rights Act, even on a showing that the judicial officer erred in authorizing the search [*Commonwealth of Pennsylvania ex rel. Feiling v. Sincavage (3rd Cir. 1971) 439 F.2d 1133, 1134]* . Local government entities and their agencies, however, have no immunity from damages liability flowing from their constitutional violations [*Owen v. City of Independence (1980) 445 U.S. 622, 657-658, 100 S. Ct. 1398, 63 L. Ed. 2d 673* ; *but see* *Monell v. Dep't of Soc. Servs. (1978) 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611]* .

[4] Statute of Limitations

Although *42 U.S.C.S. § 1983* does not contain its own statute of limitations, a simple, broad characterization of all *42 U.S.C.S. § 1983* claims as personal injury actions is appropriate and minimizes the risk that the choice of a state statute of limitations would not fairly serve the federal interests vindicated by *42 U.S.C.S. § 1983* [*Wilson v. Garcia (1985) 471 U.S. 261, 266-271, 275-276, 105 S. Ct. 1938, 85 L. Ed. 2d 254]* . In *California, Code Civ. Proc. § 335.1* governs personal injury actions and provides for a two-year limitations period (one year, prior to January 1, 2003) [*Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)*; Ch. 345, *Limitation of Actions*, § 345.14]. However, since there was precedent prior to *Wilson* that the limitation period applicable to actions was three years, *Wilson* is applied prospectively rather than retroactively because retroactive application would bar actions relying on that precedent, rendering a result inconsistent with the purpose of *42 U.S.C.S. § 1983* [*Gibson v. United States (9th Cir. 1986) 781 F.2d 1334, 1339* ; *Parker v. Superior Court (1985) 175 Cal. App. 3d 1082, 1088-1091, 223 Cal. Rptr. 292]* .However, federal, rather than state, law governs the time of accrual [*Gibson v. United States (9th Cir. 1986) 781 F.2d 1334, 1340]* .

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[Reserved]

§§ 429.332[Reserved]

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37-429 California Forms of Pleading and Practice--Annotated § 429.350

§ 429.350 Definitions

[1] Documentary Materials

The term "documentary materials" means materials on which information is recorded. This incudes, but is not limited to, written or printed materials, photographs, motion picture films, negatives, video tapes, audio tapes, and other mechanically, magnetically, or electronically recorded cards, tapes, or discs. The term does not include contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used as, the means of committing a criminal offense [*42 U.S.C.S. § 2000aa-7(a)*].

[2] Work Product Materials

The term "work product materials" means materials used in anticipation of communicating to the public that are prepared, produced, authored, or created, whether by the person in possession of the materials or by any other person and are possessed for the purposes of communicating the materials to the public. These materials include mental impressions, conclusions, opinions, or theories of the person who prepared, produced, authored, or created the material [*42 U.S.C.S. § 2000aa-7(b)*].

[3] Any Other Government Unit

The term "any other government unit" means the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any local government, unit of local government, or any unit of state government [42 U.S.C.S. § 2000-7(c)].

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§ 429.351 Protection From Unlawful Searches and Seizures of Public Communication Materials

[1] Work Product Materials

A search and seizure of work product materials of persons reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce is unlawful unless the government official or employee (1) has probable cause to believe that the person possessing the materials has committed, or is committing the criminal offense to which the materials relate; or (2) has reason to believe that the immediate seizure of the work product materials is necessary to prevent the death of, or serious bodily injury to, a human being [*42 U.S.C.S. § 2000aa(a)(1), (2)*].

A search or seizure of any work product materials is also unlawful if the offense to which the materials relate consists of the receipt, possession, communication, or withholding of the materials or the information contained within the materials, unless the materials relate to certain national defense, classified information, or restricted data [*42 U.S.C.S. § 2000aa(a)(1)*].

[2] Other Materials

A search and seizure of documentary materials other than public communication work product materials by either federal or state officials or employees is unlawful unless [*42 U.S.C.S. § 2000aa(b)(1)-(4)*]:

- The government official or employee has probable cause to believe that the person possessing the materials has committed, or is committing the criminal offense to which the materials relate;

- The government official or employee has reason to believe that the immediate seizure of the work product materials is necessary to prevent the death of, or serious bodily injury to, a human being;

- The government official or employee has reason to believe that the giving of notice pursuant to a subpena duces tecum would result in the destruction, alteration, or concealment of the materials; or

- The materials have not been produced in response to a court order directing compliance with a subpena duces tecum, and all appellate remedies have been exhausted or there is reason to believe that the delay in an investigation or trial occassioned by further proceedings relating to the subpena would threaten the interests of justice.

A search or seizure of any documentary materials other than work product materials is also unlawful if the offense to which the materials relate consists of the receipt, possession, communication, or withholding of the materials or the information contained within the materials, unless the materials relate to certain national defense, classified information, or restricted data [*42 U.S.C.S. § 2000aa(b)(1)*].

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§ 429.352 Civil Action for Violation of Privacy Protection Act

[1] Right of Action

Persons aggrieved by an unlawful search for or seizure of materials in violation of the Privacy Protection Act have a civil cause of action for damages [*42 U.S.C.S. § 2000aa-6(a)*]. The right of action may be against the United States, or against a state which has waived its sovereignimmunity to a claim for damages resulting from a violation of the Privacy Protection Act, or against any other government unit for violations of the Act by their officers or employees while acting within the scope or under color of their office or employment [*42 U.S.C.S. § 2000aa-6(a)(1)*].

[2] Jurisdiction

The United States district courts have original jurisdiction of all civil actions arising under the Privacy Protection Act [*42 U.S.C.S. § 2000aa-6(h)*]. The right to a civil action for damages against the United States, a state, or any other government unit, or against the officer or employee whose violation of the Privacy Protection Act gave rise to the claim, or his or her estate, is exclusive of any other civil action or proceeding for conduct constituting violation of the Act [*42 U.S.C.S. § 2000aa(d)*].

[3] Settlement of Claim by Attorney General

The United States Attorney General has the power to settle a claim for damages brought against the United States for violation of the Privacy Protection Act [*42 U.S.C.S. § 2000aa(g)*].

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§ 429.353 Defenses

The United States, a state, or any other government unit may raise as a defense the belief in the lawfulness of a judicial officer's conduct which is the basis for an action under *42 U.S.C.S. § 2000aa(a)* [*42 U.S.C.S. § 2000aa-6(c)*]. An officer or employee of a government unit may also raise as a complete defense in an action for violation of this section the reasonable good-faith belief in the lawfulness of his or her conduct [*42 U.S.C.S. § 2000aa-6(b)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.370

§ 429.370 Invasion of Privacy by Unreasonable Search and Seizure

All persons within the United States and under United States jurisdiction have the right to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures [*U.S. Const. amend. IV*]. *U.S. Const. amend. IV*, may itself be the basis of a claim for damages for a violation of the prohibition against unreasonable searches and seizures. When legal rights have been invaded and a federal law provides a general right to sue for the invasion, federal courts may use any available remedy to make good the wrong done [*Bivens v. Six Unknown Fed. Narcotics Agents (1971) 403 U.S. 388, 396, 91 S. Ct. 1999, 29 L. Ed. 2d 619]* . Damages claims against federal officers for violation of the *Fourth Amendment* may be brought in federal district court [*Bivens v. Six Unknown Fed.Narcotics Agents (1971) 403 U.S. 388, 395-397, 91 S. Ct. 1999, 29 L. Ed. 2d 619]* . A federal civil rights action based on the alleged unconstitutionality of a search under *42 U.S.C.S. § 1983* is not barred by a judgment of conviction entered in a state court following a guilty plea when state collateral principles do not preclude the relitigation of the search [*see Haring v. Prosise (1983) 462 U.S. 306, 312-317, 103 S. Ct. 2368, 76 L.Ed. 2d 595]* . In California, a person may appeal a judgment of conviction following a plea of guilty or plea of nolo contendere [Penal Code § 1535.5(m); *People v. West (1970) 3 Cal. 3d 595, 601, 91 Cal. Rptr. 385, 477 P.2d 409]* .

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37-429 California Forms of Pleading and Practice--Annotated § 429.371

§ 429.371 Employee Drug and Alcohol Testing

Certain government employees may be subject to blood or urine analyses that test for the presence of drugs and alcohol without warrants or individualized suspicion, and without subjecting the government to liability for an unreasonable search and seizure [*see Skinner v. Railway Labor Executives' Ass'n (1989) 489 U.S. 602, 633-634, 109 S. Ct. 1402, 103 L. Ed. 2d 639* (railroad employees involved in major train accidents); *Treasury Employees v. Von Raab (1989) 489 U.S. 656, 679, 109 S. Ct. 1384, 103 L. Ed. 2d 685* (applicants for United States Customs Service positions directly involving interdiction of illegal drugs or requiring use of firearms)]. While acknowledging that tests intrude on reasonable societal expectations of privacy, and that intrusions are deemed searches under *U.S. Const. amend. IV*, in cases upholding these testing programs, the United States Supreme Court found that the governmental interest outweighed the privacy interests of the employees [*see Skinner v. Railway Labor Executives' Ass'n (1989) 489 U.S. 602, 620-622, 109 S. Ct. 1402, 103 L. Ed. 2d 639* ; *Treasury Employees v. Von Raab (1989) 489 U.S. 656, 668-672, 109 S. Ct. 1384, 103 L. Ed. 2d 685* ; *see also Smith v. Fresno Irrigation Dist. (1999) 72 Cal. App. 4th 147, 160, 84 Cal. Rptr. 2d 775* ; *cf. Chandler v. Miller (1997) 520 U.S. 305, 117 S. Ct. 1295, 1298, 1305, 137 L. Ed. 2d 513* (drug testing requirement for all state office candidates did not fit within closely guarded category of constitutionally permissible suspicionless searches; however, balance of constitutionality would shift if elected officials performed "high-risk, safety-sensitive" tasks); *Lanier v. City of Woodburn (9th Cir. 2008) 518 F.3d 1147, 1149-1152* (city's policy requiring candidates of choice for city positions to pass pre-employment drug test as condition of job offer was unconstitutional as applied to preferred applicant for part-time position as page at library because city failed to demonstrate special need to screen prospective page for drugs)]. It also found that requiring a warrant prior to testing would significantly hinder the objectives of the government's testing program [*Skinner v. Railway Labor Executives' Ass'n (1989) 489 U.S. 602, 623-624, 109 S. Ct. 1402, 103 L. Ed. 2d 639]* . The Court has also found that indirect monitoring of the urine collection process is a negligible intrusion into the privacy interests compromised by the process of obtaining a urine sample [*Smith v. Fresno Irrigation Dist. (1999) 72 Cal. App. 4th 147, 161, 84 Cal. Rptr. 2d 775* ; *see also* Vernonia Sch. Dist. 47J v. Acton (1995) 515 U.S. 646, 2393].

The Court concluded that the testing procedures pose only limited threats to the employees' justifiable expectations of privacy. In *Skinner v. Railway Labor Executives' Association*, involving railroad workers, the Court found that the

government interest in ensuring the safety of the traveling public was compelling, observing that the employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences, and that those employees can cause great human loss before any signs of impairment become noticeable [*Skinner v. Railway Labor Executives' Ass'n (1989) 489 U.S. 602, 628, 109 S. Ct. 1402, 103 L. Ed. 2d 639]* . The Court said that the tests also served as a deterrent to the use of controlled substances or alcohol [*Skinner v. Railway Labor Executives' Ass'n (1989) 489 U.S. 602, 629, 109 S. Ct. 1402, 103 L. Ed. 2d 639]* .

Similarly, in *Treasury Employees v. Von Raab,* involving Customs employees directly involved in the interdiction of illegal drugs or who carry firearms, the Court found that the government had a compelling interest in safeguarding national borders and the public safety [*Treasury Employees v. Von Raab (1989) 489 U.S. 656, 677, 109 S. Ct. 1384, 103 L. Ed. 2d 685]* . The Court's reasoning also emphasized the employees' expectations of privacy, finding that the expectations were diminished by the employees' participation either in certain forms of public employment [*see Treasury Employees v. Von Raab (1989) 489 U.S. 656, 671-672, 109 S. Ct. 1384, 103 L. Ed. 2d 685]* , or in an industry that has long been regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of employees [*see Skinner v. Railway Labor Executives' Ass'n (1989) 489 U.S. 602, 627, 109 S. Ct. 1402, 103 L. Ed. 2d 639]* .

Based on *Skinner v. Railway Labor Executives' Association* and *Treasury Employees v. Von Raab,* the Ninth Circuit Court of Appeals upheld requirements of the Federal Highway Administration of the Department of Transportation, mandating various forms of drug testing for commercial motor vehicle operators, including random drug testing and postaccident drug testing [*International Brotherhood of Teamsters, etc. v. DOT, 932 F.2d 1292, 1294-1309 (1991)* . The Ninth Circuit also upheld random drug testing of civilian employees of the United States Navy who hold top secret security clearances [AFGE Local 1533 v. *Cheney (9th Cir. 1991) 944 F.2d 503, 506]* . Similarly, the Ninth Circuit upheld random drug testing of clerical, warehouse, and maintenance employees at a nuclear plant pursuant to Nuclear Regulatory Commission regulations applicable to workers who have unescorted access to "protected areas" [International Bhd. of Elec. Workers, Local 1245 v. *United States Nuclear Regulatory Comm'n (9th Cir. 1992) 966 F.2d 521, 526-527]* .

Under federal law, the ultimate measure of the constitutionality of a governmental search is reasonableness. To be reasonable under the *Fourth Amendment*, a search ordinarily must be based on individualized suspicion of wrongdoing [*Smith v. Fresno Irrigation Dist. (1999) 72 Cal. App. 4th 147, 158, 84 Cal. Rptr. 2d 775* ; *see also* Vernonia Sch. Dist. 47J v. *Acton (1995) 515 U.S. 646, 115 S. Ct. 2386, 2390, 2399, 132 L. Ed. 2d 564* (drug testing of student athletes upheld)]. Whether a drug test meets the reasonableness standard is judged by balancing its intrusion on the individual's *Fourth Amendment* interests against its promotion of legitimate governmental interests [*Smith v. Fresno Irrigation Dist. (1999) 72 Cal. App. 4th 147, 158, 84 Cal. Rptr. 2d 775* ; *see also Skinner v. Railway Labor Executives' Ass'n (1989) 489 U.S. 602, 619, 109 S. Ct. 1402, 103 L. Ed. 2d 639]* . A finding of reasonableness does not require that the least intrusive search practicable be conducted [*Smith v. Fresno Irrigation Dist. (1999) 72 Cal. App. 4th 147, 158, 84 Cal. Rptr. 2d 775* ; *see also* Vernonia Sch. Dist. 47J v. Acton (1995) 515 U.S. 646, 2396]. Drug test of an existing employee without any individualized suspicion is unreasonable unless the employee is in a safety or security sensitive position [*Smith v. Fresno Irrigation Dist. (1999) 72 Cal. App. 4th 147, 158, 84 Cal. Rptr. 2d 775]* .

Although both the *Skinner* and *Von Raab* decisions characterized the government interest motivating the drug test as "compelling," the United States Supreme Court clarified this reference as describing only an interest important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive on a genuine expectation of privacy [*Smith v. Fresno Irrigation Dist. (1999) 72 Cal. App. 4th 147, 157, 84 Cal. Rptr. 2d 775* ; *see also* Vernonia Sch. Dist. 47J v. Acton (1995) 515 U.S. 646, 2390, 2394-2395].

The Ninth Circuit also upheld a provision of the Department of Labor's Drug-Free Workplace Plan providing for drug testing of employees in public health and safety-sensitive or security-sensitive positions based on reasonable suspicion of off-duty drug use [American Fed'n of Gov't Employees, AFL-CIO, Local 2391 v. *Martin (9th Cir. 1992) 969 F.2d*

788, 791-793] . The court in that case held that the provision was not facially unconstitutional under *U.S. Const. amend. IV*, but emphasized that its opinion did not preclude a further constitutional challenge to the provision as applied [American Fed'n of Gov't Employees, AFL-CIO, Local 2391 v. *Martin (9th Cir. 1992) 969 F.2d 788, 793]* .

A California court of appeal held under both the federal and state constitutions that an irrigation district's termination of the employment of a construction and maintenance worker after discovery of his ingestion of illegal substances in a random suspicionless drug and alcohol test did not violate the worker's constitutional rights [*Smith v. Fresno Irrigation Dist. (1999) 72 Cal. App. 4th 147, 84 Cal. Rptr. 2d 775]* . The court found that the worker's expectation of privacy was diminished by the fact that the testing was done in as minimally intrusive a manner as possible and that the district gave its employees six months notice before implementing its drug testing policy [*Smith v. Fresno Irrigation Dist. (1999) 72 Cal. App. 4th 147, 161-162, 84 Cal. Rptr. 2d 775]* . The court also found that the randomness of a drug testing program has been found to have beneficialeffects, since it operates as a more effective deterrent to substance abuse in the work place and eliminates the opportunity for harassment, real or alleged, which can result from reasonable cause testing [*Smith v. Fresno Irrigation Dist. (1999) 72 Cal. App. 4th 147, 162, 84 Cal. Rptr. 2d 775]* . The court further found that the worker's expectation of privacy was outweighed by the district's legitimate and substantial safety-related reasons for randomly drug testing its construction and maintenance workers [*Smith v. Fresno Irrigation Dist. (1999) 72 Cal. App. 4th 147, 162-167, 84 Cal. Rptr. 2d 775]* . Although unlike earlier cases, the safety of the worker himself or a coworker was the basis for the district's finding that construction and maintenance workers are in a safety-sensitive position, rather than the safety of the public, the district's interest in reducing a substantial and real risk of injury to plaintiff's coworkers justified the random drug test, since the district's legitimate interest in protecting the life and safety of its employees through a random drug testing policy designed to detect and deter drug use is indistinguishable from the concern for public safety that animates general acceptance of drug testing by courts. Further, it is not the number of persons who could be injured by a drug-impaired worker that determines the constitutional validity of random drug testing, but the degree, severity, and immediacy of the harm posed [*Smith v. Fresno Irrigation Dist. (1999) 72 Cal. App. 4th 147, 163, 84 Cal. Rptr. 2d 775]* .

Similar standards govern drug testing under the federal and state constitutions, and under both, an individualized suspicion of drug use is not always required [*Smith v. Fresno Irrigation Dist. (1999) 72 Cal. App. 4th 147, 157, 84 Cal. Rptr. 2d 775* ; for discussion of California constitutional standards applicable to drug and alcohol testing, *see § 429.16*].

However, off-duty drug testing may intrude on an employee's constitutionally protected right to privacy [*Edgerton v. State Pers. Bd. (2000) 83 Cal. App. 4th 1350, 1359-1361, 100 Cal. Rptr. 2d 491* (enjoining Caltrans from conducting off-duty drug testing proper)].

For related jury instructions on a claim, brought in state court, of unreasonable search in violation of constitutional rights and the affirmative defense of consent to the search, see *Judicial Council of California Civil Jury Instructions, CACI Nos. 3002, 3003, 3005* (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

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[Reserved]

§§ 429.372[Reserved]

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§ 429.390 California Points and Authorities

For memoranda of points and authorities relating to forms in this chapter, *see* California Points and Authorities, Ch. 116, *Injunctions* , Ch, 142, *Libel and Slander (Defamation)*, and Ch. 184, *Privacy: Invasion of Privacy* (Matthew Bender)

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§ 429.391 State Statutes

[1] In General

Privileges protecting publications and broadcasts. *Civ. Code § 47*

Retraction requirements in actions against newspaper or radio defendants. *Civ. Code § 48a*

Grounds for issuance of injunction. *Civ. Code § 3422*; *Code Civ. Proc. § 526*

Uniform Single Publication Act. *Civ. Code §§ 3425.1-3425.5*

Two-year statute of limitations. *Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)* (one-year period prior to 2003)

[2] Appropriation of Name or Likeness

Commercial appropriation of name, voice, signature, photograph or likeness. *Civ. Code § 3344*

Damages are not less than $750. *Civ. Code § 3344(a)*

Photograph defined. *Civ. Code § 3344(b)*

Knowing use defined. *Civ. Code §§ 3344(c), (f)*

Commercial use defined. *Civ. Code §§ 3344(d), (e)*

Remedies provided by *Civ. Code § 3344* are cumulative. *Civ. Code § 3344(g)*

Unauthorized use (appropriation) of deceased personality's name, voice, signature, photograph or likeness. *Civ. Code § 3344.1*

[3] Damages

Only special damages are recoverable for false light publicity tort if demand for retraction was required but not made. *Civ. Code § 48a*

Punitive damages if retraction requirements applicable. *Civ. Code § 48a(2), (4)(c), (4)(d)*

Punitive damages generally. *Civ. Code § 3294*

Compensatory damages. *Civ. Code § 3333*

Nominal damages. *Civ. Code § 3360*

[4] Immunity

Disclosure required and immunity provided in instances of child abuse. *Penal Code § 11164 et seq.*

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37-429 California Forms of Pleading and Practice--Annotated § 429.392

§ 429.392 Decisions

[1] In General

Invasion of right to privacy is comprised of four torts: public disclosure of private facts; publicity which places person in false light in public eye; physical intrusion into solitude or private affairs; and appropriation of name or likeness. *Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 808, 163 Cal. Rptr. 628, 608 P.2d 716* ; *Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 819*

Right of privacy does not encompass what is already public. *Gill v. Hearst Pub. Co. (1953) 40 Cal. 2d 224, 230, 253 P.2d 441* ; *Smith v. National Broad. Co. (1956) 138 Cal. App. 2d 807, 813, 292 P.2d 600*

Right of privacy recognized. *Gill v. Curtis Publishing Co. (1952) 38 Cal. 2d 273, 239 P.2d 630*

Injunctive relief is remedy for invasion of privacy. *Leavy v. Cooney (1963) 214 Cal. App. 2d 496, 504, 29 Cal. Rptr. 580*

[2] Actual Malice Requirement

Malice required is actual malice of "New York Times Rule"--that is, proof that defendant published material with knowledge of its falsity or with reckless disregard for its truth. *Time, Inc. v. Hill, 385 U.S. 374, 387-388, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967)*

Falsely implying that person endorsed Forum magazine constitutes appropriation tort. *Cher v. Forum Int'l, Ltd. (9th Cir. 1982) 692 F.2d 634, 640 , disapproved on other grounds, McQuiston v. Marsh (9th Cir. 1986) 790 F.2d 798*

Exaggerating claims of exclusivity of interview with person in magazine does not constitute appropriation tort. *Cher v. Forum Int'l, Ltd. (9th Cir. 1982) 692 F.2d 634, 638 , disapproved on other grounds, McQuiston v. Marsh (9th Cir.*

1986) 790 F.2d 798

Appropriation of person's name or likeness for another's advantage is actionable tort. *Clark v. Celeb Publ'g, Inc. (S.D.N.Y. 1981) 530 F. Supp. 979, 982* (applying California law)

Appropriation of person's name or likeness, for defendant's advantage, is tort actionable under right of privacy. *Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 808, 163 Cal. Rptr. 628, 608 P.2d 716* ; *Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 819*

Proof of malice required for false light tort. *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 35 n.16, 81 Cal. Rptr 360, 459 P.2d 912*

[3] Appropriation

Liability of advertiser for unauthorized imitation of singer's distinctive voice in radio commercial. *Waits v. Frito-Lay, Inc. (9th Cir. 1992) 978 F.2d 1093, 1098-1106*

Advertisers' unauthorized use of imitation of professional singer's distinctive voice in song used in product advertisement is not actionable under *Civ. Code § 3344* because advertisers did not use singer's name or anything else the use of which is prohibited by that section. *Midler v. Ford Motor Co. (9th Cir. 1988) 849 F.2d 460, 462-463*

Even though imitation of voice in advertisement is not actionable under *Civ. Code § 3344*, that statute does not preclude common law causes of action for damages for appropriation of voice for use in advertisement because *Civ. Code § 3344* implies availability of common law causes of action by providing that its remedies are cumulative. *Midler v. Ford Motor Co. (9th Cir. 1988) 849 F.2d 460, 463*

Appropriation of attributes of one's identity is actionable under common law. *Midler v. Ford Motor Co. (9th Cir. 1988) 849 F.2d 460, 463* (well-known, distinctive voice)

Plaintiff, who had already published photograph of himself, failed to state cause of action for violation of privacy tort of commercial appropriation of name or likeness codified in *Civ. Code § 3344* based on defendant's publishing of photograph in sexually explicit magazine. *Brewer v. Hustler Magazine, Inc. (9th Cir. 1984) 749 F.2d 527, 529-530*

Use in advertisement of race car driver's racing car with some modifications but distinguishable markings still visible was invasion of privacy. *Motschenbacher v. R.J. Reynolds Tobacco Co. (9th Cir. 1974) 498 F.2d 821, 827*

Appropriation of person's name or likeness, for defendant's advantage, is tort actionable under right of privacy. *Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 819*

Reprint in textbook of magazine article about plaintiff finding and returning quarter of million dollars was not so directly connected with sale of textbook as to constitute commercial use under *Civ. Code § 3344(a)*. *Johnson v. Harcourt, Brace, Jovanovich, Inc. (1974) 43 Cal. App. 3d 880, 895, 118 Cal. Rptr. 370*

Use of professor's name without his consent in publication of classroom notes from professor's lectures was appropriation of personality. *Williams v. Weisser (1969) 273 Cal. App. 2d 726, 742, 78 Cal. Rptr. 542*

Appropriation of name or likeness tort consists of unauthorized use of person's name, likeness, or personality. *Fairfield v. American Photocopy Equip. Co. (1955) 138 Cal. App. 2d 82, 86, 291 P.2d 194*

[4] California Constitutional Right to Privacy

Court could not determine whether trial court properly sustained demurrer to allegations that major league football team's implementation of league policy requiring all fans at team's home games to submit to patdown search before entering stadium violated fans' state constitutional right to privacy under *Cal. Const., art. I, § 1*, where, assuming alleged facts to be true, California Supreme Court could not judge reasonableness of policy because record did not establish circumstances of or reasons for policy, and team had not yet given any explanation or justification for policy, and where meager record did not establish valid consent by fans as matter of law. Sheehan v. San Francisco 49ers, *Ltd. (2009) 45 Cal. 4th 992, 997-1003, 89 Cal. Rptr. 3d 594, 201 P.3d 472*

Litigation privilege under *Civ. Code § 47(b)* applies to constitutionally based privacy cause of action, so that privilege protected letter that supervisor of county victim witness program wrote in connection with family law proceeding involving visitation rights, which provided information regarding whether one a person being considered for visitation had molested his nephew one decade earlier. *Jacob B. v. County of Shasta (2007) 40 Cal. 4th 948, 960-962, 56 Cal. Rptr. 3d 477, 154 P.3d 1003*

Although California Supreme Court had not yet considered whether violation of state constitution's privacy clause permitted action for damages, court of appeal did not need to resolve whether plaintiff stated cause of action for damages based on workers' compensation investigation into her private life, where alleged conduct was within scope of immunity provided by *Gov. Code § 821.6*, and constitutional right to privacy did not limit scope of preexisting statutory immunity. *Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE) (2007) 157 Cal. App. 4th 1056, 1066, 69 Cal. Rptr. 3d 176*

In defamation action, defendant's right to privacy under *Cal. Const. art. I, § 1*, is outweighed by plaintiff's need for disclosure in deposition of defendant's psychotherapist regarding defendant's report of suspected child abuse resulting in psychotherapist's required report to authorities under *Penal Code § 11166(a)*; psychotherapist-patient privilege under *Evid. Code §§ 1012, 1014* is inapplicable. *Roe v. Superior Court (1991) 229 Cal. App. 3d 832, 843, 280 Cal. Rptr. 380*

Criminal defendant not entitled to disclosure of names and addresses of jurors to support motion for new trial on ground of juror misconduct, after balancing of compelling public need for discovery against jurors' right of privacy under *Cal. Const. art. I, § 1*; juror information provided only after satisfactory, preliminary showing of possible juror misconduct. *People v. Rhodes (1989) 212 Cal. App. 3d 541, 550-552, 261 Cal. Rptr. 1*

[5] Damages

Continuing to release issues of magazine with objectionable photograph after demand by plaintiff to cease, and failure to answer complaint in action or make other responsive pleading supported punitive damages. *Clark v. Celeb Publ'g, Inc. (S.D. N.Y. 1981) 530 F. Supp. 979, 984* (applying California law)

Damages for embarrassment, humiliation, and other forms of mental anguish are recoverable for invasion of privacy. *Clark v. Celeb Publ'g, Inc. (S.D. N.Y. 1981) 530 F. Supp. 979, 983* (applying California law)

Requirement of *Civ. Code § 45a* that special damages be pleaded and proven in actions involving defamatory language not libelous on its face is applicable to false light action based on publication that is defamatory within meaning of statute. *Fellows v. National Enquirer, Inc. (1986) 42 Cal. 3d 234, 247-251, 228 Cal. Rptr. 215, 721 P.2d 97*

In action under *Civ. Code § 3344*, plaintiff may not introduce evidence of settlements plaintiff achieved in other

misappropriation cases to establish value of damages sustained in current case, because those settlements could have been influenced by variety of factors not relevant to current case. *O'Hearn v. Hillcrest Gym & Fitness Ctr., Inc. (2004) 115 Cal. App. 4th 491, 501, 9 Cal. Rptr. 3d 342*

Injury to be compensated includes impairment of reputation and standing in community, personal humiliation, and mental anguish and suffering. *Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 137, 188 Cal. Rptr. 762*

Amount of damages is left to sound discretion of jury. *Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 137, 188 Cal. Rptr. 762*

Physical injury not required for compensatory damages. *Leavy v. Cooney (1963) 214 Cal. App. 2d 496, 502, 29 Cal. Rptr. 580*

General damages are recoverable without showing of specific loss. *Fairfield v. American Photocopy Equip. Co. (1955) 138 Cal. App. 2d 82, 88-89, 291 P.2d 194*

[6] Defenses

[a] Creditor's Privilege

Creditor has limited privilege to reveal to others existence of debt for purpose of securing repayment. *Timperley v. Chase Collection Serv. (1969) 272 Cal. App. 2d 697, 699-700, 77 Cal. Rptr. 782*

[b] Privileges Under Civ. Code § 47

Litigation privilege under *Civ. Code § 47(b)* applies to constitutionally based privacy cause of action, so that privilege protected letter that supervisor of county victim witness program wrote in connection with family law proceeding involving visitation rights, which provided information regarding whether one a person being considered for visitation had molested his nephew one decade earlier. *Jacob B. v. County of Shasta (2007) 40 Cal. 4th 948, 960-962, 56 Cal. Rptr. 3d 477, 154 P.3d 1003*

Former *Civ. Code § 47(2), (3)* (*now see Civ. Code § 47(b), (c)*) barred action for invasion of privacy based on defendant's statements during arbitration proceedings. *Ribas v. Clark (1985) 38 Cal. 3d 355, 364, 212 Cal. Rptr. 143, 696 P.2d 637*

Dissemination of report of Attorney General's special commission was discharge of official duty by Attorney General under former *Civ. Code § 47(1)* (*now see Civ. Code § 47(a)*) absolute privilege for publication made in proper discharge of official duty. *Kilgore v. Younger (1982) 30 Cal. 3d 770, 779, 180 Cal. Rptr. 657, 640 P.2d 793*

Privileges of *Civ. Code § 47* apply to defamation and other actions, excepting only those for malicious prosecution. *Kilgore v. Younger (1982) 30 Cal. 3d 770, 778, 180 Cal. Rptr. 657, 640 P.2d 793*

In action for violation of right to privacy, based on defendants' unauthorized disclosure of plaintiff's HIV-positive status following plaintiff's limited disclosure to nurse for purpose of safe withdrawal of blood during employment-related medical examination, *Civ. Code § 47(b)* did not provide defense to doctor who revealed information in nonconfidential report to plaintiff's employer; however, *Civ. Code § 47(b)* provided valid defense for legal and insurance personnel who received information from doctor in nonconfidential report and were unaware of confidential nature of information. *Urbaniak v. Newton (1991) 226 Cal. App. 3d 1128, 1141, 277 Cal. Rptr. 354*

Party's psychotherapist does not have blanket immunity from liability under former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*) for disclosure of privileged information voluntarily made in judicial proceeding if disclosure violates patient's constitutional right to privacy. *Cutter v. Brownbridge (1986) 183 Cal. App. 3d 836, 847, 228 Cal. Rptr. 545 , overruled, Jacob B. v. County of Shasta, 40 Cal. 4th 948* (*Civil Code § 47(b)* privilege is absolute)

Allegation in complaint to set aside fraudulent conveyances that party had never included fraudulent payments in tax returns met requirements for former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*) absolute privilege for publication made injudicial proceeding. *Spira v. Superior Court (1976) 62 Cal. App. 3d 33, 36, 133 Cal. Rptr. 24*

Former *Civ. Code § 47(2)* (*now see Civ. Code § 47(b)*) absolute privilege for publication made in judicial proceeding required statement relevant to litigation and made to achieve object of litigation. *Spira v. Superior Court (1976) 62 Cal. App. 3d 33, 35, 133 Cal. Rptr. 24*

[c] Public Information Not Actionable

Newspaper that publishes truthful information that it has lawfully obtained is lawfully subject to liability, if at all, only when liability narrowly tailored to state interest of highest order; liability under a negligence per se theory, based on newspaper's violation of criminal statute prohibiting mass communication publication of identity of victims of sexual offenses, was improper because newspaper lawfully obtained information from law enforcement agency. *Florida Star v. B. J. F. (1989) 491 U.S. 524, 526, 109 S. Ct. 2603, 105 L. Ed. 2d 443*

[d] Statutory Duty to Disclose

[7] Demand for Retraction Requirement

Demand for retraction requirements of *Civ. Code § 48a* apply to false light publicity tort. *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 35, 35 n. 17, 81 Cal. Rptr. 360, 459 P.2d 912*

Statutorily required public disclosure of records required to be filed with government agency did not violate right to privacy under federal and California constitutions. *Wilson v. California Health Facilities Comm'n (1980) 110 Cal. App. 3d 317, 324, 326, 167 Cal. Rptr. 801*

Demand for retraction requirements of *Civ. Code § 48a* does not apply to public disclosure of private facts tort. *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 35, 35 n. 17, 81 Cal. Rptr. 360, 459 P.2d 912* ; *Kinsey v. Macur (1980) 107 Cal. App. 3d 265, 275, 165 Cal. Rptr. 608*

Demand for retraction requirements of *Civ. Code § 48a* do not apply to complaint based on both public disclosure of private facts tort and false light publicity tort when complaint based on unwanted publicity resulting from publication, rather than inaccuracy of publication. *Kinsey v. Macur (1980) 107 Cal. App. 3d 265, 275-276, 165 Cal. Rptr. 608*

Statutory duty to disclose identity of prospective juror to parties in litigation was defense in action for invasion of privacy under *Cal. Const. art. I, § 1* (right to privacy). *Lehman v. City & County of San Francisco (1978) 80 Cal. App. 3d 309, 145 Cal. Rptr. 493*

[8] False Light Publicity

Article falsely imputing statements to plaintiff, describing her appearance when she was not present, and misrepresenting condition of her home amounted to false light invasion of privacy. *Cantrell v. Forest City Publ'g Co. (1974) 419 U.S. 245, 248, 253, 95 S. Ct. 465, 42 L. Ed. 2d 419*

False light tort is equivalent to action for libel and requires proof of actual malice and compliance with retraction requirements of *Civ. Code § 48a*. *Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 543, 93 Cal. Rptr. 866, 483 P.2d 34 , overruled on other grounds,* *Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 696-697, 21 Cal. Rptr. 3d 663, 101 P.3d 552* & n.9, *21 Cal. Rptr. 3d 663, 101 P.3d 552* ; *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 35, n.16, 81 Cal. Rptr. 360, 459 P.2d 912* ; *Johnson v. Harcourt, Brace, Jovanovich, Inc. (1974) 43 Cal. App. 3d 880, 893-894, 118 Cal. Rptr. 370*

False light publicity tort is equivalent to action for libel. *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 35, n. 16, 81 Cal. Rptr. 360, 459 P.2d 912*

Superior court judge was unable to state cause of action in false light (or libel), based on television station's airing of videotape of plaintiff outside his house, in program broadcasting results of opinion poll rating him lowest among all judges rated, because there was no finding of falsity or reckless disregard for truth. *Aisenson v. American Broad. Co. (1990) 220 Cal. App. 3d 146, 161, 269 Cal. Rptr. 379*

Statement in newsletter of private social club, regarding marriage dissolution of member who was discharged from club under family membership provision after dissolution was final, was inadequate to constitute threshold allegation of general public disclosure in cause of action for false light; anonymously worded statement in newsletter was not reasonably construed as being "offensive and objectionable." *Warfield v. Peninsula Golf & Country Club (1989) 214 Cal. App. 3d 646, 660, 262 Cal. Rptr. 890*

Because false light privacy action is in substance equivalent to libel claim, action for false light coupled with libel action was superfluous and subject to dismissal. *McClatchy Newspapers, Inc. v. Superior Court (1987) 189 Cal. App. 3d 961, 965, 234 Cal. Rptr. 702* ; *Selleck v. Globe Int'l, Inc. (1985) 166 Cal. App. 3d 1123, 1136, 212 Cal. Rptr. 838*

Errors in date of previous marriage and age of wife did not amount to false light publicity invasion of privacy. *Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 745, 748, 20 Cal. Rptr. 405*

[9] Intrusive Investigation

Tort of "unreasonably intrusive" investigation is invasion of privacy; employer's credit check of prospective employee without that person's knowledge was not unreasonably intrusive under circumstances, even though employer deceived reporting agency regarding purpose for request. *Comeaux v. Brown & Williamson Tobacco Co. (9th Cir. 1990) 915 F.2d 1264, 1275*

[10] Method of Disclosure

Right to privacy can be violated by oral communication. *H & M Assocs. v. City of El Centro (1980) 109 Cal. App. 3d 399, 412, 167 Cal. Rptr. 392*

General rule is that right to privacy can be violated only by printings, writings, pictures, or other permanent publications or reproductions, and not by word of mouth. *Grimes v. Carter (1966) 241 Cal. App. 2d 694, 698, 50 Cal. Rptr. 808* ; *Gautier v. General Tel. Co. (1965) 234 Cal. App. 2d 302, 309, 44 Cal. Rptr. 404*

[11] Name, Likeness, or Personality

"Likeness" under *Civ. Code § 3344* refers to visual image, rather than to vocal imitation. *Midler v. Ford Motor Co. (9th Cir. 1988) 849 F.2d 460, 463*

Plaintiff, who had already published photograph of himself, failed to state cause of action for violation of his right of privacy based on defendant's publishing of photograph in sexually explicit magazine. *Brewer v. Hustler Magazine, Inc. (9th Cir. 1984) 749 F.2d 527, 529-530*

In employee's action against former employer asserting wrongful termination, cause of action for misappropriation of name, based on employer's truthful and laudatory letter to customer concerning plaintiff's hiring, failed to allege necessary element of resulting injury. *Slivinsky v. Watkins-Johnson Co. (1990) 221 Cal. App. 3d 799, 807, 270 Cal. Rptr. 585*

Unauthorized use or publication of person's name is invasion of privacy. *Stilson v. Reader's Digest Assn. (1972) 28 Cal. App. 3d 270, 273, 104 Cal. Rptr. 581* ; *Fairfield v. American Photocopy Equip. Co. (1955) 138 Cal. App. 2d 82, 86, 87, 291 P.2d 194*

[12] Reproductive Health Services Providers and Patients

Civil action for damages and injunction for online posting of personal information of provider, employee, volunteer, or patient of reproductive health services facility with intent to threaten or incite harm. *Gov. Code §§ 6218, 6218.05*

[13] Newsgathering Privilege Under First Amendment Generally

U.S. Const. amend. I does not bar action against newspaper (alleging breach of contract) brought by person who, while working for candidate's political campaign, released damaging court documents concerning opposing candidate to defendant after being promised confidentiality, and was fired for doing so. *Cohen v. Cowles Media Co. (1991) 501 U.S. 663, 669-672, 111 S. Ct. 2513, 115 L. Ed. 2d 586*

Generally applicable laws (for example, state doctrine of promissory estoppel) do not offend *U.S. Const. amend. I* simply because their enforcement against press has incidental effects on its ability to gather and report news. *Cohen v. Cowles Media Co. (1991) 501 U.S. 663, 669-670, 111 S. Ct. 2513, 115 L. Ed. 2d 586* (action against newspaper for breach of promise of confidentiality to news source)

[14] Newsworthy Matters

[a] Constitutional Protection

In general, truthful publication is constitutionally protected if newsworthy and not so offensive as to shock community's notions of decency. *Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 541, 93 Cal. Rptr. 866, 483 P.2d 34 , overruled on other grounds,* *Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 696-697, 21 Cal. Rptr. 3d 663, 101 P.3d 552* & n.9, *21 Cal. Rptr. 3d 663, 101 P.3d 552* ; *Johnson v. Harcourt, Brace, Jovanovich, Inc. (1974) 43 Cal. App. 3d 880, 891, 118 Cal. Rptr. 370* ; *O'Hilderbrandt v. Columbia Broad. Sys., Inc. (1974) 40 Cal. App. 3d 323, 333-334, 114 Cal. Rptr. 826*

Right of privacy is not absolute, but is balanced against public interest in dissemination of news and information, consistent with constitutional guaranties of freedom of speech and of press. *Gill v. Hearst Publ'g Co. (1953) 40 Cal. 2d 224, 228, 253 P.2d 441* ; *Gill v. Curtis Publishing Co. (1952) 38 Cal. 2d 273, 278-279* ; *Kinsey v. Macur (1980)*

107 Cal. App. 3d 265, 274, 165 Cal. Rptr. 608

If individual observes and can identify suspected murderer who is still at large, *U.S. Const. amend. I* provides no absolute protection from liability for printing individual's name; individual's safety and state's interest in concluding criminal investigation possibly take precedence over public's right to know name of individual. *Times Mirror Co. v. Superior Court (1988) 198 Cal. App. 3d 1420, 1426, 244 Cal. Rptr. 556*

Plaintiff has burden of proving that publication not contitutionally protected--that is, not newsworthy. *Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 130, 188 Cal. Rptr. 762*

Dividing line between individual's right to privacy and public's right to know is not easily drawn but must be determined by facts of each case. *Stryker v. Republic Pictures Corp. (1951) 108 Cal. App. 2d 191, 194, 238 P.2d 670*

[b] Criteria for Newsworthiness

Factors to consider in determining whether or not publication is newsworthy include: social value of facts published, depth of publication's intrusion intoindividual's private affairs, extent to which individual voluntarily acceded to position of public notoriety, exact nature of state's interest in preventing disclosure, whether or not information is matter of public record, and lapse of time between event and publication. *Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 810, 812, 163 Cal. Rptr. 628, 608 P.2d 716*

[c] Newsworthy Facts

Arrests and prosecutions of criminal suspects are matters of legitimate public concern. *Cox Broad. Corp. v. Cohn (1975) 420 U.S. 469, 493, 95 S. Ct. 1029, 43 L. Ed. 2d 328* ; *Coverstone v. Davies (1952) 38 Cal. 2d 315, 323, 239 P.2d 876*

Truthful reports of recent crimes and names of suspects or offenders are generally considered newsworthy. *Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 537, 93 Cal. Rptr. 866, 483 P.2d 34*

Facts of past crimes are generally considered newsworthy; but identification of actor in past crime as usually not newsworthy. *Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 537, 93 Cal. Rptr. 866, 483 P.2d 34*

Statements made by school superintendent to newspaper reporter concerning district's decision to replace principal in response to school violence were newsworthy, even if disclosure included minimal information about principal's retirement plans. *Morrow v. Los Angeles Unified School Dist. (2007) 149 Cal. App. 4th 1424, 1440*

Plaintiffs' occupations, names, likenesses, and voices were matters of legitimate public interest when used as part of televised newsmagazine report on practice of charging for so-called "toll-free" 800 telephone numbers. *Wilkins v. NationalBroad. Co. (1999) 71 Cal. App. 4th 1066, 1084-1087, 84 Cal. Rptr. 2d 329*

Publishing of articles naming woman who had given her newborn baby to her brother to bring to hospital for abandonment was newsworthy as matter of law; plaintiff was not merely involuntary victim of event of public interest, but instead by her own voluntary and extraordinary actions had created newsworthy event, making disclosure of her identity not actionable. *Pasadena Star-News v. Superior Court (1988) 203 Cal. App. 3d 131, 133-134, 249 Cal. Rptr. 729*

In action for invasion of privacy, in which former aide of Howard Hughes alleged defendants' acquisition of his correspondance with Hughes and subsequent publication of book based on this correspondance, newsworthiness of

publication was clearly established, given public interest in Hughes and extent to which plaintiff had also voluntarily assumed and retained status as public figure. *Maheu v. CBS, Inc. (1988) 201 Cal. App. 3d 662, 674-675, 247 Cal. Rptr. 304* (no cause of action stated for public disclosure of private facts)

False accusation of commission of murder, implication of responsiblity for destroying someone's life, and statement that plaintiff was prone to raping children were not newsworthy. *Kinsey v. Macur (1980) 107 Cal. App. 3d 265, 275, 165 Cal. Rptr. 608*

[d] Passage of Time

Lapse of time between event and publication is factor in determining whether or not publication is newsworthy. *Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 812, 163 Cal. Rptr. 628, 608 P.2d 716*

Passage of time does not per se extinguish privilege for newsworthy matters. *Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 812, 163 Cal. Rptr. 628, 608 P.2d 716*

Passage of time did not extinguish newsworthiness because plaintiff, acquitted of murder, maintained series of lawsuits concerning trial over 10-year period and thus rekindled public interest. *Wasser v. San Diego Union (1987) 191 Cal. App. 3d 1455, 1463, 236 Cal. Rptr. 772*

Mere passage of time does not prohibit disclosure of newsworthy matter. *Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 746, 20 Cal. Rptr. 405* P. 91

[e] State's Interest

Exact nature of state's interest in preventing disclosure is factor in determining whether or not publication is newsworthy. *Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 812, 163 Cal. Rptr. 628, 608 P.2d 716*

[f] Offensive to Community's Standards

Determination of whether or not publication is newsworthy depends on contemporary community mores and standards of decency. *Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 133, 188 Cal. Rptr. 762*

Telling how plaintiff returned quarter of million dollars that he found in street was not offensive to community's notions of decency. *Johnson v. Harcourt, Brace, Jovanovich, Inc. (1974) 43 Cal. App. 3d 880, 892, 118 Cal. Rptr. 370*

Recitation of plaintiff's relationship to murder victim in broadcast with stories of two other heinous murders was not offensive to community's notions of decency. *O'Hilderbrandt v. Columbia Broad. Sys., Inc. (1974) 40 Cal. App. 3d 323, 334, 114 Cal. Rptr. 826*

[15] Physical Intrusion

Publication or public disclosure is not required in physical intrusion tort. *Dietemann v. Time, Inc. (9th Cir. 1971) 449 F.2d 245, 249*

Clandestine photographing and recording of plaintiff in his own home after gaining entry by subterfuge was physical intrusion. *Dietemann v. Time, Inc. (9th Cir. 1971) 449 F.2d 245, 248*

For purposes of intrusion tort, fact that workplace interaction could have been heard or witnessed by other workers on premises, but not by general public, will not necessarily preclude finding that participant had objectively reasonable expectation that conversation or interaction would not be secretly videotaped by undercover television reporter for broadcast on television program, at least when workplace did not provide unfettered access to general public and intruder was posing as coworker. *Sanders v. American Broadcasting Companies, 20 Cal. 4th 907, 911, 922-923, 85 Cal. Rptr. 2d 909, 911, 922-923, 978 P.2d 67*

Physical intrusion on person's solitude or seclusion, or into his or her private affairs is tort actionable under right of privacy. *Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 808, 163 Cal. Rptr. 628, 608 P.2d 716* ; *Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 819*

Action for invasion of privacy by physical intrusion, in which plaintiff alleged that defendants broke into locked building and took plaintiff's stored letters, was meritless in view of another allegation that building was owned by one defendant. *Maheu v. CBS, Inc. (1988) 201 Cal. App. 3d 662, 676, 247 Cal. Rptr. 304*

Physical intrusion on plaintiff in own home was intrusion on solitude. *Vescovo v. New Way Enters., Ltd. (1976) 60 Cal. App. 3d 582, 587-588, 130 Cal. Rptr. 86*

Unreasonably intrusive investigation violates right to privacy. *Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 660, 109 Cal. Rptr. 269*

Intrusion on plaintiff in room in which she had exclusive right of occupancy (hospital room) was physical intrusion. *Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 660, 109 Cal. Rptr. 269*

[15] Public Disclosure of Private Facts Tort

[a] In General

Public disclosure of embarrasing private facts is tort actionable under right of privacy. *Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 808, 163 Cal. Rptr. 628, 608 P.2d 716* ; *Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 819* ; *Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 126, 188 Cal. Rptr. 762*

[b] Elements of Cause of Action

Public disclosure tort consists of following elements: (1) public disclosure, (2) of private facts, (3) that would be offensive and objectionable to a reasonable person. *Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 808-809, 163 Cal. Rptr. 628, 608 P.2d 716*

Public disclosure tort consists of following elements: (1) public disclosure, (2) of private facts, (3) that would be offensive and objectionable to a reasonable person, and (4) that are not of legitimate public concern. *Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 126, 188 Cal. Rptr. 762*

[c] Sufficiency of Allegations

Allegations that private investigator, hired by workers' compensation adjuster, failed to disclose report to claimant, were insufficient to state cause of action for invasion of privacy; requirement of credit reporting agency to disclose report to subject of report, pursuant to *15 U.S.C.S. § 1681*, was inapplicable to workers' compensation investigator.

Kemp v. County of Orange (1989) 211 Cal. App. 3d 1422, 1427-1428, 260 Cal. Rptr. 131

Allegations that attorney, representing plaintiff's wife in dissolution action, "caused to be published" among unspecified persons unspecified "particulars of the domestic relations disputes, and other facts" subjecting plaintiff to "public notoriety and disregard," after court ordered file sealed, were too vague to state cause of action under privacy protection under *Cal. Const. art. I, § 1*, or under common law tort of public disclosure of private facts. *Green v. Uccelli (1989) 207 Cal. App. 3d 1112, 1118, 255 Cal. Rptr. 315*

In cause of action for invasion of privacy based on alleged violation by attorney, who represented plaintiff's wife in dissolution action, of court order sealing file, plaintiff was required to allege that attorney publicly disclosed private facts, not that attorney violated court order; contents of dissolution proceedings are historically and presumptively matter of public record. *Green v. Uccelli (1989) 207 Cal. App. 3d 1112, 1120, 255 Cal. Rptr. 315*

[16] Public Disclosure Requirement

Disclosure of grades to State Scholarship and Loan Commission was not sufficient communication to public at large. *Porten v. University of S.F. (1976) 64 Cal. App. 3d 825, 828, 134 Cal. Rptr. 839*

Element of public disclosure requires communication to public in general or to large number of people, rather than merely to few individuals. *Porten v. University of S.F. (1976) 64 Cal. App. 3d 825, 828, 134 Cal. Rptr. 839* ; *Mason v. Western Union Tel. Co. (1975) 52 Cal. App. 3d 429, 440, 125 Cal. Rptr. 53* ; *Schwartz v. Thiele, (1966) 242 Cal. App. 2d 799, 51 Cal. Rptr. 767*

Letter to plaintiff's employer informing of attorney's bill allegedly owed was not sufficient publication to public in general. *Timperley v. Chase Collection Serv. (1969) 272 Cal. App. 2d 697, 699-700, 77 Cal. Rptr. 782*

Letter to mental health department of local court expressing opinion that plaintiff was mentally ill was not sufficient publication to public in general. *Schwartz v. Thiele (1966) 242 Cal. App. 2d 799, 805-806, 51 Cal. Rptr. 767*

[17] Public Figures

[a] In General

Person becomes public figure for all purposes by achieving pervasive fame or notoriety; person can also become public figure for limited issue, relating only to particular controversy that drew him or her into public eye. *Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, 351, 94 S. Ct. 2997, 41 L. Ed. 2d 789*

Person becomes public figure either intentionally, by his or her own activities, or involuntarily, by force of circumstances. *Werner v. Times-Mirror Co. (1961) 193 Cal. App. 2d 111, 117, 14 Cal. Rptr. 208* ; *Johnson v. Harcourt, Brace, Jovanovich, Inc. (1974) 43 Cal. App. 3d 880, 892, 118 Cal. Rptr. 370* ; *Smith v. National Broad. Co. (1956) 138 Cal. App. 2d 807, 812, 292 P.2d 600*

[b] Kinds of People Who Are

Person participating in Peace Corps was not public figure. *Kinsey v. Macur (1980) 107 Cal. App. 3d 265, 273, 165 Cal. Rptr. 608*

Employee of United Nations was not public figure. *Kinsey v. Macur (1980) 107 Cal. App. 3d 265, 273, 165 Cal. Rptr.*

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Person leading protest against land developer was public figure. *Emerson v. J.F. Shea Co. (1978) 76 Cal. App. 3d 579, 592-593, 143 Cal. Rptr. 170*

Person who is "public figure" relinquishes part of his or her right of privacy to extent public has legitimate interest in his or her activities. *Johnson v. Harcourt, Brace, Jovanovich, Inc. (1974) 43 Cal. App. 3d 880, 892, 118 Cal. Rptr. 370* ; *Werner v. Times-Mirror Co. (1961) 193 Cal. App. 2d 111, 117, 14 Cal. Rptr. 208* ; *Smith v. National Broad. Co. (1956) 138 Cal. App. 2d 807, 812, 292 P.2d 600*

People closely related to public figures also lose their right of privacy to some extent. *Johnson v. Harcourt, Brace, Jovanovich, Inc. (1974) 43 Cal. App. 3d 880, 891-892, 118 Cal. Rptr. 370* ; *Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 747-748, 20 Cal. Rptr. 405*

Motion picture actress was public figure. *O'Hilderbrandt v. Columbia Broad. Sys., Inc. (1974) 40 Cal. App. 3d 323, 329, 333, 114 Cal. Rptr. 826*

Professional athletes, noted inventors, explorers, and war heroes are public figures. *Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 746-747, 20 Cal. Rptr. 405*

Person serving in armed forces was public figure for service-connected activities. *Stryker v. Republic Pictures Corp. (1951) 108 Cal. App. 2d 191, 194, 238 P.2d 670*

[c] Passage of Time

Passage of time is factor in determining whether or not person is public figure. *Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 538, 541-542, 93 Cal. Rptr. 866, 483 P.2d 34* ; *but see* *Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 696-697, 21 Cal. Rptr. 3d 663, 101 P.3d 552* & n.9, *21 Cal. Rptr. 3d 663, 101 P.3d 552* (overruling *Briscoe* to extent liability could be predicated on publication of plaintiff's name as criminal offender decade earlier, if plaintiff's name was obtained from official court records available to public)

Person who achieved notoriety by virtue of trial and acquittal for murder of wife was not public figure. *Kinsey v. Macur (1980) 107 Cal. App. 3d 265, 274, 165 Cal. Rptr. 608*

[d] Public Officials and Candidates

Criminal activity of candidate's minor children was relevant to candidate's qualifications for office. *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 38-39, 81 Cal. Rptr. 360, 459 P.2d 912*

Because of their public responsibilities, government officials and candidates for such offices are paradigm case of public figures. *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 36, 81 Cal. Rptr. 360, 459 P.2d 912*

Thorough scrutiny is permitted of any facet of lives of government officials or candidates that may relate to their fitness for office. *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 36-37, 81 Cal. Rptr. 360, 459 P.2d 912*

Charge of criminal conduct is relevant to candidate's qualifications for office. *Beruan v. French (1976) 56 Cal. App. 3d 825, 828, 128 Cal. Rptr. 869*

[18] Public Information

[a] In General

Fact that information is in public domain or is matter of public record is factor in determining whether false light invasion of privacy has occurred. *Carlislev. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 747-748, 20 Cal. Rptr. 405*

[b] Public Records

State prohibited from sanctioning accurate publication of information obtained from public records. *Cox Broad. Corp. v. Cohn (1975) 420 U.S. 469, 491, 95 S. Ct. 1029, 43 L. Ed. 2d 328*

Media defendant has constitutional right to publish information obtained from official criminal court records available to public. *Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 692-697, 21 Cal. Rptr. 3d 663, 101 P.3d 552*

Right of privacy does not encompass information contained in public record. *Kilgore v. Younger (1982) 30 Cal. 3d 770, 778, 180 Cal. Rptr. 657, 640 P.2d 793* ; *Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 747-748, 20 Cal. Rptr. 405* ; *Werner v. Times-Mirror Co. (1961) 193 Cal. App. 2d 111, 117, 14 Cal. Rptr. 208*

Incidents recorded on police blotter are matters of public record. *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 38, 81 Cal. Rptr. 360, 459 P.2d 912*

Police department's disclosure to county sheriff department of record of confidential internal investigation of police officer, in connection with incident involving sheriff's department, was not actionable violation of right to privacy under *Cal. Const. art. I, § 1*, because information had already been in public domain in that it was revealed in quasi-judicial administrative hearing that was open to public, and final administrative decision was considered "public record." *Bradshaw v. City of Los Angeles (1990) 221 Cal. App. 3d 908, 921-922, 270 Cal. Rptr. 711*

Affidavit supporting issuance of search and arrest warrants for murder suspect was public record; lack of actual public access to affidavit until searching officers completed their paperwork and filed warrant return did not render affidavit any less of public document. *Alarcon v. Murphy (1988) 201 Cal. App. 3d 1, 6-7, 248 Cal. Rptr. 26*

In most cases, facts and circumstances surrounding arrest are required to be made public, pursuant to *Gov. Code § 6254(f)(1)*. *Alarcon v. Murphy (1988) 201 Cal. App. 3d 1, 6, 248 Cal. Rptr. 26*

Marriage and subsequent annulment are matters of public record. *Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 747, 20 Cal. Rptr. 405*

Information contained in records of trial are matters of public record. *Melvin v. Reid (1931) 112 Cal. App. 285, 290-291, 297 P. 91*

[c] Public Scenes

Use of person's photograph alone, taken in public place, is not invasion of privacy. *Gill v. Hearst Pub. Co. (1953) 40 Cal. 2d 224, 230, 253 P.2d 441*

[19] Publicity Placing Person in False Light

Publicity that places person in false light in public eye is tort actionable under right of privacy. *Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 808, 163 Cal.Rptr. 628, 608 P.2d 716* ; *Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 819*

[20] Reasonable Person Standard

[a] In General

Reasonable person standard is defined as disclosure that is offensive and objectionable to reasonable person of ordinary sensibilities. *Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 809, 163 Cal. Rptr. 628, 608 P.2d 716* ; *Gill v. Hearst Publ'g Co. (1953) 40 Cal. 2d 224, 229, 253 P.2d 441* ; *Werner v. Times-Mirror Co. (1961) 193 Cal. App. 2d 111, 117, 14 Cal. Rptr. 208*

Right of privacy is judged by reasonable person standard. *Gill v. Hearst Publishing Co. (1953) 40 Cal. 2d 224, 229, 253 P.2d 441* ; *Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 126, 188 Cal. Rptr. 762*

[b] Public Disclosure of Private Facts Tort

Mention of plaintiff in book is not offensive if clear import is to absolve plaintiff of any responsibility for murder in question. *Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 809, 163 Cal. Rptr. 628, 608 P.2d 716*

Disclosure that is not uncomplimentary or discreditable is not offensive. *Gill v. Hearst Publ'g Co. (1953) 40 Cal. 2d 224, 230-231, 253 P.2d 441*

Photograph of plaintiffs, with husband's arm around wife, was not offensive to ordinary sensibilities. *Gill v. Hearst Publ'g Co. (1953) 40 Cal. 2d 224, 230-231, 253 P.2d 441*

[c] False Light Tort

Photograph of plaintiffs in affectionate pose with caption "love at first sight" and accompanying text stating that such love was based purely on sex was sufficient allegation of offensiveness, although ultimate resolution was question of fact. *Gill v. Curtis Publishing Co. (1952) 38 Cal. 2d 273, 280, 239 P.2d 630*

Fictionalization that fills in gaps in otherwise factual account is not sufficiently objectionable. *Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 748, 20 Cal. Rptr. 405*

Insertion of supposed conversations and thoughts in article about plaintiff's early marriage was not offensive. *Carlisle v. Fawcett Publ'ns, Inc. (1962) 201 Cal. App. 2d 733, 748, 20 Cal. Rptr. 405*

Falsehood of neutral nature is not offensive. *Werner v. Times-Mirror Co. (1961) 193 Cal. App. 2d 111, 118-119, 14 Cal. Rptr. 208*

False statement that plaintiff's first wife ran his campaign for public office was not offensive. *Werner v. Times-Mirror Co. (1961) 193 Cal. App. 2d 111, 118-119, 14 Cal. Rptr. 208*

[d] Physical Intrusion Tort

Inquiry into plaintiff's occupation was not offensive because plaintiff indicated he would have divulged information if

asked directly. *Emerson v. J. F. Shea Co., 76 Cal. App. 3d 579, 592, 143 Cal. Rptr. 170*

[21] Right of Publicity

Heirs of Marx brothers were not entitled to sue for Marx brothers' right of publicity in their own characters. *Groucho Marx Prods. v. Day & Night Co. (2d Cir. 1982) 689 F.2d 317, 323* (applying California law)

Right of publicity is personal to artist and not descendable. *Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 824* ; *Guglielmi v. Spelling-Goldberg Prods. (1979) 25 Cal. 3d 860, 861, 160 Cal. Rptr. 352, 603 P.2d 454*

Under predecessor to *Civ. Code § 3344.1*, use without permission of illustration of Three Stooges on lithographs and t-shirts sold for commercial gain was not protected by *First Amendment*, because likenesses at issue were so literal as to contain no significant transformative or creative contribution, and marketability and economic value of work derived primarily from fame of comedians depicted. *Comedy III Prods., Inc. v. Gary Saderup, Inc. (2001) 25 Cal. 4th 387, 406-409, 106 Cal. Rptr. 2d 126, 21 P.3d 797*

Right of publicity means in essence that reaction of public to name and likeness, which may be fortuitous or which may be managed or planned, endows name and likeness with commercially exploitable opportunities. *Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 824*

So-called right of publicity is outgrowth of tort of appropriation of person's name or likeness. *Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 819, 824*

[22] Statute of Limitations

Rule of discovery, that cause of action does not accrue until plaintiff knows, or should know, all material facts essential to show elements of cause of action, applies to invasion of privacy actions. *Cain v. State Farm Mut. Auto. Ins. Co. (1976) 62 Cal. App. 3d 310, 314, 132 Cal. Rptr. 860*

Applicable statute of limitations for invasion of privacy actions is one year, under former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 335.1* (two-year statute of limitations)), after accrual of cause of action. *Cain v. State Farm Mut. Auto. Ins. Co. (1976) 62 Cal. App. 3d 310, 313, 132 Cal. Rptr. 860* ; *Johnson v. Harcourt, Brace, Jovanovich, Inc. (1974) 43 Cal. App. 3d 880, 895-896, 118 Cal. Rptr. 370* ; *Wiener v. Superior Court (1976) 58 Cal. App. 3d 525, 529, 130 Cal. Rptr. 61*

In general, statute of limitations runs from date of publication or utterance of objectionable material. *Wiener v. Superior Court (1976) 58 Cal. App. 3d 525, 529, 130 Cal. Rptr. 61*

Failure to notify plaintiff of publication does not constitute fraudulent concealment sufficient to toll statute of limitations absent fiduciary or confidential relationship. *Johnson v. Harcourt, Brace, Jovanovich, Inc. (1974) 43 Cal. App. 3d 880, 896, 118 Cal. Rptr. 370*

For single, integrated publication, statute of limitations runs from date of first general distribution to public. *Belli v. Roberts Bros. Furs (1966) 240 Cal. App. 2d 284, 289*

Statute of limitations for issue of newspaper for single day runs from date of first general distribution that occurred on evening of previous day. *Belli v. Roberts Bros. Furs (1966) 240 Cal. App. 2d 284, 289-290*

[23] Standing

Right of privacy is purely personal right. *Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 821* ; *Hendrickson v. California Newspapers, Inc. (1975) 48 Cal. App. 3d 59, 62, 121 Cal. Rptr. 429*

Right of privacy does not survive person's death. *Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 821* ; *Hendrickson v. California Newspapers, Inc. (1975) 48 Cal. App. 3d 59, 62-63, 121 Cal. Rptr. 429*

Person's relatives are not entitled to maintain action for invasion of that person's privacy. *Coverstone v. Davies (1952) 38 Cal. 2d 315, 323-324, 239 P.2d 876* ; *Hendrickson v. California Newspapers, Inc. (1975) 48 Cal. App. 3d 59, 62, 121 Cal. Rptr. 429*

Corporation is not entitled to sue for invasion of its privacy on basis of common law tort if no economic losses suffered. *Ion Equip. Corp. v. Nelson (1980) 110 Cal. App. 3d 868, 878-879, 168 Cal. Rptr. 361*

Partnership is entitled to sue for economic damages resulting from invasion of its privacy. *H & M Assocs. v. City of El Centro (1980) 109 Cal. App. 3d 399, 409-411, 167 Cal. Rptr. 392*

If family member's own privacy is invaded along with original person's privacy, family member is entitled to maintain cause of action. *Vescovo v. New Way Enters., Ltd. (1976) 60 Cal. App. 3d 582, 588, 130 Cal. Rptr. 86*

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§ 429.410 State Statutes

[1] AIDS Testing and Research

[a] Blood Donation

Testing of donated blood for HIV. *Health & Safety Code § 1603.1*

Notice to blood donors regarding positive AIDS test. *Health & Safety Code § 1603.3*

Nonliability of public entity, blood bank, or plasma center for unintentional disclosure of information. *Health & Safety Code § 1603.4*

Donation of blood, organs, other tissue, with knowledge of positive AIDS diagnosis; limitations on disclosure; felony offense. *Health & Safety Code § 1621.5*

[b] Criminal Defendants and Inmates

Health & Safety Code §§ 121050-121070 supersedes *Health & Safety Code §§ 120975-121020, 121075-121125, 121025-121035* and all other conflicting laws. *Health & Safety Code § 121050*

Testing of defendants charged with sex crimes. *Health & Safety Code § 121055*

Testing of defendants charged with assaulting certain public employees. *Health & Safety Code § 121060*

Testing procedure. *Health & Safety Code § 121065*

Reporting by medical personnel of information regarding exposure to AIDS and ARC. *Health & Safety Code § 121070*

Mandatory testing of persons convicted of certain sex crimes. *Penal Code § 1202.1*

Mandatory testing of persons convicted of more than one violation of *Penal Code § 647(b)* (prostitution). *Penal Code § 1202.6*

Testing and reporting with regard to certain criminal defendants and inmates. *Penal Code § 7500 et seq.* (inoperative July 1, 1999, and repealed January 1, 2000)

Testing persons subject to Department of Youth Authority, and disclosure of results. *Welf. & Inst. Code § 1768.9*

[c] Definitions

"AIDS." *Health & Safety Code § 120775(a)*

"HIV" and "HIV Test." *Health & Safety Code § 120775(b)*

[d] Disclosure and Testing Generally

Prohibition against compelling disclosure. *Health & Safety Code § 120975*

Remedies for wrongful disclosure. *Health & Safety Code § 120980*

Exemptions from prohibition against disclosure. *Health & Safety Code §§ 120985* (medical records), 121000 (testing in jails, prisons), 121022 (reports by health care providers and laboratories to local health officers)

Written authorization. *Health & Safety Code §§ 120990* (consent required), 121010 (exceptions), 121020 (consent requirements for incompetent test subjects)

Limitations on liability. *Health & Safety Code §§ 121005* (blood banks and plasma centers), 121015 (physicians)

[e] Public Health Records

Prohibition against disclosure of personal information. *Health & Safety Code § 199.42*

Health & Safety Code §§ 120975-121020 and *121075-121125* supersedes *Health & Safety Code §§ 121025-121035*. *Health & Safety Code § 121030*

[f] Research

Prohibition against disclosure of personal information. *Health & Safety Code § 121075*

Written authorization. *Health & Safety Code §§ 121080* (consent required), 121090 (exceptions), 121105 (consent criteria)

Disclosure to test subject and representatives. *Health & Safety Code § 121095*

Prohibition against compelled production in legal proceedings. *Health & Safety Code § 121100*

Remedies; penalties. *Health & Safety Code § 121110*

Prohibition against use of information for employability or insurability purposes. *Health & Safety Code § 121115*

Disclosure of nonconfidential information for research purposes. *Health & Safety Code § 121120*

[2] Business Records

Taxpayer protection from disclosure of amount of gross receipts or cost of tax on receipt for payment of business-license tax. *Bus. & Prof. Code §§ 16110-16112*

Requirements for maintenance and disclosure of privacy policy by commercial Internet site or online service that collects personally identifiable information from consumers. *Bus. & Prof. Code § 22575 et seq.*

Prohibition against requiring personal identification information in credit card transactions. *Civ. Code § 1747.08*

Bookkeeping services. *Civ. Code §§ 1799.1* (disclosure requirements), 1799.2 (civil remedies)

Video recording sales and rentals. *Civ. Code § 1799.3*

Civil action based on conviction of *Penal Code § 502* (improper access to computer system). *Penal Code § 502(e)*

Wrongful disclosure of information acquired in course of business, regarding persons who carpool, is criminal offense. *Penal Code § 637.6*

Confidentiality of reports concerning peace officers' occupational exposure for HIV infection. *Penal Code § 7554*

Telephone or telegraph corporation's disclosure regarding residential customer. *Pub. Util. Code § 2891*

Limitations on telephone corporations' disclosure of unlisted access numbers or mobile telephony numbers. *Pub. Util. Code § 2891.1*

Withholding of telephone caller's telephone number from receiver of call by telephone call identification service. *Pub. Util. Code § 2893*

Interexchange telephone corporation, local exchange telephone corporation, or radiotelephone utility is not subject to liability for wrongful disclosure under *Pub. Util. Code § 2891* or any other law, when disclosure made pursuant to court warrant, order, or administrative subpoena. *Pub. Util. Code § 2894*

[3] Collection Agent License Information

Disclosure of address and telephone number of applicant for collection agent license by Bureau of Collection and Investigative Services. *Bus. & Prof. Code § 6864.1*

[4] Criminal Records

Confidentiality of state summary criminal history information regarding criminal conviction for specific financial-institution related offenses. *Fin. Code § 4990*

Prohibition against employers' access to criminal history not leading to conviction. *Lab. Code § 432.7*

Confidentiality of identity of victim of sex offense during criminal proceedings. *Penal Code § 293.5*

Sealing of records. *Penal Code § 1203.45*

Confidentiality of information furnished to bail bond agent or licensee by local law enforcement agency. *Penal Code § 11105.6*

Dissemination of criminal records. *Penal Code §§ 11075-11081*

Criminal identification and statistics. *Penal Code §§ 11100-11113*

Access to criminal history summary. *Penal Code §§ 11105, 11105.01, 11120-11127, 11140-11144*

Criminal offender record information. *Penal Code §§ 13100-13326*

Violent Crime Information Center, regarding identity and apprehension of violent criminals regarding missing children and dependant adults. *Penal Code §§ 14200-14204*

Law enforcement information regarding missing persons. *Penal Code §§ 14205-14213*

[5] Election Registration Information

Limitations on disclosure of voter-registration information in voter registration card (*Gov. Code § 6254.4*). *Elec. Code §§ 615, 2194*; *Gov. Code § 6254.4*

[6] Employee Personnel Records

Confidentiality of records regarding alcohol or drug rehabilitation treatment. *Lab. Code §§ 1025-1028*

Inspection by employee. *Lab. Code § 1198.5*

[7] Health Records

Patient access to health records. *Health & Safety Code § 123100 et seq.*

[8] Information Privacy Act

[a] Access by Individual to Own Records

Procedures by agency to allow access. *Civ. Code §§ 1798.30-1798.37*

Right to access. *Civ. Code §§ 1798.32, 1798.34*

Fees. *Civ. Code § 1798.33*

Confidentiality of source. *Civ. Code § 1798.38*

Exemptions from access requirement. *Civ. Code §§ 1798.40-1798.44*

Corrected record. *Civ. Code § 1798.51*

[b] Collection and Maintenance of Information by Agency

Collection criteria. *Civ. Code §§ 1798.14-1798.16*

Notice included with request for information. *Civ. Code § 1798.17*

Maintenance criteria. *Civ. Code §§ 1798.18-1798.22*

Review by Department of Justice. *Civ. Code § 1798.23*

Archives. *Civ. Code § 1798.64*

[c] Construction of Provisions

Liberal construction. *Civ. Code § 1798.63*

Privacy Act supersedes certain Government Code provisions. *Civ. Code § 1798.70*

In general. *Civ. Code §§ 1798.70-1798.78*

[d] Definitions

In general. *Civ. Code § 1798.3*

Personal information. *Civ. Code § 1798.3(a)*

Agency. *Civ. Code § 1798.3(b)*

[e] Disclosure of Personal Information

Prohibitions against disclosure. *Civ. Code §§ 1798.24* (prohibitions), 1798.68 (exception regarding district attorney)

Accounting. *Civ. Code §§ 1798.25, 1798.27*

Department of Motor Vehicles procedures. *Civ. Code § 1798.26*

Notice regarding error or dispute. *Civ. Code § 1798.28*

Distribution of names and addresses. *Civ. Code §§ 1798.60* (prohibition regarding commercial use), 1798.61

(distribution for professional use), 1798.62 (mailing list restrictions)

[f] Office of Information Practices

Establishment and duties. *Civ. Code §§ 1798.4-1798.8*

Notification requirement. *Civ. Code §§ 1798.9-1798.11*

[g] Penalties

Violation by agency officer or employee. *Civ. Code § 1798.55*

Request for information under false pretenses. *Civ. Code § 1798.56*

Wrongful disclosure; misdemeanor criminal offense. *Civ. Code § 1798.57*

[h] Remedies

Action for wrongful refusal of access, improper maintenance, or other violation of disclosure provisions. *Civ. Code §§ 1798.45* (grounds), 1798.48 (damages)

Court order for injunction and production of records. *Civ. Code §§ 1798.46, 1798.47*

Standing to bring action for injunctive relief. *Civ. Code § 1798.47*

Damages for wrongful refusal of access. *Civ. Code § 1798.48*

Limitations period; venue. *Civ. Code § 1798.49*

Personnel action; restriction on cause of action regarding subjective opinion about individual. *Civ. Code § 1798.50*

Civil action for wrongful disclosure. *Civ. Code § 1798.53*

[9] Insurance

[a] Disclosure of Information

Notice of information practices. *Ins. Code § 791.04*

Format for disclosure authorization. *Ins. Code § 791.06*

Obtaining copy of investigative report. *Ins. Code § 791.07*

Access to personal insurance information. *Ins. Code § 791.08*

Amendment of record. *Ins. Code § 791.09*

Prohibition of disclosure; exemptions. *Ins. Code § 791.13*

Insurer's duty to provide information to peace officers concerning insurance fraud; information is not public record. *Ins. Code §§ 1873-1873.4*

[b] Penalties for Wrongful Disclosure

Action by insurance commissioner. *Ins. Code §§ 791.15, 791.17*

Judicial review of action by insurance commissioner. *Ins. Code § 791.18*

Penalties for violation of cease-and-desist order. *Ins. Code § 791.19*

[c] Remedies for Wrongful Disclosure

Equitable remedies for failure to provide access, or amend records. *Ins. Code § 791.20(a)*

Damages for improper disclosure. *Ins. Code § 791.20(b)*

Limitation period. *Ins. Code § 791.20(c)*

Statutory remedies are exclusive. *Ins. Code § 791.20(e)*

Requirement of malice or willfulness in actions for defamation, invasion of privacy, or negligence for improper disclosure. *Ins. Code § 791.21*

[d] Underwriting of AIDS Risks

Confidentiality of personal information is one purpose of *Ins. Code §§ 799-799.10*. *Ins. Code § 799*

Underwriting of AIDS risks by life and disability-income insurers. *Ins. Code §§ 799-799.10*

Definitions. *Ins. Code § 799.01*

Insurer's right to decline application for coverage. *Ins. Code § 799.02*

Privacy and consent regarding testing for HIV antibodies. *Ins. Code § 799.03*

Cost of required HIV-antibody test borne by insurer. *Ins. Code § 799.04*

Prohibition against discrimination based on marital status or sexual preference. *Ins. Code § 799.05*

Ins. Code §§ 799-799.10 subject to provisions of *Ins. Code §§ 791-791.26* (Insurance Information Privacy Protection Act); limitations on scope of question about prior testing of HIV antibodies in application for life or disability income insurance. *Ins. Code § 799.06*

Restriction on insurer's disclosure to insurance support organization. *Ins. Code § 799.07*

Insurer's right to limit benefits. *Ins. Code § 799.08*

Prohibition against requirement of HIV-antibodies testing is condition of coverage. *Ins. Code § 799.09*

Civil penalties, damages, and criminal offense for wrongful disclosure to third party of results of HIV antibody test requested by insurer. *Ins. Code § 799.10*

[10] Medical Information

[a] Confidentiality Generally

Confidentiality of Medical Information Act. *Civ. Code §§ 56-56.37*

Relationship of Confidentiality of Medical Information Act to other laws. *Civ. Code §§ 56.27-56.30*

[b] Disclosure by Employers

In general. *Civ. Code §§ 56.20-56.245*

Confidentiality. *Civ. Code § 56.20*

Written authorization. *Civ. Code § 56.21*

Limitation on liability. *Civ. Code § 56.23*

[c] Disclosure by Health Care Providers

Permitted disclosure. *Civ. Code § 56.10*

In general. *Civ. Code §§ 56.10-56.16*

Written authorization. *Civ. Code §§ 56.11* (criteria), 56.12 (copy to patient)

Confidentiality. *Civ. Code § 56.13*

Limitation on liability. *Civ. Code § 56.14*

[d] Disclosure by Third Party Administrators

Prohibition against disclosure generally. *Civ. Code § 56.26*

[e] Remedies

Damages. *Civ. Code § 56.35*

Misdemeanor violation. *Civ. Code § 56.36*

Effect of waivers. *Civ. Code § 56.37*

Permanent injunction. *Code Civ. Proc. § 526*

[11] Mental Health Records

Reports regarding death of person in criminal custody are public records. *Gov. Code § 12525*

Identity of victim of criminal sex offense is public record, unless victim requests nondisclosure. *Penal Code § 293*

Records and information obtained through mental health services. *Welf. & Inst. Code §§ 5328, 5328.05*

Required disclosure of mentally disordered sex offender's mental health records to law enforcement officials. *Welf. & Inst. Code § 5328.01*

Disclosure regarding patients. *Welf. & Inst. Code § 5328.1*

[12] Reproductive Health Services Providers and Patients

Civil action for damages and injunction for online posting of personal information of provider, employee, volunteer, or patient of reproductive health services facility with intent to threaten or incite harm. *Gov. Code §§ 6218, 6218.05*

[13] Student Personal Information

Nondisclosure of student telephone numbers by school district. *Educ. Code § 49073.5*

[14] Student Records

[a] Amendment of Records

Student's request for amendment; statement of disagreement. *Educ. Code §§ 67132, 67133*

[b] Disclosure

Notification of rights. *Educ. Code § 67121*

Record of disclosures. *Educ. Code § 67122*

Fees. *Educ. Code § 67123*

Students' right of inspection. *Educ. Code § 67130*

Waiver. *Educ. Code § 67131*

Permitted disclosures. *Educ. Code §§ 67140, 67141, 67143-67145*

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Prohibition against disclosure. *Educ. Code § 67143*

Rules and regulations by California State University Board of Trustees. *Educ. Code § 67146*

[c] Remedies

Civil action against school. *Educ. Code § 67137*

Injunction relief. *Educ. Code § 67137*

Damages. *Educ. Code § 67138*

Fees and costs. *Educ. Code § 67139*

Action against private person for wrongful disclosure. *Educ. Code § 67139.5*

[15] Tax Records

Limitations on disclosure of tax-return information released to California Parent Locator Service. *Rev. & Tax. Code § 19548*; *Welf. & Inst. Code §§ 11478, 11478.5*

Limitations on disclosure of tax-return information regarding applicants for, or recipients of, student financial aid. *Rev. & Tax. Code § 19557*

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§ 429.411 Decisions

[1] AIDS Testing and Research

In action against blood bank, arising from transfusion of HIV-virus-contaminated blood, discovery by plaintiff of identity of implicated blood donors was prohibited by former *Health & Safety Code § 199.20* (now *Health & Safety Code § 120975*). *Irwin Mem'l Blood Bank v. Superior Court (1991) 229 Cal. App. 3d 151, 156-157, 279 Cal. Rptr. 911*

[2] Court Records

Penal Code § 1203.10, which permits disclosure of probation files to certain persons on discretion of court, did not require court to allow inspection by probationer; criminal defendant's probation file was "court record" for purposes of exclusion from disclosure under Public Records Act (*Gov. Code § 6252(f)*). *McGuire v. Superior Court (1993) 12 Cal. App. 4th 1685, 1687-1688, 16 Cal. Rptr. 2d 726*

Court clerk's "rough" minutes, which contain only accurate information, and from which formal minutes are later prepared, was court record available for public inspection; Public Records Act (*Gov. Code § 6250 et seq.*) was inapplicable because records of court system excluded from Act (*Gov. Code § 6252(f)*). *Copley Press, Inc. v. Superior Court (1992) 6 Cal. App. 4th 106, 113-115, 7 Cal. Rptr. 2d 841* (press sought disclosure of records for purpose of monitoring attorneys' gifts to judges and possible resultant influence on cases)

[3] Criminal Records

Penal Code § 11105(b)(10) (now *Pen. Code § 11105(b)(11)* (effective January 1, 2008)), which allows local government entities access to criminal records "in fulfilling employment, certification or licensing duties," did not authorize Attorney General's release of criminal records of present and prospective public housing tenants to local

housing authority; purpose of disclosure was statutorily limited to occupational and employment functions, and did not include screening process regarding qualification to obtain public housing. *Housing Auth. v. Van de Kamp (1990) 223 Cal. App. 3d 109, 111, 115-117, 272 Cal. Rptr. 584*

Complaint stating cause of action under *Lab. Code § 432.7* (prohibition against disclosure of arrests not resulting in conviction) was required to affirmatively allege that arrest did not result in conviction; intent of statute was preventing adverse impact on employment opportunities of information concerning arrests if culpability cannot be proved. *Pitman v. City of Oakland (1988) 197 Cal. App. 3d1037, 1044, 243 Cal. Rptr. 306* (affirming sustaining of demurrer)

[4] Employment

Educ. Code § 92612, requiring University of California to disclose recommendation letters and related reports, after deletion of name and affiliation, in academic peer-review process, impermissibly conflicted with Cal. Const. art.IX, § 9, which provides university with general immunity from legislative regulation. *Scharf v. Regents of Univ. of Cal. (1991) 234 Cal. App. 3d 1393, 1405, 286 Cal. Rptr. 227*

[5] Insurance Records

Insurer prohibited from disclosing policy limits to injured third party prior to initiation of formal proceeding; policy limits at that stage of controversy were "personal information" under *Ins. Code § 791.02(s)*, protected from disclosure by Insurance Information and Privacy Act (*Ins. Code § 791 et seq.*). *Griffith v. State Farm Mut. Auto. Ins. Co. (1991) 230 Cal. App. 3d 59, 65-68, 281 Cal. Rptr. 165*

In insurance bad faith action, *Ins. Code § 791.13* precluded production of defendant insurer's claims files relating to every claim similar to plaintiff's; guidelines of *Colonial Life & Accident Co. v. Superior Court (1982) 31 Cal. 3d 785, 792, 792 n. 10, 183 Cal. Rptr. 810, 647 P.2d 86* controlled, requiring prior written permission of insureds whose claims records are sought to be disclosed. *Mead Reinsurance Co. v. Superior Court (1986) 188 Cal. App. 3d 313, 321-323, 232 Cal. Rptr. 752*

[6] Public Access to Information Under Information Practices Act

Information Practices Act is inapplicable to medical information maintained by private medical clinic, which is not government agency for purposes of Act even if clinic participated in state Medi-Cal program. *Jennifer M. v. Redwood Women's Health Ctr. (2001) 88 Cal. App. 4th 81, 92, 105 Cal. Rptr. 2d 544*

State Medical Board did not violate Information Practices Act by posting address of record for licensed physicians on public internet site, even if address of record is physician's home address, because Board gave physicians option of using business address or providing post office box number accompanied by street address that would remain confidential. *Lorig v. Medical Bd. (2000) 78 Cal. App. 4th 462, 468-469, 92 Cal. Rptr. 2d 862*

Lab. Code § 1165, precluding suit against union agent in individual capacity, was applicable only to suits for violation of labor contracts, and therefore was inapplicable to suit for violation of *Civ. Code §§ 1798-1798.78*. *Pescosolido v. Maddock (1985) 172 Cal. App. 3d 230, 233-236, 218 Cal. Rptr. 165*

[7] Public Records Generally

Court records are public records, available to public in general, absent specific exception; however, court records

sealed pursuant to stipulation by all parties were not available for use by third party regarding subsequent litigation against one of the stipulating parties two years later, because time had expired for reconsideration of sealing order (*Code Civ. Proc. § 1008*) and for relief under *Code Civ. Proc. § 473*, and original parties had right to rely on sealing order. *Church of Scientology v. Armstrong (1991) 232 Cal. App. 3d 1060, 1068-1070, 283 Cal. Rptr. 917*

[8] Review

Absent overriding constitutional mandate, extraordinary writ of review is not granted if appellate court finds that lower court had jurisdiction to make its order. *Freedom Newspapers, Inc. v. Superior Court (1986) 186 Cal. App. 3d 1102, 1109, 231 Cal. Rptr. 189*

[9] Tax Records

In action by IRS seeking enforcement of summons directing state court clerk to release sealed church documents (assertedly protected by attorney-client privilege), for use in IRS investigation of church founder, church's appeal of district court's order to enforce summons was not moot by reason of IRS's unlawful acquisition of documents in question; court's power to effectuate partial remedy by ordering IRS to destroy or return all copies in its possession was sufficient to prevent case from being moot; taxpayers have obvious possessory interest in their records. *Church of Scientology v. United States (1992) 506 U.S. 9, 113 S. Ct. 447, 121 L. Ed. 2d 313, 319-320* (declining to decide future use of documents)

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§ 429.412 Attorney General Opinions

Court order, search warrant, or subpoena duces tecum not required before coroner may release deceased person's medical or psychiatric records to police or district attorney investigators having jurisdiction over criminal investigation. *83 Ops. Cal. Att'y Gen. 32 (2000)*

Disclosure to applicant of results of pre-employment physical examination was not required by employer, or by health care provider contracted by employer to conduct pre-employment examination. *75 Ops. Cal. Att'y Gen. 149, 151, 154-155 (1992)*

Disclosure provisions of *Lab. Code § 1198.5(a)* were inapplicable to job applicant upon whom pre-employment physical examination was conducted; applicant was not "employee" within meaning of *Lab. Code § 1198.5(a)*. *75 Ops. Cal. Att'y Gen. 149, 151 (1992)*

Disclosure provisions of former *Health & Safety Code § 1795.12* (now *Health & Safety Code § 123110*) were inapplicable to job applicant upon whom pre-employment physical examination was conducted; applicant was not "patient" within the meaning of former *Health & Safety Code § 1795.12* (now *Health & Safety Code § 123110*). *75 Ops. Cal. Att'y Gen. 149, 154-155 (1992)*

Department of Motor Vehicles is allowed to disclose, to certain persons or entities, individual's mailing or residence address under some circumstances. *74 Ops. Cal. Att'y Gen. 201 (1991)*

Confidentiality and disclosure provisions of *Penal Code § 832.7* bar public agency from both compiling and releasing statistical information regarding types of citizen complaints maintained pursuant to *Penal Code § 832.5*, and from releasing summary of records maintained pursuant to *Penal Code § 832.5* to the public. *71 Ops. Cal. Att'y Gen. 247 (1988)*

Claim filed against public agency under California Tort Claims Act (*Gov. Code § 810 et seq.*) is not exempt from

disclosure under *Gov. Code § 6254(b)*. *71 Ops. Cal. Att'y Gen. 235 (1988)*

Right of city manager, assistant city manager, and citizens' review board to review complaint file against city police officers depends on authorization to investigate such complaints or to advise, impose or review discipline of police officers. *71 Ops. Cal. Att'y Gen. 1 (1988)*

Private citizens who bear no legal or familial relationship to deceased patient of private nursing home have no right to review deceased's medical records to investigate cause of death. *69 Ops. Cal. Att'y Gen. 14 (1986)*

Application for and record of permit for concealed weapon is ordinarily open to public inspection, but disclosure of records of sheriff's investigations of applicant is not required, and disclosure of state summary criminal information contained in concealed-weapon permits is prohibited. *62 Ops. Cal. Att'y Gen. 595 (1979)*

Treasurer's records specifying owners of state registered bonds are open to public inspection under Public Information Act, but are not permitted to be distributed for commercial purposes, sold, or rented by Treasurer's office. *62 Ops. Cal. Att'y Gen. 436 (1979)*

Disclosure of information concerning minor's whereabouts gleaned by Department of Health at family planning facility to parents or in official confidence to sheriff in search of runaway minor is prohibited by *Welf. & Inst. Code § 10850*. *60 Ops. Cal. Att'y Gen. 314 (1977)*

Documents submitted in support of applications for financing through California Pollution Control Financing Authority are public records subject to inspection by public under Public Information Act. 58 Cal. Op. Att'y Gen. 629 .

Details of proposed health plan are confidential for purposes of Public Information Act. 58 Cal. Op. Att'y Gen. 371

Venereal disease records kept by local health departments are confidential for purposes of Public Information Act. 53 Cal. Op. Att'y Gen. 10

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37-429 California Forms of Pleading and Practice--Annotated § 429.413

§ 429.413 Law Reviews

Comment, *The Confidentiality of HIV-Related Information: Responding to the Resurgence of Aggressive Public Health Interventions in the AIDS Epidemic, 82 Cal. L. Rev. 113 (1994)*

Smith, *We've Got Your Number! (Is It Constitutional to Give It Out?): Caller Identification Technology and the Right to Informational Privacy, 37 UCLA L. Rev. 145 (1989)*

Note, *Mandatory AIDS Testing: The Slow Death of Fourth Amendment Protection, 20 Pac. L.J. 1413 (1989)*

Note, *AIDS: A Crisis in Confidentiality, 62 S. Cal. L. Rev. 1701 (1989)*

Shattuck, *In the Shadow of 1984: National Identification Systems, Computer-Matching, and Privacy in the United States, 35 Hastings L.J. 991 (1984)*

Foreward, *Is the Pendulum Swinging Away From Freedom of Information? 16 Harv. C.R.-C.L. L. Rev. 311 (1981)*

Note, *California's Privacy Act: Controlling Government's Use of Information, 32 Stan. L. Rev. 1001 (1980)*

Comment, *Informational Privacy and Public Records, 8 Pac. L.J. 25 (1977)*

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37-429 California Forms of Pleading and Practice--Annotated § 429.414

§ 429.414 Text References

Erwin, Millman, Monroe, Sevilla, Tarlow, California Criminal Defense Practice, Ch. 71 (Matthew Bender)

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37-429 California Forms of Pleading and Practice--Annotated §§ 429.415-429.429

[Reserved]

§§ 429.415[Reserved]

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37-429 California Forms of Pleading and Practice--Annotated § 429.430

§ 429.430 Federal Constitution

Prohibition against unreasonable searches and seizures. *U.S. Const. Amend. IV*

Enumeration in Constitution of certain rights as not denying or disparaging other rights retained by the people. *U.S. Const. Amend. IX*

Prohibition against any state depriving any person of life, liberty, or property without due process of law. *U.S. Const. Amend. XIV*

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37-429 California Forms of Pleading and Practice--Annotated § 429.431

§ 429.431 State Constitution

Right to pursue and obtain privacy. *Cal. Const. art. I, § 1*

Prohibition against unreasonable searches and seizures. *Cal. Const. art. I, § 13*

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37-429 California Forms of Pleading and Practice--Annotated § 429.432

§ 429.432 Federal Statutes

Wire interception and interception of oral communications under Omnibus Crime Control and Safe Streets Act of 1968. *18 U.S.C.S. § 2510 et seq.*

Civil damages for unlawful interception and disclosure of oral communication under Omnibus Crime Control and Safe Streets Act of 1968. *18 U.S.C.S. § 2520*

Rules governing disclosure of information between federal agencies. *44 U.S.C.S. § 3508*

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37-429 California Forms of Pleading and Practice--Annotated § 429.433

§ 429.433 State Statutes

[1] Invasion of Privacy Under Penal Code §§ 630-637.5

[a] In General

Declaration of legislative intent. *Penal Code § 630*

Disclosure of information by interexchange telephone corporation, local exchange telephone corporation, or radiotelephone utility, in good faithcompliance with court order requested for law enforcement purposes, is complete defense against civil action under Penal Code § 630 et seq. Pub. Util. Code § 2894

Tapping telephone and telegraph wires. *Penal Code § 631*

Eavesdropping on or recording confidential communications. *Penal Code § 632*

Intercepting or receiving cellular radio telephone communications. *Penal Code § 632.5*

Intercepting or receiving cordless telephone communications. *Penal Code § 632.6*

Intercepting or receiving and recording communication between combinations of cellular radio, cordless, and landline telephones. *Penal Code § 632.7*

Trespassing for purpose of committing invasion of privacy. *Penal Code § 634*

Eavesdropping on or recording privileged communication of person in custody. *Penal Code § 636*

Wrongful disclosure of telegraphic or telephonic communication. *Penal Code § 637*

Opening sealed telegraphic or telephonic communication addressed to another. *Penal Code § 637.1*

Civil damages and injunctive relief. *Penal Code § 637.2*

Voice prints or voice stress analyzers. *Penal Code § 637.3*

Polygraph examination is prerequisite to accusatory pleading in cases involving violence or threat relating to sex offense. *Penal Code § 637.4*

Cable television systems. *Penal Code § 637.5(a)(1)*

[b] Exemptions

Wiretapping by public utilities. *Penal Code § 631(b)*

Correctional facility wiretapping internal telephonic communicaton system. *Penal Code § 631(b)*

Eavesdropping by public utilities. *Penal Code § 632(e)*

Correctional facility eavesdropping on internal telephonic communication system. *Penal Code § 632(e)*

Hearing aids. *Penal Code § 632(f)*

Interception or reception of cellular radio telephone communication by correctional facility. *Penal Code § 632.5(b)*

Interception or reception of cellular radio telephone communication by public utilities. *Penal Code § 632.5(b)*

Law enforcement officers wiretapping and eavesdropping on or recording confidential communication, or intercepting or receiving cellular radio telephone communication. *Penal Code § 633*

Exception for international airport law enforcement officers. *Penal Code § 633.1*

Party to communication recording communication is evidence of certain crimes. *Penal Code § 633.5*

Manufacture, sale, and possession of eavesdropping, intercepting, or receiving devices is prohibited. *Penal Code § 635(a)*

Exemptions from prohibition of manufacture, sale, and possession of eavesdropping devices. *Penal Code § 635(b)*

[2] Prisoners' Civil Rights

Prison inmates are subject to deprivation of rights only to extent necessary to provide for reasonable security and public protection. *Penal Code § 2600*

Prison inmate has right to personal visits subject to restrictions necessary for institutional security. *Penal Code § 2601*

[3] Telephone Calls Generally

Harassing telephone calls as misdemeanor. *Penal Code § 653m*

[4] Wiretapping Authorization

Presley-Felando-Eaves Wiretap Act of 1988. *Penal Code § 629 et seq.* (repealed Jan. 1, 1994)

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37-429 California Forms of Pleading and Practice--Annotated § 429.434

§ 429.434 Decisions

[1] Civil Action for Damages

Penal Code § 637.2, providing for damages for eavesdropping and recording another's telephonic communication without consent in violation of *Penal Code § 632*, is more remedial than punitive and provides right of recovery in out-of-state cause of action. *Becker v. Computer Scis. Corp. (S.D. Tex. 1982) 541 F. Supp. 694, 702*

Right to award of damages under *Penal Code § 637.2* accrues at moment of violation and plaintiff is entitled to pursue statutory remedy without proving actual injury. *Ribas v. Clark (1985) 38 Cal. 3d 355, 364-365, 212 Cal. Rptr. 143, 696 P.2d 637*

Penal Code § 637.2 provides for action against person who violated *Penal Code § 632*, but not against persons to whom violator divulged conversations. *Warden v. Kahn (1979) 99 Cal. App. 3d 805, 815, 160 Cal. Rptr. 471*

[2] Defenses and Exemptions

[a] In General

Rejection of media defendant's attempt to create blanket newsgathering defense to *Pen. Code § 632* based on constitutional freedoms of speech and press. *Lieberman v. KCOP Television, Inc. (2003) 110 Cal. App. 4th 156, 169-170, 1 Cal. Rptr. 3d 536*

Recording of suspect's telephone conversation with undercover law enforcement officer by other law enforcement officers with undercover officer's consent does not violate *Penal Code § 631* or *632* and is admissible in criminal proceedings; consent of telephone company is not necessary. *People v. Carbonie (1975) 48 Cal. App. 3d 679, 685, 121 Cal. Rptr. 831*

[a] No Reasonable Expectation of Privacy

De Lancie decision is not retroactive. *Donaldson v. Superior Court (1983) 35 Cal. 3d 24, 27, 39, 196 Cal. Rptr. 704*

California prison inmates have statutory right to privacy under *Penal Code § 2600*; jailers, however, have authority to eavesdrop on inmates' conversations to extent necessary to achieve institutional security or to protect public. *De Lancie v. Superior Court (1982) 31 Cal. 3d 865, 875, 876, 183 Cal. Rptr. 866, 647 P.2d 142 , superseded by statute as stated in People v. Lloyd (2002) 27 Cal. 4th 997*

California prison inmates have right to seek injunctive relief for violation of rights under *Penal Code § 2600*. *De Lancie v. Superior Court (1982) 31 Cal. 3d 865, 875, 876, 183 Cal. Rptr. 866, 647 P.2d 142 , superseded by statute as stated in People v. Lloyd (2002) 27 Cal. 4th 997*

Inmates of jails or prisons have no reasonable expectation of privacy and ordinary jailhouse conversation between inmates and visitors or between inmates is not made in confidence unless police or other authorized person deliberately created expectation of privacy. *North v. Superior Court (1972) 8 Cal. 3d 301, 311-312, 104 Cal. Rptr. 833, 502 P.2d 1305* ; *People v. Jardine (1981) 116 Cal. App. 3d 907, 914, 172 Cal. Rptr. 408 , overruled on other grounds, People v. Cooper (1991) 53 Cal. 3d 1158, 1167, 282 Cal. Rptr. 450, 811 P.2d 742* ;

Recorded conversation between prisoners located in back seat of police car is permissible since there exists no reasonable expectancy of privacy. *People v. Crowson (1983) 33 Cal. 3d 623, 630-631, 660 P.2d 389 , criticized on other grounds, People v. Myers (1993) 5 Cal. 4th 1193, 1195, 22 Cal. Rptr. 2d 911, 858 P.2d 301* ; *People v. Williams (1982) 128 Cal. App. 3d 981, 985-987, 180 Cal. Rptr. 734* ; *People v. Jardine (1981) 116 Cal. App. 3d 907, 914, 172 Cal. Rptr. 408 , overruled on other grounds, People v. Cooper (1991) 53 Cal. 3d 1158, 1167, 282 Cal. Rptr. 450, 811 P.2d 742* ; *see also People v. Newton (1974) 42 Cal. App. 3d 292, 296, 116 Cal. Rptr. 690*

Omnibus Crime Control and Safe Streets Act of 1968 does not preempt *Penal Code § 631*. *People v. Jones (1973) 30 Cal. App. 3d 852, 855, 106 Cal. Rptr. 749*

[b] Statute of Limitations

One year cause of action does not accrue in *Penal Code § 631* action for secret monitoring of conversation until plaintiff discovers or should have discovered all essential facts. *Montalti v. Catanzariti (1987) 191 Cal. App. 3d 96, 99-100, 236 Cal. Rptr. 231*

One-year period of limitations under former *Code Civ. Proc. § 340(1)* (*now see Code Civ. Proc. § 340(a)*) applies to action under *Penal Code §§ 630-637.5*. *Ion Equip. Corp. v. Nelson (1980) 110 Cal. App. 3d 868, 880, 168 Cal. Rptr. 361* ; *Warden v. Kahn (1979) 99 Cal. App. 3d 805, 816, n. 8, 160 Cal. Rptr. 471*

[3] Eavesdropping on or Recording of Confidential Communications

Regulation promulgated by Public Utilities Commission, prohibiting California telephone customers from surreptitiously overhearing or recording conversations without notice to parties to conversation, is not preempted by federal law. *Air Transp. Ass'n of Am. v. Public Util. Comm'n of State of Cal. (9th Cir. 1987) 833 F.2d 200*

Privileged wire communication afforded by *Penal Code § 631(a)* does not foreclose authorized interception by federal officers. *United States v. Feldman (9th Cir. 1976) 535 F.2d 1175, 1181*

Omnibus Crime Control and Safe Street Act of 1968 (*18 U.S.C.S. § 2510 et seq.*) does not contain exception for family member's wiretapping of family telephone; in criminal prosecution for murder, evidence of victim's illegal wiretapping of wife's plan to kill him is inadmissible, and admission was reversible error. *People v. Otto (1992) 2 Cal. 4th 1088, 1099-1107, 1116, 9 Cal. Rptr. 2d 596, 831 P.2d 1178*

Penal Code § 633.5 exempts from *Penal Code § 632* unconsented recording made with requisite reasonable belief that conversation relates to other party's commission of certain crimes, even though recording fails to capture anticipated evidence; in State Bar proceedings regarding bar applicant's moral character, telephonic tape recordings made without other party's permission is within exemption of *Penal Code § 633.5*, and does not support finding of moral turpitude. *Lubetzky v. State Bar (1991) 54 Cal. 3d 308, 321, 285 Cal. Rptr. 268, 815 P.2d 341*

Penal Code § 636 prohibits eavesdropping on privileged conversations of prisoners; *Penal Code § 636* prohibition is applicable to any nonconsensual monitoring of conversations, whether or not persons are aware of monitoring. *In re Arias (1986) 42 Cal. 3d 667, 680, 680 n.11, 230 Cal. Rptr. 505, 725 P.2d 664 , superseded by statute as stated in People v. Loyd (2002) 27 Cal. 4th 997, 1008, 119 Cal. Rptr. 2d 360, 45 P.3d 296*

Third party's eavesdropping on extension telephone without permission of all parties is conduct precluded by *Penal Code § 631(a)* and not within exclusion of *Penal Code § 631(b)* (excluding use of equipment furnished and used pursuant to tariffs of public utility engaged in business of providing communications services). *Ribas v. Clark (1985) 38 Cal. 3d 355, 359-363, 212 Cal. Rptr. 143, 696 P.2d 637*

Penal Code § 631(a) proscribes three distinct and mutually independent patterns of conduct: intentional wiretapping, willfully attempting to learn contents or meaning of communication in transit over wire, and attempting to use or communicate information obtained as result of engaging in either of those activities. *Tavernetti v. Superior Court (1978) 22 Cal. 3d 187, 192, 148 Cal. Rptr. 883, 583 P.2d 737*

Tape recording of telephone conversation with defendant, made without defendant's knowledge or consent through ruse that other party to conversation was television game-show producer, is not confidential within meaning of *Penal Code § 632(d)*, because defendant had reason to believe that statements would be broadcast on television. *O'Laskey v. Sortino (1990) 224 Cal. App. 3d 241, 248-249, 273 Cal. Rptr. 674*

Penal Code § 632(a) prohibits party to confidential communication from recording conversation without knowledge or consent of other party. *Warden v. Kahn (1980) 99 Cal. App. 3d 805, 812, 160 Cal. Rptr. 471* ; *People v. Wyrick (1978) 77 Cal. App. 3d 903, 909, 144 Cal. Rptr. 38* ; *Forest E. Olson, Inc. v. Superior Court (1976) 63 Cal. App. 3d 188, 191-192, 133 Cal. Rptr. 573*

[4] Wiretapping

Evidentiary provision of *Penal Code § 632(d)* (inadmissibility of evidence obtained as result of eavesdropping) does not operate to excludeindependent present recollection of participant in recorded conversation, because that evidence is not obtained as result of illegality. *Frio v. Superior Court (1988) 203 Cal. App. 3d 1480, 1498, 250 Cal. Rptr. 819*

Penal Code § 631(a) proscribes three distinct and mutually independent patterns of conduct: intentional wiretapping, willfully attempting to learn the contents or meaning of a communication in transit over a wire, and attempting to use or communicate information obtained as a result of engaging in either of the other two activities. *Ribas v. Clark (1985) 38 Cal. 3d 355, 364-365, 212 Cal. Rptr. 143, 696 P.2d 637* ; *Tavernetti v. Superior Court (1978) 22 Cal. 3d 187, 192, 148 Cal. Rptr. 883, 583 P.2d 737*

Telephone company lineman testing for malfunctions on telephone lines as unnecessarily intrusive in tapping and

listening to communication of party who was not advised that line would be monitored. *Tavernetti v. Superior Court (1978) 22 Cal. 3d 187, 192-193, 148 Cal. Rptr. 883, 583 P.2d 737*

Tapping by university police of own lines to ascertain phone numbers of callers is not unauthorized tapping within *Penal Code § 631(a)* when tap did not intercept or reveal contents of any telephonic communication. *People v. Suite (1980) 101 Cal. App. 3d 680, 685-687, 161 Cal. Rptr. 825*

Penal Code § 631 is applicable to third-party interceptors and not applicable to party to communication who records communication. *Rogers v. Ulrich (1975) 52 Cal. App. 3d 894, 898-899, 125 Cal. Rptr. 306*

Penal Code § 631 is not applicable to information communicated or divulged by answering service when information obtained with consent of all parties to communication. *People v. Wilson (1971) 17 Cal. App. 3d 598, 602-603, 94 Cal. Rptr. 923*

[5] Wrongful Disclosure of Telegraphic or Telephonic Communication

Answering service that was addressee of telephonic communication was not in violation of *Penal Code § 637* when it disclosed contents of messages received to police. *People v. Wilson (1971) 17 Cal. App. 3d 598, 603, 94 Cal. Rptr. 923*

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§ 429.435 Attorney General Opinions

Person may initiate and tape record telephone conversation in attempt to gain evidence of child molestation alleged to have been committed by person called; evidence would be admissible in subsequent civil or criminal proceeding. *82 Ops. Cal. Att'y Gen. 146 (1999)*

Installation of pen register through search warrant does not constitute "tap" or "unauthorized connection" as forbidden by *Penal Code § 631*; California magistrate is permitted to authorize installation of pen register by issuance of search warrant. *69 Ops. Cal. Att'y Gen. 55 (1986)*

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37-429 California Forms of Pleading and Practice--Annotated § 429.436

§ 429.436 Law Reviews

Pennypacker, *Reach Out and Bug Someone: California's New Wiretap Law, 29 Santa Clara L. Rev. 275 (1989)*

Comment, *Law Enforcement Use of High Technology: Does Closing the Door Matter Anymore?* 24 Cal. W.L. Rev. (1987-1988)

Comment, *Warrant Requirements for Bugged Informants Under the California Right to Privacy, 15 Pac. L.J. 1057 (1984)*

Henry, *Electronic Surveillance in California Prisons After De Lancie v. Superior Court (1982), 22 Santa Clara L. Rev. 1109, 1112*-1116

Listening Devices and Participant Monitor: Controlling the Use of Electronic Surveillance in Law Enforcement, 6 Crim. Law J. 327 (1982)

Comment, *United States v. Solis: Have the Government's Supersniffers Come Down With a Case of Constitutional Nasal Congestion? 13 San Diego L. Rev. 410 (1976)*

Note, *Privacy: The New Constitutional Language and the Old Right, 64 Cal. L. Rev. 347 (1976)*

Note, *Electronic Visual Surveillance and the Fourth Amendment: The Arrival of Big Brother? 3 Hastings Const. L.Q. 261 (1976)*

Note, *Electronic Surveillance, Title III, and the Requirement of Necessity, 2 Hastings Const. L.Q. 571 (1975)*

Seymour, *Recording Telephone Conversations: The Problem of Participant Monitoring,* 8 Bev. Hills B.J. 47 (1974)

Note, *People v. Triggs: A New Concept of Personal Privacy in Search and Seizure Law, 25 Hastings L.J. 575 (1974)*

Note, *Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies, 26 Stan. L. Rev. 1411 (1974)*

Note, *Criminal Law and Procedure: Privacy of Communication Between Attorney and Prisoner, 61 Cal. L. Rev. 451 (1973)*

Note, *Criminal Law and Procedure: Privacy of Communication Between Prisoner and Spouse, 61 Cal. L. Rev. 457 (1973)*

Note, *The Area Test--Evidence Acquired Through Eavesdropping on Conversations of Suspect in Custody May Be Admitted Into Evidence When the Suspect Has No Reasonable Expectation of Privacy as to Conversations-- In re Joseph A. (1973) 30 Cal. App. 3d 880, 106 Cal. Rptr. 729 , hearing denied, (May 23, 1973), 14 Santa Clara Lawyer 144 (1973)*

Note, *Criminal Law--Federal Pre-emption--Title III of the Omnibus Crime Control and Safe Streets Act of 1968 Does Not Pre-empt the California Invasion of Privacy Act-- People v. Jones, 30 Cal. App. 3d 852, 106 Cal. Rptr. 749 (1973) ; People v. Conklin, 31 Cal. App. 3d 914, 107 Cal. Rptr. 771 , 14 Santa Clara L. Rev. 159 (1973)*

Comment, *Participant Eavesdropping and the Right of Privacy: Time to Strike a New Balance, 8 Cal. W. L. Rev. 283 (1972)*

Karabian, *The Case Against Wiretapping, 1 Pac. L.J. 133 (1970)*

Comment, *Electronic Surveillance in California: A Study in State Legislative Control, 57 Cal. L. Rev. 1182 (1969)*

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37-429 California Forms of Pleading and Practice--Annotated § 429.437

§ 429.437 Text References

California Criminal Defense Practice, Ch. 20, Principles of Search and Seizure, § 20.09 (Matthew Bender)

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§§ 429.438[Reserved]

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§ 429.450 California Points and Authorities

For memoranda of points and authorities relating to civil rights actions, see California Points and Authorities, Ch. 35, *Civil Rights* (Matthew Bender)

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§ 429.451 Forms of Discovery

For forms of defendant's interrogatories to plaintiff relating to personal injury, see Bender's Forms of Discovery, *Damages* (Matthew Bender)

For forms of defendant's interrogatories to plaintiff relating to damages for infliction of emotional distress, see Bender's Forms of Discovery, *Emotional Distress* (Matthew Bender)

For general forms of objections to interrogatories, see Bender's Forms of Discovery, *Objections* (Matthew Bender)

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§ 429.452 Federal Constitution

Prohibition against unreasonable searches and seizures. *U.S. Const. amend. IV*

Prohibition against depriving any person of life, liberty, or property, without due process of law. *U.S. Const. amend. V*

Enumeration in Constitution of certain rights not denying or disparaging others retained by the people. *U.S. Const. amend. IX*

Prohibition against any state depri ving any person of life, liberty, or property without due process of law. *U.S. Const. amend. XIV*

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37-429 California Forms of Pleading and Practice--Annotated § 429.453

§ 429.453 Federal Statutes

[1] Civil Rights Act

Federal district court has original jurisdiction of any civil action under *42 U.S.C.S. § 1983*. *28 U.S.C.S. § 1343*

Civil action for deprivation of rights. *42 U.S.C.S. § 1983*

Reasonable attorney's fees are available to prevailing party. *42 U.S.C.S. § 1988(b)*

[2] First Amendment Privacy Protection Act

Civil action for wrongful search and seizure of public communication work product materials and documentary materials. *42 U.S.C.S. §§ 2000aa-2000aa-7*

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§ 429.454 State Statutes

Period of limitation for action on liability created by *42 U.S.C.S. § 1983*. *Code Civ. Proc. § 338(a)*

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§ 429.455 Decisions

[1] Civil Rights Actions

[a] Employee Drug and Alcohol Tests

Drug and alcohol testing of all crew members on a train involved in a relatively serious accident is constitutional. *Skinner v. Railway Labor Executives' Ass'n (1989) 489 U.S. 602, 620-622, 109 S. Ct. 1402, 103 L. Ed. 2d 639*

Drug testing of employees seeking transfer or promotion within United States Custom Service is constitutional given employee's direct involvement in drug interdiction, requirement to carry firearm or necessity of handling "truly sensitive information." *Treasury Employees Union v. Von Raab (1989) 489 U.S. 656, 677, 109 S. Ct. 1384, 103 L. Ed. 2d 685*

City's policy requiring candidates of choice for city positions to pass pre-employment drug test as condition of job offer was unconstitutional as applied to preferred applicant for part-time position as page at library, where city failed to demonstrate special need to screen prospective page for drugs because there was no substantial risk to public safety posed by position as part-time library page. However, policy was not facially invalid, where plaintiff suggested no concrete reason why policy could not constitutionally be applied to jobs that, for example, required operation of dangerous equipment. *Lanier v. City of Woodburn (9th Cir. 2008) 518 F.3d 1147, 1149-1152*

Provision of Department of Labor's Drug-Free Workplace Plan providing for drug testing of employees in public health and safety-sensitive or security-sensitive positions based on reasonable suspicion of off-duty drug use is constitutional. American Fed'n of Gov't Employees, AFL-CIO, Local 2391 v. *Martin (9th Cir. 1992) 969 F.2d 788, 791-793*

Random suspicionless drug testing of nuclear power plant workers who have unescorted access to "protected areas" of nuclear facilities upheld. International Bhd. of Elec. Workers, Local 1245 v. *United States Nuclear Regulatory Comm'n (9th Cir. 1992) 966 F.2d 521, 526*

Random suspicionless drug testing of commercial drivers of vehicles in excess of 26,000 pounds, vehicles with 15 or

more passengers, or drivers who transport hazardous materials upheld. *International Brotherhood of Teamsters, etc. v. DOT, 932 F.2d 1292 (1991)*

Random suspicionless drug testing of Department of Agriculture employees operating motor vehicles carrying passengers upheld. *National Treasury Employees Union v. Yeutter (D.C. Cir. 1990) 918 F.2d 968, 971-972, 287 U.S. App. D.C. 28*

Random suspicionless drug testing of natural gas and hazardous liquid pipeline employees upheld. International Bhd. of Elec. Workers, Local 1245 v. *Skinner (9th Cir. 1990) 913 F.2d 1454, 1456*

Random suspicionless drug testing of aviation personnel upheld. *Bluestein v. Skinner (9th Cir. 1990) 908 F.2d 451, 454-458*

Yearly random suspicionless drug test of correctional officers who have contact with prisoners upheld. *Taylor v. O'Grady (7th Cir. 1989) 888 F.2d 1189, 1199*

Random suspicionless drug testing of transportation employees in positions with direct impact on public health and safety upheld. *American Fed'n of Gov't Employees v. Skinner (D.C. Cir. 1989) 885 F.2d 884, 889-893, 280 U.S. App. D.C. 262*

Random suspicionless drug testing of air traffic controllers, pilots, aviation mechanics, flight attendants, civilian police, and guards upheld. *National Fed'n of Fed. Employees v. Cheney (D.C. Cir. 1989) 884 F.2d 603, 610, 613, 280 U.S. App. D.C. 164*

Random suspicionless drug testing of civilian employees of chemical weapons plant who have access to areas in which experiments are performed upheld. *Thomson v. Marsh (4th Cir. 1989) 884 F.2d 113*

Random suspicionless drug testing of drivers and attendants on school buses for handicapped children upheld, when testing was conducted as part of routine medical examination. *Jones v. Jenkins (D.C. Cir. 1989) 878 F.2d 1476, 1477*

Random suspicionless drug testing of government employees with "secret" national security clearances upheld. *Hartness v. Bush (D.C. Cir. 1990) 919 F.2d 170, 173*

Permanent injunction prohibiting Caltrans from conducting off-duty employee drug testing was appropriate because possibility that Caltrans might conduct off-duty testing foreshadows significant intrusion on employee's privacy at home, (1) where random drug testing is intrusion on individual's privacy rights, which is significantly enhanced when employee is subject to follow-up drug testing on off-duty time; (2) where Caltrans' employees have reasonable expectation they will be subject to off-duty follow-up drug testing on personal time because written policies provide that employees will be subject to testing while on duty; (3) where Caltrans failed to sustain its burden of showing that no less intrusive alternatives were available by failing to offer any explanation why follow-up drug testing could not occur during regular work hours; and (4) where injunction permits testing contiguous to employee's on-duty time and permits off-duty follow-up drug testing if necessary to comply with federal regulations. *Edgerton v. State Pers. Bd. (2000) 83 Cal. App. 4th 1350, 1359-1361, 100 Cal. Rptr. 2d 491*

Under both federal and state constitutions, termination of employment based on random suspicionless drug and alcohol test of irrigation district worker in safety-sensitive position did not violate employee's constitutional rights, where test was conducted by urine sample taken at medical clinic in as minimally intrusive manner as possible with no direct monitoring of worker as he provided sample; worker's expectation of privacy was diminished by advance notice of district's random drug testing program, substance abuse policy and six-month grace period in which employee could seek treatment and counseling without any termination consequence; where, in effort to fulfill legal obligation under

Lab. Code § 6401 to maintain safe work place, district instituted its substance abuse policy including random, suspicionless drug and alcohol testing of workers in safety-sensitive positions and district deemed construction and maintenance worker position safety sensitive due to hazards unique to position and danger hazards posed to employees. Smith v. Fresno Irrigation Dist.

[b] Federal Courts

Relevant market rates for paralegals and law clerks, rather than their actual cost to attorney, are properly used in calculating compensation for their work as part of attorney's fee award; practice of billing separately for paralegal and law clerk work is properly reflected in attorney's fee award if that is practice in relevant market. *State of Missouri v. Jenkins (1989) 491 U.S. 274, 109 S. Ct. 2463, 105 L. Ed. 2d 229, 240-244*

Attorney's fee provided for in contingent fee arrangement is not maximum amount of fees recoverable under *42 U.S.C.S. § 1988*; limitation would place undesirable emphasis on importance of recovery of damages in civil rights litigation but would ignore importance of equitable relief. *Blanchard v. Bergeron (1989) 489 U.S. 87, 109 S. Ct. 939, 103 L. Ed. 2d 67, 76-77*

Summary judgment for plaintiff in *42 U.S.C § 1983* action brought by state hospital employee for warrantless search of his office inappropriate when evidence indicated search might have been reasonable, even though employee had reasonable expectation of privacy in his office. *O'Connor v. Ortega (1987) 480 U.S. 709, 718-719, 726-729, 107 S. Ct. 1492, 94 L. Ed. 2d 714*

42 U.S.C.S. § 1983 is available to enforce state agents' violations of federal statutes when in enactment of statute itself Congress did not foreclose *42 U.S.C.S. § 1983* enforcement, and when statute did not create remedial mechanisms sufficiently comprehensive and effective to raise clear inference that Congress intended to foreclose *42 U.S.C.S. § 1983* cause of action. *Wright v. City of Roanoke Redevelopment & Hous. Auth. (1987) 479 U.S. 418, 424-425, 107 S. Ct. 766, 93 L. Ed. 2d 781*

Federal civil rights action based on unconstitutional search under *42 U.S.C.S. § 1983* not barred by judgment of conviction entered in state court following guilty plea when state collateral estoppel principles do not bar subsequent relitigation of search validity. *Haring v. Prosise (1983) 462 U.S. 306, 312-317, 103 S. Ct. 2368, 76 L. Ed. 2d 595*

Plaintiff is only required to allege that some person has deprived him or her of federal right and that such person acted under color of state or territorial law. *Gomez v. Toledo (1980) 446 U.S. 635, 640, 100 S. Ct. 1920, 64 L. Ed. 2d 572* ; *Smith v. Cremins (9th Cir. 1962) 308 F.2d 187, 188* ; *Cohen v. Norris (9th Cir. 1962) 300 F.2d 24, 29*

Local officials and employees are liable for violation of constitutional rights if either (1) challenged constitutional rights were clearly established at time of challenged conduct and they knew or should have known of rights and that their conduct violated rights, or (2) they acted with malicious intent to deprive constitutional rights or cause other injuries. *Wood v. Strickland (1975) 420 U.S. 308, 321-322, 95 S. Ct. 992, 43 L. Ed. 2d 214*

Violation of *Fourth Amendment* by federal agents under color of federal authority gave rise to action for damages based on agents' unconstitutional conduct. *Bivens v. Six Unknown Fed. Narcotics Agents (1971) 403 U.S. 388, 395-397, 91 S. Ct. 1999, 29 L. Ed. 2d 619*

Person seeking redress for unconstitutional deprivation of his or her personal rights under color of state law is not required to first exhaust state administrative or judicial remedies. *Monroe v. Pape (1961) 365 U.S. 167, 183, 81 S. Ct. 473, 5 L. Ed. 2d 492 , overruled on other grounds in Monell v. Department of Soc. Servs. (1978) 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611*

Scientists, engineers, and administrative support personnel at research laboratory run jointly by National Aeronautics and Space Administration and California Institute of Technology were not entitled to preliminary injunction on *Fourth Amendment* grounds to prevent intensive background checks, where government's actions were not likely to be deemed "searches" within meaning of *Fourth Amendment* because neither inquiries sent to third parties or questionnaire required of employees themselves were likely to be found to violate reasonable expectation of privacy. However, although most questions on questionnaire were unproblematic and did not implicate constitutional right to informational privacy, and even if question requiring disclosure of prior drug use, possession, supply, and manufacture implicated privacy right, it was narrowly tailored to achieve government's legitimate interest, requiring applicants to disclose "any treatment or counseling received" for drug problems fell squarely within domain protected by constitutional right to informational privacy and government did not suggest any legitimate interest in requiring disclosure of such information; further, government failed to demonstrate that inquiries to third parties were narrowly tailored to meet its legitimate interests in investigating its contractors. *Nelson v. NASA (9th Cir. 2008) 530 F.3d 865, 875-881 , cert. granted, NASA v. Nelson (2010) 130 S. Ct. 1755, 176 L. Ed. 2d 211, 2010 U.S. LEXIS 2298*

City's search of police officers' text messages was unreasonable as matter of law, whereofficers, as users of text messaging services, had reasonable expectation of privacy in their text messages and police department's informal policy that text messages would not be audited if officer paid overages rendered his expectation of privacy in those messages reasonable, and where, although purpose of search to determine efficacy of monthly character limit on text messages was reasonable, scope of search was not because there were host of simple ways to verify efficacy of character limit without intruding on officers' *Fourth Amendment* rights. *Quon v. Arch Wireless Operating Co. (9th Cir. 2008) 529 F.3d 892, 903-909 , cert. granted, City of Ontario v. Quon, 175 L. Ed. 2d 617, 2009 U.S. LEXIS 9058, 78 U.S.L.W. 3359*

In action against city, police department, and several police officers alleging that warrantless arrest of plaintiff was unreasonable seizure, after jury trial finding for defendants, trial court properly granted plaintiff's motion for judgment as a matter of law against city under Fed. Rule *Civ. Proc. 50(b)* and awarded one dollar in nominal damages to plaintiff. It granted injunctive relief, ordering city to train its police officers on what is required under *Fourth Amendment* and case law interpreting it lawfully to arrest suspect in his or her home and on procedures for obtaining warrants both in-person and on telephone, when, although situation remained dangerous, there was sufficient police presence and sufficient time after probable cause was established that arrest warrant could have been obtained well before one or more of entries that led to plaintiff's seizure; therefore, it was it was unconstitutional to fail to procure warrant. *Fisher v. City of San Jose (9th Cir. 2007) 475 F.3d 1049, 1057-1070*

Federal trial court was required to dismiss for lack of jurisdiction based on lack of standing action by corporation that operated gay men's social club, which alleged that city's ban of live sex act businesses violated corporation's federal privacy rights. Complaint failed to demonstrate corporation suffered distinct and palpable injury to any cognizable corporate right of privacy, and corporation did not have associational standing to assert rights of its customers. *Fleck & Assocs. v. City of Phoenix (9th Cir. 2006) 471 F.3d 1100, 1103-1107*

County's welfare eligibility program, which required all welfare applicants to consent to warrantless home visit as condition of eligibility, did not violate applicants' rights under federal constitution. Home visits did not qualify as searches within meaning of *Fourth Amendment*, and, even if they were searches, they were reasonable as serving important governmental interests of verifying applicant's eligibility for welfare benefits and preventing fraud, as not being criminal investigations, as occurring with advance notice and applicant's consent, and as alleviating serious administrative difficulties associated with welfare eligibility verification. Further, administration of county's welfare system presented "special need" beyond normal law enforcement, which was important enough to override individual's acknowledged privacy interest and sufficiently vital to suppress *Fourth Amendment's* normal requirement of individualized suspicion. *Sanchez v. County of San Diego (9th Cir. 2006) 464 F.3d 916, 920-928*

Conditions of own recognizance release requiring that plaintiff obtain court's permission before leaving state and make court appearances did not amount to seizure under *Fourth Amendment*, because *Fourth Amendment* seizure occurs when person is held in custody by arresting officers and even if seizure could occur as result of combination of pretrial release conditions,plaintiff was not required to report to anyone and restrictions were de minimus. *Karam v. City of Burbank (9th Cir. 2003) 352 F.3d 1188, 1194*

University student who had been given box of confidential student records and was asked to return them by university administrators and officers failed to state claim for violation of *Fourth Amendment* rights, when he was never told he was not free to leave officers' presence, he did not request to leave their presence altogether but only requested that he be allowed to leave to use telephone and to go outside to smoke and he was allowed to do so, he was not shown a weapon or physically touched or restrained, and he was informed of possibility search warrant could be obtained but reasonable person would have interpreted that not as threat but as fallback option for university officials if he decided not to voluntarily give up records; even if he was detained, detention was not unlawful when administrators and officers had strong interest in recovering box of confidential university records containing private information about former students, including medical records, mental health evaluations and disciplinary records relating to various forms of student misconduct and any detention was carefully tailored to its underlying justification because administrators remained with student only until he answered their question about whether he would willingly give them box of confidential student records he readily acknowledged belonged to university. *Desyllas v. Bernstine (9th Cir. 2003) 351 F.3d 934, 939-941*

Sheriff's deputy did not violate criminal suspect's *Fourth Amendment* right to be free from unreasonable seizures by ordering trained police dog to "bite and hold" suspect until officers arrived on scene less than one minute later, when ordering dog to bite suspect's arm or leg and permitting dog to continue biting for up to one minute, which was unusually long bite duration, did not pose more than remote possibility of death so was not use of deadly force; and when, although intrusion on suspect's *Fourth Amendment* rights was serious because deputy permitted dog to bite and hold suspect for unusually long time period, force applied was reasonably necessary under circumstances. *Miller v. Clark County (9th Cir. 2003) 340 F.3d 959, 961-968*

District court properly granted summary judgment to defendants on reasonableness of investigative stop of van by deputy, initial detention of driver, pat down search of driver and search of van for weapons, and handcuffing of driver and determined that driver was not arrested for purposes of *42 U.S.C § 1983* claim, when deputy acted reasonably from moment he was informed three Asian men with guns were seen entering blue van; when once deputy saw blue van in vicinity of where men with guns had been seen, he had reasonable suspicion to make traffic stop; and when behavior of driver, even though he was African-American, caused deputy's suspicions to intensify, so that deputy's actions once driver was stopped were reasonable. *Haynie v. County of Los Angeles (9th Cir. 2003) 339 F.3d 1071, 1075-1077*

Search of protester's backpack and his subsequent arrest for obstruction of police officer violated protester's *Fourth Amendment* rights, when protester's refusal to give officer his name could not be basis for arrest because there is clearly established *Fourth Amendment* right not to identify oneself, and protester's refusal to consent to search of his backpack could not be basis for arrest unless officer had right to search backpack and neither refusalto give name nor to consent to search could be used as basis to support finding of probable cause; and when facts that protester had heavy backpack, that two cylindrical-shaped bulges were visible to officer at base of backpack, and that protester became increasingly loud during his confrontational encounter with officer, considered in light of totality of circumstances and in context of dangerously hostile atmosphere of particular situation, as well as officer's knowledge of 1996 Olympic Park bombing in Atlanta, during which backpack bomb exploded, gave rise to reasonable suspicion justifying *Terry*-type stop, but did not support finding of probable cause for search of backpack or for arrest. However, officer was entitled to qualified immunity because, although his conduct violated protester's *Fourth Amendment* rights, reasonable officer in same situation could have believed that circumstances carried enough weight to create probable cause when there was at least some individualized suspicion and law did not provide him clear guidance as to how much weight he could give explosively hostile circumstances of Nazi parade in making his probable cause assessment. *Graves v. City of Coeur*

D'Alene (9th Cir. 2003) 339 F.3d 828, 840-848

Trial court properly denied summary judgment on grounds of qualified immunity to law enforcement officers sued for violations of *Fourth Amendment* rights of employees of organization suspected of criminal wrongdoing by various fraudulent practices harmful to consumers by detaining employees incommunicado without probable cause, for time periods ranging from one hour and 45 minutes to four hours and 45 minutes, using threat of continued detention to coerce them to submit to interrogations, and releasing them only after they submitted to tape-recorded interrogations, when, although detaining employees during search of premises served important law enforcement interests and worked no great invasion of privacy, holding employees incommunicado and using their continued detention to coerce them into submitting to interrogations was not carefully tailored to justification of underlying detention and was more intrusive than necessary to effectuate otherwise authorized investigative detention, so it was not reasonable under *Fourth Amendment*; and when reasonable officer would have known that, absent probable cause to arrest, Constitution prohibits officers from using threat of continued detention to coerce detainees to submit to interrogation and prohibits officers from holding people incommunicado for this length of time without better justification. Summary judgment was also properly denied as to plaintiffs who were children of employees whom officers refused to permit to leave, when reasonable person of any age would believe he or she was not free to leave, so that seizure occurred within meaning of *Fourth Amendment*. *Ganwich v. Knapp (9th Cir. 2003) 319 F.3d 1115, 1119-1125*

In action against police officers based on entry into plaintiff's residence to accompany plaintiff's minor daughter retrieving property under court order issued under California's Domestic Violence Prevention Act, special needs beyond normal need for law enforcement existed making *Fourth Amendment* warrant and probable cause requirement impracticable and balance of interests demonstrated that entry into home did not run afoul of the *Fourth Amendment*, when government's substantial interests in addressing domestic violence presented special need that could justify departure from ordinary warrant and probable cause requirements and requiring officers to getwarrant would have been impracticable and superfluous because officers already had court order detailing relevant restraints imposed and property rights protected, and when mother's privacy interest was tempered by notice to her of court-ordered property disbursement when she was served in advance with order and officers' intrusion into house was limited to particular areas where entry was required to retrieve daughter's property. *Henderson v. City of Simi Valley (9th Cir. 2002) 305 F.3d 1052, 1056-1061*

Fourth Amendment permits random search, at airport security checkpoint, of carry-on bag that has passed through x-ray scan without arousing suspicion that bag contains weapons or explosives. *Torbet v. United Airlines, Inc. (9th Cir. 2002) 298 F.3d 1087, 1089*

Allegations that police officer engaged in unreasonable, non-consensual, inappropriate touching and propositioning of arrestee while transporting her to police station and while she was helpless, handcuffed, and frightened and vulnerable, if proved, would establish that police officer violated her *Fourth Amendment* rights to be free of unreasonable searches and seizures so that trial court erred by dismissing complaint. *Fontana v. Haskin (9th Cir. 2001) 262 F.3d 871*

Pro se litigant is entitled to recover actual costs reasonably incurred in prosecuting *42 U.S.C.S. § 1983* action to extent that attorney could have received costs under *42 U.S.C.S. § 1988* attorney's fee award. *Burt v. Hennessey (9th Cir. 1991) 929 F.2d 457, 458-460*

Plaintiff who loses on federal claims and recovers only on pendent state claim is not prevailing party. *Mateyko v. Felix (9th Cir. 1990) 924 F.2d 824, 828*

Order awarding attorney's fees to plaintiffs as prevailing parties vacated when judgment on merits is reversed on appeal. *Turner v. McMahon (9th Cir. 1987) 830 F.2d 1003, 1009*

To be prevailing party on appeal party need not be better off after than before appeal; standard for awarding fees after

appeal is same as in trial court, and court is required to determine if, after appeal, plaintiff has succeeded on significant issue and achieved some of benefit sought in bringing suit. *Toussaint v. McCarthy (9th Cir. 1987) 826 F.2d 901, 904*

42 U.S.C.S. § 1983 cause of action does not exist for random, unauthorized deprivation of liberty or property when adequate postdeprivation procedures are available under state law; availability of state remedies is immaterial when plaintiffs allege violation of substantive constitutional rights apart from due process rights. *King v. Massarweh (9th Cir. 1986) 782 F.2d 825, 826-827*

Existence of postdeprivation state remedies does not bar substantive due process claim under *42 U.S.C.S. § 1983*; right to bring *42 U.S.C.S. § 1983* action alleging police brutality is not dependent on exhaustion of state judicial or administrative remedies. *Rutherford v. City of Berkeley (9th Cir. 1986) 780 F.2d 1444, 1447*

Acts constituting invasion of plaintiff's privacy prohibited by *Fourteenth Amendment* and by *42 U.S.C.S. § 1983*. *York v. Story (9th Cir. 1963) 324 F.2d 450, 455*

Right to security of one's privacy against arbitrary intrusion by police. *Cohen v. Norris (9th Cir. 1962) 300 F.2d 24, 31*

[c] State Courts

Although state constitution does not contain any explicit reference to "right to marry," right to marry is fundamental right whose protection is guaranteed to all persons by California Constitution, including as aspect of constitutional protection of privacy; right to marry as embodied in *Cal. Const. art. I, §§ 1* and *7* guarantees same-sex couples same substantive constitutional rights as opposite-sex couples to choose one's life partner and enter with that person into committed, officially recognized, and protected family relationship that enjoys all constitutionally based incidents of marriage. *In re Marriage Cases (2008) 43 Cal. 4th 757, 809-829, 76 Cal. Rptr. 3d 683, 183 P.3d 384*

Person who has been deprived of constitutional rights by state or local official acting under color of state law has right to bring action under *42 U.S.C.S. § 1983* in state court. *Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 173, 173 n.10, 216 Cal. Rptr. 661, 703 P.2d 1* ; *Williams v. Horvath (1976) 16 Cal. 3d 834, 837, 129 Cal. Rptr. 453, 548 P.2d 1125* ; *Pyne v. Meese (1985) 172 Cal. App. 3d 392, 401 n.5, 218 Cal. Rptr. 87*

State allows right to bring comparable state action to *42 U.S.C.S. § 1983*; any attempt to condition right under state law does not apply to the federal remedy. *Williams v. Horvath (1976) 16 Cal. 3d 834, 840-842, 129 Cal. Rptr. 453, 548 P.2d 1125*

Imposition of GPS monitoring on juvenile as condition of probation did not violate his privacy rights under *Fourth Amendment*, where, whether monitoring movements inside or outside home by means of GPS device constituted search for purposes of *Fourth Amendment*, juvenile court could impose probation conditions infringing on constitutional rights if tailored to meet needs of minor, and GPS requirement, in conjunction with other conditions of his probation, was reasonably designed to monitor his whereabouts to ensure that he attend school, remain off school premises when he should not be there, observe court-imposed curfew, and not engage in other misconduct that might be traced to him if his whereabouts was known. *In re R.V. (2009) 171 Cal. App. 4th 239, 248, 89 Cal. Rptr. 3d 702*

Pen. Code § 296(a)(1), requiring provision of DNA sample and print impressions for collection and storage in state database by person convicted of or pleading guilty or no contest to or found not guilty by reason of insanity of any felony offense, does not violate *Fourth Amendment* despite lack of necessity of warrant or probable cause. Although compulsory, nonconsensual extraction of DNA samples constituted search and seizure under *Fourth Amendment*, and governmentally compelled testing implicated state right of privacy [*Cal. Const., art. I, §§ 1, 13*], there was legitimate

governmental interest in maintaining permanent, reliable record of identification of all convicted felons, and, although DNA testing might have served more vital interest as to felons convicted of violent offenses, utility of precise identification of all felons justified minor intrusion as to which expectation of privacy was minimal. *People v. Travis (2006) 139 Cal. App. 4th 1271, 1281-1290, 44 Cal. Rptr. 3d 177*

In putative class action lawsuit alleging wage and hour violations against employer, trial court's order to employee-plaintiffs to provide employer with names, addresses, and telephone numbers of all putative class members who contacted plaintiffs' counsel in response to neutral letter sent to sample of class members was compelled disclosure that violated state constitutional privacy rights of persons who contacted plaintiffs' counsel, and privacy rights of class members who contacted plaintiffs' counsel outweighed any interest employer may have had in learning their identity. *Tien v. Superior Court (2006) 139 Cal. App. 4th 528, 539-541, 43 Cal. Rptr. 3d 121*

San Francisco ordinance seeking to discourage persons from acquiring private residential property using tenants in common (TIC) agreements in conversion of rental housing to owner occupied housing by regulating and forbidding agreements for exclusive right of occupancy (ERO) in particular dwelling unit within overall TIC property, exempting persons related to each other as grandparents, parents, brothers, sisters, children, grandchildren, or spouses, or registered as domestic partners, violated state constitutional right of privacy, because for TIC owners to desire privacy by ERO agreement among themselves is reasonable; intrusion was serious because ordinance concerned the home, which is place traditionally protected most strongly by constitutional right of privacy; and city failed to advance sufficient justification for violation and did not bear its burden of demonstrating sufficiently strong countervailing interest to preserve rental housing by limiting right of homeowners under Ellis Act to go out of business of renting, and in possibly protecting consumers by explicitly stating that owners of TICs were allowed to enter each other's homes. *Tom v. City & County of San Francisco(2004) 120 Cal. App. 4th 674, 680-688, 16 Cal. Rptr. 3d 13*

In action by sex offender alleging violation of right to privacy by web site with "pin maps" of neighborhoods, indexed by neighborhood of nearest public or private school, community park, or library, showing for given neighborhood all schools, libraries, parks and community centers, as well as general location of residence of registered sex offender in relation to those schools, libraries, and parks, thus showing location but not name and address of sex offenders living in community, maintained by city police department to implement California's Megan's Law, trial court properly granted defense summary judgment. Pin map did not disclose plaintiff's address but only his general location, in which he had no federally or state constitutionally protected right to privacy. Even if pin maps disclosed his street address, plaintiff could not show violation of his right to privacy, because informational privacy rights are not absolute and may bow to legitimate state interest, and any nontrivial privacy interest in sex offender's street address is substantially outweighed by state's interest in expanding reach of its notification to protect additional members of public. *Fredenburg v. City of Fremont (2004) 119 Cal. App. 4th 408, 420-423, 14 Cal. Rptr. 3d 437*

State court has concurrent jurisdiction with federal court to adjudicate actions under *42 U.S.C.S. § 1983*; even if concurrent jurisdiction enables plaintiff to bring simultaneous actions in state and federal court, final judgment by first court to decide matter bars other action under res judicata. *Weber v. Willard (1989) 207 Cal. App. 3d 1006, 1009, 255 Cal. Rptr. 165*

Trial court discretion in deciding whether to award attorney's fees to prevailing party is narrowly limited; controlling standard is recovery by prevailing plaintiff unless special circumstances would render award unjust; strong showing of special circumstances is required to justify denying award of attorney's fees to prevailing party; good faith by defendants not special circumstance justifying denial of attorney's fees. *McMahon v. Lopez (1988) 199 Cal. App. 3d 829, 836, 245 Cal. Rptr. 172*

42 U.S.C.S. § 1988 does not create new cause of action that abates on death of prevailing party, and claim for attorney's fees survives death of prevailing party; status as prevailing party supports right of representative of estate to recover attorney's fees. *McMahon v. Lopez (1988) 199 Cal. App. 3d 829, 835-836, 245 Cal. Rptr. 172*

Complaint alleged sufficient facts showing deprivation of civil rights to state cause of action under *42 U.S.C.S. 1983* in state court. *Rossiter v. Benoit (1979) 88 Cal. App. 3d 706, 717-718, 152 Cal. Rptr. 65*

[2] Exemplary and Punitive Damages

Local government bodies are immune from liability for punitive damages under *42 U.S.C.S. § 1983*. *Jefferson v. City of Tarrant, 522 U.S. 75 (1997); Newport v. Fact Concerts, Inc. (1981) 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616*

Exemplary or punitive damages are not necessarily precluded in absence of actual loss, but compensatory damages are not available without proof of actual injury. *Carey v. Piphus (1978) 435 U.S. 247, 254-257 n.11, 98 S. Ct. 1042, 55 L. Ed. 2d 252*

Harm due to mental and emotional distress is compensable under *42 U.S.C.S. § 1983*, provided plaintiff demonstrates that injury was direct result of wrongful deprivation of due process. *Alexander v. City of Menlo Park (9th Cir. 1986) 787 F.2d 1371, 1376*

Plaintiff has right to exemplary or punitive damages. *Pierce v. Stinson (E.D. Tenn. 1980) 493 F. Supp. 609, 611-612*

Punitive damages are recoverable in survival, but not wrongful death action brought under *42 U.S.C.S. § 1983*. *Parker v. Superior Court (1985) 175 Cal. App. 3d 1082, 1087, 1087 n.1, 223 Cal. Rptr. 292*

[3] Declaratory and Injunctive Relief

Declaratory relief is available under *42 U.S.C.S. § 1983*. *Gay Student Servs., v. Texas A & M Univ. (5th Cir. 1980) 612 F.2d 160, 166*

Doctrine of judicial immunity does not bar injunctive relief. *Harris v. Harvey (7th Cir. 1979) 605 F.2d 330, 335, n.7*

Injunctive relief is proper under *42 U.S.C.S. § 1983* when there has been deprivation of civil rights. *Schnell v. City of Chicago (7th Cir. 1969) 407 F.2d 1084, 1086*

[4] Defenses and Immunities

[a] In General

State or local official's negligence is basis for liability under *42 U.S.C.S. § 1983*. *Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981) , overruled in part, Daniels v. Williams (1986) 474 U.S. 327, 329*

Municipality is liable under *42 U.S.C.S. § 1983* only when constitutional violation results from action pursuant to official municipal policy, and not solely on respondeat superior theory. *Monell v. Department of Soc. Servs. (1978) 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611*

Immunity is affirmative defense. *Robinson v. Bergstrom (7th Cir. 1978) 579 F.2d 401, 404*

Actions for damages under *42 U.S.C.S. § 1983* are limited to persons who were directly involved in wrongdoing; state and local officials have either absolute or qualified immunity from damages liability. *Kostka v. Hogg (1st Cir. 1977) 560 F.2d 37, 39*

[b] Absolute Immunity

Exception to doctrine of judicial immunity when judge acted in clear absence of all jurisdiction. *Schucker v. Rockwood (9th Cir. 1988) 846 F.2d 1202, 1204* ; *Clark v. Taylor (D.C. Cir. 1980) 627 F.2d 284, 287*

Absolute immunity from liability for damages is accorded to judges while acting in course of official duties. *Johnson v. Reagan (9th Cir. 1975) 524 F.2d 1123, 1124*

Absolute immunity from liability for damages is accorded to states. *Sykes v. State of California (Dep't of Motor Vehicles) (9th Cir. 1974) 497 F.2d 197, 201* ; *Pyne v. Meese (1985) 172 Cal. App. 3d 392, 401-403, 218 Cal. Rptr. 87*

[c] Qualified Immunity

Local government entities are not immune from liability under *42 U.S.C.S. § 1983* on ground that constitutional violation flowed from good-faith actions. *Owen v. City of Independence (1980) 445 U.S. 622, 650-658, 100 S. Ct. 1398, 63 L. Ed. 2d 673* ; *but see Monell v. Department of Soc. Servs. (1978) 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611* (local government entities have qualified immunity from damages in civil rights action)

Local governments are liable under *42 U.S.C.S. § 1983* for constitutional infringements by their employees when employees' action was pursuant to official policy whether created by law or custom or by lawmakers or others whose edicts may fairly be said to represent official policy. *Monell v. Department of Soc. Servs. (1978) 436 U.S. 658, 692-695, 98 S. Ct. 2018, 56 L. Ed. 2d 611*

Qualified immunity from damages under *42 U.S.C.S. § 1983* is available to state and local government officials, including police officers. *Procunier v. Navarette (1978) 434 U.S. 555, 561, 98 S. Ct. 855, 55 L. Ed. 2d 24*

County's blanket policy of doing strip search with visual cavity inspection for arrestees charged with any controlled substance offense before placement in general jail population was unconstitutional as applied to plaintiff because no linkwas shown between blanket strip search policy and legitimate security concerns for detainees spontaneously arrested and detained temporarily for being under influence without ever being released into general jail population or individualized suspicion that plaintiff concealed drugs in body cavity. However, sheriff and deputy sheriff were qualifiedly immune from liability for conducting strip search of plaintiff arrested for being under influence of cocaine and released on bail. Reasonable official in position of sheriff and deputy would not have understood that following jail's policy violated plaintiff's rights because it was not clearly established at time of plaintiff's booking that strip searching persons arrested on drug charges was unreasonable. *Way v. County of Ventura (9th Cir. 2006) 445 F.3d 1157, 1159-1163*

Police officers were entitled to qualified immunity in seizing house of crime suspect, when, because suspect's roommate was removing property fromresidence, it was reasonable for officers to believe entry was necessary to prevent evidence from being lost or destroyed, and when officers had probable cause to enter home because, under totality of circumstances, there was fair probability they would find evidence of crime, because as roommate's personal search of home indicated, officers overlooked potential evidence of alleged crime in their initial search and failed to find everything listed on search warrant, so that there was no *Fourth Amendment* violation. As to due process claim against officers, jury heard evidence that officers relied on district attorney's advice and, though not conclusive, reliance on attorney's advice was evidence of officer's good faith. *Dixon v. Wallowa County (9th Cir. 2003) 336 F.3d 1013, 1017-1019*

Police officers were not entitled to qualified immunity for violation of rights of person detained during search of her

house under warrant, when officers violated her constitutional guarantee against unreasonable search and seizure because, although officers were investigating gang-related drive-by shooting, which is clearly serious crime, and they were authorized under warrant to search home and seize property in relation to their investigation of officers' primary suspect, plaintiff was not subject of investigation, posed no immediate threat to safety of officers or others, did not actively resist arrest or attempt to flee, was unarmed, docile, and cooperative in every regard, and searches of her person and room produced no evidence of gang membership or contraband and 18 well-armed SWAT team officers secured house in matter of minutes but handcuffed her and kept her in handcuffs for two to three hours and unduly invaded her privacy by inquiring unnecessarily into her citizenship status presumably based on nothing more than her name or ethnic appearance, and by any standard of reasonableness, in light of fact she was not suspect, officers should have released her from handcuffs when it became clear she posed no immediate threat and did not resist arrest; and when right to be free from type of search plaintiff alleged was clearly established at time of search. *Mena v. City of Simi Valley (9th Cir. 2003) 332 F.3d 1255, 1261-1267*

Police officer acting in good faith and in reasonable manner in executing search warrant issued by judicial officer is not liable in damages under Civil Rights Act, even if judicial officer erred in authorizing search. *Commonwealth of Pennsylvania ex rel. Feiling v. Sincavage (3d Cir. 1971) 439 F.2d 1133, 1134*

Police were entitled to qualified immunity on claim they violated plaintiff's *Fourth Amendment* rights by violating implied consent law by not giving him choice between breath, blood, and urine tests for intoxication and forcing blood draw. Even assuming officers violated plaintiff's state statutory rights under implied consent law, it was not violation of his federal constitutional rights. *Ritschel v. City of Fountain Valley (2006) 137 Cal. App. 4th 107, 115-121, 40 Cal. Rptr. 3d 48*

Government officials performing discretionary functions are shielded from liability for civil damages when their conduct does not violate clearly established statutory or constitutional rights known to reasonable person. *Pyne v. Meese (1985) 172 Cal. App. 3d 392, 405-406, 218 Cal. Rptr. 87*

[d] Statute of Limitations

State law doctrines allowing tolling of statute of limitations are applicable to *42 U.S.C.S. § 1983* actions unless they are inconsistent with federal policy underlying cause of action under consideration. *Hardin v. Straub (1989) 490 U.S. 536, 109 S. Ct. 1998, 104 L. Ed. 2d 582, 588-591* ; *Donoghue v. Orange County (9th Cir. 1987) 848 F.2d 926, 930*

Characterization of *42 U.S.C.S. § 1983* claim as federal question; only limitation periods and closely related questions of tolling and application are governed by state law; *42 U.S.C.S. § 1983* is best characterized as personal injury action for purpose of choosing applicable state statute of limitations. *Wilson v. Garcia (1985) 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254, 260-263, 266*

Statute of limitations in *42 U.S.C.S. § 1983* action is not equitably tolled during pendency of state court proceeding arising out of same situation when plaintiff had not acted in good faith by stringing out state proceedings until forced to brink of trial and then abandoning those proceedings to initiate federal proceedings on precisely same claim. *Bacon v. City of Los Angeles (9th Cir. 1988) 843 F.2d 372, 374-376*

Applicable statute of limitations for causes of action arising prior to *Wilson* is eitherthree years from time cause of action arose or one year from *Wilson*, depending on which period expires first. *Usher v. City of Los Angeles (9th Cir. 1987) 828 F.2d 556, 561*

Wilson v. Garcia (1985) 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254, 260-263, 266 (characterizing *42 U.S.C.S. § 1983* action as personal injury action) applied prospectively in California because prior precedent indicated three-year

limitation period and retroactive application would bar actions and be inconsistent with purpose of *42 U.S.C.S. § 1983*. *Gibson v. United States (9th Cir. 1986) 781 F.2d 1334, 1339* ; *Jones v. Bechtel (9th Cir. 1986) 788 F.2d 571, 573-574* ; *Parker v. Superior Court (1985) 175 Cal. App. 3d 1082, 1089-1091, 223 Cal. Rptr. 292*

Federal law governs time of accrual of statute of limitations in *42 U.S.C.S. § 1983* action even though state law prescribes applicable statute of limitations. *Gibson v. United States (9th Cir. 1986) 781 F.2d 1334, 1340*

Statute of limitations for *42 U.S.C.S. § 1983* actions is state statute of limitations governing personal injury actions; applicable statutory period in California was one year under former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 335.1* (two-year statute of limitations beginning in 2003)). *Parker v. Superior Court (1985) 175 Cal. App. 3d 1082, 1088-1089, 223 Cal. Rptr. 292* .

[5] Parties

State officials, sued in their individual capacities, are "persons" within meaning of *42 U.S.C.S. § 1983*, and subject to suit. *Hafer v. Melo (1991) 502 U.S. 21, 112 S. Ct. 358, 116 L. Ed. 2d 301, 313*

Local officials and employees are liable for violation of constitutional rights if either (1) the challenged constitutional rights were clearly established at time of challenged conduct and they knew or should have known of the rights and that their conduct violated the rights, or (2) they acted with malicious intent to deprive constitutional rights or cause other injuries. *Wood v. Strickland (1975) 420 U.S. 308, 321-322, 95 S. Ct. 992, 43 L. Ed. 2d 214*

42 U.S.C.S. § 1983 claim that accrued before death survive decedent when state law authorizes survival action as suitable remedy; *Prob. Code § 573* enables administrator to maintain *42 U.S.C.S. § 1983* action. *Smith v. City of Fontana (9th Cir. 1987) 818 F.2d 1411, 1416-1418*

Children of decedent who died from alleged excessive force by police may not maintain personal causes of action under *42 U.S.C.S. § 1983* for violationof *U.S. Const. amend. IV*, but may maintain action for violation of their substantive due process rights. *Smith v. City of Fontana (9th Cir. 1987) 818 F.2d 1411, 1416-1420*

Prob. Code § 573 allows personal representative to bring *42 U.S.C.S. § 1983* action; tort liability under *42 U.S.C.S. § 1983* continues after death of victim. *Ochoa v. Superior Court (1985) 39 Cal. 3d 159, 173-174, 216 Cal. Rptr. 661, 703 P.2d 1*

[6] Pleading

When plaintiff in *42 U.S.C.S. § 1983* claim appears pro se, court must construe pleadings liberally and afford plaintiff benefit of any doubt; court must give pro se litigant leave to amend his or her complaint unless it is absolutely clear that deficiencies of complaint could not be cured by amendment, and give plaintiff statement of complaint's deficiencies before dismissing case. *Karim-Panahi v. Los Angeles Police Dep't (9th Cir. 1988) 839 F.2d 621, 623* ; *Eldridge v. Block (9th Cir. 1987) 832 F.2d 1132, 1135-1136*

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§ 429.456 Law Reviews

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[Reserved]

§§ 429.458[Reserved]

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Volume 37: Pretrial Proceedings thru Privacy-Chs. 425-439
Chapter 429 PRIVACY
PART IV. FORMS
A. Invasion Of Privacy

37-429 California Forms of Pleading and Practice--Annotated § 429.470

§ 429.470 Complaint [Code Civ. Proc. § 425.10] for General Damages [Civ. Code § 3333], Punitive Damages [Civ. Code § 3294], and Injunctive Relief [Civ. Code § 3422; Code Civ. Proc. § 526] for Invasion of Privacy--Public Disclosure of Private Facts

[1] FORM Complaint [Code Civ. Proc. § 425.10] for General Damages [Civ. Code § 3333], Punitive Damages [Civ. Code § 3294], and Injunctive Relief [Civ. Code § 3422; Code Civ. Proc. § 526] for Invasion of Privacy--Public Disclosure of Private Facts

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES [AND INJUNCT-
_____ [*name*], [and DOES	)	IVE RELIEF]
1-_____,]	)	(Invasion of Privacy)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff is, and at all times mentioned herein was, _____ [*state capacity and residence of plaintiff, e.g.,* a resident of _____ County, California], and _____ [*specify professional, societal, or other pertinent status of plaintiff, e.g.,* a doctor and a respected member of the community].

2. Defendant _____ [*name*] is, and at all times mentioned herein was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a resident of _____ County,

California *or* a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), _____ County, California (, doing business as the publisher of a daily newspaper entitled _____, published and circulated in _____ (*city*), _____ County, California)].

[3. Defendants DOES 1-49 inclusive, are sued herein under fictitious names, their true names and capacities being unknown to plaintiff. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged and that plaintiff's damages as herein alleged were proximately caused by those defendants. At all times, defendants DOES 50-99, inclusive, were the agents, servants, and employees of their codefendants, and in doing the things hereinafter alleged were acting within the course and scope of their authority as those agents, servants, and employees, and with the permission and consent of their codefendants.]

[4. Plaintiff is informed and believes and alleges that, at all times, defendants _____ (*names*) were the agents, servants, and employees of their codefendants and, in doing the things, were acting within the course and scope of their authority as agents, servants, and employees with the permission and consent of their codefendants.]

5. On or about _____ [*date*], defendant, without plaintiff's consent, invaded plaintiff's right to privacy by _____ [*specify manner in which defendant publicly disclosed private facts about plaintiff, e.g.,* publishing an article entitled _____ in which plaintiff was identified by name as a person who had undergone medical and surgical procedures to implement a gender change].

[6. The statement that is the basis of the invasion of privacy is _____ (*set forth precise language of statement, e.g.,* as follows: _____, *or* attached as Exhibit _____, and incorporated as if set out in full).]

7. The disclosure by defendant was a public disclosure to a large number of people in that _____ [*specify facts supporting allegation, e.g.,* the disclosure was made in a magazine entitled _____, which claims a circulation of _____ (*number*)].

8. The facts disclosed about plaintiff were private facts that plaintiff desired to keep private. [_____ (*Add additional facts supporting allegation, e.g.,* Since undergoing gender change procedures, plaintiff has taken steps to start a new life, with a new job and new friends, and has not publicized the fact that he/she had a gender change.).]

9. The disclosure by defendant of the above facts was offensive and objectionable to plaintiff and to a reasonable person of ordinary sensibilities in that _____ [*specify facts supporting allegation, e.g.,* it revealed extremely private details about plaintiff's past gender identity, as well as his/her medical and surgical history, that plaintiff had attempted to keep private.].

10. The private facts disclosed by defendant were not of legitimate public concern, or newsworthy. The disclosed facts did not bear a logical relationship to the newsworthy subject of the broadcast and were intrusive in great disproportion to their relevance, in that _____ [*specify facts supporting allegation, e.g.,* the investigation tool of placing a microphone in an airambulance with the plaintiff was overly intrusive relative to the newsworthiness of reporting the plaintiff's rescue].

11. As a proximate result of the above disclosure, plaintiff _____ [*specify injury suffered by plaintiff, e.g.,* was scorned and abandoned by his/her friends and family, exposed to contempt and ridicule, and suffered loss of reputation and standing in the community, all of which caused him/her humiliation, embarrassment, hurt feelings, mental anguish, and suffering], all to his/her general damage in an amount according to proof.

[12. As a further proximate result of the above-mentioned disclosure, plaintiff _____ (*specify special damages suffered by plaintiff, e.g.,* has suffered injury to his/her business, in that he/she has lost _____ (*number*) patients from his/her medical practice), all to his/her special damage in an amount according to proof.]

[13. In making the disclosure described above, defendant was guilty of oppression, fraud, or malice, in that defendant made the disclosure with _____ (the intent to vex, injure, or annoy plaintiff *or* a willful and conscious disregard of plaintiff's rights *or state facts showing such intent or disregard*). Plaintiff therefore seeks an award of punitive damages.]

[14. Defendant has threatened to continue disclosing the above information. Unless and until enjoined and restrained by order of this court, defendant's continued publication will cause plaintiff great and irreparable injury in that _____ (*specify facts supporting allegation, e.g.,* plaintiff will suffer continued humilitation, embarrassment, hurt feelings, and mental anguish). Plaintiff has no adequate remedy at law for the injuries being suffered in that _____ (*specify facts supporting allegation, e.g.,* a judgment for monetary damages will not end the invasion of plaintiff's privacy).]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages according to proof;

[2. For special damages according to proof;]

[3. For exemplary or punitive damages;]

[4. For _____ (*specify injunctive relief sought, e.g.,* a preliminary injunction and a permanent injunction enjoining defendant and his/her agents, servants, and employees, and all persons acting under, in concert with, or for him/her from continuing to publish the above-described private facts about plaintiff);]

5. For costs of suit herein incurred; and

6. For such other further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

CAUTION:

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . In a limited civil case, the court may issue temporary restraining orders and preliminary injunctions, but not permanent injunctive relief; thus, if permanent injunctive relief is sought, the action cannot be brought as a limited civil case [*see Code Civ. Proc. §§ 85, 86(a)(8)*]. For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

[2] Use of Form

This form of complaint may be used to obtain general, special, and punitive damages and injunctive relief for an invasion of privacy by the public disclosure of private facts. The right of privacy is recognized in California, and an invasion of the right by the public disclosure of private facts is an actionable tort [*see Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 808, 163 Cal. Rptr. 628, 608 P.2d 716* ; *Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 819*]. For further discussion of this tort, see *§ 429.32*.

[3] Allegations

The complaint alleges the following:

- The status of plaintiff (Paragraph 1);
- The basis for venue (Paragraph 2) [*see Code Civ. Proc. §§ 395* (individual), 395.2 (unincorporated association), 395.5 (corporation or association)];
- The potential existence of additional defendants whose identities are unknown to plaintiff (Paragraph 3) [*Code Civ. Proc. § 474*];
- The basis for application of the doctrine of respondeat superior (Paragraph 4) [*see Civ. Code § 2338*];
- The manner in which private facts were publicly disclosed (Paragraph 5);
- The public nature of the disclosure (Paragraph 7);
- The private nature of the facts disclosed (Paragraph 8);
- The fact that the disclosure would be offensive and objectionable to a reasonable person of ordinary sensibilities (Paragraph 9) [*see Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 808, 163 Cal. Rptr. 628, 608 P.2d 716]* ; and

- That the private facts disclosed by defendant were not of legitimate public concern, or newsworthy.

The form also provides an optional paragraph for quoting or incorporating the precise language of the disclosure (Paragraph 6).

Regarding relief, the forms provides an allegation for general compensatory damages (Paragraph 11), and optional paragraphs for special damages (Paragraph 12) and punitive damages (Paragraph 13). In addition, an optional allegation to support injunctive relief is included (Paragraph 14) [*see Leavy v. Cooney (1963) 214 Cal. App. 2d 496, 504, 29 Cal. Rptr. 580]* .

Lack of newsworthiness or legitimate public concern is an element of the private facts tort, making newsworthiness a complete bar to common law liability [*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 215, 74 Cal. Rptr. 2d 843, 955 P.2d 469* ; *see also Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 126, 188 Cal. Rptr. 762]* . For discussion of newsworthiness, see *§ 429.40*. If the plaintiff is a limited involuntary public figure (for example, the victim of an auto accident rescued with the jaws of life), he or she must allege that the disclosed facts did not bear a logical relationship to the newsworthy subject of the broadcast and were intrusive in great disproportion to their relevance [*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 228, 74 Cal. Rptr. 2d 843, 955 P.2d 469]* .

[4] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*]. Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446*] and precludes a general denial in superior court and some limited civil cases [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

If the action seeks permanent injunctive relief, it is in the jurisdiction of the superior court and is not a limited civil case [*see Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*].

If permanent injunctive relief is not sought, the superior court has jurisdiction of the action unless it is a limited civil case (amount in controversy, exclusive of interest, is $25,000 or less) [*see Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases the caption must state whether the demand exceeds or does not exceed $10,000. When a limited civil case is brought in the superior court, the caption must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

The existence of a statute relating to the authority of the court in a limited civil case does not, by itself, imply that the same authority does or does not exist in an unlimited civil case. The existence of a statute relating to the authority of the court in an unlimited civil case does not, by itself, imply that the same authority does or does not exist in a limited civil case [*Code Civ. Proc. § 89*].

In an action for invasion of privacy, venue is proper in the county where the defendants, or some of them, reside at the commencement of the action [*Code Civ. Proc. § 395(a)*]. Because invasion of privacy does not result in a physical injury, it is not considered an action for "injury to person" for the purposes of the venue provision of *Code Civ. Proc. § 395(a)* which allows an action to be brought in the county in which the injury occurred [*see Monk v. Ehret (1923) 192*

Cal. 186, 193, 219 P. 452 ; *Graham v. Mixon (1917) 177 Cal. 88, 92, 169 P. 1003]* . However, in the case of a corporate defendant, an action for invasion of privacy may be brought in the county in which the injury occurred under the provisions of *Code Civ. Proc. § 395.5*, which provides for venue in the county where the liability arose [*see Code Civ. Proc. § 395.5*]. Tort liability arises where the injury occurs, and the injury in most invasion of privacy actions, the same as in libel actions, occurs in the county in which the plaintiff resides and the unwanted disclosure is made [*see Tingley v. Times-Mirror Co. (1904) 144 Cal. 205, 206, 77 P. 918* (libel action)]. Thus, an action against a corporate media defendant may be brought in the county in which the medium was circulated or broadcast if the plaintiff resides in that county [*see Tingley v. Times-Mirror Co. (1904) 144 Cal. 205, 206-207, 77 P. 918* ; *Shores v. Chip Steak Co. (1955) 130 Cal. App. 2d 627, 629-630, 279 P.2d 595* (trade libel action)].

If none of the defendants reside in the state, venue is proper in any county in the state that the plaintiff designates [*Code Civ. Proc. § 395(a)*].

[6] Uniform Single Publication Act

No person shall have more than one cause of action for damages for invasion of privacy founded on any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in that action shall include all damages for any such tort suffered by plaintiff in all jursidictions [*Civ. Code § 3425.3*; *see § 429.43*].

[7] Damages

[a] Compensatory Damages

The injury to be compensated in an action for invasion of privacy includes impairment of reputation and standing in the community, personal humiliation, mental anguish, suffering, and hurt feelings [*see Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 137, 188 Cal. Rptr. 762* ; *Fairfield v. American Photocopy Equip. Co. (1955) 138 Cal. App. 2d 82, 88-89, 291 P.2d 194* ; *see generally § 429.530[4]*].

[b] Punitive Damages

Punitive damages may be awarded when it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice [*Civ. Code § 3294(a)*]. The complaint must allege sufficient facts to support the allegations of oppression, fraud, or malice. If sufficient facts are alleged to support the allegation of punitive damgages, pleading an entitlement to punitive damages in the language of *Civ. Code § 3294* is not objectionable [*see Perkins v. Superior Court (1981) 117 Cal. App. 3d 1, 6-7, 172 Cal. Rptr. 427]* . The operative facts in an invasion of privacy action are that defendant acted with the intent to vex, injure, or annoy, or with a conscious disregard of plaintiff's rights [*see Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 135, 188 Cal. Rptr. 762* ; *see generally § 429.530[4]*].

[c] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[8] Injunctive Relief

Injunctive relief may be available in cases of invasion of privacy [*see Leavy v. Cooney (1963) 214 Cal. App. 2d 496, 504, 29 Cal. Rptr. 580]* .

[9] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For a discussion, forms, and procedures relating to preliminary and permanent injunctions, see Ch. 303, *Injunctions*

For a discussion and forms relating to libel and slander, see Ch. 340, *Libel and Slander*

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A. Invasion Of Privacy

37-429 California Forms of Pleading and Practice--Annotated § 429.471

§ 429.471 Complaint for General Damages [Civ. Code § 3333], Punitive Damages [Civ. Code § 3294], and Injunctive Relief [Civ. Code § 3422; Code Civ. Proc. § 526] for Invasion of Privacy--Publicity Placing Person in False Light in Public Eye

[1] FORM Complaint for General Damages [Civ. Code § 3333], Punitive Damages [Civ. Code § 3294], and Injunctive Relief [Civ. Code § 3422; Code Civ. Proc. § 526] for Invasion of Privacy--Publicity Placing Person in False Light in Public Eye

[*Caption. See § 429.470.*]

Plaintiff alleges:

1. [*Capacity, residence, and status of plaintiff. See § 429.470, Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 429.470, Paragraph 2.*]

3. [*Fictitious name allegation, if appropriate. See § 429.470, Paragraph 3.*]

4. [*Agency allegation, if appropriate. See § 429.470, Paragraph 4.*]

5. On or about _____ [*date*], defendant, without plaintiff's consent, invaded plaintiff's right to privacy by _____ [*specify manner in which defendant created publicity that placed plaintiff in false light in public eye, e.g.,* publishing a newspaper story, as a follow-up to a local disaster in which plaintiff lost his/her husband, which focused on plaintiff's family, and in which statements concerning his/her economic status were falsely attributed to plaintiff, his/her grief was falsely portrayed, and the conditions of his/her home were falsely described as abject poverty].

[6. *Allegation of precise statement constituting invasion of privacy. See § 429.470, Paragraph 6.*]

7. The disclosure by defendant created publicity in the sense of a public disclosure to a large number of people in that _____ [*specify facts supporting allegation, e.g.,* the story was published, as the lead feature of the Sunday magazine, in a newspaper which claims a circulation of _____ (*number*)].

8. The publicity created by defendant placed plaintiff in a false light in the public eye in that _____ [*specify facts supporting allegation, e.g.,* the story contained false statements and inaccuracies which incorrectly portrayed plaintiff as being non-expressive, falsely reported that he/she had stated that he/she had refused help in the form of money, and misrepresented his/her children's clothes as old and ill-fitting, and his/her home as dirty and dilapidated].

9. The publicity created by defendant was offensive and objectionable to plaintiff and to a reasonable person of ordinary sensibilities in that _____ [*specify facts supporting allegation, e.g.,* it made plaintiff the object of pity and ridicule].

10. The publicity created by defendant was done with malice in that it was made either with knowledge of its falsity or in reckless disregard of its truth in that _____ [*specify facts supporting allegation, e.g.,* the statements describing plaintiff's physical condition and stating that he/she had made certain comments, which both plainly implied that he/she had been interviewed in person, were calculated falsehoods because defendant knew that plaintiff in fact had not been present during any interview].

[*If demand for retraction is required, allege*]

[11. On _____ (*date*), within 20 days after plaintiff learned of the publication or broadcast, plaintiff served on defendant a demand for a correction or retraction as required by *Section 48a of the Civil Code* of the State of California. A copy of that demand is attached hereto, marked Exhibit _____, and incorporated herein by reference.]

[*And allege EITHER*]

[12. Up to and including the date of the filing of this complaint, defendant has failed and refused to publish a correction or retraction as required by law.]

[*OR*]

[12. On _____ (*date*), defendant published what it claimed was a retraction in compliance with the law. A copy of that retraction is attached hereto, marked Exhibit _____, and incorporated herein by reference. The retraction is not legally sufficient because it fails to meet the requirements of *Section 48a(3) of the Civil Code* in that it _____ (was not published in substantially as conspicuous a manner as the original publication *and/or* does not have the same force and effect as though it had been published within three weeks after the demand for it was made).]

[*CONTINUE*]

13. [*Allegation of general damages. See § 429.470, Paragraph 11.*]

[14. *Allegation of special damages, which is required under Civ. Code § 48a(1) if demand for retraction was required but was not made. See § 429.470, Paragraph 12.*]

[*EITHER*]

[15. *Allegation of usual punitive damages. See § 429.470, Paragraph 13.*]

[*OR, if retraction requirements apply, allege*]

[15. In creating the above publicity, defendant acted with hatred and ill will toward plaintiff within the meaning of Section 48a(4)(c), (d) of the Civil Code, in that _____ (*specify facts supporting allegation*), and plaintiff therefore seeks an award of punitive damages.]

[*CONTINUE*]

[16. *Allegation for injunctive relief. See § 429.470, Paragraph 14.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages according to proof;

[2. For special damages according to proof;]

[3. For exemplary or punitive damages;]

[4. For _____ (*specify injunctive relief sought, e.g.,* a preliminary injunction and a permanent injunction enjoining defendant and his/her agents, servants, and employees, and all such persons acting under, in concert with, or for him/her from continuing to _____ (*specify conduct to be enjoined, e.g.,* publish the above-described facts about plaintiff in such manner as to falsely imply that plaintiff lives in abject poverty and to bring her into pity and ridicule));]

5. For costs of suit herein incurred; and

6. For such other further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 429.470.*]

CAUTION:

This complaint must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* .

[2] Use of Form

This form of complaint may be used to obtain general, special, and punitive damages and injunctive relief for an invasion of privacy by publicity which places a person in a false light in the public eye. The right of privacy is recognized in California, and an invasion of the right by publicity placing a person in a false light in the public eye is an actionable tort [*see Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 819*]. For a further discussion of this tort, see *§ 429.33*.

[3] Allegations

The complaint alleges [*see Gill v. Hearst Pub. Co. (1953) 40 Cal. 2d 224, 229, 253 P.2d 441* (reasonable person element); *Kinsey v. Macur (1980)107 Cal. App. 3d 265, 270, 165 Cal. Rptr. 608* (public disclosure requirement); *Werner v. Times-Mirror Co. (1961) 193 Cal. App. 2d 111, 119-121, 14 Cal. Rptr. 208* (publicity and false light elements)]:

- The manner in which the false light publicity was created (Paragraph 5);
- The public as opposed to private nature of the publicity (Paragraph 7);
- The nature of the false light created by the publicity (Paragraph 8);
- The offensiveness and objectionableness to a reasonable person of ordinary sensibilities of the publicity (Paragraph 9).

In addition, the following allegations are included [*see Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 543, 93 Cal. Rptr. 866, 483 P.2d 34 , overruled on other grounds, Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 696-697, 21 Cal. Rptr. 3d 663, 101 P.3d 552* & n.9, *21 Cal. Rptr. 3d 663, 101 P.3d 552]* :

- The defendant created the publicity with malice in the sense of either knowledge of its falsity or in reckless disregard of its truth (Paragraph 10);
- The plaintiff demanded a retraction (Paragraph 11); and
- The defendant either refused to make a retraction or made a defective retraction (alternative Paragraphs 12).

An optional paragraph for quoting the precise language of the publicity is also provided (Paragraph 6).

An allegation for general compensatory damages (Paragraph 13), and optional paragraphs for special damages (Paragraph 14) and punitive damages (Paragraph 15) are also provided. In addition, an optional allegation to support injunctive relief is included (Paragraph 16) [*see Leavy v. Cooney (1963) 214 Cal. App. 2d 496, 504, 29 Cal. Rptr. 580]* .

[4] Actual Malice Required

The false light tort for invasion of privacy is equivalent to an action for libel. The requirement of libel law that plaintiff prove actual malice applies [*Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 543, 93 Cal. Rptr. 866, 483 P.2d 34 , overruled on other grounds, Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 696-697, 21 Cal. Rptr. 3d 663, 101 P.3d 552* & n.9, *21 Cal. Rptr. 3d 663, 101 P.3d 552* ; *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 35, n. 16, 81 Cal. Rptr. 360, 459 P.2d 912]* . The actual malice required is that of the "New York Times Rule"--proof that defendant published the material with knowledge of its falsity or with reckless disregard for its truth [*see Time v. Hill (1967) 385 U.S. 374, 387-388, 87 S. Ct. 534, 17 L. Ed. 2d 456* ; *see also § 429.33[3]*; *see generally* Ch. 340, *Libel and Slander*].

[5] Demand for Retraction Requirement

Because the false light tort for invasion of privacy is equivalent to an action for libel, the retraction requirements of *Civ. Code § 48a* apply[*Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 543, 93 Cal. Rptr. 866, 483 P.2d 34 , overruled on other grounds, Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 696-697, 21 Cal. Rptr. 3d 663, 101 P.3d 552* & n.9, *21 Cal. Rptr. 3d 663, 101 P.3d 552* ; *Kapellas v. Kofman (1969) 1 Cal. 3d 20, 35, n. 16, 81 Cal. Rptr. 360, 459 P.2d 912] . Civ. Code § 48a* essentially requires that plaintiff make a written demand for a retraction to newspaper or radio defendants within 20 days after knowledge of the offensive publication or broadcast [*Civ. Code § 48a(1)*]. Plaintiff's recovery is limited to special damages unless the retraction is demanded and is not published or broadcast [*Civ. Code § 48a(1)*; *see § 429.33[4]*; *see generally* Ch. 340, *Libel and Slander*].

Under the provisions of *Civ. Code § 48a*, no exemplary damages may be recovered unless plaintiff proves that defendant made the publication or broadcast with "actual malice," as defined in the statute [*Civ. Code § 48a(2)*]. The statute defines "actual malice" as hatred or ill will toward plaintiff, with the proviso that a good-faith belief by defendant in the truth of the publication or broadcast does not constitute actual malice [*Civ. Code § 48a(4)(d)*].

[6] Cross References

For a discussion and forms relating to actual malice requirement for libel claims and to retraction requirements of *Civ. Code § 48a*, see Ch. 340, *Libel and Slander*

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37-429 California Forms of Pleading and Practice--Annotated § 429.472

§ 429.472 Complaint for General Damages [Civ. Code § 3333], Punitive Damages [Civ. Code § 3294], and Injunctive Relief [Civ. Code § 3422; Code Civ. Proc. § 526] for Invasion of Privacy--Physical Intrusion on Solitude or Into Private Affairs

[1] FORM Complaint for General Damages [Civ. Code § 3333], Punitive Damages [Civ. Code § 3294], and Injunctive Relief [Civ. Code § 3422; Code Civ. Proc. § 526] for Invasion of Privacy--Physical Intrusion on Solitude or Into Private Affairs

[*Caption. See § 429.470.*]

Plaintiff alleges:

1. [*Capacity, residence, and status of plaintiff. See § 429.470, Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 429.470, Paragraph 2.*]

3. [*Fictitious name allegation, if appropriate. See § 429.470, Paragraph 3.*]

4. [*Agency allegation, if appropriate. See § 429.470, Paragraph 4.*]

5. On or about _____ [*date*], defendant, without plaintiff's consent, invaded plaintiff's right to privacy by _____ [*specify manner in which defendant physically intruded on plaintiff's solitude or private affairs, e.g.,* publishing a derogatory classified advertisement which included the name and address of plaintiff's mother, thereby causing numerous unsavory persons to respond to the advertisement by coming to plaintiff's home and physically trespassing, harassing, and annoying plaintiff in the solitude of his/her own home].

6. The intrusion was offensive and objectionable to plaintiff and to a reasonable person of ordinary sensibilities in that _____ [*specify facts supporting allegation, e.g.,* it consisted of a physical trespass of plaintiff's home

by unsavory persons using lewd and abusive language to solicit immoral and criminal acts].

7. The intrusion was into a place or thing which was private and entitled to be private in that _____ [*specify facts supporting allegation, e.g.,* it involved an unconsented invasion into plaintiff's home].

8. [*Allegation of general damages. See § 429.470, Paragraph 11.*]

[9. *Allegation of special damages. See § 429.470, Paragraph 12.*]

[10. *Allegation of punitive damages. See § 429.470, Paragraph 13.*]

[11. *Allegation for injunctive relief. See § 429.470, Paragraph 14.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages according to proof;

[2. For special damages according to proof;]

[3. For exemplary or punitive damages;]

[4. For _____ (*specify injunctive relief sought, e.g.,* a preliminary injunction and a permanent injunction enjoining defendant and his/her agents, servants, and employees, and all such persons acting under, in concert with, or for him/her from continuing to publish the above-described advertisement including the name and/or address of plaintiff's mother);]

5. For costs of suit herein incurred; and

6. For such other further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 429.470.*]

CAUTION:

This complaint must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* .

[2] Use of Form

This form of complaint may be used to obtain general, special, and punitive damages and injunctive relief for an invasion of privacy by physical intrusion on a person's solitude or into his or her private affairs. The right of privacy is recognized in California, and an invasion of the right by physical intrusion on solitude or into private affairs is an actionable tort [*see Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 819*]. For further discussion of this tort, see *§ 429.34*.

[3] Allegations

The complaint alleges [*see Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 231, 74 Cal. Rptr. 2d 843, 955 P.2d 469* ; *Noble v. Sears, Roebuck & Co. (1973) 33 Cal. App. 3d 654, 659-660, 109 Cal. Rptr. 269]* :

- The manner of the physical intrusion on solitude or into private affairs (Paragraph 5);

- The offensiveness and objectionableness to a reasonable person of ordinary sensibilities of the intrusion (Paragraph 6);

- The private nature of the place or thing intruded on (Paragraph 7).

An allegation for general compensatory damages (Paragraph 8), and optional paragraphs for special damages (Paragraph 9) and punitive damages (Paragraph 10) are also provided. In addition, an optional allegation to support injunctive relief is included (Paragraph 11) [*see Leavy v. Cooney (1963) 214 Cal. App. 2d 496, 504, 29 Cal. Rptr. 580]* .

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37-429 California Forms of Pleading and Practice--Annotated § 429.473

§ 429.473 Complaint for General Damages [Civ. Code § 3333], Punitive Damages [Civ. Code § 3294], and Injunctive Relief [Civ. Code § 3422; Code Civ. Proc. § 526] for Invasion of Privacy--Appropriation of Person's Name or Likeness Under Common Law

[1] FORM Complaint for General Damages [Civ. Code § 3333], Punitive Damages [Civ. Code § 3294], and Injunctive Relief [Civ. Code § 3422; Code Civ. Proc. § 526] for Invasion of Privacy--Appropriation of Person's Name or Likeness Under Common Law

[*Caption. See § 429.470.*]

Plaintiff alleges:

1. [*Capacity, residence, and status of plaintiff. See § 429.470, Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 429.470, Paragraph 2.*]

3. [*Fictitious name allegation, if appropriate. See § 429.470, Paragraph 3.*]

4. [*Agency allegation, if appropriate. See § 429.470, Paragraph 4.*]

5. On or about _____ [*date*], defendant, without plaintiff's consent, invaded plaintiff's right to privacy by _____ [*specify manner in which defendant appropriated plaintiff's name, likeness, or personality, e.g.,* publishing and commercially distributing classroom notes taken at plaintiff's lectures, using plaintiff's name and thereby implying plaintiff's assistance in the preparation of the publication, which was defective in several respects because it omitted certain important information].

[*EITHER*]

[6. The statement which is the basis of the invasion of privacy is _____ (*set forth precise language of statement, e.g.,* as follows: _____, *or* attached hereto as Exhibit _____, and incorporated herein as if set out in full).]

[*OR*]

[6. A _____ (copy *or* photograph) of the _____ (*specify offending item, e.g.,* notes as published by the defendant) is attached hereto as Exhibit _____, and incorporated herein as if set out in full).]

7. The appropriation was unauthorized and without plaintiff's consent.

8. Defendant's conduct involved the appropriation of plaintiff's _____ [name *and/or* likeness *and/or* personality]. [_____ (*Add additional facts supporting allegation, e.g.,* Defendant's conduct involved the appropriation of plaintiff's personality because the use of plaintiff's name in association with the publication implied his/her assistance with its preparation and constituted the use of his/her expertise and professional status).]

9. The appropriation was for defendant's advantage in that _____ [*specify facts supporting allegation, e.g.,* it was for defendant's pecuniary gain and profit].

10. [*Allegation of general damages. See § 429.470, Paragraph 11.*]

[11. *Allegation of special damages. See § 429.470, Paragraph 12.*]

[12. *Allegation of punitive damages. See § 429.470, Paragraph 13.*]

[13. *Allegation for injunctive relief. See § 429.470, Paragraph 14.*]

WHEREFORE, _____ plaintiff prays judgment against defendant as follows:

1. For general damages according to proof;

[2. For special damages according to proof;]

[3. For exemplary or punitive damages;]

[4. For _____ (*specify injunctive relief sought, e.g.,* a preliminary injunction and a permanent injunction enjoining defendant and his/her agents, servants, and employees, and all such persons acting under, in concert with, or for him/her from continuing to _____ (*specify conduct to be enjoined, e.g.,* publish and distribute the notes based on plaintiff's lectures));]

5. For costs of suit herein incurred; and

6. For such other further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 429.470.*]

CAUTION:

This complaint must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* .

[2] Use of Form

This form of complaint may be used to obtain general, special, and punitive damages and injunctive relief for an invasion of privacy by appropriation of a person's name, likeness, or personality under the common law; for a form of complaint for appropriation under *Civ. Code § 3344*, see *§ 429.474*.

The right of privacy is recognized in California, and an invasion of the right by appropriation of name, likeness, or personality is an actionabletort [*see Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 819*]. For a further discussion of this tort, see *§ 429.35*.

[3] Allegations

The complaint alleges [*see Fairfield v. American Photocopy Equip. Co. (1955) 138 Cal. App. 2d 82, 86, 291 P.2d 194]* :

- The manner of the appropriation (Paragraph 5);
- That the appropriation was without plaintiff's consent (Paragraph 7);
- That the conduct involved appropriation of either plaintiff's name or likeness, or his or her personality (Paragraph 8);
- The manner in which the appropriation was for defendant's advantage (Paragraph 9).

Alternative optional paragraphs for quoting the precise language of the appropriation or for attaching a copy or photograph of the offending item are also provided (Paragraph 6). An allegation for general compensatory damages (Paragraph 10), and optional paragraphs for special damages (Paragraph 11) and punitive damages (Paragraph 12) are also provided. In addition, an optional allegation to support injunctive relief is included (Paragraph 13) [*see Leavy v. Cooney (1963) 214 Cal. App. 2d 496, 504, 29 Cal. Rptr. 580]* .

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37-429 California Forms of Pleading and Practice--Annotated § 429.474

§ 429.474 Complaint for General Damages [Civ. Code § 3333], Punitive Damages [Civ. Code § 3294], and Injunctive Relief [Civ. Code § 3422; Code Civ. Proc. § 526] for Invasion of Privacy--Appropriation of Person's Name, Voice, Signature, Photograph, or Likeness for Commercial Purpose [Civ. Code § 3344]

[1] FORM Complaint for General Damages [Civ. Code § 3333], Punitive Damages [Civ. Code § 3294], and Injunctive Relief [Civ. Code § 3422; Code Civ. Proc. § 526] for Invasion of Privacy--Appropriation of Person's Name, Voice, Signature, Photograph, or Likeness for Commercial Purpose [Civ. Code § 3344]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DAMAGES [AND INJUNCT-
[and DOES 1 through _____,]	)	IVE RELIEF]
Defendant(s).	)	(Invasion of Privacy by Commercial Appropriation)
	)	
	)	

_____

Plaintiff alleges:

1. [*Capacity, residence, and status of plaintiff. See § 429.470, Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 429.470, Paragraph 2.*]

3. [*Fictitious name allegation, if appropriate. See § 429.470, Paragraph 3.*]

4. [*Agency allegation, if appropriate. See § 429.470, Paragraph 4.*]

5. On or about _____ [*date*], defendant, knowingly and without plaintiff's prior consent, invaded plaintiff's right to privacy by appropriating plaintiff's _____ [name *and/or* voice *and/or* signature *and/or* photograph *and/or* likeness] by _____ [*specify manner in which defendant appropriated plaintiff's name, voice, signature, photograph or likeness, e.g.,* using plaintiff's name in an advertisement for defendant's photocopier which stated that plaintiff was a satisfied user of the copier when in fact plaintiff was not, having returned the copier for a refund].

6. [*Quotation of statement constituting invasion, or copy or photograph of offending item. See § 429.473, Paragraph 6.*]

7. The appropriation was unauthorized and without the prior consent of _____ [plaintiff *or* plaintiff's _____ (parent *or* guardian)].

[*EITHER*]

8. Defendant's conduct involved the appropriation of plaintiff's _____ [name *and/or* voice, *and/or* signature, *and/or* photograph, *and/or* likeness].

[*AND/OR*]

9. Defendant's conduct involved the appropriation of a photograph of plaintiff, and plaintiff is readily identifiable in the photograph in that any person viewing the photograph with the naked eye can reasonably determine that the person depicted in it is plaintiff. [_____ (*Add additional facts supporting allegation, e.g.,* Plaintiff's face is clearly visible and distinguishable).]

[*CONTINUE*]

10. The appropriation by defendant was for the purpose of _____ [advertising *and/or* soliciting purchases of] products, merchandise, goods, or services, specifically _____ [*specify facts supporting allegation, e.g.,* advertising defendant's photocopier and soliciting purchases of it from the legal community].

11. [*Allegation of general damages. See § 429.470, Paragraph 11.*]

[12. As a further proximate result of the above-described appropriation of plaintiff's _____ [name *and/or* voice *and/or* signature *and/or* photograph *and/or* likeness] by defendant, defendant made a gross revenue of $_____.]

[13. *Allegation of special damages. See § 429.470, Paragraph 12.*]

[14. *Allegation of punitive damages. See § 429.470, Paragraph 13.*]

[15. *Allegation for injunctive relief. See § 429.470, Paragraph 14.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For statutory damages in the sum of $_____ [*specify amount not less than $750*];

2. For general damages according to proof;

3. For special damages according to proof;

4. For exemplary or punitive damages;

[5. For _____ (*specify injunctive relief sought, e.g.,* a preliminary injunction and a permanent injunction enjoining defendant and his agents, servants, and employees, and all such persons acting under, in concert with, or for him from continuing to _____ (*specify conduct to be enjoined, e.g.,* use plaintiff's name in connection with advertisements of defendant's products));]

6. For attorney's fees in the amount of $_____;

7. For costs of suit herein incurred; and

8. For such other further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 429.470.*]

CAUTION:

This complaint must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* .

[2] Use of Form

This form of complaint may be used to obtain general, special, and punitive damages and injunctive relief for an invasion of privacy by appropriation of a person's name, voice, signature, photograph, or likeness pursuant to *Civ. Code § 3344* [*see § 429.473* for form of complaint for appropriation under common law]. For further discussion of this tort, see *§ 429.36*.

[3] Allegations

The complaint alleges [*see Civ. Code § 3344*]:

- The manner of the appropriation (Paragraph 5);
- That the appropriation was without plaintiff's prior consent (Paragraph 7);

- That the conduct involved the appropriation of either plaintiff's name, voice, signature, photograph, and/or likeness (Paragraph 8), and in the case of a photograph, that plaintiff is readily identifiable in the photograph (Paragraph 9); and

- That the appropriation was for the purpose of advertising or soliciting purchases of products or services (Paragraph 10).

Alternative optional paragraphs for quoting the precise language of the appropriation or for attaching a copy or photograph of the offending item are also provided (Paragraph 6). An allegation for general compensatory damages (Paragraph 11), and optional paragraphs to allege gross revenue gained by the defendant (Paragraph 12 [*Civ. Code § 3344(a)*], additional special damages (Paragraph 13), and punitive damages (Paragraph 14) are also provided. In addition, an optional allegation to support injunctive reliefis included (Paragraph 15) [*see Civ. Code § 3344(a), (g)*; *Leavy v. Cooney (1963) 214 Cal. App. 2d 496, 504, 29 Cal. Rptr. 580]* .

[4] Appropriation Under Civ. Code § 3344

A person who knowingly and without prior consent uses another's name, voice, signature, photograph, or likeness, in any manner, for the purpose of either advertising products, merchandise, goods, or services, or soliciting purchases of products, merchandise, goods, or services is liable for damages sustained by the person injured as a result of the unauthorized use [*Civ. Code § 3344(a)*]. A person who violates *Civ. Code § 3344* is liable for damages no less than $750, and the plaintiff may recover any profit made by defendant through the unauthorized use of plaintiff's name, voice, signature, photograph, or likeness, along with punitive damages. The prevailing party in an action under *Civ. Code § 3344* shall be awarded attorney's fees and costs [*Civ. Code § 3344(a)*]. The remedies provided by the statute are cumulative and in addition to any others provided by law [*Civ. Code § 3344(g)*]. For further discussion of *Civ. Code § 3344*, including the definition of "photograph" and restrictions on what constitutes a commercial use, see *§ 429.36*.

If defendant has committed multiple related acts of appropriation, but these acts are taken with a common purpose or as part of a common plan and give rise to only a single cause of action, then plaintiff's compensatory damages are limited to a single payment of $750 unless plaintiff can prove actual damages of a greater amount [*Miller v. Collectors Universe, Inc. (2008) 159 Cal. App. 4th 988, 1008, 72 Cal. Rptr. 3d 194* (14,060 separate certificates of authenticity issued to customers over several months by celebrity autograph authentication business using plaintiff's name without consent gave rise to single cause of action and supported only single payment of $750 for statutory damages)].

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37-429 California Forms of Pleading and Practice--Annotated § 429.475

§ 429.475 Complaint for General Damages [Civ. Code § 3333], Punitive Damages [Civ. Code § 3294], and Injunctive Relief [Civ. Code § 3422; Code Civ. Proc. § 526] for Invasion of Privacy--Unauthorized Use of Deceased Personality's Name, Voice, Signature, Photograph or Likeness in Violation of Rights of Successor in Interest [Civ. Code § 3344.1]

[1] FORM Complaint for General Damages [Civ. Code § 3333], Punitive Damages [Civ. Code § 3294], and Injunctive Relief [Civ. Code § 3422; Code Civ. Proc. § 526] for Invasion of Privacy--Unauthorized Use of Deceased Personality's Name, Voice, Signature, Photograph or Likeness in Violation of Rights of Successor in Interest [Civ. Code § 3344.1]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DAMAGES [AND INJUNCT-
[and DOES 1	)	IVE RELIEF]
through _____,]	)	(Invasion of Privacy by Commercial Appropriation)
Defendant(s).	)	
	)	
	)	

_____

Plaintiff alleges:

1. [*Capacity, residence, and status of plaintiff. See § 429.470, Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 429.470, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 429.470, Paragraph 3.*]

[4. *Agency allegation, if appropriate. See § 429.470, Paragraph 4.*]

5. Plaintiff is the _____ [*state relationship as a successor in interest*] of _____ [*name of deceased personality*], having _____ [succeeded to *or* been assigned *or* been given *or* been bequeathed *or other mode of transfer*] the right to make use of the name, voice, signature, photograph, and likeness of _____ [*name of deceased personality*] on or about _____ [*date*].

6. Because of the above transfer of said right, plaintiff(s) is/are the _____ [owner(s) of *or* transferee(s) of] _____ percent of the right to commercially use the name, voice, signature, photograph, and likeness of _____ [*name of deceased personality*]. [Plaintiff(s) are bringing this action on behalf of _____ (*name(s)*), who together with plaintiff(s) are all the persons entitled to such rights.)]

7. _____ [*Name of deceased personality*] died on or about _____ [*date*], and all of the actions by defendant complained of herein occurred within 70 years of the death of _____ [name of deceased personality].

8. At the time of his/her death, the name, voice, signature, photograph, and likeness of _____ [*name of deceased personality*] had commercial value.

9. On or about _____ [*date*], defendant, without plaintiff's prior consent, violated plaintiff's right to make use of the _____ [name *and/or* voice, *and/or* signature *and/or* photograph *and/or* likeness] of _____ [*name of deceased personality*] by _____ [*specify facts showing how defendant used the name, voice, signature, photograph and/or likeness of the deceased personality*].

10. [*Allege type of appropriation. See § 429.474, Paragarphs 8, 9.*]

11. [*Allege commercial use of name, voice, signature, photograph, and/or likeness by defendant. See § 429.474, Paragraph 10.*]

12. On or about _____ [*date*], and prior to the date of the above use by defendant, plaintiff duly registered his/her claim as the person having the right to make use of the name, voice, signature, photograph and likeness of _____ [*name of deceased personality*] with the office of the Secretary of State of California.

13. [*Allegation of general damages. See § 429.470, Paragraph 11.*]

14. [*Allegation of gross revenues. See § 429.474, Paragraph 12.*]

[15. *Allegation of special damages. See § 429.470, Paragraph 12.*]

[16. *Allegation of punitive damages. See § 429.470, Paragraph 13.*]

[17. *Allegation for injunctive relief. See § 429.470, Paragraph 14.*]

[*Prayer. See § 429.474*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*typed name*]

[2] Use of Form

This complaint is for use by a deceased personality's heirs or other successor in interest to recover damages and injunctive relief for the unauthorized use of the deceased personality's name, voice, signature, photograph, or likeness in violation of the rights of the personality's heirs or other successor in interest under *Civ. Code § 3344.1*.

[3] Allegations

The complaint alleges the following [*see Civ. Code § 3344.1*]:

- The relationship as a successor in interest between plaintiff and the deceased personality, the mode and time of succession to that interest (Paragraph 5);

- The extent of plaintiff's ownership interest, and for optional use, the person(s) on whose behalf the complaint is brought, if the plaintiff or plaintiffs own more than half but less than the entire interest (Paragraph 6);

- The date on which the deceased personality died and the fact that actions by defendant(s) occurred within 70 years after the time of death (Paragraph 7);

- The fact that commercial value was attached to the attributes of the deceased personality (Paragraph 8);

- Specific facts showing the date and type of nonpermissive use made of the attributes of the deceased personality (Paragraph 9);

- The type of appropriation and its commercial nature of the appropriation (Paragraphs 10, 11); and

- Registration of the right to make use of the attributes of the deceased personality by the plaintiff, with the Secretary of State of California (Paragraph 12).

Allegations for general damages (Paragraph 13), and optional paragraphs for gross revenues of the defendant(s) (Paragraph 14), special damages (Paragraph 15), punitive damages (Paragraph 16), and injunctive relief (Paragraph 16) are also included [*see Leavy v. Cooney (1963) 214 Cal. App. 2d 496, 504, 29 Cal. Rptr. 580]* .

[4] Plaintiff's Owning Less Than Entire Interest

If plaintiff's interest in the commercial use of the deceased personality's name, voice, signature, photograph, or likeness is less than total, the optional sentence at the end of Paragraph 6 may be used. While *Civ. Code § 3344.1* does not expressly prohibit an individual with less than a 50 percent interest from bringing the action (except for children of deceased children, whose share must be exercised by a majority of them under *Civ. Code § 3344.1(d)(4)*), it does provide that the rights under *Civ. Code § 3344.1* may be exercised on behalf of and for the benefit of all of the interested persons, by those persons who, in the aggregate, are entitled to more than a one-half interest in such rights [

see Civ. Code § 3344.1(d)].

[5] Damages and Attorney's Fees Under Civ. Code § 3344.1

One who without prior consent of the holder of the right uses the name, voice, signature, photograph or likeness of a deceased personality on or in products, merchandise, or goods, or for purpose of advertising or selling or soliciting purchases of products, merchandise, goods or services is liable for any damages sustained by the person injured as a result of the unauthorized use [*Civ. Code § 3344.1(a)*]. A person who violates *Civ. Code § 3344.1* is liable for damages in an amount equal to the greater of $750 or actual damages suffered, and any profits from the unauthorized use not taken into account in computing actual damages. Punitive damages mayalso be awarded to the injured party. The prevailing party in an action under *Civ. Code § 3344.1* will also be awarded attorney's fees and costs [*Civ. Code § 3344.1(a)*]. The remedies provided by *Civ. Code § 3344.1* are cumulative and in addition to any others provided by law [*Civ. Code § 3344.1(m)*]. For further discussion of *Civ. Code § 3344.1*, see *§ 429.36*.

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37-429 California Forms of Pleading and Practice--Annotated § 429.475A

§ 429.475A Complaint for General Damages [Civ. Code § 3333], Punitive Damages [Civ. Code § 3294], Disgorgement of Profits, and Injunctive Relief [Civ. Code § 3422; Code Civ. Proc. § 526] for Invasion of Privacy--Statutory Action for Invasion of Privacy Through Intrusion or Assault With Intent To Capture Image, Sound Recording, or Other Physical Impression of Plaintiff [Civ. Code § 1708.8]

[1] FORM Complaint for General Damages [Civ. Code § 3333], Punitive Damages [Civ. Code § 3294], Disgorgement of Profits, and Injunctive Relief [Civ. Code § 3422; Code Civ. Proc. § 526] for Invasion of Privacy--Statutory Action for Invasion of Privacy Through Intrusion or Assault With Intent To Capture Image, Sound Recording, or Other Physical Impression of Plaintiff [Civ. Code § 1708.8]

[*Caption. See Form 1.*]

Plaintiff alleges:

1. [*Capacity, residence, and status of plaintiff. See § 429.470, Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 429.470, Paragraph 2.*]

3. [*Fictitious name allegation, if appropriate. See § 429.470, Paragraph 3.*]

4. [*Agency allegation, if appropriate. See § 429.470, Paragraph 4.*]

[*EITHER*]

5. On or about _____ [*date*], the defendant invaded the plaintiff's right to privacy by _____ [*specify manner in which defendant intruded on plaintiff's property with intent to capture visual image, sound recording, or other physical impression of plaintiff engaging in personal or familial activity, e.g.,*

knowingly entering onto the plaintiff's property located at _____ [*property address*], without the plaintiff's consent, with camera equipment in order to surreptitiously photograph the plaintiff engaging in recreational activities with family members in the plaintiff's fenced-in backyard].

[*OR*]

5. On or about _____ [*date*], the defendant invaded the plaintiff's right to privacy by _____ [*specify manner in which defendant attempted to capture visual image, sound recording, or other physical impression of plaintiff engaging in private personal or familial activity through use of visual or auditory enhancing device, e.g.,* stationing (himself *or* herself) on the roof of a building located 400 feet from the plaintiff's property and using a camera with a telephoto lens with the intent to capture photographs of the plaintiff engaging in recreational activities with family members in the plaintiff's fenced-in backyard]. The defendant could not have acquired this _____ [*specify, e.g.,* image *or* sound recording *or other type of physical impression] without the use of* _____ [*specify type of enhancement equipment, e.g.,* telephoto lens].

[*OR*]

5. On or about _____ [*date*], the defendant committed an assault on _____ [*specify person who was target of assault*] with the intent to capture a _____ [*specify type of impression of plaintiff sought by defendant, e.g.,* visual image *or* sound recording] of the plaintiff.

[*CONTINUE*]

6. [*Add, if intrusion is basis for action*] The intrusion was offensive to the plaintiff and to a reasonable person of ordinary sensibilities in that _____ [*specify facts supporting allegation, e.g.,* it consisted of an illegal trespass onto the plaintiff's property and required the defendant to climb over a ten-foot privacy fence that surrounded the plaintiff's property].

7. The intrusion violated the plaintiff's reasonable expectation of privacy in that _____ [*specify facts supporting allegation, e.g.,* the plaintiff expected to be free of uninvited intrusions into the time the plaintiff spent with (his *or* her) family at their home].

8. [*Add, if applicable*] The invasion of privacy committed by the defendant _____ [*name*] was committed for a commercial purpose in that _____ [*specify facts supporting allegation, e.g.,* the defendant was promised that he *or* she would be paid for any photographs that he *or* she obtained].

9. [*Add, if applicable*] The defendant _____ [*name*], although not the person who committed the _____ [intrusion *or* assault], may be held liable for any general, special, or consequential damages caused by the _____ [intrusion *or* assault], and may be held liable for any punitive damages to the extent that an employer would be subject to punitive damages pursuant to *Civil Code Section 3294(b),* because the defendant _____ [*name*] _____ [directed *or* solicited *or* actually induced *or* actually caused] _____ [*name of person who committed intrusion or assault] to commit the* _____ [intrusion *or* assault] by _____ [*specify facts supporting allegation, e.g.,* agreeing to pay to purchase any photos acquired by defendant _____ (*name*)].

10. [*Allegation of general damages. See § 429.470, Paragraph 11.*]

11. [*Add, if applicable.*] As a proximate result of the _____ [intrusion *or* assault], the defendant _____ [*name of defendant who committed intrusion or assault*] profited in the amount of $_____.

12. [*Allegation of special damages. See § 429.470, Paragraph 12.*]

13. [*Allegation of punitive damages. See § 429.470. Paragraph 13.*]

14. [*Allegation for injunctive relief. See § 429.470, Paragraph 14.*]

WHEREFORE, plaintiff prays judgment against defendant(s) as follows:

1. For general damages according to proof;

2. For special damages according to proof;

3. For statutory damages in the sum of three times the amount of general and special damages.

4. For exemplary or punitive damages;

[5. For disgorgement of profits in the amount of $_____;]

6. For _____ [*specify injunctive relief sought, e.g.,* a preliminary injunction and a permanent injunction enjoining the defendant _____ (*name*) and the defendant's agents, servants, and employees from attempting to obtain, through trespass or with the aid of visual or auditory enhancement equipment, a visual image, sound recording, or other physical impression of the plaintiff.]

7. For costs of suit herein incurred; and

8. For such other further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 429.470.*]

[2] Use of Form

This form of complaint may be used to obtain general, special, statutory, and punitive damages and injunctive relief, along with disgorgement of any profits, for an invasion of privacy by trespass, the use of visual or audio enhancement equipment, or assault in order to obtain a visual image, sound recording, or other physical impression of the plaintiff in violation of *Civ. Code § 1708.8*. For further discussion of this statutory action, see *§ 429.34A*. For a complaint for intrusion under the common law, see *§ 429.473*.

[3] Allegations

This complaint alleges the following [*see Civ. Code § 1708.8*]:

- A trespass onto the plaintiff's property, the use of a visual or auditory enhancing device, or an assault committed in order to obtain a visual image, sound recording, or other physical impression of the plaintiff (Paragraph 5);

- The offensiveness of the means used (Paragraph 6);

- The plaintiff's reasonable expectation of privacy (Paragraph 7);

- The fact that the defendant committed the invasion of privacy for a commercial purpose (Paragraph 8); and

- The fact that the invasion was directed, solicited, actually induced, or actually caused by another person, who may also be liable for the invasion (Paragraph 9).

Allegations supporting general damages (Paragraph 10), special damages (Paragraph 12), punitive damages (Paragraph 13), and injunctive relief (Paragraph 14) are included, as are allegations of commercial profits obtained by the defendant who actually committed the invasion of privacy (Paragraph 11), which may be used to support a claim for disgorgement of profits [*see Civ. Code § 1708.8(d)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.476

§ 429.476 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Lack of Standing

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Lack of Standing

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that plaintiff is not entitled to sue for the invasion of privacy which is the basis of plaintiff's complaint because _____ [*specify either* plaintiff is not suing for an invasion of his or her own right of privacy *or* plaintiff is a business entity and a business entity does not have a right of privacy]. [_____ (*Add additional facts supporting the allegation, e.g.,* Plaintiff is suing for the invasion of his/her child's right of privacy.]

[2] Use of Form

This affirmative defense is for insertion in an answer to a complaint for invasion of privacy when plaintiff is not entitled to sue for the particular invasion which is the basis of the complaint. This defense may be based either on the fact that plaintiff is suing for someone else's invasion of privacy, or that plaintiff is a business entity which does not have a right of privacy [*see Lugosi v. Universal Pictures (1979) 25 Cal. 3d 813, 821* (right is personal); *Ion Equip. Corp. v. Nelson (1980) 110 Cal. App. 3d 868, 878-879, 168 Cal. Rptr. 361* (corporation has no right of privacy); *but see H & M Assocs. v. City of El Centro (1980) 109 Cal. App. 3d 399, 409-411, 167 Cal. Rptr. 392* (partnership may sue for invasion of privacy)]. It appears that a business entity may sue for economic damages resulting from an invasion of privacy, but not for mere "hurt feelings" [*compare H & M Assocs. v. City of El Centro (1980) 109 Cal. App. 3d 399, 410, 167 Cal. Rptr. 392* (loss of real property through foreclosure); *with Ion Equip. Corp. v. Nelson (1980) 110 Cal. App. 3d 868, 878-879, 168 Cal. Rptr. 361]* . For a further discussion of this defense, see *§ 429.42*.

If more than one affirmative defense is set forth in the answer, each defense must be separately stated [*Code Civ. Proc. § 431.30(g)*] and numbered [*Cal. Rules of Ct., Rule 2.112(1)*]. If the complaint sets forth more than one cause of action, the affirmative defense must refer to the cause of action it is intended to answer [*Code Civ. Proc. § 431.30(g)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.477

§ 429.477 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Public Figure Status of Plaintiff

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Public Figure Status of Plaintiff

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that plaintiff is a public figure because _____ [*specify facts supporting allegation, e.g.,* plaintiff is a candidate for public office]. As a public figure, plaintiff has relinquished his or her right of privacy in the matter which is the subject of his or her complaint. The public has a legitimate interest in the subject matter because _____ [*specify facts supporting allegation, e.g.,* a charge of criminal conduct is relevant to a candidate's qualifications for office].

[2] Use of Form

This affirmative defense is for insertion in an answer to a complaint for invasion of privacy when plaintiff is a public figure and as such has relinquished his or her right of privacy in the matter which is the basis of the complaint. A public figure loses his or her right of privacy to the extent that the public has a legitimate interest in his or her activities [*see Johnson v. Harcourt, Brace, Jovanovich, Inc. (1974) 43 Cal. App. 3d 880, 892, 118 Cal. Rptr. 370]* . For further discussion of this defense, see *§ 429.41*.

[3] Cross References

For a related form, see *§ 429.476*.

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37-429 California Forms of Pleading and Practice--Annotated § 429.478

§ 429.478 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Newsworthiness of Publication

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Newsworthiness of Publication

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

1. The publication that is the basis of plaintiff's complaint is constitutionally protected because it is truthful, newsworthy, and does not reveal facts which are so offensive as to shock the community's notions of decency.

2. The publication is newsworthy for the following reason(s):

[*EITHER*]

3. The disclosed facts bore a logical relationship to the newsworthy subject of the broadcast and were not intrusive in great disproportion to their relevance in that _____ [*specify facts supporting allegation, e.g.,* they involved the rescue of a victim from the scene of an auto crash and such matters are of legitimate concern to the public].

[*AND/OR*]

4. There is significant social value in the facts published because _____ [*specify facts supporting allegation, e.g.,* they involved the arrest and prosecution of a criminal suspect and such matters are of legitimate concern to the public].

[*AND/OR*]

5. The publication's intrusion into private affairs was minimal in that _____ [*specify facts supporting allegation, e.g.,* the information had already been published by several local newspapers].

[*AND/OR*]

6. Plaintif f had voluntarily acceded to a position of public notoriety concerning the subject matter in that _____ [*specify facts supporting allegation, e.g.,* he/she committed a criminal act].

[*AND/OR*]

7. The state's interest in preventing disclosure of the information was not significant because _____ [*specify facts supporting allegation, e.g.,* there was still unsolved criminal activity surrounding the incident].

[*AND/OR*]

8. The information contained in the publication was already a matter of public record in that _____ (*specify facts supporting allegation, e.g.,* it was set forth in official police and court records).

[*AND/OR*]

9. The amount of time between the incident and the publication was not significant in that _____ [*specify facts supporting allegation, e.g.,* it was only _____ (number) months].

[*CONTINUE*]

10. The publication was not so offensive as to shock the community's notions of decency because _____ [*specify facts supporting allegation, e.g.,* it only revealed a laudatory action by plaintiff, that is, returning a quarter of a million dollars to its rightful owner].

[2] Use of Form

This affirmative defense is for insertion in an answer to a complaint for invasion of privacy when the publication involved is constitutionally protected because it is newsworthy. Truthful publications are constitutionally protected if they are newsworthy and do not reveal facts so offensive as to shock the community's notions of decency [*see Briscoe v. Reader's Digest Ass'n, Inc. (1971) 4 Cal. 3d 529, 541, 93 Cal. Rptr. 866, 483 P.2d 34 , overruled on other grounds, Gates v. Discovery Communications, Inc. (2004) 34 Cal. 4th 679, 696-697, 21 Cal. Rptr. 3d 663, 101 P.3d 552* & n.9, *21 Cal. Rptr. 3d 663, 101 P.3d 552]* . Among the factors to consider in determining whether a publication is newsworthy are the following [*Forsher v. Bugliosi (1980) 26 Cal. 3d 792, 810, 812, 163 Cal. Rptr. 628, 608 P.2d 716]* :

- The social value of the facts published;
- The depth of the publication's intrusion into an individual's private affairs;

- The extent to which the individual voluntarily acceded to a position of public notoriety;
- The exact nature of the state's interest in preventing disclosure;
- Whether the information is a matter of public record; and
- The lapse of time between the event and the publication.

Lack of newsworthiness or legitimate public concern is an element of the private facts tort, making newsworthiness a complete bar to common law liability [*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 215, 74 Cal. Rptr. 2d 843, 955 P.2d 469* ; *see also Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 126, 188 Cal. Rptr. 762]* . However, although lack of newsworthiness is an element, thus plaintiff's burden to prove, newsworthiness is at the same time a constitutional defense to, or a privilege against, liability for publication of truthful information [*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 216, 74 Cal. Rptr. 2d 843, 955 P.2d 469]* . The analysis of newsworthiness in the private facts context involves accommodating conflicting interests in personal privacy and in press freedom; thus, if the facts disclosed about a limited involuntary public figure (for example, the victim of an auto accident rescued with the jaws of life) bear a logical relationship to the newsworthy subject of a broadcast and are not intrusive in great disproportion to their relevance, a broadcast is of legitimate public concern [*Shulman v. Group W Prods., Inc. (1998) 18 Cal. 4th 200, 215, 74 Cal. Rptr. 2d 843, 955 P.2d 469]* .

For further discussion of newsworthiness, see § 429.4o.

[3] Cross References

For a related form, see *§ 429.476*.

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37-429 California Forms of Pleading and Practice--Annotated § 429.479

§ 429.479 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Statutory Duty to Disclose Information

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Statutory Duty to Disclose Information

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges defendant had a statutory duty to disclose the information that is the basis of plaintiff's claim of an invasion of privacy, specifically, _____ [*specify facts supporting allegation, e.g.,* defendant is a telegraph company and had a statutory duty under *Section 2207 of the Civil Code* and *Sections 453* and *7904 of the Public Utilities Code* to transmit the telegram that plaintiff claims invaded his/her right to privacy].

[2] Use of Form

This affirmative defense is for insertion in an answer to a complaint for invasion of privacy when defendant had a statutory duty to disclose the information that is the basis of the complaint. For example, because a defendant telegraph company has a statutory duty to transmit all telegrams presented to it, there is no cause of action for invasion of privacy based on the information disclosed in the telegrams [*Mason v. Western Union Tel. Co. (1975) 52 Cal. App. 3d 429, 440, 125 Cal. Rptr. 53]* . For discussion of this defense, see *§ 429.47[4]*.

For a discussion of statutory duties to disclose information, see *§ 429.60* et seq., and for a discussion of the defense of duty to disclose in actions based on the right to privacy under the California Constitution, see *§ 429.16*.

[3] Cross References

For a related form, see *§ 429.476*.

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37-429 California Forms of Pleading and Practice--Annotated § 429.480

§ 429.480 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Freedom of Expression

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Freedom of Expression

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the publication that is the basis of plaintiff's complaint is constitutionally protected because the celebrity-depicting work contains significant creative and transformative elements such that the work is primarily the defendant's own expression and not merely a likeness of the celebrity.

[2] Use of Form

This affirmative defense, which is based on the right to free expression guaranteed by the *First Amendment to the U.S. Constitution*, is for insertion in an answer to a complaint alleging a violation of the right of publicity without authorization from the holder of the right. The constitutional freedom of expression defense may be used if suit is brought against an artist who has profited from creating a celebrity likeness, but only if the likeness is sufficiently creative and transformative that the value of the work stems primarily from the artist's creativity. The defense is not generally be available if the depiction is so literal that the value of the work stems primarily from the fame of the celebrity depicted [*Comedy III Prods., Inc. v. Gary Saderup, Inc. (2001) 25 Cal. 4th 387, 406-407, 106 Cal. Rptr. 2d 126, 21 P.3d 797]* .

For further discussion of this defense, see *§ 429.36[12]*.

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37-429 California Forms of Pleading and Practice--Annotated §§ 429.481-429.499

[Reserved]

§§ 429.481[Reserved]

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37-429 California Forms of Pleading and Practice--Annotated § 429.500

§ 429.500 Complaint for Damages [Civ. Code § 1798.45(b), (c)]--Failure to Maintain Record Properly [Civ. Code § 1798.18]

[1] FORM Complaint for Damages [Civ. Code § 1798.45(b), (c)]--Failure to Maintain Record Properly [Civ. Code § 1798.18]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES	)	(Violation Regarding Government Records)
1-_____,]	)	[*Civ. Code § 1798.45(b), (c)*]
Defendants.	)	
	)	

_____

Plaintiff alleges:

1. Plaintiff is a natural person. _____ [Plaintiff is, and at all times mentioned herein was, a resident of *or* Plaintiff's principal place of business in located in *or* The agency records described herein are situated in] _____ County, California.

2. Defendant _____ [*name of agency*] is, and at all times mentioned herein was, an agency of the state government, which _____ [*state functions and duties of agency, e.g.,* is a law enforcement agency, charged with the enforcement of law and order].

3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as Does 1- _____,

inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when these are ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by the conduct of such fictitiously named defendants.

4. Defendant _____ [*name of agency*] maintains the following records: _____ [*identify records*]. These records contain the following purported information concerning plaintiff: _____ [*summarize improperly maintained information*]. [Copies of these records are attached hereto as Exhibit _____ and made a part hereof.]

5. This purported information concerning plaintiff contained in defendant agency's records is _____ [inaccurate *or* untimely *or* incomplete *or* irrelevant] in that _____ [*specify defect in records, e.g.,* it fails to include events and circumstances arising since the occurrence of the events that are recorded in defendant agency's records. The additional facts concerning the events and circumstances that the information described above purports to address are _____ (*state true facts*)].

6. Defendant failed properly to maintain its records in that _____ [*allege conduct constituting failure to properly maintain records, e.g.,* defendant collected the above information from indirect sources despite the fact that defendant knew of plaintiff's whereabouts and could have obtained accurate and timely information directly from plaintiff].

7. _____ [At the times mentioned herein, plaintiff was unaware, and had no way of being aware, of the _____ (inaccuracy *or* untimeliness *or* incompleteness *or* irrelevance) of the information maintained by defendant _____ (*name of agency*) *or allege request for amendment of information, denial of request, and refusal to include statement of disagreement in records. See § 429.502, Paragraphs 7-11*].

8. _____ [*Specify determination relating to qualification, character, rights, opportunities or benefits of plaintiff that was made adversely to plaintiff based on the above alleged information*].

9. This adverse determination was made on the basis of the above-described information concerning plaintiff contained in defendant's records. The manner in which defendant maintained the defendant agency's records containing information concerning plaintiff denied plaintiff fairness in the determination in that _____ [*specify circumstances showing how improper maintenance of records denied fairness in determination*]. The adverse result of the determination was a proximate result of failure of defendant to properly maintain its records.

10. As a proximate result of the conduct of the defendants as herein alleged, plaintiff has suffered damages in that _____ [*specify damages suffered*].

11. On or about _____ [*date*], plaintiff presented to defendant _____ [*name of agency*] by _____ [delivering *or* mailing] a claim to the _____ [clerk *or* secretary *or* auditor] for the injuries, disabilities, and damages that plaintiff suffered by reason of the above-described conduct of defendant. A copy of the claim is attached hereto as Exhibit _____, and made a part hereof.

12. On or about _____ [*date*], defendant agency _____ [rejected the plaintiff's claim in its entirety *or* allowed the plaintiff's claim in the amount of $_____ and rejected it as to the remainder *or* failed to act on the claim within 45 days after its presentation].

13. Plaintiff has incurred $_____ in reasonable attorney's fees in maintaining this action.

WHEREFORE, plaintiff prays judgment against defendants as follows:

1. For actual damages incurred plus damages in such further sums as may be sustained by the court and are ascertained before final judgment herein;

[2. For reasonable attorney's fees as determined by the court;]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired, see § 429.470*.]

[2] Use of Form

This form of complaint is for use by a plaintiff who is seeking damages for a government entity's failure to properly maintain records containing information concerning plaintiff. A person may bring a civil action for damages if a government agency improperly maintained records containing information concerning that person and such improper maintenance resulted in the person's being denied fairness in an official determination based on the records [*see Civ. Code §§ 1798.18, 1798.45(b), (c), 1798.48*].

[3] Allegations

The form alleges:

- The grounds for standing (Paragraph 1) [*see Civ. Code § 1798.3(d)* (definition of "individual"), 1798.45(b), (c) (cause of action)].

- The basis for venue (Paragraph 2) [*see Civ. Code § 1798.49*].

- The existence of records containing information pertaining to plaintiff (Paragraph 4).

- The inaccuracy, or other improperly maintained character of records of information in records (Paragraph 5) [*see Civ. Code §§ 1798.18, 1798.45(b)*] and true facts.

- Conduct constituting improper maintenance of records (Paragraph 6) [*see Civ. Code §§ 1798.18, 1798.45(b)*].

- The plaintiff's lack of knowlege of inaccuracy or plaintiff's attempt to secure amendment of record (Paragraph 7) [*see Civ. Code §§ 1798.35, 1798.36*].

- The making of an official determination adverse to the plaintiff based on and proximately caused by

the improperly maintained records (Paragraphs 8, 9) [*see Civ. Code §§ 1798.18, 1798.45(b)*].

- Damages (Paragraph 10).

- A claim for damages was filed with the state agency and was totally or partially denied (Paragraphs 11, 12) [*Gov. Code §§ 905, 905.2, 912.4*].

- Attorney's fees (Paragraph 13) [*see Civ. Code § 1798.48*].

[4] Verification

For discussion of verification, see *§ 429.470[4]*.

[5] Disclosure of Improperly Maintained Information

When appropriate, counsel may incorporate into this form an allegation that defendants disseminated the alleged information outside of government without verifying its accuracy [*see Civ. Code § 1798.18*; *see § 429.501*].

[6] Refusal to Amend Information at Plaintiff's Request

If plaintiff wants the improperly maintained record to be amended, counsel may incorporate into this form an allegation that the defendants have refused the plaintiff's proper request to amend the inaccurate information contained in its records, and a prayer for injunctive relief ordering the defendants to make the amendments [*see Civ. Code §§ 1798.35, 1798.36*; *see § 429.502*].

[7] Jurisdiction and Venue

An action against a state agency brought pursuant to *Civ. Code §§ 1798.18, 1798.45(b), (c), 1798.48* for failure to properly maintain records may be brought in any court of competent jurisdiction in the county in which the complainant resides, or has his or her principal place of business, or in which the defendant agency's records are situated [*see Civ. Code § 1798.49*].

[8] Statute of Limitations

An action against a state agency brought pursuant to *Civ. Code §§ 1798.18, 1798.45(b), (c), 1798.48* for failure to properly maintain records may be brought within two years from the date on which the cause of action arises, except that when a defendant has materially and willfully misrepresented any information required under *Civ. Code § 1798.49* to be disclosed to an individual who is the subject of the information and the information so misrepresented is material to the establishment of the agency's liability to that individual under *Civ. Code § 1798.49*, the action may be brought at any time within two years after discovery by the complainant of the misrepresentation [*see Civ. Code § 1798.49*]. For further discussion of *Civ. Code § 1798.49*, see *§ 429.123[5]*.

[9] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, *see* Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, *see* Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, *see* Ch. 123, *Complaints and Cross Complaints*

For alternative forms of prayers, *see* Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, *see* Ch. 518, *Service of Summons and Papers*

For alternative forms of verification, *see* Ch. 572, *Verification*

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37-429 California Forms of Pleading and Practice--Annotated § 429.501

§ 429.501 Allegations--For Complaint for Damages [Civ. Code §§ 1798.45(b), (c), 1798.48]--Disclosure of Improperly Maintained Personal Information [Civ. Code § 1798.18]

[1] FORM Allegations--For Complaint for Damages [Civ. Code §§ 1798.45(b), (c), 1798.48]--Disclosure of Improperly Maintained Personal Information [Civ. Code § 1798.18]

Plaintiff alleges:

1. On _____ [*date*], defendants disseminated the above-described purported information to _____ [*identify recipient of disclosure*], _____ [which *or* who] is not an agency of the State Government.

2. At the time defendants disseminated the purported information, defendants knew or had reason to believe that the information was _____ [inaccurate *or* untimely] but failed to correct the defect.

[2] Use of Form

This form of allegations may be incorporated into a form of complaint for damages for the failure of the defendants to properly maintain the defendant agency's records, such as that *set out in § 429.500*. A government agency is required to assure that the information has been properly maintained before disseminating personal information from its records to persons who are not government entities [*see Civ. Code § 1798.18*].

[3] Allegations

The form alleges dissemination of information outside of the state government [*Civ. Code § 1798.18*] (Paragraph 1); and defendants' failure to assure that the records were properly maintained at the time of disclosure [*see Civ. Code § 1798.18*] (Paragraph 2).

These allegations may be substituted for or inserted after Paragraphs 7 and 8, respectively, of § 429.500.

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37-429 California Forms of Pleading and Practice--Annotated § 429.502

§ 429.502 Complaint for Permanent Injunction [Civ. Code §§ 1798.45(b), (c), 1798.47, 3422; Code Civ. Proc. § 526]--Refusal to Amend Record [Civ. Code §§ 1798.35, 1798.36]

[1] FORM Complaint for Permanent Injunction [Civ. Code §§ 1798.45(b), (c), 1798.47, 3422; Code Civ. Proc. § 526]--Refusal to Amend Record [Civ. Code §§ 1798.35, 1798.36]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	COMPLAINT FOR PERMANENT INJUNCTION
and DOES 1 through _____,	)	(Violation Regarding Government Records)
Defendants.	)	
	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of plaintiff. See § 429.500, Paragraph 1.*]

2. [*Name and capacity of defendant agency and location of records. See § 429.500, Paragraph 2.*]

3. Defendant _____ (*name*) is, and at all times mentioned herein was, the _____ (*title of head of agency*) of _____ (*name of agency*). [Defendant(s) _____ (*name(s) of agency employee(s) joined as defendants*) is/are, and at all times mentioned herein was/were _____ (*describe status and duties as employee(s) of defendant agency, and responsibility for maintaining records*)].

4. [*Fictitious defendant allegations. See § 429.500, Paragraph 3.*]

5. [*Existence of records containing information concerning plaintiff. See § 429.500, Paragraph 4.*]

6. [*Impropriety of information concerning plaintiff contained in records. See § 429.500, Paragraph 5.*]

7. On or about _____ [*date*], plaintiff delivered a written request to _____ [*name of responsible official*], who is the agency employee responsible for the maintenance of the the records, that the information concerning plaintiff included in defendant agency's records be amended in order to correct the aforementioned impropriety. Plaintiff's request identified the information sought to be amended and the records in which such information is included with sufficient specificity to permit such information to be located and retrieved without undue difficulty. [Plaintiff's request for amendment is included herein as Exhibit _____ and made a part hereof.]

[*EITHER*]

8. On or about _____ [*date*], defendants informed plaintiff that defendants would not amend defendant agency's records in accordance with plaintiff's request, giving the following reasons: _____ [*state reasons given by agency*]. These reasons do not justify the refusal to amend the information. [Defendants' response stating the refusal to amend is included here as Exhibit _____ and made a part hereof.]

[*OR*]

8. Defendants have not responded to plaintiff's request.

[*CONTINUE*]

9. On or about _____ [*date*], plaintiff delivered to the _____ [head of defendant agency *or* appropriate official designated by the head of defendant agency] a written request to review the decision not to amend the records.

10. On or about _____ [*date*], _____ [the head of defendant agency *or* such official designated by the head of defendant agency] informed plaintiff of his/her decision to uphold defendants' refusal to amend the records.

[11. On or about _____ [*date*], the plaintiff submitted to defendant _____ (*name of agency*) a statement of reasonable length stating plaintiff's disagreement with the information contained in defendant agency's records. (A copy of plaintiff's statement of disagreement is herein enclosed as Exhibit _____ and made a part hereof.)]

[*EITHER*]

[12. To date, defendants have not included the plaintiff's statement of disagreement in the records of defendant _____ (*name of agency*)(, nor have defendants clearly noted the disputed portion of the record).]

[*AND/OR*]

[13. To date, defendants have not included in the records of defendant _____ (*name of agency*) a statement by defendant agency setting out defendants' refusal to amend the above alleged records and reasons therefore.]

[*CONTINUE*]

14. Plaintiff has no adequate remedy at law for the injuries being currently suffered in that _____ [*specify facts in addition to those previously alleged showing inadequacy of any legal remedy to which plaintiff might be entitled, e.g.,* monetary damages will not protect plaintiff from prejudice caused by inaccuracy of the above-described information].

15. [*Attorney's fees. See § 429.500, Paragraph 13.*]

WHEREFORE, plaintiff prays judgment against defendants and each of them as follows:

1. For a permanent injunction, requiring defendants and each of them to amend the record(s) maintained by defendants as alleged above to _____ [correct the inaccuracy of the *or* delete the irrelevant] information contained in such records as alleged above;

2. In the alternative, if the order prayed for in Item 1., above, is not granted, for a permanent injunction, enjoining defendants, and each of them, to include plaintiff's statement of disagreement in the record(s) pertaining to plaintiff; to include defendant agency's own statement in the record(s) setting out the refusal to amend the record(s) as requested by plaintiff and specifying reasons for such refusal; and to provide any persons and entities to whom defendants have in the past disclosed the record(s) with copies of these statements;

[3. For reasonable attorney's fees as determined by the court;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired, see § 429.470*]

[2] Use of Form

This form of complaint may be used in an action against a state agency and any appropriate responsible officials of the agency for a permanent injunction ordering the agency and its responsible officials to amend information concerning the

plaintiff contained in the agency's records, or in the alternative to include in those records a statement by plaintiff of his or her disagreement with the information and a statement by the agency itself stating the refusal to amend the records and specifying reasons therefore [*see Civ. Code §§ 1798.35-1798.37*; *see generally § 429.122*].

When appropriate, this form may be combined with a form of complaint against a state agency for damages for failure to properly maintain its records under *Civ. Code §§ 1798.18, 1798.45(b), (c)* [*see § 429.500*].

[3] Allegations

This form of complaint includes allegations of a proper request to amend records [*Civ. Code §§ 1798.35, 1798.36*] (Paragraph 7); (2) the defendants' refusal, for unjustifiable reasons, to amend the records [*see Civ. Code § 1798.35(b)*] (Paragraph 8); (3) the plaintiff's request for internal review [*Civ. Code § 1798.36*] (Paragraph 9); (4) affirmation on review of the refusal to amend (Paragraph 10); (5) the lack of adequate legal remedy [*see Code Civ. Proc. § 526(a)(4)*] (Paragraph 14).

The form also includes optional allegations that plaintiff submitted a statement of disagreement and that defendant agency failed to include the statement in the record [*Civ. Code § 1798.37*] (Paragraphs 11, 12). A related optional allegation that defendants failed to include in the record a statement of refusal to amend the record and reasons therefore, for use in a state action, is included [*Civ. Code § 1798.37*] (Paragraph 13).

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37-429 California Forms of Pleading and Practice--Annotated § 429.503

§ 429.503 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--No Cause of Action for Subjective Opinion in Personnel Evaluation Contained in Records [Civ. Code § 1798.50]

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--No Cause of Action for Subjective Opinion in Personnel Evaluation Contained in Records [Civ. Code § 1798.50]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that the information relating to plaintiff which was included in defendant's records is a subjective opinion of _____ [*name and position of person who recorded opinion*] regarding plaintiff's qualifications, which was made in connection with _____ [*state nature of personnel action in connection with which opinion was recorded*], rather than an assertion of fact.

[2] Use of Form

This affirmative defense is for insertion in an answer to a complaint against a state agency brought under *Civ. Code § 1798.18* alleging that information in the agency's records was not accurate, relevant, timely, or complete, or that the agency disseminated information from its records outside of state government when the agency knew or had reason to believe that the information was inaccurate or untimely [*see §§ 429.500, 429.501*]. There is no cause of action under *Civ. Code §§ 1798.45-1798.53* (remedies for violations of the Information Practices Act) based on an allegation that a subjective opinion, as distinguished from a factual assertion, about an individual's qualifications, in connection with a personnel action concerning that individual, was not accurate, relevant, timely, or complete [*Civ. Code § 1798.50*]. *5 U.S.C.S. § 552a* does not include any comparable provision barring liability for subjective personnel evaluations.

If more than one affirmative defense is set out in the answer, each defense must be separately stated and numbered [*Code Civ. Proc. § 431.30(g), Cal. Rules of Ct., Rule 2.112(1)*]. If the complaint sets out more than one cause of action, the affirmative defense must refer to the cause of action it is intended to answer [*Code Civ. Proc. § 431.30(g)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.504

§ 429.504 Complaint for Injunction [Civ. Code §§ 1798.45(a), (c), 1798.46, 1798.47; Code Civ. Proc. § 526]--Refusal to Permit Review of Personal Record [Civ. Code § 1798.34]

[1] FORM Complaint for Injunction [Civ. Code §§ 1798.45(a), (c), 1798.46, 1798.47; Code Civ. Proc. § 526]--Refusal to Permit Review of Personal Record [Civ. Code § 1798.34]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	COMPLAINT FOR INJUNCTION
and DOES 1 through _____,	)	(Violation Regarding Government Records)
Defendants.	)	
	)	
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of plaintiff. See § 429.500, Paragraph 1.*]

2. [*Name and capacity of defendant agency and location of records. See § 429.500, Paragraph 2.*]

3. [*Responsibility and capacity of individual defendants. See § 429.502, Paragraph 3.*]

4. [*Fictitious defendant allegations. See § 429.500, Paragraph 3.*]

5. Defendants maintain the following records, in which information concerning plaintiff is contained, as records of the defendant agency: _____ [*identify records*].

6. Plaintiff is informed and believes and alleges thereon that the above-described information concerning plaintiff can be severed without undue difficulty from any personal information or any information concerning other persons that may be included in the same record.

7. On or about _____ [*date*], plaintiff requested that defendants provide him/her [and _____ (*name of individual of plaintiff's choosing to whom plaintiff is seeking to have records disclosed*)] with _____ [access to *or* copies of] the record(s) described above. Plaintiff's request identified the records and information sought with sufficient specificity to permit these materials to be located and retrieved without undue difficulty. [*If plaintiff requested that access be provided to an individual of plaintiff's choosing as well as to plaintiff add,* Plaintiff is and at all times herein mentioned was prepared to sign an authorization permitting disclosure of any of the information of which plaintiff isseeking disclosure to _____ (*individual to whom plaintiff is seeking to have records disclosed*)].

8. Defendants have refused to _____ [allow plaintiff access to *or* provide plaintiff with copies of] the requested records or to the information concerning plaintiff included in those records.

9. [*Attorney's fees. See § 429.500, Paragraph 13.*]

WHEREFORE, plaintiff prays judgment against defendants, and e ach of them, as follows:

1. For an injunction ordering defendants, and each of them, to provide plaintiff [and, on plaintiff's signing an authorization, an individual of plaintiff's choosing] with access to, or copies of, the requested records [*if the action concerns state agency records, add,* at a place near the plaintiff's residence or by mail,] and on payment by plaintiff of a reasonable fee, if any, covering the costs to defendant agency of providing such access or copies;

2. In the alternative, if any portions of the information concerning plaintiff contained in the requested records is found to be personal or otherwise exempt from disclosure, an injunction ordering defendants, and each of them, to provide plaintiff with access to, or copies of, all nonexempt portions of the records after exempt portions have been deleted [*if the action concerns state agency records, add,* at a place near the plaintiff's residence or by mail,] and on payment by plaintiff of a reasonable fee, if any, covering the cost to defendant agency of providing such access or copies;

3. For reasonable attorney's fees as determined by the court;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired, see § 429.470.*]

[2] Use of Form

This form of complaint may be used in an action for an injunction ordering a state agency and its appropriate responsible officials to provide the plaintiff with access to or copies of information concerning the plaintiff that is included in the agency's records [*see Civ. Code § 1798.34(a)*; *see § 429.160*].

[3] Allegations

This form alleges:

- That the defendants maintain records containing information pertaining to the plaintiff [*Civ. Code § 1798.34*] (Paragraph 5).

- That the information concerning the plaintiff is severable from information not subject to disclosure which is included in the same record [*see Civ. Code § 1798.43*] (Paragraph 6).

- That the plaintiff made a proper request for access to or copies of the information [*Civ. Code § 1798.34*] (Paragraph 7).

- That the defendants refused to permit access or provide copies [*Civ. Code § 1798.34*] (Paragraph 8).

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B. Collection, Dissemination, And Inspection Of Information

37-429 California Forms of Pleading and Practice--Annotated § 429.505

§ 429.505 Complaint for Temporary Restraining Order, Preliminary Injunction [Civ. Code § 527], Permanent Injunction [Civ. Code §§ 1798.45(b), (c), 1798.47, 3422; Code Civ. Proc. § 526], and Damages [Civ. Code §§ 1798.45(b), (c), 1798.48]--Improper Disclosure of Personal Information From Record [Civ. Code § 1798.24]

[1] FORM Complaint for Temporary Restraining Order, Preliminary Injunction [Civ. Code § 527], Permanent Injunction [Civ. Code §§ 1798.45(b), (c), 1798.47, 3422; Code Civ. Proc. § 526], and Damages [Civ. Code §§ 1798.45(b), (c), 1798.48]--Improper Disclosure of Personal Information From Record [Civ. Code § 1798.24]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR TEMPORARY RESTRAINING
_____ [*names*],	)	ORDER, PRELIMINARY INJUNCTION, AND
and DOES 1 through _____,	)	PERMANENT INJUNCTION AND DAMAGES
Defendants.	)	(Violation Regarding Government Records)
	)	[*Civ. Code §§ 1798.45(c), 1798.47, 1798.48, 3422; Code Civ. Proc. §§ 526, 527*]

_____

Plaintiff alleges:

1. [*Capacity and residence of plaintiff. See § 429.500, Paragraph 1.*]

2. [*Name and capacity of defendant agency and location of records. See § 429.500, Paragraph 2.*]

3. [*Capacity, responsibility, and residence of individual defendants. See § 429.502, Paragraph 3.*]

4. [*Fictitious defendant allegations. See § 429.500, Paragraph 3.*]

5. [*Maintenance by defendants of records containing personal information. See § 429.504, Paragraph 5.*]

[*EITHER, if the action involves prior disclosure*]

6. On or about _____ [*date*], defendant agency disclosed the personal information described above to _____ [*person or entity receiving disclosure*], _____ [who *or* which] has no legitimate interest in receiving such information. [Plaintiff is informed and believes and thereon alleges that defendants will continue to make tha information available to members of the public who have no legitimate interest in the information.]

[*OR, if the action concerns future disclosure*]

6. On or about _____ [*date*], plaintiff became aware that defendants plan to disclose the personal information described above to _____ [*person or entity to receive disclosure*], _____ [who *or* which] has no legitimate interest in receiving that information. [Plaintiff is informed and believes and thereon alleges that defendants will continue to make the information available to members of the public, who have no legitimate interest in that information.]

[*CONTINUE*]

7. Defendants' improper disclosure of the personal information described above, unless and until enjoined and restrained by order of this court, will cause great and irreparable injury to plaintiff in that _____ [*specify facts showing how great and irreparable injury will result, e.g.,* once this personal information has been disclosed to persons or entities having no legitimate interest in it, it will not be possible to restore the confidentiality of the information].

8. Plaintiff has no adequate remedy at law for the injuries being currently suffered in that _____ [*specify additional facts showing inadequacy of any legal remedy, e.g.,* monetary damages will not compensate plaintiff for future disclosures by defendants of the personal information described above].

9. As a proximate result of defendant agency's past improper disclosure of the personal information described above, plaintiff has sustained damages in that _____ [*allege facts showing damages*].

10. [*Filing of claim with defendant agency. See § 429.500, Paragraph 11.*]

11. [*Total or partial denial of claim by defendant agency. See § 429.500, Paragraph 12.*]

12. [*Attorney's fees. See § 429.500, Paragraph 13.*]

WHEREFORE, plaintiff prays judgment against defendants and each of them as follows:

1. For actual damages according to proof;

2. For a _____ [temporary restraining order, an order requiring defendants and each of them to show cause, if any it/they has/have why it/they should not be enjoined as hereinafter set out during the pendency of this action, a preliminary injunction, and] permanent injunction, enjoining defendants and each of them, and its/their agents,

servants, officers and employees, and all persons acting in concert with, or for defendant(s) from disclosing the above-described personal information concerning plaintiff contained in the records of defendant _____ [*name of agency*] to any person except employees of defendant agency who require such information in order to carry out their duties, consistent with the proper use of such information;

3. For reasonable attorney's fees as specified by the court;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired, see § 429.500*.]

CAUTION:

If plaintiff is seeking a preliminary injunction, this complaint must either be verified or accompanied by affidavits (or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*]) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint rather than affidavits or declarations, plaintiff must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* .

[2] Use of Form

This form of complaint is for use by a plaintiff in an action for improper disclosure of personal information concerning the plaintiff from a government agency's records under *Civ. Code § 1798.24* (state agencies).

[3] Allegations

The form alleges disclosure of information by the defendant agency and/or its responsible officials [*Civ. Code § 1798.24*] (Paragraph 6) and damages resulting from the disclosure (Paragraph 9).

To support injunctive relief, the form includes an allegation of lack of adequate legal remedy [*see Code Civ. Proc. § 526(a)(4)*] (Paragraph 8), and if the plaintiff is seeking a temporary restraining order or preliminary injunction, it must be alleged that great and irreparable harm to the plaintiff will result from the conduct of the defendant(s) unless such conduct is restrained [*see Code Civ. Proc. § 527*] (Paragraph 7).

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37-429 California Forms of Pleading and Practice--Annotated § 429.506

§ 429.506 Complaint for Damages Against Individual for Intentional Disclosure of Information Obtained From Personal Records Maintained by Government Agency [Civ. Code § 1798.53]

[1] FORM Complaint for Damages Against Individual for Intentional Disclosure of Information Obtained From Personal Records Maintained by Government Agency [Civ. Code § 1798.53]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], and DOES 1	)	(Intentional Disclosure of Personal Information from
through _____,	)	Government Records)
Defendants.	)	
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of plaintiff. See § 429.500, Paragraph 1.*]

2. Defendant _____ [*name*] is, and at all times herein mentioned was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a resident of _____ County, California *or* a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), California].

3. [*Fictitious defendant allegations. See § 429.500, Paragraph 3.*]

4. _____ [*Name of state or federal agency maintaining records*] maintains the following records which include information concerning plaintiff: _____ [*identify records*]. The information concerning plaintiff contained in these records is personal and may not by disclosed by _____ [*name of agency*].

5. Despite the personal character of the information described above, defendants became privy to it. On or about _____ [*date*], defendants intentionally disclosed this information to _____ [*person or entity receiving disclosure*], _____ [who *or* which] had no legitimate interest in receiving such information. [*If the named defendant is employee of the agency add,* In making such disclosure, defendant _____ [*name*] was not acting solely in any official capacity as employee of any government agency, since _____ (*state circumstance showing that named defendant was not acting in official capacity, e.g.,* the disclosure was wholly unrelated to any duties or responsibilities which defendant _____ [*name*] held as a state employee)].

6. At the time when defendants intentionally disclosed the information described above, defendants knew or should have known that such information was obtained from personal information or records being maintained by a federal or state agency.

7. [*Damages. See § 429.500, Paragraph 10.*]

8. Plaintiff has incurred $_____ in attorney's fees in maintaining this action.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For actual damages according to proof plus damages in such sum as may be sustained by the court and are ascertained before final judgment herein;

2. For exemplary damages as provided in *Civil Code Section 1798.53*;

3. For reasonable attorney's fees as determined by the court;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 429.470.*]

[2] Use of Form

This form of complaint is for use in an action against a person who has intentionally disclosed information concerning the plaintiff which that person knew or should have known was obtained from personal information or records maintained by a federal or state agency. Any person, other than an employee of the state or of a local government

agency acting solely in his or her official capacity, who intentionally discloses previously undisclosed information which they know or should reasonably know was obtained from personal information maintained by a state or federal agency shall be subject to a civil action, for invasion of privacy, by the individual to whom the information pertains [*see Civ. Code § 1798.53*; *see § 429.180[10][b]*].

[3] Allegations

The form alleges:

- The capacity and residence or location of the named defendant (Paragraph 2);
- The existence of records containing personal information which the agency may not disclose (Paragraph 4) [*5 U.S.C.S. § 552a(b)*; *Civ. Code § 1798.24*];
- The intentional disclosure of information by the defendants (Paragraph 5) [*Civ. Code § 1798.53*];
- That the defendants knew or should have known that information was obtained from an agency record (Paragraph 6) [*Civ. Code § 1798.53*]; and
- Attorney's fees (Paragraph 8) [*Civ. Code § 1798.53*].

[4] State Action for Both State and Federal Disclosures

There is no federal provision setting out a cause of action against a private individual for disclosure of personal information from government records which is comparable to *Civ. Code § 1798.53*. However, the cause of action set out in *Civ. Code § 1798.53* extends to individuals who disclose information obtained from federal agencies as well as to individuals who disclose information obtained from state agencies. Thus, the this complaint may be used to bring an action in state court regardless of whether the disclosed information that is the subject of the action came from state or federal records [*see Civ. Code § 1798.53*].

[5] Remedy Not Exclusive

The right, remedy, and cause of action set forth in *Civ. Code § 1798.53* against a private person for disclosure of personal information obtained from government records is nonexclusive and is in addition to all other rights, remedies, and causes of action for invasion of privacy, inherent in *Cal. Const. art. I, § 1* [*Civ. Code § 1798.53*].

[6] Exemplary Damages

In any successful action brought under *Civ. Code § 1798.53*, the complainant, in addition to any special or general damages awarded, shall be awarded a minimum of two thousand five hundred dollars ($2,500) in exemplary damages [*Civ. Code § 1798.53*]. No claim may state the amount of exemplary damages being sought, so the prayer of the form requests exemplary damages under *Civ. Code § 1798.53* without stating an amount [*Civ. Code § 3295(e)*.].

[7] Attorney's Fees and Costs

Civ. Code § 1798.53 also provides for award of attorney's fees and other litigation costs reasonably incurred in the suit when the plaintiff has litigated the action successfully.

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37-429 California Forms of Pleading and Practice--Annotated § 429.507

§ 429.507 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Exemption to Prohibition on Disclosure of Personal Information Applies [Civ. Code § 1798.24]--Law Enforcement Exemption [Civ. Code § 1798.24(o)]

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Exemption to Prohibition on Disclosure of Personal Information Applies [Civ. Code § 1798.24]--Law Enforcement Exemption [Civ. Code § 1798.24(o)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

The alleged information concerning plaintiff which was contained in defendant's files was disclosed to _____ [*name of law enforcement agency to which information was disclosed*], a law enforcement agency which required the information for an investigation of _____ [*specify unlawful activity being investigated by law enforcement agency*].

[2] Use of Form

This affirmative defense is for insertion in an answer to a complaint against a government agency brought under *Civ. Code § 1798.24* (state agency) alleging that the agency improperly disclosed information concerning the plaintiff from its records [*see § 429.505*]. *Civ. Code § 1798.24*, which prohibits disclosure of personal records by a state agency, specifically allows disclosures made to a law enforcement agency when required for an investigation of unlawful activity, as well as for licensing, certification, or regulatory purposes, unless such disclosure is otherwise prohibited by law [*Civ. Code § 1798.24(o)*].

[3] Other Exemptions From Disclosure Requirement

Civ. Code § 1798.24, which prohibits disclosure of information concerning particular persons from state agency files, sets out numerous exemptions from its general disclosure prohibitions. If it appears that an exemption or exemptions

apply to the case, counsel may insert additional affirmative defense allegations in the answer showing that one or more of these exemptions, in addition to the law enforcement exemption, apply.

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37-429 California Forms of Pleading and Practice--Annotated § 429.508

§ 429.508 Complaint for Damages [Civ. Code § 56.35], Temporary Restraining Order, Preliminary Injunction [Civ. Code § 3422; Code Civ. Proc. § 527] and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526]--For Improper Disclosure of Medical Information by a Health Care Provider [Civ. Code § 56.10]

[1] FORM Complaint for Damages [Civ. Code § 56.35], Temporary Restraining Order, Preliminary Injunction [Civ. Code § 3422; Code Civ. Proc. § 527] and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526]--For Improper Disclosure of Medical Information by a Health Care Provider [Civ. Code § 56.10]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name(s)*], and DOES	)	(Violation of Confidentiality of Medical Information
1-_____,	)	Act)
Defendants.	)	[*Civ. Code §§ 56.10, 56.35, 3422*; *Code Civ. Proc.*
	)	*§§ 425.10, 526, 527*]

_____

Plaintiff alleges:

1. Plaintiff is a patient whose medical information has been disclosed in violation of *Section 56.10 of the Civil Code*, and who consequently has suffered _____ [economic loss *and/or* personal injury].

2. Defendant _____ [*name*] is and at all times herein mentioned was _____ [*specify status as health care provider, e.g.,* a physician and surgeon engaged in the practice of medicine].

[3. Defendants _____ (*names of employees or agents of defendant health care provider*) are and at all

times herein mentioned were (employees *or* agents) of _____ (*name of defendant health care provider*) and during the course of their (employment *or* agency) with _____ (*name of defendant health care provider*) had access to the information concerning plaintiff as alleged below.]

4. Defendant _____ [*name*] is, and at all times herein mentioned was, _____ [*state capacity and residence of defendant or other basis for venue, e.g.,* a professional corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), _____ County, California].

5. [*Fictitious defendant allegations. See § 429.500, Paragraph 4.*]

6. Plaintiff _____ [was a patient of *or* was admitted as an inpatient at *or* obtained health care services at] _____ [*name of defendant health care provider*] _____ [on _____ (*date*) *or* from _____ (*date*), to _____ (*date*)].

7. As a result of plaintiff's obtaining health care services from defendant _____ [*name of defendant health care provider*], defendant had in his/her/its possession certain medical information concerning plaintiff [to-wit: _____ (*describe information*)] [to which his/her/its _____ (employees *and/or* agents) had access].

[*EITHER*]

8. On or about _____ [*date*], defendant(s) _____ [*name(s)*] disclosed [and _____ (*describe threat of future disclosure, e.g.,* defendant(s) _____ (*name(s)*) have informed plaintiff that he/she/it/they plan(s) to continue to disclose] the aforementioned medical information to _____ [*indentify person or entity*]. Plaintiff has not authorized that disclosure.

[*OR*]

8. On or about _____ [*date*], plaintiff became aware that defendant(s) _____ [*name(s)*] plan(s) to disclose the aforementioned medical information to _____ [*indentify person or entity*]. Plaintiff has not authorized that disclosure.

[*CONTINUE*]

[9. The improper disclosure of the aforementioned medical information by defendant(s), unless enjoined and restrained by order of this court, will cause great and irreparable injury to plaintiff in that if the information is (further) disclosed it will not be possible to restore its confidentiality.]

[10. Plaintiff has no adequate remedy at law for the injuries set forth herein because monetary damages cannot fully compensate plaintiff for the invasion of his/her privacy that _____ (has been *and/or* would be) caused by the (further) disclosure of the information.]

11. As a proximate result of defendants' improper disclosure of the aforementioned medical information and other conduct as mentioned above, plaintiff has sustained damages in that _____ [*specify facts showing damages*].

[*ADD, if defendant is public hospital or other public entity*]

12. On or about _____ [*date*], plaintiff presented to defendant _____ [*name of defendant health care provider*] by _____ [delivering *or* mailing] a claim to the _____ [clerk *or* secretary *or* auditor] for the injuries, disabilities, and damages that plaintiff suffered by reason of defendant health care provider's aforementioned conduct. A copy of the claim is attached hereto as Exhibit _____, and made a part hereof.

13. On or about _____ [*date*], defendant health care provider _____ [rejected the above claim in its entirety *or* allowed the aforementioned claim in the amount of $_____ and rejected it as to the remainder *or* failed to act on the claim within 45 days after its presentation].

[*CONTINUE*]

14. Plaintiff has incurred reasonable attorney's fees in maintaining this action.

WHEREFORE, plaintiff prays for judgment as follows:

[1. For a _____ (temporary restraining order, an order requiring defendants and each of them to show cause, if any they have, why they should not be enjoined as hereinafter set out during the pendency of this action, a preliminary injunction, and) permanent injunction, enjoining defendants and each of them and their agents, servants, officers and employees, and all persons acting in concert with, or for defendants, from disclosing the aforementioned personal information concerning plaintiff contained in the aforementioned records to any person except employees of defendant health care provider who require that information in order to carry out their duties, consistent with the proper use of that information;]

2. For actual damages according to proof;

3. For exemplary damages according to proof;

4. For reasonable attorney's fees as specified by the court;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired, see § 429.470*.]

CAUTION:

If plaintiff is seeking a preliminary injunction in a state action, this complaint must either be verified or accompanied by affidavits (or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*]) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint rather than affidavits or declarations, plaintiff must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* .

[2] Use of Form

This form of complaint is for use in an action by a patient against a provider of health care and/or the health care provider's employees oragents for improper disclosure of medical information concerning the patient under *Civ. Code § 56.10* [*see Civ. Code § 56.35*].

[3] Allegations

This complaint alleges:

- The plaintiff's standing (Paragraph 1) [*see Civ. Code §§ 56.05(c)* (definition of "patient"), 56.35 (standing)].

- The status of defendant or defendants (Paragraphs 2, 3) [*see* Civ. Code § 56.02(h) (definition of "health-care provider")].

- The basis for venue (Paragraph 4).

- A statement that plaintiff was under defendant's care (Paragraph 6).

- A statement that defendant possessed medical information (Paragraph 7) [*see Civ. Code § 56.05* (definition of "medical information")].

- Facts concerning disclosure or threatened disclosure by defendant (Paragraph 8) [*see Civ. Code § 56.10* (permitted disclosure)].

- Facts concerning plaintiff's damages (Paragraph 11) [*see Civ. Code § 56.35*].

- The amount of attorney's fees incurred (Paragraph 14) [*see Civ. Code § 56.35*].

Optional Paragraphs 9 and 10 are for use if plaintiff is seeking injunctive relief [*see Code Civ. Proc. §§ 526* (permanent injunction), 527 (temporary restraining order or preliminary injunction)].

If the defendant health care provider is a public institution and the plaintiff is seeking damages, the complaint must also allege that the plaintiff filed a claim with the defendant health care provider (Paragraphs 12, 13) [*see Gov. Code §§ 905* (claims for money or damages against local public agencies), 905.2 (claims for money or damages against the state), 912.4 (time limit for public entity to act on claim)]. For discussion and forms relating to claims against public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[4] Punitive Damages and Attorney's Fees

In addition to any other remedies, a patient whose medical information has been used or disclosed in violation of *Civ.*

Code § 56.10, and who has sustained economic loss or personal injury therefrom, may recover compensatory damages, exemplary damages not to exceed $3,000 and attorney's fees not to exceed $1,000, and the costs of litigation [*Civ. Code § 56.35*]. If the actual or punitive damages are for personal injury, the amount of damages sought are not set forth in the complaint [*Code Civ. Proc. § 425.10*].

[5] Cross References

For related forms, see *§§ 429.500* and *429.505*.

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37-429 California Forms of Pleading and Practice--Annotated § 429.509

§ 429.509 Complaint for Damages for Wrongful and Willful Disclosure of Results of HIV Test [Health & Safety Code § 120980]

[1] FORM Complaint for Damages for Wrongful and Willful Disclosure of Results of HIV Test [Health & Safety Code § 120980]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES 1	)	(Willful Disclosure of Results of HIV Test)
through_____,]	)	
Defendant(s).	)	
	)	

_____

Plaintiff alleges:

1. Plaintiff is a person who is the subject of a test for human immunodeficiency virus (HIV), which is defined under *Health and Safety Code Section 120775* as any clinical test, laboratory or otherwise, used to identify HIV, a component of HIV, or antibodies or antigens to HIV.

2. Defendant _____ [*name*] is, and at all times herein mentioned was, _____ [*state residence of defendant or other basis of venue, e.g.,* a resident of _____ County, California *or* a professional corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), _____ County, California].

[3. *Fictitious defendant allegations, if appropriate. See § 429.470, Paragraph 3.*]

[4. *Respondeat superior allegations, if appropriate. See § 429.470, Paragraph 4.*]

5. On or about _____ [*date*], defendant willfully and wrongfully disclosed to _____ [*name of third party to whom disclosure was made*] the results of an HIV test performed on plaintiff, in a manner that identified or provided identifying characteristics of plaintiff, without plaintiff's written authorization.

[6. Further, on or about _____ (*date*), defendant willfully and wrongfully disclosed to _____ (*name of third party to whom disclosure was made*) the results of an HIV test performed on plaintiff, in a manner that identified or provided identifying characteristics of plaintiff, without plaintiff's written authorization.]

7. As a proximate result of the defendant's willful and wrongful disclosure of the test results described herein, plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervoussystem and person, all of which injuries have caused and continue to cause plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that the injuries will result in some permanent disability to him/her.] As a result of the injuries, plaintiff has suffered general damages.

[8. As a further proximate result of the above disclosure, plaintiff _____ (*specify special damages, e.g.*, was discharged from his/her employment on _____ (*date*). Plaintiff has consequently been unable to obtain further employment because he/she was terminated for that reason). Plaintiff has therefore suffered _____ (*specify, e.g.*, loss of wages and medical benefits) to his/her special damage.]

9. Plaintiff is entitled to an amount of $10,000 as a civil penalty for each wrongful disclosure, in addition to court costs.

10. [*Allegation of entitlement to punitive damages. See § 429.470, Paragraph 13.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages according to proof;

[2. For special damages according to proof;]

[3. For exemplary or punitive damages;]

4. For a civil penalty in the sum of $10,000 for each wrongful disclosure;

5. For costs of suit herin incurred; and

6. For such further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 429.470.*]

[2] Use of Form

This form of complaint is for use by the subject of a test for human immunodeficiency virus (HIV), to seek damages and civil penalties for the wrongful disclosure of the test results [*see Health and Safety Code § 120980*]. An HIV test is defined as any clinical test, laboratory or otherwise, used to identify HIV, a component of HIV, or antibodies or antigens to HIV [*Health and Safety Code § 120775(c)*].

With minor modifications, the form may be used to bring an action based on negligent or malicious disclosure of HIV test results [*Health & Safety Code § 120980(a), (b), (d)*].

Although the form alleges the right to recover, and prays for recovery of, a civil penalty pursuant to *Health & Safety Code § 120980(b)*, it is unclear whether plaintiff may recover the civil penalty in an action to seek damagesunder *Health & Safety Code § 120980(d)* (actual damages) or *Health & Safety Code § 120980(h)* (damages under any applicable law), or whether the civil penalty is only available in an action by the appropriate prosecuting agency.

In appropriate cases, counsel may wish to consider alleging other causes of action such as invasion of privacy by publication of private facts [*see § 429.32*], intentional infliction of emotional distress [*see* Ch. 362, *Mental Suffering and Emotional Distress*], and defamation [*see* Ch. 340, *Libel and Slander*].

[3] Allegations

The complaint alleges the following:

- The status of plaintiff (Paragraph 1) [*see Health & Safety Code §§ 120975* (protection of test subject), 120980(b) (civil penalty payable to test subject), (d) (test subject entitled to damages)].

- The basis for venue (Paragraph 2) [*see Code Civ. Proc. §§ 395* (individual), 395.2 (unincorporated association), 395.5 (corporation or association)].

- A statement of facts regarding the wrongful disclosure (Paragraphs 5, 6) [*see Health & Safety Code § 120980(b)* (civil penalty for willful disclosure), (e) (each disclosure separate violation)].

- A description of general and special damages (Paragraphs 7, 8) [*see Health & Safety Code § 120980(d)*].

- A statement of entitlement to civil penalties (Paragraph 9) [*see Health & Safety Code § 120980(b)* (civil penalty for willful disclosure), (e) (each disclosure separate violation)].

If one of the defendants is a public entity, plaintiff must also allege compliance with the requirements of the California Tort Claims Act. For forms and a discussion of the pleading requirements in suits against public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[4] Inapplicability of Disclosure Prohibition

The prohibition against disclosure under *Health & Safety Code § 120980(b)* does not apply to the following:

- Disclosure pursuant to written authorization [*Health & Safety Code§ 120980(b)*; *see Health & Safety Code § 120990* (consent requirements; exceptions)];

- AIDS testing with respect to blood donors pursuant to *Health & Safety Code § 1603.1* or *1603.3* [*Health & Safety Code § 120980(b)*];

- Inclusion of information in medical records [*Health & Safety Code § 120980*(*l*)];

- A physician's record of the test [*Health & Safety Code § 120985*];

- Blood tests pursuant to the powers of the California Youth Authority under *Welf. & Inst. Code § 1768.9* [*Health & Safety Code § 120995*];

- Testing of prisoners pursuant to *Penal Code § 7500 et seq.* [*Health & Safety Code § 121000*];

- Disclosure to the test subject's representatives and certain health care providers [*Health & Safety Code § 121010*]; or

- Disclosure by health care providers and laboratories to local health officers [*Health & Safety Code § 121022*].

For further discussion, see *§ 429.252[7]*.

[5] Amount of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

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Chapter 429 PRIVACY
PART IV. FORMS
B. Collection, Dissemination, And Inspection Of Information

37-429 California Forms of Pleading and Practice--Annotated § 429.510

§ 429.510 Complaint for Damages for Wrongful and Willful Disclosure of Confidential AIDS Research Records [Health & Safety Code §§ 121075, 121110]

[1] FORM Complaint for Damages for Wrongful and Willful Disclosure of Confidential AIDS Research Records [Health & Safety Code §§ 121075, 121110]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Willful Disclosure of Confidential AIDS Research
[and DOES 1 through _____,]	)	Records)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds or does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff is the subject of research related to acquired immune deficiency syndrome (AIDS) within the meaning of *Health & Safety Code Section 121075*.

2. Defendant _____ [*name*] is, and at all times herein mentioned was, _____ [*state residence of defendant or other basis of venue, e.g.*, a resident of _____ County, California, *or* a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), _____ County, California].

[3. *Fictitious defendant allegations, if appropriate. See § 429.470, Paragraph 3.*]

[4. *Respondeat superior allegation, if appropriate. See § 429.470, Paragraph 4.*]

5. On or about _____ [*date*], defendant _____ [*name*] _____ [willfully *or* maliciously] disclosed to _____ [*name of third party to whom disclosure was made*] the contents of a confidential research record that was _____ [developed *or* acquired] in the course of conducting _____ [research *or* a research study] relating to AIDS. The record [, which consists of _____ (*specify, e.g.,* personal information obtained from plaintiff pursuant to an interview conducted by _____ (*name*) at _____ (*name of facility*) on _____ (*date*)),] contained information that personally identified plaintiff.

[6. Further, on or about _____ (*date*), defendant _____ (*name*) _____ (willfully *or* maliciously) disclosed to _____ (*name of third party to whom disclosure was made*) the content of a confidential researchrecord(, to-wit: _____ (*specify, e.g.,* personal information obtained from plaintiff pursuant to an interview conducted by _____ (*name*) at _____ (*name of facility*) on _____ (*date*),) in the possession of defendant, and _____ (developed *or* acquired) in the course of conducting _____ (research *or* a research study) relating to AIDS.]

7. As a proximate result of the defendant's wrongful and malicious disclosure of the record [s] described herein, plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervous system and person, all of which injuries have caused and continue to cause plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that the injuries will result in some permanent disability to him/her.] As a result of the injuries, plaintiff has suffered general damages.

[8. As a further proximate result of the above disclosure, plaintiff _____ (*specify special damages, e.g.,* was discharged from his/her employment on _____ (*date*). Plaintiff has consequently been unable to obtain further employment because he/she was terminated for that reason). Plaintiff has therefore suffered _____ (*specify, e.g.,* loss of wages and medical benefits) to his/her special damage.]

[9. *Allegation of entitlement to punitive damages. See § 429.470, Paragraph 13.*]

10. Plaintiff is entitled to a civil penalty in the amount of $10,000 for each wrongful disclosure, in addition to court costs.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages according to proof;

[2. For special damages according to proof;]

[3. For exemplary or punitive damages according to proof;]

4. For a civil penalty in the amount of $10,000 for each wrongful disclosure;

5. For costs of suit herein incurred; and

6. For such further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

[*Verification. See § 429.470.*]

[2] Use of Form

This complaint is for use by the subject of a research record relating to the acquired immune deficiency syndrome (AIDS), to seek damages and civil penalties for the wrongful disclosure of the research records [*see Health & Safety Code §§ 121075* (prohibition against disclosure of research records), 121110 (remedies for wrongful disclosure of research records)].

With minor modifications, the form may be used to bring an action based on the negligent disclosure of confidential AIDS research records [*see Health & Safety Code § 121110(a), (d)*]. In addition, this form may easily be modified to state an action based on the negligent, willful, or malicious disclosure of confidential public health records relating to HIV or AIDS [*see Health & Safety Code § 121025(a), (e)*; *see also § 429.259*].

[3] Allegations

The complaint alleges the following:

- The status of plaintiff (Paragraph 1) [*see Health & Safety Code §§ 121075* (confidentiality of research records containing personally identifying information of subject), 121110 (remedies)];

- The basis for venue (Paragraph 2) [*see Code Civ. Proc. §§ 395* (individual), 395.2 (unincorporated association), 395.5 (corporation or association)];

- Facts regarding the disclosure, and a statement that the disclosed record contained information that personally identified plaintiff (Paragraphs 5, 6) [*see Health & Safety Code §§ 121075* (confidentiality of research records containing personally identifying information of subject), 121110 (remedies)];

- A description of general damages (Paragraph 7) [*see Health & Safety Code § 121110(d)*];

- A description of special damages (Paragraph 8) [*see Health & Safety Code § 121110(d)*]; and

- A statement of entitlement to civil penalties (Paragraph 10) [*see Health & Safety Code § 121110(b)* (civil penalty for willful or malicious disclosure), (f) (each disclosure separate violation)].

[4] Remedies

Any person who willfully, maliciously, or negligently discloses the content of any confidential research record, in violation of *Health & Safety Code § 121110(a)* or *(b)*, to any third party is liable to the subject of the test for all actual damages for economic, bodily, or psychological harm that proximately results from the act [*Health & Safety Code § 121110(d)*]. Moreover, the defendant shall be assessed a civil penalty plus court costs, as determined by thecourt, payable to the subject of the test [*Health & Safety Code § 121110(a)*]. The civil penalty for willful or malicious disclosure must be at least $5,000, but no more than $10,000, while the civil penalty for a negligent disclosure cannot

exceed $2,500 [*Health & Safety Code § 121110(a), (b)*]. It is unclear whether plaintiff may recover the civil penalty in an action to seek damages under *Health & Safety Code § 121110(d)*, or whether the civil penalty is only available in an action by the appropriate prosecuting agency.

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37-429 California Forms of Pleading and Practice--Annotated § 429.511

§ 429.511 Consent to Disclosure of Confidential AIDS Research Records [Health & Safety Code § 121080]

[1] FORM Consent to Disclosure of Confidential AIDS Research Records [Health & Safety Code § 121080]

This information has been disclosed to you from a confidential research record the confidentiality of which is protected by state law, and any further disclosure of it without specific prior written consent of the person to whom it pertains is prohibited. Violation of these confidentiality guarantees may subject you to civil or criminal liabilities.

[2] Use of Form

This form of consent is for use with a disclosure authorized by an AIDS research subject. Any authorized disclosure must be accompanied by this form or one in substantially the same language [*see Health & Safety Code § 121080*].

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37-429 California Forms of Pleading and Practice--Annotated §§ 429.512-429.529

[Reserved]

§§ 429.512[Reserved]

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PART IV. FORMS
C. Protection Against Eavesdropping And Other Forms Of Invasion Of Privacy Under Penal Code §§ 630-637.5

37-429 California Forms of Pleading and Practice--Annotated § 429.530

§ 429.530 Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. § 526] and for Damages [Penal Code § 637.2]--Wiretapping of Telephonic or Telegraphic Communications [Penal Code § 631]

[1] FORM Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. § 526] and for Damages [Penal Code § 637.2]--Wiretapping of Telephonic or Telegraphic Communications [Penal Code § 631]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AND PRELIMIN-
_____ [*name*], [and DOES 1	)	ARY AND PERMANENT INJUNCTION
through _____,]	)	(Invasion of Privacy)
Defendant(s).	)	
	)	

_____

Plaintiff alleges:

1. _____ [*Allege plaintiff's residence and capacity, e.g.,* Plaintiff is, and at all times herein mentioned was, a resident of _____ (*city*), California, and on or about _____ (*date*), (through on or about _____ [*date*],) was a telephone subscriber having a private line with the number _____ (*telephone number*)].

2. Defendant is, and at all times herein mentioned was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a resident of _____ County, California *or* a corporation

organized and existing under the laws of the State of _____ (*name*) with its principal office for the transaction of business in _____ (*city*), _____ County, California].

[3. Defendant(s) _____ (*name(s)*) is/are, and at all times herein mentioned was/were, the agent(s), servant(s), and employee(s) of defendant _____ (*name of telephone company*) and, in doing the things herein mentioned, was/were acting within the scope of said agency and employment.]

[4. The true names and capacities, whether individual, corporate, associate, or otherwise, of defendants DOES 1-_____ inclusive, are unknown to plaintiff who, therefore, sues said defendants by such fictitious names. Plaintiff will amend this complaint to show their true names and capacitieswhen ascertained. (Plaintiff is informed and believes, and thereon alleges, that each of said defendants is responsible in some manner for the events and happenings, and proximately caused the injuries and damages, hereinafter alleged.)]

[5. Because of the nature of the business in which they are engaged, defendant(s and each of them,) have special knowledge of the practice of tapping or making connections with any _____ (telephone *or* telegraphic) wire and have special abilities in such practice.]

6. _____ [On or about _____ (*date*), *or* Between _____ (*date*), and _____ (*date*), inclusive,] defendant[s, and each of them,] [willfully, deliberately, maliciously,] and intentionally _____ [*specify, e.g.*, installed, or caused to be installed, on plaintiff's telephone line an interception device for the sole purpose of listening to plaintiff's telephone conversations in violation of *Section 631(a) of the Penal Code*.]

7. At no time did defendant[s, or any of them,] or any other person, inform plaintiff of the interception of his/her telephone conversations, and at no time did plaintiff consent to the wiretapping of this telephone line.

8. On said date[s] defendant[s, and each of them,] knowing that it was unlawful and a violation of plaintiff's right to privacy, intruded on plaintiff's privacy by [willfully, deliberately, maliciously, and] intentionally intercepting all telephone calls made to and from plaintiff's home by means of wiretapping devices.

[9. Defendant(s, and each of them,) knowing that it was unlawful and a violation of plaintiff's right to privacy, intercepted his/her calls by means of wiretapping devices, and, through the use of these devices, wrongfully, unlawfully, [maliciously,] and intentionally communicated information obtained from the wrongful wiretapping to _____ (*specify facts relating to disclosure, e.g.*, police officers in _____ (*city*), _____ County, California,) in violation of *Section 631(a) of the Penal Code*.]

[*EITHER, if plaintiff seeks statutory damages*]

10. Under the provisions of *Section 637.2(a)(1) of the Penal Code*, plaintiff claims statutory damages against defendants, and each of them, in the sum of $5,000 for violation of *Section 631(a) of the Penal Code*.

[*OR, if plaintiff alleges actual damages*]

10. As a proximate result of the interception of plaintiff's telephone calls [and the wrongful communication of the information so obtained to _____ (*name or description, e.g.*, the police)] as herein alleged, _____ [*allege damages, e.g.*, plaintiff was charged with the commission of a number of felonies, arrested by the police at his place of employment, manacled, and taken into custody, although all charges were subsequently dismissed for insufficiency of the evidence,] all to plaintiff's general damage in the sum of

$_____.

[*AND/OR*]

11. As a [further] proximate result of the wrongful interception, [the wrongful communication of the information so obtained to the police, and the arrest] as herein alleged, _____ [*allege additional damages, e.g.,* plaintiff was discharged from his/her employment and his/her employer has failed and refused to reemploy him/her, notwithstanding the dismissal of the criminal charges as herein alleged,] to plaintiff's [further] damages in an as yet unascertained sum. Plaintiff will seek leave of court to amend this complaint to insert the correct amount thereof when ascertained.

[*AND*]

12. Plaintiff seeks treble damages in the amount of $_____, three times the amount of the actual damages sustained by such wrongful act[s] performed in violation of *Section 631(a) of the Penal Code*.

[*CONTINUE if injunctive relief desired*]

13. Injunctive relief is an appropriate remedy expressly authorized by *Section 637.2(b) of the Penal Code* in order to obtain the right of privacy as guaranteed by Article One, Section One, of the California Constitution.

14. Unless defendants, and each of them, are restrained by order of this court, plaintiff would have no adequate remedy at law since pecuniary compensation would not afford adequate relief.

15. Unless defendants, and each of them, are restrained by order of this court, it will be necessary for plaintiff to commence many successive actions against defendants, and each of them, to secure compensation for damages sustained, thus requiring a multiplicity of judicial proceedings, and plaintiff will be arbitrarily threatened with a continuing invasion of privacy by having his/her telephonic communications intercepted by wiretapping devices [, and by having information obtained from his/her telephonic communications being communicated to other persons].

WHEREFORE, plaintiff prays judgment against defendants as follows:

1. For a preliminary and a permanent injunction enjoining defendants, and each of them, from _____ [*specify each act or course of conduct defendants are to be prohibited from doing, commencing, continuing, maintaining, etc., e.g.,* (1) installing, or causing to be installed, or maintaining on plaintiff's telephone line an interception device, (2) intercepting telephone calls on plaintiff's telephone line, (3) learning the contents of intercepted calls on plaintiff's telephone line, and (4) communicating information obtained from interception of plaintiff's telephone line].

[*EITHER*]

2. Statutory damages in the sum of $5,000.

[*OR*]

2. Treble damages in the sum of $_____.

[3. Treble damages for loss of earnings according to proof].

[*CONTINUE*]

4. For costs of suit herein incurred.

5. For such other and further relief as the Court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 429.470.*]

CAUTION:

This complaint must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* .

[2] Use of Form

This form of complaint is for use in seeking a preliminary and permanent injunction and damages for any violation of *Penal Code § 631(a)*, which proscribes intentional wiretapping, willfully attempting to learn the contents or meaning of a communication in transit over a wire, and attempting to use or communicate information obtained as a result of engaging in either of those activities. The victim of a violation of *Penal Code § 631(a)* is entitled to bring a civil action for damages or for an injunction to restrain any violation of the wiretapping statute or for both. The plaintiff may be anyone who has been injured by a violation of *Penal Code § 631(a)*; he or she need not be a subscriber to telephone services in order to obtain recovery under this section. Damages and injunctive relief may be sought in the same action [*Penal Code § 637.2*; for further discussion of damages and injunctive relief, *see § 429.292[1]* and *[2]*].

In an action brought under *Penal Code § 631*, or any other law, the defendant has a complete defense to the action if he or she acted in good faith reliance on a court order issued under *Penal Code § 629 et seq.* [*see § 429.284*], regardless of whether the defendant is law enforcement personnel or is an employee of a public utility, landlord, custodian, or other person furnishing information, facilities, and technical assistance as directed by the order [*Penal Code § 629.41* (operation of this statute was suspended from January 1, 1996, through December 31, 1997, by *Penal Code § 629.48*); *Penal Code § 629.91* (repealed January 1, 1998, by *Penal Code § 629.98*)]. Thus, this form should not be used if wiretapping was authorized by court order pursuant to that Act.

[3] Allegations

The complaint alleges the following:

- The residence and capacity of the parties (Paragraphs 1 and 2) [*see Penal Code § 631(a)*].

- An optional allegation of agency (Paragraph 3).

- An optional allegation of fictitious names of defendants (Paragraph 4) [*see Code Civ. Proc. § 474*].

- An optional allegation that defendants have special knowledge and abilities relating to the tapping or connecting of wires (Paragraph 5) [*see Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 167, 177-178, 84 Cal. Rptr. 718, 465 P.2d 854]* .

- The time and manner of the defendant's actions creating an invasion of privacy (Paragraph 6) [*see Penal Code § 631(a)*; *Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 165, 84 Cal. Rptr. 718, 465 P.2d 854]* .

- Plaintiff's lack of consent (Paragraph 7) [*see Penal Code § 631(a)*; *Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 165, 84 Cal. Rptr. 718, 465 P.2d 854]* .

- Defendant's knowledge of the illegality of intercepting plaintiff's telephone calls (Paragraph 8) [*see Penal Code § 631(a)*; *Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 166, 84 Cal. Rptr. 718, 465 P.2d 854]* .

- For optional use, a paragraph regarding defendants' wrongful communication of information obtained through unlawful interception (Paragraph 9) [*see Penal Code § 631(a)*; *Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 166, 84 Cal. Rptr. 718, 465 P.2d 854]* .

- In the alternative, statutory or actual damages (Paragraphs 10-12) [*see Penal Code § 637.2(a)*; *Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 166, 84 Cal. Rptr. 718, 465 P.2d 854* ; *see also § 429.530[4]*].

- The express authority for injunctive relief (Paragraph 13) [*Penal Code § 637.2(b)*; *see § 429.530[5]*].

- The absence of any adequate remedy at law and the necessity for a multiplicity of suits (Paragraphs 14, 15) [*see Code Civ. Proc. § 526*].

[4] Damages

Any person who has been injured by violations of *Penal Code §§ 631-637.5* has a right to bring an action against the person who committed the violation. When the plaintiff's actual damages amount to more than$1,000, counsel should seek damages in the amount of three times the actual damages sustained [*Penal Code § 637.2(a)(2)*; *see also Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 166, 84 Cal. Rptr. 718, 465 P.2d 854]* . The "actual damages" referred to in the statute are only those damages relating directly to the act of surreptitious recording, or relating to the plaintiff learning of or trying to recover that recording, but not to any damages that may have been sustained because the recording was communicated to third parties [*Lieberman v. KCOP Television, Inc. (2003) 110 Cal. App. 4th 156, 167, 1 Cal. Rptr. 3d 536]* .

In the absence of actual damages, or if actual damages, when trebled, amount to less than $5,000, counsel should seek statutory damages in the amount of $5,000 [*Penal Code § 637.2(a)(1)*]. It is not a necessary prerequisite that the plaintiff suffer, or be threatened with, actual damages [*Penal Code § 637.2(c)*; *Ion Equip. Corp. v. Nelson (1980) 110*

Cal. App. 3d 868, 882, 168 Cal. Rptr. 361] . For discussion and forms relating to damages generally, *see* Ch. 177, *Damages* .

[5] Injunctive Relief

Any person may also bring an action in accordance with *Code Civ. Proc. § 525 et seq.* to enjoin or restrain any violation of *Penal Code §§ 630-637.5*. When seeking a permanent injunction, counsel should allege that plaintiff has no adequate remedy at law and that unless relief is granted, plaintiff would necessarily be required to entertain a multiplicity of suits as provided by *Code Civ. Proc. § 526* (*see* Paragraphs 11, 12). Counsel may include an allegation requesting that the order include a provision permitting the victim to record any prohibited communication made to him or her by the perpetrator [*Pen. Code § 633.6*]. An action for damages may be sought in the same action as that for injunctive relief [*Penal Code § 637.2(b)*]. For discussion and forms relating to injunctive relief generally, *see* Ch. 303, *Injunctions* .

[6] Verification

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc.§ 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order or preliminary injunction, *see* Ch. 303, *Injunctions* .

[7] Jurisdiction

An action seeking permanent injunctive relief is in the jurisdiction of the superior court as an unlimited civil case [*see Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.531

§ 429.531 Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. § 526] and for Damages [Penal Code § 637.2]--Unlawful Eavesdropping on or Recording of Confidential Communications [Penal Code § 632(a)]

[1] FORM Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. § 526] and for Damages [Penal Code § 637.2]--Unlawful Eavesdropping on or Recording of Confidential Communications [Penal Code § 632(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AND PRELIMIN-
_____ [*name*], [and DOES 1	)	ARY AND PERMANENT INJUNCTION
through _____,]	)	(Invasion of Privacy)
Defendant(s).	)	
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of plaintiff. See § 429.530, Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 429.530 Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 429.530, Paragraph 3.*]

[4. *Fictitious name allegation. See § 429.530, Paragraph 4.*]

5. _____ [On or about _____ (*date*), *or* Between _____ (*date*), and _____ (*date*), inclusive,] plaintiff _____ [*describe one or more conversations that were overheard or recorded and the circumstances indicating that they were confidential, e.g.,* spoke over the telephone with _____ (*name*), his/her attorney, concerning litigation in which _____ (*name*) was representing the plaintiff]. This/These confidential conversation(s) were willfully, deliberately, maliciously, and intentionally _____ [eavesdropped on *or* recorded] by defendant[s, and each of them,] by means of an electronic device in violation of *Section 632(a) of the Penal Code*.

6. At no time did defendant[s, or any of them,] or any other person, inform plaintiff of the _____ [eavesdropping on *or* recording of] plaintiff's _____ [*describe confidential communications, e.g.,* telephone communications made to and from plaintiff's home, which were made with the reasonable expectation that they were confidential and confined to the parties involved in the telephonic communications], and at no time did plaintiff consent to the _____ [eavesdropping on *or* recording of] his/her confidential communications.

[7. On said date(s) defendant(s, and each of them,) knowing that it was unlawful and a violation of plaintiff's right to privacy, intruded on plaintiff's privacy by willfully, deliberately, maliciously, and intentionally _____ (eavesdropping on *or* recording) plaintiff's confidential communications by means of an electronic device.]

[*EITHER, if plaintiff seeks statutory damages*]

8. Under the provisions of *Section 637.2(a)(1) of the Penal Code*, plaintiff claims statutory damages against defendants, and each of them, in the sum of $5,000 for violation of *Section 632(a) of the Penal Code*.

[*OR, if plaintiff alleges actual damages*]

8. As a proximate result of the _____ [eavesdropping on *or* recording of] plaintiff's confidential communications, _____ [*allege damages, e.g.,* plaintiff was charged with the commission of a number of felonies, arrested by the police at his place of employment, manacled, and taken into custody, although all charges were subsequently dismissed for insufficiency of the evidence,] all to plaintiff's general damage in the sum of $_____.

[*AND/OR*]

9. As a [further] proximate result of the wrongful _____ [eavesdropping on *or* recording of] plaintiff's confidential communications, _____ (*allege additional damages, e.g.,* plaintiff was discharged from his/her employment and his/her employer has failed and refused to reemploy him/her, notwithstanding the dismissal of the criminal charges as herein alleged,) to plaintiff's [further] damages in an as yet unascertained sum. Plaintiff will seek leave of court to amend this complaint to insert the correct amount thereof when ascertained.

[*AND*]

10. Plaintiff seeks treble damages in the amount of $_____, three times the amount of the actual damages sustained by such wrongful act[s] performed in violation of *Section 631(a) of the Penal Code*.

[*CONTINUE if injunctive relief is sought*]

11. Injunctive relief is an appropriate remedy expressly authorized by *Section 637.2(b) of the Penal Code* in order to obtain the right of privacy as guaranteed by Article One, Section One, of the California Constitution.

12. Unless defendants, and each of them, are restrained by order of this court, plaintiff would have no adequate remedy at law since pecuniary compensation would not afford adequate relief for the irretrievable loss of plaintiff's privacy.

13. Unless defendants, and each of them, are restrained by order of this court, it will be necessary for plaintiff to commence many successive actions against defendants, and each of them, to secure compensation fordamages sustained, thus requiring a multiplicity of judicial proceedings, and plaintiff will be arbitrarily threatened with the continuing invasion of his/her privacy by having his/her confidential communications wrongfully _____ [eavesdropped on *or* recorded] by means of electronic devices.

WHEREFORE, plaintiff prays judgment against defendants as follows:

1. For a preliminary and a permanent injunction enjoining defendants, and each of them, from _____ [eavesdropping on *or* recording *or* eavesdropping on or recording] plaintiff's confidential communications by electronic or other device.

[*EITHER*]

2. Statutory damages in the sum of $5,000.

[*OR*]

2. Treble damages in the sum of $_____.

[3. Treble damages for loss of earnings according to proof.]

[*CONTINUE*]

4. For costs of suit herein incurred.

5. For such other and further relief as the Court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 429.470.*]

CAUTION:

This complaint must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* .

[2] Use of Form

This form of complaint is for use in seeking a preliminary and permanent injunction and damages for any violation of *Penal Code § 632(a)*, which prohibits eavesdropping on or recording of confidential communications without the consent of all parties to the communication. The victim of a violation of *Penal Code § 632(a)* is entitled to bring a civil action for damages or for an injunction to restrain any violation of that statute, or for both. Damages and injunctive relief may be sought in the same action [*Penal Code § 637.2*]; for further discussion of damages and injunctive relief, *see § 429.292[1]* and *[2]*.

[3] Allegations

This complaint alleges the following: (1) the residence and capacity of the parties (Paragraphs 1 and 2) [*see Penal Code § 632(a)*]; (2) the defendant's eavesdropping on or recording of a communication or communications and the circumstances showing the confidential nature of the communication or communications (Paragraph 5) [*see Penal Code § 632(a)*; *Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 165, 84 Cal. Rptr. 718, 465 P.2d 854]* ; (3) plaintiff's lack of consent (Paragraph 6) [*see Penal Code § 632(a)*; *Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 165, 84 Cal. Rptr. 718, 465 P.2d 854]* ; (4) for use as an optional paragraph, defendants' knowledge of illegality of actions of invasion of privacy by eavesdropping on or recording plaintiff's confidential communications (Paragraph 7) [*see Penal Code § 632(a)*; *Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 166, 84 Cal. Rptr. 718, 465 P.2d 854]* ; (5) for use as alternative paragraphs, statutory or actual damages (Paragraphs 8-10) [*see Penal Code § 637.2(a)*; *Pacific Tel. & Tel. Co. v. Superior Court (1970) 2 Cal. 3d 161, 166, 84 Cal. Rptr. 718, 465 P.2d 854]* ; (6) the express authority for injunctive relief (Paragraph 11) [*Penal Code § 637.2(b)*; *see also § 429.530[5]*]; and (7) the absence of any adequate remedy at law and the necessity for a multiplicity of suits (Paragraphs 12, 13) [*see Code Civ. Proc. § 526*].

[4] Confidential Communication

Whether or not a communication is confidential depends on whether the circumstances reasonably indicate that any party to the communication desires it to be confined to the parties having the communication or are such that the parties to the communication may reasonably expect that the communication may be overheard or recorded [*see Penal Code § 632*; *Warden v. Kahn (1979) 99 Cal. App. 3d 805, 815, 160 Cal. Rptr. 471* ; for specific exclusions from confidentiality, *see § 429.281[2]*]. This is a question of fact [*see Warden v. Kahn (1979) 99 Cal. App. 3d 805, 815, 160 Cal. Rptr. 471* (telephone conversation between attorney and client); *People v. Pedersen (1978) 86 Cal. App. 3d 987, 994, 150 Cal. Rptr. 577* (meeting of partners and accountants not confidential)].

[5] Participant Recording

A participant to a private communication can also violate *Penal Code § 632(a)* through the unauthorized recording of the communication. *Penal Code § 632(c)* provides that a communication is confidential whenever one party to the communication can show that he or she expected that underthe circumstances of the communication, it would be confined to the parties involved in the communication [*see § 429.531[4]*; *see also People v. Gibbons (1989) 215 Cal. App. 3d 1204, 1209, 263 Cal. Rptr. 905* (participant in sex act recorded incident with hidden video camera)].

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37-429 California Forms of Pleading and Practice--Annotated § 429.532

§ 429.532 Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. § 526] and for Damages [Penal Code § 637.2]--Unlawful Eavesdropping on or Recording of Privileged Communications of Person in Custody [Penal Code § 636]

[1] FORM Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. § 526] and for Damages [Penal Code § 637.2]--Unlawful Eavesdropping on or Recording of Privileged Communications of Person in Custody [Penal Code § 636]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DAMAGES AND PRELIMIN-
[and DOES 1 through _____,]	)	ARY AND PERMANENT INJUNCTION
Defendant(s).	)	(Invasion of Privacy)
	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 429.530, Paragraph 2.*]

[2. *Agency allegation, if appropriate. See § 429.530, Paragraph 3.*]

[3. *Fictitious name allegation. See § 429.530, Paragraph 4.*]

4. _____ [On or about _____ (*date*), *or* Between _____ (*date*), and _____ (*date*), inclusive,] _____ [*allege custody or presence on public agency's property, e.g.,* plaintiff was in the custody of the _____City Police at the _____ City Jail].

5. _____ [*Allege confidential conversation or conversations, e.g.,* On or about _____ (*date*), and on or about _____ (*date*), plaintiff had two confidential conversations with his/her _____ (attorney *or* religious advisor *or* physician) in a room provided by the _____ City Jail specifically for confidential communications].

6. Defendant[s and each of them,] willfully, deliberately, maliciously, and intentionally _____ [eavesdropped *and/or* recorded] by means of an electronic or other device the above-described confidential conversation(s) between plaintiff and his/her _____ [attorney *or* religious adviser *or* physician] in violation of *Section 636 of the Penal Code*.

7. At no time did defendant[s, or any of them,] or any other person, inform plaintiff [or his/her _____ (attorney *or* religious adviser *or* physician)] of the _____ (eavesdropping on *or* recording of) the above-described confidential conversation(s), and at no time did the plaintiff consent to the_____(eavesdropping on *or* recording of *or* eavesdropping on or recording of) his/her privileged communications.

[8. On the above-mentioned date(s) defendants, and each of them, knowing that it was unlawful and a violation of plaintiff's right to privacy, intruded on plaintiff's privacy by willfully, deliberately, maliciously, and intentionally _____ (eavesdropping on *or* recording) plaintiff's confidential communications by means of an electronic or other device].

[*EITHER, if plaintiff seeks statutory damages*]

9. Under the provisions of *Section 637.2(a)(1) of the Penal Code*, plaintiff claims statutory damages against defendants, and each of them, in the sum of $5,000 for violation of *Section 632(a) of the Penal Code*.

[*OR, if plaintiff alleges actual damages*]

9. As a proximate result of the _____ [eavesdropping on *or* recording of] plaintiff's confidential conversation(s), _____ [*allege damages, e.g.,* plaintiff was charged with the commission of a number of felonies, arrested by the police at his place of employment, mannacled, and taken into custody, although all charges were subsequently dismissed for insufficiency of the evidence,] all to plaintiff's general damage in the sum of $_____.

[*AND/OR*]

10. As a (further) proximate result of the wrongful _____ [eavesdropping on *or* recording of] plaintiff's confidential communications, _____ (*allege additional damages, e.g.,* plaintiff was discharged from his/her employment and his/her employer has failed and refused to reemploy him/her, notwithstanding the dismissal of the criminal charges as herein alleged,) to plaintiff's further damages in an as yet unascertained sum. Plaintiff will seek leave of court to amend this complaint to insert the correct amount thereof when ascertained.

[*AND*]

11. Plaintiff seeks treble damages in the amount of $_____, three times the amount of the actual damages sustained by such wrongful act[s] performed in violation of *Section 631(a) of the Penal Code*.

12. Injunctive relief is an appropriate remedy expressly authorized by *Section 637.2(b) of the Penal Code* in order to obtain the right of privacy as guaranteed by *Article 1, Section 1, of the California Constitution*.

13. Unless defendant[s, and each of them,] are restrained by order of this court, plaintiff would have no adequate remedy at law since pecuniary compensation would not afford adequate relief.

14. Unless defendants, and each of them, are restrained by order of this court, it will be necessary for plaintiff to commence many successive actions against defendants, and each of them, to secure compensation for damages sustained, thus requiring a multiplicity of judicial proceedings, and plaintiff will be arbitrarily threatened with _____ [*specify injury, e.g.*, having his/her confidential communications subjected to the wrongful _____ [eavesdropping on or recording of] his/her confidential communications by means of electronic devices.

WHEREFORE, plaintiff prays judgment against defendants as follows:

1. For a preliminary and a permanent injunction enjoining defendants, and each of them, from _____ [eavesdropping on *or* recording *or* eavesdropping on and recording] plaintiff's conversations with _____ [*name*] by means of an electronic or other device.

[*EITHER*]

2. Statutory damages in the sum of $5,000.

[*OR*]

3. Treble damages in the sum of $_____.

[4. Treble damages for loss of earnings according to proof.]

5. For costs of suit herein incurred.

6. For such other and further relief as the Court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 429.470.*]

CAUTION:

This complaint must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* .

[2] Use of Form

This form of complaint is for use in seeking a preliminary and permanent injunction and damages for any violation of *Penal Code § 636*, which prohibits eavesdropping on or recording of conversations between a person in custody and his or her attorney, physician, or religious adviser without the consent of all the parties to the communication. The victim of a violation of *Penal Code § 636* is entitled to bring a civil action for damages,or an injunction to restrain any violation of that statute, or both. Damages and injunctive relief may be sought in the same action [*Penal Code § 637.2*].

[3] Allegations

This complaint alleges the following: (1) the residence and capacity of defendant (Paragraph 1) [*see Penal Code § 636*]; (2) for optional use, agency (Paragraph 2) [*see Code Civ. Proc. § 474*]; (3) for optional use, to allege fictitious names of defendants (Paragraph 3); (4) a conversation between a person on public property or in the custody of a law enforcement or other officer and that person's attorney, religious adviser, or licensed physician (Paragraph 4) [*see Penal Code § 636*]; (5) the eavesdropping on or recording of that conversation by the defendant (Paragraph 6) [*see Penal Code § 636*]; (6) the parties' lack of consent (Paragraph 7) [*see Penal Code § 636*]; (7) for optional use, defendants' knowledge of illegality eavesdropping on or recording plaintiff's privileged communications (Paragraph 8) [*see Penal Code § 636*]; (8) for use as alternative paragraphs, statutory or actual damages (Paragraphs 9-11) [*see Penal Code § 637.2(a)*]; (9) the express authority for injunctive relief (Paragraph 12) [*Penal Code § 637.2(b)*]; (10) the absence of any adequate remedy at law and the necessity for a multiplicity of suits (Paragraphs 12, 13) [*see Code Civ. Proc. § 526*].

[4] Extent of Protection Under Penal Code § 636

Penal Code § 636 applies only to conversations between a person who is in the physical custody of a law enforcement officer or other public officer or who is on the property of a law enforcement agency or other public agency [*Penal Code § 636*]. Only privileged conversations between a person and his or her attorney, religious adviser, or physician are protected by *Penal Code § 636*. Conversations between spouses in correctional facilities are not within the purview of the statute [*North v. Superior Court (1972) 8 Cal. 3d 301, 311-312, 312 n. 6, 104 Cal. Rptr. 833, 502 P.2d 1305]* . A person in custody, or his or her spouse, may, however, be able to seek damages or injunctive relief against the monitoring of their jailhouse conversations under either *Penal Code § 631(a)* (wiretapping) [*see § 429.530*], or *Penal Code § 632(a)* (eavesdropping or recording) [*see § 429.531*], whichever is appropriate. Relief may be available if he or she can show that the monitoring practice used was not necessary for the reasonable maintenance of jail security [*see Penal Code §§ 2600, 2601*; *De Lancie v. Superior Court (1982) 31 Cal. 3d 865, 875, 183 Cal. Rptr. 866, 647 P.2d 142] , superseded by statute as stated in People v. Lloyd (2002) 27 Cal. 4th 997* or that the conduct by the custodial officials in allowing them to speak together under private or semi-private conditions created a reasonable expectation of privacy. [*North v. Superior Court (1972) 8 Cal. 3d 301, 311-312, 104 Cal. Rptr. 833, 502 P.2d 1305]* .

[5] Alternative Remedy Challenging Monitoring Practices of Persons Not Covered by Penal Code § 636

Injunctive and declaratory relief is available for persons in custody to challenge surveillance practices such as monitoring conversations between inmates and visitors, or between inmates themselves, in either city or county jails, or

state correctional facilities [*DeLancie v. Superior Court (1982) 31 Cal. 3d 865, 870-877, 183 Cal. Rptr. 866, 647 P.2d 142] , superseded by statute as stated in People v. Lloyd (2002) 27 Cal. 4th 997* . Persons confined in state prisons or county jails have certain rights, including the right to personal visits subject to such restrictions as are necessary to the reasonable security of the institution [*see Penal Code § 2601*; *DeLancie v. Superior Court (1982) 31 Cal. 3d 865, 870-877, 183 Cal. Rptr. 866, 647 P.2d 142 , superseded by statute as stated in People v. Lloyd (2002) 27 Cal. 4th 997* ; *see also Penal Code § 2600*]. Relief under *Penal Code § 2600*, however, is not available for causes of action arising before the decision in *Delancie* was announced on July 8, *Donaldson v. Superior Court (1983) 35 Cal. 3d 24, 27, 39, 196 Cal. Rptr. 704, 672 P.2d 110* ; for further discussion of prisoner's rights, *see* Ch. 114, *Civil Rights: Prisoners' Rights*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.533

§ 429.533 Allegations--Unlawful Invasion of Privacy Against Public Utility and Its Employees--By Telephone Customer

[1] FORM Allegations--Unlawful Invasion of Privacy Against Public Utility and Its Employees--By Telephone Customer

1. Defendant _____ [*name of public utility*] is, and at all times herein mentioned was, a corporation organized and existing under the laws of California with its principal office for the transaction of business in _____ County, and engaged in operating a telephone communication system doing business in California, including _____ County.

[2. Defendants _____ [*names*] are, and at all times herein mentioned were, the agents, servants, and employees of defendant _____ [*name of public utility*] and, doing the things herein mentioned, were acting within the scope of said agency and employment.]

[2] Use of Form

These allegations of the defendants' capacity and residence are for use in a complaint by a telephone customer seeking preliminary and permanent injunctive relief and damages against a public utility for invasion of privacy in violation of *Penal Code §§ 630-637.5*. The optional allegation may be included when counsel wishes to include agents and employees of the public utility as defendants. The allegations may be used in lieu of Paragraph 2 in §§ 429.530-429.532, 429.538 and 429.539.

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37-429 California Forms of Pleading and Practice--Annotated § 429.534

§ 429.534 Allegations--Unlawful Invasion of Privacy Against Public Entity and Its Employees--By Telephone User

[1] FORM Allegations--Unlawful Invasion of Privacy Against Public Entity and Its Employees--By Telephone User

1. Defendant _____ [*name of public entity*] is, and at all times herein mentioned was, a public entity organized and existing under the laws of California.

[2. Defendants _____ [*names*] are, and at all times herein mentioned were, the agents, and employees of defendant _____ [*name of public entity*] and, doing the things herein mentioned, were acting within the course and scope of said agency and employment.]

[2] Use of Form

These allegations of the defendants' capacity are for use in a complaint by a telephone customer seeking a preliminary and permanent injunction, as well as damages, against a public entity for invasion of privacy in violation of *Penal Code §§ 630-637.5*. The optional allegation may be included when counsel wishes to include agents and employees of the public entity as defendants. The allegations may be used in lieu of Paragraph 2 in §§ 429.530-429.532, 429.538 and 429.539.

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37-429 California Forms of Pleading and Practice--Annotated § 429.535

§ 429.535 Allegation--Wrongful Disclosure of Telegraphic or Telephonic Communication [Penal Code § 637]

[1] FORM Allegation--Wrongful Disclosure of Telegraphic or Telephonic Communication [Penal Code § 637]

1. On or about _____ [*date*], defendants, and each of them, willfully and without plaintiff's consent, [and without a lawful court order,] disclosed the contents of a _____ [telegraphic *or* telephonic] message addressed to plaintiff in violation of *Section 637 of the Penal Code*.

[2] Use of Form

This allegation is for use in a complaint by a plaintiff seeking preliminary and permanent injunctive relief and damages for wrongful disclosure of a telegraphic or telephonic message addressed to him or her in violation of *Penal Code § 637*. This allegation may be inserted after Paragraph 5 in §§ 429.530 and 429.531 to state a cause of action for wrongful disclosure. It may also be inserted after Paragraph 7 in § 429.538.

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37-429 California Forms of Pleading and Practice--Annotated § 429.536

§ 429.536 Allegations--Wrongful Obtaining of Telegraphic or Telephonic Communication Addressed to Another [Penal Code § 637.1]

[1] FORM Allegations--Wrongful Obtaining of Telegraphic or Telephonic Communication Addressed to Another [Penal Code § 637.1]

[*EITHER*]

1. On or about _____ [*date*], defendant[s, and each of them,] willfully and without plaintiff's consent, [and without authority] opened a sealed envelope containing a _____ [telegraphic *or* telephonic] message addressed to plaintiff with the purpose of learning the contents of the message in violation of *Section 637.1 of the Penal Code*.

[*OR*]

1. On or about _____ [*date*], defendant fraudulently represented plaintiff and thereby procured to be delivered to him/her a _____ [telegraphic *or* telephonic] message with the intent to use, destroy, or detain the message from plaintiff, the person entitled to receive the message in violation of *Section 637.1 of the Penal Code*.

[2] Use of Form

These allegations are for use in a complaint by a plaintiff seeking preliminary and permanent injunctive relief and damages for wrongfully obtaining a telegraphic or telephonic message addressed to plaintiff in violation of *Penal Code § 637.1*. The allegations may be inserted after or in lieu of Paragraph 5, as appropriate, in §§ 429.530 and 429.531 to state a cause of action for the wrongful obtaining of a message. It may also be inserted after Paragraph 7 in § 429.538.

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37-429 California Forms of Pleading and Practice--Annotated § 429.537

§ 429.537 Allegations--Unlawful Trespassing for Purpose of Committing Invasion of Privacy [Penal Code § 634]

[1] FORM Allegations--Unlawful Trespassing for Purpose of Committing Invasion of Privacy [Penal Code § 634]

1. At all times herein mentioned, plaintiff is and was _____ [*specify, e.g.,* the owner] in possession of certain real property located in _____ County, California, described as follows: _____ [*legal description*] [, and commonly known as _____ (address)].

[*EITHER*]

2. On or about _____ [*date*], defendant[s, and each of them,] entered on plaintiff's premises without right and without plaintiff's consent for the purpose of _____ [*specify, e.g.,* tapping or making an unauthorized connection with plaintiff's telephone in violation of *Section 631(a) of the Penal Code*].

[*OR*]

2. On or about _____ [*date*], defendant[s, and each of them,] entered on plaintiff's premises without right and without plaintiff's consent for the purpose of _____ [*specify, e.g.,* eavesdropping on and/or making a recording of plaintiff's confidential communications in violation of *Section 632(a) of the Penal Code*].

[*OR*]

2. On or about _____ [*date*], defendant[s, and each of them,] entered on plaintiff's premises without right and without plaintiff's consent for the purpose of _____ [*specify, e.g.,* intercepting and/or receiving plaintiff's cellular radio telephone communication(s) in violation of *Section 632.5(a) of the Penal Code*].

[2] Use of Form

These allegations are for use in a complaint by a plaintiff seeking preliminary and permanent injunctive relief and damages for trespass on his or her property for the purpose of committing an invasion of privacy in violation of *Penal Code § 631(a), 632(a), 632.5(a),* or *632.6(a)* [*Penal Code § 634*]. The allegation of plaintiff's possession of the property in Paragraph 1 may be used in lieu of Paragraph 1 in §§ 429.530, 429.531, and 429.538. The first Paragraph 2 is for use with § 429.530 and should be inserted after Paragraph 4 of that form. The second Paragraph 2 is for use with § 429.531 and should be inserted after Paragraph 4 of that form. The third Paragraph 2 is for use with § 429.538 and should be inserted after Paragraph 4 of that form.

[3] Cross References

For discussion and forms relating to trespass generally, *see* Ch. 550, *Trespass* .

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37-429 California Forms of Pleading and Practice--Annotated § 429.538

§ 429.538 Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. § 526] and for Damages [Penal Code § 637.2]--Unlawful Interception or Reception of Cellular Radio Telephone Communications [Penal Code § 632.5]

[1] FORM Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. § 526] and for Damages [Penal Code § 637.2]--Unlawful Interception or Reception of Cellular Radio Telephone Communications [Penal Code § 632.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AND PRELIMIN-
_____ [*name*] [and DOES 1	)	ARY AND PERMANENT INJUNCTION
through _____],	)	(Invasion of Privacy)
Defendant(s).	)	
	)	

Plaintiff alleges:

1. _____ [*Allege plaintiff's residence and capacity, e.g.,* Plaintiff is, and at all times herein mentioned was, a resident of _____ (*city*), California, and on or about _____ [*date*] (through on or about _____ (*date*)), was a subscriber to a cellular radio telephone having a private line with the number _____ (*cellular radio telephone number*)].

2. [*Capacity and residence of defendant. See § 429.530, Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 429.530, Paragraph 3.*]

[4. *Fictitious name allegation, if appropriate. See § 429.530, Paragraph 4.*]

5. _____ [On or about _____ (*date*), *or* Between _____ (*date*), and _____ (*date*), inclusive,] plaintiff _____ [*describe one or more communications that were intercepted or received, e.g.,* spoke over the cellular radio telephone with _____ (*name*) on a _____ (landline telephone *or* another cellular radio telephone), concerning _____]. This/These communication[s] was/were maliciously _____ [intercepted *and/or* received] by _____ [*name(s) of defendant(s)*].

[6. _____ (On or about _____ (*date*), *or* Between _____ (*date*), and _____ (*date*), inclusive,) _____ (*name(s) of assisting defendant(s)*) assisted _____ (*name(s) of intercepting or receiving defendant(s)*) in _____ (intercepting *and/or* receiving) the above-described cellular radio telephone communication(s).]

7. At no time did plaintiff consent to the _____ [interception *and/or* reception] of his/her cellular radio telephone communication(s).

[*EITHER, if plaintiff seeks statutory damages*]

8. Under the provisions of *Section 637.2(a)(1) of the Penal Code*, plaintiff claims statutory damages against defendants, and each of them, in the sum of $5,000 for violation of *Section 632.5(a) of the Penal Code*.

[*OR, if plaintiff alleges actual damages*]

8. As a proximate result of the _____ [interception *and/or* reception] of plaintiff's cellular radio telephone communication(s), _____ [*allege damages, e.g.,* plaintiff was charged with the commission of a number of felonies, arrested by the police at his/her place of employment, manacled, and taken into custody, although all charges were subsequently dismissed for insufficiency of the evidence,] all to plaintiff's general damage in the sum of $_____.

[*AND/OR*]

9. As a [further] proximate result of the wrongful _____ [interception *and/or* reception] of plaintiff's cellular radio telephone communication[s], _____ [*allege additional damages, e.g.,* plaintiff was discharged from his/her employment and his/her employer has failed and refused to reemploy him/her, notwithstanding the dismissal of the criminal charges as herein alleged,] to plaintiff's [further] damages in an as yet unascertained sum. Plaintiff will seek leave of court to amend this complaint to insert the correct amount thereof when ascertained.

[*AND*]

10. Plaintiff seeks treble damages in the amount of $_____, three times the amount of the actual damages sustained by the[se] wrongful act[s] performed in violation of *Section 632.5(a) of the Penal Code*.

[*CONTINUE*]

11. Injunctive relief is an appropriate remedy expressly authorized by *Section 637.2(b) of the Penal Code* in order to obtain the right of privacy as guaranteed by *California Constitution, Article I, Section 1*.

12. Unless defendants, and each of them, are restrained by order of this court, plaintiff would have no adequate remedy at law since pecuniary compensation would not afford adequate relief for the irretrievable loss of plaintiff's privacy.

13. Unless defendants, and each of them, are restrained by order of this court, it will be necessary for plaintiff to commence many successive actions against defendants, and each of them, to secure compensation for damages sustained, thus requiring a multiplicity of judicial proceedings, and plaintiff will be arbitrarily threatened with the continuing invasion of his/her privacy by having his/her cellular radio telephone communications wrongfully _____ [intercepted *and/or* received] by the defendants.

WHEREFORE, plaintiff prays judgment against defendants as follows:

1. For a preliminary and a permanent injunction enjoining defendants, and each of them, from intercepting or receiving, or from assisting in the interception or reception of, plaintiff's cellular radio telephone communications.

2. _____ [Statutory damages in the sum of $5,000 *or* Treble damages in the sum of $_____].

[3. Treble damages for loss of earnings according to proof.]

4. For costs of suit herein incurred.

5. For such other and further relief as the Court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 429.470.*]

CAUTION:

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . An action seeking permanent injunctive relief is in the jurisdiction of the superior court and is not a limited civil case [*see Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*]. For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

[2] Use of Form

This form of complaint is for use in seeking a preliminary and permanent injunction and damages for any violation of *Penal Code § 632.5(a)*, which prohibits a person from maliciously intercepting or receiving, or assisting a person in intercepting or receiving, a communication transmitted between cellular radio telephones or between any cellular radio telephone and a landline telephone, without the consent of all parties to the communication. The victim of a violation of *Penal Code § 632.5(a)* is entitled to bring a civil action for damages or for an injunction to restrain any violation of that statute, or for both. Damages and injunctive relief may be sought in the same action [*Penal Code § 637.2*; *see § 429.530[4], [5]*].

[3] Allegations

This complaint alleges the following:

- The residence and capacity of the parties (Paragraphs 1 and 2) [*see Penal Code § 632.5(a)*].

- The defendant's intercepting or receiving a cellular radio telephone communication, or assistance in the interception or reception of a communication (Paragraphs 5 and 6) [*see Penal Code § 632.5(a)*].

- Plaintiff's lack of consent (Paragraph 7) [*see Penal Code § 632.5(a)*].

- For use as alternative paragraphs, statutory or actual damages (Paragraphs 8-10) [*see Penal Code § 637.2(a)*].

- The express authority for injunctive relief (Paragraph 11) [*Penal Code § 637.2(b)*; *see § 429.530[5]*].

- Grounds for both permanent and preliminary injunctive relief (Paragraphs 12, 13) [*see Civ. Code § 3422*; *Code Civ. Proc. § 526*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.539

§ 429.539 Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. § 526] and for Damages [Penal Code § 637.2]--Unlawful Interception or Reception of Cordless Telephone Communications [Penal Code § 632.6]

[1] FORM Complaint for Preliminary [Code Civ. Proc. § 527(a)] and Permanent Injunction [Code Civ. Proc. § 526] and for Damages [Penal Code § 637.2]--Unlawful Interception or Reception of Cordless Telephone Communications [Penal Code § 632.6]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AND PRELIMIN-
_____ [*name*] [and DOES 1	)	ARY AND PERMANENT INJUNCTION
through _____],	)	(Invasion of Privacy)
Defendant(s).	)	
	)	

Plaintiff alleges:

1. _____ [*Allege plaintiff's residence and capacity, e.g.,* Plaintiff is, and at all times herein mentioned was, a resident of _____ (*city*), California, and on or about _____ [*date*] (through on or about _____ (*date*)), was a subscriber to a cordless telephone having a private line with the number _____ (*cordless telephone number*)].

2. [*Capacity and residence of defendant. See § 429.530, Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 429.530, Paragraph 3.*]

[4. *Fictitious name allegation, if appropriate. See § 429.530, Paragraph 4.*]

5. _____ [On or about _____ (*date*), *or* Between _____ (*date*), and _____ (*date*), inclusive,] plaintiff _____ [*describe one or more communications that were intercepted or received, e.g.,* spoke over the cordless telephone with _____ (*name*) on a _____ (landline telephone *or* another cordless telephone *or* a cellular radio telephone), concerning _____]. This/These communication [s] was/were maliciously _____ [intercepted *and/or* received] by _____ [*name(s) of defendant(s)*].

[6. _____ (On or about _____ (*date*), *or* Between _____ (*date*), and _____ (*date*), inclusive,) _____ (*name(s) of assisting defendant(s)*) assisted _____ (*name(s) of intercepting or receiving defendant(s)*) in _____ (intercepting *and/or* receiving) the above-described cordless telephone communication(s).]

7. At no time did plaintiff consent to the _____ [interception *and/or* reception] of his/her cordless telephone communication(s).

[*EITHER, if plaintiff seeks statutory damages*]

8. Under the provisions of *Section 637.2(a)(1) of the Penal Code*, plaintiff claims statutory damages against defendants, and each of them, in the sum of $5,000 for violation of *Section 632.6(a) of the Penal Code*.

[*OR, if plaintiff alleges actual damages*]

8. As a proximate result of the _____ [interception *and/or* reception] of plaintiff's cordless telephone communication(s), _____ [*allege damages, e.g.,* plaintiff was charged with the commission of a number of felonies, arrested by the police at his/her place of employment, manacled, and taken into custody, although all charges were subsequently dismissed for insufficiency of the evidence,] all to plaintiff's general damage in the sum of $_____.

[*AND/OR*]

9. As a [further] proximate result of the wrongful _____ [interception *and/or* reception] of plaintiff's cordless telephone communication[s], _____ [*allege additional damages, e.g.,* plaintiff was discharged from his/her employment and his/her employer has failed and refused to reemploy him/her, notwithstanding the dismissal of the criminal charges as herein alleged,] to plaintiff's [further] damages in an as yet unascertained sum. Plaintiff will seek leave of court to amend this complaint to insert the correct amount thereof when ascertained.

[*AND*]

10. Plaintiff seeks treble damages in the amount of $_____, three times the amount of the actual damages sustained by the[se] wrongful act[s] performed in violation of *Section 632.6(a) of the Penal Code*.

[*CONTINUE*]

11. [*Statutory authority for injunctive relief. See § 429.538, Paragraph 11.*]

12. [*Inadequate legal remedy. See § 429.538, Paragraph 12.*]

13. Unless defendants, and each of them, are restrained by order of this court, it will be necessary for plaintiff to commence many successive actions against defendants, and each of them, to secure compensation for damages sustained, thus requiring a multiplicity of judicial proceedings, and plaintiff will be arbitrarily threatened with the continuing invasion of his/her privacy by having his/her cordless telephone communications wrongfully _____ [intercepted *and/or* received] by the defendants.

WHEREFORE, plaintiff prays judgment against defendants as follows:

1. For a preliminary and a permanent injunction enjoining defendants, and each of them, from intercepting or receiving, or from assisting in the interception or reception of, plaintiff's cordless telephone communications.

2. _____ [Statutory damages in the sum of $5,000 *or* Treble damages in the sum of $_____].

[3. Treble damages for loss of earnings according to proof.]

4. For costs of suit herein incurred.

5. For such other and further relief as the Court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 429.470.*]

CAUTION:

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . An action seeking permanent injunctive relief is in the jurisdiction of the superior court and is not a limited civil case [*see Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*]. For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

[2] Use of Form

This form of complaint is for use in seeking a preliminary and permanent injunction and damages for any violation of *Penal Code § 632.6(a)*, which prohibits a person from maliciously intercepting or receiving, or assisting a person in intercepting or receiving, a communication transmitted between cordless telephones, between any cordless telephone and a landline telephone, or between a cordless telephone and a cellular radio telephone, without the consent of all parties to the communication. The victim of a violation of *Penal Code § 632.6(a)* is entitled to bring a civil action for damages or for an injunction to restrain any violation of that statute, or for both. Damages and injunctive relief may be sought in the same action [*Penal Code § 637.2*; *see § 429.530[4], [5]*].

[3] Allegations

This complaint alleges the following:

- The residence and capacity of the parties (Paragraphs 1 and 2) [*see Penal Code § 632.6(a)*].

- The defendant's intercepting or receiving a cordless telephone communication, or assistance in the interception or reception of that communication (Paragraphs 5 and 6) [*see Penal Code § 632.6(a)*].

- Plaintiff's lack of consent (Paragraph 7) [*see Penal Code § 632.6(a)*].

- For use as alternative paragraphs, statutory or actual damages (Paragraphs 8-10) [*see Penal Code § 637.2(a)*].

- Grounds for both permanent and preliminary injunctive relief (Paragraph 13) [*see Civ. Code § 3422*; *Code Civ. Proc. § 526*].

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37-429 California Forms of Pleading and Practice--Annotated §§ 429.540-429.559

[Reserved]

§§ 429.540[Reserved]

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D. Federal Civil Rights Violations

37-429 California Forms of Pleading and Practice--Annotated § 429.560

§ 429.560 Complaint [Fed. R. Civ. P., Rule 7] in United States District Court for Damages and Injunction [Fed. R. Civ. P., Rule 65; 28 U.S.C.S. § 1343(4)] for Deprivation of Rights Under Color of State Law [42 U.S.C.S. § 1983] for Invasion of Privacy--Against State or Local Officials

[1] FORM Complaint [Fed. R. Civ. P., Rule 7] in United States District Court for Damages and Injunction [Fed. R. Civ. P., Rule 65; 28 U.S.C.S. § 1343(4)] for Deprivation of Rights Under Color of State Law [42 U.S.C.S. § 1983] for Invasion of Privacy--Against State or Local Officials

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF
CALIFORNIA, _____ DIVISION

_____ [*name*],	)	
Plaintiff,	)	Civil Action
vs.	)	File No. _____
_____ [*name*],	)	COMPLAINT AND DEMAND FOR JURY TRIAL
Defendant(s).	)	(Civil Rights)
	)	
	)	

1. This action arises under the Civil Rights Act of 1871 [*42 U.S.C.S. § 1983*] as hereinafter more fully appears. This court has jurisdiction under *28 U.S.C.S. § 1343*.

2. At all times herein mentioned, plaintiff was, and now is, a _____ [citizen *or* person within the

jurisdiction] of the United States, and resides at _____ [*address*], _____ [*city*], _____ County, California.

3. At all times hereinafter mentioned, defendant(s), _____ [*name(s*)], were _____ [*specify, e.g.,* law enforcement officers] in the _____ [*specify law enforcement agency, e.g.,* _____ (*name*) Police Department] and in doing all of the things hereinafter mentioned, acted under color of their authority as such, [and] under color of the statues, regulations, customs, and usages of the _____ [*specify, state, county, and/ local entities as appropriate, e.g.,* State of California, the City of _____ (*name*), and the aforementioned Police Department(*add, if municipality is included as defendant,* and pursuant to the official policy of defendant municipality as created by _____ (*specify, e.g.,* the defendant _____ (*name*), Chief of Police, acting under color of his/her authority as such)].

4. _____ [*Allege any background facts preceding the acts constituting invasion of privacy, e.g.,* On or about _____ (*date*), at about _____ (*time*), plaintiff came to the _____ Station of the Police Departmentof the City of _____ (*name*), to report an assault on her and was interviewed by defendant(s) _____ (*name(s)*)].

5. _____ [*Allege acts invading plaintiff's privacy, e.g.,* At that time, the above mentioned defendant(s) wrongfully invaded plaintiff's right of privacy by unlawfully and wrongfully taking, reproducing, and distributing photographs of plaintiff in the nude in various indecent positions after advising plaintiff that it was necessary to take photographs of her in the nudeand after asking plaintiff to undress and to assume various indecent positions, despite her objections thereto].

6. Plaintiff in no way consented _____ [*allege facts showing plaintiff's lack of consent to acts constituting invasion of privacy, e.g.,* to the taking, reproduction, and distribution of the above-mentioned photographs, and cooperated with the defendant(s) in the taking of the photographs only because she was directed to do so by the defendant(s) acting under the color of their authority and under the color of the statutes, ordinances, regulations, customs, and usages of the State of California, the (defendant) City of _____, and of the Police Department of the the City of _____].

7. By reason of the above-mentioned conduct of the defendant(s), plaintiff was deprived of rights, privileges, and immunities secured to him/her by the Constitution of the United States and laws enacted thereunder in that such conduct constituted an arbitrary intrusion by defendant(s) upon the security of plaintiff's privacy and was not authorized by law and was beyond his/her/their authority as police officers in that _____ [*allege facts showing acts constituting invasion of privacy, e.g.,* the photographing of plaintiff's naked body, and the distribution of the photographs, was unnecessary for law enforcement purposes for the reason that the photographs showed no injuries resulting from the reported assault on the plaintiff] and as a result of the above mentioned conduct, defendant(s) deprived plaintiff of life, liberty, and property without due process of law.

8. As a result of such deprivations of his/her rights caused by the above-mentioned conduct, plaintiff is entitled to relief under *Section 1983 of Title 42 of the United States Code*.

9. As a further result of the acts of the defendant(s), plaintiff _____ [*allege injuries and damages suffered, e.g.,* was subjected to humiliation and indignity and suffered great mental pain and suffering, to his/her damage in the sum of $_____].

[10. Defendant(s) did the things herein alleged maliciously and oppressively. Plaintiff is therefore entitled to exemplary and punitive damages in the sum of $_____.]

[11. Plaintiff is informed and believes and thereon alleges that defendant(s), _____ (*name(s)*), are

continuing to reproduce and distribute the photographs of defendant taken under color of authority and that defendant's (defendants') wrongful conduct will continue unless enjoined by this court. If defendant(s) (is or are) not restrained, plaintiff will suffer immediate and irreparable injury, loss, and damage in that _____ (*specify, e.g.,* plaintiff will continue to suffer humiliation and indignity resulting from the deprivation of his/her right to privacy and to continue to be prevented from transacting his/her business, and to suffer great physical and mental pain and suffering as a result of the continuing deprivation of his/her rights).]

WHEREFORE, plaintiff requests judgment as follows against defendant[s and each of them]:

[1. For a _____ (temporary restraining order, an order requiring defendant(s and each of them) to show cause, if any he/she/they _____ (has/have) why he/she/they should not be enjoined as hereinafter set out during the pendancy of this action, a preliminary injunction, and) permanent injunction, enjoining defendant(s and each of them), and _____ (its *or* their) agents, servants, officers and employees, and all persons acting in concert with, or for defendant(s) from _____ (*specify conduct to be enjoined, e.g.,* reproducing, distributing, or otherwise showing any of the photographs or copies of the photographs of plaintiff taken under color of authority at the time plaintiff reported an assault);]

2. That defendant(s) be required to pay to plaintiff damages in the sum of $_____;

[3. That defendant(s) be required to pay to plaintiff exemplary and punitive damages in the sum of $_____;]

4. That defendant(s) be required to pay to plaintiff attorney's fees pursuant to *Section 1988(b) of Title 42 of the United States Code*;

5. That defendant(s) be required to pay to plaintiff the cost of suit herein incurred; and

6. That plaintiff have such other and further relief as the court may deem proper.

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

DEMAND FOR JURY TRIAL

The plaintiff in the above-entitled action requests a trial by jury as provided by *Amendment VII of the United States Constitution* and by *Rule 38 of the Federal Rules of Civil Procedure.*

[*Verification, if desired. See § 429.500.*]

[2] Use of Form

This form of complaint is for use by a plaintiff in an action for damages for violation of *42 U.S.C.S. § 1983* on account of deprivation of rights under color of state law by a wrongful invasion of plaintiff's right to privacy.

[3] Allegations

The complaint alleges all of the following:

- Jurisdiction (Paragraph 1) [*Fed. R. Civ. P., Rule 8(a)(1)*].

- That the plaintiff is an individual protected by *42 U.S.C.S. § 1983* (Paragraph 2) [*York v. Story (9th Cir. 1963) 324 F.2d 450, 455]* .

- Facts showing that defendants are subject to *42 U.S.C.S. § 1983* by acting under color of law, and if there is a municipal defendant, pursuant to an official policy (Paragraph 3) [*Gomez v. Toledo (1980) 446 U.S. 635, 639-640, 100 S. Ct. 1920, 64 L. Ed. 2d 572* ; *Monell v. Department of Soc. Servs. (1978) 436 U.S. 658, 692-696, 98 S. Ct. 2018, 56 L. Ed. 2d 611]* .

- Facts showing the nature of defendants' wrongful conduct in depriving the plaintiff of protected rights, privileges, and immunities (Paragraphs 4, 5) [*York v. Story (9th Cir. 1963) 324 F.2d 450, 455]* .

- Facts showing the plaintiff's lack of consent to defendant's conduct and his or her submission to defendant's directions under the color of authority (Paragraph 6) [*York v. Story (9th Cir. 1963) 324 F.2d 450, 455]* .

- A description of plaintiff's civil rights that were violated by defendants' conduct (Paragraph 7) [*York v. Story (9th Cir. 1963) 324 F.2d 450, 455]* .

- The right to relief under *42 U.S.C.S. § 1982* and actual damages that the plaintiff has suffered (Paragraphs 8, 9) [*York v. Story (9th Cir. 1963) 324 F.2d 450, 455]* .

- The plaintiff's right to exemplary or punitive damages (Paragraph 10) [*see Pierce v. Stinson (E.D. Tenn. 1980) 493 F. Supp. 609, 611-612]* .

- For optional use, an allegation to support injunctive relief (Paragraph 11) [*see 42 U.S.C.S. § 3612(c)*].

[4] Punitive Damages Against Local Governments

Local government bodies are immune from liability for punitive damages under *42 U.S.C.S. § 1983* [*Newport v. Fact Concerts, Inc. 453 U.S. 247, 271, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981)* .

[5] State Remedies

A state's constitution and laws prohibiting unlawful intrustion into the privacy of its citizens do not bar a suit in a federal district court against a person who, under color of state law, custom, or usage, subjects another to the deprivation of any rights, privileges, or immunities secured by the Federal Constitution. The state remedy is supplemented by the federal remedy, and the state remedy need not be first sought and refused before the federal remedy is invoked [*Monroe v. Pape (1961) 365 U.S. 167, 81 S. Ct. 473, 183, 5 L. Ed. 2d 492* , *overruled on other grounds,* *Monell v. Department of Soc. Servs. (1978) 436 U.S. 658, 663, 98 S. Ct. 2018, 56 L. Ed. 2d 611]* .

[6] Demand for Jury Trial

A plaintiff seeking damages in an action for invasion of privacy may demand a jury trial [*see Turner v. Fouche (S.D. Ga. 1968) 290 F. Supp. 648, 652]* . In the federal district court, the demand is made by serving on the other parties a written demand for a jury trial at any time after the commencement of the action but not later than 10 days after the service of a pleading directed to an issue triable by right by a jury [*Fed. R. Civ. P., Rule 38(b)*].

U.S. Dist. Ct., Cen. Dist. of Cal., Rule 3.4.10.1, provides that any party may demand a jury trial as provided in *Fed. R. Civ. P., Rule 38(b)*, but the demand, if included in a pleading referred to in Rule 38(b), must be set forth at the end of the pleading and be signed by the attorney for the party making the demand. Rule 3.4.10.1 further provides that the caption of the pleading in which the demand is made must contain the words "DEMAND FOR JURY TRIAL" in capital letters. In the other districts, if the demand is made in the complaint, it is required to appear immediately following the title of the paper [U.S. Dist. Ct., East. Dist. of Cal., Rule 204; U.S. Dist. Ct., No. Dist. of Cal., Rule 200-4; U.S. Dist. Ct., So. Dist. of Cal., Rule 200-2].

[7] Local Government Immunity

Local government entities and their agencies have no immunity from damages liability flowing from their constitutional violations [*Owen v. City of Independence (1980) 445 U.S. 622, 657-658, 100 S. Ct. 1398, 63 L. Ed. 2d 673* ; *but see Monell v. Department of Soc. Servs. (1978) 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611]* .

[8] Verification

Verification of the complaint is not required [*see Fed. R. Civ. P., Rule 11(a)*], but if a temporary restraining order is sought, it must clearly appear from specific facts shown by affidavit or verified complaint that immediate and irreparable injury, loss, or damage will result if the order is not granted [*Fed. R. Civ. P., Rule 65*]. Hence, a form of verification is included.

[9] Cross References

For additional forms of jurisdictional allegations for complaints in federal courts, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For discussion, forms, and procedural guides relating to civil rights actions generally, see Ch. 112, *Civil Rights: Government-Funded Programs and Activities*

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37-429 California Forms of Pleading and Practice--Annotated § 429.561

§ 429.561 Affirmative Defense Allegation--Qualified Immunity for Acting in Good Faith

[1] FORM Affirmative Defense Allegation--Qualified Immunity for Acting in Good Faith

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that he/she is immune from any civil liability in the above-entitled action in that _____ [*specify, e.g.,* he/she had a good-faith belief that there existed reasonable and probable cause to believe that plaintiff had in his/her possession contraband in violation of *Section 11350 of the Health and Safety Code*].

[2] Use of Form

This affirmative defense is for insertion in an answer to a complaint based on deprivation of civil rights under *42 U.S.C.S. § 1983*. This defense is based on the doctrine of immunity for government officials who participated in the acts complained of as a violation of the plaintiff's civil rights, but did so in good faith [*see Commonwealth of Pennsylvania ex rel. Feiling v. Sincavage (3rd Cir. 1971) 439 F.2d 1133, 1134]* .

[3] Cross References

For discussion and forms of affirmative defense answers generally, see Ch. 26, *Answers* .

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37-429 California Forms of Pleading and Practice--Annotated § 429.562

§ 429.562 Complaint [Fed. R. Civ. P., Rule 7] in United States District Court for Damages for Unlawful Search and Seizure by Federal Officers Acting Under Color of Federal Authority [U.S. Const. Amend. IV]

[1] FORM Complaint [Fed. R. Civ. P., Rule 7] in United States District Court for Damages for Unlawful Search and Seizure by Federal Officers Acting Under Color of Federal Authority [U.S. Const. Amend. IV]

[*Caption. See § 429.560*]

1. This action arises under the *Fourth Amendment to the Constitution of the United States*, as hereinafter more fully appears. The matter in controversy exceeds, exclusive interest and costs, the sum of ten thousand dollars.

2. [*Allege plaintiff's capacity. See § 429.560, Paragraph 2*].

3. At all times hereinafter mentioned, defendant(s), _____ [*name(s)*], was/were _____ [*specify, e.g.,* federal agents employed by the _____ (*specify federal law enforcement agency*)], and in doing all the things hereinafter mentioned, acted under color of his/her/their federal authority and under color of the statutes, regulations, customs, and usages of the United States and the aforementioned _____ [agency].

[4. On or about _____ [*date*], at about _____ [*time*], plaintiff _____ (*allege any relevant facts relating to plaintiff's activities immediately preceding the alleged unconstitutional acts, e.g.,* and his/her wife/husband and three children were at plaintiff's apartment, Apartment No. _____, at _____ [*address*], _____ [*city*], California).]

5. On or about _____ [*date*], at about _____ [*time*], defendant[s, and each of them,] wrongfully violated plaintiff's constitutionally protected right to be free from unreasonable search and seizure in that defendant[s, and each of them,] _____ [*allege acts constituting an unreasonable search and seizure, e.g.,* entered his/her apartment without a search warrant and unlawfully searched plaintiff's apartment, and thereafter

without probable cause arrested plaintiff for narcotics violations and took plaintiff to _____ [*address*], _____ [*city*], California, where he/she was interrogated, fingerprinted, photographed, subjected to a visual strip search, and booked.

6. On _____ [*date*], _____ (*name*), United States Commissioner, dismissed the complaint that was filed against plaintiff for narcotics violations and related charges].

7. Plaintiff in no way _____ [*allege facts showing plaintiff's lack of consent to unreasonable search and seizure, or submission to con trol and custody of defendant only because defendant claimed to be acting pursuant to federal authority, e.g.,* consented to the search and seizure and submitted to the above-mentioned acts of the defendant(s, and each of them,) only after he/she/they displayed identification cards stating that he/she/they _____ (was *or* were) agents of the _____ (*federal agency*)].

8. The above-mentioned acts and conduct of the defendant[s, and each of them], claimed by him/her/them to be under federal authority, constituted an abuse of their federal authority and was not within his/her/their scope of employment as federal agent(s) in that _____ [*allege facts showing that defendants are not immune from liability, e.g.,* their acts and conduct were not based on the exercise or performance of a discretionary function or duty assumed by them as agent(s) of the _____ (*federal agency*) and were not acts and conduct done pursuant to the regulations of the _____ (*federal agency*)].

9. By reason of the plaintiff's presence on the premises and the above mentioned conduct of defendant[s, and each of them], plaintiff was deprived of his/her right to be secure in his/her privacy, person, house, papers, and effects against unreasonable searches and seizures by federal agents acting under color of federal authority, as guaranteed to him/her by the *Fourth Amendment to the Constitution of the United States*].

10. As a result of the deprivation of his/her rights, plaintiff _____ [*allege injuries or damages suffered, e.g.,* suffered great humiliation, embarassment, and mental anguish, all to his/her damage in the sum $_____].

WHEREFORE, plaintiff demands judgment as follows against defendant[s and each of them]:

1. That defendant(s) be required to pay to plaintiff damages in the sum of $_____;

2. That defendant(s) be required to pay to plaintiff the cost of suit herein incurred; and

3. That plaintiff have such other and further relief as the court may deem proper.

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Demand for jury trial, if desired. See § 429.560.*]

[*Verification, if desired. See § 429.500.*]

[2] Use of Form

This form of complaint is for use by a plaintiff in an action for damages for intrusion into plaintiff's privacy through an unlawful search and seizure by federal officials [*U.S. Const. amend. IV*; *Bivens v. Six Unknown Fed. Narcotics Agents (1971) 403 U.S. 388, 395-397, 91 S. Ct. 1999, 29 L. Ed. 2d 619]* .

[3] Allegations

This complaint alleges:

- Jurisdicton (Paragraph 1 [*Fed. R. Civ. P. Rule 8(a)(1)*];
- That plaintiff is an individual protected by the *Fourth Amendment* (Paragraph 2);
- Facts showing that defendants are subject to an action for money damages under the *Fourth Amendment* as acting under color of federal authority (Pargraph 3) [*Bivens v. Six Unknown Fed. Narcotics Agents (1971) 403 U.S. 388, 395-397, 91 S. Ct. 1999, 29 L. Ed. 2d 619]* ;
- For use as an optional allegation, plaintiff's activities prior to the search and seizure (Paragraph 4);
- Facts showing the nature of defendants' wrongful conduct in depriving plaintiff of right to privacy and to remain free from unreasonable search and seizure (Paragraphs 5, 6);
- Plaintiff's lack of consent to the search and seizure and/or submission to claimed authority (Paragraph 7);
- Facts showing that defendants are not immune from liability for their acts and conduct (Paragraph 8);
- A description of plaintiff's constitutional rights that were violated (Paragraph 9);
- The damages or injury that plaintiff suffered (Paragraph 10) [*Bivens v. Six Unknown Fed. Narcotics Agents (1971) 403 U.S. 388, 395-397, 91 S. Ct. 1999, 29 L. Ed. 2d 619]* .

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Chapter 429 PRIVACY
PART IV. FORMS
D. Federal Civil Rights Violations

37-429 California Forms of Pleading and Practice--Annotated § 429.563

§ 429.563 Complaint [Fed. R. Civ. P., Rule 7] in United States District Court for Wrongful Search and Seizure of Public Communication Work Product Materials by Government Officials and Employees [42 U.S.C.S. § 2000aa(a)]

[1] FORM Complaint [Fed. R. Civ. P., Rule 7] in United States District Court for Wrongful Search and Seizure of Public Communication Work Product Materials by Government Officials and Employees [42 U.S.C.S. § 2000aa(a)]

[*Caption. See § 429.560.*]

1. This action arises under the Privacy Protection Act of 1980 [*42 U.S.C.S. § 2000aa*] as hereinafter more fully appears. This court has jurisdiction under *42 U.S.C.S. § 2000aa-6(h)*.

2. [*Allege plaintiff's status and residency. See § 429.560, Paragraph 2*].

3. At all times hereinafter mentioned, defendant(s), _____ [*name(s)*], was/were _____ [*specify, e.g.,* law enforcement officer(s) in the United States Department of Justice] and in doing all of the things hereinafter mentioned, acted under color of his/her/their authority as such, and under color of the statutes, regulations, customs, usages, of the defendant United States and the aforementioned _____ [*specify, e.g.,* Department of Justice].

4. On or about _____ [*date*], defendant[s, and each of them,] _____ [*allege facts constituting wrongful search and seizure of public communication materials, e.g.,* entered plaintiff's place of business at _____ (*street address*), _____ (*city*), California, displayed Department of Justice badge(s), and indentification card(s); stated that he/she/they _____ (was *or* were) law enforcement agent(s), searched through plaintiff's effects, and seized and carried from the premises work product materials prepared by plaintiff in anticipation of writing and publishing a newspaper article for public distribution that included plaintiff's mental impressions, conclusions, and opinions relating to various matters of interest to the public regarding the involvement of defendant United States in the internal affairs of third world countries)].

5. Plaintiff in no way consented to defendant[s, and each of them,] _____ [*allege facts showing that plaintiff did not consent to search and seizure, and/or that plaintiff submitted to ostensible authority, e.g.,* entering into his/her premises or the subsequent search and seizure, but protested the same until he/she submitted to the above mentioned defendants under color of their federal authority]. [Defendants had no search or arrest warrants, and they did not arrest plaintiff.]

6. By reason of the defendant's (defendants') conduct described above, plaintiff was deprived of rights secured to him/her by the Constitution of the United States and by *Section 2000aa(a) of Title 42 of the United States Code* in that the search and seizure of plaintiff's work product materials intended for dissemination to the public were not authorized by law; there was no probable cause to believe that the plaintiff had committed or wascommitting a criminal offense relating to the work product materials; nor was there reason to believe that the immediate seizure of the materials was necessary to prevent the death of, or serious bodily injury to, a human being.

7. As a result of the deprivation(s) of his/her rights by defendant's (defendants') conduct in arbitrarily intruding into plaintiff's privacy and premises and depriving plaintiff of property without due process of law, plaintiff is entitled to damages in the amount of $_____.

WHEREFORE, plaintiff demands judgment as follows against defendant[s and each of them]:

1. That defendant(s) be required to pay to plaintiff damages in the sum of $_____;

2. That defendant(s) be required to pay to plaintiff the cost of suit herein incurred; and

3. That plaintiff have such other and further relief as the court may deem proper.

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Demand for jury trial, if desired. See § 429.560.*]

[*Verification, if desired. See § 429.500.*]

[2] Use of Form

This form of complaint is for use by a plaintiff in an action for damages for violation of *42 U.S.C.S. § 2000aa* on account of a wrongful search and seizure of public communication materials.

[3] Allegations

This complaint alleges:

- Jurisdiction (Paragraph 1) [*Fed. R. Civ. P., Rule 8(a)(1)*];

- The plaintiff's status and residency (Paragraph 2);

- Facts showing that defendants are subject to *42 U.S.C.S. § 2000aa* (Paragraph 3);

- Facts showing the nature of defendants' wrongful conduct in depriving the plaintiff of protected property rights (Paragraph 4);

- Facts showing that the plaintiff did not consent to the wrongful conduct of defendants and/or submitted only to authority (Paragraph 5);

- A description of the plaintiff's civil rights that were violated by defendants' conduct (Paragraph 6); and

- The damages suffered by plaintiff (Paragraph 7) [*42 U.S.C.S. § 2000aa-6*].

[4] Work Product Materials Defined

Work product materials, as used in *42 U.S.C.S. § 2000aa(a)*, means materials other than those that are criminally possessed or used, that are prepared, produced, authored, or created, whether by the person in possession, or any other person, in anticipation of public communication and are possessed for the purpose of public communication and include the mental impressions, conclusions, opinions, or theories of the person who prepared, produced, authored, or created the material [*42 U.S.C.S. § 2000aa-7(b)*].

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37-429 California Forms of Pleading and Practice--Annotated § 429.564

§ 429.564 Allegation--Wrongful Search and Seizure of Public Communication Documentary Materials by Government Officials and Employees [42 U.S.C.S. § 2000aa(b)]

[1] FORM Allegation--Wrongful Search and Seizure of Public Communication Documentary Materials by Government Officials and Employees [42 U.S.C.S. § 2000aa(b)]

On or about _____ [*date*], defendant(s), _____ [*name(s)*], entered plaintiff's place of business at _____ [*street address*], _____ [*city*], California, _____ [*allege facts constituting wrongful search and seizure of public communication materials, e.g.,* displayed Department of Justice badge(s), and indentification card(s), stated that he/she/they _____ (was a *or* were) law enforcement agent(s), searched through plaintiff's effects, and seized and carried from the premises _____ (*describe material seized, e.g.,* printed materials that were public communication documentary materials prepared by plaintiff in anticipation of communicating the materials to the public)].

[2] Use of Form

This form of allegation is for use by a plaintiff in an action for damages for violation of *42 U.S.C.S. § 2000aa(b)* on account of a wrongful search and seizure of public communication documentary materials other than work product materials [*see § 429.563*]. The allegation may be inserted after or in place of Paragraph 4 in § 429.563.

[3] Documentary Materials Defined

Documentary materials as used in *42 U.S.C.S. § 2000aa(b)* means materials on which information is recorded, and includes but is not limited to written or printed materials, photographs, motion picture films, negatives, video tapes, audio tapes, and other mechanically or electronically recorded cards, tapes, or discs. The definition does not include contraband, fruits of a crime, or things otherwise criminally possessed or used [*42 U.S.C.S. § 2000aa-7(a)*].

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Volume 37: Pretrial Proceedings thru Privacy-Chs. 425-439
Chapters 430-439 [RESERVED]

37-430 California Forms of Pleading and Practice--Annotated Chapters 430-439

[RESERVED]

Chapter 431, *Procedural Guide for Civil Actions (General),* has been moved and now appears in Volume 1 as Chapter 2.

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Volume 38: Probate: Is Probate Necessary? thru Probate: Estate Tax-Chs. 440-453
Chapter 440 PROBATE: IS PROBATE NECESSARY?

38-440 California Forms of Pleading and Practice--Annotated 440.syn

§ 440.syn Synopsis to Chapter 440: PROBATE: IS PROBATE NECESSARY?

§ 440.01 Scope of Chapter

§ 440.02 Cross References

§§ 440.03-440.09 [Reserved]

§ 440.10 Flow Chart

§ 440.11 Calculation of Prob. Code §§ 13100, 13101 Value

[1] Prerequisites

[2] Computation of Prob. Code § 13100 Value

§ 440.12 Calculation of Prob. Code § 6602 Values

[1] Prerequisites

[2] Computation of Prob. Code § 6602 Values

§ 440.13 Liability of Beneficiaries Under Prob. Code § 6609 for Decedent's Debts

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Chapter 440 PROBATE: IS PROBATE NECESSARY?
PART I. SCOPE

38-440 California Forms of Pleading and Practice--Annotated § 440.01

§ 440.01 Scope of Chapter

The flow chart in § 440.10 of this chapter is designed to answer the question "IS PROBATE NECESSARY?" The arrow from the applicable answer indicates the next step. Progress is from question to question. You are referred to the appropriate form in lieu of probate or to Ch. 442, *Probate: Initiating Probate Administration*, to commence probate administration.

Of particular help are the special notes to the chart. Even counsel familiar with the dollar limits of *Prob. Code §§ 6600, 6602*, or *13050* have difficulty with the exemption that may be excluded before determining if the limit is exceeded. The sections following the chart discuss how to compute the exemption; the chart indicates which analyses to use.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateCosts & Expenses

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PART I. SCOPE

38-440 California Forms of Pleading and Practice--Annotated § 440.02

§ 440.02 Cross References

For discussion of disposition of administration, including collection of a small estate without administration, summary administration of a small estate, establishing the fact of death, and passage of property to a surviving spouse without administration, see Ch. 441, *Probate: Disposition Without Administration*

For discussion of initiating probate administration, see Ch. 442, *Probate: Initiating Probate Administration*

For discussion of compelling production of a will, see Ch. 443, *Probate: Compelling Production of Will*

For discussion of will contests, see Ch. 444, *Probate: Will Contests*

For discussion of independent administration of estates, see Ch. 445, *Probate: Independent Administration of Estates*

For discussion of bond requirements, see Ch. 446, *Probate: Bonds--Increase and Decrease During Administration*

For discussion of statutory notice requirements, see Ch. 447, *Probate: Statutory Notice Requirements*

For discussion of a family allowance, see Ch. 448, *Probate: Family Allowance*

For discussion of a personal property exempt from probate and homesteads, see Ch. 449, *Probate: Exempt Personal Property and Probate Homesteads*

For discussion of the collection of assets, see Ch. 450, *Probate: Collecting Assets*

For discussion of compiling and inventory and appraisal, see Ch. 451, *Probate: Inventory and Appraisal*

For discussion of estate tax proration and generation-skipping transfer taxes, see Ch. 452, *Probate: Inventory and Appraisal*

For discussion of estate taxes, see Ch. 453, *Probate: Estate Taxes*

For discussion of claims against an estate, see Ch. 454, *Probate: Claims Against the Estate*

For discussion of the sale of estate property, see Ch. 455, *Probate: Sale of Estate Property*

For discussion of management of estate assets, see Ch. 456, *Probate: Management of Estate Assets*

For discussion of petitioning for instructions or confirmation of a personal representative, see Ch. 457, *Probate: Instructions to Personal Representative*

For discussion of heirs and determination of who is an heir, see Ch. 458, *Probate: Determination of Heirship*

For discussion of simultaneous death when two or more persons have died within a prescribed time period, see Ch. 458A, *Probate: Simultaneous Death*

For discussion of the suspension, removal, or resignation of a personal respresentative, see Ch. 458B, *Probate: Suspension, Removal, and Resignation*

For discussion of the distribution of estate assets or compensation before final distribution, see Ch. 458C, *Probate: Preliminary Distribution and Partial Allowance of Compensation*

For discussion of the accounts prepared for the court, final distribution, and compensation, see Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation*

For discussion of discharge from probate, see Ch. 458E, *Probate: Discharge*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesFamiliesEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesEstate, Gift & Trust LawWill ContestsGeneral OverviewTax LawState & Local TaxesEstate & Gift TaxGeneral Overview

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38-440 California Forms of Pleading and Practice--Annotated §§ 440.03-440.09

[Reserved]

§§ 440.03[Reserved]

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PART II. PROBATE FLOW CHART

38-440 California Forms of Pleading and Practice--Annotated § 440.10

§ 440.10 Flow Chart

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PART II. PROBATE FLOW CHART

38-440 California Forms of Pleading and Practice--Annotated § 440.11

§ 440.11 Calculation of Prob. Code §§ 13100, 13101 Value

[1] Prerequisites

The decedent's successor without procuring letters of administration or awaiting the probate of the will may, collect any money due the decedent; receive the tangible personal property of the decedent; and have any evidences of a debt, obligation, interest, right, security, or chose in action transferred to the successor, whether or not secured by a lien on real property [*Prob. Code § 13100*]. An affidavit or a declaration under penalty or perjury under the laws of California must be furnished to the holder of the decedent's property and must state several specific facts enumerated by statute [*Prob. Code § 13101(a)*]. A certified copy of the decedent's death certificate must be attached to the affidavit or declaration [*Prob. Code § 13101(d)*]. The following conditions must also exist:

- The gross value of the decedent's real and personal property in California must not exceed $100,000 [*Prob. Code § 13100*].

- Forty days must have elapsed since the decedent's death.

[2] Computation of Prob. Code § 13100 Value

A determination of the total value of decedent's real and personal property in California, for the purpose of applying *Prob. Code § 13100*, may be made as follows.

- Gross Estate:

  Begin with the total value of decedent's personal property in California. Include in that figure half of the value of community property. Include also the value of property that decedent was entitled to receive at death (for example, unpaid earnings). Do not include the value of any property that would not pass through the estate (for example, life insurance proceeds payable to a named beneficiary).

- Real Property:

Add the gross value of decedent's California real property, taking into consideration the *Prob. Code § 13050* exclusions. If the value does not exceed $20,000, the court may award decedent's successor with marketable title to the property without probate if the successor files an affidavit stating several specifically enumerated facts [*see Prob. Code §§ 13200, 13202*; *but see Prob. Code § 13203(b)* (later administration proceedings are not precluded by affidavit procedure)]. An inventory and appraisal of the real property and a copy of decedent's will, if the successor claims the property under the will, must be attached to the affidavit. The appraisal must be made by a probate referee [*Prob. Code § 13200(c), (d)*; *see also Prob. Code § 8800 et seq.* (inventory and appraisal)]. The following conditions must also be satisfied:

- At least six months must have passed since decedent's death [*see Prob. Code § 13200(a)*].

- Either no proceeding for administration of decedent's estate is being or has been conducted in California, or the decedent's personal representative has consented in writing to use of the procedure provided by *Prob. Code § 13200 et seq.* [*see Prob. Code § 13200(a)(7)*].

- The funeral expenses, expenses of last illness, and all of decedent's unsecured debts must have been paid [*see Prob. Code § 13200(a)(8)*].

A copy of the affidavit and attachments must be mailed to the guardian or conservator of decedent's estate if there was one at the time of decedent's death [*see Prob. Code § 13200(f)*; *see also Prob. Code § 13200(a)(4)*].

If the value of the real property is greater than $20,000, but the gross value of decedent's real and personal property is less than $100,000, a petition should be filed with the court requesting a court order determining that the petitioner has succeeded to the real property [*see Prob. Code §§ 13151, 13152*]. An inventory and appraisal of the real property, and a copy of decedent's will if the petitioner claims the property under the will, must be attached to the petition. The appraisal must be made by a probate referee [*see Prob. Code § 13152(b), (c)*; *see also Prob. Code § 8800 et seq.* (inventory and appraisal)]. The petition may also include a request that the court make an order determining that the petitioner has succeeded to personal property described in the petition [*Prob. Code § 13152*]. After a hearing, the court will determine that the property passes to the petitioner if all of the following conditions are met:

- Forty days have elapsed since the death of the decedent [*Prob. Code §§ 13151, 13154*].

- Either no proceeding for administration of decedent's estate is being or has been conducted in California, or the decedent's personal representative has consented in writing to use of the procedure provided by *Prob. Code § 13150 et seq.* [*see Prob. Code §§ 13150, 13154*].

- The petition is joined by all successors [*see* Cal. L. Revision Comm'n Comment to *Prob. Code § 13151*].

- Exclude Vehicles and Vessels:

  Exclude amount representing the value, or any part of the value, of any motor vehicle or vessel or any manufactured home, mobile home, commercial coach, truck camper, or floating home registered under *Health & Safety Code §§ 18000-18124.5* [*Prob. Code § 13050(b)*]. Such a vehicle should be considered as not being decedent's property. For one definition of "motor vehicle" see *Veh. Code §§ 415* and *670*; included are construction equipment, special mobile equipment, forklift trucks, golf carts, snowmobiles, recreational vehicles, andimplements of husbandry.

- Exclude Veterans Benefits:

  Amounts due to decedent for services in the armed forces of the United States [*Prob. Code § 13050(c)(1)*].

- Exclude Salary:

  An amount, up to a maximum exclusion of $5,000, representing salary or other compensation, including compensation for unused vacation, owed to decedent for services from any employment [*Prob. Code § 13050(c)(2)*]. It appears that such an amount may be made up out of any earnings owed to decedent for personal services, whether the earnings are in the nature of a salary, time wages, piece-work compensation, or a lump sum earned for services under a contract.

- Exclude Joint Tenancy or Property Passing to Surviving Spouse or Registered Domestic Partner:

  Any amount representing the value, or a part of the value, of any property or any interest in property or any lien on property that decedent owned at the time of death as a joint tenant, or in which decedent owned a life estate or another kind of interest terminable by decedent's death, or that was held by the decedent and passed to the decedent's surviving spouse pursuant to *Prob. Code § 13500*, is excluded in determining the property or estate of the decedent or its value [*see Prob. Code § 13050(a)(1)*].

  Beginning January 1, 2005, these provisions also apply with respect to the surviving registered domestic partner of a decedent. A surviving registered domestic partner, following the other partner's death, has the same rights, protections, and benefits, and is subject to the same responsibilities, obligations, and duties under law that are granted to and imposed on a surviving spouse [*Fam. Code § 297.5(c)*; *see Fam. Code § 297.5(j)* (when necessary to implement statutory rights of domestic partners, gender-specific terms referring to spouses must be construed to include domestic partners)].

- Exclude Property in Revocable Trust:

  Any property that was held in a trust revocable by the decedent during his or her lifetime must also be excluded in determining the property or estate of the decedent, or its value [*Prob. Code § 13050(a)(1)*].

- Net Estate:

  If the result is a value of $100,000 or less, then a probate proceeding may be avoided; but if the value resulting is more than $100,000, then a probate proceeding is necessary.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstates Created by Trusts & WillsLife EstatesGeneral OverviewEstate, Gift & Trust LawNonprobate TransfersJointly Held PropertyReal PropertyEstate, Gift & Trust LawProbateGeneral OverviewReal Property LawOwnership & TransferDeath & IncapacityGeneral OverviewReal Property LawOwnership & TransferDeath & IncapacityTestamentary DispositionsTax LawFederal Estate & Gift TaxesTaxable PropertyProperty

Held at Death (IRC secs. 2033, 2044)Extent of Decedent's Interest

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PART II. PROBATE FLOW CHART

38-440 California Forms of Pleading and Practice--Annotated § 440.12

§ 440.12 Calculation of Prob. Code § 6602 Values

[1] Prerequisites

When an appropriate petition is filed under *Prob. Code §§ 6604-6606*, the probate court will determine whether decedent's surviving spouse, or decedent's surviving minor children, or any one or more of them, should receive the estate without a regular probate proceeding [*see Prob. Code § 6602*]. The court will set aside the estate in this manner if the net value of the estate (determined by the calculation described below) does not exceed $20,000, unless the court determines that making such an order would be inequitable under the circumstances of the particular case [*Prob. Code § 6609(a)*]. In making that determination, the court will consider the following factors:

- The needs of the surviving spouse and minor children, the liens and encumbrances on the property of decedent's estate, the claims of creditors, the needs of decedent's heirs or devisees, decedent's intent, decedent's estate plan as expressed in inter vivos and testamentary transfers or by other means, and any other relevant considerations [*Prob. Code § 6609(b)*].

- Whether the surviving spouse has remarried at the time the petition is heard; if so, it will be presumed that his or her needs do not justify setting aside the small estate, or any portion thereof, in his or her favor [*Prob. Code § 6609(b)*].

Beginning January 1, 2005, these provisions also apply with respect to the surviving registered domestic partner of a decedent. A surviving registered domestic partner, following the other partner's death, has the same rights, protections, and benefits, and is subject to the same responsibilities, obligations, and duties under law that are granted to and imposed on a surviving spouse [*Fam. Code § 297.5(c)*; *see Fam. Code § 297.5(j)* (when necessary to implement statutory rights of domestic partners, gender-specific terms referring to spouses must be construed to include domestic partners)].

[2] Computation of Prob. Code § 6602 Values

The court will determine the net value of decedent's estate, for the purpose of applying *Prob. Code §§ 6600-6613*, using the following formula:

- Gross Value:

  The beginning amount is the total value of decedent's estate. That figure includes half of the value of the community property. It also includes the value of property that decedent was entitled to receive at death (for example, unpaid earnings). It does not include the value of any property that would not passthrough the estate (for example, life insurance proceeds payable to a namedbeneficiary).

- Exclusions:

  The following amounts will be excluded from the beginning amount:

  - An amount equal to all liens and encumbrances on decedent's property at the date of death [*see Prob. Code § 6602*].

  - An amount representing the value of any probate homestead interest set apart out of decedent's estate under *Prob. Code § 6520* [*see Prob. Code § 6602*].

  - Any amount representing the value of any property, or interest in property, or lien on property, that decedent owned as a joint tenant at the time of his or her death or in which decedent had a life estate, or other kind of interest, terminable by his or her death [*Prob. Code § 6600(b)(1)*].

  - Any amount representing the value of a multiple-party account to which decedent was a party at the time of his or her death, whether or not all or a portion of the sums on deposit are community property, to the extent that the sums on deposit belong to a surviving party after decedent's death, P.O.D. payee, or beneficiary [*Prob. Code § 6600(b)(2)*].

- Net Estate:

  If the result is a value of $20,000 or less, then the estate may be set aside, at the court's discretion, without a regular probate proceeding [*see Prob. Code § 6609*]. However, if the resulting value is more than $20,000, or if, in the court's discretion, a petition to set aside should be denied, a probate proceeding is necessary [*see Prob. Code §§ 6609, 6612*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesHomesteadsEstate, Gift & Trust LawEstates Created by Trusts & WillsGeneral OverviewEstate, Gift & Trust LawEstates Created by Trusts & WillsLife EstatesGeneral OverviewEstate, Gift & Trust LawPersonal GiftsLifetime GiftsEstate, Gift & Trust LawProbateGeneral OverviewTax LawFederal Estate & Gift TaxesTaxable PropertyGeneral Overview

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38-440 California Forms of Pleading and Practice--Annotated § 440.13

§ 440.13 Liability of Beneficiaries Under Prob. Code § 6609 for Decedent's Debts

The person or persons in whom title to property vests pursuant to *Prob. Code § 6609* will be personally liable for the unsecured debts of the decedent [*Prob. Code § 6611(a)*]. However, the personal liability will not exceed the fair market value of the subject property at the time of decedent's death, less (1) the amount of any liens and encumbrances on the property, (2) the value of any probate homestead set apart under *Prob. Code § 6520*, and *(3)* the value of any other property set aside under *Prob. Code § 6510* [*Prob. Code § 6611(b)*]. The person or persons subjected to liability may assert any defense, cross complaint, or setoff that would have been available to the decedent [*Prob. Code § 6611(c)*].

If proceedings have been commenced in California for the administration of the estate, and the time for filing or presenting claims has commenced, any action for personal liability will be barred to the same extent as provided for claims under *Prob. Code § 9000 et seq.* [*Prob. Code § 6611(d)*]. *Code Civ. Proc. § 366.2* (limiting commencement of civil actions on death of defendant) applies in an action under *Prob. Code § 6611* [*Prob. Code § 6611(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesHomesteadsEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesTime LimitationsEstate, Gift & Trust LawProbateGeneral Overview

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Chapter 441 PROBATE: DISPOSITION WITHOUT ADMINISTRATION

38-441 California Forms of Pleading and Practice--Annotated 441.syn

§ 441.syn Synopsis to Chapter 441: PROBATE: DISPOSITION WITHOUT ADMINISTRATION

§ 441.01 Scope of Chapter

§ 441.02 Cross References

§§ 441.03-441.09 [Reserved]

§ 441.10 Governing Statutes

§§ 441.11-441.29 [Reserved]

§ 441.30 Collection, Receipt, or Transfer of Personal Property

§ 441.31 Successor Defined

§ 441.32 Proceeding Defined

§ 441.33 Calculation of Gross Value

§ 441.34 Procedure

[1] Affidavit or Declaration

[2] Obligation Secured by Lien on Real Property

[3] Supporting Papers

[4] Proof of Identity of Affiant or Declarant

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[2] Affidavit Procedure Not Exclusive

§ 441.36 Transfer on Receipt of Affidavit or Declaration

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[2] Effect of Transfer

[a] Liability of Holder of Property

[b] Liability of Successor

[i] Unsecured Debts

[ii] Limitation Periods Under Code of Civil Procedure

[iii] Restitution to Estate

[iv] Persons With Superior Rights Regarding Personal Property

[v] Fraud Regarding Personal Property

[vi] Limitation Period Regarding Personal Property

[vii] Extent of Liability Regarding Personal Property

[c] Obligation Secured by Recorded Lien on Real Property

[i] Same Effect as Assignment

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[3] Effect of Refusal to Transfer

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[1] Estate Valued at Less Than $100,000

[2] Contents of Petition

[3] Notice of Hearing

[4] Hearing and Court Order

[5] Effect of Order Granting Petition

§ 441.51 Affidavit Procedure for Real Property

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[2] Contents of Affidavit, Procedure, and Attachments

[3] Filing and Recording Affidavit

[4] Effect of Recording Affidavit

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[b] Liability of Successor Regarding Real Property

[i] Unsecured Debts

[ii] Restitution to Estate

[iii] Persons With Superior Rights Regarding Real Property

[iv] Fraud Regarding Real Property

[v] Limitation Period Regarding Real Property

[vi] Extent of Liability Regarding Real Property

§§ 441.52-441.69 [Reserved]

§ 441.70 Governing Statutes

§ 441.71 Summary Administration of Small Estates

§§ 441.72-441.89 [Reserved]

§ 441.90 Governing Statutes

§ 441.91 Establishing Fact of Death

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[2] Commencement of Proceedings

[3] Probate Proceedings Pending

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§ 441.94 Appealability of Order

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§ 441.110 Governing Statutes

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§ 441.112 Property Passing to Spouse or Registered Domestic Partner Without Administration

[1] In General

[2] When Administration Permitted

[3] Transfer to Trustee Permitted

§ 441.113 Power Regarding Real Property

§ 441.114 Power to Dispose of Securities

§ 441.115 Decedent's Property Subject to Administration

§ 441.116 Survivor's Personal Liability for Debts

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[2] Effect of Proceedings to Administer Estate

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§ 441.118 Survivor's Liability to Person With Superior Right to Decedent's Property

[1] Personal Liability

[2] Limitations on Liability

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[3] Offset for Amounts Paid on Decedent's Debts

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[1] Filing

[2] Copy of Will Required to Be Attached

[3] Copy of Agreement for Non Pro Rata Division of Community or Quasi-Community Property Required to Be Attached

[4] Petition Not Applicable When Administration Elected

[5] Fees Not Charged When Administration Pending

[6] Joinder Permitted When Proceedings Not Pending

[7] Effect of Petition on Other Proceedings

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[1] Petition to Allocate Responsibility

[2] Contents of Petition

[3] Information Concerning Other Property

[4] Notice

[5] Allocation by Agreement

[6] Court Determination of Apportionment

[7] Order Apportioning Debts

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[1] Right to Collect

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[3] Employer's Duty

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[1] Personal Property

[a] Affidavit Procedure

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[2] Real Property

[a] Petition to Determine Succession

[b] Affidavit Procedure

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§§ 441.153-441.169 [Reserved]

§ 441.170 State Statutes

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§§ 441.173-441.189 [Reserved]

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[1] Alameda County

[2] Los Angeles County

[3] Orange County

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[5] City and County of San Francisco

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§ 441.210 State Statutes

[1] Apportionment of Debts

[2] Community Property Generally

[3] Disposition of Property Passing to Surviving Spouse or Registered Domestic Partner

[4] Proceedings for Confirmation of Community Property

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[1] Orange County

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§ 441.230 Disposition of Personal Property Without Administration

§ 441.231 Disposition of Real Property Without Administration When Real and Personal Property Has Gross Value Not Exceeding $100,000

§ 441.232 Disposition of Real Property Without Administration When All Real Property in Estate Has Gross Value Not Exceeding $20,000

§§ 441.233-441.249 [Reserved]

§ 441.250 Summary Administration

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§ 441.270 Declaration Under Penalty of Perjury [Code Civ. Proc. § 2015.5] for Collection of Personal Property of Deceased Not Exceeding $100,000 in Value [Prob. Code §§ 13100, 13101]

[1] FORM

[2] Use of Form

[3] Personal Property That May Be Collected Without Administration

[4] Procedure

[a] Affidavit or Declaration Must Be Presented

[b] Who Must Execute Affidavit or Declaration

[c] Contents of Affidavit

[d] Attachments

[e] Recording of Declaration if Obligation Secured by Lien on Real Property

[5] State Statutes

[6] Text References

§ 441.271 Proceedings to Determine Succession to Real Property--Estate With Gross Value of Real and Personal Property Not Exceeding $100,000 [Prob. Code §§ 13150-13157]--Petition [Prob. Code §§ 13151, 13152]--Judicial Council Form DE-310

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Attachments

[5] Verification

[6] Hearing on Petition

[7] State Statutes

[8] Cross References

§ 441.272 Proceedings to Determine Succession to Real Property--Estate With Gross Value of Real and Personal Property Not Exceeding $100,000 [Prob. Code §§ 13150-13157]--Order [Prob. Code § 13154]--Judicial Council Form DE-315

[1] FORM

[2] Use of Form

[3] Required Determinations

[4] Order Granting Petition

[5] State Statutes

[6] Text References

[7] Cross References

§ 441.273 Affidavit Establishing Right to Succeed to Particular Item of Real Property When Gross Value of All Real Property in Decedent's Estate Does Not Exceed $20,000 [Prob. Code § 13200]--Judicial Council Form DE-305

[1] FORM

[2] Use of Form

[3] Contents of Form and Attachments

[4] Service or Mailing

§§ 441.274-441.289 [Reserved]

§ 441.290 Petition to Have Estate With Net Value Not Exceeding $20,000 Set Aside to Surviving Spouse, Registered Domestic Partner, or Minor Child [Prob. Code §§ 6600-6615; Fam. Code § 297.5(c)]

[1] FORM

[2] Use of Form

[3] Setting Aside Estate Not Exceeding $20,000

[4] Who May File Petition

[5] Contents of Petition

[6] Alternative Filing Procedures

[7] Liability of Petitioner for Decedent's Unsecured Debts

[8] Venue

[9] Verification

[10] State Statutes

[11] Local Rules of Court:

[a] Orange County

[b] San Diego County

[12] Cross References

§ 441.291 Notice of Hearing [Prob. Code §§ 1211, 6607(a)] on Petition to Have Estate With Net Value Not Exceeding $20,000 Set Aside to Surviving Spouse, Registered Domestic Partner, or Minor Child [Prob. Code §§ 6600-6615; Fam. Code § 297.5(c)]

[1] FORM

[2] Use of Form

[3] Notice Requirement

[a] When Administration Proceedings Not Pending

[b] When Petition Filed With Petition for Probate or for Letters

[c] When Administration Proceedings Are Pending

[4] State Statutes

[5] Cross References

§ 441.292 Order [Prob. Code § 6609] Setting Aside Estate With Net Value Not Exceeding $20,000 to Surviving Spouse, Registered Domestic Partner, or Minor Child [Prob. Code §§ 6600-6615; Fam. Code § 297.5(c)]

[1] FORM

[2] Use of Form

[3] Factors Court Must Consider

[4] Grounds for Granting Petition

[5] State Statutes

[6] Cross References

§§ 441.293-441.309 [Reserved]

§ 441.310 Petition to Establish Fact of Death of Joint Tenant or Life Tenant [Prob. Code § 201]--Real Property--Independent Proceeding--No Probate Pending

[1] FORM

[2] Use of Form

[3] Petition to Establish Death of Joint Tenant or Life Tenant

[4] State Statutes

[5] Local Rules of Court

[a] Alameda County

[b] City and County of San Francisco

[6] Decisions

[7] Text References

§ 441.311 Petition to Establish Fact of Death of Joint Tenant or Life Tenant [Prob. Code § 201]--Personal Property--No Probate Pending

[1] FORM

[2] Cross References

§ 441.312 Declaration of Fact of Death of Joint Tenant or Life Tenant

[1] FORM

[2] Use of Form

[3] Acknowledgment

[4] Cross References

[5] State Statutes

§ 441.313 Order Establishing Fact of Death of Joint Tenant or Life Tenant [Prob. Code § 204(b)]--Real Property

[1] FORM

[2] State Statutes

[3] Local Rules of Court

[4] Decisions

[5] Text References

[6] Cross References

§ 441.314 Petition to Identify Heir [Prob. Code § 248]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Filing and Notice

[5] Petition to Determine Heirship Distinguished

[6] State Statutes

§ 441.315 Order Identifying Heir [Prob. Code § 248]

[1] FORM

[2] Use of Form

[3] Cross References

§§ 441.316-441.329 [Reserved]

§ 441.330 Election to Have Property of Deceased Spouse or Registered Domestic Partner Be Subject to Administration [Prob. Code § 13502; Fam. Code § 297.5(c)]--Optional Provision Extending Election to Community of Surviving Spouse or Registered Domestic Partner--After Issuance of Letters

[1] FORM

[2] Use of Form

[3] Essential Allegations

§ 441.331 Election and Agreement to Have Interest of Surviving Spouse or Registered Domestic Partner in Community Property Transferred to Trustee [Prob. Code § 13503; Fam. Code § 297.5(c)]--By Surviving Spouse or Registered Domestic Partner or by Personal Representative, Guardian, or Conservator of Surviving Spouse's or Registered Domestic Partner's Estate--Before Entry of Order for Final Distribution

[1] FORM

[2] Use of Form

[3] Essential Allegations

§ 441.332 Notice of Interest in Community Real Property Under Will of Deceased Spouse [Prob. Code §§ 13540, 13541; Fam. Code § 297.5(c)] or Registered Domestic Partner

[1] FORM

[2] Use of Form

[3] Contents of Notice

[4] Time to Record

[5] Effect of Recording Notice

[6] Slander of Title

§ 441.333 Declaration Under Penalty of Perjury [Code Civ. Proc. § 2015.5] for Collection of Compensation of Deceased Not Exceeding $5,000 Net [Prob. Code §§ 13600, 13601; Fam. Code § 297.5(c)]

[1] FORM

[2] Use of Form

[3] Contents of Affidavit or Declaration

[4] Proof of Identity

[5] Affidavit or Declaration as Receipt

[6] State Statutes

§ 441.334 Complaint for Collection of Compensation of Deceased Not Exceeding $5,000 Net [Prob. Code § 13604; Fam. Code § 297.5(c)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Employer's Duty to Pay Compensation

[5] Attorney's Fees

[6] State Statutes

§ 441.335 Proceedings for Confirmation and Determination of Property Passing to Surviving Spouse or Registered Domestic Partner Without Administration [Prob. Code §§ 13500, 13650, 13651; Fam. Code § 297.5]--Spousal or Domestic Partner Property Petition Judicial Council Form DE-221

[1] FORM

[2] Use of Form

[3] Jurisdiction

[4] Attachments

[5] State Statutes

[6] California Rules of Court

[7] Decisions

§ 441.336 Proceedings for Confirmation and Determination of Property Passing to Surviving Spouse or Registered Domestic Partner Without Administration [Prob. Code §§ 13500, 13650, 13651; Fam. Code § 297.5]--Spousal or Domestic Partner Property Order [Prob. Code §§ 13656-13658]--Judicial Council Form DE-226

[1] FORM

[2] Use of Form

[3] Jurisdictional Findings

[4] Attachments

[5] Recording Order

[6] State Statutes

[7] Local Rules of Court

§ 441.337 Proceedings to Allocate Responsibility for Debts [Prob. Code § 11440-11446; Fam. Code § 297.5]--Petition to Allocate Responsibility [Prob. Code § 11441]--By Personal Representative, Surviving Spouse, Surviving Registered Domestic Partner, or Beneficiary

[1] FORM

[2] Use of Form

[3] Allegations

[4] Time of Filing Petition

[5] Notice

[6] Court Determination of Allocation

[7] State Statutes

§ 441.338 Proceedings to Allocate Responsibility For Debts [Prob. Code § 11440-11446]--Order to Show Cause Why Information Concerning Separate Property of Surviving Spouse or Registered Domestic Partner, Community Property, and Quasi-Community Property Not Administered in Estate Should Not Be Furnished to Petitioner Seeking Allocation [Prob. Code § 11442]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 441.339 Proceedings to Allocate Responsibility For Debts [Prob. Code §§ 11440-11446; Fam. Code § 297.5(c)]--Agreement Allocating Responsibility for Debts Payable by Estate and Surviving Spouse or Registered Domestic Partner [Prob. Code § 11444(a)]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 441.340 Proceedings to Allocate Responsibility For Debts [Prob. Code §§ 11440-11446; Fam. Code §

297.5(c)]--Order Approving Allocation as Agreed on by Personal Representative of Estate and Surviving Spouse or Registered Domestic Partner [Prob. Code § 11444]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 441.341 Proceedings to Allocate Responsibility For Debts [Prob. Code §§ 11440-11446; Fam. Code § 297.5(c)]--Order Apportioning Debts Between Property of Estate and Surviving Spouse or Registered Domestic Partner [Prob. Code § 11445]

[1] FORM

[2] Use of Form

[3] State Statutes

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PART I. SCOPE

38-441 California Forms of Pleading and Practice--Annotated § 441.01

§ 441.01 Scope of Chapter

This chapter discusses collection of all or a portion of a small estate without administration [*Prob. Code §§ 13100-13116*]. Included are a declaration for the collection of personal property of a deceased person not exceeding $100,000 [*see § 441.270*], the Judicial Council approved petition to determine succession to real property when the gross value of the estate does not exceed 100,000 [*see § 441.271*], and the Judicial Council approved order on the petition [*see § 441.272*]. Also included is the Judicial Council approved affidavit to establish a right to succeed to a particular item of real property when the gross value of all the real property in the decedent's estate does not exceed $20,000 [*see § 441.273*].

This chapter also discusses summary administration of small estates under *Prob. Code §§ 6600-6615*. It includes forms for petitions to set aside an estate [*see § 441.290*, a form for notice [*see § 441.291*], and forms for orders to set aside an estate [*see § 441.292*].

In addition, this chapter discusses procedure for establishing the fact of death of a joint tenant or life tenant, and includes related forms of petition [§§ 441.310, 441.311], declaration [*see § 441.312*], and order [*see § 441.313*]. This chapter also discusses the proceedings applicable to determining membership in certain classes entitled to property other than by laws of succession [§§ 441.314, 441.315].

This chapter also discusses the passage of property to a surviving spouse or registered domestic partner without administration and the procedures used to determine and confirm that property passes to a surviving spouse or registered domestic partner, as well as to apportion debts payable by the surviving spouse or registered domestic partner and the estate [*see § 441.110* et seq.].

This analysis includes the Judicial Council form for a spousal or domestic partner property petition for a determination that property passes to the surviving spouse or registered domestic partner without administration [*see § 441.335*], as well as the Judicial Council form for a spousal or domestic partner property order [*see § 441.336*]. It also includes an election to have the community property administered [*see § 441.330*], an election and agreement to have the surviving spouse's or domestic partner's interest in the community property transferred to a trustee [*see § 441.331*], and a notice of interest in the community real property [*see § 441.332*]. Also included are a declaration under penalty of perjury for the

collection of compensation of a decedent not exceeding $5,000 [*see § 441.333*], and a complaint to collect compensation not exceeding $5,000 owing to a decedent [*see § 441.334*]. These forms may be modified for use in proceedings involving quasi-community property. Forms related to proceedings to allocate responsibility for debts are also included [*see §§ 441.337 -441.341*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawCommunity PropertyElectionEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesFamily LawMarital Duties & RightsProperty RightsGeneral OverviewReal Property LawEstatesPresent EstatesMarital EstatesCommunity Property

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38-441 California Forms of Pleading and Practice--Annotated § 441.02

§ 441.02 Cross References

For additional forms for establishing the fact of death by a person claiming an interest in property affected by the death of the decedent, see Ch. 99, *Birth and Death, Establishing Fact of.*

For discussion and forms related to community property generally, see Ch. 122, *Community Property* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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38-441 California Forms of Pleading and Practice--Annotated §§ 441.03-441.09

[Reserved]

§§ 441.03[Reserved]

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1. In General

38-441 California Forms of Pleading and Practice--Annotated § 441.10

§ 441.10 Governing Statutes

The collection or transfer, without administration, of decedent's personal property of a small estate is governed by *Prob. Code §§ 13100-13116*, which replace former *Prob. Code §§ 630-632*. *Prob. Code §§ 13100-13116* are operative July 1, 1987, and they are applicable whether the decedent died before, on, or after July 1, 1987. However, if collection was made pursuant to former *Prob. Code §§ 630-632* before July 1, 1987, the prior law applies.

The succession, without administration, to decedent's real property of a small estate is governed by *Prob. Code §§ 13150 et seq.* and *13200 et seq.*, which were also enacted in 1986, and became operative July 1, 1987.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewReal Property LawOwnership & TransferDeath & IncapacityGeneral Overview

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38-441 California Forms of Pleading and Practice--Annotated §§ 441.11-441.29

[Reserved]

§§ 441.11[Reserved]

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2. Collection Of Personal Property Of Small Estates Without Administration

38-441 California Forms of Pleading and Practice--Annotated § 441.30

§ 441.30 Collection, Receipt, or Transfer of Personal Property

Prob. Code §§ 13100-13116 provide a procedure for collecting, receiving, or transferring personal property of a small estate by a simple affidavit or declaration procedure. If the gross value of decedent's real and personal property in California does not exceed $100,000 and if 40 days have elapsed since decedent's death, the successor of a decedent may collect, receive, or transfer one or more particular items of the decedent's personal property without procuring letters of administration or awaiting probate of the will [*Prob. Code § 13100*; *see Prob. Code § 13050* (certain property excluded from calculation of gross value of decedent's estate)]. In particular, the successor may do any of the following [*Prob. Code § 13100*]:

- Collect any particular item of property that is money due the decedent.

- Receive any particular item of property that is tangible personal property of the decedent.

- Have any particular item of property that is evidence of a debt, obligation, interest, right, security, or chose in action belonging to the decedent transferred, whether or not secured by a lien on real property.

This procedure may be used only if either no proceeding for the administration of the decedent's estate is pending or has been conducted in California, or if the decedent's personal representative consents in writing to the payment, transfer, or delivery of the property described in the affidavit or declaration. Use of the procedure does not preclude later proceedings for the administration of the esate [*Prob. Code § 13108*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall Estates

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38-441 California Forms of Pleading and Practice--Annotated § 441.31

§ 441.31 Successor Defined

If the decedent died leaving a will, a "successor of the decedent" is the sole beneficiary, or all of the beneficiaries, who succeeded to a particular item of decedent's property under the will. A beneficiary includes a trust if the trust succeeds to the particular item of property under the will [*Prob. Code § 13006(a)*].

If the decedent died without a will, the "successor" is the sole person, or all of the persons, who succeeded to a particular item of decedent's property under *Prob. Code §§ 6401* and *6402* (intestate succession) or, if the law of a sister state or foreign nation governs succession to the particular item of property, under the law of the sister state or foreign nation [*Prob. Code § 13006(b)*; *see Prob. Code §§ 12502* ("foreign nation" defined), 12506 ("sister state" defined)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawTrustsGeneral Overview

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2. Collection Of Personal Property Of Small Estates Without Administration

38-441 California Forms of Pleading and Practice--Annotated § 441.32

§ 441.32 Proceeding Defined

When used in the provisions governing the collection of small estates without administration, the term "proceeding" means any one of the following [*Prob. Code § 13007*]:

- A petition is currently pending in California for administration of a decedent's estate [*see Prob. Code §§ 7000-12591*], or

- A special administrator for the decendent's estate has been appointed in California and is now serving, or

- A personal representative for the decedent's estate has been appointed in California with general powers.

"Proceeding" does not include (1) a petition for administration that was dismissed without the appointment of a personal representative, (2) any proceeding under the Probate Code provisions governing the disposition of an estate without administration (*see Prob. Code § 13000 et seq.*), or (3) any action or proceeding in another state [*Prob. Code § 13007*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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2. Collection Of Personal Property Of Small Estates Without Administration

38-441 California Forms of Pleading and Practice--Annotated § 441.33

§ 441.33 Calculation of Gross Value

Any property, or interest or lien on the property, that, at the time of the decedent's death, was held by the decedent as a joint tenant, or in which the decedent had a life estate or other interest terminable on the decedent's death, or that was held by the decedent and passed to the decedent's spouse or registered domestic partner [*see Fam. Code 297.5(c)* (effective January 1, 2005, surviving registered domestic partner has same rights as a surviving spouse)] without administration pursuant to *Prob. Code § 13500*, must be excluded in determining decedent's property or estate or its value [*Prob. Code § 13050(a)(1)*]. Property held in a trust that was revocable by the decedent during his or her lifetime must also be excluded [*Prob. Code § 13050(a)(1)*].

A multiple-party account to which the decedent was a party at the time of his or her death must also be excluded, whether all or a portion of the sums on deposit are community property, to the extent that the sums on deposit belong, after the death of the decedent, to a surviving party, P.O.D. payee, or beneficiary [*Prob. Code § 13050(a)(2)*; *see Prob. Code § 5120 et seq.* (definitions)].

The following property must also be excluded in determining the property or estate of the decedent, or its value [*Prob. Code § 13050(b)*]:

- Any vehicle registered under *Veh. Code §§ 4000-9810* or titled under *Veh. Code §§ 38000-38397*.
- Any vessel numbered under *Veh. Code §§ 9840-9928*.
- Any manufactured home, mobilehome, commercial coach, truck camper, or floating home registered under *Health & Safety Code §§ 18000-18124.5*.

The value of the following property must be excluded from determining the value of decedent's property in California [*Prob. Code § 13050(c)*]:

- Any amounts due to the decedent for services in the armed forces of the United States.

- The amount, not exceeding $5,000, of salary or other compensation, including compensation for unused vacation, owing to the decedent from personal services from any employment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawEstates Created by Trusts & WillsLife EstatesGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesPresent EstatesLife EstatesTax LawFederal Estate & Gift TaxesTaxable PropertyProperty Held at Death (IRC secs. 2033, 2044)General Overview

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38-441 California Forms of Pleading and Practice--Annotated § 441.34

§ 441.34 Procedure

[1] Affidavit or Declaration

To collect money, to receive tangible personal property, or to have evidences of a debt, obligation, interest, right, security, or chose in action transferred under *Prob. Code §§ 13100-13116*, an affidavit, or declaration under penalty of perjury under the laws of California (*see Code Civ. Proc. § 2015.5*), must be furnished to the holder of decedent's property, stating the facts specifically required by *Prob. Code § 13101(a)* [*see Prob. Code § 13101(a)*; *see also Prob. Code § 13106.5(a)* (additional content requirements for affidavit or declaration regarding obligation secured by recorded lien on real property); *see § 441.270*].

[2] Obligation Secured by Lien on Real Property

If the particular item of property transferred is a debt or other obligation secured by a lien on real property and the instrument creating the lien has been recorded in the office of the county recorder of the county where the real property is located, the affidavit or declaration described in *Prob. Code § 13101* must be recorded in the office of the county recorder of that county. In addition, the affidavit or declaration must include a notary public's certificate of acknowledgment identifying each person executing the affidavit or declaration [*Prob. Code § 13106.5(a)*].

[3] Supporting Papers

A certified copy of the decedent's death certificate must be attached to the affidavit or declaration [*Prob. Code § 13101(d)*]. If the decedent's personal representative has consented to the payment, transfer, or delivery of the described property to the affiant or declarant, copies of the consent and the personal representative's letters must be attached to the affidavit or declaration [*Prob. Code § 13101(e)*].

Evidence of the decedent's ownership of the subject property may be required to be presented with the affidavit or declaration [*Prob. Code § 13102(a)*]. If no such evidence is presented, the holder of the property may require the person presenting the affidavit or declaration to post a bond or undertaking, or to enter into an agreement concerning the duty

of that person to indemnify the holder [*Prob. Code § 13102(b)*]. If decedent's estate includes any real property in California, the affidavit or declaration must be accompanied by an inventory and appraisal of the real property made by a probate referee [*Prob. Code § 13103*; *see Prob. Code § 400* (appointment of referee); *see also Prob. Code § 8800 et seq.* (form, content, and manner of making inventory and appraisal)].

[4] Proof of Identity of Affiant or Declarant

Each person executing the affidavit or declaration must provide the holder of the decedent's property with reasonable proof of identity [*Prob. Code § 13104(a)*; *see Prob. Code § 13106.5(a)* (notarization required if obligation secured by recorded lien on real property)]. Reasonable proof is provided if (1) the person executing the affidavit or declaration is personally known to the holder, and (2) the person executes the affidavit or declaration in the presence of the holder [*Prob. Code § 13104(b)*].

If the affidavit or declaration is executed in the presence of the holder, a written statement under penalty of perjury by a person personally known to the holder affirming the identity of the person executing the affidavit or declaration is reasonable proof of identity [*Prob. Code § 13104(c)*]. Alternatively, the holder may reasonably rely on any of the following documents, if the document is current or was issued within the preceeding five years, for proof of identity when the affidavit or declaration is executed in the the holder's presence [*see Prob. Code § 13104(d)*]:

- An identification card or driver's license issued by the California Department of Motor Vehicles.
- A United States passport.
- If it contains a photograph and description of the person named on it, is signed by that person, and bears a serial or other identifying number, (A) a foreign passport that has been stamped by the United States Immigration and Naturalization Service, (B) a driver's license issued by a state other than California, (C) an identification card issued by a state other than California, or (D) an identification card issued by any branch of the United States armed forces.

A notary public's certificate of acknowledgment identifying the person executing the affidavit or declaration is also reasonable proof of identity [*Prob. Code § 13104(e)*].

If the affidavit or declaration does not contain a notary public's certificate, the holder must note on the affidavit or declaration either that the person executing the affidavit or declaration is personally known, or a description of the identification provided by the person [*Prob. Code § 13104(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesAppointmentsEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewReal Property LawProperty Valuation

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38-441 California Forms of Pleading and Practice--Annotated § 441.35

§ 441.35 Money or Property Subject to Pending Action or Proceeding

[1] In General

If the money or property claimed in an affidavit or declaration executed under *Prob. Code § 13100 et seq.* is the subject of a pending action or proceeding in which the decedent was a party, the successor of the decedent must, without procuring letters of administration or awaiting probate of the will, be substituted as a party in place of the decedent by making a motion under *Code Civ. Proc. § 377.30 et seq.*. The successor of the decedent must also file the affidavit or declaration with the court when the motion is made. For the purpose of *Code Civ. Proc. § 377.30 et seq.*, a successor of the decedent who complies with *Prob. Code § 13100 et seq.* is a "successor in interest of the decedent" [*Prob. Code § 13107.5*; for forms for substituting parties under *Code Civ. Proc. § 377.30 et seq.*, *see* Ch. 21, *Amended and Supplemental Pleadings*].

[2] Affidavit Procedure Not Exclusive

The procedure provided in *Prob. Code §§ 13100-13116* is in addition to and supplemental to any other procedure for (1) collecting money due to a decedent, (2) receiving tangible personal property of a decedent, or (3) having evidence of ownership of property of a decedent transferred. Nothing in *Prob. Code §§ 13100-13116* restricts or limits the release of tangible personal property of a decedent pursuant to any other provision of law [*Prob. Code § 13116* (by its own terms, declaratory of existing law)].

For example, property may be delivered to a person without compliance with *Prob. Code §§ 13100-13116* under the following provisions: (1) *Prob. Code §§ 13600-13605* (to collect salary owing to decedent; *see § 441.110* et seq.); (2) *Fin. Code § 6950* (payment of deposit account of nonresident decedent); (3) *Gov. Code § 27491.3* (property at scene of death released to coroner); and (4) *Health & Safety Code § 18102* and *Veh. Code §§ 5910, 9916* (transfer of mobilehome and other vehicles and watercraft). *Prob. Code § 13106*, which protects the transferor from liability, does not apply when the property is released pursuant to other procedures. However, other procedures may protect the transferor from liability, for example, *Fin. Code § 6951* (protection of certain financial institutions), and *Veh. Code § 5910* (protection of Department of Motor Vehicles and employees) [*see* Cal. L. Revision Comm'n Comment to *Prob.*

Code § 13116].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal PropertyEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-441 California Forms of Pleading and Practice--Annotated § 441.36

§ 441.36 Transfer on Receipt of Affidavit or Declaration

[1] In General

If the requirements of *Prob. Code §§ 13100-13104* are satisfied, the following occurs [*Prob. Code § 13105(a)*]:

- The person or persons executing the affidavit or declaration as successor are entitled to have the property described in the affidavit or declaration paid, delivered, or transferred to them.

- A transfer agent of a security described in the affidavit or declaration must change the registered ownership on the books of the corporation from the decedent to the person or persons executing the affidavit or declaration as successor of the decedent.

[2] Effect of Transfer

[a] Liability of Holder of Property

If the requirements of *Prob. Code §§ 13100-13104* are satisfied, receipt by the holder of the affidavit or declaration constitutes sufficient aquittance for the payment of money, delivery of property, or changing registered ownership of property pursuant to *Prob. Code §§ 13100-13116*, and it discharges the holder from any further liability with respect to the money or property. The holder may rely in good faith on the statements in the affidavit or declaration, and has no duty to inquire into the truth of any statement in the affidavit or declaration [*Prob. Code § 13106(a)*].

The holder is also not liable for any taxes due to California by reason of paying money, delivering property, or changing registered ownership of property pursuant to *Prob. Code §§ 13100-13116* [*Prob. Code § 13106(b)*].

[b] Liability of Successor

[i] Unsecured Debts

A person to whom payment, delivery, or transfer of the decedent's property is made under *Prob. Code §§ 13100-13116* is personally liable, to the extent provided in *Prob. Code § 13112*, for the unsecured debts of the decedent. Any such debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. In any action based on the debt, the person may assert any defenses, cross complaints, or setoffs that would have been available to the decedent if the decedent had not died. Nothing in *Prob. Code § 13109* permits enforcement of a claim that is barred under *Prob. Code § 9000 et seq.* (creditors' claims) [*Prob. Code § 13109*]. For discussion of *Prob. Code § 9000 et seq.*, see Ch. 454, *Probate: Claims Against the Estate* .

[ii] Limitation Periods Under Code of Civil Procedure

Code Civ. Proc. § 366.2 (limiting commencement of civil actions on death of defendant) applies in an action to enforce the decedent's unsecured debts against a successor [*Prob. Code § 13109*]. *Code Civ. Proc. § 366.2* provides that if a person against whom an action may be brought on a liability of the person dies before expiration of the applicable limitation period, and if the cause of action survives, an action may be commenced within one year after the date of death, and the limitation period that would have been applicable does not apply [*Code Civ. Proc. § 366.2(a)*]. This limitation period applies to all types of actions, whether they arise in contract, tort, or otherwise, and whether they are accrued or not accrued [*Code Civ. Proc. § 366.2(a)*].

The limitations period provided under *Code Civ. Proc § 366.2* cannot be tolled or extended for any reason, except as follows [*Code Civ. Proc. § 366.2(b)*]:

- The statutes governing claims against the probate estate [*see Prob. Code § 9000 et seq.* (creditor claims in administration of estates of decedents); for discussion, *see* Ch. 454, *Probate: Claims Against the Estate*];

- The statutes governing claims against the assets of revocable trusts [*see Prob. Code § 19000 et seq.* (payment of claims debts, and expenses from revocable trust of deceased settlor); for discussion, *see* Ch. 560, *Trusts*]; and

- The former statutes governing no contest clauses, as they read prior to repeal by Stats 2008 ch. 174, effective January 1, 2010 [*see* former *Prob. Code § 21300* (no contest clauses; repealed 1/1/2010); for discussion, *see* Ch. 444, *Probate: Will Contests*].

Code Civ. Proc. § 366.2 applies only to actions founded on the liability of persons who died on or after January 1, 1993 [*Code Civ. Proc. § 366.2(c)*]. A comparable one-year statute applies to actions founded on the liability of persons who died on or after January 1, 1991, but before January 1, 1993 [*compare* former *Code Civ. Proc. § 366.2 with* former *Code Civ. Proc. § 353(b)*]. Longer limitation period may apply to actions founded on the liability of persons who died before January 1, 1991 [*see* former *Code Civ. Proc. § 353(c), (d)* (setting forth different limitation periods)].

For further discussion of *Code Civ. Proc. § 366.2*, see Ch. 345, *Limitation of Actions* .

[iii] Restitution to Estate

Either if proceedings for administration of the decedent's estate are commenced or if the decedent's personal representative consented to the payment, transfer, or delivery of the property and later requests that the property be restored to the estate, each person to whom payment, delivery, or transfer of the property is made is liable for the restitution of the property, or for its fair market value to the estate [*see Prob. Code § 13111*; for discussion of restitution when fraud has occurred, see *§ 441.36[2][b][v]*]. For a discussion relating to restitution of personal property collected without administration, see Ch. 450, *Probate: Collecting Assets* .

[iv] Persons With Superior Rights Regarding Personal Property

Except as provided in *Prob. Code § 13110(b)*, each person to whom payment, delivery or transfer is made under *Prob. Code §§ 13100-13116* is personally liable, to the extent provided in *Prob. Code § 13112*, to any person having a superior right by testate or intestate succession from the decedent [*Prob. Code § 13110(a)*].

[v] Fraud Regarding Personal Property

In addition to any other liability the person has under *Prob. Code §§ 13109-13112*, any person who fraudulently secures the payment, delivery or transfer of decedent's property under *Prob. Code §§ 13100-13116* is liable to the person having a superior right for three times the fair market value of the property [*Prob. Code § 13110(b)*].

For the purposes of *Prob. Code § 13110(b)*, the "fair market value of the property" is the fair market value of the property paid, delivered, or transferred to the person liable under *Prob. Code § 13110(b)*, valued as of the time the liable person presents the affidavit or declaration under *Prob. Code §§ 13100-13116* to the holder of the decedent's property, less any liens and encumbrances on the property at that time [*Prob. Code § 13110(b)*].

Subject to any additional liability he or she has under *Prob. Code §§ 13109-13112*, if the person fraudulently secured the payment, delivery, or transfer of the decedent's property, the person is liable for restitution to the decedent's estate of three times the fair market value of the property [*Prob. Code § 13111(b)*]. For purposes of *Prob. Code § 13111(b)*, "fair market value" is determined as of the time the person liable presents the affidavit or declaration under *Prob. Code § 13110 et seq.* of the property paid, delivered, or transferred, less the amount of any liens and encumbrances on the property at that time [*Prob. Code § 13111(b)*].

[vi] Limitation Period Regarding Personal Property

An action to impose liability under *Prob. Code § 13110* is forever barred three years after the affidavit or declaration is presented under *Prob. Code § 13100 et seq.* to the holder or three years after the discovery of the fraud, whichever is later. The three-year period is not tolled for any reason [*Prob. Code 13110(c)*].

[vii] Extent of Liability Regarding Personal Property

A person to whom payment, delivery, or transfer of the decedent's property has been made under *Prob. Code § 13100 et seq.* is not liable under *Prob. Code § 13109* or *13110* if proceedings for the administration of the decedent's estate are commenced, and the person satisfies the requirements of *Prob. Code § 13111* [*Prob. Code § 13112(a)*; *see Prob. Code § 13111* (restitution of property to estate if administration proceedings commenced in California); for a discussion of the restitution of property under *Prob. Code § 13111*, *see* Ch. 450, *Probate: Collecting Assets*].

Except as provided in *Prob. Code § 13110(b)*, the aggregate of the personal liability of a person under *Prob. Code §§ 13109* and *13110* will not exceed the fair market value, valued as of the time the affidavit or declaration is presented under *Prob. Code § 13100 et seq.*, of the property paid, delivered, or transferred to the person under *Prob. Code §§ 13100-13116*, less the amount of any liens and encumbrances on the property at that time, together with the net income the person received from the property and, if the property has been disposed of, interest on the fair market value of the property accruing from the date of disposition at the rate payable on a money judgment [*Prob. Code § 13112(b)*].

For the purposes of *Prob. Code § 13112(b)*, the "fair market value of the property" is the fair market value, determined as of the time of the disposition of the property, of the property paid, delivered, or transferred to the person under *Prob. Code §§ 13100-13116*, less any liens and encumbrances on the property at that time [*see Prob. Code § 13112(b)*; *see also Prob. Code § 13111(a)(2)*].

[c] Obligation Secured by Recorded Lien on Real Property

[i] Same Effect as Assignment

The transfer under *Prob. Code §§ 13100-13116* of the debt or obligation secured by a lien on real property has the same effect as would be given to an assignment of the right to collect the debt or to enforce the obligation. The recording of the affidavit or declaration under *Prob. Code § 13106.5(a)* (pursuant to *Prob. Code § 13101*) has the same effect as is given under *Civ. Code §§ 2934* and *2935* to recording an assignment of a mortgage and an assignment of the beneficial interest under a deed of trust [*Prob. Code § 13106.5(b)*; for discussion of *Civ. Code §§ 2934* and *2935*, *see* Ch. 555, *Trust Deeds and Real Property Mortgages*].

[ii] Reliance on Deed of Trust

If a deed of trust on the real property was given to secure the debt, and the requirements of *Prob. Code §§ 13100-13103* and *13106.5(a)* are satisfied, the trustee under the deed of trust may rely in good faith on the statements made in the affidavit or declaration and has no duty to inquire into the truth of any statement in the affidavit or declaration [*Prob. Code § 13106.5(c)(1)*]. A person acting in good faith and for a valuable consideration may rely on a recorded reconveyance of the trustee under the deed of trust [*Prob. Code § 13106.5(c)(2)*].

[iii] Reliance on Recorded Discharge of Mortgage

If a mortgage on the real property was given to secure the debt, and the requirements of *Prob. Code §§ 13100-13103* and *13106.5(a)* are satisfied, a person acting in good faith and for a valuable consideration may rely on a recorded discharge of the mortgage executed by the person or persons executing the affidavit or declaration as successor of the decedent or by their successors in interest [*Prob. Code § 13106.5(d)*].

[3] Effect of Refusal to Transfer

If the holder of the decedent's property refuses to pay, deliver or transfer any personal property, or evidence of personal property, to the successor within a reasonable time, the successor may recover the property, or compel its payment, delivery, or transfer in an action brought for that purpose against the holder [*Prob. Code § 13105(b)*].

If an action is brought against the holder under *Prob. Code § 13105(b)*, the court must award reasonable attorney's fees to the person or persons bringing the action if the court finds that the holder acted unreasonably in refusing to pay, deliver, or transfer the property to them as required by *Prob. Code § 13105(a)* [*Prob. Code § 13105(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of CareEstate, Gift & Trust LawWill ContestsNo Contest ClausesReal Property LawFinancingMortgages & Other Security InstrumentsTransfersGeneral Overview

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[Reserved]

§§ 441.37[Reserved]

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38-441 California Forms of Pleading and Practice--Annotated § 441.50

§ 441.50 Petition to Determine Succession to Real Property

[1] Estate Valued at Less Than $100,000

If a decedent dies leaving real property in California, and (1) the gross value of decedent's real and personal property in California does not exceed $100,000 and (2) 40 days have elapsed since the death of the decedent, the decedent's successor to an interest in a particular item of real property, without procuring letters of administration or awaiting probate of the will, may file a petition in the superior court of the county in which the estate of the decedent may be administered, requesting a court order determining that the petitioner has succeeded to that real property [*Prob. Code § 13151*; *see Prob. Code § 13006* ("successor" defined)]. The petition may include an additional request that the court make an order determining that the petitioner has succeeded to personal property described in the petition [*Prob. Code § 13151*; *see also* Cal. L. Revision Comm'n Comment to *Prob. Code § 13151* (petition requesting order concerning personal property only is not permitted under *Prob. Code § 13151*; if only personal property is involved, proper procedure is affidavit pursuant to *Prob. Code § 13100*)].

The procedure may be used only if one of the following requirements is satisfied [*Prob. Code § 13150*]:

- No proceeding is being or has been conducted in California for administration of the decedent's estate [*see Prob. Code § 13007* ("proceeding" defined)]; or

- The decedent's personal representative consents in writing to use of the procedure set forth in *Prob. Code § 13150 et seq.* to determine that real property of the decedent is property passing to the petitioners.

[2] Contents of Petition

The petition must be verified by each petitioner and contain a request that the court make an order under *Prob. Code § 13150 et seq.* determining that the property described in the petition passes to the petitioner. It must also state the facts enumerated in *Prob. Code § 13152(a)* [*Prob. Code § 13152(a)*; *see § 441.271*].

An inventory and appraisal of the decedent's real and personal property in California, excluding the property described in *Prob. Code § 13050*, in the form set forth in *Prob. Code § 8802*, must be attached to the petition. The appraisal must be made by a probate referee; however, the petitioner may appraise the assets a personal representative could appraise under *Prob. Code § 8901* [*Prob. Code § 13152(b)*; *see Prob. Code § 8800 et seq.* (inventory and appraisal]. The petitioner must select the probate referee from those appointed by the controller under *Prob. Code § 400* to appraise property in the county where the real property is located [*Prob. Code § 13152(b)*].

If the petitioner bases his or her claim to the property on the decedent's will, a copy of the will must also be attached to the petition [*Prob. Code § 13152(c)*].

If the decedent's personal representative consented to use of the procedure provided by *Prob. Code § 13150 et seq.*, a copy of the consent must be attached to the petition [*Prob. Code § 13152(d)*].

[3] Notice of Hearing

At least 15 days notice of the hearing must be given as provided in *Prob. Code § 1220* to each of the persons named in the petition pursuant to *Prob. Code § 13152* [*Prob. Code §§ 1220, 13153*]. For discussion and forms relating to *Prob. Code § 1220*, see Ch. 447, *Probate: Statutory Notice Requirements* .

[4] Hearing and Court Order

If the court makes the determinations required and enumerated by *Prob. Code § 13154(b)*, it must issue an order determining that the decedent's real property, which must be described in the order, is property passing to the petitioner or petitioners, and the specific property interest of each petitioner in the described property. If requested in the petition, the order must also determine that personal property of the decedent described in the order is property passing to the petitioners, and must set forth the specific property interest of each petitioner in the described property [*Prob. Code § 13154(a)*]. The court's determination must be made on the basis of the verified petition, and the attached inventory and appraisal. Evidence offered by a person opposing the petition that the gross value of decedent's real and personal property exceeds $100,000 must also be considered [*Prob. Code § 13154(c)*].

[5] Effect of Order Granting Petition

When an order under *Prob. Code § 13150 et seq.*becomes final, it is conclusive on all persons, whether or not they are in being [*Prob. Code § 13155*]. The petitioner who receives the decedent's property pursuant to the order is personally liable for the unsecured debts of the decedent [*Prob. Code § 13156(a)*]. However, the personal liability of the petitioner will not exceed the fair market of the property at the date of the decedent's death, less the amount of any liens and encumbrances on the property [*Prob. Code § 13156(b)*]. In any action based on an unsecured debt of the decedent, the petitioner may assert any defense, cross complaint, or setoff that would have been available to the decedent if the decedent had not died [*Prob. Code § 13156(c)*].

Nothing in *Prob. Code § 13156* permits enforcement of a claim that is barred under *Prob. Code § 9000 et seq.* (creditors' claims) [*Prob. Code § 13156(d)*]. For discussion of creditors' claims against a decedent's estate, *see* Ch. 454, *Probate: Claims Against the Estate* .

The limitation period under *Code Civ. Proc. § 366.2* applies in an action under *Prob. Code § 13156(e)*. For discussion of these limitation provisions, see *§ 441.36[2][b][ii]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesAppointmentsEstate, Gift & Trust LawEstate AdministrationGeneral

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38-441 California Forms of Pleading and Practice--Annotated § 441.51

§ 441.51 Affidavit Procedure for Real Property

[1] Gross Value Less Than $20,000

No sooner than six months from the death of a decedent, a person or persons claiming a particular item of real property as decedent's successor may file an affidavit in the form prescribed by the Judicial Council pursuant to *Prob. Code § 1001*, in the superior court in the county in which the decedent was domiciled at the time of death. If the decedent was not domiciled in California at the time of death, then the affidavit may be filed in any county in which real property of the decedent is located [*Prob. Code § 13200(a)*].

[2] Contents of Affidavit, Procedure, and Attachments

The affidavit must be in the form prescribed by the Judicial Council pursuant to *Prob. Code § 1001* [*see § 441.271*.5] and must state all of the following [*Prob. Code § 13200(a)*]:

- The name of the decedent.
- The date and place of the decedent's death.
- A legal description of the real property, and the interest of the decedent therein.
- The name and address of each person serving as guardian or conservator of the estate of the decedent at the time of the decedent's death, insofar as known to the affiant.
- That the gross value of all real property in the decedent's estate located in California, as shown by the inventory and appraisal attached to the affidavit, excluding the real property described in *Prob. Code § 13050*, does not exceed $20,000;
- That at least six months have elapsed since the death of the decedent, as shown in a certified copy of

the decedent's death certificate attached to the affidavit.

- That either no proceeding (as defined in *Prob. Code § 13007*) is now being or has been conducted in California for administration of the decedent's estate, or the decedent's personal representative has consented in writing to use of the procedure provided by *Prob. Code § 13200 et seq.*.

- That the funeral expenses, expenses of the last illness, and all unsecured debts of the decedent have been paid.

- That the affiant is the successor of the decedent (as defined in *Prob. Code § 13006*) and to the decedent's interest in the described property, and that no other person has a superior right to decedent's interest.

The affidavit must be certified by a notary public as to the identity of each person executing it [*Prob. Code § 13200(b)*]. An inventory and appraisal of decedent's real property in California, excluding the real property described in *Prob. Code § 13050*, must be attached to the affidavit. The appraisal must be made by a probate referee selected by the affiant from those appointed by the Controller under *Prob. Code § 400* to appraise property in the county in which the real property is located [*Prob. Code § 13200(c)*; *see Prob. Code § 8800 et seq.* (form, content, and manner of making inventory and appraisal)].

A certified copy of the decedent's death certificate must also be attached to the affidavit [*Prob. Code § 13200(e)*].

If the decedent's personal representative has consented to the use of the procedure, a copy of the consent and of the personal representative's letters must also be attached to the affidavit [*Prob. Code § 13200(e)*].

If the affiant claims under the decedent's will and no estate proceeding is pending or has been conducted in California, a copy of the will must be attached to the affidavit [*Prob. Code § 13200(d)*].

Prior to July 1, 1991, the affiant was requested to personally serve or mail, postage prepaid, a copy of the affidavit and attachments to each person serving as guardian or conservator of the decedent's estate at the time of the decedent's death, insofar as known to the affiant [*Prob. Code § 13200(f)*; *see Prob. Code § 13200(a)(4)*].

Since July 1, 1991, the affiant is required to mail a copy of the affidavit and attachments to each of those persons [*Prob. Code § 13200(f)*, as amended operative July 1, 1991; *see Prob. Code § 13200(a)(4)*]. For discussion of mailing procedures, see Ch. 447, Probate: Statutory Notice.

[3] Filing and Recording Affidavit

When the affidavit and the required filing fee are received by the court clerk, and the clerk determines that the affidavit is complete and has the required attachments, he or she must file the affidavit and attachments, and issue a certified copy of the affidavit without the attachments. The copy must be recorded in the office of the county recorder in the county where the real property is located. The county recorder must index the certified copy in the index of grantors and grantees, with the decedent indexed as grantor, and each person designated as a successor to the property on the certified copy indexed as a grantee [*Prob. Code § 13202*; *see Prob. Code § 13201* (filing fee)].

[4] Effect of Recording Affidavit

[a] Rights of Successor's Purchasers, Lessees, and Creditors

A person acting in good faith and for a valuable consideration with a person designated as a successor of the decedent in

regard to a particular item of property in a certified copy of an affidavit issued under *Prob. Code § 13202* and recorded in the county in which the real property is located has the same rights and protections as the person would have if each person designated as a successor in the recorded certified copy of the affidavit had been named as a distributee of the real property in an order for distribution that had become final [*Prob. Code § 13203(a)* as adopted by Stats. 1990, ch. 79, § 14, operative July 1, 1991; *see also* Cal. L. Revision Comm'n Comment to *Prob. Code § 13203* (the section continues repealed section 13203, but extends it to cover any person entering a transaction in good faith and for valuable consideration, rather than only purchasers, lessees, and lenders)]. The issuance and recording of a certified copy of an affidavit under *Prob. Code § 13200 et seq.* does not preclude later proceedings for administration of the decedent's estate [*Prob. Code § 13203(b)*].

[b] Liability of Successor Regarding Real Property

[i] Unsecured Debts

Each person who is designated as a successor in a certified copy of an affidavit issued under *Prob. Code § 13202* is personally liable, to the extent provided in *Prob. Code § 13207*, for the unsecured debts of the decedent. The debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. In any action based on the debt, the person may assert any defense, cross complaint, or setoff that would have been available to the decedent if the decedent had not died. Nothing in *Prob. Code § 13204* permits enforcement of a claim that is barred under *Prob. Code § 9000 et seq.* (creditors' claims) [*Prob. Code § 13204*]. For discussion of creditors' claims against a decedent's estate, *see* Ch. 454, *Probate: Claims Against the Estate* .

The limitation period under *Code Civ. Proc. § 366.2* applies in an action under *Prob. Code § 13204* [*Prob. Code § 13204*]. For discussion of these limitation provisions, see *§ 441.36[2][b][ii]*.

[ii] Restitution to Estate

Either if proceedings for administration of the decedent's estate are commenced or if the decedent's personal representative has consented to use of the procedure under *Probate Code Section 13200 et seq.* and later requests that the property be restored to the estate, each person who is designated as a successor of the decedent in a certified copy of the affidavit issued under *Prob. Code § 13202* is liable for restitution of the property or its fair market value to the estate [*see Prob. Code § 13206*; for discussion of restitution when fraud has occurred, see *§ 441.36[2][b][v]*]. For a discussion relating to restitution of personal property collected without administration, see Ch. 450, *Probate: Collecting Assets* .

[iii] Persons With Superior Rights Regarding Real Property

Except as provided in *Prob. Code § 13205(b)*, each person who is designated as a successor in a certified copy of an affidavit issued under *Prob. Code § 13202* is personally liable, to the extent provided in *Prob. Code § 13207*, to any person having a superior right by testate or intestate succession from the decedent [*Prob. Code § 13205(a)*].

[iv] Fraud Regarding Real Property

In addition to any other liability the person has under *Prob. Code §§ 13205-13207*, if the person fraudulently executed or filed the affidavit under *Prob. Code § 13200 et seq.*, he or she is liable to the person having a superior right for three times the fair market value of the property [*Prob. Code § 13205(b)*].

For the purposes of *Prob. Code § 13205(b)*, the "fair market value of the property" is the fair market value, valued as of the time the certified copy of the affidavit was issued under *Prob. Code § 13202*, of the property the person liable took under the certified copy, less any liens and encumbrances on the property at that time [*Prob. Code § 13205(b)*].

If the person fraudulently executed or filed the affidavit under *Prob. Code § 13200 et seq.*, he or she is liable for

restitution to the decedent's estate of three times the fair market value of the property [*Prob. Code § 13206(b)*]. For purposes of *Prob. Code § 13206(b)*, "fair market value" is the fair market value, determined as of the time the certified copy of the affidavit was issued, of the property the person took under the certified copy of the affidavit, less the amount of any liens and encumbrances on the property at that time [*Prob. Code § 13206(b)*].

[v] Limitation Period Regarding Real Property

An action to impose liability under *Prob. Code § 13205* is forever barred three years after the certified copy of the affidavit is issued under *Prob. Code § 13202* or three years after the discovery of fraud, whichever is later. The three-year period is not tolled for any reason [*Prob. Code § 13205(c)* as adopted by Stats. 1990, ch. 79, § 14; *see* former *Prob. Code § 13205(c)* (which provided for a five-year period)].

[vi] Extent of Liability Regarding Real Property

A person designated as a successor of the decedent in a certified copy of an affidavit issued under *Prob. Code § 13202* is not liable under *Prob. Code § 13204* or *13205* if proceedings for the administration of the decedent's estate are commenced or if the decedent's personal representative consented to use of the procedure under *Prob. Code § 13200 et seq.* and later requests that the property be restored to the estate, and the person satisfies the requirements of *Prob. Code § 13206* [*Prob. Code § 13207(a)*; *see Prob. Code § 13206* (restitution of property to estate if administration proceedings commenced); for a discussion of the restitution of real property under *Prob. Code § 13206*, *see* Ch. 450, *Probate: Collecting Assets*].

Except as provided in *Prob. Code § 13205(b)*, the aggregate of the personal liability of a person under *Prob. Code §§ 13204* and *13205* will not exceed the fair market value at the time of the issuance of the certified copy of the the affidavit under *Prob. Code § 13202* of the decedent's property received by that person under *Prob. Code §§ 13200-13209*, less the amount of any liens and encumbrances on the property at that time, together with the net income the person received from the property and, if the property has been disposed of, interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment [*Prob. Code § 13207(b)*].

For the purposes of *Prob. Code § 13207(b)*, the "fair market value of the property" is the fair market value, determined as of the time of the disposition of the property, of the property the person took under a certified copy of an affidavit, less the amount of any liens and encumbrances on the property at the time the certified copy of the affidavit was issued [*see Prob. Code § 13207(b)*; *see also Prob. Code § 13206(a)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesAppointmentsEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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3. Succession To Real Property Of Small Estates Without Administration

38-441 California Forms of Pleading and Practice--Annotated §§ 441.52-441.69

[Reserved]

§§ 441.52[Reserved]

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38-441 California Forms of Pleading and Practice--Annotated § 441.70

§ 441.70 Governing Statutes

Summary administration of a small estate of a decedent who died on or after July 1, 1987, is governed by *Prob. Code §§ 6600-6615*. Notice is governed by *Prob. Code § 6607*. If the decedent died prior to July 1, 1987, summary administration of a small estate is governed by former *Prob. Code §§ 640-647.5*, and notice is governed by former *Prob. Code §§ 642*, 643, 1200.5, *1201*. Former *Prob. Code §§ 640-647.5* still apply if decedent died before July 1, 1987 [*Prob. Code § 6614*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-441 California Forms of Pleading and Practice--Annotated § 441.71

§ 441.71 Summary Administration of Small Estates

The Probate Code contains provisions for summary administration of certain small estates [*see Prob. Code § 6600 et seq.* (decedents who died on or after July 1, 1987); former *Prob. Code § 640 et seq.* (decedents who died prior to July 1, 1987)]. To qualify for summary administration, the net value of the decedent's estate, over and above (1) all liens and encumbrances at the date of death and (2) the value of any probate homestead interest set apart for the surviving spouse, registered domestic partner [*see Fam. Code § 297.5(c)* (effective January 1, 2005, surviving registered domestic partner has same rights as a surviving spouse)], or minor children of the decedent, must not exceed $20,000 [*see Prob. Code § 6602*; former *Prob. Code § 640*]. The procedure is described in the § 441.250.

Prob. Code §§ 6600-6615, like the family allowance procedure [*see Prob. Code §§ 6540-6545*, discussed in Ch. 448, *Probate: Family Allowance*], may be used to get immediate cash or property to the surviving spouse or domestic partner and minor children if the estate does not exceed $20,000, even if they are not named in the decedent's will. The process is a summary proceeding, and so avoids the filing of a petition for probate and publication of notice to creditors (unless filed with a petition for probate) [*see Prob. Code § 6607*], although the spouse or domestic partner and children remain liable personally to the creditors up to the amount that they take [*see Prob. Code § 6111*]. The court has broad discretion to grant the petition [*see Prob. Code § 6609(a)*].

Unlike a spousal property petition [*see Prob. Code § 13500 et seq*, discussed in § 41.110 *et seq. through § 441.150* et seq.], this procedure may be used to get estate property to the minor children. The spousal property petition can be used only with respect to a surviving spouse or registered domestic partner [*see Prob. Code § 13500*].

The summary probate declaration process [*Prob. Code § 13100 et seq.*, discussed in *§ 441.10* et seq.], available when the estate is valued at $100,000 or less, directs property to the beneficiaries of the estate [*see Prob. Code §§ 13006, 13101*]. In contrast, the procedure under § *Prob. Code § 6600 et seq.* directs property solely to the surviving spouse or registered domestic partner and/or the decedent's minor children, even if the will directs that property to others [*see Prob. Code § 6609(e)* (upon issuance of court order, title to property vests absolutely in spouse, registered domestic partner, or minor children, and there will be no further administration proceedings unless additional property is discovered)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesFamiliesEstate, Gift & Trust LawEstate AdministrationAllowancesHomesteadsEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesFamily LawMarital Duties & RightsProperty RightsHomestead Rights

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38-441 California Forms of Pleading and Practice--Annotated §§ 441.72-441.89

[Reserved]

§§ 441.72[Reserved]

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38-441 California Forms of Pleading and Practice--Annotated § 441.90

§ 441.90 Governing Statutes

Proceedings to establish death are governed generally by *Prob. Code §§ 200-215*. Standing is governed by *Prob. Code § 200*. Requirements regarding the petition are governed by *Prob. Code §§ 201, 202*. Notice is governed by *Prob. Code § 203*. Evidence and the judgment establishing death are governed by *Prob. Code § 204*. Recording requirements are governed by *Prob. Code § 210-212*. Reporting the fact of death is governed by *Prob. Code § 215*.

Proceedings to determine the identity of heirs when property vests other than by laws of succession are governed by *Prob. Code §§ 248-249*.

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38-441 California Forms of Pleading and Practice--Annotated § 441.91

§ 441.91 Establishing Fact of Death

[1] In General

If title to or an interest in real or personal property is affected by the death of a person, another person who claims an interest in the property may commence proceedings under *Prob. Code §§ 200-204* to establish the fact of the death [*Prob. Code § 200*].

[2] Commencement of Proceedings

Proceedings under *Prob. Code §§ 200-204* must be commenced in the superior court of the county of which the decedent was a resident at the time of death or in the superior court of any county in which the property is located [*Prob. Code § 201(a)*]. The proceedings are commenced by filing a verified petition that sets forth all of the following information [*Prob. Code §§ 201(b), 1021(a)(1)*]:

- The jurisdictional facts [*see Prob. Code §§ 200, 201(a)*].
- A particular description of the affected property and of the interest of the petitioner in the property.

[3] Probate Proceedings Pending

If proceedings for the administration of the decedent's estate are pending, proceedings under *Prob. Code §§ 200-204* may be combined with the administration proceedings in the manner specified in *Prob. Code § 202*. The petition must be filed in the administration proceedings by the person affected or by the personal representative [*Prob. Code § 202(a)*]. The petition must be filed at any time before the filing of a petition for final distribution, and may be included in a petition for probate of the will of the decedent or for letters [*Prob. Code § 202(b)*]. The petition is filed without any additional fee [*Prob. Code § 202(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-441 California Forms of Pleading and Practice--Annotated § 441.92

§ 441.92 Notice of Hearing

If the person who files the petition files an affidavit (declaration) with the petition stating that that person has no reason to believe that there is any opposition to, or contest of, the petition, the court may act ex parte [*Prob. Code § 203(b)*]. In any other case, at least 15 days notice of the hearing must be given as provided in *Prob. Code § 1220* [*Prob. Code § 203(a)*]. For discussion and forms relating to *Prob. Code § 1220* and other relevant notice provisions, see Ch. 447, *Probate: Statutory Notice Requirements* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-441 California Forms of Pleading and Practice--Annotated § 441.93

§ 441.93 Evidence and Judgment

The petition and supporting affidavits (declarations) may be received in evidence and acted on by the court with the same force and effect as if the petitioner and affiants (declarants) were personally present and testified to the fact set forth. The court may render judgment on the petition and affidavits, establishing the fact of the death. The judgment is prima facie evidence of the fact of the death. The presumption established by this section is a presumption affecting the burden of producing evidence [*Prob. Code § 204*].

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38-441 California Forms of Pleading and Practice--Annotated § 441.94

§ 441.94 Appealability of Order

An order establishing the fact of death is not one of the orders listed as appealable orders in *Prob. Code §§ 1300-1304* (appealable orders under the Probate Code, effective Jan. 1, 1998). Under predecessor statutes, it was held that such an order was not an appealable judgment [*LePleux (Py) v. Applegate (1958) 164 Cal. App. 2d 9, 11, 330 P.2d 65* (interpreting former *Prob. Code § 1240*)]. The basis for this decision was that the judgment under former Prob. Code § 1174 is only prima facie evidence of death [*LePleux (Py) v. Applegate (1958) 164 Cal. App. 2d 9, 11, 330 P.2d 65]* . The same rationale could be applied to a judgment under *Prob. Code § 204* [*see Prob. Code § 204(b)*].

Legal Topics:

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38-441 California Forms of Pleading and Practice--Annotated § 441.95

§ 441.95 Recording Evidence of Death

If title to real property is affected by the death of a person, any person may record, in the county in which the property is located, either of the following documents establishing the fact of death [*Prob. Code § 210*]:

- An affidavit of death executed by a person having knowledge of the facts. The affidavit must include a particular description of the real property and an attested or certified copy of a record of the death made and filed in a designated public office as required by law.

- A certified copy of a court order that determines the fact of death made under *Prob. Code §§ 200-204* or under another statute that provides for a determination of the fact of death.

A document establishing the fact of death recorded under *Prob. Code §§ 210-212* is subject to all statutory requirements for recorded documents [*Prob. Code § 211(a)*]. The county recorder must index a document so recorded in the index of grantors and grantees, and the person whose death is established is deemed to be the grantor [*see Prob. Code § 211(b)*].

A document establishing the fact of death of a person recorded under *Prob. Code §§ 210-212* is prima facie evidence of the death insofar as the document identifies real property situated in the county, title to which is affected by the death [*Prob. Code § 212*]. The presumption is one affecting the burden of producing evidence [*Prob. Code § 212*].

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38-441 California Forms of Pleading and Practice--Annotated § 441.96

§ 441.96 Determining Identity of Heirs When Property Vests Other Than by Laws of Succession

When title to real or personal property, or any interest in the property, vests, other than by laws of succession, in the heirs, heirs of the body, issue, or children of any person, without other description or means of identifying the person embraced in the description, a petition may be filed requesting that a decree be entered determining and establishing the identity of the persons embraced in the general description. The petition may be filed by any person interested in the property as the heir, heir of the body, issue, or child, or his or her successor in interest, or by the personal representative of any interested person or his or her successor in interest [*Prob. Code § 248*; *see § 441.313*.1].

At any time before the hearing on a petition to identify heirs, any person interested in the property may answer the petition and deny any of the matters contained in it. The court must hear the proofs offered by the petitioner and by any person contesting, and must make a decree conformable to the proofs. The decree is prima facie evidence of the facts determined by the proofs and is conclusive in favor of anyone acting thereon in good faith without notice of any conflicting interest [*Prob. Code § 249*; *see § 441.313*.2].

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38-441 California Forms of Pleading and Practice--Annotated §§ 441.97-441.109

[Reserved]

§§ 441.97[Reserved]

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38-441 California Forms of Pleading and Practice--Annotated § 441.110

§ 441.110 Governing Statutes

The passage of property to a surviving spouse, including separate property of the deceased spouse, is governed by *Prob. Code § 13500 et seq.* The procedure for obtaining a determination by the court that all or a portion of the decedent's estate is community or quasi-community property passing to the surviving spouse by intestate succession or by will without administration is set forth in *Prob. Code §§ 13650-13660*. These sections apply whether the decedent died before, on, or after their operative date of July 1, 1987 [*Prob. Code § 13505*].

Filing a petition for spousal or domestic partner property is governed by *Cal. Rules of Ct., Rule 7.301*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyIntestacyEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesFamily LawCohabitationDomestic PartnersPropertyFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Duties & RightsProperty RightsCharacterizationSeparate Property

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38-441 California Forms of Pleading and Practice--Annotated § 441.111

§ 441.111 Rights of Registered Domestic Partners

As of January 1, 2005, registered domestic partners have the same rights, protections, and benefits, and are subject to the same responsibilities, obligations, and duties under law that are granted to and imposed on spouses [*Fam. Code § 297.5(a)*; *see Knight v. Superior Court (2005) 128 Cal. App. 4th 14, 22-31, 26 Cal. Rptr. 3d 687* (enactment of *Fam. Code § 297.5* is not an improper legislative amendment of Proposition 22, codified in *Fam. Code § 308.5*, which states that only marriage between a man and a woman is valid or recognized in California)]. A surviving registered domestic partner, following the other partner's death, has the same rights, protections, and benefits, and is subject to the same responsibilities, obligations, and duties that are granted to and imposed on a surviving spouse [*Fam. Code § 297.5(c)*]. Thus, the provisions of the Probate Code that provide for the passage of property to a surviving spouse [*Prob. Code § 13500 et seq.*] apply equally to the passage of property to a surviving registered domestic partner.

The legislature has made clear its intention in the domestic partnership law to substantially equalize the status of registered domestic partners and spouses [*Koebke v. Bernardo Heights Country Club (2005) 36 Cal. 4th 824, 839, 31 Cal. Rptr. 3d 565, 115 P.3d 1212]* . To couples who meet the requirements of establishing a domestic partnership under the domestic partnership law and who have registered under that law, the legislature has granted legal recognition comparable to marriage, both procedurally and in terms of the substantive rights and obligations granted to and imposed on the partners, which are supported by policy considerations similar to those favoring marriage. These rights and responsibilities are not shared by couples who cohabit or who have not registered as domestic partners [*Koebke v. Bernardo Heights Country Club (2005) 36 Cal. 4th 824, 845-846, 31 Cal. Rptr. 3d 565, 115 P.3d 1212* (finding that in light of domestic partnership law, Unruh Act requires businesses to treat registered domestic partners same as spouses)].

For purposes of determining the rights of registered domestic partners with respect to community property, references in statutes, rules, and other sources of law to the date of marriage are deemed to refer to the date on which the domestic partnership was registered with the state [*Fam. Code § 297.5(k)(1)*].

Legal Topics:

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

Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesFamily LawCohabitationDomestic PartnersDuties & RightsFamily LawCohabitationDomestic PartnersPropertyFamily LawCohabitationDomestic PartnersRegistrationFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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38-441 California Forms of Pleading and Practice--Annotated § 441.112

§ 441.112 Property Passing to Spouse or Registered Domestic Partner Without Administration

[1] In General

Except as provided in *Prob. Code §§ 13500-13506*, when a spouse or registered domestic partner dies intestate leaving property that passes to the surviving spouse under *Prob. Code § 6401* (intestate share of surviving spouse or surviving registered domestic partner), or dies testate and by his or her will devises all or part of his or her property to the surviving spouse or surviving registered domestic partner, the property passes to the survivor subject to the provisions of *Prob. Code §§ 13540-13554*, and no administration is necessary [*Prob. Code § 13500*; *see Fam. Code § 297.5*(j) (gender-specific terms referring to spouses must be construed to include domestic partners when necessary to implement statutory rights of registered domestic partners)].

[2] When Administration Permitted

On the election of the surviving spouse or registered domestic partner or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse or registered domestic partner, all or a portion of the following property may be administered under the Probate Code [*Prob. Code § 13502(a)*; *Fam. Code § 297.5(c)*]:

- The one half of the community property that belongs to the decedent under *Prob. Code § 100(a)*, the one half of the quasi-community property that belongs to the decedent under *Prob. Code § 101(a)*, and the separate property of the decedent.

- The one half of the community property that belongs to the survivor under *Prob. Code § 100(a)*, and the one half of the quasi-community property that belongs to the survivor under *Prob. Code § 101(a)*.

The election must be made by a writing specifically evidencing the election filed in the proceedings for the administration of the decedent's estate within four months after the issuance of letters or within such a further time as the court may allow on a showing of good cause, by a writing specifically evidencing the election filed in the proceedings for the administration of the estate and before the entry of an order under *Prob. Code § 13656* [*Prob. Code § 13502(b)*; *Fam. Code § 297.5(c)*].

In addition, to the extent that a pecuniary devise to the surviving spouse or registered domestic partner or a fractional interest passing to the surviving spouse or registered domestic partner in any property in which the remaining fraction is subject to administration has not passed by inheritance as determined by a spousal or domestic partner property order [*see Prob. Code § 13650 et seq.*], the personal representative may petition for an order that the property be administered, and the court may make the order on a showing of good cause [*Prob. Code § 13502.5(a)*]. Notice of the petition must be given as provided in *Prob. Code § 1220* and to the surviving spouse or registered domestic partner [*Prob. Code § 13502.5(b)*; *Fam. Code § 297.5(c)*].

Note that if the spouses or registered domestic partners have agreed in writing to divide their community property or quasi-community property on the basis of a non pro rata division of the aggregate value of the property or on the basis of a division of each individual item or asset of such property, a division other than one half may apply [*see Prob C §§ 100(b), 101(b)*; *Fam. Code § 297.5(c)*; *see also Prob. Code § 13651(a)(2), (4), (5)*].

For general procedure and forms relating to petitions for probate, see Ch. 442, *Probate: Initiating Probate Administration* .

[3] Transfer to Trustee Permitted

The surviving spouse or registered domestic partner, or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse or registered domestic partner may file an election and agreement to have all or part of the one half of the community property that belongs to the survivor under *Prob. Code § 100(a)*, and the one half of the quasi-community property that belongs to the survivor under *Prob. Code § 101(a)*, transferred by the survivor or by survivor's personal representative, guardian, or conservator to the trustee under the will of the deceased spouse or registered domestic partner or the trustee of an existing trust identified by the decedant's will to be administered and distributed by the trustee. The election and agreement must be filed before the entry of the order for final distribution in the proceedings [*Prob. Code § 13503*; *Fam. Code § 297.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyElectionEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesEstate, Gift & Trust LawTrustsTrusteesGeneral OverviewFamily LawCohabitationDomestic PartnersRegistrationFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Duties & RightsProperty RightsCharacterizationSeparate Property

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38-441 California Forms of Pleading and Practice--Annotated § 441.113

§ 441.113 Power Regarding Real Property

Except as provided in *Prob. Code § 13541*, after 40 days from the death of a spouse or registered domestic partner, the surviving spouse or registered domestic partner or the personal representative, or guardian or conservator of the estate of the surviving spouse or registered domestic partner has full power to sell, convey, lease, mortgage, or otherwise deal and dispose of the community or quasi-community real property. The right, title, and interest of any grantee, purchaser, encumbrancer, or lessee is free of rights of the estate of the decedent or of devisees or creditors of the to the same extent as if the property had been owned as the separate property of the survivor [*Prob. Code § 13540*]. The survivor or the personal representative, guardian of the estate, or conservator of the estate of the survivor may record, together with the instrument that makes a disposition of property, an affidavit of the facts that establish the right of the survivor to make the disposition [*Prob. Code § 13540(b)*; *Fam. Code § 297.5(c)*].

Prob. Code § 13540(a) does not apply to a sale, conveyance, lease, mortgage, or other disposition that takes place after a notice that satisfies the requirements of *Prob. Code § 13541(b)* is recorded in the office of the county recorder of the county in which the real property is located [*Prob. Code § 13541(a)*; *Fam. Code § 297.5(c)*].

The notice must contain all of the following [*Prob. Code § 13541(b)*; *Fam. Code § 297.5(c)*]:

- A description of the real property in which an interest is claimed;
- A statement that an interest in the property is claimed by a named person under the will of the deceased spouse or registered domestic partner; and
- The name or names of the owner or owners of the record title to the property.

The notice must instruct the recorder to index the name or names of the owner or owners of the record title to the property, as grantor or grantors, and the name of the person claiming an interest in the property, as grantee [*Prob. Code § 13541(c)*].

A person may not record a notice under *Prob. Code § 13541* for the purpose of slandering title to the property. If, in an action or proceeding relating to the rights of the parties, the court determines that a person recorded a notice for the purpose of slandering title, it will award against that person the cost of the action or proceeding, including a reasonable attorney's fee, and the damages caused by the recording [*Prob. Code § 13541(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-441 California Forms of Pleading and Practice--Annotated § 441.114

§ 441.114 Power to Dispose of Securities

After the decedent's death, the surviving spouse or registered domestic partner or the personal representative, guardian of the estate, or conservator of the estate of the survivor has full power to sell, assign, pledge, or otherwise deal with and dispose of community or quasi-community property securities registered in the name of the survivor alone, and the right, title, and interest of any purchaser, assignee, encumbrancer, or other transferee will be free of the rights of the estate of the decedent or of devisees or creditors of the decedent to the same extent as if the decedent had not died [*Prob. Code § 13545(a)*; *Fam. Code § 297.5(c)*; for discussion of property rights as between spouses or registered domestic partners and their creditors, *see* Ch. 122, *Community Property*]. *Prob. Code § 13545* does not affect or limit liability of a surviving spouse or registered domestic partner under *Prob. Code §§ 13550-13553, 13560 et seq.* [Prob. Code § 13454(b); *Fam. Code § 297.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-441 California Forms of Pleading and Practice--Annotated § 441.115

§ 441.115 Decedent's Property Subject to Administration

Except as provided in *Prob. Code §§ 6600-6615* (small estate set-aside; *see § 441.70* et seq.), the following property of the decedent is subject to administration under the Probate Code [*Prob. Code § 13501*; *Fam. Code § 297.5(c)*]:

- Property passing to someone other than the surviving spouse or registered domestic partner under the decedent's will or by intestate succession;

- Property disposed of in trust under the decedent's will; and

- Property in which the decedent's will limits the surviving spouse or registered domestic partner to a qualified ownership. A devise or bequest to the surviving spouse or registered domestic partner that is conditioned on surviving the decedent by a specified period of time is not a qualified ownership interest for the purposes of *Prob. Code § 13501(c)* if the specified period of time has expired.

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-441 California Forms of Pleading and Practice--Annotated § 441.116

§ 441.116 Survivor's Personal Liability for Debts

[1] In General

Except as provided by *Prob. Code §§ 11446* (funeral expenses and last illness debts payable primarily from estate), 13552, 13553, and 13554, on the death of a married person or registered domestic partner, the surviving spouse or registered domestic partner is personally liable for the debts of the decedent chargeable against the property described in *Prob. Code § 13551* [*Prob. Code § 13550*; *Fam. Code § 297.5(c)*]. The liability imposed by *Prob. Code § 13550* must not exceed the fair market value at the date of decedent's death, less the amount of any liens or encumbrances, of the total of the following [*Prob. Code § 13551*; *Fam. Code § 297.5(c)*]:

- The portion of the one half of the community and quasi-community property that belongs to the survivor under *Prob. Code §§ 100(a)* and *101(a)* that is not exempt from enforcement of a money judgment, and is not administered in the estate of the decedent.

- The portion of the one half of the community and quasi-community property that belongs to the decedent under *Prob. Code §§ 100(a)* and *101*(a) that passes to the survivor without administration.

- The separate property of the decedent that passes to the survivor without administration.

Note that if the parties have agreed in writing to divide their community property or quasi-community property on the basis of a non pro rata division of the aggregate value of the property or on the basis of a division of each individual item or asset of that property, a division other than one half may apply [*see Prob. Code §§ 100(b), 101(b)*; *Fam. Code § 297.5(c) see also Prob. Code § 13651(a)(2), (4), (5)*].

The survivor is not liable under *Prob. Code §§ 13550-13554* if all of the property described in *Prob. Code § 13502(a)* is administered under the Probate Code [*Prob. Code § 13553*; *Fam. Code § 297.5(c)*].

[2] Effect of Proceedings to Administer Estate

If proceedings are commenced in California for the administration of the estate of the deceased spouse or registered domestic partner and the time for filing claims has commenced, any action on the liability of the survivor under *Prob. Code § 13550* is barred to the same extent as provided for claims under *Prob. Code § 9000 et seq.*, except as to the following [*Prob. Code § 13552*; *Fam. Code § 297.5(c)*]:

- Creditors who commence judicial proceedings for the enforcement of the debt and serve the survivor with the complaint before the expiration of the time for filing claims.

- Creditors who have or who secure the survivor's acknowledgement in writing of his or her liability for the debts.

- Creditors who file a timely claim in the proceedings for the administration of the decedent's estate.

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-441 California Forms of Pleading and Practice--Annotated § 441.117

§ 441.117 Enforcement of Debt and Defenses Available to Surviving Spouse or Registered Domestic Partner

Except as otherwise provided by *Prob. Code §§ 13550-13554*, any debt described in *Prob. Code § 13550* may be enforced against the surviving spouse or registered domestic partner in the same manner as it could have been enforced against the decedent if he or she had not died. In any action or proceeding based on the debt, the survivor may assert any defense, cross complaint, or setoff that would have been available to the decedent if he or she had not died [*Prob. Code § 13554*; *Fam. Code § 297.5(c)*].

The limitation period under *Code Civ. Proc. § 366.2* applies in an action under *Prob. Code § 13554* [*Prob. Code § 13554(c)*]. Thus, the one-year limitation period of *Code Civ. Proc. § 366.2*, and not the four-year limitation period of *Fam. Code § 914*, under which spouses or partners are personally liable for each other's debts incurred for necessaries of life, applied in an action against a surviving spouse for recovery of medical expenses of the deceased spouse's last illness [*Collection Bureau of San Jose v. Rumsey (2000) 24 Cal. 4th 301, 310, 99 Cal. Rptr. 2d 792, 6 P.3d 713]* . For a discussion of the limitation provisions, see *§ 441.36[2][b][ii]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-441 California Forms of Pleading and Practice--Annotated § 441.118

§ 441.118 Survivor's Liability to Person With Superior Right to Decedent's Property

[1] Personal Liability

If the decedent's property is in the possession or control of the surviving spouse or registered domestic partner at the time of the decedent's death, the survivor is personally liable to any person having a superior right by testate succession from the decedent [*Prob. Code § 13561(a)*; *Fam. Code § 297.5(c) see also Prob. Code § 13563* (limitations on liability, discussed in *§ 441.118[2]*)]. The term "decedent's property" means the one half of the community property that belongs to the decedent under *Prob. Code § 100(a)* and the one half of the quasi-community property that belongs to the decedent under *Prob. Code § 101(a)* [*Prob. Code § 13560*; *Fam. Code § 297.5(c)*].

An action to impose liability under *Prob. Code § 13561* is forever barred three years after the death of the decedent. The three-year period may not be tolled for any reason [*Prob. Code § 13561(b)*; *Fam. Code § 297.5(c)*].

The remedies available under *Prob. Code §§ 13561-13563* are in addition to any remedies available by reason of any fraud or intentional wrongdoing [*Prob. Code § 13564*; *Fam. Code § 297.5(c)*].

[2] Limitations on Liability

The surviving spouse or registered domestic partner is not liable under *Prob. Code § 13561* (*see § 441.118[1]*) if proceedings for the administration of the decedent's estate are commenced and the survivor satisfies the requirements of *Prob. Code § 13562* (discussed in *§ 441.119*) [*Prob. Code § 13563(a)*; *Fam. Code § 297.5(c)*].

The aggregate of the personal liability of the survivor under *Prob. Code § 13561* may not exceed the sum of the following [*Prob. Code § 13563(b)*; *Fam. Code § 297.5(c)*]:

- The fair market value at the time of the decedent's death, less the amount of any liens and encumbrances on the decedent's property at that time, of the portion of the decedent's property that passes to any person having a superior right by testate succession from the decedent.

- The net income the survivor received from the portion of the decedent's property that passes to any person having a superior right by testate succession from the decedent.

- If the decedent's property has been disposed of, interest on the fair market value of the portion of the decedent's property that passes to any person having a superior right by testate succession from the decedent from the date of disposition at the rate payable on a money judgment. The term "fair market value" means fair market value, determined as of the time of disposition of the decedent's property, less the amount of any liens and encumbrances on the decedent's property at the time of the decedent's death.

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-441 California Forms of Pleading and Practice--Annotated § 441.119

§ 441.119 Restitution to Estate of Decedent's Property Held by Surviving Spouse or Registered Domestic Partner

[1] General Rule

Subject to *Prob. Code § 13562(b), (c),* and *(d)* (discussed in *§ 441.119[3]*), if proceedings for the administration of the decedent's estate are commenced, the surviving spouse or registered domestic partner is liable for the following [*Prob. Code § 13562(a)*; *Fam. Code § 297.5(c)*]:

- Restitution to the decedent's estate of the decedent's property if the survivor still has the decedent's property, together with (1) the net income the survivor received from the decedent's property and (2) if the survivor encumbered the decedent's property after the date of death, the amount necessary to satisfy the balance of the encumbrance as of the date the decedent's property is restored to the estate;

- Restitution to the decedent's estate of the fair market value of the decedent's property if the survivor no longer has the decedent's property, together with (1) the net income the survivor received from the decedent's property prior to disposing of it and (2) interest from the date of disposition at the rate payable on a money judgment on the fair market value of the decedent's property. The term "fair market value of the decedent's property" means the fair market value of the decedent's property, determined as of the time of the disposition of the decedent's property, less the amount of any liens and encumbrances on the decedent's property at the time of the decedent's death.

[2] If Survivor Made Improvements to Property

If proceedings for the administration of the decedent's estate are commenced and the surviving spouse or registered domestic partner made a significant improvement to the decedent's property in the good faith belief that the he or she was the successor of the decedent to the decedent's property, the survivor is liable for whichever of the following the decedent's estate elects [*Prob. Code § 13562(b)*; *Fam. Code § 297.5(c)*]:

- Restitution of the decedent's property, as improved, to the estate of the decedent on the condition that the estate reimburse the survivor for (1) the amount by which the improvement increases the fair market

value of the decedent's property restored, valued as of the time of restitution, and (2) the amount paid by the survivor for principal and interest on any liens or encumbrances that were on the decedent's property at the time of the decedent's death; or

- Restoration to the decedent's estate of the fair market value of the decedent's property, valued as of the time of the decedent's death, excluding the amount of any liens and encumbrances on the decedent's property at that time, together with interest on the net amount at the rate payable on a money judgment running from the date of the decedent's death.

[3] Offset for Amounts Paid on Decedent's Debts

The property and amount required to be restored to the estate under *Prob. Code § 13562* must be reduced by any property or amount paid by the surviving spouse or registered domestic partner to satisfy a liability for the decedent's debts under *Prob. Code § 13550 et seq.* [*Prob. Code § 13562(c)*; *Fam. Code § 297.5(c)*].

[4] Action to Enforce Restitution

An action to enforce liability under *Prob. Code § 13562* may be brought only by the personal representative of the estate of the decedent. In an action to enforce liability, the court's judgment may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent [*Prob. Code § 13562(d)*].

An action to enforce liability under *Prob. Code § 13562* is forever barred three years after the death of the decedent. The three-year period may not be tolled for any reason [*Prob. Code § 13562(e)*].

The remedies available under *Prob. Code §§ 13561-13563* are in addition to any remedies available by reason of any fraud or intentional wrongdoing [*Prob. Code § 13564*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-441 California Forms of Pleading and Practice--Annotated § 441.120

§ 441.120 Community Property Held in Revocable Trust

Notwithstanding *Prob. Code § 13500 et seq.*, community property held in a revocable trust described in *Fam. Code § 761* is governed by the provisions, if any, in the trust for disposition in the event of death [*Prob. Code § 13504*; *see Estate of Khan (1985) 168 Cal. App. 3d 270, 273-274, 214 Cal. Rptr. 109* (prior law; decedent's attempted unilateral revocation of both spouses' intervivos trusts was ineffective when power of unilateral revocation had not been specifically reserved)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-441 California Forms of Pleading and Practice--Annotated § 441.121

§ 441.121 Effect of Reference in Written Instrument to Former Law

On and after July 1, 1987, a reference in any California statute or in a written instrument, including a will or trust, to a provision of former *Prob. Code §§ 202-206* (as repealed by Stats. 1984, ch. 527) or former Prob. Code §§ 649.1-649.5 or *650-658* (as repealed by Stats. 1986, ch. 783), is deemed to be a reference to the comparable provision of *Prob. Code § 13500 et seq.* [*Prob. Code § 13506*].

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38-441 California Forms of Pleading and Practice--Annotated § 441.122

§ 441.122 Petition for Confirming Passage of Property to Surviving Spouse or Registered Domestic Partner

[1] Filing

A surviving spouse or registered domestic partner or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse or registered domestic partner may file a petition in the superior court in the county in which the estate of the decedent may be administered requesting an order that administration of all or part of the estate is not necessary for the reason that all or part of the estate is property passing to the surviving spouse or registered domestic partner. The petition may also request an order confirming survivor the ownership of property belonging to the survivor under *Prob. Code § 100* or *101* [*Fam. Code § 297.5(c)*; *Prob. Code § 13650(a)*].

The petition for spousal or domestic partner property determination or confirmation is required to be filed separately from a petition for probate of will or for letters of administration, even if both petitions are filed at the same time [*Cal. Rules of Ct., Rule 7.301*]. The two petitions are required to be filed under the same case number [*Cal. Rules of Ct., Rule 7.301*].

The petition must be verified, and must allege that administration of all or a part of the decedent's estate is not necessary for the reason that all or a part of the estate is property passing to the surviving spouse or registered domestic partner. The petition must also set forth all of the following information [*Fam. Code § 297.5(c)*; *Prob. Code § 13651(a)*]:

- If proceedings for the administration of the estate are not pending, the facts necessary to determine the county in which the estate of the decedent may be administered.

- A description of the property of the decedent that the petitioner alleges is property passing to the surviving spouse or registered domestic partner, including the trade or business name of any property passing to the survivor that consists of an unincorporated business or an interest in an unincorporated business that the decedent was operating or managing at the time of death.

- The facts on which the petitioner bases the allegation that all or part of the estate of the decedent is

property passing to the surviving spouse or registered domestic partner.

- A description of any interest in the community property or quasi-community property, or both, that the petitioner requests the court to confirm to the survivor as belonging to the survivor under *Prob. Code § 100* or *101*.

- A disclosure of any written agreement between the decedent and the survivor providing for a non pro rata division of the aggregate value of the community property assets or quasi-community property assets, or both [*Prob. Code § 13651(5)*; *Fam. Code § 297.5(c)*; *see also Prob. Code § 13651(a)(2)* (property consisting of unincorporated business or interest in such business subject to any written agreement for non pro rata division), (4) (community property or quasi-community property under *Prob. Code § 100* or *101* subject to any written agreement for non pro rata division)].

- The name, age, address, and relation to the decedent of each heir and devisee of the decedent, the names and addresses of all persons named as executors of the will of the decedent, and the names and addresses of all persons appointed as personal representatives of the decedent, that are known to the petitioner.

A guardian or conservator may file a petition under *Prob. Code § 13650* without authorization or approval of the court in which the guardianship or conservatorship proceeding is pending [*Prob. Code § 13650(c)*].

[2] Copy of Will Required to Be Attached

If the petitioner bases the allegation that all or part of the estate of the decedent is property passing to the surviving spouse or registered domestic partner on the will of the decedent, a copy of the will must be attached to the petition [*Prob. Code § 13651(b)*; *Fam. Code § 297.5(c)*].

[3] Copy of Agreement for Non Pro Rata Division of Community or Quasi-Community Property Required to Be Attached

If the petitioner bases the description of the property of the decedent passing to the surviving spouse or registered domestic partner or the property to be confirmed to the surviving spouse or registered domestic partner, or both, on a written agreement for non pro rata division of the community property or quasi-community property assets, or both, a copy of the agreement must be attached to the petition [*Prob. Code § 13651(c)*; *Fam. Code § 297.5(c)*].

[4] Petition Not Applicable When Administration Elected

To the extent of the election, *Prob. Code § 13650* does not apply to property that the petitioner has elected, as provided in *Prob. Code § 13502*, to have administered under the Probate Code [*Prob. Code § 13650(b)*].

[5] Fees Not Charged When Administration Pending

If proceedings for the administration of the estate of a deceased spouse or registered domestic partner are pending, the petition under *Prob. Code §§ 13650-13660* may be filed in the proceedings without the payment of an additional fee [*Prob. Code § 13652*; *Fam. Code § 297.5(c)*].

[6] Joinder Permitted When Proceedings Not Pending

If proceedings for the administration of the estate of a deceased spouse or registered domestic partner are not pending, the petition under *Prob. Code §§ 13650-13660* may, but need not, be joined with a verified petition for probate of the will or administration of the estate [*Prob. Code § 13653*; *Fam. Code § 297.5(c)*].

[7] Effect of Petition on Other Proceedings

The filing of a petition under *Prob. Code §§ 13650-13660* does not preclude the court from admitting the will of the deceased spouse or registered domestic partner to probate or appointing a personal representative of the decedent's estate on the petition of any person legally entitled, including any petition for probate of the will or administration of the estate that is filed with a petition filed under *Prob. Code §§ 13650-13660* [*Prob. Code § 13654*; *Fam. Code § 297.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesFamily LawCohabitationDomestic PartnersRegistrationFamily LawMarital Duties & RightsProperty RightsGeneral Overview

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38-441 California Forms of Pleading and Practice--Annotated § 441.123

§ 441.123 Hearing and Notice

If proceedings for the administration of the estate of the deceased spouse or registered domestic partner are pending at the time a petition is filed under *Prob. Code §§ 13650-13660*, or if the proceedings are not pending and if the petition filed under *Prob. Code §§ 13650-13660* is not filed with a petition for probate of the decedent's will or for administration of the decedent's estate notice of the hearing on the petition filed under *Prob. Code §§ 13650-13660* must be given as provided in *Prob. Code § 1220* to all of the following persons [*Prob. Code § 13655(a)*; *Fam. Code § 297.5(c)*]:

- Each person listed in *Prob. Code § 1220* and each person named as executor in any will of the deceased spouse.

- All devisees and known heirs of the decedent and, if the petitioner is the trustee of a trust that is a devisee under the decedent's will, all persons interested in the trust as determined in case of future interests pursuant to *Prob. Code § 15804(a)(1), (2),* or *(3)*.

Notice must also be mailed to the Attorney General, addressed to the office of the Attorney General at Sacramento, if the petitioner bases the allegation that all or part of the estate of the decedent is property passing to the surviving spouse or registered domestic partner on the will of the and the will involves or may involve either of the following [*Fam. Code § 297.5(c)*; *Prob. Code § 13655(b)*]:

- A testamentary trust of property for charitable purposes other than a charitable trust with a designated trustee, resident in California.

- A devise for a charitable purpose without an identified devisee or beneficiary.

Legal Topics:

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

Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesEstate, Gift & Trust LawTrustsCharitable TrustsFamily LawCohabitationDomestic PartnersProperty

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38-441 California Forms of Pleading and Practice--Annotated § 441.124

§ 441.124 Order When Court Finds That All Property Passes to Surviving Spouse or Registered Domestic Partner

If the court finds that all of the estate of the decedent is property passing to the surviving spouse or registered domestic partner, it must issue an order describing the property, determining that the property is property passing to the surviving spouse or registered domestic partner, and determining that no administration is necessary. The court may issue any further orders that may be necessary to cause delivery of the property, or its proceeds, to the survivor [*Fam. Code § 297.5(c)*; *Prob. Code § 13656(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesFamily LawCohabitationDomestic PartnersPropertyFamily LawCohabitationDomestic PartnersRegistration

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38-441 California Forms of Pleading and Practice--Annotated § 441.125

§ 441.125 Order When Court Finds That All or Part of Property Does Not Pass to Surviving Spouse or Registered Domestic Partner

If the court finds that all or part of the estate of the decedent is not property passing to the surviving spouse or registered domestic partner, the court must issue an order [*Prob. Code § 13656(b)*; *Fam. Code § 297.5(c)*]:

- Describing any property that is not property passing to the survivor, determining that that property does not pass to the survivor, and determining that the property is subject to administration under the Probate Code; and

- Describing the property, if any, that is property passing to the survivor, determining that that property passes to the survivor, and determining that no administration of that property is necessary. If the court determines that property passes to the survivor, the court may issue any further orders that may be necessary to cause delivery of that property, or its proceeds, to the survivor.

If the petition filed under *Prob. Code § 13650 et seq.* includes a description of the interest of the survivor in the community property or quasi-community property, or both, that belongs to the survivor under *Prob. Code § 100* or *101*, and the court finds that the interest belongs to the survivor, the court must issue an order describing the property and confirming the ownership of the survivor, and may issue any further orders that may be necessary to cause ownership of the property to be confirmed in the survivor [*Prob. Code § 13656(c)*; *Fam. Code § 297.5(c)*].

If a dispute arises as to the division of the community property assets of quasi-community property assets, or both, pursuant to an agreement for a non pro rata division of the aggregate value of that property, the court must determine the division subject to terms and conditions or other remedies that appear equitable under the circumstances of the case, taking into account the rights of all interested persons [*Prob. Code § 13651(c)*; *Fam. Code § 297.5(c)*].

Legal Topics:

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

Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesFamily LawCohabitationDomestic PartnersPropertyFamily LawCohabitationDomestic PartnersRegistrationFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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38-441 California Forms of Pleading and Practice--Annotated § 441.126

§ 441.126 Orders Conclusive on All Persons

A final order under *Prob. Code § 13656* that determines that property passes to a surviving spouse or registered domestic partner, or that confirms the survivor's ownership of property under *Prob. Code § 100* or *101*, is conclusive on all persons, whether or not in being [*Prob. Code § 13657*; *Fam. Code § 297.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesFamily LawCohabitationDomestic PartnersPropertyFamily LawCohabitationDomestic PartnersRegistration

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38-441 California Forms of Pleading and Practice--Annotated § 441.127

§ 441.127 List of Creditors of Decedent's Business; Protection of Creditors

If the court determines that all or a part of the property passing to the surviving spouse or registered domestic partner consists of an unincorporated business or an interest in an unincorporated business that the decedent was operating or managing at the time of death, the court shall require the survivor to file a list of all of the known creditors of the business and the amount owing to each of them. The court may issue any order necessary to protect the interests of the creditors of the business, including the filing of (1) an undertaking and (2) an inventory and appraisal in the form provided in *Prob. Code § 8802* and made as provided in *Prob. Code §§ 8800 et seq.* [*Prob. Code § 13658*; *Fam. Code § 297.5(c)*; for a form for inventory and appraisal, *see § 451.70*].

Except as provided in *Prob. Code § 13658*, an inventory and appraisal of the estate of the decedent is not required in a proceeding under *Prob. Code § 13650 et seq.* Nevertheless, within three months after the filing of a petition under *Prob. Code § 13650 et seq.*, or within such further time as the court may allow, the petitioner may file an inventory and appraisal made as provided in *Prob. Code § 8800 et seq.* The petitioner may appraise the assets that a personal representative could appraise under *Prob. Code § 8901* [*Prob. Code § 13659*]. For discussion and forms relating to inventory and appraisal under *Prob. Code § 8800 et seq.*, see Ch. 451, *Probate: Inventory and Appraisal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesFamily LawCohabitationDomestic PartnersPropertyFamily LawCohabitationDomestic PartnersRegistrationTax LawFederal Estate & Gift TaxesEstate Tax ReturnsFiling

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38-441 California Forms of Pleading and Practice--Annotated § 441.128

§ 441.128 Apportionment of Debts

[1] Petition to Allocate Responsibility

If it appears that a debt of the decedent has been paid or is payable in whole or in part by the surviving spouse or registered domestic partner, or that a debt of the survivor has been paid or is payable in whole or in part from property in the decedent's estate, the personal representative, the survivor, or a beneficiary, at any time before an order for final distribution is made, may petition for an order to allocate the debt [*Prob. Code § 11440*; *Fam. Code § 297.5(c)*; *see Prob. Code §§ 13550-13554* (liability for debts of decedent)].

Under *Prob. Code § 11440*, a petition may be made for allocation of a debt of the decedent or of the surviving spouse or registered domestic partner, even though the creditor has not made a claim and the debt has not been established under *Prob. Code §§ 9000-12409* (general provisions for administration of estate) [*Prob. Code § 11440*; *Fam. Code § 297.5(c)*]. In this respect, the term "debt" in *Prob. Code § 11440* is broader than the definition in *Prob. Code § 11401*, which defines "debt" as a claim established under *Prob. Code § 9000 et seq.*, or that is otherwise payable in the course of the administration; an expense of administration; or a charge against the estate including, but not limited to, taxes, expenses of last illness, and family allowance [*see* Cal. L. Revision Comm'n Comment to *Prob. Code § 11440*].

[2] Contents of Petition

The petition must include a statement of all of the following [*Fam. Code § 297.5(c)*; *Prob. Code § 11441*]:

- All debts of the decedent and surviving spouse or registered domestic partner known to the petitioner that are alleged to be subject to allocation and whether paid in whole or part or unpaid.
- The reason why the debts should be allocated.
- The proposed allocation and the basis for allocation alleged by the petitioner.

For a form for a petition for allocation, see *§ 441.337*.

[3] Information Concerning Other Property

If it appears from the petition that allocation would be affected by the value of the separate property of the surviving spouse or registered domestic partner and any community property and quasi-community property not administered in the estate, and if an inventory and appraisal of the property has not been provided by the survivor, the court will make an order to show cause why the information should not be provided [*Prob. Code § 11442*; *Fam. Code § 297.5(c)*]. For a form for a petition including an allegation under *Prob. Code § 11442*, *see § 441.337*. For an order to show cause for use with the petition, *see § 441.338*.

[4] Notice

The petitioner must give at least 15 days notice of the hearing as provided in *Prob. Code § 1220*, together with a copy of the petition and the order to show cause, if any [*Prob. Code § 11443*]. For discussion and forms regarding *Prob. Code § 1220* and related provisions, see Ch. 447, *Probate: Statutory Notice Requirements* .

[5] Allocation by Agreement

The personal representative and the surviving spouse or registered domestic partner may provide for allocation by agreement. On determination by the court that the agreement substantially protects the rights of interested persons, the court will order the allocation provided in the agreement [*Prob. Code § 11444(a)*; *Fam. Code § 297.5(c)*]. For an agreement for allocation, *see § 441.339*.

[6] Court Determination of Apportionment

In the absence of an agreement, each debt of the decedent will be characterized as separate or community. Then the debts will be allocated as follows [*Prob. Code § 11444(b)*; *Fam. Code § 297.5(c)*]:

- Separate debts of either spouse or partner are allocated to that spouse's or partner's separate property assets, and community debts are allocated to the parties' community property assets.

- If a separate property asset of either spouse or partner is subject to a secured debt that is characterized as that spouse's or partner's separate debt, and the net equity in that asset available to satisfy the secured debt is less than the secured debt, the unsatisfied portion of the secured debt is treated as an unsecured separate debt of that spouse or partner and allocated to the net value of that spouse's or partner's other separate property assets.

- If the net value of either spouse's or partner's separate property assets is less than that spouse's or partner's unsecured separate debt or debts, the unsatisfied portion of the debt or debts is allocated to the net value of that spouse's or partner's one-half share of the community property assets. If the net value of that spouse's or partner's one-half share of the community property assets is less than that spouse's or partner's unsatisfied unsecured separate debt or debts, the remaining unsatisfied portion of the debt or debts is allocated to the net value of the other spouse's or partner's one-half share of the community property assets.

- If a community property asset is subject to a secured debt that is characterized as a community debt, and the net equity in that asset available to satisfy the secured debt is less than the secured debt, the unsatisfied portion of the secured debt is treated as an unsecured community debt and allocated to the net value of the other community property assets.

- If the net value of the community property assets is less than the unsecured community debt or debts,

the unsatisfied portion of the debt or debts is allocated equally between the separate property assets of the decedent and the survivor. If the net value of either party's separate property assets is less than that party's share of the unsatisfied portion of the unsecured community debt or debts, the remaining unsatisfied portion of the debt or debts is allocated to the net value of the other party's separate property assets.

The net value of separate property is its fair market value as of the date of the decedent's death, minus the date-of-death balance of any liens and encumbrances that are characterized as debts of the owner spouse [*Prob. Code § 11444(c)(1)*]. The net value of community property is its fair market value as of the date of the decedent's death, minus the date-of-death balance of any liens and encumbrances that are characterized as community debts [*Prob. Code § 11444(c)(2)*]. For allocation purposes, a nonrecourse debt is defined as a debt for which the debtor's obligation to repay is limited to the collateral securing the debt and for which a deficiency judgment against the debtor is not permitted, and would limit the amount of a nonrecourse debt to the net equity in the collateral [*Prob. Code § 11444(c)(3)*]. A court may order a different allocation of debts if it finds that allocation to be equitable under the circumstances [*Prob. Code § 11444(d)*].

If a personal representative or the survivor incurs any damages or expense, including attorney's fees, on account of the nonpayment of a debt that was allocated to the other party, or as the result of a debt being misallocated due to fraud or intentional misrepresentation by the other party, the party incurring damages may recover from the other party for reasonable damages or expense [*Prob. Code § 11444(e)*; *Fam. Code § 297.5(c)*].

[7] Order Apportioning Debts

On making a determination under *Prob. Code §§ 11440-11446*, the court must make an order that directs the personal representative to do the following [*Prob. Code § 11445*; *Fam. Code § 297.5(c)*]:

- Make payment of the amounts allocated to the estate by payment to the surviving spouse or registered domestic partner or creditors.

- Charge amounts allocated to the survivor against any property or interests of the survivor that are in the possession or control of the personal representative. To the extent that property or interests of the survivor in the possession or control of the personal representative are insufficient to satisfy the allocation, the court order must summarily direct the survivor to pay the allocation to the personal representative.

For an order for allocation, *see § 441.341*.

[8] Funeral and Last Illness Expenses

Funeral and last illness expenses will be charged against the estate of the decedent and will not be allocated to, or charged against the community share of the survivor, whether or not the survivor is financially able to pay the expenses and whether or not the survivor or any other person is also liable for the expenses. This rule controls despite any other statute [*Prob. Code § 11446*; *Fam. Code § 297.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsContracts LawSecured TransactionsDefaultForeclosure & RepossessionEnforcementEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawEstate

AdministrationAllowancesFamiliesEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesReal Property LawProperty Valuation

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38-441 California Forms of Pleading and Practice--Annotated § 441.129

§ 441.129 Collection of Compensation Owed to Decedent

[1] Right to Collect

At any time after a husband or wife dies, the surviving spouse or registered domestic partner, or the guardian or conservator of the surviving spouse's estate, without procuring letters of administration or awaiting probate of the will, may collect salary, or other compensation, owed by an employer for the deceased spouse's or registered domestic partner's personal services, including compensation for unused vacation, not in excess of $5,000 net [*Prob. Code § 13600(a)*; *Fam. Code § 297.5(c)*; *see Fam. Code § 297.5*(j) (gender-specific terms referring to spouses must be construed to include domestic partners when necessary to implement statutory rights of registered domestic partners)].

Not more than $5,000 net, in aggregate, may be collected by or for the survivor under *Prob. Code §§ 13600-13606* from all of the employers of the decedent [*Prob. Code § 13600(b)*; *Fam. Code § 297.5(c)*].

For the purposes of *Prob. Code §§ 13600-13606*, a guardian or conservator of the survivor's estate may act on behalf of the survivor without authorization or approval of the court in which the guardianship or conservatorship proceeding is pending [*Prob. Code § 13600(c)*; *Fam. Code § 297.5(c)*].

The $5,000 net limitation does not apply to the survivor, or the guardian or conservator of the estate of the survivor, of a firefighter or peace officer [*Prob. Code § 13600(d)*; *Fam. Code § 297.5(c)*].

On January 1 of each year, the maximum net amount of salary or compensation payable to the survivor, or the guardian or conservator of the estate of the survivor, may be adjusted to reflect any increase in the cost of living occurring after January 1 of the immediately preceding year [*Prob. Code § 13600(e)* (applicable to 2003 and later years)]. The net amount payable may not be decreased by any cost of living adjustment [*Prob. Code § 13600(e)*; *Fam. Code § 297.5(c)*].

[2] Procedure

To collect salary or other compensation under *Prob. Code §§ 13600-13606*, an affidavit or a declaration under penalty of perjury under the laws of California must be furnished to the decedent's employer stating several specifically

enumerated facts [*Prob. Code § 13601(a)*; *Fam. Code § 297.5(c)*; *see § 441.333*.6].

Reasonable proof of identity of the surviving spouse or registered domestic partner must also be provided to the employer. If a guardian or conservator is acting for the survivor, reasonable proof of the identity of the guardian or conservator must also be provided. Proof of identity that is sufficient under *Prob. Code § 13104* is sufficient identity [*Prob. Code § 13601(b)*; *Fam. Code § 297.5(c)*; for discussion of proof of identity under *Prob. Code § 13104, see § 441.34[4]*].

If a person presenting the affidavit or declaration is a person claiming to be the guardian or conservator of the survivor's estate, the employer must be provided with reasonable proof, satisfactory to the employer, of the appointment of the person to act as guardian or conservator [*Prob. Code § 13601(c)*; *Fam. Code § 297.5(c)*].

The procedure provided in *Prob. Code §§ 13600-13606* is in addition to, and not in lieu of, any other method of collecting compensation owed to a decedent [*Prob. Code § 13606*].

[3] Employer's Duty

If the requirements of *Prob. Code § 13600* are satisfied, the employer to whom the affidavit or declaration is presented must promptly pay the earnings of the decedent, including compensation for unused vacation, not in excess of $5,000 net, to the person presenting the affidavit or declaration [*Prob. Code § 13602*].

If the employer refuses to pay as required by *Prob. Code §§ 13600-13606*, the surviving spouse or registered domestic partner may recover the amount the survivor is entitled to receive in an action brought for that purpose against the employer [*Prob. Code § 13604(a)*; *Fam. Code § 297.5(c)*; for a complaint, *see § 441.333*.7]. If an action is brought against the employer under *Prob. Code § 13604*, the court must award reasonable attorney's fees to the survivor if it finds that the employer acted unreasonably in refusing to pay [*Prob. Code § 13604(b)*; *Fam. Code § 297.5(c)*].

[4] Discharge of Employer's Liability

If the requirements of *Prob. Code § 13601* are satisfied, receipt by the employer of the affidavit or declaration constitutes acquittance for the compensation paid pursuant to *Prob. Code §§ 13600-13606*, and discharges the employer from any further liability with respect to the compensation paid. The employer may rely in good faith on the statements in the affidavit or declaration, and has no duty to inquire into the truth of any statement therein [*Prob. Code § 13603*].

[5] Liability of Person to Whom Payment Made

Nothing in *Prob. Code §§ 13600-13606* limits the rights of the heirs or devisees of the decedent. Payment of a decedent's compensation pursuant to *Prob. Code §§ 13600-13606* does not preclude later proceedings for administration of the decedent's estate [*Prob. Code § 13605(a)*; *Fam. Code § 297.5(c)*].

Any person to whom payment is made under *Prob. Code §§ 13600-13606* is answerable and accountable to the personal representative of the decedent's estate, and is liable for the amount of the payment to any other person having a superior right to the payment received [*Prob. Code § 13605(b)*].

In addition to any other liability the person has under *Prob. Code § 13605*, a person who fraudulently secures a payment under *Prob. Code §§ 13600-13606* is liable to a person having a superior right to the payment for three times the amount of the payment [*Prob. Code § 13605(b)*].

Legal Topics:

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

Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesFamily LawCohabitationDomestic PartnersDuties & RightsFamily LawCohabitationDomestic PartnersRegistration

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[Reserved]

§§ 441.130[Reserved]

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PART III. RESEARCH GUIDE
A. Collection Of Small Estate Without Administration

38-441 California Forms of Pleading and Practice--Annotated § 441.150

§ 441.150 State Statutes

[1] Personal Property

[a] Affidavit Procedure

Property excluded in determining property or estate of decedent or its value for purposes of *Prob. Code §§ 13100 et seq., 13150 et seq., 13200 et seq. Prob. Code § 13050*

Affidavit or declaration to collect money, receive personal property, or transfer evidences of debt, obligation, interest, right, security, or chose in action; gross estate not exceeding $100,000. *Prob. Code §§ 13100, 13101*

Evidence of decedent's ownership of personal property as possibly required to be presented with affidavit or declaration; bond as possibly required if no evidence of ownership presented. *Prob. Code § 13102*

Inventory and appraisal required if decedent's estate includes any real property. *Prob. Code § 13103*

Reasonable proof of identity of each person executing affidavit or declaration required; forms of reasonable proof of identity. *Prob. Code § 13104*

Payment, delivery, or transfer of decedent's personal property required when affidavit or declaration properly presented; action to compel payment, delivery, or transfer. *Prob. Code § 13105*

Receipt of affidavit as constituting sufficient acquittance for any payment of money or delivery or property made pursuant to Prob. Code *§ 13100 et seq. Prob. Code* § 13106

Effect of transfer of obligation secured by recorded lien on real property. *Prob. Code § 13106.5*

Procedure when successor with claim to property is also deceased. *Prob. Code § 13107*

Prob. Code § 13100 et seq. procedure available only if no proceeding for administration of estate is pending or has been conducted or if decedent's personal representative consents in writing; use of procedure as not precluding later administration of estate. *Prob. Code § 13108*

Personal liability of persons to whom payment, delivery, or transfer of decedent's personal property is made under *Prob. Code § 13100 et seq.* for decedent's unsecured debts; action to enforce liability. *Prob. Code § 13109*

Personal liability of persons to whom payment, delivery, or transfer of decedent's personal property is made under *Prob. Code § 13100 et seq.* to persons with superior right to property by testate or intestate succession; liability for fraud; actions to impose liability. *Prob. Code § 13110*

Liability of person receiving property under *Prob. Code § 13100 et seq.* if proceedings for administration of deceased's estate are commenced or if decedent's personal representative consents and later requests that property be restored to estate. *Prob. Code §§ 13111, 13112*

Affidavit procedure not exclusive. *Prob. Code § 13116*

[b] Other Procedures

Payment of deposit account of nonresident decedent. *Fin. Code § 6950*

Release of property at scene of death to coroner. *Gov. Code § 27491.3*

Transfer without probate of manufactured home, mobilehome, or commercial coach registered under Health and Safety Code when decedent leaves no other property requiring probate. *Health & Safety Code § 18102*

Disposition without probate of money and other personal property of any veteran held by the Veteran's Home of *California. Mil. & Vet. Code § 1035*

Payment of unemployment insurance benefits due deceased or incompetent person on affidavit executed by person claiming benefits. *Unemp. Ins. Code § 1341*

Transfer without probate of vehicle registered under Vehicle Code where decedent leaves no other property requiring probate. *Veh. Code § 5910*

Transfer of watercraft without probate. *Veh. Code § 9916*

[2] Real Property

[a] Petition to Determine Succession

Notice. *Prob. Code §§ 1211* (form of notice), 1220 (requirements), 13153 (notice of hearing on petition)

Petition to determine succession to real property; gross estate not exceeding $100,000. *Prob. Code §§ 13150-13152*

On making required determinations, court required to issue order determining that real property passes to petitioners. *Prob. Code § 13154*

Final order determining passage of property to petitioner under *Prob. Code § 13150 et seq.* as conclusive on all persons, whether or not they are in being. *Prob. Code § 13155*.

Personal liability of persons who receive real property under *Prob. Code § 13150 et seq.*; action based on unsecured debt. *Prob. Code § 13156*

Attorney's fee for services in connection with filing petition and obtaining court order under Prob. Code *§ 13150 et seq.Prob. Code* § 13157

[b] Affidavit Procedure

Affidavit procedure for real property of small value; gross value of real property in decedent's estate located in California not exceeding $20,000. *Prob. Code § 13200 et seq.*

Filing fee for filing affidavit under *Prob. Code § 13200*, and issuance of certified copy under *Prob. Code § 13202*. *Prob. Code § 13201*

Clerk required to issue certified copy of affidavit filed under *Prob. Code § 13200* on receipt of affidavit and required fee; certified copy as recorded in office of county recorder of county where real property located. *Prob. Code § 13202*

Rights of person acting in good faith and for valuable consideration with person designated as successor in certified copy of affidavit issued under *Prob. Code § 13202*. *Prob. Code § 13203*

Personal liability of persons designated as successors in certified copy of affidavit under *Prob. Code § 13202* for decedent's unsecured debts; action to enforce liability for debt. *Prob. Code § 13204*

Personal liability of persons designated as successors in certified copy of affidavit under *Prob. Code § 13202*; actions to impose liability. *Prob. Code § 13205*

Liability of person designated as successor to property under *Prob. Code § 13200 et seq.* if proceedings for administration of decedent's estate are commenced or if decedent's personal representative consents and later requests that property be restored to estate. *Prob. Code §§ 13206, 13207*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesReal Property LawEstatesGeneral OverviewReal Property LawOwnership & TransferDeath & IncapacityGeneral OverviewTax LawState & Local TaxesEstate & Gift TaxGross Estate

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38-441 California Forms of Pleading and Practice--Annotated § 441.151

§ 441.151 Decisions

Under former *Prob. Code § 631* (discharging transferor from further obligation to pay money when it transferred decedent's funds in reliance on affidavit; *now see Prob. Code § 13106*), bank is subject to liability for transferring deposit account funds to alleged beneficiary under affidavit, when bank had actual notice of superior, statutory claim. *Mautner v. Peralta (1989) 215 Cal. App. 3d 796, 263 Cal. Rptr. 535*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsDeposit AccountsGeneral OverviewBanking LawBank ActivitiesBank AccountsDeposit AccountsLiabilityEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall Estates

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38-441 California Forms of Pleading and Practice--Annotated § 441.152

§ 441.152 Text References

California Probate Practice, Ch. 4, *Transfer of Property Without Administration* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall Estates

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38-441 California Forms of Pleading and Practice--Annotated §§ 441.153-441.169

[Reserved]

§§ 441.153[Reserved]

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38-441 California Forms of Pleading and Practice--Annotated § 441.170

§ 441.170 State Statutes

Petition to have estate with net value not exceeding $20,000 set aside to surviving spouse or registered domestic partnerand minor children, or one or more of them. *Prob. Code § 6602*; *Fam. Code § 297.5(c)* (surviving registered domestic partner has same rights and responsibilities as surviving spouse)

Form and filing of petition. *Prob. Code §§ 6603, 6604*

Procedure for filing petition. *Prob. Code § 6605*

Persons who may file petition. *Prob. Code § 6606*

Requirements for notice of hearing. *Prob. Code § 6607*

Inventory and appraisal on filing of petition under *Prob. Code §§ 6600-6615*. *Prob. Code § 6608*

Order setting aside and assigning whole of decedent's estate with net value not exceeding $20,000 to surviving spouse or registered domestic partner and minor children. *Prob. Code § 6609(a)-(c)*; *Fam. Code § 297.5(c)* (surviving registered domestic partner has same rights and responsibilities as surviving spouse)

Order for payment of liabilities for unpaid expenses of last illness, funeral charges, administration expenses. *Prob. Code § 6609(d)*

Further proceedings in administration is prohibited on order setting aside estate unless additional property in estate discovered. *Prob. Code § 6609(e)*

Order under *Prob. Code § 6609* is conclusive on all persons, whether or not they are then in being. *Prob. Code § 6610*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesFamily LawCohabitationDomestic PartnersDuties & RightsFamily LawCohabitationDomestic PartnersRegistration

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38-441 California Forms of Pleading and Practice--Annotated § 441.171

§ 441.171 Decisions

Decedent's estranged wife was equitably estopped under *Evid. Code § 623* from asserting statutory right as surviving spouse to have her share of decedent's property pass without administration under *Prob. Code § 13500*, when wife, daughter, and decedent's girlfriend had entered into a written settlement agreement and wife implicity acknowledged that she would not ask that her share pass to her outside of probate. *Estate of Bonanno (2008) 165 Cal. App. 4th 7, 23, 80 Cal. Rptr. 3d 560* .

Surviving spouse entitled to summary disposition under former *Prob. Code § 640* when decedent's attempted unilateral revocation of spouses' inter vivos trusts was ineffective because power of unilateral revocation was not specifically reserved. *Estate of Khan (1985) 168 Cal. App. 3d 270, 273-274, 214 Cal. Rptr. 109* (prior law).

Decedent's interest in both separate and community property must be included in net value of whole estate for purposes of determining qualification for summary distribution under former *Prob. Code § 640*. *Estate of Pezzola (1980) 112 Cal. App. 3d 752, 758, 169 Cal. Rptr. 464* (prior law).

Necessity of surviving spouse establishing conditions enumerated in former *Prob. Code § 630* to recover possession of personalty belonging to decedent. *Bruce v. Churchman (1942) 55 Cal. App. 2d 850, 854, 132 P.2d 8* (prior law).

Provisions for summary administration of small estates limit decedent's general power of testamentary disposition. *McMillan v. Boese (1941) 45 Cal. App. 2d 764, 765, 115 P.2d 37* (prior law).

Necessity that decedent owe duty of support to widow before estate can be set aside to widow. *Estate of Abila (1948) 32 Cal. 2d 559, 560, 197 P.2d 10* (prior law).

Legal Topics:

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

Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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38-441 California Forms of Pleading and Practice--Annotated § 441.172

§ 441.172 Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, §§ 780, 787-791, 796, 834 (10th ed. 2005).

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-441 California Forms of Pleading and Practice--Annotated §§ 441.173-441.189

[Reserved]

§§ 441.173[Reserved]

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38-441 California Forms of Pleading and Practice--Annotated § 441.190

§ 441.190 State Statutes

Verified petition to establish death affecting title to real or personal property. *Prob. Code §§ 200, 201, 1021(a)(1)*.

Procedure for combining proceeding with administration proceedings. *Prob. Code § 202*.

Requirements of notice for filing petition to establish death affecting title to real or personal property. *Prob. Code § 203*.

Court is able to act on petition or affidavits in support thereof with same force and effect as if petitioner or affiant personally present and testifying. *Prob. Code § 204(a)*.

Judgment on petition to establish death affecting title to real or personal property creates presumption of death affecting burden of producing evidence. *Prob. Code § 204(b)*.

Recording evidence of death; procedure; effect. *Prob. Code §§ 210-212*.

Determining identity of heirs when property vests other than by laws of succession. *Prob. Code §§ 248-249*.

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38-441 California Forms of Pleading and Practice--Annotated § 441.191

§ 441.191 Local Rules of Court

[1] Alameda County

Proceedings to establish fact of death. Alameda Co. Super. Ct. Rules, Rule 12.13.7.2.

[2] Los Angeles County

Extraordinary fees for termination of joint tenancy allowed only if termination of joint tenancy with predeceaseed joint tenant is necessary to clear title to property in decedent's estate. Los Angeles Co. Super. Ct. Rules, Rule 10.139.

[3] Orange County

Proceeding to establish fact of death in joint tenancies and life estates. Orange Co. Super. Ct. Rules, Rule 609.01 et seq..

[4] Sacramento County

Proceeding to establish fact of death. Sacramento Co. Super. Ct. Rules, Rules 801, 802.

[5] City and County of San Francisco

Procedure in proceeding to establish fact of death. San Francisco Uniform Local Ct. Rules, Rule 14.35(F).

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstates Created by Trusts & WillsGeneral OverviewEstate, Gift & Trust LawEstates Created by Trusts & WillsLife EstatesGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesPresent EstatesLife Estates

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38-441 California Forms of Pleading and Practice--Annotated § 441.192

§ 441.192 Decisions

Decree establishing fact of death does not conclusively adjudicate the rights of the parties. *King v. Pauly (1911) 159 Cal. 549, 554, 557-558, 115 P. 210* (decided under former *Code Civ. Proc. § 1723*; *now see Prob. Code §§ 200-212*); *Hansen v. Union Sav. Bank (1905) 148 Cal. 157, 160, 82 P. 768* (decided under former *Code Civ. Proc. § 1723*; *now see Prob. Code §§ 200-212*).

Requirement of proper notice for jurisdiction to render decree establishing fact of death. *In re Petition of Tracey (1902) 136 Cal. 385, 389, 69 P. 20* (decided under former *Code Civ. Proc. § 1723*; *now see Prob. Code §§ 200-212*).

Decree establishing fact of death is only prima facie evidence thereof. *Goldberg v. Goldberg (1963) 217 Cal. App. 2d 623, 628, 32 Cal. Rptr. 93* ; *LePleux (Py) v. Applegate (1958) 164 Cal. App. 2d 9, 11, 330 P.2d 65* .

Order under former Prob. Code § 1174, establishing death does not affect title and is pro tanto void if purporting to do so. *Goldberg v. Goldberg (1963) 217 Cal. App. 2d 623, 628, 32 Cal. Rptr. 93* .

Proceeding to establish the fact of death is not appealable. *LePleux (Py) v. Applegate (1958) 164 Cal. App. 2d 9, 11, 330 P.2d 65* ; *Estate of Basso (1945) 68 Cal. App. 2d 294, 299-300, 156 P.2d 476* .

Holding possession of real property after a decree establishing fact of death has been rendered is not adverse to a lienholder's interest. *Hinkel v. Crowson (1927) 83 Cal. App. 87, 96, 256 P. 479* (decided under former *Code Civ. Proc. § 1723*; *now see Prob. Code §§ 200-212*).

Executrix followed usual proceedings to terminate joint tenancy corroborated fact that her testimony that she believed property was held in joint tenancy and negated inference that she and her deceased husband had agreed that it was community property. *Estate of Kruse (1970) 7 Cal. App. 3d 471, 477-478, 86 Cal. Rptr. 491* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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38-441 California Forms of Pleading and Practice--Annotated § 441.193

§ 441.193 Text References

Witkin, Summary of California Law, Vol. 14, *Wills and Probate*, § 719 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-441 California Forms of Pleading and Practice--Annotated §§ 441.194-441.209

[Reserved]

§§ 441.194[Reserved]

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38-441 California Forms of Pleading and Practice--Annotated § 441.210

§ 441.210 State Statutes

[1] Apportionment of Debts

Grounds and standing regarding allocation. *Prob. Code § 11440*

Contents of petition. *Prob. Code § 11441*

Order to show cause regarding inventory. *Prob. Code § 11442*

Notice. *Prob. Code § 11443*

Allocation on stipulation or court determination. *Prob. Code § 11444*

Funeral and last illness expenses. *Prob. Code § 11446*

[2] Community Property Generally

Rights and obligations defined; separate property distinguished. *Fam. Code § 700 et seq.*

Presumptions regarding community and separate property. *Fam. Code § 802 et seq.*

Liability of community property for debts and obligations. *Fam. Code § 900 et seq.*

[3] Disposition of Property Passing to Surviving Spouse or Registered Domestic Partner

Registered domestic partners have same rights, protections, and benefits as spouses. *Fam. Code § 297.5*

Surviving spouse's right to one half of community property. *Prob. Code § 100(a)*

Surviving spouse's or partner's right to one half of quasi-community property. *Prob. Code § 101(a)*

Written agreement for non pro rata division of community property. *Prob. Code § 100(b)*

Written agreement for non pro rata division of quasi-community property. *Prob. Code § 101(b)*

Spouse's or partner's power of testamentary disposition of community property interest. *Prob. Code § 6101(b)*

Spouse's or partner's power of testamentary disposition of quasi-community property interest. *Prob. Code § 6101(c)*

Property passing to surviving spouse does so without administration. *Prob. Code § 13500*

Property subject to administration. *Prob. Code § 13501*

Election of administration of property passing to surviving spouse or domestic partner. *Prob. Code § 13502*

Transfer of community property and quasi-community property permitted. *Prob. Code § 13503*

Community property under revocable trust. *Prob. Code § 13504*

Construction of reference to former law in written instrument. *Prob. Code § 13506*

Power to sell community or quasi-community real property. *Prob. Code §§ 13540, 13541*

Power to dispose of securities. *Prob. Code § 13545*

Personal liability of surviving spouse or partner for debts of deceased spouse chargeable against property passing to surviving spouse or partner. *Prob. Code §§ 13550-13554*

Surviving spouse's or partner's liability to person with superior right to decedent's property. *Prob. Code § 13560 et seq.*

[4] Proceedings for Confirmation of Community Property

Petition alleging administration not necessary. *Prob. Code §§ 13650, 13651*

No fee when proceedings pending; joinder with petition for probate or for administration. *Prob. Code §§ 13652, 13653*

Filing of petition alleging administration not necessary because does not preclude issuance of letters testamentary or of administration. *Prob. Code § 13654*

Notice of hearing if administration proceedings for deceased spouse's estate are pending at time of filing petition, or if proceedings are not pending and petition is not filed with petition for probate or administration. *Prob. Code § 13655(a)*

When notice must be given to Attorney General. *Prob. Code § 13655(b)*

Contents of order. *Prob. Code §§ 13656, 13657*

List of known creditors and amount owing to each when community property consists of business. *Prob. Code § 13658*

Filing inventory and appraisal. *Prob. Code §§ 13658, 13659*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawCommunity PropertyElectionEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesFamily LawCohabitationDomestic PartnersPropertyFamily LawCohabitationDomestic PartnersRegistrationFamily LawMarital Duties & RightsProperty RightsGeneral OverviewReal Property LawEstatesPresent EstatesMarital EstatesCommunity Property

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38-441 California Forms of Pleading and Practice--Annotated § 441.211

§ 441.211 Rights of Registered Domestic Partners

Registered domestic partners have same rights, protections, and benefits as spouses. *Fam. Code § 297.5(a)*

Surviving registered domestic partner, following other partner's death, has same rights, protections, and benefits as surviving spouse. *Fam. Code § 297.5(c)*

Gender-specific terms referring to spouses must be construed to include domestic partners when necessary to implement statutory rights of registered domestic partners. *Fam. Code § 297.5*(j)

For purposes of determining rights of registered domestic partners with respect to community property, references in statutes, rules, and other sources of law to date of marriage are deemed to refer to date on which domestic partnership was registered. *Fam. Code § 297.5(k)(1)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-441 California Forms of Pleading and Practice--Annotated § 441.212

§ 441.212 Decisions

One-year limitation period of *Code Civ. Proc. § 366.2*, and not four-year limitation period of *Fam. Code § 914*, under which spouses are personally liable for each other's debts incurred for necessaries of life, applies in action against surviving spouse for recovery of medical expenses of deceased spouse's last illness. *Collection Bureau of San Jose v. Rumsey (2000) 24 Cal. 4th 301, 310, 99 Cal. Rptr. 2d 792, 6 P.3d 713*

Only property in inventory, not property passing without administration, qualifies for probate homestead. *Estate of Liccardo (1991) 232 Cal. App. 3d 962, 967-968, 283 Cal. Rptr. 839*

Sums paid for erecting plaque and reciting kaddish one year after death and on each anniversary are not properly chargeable against estate as funeral expenses. *Estate of Silverstein (1984) 159 Cal. App. 3d 221, 226-227, 205 Cal. Rptr. 294*

Decedent's daughter by previous marriage has cause of action against widow under former Prob. Code § 205 (*now see Prob. Code §§ 13550-13554*) to recover portion of estate assets (which passed to widow) in lieu of proceeds of life insurance policy that decedent had been required by divorce decree to carry for daughter's benefit but did not. *Spurr v. Spurr (1979) 88 Cal. App. 3d 614, 618-619, 151 Cal. Rptr. 813*

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-441 California Forms of Pleading and Practice--Annotated § 441.213

§ 441.213 California Rules of Court

Petition filed in addition to and under same case number as petition for probate of will or for letters of administration.
Cal. Rules of Ct., Rule 7.301

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall Estates

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38-441 California Forms of Pleading and Practice--Annotated § 441.214

§ 441.214 Local Rules of Court

[1] Orange County

Spousal property petitions. Orange Co. Super. Ct. Rules, Div. VI, Rule 607.10

[2] San Francisco

Spousal property petition and election. San Francisco Uniform Local Ct. Rules, Rule 14.32

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38-441 California Forms of Pleading and Practice--Annotated § 441.215

§ 441.215 Law Reviews

Kahn and Frimmer, *Management, Probate and Estate Planning Under New Community Property*, 49 Cal. St. B.J. 516 (1974) [Part One]

Kahn and Frimmer, *Management, Probate and Estate Planning Under New Community Property*, 50 Cal. St. B.J. 42 (1975) [Part Two]

Meserve, Crary and Grant, *Senate Bills 570 and 1846: The Effects of Probate and Estate Planning Practice of the Recent Changes in the California Probate Code Relating to Community Property, 50 L.A. Bar Bull. 9 (1974)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-441 California Forms of Pleading and Practice--Annotated §§ 441.216-441.229

[Reserved]

§§ 441.216[Reserved]

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PART IV. PROCEDURAL CHECKLIST
A. Collection of Small Estate Without Administration

38-441 California Forms of Pleading and Practice--Annotated § 441.230

§ 441.230 Disposition of Personal Property Without Administration

1. Ascertain that the gross value of real and personal property of the estate in California does not exceed $100,000. In calculating the gross value of the estate, do not include the following property:

a. Any property, or an interest or lien on property, that, at the time of the decedent's death, was held by the decedent as a joint tenant, in which the decedent had a life estate or other interest terminable on the decedent's death, that was held by the decedent and passed to the decedent's spouse or registered domestic partner [*see Fam. Code 297.5(c)* (effective January 1, 2005, surviving registered domestic partner has same rights as a surviving spouse)] without administration pursuant to *Prob. Code § 13500*, or that was held in a trust that was revocable by the decedent during the decedent's lifetime [*Prob. Code § 13050(a)(1)*].

b. Any multiple-party account to which the decedent was a party at the time of the decedent's death, whether or not all or a portion of the sums on deposit are community property, to the extent that the sums on deposit belong, after the death of the decedent, to a surviving party, P.O.D. payee, or beneficiary [*Prob. Code § 13050(a)(2)*; *see Prob. Code § 5120 et seq.* (definitions)].

c. Any vehicle registered or titled under *Veh. Code §§ 4000-9810* or *38000-38397*, respectively; any vessel numbered under *Veh. Code §§ 9840-9928*; and any manufactured home, mobilehome, commercial coach, truck camper, or floating home registered under *Health & Safety Code §§ 18000-18124.5* [*Prob. Code § 13050(b)*].

d. Any amounts due to the decedent for services in the armed forces of the United States and the amount, not exceeding $5,000, of salary or other compensation, including compensation for unused vacation, owing to the decedent from personal services from any employment [*Prob. Code § 13050(c)*].

2. Determine that either [*Prob. Code §§ 13101(a), 13108(a)*]:

a. No proceeding is now being or has been conducted in California for administration of the decedent's estate; or

b. The decedent's personal representative consents in writing to the payment, transfer, or delivery of the property.

3. Determine that 40 days have passed since decendent's death [*Prob. Code § 13100*].

4. Determine that the successor is the sole beneficiary (including a trust if it succeeds to a particular item of property under the will), or all of the beneficiaries, who succeeded to a particular item of decedent's property under decedent's will [*Prob. Code § 13006(a)*]. If the decedent died without a will, determine that the successor is the sole person, or all of the persons, who succeeded to a particular item of decedent's property under *Prob. Code §§ 6401* and *6402* (intestate succession) or, if the law of a sister state or foreign nation governs succession to the item, under the law of that state or nation [*Prob. Code § 13006(b)*].

5. Prepare affidavit, certification, or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*] showing right of affiant or affiants to receive the money or property or to transfer the evidences of a debt, obligation, interest, right, security, or chose in action [*Prob. Code § 13101*]. See *§ 441.270*. Attach the following papers:

a. A certified copy of the death certificate [*Prob. Code § 13101(c)*].

b. If decedent's personal representative has consented to use of the procedure, copies of the consent and the personal representative's letters [*Prob. Code § 13101(d)*].

c. If decedent's estate includes any real property, an inventory and appraisal of that property [*Prob. Code § 13103*].

6. If the transferred property is a debt or other obligation secured by a lien on real property and the instrument creating the lien has been recorded in the county recorder's office where the real property is located, obtain notarization of each signature on the declaration, and have the declaration recorded in the county in which the lien is recorded [*see Prob. Code § 13106.5(a)(2)*].

7. Present affidavit or declaration to holder of decedent's property [*Prob. Code § 13101(a)*], together with proof of identification [*see Prob. Code § 13104(a)*; *see also Prob. Code § 13107* (when money or property claimed in affidavit or declaration is that of deceased heir or devisee of deceased person whose estate is being administered, successor is required to present affidavit or declaration to court in which estate being administered); *see § 441.270*]. If proof of identification is not by a notary public's certificate of acknowledgment, have the holder of the property note on the affidavit or declaration that the holder personally knows the affiant or a description of the identification presented by the affiant [*Prob. Code § 13104(f)*].

8. If the requirements of *Prob. Code §§ 13100-13104* are satisfied, ensure that the holder of the property described in the affidavit or declaration pays, delivers, or transfers the property to the successor [*see Prob. Code § 13105(a)(1)*; *see also Prob. Code § 13105(a)(2)* (transfer of securities)]. If the holder refuses to pay, deliver, or transfer the property, initiate action to recover the property or compel its

payment, delivery or transfer to successor [*Prob. Code § 13105(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawEstates Created by Trusts & WillsLife EstatesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesEstate, Gift & Trust LawWillsBeneficiariesGeneral OverviewFamily LawCohabitationDomestic PartnersRegistrationFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyReal Property LawOwnership & TransferDeath & IncapacityGeneral OverviewTax LawFederal Estate & Gift TaxesTaxable PropertyProperty Held at Death (IRC secs. 2033, 2044)General Overview

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Chapter 441 PROBATE: DISPOSITION WITHOUT ADMINISTRATION
PART IV. PROCEDURAL CHECKLIST
A. Collection of Small Estate Without Administration

38-441 California Forms of Pleading and Practice--Annotated § 441.231

§ 441.231 Disposition of Real Property Without Administration When Real and Personal Property Has Gross Value Not Exceeding $100,000

1. Ascertain that the gross value of decedent's real and personal property in California does not exceed $100,000 [*Prob. Code § 13151*]. Do not include the property described in *Prob. Code § 13050* [*see § 441.230*, Paragraph 1].

2. Determine that either [*Prob. Code § 13150*]:

a. No proceeding is now being or has been conducted in California for administration of the decedent's estate; or

b. The decedent's personal representative consents in writing to use of the procedure provided by *Prob. Code § 13150 et seq.*

3. Determine that at least 40 days have elapsed since decedent's death [*Prob. Code § 13151*].

4. Determine that the petitioner is a successor of the decedent [*see Prob. Code § 13151*; *see also Prob. Code § 13006* ("successor" defined)].

5. Prepare a verified petition showing the right of petitioner to succeed to decedent's real property, and describing any personal property to be additionally determined under the petition [*Prob. Code §§ 13151, 13152(a)*; *see § 441.271*]. Attach the following papers:

a. An inventory and appraisal of decedent's real and personal property in California (excluding property described in *Prob. Code § 13050*) made pursuant to *Prob. Code § 8800 et seq.* by a probate referee selected from those appointed to appraise property in the county in which the real property is located; petitioner may appraise any items appraisable by a personal representative under *Prob. Code § 8901* [*see Prob. Code § 13152(b)*].

b. If petitioner's claim is based on the decedent's will, a copy of the will [*see Prob. Code § 13152(c)*].

c. If the decedent's personal representative has consented to use of the petition procedure, a copy of the consent [*Prob. Code § 13152(d)*].

6. File the petition in the superior court of the county in which the estate of the decedent may be administered [*Prob. Code § 13151*].

NOTE:

The county in which the estate may be administered is the county in which the decedent was domiciled if the decedent was domiciled in California at the time of death [*see* *Prob. Code § 7051*]. If the decedent was not domiciled in California at the time of death, the proper county is either (1) the county where the decedent died if property of the decedent is located there, or (2) any county where property of the decedent is located (a) if no property of the decedent is located in the county where the decedent died or (b) if the decedent did not die in California [***see*** *Prob. Code § 7052*]

7. After the clerk has set the petition for hearing, at least 15 days before the hearing, mail notice to each of the persons named in the petition pursuant to *Prob. Code § 13152* [*Prob. Code §§ 1220* (method of mailing), 13153 (notice of hearing to determine succession to real property); for a form for notice under *Prob. Code § 1220*, *see* Ch. 447, *Probate: Statutory Notice Requirements*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesAppointmentsEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall Estates

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38-441 California Forms of Pleading and Practice--Annotated § 441.232

§ 441.232 Disposition of Real Property Without Administration When All Real Property in Estate Has Gross Value Not Exceeding $20,000

1. Ascertain that the gross value of all real property in the decedent's estate located in California does not exceed $20,000 [*Prob. Code § 13200(a)*]. Do not include the property described in *Prob. Code § 13050* [*see § 441.230,* P 1].

2. Determine that either [*Prob. Code § 13200(a)*]:

a. No proceeding is now being or has been conducted in California for administration of the decedent's estate; or

b. The decedent's personal representative consents in writing to use of the procedure.

3. Determine whether at least six months have elapsed since decedent's death [*Prob. Code § 13200(a)*].

4. Determine that the affiant is a successor of the decedent [*see Prob. Code § 13200(a)*; *see also Prob. Code § 13006* ("successor" defined)].

5. Prepare a certified affidavit showing right of affiant to succeed to the real property [*Prob. Code § 13200(a), (b)*; *see § 441.271*] and attach the following papers:

a. Inventory and appraisal of the decedent's real property in California, excluding real property described in *Prob. Code § 13050*, made pursuant to *Prob. Code § 8800 et seq.* [*Prob. Code § 13200(c)*; *see* Ch. 451, *Probate: Inventory and Appraisal*].

b. Certified copy of the decedent's death certificate [*Prob. Code § 13200(e)*].

c. If affiant's claim is based on the decedent's will and no estate proceeding is pending or

has been conducted in California, a copy of the will [*Prob. Code § 13200(d)*].

d. If decedent's personal representative has consented to use of the procedure, a copy of the consent and of the personal representative's letters [*Prob. Code § 13200(e)*].

6. File affidavit and supporting papers in the superior court in the county in which the decedent was domiciled at the time of death. If the decedent was not domiciled in California at the time of death, the affidavit may be filed in any county in which real property of the decedent is located. Include filing fee [*Prob. Code §§ 13200(a), 13201*].

7. Mail a copy of the affidavit and attachments to the person, if any, who was the guardian or conservator of decedent's estate at the time of decedent's death [*Prob. Code § 13200(f)*; *see* Ch. 447, *Probate: Statutory Notice Requirements*].

8. Secure a certified copy of the affidavit, without attachments, from the court clerk. Record the certified copy in the office of the county recorder of the county where the real property is located [*Prob. Code § 13202*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall Estates

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[Reserved]

§§ 441.233[Reserved]

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38-441 California Forms of Pleading and Practice--Annotated § 441.250

§ 441.250 Summary Administration

NOTE:
This procedure applies to decedents who died after July1, 1987. Decedents who died before that date are governed by former *Prob. Code §§ 640-647.5* [*Prob. Code § 6614*].

1. Determine which method of petitioning is proper. If proceedings for the administration of decedent's estate have not yet been commenced, the petition may be filed concurrently with a petition for probate of a will or letters of administration. If no petition for probate of a will or letters of administration is being filed, the petition may be filed independently [*Prob. Code § 6605(b)*].

2. Determine who will file petition [*Prob. Code § 6606(a)*; *Fam. Code § 297.5(c)* (surviving registered domestic partner has same rights and responsibilities as surviving spouse)]:

a. Person named in decedent's will as executor.

b. Surviving spouse or registered domestic partner.

c. Guardian of minor child.

d. Child who was a minor at time of decedent's death.

e. Personal representative if one has been appointed.

3. Prepare petition to have estate with net value not exceeding $20,000 set aside to surviving spouse or registered domestic partner and minor children, or one or more of them [*Prob. Code § 6602*; *Fam. Code § 297.5(c)* (surviving registered domestic partner has same rights and responsibilities as surviving spouse) *see § 441.290*].

4. Prepare inventory and appraisal of decedent's estate [*Prob. Code § 6608*; *see Prob. Code §§ 8800-8980* (inventory and appraisal); *see § 451.70*].

5. Prepare and give notice of hearing.

a. If proceedings for the administration of the decedent's estate are not pending, and the petition is not joined with a petition for probate or for administration, give notice by mail to each heir and devisee, and to each person named as executor, not less than 15 days before the hearing. A copy of the petition must be sent to the surviving spouse or registered domestic partner, each child, and each devisee [*Prob. Code § 6607(a)*; *Fam. Code § 297.5(c)* (surviving registered domestic partner has same rights and responsibilities as surviving spouse) *see § 441.291*].

b. If the petition is filed with a petition for probate or for administration, give notice in the manner prescribed for that procedure [*Prob. Code § 6607(b)*; *see Prob. Code §§ 8003* (setting for hearing), 8100-8125 (notice of hearing)].

c. If proceedings for the administration of the decedent's estate are pending, give notice of the small estate set-aside petition in accordance with *Prob. Code § 1220* [*Prob. Code § 6607(c)*; *see* Ch. 447, *Probate: Statutory Notice Requirements*].
(1) If the hearing of the petition for probate or for administration is set for a day more than 15 days after the filing of the small estate set-aside petition, the small estate set-aside petition will be set for hearing at the same time as the petition for probate or for administration [*Prob. Code § 6607(c)*].

(2) If the hearing of the petition for probate or for administration is not set for a day more than 15 days after the filing of the small estate set-aside petition, the small estate set-aside petition will be set for hearing at least 15 days after the date it is filed, and if the petition for probate or for administration has not already been heard, that petition will be continued until that date and heard at the same time unless the court orders otherwise [*Prob. Code § 6607(c)*].

NOTE:
If notice is given in accordance with *Prob. Code § 1220*, ascertain whether special notice has been requested or is required, and if so, give that notice pursuant to *Prob. Code §§ 1250-1252* [*Prob. Code § 1220(a)(2)(B)*].

6. Prepare order assigning estate [*Prob. Code § 6609*; *see § 441.292*].

7. File petition with county clerk in county of probate [*Prob. Code §§ 7051, 7052*; *see Prob. Code § 3* (general transitional provision)].

8. File inventory and appraisal with county clerk before hearing on the petition [*Prob. Code § 6608*].

9. Attend hearing, making proof of notice as required, and proof of the allegations of the petition [*see Prob. Code §§ 1260* (proof of notice), 6609(a), (b)].

10. Obtain order assigning estate, and file original with county clerk. Secure endorsed or certified copies as required.

11. If a separate petition for probate of will, or for letters of administration, has been filed, obtain an order denying that petition, and file original with county clerk.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesFamily LawCohabitationDomestic PartnersGeneral OverviewFamily LawCohabitationDomestic PartnersChildrenFamily LawCohabitationDomestic PartnersRegistration

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38-441 California Forms of Pleading and Practice--Annotated §§ 441.251-441.269

[Reserved]

§§ 441.251[Reserved]

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38-441 California Forms of Pleading and Practice--Annotated § 441.270

§ 441.270 Declaration Under Penalty of Perjury [Code Civ. Proc. § 2015.5] for Collection of Personal Property of Deceased Not Exceeding $100,000 in Value [Prob. Code §§ 13100, 13101]

[1] FORM Declaration Under Penalty of Perjury [Code Civ. Proc. § 2015.5] for Collection of Personal Property of Deceased Not Exceeding $100,000 in Value [Prob. Code §§ 13100, 13101]

I/We, _____ [*name(s)*], declare:

1. On _____, [*date*], _____ [*name*] died in _____ County, California.

2. At least 40 days have elapsed since the death of the decedent, as shown in a certified copy of the decedent's death certificate attached to this declaration.

[*EITHER*]

3. No proceeding is now being or has been conducted in California for administration of the decedent's estate.

[*OR*]

3. Letters _____ [testamentary *or* of administration *or* of administration with the will annexed] were issued to _____ [*name of personal representative*] on _____ [*date*]. _____ [*Name of personal representative*], as decedent's personal representative, has consented in writing to the payment, transfer, or delivery to the declarant of the property described in the declaration.

[*CONTINUE*]

4. The current gross fair market value of decedent's real and personal property in California, excluding the property described in *Section 13050 of the Probate Code*, does not exceed one hundred thousand dollars ($100,000).

5. The property of decedent that should be _____ [paid *or* transferred *or* delivered] to _____ [*name of declarant*] is described as follows: _____.

[*EITHER*]

6. The declarant[s] _____ [*name(s)*] is/are the successor[s] of the decedent (as defined in *Section 13006 of the Probate Code*) to the decedent's interest in the described property.

[*OR*]

6. The declarant[s] is/are authorized under *Section 13051 of the Probate Code* to act on behalf of _____ [*name(s)*], the successor[s] of the decedent (as defined in *Section 13006 of the California Probate Code*) with respect to the decedent's interest in the described property.

[*CONTINUE*]

7. No other person has a superior right to the interest of the decedent in the described property.

[*EITHER*]

8. The declarant[s] request[s] that the described property be _____ [paid *or* delivered *or* transferred] to the declarant.

[*AND/OR*]

8. The declarant(s) request(s) that the described evidence(s) of _____ [a debt *and/or* an obligation *and/or* an interest *and/or* a right *and/or* a security *and/or* a chose in action] be transferred to the declarant.

[*CONTINUE*]

[9. The _____ [*describe debt or other obligation*] is secured by a lien on real property located in _____ County, California. The instrument creating the lien is a _____ [*describe instrument*], which has been recorded in the Official Records of the County of _____, California, Book _____, page _____.]

I/We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____[*signature(s)*]

CAUTION:

This declaration must be notarized with regard to each declarant if the item of property transferred is a debt or other obligation secured by a lien on real property, and the instrument creating the lien is recorded in the county where the real property is located [*Prob. Code § 13106.5*].

[2] Use of Form

This declaration is for use by a decedent's successor to collect, receive, or obtain the transfer without administration of particular items of decedent's personal property. It may only be used when the gross value of decedent's real and personal property does not exceed $100,000, at least 40 days have passed since decedent's death, and either no proceeding for the administration of the decedent's estate is pending or has been conducted in California or the decedent's personal representative consents in writing to the payment, transfer, or delivery of the property [*see Prob. Code §§ 13100, 13108(a)*; *see also Prob. Code § 13006* ("successor of decedent" defined); for discussion of calculating the value of the property, *see § 441.33*].

[3] Personal Property That May Be Collected Without Administration

The decedent's successor may (1) collect any particular item of property that is money due the decedent, (2) receive any particular item of property that is tangible personal property of the decedent, or (3) have any particular item of property that is evidence of a debt, obligation, interest, right, security, or chose in action belonging to the decedent transferred, whether or not secured by a lien on real property, without procuring letters of administration [*Prob. Code § 13100*].

[4] Procedure

[a] Affidavit or Declaration Must Be Presented

To collect decedent's personal property or to transfer the evidences of a debt, obligation, interest, right, security, or chose in action, without administration, an affidavit, or declaration under penalty of perjury (*see Code Civ. Proc. § 2015.5*), must be furnished to the holder of decedent's property [*Prob. Code § 13101(a)*]. A certified copy of the decedent's death certificate must be attached to the affidavit or declaration [*Prob. Code § 13101(d)*]. If the decedent's personal representative has consented to the payment, transfer, or delivery of the described property to the affiant or declarant, copies of the consent and the personal representative's letters must be attached to the affidavit or declaration [*Prob. Code § 13101(e)*]. Evidence of the decedent's ownership of the subject property may also be required to be presented [*see Prob. Code § 13102(a)*].

Each person executing the declaration must provide the holder of the property with reasonable proof of identity [*Prob. Code § 13104(a)*]. For discussion of what constitutes reasonable proof of identity, see *§ 441.34[4]*. If the declaration is not certified by a notary public, the holder must note on the declaration either that the declarant is personally known, or a description of the identification provided [*Prob. Code § 13104(f)*].

[b] Who Must Execute Affidavit or Declaration

The affidavit or declaration must be executed by all successors of the decedent who have an interest in the property sought to be collected, received, or transferred [*see Prob. Code § 13101*]. A guardian or conservator, a custodian under the Uniform Gifts to Minors Act or Uniform Transfers to Minors Act, or a trustee, if the successor is a trust, may act on behalf of the successor or successors [*see Prob. Code § 13051*]. A sister-state personal representative may act on behalf of the beneficiaries as provided in *Prob. Code § 12570 et seq.* (collection of personal property of small estate by sister-state personal representative) [*Prob. Code § 13051*].

[c] Contents of Affidavit

The affidavit or declaration must state all of the following [*Prob. Code § 13101(a)*]:

- The name of the decedent (Paragraph 1).
- The date and place of decedent's death (Paragraph 1).
- That at least 40 days have elapsed since the death of the decedent, as shown in a certified copy of the decedent's death certificate attached to the affidavit or declaration (Paragraph 2).
- Either that no proceeding is now being or has been conducted in California for administration of the decedent's estate or that the decedent's personal representative has consented in writing to the payment, transfer, or delivery to the affiant or declarant of the property described in the affidavit or declaration (Paragraph 3).
- The current gross fair market value of decedent's real and personal property in California, excluding the property described in *Prob. Code § 13050*, does not exceed $60,000 (Paragraph 4).
- A description of decedent's property that is to be paid, transferred or delivered to the affiant or declarant (Paragraph 5).
- The name of decedent's successor (as defined in *Prob. Code § 13006*) to the described property (Paragraph 6).
- Either of the following, as appropriate:
  - That the affiant or declarant is the decedent's successor (as defined in *Prob. Code § 13006*) to the decedent's interest in the described property (Paragraph 6).
  - That the affiant or declarant is authorized under *Prob. Code § 13051* to act on behalf of decedent's successor (as defined in *Prob. Code § 13006*) with respect to decedent's interest in the described property (Paragraph 6).
- That no other person has a superior right to decedent's interest in the described property (Paragraph 7).
- Either or both of the following, as appropriate:
  - That the affiant or declarant requests that the described property be paid or delivered to the affiant or declarant (Paragraph 8).
  - That the affiant or declarant requests that the described evidences of a debt, obligation, interest, right, security, or chose in action be transferred to the affiant or declarant (Paragraph 8).

In addition, if the particular item of property to be transferred is a debt or other obligation secured by

a lien on real property, and the instrument creating the lien has been recorded in the office of the county recorder of the county where the real property is located, the affidavit or declaration must satisfy the requirements both of *Prob. Code § 13101* and *Prob. Code § 13106.5* [*Prob. Code § 13101(c)*]. *Prob. Code § 13106.5* requires the affidavit or declaration to be recorded in the office of the county recorder of that county and, in addition to the contents required by *Prob. Code § 13101*, to include both of the following [*Prob. Code § 13106.5*]:

- The recording reference of the instrument creating the lien (*see* optional Paragraph 9).

- A notary public's certificate of acknowledgment identifying each person executing the affidavit or declaration.

[d] Attachments

A certified copy of the decedent's death certificate must be attached to the affidavit or declaration [*Prob. Code § 13101(d)*]. Evidence of the decedent's ownership of the subject property may also be required to be presented [*see Prob. Code § 13102*].

If the decedent's personal representative has consented to the payment, transfer, or delivery of the described property to the affiant or declarant, copies of the consent and the personal representative's letters must be attached to the affidavit or declaration [*Prob. Code § 13101(e)*].

If decedent's estate includes any real property in California, an inventory and appraisal of the real property made by a probate referee must be attached [*Prob. Code § 13103*; *see Prob. Code §§ 8800-8980* (form, content, and manner of making inventory and appraisal); for a form of inventory and appraisal, *see § 451.70*].

[e] Recording of Declaration if Obligation Secured by Lien on Real Property

If the particular item of property transferred is a debt or other obligation secured by a lien on real property, and the instrument creating the lien has been recorded in the office of the county recorder of the county where the real property is located, the affidavit or declaration under *Prob. Code § 13101* must be recorded in the office of the county recorder of that county [*Prob. Code § 13106.5(a)*].

[5] State Statutes

Declaration under penalty of perjury in lieu of affidavit. *Code Civ. Proc. § 2015.5*

Disposition of money and other personal property of any veteran held by Veteran's Home of California without probate. *Mil. & Vet. Code § 1035*

Estate terminable on decedent's death as excluded in determining the property or estate of decedent or its value for purposes of Prob. Code *§ 13100 et seq.Prob. Code* § 13050

Receipt of affidavit as constituting sufficient acquittance for any payment of money or delivery of property made pursuant to the provisions of Prob. Code *§ 13100 et seq.Prob. Code* § 13106

Recording and notarization of declaration if obligation is secured by lien on real property, and instrument creating lien is recorded. *Prob. Code § 13106.5*

Procedure for obtaining money or property claimed under *Prob. Code § 13100 et seq.* when money or property claimed is that of deceased heir or legatee of person whose estate is in probate. *Prob. Code § 13107*

Substitution of parties without probate when money or property is subject to pending action or proceeding. *Prob. Code § 13107.5*

Payment of unemployment insurance benefits due deceased or incompetent person on affidavit executed by person claiming benefits. *Unemp. Ins. Code § 1341*

Transfer of vehicle registered under Vehicle Code without probate where decedent leaves no other property requiring probate. *Veh. Code § 5910*

[6] Text References

California Probate Practice, Ch. 4, Transfer of Property Without Administration, § 4.31[5] (Matthew Bender)

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, § 797 et seq. (10th ed. 2005)

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38-441 California Forms of Pleading and Practice--Annotated § 441.271

§ 441.271 Proceedings to Determine Succession to Real Property--Estate With Gross Value of Real and Personal Property Not Exceeding $100,000 [Prob. Code §§ 13150-13157]--Petition [Prob. Code §§ 13151, 13152]--Judicial Council Form DE-310

[1] FORM Proceedings to Determine Succession to Real Property--Estate With Gross Value of Real and Personal Property Not Exceeding $100,000 [Prob. Code §§ 13150-13157]--Petition [Prob. Code §§ 13151, 13152]--Judicial Council Form DE-310

Click here to view image.

[2] Use of Form

This form, Judicial Council Form DE-310, is for use by the successor of a decedent to an interest in a particular item of real property, and personal property described in the petition, to petition the court for an order determining that the petitioner has succeeded to that property when the gross value of the real and personal property in the estate does not exceed $100,000 [*see Prob. Code § 13151*]. Use of this form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*].

For a discussion of the calculation of the value of the property, and the items that must be excluded from the calculation under *Prob. Code § 13050*, see *§ 441.33*.

The form must be used when (1) the decedent dies leaving real property in California, (2) the value of decedent's real and personal property does not exceed $100,000, and (3) at least 40 days have passed since decedent's death [*Prob. Code § 13151*]. This procedure may be used only if either no proceeding is being, or has been, conducted in California for administration of the decedent's estate or the decedent's personal representative consents in writing to use of the procedure set forth in *Prob. Code § 13150 et seq.* to determine that real property of the decedent is property passing to the petitioners [*Prob. Code § 13150*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

For an affidavit that may be used when the gross value of all the real property in decedent's estate located in California does not exceed $20,000, *see § 441.271*.5.

[3] Contents of Petition

The petition must state all of the following [*Prob. Code § 13152*]:

- The facts necessary to determine that the petition is filed in the proper county (Paragraph 4).

- The gross value of the decedent's real and personal property in California, excluding the property described in *Prob. Code § 13050*, as shown by the inventory and appraisal attached to the petition, does not exceed $100,000 (Paragraph 8).

- A legal description of the particular item of real property in California that the petitioner alleges is property of the decedent passing to the petitioner (Paragraph 11). If the petition includes an additional request that the court make an order determining that the petitioner has succeeded to personal property [*see Prob. Code § 13151*], counsel should also include a description of the personal property that the petitioner alleges is property of the decedent passing to the petitioner [*Prob. Code § 13152(a)(3)*].

- The facts on which the petitioner bases the allegation that the described property is property passing to the petitioner (Paragraphs 12 and 13).

- A statement that no proceeding is being, or has been, conducted in California for administration of the decedent's estate (Paragraph 6(a)). If administration of the estate has commenced, the personal representative must have consented to the procedure under *Prob. Code § 13150 et seq.* [*Prob. Code § 13152(a)(5)(B)*]; the personal representative's consent in such a case must be attached as Attachment 6b (Paragraph 6(b)).

- Whether estate proceedings for the decedent have been commenced in any other jurisdiction and, if so, where those proceedings are pending or were conducted (Paragraph 7).

- The name, age, address, and relation to the decedent of each heir and devisee of the decedent (Paragraphs 9, 10, and 14) [*Prob. Code § 13152(a)(7)*].

- The names and addresses of all persons named as executors of decedent's will (Paragraph 15).

- If the petitioner is the trustee of a trust that is a devisee under the will, the names and addresses of all persons interested in the trust, as determined in cases of future interests pursuant to *Prob. Code § 15804(a)(1)-(3)*, so far as known to the petitioner (Paragraph 16).

- The name and address of each person serving as guardian or conservator of the decedent's estate at the time of the decedent's death, so far as known to any petitioner (Paragraph 17).

[4] Attachments

An attachment (labeled Attachment 11) must contain the legal description of the decedent's real property, and its Assessor's Parcel Number, along with the description of any personal property requested in the petition to pass to petitioner, and a statement of decedent's interest in the property [*see Prob. Code § 13152(a)(3)*].

An inventory and appraisal of the decedent's real and personal property in California, excluding the property described in *Prob. Code § 13050*, must be attached to the petition [*Prob. Code § 13152(b)*; *see Prob. Code § 8800 et seq.*; for a form of inventory and appraisal, *see* § 451.170]. The probate referee that makes the appraisal must have been selected from those appointed by the controller under *Prob. Code § 400* to appraise property in the county where the real property is located [*Prob. Code § 13152(b)*].

If the petitioner bases his or her claim to the property on decedent's will, a copy of the will must also be attached to the petition [*Prob. Code § 13152(c)*; *see* Paragraphs 5 and 12(a)].

If the decedent's personal representative has consented to use of the procedure provided by *Prob. Code § 13150 et seq.*, a copy of the consent must be attached to the petition [*Prob. Code § 13152(d)*; *see* Paragraph 6(b)].

[5] Verification

The petition must be verified by each petitioner [*Prob. Code § 13152(a)*].

[6] Hearing on Petition

The clerk will set the petition for hearing. At least 15 days before the hearing, notice must be mailed as provided in *Prob. Code § 1220* to each of the persons named in the petition pursuant to *Prob. Code § 13152* [*Prob. Code §§ 1220, 13153*]. For discussion and forms relating to *Prob. Code § 1220*, see Ch. 447, *Probate: Statutory Notice Requirements* .

[7] State Statutes

Successor permitted to petition court for order determining succession to real property, and that administration of decedent's estate is unnecessary. *Prob. Code § 13151*

Petition for order determining succession to real property. *Prob. Code § 13152*

Notice: *Prob. Code § 13153*

[8] Cross References

For a related form, *see § 441.272*.

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Volume 38: Probate: Is Probate Necessary? thru Probate: Estate Tax-Chs. 440-453
Chapter 441 PROBATE: DISPOSITION WITHOUT ADMINISTRATION
PART V. FORMS
A. Collection Of Small Estate Without Administration

38-441 California Forms of Pleading and Practice--Annotated § 441.272

§ 441.272 Proceedings to Determine Succession to Real Property--Estate With Gross Value of Real and Personal Property Not Exceeding $100,000 [Prob. Code §§ 13150-13157]--Order [Prob. Code § 13154]--Judicial Council Form DE-315

[1] FORM Proceedings to Determine Succession to Real Property--Estate With Gross Value of Real and Personal Property Not Exceeding $100,000 [Prob. Code §§ 13150-13157]--Order [Prob. Code § 13154]--Judicial Council Form DE-315

Click here to view image.

[2] Use of Form

This form, Judicial Council Form DE-315, is an order for use by the court to grant a petition to determine succession to real property in an estate, and personal property specified in the petition, in which the gross value of the real and personal property does not exceed $100,000 [*see Prob. Code §§ 13151, 13154*]. Use of this Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*].

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[3] Required Determinations

Before the court may grant a petition to determine succession to real property, and that no administration of decedent's estate is necessary, it must make the following determinations [*Prob. Code § 13154(b)*].

- The gross value of the decedent's real and personal property in California, excluding the property described in *Prob. Code § 13050*, does not exceed $100,000.

- Not less than 40 days have elapsed since the death of the decedent.

- Either no proceeding is being or has been conducted in California for administration of the decedent's estate or the decedent's personal representative has consented in writing to use of the procedure provided by *Prob. Code § 13150 et seq.*

- The property described in the order is property of the decedent passing to the petitioner or petitioners.

[4] Order Granting Petition

If the court makes the determinations required by *Prob. Code § 13154(b)*, it must issue an order determining (1) that the decedent's real property passes to the petitioner or petitioners, and (2) if the petition so requests, that personal property of the decedent to be described in the order is property passing to the petitioners, and the specific property interest of each petitioner in the described property [*Prob. Code § 13154(a)*].

[5] State Statutes

Order granting petition determining succession to real property. *Prob. Code § 13154*

[6] Text References

California Probate Practice, Ch. 4, Transfer of Property Without Administration, § 4.32[4] (Matthew Bender)

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, § 834 (10th ed. 2005)

[7] Cross References

For a related form, see *§ 441.271*.

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38-441 California Forms of Pleading and Practice--Annotated § 441.273

§ 441.273 Affidavit Establishing Right to Succeed to Particular Item of Real Property When Gross Value of All Real Property in Decedent's Estate Does Not Exceed $20,000 [Prob. Code § 13200]--Judicial Council Form DE-305

[1] FORM Affidavit Establishing Right to Succeed to Particular Item of Real Property When Gross Value of All Real Property in Decedent's Estate Does Not Exceed $20,000 [Prob. Code § 13200]--Judicial Council Form DE-305

Click here to view image.

[2] Use of Form

This form, Judicial Council Form DE-305, is an affidavit for use by the successor of a decedent to establish his or her right to succeed to a particular item of real property when the gross value of all real property, excluding the real property described in *Prob. Code § 13050* (property held in joint tenancy), does not exceed $20,000 [*see Prob. Code § 13200*]. Use of the form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*], and any form prescribed by the Judicial Council is deemed to comply with *Prob. Code § 13200 et seq.* [*see Prob. Code § 13200(a)*]. The current version of the form is designed for use when no proceeding is being or has been conducted in California for administration of the decedent's estate. The affidavit procedure may also be used, however, when administration has commenced, if the decedent's personal representative consents in writing to use of the procedure [*see Prob. Code § 13210(b)*]. If the form is being used in this situation, it should be adapted accordingly.

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[3] Contents of Form and Attachments

CAUTION:

Civ. Code § 1189, enacted in 1990, governs the format for notary acknowledgments generally. Although the Judicial Council feels that the notary acknowledgment in its form "substantially" complies with §

1189 [*see Civ. Code § 1189(a)*], the Council has stated that some county recorders may no longer accept the "old style" acknowledgment contained in its form. Counsel may wish to encourage notaries to attach their own acknowledgment in the format required by *Civ. Code § 1189* on 81/2-by-11-inch paper [*see Cal. Rules of Ct., Rule 2.100* (form for papers presented for filing)].

The Judicial Council form contains places for filling in the information required by *Prob. Code § 13200(a)*, as well as the statements required by that section (Paragraphs 1-11). For each person executing the affidavit, the affidavit must contain a notary public's certificate of acknowledgment identifying the person [*Prob. Code § 13200(b)*]. In addition, the following must be attached to the affidavit:

- An inventory and appraisal of the decedent's real property in California, excluding the real property described in *Prob. Code § 13050* (property excluded in determining value of estate) [*Prob. Code § 13200(c)*];

- A certified copy of the decedent's death certificate [*Prob. Code § 13200(e)*];

- If the decedent's personal representative has consented to the use of the procedure, a copy of the consent and of the personal representative's letters [*Prob. Code § 13200(e)*]; and

- If the affiant claims under the decedent's will and no estate proceeding is pending in California, a copy of the decedent's will [*Prob. Code § 13200(d)*].

For further discussion, see *§ 441.51*.

[4] Service or Mailing

The affiant must personally serve or mail, postage prepaid, a copy of the affidavit and attachments to any person serving as guardian or conservator of decedent's estate at the time of decedent's death [*see Prob. Code § 13200(f)*; *see also Prob. Code § 13200(a)(4)*]. The affiant must identify these persons in Paragraph 7 of this form.

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38-441 California Forms of Pleading and Practice--Annotated §§ 441.274-441.289

[Reserved]

§§ 441.274[Reserved]

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Chapter 441 PROBATE: DISPOSITION WITHOUT ADMINISTRATION
PART V. FORMS
B. Summary Administration Of Small Estate

38-441 California Forms of Pleading and Practice--Annotated § 441.290

§ 441.290 Petition to Have Estate With Net Value Not Exceeding $20,000 Set Aside to Surviving Spouse, Registered Domestic Partner, or Minor Child [Prob. Code §§ 6600-6615; Fam. Code § 297.5(c)]

[1] FORM Petition to Have Estate With Net Value Not Exceeding $20,000 Set Aside to Surviving Spouse, Registered Domestic Partner, or Minor Child [Prob. Code §§ 6600-6615; Fam. Code § 297.5(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION TO HAVE
Estate of _____ [*name*],	)	ESTATE SET ASIDE
also known as _____	)	[*Prob. Code §§ 6600-6615*]
[*name*],	)	
Decedent.		

_____

Petitioner[s], _____ [*name(s)*], respectfully represent[s]:

1. The small estate set-aside provision of *Probate Code Sections 6600 through 6615* apply to the estate of _____ [*name*], decedent.

2. Petitioner[s] is/are _____ [the person(s) named in decedent's will as executor *or* the surviving _____ (spouse *or* registered domestic partner) *or* the duly appointed guardian of _____ (*name*), decedent's minor child *or* a child of decedent who was a minor at the time decedent died *or* the personal representative appointed in decedent's estate].

[3. The decedent died _____ [testate *or* intestate] on or about _____ (*date*), in

_____ County, _____ [*state*]; at the time of death the deceased was a resident of _____ County, California.]

4. So far as known to the petitioner[s], the names, ages, residences, and relation to the decedent of his/her heirs and devisees are as follows:

Name	Age	Residence	Relation
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

5. A specific description and estimate of the value of the decedent's estate are as follows:

Description	Estimated Value
_____	_____
_____	_____
_____	_____

6. A list of all liens and encumbrances on the estate at the date of the decedent's death is as follows:

Description	Amount
_____	_____
_____	_____
_____	_____

[*EITHER*]

7. No real property located outside California has passed to _____ [petitioner *or* the surviving _____ (spouse *or* registered domestic partner) and minor children, or any one or more of them].

[*OR*]

7. A specific description and estimate of the value of the decedent's real property located outside California which passed to _____ [petitioner *or* the surviving _____ (spouse *or* registered domestic partner) and minor children *or any combination of them*] are as follows:

Description	Estimated Value
_____	_____
_____	_____

[*EITHER*]

8. No property as described in *Probate Code Section 6600(b)* has passed to _____ [petitioner *or* the surviving _____ (spouse *or* registered domestic partner) and minor children *or any one or more of them*].

[*OR*]

8. A specific description and estimate of the value of the decedent's property as described in *Probate Code Section 6600(b)* that passed to _____ [petitioner *or* the surviving _____ (spouse *or* registered domestic partner) and minor children *or any combination of them*] are as follows:

Description	Estimated Value
_____	_____
_____	_____

[*EITHER*]

9. No property has been set apart out of the decedent's estate as a probate homestead under *Prob. Code § 6520*.

[*OR*]

9. A designation of the property set apart out of the decedent's estate as a probate homestead under *Prob. Code § 6520* is as follows: _____ [*legal and common description*].

[*EITHER*]

10. The expenses of decedent's last illness, funeral charges, and expenses of administration have been paid.

[*OR*]

10. A statement of unpaid liabilities for expenses of decedent's last illness, funeral charges, and expenses of administration are as follows:

Description	Amount
_____	_____
_____	_____
_____	_____

11. The estate should be set aside for _____ [*specify the requested disposition of the estate, and the considerations that justify that disposition, e.g.,* _____ (*name*), the decedent's minor child, alone, and the other minor children and decedent's surviving _____ (spouse *or* registered domestic partner)

should be excluded, because decedent's will shows that he/she intended _____ (*name*) to be the sole beneficiary thereof.]

[12. Heretofore, on _____ (*date*), _____ (*name*) filed a petition for probate.]

WHEREFORE, petitioner[s] pray[s] for an order setting aside and assigning the whole of decedent's estate to _____ [petitioner(s) *or* the minor child], and for all other proper orders.

_____ [*signature(s*)]
Petitioner[s]
_____ [*signature*]
Attorney for Petitioner[s]

VERIFICATION

I/We, _____ [*name*], am/are the petitioner[s] in the above-entitled proceeding. I/We have read the foregoing petition and know the contents thereof. The same is true of my/our own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I/we believe it to be true.

I/We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature(s*)]

[2] Use of Form

This petition is for use to have an estate with a net value not exceeding $20,000 set aside to the surviving spouse, registered domestic partner, or minor child of a decedent who died on or after July 1, 1987 [*see Prob. Code §§ 6602-6606, 6614*]. For a discussion of the calculation of the value of the estate, and the items that must be excluded from the calculation under *Prob. Code § 6600(b)*, see Ch. 440, *Probate: Is Probate Necessary ?*, § 440.10 et seq.

[3] Setting Aside Estate Not Exceeding $20,000

A petition may be filed requesting an order setting aside the decedent's estate to the decedent's surviving spouse or registered domestic partner and minor children, or one or more of them, if the net value of the estate, over and above all liens and encumbrances at the date of decedent's death, and over and above the value of any probate homestead interest set apart out of the estate under *Prob. Code § 6520*, does not exceed $20,000 [*Prob. Code § 6602*; *Fam. Code § 297.5(c)* (surviving registered domestic partner has same rights and responsibilities as surviving spouse)].

[4] Who May File Petition

The petition may be filed by any of the following (Paragraph 2) [*Prob. Code § 6606(a)*; *Fam. Code § 297.5(c)* (surviving registered domestic partner has same rights and responsibilities as surviving spouse)]:

- The person named in the decedent's will as executor.
- The decedent's surviving spouse or registered domestic partner.

- A child of the decedent who was a minor when the decedent died.

- The guardian of a minor child of the decedent.

- The personal representative if a personal representative has been appointed for the decedent's estate.

[5] Contents of Petition

The petition must allege that *Prob. Code §§ 6600-6615* applies (Paragraph 1), and request that an order be made setting aside decedent's estate (prayer) [*Prob. Code § 6604(a)*].

In addition, the petition must include the following [*Prob. Code § 6604(b)*; *Fam. Code § 297.5(c)* (surviving registered domestic partner has same rights and responsibilities as surviving spouse)]:

- If the proceedings for administration of the estate are not pending, the facts necessary to determine the county in which the estate may be administered (Paragraph 3) [*see Prob. Code §§ 6603, 7051, 7052*].

- The name, age, address, and relation to the decedent of each heir and devisee of the decedent, so far as known to the petitioner (Paragraph 4).

- A specific description and estimate of the value of the decedent's estate, and a list of all liens and encumbrances at the date of dececent's death (Paragraphs 5 and 6).

- A specific description and estimate of the value of any of the decedent's real property located outside California that passed to decedent's surviving spouse or registered domestic partner and minor children, or any one or more of them, under decedent's will, or by intestate succession (Paragraph 7).

- A specific description and estimate of the value of any of the decedent's property described in *Prob. Code § 6600(b)* (certain property passing without probate, such as joint tenancies) that passed to decedent's surviving spouse or registered domestic partner and minor children, or any one or more of them, on decedent's death (Paragraph 8).

- A designation of any property as to which a probate homestead is set apart out of the decedent's estate under *Prob. Code § 6520* (Paragraph 9).

- A statement of any unpaid liabilities for expenses of the last illness, funeral charges, and expenses of administration (Paragraph 10).

- The requested disposition of decedent's estate, and the considerations that justify the requested disposition (Paragraph 11).

[6] Alternative Filing Procedures

If proceedings for the administration of the estate have not yet been commenced, the petition may be filed concurrently with a petition for the probate of the decedent's will, or for administration of the estate. If no petition for probate or for administration is being filed, a petition may be filed independently [*Prob. Code § 6605(b)*]. In any event, a petition may be filed at any time prior to the entry of the order for final distribution of the estate [*Prob. Code § 6605(c)*]. If a decedent died before July 1, 1987, the proceeding would be governed by former *Prob. Code §§ 640-647.5*, instead of *Prob. Code §§ 6600-6615* (*Prob. Code § 6614*].

[7] Liability of Petitioner for Decedent's Unsecured Debts

The person or persons in whom title vested pursuant to *Prob. Code § 6609* are personally liable for the unsecured debts of the decedent [*Prob. Code § 6611(a)*]. Personal liability does not exceed the fair market value of the property at the date of the decedent's death, less the total of all the following [*Prob. Code § 6611(b)*]:

- The amount of any liens and encumbrances on that property.
- The value of any probate homestead interest set apart under *Prob. Code § 6520*.
- The value of any other property set aside out of that property under *Prob. Code § 6510*.

In any action or proceeding based on an unsecured debt of the decedent, the decedent's surviving spouse, registered domestic partner, child, or children, or the guardian of the decedent's minor child or children, may assert any defense, cross complaint, or setoff that would have been available to the decedent if the decedent had not died [*Prob. Code § 6611(c)*; *Fam. Code § 297.5(c)* (surviving registered domestic partner has same rights and responsibilities as surviving spouse)].

[8] Venue

The petition must be filed in the superior court of a county in which the estate of the decedent may be administered [*Prob. Code § 6603*].

[9] Verification

The petition must be verified [*Prob. Code § 1021(a)(1)*]. An affidavit or verified petition must be received in evidence when offered in an uncontested proceeding under the Probate Code [*Prob. Code § 1022*]. If a petitioner is absent from the county or, for some other cause, is unable to sign or verify a petition filed pursuant to the Probate Code, the person's attorney may sign or verify the petition, unless the person is a fiduciary appointed in the proceeding [*Prob. Code § 1023*].

[10] State Statutes

Property excluded from determination of small estate. *Prob. Code § 6600(b)*

Small estate set-aside. *Prob. Code § 6602*

Venue for petition for small estate set-aside. *Prob. Code § 6603*.

Petition for small estate set-aside. *Prob. Code § 6604*.

Procedures for filing petition for small estate set-aside. *Prob. Code § 6605*.

Persons who may file petition for small estate set-aside. *Prob. Code § 6606*.

[11] Local Rules of Court:

[a] Orange County

Petition to set aside small estate. Orange Co. Super. Ct. Rules, Rule 603.14

[b] San Diego County

Petition to set aside small estate. San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.57

[12] Cross References

For a related form, *see § 441.291*.

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38-441 California Forms of Pleading and Practice--Annotated § 441.291

§ 441.291 Notice of Hearing [Prob. Code §§ 1211, 6607(a)] on Petition to Have Estate With Net Value Not Exceeding $20,000 Set Aside to Surviving Spouse, Registered Domestic Partner, or Minor Child [Prob. Code §§ 6600-6615; Fam. Code § 297.5(c)]

[1] FORM Notice of Hearing [Prob. Code §§ 1211, 6607(a)] on Petition to Have Estate With Net Value Not Exceeding $20,000 Set Aside to Surviving Spouse, Registered Domestic Partner, or Minor Child [Prob. Code §§ 6600-6615; Fam. Code § 297.5(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of_____ [*name*],	)	NOTICE OF HEARING ON PETITION TO SET
also known as_____ [*name*],	)	ASIDE
Decedent.	)	[*Prob. Code § 6607(a)*]

_____

NOTICE IS HEREBY GIVEN that _____ [*name of petitioner(s)*] has/have filed a petition for an order setting aside the decedent's estate for _____ [petitioner(s) *or* _____ (*name*) decedent's surviving _____ (spouse *or* registered domestic partner) and _____ (*names*), decedent's minor children *or any combination of them, reference to which is made for further particulars*]. A hearing on the petition has been set in [_____ (Department *or* Division) _____ of] the above-entitled court at _____ [*address*], _____ [*city*], on _____ [*date*], at _____ _____.M.
Dated: _____.

_____ [*signature*]
Attorney for Petitioner[s]

[2] Use of Form

This form is for use to give notice of a hearing on a petition to have an estate with a net value not exceeding $20,000 set aside, when the decedent died on or after July 1, 1987 [*see Prob. Code §§ 1211* (form of notice), 6607(a) (notice requirement)].

[3] Notice Requirement

[a] When Administration Proceedings Not Pending

When proceedings for the administration of decedent's estate are not pending, and the petition to set aside is not joined with a petition for the probate of decedent's will, or for administration of decedent's estate, the petitioner must give notice of the hearing on the petition as provided in *Prob. Code § 1220* to each person named as executor in the decedent's will, and to each heir or devisee of the decedent if known to the petitioner. A copy of the petition must be sent by mail, not less than 15 days before the hearing, to each heir and devisee of the decedent, and to each person named as executor who is not petitioning, if known. A copy of the petition must be sent with the notice to the surviving spouse or registered domestic partner, each child, and each devisee who is not petitioning [*Prob. Code § 6607(a)*; *Fam. Code § 297.5(c)* (surviving registered domestic partner has same rights and responsibilities as surviving spouse)].

When notice is given pursuant to *Prob. Code § 1220*, notice must be given to all persons who have requested special notice in the estate proceeding pursuant to *Prob. Code § 1250* [*Prob. Code § 1220(a)(2)(B)*]. For further discussion of notice under *Prob. Code § 1220*, see Ch. 447, *Probate: Statutory Notice Requirements* .

[b] When Petition Filed With Petition for Probate or for Letters

If the petition is filed with a petition for probate of the decedent's will or with a petition for administration of the estate of the deceased spouse or registered domestic partner, notice of the hearing on the petition must be given to the persons and in the manner prescribed by *Prob. Code § 8003* (setting and notice of hearing) and must be included in the notice required by *Prob. Code § 8003* [*Prob. Code § 6607(b)*; *Fam. Code § 297.5(c)* (surviving registered domestic partner has same rights and responsibilities as surviving spouse) *see also Prob. Code §§ 8100-8125* (notice of hearing); *see* Ch. 442, *Probate: Intiating Probate Administration*].

[c] When Administration Proceedings Are Pending

If the proceedings for the administration of the estate are pending when the petition is filed, notice must be given as provided in *Prob. Code § 1220* [*Prob. Code § 6607(c)*].

If the hearing of the petition for probate or for administration is set for a day more than 15 days after the filing of the small estate set-aside petition, the small estate set-aside petition will be set for hearing at the same time as the petition for probate or for administration. If the hearing of the petition for probate or for administration is not set for a day more than 15 days after the filing of the small estate set-aside petition, the small estate set-aside petition will be set for hearing at least 15 days after the date it is filed, and if the petition for probate or for administration has not already been heard, that petition will be continued until that date and heard at the same time unless the court orders otherwise [*Prob. Code § 6607(c)*].

When notice is being given in accordance with *Prob. Code § 1220*, it may be necessary to give special notice to persons who have requested it or who have appeared in the estate proceedings [*see Prob. Code § 1220(a)(2)(B)*]. For further discussion of notice under *Prob. Code § 1220*, see Ch. 447, *Probate: Statutory Notice Requirements* .

[4] State Statutes

Form of notice. *Prob. Code § 1211*

Notice when proceedings for administration of estate not pending, and petition not joined with probate or administration petition. *Prob. Code § 6607(a)*

Notice when petition filed with petition for probate or administration. *Prob. Code § 6607(b)*

Notice when proceedings for administration of estate are pending. *Prob. Code § 6607(c)*

[5] Cross References

For a related form, *see § 441.290*.

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38-441 California Forms of Pleading and Practice--Annotated § 441.292

§ 441.292 Order [Prob. Code § 6609] Setting Aside Estate With Net Value Not Exceeding $20,000 to Surviving Spouse, Registered Domestic Partner, or Minor Child [Prob. Code §§ 6600-6615; Fam. Code § 297.5(c)]

[1] FORM Order [Prob. Code § 6609] Setting Aside Estate With Net Value Not Exceeding $20,000 to Surviving Spouse, Registered Domestic Partner, or Minor Child [Prob. Code §§ 6600-6615; Fam. Code § 297.5(c)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER GRANTING
Estate of _____ [*name*],	)	PETITION TO SET ASIDE
also known as _____ [*name*],	)	ESTATE
Decedent.	)	[*Prob. Code § 6609*]
	)	

_____

The petition of _____ [*name(s)*] for an order to set aside the decedent's estate for _____ [petitioner(s) *or* _____ (*name*), decedent's surviving _____ (spouse *or* registered domestic partner) and _____ (*names*), decedent's minor children, *or any combination of them*], came on regularly for hearing by the court on _____, [*date*]. Petitioner[s] appeared by counsel _____ [*name*]; respondent[s] appeared by counsel _____ [*name*].

The court finds from proof made to the satisfaction of the court that:

1. Notice of the time and place of the hearing was given as required by *Probate Code Section 6607*.

2. All facts alleged in the petition are true.

3. The net value of the decedent's estate, over and above all liens and encumbrances at the date of decedent's death, [and over and above the value of the probate homestead interest set apart out of the decedent's estate under *Probate Code Section 6520*] did not exceed $20,000 as of the date of decedent's death.

On considering the needs of the surviving _____ (spouse *or* registered domestic partner) and minor children, the liens and encumbrances on the property of the decedent's estate, the claims of creditors, [the needs of decedent's heirs or devisees,] the intent of the decedent with respect to the estate property and decedent's estate plan as expressed in _____ [*specify, e.g.,* inter vivos and testamentary transfers *or by other means*], and _____ [*specify any other relevant considerations*], the court finds that it would not be inequitable to grant the petition.

IT IS ORDERED that the whole of the estate of _____ [*name*], decedent, shall be set aside and assigned to, and the title thereof shall vest absolutely in, subject to all liens and encumbrances on property in the estate at the date of the decedent's death, the _____ [*specify* surviving _____ (spouse *or* registered domestic partner) and minor children, *or any combination of them*].

[IT IS FURTHER ORDERED that the liabilities for the expenses _____ (*specify, e.g.,* of the last illness *or* funeral charges *or* administration) that are unpaid as of the date of this order shall be _____ (*specify such arrangements as are necessary to satisfy the liabilities*).]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This order is for use to grant a petition to set aside an estate with a net value not exceeding $20,000 to the surviving spouse, registered domestic partner, or minor child if the decedent died on or after July 1, 1987 [*see Prob. Code § 6609*; *Fam. Code § 297.5(c)* (surviving registered domestic partner has same rights and responsibilities as surviving spouse)]. For a petition on which this order is based, see *§ 441.290*.

[3] Factors Court Must Consider

In considering whether to make an order granting a petition to set aside, the court must consider the needs of the surviving spouse, registered domestic partner, and minor children, the liens and encumbrances on the property of the decedent's estate, the claims of creditors, the needs of decedent's heirs or devisees, the intent of the decedent with respect to the estate property and decedent's estate plan as expressed in inter vivos and testamentary transfers or by other means, and any other relevant considerations. If the surviving spouse has remarried at the time the petition is heard, it is presumed that the needs of the surviving spouse do not justify the set-aside. This is a presumption affecting the burden of proof [*Prob. Code § 6609(b)*; *Fam. Code § 297.5(c)*]. As of January 1, 2005, surviving registered domestic partners have the same rights and responsibilities as surviving spouses. However, the statute does not make clear how this remarriage provision applies in the case of a surviving registered domestic partner who subsequently enters into another registered domestic partnership. It seems likely that this will be treated like a subsequent remarriage [*see Fam. Code § 297.5(c)*].

[4] Grounds for Granting Petition

If the court determines that the net value of the decedent's estate, over and above all liens and encumbrances at the date of decedent's death, and over and above the value of any probate homestead interest set apart out of decedent's estate

under *Prob. Code § 6520*, does not exceed $20,000 as of the date of decedent's death, the court must make an order granting the petition, unless the court determines that it would be inequitable under the circumstances [*Prob. Code § 6609(a)*].

[5] State Statutes

Order granting petition to set aside small estate. *Prob. Code § 6609*

[6] Cross References

For a related form, *see § 441.290*.

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38-441 California Forms of Pleading and Practice--Annotated §§ 441.293-441.309

[Reserved]

§§ 441.293[Reserved]

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38-441 California Forms of Pleading and Practice--Annotated § 441.310

§ 441.310 Petition to Establish Fact of Death of Joint Tenant or Life Tenant [Prob. Code § 201]--Real Property--Independent Proceeding--No Probate Pending

[1] FORM Petition to Establish Fact of Death of Joint Tenant or Life Tenant [Prob. Code § 201]--Real Property--Independent Proceeding--No Probate Pending

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION TO
Estate of _____ [*name*],	)	ESTABLISH FACT OF DEATH
also known as _____	)	[*Prob. Code § 201*]
[*name*],	)	
Deceased.		

_____

Petitioner, _____ [*name*], alleges that:

1. _____ [*Name of decedent*] died on _____ [*date*], a resident of _____ County, California.

[*EITHER*]

2. Petitioner and the decedent are the same persons named as grantees in that certain deed dated _____ [*date*], executed by _____ [*name*] as grantor, which conveyed to _____ and _____ [*names of grantees as set forth in deed*], as joint tenants, the real

property in _____ County, California, more particularly described as follows: _____ [*set forth legal and common description*].

[*OR*]

2. Petitioner and the decedent are the same persons named as grantees in that certain deed dated _____ [*date*], executed by _____ [*name*] as grantor, which conveyed to _____ [*life tenant named in deed*] for life, remainder to _____ [*remainder beneficiary named in deed*], the real property in _____ County, California more particularly described as follows: _____ [*set forth legal and common description*].

3. The deed was duly recorded on _____ [*date*], as Instrument No. _____ in Book _____ at page _____ of the Official Records in the office of the County Recorder of _____ County, California], a copy of the deed is attached as Exhibit "A," and incorporated by reference].

WHEREFORE, petitioner prays that this petition be set for hearing; that notice thereof be given as required by law; and that on hearing this petition the court decree that the decedent died on _____ [*date*].

_____ [*signature*]
Petitioner
_____ [*signature*]
Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know its contents. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

CAUTION:
A petition for a decree establishing the death of a joint tenant or life tenant must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is a petition for a decree establishing the death of a joint tenant or life tenant when there is no probate pending.

[3] Petition to Establish Death of Joint Tenant or Life Tenant

If title to or an interest in real or personal property is affected by the death of a person, another person who claims an interest in the property may commence proceedings under *Prob. Code §§ 200-204* to establish the fact of the death [*Prob. Code § 200*].

Proceedings under *Prob. Code §§ 200-204* must be commenced in the superior court of the county of which the decedent was a resident at the time of death or in the superior court of any county in which the property is located [*Prob. Code § 201(a)*]. The proceedings are commenced by filing a verified petition that sets forth all of the following information [*Prob. Code §§ 201(b), 1021(a)(1)* (verification)]:

- The jurisdictional facts [*see Prob. Code §§ 200, 201(a)*].
- A particular description of the affected property and of the interest of the petitioner in the property.

[4] State Statutes

Verified petition to establish death affecting title to real or personal property. *Prob. Code §§ 200-202, 1021(a)(1)*

Requirements of notice. *Prob. Code § 203*

Court is able to act on petition or affidavits in support thereof with same force and effect as if petitioner or affiant personally present and testifying. *Prob. Code § 204(a)*

Judgment on petition creates presumption of death affecting the burden of producing evidence. *Prob. Code § 204(b)*

Recording of certified copy of court order determining fact of death, in county in which property is located. *Prob. Code § 210*

[5] Local Rules of Court

[a] Alameda County

Proceedings to establish fact of death. Alameda Co. Unified Super. Ct. Rules, Rule 12.13.17.2

[b] City and County of San Francisco

Petition must be filed in name of decedent whose interest is to be terminated. San Francisco Uniform Local Ct. Rules, Rule 14.103(A)

Attorney's fees arrangements should be made directly with client. San Francisco Uniform Local Ct. Rules, Rule 14.103(E)

[6] Decisions

Decree establishing fact of death does not conclusively adjudicate the rights of the parties. *King v. Pauly (1911) 159 Cal. 549, 554, 115 P. 210* (decided under former *Code Civ. Proc. § 1723*; *now see Prob. Code §§ 200-212*); *Hansen v. Union Sav. Bank (1905) 148 Cal. 157, 160, 82 P. 768* (dictum; decided under former *Code Civ. Proc. § 1723*; *now see Prob. Code §§ 200-212*)

Requirement of proper notice for jurisdiction to render decree establishing fact of death. *In re Petition of Tracey (1902) 136 Cal. 385, 69 P. 20* (decided under former *Code Civ. Proc. § 1723*; *now see Prob. Code §§ 200-212*)

Decree establishing fact of death is only prima facie evidence thereof. *Goldberg v. Goldberg (1963) 217 Cal. App. 2d 623, 628, 32 Cal. Rptr. 93* ; *LePleux (Py) v. Applegate (1958) 164 Cal. App. 2d 9, 11, 330 P.2d 65*

Order under former Prob. Code § 1174 (*now see Prob. Code § 204*), establishing death, does not affect title and is pro tanto void if purporting to do so. *Goldberg v. Goldberg (1963) 217 Cal. App. 2d 623, 628, 32 Cal. Rptr. 93*

Proceeding to establish the fact of death is not appealable. *LePleux (Py) v. Applegate (1958) 164 Cal. App. 2d 9, 11, 330 P.2d 65* ; *Estate of Basso (1945) 68 Cal. App. 2d 294, 299-300, 156 P.2d 476*

Holding possession of real property after a decree establishing fact of death has been rendered is not adverse to a lien-holder's interest. *Hinkel v. Crowson (1927) 83 Cal. App. 87, 96, 256 P. 479* (decided under former *Code Civ. Proc. § 1723*; *now see* Prob. Code §§ 1170-1175)

Executrix following usual proceedings to terminate joint tenancy corroborated her testimony that she believed property held in joint tenancy and negated inference that she and her deceased husband had agreed that it was community property. *Estate of Kruse (1970) 7 Cal. App. 3d 471, 477-478, 86 Cal. Rptr. 491*

[7] Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate, §§ 13-15* (10th ed. 2005)

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38-441 California Forms of Pleading and Practice--Annotated § 441.311

§ 441.311 Petition to Establish Fact of Death of Joint Tenant or Life Tenant [Prob. Code § 201]--Personal Property--No Probate Pending

[1] FORM Petition to Establish Fact of Death of Joint Tenant or Life Tenant [Prob. Code § 201]--Personal Property--No Probate Pending

[*Caption. See § 441.310.*]

1. [*Allegation of death. See § 441.310, Paragraph 1.*]

2. At the time of his/her death, decedent was the owner of a _____ [joint tenancy *or* life estate] interest in the following described personal property registered in the names of petitioner and the decedent as _____ [joint tenants *or* life tenant and remainder person]: _____ [*set forth description of personal property, e.g.,* _____ shares of the capital stock of _____ Corporation as evidenced by Certificate No. _____ of _____Corporation registered in the names of _____ and _____ as joint tenants].

WHEREFORE, petitioner prays that this petition be set for hearing; that notice thereof be given as required by law; and that on hearing this petition this court decree that the decedent died on _____ [*date*].

_____ [*signature*]
Petitioner
_____ [*signature*]
Attorney for Petitioner

[*Verification. See § 441.310.*]

[2] Cross References

For a related form, *see § 441.310*.

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38-441 California Forms of Pleading and Practice--Annotated § 441.312

§ 441.312 Declaration of Fact of Death of Joint Tenant or Life Tenant

[1] FORM Declaration of Fact of Death of Joint Tenant or Life Tenant

I, _____ [*name*], declare:

1. I am 18 years of age or older.

2. Attached hereto is a certified copy of the Certificate of Death of _____ [*name*], deceased.

3. The decedent named in the Certificate of Death is the same person as _____ [*name*] named as one of the parties in the deed dated _____, executed by _____ [*name*], grantor, to _____ [*name of deceased*] *and* _____ [*name of other person whose interest is affected*] as _____ [joint tenants *or* life tenant and remainderperson], and recorded on _____ [*date*], in Book _____, page _____, of Official Records of _____ County, California, as Instrument No. _____, concerning the real property located in _____ County, California, and described as follows: _____ [*set forth legal and common description*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

CERTIFICATE OF ACKNOWLEDGMENT

)
State of California,)
County of _____)

_____

On _____ [*date*], before me _____ [*name and title of officer*], personally appeared _____ [*name of person or entity claiming interest*], _____ who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument _____ [the person *or* the entity on behalf of which the person acted] executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing is true and correct.

WITNESS my hand and official seal.

Signature: _____ [*Seal*]
Notary Public for the
State of California

[2] Use of Form

Code Civ. Proc. § 2015.5 authorizes a declaration under penalty of perjury as in the above form in lieu of an affidavit.

This form is a declaration may be recorded in the county in which the property is located, along with an attested or certified copy of a record of the death made and filed in a designated public office as required by law [*Prob. Code § 210(a)*]. When so recorded, the document is prima facie evidence of the death insofar as the document identifies real property located in the county, title to which is affected by the death [*Prob. Code § 212*].

The above form will be recognized by the title company as establishing the fact of death if no estate tax is due, if it is submitted with a certified copy of the death certificate.

[3] Acknowledgment

A document establishing the fact of death recorded under *Prob. Code §§ 210-212* is subject to all statutory requirements for recorded documents, including acknowledgment [*Prob. Code § 211(a)*; *see, e.g., Gov. Code §§ 27280-27297, 27320-27336*]. *Gov. Code § 27287* provides that before an instrument can be recorded, it must be acknowledged or proved by a subscribing witness as provided in *Civ. Code §§ 1198, 1199*.

Although case law suggests that a declaration to establish the fact of death may not be an "instrument" for purposes of the requirement of acknowledgement [*see Hoag v. Howard (1880) 55 Cal. 564, 566* ; *see also U.S. Hertz, Inc. v. Niobrara Farms (1974) 41 Cal. App. 3d 68, 86, 116 Cal. Rptr. 44]* , since it transfers no interest and confers no rights [*see, e.g., Goldberg v. Goldberg (1963) 217 Cal. App. 2d 623, 628, 32 Cal. Rptr. 93]* , the safer course is to include the acknowledgement.

The county recorder must index a document so recorded in the index of grantors and grantees, and the person whose death is established is deemed to be the grantor [*see Prob. Code § 211(b)*]. The foregoing form of acknowledgment is for use when the acknowledgment is made by an individual on his or her own behalf and the officer before whom the acknowledgment is made is other than a military officer [*see Civ. Code § 1189*]. For further discussion and forms of acknowledgments, see Ch. 9, *Acknowledgments* .

[4] Cross References

For alternative forms, see Ch. 15, *Affidavits, Certificates, and Declarations*

[5] State Statutes

Recording of affidavit of death. *Prob. Code § 210(a)*

Effect of recording. *Prob. Code § 212*

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38-441 California Forms of Pleading and Practice--Annotated § 441.313

§ 441.313 Order Establishing Fact of Death of Joint Tenant or Life Tenant [Prob. Code § 204(b)]--Real Property

[1] FORM Order Establishing Fact of Death of Joint Tenant or Life Tenant [Prob. Code § 204(b)]--Real Property

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER ESTABLISHING DEATH
Deceased.	)	

The verified petition of _____ [*name*] to establish the fact of death of the above named _____ [joint tenant *or* life tenant] in the herein described property came on regularly for hearing on _____ [*date*], in Department _____ of the above entitled court, the Honorable _____ [*name*], Judge, presiding. Proof having been made to the satisfaction of the court, the court finds that all the allegations of the petition are true and that notice of the hearing of the petition has been given as required by law.

IT IS ORDERED as follows:

1. The decedent, _____ [*name*], died on _____ [*date*].

2. The real property described in the deed and affected by the death of the decedent is the real property in _____ County, California, more particularly described as follows: _____ [*set forth legal and common description*].

Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] State Statutes

Rendition of decree establishing fact of death. *Prob. Code § 204(b)*

Recordation of certified copy of decree. *Prob. Code § 210(b)*

[3] Local Rules of Court

Procedure for submission of proposed orders in advance of hearing date. San Francisco Uniform Local Ct. Rules, Rule 14.6

Material to be included in probate orders. Los Angeles Co. Super. Ct. Rules, Rule 10.42; San Francisco Uniform Local Ct. Rules, Rule 14.27

[4] Decisions

Decree establishing fact of death as only prima facie evidence thereof. *LePleux (Py) v. Applegate (1958) 164 Cal. App. 2d 9, 11, 330 P.2d 65*

[5] Text References

California Probate Practice, Ch. 4, Transfer of Property Without Administration, § 4.21[10] (Matthew Bender)

[6] Cross References

For a related form, *see § 441.310*.

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38-441 California Forms of Pleading and Practice--Annotated § 441.314

§ 441.314 Petition to Identify Heir [Prob. Code § 248]

[1] FORM Petition to Identify Heir [Prob. Code § 248]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
In the Matter of Identifying	)	PETITION TO IDENTIFY
the Heirs of _____ [*name*]	)	HEIR
	)	

_____

Petitioner, _____ [*name*], respectfully represents:

1. Petitioner is _____ [*describe status, e.g.,* the brother of _____ (*name*), and a person interested in the property described in Paragraph 3, below]. Petitioner is a resident of _____ County, California, and is _____ years of age.

2. On _____ [*date*], _____ [*name*] executed _____ [*specify instrument vesting title in member of class sought to be determined, e.g.,* a grant deed granting a life estate to the heirs of _____ (*name*)]. No further description of _____ [*specify class sought to be determined, e.g.,* "heirs"] is contained in the _____ [*specify instrument vesting title, e.g.,* grant deed]. Attached as Exhibit A is the _____ [*specify document, e.g.,* deed].

3. The property affected is a parcel of land located at _____ County, California, more particularly described as follows: _____ [*set forth legal description*].

4. Petitioner offers the following proof that title to the affected property vests in petitioner: _____ [*briefly describe petitioner's proof*].

[5. So far as is known to petitioner, _____ (*name*) left the following other heirs: _____ (*list names, ages, and residences of other heirs, and if any of the other heirs are dead or their residences are unknown, state that fact*).]

WHEREFORE, petitioner requests that a decree be entered determining and establishing the identity of _____ [*specify, e.g.,* "heirs," as that description is used in the grant deed attached as Exhibit A].

Dated _____.
_____ [*signature*]
Petitioner
_____ [*signature*]
Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

This form is a petition to identify heirs who are entitled to property other than by laws of succession.

[3] Contents of Petition

The petition must set forth briefly the deraignment of the petitioner's title (Paragraph 4), a description of the property affected (Paragraph 3), and so far as known to the petitioner, the names, ages, and residences of the heirs, heirs of the body, issue, or children whose identity is sought to be determined (optional Paragraph 5). If any of these potential heirs are dead or if the residence of any is unknown, the petition must state that fact. The form also alleges the petitioner's standing (Paragraph 1) and requests that a decree be entered determining and establishing the identity of the person sought to be determined. Lastly, the petition includes a verification as required [*Prob. Code § 248*].

[4] Filing and Notice

The petition must be verified and filed in the superior court of the county in which the property or any part of the property is situated [*Prob. Code § 248*]. The clerk must set the petition for hearing by the court and give notice of the petition by posting a notice of the time and place of the hearing at least 15 days before the time set for the hearing [*Prob. Code § 248.5*; *see Prob. Code §§ 1230, 1260*].

[5] Petition to Determine Heirship Distinguished

This petition to identify heirs should not be confused with a petition to determine heirship under *Prob. Code §§ 11700-11705*. An "heirship petition" applies when it is necessary to determine the persons entitled to distribution of an estate, such as identifying intestate heirs [*see Prob. Code § 11700*]. For a detailed discussion of the proceedings authorized by *Prob. Code § 11700*, see Ch. 458, *Probate: Determination of Heirship* .

[6] State Statutes

Petition to identify heirs entitled to property other than by laws of succession. *Prob. Code § 248*

Setting petition for hearing; notice. *Prob. Code § 248.5*

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38-441 California Forms of Pleading and Practice--Annotated § 441.315

§ 441.315 Order Identifying Heir [Prob. Code § 248]

[1] FORM Order Identifying Heir [Prob. Code § 248]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of Identifying the Heirs of_____ [*name*].	))))	NO. _____ ORDER DETERMINING AND ESTABLISHING IDENTIFY OF HEIR

_____

The verified petition of _____ [*name*], to identify the persons included in a class entitled to property other than by the laws of succession, and requesting that a decree be entered determining and establishing the identity of such persons, came before this court on _____ [*date*]. From the proof made, the court is satisfied that the allegations of the petition are true and that notice of the hearing of the petition has been given as required by law.

IT IS ORDERED that petitioner be identified as the _____ [*specify, e.g.,* heir] of _____ [*name*] for purposes of vesting title to the property described in the petition.

Dated _____.
_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The foregoing form is for use as an order identifying heirs who are entitled to property other than by laws of succession [*see Prob. Code § 248*].

[3] Cross References

For a related form, *see § 441.314*.

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[Reserved]

§§ 441.316[Reserved]

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D. Passage Of Property To Surviving Spouse Or Registered Domestic Partner Without Administration

38-441 California Forms of Pleading and Practice--Annotated § 441.330

§ 441.330 Election to Have Property of Deceased Spouse or Registered Domestic Partner Be Subject to Administration [Prob. Code § 13502; Fam. Code § 297.5(c)]--Optional Provision Extending Election to Community of Surviving Spouse or Registered Domestic Partner--After Issuance of Letters

[1] FORM Election to Have Property of Deceased Spouse or Registered Domestic Partner Be Subject to Administration [Prob. Code § 13502; Fam. Code § 297.5(c)]--Optional Provision Extending Election to Community of Surviving Spouse or Registered Domestic Partner--After Issuance of Letters

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ELECTION TO HAVE PROPERTY ADMIN-
Deceased.	)	ISTERED UNDER PROBATE CODE

_____

1. _____ [*Name*] is _____ [the surviving _____ (spouse *or* registered domestic partner) of the above-named decedent *or* the personal representative of the surviving _____ (spouse *or* registered domestic partner) *or* the guardian of the estate of the surviving _____ (spouse *or* registered domestic partner) *or* the conservator of the property of the surviving _____ (spouse *or* registered domestic partner)].

2. _____ [*Name*] hereby elects, under *Probate Code Section 13502*, to have the one-half of the community property that belongs to the decedent under *Probate Code Section 100*, the one-half of any quasi-community property that belongs to the decedent under *Probate Code Section 101*, and the separate property of the decedent, administered under the California Probate Code. [_____ (*Name*) further elects to have the one-half of the community property that belongs to the decedent's surviving _____ (spouse *or* registered domestic partner), _____ (*name*), under *Probate Code Section 100*, and the one-half of the

community property that belongs to the decedent's surviving _____ (spouse *or* registered domestic partner), _____ (*name*) under *Probate Code Section 101*, administered under the California Probate Code.]

3. Letters were issued on _____ [*date*].

4. An order has not been entered in the above-entitled estate pursuant to *Probate Code Section 13656*.

[5. Good cause exists for permitting the election to be filed more than four months after the issuance of letters in that _____ (*specify facts constituting good cause*).]
Dated: _____.

_____ [*signature*]

[2] Use of Form

This form is an election by the surviving spouse or registered domestic partner or the personal representative, guardian, or conservator of the estate of the surviving spouse or registered domestic partner to elect to have property administered under the Probate Code [Prob. Code § 13502(a) Fam. Code § 297.5(c) (surviving registered domestic partner has same rights as surviving spouse)].

The election is made when the person filing the election does not wish to be subject to the provisions of *Prob. Code § 13500*, which provides for the passing of the deceased spouse's property to the surviving spouse or registered domestic partner without administration. The election may be extended to the survivor's share of the community and quasi-community property if desired [*Prob. Code § 13502(a)(2)*; *see* Paragraph 2 of the form]. The election must be made by a writing specifically evidencing the election [*Prob. Code § 13502(b)*]. It must be filed in the proceedings for the administration of the estate within four months after the issuance of letters, or within any further time that the court may allow on a showing of good cause, before entry of an order under *Prob. Code § 13656* [*Prob. Code § 13502(b)*].

The election should be filed separately from but under the same case number as a petition for probate of will or for letters of administration [*cf. Cal. Rules of Ct., Rule 7.301* (spousal or domestic partner property petitions)].

As of January 1, 2005, a surviving registered domestic partner has same rights and responsibilities as a surviving spouse [*Fam. Code § 297.5(c)*].

[3] Essential Allegations

The election should identify the person filing the election (Paragraph 1), should state the fact of the election (Paragraph 2), and should also allege that no order has been entered under *Prob. Code §§ 13656, 13657* (Paragraph 4) [*see Prob. Code § 13502(b)*; *Fam. Code § 297.5(c)*]. The election should also include the date on which letters were issued (Paragraph 3); this date must not be greater than four months from the date of filing the petition, unless a showing of good cause for the delay is made by the person filing the election and accepted by the court (Paragraph 5) [*see Prob. Code § 13502(b)*; *Fam. Code § 297.5(c)*].

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38-441 California Forms of Pleading and Practice--Annotated § 441.331

§ 441.331 Election and Agreement to Have Interest of Surviving Spouse or Registered Domestic Partner in Community Property Transferred to Trustee [Prob. Code § 13503; Fam. Code § 297.5(c)]--By Surviving Spouse or Registered Domestic Partner or by Personal Representative, Guardian, or Conservator of Surviving Spouse's or Registered Domestic Partner's Estate--Before Entry of Order for Final Distribution

[1] FORM Election and Agreement to Have Interest of Surviving Spouse or Registered Domestic Partner in Community Property Transferred to Trustee [Prob. Code § 13503; Fam. Code § 297.5(c)]--By Surviving Spouse or Registered Domestic Partner or by Personal Representative, Guardian, or Conservator of Surviving Spouse's or Registered Domestic Partner's Estate--Before Entry of Order for Final Distribution

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ELECTION AND AGREEMENT TO HAVE IN-
Deceased.	)	TEREST OF SURVIVING _____
		[SPOUSE *or* REGISTERED DOMESTIC PART-
		NER] TRANSFERRED TO TRUSTEE

_____

1. [*Identity of person making election. See § 441.330, Paragraph 1.*]

2. Decedent's will provides that _____ [*name of trustee or trust*] is charged with the responsibility of administering and distributing property under the will of decedent in the above-entitled estate.

3. _____ [*Name*] hereby elects to have _____ [all *or specify which part*)] of the community property transferred to _____ [*name of trustee under the will of the deceased spouse or registered domestic partner or name of trustee of an existing trust identified by the will of the deceased spouse or*

registered domestic partner].

4. No order for final distribution has been filed in the above-entitled estate.
Dated: _____.

_____ [*signature*]

[2] Use of Form

This election and agreement is for use by the surviving spouse or registered domestic partner or the personal representative, guardian, or conservator of the surviving spouse's estate when it has been decided to have either all or a part of the interest of the surviving spouse or registered domestic partner in the community property transferred to the trustee under the will of the deceased spouse or registered domestic partner or to the trustee of an existing trust identified by the will of the deceased spouse or registered domestic partner so that it may be administered and distributed by the trustee [*see Prob. Code § 13503(a)*; *Fam. Code § 297.5(c)*]. Such an election and agreement is filed when the person filing the election does not wish either to be subject to the provisions of *Prob. Code § 13500* or to elect administration under *Prob. Code § 13502*.

As of January 1, 2005, a surviving registered domestic partner has same rights and responsibilities as a surviving spouse [*Fam. Code § 297.5(c)*].

The election and agreement must be filed in the proceedings for the administration of the estate of the deceased spouse or registered domestic partner and before the entry of the order for final distribution in the proceeding [*Prob. Code § 13503(b)*; *Fam. Code § 297.5(c)*].

The election should be filed separately from but under the same case number as a petition for probate of will or for letters of administration [*cf. Cal. Rules of Ct., Rule 7.301* (spousal or domestic partner property petitions)].

[3] Essential Allegations

The election and agreement should identify the person filing the election (Paragraph 1), should identify the trustee or trust charged withadministering and distributing property under the will of decedent (Paragraph 2), should state the fact of the election to transfer either all or a part of the surviving spouse's or registered domestic partner's interest in the community property to the trustee (Paragraph 3), and should allege that no order for final distribution has been filed (Paragraph 4) [*see Prob. Code § 13503*; *Fam. Code § 297.5(c)*].

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38-441 California Forms of Pleading and Practice--Annotated § 441.332

§ 441.332 Notice of Interest in Community Real Property Under Will of Deceased Spouse [Prob. Code §§ 13540, 13541; Fam. Code § 297.5(c)] or Registered Domestic Partner

[1] FORM Notice of Interest in Community Real Property Under Will of Deceased Spouse [Prob. Code §§ 13540, 13541; Fam. Code § 297.5(c)] or Registered Domestic Partner

RECORDING REQUESTED BY:

_____ [*name*]
_____ [*street, address*]
_____ [*city, state, zip*]

[*This space is for recorder's use*]

When recorded, mail to:

_____ [*name*]
_____ [*street, address*]
_____ [*city, state, zip*]

NOTICE OF INTEREST IN COMMUNITY REAL PROPERTY

Notice is hereby given that:

The undersigned, _____ [*name*], claims an interest in the real property described as follows: _____ [*legal description*], more commonly known as _____ [*street address and city*

].

The interest in the property is claimed by the undersigned as a named person under the will of the deceased _____ [spouse *or* registered domestic partner].

The name of each owner of record of the above described real property is as follows: _____ [*set forth each name as it appears on the recorded document of title*].

INDEXING INSTRUCTIONS TO RECORDER

Please index this notice in the name of each record owner, as listed above, as GRANTOR.

Please index this notice in the name of the undersigned, as GRANTEE.
Dated: _____.

_____ [*signature*]

CERTIFICATE OF ACKNOWLEDGMENT

State of California,)
County of _____)
_____

On _____ [*date*], before me _____ [*name and title of officer*], personally appeared _____ [*name of person or entity claiming interest*], _____ [personally known to me *or* proved to me on the basis of satisfactory evidence] to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument _____ [the person *or* the entity on behalf of which the person acted] executed the instrument.

WITNESS my hand and official seal.

Signature: _____ .....[*Seal*]
Notary Public for the State of California

CAUTION:
Documents that are to be recorded must be acknowledged or proved by subscribing witness or as provided in *Civ. Code §§ 1198* and *1199* [*Gov. Code § 27287*].

[2] Use of Form

This notice is for use by a person claiming an interest in community real property under the will of the deceased spouse or registered domestic partner. By recording this notice, that person can prevent the surviving spouse or registered domestic partner from selling or otherwise disposing of the property [*Prob. Code §§ 13540, 13541*; *Fam. Code § 297.5(c)*].

As of January 1, 2005, a surviving registered domestic partner has same rights and responsibilities as a surviving spouse [*Fam. Code § 297.5(c)*].

[3] Contents of Notice

The notice of interest in community real property under the will of a deceased spouse or registered domestic partner must contain the following information [*Prob. Code § 13541(b)*; *Fam. Code § 297.5(c)*]:

- A description of the real property;
- A statement that an interest in the property is claimed by a named person under the will of the deceased spouse or registered domestic partner;
- The names of each owner of record; and
- Instructions to the county recorder to index the notice in the name of each owner of record as grantor, and in the name of the interested party as grantee.

[4] Time to Record

The notice of interest blocks sale, conveyance, lease, mortgage or other disposition of the property that "takes place after" the notice is recorded. Because the surviving spouse has full power to dispose of property after 40 days from the decedent's death, the claimant should file within the 40-day period for full protection, although a later recording will be effective if the transaction has not yet taken place at the time of recording [*see Prob. Code §§ 13540(a), 13541(a)*].

[5] Effect of Recording Notice

Recording a notice that a person claims an interest in community real property under the will of a deceased spouse or registered domestic partner prevents the surviving spouse or registered domestic partner or the personal representative, guardian or conservator of the estate of the surviving spouse or registered domestic partner from being able to sell or otherwise deal with the property. If notice is not recorded, the surviving spouse or registered domestic partner, or the personal representative, guardian or conservator of the estate of the surviving spouse or registered domestic partner, is able to so act after 40 days have passed from the date of death of the deceased spouse or registered domestic partner [*Prob. Code §§ 13540, 13541*; *Fam. Code § 297.5(c)*].

[6] Slander of Title

If, in a court action or proceeding relating to the parties' rights, a court determines that a person recorded a notice of interest for the purpose of slandering title, the court will award costs, including a reasonable attorney's fee against that person, and damages caused by the recording [*Prob. Code § 13541(d)*].

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38-441 California Forms of Pleading and Practice--Annotated § 441.333

§ 441.333 Declaration Under Penalty of Perjury [Code Civ. Proc. § 2015.5] for Collection of Compensation of Deceased Not Exceeding $5,000 Net [Prob. Code §§ 13600, 13601; Fam. Code § 297.5(c)]

[1] FORM Declaration Under Penalty of Perjury [Code Civ. Proc. § 2015.5] for Collection of Compensation of Deceased Not Exceeding $5,000 Net [Prob. Code §§ 13600, 13601; Fam. Code § 297.5(c)]

I, _____ [*name*], declare:

1. On _____ [*date*], _____ [*name*] died in _____ County, California.

[*EITHER*]

2. The declarant is the surviving _____ [spouse *or* registered domestic partner] of the decedent.

[*OR*]

2. The declarant is the _____ [guardian *or* conservator] of the estate of the surviving _____ [spouse *or* registered domestic partner] of the decedent.

[*CONTINUE*]

3. The surviving _____ [spouse *or* registered domestic partner] of the decedent is entitled to the earnings of the decedent _____ [under the decedent's will *or* by intestate succession], and no one else has a superior right to the earnings.

4. No proceeding is now being or has been conducted in California for administration of the decedent's estate.

5. *California Probate Code Sections 13600 to 13605*, inclusive, require that the earnings of the decedent, including compensation for unused vacation, not in excess of $5,000 net, be paid promptly to the declarant.

6. Neither _____ [declarant *or* the surviving _____ (spouse *or* registered domestic partner)], nor anyone acting on behalf of the surviving _____ [spouse *or* registered domestic partner], has a pending request to collect compensation owed by another employer for personal services of the decedent under *California Probate Code Sections 13600 to 13605*, inclusive.

7. Neither _____ [declarant *or* the surviving _____ (spouse *or* registered domestic partner)], nor anyone acting on behalf of the surviving _____ [spouse *or* registered domestic partner], has collected any compensation owed by an employer for personal services of the decedent under *California Probate Code Sections 13600 to 13605*, inclusive, except the sum of _____ dollars, which was collected from _____ [*name*].

8. The declarant requests that he/she be paid the salary, or other compensation, owed by you for personal services of the decedent, including compensation for unused vacation, not to exceed $5,000 net[, less the amount of _____ dollars which was previously collected].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This declaration under penalty of perjury is for use by a surviving spouse or registered domestic partner to collect salary or other compensation, not exceeding $5,000 net, owed by an employer for personal services to a deceased spouse or registered domestic partner without procuring letters of administration or awaiting probate of the will. The form also may be used by the guardian or conservator of the estate of the surviving spouse or registered domestic partner [*see Prob. Code § 13601(a)*; *Fam. Code § 297.5(c)*].

As of January 1, 2005, a surviving registered domestic partner has same rights and responsibilities as a surviving *Fam. Code § 297.5(c)*].

[3] Contents of Affidavit or Declaration

An affidavit or a declaration under penalty of perjury must be furnished to the deceased spouse's employer stating all of the following [*Prob. Code § 13601(a)*; *Fam. Code § 297.5(c)*]:

- The name of the decedent (Paragraph 1).

- The date and place of the decedent's death (Paragraph 1).

- Either that the affiant or declarant is the surviving spouse or registered domestic partner of the decedent or the guardian or conservator of the surviving spouse's or registered domestic partner's estate (alternative Paragraphs 2).

- That the decedent's surviving spouse or registered domestic partner is entitled to the earnings of the decedent under the decedent's will or by intestate succession, and no one else has a superior right to the earnings (Paragraph 3).

- That no proceeding is now being or has been conducted in California for administration of the decedent's estate (Paragraph 4).

- That *Prob. Code §§ 13600-13605* require that the decedent's earnings, including compensation for unused vacation, not in excess of $5,000 net, be paid promptly to the affiant or declarant (Paragraph 5).

- That neither the surviving spouse or registered domestic partner, nor anyone acting on behalf of the surviving spouse or registered domestic partner, has a pending request to collect compensation owed by another employer for decedent's personal services under *Prob. Code §§ 13600-13605* (Paragraph 6).

- That neither the surviving spouse or registered domestic partner, nor anyone acting on behalf of the surviving spouse or registered domestic partner, has collected any compensation owed by an employer for the decedent's personal services under *Prob. Code §§ 13600-13605*, other than a certain specified sum, if any (Paragraph 7).

- That the affiant or declarant requests that he or she be paid the salary, or other compensation, owed by the employer for the decedent's personal services, including compensation for unused vacation, not exceeding $5,000 net, less any amount previously collected (Paragraph 8).

[4] Proof of Identity

Reasonable proof of the identity of the surviving spouse or registered domestic partner, or a guardian or conservator acting for the surviving spouse, must be provided to the employer [*Prob. Code § 13601(b)*; *see Prob. Code § 13104* (satisfactory proof of identity); *see also § 441.34[4]*]. Further, the employer must be provided with reasonable proof, satisfactory to the employer, of the appointment of any person claiming to act as the surviving spouse's or registered domestic partner's guardian or conservator [*Prob. Code § 13601(c)*; *Fam. Code § 297.5(c)*].

[5] Affidavit or Declaration as Receipt

Receipt of the affidavit or declaration by the employer constitutes acquittance for the compensation paid, and discharges the employer from any further liability with respect to the compensation. The employer may rely in good faith on the statements in the affidavit or declaration, and has no duty to inquire into the truth of any statement therein [*Prob. Code § 13603*].

[6] State Statutes

Surviving spouse or registered domestic partner permitted to collect compensation not in excess of $5,000 owed to deceased spouse for personal services. *Prob. Code § 13600*; *Fam. Code § 297.5(c)*

Affidavit or declaration to collect compensation. *Prob. Code § 13601*

Receipt of affidavit or declaration is acquittance for compensation paid. *Prob. Code § 13603*

Person fraudulently securing payment of compensation under *Prob. Code §§ 13600-13606* is liable to person with superior right to payment for three times amount of payment. *Prob. Code § 13605*

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38-441 California Forms of Pleading and Practice--Annotated § 441.334

§ 441.334 Complaint for Collection of Compensation of Deceased Not Exceeding $5,000 Net [Prob. Code § 13604; Fam. Code § 297.5(c)]

[1] FORM Complaint for Collection of Compensation of Deceased Not Exceeding $5,000 Net [Prob. Code § 13604; Fam. Code § 297.5(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff, vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR COMPENSATION OWED TO
[and DOES I through _____,]	)	DECEASED SPOUSE [OR REGISTERED DO-
Defendant(s).	)	MESTIC PARTNER]
	)	Limited Civil Case
	)	(Amount demanded does not exceed $10,000)

_____

Plaintiff alleges:

1. Defendant[s] _____ [*name*(s)] is/are, and at all times herein mentioned was/were, [a] resident[s] of _____ County, California.

[2. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.)]

3. Decedent _____ [*name*] died on _____ [*date*]. From _____, until _____ [*dates*], decedent was employed by defendant[s, and each of them].

4. At the date of decedent's death, defendant[s, and each of them] owed decedent unpaid _____ [*specify, e.g,* salary *or other compensation, including compensation for unused vacation*] in the amount of $_____ [*specify amount owed, not in excess of $5,000*] for personal services.

5. Plaintiff is the surviving _____ [spouse *or* registered domestic partner] of decedent, and is entitled to the earnings of the decedent _____ [under decedent's will *or* by intestate succession]. On or about _____ [*date*], plaintiff furnished to defendant[s, and each of them] his/her _____ [affidavit *or* declaration under penalty of perjury] pursuant to *California Probate Code Sections 13600-13606* to collect the unpaid _____ [*specify, e.g,* salary *or other compensation, including compensation for unused vacation*] owed to decedent.

6. Defendant[s, and each of them] have refused, and continue to refuse, to pay to plaintiff the unpaid _____ [*specify, e.g,* salary *or other compensation, including compensation for unused vacation*] owed to decedent, as required by *Probate Code Sections 13600-3606*. _____ [*If attorney's fee's sought, add:* Defendant(s) acted unreasonably in refusing to pay to plaintiff the unpaid compensation owed to the decedent in that _____ (*allege facts showing that defendant's conduct was unreasonable*)].

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them] as follows:

1. For the unpaid compensation owed to decedent in the sum of $_____.

2. For reasonable attorney's fees in a sum according to proof.

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[2] Use of Form

This complaint is for use by a surviving spouse or registered domestic partner of a decedent to collect compensation owed by the decedent's employer for personal services not in excess of $5,000, when the employer has failed to pay in response to the surviving spouse's or registered domestic partner's affidavit or declaration claiming the compensation [*see Prob. Code § 13604(a)*; *Fam. Code § 297.5(c)*].

The case must be filed as a limited civil case [*see Code Civ. Proc. § 86(a)(1)*]. The caption must state that the case is a limited civil case [*Code Civ. Proc. § 422.30(b)*], and also must state that the amount of the demand does not exceed $10,000 [*Cal. Rules of Ct., Rule 2.111(9)*]. It may be filed as a limited civil case in the superior court or as a limited civil case within the jurisdiction of the small claims division [*see Code Civ. Proc. §§ 87, 116.220(a)(1)*].

As of January 1, 2005, a surviving registered domestic partner has same rights and responsibilities as a surviving spouse [*Fam. Code § 297.5(c)*].

[3] Allegations

This complaint alleges:

- That decedent was employed by defendant or defendants (Paragraph 3).

- That defendants owe unpaid compensation for decedent's personal services (Paragraph 4).

- That plaintiff is decedent's surviving spouse or registered domestic partner who is entitled to the unpaid compensation by decedent's will, or by intestate succession, and has presented defendant or defendants with an affidavit or declaration to collect the unpaid compensation [*see Prob. Code § 13601*] (Paragraph 5)

- That defendant or defendants refuse to pay the unpaid compensation to decedent's surviving spouse or registered domestic partner (Paragraph 6).

[4] Employer's Duty to Pay Compensation

The employer to whom an affidavit or declaration is presented pursuant to *Prob. Code § 13601* must promptly pay the earnings of the decedent, including compensation for unused vacation, not in excess of $5,000 net, to the person presenting the affidavit or declaration [*Prob. Code § 13602*; *see § 441.333*]. If the employer refuses to pay, the surviving spouse or registered domestic partner may recover the amount he or she is entitled to receive in an action brought for that purpose against the employer [*Prob. Code § 13604(a)*; *Fam. Code § 297.5(c)*].

[5] Attorney's Fees

If an action is brought against the employer under *Prob. Code § 13604*, the court must award reasonable attorney's fees to the surviving spouse if it finds that the employer acted unreasonably in refusing to pay as required by *Prob. Code §§ 13600-13606* [*Prob. Code § 13604(b)*].

[6] State Statutes

Employer must pay compensation earned by decedent to surviving spouse or registered domestic partner. *Prob. Code § 13602*; *Fam. Code § 297.5(c)*]

Action for recovery of compensation by surviving spouse or registered domestic partner when employer refuses to pay. *Prob. Code § 13604*; *Fam. Code § 297.5(c)*]

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38-441 California Forms of Pleading and Practice--Annotated § 441.335

§ 441.335 Proceedings for Confirmation and Determination of Property Passing to Surviving Spouse or Registered Domestic Partner Without Administration [Prob. Code §§ 13500, 13650, 13651; Fam. Code § 297.5]--Spousal or Domestic Partner Property Petition Judicial Council Form DE-221

[1] FORM Proceedings for Confirmation and Determination of Property Passing to Surviving Spouse or Registered Domestic Partner Without Administration [Prob. Code §§ 13500, 13650, 13651; Fam. Code § 297.5]--Spousal or Domestic Partner Property Petition Judicial Council Form DE-221

Click here to view image.

CAUTION:

The petition must be verified [*Prob. Code § 1021(a)(1)*]. If no administration is pending, it may be joined with a petition for probate of the will or for letters of administration [*Prob. Code § 13653*]. However, the spousal or domestic partner property petition must be filed separately from a petition for probate of will or for letters of administration, even if both petitions are filed at the same time [*Cal. Rules of Ct., Rule 7.301*]. The two petitions are required to be filed under the same case number [*Cal. Rules of Ct., Rule 7.301*].

[2] Use of Form

This form, Judicial Council Form DE-221, is a spousal or domestic partner property petition for use by the surviving spouse or registered domestic partner or the personal representative, guardian of the estate, or conservator of the estate of the surviving spouse or registered domestic partner to petition for confirmation and determination that all or part of the estate of the decedent is property passing or belonging to the surviving spouse or registered domestic partner and that administration is therefore not necessary [*Prob. Code §§ 13650(a), 13651(a)*; *Fam. Code § 297.5(c)* (surviving registered domestic partner has same rights as surviving spouse)]. Use of this Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.30-1.35*; Cal. Rules of Ct., Appen., Div. III]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is availableat www.lexisone.com at no charge.

For discussion of the contents of the petition, see *§ 441.122[1]*.

[3] Jurisdiction

The petition must be filed in the superior court in the county in which the decedent's estate may be administered [*Prob. Code § 13650(a)*]. The petition should allege either that proceedings for administration of the estate were commenced on a particular date or facts sufficient to establish the court's jurisdiction [*see Prob. Code § 13651(a)(1)*]. If decedent was domiciled in California at the time of death, the proper county for administration of the estate is the county in which he or she was domiciled [*see Prob. Code § 7051*]. If the decedent was not domiciled in California at the time of death, the proper county for administration of the estate is either (1) the county where the decedent died if property of the decedent is located there, or (2) any county where property of the decedent is located if no property of the decedent is located in the county where the decedent died or if the decedent did not die in California. If property of the nondomiciliary decedent is located in more than one county, the proper county for administration is the county in which a petition for ancillary administration is first filed; the court in that county has jurisdiction of the administration of the estate [*see Prob. Code § 7052*].

[4] Attachments

Relevant attachments should be prepared and labeled as follows:

- If the decedent died testate, a copy of the will and any codicil, designated as Attachment 4c or 7 [*Prob. Code § 13651(c)*];

- A legal description, designated as Attachment 7a, of the decedent's property that the petitioner requests to be determined as passing to the surviving spouse or partner, including the trade or business name of any property that consists of an unincorporated business or an interest in such a business that the decedent was operating or managing at the time of death [*Prob. Code § 13651(a)(2)*; *Fam. Code § 297.5(c)*];

- A legal description of the community and quasi-community property that the petitioner requests the court to confirm as belonging to the surviving spouse or partner under *Prob. Code §§ 100* and *101*, designated as Attachment 7b [*Prob. Code § 13651(a)(4)*; *Fam. Code § 297.5(c)*];

- A statement of the facts on which the petitioner bases his or her allegation that the property described in Attachments 7a and 7b is property that should pass or be confirmed as belonging to the surviving spouse or partner, designated as Attachment 7 [*Prob. Code § 13651(a)(3)*; *Fam. Code § 297.5(c)*];

- Disclosure of any written agreement between the decedent and the surviving spouse or partner providing for a non pro rata division of the aggregate value of the community property assets or quasi-community property assets, or both [*Prob. Code § 13651(a)(5)*; *Fam. Code § 297.5(c)*; *see also Prob. Code § 13651(a)(2)* (property consisting of unincorporated business or interest in such business subject to any written agreement for non pro rata division), (4) (community property or quasi-community property under *Prob. Code §§ 100* or *101* subject to any written agreement for non pro rata division)]. If the petition bases the description of the property of the decedent passing to the surviving spouse or partner or the property to be confirmed to the surviving spouse or partner, or both, on such a written agreement, a copy of the agreement must be attached to the petition as Attachment 8 [*Prob. Code § 13651(c)*; *Fam. Code § 297.5(c)*].

- Additional attachments setting forth the names, addresses, and other information required by Paragraphs 9-11, if there is insufficient space to set forth that information in the petition itself.

The number of pages attached must be specified in Paragraph 13.

[5] State Statutes

Disposition of community property on death. *Prob. Code §§ 100, 6401(a), 6414(a)*

Disposition of quasi-community property on death. *Prob. Code §§ 101, 6401(b), 6414(a)*

Determination of property passing to surviving spouse without administration. *Prob. Code § 13500*

Who may file and contents of petition alleging that property passes to surviving spouse or registered domestic partner without administration. *Prob. Code §§ 13650, 13652*; *Fam. Code § 297.5(c)*

Surviving registered domestic partner, following other partner's death, has same rights as surviving spouse. *Fam. Code § 297.5(c)*

[6] California Rules of Court

Petition filed in addition to and under same case number as petition for probate of will or for letters of administration. *Cal. Rules of Ct., Rule 7.301*

[7] Decisions

Under former *Prob. Code § 201* [*now see Prob. Code §§ 100, 6101, 6401(a)*], spouse, without consent of other spouse, has power to dispose of half of each community property asset rather than half of aggregate of community assets; Totten trust accounts established by decedent with community funds devolve one-half to named beneficiaries and one-half as community property of surviving spouse. *Estate of Wilson (1986) 183 Cal. App. 3d 67, 72-73, 227 Cal. Rptr. 794*

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38-441 California Forms of Pleading and Practice--Annotated § 441.336

§ 441.336 Proceedings for Confirmation and Determination of Property Passing to Surviving Spouse or Registered Domestic Partner Without Administration [Prob. Code §§ 13500, 13650, 13651; Fam. Code § 297.5]--Spousal or Domestic Partner Property Order [Prob. Code §§ 13656-13658]--Judicial Council Form DE-226

[1] FORM Proceedings for Confirmation and Determination of Property Passing to Surviving Spouse or Registered Domestic Partner Without Administration [Prob. Code §§ 13500, 13650, 13651; Fam. Code § 297.5]--Spousal or Domestic Partner Property Order [Prob. Code §§ 13656-13658]--Judicial Council Form DE-226

Click here to view image.

[2] Use of Form

This form, Judicial Council Form DE-226, is an order for use by the court in ruling on the spousal or domestic partner property petition set forth in *see § 441.335* [*see Prob. Code §§ 13656-13658*; *Fam. Code § 297.5*]. Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

For discussion of the statutory requirements regarding the form, contents, and effect of the order, see *§ 441.124*, et seq.

[3] Jurisdictional Findings

Orders in probate proceedings need not recite the existence of facts on which the jurisdiction of the court may depend [*Prob. Code § 1047*]. The foregoing form, however, includes those facts as findings in Paragraph 3. The findings also include the date the decedent died, which is customary.

[4] Attachments

Relevant attachments should be prepared and labelled as indicated in the body of the form as follows [*see Prob. Code §§ 13656, 13658*; *Fam. Code § 297.5*]:

- Description of property passing to surviving spouse or domestic partner without administration (Attachment 5a);

- Any further order respecting transfer of the property to the surviving spouse or domestic partner (Attachment 5b);

- Any further order protecting interests of creditors of a business passing to the surviving spouse or domestic partner (Attachment 6b).

- Description of community and quasi-community property that belongs to the surviving spouse or domestic partner under *Prob. Code §§ 100* and *101* and any further orders respecting transfer of that property to the surviving spouse or domestic partner (Attachments 7a, 7b).

- Description of property subject to administration (Attachment 8).

If attachments are included, the box in Paragraph 9 should be checked and the number of pages attached set forth in the space indicated.

[5] Recording Order

When an order is made affecting the title to real property, a certified copy of the order must be recorded in the office of the county recorder in each county in which the land, or any part of it, is located. From the time of filing the order for record, notice is imparted to all persons of its contents [*Prob. Code § 7263*]. Consequently, one certified copy of the order should be obtained for each county in which real property affected by the order is located.

[6] State Statutes

Order determining division of community or quasi-community property assets under written agreement for non pro rata division of such property. *Prob. Code § 13651(a)(5)*

Order if court finds all property is property passing to surviving spouse or registered domestic partner. *Prob. Code § 13656(a)*; *Fam. Code § 297.5*

Order if court finds that all or part of property does not pass to surviving spouse or registered domestic partner. *Prob. Code § 13656(b)*; *Fam. Code § 297.5*

Order confirming surviving spouse's or registered domestic partner's interest in community or quasi-community property under *Prob. Code § 100* or *101*. *Prob. Code § 13656(c)*; *Fam. Code § 297.5*

Conclusiveness of order. *Prob. Code § 13657*

Protection of creditors of unincorporated business operated or managed by deceased spouse or registered domestic partner at time of death. *Prob. Code § 13658*; *Fam. Code § 297.5*

Surviving registered domestic partner, following other partner's death, has same rights and obligations as surviving

spouse. *Fam. Code § 297.5(c)*

[7] Local Rules of Court

Order on calendared matter is required to be submitted first to Probate Attorney. Los Angeles Co. Super. Ct. Rules, Rule 10.36

Orders required to be complete in themselves and set forth all matters actually passed on by court, date of hearing, relief granted, and names of persons and descriptions of property or amounts of money affected. Los Angeles Co. Super. Ct. Rules, Rule 10.42; San Francisco Uniform Local Ct. Rules, Rule 14.27

Submission of proposed orders. San Francisco Uniform Local Ct. Rules, Rule 14.6

Notes to *see § 441.335*.

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38-441 California Forms of Pleading and Practice--Annotated § 441.337

§ 441.337 Proceedings to Allocate Responsibility for Debts [Prob. Code § 11440-11446; Fam. Code § 297.5]--Petition to Allocate Responsibility [Prob. Code § 11441]--By Personal Representative, Surviving Spouse, Surviving Registered Domestic Partner, or Beneficiary

[1] FORM Proceedings to Allocate Responsibility for Debts [Prob. Code § 11440-11446; Fam. Code § 297.5]--Petition to Allocate Responsibility [Prob. Code § 11441]--By Personal Representative, Surviving Spouse, Surviving Registered Domestic Partner, or Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	PETITION TO ALLOCATE RESPONSIBILITY
Deceased.	)	FOR DEBTS PAYABLE BY ESTATE AND SUR-
	)	VIVING _____ [SPOUSE *or* SUR-
		VIVING REGISTERED DOMESTIC PARTNER]

_____

Petitioner alleges:

1. Petitioner is _____ [the personal representative *or* the surviving _____ (spouse *or* registered domestic partner) *or* a beneficiary of the estate] of _____ [*name of deceased*], who died on _____ [*date*].

2. All the debts of the decedent and [petitioner, as] the surviving _____ [spouse *or* registered domestic partner][,] known to the petitioner that are subject to allocation are the following:

_____

_____

_____

3. Petitioner believes that the above-described debts should be allocated for the following reason(s): _____ [*set forth reason(s)*].

4. Petitioner proposes the following allocation under *Probate Code Section 11441* on the belief that it is the best manner in which to allocate responsibility for the debts listed above between the estate of the deceased _____ [spouse *or* registered domestic partner] and [petitioner, as] the surviving _____ [spouse *or* registered domestic partner]: _____ [*set forth proposed allocation*].

5. The basis for the above-proposed allocation is that _____ [*set forth basis with legal authority*].

6. As of this date, there has been no order for final distribution filed in the above-entitled estate.

[7. The above-proposed allocation is affected by the value of the separate property of the surviving spouse _____ (spouse *or* registered domestic partner) and community property and quasi-community property not administered in the estate because _____ (*specify reason(s) why allocation would be affected*). Inventory and appraisal of the property has not been provided by the surviving _____ (spouse *or* registered domestic partner).]

WHEREFORE, petitioner prays for an order:

1. Directing _____ [*name of personal representative or, if the petitioner is the personal representative,* petitioner], as the personal representative of the estate, to charge the amounts to be allocated to _____ [the surviving spouse or registered domestic partner *or, if petitioner is the surviving spouse or registered domestic partner*, petitioner, as surviving spouse or registered domestic partner,] against any of his/her property or interests that are in the possession or control of _____ [*name of personal representative or, if petitioner is the personal representative,* petitioner], as personal representative of the estate.

2. Directing _____ [*name of surviving spouse or registered domestic partner or, if petitioner is the surviving* _____ *(spouse or registered domestic partner)* petitioner], as surviving _____ [spouse *or* registered domestic partner], to make payment of the amount to be allocated the estate to _____ [*name of personal representative or, if petitioner is the personal representative,* petitioner], as personal representative of the estate, to the extent that his/her property or interests that are in possession or control of _____ [*name of personal representative or, if petitioner is the personal representative,* petitioner], as personal representative of the estate, are insufficient to satisfy the allocation.

3. Directing _____ [*name of personal representative or, if petitioner is the personal representative,* petitioner], as personal representative of the estate, to make payment of the amounts allocated to the estate by payment to the surviving spouse or registered domestic partner or creditors[; and]

[4. Ordering the surviving spouse or registered domestic partner to show cause why the information concerning the inventory of the separate property and any community and quasi-community property not administered in the estate as well as the value thereof should not be furnished to the petitioner.]
Dated: _____.

_____ [*signature*]
Attorney for Petitioner

[2] Use of Form

This form of petition is for use by the personal representative or a beneficiary of the estate, or the decedent's surviving spouse or registered domestic partner, to seek an order to allocate responsibility for debts payable by both the estate and the survivor [*see Prob. Code § 11440*; *Fam. Code § 297.5(c)*].

As of January 1, 2005, a surviving registered domestic partner has same rights and responsibilities as a surviving spouse [*Fam. Code § 297.5(c)*].

[3] Allegations

This petition alleges:

- The capacity and standing of the petitioner (Paragraph 1) [*see Prob. Code § 11440*];
- A list of all the debts of the decedent and the surviving spouse or registered domestic partner known to the petitioner that are subject to allocation (Paragraph 2) [*see Prob. Code § 11441(a)*];
- A statement of reasons for the allocation (Paragraph 3) [*see Prob. Code § 11441(b)*];
- A description of the proposed allocation (Paragraph 4) [*see Prob. Code § 11441(c)*];
- The basis for the allocation (Paragraph 5) [*see Prob. Code § 11441(c)*]; and
- A statement that no order for final distribution has been made (Paragraph 6) [*see Prob. Code § 11440*; *Fam. Code § 297.5(c)*].

Optional Paragraph 7, alleging that the proposed allocation is affected by the value of the surviving spouse's or registered domestic partner's separate property and community and quasi-community property not administered in the estate, for which no inventory and appraisal has been provided, is for use by a petitioning personal representative or beneficiary to seek an order to show cause why the information should not be provided by the surviving spouse or registered domestic partner [*see Prob. Code § 11442*; *Fam. Code § 297.5(c)*]. For a form for an order to show cause under *Prob. Code § 11442*, *see § 441.338*. For a stipulation between the surviving spouse or registered domestic partner and the personal representative, *see § 441.339*.

[4] Time of Filing Petition

The petition may be brought at any time before an order for final distribution is made [*Prob. Code § 11440*].

[5] Notice

The petitioner must give at least 15 days notice of the hearing as provided in *Prob. Code § 1220*, together with a copy of the petition and the order to show cause, if any [*Prob. Code § 11443*]. For discussion and forms relating to *Prob. Code § 1220* and other relevant notice provisions, see Ch. 447, *Probate: Statutory Notice Requirements* .

[6] Court Determination of Allocation

In the absence of an agreement, each debt of the decedent shall be characterized as separate or community. Then the

debts will be allocated as follows [*Prob. Code § 11444(b)*; *Fam. Code § 297.5(c)*]:

- Separate debts of either spouse are allocated to that spouse's separate property assets, and community debts are allocated to the spouses' community property assets.

- If a separate property asset of either spouse or registered domestic partner is subject to a secured debt that is characterized as that spouse's or registered domestic partner's separate debt, and the net equity in that asset available to satisfy the secured debt is less than the secured debt, the unsatisfied portion of the secured debt is treated as an unsecured separate debt of that spouse or registered domestic partner and allocated to the net value of that spouse's or registered domestic partner's other separate property assets.

- If the net value of either spouse's or registered domestic partner's separate property assets is less than that spouse's or registered domestic partner's unsecured separate debt or debts, the unsatisfied portion of the debt or debts is allocated to the net value of that spouse's or registered domestic partner's one-half share of the community property assets. If the net value of that spouse's or registered domestic partner's one-half share of the community property assets is less than that spouse's or registered domestic partner's unsatisfied unsecured separate debt or debts, the remaining unsatisfied portion of the debt or debts is allocated to the net value of the other spouse's or registered domestic partner's one-half share of the community property assets.

- If a community property asset is subject to a secured debt that is characterized as a community debt, and the net equity in that asset available to satisfy the secured debt is less than the secured debt, the unsatisfied portion of the secured debt is treated as an unsecured community debt and allocated to the net value of the other community property assets.

- If the net value of the community property assets is less than the unsecured community debt or debts, the unsatisfied portion of the debt or debts is allocated equally between the separate property assets of the decedent and the surviving spouse or registered domestic partner. If the net value of either spouse's or registered domestic partner's separate property assets is less than that spouse's or registered domestic partner's share of the unsatisfied portion of the unsecured community debt or debts, the remaining unsatisfied portion of the debt or debts is allocated to the net value of the other spouse's or registered domestic partner's separate property assets.

The net value of separate property is its fair market value as of the date of the decedent's death, minus the date-of-death balance of any liens and encumbrances that are characterized as debts of the owner spouse or registered domestic partner's [*Prob. Code § 11444(c)(1)*]. The net value of community property is its fair market value as of the date of the decedent's death, minus the date-of-death balance of any liens and encumbrances that are characterized as community debts [*Prob. Code § 11444(c)(2)*]. For allocation purposes, a nonrecourse debt is defined as a debt for which the debtor's obligation to repay is limited to the collateral securing the debt and for which a deficiency judgment against the debtor is not permitted, and would limit the amount of a nonrecourse debt to the net equity in the collateral [*Prob. Code § 11444(c)(3)*]. A court may order a different allocation of debts if it finds that allocation to be equitable under the circumstances [*Prob. Code § 11444(d)*; *Fam. Code § 297.5(c)*].

If a personal representative or the surviving spouse or registered domestic partner incurs any damages or expense, including attorney's fees, on account of the nonpayment of a debt that was allocated to the other party, or as the result of a debt being misallocated due to fraud or intentional misrepresentation by the other party, the party incurring damages may recover from the other party for reasonable damages or expense [*Prob. Code § 11444(e)*; *Fam. Code § 297.5(c)*].

[7] State Statutes

Grounds and standing regarding allocation. *Prob. Code § 11440*

Contents of petition. *Prob. Code § 11441*

Order to show cause regarding inventory. *Prob. Code § 11442*

Notice. *Prob. Code § 11443*

Allocation on stipulation or court determination. *Prob. Code § 11444*

Funeral and last illness expenses. *Prob. Code § 11446*

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38-441 California Forms of Pleading and Practice--Annotated § 441.338

§ 441.338 Proceedings to Allocate Responsibility For Debts [Prob. Code § 11440-11446]--Order to Show Cause Why Information Concerning Separate Property of Surviving Spouse or Registered Domestic Partner, Community Property, and Quasi-Community Property Not Administered in Estate Should Not Be Furnished to Petitioner Seeking Allocation [Prob. Code § 11442]

[1] FORM Proceedings to Allocate Responsibility For Debts [Prob. Code § 11440-11446]--Order to Show Cause Why Information Concerning Separate Property of Surviving Spouse or Registered Domestic Partner, Community Property, and Quasi-Community Property Not Administered in Estate Should Not Be Furnished to Petitioner Seeking Allocation [Prob. Code § 11442]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER TO SHOW CAUSE CONCERNING
Deceased.	)	INFORMATION NOT FURNISHED
	)	

_____

TO _____ [*name of surviving spouse or registered domestic partner*]:

You are hereby ordered to appear before this court [in Department _____ thereof] on _____ [*date*], at _____ _____.M., then and there to show cause why you should not furnish to _____ [*name of petitioner*] information that describes and places a value on your separate property and any community property and quasi-community property not administered in the above-described estate that appears to affect the allocation of debts payable by the estate and by you as proposed by the petition of _____ [*name of petitioner*] filed on _____ [*date*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This order is for use by a court issuing an order to the surviving spouse or registered domestic partner to show cause why information concerning the surviving spouse's separate property and any community property and quasi-community property not administered in the estate should not be furnished to a person who has petitioned for an order to allocate responsibility for debts payable by the estate and the surviving spouse or registered domestic partner [*see Prob. Code § 11442*; *Fam. Code § 297.5(c)*].

As of January 1, 2005, a surviving registered domestic partner has same rights and responsibilities as a surviving spouse [*Fam. Code § 297.5(c)*].

[3] State Statutes

Order to show cause concerning property affecting allocation. *Prob. Code § 11442*

[4] Cross References

For a related form, *see § 441.337*.

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38-441 California Forms of Pleading and Practice--Annotated § 441.339

§ 441.339 Proceedings to Allocate Responsibility For Debts [Prob. Code §§ 11440-11446; Fam. Code § 297.5(c)]--Agreement Allocating Responsibility for Debts Payable by Estate and Surviving Spouse or Registered Domestic Partner [Prob. Code § 11444(a)]

[1] FORM Proceedings to Allocate Responsibility For Debts [Prob. Code §§ 11440-11446; Fam. Code § 297.5(c)]--Agreement Allocating Responsibility for Debts Payable by Estate and Surviving Spouse or Registered Domestic Partner [Prob. Code § 11444(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	AGREEMENT
Estate of _____ [*name*],	)	ALLOCATING
Deceased.	)	RESPONSIBILITY FOR DEBTS PAYABLE BY
	)	ESTATE AND SURVIVING _____
		SPOUSE *or* REGISTERED DOMESTIC PARTNER]

_____

_____ [*Name of personal representative of estate*], the personal representative of the estate of _____ [*name of deceased*] and _____ [*name of surviving spouse or registered domestic partner*], the surviving _____ [spouse *or* registered domestic partner] of the estate of _____ [*name of deceased*], hereby agree to allocate the responsibility for the debts payable by the estate and the survivingin the following manner:

_____ [*Set forth allocation agreed on.*]
Dated: _____.

_____ [*signature*]
Personal Representative
_____ [*signature*]
Surviving Spouse

[2] Use of Form

This form is an agreement for use by the personal representative of the estate and the surviving spouse or registered domestic partner when they have agreed to allocate responsibility for the debts payable by the estate and the surviving spouse or registered domestic partner. The agreement is subject to the court's determination that it substantially protects the rights of persons interested in the estate; it must also be ordered by the court [*see Prob. Code § 11444*; *Fam. Code § 297.5(c)*].

As of January 1, 2005, a surviving registered domestic partner has same rights and responsibilities as a surviving spouse [*Fam. Code § 297.5(c)*].

[3] State Statutes

Allocation of debts by agreement. *Prob. Code § 11444*

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38-441 California Forms of Pleading and Practice--Annotated § 441.340

§ 441.340 Proceedings to Allocate Responsibility For Debts [Prob. Code §§ 11440-11446; Fam. Code § 297.5(c)]--Order Approving Allocation as Agreed on by Personal Representative of Estate and Surviving Spouse or Registered Domestic Partner [Prob. Code § 11444]

[1] FORM Proceedings to Allocate Responsibility For Debts [Prob. Code §§ 11440-11446; Fam. Code § 297.5(c)]--Order Approving Allocation as Agreed on by Personal Representative of Estate and Surviving Spouse or Registered Domestic Partner [Prob. Code § 11444]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER APPROVING AGREEMENT
Deceased.	)	ALLOCATING DEBTS
	)	

_____

The agreement between _____ [*name of personal representative*] and _____ [*name of surviving spouse or registered domestic partner*] was filed on _____ [*date*].

The court, having considered the agreement, has determined that the agreement substantially protects the rights of all persons who are interested in the estate.

IT IS ORDERED that:

1. The allocation provided for in the agreement filed on _____[*date*], is the method by which debts payable by the personal representative and the surviving _____ [spouse *or* registered domestic partner] are to be allocated in the above-entitled estate.

Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This order is for use by the court in approving an agreement between the personal representative and the surviving spousespouse or registered domestic partner that allocates the responsibility for debts payable by each [see *Prob. Code § 11444*].

As of January 1, 2005, a surviving registered domestic partner has same rights and responsibilities as a surviving spouse [*Fam. Code § 297.5(c)*].

[3] State Statutes

Allocation of debts by agreement. *Prob. Code § 11444*

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38-441 California Forms of Pleading and Practice--Annotated § 441.341

§ 441.341 Proceedings to Allocate Responsibility For Debts [Prob. Code §§ 11440-11446; Fam. Code § 297.5(c)]--Order Apportioning Debts Between Property of Estate and Surviving Spouse or Registered Domestic Partner [Prob. Code § 11445]

[1] FORM Proceedings to Allocate Responsibility For Debts [Prob. Code §§ 11440-11446; Fam. Code § 297.5(c)]--Order Apportioning Debts Between Property of Estate and Surviving Spouse or Registered Domestic Partner [Prob. Code § 11445]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER ALLOCATING DEBTS [*Prob. Code § 11445*]
Deceased	)	

_____

A petition to allocate responsibility for the debts in the above-entitled estate between _____ [*name of personal representative*], the personal representative of the estate, and _____ [*name of surviving spouse* or *registered domestic partner*], the surviving _____ [spouse *or* registered domestic partner], was filed on _____ [*date*], by _____ [*name of personal representative, surviving spouse, or registered domestic partner or beneficiary*].

IT IS ORDERED that the debts payable by the estate and the surviving _____ [spouse *or* registered domestic partner] are to be apportioned as follows: _____ [*set forth apportionment of each debt*].

IT IS FURTHER ORDERED that:

1. The personal representative must charge the amounts allocated to the surviving _____ [spouse *or*

registered domestic partner] against any property or interests of the surviving _____ [spouse *or* registered domestic partner] that are in the possession or control of the personal representative;

2. The surviving _____ [spouse *or* registered domestic partner] must pay to the personal representative the amount of the allocation to the extent that the property or interests of the surviving _____ [spouse *or* registered domestic partner] in the possession or control of the personal representative are insufficient to satisfy the allocation;

3. The personal representative pay the amounts allocated to the estate by payment to the surviving _____ [spouse *or* registered domestic partner] or creditors.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This order is for use in allocating the debts between the property of the estate and the surviving spouse or registered domestic partner after a hearing on a petition for allocation [*see Prob. Code § 11445*]. For a petition on which the order is based, *see § 441.337*.

As of January 1, 2005, a surviving registered domestic partner has same rights and responsibilities as a surviving spouse [*Fam. Code § 297.5(c)*].

[3] State Statutes

Order apportioning debts. *Prob. Code § 11445*

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Chapter 442 PROBATE: INITIATING PROBATE ADMINISTRATION

38-442 California Forms of Pleading and Practice--Annotated 442.syn

§ 442.syn Synopsis to Chapter 442: PROBATE: INITIATING PROBATE ADMINISTRATION

§ 442.01 Scope

§ 442.02 Cross References

§§ 442.03-442.09 [Reserved]

§ 442.10 Governing Statutes

§ 442.11 Governing Rules

§ 442.12 Status of Estate

§ 442.13 Jurisdiction and Venue

§ 442.14 Initiating Proceeding

[1] Petition for Probate

[2] Filing Fee

[3] Reimbursement of Filing Fee

[4] Filing Fee Adjustments

[5] Notice

§ 442.15 Probate of Will

§ 442.16 Proof of Will

§ 442.17 Personal Representative

[1] Necessity for Appointment

[2] Competency to Act as Personal Representative

[3] Nonresident

[4] Executor

[5] Administrator With the Will Annexed

[6] Administrator

[7] Special Administrator

[a] As Emergency Officer

[b] Appointment With or Without Notice

[c] Special Powers, Duties, and Obligations

[d] General Powers, Duties, and Obligations

§ 442.18 Qualification of Personal Representative

[1] Required

[2] Oath or Affirmation in Lieu of Oath

[3] Bond

§ 442.19 Independent Administration of Estates Act

§ 442.20 Opposition to Petition for Probate

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[9] Lost or Destroyed Will

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[4] Independent Administration of Estates

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[1] FORM

[2] Source of Form

[3] Use of Form

[4] Who May Bring Petition

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[b] Publication of Notice of Hearing (Paragraph 1)

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[i] In General

[ii] Administrators

[iii] Administrators With Will Annexed

[iv] Executors

[v] Special Administrator

[e] Petition for Administration of Decedent's Estate

[f] Venue

[g] Verification

[11] California Rules of Court

[a] Appointment of Executors and Administrators

[b] Bonding of Personal Representatives, Guardians, Conservators, and Trustees

[12] Local Court Rules

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[c] Captions

[d] Copy of Will to Be Attached to Petition for Probate

[e] Documents to Be Included With Petition for Probate of Will

[f] Petitions for Probate of Holographic Will

[g] Petitions Required to Be Set for Hearing as Required to Have Self-Addressed, Stamped Envelope Attached

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[14] Text References

§ 442.141 Allegation--Lost or Destroyed Will [Prob. Code § 8223]

[1] FORM

[2] Use of Form

[3] Proof of Lost or Destroyed Will

[4] Presumption of Revocation

[5] Admissibility of Testimony Concerning Lost or Destroyed Will

[6] State Statutes

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[1] FORM

[2] Use of Form

[3] Decisions

[4] Law Reviews

[5] Text References

[6] Cross References

§ 442.143 Declination to Act and Waiver of Right to Appointment by Person Named in Will as Executor [Prob. Code § 8440]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 442.144 Waiver of Bond Requirement [Prob. Code § 8481(a)(2)]--By Beneficiary of Estate

[1] FORM

[2] Use of Form

[3] State Statutes

§ 442.145 Receipt From Depository for Deposited Assets of Deceased to Be Withdrawn Only on Authorization of Court [Prob. Code §§ 8401, 8483]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 442.146 Notice of Petition to Administer Estate [Prob. Code §§ 8100, 10451]--Judicial Council Form DE-121

[1] FORM

[2] Source of Form

[3] Use of Form

[4] Contents of Notice

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[b] Independent Administration Information

[c] Objection Information

[d] Creditor Information

[e] Special Notice Information

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[c] To Named Executors

[d] To Attorney General

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[6] Publication of Notice

[a] Generally

[b] Time, Place, and Manner

[c] Good Faith Compliance With Notice Requirement

[d] Type Size

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[ii] By Mail or Personal Delivery

[iii] General Requirements

[b] Proof of Notice

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[10] Local Court Rules

[11] Decisions

[12] Text References

§ 442.147 Proof of Subscribing Witness [Prob. Code § 8220]--Judicial Council Form DE-131

[1] FORM

[2] Source of Form

[3] Use of Form

[4] Manner of Executing Wills

[5] Attorney's Certification

[6] State Statutes

[7] Local Court Rules

[a] Los Angeles County

[b] Orange County

[c] Riverside County

[d] San Francisco

[8] Text References

§ 442.148 Declaration and Order for Commission to Take Deposition of Subscribing Witness [Code Civ. Proc. §§ 2025.010-2028.080; Prob. Code § 8220(c)]

[1] FORM

[2] Use of Form

[3] California Deposition and Discovery Practice

[4] State Statutes

[5] Local Court Rules

§ 442.149 Commission to Take Deposition of Witness to Will [Code Civ. Proc. §§ 2025.010-2025.620, 2028.010-2028.080; Prob. Code § 8220(c)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 442.150 Proof of Holographic Instrument [Prob. Code § 8222; Evid. Code § 1416]--Judicial Council Form DE-135

[1] FORM

[2] Source of Form

[3] Use of Form

[4] Attorney's Certification

[5] State Statutes

[6] Local Court Rules

[a] Los Angeles County

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[1] FORM

[2] Use of Form

[3] Grounds of Opposition

[4] Procedure

[5] Verification

[6] State Statutes

[7] Local Court Rules

[8] Cross References

§ 442.152 Order for Probate [Prob. Code §§ 8006, 10452]--Judicial Council Form DE-140

[1] FORM

[2] Source of Form

[3] Use of Form

[4] Findings at Hearing

[5] Requirements for Issuance of Order

[6] State Statutes

[7] Local Court Rules

[a] Los Angeles County

[b] Orange County

[c] Riverside County

[d] San Francisco

[8] Cross References

§ 442.153 Order for Probate [Prob. Code §§ 8006, 10452]--Admitting Lost or Destroyed Will to Probate and Directing Issuance of Letters [Prob. Code § 8223]--Drafted Form

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Local Court Rules

[5] Cross References

§ 442.154 Order for Probate [Prob. Code §§ 8006, 10452]--Ancillary Administration--Admitting Nondomiciliary Decedent's Will to Probate and Directing Issuance of Letters [Prob. Code §§ 12522, 12523]--Drafted Form

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[2] Use of Form

[3] State Statutes

[4] Cross References

§ 442.155 Duties and Liabilities of Personal Representative [Prob. Code § 8404]--Judicial Council Form DE-147

[1] FORM

[2] Source of Form

[3] Use of Form

[4] Acknowledgment of Receipt

[5] State Statutes

[6] California Rules of Court

§ 442.156 Confidential Statement of Birth Date and Driver's License Number [Prob. Code § 8404(b)]--Judicial Council Form DE-147S

[1] FORM

[2] Use of Form

[3] Cross References

§ 442.157 Letters [Prob. Code §§ 8403, 8405]--Judicial Council Form DE-150

[1] FORM

[2] Source of Form

[3] Use of Form

[4] Authority to Independently Administer Estate

[5] Oath of Office

[6] State Statutes

§ 442.158 Request for Appointment of Probate Referee [Prob. Code §§ 8900, 8902]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 442.159 Order Appointing Probate Referee [Prob. Code §§ 8900, 8902]

[1] FORM

[2] Use of Form

[3] Cross References

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PART I. SCOPE

38-442 California Forms of Pleading and Practice--Annotated § 442.01

§ 442.01 Scope

This chapter discusses the court proceedings necessary to begin probate administration in both testate (decedent died leaving a will) and intestate estates. It includes the mandatory Judicial Council form for a petition for probate [*see § 442.140*]. For testate estates, there is a waiver of appointment as executor [*see § 442.143*]. For testate or intestate estates, a waiver of the bond requirement [*see § 442.144*] and a receipt for the deposit of property in a financial institution subject to withdrawal only on court order [*see § 442.145*] are included. A notice of petition to administer the estate [*see § 442.146*] is also included. For the additional requirements and a notice of administration to creditors under *Prob. Code §§ 9050-9054*, see Ch. 454, *Probate: Claims Against the Estate* .

This chapter includes forms for offering proof of wills [*see §§ 442.147 -442.150*]. For discussion and forms relating to contesting wills, see Ch. 444, *Probate: Will Contests* .

This chapter also includes a form for contesting the appointment of a particular person as personal representative [*see § 442.151*], orders for probate [*see §§ 442.152 -442.154*], the Judicial Council forms for duties and liabilities of the personal representative [§§ 442.155, 442.157] and for letters [*see § 442.157*].

A petition [*see § 442.158*] and order [*see § 442.159*] to designate a probate referee, if this is not done in the original petition and order commencing administration, are also included.

A personal representative may be granted authority to administer the estate under the Independent Administration of Estates Act (*Prob. Code § 10400 et seq.*). The Judicial Council form for a petition for administration in this chapter [*see § 442.140*] includes optional language to request authority under the Act. For detailed discussion of that Act, see Ch. 445, *Probate: Independent Administration of Estates* .

For forms and procedure for the transfer of property without administration under *Prob. Code §§ 200-215, 6600-6615,* and *13000-13660*, see Ch. 441 *Probate: Disposition Without Administration* . For forms and procedure for setting apart exempt personal property and homesteads under *Prob. Code §§ 6500-6528*, see Ch. 449, *Probate: Exempt Personal Property and Probate Homesteads* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawWill ContestsGeneral Overview

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38-442 California Forms of Pleading and Practice--Annotated § 442.02

§ 442.02 Cross References

For notice of appeal and preparation of transcript in probate proceedings, see Ch. 42, *Appeal: Notice of Appeal* , and Ch. 44, *Appeal: Preparing and Filing the Record*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsRecords on AppealCivil ProcedureAppealsReviewabilityGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-442 California Forms of Pleading and Practice--Annotated §§ 442.03-442.09

[Reserved]

§§ 442.03[Reserved]

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38-442 California Forms of Pleading and Practice--Annotated § 442.10

§ 442.10 Governing Statutes

The initiation of administration of an estate is generally governed by *Prob. Code §§ 8000-8577*, although sections outside that range are also relevant. The following code sections that primarily govern particular aspects of the initiation of administration:

- Passage of title is governed by *Prob. Code §§ 7000* and *7001*.

- Jurisdiction and venue are governed by *Prob. Code §§ 7050-7052*.

- Commencement of the proceedings and notice of the petition to administer a decedent's estate are governed by *Prob. Code §§ 8000-8125*.

- Probate of wills, including production and proof of wills, will contests, and revocation of probate are governed by *Prob. Code §§ 8200-8272*.

- Appointment of the personal representative is governed by *Prob. Code §§ 8400-8488* (generally), 8570-8577 (nonresidents), and appointment of a special administrator is governed by *Prob. Code §§ 8540-8547*.

- Administration of the estates of nondomiciliary decedents is governed by *Prob. Code § 10400 et seq.*

- Administration of estates under the Independent Administration of Estates Act is governed by *Prob. Code §§ 10400-10600*.

Other relevant statutes include those governing a trust company's authority to be a personal representative (*Prob. Code §§ 300, 301*) and general procedural provisions (*Prob. Code §§ 1000-1050, 7060-7280*).

In addition, a wide variety of local court rules govern probate practice.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesAppointmentEstate, Gift & Trust LawWill ContestsRevocationGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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38-442 California Forms of Pleading and Practice--Annotated § 442.11

§ 442.11 Governing Rules

Cal. Rules of Ct., Rule 7.1 et seq. apply to every action and proceeding to which the Probate Code applies, and to any other action or proceeding in which they are explicitly made applicable [*Cal. Rules of Ct., Rule 7.2(a)*]. However, for good cause shown, the court may waive the application of these rules in any individual case [*Cal. Rules of Ct., Rule 7.4*].

These rules are adopted by the Judicial Council, and are designed to implement the purposes of the probate law by promoting uniformity in practice and procedure [*Cal. Rules of Ct., Rule 7.2(b)*].

Unless the context otherwise requires, to the extent that these rules are substantially the same as existing statutory provisions relating to the same subject matter, these rules are to be construed as restatements and a continuation of those statutes [*Cal. Rules of Ct., Rule 7.2(c)(1)*]. To the extent that these rules may add to existing statutory provisions relating to the same subject matter, unless the context otherwise requires, they are to be construed so as to implement the purposes of the probate law [*Cal. Rules of Ct., Rule 7.2(c)(1)*].

Unless the context or subject matter requires otherwise, the definitions of *Prob. Code § 20 et seq.* apply to these rules [*Cal. Rules of Ct., Rule 7.3*].

If there is a contested hearing or trial, and the court has continued a matter to allow a written objection or response to be made, and the responding or objecting party fails to serve and file a timely objection or response, the court may deem the objections or responses waived [*Cal. Rules of Ct., Rule 7.801*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWill ContestsGeneral Overview

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38-442 California Forms of Pleading and Practice--Annotated § 442.12

§ 442.12 Status of Estate

Title to a person's property passes on his or her death to the person to whom it is devised in the decedent's last will or, in the absence of a devise, to the decedent's heirs as prescribed in the laws governing intestate succession [*Prob. Code § 7000*]. The estate is not a legal entity and does not receive the property. "Estate" merely describes all of the decendent's property that passes to his or her heirs or devisees. Property of the decedent is "in" the estate, for the purpose of administration [*see Prob. Code § 7001*], until it is delivered to the owners, who are the heirs or the devisees.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWill ContestsGeneral Overview

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38-442 California Forms of Pleading and Practice--Annotated § 442.13

§ 442.13 Jurisdiction and Venue

The superior court has jurisdiction of proceedings under the Probate Code concerning the administration of a decedent's estate [*Prob. Code § 7050*]. In these proceedings, the court is a court of general jurisdiction. The court, or a judge of the court, has the same power and authority with respect to the proceedings as otherwise provided by law for a superior court, or a judge of the superior court, including, but not limited to, the matters authorized by *Code Civ. Proc. § 128* (enumerating statutory powers of courts) [*Prob. Code § 800*].

The proper county for proceedings related to a decedent's estate is determined by the following rules:

- If the decedent was domiciled in California at the time of death, then the proper county for proceedings concerning administration of the estate is the county where he or she was domiciled, regardless of where he or she died [*Prob. Code § 7051*].

- If the decedent was not domiciled in California at the time of death, and

  - Died in California in a county where he or she left property, then that county is the proper venue for estate administration proceedings [*see Prob. Code § 7052(a)*].

  - Died in California in a county where he or she did not leave property, then any county where he or she left property is the proper venue for estate administration proceedings, regardless of where he or she died. If the decedent left property in more than one county, then the proper county for estate administration proceedings is the county where a petition for ancillary administration is first filed [*see Prob. Code § 7052(b)*; *see also Prob. Code § 12511* (proper county for ancillary administration under *Prob. Code §§ 12500-12591*)].

  - Did not die in California, then any county where he or she left property is the proper venue for estate administration proceedings, regardless of where he or she died. If the decedent left property in more than one county, then the proper county for estate

administration proceedings is the county where a petition for ancillary administration is first filed [*see Prob. Code § 7052(b)*; *see also Prob. Code § 12511*].

- If, in the proper county as determined by the foregoing rules, there is no judge of the court in which the proceeding is pending who is qualified to act in the administration of the estate [*see Prob. Code § 7060*], then on the filing of a petition, the court must order the proceeding transferred to another county, unless the Chief Justice, as Chairperson of the Judicial Council, assigns a qualified judge to act in place of the disqualified judge or judges [*see Prob. Code § 7070*].

Transfer of an estate administration proceeding is in the same manner and with the same effect as transfer of actions and proceedings under the Code of Civil Procedure [*see* Cal. Law Revision Comm'n. Comment to *Prob. Code § 7070*]. The proceeding must be transferred to either another county where the decedent's property is located or, if there is no other county where the decedent has property, to an adjoining county [*see Prob. Code § 7071*]. The proceeding can be transferred back to the court in which it originated if a qualified judge becomes available there and if the convenience of interested parties would be promoted by retransfer [*see Prob. Code § 7072*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral JurisdictionCivil ProcedureVenueGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateJurisdiction & VenueDomicile

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38-442 California Forms of Pleading and Practice--Annotated § 442.14

§ 442.14 Initiating Proceeding

[1] Petition for Probate

Any interested person may commence administration of a decedent's estate by filing a petition for an order determining the date and place of the decedent's death and for appointment of a personal representative. If the decedent died testate, the petition may also include a petition for probate of the decedent's will [*see Prob. Code § 8000(a)*; *see also Prob. Code §§ 48* (interested person defined), 58 (personal representative defined)]. If a will is being probated, the personal representative will be an executor (if named in the will) or an administrator with the will annexed (if not named in the will) [*compare Prob. Code § 8420, 8421 with Prob. Code § 8440*]. If the decedent died intestate, the personal representative will be an administrator [*see Prob. Code § 8460*].

If the circumstances of the estate require immediate appointment of a personal representative, the court may appoint a special administrator to exercise any powers that may be appropriate for the preservation of the estate [*see Prob. Code § 8540*].

For the Judicial Council petition form that must be used in any of these situations, see *§ 442.140*. The terminology for these petitions varies. It is often referred to as a petition for administration as it is, for example, in *Prob. Code § 8100*. The Judicial Council form is entitled "petition for probate", but by checking the boxes in the caption, the paper may be denominated in a variety of manners, including for example, petition for letters of administration. Throughout this part, the terms petition for administration, petition for probate, petition for appointment of a personal representative and petition for the issuance of letters all refer to the petition that commences the proceeding.

[2] Filing Fee

Prior to January 1, 2009, probate fees were determined based on a sliding scale of fees that grew progressively larger with the size of the estate. Effective January 1, 2009, this scale was eliminated and replaced with a flat filing fee [*Gov. Code § 70650(a)*].

The uniform filing fee for the first petition for letters of administration or letters testamentary, or the first petition for special letters of administration with the power of a general personal representative is $355 [*Gov. Code § 70650(a)*].

The uniform filing fee for the first objections to the probate of any will of codicil under *Prob. Code § 8250*, or the first petition for revocation of probate of any will or codicil under *Prob. Code § 8270* also is $355 [*Gov. Code § 70650 (b)*]. The uniform filing fee for the first petition for special letters of administration without the powers of a general personal representative is provided in *Gov. Code § 70657.5* [*Gov. Code § 70650(b)*]. If a petition for special administration is filed together with a petition for letters of administration or letters testamentary by the same person, the person filing the petitions will be charged the applicable filing fees for both petitions [*Gov. Code § 70650(d)*].

A fee of $355 also will be charged for filing each subsequent petition or objection in the same proceeding by a person other than the original petitioner or contestant [*Gov. Code § 70650(c)*].

[3] Reimbursement of Filing Fee

In decedents' estates proceedings commenced on or after August 18, 2003, a general personal representative who is appointed on a petition for probate that was not the first-filed petition for appointment of a general personal representative in the proceeding must reimburse the unsuccessful petitioner on the first-filed petition for a portion of the filing fee the unsuccessful petitioner paid [*Cal. Rules of Ct., Rule 7.151(a)*]. The amount of the required reimbursement is the filing fee the unsuccessful petitioner paid in excess of the filing fee that would have been payable on that date for a petition for probate of an estate, less the unpaid amount of any costs or sanctions awarded against the unsuccessful petitioner in favor of the party that sought the personal representative's appointment in the proceeding [*Cal. Rules of Ct., Rule 7.151(b)*].

The reimbursement payment must be made in cash and in full no later than the date the inventory and appraisal is due under *Prob. Code § 8800(b)*, including any additional time the court allowed under that provision [*Cal. Rules of Ct., Rule 7.151(c)*]. This payment is an authorized expense of administration and may be made from estate funds without a prior court order [*Cal. Rules of Ct., Rule 7.151(d)*]. The unsuccessful petitioner must give a signed receipt for the reimbursement payment [*Cal. Rules of Ct., Rule 7.151(e)*].

A personal representative who is required to but fails to make a reimbursement payment may not claim a refund of the difference between the estimated filing fee and the corrected filing fee under *Cal. Rules of Ct., Rule 7.552(c)* [*Cal. Rules of Ct., Rule 7.151(f)*; § 442.14[4]]. A petitioner who is eligible to receive a refund of the filing fee for a dismissed petition for probate under *Cal. Rules of Ct., Rule 7.552(d)* is not an unsuccessful petitioner within the meaning of *Cal. Rules of Ct., Rule 7.151* [*Cal. Rules of Ct., Rule 7.151(g)*].

[4] Filing Fee Adjustments

The final account or report [*see* Ch. 458D, *Probate: Accounts, Final Distribu tion, and Compensation*] filed in every decedent's estate proceeding commenced on or after August 18, 2003, must include a separate schedule showing all of the following [*Cal. Rules of Ct., Rule 7.552(a)*]:

- The name of each petitioner on the first-filed petition for probate and the date the petition was filed.
- The estimated value of the estate shown in item 3 of the first-filed petition;
- The filing fee paid for this petition.
- The combined total appraised value of the estate shown in all filed inventories and appraisals.
- A statement of the amount of the filing fee that would have been payable if the total actual appraised value of the estate had been used as the estimated value for filing fee purposes.

- The difference between the fee paid and the fee which should have been paid.

- Information concerning filing fee reimbursement payments made by the personal representative under *Cal. Rules of Ct., Rule 7.151*.

A sample schedule is set forth in *Cal. Rules of Ct., Rule 7.552(f)*.

If the estimated filing fee is less than the corrected filing fee, the petition filed with the final account or report must allege that the difference between them has been paid to the clerk of the court, and a copy of the clerk's receipt for payment must be attached as an exhibit to the account or report [*Cal. Rules of Ct., Rule 7.552(b)*]. If the estimated filing fee is more than the corrected filing fee, the personal representative is eligible to receive a refund of the difference between them, without interest [*Cal. Rules of Ct., Rule 7.552(c)(1)*]. The personal representative must apply to the court for a refund in accordance with the court's local rules and practices [*Cal. Rules of Ct., Rule 7.552(c)(2)*]. Unless authorized to retain a reserve against closing expenses that expressly is to include the court's refund payment after the personal representative's discharge, the personal representative must not apply for a discharge while the application for a refund of the filing fee is pending and before the court's refund payment is received [*Cal. Rules of Ct., Rule 7.552(c)(3)*].

If the expenses of administration must be proportionately reduced under *Prob. Code § 11420* because the property in the estate is insufficient to pay them in full, the court may approve a determination of the corrected filing fee that reflects the proportionate reduction of those expenses. However, the corrected filing fee may not be reduced below the minimum fee required by *Gov. Code § 70650* on the date the estimated fee was paid [*Cal. Rules of Ct., Rule 7.552(e)*]. A petitioner who voluntarily dismisses the petition at any time within 90 days after it is filed and before an order granting or denying the petition is filed, is eligible to receive a refund, without interest, of all filing fees paid in excess of the filing fees that would have been payable on the original filing date for a petition for probate of an estate valued at less than $250,000 [*Cal. Rules of Ct., Rule 7.552(d)(1)*]. The petitioner must apply to the court for a refund in accordance with the court's local rules and practices [*Cal. Rules of Ct., Rule 7.552(d)(2)*].

[5] Notice

Notice of the hearing on the petition must be given to (1) each heir of the decedent, so far as known to or reasonably ascertainable by the petitioner and (2) each devisee, executor, and alternative executor named in any will being offered for probate, regardless of whether the devise or appointment is purportedly revoked in a subsequent instrument [*Prob. Code § 8110*; *see Estate of Carter (2003) 111 Cal. App. 4th 1139, 1147-1148, 1152-1153, 4 Cal. Rptr. 3d 490* (determination of whether children born to decedent out of wedlock might be heirs, and therefore entitled to notice, must be made by court, not petitioner for administration of estate)]. The phrase "reasonably ascertainable," as used in *Prob. Code § 8110*, must be given a broad meaning, sufficient to include individuals whose identities are known to the petitioner and who reasonably might be heirs [*Estate of Carter (2003) 111 Cal. App. 4th 1139, 1142, 4 Cal. Rptr. 3d 490]* . If the petitioner fails to give notice to a known heir, he or she commits extrinsic fraud and the heir may maintain an action in equity for a constructive trust [*Estate of Carter (2003) 111 Cal. App. 4th 1139, 1148-1149, 4 Cal. Rptr. 3d 490]* .

It may also be necessary to give notice to the Attorney General [*Prob. Code § 8111*] or to diplomatic or consular officials in the United States *Prob. Code § 8113*]. For further discussion, see *§ 442.146*. For discussion of notice to public entity creditors, see Ch. 454, *Probate: Claims Against the Estate* .

Publication and service of a notice of petition to administer estate is sufficient notice of any instrument offered for probate that is filed with, and specifically referred to in, the petition [*Cal. Rules of Ct., Rule 7.54*]. Any other instrument must be presented in an amended petition, and a notice of the amended petition must be published and served [*Cal. Rules of Ct., Rule 7.54*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawEstates Created by Trusts & WillsGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-442 California Forms of Pleading and Practice--Annotated § 442.15

§ 442.15 Probate of Will

A proceeding to probate a will is a proceeding in rem to determine the legal status of a written instrument [*Estate of Neubauer (1958) 49 Cal. 2d 740, 745, 321 P.2d 741* ; *Estate of Baker (1915) 170 Cal. 578, 585, 150 P. 989]* . It is a special proceeding created by statute and was unknown to the common law [*Estate of Baker (1915) 170 Cal. 578, 585, 150 P. 989]* .

The court has no authority to consider the legality of a will until the will is properly brought before the court by a petition for probate [*Estate of Edwards (1908) 154 Cal. 91, 94-95, 97 P. 23* ; *Estate of Olson (1962) 200 Cal. App. 2d 234, 237, 19 Cal. Rptr. 307]* . The authority to proceed arises on the filing of a petition, the production of the will unless it has been lost or destroyed, the publication of notice, and the service of the notice [*Murray v. Superior Court (1929) 207 Cal. 381, 385, 278 P. 1033* ; *Estate of Olson (1962) 200 Cal. App. 2d 234, 237, 19 Cal. Rptr. 307]* .

If a will is admitted to probate after an administrator was appointed on the ground of intestacy, the administrator will be removed from office on the admission of the will to probate [*Prob. Code § 8504(a)*]. Similarly, an executor or administrator with the will annexed will be removed from office on the admission to probate of a later will [*Prob. Code § 8504(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWillsGeneral Overview

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38-442 California Forms of Pleading and Practice--Annotated § 442.16

§ 442.16 Proof of Will

The manner of proving the will is set out in *Prob. Code §§ 8220-8226*.

Unless there is a will contest, an attested will may be proved on the evidence of one of the subscribing witnesses, if the evidence shows that the will was executed in all particulars as required by law [*see Prob. Code § 8220(a)*]. That evidence may be received by an affidavit with a photographic copy of the will attached or by an affidavit in the original will that includes or incorporates the attestation clause [*see Prob. Code § 8220(b)*; *see also Prob. Code § 1022* (affidavit admissible in uncontested proceedings under Probate Code generally)]. If none of the subscribing witnesses resides in the county where the proceeding is pending, the witness's testimony may be given by deposition [*see Prob. Code § 8220(c)*]. For forms for presenting the evidence of subscribing witnesses, see *§§ 442.147 -442.149*.

If no subscribing witness is available as a witness within the meaning of *Evid. Code § 240* and the will on its face conforms to all requirements of the law, the court may permit proof of the will by proof of the testator's handwriting, plus either (1) proof of the handwriting of one of the subscribing witnesses or (2) receipt in evidence of a document reciting facts showing due execution of the will. Such a document may be a writing in the will bearing the signatures of all subscribing witnesses or an affidavit of a person who is not a subscribing witness but who has personal knowledge of the circumstances of the execution [*see Prob. Code § 8221*]. If the will of a person who was domiciled in California at the time of death is detained in a court of any other state or country and cannot be produced for probate in California, a certified copy may be admitted to probate, on the same evidence as for an original will [*see Prob. Code § 8202*].

A holographic will may be proved in the same manner as other writings are proved [*see Prob. Code § 8222*]. Regarding the proof of private writings, see *Evid. Code §§ 1400-1454* (authentication and proof of writings) and *Evid. Code §§ 1520-1553* (proof of content of writings). For a form for declaration to prove a holographic will, see *§ 442.150*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWill ContestsTestamentary

FormalitiesGeneral OverviewEstate, Gift & Trust LawWill ContestsTestamentary FormalitiesWitnessesGeneral OverviewEstate, Gift & Trust LawWill ContestsTestamentary FormalitiesWitnessesAttestation & SubscriptionEstate, Gift & Trust LawWillsGeneral OverviewEstate, Gift & Trust LawWillsHandwritten & Oral WillsGeneral OverviewEvidenceTestimonyLay WitnessesPersonal Knowledge

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38-442 California Forms of Pleading and Practice--Annotated § 442.17

§ 442.17 Personal Representative

[1] Necessity for Appointment

No person has any authority to act as personal representative until he or she is issued letters [*see Prob. Code § 8400(a)*].

Nevertheless, a person petitioning for appointment as personal representative may deliver estate property in his or her possession to a trust company or financial institution for deposit, or allow a trust company or financial institution to retain on deposit property already in its possession, as provided in *Prob. Code §§ 9700-9705* (governing deposit by personal representative of estate money, personal property, and securities) [*Prob. Code § 8401*; *see Prob. Code §§ 9700-9705*; for further discussion of the personal representative's authority to deposit estate property in specified depositories, *see* Ch. 456, *Probate: Management of Estate Assets*]. This may reduce the amount of the bond that may be required of the personal representative [*see Prob. Code § 8483*; for a form for a receipt that may be filed with the petition for administration, *see § 442.145*; for further discussion, *see* Ch. 446, *Probate*]. Moreover, a person named as executor in the will may pay funeral expenses and may take necessary steps to preserve the estate before letters are issued [*see Prob. Code § 8400(b)*].

[2] Competency to Act as Personal Representative

A person is not competent to act as personal representative in any of the following circumstances [*Prob. Code § 8402(a)*]:

- The person is under the age of majority.

- The person is subject to a conservatorship of the estate or is otherwise incapable of executing, or is otherwise unfit to execute, the duties of the office.

- There are grounds for removal of the person from office under *Prob. Code § 8502*, discussed in Ch. 458B, *Probate: Suspension, Removal, and Resignation* .

- The person is not a resident of the United States.

- The person is a surviving partner of the decedent and an interested person objects to the appointment.

Prob. Code § 8402(a)(4) and *(5)* do not apply to disqualify a person named as executor or successor executor in the decedent's will [*Prob. Code § 8402(b)*].

A trust company may be appointed to act as personal representative of a decedent's estate [*Prob. Code § 300*; *see Prob. Code § 83* ("trust company" defined)].

[3] Nonresident

A nonresident personal representative is defined as a nonresident of California appointed as personal representative, or a California resident appointed as personal representative who later removes from and resides outside of California [*see Prob. Code § 8570*]. A person can qualify for appointment as personal representative even though he or she is not a resident of California, and a personal representative who removes his or her residence outside California can continue to act as executor [*see Prob. Code §§ 8571, 8572*]. However, a nonresident applying for appointment or intending to continue as personal representative must take certain steps designed to protect the beneficiaries and other interested persons from the inconveniences and potential dangers of administration by a person who is physically beyond the jurisdiction of the state [*see Prob. Code §§ 8572-8576*], and failure to comply with these statutory requirements is a ground for removal [*see Prob. Code § 8577*]. A nonresident executor is frequently required to post bond even though the will expressly waives bond [*see Prob. Code § 8571*].

[4] Executor

The person named as executor in the decedent's will has the right to appointment as personal representative [*Prob. Code § 8420*]. If a person is not named as executor in a will but it appears by the terms of the will that the testator intended to commit the execution of the will and the administration of the estate to the person, the person is entitled to appointment as personal representative in the same manner as if named as executor [*Prob. Code § 8421*]. The testator may by will confer on a person the power to designate an executor or coexecutor, or successor executor or coexecutor. A designation shall be in writing and filed with the court. Unless the will provides otherwise, if there are two or more holders of the power to designate, the designation must be unanimous, unless one of the holders of the power is unable or unwilling to act, in which case the remaining holder or holders may exercise the power [*Prob. Code § 8422(a), (b)*]. An executor does not have authority to name a coexecutor, or a successor executor or coexecutor unless the will gives the executor such a power of designation [*Prob. Code § 8422(c)*].

If the executor named in the will is a trust company that has sold its business and assets to, has consolidated or merged with, or is in any manner provided by law succeeded by, another trust company, the court may, and to the extent required by the Banking Law, *Fin. Code §§ 99-3904*, must appoint the successor trust company as executor [*Prob. Code § 8423*].

If a person named as executor is under the age of majority and there is another person named as executor, the other person may be appointed and may administer the estate until the majority of the minor, who may then be appointed as coexecutor. If there is no other person named as executor, another person may be appointed as personal representative, but the court may revoke the appointment on the majority of the minor, who may then be appointed as executor [*Prob. Code § 8424*].

If the court does not appoint all the persons named in the will as executors, those appointed have the same authority to act in every respect as all would have if appointed [*Prob. Code § 8425*].

[5] Administrator With the Will Annexed

An administrator with the will annexed will be appointed as personal representative if no executor is named in the will or if the sole executor or all the executors named in the will have waived the right to appointment or are for any reason unwilling or unable to act [*Prob. Code § 8440*].

Persons and their nominees are entitled to appointment as administrator with the will annexed in the same order of priority as for appointment of an administrator [§ 442.41[11][b]], except that a person who takes under the will has priority over a person who does not. However, the court in its discretion may give priority to a person who does not take under the will if the person is entitled to a statutory interest that is a substantially greater portion of the estate than the devise to the person who takes under the will and the priority appears appropriate under the circumstances. A person who takes more than 50 percent of the value of the estate under the will or the person's nominee, or the nominee of several persons who together take more than 50 percent of the value of the estate under the will, has priority over other persons who take under the will [*Prob. Code § 8441*].

An administrator with the will annexed has the same authority over the decedent's estate as an executor named in the will would have, with one exception. The exception is that if the will confers a discretionary power or authority on an executor that is not conferred by law and the will does not extend the power or authority to other personal representatives, the power or authority shall not be deemed to be conferred on an administrator with the will annexed. The court, however, in its discretion may authorize the exercise of the power or authority [*Prob. Code § 8442*].

[6] Administrator

If the decedent died intestate, the court will appoint one or more persons as administrator of the estate [*Prob. Code § 8460*]. Letters may be granted to one or more of the persons listed in *Prob. Code § 8461* (priority for appointment) otherwise competent, and preference is given according to the order of priority set out in that section and the rules set out in *Prob. Code §§ 8462-8469*. For discussion of priority, see *§ 442.140*.

[7] Special Administrator

[a] As Emergency Officer

A special administrator may be appointed in either a testate or an intestate estate and is appointed to serve in the absence of a qualified executor or general administrator when the circumstances require [*see Prob. Code § 8540(a)*]. The appointment may be for a specified term, to perform particular acts, or on any other terms specified in the court order [*Prob. Code § 8540(b)*]. The special administrator is an emergency officer [*Miller v. Superior Court (1921) 186 Cal. 453, 456, 199 P. 805]* .

Under *Prob. Code § 8540(a)*, grounds for appointment of a special administrator would include situations in which [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 8540*]:

- No application is made for appointment of a personal representative;
- There is a delay in appointing a personal representative;
- Insufficient bond is given, or letters are otherwise granted irregularly;
- The personal representative dies, resigns, or is suspended or removed from office;
- An appeal is taken from an order revoking probate of a will;

- There is a will contest pending;
- Appointment is necessary to maintain a lawsuit on the decedent's cause of action; or
- For any other cause the personal representative is unable to act.

The court may also appoint the public administrator [*see Prob. Code § 8541(b)*].

For a petition to appoint a special administrator, see *§ 442.140*.

[b] Appointment With or Without Notice

In keeping with the emergency character of the appointment, a special administrator may be appointed at any time without notice or on such notice to interested persons as the court deems reasonable [*see Prob. Code § 8541(a)*].

However, if the court grants the special administrator the same powers, duties, and obligations as a general personal representative, and letters have not previously been issued to a general personal representative, that grant must be on the same notice required under *Prob. Code § 8003* for appointment of a personal representative [*see Prob. Code § 8545(a)*]. *Prob. Code § 8003* requires both service and publication of notice [*see Prob. Code § 8003*]. An exception to this rule applies if the appointment is made at a hearing on a petition for appointment of a general personal representative and notice of that petition has been given as required by *Prob. Code § 8003*. In that situation, the court may appoint a special administrator with the same powers, duties, and obligations as a general personal representative, without further notice under *Prob. Code § 8003* [*Prob. Code § 8545(a)*].

[c] Special Powers, Duties, and Obligations

Except to the extent the order appointing the special administrator prescribes terms, the special administrator has the power to do all of the things enumerated in *Prob. Code § 8544(a)* without further order of the court [*see Prob. Code § 8544(a)*]. Except to the extent the order prescribes terms, the special administrator has the power to do all of the things enumerated in *Prob. Code § 8544(b)* on order of the court [*see Prob. Code § 8544(b)*]. Except when the powers, duties, and obligations of a general personal representative are granted, the special administrator is not a proper party to an action on a claim against the decedent [*see Prob. Code § 8544(c)*]. A special administrator appointed to perform a particular act has no duty to take any other action to protect the estate [*Prob. Code § 8544(d)*].

[d] General Powers, Duties, and Obligations

The court may grant a special administrator the same powers, duties, and obligations as a general personal representative when to do so appears proper. As previously noted, the grant of general powers must be on notice if letters have not previously been issued to a general personal representative [*see Prob. Code § 8545(a)*]. Additionally, subject to *Prob. Code § 8543*, the court may require, as a condition of the grant, that the special administrator give any additional bond that the court deems proper [*see Prob. Code § 8545(b)*]. If a grant of general powers is made, the letters must recite that the special administrator has those powers [*see Prob. Code § 8545(c)*]. Distribution of the estate is to be made by a general, not a special, representative [*Estate of Davis (1917) 175 Cal. 198, 202, 165 P. 525* ; *In re Welch (1895) 106 Cal. 427, 433, 39 P. 805]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesAppointmentEstate, Gift & Trust LawProbatePersonal RepresentativesDuties &

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§ 442.18 Qualification of Personal Representative

[1] Required

A person has no power to administer an estate until the person is appointed personal representative and the appointment becomes effective [*Prob. Code § 8400(a)*]. Appointment of a personal representative does not become effective until letters are issued to the appointee [*Prob. Code § 8400(a)*]. This is true even when the appointee is named as executor in the decedent's will [*Prob. Code § 8400(b)*].

Letters will not issue until the appointee files an acknowledgment of receipt of a statement of the duties and liabilities of the office of personal representative [*Prob. Code § 8404(a)*; *Cal. Rules of Ct., Rule 7.150* (Judicial Council Form DE-147 must be executed and filed by each personal representative, other than company authorized to conduct trust business in California, before court may issue letters); *see § 442.155*]. Further, the first page of the order appointing a personal representative must contain a warning, printed in capital letters in at least 12-point type, stating the following: "WARNING: THIS APPOINTMENT IS NOT EFFECTIVE UNTIL LETTERS HAVE ISSUED" [*Prob. Code § 8400(c)*].

[2] Oath or Affirmation in Lieu of Oath

Prob. Code § 8403 sets out the general form of the oath of office, which must be attached to or endorsed on the letters. The uniform practice is to endorse the oath on the letters. An affirmation, in lieu of oath, may be and usually is employed [*see Code Civ. Proc. § 2015.6*]. The oath may be signed at the time the petition for appointment of the personal representative is signed [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 8403*].

Every appointee, whether a trust company or an individual, must take the oath of office. The former does so by its president, vice president, secretary, assistant secretary, manager, trust officer, or assistant officer [*Fin. Code § 1587*; *Prob. Code § 301(b)*].

For a form for letters, including an affirmation, see *§ 442.157*.

[3] Bond

Except as otherwise provided by statute, every individual appointed personal representative must, before letters are issued, give a bond approved by the court. If two or more persons are appointed, the court may require either a separate bond from each or a joint and several bond. If a joint bond is furnished, the liability on the bond is joint and several [*see Prob. Code § 8480(a)*]. The bond is for the benefit of interested persons and must be conditioned on the personal representative's faithful execution of the duties of the office according to law [*Prob. Code § 8480(b)*]. Furthermore, if the person appointed personal representative fails to give the required bond, letters cannot be issued [*Prob. Code § 8480(c)*].

A bond is not required in either of the following cases [*Prob. Code § 8481(a)*]:

- The will waives the requirement of a bond.

- All beneficiaries waive in writing the requirement of a bond, and the written waivers are attached to the petition for appointment of a personal representative. However, this subparagraph does not apply if the will requires a bond. For a form of waiver of filing a bond, see *§ 442.144*.

If the will waives bond, the petition for probate is required to so state [*Cal. Rules of Ct., Rule 7.201(a)*].

Notwithstanding the waiver of a bond by a will or by all the beneficiaries, on petition of any interested person or on its own motion the court may for good cause require that a bond be given, either before or after issuance of letters [*Prob. Code § 8481(b)*; *Cal. Rules of Ct., Rule 7.201(b)*]. Additionally, notwithstanding the waiver of a bond, the court in its discretion may require a nonresident personal representative to give a bond in an amount determined by the court [*Prob. Code § 8571*; *Cal. Rules of Ct., Rule 7.201(b)*].

If a will admitted to probate names two or more persons to serve as executors, but not all serve, and the will does not expressly waive bond if fewer than all of the named persons serve, the court must require each executor to give a bond unless the court waives this requirement under *Prob. Code § 8481(a)(2)* [*Cal. Rules of Ct., Rule 7.202*].

Because a corporate fiduciary (whether a personal representative, guardian, conservator, or trustee) cannot assume responsibility for the acts of an individual cofiduciary, an individual cofiduciary who is required to give a bond is required to provide a separate bond, except to the extent that the court orders the assets to be held solely by the corporate cofiduciary [*Cal. Rules of Ct., Rule 7.203*].

For a discussion of the amount of bond required, deposits in lieu of bond, and increasing and decreasing the amount of bond during administration, see Ch. 446, *Probate: Bonds--Increase and Decrease During Administration* .

Although required to take the oath of office of personal representative, a trust company as defined in *Prob. Code § 83* is not required to give any bond or security as a part of qualification for appointment as a personal representative [*see Prob. Code § 301(a)*].

Bonds furnished by a personal representative under *Prob. Code § 8480* are generally governed by the Bond and Undertaking Law (*Code Civ. Proc. §§ 995.010-996.560*) except to the extent a statute prescribes a different rule or is inconsistent [*see Code Civ. Proc. § 995.020(a)*; *Prob. Code § 8487*]. For further discussion of general procedures regarding bonds and undertakings, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal

RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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§ 442.19 Independent Administration of Estates Act

The Independent Administration of Estates Act (*Prob. Code §§ 10400 et seq.*) allows the personal representative to administer the estate without having to obtain court approval for many actions taken in connection with the estate. However, before taking certain actions, the personal representative is required to give notice to interested persons unless they have waived notice or have consented to the proposed action [*see Prob. Code § 10451(c)*].

The personal representative may request authority under the Act in the petition for administration of the estate or may petition separately for such authority at a later time [*see Prob. Code § 10450(a)*]. Authority under the Act will be granted unless an interested person objects in accordance with *Prob. Code § 1043*, and the court determines that the objecting party has shown good cause why authority should not be granted [*see Prob. Code §§ 10450, 10452*]. The petition for administration in § 442.140 includes optional language to request authority under the Act. For discussion of independent administration, forms for seeking authority for independent administration after administration has commenced, and forms for use in the course of independent administration, see Ch. 445, *Probate: Independent Administration of Estates* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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§ 442.20 Opposition to Petition for Probate

A petition for probate may be opposed with respect to the appointment of the personal representative or probate of the will. If appointment of the personal representative is contested, the grounds of opposition may include a challenge to the competency of the personal representative or the right to appointment. If the contest asserts the right of another person to appointment as personal representative, the contestant shall also file a petition and serve notice in the manner provided in *Prob. Code §§ 8110-8113*, and the court shall hear the two petitions together [*Prob. Code § 8004(a)*; *see § 442.151*]. If a will is contested, the procedure provided by *Prob. Code §§ 8250-8254* applies [*Prob. Code § 8004(b)*; for discussion, *see* Ch. 444, *Probate: Will Contests*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 442 PROBATE: INITIATING PROBATE ADMINISTRATION
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38-442 California Forms of Pleading and Practice--Annotated § 442.21

§ 442.21 Ancillary Administration

[1] Defined

"Ancillary administration" means proceedings in California for administration of the estate of a nondomiciliary decedent [*Prob. Code § 12501*]. A "nondomiciliary decedent" is a person who dies domiciled in a sister state or foreign nation [*Prob. Code § 12505*]. Additional definitions are contained in *Prob. Code §§ 12502-12504, 12506, 12507*.

[2] Initiating Ancillary Administration

[a] Procedure

Any interested person, or a sister state or foreign nation personal representative, may commence an ancillary administration proceeding by a petition to the court for (a) probate of the nondomiciliary decedent's will and/or (b) appointment of a local personal representative [*Prob. Code § 12510*].

The proper county for an ancillary administration proceeding under *Prob. Code §§ 12510-12542* is the county determined pursuant to *Prob. Code § 7052* (venue in case of nondomiciliary decedent) [*Prob. Code § 12511*; *see § 442.13*].

Notice of an ancillary administration proceeding is given and, except as provided in *Prob. Code §§ 12520-12524* [§ 442.21[3]], the same proceedings are had as in the case of a petition for probate of a will or appointment of a personal representative of a person who dies domiciled in California [*Prob. Code § 12512*].

[b] Preference for Appointment of Local Personal Representative

If the decedent dies while domiciled in a sister state, a personal representative appointed by a court of the decedent's domicile has priority over all other persons except when the decedent's will nominates a different person to be the personal representative in California. The sister state personal representative may nominate another person as personal representative and the nominee has the same priority as the sister state personal representative [*Prob. Code § 12513*].

[3] Probate of Will Admitted to Probate Outside California

[a] Procedure

If a nondomiciliary decedent's will has been admitted to probate in a sister state or foreign nation and satisfies the requirements of *Prob. Code §§ 12520-12524*, probate of the will in an ancillary administration proceeding is governed by *Prob. Code §§ 12520-12524* [*Prob. Code § 12520(a)*]. If a nondomiciliary decedent's will has been admitted to probate in a sister state or foreign nation, but does not satisfy the requirements of *Prob. Code §§ 12520-12524*, the will may be probated in an ancillary administration proceeding pursuant to *Prob. Code §§ 8000-8577* [*Prob. Code § 12520(b)*].

[b] Petition for Probate

A petition for probate of a nondomiciliary decedent's will under *Prob. Code §§ 12520-12524* must include both (1) the will or an authenticated copy of it and (2) an authenticated copy of the order admitting the will to probate in the sister state or foreign nation or other evidence of the establishment or proof of the will in accordance with the law of the sister state or foreign nation [*Prob. Code § 12521(a)*].

As used in *Prob. Code § 12521*, "authenticated copy" means a copy that satisfies the requirements of *Evid. Code §§ 1530-1532* (authentication of writings) [*Prob. Code § 12521(b)*]. For additional discussion, see *§ 442.140[8]*.

[c] Will Admitted to Probate in Sister State

If a nondomiciliary decedent's will was admitted to probate, or established or proved, in accordance with the laws of a sister state, the court must admit the will to probate in California, and may not permit a contest or revocation of probate, unless one or more of the following are shown [*Prob. Code § 12522*]:

- The determination in the sister state is not based on a finding that at the time of death the decedent was domiciled in the sister state.

- One or more interested parties were not given notice and an opportunity for contest in the proceedings in the sister state.

- The determination in the sister state is not final.

[d] Will Admitted to Probate in Foreign Nation

Except as provided below, if a nondomiciliary decedent's will was admitted to probate, or established or proved, in accordance with the laws of a foreign nation, the court must admit the will to probate in California, and may not permit a contest or revocation of probate, if it appears from the order admitting the will to probate in the foreign nation, or otherwise appears, that all of following conditions are satisfied [*Prob. Code § 12523(a)*]:

- The determination in the foreign nation is based on a finding that at the time of death the decedent was domiciled in the foreign nation.

- All interested parties were given notice and an opportunity for contest in the proceedings in the foreign nation.

- The determination in the foreign nation is final.

The court may refuse to admit the will, even though it is shown to satisfy the foregoing conditions, if the order

admitting the will was made under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law [*Prob. Code § 12523(b)*].

[e] Effect of Admission of Will

A nondomiciliary decedent's will admitted to probate under *Prob. Code §§ 12520-12524* has the same force and effect as the will of a person who dies while domiciled in California that is admitted to probate in California [*Prob. Code § 12524*].

[f] Application of General Provisions

Except to the extent otherwise provided in *Prob. Code §§ 12510-12542*, ancillary administration of a decedent's estate is subject to all other provisions of *Prob. Code §§ 7000-12591*(administration of decedents' estates), including, but not limited to, opening estate administration, inventory and appraisal, creditor claims, estate management, independent administration, compensation, accounts, payment of debts, distribution, and closing estate administration [*Prob. Code § 12530*]. For discussion of the distribution of property in an ancillary proceeding, see Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation* .

Legal Topics:

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

§§ 442.22[Reserved]

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§ 442.40 California Points and Authorities

For memoranda of points and authorities related to forms in this chapter, see California Points and Authorities, Ch. 186, *Probate of Wills* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-442 California Forms of Pleading and Practice--Annotated § 442.41

§ 442.41 State Statutes

[1] Ancillary Administration

Definitions. *Prob. Code §§ 12500-12507*

Commencement of proceedings. *Prob. Code § 12510*

Venue. *Prob. Code § 12511*

Procedure. *Prob. Code § 12512*

Preference for appointment as local personal representative. *Prob. Code § 12513*

Applicable procedure. *Prob. Code § 12520*

Petition for probate of nondomiciliary decedent's will. *Prob. Code § 12521*

Admission of will admitted to probate in sister state. *Prob. Code § 12522*

Admission of will admitted to probate in foreign nation. *Prob. Code § 12523*

Effect of admission of nondomiciliary decedent's will. *Prob. Code § 12524*

[2] Bond

Application of Bond and Undertaking Law. *Code Civ. Proc. § 995.020(a)*; *Prob. Code § 8487*

Execution, filing, and effect of bond. *Code Civ. Proc. §§ 995.310-995.440*

Sureties. *Code Civ. Proc. §§ 995.510-995.660*

Deposit in lieu of bond. *Code Civ. Proc. § 995.710*

Written affirmation in lieu of oath. *Code Civ. Proc. § 2015.6*

Form for clerk's certification. *Evid. Code § 1531*

Reduction in amount of bond by deposit in insured account. *Prob. Code §§ 8401, 8483*

Bond as required. *Prob. Code § 8480*

Waiver of bond. *Prob. Code § 8481*

Amount of bond. *Prob. Code § 8482*

Petition to reduce bond. *Prob. Code § 8484*

Cost of bond. *Prob. Code § 8486*

[3] Community Property

Intestate succession of community property or quasi-community property. *Prob. Code §§ 100, 101*

Intestate share of issue of predeceased spouse. *Prob. Code § 6402.5*

[4] Disqualification of Judge

Disqualification of judge. *Prob. Code § 7060*

[5] General Procedural Provisions

Verification. *Code Civ. Proc. § 446*; *Prob. Code §§ 1021, 1023*

Conclusiveness and effect of judgment. *Code Civ. Proc. § 1908*

Declaration under penalty of perjury in lieu of affidavit. *Code Civ. Proc. § 2015.5*

Application of rules of practice of Code of Civil Procedure to probate proceedings. *Prob. Code § 1000*

Application of Judicial Council and local court rules to probate proceedings. *Prob. Code § 1001*

Costs. *Prob. Code § 1002*

Appointment of guardian ad litem. *Prob. Code § 1003*

Evidentiary effect of verified petition. *Prob. Code § 1022*

[6] Holographic Will

Requirements of holographic will. *Prob. Code § 6111*

Admissibility of extrinsic evidence. *Prob. Code § 6111.5*

Proof of holographic will. *Prob. Code § 8222*

[7] Intestate Succession

Rules of intestate succession. *Prob. Code § 6400 et seq.*

[8] Jurisdiction and Venue

Jurisdiction of probate court to supervise real property transaction is not diminished by *Code Civ. Proc. § 1298* (arbitration clauses in specified contracts for conveyance and in contracts between principal and agents in real property sales transactions). *Code Civ. Proc. § 1298(d)*

Recital of jurisdiction is unnecessary in orders and decrees in probate proceedings. *Prob. Code § 1047*

Jurisdiction and venue. *Prob. Code §§ 7050-7052*

Transfer of proceedings. *Prob. Code §§ 7070-7072*

Conclusiveness of order admitting will to probate or appointing personal representative. *Prob. Code § 8007*

[9] Lost or Destroyed Will

Proof of lost or destroyed will. *Prob. Code § 8223*

[10] Notice

[a] Generally

Notice requirement on petition to administer estate. *Prob. Code § 8003*

Form of notice. *Prob. Code § 8100*

[b] Service

Persons on whom notice must be served. *Prob. Code § 8110*

Service on attorney general. *Prob. Code § 8111*

Notice to creditors and public entity claimants. *Prob. Code § 8112*

Notice involving foreign citizen. *Prob. Code § 8113*

[c] Publication

Publication required. *Prob. Code § 8120*

Publication procedure. *Prob. Code § 8121*

Good faith compliance with publication requirement. *Prob. Code § 8122*

Type size. *Prob. Code § 8123*

Affidavit of publication. *Prob. Code § 8124*

Contents of subsequent published notice. *Prob. Code § 8125*

[11] Personal Representative

[a] General Provisions

"Letters" defined. *Prob. Code § 52*

"Personal representative" defined. *Prob. Code § 58*

Validity of acts performed by fiduciary pending appeal of order of appointment. *Prob. Code § 1311*

Appointment necessary. *Prob. Code § 8400(a)*

Power prior to appointment. *Prob. Code §§ 8400(b), 8401*

Qualifications. *Prob. Code § 8402*

Oath. *Prob. Code § 8403*

Statement of duties and liabilities. *Prob. Code § 8404*

Form of letters. *Prob. Code § 8405*

[b] Administrator

Appointment of administrator. *Prob. Code § 8460*

Priority for appointment. *Prob. Code § 8461*

Priority of relatives. *Prob. Code § 8462*

Appointment of surviving spouse. *Prob. Code § 8463*

Appointment when minor or incompetent is entitled to priority. *Prob. Code § 8464*

Nominee of person entitled to appointment. *Prob. Code § 8465*

Appointment of creditor. *Prob. Code § 8466*

Equal priority for appointment. *Prob. Code § 8467*

Failure to claim appointment. *Prob. Code § 8468*

[c] Administrator With Will Annexed

Appointment of administrator with will annexed. *Prob. Code § 8440*

Priority for appointment. *Prob. Code § 8441*

Authority of administrator with will annexed. *Prob. Code § 8442*

[d] Executor

Right to appointment. *Prob. Code § 8420*

Appointment when executor appears from terms of will but is not named in it. *Prob. Code § 8421*

Power to designate executor in will. *Prob. Code § 8422*

Appointment of successor trust company. *Prob. Code § 8423*

Minor named as executor. *Prob. Code § 8424*

Authority when fewer than all executor appointed. *Prob. Code § 8425*

[e] Special Administrators

Grounds for appointment. *Prob. Code § 8540*

Procedure for appointment. *Prob. Code § 8541*

Issuance of letters. *Prob. Code § 8542*

Waiver of bond. *Prob. Code § 8543*

Special powers, duties, and obligations. *Prob. Code § 8544*

General powers, duties, and obligations. *Prob. Code § 8545*

Termination of authority. *Prob. Code § 8546*

Compensation. *Prob. Code § 8547*

[12] Petition for Administration of Estate

Who may petition. *Prob. Code § 8000*

Failure of person named as executor to petition. *Prob. Code § 8001*

Contents of petition. *Prob. Code § 8002*

Setting and notice of hearing. *Prob. Code § 8003*

Opposition. *Prob. Code § 8004*

Hearing. *Prob. Code § 8005*

Order. *Prob. Code § 8006*

[13] Probate Referee

Designation of probate referee. *Prob. Code §§ 400-408, 8920-8923*

Duties and powers probate referee. *Prob. Code §§ 450-453, 8900, 8902*

[14] Production of Will

Delivery of will. *Prob. Code § 8200*

Order for production. *Prob. Code § 8201*

Will detained outside *California. Prob. Code § 8202*

Transfer of will to court of county in which proceeding is pending. *Prob. Code § 8203*.

[15] Proving Will

Proof of when subscribing witness not available. *Evid. Code § 1416*; *Prob. Code § 8221*

Proof by subscribing witness in uncontested proceeding. *Prob. Code § 8220*

Preservation of testimony in proceeding concerning execution or provisions of will. *Prob. Code § 8224*

Recording admission of will to probate in minutes. *Prob. Code § 8225*

Conclusiveness of admission to probate. *Prob. Code § 8226*

[16] Validity and Construction of Wills

Validity and rules of construction. *Prob. Code §§ 6100-6390*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 442.42 California Rules of Court

[1] Appointment of Executors and Administrators

Requirement that personal representative execute and file Judicial Council Form DE-147. *Cal. Rules of Ct., Rule 7.150*

[2] Bonding of Personal Representatives, Guardians, Conservators, and Trustees

Statement in petition when bond waived. *Cal. Rules of Ct., Rule 7.201(a)*

Bond requirement despite waiver, for out-of-state personal representative or on good cause. *Cal. Rules of Ct., Rule 7.201(b)*

Bond requirement when two or more representatives. *Cal. Rules of Ct., Rule 7.202*

Requirement of separate bonds for cofiduciaries. *Cal. Rules of Ct., Rule 7.203*

Procedure to increase bond. *Cal. Rules of Ct., Rule 7.204*

Additional bond on sale of real estate. *Cal. Rules of Ct., Rule 7.206*

[3] General Provisions

Applicability of rules. *Cal. Rules of Ct., Rule 7.2(a)*

Purpose of rules. *Cal. Rules of Ct., Rule 7.2(b)*

Construction of rules. *Cal. Rules of Ct., Rule 7.2(c)*

Definitions that apply. *Cal. Rules of Ct., Rule 7.3*

Waiver of rules in individual case for good cause. *Cal. Rules of Ct., Rule 7.4*

Publication and notice of petition to administer estate. *Cal. Rules of Ct., Rule 7.54*

Signature and verification of pleadings. *Cal. Rules of Ct., Rule 7.103*

[4] Independent Administration of Estates

Reporting requirements. *Cal. Rules of Ct., Rule 7.250*

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§ 442.43 Local Court Rules

[1] Allegations in Petitions re Heirs

Los Angeles Co. Super. Ct. Rules, Rule 10.48

Orange Co. Super. Ct. Rules, Rule 603.04

Sacramento Co. Local Ct. Rules, Rule 15.32

San Bernardino Co. Prob. Pol. Mem. § 604

San Diego Co. Coordinated Ct. Rules, Div. IV, Rule 1.63

San Francisco Uniform Local Ct. Rules, Rule 14.35(D)

[2] Appointment of Executors and Administrators

San Francisco Uniform Local Ct. Rules, Rule 14.34(A)

[3] Copy of Will to Be Attached to Petition for Probate

Alameda Co. Unified Super. Ct. Rules, Rule 12.2.2.4

Los Angeles Co. Super. Ct. Rules, Rule 10.53

Marin Co. Rule, Probate 5.18(A), (B)

Orange Co. Super. Ct. Rules, Rule 603.02

Sacramento Co. Local Ct. Rules, Rule 15.30

San Bernardino Co. Prob. Pol. Mem. § 603

San Francisco Uniform Local Ct. Rules, Rule 14.40

[4] Granting of Letters Pursuant to Various Forms of Petitions

Alameda Co. Unified Super. Ct. Rules, Rule 12.2.5

Los Angeles Co. Super. Ct. Rules, Rule 10.59

San Francisco Uniform Local Ct. Rules, Rule 14.34

[5] Notice by Mail; by Whom Given

Alameda Co. Unified Super. Ct. Rules, Rule 12.2.5

Los Angeles Co. Super. Ct. Rules, Rule 10.50

Marin Co. Rule, Probate 5.13

Sacramento Co. Local Ct. Rules, Rule 15.21(A)

San Francisco Uniform Local Ct. Rules, Rule 14.30

[6] Notice re Petition for Letters of Administration With Will Annexed When Will Previously Admitted

Alameda Co. Unified Super. Ct. Rules, Rule 12.2.5.1

Los Angeles Co. Super. Ct. Rules, Rule 10.49

San Bernardino Co. Prob. Pol. Mem. § 203

[7] Notice re Petition for Letters Testamentary When Will Previously Admitted

Alameda Co. Unified Super. Ct. Rules, Rule 12.2.5.1

Los Angeles Co. Super. Ct. Rules, Rule 10.49

San Bernardino Co. Prob. Pol. Mem. § 203

San Francisco Uniform Local Ct. Rules, Rule 14.36(F)

[8] Petitions for Probate of Holographic Will

Alameda Co. Unified Super. Ct. Rules, Rules 12.2.2.3, 12.2.2.4

Los Angeles Co. Super. Ct. Rules, Rule 10.53, 10.54(b)

Orange Co. Super. Ct. Rules, Rule 603.02

San Bernardino Co. Prob. Pol. Mem. § 603

San Francisco Uniform Local Ct. Rules, Rule 14.35(A)

[9] Proof of Wills by Affidavit or Declaration

Alameda Co. Unified Super. Ct. Rules, Rule 12.2.2.2

Los Angeles Co. Super. Ct. Rules, Rule 10.54

Marin Co. Rule, Probate 5.20

Orange Co. Super. Ct. Rules, Rule 603.11

Sacramento Co. Local Ct. Rules, Rule 15.29

San Francisco Uniform Local Ct. Rules, Rule 14.37

[10] Requirements of Publication of Notice of Probate of Will

Alameda Co. Unified Super. Ct. Rules, Rule 12.2.3

Los Angeles Co. Super. Ct. Rules, Rules 10.50, 10.62, 10.71

Marin Co. Rule, Probate 5.19(C), (D)

Sacramento Co. Local Ct. Rules, Rule 15.34

San Bernardino Co. Prob. Pol. Mem. § 202

San Francisco Uniform Local Ct. Rules, Rule 14.30

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§ 442.44 Decisions

[1] Administrators

Surviving spouse's nominated son, had priority over decedent's daughter in obtaining letters of administration under *Prob. Code § 8461* when the past filing of a dissolution action by surviving spouse was dismissed for lack of prosecution, resulting in surviving spouse having priority under *Prob. Code § 8463*, as well as her son, as nominee, under *Prob. Code § 8465*. *Estate of Garrett (2008) 159 Cal. App. 4th 831, 839, 71 Cal. Rptr. 3d 864*

Putative spouse (former *Civ. Code § 4452*; *now see Fam. Code § 2251*) is surviving spouse within meaning of former *Prob. Code § 422* (*now see Prob. Code § 8461*) and thus is entitled to first priority in grant of letters of administration. *Estate of Leslie (1984) 37 Cal. 3d 186, 200-201, 204, 207 Cal. Rptr. 561, 689 P.2d 133*

Alleged biological child of decedent is not entitled to priority under former *Prob. Code § 422* (*now see Prob. Code § 8461*) when conclusive presumption of former *Evid. Code § 621(a)* (*now see Fam. Code § 7540*) applies to make alleged child the child of one other than decedent. *Estate of Cornelious (1984) 35 Cal. 3d 461, 467, 198 Cal. Rptr. 543, 674 P.2d 245*

Appointment of general administrator is authorized only in absence of testamentary disposition. *Estate of Edwards (1908) 154 Cal. 91, 93, 97 P. 23*

Filing of petition for letters and posting of notice are jurisdictional. *Estate of Aldrich (1905) 147 Cal. 343, 345, 81 P. 1011*

Decedent's heirs precluded from nominating administrator if they are not United States residents. *Estate of Damskog (1991) 1 Cal. App. 4th 78, 81, 1 Cal. Rptr. 2d 653*

Remarriage of surviving spouse does not vitiate preferred status for obtaining letters of administration under former *Prob. Code § 422(a)(1)* (*now see Prob. Code § 8461*). *Estate of Lindsey (1980) 108 Cal. App. 3d 428, 436, 166 Cal. Rptr. 511*

Timely filing of counterpetition for letters of administration (former *Prob. Code § 442* (*now see Prob. Code § 8004(a)*)) is required to ensure notice to decedent's heirs so that one contested hearing may be held; surviving spouse is entitled to seek revocation of letters of administration and assert prior right to obtain letters (former *Prob. Code § 452* (*now see Prob. Code § 8503*)) even though he or she failed to timely file counterpetition to contest original petition under former *Prob. Code § 442* (*now see Prob. Code § 8004(a)*). *Estate of Lindsey (1980) 108 Cal. App. 3d 428, 433-434, 166 Cal. Rptr. 511*

Nominee of nonresident heir has no better standing to serve as administrator than nonresident heir. *Estate of Pascoe (1966) 242 Cal. App. 2d 85, 87, 51 Cal. Rptr. 91* (dictum)

"Any person interested," and therefore able to oppose a petition for letters of administration, under former *Prob. Code § 442* (*now see Prob. Code §§ 1043, 8004*), means a person entitled to share absolutely or contingently in the estate. *Estate of Lyons (1955) 132 Cal. App. 2d 790, 793, 283 P.2d 66*

[2] Appearance by Executor In Propria Persona

Executor or personal representative of decedent's estate who is not licensed to practice law is not authorized to appear in pro per on behalf of estate in matters outside probate proceedings. *Hansen v. Hansen (2003) 114 Cal. App. 4th 618, 621-622* ; *7 Cal. Rptr. 3d 688*

[3] Citations

Nature and use of citation in probate proceedings. *Horney v. Superior Court (1948) 83 Cal. App. 2d 262, 266-267, 188 P.2d 552*

[4] Collateral Attack on Order for Probate

Order admitting will to probate may be set aside on grounds of extrinsic fraud. *Estate of Starkweather (1998) 64 Cal. App. 4th 580, 594, 75 Cal. Rptr. 2d 766* .

Collateral attack on order admitting will to probate and granting letters of administration made approximately one year after entry of order was not barred by period of limitation of former Prob. Code § 384 (*now see Prob. Code §§ 8226(a), 8270(b)*) when motion was based on lack of subject matter jurisdiction. *Estate of Buckley (1982) 132 Cal. App. 3d 434, 451-452, 183 Cal. Rptr. 281*

Trial court properly entertained collateral attack on order admitting will to probate and granting letters of administration when there had been no publication of notice of death and of petition to administer estate pursuant to former Prob. Code § 333 (*now see Prob. Code §§ 8120-8125*), because publication of notice is required for subject matter jurisdiction. *Estate of Buckley (1982) 132 Cal. App. 3d 434, 443-451, 183 Cal. Rptr. 281*

Collateral attack on order admitting will to probate and granting letters of administration made approximately one year after entry of order is not barred by laches when delay in bringing motion did not result in disadvantage or prejudice to opposing party. *Estate of Buckley (1982) 132 Cal. App. 3d 434, 451-452, 183 Cal. Rptr. 281*

[5] Dependent Relative Revocation

Doctrine of dependent relative revocation discussed and applied. *Estate of Cuneo (1963) 60 Cal. 2d 196, 202-206, 32 Cal. Rptr. 409, 384 P.2d 1* ; *Estate of Salmonski (1951) 38 Cal. 2d 199, 212-213, 238 P.2d 966* ; *Estate of Kaufman (1945) 25 Cal. 2d 854, 856-861, 155 P.2d 831* ; *Estate of Robertson (1968) 266 Cal. App. 2d 866, 867-869, 72 Cal. Rptr. 396* ; *Estate of Strickman (1966) 247 Cal. App. 2d 469, 474, 55 Cal. Rptr. 606*

General revocation clause in last will can encompass power of appointment exercised in earlier will. Estate of Anderson *(1997) 56 Cal. App. 4th 235, 242-244 65 Cal. Rptr. 2d 307*

[6] Executor

Court may not appoint executor named in will if court finds that the individual is unqualified. *Estate of Hammer (1993) 19 Cal. App. 4th 1621, 1642-1643, 24 Cal. Rptr. 2d 190*

Executor named in will is entitled to letters even though title to property claimed by other heirs stands in his/her name; such conflict of interest is not ground of incompetency under former *Prob. Code § 401* (*now see Prob. Code § 8402*). *Estate of Backer (1985) 164 Cal. App. 3d 1159, 1164-1165, 211 Cal. Rptr. 163 , superseded by statute as stated in 175 Cal. App. 4th 1414 (2009).*

Court does not abuse discretion in issuing letters to person named in will as personal representative, even though he was married to beneficiary of estate and had filed creditor's claim, because possession of adverse interest in decedent's estate is not ground for disqualification under former *Prob. Code § 401* (*now see Prob. Code § 8402*). *Estate of Buckley (1982) 132 Cal. App. 3d 434, 456-457, 183 Cal. Rptr. 281*

After vacating prior order admitting will to probate and granting letters of administration, court is not precluded from issuing letters to person named as personal representative in will, even though that person could be held to have renounced right to letters pursuant to former Prob. Code § 324 (*now see Prob. Code § 8001*) by failing to apply for them within 30 days after notice of death, because former Prob. Code § 324 is discretionary. *Estate of Buckley (1982) 132 Cal. App. 3d 434, 454-455, 183 Cal. Rptr. 281*

[7] Holographic Will

Denial of probate of holographic will is improper when will was written, dated, and signed by testator, her testamentary intent was clearly revealed in words as she wrote them, and preprinted incorporated material was neither material to substance of will nor essential to its validity. *Estate of Black (1982) 30 Cal. 3d 880, 882, 888, 181 Cal. Rptr. 222, 641 P.2d 754* (decided under former *Prob. Code § 53*; *now see Prob. Code § 6111*)

Handwritten document in which decedent wrote his name in block letters at the top, stated the disposition of some of his assets, and included some language of testamentary intent, was a valid holographic will. *Estate of Williams (2007) 155 Cal. App. 4th 197, 207, 66 Cal. Rptr. 3d 34*

Photocopies of testator's handwritten dispositions, if properly authenticated, satisfy statutory requirement that material provisions of holographic will be in testator's handwriting. *Estate of Brenner (1999) 76 Cal. App. 4th 1298, 1301-1302, 91 Cal. Rptr. 2d 149*

Absence of date on holographic will written when former *Prob. Code § 53* required date and when testator lost testamentary capacity before former *Prob. Code § 53* was repealed does not invalidate will, because retroactive application of statutes dispensing with will execution formalities are based not on ambulatory nature of wills but on strong policy of law to uphold, when possible, validity of wills. *Estate of MacLeod (1988) 206 Cal. App. 3d 1235, 1244, 254 Cal. Rptr. 156*

Holographic will appearing to be complete testamentary document is valid when signed elsewhere than at end. *Estate of MacLeod (1988) 206 Cal. App. 3d 1235, 1241-1243, 254 Cal. Rptr. 156* ; *Estate of Archer (1987) 193 Cal. App. 3d 238, 244, 239 Cal. Rptr. 137*

Additions or alterations to a holographic will made after date on which it was signed, when made in testator's handwriting and with testamentary intent, operates to adopt old date and signature. *Estate of Archer (1987) 193 Cal. App. 3d 238, 244, 239 Cal. Rptr. 137*

Presence of witnesses' signatures do not invalidate holographic will that is otherwise effective. *Estate of Archer (1987) 193 Cal. App. 3d 238, 243, 239 Cal. Rptr. 137*

Unsigned holographic codicil is not entitled to be probated; will by definition is unable to incorporate future codicils; codicil does not incorporate will by referring to it nor as integrated into will. *Estate of Twohig (1986) 178 Cal. App. 3d 555, 560-562, 223 Cal. Rptr. 352* (decided under former *Prob. Code § 53*; *now see Prob. Code § 6111*)

Will in testator's handwriting on preprinted form, which testator intended to be formal will and which was falsely witnessed, could not be probated as holographic will. *Estate of Brown (1985) 171 Cal. App. 3d 1064, 1069, 218 Cal. Rptr. 108* (decided under former *Prob. Code § 53*; *now see Prob. Code § 6111*)

[8] Jurisdiction

Rule that jurisdiction of superior courts sitting in probate to administer decedents' estates does not encompass power to pass on assertions of title to property by parties not in privity with estate but claiming adversely to it, and exceptions to rule. *Estate of Baglione (1966) 65 Cal. 2d 192, 196, 53 Cal. Rptr. 139, 417 P.2d 683*

In a court that has a probate department, a nonprobate department does not lack jurisdiction over a probate matter; a probate department merely has "primary" jurisdiction and a nonprobate department has "secondary" jurisdiction of probate-related proceedings. *Harnedy v. Whitty (2003) 110 Cal. App. 4th 1333, 1344, 2 Cal. Rptr. 3d 798*

By giving notice prescribed by statute, court acquires jurisdiction over all persons for purposes of determining their rights to any portion of the estate. *Parage v. Couedel (1997) 60 Cal. App. 4th 1037, 1042, 70 Cal. Rptr. 2d 671*

Although probate court has all powers of the superior court when considering cases brought before it under the Probate Code, its jurisdiction is limited in that it may exercise only those powers over decedents' estates that are conferred on it by statute. *Estate of Jimenez (1997) 56 Cal. App. 4th 733, 739-740, 65 Cal. Rptr. 2d 710*

Dispute between heirs as to burial arrangements for decedent is not within jurisdiction of probate court when decedent's wishes area not contained in the will; parties' remedy is a civil action in superior court, not a petition in probate. *Estate of Jimenez (1997) 56 Cal. App. 4th 733, 740-742, 65 Cal. Rptr. 2d 710*

Jurisdiction; residence of decedent who entered state after being adjudicated incompetent. *Estate of Phillips (1969) 269 Cal. App. 2d 656, 659-665, 75 Cal. Rptr. 301*

Court lacks jurisdiction to consider legality of will until will is properly brought before court by petition for probate. *Estate of Olson (1962) 200 Cal. App. 2d 234, 237, 19 Cal. Rptr. 307*

[9] Nature of Proceedings

Probate proceedings are in rem; that is, they seek to affect the interests of all persons in certain property; in such proceedings constructive notice authorized by statute satisfies the requirements of due process. *Parage v. Couedel (1997) 60 Cal. App. 4th 1037, 1042, 70 Cal. Rptr. 2d 671*

Probate proceedings must be handled expeditiously to effect prompt distribution of property to decedent's designated beneficiaries and to avoid unnecessary delay or expense. *Estate of Horn (1990) 219 Cal. App. 3d 67, 71, 268 Cal. Rptr. 41*

[10] Procedural Provisions

Determination whether nonsuit should be granted in proceeding to contest holographic will is governed by same rules that apply to civil cases. *Estate of Callahan (1967) 67 Cal. 2d 609, 612, 63 Cal. Rptr. 277, 432 P.2d 965*

There is no right to appeal from any probate orders except as specified in the *Probate Code. Estate of Stoddart (2004) 115 Cal. App. 4th 1118, 1126* ; *9 Cal. Rptr. 3d 770* (order denying motion for reconsideration is not one of orders made appealable by *Prob. Code §§ 1300-1304*)

Cal. Rules of Ct., Rule 3.1702 (formerly 870.2), governing motions for attorney's fees, does not apply to a request for attorney's fees in a probate proceeding. *Hollaway v. Edwards (1998) 68 Cal. App. 4th 94, 99, 80 Cal. Rptr. 2d 166* (attorney's fees deriving from probate proceedings are subject to concerns sufficiently unique to distinguish them from fees generated in ordinary civil litigation)

Rulings in probate proceedings are not appealable unless expressly made appealable by statute; primary reason for this rule is to prevent delay in distribution of estates. *Varney v. Superior Court (1992) 10 Cal. App. 4th 1092, 1098, 12 Cal. Rptr. 2d 865*

Probate court has jurisdiction under *Code Civ. Proc. § 473* to vacate orders issued under the *Probate Code. Estate of Maniscalco (1992) 9 Cal. App. 4th 520, 522 n.2, 11 Cal. Rptr. 2d 803*

As in any other proceeding, a petitioner in a probate proceeding must have standing. *Estate of Weber (1991) 229 Cal. App. 3d 22, 25 n.4, 280 Cal. Rptr. 22*

As a general rule, a probate court should not be required to act on its own motion to postpone a hearing on admitting a will to probate even when a petition contesting the will is in the probate file; the contestant must appear or otherwise inform the court of the status of the contest. *Estate of Horn (1990) 219 Cal. App. 3d 67, 72, 268 Cal. Rptr. 41*

General rules of practice on procedural matters apply in probate proceedings unless the Probate Code provides a special rule. *Swaithes v. Superior Court (1989) 212 Cal. App. 3d 1082, 1088-1089, 261 Cal. Rptr. 41* (*Code Civ. Proc. § 36(a)* provision for preferential trial setting applies in probate proceedings)

Discovery procedures under Code of Civil Procedure are available for use in probate proceedings. *Morris Stulsaft Foundation v. Superior Court (1966) 245 Cal. App. 2d 409, 415, 54 Cal. Rptr. 12*

[11] Special Administrators

Special administration proceeding as distinct from general administration proceeding. *Miller v. Superior Court (1921) 186 Cal. 453, 456-458, 199 P. 805* ; *Estate of Damke (1901) 133 Cal. 433, 435-436, 65 P. 888*

[12] Statutory Will

When statutory will is signed by testator and two attesting witnesses, will is vaild under general execution requirements of *Prob. Code § 6221*, even though specific requirements of *Prob. Code § 6221* are not met because someone other than testator had filled in blanks. *Estate of Perry (1996) 51 Cal. App. 4th 440, 445, 58 Cal. Rptr. 2d 797* ; see also *Estate of Smith (1998) 61 Cal. App. 4th 259, 266-269, 71 Cal. Rptr. 2d 424* (execution requirements met despite testator's failure to fill in some blanks on statutory will with trust form under former *Prob. Code § 6241*)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateJurisdiction & VenueGeneral OverviewEstate, Gift & Trust LawWill ContestsGeneral OverviewEstate, Gift & Trust LawWill ContestsRevocationGeneral OverviewEstate, Gift & Trust LawWillsGeneral OverviewEstate, Gift & Trust LawWillsHandwritten & Oral WillsGeneral OverviewEstate, Gift & Trust LawWillsHandwritten & Oral WillsRequirementsEstate, Gift & Trust LawWillsStatutory Wills

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38-442 California Forms of Pleading and Practice--Annotated § 442.45

§ 442.45 Law Reviews

Schlesinger, *A Postmortem Estate Planning Checklist (Part 1),* 30(2) Prac. Law. 11 (1984)

Schlesinger, *A Postmortem Estate Planning Checklist (Part 2),* 30(3) Prac. Law. 35 (1984)

De Meo, *A System of Marshaling Estate Assets*, 25(6) Prac. Law. 53 (1979)

Niles, *Probate Reform in California, 31 Hastings L.J. 185 (1979)*

Comment, *Notice Requirements in California Probate Proceedings, 66 Calif. L. Rev. 1111 (1978)*

Hancock, *Conceptual Devices for Avoiding the Land Taboo in Conflict of Laws: The Disadvantages of Disingenuousness, 20 Stan. L. Rev. 1 (1968)*

Note, *Consequences of California's Adopting the Uniform Additions to Trust Act [Probate Code Sections 170-173], 15 UCLA L. Rev. 217 (1967)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesAppointmentEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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§ 442.46 Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate, §§ 61*, 179-181, 398, *425-455*, 543-552, 583-590 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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[Reserved]

§§ 442.47[Reserved]

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PART IV. PROCEDURAL CHECKLIST
A. Client Interview--Facts And Documents

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§ 442.60 Facts

1. As to client.

a. Name.

b. Residence: street address, city, state, and zip code.

c. Residence telephone.

d. Occupation.

e. Business address.

f. Business telephone.

g. Relationship to deceased.

h. Capacity, whether named executor or executrix, applicant for letters of administration, or other.

2. As to deceased.

a. Name in full, together with variations in name style employed, such as use of first initial for one or both first and middle names. Also, inquire as to use of any pseudonym, especially if deceased was in entertainment or literary field.

b. Date of death.

c. Place of death: street address, city, county, and state, together with specification as to hospital, residence, or other place.

d. Cause of death.

e. Length of illness.

f. Attending physician.

g. Disposition of remains.
(1) If attended to, ascertain name and address of funeral director and disposition.

(2) If not attended to, inquire as to instructions concerning disposition [*Health & Safety Code § 7100*], including anatomical gifts [*Health & Safety Code §§ 7151-7156*].

(3) If necessary, arrange with deceased's representative for disposition of remains, first obtaining consent of next of kin. As to responsibility for arrangements, see *Health & Safety Code §§ 7100, 7103*.

h. Place of residence at death: street address, city, county, and state, together with length of residence there.

i. Date of birth.

j. Place of birth.

k. Residence in California: times and places.

l. Residence outside California: times and places.

m. Marital status: if married, date and place, together with residence at date of marriage.

n. Name, age, and address of surviving spouse, if any.

o. If widowed, name of deceased spouse and date of death.

p. Previous marriage, if any, together with date and place of marriage, name of former spouse, and mode of termination of marriage, by divorce, annulment, or death of spouse, together with date and place of termination.

NOTE:
Questions eliciting facts similar to those set forth in items m. through p., ***above***, may be asked with respect to any registered domestic partnership [***see*** *Fam. Code § 297.5(c)*].

q. Names, ages, and addresses of surviving children, if any, and name of other parent.

r. Existence and location of a will.

s. Names, ages, and addresses of grandchildren and more remote descendants, as pertinent.

t. If having neither spouse, registered domestic partner, nor descendants, names and addresses of parents, brothers and sisters, and others who are legal heirs, as pertinent [*see* Table of Consanguinity and Chart of Relationships].

u. Social security number.

v. Service in armed forces: dates of service, branch, serial number, and rate or rank.

w. If employed by others, dates, place, and position of last employment. If last employment was of relatively short duration, inquire similarly as to previous employment.

x. If self-employed, dates and place of employment, and whether as sole proprietor, partner, or associate.

y. Name and address of accountant.

z. Memberships in clubs and social organizations.

3. Assets of deceased.

NOTE:

In order to prepare a petition for probate of a will or for letters of administration counsel must obtain the character and estimated value of the estate of deceased. The first interview in this respect should consist of a combination of inquiry as to known property, instruction as to search for other possibly existing but unknown property, and instruction as to data required on the respective items or categories of property.

a. Inquire as to safe deposit boxes and other depositories which may be expected to hold deeds, bonds, stock certificates, and other documents of value, and the names of persons having keys and access thereto.

b. Inquire as to accounts with banks, savings and loan associations, brokerage houses, and the like, together with the location of passbooks and other records of ownership.

c. Instruct the representative to examine, or have examined, carefully the deceased's personal effects for indicia of bank accounts, safe deposit boxes, and other depositories of assets. The search should extend to wallets, purses, clothing pockets, books, magazines, desk drawers, household containers, and the like. Close attention should be paid to any cryptic notes, which sometimes refer to places or persons that will produce assets or information leading to assets. In examining the decedent's effects, have at least two persons present to guard against possible charges of wrongdoing.

d. Have the representative interview family, friends, business associates, and others as appropriate for information about the affairs and property of the deceased.

e. Instruct the representative to circularize letters to ascertain bank accounts, safe deposit boxes, brokerage accounts, savings and loan accounts, and the like.

f. Data required on real property. Have the representative obtain and furnish the following information:

(1) Location of property by city, county, and state;

(2) Common description;

(3) Improvements;

(4) Location of deeds to property;

(5) Extent of ownership (full interest, half interest, or other);

(6) Estimated value at date of death;

(7) Probable annual income.

g. Data required on personal property. Have the representative obtain and supply the following data:

(1) Cash: amount and location;

(2) Bonds: location of bonds, estimated value at date of death, name and address of broker;

(3) Stocks: location of certificates, estimated value at date of death, name and address of broker;

(4) Other items of personal property of value: common description, location, estimated value at date of death;

(5) Probable annual income from personal property.

h. Ascertain nature of ownership of real and personal property (community property, separate property, joint tenancy, etc.) [for a discussion of community and separate property, *see* Ch. 122, *Community Property*].

NOTE:
Property cannot be community property and held in joint tenancy at the same time. For an explanation of the tax implications involved in characterizing property, see Ch. 453I, *Probate: Estate Tax* .

4. Instructions to deceased's personal representative.

a. If client is the personal representative of the deceased, make certain that he or she understands his or her powers and duties [*see Prob. Code § 9600 et seq.*].

b. In particular, advise him or her as to necessity of taking immediate steps for preservation of the estate. In this connection, see Paragraph II(C).

5. Commissions and fees.

a. If client is the representative of the deceased, inform client that if there is provision in the will for compensating the representative for his and only or her services, that provision generally will be full compensation [*Prob. Code § 10802(a)*]. Representative may petition the court for relief from provision of will that provides for compensation of representative, pursuant to *Prob. Code § 10802* [*Prob. Code §*

10802(b); *see Prob. Code § 10802(c)* (notice requirements for hearing on petition)]. After a hearing on the petition, if court determines that it is to advantage of estate and in best interest of persons interested in estate, court may make an order authorizing compensation for representaitve in an amount greater than provided in will [*Prob. Code § 10802(d)*].

b. Inform client of the graded commissions set forth in *Prob. Code § 10800*. Make certain that client as representative understands that the commissions constitute payments for duties performed [*see Estate of Buchman (1955) 138 Cal. App. 2d 228, 235, 291 P.2d 547]* .

NOTE:

Notwithstanding any provision in the will, a personal representative who is an attorney may receive the personal representative's compensation but may not receive compensation for acting as the attorney for the estate unless the court specifically approves the right to the compensation in advance and finds that the arrangement is to the advantage, benefit, and best interests of the estate [*Prob. Code § 10804*].

c. Inform client that attorney's fees are set by law [*Prob. Code §§ 10810, 10811*] for services performed and that scale is the same as that for representative's commissions. However, if the attorney is representing a person filing a petition under *Prob. Code §§ 13650(a)* and *13651*, the fees may be set by a private agreement with the client, without court approval [*see Prob. Code § 13660*].

d. If the representative is unwilling or unable to perform all of his or her duties, consider an arrangement with representative, evidenced by an agreement in writing, to perform certain of representative's duties. In the absence of an agreement, the representative is not personally liable for attorney's fees or other costs incurred on behalf of the estate [*see Hatch v. Bush (1963) 215 Cal. App. 2d 692, 703, 30 Cal. Rptr. 397]* ; they are payable out of the estate.

e. In case of a contest for letters testamentary or letters of administration, obtain a contract from the client for payment of legal fees. Legal fees in connection with a contest of a will or opposition to an appointment are not necessarily payable out of the estate [*see Estate of Morinini (1967) 252 Cal. App. 2d 805, 806-809, 60 Cal. Rptr. 813]* .

f. In case of a will contest, consider the law, respectively, as to contests before probate of the will and contests afterwards. The representative has a right, but no duty, to oppose contest of a will before probate [*Estate of Hite (1909) 155 Cal. 448, 454-455, 101 P. 448* ; *Estate of Schwartz (1948) 87 Cal. App. 2d 569, 574, 197 P.2d 223]* , and the attorney's fees for opposing the will contest are not payable out of the estate [*Estate of Schwartz (1948) 87 Cal. App. 2d 569, 574, 197 P.2d 223]* .

NOTE:

Therefore, if opposing a contest before probate, obtain a contract from the client for payment by him or her personally. If the contest is after probate, the personal representative has a duty to defend the will, and attorney's fees are payable out of the estate [*Estate of Corotto (1954) 125 Cal. App. 2d 314, 320, 270 P.2d 498* ; *Estate of Dunton (1936) 15 Cal. App. 2d 729, 731, 60 P.2d 159]* .

g. In case of a contest as to heirship, obtain a contract from the client for legal services, inasmuch as legal services for an heir as such are not chargeable to the estate. An attorney's contract with an heir will be upheld even though the heir is also the executor and the attorney also acts for the executor as such [*see Estate of Kerr (1966) 63 Cal. 2d 875, 878, 48 Cal. Rptr. 707, 409 P.2d 931]* . An executor's or

administrator's interest in the estate as an heir does not constitute the kind of conflict of interest that will cause his or her removal [*see Luckey v. Superior Court (1930) 209 Cal. 360, 369, 287 P. 450]* .

h. In case civil litigation is pending involving the deceased, note that extraordinary fees may be allowable [*see Prob. Code § 10801*], but the litigation must be beneficial and necessary to the estate. If ordinary fees are adequate to compensate for extraordinary service, extra fees may be denied.

i. If the court rejects a claim made by the representative against the estate, and the representative subsequently brings an action against the estate on the rejected claim [*see Prob. Code § 9252(c)*], the prevailing party in the action will be awarded costs [*Prob. Code § 9354(c)*]. If the court determines that the prosecution or defense of the action against the prevailing party was unreasonable, the prevailing party will be awarded reasonable litigation expenses, including attorney's fees [*Prob. Code § 9354(c)*].

j. If there is joint tenancy real property that must be terminated, arrange for the client to pay the fees. They are not payable by the estate even though termination is by order of the court in probate proceedings.

6. Subsequent interviews and appointments.

a. If additional information is needed to prepare petition for probate of will or for letters of administration, as the case may be, schedule a second interview with the client at the earliest convenient date.

b. Schedule a conference with the family and personal representative of the deceased for the purpose of reading and explaining provisions of the will, if any, respective duties of personal representative and counsel and compensation of each, discussing needs of dependents, and other matters as pertinent.

c. Schedule a subsequent interview with the client promptly after the hearing on the petition for probate of will or for letters of administration for the purpose of arranging for notice to creditors, inventorying and dealing with the estate property, and discussing tax liability.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewFamily LawCohabitationDomestic PartnersRegistrationReal Property LawEstatesPresent EstatesMarital EstatesSeparate PropertyTax LawState & Local TaxesEstate & Gift TaxGeneral Overview

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§ 442.61 Documents

1. Obtain death certificate.

2. Obtain instructions, if any, regarding disposition of remains of deceased.

3. Obtain will, if any, and photocopy one copy for filing with original in county clerk's office; one copy for deceased's personal representative; one copy for trustee, if will creates a trust; one copy for filing with Federal Estate Tax Return, if any; one copy for filing with California "pickup" estate tax return, if any; one copy for distribution to each person interested; and one office copy.

4. Obtain originals or photocopies of deeds and other instruments relating to real property.

5. Obtain originals or photocopies of instruments relating to personal property: stock certificates, automobile registrations, and the like.

6. Give receipts for originals of any instruments received.

7. Inventory worksheets. Give the client, assuming he or she is the personal representative of the deceased, inventory worksheets for listing and describing items of property of the estate.

8. Tax forms. Give the client copies of Federal Estate Tax Return Form 706, if size of gross estate so warrants, to fill out insofar as he or she is able.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesAppointmentEstate, Gift & Trust

LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewTax LawState & Local TaxesEstate & Gift TaxGross Estate

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[Reserved]

§§ 442.62[Reserved]

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§ 442.80 Mode of Administration or Disposition of Estate

1. In case a will is produced, determine that it is in fact the last will of the deceased.

2. If the family has no knowledge of a will, a thorough search must be made of safe deposit boxes and other depositories used by the deceased, and of his personal effects. This process should include contacting the deceased's attorneys.

3. If there is a will naming one or more executors, ascertain availability and willingness to act.

4. If there is a will without naming an executor or, if named, none available or consenting to act, determine who will apply for letters of administration with the will annexed [*see Prob. Code §§ 8440, 8441*].

5. If evidence of due execution is not provided by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) in the original will [*see Prob. Code § 8220*], determine the availability and willingness of the subscribing witnesses to the will to give evidence as to its due execution. If no evidence of any subscribing witness can be procured, pursue alternative method of proof [*see Prob. Code § 8221*].

6. If no will can be found, determine who will apply for letters of administration [*see Prob. Code § 8461*].

7. Determine whether the estate may be disposed of without administration [*see Prob. Code §§ 13000-13660*] or with summary administration [*see Prob. Code §§ 6600-6613*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateProcedures in

ProbateGeneral OverviewEstate, Gift & Trust LawProbateSmall EstatesEstate, Gift & Trust LawWill ContestsTestamentary FormalitiesWitnessesGeneral Overview

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§ 442.81 Conference With Family and Personal Representative

1. Read and explain provisions of will, if any.

2. Explain respective duties of personal representative and counsel and compensation of each.

3. Investigate facts as to homestead and exempt property [*Prob. Code §§ 6500-6528*].

4. Discuss requirements of dependents in light of cash and credit immediately available, statutory provisions for family allowance [*see Prob. Code §§ 6540-6545*], and condition of estate. If important to do so, an order for family allowance may be sought at the outset, at the time of filing a petition for letters, and although the order may be made retroactive to date of death, there is a normal time interval of about two weeks between the time of filing the petition and the time of obtaining an order for such an allowance. During that interval, cash or credit is needed.

5. Consider the following sources of funds to cover the dependents' needs in the interim:

a. Joint tenancy bank accounts. The funds are immediately available.

b. Cash on hand. If community or quasi-community property, one half belongs to the surviving spouse and, subject to the law as to inventorying, is immediately usable.

NOTE:
A decedent's community property that passes to a surviving spouse or registered domestic partner may do so without probate administration [*see* *Prob. Code §§ 13500, 13502, 13503*; *Fam. Code § 297.5(c)*]. For a further discussion, see *Ch. 441,* ***Probate: Disposition Without Administration,*** *§ 441.110* et seq.

c. Unpaid wages. To the extent that they are exempt from execution, unpaid wages are exempt property [

see Code Civ. Proc. §§ 706.050, 706.051]. Dependents are entitled to possession of exempt wages until 60 days after the inventory is filed, or for any other period ordered by the court on petition by an interested person [*see Prob. Code § 6500, 6501*]. Once the inventory is filed, the court may set the property aside to the dependents [*see Prob. Code §§ 6510, 6511*]. On request, the employer usually will deliver a check for the unpaid wages to the surviving spouse. The check may be deposited in a joint tenancy bank account, endorsed "for deposit only," using a printed or stamped signature [*see Com. Code §§ 3206, 3401*]. When the check has cleared, the surviving joint tenant may withdraw the proceeds from the joint account. Again, such property is subject to the law relating to inventorying and accounting for community property as applicable.

d. Partnership draw. Use the same procedure as for wages. The draw constitutes earnings to the extent that it represents a return for personal effort and skill as opposed to return on capital [*LeFont v. Rankin (1959) 167 Cal. App. 2d 433, 435, 334 P.2d 608* ; *Gamble v. Utley (1927) 86 Cal. App. 414, 420, 260 P. 930]* .

e. Pension funds. If the pension check is payable to the deceased, use the same procedure as for unpaid wages. If payable to the surviving spouse or registered domestic partner, the funds are not administrable. Pensions are partially exempt [*see Code Civ. Proc. § 704.110* (public), *Code Civ. Proc. § 704.115* (private)].

f. Profit sharing plan funds. If payable to the surviving spouse or registered domestic partner, the funds are not subject to administration.

g. Life insurance proceeds. Benefits from matured life insurance policies are exempt from execution to the extent that they are reasonably necessary for support of the decedent's surviving spouse or registered domestic partner and dependents [*see Code Civ. Proc. § 704.100(c)*].

h. Government death benefits. If payable to the surviving spouse or registered domestic partner, the benefits are not subject to administration. All government death benefits are exempt property [*see Code Civ. Proc. § 704.110*].

6. If the utilities company, grocer, or other provider of necessities is threatening to cut off service, or terminate credit, advise the creditor by the most expeditious means of plans to make payment out of presently available monies or out of anticipated family allowance as the case may be.

7. If deceased left dependent children, inquire as to their custody and care and the existence of a surviving parent able to take charge. If the health and safety of children are in danger because of lack of such a parent, a responsible person should petition for letters of guardianship [*see Prob. Code § 1514*].

8. Determine the proper amount to be sought for family allowance and the most appropriate time for making application therefor.

9. Discuss other matters as pertinent.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesFamiliesEstate, Gift & Trust LawNonprobate TransfersJointly Held PropertyGeneral OverviewEstate, Gift & Trust LawNonprobate

TransfersJointly Held PropertyBank AccountsEstate, Gift & Trust LawProbateGeneral OverviewFamily LawCohabitationDomestic PartnersPropertyFamily LawCohabitationDomestic PartnersRegistrationFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity Property

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PART IV. PROCEDURAL CHECKLIST
B. Preliminary Investigations And Determinations

38-442 California Forms of Pleading and Practice--Annotated § 442.82

§ 442.82 Preservation of Estate

1. Make certain that the representative inventories contents of dwelling, office, or other place, and removes contents when appropriate.

2. Ascertain that personal representative obtains possession of all of deceased's records, checkbooks, passbooks, books of accounting, broker's statements, old income tax returns, tax bills, deeds, and other papers.

3. Determine that personal representative arranges with postmaster or family to forward mail to him or her.

4. Consider advisability of an application for special letters of administration.

5. Ascertain that personal representative makes any necessary arrangements to care for perishable property or animals.

6. Make sure personal representative obtains binders for property, burglary, liability, automobile, or other insurance.

7. Determine that personal representative arranges for proper storage of decedent's automobiles, boats, and similar property.

8. Make certain personal representative has vacated any rented property not necessary for continued use.

9. Determine that personal representative discontinues gas, electricity, telephone, water, and other services when appropriate.

10. Confer with personal representative as to the necessity for petitioning for authority to continue

decedent's business.

11. Ascertain that personal representative arranges for release or continued service of employees.

12. Determine that personal representative removes the contents of all safe deposit boxes, releases the boxes, and obtains any refunds of box rentals.

13. Make sure that personal representative cancels any open security orders.

14. Ascertain that personal representative obtains possession of any securities held in safekeeping by brokers or banks.

15. Determine that personal representative notifies stock companies to pay dividends and send notices to him or her, and that he or she obtains transfer requirements.

16. Ascertain that personal representative collects salary, trust income, other receivables, and life insurance payable to estate, as opposed to surviving spouse or other dependent.

17. Determine that personal representative collects or has transferred into his or her name monies on deposit with banks, savings and loan associations, or brokers when the monies are not payable to surviving spouse or other dependent.

18. Ascertain that personal representative sets up in assets any notes and other receivables with full instructions for servicing.

19. Ascertain that personal representative sets up any pledged assets.

20. Determine that personal representative sets up in assets any real property interests, with details required for management.

21. Determine that personal representative sets up in assets any partnership or business interests of deceased with complete analysis.

22. Ascertain that personal representative sets up all miscellaneous assets.

23. Ask personal representative to prepare an estate budget.

24. Confer with personal representative as to policy on abatement [*see Prob. Code §§ 21400-21406*].

25. Make sure that personal representative obtains California and foreign tax waivers as appropriate.

26. Ascertain whether deceased was acting as executor, guardian, trustee, or in other fiduciary capacity and, if so, have proper steps taken to settle his or her accounts and obtain releases.

27. Determine whether any litigation is pending affecting deceased as either plaintiff or defendant and, if so, evaluate it with a view to continuing or disposing of it.

28. Ascertain whether ancillary administration is necessary.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesForeign RepresentativesInsurance LawMotor Vehicle InsuranceCancellation & RenewalNotice RequirementsContents of NoticesInsurance LawMotor Vehicle InsuranceVehicle OwnershipLeases & Rental VehiclesReal Property LawDeedsTypesGeneral Overview

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B. Preliminary Investigations And Determinations

38-442 California Forms of Pleading and Practice--Annotated §§ 442.83-442.99

[Reserved]

§§ 442.83[Reserved]

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PART IV. PROCEDURAL CHECKLIST
C. Probate Of Wills And Appointment Of Executors Or Administrators

38-442 California Forms of Pleading and Practice--Annotated § 442.100

§ 442.100 Petition for Probate of Will and for Letters Testamentary

NOTE:
Letters testamentary are to be sought when an executor is named in the will and consents to act. If two or more executors are named, and at least one, but less than all, is petitioning, letters testamentary are to be sought by the petitioning executor and, in the case of any living but declining executor named, a renunciation is to be prepared and filed. If an executor is not named in the will or, if named, the sole executor, or all of two or more executors, is deceased, incompetent, or declines to act, and a representative is being substituted, letters of administration with the will annexed are to be sought.

1. Note whether the petitioner is:

a. One named as executor [*see Prob. Code §§ 8420, 8421*].

b. A bank or trust company [*see Prob. Code §§ 83, 300*].

2. If one of two or more named executors declines to act, obtain and file a renunciation or waiver [*see § 442.143*].

3. Ascertain whether there are omitted heirs [*see Prob. Code §§ 21600-21630*].

4. Note whether any of the subscribing witnesses is a devisee under the will.

5. Prepare petition for appointment of personal representative and probate of will [*Prob. Code §§ 8000, 8002*; *see § 442.140*].

NOTE:
Use of the Judicial Council form [*see § 442.140*] is mandatory.

6. Have petition verified [*Prob. Code §§ 1021, 1023*].

7. Prepare notice of hearing on petition [*see Prob. Code § 8100* and *see § 442.146*].

a. The clerk is to set the petition for hearing when it is filed [*see Prob. Code § 1041*].

NOTE:
The hearing must be set for at least 15 but not more than 30 days from the date of filing [*see* *Prob. Code § 8003* (also providing that on petitioner's request at time of filing, this may be extended to not less than 30 or more than 45 days)]. The court may not shorten the time for giving notice of hearing [*Prob. Code § 8003(a)*].

b. Copies of notice [*Prob. Code §§ 8110, 8111, 8113*]:

(1) One copy for each heir (so far as known to or reasonably ascertainable by petitioner);

(2) One copy for each devisee, executor, and alternate executor named in any will being offered for probate (regardless of whether devise or appointment is purportedly revoked in a subsequent instrument);

(3) One copy for Attorney General if will involves or may involves testamentary trust of property for charitable purposes other than charitable trust with designated trustee resident in California, or devise for charitable purposes without identified devisee;

(4) One copy for recognized diplomatic or consular official of foreign country maintaining office in United States if citizen of that country dies without will or leaves with without naming executor, or if it appears that property will pass to citizen of that country.

8. Bond of executor.

a. Requirement. Unless the will waives the executor's bond, or the executor is a bank or trust company [*see Prob. Code §§ 83, 301*], or, if the will does not require a bond, all of the beneficiaries waive the bond requirement (in which case on hearing of the petition, if the petition so requests, the court may direct that no bond be filed) [*see Prob. Code § 8481(a)*], a bond is required in the minimum penalty sum prescribed by *Prob. Code § 8482*. Even if there is a waiver of bond in the will, the court may demand a bond for good cause or for a non-resident personal representative [*Prob. Code §§ 8481(b), 8571*; *Cal. Rules of Ct., Rule 7.201(b)*]. Consult *Cal. Rules of Ct., Rule 7.201 et seq.* for specific rules regarding bonds, and any local rules that do not conflict.

b. Obtaining bond. Arrange with a broker or bonding company to have a bond available on the date of hearing. Many brokers and companies who deal regularly in probate and litigation bonds will leave the amount blank to be filled in when the order is made.

c. Alternatives to filing surety bond. Consider the alternatives provided by *Code Civ. Proc. § 995.710*.

d. Reduction in bond by depositing estate property [*see Prob. Code § 8483*; *see also Prob. Code §§ 9700-9705*]. Consider this course of action and the inclusion of appropriate allegations in the petition [*see § 442.145*].

e. If all beneficiaries agree to waive the bond, obtain a written waiver [*see § 442.144*] and file waiver

before the hearing [*see Prob. Code § 8481(a)*].

9. Prepare order admitting will to probate and for letters testamentary [*see Prob. Code § 8006*; *see also § 442.152*].

10. Prepare letters testamentary and affirmation [*Prob. Code §§ 8403, 8405*; *Code Civ. Proc. § 2015.6*; *see § 442.157*]. Complete mandatory Judicial Council form for Statement of Duties and Liabilities of Personal Representative [*see Prob. Code § 8404*; *Cal. Rules of Ct., Rule 7.150*; *see also see § 442.155*]. Also complete Confidential Statement of Birth Date and Driver's License Number if required by local rule [*see Prob. Code § 8404(b)*; *see also* § 442.155A].

11. Proof of due execution of the will. Determine whether, in an uncontested proceeding, local practice permits proof of due execution of the will by affidavit or declaration of one or more of the subscribing witnesses. *Prob. Code § 8220* permits proof in this manner, thus obviating a court appearance for the witnesses, but inasmuch as the statute is permissive only, check local practice. If this proof is acceptable, use Form 238 unless the affidavit or declaration is contained in the original will. If not, arrange for court appearance of one or more of the witnesses as required.

12. File petition with county clerk in county of probate [*see Prob. Code §§ 7051, 7052*]. At the time of filing petition, file a copy of the will, the original will, and the clerk's notice of hearing. Obtain receipt for original will.

13. If making proof by affidavit or declaration of one or more subscribing witnesses, at the time of filing the petition for probate of will or within one to four days before the hearing as permitted by local practice, file the affidavit with a photocopy of the will attached, with the testator's and subscribing witnesses' signatures clearly evident.

14. Notice and proof [*Prob. Code §§ 8100-8125*]. A notice of petition to administer the estate [*see Prob. Code § 8100*; *see § 442.146*] must be published [*see Prob. Code §§ 8120-8125*]. A copy of a notice of the hearing must be served on each of the heirs and devisees, on nonpetitioning named executors, if any, the attorney general, and special diplomatic officers at least 15 days before the date of the hearing [*Prob. Code §§ 8003, 8110-8111, 8113*].

15. If not attending the hearing as permitted by local practice, approximately two to four days before the hearing date present the prepared order admitting will to probate and appointing executor to the clerk, probate commissioner, or probate attorney, as the case may be. Consult local practice.

16. Following the hearing obtain the signed order and file original with the clerk. Conform copies as required.

17. At the time of filing the order with the clerk, present to the clerk the bond required, if any, and the prepared letters testamentary for his or her issuance. File original letters and obtain certified copies as required.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawWill ContestsTestamentary FormalitiesGeneral OverviewEstate, Gift & Trust LawWill ContestsTestamentary FormalitiesWitnessesGeneral OverviewEstate, Gift & Trust LawWill ContestsTestamentary FormalitiesWitnessesAttestation & Subscription

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C. Probate Of Wills And Appointment Of Executors Or Administrators

38-442 California Forms of Pleading and Practice--Annotated § 442.101

§ 442.101 Petition for Probate of Will and for Letters of Administration With The Will Annexed

NOTE:
Letters of administration with the will annexed are to be sought if there is a will, but an executor is not named or, if named, the sole executor, or all of two or more executors, is deceased, incompetent, or declines to act, thus necessitating the appointment of a substitute personal representative. He or she is called administrator with the will annexed [*see* *Prob. Code § 8440*].

1. Note whether the petitioner is:

a. A person entitled to appointment by rank and priority [*see Prob. Code § 8441*].

b. Resident of California [*see Prob. Code §§ 8570-8577*].

c. A bank or trust company [*see Prob. Code § 300*].

2. If there is a named executor declining to act, obtain and file a renunciation or waiver [*see Prob. Code §§ 8002(b)(3), 8440*; *see § 442.143*].

3. Ascertain whether there are omitted heirs [*see Prob. Code §§ 21600-21630*].

4. Note whether any of the subscribing witnesses is a devisee [*see Prob. Code §§ 6112(b)-(d)*].

5. Prepare petition for probate of will and for letters of administration with will annexed [*Prob. Code §§ 8000, 8002*]. See Forms 225.

6. Have petition verified [*Prob. Code §§ 1021, 1023*].

7. Prepare notice of hearing on petition [*see Prob. Code § 8100* and *see § 442.146*].

a. The clerk is to set the petition for hearing when it is filed [*see Prob. Code § 1041*].

NOTE:
The hearing is to be set for at least 15 but not more than 30 days from the date of filing [*see* *Prob. Code § 8003* (also providing that on petitioner's request at time of filing, this may be extended to not less than 30 or more than 45 days)]. The court may not shorten the time for giving notice of hearing [*Prob. Code § 8003(a)*].

b. Copies of notice [*Prob. Code §§ 8110, 8111, 8113*]:

(1) One copy for each heir (so far as known to or reasonably ascertainable by petitioner);

(2) One copy for each devisee, executor, and alternate executor named in any will being offered for probate (regardless of whether devise or appointment is purportedly revoked in a subsequent instrument);

(3) One copy for Attorney General if will involves or may involves testamentary trust of property for charitable purposes other than charitable trust with designated trustee resident in California, or devise for charitable purposes without identified devisee;

(4) One copy for recognized diplomatic or consular official of foreign country maintaining office in United States if citizen of that country dies without will or leaves with without naming executor, or if it appears that property will pass to citizen of that country.

8. Bond of administrator [*Prob. Code § 8480*]. Unless the administrator is a bank or trust company [*see Prob. Code §§ 83, 301*], or all the beneficiaries waive the bond [*see Prob. Code § 8481(a)*], a bond or other security is required [*see Prob. Code § 8480*]. See *§ 442.100*, Paragraph 8, for other applicable data.

9. Prepare order admitting will to probate and for letters of administration with the will annexed [*Prob. Code § 8006*]. See *§ 442.152*.

10. Prepare letters of administration with the will annexed and affirmation [*Code Civ. Proc. § 2015.6*; *Prob. Code §§ 8403, 8405*; *see § 442.157*]. Complete mandatory Judicial Council form for Statement of Duties and Liabilities of Personal Representative [*Prob. Code § 8404*; *see § 442.155*]. Also complete Confidential Statement of Birth Date and Driver's License Number if required by local rule [*see Prob. Code § 8404(b)*; *see also § 442.157*].

11. Proof of due execution of the will [*see § 442.100*, Paragraph 11].

12. Filing petition and will [*see § 442.100*, Paragraph 12].

13. Filing affidavit or declaration of one or more subscribing witnesses [*see § 442.100*, Paragraph 13].

14. Notice and proof [*Prob. Code §§ 8003, 8110-8125*]. Determine that notice requirements applicable in the case of a proceeding for letters testamentary [*see § 442.100*, Paragraph 14] have been met.

15. If not attending the hearing as permitted by local practice, approximately two to four days before the hearing date present the prepared order admitting will to probate and appointing administrator with will annexed to the clerk, probate

commissioner, or probate attorney, as the case may be. Consult local practice.

16. Following the hearing obtain the signed order and file original with the county clerk. Conform copies of order as required.

17. At the time of filing the order with the clerk, present to the clerk the bond as required and the prepared letters of administration with will annexed for his or her issuance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawWill ContestsRevocationLater WritingsEstate, Gift & Trust LawWill ContestsTestamentary FormalitiesWitnessesGeneral OverviewEstate, Gift & Trust LawWill ContestsTestamentary FormalitiesWitnessesAttestation & Subscription

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38-442 California Forms of Pleading and Practice--Annotated § 442.102

§ 442.102 Petition for Letters of Administration

NOTE:
Letters of administration are to be sought when there is no will.

1. Ascertain the relationship of the petitioner to the deceased.

2. Note whether the proposed administrator is:

a. A person entitled to appointment by rank and priority [*see* Prob. Code § 8461].

b. A resident of the United States, which is required [*see Prob. Code § 8402(a)(4)*].

c. A resident of California [*see Prob. Code §§ 8570-8577*].

d. A bank or trust company [*see Prob. Code § 300*].

e. A partner of deceased and whether there are any objections to his or her appointment [*see Prob. Code § 8402(a)(5)*].

f. A guardian of an incompetent person or a conservator of a conservatee [*see Prob. Code § 8464*].

g. A guardian of a minor [*see Prob. Code § 8464*].

3. Prepare petition for letters of administration [*see Prob. Code §§ 8002, 8540, 8541*]. See *§ 442.140*.

4. Have petition verified [*Prob. Code §§ 1021, 1023*].

5. Notice of application for letters of administration. See *§ 442.146*.

a. The clerk is to set the petition for hearing when it is filed [*see Prob. Code § 1041*].

NOTE:
The hearing is to be set for at least 15 but not more than 30 days from the date of filing [*see* *Prob. Code § 8003* (also providing that on petitioner's request at time of filing, this may be extended to not less than 30 or more than 45 days)]. The court may not shorten the time for giving notice of hearing [*Prob. Code § 8003(a)*].

b. Copies of notice: one copy for each of the heirs named in the petition, and an office copy.

6. Bond of administrator [*Prob. Code § 8480*]. Unless the administrator is a bank or trust company [*Prob. Code §§ 83, 301*], or all the heirs in writing waive the bond [*see Prob. Code § 8481(a)*], a bond or other security is required [*Prob. Code § 8480*; *see* Paragraph A(8) for other applicable data].

7. Prepare order appointing administrator [*Prob. Code § 8006*]. See *§ 442.152*.

8. Prepare letters of administration and affirmation [*see Prob. Code §§ 8403, 8405*; *Code Civ. Proc. §§ 1923, 2015.6*; *see § 442.157*]. Prepare mandatory Judicial Council form of Statement of Duties and Liabilities of Personal Representative [*see Prob. Code § 8404*; *see also § 442.155*].

9. File petition with county clerk in county of probate [*see Prob. Code §§ 7050, 7051*].

10. Notice and proof [*Prob. Code §§ 8003, 8110-8125*]. A notice of hearing [*see Prob. Code § 8100*; *see § 442.146*] must be served and published [*see Prob. Code §§ 8110-8125*]. A copy of the notice of hearing must be served on each of the heirs, by mail, at least 15 days before the date of the hearing [*Prob. Code § 8110*]. Persons and entities described in *Prob. Code §§ 8111-8113* may also need to be served.

11. If not attending the hearing, as permitted by local practice, approximately two to four days before the hearing date present the prepared order appointing administrator to the clerk, probate commissioner, or probate attorney, as the case may be. Consult local practice.

12. Following the hearing obtain the signed order and file original with the county clerk. Conform copies of the order as required.

13. At the time of filing the order with the clerk, present to the clerk the bond as required and the prepared letters of administration for his or her issuance. Prepare and file the mandatory Judicial Council form of statement of Duties and Liabilities of the Personal Representative [*see Prob. Code § 8404*; *Cal. Rules of Ct., Rule 7.150*; *see § 442.155*]. File original letters and obtain certified copies as required.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral Overview

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38-442 California Forms of Pleading and Practice--Annotated § 442.103

§ 442.103 Petition for Special Letters of Administration

NOTE:

Special letters of administration are to be sought in either testate or intestate estates when there is not a qualified executor or general administrator, as the case may be, and the circumstances of the estate require the immediate appointment of a personal representative to take possession of the estate and to exercise such other powers as may be necessary for its preservation [*see* *Prob. Code § 8540*]. He or she is an emergency officer and the emphasis is on conservation, as opposed to administration.

1. Indicate reason for lack of qualified executor or administrator [*see Prob. Code § 8540(a)*].

a. Delay in granting letters testamentary or of administration.

b. Letters granted irregularly.

c. No sufficient bond is filed as required.

d. No application is made for letters.

e. Executor or administrator is dead or is suspended or removed.

2. Indicate the necessity requiring special letters [*see Prob. Code § 8540*].

3. Determine who may petition.

a. Preference is ordinarily given to a person entitled to appointment as personal representative. The court can also appoint the public administrator [*Prob. Code § 8541(b)*

].

b. If there is a nominee of a person entitled [*see Prob. Code § 8465*], ascertain whether there is a nomination on file.

c. Petitioner must be a United States resident [*Prob. Code § 8402(a)(4)*].

4. Determine whether limited powers [*see Prob. Code § 8544*] or general powers [*see Prob. Code § 8545*] are to be sought, bearing in mind the extended notice requirements for a grant of general powers [*see Prob. Code § 8545(a)*].

5. Prepare petition for special letters of administration [*see Prob. Code §§ 8540, 8545*; *see § 442.140*].

6. Have petition verified [*Prob. Code §§ 1021, 1023*].

7. Notice of application for special letters of administration [*Prob. Code §§ 8540(a), 8545(a)*].

a. An appointment of limited powers may be made with or without notice, or on such notice to interested persons as the court deems reasonable [*see Prob. Code § 8541(a)*]. Preferably, arrange to give notice, however limited, circumstances permitting [*see § 447.60* for order prescribing notice]. Otherwise, prepare the ex parte order for appointment [*see § 442.152*].

NOTE:
If notice of the application is required, the Judicial Council form of Notice of Hearing (Probate) may be used; for an illustration, see Ch. 447, *Probate: Statutory Notice Requirements* .

b. An appointment conferring general powers on the special administrator must be on the same notice required under *Prob. Code § 8003* (service and publication) for appointment of a personal representative [*see Prob. Code § 8545(a)*; *see § 442.146*].

8. Bond of special administrator [*Prob. Code §§ 8542(a)(1), 8543*]. Except in the case of the public administrator [*see Prob. Code § 8542(b)*], or of a trust company [*Prob. Code § 301*], arrange for the special administrator to give bond. Note that, subject to *Prob. Code § 8543* (waiver of bond), the court may require, as a condition of a grant of general powers, that the special administrator give any additional bond the court deems proper [*see Prob. Code § 8545(b)*].

9. Prepare order appointing special administrator [*see Prob. Code §§ 8540, 8541*]. See *§ 442.152*.

10. Prepare special letters of administration, and affirmation [*see Prob. Code §§ 8403, 8405, 8542*; *Code Civ. Proc. § 2015.6*]. See *§ 442.157*. Prepare mandatory Judicial Council form for statement of Duties and Liabilities of Personal Representative [*see Prob. Code § 8404*; *Cal. Rules of Ct., Rule 7.150*]. See *§ 442.155*. Also complete Confidential Statement of Birth Date and Driver's License Number if required by local rule [*see Prob. Code § 8404(b)*; *see also § 442.157*].

11. File petition with county clerk in county of probate.

12. Present to court order prescribing notice or order dispensing with notice.

13. Following signing of the order file it with the clerk. Unless notice and hearing have been waived by the court,

arrange to have petition set for hearing [*see Prob. Code § 8003*].

14. Notice and proof [*Prob. Code §§ 8541(a), 8545(a), 8110-8125*]. Cause notice to be mailed or published as required by the order.

15. If proceeding on notice, attend the hearing, make proof of the allegations of the petition, and present prepared order appointing special administrator for signature.

16. If proceeding ex parte, present prepared order appointing special administrator.

17. On obtaining order appointing special administrator, file with clerk. Conform copies of order as required.

18. At the time of filing the order with the clerk, present to the clerk the bond as required and the prepared letters of special administration. Obtain certified copies as required. File special administrator's acknowledgment of receipt of statement of duties and liabilities of the office [*see Prob. Code § 8404(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawIntestacyAdministratorsEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 38: Probate: Is Probate Necessary? thru Probate: Estate Tax-Chs. 440-453
Chapter 442 PROBATE: INITIATING PROBATE ADMINISTRATION
PART IV. PROCEDURAL CHECKLIST
C. Probate Of Wills And Appointment Of Executors Or Administrators

38-442 California Forms of Pleading and Practice--Annotated §§ 442.104-442.119

[Reserved]

§§ 442.104[Reserved]

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Volume 38: Probate: Is Probate Necessary? thru Probate: Estate Tax-Chs. 440-453
Chapter 442 PROBATE: INITIATING PROBATE ADMINISTRATION
PART V. TABLE OF CONSANGUINITY AND CHART OF RELATIONSHIPS [SEE PROB. CODE §§ 6401-6402]

38-442 California Forms of Pleading and Practice--Annotated § 442.120

§ 442.120 Purpose

To assist the attorney in determining which of the decedent's relatives qualifies as an heir, the following two tables graphically demonstrate the degrees of kinship and the relationships among the descendents of a common ancestor.

Prob. Code § 13 provides that the degree of kinship or consanguinity between two persons is determined by counting the number of generations separating those persons as provided in *Prob. Code § 13(b)* and *(c)* [*Prob. Code 13(a)*]. Each generation is called a "degree" [*Prob. Code § 13(a)*].

"Lineal" kinship or consanguinity is the relationship between two persons, one of whom is a direct descendant of the other [*Prob. Code § 13(b)*]. The degree of kinship between those persons is determined by counting the generations separating the first person from the second person [*Prob. Code § 13(b)*]. In counting the generations, the first person is excluded and the second person is included [*Prob. Code § 13(b)*]. For example, parent and child are related in the first degree of lineal kinship or consanguinity, while grandchild and grandparent are related in the second degree [*Prob. Code § 13(b)*].

"Collateral" kinship or consanguinity is the relationship between two people who spring from a common ancestor, but neither person is the direct descendent of the other [*Prob. Code § 13(c)*]. The degree of kinship is determined by counting the generations from the first person up to the common ancestor and from the common ancestor down to the second person [*Prob. Code § 13(c)*]. In counting the generations, the first person is excluded, the second person is included, and the common ancestor is counted only once [*Prob. Code § 13(c)*]. For example, siblings are related in the second degree of collateral kinship or consanguinity, an aunt or uncle and a niece or nephew are related in the third degree, and first cousins are related in the fourth degree [*Prob. Code § 13(c)*].

The tables should be of assistance to counsel when an issue arises regarding the relationship between a decedent and two or more relatives of the decedent under the intestate succession statutes [*see Prob. Code §§ 13, 6402, 6402.5*].

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Chapter 442 PROBATE: INITIATING PROBATE ADMINISTRATION
PART V. TABLE OF CONSANGUINITY AND CHART OF RELATIONSHIPS [SEE PROB. CODE §§ 6401-6402]

38-442 California Forms of Pleading and Practice--Annotated § 442.121

§ 442.121 Table of Consanguinity and Chart of Relationships

[1] FORM Table of Consanguinity and Chart of Relationships

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesAppointmentEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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Volume 38: Probate: Is Probate Necessary? thru Probate: Estate Tax-Chs. 440-453
Chapter 442 PROBATE: INITIATING PROBATE ADMINISTRATION
PART V. TABLE OF CONSANGUINITY AND CHART OF RELATIONSHIPS [SEE PROB. CODE §§ 6401-6402]

38-442 California Forms of Pleading and Practice--Annotated §§ 442.122-442.139

[Reserved]

§§ 442.122[Reserved]

California Forms of Pleading and Practice--Annotated

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Volume 38: Probate: Is Probate Necessary? thru Probate: Estate Tax-Chs. 440-453
Chapter 442 PROBATE: INITIATING PROBATE ADMINISTRATION
PART VI. FORMS

38-442 California Forms of Pleading and Practice--Annotated § 442.140

§ 442.140 Petition for Probate [Prob. Code §§ 8000, 8002, 10450]--Appointment of Personal Representative and Issuance of Letters [Prob. Code § 8405]--Judicial Council Form DE-111

[1] FORM Petition for Probate [Prob. Code §§ 8000, 8002, 10450]--Appointment of Personal Representative and Issuance of Letters [Prob. Code § 8405]--Judicial Council Form DE-111

Click here to view image.

CAUTION:
The petition must be verified [*see Prob. Code §§ 1021(a)(1)*; *Cal. Rules of Ct., Rule 7.103(b), (c)*].

[2] Source of Form

This form is an illustration of Judicial Council Form DE-111, petition for probate, which is also commonly referred to as a petition for administration of a decedent's estate [*see, e.g., Prob. Code § 8100*]. Use of this Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Use of Form

This mandatory form for a petition is for use by any interested person to commence proceedings for administration of the estate of a decedent [*see Prob. Code § 8000*]. It may be used to appoint either an executor or an administrator with the will annexed if the decedent died testate, to appoint an administrator if the decedent died intestate, or to appoint a special administrator in either case [*see Prob. Code §§ 8462-8469, 8540-8547*].

This form is for use when the decedent died after December 31, 1984. A Judicial Council form for use if the decedent died on or before that date is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[4] Who May Bring Petition

At any time after a decedent's death, any interested person may commence proceedings for administration of the decedent's estate by filing the foregoing form of petition [*see Prob. Code § 8000(a)*]. The petition for probate of the decedent's will may be made regardless of whether the will is in the petitioner's possession [*see Prob. Code § 8201* (compelling production of will)], is lost or destroyed [*see § 442.141*, Comments], or is beyond the jurisdiction of the state [*Prob. Code § 8000(b)*; *see Prob. Code § 8202* (proving will when original is beyond jurisdiction of state)]. The petitioner for probate of a will need not be a person entitled to issuance of letters, but commonly is such a person.

[5] Contents

[a] Caption

In the initial petition, the caption should show not only the name by which decedent was commonly known, but also aliases. Include variant forms of the commonly used name, and variant spellings. Spell out in full middle names, spelling with initials in other cases. Include maiden names. The purpose of the listing is to ensure that all interested persons who read the published or posted notice of the proceeding will recognize the decedent's name and know of their interests in the estate.

In the block for the title of the petition, check the appropriate box or boxes to indicate the nature of the petition as follows:

- If the decedent left a will, it is filled out as either a petition for probate of will and for letters testamentary (if an executor named in the will or whose identity is clear from the terms of the will is to be appointed personal representative) or as a petition for probate of will and for letters of administration with will annexed (if the will does not name an executor, or the person named declines to act, so that an administrator with will annexed is to be appointed) [*see Prob. Code §§ 8000(a), 8420, 8421, 8440*].

- If the decedent died intestate, it is filled out as a petition for letters of administration [*see Prob. Code §§ 8000(a), 8460*].

- If appointment of a special administrator is sought, it is filled out as a petition for letters of special administration [*see Prob. Code § 8540*; *see also § 442.17[7]*].

- In any case, if authority under the Independent Administration of Estates Act (*Prob. Code § 10400 et seq.*) is sought along with the appointment of the personal representative, the title of the paper should reflect that, and if only limited independent authority is sought, the "with limited authority" box should be checked [*see Prob. Code §§ 10405, 10450*; § 442.140[5][c][ii]].

Local court rules sometimes specify additional matters that must be indicated in the caption. For example, Los Angeles County requires that if any part if the estate is to be distributed to a trust, the caption must so indicate [Los Angeles Co. Super. Ct. Rules, Rule 10.9].

[b] Publication of Notice of Hearing (Paragraph 1)

The publication, under *Prob. Code §§ 8120-8125*, of notice of the hearing on the petition is a jurisdictional fact that must be established at the hearing on the petition [*Prob. Code § 8005(b)(1)(C)*]. For a form for notice of hearing, see *§ 442.146*.

[c] Subject of Petition (Paragraph 2)

[i] Probate of Will and Appointment of Personal Representative

The manner in which Paragraphs 2a and 2b are filled out should parallel the caption.

If the decedent left a will, the check box 2a and, unless there is an emergency situation calling for appointment of a special administrator, seek appointment of an executor or adminstrator with the will annexed by checking either 2b(1) or 2b(2). If the decedent did not leave a will, unless there is an emergency situation, check only box 2b(3) to seek appointment of an administrator. If there is an emergency situation that requires appointment of a special administrator, check box 2a(4); if there is a will, check 2a(1) as well.

[ii] Authority Under Independent Administration of Estates Act

If the petition seeks a grant of independent authority to administer the estate under the Independent Administration of Estates Act, check box 2c, and check the appropriate box to seek either full or limited authority.

The Independent Administration of Estates Act (*Prob. Code § 10400 et seq.*) allows the personal representative to administer the estate without court supervision to a certain extent [*see Prob. Code § 10500*]. Authority to administer the estate under that act may be requested in the petition for appointment of the personal representative, as well as at a later time [*Prob. Code § 10450*]. The testator may preclude the grant of independent administration authority in his or her will [*Prob. Code § 10404*; *see § 442.19*]. For full discussion of the act, including the distinction between full and limited authority and the method for opposing a request for authority to independently administer an estate, see Ch. 445, *Probate: Independent Administration of Estates* .

[iii] Bond

If bond is not required or the requirement is waived, check the first box in Paragraph 2d. For discussion, see *§ 442.140[5][g]*.

If bond is required and not waived, check the second box in Paragraph 2d and calculate the amount of the bond. For related discussion, see *§ 442.140[5][f]*; for full discussion of the amount of the bond, see Ch. 446, *Probate: Bonds--Increase and Decrease During Administration* .

The last box of Paragraph 2d is for use when the petitioner seeks to either reduce the amount of the bond by depositing assets in a blocked account or exclude assets deposited in a blocked account from the estate property used in determining the amount of the bond. The assets in the account cannot be withdrawn without a court order [*see Prob. Code §§ 8401, 8483*; for a form of deposit receipt, *see § 442.145*; *see also* Ch. 446, *Probate: Bonds--Increase and Decrease During Administration*].

[d] Date and Place of Death (Paragraphs 3a, 3b)

Give the date and place of decedent's death and check the appropriate box relating to decedent's residence in Paragraph 3a [*see Prob. Code § 8002(a)(1)*; *see also* *Texas Co. v. Bank of America etc. Assn. (1935) 5 Cal. 2d 35, 39, 53 P.2d 127* (death is jurisdictional fact that must be alleged)]. Specify the street address and city, or other address, and the county, of the decedent's residence at the time of his or her death in Paragraph 3b [*see Prob. Code § 8002(a)(2)*]. The time, place, and manner of decedent's death, and that the decedent was either domiciled in California or left property in California at the time of death are jurisdictional facts that must be established at the hearing on the petition [*see Prob. Code § 8005(b)(1)(A), (B)*]. They also support venue [*see Prob. Code §§ 7051, 7052*]. For discussion, see *§ 442.13*.

In addition, the date of death is significant because it fixes the time when title passes [*see Prob. Code § 7000*; *Layne v. Johnson (1912) 19 Cal. App. 95, 99, 124 P. 860* ; *see also* Ch. 453, *Probate: Estate Tax*]. The date of death also may be

relevant to the question of whether the custodian of the will delivered it and mailed a copy of it within the period specified in *Prob. Code § 8200(a)* [*see Prob. Code § 8200(a)* (30 days after having knowledge of the testator's death)], and to the question of whether a person nominated in the will to act as executor should be deemed, because of his or her failure to petition within the statutorily prescribed period, to have waived the right to appointment as personal representative [*see Prob. Code § 8001*]. The date of death also determines who is an heir [*see Prob. Code § 6402* (requiring heirs to be survivors of decedent)].

[e] Character and Value of Estate (Paragraph 3c)

The petition must allege the character and estimated value of the property in the estate [*Prob. Code § 8002(a)(4)*]. By "character," the statute means whether the property is real or personal [*Duff v. Duff (1886) 71 Cal. 513, 521-522, 525, 12 P. 570]* . These values are entered in Paragraph 3.c. The value of the personal property and the value of the probable annual gross income from all the property, real or personal, are relevant to determining the amount of the personal representative's bond, if any. The value of the decedent's interest in real estate is a factor in the amount of the bond only if the personal representative requests full authority under the Independent Administration of Estates Act [*see Prob. Code §§ 8482(a), 10402, 10403*]. For more detailed discussion of the amount of the bond, see Ch. 446, *Probate: Bonds--Increase and Decrease During Administration* .

[f] Waiver of Bond (Paragraph 3d)

If requirement that the personal representative provide a bond is waived, the reason is indicated by checking the appropriate box in Paragraph 3d. If the decedent left a will, the bond requirement may by waived by the will [*see Prob. Code § 8481(a)(1)*; *Cal. Rules of Ct., Rule 7.201(a)*; *see also Prob. Code § 8543(a)* (if person appointed special administrator is named as executor in will, waiver of bond in will applies to special administrator)] or unless the will requires a bond, the bond requirement may be waived by all beneficiaries waiving it in writing, in which case the written waivers must be attached to the petition [*see Prob. Code §§ 8481(a)(2), 8543(b)*]. The procedure for waiving bond by all beneficiaries also applies when the decedent died intestate, in which case the box relating to the heirs waiving bond should be checked [*see Prob. Code § 8481(a)(2)*; *see also Prob. Code § 24* (beneficiary defined)]. For a form for a written waiver of the bond requirement, see *§ 442.144*.

On petition of any interested person, or on its own motion, the court, for good cause, may require that a bond be given, either before or after the issuance of letters [*see Prob. Code § 8481(b)*; *Cal. Rules of Ct., Rule 7.201(b)*]. The court in its discretion may require an out-of-state personal representative to give a bond, regardless of any waiver [*see* Prob. Code § 8517; *Cal. Rules of Ct., Rule 7.201(b)*].

If there are multiple personal representatives and bond is not waived as to all, the court will require each to give a bond unless the court waives the requirement under *Prob. Code § 8481(a)(2)* [*see Cal. Rules of Ct., Rule 7.202*].

If the personal representative is a corporate fiduciary, a bond is not required, and the last box in Paragraph 3d should be checked [*see Prob. Code §§ 301(a), 8480(a)*]. However, if an individual is a cofiduciary of a corporate fiduciary, the individual will be required to provide a bond, except to the extent that the court orders the assets to be held solely by the corporate cofiduciary [*see Cal. Rules of Ct., Rule 7.203*].

[g] Status of Estate as Testate or Intestate (Paragraph 3e)

Whether or not the decedent left a will is a matter that must be established by the court at the hearing on the petition [*see Prob. Code § 8005(b)(2)*].

If the decedent did not leave a will, the first box should be checked to indicate that he or she died intestate.

If the decedent left a will, the second box should be checked and the date filled in. If there are codicils to the will, the third box should be checked and their dates filled in. A photocopy of the will must be attached as Attachment 3e(2). In the case of a holographic will or any other will of which the material provisions are handwritten, a typed copy of the will, as well as a photocopy of the original will, must be included in Attachment 3e(2) [*see Prob. Code § 8002(b)(1)*]. If the will is in a foreign language, the petitioner must attach an English language translation to the petition [*see Prob. Code § 8002(b)(2)*].

The original will is required to be filed with the clerk [*see Prob. Code § 8200(a)(1)*] and should not be attached to the petition. When the will is photocopied, the pages must not be taken apart. The will must be preserved intact in the form and condition in which the testator left it.

[h] Personal Representative (Paragraph 3f)

[i] Testate Estate

The personal representative of a testate estate will either be an executor, if one is named in or apparent from the terms of the will [*see Prob. Code §§ 8420, 8421*] or an administrator with the will annexed if the will does not name an executor or all the executors named in the will have waived the right to appointment or are for any reason unwilling or unable to act [*see Prob. Code § 8440*].

In addition to being named in the will, an executor may be appointed based on the exercise of a power to designate the executor (or successor executor), conferred by the testator in the will on one person or two or more persons [*see Prob. Code § 8422*]. The person may also be nominated in the will as a successor executor, to become executor if the first nominee for any reason fails to qualify or ceases to act as executor [*see Prob. Code § 8422*]. In the case of a trust company nominated by name but presently nonexistent because it was succeeded, through sale, consolidation, merger, or otherwise, by another trust company, the successor company must be appointed [*see Prob. Code § 8423*]. Not all of the persons who are named in the will need to be appointed [*see Prob. Code § 8425*], and any one of them may petition, without the cooperation or joinder of the others [*see Prob. Code §§ 8000(a)* (petitioner), 8110(b) (notice to any executor named in the will)].

The petition must state whether the person named as executor in the will consents to act or waives the right to appointment [*Prob. Code § 8002(b)(3)*]. If the person nominated to act as executor has affirmatively renounced his or her right to appointment, then the renunciation should be expressed in writing and filed [*see § 442.143*]. Failure to make timely application for probate of the will and issuance of letters can have the effect of a renunciation [*see Prob. Code § 8001*].

If an administrator with the will annexed is to be appointed, the boxes in Paragraph 3f(1) should be checked to indicate that no executor was named in the will or that none of the named executors will act because of death, declination, or other reasons [*see Prob. Code § 8440*].

In addition, the items under Paragraph 3f(2) should be filled in to indicate the petitioner's priority for appointment as administrator with the will annexed. This priority is the same as the priority for appointment as administrator in an intestate estate, discussed in *§ 442.140[5][h][ii]*, except that a person who takes under the will has priority over a person who does not. However, the court may, in its discretion, give priority to a person who does not take under the will if the person is entitled to a statutory interest that is a substantially greater portion of the estate than the devise to the person who takes under the will and the priority appears appropriate under the circumstances. A person who takes more than 50 percent of the value of the estate under the will or the person's nominee, or the nominee of several persons who together take more than 50 percent of the value of the estate under the will, has priority over other persons who take under the will [*Prob. Code § 8441*].

[ii] Intestate Estate

If the decedent dies intestate, the court appoints an administrator as personal representative [*Prob. Code § 8460(a)*]. More than one person may be appointed [*Prob. Code § 8460(b)*]. Subject to the other provisions in *Prob. Code §§ 8460-8468*, discussed below, the following persons are entitled to appointment as administrator in the following order of priority [*Prob. Code § 8461*]:

(1) Surviving spouse or domestic partner.

(2) Decedent's children;

(3) Decedent's grandchildren;

(4) Other issue of decedent;

(5) Decedent's parents;

(6) Decedent's brothers and sisters;

(7) Issue of decedent's brothers and sisters;

(8) Decedent's grandparents;

(9) Issue of decedent's grandparents;

(10) Children of a predeceased spouse or domestic partner;

(11) Other issue of a predeceased spouse or domestic partner;

(12) Other next of kin;

(13) Parents of a predeceased spouse or domestic partner;

(14) Issue of parents of a predeceased spouse or domestic partner;

(15) Conservator or guardian of decedent's estate acting in that capacity at the time of death who has filed a first account and is not acting as conservator or guardian for any other person;

(16) Public administrator;

(17) Decedent's creditors; and

(18) Any other person.

The surviving spouse or domestic partner of the decedent, a relative of the decedent, or a relative of a predeceased spouse or domestic partner of the decedent has priority as listed above only if one of the following conditions is satisfied [*see Prob. Code § 8462*]:

- The surviving spouse or domestic partner, or relative is entitled to succeed to all or part of the estate.

- The surviving spouse or domestic partner, or relative either takes under the will of, or is entitled to succeed to all or part of the estate of, another deceased person who is entitled to succeed to all or part of the decedent's estate.

Under *Prob. Code § 37*, the term "domestic partner" as used in the Probate Code does not refer to simply any cohabitant, but rather is narrowly defined to mean one of two persons who has filed a Declaration of Domestic Partnership with the Secretary of State under *Fam. Code § 297 et seq.*, provided that the domestic partnership has not been terminated [*Prob. Code § 37(a)*; *see Fam. Code § 299* (termination of domestic partnerships)]. When a domestic partnership is terminated by the death of one of the parties, however, and no notice of termination was filed by either domestic partner prior to the date of the decedent's death, the survivor is a surviving domestic partner for purposes of the Probate Code [*Prob. Code § 37(b)*]. For detailed discussion of the formation and termination of domestic partnerships, and the rights and obligations of domestic partners, under the California Domestic Partner Rights and Responsibilities Act of 2003 [*Fam. Code §§ 297-299.3*], see Ch. 387, *Nonmarital Cohabitation* .

If the surviving spouse is a party to an action for separate maintenance, annulment, or dissolution of the marriage of the decedent and the surviving spouse, and was living apart from the decedent on the date of the decedent's death, the surviving spouse has priority next after brothers and sisters and not the priority as listed above [*Prob. Code § 8463*].

If a person otherwise entitled to appointment as administrator is a person under the age of majority or a person for whom a guardian or conservator of the estate has been appointed, the court in its discretion may appoint the guardian or conservator or another person entitled to appointment [*Prob. Code § 8464*].

The court may appoint as administrator a person nominated by a person otherwise entitled to appointment or by the guardian or conservator of the estate of a person otherwise entitled to appointment. The nomination must be made in writing and filed with the court [*Prob. Code § 8465(a)*]. If a person making a nomination for appointment of an administrator is the surviving spouse or domestic partner as defined by *Fam. Code § 297 et seq.*, child, grandchild, other issue, parent, brother or sister, or grandparent of the decedent, the nominee has priority next after those in the class of the person making the nomination [*Prob. Code § 8465(b)*]. If a person making a nomination for appointment of an administrator is other than a person described in the preceding sentence, the court in its discretion may appoint either the nominee or a person of a class lower in priority to that of the person making the nomination. However, other persons of the class of the person making the nomination have priority over the nominee [*Prob. Code § 8465(c)*].

If a person whose only priority is that of a creditor claims appointment as administrator, the court in its discretion may deny the appointment and appoint another person [*Prob. Code § 8466*].

If several persons have equal priority for appointment as administrator, the court may appoint one or more of them. If those persons are unable to agree, the court may appoint the public administrator or a disinterested person in the same or the next lower class of priority as the persons who are unable to agree [*Prob. Code § 8467*].

If persons having priority fail to claim appointment as administrator, the court may appoint any person who claims appointment [*Prob. Code § 8468*].

[iii] Special Administration

If special administration is sought, check box 3f(3). The grounds specified in the attachment should show why the circumstances of the estate require immediate appointment of a personal representative, and the powers requested should be those appropriate under the circumstances for the preservation of the estate [*see Prob. Code § 8540(a)*]. The powers that a special administrator has unless the order appointing him or her prescribes different terms, are listed in *Prob. Code § 8544*. In addition, a special administrator may be appointed to perform particular acts [*see Prob. Code §§ 8540(b), 8541(c)*] and/or may be given the same powers, duties, and obligations as a general personal representative [

see Prob. Code § 8545]. For further discussion, see *§ 442.140[9][e]*; see also *§ 442.140[8]*.

[i] Residency (Paragraph 3g)

Check the appropriate box in Paragraph 3g. A nonresident of California may act as a personal representative, but must sign and file with the court a statement of his or her permanent address, which should be attached as indicated on the form, as Attachment 3g [*see Prob. Code § 8573*]. However, with the exception of a person named as executor or successor executor in the decedent's will, a person who is not a resident of the United States is not competent to act as a personal representative [*see Prob. Code § 8402(a)(4)* (residency requirement), (b) (exception)].

[j] Independent Administration of Estates Act (Paragraph 4)

The testator may preclude the grant of authority under the Independent Administration of Estates Act in his or her will [*Prob. Code § 10404*]. Therefore, in a testate estate in which authority for independent administration is sought, Paragraph 4 should be checked to establish that independent administration is not barred by the will.

[k] Heirs (Paragraphs 5-6)

In connection with the listing of all heirs and devisees of the decedent called for by Paragraph 7, discussed below, check the appropriate boxes in Paragraphs 5 and 6 to describe the closest relatives who survived the decedent, including a domestic partner. Information on the surviving spouse (or surviving domestic partner) and children is called for in Paragraph 5 [*see Prob. Code §§ 6401, 6402(a)*]. The parent-child relationship referred to in Paragraph 5b involves the possibility of intestate succession from or through a foster parent or stepparent. *Prob. Code § 6454* provides that for the purpose of intestate succession by a person or his or her descendents from or through a foster parent or stepparent, the relationship of parent and child exists between the person and the foster parent or stepparent if (1) the relationship began during the person's minority and continued throughout the parties' joint lifetimes and (2) it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier.

If decedent is survived by a spouse (or domestic partner) and issue, or by issue but no surviving spouse (or domestic partner), they take the entire estate, and Paragraphs 6 and 7 are irrelevant [*see Prob. Code §§ 6401, 6402(a)*].

If decedent is survived by a spouse, but no issue, then the heirs include any surviving parent (check Paragraph 5a) or issue of deceased parents (check Paragraph 5b). If there is no surviving parent or issue of a deceased parent, the surviving spouse or domestic partner takes all, and Paragraphs 6 and 7 are irrelevant [*see Prob. Code § 6401(c)(1)*].

If decedent is not survived by a spouse (or domestic partner) or issue, then his or her relatives, or the relatives of a predeceased spouse, take his or her estate in the order in which they are listed in Paragraph 6, and the first applicable box should be checked and the people listed in Attachment 8 [*see Prob. Code § 6402*]. Relatives of a predeceased spouse indicated in Paragraph 6e and 6g would be entitled to take the entire estate under *Prob. Code § 6402(e)* or *(g)*, respectively. However, even when these relative do not take the entire estate, they may nonetheless be entitled to a portion of the estate when that portion is attributable to the predeceased spouse [*see Prob. Code § 6402.5* and discussion in *§ 442.140[5][l]*].

[l] Heirs to Property Attributable to Predeceased Spouse (Paragraph 7)

If the decedent left no surviving spouse or issue, a portion of the estate that is attributable to a predeceased spouse may be distributed to the predeceased spouse's heirs [*see Prob. Code § 6402.5(a), (b)*]. The rights of the heirs of a predeceased spouse to this portion of the decedent's estate depend on the date of decedent's death and the date of the predeceased spouse's death. If the decedent died after January 1, 1985, *Prob. Code § 6402.5* governs the distribution to the heirs of the predeceased spouse [*see Prob. Code § 6414(a)* (former law, which is former Prob. Code § 229, governs if the decedent died prior to that date)]. This form is based on *Prob. Code § 6402.5*.

Under *Prob. Code § 6402.5*, the heirs of the predeceased spouse are entitled to distribution of the portion of real property from the decedent's estate that is attributable to the predeceased spouse if the predeceased spouse died not more than 15 years before the decedent [*see Prob. Code § 6402.5(a)*]. They are also entitled to distribution of personal property valued at more than $10,000, and attributable to the predeceased spouse, if the predeceased spouse died not more than five years before the decedent [*see Prob. Code § 6402.5(b), (e)*]. Check the appropriate boxes, and list the relevant people, if any, in Attachment 8.

[m] List of Heirs and Devisees (Paragraph 8)

The petition must state the name, age, and address of each heir and devisee of the decedent, so far as known to or reasonably ascertainable by the petitioner [*see Prob. Code § 8002(a)(3)*]. Ages may be stated as either over or under 18, and the birth date of a minor should be stated so that the court can determine at any time when it may become relevant whether the person is still a minor. This information is relevant, for example, when distribution is to be made to a person who might be a minor.

The format in which the names, ages, relationships, and addresses should be listed is not prescribed by the Probate Code. Following are some illustrations of how heirs and devisees may be listed in the petition.

a. *Spouse*:

Mary Smith of 100 Family Circle, Citytown, California 98765, over 18, wife of decedent.

b. *Minor child*:

John Smith, Jr. of 100 Family Circle, Citytown, California 98765, under 18 (born December 12, 1985), son and heir of decedent.

c. *Name different from name in will*:

Betty (Smith) Jones of 200 Young Street, Citytown California 98765, over 18, daughter, heir, and devisee of decedent.

d. *Predeceased devisee; lapsed gift*:

Joseph Doe, deceased July 11, 1988, devisee of decedent and stranger.

e. *Predeceased devisee; nonlapsing gift*:

Dorothy Smith of 700 Oak Boulevard, Pacific City, California 97531, over 18 (heir of David Smith, brother of decedent and devisee, deceased October 15, 1987).

f. *Survivor of decedent but later deceased*:

Barbara Smith, deceased August 9, 1989, mother and heir of decedent. The executor of her estate is First National Bank & Trust Co., 500 Main Street, Citytown, California 98765.

g. *Missing beneficiary*:

David Smith, over 18, brother and heir of decedent. The present address of David Smith is unknown. County of Surf, California, was the county of last residence.

Immediately preceding § 442.140 is a Table of Consanguinity and a Chart of Relationships, which may be consulted to determine relationships and their degrees [*see Prob. Code §§ 6401, 6402*; *see also Prob. Code §§ 21114-21115*].

[6] Attachments (Paragraph 9)

In Paragraph 9, counsel should insert the number of pages of attachments, as requested by the form.

[7] Signature and Verification

The petitioner must sign the petition, or if there is more than one petitioner, all of them must sign [*see Prob. Code § 1020*]. The petition must also be verified by the petitioner or by any one of them, if more than one person is petitioning [*see Prob. Code § 1021(a)(1), (b)(1)*]. If the petitioner is absent from the county or for some other cause is unable to sign or verify the petition, his or her attorney may sign or verify it unless the petitioner is a fiduciary (personal representative) appointed in the proceeding, which is unlikely in the case of this petition [*see Prob. Code § 1023*]. A verified petition shall be received in evidence when offered in an uncontested proceeding under the Probate Code [*see Prob. Code § 1022*].

[8] Requesting Ancillary Administration

The mandatory Judicial Council petition form does not provide any special space or check box for use when the petition seeks ancillary administration for the estate of a decedent domiciled outside California. One method of adapting the form that has been successful is simply typing in the word "Ancillary" above the box that must be checked for probate [*see* Paragraph 2(a) of Form]. Success has also been achieved by describing the ancillary procedure in Attachment 3f(2) (relating to appointment of an administrator), citing (if appropriate) *Prob. Code § 12513*, which grants preference to the personal representative appointed by a court of the decedent's domicile when the decedent dies while domicilied in another state. The safest procedure is to inquire regarding local practice or requirements before filing the petition when ancillary administration is being requested, as local customs may vary.

When a petition requests ancillary administration, the will or an authenticated copy of the will must be attached to the petition [*Prob. Code § 12521(a)(1)*]. The petition must also include an authenticated copy of the order admitting the will to probate in a sister state or foreign nation, or other evidence of the establishment or proof of the will in accordance with the law of the sister state or foreign nation [*Prob. Code § 12521(a)(1)*]. "Authenticated copy" means a copy that satisfies the requirements of *Evid. Code §§ 1530-1532*, governing secondary evidence of official and recorded writings [*Prob. Code § 12521(b)*]. Presumably these materials should be included as Attachment 4e(2).

Any interested person, or a sister state or foreign nation personal representative, may commence an ancillary administration proceeding by a petition to the court for either probate of the nondomiciliary decedent's will and appointment of a local personal representative [*Prob. Code § 12510*]. The proper county for an ancillary administration proceeding is the county determined pursuant to *Prob. Code § 7052* [*see Prob. Code § 12511*; for discussion of jurisdiction, *see § 442.13*]. Notice of an ancillary administration proceeding must be given and, except as provided in *Prob. Code §§ 12510-12542* (ancillary administration proceedings), the same proceedings had as in the case of a petition for probate of a will or appointment of a personal representative of a person who dies domiciled in California [*Prob. Code § 12512*].

If the sister state or foreign nation order admitting the will to probate does not satisfy the requirements of *Prob. Code §§ 12522* or *12523*, then the general provisions concerning opening administration apply, and the petitioner must proceed under *Prob. Code §§ 8000-8577* [*see Prob. Code § 12520*]. The general provisions also apply in any case in which admission has not been sought in the sister state or foreign nation [Cal. Law Revision Comm'n Comment to *Prob. Code § 12520*].

[9] Appointment of Special Administrator

If the circumstances of the estate require the immediate appointment of a personal representative, the court may appoint a special administrator to exercise any powers that may be appropriate under the circumstances for the preservation of the estate. The appointment may be for a specified term, to perform particular acts, or on any other terms specified in the court order [*Prob. Code § 8540*]. In the case of an appointment to perform a particular act, request for approval of the act may be included in the petition for appointment, and approval may be made on the same notice and at the same time as the appointment [*Prob. Code § 8541(c)*].

The court may grant a special administrator the same powers, duties, and obligations as a general personal representative when to do so appears proper. However, if letters have not previously issued to a general personal representative, notice will have to be given pursuant to *Prob. Code §§ 8003, 8100-8125* [*see Prob. Code § 8545(a)*; for discussion of those notice requirements, *see § 442.146*].

[10] State Statutes

[a] Bonds

Bond requirement. *Prob. Code § 8480*

Waiver of bond. *Prob. Code §§ 8481, 8543*

Amount of bond. *Prob. Code § 8482*

Reduction of bond. *Prob. Code §§ 8483, 8484*

Cost of bond. *Prob. Code § 8486*

[b] Intestate Succession

Distribution of estate not disposed of by will. *Prob. Code §§ 6400-6455*

[c] Jurisdiction

Superior court in probate proceedings is court of general jurisdiction. *Prob. Code § 800*

Title to property passes on death to devisees or heirs. *Prob. Code § 7000*

Decedent's property is subject to administration under Probate Code. *Prob. Code § 7001*

Jurisdiction of superior court over administration of decedents' estates. *Prob. Code § 7050*

Disqualification of judge. *Prob. Code § 7060*

Transfer of proceeding if all judges in proper court disqualified. *Prob. Code §§ 7070, 7071*

Retransfer of transferred proceeding. *Prob. Code § 7072*

[d] Personal Representatives

[i] In General

"Personal representative" defined. *Prob. Code § 58(a)*

"General personal representative" defined. *Prob. Code § 58(b)*

Appointment as necessary. *Prob. Code § 8400*

Qualifications for appointment. *Prob. Code § 8402*

Nonresident personal representatives. *Prob. Code §§ 8570-8577*

[ii] Administrators

Appointment. *Prob. Code § 8460*

Priority for appointment. *Prob. Code §§ 8461-8468*

[iii] Administrators With Will Annexed

Appointment. *Prob. Code § 8440*

Priority for appointment. *Prob. Code §§ 8441, 8461-8469*

Authority. *Prob. Code § 8442*

[iv] Executors

Appointment of person named in will. *Prob. Code § 8420*

Appointment of person intended by, but not named in, will. *Prob. Code § 8421*

Appointment of person designated by another under testator's authority to designate executor. *Prob. Code § 8422*

Appointment of successor trust company. *Prob. Code § 8423*

Minor named as executor. *Prob. Code § 8424*

Appointment of fewer than all named executors. *Prob. Code § 8425*

[v] Special Administrator

Appointment. *Prob. Code §§ 8540, 8541*

Authority. *Prob. Code §§ 8544-8546*

[e] Petition for Administration of Decedent's Estate

Persons who may petition and orders available. *Prob. Code §§ 8000, 10450*

Effect of executor's failure to timely petition. *Prob. Code § 8001*

Contents of petition. *Prob. Code §§ 8002, 8005(b)*

Duty of custodian to deliver will. *Prob. Code § 8200*

Compelling production of will. *Prob. Code § 8201*

Will detained outside of *California. Prob. Code § 8202*

Transfer of will to court of county in which proceeding is pending. *Prob. Code § 8203*

Petition for independent authority to administer estate. *Prob. Code § 10450*

[f] Venue

Domiciliary decedent. *Prob. Code § 7051*

Nondomiciliary decedent. *Prob. Code § 7052*

[g] Verification

Verification of pleadings in civil actions. *Code Civ. Proc. § 446*

Declaration under penalty of perjury in lieu of affidavit. *Code Civ. Proc. § 2015.5*

Petition is required to be verified; who may verify. *Prob. Code §§ 1021, 1023*

Affidavit or verified petition as evidence in uncontested proceeding. *Prob. Code § 1022*

[11] California Rules of Court

[a] Appointment of Executors and Administrators

Requirement that personal representative execute and file Judicial Council Form DE-147. *Cal. Rules of Ct., Rule 7.150*

[b] Bonding of Personal Representatives, Guardians, Conservators, and Trustees

Statement in petition when bond waived. *Cal. Rules of Ct., Rule 7.201(a)*

Bond requirement despite waiver, for out-of-state personal representative or on good cause. *Cal. Rules of Ct., Rule 7.201(b)*

Bond requirement when two or more representatives. *Cal. Rules of Ct., Rule 7.202*

Requirement of separate bonds for cofiduciaries. *Cal. Rules of Ct., Rule 7.203*

Procedure to increase bond. *Cal. Rules of Ct., Rule 7.204*

Fixing bond when personal representative has independent power to sell real property. *Cal. Rules of Ct., Rule 7.205*

Additional bond on sale of real estate. *Cal. Rules of Ct., Rule 7.206*

[12] Local Court Rules

[a] Allegations in Petitions re Heirs

Los Angeles Co. Super. Ct. Rules, Rule 10.48

Marin Co. Rule, Probate 5.18

Orange Co. Super. Ct. Rules, Rule 603.04

Sacramento Co. Local Ct. Rules, Rule 15.32

San Bernardino Co. Prob. Pol. Mem. § 604

San Francisco Uniform Local Ct. Rules, Rule 14.35

[b] Bonds for Nonresident Executors

Alameda Co. Unified Super. Ct. Rules, Rule 12.5.5

Los Angeles Co. Super. Ct. Rules, Rule 10.57(a)

San Francisco Uniform Local Ct. Rules, Rule 14.47

[c] Captions

Los Angeles Co. Super. Ct. Rules, Rule 10.9

Orange Co. Super. Ct. Rules, Rule 601.05

[d] Copy of Will to Be Attached to Petition for Probate

Alameda Co. Unified Super. Ct. Rules, Rule 12.2.2.4

Los Angeles Co. Super. Ct. Rules, Rule 10.53

Marin Co. Rules, Probate 518

Orange Co. Super. Ct. Rules, Rule 603.02

Sacramento Co. Local Ct. Rules, Rule 15.30

San Bernardino Co. Prob. Pol. Mem. § 603

San Francisco Uniform Local Ct. Rules, Rule 14.35

[e] Documents to Be Included With Petition for Probate of Will

San Francisco Uniform Local Ct. Rules, Rule 14.35

[f] Petitions for Probate of Holographic Will

Alameda Co. Unified Super. Ct. Rules, Rules 12.2.2.3, 12.2.2.4

Contra Costa Co. Prob. Pol. Man. § 302

Los Angeles Co. Super. Ct. Rules, Rules 10.53, 10.54(b)

Orange Co. Super. Ct. Rules, Rule 603.02

San Francisco Uniform Local Ct. Rules, Rule 14.35

[g] Petitions Required to Be Set for Hearing as Required to Have Self-Addressed, Stamped Envelope Attached

Los Angeles Co. Super. Ct. Rules, Rule 10.31(a) (or attach fax cover sheet; *see* Los Angeles Co. Super. Ct. Rules, Rule 10.31(b))

[13] Decisions

Death of testator is jurisdictional fact. *Texas Co. v. Bank of America etc. Assn. (1935) 5 Cal. 2d 35, 39, 53 P.2d 127*

Issuance of letters of administration authorized only in the absence of testamentary disposition of estate. *Estate of Danford (1925) 196 Cal. 339, 343, 238 P. 76* ; *Estate of Edwards (1908) 154 Cal. 91, 93, 97 P. 23*

Jurisdictional facts to be alleged in petition. *Alden v. Superior Court (1921) 186 Cal. 309, 312, 199 P. 29*

"Character" of property required to be alleged must be either real or personal. *Duff v. Duff (1886) 71 Cal. 513, 521-522, 525, 12 P. 570*

Allegation of manner of execution of will as witnessed or holographic is unnecessary. *Estate of Learned (1886) 70 Cal. 140, 142, 11 P. 587* (decided under former *Code Civ. Proc. § 1300*; *now see Prob. Code § 8002*)

Sufficiency of description of will in petition. *Estate of Olson (1962) 200 Cal. App. 2d 234, 237, 19 Cal. Rptr. 307*

[14] Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, §§ 415, 430-450 (10th ed. 2005)

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38-442 California Forms of Pleading and Practice--Annotated § 442.141

§ 442.141 Allegation--Lost or Destroyed Will [Prob. Code § 8223]

[1] FORM Allegation--Lost or Destroyed Will [Prob. Code § 8223]

Decedent executed a valid will dated _____ [*date*], but that will was _____ [lost *or* destroyed] _____ [*describe circumstances of loss or destruction*]. The testamentary words of the will were (substantially) as follows: _____ [*specify*].

[2] Use of Form

This allegation may be attached to the petition for probate [*see § 442.140*] if the decedent's will was lost or destroyed. In these circumstances, the controlling statute is *Prob. Code § 8223*, which provides that the petition for the probate of a lost or destroyed will must include a written statement of the testamentary words or their substance. The mandatory Judicial Council form for petition for probate [*see § 442.140*] does not include a specific place for including such a statement. It appears, therefore, that the most logical way to satisfy this requirement using the Judicial Council form would be to attach this allegation as Attachment 3(e)(2) in lieu of the text of the lost or destroyed will [*see § 442.140*, paragraph 3(e)(2); *see also § 442.140[5][g]*].

If the lost or destroyed will is proved, its provisions will be set forth in the order admitting the will to probate. For an order admitting a lost or destroyed will to probate, see *§ 442.153*.

[3] Proof of Lost or Destroyed Will

The repeal of former *Prob. Code § 351* and the enactment of *Prob. Code § 8223*, operative July 1, 1989, continue the effect of earlier legislation, operative January 1, 1985, which abolished the requirement that a lost or destroyed will must have been in existence at the testator's death or destroyed during the testator's lifetime without his or her knowledge [*see Prob. Code § 8223*; *see also* former *Prob. Code §§ 350-351*; Stats. 1983, ch. 842]. Thus, any valid, unrevoked will may be proved by a preponderance of the evidence [*see Recommendations Relating to Wills and Intestate Succession*, 16 Cal. Law Revision Comm'n Reports 2327-2328, 2488-2489 (1982)].

[4] Presumption of Revocation

If the testator's will was last in the testator's possession, the testator was competent until death, and neither the will nor a duplicate original of the will can be found after the testator's death, it is presumed that the testator destroyed the will with the intent to revoke it. This presumption is a presumption affecting the burden of producing evidence [*Prob. Code § 6124*; *see Evid. Code § 550*].

[5] Admissibility of Testimony Concerning Lost or Destroyed Will

If an unexecuted copy of the will does not exist, then the substance of the provisions must to be stated in an exhibit attached to the petition [*see Prob. Code § 8223*]. The testimony of each witness in any proceeding concerning the execution or provisions of a will, the testamentary capacity of the decedent, and other issues of fact, may be reduced to writing, signed by the witness, and filed, whether or not the will is contested [*Prob. Code § 8224*].

The testimony thus preserved, or an official reporter's transcript of the testimony, is then admissible in evidence in any subsequent proceeding concerning the will if the witness has become unavailable as a witness within the meaning of *Evid. Code § 240* ("unavailable as a witness" defined) [*see Prob. Code § 8224*].

[6] State Statutes

Contents of petition for probate of lost or destroyed will. *Prob. Code § 8223*

Presumption concerning lost wills. *Prob. Code § 6124*

[7] Local Court Rules

Lost or destroyed wills. San Francisco Uniform Local Ct. Rules, Rule 14.38

[8] Cross References

For a related form, see *§ 442.140*.

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38-442 California Forms of Pleading and Practice--Annotated § 442.142

§ 442.142 Allegation--Two Documents Constituting Will Under Doctrine of Dependent Relative Revocation

[1] FORM Allegation--Two Documents Constituting Will Under Doctrine of Dependent Relative Revocation

Decedent left two documents, each of which purports to be a will, which together constitute decedent's will according to the principle of dependent relative revocation, as follows: _____ [*specify facts giving rise to application of principle, e.g.,* the two documents, one dated _____ [*date*], and the other dated _____ [*date*], contain substantially the same provisions, but the earlier document contains a clause disposing of the residue of the estate, and the later document, which purports to revoke the earlier document, contains no clause disposing of the residue]. These two documents are presented herewith for filing, and photocopies of them hereby attached to this petition as part of this Attachment 3(e)(2). [*Attach copies of both documents, or all relevant documents if there are more than two.*]

[2] Use of Form

This allegation may be attached to the petition for probate [*see § 442.140*] if the decedent's will is believed to consist of two or more documents that together constitute the will under the doctrine of dependent relative revocation. The mandatory Judicial Council form for petition for probate [*see § 442.140*] provides only boxes indicating that the decedent's will and codicils are attached, and does not include a specific place for including the type of allegation in this form. It appears, therefore, that the most logical way to satisfy this requirement using the Judicial Council form would be to attach this allegation and he text of all the relevant instruments as Attachment 3(e)(2) to the Judicial Council petition [*see § 442.140[1],* paragraph 3(e)(2); *see also § 442.140[5][g]*].

Under the doctrine of dependent relative revocation, an earlier will, which was revoked for the purpose of giving effect to a later will, is deemed to remain effective to the extent that the later will is not effective. The purpose of the doctrine is to carry out the testator's probable intention that the earlier will should not be revoked unless the later will becomes effective. When in a later will a testator repeats substantially the same plan of disposition set out in an earlier will, which he or she thereby revokes, the revocation of the earlier will is deemed to depend on the later will's becoming effective [*see Estate of Kaufman (1945) 25 Cal. 2d 854, 858-860, 155 P.2d 831]* .

[3] Decisions

Doctrine of dependent relative revocation discussed and applied. *Estate of Cuneo (1963) 60 Cal. 2d 196, 202-206, 32 Cal. Rptr. 409, 384 P.2d 1* ; *Estate of Salmonski (1951) 38 Cal. 2d 199, 212-213, 238 P.2d 966* ; *Estate of Kaufman (1945) 25 Cal. 2d 854, 858-860, 155 P.2d 831* ; *Estate of Strickman (1966) 247 Cal. App. 2d 469, 473-474, 55 Cal. Rptr. 606*

[4] Law Reviews

Comment, *Dependent Relative Revocation and the Probate of Lost or Destroyed Wills in California, 16 U.S.F. L. Rev. 631 (1982)*

[5] Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate, §§ 353-354* (10th ed. 2005)

[6] Cross References

For a related form, see *§ 442.140*.

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38-442 California Forms of Pleading and Practice--Annotated § 442.143

§ 442.143 Declination to Act and Waiver of Right to Appointment by Person Named in Will as Executor [Prob. Code § 8440]

[1] FORM Declination to Act and Waiver of Right to Appointment by Person Named in Will as Executor [Prob. Code § 8440]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	DECLINATION TO ACT AND WAIVER OF
Deceased.	)	RIGHT TO APPOINTMENT AS EXECUTOR

_____

_____ [*Name of individual or entity named in will to act as executor*], being named in the will of _____ [*name of decedent*] to act as executor, hereby declines to act and waives all rights to appointment as executor under the will.
Dated: _____.

_____ [*Name of*

corporate entity, if any

[By]: _____ [*signature*]

[*Typed name and title if signing*

for corporate entity]

[2] Use of Form

This form for declination and waiver may be executed and filed by a person named in the decedent's will as executor who affirmatively declines to act as such and waives the right to appointment as executor [*see Prob. Code § 8440*].

The right of a named executor to so decline and waive is implied in *Prob. Code § 8440*, but no form or manner for doing so is prescribed [*see Prob. Code § 8440*]. However, it is good practice to file a written declination and waiver, and may be required by local court rule [*see, e.g.*, Los Angeles Co. Super. Ct. Rules, Rule 10.60].

[3] State Statutes

Petition for administration of decedent's estate is required to state whether person named in will as executor consents to act or waives right to appointment. *Prob. Code § 8002(b)(3)*

Waiver of right to appointment as executor. *Prob. Code § 8440*

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38-442 California Forms of Pleading and Practice--Annotated § 442.144

§ 442.144 Waiver of Bond Requirement [Prob. Code § 8481(a)(2)]--By Beneficiary of Estate

[1] FORM Waiver of Bond Requirement [Prob. Code § 8481(a)(2)]--By Beneficiary of Estate

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	WAIVER OF BOND
Deceased.	)	

_____

I declare that I am a _____ [devisee under the will *or* an heir] of _____ [*name of decedent*] and that under the provisions of *Probate Code Section 8481(a)(2)*. I waive the requirement that _____ [*name of executor or administrator*] file a bond to act as _____ [executor *or* administrator] in the estate of _____ [*name of decedent*].
Dated: _____.

_____ [*signature(s*)]

[*typed name*]

[2] Use of Form

This form is for use by a devisee under the decedent's will or an heir at law to waive the requirement that the personal representative file a bond. For the bond requirement to be waived, a waiver must be obtained from all the beneficiaries of the estate [*Prob. Code § 8481(a)(2)*; *see Prob. Code § 24* (beneficiary defined)]. The form may not be used if the will requires a bond. The petition for probate and issuance of letters should allege that all the beneficiaries or heirs waive the bond and request that no bond be required; the waiver(s) must be attached to the petition [*Prob. Code § 8481(a)(2)*; *see*

§ 442.140].

Even if the will or all the beneficiaries waive bond, on petition of any interested person, or on its own motion, the court may, for good cause, require that a bond be given, either before or after the issuance of letters [*Prob. Code § 8481(b)*].

[3] State Statutes

Waiver of bond requirement. *Prob. Code § 8481*

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38-442 California Forms of Pleading and Practice--Annotated § 442.145

§ 442.145 Receipt From Depository for Deposited Assets of Deceased to Be Withdrawn Only on Authorization of Court [Prob. Code §§ 8401, 8483]

[1] FORM Receipt From Depository for Deposited Assets of Deceased to Be Withdrawn Only on Authorization of Court [Prob. Code §§ 8401, 8483]

There is on deposit with the undersigned _____ [*specify type of institution, e.g.,* bank] property of the decedent as follows: _____ [*set forth name and address of financial institution, trust company, or securities depository, amount of money or securities, or description of other personal property, and type and number of account*].

This deposit is impounded pursuant to an agreement, dated _____, with _____ [*name*] in a proceeding in the Superior Court of California, County of _____, entitled Estate of _____ [*name*], deceased, No. _____, whereby withdrawals shall not be allowed from the deposit except on order of the court.
Dated: _____.

_____

[*name of depository*]

By: _____

[*signature of authorized agent*]

_____

[*typed name and title*]

[2] Use of Form

This form is a receipt for use to obtain a reduction in the amount of bond to be required of the personal representative or to exclude assets deposited in the blocked account from the estate property used in calculating the amount of the bond [*see Prob. Code § 8483*] by placing assets in a blocked account with an authorized depository [*see Prob. Code §§ 8401, 8483*; *see also Prob. Code §§ 9700-9702* (authorized depositories)]. It may be used in connection with see *§ 442.140*. The financial institution may have its own form for this purpose. For forms for use in increasing or reducing bond during administration, see Ch. 446, *Probate: Bonds--Increase and Decrease During Administration* .

[3] State Statutes

Deposit of assets in blocked account. *Prob. Code § 8401, 8483*

Reduction of bond by deposit of assets. *Prob. Code § 8483*

[4] Cross References

For a related form, see *§ 442.140*.

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38-442 California Forms of Pleading and Practice--Annotated § 442.146

§ 442.146 Notice of Petition to Administer Estate [Prob. Code §§ 8100, 10451]--Judicial Council Form DE-121

[1] FORM Notice of Petition to Administer Estate [Prob. Code §§ 8100, 10451]--Judicial Council Form DE-121

Click here to view image.

[2] Source of Form

This form is an illustration of Judicial Council Form DE-121, Notice of Petition to Administer Estate. Use of this form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. It is drawn from and based on the form of notice set forth in *Prob. Code § 8100*.

[3] Use of Form

This mandatory form is for use to give notice of the hearing on a petition for probate and appointment of a personal representative, which may include requests to probate the decedent's will and/or obtain authority to administer the estate under the Independent Administration of Estates Act (*Prob. Code § 10400 et seq.*) [*see Prob. Code §§ 8100, 10451(a), (c)*]. The form also provides for giving notice of a petition for determination or confirmation of property passing or belonging to a surviving spouse under *Prob. Code § 13650* if such a petition is joined with the petition to administer the estate [*see Prob. Code § 13653*].

The form is served on the persons and entities described in *Prob. Code §§ 8110-8113* and published in accordance with *Prob. Code §§ 8120-8125* [*see Prob. Code § 8100*]. The notice need no longer be posted [*see* Cal. Law Revision Comm'n Comment to repeal of former Prob. Code § 333].

[4] Contents of Notice

[a] Generally

The notice must state substantially the text of the form of notice set forth in *Prob. Code § 8100* [*see Prob. Code § 8100*].

[b] Independent Administration Information

If authority under the Independent Administration of Estates Act is requested in the petition for appointment of the personal representative, notice of the hearing on the petition for authority is given for the period and in the manner applicable to the petition for appointment [*see Prob. Code § 10451(a)*]. The notice of hearing on a petition that includes a request for independent administration must include a statement prescribed by statute about the request [*see Prob. Code §§ 8100, 10451(c)*].

For further discussion of proceedings under the Act, including notice requirements when independent administration authority is sought in a separate petition, see Ch. 445, *Probate: Independent Administration of Estates* .

[c] Objection Information

The notice of hearing must advise recipients that they may object to the granting of the petition, either in person at, or in writing before, the hearing. The objector may appear in person or by attorney [*see Prob. Code § 8100*; *see also Prob. Code §§ 1020, 1021, 1043* (objections in probate proceedings, generally)]. For a form for use in objecting to the issuance of letters to a person named as an executor in the will, see *§ 442.151*. For discussion and forms relating to objections to the probate of a will, see Ch. 444, *Probate: Will Contests* .

[d] Creditor Information

The notice of hearing must advise the decedent's creditors or contingent creditors of the time within which creditor claims against the estate must be filed [*see Prob. Code § 8100*]. For discussion and forms for use in proceedings involving creditor claims against the estate, see Ch. 454, *Probate: Claims Against the Estate* .

[e] Special Notice Information

The notice of hearing must advise recipients of the notice that they may request special notice of the filing of an inventory and appraisal of estate assets or of any petition or account as provided in *Prob. Code § 1250* [*Prob. Code § 8100*]. For discussion and forms for use in requesting special notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

[f] Hearing Date

The clerk will set the hearing on the petition for a day not less than 15 nor more than 30 days after the petition is filed. However, at the petitioner's request made at the time the petition is filed, the clerk is required to set the hearing for a day not less than 30 nor more than 45 days after the petition is filed [*Prob. Code §§ 1041, 8003(a)*]. The court may not shorten the time for giving the notice of hearing [*Prob. Code § 8003(a)*].

[5] Service of Notice

[a] Generally

The petitioner must serve notice of the hearing in the manner prescribed in *Prob. Code §§ 8110-8113*, discussed below [*see Prob. Code § 8003(b)*]. Service of the notice of hearing must be established at the hearing on the petition [*see Prob. Code § 8005(b)(3)*].

[b] To Heirs and Devisees

At least 15 days before the hearing, the petitioner must serve notice of the hearing by mail or personal delivery on each heir of the decedent and on each devisee named in any will offered for probate, so far as the heirs and devisees are known to or reasonably ascertainable by the petitioner [*see Prob. Code § 8110*; *see also Prob. Code § 1206* (notice to heirs and devisees), *Prob. Code §§ 1215, 1220* (manner of mailing notice)]. The phrase "reasonably ascertainable," as used in *Prob. Code § 8110*, must be given a broad meaning, sufficient to include individuals whose identities are known to the petitioner and who reasonably might be heirs [*Estate of Carter (2003) 111 Cal. App. 4th 1139, 1142, 4 Cal. Rptr. 3d 490]* . If the petitioner fails to give notice to a known heir, he or she commits extrinsic fraud and the heir may maintain an action in equity for a constructive trust [*Estate of Carter (2003) 111 Cal. App. 4th 1139, 1148-1149, 4 Cal. Rptr. 3d 490]* .

Generally, notice need not be given to a person who, because of a possible parent-child relationship between a stepchild and a stepparent or between a foster child and a foster parent, may be an heir of the decedent or a member of a class to which a devise was made [*see Prob. Code § 1207(a)*]. However, this rule does not apply when the petitioner has actual knowledge of facts that a person would reasonably believe give rise under *Prob. Code § 6454* to the parent-child relationship between the stepchild and the stepparent or between the foster child and the foster parent [*see Prob. Code § 1207(b)*].

The determination of whether children born to the decedent out of wedlock might be heirs, and therefore entitled to notice, must be made by the court, not by the petitioner [*Estate of Carter (2003) 111 Cal. App. 4th 1139, 1147-1148, 1152-1153, 4 Cal. Rptr. 3d 490]* .

The petitioner need not provide notice to any other person who joins in the petition. Furthermore, if the petitioner is a person for whom notice would ordinarily be required under *Prob. Code § 8110*, the petitioner need not give notice to himself or herself [*see Prob. Code § 1201*].

[c] To Named Executors

In like manner as with heirs and devisees, notice must be served on or mailed to all persons named as executor in any will offered for probate [*see Prob. Code § 8110*]. All persons named as executor, whether as coexecutors to serve jointly or as successor executors, should be given notice.

[d] To Attorney General

If the will involves or may involve a testamentary trust of property for charitable purposes, other than a charitable trust with a designated trustee residing in California, or if it involves or may involve a devise for charitable purposes without an identified devisee, notice of the hearing on the petition to administer the estate, accompanied by a copy of the petition and of the will, must be served on the Attorney General of California [*Prob. Code § 8111*]. The notice and accompanying required papers must be mailed to the Attorney General at his or her office in Sacramento [*see Prob. Code § 1209(b)*; *see also Prob. Code §§ 1215, 1220* (manner of mailing notice)]. The address of the office of the Attorney General in Sacramento is 515 Capitol Mall, Sacramento, California 95814.

[e] To Creditors and Public Entity Claimants

A general personal representative must give notice of administration of the estate to creditors under *Prob. Code §§ 9050-9054*, and to public entities under *Prob. Code §§ 9200-9205* [*Prob. Code § 8112*]. For discussion and forms, see Ch. 454, *Probate: Claims Against the Estate* .

[f] To Foreign Officials

If a citizen of a foreign country dies without leaving a will, or leaves a will without naming an executor, or if it appears

that property will pass to a citizen of a foreign country, notice must be given to a recognized diplomatic or consular official of the foreign country maintaining an office in the United States [*Prob. Code § 8113*]. Whether a country has recognized diplomatic or consular representation in the United States may be ascertained from the United States Department of State [Cal. Law Revision Comm'n, Comment to *Prob. Code § 8113*].

[6] Publication of Notice

[a] Generally

In addition to service of the notice of hearing by mail or personal delivery, as provided in *Prob. Code §§ 8110-8113*, discussed above, notice of hearing of a petition for administration of a decedent's estate must also be published before the hearing in the manner provided in *Prob. Code §§ 8120-8125* [*Prob. Code § 8120*].

[b] Time, Place, and Manner

The first publication date of the notice must be at least 15 days before the hearing. Three publications in a newspaper published once a week or more often, with at least five days intervening between the first and last publication dates, not counting the publication dates, are sufficient [*Prob. Code § 8121(a)*].

Notice must be published in a newspaper of general circulation in the city where the decedent resided at the time of death, or where the decedent's property is located if the court has jurisdiction under *Prob. Code § 7052* (nondomiciliary decedents). If there is no such newspaper, if the decedent did not reside in a city, or if the property is not located in a city, then notice must be published in a newspaper of general circulation in the county which is circulated within the area of the county in which the decedent resided or the property is located. If there is no such newspaper, notice must be published in a newspaper of general circulation published in California nearest to the county seat of the county in which the decedent resided or the property is located, and which is circulated within the area of the county in which the decedent resided or the property is located [*Prob. Code § 8121(b)*].

For the purposes of *Prob. Code § 8121*, "city" means a charter city as defined in *Gov. Code § 34101* or a general law city as defined in *Gov. Code § 34102* [*Prob. Code § 8121(c)*].

[c] Good Faith Compliance With Notice Requirement

It is the express intent of the Legislature that notice published in a good faith attempt to comply with the requirements of *Prob. Code § 8121* (discussed in *§ 442.146[6][b]*) is sufficient to provide notice of hearing and to establish jurisdiction, if the court expressly finds that the notice was published in a newspaper of general circulation published within the county and widely circulated within a true cross-section of the area of the county in which the decedent resided or his or her property was located in substantial compliance with *Prob. Code § 8121*. The purpose of this good faith, substantial compliance publication standard is to prevent a minor error in publication from invalidating what would otherwise be a proper proceeding. This expression of legislative intent is based on findings that, to be most effective, notice of hearing should be published in compliance with *Prob. Code § 8121*. However, these findings are tempered with a recognition of the possibility that, in unusual cases due to confusion over jurisdictional boundaries or oversight, notice may inadvertently be published in a newspaper that does not satisfy the requirements of *Prob. Code § 8121* [*see Prob. Code § 8122*].

[d] Type Size

The caption of the notice must be in 8-point type or larger. The text must be in 7-point type or larger [*Prob. Code § 8123*].

[e] Proof

A petition for administration of a decedent's estate cannot be heard by the court unless an affidavit showing due publication of the notice of hearing has been filed with the court. The affidavit must contain a copy of the notice and state the date of its publication [*Prob. Code § 8124*]. The publication of notice under *Prob. Code §§ 8120-8125* is a jurisdictional fact that is required to be established at the hearing on the petition [*see Prob. Code § 8005(b)(1)(C)*].

[f] Subsequent Notice.

Notwithstanding *Prob. Code § 8100*, after the notice of hearing is published and an affidavit filed, any subsequent publication of the notice ordered by the court may omit the information for creditors and contingent creditors [*Prob. Code § 8125*].

Publication and service of a notice of petition to administer estate is sufficient notice of any instrument offered for probate that is filed with, and specifically referred to in, the petition [*Cal. Rules of Ct., Rule 7.54*]. Any other instrument must be presented in an amended petition, and a notice of the amended petition must be published and served [*Cal. Rules of Ct., Rule 7.54*].

[7] State Statutes

[a] Notice

[i] By Publication

When required. *Prob. Code §§ 8003(b), 8120*

Duration and medium. *Prob. Code § 8121*

Good faith compliance. *Prob. Code § 8122*

Type size. *Prob. Code § 8123*

Contents of subsequent notice. *Prob. Code § 8125*

[ii] By Mail or Personal Delivery

When required. *Prob. Code § 8003(b)*

To heirs, devisees, and named executors. *Prob. Code § 8110*

To Attorney General. *Prob. Code §§ 1209(b), 8111*

To creditors and public entity claimants. *Prob. Code § 8112*

To foreign officials. *Prob. Code § 8113*

[iii] General Requirements

Notice as not required to petitioner(s). *Prob. Code § 1201*

Mailing of notice. *Prob. Code §§ 1215, 1220*

Hearing date. *Prob. Code § 8003(a)*

Form and content of notice. *Prob. Code § 8100*

Request for independent administration authority. *Prob. Code § 10451(c)*

[b] Proof of Notice

Proof of service by mail, generally. *Code Civ. Proc. § 1013a*

Proof of notice of hearing as required. *Prob. Code §§ 1260, 8005(b)(3)*

Proof of mailing. *Prob. Code § 1261*

Proof of publication. *Prob. Code §§ 1262, 8005(b)(1)(C), 8124*

Proof of personal delivery. *Prob. Code § 1264*

Proof at hearing. *Prob. Code § 1265*

[9] California Rules of Court

Publication and notice of petition to administer estate. *Cal. Rules of Ct., Rule 7.54*

[10] Local Court Rules

Department number and hearing date required on documents filed in connection with matters already set for hearing. Los Angeles Co. Super. Ct. Rules, Rule 10.10

[11] Decisions

Service on devisee of preprinted Judicial Council former form for notice of death and petition to administer estate (*now see* notice of petition to administer estate) meets notice requirements of former Prob. Code § 328 (*now see Prob. Code §§ 8110, 8111*) *Estate of Baird (1987) 196 Cal. App. 3d 957, 961, 242 Cal. Rptr. 246*

Trial court properly entertained collateral attack on order admitting will to probate and granting letters of administration when there had been no publication of notice of death and of petition to administer estate pursuant to former Prob. Code § 333 (*now see Prob. Code §§ 8120-8125*), because publication of notice is required for subject matter jurisdiction. *Estate of Buckley (1982) 132 Cal. App. 3d 434, 443-451, 183 Cal. Rptr. 281*

[12] Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, § 445 (10th ed. 2005)

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Volume 38: Probate: Is Probate Necessary? thru Probate: Estate Tax-Chs. 440-453
Chapter 442 PROBATE: INITIATING PROBATE ADMINISTRATION
PART VI. FORMS

38-442 California Forms of Pleading and Practice--Annotated § 442.147

§ 442.147 Proof of Subscribing Witness [Prob. Code § 8220]--Judicial Council Form DE-131

[1] FORM Proof of Subscribing Witness [Prob. Code § 8220]--Judicial Council Form DE-131

Click here to view image.

[2] Source of Form

This form is an illustration of Judicial Council Form DE-131, Proof of Subscribing Witness. Use of this form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Use of Form

This mandatory declaration is for use to prove the will in an uncontested probate proceeding when (1) the evidence of due execution is not available in the form of an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) included in the original will, (2) the execution of the will satisfies the requirements of *Prob. Code § 6110*, and *(3)* the decedent died on or after January 1, 1985 [*see Prob. Code § 8220(a)*; *see also Prob. Code §§ 6103* (law applying when testator died on or after January 1, 1985), 6113(b) (validity of will based on law at time and place of execution)].

Prob. Code § 8220 is framed in permissive language. Some courts will not accept proof by affidavit or declaration but require live testimony. Local rules and practice should therefore be consulted.

[4] Manner of Executing Wills

A written will is validly executed if its execution complies with any of the following [*Prob. Code § 6113*]:

- It is executed in compliance with *Prob. Code § 6110* (witnessed wills) or 6111 (holographic wills) or *Prob. Code §§ 6200-6248* (California Statutory Wills) or 6380-6390 (Uniform International Wills Act).

- The execution of the will complies with the law at the time of execution of the place where the will is executed.

- The execution of the will complies with the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national.

A witnessed will must be in writing [*Prob. Code § 6110(a)*]. It must also be signed (1) by the testator [*Prob. Code § 6110(b)(1)*], (2) by some other person signing in the testator's name and presence and by the testator's direction [*Prob. Code § 6110(b)(2)*], or (3) by a conservator pursuant to a court order to make a will under *Prob. Code § 2580* [*Prob. Code § 6110(b)(3)*].

A will must be witnessed during the testator's lifetime [*Prob. Code § 6110(c)(1)*]. However, if a will was not executed in compliance with *Prob. Code § 6110(c)(1)*, the will must be treated as if it was executed in compliance with *Prob. Code § 6110(c)(1)* if the proponent of the will can establish by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will [*Prob. Code § 6110(c)(2)*].

Under *Prob. Code § 6104*, the execution of a will, or of any part of a will, is ineffective to the extent that the execution is procured by duress, menace, fraud, or undue influence (Paragraph 3) [*see Prob. Code § 6104*].

This form assumes that the will was properly executed under Prob. Code § 6110. Therefore, modifications to the form may be necessary if the will was executed in another state.

[5] Attorney's Certification

To prove the will by affidavit it is necessary to establish that the will on which the subscribing witness is offering evidence is also the will that is being offered for probate. This may be done by the attorney's certification, located at the end of this form. Otherwise, the photocopy of the will must be a clerk's certified copy, which, of course, cannot be obtained until after the original has been filed. Some courts will accept an "endorsed filed" copy in lieu of a clerk's certified copy.

[6] State Statutes

Declaration under penalty of perjury in lieu of affidavit. *Code Civ. Proc. § 2015.5*

Choice of law applicable to determination of validity of will. *Prob. Code § 6113*

Evidence of subscribing witness to prove will as permitted to be by affidavit in uncontested proceeding. *Prob. Code § 8220*

[7] Local Court Rules

[a] Los Angeles County

Proof of wills by affidavit or declaration. Los Angeles Co. Super. Ct. Rules, Rule 10.54

[b] Orange County

Proof of wills by affidavit or declaration. Orange Co. Super. Ct. Rules, Rule 603.11

[c] Riverside County

Proof of wills in uncontested proceedings. Riverside Co. Consol. Ct. Rules, Rule 6.0204

[d] San Francisco

Proof of wills. San Francisco Uniform Local Ct. Rules, Rule 14.37.

[8] Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, §§ 545, 590 (10th ed. 2005)

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Volume 38: Probate: Is Probate Necessary? thru Probate: Estate Tax-Chs. 440-453
Chapter 442 PROBATE: INITIATING PROBATE ADMINISTRATION
PART VI. FORMS

38-442 California Forms of Pleading and Practice--Annotated § 442.148

§ 442.148 Declaration and Order for Commission to Take Deposition of Subscribing Witness [Code Civ. Proc. §§ 2025.010-2028.080; Prob. Code § 8220(c)]

[1] FORM Declaration and Order for Commission to Take Deposition of Subscribing Witness [Code Civ. Proc. §§ 2025, 2026, 2028 (effective until July 1, 2005); Code Civ. Proc. §§ 2025.010-2028.080 (effective July 1, 2005); Prob. Code § 8220(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	DECLARATION AND ORDER FOR COMMIS-
Deceased.	)	SION TO TAKE DEPOSITION OF SUBSCRIBING WITNESS

_____

I, _____ [*name*], declare:

I am the [attorney for the] petitioner for probate of the will of _____ [*name*], deceased.
_____

No subscribing witness to the document filed herein as the purported will of the decedent resides in _____ [*identify county in which petition for probate is filed*].

_____ [*Name of witness*] is one of the subscribing witnesses to that document and is a necessary and material witness without whose testimony the hearing on the petition for probate cannot proceed. The witness resides in _____ [*identify location of residence outside of California*], and will be absent from California when his/her testimony will be required.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

ORDER

It appears from the foregoing declaration that no subscribing witness to the document filed herein as the purported will of the decedent resides in _____ [*identify county in which petition for probate is filed*], but that _____ [*name of witness*] is a necessary and material witness to the matter in question who will be absent from California when his/her testimony is required.

IT IS ORDERED that the clerk shall issue a commission to _____ [*either named individual or* any notary public residing in _____ (*locale where witness resides*)], who is hereby appointed commissioner to examine _____ [*name of witness*], on an oath taken before the commissioner, on the written questions to be annexed to the commission, and on a photographic copy of the alleged will of decedent, and to cause the examination to be reduced to writing and to be signed by the witness, and returned together with the certificate of the commissioner, to the clerk.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is a combined declaration and order for use to obtain a commission for taking the deposition by written questions of a subscribing witness to the decedent's will who does not reside in the county in which the petition for probate is filed. Under *Prob. Code § 8220(c)*, if no subscribing witness resides in the county, but a witness's deposition can be taken elsewhere, the court may direct the deposition to be taken. On the examination of the witness, the court may authorize a photocopy of the will to be made and presented to the witness. The witness may be asked the same questions with respect to the photocopy as if the original will were present [*see Prob. Code § 8220(c)*].

The provisions of the Civil Discovery Act [*Code Civ. Proc. § 2016.010 et seq.*] apply to the deposition procedure established by *Prob. Code § 8220(c)* [*see Prob. Code § 1000*]. The petitioner must adhere to the requirements for depositions by written questions set forth in *Code Civ. Proc. §§ 2028.010-2028.080*, as modified by the requirements for oral depositions set forth in *Code Civ. Proc. §§ 2025.010-2027.010*.

The example in this form assumes that the subscribing witness to be deposed resides outside of California. On request, the clerk of the court may issue a commission authorizing the deposition in another state or place without a noticed motion or court order. The commission may contain such terms as are required by the foreign jurisdiction to initiate the process. If a court order is required by the foreign jurisdiction, an order for a commission may be obtained by an ex parte application [*Code Civ. Proc. § 2026.010(f)*].

If the subscribing witness resides outside the county but within California, it appears that the same commission procedure may be used if the court directs that the witness's deposition be taken under *Prob. Code § 8220(c)*. Otherwise, general procedures for taking a deposition by written questions within the state are governed by *Code Civ. Proc. §§*

2028.010-2028.080.

Any process and procedure required and available under the laws of the state, territory, or insular possession where the deposition will be held is sufficient to compel attendance if the witness resides out of state [*see Code Civ. Proc. §§ 2026.010(c), 2028.010*]. If the witness resides within California, he or she may be compelled to attend by use of a deposition subpoena [*see Code Civ. Proc. §§ 2020.020, 2020.210-2020.310, 2025.440-2025.450*, 2028.010Prob Code § 1000]. The petitioner may, but need not, also serve the witness with a notice of deposition [*see Code Civ. Proc. §§ 2025.220, 2025.410, 2028.010*. A court may permit a witness who is not a party to appear at his or her deposition by telephone if there is good cause and no prejudice to any party [*Code Civ. Proc. § 2025.310(b)*].

For forms for notice of written deposition and deposition subpoena, see Ch. 190, *Depositions and Discovery* .

[3] California Deposition and Discovery Practice

For further discussion and forms pertaining to written deposition procedures, see DeMeo, California Deposition and Discovery Practice, chs. 52, 53

[4] State Statutes

Deposition of subscribing witness. *Code Civ. Proc. §§ 2020.010-2020.310, 2025.010-2028.080P*rob. Code § 8220(c)

Applicability of discovery procedures under Code of Civil Procedure to probate proceeding. *Prob. Code § 1000*

Admissibility of affidavit in uncontested probate proceeding. *Prob. Code § 1022*

[5] Local Court Rules

Department number and hearing date required on documents filed in connection with matters already set for hearing. Los Angeles Co. Super. Ct. Rules, Rule 10.10

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38-442 California Forms of Pleading and Practice--Annotated § 442.149

§ 442.149 Commission to Take Deposition of Witness to Will [Code Civ. Proc. §§ 2025.010-2025.620, 2028.010-2028.080; Prob. Code § 8220(c)]

[1] FORM Commission to Take Deposition of Witness to Will [Code Civ. Proc. §§ 2025, 2028 (effective until July 1, 2005); Code Civ. Proc. §§ 2025.010-2025.620, 2028.010-2028.080 (effective July 1, 2005); Prob. Code § 8220(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	COMMISSION TO TAKE DEPOSITION OF WIT-
Deceased.	)	NESS TO WILL

_____

The People of the State of California to _____ [*name or title of person to take deposition*], Greetings:

WHEREAS, it appears to our Superior Court of the State of California for _____ County that _____ [*name of unavailable witness*], a material witness in a certain proceeding now pending in that Superior Court, in the matter of the Estate of _____ [*name*], deceased, and that the personal attendance of this witness cannot be procured at the hearing in the proceeding, therefore, we, in confidence of your prudence and fidelity, have appointed you, and by these presents do appoint you, a commissioner to examine this witness and empower you, at certain days and places (to be by you for that purpose appointed), diligently to examine this witness on the will and questions annexed to this commission, and on his/her oath, taken before you, to cause the examination of that witness and by yourself, under your seal, and then return the same, annexed to this commission, to our Superior Court, with all convenient speed.

Witness, the Honorable _____ [*name*], Judge of the Superior Court of the State of California for the County of _____, with the seal of the court affixed, this _____ day of

_____.

Attest: _____ [*signature*]
Clerk

[*SEAL*] By: _____ [*signature*]
Deputy

Direction to commissioner: On completion of deposition please return this commission with the photocopy of the will to the clerk of this court. Hearing before the court is set for _____ [*date*].

Questions to be administered to _____ [*name*] of the City of _____, County of _____, State of _____, a witness produced by the petitioner in the matter mentioned in the foregoing commission:

1. What is your name, age, and residence?

Answer: _____.

2. Where did you reside on _____ [*date*]?

Answer: _____.

3. Were you acquainted with _____ [*name of deceased*] on _____ [*date*], the date of the instrument filed in the Court in the matter mentioned in the annexed commission on _____ [*date*], purporting to be the last will of _____, deceased, a photographic copy of which is attached and marked Exhibit "A?"

Answer: _____.

4. After examining Exhibit "A" and the signature thereto, do you recognize the signature purporting to have been signed by you as your signature?

Answer: _____.

5. Did you know the other subscribing witness to the instrument on _____ [*date*], the date of the instrument?

Answer: _____.

6. Do you recognize the signature purporting to have been signed by _____ [*name of the other subscribing witness*]?

Answer: _____.

7. And is that his/her signature attached to the instrument?

Answer: _____.

8. Do you recognize the signature purporting to have been signed by _____ [*name of decedent*]?

Answer: _____.

9. And is that his/her signature attached to the instrument?

Answer: _____.

10. Was the instrument signed by _____ [*name of decedent*] at the City of _____, County of _____, State of _____, on _____ [*date*], the day it bears date, in the presence of yourself and of _____ [*name of other subscribing witness*]?

Answer: _____.

11. Did _____ [*name of decedent*] declare to you and _____ [*name*], the other subscribing witness, both present at the same time, that the instrument was his/her last will?

Answer: _____.

12. Did you and _____ [*name of other subscribing witness*] then and there, at the request of _____ [*name of decedent*] and in his/her presence, subscribe your names as witnesses to the instrument?

Answer: _____.

13. About how old was _____ [*name of testator*] at the time he/she signed his/her name to the instrument?

Answer: _____.

14. What was the condition, if you know, of the mind and memory of _____ [*name of testator*] at the time he/she signed his/her name to the instrument?

Answer: _____.

15. Was _____ [*name of decedent*] at the time he/she signed the instrument acting under duress, menace, fraud, undue influence, or misrepresentation?

Answer: _____.

16. After examining Exhibit "A" and refreshing your memory, please state what occurred at the time of signing and witnessing the document purporting to be the last will of _____ [*name of decedent*]?

Answer: _____.

_____ [*signature*]
Deponent

Subscribed and sworn to before me on _____ [*date*].

_____ [*signature*]
Commissioner appointed by the

Superior Court of California,

County of _____

State of _____,)) ss.
County of _____.)

_____

I, _____, under and by virtue of the commission attached hereto, certify that _____, named in the foregoing commission as a witness, and whose signature is attached to the foregoing questions, and answers thereto, appeared before me at my office in the City of _____, County of _____, State of _____, on _____ [*date*], and after being duly sworn by me, according to law, made answer to each and every and all of the foregoing questions as set forth above, and that the answers set forth are the answers of that witness to those questions reduced to writing by me, and carefully read over by me to the witness[, who corrected them], and then affixed his/her signature thereto.

In witness whereof, I have hereunto set my hand this _____ [*date*].

_____ [*signature*]
Commissioner appointed by the

Superior Court of California,

County of _____

[2] Use of Form

This form is a commission for use when no printed form is available from the clerk. The issued commission should be mailed by certified mail to the appointed commissioner, accompanied by the written questions and a certified copy of the will.

[3] Cross References

For a related form, see *§ 442.148*.

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38-442 California Forms of Pleading and Practice--Annotated § 442.150

§ 442.150 Proof of Holographic Instrument [Prob. Code § 8222; Evid. Code § 1416]--Judicial Council Form DE-135

[1] FORM Proof of Holographic Instrument [Prob. Code § 8222; Evid. Code § 1416]--Judicial Council Form DE-135

Click here to view image.

[2] Source of Form

This form is an illustration of Judicial Council Form DE-135, Proof of Holographic Instrument. Use of the form is mandatory [*see Cal. Rules of Ct., Rules 1.30-1.35*; Cal. Rules of Ct., Appen., Div. III]. This form isavailable in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Use of Form

This mandatory form of declaration is for use to prove the validity of a holographic will through the opinion evidence of a non-expert witness who has personal knowledge of the testator's handwriting [*see Evid. Code § 1416*; *Prob. Code § 8222*]. A holographic will may be proved in the same manner as other writings, and extrinsic evidence is admissible to determine whether a document constitutes a holographic will [*Prob. Code §§ 6111.5, 8222*]. One way in which a writing may be proved is by establishing the genuineness of the writer's handwriting [*see Evid. Code § 1415*], and the non-expert opinion of someone with personal knowledge of that handwriting is admissible evidence in establishing that genuineness [*see Evid. Code § 1416*].

Under *Evid. Code § 1416*, a witness who is not otherwise qualified to testify as an expert may state his or her opinion whether a writing is in the handwriting of a supposed writer if the court finds that he or she has personal knowledge of the handwriting of the supposed writer. This personal knowledge may be acquired from having seen the supposed writer write, having seen a writing purporting to be in the handwriting of the supposed writer and on which the supposed writer has acted or been charged, having received letters in the due course of mail purporting to be from the supposed

writer in response to letters duly addressed and mailed to him or her by the witness, or by any other means [*Evid. Code § 1416*]. The witness's testimony may be presented by affidavit (or declaration under penalty of perjury under *Code Civ. Proc. § 2015.5*), and must be received as evidence when offered in an uncontested probate proceeding [*see Prob. Code § 1022*].

[4] Attorney's Certification

To prove the holograph by declaration it is necessary to establish that the will on which the witness is offering evidence is also the will that is being offered for probate. This may be done by the attorney's certification, located at the end of the foregoing form. Otherwise, the photocopy of the will must be a clerk's certified copy, which, of course, cannot be obtained until after the original has been filed. Some courts will accept an "endorsed filed" copy in lieu of a clerk's certified copy.

[5] State Statutes

Declaration under penalty of perjury in lieu of affidavit. *Code Civ. Proc. § 2015.5*

Opinion proof of handwriting. *Evid. Code § 1416*

Use of affidavit as evidence in uncontested proceeding. *Prob. Code § 1022*

Substantive requirements for holographic will. *Prob. Code § 6111* (applicable if decedent died on or after January 1, 1985); former *Prob. Code § 53* (applicable if decedent died before January 1, 1985)

Admissibility of extrinsic evidence. *Prob. Code § 6111.5*

Proof of holographic will. *Prob. Code § 8222*

[6] Local Court Rules

[a] Los Angeles County

Department number and hearing date required on documents filed in connection with matters already set for hearing. Los Angeles Co. Super. Ct. Rules, Rule 10.10

Holographic will provable by attaching copy of will to proof of will. Los Angeles Co. Super. Ct. Rules, Rule 10.54(b)

[b] San Francisco City and County

Typewritten copy of will required to accompany petition when photocopy of handwritten will attached to petition. San Francisco Uniform Local Ct. Rules, Rule 14.35

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38-442 California Forms of Pleading and Practice--Annotated § 442.151

§ 442.151 Contest of Appointment of Personal Representative [Prob. Code §§ 1043, 8004(a)]

[1] FORM Contest of Appointment of Personal Representative [Prob. Code §§ 1043, 8004(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	CONTEST OF APPOINTMENT OF PERSONAL
Deceased.	)	REPRESENTATIVE

_____

Contestant _____ [*name*] is a person interested in this estate by reason of being _____ [*identify contestant's interest, e.g.,* the decedent's son].

Contestant opposes appointment of _____ [*name*] as _____ [executor *or* administrator *or* administrator with the will annexed] for the following reasons:

1. _____ [*Name of proposed personal representative*] is not competent to serve as _____ [executor *or* administrator *or* administrator with the will annexed] in that _____ [*describe grounds of opposition, e.g.,* he/she is addicted to alcohol and cannot execute the duties of the trust by reason of drunkenness].

2. [*Continue with as many grounds for opposition as may exist.*]

[*ADD, if contestant asserts his/her right to appointment as personal representative*]

Contestant is entitled, after petitioner, to appointment as _____ [executor *or* administrator *or*

administrator with the will annexed] and to letters _____ [testamentary *or* of administration *or* of administration with the will annexed]. Contestant has filed his/her petition for appointment as such, and has served notice of hearing on that petition in the manner provided in *Sections 8110-8113 of the Probate Code*. Copies of that petition and notice are attached hereto as Exhibits A and B and incorporated by reference.

WHEREFORE, contestant prays that the court:

1. Deny petitioner's petition for appointment as _____ [executor of the will *or* administrator *or* administrator with the will annexed] of _____ [*name*], deceased, and for issuance of letters _____ [testamentary *or* of administration *or* of administration with the will annexed].
Dated: _____.

_____ [*signature*]
Contestant

_____ [*signature*]
Attorney for Contestant

VERIFICATION

I, _____ [*name*], am the contestant in the above-entitled proceeding. I have read the foregoing statement of opposition and know the contents thereof. The same is true of my own knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].

_____ [*signature*]

CAUTION:
A response or objection to a petition must be verified [***see*** *Prob. Code §§ 1021(a)(2)*].

[2] Use of Form

This form of contest is for use by an interested person to oppose the appointment of a personal representative. The form includes optional language for use if the contestant is asserting his or her right to appointment in lieu of that of the proposed appointee [*see Prob. Code § 8004(a)*].

If the contestant asserts the right of another person to appointment as personal representative, the contestant must also file a petition for appointment and serve notice in the manner provided in *Prob. Code § 8110-8113*, and the two petitions will be heard together [*see Prob. Code § 8004(a)*].

Contest of the appointment of a personal representative under *Prob. Code § 8004(a)* does not constitute a contest of the probate of the will [*see Prob. Code § 8004(b)*; *see also* Ch. 444, *Probate: Will Contests*], but is only opposition to the competency of an individual or a legal entity to serve as personal representative.

[3] Grounds of Opposition

The grounds for opposing appointment are found in *Prob. Code § 8402*, which sets forth the conditions under which a person may not serve as a personal representative [*Prob. Code § 8402(a)(3)*]. One of these conditions includes the existence of any ground for removal of the personal representative set forth in *Prob. Code § 8502*. The sample ground of opposition in the foregoing form is drawn from *Prob. Code § 8502(b)*.

If the opposition is based on the fact that a person named as executor is a minor, then *Prob. Code § 8424* may apply and a "temporary" executor may be appointed until the minor reaches age 18 [*see Prob. Code § 8424*].

[4] Procedure

The Law Revision Commission Comments to *Prob. Code § 8004(a)* indicate that it continues prior procedure for objecting to the appointment of a personal representative without substantive change. The comment also refers to *Prob. Code §§ 1043* and *1045*, the general procedural sections on response or objection and continuance or postponement, respectively. Note that the form, in accordance with *Prob. Code § 8004*, uses the term "contest," although the general sections use the terms "response" or "objection."

The objector may appear and make objections in writing at or before the hearing on the petition for appointment of the personal representative [*see Prob. Code § 1043(a)*], or may make the objections orally at the hearing [*see Prob. Code § 1043(b)*]. If they are made in writing, they must be verified [*see Prob. Code §§ 1021(b)(3), 1023*]. The court in its discretion must either hear and determine the objection at the hearing, or grant a continuance to allow the objection to be made in writing [*see Prob. Code §§ 1043(b), 1045*]. A request for a continuance for the purpose of making a written objection is not itself considered an objection. The failure to make an objection during the time allowed is also not to be considered an objection [*see Prob. Code § 1043(c)*].

[5] Verification

An objection or response filed under the Probate Code in response to a petition must be verified by the objector or respondent. If there are two or more parties joining in the objection or response, any of them may verify [*see Prob. Code § 1021(a)(2), (b)(3)*; *see Prob. Code § 1023* (when attorney may sign and/or verify objection or response)].

[6] State Statutes

Objections generally. *Prob. Code § 1043*

Contest of appointment of personal representative. *Prob. Code § 8004(a)*

Grounds for opposition to appointment of personal representative. *Prob. Code §§ 8402, 8502*

[7] Local Court Rules

Department number and hearing date required on documents filed in connection with matters already set for hearing. Los Angeles Co. Super. Ct. Rules, Rule 10.10

[8] Cross References

For a related form, see *§ 442.140*.

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38-442 California Forms of Pleading and Practice--Annotated § 442.152

§ 442.152 Order for Probate [Prob. Code §§ 8006, 10452]--Judicial Council Form DE-140

[1] FORM Order for Probate [Prob. Code §§ 8006, 10452]--Judicial Council Form DE-140

Click here to view image.

[2] Source of Form

This form is an illustration of Judicial Council Form DE-140, Order for Probate. Use of this form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Use of Form

This mandatory form is for use to admit a will to probate and appoint a personal representative in a testate estate or to appoint a personal representative in an intestate estate. It includes optional language for granting full or limited authority to independently administer an estate under the Independent Administration of Estates Act [*see Prob. Code § 8006* (order); *see also Prob. Code § 8000* (petition for administration of decedent's estate), *Prob. Code § 10452* (Independent Administration) and Comments and References to § 442.140].

The first page of the order appointing a personal representative must contain a warning, printed in capital letters in at least 12-point type, stating the following: "WARNING: THIS APPOINTMENT IS NOT EFFECTIVE UNTIL LETTERS HAVE ISSUED" [*Prob. Code § 8400(c)*].

[4] Findings at Hearing

At the hearing on the petition to administer the decedent's estate, the court may examine and compel any person to attend as a witness concerning any of the following matters [*Prob. Code § 8005(a)*]:

- The time, place, and manner of the decedent's death.

- The place of the decedent's domicile and residence at the time of death.
- The character and value of the decedent's property.
- Whether or not the decedent left a will.

The following matters must also be established [*Prob. Code § 8005(b)*]:

- The jurisdictional facts, including (A) the date and place of the decedent's death, (B) the fact that the decedent was domiciled or left property in California at the time of death, and (C) the publication of notice under *Prob. Code §§ 8120-8125*;
- The existence or nonexistence of the decedent's will; and
- The service of notice of the hearing as provided in *Prob. Code §§ 8110-8113*.

[5] Requirements for Issuance of Order

If the court finds that the matters covered in *Prob. Code § 8005(b)(1)* and listed above are established, it will issue an order determining the time and place of the decedent's death and the jurisdiction of the court. When appropriate and on satisfactory proof, the order will admit the decedent's will to probate and appoint a personal representative. The date the will is admitted to probate must be included in the order [*Prob. Code § 8006(a)*].

If the petition requested authority for independent administration of the estate, the court is required to grant the requested authority unless an interested party objects pursuant to *Prob. Code § 1043* and the court determines that the objecting party has shown good cause why the authority should not be granted. If the objecting party has shown good cause why only limited authority should be granted, the court is required to grant only limited authority [*Prob. Code § 10452(b)*; *see also Prob. Code § 10403* (defining "limited authority"); Ch. 445, *Probate: "Independent Administration of Estates"*].

If, through defect of form or error, the matters covered in *Prob. Code § 8005(b)(1)* are incorrectly stated in the petition but actually are established, then the court has and retains jurisdiction to correct the defect or error at any time. No such defect or error makes void an order admitting the will to probate or appointing a personal representative or an order made in any subsequent proceeding [*Prob. Code § 8006(b)*].

[6] State Statutes

Recital of jurisdictional facts as unnecessary. *Prob. Code § 1047*

Entry of orders. *Prob. Code § 1048*

Finding of giving or waiver of notice as required. *Prob. Code § 1260(b)*.

Appeal. *Prob. Code § 1303(a), (b)*

Findings on hearing. *Prob. Code § 8005*

Order for probate. *Prob. Code § 8006*

Conclusiveness of order. *Prob. Code § 8007*

Minute order admitting will to probate. *Prob. Code § 8225*

[7] Local Court Rules

[a] Los Angeles County

Material to be included in probate orders. Los Angeles Co. Super. Ct. Rules, Rule 10.42

[b] Orange County

Probate orders. Orange Co. Super. Ct. Rules, Rule 601.14

[c] Riverside County

Miscellaneous provisions concerning orders. Riverside Co. Consol. Ct. Rules, Rule 6.0706

[d] San Francisco

Material to be included in probate orders. San Francisco Uniform Local Ct. Rules, Rule 14.27

[8] Cross References

For a related form, see *§ 442.140*.

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38-442 California Forms of Pleading and Practice--Annotated § 442.153

§ 442.153 Order for Probate [Prob. Code §§ 8006, 10452]--Admitting Lost or Destroyed Will to Probate and Directing Issuance of Letters [Prob. Code § 8223]--Drafted Form

[1] FORM Order for Probate [Prob. Code §§ 8006, 10452]--Admitting Lost or Destroyed Will to Probate and Directing Issuance of Letters [Prob. Code § 8223]--Drafted Form

(c). Decedent left a will dated _____. This will has never been revoked but was _____ [lost *or* destroyed]. That will is admitted to probate as of _____ [*date*] as decedent's will, and its provisions are as follows:

[*Set out in paragraphs or other convenient format the provisions of the will.*]

[2] Use of Form

This form contains language that may be inserted into an order for probate when the decedent's will has been lost or destroyed [*see Prob. Code § 8223*]. The Judicial Council form for an order for probate [*see § 442.152*] does not contain language for use in this situation. However, since use of the Judicial Council form is now mandatory, it is recommended that Paragraph 2(c) of the Judicial form be crossed out with a reference to an attachment containing the language in this form.

When the decedent's will has been lost or destroyed, the order admitting the will to probate must must set forth the provisions of the will [*Prob. Code § 8223*] and must include the date the will is admitted to probate [*Prob. Code § 8006(a)*]. If it appears to the satisfaction of the court that notice of the hearing has been regularly given or that the party entitled to notice has waived it, the court must so find in its order [*Prob. Code § 1260(b)*]. Except as otherwise provided in the Probate Code, an order need not recite the existence of facts, or the performance of acts, on which jurisdiction depends, but need only contain the matters ordered [*Prob. Code § 1047*].

[3] State Statutes

Order for probate of lost or destroyed will. *Prob. Code § 8223*

Authority to administer under Independent Administration of Estates Act. *Prob. Code §§ 10450, 10452*

[4] Local Court Rules

Material to be included in probate orders. Los Angeles Co. Super. Ct. Rules, Rule 10.42; San Francisco Uniform Local Ct. Rules, Rule 14.27

Orders required to be submitted to Probate Courtroom at least two weeks in advance of hearing date and to state hearing date on face. San Francisco Uniform Local Ct. Rules, Rule 14.6

[5] Cross References

For related forms, see *§§ 442.141* and *442.152*.

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38-442 California Forms of Pleading and Practice--Annotated § 442.154

§ 442.154 Order for Probate [Prob. Code §§ 8006, 10452]--Ancillary Administration--Admitting Nondomiciliary Decedent's Will to Probate and Directing Issuance of Letters [Prob. Code §§ 12522, 12523]--Drafted Form

[1] FORM Order for Probate [Prob. Code §§ 8006, 10452]--Ancillary Administration--Admitting Nondomiciliary Decedent's Will to Probate and Directing Issuance of Letters [Prob. Code §§ 12522, 12523]--Drafted Form

(c) Decedent left a will dated _____. This will has been _____ [duly admitted to probate in the _____(*name of court*) *or* established or proved in accordance with the laws] of the _____ [State *or* Country] of _____ [*name*]. Authenticated copies of the will and of _____ [the order or decree admitting it to probate *or* evidence of its establishment or proof in accordance with the laws of that _____ (state *or* country)] satisfying the requirements of *Sections 1530-1532 of the California Evidence Code* have been filed. At the time of admitting the will to probate the court was a court of competent jurisdiction and had jurisdiction of the subject matter, and all interested parties were given notice and an opportunity for contest; and the determination has become final, and is based on a finding that decedent was domiciled at his/her death in that _____ [state *or* country].

[2] Use of Form

This form contains language that may be inserted into an order for ancillary probate when the decedent's will has been admitted to probate in another state or a foreign nation [*see Prob. Code § 8223*]. The mandatory Judicial Council form for an order for probate [*see § 442.152*] does not contain language for use in this situation, and some attorneys have simply used the Judicial Council form "as is"--in other words, without modifying it to reflect the fact that it involves ancillary administration. However, if the attorney deems it advisable to modify the Judicial Council form to reflect the fact that an ancillary administration is involved, it is recommended that Paragraph 2(c) of the Judicial form be crossed out, with a reference to an attachment containing the language in this form.

This language recites the conditions specified in *Prob. Code §§ 12522* (will admitted to probate in sister state) and 12523(a) (will admitted to probate in foreign nation) for admission of the nondomiciliary decedent's will to probate in California. As long as these conditions are met, the California court must admit the will to probate in California and may not permit a contest or revocation of probate [*see Prob. Code §§ 12522, 12523(a)*]. However, the California court may refuse to admit a will admitted to probate in a foreign nation, even though it is shown to satisfy the conditions of

Prob. Code § 12523(a), if the order admitting the will was made under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process [*Prob. Code § 12523(b)*].

A nondomiciliary decedent's will admitted to probate under Prob. Code §§ 12520-12524 (probate of nondomiciliary decedent's will admitted to probate in sister state or foreign nation) has the same force and effect as the will of a person who dies while domiciled in California that is admitted to probate in California [*Prob. Code § 12524*].

The personal representative may be given the authority under the Independent Administration of Estates Act (*Prob. Code § 10400 et seq.*) [*see Prob. Code § 12530*].

[3] State Statutes

Admission of will admitted to probate in sister state. *Prob. Code § 12522*

Admission of will admitted to probate in foreign nation. *Prob. Code § 12523*

Effect of admission of nondomiciliary decedent's will. *Prob. Code § 12524*

Provisions governing ancillary administration. *Prob. Code §§ 12530-12542*

[4] Cross References

For related forms, see *§§ 442.140* and *442.152*.

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38-442 California Forms of Pleading and Practice--Annotated § 442.155

§ 442.155 Duties and Liabilities of Personal Representative [Prob. Code § 8404]--Judicial Council Form DE-147

[1] FORM Duties and Liabilities of Personal Representative [Prob. Code § 8404]--Judicial Council Form DE-147

Click here to view image.

[2] Source of Form

This form is an illustration of Judicial Council Form DE-147, Duties and Liabilities of Personal Representative. Use of this form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Use of Form

This mandatory form is for use to provide a personal representative with a summary statement of his or her duties and liabilities as personal representative and for him or her to acknowledge receipt of the statement. The statement contained in the form does not supersede the law on which the statement is based [*see Prob. Code § 8404*].

[4] Acknowledgment of Receipt

Before letters are issued, the personal representative, other than a trust company or a public administrator, must file an acknowledgment of receipt of the statement [*Prob. Code § 8404(a)*; *Cal. Rules of Ct., Rule 7.150* (Judicial Council Form DE-147 must be executed and filed by each personal representative, other than company authorized to conduct trust business in California, before court may issue letters)]. The court, by local rule, may require the acknowledgment to include the personal representative's birth date and driver's license number, if any, as long as the court ensures their confidentiality [*see Prob. Code § 8404(b)*]. The acknowledgment is on the reverse side of the form.

[5] State Statutes

Statement of personal representative's duties and liabilities. *Prob. Code § 8404*

[6] California Rules of Court

Requirement that personal representative execute and file Judicial Council Form DE-147. *Cal. Rules of Ct., Rule 7.150*

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38-442 California Forms of Pleading and Practice--Annotated § 442.156

§ 442.156 Confidential Statement of Birth Date and Driver's License Number [Prob. Code § 8404(b)]--Judicial Council Form DE-147S

[1] FORM Confidential Statement of Birth Date and Driver's License Number [Prob. Code § 8404(b)]--Judicial Council Form DE-147S

Click here to view image.

[2] Use of Form

This form is an illustration of Judicial Council Form DE-147S, Confidential Statement of Birth Date and Driver's License Number. Use of this form is mandatory when the court, by local rule, requires the personal representative's acknowledgment of receipt of a statement of duties and liabilities of the office of personal representative [*see § 442.155*] to include the personal representative's birth date and driver's license number. The court is required to ensure the confidentiality of this information [*Prob. Code § 8404(b)*].

[3] Cross References

For a related form, see *§ 442.155*.

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38-442 California Forms of Pleading and Practice--Annotated § 442.157

§ 442.157 Letters [Prob. Code §§ 8403, 8405]--Judicial Council Form DE-150

[1] FORM Letters [Prob. Code §§ 8403, 8405]--Judicial Council Form DE-150

Click here to view image.

CAUTION:
Letters will not be issued until the personal representative files an acknowledgement of receipt of a statement of duties and liabilities of office in the form prescribed by the Judicial Council [*Prob. Code § 8404(a)*; *see § 442.155*].

[2] Source of Form

This form is an illustration of Judicial Council Form DE-150, Letters. Use of this form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Use of Form

This mandatory form is for use to issue to a personal representative letters testamentary, letters of administration, letters of administration with the will annexed, or letters of special administration. This form of letters is usually prepared by counsel for issuance by the clerk.

[4] Authority to Independently Administer Estate

The letters must note whether the personal representative is authorized to act under the Independent Administration of Estates Act (*Prob. Code § 10400 et seq.*), and whether that authority includes or excludes the power to sell, exchange, or grant an option to purchase real property, or to borrow money with the loan secured by an encumbrance on real property (full versus limited authority) [*Prob. Code § 8405*; *see Prob. Code §§ 10402, 10403*].

This notation may be found in paragraph 3 of this form.

[5] Oath of Office

Before letters are issued, the personal representative must take and subscribe an oath to perform, according to law, the duties of the office. The oath constitutes an acceptance of the office and must be attached to or endorsed on the letters [*see Prob. Code § 8403*]. The oath (or affirmation) is located on the right-hand side of this form.

[6] State Statutes

Oath of office. *Prob. Code § 8403*

Form of letters. *Prob. Code § 8405*

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38-442 California Forms of Pleading and Practice--Annotated § 442.158

§ 442.158 Request for Appointment of Probate Referee [Prob. Code §§ 8900, 8902]

[1] FORM Request for Appointment of Probate Referee [Prob. Code §§ 8900, 8902]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	REQUEST FOR APPOINTMENT OF PROBATE
Deceased.	)	REFEREE

_____

It is hereby requested that a duly appointed, qualified, and acting Probate Referee for _____ County be appointed Referee for the purpose of appraising the property in the estate pursuant to *Section 8902 of the Probate Code*. The approximate value of the property in the estate is $_____.
Dated: _____.

_____ [*signature*]
Attorney for Personal Representative

_____ [*Name*] is the Probate Referee next in line for appointment.

_____ [*name*],
County Clerk

By: _____ [*signature*],
Deputy Clerk

[2] Use of Form

This form is a request for appointment of a probate referee for use when no printed form is available and local rules require that an appointment be requested. Local rules may prescribe a different form [*see, e.g.*, San Francisco Uniform Local Ct. Rules, Rule 14.54]. The notation by the clerk as to which referee is next in line for appointment would be appended to the request in those counties in which two or more referees are by practice appointed in rotation or by some other method of selection. Appointment of a probate referee is implicit in *Prob. Code §§ 8900, 8902*, which require a referee to appraise certain types of estate property. The court may, for good cause and on the petition of the personal representative, waive appointment of a probate referee [*see Prob. Code § 8903*]. For further discussion and a form for a petition and waiver, see Ch. 451, *Probate: Inventory and Appraisement* .

[3] State Statutes

Appointment of probate referees. *Prob. Code §§ 400-408*

Powers of probate referees. *Prob. Code §§ 450-453*

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Chapter 442 PROBATE: INITIATING PROBATE ADMINISTRATION
PART VI. FORMS

38-442 California Forms of Pleading and Practice--Annotated § 442.159

§ 442.159 Order Appointing Probate Referee [Prob. Code §§ 8900, 8902]

[1] FORM Order Appointing Probate Referee [Prob. Code §§ 8900, 8902]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER APPOINTING PROBATE REFEREE
Deceased.	)	

_____

IT IS ORDERED that:

_____ [*Name*] is appointed Probate Referee to appraise the assets of the above-entitled estate.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is an order for appointment of a probate referee is for use when the appointment is to be made independent of the order appointing the personal representative.

[3] Cross References

For a related form, see *§ 442.158*.

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38-443 California Forms of Pleading and Practice--Annotated 443.syn

§ 443.syn Synopsis to Chapter 443: PROBATE: COMPELLING PRODUCTION OF WILL

§ 443.01 Scope of Chapter

§§ 443.02-443.09 [Reserved]

§ 443.10 Governing Law

§ 443.11 Duty to Deliver Will

§ 443.12 Obtaining Copy of Will From Clerk

§ 443.13 Petition and Order for Production of Will

§ 443.14 Contempt for Refusal to Produce

§ 443.15 Transfer of Will Delivered to Improper Court

§§ 443.16-443.29 [Reserved]

§ 443.30 State Statutes

§ 443.31 Decisions

§§ 443.32-443.49 [Reserved]

§ 443.50 Petition for Order Requiring Production of Will [Prob. Code § 8201]

[1] FORM

[2] Use of Form

[3] Caption

[4] Allegations

[5] State Statutes

[6] Local Rules of Court

[7] Text References

§ 443.51 Order [Prob. Code § 1047] Requiring Production of Will [Prob. Code § 8201]

[1] FORM

[2] Use of Form

[3] Citation

[4] State Statutes

[5] Cross References

§ 443.52 Petition for Ex Parte Order to Transfer Will to Court of County in Which Proceeding Is Pending [Prob. Code § 8203]

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Notice and Transmittal

§ 443.53 Ex Parte Order to Transfer Will [Prob. Code § 8203]

[1] FORM

[2] Use of Form

[3] Cross References

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Chapter 443 PROBATE: COMPELLING PRODUCTION OF WILL
PART I. SCOPE

38-443 California Forms of Pleading and Practice--Annotated § 443.01

§ 443.01 Scope of Chapter

This chapter discusses and contains forms regarding the power of the probate court to have a will produced after the death of the testator, and the procedure by which an interested party can force production of such a will. It contains a petition for an order [*see § 443.50*] and an order [*see § 443.51*] requiring production of a will. This chapter also discusses the procedures applicable to transferring a will that has been delivered to a court in which no proceeding is pending to administer the testator's estate [§§ 443.52, 443.53]. For discussion of torts relating to offering a forged will for probate or fraudulently destroying or concealing a will, see Ch. 444, *Probate: Will Contests* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateApplication ProcessEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWillsGeneral Overview

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38-443 California Forms of Pleading and Practice--Annotated §§ 443.02-443.09

[Reserved]

§§ 443.02[Reserved]

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38-443 California Forms of Pleading and Practice--Annotated § 443.10

§ 443.10 Governing Law

The duty of the custodian of the will of a deceased testator to deliver the will to the court clerk or executor is governed by *Prob. Code § 8200*. Compelling production of a will by petition for a court order is governed by *Prob. Code § 8201*. Citations are governed by *Prob. Code §§ 1240-1242*. The procedures governing the transfer of a will to the court in which a proceeding is pending to administer the testator's estate are set forth in *Prob. Code § 8203*. In addition, there are a wide variety of local court rules governing probate practice. The attorney should consult the applicable rules in each jurisdiction.

The production of a will after the death of the testator must be distinguished from the discovery of a will while the testator is still living. A will ordinarily is not subject to discovery during the testator's lifetime, since it is protected under the privacy provisions of the California Constitution [*Cal. Const., Art I, § 1*; *Estate of Gallio (1995) 33 Cal. App.4th 592, 597, 39 Cal. Rptr. 2d 470]* . This constitutional right to privacy is qualified and not absolute, but even when discovery of private information is directly relevant to the issues of ongoing litigation it will not be automatically allowed; there must be a careful balancing of the compelling public need for discovery against the fundamental right of privacy [*Estate of Gallio (1995) 33 Cal. App. 4th 592, 597, 39 Cal. Rptr. 2d 470* ; *Davis v. Superior Court (1992) 7 Cal. App. 4th 1008, 1014, 9 Cal. Rptr. 2d 331]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateApplication ProcessEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWillsGeneral Overview

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38-443 California Forms of Pleading and Practice--Annotated § 443.11

§ 443.11 Duty to Deliver Will

Unless a petition for probate of the will is filed earlier, the custodian of a will must, within 30 days after having knowledge of the testator's death, do both of the following [*Prob. Code § 8200(a)*]:

- Deliver the will to the clerk of the superior court of the county in which the estate of the decedent may be administered. No fee will be charged for compliance with this requirement.

- Mail a copy of the will to the person named in the will as executor, if the person's whereabouts is known to the custodian, or if not, to a person named in the will as a beneficiary, if the person's whereabouts is known to the custodian.

A custodian who fails to comply with these requirements is liable for all damages sustained by any person injured by that failure [*Prob. Code § 8200(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateApplication ProcessEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWillsGeneral Overview

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38-443 California Forms of Pleading and Practice--Annotated § 443.12

§ 443.12 Obtaining Copy of Will From Clerk

The clerk will release a copy of a will delivered under *Prob. Code § 8200* forattachment to a petition for probate of the will or otherwise on receipt of either a court order for production of the will or a certified copy of a death certificate of the decedent and payment of the required fee [*Prob. Code § 8200(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateApplication ProcessEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWillsGeneral Overview

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PART II. LEGAL BACKGROUND

38-443 California Forms of Pleading and Practice--Annotated § 443.13

§ 443.13 Petition and Order for Production of Will

If, on petition to the superior court of the county in which the estate of the decedent is being or may be administered alleging that a person has possession of a decedent's will, the court is satisfied that the allegation is true, the court will order the person to produce the will [*Prob. Code § 8201*].

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38-443 California Forms of Pleading and Practice--Annotated § 443.14

§ 443.14 Contempt for Refusal to Produce

Prob. Code § 8201 does not specifically refer to the availability of a contempt sanction for failure to obey a court order to produce the will. However, the probate court has the same power and authority as otherwise provided by law for a superior court [*see Prob. Code § 800*; *see also Code Civ. Proc. § 128(a)(4)* (power to compel obedience to its orders); *Prob. Code § 1000* (applicability of rules of practice applicable to civil actions to proceedings under Probate Code)]. *Code Civ. Proc. §§ 1209-1222* set forth the circumstances under which a court may find someone in contempt. Failure to obey a court order is grounds for contempt [*Code Civ. Proc. § 1209(a)(5)*; for discussion and forms regarding contempt, *see* Ch. 135, *Contempt*]. However, an individual cannot be held in contempt for failure to obey a court order if he or she had neither knowledge nor notice of the order for violation of which contempt is shown [*Anderson v. Superior Court (1998) 68 Cal. App. 4th 1240, 1245, 80 Cal. Rptr. 2d 891* ; *In re Cassil (1995) 37 Cal. App. 4th 1081, 1087, 44 Cal. Rptr. 2d 267]* . Thus, a custodian must have been served with the order to produce the will before he or she may be held in contempt.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateApplication ProcessEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWillsGeneral Overview

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38-443 California Forms of Pleading and Practice--Annotated § 443.15

§ 443.15 Transfer of Will Delivered to Improper Court

If a will has been delivered to the clerk of the superior court in a county in which no proceeding is pending to administer the testator's estate, that court may order the will transferred to the clerk of the superior court in a county in which the proceeding to administer the estate is pending [*Prob. Code § 8203*; *see § 443.52*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateApplication ProcessEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWillsGeneral Overview

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[Reserved]

§§ 443.16[Reserved]

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PART III. RESEARCH GUIDE

38-443 California Forms of Pleading and Practice--Annotated § 443.30

§ 443.30 State Statutes

Citation. *Prob. Code § 1241*

Duty of custodian to deliver will to court and mail copy to executor. *Prob. Code § 8200(a)*

Liability of custodian for failure to deliver will. *Prob. Code § 8200(b)*

Petition for order requiring production of will. *Prob. Code § 8201*

Use of photocopy of will if original is detained in court of other state or country. *Prob. Code § 8202*

Will delivered to court in which no proceeding to administer estate is pending. *Prob. Code § 8203*

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PART III. RESEARCH GUIDE

38-443 California Forms of Pleading and Practice--Annotated § 443.31

§ 443.31 Decisions

Contestant who claims interest under prior will as not required to petition for order of production if custodian of will is unascertained. *Estate of Munfrey (1943) 61 Cal. App. 2d 565, 569-570, 143 P. 2d 414*

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38-443 California Forms of Pleading and Practice--Annotated §§ 443.32-443.49

[Reserved]

§§ 443.32[Reserved]

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PART IV. FORMS

38-443 California Forms of Pleading and Practice--Annotated § 443.50

§ 443.50 Petition for Order Requiring Production of Will [Prob. Code § 8201]

[1] FORM Petition for Order Requiring Production of Will [Prob. Code § 8201]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____ PETITION FOR ORDER
Estate of_____ [*name*],	)	TO PRODUCE WILL
also known as_____ [*name*],	)	
Deceased.		

_____

Petitioner _____ [*name*] respectfully represents:

[1. Petitioner is _____ (*specify, e.g.,* the surviving spouse of _____ (*name*), decedent,) and a person interested in the _____ (estate *or* will) of (_____ (*name*),) decedent.]

2. The decedent died testate on _____ [*date*].

[*EITHER, if decedent died domiciled in California*]

3. At the time of death, the decedent was a resident of the County of _____, State of California.

[*OR, if decedent died domiciled in outside California*]

3. At the time of death, the decedent was a resident of the County of _____, State of _____. Decedent died in the County of _____, State of _____, leaving property in the County of _____, State of California.

[*CONTINUE*]

4. The decedent left a will dated _____ [*date*], which is his/her last will. [Petitioner is named in the will as executor.]

5. [Petitioner is informed and believes and alleges thereon that] [t]he will is in the possession of _____ [*name*], who resides at _____ [*street address*], in _____ [*city*], _____ County, California.

[6. On or about _____ (*date*), petitioner informed _____ (*name of custodian*) of the testator's death, but he/she refuses to deliver the will to the clerk of this court or to mail petitioner, as _____ (the executor *or* a beneficiary) named therein, a copy of the will, although requested to do so.]

WHEREFORE, petitioner prays for an order requiring _____ [*name*] to produce the will.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

CAUTION:
The petition must be verified. [*Prob. Code § 1021*].

[2] Use of Form

This form is a petition for use by any person to seek to compel production of a will when the will is in the possession of a known person. The petition should be filed in the county where the decedent's estate is being or may be administered [

see Prob. Code § 8201; *see Prob. Code §§ 7051, 7052* (venue)].

[3] Caption

The petition is captioned in the estate of the deceased even though it may be filed before a petition for probate of the will.

[4] Allegations

An optional allegation of the petitioner's status is provided, although *Prob. Code § 8201* is silent with respect to who may petition (Paragraph 1). The petition alleges the decedent's death (Paragraph 2) and the basis for venue (Paragraphs 3) [*see Prob. Code §§ 7051, 7052*]; that decedent left a will (Paragraph 4), and the identity of the custodian of the will (Paragraph 5) [*see Prob. Code § 8201*]. These allegations reflect the terms of *Prob. Code § 8201*, which does not expressly require any demand for the will or even that the custodian have knowledge of the death before the order issues. Nonetheless, an optional paragraph is provided toallege knowledge and refusal to produce the will (Paragraph 6), should its use be appropriate.

[5] State Statutes

Verification. *Code Civ. Proc. § 446*; *Prob. Code § 1021*

Duty of custodian to deliver will. *Prob. Code § 8200*

Petition for order requiring production of will. *Prob. Code § 8201*

[6] Local Rules of Court

Petition for order to produce will and proposed order as to be presented in office of Probate Attorney before filing with clerk. Los Angeles Co. Super. Ct. Rules, Rule § 10.16

[7] Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, § 543 (10th ed. 2005)

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38-443 California Forms of Pleading and Practice--Annotated § 443.51

§ 443.51 Order [Prob. Code § 1047] Requiring Production of Will [Prob. Code § 8201]

[1] FORM Order [Prob. Code § 1047] Requiring Production of Will [Prob. Code § 8201]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of_____ [*name*],	)	ORDER REQUIRING PRODUCTION OF WILL
also known as_____ [*name*],	)	
Deceased.		

_____

The petition of _____ [*name*], alleging that _____ [*name*] has in his/her possession a document purporting to be the last will of _____ [*name*], decedent, and praying for an order requiring its production, has been presented to the court this date. From the proof made the court is satisfied that the allegation is true.

IT IS ORDERED as follows:

1. _____ [*Date*], at _____ [*time*], in the courtroom of Department _____ [*number*] of the court, are fixed as the time and place for producing the document.

2. The clerk of the court forthwith issue a Citation directing _____ [*name*] to produce the document at the time and place specified, as provided by *Probate Code Section 8201*.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is an order for use require production of will, and contemplates the issuance and service of a citation on the person in possession of the will. Although *Prob. Code § 8201* does not refer to the use of a citation, the probate court has the same power and authority as otherwise provided by law for a superior court [*see Prob. Code § 800*; *see also Prob. Code § 1000* (general practice rules applicable)].

[3] Citation

For discussion of citations and an illustration of the Judicial Council form of citation for use in probate proceedings, see Ch. 447, *Probate: Statutory Notice Requirements* . This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[4] State Statutes

Contents of probate orders. *Prob. Code § 1047*

Citations. *Prob. Code §§ 1240-1242*

Citation to be served at least 5 days before its return day. *Prob. Code § 1242*

Order requiring production of will. *Prob. Code § 8201*

[5] Cross References

For a related form, *see § 443.50*.

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38-443 California Forms of Pleading and Practice--Annotated § 443.52

§ 443.52 Petition for Ex Parte Order to Transfer Will to Court of County in Which Proceeding Is Pending [Prob. Code § 8203]

[1] FORM Petition for Ex Parte Order to Transfer Will to Court of County in Which Proceeding Is Pending [Prob. Code § 8203]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	PETITION FOR EX
Deceased.	)	PARTE ORDER TO TRANSFER WILL
	)	

_____

Petitioner, _____ [name], respectfully represents:

[1. Petitioner is _____ (*describe status, e.g.,* the brother of _____ [*name*], deceased,) and a person interested in the _____ (estate *or* will) of _____ (*name*), deceased, in that _____ (*specify, e.g.,* petitioner is a beneficiary of the will and is named as executor of the will)].

2. The decedent died testate on _____ [*date*].

3. The decedent left a will dated _____. That will is his/her last will.

4. Decedent's will is in the possession of the clerk of the Superior Court of the County of _____, California. No proceeding is pending to administer the estate of _____ [*name*] in this court.

5. A proceeding is pending to administer the estate of _____ [*name*] in the Superior Court of the

County of _____, California. The case number of the proceeding is _____ [*specify*].

6. A copy of this petition has been mailed to _____ [*specify persons who are entitled to receive copy*], as required by *Probate Code Section 8203*. Attached to this petition as Exhibit A is the proof of service.

WHEREFORE, petitioner prays for an order transferring the will of _____ [*name*] to the clerk of the Superior Court of the County of _____, California.
Dated _____.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. Ihave read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is a petition for an ex parte order to transfer a will that has been delivered to the clerk of the superior court in a county in which no proceeding is pending to administer the testator's estate [*see Prob. Code § 8203*].

[3] Contents of Petition

The petition must include the case number of the proceeding in the court to which transfer is prayed (*see* Paragraph 5) [*Prob. Code § 8203*]. The form also alleges the petitioner's standing (optional Paragraph 1), the date of death (Paragraph 2), the existence of a will in the custody of the court petitioned (Paragraphs 3 and 4), the existence of a pending proceeding for the administration of decedent's estate in a different court (Paragraph 5), and that a copy of the petition has been mailed to all persons entitled to receive it (Paragraph 6).

[4] Notice and Transmittal

A petition for transfer may be made without notice, but will not be granted without proof that a copy of the petition has

been mailed to the petitioner and any persons requesting special notice in the proceeding in the court to which the will is to be transferred. Certified copies of the petition, any supporting documents, and the order must be transmitted along with the original will. The certified copies must be filed in the proceeding by the clerk of the recipient court [*Prob. Code § 8203*].

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38-443 California Forms of Pleading and Practice--Annotated § 443.53

§ 443.53 Ex Parte Order to Transfer Will [Prob. Code § 8203]

[1] FORM Ex Parte Order to Transfer Will [Prob. Code § 8203]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	EX PARTE ORDER TO TRANSFER WILL
Deceased.	)	

_____

Petitioner, _____ [name], respectfully represents:

The petition of _____ [*name*], alleging that the will of _____ [*name*], decedent, is in the possession of the clerk of the Superior Court of the County of _____, California, and praying for an order transferring the will to the Superior Court of the County of _____, California, came before this court ex parte on _____ [*date*]. From the proof made, the court is satisfied that the allegations of the petition are true and that a copy of the petition has been mailed to all persons entitled to receive it.

The case number of the proceeding to which the will is sought to be transferred is _____ [*specify*].

IT IS ORDERED as follows:

The clerk of the court shall immediately transmit the original will along with certified copies of the petition, any supporting documents, and this order to the clerk of the Superior Court of the County of _____, California.
Dated _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is an ex parte order to transfer a will that has been delivered to the clerk of the superior court in a county in which no proceeding is pending to administer the testator's estate [*see Prob. Code § 8203*]. The order must include the case number of the proceeding in the court to which transfer is prayed [*Prob. Code § 8203*].

[3] Cross References

For a related form, *see § 443.52*.

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Chapter 444 PROBATE: WILL CONTESTS

38-444 California Forms of Pleading and Practice--Annotated 444.syn

§ 444.syn Synopsis to Chapter 444: PROBATE: WILL CONTESTS

§ 444.01 Scope of Chapter

§ 444.02 Cross References

§§ 444.03-444.09 [Reserved]

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Chapter 444 PROBATE: WILL CONTESTS
PART I. SCOPE

38-444 California Forms of Pleading and Practice--Annotated § 444.01

§ 444.01 Scope of Chapter

This chapter discusses and contains forms regarding will contests. It contains forms for use in a contest before probate, including forms for use by the contestant [*see §§ 444.90 -444.101*] and by the respondent [§§ 444.102, 444.103, 294], forms for obtaining summary judgment [§§ 444.105, 444.106], a form for statement of decision [*see § 444.107*], forms for findings regarding a lost or destroyed will [*see § 444.108*], and forms for judgment [§§ 444.109, 444.110]. This chapter also contains forms for use in a proceeding for revocation of a will after probate, including forms for use by the contestant [§ 444.111] and by the respondent [§§ 444.112-444.116] and a form for a judgment [*see § 444.116*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWill ContestsGeneral OverviewEstate, Gift & Trust LawWill ContestsRevocationGeneral OverviewEstate, Gift & Trust LawWillsLost Wills

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38-444 California Forms of Pleading and Practice--Annotated § 444.02

§ 444.02 Cross References

For discussion and forms regarding appeals, see Ch. 40, *Appeal: An Overview*

For discussion and forms relating to demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

For discussion and forms relating to service of summons, see Ch. 518, *Service of Summons and Papers*

For discussion and forms regarding summary judgments, see Ch. 537, *Summary Judgment*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWill ContestsGeneral Overview

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[Reserved]

§§ 444.03[Reserved]

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38-444 California Forms of Pleading and Practice--Annotated § 444.10

§ 444.10 Governing Law

Contest of wills before probate is governed generally by *Prob. Code §§ 8250-8254* [*see Prob. Code § 8004(b)*]. Revocation of a will after probate is governed generally by *Prob. Code §§ 8270-8272*. Validity and execution of wills are governed by *Prob. Code §§ 6100-6113*; and in some cases by former *Prob. Code §§ 56-56.14* regarding statutory wills, if the decedent died on or after January 1, 1985; and by former *Prob. Code §§ 20-29, 50-53, 56-56.14, 60-60.8, 70-79* if the decedent died before January 1, 1985. The enforceability of no contest clauses is governed in part by *Prob. Code § 21310 et seq.* and in part by case law. Proving a lost or destroyed will is governed by *Prob. Code § 8223* if the decedent died on or after January 1, 1985, and by former *Prob. Code § 350* if the decedent died before January 1, 1985. There is no right to a jury trial in a will contest [*see Prob. Code § 825*].

The applicability of procedure regarding civil actions to probate proceedings is governed by *Prob. Code § 1000*. Application to probate proceedings of the Civil Law and Motion Rules in the California Rules of Court is governed by *Cal. Rules of Ct., Rules 3.1100, 3.1103*. In addition, local courts provide their own probate rules, which should be consulted in each jurisdiction.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateRight to Jury TrialEstate, Gift & Trust LawWill ContestsGeneral OverviewEstate, Gift & Trust LawWill ContestsNo Contest ClausesEstate, Gift & Trust LawWillsLost WillsEstate, Gift & Trust LawWillsStatutory Wills

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§ 444.11 Nature of Contest Proceeding

A will contest is a proceeding in disproof of a will and, as such, is a proceeding in rem to determine the legal status of a written instrument [*Estate of Baker (1915) 170 Cal. 578, 585, 150 P. 989]* . It is a special proceeding created by statute, unknown to the common law, and a contestant has only those rights pursuant to statutory law [*Estate of Baker (1915) 170 Cal. 578, 585, 150 P. 989]* .

The issue of whether or not a proceeding amounts to a "contest" typically arises when the instrument in question contains a "no contest" clause. For discussion of what constitutes a "contest" in the latter context, see *§ 444.14[2]*.

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§ 444.12 Standing to Contest Will

[1] Interested Person

A petitioner in a probate proceeding must have standing. In the context of a will contest, the petitioner must allege sufficient facts to demonstrate that the petitioner is an "interested person" [*Estate of Weber (1991) 229 Cal. App. 3d 22, 25 n.4, 280 Cal. Rptr. 22* ; *see Prob. Code §§ 1043(a), (b), 8270(a)* ("interested person" may contest will offered for probate); *see also Prob. Code § 48(a)* ("interested person" defined)]. This requirement applies whether the contest is filed before or after probate [*Estate of Lind (1989) 209 Cal. App. 3d 1424, 1430, 257 Cal. Rptr. 853]* .

Prob. Code § 48(a) provides a nonexclusive list of recognizable interests, giving the court the authority to designate as an "interested person" anyone having a property right in or claim against the decedent's estate that may be affected by the probate proceeding [*Estate of Maniscalco (1992) 9 Cal. App. 4th 520, 523, 11 Cal. Rptr. 2d 803]* . Because will contests are disfavored, the courts have limited the right to contest the probate of a will to those who have such a pecuniary interest in the distribution of the decedent's estate as would be impaired or defeated by the probate of the will, or benefited by setting it aside [*Estate of Lind (1989) 209 Cal. App. 3d 1424, 1430-1431, 257 Cal. Rptr. 853* ; *Estate of Powers (1979) 91 Cal. App. 3d 715, 719, 154 Cal. Rptr. 366]* .

There are basically two categories of interested persons who may contest the probate of a will. The first category consists of persons who are the decedent's heirs and who, as the result of a successful will contest, would be entitled to distribution of the decedent's estate under the laws of intestate succession. The second category consists of persons who allege that they are the beneficiaries under a different will the decedent executed either before or after executing the will offered for probate [*Estate of Powers (1979) 91 Cal. App. 3d 715, 719, 154 Cal. Rptr. 366]* . If a contestant properly alleges that he or she is an heir of the decedent and that a successful contest would allow him or her to take by intestacy, or that he or she is a beneficiary under a valid will which should be probated as the decedent's last will, then the contestant has a sufficient interest in the probate to allow the contestant to pursue a will contest [*Estate of Powers (1979) 91 Cal. App. 3d 715, 719, 154 Cal. Rptr. 366* ; *see Zwirn v. Schweizer (2005) 134 Cal. App. 4th 1153, 1154-1155, 36 Cal. Rptr. 3d 527* (beneficiary of decedent's alleged oral agreement to give beneficiary 50 percent of decedent's estate had standing to contest decedent's will)]. The requirement that a contestant must be an "interested person" prevents persons with no interest from delaying the settlement of a decedent's estate [*Estate of Powers (1979)*

91 Cal. App. 3d 715, 719, 154 Cal. Rptr. 366] .

A named executor who is left nothing under the will is not an "interested person" for purposes of a will contest [*Jay v. Superior Court (1970) 10 Cal. App. 3d 754, 758-759, 89 Cal. Rptr. 466]* .

The person who would be trustee of a testamentary trust under an earlier-dated document may contest probate of a later-dated document if the pecuniary rights of trust beneficiaries under the earlier-dated document would be impaired if the later-dated document is admitted as decedent's will. However, if the trust beneficiaries' interests would be enhanced by admission of the later-dated document as decedent's will, the trustee under the earlier-dated document has no standing to contest probate of the later-dated document [*Estate of Getty (1978) 85 Cal. App. 3d 755, 760-761, 149 Cal. Rptr. 656]* .

[2] Limitation if Contest Is After Probate

After a will is admitted to probate, standing to contest it is further limited. In that case, in addition to being an interested person, the contestant must not have been a party to a prior contest of the probated will or have had actual notice of a prior will contest in time to have joined it [*Prob. Code § 8270(a)*]. "Actual notice of a will contest" means knowledge of interest and right to contest as well as notice of the contest [*see Estate of Meyer (1953) 116 Cal. App. 2d 498, 499-502, 251 P.2d 430* (decided under former *Prob. Code § 380*)].

Despite the limitations on standing for contest after probate, if the contestant was a minor or was incompetent and had no guardian or conservator at the time the will was admitted to probate, he or she may petition the court to revoke the probate of the will at any time before entry of an order for final distribution [*Prob. Code § 8270(b)*].

[3] Pleading and Proving Standing

An allegation that the contestant is an heir of the decedent is not sufficient to establish that the contestant will benefit if the court sets aside the will. The contestant must also allege that intestacy will result if the attack on the purported will succeeds [*Estate of Lind (1989) 209 Cal. App. 3d 1424, 1431, 257 Cal. Rptr. 853* ; *Estate of Powers (1979) 91 Cal. App. 3d 715, 719-720, 722, 154 Cal. Rptr. 366]* .

A potential legatee or devisee under a valid will executed by the decedent before or after the will offered for probate has a sufficient interest in the probate to file a will contest. If the contestant does not attack the validity of the will offered for probate, but contends that this will has been revoked by implication in a subsequent instrument, the contestant must plead facts establishing the existence of the subsequent will in which the contestant is named as a devisee [*Estate of Lind (1989) 209 Cal. App. 3d 1424, 1431, 257 Cal. Rptr. 853* ; *Estate of Powers (1979) 91 Cal. App. 3d 715, 722, 154 Cal. Rptr. 366]* .

If the proponent of the will challenges the contestant's standing, the court may require proof of the contestant's interest in the estate and of his or her right to contest the will before proceeding with the trial of the contest [*Estate of Lind (1989) 209 Cal. App. 3d 1424, 1435, 257 Cal. Rptr. 853* ; *Estate of Powers (1979) 91 Cal. App. 3d 715, 719, 154 Cal. Rptr. 366]* . This demonstration of standing should be made either at a separate evidentiary hearing on the issue (frequently on the petitioner's general demurrer alleging the contestant's lack of standing) or on a motion for summary judgment [*Estate of Powers (1979) 91 Cal. App. 3d 715, 723, 154 Cal. Rptr. 366]* . The contestant bears the burden of proof on the issue [*Estate of Lind (1989) 209 Cal. App. 3d 1424, 1434, 257 Cal. Rptr. 853]* . Minimal delay and minimal discovery limited to the issue of standing should precede the hearing. If the contestant fails to establish standing, the court should dismiss the contest [*Estate of Lind (1989) 209 Cal. App. 3d 1424, 1435, 257 Cal. Rptr. 853]* . If the court finds that the contest was filed in bad faith or solely for the purpose of delay, the court may impose sanctions under *Code Civ. Proc. § 128.5* on the contestant [*Estate of Lind (1989) 209 Cal. App. 3d 1424, 1435, 257 Cal. Rptr. 853]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureJusticiabilityStandingBurdens of ProofEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawWill ContestsGeneral OverviewEstate, Gift & Trust LawWill ContestsRevocationGeneral OverviewEstate, Gift & Trust LawWill ContestsRevocationLater WritingsEstate, Gift & Trust LawWill ContestsStandingEstate, Gift & Trust LawWillsBeneficiariesGeneral Overview

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§ 444.13 Grounds for Will Contest

[1] Generally

The execution or revocation of a will or a part of a will is ineffective to the extent the execution or revocation was procured by duress, menace, fraud, or undue influence [*Prob. Code § 6104*]. In addition, the validity of a will depends on issues such as competence to make a will, compliance with execution requirements, and revocation and revival [*see Prob. Code §§ 6100-6124*].

[2] Validity and Execution of Will

[a] Who May Make Will

An individual 18 or more years of age who is of sound mind may make a will [*Prob. Code § 6100(a)*].

Because a minor cannot make a will, a minor dies intestate. In the absence of any spouse or issue at death, a minor's estate is distributed to his or her parents equally [*Prob. Code § 6402(b)*; *Sisco v. Cosgrove, Michelizzi, Schwabacher, Ward & Bianchi (1996) 51 Cal. App. 4th 1302, 1308, 59 Cal. Rptr. 2d 647* (minor lacks legal capacity to designate beneficiary; any purported designation of beneficiary during minority is void as either a testamentary act or an attempted disposition of a future interest)].

[b] Incompetence

A person is not mentally competent to make a will if, at the time of making the will, either of the following is true [*Prob. Code § 6100.5(a)*]:

- He or she does not have sufficient mental capacity to (1) understand the nature of the testamentary act, (2) understand and recollect the nature and situation of his or her property, or (3) remember and understand his or her relations to living descendants, spouse, and parents, and those whose interests are affected by the will; or

- He or she suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the person's devising property in a way that, except for the existence of the delusions or hallucinations, he or she would not have done.

A person who suffers from a mental disorder with symptoms including delusions or hallucinations is not necessarily incapable of making a will, and a will made by such a person is valid notwithstanding the delusions or hallucinations unless there is proof that the will (or a dispositive provision of the will) resulted from the delusions or hallucinations; that is, that the testator made the will (or disposed of property in the will) in a way that he or she would not have done absent those delusions or hallucinations [*Moore v. Anderson Zeigler Disharoon Gallagher & Gray (2003) 109 Cal. App. 4th 1287, 1298-1300, 135 Cal. Rptr. 2d 888* ; *Goodman v. Zimmerman (1994) 25 Cal. App. 4th 1667, 1677-1678, 32 Cal. Rptr. 2d 419]* .

Prob. Code § 6100.5 does not supersede existing law relating to the admissibility of evidence to prove the existence of mental incompetence or mental disorders [*Prob. Code § 6100.5(b)*].

A person who is subject to a conservatorship is not necessarily incompetent to make a will [*Prob. Code § 1871(c)*]. The grounds for appointment of a conservator [*see Prob. Code § 1801*] are not inconsistent with competence to make a will, and a conservatee may or may not have the capacity to make a will [*see Estate of Mann (1986) 184 Cal. App. 3d 593, 605, 229 Cal. Rptr. 225]* . When a conservatee is competent to make a will, he or she may properly do so [*Prob. Code § 1871(c)*].

A conservator may also make a will for the conservatee, providing the court first authorizes the action [*Prob. Code §§ 2580(b)(13), 6100(b), 6100.5(c)*]. If a conservator has made a will for the conservatee, the conservatee may later elect to revoke or amend the will, or to make a new and inconsistent will, but the conservatee may do this only if he or she is then mentally competent to make a will [*Prob. Code § 6100(b)*]. The fact that the conservatorship might still be in existence would not prevent the conservatee from doing any of these things, providing the conservatee has the required mental competence [*see Prob. Code § 6100(b)*].

An attorney preparing a will for a testator does not owe a duty to the beneficiary of the will or to the beneficiary under a prior will to ascertain and document the client's testamentary capacity [*Moore v. Anderson Zeigler Disharoon Gallagher & Gray (2003) 109 Cal. App. 4th 1287, 1298, 135 Cal. Rptr. 2d 888]* . When the testator's testamentary capacity is the basis for a will contest, the testator's true intent is the central question, and that intent cannot be ascertained from the will or other challenged estate plan document. The attorney who is persuaded of the client's testamentary capacity by the attorney's own observations and experience, and who drafts the will accordingly, fulfills the attorney's duty of loyalty to the testator. In doing so, the attorney should not be required to consider the effect of the new will on beneficiaries under a former will or beneficiaries of the new will [*Moore v. Anderson Zeigler Disharoon Gallagher & Gray (2003) 109 Cal. App. 4th 1287, 1299, 135 Cal. Rptr. 2d 888]* . The attorney is not required to urge the testator to consider an alternative plan to forestall a claim by someone thereby excluded from the will or included in the will but deprived of a specific asset that is devised to someone else. Any other conclusion would place the attorney in an untenable position of divided loyalty [*Boranian v. Clark (2004) 123 Cal. App. 4th 1012, 1014, 20 Cal. Rptr. 3d 405]* . These beneficiaries do not have a cause of action against the attorney for malpractice. Their remedy is to contest the probate and challenge the will on the ground that the testator lacked testamentary capacity at the time of executing the will [*Boranian v. Clark (2004) 123 Cal. App. 4th 1012, 1020-1021, 20 Cal. Rptr. 3d 405* ; *Moore v. Anderson Zeigler Disharoon Gallagher & Gray (2003) 109 Cal. App. 4th 1287, 1307, 135 Cal. Rptr. 2d 888]* .

Likewise, an attorney who is retained by a grantor to prepare a grant deed transferring her residence to her daughter as part of her testamentary plan does not owe a duty to the grantor's children to ascertain her intent or capacity to favor one child over another. Imposing an obligation on the attorney to act in the grantee's best interests would necessarily result in a breach of the attorney's duty to the client, a classic example of divided loyalty [*Featherson v. Farwell (2004) 123 Cal. App. 4th 1022, 1029, 20 Cal. Rptr. 3d 412* (if attorney had acted in grantee's best interests, he would have subjected

himself to claims from grantor's other children)].

[c] Undue Influence

The execution or revocation of a will or part of a will is ineffective to the extent it was procured by undue influence [*Prob. Code § 6104*; *David v. Hermann (2005) 129 Cal. App. 4th 672, 684, 28 Cal. Rptr. 3d 622]* . Undue influence is pressure brought to bear directly on the testamentary act, sufficient to overcome the testator's free will and amounting to coercion that destroys the testator's free agency [*Rice v. Clark (2002) 28 Cal. 4th 89, 96, 120 Cal. Rptr. 2d 522, 47 P.3d 300]* .

At the trial of a will contest, the contestants ordinarily have the burden of proving that the will was the result of undue influence [*Prob. Code § 8252(a)*]. Proof of undue influence by circumstantial evidence generally requires a showing of a number of factors, which, in combination, justify the inference [*David v. Hermann (2005) 129 Cal. App. 4th 672, 684, 28 Cal. Rptr. 3d 622]* .

Under limited circumstances, a presumption of undue influence may arise, which shifts to the proponent of the will the burden of proving by a preponderance of the evidence that the will was not procured by undue influence [*Conservatorship of Davidson (2003) 113 Cal. App. 4th 1035, 1059, 6 Cal. Rptr. 3d 702]* . A presumption of undue influence arises if the contestant shows all of the following [*Rice v. Clark (2002) 28 Cal. 4th 89, 96-97, 120 Cal. Rptr. 2d 522, 47 P.3d 300]* :

- There was a confidential relationship between the testator and the person allegedly exerting undue influence;

- The person allegedly exerting undue influence actively participated in the preparation or execution of the will; and

- The person allegedly executing undue influence (or a member of that person's family) would receive an undue profit if the will were allowed to stand.

For example, a confidential relationship existed between a son and his 81 year old father, when, at the time of executing a new will leaving everything to the son, the father relied almost completely on the son, and was critically ill, disoriented, and not eating. The son had a lawyer prepare the will without ever talking to the father alone and had two friends act as witnesses [*Estate of Gonzalez (2002) 102 Cal. App. 4th 1296, 1306, 126 Cal. Rptr. 2d 332]* .

While evidence of procurement is highly probative of undue influence and figures repeatedly in judicial discussions of the principle, it is essential to proof of undue influence only if the court relies on the presumption of undue influence to shift the burden of proof to the proponent of the will [*David v. Hermann (2005) 129 Cal. App. 4th 672, 684, 28 Cal. Rptr. 3d 622]* .

[d] Fraud

The execution or revocation of a will or part of a will is ineffective to the extent it was procured by fraud [*Prob. Code § 6104*]. The theories of undue influence and fraud often rest on a similar factual basis, because contestants relying on a theory of undue influence may claim that the beneficiary of the will employed misrepresentations to pressure the testator into making the will. However, they are distinct grounds for a will contest [*David v. Hermann (2005) 129 Cal. App. 4th 672, 685, 28 Cal. Rptr. 3d 622]* .

The elements of fraud in the procurement of a testamentary instrument are the same as those required to invalidate a contract [*David v. Hermann (2005) 129 Cal. App. 4th 672, 685, 28 Cal. Rptr. 3d 622* ; for discussion, see Ch. 215,

Duress, Menace, Fraud, Undue Influence, and Mistake]. An intent to deceive the testator or to induce the testator to execute the will is a necessary element [*David v. Hermann (2005) 129 Cal. App. 4th 672, 685-686, 28 Cal. Rptr. 3d 622]* . Because proof of intent to deceive is necessarily largely or entirely circumstantial, a contestant is not confined to the bare facts, but is entitled to the benefit of all inferences that can legitimately be drawn from the established facts [*David v. Hermann (2005) 129 Cal. App. 4th 672, 686, 28 Cal. Rptr. 3d 622]* . Proof that the testator was induced by misrepresentations into making dispositions that the testator would not have made absent those misrepresentations constitutes fraud [*David v. Hermann (2005) 129 Cal. App. 4th 672, 686, 28 Cal. Rptr. 3d 622]* .

[e] Execution of Witnessed Will

A will must be in writing and satisfy the requirements of *Prob. Code § 6110*, except as provided in *Prob. Code §§ 6100-6390* [*Prob. Code § 6110(a)*; *see, e.g., Prob. Code §§ 6380-6390* (Uniform International Wills Act)]. It must be signed (1) by the testator [*Prob. Code § 6110(b)(1)*], (2) by some other person signing in the testator's name and presence and by the testator's direction [*Prob. Code § 6110(b)(2)*], or (3) by a conservator pursuant to a court order to make a will under *Prob. Code § 2580* [*Prob. Code § 6110(b)(3)*]. It must be witnessed by being signed, during the testator's lifetime, by at least two persons each of whom, being present at the same time, witnessed either the signing of the will or the testator's acknowledgment of the signature or of the will, and understand that the instrument they sign is the testator's will [*Prob. Code § 6110(c)(1)*; *see Prob. Code § 6101* (property subject to will disposition), *Prob. Code § 6102* (who may take under will), *Prob. Code § 6112* (who may witness will); *see also Health & Safety Code §§ 7150-7151.40* (Uniform Anatomical Gift Act, regarding donation of body parts effective on death)]. However, if a will was not executed in compliance with *Prob. Code § 6110(c)(1)*, the will must be treated as if it was executed in compliance with *Prob. Code § 6110(c)(1)* if the proponent of the will can establish by clear and convincing evidence that, at the time the testator signed the will, the testator intended the will to constitute the testator's will [*Prob. Code § 6110(c)(2)*].

For a witness's subscription to be valid, it must occur prior to the testator's death [*Estate of Saueressig (2006) 38 Cal. 4th 1045, 1052, 44 Cal. Rptr. 3d 672, 136 P.3d 201]* . A will that has not been subscribed by two witnesses at the time of the testator's death neither complies nor substantially complies with *Prob. Code § 6110* [*Estate of Saueressig (2006) 38 Cal. 4th 1045, 1052, 44 Cal. Rptr. 3d 672, 136 P.3d 201]* .

[f] Holographic Will

A will that does not comply with the *Prob. Code § 6110* formalities for a witnessed will is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator [*Prob. Code § 6111(a)*]. *Prob. Code § 6111* gives validity to an unwitnessed handwritten will because of the "recognized difficulty of forging an entire handwritten instrument" [*Estate of Black (1982) 30 Cal. 3d 880, 888, 181 Cal. Rptr. 222, 641 P.2d 754* ; *Estate of Brenner (1999) 76 Cal. App. 4th 1298, 1301, 91 Cal. Rptr. 2d 149]* . The testator's signature need not be located at the end of the holographic will, but may appear in another part of the will, as long as the testator wrote his or her name there with the intention of authenticating or executing the instrument as his or her will [*Estate of Black (1982) 30 Cal. 3d 880, 888, 181 Cal. Rptr. 222, 641 P.2d 754* (fact that testatrix wrote her name on each page of holographic will was deemed a sufficient signature)].

If a holographic will does not contain a statement concerning the date of its execution, and if the omission results in doubt regarding whether its provisions or the inconsistent provisions of another will are controlling, the holographic will is invalid to the extent of the inconsistency unless the time of its execution is established to be after the date of execution of the other will [*Prob. Code § 6111(b)(1)*].

If a holographic will does not contain a statement concerning the date of its execution, and if it is established that the testator lacked testamentary capacity at any time during which the will might have been executed, the will is invalid unless it is established that it was executed at a time when the testator had testamentary capacity [*Prob. Code §*

6111(b)(2)].

Prob. Code § 6111 requires "material" provisions of a holographic will to be in the testator's handwriting [*Prob. Code § 6111(a)*]. Courts will not admit a testamentary document to probate as a holographic will if material provisions within the body of the will are printed or typewritten [*see Estate of Sola (1990) 225 Cal. App. 3d 241, 247, 275 Cal. Rptr. 98]* . To determine whether or not printed provisions are material, courts examine a number of factors, including whether or not the particular provision was relevant to the substance of the will, whether the provision was essential to the will's validity, whether the testator intended to incorporate the provision, and whether invalidation of the holograph would defeat the testator's intent [*Estate of Black (1982) 30 Cal. 3d 880, 882, 885-886, 181 Cal. Rptr. 222, 641 P.2d 754* (instrument handwritten on three pages of partially preprinted stationer's form was upheld as holographic will, when printed language on stationer's form incorporated in will was not material to its substance or essential to its validity as a testamentary disposition)]. Photocopies of the testator's handwritten dispositions, if properly authenticated, satisfy the requirement that the material provisions of a holographic will be in the testator's handwriting [*Estate of Brenner (1999) 76 Cal. App. 4th 1298, 1301-1302, 91 Cal. Rptr. 2d 149]* . For a form containing grounds of opposition to probate, based on the ground that a formally witnessed will prevails over a holographic will, see *§ 444.100*.

Whether a document should be admitted to probate as a holographic will depends on proof of its authorship and authenticity, and on whether the words used establish that the testator intended it to be his or her last will and testament at the time he or she wrote it [*Estate of Southworth (1996) 51 Cal. App. 4th 564, 571, 59 Cal. Rptr. 2d 272]* . Although no particular words are necessary to establish a holographic will, a holographic will must be executed with testamentary intent [*Estate of Wong (1995) 40 Cal. App. 4th 1198, 1204-1205, 47 Cal. Rptr. 2d 707* ; *see Estate of Black (1982) 30 Cal. 3d 880, 888, 181 Cal. Rptr. 222, 641 P.2d 754* (testatrix's reference to instrument as her will and statement that she hoped this writing would be given legal effect as testamentary disposition was evidence of her intent to authenticate this document as her last will and testament)]. The court may look at extrinsic evidence to confirm the testator's intent and to determine whether there is any danger of fraud [*Estate of Brenner (1999) 76 Cal. App. 4th 1298, 1302-1303, 91 Cal. Rptr. 2d 149]* . For example, a court may consider statements the testator made before and after making a holographic will, as well as the surrounding circumstances [*Estate of Southworth (1996) 51 Cal. App. 4th 564, 566, 572, 59 Cal. Rptr. 2d 272]* .

Both the courts and the legislature have shown a tendency toward liberality in accepting a writing as a holographic will [*Estate of Black (1982) 30 Cal. 3d 880, 883-884, 181 Cal. Rptr. 222, 641 P.2d 754* ; *Estate of Brenner (1999) 76 Cal. App. 4th 1298, 1301, 91 Cal. Rptr. 2d 149]* . Substantial compliance with the statutory requirements, not absolute precision, is all that is necessary [*Estate of Black (1982) 30 Cal. 3d 880, 883-884, 181 Cal. Rptr. 222, 641 P.2d 754]* . An overly technical application by the courts of the holographic will statute to handwritten testamentary dispositions, which generally are made by people who have no legal training, would seriously limit the effectiveness of the legislative decision to authorize holographic wills [*Estate of Black (1982) 30 Cal. 3d 880, 884, 181 Cal. Rptr. 222, 641 P.2d 754]* .

However, an instrument that does not meet the requirements of *Prob. Code § 6111* is not a holographic will. For example, a charitable donor card containing printed language showing an intent to make a future gift to the charity on which the testator writes that his or her entire estate is left to the charity and which is dated and signed by the testator is not a holographic will; the donor card is not a "commercially printed form will" as specified by the statute, and the material printed language together with the handwriting show a future intent, not a present testamentary intent [*see Estate of Southworth (1996) 51 Cal. App. 4th 564, 566, 571-572, 59 Cal. Rptr. 2d 272]* . Likewise, a written, witnessed will, which the testator alters by crossing out portions and substituting language in the testator's handwriting does not constitute a holographic will; when the handwriting itself lacks testamentary intent and substance, and has meaning only in relationship to the typewritten words, there is no complete testamentary document that can be deemed to be a holographic will [*see Estate of Sola (1990) 225 Cal. App. 3d 241, 245-248, 275 Cal. Rptr. 98* ("even rules of liberal construction do not permit [court] to ignore clear and explicit statutory requirements")].

When a testator executes a holographic will before marriage naming as a beneficiary a person whom he or she later marries and divorces, *Prob. Code § 6122*, the "revocation by divorce" statute, applies to revoke the holographic will by operation of law [*Estate of Reeves (1991) 233 Cal. App. 3d 651, 654-655, 284 Cal. Rptr. 650]* . The holographic will may be revived only by the testator's remarriage to the former spouse [*Prob. Code § 6122(b)*; *Estate of Reeves (1991) 233 Cal. App. 3d 651, 659, 284 Cal. Rptr. 650* (evidence of statements testator made that former spouse should take entire estate and evidence of testator's continuing belief that holographic will was still valid are irrelevant)].

[g] Validity Made Conditional by Terms in Will

A will, the validity of which is made conditional by its own terms, must be granted or denied probate, or denied effect after probate, in conformity with the condition [*Prob. Code § 6105*].

[h] Revocation of Will

A will or any part of a will is revoked by any of the following [*Prob. Code § 6120*]:

- A subsequent will that revokes the prior will or part of the will expressly or by inconsistency.

- Being burned, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, by either the testator or another person in the testator's presence and by the testator's direction.

A will executed in duplicate or any part thereof is revoked if one of the duplicates is burned, torn, canceled, obliterated, or destroyed with the intent and for the purpose of revoking it, by either the testator or another person in the testator's presence and by the testator's direction [*Prob. Code § 6121*].

If the testator's marriage is dissolved or annulled, provisions of the will relating to the former spouse may be revoked [*see Prob. Code § 6122*]. If the dissolution or annulment occurred before January 1, 1985 (the operative date of *Prob. Code § 6122*), it will have no effect on the will [*Prob. Code § 6122(f)*]. An annulment or dissolution that occurs on or after January 1, 1985, generally will revoke any provision of the will that benefits the former spouse. Unless the will expressly provides otherwise, the dissolution or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision of the will conferring a general or special power of appointment on the former spouse, and any provision of the will nominating the former spouse as executor, trustee, conservator, or guardian [*Prob. Code § 6122(a)*]. Revocation occurs even if the testator executed the will before the marriage that is subsequently dissolved or annulled [*Estate of Reeves (1991) 233 Cal. App. 3d 651, 657-658, 284 Cal. Rptr. 650]* . For example, provisions of a trust incorporated in a decedent's will, appointing his wife as trustee, granting her a power of appointment, or transferring any property or income from property to her were revoked by *Prob. Code § 6122* on the dissolution of their marriage, because that statute provides that the terms of a trust incorporated in a will must be administered and distributed as though the former spouse had predeceased the decedent [*Estate of Coleman (2005) 129 Cal. App. 4th 380, 389, 28 Cal. Rptr. 3d 282]* . When will provisions are revoked because of a dissolution or annulment of marriage, property that would have passed to the former spouse but for the revocation will pass as if the former spouse failed to survive the testator [*Prob. Code § 6122(c)(1)*]. Other provisions of the will conferring any power or office on the former spouse must be interpreted as if the former spouse failed to survive the testator [*Prob. Code § 6122(c)(2)*].

Although *Prob. Code § 6122* does not address the effect of dissolution on bequests to children of the former spouse, the courts have held that, unless a contrary intention is indicated in the will, it is generally presumed that a testator intends to exclude the children of an ex-spouse from taking under the will [*Estate of Jones (2004) 122 Cal. App. 4th 326, 332, 18 Cal. Rptr. 3d 637* (residuary bequest to adult stepdaughter was revoked by her mother's dissolution from testator); *Estate of Hermon (1995) 39 Cal. App. 4th 1525, 1531-1532, 46 Cal. Rptr. 2d 577* (court called on legislature to adopt

provision similar to that set forth in Uniform Probate Code, which provides that dissolution revokes not only testamentary bequests to former spouse but also bequests to former spouse's relatives)]. Evidence showing that the testator continued to have a relationship with the child of a former spouse following dissolution may show an intent by the testator to continue to have the child take under the will [*Estate of Jones (2004) 122 Cal. App. 4th 326, 337, 18 Cal. Rptr. 3d 637]* .

Similar provisions apply with respect to the termination of a registered domestic partnership under *Fam. Code §§ 297-299*. Unless the will expressly provides otherwise, the termination revokes any disposition or appointment of property made by the will to the testator's former domestic partner, any provision of the will conferring a general or special power of appointment on the former domestic partner, and any provision of the will nominating the former domestic partner as executor, trustee, conservator, or guardian [*Prob. Code § 6122.1(a)*]. When will provisions are revoked because of a termination of a domestic partnership, property that would have passed to the former domestic partner but for the revocation will pass as if the partner failed to survive the testator [*Prob. Code § 6122.1(c)(1)*]. Other provisions of the will conferring any power or office on the former domestic partner must be interpreted as if the partner failed to survive the testator [*Prob. Code § 6122.1(c)(2)*]. These provisions apply only to wills executed on or after January 1, 2002 [*Prob. Code § 6122.1(d)*].

The revocation of a will that revoked an earlier will generally does not revive the earlier will unless the testator's intent to the contrary is established [*see Prob. Code § 6123*].

If the testator's will was last in the testator's possession, the testator was competent until death, and neither the will nor a duplicate original of the will can be found after the testator's death, it is presumed that the testator destroyed the will with intent to revoke it. This presumption is a presumption affecting the burden of producing evidence [*Prob. Code § 6124*]. The term "duplicate original," as used in *Prob. Code § 6124*, does not include a photocopy of the will that has not been personally signed by the testator and the witnesses. Therefore, the presumption of revocation applies when this is the only copy of the will that can be produced [*Lauermann v. Superior Court (2005) 127 Cal. App. 4th 1327, 1333, 26 Cal. Rptr. 3d 258* (fact that testator preserved photocopy of will is not of sufficient significance to permit court to infer that testator would not have preserved photocopy if he or she intended to revoke will)].

[i] Reference to Writing Other than Will

A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification [*Prob. Code § 6130*]. The extrinsic writing may be of any kind or character, formal or informal, and may be written by the testator or by another person [*see Estate of Foxworth (1966) 240 Cal. App. 2d 784, 788-790, 50 Cal. Rptr. 237]* . Under the traditional rule, however, the extrinsic writing must be in existence when the will is executed, since to allow the incorporation of a writing to be prepared at a later time would permit the testator to dispose of property without complying with the formalities required for the execution of wills [*see Estate of Bauer (1942) 51 Cal. App. 2d 636, 638, 124 P.2d 630]* . In addition, the will must identify the extrinsic writing by a sufficiently certain description [*Simon v. Grayson (1940), 15 Cal. 2d 531, 534, 102 P.2d 1081]* , and it must appear that the testator intended to make it a part of the will [*Estate of Selditch (1949) 91 Cal. App. 2d 62, 66, 204 P.2d 364]* .

Prob. Code § 6132 provides an exception to the traditional rule for testators who want to make relatively small gifts of tangible personal property in a separate writing. Under this rule, a testator may refer to a writing that directs disposition of tangible personal property not otherwise disposed of by a will [*Prob. Code § 6132*]. The writing may be written or signed either before or after the execution of the will [*Prob. Code § 6132(c)*]. Such a writing is effective only if an unrevoked will refers to the writing, the writing is dated and is either in the handwriting of or signed by the testator, and the writing describes the items and the recipients of the property with reasonable certainty [*Prob. Code § 6132(a)*]. The total value of property identified and disposed of in the writing must not exceed $25,000, and the individual value of each item must not exceed $5,000. Items with a value in excess of $5,000 described in the writing will be disposed of as

provided in the remainder clause of the will [*Prob. Code § 6132(g)*]. A writing that meets the requirements of *Prob. Code § 6132* will be given effect as if it were actually contained in the will itself, except that if any person designated to receive property in the writing dies before the testator, the property will pass as further directed in the writing and, in the absence of any further directions, the disposition will lapse [*Prob. Code § 6132(c)*]. For additional discussion of *Prob. Code § 6132* and the rules governing incorporation by reference, see *California Legal Forms, Ch. 61, Will Drafting and Complete Will Forms, § 61.20[3]*; *Ch. 63, Will Provisions, § 63.423*.

[3] Devise to Person Who Drafted Will or Other Related Individuals

[a] Invalidity

Prob. Code § 21350 generally invalidates provisions in wills, trusts, and other instruments that purport to make gifts to any of the following [*Prob. Code § 21350(a)*]:

- The person who drafted the instrument.
- A person who is related by blood or marriage to, is a domestic partner of, or is a cohabitant with or employee of the person who drafted the instrument.
- Any partner or shareholder of any law partnership or law corporation in which a person described in the first category above has an ownership interest, and any employee of any such law partnership or law corporation.
- Any person who has a fiduciary relationship with the transfer, including a conservator or trustee, who transcribes the instrument or causes it to be transcribed.
- A person who is related by blood or marriage to, is a domestic partner of, or is a cohabitant with or employee of a person described in the category immediately above.
- A care custodian of a dependent adult.
- A person who is related by blood or marriage to, is a domestic partner of, or is a cohabitant with or employee of the care custodian.

For purposes of this rule, a "person who is related by blood or marriage" to a person means all of the following [*Prob. Code § 21350(b)*]:

- The person's spouse or predeceased spouse.
- Relatives within the third degree of the person and the person's spouse.
- The spouse of any person described in the category immediately above.

The term "dependent adult" means any of the following [*Prob. Code § 21350(c)*; *see Welf. & Inst. Code § 15610.23(a)*]:

- Any person residing in California, between the ages of 18 and 64 years, who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age [*Prob. Code § 21350(c)*].

- Any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility as defined in *Health & Safety Code §§ 1250, 1250.2,* and *1250.3*.

- Any person older than age 64 who would be a "dependent adult" under the above definitions if he or she were between the ages of 18 and 64.

The term "care custodian" means an administrator or an employee of any of the following public or private facilities or agencies, or persons providing care or services for elders or dependent adults, including members of the support staff and maintenance staff [*Prob. Code § 21350(c)*; *Welf & Inst. Code § 15610.17*]:

- Twenty-four hour health facilities [*see Health & Saf. Code §§ 1250, 1250.2, 1250.3*].

- Clinics.

- Home health agencies.

- Agencies providing publicly funded in-home supportive services, nutrition services, or other home and community-based support services.

- Adult day health care centers and adult day care.

- Secondary schools that serve 18- to 22-year-old dependent adults and postsecondary educational institutions that serve dependent adults or elders.

- Independent living centers.

- Camps.

- Alzheimer's disease day care resource centers.

- Community care facilities [*see Health & Saf. Code § 1502*] and residential care facilities for the elderly [*see Health & Saf. Code § 1569.2*].

- Respite care facilities.

- Foster homes.

- Vocational rehabilitation facilities and work activity centers.

- Designated area agencies on aging.

- Regional centers for persons with developmental disabilities.

- State Department of Social Services and State Department of Health Services licensing divisions.

- County welfare departments.

- Offices of patients' rights advocates and clients' rights advocates, including attorneys.

- The office of the long-term care ombudsman.

- Offices of public conservators, public guardians, and court investigators.

- Any protection or advocacy agency or entity that is designated by the Governor to fulfill the requirements and assurances of the federal Developmental Disabilities Assistance and *Bill of Rights* Act of 2000 [*see 42 U.S.C. § 15001 et seq.*] or the Protection and Advocacy for the Mentally Ill Individuals Act of 1986 [*see 42 U.S.C. § 10801 et seq.*], for the protection and advocacy of the rights of persons with mental illness.

- Humane societies and animal control agencies.

- Fire departments.

- Offices of environmental health and building code enforcement.

- Any other protective, public, sectarian, mental health, or private assistance or advocacy agency or person providing health services or social services to elders or dependent adults.

The last item in the preceding list of care custodians is the most significant in light of its broad interpretation by California courts. In *Bernard v. Foley*, the California Supreme Court held that the statutory definition set out above does not include a professional or occupational limitation and does not provide for a pre-existing personal friendship exception. Thus, the definition includes any person providing care or health services to a dependent adult [*Bernard v. Foley (2006) 39 Cal. 4th 794, 808, 47 Cal. Rptr. 3d 248, 139 P.3d 1196]* . In *Bernard v. Foley*, the presumptive disqualification of gifts to care custodians was held applicable although the trustee and other caregivers involved in the case were not health care professionals and had a preexisting personal friendship with the decedent [*Bernard v. Foley (2006) 39 Cal. 4th 794, 809, 47 Cal. Rptr. 3d 248, 139 P.3d 1196]* . This decision makes virtually any gift to a family friend who has incidentally provided care to a testator subject to challenge under *Prob. Code § 21350* on the basis that the individual is a "care custodian." Estate planners and probate attorneys need to be aware of the danger and anticipate a possible challenge whenever a testator wishes to make a gift to anyone who has provided any kind of care to the testator.

It has also been held that a long-term care ombudsman for a health care facility is a "care custodian" for purposes of the statute during the time he or she serves as ombudsman for a particular "dependent adult," and remains a care custodian within the meaning of the statute even after his or her formal ombudsman relationship with a particular resident has ended, due either to a change in the ombudsman's facility assignment or the fact that the resident has left the facility, when the ombudsman, as a result or his or her fiduciary relationship with the resident, develops a personal relationship with the resident and thereby acquires personal and financial information about the resident [*Estate of Shinkle (2002) 97 Cal. App. 4th 990, 993, 1007, 119 Cal. Rptr. 2d 42* ; *overruled in part on other grounds in Bernard v. Foley (2006) 39 Cal. 4th 794, 816, 47 Cal. Rptr. 3d 248, 139 P.3d 1196]* .

Prob. Code § 21350(a)(4), which includes in the category of presumptive disqualified persons any fiduciary who transcribes the testamentary instrument or causes it to be transcribed, does not apply to a person who provides information needed in the preparation of the instrument [*e.g.*, a list of the testator's assets] and who encourages the donor to execute it, but does not direct or otherwise participate in the transcription of the instrument to final written form [*Rice v. Clark (2002) 28 Cal. 4th 89, 101-105, 120 Cal. Rptr. 2d 522, 47 P.3d 300]* . A conservator was held not to have caused a will and trust to be transcribed for purposes of this rule when he had called an estate planning company to meet with the conservatee, brought the company's agent to the conservatee's house, and wrote a check from the conservatee's funds for the will and trust. The court of appeal concluded that to cause a document to be transcribed would necessarily involve directing the drafted document to be written out in its final form, which the conservator had not done [*Estate of Swetmann (2000) 85 Cal. App. 4th 807, 819-820, 102 Cal. Rptr. 2d 457]* .

When the attorney drafting a will is aware that a beneficiary may be a presumptively disqualified donee, the attorney has a duty of care to advise the client-testator that, absent steps taken under *Prob. Code § 21351(b)* to obtain a certificate of independent review from another attorney, the devise to the proposed beneficiary, if challenged, will have a significant likelihood of failing because of the presumptive disqualification. The attorney also has a duty to recommend that the client-testator seek independent counsel in an effort to obtain this certificate [*Osornio v. Weingarten (2004) 124 Cal. App. 4th 304, 328-331, 21 Cal. Rptr. 3d 246]* . This duty of care is owed to both the testator and to the prospective beneficiary [*Osornio v. Weingarten (2004) 124 Cal. App. 4th 304, 336-339, 21 Cal. Rptr. 3d 246]* .

Prob. Code § 21350 implicitly requires a person whose interest in a will or trust is threatened by a transfer to a disqualified person to invoke the protection of the statute affirmatively by seeking a court order establishing the invalidity of the transfer [*Estate of Shinkle (2002) 97 Cal. App. 4th 990, 1004, 119 Cal. Rptr. 2d 42* ; *overruled in part on other grounds in Bernard v. Foley (2006) 39 Cal. 4th 794, 816, 47 Cal. Rptr. 3d 248, 139 P.3d 1196]* . The burden then shifts to the transferee to justify the transfer under *Prob. Code § 21351* [*Estate of Shinkle (2002) 97 Cal. App. 4th 990, 1004, 119 Cal. Rptr. 2d 42* ; *overruled in part on other grounds in Bernard v. Foley (2006) 39 Cal. 4th 794, 816, 47 Cal. Rptr. 3d 248, 139 P.3d 1196* ; see discussion of *Prob. Code § 21351* exceptions in § 444.13[3][b]].

In determining relationships for purposes of this rule, *Prob. Code § 6406*, which governs the inheritance rights of relatives of the half blood, *Prob. Code § 6407*, which covers the inheritance rights of afterborn heirs, and *Prob. Code §§ 6450-6455*, which prescribe rules for determining the relationship of parent and child for purposes of intestate succession, are all applicable [*Prob. Code § 21350(b)*].

Prob. Code § 21350 generally applies to all instruments that become irrevocable on or after September 1, 1993 [*Prob. Code § 21355*]. If an instrument was revocable or amendable on that date, but the transfer by reason of incapacity was unable to change the disposition of his or her property and did not regain capacity before the date of his or her death, the instrument is deemed to be irrevocable for this purpose [*Prob. Code § 21355*].

[b] Exceptions

A transfer is not invalidated under *Prob. Code § 21350* if any of the following conditions are met [*Prob. Code § 21351*; *see also* discussion of *Prob. Code § 21351(d)* in [c], *below*]:

- The transferor is related by blood or marriage to, is a cohabitant with, or is the registered domestic partner of, the transferee or the person who drafted the instrument. "Related by blood or marriage" includes persons within the fifth degree or heirs of the transferor [*Prob. Code § 21351(g)*]. A "cohabitant" means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship [*Prob. Code § 21351(a)*; *see Pen. Code § 13700(b)*]. This provision applies retroactively to an instrument that becomes irrevocable on or after July 1, 1993 [*Prob. Code § 21351(a)*]. This exception applies to a spouse who was care custodian of the transferee prior to marriage [*Estate of Pryor (2009) 177 Cal. App. 4th 1466, 1468, 1476, 99 Cal. Rptr. 3d 895* (decedent's spouse could invoke the spousal exception to the presumption in *Prob. Code § 21351(a)* despite her prior status as a care custodian before her marriage to decedent)].

- The instrument is reviewed by an independent attorney who counsels the transferor about the nature and consequences of the intended transfer, attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and signs and delivers a "Certificate of Independent Review" in substantially the form set forth in *Prob. Code § 21351(b)* [*Prob. Code § 21351(b)*].

- After full disclosure of the relationships of the persons involved, the court approves the instrument

by order under *Prob. Code § 2580 et seq.* (substituted judgment) [*Prob. Code § 21351(c)*].

- The transferee is a federal, state, or local public entity, an entity that qualifies for a charitable exemption from taxation under *I.R.C. § 501(c)(3)* or *I.R.C. § 501(c)(19)*, or a trust holding an interest for this entity, but only to the extent of the interest of the entity, or the trustee of this trust [*Prob. Code § 21351(f)*].

- The transfer does not exceed $3,000 [*Prob. Code § 21351(h)*]. This provision does not apply if the total value of the property in the transferor's estate does not exceed the amount prescribed in *Prob. Code § 13100, i.e.,* $100,000 [*Prob. Code § 21351(h)*].

- The transfer is made by an instrument executed by a nonresident of California who was not a resident when the instrument was executed, and that was not signed in California [*Prob. Code § 21351(i)*; *see also Estate of Clementi (2008) 166 Cal. App. 4th 375, 383, 82 Cal. Rptr. 3d 685* (*Prob. Code § 21351(i)* exempted testator's will from the prohibition in *Prob. Code § 21350* against donative transfers to the drafter of the will, since testator was nonresident of California when he signed will, even though he was a resident of California at the time of his death)].

[c] Presentation of Evidence to Rebut Presumption

A transfer to a person who is prohibited from receiving a transfer under *Prob. Code § 21350* still may be found valid if the instrument making the transfer falls within one of the categories of instruments specified in *Prob. Code § 21351(d)* (*see below*) and the court determines that the transfer was not the product of fraud, menace, duress, or undue influence [*Prob. Code § 21350(d)*]. With respect to these categories of instruments, *Prob. Code § 21351(d)* creates a rebuttable presumption that the transfer was the product of fraud, duress, menace, or undue influence. A person who otherwise would be prohibited from receiving a transfer still may inherit if he or she successfully rebuts this presumption. In order to rebut the presumption, the transferee must present clear and convincing evidence, which does not include his or her own testimony, that the transfer was not the product of fraud, duress, menace, or undue influence [*Prob. Code § 21351(d)*; *Bernard v. Foley (2006) 39 Cal. 4th 794, 799, 47 Cal. Rptr. 3d 248, 139 P.3d 1196]* . However, if the court finds that the transfer *was* the product of fraud, menace, duress, or undue influence, the disqualified person not only is unable to receive the property, but also must bear all costs of the proceeding, including reasonable attorney's fees [*Prob. Code § 21351(d)*].

Prob. Code § 21351(d) applies to the following instruments:

- Any instrument *other than one making a transfer to the person who drafted the instrument* [*Prob. Code §§ 21350(a)(1), 21351(e)(1)*].

- Any instrument executed on or before July 1, 1993, by a person who was a California resident at the time the instrument was executed [*Prob. Code § 21351(e)(2)*].

- Any instrument executed by a California resident who was not a resident at the time the instrument was executed [*Prob. Code § 21351(e)(3)*].

For example, an attorney who drafts a client's will so as to benefit himself or herself and does not meet any of the exceptions discussed in [b], *above*, is conclusively disqualified under *Prob. Code § 21351(e)(1)*, whereas an attorney who drafts a client's will so as to benefit one of the attorney's relatives or law partners is presumed to be disqualified, but this presumption is rebuttable under *Prob. Code § 21351(d)* by clear and convincing evidence other than the attorney's testimony that the client freely chose this disposition [*Rice v. Clark (2002) 28 Cal. 4th 89, 98, 120 Cal. Rptr. 2d 522, 47 P.3d 300]* .

[d] Time Within Which Action Must Be Commenced

An action to establish the invalidity of a transfer under *Prob. Code § 21350* can only be commenced within statutory time limits. If the transfer was by will, the action must be commenced after letters are first issued to a general representative and before an order for final distribution is made [*Prob. Code § 21356(a)*]. If the transfer is made by some instrument other than a will, it must be commenced within the later of three years after the transfer becomes irrevocable or three years from the date the person bringing the action discovers, or reasonably should have discovered, the facts material to the transfer [*Prob. Code § 21356(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 444 PROBATE: WILL CONTESTS
PART II. LEGAL BACKGROUND

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§ 444.14 No Contest Clause

[1] Nature and Validity

A no contest clause in a will or other dispositive instrument creates a condition on the gifts and dispositions provided for in the instrument [*Burch v. George (1994) 7 Cal. 4th 246, 254, 27 Cal. Rptr. 2d 165, 866 P.2d 92* ; *Estate of Lindstrom (1987) 191 Cal. App. 3d 375, 381, 236 Cal. Rptr. 376*]. In essence, a no contest clause in a will conditions the rights of the devisees named in the will to take the devises provided for in the will on their acquiescence in its terms. To the extent that a particular devisee acquiesces in those terms, the devisee is entitled to take the devise; to the extent that the devisee does not acquiesce, the devisee cannot take [*see* *Burch v. George (1994) 7 Cal. 4th 246, 254, 27 Cal. Rptr. 2d 165, 866 P.2d 92*].

The purpose of a no contest clause is to discourage will contests by imposing a penalty of forfeiture against any beneficiary who challenges the will [Estate of Gonzalez (2002) *102 Cal. App. 4th, 1296, 1302, 126 Cal. Rptr. 2d 332*]. A no contest clause also is known as an "in terrorem" clause.

No contest clauses are valid and enforceable in California [*Burch v. George (1994) 7 Cal. 4th 246, 254, 27 Cal. Rptr. 2d 165, 866 P.2d 92*] to the extent permitted under the governing law [*see* [2], [3], *below*]. Typically, the no contest clause is not asserted as an affirmative defense in the contest itself, because it does not address the merits if the underlying claim (for example, in a contest based on capacity, it has no bearing on whether or not the testator had capacity to make a will). Rather, it is invoked at the time of distribution, which theoretically occurs after the contest has been concluded. If the contestant was unsuccessful, then the fiduciary seeks approval for a distribution in conformity with the application of the no contest clause. (If the contest was successful, of course, the document containing the no contest clause would not control the distribution in any case.)

[2] Enforcement of No Contest Clause Under Probate Code

[a] Applicable Law and Enforceability

The rules governing no contest clauses were significantly revised effective January 1, 2010 [*Prob. Code § 21315*; *see Prob. Code §§ 21310-21315*]. The revised statute governs the enforcement of no contest clauses in "protected

instruments" [*see* [c], *below*] that are filed on or after January 1, 2010, whenever executed, provided that the protected instrument became irrevocable on or after January 1, 2001 [*Prob. Code § 21315*]. Common law continues to govern no contest clauses in all other instruments [*Prob. Code § 21315*; *see* [3], *below*].

Under the revised rules, a no contest clause is only enforceable in three specific circumstances [*Prob. Code § 21311(a)*]:

- A direct contest brought without probable cause [*see* [d], *below*].
- A challenge to the transfer of property (provided the no contest clause provides) [*see* [e], *below*].
- The filing of a creditor's claim (provided the no contest clause provides) [*see* [f], *below*].

There is no opt-out provision in this statute. The provisions of *Prob. Code §§ 21310-21315* apply notwithstanding any contrary provisions in an instrument [*Prob. Code § 21314*].

[b] No Contest Clause Defined

Under the Probate Code revision, a no contest clause is a provision in a valid instrument which, if enforced, would penalize a beneficiary for filing a pleading in any court [*Prob. Code § 21310(c)*]. A pleading is a petition, complaint, cross-complaint, objection, answer, response, or claim [*Prob. Code § 21310(d)*].

[c] Protected Instrument

The Probate Code allows the enforcement of a no contest clause only with respect to a "protected instrument" [*see Prob. Code §§ 21310, 21311*]. "Protected instrument" means the following [*Prob. Code § 21310(e)*]:

- The instrument containing the no contest clause; or
- An instrument that is in existence on the date the instrument containing the no contest clause is executed and is expressly identified in the no contest clause, either individually or as part of an identifiable class of instruments, as being governed by the no contest clause.

Since a no contest clause cannot apply to future instruments [*see Prob. Code § 21310(e)(2)*], each codicil to an existing will should contain its own no contest clause if one is desired. A statement in amendments that the testator confirms and ratifies the original will is inadequate to incorporate the no contest clause into the amendment [*see Prob. Code § 21310(e), see also Perrin v. Lee (2008) 164 Cal. App. 4th 1239, 79 Cal. Rptr. 3d 885*].

It is also important to clarify whether or not a testamentary trust created under a will that contains a no contest clause is subject to a no contest provision. Any no contest clause applicable to the trust should be separately contained in the trust terms as recited in the order for distribution entered in the probate proceeding [*Meyer v. Meyer (2008) 162 Cal. App. 4th 983, 76 Cal. Rptr. 3d 546* (no contest clause had not been incorporated by reference into the testamentary trust because the decrees of distribution specifying the terms of the testamentary trust did not include the will's no contest clause as one of those terms)].

[d] Direct Contest

A no contest clause is enforceable in a direct contest that is brought without probable cause [*Prob. Code § 21311(a)(1)*]. A direct contest is one that alleges the invalidity of a protected instrument or one or more of its terms based on any of the following [*Prob. Code §21310(b)*]:

- Forgery.
- Lack of due execution.
- Lack of capacity.
- Menace, duress, fraud, or undue influence.
- Revocation of a will pursuant to *Prob. Code § 6120*, revocation of a trust pursuant to *Prob. Code § 15401*, or revocation of an instrument other than a will or trust pursuant to the procedure for revocation that is provided by statute or by the instrument.
- Disqualification of a beneficiary under *Prob. Code §§ 6112, 21350*.

Probable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable opportunity for further investigation or discovery [*Prob. Code § 21311(b)*].

[e] Challenge to Transfer of Property

A no contest clause also is enforceable against a pleading challenging the transfer of property on the grounds that it was not the transferor's property at the time of the transfer (a "forced election"), as long as the no contest clause expressly so provides [*Prob. Code § 21311(a)(2)*]. In this type of contest, probable cause is irrelevant, and the forced election may be applicable to anyone [*see Prob. Code § 21311(a)(2)*].

[f] Creditor's Claim

A no contest clause also is enforceable against the filing of a creditor's claim or prosecution of an action based on it, as long as the no contest clause expressly provides for such an application of the clause [*Prob. Code § 21311(a)(3)*]. In this type of contest, probable cause is also irrelevant [*see Prob. Code § 21311(a)(3)*].

[g] Declaratory Relief Unavailable

Under former law, declaratory relief was available to determine whether a proposed challenge to an instrument violated a no contest clause [*see* former *Prob. Code §21320*]. Such relief is no longer available under the revised statutes effective January 1, 2010 [*see Prob. Code §§ 21310-21315*].

[3] Enforcement of No Contest Clauses Under Common Law

[a] In General

For contests of a will or trust that contain a no contest clause, but are not governed by the revisions of *Prob. Code § 21310 et seq.* [*see* [2][a], *above*], common law continues to apply. Whether there has been a "contest" within the meaning of the language of a no contest clause is to be determined according to the circumstances of each case and the language used [*Estate of Strader (2003) 107 Cal. App. 4th 996, 1003, 132 Cal. Rptr. 2d 649* ; *Nairne v. Jessop-Humblet (2002) 101 Cal. App. 4th 1124, 1128, 124 Cal. Rptr. 2d 726*].

Factors relevant to determining whether a claim involving the characterization, inclusion, or distribution of a certain item of property in a testamentary instrument is a contest include [*Nairne v. Jessop-Humblet (2002) 101 Cal. App. 4th 1124, 1129, 124 Cal. Rptr. 2d 726*]:

- The particular language of the no contest clause.

- Whether the instrument specifies the property and its distribution.

- Whether the instrument specifically characterizes the property, *e.g.*, as separate versus community property.

- Whether the challenge, if successful, would thwart the testator's intent.

[b] Indirect Attack

Under common law, an indirect attack in a separate proceeding that nullifies or thwarts the express wishes of the creator of the instrument may constitute a "contest" for purposes of a no contest clause; for example:

- A proposed federal complaint by a surviving spouse against pension plan administrators to assert community property rights to plan benefits that had been transferred to a trust [*see* Burch v. George (1994) *7 Cal. 4th, 246, 27 Cal. Rptr. 2d 165, 866 P.2d 92*].

- A no contest clause in a trust instrument that applied to any attempt to "impair" the trust extended to a trust beneficiary's adjustment petition under the California Uniform Principal and Income Act to reallocate principal and income, when reallocation would have resulted in more income to beneficiary than allowed by trust and invasion of trust principal reserved to other beneficiaries [*Mc Kenzie v. Vanderpoel (2007) 151 Cal. App. 4th 1442, 1454, 61 Cal. Rptr. 3d 129*].

- A beneficiary's petition to recharacterize property that had been specifically characterized by settlors [Estate of Pittman (1997) *63 Cal. App. 4th, 290, 298-305, 73 Cal Rptr. 2d 622*].

- A proposed challenge by a surviving spouse to a corporate stock redemption agreement which was a "cornerstone" of the decedent's integrated estate plan [*Genger v. Delsol (1997) 56 Cal. App. 4th 1410, 1428-1429, 66 Cal. Rptr. 2d 527* ; *but see Jacobs-Zorne v. Superior Court (1966) 46 Cal. App. 4th 1064, 1075, 54 Cal. Rptr. 2d 385* (thwarting of testator's intent not appropriate test in determining whether no contest clause has been triggered)].

[c] Oral Contract

Although some older cases suggest that actions seeking to enforce an oral contract independent of a testamentary instrument do not constitute "contests" [*see Estate of Watson (1986) 177 Cal. App. 3d 569, 573-574, 223 Cal. Rptr. 14* ; *Estate of Black (1984) 160 Cal. App. 3d 582, 591, 206 Cal. Rptr. 663*], the California Supreme Court has clearly indicated that there is no "categorical proposition that any proceeding based upon a claim of right independent of a will or trust instrument is never a contest for purposes of the no contest law" [Burch v. George (1994) *7 Cal. 4th, 246, 261, 27 Cal. Rptr. 2d 165, 866 P.2d 92*]. As a result, more recent cases have held that a complaint seeking to establish and enforce an oral contract based on a right independent of a testamentary instrument may constitute a contest within the meaning of a no contest provision in that instrument [*Nairne v. Jessop-Humblet (2002) 101 Cal. App. 4th 1124, 1129-1131, 124 Cal. Rptr. 2d 726* (complaint alleging that settlors had orally agreed to give specified property to plaintiff and therefore that property should not have been included in trust violated no contest clause in trust because it directly attacked provision of trust that identified and disposed of this property)].

[d] Interpretation

A judicial action seeking an interpretation of a will or other dispositive instrument is not an attack on the instrument and does not constitute a contest of the instrument. It is merely an effort to ascertain the true intentions of the author of the

instrument [Graham v. Lenzi (1995) *37 Cal. App. 4th, 248, 258, 43 Cal. Rptr. 2d 407*]. A petition seeking to interpret a will generally does not violate a no contest clause because, rather than thwarting the testator's dispositive intent, the proceeding serves to ascertain and enforce that intent [*Estate of Strader (2003) 107 Cal. App. 4th 996, 1004, 132 Cal. Rptr. 2d 649*].

[4] Strict Construction

The strict statutory rules regarding no contest clauses reflect the general doctrine that no contest clauses are disfavored by the public policy against forfeiture [*McIndoe v. Olivos (2005) 132 Cal. App. 4th 483, 487, 33 Cal. Rptr. 3d 689* ; *Estate of Richter (1993) 12 Cal. App. 4th 1361, 1367, 16 Cal. Rptr. 2d 108* ; *Scharlin v. Superior Court (1992) 9 Cal. App. 4th 162, 168-169, 11 Cal. Rptr. 2d 448*]. Accordingly, under both the Probate Code and common law, no contest clauses must be strictly construed and cannot be extended beyond what the testator clearly intended by the wording of the will [*see Prob. Code 21312*; *see also* *Meyer v. Meyer (2008) 162 Cal. App. 4th 983, 998, 76 Cal. Rptr. 3d 546* ; *Zwirn v. Schweizer (2005) 134 Cal. App. 4th 1153, 1159, 36 Cal. Rptr. 3d 527* ; *Nairne v. Jessop-Humblet (2002) 101 Cal. App. 4th 1124, 1128, 124 Cal. Rptr. 2d 726*]. Under the common law, a beneficiary will be found to have violated a no contest clause only if the beneficiary's action clearly falls within the terms of the clause, and the penalty will be imposed only if it is found that the beneficiary's act clearly was intended by the testator to require the imposition of the penalty [*Estate of Rossi (2006) 138 Cal. App. 1325, 1338, 42 Cal. Rptr. 3d 244* ; *McIndoe v. Olivos (2005) 132 Cal. App. 4th 483, 487, 489, 33 Cal. Rptr. 3d 689* ; *Estate of Richter (1993) 12 Cal. App. 4th 1361, 1367, 16 Cal. Rptr. 2d 108*].

Thus, for example, a testator could permissively provide that three of his five children would *all* lose their testamentary gifts under a trust if any one of them contested it [Tunstall v. Wells (2006) *144 Cal. App. 4th, 554, 557-558, 50 Cal. Rptr. 3d 468*]. The court concluded that the no contest clause did not violate public policy, and reasoned that the decedent's intentions to impose conditions on the gifts of the three children were within his rights as a testator [Tunstall v. Wells (2006) *144 Cal. App. 4th, 554, 557-558, 50 Cal. Rptr. 3d 468*]. Similarly, a no contest clause in a testamentary trust was upheld although it forced the settlor's former wife and their children to choose between enforcing their rights under an existing martial dissolution judgment by filing creditor's claims, or relinquishing those rights and taking the gifts provided for them in the settlor's trust [*Colburn v. Northern Trust Co. (2007) 151 Cal. App. 4th 439, 447, 59 Cal. Rptr. 3d 828*]. Also upheld was a clause in a trust instrument that applied to any attempt to "impair" the trust, which was held applicable to the trust beneficiary's adjustment petition under the California Uniform Principal and Income Act to reallocate principal and income, when the reallocation would have resulted in more income to the beneficiary than was allowed by the trust and the invasion of trust principal reserved to other beneficiaries [*McKenzie v. Vanderpoel (2007) 151 Cal. App. 4th 1442, 1454, 61 Cal. Rptr. 3d 129*].

Extrinsic evidence on the testator's intended meaning of the no contest clause is admissible if it is relevant to show a meaning to which the language is reasonably susceptible [*Estate of Kaila (2001) 94 Cal. App. 4th 1122, 1132, 114 Cal. Rptr. 2d 865*]. However, consideration of extrinsic evidence does not necessarily require a determination of an action on the merits that would preclude relief [*Estate of Kaila (2001) 94 Cal. App. 4th 1122, 1136, 114 Cal. Rptr. 2d 865*].

[5] Review of Determination

A court order determining whether a particular motion, petition, or other act by the beneficiary would constitute a contest within the terms of the no contest clause is appealable [*Prob. Code § 1303(j), see* *Estate of Hoffman (2002) 97 Cal. App. 4th 1436, 1438 n.1, 119 Cal. Rptr. 2d 248*].

Cases have held that, given the short filing times in many probate matters and the need for timely and orderly administration of estates, appeal may constitute an inadequate legal remedy. Under these circumstances, a writ of mandate would be the appropriate remedy for reviewing the court's order [*see* *Varney v. Superior Court (1992) 10 Cal.*

App. 4th 1092, 1098, 12 Cal. Rptr. 2d 865 ; *Scharlin v. Superior Court (1992) 9 Cal. App. 4th 162, 167, 11 Cal. Rptr. 2d 448*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 444.15 Contest Before Probate

[1] Initiating Contest

An interested person may contest a will by objecting to a petition for probate [*see Prob. Code §§ 1040, 1043, 8004(b), 8250(a)*]. The objection must be in writing and verified; it may be filed at or before the hearing on the petition [*see Prob. Code §§ 1020, 1021, 1043(a)*; *but see Prob. Code § 1043(b), (c)* (autho rizing oral response or objection at hearing and allowing court to hear and determine issue or grant continuance to allow response or objection to be made in writing, but providing that request for continuance does not constitute a response or an objection)].

For discussion of who is an "interested person" for purposes of a will contest before probate, see *§ 444.12[1]*.

[2] Summons

[a] Issuance

When a will contestant objects to probate of a will, a summons must be issued and served with a copy of the petition to each heir of the decedent and each devisee and executor named in the contested will [*see Prob. Code §§ 8110, 8250(a)*; *see also Prob. Code § 34* ("devisee" defined), *Prob. Code § 44* ("heirs" defined)]. Notice must be provided to all affected persons wherever residing, including minors and incompetents [Cal. Law Revision Comm'n Comment to *Prob. Code § 8250*]. For the Judicial Council summons form adopted for mandatory use, *see § 444.101*.

[b] Contents

The summons must contain a direction that the persons summoned file with the court a written pleading in response to the contest within 30 days after service of the summons [*Prob. Code § 8250(a)*].

[c] Service

Service of the summons must be made in the manner provided by law for service of a summons in a civil action under *Code Civ. Proc. §§ 413.10-417.40* [*Prob. Code § 8250(a)*; *see also* Ch. 518, *Service of Summons and Papers*].

[3] Responsive Pleading

The petitioner and any other interested person may jointly or separately answer the objection or demur to the objection within the time prescribed in the summons [*Prob. Code § 8251(a)*]. A demurrer may be made on any of the grounds available in civil actions [*Prob. Code § 8251(b)*; *see Code Civ. Proc. §§ 430.10-430.90* (demurrers generally); *see also* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*]. For a demurrer to a contest and a notice of hearing on demurrer, see *§§ 444.102* and *444.103*, respectively.

If a demurrer to the objection is sustained, the court may allow the contestant a reasonable time, not exceeding 15 days, within which to amend the objection. If the demurrer is overruled, the petitioner and other interested persons may, within 15 days thereafter, answer the objection [*Prob. Code § 8251(b)*]. For a form of answer, *see § 444.104*.

[4] Failure to Timely Respond

Under *Prob. Code § 8521(c)*, if a person fails to timely respond to the summons, the case is at issue notwithstanding the failure [*Prob. Code § 8251(c)(1)*]. The case may proceed on the petition and other documents filed by the time of the hearing; no further pleadings by other persons are necessary [*Prob. Code § 8251(c)(1)*]. A person who fails to timely respond is also prohibited from participating further in the will contest, and he or she is bound by the decision in the proceeding [*Prob. Code § 8251(c)(2), (3)*]. Although a person's failure to timely respond to a contestant's summons results in loss of the right to participate in the contest of the will, the failure does not otherwise affect that party's interest in the estate [*Prob. Code § 8251(c)(2)*]. Nothing in *Prob. Code § 8251(c)* precludes further participation by the petitioner [*Prob. Code § 8251(c)(2)*].

However, the rules of court provide that if the court continues a matter to allow a written objection or response to be made, and the responding or objecting party fails to serve and file a timely objection or response, the court may deem the objections or responses waived [*Cal. Rules of Ct., Rule 7.801*].

[5] Pretrial Motions

Procedures set forth in Part II of the Code of Civil Procedure are available in probate proceedings unless otherwise provided by the Probate Code or Judicial Council rules [*see Prob. Code §§ 1000, 1001*]. For example, if appropriate, a respondent to a will contest may wish to file a demurrer under *Code Civ. Proc. § 430.10* (*see § 444.102*) or a motion for summary judgment pursuant to *Code Civ. Proc. § 437c* (*see §§ 444.105, 444.106*). For discussion and additional forms regarding motions to strike and other pretrial motions, see Ch. 375, *Motions to Strike: Pleadings* . For discussion and additional forms regarding summary judgments, see Ch. 537, *Summary Judgment* .

[6] Probate and Contest Proceedings

[a] Concurrent Hearings

When a will is contested before probate, there are two distinct, although related, proceedings before the court: the petition for probate of the will, and the contest of the probate of the will [*Swift v. Superior Court (1952) 39 Cal. 2d 358, 363, 247 P.2d 6* ; *Estate of Black (1926) 199 Cal. 257, 261, 248 P. 1015* ; *Estate of Latour (1903) 140 Cal. 414, 437-438, 74 P. 441]* . The hearing of the two proceedings must occur at the same time. The hearing of the petition for probate is supplementary to, and in aid of, the hearing on the contest [*Swift v. Superior Court (1952) 39 Cal. 2d 358, 363, 247 P.2d 6* ; *Estate of Black (1926) 199 Cal. 257, 261, 248 P. 1015]* .

[b] Nature of Respective Proceedings

In the proceeding for probate of the will, the petitioner or proponent of the will sets forth issues of fact regarding the ultimate question of the validity of the will [*Estate of Relph (1923) 192 Cal. 451, 458, 221 P. 361]* . There are no

defendants in the sense of active litigants in the proceeding. It is in a sense an ex parte proceeding, in which the burden rests on the petitioner to prove all the material allegations of the petition. It is the court's function to guard and protect the interests of all interested persons [*Estate of Relph (1923) 192 Cal. 451, 458-459, 221 P. 361]* .

A will contest, although a proceeding in rem, is at the same time an adversary proceeding, the parties to which are (1) those persons interested in the estate who have appeared and contested the will and (2) the proponents of the will who have appeared and filed a pleading in response to the contest [*Estate of Relph (1923) 192 Cal. 451, 459, 221 P. 361* ; *see Prob. Code § 8252(a)*]. The only issues of fact are those framed by the allegations of the contest and the denials of the answer [*Estate of Relph (1923) 192 Cal. 451, 459, 221 P. 361]* .

[7] Trial

[a] Burden of Proof

At the trial, the proponents of the will have the burden of proof of due execution. The contestants of the will have the burden of proof of lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation [*Prob. Code § 8252(a)*].

[b] Court as Trier of Fact

At the trial, the court must try and determine any contested issue of fact that affects the validity of the will [*Prob. Code § 8252(b)*; *see Prob. Code § 825*]. There is no constitutional right to jury trial in will contest proceedings [*see* Law Revision Comm'n Comment to *Prob. Code § 8252, 20* Cal. Law Revision Com'n Reports 1527 (1990); *Estate of Gardner (1991) 1 Cal. App. 4th 995, 999, 2 Cal. Rptr. 2d 664* ; *Estate of Beach (1975) 15 Cal. 3d 623, 642, 125 Cal. Rptr. 570, 542 P.2d 994* ; *Estate of England (1931) 214 Cal. 298, 300, 5 P.2d 428]* .

[c] Determination of Whether Later Will Revokes Former Will

If the will is opposed by the petition for probate of a later will revoking the former, the court must determine first whether the later will is entitled to probate [*Prob. Code § 8252(a)*].

[d] Production and Examination of Witnesses

At the trial, each subscribing witness must be produced and examined. If no subscribing witness is available as a witness within the meaning of *Evid. Code § 240*, the court may admit the evidence of other witnesses to prove the due execution of the will [*Prob. Code § 8253*]. If only one subscribing witness is available in a will contest, his or her evidence alone may be sufficient to prove due execution and the unavailable witness is not necessary [*Estate of Burdette (2000) 81 Cal. App. 4th 938, 945, 97 Cal. Rptr. 2d 263]* . In addition, the court may admit proof of the handwriting of the testator and of any of the subscribing witnesses as evidence of the due execution of the will when no witness is available [*Prob. Code § 8221*; Cal. Law Revision Comm'n Comment to *Prob. Code § 8253*]. For discussion of *Evid. Code § 240*, see *Ch. 551, Trial, § 551.121* et seq.

[8] Judgment Allowing or Rejecting Probate

The court may make appropriate orders, including orders sustaining or denying objections, and must render judgment either admitting the will to probate or rejecting it, in whole or in part, and appointing a personal representative [*Prob. Code § 8254*]. For forms of judgment after trial, *see §§ 444.109* and *444.110*. For statements of decision for use after trial, see *§§ 444.107, 444.108*.

[9] Relief From Judgment

Relief from a judgment in a will contest may be available under *Code Civ. Proc. § 473* [*see Prob. Code § 1000*; Cal. Law Revision Comm'n Comment to *Prob. Code § 1043*]. For discussion of and forms regarding relief from default judgment, see Ch. 489, *Relief From Judgments and Orders* .

[10] Appeal

An appeal may be taken from an order or the refusal to make an order admitting a will to probate or revoking the probate of a will [*Prob. Code § 1303(b)*; *see Code Civ. Proc. § 664.5* (mailing and filing of notice of entry of judgment)]. However, when a will contest is filed before the will is admitted to probate, appeal may not be taken from an order dismissing the contest [*Estate of Weber (1991) 229 Cal. App. 3d 22, 24, 280 Cal. Rptr. 22]* .

[11] Perpetuation of Testimony

The testimony of each witness in a proceeding concerning the execution or provisions of a will, the testamentary capacity of the decedent, and other issues of fact, may be reduced to writing, signed by the witness, and filed [*Prob. Code § 8224*]. The testimony so preserved, or an official reporter's transcript of the testimony, is admissible in evidence in a subsequent contest of the will if the witness has become unavailable as a witness within the meaning of *Evid. Code § 240* [*see Prob. Code § 8224*]. For discussion of *Evid. Code § 240*, see *Ch. 551, Trial, § 551.72* et seq.

[12] Defense of Contest by Personal Representative

[a] Executor's Duty

A person named as executor in the will is under no duty to defend a contest of the will until the person is appointed as personal representative [*Prob. Code § 8250(b)*]. After the will has been admitted to probate and the executor has taken up the administration of the estate, it is then the executor's duty to defend and uphold the will against attack and to protect the interest of the beneficiaries [*Estate of Logan (1915) 171 Cal. 357, 362, 153 P. 388]* . For a form containing grounds of opposition to probate of a holographic will by the executor of a prior witnessed will, *see § 444.100*.

[b] Compensation of Personal Representative

Prob. Code § 10801 provides that in addition to the basic compensation for personal representatives provided by *Prob. Code § 10800* (compensation based on value of estate), the court may allow additional compensation for extraordinary services by the personal representative in an amount the court determines is just and reasonable. Thus, if the court concludes that it is just and reasonable to grant the personal representative additional compensation for services performed in connection with a will contest, an executor or administrator may receive compensation for the successful defense of a contested will [*see Prob. Code § 10801*]. Extraordinary compensation may be awarded prior to final distribution of the estate if it appears that administration of the estate will continue, due to litigation or otherwise, for an unreasonably long time [*Prob. Code § 10832*].

Prob. Code § 10800 et seq. apply to estates in which administration is commenced after July 1, 1991 [*Prob. Code § 10850*]. For estates in which administration commenced prior to that date, former law continues to apply [*Prob. Code § 10850(b)*].

Former Prob. Code § 902 (repealed eff. July 1, 1991) contained a list of "extraordinary services" for which additional compensation could be awarded. Among other things, the list included the successful defense of a will that is contested before the will is admitted to probate, and the good faith defense of a will that is contested after it is admitted to probate, as examples of "extraordinary services" for which additional compensation was warranted. Former Prob. Code § 902 continues to apply to all administration proceedings commenced before July 1, 1991, but not to those commenced on or after that date [*Prob. Code § 10850(b)*; Stats. 1990, ch. 79, § 14]. Although the law that applies to administrative proceedings commenced on or after July 1, 1991, does not contain a list of "extraordinary services," the list in former

Probate Code § 902 still appears to be instructive, and it is likely that the services listed in it will still be considered as examples of the kinds of services for which the courts will award additional compensation.

Pre-1991 case law provides that an executor or administrator who voluntarily assumes a burden properly belonging to the beneficiaries must look to the beneficiaries and not to the estate for reimbursement [*Estate of Higgins (1910) 158 Cal. 355, 358, 111 P. 8]* . For example, if defense of a will contest benefits only the executor as a devisee and legatee and could not benefit any other person interested in the estate, the executor must bear the cost and charges of maintaining it [*Estate of Higgins (1910) 158 Cal. 355, 359, 111 P. 8]* . If an administrator or executor incurs expense in a fruitless attempt to establish a will at the request of a beneficiary, the beneficiary, but not the estate, is liable for the expenses incurred. If the will is established, however, costs and counsel fees, being chargeable against those who are benefited by the litigation, may be charged against the estate if it goes to the parties so benefited. Otherwise, the executor's remedy is by action for contribution [*Estate of Hite (1909) 155 Cal. 448, 455-456, 101 P. 448]* .

For discussion of the availability of costs and attorney's fees in will contests, see *§ 444.17*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawWill ContestsGeneral OverviewEstate, Gift & Trust LawWill ContestsFraudEstate, Gift & Trust LawWill ContestsRevocationGeneral OverviewEstate, Gift & Trust LawWill ContestsStandingEstate, Gift & Trust LawWill ContestsTestamentary CapacityGeneral OverviewEstate, Gift & Trust LawWill ContestsTestamentary FormalitiesGeneral OverviewEstate, Gift & Trust LawWill ContestsTestamentary FormalitiesWitnessesGeneral OverviewEstate, Gift & Trust LawWill ContestsUndue InfluenceBurdens of Proof

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PART II. LEGAL BACKGROUND

38-444 California Forms of Pleading and Practice--Annotated § 444.16

§ 444.16 Will Contest After Probate

[1] Petition to Revoke Probate of Will

A petition to contest a will already admitted to probate must generally be brought within 120 days after the will was admitted to probate [*see Prob. Code § 8270(a)*]. However, a person who was a minor or who was incompetent and had no guardian or conservator at the time a will was admitted to probate may petition the court to revoke the probate of the will at any time before entry of an order for final distribution [*Prob. Code § 8270(b)*].

On the filing of the petition, a summons must be directed to the personal representative and to the heirs and devisees of the decedent, so far as known to the petitioner. The summons must contain a direction that the persons summoned file with the court a written pleading in response to the petition within 30 days after service of the summons [*Prob. Code § 8271(a)*; *see § 444.101*].

The summons must be issued and served with a copy of the petition, and proceedings had as in the case of a contest of the will [*Prob. Code § 8271(b)*]. For discussion of service and proceedings in will contests, see *§ 444.15[2]*.

Under limited circumstances, a petition under *Prob. Code § 8250* contesting the will before it has been admitted to probate may be treated as a petition under *Prob. Code § 8270*. For example, when a will was admitted to probate eight days after the contestant filed a preprobate petition, and the contestant's counsel informally asked the court to deem the petition to have been filed after the admission of the will to probate, the court of appeal found it was prejudicial error for the probate court not to grant the contestant's request. The court observed that the only material difference between the two types of petitions, that is, the requirement that a postprobate petition allege the date the will was admitted to probate, was easily satisfied by simple interlineation. Further, the court found there was no problem with the notice given by the contestant [*Estate of Horn (1990) 219 Cal. App. 3d 67, 69-74, 268 Cal. Rptr. 41* ; for discussion of a preprobate petition under *Prob. Code § 8250*, see *§ 444.15[1], above*]. The court cautioned, however, that not every petition under *Prob. Code § 8250* should be treated as a postprobate petition once the will has been admitted to probate. It explained that its decision was based on what, in effect, was a motion to amend the preprobate petition, and that absent that motion, the timely filing of a petition under *Prob. Code § 8270* is necessary following the admission of the will to probate [*Estate of Horn (1990) 219 Cal. App. 3d 67, 73, 73 n.7, 268 Cal. Rptr. 41* (decided under former *Prob.*

Code §§ 370, 380)].

[2] Failure to Respond

If a person fails to timely respond to the summons, the case is at issue notwithstanding the failure [*Prob. Code § 8271(c)(1)*]. The case may proceed on the petition and other documents filed by the time of the hearing; no further pleadings by other persons are necessary [*Prob. Code § 8271(c)(1)*]. A person who fails to timely respond is also prohibited from participating further in the will contest, and he or she is bound by the decision in the proceeding [*Prob. Code § 8271(c)(2), (3)*]. Although a person's failure to timely respond to a contestant's summons results in loss of the right to participate in the contest of the will, the failure does not otherwise affect that party's interest in the estate [*Prob. Code § 8271(c)(2)*].

However, the rules of court provide that if the court continues a matter to allow a written objection or response to be made, and the responding or objecting party fails to serve and file a timely objection or response, the court may deem the objections or responses waived [*Cal. Rules of Ct., Rule 7.801*].

[3] Availability of Pretrial Motions

Pretrial motions available generally in civil actions are available in probate proceedings, unless otherwise provided by the Probate Code [*see Prob. Code § 1000*]. For discussion of pretrial motions in will contests, see *§ 444.15[5]*. For notice and motion for summary judgment and order granting the motion, see *§§ 444.114* and *444.115*.

[4] Responsive Pleadings to Petition

The procedures for responsive pleadings in revocation proceedings are similar to those for will contest proceedings [*see Prob. Code § 8271(b)* (proceedings must be had as in case of contest of the will)]. For discussion of these procedures, see *§ 444.15[3]*. For a demurrer and an answer, see *§§ 444.112* and *444.113*, respectively.

[5] Revocation of Probate and Liability of Personal Representative

If it appears on satisfactory proof that the will should be denied probate, the court must revoke the probate of the will [*Prob. Code § 8272(a)*; *see § 444.116*].

Revocation of probate of a will terminates the powers of the personal representative. The personal representative is not liable for any otherwise proper act done in good faith before the revocation, nor is any transaction void by reason of the revocation if entered into with a third person dealing in good faith and for value [*Prob. Code § 8272(b)*].

[6] Effect of Admission of Will to Probate

If no person contests the validity of a will or petitions for revocation of probate of the will within the time provided in *Prob. Code §§ 8200-8272*, admission of the will to probate is conclusive, unless there was fraud in the procurement of the court order or the court order was based on the erroneous determination of the decedent's death [*Prob. Code § 8226(a)*; *see Prob. Code § 8007*; *see also Prob. Code § 8270* (petition for revocation as required to be filed within 120 days of will's admission to probate)].

Except as provided in *Prob. Code § 8226(c)* [*see* discussion *below*], a will may be admitted to probate notwithstanding prior admission to probate of another will or prior distribution of property in the proceeding [*Prob. Code § 8226(b)*; *see Estate of Moore (1919) 180 Cal. 570, 573, 182 P. 285]* . The will may not affect property previously distributed, but the court may determine how any provision of the will affects property not yet distributed and how any provision of the will affects provisions of another will [*Prob. Code § 8226(b)*].

Prob. Code § 8226(c) provides that if the proponent of a will has received notice of a petition for probate or a petition for letters of administration for a general representative, the proponent may petition for probate of the will only within the later of either of the following time periods:

- 120 days after issuance of the order admitting the first will to probate or determining the decedent to be intestate.

- 60 days after the proponent of the will first obtains knowledge of the will.

However, *Prob. Code § 8226(c)* applies only to those who have received notice of the petition for letters of administration pursuant to the notice provisions of the Probate Code [*Estate of Kelly (2009) 172 Cal. App. 4th 1367, 1375, 91 Cal. Rptr. 3d 674* (time limits of *Prob. Code § 8226(c)* did not apply because will proponent never received notice of the petition for letters of administration, as required to trigger the statute)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsStandards of ReviewHarmless & Invited ErrorsGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbatePleadingsEstate, Gift & Trust LawWill ContestsGeneral OverviewEstate, Gift & Trust LawWill ContestsFraudEstate, Gift & Trust LawWill ContestsRevocationGeneral OverviewEstate, Gift & Trust LawWill ContestsStanding

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§ 444.17 Reimbursement for Costs and Attorney's Fees

Attorneys, like personal representatives, may be awarded additional compensation for extraordinary services, in an amount that the court determines to be just and reasonable [*Prob. Code §§ 10801, 10811*; for discussion, § 444.30[2]]. Although the current statutes to not specifically authorize compensation for services performed in connection with will contests, compensation may be awarded in appropriate cases under the court's general authority to grant compensation for extraordinary services.

Estates in which administration commenced prior to July 1, 1991, are governed by former law [*Prob. Code § 10850(b)*]. Former Prob. Code § 902 contained a list of "extraordinary services" for which additional compensation could be awarded. Among other things, the list included the successful defense of a will that is contested before the will is admitted to probate, and the good faith defense of a will that is contested after it is admitted to probate, as examples of "extraordinary services" for which additional compensation was warranted. For additional discussion, see *§ 444.15[12][b]*.

An attorney for a personal representative may agree to perform extraordinary services on a contingent fee basis [*Prob. Code § 10811(c)*]. However, any contingent fee agreement must be in writing, must comply with all of the requirements of *Bus. & Prof. Code § 6147*, and must be approved by the court after notice has been given to all of the persons entitled to notice in the proceedings [*Prob. Code § 10811(c)*]. For further discussion, see *Ch. 458D, Probate: Accounts, Final Distribution, and Compensation, § 458D.132[2]*, and Ch. 72, *Attorney Practice and Ethics* .

Attorney's fees are not costs [*see Code Civ. Proc. § 1021*]. Unless it is otherwise provided by the Probate Code or by rules adopted by the Judicial Council, either the superior court or the court on appeal may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require [*Prob. Code § 1002*; *see Estate of Costa (1961) 191 Cal. App. 2d 515, 521-521, 12 Cal. Rptr. 920* (witness fee)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesEstate, Gift & Trust

LawProbateGeneral OverviewEstate, Gift & Trust LawWill ContestsGeneral Overview

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§ 444.18 Tort Actions Related to Will Contest--Malicious Prosecution

A malicious prosecution action may lie against a person who brings a will contest, providing all of the requisites of a malicious prosecution are satisfied [*Crowley v. Katleman (1994) 8 Cal. 4th 666, 679, 34 Cal. Rptr. 2d 386, 881 P.2d 1083]* . To establish a cause of action for malicious prosecution of a will contest, the plaintiff must plead and prove that the contest was commenced by or at the direction of the defendant and was pursued to a legal termination in the plaintiff's favor, that the contest was brought without probable cause, and that it was initiated with malice [*Crowley v. Katleman (1994) 8 Cal. 4th 666, 676, 34 Cal. Rptr. 2d 386, 881 P.2d 1083* ; for further discussion, see Ch. 357, *Malicious Prosecution and Abuse of Process*].

An unsuccessful will contest may form the basis for a malicious prosecution action when the contest was brought on several grounds, some of which were supported by probable cause and some of which were not. It is not necessary to allege that every ground was without probable cause; a malicious prosecution action will lie if only one of the grounds was without probable cause [*Crowley v. Katleman (1994) 8 Cal. 4th 666, 679, 34 Cal. Rptr. 2d 386, 881 P.2d 1083]* .

A malicious prosecution action may also follow a successful will contest, although the plaintiff in such a case must be the party who prevailed in the contest. If the submission of the will to probate was in itself without probable cause and malicious, then the party who successfully contests the probate of the will may maintain a suit for malicious prosecution, provided all of the requirements for a malicious prosecution action are satisfied [*Steiner v. Eikerling (1986) 181 Cal. App. 3d 639, 645, 226 Cal. Rptr. 694]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawWill ContestsGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsIntentional TortsMalicious ProsecutionElementsGeneral OverviewTortsIntentional TortsMalicious ProsecutionElementsProbable CauseGeneral Overview

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[Reserved]

§§ 444.19[Reserved]

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§ 444.30 State Statutes

[1] Civil Procedure

Civil actions. *Code Civ. Proc. §§ 307-1062.20*

Service of summons. *Code Civ. Proc. §§ 413.10-417.40*

Demurrers. *Code Civ. Proc. §§ 430.10-430.80*

Default judgment, relief from. *Code Civ. Proc. § 473*

Discovery. *Code Civ. Proc. §§ 2016.010-2093*

Rules of practice applicable to civil actions as also applicable in probate proceedings. *Prob. Code § 1000*

[2] Compensation of Personal Representative

Compensation of personal representative for extraordinary services. *Prob. Code § 10801*

Compensation of attorney for personal representative for extraordinary services. *Prob. Code § 10811*

[3] Contest of Will After Probate

Petition required to be in writing, signed by petitioners, and filed with court clerk. *Prob. Code § 1020*

Petition required to be verified. *Prob. Code § 1021(a)(1)*

Standing to contest will; filing of petition. *Prob. Code § 8270*

Summons. *Prob. Code § 8271*

Revocation of probate. *Prob. Code § 8272*

[4] Contest of Will Before Probate

Objection required to be in writing, signed by objectors, and filed with court clerk. *Prob. Code § 1020*

Objection required to be verified. *Prob. Code § 1021(a)(2)*

Objections. *Prob. Code § 1043*

Grounds. *Prob. Code § 6104*

Governing law. *Prob. Code § 8004(b)*

Summons. *Prob. Code § 8250(a)*

Executor's duty to defend contest. *Prob. Code § 8250(b)*

Responsive pleading. *Prob. Code § 8251(a), (b)*

Failure to timely respond. *Prob. Code § 8251(c)*

Burden of proof. *Prob. Code § 8252(a)*

Court as trier of fact. *Prob. Code § 8252(b)*

Evidence of Execution. *Prob. Code § 8253*

Judgment. *Prob. Code § 8254*

[5] Definitions

"Devisee" defined. *Prob. Code § 34*

"Heirs" defined. *Prob. Code § 44*

"Interested person" defined. *Prob. Code § 48*

"Personal representative" defined. *Prob. Code § 58*

"Will" defined. *Prob. Code § 88*

[6] No Contest Clause

"Contest" defined. *Prob. Code § 21310(a)*

"Direct contest" defined. *Prob. Code § 21310(b)*

"No contest clause" defined. *Prob. Code § 21310(c)*

"Pleading" defined. *Prob. Code § 21310(d)*

"Protected instrument" defined. *Prob. Code § 21310(e)*

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Strict construction. *Prob. Code § 21312*

Applicability of common law. *Prob. Code § 21313*

Applicability notwithstanding contrary provision in instrument. *Prob. Code § 21314*

Applicability to instruments. *Prob. Code § 21315*

[7] Validity and Execution of Will

Property subject to disposition. *Health & Safety Code §§ 7150-7151.40* (Uniform Anatomical Gift Act); *Prob. Code § 6101* (generally)

Court may authorize conservator to make will for conservatee. *Prob. Code § 2580(b)(13)*.

Who may make will. *Prob. Code § 6100*

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Who may take under will. *Prob. Code § 6102*

Conditional will. *Prob. Code § 6105*

Execution of written will. *Prob. Code § 6110*

Holographic will. *Prob. Code § 6111*

Witnesses. *Prob. Code § 6112*

Validity of foreign wills. *Prob. Code § 6113*

Revocation. *Prob. Code §§ 6120-6124*

References in will to other documents (rules governing incorporation by reference). *Prob. Code §§ 6130, 6132*

California statutory will. *Prob. Code § 6200 et seq.*

Uniform International Wills Act. *Prob. Code §§ 6380-6390*

Proof of will. *Prob. Code §§ 8220-8223*

Subsequent admissibility of testimony. *Prob. Code § 8224*

Admission of will to probate. *Prob. Code § 8225*

Effect of admission of will to probate. *Prob. Code § 8226*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWill ContestsGeneral OverviewEstate, Gift & Trust LawWill ContestsNo Contest ClausesEstate, Gift & Trust LawWill ContestsRevocationGeneral OverviewEstate, Gift & Trust LawWill ContestsStanding

California Forms of Pleading and Practice--Annotated

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Volume 38: Probate: Is Probate Necessary? thru Probate: Estate Tax-Chs. 440-453
Chapter 444 PROBATE: WILL CONTESTS
PART III. RESEARCH GUIDE

38-444 California Forms of Pleading and Practice--Annotated § 444.31

§ 444.31 California Rules of Court

Objections or responses waived if not timely filed after matter continued to allow for their filing. *Cal. Rules of Ct., Rule 7.801*

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§ 444.32 Local Rules of Court

Continuance to permit filing of contest.

Alameda Co. Super. Ct. Rules, Rule 12.1.7

Los Angeles Co. Super. Ct. Rules, Rules 10.19, 10.61

Sacramento Co. Super. Ct. Rules, Rule 15.47

San Bernardino Co. Prob. Pol. Mem. § 106

Santa Clara Co. Super. Ct. Rules, Rule 5.1(H)

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§ 444.33 Decisions

[1] Attorney's Fees

Amendment of statute authorizing attorney's fees is applicable to case in which appeal is pending on effective date of amendment. *Estate of Schuster (1984) 163 Cal. App. 3d 337, 341, 209 Cal. Rptr. 289* (authorizing award of attorney's fees for successful defense of will contest, pursuant to 1984 amendment of Prob. Code § 902)

NOTE:
Prob. Code § 902 is applicable if administration was commenced before July 1, 1991; *Prob. Code §§ 10810, 10811* are applicable if administration is commenced after July 1, 1991.

Applicant for letters testamentary is not entitled to attorney's fees incurred in application for letters and in resistance to will contest, because contest was purely personal and not maintained for benefit of estate. *Estate of Bloom (1980) 107 Cal. App. 3d 195, 201, 165 Cal. Rptr. 591*

[2] Construction of Will

Paragraphing alone is insufficient to overcome natural meaning of language used in will. *Estate of Edwards (1988) 203 Cal. App. 3d 1366, 1374, 250 Cal. Rptr. 779*

Meaning of clear and distinct devise or bequest is not changed by inference from other parts of will, even if devise is inconsistent with other portions; reference to other parts of will for guidance is appropriate only when uncertainty may appear with regard to single part. *Estate of Edwards (1988) 203 Cal. App. 3d 1366, 1374, 250 Cal. Rptr. 779*

Technical words in will are given their technical sense only if no contrary intent shown. *Estate of Edwards (1988) 203 Cal. App. 3d 1366, 1374, 250 Cal. Rptr. 779*

Obliteration with intent to revoke revokes portion of will; undated, unsigned interlineation is not effective for new or different bequest. *Estate of Cumming (1979) 96 Cal. App. 3d 867, 871, 158 Cal. Rptr. 263*

When designation of beneficiary in will is ambiguous (two or more persons or organizations measure up to designation or description mentioned in will), extrinsic evidence is admissible for purpose of identifying intended beneficiary. *Estate of Jackson (1979) 92 Cal. App. 3d 486, 490, 155 Cal. Rptr. 380*

Use of extrinsic evidence to interpret will that is uncertain on its face. *Estate of Vollhaber (1967) 251 Cal. App. 2d 145, 152, 59 Cal. Rptr. 169*

Whether condition in will is precedent or subsequent depends on intention of testator as expressed in will when read in light of surrounding circumstances. *Estate of Alpers (1967) 251 Cal. App. 2d 40, 45-46, 58 Cal. Rptr. 841*

In construing will, rules favoring early vesting and vested rather than contingent remainders are applicable to resolve uncertainties, if testator's intention is imperfectly expressed. *Estate of Campbell (1967) 250 Cal. App. 2d 576, 580-581, 58 Cal. Rptr. 723*

Construction of will is question of law; will is construed according to intention of testator. *Estate of Campbell (1967) 250 Cal. App. 2d 576, 580, 58 Cal. Rptr. 723*

Court's inquiry in construing will is limited to ascertaining what testator meant by language used; if language results in intestacy, and there can be no doubt about meaning of language used, court properly held that intestacy was intended. *Estate of Bailess (1967) 249 Cal. App. 2d 970, 976, 57 Cal. Rptr. 850*

If will contains no residuary clause, intent of testator is properly inferred to dispose of all property through specific gifts, and not to allow any gifts to fail by reason of transmutation of property. *Estate of Newsome (1967) 248 Cal. App. 2d 712, 714, 56 Cal. Rptr. 874*

Appellate court is not bound by decision of probate court interpreting will if no evidence touching on question of interpretation was received at hearing on petition to determine heirship. *Estate of Phillips (1966) 247 Cal. App. 2d 510, 511, 55 Cal. Rptr. 658*

When extrinsic evidence is admissible in will contest. *Estate of Garner (1964) 228 Cal. App. 2d 506, 509, 39 Cal. Rptr. 577*

Construction of will in accordance with the intention of the testator; testacy favored. *Estate of Meade (1964) 228 Cal. App. 2d 169, 175-176, 39 Cal. Rptr. 278*

[3] Exhumation of Testator's Body

Absent express statutory language, trial court in postprobate will contest is without legal authority, inherent or expressly conferred, to authorize or direct disinterment or autopsy of testator's body for discovery on issue of testator's lack of testamentary capacity or susceptibility to exertion of undue influence in making will. *Holm v. Superior Court (1986) 187 Cal. App. 3d 1241, 1243, 1245-1249, 232 Cal. Rptr. 432*

[4] Foreign Wills

California law is properly applied to permit admission to probate of duly authenticated copy of original will, executed in conformity with Mexican law, when testator was California resident both when he executed will and when he died,

entire estate was located in California, and executor, sole beneficiary, and one of will contestants resided in *California. Estate of Guerrero (1986) 183 Cal. App. 3d 723, 730, 228 Cal. Rptr. 408*

"State" in former *Prob. Code § 26* includes foreign country; will executed in foreign country according to its law is valid under former *Prob. Code § 26* (*now see Prob. Code § 6113(b), (c)*). *Estate of Guerrero (1986) 183 Cal. App. 3d 723, 728, 228 Cal. Rptr. 408 (Mexico)* ; *Estate of Hudson (1982) 137 Cal. App. 3d 984, 986-987, 187 Cal. Rptr. 532 (Japan)*

[5] Governing Law

Statutes dispensing with formalities previously required in execution of wills may be applied retrospectively if effect is to validate previously executed will of testators who were alive when statutes were adopted. *Estate of MacLeod (1988) 206 Cal. App. 3d 1235, 1244, 254 Cal. Rptr. 156*

[6] Grounds for Will Contest

[a] Generally

Only issue in will contest is validity of will, pursuant to grounds under former *Prob. Code § 371* (*now see Prob. Code § 8252(a)*). *Estate of Straisinger (1967) 247 Cal. App. 2d 574, 581-582, 55 Cal. Rptr. 750*

Estoppel, as matter of law, is not ground for will contest. *Estate of Straisinger (1967) 247 Cal. App. 2d 574, 582, 55 Cal. Rptr. 750*

[b] Devise to Person Who Drafted Will or Other Related Individuals

Decedent's spouse can invoke spousal exception to presumption in *Prob. Code § 21351(a)* despite her prior status as a care custodian before her marriage to decedent. *Estate of Pryor (2009) 177 Cal. App. 4th 1466, 1468, 1476, 99 Cal. Rptr. 3d 895*

Prob. Code § 21350 implicitly requires person whose interest in will or trust is threatened by transfer to disqualified person to invoke protection of statute affirmatively by seeking court order establishing invalidity of transfer. *Estate of Shinkle (2002) 97 Cal. App. 4th 990, 1004, 119 Cal. Rptr. 2d 42*

Trust instrument executed by elderly woman in skilled nursing facility in which woman made donative transfer of property to long-term care ombudsman for facility was invalid under *Prob. Code § 21350(a)(6)*, because ombudsman was "care custodian" within meaning of statute and therefore disqualified from benefiting from trust. *Estate of Shinkle (2002) 97 Cal. App. 4th 990, 992-993, 1005-1007, 119 Cal. Rptr. 2d 42*

Conservator who called estate planning company to meet with conservatee, brought company's agent to conservatee's house, and wrote check from conservatee's funds for will and trust did not cause will and trust to be transcribed; conservatee did not direct drafted document to be written out in final form. *Estate of Swetmann (2000) 85 Cal. App. 4th 807, 819-820, 102 Cal. Rptr. 2d 457*

[c] Due Execution of Will

For a witness's subscription to be valid, it must occur prior to testator's death, not thereafter; will that has not been subscribed by two witnesses at time of testator's death neither complies nor substantially complies with *Prob. Code §*

6110. Estate of Saueressig (2006) 38 Cal. 4th 1045, 1052, 44 Cal. Rptr. 3d 672, 136 P.3d 201

Court is not required to find in accordance with presumption that will has been duly executed on proof of signatures of testator and witnesses, when contrary evidence is clear. *Estate of Fletcher (1958) 50 Cal. 2d 317, 319, 325 P.2d 103*

Statutory requirements for execution of will are strictly construed; testator's intent is not properly considered in determining whether requirements have been met. *Estate of Howell (1958) 50 Cal. 2d 211, 215, 324 P.2d 578*

In action against decedent's estate by woman who had lived with decedent for 20 years, seeking constructive trust on estate after decedent's will leaving everything to woman was found invalid because it was not properly witnessed, court erred in dismissing action for not being filed within one year of decedent's death, as required by *Code Civ. Proc. § 366.2*; no action could be brought until will was declared invalid, and will contest was not concluded until more than one year after decedent's death. *Estate of Roberson (2002) 102 Cal. App. 4th 1201, 1206-1210, 126 Cal. Rptr. 2d 238*

Contestant bears burden of proof that witnesses' signatures to will were not genuine when petition for probate did not allege that will was duly executed and contestant raised issue of due execution, specifying lack of proof of genuineness of witnesses' signatures. *Estate of Guerrero (1986) 183 Cal. App. 3d 723, 729, 228 Cal. Rptr. 408*

Unsigned holographic codicil was not entitled to probate; will by definition is unable to incorporate future codicils; codicil does not incorporate will by referring to it or integrate it into will. *Estate of Twohig (1986) 178 Cal. App. 3d 555, 560-562, 223 Cal. Rptr. 352*

Will in testator's handwriting on preprinted form, which testator intended to be formal will and which was falsely witnessed, was not able to be probated as holographic will. *Estate of Brown (1985) 171 Cal. App. 3d 1064, 1069, 218 Cal. Rptr. 108* (death prior to January 1, 1985)

Savings and loan association, which employed notary public to perform services for its customers, was not liable to beneficiary of will notarized by employee but not witnessed when will not admitted to probate and beneficiary alleged that notary was aware that no valid will was created. *Vanderhoof v. Prudential Sav. & Loan Assn. (1975) 46 Cal. App. 3d 507, 512, 120 Cal. Rptr. 207*

[d] Revocation

When subsequent will is predicated on conditions that fail to materialize, earlier will was revived by doctrine of dependent relative revocation. *Estate of Cuneo (1963) 60 Cal. 2d 196, 202, 32 Cal. Rptr. 409, 384 P.2d 1* ; *Estate of Robertson (1968) 266 Cal. App. 2d 866, 867-869, 72 Cal. Rptr. 396*

[e] Revocation of Codicil Under Former Prob. Code § 75

Former *Prob. Code § 75*, providing that revocation of second will does not revive first will, except under specified circumstances (*now see Prob. Code § 6123*), is not applicable to codicils, and revocation of codicil leaves will in force and effect as written. *Estate of Hering (1980) 108 Cal. App. 3d 88, 92-99, 166 Cal. Rptr. 298*

[f] Undue Influence

Undue influence is pressure brought to bear directly on the testamentary act, sufficient to overcome the testator's free will and amounting to coercion that destroys the testator's free agency. *Rice v. Clark (2002) 28 Cal. 4th 89, 96, 120 Cal. Rptr. 2d 522, 47 P.3d 300*

Although person challenging testamentary instrument ordinarily bears burden of proving undue influence, presumption of undue influence shifting burden of proof arises on showing by challenger that (1) person alleged to have exerted undue influence had confidential relationship with testator, (2) person actively participated in procuring instrument's preparation or execution, and (3) person would benefit unduly by instrument. *Rice v. Clark (2002) 28 Cal. 4th 89, 96-97, 120 Cal. Rptr. 2d 522, 47 P.3d 300*

Mere general influence is not enough to invalidate will for undue influence; evidence that beneficiary was active in procuring execution of will to his or her undue profit is required; showing of confidential relationship between beneficiary and testator, and finding of "unnatural" will are insufficient. *Estate of Callahan (1967) 67 Cal. 2d 609, 618-619, 63 Cal. Rptr. 277, 432 P.2d 965*

Undue influence is influence that destroys testator's free agency and substitutes agency of some other person; proof of undue influence requires proof of pressure that overpowered testator's mind and bore down on testator's volition. *Hagen v. Hickenbottom (1995) 41 Cal. App. 4th 168, 180-183, 48 Cal. Rptr. 2d 197*

Undue influence consists in whole or in part of allegedly true statements made to testator; undue influence is distinguished from fraud or misrepresentation in that falsity is essential element of claim for fraud or misrepresentation but not of undue influence; truth of statements made to settlor does not constitute complete defense to claim of undue influence. *Hagen v. Hickenbottom (1995) 41 Cal. App. 4th 168, 180-183, 48 Cal. Rptr. 2d 197*

Presumption in favor of will is neutralized by presumption of undue influence; presumption of undue influence arises only if all of following elements are shown: (1) existence of confidential relationship between testator and person alleged to have exerted undue influence; (2) active participation by that person in actual preparation or execution of will, that conduct not being of merely incidental nature; and (3) undue profit accruing to that person by virtue of will. *Estate of Sarabia (1990) 221 Cal. App. 3d 599, 605, 270 Cal. Rptr. 560*

Undue influence is legal condemnation of situation in which extraordinary and abnormal pressure subverts independent free will and diverts it from its natural course in accordance with dictates of another person; influence must amount to coercion destroying free agency on part of testator and produce result inconsistent with voluntary action on part of testator. *Estate of Sarabia (1990) 221 Cal. App. 3d 599, 604-605, 270 Cal. Rptr. 560*

Undue influence is presumed when confidential relationship between testator and beneficiary is shown if beneficiary actively participates in preparing will and unduly profits thereby. *Estate of Mann (1986) 184 Cal. App. 3d 593, 607, 229 Cal. Rptr. 225* ; *Estate of Duhaney (1966) 246 Cal. App. 2d 653, 659, 54 Cal. Rptr. 838*

To set aside will on ground of undue influence, evidence is required to show that pressure was brought to bear directly on testamentary act; influence is required to have been used directly to procure will and to have amounted to coercion destroying free agency of testator. *Estate of Mann (1986) 184 Cal. App. 3d 593, 606, 229 Cal. Rptr. 225*

Determination that certain provisions of will were obtained through undue influence was proper even though it was also determined that testator was of sound mind in making certain bequests and other provisions, because soundness of mind and body does not imply immunity from undue influence. *Estate of Baker (1982) 131 Cal. App. 3d 471, 486, 182 Cal. Rptr. 550*

Evidence that appellant influenced testator to obtain inter vivos gifts before execution of will, and that influence persisted after will's execution, was sufficient to justify inference that appellant actively participated in preparation or execution of will for purposes of establishing undue influence. *Estate of Baker (1982) 131 Cal. App. 3d 471, 482, 182 Cal. Rptr. 550*

Clause disinheriting heirs at law does not operate to prevent heirs at law from taking under statutory rules of inheritance when decedent's intestacy was due to invalidity of will on ground of undue influence. *Estate of Baker (1982) 131 Cal. App. 3d 471, 484, 182 Cal. Rptr. 550*

When attorney, by advice or action, takes part in preparation or execution of will, presumption of undue influence arises from confidential or fiduciary relationship when will benefits attorney. *Estate of Clegg (1978) 87 Cal. App. 3d 594, 603, 151 Cal. Rptr. 158*

Undue influence is proved by circumstantial evidence. *Estate of Franco (1975) 50 Cal. App. 3d 374, 382, 123 Cal. Rptr. 458*

Proof of undue influence; necessity for specific evidence; summary judgment. *Estate of Niquette (1968) 264 Cal. App. 2d 976, 978-984, 71 Cal. Rptr. 83*

[g] Gift to Will Drafter, Caregiver, or Other Disqualified Person Under Prob. Code § 21350

Statutory definition of "care custodian" in *Prob. Code § 21350(a)* does not include a professional or occupational limitation and does not provide for a pre-existing personal friendship exception; thus, the definition includes any person providing care or health services to a dependent adult. *Bernard v. Foley (2006) 39 Cal. 4th 794, 808-809, 47 Cal. Rptr. 3d 248, 139 P.3d 1196*

Decedent's spouse can invoke spousal exception to presumption in *Prob. Code § 21351(a)* despite her prior status as a care custodian before her marriage to decedent. *Estate of Pryor (2009) 177 Cal. App. 4th 1466, 1468, 1476, 99 Cal. Rptr. 3d 895*

Prob. Code § 21351(i) exempted testator's will from the prohibition in *Prob. Code § 21350* against donative transfers to the drafter of the will, since testator was nonresident of California when he signed will, even though he was a California resident at the time of his death. *Estate of Clementi (2008) 166 Cal. App. 4th 375, 383, 82 Cal. Rptr. 3d 685*

Paid live-in caregiver clearly provided social services within the meaning of *Prob. Code § 21350(a)* and therefore was a care custodian and subject to the presumption of undue influence. *Estate of Odian (2006) 145 Cal. App. 4th 152, 167, 51 Cal. Rptr. 3d 390*

Long-term care ombudsman for health care facility remains a care custodian within the meaning of *Prob. Code § 21350(a)* even after formal ombudsman relationship with a particular resident has ended when the ombudsman, as a result or his or her fiduciary relationship with the resident, develops a personal relationship with the resident and thereby acquires personal and financial information about the resident. *Estate of Shinkle (2002) 97 Cal.App. 4th 990, 993, 1007, 119 Cal. Rptr. 2d 42* ; *overruled in part on other grounds in Bernard v. Foley (2006) 39 Cal. 4th 794, 816, 47 Cal. Rptr. 3d 248, 139 P.3d 1196*

[7] Holographic Wills

Petition to admit holographic will to probate was untimely under *Prob. Code § 8226(c)* when petition was filed more than five months after determination of intestacy and more than three months after administrator discovered will. *Estate of Earley (2009) 173 Cal. App. 4th 369, 376, 92 Cal. Rptr. 3d 577*

Photocopies of testator's handwritten dispositions, if properly authenticated, satisfy statutory requirement that material provisions of holographic will be in testator's handwriting. *Estate of Brenner (1999) 76 Cal. App. 4th 1298, 1301-1302, 91 Cal. Rptr. 2d 149*

Donor card prepared by animal shelter did not qualify as holographic will when donor selected printed option of not taking "immediate action" but of stating his or her intention to make gift to shelter in future and, in blank space, wrote, "My entire estate is to be left to North Shore Animal League;" by selecting this option, donor evidenced intent not to make present testamentary disposition, but to make will in future. *Estate of Southworth (1996) 51 Cal. App. 4th 564, 572, 59 Cal. Rptr. 2d 272*

Undated holographic will was not invalid under former *Prob. Code § 53*, even though at time will was drafted, former *Prob. Code § 53* required all holographic wills to be dated; subsequent version of former *Prob. Code § 53*, in effect at time of testator's death, and not requiring date, applied to testator's will. *Estate of MacLeod (1988) 206 Cal. App. 3d 1235, 1244-1245, 254 Cal. Rptr. 156*

Fact that holographic will was signed at the beginning, rather than end, did not defeat will's validity when instrument otherwise demonstrated that testator intended to authenticate it as a will. *Estate of MacLeod (1988) 206 Cal. App. 3d 1235, 1243, 254 Cal. Rptr. 156*

Under both former *Prob. Code § 53* and present *Prob. Code § 6111(a)*, presence of witnesses' signatures did not invalidate otherwise effective holographic will. *Estate of Archer (1987) 193 Cal. App. 3d 238, 243, 239 Cal. Rptr. 137*

Addition of undated and unsigned testamentary provisions on back of holographic codicil did not transform added provisions into separate writing because (1) holographic will that appears to be complete testamentary document is valid even though signed elsewhere than at end, and (2) additions or alterations to holographic will made after date on which will was signed, when made in testator's handwriting with testamentary intent, operate to adopt old date and signature. *Estate of Archer (1987) 193 Cal. App. 3d 238, 244, 239 Cal. Rptr. 137*

CAUTION:

The cases below were decided prior to the 1982 amendment to former *Prob. Code § 53*, which provided criteria for valid and invalid holographic wills. The cases were also decided before the repeal of former *Prob. Code § 53*, operative January 1, 1985 [*see now Prob. Code § 6111*].

Denial of probate of holographic will was improper because will was written, dated, and signed by testator, her testamentary intent was clearly revealed in words as she wrote them, and preprinted incorporated material was neither material to substance of will nor essential to its validity. *Estate of Black (1982) 30 Cal. 3d 880, 888, 181 Cal. Rptr. 222, 641 P.2d 754* (disapproving *Estate of Christian (1976) 60 Cal. App. 3d 975, 131 Cal. Rptr. 841* , and *Estate of Helmar (1973) 33 Cal. App. 3d 109, 109 Cal. Rptr. 6*)

Allegations of particular grounds for revocation of probate. *Estate of Streeton (1920) 183 Cal. 284, 289, 191 P. 16* ; *Estate of Bixler (1924) 194 Cal. 585, 589-590, 229 P. 704*

Handwritten changes in already-executed will did not constitute holographic will or codicil when handwritten material has meaning only when read in conjunction with typewritten provisions of will. *Estate of Phifer (1984) 152 Cal. App. 3d 813, 817-818, 200 Cal. Rptr. 319*

Strikeouts and handwritten interlineations to typewritten will are possible holographic codicil, inferring intent to incorporate by reference those portions of typewritten will that had not been modified or revoked. *Estate of Nielson (1980) 105 Cal. App. 3d 796, 804, 165 Cal. Rptr. 319*

Whether holographic will has been executed in substantial compliance with former *Prob. Code § 53* must be determined by face of instrument itself. *Estate of Helmar (1973) 33 Cal. App. 3d 109, 112, 109 Cal. Rptr. 6* (

disapproved on other grounds in *Estate of Black (1982) 30 Cal. 3d 880, 887, 181 Cal. Rptr. 222, 641 P.2d 754*)

Tendency of both courts and Legislature to validate holographic will is increasingly liberal. *Estate of Helmar (1973) 33 Cal. App. 3d 109, 112-113, 109 Cal. Rptr. 6* (disapproved on other grounds in *Estate of Black (1982) 30 Cal. 3d 880, 887, 181 Cal. Rptr. 222, 641 P.2d 754*)

Holographic will interpreted by layman's standard. *Estate of O'Connell (1972) 29 Cal. App. 3d 526, 530, 105 Cal. Rptr. 590*

Intention of deceased in executing holographic will is irrelevant in determining whether will had been properly executed. *Estate of Hazelwood (1967) 249 Cal. App. 2d 263, 267, 57 Cal. Rptr. 332*

Appellate court properly exercised independent judgment in interpreting validity of letter as holographic codicil when evidence uncontradicted. *Estate of Darms (1966) 247 Cal. App. 2d 254, 257, 55 Cal. Rptr. 463*

[8] Nature of Will Contest

Petition for probate of will and contest of probate were two distinct, although related, proceedings. *Swift v. Superior Court (1952) 39 Cal. 2d 358, 363, 247 P.2d 6* ; *Estate of Black (1926) 199 Cal. 257, 262, 248 P. 1015*

[9] No Contest Clause

CAUTION:

Effective Jan. 1, 2010, revisions to *Prob. Code § 21310-21315* significantly changed the law governing enforcement of no contest clauses [*Prob. Code § 21315*]. Cases decided under pre-2010 law should be reviewed carefully to determine their applicability under the current law. For discussion of the enforcement of no contest clauses under both the current Probate Code provisions and the common law, see *§ 444.14*.

Challenge to surviving spouse's mental capacity to transfer assets and appoint a successor trustee did not violate no contest clause in family trust since trustee did not propose to void, nullify, or set aside trust or any of its provisions, or to change provisions that were clearly and unambiguously expressed. *Johnson v. Greenelsh (2009) 47 Cal. 4th 598, 599, 100 Cal. Rptr. 3d 622, 217 P.3d 1194*

Prob. Code § 15409 modification petition to delete special needs provision because settlor misunderstood the circumstances did not violate no contest clause as a matter of public policy, and safe harbor petition was properly granted. *Balian v. Balian (2009) 179 Cal. App. 4th 1505, 1513, 102 Cal. Rptr. 3d 470*

When testators instructed that beneficiary's debt to them be offset against that beneficiary's distribution, beneficiary's assertion that debt was not enforceable was an indirect contest that violated no contest provision. *Cook v. Cook (2009) 177 Cal. App. 4th 1436, 99 Cal. Rptr. 3d 913*

Petition by contingent remainder beneficiaries, seeking information with regard to how trustee was spending trust funds, which was necessary to enable beneficiaries to enforce their rights under the trust pursuant to *Prob. Code § 16060*, was not a contest within the meaning of trust's no contest clause. *Salter v. Lerner (2009) 176 Cal. App. 4th 1184, 1189, 99 Cal. Rptr. 3d 1*

Beneficiary's challenge to validity of handwritten notations made by settlor on trust after it was executed, which qualified as an instrument other than the instrument containing the no contest clause, was determined not to be a contest

under *Prob. Code § 21305(a)(3).* *Cory v. Toscano (2009) 174 Cal. App. 4th 1039, 1046, 94 Cal. Rptr. 3d 841*

Proposed petition challenging the exercise of a fiduciary power by trustee did not constitute a contest as a matter of public policy. *Bradley v. Gilbert (2009) 172 Cal. App. 4th 1058, 1071, 91 Cal. Rptr. 3d 680*

Language in trust documents establishing three methods of exercising a limited power of appointment was ambiguous, allowing reformation in accordance with grantors' intent not to violate trusts' no contest clause. *Giammarrusco v. Simon (2009) 171 Cal. App. 4th 1586, 91 Cal. Rptr. 3d 50*

Proposed challenge to trust amendment did no violate trust's no contest clause because no contest clause in the trust did not specifically provide that it applied to trust amendments. *Townsend v. Townsend (2009) 171 Cal. App. 4th 389, 402-403, 89 Cal. Rptr. 3d 760*

Beneficiary who filed petition outside of safe harbor provisions of *Prob. Code § 21320*, with clear purpose to defeat surviving settlor's testamentary and donative intent, violated no-contest clause. Schwartz v. Schwartz (2008) Cal. App. 4th 733, 745, *84 Cal. Rptr. 3d 387*

Proposed challenge to two trust amendments did not trigger no contest clause because no contest clause in trust did not specifically state that it applied to trust amendments and amendments did not contain no contest clause as required by *Prob. Code § 21305(a)(3).* *Perrin v. Lee (2008) 164 Cal. App. 4th 1239, 1244* ; *79 Cal. Rptr. 3d 885*

Minor's claims, brought under *Prob. Code § 21320* safe harbor provision through a guardian ad litem, do not violate trust's no contest clause since minor's written consent to appointment of his mother as guardian ad litem does not constitute voluntary participation in the trust contest. *Safai v. Safai (2008) 164 Cal. App. 4th 233, 244, 78 Cal. Rptr. 3d 759*

After appellate decision that settlor's daughter had triggered no contest clause in irrevocable trust, trial court acted within its authority when it reconsidered on its own motion its earlier grant of *Prob. Code § 21320* relief and held that daughter lacked standing because she was no longer a beneficiary; and since a related revocable trust contained same no contest language as the irrevocable trust, trial court did not err in ruling that daughter lacked standing as to both trusts. *Montegani v. Johnson (2008) 162 Cal. App. 4th 1231, 1239, 76 Cal. Rptr. 3d 621*

No contest clause in will was not incorporated by reference into testamentary trust when decrees of distribution contained some language that referred to the will, but clear statement in distributing clause of trust, stating that trust was completely set forth in the decree, established that no trust provisions were omitted and there was no room to supplement trust provisions by incorporating provisions contained in will. *Meyer v. Meyer (2008) 162 Cal. App. 4th 983, 998, 76 Cal. Rptr. 3d 546*

Beneficiary's filing of second proposed petition did not violate trust's no contest clause because it sought to impose liability on trustees for alleged breach of fiduciary duty for improper disbursements and did not seek an accounting or seek to void, nullify, or set aside portion of trust limiting liability of successor trustees; doctrine of conclusiveness did not apply as it applies to filed pleadings but has no application to pleadings proposed to be filed under *Prob. Code § 21320.* *Betts v. City Nat'l Bank (2007) 156 Cal App 4th 222, 67 Cal Rptr. 3d 152, 162*

No contest clause in trust instrument which applied to any attempt to "impair" the trust extended to trust beneficiary's adjustment petition under California Uniform Principal and Income Act to reallocate principal and income, when reallocation would have resulted in more income to beneficiary than allowed by trust and invasion of trust principal reserved to other beneficiaries. *McKenzie v. Vanderpoel (2007) 151 Cal. App. 4th 1442, 1454, 61 Cal. Rptr. 3d 129*

No contest clause in testamentary trust upheld as valid although it forced settlor's former wife and their children to

choose between enforcing their rights under an existing martial dissolution judgment by filing creditor's claims, or relinquishing those rights and taking gifts provided for them in settlor's trust. *Colburn v. Northern Trust Co. (2007) 151 Cal. App. 4th 439, 447, 59 Cal. Rptr. 3d 828*

Change in amount available for distribution to residuary beneficiaries, as a result of accounting, does not constitute attack on provision of will apportioning residue among beneficiaries, absent an unequivocal indication of testator's intent with respect to the disputed property. *Estate of Strader (2003) 107 Cal. App. 4th 996, 1006, 132 Cal. Rptr. 2d 649*

Purpose of no contest clause is to discourage will contests by imposing penalty of forfeiture against any beneficiary who challenges the will; no contest clause conditions beneficiary's right to take share provided to that beneficiary under the will on beneficiary's agreement to acquiesce to terms of will. *Estate of Gonzalez (2002) 102 Cal. App. 4th 1296, 1302, 126 Cal. Rptr. 2d 332*

"Reasonable cause" to contest will with no contest clause is determined objectively, based on facts known to contestant when he or she filed the contest. *Estate of Gonzalez (2002) 102 Cal. App. 4th 1296, 1305-1306, 126 Cal. Rptr. 2d 332*

No contest clause disfavored under public policy against forfeiture and thus strictly construed. *Estate of Hoffman (2002) 97 Cal. App. 4th 1436, 1442, 119 Cal. Rptr. 2d 248*

Beneficiaries proposed petition seeking removal of executors does not constitute will contest because it comes within the exemption of *Prob. Code § 21305(b)(7)* for petitions seeking removal of a fiduciary. *Estate of Hoffman (2002) 97 Cal. App. 4th 1436, 1444-1446, 119 Cal. Rptr. 2d 248*

Extrinsic evidence on the testator's intended meaning of the no contest clause is admissible if it is relevant to show a meaning to which the language is reasonably susceptible. *Estate of Kaila (2001) 94 Cal. App. 4th 1122, 1132, 114 Cal. Rptr. 2d 865* . However, consideration of extrinsic evidence does not necessarily require a determination of an action on the merits that would preclude relief. *Estate of Kaila (2001) 94 Cal. App. 4th 1122, 1136, 114 Cal. Rptr. 2d 865*

Claim to property based on source of right independent of will did not constitute "contest" within meaning of no contest clause. *Estate of Richter (1993) 12 Cal. App. 4th 1361, 1367, 16 Cal. Rptr. 2d 108*

Claim that property was community property and thus not subject to disposition under deceased spouse's will did not constitute "contest" under no contest clause in will that simply refers to "my estate." *Estate of Richter (1993) 12 Cal. App. 4th 1361, 1369, 16 Cal. Rptr. 2d 108*

No contest clause must be strictly construed in accordance with testator's intent as expressed in will; only when act comes strictly within express terms of clause may court declare breach of clause. *Varney v. Superior Court (1992) 10 Cal. App. 4th 1092, 1102-1103, 12 Cal. Rptr. 2d 865*

When no contest clause refers to "will contests," only act that actually constitutes "contest" can violate clause. *Varney v. Superior Court (1992) 10 Cal. App. 4th 1092, 1106-1107, 12 Cal. Rptr. 2d 865*

Mere filing of creditor's claim, or commencement of action to collect on denied claim, cannot violate provision of will forbidding "will contests." *Varney v. Superior Court (1992) 10 Cal. App. 4th 1092, 1107-1108, 12 Cal. Rptr. 2d 865*

No contest clause is strictly construed and given no wider scope than is plainly required. *Estate of Lindstrom (1987) 191 Cal. App. 3d 375, 383-384, 236 Cal. Rptr. 376*

No contest clause of will was inapplicable to inter vivos trust executed by decedent on same day as will when clause referred only to will, despite decedent's belief that trust and will together formed one testamentary package. *Estate of Lindstrom (1987) 191 Cal. App. 3d 375, 383, 236 Cal. Rptr. 376*

Whether will has been contested within meaning of no-contest clause depends on particular case and language used; determination of whether prohibited contest has occurred must be made on case-by-case basis. *Estate of Lindstrom (1987) 191 Cal. App. 3d 375, 381, 236 Cal. Rptr. 376*

No contest clause was not violated when daughters of testator sued stepmother's estate to impose constructive trust on property that testator left to stepmother after promising to leave it to daughters. *Estate of Watson (1986) 177 Cal. App. 3d 569, 574-575, 223 Cal. Rptr. 14*

Litigation against cobeneficiary for damages and constructive trust violates no contest clause to extent of forfeiting litigant's interest under will, but did not affect remainder interests of litigant's children. *Estate of Friedman (1979) 100 Cal. App. 3d 810, 818, 819, 161 Cal. Rptr. 311*

[10] Other Forms of Attack

After 120-day period set forth in former *Prob. Code § 380* (*now see Prob. Code § 8270(a)*), court has equitable jurisdiction to set aside order admitting will to probate procured by extrinsic and collateral fraud; executor is fiduciary; extrinsic fraud found in concealment by executor, who was also primary beneficiary, of fact that decedent had made second will revoking major bequest to other beneficiaries and statements of executor that he was looking after other beneficiaries' interests and that they need not appear. *Estate of Sanders (1985) 40 Cal. 3d 607, 613-619, 221 Cal. Rptr. 432, 710 P.2d 232*

[11] Presumption of Revocation

Rebuttable presumption of revocation of will arises when it is shown that (1) decedent had will in his or her possession at time of death, (2) decedent was competent until that time, and (3) will could not be found after death; presumption exists only until rebutted by substantial evidence. *Estate of Obernolte (1979) 91 Cal. App. 3d 124, 128, 129, 153 Cal. Rptr. 798*

[12] Procedure

[a] Conclusiveness of Order

Offer of earlier will more than six months after probate of later will is not a contest and not barred by former *Prob. Code §§ 380*, 384 (*now see Prob. Code §§ 8226(a), 8270*). *Estate of Robertson (1968) 266 Cal. App. 2d 866, 867, 72 Cal. Rptr. 396*

[b] Consolidation of Actions

Consolidation of will contest and action to set aside deed and to recover money and securities is proper pursuant to *Code Civ. Proc. § 1048*. *Estate of Baker (1982) 131 Cal. App. 3d 471, 485, 182 Cal. Rptr. 550*

[c] Evidence

When extrinsic evidence is admissible in will contest. *Estate of Garner (1964) 228 Cal. App. 2d 506, 512, 39 Cal. Rptr. 577*

[d] Judgments

Form and scope of judgments in will contests. *Estate of Jamison (1951) 107 Cal. App. 2d 483, 485-487, 237 P.2d 546*

[e] Pleadings

Rules in civil action are applicable to determine whether nonsuit should be granted in contest of holographic will. *Estate of Callahan (1967) 67 Cal. 2d 609, 612, 63 Cal. Rptr. 277, 432 P.2d 965*

Allegations of particular grounds of opposition. *Estate of Streeton (1920) 183 Cal. 284, 289, 191 P. 16* ; *Estate of Bixler (1924) 194 Cal. 585, 589-590, 229 P. 704*

Use of motion to strike and motion for summary judgment. *Estate of Ross (1962) 204 Cal. App. 2d 82, 83-86, 22 Cal. Rptr. 135*

Pleading to contest will must contain concise statement of facts under general rules of pleading for complaints, as well as formal parts and prayer. *Estate of Marler (1957) 148 Cal. App. 2d 30, 36-37, 306 P.2d 105*

[13] Standing to Contest Will

Prob. Code § 48(a) provides nonexclusive list of recognizable interests, giving court authority to designate as an "interested person" anyone having a property right in or claim against the decedent's estate that may be affected by the probate proceeding. *Estate of Maniscalco (1992) 9 Cal. App. 4th 520, 523, 11 Cal. Rptr. 2d 803*

Petitioner in probate proceeding must have standing; in context of a will contest, petitioner must allege sufficient facts to demonstrate that petitioner is an "interested person." *Estate of Weber (1991) 229 Cal. App. 3d 22, 25 n.4, 280 Cal. Rptr. 22*

Because will contests are disfavored, courts have limited right to contest probate of will to those who have such a pecuniary interest in distribution of decedent's estate as would be impaired or defeated by probate of will, or benefited by setting it aside. *Estate of Lind (1989) 209 Cal. App. 3d 1424, 1430-1431, 257 Cal. Rptr. 853*

Requirement that contestant must be an "interested person" prevents persons with no interest from delaying settlement of a decedent's estate. *Estate of Powers (1979) 91 Cal. App. 3d 715, 719, 154 Cal. Rptr. 366*

[14] Time for Filing Will Contest

Time limits of *Prob. Code § 8226(c)* apply to those who have received notice of a petition for letters of administration pursuant to the notice provisions of the Probate Code; time limits of *Prob. Code § 8226(c)* did not apply because will proponent never received notice of petition for letters of administration, as required to trigger the statute. *Estate of Kelly (2009) 172 Cal. App. 4th 1367, 1375, 91 Cal. Rptr. 3d 674*

Time for filing contest before probate. *Estate of Mollenkopf (1913) 164 Cal. 576, 579-582, 129 P. 997* ; *Estate of Marler (1957) 148 Cal. App. 2d 30, 36, 306 P.2d 105*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewEstate, Gift & Trust LawWill ContestsNo Contest ClausesEstate, Gift & Trust LawWill ContestsRevocationGeneral OverviewEstate, Gift & Trust LawWill ContestsRevocationDependent Relative RevocationEstate, Gift & Trust LawWill ContestsRevocationDestructive ActsEstate, Gift & Trust LawWill ContestsRevocationRevivalEstate, Gift & Trust LawWill ContestsStandingEstate, Gift & Trust LawWill ContestsTestamentary CapacityGeneral OverviewEstate, Gift & Trust LawWill ContestsTestamentary FormalitiesSignature PlacementsEstate, Gift & Trust LawWill ContestsTestamentary FormalitiesWitnessesGeneral OverviewEstate, Gift & Trust LawWill ContestsTestamentary FormalitiesWitnessesAttestation & SubscriptionEstate, Gift & Trust LawWill ContestsUndue InfluenceBurdens of ProofEstate, Gift & Trust LawWill ContestsUndue InfluenceElementsEstate, Gift & Trust LawWillsInterpretationTestator's IntentExtrinsic Evidence

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Chapter 444 PROBATE: WILL CONTESTS
PART III. RESEARCH GUIDE

38-444 California Forms of Pleading and Practice--Annotated § 444.34

§ 444.34 Law Reviews

McGovern, *Facts and Rules in the Construction of Wills, 26 UCLA L. Rev. 285 (1978)*

Tucker, *A Practical Primer: If a Will Is Contested ...*, 50 Cal. St. B.J. 382 (1975)

Note, *Testamentary Capacity in a Nutshell: A Psychiatric Reevaluation, 18 Stan. L. Rev. 1119 (1966)*

Halbach, *Stare Decisis and Rules of Construction in Wills and Trusts, 52 Calif. L. Rev. 921 (1964)*

Selvin, *Terror in Probate*, 16 Stan. L. Rev. 355 (1964)

Kerson, *Creditors and the Will Contest, 14 Hastings L.J. 18 (1962)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWill ContestsGeneral OverviewEstate, Gift & Trust LawWill ContestsTestamentary CapacityGeneral OverviewEstate, Gift & Trust LawWillsInterpretationGeneral OverviewEstate, Gift & Trust LawWillsInterpretationRules of ConstructionGeneral Overview

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§ 444.35 Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate, §§ 553-559,* 577-579 (10th ed. 2005)

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PART III. RESEARCH GUIDE

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[Reserved]

§§ 444.36[Reserved]

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Volume 38: Probate: Is Probate Necessary? thru Probate: Estate Tax-Chs. 440-453
Chapter 444 PROBATE: WILL CONTESTS
PART IV. PROCEDURAL CHECKLIST
A. Contest Before Probate

38-444 California Forms of Pleading and Practice--Annotated § 444.50

§ 444.50 Contestant's Guide

1. Ascertain all relevant facts.

a. Facts about probate proceeding.
(1) Title of proceeding.

(2) County in which proceeding is pending.

(3) Number assigned to proceeding.

(4) Whether petitioner (proponent of will) appears in propria persona or by counsel; and name, address, and telephone number of petitioner or counsel shown on petition.

(5) Date when petition for probate was filed.

(6) Date, time, and place of hearing.

NOTE:
These facts regarding the hearing should be ascertained as promptly as possible, either from the notice of hearing (if client has a copy in hand) or from the clerk by telephone. The objection must be in writing and verified; it may be filed at or before the hearing on the petition for probate [*see* *Prob. Code §§ 1020, 1021, 1043(a)*; *but see* *Prob. Code § 1043(b), (c)* (authorizing oral response or objection at hearing and allowing court to hear and determine issue or grant continuance to allow response or objection to be made in writing, but providing that request for continuance does not constitute a response or an objection)].

b. Facts about contestant (client).

NOTE:
If representing two or more contestants, the following information should be obtained respecting each one.

(1) Name.

(2) Address.

(3) Telephone number at which client can be reached during law office business hours.

(4) Contestant's relationship to decedent, by blood, marriage, or association.

(5) Whether contestant is an heir.

(6) Whether contestant is named in the will offered for probate and/or in another will as a devisee.

(7) Whether contestant will risk disinheritance under the purported will by contesting it [*see Prob. Code § 21310 et seq.*; *see also § 444.14*].

(8) Whether contestant is a competent adult individual suing in the contestant's own behalf; and if not:

(a) Whether contestant is incompetent or a minor.

NOTE:
A party who is a minor or is incompetent or has a conservator must appear by a guardian or conservator of the estate or a guardian ad litem [*Code Civ. Proc. § 372(a)*]. Ascertain whether minor or incompetent contestant has a guardian or conservator. For discussion and forms regarding the appointment of a guardian or conservator, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , and Ch. 281, ***Guardianship and Conservatorship: Appointment of Conservators*** .

(b) Whether contestant is a personal representative, a trustee of an express trust, or another person expressly authorized by statute to sue in that person's own name.

NOTE:
A personal representative, a trustee of an express trust, or any other person expressly authorized by statute to do so may sue without joining the real party in interest as parties [*Code Civ. Proc. § 369(a)*].

(c) Whether contestant is a corporation.

NOTE:
Incorporation and good standing of a domestic corporation, and qualification of a foreign corporation, should be verified by certificate(s) from the Secretary of State. A suspended domestic corporation or an unqualified foreign corporation is disabled from suing [*Corp. Code § 2203(c)* (foreign); *Rev. & Tax. Code § 23301* (suspension of powers of domestic and foreign corporations)]. Also, adoption of an appropriate resolution by the directors authorizing the corporation to maintain a contest should be verified, and a copy of the resolution should be obtained for the file.

(d) Whether contestant is a partnership or other unincorporated association.

NOTE:
A partnership or other unincorporated association may sue in the name that it has assumed or by which it is known [*Code Civ. Proc. § 369.5(a)*].

(9) Nature of contestant's pecuniary interest in the estate.

NOTE:
Contestant must be an interested person [*see* *Prob. Code § 1043(a), (b)*], meaning that contestant must have a pecuniary interest that may be impaired or defeated by admitting the purported will to probate, or benefited by denying admission [***see*** *Prob. Code § 48*; *Estate of Lind (1989) 209 Cal. App. 3d 1424, 1430-1431, 257 Cal. Rptr. 853* ; *Estate of Powers (1979) 91 Cal. App. 3d 715, 719, 154 Cal. Rptr. 366]* .

c. Facts about decedent.

(1) Names by which decedent was known, other than a name shown in caption on petition.

(2) Date of death.

(3) Residence at time of death (county and state or foreign country).

(4) Place of death (county and state or foreign country).

(5) Counties in California in which decedent owned real property at the time of death.

(6) Name, address, and telephone number of any attorney or law firm that decedent consulted on a relatively regular basis during his or her lifetime.

d. Facts about proponent.

NOTE:
If there are two or more proponents, the following information should be obtained respecting each one.

(1) Name.

(2) Address.

(3) Telephone number.

NOTE:
The above facts will already have been recorded under § 444.50, Paragraph (1)(a), if proponent appears in propria persona.

(4) Proponent's relationship to decedent.

(5) Proponent's relationship to contestant.

(6) Whether proponent is named in the purported will as executor or devisee, or is interested in the estate for some other reason; if interested for some other reason, the nature of that interest.

NOTE:
Proponent must have some interest in the estate [*see* *Prob. Code §§ 48, 8000*].

(7) Whether proponent is a corporation.

NOTE:
Incorporation and good standing of a domestic corporation, and qualification of a foreign corporation, should be verified by certificate(s) from the Secretary of State. A suspended domestic corporation or an unqualified foreign corporation is disabled from suing [*Corp. Code § 2203(c)* (foreign); *Rev. & Tax. Code § 23301* (suspension of powers of domestic and foreign corporations)]. Also, authority of the corporation to conduct the business of a trust company in California should be verified. That authority is prerequisite to appointment as executor [*Prob. Code § 300*; *see* *Prob. Code § 83* ("trust company" defined)].

(8) Whether proponent is an unincorporated association.

NOTE:
Authority of the association to conduct the business of a trust company in California should be verified. That authority is prerequisite to appointment as executor [*Prob. Code § 300*; *see* *Prob. Code § 83* ("trust company" defined)].

e. Facts about subscribing witnesses.

NOTE:
Obtain the following information regarding each witness attesting execution of the purported will.

(1) Name.

(2) Address, if living.

(3) Date and place of death, if dead.

(4) Witness's relationship by blood, marriage, or association, to each of the following persons:

(a) Decedent.

(b) Proponent.

(c) Contestant.

(5) Whether any witness is incompetent to testify [*see Evid. Code §§ 700, 701*].

(6) Whether any witness is absent from the county in which the probate proceeding is pending.

(7) Whether the evidence of all subscribing witnesses is producible.

NOTE:
If no subscribing witness is available as a witness within the meaning of *Evid. Code § 240*, the court may admit the evidence of other witnesses to prove the circumstances of execution [*Prob. Code § 8253*]. In that case, obtain identities and whereabouts of other persons who might have knowledge of facts concerning execution (*e.g.*, other attorneys, their staffs, family members, friends).

f. Facts about heirs.

(1) Whether decedent was survived by a spouse or a domestic partner and, if so, the following:

(a) Whether decedent was survived by issue;

(b) If not survived by issue, whether decedent was survived by a parent;

(c) If survived by neither issue nor a parent, whether decedent was survived by issue of a parent.

NOTE:
If a spouse or a domestic partner survives, and no issue, parent, brother, sister, or issue of a deceased brother or sister survives, the spouse or domestic partner is the sole heir [*Prob. Code § 6401(c)(1)*]. If a spouse (or domestic partner) and issue survive, they are joint heirs [*Prob. Code § 6401(c)(2)(A), (3)*]. If a spouse (or domestic partner) and a parent or issue of a parent survive, but no issue of decedent survives, the spouse and the parent or parent's issue are joint heirs [*Prob. Code § 6401(c)(2)(B)*].

(2) Whether decedent, not being survived by a spouse (or domestic partner), was survived by any of the following:

(a) Issue.

NOTE:
If no spouse (or domestic partner) survives but issue survives, the heirs are the closest surviving issue [*Prob. Code § 6402(a)*].

(b) A parent, if decedent is survived by no issue.

NOTE:
If neither a spouse (or domestic partner) nor issue survives, each surviving parent is an heir [*Prob. Code § 6402(b)*].

In addition, if decedent leaves no surviving spouse or issue, but had a predeceased spouse, certain heirs of that predeceased spouse may also be heirs of decedent [*see* *Prob. Code § 6402.5*].

(c) A brother or sister or their descendants, if decedent is survived by no issue or parent.

NOTE:
If no spouse or domestic partner, issue, or parent survives, the heirs are the closest

surviving issue of a parent of the decedent [*see* *Prob. Code § 6402(c)*].

(d) A grandparent or, if no grandparent survives, their descendants, if decedent is survived by no issue, parent, or issue of a parent.

NOTE:
If no spouse or domestic partner, issue, parent, or issue of a parent survives, the heirs are the grandparent, or if no surviving grandparent, the closest surviving issue of a grandparent of the decedent [*see* *Prob. Code § 6402(d)*].

(e) A next of kin, if not survived by a spouse or domestic partner, issue, parent, or issue of a parent, grandparent, or issue of a grandparent.

NOTE:
If no spouse or domestic partner, issue, parent, or issue of a parent, grandparent, or issue of a grandparent survives, the heirs are the closest surviving next of kin [*Prob. Code § 6402(f)*]. If no spouse or domestic partner, issue, parent, issue of a parent, or next of kin survives, decedent has no heirs because there are no surviving relatives.

g. Names, ages, and addresses of heirs.

(1) Name.

(2) Age, that is, whether over 18.

(3) Relationship to decedent.

(4) Residence address.

h. Facts about marriages.

(1) Decedent's marital status at death and, if appropriate, the following:

(a) Surviving spouse's name and address.

(b) Date and place of marriage.

(2) If ever married, whether married more than once and, if appropriate, the following for each prior marriage:

(a) How prior marriage was terminated.

(b) Prior spouse's name and address.

(c) Date and place of annulment.

(d) Date and place of divorce.

(e) Date and place of spouse's prior death.

i. Facts about devisees.

NOTE:
The following facts should be ascertained respecting all individuals and other persons named in the purported will as a devisee or legatee.

(1) Respecting individuals, the following:

(a) Name.

(b) Age, if living.

(c) Fact of death, if dead.

(d) Residence address, if living.

NOTE:
For each individual who is dead and whose heirs are designated to take by right of representation, obtain names, ages if living or fact of death if dead, and residence addresses if living of the heirs, in the same manner as for the heirs of decedent [*see § 444.50*, Paragraph A(1)(g)].

(2) Respecting devisees other than individuals, the following:

(a) Name.

(b) Address if existent.

(c) Fact of demise if nonexistent.

(d) Names and addresses of successors, if any.

j. Facts about contested will and any other will.

NOTE:
If there is more than one will, ascertain facts concerning each will.

(1) Name, address, and telephone number of person who prepared the contested will.

(2) Whether or not decedent executed any will prior to or after execution of the purported will and, if so, the following:

(a) Name, address, and telephone number of person who prepared the other will.

(b) Whereabouts of the other will.

(c) Date of other will.

(d) If other will is not purportedly holographic, facts about witnesses.

NOTE:
If other will exists, it becomes eligible for admission to probate when purported will is invalidated. If copy of other will can be obtained, determine whether it is more beneficial to client than purported will; ascertain whether client would want to contest other will or to petition for its admission to probate, and prepare case accordingly. For forms and procedure respecting petitioning for admission to probate, see Ch. 442, *Probate: Initiating Probate Administration* .

(3) Whether or not the will shows evidence that decedent attempted to revoke it [*see Prob. Code §§ 6120(b), 6121*] or evidence of tampering by a third party.

(4) Whether or not the will appears to be holographic and, if so, the following:

(a) Whether or not the signature and the material provisions are in the decedent's handwriting [*see Prob. Code § 6111(a)*].

NOTE:
If there is any question whether the handwriting is that of decedent, obtain handwriting specimens and the opinion of an expert if necessary.

(b) If holographic will is not dated, determine whether it is inconsistent with another will, whether time of execution of holographic will can be established, and whether decedent lacked testamentary capacity at any time during which will might have been executed.

NOTE:
If the document is undated, it is invalid to the extent of any inconsistency with another will unless it is established that the holograph was executed after the date of execution of the other will [*see* *Prob. Code § 6111(b)(1)*]. An undated document is also invalid if it is shown that the decedent lacked testamentary capacity at any time it might have been executed, unless it is established that the document was executed at a time when he or she had that capacity [***see*** *Prob. Code § 6111(b)(2)*].

(5) If the existence or whereabouts of another will is unknown, the places where decedent resided, elsewhere than residence at time of death, during adult life.

NOTE:
Another will may be discovered if advertisements are placed in legal newspapers in areas where decedent formerly resided, directed at attorneys or anyone having a reason to know about a prior will. Other wills should be located if possible because client may have beneficial interest in one of them.

k. Facts about execution and attestation of formal will.

(1) Whether decedent signed will [*Prob. Code § 6110(b)(1)*].

(2) Whether some other person signed will in decedent's name, in decedent's presence, and at decedent's direction [*Prob. Code § 6110(b)(2)*].

(3) Whether decedent's conservator signed will pursuant to court order to make a will under *Prob. Code § 2580*.

(4) Whether will was witnessed by being signed, during testator's lifetime, by at least two persons, each of whom [*Prob. Code § 6110(c)(1)*]:

(a) Were present at the same time and witnessed either the signing of the will or decedent's acknowledgment of the signature or of the will, and

(b) Understood that instrument they signed was the decedent's will.

(5) Whether decedent revoked will.

l. Facts about decedent's competence.

(1) Whether decedent was at least 18 years of age [*Prob. Code § 6100(a)*].

(2) Whether decedent was of sound mind [*Prob. Code § 6100(a)*; *see Prob. Code § 6100.5(a)* (when person not competent to make will)].

NOTE:
If decedent's age is a question, obtain a certified copy of the birth certificate. If soundness of mind is in question, obtain decedent's medical history. Not all mental disorders render a person incompetent to make a will. Further, the mere existence of a conservatorship does not establish that the conservatee was not competent to make a will [*see* *Prob. Code § 1871(c)* and *discussion under § 444.13[b]* in the Introduction to this part].

m. Facts about duress.

(1) Whether decedent, decedent's spouse, an ancestor, a descendant, or an adopted child of decedent or the decedent's spouse was placed in unlawful confinement [*see Civ. Code § 1569(1)*].

(2) Whether the property of any of those persons was unlawfully detained [*see Civ. Code § 1569(2)*].

(3) Whether any of those persons was placed in confinement lawful in form but fraudulently obtained, or fraudulently made unjustly harassing or oppressive [*see Civ. Code § 1569(3)*].

n. Facts about menace.

(1) Whether decedent, decedent's spouse, an ancestor, a descendant, or an adopted child of the decedent or the decedent's spouse was threatened with unlawful confinement [*see Civ. Code § 1570(1)*].

(2) Whether any of those persons was threatened with confinement lawful in form but fraudulently obtained or fraudulently made unjustly harassing and oppressive [*see Civ. Code § 1570(1)*].

(3) Whether any of those persons was threatened with unlawful and violent injury to his or her person or property [*see Civ. Code § 1570(2)*].

(4) Whether any of those persons was threatened with injury to his or her character [*see Civ. Code § 1570(3)*].

o. Facts about fraud.

(1) Whether decedent was induced to execute a purported will by any person's actual fraud consisting in the following:

(a) Suggestion, as a fact, of that which is not true, by one who does not believe it to be true [*see Civ. Code § 1572(1)*].

(b) Positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though that person believes it to be true [*see Civ. Code § 1572(2)*].

(c) Suppression of that which is true by one having knowledge or belief of the fact [*see Civ. Code § 1572(3)*].

(d) A promise made without any intention of performing it [*see Civ. Code § 1572(4)*].

(e) Any other act fitted to deceive [*see Civ. Code § 1572(5)*].

(2) Whether decedent was induced to execute a purported will by constructive fraud consisting of the following:

(a) Breach of duty that, without an actually fraudulent intent, gains an advantage to the person in fault, or anyone claiming under that person, by misleading decedent to decedent's prejudice, or to the prejudice of anyone claiming under decedent [*see Civ. Code § 1573(1)*].

(b) Any act or omission that the law specially declares to be fraudulent, without respect to actual fraud [*see Civ. Code § 1573(2)*].

p. Facts about undue influence.

(1) Whether any person in whom decedent reposed confidence, or who held a real or apparent authority over decedent, used that confidence or authority for the purpose of obtaining an unfair advantage over decedent [*see Civ. Code § 1575(1)*].

(2) Whether any person took unfair advantage of decedent's weakness of mind [*see Civ. Code § 1575(2)*].

(3) Whether any person took a grossly oppressive and unfair advantage of decedent when decedent was in a condition of need or distress [*see Civ. Code § 1575(3)*].

q. Facts about other grounds for contest.

2. Collect all relevant documents, in certified copies when possible, including the following:

a. Birth certificates.

b. Adoption certificates.

c. Marriage certificates.

d. Judgments or abstracts of divorce or dissolution, annulment, and legal separation.

e. Death certificates.

f. If client or proponent purports to be domestic corporation, certificate of incorporation.

g. If client or proponent is domestic corporation, certificate that domestic corporation is in good standing.

h. If client or proponent is foreign corporation, certificate of qualification of foreign corporation.

i. If client is corporation, resolution of directors authorizing maintenance of contest.

j. If proponent is corporation, certificate of authorization from State Superintendent of Banks to conduct business as a trust company.

k. Purported will.

l. Prior wills and codicils.

m. Affidavits (or declarations under *Code Civ. Proc. § 2015.5*) of subscribing witnesses.

n. Hospital records.

3. Prepare pleading and related documents.

NOTE:
Prepare enough copies for service on the persons listed in Paragraph 6, *below,* in addition to originals for filing, office copies, and copy for contestant if desired.

a. Contest [§§ 444.90, 444.100; *see §§ 444.91 -444.99*, alternative allegations for insertion in contest].

NOTE:
Objections to a petition for probate are required to be in writing, signed by all of the objectors, verified, and filed with the court, although verification of a document constitutes signature of that document unless expressly provided to the contrary [*Prob. Code §§ 1020, 1021*; *but see* *Prob. Code § 1043(b), (c)* (authorizing oral response or objection at hearing).

b. Summons [*see § 444.101*].

4. Prepare for any necessary ancillary proceedings, such as the following:

a. Appointment of guardian or conservator of the estate or guardian ad litem to represent a minor or

incompetent contestant [*see Code Civ. Proc. § 372*]. For discussion and forms, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators* , and Ch. 291, *Guardians ad Litem* .

b. Admission to probate of another will that contestant wishes to propose for probate [*see, e.g., Prob. Code § 8252(b)* (opposition to will by petition for probate of later will revoking the former)]. For discussion and forms, see Ch. 442, *Probate: Initiating Probate Administration* .

c. Appointment of contestant or some other person as personal representative of the estate if contest is successful. For discussion and forms, see Ch. 442, *Probate: Initiating Probate Administration* .

5. Filing.

a. Ascertain filing fee (varies among counties).

b. File contest.

c. Have summons issued.

6. Have summons and objection served on the following persons:

a. Heirs of decedent [*Prob. Code §§ 8110(a), 8250(a)*].

b. Devisees [*Prob. Code §§ 8110(b), 8250(a)*].

c. The executor of the contested will [*Prob. Code §§ 8110(b), 8250(a)*].

7. Prepare and file proof of service [*see Code Civ. Proc. §§ 417.10-417.40*; *Prob. Code § 8250(a)*; for discussion, forms, and a procedural guide relating to service and proof of service of summons, see Ch. 518, *Service of Summons and Papers*].

8. Action to move contest toward conclusion. When any defendant has made a timely response to the contest, or the time for defense action has passed, take appropriate action to move contest toward conclusion, such as the following:

a. Respond to defendant's demurrer to contest.

NOTE:
For discussion and forms regarding demurrers generally, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* . For memoranda of points and authorities regarding demurrers, see *California Points and Authorities, Ch. 71,* ***Demurrers and Motions for Judgment on the Pleadings****, § 71.20 et seq.*

b. Respond to pretrial motions; make necessary motions and countermotions.

NOTE:
For discussion and forms regarding pretrial motions generally, see Ch. 372, ***Motions and Orders*** **,** and Ch. 206, ***Demurrers and Motions for Judgment on the Pleadings*** **,** Ch. 375, ***Motions to Strike: Pleadings*** **,** Ch. 376, ***Motions to Strike: Anti-SLAPP*** **,** and Ch. 389, ***Nonsuit and Motions for Judgment*** ***see also*** Ch. 21, ***Amended and Supplemental Pleadings*** **,** Ch. 125, ***Consolidation, Severance, and Coordination of Actions*** **,** Ch. 135,

Continuances **,** Ch. 212, ***Dismissal*** **,** Ch. 524, ***Shortening and Extension of Time*** **,** Ch. 537, ***Summary Judgment*** **,** Ch. 551, ***Trial*** **,** and Ch. 571, ***Venue*** (motion to retain venue on ground of convenience of witnesses). For memoranda of points and authorities, see California Points and Authorities, Ch. 16, ***Amended and Supplemental Pleadings*** **,** Ch. 125, ***Consolidation and Severance of Actions*** **,** Ch. 48, ***Continuance of Proceedings*** **,** Ch. 71, ***Demurrers and Motions for Judgment on the Pleadings*** **,** Ch. 90, ***Dismissal*** **,** Ch. 212, ***Shortening and Extension of Time*** **,** Ch. 160, ***Motions to Strike*** **,** Ch. 180, ***Pretrial Proceedings*** **,** Ch. 221, ***Summary Judgments*** **,** and Ch. 238, ***Venue*** **.**

9. Conduct appropriate discovery, such as the following:

NOTE:

Discovery is conducted in accordance with *Code Civ. Proc. §§ 2016.010-2093*. For discussion and forms regarding discovery generally, see Ch. 190, *Depositions and Discovery* ; *see also* California Points and Authorities, Ch. 80, ***Discovery*** .

a. Depositions of witnesses or parties on oral examination [Code Civ. Proc. §§ 2025.010-2027.010].

b. Depositions of witnesses or parties by written questions [*Code Civ. Proc. §§ 2028.010-2028.080*].

c. Interrogatories to parties [*Code Civ. Proc. §§ 2030.010-2030.410*].

d. Inspection and copying of documents [*Code Civ. Proc. §§ 2031.010-2031.510*].

e. Request for admission of genuineness of document or truth of fact [*Code Civ. Proc. §§ 2033.010-2033.420*].

10. Prepare for trial.

11. Prepare papers for proceedings after trial, such as the following:

a. Motion for new trial.

b. Motion to vacate judgment.

NOTE:

For discussion and forms regarding motions after trial generally, see Ch. 371, *Motions After Trial* . For memoranda of points and authorities relating to motions after trial, see California Points and Authorities, Ch. 155, ***Motions After Trial*** .

12. Prepare papers relating to conclusion of trial, such as the following:

a. Statement of decision [*see § 444.107*], including findings regarding lost or destroyed wills [*see § 444.108*].

NOTE:

For discussion and forms regarding statement of decision generally, see Ch. 529, *Statement of Decision* . For memoranda of points and authorities regarding statement of decision, see California Points and Authorities, Ch. 215, ***Statement of Decision*** .

b. Judgment [§§ 444.109, 444.110].

NOTE:

For discussion and forms regarding judgments generally, see Ch. 318, *Judgments* .
For memoranda of points and authorities regarding judgments, see California Points and Authorities, Ch. 131, ***Judgments*** .

13. Prepare notice of appeal, if desired.

For discussion and forms regarding appeals generally, see Ch. 40, *Appeal: An Overview* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureSummary JudgmentTime LimitationsEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawWill ContestsGeneral OverviewEstate, Gift & Trust LawWill ContestsRevocationGeneral OverviewEstate, Gift & Trust LawWill ContestsTestamentary CapacityGeneral OverviewEstate, Gift & Trust LawWill ContestsTestamentary FormalitiesWitnessesGeneral OverviewEstate, Gift & Trust LawWillsHandwritten & Oral WillsGeneral Overview

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Volume 38: Probate: Is Probate Necessary? thru Probate: Estate Tax-Chs. 440-453
Chapter 444 PROBATE: WILL CONTESTS
PART IV. PROCEDURAL CHECKLIST
A. Contest Before Probate

38-444 California Forms of Pleading and Practice--Annotated § 444.51

§ 444.51 Respondent's Guide

1. Ascertain all relevant facts.

a. Facts about probate proceeding.

NOTE:
These facts will be known if the respondent is also the one petitioning to have the purported will admitted to probate.

(1) Title of estate proceeding in which contest is filed.

(2) County in which estate proceeding is pending.

(3) Number assigned to estate proceeding.

(4) Whether contestant appears in propria persona or by counsel, and the name, address, and telephone number of contestant or counsel shown on contest.

(5) Date contest was filed.

b. Facts about contestant.

(1) Name.

(2) Address.

NOTE:
These facts have already been ascertained if contestant appears in propria persona.

(3) Relationship to decedent.

(4) Whether contestant is an heir or is named in the will as a devisee or legatee and, if neither, what is contestant's pecuniary interest in decedent's estate.

NOTE:

If contestant is not an heir, devisee, or a legatee, then contestant has no standing to contest the will unless contestant has a pecuniary interest in decedent's estate [*see* *Prob. Code §§ 48, 1043*; that would be impaired or defeated by admitting the purported will to probate, or benefited by denying admission [***see*** *Prob. Code §§ 48*; 1043; *Estate of Lind (1989) 209 Cal. App. 3d 1424, 1430-1431, 257 Cal. Rptr. 853* ; *Estate of Powers (1979) 91 Cal. App. 3d 715, 719, 154 Cal. Rptr. 366]* .

(5) Whether contestant is a competent adult individual suing in the contestant's own behalf and, if not, contestant's other capacity.

NOTE:

Regarding contestant's capacity, see *§ 444.50*, Pararaph (1)(b)(8), *above.*

(6) Whether contestant risks disinheritance under will because of contest.

NOTE:

A will may contain a "no-contest" clause that may result in disinheritance of a contestant. See *§ 444.14*. This fact is not relevant to the pleadings or the proceeding, but it may provide a basis for settling the contest.

c. Facts about respondent.

(1) Whether client is proponent of the will.

(2) If client is proponent and attorney represents proponent in proceeding for admission of will to probate, the following facts should already be known; if not, the following:

(a) Name.

(b) Address.

(c) Telephone number at which client can be reached during law office business hours.

(d) Relationship to decedent.

(e) Whether client is an heir or a devisee or some otherwise interested person; and if otherwise interested, the basis for that interest.

NOTE:

Only the petitioner or other interested persons may demur to or answer the contest [*Prob. Code § 8251(a)*]. If client is not an heir or devisee, then client must have a pecuniary interest in decedent's estate [*see* *Prob. Code § 48*; *Estate of Lind (1989) 209 Cal. App. 3d 1424, 1430-1431, 257 Cal. Rptr. 853* ; *Estate of Powers (1979) 91 Cal. App. 3d 715, 719, 154 Cal. Rptr. 366]* . An executor named in a will proposed for probate may oppose a contest before probate, but is under no duty to do so until so appointed [*Prob. Code § 8250(b)*; *Estate of Perreira (1961) 191 Cal. App. 2d 369, 371, 12 Cal. Rptr.*

589] .

(f) Whether client is an adult individual responding on the client's own behalf or is a minor or incompetent; is a corporation; is a personal representative, a trustee of an express trust, or another person expressly authorized by statute to sue in that person's own name; or is a partnership or other unincorporated association.

NOTE:

A party who is a minor or is incompetent or has a conservator, must appear by a guardian or conservator of the estate or a guardian ad litem [*Code Civ. Proc. § 372(a)*]. Ascertain whether minor or incompetent client has a guardian or conservator; for discussion and forms regarding guardians and conservators, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , through Ch. 290H, ***Guardianship and Conservatorship: Termination of Guardianships and Conservatorships* .** If client is a corporation, then incorporation and good standing of a domestic corporation or qualification of a foreign corporation should be verified by certificate from the Secretary of State. A suspended domestic corporation or an unqualified foreign corporation is disabled from making a response [*Corp. Code § 2203(c)* (foreign); *Rev. & Tax. Code § 23301* (domestic)]. Also, adoption of an appropriate resolution by the directors authorizing the corporation to participate as respondent should be verified, and a copy of the resolution should be obtained for the file. If client is a personal representative, a trustee of an express trust, or some other person expressly authorized by statute to do so, client may make a response in client's own name [***see*** *Code Civ. Proc. § 369(a)*]. Similarly, if client is a partnership or other unincorporated association, client may make a response in the name that it has assumed or by which it is known [*Code Civ. Proc. § 388(a)*].

d. Facts about decedent [*see § 444.50*, Paragraph (1)(c)].

e. Facts about other wills of decedent.

(1) Whether contestant intends to propose another will for admission to probate if contest is successful.

(2) If so, facts about the other will:

(a) Location.

(b) Name and address of person having custody of other will.

(c) Name and address of person who prepared other will.

(d) Date of other will.

(3) If other will is formal, facts about witnesses.

NOTE:

The above facts should be ascertained to determine the impact of any other wills than the one being contested and to determine whether respondent will wish to contest another will offered for admission to probate by contestant if contest is successful.

f. Facts about grounds for contest.

(1) The ground or grounds on which contestant bases the contest.

(2) Defense facts relevant to the asserted ground or grounds.

NOTE:
Regarding grounds for contest, see *§ 444.50*, Paragraphs (1)(k)-(q).

2. Collect all relevant documents, in certified copies when possible [*see § 444.50*, Paragraph 2].

See § 440.50, Paragraph A(2), for list of possibly relevant documents.

3. File response to objection contesting will. The person responding to a contest must file with the court a written pleading in response to the contest within 30 days after service of summons [*see Prob. Code § 8250(a)*]. Responses include:

a. Demurrer. Determine whether contest (pleading) is subject to demurrer [*see Code Civ. Proc. §§ 430.10, 430.30*; *Prob. Code § 8251(b)*]. If so, prepare and serve demurrer [*see § 444.103*]. Prepare proof of service, and file demurrer, memorandum, notice, and proof of service. Ascertain filing fee (varies among counties). For discussion, additional forms, and a procedural guide, see Ch. 206, *Demurrers and Motions for Judgments on the Pleadings* .

NOTE:
If the demurrer is overruled, the respondent will have 15 days in which to file an answer [*Prob. Code § 8251(b)*].

b. Answer. If not demurring, or if contest is sustained against demurrer, prepare and serve answer [*see § 444.104*], prepare proof of service, and file answer and proof of service [*see Prob. Code § 8251(a)*]. If no demurrer has been made, ascertain filing fee (varies among counties).

4. Conduct appropriate discovery [*see* Paragraph A(9), *above*].

5. Summary judgment. Determine whether to move for summary judgment [*see Code Civ. Proc. § 437c*]. If motion will be made, prepare notice of motion [*see § 444.105*], memorandum, and supporting papers [*see Code Civ. Proc. § 437c*], serve notice, memorandum, and supporting papers at least 75 days before date of hearing [*see Code Civ. Proc. § 437c(a)*]; prepare proof of service; file notice, memorandum, supporting papers, and proof of service [*see § 444.106* (order denying motion for summary judgment)]. For discussion, additional forms, and a procedural guide, see Ch. 537, *Summary Judgment* .

6. Respond to pretrial motions of plaintiff (contestant). Make necessary motions and countermotions.

NOTE:
For a list of relevant chapters in this publication, and in California Points and Authorities, see *§ 444.50*, Paragraph 8.

7. Prepare for trial [*see § 444.50*, Paragraph (10)].

8. Prepare papers for proceedings after trial [*see § 444.50*, Paragraph (11)].

9. Prepare papers relating to conclusions of trial [*see § 444.50*, Paragraph (12)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of LawCivil ProcedureSummary JudgmentTime LimitationsEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawConservators & GuardiansConservatorsRemoval & TerminationEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbatePleadingsEstate, Gift & Trust LawWill ContestsGeneral OverviewEstate, Gift & Trust LawWill ContestsStanding

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Chapter 444 PROBATE: WILL CONTESTS
PART IV. PROCEDURAL CHECKLIST
A. Contest Before Probate

38-444 California Forms of Pleading and Practice--Annotated §§ 444.52-444.69

[Reserved]

§§ 444.52[Reserved]

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Volume 38: Probate: Is Probate Necessary? thru Probate: Estate Tax-Chs. 440-453
Chapter 444 PROBATE: WILL CONTESTS
PART IV. PROCEDURAL CHECKLIST
B. Contest After Probate

38-444 California Forms of Pleading and Practice--Annotated § 444.70

§ 444.70 Petitioner's Guide

NOTE:
The following is a general outline of recommended procedures. Any given case may require procedures not set forth here.

1. Ascertain all relevant facts.

a. Facts about probate proceedings.

(1) Title of proceeding.

(2) County in which proceeding is pending.

(3) Number assigned to proceeding.

NOTE:
A contest after probate bears the same number as the probate proceeding.

(4) Capacity of personal representative as executor or administrator with will annexed and the name, address, and telephone number of counsel shown on court's file.

(5) Date of order admitting will to probate and appointing personal representative.

NOTE:
A contest after probate must be filed within 120 days after the date the court admits the will to probate [*Prob. Code § 8270(a)*]. However, a person who was a minor or who was incompetent and had no guardian or conservator at the time a will was admitted to probate may petition the court to revoke the probate of the will at any time before entry of an order for final distribution [*Prob.*

***Code § 8270(b)*]**.

b. Facts about contestant (client).

NOTE:
If representing two or more contestants, the following information should be obtained respecting each one.

(1) Name.

(2) Address.

(3) Telephone number at which client can be reached during law office business hours.

(4) Client's relationship to decedent, by blood, marriage, or association.

(5) Whether client is an heir.

(6) Whether client, not being an heir, is named in the will as a devisee.

(7) If client is neither an heir nor a devisee, the nature of client's pecuniary interest in the distribution of decedent's estate.

NOTE:
Contestant must be an "interested person," that is, interested in the distribution of decedent's estate [*see* *Prob. Code § 8270*], meaning that contestant must have a pecuniary interest that has been impaired or defeated by admitting the will to probate [***see*** *Prob. Code § 48*; *Estate of Lind (1989) 209 Cal. App. 3d 1424, 1430-1431, 257 Cal. Rptr. 853* ; *Estate of Powers (1979) 91 Cal. App. 3d 715, 719, 154 Cal. Rptr. 366]* .

(8) Whether client will risk disinheritance under the will by contesting it [*see Prob. Code § 21310 et seq.*; *see also 444.14*].

(9) Whether client is a competent adult individual suing on his or her own behalf and, if not, the following:

(a) Whether client is a minor or incompetent.

NOTE:
A party who is a minor or incompetent, or has a conservator must appear by a guardian or conservator of the estate or a guardian ad litem [*Code Civ. Proc. § 372(a)*]. Ascertain whether minor or incompetent client has a guardian or conservator (for discussion and forms regarding appointment of a guardian or conservator, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , and Ch. 281, ***Guardianship and Conservatorship: Appointment of Conservators***). If more then 120 days have passed since the will was admitted to probate and client is minor or incompetent, ascertain whether client had a guardian or conservator when the will was admitted to probate. If not, the client will be able to petition to revoke the probate at any time before entry of an order for final distribution [***see*** *Prob. Code § 8270(b)*].

(b) Whether client is a personal representative, a trustee of an express trust, or another person expressly authorized by statute to sue in that person's own name.

NOTE:

A personal representative, a trustee of an express trust, or any other person expressly authorized by statute to do so may sue without joining the real party in interest [*Code Civ. Proc. § 369*].

(c) Whether client is a corporation.

NOTE:

Incorporation and good standing of a domestic corporation, and qualification of a foreign corporation, should be verified by certificate from the Secretary of State. A suspended domestic corporation or an unqualified foreign corporation is disabled from suing [*Corp. Code § 2203(c)* (foreign), *Rev. & Tax. Code § 23301* (suspension of powers of domestic and foreign corporations)]. Adoption of an appropriate resolution by the directors authorizing the corporation to maintain a contest should be verified, and a copy of the resolution should be obtained for the file.

(d) Whether client is a partnership or other unincorporated association.

NOTE:

A partnership or other unincorporated association may sue in the name which it has assumed or by which it is known [*Code Civ. Proc. § 389.5(a)*].

(10) Whether client was a party to a previous contest.

NOTE:

A party to a contest before probate has no standing to contest a will after probate [*see* *Prob. Code § 8270(a)*].

(11) Whether client, not having been a party to a contest before probate, received actual notice of such a contest.

NOTE:

A person who had actual notice of a contest before probate in time to have joined in it has no standing to make a later contest [*see* *Prob. Code § 8270(a)*].

c. Facts about decedent [*see § 444.50*, Paragraph 1(c)].

d. Facts about personal representative.

(1) Name.

(2) Address.

(3) Capacity as either executor or administrator with will annexed.

e. Facts about subscribing witnesses [*see § 444.50*, Paragraph 1(e)].

f. Facts about heirs [*see § 444.50*, Paragraph 1(f)].

g. Names, ages, and addresses of heirs [*see § 444.50*, Paragraph 1(g)].

h. Facts about marriages [*see § 444.50*, Paragraph 1(h)].

i. Facts about devisees and legatees [*see § 444.50*, Paragraph 1(i)].

j. Facts about other wills of decedent [*see § 444.50*, Paragraph 1(j)].

k. Facts about execution and attestation of formal wills [*see § 444.50*, Paragraph 1(k)].

l. Facts about decedent's competence [*see § 44.50*, Paragraph 1(l)].

m. Facts about duress [*see § 444.50*, Paragraph 1(m)].

n. Facts about menace [*see § 444.50*, Paragraph 1(n)].

o. Facts about fraud [*see § 444.50*, Paragraph 1(o)].

p. Facts about undue influence [*see § 444.50*, Paragraph 1(p)].

q. Facts about other grounds for contest.

2. Collect all relevant documents [*see § 444.50*, Paragraph 2].

3. Prepare pleading and related documents.

NOTE:
Prepare enough copies for service on the persons listed in Paragraph 6, *below,* in addition to originals for filing, office copies, and copy for contestant if desired.

a. Petition for revocation of probate [§ 444.111].

b. Summons [*see § 444.101*].

4. Prepare for any necessary ancillary proceedings [*see § 444.50*, Paragraph 4].

5. Filing.

a. Ascertain filing fee (varies among counties).

b. File petition.

NOTE:
Petition must be filed within 120 days after the date the court admits the will to probate [*Prob. Code § 8270(a)*]. If contestant is a minor or incompetent, this limitation period may be extended until the entry of an order for final distribution [*see* *Prob. Code § 8270(b)*].

c. Have summons issued.

6. Have copies of the petition and the summons served

Have summons and a copy of the petition served on the following persons:

a. Heirs of decedent [*see Prob. Code §§ 8110(a), 8250(a), 8271(b)*].

b. Devisees named in the contested will [*see Prob. Code §§ 8110(b), 8250(a), 8271(b)*].

c. Executor named in the contested will [*Prob. Code §§ 8110(b), 8250(a), 8271(b)*].

7. Action to move contest toward conclusion [*see § 444.50*, Paragraph 8].

8. Conduct appropriate discovery [*see § 444.50*, Paragraph 9].

9. Prepare for trial [*see § 444.50*, Paragraph 10].

10. Prepare papers for proceedings after trial [*see § 444.50*, Paragraph 11].

11. Prepare papers relating to conclusion of trial [*see § 444.50*, Paragraph 12].

12. Appeal [*see § 444.50*, Paragraph 13].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsAppointmentEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawWill ContestsGeneral OverviewEstate, Gift & Trust LawWill ContestsFraudEstate, Gift & Trust LawWill ContestsRevocationGeneral OverviewEstate, Gift & Trust LawWill ContestsStandingEstate, Gift & Trust LawWill ContestsTestamentary FormalitiesWitnessesGeneral OverviewEstate, Gift & Trust LawWill ContestsUndue InfluenceGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral Overview

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B. Contest After Probate

38-444 California Forms of Pleading and Practice--Annotated § 444.71

§ 444.71 Respondent's Guide

1. Ascertain all relevant facts:

NOTE:
These facts will already be known if respondent is the personal representative of the estate.

(1) Title of estate proceeding in which contest is filed.

(2) County in which estate proceeding is pending.

(3) Number assigned to estate proceeding.

(4) Whether contestant appears in propria persona or by counsel, and the name, address, and telephone number of petitioner or counsel shown on petition.

(5) Date petition was filed and whether petition was filed within 120 days after the will was admitted to probate.

NOTE:
A contest after probate generally must generally be filed within 120 days after the date the court admits the will to probate [*Prob. Code § 8270(a)*], but if petitioner is a minor or is of unsound mind (***see*** *§ 444.71*, Paragraph 1(b)), the period for filing may be extended [***see*** *Prob. Code § 8270(b)*].

b. Facts about contestant.

NOTE:

If there are two or more contestants, the following information should be obtained for each one.

(1) Name.

(2) Address.

NOTE:
These facts have already been obtained if contestant appears in propria persona.

(3) Relationship to decedent.

(4) Whether contestant is an heir or is named in the will as a devisee and, if neither, contestant's pecuniary interest in the devolution of decedent's estate.

NOTE:
If contestant is neither an heir nor a devisee, then contestant has no standing to contest the will unless contestant has a pecuniary interest in distribution of decedent's estate [*see* *Prob. Code §§ 48, 8270(a)*; *Estate of Lind (1989) 209 Cal. App. 3d 1424, 1430-1431, 257 Cal. Rptr. 853* ; *Estate of Powers (1979) 91 Cal. App. 3d 715, 719, 154 Cal. Rptr. 366]* .

(5) Whether contestant is a competent adult individual suing on his or her own behalf and, if not, contestant's other capacity.

NOTE:
For facts regarding the contestant's capacity, see *§ 444.70*, Paragraph 1(b)(9).

(6) Whether contestant risks disinheritance under the will because of the contest.

NOTE:
A will may contain a "no-contest" clause that may result in disinheritance of a contestant. This fact is not relevant to the pleadings or proceeding, but it may provide a basis for settling the contest [*see* *§ 444.70*, Paragraph 1(b)(8)].

(7) Whether contestant was a party to a contest of the will before probate or received actual notice of the contest in time to have joined it.

NOTE:
A party to a contest before probate or a person who had actual notice of a previous contest in time to have joined in it has no standing to bring a contest after probate [*see* *Prob. Code § 8270(a)*]. If the petition does not allege facts respecting the contestant's standing, the most direct way to raise the issue is by demurrer, arguing that standing is an essential allegation to state a cause of action [***see*** Comments to § 444.111].

(8) Whether contestant was a minor or incompetent who did not have a guardian or conservator when the will was admitted to probate.

NOTE:
The order admitting the will to probate is conclusive if no contest is filed within 120 days after the date the court admits the will to probate. However, a person who was

a minor or who was incompetent and had no guardian or conservator at the time the will was admitted to probate may petition the court to revoke the probate of the will at any time before entry of an order for final distribution [*see* *Prob. Code §§ 8226(a), 8270(b)*].

c. Facts about respondent (client).

NOTE:
If representing two or more respondents, obtain the following information about each one.

(1) Whether client is the personal representative of the estate.

(2) If client is the personal representative and attorney is representing the personal representative in administration of decedent's estate, the following facts should already be known; if not, obtain the following:

(a) Name.

(b) Address.

(c) Telephone number at which client can be reached during law office business hours.

(d) Relationship to decedent.

(e) Whether client is an heir, a devisee, or some otherwise interested person; and if the latter, the basis for that interest.

NOTE:
Only an heir, devisee, or other interested person may demur to or answer the contest [*see* *Prob. Code § 8251(a)*]. If client is not an heir or devisee, then client must have a pecuniary interest in the distribution of decedent's estate [***see*** *Prob. Code § 48*; *Estate of Lind (1989) 209 Cal. App. 3d 1424, 1430-1431, 257 Cal. Rptr. 853* ; *Estate of Powers (1979) 91 Cal. App. 3d 715, 719, 154 Cal. Rptr. 366]* .

(f) Which of following categories describes client [*see § 444.51*, Paragraph 1(c)(2)(f)]:

(i) Adult individual responding on his or her own behalf.

(ii) Minor or incompetent.

(iii) Corporation.

(iv) Partnership.

(v) Limited liability company.

(vi) Executor.

(vii) Administrator.

(viii) Trustee of an express trust.

(ix) Another person expressly authorized by statute to sue in his or her own name.

(x) Partnership or other unincorporated association.

d. Facts about decedent [*see § 444.50*, Paragraph 1(c)].

e. Facts about other wills of decedent.

(1) Whether contestant intends to propose another will for admission to probate if contest is successful.

(2) If so, facts about the other will [*see § 444.51*, Paragraph 1(j)(2)].

f. Facts about grounds for contest.

(1) Ground(s) on which contestant bases the contest [*see § 444.51*, Paragraph 1(f)].

(2) Defense facts relevant to asserted ground(s).

NOTE:
For the grounds for contest, see *§ 444.50*, Paragraphs 1(l)-(q).

2. Collect all relevant documents; certified copies if possible.

NOTE:
See § 444,50, Paragraph 2, for a list of relevant documents.

3. File response to petition for revocation:

NOTE:
The person responding to a petition for revocation must file with the court a written pleading in response to the petition within 30 days after service of the summons [*see* *Prob. Code § 8270(a)*]. Responses include those listed below.

a. Demurrer.

NOTE:
For discussion, additional forms, and a procedural guide, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

(1) Determine whether petition for revocation is subject to demurrer [*see Code Civ. Proc. §§ 430.10, 430.30*; *Prob. Code §§ 8251(b), 8271(b)*].

(2) If so, prepare and serve demurrer [*see § 444.112*], memorandum of points and authorities, and notice of hearing on demurrer.

(3) Prepare proof of service.

(4) Ascertain filing fee (varies among counties).

(5) File demurrer, memorandum, notice and proof of service.

NOTE:
If the demurrer is overruled, the respondent will have 15 days in which to file an answer [*Prob. Code §§ 8251(b), 8271(b)*].

b. If not demurring, or if contest is sustained against demurrer:

(1) Prepare and serve answer [*see § 444.113*].

(2) Prepare proof of service.

(3) Ascertain filing fee (varies among counties)

(4) File answer and proof of service [*see Prob. Code §§ 8251(a), 8271(b)*].

4. Conduct appropriate discovery [*see § 444.50*, Paragraph 9].

5. Summary judgment.

a. Determine whether to move for summary judgment [*see Code Civ. Proc. § 437c*.

b. If motion will be made, prepare and serve the following at least 75 days before date of hearing [*see Code Civ. Proc. § 437c(a)*]:

(1) Notice of motion [*see § 444.114*].

(2) Memorandum of points and authorities.

(3) Supporting papers.

c. Prepare proof of service.

d. File notice, memorandum, supporting papers, and proof of service.

e. If motion is granted, prepare order for judgment [*see § 444.115*] and filed order when it is signed.

6. Respond to pretrial motions of petitioner; make necessary motions and countermotions [*see § 444.50*, Paragraph 8].

7. Prepare for trial.

NOTE:
For forms and procedures generally, see Ch. 551, *Trial* .

8. Prepare papers for proceedings after trial [*see § 444.50*, Paragraph 11].

9. Prepare papers relating to conclusion of trial, such as the following:

a. Statement of decision.

NOTE:
For forms and procedures, see Ch. 529, *Statement of Decision* . See also California Points and Authorities, Ch. 215, ***Statement of Decision*** (Matthew Bender).

b. Judgment [*see § 444.116*].

NOTE:
For forms and procedures, see Ch. 318, *Judgments* . See also California Points and Authorities, Ch. 131, ***Judgments*** (Matthew Bender).

10. Prepare notice of appeal, if desired.

NOTE:
For discussion and forms regarding appeals generally, see Ch. 40, *Appeal: An Overview* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureSummary JudgmentBurdens of Production & ProofGeneral OverviewCivil ProcedureSummary JudgmentTime LimitationsCivil ProcedureAppealsReviewabilityGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawWill ContestsGeneral OverviewEstate, Gift & Trust LawWill ContestsRevocationGeneral OverviewEstate, Gift & Trust LawWill ContestsStanding

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Chapter 444 PROBATE: WILL CONTESTS
PART IV. PROCEDURAL CHECKLIST
B. Contest After Probate

38-444 California Forms of Pleading and Practice--Annotated §§ 444.72-444.89

[Reserved]

§§ 444.72[Reserved]

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38-444 California Forms of Pleading and Practice--Annotated § 444.90

§ 444.90 Proceedings to Contest Will Before Probate--Grounds of Opposition [Prob. Code §§ 6100, 6100.5, 6104, 6110, 6111]--General Form

[1] FORM Proceedings to Contest Will Before Probate--Grounds of Opposition [Prob. Code §§ 6100, 6100.5, 6104, 6110, 6111]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Estate of _____ [*name*],	)	
Deceased.	)	
_____ [*name*],	)	NO. _____
Contestant,	)	CONTEST AND GROUNDS
vs.	)	OF OPPOSITION TO PROBATE OF WILL
_____ [*name*],	)	
Petitioner and Respondent.	)	
	)	
	)	

Contestant, _____ [*name of contestant*], alleges:

1. On or about _____ [*date*], _____ [*name*], hereinafter called decedent, died in _____ County, California.

2. At the time of death decedent was a resident of _____County, California and left property in _____ County, California.

3. On _____ [*date*], _____ [*name*], petitioner and respondent, filed a petition for probate of a document dated _____ [*date*], purporting to be the last will of decedent, and for issuance

of letters _____ [testamentary *or* of administration with the will annexed] to _____ [himself/herself or _____ (*name*)].

4. Contestant is an interested person entitled to contest the admission of the purported will to probate in that _____ [*specify status and interest of contestant that may be impaired or defeated by probate of will*].

5. Probate of the purported will should be denied on the following grounds:

[*LIST, in as many subparagraphs as necessary, all grounds present under the facts of the case, for example:*]

a. First Ground: At the time of the alleged execution of the purported will, the decedent was not of sound and disposing mind.

b. Second Ground: The purported will was not executed by decedent in the manner and form required by law for the execution of a will.

c. Third Ground: The purported will was made as a direct result of undue influence exercised by _____ [*name*] over decedent and is not, and never was, the will of decedent. This undue influence consisted of the following: _____ [*specify facts*].

d. Fourth Ground: The purported will was procured to be made, and to be signed by decedent, by reason of the fraud of _____ [*name*]. This fraud consisted of the following: _____ [*specify facts*].

e. Fifth Ground: [*Set forth here and subsequently additional grounds as appropriate such as duress or revocation of the will, specifying the facts constituting the ground in each case.*]

[*CONTINUE*]

6. The names, ages, and residences of the heirs of decedent, so far as known to contestant, are:

[*LIST in as many subparagraphs as necessary, for example:*]

a. _____ [*Name*], _____ [*address*], aged _____ [*age*], _____ [*relationship, e.g.,* grandchild of the decedent].

b. _____ [*Name*], _____ [*address*], aged _____ [*age*], _____ [*relationship, e.g.,* sister of the decedent].

[*CONTINUE*]

7. The names, ages, and residences of the persons named as devisees in the purported will are:

[*LIST in as many subparagraphs as necessary, for example:*]

a. _____ [*Name*], _____ [*address*], aged _____ [*age*], _____ [*relationship, e.g.,* legatee of the decedent and stranger].

b. _____ [*Name*], _____ [*address*], aged _____ [*age*], _____ [*relationship, e.g.,* legatee of the decedent and stranger].

[*CONTINUE*]

WHEREFORE, contestant prays that the above-described purported will be denied probate, for costs of suit, and for other and further relief as proper.

_____ [*signature*]

Contestant

_____ [*signature*]

Attorney for Contestant

VERIFICATION

I, _____ [*name*], am the contestant in the above-entitled proceeding. I have read the foregoing written grounds of opposition to probate and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

CAUTION:
The objection must be verified [***see*** *Prob. Code § 1021(a)(2)*].

[2] Use of Form

This form for a contest and grounds of opposition to the probate of a purported will is for use by any interested person to contest a will before probate [*see Prob. Code §§ 1020, 1043(a)*]. More than one person may join as a contestant, in which case the names of any additional contestants should be added to the caption.

[3] Essential Allegations

Although the first two paragraphs of this pleading normally would be found in the petition for probate of the will, the preferred practice is also to include them in the grounds of opposition to probate [*see Estate of Ramey (1923) 62 Cal. App. 413, 431-432, 217 P. 135]* . This pleading is in the nature of a complaint and should be complete in itself [*Estate of Marler (1957) 148 Cal. App. 2d 30, 36-37, 306 P.2d 105]* .

Pleading the contestant's interest in the devolution of the estate and right to bring the contest is a necessary allegation [*Estate of Lind (1989) 209 Cal. App. 3d 1424, 1431, 257 Cal. Rptr. 853* ; *Estate of Powers (1979) 91 Cal. App. 3d 715, 719-720, 722, 154 Cal. Rptr. 366]* . Unless the contestant is an executor opposing probate of another will, only a person pecuniarily interested may file a contest [*see Prob. Code §§ 48, 1043, 8250(b)*; *Estate of Lind (1989) 209 Cal. App. 3d 1424, 1430-1431, 257 Cal. Rptr. 853* ; *Estate of Powers (1979) 91 Cal. App. 3d 715, 719, 154 Cal. Rptr. 366]* . The contestant should set forth facts showing an interest in the estate that will be impaired or defeated by admission of the will to probate, or conversely, benefited by denial of probate [*Estate of Lind (1989) 209 Cal. App. 3d 1424, 1430-1431, 257 Cal. Rptr. 853* ; *Estate of Powers (1979) 91 Cal. App. 3d 715, 719, 154 Cal. Rptr. 366]* . Failure to plead a pecuniary interest subjects the pleading to demurrer [*see Prob. Code § 1043*; *Estate of Lind (1989) 209 Cal. App. 3d 1424, 1430-1431, 257 Cal. Rptr. 853* ; *Estate of Powers (1979) 91 Cal. App. 3d 715, 719, 154 Cal. Rptr. 366]* .

[4] Standing

If the proponent of the will challenges the contestant's standing, the court may require proof of the contestant's interest in the estate and of his or her right to contest the will before proceeding with the trial of the contest [*Estate of Lind (1989) 209 Cal. App. 3d 1424, 1435, 257 Cal. Rptr. 853* ; *Estate of Powers (1979) 91 Cal. App. 3d 715, 719, 154 Cal. Rptr. 366]* . This demonstration of standing should be made either at a separate evidentiary hearing on the issue (frequently on the petitioner's general demurrer alleging the contestant's lack of standing) or on a motion for summary judgment [*Estate of Powers (1979) 91 Cal. App. 3d 715, 723, 154 Cal. Rptr. 366]* . The contestant bears the burden of proof on the issue [*Estate of Lind (1989) 209 Cal. App. 3d 1424, 1434, 257 Cal. Rptr. 853]* . Minimal delay and minimal discovery limited to the issue of standing should precede the hearing.

If the contestant fails to establish standing, the court should dismiss the contest [*Estate of Lind (1989) 209 Cal. App. 3d 1424, 1435, 257 Cal. Rptr. 853]* . If the court finds that the contest was filed in bad faith or solely for the purpose of delay, the court may impose sanctions under *Code Civ. Proc. § 128.5* on the contestant [*Estate of Lind (1989) 209 Cal. App. 3d 1424, 1435, 257 Cal. Rptr. 853]* .

[5] Grounds to Be Separately Stated

The various grounds of opposition to probate should be separately stated (Paragraph 5) [this form is adapted from that used in *Estate of Wolf (1959) 174 Cal. App. 2d 144, 344 P.2d 37]* . The first two grounds set forth in Paragraph 5, unsoundness of mind and lack of due execution, are sufficiently alleged in the language of the statute, and are not subject to demurrer for uncertainty [*see Estate of Streeton (1920) 183 Cal. 284, 289, 191 P. 16]* .

On the other hand, when alleging grounds such as undue influence, fraud, duress, a subsequent will, revocation, the facts relied on must be pleaded [*Estate of Streeton (1920) 183 Cal. 284, 289, 191 P. 16]* .

[6] Signing and Verification

Written grounds of opposition filed before a will contest constitute an "objection" for purposes of the Probate Code provisions governing will contests [*see Prob. Code § 8250(a)*]. Consequently, the form must be signed by all of the parties bringing the contest [*see Prob. Code § 1020*)]. In addition, it must be verified by the contestant, or if there are two or more contestants, by any of them [*Prob. Code § 1021(b)(3)*]. Nevertheless, verification of a document constitutes signature of that document unless expressly provided to the contrary [*Prob. Code § 1020*].

However, if a contestant is absent from the county or for some other cause is unable to sign or verify the written grounds of opposition, the contestant's attorney may sign or verify the written grounds unless the contestant is a fiduciary appointed in the proceeding [*see Prob. Code § 1023*].

[7] State Statutes

[a] Grounds for Contest

Who may make will. *Prob. Code § 6100*

Incompetence. *Prob. Code § 6100.5*

Effective date of new law; applicability of former law. *Prob. Code § 6103*

Duress, menace, fraud, or undue influence. *Prob. Code § 6104*

Conditional will. *Prob. Code § 6105*

[b] Execution of Wills

Witnessed wills; execution. *Prob. Code § 6110*

Holographic wills; execution. *Prob. Code § 6111*

[c] Standing to Contest Will

Generally. *Prob. Code §§ 48, 1043*

Effect of no contest clause. *Prob. Code § 21310 et seq.*

[d] Verification

Form for verification. *Code Civ. Proc. § 446*; *Prob. Code § 1000*

Verification of probate documents. *Prob. Code §§ 1021, 1023*

[8] Local Rules of Court

Continuance to permit filing contest.

Alameda Co. Unified Super. Ct. Rules, Rule 12.7

Los Angeles Co. Super. Ct. Rules, Rules 10.19, 10.61

Sacramento Co. Local Ct. Rules, Rule 15.47

San Bernardino Co. Prob. Pol. Mem., § 106

San Francisco Uniform Local Ct. Rules, Rule 14.8

Santa Clara Co. Super. Ct. Rules, Rule 5.1(H)

Document format.

Department number and date of hearing must be placed immediately below title of document on first page of document filed. Los Angeles Co. Super. Ct. Rules, Rules 10.10

[9] Decisions

Requisite interest of contestant. *Estate of Lind (1989) 209 Cal. App. 3d 1424, 1430-1431, 257 Cal. Rptr. 853* ; *Estate of Powers (1979) 91 Cal. App. 3d 715, 719, 154 Cal. Rptr. 366*

Allegations of particular grounds of opposition. *Estate of Bixler (1924) 194 Cal. 585, 589-591, 229 P. 704* ; *Estate of Streeton (1920) 183 Cal. 284, 289, 191 P. 16*

Time for filing contest before probate. *Estate of Mollenkopf (1913) 164 Cal. 576, 579-581, 129 P. 997* ; *Estate of Marler (1957) 148 Cal. App. 2d 30, 36, 306 P.2d 105*

Petition contesting will, like complaint, must allege ultimate facts and not conclusions of law. *Estate of Archer (1987) 193 Cal. App. 3d 238, 245, 239 Cal. Rptr. 137*

Will denied probate under former *Prob. Code § 350* (lost or destroyed will *now see Prob. Code § 8223*) was nevertheless effective to revoke prior wills. *Estate of Lopes (1984) 152 Cal. App. 3d 302, 308-309, 199 Cal. Rptr. 425*

Testamentary capacity; evidence. *Moore v. Anderson Zeigler Disharoon Gallagher & Gray (2003) 109 Cal. App. 4th 1287, 1298-300, 135 Cal. Rptr. 2d 888* ; *Goodman v. Zimmerman (1994) 25 Cal. App. 4th 1667, 1677-1678, 32 Cal. Rptr. 2d 419*

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38-444 California Forms of Pleading and Practice--Annotated § 444.91

§ 444.91 Proceedings to Contest Will Before Probate--Allegation of Undue Influence [Prob. Code § 6104]--Confidential Relationship in General

[1] FORM Proceedings to Contest Will Before Probate--Allegation of Undue Influence [Prob. Code § 6104]--Confidential Relationship in General

The purported will described above was made as a direct result of undue influence exercised by _____ [*name*] over decedent when the will was executed, and it is not now and never was the will of decedent. This undue influence consisted of the following facts: _____ [*specify facts, e.g.:*]

_____ [*Name of person exercising undue influence*] occupied the position of _____ [*specify relationship to decedent*] to the decedent for a period of approximately _____ [*length of time*] before and up to the time of the latter's death; there was a friendly and confidential relationship exercised by _____ [*name of person exercising undue influence*] over decedent, who reposed trust and confidence in _____ [*name of person exercising undue influence*].

During this period, by reason of that relationship and the trust and confidence so reposed in him/her, _____ [*name of person exercising undue influence*] was able to and did control and influence the mind and actions of the decedent to such an extent that decedent did whatever _____ [*name of person exercising undue influence*] instructed him/her to do.

Taking advantage of this trust and confidence, _____ [*name of person exercising undue influence*] suggested and dictated the contents of the purported will, and caused decedent to execute it. At the time of the making and execution of the purported will, the decedent was wholly under the influence of _____ [*name of person exercising undue influence*]. The purported will is not the free and voluntary act of the decedent, but was procured by the undue influence of _____ [*name of person exercising undue influence*].

[2] Use of Form

This allegation is for use in written grounds of opposition to the probate of a purported will to allege specifically that undue influence on the decedent was based on a confidential relationship [*see Civ. Code § 1575*; *Prob. Code § 6104*].

This allegation may be inserted in the third ground of Paragraph 5 of *see § 444.90*.

[3] State Statutes

Undue influence. *Civ. Code § 1575*

Denial of probate of purported will on ground of undue influence. *Prob. Code § 6104*

[4] Decisions

Confidential relationship existed between son and father, who was 81 years old at time of executing new will leaving everything to son, relied almost completely on son, and was critically ill, disoriented, and not eating; son had lawyer prepare will without ever talking to father alone, and had two friends act as witnesses. *Estate of Gonzalez (2002) 102 Cal. App. 4th 1296, 1306, 126 Cal. Rptr. 2d 332*

Given confidential relationship between elderly, infirm testatrix and attorney who prepared will, bequest in will of one half of estate to attorney invited invocation of evidentiary presumption of undue influence, shifting burden to attorney to show he did not unduly influence testatrix. *Estate of Lind (1989) 209 Cal. App. 3d 1424, 1430, 257 Cal. Rptr. 853*

When proponent of will sustained confidential relationship toward testator, actively participated in procuring execution of will, and unduly profited thereby, presumption of undue influence arose. *Estate of Gelonese (1974) 36 Cal. App. 3d 854, 863, 111 Cal. Rptr. 833*

Influence gained by kindness, gratitude, or affection is not undue influence, absent fraud. *Estate of Niquette (1968) 264 Cal. App. 2d 976, 981, 71 Cal. Rptr. 83*

[5] Cross References

For a related form, *see § 444.90*.

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38-444 California Forms of Pleading and Practice--Annotated § 444.92

§ 444.92 Proceedings to Contest Will Before Probate--Allegation of Undue Influence [Prob. Code § 6104]--Confidential and Personal Relationship

[1] FORM Proceedings to Contest Will Before Probate--Allegation of Undue Influence [Prob. Code § 6104]--Confidential and Personal Relationship

The purported will described above was made as a direct result of undue influence exercised by _____ [*name of person exercising undue influence*] over decedent. This undue influence consisted of the following: _____ [*specify, e.g.:*]

At the time of her death, decedent was over 80 years of age. During the last year of her life, and for some time prior thereto, by reason of her age and physical condition, her mental faculties had become so impaired that she was easily influenced by those in whom she had confidence. _____ [*Name of person exercising undue influence*] is a young man about 35 years of age, and during the last five years before and up to the time of her death, he served as the business manager and confidential agent of the decedent.

During this period and up to the time of her death, there existed a strange attachment on the part of decedent for _____ [*name of person exercising undue influence*], induced by unnatural flattery of decedent by _____ [*name of person exercising undue influence*] and attentions given her by him. This strange attachment existed to such an extent that, during this period and up to the time of her death, she kept constant company with _____ [*name of person exercising undue influence*]. During a great deal of the time, she excluded herself from her relatives and household servants, and consulted him constantly about both her business and social affairs and followed his advice explicitly in both business and social matters. The decedent reposed trust and confidence in _____ [*name of person exercising undue influence*], and he controlled and influenced her mind and actions to such an extent that, during this period, she did whatever he suggested or instructed her to do so that _____ [*name of person exercising undue influence*] succeeded in substituting the purported will described above for the actual will of decedent.

For many years and up to the time when the document purporting to be the last will of decedent was made, she had employed _____ [*name*] to act as her attorney. On or about _____ [*date*],

_____ [*name of person exercising undue influence*] used his influence over decedent and induced her to visit _____ [*name*], his attorney, for the purpose of having a last will prepared for her. The document, purporting to be her last will, was prepared by _____ [*name of person exercising undue influence*]'s attorney at the suggestion of _____ [*name of person exercising undue influence*] by supplanting his will for that of the decedent, by taking advantage of the trust and confidence reposed in him by her so that he succeeded in having decedent devise and bequeath to him by that document approximately one third of the residue of her estate.

At the time of execution of the purported will, decedent was not following the dictates of her own will, which would naturally have led her to have devised all of her estate to her heirs, but she was acting wholly under the influence of _____ [*name of person exercising undue influence*], who suggested and dictated to her the terms of the document. As a direct result, the document was not the free and voluntary act of the decedent, but was procured to be made by the undue influence of _____ [*name of person exercising undue influence*].

[2] Use of Form

This allegation is for use in written grounds of opposition to the probate of a purported will to allege specifically that undue influence over the decedent was based on a confidential and personal relationship [*see Rice v. Clark (2002) 28 Cal. 4th 89, 96-97, 120 Cal. Rptr. 2d 522, 47 P.3d 300]* . It includes a statement that the person charged with undue influence profited by the purported will. Although this is not a necessary allegation, it is nonetheless a usual, important aspect of undue influence, and alleging the fact may have a strategic effect in some cases. Although a will contestant normally bears the burden of proving undue influence, a presumption of undue influence shifting the burden of proof arises on the contestant's showing that (1) the person alleged to have exerted the undue influence had a confidential relationship with the testator; (2) the person actively participated in procuring the preparation or execution of the will; and (3) the person would benefit unduly by the will [*Rice v. Clark (2002) 28 Cal. 4th 89, 96-97, 120 Cal. Rptr. 2d 522, 47 P.3d 300]* .

This allegation may be inserted in the third ground of Paragraph 5 of *see § 444.90*.

This bulk of this allegation consists of a description of the basic facts giving rise to the claim of undue influence. The facts here are illustrative only and any such description obviously must be tailored to the specific facts of each individual situation. However, this example demonstrates how the underlying facts may be stated in support of the undue influence claim.

[3] Cross References

For related forms, *see §§ 444.90* and *444.91*.

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38-444 California Forms of Pleading and Practice--Annotated § 444.93

§ 444.93 Proceedings to Contest Will Before Probate--Allegation of Undue Influence [Prob. Code § 6104]--Confidential and Family Relationship

[1] FORM Proceedings to Contest Will Before Probate--Allegation of Undue Influence [Prob. Code § 6104]--Confidential and Family Relationship

The purported will described above was made as a direct result of undue influence exercised by _____ [*name of person exercising undue influence*], over the decedent at the time, and it is not now and never was the will of the decedent. This undue influence consisted of the following: _____ [*specify, e.g.:*]

At the time of her death, decedent was 87 years of age, and for the last eight years of her life, she suffered from a number of serious ailments that gradually deteriorated both her mind and body. She was under the constant care of a physician, and during this period, her physical and mental condition was such that her freedom of will was easily subverted by those in whom she had confidence. For the last four or five months of her life, during which period the document was executed, her speech was hesitant and fumbling, and her mind was not clear.

Following the death in 1999 of decedent's husband, father of _____ [*name of person exercising undue influence*] and contestant, _____ [*name of person exercising undue influence*] lived in the home of his mother, decedent, until the time of her death on _____ [*date*], and throughout that period managed most of decedent's business affairs. A confidential relationship thereby existed between _____ [*name of person exercising undue influence*] and decedent throughout that period. Decedent reposed trust and confidence in _____ [*name of person exercising undue influence*] and would make or sign any documents that he proposed or presented to her.

At the time of the death of her husband in 1999, decedent had a net worth of about $145,000; thereafter during her lifetime, her property, enlarged by certain purchases, appreciated in value to approximately $700,000 at the time of her death. By reason of his management of most of the business affairs of decedent during this period, _____ [*name of person exercising undue influence*] knew of this appreciation in value and had a duty to disclose it to decedent, but he suppressed the facts and did not disclose them to her.

As a result of this suppression and withholding of the facts from her, decedent did not know the nature and extent of her property at the time of execution of the document. By taking advantage of the suppression of facts and of the trust and confidence so reposed in him, and by subverting the will of decedent to his will, _____ [*name of person exercising undue influence*] induced her to execute the document whereby she left the bulk of her estate to him and provided for payment by him to contestant of the sum of $7,000 out of the estate.

The disposition of her estate as provided in the document by decedent is unnatural. During her lifetime, decedent frequently stated that she loved her children equally well and intended to provide equally for them. At the time of execution of the document, decedent was not following the dictates of her own will, but rather, was acting wholly under the influence of _____ [*name of person exercising undue influence*], who was active in procuring the execution of the document, which was not the free and voluntary act of decedent but was procured to be made by the undue influence of _____ [*name of person exercising undue influence*].

[2] Use of Form

The allegation is for use in written grounds of opposition to the probate of a purported will, before probate, to allege specifically that undue influence on the decedent was based on a confidential and family relationship [*see Hagen v. Hickenbottom (1995) 41 Cal. App. 4th 168, 172-183, 48 Cal. Rptr. 2d 197* (contest by decedent's grandchildren on ground that decedent's cousin had unduly influenced decedent)]. This form includes allegations of fraud by concealment of facts by a person with a duty to disclose. Although fraud and undue influence are separate grounds for setting aside a will, they are closely related, and fraud may be considered in determining whether there was undue influence. However, although undue influence often consists of untrue statements made to the testator for the purpose of overpowering the testator's free agency, untrue statements are not essential to undue influence. A claim of undue influence may be supported, in whole or in part, by proof of completely true statements. Falsity is an essential element of a claim for fraud or misrepresentation, but not for a claim of undue influence. Therefore, truth is not an absolute defense to a claim of undue influence, as it is to a claim for fraud or misrepresentation, although the truth of the statements may tend to negate the inference that they had the effect of unduly influencing the testator [*Hagen v. Hickenbottom (1995) 41 Cal. App. 4th 168, 180-183, 48 Cal. Rptr. 2d 197]* . The foregoing allegation may be inserted in the third ground of Paragraph 5 of § 444.90. It should be designated an allegation of undue influence rather than a combined allegation of fraud and undue influence. A separate ground of fraud may be stated, using many of the same statements.

This bulk of this allegation consists of a description of the basic facts giving rise to the claim of undue influence. The facts here are illustrative only and any such description obviously must be tailored to the specific facts of each individual situation. However, this example demonstrates how the underlying facts may be stated in support of the undue influence claim.

[3] Cross References

For related forms, *see §§ 444.90* and *444.91*.

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38-444 California Forms of Pleading and Practice--Annotated § 444.94

§ 444.94 Proceedings to Contest Will Before Probate--Allegation of Undue Influence [Prob. Code § 6104]--Terminal Illness

[1] FORM Proceedings to Contest Will Before Probate--Allegation of Undue Influence [Prob. Code § 6104]--Terminal Illness

The purported will described above was made as a direct result of undue influence exercised by _____ [*name of person exercising undue influence*] over decedent. This undue influence consisted of the following: _____ [*specify, e.g.:*]

Approximately six months before her death, decedent incurred terminal cancer of the cervical spine with cord involvement; thereafter on or about _____ [*date*], decedent became paralyzed, bedridden, and helpless, and remained in such condition from that day to the day of her death.

On or about _____ [*date*], while decedent was so paralyzed, bedridden, and helpless, _____ [*name of person exercising undue influence*], one of her brothers, assumed complete charge and control of decedent and of her property, business affairs, and household. A confidential relationship was thereby created between _____ [*name of person exercising undue influence*] and decedent, and she reposed trust and confidence in him.

As a result of her illness, decedent was so sick in mind and body that she was easily influenced and controlled by _____ [*name of person exercising undue influence*], and he did control and influence her mind and actions to such an extent that decedent did whatever he suggested or instructed her to do. _____ [*Name of person exercising undue influence*] isolated decedent from her friends and relatives for the purpose of holding and keeping decedent subject only to his own influence, direction, and control.

On or about _____ [*date*], _____ [*name of person exercising undue influence*] instructed and caused _____ [*name*], his attorney, to prepare the document to be xecuted by decedent as her last will, which would leave all of her estate to _____ [*name of person exercising undue influence*]. On the following day, _____ [*name of person exercising undue influence*] caused his

attorney to take and present the purported will to decedent for execution. _____ [*Name of person exercising undue influence*] was then present and in the same room with decedent and remained in the room until she had executed the document. _____ [*Name of person exercising undue influence*] took advantage of the trust and confidence so reposed in him by decedent and of his influence over her and, subverting her will to his, caused decedent to execute the document.

At the time of the execution of the document, decedent was not following the dictates of her own will, which would naturally have led her to devise and bequeath her estate to her children, including contestant, but was acting under the control, direction, and influence of _____ [*name of person exercising undue influence*]. Decedent's execution of the document was not her free and voluntary act, but was procured by the undue influence of _____ [*name*].

[2] Use of Form

This allegation is for use in written grounds of opposition to the probate of a purported will to allege specifically that undue influence on the decedent was based on the decedent's terminal illness. The foregoing allegation may be inserted in the third ground of Paragraph 5 of § 444.90.

This bulk of this allegation consists of a description of the basic facts giving rise to the claim of undue influence. The facts here are illustrative only and any such description obviously must be tailored to the specific facts of each individual situation. However, this example demonstrates how the underlying facts may be stated in support of the undue influence claim.

[3] Cross References

For related forms, *see §§ 444.90*, *444.91*, and *444.93*.

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38-444 California Forms of Pleading and Practice--Annotated § 444.95

§ 444.95 Proceedings to Contest Will Before Probate--Allegation of Fraud [Prob. Code § 6104]--Misrepresentations About Contestant's Character

[1] FORM Proceedings to Contest Will Before Probate--Allegation of Fraud [Prob. Code § 6104]--Misrepresentations About Contestant's Character

The purported will described above was procured to be made and to be signed by decedent by reason of the fraud of _____ [*name of person perpetrating fraud*]. The fraud consisted of the following: _____ [*specify, e.g.:*]

On or about _____ [*date*], and before the making and signing of the document, _____ [*name*], a daughter of decedent and a sister of contestant, instituted a proceeding in the Superior Court for the County of _____, California, to have a conservator appointed for decedent on the alleged ground that decedent was incompetent to manage and take care of her property. Decedent expressed to contestant her strong resentment over the bringing of the conservatorship proceeding and asked the assistance of contestant in opposing the conservatorship, which contestant undertook to give.

During the pendency of the conservatorship and on or about _____ [*date*], also before the making and signing of the purported will, _____ [*name of person perpetrating fraud*], a daughter of decedent by a second marriage and a half-sister of contestant, falsely and fraudulently represented to decedent that contestant was the real instigator of the conservatorship proceeding and responsible for the whole affair, that contestant only cared for decedent for what she could get out of her, that contestant was after her property, and that contestant was immoral and indecent.

At the time of making these representations to and including the making of the purported will and the subsequent death of decedent, _____ [*name of person perpetrating fraud*] lived with decedent and reiterated these representations about contestant to her frequently during that period.

All the foregoing representations made by _____ [*name of person perpetrating fraud*] about contestant were false, and she knew them to be false when she made them. She made those representations with the intent and for

the purpose of deceiving, prejudicing, and inducing decedent to change her will dated _____ [*date*], whereby she left a proportionate share of her estate to contestant, and to make and sign the purported will disinheriting contestant and leaving the bulk of her estate to _____ [*name of person perpetrating fraud*].

At all times when the representations were made and reiterated, decedent was ignorant of the falsity of those representations and believed and relied on them, and was thereby induced to make and sign the purported will. Had decedent known the true facts, she would not have made and signed that document.

[2] Use of Form

This allegation is for use in written grounds of opposition to the probate of a will to allege specifically that fraud perpetrated on the decedent was based on misrepresentations about the contestant's character [*see Hagen v. Hickenbottom (1995) 41 Cal. App. 4th 168, 180-183, 48 Cal. Rptr. 2d 197* (contest by decedent's grandchildren on ground that decedent's cousin had unduly influenced decedent to leave almost none of her property to grandchildren by informing grandmother of grandchildren's drug use)]. This allegation may be inserted in the fourth ground of Paragraph 5 of § 444.90.

[3] Allegation of Decedent's Mental State

Weakness of the decedent's mind or mental pressure on the decedent is not essential to either pleading or proof of fraud [*Estate of Newhall (1923) 190 Cal. 709, 718, 214 P. 231]* , but both may exist in aid of the fraud and pleading their existence may have a strategic advantage.

[4] State Statutes

Fraud. *Civ. Code §§ 1571-1573*

Denial of probate of will procured to be made by fraud. *Prob. Code § 6104*

[5] Decisions

Fraud distinguished from undue influence. *Estate of Newhall (1923) 190 Cal. 709, 711-723, 214 P. 231*

[6] Cross References

For a related form, *see § 444.90*.

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38-444 California Forms of Pleading and Practice--Annotated § 444.96

§ 444.96 Proceedings to Contest Will Before Probate--Allegation of Fraud [Prob. Code § 6104]--Misrepresentations That Contestant Would Waste Inheritance

[1] FORM Proceedings to Contest Will Before Probate--Allegation of Fraud [Prob. Code § 6104]--Misrepresentations That Contestant Would Waste Inheritance

The purported will described above was procured to be made and to be signed by decedent by reason of the fraud of _____ [*name of person perpetrating fraud*]. The fraud consisted of the following: _____ [*specify, e.g.:*]

During the month of _____ [*date*], and immediately preceding the making and signing of the document, decedent visited _____ [*name of person perpetrating fraud*], his brother, in _____ [*location, including state*], and during this visit, decedent became severely ill and was hospitalized for a condition from which he died shortly thereafter.

During that illness and hospitalization, and before the making and signing of the document, _____ [*name of person perpetrating fraud*] visited decedent frequently in the hospital and, during those visits, falsely and fraudulently represented to him that contestant was wrongfully attempting to deprive decedent of all of his property and to convert it to contestant's use, that contestant did not care for decedent and was trying to hasten his death, that contestant was not deserving of any inheritance whatsoever and would squander and dissipate any inheritance left him, and that he, _____ [*name of person perpetrating fraud*], would help decedent in his business affairs and make life easier for him.

All of the foregoing representations made by _____ [*name of person perpetrating fraud*] were false, and when made, he knew them to be false. He made those representations with the intent and for the purpose of deceiving, prejudicing, and inducing decedent to change his will dated _____ [*date*], under which he left the major part of his estate to contestant, who as his son was the natural object of his bounty, and to sign the document disinheriting contestant and making _____ [*name of person perpetrating fraud*] the principal beneficiary.

At the time these representations were made, decedent was over 69 years of age, and by reason of his age, illness, and physical condition, his mental faculties were so impaired that he was unable to resist _____ [*name of person perpetrating fraud*]'s importunities and to recognize the falsity of those representations, and he believed and relied on the representations and was thereby induced to sign the document that _____ [*name of person perpetrating fraud*] procured to be made. Had decedent known the true facts, he would not have signed the document.

[2] Use of Form

This form is an allegation for use in written grounds of opposition to the probate of a purported will to allege specifically that fraud perpetrated on the decedent was based on the misrepresentations that the contestant would waste the inheritance [*see Estate of Gecht (1958) 165 Cal. App. 2d 431, 331 P.2d 1019* (decided against the contestant on grounds of failure of proof)]. This allegation may be inserted in the fourth ground of Paragraph 5 of § 444.90.

[3] Cross References

For related forms, *see §§ 444.90* and *444.95*.

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38-444 California Forms of Pleading and Practice--Annotated § 444.97

§ 444.97 Proceedings to Contest Will Before Probate--Allegation of Revocation [Prob. Code § 6120(b)]--Cancellation by Lining Out Signatures

[1] FORM Proceedings to Contest Will Before Probate--Allegation of Revocation [Prob. Code § 6120(b)]--Cancellation by Lining Out Signatures

The purported will described above was revoked by the decedent by cancellation, in that he/she drew a line through each of his/her signatures appearing on the margin of each page, and through his/her signature written as his/her subscription at the end of the document, all with the intent and for the purpose of revoking it.

[2] Use of Form

This form is an allegation for use in written grounds of opposition to the probate of a purported will to allege specifically that the decedent revoked the purported will by lining out all signatures [*see Estate of Olmsted (1898) 122 Cal. 224, 54 P. 745]* . The foregoing allegation may be inserted in the fifth ground of Paragraph 5 of § 444.90.

[3] State Statutes

Revocation of will by cancellation. *Prob. Code § 6120(b)*

[4] Decisions

Lining out of signatures is most significant act and constituties cancellation; lining out of provisions as evidence of intent of testator. *Estate of Olmsted (1898) 122 Cal. 224, 230, 54 P. 745*

Written will is subject to revocation only by subsequent instrument or by destruction or mutilation. *Estate of O'Brien (1966) 246 Cal. App. 2d 788, 795, 55 Cal. Rptr. 343* (interpreting former *Prob. Code § 74*)

[5] Cross References

For a related form, *see § 444.90*.

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38-444 California Forms of Pleading and Practice--Annotated § 444.98

§ 444.98 Proceedings to Contest Will Before Probate--Allegation of Revocation [Prob. Code § 6120(b)]--By Mutilation

[1] FORM Proceedings to Contest Will Before Probate--Allegation of Revocation [Prob. Code § 6120(b)]--By Mutilation

The purported will described above was revoked by the decedent in that he/she mutilated a duplicate original of the document with the intent and for the purpose of revoking it.

[2] Use of Form

This form is an allegation for use in written grounds of opposition to the probate of a purported will to allege specifically that the decedent revoked the purported will by mutilating it [*see Estate of Hewitt (1923) 63 Cal. App. 440, 218 P. 778]* . This allegation may be inserted in the fifth ground of Paragraph 5 of § 444.90.

[3] Evidence

When a will is found immediately on the death of the testator, among his or her private papers, or in his or her depository, and in a mutilated condition, having been continuously in the testator's posses sion until his or her death, the inference is that it was mutilated by the testator with intent to revoke it [*Estate of Hewitt (1923) 63 Cal. App. 440, 447, 218 P. 778]* . However, when the will is not shown to have been continuously in the possession of the testator, this presumption is not applicable [*Estate of Holmes (1948) 88 Cal. App. 2d 360, 364, 198 P.2d 708]* .

[4] State Statutes

Revocation of will by tearing up. *Prob. Code § 6120(b)*

[5] Cross References

For a related form, *see § 444.97*.

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38-444 California Forms of Pleading and Practice--Annotated § 444.99

§ 444.99 Proceedings to Contest Will Before Probate--Allegation That Revocation Is Presumed [Prob. Code § 6124]--Will Last in Decedent's Possession Not Found

[1] FORM Proceedings to Contest Will Before Probate--Allegation That Revocation Is Presumed [Prob. Code § 6124]--Will Last in Decedent's Possession Not Found

The purported will described above is presumed to have been revoked because the will was last in the testator's possession, the testator was competent until death, and neither the will nor a duplicate original of the will could be found after the testator's death.

[2] Use of Form

This form is an allegation for use in written grounds of opposition to the probate of a purported will to assert a presumption that the testator destroyed a will with the intent to revoke it [*see Prob. Code § 6124*]. The foregoing allegation may be inserted in the fifth ground of Paragraph 5 of § 444.90.

[3] Presumption Affects Burden of Producing Evidence

The presumption that a testator's will that was last in the testator's possession was revoked if not found is a presumption affecting the burden of producing evidence [*Prob. Code § 6124*].

[4] State Statutes

Presumption that will was destroyed with intent to revoke. *Prob. Code § 6124*

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38-444 California Forms of Pleading and Practice--Annotated § 444.100

§ 444.100 Proceedings to Contest Will Before Probate--Contest of Purported Holographic Will [Prob. Code § 6111]--Opposition by Executor of Will Previously Admitted to Probate

[1] FORM Proceedings to Contest Will Before Probate--Contest of Purported Holographic Will [Prob. Code § 6111]--Opposition by Executor of Will Previously Admitted to Probate

[*Caption. See § 444.90.*]

Contestant, _____ [*name of contestant*], alleges:

1. On or about _____ [*date*], _____ [*name*], hereinafter called the decedent, died in the County of _____, State of _____.

2. At the time of death, the decedent was a resident of the County of _____, State of _____, and left property in the County of _____, California.

3. The decedent left a will dated _____ [*date*], which is the last will of the decedent, and which names contestant as executor thereof. Heretofore, on _____ [*date*], that will was duly admitted to probate herein, and contestant qualified for issuance of letters testamentary and letters, which were duly issued to contestant.

4. Subsequently, on _____ [*date*], petitioner and respondent _____ [*name of proponent of holographic will*] filed a petition for probate of a holographic document dated _____, purporting to be a recently discovered last will of the decedent, and for revocation of the prior letters testamentary issued to contestant as executor.

5. Probate of the purported holographic will of the decedent should be denied on the following grounds:

[*LIST, in as many subparagraphs as necessary, all grounds present under the facts of the case, for example:*]

a. First Ground: The signature and material provisions of the purported holographic will are not in the testator's handwriting.

b. Second Ground: The purported holographic will does not contain a statement as to the date of its execution, and the omission results in doubt as to whether its provisions or the inconsistent provisions of decedent's will dated _____are controlling. The time of execution of the purported holographic will cannot be established.

c. Third Ground: The purported holographic will does not contain a statement as to the date of its execution, and the testator lacked testamentary capacity _____ [*indicate time period when testator lacked capacity, e.g.,* in November and December, 1987], during which period the purported holographic will may have been executed.

[*CONTINUE*]

6. The names, ages, and residences of the heirs, devisees, and legatees of the decedent so far as known to contestant, are:

[*LIST in as many subparagraphs as necessary, for example:*]

a. _____ [*Name*] of _____ [*address*], aged _____ [*age*], _____ [*relationship, e.g.,* grandchild of the decedent].

b. _____ [*Name*] of _____ [*address*], aged _____ [*age*], _____ [*relationship, e.g.,* sister of the decedent].

c. _____ [*Name*] of _____ [*address*], age unknown, _____ [*relationship, e.g.,* legatee of the decedent and stranger].

WHEREFORE, contestant prays that the purported holographic will be denied probate, and for other and further relief as proper.

_____ [*signature*]

Contestant

_____ [*signature*]

Attorney for Contestant

[*Verification. See § 444.90.*]

CAUTION:
The objection must be verified [*Prob. Code § 1021(a)(2)*].

[2] Use of Form

This form is a contest for use by an executor of a will that has been admitted to probate to set forth written grounds of opposition to a petition to probate a holographic will that is subsequently offered for probate. The ground of opposition is that the subsequently discovered holographic will is invalid [*see Prob. Code § 1043(a)* (written opposition to probate); *see also Prob. Code § 6111* (validity of holographic will); *Estate of Costa (1961) 191 Cal. App. 2d 515, 517-518, 12 Cal. Rptr. 920* (standing of executor)].

[3] State Statutes

Compensation for successful defense by executor. Prob. Code §§ 902 (applicable if administration is commenced before July 1, 1991), 10801 (applicable if administration is commenced after July 1, 1991)

Holographic will; form; execution. *Prob. Code § 6111* (if decedent died on or after January 1, 1985)

[4] Decisions

Testator's signature need not be located at end of holographic will, but may appear in another part of will, as long as testator wrote his or her name there with intention of authenticating or executing instrument as his or her will. *Estate of Black (1982) 30 Cal. 3d 880, 888, 181 Cal. Rptr. 222, 641 P.2d 754* (fact that testatrix wrote her name on each page of holographic will was deemed a sufficient signature)

Photocopies of testator's handwritten dispositions, if properly authenticated, satisfy statutory requirement that material provisions of holographic will be in testator's handwriting. *Estate of Brenner (1999) 76 Cal. App. 4th 1298, 1301-1302, 91 Cal. Rptr. 2d 149*

Whether document should be admitted to probate as holographic will depends on proof of its authorship and authenticity, and on whether words used establish that testator intended it to be his or her last will and testament at time he or she wrote it. *Estate of Southworth (1996) 51 Cal. App. 4th 564, 571, 59 Cal. Rptr. 2d 272*

Although no particular words are necessary to establish holographic will, it must be executed with testamentary intent. *Estate of Wong (1995) 40 Cal. App. 4th 1198, 1204-1205, 47 Cal. Rptr. 2d 707*

Fact that holographic will was signed at beginning, rather than end, does not defeat will's validity when instrument otherwise demonstrated that testator intended to authenticate it as a will. *Estate of MacLeod (1988) 206 Cal. App. 3d 1235, 1243, 254 Cal. Rptr. 156*

Undated holographic will is not invalid under former *Prob. Code § 53*, even though when will was drafted, former *Prob. Code § 53* required all holographic wills to be dated; subsequent version of former *Prob. Code § 53*, in effect at time of testator's death, and not requiring date, applies to testator's will. *Estate of MacLeod (1988) 206 Cal. App. 3d 1235, 1244-1245, 254 Cal. Rptr. 156*

[5] Cross References

For a related form, *see § 444.90*.

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38-444 California Forms of Pleading and Practice--Annotated § 444.101

§ 444.101 Summons and Proof of Service for Will Contest [Prob. Code §§ 8250, 8271]--Judicial Council Form DE-125

[1] FORM Summons and Proof of Service for Will Contest [Prob. Code §§ 8250, 8271]--Judicial Council Form DE-125

Click here to view image.

[2] Source of Form

This form is an illustration of Judicial Council Form DE-125, Summons (Probate). Use of this form, which includes proof of service, is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Use of Form

This mandatory form of summons and proof of service is for use by the person contesting the purported will to notify all persons interested in the purported will to appear and plead to the contest [*see Prob. Code § 8250(a)*; *see also Prob. Code § 8271(a)* (use of summons in connection with petition for revocation of probate)].

[4] Contents of Form

The form includes a direction that the persons summoned file with the court a written pleading in response to the contest within 30 days after service of the summons [*see Prob. Code § 8250(a)*; *see also Prob. Code § 8271(a)* (similar requirement for summons served in connection with petition for revocation)].

[5] Service of Summons

The summons must be issued and directed to all persons required to be served with notice of hearing of a petition for

administration of the decedent's estate [*Prob. Code § 8250(a)*; *see Prob. Code § 8110* (listing persons required to be served with notice of hearing of petition for administration); *see also Prob. Code § 8271(a)* (in contest after probate, summons is directed to personal representative and to heirs and devisees of decedent, so far as known to petitioner)].

The summons is served on the person summoned in the same manner as provided in *Code Civ. Proc. §§ 413.10-417.40* [*see Prob. Code § 8250(1)*]. It must be served with a copy of the objection [*Prob. Code § 8250(a)*]. For detailed coverage of the law governing service of summons, see Ch. 518, *Service of Summons and Papers* .

[6] State Statutes

Summons on contest before probate. *Prob. Code § 8250(a)*

Summons on contest after probate. *Prob. Code § 8271(a), (b)*

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§ 444.102 Proceedings to Contest Will Before Probate--Demurrer to Contest and Grounds of Opposition to Probate of Purported Will [Code Civ. Proc. § 430.10; Prob. Code § 8251]

[1] FORM Proceedings to Contest Will Before Probate--Demurrer to Contest and Grounds of Opposition to Probate of Purported Will [Code Civ. Proc. § 430.10; Prob. Code § 8251]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Estate of _____ [*name*],	)	
Deceased.	)	
_____ [*name*],	)	NO. _____
Contestant,	)	DEMURRER TO CONTEST AND GROUNDS OF
vs.	)	OPPOSITION TO PROBATE
_____ [*name*],	)	
Petitioner and Respondent.	)	
	)	
	)	

_____ [*Name of party petitioning for probate of will*], petitioner and respondent, demurs to the Contest and Grounds of Opposition to Probate of Purported Will on the following grounds:

[*SET FORTH grounds of demurrer, for example:*]

1. The contestant does not have legal capacity to contest the probate of the will in that contestant does not allege, nor does it appear that contestant has, any interest in the estate of the decedent that may be impaired or defeated by admission of the will to probate.

2. The Contest and Grounds of Opposition to Probate of Purported Will does not state facts sufficient to constitute a ground of opposition to probate of the will.

3. The _____ [*specify ordinal number, e.g.,* third] ground of opposition to probate of the will is uncertain in that it states a mere conclusion of the pleader as to the existence and exercise of undue influence in allegedly procuring the execution of the will and it is not alleged, nor can it be ascertained therefrom, what, if any, facts constituted undue influence or how or in what manner any undue influence was exercised on the decedent so as to cause the will to be executed.

4. [*Specify additional grounds if necessary*.]
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner and Respondent
_____ [*name*]

CAUTION:
The California Rules of Court governing civil law and motion do not apply to probate proceedings, except for discovery matters [*see Cal. Rules of Ct., Rules 3.1100, 3.1103*]. *Cal. Rules of Ct., Rule 3.1103* states that the rules do apply to demurrers, unless the context or subject matter otherwise require [*see Cal. Rules of Ct., Rule 3.1113* for format regarding memoranda of points and authorities].

[2] Use of Form

This form is a demurrer for use by a person who has petitioned for the administration of an estate and probate of a will or an interested person to demur to a will contest before probate. The basis of the demurrer is that the written grounds of opposition to the petition fail to state facts sufficient to contest the purported will [*see Code Civ. Proc. § 430.10(e)* (demurrer on ground of failure to state cause of action); *Prob. Code § 8251(a), (b)* (demurrer available in will contest); *see also Estate of Ramey (1923) 62 Cal. App. 413, 431-432, 217 P. 135]* .

[3] Procedure After Ruling on Demurrer

If a demurrer is sustained, the court may allow the contestant a reasonable time, not exceeding 15 days, within which to amend the objection. If the demurrer is overruled, the petitioner and other interested persons may, within 15 days thereafter, answer the objection [*Prob. Code § 8251(b)*].

When a demurrer to any pleading is sustained or overruled, and time to amend or answer is given, the time so given runs from the service of notice of the decision or order, unless the notice is waived in open court, and the waiver entered in the minutes or docket. When an order sustaining a demurrer without leave to amend is reversed or otherwise remanded by a reviewing court, any amended complaint must be filed within 30 days after the notice of the issuance of the remittitur is mailed [*Code Civ. Proc. § 472b*; *see Prob. Code § 1000* (application of general civil practice rules to probate proceedings)]. For a form for an answer, see *§ 444.104*.

[4] Cross References

For discussion and forms relating to demurrers generally, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

[5] California Points and Authorities

For memoranda relating to demurrers generally, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*

For a memorandum in support of demurrer to contest, see California Points and Authorities, Ch. 186, *Probate of Wills*

[6] State Statutes

Grounds of demurrer. *Code Civ. Proc. § 430.10*

Filing of answer after ruling on demurrer. *Code Civ. Proc. § 472b*; *Prob. Code § 8251(b)*

Demurrer to written grounds of opposition to probate. *Prob. Code § 8251(a), (b)*

[7] Decisions

Necessity of pleading facts relied on to constitute undue influence. *Estate of Sheppard (1906) 149 Cal. 219, 220-221, 85 P. 312*

Truth of allegation in petition contesting will that decedent lacked testamentary intent is not admitted by general demurrer when allegation consisted of mere conclusion of law and failed to apprise adversary of factual basis of claim. *Estate of Archer (1987) 193 Cal. App. 3d 238, 245, 239 Cal. Rptr. 137*

Demurrer for failure to plead facts sufficient to state grounds of contest. *In re Estate of Ramey (1923) 62 Cal. App. 413, 425, 217 P. 135*

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Volume 38: Probate: Is Probate Necessary? thru Probate: Estate Tax-Chs. 440-453
Chapter 444 PROBATE: WILL CONTESTS
PART V. FORMS

38-444 California Forms of Pleading and Practice--Annotated § 444.103

§ 444.103 Proceedings to Contest Will Before Probate--Notice of Hearing on Demurrer [Cal. Rules of Ct., Rule 3.1320]

[1] FORM Proceedings to Contest Will Before Probate--Notice of Hearing on Demurrer [Cal. Rules of Ct., Rule 3.1320]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
Estate of _____ [*name*],	)	NO. _____
Deceased.	)	NOTICE OF HEARING ON DEMURRER OF
_____ [*name*],	)	_____ [*name*] TO WILL CONTEST
Contestant,	)	AND GROUNDS OF OPPOSITION TO PROBATE
vs.	)	
_____ [*name*],	)	Date: _____
Petitioner and Respondent.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

To _____ [*name of contestant*], the above-named contestant, and to _____ [*name*], his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that the demurrer to the Contest and Grounds of Opposition to Probate of Purported Will, a copy of which is served herewith, has been set for hearing on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in the courtroom of [_____ (Department *or* Division) _____ of] the above-entitled court, located [in the

_____ (*name of building*)] at _____ [*street address and city*], California.
Dated: _____.

_____ [*signature*]

Attorney for Petitioner and Respondent

CAUTION:

The California Rules of Court governing civil law and motion do not apply to probate proceedings, except for discovery matters [*see Cal. Rules of Ct., Rules 3.1100, 3.1103*]. *Cal. Rules of Ct., Rule 3.1103* states that the rules do apply to demurrers, unless the context or subject matter requires otherwise.

[2] Use of Form

This form is a notice for use to provide notice of a demurrer to a will contest and written opposition to the probate of a purported will before probate [*see Cal. Rules of Ct., Rule 3.1320*]. For discussion and forms regarding notice for demurrers and *Code Civ. Proc. § 1005(b)* (requirements for notice of motion), see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[3] Local Rules of Court

Department number and date of hearing must be placed immediately below case number on first page of document filed. Los Angeles Co. Super. Ct. Rules, Rules 10.10

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38-444 California Forms of Pleading and Practice--Annotated § 444.104

§ 444.104 Proceedings to Contest Will Before Probate--Answer to Contest and Grounds of Opposition to Probate of Purported Will [Prob. Code §§ 1000, 8251]

[1] FORM Proceedings to Contest Will Before Probate--Answer to Contest and Grounds of Opposition to Probate of Purported Will [Prob. Code §§ 1000, 8251]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Estate of _____ [*name*],	)	
Deceased.	)	
_____ [*name*],	)	NO. _____
Contestant,	)	ANSWER TO WRITTEN OPPOSITION TO PRO-
vs.	)	BATE OF PURPORTED WILL
_____ [*name*],	)	
Petitioner and Respondent.	)	
	)	
	)	

For answer to the Contest and Grounds of Opposition to Probate of Purported Will, _____ [*name of proponent of will*], petitioner and respondent, admits, denies, and alleges as follows:

1. Admits the allegations of Paragraph _____ [*specify, e.g.,* 3, except that petitioner and respondent denies the allegation "purporting to be" made in reference to the document and alleges that the document is the last will of the decedent].

2. Denies each and every allegation contained in Paragraph _____ [*specify*].

3. Admits the allegation of Paragraph _____ [*specify, e.g.,* 4] that contestant is a nephew of decedent,

but except as expressly so admitted, denies each and every allegation contained in Paragraph 4].

4. Admits the allegation contained in Paragraph _____ [*specify, e.g.,* 5, that _____ (*name*), petitioner and respondent, occupied the position of business manager to decedent and that she reposed trust and confidence in petitioner and respondent, but except as expressly so admitted, denies each and every allegation contained in Paragraph 5 and in each ground of opposition set forth therein].

5. Denies each and every allegation contained in Paragraph _____ [*specify*] and in each ground of opposition set forth therein.

6. Admits the allegations of Paragraph _____ [*specify, e.g.,* 7], except that petitioner and respondent denies the allegation "purported" made in reference to the will and alleges that the will is the last will of decedent.

[*Include the following, as appropriate*]

AS A [FIRST] SEPARATE AND AFFIRMATIVE DEFENSE, petitioner and respondent alleges:

The Contest and Grounds of Opposition to Probate of Purported Will does not state facts sufficient to constitute any ground of opposition to probate of the will.

AS A [SECOND] SEPARATE AND AFFIRMATIVE DEFENSE, petitioner and respondent alleges:

Contestant does not have the legal capacity to contest the probate of the will in that contestant does not allege, nor does contestant have, any interest in the devolution of the estate of decedent that may be impaired or defeated by admission of the will to probate.

AS A [THIRD] SEPARATE AND AFFIRMATIVE DEFENSE, petitioner and respondent alleges:

_____ [*Specify, e.g.,* Any and all wills allegedly executed by the decedent prior to the will dated _____ [*date*], offered for probate herein, and especially any will alleged to have been executed on or about _____ [*date*], were revoked by the decedent.]

AS A [FOURTH] SEPARATE AND AFFIRMATIVE DEFENSE, petitioner and respondent alleges:

[*Set forth any additional defenses.*]

WHEREFORE, petitioner and respondent prays that the Contest and Grounds of Opposition to Probate of Purported Will be dismissed, that the will of the Decedent dated _____ [*date*], be admitted to probate, for costs of suit, and for all other orders as proper.

_____ [*signature*]
Attorney for Petitioner and Respondent

VERIFICATION

I, _____ [*name*], am the petitioner and respondent in the above-entitled proceeding. I have read the

foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

CAUTION:
The answer apparently must be verified [***see*** *Code Civ. Proc. § 446*; *Prob. Code §§ 1000, 1021(a)(2)*].

[2] Use of Form

This form is an answer for use to respond to a will contest and written opposition to a petition for administration of an estate and probate of a purported will [*see Code Civ. Proc. § 431.30* (answer); *Prob. Code § 1000* (application of general civil practice rules to probate proceedings)]. For a form for a written opposition to probate on which the foregoing form of answer is based, see *§ 444.90*.

[3] Verification

The pleading that alleges grounds for the will contest is required to be verified [*see Prob. Code § 1021(a)(2)* (verification of objection); *Prob. Code § 8250(a)* (pleading alleging grounds for contest as "objection")]. Consequently, verification of the answer is probably also required, on the ground that, pursuant to civil procedure, an answer to a verified pleading must also be verified [*see Code Civ. Proc. § 446* (complaints and answers in civil actions); *Prob. Code § 1000* (application of general civil practice rules to probate proceedings)]. If the answer is verified, the denial of the allegations must be made positively or according to the information and belief of the respondent [*see Code Civ. Proc. § 431.30(d)* (answers to complaints)].

[4] State Statutes

Answer. *Code Civ. Proc. § 431.30*

[5] Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate, §§ 553-559*, 532, 577-579 (10th ed. 2005)

[6] Cross References

For a related form, *see § 444.90*.

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38-444 California Forms of Pleading and Practice--Annotated § 444.105

§ 444.105 Proceedings to Contest Will Before Probate--Notice of Motion [Code Civ. Proc. § 1010] for Summary Judgment [Prob. Code § 1000]--General Form

[1] FORM Proceedings to Contest Will Before Probate--Notice of Motion [Code Civ. Proc. § 1010] for Summary Judgment [Code Civ. Proc. § 437c; Prob. Code § 1000]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
Estate of _____ [*name*],	)	NO. _____
Deceased.	)	NOTICE OF MOTION FOR SUMMARY JUDG-
_____ [*name*],	)	MENT
Contestant,	)	
vs.	)	Date: _____
_____ [*names*],	)	Time: _____
Petitioner and Respondent.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

To _____ [*identify party, e.g.*, contestant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify moving party, e.g.*, petitioner and respondent _____ (*name*)] will move for an order that judgment be entered in favor of _____ [*identify moving party, e.g.*, petitioner and respondent

_____ (*name*)] and against _____ [*identify opposing party, e.g.,* contestant _____ (*name*)] as prayed in the [*specify pleading, e.g.,* contest and written opposition to probate of the will]. The motion will be made on the grounds that _____ [*specify, e.g.,* the proceeding has no merit, that there is no triable issue of material fact, and that petitioner and respondent is entitled to judgment as a matter of law].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s*)], [the affidavit(s) of _____ (*name(s*)),] [the admission(s) of _____ (*name(s*)),] [the deposition(s) of _____ (*name(s*)),] [the answers to interrogatories by _____ (*name(s*)),] [judicial notice, which is hereby requested, of (the attached) _____ (*specify matter(s) of which notice is to be taken*),] the attached statement of undisputed material facts, the attached memorandum of points and authorities, the recordsand file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*signature*]

Attorney for _____ [*moving party*]

CAUTION:

The California Rules of Court governing civil law and motion do not apply to probate proceedings, except for discovery matters [*see Cal. Rules of Ct., Rules 3.1100, 3.1103*]. Nevertheless, counsel should consult local probate departments to determine whether specific practices, such as the filing of memoranda of points and authorities, are required or preferred. The format for points and authorities in civil actions generally is set forth in *Cal. Rules of Ct., Rule 3.1113*. A motion for summary judgment is supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice must or may be taken. The supporting papers must include a separate statement setting forth all material facts contended to be undisputed [*Code Civ. Proc. § 437c(b)*; *see* Ch. 537, *Summary Judgment*].

[2] Use of Form

This form is a notice of motion for use by a party to move for summary judgment in a will contest before probate [*Code Civ. Proc. § 437c(a)* (summary judgment generally); *Prob. Code § 1000* (applicability of procedure for civil actions to probate proceedings)]. Notice of the motion and supporting papers must be served on all other parties to the proceeding at least 75 days before the date of the hearing [*Code Civ. Proc. § 437c(a)*].

If the moving party seeks an order imposing monetary sanctions on the grounds that any of the opposing party's affidavits are presented in bad faith or solely for purposes of delay, notice that the order is sought should be contained in the moving party's papers, and the form should be adapted accordingly [*see Code Civ. Proc. § 437c(j)*; *see also § 444.106*].

[3] Supporting Papers

The notice of motion must be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken. The supporting papers must include a separate statement setting forth plainly and concisely all material facts that the moving party contends are undisputed. Each of the material facts stated must be followed by a reference to the supporting evidence. The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denial of the motion [*Code Civ. Proc. § 437c(b)*]. For discussion and forms relating to summary judgments generally, see Ch. 537, *Summary Judgment* .

[4] California Points and Authorities

For memoranda relating to summary judgments generally, see California Points and Authorities, Ch. 221, *Summary Judgments*

[5] State Statutes

Motion for summary judgment. *Code Civ. Proc. § 437c*

[6] Decisions

Summary judgment procedure is available in will contest. *Estate of Kelly (1960) 178 Cal. App. 2d 24, 28-31, 2 Cal. Rptr. 634*

[7] Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate, §§ 365, 371, 372*, 379, *385*, 398-401, *409-411*, 415-420, *425-456*, 458-461, 587 (10th ed. 2005)

[8] Cross References

For a related form, *see § 444.103*.

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38-444 California Forms of Pleading and Practice--Annotated § 444.106

§ 444.106 Proceedings to Contest Will Before Probate--Order [Code Civ. Proc. § 1003] Granting or Denying Motion for Summary Judgment [Code Civ. Proc. § 437c]

[1] FORM Proceedings to Contest Will Before Probate--Order [Code Civ. Proc. § 1003] Granting or Denying Motion for Summary Judgment [Code Civ. Proc. § 437c]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
Estate of _____ [*name*],	)	NO. _____
Deceased.	)	ORDER _____
_____ [*name*],	)	[GRANTING *or* DENYING] MOTION FOR SUM-
Contestant,	)	MARY JUDGMENT
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Petitioner and Respondent.	)	Location: _____
	)	Judge: _____
	)	Data Action Filed: _____
	)	[Trial Date: _____]

_____

The motion of _____ [*identify moving party, e.g.*, petitioner and respondent] for an order for summary judgment came on regularly for hearing by the court on _____ [*date*]. Contestant appeared by counsel _____ [*name*]; petitioner and respondent _____ [*name*] appeared by counsel _____ [*name*].

The Court finds from proof made to the satisfaction of the Court:

1. Notice of the time and place of the hearing was given as required by law.

[*EITHER*]

2. A triable issue of material fact exists with respect to _____ [*specify all material facts presenting triable issues, e.g.,* the existence of a lost will of the decedent, purportedly executed on _____ (*date*)], as evidenced by _____ [*refer specifically to supporting and opposing evidence showing existence of the controversy, e.g.,* the declaration of _____ (*name*), page(s) _____ (*number or range of numbers*), which supports the existence of a lost will that, if proved, would supersede and revoke the purported will of decedent dated _____ (*date*); and the declaration of _____ (*name*), page(s) _____ (*number or range of numbers*), which refutes the existence of a lost will, and supports the perpetration of fraud by _____ (*name*)].

IT IS THEREFORE ORDERED that the motion of _____ [*name*] for an order granting summary judgment be denied.

[*OR*]

2. On consideration of all the evidence set forth in the papers submitted and the inferences reasonably deducible therefrom, the Court determines that there is no triable issue as to any material fact and that _____ [*name*] is entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED that the motion of _____ [*name*] for an order granting summary judgment be granted, and that judgment be entered accordingly for _____ [*name*] _____ [*specify relief sought, e.g.,* rejecting and denying probate of the document purported to be the will of decedent].

[*CONTINUE*]

[The Court further determines that the _____ (declaration(s) *or* affidavit(s)) of _____ (*name(s*)) presented by _____ (*identify moving party, e.g.,* petitioner and respondent) was/were presented _____ (in bad faith *or* solely for purpose of delay). Accordingly,

IT IS FURTHER ORDERED that _____(*name*) pay _____ (*identify opposing party, e.g.,* contestant), _____ (*name*), the sum of $_____ as the amount of reasonable expenses incurred as a result.]
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

This form is an order for use to grant or deny a motion for summary judgment in a will contest before probate [*see Code Civ. Proc. § 437c* (motion for summary judgment)].

[3] Contents of Probate Order

Orders and decrees made by the court or a judge thereof in probate proceedings need not recite the existence of facts, or the performance of acts, on which the jurisdiction of the court or judge may depend, but it is only necessary that they contain the matters ordered, except as otherwise provided in the Probate Code [*Prob. Code § 1047*; *see Prob. Code § 1260* (finding regarding notice)].

[4] Order Denying Motion for Summary Judgment

On denial of a motion for summary judgment on the ground that there is a triable issue regarding one or more material facts, the court must, by written or oral order, specify one or more material facts raised by the motion as to which the court has determined there exists a triable controversy. This determination must specifically refer to the evidence proffered in support of and in opposition to the motion that indicates that a triable controversy exists. The court must also state its reasons for any other determination. The court must record its determination by court reporter or written order [*Code Civ. Proc. § 437c(g)*].

[5] Order Granting Motion for Summary Judgment

On granting a motion for summary judgment on the ground that there is no triable issue of material fact, the court must, by written or oral order, specify the reasons for its determination. The order must specifically refer to the evidence proffered in support of and, if applicable, in opposition to the motion that indicates that no triable issue exists [*Code Civ. Proc. § 437c(g)*].

[6] Sanctions for Bad Faith Conduct or Delay

If the court determines at any time that any of the affidavits are presented in bad faith or solely for purposes of delay, the court must order the party presenting the affidavits to pay the other party the amount of the reasonable expenses that the filing of the affidavits caused the other party to incur. Sanctions can only be imposed under *Code Civ. Proc. § 437c(j)* on notice contained in a party's papers, or on the court's own noticed motion, and after an opportunity to be heard [*Code Civ. Proc. § 437c(j)*]. An optional determination and order granting sanctions are provided at the end of the form.

[7] State Statutes

Contents of orders. *Prob. Code § 1047*

Entry and filing of orders. *Prob. Code § 1048*

Finding regarding notice. *Prob. Code § 1260*

[8] Local Rules of Court

Material to be included in probate orders. Los Angeles Co. Super. Ct. Rules, Rule 10.42; San Francisco Uniform Local Ct. Rules, Rule 14.27

Orders required to be submitted to Probate Courtroom at least two weeks in advance of hearing date and required to state hearing date on face. San Francisco Uniform Local Ct. Rules, Rule 14.6

[9] Cross References

For related forms, *see §§ 444.90* and *444.105*.

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38-444 California Forms of Pleading and Practice--Annotated § 444.107

§ 444.107 Proceedings to Contest Will Before Probate--Statement of Decision [Code Civ. Proc. § 632; Prob. Code § 1000]--General Form

[1] FORM Proceedings to Contest Will Before Probate--Statement of Decision [Code Civ. Proc. § 632; Prob. Code § 1000]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Estate of _____ [*name*],	)	
Deceased.	)	
_____ [*name*],	)	NO. _____
Contestant,	)	STATEMENT OF DECISION
vs.	)	[*Code Civ. Proc. § 632*; *Prob. Code § 1000*]
_____ [*name*],	)	
Petitioner and Respondent.	)	
	)	
	)	

The above-entitled contest of probate of a purported will of _____ [*name*], decedent, came on regularly for trial commencing on _____ [*date*], before the court sitting without a jury. Contestant of the will _____ [*name*] appeared by counsel _____ [*name*]; petitioner and respondent _____ [*name*] [, named executor of the purported will,] appeared by counsel _____ [*name*].

Evidence, both oral and documentary, was introduced on behalf of all parties and the cause was argued and submitted for decision. The court, having considered the evidence and heard the arguments of counsel and being fully advised, makes the following statement of decision:

1. Notice of the time and place of the hearing was given as required by *Probate Code Section 8110*.

2. _____ [*Name*], decedent, died on _____ [*date*], and was then a resident of _____ County, California.

3. The decedent left estate in _____ County, California.

4. The decedent left a document dated _____ [*date*], which has been offered for probate as the last will of the decedent.

[*EITHER*]

5. At the time of the alleged execution of the document dated _____ [*date*], the decedent was not of sound and disposing mind in that _____ [*specify*].

[*OR*]

5. At the time the decedent executed the document dated _____ [*date*], he/she was over the age of 18 years and was of sound and disposing mind, and was in every respect competent, by last will, to dispose of all of his/her estate.

[*EITHER, if purported will is holographic*]

6. The document dated _____ [*date*], _____ [was *or* was not] executed by the decedent in the manner and form required by law for the execution of a holographic will in that _____ [*either, if will is valid,* the signature and material provisions are in the decedent's handwriting *or specify deficiency, e.g.,* it is not signed in the handwriting of the decedent].

[*OR, if purported will is witnessed and found valid*]

6. The document dated _____ [*date*], was executed by the decedent in the manner and form required by law for the execution of a witnessed will. It was signed at the end thereof by the decedent and attested by two subscribing witnesses. The decedent acknowledged the document to be his/her will in the presence of the witnesses, present at the same time, and those witnesses signed the document at the request of the decedent and in his/her presence and in the presence of each other.

[*OR, if purported will is witnessed and found invalid*]

6. The document dated _____ [*date*], was not executed by the decedent in the manner and form required by law for the execution of a witnessed will in that _____ [*specify deficiency, e.g.,* the two purported subscribing witnesses did not sign the document in the presence of decedent].

[*EITHER*]

7. The document dated _____ [*date*], was made as a direct result of undue influence exercised by _____ [*name of person exercising undue influence*] over the decedent. The undue influence consisted of the following facts: _____ [*specify*].

[*OR*]

7. The document dated _____ [*date*], was not obtained through the undue influence of _____ [*name of person exercising undue influence*] or of any other person.

[*EITHER*]

8. The document dated _____ [*date*], is not the valid will of the decedent. The decedent died intestate.

[*OR*]

8. The document dated _____ [*date*], is the last will of the decedent.

[*CONTINUE*]

9. _____ [*Specify conclusion, e.g.,* Contestant _____ (*name*) is entitled to judgment (against petitioner and respondent _____ (*name*) rejecting and denying probate of the document purported to be the will of the decedent *or* Petitioner and respondent is entitled to judgment against contestant _____(*name*) admitting the document to probate as the last will of the decedent].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is a statement of decision for use after trial by the court of a contest of probate of a will if a statement of decision was requested [*see Code Civ. Proc. § 632* (statement of decision); *Prob. Code § 1000* (application of general civil practice rules to probate proceedings)].

[3] Contest With Two Documents

Frequently, a will contest involves two documents, each of which is purported to be the valid last will of the decedent, or one of which is purported to be a codicil changing the will of the decedent. In that case, findings and conclusions as to both documents are combined in one statement of decision.

[4] Cross References

For discussion and forms relating to statement of decision generally, see Ch. 529, *Statement of Decision*

[5] State Statutes

Trial by court. *Code Civ. Proc. §§ 631-636*

Statement of decision. *Code Civ. Proc. § 632*

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38-444 California Forms of Pleading and Practice--Annotated § 444.108

§ 444.108 Proceedings to Contest Will Before Probate--Statement of Decision [Code Civ. Proc. § 632; Prob. Code § 1000]--Findings Regarding Lost or Destroyed Will

[1] FORM Proceedings to Contest Will Before Probate--Statement of Decision [Code Civ. Proc. § 632; Prob. Code § 1000]--Findings Regarding Lost or Destroyed Will

1. On or about _____ [*date*], the decedent undertook to execute a certain document that _____ [*name*], petitioner and respondent seeks to probate as a lost or destroyed will.

2. _____ [*Set forth facts regarding execution of will, e.g.,* _____ (*Name*), attorney at law, drafted and his/her secretary, _____ (*name*), typed an original and one carbon copy of the document, entitled "Will of _____(*name*)"].

3. _____ [*Set forth facts relating to manner in which content of lost or destroyed will has been proved, e.g.,* _____ (*Name*), petitioner and respondent, has offered the carbon copy of the document, _____ (*exhibit number*), as a true copy of a lost or destroyed will of the decedent)].

[*EITHER*]

4. The will was _____ [lost *or* destroyed], but is valid and unrevoked.

5. The provisions of the document _____ [were *or* were not] proved by a preponderance of the evidence.

[*OR*]

4. The decedent died intestate.

[*CONTINUE*]

6. _____ [*State conclusion, e.g.,* Contestant _____ [*name*] is entitled to judgment against _____ (*name*), petitioner and respondent, rejecting and denying probate of the document purported to be a lost or destroyed will of the decedent].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form consists of findings for use in a statement of decision after trial by the court of a will contest before probate if the document was purportedly lost or destroyed [*see Code Civ. Proc. § 632* (statement of decision); *Prob. Code § 1000* (application of general civil practice rules to probate proceedings)]. The paragraphs in the form may be substituted for Paragraphs 5-10 in *see § 444.107*, and renumbered accordingly.

[3] Proof by Preponderance of Evidence

The provisions of a lost or destroyed will are provable by a preponderance of the evidence and may be proved by a single witness [*see* 16 Cal. Law Revision Commn Reports 2489 (comment to former *Prob. Code § 350*)].

[4] Cross References

For a related form, *see § 444.107*.

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Chapter 444 PROBATE: WILL CONTESTS
PART V. FORMS

38-444 California Forms of Pleading and Practice--Annotated § 444.109

§ 444.109 Proceedings to Contest Will Before Probate--Judgment [Prob. Code § 8254]--Will Admitted to Probate

[1] FORM Proceedings to Contest Will Before Probate--Judgment [Prob. Code § 8254]--Will Admitted to Probate

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Estate of _____ [*name*],	)	
Deceased.	)	
_____ [*name*],	)	NO. _____
Contestant,	)	JUDGMENT
vs.	)	[*Prob. Code § 8254*]
_____ [*name*],	)	
Petitioner and Respondent.	)	
	)	
	)	

This proceeding to contest the probate of a certain document as the will of _____ [*name*] came on regularly for trial on _____ [*date*], in [_____ (Department *or* Division) _____ of] the above-entitled court, the Honorable _____ [*name*], Judge, presiding, sitting without a jury, Contestant _____ [*name*] appeared [in person and] by _____ [*name*], his/her attorney. Petitioner and Respondent _____ [*name*], named executor, appeared [in person and] by his/her attorney, _____ [*name*][; and _____ (*name*) appeared (in person and) by his/her attorney, _____ (*name*)]. Notice of the time and place of the hearing was given as required by *Probate Code Section 8110*.

Evidence, both oral and documentary, was introduced on behalf of all parties and the contest was argued and submitted for decision, and _____ [the court, (on request of _____ (contestant *or* petitioner and respondent),) having caused to be made and filed herein its written statement of decision *or* a statement of decision not

having been requested],

IT IS ORDERED AND ADJUDGED as follows:

1. The document filed herein, dated _____ [*date*], is admitted to probate as the last will of the decedent.

2. _____ [*Name of appointee*] is appointed _____ [executor of the will *or* administrator with the will annexed of the estate] of the decedent, and letters _____ [testamentary *or* of administration with the will annexed] issue to him/her on taking the oath required by law _____ [without bond, the will so providing *or* and giving bond in the sum of $_____ if executed by an authorized corporate surety or in twice that sum if executed by individual sureties].

3. Petitioner and respondents have and recover _____ [from contestant *or* out of the assets of the estate] their costs taxed at $_____.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is a judgment for use after trial of a will contest before probate to enter judgment against the contestant and allow probate of the will [*see Prob. Code § 8254* (court must render judgment after will contest)].

[3] Recovery of Costs

The court may order costs to be paid by any party or out of the estate assets, as justice may require [*Prob. Code § 1002*]. The court also has the discretion to make an allowance to the personal representative and his or her attorney for extraordinary services based on the successful defense of a will that is contested before it is admitted to probate [*see* Prob. Code §§ 902, 910 (applicable if administration commenced before July 1, 1991), 10801, 10811 (applicable if administration commenced after July 1, 1991)].

[4] Appeal

An appeal may be taken from an order or the refusal to make an order admitting a will to probate [*Prob. Code § 1303(b)*].

[5] Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, §§ 577-579 (10th ed. 2005)

[6] Cross References

For a related form, *see § 444.107*.

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PART V. FORMS

38-444 California Forms of Pleading and Practice--Annotated § 444.110

§ 444.110 Proceedings to Contest Will Before Probate--Judgment [Prob. Code § 8254]--Probate of Will Denied

[1] FORM Proceedings to Contest Will Before Probate--Judgment [Prob. Code § 8254]--Probate of Will Denied

[*Caption. See § 444.109.*]

This proceeding to contest the probate of a certain document as the will of _____ [*name*] came on regularly for trial on _____ [*date*], in [_____ (Department *or* Division) _____ of] the above-entitled court, the Honorable _____ [*name*], Judge, presiding, sitting without a jury. Contestant _____ [*name*] appeared [in person and] by _____ [*name*], his/her attorney. Petitioner and respondent _____ [*name*], named executor, appeared [in person and] by his/her attorney, _____ [*name*][; and respondent _____ (*name*) appeared (in person and) by his/her attorney, _____ (*name*)]. Notice of the time and place of the hearing was given as required by *Probate Code Section 8110*.

Evidence, both oral and documentary, was introduced on behalf of all parties and the contest was argued and submitted for decision, and _____ [the court, (on request of _____ (contestant *or* petitioner and respondent),) having caused to be made and filed herein its written statement of decision *or* a statement of decision not having been requested],

IT IS ORDERED AND ADJUDGED as follows:

1. The document dated _____ [*date*], purporting to be the last will of _____ [*name*], decedent, is rejected and denied probate.

2. Contestant _____ [*name*] have and recover _____ [from petitioner and respondent _____ (*name*) *or* out of the assets of the estate] his/her costs taxed at $_____.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is a judgment for use after trial by the court to deny probate of the purported will [*see Prob. Code § 8254* (court must render judgment after will contest)].

[3] Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, §§ 577-579 (10th ed. 12005

[4] Cross References

For a related form, *see § 444.107*.

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38-444 California Forms of Pleading and Practice--Annotated § 444.111

§ 444.111 Proceedings to Revoke Probate of Will--Petition for Revocation of Purported Will [Prob. Code §§ 6100, 6100.5, 6110, 6111]--General Form

[1] FORM Proceedings to Revoke Probate of Will--Petition for Revocation of Purported Will [Prob. Code §§ 6100, 6100.5, 6110, 6111]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Estate of _____ [*name*],	)	
Deceased.	)	
_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR REVOCATION OF PROBATE OF PURPORTED WILL
as _____ [*describe, e.g.*, Executor	)	
or Administrator With Will Annexed and as Devisee],	)	
and	)	
_____ [*names*],	)	
Respondents.	)	

Petitioner, _____ [*name*], alleges:

1. On or about _____ [*date*], _____ [*name*] [also known as _____ (*name*), and as _____ (*name*),] died in the County of _____, State of _____.

2. At the time of death, the decedent was a resident of the County of _____, State of _____, and left property in _____ County, California.

3. On _____ [*date*], the court made an order admitting to probate a document dated _____ [*date*], hereinafter referred to as the document, purporting to be the last will of the decedent, and appointing respondent _____ [*name and title, e.g.*, executor *or* administrator with the will annexed]. Respondent qualified and is now acting as such representative.

[*EITHER*]

4. The document was not contested before probate.

[*OR*]

4. The document was contested before probate in a proceeding in this court entitled Estate of _____ [*name*], decedent; _____ [*name*], Petitioner, vs. _____ [*name*], Respondent, No. _____. Petitioner was not a party to that contest. Petitioner _____ [did not have actual notice of that contest (in time to have joined therein) *or* was a _____ (minor *or* incompetent) for whom no _____ (guardian *or* conservator) had been appointed at the time the will was admitted to probate].

[*CONTINUE*]

5. Petitioner is a person interested in the devolution of the estate of the decedent in that _____ [*specify why petitioner would be benefited by revocation of probate of will*].

6. Probate of the document should be revoked on the following grounds:

[*LIST, in as many subparagraphs as necessary, all grounds present under the facts of the case, for example:*]

a. First Ground: At the time of the alleged execution of the document, the decedent was not of sound and disposing mind.

b. Second Ground: The document was not executed by the decedent in the manner and form required by law for the execution of a will.

c. Third Ground: The document was made as a direct result of undue influence exercised by _____ [*name*] over the deceased and is not, and never was, the will of the decedent. The undue influence consisted of the following: _____ [*specify facts*].

d. Fourth Ground: The document was procured to be made, and to be signed by the decedent, by reason of the fraud of _____ [*name*]. The fraud consisted of the following: _____ [*set forth facts*].

e. Fifth Ground: [*Set forth here and subsequently additional grounds as appropriate, such as duress or revocation of the will, specifying the facts constituting the ground in each case*].

7. The names, ages, and addresses of the heirs of the decedent, so far as known to petitioner, are:

[*LIST in as many subparagraphs as necessary, for example:*]

a. _____ [*Name*] of _____ [*address*], aged _____ [*age*], _____ [*relationship, e.g.,* grandchild of the decedent].

b. _____ [*Name*] of _____ [*address*], aged _____ [*age*], _____ [*relationship, e.g.,* sister of the decedent].

8. The names, ages, and addresses of the persons named as devisees in the purported will are:

[*LIST in as many subparagraphs as necessary, for example:*]

a. _____ [*Name*] of _____ [*address*], aged _____ [*age*], _____ [*relationship, e.g.,* devisee of the decedent and stranger].

b. _____ [*Name*] of _____ [*address*], age unknown, _____ [*relationship, e.g.,* devisee of the decedent and stranger].

WHEREFORE, contestant prays that the above-described purported will be denied probate, for costs of suit, and for such other orders as the court may deem proper.

_____ [*signature*]

Contestant

_____ [*signature*]

Attorney for Contestant

VERIFICATION

I, _____ [*name*], am the contestant in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

CAUTION:
The petition must be verified [***see*** *Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is a petition to revoke probate of a will. It is for use by an interested person to contest the probate or the validity of a will after it has been admitted to probate. The contestant may be any interested person, other than a person who was a party to a contest before probate or who had actual notice of the previous contest in time to have joined in it [*see Prob. Code § 8270*; *see also Prob. Code § 48* ("interested person" defined)].

[3] Allegations

There is no express requirement, in either the Probate Code or court decisions, that the petition allege facts regarding petitioner's standing. However, that allegation is recommended [*see Estate of Eskridge (1942) 51 Cal. App. 2d 634, 636, 125 P.2d 527* (petition for revocation of probate as required to allege every ultimate fact that must be proved in order to sustain a cause of action); *see also Byrne v. Harvey (1962) 211 Cal. App. 2d 92, 117, 27 Cal. Rptr. 110* (allegation essential to cause of action as required to be included even though negative in form, that is, stating a negative fact; relying on *Eskridge*)]. The absence of the allegation may subject the petition to a demurrer for failure to state a cause of action.

Pleading the petitioner's interest in devolution of the estate and right to bring the contest is a necessary allegation [*Estate of Land (1913) 166 Cal. 538, 540-541, 137 P. 246]* . The contestant should set forth facts showing an interest in the estate that may be benefited by revoking probate of the will in question [*Estate of Land (1913) 166 Cal. 538, 540-541, 137 P. 246* ; *see Prob. Code § 48*].

[4] Grounds Separately Stated

The various grounds of opposition to probate should be separately stated (Paragraph 6) [this form is adapted from that used in *Estate of Wolf (1959) 174 Cal. App. 2d 144, 344 P.2d 37]* .

The first two grounds set forth in Paragraph 6, unsoundness of mind and lack of due execution, are sufficiently alleged in the language of the statute, and are not subject to demurrer for uncertainty. On the other hand, when alleging undue influence, fraud, duress, a subsequent will, revocation or the like, the facts relied on must be pleaded [*Estate of Streeton (1920) 183 Cal. 284, 289, 191 P. 16]* . For forms of allegations setting forth particular examples of undue influence, fraud, and revocation, *see §§ 444.91 -444.99*.

[5] Joinder of All Parties

The personal representative and all heirs and devisees not contesting should be named as respondents. If the personal representative is also named as a devisee in the will, he or she should be sued in both capacities. Sometimes a petitioner is also named as a respondent [*see, e.g., Estate of Lauth (1960) 180 Cal. App. 2d 313, 316, 4 Cal. Rptr. 764]* .

[6] Summons Required

On the filing of the petition, a summons must be issued to the personal representative and to the heirs and devisees of the decedent, so far as known to the petitioner. The summons must be served with a copy of the petition and contain a direction that the persons summoned file with the court a written pleading in response to the petition within 30 days after service of the summons [*Prob. Code § 8271(a)*]. For an illustration of the Judicial Council approved form of summons, *see § 444.101*. For discussion of notice requirements in probate proceedings generally, see Ch. 44, *Probate: Statutory Notice Requirements* .

[7] Signing and Verification

A petition for revocation of probate must be signed by all of the petitioners [*see Prob. Code § 1020*)]. In addition, it must be verified by the petitioner, or if there are two or more parties joining in the petition, by any of them [*Prob. Code § 1021(b)(1)*]. Nevertheless, verification of a document constitutes signature of that document unless expressly provided

to the contrary [*Prob. Code § 1020*].

However, if a petitioner is absent from the county or for some other cause is unable to sign or verify the petition, the petitioner's attorney may either sign or verify the petition unless the petitioner is a fiduciary appointed in the proceeding [*see Prob. Code § 1023*].

[8] State Statutes

Verification generally. *Code Civ. Proc. § 446*; *Prob. Code §§ 1020-1023*

Costs. *Prob. Code § 1002*

Validity and execution of wills. *Prob. Code §§ 6100-6113*

Contest after probate; filing petition. *Prob. Code § 8270*

Summons. *Prob. Code § 8271*

[9] Decisions

Requisite interest of petitioner. *Estate of Plaut (1945) 27 Cal. 2d 424, 426, 164 P.2d 765* ; *Estate of Land (1913) 166 Cal. 538, 540-541, 137 P. 246*

Allegations as to particular grounds for revocation of probate. *Estate of Bixler (1924) 194 Cal. 585, 589-591, 229 P. 704* ; *Estate of Streeton (1920) 183 Cal. 284, 289, 191 P. 16*

In postprobate will contest alleging testator's lack of testamentary capacity, burden is on contestant to overcome presumption that testator was sane and competent at time of execution of will. *Estate of Mann (1986) 184 Cal. App. 3d 593, 602, 229 Cal. Rptr. 225*

Testamentary capacity; evidence. *Estate of Martin (1969) 270 Cal. App. 2d 506, 508-514, 75 Cal. Rptr. 911*

Petition to contest will after probate. *Estate of Rohde (1958) 158 Cal. App. 2d 19, 323 P.2d 490* ; *Camperi v. Chiechi (1955) 134 Cal. App. 2d 485, 286 P.2d 399*

[10] Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, §§ 579, 580 (10th ed. 2005)

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38-444 California Forms of Pleading and Practice--Annotated § 444.112

§ 444.112 Proceedings to Revoke Probate of Will--Demurrer to Petition to Contest Probate or Validity of Will

[1] FORM Proceedings to Revoke Probate of Will--Demurrer to Petition to Contest Probate or Validity of Will

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Estate of _____ [*name*],	)	
Deceased.	)	NO. _____
_____ [*name*],	)	DEMURRER TO CONTEST AND GROUNDS OF
Petitioner,	)	OPPOSITION TO PROBATE
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
as _____ [*describe, e.g.,* Executor	)	Location: _____
or Administrator With Will Annexed and as Devisee	)	Judge: _____
and Legatee], and	)	Date Action Filed: _____
_____ [*names*],	)	Trial Date: _____
Respondents.	)	

_____

Respondent _____ [*name and status, e.g.,* named executor] demurs to the Petition for Revocation of Probate of Purported Will on the following grounds:

[*LIST, in as many paragraphs as necessary, all grounds present under the facts of the case, for example:*]

1. The petitioner is barred from contesting probate of the will by the *Probate Code Section 8270* because the petitioner had actual notice of a previous contest before probate filed by _____ [*name*] in time to have joined therein, but failed and neglected to do so.

2. The petitioner does not have the legal capacity to contest the probate of the will because petitioner does not allege, nor does it appear that petitioner has, any interest in the devolution of the estate of the decedent that may be benefited by revoking probate of the will.

3. The petition does not state facts sufficient to constitute a ground for revocation of probate of the will.

4. The _____ [*ordinal number, e.g.,* third] ground of revocation of probate of the will is uncertain in that it states a mere conclusion of the pleader as to the existence and exercise of undue influence in allegedly procuring the execution of the will and it is not alleged, nor can it be ascertained therefrom, what, if any, facts constituted undue influence or how or in what manner any undue influence was exercised on the decedent so as to cause the will to be executed.

5. [*Set forth further grounds of demurrer as appropriate.*]

_____ [*signature*]

Attorney for Respondent

CAUTION:

The California Rules of Court governing civil law and motion do not apply to probate proceedings, except for discovery matters [*see Cal. Rules of Ct., Rules 3.1100, 3.1103*]. *Cal. Rules of Ct., Rule 3.1103* states that the rules do apply to demurrers, unless the context or subject matter require otherwise [*see Cal. Rules of Ct., Rule 3.1113* for format regarding memoranda].

[2] Use of Form

This form is a demurrer for use by a respondent in a will contest after probate, to plead that the petition for revocation of probate fails to state facts sufficient to support revocation [*see Code Civ. Proc. § 430.10(e)* (demurrer on ground of failure to state cause of action); *Prob. Code § 1000* (application of general civil practice rules to probate proceedings); *see also Estate of Robinson (1961) 192 Cal. App. 2d 847, 13 Cal. Rptr. 842]* . For a form for notice of hearing on demurrer to a will contest before probate, *see § 444.102*.

[3] Cross References

For related forms, *see §§ 444.102* and *444.111*.

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38-444 California Forms of Pleading and Practice--Annotated § 444.113

§ 444.113 Proceedings to Revoke Probate of Will--Answer to Petition to Contest Probate or Validity of Will [Prob. Code § 1000]

[1] FORM Proceedings to Revoke Probate of Will--Answer to Petition to Contest Probate or Validity of Will [Prob. Code § 1000]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Estate of _____ [*name*],	)	
Deceased.	)	NO. _____
_____ [*name*],	)	ANSWER TO PETITION TO REVOKE PROBATE
Petitioner,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
as _____ [*describe, e.g.*, Executor	)	Judge: _____
or Administrator With Will Annexed and as Devisee],	)	Date Action Filed: _____
and	)	Trial Date: _____
_____ [*names*],	)	
Respondents.	)	

For answer to the Petition to Revoke Probate of Purported Will, _____ [*name*], respondent, admits, denies, and alleges as follows:

[*SET FORTH admissions and denials as appropriate, e.g.:*]

1. Admits the allegations of Paragraph _____ [*number*], except that respondent denies the allegation "purporting to be" made in reference to the document and alleges that the document is the last will of the decedent.

2. Denies each and every allegation contained in Paragraph _____ [*number*].

3. Admits the allegation of Paragraph _____ [*number*] that _____ [*specify, e.g.,* petitioner is a nephew of decedent], but except as expressly so admitted denies each and every allegation contained in that Paragraph].

4. Admits the allegation in the _____ [*ordinal number, e.g.,* third] ground of opposition of the will set forth in Paragraph _____ [*number*], that _____ [*specify, e.g.,* _____ (*name*), respondent, occupied the position of business manager to decedent and that she reposed trust and confidence in respondent], but except as expressly so admitted, denies each and every allegation contained in that Paragraph and in each ground of opposition set forth therein.

5. Denies each and every allegation contained in Paragraph _____ [*number*] and in each ground of opposition set forth therein.

6. Admits the allegations of Paragraph _____ [*number*], except that _____ [*specify, e.g.,* respondent denies the allegation "purported" made in reference to the will and alleges that the will is the last will of decedent].

[*ALLEGE any affirmative defenses present on the facts of the case, e.g.:*]

AS A [FIRST] SEPARATE AND AFFIRMATIVE DEFENSE, respondent alleges:

The Petition to Revoke Probate does not state facts sufficient to constitute any ground for revocation of probate of the will.

AS A [SECOND] SEPARATE AND AFFIRMATIVE DEFENSE, respondent alleges:

Petitioner does not have the legal capacity to contest the probate of the will in that petitioner does not allege, nor does petitioner have, any interest in the devolution of the estate of Decedent that may be impaired or defeated by revocation of probate of the will.

AS A [THIRD] SEPARATE AND AFFIRMATIVE DEFENSE, respondent alleges:

_____ [*Set forth any additional affirmative defenses as appropriate.*]

[*CONTINUE*]

WHEREFORE, respondent prays that the Petition to Revoke Probate of the Will be dismissed, for costs of suit, and for all other orders as proper.

_____ [*signature*]

Attorney for Respondent

VERIFICATION

I, _____ [*name*], am the respondent in the above-entitled proceeding. I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

CAUTION:
This form must be verified [*see Prob. Code § 1021(a)(2)*].

[2] Use of Form

This answer is for use to respond to a petition to revoke probate of a will [*see Code Civ. Proc. § 431.30* (answer); *Prob. Code § 1000* (application of general civil practice rules to probate proceedings)].

[3] Verification

An answer to a petition for revocation is required to be verified [*see Prob. Code § 1021(a)(2)*]. It may be verified by the respondent, or if there are two or more parties joining in the response, by any of them [*see Prob. Code § 1021(b)(3)*]. Unless the respondent is a fiduciary appointed in the proceeding, the respondent's attorney may verify the answer if the respondent is absent from the county or otherwise unable to verify it [*Prob. Code § 1023*; *see Prob. Code § 39* (fiduciary defined)].

[4] State Statutes

Answer. *Code Civ. Proc. §§ 431.10, 431.30*

Form for verification. *Code Civ. Proc. § 446*

[5] Decisions

Requisite interest of contestant. *Estate of Lind (1989) 209 Cal. App. 3d 1424, 1430-1431, 257 Cal. Rptr. 853* ; *Estate of Powers (1979) 91 Cal. App. 3d 715, 719, 154 Cal. Rptr. 366*

[6] Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate, §§ 553-559*, 563, 577-579 (10th ed. 2005)

[7] Cross References

For a related form, *see § 444.111*.

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38-444 California Forms of Pleading and Practice--Annotated § 444.114

§ 444.114 Proceedings to Revoke Probate of Will--Notice of Motion [Code Civ. Proc. § 1010] for Summary Judgment [Prob. Code § 1000]--By Respondent

[1] FORM Proceedings to Revoke Probate of Will--Notice of Motion [Code Civ. Proc. § 1010] for Summary Judgment [Prob. Code § 1000]--By Respondent

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Estate of _____ [*name*],	)	
Deceased.	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION FOR SUMMARY JUDG-
Petitioner,	)	MENT
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
as _____ [*describe, e.g.,* Executor	)	Location: _____
or Administrator With Will Annexed and as Devisee],	)	Judge: _____
and	)	Date Action Filed: _____
_____ [*names*],	)	[Trial Date: _____]
Respondents.	)	

_____

To _____ [*name*], contestant, and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*date*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], respondent _____ [*name and status, e.g.,* named executor] will move for an order that judgment be entered in favor of respondent and against the contestant as prayed in the petition. The motion will be made on the grounds that the proceeding has no merit, there is no triable issue of material fact, and that respondent is entitled to judgment as a matter

of law.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*], [the affidavit(s) of _____ (*name(s)*),] [the admission(s) of _____ (*name(s)*),] [the deposition(s) of _____ (*name(s)*),] [the answers to interrogatories by _____ (*name(s)*),] [judicial notice, which is hereby requested, of (the attached) _____(*specify matter(s) of which notice is to be taken*),] the attached statement of undisputed material facts, the attached memorandum of points and authorities, the records and file herein, and such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*signature*]

Attorney for _____ [*moving party*]

[2] Use of Form

This notice of motion is for use by the respondent to a petition to revoke a will, to seek an order for summary judgment dismissing the petition [*Code Civ. Proc. § 437c(a)* (summary judgment generally); *Prob. Code § 1000* (application of general civil practice rules to probate proceedings)].

The motion and all supporting papers must be served at least 75 days before the hearing [*Code Civ. Proc. § 437c(a)*].

The California Rules of Court governing civil law and motion do not apply to probate proceedings, except for discovery matters [*see Cal. Rules of Ct., Rules 3.1100, 3.1103*]. Nevertheless, counsel should consult local probate departments to determine whether specific practices--for example, the filing of memoranda--are required or preferred. The format for points and authorities in civil actions generally is set forth in *Cal. Rules of Ct., Rule 3.1113*. A motion for summary judgment is supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice must or may be taken. The supporting papers must include a separate statement setting forth all material facts contended to be undisputed [*Code Civ. Proc. § 437c(b)*; *see* Ch. 537, *Summary Judgment*].

[3] Cross References

For related forms, *see §§ 444.105, 444.111*.

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Chapter 444 PROBATE: WILL CONTESTS
PART V. FORMS

38-444 California Forms of Pleading and Practice--Annotated § 444.115

§ 444.115 Proceedings to Revoke Probate of Will--Notice of Motion [Code Civ. Proc. § 1010] for Summary Judgment [Prob. Code § 1000]--Order [Prob. Code § 8272] Granting Motion

[1] FORM Proceedings to Revoke Probate of Will--Notice of Motion [Code Civ. Proc. § 1010] for Summary Judgment [Code Civ. Proc. § 437c; Prob. Code § 1000]--Order [Prob. Code § 8272] Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Estate of _____ [*name*],	)	
Deceased.	)	
_____ [*name*],	)	NO. _____
Petitioner,	)	ORDER GRANTING MOTION FOR SUMMARY JUDGMENT
vs.	)	
_____ [*name*],	)	Date: _____
as _____ [*describe, e.g.,* Executor	)	Time: _____
or Administrator With Will Annexed and as Devisee],	)	Location: _____
and	)	[Trial Date: _____]
_____ [*names*],	)	
Respondents.	)	

The motion of respondent _____ [*name*] for an order for summary judgment dismissing the petition to revoke probate of the will came on regularly for hearing by the court on _____ [*date*]. Petitioner appeared by counsel _____ [*name*]; respondent appeared by counsel _____ [*name*].

Notice of the time and place of the hearing was given as required by *Probate Code Section 8271*.

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED as follows:

1. The petition to revoke probate of the will is dismissed.

2. Petitioner, _____ [*name*], take nothing by his/her petition.

3. Respondent _____ [*name and status, e.g.,* as executor of and a devisee under the last will of the above named dece dent] have and recover his/her costs of suit from petitioner, taxed at the sum of $_____.
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

This form is an order for use to grant an order for summary judgment to dismiss a petition to revoke the probate of a will [*see Code Civ. Proc. § 437c* (summary judgment); *Prob. Code § 1000* (application of general civil practice rules to probate proceedings); *see also Prob. Code § 8272* (revocation of probate)].

[3] Costs

Unless it is otherwise provided by the Probate Code or by rules adopted by the Judicial Council, either the superior court or the court on appeal may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require [*Prob. Code § 1002*].

[4] State Statutes

Costs. *Prob. Code § 1002*

[5] Cross References

For a related form, *see § 444.111*.

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Chapter 444 PROBATE: WILL CONTESTS
PART V. FORMS

38-444 California Forms of Pleading and Practice--Annotated § 444.116

§ 444.116 Proceedings to Revoke Probate of Will--Judgment After Trial [Prob. Code § 8272]--Probate of Will Revoked

[1] FORM Proceedings to Revoke Probate of Will--Judgment After Trial [Prob. Code § 8272]--Probate of Will Revoked

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Estate of _____ [*name*],	)	
Deceased.	)	NO. _____
_____ [*name*],	)	JUDGMENT REVOKING PROBATE OF WILL
Petitioner,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
as _____ [*describe, e.g.,* Executor	)	Judge: _____
or Administrator With Will Annexed and as Devisee],	)	Date Action Filed: _____
and	)	Trial Date: _____
_____ [*names*],	)	
Respondents.	)	

This proceeding to revoke probate of a certain document heretofore admitted to probate as the last will of _____ [*name*], decedent, came on regularly for trial on _____ [*date*], in [_____ (Department *or* Division) _____ of] the above-entitled court, the Honorable _____ [*name*], Judge, presiding, sitting without a jury, a jury having been duly waived. Petitioner _____ [*name*] appeared [in person and] by _____ [*name*], his/her attorney. Respondent _____ [*name*] appeared [in person and] by his/her attorney, _____ [*name*]; and respondent _____ [*name*] appeared [in person and] by his/her attorney, _____ [*name*]. Notice of the time and place of the hearing was given as required by *Probate Code*

Section 8271.

Evidence, both oral and documentary, was introduced on behalf of all parties and the contest was argued and submitted for decision, and _____ [the court (, on request of _____ (contestant *or* respondent),) having caused to be made and filed herein its written statement of decision *or* a statement of decision not having been requested],

IT IS ORDERED AND ADJUDGED as follows:

1. The probate of the document dated _____ [*date*], admitted to probate as the last will of _____ [*name*], decedent, is revoked and the letters _____ [testamentary *or* of administration with the will annexed] issued thereon are annulled and revoked.

2. Petitioner _____ [*name*] have and recover _____ [from respondents _____ (*names*) *or* out of the assets of the estate] his/her costs taxed at $_____.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is a judgment for use after court trial, to revoke probate of the will [*see Prob. Code §§ 8254* (judgment on will contest), 8271(b) (applicability of will contest provisions to proceeding to revoke probate), 8272 (revocation of probate)].

[3] Revocation of Probate

If it appears on satisfactory proof that the will should be denied probate, the court must revoke the probate of the will [*Prob. Code § 8272(a)*]. Revocation of probate of a will terminates the powers of the personal representative [*Prob. Code § 8272(b)*]. The personal representative is not liable for any otherwise proper act done in good faith before the revocation, nor is any transaction void by reason of the revocation if entered into with a third person dealing in good faith and for value [*Prob. Code § 8272(b)*].

[4] Costs

Unless it is otherwise provided by the Probate Code or by rules adopted by the Judicial Council, either the superior court or the court on appeal may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require [*Prob. Code § 1002*].

[5] Appeal

An appeal may be taken from an order revoking or refusing to revoke the probate of a will [*Prob. Code § 1303(b)*].

[6] Cross References

For discussion and forms regarding appeal procedures generally, see Ch. 40, *Appeal: An Overview* , et seq.

For discussion and forms regarding the entry of judgments generally, see Ch. 318, *Judgments*

For discussion and forms regarding juries and procedures, regarding jury trials, see Ch. 322, *Juries and Jury Selection*

For discussion and forms regarding civil trial procedure generally, see Ch. 551, *Trial*

[7] State Statutes

Costs. *Prob. Code § 1002*

Appealability of order admitting or refusing to admit will to probate. *Prob. Code § 1303(b)*

Revocation of probate. *Prob. Code § 8272*

[8] Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, § 580 (10th ed. 2005)

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Chapter 445 PROBATE: INDEPENDENT ADMINISTRATION OF ESTATES

38-445 California Forms of Pleading and Practice--Annotated 445.syn

§ 445.syn Synopsis to Chapter 445: PROBATE: INDEPENDENT ADMINISTRATION OF ESTATES

§ 445.01 Scope of Chapter

§§ 445.02-445.09 [Reserved]

§ 445.10 Governing Law

§ 445.11 Nature of Independent Administration

§ 445.12 Independent Administration by Special Administrators

§ 445.13 Controlling Administration Through Will

§ 445.14 Initiating Independent Administration

[1] Petition

[2] Choice of Full or Limited Authority

[3] Notice

[4] Objections

[5] Determination by Court

§ 445.15 Amount of Personal Representative's Bond

§ 445.16 Method of Independent Administration

[1] Generally No Court Supervision

[2] Actions Requiring Court Supervision

[3] Optional Court Supervision

[4] Reporting Requirements for Actions Taken Without Court Approval

§ 445.17 Sales of Estate Property

§ 445.18 Powers of Personal Representative

[1] Generally

[2] Powers Exercisable Only After Giving Notice

[3] Powers Exercisable Without Notice in Some Circumstances

[a] Generally

[b] Managing and Controlling Estate Property

[c] Entering Contracts

[d] Investing Estate Money

[e] Continuing Operation of Decedent's Business

[f] Paying Family Allowance

[g] Leasing Real and Personal Property

[h] Selling or Exchanging Personal Property

[i] Granting or Extending Exclusive Right to Sell Property

[4] Powers Exercisable Without Notice

§ 445.19 Notice of Proposed Action

[1] Generally

[2] Consent and Waiver

[3] Mailing or Delivery of Notice

§ 445.20 Challenging Proposed Action

[1] By Written Objection

[2] By Application for Restraining Order

[3] Effect of Challenging Proposed Action

§ 445.21 Review of Action Taken

§ 445.22 Failure to Comply With Notice Procedure

§ 445.23 Objections to Continued Independent Administration

§ 445.24 Removal of Personal Representative From Office

§ 445.25 Preliminary Distribution

[1] Generally

[2] Amount

[3] Notice

[4] Determination of Court

§§ 445.26-445.39 [Reserved]

§ 445.40 State Statutes

[1] Definitions

[2] Governing Law

[3] Granting Independent Authority

[4] Revoking or Limiting Authority

[5] Independent Administration

§ 445.41 California Rules of Court

§ 445.42 Law Reviews

§§ 445.43-445.59 [Reserved]

§ 445.60 Petition [Prob. Code § 10450] for Authority to Administer Estate Without Court Supervision [Prob. Code § 10400 et seq.]

[1] FORM

[2] Use of Form

[3] Notice

[4] Full or Limited Authority

[5] State Statutes

[6] Local Court Rules

§ 445.61 Notice of Hearing [Prob. Code § 10451] on Petition for Authority to Administer Estate Without Court Supervision [Prob. Code § 10400 et seq.]

[1] FORM

[2] Use of Form

[3] Notice

[4] Content of Notice

[5] State Statutes

[6] Cross References

§ 445.62 Objection [Prob. Code § 10452] to Petition for Authority to Administer Estate Without Court Supervision Under Independent Administration of Estates Act [Prob. Code § 10400 et seq.]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Local Court Rules

§ 445.63 Order [Prob. Code § 10452] Granting Authority to Administer Estate Without Court Supervision Under Independent Administration of Estates Act [Prob. Code § 10400 et seq.]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Los Angeles County

[5] City and County of San Francisco

[6] Cross References

§ 445.64 Notice of Proposed Action to Be Taken by Personal Representative Without Court Supervision, Objection to Proposed Action, and Consent to Proposed Action [Prob. Code §§ 10580-10592]--Judicial Council Form DE-165

[1] FORM

[2] Use of Form

[3] Source of Form

[4] Contents of Form

[5] Recipients of Notice

[6] Mailing or Delivery of Notice

[7] State Statutes

§ 445.65 Pre-Notice Consent to Proposed Action or Waiver of Notice of Particular Proposed Action [Prob. Code §§ 10582, 10583(a)]

[1] FORM

[2] Use of Form

[3] Pre-Notice Consent

[4] Waiver of Notice of Particular Proposed Action

[5] Content of Notice

[6] State Statutes

§ 445.66 Revocation of Consent or of Waiver of Notice of Particular Proposed Action [Prob. Code § 10584]

[1] FORM

[2] Use of Form

[3] Revocation of Waiver or Consent

[4] State Statutes

§ 445.67 Waiver of Right to Notice of Proposed Action [Prob. Code § 10583] and Revocation of Waiver of Notice of Proposed Action [Prob. Code § 10584]--Judicial Council Form DE-166

[1] FORM

[2] Use of Form

[3] Source of Form

[4] Revocation of Waiver

[5] State Statutes

§ 445.68 Objection and Application for Order Restraining Personal Representative From Taking Proposed Action Without Court Supervision [Prob. Code §§ 10587, 10588]

[1] FORM

[2] Use of Form

[3] Ex Parte Application

[4] Service of Order

[5] Consummation of Proposed Action

[6] Notice of Hearing

[7] State Statutes

§ 445.69 Order Restraining Personal Representative From Taking Proposed Action Without Court Supervision [Prob. Code § 10588]

[1] FORM

[2] Use of Form

[3] Local Court Rules

[4] Cross References

§ 445.70 Petition to Revoke or Limit Authority of Personal Representative to Continue Independent Administration of Estate [Prob. Code § 10454]

[1] FORM

[2] Use of Form

[3] Contents of Form

[4] Notice of Hearing

[5] State Statutes

§ 445.71 Order [Prob. Code § 10454(d), (e)] Revoking or Limiting Authority of Personal Representative to Administer Estate Without Court Supervision Under Independent Administration of Estates Act [Prob. Code § 10400 et seq.]

[1] FORM

[2] Use of Form

[3] Good Cause Requirement

[4] Letters Testamentary or of Administration

[5] State Statutes

[6] Local Court Rules

[7] Cross References

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Chapter 445 PROBATE: INDEPENDENT ADMINISTRATION OF ESTATES
PART I. SCOPE

38-445 California Forms of Pleading and Practice--Annotated § 445.01

§ 445.01 Scope of Chapter

This chapter discusses administration of estates under the Independent Administration of Estates Act. It includes forms relating to petitioning for and granting independent administration authority [§§ 445.60, 445.61, 328] and to opposing the grant of such authority [*see § 445.62*]. In addition, it includes forms for administering the estate under independent authority [§§ 445.64, 445.67], and for objecting to proposed actions [§§ 445.68, 445.69], and for seeking revocation or limitation of independent authority [§§ 445.70, 445.71].

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38-445 California Forms of Pleading and Practice--Annotated §§ 445.02-445.09

[Reserved]

§§ 445.02[Reserved]

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PART II. LEGAL BACKGROUND

38-445 California Forms of Pleading and Practice--Annotated § 445.10

§ 445.10 Governing Law

Administration of estates under the Independent Administration of Estates Act (IAEA) is governed by *Prob. Code § 10400 et seq.*, whether authority to administer the estate was granted under current or under former law [see *Prob. Code § 10406(a)*].

Cal. Rules of Ct., Rule 7.1 et seq. govern probate proceedings in general. *Cal. Rules of Ct., Rule 7.250* governs the reporting requirements regarding actions taken without prior court approval under the Independent Administration of Estates Act. *Cal. Rules of Ct., Rule 7.201 et seq.* govern bonding requirements. In addition, there may be local court rules that govern other parts of the procedure.

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38-445 California Forms of Pleading and Practice--Annotated § 445.11

§ 445.11 Nature of Independent Administration

The Independent Administration of Estates Act (*Prob. Code § 10400 et seq.*) allows a personal representative, after obtaining permission under those sections, to administer an estate without court supervision with respect to most actions during the course of the estate administration [*see Prob. Code § 10500(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-445 California Forms of Pleading and Practice--Annotated § 445.12

§ 445.12 Independent Administration by Special Administrators

A special administrator may be granted authority to administer an estate under *Prob. Code § 10400 et seq.* if the special administrator is appointed with, or has been granted, the powers of a general personal representative [*Prob. Code § 10405*; *see also Prob. Code § 8545*].

Authority under *Prob. Code §§ 10400 et seq.* will be useful to a special administrator in an estate with a lengthy will contest when virtually all of the administration is handled by the special administrator, and when the only act that occurs after final resolution of the will contest is the distribution of the estate assets. In such a case, the special administrator may obtain independent administration authority, unless good cause is shown why the authority should not be granted [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 10405*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWill ContestsGeneral Overview

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38-445 California Forms of Pleading and Practice--Annotated § 445.13

§ 445.13 Controlling Administration Through Will

Because the authority to act as an independent administrator can only be given by a court, a testator cannot confer such power on a person in his or her will [*see Prob. Code § 10450*]. However, if a testator does not want his or her estate to be administered under *Prob. Code § 10400 et seq.*, he or she may so provide in the will [*see Prob. Code § 10404*]. The testator's will may also restrict the authority of a representative to exercise administrative powers without court supervision [*see Prob. Code § 10502(b)*].

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38-445 California Forms of Pleading and Practice--Annotated § 445.14

§ 445.14 Initiating Independent Administration

[1] Petition

A personal representative who seeks to administer the estate under *Prob. Code § 10400 et seq.* must petition the court for that authority either in the petition for his or her appointment or by a separate petition [*see Prob. Code §§ 10404, 10450(a)*; for a separate petition, *see § 445.60*; for forms of petition to appoint a personal representative, *see* Ch. 442, *Probate: Initiating Probate Administration*]. The petition may request either "full" or "limited" authority to administer the estate under *Prob. Code § 10400 et seq.* [*see Prob. Code § 10450(b)*]. "Full authority" means authority to administer the estate under *Prob. Code § 10400 et seq.*, including all the powers granted under those statutes [*Prob. Code § 10402*]. "Limited authority" means authority to administer the estate with all of those powers except the following [*Prob. Code § 10403*]:

- To sell real property.
- To exchange real property.
- To grant an option to purchase real property.
- To borrow money with the loan secured by an encumbrance on real property.

[2] Choice of Full or Limited Authority

Generally, the main factor influencing a personal representative's choice of "full" or"limited" authority is whether or not the personal representative is required to file a bond. In some cases, a significant saving in the bond premium can be realized by seeking only limited authority [Cal. Law Revision Comm'n Comment to *Prob. Code § 10450*; *see Prob. Code § 10453*; *see also § 445.15*].

[3] Notice

If authority to administer an estate under *Prob. Code § 10400 et seq.* is requested in the petition for appointment of a

personal representative, notice of the hearing of the petition must be given for the period and in the manner applicable to the petition for appointment [*Prob. Code § 10451(a)*; *see* Ch. 442, *Probate: Initiating Probate Administration*]. When proceedings for the administration of the estate are pending at the time a petition is filed under *Prob. Code § 10450*, notice of the hearing on the petition must be given, as provided in *Prob. Code § 1220*, to each person listed in *Prob. Code § 1220*, each known heir whose interest in the estate would be affected by the petition, each known devisee whose interest in the estate would be affected by the petition, and each person named as executor in the decedent's will [*Prob. Code § 10451(b)(1)-(4)*; *see also Prob. Code § 34* (defining "devisee")]. For discussion and forms related to giving notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

The notice of the hearing, whether the petition for independent authority is included in the petition for appointment or in a separate petition, must include a statutorily prescribed statement alerting the person receiving the notice as to the nature of the proceeding [*see Prob. Code § 10451(c)*; for the specific language of the statement, *see § 445.61*].

[4] Objections

An interested person may object as provided in *Prob. Code § 1043* to the granting of authority to administer the estate under *Prob. Code § 10400 et seq.* [*see Prob. Code § 10452*; *see also § 445.62*]. *Prob. Code § 1043* provides that an interested person may appear and object either in writing at or before the hearing or orally at the hearing [*Prob. Code § 1043(a), (b)*].

[5] Determination by Court

Unless the court determines that the objecting party has shown good cause why authority should not be granted, the court grant the requested authority. If the objecting party has shown good cause why only limited authority should be granted, the court grants only limited authority [*Prob. Code § 10452*; *see also Prob. Code § 10403* (defining "limited authority")]. The letters testamentary are endorsed to the effect that they are issued under *Prob. Code § 10400 et seq.* [*Prob. Code § 8405(c)*; for a form for letters, *see* Ch. 442, *Probate: Initiating Probate Administration*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral Overview

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38-445 California Forms of Pleading and Practice--Annotated § 445.15

§ 445.15 Amount of Personal Representative's Bond

If the personal representative is otherwise required to file a bond and has full authority, the court, in its discretion, fixes the amount of the bond at not more than the estimated value of the personal property, the estimated value of the decedent's interest in the real property authorized to be sold under *Prob. Code § 10400 et seq.*, and the probable annual gross income of the estate, or, if the bond is to be given by personal sureties, at not less than twice that amount [*Prob. Code § 10453(a)*; *see Prob. Code § 8482*].

If the personal representative is otherwise required to file a bond and has limited authority, the court, in its discretion, fixes the amount of the bond at not more than the estimated value of the personal property and the probable annual gross income of the estate, or, if the bond is to be given by personal sureties, at not less than twice that amount [*Prob. Code § 10453(b)*; *see Prob. Code § 8482*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-445 California Forms of Pleading and Practice--Annotated § 445.16

§ 445.16 Method of Independent Administration

[1] Generally No Court Supervision

After obtaining authority to independently administer the estate, the personalrepresentative is not required to obtain "court supervision" with respect to most actions during the course of the administration of the estate [*see Prob. Code § 10500*]. "Court supervision" means the judicial order, authorization, approval, confirmation, or instruction that would be required if authority to administer the estate had not been granted under *Prob. Code § 10400 et seq.* [*Prob. Code § 10401*; *see also Prob. Code §§ 9600-10382* (governing procedure for estate management transactions when personal representative has not been granted independent administration authority)].

[2] Actions Requiring Court Supervision

Despite the general lack of court supervision of an executor or administrator under *Prob. Code § 10400 et seq.*, he or she is required to obtain court supervision, whether he or she has been granted full or limited authority, in the manner provided in the relevant sections of the Probate Code for certain specified actions. The following actions require court supervision even when the estate is being independently administered [*Prob. Code § 10501(a)*]:

(1) Allowance of the personal representative's compensation.

(2) Allowance of compensation for the attorney for the personal representative.

(3) Settlement of accounts.

(4) Subject to *Prob. Code § 10520* (property subject to preliminary distributions when time for filing claims has expired and no loss or injury will occur), preliminary and final distributions and discharge.

(5) Sale of estate property to the personal representative or to the attorney for the personal representative.

(6) Exchange of estate property for property of the personal representative or property of the attorney for the personal representative.

(7) Grant of an option to purchase estate property to the personal representative or to the attorney for the personal representative.

(8) Allowance, payment, or compromise of a claim of the personal representative, or the attorney for the personal representative, against the estate.

(9) Compromise or settlement of a claim, action, or proceeding by the estate against the personal representative or against the attorney for the personal representative.

(10) Extension, renewal, or modification of the terms of a debt or other obligation of the personal representative, or the attorney for the personal representative, owing to or in favor of the decedent or the estate.

The actions listed in paragraphs (5) through (10) may be taken without court supervision if the action is a transaction between the personal representative as such and the personal representative as an individual when all of the the following requirements are satisfied [*Prob. Code § 10501(c)*]:

- Either the personal representative is the sole beneficiary of the estate or all the known heirs or devisees have consented to the transaction;

- The period for filing creditor's claims has expired;

- No request for special notice is on file or all persons who filed a request for special notice have consented to the transaction; and

- The claim of each creditor who filed a claim has been paid, settled, or withdrawn, or the creditor has consented to the transaction.

Notwithstanding any other provision of *Prob. Code § 10400 et seq.*, a personal representative who has obtained only limited authority to administer the estate must obtain court supervision, in the manner provided in the Probate Code for the sale or exchange of real property and for the grant of options to purchase real property. Supervision is also required when the personal representative with limited authority borrows money with the loan secured by an encumbrance on real property [*Prob. Code § 10501(b)*; *but see Prob. Code § 10406(b)* (allowing personal representative who was granted independent administration authority prior to July 1, 1988, to use authority granted under prior law to borrow money on loan secured by encumbrance on real property)].

[3] Optional Court Supervision

A personal representative may obtain court supervision of an action even though the personal representative is authorized to take the action using the independent administration procedure [*see Prob. Code § 10500(b)*].

When a personal representative requests court supervision of an action pursuant to *Prob. Code § 10500(b)* and no other procedure is provided by statute for court supervision of the particular proposed action, the personal representative may petition for instructions under *Prob. Code § 9611* [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 10500*].

[4] Reporting Requirements for Actions Taken Without Court Approval

In any accounting, report, petition for preliminary distribution, or petition for final distribution, the petitioner is required to list and describe all actions taken without prior court approval under the Independent Administration of Estates Actif

notice of the proposed action was required [*Cal. Rules of Ct., Rule 7.250(a)*].

The description of the action is required to include the following [*Cal. Rules of Ct., Rule 7.250(a)*]:

- The nature of the action.
- When the action was taken.
- A statement of when and to whom notice was given.
- Whether notice was waived, and if so, by whom.
- Whether any objections were received.

An action taken under the Independent Administration of Estates Act that was properly listed and described in a prior accounting, report, or petition for distribution, and that was approved by the court, need not be listed and described in a subsequent account, report, or petition for distribution [*Cal. Rules of Ct., Rule 7.250(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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§ 445.17 Sales of Estate Property

Subject to the limitations of *Prob. Code § 10400 et seq.*, when the personal representative exercises the authority to sell estate property under those sections, the personal representative may sell the property either at public auction or private sale, and with or without notice, for such price, for cash or on credit, and on such terms and conditions as the personal representative may determine, and the requirements applicable to court confirmation of sales of real and personal property do not apply [*Prob. Code § 10503*].

Although a personal representative with independent administration authority may sell personal or real property without giving the public notice required by *Prob. Code §§ 10250* and *10300*, the representative must generally give notice prior to the sale to persons whose interest in the estate is affected by the sale [*see Prob. Code §§ 10503, 10510, 10511, 10580, 10581*; *see also § 445.18[2]*].

Personal representatives with limited authority do not have the power to sell real property through independent administration procedures [*Prob. Code § 10501(b)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewReal Property LawOwnership & TransferNatural PersonsReal Property LawOwnership & TransferPublic Entities

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38-445 California Forms of Pleading and Practice--Annotated § 445.18

§ 445.18 Powers of Personal Representative

[1] Generally

The specific powers of personal representatives are divided by statute into three categories:

- Those powers that require a notice of proposed action under virtually all circumstances [*see Prob. Code §§ 10510-10519*; *but see Prob. Code §§ 10582, 10583* (notice not required when prior consent or waiver obtained by personal representative)];

- Those powers that require a notice of proposed action under some circumstances [*see Prob. Code §§ 10530-10538*];

- Those powers the exercise of which never require a notice of proposed action [*see Prob. Code §§ 10550-10564*].

A "notice of proposed action" is a notice that is sent by the personal representative to interested parties prior to taking an action affecting the estate [*see Prob. Code § 10580*]. The procedure for such notices is discussed in *§ 445.19[1]*.

A personal representative who has been granted independent administration authority must exercise his or her powers subject to the conditions and limitations of *Prob. Code § 9600* (governing administrator's duty to manage the estate using ordinary care and diligence) and *Prob. Code § 10400 et seq.* [*see Prob. Code § 10502*].

In addition to the powers granted to the personal representative by *Prob. Code §§ 10500-10564*, the personal representative has all the powers that the personal representative could exercise without court supervision under the Probate Code if the personal representative had not been granted authority to independently administer the estate [*Prob. Code § 10551*].

[2] Powers Exercisable Only After Giving Notice

The personal representative may exercise the following powers only if the notice requirements of *Prob. Code § 10580*

et seq. are satisfied [*Prob. Code § 10510*; *see § 445.19[1]*]:

- Selling or exchanging real property of the estate [*Prob. Code § 10511*; *see also Prob. Code § 10503* (sale of estate property); *but see Prob. Code § 10403(a), (b)* (power to independently sell or exchange real property not exercisable by representative with limited authority); *Prob. Code § 10501(a)(5), (6), (c)* (generally precluding independent administration authority from being used in sale or exchange transactions posing possible conflict of interest)].

- Selling or incorporating the decedent's unincorporated business or venture that the decedent was engaged in at the time of the decedent's death or that was wholly or partly owned by the decedent at the time of the decedent's death [*Prob. Code § 10512*; *see also Prob. Code § 10403(a)* (power to independently sell real property not exercisable by representative with limited authority), *Prob. Code § 10503* (sale of estate property)].

- Abandoning the decedent's tangible personal property when the cost of collecting, maintaining, and safeguarding the property would exceed its fair market value [*Prob. Code § 10513*].

- Borrowing money or placing, replacing, renewing, or extending an encumbrance on any property of the decedent's estate [*Prob. Code § 10514(a)*; *but see Prob. Code §§ 10403(d), 10514(b)* (power to independently borrow money with loan secured by encumbrance on real property as not exercisable by representative with limited authority)].

- Granting an option to purchase real property of the estate for a period within or beyond the period of administration [*Prob. Code § 10515*; *see also Prob. Code § 10403(c)* (power to independently grant option to purchase real property as not exercisable by representative with limited authority); *Prob. Code § 10501(a)(7), (c)* (generally precluding independent administration authority from being used when option is granted to personal representative or attorney for personal representative)].

- Conveying or transferring property to a person, if the decedent's will gives that person the option to purchase real or personal property and the person has complied with the terms and conditions stated in the will [*Prob. Code § 10516*].

- Completing a contract entered into by the decedent to convey real or personal property [*Prob. Code § 10517*].

- Allowing, compromising, or settling third-party claims to real and personal property if the decedent died in possession of or holding title to such property, or determining decedent's claim to real or personal property, title to or possession of which is held by another [*Prob. Code § 10518*; *but see Prob. Code § 10501(a)(8), (c)* (generally precluding independent administration authority from being used to compromise or settle claim of personal representative or personal representative's attorney against estate)].

- Making a disclaimer [*Prob. Code § 10519*; *see generally Prob. Code §§ 260-295*].

- Making preliminary distributions if the time for filing claims has expired and it appears that the distribution may be made without loss to creditors or injury to the estate or any interested person [*Prob. Code § 10520*]. However, this power is limited to distributing (1) income received during administration, (2) certain items of personal property that do not exceed an aggregate fair market value of $50,000 to all persons, and (3) cash to general pecuniary devisees not exceeding $10,000 to any one person [*see Prob. Code § 10520(a)-(c)*]. For discussion of the rules governing petitions for preliminary distributions under

Prob. Code §§ 11620-11622 and, in particular, of the special rules applicable to petitions for preliminary distributions of independently administered estates under *Prob. Code § 11623*, see *§ 445.25*.

[3] Powers Exercisable Without Notice in Some Circumstances

[a] Generally

There are a number of powers that under some circumstances may be exercised without giving notice of proposed action and that in other circumstances may be exercised only if the notice requirements of *Prob. Code § 10580 et seq.* are satisfied [*Prob. Code § 10530*; *see § 445.19[1]*].

[b] Managing and Controlling Estate Property

Generally, a personal representative may exercise the power to manage and control property of the estate without providing notice of proposed action [*see Prob. Code § 10531(a)*]. However, the personal representative must comply with the requirements of *Prob. Code § 10580 et seq.* (governing notice of proposed action procedure) in any case in which a provision of *Prob. Code §§ 10500-10564* governing the exercise of a specific power so requires [*Prob. Code § 10531(b)*].

[c] Entering Contracts

The personal representative has the power to enter into a contract in order to carry out the exercise of a specific power granted by *Prob. Code § 10400 et seq.*, including, but not limited to, the powers granted by *Prob. Code § 10531* (powers of management and control of estate property) and *Prob. Code § 10551* (powers exercisable without court supervision). The personal representative may exercise those powers without giving notice of proposed action unless:

- The contract is one that by its provisions is not to be fully performed within two years, and the personal representative has no unrestricted right to terminate the contract within the two-year period [*Prob. Code § 10532(b)*]; or

- The contract is made to carry out the exercise of a specific power, and the provision granting that power requires compliance with the notice requirements of *Prob. Code §§ 10580-10600* [*Prob. Code § 10532(c)*].

[d] Investing Estate Money

The personal representative has the power to deposit money belonging to the estate in an insured account in a financial institution in California [*Prob. Code § 10533(a)(1)*].

Additionally, the representative may invest money of the estate in any one ormore of the following [*Prob. Code § 10533(a)(2)*]:

- Direct obligations of the United States, or the State of California, maturing not later than one year from the date of making the investment;

- An interest in a money market mutual fund registered under the Investment Company Act of 1940 (*15 U.S.C. §§ 80a-1-80a-64*) or an investment vehicle authorized for the collective investment of trust funds pursuant to *12 C.F.R. § 9.18*, the portfolios of which are limited to United States government obligations maturing not later than five years from the date of investment and to repurchase agreements fully collateralized by United States government obligations;

- Units of a common trust fund described in *Fin. Code § 1564*. The common trust fund must have as its objective investment primarily in short term fixed income obligations and must be permitted to value investments at costs pursuant to regulations of the appropriate regulatory authority;

- Eligible securities for the investment of surplus state moneys as provided for in *Gov. Code § 16430*.

A personal representative also has the power to invest money of the estate in any manner provided by the will [*Prob. Code § 10533(a)(3)*].

The personal representative must comply with the notice requirements of *Prob. Code §§ 10580-10600* when he or she exercises the power to make any investment pursuant to the power granted by *Prob. Code § 10533(a)(2)(D)* (investment in securities eligible for investment of surplus state moneys) or *Prob. Code § 10533(a)(3)* (investment as provided by will), except that the personal representative may invest in direct obligations of the United States, or of the State of California, maturing not later than one year from the date of making the investment, without complying with the notice requirements of *Prob. Code § 10580 et seq.* [*Prob. Code § 10533(c)*].

[e] Continuing Operation of Decedent's Business

The personal representative may continue operation of an unincorporated business or venture in which the decedent was engaged or owned a whole or partial interest at the time of the decedent's death [*Prob. Code § 10534(b)*]. These powers may be exercised without giving notice under *Prob. Code § 10580 et seq.* [*Prob. Code § 10534(c)*]. However, if the personal representative continues the operation of any unincorporated business or venture for longer than six months after letters are first issued to him or her, the personal representative must comply with the notice requirements of *Prob. Code § 10580 et seq.* [*Prob. Code § 10534(d)*].

Subject to the partnership agreement and the Uniform Partnership Act (*Corp. Code § 16100 et seq.*), the personal representative may also continue as a general partner in any partnership in which the decedent was a general partner at the time of death [*Prob. Code § 10534(a)*]. This power may be exercised without giving notice under *Prob. Code §§ 10580-10600* [*Prob. Code § 10534(c)*]. However, if the personal representative continues as a general partner for longer than six months after letters are first issued to him or her, the personal representative must comply with the notice requirements of *Prob. Code § 10580 et seq.* [*Prob. Code § 10534(d)*].

[f] Paying Family Allowance

As a general rule, a personal representative may pay a reasonable family allowance without giving notice of proposed action under *Prob. Code § 10580 et seq.* [*Prob. Code § 10535(a)*]. However, compliance with the notice requirements is required for the following actions [*see Prob. Code § 10535(b)*]:

- Making the first payment of a family allowance;

- Making the first payment of a family allowance for a period commencing more than 12 months after the death of the decedent; and

- Making any increase in the amount of the payment of a family allowance.

[g] Leasing Real and Personal Property

The personal representative may enter as lessor into a lease of property of the estate for any purpose for such a period, within or beyond the period of administration, and for such a rental or royalty or both, and on such other terms and conditions as the personal representative may determine [*Prob. Code § 10536(a)*].

Generally, the personal representative may lease estate property without giving notice of proposed action under *Prob. Code § 10580 et seq.* [*see Prob. Code § 10536(a)*]. However, the personal representative must comply with the notice requirements when he or she enters into a lease of real or personal property for a term in excess of one year [*Prob. Code § 10536(b), (c)*]. If the lease permits the lessee to extend the term of the lease, the lease will be considered as if the right to extend has been exercised [*Prob. Code § 10536(b)*].

[h] Selling or Exchanging Personal Property

A personal representative may sell personal property of the estate or exchange personal property of the estate for other property on such terms and conditions as the personal representative may determine [*Prob. Code § 10537(a)*]. The personal representative must comply with the notice requirements of *Prob. Code § 10580 et seq.* prior to the sale or exchange, unless the sale or exchange involves the following [*Prob. Code § 10537(a), (b)*]:

- A security sold on an established stock or bond exchange;

- A security designated as a national market system security on an interdealer quotation system, or subsystem thereof, by the National Association of Securities Dealers, Inc., sold through a broker-dealer registered under the Securities Ex change Act of 1934 (*15 U.S.C. §§ 78a-78kk*) during the regular course of business of the broker-dealer;

- Personal property referred to in *Prob. Code § 10202* (subscription rights to securities) or *Prob. Code § 10259* (property passing on sale without need for court confirmation or approval) when sold for cash; or

- A security described in *Prob. Code § 10200* surrendered for redemption or conversion.

[i] Granting or Extending Exclusive Right to Sell Property

A personal representative has the power to grant an exclusive right to sell property for a period not to exceed 90 days. The representative may grant the same broker one or more extensions of an exclusive right to sell property, each extension being for a period not to exceed 90 days [*Prob. Code § 10538(a)*].

Generally, the personal representative may grant or extend the exclusive right to sell property without giving notice of proposed action under *Prob. Code § 10580 et seq.* [*see Prob. Code § 10538(b)*]. However, the personal representative must comply with the notice requirements if he or she grants a broker an extension of an exclusive right to sell property, and if the period of the extension, together with the periods of the original exclusive right to sell the property and any previous extensions of that right is more than 270 days [*Prob. Code § 10538(c)*].

[4] Powers Exercisable Without Notice

The personal representative may exercise certain powers without giving notice of proposed action under *Prob. Code § 10580 et seq.* [*Prob. Code § 10550*]. These powers include the following:

- Taking actions on claims of or against the estate. This power includes the right to allow, pay, reject, or contest any claim by or against the estate [*Prob. Code § 10552(a)*; *but see Prob. Code § 10501(a)(8), (9), (c)* (restricting use of independent administration authority to take actions on claims involving potential conflict of interest)]; to compromise or settle a claim, action, or proceeding by or for the benefit of, or against, the decedent, the personal representative, or the estate [*Prob. Code § 10552(b)*; *but see Prob. Code § 10501(a)(8), (9), (c)* (restricting use of independent administration authority to take actions

on claims involving potential conflict of interest)]; to release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible [*Prob. Code § 10552(c)*; *but see Prob. Code § 10501(a)(8), (9), (c)* (restricting use of independent administration authority to take actions on claims involving potential conflict of interest)]; and to allow a claim to be filed after the expiration of the time for filing the claim;

- Commencing and maintaining actions and proceedings for the benefit of the estate, and defending actions and proceedings against the decedent, the personal representative, or the estate [*Prob. Code § 10553*; *but see Prob. Code § 10501(a)(8), (9), (c)* (restricting use of independent administration authority to maintain action involving potential conflict of interest)];

- Extending, renewing, or modifying the terms of an obligation owing to or in favor of the decedent or the estate [*Prob. Code § 10554*; *but see Prob. Code § 10501(a)(10), (c)* (restricting use of independent administration authority to extend, renew, or modify terms of debt or other obligation involving potential conflict of interest)];

- Conveying or transferring property in order to carry out the exercise of a specific power granted by *Prob. Code § 10400 et seq.* [*Prob. Code § 10555*];

- Paying any expenses incurred in the collection, care, and administration of the estate, as well as any taxes and assessments [*Prob. Code § 10556*];

- Purchasing an annuity from an insurer admitted to do business in California to satisfy a devise of an annuity or other direction in the will for periodic payments to a devisee [*Prob. Code § 10557*];

- Exercising an option right that is property of the decedent's estate [*Prob. Code § 10558*];

- Purchasing securities or commodities required to perform an incomplete contract of sale when the decedent died having sold but not delivered securities or commodities not owned by the decedent [*Prob. Code § 10559*];

- Holding a security in the name of a nominee or in any other form without disclosure of the estate so that title to the security may pass by delivery [*Prob. Code § 10560*];

- Exercising security subscription or conversion rights [*Prob. Code § 10561*; *see also Prob. Code § 70* (defining "security"); *Prob. Code § 10537* (governing power to sell security subscription and conversion rights)];

- Making repairs and improvements to real and personal property of theestate [*Prob. Code § 10562*];

- Accepting a deed to property that is subject to a mortgage or deed of trust in lieu of foreclosure of the mortgage or sale under the deed of trust [*Prob. Code § 10563*]; and

- Giving a partial satisfaction of a mortgage or causing a partial reconveyance to be executed by a trustee under a deed of trust held by the estate [*Prob. Code § 10564*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift

& Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesFamiliesEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral Overview

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38-445 California Forms of Pleading and Practice--Annotated § 445.19

§ 445.19 Notice of Proposed Action

[1] Generally

A personal representative who has been granted authority to administer an estate under *Prob. Code § 10400 et seq.* must give "notice of proposed action" as provided in *Prob. Code §§ 10580-10592* before taking the proposed action without court supervision if the provision of *Prob. Code §§ 10500-10564* giving the personal representative the power to take the action so requires [*Prob. Code § 10580(a)*; *see § 445.64*]. For detailed coverage of the powers conferred by *Prob. Code §§ 10500-10564*, see the discussions in *§ 445.18[2]*, *[3][a]*, and *[4]*.

If notice is required by one of the provisions in *Prob. Code §§ 10500-10564*, the personal representative must give the notice to each known devisee and each known heir whose interest in the estate would be affected by the proposed action, and to each person who has filed a request under *Prob. Code §§ 1250-1252* for special notice of petitions filed in the administration proceeding [*Prob. Code § 10581(a)-(c)*]. Notice must also be given to the Attorney General in Sacramento if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the proposed action [*Prob. Code § 10581(d)*; *see Prob. Code § 1209* (manner of giving notice to State)]. For discussion of the contents and form of the notice of proposed action, see *§ 445.64*.

A personal representative may use the notice of proposed action procedure provided in *Prob. Code § 10400 et seq.* with respect to an action that he or she proposes to take even though the action is not one for which notice of proposed action is required [*Prob. Code § 10580(b)*].

[2] Consent and Waiver

The notice of proposed action required by *Prob. Code §§ 10580, 10581* need not be given when the person to whom notice must be given has consented to or has properly waived notice of the proposed action [*see Prob. Code §§ 10582, 10583*; *but see Prob. Code § 10580(b)* (allowing personal representative to give notice when notice not required)].

The notice need not be given to a person who consents in writing to the proposed action, and the consent may be executed at any time before or after the proposed action is taken [*Prob. Code § 10582*].

Also, the notice of proposed action need not be given to any person who, in writing, waives the right to notice of the particular proposed action. The waiver may be executed at any time before or after the proposed action is taken. The waiver must describe the particular proposed action and may waive particular aspects of the notice, such as the delivery, mailing, or time requirements of *Prob. Code § 10586*, or the giving of the notice in its entirety for the particular proposed action [*Prob. Code § 10583(a)*].

Finally, the notice of proposed action need not be given to any person who has executed a Waiver of Notice of Proposed Action on the mandatory Judicial Council form of waiver, and who in the form has made either (1) a general waiver of the right to notice of the proposed action, or (2) a waiver of the right to notice of the proposed action for all transactions of a type that include the particular proposed action [*see Prob. Code § 10583(b)*; *see also § 445.67*].

A waiver or consent may be revoked only in writing and is effective only when the writing is received by the personal representative [*Prob. Code § 10584(a)*]. A copy of the revocation may be filed with the court, but the effectiveness of the revocation is not dependent on a copy being filed with the court [*Prob. Code § 10584(b)*].

[3] Mailing or Delivery of Notice

The notice of proposed action must be mailed or personally delivered to each person required to be given notice of proposed action not less than 15 days before the date specified in the notice of proposed action on or after which the proposed action is to be taken [*Prob. Code § 10586*; *see also Prob. Code § 10581* (persons to whom notice must be given)]. If mailed, the notice of proposed action must be addressed to the person at the person's last-known address. *Prob. Code § 1215* and *Prob. Code § 1216* apply to the mailing or delivery of the notice of proposed action [*Prob. Code § 10586*]. For general discussion of *Prob. Code §§ 1215* and *1216*, see Ch. 447, *Probate: Statutory Notice Requirements* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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§ 445.20 Challenging Proposed Action

[1] By Written Objection

Any person entitled to notice of proposed action under *Prob. Code § 10581* may object to the proposed action by delivering a written objection to the personal representative at the address stated in the notice of proposed action [*Prob. Code § 10587(a), (b)*; for discussion of who is entitled to notice, *see § 445.19[1]*]. The person objecting to the proposed action may either use the Judicial Council form or may make the objection in any other writing that identifies the proposed action with reasonable certainty and indicates that the person objects to the taking of the proposed action [*Prob. Code § 10587(b)*; *see §§ 445.64, 445.68*].

The personal representative is deemed to have notice of the objection to the proposed action if it is delivered or received at the address stated in the notice of proposed action before whichever of the following times is later: (1) the date specified in the notice of proposed action on or after which the proposed action is to be taken, or (2) the date the proposed action is actually taken [*Prob. Code § 10587(c)*].

[2] By Application for Restraining Order

Any person who is entitled to notice of proposed action for a proposed action described under *Prob. Code § 10580(a)*, or any person who is given notice of a proposed action described in *Prob. Code § 10580(b)*, may apply to the court having jurisdiction over the proceeding for an order restraining the personal representative from taking the proposed action without court supervision. The court must grant the requested order without requiring notice to the personal representative and without cause being shown for the order [*Prob. Code § 10588(a)*; *see §§ 445.68, 445.69*].

The personal representative is deemed to have notice of the restraining order if it is served on the personal representative in the manner provided for in *Code Civ. Proc. § 415.10* or *Code Civ. Proc. § 415.30* or in the manner authorized by the court, before whichever of the following times is later: (1) the date specified in the notice of proposed action on or after which the proposed action is to be taken, or (2) the date the proposed action is actually taken [*Prob. Code § 10588(b)*].

[3] Effect of Challenging Proposed Action

If the proposed action is one that would require court supervision if the personal representative had not been granted authority to administer the estate under *Prob. Code § 10400 et seq.* and the personal representative has notice of a written objection made under *Prob. Code § 10587* to the proposed action or a restraining order issued under *Prob. Code § 10588*, the personal representative must, if the personal representative desires to take the proposed action, take the proposed action under the provisions of the Probate Code dealing with court supervision of that kind of action [*Prob. Code § 10589(a)*]. For example, except as provided in *Prob. Code §§ 10301-10303* and *Prob. Code § 10503*, if the proposed action is the sale of real property, notice of sale must be published [*see Prob. Code § 10300*].

If the proposed action is one that would not require court supervision even if the personal representative had not been granted authority to administer the estate under *Prob. Code § 10400 et seq.* but the personal representative has given notice of the proposed action and has notice of a written objection made under *Prob. Code § 10587* to the proposed action or a restraining order issued under *Prob. Code § 10588*, the personal representative must, if he or she desires to take the proposed action, request instructions from the court concerning the proposed action and may take the proposed action only under such order as may be entered by the court [*Prob. Code § 10589(b)*].

A person who objects to a proposed action as provided in *Prob. Code § 10587* or who serves a restraining order issued under *Prob. Code § 10588* in the manner provided in that section must be given notice of any hearing on a petition for court authorization or confirmation of the proposed action [*Prob. Code § 10589(c)*; *see also Prob. Code § 1260* (requiring proof of notice of hearing to court at or before hearing)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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§ 445.21 Review of Action Taken

Except as provided in *Prob. Code § 10590(c)* (governing review by court on its own motion), only parties entitled to notice of proposed action under *Prob. Code § 10581* may seek judicial review of a proposed action after it has been taken or may otherwise object to the proposed action after it has been taken [*Prob. Code § 10590(a)*]. For discussion of who is entitled to notice under *Prob. Code § 10581*, see *§ 445.19[1]*.

Parties entitled to notice under *Prob. Code § 10581* waive the right to have the court review the proposed action after it has been taken, if either of the following circumstances exists:

- The person has been given notice of a proposed action, as provided in *Prob. Code §§ 10580-10586*, and fails to object by sending a written objection or serving a restraining order [*Prob. Code § 10590(a)(1), (d)*; *see also Prob. Code §§ 10587* (written objections), *Prob. Code § 10588* (restraining orders)]; or

- The person has waived notice of or consented to the proposed action as provided in *Prob. Code §§ 10582-10584* [*Prob. Code § 10590(a)(2)*; *see § 445.19[2]*].

Unless the person has waived notice of or consented to the proposed action as provided in *Prob. Code §§ 10582-10584*, the court may review the action taken on motion of a person described in *Prob. Code § 10581* who establishes that he or she did not actually receive the notice of proposed action before the time to object by written objection or service of restraining order expired [*Prob. Code § 10590(b), (d)*; *see also Prob. Code §§ 10587* (written objections), 10588 (restraining orders)].

The court may review an action by a personal representative on the motion of an heir or devisee who establishes all of the following [*Prob. Code § 10590(c)*]:

- At the time the notice was given, the heir or devisee lacked capacity toobject to the proposed action or was a minor;

- No notice of proposed action was actually received by the guardian, conservator, or other legal representative of the heir or devisee;

- The guardian, conservator, or other legal representative did not waive notice of proposed action; and

- The guardian, conservator, or other legal representative did not consent to the proposed action.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-445 California Forms of Pleading and Practice--Annotated § 445.22

§ 445.22 Failure to Comply With Notice Procedure

The failure of a personal representative to comply with *Prob. Code § 10580(a)* (requiring notice of proposed action to be given when required by law), *Prob. Code § 10581* (specifying parties to whom notice must be given), *Prob. Code § 10585* (governing contents and form of notice), *Prob. Code § 10586* (governing mailing and delivery requirements for notice), and *Prob. Code § 10589* (governing actions taken by personal representative under notice of objection or restraining order), and the taking of the action by the personal representative without such compliance, does not affect the validity of the action so taken or the title to any property conveyed or transferred to bona fide purchasers or the rights of third persons who, dealing in good faith with the personal representative, changed their position in reliance on the action, conveyance, or transfer without actual notice of the failure of the personal representative to comply with those provisions [*Prob. Code § 10591(a)*]. No person dealing with the personal representative has any duty to inquire or investigate whether or not the personal representative has complied with the provisions listed in *Prob. Code § 10591(a)* [*Prob. Code § 10591(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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§ 445.23 Objections to Continued Independent Administration

Any interested person may file a petition requesting that the court make either of the following orders [*Prob. Code § 10454(a)*; *see § 445.70*]:

- Revoking the authority of the personal representative to continue administration of the estate under *Prob. Code § 10400 et seq.*, or

- Revoking the full authority of the personal representative to administer the estate under *Prob. Code § 10400 et seq.* and granting the personal representative limited authority to administer the estate.

The petition must set forth the basis for the requested order [*Prob. Code § 10454(b)*].

Notice of the hearing on the petition must be given as provided in *Prob. Code § 1220*. In addition, the personal representative must be served with a copy of the petition and a notice of the time and place of the hearing at least 15 days prior to the hearing. Service on the personal representative must be made as provided in *Code Civ. Proc. § 415.10* or *Code Civ. Proc. § 415.30*, or in such manner as may be authorized by the court [*Prob. Code § 10454(c)*; for further discussion of notice, *see* Ch. 447, *Probate: Statutory Notice Requirements*].

If the court determines that good cause has been shown, the court must make an order revoking the authority of the personal representative to continue administration of the estate under *Prob. Code § 10400 et seq.* On the making of the order, new letters will be issued without the notation described in *Prob. Code § 8405(c)* [*Prob. Code § 10454(d)*; for discussion of notation under *Prob. Code § 8405(c), see § 445.14[5]*].

If the personal representative was granted full authority and the court determines that good cause has been shown, the court must make an order revoking the full authority and granting the personal representative limited authority. On the making of the order, new letters will be issued with the notation described in *Prob. Code § 8405(c)* that is required when the authority granted is limited authority [*Prob. Code § 10454(e)*; for a form of letters and discussion of the notation, *see* Ch. 442, *Probate: Initiating Probate Administration*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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§ 445.24 Removal of Personal Representative From Office

When notice of proposed action is required by *Prob. Code § 10580 et seq.*, the court in its discretion may remove the personal representative from office unless the personal representative gives the notice of proposed action, obtains a waiver of notice of the proposed action, or obtains a consent to the proposed action as provided in *Prob. Code §§ 10580-10600* [*Prob. Code § 10592(a)*].

The court in its discretion may remove the personal representative from office if the personal representative takes a proposed action under notice of objection or restraining order, in violation of *Prob. Code § 10589* [*Prob. Code § 10592(b)*].

In determining whether to remove a personal representative, the court should consider all the circumstances of the particular case. Among the significant considerations are whether the personal representative failed to provide notice with the intent to deprive the person entitled to notice of his or her rights or whether the failure was inadvertent or merely negligent [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 10592*].

For discussion of removal of personal representatives generally, see Ch. 458B, *Probate: Suspension, Removal, and Resignation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationVoluntary ResignationEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-445 California Forms of Pleading and Practice--Annotated § 445.25

§ 445.25 Preliminary Distribution

[1] Generally

Notwithstanding *Prob. Code § 11601*, relating to notice of hearings on petitionsfor distribution generally, if authority is granted to independently administer the estate, the personal representative may petition the court for an order for preliminary distribution [*see Prob. Code § 11623(a)(1)*]. A petition for an order for preliminary distribution of all, or a portion of, the share of a decedent's estate to which a beneficiary is entitled may not be filed unless at least two months have elapsed after letters are first issued to a general personal representative [*Prob. Code § 11620*]. For a form of petition, see Ch. 458C, *Probate: Preliminary Distribution and Partial Allowance of Compensation* .

[2] Amount

The aggregate of all property distributed under *Prob. Code § 11623* cannot exceed 50 percent of the net value of the estate. For the purposes of *Prob. Code § 11623(a)(2)* the term "net value of the estate" means the excess of the value of the property in the estate, as determined by all inventories and appraisals on file with the court, over the total amount of all creditor claims and of all liens and encumbrances recorded or known to the personal representative not included in a creditor claim, excluding any estate tax lien occasioned by the decedent's death [*Prob. Code § 11623(a)(2)*].

Nothing in *Prob. Code § 11623* limits the authority of the personal representative to make preliminary distribution under other provisions of *Prob. Code §§ 11600-11642*, whether or not authority is granted to administer the estate independently [*Prob. Code § 11623(c)*].

[3] Notice

Notice of the hearing on the petition must be given as provided in *Prob. Code § 1220*, discussed in Ch. 447, *Probate: Statutory Notice Requirements* . However, notwithstanding *Prob. Code § 1220(c)* (dispensing with notice for good cause), the court may not dispense with notice unless the time for filing creditor claims has expired [*Prob. Code § 11623(a)(1)*].

[4] Determination of Court

The court must order distribution if it appears at the hearing that the distribution may be made without loss to creditors or injury to the estate or any interested person [*Prob. Code § 11621*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesCompensationEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistribution

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[Reserved]

§§ 445.26[Reserved]

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38-445 California Forms of Pleading and Practice--Annotated § 445.40

§ 445.40 State Statutes

[1] Definitions

Prob. Code §§ 10400-10600 citable as the Independent Administration of Estates Act. *Prob. Code § 10400*

"Court supervision" defined. *Prob. Code § 10401*

"Full authority" defined. *Prob. Code § 10402*

"Limited authority" defined. *Prob. Code § 10403*

[2] Governing Law

Application of *Prob. Code § 10400 et seq.*. *Prob. Code § 10406*

[3] Granting Independent Authority

Amount of personal representative's bond. *Prob. Code §§ 8482, 10453*

Effect of will prohibiting independent administration. *Prob. Code § 10404*

Independent administration by special administrator. *Prob. Code § 10405*

Petition for independent administration authority. *Prob. Code §§ 10450-10452*

[4] Revoking or Limiting Authority

Revocation or limitation of independent administration authority. *Prob. Code § 10454*

Grounds for removal of personal representative. *Prob. Code § 10592*

[5] Independent Administration

Administration without court supervision. *Prob. Code §§ 10500, 10502*

Actions requiring court supervision. *Prob. Code § 10501*

Sale of estate property. *Prob. Code § 10503*

Powers exercisable only after giving notice of proposed action. *Prob. Code § 10510 et seq.*

Powers that require giving notice of proposed action under some circumstances. *Prob. Code §§ 10530-10538*

Powers exercisable without giving notice of proposed action. *Prob. Code §§ 10550-10564*

Procedural requirements for notice of proposed action. *Prob. Code §§ 10580, 10581, 10585, 10586*

Consent and waiver. *Prob. Code §§ 10582-10584*

Objection to proposed action. *Prob. Code § 10587*

Restraining order. *Prob. Code § 10588*

Effect of objection to proposed action. *Prob. Code § 10589*

Effect of failure to object to proposed action. *Prob. Code § 10590*

Effect of failure to comply with procedural requirements. *Prob. Code § 10591*

Partial distribution; amount; notice; order. *Prob. Code §§ 11620-11624*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-445 California Forms of Pleading and Practice--Annotated § 445.41

§ 445.41 California Rules of Court

Report of actions taken without prior court approval. *Cal. Rules of Ct., Rule 7.250*

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38-445 California Forms of Pleading and Practice--Annotated § 445.42

§ 445.42 Law Reviews

Note, *Probate Reform: California's Declaration of Independent Administration, 50 S. Cal. L. Rev. 155 (1976)*

Legal Topics:

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

§§ 445.43[Reserved]

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38-445 California Forms of Pleading and Practice--Annotated § 445.60

§ 445.60 Petition [Prob. Code § 10450] for Authority to Administer Estate Without Court Supervision [Prob. Code § 10400 et seq.]

[1] FORM Petition [Prob. Code § 10450] for Authority to Administer Estate Without Court Supervision [Prob. Code § 10400 et seq.]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	PETITION FOR AUTHORITY TO ADMINISTER
also known as _____ [*name*],	)	ESTATE WITHOUT COURT SUPERVISION
Deceased.	)	[*Prob. Code § 10450*]

_____

Petitioner alleges:

1. On or about _____ [*date*], _____ [*name*] died in the County of _____, State of _____.

[*EITHER*]

2. The decedent left a will dated _____, which is the last will of the decedent and which is executed in all particulars as required by law.

3. Petitioner is named in the will to act as executor and has consented to act as such. Petitioner is over the age of majority.

4. On _____ [*date*], the will of the decedent was admitted to probate and letters testamentary were issued to this petitioner.

5. The decedent's will does not preclude administration of this estate under the Independent Administration of Estates Act.

[*OR*]

2. The decedent left a will dated _____, which is the last will of the decedent and which is executed in all particulars as required by law.

3. No executor is named in the will. Petitioner is over the age of majority and is a bona fide resident of this state, residing at _____ [*street address*] in _____ [*city*], _____ County, California. Petitioner is the _____ [*relationship*] of the decedent.

4. On _____ [*date*], the will of the decedent was admitted to probate and letters of administration with the will annexed were issued to this petitioner.

5. The decedent's will does not preclude administration of this estate under the Independent Administration of Estates Act.

[*OR*]

2. Decedent died intestate. Petitioner is over the age of majority and is a bona fide resident of this state, residing at _____ [*street address*] in _____ [*city*], _____ County, California. Petitioner is the _____ [*relationship*] of the decedent.

3. On _____ [*date*], letters of administration were issued to this petitioner.

[*CONTINUE*]

WHEREFORE, petitioner prays for _____ [full *or* limited] authority to administer the estate of _____ [*name*], deceased, without court supervision under the Independent Administration of Estates Act, for an endorsement of the letters _____ [testamentary *or* of administration with the will annexed *or* of administration] to the effect that they are issued pursuant to the Independent Administration of Estates Act, and for all other proper orders.
Dated: _____.

_____ [*signature*]
Petitioner
_____ [*signature*]
Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
Petitioner

CAUTION:
The petition must be verified [*see Prob. Code § 1021(a)(1)*].

[2] Use of Form

This petition is for use to obtain an order granting authority to an executor or administrator to administer an estate without court supervision under the Independent Administration of Estates Act [*see Prob. Code § 10450*]. This form is used when letters testamentary, letters of administration with the will annexed, or letters of administration have been issued previously. For forms to request independent administration authority at the time of appointment, see Ch. 442, *Probate: Initiating Probate Administration* .

[3] Notice

When proceedings for the administration of the estate are already pending when the petition for authority for independent administration is filed under *Prob. Code § 10450*, 15 days notice of the hearing on the petition must be given, as provided in *Prob. Code § 1220*, to each person listed in *Prob. Code § 1220*, each known heir whose interest in the estate would be affected by the petition, each known devisee whose interest in the estate would be affected by the petition, and each person named as executor in the will of the decedent [*Prob. Code § 10451(b)(1)-(4)*; *see Prob. Code § 1220(a)(1)* (time for giving notice)]. For a form for notice of hearing, see *§ 445.61*.

[4] Full or Limited Authority

The petition may request either full or limited authority to administer the estate under the Independent Administration of Estates Act [*Prob. Code § 10450(b)*; *see Prob. Code §§ 10402, 10403*]. Limited authority restricts the representative from selling or exchanging real property, granting an option to purchase real property, or borrowing money with the loan secured by an encumbrance on real property [*Prob. Code § 10403*].

[5] State Statutes

Full authority defined. *Prob. Code § 10402*

Limited authority defined. *Prob. Code § 10403*

Petition for independent administration. *Prob. Code § 10450*

Notice of hearing on petition. *Prob. Code § 10451*

[6] Local Court Rules

Petitions required to be set for hearing must have self-addressed, stamped envelope attached. Los Angeles Co. Super. Ct. Rules, Rules 10.31(a) (or attach fax cover sheet; *see* Los Angeles Co. Super. Ct. Rules, Rule 10.31(b))

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38-445 California Forms of Pleading and Practice--Annotated § 445.61

§ 445.61 Notice of Hearing [Prob. Code § 10451] on Petition for Authority to Administer Estate Without Court Supervision [Prob. Code § 10400 et seq.]

[1] FORM Notice of Hearing [Prob. Code § 10451] on Petition for Authority to Administer Estate Without Court Supervision [Prob. Code § 10400 et seq.]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	NOTICE OF HEARING ON PETITION FOR AU-
also known as _____ [*name*]	)	THORITY TO ADMINISTER ESTATE WITHOUT
Deceased.	)	COURT SUPERVISION
		[*Prob. Code § 10451*]

_____

NOTICE IS HEREBY GIVEN that _____ [*name of petitioner*], personal representative of the above-entitled estate, has filed herein a petition for authority to administer the estate of _____ [*name*], deceased, reference to which is made for further particulars, and that the time and place of hearing the same has been set for _____ [*date*], at _____ [*time*], in the courtroom [of Department _____] of this court at _____ [*address*], _____ [*city*], California.

The petition requests authority to administer the estate under the Independent Administration of Estates Act. This will avoid the need to obtain court approval for many actions taken in connection with the estate. However, before taking certain actions, the personal representative will be required to give notice to interested persons unless they have waived notice or have consented to the proposed action. The petition will be granted unless good cause is shown why it should not be.

Dated: _____.

_____ [*signature*]
Attorney for _____ [*moving party*]

[2] Use of Form

This form is for use by the executor or administrator in notifying interested parties of the hearing of the petition for authority to administer the estate without court supervision under the Independent Administration of Estates Act (*Prob. Code § 10400 et seq.*) [*see Prob. Code § 10451*].

This form is to be used if the petition for administration has already been filed. If the petition for administration has not been filed, counsel should, in lieu of using this form, provide notice in the petition for administration [*see Prob. Code § 8100*]. This can be done by checking the appropriate box on the Judicial Council form of Notice of Petition to Administer Estate. For an illustration of the Judicial Council form, see Ch. 442, *Probate: Initiating Probate Administration* .

The form may be used in lieu of the Judicial Council form of notice of hearing. However, local court rule may require that the Judicial Council form be used [*see* Cal. Rules of Ct., Rule 982(b); *see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rules 10.11(a)]. For an illustration of the Judicial Council form, see Ch. 447, *Probate: Statutory Notice Requirements* . If the Judicial Council form is used, the statement in the second paragraph of this form must be typed onto the Judicial Council form [*see Prob. Code § 10451(c)*].

[3] Notice

At least 15 days before the time set for the hearing on the petition, the petitioner must give notice as required by *Prob. Code § 1220* (discussed in Ch. 447, *Probate: Statutory Notice Requirements*). In addition to the persons listed in *Prob. Code § 1220*, the petitioner must give the same notice to each known heir and each known devisee whose interest in the estate would be affected by the petition, and to each person named as executor in the decedent's will [*see Prob. Code §§ 1206, 1220(a)(1)*, 10541(b)].

[4] Content of Notice

This form contains a statement regarding the nature of independent administration, as required by statute [*see Prob. Code § 10451(c)*].

[5] State Statutes

Notice generally. *Prob. Code §§ 1200-1265*

Notice of hearing of petition for independent administration. *Prob. Code § 10451*

[6] Cross References

For a related form, see *§ 445.60*.

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38-445 California Forms of Pleading and Practice--Annotated § 445.62

§ 445.62 Objection [Prob. Code § 10452] to Petition for Authority to Administer Estate Without Court Supervision Under Independent Administration of Estates Act [Prob. Code § 10400 et seq.]

[1] FORM Objection [Prob. Code § 10452] to Petition for Authority to Administer Estate Without Court Supervision Under Independent Administration of Estates Act [Prob. Code § 10400 et seq.]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	OBJECTION TO PETITION FOR AUTHORITY
also known as _____ [*name*],	)	TO ADMINISTER ESTATE WITHOUT COURT
Deceased.	)	SUPERVISION
		[*Prob. Code § 10452*]

_____

Objector alleges:

1. Objector is the _____ [*relationship*] of the deceased, and a person interested in his/her estate.

2. Good cause exists for not granting the petition of _____ [*name of personal representative*] for _____ [full *or* limited] authority to administer the estate of _____ [*name*] under the Independent Administration of Estates Act because _____ [*state reasons as appropriate*].

[*EITHER*]

WHEREFORE, objector prays that the petition of _____ [*name of personal representative*] requesting authority to administer the estate of _____ [*name*], decedent, without court supervision under the

Independent Administration of Estates Act be denied.

[*OR*]

WHEREFORE, objector prays that _____ [*name of personal representative*] be granted only limited authority to administer the estate of _____ [*name*], decedent, under the Independent Administration of Estates Act.

_____ [*signature*]
Objector
_____ [*signature*]
Attorney for Objector

VERIFICATION

I, _____ [*name*], am the objector in the above-entitled proceeding. I have read the foregoing objection and know the contents thereof. The same is true of my own knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*].

_____ [*signature*]

CAUTION:
An objection to a petition must be verified [*see Prob. Code § 1021(a)(2)*].

[2] Use of Form

This form is for use by a person interested in the estate to object to the court granting authority to the personal representative to administer the estate without court supervision under the Independent Administration of Estates Act [*Prob. Code § 10400 et seq.*]. The objection must be made as provided in *Prob. Code § 1043*, which permits the interested party to object either (1) in writing at or before the hearing, or (2) orally at the hearing. If the objection is oral, the court in its discretion must either hear and determine the objection at the hearing, or grant a continuance for the purpose of allowing the objection to be made in writing [*see Prob. Code § 1043(a), (b)*].

Unless the court determines that the objecting party has shown good cause why the authority to administer the estate should not be granted, the court must grant the requested authority. If the objecting party has shown good cause why only limited authority should be granted, the court must grant only limited authority [*Prob. Code § 10452*; *see Prob. Code §§ 12* ("shall" is mandatory), 10403 (defining "limited authority")].

[3] State Statutes

Responses and objections by interested parties at hearings generally. *Prob. Code § 1043*

Objections to petition for independent administration. *Prob. Code § 10452*

[4] Local Court Rules

Department number and hearing date required on documents filed in connection with matters already set for hearing.
Los Angeles Co. Super. Ct. Rules, Rule 10.10

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38-445 California Forms of Pleading and Practice--Annotated § 445.63

§ 445.63 Order [Prob. Code § 10452] Granting Authority to Administer Estate Without Court Supervision Under Independent Administration of Estates Act [Prob. Code § 10400 et seq.]

[1] FORM Order [Prob. Code § 10452] Granting Authority to Administer Estate Without Court Supervision Under Independent Administration of Estates Act [Prob. Code § 10400 et seq.]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
Estate of _____ [*name*],	)	NO. _____
also known as _____	)	ORDER GRANTING AUTHORITY TO ADMINIS-
[*name*]	)	TER ESTATE WITHOUT COURT SUPERVISION
Deceased.	)	

_____

The petition of _____ [*name*] for an order granting _____ [full *or* limited] authority to administer the estate of _____ [*name*], deceased, without court supervision under the Independent Administration of Estates Act, came on regularly to be heard on this date. Notice of the time and place of the hearing was given as required by *Probate Code Section 10451*. [Special notice was _____ (given to _____ (*name(s)*), as requested *or* requested and waived by _____ (*names(s)*)).] Proof was made to the satisfaction of the court that the allegations of the petition are true, and that no objecting party has appeared and shown good cause why such authority should not be granted. The court grants the petition as follows:

IT IS ORDERED that the petition for _____ [full *or* limited] authority to administer the estate of _____ [*name*], deceased, without court supervision under the provisions of the Independent Administration of Estates Act is hereby granted to _____ [*name of personal representative*].

[The authority granted to _____ (*name of personal representative*) does not include authority under the Independent Administration of Estates Act to sell or exchange real property, grant an option to purchase real

property, or borrow money with the loan secured by an encumbrance on real property.]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This order is for use in granting a petition for authority to administer an estate without court supervision under the Independent Administration of Estates Act [*see Prob. Code § 10400 et seq.*]. The optional paragraph at the end of the order is for use when the petition sought limited authority under *Prob. Code § 10400 et seq.* [*see Prob. Code §§ 10403, 10450(b)(2), 10452(b)*].

[3] State Statutes

Mailing and filing of notice of entry of judgment. *Code Civ. Proc. § 664.5*

Finding of giving or waiver of notice as required. *Prob. Code § 1260(b)*

Appealable orders. *Prob. Code § 1303*

Order granting petition for independent administration. *Prob. Code § 10452*

[4] Los Angeles County

Material to be included in probate orders. Los Angeles Co. Super. Ct. Rules, Rule 10.42

[5] City and County of San Francisco

Material to be included in probate orders. San Francisco Uniform Local Ct. Rules, Rule 14.27

[6] Cross References

For related forms, see *§§ 445.60 -445.62*.

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38-445 California Forms of Pleading and Practice--Annotated § 445.64

§ 445.64 Notice of Proposed Action to Be Taken by Personal Representative Without Court Supervision, Objection to Proposed Action, and Consent to Proposed Action [Prob. Code §§ 10580-10592]--Judicial Council Form DE-165

[1] FORM Notice of Proposed Action to Be Taken by Personal Representative Without Court Supervision, Objection to Proposed Action, and Consent to Proposed Action [Prob. Code §§ 10580-10592]--Judicial Council Form DE-165

Click here to view image.

[2] Use of Form

This mandatory form is for use by the executor or administrator to advise persons affected by a proposed action not requiring court supervision prior to the consummation of that action [*see Prob. Code § 10580*].

[3] Source of Form

This form is an illustration of Judicial Council Form DE-165, Notice of Proposed Action. Use of the form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[4] Contents of Form

A notice of proposed action must state all of the following [*Prob. Code § 10585(a)*]:

- The name and mailing address of the personal representative;
- The person and telephone number to call to obtain additional information;
- The action proposed to be taken, with a reasonably specific description of the action; and

- The date on or after which the proposed action is to be taken.

If a proposed action involves the sale or exchange of real property, or the granting of an option to purchase real property, the notice of proposed action must state the material terms of the transaction, including, if applicable, the sale price and the amount of, or method of calculating, any commission or compensation paid or to be paid to an agent or broker in connection with the transaction [*Prob. Code § 10585(a)(3)*].

[5] Recipients of Notice

The notice of proposed action must be given to each known devisee and heir whose interest in the estate is affected by the proposed action, to each person who has filed a request for special notice pursuant to *Prob. Code § 1250*, and to the State of California if any portion of the estate is to escheat to it and if the State's interest in the estate is affected by the proposed action [*Prob. Code § 10581*; *see also Prob. Code § 1207(a)* (limiting notice requirement when notice may be required to person because of possible stepparent-stepchild or foster parent-foster child relationship)]. However, the notice need not be given to a person who consents in writing to the proposed action, or to a person who waives the right to advice of the proposed action [*see Prob. Code §§ 10582, 10583*].

[6] Mailing or Delivery of Notice

The notice of proposed action must be mailed or personally delivered to each person required to be given notice of proposed action not less than 15 days before the date specified in the notice of proposed action on or after which the proposed action is to be taken. If mailed, the notice of proposed action must be addressed to the person at the person's last known address. *Prob. Code §§ 1215* and *Prob. Code § 1216* apply to the mailing or delivery of the notice of proposed action [*Prob. Code § 10586*].

[7] State Statutes

Mailing or delivery of notice. *Prob. Code §§ 1215, 1216, 10586*

Situations when notice of proposed action required or permitted. *Prob. Code § 10580*

Persons who must receive notice of proposed action. *Prob. Code § 10581*

Consent to proposed action. *Prob. Code § 10582*

Waiver of notice. *Prob. Code § 10583*

Form and contents of notice. *Prob. Code § 10585*

Failure to comply with notice requirements. *Prob. Code § 10591*

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38-445 California Forms of Pleading and Practice--Annotated § 445.65

§ 445.65 Pre-Notice Consent to Proposed Action or Waiver of Notice of Particular Proposed Action [Prob. Code §§ 10582, 10583(a)]

[1] FORM Pre-Notice Consent to Proposed Action or Waiver of Notice of Particular Proposed Action [Prob. Code §§ 10582, 10583(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	_____ [CONSENT TO ACTION *or*
also known as _____ [*name*],	)	WAIVER OF NOTICE OF PROPOSED ACTION]
Deceased		

_____

TO: _____ [*name of personal representative*], personal representative of the above-entitled estate.

[*EITHER*]

I hereby _____ [consent to *or* waive my right to notice of] the following action(s) proposed to be taken by the personal representative of the above-entitled estate, pursuant to his/her authority under the Independent Administration of Estates Act: _____ [*specify nature of proposed action(s)*].

I understand that by signing this _____ [consent *or* waiver] I give up my right to receive notice of the action(s) described above, and that I cannot object after the action is taken. I have been advised concerning my right to revoke this _____ [consent *or* waiver] at any time pursuant to *Probate Code Section 10584*.

[*OR, if only particular aspect of notice is waived*]

I hereby waive the requirement of _____ [*specify aspect of notice waived, e.g.,* the setting forth of the material terms of a proposed real estate transaction under *Probate Code section 10585(3)*] with regard to the following action(s) proposed to be taken by the personal representative of the above-captioned estate, pursuant to his/her authority under the Independent Administration of Estates Act: _____ [*specify nature of proposed action(s)*].

_____ [*date*]
_____ [*signature*]

[2] Use of Form

This form is for use by a person entitled to notice of proposed action to consent to or waive notice of proposed action with respect to a particular proposed action or actions [*see Prob. Code § 10582* (consent to proposed action), *Prob. Code § 10583(a)* (waiver of notice of particular proposed action)]. The consent or waiver may be executed at any time before or after the proposed action is taken [*see Prob. Code §§ 10582* (consent), 10583(a) (waiver)].

If the person intends to waive his or her right to notice of *all* proposed actions involving specified types of transaction, the Judicial Council form of waiver set forth in *see § 445.67* must be used rather than this form [*see Prob. Code § 10583(b)*].

[3] Pre-Notice Consent

If pre-notice consent is given, the notice of proposed action need not be given to that consenting party [*see Prob. Code §§ 10580, 10581*]. If a person wishes to consent to a proposed action after notice has been served, he or she may do so by executing the appropriate section of the Notice of Proposed Action form [*see § 445.64*].

Pre-notice consent can be used to avoid the delay that otherwise would result from the requirement under *Prob. Code §§ 10586* and *10587* that a person given notice of proposed action be allowed at least 15 days within which to object to the proposed action [Law Rev. Comm. Comment to *Prob. Code § 10582*].

The giving of consent to an action precludes the person from seeking court review of the action after it has been taken [*see Prob. Code § 10590(a)(2)*].

Consent may be revoked in writing [*see Prob. Code § 10584*]. For a form for revocation of consent, see *§ 445.64*.2.

[4] Waiver of Notice of Particular Proposed Action

The waiver of notice of a particular proposed action must describe the particular proposed action and may waive particular aspects of the notice, such as the delivery, mailing, or time requirements of *Prob. Code § 10586*, or the giving of the notice in its entirety for the particular proposed action [*see Prob. Code § 10583(a)*]. Waiving notice of a proposed action precludes the waiving party from seeking court review of the action after it has been taken [*see Prob. Code § 10590(a)(2)*].

If notice itself is not waived, but only a technical aspect of that notice, such as a time requirement, it would appear that the person should not be precluded from seeking review of the proposed action after it has been taken [*see Prob. Code § 10590(a)(2)* (precluding person who "has waived notice of ... the proposed action" from seeking review)].

[5] Content of Notice

Although not specifically required by *Prob. Code §§ 10582* (governing consent to proposed action) or 10583(a)

(governing waiver of notice of particularproposed action), this form incorporates certain warnings and notice of rights set forth in the Judicial Council form for waiver of notice of all proposed actions or of all actions involving specified kinds of transactions [*see Prob. Code § 10583(b)*; *see § 445.67* for illustration of Cal. Judicial Council Form DE-166]. These include statements of understanding that by signing the waiver or consent the person gives up his or her right to prior notice of the action [*see Prob. Code §§ 10582* (consent), 10583(a) (waiver)] and the right to object to the proposed action after it is taken, [*see Prob. Code § 10590(a)(2)*] and that the person has the right to revoke the consent or waiver, pursuant to *Prob. Code § 10584*.

[6] State Statutes

Consent to proposed action. *Prob. Code § 10582*

Waiver of notice concerning particular proposed action. *Prob. Code § 10583(a)*

Effect of waiver. *Prob. Code § 10590*

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38-445 California Forms of Pleading and Practice--Annotated § 445.66

§ 445.66 Revocation of Consent or of Waiver of Notice of Particular Proposed Action [Prob. Code § 10584]

[1] FORM Revocation of Consent or of Waiver of Notice of Particular Proposed Action [Prob. Code § 10584]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	REVOCATION OF _____
also known as _____ [*name*],	)	[CONSENT TO ACTION *or* WAIVER OF NOTICE
Deceased	)	OF PROPOSED ACTION]

_____

TO: _____ [*name of personal representative*], personal representative of the above-entitled estate.

[*EITHER*]

I hereby revoke my written consent to _____ [*specify the particular action or type of transactions to which consent had been given*].

[*OR*]

I hereby revoke my waiver of my right to receive notice of the following proposed action: _____ [*specify particular action for which notice was waived*].

[*CONTINUE*]

A copy of the _____ [consent *or* waiver], dated _____, which is hereby revoked, is attached.
_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form is for use by a person who consented to a proposed action under *Prob. Code § 10582* or waived notice of a particular proposed action under *Prob. Code § 10583(a)* to revoke that consent or waiver [*see Prob. Code § 10584*].

If the person has executed a general waiver of the right to all notices of proposed actions [*see Prob. Code § 10583(b)(1)*] or a waiver of the right to notice of proposed action for all transactions of a type that includes the particular proposed action [*see Prob. Code § 10583(b)(2)*], the Judicial Council form for revocation must be used [*see § 445.67*].

[3] Revocation of Waiver or Consent

A waiver or consent must be revoked in writing and is effective only when thewriting is received by the personal representative [*Prob. Code § 10584(a)*]. A copy of the revocation may be filed with the court, but its effectiveness is not dependent on the filing [*Prob. Code § 10584(b)*].

[4] State Statutes

Waiver of notice concerning particular proposed action. *Prob. Code § 10583(a)*

Revocation of consent or waiver. *Prob. Code § 10584*

Effect of waiver. *Prob. Code § 10590*

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38-445 California Forms of Pleading and Practice--Annotated § 445.67

§ 445.67 Waiver of Right to Notice of Proposed Action [Prob. Code § 10583] and Revocation of Waiver of Notice of Proposed Action [Prob. Code § 10584]--Judicial Council Form DE-166

[1] FORM Waiver of Right to Notice of Proposed Action [Prob. Code § 10583] and Revocation of Waiver of Notice of Proposed Action [Prob. Code § 10584]--Judicial Council Form DE-166

Click here to view image.

[2] Use of Form

This form of waiver is for use by a person who is entitled to receive notices of proposed action from the personal representative, to make either a general waiver of the right to all notices of proposed actions, or a waiver of the right to notice of proposed action for all transactions of a particular type [*see Prob. Code § 10583(b)*].

Use of the Judicial Council Form is mandatory to make a general waiver or a waiver of notice of specified types of transactions [*see Prob. Code § 10583(b)*].

If the person entitled to notice intends to waive notice only of a particular proposed action, or only of a particular aspect of notice, but does not wish to execute a general waiver, or a waiver as to all transactions of a particular type, the *form in § 445.65* should be used.

[3] Source of Form

This form is an illustration of Judicial Council Form DE-166, Waiver of Notice of Proposed Action. Use of this form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*); Cal. Rules of Ct., Appen., Div. III]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[4] Revocation of Waiver

A waiver or consent may be revoked only in writing and is effective only when the writing is received by the personal representative [*Prob. Code § 10584(a)*]. A copy of the revocation may be filed with the court, but the effectiveness of the revocation is not dependent on a copy being filed with the court [*Prob. Code § 10584(b)*].

[5] State Statutes

Waiver of notice. *Prob. Code § 10583*

Revocation of waiver. *Prob. Code § 10584*

Effect of waiver. *Prob. Code § 10590*

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38-445 California Forms of Pleading and Practice--Annotated § 445.68

§ 445.68 Objection and Application for Order Restraining Personal Representative From Taking Proposed Action Without Court Supervision [Prob. Code §§ 10587, 10588]

[1] FORM Objection and Application for Order Restraining Personal Representative From Taking Proposed Action Without Court Supervision [Prob. Code §§ 10587, 10588]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	OBJECTION AND APPLICATION FOR ORDER
Estate of _____ [*name*],	)	RESTRAINING PERSONAL
also known as _____ [*name*],	)	REPRESENTATIVE FROM TAKING PROPOSED
Deceased.	)	ACTION WITHOUT COURT SUPERVISION
		[*Prob. Code §§ 10587, 10588*]

_____

Objector alleges:

1. Objector is the _____ [*relationship*] of the deceased, and a person interested in his/her estate.

2. On _____ [*date*], _____ [*name of personal representative*] was granted authority to administer the estate of _____ [*name*], deceased, without court supervision under the Independent Administration of Estates Act.

3. On _____ [*date*], _____ [*name of personal representative*] gave objector notice of a proposed action that does not require court supervision under *Probate Code Section 10502*. A copy of that notice is attached hereto as Exhibit A.

4. Objector objects to _____ [*name of personal representative*] taking the following proposed action, without court supervision: _____ [*describe proposed action briefly*].

WHEREFORE, objector prays for an order restraining _____[*name of personal representative*] from taking the above described action without court supervision.
Dated: _____.

_____ [*signature*]
Objector
_____ [*signature*]
Attorney for Objector

CAUTION:
An objection to a petition must be verified [*see Prob. Code § 1021(a)(2)*].

[2] Use of Form

This form is for use by a person affected by an action that the executor or administrator proposes to take without court supervision to obtain an order restraining the action [*see Prob. Code §§ 10587, 10588*].

[3] Ex Parte Application

The person objecting to the proposed action does not need to notify the personal representative of the objection and application for a restraining order. Further, the person does not need to show cause to obtain the order restraining the personal representative from taking the proposed action without court supervision [*see Prob. Code § 10588(a)*].

[4] Service of Order

The personal representative is deemed to have notice of the restraining order if it is served on the personal representative in the same manner provided for in *Code Civ. Proc. § 415.10* or *415.30* or in the manner authorized by the court, before whichever of the following times is later [*Prob. Code § 10588*]:

- The date specified in a notice of proposed action on or after which the proposed action is to be taken, or
- The date the proposed action is actually taken.

[5] Consummation of Proposed Action

If the proposed action is one that would require court supervision if the personal representative had not been granted authority to administer the estate under the Independent Administration of Estates Act and the personal representative has notice of a written objection made under *Prob. Code § 10587* to the proposed action or a restraining order issued under *Prob. Code § 10588*, then the personal representative must, if he or she desires to take the proposed action, take the proposed action under the provisions of the Probate Code dealing with court supervision of that kind of action [*Prob. Code § 10589(a)*].

If the proposed action is one that would not require court supervision even if the personal representative had not been granted authority to administer the estate under the Independent Administration of Estates Act, but the personal representative has given notice of the proposed action and has notice of a restraining order issued under *Prob. Code § 10588*, the personal representative must, if he or she desires to take the proposed action, request instructions from the

court concerning the proposed action and may take the proposed action only under such order asmay be entered by the court [*Prob. Code § 10589(b)*; *see also Prob. Code § 9610* and Ch. 457, *Probate: Instructions to Personal Representative*].

[6] Notice of Hearing

A person who serves a restraining order issued under *Prob. Code § 10588* in the manner provided in that section must be given notice of any hearing on a petition for court authorization or confirmation of the proposed action [*Prob. Code § 10589(c)*].

[7] State Statutes

Alternative manner of objection; delivery of written objection to executor or administrator. *Prob. Code § 10587*

Application for order restraining proposed action. *Prob. Code § 10588*

Court supervision of action following restraining order. *Prob. Code § 10589(a), (b)*

Notice of hearing. *Prob. Code § 10589(c)*

Consequences for failure of personal representative to comply with *Prob. Code § 10589*. *Prob. Code § 10591*

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38-445 California Forms of Pleading and Practice--Annotated § 445.69

§ 445.69 Order Restraining Personal Representative From Taking Proposed Action Without Court Supervision [Prob. Code § 10588]

[1] FORM Order Restraining Personal Representative From Taking Proposed Action Without Court Supervision [Prob. Code § 10588]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER RESTRAINING PERSONAL
Estate of _____ [*name*],	)	REPRESENTATIVE FROM TAKING PROPOSED
also known as _____ [*name*],	)	ACTION WITHOUT COURT SUPERVISION
Deceased.	)	[*Prob. Code § 10588*]

_____

The objection of _____ [*name*] to the proposed action of _____ [*name of personal representative*], as personal representative of the estate of _____ [*name*], deceased, under *Probate Code Section 10587* came on regularly to be heard on this date. Proof was made to the satisfaction of the court that on _____ [*date*], the above-named personal representative advised the above-named objector, a person interested in the estate of _____ [*name*], deceased, of the proposed action. _____ [*Name of objector*] on this day has filed an objection to the taking of that proposed action and has requested an order restraining the taking of the proposed action without court supervision. Therefore, the court grants the application for a restraining order as follows:

[*EITHER, if proposed action would require court supervision if the personal representative did not have authority under the IAEA*]

IT IS ORDERED that _____ [*name of personal representative*] is hereby restrained from _____ [*describe proposed action*] except pursuant to the provisions of Probate Code section _____ [*specify section governing court supervision of that kind of action in absence of IAEA authority*].

[*OR, if proposed action would not require court supervision even if the personal representative did not have authority under the IAEA*]

IT IS ORDERED that _____ [*name of personal representative*] is hereby restrained from _____ [*describe the proposed action*] without requesting instructions from the court concerning the proposed action and thereafter taking the proposed action only under such order as may be entered by the court.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This order is for use in granting a petition to restrain an executor or administrator from taking a proposed action without court supervision [*see Prob. Code § 10588*].

[3] Local Court Rules

Material to be included in probate orders. Los Angeles Co. Super. Ct. Rules, Rule 10.42; San Francisco Uniform Local Ct. Rules, Rule 14.27; Santa Clara Co. Super. Ct. Rules, Rule 5.2(G)

Procedure on submission of orders in advance of hearing date. San Francisco Uniform Local Ct. Rules, Rule 14.6

[4] Cross References

For a related form, *see § 445.68*.

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38-445 California Forms of Pleading and Practice--Annotated § 445.70

§ 445.70 Petition to Revoke or Limit Authority of Personal Representative to Continue Independent Administration of Estate [Prob. Code § 10454]

[1] FORM Petition to Revoke or Limit Authority of Personal Representative to Continue Independent Administration of Estate [Prob. Code § 10454]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	PETITION TO _____ [LIMIT *or*
also known as _____ [*name*],	)	REVOKE] INDEPENDENT ADMINISTRATION
Deceased.	)	OF ESTATE AUTHORITY OF PERSONAL REP-
		RESENTATIVE
		[*Prob. Code § 10454*]

_____

Petitioner alleges:

1. Petitioner is the _____ [*relationship*] of the decedent, and a person interested in his/her estate.

2. _____ [*Name of personal representative*] is the personal representative of the estate of decedent and, on _____ [*date*], was given _____ [full *or* limited] authority to administer the estate under the Independent Administration of Estates Act.

[*EITHER*]

3. _____ [*Name of personal representative*] has performed his/her duties incompetently and his/her

authority to continue to administer the decedent's estate without court supervision should be revoked because _____ [*state reasons*].

[*OR*]

3. _____ [*Name of personal representative*] should not have full authority to administer the decedent's estate because _____ [*state reasons*].

WHEREFORE, petitioner prays for an order restraining _____ [*name of personal representative*] from continuing to administer the estate of _____ [*name*], deceased, _____ [without court supervision *or* with full authority] under the Independent Administration Estates Act [and granting _____(*name of personal representative*) limited authority to administer the estate].
Dated: _____.

_____ [*signature*]
Petitioner
_____ [*signature*]
Attorney for Petitioner

[*Verification. See § 445.60.*]

CAUTION:
This petition must be verified [*see Prob. Code § 1021(a)(1)*].

[2] Use of Form

This petition is for use to obtain an order revoking the authority or limiting full authority of a personal representative to continue the administration of an estate without court supervision under the Independent Administration of Estates Act [*see Prob. Code § 10454(b)*].

[3] Contents of Form

Paragraphs 1 and 2 in this form contain statements showing the standing of an interested party to object to continued independent administration by a representative [*see Prob. Code § 10454(a)*].

The petition must set forth the basis for the revocation or limitation of the authority of the executor or administrator [*Prob. Code § 10454(b)*]. The first alternative Paragraph 3 is for use if the petitioner seeks to revoke the representative's full or limited authority [*see Prob. Code § 10454(a)(1)*]. The second alternative Paragraph 3 is for use if the petitioner seeks to restrict the representative's full authority to limited authority [*see Prob. Code § 10454(a)(2)*]. A personal representative with "limited authority" generally must obtain court supervision to sell or exchange real property, grant an option to purchase real property, or borrow money with the loan secured by encumbrance on real property [*see Prob. Code §§ 10403, 10501(b)*].

[4] Notice of Hearing

Notice of the hearing on the petition must be given as provided in *Prob. Code § 1220*. In addition, the personal representative must be served with a copy of the petition and a notice of the time and place of the hearing at least 15 days prior to the hearing. Service must be made in the manner provided in *Code Civ. Proc. § 415.10* or *Code Civ. Proc. § 415.30* or in such manner as may be authorized by the court [*Prob. Code § 10454(c)*]. For discussion and forms for

notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

[5] State Statutes

Petition to revoke or limit independent administration authority. *Prob. Code § 10454*

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38-445 California Forms of Pleading and Practice--Annotated § 445.71

§ 445.71 Order [Prob. Code § 10454(d), (e)] Revoking or Limiting Authority of Personal Representative to Administer Estate Without Court Supervision Under Independent Administration of Estates Act [Prob. Code § 10400 et seq.]

[1] FORM Order [Prob. Code § 10454(d), (e)] Revoking or Limiting Authority of Personal Representative to Administer Estate Without Court Supervision Under Independent Administration of Estates Act [Prob. Code § 10400 et seq.]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER _____ [LIMITING *or* RE-
also known as _____ [*name*],	)	VOKING] AUTHORITY OF PERSONAL REPRES-
Deceased.	)	ENTATIVE TO INDEPENDENTLY ADMINISTER ESTATE
		[*Prob. Code § 10454*]

_____

The petition of _____ [*name of petitioner*] to revoke the [full] authority of _____ [*name of personal representative*] to independently administer the estate of _____ [*name*], decedent, came on regularly to be heard on this date. Notice of the time and place of the hearing was given as required by *Probate Code Section 10454(c)*. [Special notice was _____ (given to _____ (*name(s)*), as requested *or* requested and waived by _____ (*names(s)*).] Proof was made to the satisfaction of the court that good cause is shown why _____ [*name of personal representative*] should not continue to have [full] authority to administer the estate of _____ [*name*] under the Independent Administration of Estates Act. Therefore, the court grants the petition to _____ [revoke *or* restrict] the authority of _____ [*name of personal representative*] as follows:

[*EITHER, if existing authority is to be revoked in its entirety*]

IT IS ORDERED that the _____ [full *or* limited] authority granted to _____ [*name of personal representative*] to independently administer the estate of _____ [*name*], decedent, is hereby revoked.

IT IS FURTHER ORDERED that new letters _____ [testamentary *or* of administration] shall issue forthwith reflecting that _____ [*name of personal representative*] does not have authority under the Independent Administration of Estates Act.

[*OR, if full authority is to be revoked and limited authority granted instead*]

IT IS ORDERED that the full authority granted to _____ [*name ofpersonal representative*] to administer the estate of _____ [*name*], decedent, is hereby revoked. Limited authority is granted to him/her to administer the estate under the Independent Administration of Estates Act, pursuant to which there is no authority, without court supervision, to (1) sell or exchange real property, (2) grant an option to purchase real property, or (3) borrow money with the loan secured by an encumbrance on real property.

IT IS FURTHER ORDERED that new letters _____ [testamentary *or* of administration] shall issue forthwith annotated as described in *Section 8405(c) of the Probate Code* to reflect limited authority to administer the estate under the Independent Administration of Estates Act.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This order is for use in granting a petition to revoke or limit the authority of a personal representative to administer an estate under the Independent Administration of Estates Act [*see Prob. Code § 10454*].

[3] Good Cause Requirement

The petitioner must demonstrate to the court that good cause exists for revoking or limiting the authority of an executor to independently administer an estate [*see Prob. Code § 10454(d), (e)*].

[4] Letters Testamentary or of Administration

If the court revokes the authority of the personal representative to continue independent administration of the estate, new letters testamentary or of administration should issue without the notation described in *Prob. Code § 8405(c)*, or if full authority is revoked and limited authority granted, with the notation described in *Prob. Code § 8405(c)* that is required when the authority granted is limited authority [*see Prob. Code §§ 8405(c), 10454(d), (e)*]. *Prob. Code § 8405(c)* stipulates that letters must include a notation whether the personal representative is authorized to act under the Independent Administration of Estates Act and whether the authority includes or excludes sale, exchange, granting an option to purchase, or borrowing money with the loan secured by an encumbrance on, real property under the act [*see Prob. Code § 8405(c)*].

[5] State Statutes

Mailing and filing of notice of entry of judgment. *Code Civ. Proc. § 664.5*

Finding of giving or waiver of notice as required. *Prob. Code § 1260(b)*

Appealable order. *Prob. Code § 1303(a)*

Order revoking or limiting authority to independently administer estate. *Prob. Code § 10454(d), (e)*

[6] Local Court Rules

Material to be included in probate orders. San Francisco Super. Ct. Rules, Rule 2.5

[7] Cross References

For a related form, *see § 445.70*.

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38-446 California Forms of Pleading and Practice--Annotated 446.syn

§ 446.syn Synopsis to Chapter 446: PROBATE: BONDS--INCREASE AND DECREASE DURING ADMINISTRATION

§ 446.01 Scope of Chapter

§§ 446.02-446.09 [Reserved]

§ 446.10 Governing Law

§ 446.11 Bond Requirements

[1] Generally

[2] Waiver

[a] Grounds

[b] Requiring Bond Despite Waiver

[3] Deposit in Lieu of Bond

§ 446.12 Execution of Bond

§ 446.13 Personal Sureties

§ 446.14 Admitted Surety Insurers

§ 446.15 Release and Substitution of Surety

§ 446.16 Reduction in Amount of Bond

§ 446.17 Reduction of Bond by Amount in Blocked Account

[1] Authorization in Court's Discretion

[2] Deposit of Property With Financial Institution

[a] By Personal Representative

[b] By Petitioner for Appointment as Personal Representative

[3] Disadvantages to Reduction of Bond Premiums

§ 446.18 Increase in Amount of Bond

[1] Bond Given Is Insufficient

[2] New Bond Within Reasonable Time

[3] Suspension of Powers

[4] Appointment of Subsequent Administrator

[5] Sale of Real Property

§ 446.19 Public Administrator's Bond

§ 446.20 Action on Bond

§ 446.40 State Statutes

[1] Bond Requirement

[2] Change of Surety

[3] Cost of Bond

[4] Deposit of Estate Property

[5] Increase in Bond Amount

[6] Liability on Bond

[7] Reduction in Bond Amount

[8] Sureties

§ 446.41 California Rules of Court

§ 446.42 Local Rules of Court

[1] Alameda County

[2] Los Angeles County

[3] Sacramento County

[4] San Diego County

[5] City and County of San Francisco

§ 446.43 Decisions

§§ 446.44-446.59 [Reserved]

§ 446.60 Facts to Be Ascertained

§ 446.61 Preliminary Determinations

§ 446.62 Make Deposit and Obtain Receipts

§ 446.63 Draft Papers for Petition to Reduce Amount of Bond

§ 446.64 File Petition With the Court That Has Jurisdiction of the Estate

§ 446.65 Notice of Hearing

§ 446.66 Attend Hearing and Present Receipts of Depositories

§ 446.67 Present Order for Signature

§ 446.68 File Reduced Bond

§§ 446.69-446.79 [Reserved]

§ 446.80 Application for Ex Parte Order That Property on Deposit Be Withdrawn Only on Court Authorization and Supporting Declaration [Prob. Code § 9703(a)]

[1] FORM

[2] Use of Form

[3] Contents of Form

[4] Cross References

[5] State Statutes

[6] Local Rules of Court

§ 446.81 Ex Parte Order That Property on Deposit Be Withdrawn Only on Court Authorization [Prob. Code § 9703(a)]

[1] FORM

[2] Use of Form

[3] Contents of Form

[4] Finding Regarding Notice

[5] State Statutes

[6] Local Rules of Court

§ 446.82 Petition to Reduce Bond Based on Property in Blocked Account [Prob. Code § 8483]

[1] FORM

[2] Use of Form

[3] Property Deposited in Blocked Account

[4] Determination of Bond Reduction

[5] Affidavit Regarding Condition of Estate

[6] Notice of Hearing

[7] State Statutes

[8] Local Rules of Court

[9] Text References

§ 446.83 Order Reducing Bond Based on Funds in Blocked Account [Prob. Code § 8483]

[1] FORM

[2] Use of Form

[3] Local Rules of Court

[4] Cross References

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38-446 California Forms of Pleading and Practice--Annotated § 446.01

§ 446.01 Scope of Chapter

This chapter discusses increases and decreases in the amount of bonds and liability on the bond during the course of administration of the estate. It sets forth the procedure to seek increase or reduction of the bond. It contains the following forms:

- An application for an ex parte order [*see § 446.80*] and an ex parte order [*see § 446.81*] permitting the personal representative to deposit estate funds or other property in specified accounts (so-called "blocked" accounts), subject to withdrawal only on court order.

- A notice of motion to reduce a bond based on estate property deposited in a blocked account [*see § 446.82*] and an order granting that motion [*see § 446.83*].

For discussion and forms regarding increase and decrease in bond requirements regarding the sale of property, see Ch. 455, *Probate: Sale of Estate Property* .

For discussion of procedure for depositing assets in and obtaining distribution from blocked accounts, see Ch. 456, *Probate: Management of Estate Assets* .

For discussion and forms regarding increase of an insufficient bond, and an application by a surety for release, as well as other issues and forms regarding bonds generally, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateCosts & Expenses

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[Reserved]

§§ 446.02[Reserved]

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38-446 California Forms of Pleading and Practice--Annotated § 446.10

§ 446.10 Governing Law

Bonds and undertakings in probate proceedings are governed by *Prob. Code §§ 8480-8488* and the Bond and Undertaking Law (*Code Civ. Proc. §§ 995.010-996.560*). The bond of a personal representative holding authority under the Independent Administration of Estates Act is additionally governed by *Prob. Code § 10453*. A public administrator's bond is governed by *Prob. Code § 7621(d)*. The deposit of assets with financial institutions is governed generally by *Prob. Code §§ 9700-9705*. *Cal. Rules of Ct., Rule 7.201* governs waiver of bond and court requirement of bond despite waiver in certain cases. *Cal. Rules of Ct., Rule 7.202* governs bond for two or more personal representatives. *Cal. Rules of Ct., Rule 7.203* governs the requirement of a separate bond for an individual cofiduciary of a corporate fiduciary. *Cal. Rules of Ct., Rule 7.204* governs petitions to increase bond. *Cal. Rules of Ct., Rule 7.205* governs the fixing of the amount of bond when the personal representative has independent power to sell real property. *Cal. Rules of Ct., Rule 7.206* governs bond on a sale of real property. *Cal. Rules of Ct., Rule 7.501* governs bonds on inventory and appraisal.

In addition, there may be local court rules that govern additional procedures not covered by the California Rules of Court listed above. The attorney should consult the applicable rules in each jurisdiction.

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-446 California Forms of Pleading and Practice--Annotated § 446.11

§ 446.11 Bond Requirements

[1] Generally

Except as otherwise provided by statute, every person appointed as personal representative must give a bond approved by the court before letters are issued. If two or more persons are appointed, the court may require either a separate bond from each or a joint and several bond. If a joint bond is furnished, the liability on the bond is joint and several [*Prob. Code § 8480(a),(c)*; *see Prob. Code § 8542(a)(1)* (application of this bond requirement to special administrators)]. The bond must be for the benefit of interested persons and must be conditioned on the personal representative's faithful execution of the duties of the office according to law [*Prob. Code § 8480(b)*].

If a will admitted to probate names two or more persons to serve as executors but not all serve and the will does not expressly waive bond if fewer than all of the named persons serve, the court must require each executor to give a bond, unless the court waives this requirement under *Prob. Code § 8481(a)(2)* [*Cal. Rules of Ct., Rule 7.202*].

Because a corporate fiduciary (whether a personal representative, guardian, conservator, or trustee) cannot assume responsibility for the acts of an individual cofiduciary, an individual cofiduciary who is required to give a bond is required to provide a separate bond, except to the extent that the court orders the assets to be held solely by the corporate cofiduciary [*Cal. Rules of Ct., Rule 7.203*].

The court in its discretion may fix the amount of the bond, but the amount of the bond will not be more than the sum of the following [*Prob. Code § 8482(a)*]:

- The estimated value of the personal property; and
- The probable annual gross income of the estate; and
- If independent administration is granted as to real property, the estimated value of the decedent's interest in the real property.

Notwithstanding *Prob. Code § 8482(a)*, if the bond is to be given by an admitted surety insurer, the court may establish a fixed minimum amount for the bond, based on the minimum premium required by the admitted surety insurer [*Prob. Code § 8482(b)*; *see Code Civ. Proc. § 995.120* (admitted surety insurer defined)].

If the bond is to be given by personal sureties, the amount of the bond must be twice the amount fixed by the court under *Prob. Code § 8482(a)* [*see Prob. Code § 8482(c)*].

In addition, the content of and procedures relating to bonds required by *Prob. Code § 8480* are governed by the Bond and Undertaking Law (*Code Civ. Proc. §§ 995.010-996.560*), except to the extent that *Prob. Code §§ 7000-12591* provide differently [*Prob. Code 8487*; *see Code Civ. Proc. § 995.020(a)*].

[2] Waiver

[a] Grounds

A bond is not required in either of the following cases [*Prob. Code § 8481(a)*; *see also Cal. Rules of Ct., Rule 7.201(a)* (if will waives bond, petition for letters must so state)]:

- The will waives the bond requirement.
- All beneficiaries waive the bond requirement in writing and the written waivers are attached to the petition for appointment of a personal representative. However, this does not apply if the will requires a bond.

[b] Requiring Bond Despite Waiver

Notwithstanding the waiver of a bond by a will or by all the beneficiaries, on petition of any interested person or on its own motion, the court may for good cause require that a bond be given, either before or after issuance of letters [*Prob. Code § 8481(b)*; *Cal. Rules of Ct., Rule 7.201(b)*].

In addition, the court in its discretion may require an out-of-state personal representative to give a bond, regardless of any waiver [see Prob. Code § 8517; *Cal. Rules of Ct., Rule 7.201(b)*].

[3] Deposit in Lieu of Bond

In lieu of filing a bond, a personal representative may deposit any of the following with the court clerk [*Code Civ. Proc. § 995.710(a)* (requirements); see *Code Civ. Proc. §§ 995.160, 995.170* (definitions)]:

- Lawful money of the United States.
- Bearer bonds or bearer notes of the United States or the State of California.
- Certificates of deposit payable to the clerk issued by banks or savings and loan associations.
- Bank savings accounts assigned to the clerk, with evidence of deposit.
- Investment certificates or share accounts issued by savings and loan associations and assigned to the clerk.
- Certificates for funds or share accounts issued by a credit union and assigned to the clerk.

The deposit must be in an amount or have a face value or, in the case of bearer bonds or bearer notes, have a market value equal to or in excess of the amount that would be required to be secured by the bond if the bond were given by an admitted surety insurer [*Code Civ. Proc. § 995.710(b)*]. The deposit must be accompanied by an agreement executed by the personal representative authorizing the clerk to collect, sell, or otherwise apply the deposit to enforce the liability on the deposit. The agreement must include an address at which the personal representative may be served with notices, papers, or other documents [*see Code Civ. Proc. § 995.710(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-446 California Forms of Pleading and Practice--Annotated § 446.12

§ 446.12 Execution of Bond

A bond must be executed by two or more sufficient personal sureties, or by one sufficient admitted surety insurer, or by any combination of sufficient personal sureties and admitted surety insurers [*Code Civ. Proc. § 995.310*; *see Code Civ. Proc. § 995.120* ("admitted surety")].

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§ 446.13 Personal Sureties

A personal surety on a bond is sufficient if all of the following conditions are satisfied [*Code Civ. Proc. § 995.510(a)*]:

- The surety is a person other than the personal representative and is not an officer of the court or member of the State Bar;

- The surety is a resident, and either an owner of real property or a householder, within the state; and

- The surety is worth the amount of the bond in real or personal property, or both, situated in this state, over and above all debts and liabilities, exclusive of property exempt from enforcement of a money judgment.

If the amount of the bond is over $10,000 and it is executed by more than two personal sureties, their individual worth may be less than the amount of the bond long as their aggregate worth is twice the amount of the bond [*Code Civ. Proc. § 995.510(b)*].

A bond executed by personal sureties must be accompanied by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of the qualifications of each surety [*Code Civ. Proc. § 995.520(a)*]. For a discussion of the information that must be set forth in this affidavit, see *Code Civ. Proc. § 995.520(b)* and Ch. 538, *Suretyship, Bonds, and Undertakings*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 446.14 Admitted Surety Insurers

For purposes of the Bond and Undertaking Law (*Code Civ. Proc. §§ 995.010-996.560*), an authorized surety company is equivalent to an admitted surety insurer [*see Code Civ. Proc. § 995.120(b)*]. The term "admitted surety insurer" means a corporate insurer or a reciprocal or interinsurance exchange to which the Insurance Commissioner has issued a certificate of authority to transact surety insurance in this state, as defined in *Ins. Code § 105* [*Code Civ. Proc. § 995.120(a)*].

Inasmuch as *Prob. Code § 8480* provides for a bond with any number of sureties, one sufficient admitted surety insurer may become, and must be accepted as, sole surety on the bond [*see Code Civ. Proc. § 995.610(a)*]. The admitted surety insurer is subject to all the liabilities and entitled to all the rights of personal sureties [*Code Civ. Proc. § 995.610(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-446 California Forms of Pleading and Practice--Annotated § 446.15

§ 446.15 Release and Substitution of Surety

When a surety of a personal representative desires to be released from liability on the bond, he or she may apply to the court for relief [*see Code Civ. Proc. § 996.110(a)*]. The personal representative may, if a surety applies for release from liability on the bond, apply to the court for an order that another surety be substituted for the original surety [*see Code Civ. Proc. § 996.110(b)*]. A personal representative who petitions for the substitution or release of a surety must file with the petition an account in the form provided in *Prob. Code § 10900*. The court will not order a substitution or release unless the account is approved [*Prob. Code § 8485*; for a form for an account that may be adapted for use in this context, *see* Ch. 458, *Probate: Final Distribution*].

The surety applying for a release must serve a copy of the application and a notice of hearing on the application on the personal representative and on any other sureties not less than 15 days before the date set for the hearing [*see Code Civ. Proc. § 996.110(c)*].

On hearing the application, the court must determine whether or not injury to the estate would result from substitution or release of the surety. If the court determines that the release would not reduce the amount of the bond or the number of sureties below the minimum required by *Prob. Code § 8482* and *Code Civ. Proc. § 995.310*, substitution of the surety is not necessary and the court must order the release of the surety. If the court determines that no injury would result from the substitution of the surety, the court must order the substitution of a sufficient surety within such time as appears reasonable [*see Code Civ. Proc. § 996.120*].

For further discussion and forms of notices of motion and orders to release or to substitute sureties, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesBondsSuretiesProceduresEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in

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38-446 California Forms of Pleading and Practice--Annotated § 446.16

§ 446.16 Reduction in Amount of Bond

If a personal representative petitions to have the amount of bond reduced, the petition must include an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) setting forth the condition of the estate. Notice of hearing must be given as provided in *Prob. Code § 1220* [*Prob. Code § 8484*; *see Code Civ. Proc. § 996.030(b)* (motion for determination of excessive bond)]. At least 15 days notice must be given to those entitled to notice, which include all persons who have given notice of appearance in person or by attorney, as well as those entitled to special notice [*see Prob. Code § 1220*; *see also* Ch. 447, *Probate: Statutory Notice Requirements*].

On hearing the motion, the court may determine that the amount of the bond is excessive and may order it reduced to an amount that, in its discretion, appears proper under the circumstances [*Code Civ. Proc. § 996.030(a)*]. The order is subject to the limitations of *Prob. Code § 8482*, providing for the amount of the bond [*see Code Civ. Proc. § 996.030(a)*; *see also* the discussion in *§ 446.11*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-446 California Forms of Pleading and Practice--Annotated § 446.17

§ 446.17 Reduction of Bond by Amount in Blocked Account

[1] Authorization in Court's Discretion

Prob. Code § 8483 applies when some of the property in the estate has been deposited, pursuant to *Prob. Code §§ 9700-9705*, in an insured account in a financial institution, with a trust company, or in a securities depository on condition that the property, including any earnings thereon, not be withdrawn except on authorization of the court [*Prob. Code § 8483(a)*]. For discussion of deposit of property pursuant to *Prob. Code §§ 9700-9705*, see *§ 446.17[2]*.

In a proceeding to determine the amount of the bond of the personal representative (whether at the time of appointment or subsequently), on production of a receipt showing the deposit of property in the estate in the manner described in *Prob. Code § 8483(a)*, the court may order that the property not be withdrawn except on authorization of the court and may, in its discretion, do either of the following [*Prob. Code § 8483(b)*; *see §§ 446.82*, *446.83*]:

- Exclude the property in determining the amount of the required bond or reduce the amount of the bond to an amount the court determines is reasonable.

- If a bond has already been given or the amount fixed, reduce the amount to an amount the court determines is reasonable.

[2] Deposit of Property With Financial Institution

[a] By Personal Representative

A personal representative is generally authorized to deposit money of the estate in an insured account in a financial institution in California [*Prob. Code § 9700*], and to deposit personal property of the estate with a trust company [*Prob. Code § 9701*; *see also Prob. Code § 9702* (trust company serving as personal represenative, or trust company with whom the personal representative has deposited securities under *Prob. Code § 9701*, is authorized to deposit securites of estate in securities depository as provided in *Fin. Code § 1592*)]. On application of the personal representative, the court, with or without notice, may order that money or other personal property be deposited under *Prob. Code § 9700* or *9701* and be subject to withdrawal only on authoritization of the court [*Prob. Code § 9703(a)*; *see also Prob. Code §§*

9700, 9701 (generally permitting withdrawal without court order unless otherwise provided by court order)]. The personal representative must deliver a copy of the court order to the financial institution or trust company at the time the deposit is made [*Prob. Code § 9703(b)*].

For forms for an ex parte application and order under *Prob. Code § 9703(a), see §§ 446.80* and *446.81*. For further discussion of *Prob. Code §§ 9700-9705*, see Ch. 456, *Probate Management of Assets* .

[b] By Petitioner for Appointment as Personal Representative

Notwithstanding *Prob. Code § 8400* (no power to administer estate until appointment as personal representative is effective), a petitioner for appointment as personal representative may deliver property in the petitioner's possession to a trust company or financial institution for deposit, or allow a trust company or financial institution to retain on deposit property already in its possession, as provided in *Prob. Code §§ 9700-9705* (deposit by personal representative of estate money, personal property, and securities) [*Prob. Code § 8401(a)*]. The petitioner must obtain and file with the court a written receipt including the agreement of the trust company or financial institution that the property on deposit, including any earnings thereon, will not be allowed to be withdrawn except on order of the court [*Prob. Code § 8401(b)*]. In receiving and retaining property under *Prob. Code § 8401*, the trust company or financial institution is protected to the same extent as though it had received the property from a person who had been appointed personal representative [*Prob. Code § 8401(c)*].

The effect of language in *Prob. Code § 8401(a)*, providing for the deposit of property with a financial institution or for the retention of property by such an institution "as provided in" *Prob. Code §§ 9700-9705*, is unclear. The latter provisions are applicable to deposits by duly appointed personal representatives. This langugage in *Prob. Code § 8401(a)* may be construed, on one hand, simply to require that a petitioner for appointment as personal representative make deposits in the same manner, and with the same types of institutions, as a personal representative is required to do under *Prob. Code § 9700* or *9701*. On the other hand, it may also mean that a petitioner for appointment as personal representative must, before depositing property pursuant to *Prob. Code § 8401(a)*, obtain a prior court order pursuant to *Prob. Code § 9703*. For further discussion of *Prob. Code §§ 9700, 9701*, and *9703*, see *§ 446.17[2][a]*.

[3] Disadvantages to Reduction of Bond Premiums

Although a reduction of the bond amount would result in the reduction of the amount of the bond premiums, there are disadvantages to using a blocked account. "An insured account in a financial institution" means an account in a bank, an account in an insured credit union, and an account in an insured savings and loan association, to the extent that the account is insured [*Prob. Code § 46*; *see Prob. Code § 22* (definition of account in an insured credit union), *Prob. Code § 23* (definition of account in an insured savings and loan association)]. Thus, a blocked account is generally a type of savings account. Withdrawals from these accounts involve the preparation of affidavits and orders, for which the attorney for the representative is entitled to an extraordinary fee. Moreover, the financial institution may impose service charges. Thus, the costs involved may nullify or exceed the savings in bond premiums. Therefore, the respective costs and lack of flexibility should be considered before determining which method to employ.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBonds, Guarantees & Letters of CreditGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateCosts & Expenses

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§ 446.18 Increase in Amount of Bond

[1] Bond Given Is Insufficient

The court may determine that the bond that has been given is or has, from any cause, become insufficient because the sureties are insufficient or because the amount of the bond is insufficient [*see Code Civ. Proc. § 996.010(a)*]. The court's determination is made on motion supported by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) or on the court's own motion [*Code Civ. Proc. § 996.010(b)*]. The notice of motion must specify the precise grounds for the objection. If the ground for the objection is that the amount of the bond is insufficient, the notice of motion must state the reasons for the insufficiency and must include an estimate of the amount that would be sufficient [*Code Civ. Proc. § 996.010(b)*; *see Code Civ. Proc. § 995.930(a)*].

When facts occur that make it necessary or appropriate to increase the amount of the bond, the personal representative is required to immediately make an ex parte application for an order increasing the bond [*Cal. Rules of Ct., Rule 7.204(a)*]. If the personal representative has not already done so, the attorney for the personal representative is required to make the ex parte application, immediately on becoming aware of the need to increase the bond [*Cal. Rules of Ct., Rule 7.204(b)*]. The application by a personal representative or the attorney for a personal representative must show the value of the estate's personal property and the probable annual gross income of the estate [*Cal. Rules of Ct., Rule 7.204(c)(1)*]. If the personal representative has full Independent Administration of Estates Act authority, the applicant should also show the amount of the equity in estate real property [*Cal. Rules of Ct., Rule 7.204(c)(3)*].

At the time of inventory and appraisal, whether bond has been filed and the amount of bond that has been filed must be stated [*Cal. Rules of Ct., Rule 7.501(a)*]. If the bond is insufficient, the fiduciary is required to immediately make ex parte application, as provided in *Cal. Rules of Ct., Rule 7.204*, for an order increasing the amount of the bond [*Cal. Rules of Ct., Rule 7.501(b)*]. The statement must be signed by the attorney of record for each fiduciary who has an attorney of record and by each fiduciary who does not [*Cal. Rules of Ct., Rule 7.501(c)*].

For further discussion and forms, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[2] New Bond Within Reasonable Time

On determining that the bond is insufficient, the court must order that a sufficient new, additional, or supplemental bond be given within a reasonable time not less than five days. The order is subject to the limitations in *Prob. Code § 8482*, providing for the amount of the bond [*see Code Civ. Proc. § 996.010(c)*].

[3] Suspension of Powers

On petition of an interested person, the court may suspend the powers of the personal representative in whole or in part, for a time, as to specific property or circumstances or as to specific duties of the office, or may make any other order to secure proper performance of the duties of the personal representative, if it appears to the court that the personal representative otherwise may take some action that would jeopardize unreasonably the interest of the petitioner. Persons with whom the personal representative may transact business may be made parties [*Prob. Code § 9614(a)*].

The matter will be set for hearing within 10 days unless the parties agree otherwise. Notice as the court directs must be given to the personal representative and attorney of record, if any, and to any other parties named in the petition [*Prob. Code § 9614(b)*; for discussion and forms relating to notice, *see* Ch. 447, *Probate: Statutory Notice*]. If it determines that the petition was brought unreasonably and for the purpose of hindering the personal representative in the performance of his or her official duties, the court may assess attorney's fees against the petitioner and make the assessment a charge against the interest of the petitioner [*Prob. Code § 9614(c)*].

[4] Appointment of Subsequent Administrator

If the person appointed as personal representative fails to give a new, additional, or supplemental bond, or to substitute a sufficient surety, under court order, the person may be removed from office [*Prob. Code § 8480(c)*]. On removal of a personal representative from office, the court will revoke any letters issued to that representative, and the authority of that representative ceases [*Prob. Code § 8501*].

[5] Sale of Real Property

If the personal representative requests or has been granted an independent power to sell or hypothecate real estate or to lease it for a term of more than one year, the personal representative is required to state in the request to fix the amount of the bond the value of the real property less encumbrances [*Cal. Rules of Ct., Rule 7.205*].

Before confirming a sale of real property the court will require such additional bond as may be proper, not exceeding the maximum requirements of *Prob. Code § 8482*, treating the expected proceeds of the sale as personal property [*Prob. Code § 8482(c)*; for further discussion, *see* Ch. 455, *Probate: Sale of Estate Property*]. If a bond or additional bond is required in an order confirming sale of real estate, the court must not file the order until the additional bond is filed [*Cal. Rules of Ct., Rule 7.206*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateCosts & Expenses

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§ 446.19 Public Administrator's Bond

Appointment of the public administrator as personal representative may be made on the court's own motion, after notice to the public administrator as provided in *Prob. Code § 1220* [*Prob. Code § 7621(b)*]. When a public administrator is appointed personal representative, his or her oath and official bond are in lieu of the personal representative's oath and bond. Every estate so administered will be charged an annual bond fee in the amount of $25, plus one-fourth of one percent of the amount of an estate greater than $10,000 [*Prob. Code § 7621(d)*]. If a successor personal representative is appointed, or if the public administrator is discharged before the annual fee has been fully earned, the bond charges will be prorated [*Prob. Code § 7621(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawIntestacyAdministratorsEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateCosts & Expenses

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§ 446.20 Action on Bond

The bond is for the benefit of interested persons [*Prob. Code § 8480(b)*]. If any condition of the bond is breached, an action may be brought against the sureties on the bond for the use and benefit of the estate or any person interested in it [*Prob. Code § 8488(a)*]. If there was a former personal representative, the current representative may bring an action on the bond of the former representative for the use and benefit of all interested persons [*Prob. Code § 9822*].

The bond is conditioned on the personal representative's faithful execution of the duties of the office according to law [*Prob. Code § 8481(b)*]. Some specific instances in which the personal representative and the surety on the bond may be subject to liability are the following:

- Neglect or misconduct in proceedings in relation to a sale of estate property [*see Prob. Code §§ 10380, 10381*].

- Failure to pay a debt to the extent of the order for its payment [*Prob. Code §§ 11424, 11429(b)*].

Any action against the sureties on the personal representative's bond must be commenced within four years after the personal representative has been discharged or removed or, if the representative has been surcharged, within four years after surcharge order becomes final, whichever is later [*Prob. Code § 8488(b)*]. If an order of discharge is ineffective to release the personal representative from personal liability (because, for example, the order was obtained by fraud or conspiracy, or by misrepresentation of a material fact in a petition or account) [*see Prob. Code § 7250(c)*], then the action must be commenced within six years after the order of discharge becomes final, regardless of the fact that the order was ineffective to release the personal representative from personal liability [*Prob. Code § 8488(c)*]. For discussion and forms relating to such actions, *see* Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 446.40 State Statutes

[1] Bond Requirement

Bond and Undertaking Law. *Code Civ. Proc. § 995.010 et seq.*

Execution and filing. *Code Civ. Proc. § 995.310 et seq.*

Deposit in lieu of bond. *Code Civ. Proc. § 995.710 et seq.*

Bond requirement. *Prob. Code § 8480*

Waiver. *Prob. Code § 8481(a)*

Amount. *Prob. Code § 8482*

[2] Change of Surety

Release or substitution of sureties. *Code Civ. Proc. § 996.110 et seq.*; *Prob. Code § 8485*

[3] Cost of Bond

Personal representative allowed reasonable cost of bond. *Prob. Code § 8486*

[4] Deposit of Estate Property

Deposit of money of estate in bank or trust company; order; effect of deposit; holding and repayment; order ex parte. *Fin. Code §§ 1592, 1593*

Deposit of personal assets of estate with trust company; reduction of bond. *Fin. Code § 1586*

Delivery of property to depository by petitioner; written receipt and agreement as to withdrawal; extent of depository's protection. *Prob. Code § 8401*

Exclusion of deposited property in determining amount of bond. *Prob. Code § 8483*

[5] Increase in Bond Amount

Procedure for increasing bond. *Code Civ. Proc. § 996.010*

Increase in bond due to sale of real property. *Prob. Code § 8482(d)*

[6] Liability on Bond

Period of limitation for action on bond. *Prob. Code § 8488*

Action on bond of former personal representative. *Prob. Code § 9822*

Liability for neglect or misconduct in relation to sale of estate property. *Prob. Code §§ 10380, 10381*

Liability for failure to pay debt. *Prob. Code §§ 11424, 11429(b)*

[7] Reduction in Bond Amount

Procedure for reduction of bond. *Code Civ. Proc. § 996.030*; *Prob. Code § 8484*

Reduction in bond by deposit of funds in blocked account. *Prob. Code § 8483*

[8] Sureties

Admitted surety insurers. *Code Civ. Proc. §§ 995.120, 995.610 et seq.*

Personal sureties. *Code Civ. Proc. §§ 995.510, 995.520*

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-446 California Forms of Pleading and Practice--Annotated § 446.41

§ 446.41 California Rules of Court

Bonds and undertakings. *Cal. Rules of Ct., Rule 3.1130*

Statement in petition when bond waived. *Cal. Rules of Ct., Rule 7.201(a)*

Bond requirement, despite waiver, for out-of-state personal representative or for good cause. *Cal. Rules of Ct., Rule 7.201(b)*

Bond requirement when there are two or more representatives. *Cal. Rules of Ct., Rule 7.202*

Requirement of separate bonds for cofiduciaries. *Cal. Rules of Ct., Rule 7.203*

Procedure to increase bond. *Cal. Rules of Ct., Rule 7.204*

Fixing bond when personal representative has independent power to sell real property. *Cal. Rules of Ct., Rule 7.205*

Additional bond for sale of real estate. *Cal. Rules of Ct., Rule 7.206*

Inventory and appraisal statement of bond and order to increase bond if bond is insufficient. *Cal. Rules of Ct., Rule 7.501*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 446.42 Local Rules of Court

[1] Alameda County

Bond of personal representative. Alameda Co. Super. Ct. Rules, Rule 12.5

[2] Los Angeles County

Personal representative's bond. Los Angeles Co. Super. Ct. Rules, Rule 10.57

Special administrator's bond. Los Angeles Co. Super. Ct. Rules, Rule 10.58

Effect of sale of real estate on bond. Los Angeles Co. Super. Ct. Rules, Rule 10.92

[3] Sacramento County

Waiver of bond. Sacramento Co. Super. Ct. Rules, Rule 15.25

Deposit of property to reduce bond. Sacramento Co. Super. Ct. Rules, Rule 15.26

[4] San Diego County

Inventory and appraisal to show sufficiency of bond. San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.40

Additional bond. San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.41

Bond on sale of real property. San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.76

[5] City and County of San Francisco

Bonds. San Francisco Uniform Local Ct. Rules, Rules 14.34, 14.45 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-446 California Forms of Pleading and Practice--Annotated § 446.43

§ 446.43 Decisions

Surety not required to pay successor administrator on disappearance of administrator who was sole distributee, even though assets were missing. *Estate of Johnson (1985) 162 Cal. App. 3d 917, 921-922, 208 Cal. Rptr. 821*

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[Reserved]

§§ 446.44[Reserved]

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38-446 California Forms of Pleading and Practice--Annotated § 446.60

§ 446.60 Facts to Be Ascertained

NOTE:

The following guide for decreasing bond is illustrative only. It addresses only bonds given by admitted surety insurers. Forms of such bonds are provided by the insurer. This guide relates to reduction of bond under *Prob. Code § 8483(b)(2)* based on the deposit of estate assets in blocked accounts. The procedure for obtaining bond in a reduced amount at the time the personal representative is appointed based on assets being in blocked accounts under *Prob. Code § 8401* is incorporated in Ch. 442, *Probate: Initiating Probate*. Each case has differences that may require procedures not set forth here, and there may be significant variations if a different reason for seeking reduced bond is involved or if personal sureties rather than admitted surety insurers are used.

1. Facts relating to value of estate assets.

a. Value of all personal property.

b. Value of annual income from all real and personal property.

c. If independent administration is granted as to real property, estimated value of decedent's interest in the real property.

2. Facts relating to personal representative.

a. Does the will waive or require bond for the personal representative?

b. Is personal representative the sole beneficiary under the will or do all devisees waive the bond requirement?

c. Is personal representative entitled to the entire estate by intestate succession or do all heirs waive the bond requirement?

NOTE:
If the answer to subparagraph (b) or (c) is affirmative, bond may be dispensed with if a request is made in the petition for appointment of a personal representative. The written waivers of all the beneficiaries of the estate must be attached to the petition [*Prob. Code § 8481(a)*; *see* *Prob. Code § 24* ("beneficiary" defined); for forms, *see* Ch. 442, *Probate: Initiating Probate*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateCosts & Expenses

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§ 446.61 Preliminary Determinations

1. Estimate cash requirements for estate, including cash that may be needed to pay family allowance, debts, taxes, cash bequests, miscellaneous administration expenses, and commissions and fees.

2. Value of cash, securities, and personal property available for deposit in blocked account [*see Prob. Code §§ 8401, 8483, 9700-9705*].

3. Amount of premium to be saved annually by excluding value of deposited assets from computation of amount of bond [*see Prob. Code § 8483(b)*].

4. Estimate probable amount of bond by adding value of all personal property to the probable value of annual gross rents, issues, profits of all property belonging to the estate and, if independent administration is granted as to real property, the estimated value of the decedent's interest in the real property [*see § 446.60*, Paragraph 1].

5. Ascertain amount of annual premium for corporate surety bond in the amount calculated if no reduction [*see Code Civ. Proc. §§ 995.120(b), 995.610-995.660*].

6. Ascertain amount of premium saved annually if the value of the assets available for deposit in a blocked account [Paragraph (2), *above*] is excluded from the calculation of the amount of bond [*see Prob. Code § 8483(b)*].

7. From the amount of premium saved, deduct the estimated charge for the blocked account by the depositor.

8. Determine if savings to estate warrants interference with ease of estate management and expenses of service charges and obtaining court authorization for withdrawals [*see Prob. Code § 8484*; *see also Code Civ. Proc. § 996.030*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesFamiliesEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateCosts & Expenses

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38-446 California Forms of Pleading and Practice--Annotated § 446.62

§ 446.62 Make Deposit and Obtain Receipts

1. Apply to the court for an order that the property be deposited subject to withdrawal only on court authorization [*see Prob. Code §§ 8483(a),(b), 9703(a),(b)*; §§ 446.80, 446.81].

NOTE:
The application may be made with or without notice [*Prob. Code 9703(a)*].

2. Collect assets selected to be deposited in blocked account.

3. If financial institution does not have its own adequate form or receipt, prepare original and at least two copies of receipt [*see Prob. Code §§ 8401(b), 8483(b)*].

NOTE:
Written receipts of the financial institution or institutions in which the cash, securities, and/or personal property is deposited that include the financial institution's agreement not to allow withdrawals without a court order will have to be filed with the court [*Prob. Code § 8483(b)*].

4. Deliver the assets and a certified copy of the personal representative's letters to the depository along with a copy of the court order that the property be subject to withdrawal only on authorization of the court [*see Prob. Code § 9703(b)*].

5. Have an authorized bank officer sign the original receipt, and retain it for filing with the court, leaving one conformed copy for the depository's records [*see Prob. Code §§ 8401(b), 8483(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawDirectors & OfficersGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in

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38-446 California Forms of Pleading and Practice--Annotated § 446.63

§ 446.63 Draft Papers for Petition to Reduce Amount of Bond

Draft the following papers:

1. Petition to reduce bond [*see Prob. Code § 8484*; *see § 446.82*].

2. Declaration setting forth the condition of the estate [*see Prob. Code § 8484*; *see also Code Civ. Proc. § 2015.5* (use of declaration in lieu of affidavit)].

3. Order reducing bond [*see Prob. Code § 8484*; *see § 446.83*].

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§ 446.64 File Petition With the Court That Has Jurisdiction of the Estate

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§ 446.65 Notice of Hearing

At least 15 days before the time set for the hearing, mail notice of the time and place of hearing to any other personal representative not petitioning and to all persons, or their attorneys, who have appeared in the proceeding or requested special notice [*see Prob. Code §§ 1220(a), 1252, 8484*].

NOTE:

Proof of the giving of notice must be made at the hearing. It is usually done by an affidavit or declaration of mailing [*see* *Prob. Code §§ 1260, 1261*; for discussion and forms relating to notice, ***see*** Ch. 447, ***Probate: Statutory Notice***].

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-446 California Forms of Pleading and Practice--Annotated § 446.66

§ 446.66 Attend Hearing and Present Receipts of Depositories

NOTE:

The affidavit or declaration may be offered in evidence if uncontested [*Prob. Code § 1022*]. In addition, written receipts of the depositories must be produced [*Prob. Code § 8483(b)*].

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PART IV. PROCEDURAL CHECKLIST

38-446 California Forms of Pleading and Practice--Annotated § 446.67

§ 446.67 Present Order for Signature

File original and obtain one certified copy for each depository and an endorsed filed copy for office files. Obtain one certified copy of letters for each depository [*see Prob. Code § 8401(b)*; *see § 446.83*].

NOTE:

Under *Code Civ. Proc. § 1019.5(a)*, when a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order (***see*** Ch. 372, ***Motions and Orders***) must be given by the prevailing party to all other parties or their attorneys in the manner provided in *Code Civ. Proc. §§ 1010-1020* (***see*** Ch. 518, ***Service of Summons and Papers***), unless notice is waived by all parties in open court and is entered in the minutes.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateCosts & Expenses

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38-446 California Forms of Pleading and Practice--Annotated § 446.68

§ 446.68 File Reduced Bond

1. Obtain bond in the reduced amount.

NOTE:
The surety on the new, reduced bond may be the same as on the previous bond [*Code Civ. Proc. § 996.030(c)*].

2. File original of the new bond with the court clerk and obtain an endorsed filed copy of the receipt for office files [*see Code Civ. Proc. § 995.340*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsExecutionsEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateCosts & Expenses

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[Reserved]

§§ 446.69[Reserved]

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38-446 California Forms of Pleading and Practice--Annotated § 446.80

§ 446.80 Application for Ex Parte Order That Property on Deposit Be Withdrawn Only on Court Authorization and Supporting Declaration [Prob. Code § 9703(a)]

[1] FORM Application for Ex Parte Order That Property on Deposit Be Withdrawn Only on Court Authorization and Supporting Declaration.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	APPLICATION FOR EX PARTE ORDER THAT
Deceased.	)	PROPERTY ON DEPOSIT BE WITHDRAWN ONLY ON COURT AUTHORIZATION AND SUPPORTING DECLARATION OF _____ [*name*]

_____

APPLICATION

I, _____ [*name of attorney*], hereby apply on behalf of _____ [*name*], _____ [*specify representative capacity, e.g.,* executor of the will of _____ (*name*), deceased] for an order that _____ [$_____ *or describe and give value of personal property*], belonging to decedent's estate, be deposited in _____ [*name and location of financial institution or trust company*] and be subject to withdrawal only on authorization of this court, pursuant to *Probate Code Section 9703(a)*.

[*If local court rule requires a statement regarding special notice, add, EITHER, if no special notice has been requested*]

No special notice of the filing of this application has been requested.

[*OR, if special notice has been requested but waived or withdrawn*]

The following persons have _____ [waived *and/or* withdrawn requests for] special notice of the filing of this application, pursuant to Sections(s) _____ [1204 *and/or 1251 of the Probate Code*] Copies of the _____ [waivers *or* withdrawals] are marked as Exhibits _____, attached to this application, and made a part hereof.

[*CONTINUE*]

_____ [*date*]

_____ [*signature*]
Attorney for _____ [*applicant*]

VERIFICATION

I, _____ [*name*], am the applicant in the above-entitled proceeding. I have read the foregoing application and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

SUPPORTING DECLARATION OF _____ [*name*]

In support of this application, I declare that:

1. I am the duly appointed, qualified, and acting executor of the will of _____ [*name*], deceased.

2. I plan to deposit _____ [$_____ *or describe and give value of personal property*], belonging to decedent's estate, in _____ [*name and location of financial institution or trust company*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form is an application and supporting declaration for use by the personal representative to obtain an ex parte order that money or other personal property belonging to the estate be deposited pursuant to *Prob. Code § 9700* (money deposited in financial institution) or *Prob. Code § 9701* (personal property deposited with trust company) and be subject to withdrawal only on authorization of the court [*see Prob. Code § 9703(a)*]. For a form of order granting the application, *see § 446.81*. For further discussion of the deposit of estate funds or property by the personal representative, see the Introduction under *§ 446.17[2], above* , and Ch. 456, *Probate: Management of Estate* , *Management of Estate Assets*.

Whether this form should be referred to as an application or a petition depends on the court rule authorizing the particular relief sought and on local practice [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 10.37 ("application"); San Francisco Uniform Local Ct. Rules, Rule 14.20 ("petition")].

[3] Contents of Form

Each county has its own requirements for the issuance of ex parte orders in probate matters, which should be considered in drafting an application based on the foregoing form. For example, this form includes optional statements for use when local rule requires a statement respecting the existence of any requests for special notice [*see* Los Angeles Co. Super. Ct. Rules, Rule 10.38; San Francisco Uniform Local Ct. Rules, Rule 14.20] and a form for verification of the application [*see* Los Angeles Co. Super. Ct. Rules, Rules 10.37; San Francisco Uniform Local Ct. Rules, Rule 14.20].

The declaration may be adapted for use if counsel chooses to include statements, required by local court rule in certain circumstances, that notice of the application to interested parties has been given or attempted [*see* Los Angeles Co. Super. Ct. Rules, Rules 10.37 (required when it is not entirely clear that an ex parte order is proper or if factual issues are presented in which facts might be in doubt so that other parties should have an opportunity to be heard)].

For further discussion and forms for use in giving notice in probate matters, see Ch. 447, *Statutory Notice Requirements* .

[4] Cross References

For forms of declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

For forms of verification, see Ch. 572, *Verification*

For a related form, *see §§ 446.81* and *446.82*.

[5] State Statutes

Deposit of estate funds in financial institution. *Prob. Code § 9700*.

Deposit of estate personal property with trust company. *Prob. Code §§ 9701, 9702*

Property deposited subject to withdrawal only on court authorization. *Prob. Code § 9703*

[6] Local Rules of Court

Applications for ex parte order. Los Angeles Co. Super. Ct. Rules, Rules 10.37

Ex parte matters. San Francisco Uniform Local Ct. Rules, Rule 14.20

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38-446 California Forms of Pleading and Practice--Annotated § 446.81

§ 446.81 Ex Parte Order That Property on Deposit Be Withdrawn Only on Court Authorization [Prob. Code § 9703(a)]

[1] FORM Ex Parte Order That Property on Deposit Be Withdrawn Only on Court Authorization [Prob. Code § 9703(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	EX PARTE ORDER THAT PROPERTY ON DE-
Deceased.	)	POSIT BE WITHDRAWN ONLY ON COURT AU-
		THORIZATION

_____

The application of _____ [*name and representative capacity, e.g.,* executor of the will of _____ (*name*), deceased] for an ex parte order that _____ [$_____ *or describe and give value of personal property*], belonging to the estate of _____ [*name*], deceased, be deposited in _____ [*name and location of financial institution or trust company*], subject to withdrawal only on authorization of this court came before this court on _____ [*date*]. _____ [*Name of personal representative*] appeared by counsel, _____ [*name*].

The court finds that:

1. _____ [*Name*] is the duly appointed, qualified, and acting _____ [*describe representative capacity, e.g.,* executor of the will of _____ (*name*), deceased].

2. Notice of the hearing on the application was _____ [regularly given *or* waived *or* not required].

IT IS ORDERED that _____ [$_____ *or describe and give value of personal property*], belonging to the estate of _____ [*name*], deceased, be deposited in _____ [*name and location of financial institution or trust company*], subject to withdrawal only on authorization of this court.
Dated: _____

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is an ex parte order is for use when the court has granted an application for an order that estate money or other personal property be deposited pursuant to *Prob. Code § 9700* (money deposited in financial institution) or *Prob. Code § 9701* (personal property deposited with trust company) and be subject to withdrawal only on authorization of the court [*see Prob. Code § 9703(a)*].

The personal representative must deliver a copy of the court order to the financial institution or trust company at the time the deposit is made [*Prob. Code § 9703(b)*]. Unless it has actual notice of the order, the financial institution or trust company accepting a deposit pursuant to *Prob. Code § 9700* (money) or 9701 (personal property) need not be on notice of the existence of an order that the money or other property is subject to withdrawal only on court authorization [*Prob. Code § 9703(c)*].

For discussion of procedure to be followed when money or other property is ordered distributed, see Ch. 456, *Probate: Management of Estate* .

[3] Contents of Form

Local court rule may require the application to be accompanied by a separate order complete in itself [*see* Los Angeles Co. Super. Ct. Rules, Rule 10.37; San Francisco Uniform Local Ct. Rules, Rule 14.20]. In the Central District of the Los Angeles County Superior Court, however, the clerk has been instructed to prepare all orders and decrees of the court unless specifically directed otherwise at the time of the hearing. An ex parte order for deposit and withdrawal under *Prob. Code § 9703* does not appear to be among those orders and decrees normally designated for preparation by counsel [*see* Los Angeles Co. Super. Ct. Rules, Rules 10.37].

[4] Finding Regarding Notice

If it appears to the satisfaction of the court that notice has been regularly given or that the party entitled to notice has waived it, the court must so find in its order [*Prob. Code § 1260(b)*].

[5] State Statutes

Probate orders. *Prob. Code § 1047*

Requirement that order contain finding regarding notice. *Prob. Code § 1260(b)*

Property deposited as subject to withdrawal only on court authorization. *Prob. Code § 9703*

[6] Local Rules of Court

Orders must be complete in themselves and set forth all matters actually passed on by court, date of hearing, relief

granted, and names of persons and descriptions of property or amounts of money affected. Los Angeles Co. Super. Ct. Rules, Rule 10.42(a)

Any exhibits to order must appear before court's signature. San Francisco Uniform Local Ct. Rules, Rule 14.7

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38-446 California Forms of Pleading and Practice--Annotated § 446.82

§ 446.82 Petition to Reduce Bond Based on Property in Blocked Account [Prob. Code § 8483]

[1] FORM Petition to Reduce Bond Based on Property in Blocked Account [Prob. Code § 8483]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION TO REDUCE BOND AND SUPPORT-
	)	ING DECLARATION OF _____
Estate of _____ [*name*],	)	[*name*]
Deceased.	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____

_____

Petitioner _____ [*name*] respectfully represents:

1. Petitioner is the duly appointed, qualified, and acting personal representative of the Estate of _____ [*name*].

2. The deceased died on _____ [*date*] and his/her estate is pending administration in this court.

3. On _____ [*date*], petitioner filed a bond in the amount of $_____, based on the value of the assets of this estate.

4. The decedent's estate includes _____ [$_____ *and/or* securities valued at $_____ *and/or describe and give value of personal property*] deposited in _____ [

name and location of financial institution, trust company, or securities depository], pursuant to *Probate Code Sections 9700-9705*, and subject to the agreement of _____ [*name of financial institution, trust company, or securities depository*] that withdrawal of the _____ [funds *or* securities *or* property] will not be allowed except on authorization of the court. The deposit receipt signed by an authorized agent of the depository is attached hereto as Exhibit "_____" and made a part hereof.

5. The value of the deposited _____ [funds *and/or* securities *and/or* property] should be excluded from the computation of the amount of the bond, and the amount of the bond required should therefore be reduced to $_____, which is a reasonable sum under the circumstances.

WHEREFORE, petitioner prays for an order reducing the amount of bond required to $_____.

_____ [*signature*]
Petitioner
_____ [*signature*]
Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

SUPPORTING DECLARATION OF _____ [*name of personal representative*]

I, _____ [*name*], declare:

1. I am the duly appointed, qualified, and acting personal representative of decedent's estate.

2. The estimated value of the assets of the estate currently held by petitioner are as follows:

a. Annual gross income from real property ..... $_____

b. Personal property..... $_____

c. Annual gross income from personal property ..... $_____

[d. *If independent administration is granted as to real property*, Estimated value of decedent's interest in real property ..... $_____]

Total..... $_____

3. The estimated cash requirement of the estate is $_____, which includes the anticipated expense of: _____ [*specify*].

4. Declarant has deposited _____ [$_____ *and/or* securities valued at $_____ *and/or describe and give value of personal property*] in _____ [*name and address of financial institution, trust company, or securities depository*] in a blocked account, pursuant to *Probate Code Sections 9700-9705*, to be released only on order of court. A receipt issued by _____ [*name of financial institution, trust company, or securities depository*] and showing that withdrawal will not be allowed without court order has been filed in this proceeding.

5. If the value of _____ [funds *and/or* securities *and/or* property] so deposited is excluded from the calculation of the amount of the bond, the total amount of the bond should be $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This petition and supporting declaration is for use by the personal representative of an estate to obtain an order to reduce the amount of the required bond on the ground that money, securities, or other personal property of the estate has been deposited in a blocked account pursuant to *Prob. Code §§ 9700-9705* [*see Prob. Code §§ 8483, 8484*; *see also Prob. Code §§ 8401, 9703* (deposit in blocked account)]. The form may be adapted for use to seek reduction in the amount of bond if for some other reason it is considered excessive [*see Code Civ. Proc. § 996.030* (reduction of bonds generally); *Prob. Code § 8487* (application of Bond and Undertaking Law to bonds given in probate proceeding)].

[3] Property Deposited in Blocked Account

Prob. Code §§ 9700-9705 govern the deposit by the personal representative of various types of estate property in various types of depositories. Because an order reducing bond under *Prob. Code § 8483* requires the production of a receipt showing the property to have been deposited pursuant to *Prob. Code §§ 9700-9705*, the personal representative must petition for an order authorizing the deposit and make the deposit before bringing this petition to reduce bond [*see Prob. Code §§ 8483, 9703* and §§ 446.80, 446.81; for further discussion, see *§ 446.17[2]*].

For discussion and forms regarding a motion to increase an insufficient bond (*Code Civ. Proc. § 996.010*), and regarding an application by a surety for an order for release (*Code Civ. Proc. § 996.110*), see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[4] Determination of Bond Reduction

In a proceeding to determine the amount of the personal representative's bond, on production of a receipt showing the deposit of estate property in an insured account in a financial institution on condition that the property, including any earnings thereon, will not be withdrawn except on authorization of the court, the court may order that the property shall not be withdrawn except on authorization of the court, and in its discretion, reduce the amount of the bond to an amount the court determines is reasonable [*Prob. Code § 8483*].

In addition, whenever a bond is given or ordered in a proceeding, the court may determine that the amount of the bond

is excessive, and order the amount reduced to an amount that in the discretion of the court appears proper under the circumstances. The order is subject, however, to any limitations in the statute providing for the bond [*Code Civ. Proc. § 996.030(a)*; *see Prob. Code § 8482* (amount of personal representative's bond)].

The principal may give a new bond for the reduced amount. The sureties may be the same sureties as on the original bond [*Code Civ. Proc. § 996.030(c)*].

[5] Affidavit Regarding Condition of Estate

If a personal representative petitions to have the amount of bond reduced, the petition must include an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) setting forth the condition of the estate [*Prob. Code § 8484*].

[6] Notice of Hearing

At least 15 days notice of hearing must be given as provided in *Prob. Code § 1220* [*see Prob. Code §§ 1220, 8484*; for discussion and forms, *see* Ch. 447, *Probate: Statutory Notice*].

[7] State Statutes

Applicability of civil procedure to probate proceedings. *Prob. Code § 1000*

Reduction of bond based on blocked account. *Prob. Code §§ 8401(b), 8483*

Requirement of affidavit regarding condition of estate. *Prob. Code § 8484*

Deposit of money in financial institution. *Prob. Code § 9700*

Deposit of personal property with trust company. *Prob. Code § 9701*

Deposit of securities with securities depository. *Prob. Code § 9702*

[8] Local Rules of Court

Petitions required to be set for hearing are required to have self-addressed, stamped envelope attached. Los Angeles Co. Super. Ct. Rules, Rules 10.31(a) (or attach fax cover sheet; see Los Angeles Co. Super. Ct. Rules, Rule 10.31(b))

[9] Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, §§ 448-450 (10th ed. 2005)

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38-446 California Forms of Pleading and Practice--Annotated § 446.83

§ 446.83 Order Reducing Bond Based on Funds in Blocked Account [Prob. Code § 8483]

[1] FORM Order Reducing Bond Based on Funds in Blocked Account [Prob. Code § 8483]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER REDUCING BOND
	)	Date: _____
Estate of _____ [*name*],	)	Time: _____
Deceased.	)	Location: _____
	)	Judge: _____
	)	

_____

The petition of _____ [*name of personal representative*], as the personal representative of the estate, for an order to reduce the required bond came on regularly for hearing by the court on _____ [*date*]. The personal representative appeared by counsel _____ [*name*]; _____ [*identify person(s) entitled to notice who appeared*] appeared by counsel _____ [*name(s)*].

The court finds that:

1. Notice of the time and place of the hearing was given as required by *Probate Code Section 1220*. [Special notice was _____ (given to _____ (*name(s)*), as requested *or* requested and waived by _____ (*names(s)*)).]

2. _____ [$_____ *and/or* securities valued at $_____ *and/or describe and give value of personal property*] has/have been deposited in _____ [*name and address of*

financial institution, trust company, or securities depository], pursuant to *Probate Code Sections 9700-9705*, and on the condition that no withdrawal will be allowed without the authorization of the court.

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED as follows:

1. Petitioner _____ [*name*] shall not withdraw and _____ [*name of financial institution, trust company, or securities depository*] shall not allow withdrawal of the above listed sums except on the specific written order of this court.

3. Bond for petitioner is fixed at the reduced sum of $_____, to be issued by an authorized corporate surety.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form is an order for use when the court has granted a motion by the personal representative to reduce the amount of the required bond on the ground that property of the estate has been deposited in a blocked account [*see Prob. Code §§ 8483* (reduction of bond based on blocked account), 9700-9705; *see also Prob. Code § 1047* (probate orders)].

[3] Local Rules of Court

Orders required to be submitted to Probate Courtroom at least two weeks in advance of hearing date and to state hearing date on face. San Francisco Uniform Local Ct. Rules, Rule 14.6

[4] Cross References

For related forms, *see §§ 446.81* and *446.82*.

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38-447 California Forms of Pleading and Practice--Annotated 447.syn

§ 447.syn Synopsis to Chapter 447: PROBATE: STATUTORY NOTICE REQUIREMENTS

§ 447.01 Scope of Chapter

§ 447.02 Cross References

§§ 447.03-447.09 [Reserved]

§ 447.10 Governing Law

[1] When Notice Given on or After July 1, 1988

[2] When Notice Given Before July 1, 1988

§ 447.11 Order for Further or Additional Notice

§ 447.12 Order Shortening Notice Period

§ 447.13 Waiver of Notice

§ 447.14 Who Must Be Given Notice

[1] In General

[2] Notice Not Required to Oneself or Others Joining in Petition

[3] Known Heirs or Devisees

[4] Step and Foster Relationships

[5] Trust Beneficiaries

[6] State of California

[a] In General

[b] Notice to Director of California Victim Compensation and Government Claims Board

§ 447.15 Notice of Continued or Postponed Hearing

§ 447.16 Form of Notice of Hearing

§ 447.17 Notice by Mail

[1] Notice of Hearing

[a] When Required

[b] Who Must Be Given Notice

[c] Period and Manner of Notice

[2] Manner of Mailing

[a] Notice or Other Paper

[b] When Mailing Is Complete

[c] Notice Period Not Extended

§ 447.18 Notice by Personal Delivery

§ 447.19 Service of Notice When Person's Address Is Unknown

§ 447.20 Notice of Hearing by Posting

[1] Period of Notice

[2] Contents of Notice

§ 447.21 Notice by Citation

§ 447.22 Period and Manner of Notice When Not Specified

§ 447.23 Request for Special Notice

[1] Who May Request

[2] Form and Content of Request

[3] Matters of Which Special Notice May Be Requested

[4] Service and Proof of Service of Request

[5] Modification or Withdrawal of Request

§ 447.24 Manner of Giving Special Notice

§ 447.25 Proof of Notice of Hearing

[1] When Made

[2] Manner of Proof

[a] Generally

[b] Mailing

[c] Publication

[d] Posting

[e] Personal Delivery

[3] Findings; Conclusiveness

§§ 447.26-447.39 [Reserved]

§ 447.40 State Statutes

[1] Citation

[2] General Notice

[3] Mailing Notice

[4] Notice of Hearing

[5] Proof of Notice

[6] Special Notice

§ 447.41 California Rules of Court

§ 447.42 Local Rules of Court

§ 447.43 Decisions

§§ 447.44-447.59 [Reserved]

§ 447.60 Order Prescribing Notice (Probate)--Judicial Council Form

[1] FORM

[2] Source of Form

[3] Use of Form

§ 447.61 Notice of Hearing (Probate) [Prob. Code §§ 851, 1211, 1215, 1216, 1230, 17100]--Judicial Council Form DE-120

[1] FORM

[2] Source of Form

[3] Use of Form

[4] State Statutes

[a] Manner of Giving Notice of Hearing

[b] Proof of Service of Notice of Hearing

[5] California Rules of Court

§ 447.62 Attachment to Notice of Hearing of Proof of Service by Mail--Judicial Council Form DE-120(MA)

[1] FORM

[2] Use of Form

§ 447.63 Proof of Personal Service of Notice of Hearing [Prob. Code §§ 851, 1216, 1264]--Judicial Council Form DE-120(P)

[1] FORM

[2] Use of Form

§ 447.64 Citation and Proof of Service--Judicial Council Form DE-122

[1] FORM

[2] Source of Form

[3] Use of Form

[4] Issuance and Service of Citation

[5] Cross References

[6] State Statutes

§ 447.65 Proceedings for Order Prescribing Further or Additional Notice of Hearing [Prob. Code § 1202]--Application for Ex Parte Order and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Contents of Form

[a] Application and Declaration

[b] Order

[4] Cross References

[5] State Statutes

[6] California Rules of Court

[7] Los Angeles County

[8] San Francisco City and County

[9] Decisions

§ 447.66 Proceedings for Order Shortening Time for Giving Notice of Hearing [Prob. Code § 1203]--Application for Ex Parte Order and Supporting Declaration

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 447.67 Waiver of Notice [Prob. Code § 1204]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 447.68 Request for Special Notice and Proof and Admission of Service [Prob. Code § 1250]--Judicial Council Form

[1] FORM

[2] Source of Form

[3] Use of Form

[4] Contents of Form

[5] Who May Request Special Notice

[6] Service of Request for Special Notice

§ 447.69 Withdrawal or Modification of Request for Special Notice [Prob. Code § 1251]

[1] FORM

[2] Use of Form

[3] State Statutes

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PART I. SCOPE

38-447 California Forms of Pleading and Practice--Annotated § 447.01

§ 447.01 Scope of Chapter

This chapter discusses and provides forms for use in preparing the notice, both general and special, required to be given at various stages of estate administration following the opening of probate.

In the area of general notice, this chapter also includes Judicial Council forms of an order prescribing notice, a notice of hearing adaptable for use in giving special notice of hearing, and a citation and proof of service [*see §§ 447.60 -447.64*]. It also includes forms to obtain further or additional notice [*see § 447.65*], and shorten the time for giving notice of a hearing [*see § 447.66*]. A form for waiving notice adaptable for use in waiving special notice is also included [*see § 447.67*].

In the area of special notice, this chapter includes forms to request special notice [*see § 447.68*], and to modify or withdraw a request for special notice [*see § 447.69*].

Notice of sales of estate property are more fully covered in Ch. 455, *Probate: Sale of Estate Property* . Notice requirements in proceedings involving guardianships or conservatorships, including conservatorships of estates of missing persons, are discussed in Ch. 284, *Guardianship and Conservatorship: Notice* . Notice requirements for the administration of estates of missing persons presumed dead are discussed in Ch. 368, *Missing Persons* . Notice requirements with respect to the administration of trusts are discussed in Ch. 560, *Trusts: Express, Charitable, and Totten Trusts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGuardians for Missing & Undetermined HeirsEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawTrustsAdministration

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§ 447.02 Cross References

For discussion and forms for use in the preparation of affidavits, see Ch. 15, *Affidavits, Certificates, and Declarations*

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38-447 California Forms of Pleading and Practice--Annotated §§ 447.03-447.09

[Reserved]

§§ 447.03[Reserved]

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§ 447.10 Governing Law

[1] When Notice Given on or After July 1, 1988

Except as otherwise provided in the Probate Code, *Prob. Code §§ 1200-1265* govern notice required or permitted under the Probate Code [*Prob. Code § 1200(a)*].

Prob. Code §§ 1200-1265 do not apply to notice under a particular provision of the Probate Code to the extent that the particular provision is inconsistent with *Prob. Code §§ 1200-1265* [*Prob. Code § 1200(b)*].

Additional requirements for notices are set forth in *Cal. Rules of Ct., Rules 7.50-7.55*.

Furthermore, there are a wide variety of local court rules governing probate practice. To ensure complete compliance, attorneys should consult the applicable rules.

[2] When Notice Given Before July 1, 1988

Prob. Code §§ 1200-1265 do not apply to the giving of a particular notice when the notice was delivered, mailed, posted, or first published before July 1, 1991. The applicable law in effect before July 1, 1991, continues to apply to the giving of that notice, notwithstanding its repeal [*see Prob. Code § 1200(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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§ 447.11 Order for Further or Additional Notice

If the court determines that the notice otherwise required is insufficient in the particular circumstances, the court may require that further or additional notice, including a longer period of notice, be given [*Prob. Code § 1202*]. For a form of application and supporting declaration for an ex parte order for further or additional notice of a hearing, see *§ 447.65*.

Whether further or additional notice is required is within the discretion of the court [*Estate of Bell (1943) 58 Cal. App. 2d 333, 338, 136 P.2d 804]* . However, local court rules may require further or additional notice under specified circumstances, such as when it appears that the interests of any person may be adversely affected by the determination of the issues raised by the pleadings [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 10.26]. Typical examples are when the status of property is to be determined or when substantial extra fees are requested [Los Angeles Co. Super. Ct. Rules, Rule 10.26].

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§ 447.12 Order Shortening Notice Period

The court may, for good cause, shorten the time for giving a notice of hearing,unless the particular provision governing the notice of hearing provides that the time for giving notice may not be shortened [*Prob. Code § 1203(a)*]. Specific situations in which the court is prohibited from shortening time for notice include, for example, a hearing on a petition for appointment of a personal representative or for probate of decedent's will [*see Prob. Code § 8003(a)*] and a hearing on a petition for an order to transfer property to or from the decedent [*see Prob. Code § 851(c)*]. Furthermore, unless the particular provision governing the publication of notice of hearing otherwise provides, the court may not shorten the time for publication of notice of hearing [*Prob. Code § 1203(a)*].

For an application and supporting declaration for an ex parte order to shorten the time for giving notice of a hearing, see *§ 447.66*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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§ 447.13 Waiver of Notice

A person, including a guardian ad litem, guardian, conservator, trustee, or other fiduciary, may waive notice by a writing signed by the person or the person's attorney and filed in the proceeding [*Prob. Code § 1204*]. For a waiver of notice, see *§ 447.67*.

For a discussion of the power of a guardian or conservator of the estate of an interested person to appear for the ward or conservatee and waive notice pursuant to *Prob. Code § 1210*, see Ch. 284, *Guardianship and Conservatorship: Notice* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewFamily LawGuardiansGeneral OverviewFamily LawGuardiansDuties & Rights

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§ 447.14 Who Must Be Given Notice

[1] In General

Generally, the class of persons or parties to whom notice of a particular proceeding or paper must be given is specified by the section of the Probate Code relating to that particular proceeding or paper [*see, e.g., Prob. Code §§ 9803* (hearing on petition requiring or authorizing personal representative to take specified actions), 11604(d) (motion to inquire into equity of distribution of estate property to nonbeneficiary)]. *Prob. Code §§ 1201, 1206-1209*, in turn, provide rules for specifically identifying who, within a given class, must be given that notice [*see Prob. Code §§ 1201, 1206-1209*].

[2] Notice Not Required to Oneself or Others Joining in Petition

If a person is required to give notice, that person need not give the notice to himself or herself or to any other person who joins in the petition [*Prob. Code § 1201*].

[3] Known Heirs or Devisees

Generally, when notice is required to be given to known heirs or known devisees, notice must be given to the following persons [*Prob. Code § 1206(a)*]:

- If the estate is intestate, to the heirs named in the petition for letters of administration and to any additional heirs who become known to the person giving the notice prior to the giving of notice; and

- If testate, to the devisees named in the petition for probate of the will and to any additional devisees who become known to the person giving the notice prior to the giving of notice.

However, notice need not be given to a person under *Prob. Code § 1206(a)* if the person's interest has been satisfied pursuant to court order or as evidenced by the person's written receipt [*Prob. Code § 1206(b)*].

[4] Step and Foster Relationships

Generally, when notice is required to be given to a decedent's beneficiaries, devisees, or heirs, notice need not be given to a person who, because of a possible parent-child relationship between a stepchild and a stepparent, or between a foster child and a foster parent, may be (1) an heir of the decedent or (2) a member of a class to which a devise is made [*Prob. Code § 1207(a)*]. A stepchild or foster child who is not required to be given notice under *Prob. Code § 1207* may request special notice under *Prob. Code §§ 1250-1252* [*see* Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code § 1207, 20* Cal. L. Revision Comm'n Reports 1217 (1990)].

However, *Prob. Code § 1207(a)* does not apply when the person required to give the notice has actual knowledge of facts that a person would reasonably believe give rise under *Prob. Code § 6454* (establishment of parent-child relationship for purpose of determining intestate succession) to the parent-child relationship between the stepchild and the stepparent, or between the foster child and the foster parent [*Prob. Code § 1207(b)*].

[5] Trust Beneficiaries

Generally, if notice is required to be given to a trust or trustee, notice to trust beneficiaries is not required [*Prob. Code § 1208(a)*; *see Prob. Code§ 34(b)* ("devisee" in the case of a devise to a trust means the trust or trustee, rather than the trust beneficiaries)].

However, when the personal representative and the trustee are the same person or when no trustee has been appointed, notice must be given to each person to whom income or principal would be required or authorized in the trustee's discretion to be currently distributed if the trust were in effect. If there are no such persons, then notice shall be given to each person who, under the terms of the trust, would be entitled to any distribution if the trust were terminated at the time the notice is required to be given [*Prob. Code § 1208(b)*].

Notice to trust beneficiaries is not required under *Prob. Code § 1208(b)*,however, when the trust has more than one trustee and notice is given to a cotrustee who is not a personal representative [*Prob. Code § 1208(c)*].

[6] State of California

[a] In General

When notice is required to be given to the State of California, it must be given to the Attorney General [*Prob. Code § 1209(a)*]. When notice is required to be given to the Attorney General, it must be mailed to the Attorney General at the office of the Attorney General at Sacramento [*Prob. Code § 1209(b)*]. *Prob. Code § 1209* does not apply when a particular Probate Code section requires notice to be given to some other officer [*see* Cal. L. Revision Comm'n Comment to *Prob. Code § 1209*].

[b] Notice to Director of California Victim Compensation and Government Claims Board

When a decedent has an heir who is confined in a prison or facility under the jurisdiction of the Department of Corrections or the Department of the Youth Authority, or is confined in a local correctional facility, the estate attorney or, if there is no estate attorney, the beneficiary, the personal representative, or the person in possession of property of the decedent, must notify the Director of the California Victim Compensation and Government Claims Board of the decedent's death [*Prob. Code § 216*]. The notice must include the name and location of the decedent's heir and must include a copy of the decedent's death certificate. The notice must be given by mail in accordance with the requirements of *Prob. Code § 1215* [*see § 447.17[2][a]*], no later than 90 days after the date of death [*Prob. Code § 216*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral

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§ 447.15 Notice of Continued or Postponed Hearing

If a hearing is continued or postponed, no further notice of the continued or postponed hearing is required unless ordered by the court [*Prob. Code § 1205*].

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§ 447.16 Form of Notice of Hearing

The Judicial Council has approved a form for giving notice of hearing in probate proceedings [*see § 447.61* (Cal. Judicial Council Form DE-120)]. Use of that form is mandatory [*see Cal. Rules of Ct., Rule 1.31*].

The notice of hearing must state the complete title of the pleading to which the notice relates [*Cal. Rules of Ct., Rule 7.50*]. An amended pleading (or an amendment to a pleading) requires the same notice of hearing, including publication, as the pleading it amends [*Cal. Rules of Ct., Rule 7.53(a)*]. A supplement to a pleading does not require additional notice of hearing, but a copy of the supplement must be served if service of a copy of the pleading was required, unless the court waives service [*Cal. Rules of Ct., Rule 7.53(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 447.17 Notice by Mail

[1] Notice of Hearing

[a] When Required

Prob. Code § 1220 applies when notice of a hearing is required to be given [*see Prob. Code § 1220(a)*]. The statute also authorizes the court to dispense with the notice for good cause [*Prob. Code § 1220(c)*]. Apart from this power of the court to act on good cause, nothing in *Prob. Code § 1220* excuses compliance with the requirements for notice to a person who has requested special notice pursuant to *Prob. Code § 1250 et seq.* (discussed in *§ 447.23*) [*Prob. Code § 1220(b)*].

[b] Who Must Be Given Notice

Unless a statute requiring notice specifies the persons to be given notice, notice must be mailed to the personal representative and to all persons who have requested special notice in the estate proceeding pursuant to *Prob. Code § 1250* [*Prob. Code § 1220(a)(2)*]. Except as otherwise permitted in the Probate Code, a notice sent by mail under *Prob. Code § 1220* must be mailed individually and directly to the person entitled to notice [*Cal. Rules of Ct., Rule 7.51(a)(1)*]. A notice mailed to a person in care of another person is insufficient unless the person entitled to notice is an adult, and has directed the party giving notice, in writing, to send the notice in care of that other person [*Cal. Rules of Ct., Rule 7.51(a)(2)*]. Notices mailed to two or more persons in the same household must be sent separately to each person [*Cal. Rules of Ct., Rule 7.51(a)(3)*].

If any person entitled to notice is represented by an attorney of record, the notice must also be given to that attorney [*Prob. Code § 1214*; *Cal. Rules of Ct., Rule 7.51(b)*]. The court may dispense with notice for good cause [*Prob. Code § 1220(c)*; *see* discussion in *§ 447.17*].

If a guardian or conservator has been appointed for a person entitled to notice, the notice must be sent to the guardian or conservator [*Cal. Rules of Ct., Rule 7.51(c)(1)*]. A copy of the notice must also be sent to the ward or conservatee, unless the court dispenses with notice or, under *Prob. Code § 1210*, the notice is personally served on a California-resident guardian or conservator of the estate of the ward or conservatee [*Cal. Rules of Ct., Rule 7.51(c)(2)*].

For a discussion of the power of a guardian or conservator of the estate of an interested person to appear for the ward or conservatee and waive notice pursuant to *Prob. Code § 1210*, see Ch. 284, *Guardianship and Conservatorship: Notice* .

Notice to a minor must be sent directly to the minor, except as permitted in *Prob. Code § 1460.1* for guardianships, conservatorships, and certain protective proceedings [*Cal. Rules of Ct., Rule 7.51(d)*]. A separate copy of the notice must be sent to the persons having legal custody of the minor with whom the minor resides [*Cal. Rules of Ct., Rule 7.51(d)*].

Special rules apply with respect to giving notice to a deceased beneficiary of a decedent's estate. Notice must be sent to the personal representative of a beneficiary who died after the decedent and survived for the period required by the decedent's will [*Cal. Rules of Ct., Rule 7.51(e)(1)*]. If a personal representative has not been appointed for the deceased beneficiary, notice must be sent to his or her beneficiaries or other persons entitled to succeed to his or her interest in the decedent's estate [*Cal. Rules of Ct., Rule 7.51(e)(1)*]. When a beneficiary of the decedent's will died before the decedent or fails to survive the decedent for the period required by the will, notice must be sent to the persons named in the decedent's will as substitute beneficiaries of the gift to the deceased beneficiary [*Cal. Rules of Ct., Rule 7.51(e)(2)*]. If the decedent's will does not make a substitute disposition of this gift, notice must be sent as follows: (1) if the deceased beneficiary is a "transferee" under *Prob. Code § 21110(c)*, notice must be sent to his or her issue determined under *Prob. Code § 240* and to the decedent's residuary beneficiaries or to the decedent's heirs if the decedent's will does not provide for distribution of the residue of the estate; or (2) if the deceased beneficiary is not a "transferee," notice must be sent to the decedent's residuary beneficiaries or to the decedent's heirs if the decedent's will does not provide for distribution of the residue of the estate [*Cal. Rules of Ct., Rule 7.51(e)(2)*].

[c] Period and Manner of Notice

When notice is given pursuant to *Prob. Code § 1220*, it must be given at least 15 days before the time set for the hearing [*Prob. Code § 1220(a)(1)*].

The notice must be mailed to each person entitled to notice at the person's business or residence address, if known [*Prob. Code § 1220(a)(3)*]. If a person's business or residence address is not known, the court may order that the notice be given in a manner reasonably calculated to give actual notice to that person [*Prob. Code §§ 1212, 1215(d)*; *see Code Civ. Proc. § 413.30*; *see also § 447.19*]. In the case of a person who requested special notice, the notice must be mailed to the address set forth in the request [*Prob. Code § 1252(a)*].

The requirement of notice by mail in *Prob. Code § 1220(b)* can be satisfied by personal delivery of the notice under *Prob. Code § 1216* (personal delivery in lieu of mailing; *see § 447.18*) [*see* Cal. L. Revision Comm'n Comment to *Prob. Code § 1220*].

[2] Manner of Mailing

[a] Notice or Other Paper

Prob. Code § 1215 governs the manner of mailing a notice or other paper [*Prob. Code § 1215(a)*]. Under Section 1215, the notice or paper must be sent by one of the following methods [*Prob. Code § 1215(b)*]:

- First-class mail, if the person's address is within the United States. First-class mail includes certified, registered, and express mail.

- Airmail, if the person's address is not within the United States.

The notice or other paper must be deposited for collection in the United States mail, in a sealed envelope, with postage

paid, addressed to the person to whom it is mailed [*Prob. Code § 1215(c)*].

[b] When Mailing Is Complete

When the notice or other paper is deposited in the mail, mailing is complete [*Prob. Code § 1215(e)*].

[c] Notice Period Not Extended

The period of notice is not extended when notice is given by mail [*Prob. Code § 1215(e)*]. This rule is in contrast to the rule stated in *Code Civ. Proc.§ 1013(a)*, which extends any prescribed period of notice when the notice or other paper is given by mail [*see Code Civ. Proc. § 1013(a)*; *see also Recommendations Relating to Probate Law*, 19 Cal. L. Revision Comm'n Reports 362 n.10 (1987)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansConservatorsDuties & RightsEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWillsBeneficiariesGeneral OverviewFamily LawGuardiansGeneral OverviewFamily LawGuardiansDuties & Rights

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§ 447.18 Notice by Personal Delivery

Under *Prob. Code § 1216(a)*, if a notice or other paper is required or permitted to be mailed to a person, then it may be delivered personally to that person. Personal delivery as provided in *Prob. Code § 1216* satisfies any provision in the Probate Code that requires or permits a notice or other paper to be mailed [*Prob. Code § 1216(a)*].

Personal delivery pursuant to *Prob. Code § 1216* is complete when the notice or other paper is delivered personally to the person who is to receive it [*Prob. Code § 1216(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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§ 447.19 Service of Notice When Person's Address Is Unknown

If a person who is entitled to notice cannot be located after a diligent search, the court may prescribe the manner of giving notice to that person or may dispense with notice to that person [*Cal. Rules of Ct., Rule 7.52(c)*]. The petitioner must file a declaration describing the efforts made to locate the person before the court willprescribe an alternate form of notice or dispense with notice [*Cal. Rules of Ct., Rule 7.52(a)*]. The declaration must state the name of the person whose address is unknown, the person's last known address, the approximate date on which the person was last known to reside there, the efforts made to locate the person, and any facts explaining why the person's address cannot be obtained [*Cal. Rules of Ct., Rule 7.52(a)*]. The declaration must describe the attempts to learn of the person's business and residences by: (1) inquiry of the relatives, friends, acquaintances, and employers of the person entitled to notice and of the person who is the subject of the proceeding; (2) review of appropriate city telephone directories and directory assistance; and (3) search of the real and personal property indexes in the recorder's and assessor's offices for the county in which the person was last known or believed to reside [*Cal. Rules of Ct., Rule 7.52(a)*]. Mailing notice to a person at a county seat is not a manner of giving notice that is reasonably calculated to give actual notice [*Cal. Rules of Ct., Rule 7.52(b)*].

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§ 447.20 Notice of Hearing by Posting

[1] Period of Notice

When notice of hearing is required to be posted as provided in *Prob. Code § 1230*, the court clerk shall cause a notice of the time and place of the hearing to be posted at least 15 days before the time set for the hearing. The notice is posted at the courthouse of the county in which the proceedings are pending. If court is held at a place other than the county seat, the notice may be posted either at the courthouse of the county in which the proceedings are pending or at the building in which the court is held [*Prob. Code § 1230(a)*].

[2] Contents of Notice

The posted notice of hearing shall state the names of the estate and the petitioner, the nature of the petition, referring to the petition for further particulars, and the time and place of the hearing of the petition [*Prob. Code § 1230(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewGovernmentsCourtsClerks of Court

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§ 447.21 Notice by Citation

When use of a citation is authorized or required by statute, a citation may be issued by the court clerk on the application of any party. A court order for issuance of a citation is not necessary, except in cases in which an order is expressly required by law [*Prob. Code § 1240*]. For the Judicial Council form for citation and proof of service, see *§ 447.64*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewGovernmentsCourtsClerks of Court

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§ 447.22 Period and Manner of Notice When Not Specified

If a notice or other paper is required to be served or otherwise given, and no other manner of giving the notice or other paper is specified by statute, then the notice or other paper must be mailed or personally delivered as provided in *Prob. Code §§ 1215-1217* [*Prob. Code § 1217*].

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38-447 California Forms of Pleading and Practice--Annotated § 447.23

§ 447.23 Request for Special Notice

[1] Who May Request

At any time after the issuance of letters in a proceeding under the Probate Code for the administration of a decedent's estate, any person interested in the estate, whether as devisee, heir, creditor, beneficiary under a trust, or as otherwise interested, may, in person or by attorney, make a request for special notice by serving a copy of the request on the personal representative or the personal representative's attorney and filing the original request with the court clerk [*see Prob. Code § 1250(a), (e), (f)*].

[2] Form and Content of Request

By statute request for special notice must be in a writing so entitled and must set forth the name of the person to whom and the address to which notices are to be sent [*see Prob. Code § 1250(a),(b)*].

Special notice may be requested of any matter listed in *Prob. Code § 1250(c)* (discussed in *§ 447.23[3]*) by describing the matter. Alternatively, special notice may be requested of all matter listed in *Prob. Code § 1250(c)* by referring generally to "the matters described in subdivision (c) of *Section 1250 of the Probate Code*," or by using words of similar meaning [*Prob. Code § 1250(d)*].

The Judicial Council has approved a form for requesting special notice [*see § 447.68* (Cal. Judicial Council Form DE-154)]. Use of that form is mandatory [*see Cal. Rules of Ct., Rule 1.31*].

[3] Matters of Which Special Notice May Be Requested

Special notice may be requested of one or more of the following matters [*Prob. Code § 1250(c)*]:

- Petitions filed in the estate administration;

- Inventories and appraisals of property in the estate, including any supplemental inventories and appraisals;

- Objections to an appraisal;
- Accounts of a personal representative;
- Reports of status of administration.

[4] Service and Proof of Service of Request

A copy of the request must be personally delivered or mailed to the personalrepresentative or to the attorney for the personal representative. If personally delivered, the request is effective when it is delivered. If mailed, the request is effective when it is received [*Prob. Code § 1250(e)*]. The Judicial Council form contains a proof of service [*see § 447.68*].

When the original of the request is filed with the court clerk, it must be accompanied by a written admission or proof of service [*Prob. Code § 1250(f)*].

[5] Modification or Withdrawal of Request

A request for special notice under *Prob. Code § 1250-1252* may be modified or withdrawn in the same manner as provided for the making of the initial request [*Prob. Code § 1251*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewGovernmentsCourtsClerks of Court

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38-447 California Forms of Pleading and Practice--Annotated § 447.24

§ 447.24 Manner of Giving Special Notice

Unless the court makes an order dispensing with the notice, if a request has been made pursuant to *Prob. Code § 1250* for special notice of a hearing, the person filing the petition, report, account, or other paper shall give written notice of the filing, together with a copy of the petition, report, account, or other paper, and the time and place set for the hearing to the person named in the request. Notice must be given by mail to the address set forth in the request at least 15 days before the time set for the hearing [*Prob. Code § 1252(a)*].

If a request has been made pursuant to *Prob. Code § 1250* for special notice of the filing of an inventory and appraisal of the estate or of the filing of any other paper that does not require a hearing, the inventory and appraisal or other paper must be mailed not later than 15 days after it is filed with the court [*Prob. Code § 1252(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-447 California Forms of Pleading and Practice--Annotated § 447.25

§ 447.25 Proof of Notice of Hearing

[1] When Made

If notice of a hearing is required, proof of giving notice of the hearing must be made to the satisfaction of the court at or before the hearing [*Prob. Code § 1260(a)*].

[2] Manner of Proof

[a] Generally

Proof of notice, however given, may be made by evidence presented at the hearing [*Prob. Code § 1265*].

[b] Mailing

Proof of mailing may be made in the manner prescribed in *Code Civ. Proc. § 1013a* (by affidavit or certificate) [*Prob. Code § 1261*; *see also Code Civ.Proc. § 2015.5* (use of declaration in lieu of affidavit)]. For the Judicial Council form for proof of service by mail for use in probate proceedings, see *§ 447.61*; for discussion and general forms relating to *Code Civ. Proc. § 1013a*, see Ch. 518, *Service of Summons and Papers* .

[c] Publication

Proof of publication may be made by the affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of the publisher or printer, or the foreperson or principal clerk of the publisher or printer, showing the time and place of publication [*Prob. Code § 1262*].

[d] Posting

Proof of posting may be made by the affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of the person who posted the notice [*Prob. Code § 1263*]. A court clerk may use a certificate in lieu of an affidavit [*see Code Civ. Proc. § 2015.3*]. For the Judicial Council form of clerk's certificate of posting, see *§ 447.61*.

[e] Personal Delivery

Proof of notice by personal delivery may be made by the affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of the person making the delivery, showing the time and place of delivery and the name of the person to whom delivery was made [*Prob. Code § 1264*].

[3] Findings; Conclusiveness

If it appears to the satisfaction of the court that notice has been regularly given, or that the party entitled to notice has waived it, the court must so find in its order [*Prob. Code § 1260(b)*]. The provision for waiver of notice is drawn from case law [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 1260*; see, e.g., *Estate of Pailhe (1952) 114 Cal. App. 2d 658, 662, 251 P.2d 76* ; *Estate of Palm (1945) 68 Cal. App. 2d 204, 213-214, 156 P.2d 62* (both cases involving waiver by general appearance)].

The court's finding on the giving or waiver of notice is conclusive on all persons when the court's order becomes final [*Prob. Code § 1260(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProceduresPleading & PracticeService of ProcessMethodsPublicationCivil ProceduresPleading & PracticeService of ProcessProofGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewGovernmentsCourtsClerks of Court

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38-447 California Forms of Pleading and Practice--Annotated §§ 447.26-447.39

[Reserved]

§§ 447.26[Reserved]

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38-447 California Forms of Pleading and Practice--Annotated § 447.40

§ 447.40 State Statutes

[1] Citation

Issuance of citation. *Prob. Code § 1240*

Content of citation. *Prob. Code § 1241*

Service of citation. *Prob. Code § 1242*

[2] General Notice

Applicability of *Prob. Code §§ 1200-1265*. *Prob. Code § 1200*

Notice to oneself or others joining in petition. *Prob. Code § 1201*

Further or additional notice. *Prob. Code § 1202*

Order shortening time. *Prob. Code § 1203*

Waiver of notice. *Prob. Code § 1204*

Notice of continued or postponed hearing. *Prob. Code § 1205*

Notice to known heirs or devisees. *Prob. Code § 1206*

Effect of step or foster parent-child relationship on notice requirement. *Prob. Code § 1207*

When notice to trust beneficiaries is required. *Prob. Code § 1208*

Notice to State of *California. Prob. Code § 1209*

[3] Mailing Notice

Manner of mailing. *Prob. Code § 1215*

Personal delivery in lieu of mailing. *Prob. Code § 1216*

Notice by mail when no manner of notice is specified. *Prob. Code § 1217*

[4] Notice of Hearing

Manner of mailing. *Prob. Code § 1220*

Manner of posting. *Prob. Code § 1230*

[5] Proof of Notice

When proof required. *Prob. Code § 1260*

Proof of mailing. *Prob. Code § 1261*

Proof of publication. *Prob. Code § 1262*

Proof of posting. *Prob. Code § 1263*

Proof of personal delivery. *Prob. Code § 1264*

Proof by evidence at hearing. *Prob. Code § 1265*

[6] Special Notice

Request for special notice. *Prob. Code § 1250*

Modification or withdrawal of special notice request. *Prob. Code § 1251*

Notice to person requesting special notice. *Prob. Code § 1252*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawTrustsGeneral Overview

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38-447 California Forms of Pleading and Practice--Annotated § 447.41

§ 447.41 California Rules of Court

Description of pleading in notice of hearing. *Cal. Rules of Ct., Rule 7.50*

Service of notice of hearing. *Cal. Rules of Ct., Rule 7.51*

Service of notice on person whose address is unknown. *Cal. Rules of Ct., Rule 7.52*

Notice of hearing of amended or supplemented pleading. *Cal. Rules of Ct., Rule 7.53*

Special notice of ex parte application for order. *Cal. Rules of Ct., Rule 7.55*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsSupplemental PleadingsEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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38-447 California Forms of Pleading and Practice--Annotated § 447.42

§ 447.42 Local Rules of Court

General requirements.

Los Angeles Co. Super. Ct. Rules, Rule 10.25 et seq.

San Francisco Uniform Local Ct. Rules, Rule 14.29, 14.36

Additional notice requirements. Los Angeles Co. Super. Ct. Rules, Rule 10.26

Notice requirements for petition for family allowance.

Los Angeles Co. Super. Ct. Rules, Rule 10.75

San Francisco Uniform Local Ct. Rules, Rule 14.96

Notice requirements for petition for permission to operate business.

Los Angeles Co. Super. Ct. Rules, Rule 10.76

San Francisco Uniform Local Ct. Rules, Rule 14.98

Notice requirements for petition to determine title to real or personal property.

Los Angeles Co. Super. Ct. Rules, Rule 10.73

San Francisco Uniform Local Ct. Rules, Rule 14.99

Notice requirements for special letters of administration.

Los Angeles Co. Super. Ct. Rules, Rule 10.45

San Francisco Uniform Local Ct. Rules, Rule 14.34

Notice of petition for appointment of successor personal representative when will previously admitted.

San Francisco Uniform Local Ct. Rules, Rule 14.36(F)(1)

Notice to foreign consul.

Los Angeles Co. Super. Ct. Rules, Rule 10.51

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesFamiliesEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-447 California Forms of Pleading and Practice--Annotated § 447.43

§ 447.43 Decisions

Waiver of notice by general appearance. *Estate of Pailhe (1952) 114 Cal. App. 2d 658, 662, 251 P.2d 76* ; *Estate of Palm (1945) 68 Cal. App. 2d 204, 213-214, 156 P.2d 62* (now see *Prob. Code § 1260(b)*, codifying this point)

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38-447 California Forms of Pleading and Practice--Annotated §§ 447.44-447.59

[Reserved]

§§ 447.44[Reserved]

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38-447 California Forms of Pleading and Practice--Annotated § 447.60

§ 447.60 Order Prescribing Notice (Probate)--Judicial Council Form

[1] FORM Order Prescribing Notice (Probate)--Judicial Council Form

Click here to view image.

[2] Source of Form

This form is an illustration of a Judicial Council form of order prescribing notice in probate proceedings. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Use of Form

This form is for use by the court to order the time and place of a hearing on a petition when the statutory authority for the petition does not prescribe a period or a manner of notice [*see, e.g., Prob. Code § 8541(a)* (petition for appointment of special administrator on such notice as court deems reasonable)]. This form is not sufficient as a notice of hearing. For a form for notice of hearing, see *§ 447.61*. Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31*, 7.101].

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38-447 California Forms of Pleading and Practice--Annotated § 447.61

§ 447.61 Notice of Hearing (Probate) [Prob. Code §§ 851, 1211, 1215, 1216, 1230, 17100]--Judicial Council Form DE-120

[1] FORM Notice of Hearing (Probate) [Prob. Code §§ 851, 1211, 1215, 1216, 1230, 17100]--Judicial Council Form DE-120

Click here to view image.

[2] Source of Form

This form is an illustration of a Judicial Council form for notice of probate hearing and proof of service. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Use of Form

This form is for use by an attorney or a party, usually the personal representative or his or her attorney, to give notice of a hearing. It is based on the statutory notice form [*Prob. Code § 1211*], and is used to give notice as required under *Prob. Code §§ 1220* (basic notice requirement in probate proceedings) and 1252 (notice to persons requesting special notice). It is also used to give notice as required by many sections throughout the code, such as *Prob. Code § 11601* (petition for distribution), that call for notice to be given in accordance with *Prob. Code § 1220* and for the same notice to be given to additional persons specified in the code section. The form is also used if the court prescribes the notice to be given [*see Prob. Code §§ 1202* (further or additional notice), 1203 (shorten notice); *see, e.g., Prob. Code § 8541(a)* (petition for appointment of special administrator on such notice as court deems reasonable)]. A form for proof of service is on the reverse side of the notice.

As noted on this form, it is not for use to give notice under *Prob. Code § 8100* of the hearing on a petition for administration of the decedent's estate. For an illustration of the Judicial Council form for giving that notice, see Ch. 442, *Probate: Initiating Estate Administration* .

[4] State Statutes

[a] Manner of Giving Notice of Hearing

Mailing. *Prob. Code §§ 1215, 1220*

Personal delivery. *Prob. Code § 1216*

Posting. *Prob. Code § 1230*

Special notice of hearing. *Prob. Code § 1252*

[b] Proof of Service of Notice of Hearing

Proof of service by mail, generally. *Code Civ. Proc. § 1013a*; *Prob. Code § 1261*

Proof of notice of hearing as required. *Prob. Code § 1260*

Proof of publication. *Prob. Code § 1262*

Proof of posting. *Prob. Code § 1263*

Proof of personal delivery. *Prob. Code § 1264*

Proof at hearing. *Prob. Code § 1265*

[5] California Rules of Court

Description of pleading in notice of hearing. *Cal. Rules of Ct., Rule 7.50*

Service of notice of hearing. *Cal. Rules of Ct., Rule 7.51*

Service of notice on person whose address is unknown. *Cal. Rules of Ct., Rule 7.52*

Notice of hearing of amended or supplemented pleading. *Cal. Rules of Ct., Rule 7.53*

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38-447 California Forms of Pleading and Practice--Annotated § 447.62

§ 447.62 Attachment to Notice of Hearing of Proof of Service by Mail--Judicial Council Form DE-120(MA)

[1] FORM Attachment to Notice of Hearing of Proof of Service by Mail--Judicial Council Form DE-120(MA)

Click here to view image.

[2] Use of Form

This form is a filled-in reproduction of California Judicial Council Form DE-120(MA), which may be used as an attachment to the Notice of Hearing [*see* § 346.6] to set forth the name and address of each person to whom notice was mailed. Although this form has been designated as optional [*see Cal. Rules of Ct., Rules 1.31(b), 1.35*], Judicial Council forms must be used for documents submitted in probate proceedings if the Judicial Council has adopted a form for the particular document [*Cal. Rules of Ct., Rule 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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38-447 California Forms of Pleading and Practice--Annotated § 447.63

§ 447.63 Proof of Personal Service of Notice of Hearing [Prob. Code §§ 851, 1216, 1264]--Judicial Council Form DE-120(P)

[1] FORM Proof of Personal Service of Notice of Hearing [Prob. Code §§ 851, 1216, 1264]--Judicial Council Form DE-120(P)

Click here to view image.

[2] Use of Form

This form is a filled-in reproduction of California Judicial Council Form DE-120(P), which may be used as proof of personal service of the Notice of Hearing [*see* § 346.6]. The name and address of each person to who was personally served with notice should be stated. If more than six individuals were personally served, Judicial Council Form DE-120(PA), Attachment to Notice of Hearing--Proof of Personal Service, should be used to state the names and addresses of the additional persons who were served. A separate form must be completed for each person who personally served a copy of the notice.

Although this form has been designated as optional [*see Cal. Rules of Court, Rules 1.31(b), 1.35*], Judicial Council forms must be used for documents submitted in probate proceedings if the Judicial Council has adopted a form for the particular document [*Cal. Rules of Ct., Rule 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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38-447 California Forms of Pleading and Practice--Annotated § 447.64

§ 447.64 Citation and Proof of Service--Judicial Council Form DE-122

[1] FORM Citation and Proof of Service--Judicial Council Form DE-122

Click here to view image.

[2] Source of Form

This form is an illustration of the Judicial Council form of probate citation and proof of service. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Use of Form

This form is for use to give notice, as required, at stages of estate administration following the opening of probate [*Prob. Code § 1240*; *see Recommendations Relating to Probate Law*, 19 Cal. Law Revision Comm'n Reports 361 (1988)]. The requirement that notice be given by citation will appear in the Probate Code section relating to the proceeding of which notice is to be given [*Recommendations Relating to Probate Law*, 19 Cal. Law Revision Comm'n Reports 363 (1988); *see, e.g., Prob. Code § 8873(a)* (notice by citation to person in possession or control of estate property to appear and make an account of the property)].

When use of a citation is authorized or required by statute, the citation must be directed to the person to be cited, signed by the court clerk, and issued under the seal of the court. It must contain the title of the proceeding, a brief statement of the nature of the proceeding, and a direction that the person cited appear at a time and place specified [*Prob. Code § 1241*].

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*].

[4] Issuance and Service of Citation

The citation may be issued by the court clerk on the application of any party, without a court order, except in cases in which an order is expressly required by law [*Prob. Code § 1240*]. It must be served on the person cited in the same manner as summons is served, as provided in *Code Civ. Proc. §§ 413.10-417.40* (service of summons in civil actions). When no other time is specifically prescribed by law, it must be served at least five days before its return day [*Prob. Code § 1242*].

[5] Cross References

For discussion of the service of summons in civil actions, see Ch. 518, *Service of Summons and Papers*

[6] State Statutes

Issuance of citation. *Prob. Code § 1240*

Contents of citation. *Prob. Code § 1241*

Service of citation. *Prob. Code § 1242*

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38-447 California Forms of Pleading and Practice--Annotated § 447.65

§ 447.65 Proceedings for Order Prescribing Further or Additional Notice of Hearing [Prob. Code § 1202]--Application for Ex Parte Order and Supporting Declaration

[1] FORM Proceedings for Order Prescribing Further or Additional Notice of Hearing [Prob. Code § 1202]--Application for Ex Parte Order and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	APPLICATION FOR EX PARTE ORDER
	)	_____
	)	[*describe further or additional notice sought, e.g.,*
Estate of	)	EXTENDING PERIOD FOR GIVING NOTICE OF
_____ [*name*],	)	HEARING] AND
Deceased.	)	SUPPORTING
	)	DECLARATION OF
	)	_____ [*name*]
		[*Prob. Code § 1202*]

_____

APPLICATION

I, _____ [*name of attorney*], hereby apply on behalf of _____ [*name of applicant*] for an order requiring _____ [further *and/or* additional] notice of the hearing on _____ [*specify, e.g.,* the petition of _____ (*name*), personal representative of the above-entitled estate, for final distribution and for the allowance of compensation for extraordinary services]. Specifically, applicant applies for an order _____ [*describe type of further and/or additional notice sought, e.g.,* amending notice of the

hearing to include a summary of matters to be determined at the hearing, requiring service of a copy of the petition on applicant, and extending the notice period from 15 to 20 days].

[EITHER, if no special notice has been requested]

No special notice of the above-described hearing has been requested.

[*OR, if special notice has been requested*]

The following _____ [*specify*, e.g., individuals] have requested special notice of the above-described hearing, pursuant to *Probate Code Section 1250*: _____ [*name(s)*]. Special notice of this application has been given to _____ [this individual *or* these individuals]. [Proof *or* Proofs] of service is/are attached to this application.

[*OR, if special notice has been requested but waived*]

The following _____ [*specify, e.g.*, individuals] have waived special notice of the above-described hearing, pursuant to *Probate Code Section1204*: _____ [*name(s*)]. _____ [A copy *or* Copies] of the waiver(s) is/are attached to this application.

_____ [*date*]
_____ [*signature*]
Attorney for _____ [*applicant*]

VERIFICATION

I, _____ [*name*], am the applicant in the above-entitled proceeding. I have read the foregoing application and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

SUPPORTING DECLARATION OF _____ [*name*]

In support of this application, I declare that:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*applicant*) *or other statement as appropriate*].

[*STATE, in as many paragraphs as necessary, facts showing*

why further and/or additional notice is required, e.g.:]

2. The interests of applicant may be adversely affected by a determination of the issues raised in the notice of hearing on the personal representative's petition, in that _____ [*state facts showing how the applicant's interests may be adversely affected*].

3. Additional time is required to prepare for the hearing because _____ [*state facts showing why additional time is necessary*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The foregoing form of application and supporting declaration is for use to obtain an ex parte order requiring further or additional notice of a hearing [*see Prob. Code § 1202*]. For forms of orders adaptable for use in requiring further or additional notice, see Ch. 372, *Motions and Orders* .

When the court determines that the notice otherwise required is insufficient in the particular circumstances, the court may require that further or additional notice, including a longer period of notice, be given [*Prob. Code § 1202*]. When further or additional notice is required, the court may require notice to include, in addition to the time and place of the hearing as specified in former *Prob. Code § 1220(b)* (*now see Prob. Code § 1220(a)(1)*), a summary of the matters to be determined. It may also require a copy of the petition to be served with the notice [*see* Los Angeles Co. Super. Ct. Rules, Rule 10.26(a)].

Whether the foregoing form should be referred to as an application or a petition depends on the court rule authorizing the particular relief sought and on local practice [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 10.37 ("application"), San Francisco Uniform Local Ct. Rules, Rule 14.20 ("petition")].

[3] Contents of Form

[a] Application and Declaration

An ex parte application for an order must allege whether special notice has been requested and, if so, must identify each person who has requested special notice and must allege that special notice has been given or waived by each person who has requested it [*Cal. Rules of Ct., Rule 7.55(a), (b)*]. Proofs of service of special notice or written waivers of special notice must be filed with the application [*Cal. Rules of Ct., Rule 7.55(c)*].

Each county has its own requirements for the issuance of ex parte orders in probate matters, which should be considered in drafting an application based on the foregoing form. For example, this form includes a form of verification of the application [*see* Los Angeles Co. Super. Ct. Rules, Rule 10.37; San Francisco Uniform Local Ct. Rules, Rule 14.20 (E)].

[b] Order

Local court rule may require the application to be accompanied by a separate order complete in itself [*see* Los Angeles Co. Super. Ct. Rules, Rule 10.37(d); San Francisco Uniform Local Ct. Rules, Rule 14.20(J)].

[4] Cross References

For forms of declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

For forms of verification, see Ch. 572, *Verification*

[5] State Statutes

Further or additional notice. *Prob. Code § 1202*

[6] California Rules of Court

Allegations regarding requests for special notice. *Cal. Rules of Ct., Rule 7.55*

[7] Los Angeles County

Additional notice requirements. Los Angeles Co. Super. Ct. Rules, Rule 10.26

Signature of judge. Los Angeles Co. Super. Ct. Rules, Rule 10.36

Applications for ex parte orders. Los Angeles Co. Super. Ct. Rules, Rule 10.37

Preparation of orders. Los Angeles Co. Super. Ct. Rules, Rule 10.39

[8] San Francisco City and County

Ex parte matters. San Francisco Uniform Local Ct. Rules, Rule 14.20

Material to be included in probate orders. San Francisco Uniform Local Ct. Rules, Rule 14.27

Notice requirements. San Francisco Uniform Local Ct. Rules, Rule 14.36

[9] Decisions

Giving of additional notice as within court's discretion, and failure to give as reviewable only for abuse of discretion. *Estate of Jenanyan (1982) 31 Cal. 3d 703, 711 n.5, 183 Cal. Rptr. 525, 646 P.2d 196* (decided under prior law); *Estate of Bell (1943) 58 Cal. App. 2d 333, 338, 136 P.2d 804* (decided under prior law)

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38-447 California Forms of Pleading and Practice--Annotated § 447.66

§ 447.66 Proceedings for Order Shortening Time for Giving Notice of Hearing [Prob. Code § 1203]--Application for Ex Parte Order and Supporting Declaration

[1] FORM Proceedings for Order Shortening Time for Giving Notice of Hearing [Prob. Code § 1203]--Application for Ex Parte Order and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of	)	APPLICATION FOR EX PARTE ORDER SHORT-
_____ [*name*],	)	ENING TIME FOR GIVING NOTICE OF HEAR-
Deceased.	)	ING, SUPPORTING DECLARATION OF
		_____ [*name*][, AND
		_____ (*describe supporting papers, if any, e.g.,* WAIVER(S) OF SPECIAL NOTICE)]
		[*Prob. Code § 1203*]

_____

APPLICATION

I, _____ [*name of attorney*], hereby apply on behalf of _____ [*name and representative capacity, if any, e.g.,* personal representative of the above-entitled estate] for an order authorizing him/her to give _____ [*number, e.g.,* 10] days' notice of hearing on _____ [*specify*], rather than 15 days, as required by _____ [*Prob. Code § 1220(a)(1) or Prob. Code § 1220(a)(1)* and *Prob. Code § 1252(a)*].

[*Statement regarding special notice. See § 447.65*]

_____ [*date*]

_____ [*signature*]
Attorney for _____ [*applicant*]

[*Verification. See § 447.65*]

SUPPORTING DECLARATION OF _____ [*name*]

In support of this application, I declare that:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*applicant*) *or other statement, as appropriate*].

2. There is good cause for shortening the time for giving notice of the above-described hearing in that _____ [*state with particularity facts relied on to establish good cause*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The foregoing form of application and supporting declaration is for use to obtain an ex parte order shortening the time within notice of a hearing must be given [*see Prob. Code § 1203(a)*]. As indicated by the alternative in the first paragraph of the application, the notice period to be shortened may be the regular notice period required by *Prob. Code § 1220(a)(1)* or both that and the special notice period required by *Prob. Code § 1252(a)*. An order shortening time may also be sought by noticed motion.

For good cause, the court may shorten the time for giving notice of a hearing, unless the particular provision governing notice of hearing provides that the time for giving notice may not be shortened [*see Prob. Code § 1203(a)*]. For a discussion of the conditions under which a court may not shorten the time for giving notice, see the Introduction under Order Shortening Notice Period.

For forms of ex parte orders that may be adapted for use to order a shortened time within which to give notice, see Ch. 524, *Shortening and Extension of Time* .

[3] State Statutes

Order shortening time. *Prob. Code § 1203*

[4] Cross References

For a related form, see *§ 447.65*.

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38-447 California Forms of Pleading and Practice--Annotated § 447.67

§ 447.67 Waiver of Notice [Prob. Code § 1204]

[1] FORM Waiver of Notice [Prob. Code § 1204]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of	)	WAIVER OF [SPECIAL] NOTICE
_____ [*name*],	)	[*Prob. Code § 1204*]
Deceased.	)	

_____

[*EITHER, to waive regular notice*]

_____ [*Name of waiving party*], who is _____ [*specify capacity, e.g.,* a devisee named in the petition for probate of the will in the above-entitled estate], and is therefore entitled to notice under _____ [*specify, e.g., Probate Code Sections 1206(a)(2)* and *11000*] hereby waives notice of _____ [*specify hearing or filing of paper, e.g.,* the hearing on the petition of _____ (*name and representative capacity, if any*) for _____ (*describe petition*)].

[*OR, to waive special notice*]

_____ [*Name of waiving party*], who filed and served a request for special notice of proceedings in the above-entitled estate on _____ [*date*], pursuant to _____ [*Probate Code Section 1250 or* and *Probate Code Sections 1250* and *7280(a)*], hereby waives notice of _____ [*specify hearing or filing of paper, e.g.,* the hearing on the petition of _____ (*name and representative*

capacity, if any) for _____ (*describe petition*)].

[*CONTINUE*]

This waiver is limited to the _____ [*specify, e.g.,* hearing] described above.

_____ [*date*]

_____ [*signature*]
_____ [Waiving Party *or*
Attorney for Waiving Party]

[2] Use of Form

This form is for use to waive notice in estate proceedings under the Probate Code [*see Prob. Code § 1204*]. It can be used by a person who has requested special notice of a hearing or the filing of a paper to waive special notice of that particular hearing or filing [*see Prob. Code § 1204*; *see also* Cal. Law Revision Comm'n Comment to *Prob. Code § 1252* (indicating applicability of waiver provision of *Prob. Code § 1204* to requests for special notice)]. It can also be used by a person who is entitled to notice of a hearing or filing of a paper without having requested special notice [*see Prob. Code § 1204*; *see also Prob. Code §§ 1206-1209, 1220*, and specific Probate Code sections requiring notice to be given, e.g., *Prob. Code § 11000*]. It may be adapted for use to waive notice of more than one hearing or filing, or of all hearings or filings, to which the waiving party is entitled or of which the waiving party has previously requested special notice. For further discussion of waiver of notice, see the Introduction under Waiver of Notice.

For a form for use to modify or withdraw a request for special notice, see *§ 447.69*.

[3] State Statutes

Waiver of notice. *Prob. Code § 1204*

Request for special notice. *Prob. Code § 1250*

Right of United States government to request special notice. *Prob. Code § 7280(a)*

Right of guardian or conservator to waive notice on behalf of ward or conservatee. *Prob. Code § 1210*

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38-447 California Forms of Pleading and Practice--Annotated § 447.68

§ 447.68 Request for Special Notice and Proof and Admission of Service [Prob. Code § 1250]--Judicial Council Form

[1] FORM Request for Special Notice and Proof and Admission of Service [Prob. Code § 1250]--Judicial Council Form

Click here to view image.

[2] Source of Form

This form is an illustration of the Judicial Council form for use to request special notice. It also contains a proof and admission of service. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Use of Form

This form is for use by any person interested in the estate to request special notice (1) of all the matters for which special notice may be requested [*see Prob. Code § 1250(c)*]; (2) of specific matters set out in *Prob. Code § 1250(c)*; or *(3)* of specified petitions or other matters.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31,* 7.101].

[4] Contents of Form

Special notice may be requested of any matter in *Prob. Code § 1250(c)* by describing it, or of all the matters in *Prob. Code § 1250(c)*, by referring generally to "the matters described in subdivision (c) of *Section 1250 of the Probate Code*" or by using words of similar meaning [*Prob. Code § 1250(d)*]. For discussion of the matters of which special notice may be requested, see *§ 447.23[3]*.

A request for special notice must be in writing and may be filed with the court clerk at any time after the issuance of

letters [*Prob. Code § 1250(a)*]. A request for special notice must be so entitled and must set forth the name of the person and the address to which notices are to be sent [*Prob. Code § 1250(b)*].

[5] Who May Request Special Notice

Any person interested in the estate, whether as devisee, heir, creditor, beneficiary under a trust, or as otherwise interested, may file a request for special notice. The interested person may request special notice in person or by attorney [*see Prob. Code § 1250(a)*].

When the State Controller has an interest in the estate, he or she would be included within the persons who can request special notice as a person "otherwise interested" [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 1250*].

When compensation, pension, insurance, or other allowance is made or awarded by a department or bureau of the United States government to a decedent's estate, the department or bureau has the same right as an interested person to request special notice [*see Prob. Code § 7280(a)*].

[6] Service of Request for Special Notice

A copy of the request must be personally delivered or mailed to the personal representative or to the attorney for the personal representative. If the request is personally delivered, it is effective when it is delivered. If the request is mailed, it is effective when it is received [*Prob. Code § 1250(e)*]. For discussions of mailing notice and personal notice, see *§§ 447.17* and *447.18*, respectively.

When the original of the request is filed with the court clerk, it must be accompanied by a written admission or proof of service [*Prob. Code § 1250(f)*].

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38-447 California Forms of Pleading and Practice--Annotated § 447.69

§ 447.69 Withdrawal or Modification of Request for Special Notice [Prob. Code § 1251]

[1] FORM Withdrawal or Modification of Request for Special Notice [Prob. Code § 1251]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of	)	_____ [WITHDRAWAL *or* MODI-
_____ [*name*],	)	FICATION] OF REQUEST FOR SPECIAL NOTICE
Deceased.		
_____		

_____ [*Name of requesting party*], who previously filed and served a request for special notice in estate proceedings in the above-entitled estate on _____ [*date*], pursuant to Section[s] 1250 [and 7280(a)] of the Probate Code, hereby _____ [withdraws that request *or* modifies that request by requesting special notice of _____ (*specify modification, e.g.,* all the matters described in *Probate Code Section 1250(c)*), rather than _____ (*describe initial request, e.g.,* special notice of only the filing of inventories and appraisements of the estate), as initially requested)].

[Special notice, as herein modified, is to be sent to _____ (*name of requesting party*) at the following address: _____.]

_____[*date*]
_____ [*signature*]
_____
[Requesting Party *or* Attorney for Requesting Party]

[2] Use of Form

This form is for use by a person who has requested special notice of matters specified in *Prob. Code § 1250(c)* to either withdraw or modify that request. A request for special notice may be modified or withdrawn in the same manner as provided for the making of the initial request [*Prob. Code § 1251*]. For further discussion of withdrawing or modifying a request for special notice, see *§ 447.23[5]*. For a form for use to waive notice, see *§ 447.67*.

[3] State Statutes

Request for special notice. *Prob. Code §§ 1250, 7280(a)*

Withdrawal or modification of request for special notice. *Prob. Code § 1251*

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38-448 California Forms of Pleading and Practice--Annotated 448.syn

§ 448.syn Synopsis to Chapter 448: PROBATE: FAMILY ALLOWANCE

§ 448.01 Scope of Chapter

§§ 448.02-448.09 [Reserved]

§ 448.10 Governing Law

§ 448.11 Statutory Authority for Family Allowance

§ 448.12 Legislative Purpose of Family Allowance

§ 448.13 Family Allowance for Insolvent Estate

§ 448.14 Priority of Family Allowance

§ 448.15 Effect of Funds From Other Sources

§ 448.16 Right to Family Allowance

§ 448.17 Application for Allowance

[1] While Status Exists

[2] Before or After Inventory

[3] Notice Required

§ 448.18 Hearing

§ 448.19 Persons Entitled to Allowance

§ 448.20 Time of Payment; No Stay on Appeal When Undertaking Given

§ 448.21 Effect of In Terrorem Clauses

§ 448.22 Waiver of Family Allowance

§ 448.23 Termination of Family Allowance

§ 448.24 Expense of Proceedings

§ 448.25 Right to Appeal

§ 448.26 Family Allowance as Taxable Income

§§ 448.27-448.39 [Reserved]

§ 448.40 State Statutes

§ 448.41 Local Rules of Court

§ 448.42 Decisions

[1] Effect of In Terrorem Clauses

[2] Modification of Family Allowance

[3] Persons Entitled to Allowance

[4] Purpose of Family Allowance

[5] Relationship of Family Allowance to Probate Homestead

[6] Right to Appeal

[7] Right to Attorney's Fees

[8] Right to Family Allowance

[9] Size of Family Allowance

[10] Termination of Family Allowance

[a] Property Settlement Agreements

[b] Loss of Status

[c] Date of Decree of Distribution

[d] Effect of Remarriage

[e] Effect of Death

[f] Effect of Time

[g] Effect of Divorce

[11] Waiver of Allowance

§ 448.43 Text References

§§ 448.44-448.59 [Reserved]

§ 448.60 Facts to Be Ascertained

§ 448.61 Preliminary Determinations

§§ 448.62-448.79 [Reserved]

§ 448.80 Petition for Family Allowance [Prob. Code §§ 6540-6545; Fam. Code § 297.5(c)]--Before Inventory Filed [Prob. Code § 6541(b)(1)]

[1] FORM

[2] Use of Form

[3] Other Sources of Income

[4] Attorney's Fees

[5] Verification

[6] Notice of Hearing

[7] State Statutes

[8] Local Rules of Court

[9] Decisions

§ 448.81 Allegations--After Inventory Filed [Prob. Code § 6541(b)(2)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 448.82 Objections to Petition for Family Allowance [Prob. Code § 6541]

[1] FORM

[2] Use of Form

[3] Source of Form

[4] State Statutes

[5] Local Rules of Court

§ 448.83 Order Granting Family Allowance [Prob. Code §§ 6540(a), 6541(b)(1), (c)]; Fam. Code § 297.5(c)--Before Inventory Filed

[1] FORM

[2] Use of Form

[3] Duration of Payment

[4] State Statutes

[5] Local Rules of Court

[6] Cross References

§ 448.84 Order Granting Family Allowance [Prob. Code §§ 6540, 6541(b)(2), (c)]--After Inventory Filed

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 448.85 Petition for Modification or Termination of Family Allowance [Prob. Code § 6541; Fam. Code § 297.5(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Local Rules of Court

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38-448 California Forms of Pleading and Practice--Annotated § 448.01

§ 448.01 Scope of Chapter

This chapter deals with family allowances. It contains forms of petition for family allowance [§§ 448.80, 448.81], objections to family allowance [*see § 448.82*], an order granting family allowance [§§ 448.83, 448.84], and a petition for modification or termination of family allowance [*see § 448.85*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesFamiliesEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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[Reserved]

§§ 448.02[Reserved]

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38-448 California Forms of Pleading and Practice--Annotated § 448.10

§ 448.10 Governing Law

Family allowances are governed by *Prob. Code §§ 6540-6545*. In addition, a wide variety of local court rules govern probate practice. To insure complete compliance, the attorney should consult the applicable rules. In the comments to the forms, references are made to some of the rules of the major counties, particularly Los Angeles and San Francisco.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesFamiliesEstate, Gift & Trust LawProbateGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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38-448 California Forms of Pleading and Practice--Annotated § 448.11

§ 448.11 Statutory Authority for Family Allowance

The surviving spouse, minor children, and adult children who are physically or mentally incapacitated from earning a living and were actually dependent in whole or in part on the decedent for support are entitled to a reasonable allowance out of the estate as is necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate [*Prob. Code § 6540(a)*]. In addition, other adult children who were actually dependent in whole or in part on the decedent for support, or a parent of the decedent who was actually dependent in whole or in part on the decedent for support, may be given such reasonable allowance out of the estate as the court, in its discretion, determines is necessary for their maintenance according to their circumstances during the progress of the settlement of the estate [*Prob. Code § 6540(b)*].

Beginning January 1, 2005, the surviving registered domestic partner of a decedent also is entitled to such a reasonable family allowance out of the estate as is necessary for the surviving partner's maintenance according to his or her circumstances during administration of the estate. A surviving registered domestic partner, following the other partner's death, has the same rights, protections, and benefits, and is subject to the same responsibilities, obligations, and duties under law that are granted to and imposed on a surviving spouse [*Fam. Code § 297.5(c)*; *see Fam. Code § 297.5(j)* (when necessary to implement statutory rights of domestic partners, gender-specific terms referring to spouses must be construed to include domestic partners)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesFamiliesFamily LawCohabitationDomestic PartnersRegistration

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38-448 California Forms of Pleading and Practice--Annotated § 448.12

§ 448.12 Legislative Purpose of Family Allowance

The statutes creating the right to a family allowance were enacted out of concern for the needs of the surviving family during the period of readjustment following the death of a spouse, and a highly preferential position is accorded the family allowance [*Estate of Blair (1954) 42 Cal. 2d 728, 730, 269 P.2d 612]* . Thus, the family allowance is preferred to most other claims, and must be granted on proper application even if the estate is insolvent [*Estate of Blair (1954) 42 Cal. 2d728, 730, 269 P.2d 612* ; *see Prob. Code § 6543* (allowance limited to one year when estate insolvent)].

The right to a family allowance is entirely statutory [*Parson v. Parson (1996) 49 Cal. App. 4th 537, 540, 56 Cal. Rptr. 2d 686]* . The preferential position afforded by the statute is therefore for the benefit of only those persons designated in the statute [*Estate of Blair (1954) 42 Cal. 2d 728, 730, 269 P.2d 612]* . The right to a family allowance has also been held to parallel the right to a probate homestead with the right to one linked to the right to the other [*see Estate of Brooks (1946) 28 Cal. 2d 748, 750, 171 P.2d 724* ; *see also* discussion of probate homesteads in Ch. 449, *Probate: Exempt Personal Property and Probate Homesteads*].

Despite its favored position, the right to a family allowance is subject to various limitations [*Parson v. Parson (1996) 49 Cal. App. 4th 537, 540, 56 Cal. Rptr. 2d 686]* . For example, a family allowance may not be awarded to the estate of a deceased spouse, even if the spouse would have qualified for the allowance had he or she requested it during his or her lifetime. Similarly, a putative spouse does not have a right to a family allowance because a putative spouse is not one of the persons specified in *Prob. Code § 6540* [*Parson v. Parson (1996) 49 Cal. App. 4th 537, 540, 56 Cal. Rptr. 2d 686* ; *Estate of Hafner (1986) 184 Cal. App. 3d 1371, 1397-1399, 229 Cal. Rptr. 676]* . A dependent parent does not have an entitlement to a family allowance, but only the right to apply for an allowance under *Prob. Code § 6540(b)* [*Estate of Herrera (1992) 10 Cal. App. 4th 630, 636-639, 12 Cal. Rptr. 2d 751* (court may apply equitable principles in determining parent's application)]. A family allowance may not be awarded when there is no estate because all of the decedent's assets were placed in a revocable trust; *Prob. Code § 6450* only authorizes payment of a family allowance "out of the estate" during its administration [*Parson v. Parson (1996) 49 Cal. App. 4th 537, 540-542, 56 Cal. Rptr. 2d 686]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-448 California Forms of Pleading and Practice--Annotated § 448.13

§ 448.13 Family Allowance for Insolvent Estate

The right to a family allowance is the same in case of an insolvent estate except there is a time limit. It may not continue longer than one year after granting letters [*Prob. Code § 6543(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesFamiliesEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-448 California Forms of Pleading and Practice--Annotated § 448.14

§ 448.14 Priority of Family Allowance

The family allowance must be paid in preference to all other charges, except funeral charges, expenses of the last illness, and expenses of administration [*see Prob. Code § 11420(a)*]. The allowance commences on the date of the court's order or at such other time as may be provided in the court's order, whether before or after the date of the order, as the court in its discretion determines; but the allowance may not be made retroactive to a date earlier than the date of the decedent's death [*Prob. Code § 6542*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesFamiliesGovernmentsLegislationEffect & OperationRetrospective Operation

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38-448 California Forms of Pleading and Practice--Annotated § 448.15

§ 448.15 Effect of Funds From Other Sources

If any person or persons otherwise eligible for family allowance under *Prob. Code § 6540* have a reasonable maintenance derived from other sources, and there are other persons entitled to a family allowance, the allowance may be granted only to those who do not have such maintenance [*Prob. Code § 6540(c)*].

While a spouse may not be deprived of a family allowance merely because he or she has property other than his or her interest in the estate, the nature and extent of such other property is material and relevant to the following issues: (1) Is any sum necessary for the support and maintenance of the petitioner during the period of the administration of decedent's estate? (2) If a sum is necessary for his or her support and maintenance, what is a reasonable amount to allow the petitioner [*Estate of Hoffman (1963) 213 Cal. App. 2d 635, 644, 29 Cal. Rptr. 60]* . The fact that petitioner has an income in excess of the amount of his or her living expenses and has capital of a substantial amount is not sufficient reason for denying the petition outright [*Estate of Van Der Oef (1963) 212 Cal. App. 2d 155, 156, 27 Cal. Rptr. 855]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-448 California Forms of Pleading and Practice--Annotated § 448.16

§ 448.16 Right to Family Allowance

The right to a family allowance is not a vested right and nothing accrues before the order granting it [*Estate of Blair (1954) 42 Cal. 2d 728, 733, 269 P.2d 612]* . The right to a family allowance does not depend on heirship, but depends on the claimant's right to support at the time of the decedent's death and the existence of a relationship that is recognized by statute between the claimant and the decedent [*Estate of Hafner (1986) 184 Cal. App. 3d 1371, 1398, 229 Cal. Rptr. 676]* . A surviving spouse is entitled to a family allowance if the surviving spouse is entitled to support at the decedent's death, but need not actually be receiving support at the decedent's death [*Estate of Hafner (1986) 184 Cal. App. 3d 1371, 1398, 229 Cal. Rptr. 676]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-448 California Forms of Pleading and Practice--Annotated § 448.17

§ 448.17 Application for Allowance

[1] While Status Exists

A petition for family allowance must be filed while the family status or minority is in existence. It is not a vested right and is lost when the one for whom it is asked has lost the status on which the right depends [*see Estate of Blair (1954) 42 Cal. 2d 728, 732-733, 269 P.2d 612]* .

[2] Before or After Inventory

The application may be made before or after the inventory of the estate is filed [*Prob. Code § 6541(b)*]. In granting a family allowance before inventory, most courts limit the duration of the allowance to the time of filing the inventory, notexceeding six months. Subsequent allowances are usually limited to a definite period, not exceeding 12 months [*see, e.g.*, Los Angeles Co. Super. Ct. Rules, Rule 10.75(c)].

[3] Notice Required

Before the inventory is filed, an order for the family allowance provided for by *Prob. Code § 6540(a)* may be made or modified either (1) ex parte or (2) after notice of the hearing on the petition has been given as the period and in the manner provided in *Prob. Code § 1220* [*Prob. Code § 6541(b)(1)*]. After the inventory is filed, an order for the family allowance provided for by *Prob. Code § 6540(a)* may be made or modified only after notice of the hearing on the petition has been given as provided in *Prob. Code § 1220* [*Prob. Code § 6541(b)(2)*]. For further discussion of notice requirements, see Ch. 447, *Probate: Statutory Notice Requirements* .

An order for the family allowance provided in *Prob. Code § 6540(b)* may be made only after notice of the hearing on the petition has been given as provided in *Prob. Code § 1220* to all of the following persons [*Prob. Code § 6541(c)*]:

- Each person listed in *Prob. Code § 1220*.
- Each known heir whose interest in the estate would be affected by the petition.

- Each known devisee whose interest in the estate would be affected by the petition.

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-448 California Forms of Pleading and Practice--Annotated § 448.18

§ 448.18 Hearing

Affidavits or declarations are not competent evidence in a contested proceeding concerning the award of a family allowance [*Estate of Wallace (1977) 74 Cal. App. 3d 196, 201]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-448 California Forms of Pleading and Practice--Annotated § 448.19

§ 448.19 Persons Entitled to Allowance

It is not necessary that the person be living with the deceased. The word "family" is not synonymous with "household." It includes those members of the family living apart from decedent but for whose support he or she is liable [*Estate of Woodward (1964) 230 Cal. App. 2d 113, 116, 40 Cal. Rptr. 781]* . Illegitimate children are included within the family members entitled to an allowance [*Estate of Woodward (1964) 230 Cal. App. 2d 113, 118, 119, 40 Cal. Rptr. 781]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-448 California Forms of Pleading and Practice--Annotated § 448.20

§ 448.20 Time of Payment; No Stay on Appeal When Undertaking Given

Notwithstanding the general statutory rules governing stay of proceedings when an appeal is filed [*see Code Civ. Proc. §§ 916-936.1*], the perfecting of an appeal from an order made under *Prob. Code §§ 6540-6545* does not stay proceedings under *Prob. Code §§ 6540-6545* or the enforcement of the order appealed from if the person in whose favor the order is made gives an undertaking in double the amount of the payment or payments to be made to that person. The undertaking must be conditioned that if the order appealed from is modified or reversed, so that the payment (or any part thereof) to the person proves to have been unwarranted, the payment (or part thereof), unless deducted from any preliminary or final distribution ordered in favor of the person, must be repaid and refunded into the estate within 30 days after the court so orders following the modification or reversal, together with interest and costs [*Prob. Code § 6545*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-448 California Forms of Pleading and Practice--Annotated § 448.21

§ 448.21 Effect of In Terrorem Clauses

It is always proper for a beneficiary of an estate who believes that the executor is not fulfilling his duty to make the objections which the Probate Code permits without risk of suffering a penalty provided by an *in terrorem* clause [*Estate of Kruse (1970) 7 Cal. App. 3d 471, 476, 86 Cal. Rptr. 491]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-448 California Forms of Pleading and Practice--Annotated § 448.22

§ 448.22 Waiver of Family Allowance

The right of a family allowance is not absolute. It may be waived by agreement or by conduct [*Estate of Brooks (1946) 28 Cal. 2d 748, 750, 171 P.2d 724]* . To be effective as a waiver of the right to a family allowance, the intention to waive the right must be expressed in clear language. Any uncertainty is construed in favor of the right [*Estate of Van Der Oef (1963) 212 Cal. App. 2d 155, 158, 27 Cal. Rptr. 855]* .

However, the right to a family allowance is not lost by either delay in seeking it, or by the fact that the applicant has previously received estate funds from the administrator of the estate without proper authorization [*Estate of Herrera (1992) 10 Cal. App. 4th 630, 636, 12 Cal. Rptr. 2d 751]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-448 California Forms of Pleading and Practice--Annotated § 448.23

§ 448.23 Termination of Family Allowance

A family allowance terminates no later than the entry of the order for final distribution or, if the estate is insolvent, no later than one year after the granting of letters [*Prob. Code § 6543(a)*]. Subject to that limitation, a family allowance continues until modified or terminated by the court or until such time as the court may provide in its order [*Prob. Code § 6543(b)*].

The family allowance is a personal right that ends with the death of the person so entitled [*Estate of Blair (1954) 42 Cal. 2d 728, 732, 269 P.2d 612]* . The allowance is also lost when the one for whom it is asked has lost the status on which the right depends [*Estate of Murphy (1964) 225 Cal. App. 2d 224, 232, 37 Cal. Rptr. 205]* . However, the remarriage of the decedent's spouse (or, afterJanuary 1, 2005, the entering of a new registered domestic partnership by the decedent's domestic partner) [*see Fam. Code § 297.5(c)*] is not a bar to the continuance of an allowance for the benefit of minor children [*Estate of Murphy (1964) 225 Cal. App. 2d 224, 232, 37 Cal. Rptr. 205]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 448.24 Expense of Proceedings

The costs of all proceedings provided for must be paid by the estate as expenses of administration [*Prob. Code § 6544*]. However, there is no right of a successful applicant for attorney's fees [*Estate of Van Der Oef (1963) 212 Cal. App. 2d 155, 158, 27 Cal. Rptr. 855]* .

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38-448 California Forms of Pleading and Practice--Annotated § 448.25

§ 448.25 Right to Appeal

An order retroactively terminating a family allowance has been held to be an appealable order [*Estate of Hoffman (1963) 213 Cal. App. 2d 635, 640, 29 Cal. Rptr. 60]* . However, an order of the court refusing to vacate an order for family allowance is not appealable [*Estate of Casimir (1971) 19 Cal. App. 3d 773, 783, 97 Cal. Rptr. 623]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-448 California Forms of Pleading and Practice--Annotated § 448.26

§ 448.26 Family Allowance as Taxable Income

Treas. Reg. §§ 1.661(a)-2(c), 1.661(a)-2(e), and 1.661(a)-3(b) make the family allowance paid by the estate to the widow or children includable in the recipient's gross income to the extent that the recipient participates in the estate's distributable income [*see* Rabow, "A New Trap for the Probate Family Allowance," 48 State BJ 562 (1973)].

Legal Topics:

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

§§ 448.27[Reserved]

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38-448 California Forms of Pleading and Practice--Annotated § 448.40

§ 448.40 State Statutes

Family allowance, generally. *Prob. Code §§ 6540-6545*

Surviving registered domestic partner, following other partner's death, has same rights, protections, and benefits as surviving spouse. *Fam. Code § 297.5(c)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-448 California Forms of Pleading and Practice--Annotated § 448.41

§ 448.41 Local Rules of Court

Ex parte orders will not be granted unless special notice is waived.

Alameda Co. Unified Super. Ct. Rules, Rule 12.1.15.2

Contra Costa Co. Prob. Pol. Man., § 205

Los Angeles Co. Super. Ct. Rules, Rule 10.38

Marin Co. Rules, Probate 5.5(B)

Orange Co. Super. Ct. Rules, Rule 601.13

Sacramento Co. Super. Ct. Rules, Rule 15.38

San Bernardino Co. Prob. Pol. Mem. § 409

San Diego Co. Super. Ct. Rules, Div. IV, Rules 4.20, 4.32

San Francisco Uniform Local Ct. Rules, Rule 14.20

Stanislaus Co. Super. Ct. Rules, Rule 405

Orders for family allowance.

Alameda Co. Unified Super. Ct. Rules, Rule 12.13.1

Contra Costa Co. Prob. Pol. Man., § 206

Los Angeles Co. Super. Ct. Rules, Rule 10.75(b), (c)

Orange Co. Super. Ct. Rules, Rule 607.01

San Bernardino Co. Prob. Pol. Mem. § 411

San Diego Co. Super. Ct. Rules, Div. IV, Rule 4.58

San Francisco Uniform Local Ct. Rules, Rule 14.96

Santa Clara Co. Super. Ct. Rules, Rule 5.6

All orders for continuing payments must have a maximum time limit.

Los Angeles Co. Super. Ct. Rules, Rule 10.43

San Bernardino Co. Prob. Pol. Mem., § 610

San Diego Co. Super. Ct. Rules, Div. IV, Rule 4.29

San Francisco Uniform Local Ct. Rules, Rule 14.28

Santa Clara Co. Super. Ct. Rules, Rule 5.6

Legal Topics:

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38-448 California Forms of Pleading and Practice--Annotated § 448.42

§ 448.42 Decisions

[1] Effect of In Terrorem Clauses

Objections to executor's performance does not trigger penalty under *in terrorem* clause of will. *Estate of Kruse (1970) 7 Cal. App. 3d 471, 476, 86 Cal. Rptr. 491*

[2] Modification of Family Allowance

Modification of order for family allowance is not retroactive. *Estate of Nelson (1914) 167 Cal. 321, 325, 139 P. 692*

[3] Persons Entitled to Allowance

Former *Prob. Code § 680* (*now see Prob. Code § 6540*) does not authorize probate court to award family allowance to putative spouse. *Estate of Hafner (1986) 184 Cal. App. 3d 1371, 1398, 229 Cal. Rptr. 676*

The word "family" includes members of family living apart from decedent but for whose support he is liable. *Estate of Woodward (1964) 230 Cal. App. 2d 113, 116, 40 Cal. Rptr. 781*

Illegitimate children are included within family members entitled to an allowance. *Estate of Woodward (1964) 230 Cal. App. 2d 113, 118, 119, 40 Cal. Rptr. 781*

[4] Purpose of Family Allowance

Legislative purpose is to provide for the support of persons designated in statute during period between decedent's death and distribution of estate. *Parson v. Parson (1996) 49 Cal. App. 4th 537, 540, 56 Cal. Rptr. 2d 686*

[5] Relationship of Family Allowance to Probate Homestead

Section on probate homestead and section on family allowance are related statutes. *Estate of Brooks (1946) 28 Cal. 2d 748, 750, 171 P.2d 724*

[6] Right to Appeal

Order retroactively terminating a family allowance is appealable. *Estate of Hoffman (1963) 213 Cal. App. 2d 635, 640, 29 Cal. Rptr. 60*

Order refusing to vacate an order for family allowance is not appealable. *Estate of Casimir (1971) 19 Cal. App. 3d 773, 783, 97 Cal. Rptr. 623*

[7] Right to Attorney's Fees

Successful applicant for family allowance as not entitled to obtain attorney's fees. *Estate of Van Der Oef (1963) 212 Cal. App. 2d 155, 158, 27 Cal. Rptr. 855*

[8] Right to Family Allowance

Because payment of family allowance is given priority over virtually every other debt, it is said to occupy a preferential position and to be "highly favored by the law." *Parson v. Parson (1996) 49 Cal. App. 4th 537, 540, 56 Cal. Rptr. 2d 686*

Family allowances have priority over creditors' claims even when reduced to judgment; probate court lacks authority to alter this preference. *Estate of Herrera (1992) 10 Cal. App. 4th 630, 635-636, 12 Cal. Rptr. 2d 751*

Prob. Code § 6540 differentiates between claimants who are entitled to family allowance and those who may be given allowance; equitable principles apply in those cases which involve court's discretion. *Estate of Herrera (1992) 10 Cal. App. 4th 630, 636-638, 12 Cal. Rptr. 2d 751*

Right to family allowance depends not on heirship but on claimant's right to support at time of decedent's death and existence of relationship that is recognized by statute between claimant and decedent. *Estate of Hafner (1986) 184 Cal. App. 3d 1371, 1398, 229 Cal. Rptr. 676*

When right of wife to receive support from husband exists at time of husband's death, granting or withholding of support from husband's estate is not within discretion of probate court, even though court has broad discretion in determining reasonableness and necessity for family allowance. *Estate of Hafner (1986) 184 Cal. App. 3d 1371, 1399, 229 Cal. Rptr. 676*

Right to family allowance is entirely statutory. *Estate of Blair (1954) 42 Cal. 2d 728, 730, 269 P.2d 612*

Stipulation and order on order to show cause in dissolution proceeding that provided that surviving spouse would vacate family home, but did not provide for temporary support, did not affect mutual obligation of spouses to support each other during marriage for purposes of determining surviving spouse's right to family allowance under former *Prob. Code § 680*. *Estate of Kalal (1981) 121 Cal. App. 3d 841, 851, 175 Cal. Rptr. 582*

Determination of whether or not parties intended to separate and permanently waive spousal support for purposes of evaluating surviving spouse's right to family allowance (former *Prob. Code § 680*) is factual issue within province of

probate court, which will be reversed only on showing of abuse of discretion. *Estate of Kalal (1981) 121 Cal. App. 3d 841, 851, 175 Cal. Rptr. 582*

Fact that surviving spouse may have own property or income is not a basis for denial of family allowance under former *Prob. Code § 680*, but relevant on issues of necessity for and reasonableness of allowance. *Estate of Kalal (1981) 121 Cal. App. 3d 841, 851, 175 Cal. Rptr. 582*

Right to family allowance is entirely statutory; is favored by law; is for survivor's maintenance and support and for no other purpose; and is subject to attachment under former *Code Civ. Proc. § 541*. *Estate of Silverman (1967) 249 Cal. App. 2d 180, 182, 183, 57 Cal. Rptr. 379*

Right to family allowance is not a vested right. *Estate of Blair (1954) 42 Cal. 2d 728, 733, 269 P.2d 612*

[9] Size of Family Allowance

Factors to be considered in determining amount of allowance. *Estate of Hoffman (1963) 213 Cal. App. 2d 635, 644, 29 Cal. Rptr. 60*

That widow's existing income exceeds her expenses is not ground to deny petition for allowance outright. *Estate of Van Der Oef (1963) 212 Cal. App. 2d 155, 156, 27 Cal. Rptr. 855*

[10] Termination of Family Allowance

[a] Property Settlement Agreements

Denial of family allowance to two minor children on finding that mother and father, pending divorce, entered into property settlement agreement containing provisions that husband maintain life insurance policies for benefit of his minor children and parties intended that insurance proceeds furnish child support and support not be burden on father's estate, was proper; waiver by contract of right to family allowance by spouse; allowance order is not subject to collateral attack; right to terminate allowance previously granted on good faith claims is retroactive only to date of filing petition to set aside. *Estate of Schumacher (1971) 18 Cal. App. 3d 146, 151-153, 95 Cal. Rptr. 572*

[b] Loss of Status

Family allowance lost when the one who is entitled to it loses the status upon which it is based. *Estate of Murphy (1964) 225 Cal. App. 2d 224, 232, 37 Cal. Rptr. 205*

[c] Date of Decree of Distribution

Trial court did not abuse its discretion in terminating widow's allowance as of date of decree of distribution although order granting allowance did not indicate termination date for allowance, because final decree of distribution did not provide for further proceedings and expressly stated that all debts, expenses, and claims against estate had been paid when widow had received all she was entitled to receive from estate, and widow was party who appealed from decree of distribution. *Estate of Vannucci (1980) 103 Cal. App. 3d 175, 182-185, 163 Cal. Rptr. 11*

[d] Effect of Remarriage

Remarriage of decedent's spouse is not a bar to the continuance of allowance for the benefit of minor children. *Estate of Murphy (1964) 225 Cal. App. 2d 224, 232, 37 Cal. Rptr. 205*

[e] Effect of Death

Family allowance ends with the death of the person entitled to it. *Estate of Blair (1954) 42 Cal. 2d 728, 732, 269 P.2d 612*

[f] Effect of Time

Denial of petition to continue allowance beyond specified period. *Estate of Coffin (1936) 16 Cal. App. 2d 532, 534, 61 P.2d 81*

Discontinuance of allowance at end of reasonable period for settlement of estate. *Estate of Taylor (1936) 12 Cal. App. 2d 374, 376, 55 P.2d 537*

[g] Effect of Divorce

Propriety of entering testator's final decree of divorce nunc pro tunc to date prior to his death pursuant to former *Civ. Code § 4515* (*now see Civ. Code § 4513*) thereby denuding wife of her status of widow and disqualifying her from family allowance. *Estate of Casimir (1971) 19 Cal. App. 3d 773, 778-782, 97 Cal. Rptr. 623*

[11] Waiver of Allowance

Right to family allowance can be waived. *Estate of Brooks (1946) 28 Cal. 2d 748, 750, 171 P.2d 724*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 448.43 Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, §§ 774-779, 787-790 (10th ed. 2005)

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[Reserved]

§§ 448.44[Reserved]

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§ 448.60 Facts to Be Ascertained

1. Ascertain who will file petition:

a. Surviving spouse [*see Prob. Code § 78*] or registered domestic partner [*see Prob. Code § 37*; *Fam. Code § 297.5(c)*].

b. Executor or administrator.

c. Guardian of minor child or children or adult incompetent [*Prob. Code § 6540(a)*].

2. Facts relating to petitioner.

a. Estimate of monthly expenses.

b. Estimate of other income.

c. Anticipated duration of payment.

3. Facts relating to estate.

a. Is the estate solvent?

NOTE:
If the estate is insolvent the family allowance must not continue for more than one year after letters issue [*Prob. Code § 6543(a)*].

b. Estimated cash requirements [ENB Form No. 20, *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-448 California Forms of Pleading and Practice--Annotated § 448.61

§ 448.61 Preliminary Determinations

1. Tax consequences to surviving spouse [*see Treas. Reg. § 1.661(a)-2*].

2. Tax consequences to estate.

3. Source of payment, income or corpus.

4. Amount of allowance to be requested.

5. Determine commencing date to be sought, whether from date of death or some other date [*Prob. Code § 6542*].

NOTE:
Check local probate policy rules as to practice in fixing duration of allowance. For example, if made before inventory is filed, it is the practice of some courts to make the order for a period commencing with date of death and continuing until inventory is filed, but not to exceed six months [*see*Los Angeles Co. Super. Ct. Rule, Rule 10.75(b)]. Subsequent orders are limited to a definite period, usually not to exceed 12 months.

6. Prepare petition and order [*see §§ 448.80, 448.83* (before inventory); 351, 354 (after inventory)].

7. Have petitioner verify petition [*Prob. Code § 1021*]. Verified petition may also be used as evidence in uncontested proceedings [*Prob. Code § 1022*].

8. File original of petition with county clerk.

9. Notice of hearing [*Prob. Code §§ 1220, 6541*].

a. Before inventory is filed: *Prob. Code § 6541(b)(1)(A)* permits application on behalf of the surviving spouse or registered domestic partner [*see Prob. Code § 37*; *Fam. Code § 297.5(c)*], minor children, and adult children who are physically or mentally incapacitated from earning a living to be made ex parte before inventory. The application can also be made after notice of hearing on the petition has been given as provided in *Prob. Code § 1220* [*see Prob. Code § 6541(b)(1)(B)*]. However, an application for an allowance for an adult child who is not incapacitated or a parent must be noticed whenever it is made [*Prob. Code § 6541(c)*]. Some courts specifically request that notice be given when application is made more than six months after the personal representative has qualified [*see* Los Angeles Co. Super. Ct. Rule, Rule 10.75(c)]. If application is not made by the personal representative, some counties require his or her consent to the allowance or his or her waiver of notice to accompany the petition [*see* Los Angeles Co. Super. Ct. Rule, Rule 10.75(a)].

b. After inventory is filed: At least 15 days before the hearing, the petitioner must give notice of the time and place of the hearing to the personal representative and to all persons who have requested special notice in the estate proceeding pursuant to *Prob. Code § 1250* [*Prob. Code § 6541(a)(2)*; *see Prob. Code § 1220(a)(1), (2)*]. Additional notice is required if the application is for an allowance for an adult child who is not incapacitated or for a parent [*Prob. Code § 6541(c), see* Subparagraph c., *below*]. In the case of persons requesting special notice, the notice must be mailed to the address set forth in the request [*Prob. Code § 1252(a)*]. In the case of others entitled to notice, the notice must be mailed to the person's business or residence address, if known; if not known, the court may order that the notice be given in a manner reasonably calculated to give actual notice to that person [*Prob. Code §§ 1212, 1220(a)(3)*; *see Code Civ. Proc. § 413.30*]. If any person entitled to notice is represented by an attorney of record, the notice must also be given to that attorney [*Prob. Code § 1214*].

c. Adult children who are incapacitated or parents of decedentactually dependent in whole or in part on decedent for support. Hearing must be given as provided in *Prob. Code § 1220(a), (b), (d)-(f)* (discussed in part in Subparagraph b. *above*) to each known heir and devisee whose interest in the estate is affected by the petition [*see Prob. Code § 6541(c)*].

10. Presenting or hearing petition.

a. If proceeding ex parte, present the petition, along with the clerk's file, to court for approval.

b. If proceeding on notice and hearing, attend making proof of notice and of allegations of petition.

c. After obtaining an order for family allowance, file original with county clerk and secure certified or conformed copies as required.

NOTE:

Under *Code Civ. Proc. § 1019.5(a)*, when a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order (***see*** Ch. 372, ***Motions and Orders***) must be given by the prevailing party to all other parties or their attorneys, in the manner provided in *Code Civ. Proc. §§ 1010-1020* (***see*** Ch. 518, ***Service of***

Summons and Papers), unless notice is waived by all parties in open court and is entered in the minutes.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesFamiliesEstate, Gift & Trust LawProbateGeneral OverviewFamily LawCohabitationDomestic PartnersRegistration

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38-448 California Forms of Pleading and Practice--Annotated §§ 448.62-448.79

[Reserved]

§§ 448.62[Reserved]

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38-448 California Forms of Pleading and Practice--Annotated § 448.80

§ 448.80 Petition for Family Allowance [Prob. Code §§ 6540-6545; Fam. Code § 297.5(c)]--Before Inventory Filed [Prob. Code § 6541(b)(1)]

[1] FORM Petition for Family Allowance [Prob. Code §§ 6540-6545; Fam. Code § 297.5(c)]--Before Inventory Filed [Prob. Code § 6541(b)(1)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	PETITION FOR FAMILY ALLOWANCE
Deceased.	)	[*Prob. Code § 6540*]
	)	

_____

Petitioner _____ [*name*] respectfully represents:

[*EITHER*]

1. Petitioner is the _____ [surviving spouse *or* surviving registered domestic partner *or* adult child] of the decedent.

[*OR*]

1. Petitioner is the duly appointed, qualified, and acting guardian of the person and estate of _____ [*name*], the minor child of the decedent.

[*OR*]

1. Petitioner is the duly appointed, qualified, and acting conservator of the person and/or estate of _____ [*name*], the decedent's adult child who is _____ [physically *or* mentally] incapacitated from earning a living and was actually dependent in _____ [whole *or* part] for support on decedent.

[*OR*]

1. Petitioner is the duly appointed, qualified, and acting personal representative of the decedent's estate. The decedent is survived by _____ [*name*], who is decedent's _____ [spouse *or* surviving registered domestic partner *or* minor child *or* adult child who was dependent in _____ (whole *or* part) on decedent for support *or* adult child who is _____ (physically *or* mentally) incapacitated from earning a living and was dependent in _____ (whole *or* part) on decedent for support].

[*OR*]

1. Petitioner is an interested person in that he/she is _____ [*specifyfacts making petitioner an interested person, e.g.,* a devisee under the decedent's will].

[*OR*]

1. Petitioner is the [duly appointed, qualified, and acting conservator of the person and/or estate of the] _____ [father *or* mother] of the decedent, who was dependent on decedent for support.

[CONTINUE]

2. Decedent died on _____ [*date*], and his estate is pending administration in this court.

3. An inventory and appraisement has not yet been filed in this estate.

4. The character and estimated value of the estate is as follows:

1.	Real property	$_____
2.	Personal property.....	$_____
3.	Annual income from all property.....	$_____
Total.....		$_____

5. The estate is indebted as follows: _____ [*list debts, include creditor claims, tax liabilities, and estimated cost of administration*].

6. The itemized monthly expenses of the surviving _____ [spouse *or* child] of decedent are as follows: _____ [*specify*]. The surviving _____ [spouse *or* registered domestic partner *or* child] has no maintenance from other sources [except _____ (*specify source and amount*)].

7. Pursuant to the provisions of *Probate Code Section 6540*, _____ [petitioner *or* the surviving spouse *or* surviving registered domestic partner *or* the child] is a person entitled to the payment of a family allowance from the assets of the decedent's estate pending administration.

[*EITHER*]

8. No request for special notice has been filed.

[*OR*]

8. _____ [*Name*] has requested and has _____ [been given *or* waived] notice.

[CONTINUE]

9. The sum of $_____ is a reasonable sum to be allowed out of the estate to _____ (*name*) for attorney's fees for services necessary in protecting the rights of petitioner to maintenance out of the estate.

WHEREFORE petitioner prays for an order of this court directing the personal representative of the estate to pay to _____ [*name*] [for the benefit of _____ (*name*)] the sum of $_____, as a reasonable allowance for maintenance according to the circumstances. The payment is to be made from _____ [income *or* principal] and shall be paid monthly from the date of death up to the filing of the inventory or six months, whichever is sooner, or until otherwise modified or terminated by order of this court; to pay to _____ (*name*) the sum of $_____ as reasonable attorney's fees; and for such other orders as the court shall deem proper.
Dated: _____.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

VERIFICATION [*Code Civ. Proc. §§ 446, 2015.5*]

I, _____, am the petitioner and state that I have read the foregoing petition and know the same to be true of my own knowledge, except as to those matters stated therein on information and belief, and as to those matters I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

Petitioner

[2] Use of Form

This form is for use to petition the court for a family allowance before the inventory and appraisement has been filed [*see Prob. Code § 6541(b)(1)*]. The alternative provisions for the first paragraph permit the form to be used by either the personal representative, the person entitled to the family allowance, or any other interested person [*see Prob. Code § 6541(a)*; *see also Prob. Code § 48* (defining interested person)].

[3] Other Sources of Income

If any person or persons otherwise eligible for family allowance under *Prob. Code § 6540* have a reasonable maintenance derived from other sources, and there are other persons entitled to a family allowance, the allowance may be granted only to those who have not that maintenance [*Prob. Code § 6540(c)*].

The nature and extent of other property is also considered material to the following issues [*see Estate of Hoffman (1963) 213 Cal. App. 2d 635, 644, 29 Cal. Rptr. 60]* :

- Is any sum necessary for the support and maintenance of the petitioner during the period of administration of the estate; and
- If a sum is necessary, what is a reasonable amount to allow.

Disclosure of other property should be made in the petition. Its existence is certain to be a subject of examination sooner or later and failure to disclose at the outset may be harmful [*see Estate of Hoffman (1963) 213 Cal. App. 2d 635, 644, 29 Cal. Rptr. 60]* . "Although there is some question as to whether attorney's fees, as such, may be awarded to a widow in connection with her petition for a family allowance, it was squarely held that such an award is proper where the petition is on behalf of a minor child" [*Estate of Barkdull (1969) 275 Cal. App. 2d 729, 731, 80 Cal. Rptr. 317]* . By way of explanation, the court in *Barkdull* pointed out, in a footnote: "In the case of a widow, the practice is to grant an allowance large enough (if possible) to enable her to treat the cost of securing the order as a part of her living expense. That was the device which the widow utilized in her prayer in the court below" [*Estate of Barkdull (1969) 275 Cal. App. 2d 729, 731, 80 Cal. Rptr. 317]* .

[4] Attorney's Fees

Prob. Code § 6544 provides that the costs of family allowance proceedings are to be paid by the estate as expenses of administration. Cases decided under the predecessor statute created a degree of uncertainty over the extent to which attorney's fees are allowable as "costs" under the statute [*see Estate of Filtzer (1949) 33 Cal. 2d 776, 782-784, 205 P.2d 377* ; cf. *Estate of Van Der Oef (1963) 212 Cal. App. 2d 155, 158, 27 Cal. Rptr. 855]* . This form assumes that attorney's fees will be requested.

[5] Verification

The petition must be verified by the petitioner [*Prob. Code § 1021*]. It should also be verified if it is to be used as evidence under *Prob. Code § 1022*. Additionally, some local court rules specify that an executor, administrator, trustee,

guardian, or conservator acting in his or her official capacity must verify any petitions made in that capacity [*see, e.g.*, Los Angeles Co. Super. Ct. Rules, Rule 10.12].

[6] Notice of Hearing

Before the inventory is filed, a family allowance may be granted with or without notice if the allowance is for a surviving spouse, minor child, or adult child who is physically or mentally incapacitated from earning a living [*Prob. Code § 6541(b)(1)*. After the inventory has been filed, however, notice of the petition must be given [*Prob. Code § 6541(b)(2)*]. If the petition is for an allowance for an adult child who is not incapacitated from earning a living, or for an allowance for a parent who was dependent on the decedent for support, notice is required regardless of when the petition is made [*Prob. Code § 6541(c)*]. For a discussion of the notice requirements, see the Procedural Guide. In Los Angeles County, if the petition for allowance is made more than six months after the personal representative has qualified, it is noticed and placed on the calendar [Los Angeles Co. Super. Ct. Rules, Rule 10.75(c)].

[7] State Statutes

Petition must be verified. *Prob. Code § 1021*

Entitlement to family allowance; priority of allowance. *Prob. Code § 6540*

Petition before inventory filed. *Prob. Code § 6541(b)(1)*

Denial to persons amply provided from other sources. *Prob. Code § 6540(c)*

Cost chargeable to estate. *Prob. Code § 6544*

Bond on appeal from family allowance order. *Prob. Code § 6545*

[8] Local Rules of Court

Applications for ex parte orders.

Contra Costa Co. Prob. Pol. Man. § 205

Los Angeles Co. Super. Ct. Rules, Rule 10.37

Orange Co. Super. Ct. Rules, Rule 601.13

San Bernardino Co. Prob. Pol. Mem., §§ 607-609

San Diego Co. Super. Ct. Rules, Div. IV, Rules 4.30

San Francisco Uniform Local Ct. Rules, Rule 14.20

Santa Clara Co. Super. Ct. Rules, Rule 5.2(E)

Ex parte orders will not be granted unless special notice is waived.

Alameda Co. Unified Super. Ct. Rules, Rule 12.1.15.2

Contra Costa Co. Prob. Pol. Man., § 205

Fresno Co. Prob. Pol. Mem., § 4.5(d)

Los Angeles Co. Super. Ct. Rules, Rule 10.38

Marin Co. Rules, Probate 5.5(B)

Orange Co. Super. Ct. Rules, Rule 601.13

Sacramento Co. Local Ct. Rules, Rule 15.38

San Bernardino Co. Prob. Pol. Mem., § 609

San Diego Co. Super. Ct. Rules, Div. IV, Rule 4.32

San Francisco Uniform Local Ct. Rules, Rule 14.20

Orders for family allowance.

Alameda Co. Unified Super. Ct. Rules, Rule 12.13.1

Contra Costa Co. Prob. Pol. Man., § 206

Fresno Co. Prob. Pol. Mem., § 10.1

Los Angeles Co. Super. Ct. Rules, Rule 10.75

Orange Co. Super. Ct. Rules, Rule 607.01

San Bernardino Co. Prob. Pol. Mem., § 613

San Diego Co. Super. Ct. Rules, Div. IV, Rule 4.58

San Francisco Uniform Local Ct. Rules, Rule 14.96

Santa Clara Co. Super. Ct. Rules, Rule 5.6

All orders for continuing payments must have a maximum time limit.

Fresno Co. Prob. Pol. Mem., § 10.1(b)

San Bernardino Co. Prob. Pol. Mem., § 613

San Francisco Uniform Local Ct. Rules, Rule 14.28

Necessary allegations in petition for family allowance.

Los Angeles Co. Super. Ct. Rules, Rule 10.75

San Francisco Uniform Local Ct. Rules, Rule 14.96(A)

Santa Clara Co. Super. Ct. Rules, Rule 5.6

San Diego Co. Super. Ct. Rules, Div. IV, Rule 4.58

Petitions required to be set for hearing must have self-addressed, stamped envelope or fax cover sheet attached. Los Angeles Co. Super. Ct. Rules, Rule 10.31(a), (b)

[9] Decisions

Right to family allowance is entirely statutory. *Estate of Blair (1954) 42 Cal. 2d 728, 730, 269 P.2d 612*

Section on probate homestead and section on family allowance are related statutes. *Estate of Brooks (1946) 28 Cal. 2d 748, 750, 171 P.2d 724*

Entitlement to allowance before letters granted. *Estate of Welch (1895) 106 Cal. 427, 432, 39 P. 805* (citing former Code Civ. Proc. § 1464)

When presented with request by qualified applicant for family allowance, probate court has no discretion to deny request. *Estate of Herrera (1992) 10 Cal. App. 4th 630, 635, 12 Cal. Rptr. 2d 751*

Receipt by decedent's former wife of insurance proceeds as guardian for minor children does not defeat children's right to family allowance. *Estate of Barkdull (1969) 275 Cal. App. 2d 729, 731, 80 Cal. Rptr. 317*

Social security payments are not monies "derived from other property" within meaning of former *Prob. Code § 682. Estate of Barkdull (1969) 275 Cal. App. 2d 729, 731, 80 Cal. Rptr. 317*

Maintenance derived from property settlement agreement defeats need for family allowance. *Estate of Schumacher (1971) 18 Cal. App. 3d 146, 151-153, 95 Cal. Rptr. 572*

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38-448 California Forms of Pleading and Practice--Annotated § 448.81

§ 448.81 Allegations--After Inventory Filed [Prob. Code § 6541(b)(2)]

[1] FORM Allegations--After Inventory Filed [Prob. Code § 6541(b)(2)]

3. The inventory and appraisement of the estate of the deceased was filed on _____ [*date*].

4. The inventory and appraisement show the character and appraised value of the property of the estate to be as follows:

1. Real property ..... $_____
2. Personal property ..... $_____
3. Annual income from all property $_____

.....
.....
.....

Total $_____

.....
.....
.....

[2] Use of Form

These allegations are for use in place of Paragraphs 3 and 4 of § 448.80 when the petition for family allowance is presented after the inventory is filed.

[3] State Statutes

Petition after inventory filed. *Prob. Code § 6541(b)(2)*

[4] Cross References

For a related form, see *§ 448.80*.

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38-448 California Forms of Pleading and Practice--Annotated § 448.82

§ 448.82 Objections to Petition for Family Allowance [Prob. Code § 6541]

[1] FORM Objections to Petition for Family Allowance [Prob. Code § 6541]

[*Caption. See § 448.80.*]

Objector, _____ [*name*], objects to the petition of _____ [*name*] for family allowance as follows:

[*EITHER*]

1. Objector is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

[*OR*]

1. Objector is _____ [a beneficiary under the will *or* an heir, to wit _____ (*name*), entitled to inherit property *or* a creditor] of _____ [*name*], deceased.

[*EITHER*]

2. There is insufficient property, money, or income of the estate of the deceased for payment of any family allowance. The only assets of the estate consist of _____ [*specify and show claim of higher priority therefor*].

[*AND/OR*]

3. Petitioner is not entitled to family allowance because he/she has substantial other sources of income from which he/she derives a reasonable maintenance according to his circumstances and no allowance out of the estate is necessary for his/her maintenance. The character and estimated value of petitioner's other sources of maintenance, and the probable annual income therefrom are as follows: _____ [*specify*]. The following persons are entitled to a family allowance pursuant to the provisions of *Probate Code Section 6540*: _____ [*names*] [and have filed petitions for family allowance herein].

[*AND/OR*]

4. None of the property in the estate of the deceased was the community property of petitioner and the deceased, but all of it is the separate property of the deceased.

[*AND/OR*]

5. At the time of the death of the deceased, petitioner had no right to support from the deceased in that theretofore on _____ [*date*], petitioner and the deceased entered into a property settlement agreement in writing, whereby petitioner waived any community interest, and right to acquire any community interest, and any right of inheritance, of probate allowance, of property exemptfrom execution, of homestead, of family allowance, or other interest in the property of the deceased.

WHEREFORE, objector prays that the petition of _____ [*name*] for family allowance be denied.

_____ [*signature*]

Objector

_____ [*signature*]

Attorney for Objector

[*Verification. See § 448.80.*]

[2] Use of Form

This form is to be used when an interested person objects to a family allowance.

The statutes are completely silent as to the form any objections to the petition should take [*see Prob. Code §§ 6540-6545*]. The general practice has developed of filing "Objections to the Petition for Family Allowance." Objections filed, however entitled, certainly do produce a contest and they may appropriately be entitled as in *Estate of Van Der Oef* [*Estate of Van Der Oef (1963) 212 Cal. App. 2d 155, 27 Cal. Rptr. 855]* . They do not, however, produce a contest in the fullest sense in which the term is usually employed; there is no right to move for a new trial [*In re Estate of Heywood (1908) 154 Cal. 312, 314, 97 P. 825]* . Therefore, the general practice developed in entitling the objections has been retained.

Not all of the objections set forth in this form would be employed simultaneously, as a rule. Various other objections may be appropriate to a particular case.

[3] Source of Form

This form is adapted from the objections filed in *Estate of Van Der Oef (1963) 212 Cal. App. 2d 155, 27 Cal. Rptr. 855* ; *Estate of Zlaket (1960) 180 Cal. App. 2d 553, 4 Cal. Rptr. 450* ; and *Estate of Gormly (1959) 170 Cal. App. 2d 103, 338 P.2d 457* . In the first case, however, the objections were entitled "Contest and Grounds of Opposition to Petition for Family Allowance."

[4] State Statutes

Objection must be verified by objector. *Prob. Code § 1021(a)(2)*

Objections to petition for family allowance. *Prob. Code §§ 6540, 6541*

[5] Local Rules of Court

Department number, time, and hearing date are required on documents filed in matters already set for hearing. Los Angeles Co. Super. Ct. Rules, Rules 10.10

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38-448 California Forms of Pleading and Practice--Annotated § 448.83

§ 448.83 Order Granting Family Allowance [Prob. Code §§ 6540(a), 6541(b)(1), (c)]; Fam. Code § 297.5(c)--Before Inventory Filed

[1] FORM Order Granting Family Allowance [Prob. Code §§ 6540(a), 6541(b)(1), (c)]; Fam. Code § 297.5(c)--Before Inventory Filed

[*Caption. See § 448.80.*]

The petition of _____ [*name and status, e.g.,* personal representative *or* surviving spouse *or* surviving registered domestic partner] of _____ [*name*], deceased, for family allowance out of the estate of the deceased was duly presented to the court this date. Petitioner appeared by counsel _____ [*name*].

The court finds from proof made to the satisfaction of the court:

1. Notice of the time and place of the hearing was given as required by Probate Code Section _____ [6541(b)(1)*and/or Prob. Code § 6541(c)*]. [Special notice was _____ (given to _____ (*name* (*s*)), as requested *or* requested and waived by _____ (*name* (*s*))).]

2. The deceased died on _____ [*date*], leaving surviving him his _____ [*specify, e.g.,* widow, petitioner, and two minor children, _____ (*name*), born _____ (*date*), and _____ (*name*), born _____ (*date*)] who _____ [is *or* are] entitled to a family allowance.

3. An inventory and appraisement of the estate of the deceased has not yet been filed.

4. The character of the property of the estate is _____ [*specify, e.g.,* real and personal] property and the estimated value thereof is $_____. The probable annual income from the property is $_____.

5. _____ [*Name*] is a person entitled to a family allowance [and is without maintenance derived from other sources].

6. The sum of $_____ per month, from the date of the death of the deceased, is necessary for the maintenance of _____ [*name and status, e.g.,* petitioner and the minor children] according to _____ [his *or* her *or* their] circumstances, during the progress of the settlement of the estate, and is a reasonable allowance out of the estate for the purpose.

IT IS ORDERED that _____ [*name*] as personal representative of the estate of _____ [*name*], deceased, pay to _____ [*name*] from _____ [*specify, e.g.,* income or principle] of the estate, for the maintenance of _____ [*names and relationships, e.g.,* widow and minor children] of the deceased, the sum of $_____ per month, commencing _____ [*date*], and continuing until the filing of inventory [but notexceeding six months], together with the costs of this proceeding. Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is to be used with § 448.80.

[3] Duration of Payment

In Los Angeles County an order for family allowance made before the filing of the inventory is made for the period until the inventory is filed but not to exceed six months [Los Angeles Co. Super. Ct. Rules, Rule 10.75(b)]. The same is true in San Francisco [San Francisco Uniform Local Ct. Rules, Rule 14.96(B)].

[4] State Statutes

Mailing and filing of notice of entry of order or judgment. *Code Civ. Proc. § 664.5*

Finding of giving or waiver of notice are required. *Prob. Code § 1260(b)*

Order granting family allowance is appealable. *Prob. Code § 1303(e)*

Order granting famiy allowance before inventory filed. *Prob. Code § 6541(b)(1), (c)*

[5] Local Rules of Court

Procedure in submission of proposed order in advance of hearing date. San Francisco Uniform Local Ct. Rules, Rule 14.6

Material to be included in probate orders. Los Angeles Co. Super. Ct. Rules, Rule 10.42; San Francisco Uniform Local Ct. Rules, Rule 14.27

[6] Cross References

For a related form, see *§ 448.80*.

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38-448 California Forms of Pleading and Practice--Annotated § 448.84

§ 448.84 Order Granting Family Allowance [Prob. Code §§ 6540, 6541(b)(2), (c)]--After Inventory Filed

[1] FORM Order Granting Family Allowance [Prob. Code §§ 6540, 6541(b)(2), (c)]--After Inventory Filed

[*Caption. See § 448.80.*]

The petition of _____ [*name and status, e.g.,* personal representative *or* surviving spouse *or* surviving registered domestic partner], for family allowance out of the estate of the deceased came on regularly for hearing by the court this day. Petitioner appeared by counsel _____ [*name*].

The court finds from proof made to the satisfaction of the court:

1. Notice of the time and place of the hearing was given as required by Probate Code Section _____ [6541(b)(2)*and/or Probate Code Section 6541(c)*]. [Special notice was _____ (given to _____ (*name* (*s*)), as requested *or* requested and waived by _____ (*name* (*s*)).]

2. The deceased died on _____ [*date*], leaving surviving him/her _____ [*specify, e.g.,* a widow and two minor children _____ (*name*), born _____ (*date*), and _____ (*name*), born _____ (*date*), and], who _____ [is *or* are] entitled to a family allowance.

3. The inventory and appraisement of the estate of the deceased was filed on _____ [*date*].

4. The inventory and appraisement show the character of the property of the estate to be _____ [*specify, e.g.,* real and personal] property having an appraised value of $_____, and probable annual income of $_____.

5. _____ [*Name*] is a person entitled to a family allowance [and is without maintenance derived from other sources.]

6. The sum of $_____ per month [, from the date of the death of the deceased,] is necessary for the maintenance of _____ [*specify, e.g.,* the surviving spouse and the minor children] according to _____ [his *or* her *or* their] circumstances, during the progress of the settlement of the estate, and is a reasonable allowance out of the estate for the purpose.

7. The estate is _____ [solvent *or* insolvent].

IT IS ORDERED that _____ [*name*] as personal representative of the estate of _____ [*name*] deceased, pay to _____ [*name*] from _____ [*specify, e.g.*, income *or* principal] of the estate, for the maintenance of _____ [*names and relationship*] of the deceased, the sum of$_____ per month, commencing _____ [*date*], and continuing for a period of not to exceed _____ months from said date, together with the costs of this proceeding.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use in connection with § 448.81 as an order granting family allowance after the inventory and appraisement have been filed [*see Prob. Code § 6541(b)(2), (c)*].

[3] State Statutes

Mailing and filing of notice of entry of order or judgment. *Code Civ. Proc. § 664.5*

Finding of giving or waiver of notice as required. *Prob. Code § 1260(b)*.

Order granting family allowance as appealable. *Prob. Code § 7240(e)*

Order granting family allowance after inventory filed. *Prob. Code § 6541(b)(2), (c)*

[4] Cross References

For a related form, see *§ 448.81*.

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Chapter 448 PROBATE: FAMILY ALLOWANCE
PART V. FORMS

38-448 California Forms of Pleading and Practice--Annotated § 448.85

§ 448.85 Petition for Modification or Termination of Family Allowance [Prob. Code § 6541; Fam. Code § 297.5(c)]

[1] FORM Petition for Modification or Termination of Family Allowance [Prob. Code § 6541; Fam. Code § 297.5(c)]

[*Caption. See § 448.80.*]

Petitioner _____ [*name*] respectfully represents:

1. Petitioner is a person interested in the estate in that petitioner is _____ [*describe, e.g.*, a beneficiary under the will, a creditor] of _____ [*name*], deceased.

2. The deceased died on _____ [*date*], and his estate is now pending administration in this court.

3. On _____ [*date*], _____ [*name*] was appointed and now is the duly appointed, qualified, and acting personal representative of the estate of the deceased.

4. Heretofore, on _____ [*date*], the court made an order for family allowance _____ [before *or* after inventory] to _____ [*name and relationship, e.g.*, surviving spouse *or* surviving registered domestic partner] of the deceased, in the sum of $_____ per month, commencing _____ [*date*] and continuing until _____ [*specify, e.g.*, the filing of the inventory but not to exceed _____ (*number*) months].

5. The inventory and appraisement of the estate of the deceased was filed on _____ [*date*].

[*Specify Grounds, e.g. EITHER*]

6. The surviving _____ [spouse *or* registered domestic partner] has substantial other sources from which he/she derives a reasonable maintenance according to his/her circumstances and there are other persons entitled to a family allowance. A family allowance out of the estate to the surviving _____ [spouse *or* registered domestic partner] in the sum of $_____ per month is not necessary. The character and estimated value of his/her other sources, and the probable annual income therefrom, are as follows: _____ [*specify*].

[*AND/OR*]

7. The surviving _____ [spouse *or* registered domestic partner] has received by way of preliminary distribution ample assets from the estate to provide for the reasonable maintenance according to his/her circumstances and accustomed mode of life, and an allowance out of the estate in the sum of $_____ is no longer necessary. The assets so distributed to him/her and the date of distribution are as follows: _____ [*specify*].

[*AND/OR*]

8. The surviving _____ [spouse *or* registered domestic partner] has received this allowance out of the estate for a period of _____ [*number*] _____ [months *or* years] and more than a reasonable time for settlement of the estate has elapsed; although able to as personal representative of the estate of the deceased, he/she has failed, and continues to fail, to take steps to settle the estate.

[*AND/OR*]

9. The estate is small in value, to wit: _____ [*specify amount*]. Unless the allowance is _____ [substantially decreased *or* terminated], there will not be sufficient funds to pay bequests provided for in the will, including the bequest to _____ [petitioner *or* to provide the inheritance to which petitioner is entitled *or* to pay the claim of petitioner].

[*CONTINUE*]

10. A request for special notice _____ [has not been filed *or* has been filed and notice will be given as required by law].

WHEREFORE, petitioner prays for an order _____ [modifying *or* terminating] the order for family allowance to _____ [*name*], entered on _____ [*date*][, making a new and different order as follows: _____ (*specify*)].

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 448.80.*]

[2] Use of Form

The petition for modification may seek either an increase, continuance, or decrease in the allowance. This form is designed for decreasing or terminating the allowance. Paragraphs 6-9 illustrate different grounds that may apply. Other grounds may also be alleged.

[3] State Statutes

Order modifying family allowance is appealable. *Prob. Code § 7240(e)*

Petition for modification or termination of family allowance. *Prob. Code § 6541*

Surviving registered domestic partner, following other partner's death, has same rights, protections, and benefits as surviving spouse. *Fam. Code § 297.5(c)*

[4] Local Rules of Court

Petitions required to be set for hearing as required to have self-addressed, stamped envelope attached. Los Angeles Co. Super. Ct. Rules, Rule 10.31(a) (or attach fax cover sheet; *see*Los Angeles Co. Super. Ct. Rules, Rule 10.31(b))

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38-449 California Forms of Pleading and Practice--Annotated 449.syn

§ 449.syn Synopsis to Chapter 449: PROBATE: EXEMPT PERSONAL PROPERTY AND PROBATE HOMESTEADS

§ 449.01 Scope of Chapter

§ 449.02 Cross References

§§ 449.03-449.09 [Reserved]

§ 449.10 Governing Law

§ 449.11 Setting Apart Exempt Property

§ 449.12 Probate Homestead

[1] When Set Apart

[2] For Whom Set Apart

[3] Property From Which Selected

[4] Duration

[5] Effect on Administration

[6] Liability for Claims Against Decedent's Estate

§ 449.13 Hearing on Petition to Set Apart

§ 449.14 Modification and Termination of Homestead Right

§ 449.15 Effect on Declaration of Homestead

§ 449.16 Waiver of Probate Homestead

§§ 449.17-449.29 [Reserved]

§ 449.30 State Statutes

[1] Exempt Property

[2] Probate Homestead

§ 449.31 Decisions

[1] Exempt Personal Property

[2] Expenses

[3] Probate Homestead

[a] Duration

[b] Survivor's Right

[c] Property Set Apart

[d] Value as Without Limit

§ 449.32 Law Reviews

§ 449.33 Text References

§§ 449.34-449.49 [Reserved]

§ 449.50 Facts to Be Ascertained

§ 449.51 Documents to Be Obtained

§ 449.52 Preliminary Determinations

§ 449.53 Preparation of Petition

§§ 449.54-449.69 [Reserved]

§ 449.70 Petition for Order Setting Apart Exempt Personal Property of Deceased to Surviving Spouse or Registered Domestic Partner or Minor Child [Prob. Code § 6510; Fam. Code § 297.5(c)]

[1] FORM

[2] Use of Form

[3] Essential Allegations

[4] State Statutes

[5] Local Rules of Court

[6] Text References

§ 449.71 Order Setting Apart Exempt Personal Property of Deceased to Surviving Spouse or Registered Domestic Partner or Minor Child [Prob. Code § 6510; Fam. Code § 297.5(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Local Rules of Court

[5] Decisions

§ 449.72 Petition for Order Modifying Time Period for Temporary Possession of Family Dwelling and Exempt Property [Prob. Code § 6500]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 449.73 Order Modifying Time Period for Temporary Possession of Family Dwelling and Exempt Property [Prob. Code § 6500]

[1] FORM

[2] Use of Form

[3] Cross References

§ 449.74 Petition for Order Setting Apart Probate Homestead to Surviving Spouse or Registered Domestic Partner or Minor Child [Prob. Code § 6520; Fam. Code § 297.5(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Text References

[6] Cross References

§ 449.75 Order Setting Apart Probate Homestead to Surviving Spouse or Registered Domestic Partner or Minor Child [Prob. Code § 6520; Fam. Code § 297.5(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

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38-449 California Forms of Pleading and Practice--Annotated § 449.01

§ 449.01 Scope of Chapter

This chapter deals with probate homesteads and exempt personal property of decedent. It includes a procedural guide, and forms for setting apart exempt personal property [§§ 449.70, 449.71], forms for modifying the time period for temporary possession of a family dwelling and exempt property [§§ 449.72, 449.73], and forms for setting apart a probate homestead [§§ 449.74, 449.75].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationAllowancesHomesteadsEstate, Gift & Trust LawProbateGeneral OverviewReal Property LawHomestead Exemptions

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§ 449.02 Cross References

For declarations of homestead and related proceedings, see Ch. 294, *Homesteads*

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[Reserved]

§§ 449.03[Reserved]

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38-449 California Forms of Pleading and Practice--Annotated § 449.10

§ 449.10 Governing Law

Setting apart exempt property of the decedent and probate homesteads is governed by *Prob. Code §§ 6500-6528*. The notice required when a petition to set apart exempt property and/or a probate homestead is filed is governed by *Prob. Code § 1220* (general requirements for mailing of notices), *Prob. Code § 6501* (petition for order to modify time period for temporary possession of family dwelling and exempt property), *Prob. Code § 6511* (petition for order to set apart exempt personal property of deceased), and *Prob. Code § 6525* (petition to select and set apart probate homestead). Special notice is governed by *Prob. Code §§ 1250-1252*.

In addition, there are a wide variety of local court rules governing probate practice. To assure complete compliance, the attorney should consult the applicable rules. In the comments to the forms, references are made to some of these local court rules.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationAllowancesHomesteadsEstate, Gift & Trust LawProbateGeneral OverviewGovernmentsCourtsRule Application & InterpretationReal Property LawHomestead Exemptions

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38-449 California Forms of Pleading and Practice--Annotated § 449.11

§ 449.11 Setting Apart Exempt Property

Until the inventory is filed and for a period of 60 days thereafter, or for such other period as may be ordered by the court for good cause on petition therefor, the decedent's surviving spouse and minor children are entitled to remain in possession of the family dwelling, the wearing apparel of the family, the household furniture, and other property of the decedent exempt from execution [*Prob. Code § 6500*]. Personal property exempt from execution is described in *Code Civ. Proc. §§ 704.010-704.210*. On the filing of the inventory or at any subsequent time during the administration of the estate, the court in its discretion may on petition therefor set apart all or any part of the property of the decedent exempt from enforcement of a money judgment, other than the family dwelling, to any one or more of the surviving spouse and the minor children of the decedent [*Prob. Code § 6510*]. Notice of the hearing on the petition must be given as provided in *Prob. Code § 1220* [*see Prob. Code § 6511*; *see also Prob. Code §§ 1250-1252* (special notice)]. For a discussion of notice requirements generally, see Ch. 447, *Probate: Statutory Notice Requirements* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesHomesteadsEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-449 California Forms of Pleading and Practice--Annotated § 449.12

§ 449.12 Probate Homestead

[1] When Set Apart

On the filing of the inventory or at any subsequent time during the administration of the estate, the court in its discretion may on petition therefor select and set apart one probate homestead in the manner provided in *Prob. Code §§ 6520-6528* [*Prob. Code § 6520*].

[2] For Whom Set Apart

The homestead is set apart for the use of one or more of: (1) the surviving spouse and (2) the minor children of the decedent [*Prob. Code § 6521*].

Beginning January 1, 2005, the surviving registered domestic partner of a decedent also is one of the persons for whom a probate homestead can be set aside. A surviving registered domestic partner, following the other partner's death, has the same rights, protections, and benefits, and is subject to the same responsibilities, obligations, and duties under law that are granted to and imposed on a surviving spouse [*Fam. Code § 297.5(c)*; *Prob. Code § 37* ("domestic partner" defined); *see Fam. Code § 297.5*(j) (when necessary to implement statutory rights of domestic partners, gender-specific terms referring to spouses must be construed to include domestic partners)].

[3] Property From Which Selected

The homestead is required to be selected from the following property, giving first preference to the community and quasi-community property of, or property owned in common by, the decedent and the person entitled to have the homestead set apart [*Prob. Code § 6522(a)*; *Fam. Code § 297.5(c)*]:

- If the homestead is set apart for the use of the surviving spouse or registered domestic partner or for the use of the surviving spouse or registered domestic partner and minor children, out of community property or quasi-community property.

- If the homestead is set apart for the use of the surviving spouse or registered domestic partner or for

> the use of the minor children, or for the use of the surviving spouse and minor children, out of property owned in common by the decedent and the persons entitled to have the homestead set apart, or out of the separate property of the decedent or, if the decedent was not married at the time of death, out of property owned by the decedent.

Quasi-community property is defined in *Prob. Code § 66*, community property is defined in *Civ. Code § 687* and *Fam. Code § 760 et seq.*, and interest in common is defined in *Civ. Code § 685*. Separate property is described in *Fam. Code §§ 770, 771, 772, 781*.

A probate homestead cannot be selected out of property if the right to possession of that property is vested in a third person unless the third person consents to it. The term third person means a person whose right to possession of the property (1) existed at the time of, or came into existence on, the decedent's death, and (2) was not created by testate or intestate succession from the decedent [*Prob. Code § 6522(b)*].

[4] Duration

The period for which property may be set apart for a homestead is limited and must be designated in the order which sets it apart. The period may not extend beyond the lifetime of the surviving spouse or domestic partner, or, as to a child, beyond the child's minority [*Prob. Code § 6524*; *Fam. Code § 297.5(c)*].

[5] Effect on Administration

Subject to the homestead right, the property of the decedent remains subject to administration, including testate and intestate succession. The rights of the parties during the period for which the homestead is set apart are governed, to the extent applicable, by the Legal Estates Principal and Income Law (*Civ. Code §§ 731-731.15*) [*Prob. Code § 6524*].

[6] Liability for Claims Against Decedent's Estate

Property of the decedent set apart as a probate homestead is liable for claims against the estate of the decedent, subject to the probate homestead right. The probate homestead right in the decedent's property is liable for claims that are secured by liens and encumbrances on the property at the time of the decedent's death but is exempt to the extent of the homestead exemption [*see Code Civ. Proc. §§ 704.710-704.850*] as to any claim that would have been subject to a homestead exemption at the time of the decedent's death [*Prob. Code § 6526(a)*]. The right is not liable for claims against the person for whose use the homestead is set apart [*Prob. Code § 6526(b)*], but property of the decedent set apart as a probate homestead is liable for claims against the testate or intestate successors of the decedent or other successors to the property after administration, subject to the probate homestead right [*Prob. Code § 6526(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesHomesteadsEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewFamily LawCohabitationDomestic PartnersRegistrationFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead Exemptions

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38-449 California Forms of Pleading and Practice--Annotated § 449.13

§ 449.13 Hearing on Petition to Set Apart

A petition to select and set apart a probate homestead may be filed by any interested person [*Prob. Code § 6525(a)*]. Notice of the hearing on the petition must be given as provided in *Prob. Code § 1220* to each person listed in *Prob. Code § 1220* and to each known heir and known devisee whose interest in the estate would be affected by the petition [*see* Prob. Code § 6252(b); *see also Prob. Code §§ 1220* (notice by mail), 1285 (clerk to set matter for hearing) and Ch. 447, *Probate: Statutory Notice Requirements*].

In selecting and setting apart the homestead, the court must consider the needs of the surviving spouse or registered domestic partner [*see Fam. Code § 297.5(c)*] and minor children, the liens and encumbrances on the property, the claims of creditors, the needs of the heirs or devisees of the decedent, and the decedent's intent with respect to the property in the estate and the estate plan of decedent asexpressed in inter vivos and testamentary transfers or by other means [Prob. Code§ 6523(a)]. The court, in light of the foregoing and other relevant considerations as determined by the court in its discretion, must select as a probate homestead the most appropriate property available that is suitable for use as a dwelling. The court must set apart, in addition to the dwelling, any adjoining property as appears reasonable for such a term and on such conditions (including but not limited to assignment by the homestead recipient of other property to the heirs or devisees of the property that has been set apart as a homestead) as appear proper [*Prob. Code § 6523(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationAllowancesHomesteadsEstate, Gift & Trust LawPersonal GiftsLifetime GiftsEstate, Gift & Trust LawProbateGeneral OverviewFamily LawCohabitationDomestic PartnersRegistrationFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead Exemptions

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38-449 California Forms of Pleading and Practice--Annotated § 449.14

§ 449.14 Modification and Termination of Homestead Right

The court, by order, may modify the term or conditions of the probate homestead right or may terminate the probate homestead right at any time prior to entry of an order for final distribution of the decedent's estate if, in the court's discretion, to do so appears appropriate under the circumstances of the case [*Prob. Code § 6527(a)*]. A petition for an order may be filed by any of the following [*Prob. Code § 6527(b)*]:

- The person for whose use the probate homestead is set apart.

- The testate or intestate successors of the decedent or other successors to that property set apart as a probate homestead.

- Persons having claims secured by liens or encumbrances on the property set apart as a probate homestead.

Notice of the hearing on the petition must be given to all the persons listed in *Prob. Code § 6527(b)* (other than the petitioner) as provided in *Prob. Code § 1220* [*Prob. Code § 6527(c)*; *see* Ch. 447, *Probate: Statutory Notice Requirements*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesHomesteadsEstate, Gift & Trust LawProbateGeneral OverviewReal Property LawHomestead Exemptions

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38-449 California Forms of Pleading and Practice--Annotated § 449.15

§ 449.15 Effect on Declaration of Homestead

Nothing in *Prob. Code §§ 6520-6528* terminates or otherwise affects a declaration of homestead by, or for the benefit of, a surviving spouse, registered domestic partner, or minor child of the decedent with respect to the community, quasi-community, or common interest of the surviving spouse or minor child in property in the decedent's estate [*Prob. Code § 6528*; *Fam. Code § 297.5(c)*]. This provision is declaratory of, and does not constitute a change in, existing law [*Prob. Code § 6528*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesHomesteadsFamily LawCohabitationDomestic PartnersRegistrationFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead Exemptions

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38-449 California Forms of Pleading and Practice--Annotated § 449.16

§ 449.16 Waiver of Probate Homestead

The right to a probate homestead may be waived by agreement or conduct [*Estate of Alba (1965) 238 Cal. App. 2d 618, 622, 48 Cal. Rptr. 100]* . The requirements of an effective waiver are (1) an existing right; (2) a knowledge, actual or constructive, of the existence of the right; and (3) an actual intention to relinquish the right or conduct so inconsistent with the intent to enforce it as to induce a reasonable belief that the right has been relinquished [*Estate of Alba (1965) 238 Cal. App. 2d 618, 622, 48 Cal. Rptr. 100]* . Thus, although waiver of a probate homestead by agreement may take the form of a writing, such as an attachment to the will of the deceased spouse, a separation agreement, or a prenuptial agreement, the courts subject the agreements to an extremely strict construction in order to preserve the surviving spouse's right to a probate homestead [*Estate of Alba (1965) 238 Cal. App. 2d 618, 623, 48 Cal. Rptr. 100]* . If acts are relied on to establish abandonment or waiver of a legal right there must be either clear, unequivocal, and decisive acts of the party showing that purpose or acts amounting to an estoppel on his or her part [*Estate of Alba (1965) 238 Cal. App. 2d 618, 623, 48 Cal. Rptr. 100]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesHomesteadsEstate, Gift & Trust LawProbateGeneral OverviewFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead Exemptions

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38-449 California Forms of Pleading and Practice--Annotated §§ 449.17-449.29

[Reserved]

§§ 449.17[Reserved]

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38-449 California Forms of Pleading and Practice--Annotated § 449.30

§ 449.30 State Statutes

[1] Exempt Property

Property exempt from execution. *Code Civ. Proc. §§ 704.010-704.850*

Notice of hearing generally. *Prob. Code §§ 1211, 1220, 1250-1252*

Right of surviving spouse and minor children to temporary possession. *Prob. Code § 6500*

Petition to shorten or extend period of temporary possession. *Prob. Code § 6501*

Setting aside exempt property other than dwelling to surviving spouse and/or minor children of decedent. *Prob. Code § 6510*

Petition to set apart exempt property. *Prob. Code § 6511*

[2] Probate Homestead

Petition to set apart homestead. *Prob. Code § 6520*

Persons for whose use probate homestead may be set apart. *Prob. Code § 6521*

Property from which probate homestead may be set apart. *Prob. Code § 6522*

Matters considered by court in setting apart probate homestead. *Prob. Code § 6523*

Duration of homestead. *Prob. Code § 6524*

Effect of homestead on administration of estate. *Prob. Code § 6524*

Notice of hearing on petition to set apart homestead. *Prob. Code § 6525*

Liability of homestead for claims against decedent's estate. *Prob. Code § 6526*

Modification and termination of homestead right. *Prob. Code § 6527*

Effect on declaration of homestead. *Prob. Code § 6528*

Surviving registered domestic partner has same rights, responsibilities, protections, and benefits as surviving spouse. *Fam. Code § 297.5(c)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesHomesteadsEstate, Gift & Trust LawProbateGeneral OverviewFamily LawCohabitationDomestic PartnersRegistrationFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead Exemptions

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38-449 California Forms of Pleading and Practice--Annotated § 449.31

§ 449.31 Decisions

[1] Exempt Personal Property

Discretion of court in setting apart exempt personal property of deceased. *Estate of Jones (1947) 78 Cal. App. 2d 265, 266-267, 177 P.2d 372*

[2] Expenses

When widow was awarded probate homestead in two-flat building which she and decedent owned as tenants in common, trial court did not abuse its discretion in ordering that widow receive rental income from flat she was not occupying and that she pay all taxes and assessments on building and real property, all costs of insurance and maintenance, and one-half of principal and interest on mortgage since heirs would derive no monetary benefit from property during life of homestead. *Estate of Vannucci (1980) 103 Cal. App. 3d 175, 182, 163 Cal. Rptr. 11*

[3] Probate Homestead

[a] Duration

Period for which property may be set apart for homestead must be designated in order setting it apart, and in no case to extend beyond lifetime of surviving spouse, or as to child, beyond child's minority. *Estate of Murray (1982) 133 Cal. App. 3d 601, 605, 183 Cal. Rptr. 924*

[b] Survivor's Right

Right to have probate homestead set apart is nonassignable. *Estate of Blair (1954) 42 Cal. 2d 728, 731, 269 P.2d 612*

Right to probate homestead is paramount to all others and not conditioned on the existence of family status. *Estate of*

Nelson (1964) 224 Cal. App. 2d 138, 144-145, 36 Cal. Rptr. 352

Right of surviving spouse to probate homestead is independent of and in addition to any other right or property he or she may have. *Estate of Ronayne (1951) 104 Cal. App. 2d 53, 58, 231 P.2d 105*

Probate homestead inures to benefit of entire family. *Estate of Branam (1944) 66 Cal. App. 2d 309, 315, 152 P.2d 354*

[c] Property Set Apart

Local subdivision ordinance is not binding on probate court or decedent's family in derogation of court's exercise of its statutory discretion to set aside part of parcel as probate homestead. *Wells Fargo Bank v. Town of Woodside (1983) 33 Cal. 3d 379, 391, 189 Cal. Rptr. 41, 657 P.2d 819*

Selection of probate homestead from property held by deceased in common with third person. *Estate of Kachigian (1942) 20 Cal. 2d 787, 792-793, 128 P.2d 865*

Necessity for dwelling house on property set apart as probate homestead. *Estate of Faber (1914) 168 Cal. 491, 493, 143 P. 737*

Probate homestead can be imposed only on property within the estate. *Estate of Liccardo (1991) 232 Cal. App. 3d 962, 967-968, 283 Cal. Rptr. 839* ; *Estate of Schmelz (1968) 259 Cal. App. 2d 440, 443-444, 66 Cal. Rptr. 480*

Probate homestead consisted of undivided one-fourth interest in four-unit apartment building for eight years. *Estate of Moskowitz (1966) 247 Cal. App. 2d 499, 502, 55 Cal. Rptr. 572*

Discretion of court in designating property to be set apart as probate homestead. *Estate of Mattingly (1937) 19 Cal. App. 2d 550, 551-552, 65 P.2d 1338*

[d] Value as Without Limit

Lack of statutory limitation as to value of probate homestead. *Estate of Levy (1904) 141 Cal. 646, 652, 75 P. 301* ; *Estate of Claussenius (1950) 96 Cal. App. 2d 600, 611, 216 P.2d 485*

Former *Prob. Code § 661* (*now see Prob. Code §§ 6521, 6522, 6524*) places no limitation on value of homestead. *Estate of Nelson (1964) 224 Cal. App. 2d 138, 144, 36 Cal. Rptr. 352*

Residence of surviving spouse is homestead irrespective of land on which it is situated. *Estate of Nelson (1964) 224 Cal. App. 2d 138, 145, 36 Cal. Rptr. 352*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesHomesteadsEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateJudicial ReviewFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead Exemptions

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PART III. RESEARCH GUIDE

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§ 449.32 Law Reviews

Brown & Brown, "The Widow's Election," 43 State BJ 343 (1968)

Comment, "The Probate Homestead in California," *53 Cal. L Rev 655 (1965)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationAllowancesHomesteadsEstate, Gift & Trust LawProbateGeneral OverviewFamily LawMarital Duties & RightsProperty RightsHomestead Rights

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38-449 California Forms of Pleading and Practice--Annotated § 449.33

§ 449.33 Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, §§ 765-767 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesHomesteadsEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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[Reserved]

§§ 449.34[Reserved]

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38-449 California Forms of Pleading and Practice--Annotated § 449.50

§ 449.50 Facts to Be Ascertained

NOTE:
The following guide is illustrative only. In an actual case procedures may be called for that are not set forth here.

1. Name of surviving spouse or registered domestic partner.

2. Name and birth dates of minor children.

3. Name of personal representative, if other than surviving spouse or registered domestic partner.

NOTE:
If probate administration has not yet been opened, consider preparing petition for probate for surviving spouse [*see* Ch. 442, *Probate: Initiating Probate Administration*].

4. Name and address of each heir, devisee, and legatee, other than the surviving spouse or registered domestic partner and minor children. Identify which are likely to resist a petition to set apart.

NOTE:
This information may be obtained by examining a copy of the petition for probate, if any.

5. Property in the estate.

6. The disposition of the property to be set apart if allowed to pass by intestate succession or by the will.

NOTE:
If decedent died intestate all of the community property passes to the surviving

spouse or surviving registered domestic partner. Separate property of the decedent is shared by the surviving spouse and the children. If there is only one surviving child, the property is shared equally between the surviving spouse and the child. If there are two or more surviving children, then they share two thirds equally, and the surviving spouse takes one third [*see* *Prob. Code §§ 6401, 6402*]. The same provisions regarding intestate succession apply with respect to a surviving domestic partner [***see*** *Prob. Code §§ 6401(c), 6402* (effective July 1, 2003); *Fam. Code § 297.5(c)* (effective January 1, 2005, registered domestic partners have same rights and responsibilities as surviving spouses)].

7. The financial condition of the surviving spouse and minor children.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyFamily LawMarital Duties & RightsProperty RightsCharacterizationSeparate Property

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38-449 California Forms of Pleading and Practice--Annotated § 449.51

§ 449.51 Documents to Be Obtained

1. Copy of the petition for probate when filed.

2. Copy of inventory when filed.

3. Copy of deed to real property which is sought to be set apart as homestead.

4. Copy of any trust deed, note, or other document evidencing a lien or encumbrance on real property which is sought to be set apart as homestead.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationAllowancesHomesteadsEstate, Gift & Trust LawProbateGeneral OverviewReal Property LawHomestead Exemptions

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38-449 California Forms of Pleading and Practice--Annotated § 449.52

§ 449.52 Preliminary Determinations

1. Has the inventory been filed?

NOTE:

The surviving spouse and minor children are entitled to remain in possession of the family dwelling, the wearing apparel of the family, the household furniture, and other property of the decedent exempt from execution until the inventory is filed and for 60 days thereafter, or for such other period as the court orders for good cause [*Prob. Code § 6500*]. The petition to set apart to the surviving spouse or registered domestic partner and/or the decedent's minor children all or any part of the decedent's property exempt from execution other than the dwelling is filed on or after the date of filing the inventory [*Prob. Code § 6510*; *Fam. Code § 297.5(c)*].

2. What personal property of the decedent qualifies as exempt property?

NOTE:

For property exempt from execution, see *Code Civ. Proc. §§ 704.010-704.210*.

3. Is there real property in the estate which is suitable as a residence for the surviving spouse or registered domestic partner and/or minor children?

NOTE:

It is not necessary that surviving spouse or minor children resided on the property at the time of decedent's death, or that the property be a detached, single family dwelling [*see* *Estate of Schmelz (1968) 259 Cal. App. 2d 440, 443-444, 66 Cal. Rptr. 480]* . There is no value limitation on the property which may be set apart. However, a homestead cannot be selected out of property if the right to possession of that property is vested in a third person unless the third person consents to it. The term third person means a person whose right to possession of the property (1) existed at the time of, or came into existence on, the decedent's death, and (2) was not created by testate or intestate

succession from the decedent [*Prob. Code § 6522(b)*].

4. What are the needs of the parties and what is the condition of the estate?

NOTE:

In selecting and setting apart a homestead, the court is required to consider the needs of the surviving spouse or registered domestic partner and minor children, the liens and encumbrances on the property, the claims of creditors, the needs of the heirs or devisees of the decedent, and the decedent's intent with respect to the property in the estate and the estate plan of the decedent as expressed in inter vivos and testamentary transfers or by other means [*Prob. Code § 6523(a)*; *Fam. Code § 297.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesHomesteadsEstate, Gift & Trust LawPersonal GiftsLifetime GiftsFamily LawCohabitationDomestic PartnersRegistrationFamily LawMarital Duties & RightsProperty RightsHomestead RightsReal Property LawHomestead Exemptions

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38-449 California Forms of Pleading and Practice--Annotated § 449.53

§ 449.53 Preparation of Petition

1. Prepare petition and order:

a. For petition to set apart exempt personal property, *see § 449.70*.

b. For petition to set apart probate homestead, *see § 449.74*.

NOTE:
The petition must be verified [*see Prob. Code § 1021(a)(1)*]; but if it is, it may be admitted in evidence if the matter is uncontested, thus avoiding taking testimony [*see Prob. Code § 1022*].

2. File original of petition with county clerk and have it set for hearing.

3. Give notice of hearing. At least 15 days before the time set for hearing, mail notice of time and place of hearing to personal representative and all persons who have requested special notice pursuant to *Prob. Code § 1250* [*Prob. Code § 1220(a)*]. Mail notice to business or residence address, if known; if not known, court may prescribe service in manner reasonably calculated to give actual notice [*Prob. Code §§ 1212, 1220(a)(3), 1252*; *see Code Civ. Proc. § 413.30*]. If any person entitled to notice is represented by an attorney of record, the notice must also be given to that attorney [*Prob. Code § 1214*].

4. Attend hearing, making proof of notice and of allegations of petition.

5. Present order for signature.

NOTE:
Upon obtaining order setting apart homestead, file original with court clerk and secure conformed copies as required and at least one certified copy for recording.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsEnforcementProof of SignatureEstate, Gift & Trust LawEstate AdministrationAllowancesHomesteadsEstate, Gift & Trust LawProbateGeneral OverviewGovernmentsCourtsClerks of CourtReal Property LawHomestead Exemptions

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[Reserved]

§§ 449.54[Reserved]

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38-449 California Forms of Pleading and Practice--Annotated § 449.70

§ 449.70 Petition for Order Setting Apart Exempt Personal Property of Deceased to Surviving Spouse or Registered Domestic Partner or Minor Child [Prob. Code § 6510; Fam. Code § 297.5(c)]

[1] FORM Petition for Order Setting Apart Exempt Personal Property of Deceased to Surviving Spouse or Registered Domestic Partner or Minor Child [Prob. Code § 6510; Fam. Code § 297.5(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*]	)	PETITION TO SET APART _____
Deceased.	)	[*specify, e.g.,* EXEMPT PERSONAL PROPERTY]
	)	[*Prob. Code § 6510*]

_____

Petitioner _____ [*name*] respectfully represents:

1. Petitioner is a person interested in the estate of _____ [*name*], deceased, in that _____ [*specify petitioner's status as interested person, e.g.,* he/she is the surviving/_____ (spouse *or* registered domestic partner) of _____ (*name of deceased*)].

2. The deceased died on _____ [*date*], and his/her estate is now pending administration in this court.

3. On _____ [*date*], _____ [*name*] was appointed and now is the duly appointed, qualified, and acting personal representative of the estate.

4. The inventory was filed on _____ [*date*], and shows the character and appraised value of the property of the estate to be as follows: _____ [*list all property, real and personal, as in inventory*].

5. The estate is indebted for the following: _____ [*itemize funeral expense, expenses of last illness, current bills, and any large debts due creditors*].

6. The following-described personal property returned in the inventory is exempt by law from execution: _____ [*list any property exempt under Code Civ. Proc. §§ 703.010-704.995*].

7. The surviving family of the deceased consists of _____ [*specify, e.g.,* _____ (*name*), wife, and one minor child _____ (*name*), born _____ (*date*)].

8. Request for special notice has _____ [not been filed herein *or* been filed by _____ (*name*), whose address is _____ (*set forth address of person who filed request*)].

WHEREFORE, petitioner prays for an order setting apart all of the exempt personal property to petitioner for the use and benefit of the family of the deceased.

_____ [*signature*]
Petitioner
_____ [*signature*]
Attorney for Petitioner

VERIFICATION

I, _____ [*name*], the petitioner, have read the foregoing petition and know the contents thereof. The same is true of my own personal knowledge, except as to those matters which are therein stated on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing, including any attachments is true and correct.
Dated: _____.

_____ [*signature*]
Petitioner

[2] Use of Form

This form is to be used to set apart exempt personal property of decedent to the surviving spouse or registered domestic partner or a minor child of the decedent [*see Prob. Code § 6510*; *Fam. Code § 297.5(c)*].

[3] Essential Allegations

When the proceeding is brought on behalf of a minor child or children, the petition should include an allegation of the appointment of a guardian. Although the petition would ordinarily be brought by the surviving spouse or registered domestic partner, or the guardian of a minor child, any interested person may file the petition [*Prob. Code § 6510*; *Fam. Code § 297.5(c) see also Prob. Code § 48* (defining interested person)]. Therefore, the petition should allege the facts bringing the petitioner within the definition of interested person.

Since the power of the court to set apart is discretionary [*Prob. Code § 6510*; *Estate of Jones (1947) 78 Cal. App. 2d 265, 266-267, 177 P.2d 372]* the court generally will want to be informed as to the condition of the estate. The petition

should, therefore, set forth fully all property and indebtedness, as indicated, together with all other relevant facts, even though the application is for exempt personal property only.

When the surviving family includes one or more minor children in addition tothe surviving spouse or registered domestic partner, the name and birth dates of each should be included since the size of the family is important. The property is set apart to the spouse or partner only in that case, but it is for the use and benefit of all.

[4] State Statutes

Petition for order setting apart exempt personal property of deceased to surviving spouse or minor child. *Prob. Code §§ 6510, 6511*

Notice of hearing. *Prob. Code §§ 1220, 1250-1252*

Surviving registered domestic partner has same rights, responsibilities, protections, and benefits as surviving spouse. *Fam. Code § 297.5(c)*

[5] Local Rules of Court

Petitions required to be set for hearing must have self-addressed, stamped envelope attached. Los Angeles Co. Super. Ct. Rules, Rule 10.31(a) (or attach fax cover sheet; *see* Los Angeles Co. Super. Ct. Rules, Rule 10.31(b))

[6] Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, §§ 756, 766 (10th ed. 2005)

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38-449 California Forms of Pleading and Practice--Annotated § 449.71

§ 449.71 Order Setting Apart Exempt Personal Property of Deceased to Surviving Spouse or Registered Domestic Partner or Minor Child [Prob. Code § 6510; Fam. Code § 297.5(c)]

[1] FORM Order Setting Apart Exempt Personal Property of Deceased to Surviving Spouse or Registered Domestic Partner or Minor Child [Prob. Code § 6510; Fam. Code § 297.5(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER SETTING APART EXEMPT PERSONAL
Estate of _____ [*name*],	)	PROPERTY
Deceased.	)	OF DECEDENT TO _____
	)	SURVIVING SPOUSE *OR* REGISTERED DO-
	)	MESTIC PARTNER *AND/OR* MINOR
		CHILD(REN)
		[*Prob. Code § 6510*]

_____

The petition of _____ [*name*] for an order setting apart certain personal property of the estate of _____ [*name*], deceased, as exempt property came on regularly for hearing by the court this date. Petitioner appeared by counsel _____ [*name*].

The court finds from proof made to the satisfaction of the court:

1. Notice of the time and place of the hearing was given as required by *Probate Code Section 6511*. [Special notice was _____ (given to _____ (*name(s)*), as requested *or* requested and waived by _____ (*name(s)*)).]

2. The deceased died on _____ [*date*], leaving surviving him/her a family consisting of _____ [*describe, e.g.*, wife and two minor children _____ (*name*), born _____ [*date*], and _____ (*name*), born _____ [*date*].

3. The inventory was filed on _____ [*date*].

4. The personal property hereinafter described was included in the inventory and is exempt by law from execution.

5. The estate is _____ [solvent *or* insolvent].

NOW, THEREFORE, IT IS HEREBY ORDERED that the following personal property is set apart to _____ [*name*], as _____ [*specify, e.g.*, surviving spouse of the deceased] for the use and benefit of _____ [*specify, e.g.*, petitioner and the two minor children of the deceased, _____ (*name*) and _____ (*name*)]:

_____ [*List property item by item*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order setting apart exempt personal property is for use in connection with *see § 449.70*.

[3] State Statutes

Mailing and filing of notice of entry of order or judgment. *Code Civ. Proc. § 664.5*

Finding of giving or waiver of notice is required. *Prob. Code § 1260(b)*.

Order setting apart property claimed to be exempt from enforcement as appealable. *Prob. Code § 1303(d)*

Order setting apart exempt personal property of deceased to surviving spouse and/or minor child. *Prob. Code § 6510*

Surviving registered domestic partner has same rights, responsibilities, protections, and benefits as surviving spouse. *Fam. Code § 297.5(c)*

[4] Local Rules of Court

Orders required to be submitted to Probate Courtroom at least two weeks in advance of scheduled hearing date and required to note hearing date on face sheet. San Francisco Uniform Local Ct. Rules, Rule 14.6

Orders required to be complete in themselves and to set forth all matters actually passed on by the court, the date of hearing, the relief granted, and the names of persons and descriptions of property or amounts of money affected. Los Angeles Co. Super. Ct. Rules, Rule 10.42; San Francisco Uniform Local Ct. Rules, Rule 14.27

[5] Decisions

Order setting exempt personal property apart to the surviving spouse and/or minor child as species of distribution.
Estate of Miller (1898) 121 Cal. 353, 355, 53 P. 906

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38-449 California Forms of Pleading and Practice--Annotated § 449.72

§ 449.72 Petition for Order Modifying Time Period for Temporary Possession of Family Dwelling and Exempt Property [Prob. Code § 6500]

[1] FORM Petition for Order Modifying Time Period for Temporary Possession of Family Dwelling and Exempt Property [Prob. Code § 6500]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	PETITION TO MODIFY PERIOD FOR TEMPOR-
Deceased.	)	ARY POSSESSION OF DWELLING AND EX-
	)	EMPT PROPERTY
		[*Prob. Code § 6500*]

_____

Petitioner _____ [*name*] respectfully represents:

1. [*Status of petitioner. See § 449.70, Paragraph 1.*].

[*EITHER*]

2. The inventory was filed on _____ [*date*], and shows the character and appraised value of the property of the estate to be as follows: _____ [*list all property, real and personal, as in inventory*].

[*OR*]

2. The inventory has not yet been filed; the character and estimated value of the estate is as follows: _____ [*specify, e.g.*, real property in the amount of $1,700,000; personal property in the amount of $40,000; and annual income from all property in the amount of $35,000].

[*CONTINUE*]

3. Notice has been given as required by *Section 6501 of the Probate Code*. Request for special notice has _____ [not been filed herein *or* been filed by, and special notice has been given to, _____ (*name*), whose address is _____ (*specify address of person who requested special notice*)].

4. Good cause exists to _____ [shorten *or* extend] the period of time that the _____ [surviving _____ (spouse *or* registered domestic partner) *and/or* minor children] are entitled to remain in possession of the family dwelling, the wearing apparel of the family, the household furniture, and the other property of _____ [*name*], deceased, that is exempt from enforcement of a money judgment. The facts constituting good cause are as follows: _____ [*specify, e.g.*, the hearing on a petition to set apart a probatehomestead has been set for _____ [*date*], more than 60 days after the filing of the inventory, and the _____ (surviving _____ (spouse *or* registered domestic partner) *and/or* minor children) need to be allowed to remain in the family dwelling until that date].

WHEREFORE, petitioner prays for an order _____ [shortening *or* extending] the period of time that the _____ [surviving _____ (spouse *or* registered domestic partner) *and/or* minor children] are entitled to remain in possession of the family dwelling, the wearing apparel of the family, the household furniture, and the other property of the decedent that is exempt from enforcement of a money judgment, so that the period of time ends on _____ [*date*].

_____ [*signature*]
Petitioner
_____ [*signature*]
Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form is for use to shorten or extend the period of time during which the surviving spouse or registered domestic partner and minor children of a decedent are entitled to remain in possession of the family dwelling, the wearing apparel of the family, the household furniture, and the other property of the deceased that is exempt from enforcement of a money judgment [*Prob. Code §§ 6500, 6501*; *Fam. Code § 297.5(c)*]. The usual period lasts until 60 days after the

inventory is filed, but may last for a different period by order of the court for good cause [see *Prob. Code § 6500*]. Although the statute provides that the surviving spouse or registered domestic partner and minor children are entitled to possession, if there is no surviving spouse or registered domestic partner or no minor children, the petition arguably would be proper if filed on behalf of the survivor(s). This interpretation does not have any direct support in the statutory scheme, although it appears to comport with practice under the former law [*see, e.g., Robson v. Meder (1944) 66 Cal. App. 2d 47, 48, 151 P.2d 662* (surviving spouse without any minor children held properly in possession of homestead under former *Prob. Code § 660*)].

The petition must be verified by the petitioner [*Prob. Code § 1021(a)*]. When the petition is verified and is not opposed, the allegations of the petition must be accepted as evidence [*Prob. Code § 1022*].

[3] State Statutes

Right of surviving spouse and minor children to possession of family property and exempt property; period of possession. *Prob. Code § 6500*

Petition for order altering period of possession; notice required. *Prob. Code § 6501*

Surviving registered domestic partner has same rights, responsibilities, protections, and benefits as surviving spouse. *Fam. Code § 297.5(c)*

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38-449 California Forms of Pleading and Practice--Annotated § 449.73

§ 449.73 Order Modifying Time Period for Temporary Possession of Family Dwelling and Exempt Property [Prob. Code § 6500]

[1] FORM Order Modifying Time Period for Temporary Possession of Family Dwelling and Exempt Property [Prob. Code § 6500]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER MODIFYING PERIOD FOR TEMPOR-
Deceased.	)	ARY POSSESSION OF DWELLING AND EX-
	)	EMPT PROPERTY
		[*Prob. Code § 6500*]

_____

The petition of _____ [*name*] for an order _____ [shortening *or* extending] the period of time that the _____ [surviving spouse *or* surviving registered domestic partner *and/or* minor children] are entitled to remain in possession of the family dwelling, the wearing apparel of the family, the household furniture, and the other property of the decedent exempt from enforcement of a money judgment came on regularly for hearing by the court on this date. Petitioner appeared by counsel _____ [*name*].

The court finds from proof made to the satisfaction of the court:

1. Notice of the time and place of the hearing was given as required by *Probate Code Section 6501*. [Special notice was _____ (given to _____ (*name(s)*), as requested *or* requested and waived by _____ (*name(s)*)).]

2. Good cause has been established supporting the petition to _____ [shorten *or* extend] the period of

time that the _____ [surviving spouse *or* surviving registered domestic partner *and/or* minor children] are entitled to remain in possession of the family dwelling, the wearing apparel of the family, the household furniture, and the other property of the decedent that is exempt from enforcement of a money judgment.

THEREFORE, IT IS HEREBY ORDERED that the time that the _____ [surviving spouse_____ (spouse *or* registered domestic partner) *and/or* minor children] are entitled to remain in possession of the following property is _____ [extended *or* shortened], so that the period of time now ends on _____ [*date*].

_____ [*List property item by item*]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is an order extending or shortening time that a surviving spouse or registered domestic partner [*see Fam. Code § 297.5(c)*] and/or minor children of a decedent may remain in possession of the family dwelling, the wearing apparel of the family, the household furniture, and the other property of the decedent exempt from enforcement of a money judgment. The form is for use in connection with the *form in § 449.72*.

[3] Cross References

For a related form, *see § 449.72*.

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Volume 38: Probate: Is Probate Necessary? thru Probate: Estate Tax-Chs. 440-453
Chapter 449 PROBATE: EXEMPT PERSONAL PROPERTY AND PROBATE HOMESTEADS
PART V. FORMS

38-449 California Forms of Pleading and Practice--Annotated § 449.74

§ 449.74 Petition for Order Setting Apart Probate Homestead to Surviving Spouse or Registered Domestic Partner or Minor Child [Prob. Code § 6520; Fam. Code § 297.5(c)]

[1] FORM Petition for Order Setting Apart Probate Homestead to Surviving Spouse or Registered Domestic Partner or Minor Child [Prob. Code § 6520; Fam. Code § 297.5(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	PETITION FOR ORDER SETTING APART PRO-
Deceased.	)	BATE HOMESTEAD TO SURVIVING SPOUSE
	)	[OR REGISTERED DOMESTIC PARTNER] OR
		MINOR CHILD
		[*Prob. Code § 6520*]

_____

Petitioner, _____ [*name*], respectfully represents:

1. [*Status of petitioner. See § 449.70, Paragraph 1.*].

2. The deceased died on _____ [*date*], and his/her estate is now pending administration in this court.

3. On _____ [*date*], _____ [*name*], was appointed and now is the duly appointed, qualified, and acting personal representative of the estate of the deceased.

4. The inventory of the estate of the deceased was filed on _____ [*date*].

5. Certain real property, hereinafter described as "the real property," was included in the inventory and described as

follows: _____ [*Set forth legal and common description, and appraised value*].

[*EITHER*]

6. At the time of his/her death, the deceased and _____ [*name or* petitioner] owned and held the real property as _____ [community property *or* quasi-community property *or* tenants in common].

[*OR, if separate property*]

6. At the time of his/her death, the deceased owned and held the real property as his/her separate property; there is no community or quasi-community property or property owned in common from which a homestead can be selected.

[*CONTINUE*]

7. The surviving family of the deceased consists of _____ [*specify, e.g.*, petitioner, the surviving _____ (spouse *or* registered domestic partner), and two minor children _____ (*name*), born _____ [*date*], and _____ (*name*), born _____ [*date*], who _____ [is *or* are] entitled to have a homestead set apart for his/her/their use.

[*EITHER*]

8. The real property is being used as a residence by _____ [*name or* petitioner] [and the minor child(ren) of the deceased].

[*OR*]

8. The real property is suitable for use as a homestead.

[*CONTINUE*]

9. Request for special notice has _____ [not been filed herein *or* been filed by, and notice given to, _____ (*name*), whose address is _____ (*specify address of person who requested special notice*)].

WHEREFORE, petitioner prays judgment as follows:

1. For an order setting apart the real property as a homestead for the use of _____ [petitioner *or* petitioner and _____ (*name(s)*), the minor child(ren) of the deceased *or* _____ (*name(s)*), the minor child(ren) of the deceased];

2. For costs; and

3. For such other and further orders as the court may deem proper.
Dated: _____.

_____ [*signature*]
Petitioner
_____ [*signature*]
Attorney for Petitioner

[*Verification. See § 449.70.*]

[2] Use of Form

This form is to be used to set apart a probate homestead [*Prob. Code § 6520*]. The homestead may be set apart for the use of the surviving or registered domestic partner and/or the minor children of the decedent [*Prob. Code § 6521*; *Fam. Code § 297.5(c)*].

[3] State Statutes

For whom homestead may be set apart. *Prob. Code § 6521*

Property out of which homestead is selected. *Prob. Code § 6522*

Notice of hearing. *Prob. Code § 6525*

Surviving registered domestic partner has same rights, responsibilities, protections, and benefits as surviving spouse. *Fam. Code § 297.5(c)*

[4] Decisions

Selection from property held by deceased in common with a third person. *Estate of Kachigian (1942) 20 Cal. 2d 787, 792, 793, 128 P.2d 865*

Discretion of court in designating property to be set apart. *Estate of Mattingly (1937) 19 Cal. App. 2d 550, 551-552, 65 P.2d 1338*

Necessity for dwelling house on property. *Estate of Faber (1914) 168 Cal. 491, 493, 143 P. 737*

Lack of statutory limitation on value of probate homestead. *Estate of Levy (1904) 141 Cal. 646, 652, 75 P. 301* ; *Estate of Claussenius (1950) 96 Cal. App. 2d 600, 611, 216 P.2d 485*

Probate homestead inures to benefit of entire family. *Estate of Branam (1944) 66 Cal. App. 2d 309, 315, 152 P.2d 354*

Probate homestead is a privilege, not a vested right, to be claimed while requisite family status exists. *Estate of Pillsbury (1917) 175 Cal. 454, 457, 166 P. 11*

Right to have probate homestead set apart is nonassignable. *Estate of Blair (1954) 42 Cal. 2d 728, 731, 269 P.2d 612*

[5] Text References

Witkin, Summary of California Law, vol. 42, *Wills and Probate*, §§ 767 (10th ed. 2005)

[6] Cross References

For a related form, *see § 449.70*.

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38-449 California Forms of Pleading and Practice--Annotated § 449.75

§ 449.75 Order Setting Apart Probate Homestead to Surviving Spouse or Registered Domestic Partner or Minor Child [Prob. Code § 6520; Fam. Code § 297.5(c)]

[1] FORM Order Setting Apart Probate Homestead to Surviving Spouse or Registered Domestic Partner or Minor Child [Prob. Code § 6520; Fam. Code § 297.5(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER SETTING APART PROBATE
Deceased.	)	HOMESTEAD TO SURVIVING SPOUSE *OR* RE-
	)	GISTERED DOMESTIC PARTNER *AND/OR*
		MINOR CHILD[REN]
		[*Prob. Code § 6520*]

_____

The petition of _____ [*name*] for an order setting apart a probate homestead came on regularly for hearing by the court this date. Petitioner appeared by counsel _____ [*name; specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court:

1. Notice of the time and place of the hearing was given as required by *Probate Code Section 6525*. [Special notice was _____ (given to _____ (*name(s)*), as requested *or* requested and waived by _____ (*name(s)*)).]

2. The deceased _____ [*name*] died on _____ [*date*], and was survived by _____ [*specify, e.g.*, _____ (*name*), wife, and two minor children

_____ (*name*), born _____ (*date*), and _____ (*name*), born _____ (*date*).

3. The inventory of the estate of the deceased was filed on _____ [*date*].

4. The real property hereinafter described and referred to as "the real property," was included in the inventory and appraised therein at $_____.

[*EITHER*]

5. At the time of his/her death, the deceased and _____ [*name of petitioner*] owned and held the real property as _____ [community *or* quasi-community] property.

[*OR, IF SEPARATE PROPERTY*]

5. At the time of his/her death, the deceased owned and held the real propertyas his/her separate property; there is no community property, quasi-community property, or property owned in common from which a homestead can be selected.

[*CONTINUE*]

[*EITHER*]

6. The real property is being used as a residence by _____ [*name or* petitioner] [and the minor child(ren) of the deceased].

[*OR*]

6. The real property is suitable for use as a homestead.

[*CONTINUE*]

NOW, THEREFORE, IT IS HEREBY ORDERED that the following-described real property is set apart for the use of _____ [*name(s)*], the _____ [surviving spouse of the deceased *or* surviving spouse and the minor child(ren) of the deceased *or* minor children of the deceased] for _____ [*specify duration*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is an order for use with a petition to set apart a probate homestead [*Prob. Code § 6520*; *see § 449.74*]. For

discussion of what the court must consider in setting apart a homestead and what property the court may select, see *§ 449.12[3]*.

[3] State Statutes

Matters considered by court. *Prob. Code § 6523*

Modification and termination of homestead right by court order. *Prob. Code § 6527*

Surviving registered domestic partner has same rights, responsibilities, protections, and benefits as surviving spouse. *Fam. Code § 297.5(c)*

[4] Cross References

For a related form, see *§ 449.71*.

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38-450 California Forms of Pleading and Practice--Annotated 450.syn

§ 450.syn Synopsis to Chapter 450: PROBATE: COLLECTING ASSETS

§ 450.01 Scope of Chapter

§ 450.02 Cross References

§§ 450.03-450.09 [Reserved]

§ 450.10 Governing Law

§ 450.11 Delivery of Decedent's Tangible Personal Property

[1] When Required

[2] Exception

[3] Effect of Delivery

[4] Delivery to Personal Representative

[5] Liability for Recipient's Loss or Damage to Property

§ 450.12 Representative's Duty to Collect Assets

[1] In General

[2] Duty to Maintain and Manage Property

[3] Standard of Care

[4] Possession of Property in Representative Capacity

[5] Title to Real Property in Heirs

[6] Retention by Person Presumptively Entitled to Property

[7] Action by Heirs for Possession or Title

§ 450.13 Discovery in Aid of Collection of Assets

[1] Citation for Examination

[2] Conduct of Examination; Order for Disclosure

[3] Recovery of Attorney's Fees by Person Cited

[4] Interrogatories

[5] Citation to Compel Account for Property

[6] Penalty for Wrongful Taking or Concealment of Estate Property

§ 450.14 Good Faith Possession of Property

[1] Immunity of Personal Representative

[2] Reasonable Compensation for Services

§ 450.15 Partnership Interest

[1] Order to Render Account

[2] Exercise of Decedent's Partnership Rights

§ 450.16 Duty to Recover Property Transferred in Fraud of Creditors

§ 450.17 Survival of Actions

[1] In General

[2] Commencement of or Substitution in Action

[3] Damages Recoverable in Action on Behalf of Decedent

[4] Applicable Law

§ 450.18 Compromise of Claims

[1] Without Court Authorization

[2] When Court Authorization Is Required

[a] Claim Period Not Expired

[b] Matters Affecting Real Property

[c] Transaction in Excess of $25,000

[d] Claim by Estate Against Personal Representative

[e] Matters Affecting Personal Representative's Debt to Estate

[f] Wrongful Death or Personal Injury Claims

[3] Procedure for Obtaining Court Order

[4] Transfer of Property to Effect Compromise or Settlement

§ 450.19 Acceptance of Deed in Lieu of Foreclosure

§ 450.20 Grant of Partial Satisfaction or Reconveyance

§ 450.21 Apportionment of Debt

§ 450.22 Restitution of Decedent's Property Collected or Transferred Without Administration

[1] When Estate Proceedings Commenced

[2] Triple Restitution for Fraudulent Acquisition of Property

[3] Reduction of Amount Restored

[4] Effect of Improvements on Real Property

[5] Statute of Limitations

[6] Nondomiciliary Decedents

§ 450.23 Effect of Final Judgment or Order

§§ 450.24-450.39 [Reserved]

§ 450.40 State Statutes

[1] In General

[2] Actions by Personal Representative

[3] Collection of Assets

[4] Compromise of Claims

[a] In General

[b] Court Approval Required

[c] Procedure

[5] Notice and Setting of Hearing

[6] Verification

§ 450.41 Local Rules of Court

[1] Compromise of Claims

[2] Wrongful Death Damages

§ 450.42 Decisions

[1] Compromise of Claims

[2] Duty of Personal Representative to Collect Assets

[3] Jurisdiction

[4] Ownership of Estate Property

[5] Punitive Damages

[6] Ratification by Court

[7] Statute of Limitations

[8] Survival of Decedent's Rights

§ 450.43 Text References

§§ 450.44-450.59 [Reserved]

§ 450.60 Complaint by Personal Representative in Civil Action to Collect Assets of Estate [Prob. Code §§ 377.20-377.35, 9650(a)(1), 9820(a)]

[1] FORM

[2] Use of Form

[3] Survival of Decedent's Cause of Action

[4] Verification

[5] Cross References

[6] State Statutes

[7] Decisions

§ 450.61 Petition for Order Authorizing Compromise or Settlement of Claim, or Extension, Renewal, or Modification of Obligation, or Release of Claim by Estate Against Debtor or Tortfeasor [Prob. Code §§ 9830-9837]

[1] FORM

[2] Use of Form

[3] When Court Authorization Required

[4] Who May File

[5] Contents of Petition

[6] Verification

[7] Notice of Hearing

[8] Compromise of Claims

[a] Authority of Personal Representative

[b] When Court Approval Required

[c] Procedure for Obtaining Court Approval

[9] Local Rules of Court

[a] Collection of Damages for Wrongful Death

[b] Petition Procedure

[10] Decisions

[11] Text References

§ 450.62 Objections to Petition for Order Authorizing Compromise or Settlement of Claim, or Extension, Renewal, or Modification of Obligation, or Release of Claim by Estate Against Debtor or Tortfeasor [Prob. Code §§ 9830-9837]

[1] FORM

[2] Use of Form

[3] Cross References

§ 450.63 Order Authorizing Compromise or Settlement of Claim, or Extension, Renewal, or Modification of Obligation, or Release of Claim by Estate Against Debtor or Tortfeasor [Prob. Code §§ 9830-9837]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Local Rules of Court

[5] Cross References

§ 450.64 Petition for Order for Issuance of Citation for Examination Regarding Taking, Concealment, or Withholding of Property of Estate [Prob. Code § 8870]

[1] FORM

[2] Use of Form

[3] Notice of Hearing

[4] Verification

[5] Citation

[6] Order for Disclosure

[7] State Statutes

§ 450.65 Petition for Order Authorizing Personal Representative to Accept Deed of Property Subject to Trust Deed or Mortgage Held by Deceased in Lieu of Sale Under Trust Deed or Foreclosure [Prob. Code § 9850]

[1] FORM

[2] Use of Form

[3] Burden of Proof

[4] Notice of Hearing

[5] State Statutes

[6] Cross References

§ 450.66 Order Authorizing Personal Representative to Accept Deed of Property Subject to Trust Deed or Mortgage Held by Deceased in Lieu of Sale Under Trust Deed or Foreclosure [Prob. Code § 9850]

[1] FORM

[2] Use of Form

[3] Cross References

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Chapter 450 PROBATE: COLLECTING ASSETS
PART I. SCOPE

38-450 California Forms of Pleading and Practice--Annotated § 450.01

§ 450.01 Scope of Chapter

This chapter contains discussion and forms relating to the collection of the assets of a decedent's estate by the personal representative. Included is a form for a complaint against a debtor or tortfeasor [*see § 450.60*], forms to petition the court for approval of a compromise of a claim by the estate [§§ 450.61, 450.63], and a form for objections to a petition for approval of a compromise of a claim [*see § 450.62*]. Also included are a form for a citation for examination of a person having knowledge or possession of property of the estate [*see § 450.64*], a form for a petition for an order authorizing acceptance of a deed of property subject to a trust deed or mortgage held by the decedent in lieu of a sale under the trust deed or foreclosure of the mortgage, and an order authorizing the acceptance of the deed [§§ 450.65, 450.66].

For discussion of notice requirements in probate proceedings, see Ch. 447, *Probate: Statutory Notice Requirements* . For discussion and forms relating to claims against the estate, see Ch. 454, *Probate: Claims Against the Estate* . For discussion and forms for use in managing estate assets after collection, see Ch. 456, *Probate: Management of Estate Assets* .

For forms for use in substituting a personal representative for a deceased party in an action, see Ch. 21, *Amended and Supplemental Pleadings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbateGeneral Overview

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38-450 California Forms of Pleading and Practice--Annotated § 450.02

§ 450.02 Cross References

For forms for use in substituting a personal representative for a deceased party, see Ch. 21, *Amended and Supplemental Pleadings*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSubstitutionsDeath of PartyEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-450 California Forms of Pleading and Practice--Annotated §§ 450.03-450.09

[Reserved]

§§ 450.03[Reserved]

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PART II. LEGAL BACKGROUND

38-450 California Forms of Pleading and Practice--Annotated § 450.10

§ 450.10 Governing Law

The delivery of a decedent's tangible personal property to designated persons either before or after the appointment of a personal representative is governed by *Prob. Code § 330*.

Collection of estate assets in general is governed by *Prob. Code §§ 9650, 9651, 9653*, and *9654*. Provisions relating to a decedent's interest in a partnership are contained in *Prob. Code §§ 9761* and *9763*. Discovery in aid of collection is governed by *Prob. Code §§ 8870-8873*. *Prob. Code § 859* imposes a penalty for bad faith taking, concealment, or disposition of estate property.

Survival of actions is governed by *Code Civ. Proc. § 377.10 et seq.* Compromise of claims by or against the estate and modifications of obligations owed to the estate are governed by *Prob. Code §§ 9830-9839*, and authorization to accept a deed in lieu of foreclosure or a trustee's sale is governed by *Prob. Code § 9850*. Allocation of debts between the estate and a surviving spouse or registered domestic partner [*see Fam. Code § 297.5(c)*] is governed by *Prob. Code §§ 11440-11446*, and recovery of property collected or transferred to another without administration is governed by *Prob. Code §§ 13111* (personal property) and 13206 (real property).

Provisions relating to notice in probate matters are governed by *Prob. Code §§ 1200-1265*. Provisions related to verification of probate documents and setting a matter for hearing are governed by *Prob. Code §§ 1021-1023* and *1041*, respectively. "Personal representative" is defined in *Prob. Code § 58* and "interested person" is defined in *Prob. Code § 48*. Provisions regarding release from liability for claims after final judgment are set forth in *Prob. Code § 9612*.

Rules of Court governing Probate Practice are contained in Title 7 of the California Rules of Court. Local court rules also govern probate practice. Counsel should consult the applicable rules to insure compliance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsReleases From LiabilityGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift

& Trust LawProbatePersonal RepresentativesGeneral OverviewFamily LawCohabitationDomestic PartnersRegistrationGovernmentsCourtsRule Application & Interpretation

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Chapter 450 PROBATE: COLLECTING ASSETS
PART II. LEGAL BACKGROUND

38-450 California Forms of Pleading and Practice--Annotated § 450.11

§ 450.11 Delivery of Decedent's Tangible Personal Property

[1] When Required

Personal property of a decedent will frequently be in the possession of someone other than the decedent at the time of death. *Prob. Code § 330* provides a mechanism for delivering that property to designated persons before estate administration proceedings have been commenced and a personal representative appointed [*see Prob. Code § 330*].

As a general rule, a public administrator, government official, law enforcementagency, hospital or institution in which a decedent died, or a decedent's employer may, without the need to wait 40 days after death, deliver the tangible personal property of the decedent in its possession (including keys to the decedent's residence) to the decedent's surviving spouse, registered domestic partner, or relative, or conservator or guardian of the estate acting in that capacity at the time of death [*Prob. Code § 330(a)*; *Fam. Code § 297.5(c)*]. The person who delivers the property must require reasonable proof of the status and identity of the person to whom the property is delivered [*see Prob. Code § 330(c)*], and must keep a record of both the property delivered and the status and identity of the person to whom it was delivered [*see Prob. Code § 330(d)*].

[2] Exception

The exception to the foregoing rule is that the property must not be delivered if the person in possession of it knows or has reason to believe that there is a dispute over the right to possession of the property [*Prob. Code § 330(b)*].

[3] Effect of Delivery

Delivery of the property does not determine ownership of the property or confer any greater rights in the property than the recipient would otherwise have. Delivery of the property also does not preclude later proceedings for administration of the decedent's estate [*Prob. Code § 330(e)*].

[4] Delivery to Personal Representative

If proceedings for administration of the decedent's estate are commenced, the person holding the property must deliver

it to the personal representative on the representative's request [*Prob. Code § 330(e)*].

[5] Liability for Recipient's Loss or Damage to Property

The person who delivers the property is not liable for loss or damage to the property caused by the person to whom the property is delivered [*Prob. Code § 330(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawIntestacyAdministratorsEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewFamily LawCohabitationDomestic PartnersRegistration

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38-450 California Forms of Pleading and Practice--Annotated § 450.12

§ 450.12 Representative's Duty to Collect Assets

[1] In General

Once estate administration proceedings have commenced and a personal representative has been appointed, the personal representative has the right and the duty to collect assets of the estate.

Except as provided by statute, and subject to *Prob. Code § 9650(c)* [§ 450.12[6]], the personal representative has the right to, and must take possession or control of, all the property of the decedent to be administered in the decedent's estate and must collect all debts due to the decedent or the estate. The personal representative is not accountable for any debts that remain uncollected without his or her fault [*Prob. Code § 9650(a)(1)*; *see Prob. Code § 58* (definition of personal representative)].

If necessary, the personal representative may bring an action to recover possession of estate property or to determine title to it [*see Prob. Code §§ 9654, 9820*; Cal. L. Revision Comm'n Comment to *Prob. Code § 9650*; *see also § 450.12[7]*]. For forms of complaint that can be adapted for use by the personal representative to recover property, combine the allegations in § 450.60 with the appropriate complaint from Ch. 119, *Claim and Delivery,* or Ch. 150, *Conversion* [*see also Prob. Code § 859* (discussed in *§ 450.13[6]*)]. Alternatively, the personal representative may proceed by way of petition under *Prob. Code §§ 850 et seq.* for an order for conveyance or transfer of the property. For discussion of *Prob. Code §§ 850 et seq.* and related forms of petition and order, see Ch. 456, *Probate: Management of Estate Assets* .

The personal representative is also entitled to receive the rents, issues, and profits from the real and personal property in the estate until the estate is distributed [*Prob. Code § 9650(a)(2)*]. The personal representative's right to collect estate assets, how ever, may be barred by an applicable statute of limitations [*see Estate of Peebles (1972) 27 Cal. App. 3d 163, 166, 103 Cal. Rptr. 560* (action for accounting filed more than four years after decedent partner's death barred by statute of limitations, since action accrued at date of partner's death)].

For a form of complaint for use by a personal representative to collect an asset owed to the estate, *see § 450.60*.

[2] Duty to Maintain and Manage Property

The personal representative must pay taxes on, and take all steps reasonably necessary for the management, protection, and preservation of the estate in his or her possession [*Prob. Code § 9650(b)*; for further discussion regarding the personal representative's duties to manage estate assets, *see* Ch. 456, *Probate: Management of Estate Assets*]. This duty includes, for example, a duty to obtain and maintain reasonably necessary insurance on estate property [*see Prob. Code § 9656*; Cal. Law Revision Comm'n Comment to *Prob. Code § 9650*].

[3] Standard of Care

The personal representative manages and has control of the estate and, in performing these duties, he or she must use ordinary care and diligence. What constitutes ordinary care and diligence is determined by all the circumstances of the particular estate [*Prob. Code § 9600(a)*]. A personal representative who breaches this duty will be held liable for losses to the estate caused by the breach [*see Estate of Guiol (1972) 28 Cal. App. 3d 818, 826-827, 105 Cal. Rptr. 35]* .

In addition, the personal representative must exercise a power or refrain from exercising a power to the extent that ordinary care and diligence require [*see Prob. Code § 9600(b)*].

For further discussion of a personal representative's standard of care in managing the estate, see Ch. 456, *Rebate: Management of Estate Assets* .

[4] Possession of Property in Representative Capacity

The fact that a representative is an heir or a beneficiary under the will does not give the representative the right to deal with the property of the estate other than as a representative until it has been distributed under the terms of the will. In such a case, possession up to the time of distribution is in his or her representative capacity [*Estate of Curry (1969) 274 Cal. App. 2d 502, 503, 79 Cal. Rptr. 125]* .

[5] Title to Real Property in Heirs

An estate may not take title to the decedent's real property. When a person dies, title to the decedent's real property vests in the heirs or devisees, subject to administration [*Dorland v. Dorland (1960) 178 Cal. App. 2d 664, 669, 3 Cal. Rptr. 262]* .

[6] Retention by Person Presumptively Entitled to Property

Real or tangible personal property may be left with or surrendered to the person presumptively entitled to it unless or until, in the judgment of the personal representative, possession of the property by the personal representative will be necessary for purposes of administration. The person holding the property must surrender it to the personal representative on his or her request [*Prob. Code § 9650(c)*]. It may be possible for the heir or devisee to question the personal representative's judgment in a later proceeding to surcharge for breach of fiduciary duty, but this possibility should not interfere with the representative's administrative authority as it relates to the possession of the estate. Indeed, the representative may be liable for failing to take possession of estate property if the property is thereby lost to those entitled to it [*Estate of Boggs (1939) 33 Cal. App. 2d 30, 33, 90 P.2d 814* ; Cal. Law Revision Comm'n Comment to *Prob. Code § 9650*].

[7] Action by Heirs for Possession or Title

The heirs or devisees may themselves, or jointly with the personal representative, maintain an action for possession of property or to quiet title to property against any person except the personal representative [*Prob. Code § 9654*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsTortsIntentional TortsBreach of Fiduciary DutyGeneral Overview

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38-450 California Forms of Pleading and Practice--Annotated § 450.13

§ 450.13 Discovery in Aid of Collection of Assets

[1] Citation for Examination

On petition by the personal representative or an interested person, the court may order that a citation be issued to a person to answer interrogatories, or to appear before the court and be examined under oath, or both, concerning allegations that (1) the person has wrongfully taken, concealed, or disposed of property in the estate of the decedent, or (2) the person has knowledge or possession of (A) a deed, conveyance, bond, contract, or other writing that contains evidence of or tends to disclose the right, title, interest, or claim of the decedent to property, (B) a claim of the decedent, or (C) a lost will of the decedent [*Prob. Code § 8870(a)*; for a form of petition, *see § 450.64*; for discussion and a form of citation, *see* Ch. 447, *Probate: Statutory Notice Requirements*]. Disobedience of the citation may be punished as a contempt of the court issuing the citation [*Prob. Code § 8870(c)*; *see also Prob. Code § 800* (power of court in probate proceedings)].

If the person to whom the citation is directed does not reside in the county in which the estate is being administered, the superior court either of the county in which the person resides or of the county in which the estate is being administered may issue the citation [*Prob. Code § 8870(b)*].

[2] Conduct of Examination; Order for Disclosure

At the examination before the court of a person cited pursuant to *Prob. Code § 8870*, witnesses may be produced and examined on either side [*Prob. Code § 8872(a)*]. If it appears from the examination that the allegations of the petition are true, the court may order the person to disclose the person's knowledge of the facts to the personal representative [*Prob. Code § 8872(b)*]. The court order of disclosure is enforceable in the same manner as other court orders [*see* Cal. L. Revision Comm'n Comment to *Prob. Code § 8872*; *Prob. Code §§ 800* (power of court in probate proceedings), 1000 (applicability of rules of civil practice to probate proceedings)].

A petition under *Prob. Code §§ 8870, 8872* does not invoke the jurisdiction of the probate court to determine title to the property claimed by the personal representative to belong to the estate [*see Estate of Schechtman (1955) 45 Cal. 2d 50, 53, 286 P.2d 345* (decided under former *Prob. Code § 613*)]. That must be done in a civil action or by petition under *Prob. Code §§ 850 et seq.*, discussed in Ch. 456, *Probate: Management of Estate Assets* .

[3] Recovery of Attorney's Fees by Person Cited

If it appears from the examination of a person cited pursuant to *Prob. Code § 8870* that the allegations of the petition are not true, the person's necessary expenses, including a reasonable attorney's fee, shall be charged against the petitioner or allowed out of the estate, in the discretion of the court [*Prob. Code § 8872(c)*].

[4] Interrogatories

If a citation issued pursuant to *Prob. Code § 8870* requires the person cited toanswer interrogatories, the interrogatories and answers must be in writing; and the answers must be signed by the person cited under penalty of perjury. The interrogatories and answers are filed with the court [*Prob. Code § 8871*; *see Prob. Code § 1000* (applicability of rules of civil practice to probate proceedings)]. For discussion and forms of interrogatories in civil actions, see Ch. 194, *Discovery: Interrogatories* .

[5] Citation to Compel Account for Property

On petition by the personal representative, the court may issue a citation to a person who has possession or control of property in the decedent's estate to appear before the court and to make an account under oath of the property and of the person's actions with respect to the property [*Prob. Code § 8873(a)*; *see also Code Civ. Proc. § 166* (actions in chambers, applicable to proceedings under the Probate Code by virtue of *Prob. Code § 1000*)]. Disobedience of a citation issued pursuant to *Prob. Code § 8873* may be punished as a contempt of the court issuing the citation [*Prob. Code § 8873(b)*; *see also Prob. Code § 800* (power of court in probate proceedings)].

Prob. Code § 8873 is in the nature of a discovery proceeding and does not confer on the probate court jurisdiction to determine title to the property claimed by the personal representative to belong to the estate or to require that such property be surrendered to the personal representative. That must be done in a civil action or by petition under *Prob. Code §§ 850 et seq.*, discussed in Ch. 456, *Probate: Management of Estate Assets* [*see Estate of Linnick (1985) 171 Cal. App. 3d 752, 759-760, 217 Cal. Rptr. 552* (decided under former Prob. Code § 615)].

[6] Penalty for Wrongful Taking or Concealment of Estate Property

A person who, in bad faith, has wrongfully taken, concealed, or disposed of property in the estate of the decedent is liable for twice the value of the property, recoverable in an action by the personal representative for the benefit of the estate [*Prob. Code § 859*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsGeneral OverviewCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateJurisdiction & VenueGeneral OverviewEstate, Gift & Trust LawWillsLost Wills

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38-450 California Forms of Pleading and Practice--Annotated § 450.14

§ 450.14 Good Faith Possession of Property

[1] Immunity of Personal Representative

A personal representative who in good faith takes real or personal property into his or her possession and reasonably believes that the property is part of the estate of the decedent is not criminally or civilly liable to any person for so doing [*Prob. Code § 9651(a)*]. The personal representative must make reasonable efforts to determine the true nature of, and title to, the property so taken into possession [*Prob. Code § 9651(b)*].

During his or her possession, the personal representative is entitled to receive all rents, issues, and profits of the property. If the property is later determined not to be part of the estate of the decedent, the personal representative must deliver the property, or cause it to be delivered, to the person legally entitled to it, together with all rents, issues, and profits of the property received, less any expenses incurred in protecting and maintaining the property and in collecting the rents, issues, and profits. The personal representative may request court approval before delivering the property pursuant to these provisions [*Prob. Code § 9651(c)*].

[2] Reasonable Compensation for Services

The court may allow the personal representative reasonable compensation for services rendered in connection with the duties specified in *Prob. Code § 9651* as to property later determined not to be part of the decedent's estate, if the court makes one of the following findings [*Prob. Code § 9651(d)*]:

- That the services were of benefit to the estate. If the court makes this finding, the compensation and the expenses and costs of litigation, including the attorney's fees of the attorney hired by the personal representative to handle the matter, are a proper expense of administration.

- That the services were essential to preserve, protect, and maintain the property. If the court makes this finding, it must award compensation and the expenses and costs of litigation, including the attorney's fees of the attorney hired by the personal representative to handle the matter, as an expense deductible from the rents, issues, and profits received by the personal representative, or, if these are insufficient, as a lien against the property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-450 California Forms of Pleading and Practice--Annotated § 450.15

§ 450.15 Partnership Interest

[1] Order to Render Account

Prob. Code § 9761 provides that, if a partnership existed between the decedent and another person at the time of the decedent's death, on application of the personal representative, the court may order any surviving partner to render an account pursuant to *Corp. Code §§ 15510, 15634,* or *16807*. Any such order made may be enforced by the court's power to punish for contempt [*Prob. Code § 9761*]. *Corp. Code §§ 15510* and *15634,* which govern limited partners' rights under the Uniform Limited Partnership Act (ULPA) and the California Revised Limited Partnership Act (CRLPA), respectively, are repealed effective January 1, 2010 [*Corp. Code § 15534* (ULPA); *Corp. Code § 15724* (CRLPA)]; as of that date the Uniform Limited Partnership Act of 2008 (ULPA '08) will govern the rights of the personal representative of a limited partner to obtain partnership information [*see Corp. Code §§ 15903.04, 15907.04, 15912.06(b)* (ULPA '08)].

The Uniform Partnership Act of 1994 (UPA 1994), which became effective on January 1, 1997, provides for an automatic buyout of the interest of a "dissociated" partner (*e.g.,* a partner who has died) [*see Corp. Code §§ 16601(7)(A), 16701(a)*] and requires that any payment or tender of the buyout price be accompanied, among other things, by a statement of partnership assets and liabilities as of the date of distribution, the latest available partnership balance sheet and income statement, if any, and an explanation of how the estimated amount of the payment was calculated [*Corp. Code § 16701(g)*]. The UPA 1994 further states that the partner's right to maintain an action against the partnership to compel a buyout of the partner's interest in the partnership may be maintained "with or without an accounting as to partnership business" [*Corp. Code § 16405(b)(2)(B)*].

For an explanation of the UPA 1994, see Ch. 400, *Partnerships: Governing Statutes* . For a general discussion of the rights to an accounting under both the UPA 1994, see Ch. 401, *Partnerships: Actions Between General Partners and Partnership* . For general coverage of the rights of a dissociated partner (including a deceased partner [*see Corp. Code § 16601(7)(A)* (partner's death causes dissociation)] under a partnership governed by the UPA 1994, see Ch. 403, *Partnerships: Actions by and Against Dissociated Partners* .

[2] Exercise of Decedent's Partnership Rights

If the decedent was a general partner, the personal representative may commence and maintain any action against the surviving partner that the decedent could have commenced and maintained [*Prob. Code § 9763(a)*]. The personal representative may exercise the decedent's rights as a limited partner as provided in *Corp. Code § 15675* [*Prob. Code § 9763(b)*].

Corp. Code § 15675 was enacted as part of the California Revised Limited Partnership Act [*Corp. Code § 15611 et seq.* (CRLPA)], which will be repealed January 1, 2010 [*Corp. Code § 15724* (CRLPA)], at which time the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code § 15900 et seq.* (ULPA '08)] will for most purposes govern all limited partnerships [*Corp. Code § 15912.06(b)* (ULPA '08)]. In addition, the ULPA '08 governs any limited partnership formed on or after January 1, 2008 [*Corp. Code § 15912.04* (ULPA '08)]. The ULPA '08 contains special provisions governing the powers of a deceased partner's personal representative. If a general or limited partner in a limited partnership governed by the ULPA '08 dies, the deceased partner's personal representative or other legal representative may exercise the rights of a transferee of the deceased partner's interest [*see Corp. Code § 15907.02* (ULPA '08)] and, for the purposes of settling the estate, may exercise the rights of a current limited partner to access to partnership information [*Corp. Code § 15907.04* (ULPA '08); *see Corp. Code § 15903.04* (ULPA '08) (right to partnership information)].

For further discussion of the right of the personal representative to operate a decedent's partnership or nonpartnership business, see Ch. 456, *Probate: Management of Estate Assets* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewBusiness & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-450 California Forms of Pleading and Practice--Annotated § 450.16

§ 450.16 Duty to Recover Property Transferred in Fraud of Creditors

On application of a creditor of the decedent or the estate, the personal representative must commence and prosecute an action for the recovery of real or personal property of the decedent for the benefit of creditors if the personal representative has insufficient assets to pay creditors, and the decedent during lifetime did any of the following with respect to the property [*Prob. Code § 9653(a)*]:

- Made a conveyance of the property or any right or interest in the property that is fraudulent as to creditors under the Uniform Fraudulent Transfer Act (*Civ. Code §§ 3439-3439.12*);

- Made a gift of the property in view of impending death; or

- After January 1, 1993, made a direction to transfer a vehicle, undocumented vessel, manufactured home, mobilehome, commercial coach, truck camper, or floating home to a designated beneficiary on the decedent's death pursuant to *Health & Safety Code § 18102.2* or *Veh. Code § 5910.5* or *9916.5*, and the property has been transferred as directed.

The requirement that the transfer must have been "during lifetime" does not preclude recovery of property given by a transfer that takes effect at death [*see* Cal. L. Revision Comm'n Comment to *Prob. Code § 9653*; *see, e.g., Headen v. Miller (1983) 141 Cal. App. 3d 169, 175, 190 Cal. Rptr. 198* (life insurance); *Rupp v. Kahn (1966) 246 Cal. App. 2d 188, 195, 55 Cal. Rptr. 108* (joint tenancy)].

Apparently, the personal representative must take action to recover the property even in the absence of a creditor's request [*see Goldstein v. Prien (1956) 143 Cal. App. 2d 123, 127, 299 P.2d 344* ; Cal. L. Revision Comm'n Comment to *Prob. Code § 9653*]. The representative, with court approval, may assign to the creditor the right to bring the action [*see Webb v. Pillsbury (1943) 23 Cal. 2d 324, 329, 144 P.2d 1* ; Cal. L. Revision Comm'n Comment to *Prob. Code § 9653*].

The remedy provided in *Prob. Code § 9653* is not an exclusive remedy. When the claim is one that may be brought by an interested person under *Prob. Code 850*, a creditor may be able to file a petition under the latter section as an

interested person, requesting the court to make a determination [*see Estate of Myers (2006) 139 Cal. App. 4th 434, 442, 42 Cal. Rptr 3d 753]* .

A creditor applying for relief under *Prob. Code § 9653* must pay a portion of the costs of suit and attorney's fees or give an undertaking to the personal representative for this purpose, pursuant to an agreement between the creditor and personal representative or as ordered by the court or the judge [*Prob. Code § 9653(b)*]. Any property recovered must be sold for the payment of debts in the same manner as if the decedent had died seised or possessed of the property, and the proceeds distributed pursuant to *Prob. Code § 9653(c)* [*see Prob. Code § 9653(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPersonal GiftsLifetime GiftsEstate, Gift & Trust LawProbateGeneral OverviewReal Property LawPurchase & SaleFraudulent Transfers

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§ 450.17 Survival of Actions

[1] In General

Except as otherwise provided by statute, a decedent's cause of action is not lost by reason of his or her death. Rather, the cause of action survives subject to the applicable limitation period [*Code Civ. Proc. § 377.20(a)*; *see Code Civ. Proc. § 377.21* (pending action does not abate by death of party if cause of action survives)]. Subject to the general provisions relating to passage of a decedent's property [*see Prob. Code §§ 7000, 7001*], a cause of action that survives the decedent passes to the decedent's successor in interest [*Code Civ. Proc. § 377.30*; *see Code Civ. Proc. § 377.11* ("decedent's successor in interest" defined)].

[2] Commencement of or Substitution in Action

If no action was pending at the time of the decedent's death, an action that survives the decedent's death may be commenced by the decedent's personal representative or, if none, by the decedent's successor in interest [*Code Civ. Proc. § 377.30*; *see Code Civ. Proc. § 366.1* (time limitations for commencing action)]. If an action was commenced before a person's death and it does not abate after death, the court, on motion after the person's death, must allow the pending action to be continued by the decedent's personal representative or, if none, by the decedent's successor in interest [*Code Civ. Proc. § 377.31*]. With respect to survival actions, this is typically accomplished by substituting the appropriate party in the decedent's place [*see Code Civ. Proc. § 368.5*; *see also Sacks v. FSR Brokerage, Inc. (1992) 7 Cal. App. 4th 950, 957, 9 Cal. Rptr. 2d 306* (construing former *Code Civ. Proc. § 385* and former *Prob. Code § 573*; holding that judgment generally could not be rendered for decedent or decedent's personal representative until personal representative of decedent's estate had been made party by substitution)]. If there is no personal representative and the decedent's successor in interest seeks to commence an action or continue a pending action, the successor in interest must execute and file an affidavit or declaration setting forth all the required information, including a statement to the effect that no proceeding is currently pending in California for administration of the decedent's estate [*see Code Civ. Proc. § 377.32(a)*].

For more detailed discussion of the procedures applicable to commencing or substituting into a survival action, see Ch. 181, *Death and Survival Actions* .

[3] Damages Recoverable in Action on Behalf of Decedent

In an action or proceeding by a decedent's personal representative or successor in interest on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived [*Code Civ. Proc. § 377.34*]. The damages recoverable in such an action or proceeding do not include damages for pain, suffering, or disfigurement [*Code Civ. Proc. § 377.34*].

However, the preceding rule applies only if the decedent dies before judgment. It does not apply if the decedent dies after judgment but while an appeal is pending from the judgment [*Sullivan v. Delta Air Lines, Inc. (1997) 15 Cal. 4th 288, 305, 63 Cal. Rptr. 2d 74, 935 P.2d 781]* . In the latter case, the common law rule that death after judgment does not abate any aspect of personal tort actions, including the right to recover damages for pain and suffering, controls [*Sullivan v. Delta Air Lines, Inc. (1997) 15 Cal. 4th 288, 305, 63 Cal. Rptr. 2d 74, 935 P.2d 781]* .

[4] Applicable Law

As of January 1, 1993, the provisions governing a decedent's cause of action [*Code Civ. Proc. §§ 377.30-377.34*] apply to commencing an action or proceeding the decedent was entitled to commence and to continuing an action or proceeding commenced by the decedent, regardless of whether the decedent died before, on, or after January 1, 1993 [*Code Civ. Proc. § 377.35*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityAbatement on Death of PartyCivil ProcedurePartiesSubstitutionsDeath of PartyEstate, Gift & Trust LawProbateGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewTortsDamagesGeneral OverviewTortsWrongful Death & Survival ActionsGeneral OverviewTortsWrongful Death & Survival ActionsRemediesGeneral OverviewTortsWrongful Death & Survival ActionsSurvival Actions

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§ 450.18 Compromise of Claims

[1] Without Court Authorization

Unless *Prob. Code §§ 9830-9839* or some other applicable statute requires court authorization or approval, the personal representative may do any of the following without court authorization, instruction, approval, or confirmation if it is to the advantage of the estate [*Prob. Code § 9830(a)*; *see Prob. Code § 9600(b)* (standard of care of personal representative in exercising or not exercising power); *see also § 450.12[3]*]:

- Compromise or settle a claim, action, or proceeding by or for the benefit of, or against, the decedent, the personal representative, or the estate, including the giving of a covenant not to sue;

- Extend, renew, or in any manner modify the terms of an obligation owing to or in favor of the decedent or the estate; or

- Release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible.

Nothing in *Prob. Code § 9830*, however, precludes the personal representative from seeking court authorization pursuant to the provisions of *Prob. Code §§ 9830-9839* [*Prob. Code § 9830(b)*]. A probate court has the power to ratify acts of a personal representative done without previous order of the court [*Estate of McCarthy (1970) 5 Cal. App. 3d 158, 167-168, 85 Cal. Rptr. 50]* .

On petition of an interested person or on the court's own motion, the court may limit the authority of the personal representative under *Prob. Code § 9830(a)*. Notice of the hearing on the petition shall be given as provided in *Prob. Code § 1220* [*Prob. Code § 9830(c)*; *see § 450.18[3]*]. Notice of the time and place of hearing must be mailed at least 15 days before the time set for the hearing [*Prob. Code § 1220(a)(1)*]. For further discussion of notice requirements, see Ch. 447, *Probate: Statutory Notice Requirements* .

[2] When Court Authorization Is Required

[a] Claim Period Not Expired

Authorization by order of the court is required to compromise or settle a claim,action, or proceeding by or for the benefit of, or against, the decedent, the personal representative, or the estate, unless the time for filing creditor's claims has expired [*Prob. Code § 9831*; *see Prob. Code § 9100(a)* (time for filing creditor's claims)]. For further discussion of the time for filing creditors' claims, see Ch. 454, *Probate: Claims Against the Estate* .

[b] Matters Affecting Real Property

Authorization by order of the court is required for a compromise, settlement, extension, renewal, or modification that affects title to or an interest in real property, a lien or encumbrance on real property, an option to purchase real property, or an option to purchase an interest in real property [*Prob. Code § 9832(a)*; *see Prob. Code § 68* (definition of real property)].

If it is to the advantage of the estate, however, the personal representative may, without court authorization, extend, renew, or modify a real property lease when either (1) under the lease as extended, modified, or renewed, the rental is not more than $5000 a month and the term does not exceed one year, or (2) the lease is from month to month, regardless of the amount of the rental [*Prob. Code § 9832(b)*]. If the lease, as extended, renewed, or modified, gives the lessee the right to extend the term of the lease, the length of the term is considered as though the right to extend had been exercised [*Prob. Code § 9832(c)*].

[c] Transaction in Excess of $25,000

Authorization by order of the court is required for a compromise or settlement of a matter when the transaction requires the transfer or encumbrance of property of the estate, or the creation of an unsecured liability of the estate, or both, in an amount or value over $25,000 [*Prob. Code § 9833*].

[d] Claim by Estate Against Personal Representative

Authorization by order of the court is required for a compromise or settlement of a claim by the estate against the personal representative or his or her attorney, whether or not the claim arises out of the administration of the estate [*Prob. Code § 9834(a)*]. The personal representative's attorney includes the associates, partners, and attorneys of counsel with the law firm of the attorney selected by the representative, and the associates, partners, and attorneys of counsel with other law firms associated in the estate proceeding with the firm of the attorney selected by the representative [Cal Law Revision Comm'n Comment to *Prob. Code § 9834*].

[e] Matters Affecting Personal Representative's Debt to Estate

Authorization by order of the court is required for an extension, renewal, or modification of the terms of a debt or similar obligation of the personal representative, or his or her attorney, owing to, or in favor of, the estate [*Prob. Code § 9834(b)*; for discussion of who can be attorney *see § 450.18[2][d]*].

[f] Wrongful Death or Personal Injury Claims

Authorization by order of the court is required for the compromise or settlement of a claim or right of action given to the personal representative by any law for the wrongful death or injury of the decedent, including any action brought by the personal representative to enforce the claim or right of action. Authorization to compromise or settle the claim or right of action includes authorization to give a covenant not to sue [*Prob. Code § 9835*; *see also Code Civ. Proc. § 377.60* (personal representative authorized to maintain action for wrongful death generally); *Lab. Code § 2803* (personal representative authorized to maintain action for wrongful death of employee)].

[3] Procedure for Obtaining Court Order

The court authorization required by *Prob. Code §§ 9831-9835* must be obtained from the court in which the estate is being administered [*Prob. Code § 9836*]. The petition and notice requirements to obtain court authorization are set forth in *Prob. Code § 9837* [*see also Prob. Code §§ 1211* (form of notice), 1220 (mode of mailing notice)].

For a form of petition and order for use in obtaining court authorization to compromise, settle, or release a claim, action, or proceeding, or to extend, renew, or modify an obligation owing to or in favor of the estate, *see §§ 450.61* and *450.63*, respectively, and their accompanying comments. For a form of objection to be used in opposition to the petition, see *§ 450.62*.

[4] Transfer of Property to Effect Compromise or Settlement

If a court order authorizes a compromise or settlement that requires the transfer of real property of the estate, the personal representative must execute a conveyance of the property to the person entitled to it under the compromise or settlement. The conveyance must refer to the order authorizing the compromise or settlement and directing that the conveyance be executed. In addition, a certified copy of the order must be recorded in the county recorder's office in each county in which any portion of the real property is located [*Prob. Code § 9838(b)*].

A conveyance complying with the court authorization of the compromise or settlement vests in the person to whom the property is transferred (1) all the right, title, and interest that the decedent had in the property at the time of his or her death, and (2) any other or additional right, title, or interest in the property acquired by the decedent's estate, by operation of law or otherwise, prior to the transfer [*Prob. Code § 9838(b)*].

For further discussion, forms, and a procedural guide relating to compromise of claims, see Ch. 454, *Probate: Claims Against the Estate* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 450.19 Acceptance of Deed in Lieu of Foreclosure

If it is to the advantage of the estate to accept a deed to property that is subject to a mortgage or deed of trust in lieu of fore closure of the mortgage or sale under the deed of trust, the personal representative may, after authorization by court order and on such terms and conditions as may be imposed by the court, accept a deed conveying the property to the heirs or devisees of the decedent, subject to administration [*see Prob. Code § 9850(a)*].

To obtain an order authorizing acceptance of such a deed, the personal representative or any interested person must file a petition showing the advantage to the estate of accepting the deed. Notice of the hearing must be given pursuant to *Prob. Code § 1220* [*Prob. Code § 9850(b)*]. Thus, notice of the time and place of hearing must be mailed at least 15 days before the time set for the hearing [*Prob. Code § 1220(a)(1)*]. For further discussion of notice requirements, see Ch. 447, *Probate: Statutory Notice Requirements* .

The court may only make the order if the advantage to the estate of accepting the deed is shown by clear and convincing evidence [*Prob. Code § 9850(c)*]. Although not determinative, factors that may be considered by the court include (1) whether there will be subordinate liens that will continue on the property if the deed is taken that would otherwise be eliminated by foreclosure of the mortgage or sale under the deed of trust, and (2) whether there is a right of deficiency judgment that would continue if the mortgage were foreclosed and the property were to fail to yield enough to pay the amount of the encumbrance [Cal Law Revision Comm'n Comment to *Prob. Code § 9850*].

For a form of petition and order for use in obtaining court authorization to accept a deed under *Prob. Code § 9850, see §§ 450.65* and *450.66*, respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency Judgments

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38-450 California Forms of Pleading and Practice--Annotated § 450.20

§ 450.20 Grant of Partial Satisfaction or Reconveyance

With authorization by the court, a personal representative may also give a partial satisfaction of a mortgage or cause a partial reconveyance to be executed by a trustee under a trust deed held by the estate, if it is to the advantage of the estate and if other circumstances exist [*see Prob. Code § 9851*]. For further discussion, see Ch. 456, *Probate: Management of Estate Assets* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-450 California Forms of Pleading and Practice--Annotated § 450.21

§ 450.21 Apportionment of Debt

If it appears that a debt of the decedent has been paid or is payable in whole or in part by the surviving spouse, or that a debt of the surviving spouse has been paid or is payable in whole or in part from property in the decedent's estate, the personal representative, the surviving spouse, or a beneficiary may petition for an order to allocate the debt at any time before an order for final distribution is made [*Prob. Code § 11440*]. For further discussion and forms relating to the apportionment of debts, see *Ch. 441, Probate: Disposition Without Administration, § 441.110* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-450 California Forms of Pleading and Practice--Annotated § 450.22

§ 450.22 Restitution of Decedent's Property Collected or Transferred Without Administration

[1] When Estate Proceedings Commenced

If the gross value of the decedent's real property in California was less than $20,000 [*see Prob. Code § 13200 et seq.*], or if the gross value of the decedent's real and personal property in California was less than $100,000 [*see Prob. Code § 13100 et seq.*], and was collected or transferred to the decedent's successors without administration, the decedent's personal representative may be able to have the property restored to the estate [*see Prob. Code §§ 13111(d)* (personal property), 13206(e) (real property)]. For a discussion relating to collection or transfer of real or personal property without administration, see Ch. 440, *Probate: Is Probate Necessary ?*, and Ch. 441, *Probate: Disposition Without Administration*, § 441.10 et seq. and § 441.110 et seq.

If administration proceedings are commenced in California after such a disposition of property without administration, and restitution is appropriate, each person to whom payment, delivery, or transfer of the property has been made under *Prob. Code § 13100 et seq.*, or who has been designated as a successor of the decedent in a certified affidavit under *Prob. Code § 13202*, is liable for the following [*Prob. Code §§ 13111(a)* (personal property), 13206(a) (real property)]:

- The restitution of the real or personal property to the estate if the person still has the property, together with the net income the person received from the property. If the person encumbered the property after it was delivered or transferred under *Prob. Code § 13100-13116*, or after the certified copy of the affidavit was issued under *Prob. Code § 13202*, the amount necessary to satisfy the balance of the encumbrance as of the date the property is restored to the estate.

- The restitution to the estate of the fair market value of the property if the person no longer has the property, together with (1) the net income the person received from the property, and (2) interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment.

The "fair market value of the property" is determined as of the time of the disposition of the property, of the property paid, delivered, or transferred to the person under *Prob. Code § 13100 et seq.*, or taken by the person under a certified copy of an affidavit received under *Prob. Code § 13202*, less any liens or encumbrances on the property at that time [

Prob. Code §§ 13111(a)(2) (personal property), 13206(a)(2) (real property)].

[2] Triple Restitution for Fraudulent Acquisition of Property

Subject to any additional liability under *Prob. Code §§ 13109* (liability for unsecured debts of decedent), 13110 (liability to person having superior right), and 13112 (extent of liability of person who collects personal property without administration), a person who fraudulently secured a payment, delivery, or transfer under *Prob. Code § 13100 et seq.*, or fraudulently executed or filed an affidavit under *Prob. Code § 13200 et seq.*, is liable for restitution to the decedent's estate of three times the fair market value of the property [*see Prob. Code §§ 13111(b)* (personal property), 13206(b) (real property)].

The "fair market value of the property" is determined as of the time the liable person presents an affidavit or declaration under *Prob. Code § 13100 et seq.*, or as of the time a certified copy of the affidavit was issued, or the property paid, delivered, or transferred to the person, or taken by the person under a certified copy of an affidavit issued under *Prob. Code § 13202*, less the amount of any liens and encumbrances on the property at that time [*Prob. Code §§ 13111(b)* (personal property), 13206(b) (real property)].

[3] Reduction of Amount Restored

The property and amount required to be restored to the estate under *Prob. Code §§ 13111* or *13206* must be reduced by any property or amount paid by the person to satisfy a liability under *Prob. Code §§ 13109* or *13110* (personal property), or 13204 or 13205 (real property) [*Prob. Code §§ 13111(c)* (personal property), 13206(d) (real property)]. These sections impose liability on the recipient of the property for the decedent's unsecured debts, and to any person with a superior right by testate or intestate succession from the decedent [*see Prob. Code §§ 13109, 13110, 13204, 13205*].

In addition to reducing the property and amount restored, the court's judgment may enforce the liability only to the extent necessary to protect the interests of the decedent's heirs, devisees, and creditors [*Prob. Code §§ 13111(d)* (personal property), 13206(e) (real property)].

[4] Effect of Improvements on Real Property

Subject to *Prob. Code § 13206(d)* (reduction of amount restored), if the person designated as a successor of the decedent in a certified copy of an affidavit issued under *Prob. Code § 13202* made a significant improvement to the property in the good faith belief that he or she was the decedent's successor to the property, that person is liable for whichever of the following the decedent's estate elects [*Prob. Code § 13206(c)*]:

- The restitution of the property, as improved, to the estate of the decedent on the condition that the estate reimburse the person making restitution for (1) the amount by which the improvement increases the fair market value of the property restored, determined as of the time of restitution, and (2) the amount paid by the person for principal and interest on any liens or encumbrances that were on the property at the time the certified copy of the affidavit was issued.

- The restoration to the decedent's estate of the fair market value of the property, determined as of the time of the issuance of the certified copy of the affidavit under *Prob. Code § 13202*, less the amount of any liens and encumbrances on the property at that time, together with interest on the net amount at the rate payable on a money judgment running from the date of the issuance of the certified copy of the affidavit.

[5] Statute of Limitations

An action to enforce liability under *Prob. Code § 13111* is forever barred three years after presentation of an affidavit or declaration under *Prob. Code § 13100 et seq.* to the holder of the decedent's property or three years after the discovery of the fraud, whichever is later [*Prob. Code § 13111(e)*]. In the case of an action to enforce liability under *Prob. Code § 13206*, a cause of action is barred three years after the certified copy of the affidavit is issued under *Prob. Code § 13202* or the discovery of the fraud, whichever is later [*Prob. Code § 13206(f)*]. In either case, the three-year period is not tolled for any reason [*Prob. Code §§ 13111(e)* (personal property), 13206(f) (real property)].

[6] Nondomiciliary Decedents

In the case of a nondomiciliary decedent (a person who dies domiciled in a sister state or foreign nation), restitution under *Prob. Code § 13111* is made to the estate in an ancillary administration proceeding [*Prob. Code § 13111(f)*; *see Prob. Code §§ 12500-12591* (defining ancillary administration and governing the administration of the estates of nondomiciliary decedents)]. A sister-state personal representative who takes property by affidavit under *Prob. Code §§ 12570-12574* (governing the collection of personal property of small estates by sister-state personal representatives without ancillary administration) is not liable as a person to whom payment, delivery, or transfer of the decedent's property is made under *Prob. Code § 13109* or *13110* to the extent that the sister-state personal representative restores the property to the nondomiciliary decedent's estate in the sister state in compliance with *Prob. Code § 13111* [*Prob. Code § 12573*].

For discussion of the administration of the estates of nondomiciliary decedents, see Ch. 442, *Probate: Initiating Probate Administration* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateAncillary ProceedingsGovernmentsLegislationStatutes of LimitationsTime Limitations

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38-450 California Forms of Pleading and Practice--Annotated § 450.23

§ 450.23 Effect of Final Judgment or Order

When a judgment or order made pursuant to Division 7 of the Probate Code (*Prob. Code §§ 9000-12591*) becomes final, it releases the personal representative and the sureties from all claims of the heirs or devisees and of any persons affected thereby based on any act or omission directly authorized, approved, or confirmed in the judgment or order. For the purposes of this provision, "order" includes an order settling an account of the personal representative, whether an interim or final account [*Prob. Code § 9612*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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[Reserved]

§§ 450.24[Reserved]

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38-450 California Forms of Pleading and Practice--Annotated § 450.40

§ 450.40 State Statutes

[1] In General

"Interested person" defined. *Prob. Code § 48*

"Personal representative" defined. *Prob. Code § 58*

Delivery of decedent's tangible personal property. *Prob. Code § 330*

Survival of cause of action by or against decedent. Prob. Code § 377.20

Rules of practice and procedure. *Prob. Code §§ 1000-1050*

Award of costs. *Prob. Code § 1002*

Duty and standard of care of personal representative in managing estate. *Prob. Code § 9600*

Release of liability of personal representative after final judgment or order. *Prob. Code § 9612*

Action by heirs or devisees for possession of or to quiet title to property. *Prob. Code § 9654*

Apportionment of debts. *Prob. Code § 11440*

[2] Actions by Personal Representative

Action by personal representative to recover property transferred in fraud of creditors. *Prob. Code § 9653*

Application for order that surviving partner render account to decedent partner's representative. *Prob. Code § 9761*

Action against surviving partner maintainable by decedent's personal representative. *Prob. Code § 9763*

Authority of personal representative to commence and maintain actions and proceedings for estate's benefit. *Prob. Code § 9820(a)*

Action to restore to decedent's estate personal or real property collected or transferred to successor without administration. *Prob. Code §§ 13111* (personal property), 13206 (real property)

[3] Collection of Assets

Discovery in aid of collection. *Prob. Code §§ 8870-8873*

Person who wrongfully takes, conceals, or disposes of estate property liable for twice its value. *Prob. Code § 9869*

Possession of assets and collection of debts of estate by personal representative. *Prob. Code § 9650(a)*

Immunity of and compensation to representative for good faith taking of property.*Prob. Code § 9651*

[4] Compromise of Claims

[a] In General

Authority of personal representative to compromise claims, actions, or proceedings, modify obligations, or release uncollectible claims without court approval. *Prob. Code § 9830(a)*

Personal representative's option to obtain court approval. *Prob. Code § 9830(b)*

Court's power to limit personal representative's authority to compromise claims or actions, modify obligations, or release uncollectible claims. *Prob. Code § 9830(c)*

[b] Court Approval Required

Compromise of claim when time for filing claim has not expired. *Prob. Code § 9831*

Compromise of claim relating to real property. *Prob. Code § 9832*

Compromise of claim that exceeds $25,000. *Prob. Code § 9833*

Compromise of claims against or modification of obligations of personal representative. *Prob. Code § 9834*

Compromise or settlement of claim involving wrongful death or injury of decedent. *Prob. Code § 9835*

Acceptance of deed to property in lieu of foreclosure. *Prob. Code § 9850*

[c] Procedure

Authorization required from court in which estate is administered. *Prob. Code § 9836*

Requirements for petition to obtain court authorization. *Prob. Code § 9837*

Transfer of real property to effect compromise of claim. *Prob. Code § 9838*

Claim paid for less than full amount. *Prob. Code § 9839*

[5] Notice and Setting of Hearing

Clerk to set hearing for probate matters. *Prob. Code § 1041*

Form of notice. *Prob. Code § 1211*

Mailing notice of hearing. *Prob. Code § 1220*

Proof of giving notice. *Prob. Code §§ 1260-1265*

[6] Verification

Verification of probate documents. *Prob. Code §§ 1021, 1023*

Evidentiary effect of verified petition. *Prob. Code § 1022*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsReleases From LiabilityGeneral OverviewEstate, Gift & Trust LawEstate AdministrationDiscovery of AssetsEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesClaims By & AgainstReal Property LawOwnership & TransferDeath & IncapacityGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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38-450 California Forms of Pleading and Practice--Annotated § 450.41

§ 450.41 Local Rules of Court

[1] Compromise of Claims

San Mateo Co. Super. & Munic. Ct. Rules, Rule 4.38

[2] Wrongful Death Damages

Contra Costa Co. Prob. Pol. Man. § 615

Los Angeles Co. Super. Ct. Rules, Rule 10.117

Orange Co. Super. Ct. Rules, Rule 607.07

San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.105

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38-450 California Forms of Pleading and Practice--Annotated § 450.42

§ 450.42 Decisions

[1] Compromise of Claims

Power of court under former Prob. Code § 578 (*now see Prob. Code §§ 9830-9837*) is limited to authorizing administrator to make compromise. *McPike v. Superior Court (1934) 220 Cal. 254, 259, 30 P.2d 17*

Former Code Civ. Proc. § 1588 (*now see Prob. Code §§ 9830-9837*) is protective and not restrictive of common law powers of personal representative. *Moulton v. Holmes (1881) 57 Cal. 337, 343*

Equitable and just compromise made in good faith but without court approval is binding on estate; remedy is limited to action by estate against personal representative, who waived protection of former Prob. Code § 718.5 (*now see Prob. Code § 9832*) by acting without court approval. *Treharne v. Loftin (1984) 153 Cal. App. 3d 878, 886, 200 Cal. Rptr. 668*

When agreement to compromise claim is subject to court approval, neither estate nor administrator are bound when approval vacated and withdrawn prior to execution of terms of agreement. *Byrne v. Harvey (1962) 211 Cal. App. 2d 92, 112, 27 Cal. Rptr. 110*

Court's approval of compromise agreement is implicitly predicated on "best interest of the estate." *Byrne v. Harvey (1962) 211 Cal. App. 2d 92, 111-112, 27 Cal. Rptr. 110*

Former Prob. Code §§ 578 and 718.5 (*now see Prob. Code §§ 9830-9837*) neither enlarge or abrogate power of personal representative to enter into compromise agreements, but afford additional protection from liability. *Byrne v. Harvey (1962) 211 Cal. App. 2d 92, 110, 27 Cal. Rptr. 110*

Appellant's objections to petition for approval of compromise of claim was properly presented and heard at hearing when counsel fully participated in and made no objections to informality of hearing. *Estate of Wilson (1953) 116 Cal. App. 2d 523, 525-526, 253 P.2d 1011*

[2] Duty of Personal Representative to Collect Assets

Only duly qualified personal representative was authorized to bring action for recovery of personalty belonging to decedent. *Manti v. Gunari (1970) 5 Cal. App. 3d 442, 446-447, 85 Cal. Rptr. 366*

Heir or beneficiary under will is only able to deal with estate property as personal representative until it is distributed to that person. *Estate of Curry (1969) 274 Cal. App. 2d 502, 503, 79 Cal. Rptr. 125*

Personal representative has duty to sue for recovery of personal property allegedly procured from decedent by fraud. *Triplett v. Williams (1969) 269 Cal. App. 2d 135, 137, 74 Cal. Rptr. 594*

Heirs, rather than personal representative, is able to bring action for recovery of personal property belonging to estate only in exceptional circumstances. *Rogers v. Bank of America (1956) 140 Cal. App. 2d 228, 232, 294 P.2d 959*

[3] Jurisdiction

Superior court, while sitting in probate, is without power to decide disputed claim between estate and stranger thereto; but if controversy is between estate and those not strangers (i.e., heirs, beneficiaries, or representative) to probate proceedings, court has power to hear action and adjudicate conflicting claims. *Estate of Pieper (1964) 224 Cal. App. 2d 670, 680-681, 37 Cal. Rptr. 46*

[4] Ownership of Estate Property

Title to real property does not vest in estate but in heirs or devisees, subject to administration. *Dorland v. Dorland (1960) 178 Cal. App. 2d 664, 669, 3 Cal. Rptr. 262*

[5] Punitive Damages

Cause of action for punitive damages against decedent does not survive decedant's death. *Bancroft-Whitney Co. v. Glen (1966) 64 Cal. 2d 327, 357, 49 Cal. Rptr. 825, 411 P.2d 921*

[6] Ratification by Court

Probate court has power to ratify prior acts of personal representative done without order of court. *Estate of McCarthy (1970) 5 Cal. App. 3d 158, 167-168, 85 Cal. Rptr. 50*

[7] Statute of Limitations

Representative's right to collect estate assets is barred by relevant statute of limitations. *Estate of Peebles (1972) 27 Cal. App. 3d 163, 166, 103 Cal. Rptr. 560*

[8] Survival of Decedent's Rights

Cause of action against insurance company for breach of duty of good faith and fair dealing survives under former *Prob. Code § 573* (*now see Code Civ. Proc. § 377.20*). *Barney v. Aetna Casualty & Surety Co. (1986) 185 Cal. App.*

3d 966, 973, 230 Cal. Rptr. 215

Personal representative has power and duty to sue to set aside conveyance obtained from decedent by fraud or undue influence. *Estate of Denton (1971) 17 Cal. App. 3d 1070, 1075, 95 Cal. Rptr. 347*

Personal representative is able to sue to set aside conveyance or transfer obtained from decedent by means other than undue influence, fraud, menace, or duress. *Estate of McCarthy (1970) 5 Cal. App. 3d 158, 166, 85 Cal. Rptr. 50*

Cause of action for violation of property right survives death of owner of right. *Poon v. Poon (1966) 244 Cal. App. 2d 746, 753, 53 Cal. Rptr. 365*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesPunitive DamagesContracts LawContract InterpretationGood Faith & Fair DealingContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewGovernmentsCourtsAuthority to AdjudicateGovernmentsLegislationStatutes of LimitationsGeneral OverviewTortsDamagesPunitive DamagesAvailabilityGeneral Overview

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38-450 California Forms of Pleading and Practice--Annotated § 450.43

§ 450.43 Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate, §§ 403,* 413, 414, 432, 466, 475-481, 483-487, 513-520 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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[Reserved]

§§ 450.44[Reserved]

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38-450 California Forms of Pleading and Practice--Annotated § 450.60

§ 450.60 Complaint by Personal Representative in Civil Action to Collect Assets of Estate [Prob. Code §§ 377.20-377.35, 9650(a)(1), 9820(a)]

[1] FORM Complaint [Code Civ. Proc. § 425.10] by Personal Representative in Civil Action to Collect Assets of Estate [Prob. Code §§ 377.20-377.35, 9650(a)(1), 9820(a)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
as Personal Representative of	)	
_____ [*name*],	)	NO. _____
Deceased,	)	COMPLAINT FOR
Plaintiff,	)	_____ [*specify, e.g.,* MONEY]
vs.	)	[LIMITED CIVIL CASE]
_____ [*name*],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	
	)	
	)	

_____

Plaintiff _____ [*name*] alleges:

1. Plaintiff is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased, by virtue of an order duly made that has become final in a proceeding in the Superior Court of California, County of _____, titled Estate of _____ [*name*], deceased, No. _____, and brings this action in such capacity.

2. During his/her lifetime and on or about _____ [*date*], the deceased _____ [*name*] _____ [*continue here and in subsequent, numbered paragraphs with allegations stating a cause of action, e.g.,* on a promissory note running to the deceased, for recovery of specific assets of the estate, to quiet title, or the like].

WHEREFORE, plaintiff prays for judgment against the defendants, and each of them, as follows: _____ [*specify*].

_____ [*signature*]

Plaintiff

_____ [*signature*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

[2] Use of Form

This skeletal complaint may be used by a personal representative on behalf of the deceased in connection with most causes of action. The personal representative has the right to take possession and control of all the property under administration, and to collect all debts due to the decedent or estate [*Prob. Code § 9650(a)(1); see § 450.12*]. The representative may commence and maintain actions for the estate's benefit [*Prob. Code § 9820(a)*].

For a complaint for use in an action on a promissory note, see Ch. 385, *Negotiable Instruments* . For a complaint for use in an action to quiet title to real property, see Ch. 482, *Quieting Title* .

[3] Survival of Decedent's Cause of Action

Except as otherwise provided by statute, a cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitation period [*Code Civ. Proc. § 377.20(a)*]. An action that survives may be commenced by the decedent's personal representative [*Code Civ. Proc. § 377.30*; *see* discussion in *§ 450.17*].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case in the superior court [*Code Civ. Proc. §§ 92(b), 446*]. Verification will

also preclude a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Cross References

For allegations as to agency, capacity, and residence of parties, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

[6] State Statutes

Survival of cause of action by or against decedent. Prob. Code § 377.20

Collection of debts owed to decedent by personal representative. *Prob. Code § 9650(a)*

[7] Decisions

Duty of personal representative to collect, preserve, and protect assets of estate until distribution encompasses duty to prosecute and defend suits regarding claims in favor of or against estate. *Estate of Turino (1970) 8 Cal. App. 3d 642, 647, 87 Cal. Rptr. 581*

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38-450 California Forms of Pleading and Practice--Annotated § 450.61

§ 450.61 Petition for Order Authorizing Compromise or Settlement of Claim, or Extension, Renewal, or Modification of Obligation, or Release of Claim by Estate Against Debtor or Tortfeasor [Prob. Code §§ 9830-9837]

[1] FORM Petition for Order Authorizing Compromise or Settlement of Claim, or Extension, Renewal, or Modification of Obligation, or Release of Claim by Estate Against Debtor or Tortfeasor [Prob. Code §§ 9830-9837]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION TO AUTHORIZE
	)	_____
	)	[COMPROMISE *and/or* RELEASE *and/or* SET-
Estate of _____ [*name*],	)	TLEMENT *or* EXTENSION *or* RENEWAL *or*
Deceased.	)	MODIFICATION] OF _____
	)	[CLAIM *or* ACTION *or* PROCEEDING *or* OBLIG-
	)	ATION] BY ESTATE
	)	Date: _____
	)	Time: _____
		Location: _____
		Judge: _____
		[Date Action Filed: _____]
		[Trial Date: _____]

_____

Petitioner, _____ [*name*], respectfully represents:

[*EITHER*]

1. Petitioner is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

[*OR*]

1. Petitioner is a person interested in the estate of _____ [*name*], deceased, in that _____ [*specify status and interest, pursuant to Prob. Code § 48, e.g.,* she is an heir of deceased] who has obtained the written approval of _____ [*name*], the duly appointed, qualified, and acting personal representative of the deceased. A copy of the written approval is attached to this petition as Exhibit "_____".

[*CONTINUE*]

2. The time for filing creditor's claims _____ [expired *or* will expire] on _____ [*date*].

3. An inventory and appraisement of the property of the estate of the deceased was filed on _____ [*date*], and lists assets appraised at the total value of $_____.

[*EITHER, if suit has not been filed*]

4. _____ [Among *or* In addition to] the items so listed in the inventory and appraisement is a claim by the estate against _____ [*name*] as follows: _____ [*set forth nature of claim, e.g.,* a claim for personal injuries to the decedent's person against _____ (*name*) in the amount of $_____ arising from an automobile accident caused by the negligence of _____ (*name*) that occurred on _____ (*date*)].

[*OR, if suit has been filed*]

4. On _____ [*date*], the personal representative filed an action on the claim in the _____ Court, County of _____, State of California, entitled _____ [*name*], Plaintiff v. _____ [*name*], Defendant, No. _____. The complaint is for _____ [*specify nature of action, e.g.,* damages for personal injury to decedent]. Defendant filed an answer to the complaint alleging as follows: _____ [*set forth defendant's position, including any affirmative defenses asserted by defendant*].

[*EITHER*]

5. Court authorization is not required for this action, pursuant to *Probate Code section 9830(a),* because it involves _____ [*specify nature of action under either Prob. Code § 9830(a)(1), (2), or (3), e.g.,* a release of a claim belonging to the estate that is uncollectible], it is to the advantage of the estate, and no other statute requires court authorization for the action. Petitioner, however, elects to seek a prior court order authorizing the action, pursuant to *Probate Code section 9830(b).*

[*OR*]

5. Authorization by order of the court is required for this action pursuant to Probate Code Section _____ [*specify, e.g.,* 9835] because the action involves _____ [*specify statutory basis under Prob. Code §§ 9831-9835 that requires prior court authorization, e.g.,* a compromise and settlement that involves personal injuries to the decedent].

[*CONTINUE*]

6. _____ [*Specify reason for compromising or settling claim, action or proceeding, or extending, renewing or modifying an obligation, or releasing a claim, e.g.,* _____ (*Name*), the person against whom the _____ (claim *or* action *or* proceeding) has been filed, disputes the _____ (claim *or* action *or* proceeding) on the basis that the accident in question was not caused by his/her negligence but was caused by the negligence of decedent].

7. The personal representative and _____ [*name of person alleged to be liable on the claim, action, proceeding, or obligation*] propose to _____ [compromise *and/or* release *and/o* r settle *or* extend *or* renew *or* modify] the _____ [claim *or* action *or* proceeding *or* obligation] subject to the approval of this court, on the following terms: _____ [*specify terms, e.g.,* for the total amount of $_____ payable by _____ [*name*] to the estate of decedent(, and dismissal with prejudice of the pending _____ [action *or* proceeding] between the parties, described in Paragraph 4, above)]. A copy of the _____ [*specify nature of document reflecting agreement sought to be approved, e.g.,* agreement of compromise and settlement], signed by _____ [*names*], is attached as Exhibit "_____," and made a part hereof.

8. The advantage of the _____ [compromise *or* settlement *or* renewal *or* extension *or* modification *or* release] to the estate is as follows: _____ [*specify, e.g.,* the compromise and settlement would provide a definite sum to the estate, amounting to _____ percent of the _____ (claim *or* amount sought in the action), and would avoid the time, expense, and uncertainties of litigation. The compromise would accelerate the time that would otherwise be required for distribution of the estate].

9. Petitioner has thoroughly investigated and considered the _____ [compromise *or* settlement *or* renewal *or* extension *or* modification *or* release] in question and is of the opinion that such disposition of the _____ [claim *or* action *or* proceeding *or* obligation] is equitable and just and to the advantage of the estate, and should be approved.

10. A request for special notice has _____ [not been filed herein *or* been filed herein by _____ (*name*) whose address is _____]. Notice of the time and place of hearing will be given as required by law.

11. The names and addresses of the heirs of the deceased as set forth in the petition for letters _____ [testamentary *or* of administration with the will annexed *or* of administration] are as follows: _____ [*specify*].

WHEREFORE, petitioner prays that the court approve the _____ [compromise *or* settlement *or* renewal *or* extension *or* modification *or* release] of the _____ [claim *or* action *or* proceeding *or* obligation] against _____ [*name*] and authorize petitioner to do all acts and execute all documents necessary or convenient to consummate the same.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form is a verified petition for use to petition the court in which the estate is being administered for authority to compromise or settle a claim, action, or proceeding, or to extend, modify, or renew an obligation of the estate, or to release, in whole or in part, a claim to the extent that it is uncollectible [*see Prob. Code §§ 9830-9835*].

For a petition for approval of a compromise or settlement of a claim by a creditor or other claimant against the estate, see Ch. 454, *Probate: Claims Against the Estate* .

[3] When Court Authorization Required

Prob. Code § 9830 contains statutory authority for the personal representative to compromise or settle a claim, action or proceeding, to extend renew or modify the terms of certain obligations owing to or in favor of the estate, and to release certain claims belonging to the estate [*see Prob. Code § 9830(a)*]. The personal representative, however, may seek prior authorization from the court under *Prob. Code §§ 9836, 9837* before doing any acts, if he or she so desires [*Prob. Code § 9830(b)*].

Other actions specified in *Prob. Code §§ 9831-9835* require prior court authorization. In addition, the court may have limited the authority of the personal representative, on petition of an interested person or on the court's own motion, to take an action without prior court authorization [*see Prob. Code § 9830(c)*].

For further discussion, see *§ 450.18*.

[4] Who May File

The petition may be filed by either the personal representative or any interested person who has obtained the written approval of the personal representative to file the petition [*see Prob. Code § 9837(a)*; *see also Prob. Code § 48* (definition of "interested person")].

[5] Contents of Petition

The petition must show the terms of the compromise, settlement, extension, renewal, or modification and its advantage to the estate [*Prob. Code § 9837(b)*]. It is recommended that a copy of the agreement of compromise or other document be attached as an exhibit to the petition.

[6] Verification

The foregoing petition must be verified [*Prob. Code § 1021(a)(1)*]. The verification must be made by the petitioner or, if there are two or more petitioners, by any of them [*Prob. Code § 1021(b)*]. The petitioner's attorney may verify the petition if the petitioner is absent from the county, or for some other reason is unable to verify it [*see Prob. Code § 1023*].

If the proceeding is uncontested, the verified petition must be received as evidence when offered [*see Prob. Code § 1022*].

[7] Notice of Hearing

Notice of the hearing must be given at least 15 days prior to the hearing date, as provided in *Prob. Code § 1220* [*see Prob. Code § 9837(c)*]. Proof of giving notice of hearing must be made pursuant to *Prob. Code §§ 1260-1265*. For discussion and forms for use in giving notice of probate petitions, see Ch. 447, *Probate: Statutory Notice Requirements*
.

[8] Compromise of Claims

[a] Authority of Personal Representative

Authority of personal representative to compromise claims, actions, or proceedings, modify obligations, or release uncollectible claims without court approval. *Prob. Code § 9830(a)*

Personal representative's option to obtain court approval. *Prob. Code § 9830(b)*

Court's power to limit personal representative's authority to compromise claims or actions, modify obligations, or release uncollectible claims. *Prob. Code § 9830(c)*

[b] When Court Approval Required

Compromise of claim when time for filing creditor's claim has not expired. *Prob. Code § 9831*

Compromise of claim relating to real property. *Prob. Code § 9832*

Compromise of claim that exceeds $25,000. *Prob. Code § 9833*

Compromise of claims against or modification of obligations of personal representative. *Prob. Code § 9834*

Compromise or settlement of claim involving wrongful death or injury of decedent. *Prob. Code § 9835*

[c] Procedure for Obtaining Court Approval

Notice of hearing of petition. *Prob. Code §§ 1220, 9837(c)*

Verification of petition. *Prob. Code § 1021(a)(1)*

Clerk to set matter for hearing. *Prob. Code § 1041*

Court authorization required from court in which estate is administered. *Prob. Code § 9836*

Contents of and requirements for petition. *Prob. Code § 9837(a), (b)*

Transfer of real property to effect compromise of claim. *Prob. Code § 9838*

[9] Local Rules of Court

[a] Collection of Damages for Wrongful Death

Contra Costa Co. Prob. Pol. Man. § 615

Los Angeles Co. Super. Ct. Rules, Rule 10.117

Orange Co. Super. Ct. Rules, Rule 607.07

[b] Petition Procedure

Caption of petition must be all inclusive. Los Angeles Co. Super. Ct. Rules, Rule 10.9

Department number and date of hearing must appear immediately below title of document on first page of every document already set for hearing. Los Angeles Co. Super. Ct. Rules, Rules 10.10

Petitions required to be set for hearing must have self-addressed, stamped envelope attached for Probate Attorney's calendar notes. Los Angeles Co. Super. Ct. Rules, Rule 10.31(a)

Petitioner responsible for giving notice of hearing and filing proof of service. San Francisco Uniform Local Ct. Rules, Rule 14.29

[10] Decisions

Former Code Civ. Proc. § 1588 (now see *Prob. Code §§ 9830-9837*) is protective and not restrictive of common law powers of personal representative. *Moulton v. Holmes (1881) 57 Cal. 337, 343*

Power of court under former Prob. Code § 578 (now see *Prob. Code §§ 9830-9837*) is limited to authorizing administrator to make compromise. *McPike v. Superior Court (1934) 220 Cal. 254, 259, 30 P.2d 17*

[11] Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate, §§ 403,* 413, 414, 432, 466, 475-481, 483-487, 513-520 (10th ed. 2005)

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38-450 California Forms of Pleading and Practice--Annotated § 450.62

§ 450.62 Objections to Petition for Order Authorizing Compromise or Settlement of Claim, or Extension, Renewal, or Modification of Obligation, or Release of Claim by Estate Against Debtor or Tortfeasor [Prob. Code §§ 9830-9837]

[1] FORM Objections to Petition for Order Authorizing Compromise or Settlement of Claim, or Extension, Renewal, or Modification of Obligation, or Release of Claim by Estate Against Debtor or Tortfeasor [Prob. Code §§ 9830-9837]

[*Caption. See § 450.61.*]

Objector, _____ [*name*], objects to the petition of _____ [*name*], _____ [the personal representative *or* an interested person] of the estate of _____ [*name*], deceased, for an order authorizing the _____ [compromise *and/or* release *and/o* r settlement *or* extension *or* renewal *or* modification] of a _____ [claim *or* action *or* proceeding *or* obligation] on the following grounds:

1. Objector is _____ [*set forth capacity of objector as interested person, pursuant to Prob. Code § 48, e.g.,* a devisee of _____ (*name*), decedent], and a person interested in the estate.

[*EITHER*]

2. The petition contains no facts showing any advantage of the compromise to the estate.

[*OR*]

2. The facts alleged in the petition that purportedly show the advantage of the _____ [compromise *and/or* settlement *or* renewal *or* extension *or* modification *or* release] to the estate are incorrect and the

_____ [compromise *and/or* settlement *or* renewal *or* extension *or* modification *or* release] would not be to the advantage of the estate.

[*CONTINUE*]

3. _____ [*Here and in subsequently numbered paragraphs set forth facts showing disadvantage of compromise to estate*].

WHEREFORE, objector prays that the court disapprove the _____ [compromise *and/or* settlement *or* renewal *or* extension *or* modification *or* release] of the _____ [claim *or* action *or* proceeding *or* obligation].

_____ [*signature*]

Objector

_____ [*signature*]

Attorney for Objector

[*Verification. See § 450.61.*]

[2] Use of Form

This form is for use by an interested party to object to a petition for an orderauthorizing a compromise, settlement or release of a claim of the decedent or estate, or a renewal, extension, or modification of an obligation owing to or in favor of the decedent or estate [*see Prob. Code §§ 9830-9837*; *see also Prob. Code § 48* (definition of "interested party")]. While there is no specific statutory authority for objecting to the petition, it appears that an interested party may file timely objections in this manner [*see, e.g., Estate of Wilson (1953) 116 Cal. App. 2d 523, 525-526, 253 P.2d 1011]* .

The caption in § 450.61 must be modified so that the title of the paper indicates that it is an objection to the petition. The verification in *see § 450.61* must also be modified to indicate that the objector, not the petitioner, is verifying the paper.

[3] Cross References

For a related form, see *§ 450.61*.

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38-450 California Forms of Pleading and Practice--Annotated § 450.63

§ 450.63 Order Authorizing Compromise or Settlement of Claim, or Extension, Renewal, or Modification of Obligation, or Release of Claim by Estate Against Debtor or Tortfeasor [Prob. Code §§ 9830-9837]

[1] FORM Order Authorizing Compromise or Settlement of Claim, or Extension, Renewal, or Modification of Obligation, or Release of Claim by Estate Against Debtor or Tortfeasor [Prob. Code §§ 9830-9837]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER AUTHORIZING
Deceased.	)	_____ [COMPROMISE *and/or* RE-
	)	LEASE *and/or* SETTLEMENT *or* EXTENSION *or* RENEWAL *or* MODIFICATION] OF _____ [CLAIM *or* ACTION *or* PROCEEDING *or* OBLIGATION] BY ESTATE

_____

The verified petition of _____ [*name*], as _____ [the personal representative *or* an interested person] of the estate of _____ [*name*], deceased, for approval of the _____ [compromise *and/or* release and/or settlement *or* extension *or* renewal *or* modification] of a/an _____ [claim *or* action *or* proceeding *or* obligation] came on regularly for hearing by the court on _____ [*date*]. Petitioner appeared by counsel _____ [*name; specify other appearances, if any*].

The court finds the following from proof made to the satisfaction of the court:

1. Notice of the time and place of the hearing was given as required by *Probate Code sections 1220* and *9837*. [Special notice was _____ (given to _____ (*name* (*s*)), as requested *or* requested and waived by _____ (*names* (*s*))).]

2. Time for filing creditor's claims _____ [expired *or* will expire] on _____ [*date*].

3. An inventory and appraisement of the property of the estate of the deceased was filed on _____ [*date*].

[*EITHER, if suit has not been filed*]

4. _____ [Among *or* In addition to] the items so listed in the inventory and appraisement is a claim by the estate against _____ [*name*] as follows: _____ [*set forth nature of claim, e.g,* a claim for personalinjuries to the decedent's person against _____ (*name*) in the amount of $_____ arising from an automobile accident caused by the negligence of _____ (*name*) that occurred on _____ (*date*)].

[*OR, if suit has been filed*]

4. On _____ [*date*], the personal representative filed an action on the claim in the _____ Court, County of _____, State of California, entitled _____ [*name*], Plaintiff v. _____ [*name*], Defendant, No. _____. The complaint is for _____ [*specify nature of action, e.g.,* damages for personal injury to decedent].

[*CONTINUE*]

5. The personal representative and _____ [*name of person against whom claim was made or action filed*] have negotiated an agreement to _____ [compromise *and/or* release *and/o* r settle *or* extend *or* renew *or* modify] the _____ [claim *or* action *or* proceeding *or* obligation], subject to approval of the court, on the following terms: _____ [*specify terms, e.g.,* for the total amount of $_____ payable by _____ [*name*] to the estate of decedent(, and dismissal with prejudice of the pending _____ (action *or* proceeding) between the parties, described in Paragraph 4, above)]. A copy of the _____ [*specify nature of document reflecting agreement sought to be approved, e.g.,* agreement of compromise and settlement], signed by _____ [*names*], is attached to the petition filed herein, marked Exhibit "_____."

6. It is to the advantage of the estate and of all interested persons that the _____ [compromise *and/or* release *and/or* settlement *or* extension *or* renewal *or* modification] as set forth _____ [in Exhibit "_____" to the petition *or* hereinafter] be approved.

IT IS HEREBY ORDERED as follows:

[*EITHER, if suit has not been filed*]

1. The _____ [compromise *and/or* release *and/or* settlement *or* extension *or* renewal *or* modification] of the _____ [claim *or* obligation] by the estate of _____ [*name*], deceased, against _____ [*name*], for _____ [*specify*], is approved as set forth _____ [in Exhibit "_____" to the petition filed herein *or* as follows: _____ (*specify*)].

[*OR, if suit has been filed*]

1. The _____ [compromise *and/or* release *and/or* settlement *or* extension *or* renewal *or* modification] of the _____ [action *or* obligation involved in the action] filed by the personal representative in the _____ Court, County of _____, State of California, entitled _____ [*name*], Plaintiff v. _____ [*name*], Defendant, No. _____, is approved as set forth _____ [in Exhibit "_____" to the petition filed herein *or* as follows: _____ (*specify*)].

[*CONTINUE*]

2. _____ [*Name*], as personal representative of the deceased, is authorized to execute the agreement and to do all other acts and execute all other documents necessary or convenient to consummate the _____ [compromise *and/or* release *and/or* settlement *or* extension *or* renewal *or* modification].
_____ [*date*]

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is an order for use by a personal representative or interested person who has obtained an order granting authorization for a compromise, settlement, or release of a claim, action, or proceeding of the estate, or an extension, renewal, or modification of an obligation owing to or in favor of the estate [*see Prob. Code §§ 9830-9837*; *see also § 450.61* (form of petition)].

If the order authorizes a compromise or settlement that requires the transfer of real property of the estate, the order should direct that the conveyance be executed [*see Prob. Code § 9838(a)*]. A certified copy of the order must be recorded in the county recorder's office in each county in which any portion of the real property is located [*see Prob. Code §§ 7263* (orders affecting title to real property), 9838(a) (orders authorizing compromise that requires transfer of real property); *see also Prob. Code §§ 7260-7263* (orders affecting property)].

[3] State Statutes

Mailing and filing of notice of entry of judgment. *Code Civ. Proc. § 664.5*

Contents of orders. *Prob. Code § 1047*

Entry and filing of orders. *Prob. Code § 1048*

Finding of giving or waiver of notice is required in order. *Prob. Code § 1260(b)*.

Appealable orders. *Prob. Code §§ 1300, 1303*

Court from which order of approval of compromise must be obtained. *Prob. Code § 9836*

[4] Local Rules of Court

Material to be included in probate orders. Los Angeles Co. Super. Ct. Rules, Rule 10.42

Material to be included in probate orders. San Francisco Super. Ct. Rules, Rule 2.5

[5] Cross References

For discussion and forms relating to motions and orders generally, see Ch. 372, *Motions and Orders*

For a related form, see *§ 450.61*.

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38-450 California Forms of Pleading and Practice--Annotated § 450.64

§ 450.64 Petition for Order for Issuance of Citation for Examination Regarding Taking, Concealment, or Withholding of Property of Estate [Prob. Code § 8870]

[1] FORM Petition for Order for Issuance of Citation for Examination Regarding Taking, Concealment, or Withholding of Property of Estate [Prob. Code § 8870]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	PETITION FOR ORDER FOR ISSUANCE OF
Deceased.	)	CITATION FOR EXAMINATION REGARDING PROPERTY OF THE ESTATE

_____

Petitioner, _____ [*name*], alleges that:

1. Petitioner is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. In collecting decedent's records, papers, and property of the estate, petitioner _____ [*describe assets discovered and their connection with the person sought to be cited, e.g.,* found correspondence and statements disclosing that _____ (*name of person sought to be cited*) managed a 15-unit residential rental property for decedent. The property, located at _____ (*address*), was purchased by decedent on _____ (*date*). A copy of the deed by which decedent acquired the property is attached hereto marked Exhibit "A" and made a part hereof. The statements for the fiscal quarters ended _____ (*dates*) are attached hereto marked Exhibit "B" and made a part hereof. According to those statements, _____ (*name of person sought to be cited*) was forwarding to decedent net rental income from the property of approximately

$_____ every three months].

3. Petitioner _____ [*describe petitioner's demand for the property, e.g.,* spoke with _____ (*name of person sought to be cited*) by phone several times. _____ (*Name of person sought to be cited*) denied that he/she was managing the property at _____ (*address*) for decedent, and claimed he/she did not know of any other person who was managing it for decedent. By letter dated _____ (*date*), a copy of which is attached hereto marked Exhibit "C," petitioner demanded that _____ (*name of person sought to be cited*) make an accounting of income and expenses for the property for the _____ (*specify time period, e.g.,* previous two years) ending _____ (*date*) and deliver the accumulated net receipts for that period to petitioner].

4. _____ [*Name of person sought to be cited*] has failed and refusedand continues to fail and refuse to _____ [*specify nature of failure to cooperate as applicable, e.g.,* render an accounting or to remit the net receipts].

[5. _____ (*Set forth any other relevant information, e.g.,* Petitioner has written to several of the tenants, asking to whom they paid rent and for verification that rent had been paid during the period for which an accounting is sought. Responses from _____ (*names*), copies of which are attached hereto marked Exhibit "D," indicate that during the period for which an accounting is sought, they paid rent to _____ (*name of person sought to be cited*).]

WHEREFORE, petitioner prays for an order directing issuance of a citation to _____ [*name of person sought to be cited*], requiring him/her to appear before the court at the time and date specified in the order to be examined under oath concerning the allegations that he/she has wrongfully taken, concealed, or disposed of property in the estate of the decedent [and to give any reason why he/she should not be required to account for that property].

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 450.61.*]

CAUTION:
This petition must be verified [*see Prob. Code § 1021(a)*].

[2] Use of Form

This verified petition is for use by the personal representative to petition the court in which the estate is being administered for an order directing issuance of a citation requiring a person alleged to have knowledge or possession of property of the estate to appear before the court to be examined regarding the property [*Prob. Code § 8870(a)*]. If the person to whom the citation is directed does not reside in the county in which the estate is being administered, the superior court either of the county in which the person resides or of the county in which the estate is being administered may issue the citation [*Prob. Code § 8870(b)*].

On petition by the personal representative, the court also may issue a citation to a person who has possession or control

of property in the decedent's estate to appear before the court and to make an account under oath of the property and of the person's actions with respect to the property [*Prob. Code § 8873(a)*]. It is not clear whether a petition for examination pursuant to *Prob. Code §§ 8870, 8872* and one to compel an account pursuant to *Prob. Code § 8873* may be brought at the same time, or whether the personal representative must first establish, either by the examination or by the person's own admission, that the person sought to be cited has the property and then bring another petition under *Prob. Code § 8873* to compel the account. Because neither *Prob. Code §§ 8870, 8872*, nor *8873* can be used to determine the estate's right to property, if it is clear that the person sought to be cited has the property and asserts a claim to it, a petition pursuant to *Prob. Code §§ 850 et seq.* or a separate civil action is more appropriate, unless it appears that the person will voluntarily surrender the property after examination or accounting.

[3] Notice of Hearing

If the personal representative is not the petitioner, notice of the hearing on this petition must be given to the personal representative for the period and in the manner provided in *Prob. Code § 1220* [*Prob. Code § 8870(d)*]. Other persons requesting notice of the hearing pursuant to *Prob. Code § 1250* must also be given notice as set forth in *Prob. Code § 1252* [*Prob. Code § 8870(d)*]. For discussion of notice requirements under these statutes, together with applicable forms, see Ch. 447, *Probate: Statutory Notice Requirements* .

[4] Verification

This petition must be verified by the petitioner or, if more than one person joins in the petition, by any one of them [*Prob. Code § 1021(a)(1), (b)(1)*].

[5] Citation

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

For discussion of the contents and manner of service of the citation, see Ch. 447, *Probate: Statutory Notice Requirements* .

[6] Order for Disclosure

If it appears from the examination that the allegations of the petition are true, the court may order the person to disclose the person's knowledge of the facts to the personal representative [*Prob. Code § 8872(b)*].

[7] State Statutes

Issuance and service of citations. *Code Civ. Proc. § 166(a)(1)*; *Prob. Code §§ 1240-1242*

Liability for bad faith taking, concealment, or disposition of property of estate. *Prob. Code § 859*

Conduct and costs of examination. *Prob. Code § 8872*

Citation requiring person to account for property of estate. *Prob. Code § 8873*

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38-450 California Forms of Pleading and Practice--Annotated § 450.65

§ 450.65 Petition for Order Authorizing Personal Representative to Accept Deed of Property Subject to Trust Deed or Mortgage Held by Deceased in Lieu of Sale Under Trust Deed or Foreclosure [Prob. Code § 9850]

[1] FORM Petition for Order Authorizing Personal Representative to Accept Deed of Property Subject to Trust Deed or Mortgage Held by Deceased in Lieu of Sale Under Trust Deed or Foreclosure [Prob. Code § 9850]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION TO AUTHORIZE ACCEPTANCE OF
	)	DEED IN LIEU OF _____
Estate of _____ [*name*],	)	[TRUSTEE'S SALE *or* FORECLOSURE]
Deceased.	)	Date: _____
	)	
	)	Time: _____
		Location: _____
_____		

Petitioner, _____ [*name*], respectfully represents:

[*EITHER*]

1. Petitioner is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

[*OR*]

1. Petitioner is a person interested in the estate of _____ [*name*], deceased, in that _____ [*specify status and interest, pursuant to Prob. Code § 48, e.g.*, she is an heir of the deceased]. _____ [*Name*] is the duly appointed, qualified, and acting personal representative of the deceased.

[*CONTINUE*]

2. Among the assets of the estate of the deceased [listed in the inventory and appraisement on file] is a certain promissory note evidencing a secured indebtedness to the deceased made by _____ [*name*], dated _____, in the original amount of $_____, with interest at _____ percent per annum, payable _____ [*specify*].

3. The indebtedness is secured by a _____ [deed of trust *or* mortgage] on real property recorded in the office of the County Recorder of the County of _____, California, in Book _____, page _____, of official records of _____ County. The real property subject to the _____ [deed of trust *or* mortgage] is described as follows: _____ [*set forth legal and common description*].

4. There is a balance of principal and interest on the indebtedness due and unpaid in the sum of $_____. The owner of the encumbered property, _____ [*name*], offers to make a deed conveying such property to the _____ [devisees *or* heirs] of the deceased, subject to administration herein and on the following terms and conditions, in consideration of the cancellation and release of the full remaining indebtedness as payment of the claim of the estate in full: _____ [*specify terms and conditions*].

5. It is to the advantage of the estate of the deceased for _____ [petitioner, as personal representative, *or* the personal representative] to accept a deed of the property on such terms and conditions in lieu of a sale by the trustee _____ [under the deed of trust *or* foreclosing the mortgage] for the following reasons: _____ [*specify*].

6. _____ [No request for special notice has been filed herein *or* Request for special notice has been filed by _____ (*name*), whose address is _____].

WHEREFORE, petitioner prays for an order authorizing him/her to accept a deed of the property on the terms and conditions stated above, and to do all acts and execute all documents necessary or convenient to consummate the same.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 450.61.*]

[2] Use of Form

This form is a verified petition for use by the personal representative or an interested person to obtain a court order authorizing the personal representative to accept a deed of property subject to a trust deed or mortgage held by the deceased in lieu of sale under the deed or foreclosure of the mortgage [*see Prob. Code § 9850*; *see also Prob. Code § 48* (definition of "interested person")].

[3] Burden of Proof

The court will make an order under *Prob. Code § 9850* only if the petitioner shows by clear and convincing evidence that acceptance of the deed is to the advantage of the estate [*Prob. Code § 9850(c)*].

[4] Notice of Hearing

Notice of the hearing on the petition must be given at least 15 days prior to the hearing date, pursuant to *Prob. Code § 1220* [*see Prob. Code § 9850(b)*]. Proof of giving notice of hearing must be made pursuant to *Prob. Code §§ 1260-1265*. For discussion and forms for use in giving notice of probate petitions, see Ch. 447, *Probate: Statutory Notice Requirements* .

[5] State Statutes

Petition for authority to accept deed of property in lieu of sale under trust deed or foreclosure. *Prob. Code § 9850*

Notice of hearing of petition. *Prob. Code §§ 1220, 9850(b)*

[6] Cross References

For a related form, see *§ 450.61*.

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Chapter 450 PROBATE: COLLECTING ASSETS
PART IV. FORMS

38-450 California Forms of Pleading and Practice--Annotated § 450.66

§ 450.66 Order Authorizing Personal Representative to Accept Deed of Property Subject to Trust Deed or Mortgage Held by Deceased in Lieu of Sale Under Trust Deed or Foreclosure [Prob. Code § 9850]

[1] FORM Order Authorizing Personal Representative to Accept Deed of Property Subject to Trust Deed or Mortgage Held by Deceased in Lieu of Sale Under Trust Deed or Foreclosure [Prob. Code § 9850]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER AUTHORIZING ACCEPTANCE OF
Deceased.	)	DEED IN LIEU OF _____
		[TRUSTEE'S SALE *or* FORECLOSURE]

_____

The petition of _____ [*name*], as _____ [personal representative *or* an interested person] of the estate of _____ [*name*], deceased, authorizing acceptance of a deed of property subject to a _____ [trust deed *or* mortgage] in lieu of _____ [sale under the trust deed *or* foreclosure], came on regularly for hearing by the court on _____ [*date*]. Petitioner appeared by counsel _____ [*name; specify other appearance, if any*].

The court finds the following from proof made to the satisfaction of the court:

1. Notice of the time and place of the hearing was given as required by *Probate Code Section 9850*. [Special notice was _____ (given to _____ (*name* (*s*)), as requested *or* requested and waived by _____ (*name* (*s*))).]

2. Among the assets of the estate of the deceased is a promissory note evidencing a secured indebtedness to the deceased made by _____ [*name*], dated _____, in the original amount of

$_____, with interest at _____ percent per annum, payable _____ [*specify*]. The indebtedness is secured by a _____ [trust deed *or* mortgage], recorded as hereinafter set forth, on real property hereinafter described.

3. There is a balance of principal and interest on the indebtedness due and unpaid in the sum of $_____. The owner of the encumbered property, _____ [*name*], offers to make a deed conveying such property to the _____ [devisees *or* heirs] of the deceased, subject to administration herein and on the following terms and conditions, in consideration of the cancellation and release of the full remaining indebtedness as payment of the claim of the estate in full: _____ [*terms and conditions*].

4. By clear and convincing evidence presented to this court, petitioner has shown that it is to the advantage of the estate of the deceased for the personal representative to accept a deed of the property on said terms and conditions in lieu of sale by the trustee _____ [under the trust deed *or* foreclosing the mortgage].

5. The _____ [devisees *or* heirs] of the deceased are _____ [*names*].

IT IS ORDERED as follows:

1. _____ [*Name*], as personal representative of _____ [*name*], deceased, is authorized to accept a deed conveying the real property hereinafter described to _____ [*names*], _____ [devisees *or* heirs] of the deceased, subject to administration herein and on the following terms and conditions, in lieu of _____ [sale under the trust deed *or* foreclosure of the mortgage] thereon, in consideration of the cancellation and release of the full remaining indebtedness as payment of the claim of the estate in full: _____ [*terms and conditions*].

2. _____ [*Name*] as personal representative of the deceased, is authorized to do all acts and execute all documents necessary and convenient to accept the deed of the property and cancel the indebtedness.

3. The real property to be conveyed is described as follows: _____ [*set forth legal and common description*].

4. The _____ [trust deed *or* mortgage] on the property securing the indebtedness to be so cancelled is recorded in the office of the County Recorder of the County of _____, California, in Book _____, page _____, of official records of the county.
_____ [*date*]

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is an order for use by a personal representative or interested person who has obtained an order granting authorization for the personal representative to accept a deed in lieu of a sale under a deed of trust or foreclosure of a mortgage [*see Prob. Code § 9850*].

Since an order may only be issued under *Prob. Code § 9850* if the advantage to the estate of accepting the deed is shown by clear and convincing evidence, such a finding should be stated in the order [*see Prob. Code §§ 9850(c), 1047* (contents of order)].

[3] Cross References

For related forms, see *§§ 450.62* and *450.63*.

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Chapter 451 PROBATE: INVENTORY AND APPRAISAL

38-451 California Forms of Pleading and Practice--Annotated 451.syn

§ 451.syn Synopsis to Chapter 451: PROBATE: INVENTORY AND APPRAISAL

§ 451.01 Scope of Chapter

§ 451.02 Cross References

§§ 451.03-451.09 [Reserved]

§ 451.10 Governing Law

§ 451.11 Personal Representative's Duty to Conduct Inventory and Appraisal

[1] In General

[2] Bond

[3] Collection of Assets

[4] Partial Inventory and Appraisal

[5] Supplemental Inventory and Appraisal

[6] Remedies If Representative Fails to File

§ 451.12 Inventory

§ 451.13 Appraisal

[1] Generally

[2] By Personal Representative

[3] By Probate Referee

[a] Property to Be Appraised

[b] Delivery of Inventory to Referee

[c] Time for Appraisal or Status Report

[d] Hearing on Status Report

[e] Access to Appraisal Report and Backup Data

[f] Demand for Justification of Appraisal

[g] Waiver of Referee Appraisal

[4] By Independent Expert

[5] Signature and Oath

§ 451.14 Objection to Appraisal

§ 451.15 Probate Referee

[1] Designation

[2] Powers

[3] Commission and Expenses

[4] Removal

[a] Without Cause

[b] For Cause

[c] Replacement

[5] Cessation of Authority

§ 451.16 Community Property and Joint Tenancy--Tax Implications

§§ 451.17-451.29 [Reserved]

§ 451.30 State Statutes

[1] Inventory and Appraisal Generally

[2] Appraisal

[a] By Independent Expert

[b] By Personal Representative

[c] By Probate Referee

[d] Objection to Appraisal

[3] Discovery

[4] Inventory

§ 451.31 California Rules of Court

§ 451.32 Local Court Rules

[1] Inventory and appraisement.

§ 451.33 Decisions

§ 451.34 Law Reviews

§ 451.35 Text References

§§ 451.36-451.49 [Reserved]

§ 451.50 Time for Filing Inventory and Appraisal

§ 451.51 Preparation of Inventory

§ 451.52 Verification and Execution of Inventory

§ 451.53 Designation and Removal of Referee

§ 451.54 Waiver of Appraisal by Referee

§ 451.55 Appraisal Procedure

§ 451.56 Filing and Mailing of Appraisal

§ 451.57 Bond Requirements

§ 451.58 Objection to Appraisal

§§ 451.59-451.69 [Reserved]

§ 451.70 Inventory and Appraisal [Prob. Code § 8800]--Judicial Council Forms DE-160, DE-161

[1] FORM

[2] Use of Forms

[3] Source of Forms

[4] Declarations

[5] Time for Filing

[6] Copy to Persons Requesting Special Notice

[7] Contents

[8] Attachments

[9] State Statutes

[10] California Rules of Court

[11] Local Rules of Court

[a] Inventory and Appraisal

[b] Use of Judicial Council Form as Mandatory

§ 451.71 Property Tax Certification [Prob. Code § 8800(d)]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 451.72 Objection to Appraisal [Prob. Code § 8906]

[1] FORM

[2] Use of Form

[3] Notice

[4] Verification

[5] Objection Filed Without Reasonable Cause or Good Faith

[6] State Statutes

[7] Cross References

§ 451.73 Proceedings for Waiver of Probate Referee [Prob. Code § 8903]--Petition and Statement of Good Cause

[1] FORM

[2] Use of Form

[3] Contents

[4] Notice

[5] State Statutes

[6] Cross References

§ 451.74 Proceedings for Waiver of Probate Referee [Prob. Code § 8903]--Order

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Local Rules of Court

[5] Cross References

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38-451 California Forms of Pleading and Practice--Annotated § 451.01

§ 451.01 Scope of Chapter

This chapter discusses and contains forms relating to preparation of the inventory and appraisal for a decedent's estate. It includes a reproduction of the Judicial Council form for inventory and appraisal [*see § 451.70*], a property tax certification form that must accompany the inventory and appraisal [*see § 451.71*], and a form for an objection to an appraisal [*see § 451.72*]. It also includes a form for a petition for waiver of appraisal by a probate referee and statement of good cause [*see § 451.73*], and an order waiving appraisal by a probate referee [*see § 451.74*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-451 California Forms of Pleading and Practice--Annotated § 451.02

§ 451.02 Cross References

For a discussion relating to appointment of appraisers to appraise value of stock on dissolution of a corporation, see Ch. 170, *Corporations: Dissolution and Winding Up*

For a discussion relating to inventory and appraisal of a ward's or conservatee's property, see Ch. 286, *Guardianship and Conservatorship: Inventory and Appraisal*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansConservatorsGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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[Reserved]

§§ 451.03[Reserved]

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38-451 California Forms of Pleading and Practice--Annotated § 451.10

§ 451.10 Governing Law

Inventory and appraisal is governed primarily by *Prob. Code §§ 8800-8980*. The powers of the probate referee are governed by *Prob. Code §§ 450-453*. *Cal. Rules of Ct., Rule 7.501* governs the statement about the bond in the appraisal, and applications to increase the bond if it is insufficient. In addition, some counties may have local rules of court that govern other aspects of inventory and appraisal. It is recommended that the local rules (if any) for the pertinent county be consulted in these proceedings.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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38-451 California Forms of Pleading and Practice--Annotated § 451.11

§ 451.11 Personal Representative's Duty to Conduct Inventory and Appraisal

[1] In General

The personal representative is required to file with the court clerk an inventory of property to be administered in the decedent's estate together with an appraisal of the property in the inventory [*Prob. Code § 8800(a)*; *see Prob. Code §§ 8870-8874* (procedures to discover decedent's property); for discussion of discovering and collecting estate property, *see* Ch. 450, *Probate: Collecting Assets*]. The inventory and appraisal must be filed within four months after letters are first issued to a general personal representative. The court may, however, allow further time for filing if it is reasonable under the circumstances of the particular case [*Prob. Code § 8800(b)*]. When the moving party claiming entitlement to distribution based on unreasonable delay makes a showing that the personal representative has exceeded the statutory time limit, the burden shifts to the personal representative to establish that additional time is reasonable under the circumstances [*Estate of Justesen (1999) 77 Cal. App. 4th 352, 361, 91 Cal. Rptr. 2d 574]* . The Law Revision Commission has suggested that a further time might be reasonable, for example, in an estate for which a federal estate tax return is necessary and additional time is required in order to ensure that the property is valued consistently [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 8800*].

Both the inventory and appraisal must be combined in a single document that separately lists each item and states the fair market value of the item at the time of the decedent's death in monetary terms opposite the item [*Prob. Code §§ 8800(a), 8802*]. When the representative files an inventory and appraisal or a supplemental inventory and appraisal, he or she is required to mail a copy to each person who has requested special notice [*Prob. Code §§ 1252, 8803*; for discussion of supplemental inventory and appraisal, *see § 451.11[5]*; for discussion of special notice, *see* Ch. 447, *Probate: Statutory Notice Requirements*].

At the time the inventory and appraisal is filed, the personal representative must also file a certification regarding whether the decedent owned real property in California [*see Prob. Code § 8800(d)*; *see also § 451.71*]. If the decedent did not own real property in California at the time of death, the certification must state that the requirements of *Rev. & Tax. Code § 480* (regarding filing change-of-ownership statement) do not apply [*Prob. Code § 8800(d)(1)*]. However, if the decedent owned real property, the certification must state that the requirements of *Rev. & Tax. Code § 480* have been satisfied by the filing of a change in ownership statement with the county recorder or assessor of each county in

California in which the decedent owned property at the time of death [*Prob. Code § 8800(d)(2)*].

In addition, there are certain requirements regarding the bond, to be stated in the inventory and appraisal, as discussed in *§ 451.11[2]*.

[2] Bond

The inventory and appraisal must contain one of the following statements [*Cal. Rules of Ct., Rule 7.501(a)*]:

- "Bond is waived."
- "Bond has been filed in the amount of $ (specify amount) and is insufficient."
- "Bond has been filed in the amount of $ (specify amount) and is sufficient."

If the bond is insufficient, the fiduciary is required to immediately make an ex parte application, as provided in *Cal. Rules of Ct., Rule 7.204*, for an order increasing the amount of the bond [*Cal. Rules of Ct., Rule 7.501(b)*]. For further discussion of such an application, see Ch. 446, *Probate: Bonds* .

The statement must be signed by the attorney of record for each fiduciary who has an attorney of record and by each fiduciary who does not [*Cal. Rules of Ct., Rule 7.501(c)*].

[3] Collection of Assets

Collection of the assets and preparation of the inventory is the duty of the personal representative but counsel customarily assists and directs the representative in the performance of these functions. For discussion of the collection of assets, see Ch. 450, *Probate: Collecting Assets* .

The location of personal property outside California poses a problem. Courts have frequently said that a personal representative has a duty to take possession of the deceased's assets wherever situated, but the broad statement is obviously limited by the practicalities of a given situation. Laws of other jurisdictions, difficulty of reducing to possession, cost of collection as against benefit to be gained are all to be considered. Jurisdictions in which assets are located have the same right to require local administration as California does with respect to assets within this state [*see Estate of Glassford (1952) 114 Cal. App. 2d 181, 188-190, 249 P.2d 908]* . In many instances, however, banks and custodians of stocks and bonds will transmit the assets on request on being furnished a certified copy of the representative's letters. If foreign assets are not collectible by request or a procedure provided by the jurisdiction in which they are situated, the only effective course is to cause letters to be issued in the other jurisdiction. If the deceased was a resident of California, the proceedings in the other jurisdiction will then be ancillary to those in California.

An asset of the deceased cannot be administered, of course, unless it is reduced to the possession of the personal representative. It is suggested that note be made of foreign assets, but that they not be inventoried until they are actually in the hands of the personal representative. Inventory and appraisal of other assets need not wait on collection of foreign assets. A supplementary inventory and appraisal will suffice [*see Prob. Code § 8801*; discussed in *§ 451.11[5]*].

[4] Partial Inventory and Appraisal

The personal representative may file partial inventories and appraisals when appropriate under the circumstances of the particular case. The partial inventory and appraisal must be filed before expiration of the time allowed for inventory and appraisal, including any further time allowed by the court [*Prob. Code § 8800(b), (c)*].

[5] Supplemental Inventory and Appraisal

If the personal representative acquires knowledge of property to be administered in the decedent's estate that is not included in a prior inventory and appraisal, he or she must file a supplemental inventory and appraisal of the property in the manner prescribed for an original inventory and appraisal. The supplemental inventory and appraisal must be filed within four months after the personal representative acquires knowledge of the property. The court may, however, allow further time for filing a supplemental inventory and appraisal if it is reasonable under the circumstances of the particular case [*Prob. Code § 8801*].

[6] Remedies If Representative Fails to File

If the personal representative refuses or negligently fails to file an inventory and appraisal within the time allowed under *Prob. Code §§ 8800(b), (c), 8801,* any interested person may petition the court for relief [*Prob. Code § 8804*; *see Prob. Code § 48* (interested person defined)]. On the petition, the court may (1) compel the representative to file an inventory and appraisal pursuant to the procedure prescribed in *Prob. Code §§ 11050-11052* (court-compelled account and sanctions, discussed in Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation*); (2) remove the representative from office; and (3) impose on the representative personal liability for injury to the estate or to an interested person that directly results from the refusal or failure. The liability may include attorney's fees, in the court's discretion and damages awarded are a liability on the bond of the personal representative, if any [*Prob. Code § 8804*; *Estate of Fain (1999) 75 Cal. App. 4th 973, 992, 89 Cal. Rptr. 2d 618* (when personal representative's failure to marshal all of estate's assets and to file full and complete inventory required estate to undertake extensive discovery to identify estate assets, extraordinary services performed by successor administrator and its counsel in segregation of assets, reconstruction of inventories from documents and other evidence, and other problems of processing estate, which are direct consequence of personal representative's negligence, are an element of surcharge)]. An executor or administrator will not be removed for the mere delay or failure to file an inventory within the time prescribed by statute, unless the delay or failure has caused a loss to the estate [*Estate of Hammer (1993) 19 Cal. App. 4th 1621, 1636-1637, 24 Cal. Rptr. 2d 190]* . For a discussion of delay caused by the probate referee, see *§ 451.13[3][c]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionSupplemental JurisdictionAncillary JurisdictionEstate, Gift & Trust LawEstate AdministrationDiscovery of AssetsEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & InventoriesEstate, Gift & Trust LawProbatePersonal RepresentativesForeign RepresentativesReal Property LawProperty ValuationTax LawState & Local TaxesEstate & Gift TaxValuationReal Property

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38-451 California Forms of Pleading and Practice--Annotated § 451.12

§ 451.12 Inventory

The inventory, including partial and supplemental inventories, must include all property to be administered in decedent's estate [*Prob. Code § 8850(a)*]. It must particularly specify the following property [*Prob. Code § 8850(b)*]:

- Money owed to the decedent, including debts, bonds, and notes, with the name of each debtor, the date, the sum originally payable, and the endorsements, if any, with their dates. The inventory must also specify any security for the payment of money to the decedent, including mortgages and deeds of trust; and if the security is real property, the inventory must include the recording reference or, if not recorded, a legal description of the real property.

- A statement of the decedent's interest in a partnership, appraised as a single item.

- All the decedent's money and other cash items, as defined in *Prob. Code § 8901* (discussed in *§ 451.30[2][b]*).

A debt or demand of the testator against the executor or any other person must be included in the inventory even if the debt or demand is discharged or devised in the testator's will. Such a discharge or devise is a specific devise of the debt or demand. The discharge or devise is not valid against the testator's creditors, and if necessary, the debt or demand will be applied in the payment of the testator's debts. If it is not necessary that the debt or demand be applied to payment of the testator's debts, it must be distributed in the same manner and proportion as other specific devises [*Prob. Code § 8851*].

The inventory must show, to the extent ascertainable by the personal representative, the portions of the property that are community, quasi-community, and separate property of the decedent [*Prob. Code § 8850(c)*].

The personal representative, or if there is more than one, each of them, must endorse on or attach to the inventory an oath that the inventory contains a true statement of the property to be administered in the estate of which he or she has knowledge, and particularly of the decedent's money and the decedent's debts or demands against the personal representative [*see Prob. Code § 8852*; *see also Code Civ. Proc. § 2015.6* (permitting written affirmation in lieu of

oath)]. The oath must be endorsed on or attached to the inventory [*Prob. Code § 8852(a)*]. If there are multiple personal representatives, and they are unable to agree as to the property to be included in the inventory, *Prob. Code § 8852* indicates the procedure for petitioning the court to determine what property to include.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & InventoriesEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewReal Property LawOwnership & TransferDeath & IncapacityGeneral Overview

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§ 451.13 Appraisal

[1] Generally

The property in the inventory must be appraised by the personal representative, probate referee, or independent expert [*Prob. Code § 8900*]. The role of each in the appraisal is discussed below.

[2] By Personal Representative

The personal representative is required to appraise the following property, excluding items whose fair market value is, in the opinion of the personal representative, an amount different from the face value of the property [*Prob. Code § 8901*]:

- Money and other cash items. A "cash item," in this context, is a check, draft, money order, or similar instrument issued on or before the date of the decedent's death that can be immediately converted to cash.

- Checks issued after the date of the decedent's death that are either checks for wages earned before death or are refund checks, including tax and utility refunds, and Medicare, medical insurance, and other health care reimbursements and payments.

- Accounts in financial institutions. "Accounts" in this context is defined by *Prob. Code § 21* to include checking accounts, savings accounts, certificates of deposit, share accounts, mutual capital certificates, and other like arrangements.

- Cash deposits and most money market funds or accounts. This includesmoney market funds or accounts registered under the Investment Company Act of 1940 and those registered under the Code of Federal Regulations as investment vehicles that invest only in U.S. government obligations maturing in five years or less or repurchase agreements fully collateralized by U.S. government obligations [*see Prob. Code § 9730(b)*; *15 U.S.C. §§ 80a-1 et seq.*; *12 C.F.R. § 9.18*]. All other mutual funds, stocks, bonds, and other securities must be appraised by the probate referee [*Prob. Code § 8901(d)*; *see Prob. Code § 8902 et seq.* (appraisal by probate referee)].

- Proceeds of life and accident insurance policies and retirement plans and annuities payable on death in lump sum amounts.

Neither the personal representative nor the personal representative's attorney is entitled to receive compensation for extraordinary services by reason of appraising any property in the estate [*Prob. Code § 8907*; for a discussion of compensation for personal representatives generally, *see* Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation*].

[3] By Probate Referee

[a] Property to Be Appraised

All property in a decedent's estate other than that appraised by the personal representative must be appraised by a probate referee, with the exception of any unique, artistic, unusual, or special items that the personal representative elects to have appraised by an independent expert [*Prob. Code §§ 8902(b), 8904(a)*].

[b] Delivery of Inventory to Referee

The personal representative is required to deliver the inventory to the probate referee designated by the court, together with necessary supporting data to enable the referee to make an appraisal of the property in the inventory to be appraised by the referee [*Prob. Code § 8902(b)*]. The delivery is not required, however, when the court has waived appraisal by a probate referee [*see Prob. Code 8903*; for a discussion of waiver of appraisal by a probate referee, *see § 451.13[3][g]*].

[c] Time for Appraisal or Status Report

The probate referee is required to promptly and with reasonable diligence appraise the property scheduled for appraisal by the probate referee in the inventory that the personal representative delivers to the referee [*Prob. Code § 8940(a)*]. The referee, not later than 60 days after delivery of the inventory, must either return the completed appraisal to the personal representative or make a report of the status of the appraisal. The report must show the reason why the property has not been appraised and an estimate of the time needed to complete the appraisal. The report must be delivered to the personal representative and filed with the court [*Prob. Code § 8940(b)*].

[d] Hearing on Status Report

The court must, on petition of the personal representative or probate referee, or may, on its own motion, hear the report of the status of the appraisal. The court may issue a citation to compel the personal representative or the probate referee to attend the hearing [*Prob. Code § 8941(a)*]. If the probate referee does not make the report of the status of the appraisal within the time required by *Prob. Code § 8940(b)* (discussed in *§ 451.13[3][c]*) or prescribed by the court, the court must, on petition of the personal representative, or may, on its own motion, cite the probate referee to appear before the court and show the reason why the property has not been appraised [*Prob. Code § 8941(b)*]. Based on the hearing, the court may order any of the following [*Prob. Code § 8941(c)*]:

- That the appraisal be completed within a time that appears reasonable.

- That the probate referee be removed. On removal of the referee the court shall designate another probate referee in the manner prescribed in *Prob. Code § 8920* (for discussion, *see §§ 451.15[1], [4]*).

- That the commission of the probate referee be reduced by an amount the court deems appropriate, regardless of whether the commission otherwise allowable under *Prob. Code §§ 8960-8964* would be

reasonable compensation for the services rendered.

- That the personal representative deliver to the probate referee all information necessary to allow the probate referee to complete the appraisal. Failure to comply with such an order is grounds for removal of the personal representative.

- Such other orders as may be appropriate.

[e] Access to Appraisal Report and Backup Data

A probate referee who appraises property in the estate must, on demand by the personal representative or by a beneficiary, provide any appraisal report or backup data in the possession of the probate referee used by the referee to appraise an item of property. The probate referee is not permitted, however, to disclose any information that is required by law to be confidential. The probate referee must provide the appraisal report or backup data without charge. The cost of providing the report or data is not allowed as an appraisal expense but is included in the referee's commission for services [*Prob. Code § 8908(a)*].

[f] Demand for Justification of Appraisal

The probate referee must also, on demand by the personal representative orbeneficiary, justify the appraisal of an item of property if the appraisal is contested, whether by objection pursuant to *Prob. Code § 8906* (for discussion relating to objection to appraisal, *see § 451.58*), by tax audit, or otherwise. The referee may be entitled to an additional fee for services provided to justify the appraisal, to be agreed on by the personal representative or beneficiary and referee. If they are unable to agree, the court determines what fee, if any, is appropriate [*Prob. Code § 8908(b)*].

[g] Waiver of Referee Appraisal

The court may, for good cause, waive appraisal by a probate referee in the manner provided by *Prob. Code § 8903*. Good cause for waiver may include, for example, that the assets to be appraised by the personal representative, in addition to those he or she would normally appraise, consist of listed securities, including over the counter securities for which prices are published, personal belongings of the decedent, household furniture and furnishings, automobiles and similar items of recognized market value or of low value [*see* Alameda Co. Super. Ct. Rules, Rule 12.6.2.2].

The personal representative may apply for a waiver together with the petition for appointment of the personal representative or another petition. Alternatively, the representative may apply in a separate petition filed in the administration proceedings. The application may not be made, however, later than the time the personal representative delivers the inventory to the probate referee, if a probate referee has been designated. A copy of the proposed inventory and appraisal and a statement that sets forth the good cause that justifies the waiver must be attached to the petition [*Prob. Code § 8903(b)*; for a form of petition for waiver of appraisal by a probate referee and order granting the petition, *see §§ 451.73* and *451.74*]. For further discussion relating to appointment of personal representatives, see Ch. 442, *Probate: Initiating Probate Administration* .

The hearing on the waiver must not be sooner than 15 days after the petition is filed [*Prob. Code § 8903(c)*]. Notice of the hearing must be given as provided in *Prob. Code § 1220* [for discussion, *see* Ch. 447, *Probate: Statutory Notice Requirements*], together with a copy of the petition and a copy of the proposed inventory and appraisal to all of the following persons [*Prob. Code § 8903(c)*; *see Prob. Code § 1220(a)(2)*]:

- Any nonpetitioning personal representative.

- All persons who have requested special notice in the estate proceeding pursuant to *Prob. Code §*

1250.

- All known heirs and devisees whose interests in the estate would be affected by the waiver.

- The Attorney General, at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the waiver.

- The probate referee, if one has been designated.

If any person entitled to notice is represented by an attorney of record, the notice must also be given to that attorney [*Prob. Code § 1214*].

A probate referee to whom notice is given under *Prob. Code § 8903* may oppose the waiver. If the opposition fails and the court determines the opposition was made without substantial justification, the court must award litigation expenses, including reasonable attorney's fees, against the probate referee. If the opposition succeeds, the court may designate a different probate referee to appraise property in the estate [*Prob. Code § 8903(d)*].

If the petition is granted, the inventory and appraisal attached to the petition must be filed pursuant to *Prob. Code § 8800* [*Prob. Code § 8803* (*see* discussion in *§ 451.11*)].

[4] By Independent Expert

A unique, artistic, unusual, or special item of tangible personal property that would otherwise be appraised by the probate referee may, at the election of the personal representative, be appraised by an independent expert qualified to appraise the item [*Prob. Code § 8904(a)*]. The personal representative must make the election by a notation on the inventory delivered to the probate referee indicating the property to be appraised by an independent expert. The probate referee may, within five days after delivery of the inventory, petition for a court determination whether the property to be appraised by an independent expert is a unique, artistic, unusual, or special item of tangible personal property. If the petition fails and the court determines that the petition was made without substantial justification, the court must award litigation expenses, including reasonable attorney's fees, against the probate referee [*Prob. Code § 8904(b)*].

[5] Signature and Oath

A person who appraises property, whether he or she is a personal representative, probate referee, or independent expert, must sign the appraisal as to property appraised by that person. The person must also take and subscribe an oath that he or she has truly, honestly, and impartially appraised the property to the best of his or her ability [*Prob. Code § 8905*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesCompensationEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & InventoriesEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWillsBeneficiariesGeneral OverviewInsurance LawClaims & ContractsAppraisalsInsurance LawProperty InsuranceCoverageReal PropertyAppraisalsReal Property LawProperty Valuation

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38-451 California Forms of Pleading and Practice--Annotated § 451.14

§ 451.14 Objection to Appraisal

Any time before the hearing on the petition for final distribution of the estate, the personal representative or an interested person may file with the court a written objection to the appraisal [*Prob. Code § 8906(a)*; *see Prob. Code § 48* ("interested person" defined)]. The clerk is required to fix a time, not less than 15 days after the filing, for a hearing on the objection [*Prob. Code § 8906(b)*]. The person objecting must give notice of the hearing, together with a copy of the objection, as provided in *Prob. Code § 1220* (for further discussion of notice requirements, *see* Ch. 447, *Probate: Statutory Notice Requirements*). If the appraisal was made by a probate referee, the person objecting must also mail notice of the hearing and a copy of the objection to the probate referee at least 15 days before the date set for the hearing [*Prob. Code § 8906(c)*].

The person objecting to the appraisal has the burden of proof [*Prob. Code § 8906(d)*].

On completion of the hearing, the court may make any orders that appear appropriate. If the court determines the objection was filed without reasonable cause or good faith, the court may order that the fees of the personal representative and attorney and any costs incurred for defending the appraisal be made a charge against the person filing the objection [*Prob. Code § 8906(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & InventoriesEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-451 California Forms of Pleading and Practice--Annotated § 451.15

§ 451.15 Probate Referee

[1] Designation

The probate referee, when designated by the court, must be among the persons appointed by the Controller to act as a probate referee for the county [*Prob. Code §§ 400-408, 8920*]. If there is no person available who is able to act or if, pursuant to authority of *Prob. Code § 8922* (court's discretion not to designate particular person as referee) or otherwise, the court does not designate a person appointed for the county, the court may designate a probate referee from another county [*Prob. Code § 8920*].

The court may designate a person requested by the personal representative as probate referee, on a showing of good cause for the designation. The following circumstances are included within the meaning of good cause [*Prob. Code § 8921*]:

- The probate referee has recently appraised the same property that will be appraised in the administration proceeding.
- The probate referee will be making related appraisals in another proceeding.
- The probate referee has recently appraised similar property in another proceeding.

The court may not designate as probate referee any of the following persons: the court clerk; a partner or employee of the judge or commissioner who orders the designation; the spouse of the judge or commissioner who orders the designation; or a person, or the spouse of a person, who is related within the third degree either (1) to the judge or commissioner who orders the designation or (2) to the spouse of the judge or commissioner who orders the designation [*Prob. Code § 8923*].

[2] Powers

On designation by the court, the probate referee has all the powers of a referee of the superior court. In addition to these powers, the probate referee has other powers provided in *Prob. Code §§ 450-453*, which are discussed below [*Prob.*

Code § 450]. For a discussion of the powers and duties of a referee generally, see Ch. 38, *Reference* .

For the purpose of appraising estate property, the probate referee may require, and may issue a subpoena to compel, the appearance before the referee of the personal representative, guardian, conservator, or other fiduciary, an interested person, or any other person the referee has reason to believe has knowledge of the property [*Prob. Code § 451(a)*]. The probate referee is also empowered to take the testimony under oath of a person appearing before the referee, or require, and issue a subpoena to compel, the person to produce any document in the person's possession or control concerning the value of any property in the estate [*Prob. Code §§ 452(a)*]. Subpoenas issued under either *Prob. Code § 451(a)* or *452(a)* are subject to the provisions of *Code Civ. Proc. § 2020* governing deposition subpoenas until July 1, 2005, and to the provisions of *Code Civ. Proc. §§ 2020.020-2020.510* governing deposition subpoenas as of July 1, 2005 [*Prob. Code §§ 451(b), 452(b)*; *see* Stats. 2004, Ch. 182, § 64]. For a discussion of deposition subpoenas generally, see Ch. 193, *Discovery: Depositions* .

On petition of a person required to appear before the probate referee pursuant to *Prob. Code §§ 450-453*, the court may make a protective order to protect the person from annoyance, embarrassment, or oppression. The petitioner is required to mail notice of the hearing on the petition to the probate referee and the personal representative, guardian, conservator, or other fiduciary at least 15 days before the date set for the hearing. Any subpoena issued by the probate referee is stayed during the pendency of the petition [*see Prob. Code § 453(a)*].

On petition of the probate referee, the court may make an order to show cause why a person who is required, but fails, to appear before the probate referee should not be compelled to do so. The probate referee is required to mail notice of the hearing on the petition to the person at least 15 days before the date set for the hearing [*see Prob. Code § 453(b)*].

[3] Commission and Expenses

As compensation for services the probate referee is entitled to receive a commission of one-tenth of one percent of the total value of the property for eachestate appraised. Property appraised by the personal representative pursuant to *Prob. Code § 8901*, or by an independent expert pursuant to *Prob. Code § 8904* is excluded from the computation [*Prob. Code § 8961(a)*]. The commission shall in no event be less than $75 nor more than $10,000 for any estate appraised [*Prob. Code § 8963* (also empowering court to allow excess of $10,000 based on reasonable value of services, and providing notice of hearing requirements)].

The referee is also entitled to receive actual and necessary expenses for each estate appraised. The referee must file with, or list on, the inventory and appraisal a verified account of the referee's expenses [*Prob. Code § 8961(b)*].

If more than one probate referee appraises or participates in the appraisal of property in the estate, each is entitled to the share of the commission agreed on by the referees or, absent an agreement, that the court allows. In no case may the total commission for all referees exceed the maximum commission that would be allowable for a single referee [*Prob. Code § 8964*].

The commission and expenses provided by *Prob. Code §§ 8960-8964* as compensation for the services of the probate referee must be paid from the estate. The probate referee may not withhold the appraisal until the commission and expenses are paid, but must deliver the appraisal to the personal representative promptly on completion. The commission and expenses of the probate referee are an expense of administration, entitled to the priority for payment provided by *Prob. Code § 11420*, and must be paid in the course of administration [*Prob. Code § 8960*].

[4] Removal

[a] Without Cause

The personal representative has the right to remove the first probate referee who is designated by the court without cause. The personal representative may exercise the right at any time before he or she delivers the inventory to the probate referee. To exercise this right, the representative must file an affidavit or declaration under penalty of perjury with the court and mail a copy to the probate referee. Thereupon, the court is required to remove the probate referee without any further act or proof [*Prob. Code § 8924(a)(2)*].

[b] For Cause

The court is required to remove the designated probate referee if the personal representative shows cause, including incompetence or undue delay in making the appraisal, that in the opinion of the court warrants removal of the referee. The showing shall be made at a hearing on petition of the personal representative. The personal representative must mail notice of the hearing on the petition to the probate referee at least 15 days before the date set for the hearing [*Prob. Code § 8924(a)(1)*].

The court is also required to remove the designated probate referee for any other cause provided by statute [*Prob. Code § 8924(a)(3)*].

[c] Replacement

On removal of the probate referee, the court must designate another probate referee in the manner prescribed in *Prob. Code § 8920* (discussed in *§ 451.15[1]*) [*Prob. Code § 8924(b)*].

[5] Cessation of Authority

The authority of a person to act as a probate referee ceases immediately on expiration of the person's term of office, revocation of the person's appointment or other termination pursuant to law [*Prob. Code § 406(a)*; *see Prob. Code § 403(a)* (terms are for 4 years, expiring on June 30)]. On cessation of the probate referee's authority, the Controller is required to notify the court of the county for which the referee was appointed. On receipt of the notice, or if it otherwise comes to the attention of the court that the authority of the probate referee has ceased, the court is required to reassign any estate for which the person had been designated as probate referee to another probate referee [*Prob. Code § 406(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewCivil ProcedureJudicial OfficersRefereesAppointmentsEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationDisabilityEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationRemoval for CauseEstate, Gift & Trust LawWill ContestsRevocationGeneral OverviewGovernmentsFiduciary ResponsibilitiesReal Property LawProperty Valuation

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§ 451.16 Community Property and Joint Tenancy--Tax Implications

Property cannot be community property and joint tenancy property at the same time. It must be one or the other [*Jacquemart v. Jacquemart (1956) 142 Cal. App. 2d 794, 796, 299 P.2d 281* (construing former Civ. Code § 161, *now see Civ. Code §§ 682, 5104*; *Fam. Code § 750* (operative January 1, 1994)]. However, the form of the instrument under which the spouses hold title does not conclusively reflect the character of the property as separate or community property. Thus, property held in joint tenancy form may in fact be community property [*see Tomaier v. Tomaier (1944) 23 Cal. 2d 754, 757-759, 146 P.2d 905]* . Note, however, that effective July 1, 2001, spouses may hold property as community property with right of survivorship, securing the tax benefits of community property and avoiding the costs of probate [*see Civ. Code § 682.1*; *Fam Code § 750*].

In general, a surviving spouse takes community property with a stepped-up basis as to both halves of the community property, as valued at the date of death [*see I.R.C. § 1014(a)(1), (b)(6)*]. In contrast, joint tenancy assets pass to the survivor without estate administration, but only the half of the property held by the decedent receives a stepped-up basis, as valued at the time of death [*see I.R.C. § 1014(a)(1), (b)(6)*]. Consequently, future sale of the property by the survivor may or may not result in a capital gains tax, depending on whether the property is community or joint tenancy. Before completing the inventory, every effort should be made by the personal representative and counsel to determine exactly what the intention of the parties was, and what evidence is available to rebut any erroneous presumptions created by the instrument of title.

If an instrument of title has been affected by a transmutation agreement intended to establish the subject property as community property, the agreement must be made in writing, in the form of an express declaration, consented to or accepted by the spouse whose interest in the property is adversely affected [*see Fam. Code §§ 850(b), 852(a)*]. In *Estate of MacDonald,* the California Supreme Court held that, to satisfy the requirement of an "express declaration," a writing must *expressly state* that the characterization or ownership of the property is being changed [*Estate of MacDonald (1990) 51 Cal. 3d 262, 272, 272 Cal. Rptr. 153, 794 P.2d 911* ; *In re Marriage of Starkman (2005) 129 Cal. App. 4th 659, 663-665, 28 Cal. Rptr. 3d 639* (clause in trust agreement providing that property transferred to trust is community property unless transferor spouse identifies it as separate property was insufficient to transmute husband's separate property, which he failed to identify as separate property, to community property)]. Extrinsic evidence is inadmissible to clarify the transmutation agreement [*Estate of MacDonald (1990) 51 Cal. 3d 262, 264, 272 Cal. Rptr. 153, 794*

P.2d 911 ; *see* *In re Marriage of Campbell (1999) 74 Cal. App. 4th 1058, 1062-1065, 88 Cal. Rptr. 2d 580* ; *In re Marriage of Barneson (1999) 69 Cal. App. 4th 583, 588, 81 Cal. Rptr. 2d 726]* .

There is no exception from the "express declaration" requirement of *Fam. Code § 852(a)* for partial performance of an agreement to transmute property [*In re Marriage of Benson (2005) 36 Cal. 4th 1096, 1108-1109, 32 Cal. Rptr. 3d 471, 116 P.3d 1152]* . *Fam. Code § 852(a)* is stated in the negative--*i.e.*, an agreement to change the character of marital property is *not* valid *unless* it is in writing, contains an express declaration by which the transmutation is made, and is accepted in some fashion by the adversely affected spouse. The California Supreme Court has held that these features, viewed as a whole, suggest the legislature envisioned a standard for transmutations from which married couples could not freely depart [*In re Marriage of Benson (2005) 36 Cal. 4th 1096, 1104, 32 Cal. Rptr. 3d 471, 116 P.3d 1152]* . The Court also concluded the writing requirement of *Fam. Code § 852(a)* cannot be satisfied when there is no writing at all about the subject property and a transmutation would have to be inferred from acts surrounding the parties' purported agreement [*In re Marriage of Benson (2005) 36 Cal. 4th 1096-1107, 32 Cal. Rptr. 3d 471, 116 P.3d 1152]* .

For a discussion of tax problems in the context of estate tax, see Ch. 453, *Probate: Estate Tax* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewReal Property LawEstatesConcurrent OwnershipJoint TenanciesTax LawFederal Estate & Gift TaxesBasis of Property Acquired From Decedents (IRC sec. 1014)Decedent's DeathTax LawFederal Estate & Gift TaxesBasis of Property Acquired From Decedents (IRC sec. 1014)Stepped-Up BasisTax LawState & Local TaxesEstate & Gift TaxGeneral OverviewTax LawState & Local TaxesEstate & Gift TaxEstate TaxGeneral Overview

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[Reserved]

§§ 451.17[Reserved]

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38-451 California Forms of Pleading and Practice--Annotated § 451.30

§ 451.30 State Statutes

[1] Inventory and Appraisal Generally

Appraisal requirement in small estate set-aside proceedings. *Prob. Code § 6608*

Personal representative as required to file. *Prob. Code § 8800(a)*

Form. *Prob. Code §§ 8800(a), 8802*

Time requirement for filing. *Prob. Code §§ 8800(b), (c), 8801*

Partial inventories and appraisals. *Prob. Code § 8800(c)*

Certification regarding real property ownership. *Prob. Code § 8800(d)*

Supplemental inventory and appraisal. *Prob. Code § 8801*

Remedies for failure to file. *Prob. Code § 8804*

Oath of personal representative related to inventory. *Prob. Code § 8852*

Appraisal as required to be conducted by personal representative, probate referee, or independent expert. *Prob. Code § 8900*

Person appraising property is required to sign appraisal as to property appraised by him or her and take oath related to appraisal. *Prob. Code § 8905*

Objection to appraisal. *Prob. Code § 8906*

[2] Appraisal

[a] By Independent Expert

Election to have independent expert appraise unique, unusual, or special property. *Prob. Code § 8904(b)*

[b] By Personal Representative

Property to be appraised by personal representative. *Prob. Code § 8901*

Personal representative is not entitled to compensation for extraordinary services due to appraising property in an estate. *Prob. Code § 8907*

[c] By Probate Referee

Powers. *Prob. Code §§ 450-453*

Property to be appraised by probate referee. *Prob. Code § 8902(b)*

Personal representative required to deliver inventory and supporting data. *Prob. Code § 8902(a)*

Waiver of referee appraisal. *Prob. Code § 8903*

Access of personal representative and beneficiary to appraisal report and backup data. *Prob. Code § 8908(a)*

Designation of referee. *Prob. Code § 8920*

Removal of referee. *Prob. Code § 8924*

Time limit for referee's appraisal or status report. Prob. Code. § 8940

Hearing on status report. *Prob. Code § 8941*

Right to commission and expenses; limitations and exceptions. *Prob. Code § 8960 et seq.*

[d] Objection to Appraisal

Procedure for objecting to appraisal. *Prob. Code § 8906*

Obligation of probate referee to provide supporting data for appraisals and to justify appraisal. *Prob. Code § 8908*

[3] Discovery

Proceedings to discover concealed or withheld property. *Prob. Code §§ 8870-8874*

[4] Inventory

Items to be included in inventory. *Prob. Code § 8850*

Discharge or devise in will is specific devise of debt or demand to be included in inventory. *Prob. Code § 8851*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesAppointmentsEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesCompensationEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & InventoriesReal Property LawProperty Valuation

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§ 451.31 California Rules of Court

Statement of bond in inventory and appraisal and increase of bond when bond is insufficient. *Cal. Rules of Ct., Rule 7.501*

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§ 451.32 Local Court Rules

[1] Inventory and appraisement.

Alameda Co. Unified Super. Ct. Rules 12.6

Contra Costa Co. Prob. Pol. Man. § 701

Los Angeles Co. Super. Ct. Rules, Rules 10.104, 10.105

Marin Co. Rules, Probate 5.37-5.38(A)

Orange Co. Super. Ct. Rules, Rule 604.01 et seq.

San Bernardino Co. Prob. Pol. Mem. § 617

San Diego Co. Coordinated Ct. Rules, Div. IV, Rules 1.90-1.93

San Francisco Uniform Local Ct. Rules, Rule 14.55

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

Custodial individual retirement account is not property of estate but vests as property of named beneficiary on date of death. *Estate of Davis (1985) 171 Cal. App. 3d 854, 857-858, 217 Cal. Rptr. 734*

Family residence was joint tenancy property when spouses held title as joint tenants and there was no agreement between them that residence was community property, despite statement in will of deceased spouse that residence was to be considered community property. *Estate of Levine (1981) 125 Cal. App. 3d 701, 705-706, 178 Cal. Rptr. 275*

Ownership of savings accounts to be determined by titles in which they stood at decedent's death, when titles were opened in particular form because decedent desired to obtain maximum deposit insurance protection and his or her dispositional intent is unclear. *Estate of Friedman (1971) 20 Cal. App. 3d 399, 402-403, 97 Cal. Rptr. 653*

Appraisal is subject to change until filed by appraiser. *Harris v. Klure (1962) 205 Cal. App. 2d 574, 580-581, 23 Cal. Rptr. 313*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 451.34 Law Reviews

Devine, Inventorying a California Decedent's Estate, *46 L.A. Bar. B. 495 (1971)*

Hemmerling, *Life Insurance-- Unsuspected Incidents of Ownership, 44 L.A. Bar. B. 216 (1969)*

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38-451 California Forms of Pleading and Practice--Annotated § 451.35

§ 451.35 Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, §§ 591, *600* (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & InventoriesEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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PART III. RESEARCH GUIDE

38-451 California Forms of Pleading and Practice--Annotated §§ 451.36-451.49

[Reserved]

§§ 451.36[Reserved]

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38-451 California Forms of Pleading and Practice--Annotated § 451.50

§ 451.50 Time for Filing Inventory and Appraisal

Inventory and appraisal must be filed within four months after letters are first issued to a general personal representative or within such further time as the court for reasonable cause may allow [*Prob. Code § 8800(b)*]. After the inventory is submitted to the probate referee, the referee has 60 days to complete his or her part of the appraisal [*Prob. Code § 8940(b)*]. Take this time into account in calendaring for the completion of the inventory, and calendar the date when the referee should return the inventory [*see* Paragraphs 4-6 of § 451.55].

NOTE:

If the personal representative fails to file the inventory and appraisal on time, he or she may be subject on the petition of an interested person [*see Prob. Code § 48*] to being compelled to file it, to removal from office, and to liability for injuries directly resulting from the failure or refusal to file [***see Prob. Code § 8804*****].**

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesAppointmentsEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & InventoriesEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-451 California Forms of Pleading and Practice--Annotated § 451.51

§ 451.51 Preparation of Inventory

NOTE:

An erroneous decision to inventory property as community property or to omit it from the inventory on the ground that it is held in joint tenancy may result in tax problems in the future. Because the error may affect the basis of the property, capital gains problems may arise. In determining how property is held, the instrument of title may create a presumption, but it is rebuttable [*see, e.g., Fam. Code § 2581*]. For discussion of determining how title is held, *see* Ch. 122, *Community Property* , and Ch. 316, *Joint Tenancy and Tenancy in Common* .

List and describe assets [*see § 451.70*; counsel should consult local rules regarding whether use of Judicial Council forms are mandatory].

1. Money and other cash items. Included as separate items would be, for example, cash in decedent's possession at death, refund of safe deposit box key deposit, salary due, bank commercial account, bank savings account, savings share account at a savings and loan association, and the like.

a. Assign a separate number to each different item.

b. In the case of salary due, show the name and address of the employer.

c. In the case of a bank account, show the account number, nature of account, bank, branch, and address.

d. Insert the amount of each item.

2. Bonds.

a. Assign a separate item number to each different type of bonds, but not to interest.

b. Describe by showing face amount or number of bonds and denomination, name of obligor, kind of bond, date of maturity, interest rate, and interest due dates. If desired, show the exchange on which listed, or if unlisted the principal business office of the company. For example: "$60,000 maturity value Arkansas Railroad Co. first mortgage 4 percent, 20 year bonds, due November, _____ [*year*]. Interest payable quarterly on Feb. 1, May 1, Aug. 1, and Nov. 1; N.Y. Exchange," or "10 Missouri Pacific Railroad Company $1000 par value, 5 percent income debentures, due January, _____ [*year*]. Interest payable _____ [*specify*]; N.Y. Exchange," or "$1000 maturity value US Savings Bonds, Series G, due _____ [*date*]."

c. List, for example: "Interest coupons attached to bonds, item [7], due and payable on _____, [*date*], but not cashed at date of death."

d. List, for example: "Interest accrued on bonds, item [7], to _____ [*date*]."

e. Provide space for showing appraised value of each item, including interest.

3. Stocks.

a. Assign a separate item number to each different type of stock, but not to dividends.

b. Describe by showing number of shares, whether common or preferred, issue, par value, exact name of corporation and, if desired, the exchange on which listed or, if not listed, the principal business office of the company. For example: "100 shares of Pacific Gas and Electric Company 6 percent first preferred stock; N.Y. Exchange," or "50 shares of Boston Edison Company $25 par value capital stock; N.Y. Exchange."

c. List, for example: "Dividend on item [8] of $_____ per share payable to stockholders of record _____ [*date*], accrued prior to date of death."

d. Provide space for showing appraised value of each item, including dividends.

4. Promissory notes.

a. Assign a separate item number to each different note.

b. Describe by showing principal sum, name of each maker, date of note, rate of interest, due date, and security, if any. For example: "$5000 principal sum note, made by _____ [*name*], dated _____, with interest at _____ percent per annum, both principal and interest payable in installments as follows: _____; secured by deed of trust recorded _____ [*date*], in Book _____, page _____, Official Records, _____ County;" or "$750 principal sum note, made by _____, dated _____, payable in _____ equal, successive monthly installments of $_____ each, commencing on _____ [*date*]."

c. Provide space for showing appraised value of each item.

5. Real estate.

a. Assign separate item number for each separate parcel.

b. Show both a legal description, that is, recorded tract, map, or lot and block system or other recognized method, and a common description. If improved, show a separate value for the land and for the improvements, and the total. For example: "Lots 1 and 2 in Tract 485 in the City and County of Los Angeles, State of California, as per map recorded in Book 14, page 191 of Maps, in the Office of the County Recorder of said County, commonly known as 111 North New Hampshire Avenue, Los Angeles, California.

Land	$ _____
Improvements	$ _____
Total of Appraisal	$ _____"

c. Indicate a partial interest at commencement of description.

d. List a homestead, if any, identifying the property on which it is impressed.

e. In case of income property, show after common description, for example: "Income property leased for a term of _____ years, commencing _____ [*date*], and ending _____ [*date*], at a rental of $_____ payable in _____ equal, successive installments of $_____ at the end of each quarter, Apr. 1, July 1, Oct. 1, and Jan. 1."

f. List, for example: "Rent due on item [10] for quarter ending _____ [*date*], but not collected at date of death."

g. List, for example: "Rent accrued on item [10] for January and February _____ [*year*]."

h. Provide space for showing appraised value of each item, including rental.

6. Other miscellaneous property. Inventory here all items of the gross estate that cannot be inventoried under any other category, such as the following: debts due deceased, interests in business, insurance on life of another, claims including claims for tax refunds, rights, royalties, pensions, leaseholds, judgments, reversionary or remainder interests, shares in trust funds, household goods, personal effects, including wearing apparel, farm products and growing crops, livestock, farm machinery, automobiles, etc.

a. Except as hereafter noted, assign a separate item number to each item.

b. Debts due deceased. Show name of debtor, date debt incurred, sum originally payable, amount presently due. Debt due from personal representative must be included [*Prob. Code § 8852(a)*].

c. Sole proprietorship interest in business. If business is not to continue, do not describe business as such, but list individual assets under their proper categories, such as real estate. Do not list goodwill as an asset because it will not be distributed or sold. If business is to continue, describe business as such, but list individual assets separately under their proper categories. Goodwill is inventoriable if actually existing as an asset.

d. Partnership interest in business. Merely describe the interest as "interest in partnership" identifying partners, location of the business, and its nature [*see Prob. Code § 8850(b)(2)*].

e. Insurance on life of another or on life of deceased payable to estate or personal representative as such. Inventory, showing name and address of insurer, policy number, and amount payable.

f. Claims. Describe by listing claim or cause of action against a named person or entity and the nature thereof, such as claim for income tax refund, cause of action for breach of contract, personal injuries, fraud, or the like, but without detail, which is neither necessary nor desirable. Do not list a cause of action for wrongful death; it belongs to heirs and other entitled dependents [*see* Code Civ. Proc. § 377.60]. Otherwise, a cause of action survives death [*see Code Civ. Proc. § 377.20*].

g. Rights--literature and art [*see Civ. Code § 982(b)*; *17 U.S.C. §§ 101*]. If copyrighted, list title and character of work, together with fact of copyright. In case of unpublished work still dependent on secrecy, description should be terse and noninformative.

h. Rights--inventions [*see Civ. Code § 982(b)*; *35 U.S.C. §§ 117, 135, 154*]. If patented, list name of article and patent number. If not, description should be terse and noninformative.

i. Rights--trademarks and trade names. Ordinarily, a trademark [*see Bus. & Prof. Code § 14202(a)*] or a trade name [*see Bus. & Prof. Code § 14202(d)*] is transferable only in connection with transfer of goodwill of a business [*Bus. & Prof. Code §§ 14220, 14401*]. In describing, refer to words or design constituting the mark or name and the business or product it identifies.

j. Royalties. Show property from which derived, the basis of measurement, and the duration.

k. Leasehold. Show common, not legal, description, parties, date of lease, expiration date, and rental.

l. Easements. Provide a full legal description.

m. Reversionary or remainder interests. Show both a legal description and a common description.

n. Household goods. Unless located in two or more residences or separate places or certain items are specifically bequeathed, list both furniture and furnishings under one item number and show location by common description of the residence or place. For example: "Furniture and furnishings at 111 North Hampshire Avenue, Los Angeles, California."

o. Personal adornments and effects. Unless located in two or more residences or separate places or certain items are specifically bequeathed or are of unique value, list jewelry, silver, books, pictures, paintings, works of art, clothing, and personal effects under one item number and show location by common description of the residence or place.

p. Livestock. Show number, breed, age, sex, and whether or not purebred and pedigreed.

q. Automobiles and boats. Describe with reference to year, make, type, and special equipment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawEstates Created by Trusts &

WillsGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewInsurance LawClaims & ContractsAppraisalsTax LawFederal Estate & Gift TaxesTaxable PropertyLife Insurance (IRC sec. 2042)General OverviewTax LawFederal Estate & Gift TaxesTaxable PropertyLifetime Transfers (IRC secs. 2035-2038)General OverviewTax LawState & Local TaxesEstate & Gift TaxGeneral OverviewTax LawState & Local TaxesEstate & Gift TaxGross Estate

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38-451 California Forms of Pleading and Practice--Annotated § 451.52

§ 451.52 Verification and Execution of Inventory

1. Proofread descriptions.

2. Both personal representative and counsel review inventory for omissions.

3. Make certain the representative reads the inventory and oath before signing.

NOTE:
The personal representative is required to take an oath that the inventory contains a true statement of the property to be administered in the decedent's estate of which the personal representative has knowledge, and particularly of money of the decedent and debts or demands of the decedent against the personal representative [*Prob. Code § 8852(a)*]. The oath must be endorsed on or attached to the inventory [*Prob. Code § 8852(a)*]. If there are multiple personal representatives, each must take and subscribe the oath. If they disagree as to the property to be included, any of them may petition the court for a determination of what property is to be included in the estate. [*see Prob. Code § 8852(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & InventoriesEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-451 California Forms of Pleading and Practice--Annotated § 451.53

§ 451.53 Designation and Removal of Referee

1. Designation of Referee. If a referee was not designated by the court at the time it issued letters appointing the personal representative, prepare a request for designation of probate referee [*see Prob. Code § 8920*]. For form for a request and order, see Forms §§ 442.158, 442.159.

NOTE:

The referee will be assigned by the court, commonly by rotation or by lot [*see, e.g.*, Orange Co. Super. Ct. Rules, Rule 604.01; Sacramento Co. Local Ct. Rules, Rule 15.07]. The personal representative may request designation of a particular referee for good cause. Good cause includes the referee having recently appraised the same or similar property in another proceeding or that the referee will be making related appraisals in another proceeding [*see Prob. Code § 8921*].

Counsel is advised to consult local rules and practice relating to the appropriate procedure for raising this request. Absent any rule or practice to the contrary, it is recommended that the above facts be set forth by declaration incorporated into or included with the request [*see* *Cal. Rules of Ct., Rule 3.1306*].

2. Removal of first referee appointed by court.

a. If the personal representative desires to exercise the right to remove the first probate referee designated by the court, prepare a declaration under penalty of perjury exercising that right.

NOTE:

No cause need be shown, but the right must be exercised before the inventory is delivered to the probate referee [*see* *Prob. Code § 8924(a)(2)*].

b. File the declaration with the court and mail a copy to the referee.

NOTE:
No further action is necessary; the court will remove the referee andappoint another one [*see Prob. Code § 8924(a)(2), (b)*].

3. Removal of referee for cause.

a. If cause exists to remove the probate referee, and the personal representative has already exercised the right of removal under *Prob. Code § 8924(a)(2)* or the inventory has already been delivered to the referee so that the right of removal is not available, prepare a petition to remove the referee.

NOTE:
Cause includes incompetence or undue delay in making the appraisal [*see* *Prob. Code § 8924(a)(1)*].

b. Mail notice of the hearing to the referee at least 15 days before the date set for the hearing [*see Prob. Code § 8924(a)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesGeneral OverviewCivil ProcedureJudicial OfficersRefereesAppointmentsEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationRemoval for Cause

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38-451 California Forms of Pleading and Practice--Annotated § 451.54

§ 451.54 Waiver of Appraisal by Referee

1. Prepare application for waiver, either:

a. Together with the representative's petition for letters;

b. Together with another petition; or

c. In a separate petition filed in the administration proceedings [*see § 451.73*].

NOTE:
The application may not be made later than the time the personal representative delivers the inventory to the probate referee, if one has been designated [*Prob. Code § 8903(b)*].

2. Attach a copy of the proposed inventory [*see Prob. Code § 8903(b)*].

3. Attach a statement that sets forth good cause justifying the waiver [*see Prob. Code § 8903(a),(b)*].

4. File application or petition and attachments with court.

5. Notice of Hearing

NOTE:
Hearing may not be sooner than 15 days after the petition is filed [*Prob. Code § 8903(c)*].

Provide notice pursuant to *Prob. Code §§ 1220, 8903(c)*. For discussion and forms, see Ch. 447, *Probate: Statutory Notice Requirements* . In addition to the persons who must be given notice under *Prob. Code § 1220*, the same notice must be given to all of the following [*Prob. Code § 8903(c)*]:

a. The probate referee, if one has been designated;

NOTE:

A referee to whom notice is given may oppose the waiver. If the opposition fails and the court determines the opposition was made without substantial justification, the court is required to award litigation expenses, including reasonable attorneys fees. If the opposition succeeds, the court may designate a different probate referee to appraise the property in the estate [*Prob. Code § 8903(d)*].

b. Each known heir and/or devisee, whose interest in the estate would be affected by the waiver; and

c. The Attorney General, at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the waiver.

6. Prepare order granting waiver [*see § 451.74*].

7. Present order to court for signature and if proceeding was contested, give notice of the order to other parties [*see* Code Civ. Proc. § 1019.5, Prob. Code § 1000].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesAppointmentsEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & InventoriesEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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38-451 California Forms of Pleading and Practice--Annotated § 451.55

§ 451.55 Appraisal Procedure

1. Have the personal representative appraise the following items, unless he or she believes that the fair market value of the item is different from its face value [*Prob. Code § 8901*]:

a. Money.

b. Checks, drafts, money orders, or similar instruments issued on or before the decedent's date of death that can be immediately converted to cash.

c. Checks for wages earned before death issued after the date of death.

d. Refund checks issued after the date of death, including tax and utility refunds and Medicare, medical insurance, and other health care reimbursements and payments.

e. Checking accounts, savings accounts, certificates of deposit, share accounts, mutual capital certificates, and other like arrangements between the decedent as depositor and a financial institution [*see Prob. Code § 21*].

f. Cash deposits and most money market funds or accounts.

NOTE:
For discussion of included items, see *§ 451.13[2]*.

g. Proceeds from life and accident insurance policies and retirement plans and annuities payable on death in lump sum amounts.

2. Note on the inventory, the personal representative's election to have a unique, artistic, unusual, or special item of tangible personal property appraised by an independent expert [*see Prob. Code § 8904(b)*].

NOTE:

The probate referee may, within five days after delivery of theinventory, challenge the election by petitioning the court for a determination whether the property to be appraised is the kind provided for under *Prob. Code § 8904*. If the petition fails and court determines that it was made without substantial justification, the court is required to award litigation expenses, including attorney fees, against the referee [*see* *Prob. Code § 8904(b)*].

3. Transmit original and copy of inventory, including appraisals made by the personal representative, to the probate referee together with necessary supporting data to enable the referee to make his or her appraisal [*Prob. Code § 8902(a)*].

NOTE:

If the personal representative desires to apply for a waiver of appraisal by probate referee, make the application before delivering the inventory to the probate referee [*Prob. Code § 8903(b)*; *see* *§ 451.51*].

4. All property other than that appraised by the personal representative is appraised by the probate referee or independent expert [*see Prob. Code §§ 8902(b), 8904(a)*].

NOTE:

Within 60 days, the probate referee must either return the completed appraisal to the personal representative or give the personal representative and file with the court a status report showing why the appraisal has not been made and estimating the time for completion [*see* *Prob. Code § 8940(b)*].

5. If the probate referee returns a status report rather than a completed appraisal, petition for a hearing on the status report, if desired [*see Prob. Code § 8941(a)*].

NOTE:

The court may order completion of the appraisal within a reasonable time, remove the referee, reduce the referee's commission, and issue other appropriate orders. It may also order the personal representative to deliver information necessary for completion of the appraisal to the referee. Failure to comply may be grounds for removal of the personal representative [*see Prob. Code § 8941(c)*].

6. If the probate referee returns neither a status report nor a completed appraisal, petition the court to cite the referee to show cause why the property has not been appraised, if desired [*see Prob. Code § 8941(b)*; for the orders that may be issued on the hearing, *see* the note under 5, *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & InventoriesEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-451 California Forms of Pleading and Practice--Annotated § 451.56

§ 451.56 Filing and Mailing of Appraisal

1. When appraisal has been completed and returned, conform office copies and file the original of the inventory and appraisal with county clerk [*see Prob. Code § 8800(a)*].

2. Mail a copy to each person who has requested special notice [*see Prob. Code §§ 1252, 8903*].

3. Concurrent with filing inventory and appraisal, file certification stating that *Rev. & Tax. Code § 480* (regarding filing change of ownership statement for real property owned by decedent in California at time of death) either does not apply or has been complied with [*see Prob. Code § 8800(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & InventoriesEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-451 California Forms of Pleading and Practice--Annotated § 451.57

§ 451.57 Bond Requirements

1. Determine whether bond is waived or filed.

2. If bond is filed, determine whether bond is sufficient or insufficient.

NOTE:
Cal. Rules of Ct., Rule 7.501 **requires that this be stated in the inventory and appraisal, and that the attorney of record for the fiduciary sign the statement.**

3. If representing the fiduciary and bond is insufficient, seek court order to increase bond [*see Cal. Rules of Ct., Rule 7.501(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & InventoriesEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewGovernmentsFiduciary Responsibilities

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38-451 California Forms of Pleading and Practice--Annotated § 451.58

§ 451.58 Objection to Appraisal

1. Demand appraisal report or backup data in possession of the probate referee used to appraise the property [*Prob. Code § 8908(a)*].

NOTE:

This demand is not a prerequisite to making an objection; however, it may be a prudent procedure to follow to gather background data, because sanctions may result from filing an objection without reasonable cause or good faith [*see Prob. Code § 8906(e)*]. Although any interested person [*see Prob. Code § 48*] may file an objection, only the personal representative or a beneficiary may make this demand [*see Prob. Code § 8908*].

The referee is not allowed to disclose any information required by law to be confidential [*Prob. Code § 8908(a)*].

2. Prepare written objection to the appraisal [*see Prob. Code § 8906*; *see § 451.72*].

NOTE:

An objection may be made by the personal representative or by any interested person [*see Prob. Code § 48*], at any time before the hearing on the petition for final distribution of the estate [*Prob. Code § 8906(a)*]. If the court determines the objection was filed without reasonable cause or good faith, the objector may be charged with the fees of the personal representative and attorney and any costs incurred for defending the appraisal [*Prob. Code § 8906(e)*].

3. Have the objection verified [*see Prob. Code §§ 1021-1023*].

4. File the objection with the court [*see Prob. Code § 8906(a)*].

NOTE:

The clerk will set the hearing, for not less than 15 days after the filing [*see Prob. Code § 8906(b)*].

5. Give notice of the hearing on the objection as provided in Prob. Code§ 1220 [*see* Ch. 447, *Probate: Statutory Notice Requirements*], and if the appraisal was made by a probate referee, mail notice of hearing and a copy of the objection to the referee [*Prob. Code § 8906*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersAppraisals & InventoriesEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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38-451 California Forms of Pleading and Practice--Annotated §§ 451.59-451.69

[Reserved]

§§ 451.59[Reserved]

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PART V. FORMS

38-451 California Forms of Pleading and Practice--Annotated § 451.70

§ 451.70 Inventory and Appraisal [Prob. Code § 8800]--Judicial Council Forms DE-160, DE-161

[1] FORM Inventory and Appraisal [Prob. Code § 8800]--Judicial Council Forms DE-160, DE-161

Click here to view image.

Click here to view image.

CAUTION:
At the same time the inventory and appraisal is filed with the court, the administrator or executor is required to file a change in ownership statementwith the county recorder or assessor in each county in which the decedent owned real property at the time of death [*Rev. & Tax. Code § 480(b)*]. Each county has its own form, which should be obtained from the office of the county recorder or assessor.

[2] Use of Forms

This form for an inventory and appraisal is for use by the personal representative to file an inventory and appraisal of the property to be administered in the decedent's estate [*Prob. Code § 8800*]. The attachment is for use to list the assets of the estate [*see Prob. Code § 8850*]. Use of these Judicial Council forms is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*].

[3] Source of Forms

This form for inventory and appraisal and the attachment to be submitted with that form have been approved for use by the Judicial Council. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[4] Declarations

The form includes declarations to be made by the representative or small estate claimant under penalty of perjury, to the effect that the Attachments, together with all previous inventories, contain a true statement of all or a portion of the

estate (Paragraph 3). Also included is an optional statement that no probate referee is required, based on a court order to that effect (Paragraph 4).

At the time the inventory and appraisal is filed, the personal representative must also file a certification regarding the non-applicability of, or compliance with, *Rev. & Tax. Code § 480* [*see Prob. Code § 8800(d)*; *see also § 451.71*]. The certification requirement may be met by checking the appropriate box in Paragraph 5.

The inventory and appraisal also must state whether bond has been waived or filed, and if filed, whether it is sufficient or insufficient (Paragraphs 6 and 7) [*Cal. Rules of Ct., Rule 7.501(a)*]. The signature of the attorney of record for the fiduciary, or the fiduciary if none, must be included with regard to this statement (signature line) [*Cal. Rules of Ct., Rule 7.501(c)*].

[5] Time for Filing

The inventory and appraisal of the estate of the decedent must be filed by the personal representative with the court clerk within four months after letters are first issued to a general personal representative, or within such further time that the court may allow as is reasonable under the circumstances of the particular case [*Prob. Code § 8800(b)*].

[6] Copy to Persons Requesting Special Notice

On the filing of an inventory and appraisal or a supplemental inventory and appraisal, the personal representative must mail a copy to each person who has requested special notice. The copy must be mailed not later than 15 days after the inventory and appraisal is filed with the court [*Prob. Code §§ 1252(b), 8803*].

[7] Contents

The inventory is required to include all of the property to be administered in the decedent's estate, particularly specifying all money owed to the decedent, including debts, bonds, and notes, with the name of each debtor, the date, the sum originally payable, and the endorsements, if any, with their dates. The inventory must also specify security for the payment of money to the decedent, including mortgages and deeds of trust. If security for the payment of money is real property, the inventory must include the recording reference or, if not recorded, a legal description of the real property. Other property that must be particularly specified is a statement of decedent's interest in a partnership, appraised as a single item, and all money and other cash items, as defined in *Prob. Code § 8901* (discussed in *§ 451.70[8]*). The inventory must show, to the extent ascertainable by the personal representative, the portions of the property that are community, quasi-community, and separate property of the decedent [*Prob. Code § 8850(c)*].

The inventory and appraisal must separately list each item and state the fair market value of the item at the time of the decedent's death in monetary terms opposite the respective items [*Prob. Code § 8802*]. For detailed discussion relating to listing and describing assets, see *§ 451.53*.

[8] Attachments

Two attachments should be submitted with the inventory and appraisal form. On the first attachment, the personal representative lists and appraises the property that he or she is to appraise pursuant to *Prob. Code § 8901*; that is, money and other cash items; checks issued after decedent's death that are checks for wages earned before death, refund checks and Medicare, medical insurance, and other health care reimbursements and payments; accounts in financial institutions (defined by *Prob. Code § 21* as including checking, savings, and share accounts; certificates of deposit; mutual capital certificates; and other like arrangements); cash deposits and money market funds or accounts, whether in a financial institution or otherwise, including a brokerage cash account; and proceeds of life and accident insurance policies and retirement plans and annuities payable on death in lump sum amounts. The personal representative may not appraise any ofthese items that have a fair market value which, in the opinion of the personalrepresentative, is different from the

face value of the property [*Prob. Code § 8901*].

On the second attachment, the personal representative lists property that is appraised by the referee pursuant to *Prob. Code § 8902*. Additional attachments may be necessary if joint tenancy and other assets are listed for appraisal purposes only and not as part of the probate estate. In that case the assets must be separately listed and its value excluded from the total valuation of attachments 1 and 2 [*see* instructions on the back of the Judicial Council form of inventory and appraisal].

Additionally, if the personal representative elects to have a unique, artistic, unusual, or special item of tangible personal property appraised by an independent expert, notation of that fact must be made on the inventory indicating the property to be appraised by the independent expert [*Prob. Code § 8904(b)*].

Moreover, the personal representative must file a certification regarding real property ownership concurrently with filing of the inventory and appraisal [*Prob. Code § 8800(d)*; *see § 451.70*.5].

[9] State Statutes

Filing inventory and appraisal; time. *Prob. Code § 8800*

Certification regarding real property ownership. *Prob. Code § 8800(d)*.

Form of inventory and appraisal. *Prob. Code § 8802*

Contents of inventory. *Prob. Code § 8850*

Community and separate property. *Prob. Code § 8850(c)*

Inclusion in inventory of debt owed to testator that is discharged or devised by will. *Prob. Code § 8851*

Oath of representative as to truth of inventory; resolution of disputes between multiple representatives with respect to inclusion of property in inventory. *Prob. Code § 8852*

Appraisal by personal representative. *Prob. Code § 8901*

Appraisal by probate referee. *Prob. Code § 8902*

Appraisal by independent expert. *Prob. Code § 8904*

Compensation of referees; fees; expenses. *Prob. Code §§ 8960-8964*

[10] California Rules of Court

Statement of bond in inventory and appraisal and increase of bond when bond is insufficient. *Cal. Rules of Ct., Rule 7.501*

[11] Local Rules of Court

[a] Inventory and Appraisal

Alameda Co. Super. Ct. Rules, Rule 12.6

Contra Costa Co. Prob. Pol. Man. § 701

Los Angeles Co. Super. Ct. Rules, Rule 10.104 et seq.

Marin Co. Rule, Probate 5.71

Orange Co. Super. Ct. Rules, Div. VI, Rule 604.01 et seq.

San Bernardino Co. Prob. Pol. Mem. § 601 et seq.

San Diego Co. Super. Ct. Rules, Div. IV, Rules 1.90-1.93

San Francisco Uniform Local Ct. Rules, Rule 14.55

[b] Use of Judicial Council Form as Mandatory

Contra Costa Co. Prob. Pol. Man. §§ 203, 701

Los Angeles Co. Super. Ct. Rules, Rule 10.11(a)

San Bernardino Co. Prob. Pol. Mem. § 201

San Francisco Uniform Local Ct. Rules, Rule 14.23

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38-451 California Forms of Pleading and Practice--Annotated § 451.71

§ 451.71 Property Tax Certification [Prob. Code § 8800(d)]

[1] FORM Property Tax Certification [Prob. Code § 8800(d)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*],	)	NO. _____
Deceased.	)	PROPERTY TAX CERTIFICATION
	)	

_____

1. I am the personal representative of the estate of _____ [*name of decedent*].

[*EITHER*]

2. I certify that the requirements of *Revenue and Taxation Code Section 480* are not applicable because the decedent owned no real property in California at the time of death.

[*OR*]

2. I certify that the requirements of *Revenue and Taxation Code Section 480* have been satisfied by the filing of a change of ownership statement with the county recorder or assessor of each county in California in which the decedent owned property at the time of death.

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

CAUTION:
Before using this form, counsel should ask the court whether it has adopted a local form or is requiring personal representatives to prepare their own form.

[2] Use of Form

This form of property tax certification may be used to state whether *Rev. & Tax. Code § 480* (regarding filing change-of-ownership statement) applies to the decedent's estate and, if so, whether the statute was complied with [*see* CAUTION to § 451.70]. The certification must be filed with the Inventory and Appraisal [*see Prob. Code § 8800(d)*, discussed in the Introduction to § 451.11].

[3] State Statutes

Certification regarding real property ownership. *Prob. Code § 8800(d)*

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PART V. FORMS

38-451 California Forms of Pleading and Practice--Annotated § 451.72

§ 451.72 Objection to Appraisal [Prob. Code § 8906]

[1] FORM Objection to Appraisal [Prob. Code § 8906]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of_____ [*name*],	)	OBJECTION TO APPRAISAL
Deceased.	)	

_____

1. Decedent died on _____.

2. Objector _____ [*name*] is the _____ [*specify relationship establishing that petitioner is an interested person, e.g,* surviving spouse] of _____ [*name*], deceased, and a person interested in the Inventory and Appraisal.

3. The hearing on the petition for final distribution of the estate has not been held as of the date of filing of this objection.

4. The _____ [probate referee *or* personal representative *or* independent expert] in the Inventory and Appraisal filed on _____ [*date filed*] appraised Item No. _____ as follows: _____ [*set forth description of item and appraised value from Inventory and Appraisal, e.g.,* "Real Property located at 123 Elm Street, Paradise City, California," $_____].

5. Objector objects to the appraisal of this item for the following reasons: _____ [*set forth reasons for objection including facts supporting a proposed alternate appraisal figure, if appropriate*].

WHEREFORE, Objector prays the court for an order that the appraisal of Item No. _____, _____ [*specify item, e.g.,* "Real Property located at 123 Elm Street, Paradise City, California"] in the Inventory and Appraisal filed on _____ [*date*], be changed from $_____ to $_____.
Dated: _____.

_____ [*signature*]
Objector
_____ [*signature*]
Attorney for Objector

VERIFICATION

I, _____ [*name*], am the objector in the above-entitled proceeding. I have read the foregoing objection and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein objected to on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

This form is an objection to appraisal for use by any interested person to file an objection to the appraised value of an item in the inventory and appraisal, whether appraised by the personal representative, probate referee, or an independent expert [*see Prob. Code §§ 8901, 8902, 8904*]. An objection may be filed at any time before the hearing on the petition for final distribution of the estate [*Prob. Code § 8906(a)*]. The clerk must schedule a hearing not less than 15 days after the objection is filed [*Prob. Code § 8906(b)*].

[3] Notice

The person objecting must give notice of the hearing, together with a copy of the notice, as provided in *Prob. Code § 1220* [*Prob. Code § 8906(b),(c)*; *see* Ch. 447, *Probate: Statutory Notice Requirements*]. If the appraisal objected to was made by the probate referee, the person objecting must also mail a copy of the notice and objection to the probate referee at least 15 days prior to the hearing [*Prob. Code § 8906(c)*].

[4] Verification

Prob. Code § 1021 requires that an objection or response to a petition, report, plan, or account be verified by the objector [*see Prob. Code § 1021(a)(2), (b)*]. It is not clear whether an appraisal, which is explicitly required to be verified by *Prob. Code § 8906*, is a "petition, report, plan, or account" within the meaning of *Prob Code § 1021*. However, it would seem to be the better practice to verify the objection.

[5] Objection Filed Without Reasonable Cause or Good Faith

If the court determines the objection was filed without reasonable cause or good faith, the court may order that the fees of the personal representative and attorney and any costs incurred for defending the appraisal be made a charge against the person filing the objection [*Prob. Code § 8906(e)*].

[6] State Statutes

"Interested person" defined. *Prob. Code § 48*

Filing objection to appraisal; time; notice requirements. *Prob. Code § 8906*

Attorneys fees and costs charged against person filing objection without reasonablecause or good faith. *Prob. Code § 8906(e)*

[7] Cross References

For a related form, *see § 451.70*

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38-451 California Forms of Pleading and Practice--Annotated § 451.73

§ 451.73 Proceedings for Waiver of Probate Referee [Prob. Code § 8903]--Petition and Statement of Good Cause

[1] FORM Proceedings for Waiver of Probate Referee [Prob. Code § 8903]--Petition and Statement of Good Cause

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of_____[*name*],	)	PETITION FOR WAIVER
Deceased.	)	OF APPRAISAL BY PROBATE REFEREE AND
	)	STATEMENT OF CAUSE

_____

Petitioner _____ [*name*] respectfully represents:

1. Petitioner is the duly appointed, qualified, and acting personal representative of the above entitled estate.

[*EITHER, if a probate referee has been designated*]

2. _____ [*Name*] has been designated by the court to act as a probate referee in these proceedings for the administration of decedent's estate. Petitioner has not delivered an inventory of the property to be administered in decedent's estate to the probate referee.

[*OR, if a probate referee has not been designated*]

2. A probate referee has not been designated to act in these proceedings for the administration of decedent's estate.

[*CONTINUE*]

3. There is good cause to justify the court waiving appraisal by a probate referee in these proceedings on the ground(s) set forth in the Statement of Good Cause, below.

4. A proposed inventory and appraisal has been prepared, a copy of which is attached as Exhibit "A" and made a part hereof.

WHEREFORE, petitioner prays for an order as follows:

1. Waiving appraisal by a probate referee in these proceedings for the administration of the decedent's estate.

2. For such other orders as the court may deem proper.
Dated: _____

_____[*signature*]
Petitioner
_____[*signature*]
Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____[*signature*]

STATEMENT OF GOOD CAUSE

I, _____, the petitioner herein, hereby state the following:

There is good cause to justify the waiver of appraisal by a probate referee in these administration proceedings on the following ground(s): _____[*specify, e.g.,* the assets that would be appraised by the probate referee consist of securities listed on the American Stock Exchange, for which prices are published in the Wall Street Journal, and personal belongings, household furnishings, automobiles, and similar items of recognized market value or low value].
Dated: _____

_____[*signature*]
Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and statement of good cause and know the contents thereof. The same are true of my own knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____[*date*]

_____[*signature*]

CAUTION:
This petition must be verified [*see Prob. Code §§ 1021, 1023*].

[2] Use of Form

This form is for use by a personal representative to petition for a waiver of appraisal by a probate referee [*Prob. Code § 8903*]. The form may be modified for use together with a petition for appointment of the personal representative or together with another petition [*see Prob. Code § 8903(b)*; for a form of petition for appointment of the personal representative, *see* Ch. 442, *Probate: Initiating Probate Administration*]. The application may not, however, be made later than the time the personal representative delivers the inventory to the probate referee, if a probate referee has been designated [*Prob. Code § 8903(b)*].

[3] Contents

This petition states that (1) the petitioner is the personal representative of the estate (Paragraph 1); whether or not a probate referee has been designated in the proceedings (Alternative Paragraphs 2); there is good cause for the granting of the waiver (Paragraph 3); and a copy of the proposed inventory and appraisal is attached to the application (Paragraph 4) [*see Prob. Code §§ 8903(b)*].

The form includes a statement that sets forth good cause that justifies the waiver [*Prob. Code § 8903(a), (b)*]. The example of facts showing good cause is adapted from Alameda Co. Super. Ct. Rules, Rule 12.6.2. Counsel should consult with local court rules for any special requirements relating to a petition for waiver of appraisal by a probate referee.

[4] Notice

The hearing on the waiver must not be sooner than 15 days after the petition is filed [*Prob. Code § 8903(c)*]. Notice of the hearing, together with a copy of the petition and a copy of the proposed inventory and appraisal, must be given at least 15 days before the hearing to all of the following persons [*Prob. Code § 8903(c)*; *see Prob. Code § 1220(a)(2)*]:

- Any nonpetitioning personal representative.

- All persons who have requested special notice in the estate proceeding pursuant to *Prob. Code § 1250*.

- All known heirs and devisees whose interests in the estate would be affected by the waiver.

- The Attorney General, at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the waiver.

- The probate referee, if one has been designated.

If any person entitled to notice is represented by an attorney of record, the notice must also be given to that attorney [*Prob. Code § 1214*].

For discussion of Section 1220 notice and a form of notice for a hearing, seeCh. 447, *Probate: Statutory Notice Requirements* .

[5] State Statutes

Waiver of appraisal by probate referee; requirements, time limit; notice; opposition by designated probate referee; filing. *Prob. Code § 8903*

[6] Cross References

For a related form, *see § 451.70*

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38-451 California Forms of Pleading and Practice--Annotated § 451.74

§ 451.74 Proceedings for Waiver of Probate Referee [Prob. Code § 8903]--Order

[1] FORM Proceedings for Waiver of Probate Referee [Prob. Code § 8903]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____[*name*],	)	ORDER WAIVING APPRAISAL BY PROBATE
Deceased.	)	REFEREE
	)	

_____

The petition of _____ [*name*], personal representative of the estate of _____ [*name*], deceased, for waiver of probate referee and statement of good cause, came on regularly for hearing on _____ [*date*], in [Department _____ (*number*) of] the above entitled court, the Honorable _____ [*name*], Judge, presiding. Petitioner appeared by counsel _____ [*name*].

The court, after examining the petition, statement of good cause, and proposed inventory and appraisal and hearing the evidence, and finding good cause justifying the waiver of appraisal by a probate referee, and that notice of the time and place of the hearing was _____ [given *or* waived] as required by law, grants this petition as follows:

IT IS ORDERED AND ADJUDGED that appraisal by a probate referee is hereby waived.
Dated: _____.

_____[*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use when the court grants the personal representative's petition for waiver of appraisal by a probate referee [*Prob. Code § 8903*].

If the petition is granted, the inventory and appraisal attached to the petition shall be filed pursuant to *Prob. Code § 8800* [*Prob. Code § 8903(e)*].

[3] State Statutes

Probate orders generally. *Prob. Code §§ 1046-1049*

Finding of giving or waiver of notice. *Prob. Code § 1260(b)*

[4] Local Rules of Court

Orders required to be complete in themselves and set forth all matters actually passedon by court, date of hearing, relief granted, and names of persons and descriptions of property or amounts of money affected. Los Angeles Co. Super. Ct. Rules, Rule 10.42; San Francisco Uniform Local Ct. Rules, Rule 14.27

Orders required to be submitted to Probate Courtroom at least two weeks in advance of scheduled hearing date and required to note hearing date on face sheet. San Francisco Uniform Local Ct. Rules, Rule 14.6

[5] Cross References

For a related form, *see § 451.73*

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38-452 California Forms of Pleading and Practice--Annotated 452.syn

§ 452.syn Synopsis to Chapter 452: PROBATE: PRORATION OF ESTATE AND GENERATION-SKIPPING TRANSFER TAXES

§ 452.01 Scope of Chapter

§§ 452.02-452.09 [Reserved]

§ 452.10 Governing Law

§ 452.11 Definitions Applicable to Estate Tax Proration

§ 452.12 Definitions Applicable to Generation-Skipping Transfer Taxes

§ 452.13 Proration

[1] Generally

[2] Exceptions

[a] When Federal Law Directs Method of Proration

[b] When Decedent Directed Method of Apportionment

[3] Adjustments to General Proration Formula for Credits, Deductions, Exemptions, Interest, and Penalties

[4] Prorations for Trusts and Temporary Interests

[5] Adjustments for Election Under I.R.C. § 2032A

[6] Proration of Additional Tax on Excess Retirement Accumulations

[7] Responsibility for Extended Estate Tax

§ 452.14 Tax on Property Not in Possession of Personal Representative

§ 452.15 Right of Reimbursement

§ 452.16 Court Proceeding to Determine Proration

[1] Who May Commence

[2] Proper Court

[3] Notice of Hearing of Petition

§ 452.17 Court Order to Effectuate Proration

§ 452.18 Modification of Proration Order

§ 452.19 Action by Foreign Representative or Trustee

§§ 452.20-452.39 [Reserved]

§ 452.40 State Statutes

[1] Proration of Estate Taxes

[2] Proration of Generation-Skipping Transfer Taxes

§ 452.41 Decisions

[1] Adjustments

[2] Delinquent Taxes

[3] Direction Usurping Statutory Scheme

[4] Trusts and Temporary Interests

§ 452.42 Law Reviews

§§ 452.43-452.59 [Reserved]

§ 452.60 Petition to Determine Proration of Estate Tax [Prob. Code §§ 20120, 20121]

[1] FORM

[2] Use of Form

[3] Court Action Required

[4] Contents of Petition

[5] Verification

[6] Summons and Notice of Hearing

[7] Reimbursement and Property Not in Possession of Representative

[8] State Statutes

§ 452.61 Order Determining Proration of Estate Tax [Prob. Code § 20123]

[1] FORM

[2] Use of Form

[3] Effect of Order

[4] Order Appealable

[5] State Statutes

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Chapter 452 PROBATE: PRORATION OF ESTATE AND GENERATION-SKIPPING TRANSFER TAXES
PART I. SCOPE

38-452 California Forms of Pleading and Practice--Annotated § 452.01

§ 452.01 Scope of Chapter

This chapter discusses California law regarding proration of estate and generation-skipping transfer taxes with respect to estates and persons interested in estates of, and transferees of property of, decedents dying on and after January 1, 1987. This chapter includes a form of petition for determination of proration of estate tax [*see § 452.60*] and a related order [*see § 452.61*].

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PART I. SCOPE

38-452 California Forms of Pleading and Practice--Annotated §§ 452.02-452.09

[Reserved]

§§ 452.02[Reserved]

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PART II. LEGAL BACKGROUND

38-452 California Forms of Pleading and Practice--Annotated § 452.10

§ 452.10 Governing Law

For estates, and persons interested in estates, of decedents dying on and after January 1, 1987, proration of estate taxes is governed by *Prob. Code §§ 20100-20125* [*Prob. Code § 20101(a)*]. Former Prob. Code §§ 970-977 remain applicable if the decedent died before January 1, 1987 [*Prob. Code § 20101(b)*]. No inference as to the applicable law in effect before January 1, 1987, is to be drawn from the enactment of *Prob. Code §§ 20100-20125* [*Prob. Code § 20101(b)*].

For transferees of property of a decedent who died on or after January 1, 1987, proration of generation-skipping transfer taxes is governed by *Prob. Code §§ 20200-20225* [*Prob. Code § 20201(a)*]. No inference as to the applicable law in effect before January 1, 1987, is to be drawn from the enactment of *Prob. Code §§ 20200-20225* [*Prob. Code § 20201(b)*]. *Prob. Code §§ 20200-20225* parallel comparable provisions of *Prob. Code §§ 20100-20125* [*see Recommendation Relating to Proration of Estate Taxes*, 18 Cal. L. Revision Comm'n Reports 1145 (1986)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewTax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)Tax LawState & Local TaxesEstate & Gift TaxGeneration-Skipping Transfer Taxes

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PART II. LEGAL BACKGROUND

38-452 California Forms of Pleading and Practice--Annotated § 452.11

§ 452.11 Definitions Applicable to Estate Tax Proration

Except when the context otherwise requires, the following definitions govern the construction of *Prob. Code §§ 20100-20125* [*Prob. Code § 20100*]:

- "Estate tax" means a tax imposed by any federal or California estate tax law, now existing or hereafter enacted, and includes interest and penalties on any deficiency.

- "Person interested in the estate" means any person, including a personal representative, entitled to receive, or who has received, from a decedent while alive, or by reason of the death of the decedent, any property or interest therein. It includes, but is not limited to, persons who receive property by nonprobate transfer, such a joint tenant or the beneficiary of a trust [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 20100*].

- "Personal representative" includes a guardian, conservator, trustee, or other person charged with the responsibility of paying the estate tax. Thus, "personal representative" also includes an executor, administrator, administrator with will annexed, or special administrator [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 20100*].

- "Property" means property included in the gross estate for federal estate tax purposes.

- "Value" means fair market value as determined for federal estate tax purposes.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewTax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)Tax LawState & Local TaxesEstate & Gift TaxGeneration-Skipping Transfer TaxesTax LawState & Local TaxesEstate & Gift TaxGross Estate

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Chapter 452 PROBATE: PRORATION OF ESTATE AND GENERATION-SKIPPING TRANSFER TAXES
PART II. LEGAL BACKGROUND

38-452 California Forms of Pleading and Practice--Annotated § 452.12

§ 452.12 Definitions Applicable to Generation-Skipping Transfer Taxes

Except when the context otherwise requires, the following definitions shall govern the construction of *Prob. Code §§ 20200-20225* [*Prob. Code § 20200*]:

- "Generation-skipping transfer tax" means a tax imposed by any federal or California generation-skipping transfer tax law, now existing or hereafter enacted, and includes interest and penalties on any deficiency.

- "Property" means property on which a generation-skipping transfer tax is imposed.

- "Transferee" means any person who receives, who is deemed to receive, or who is the beneficiary of, any property.

- "Trustee" means any person who is a trustee within the meaning of the federal generation-skipping transfer tax law, or who is otherwise required to pay a generation-skipping transfer tax.

- "Value" means fair market value as determined for generation-skipping transfer tax purposes.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewTax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)Tax LawState & Local TaxesEstate & Gift TaxGeneration-Skipping Transfer Taxes

California Forms of Pleading and Practice--Annotated

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Volume 38: Probate: Is Probate Necessary? thru Probate: Estate Tax-Chs. 440-453
Chapter 452 PROBATE: PRORATION OF ESTATE AND GENERATION-SKIPPING TRANSFER TAXES
PART II. LEGAL BACKGROUND

38-452 California Forms of Pleading and Practice--Annotated § 452.13

§ 452.13 Proration

[1] Generally

Except as provided in *Prob. Code § 20110(b)* and *Prob. Code § 20210(b)*, any estate or generation-skipping transfer (hereinafter "GST") tax must be equitably prorated among the persons interested in the estate, in the case of estate taxes, or among the transferees, in the case of GST taxes, in the manner prescribed in *Prob. Code §§ 20110-20117* or *20210-20215* [*Prob. Code §§ 20110(a)* (estate tax), 20210(a) (GST tax)]. An extended estate tax may be prorated prior to actual payment of the tax [*see Recommendation Relating to Proration of Estate Taxes*, 18 Cal. L. Revision Comm'n Reports 1131 (1986); *Prob. Code § 20115*, discussed in *§ 452.13[7]*]. Penalties and interest on an estate or GST tax are prorated pursuant to *Prob. Code § 20112(c)* or *20212(b)*, discussed in *§ 452.13[3]*.

The proration required by *Prob. Code §§ 20110-20117* or *20210-20215* must be made in the proportion that the value of the property received by each person interested in the estate, or transferee, bears to the total value of all property received by all persons interested in the estate, or by all transferees, subject to other provisions of *Prob. Code §§ 20110-20117* or *20210-20215* [*Prob. Code §§ 20111* (estate tax), 20211 (GST tax)]. The proration is made against all property included in decedent's gross estate for federal estate tax purposes, including gifts includable under *I.R.C. § 2035*. The proration is based on fair market value as determined for federal estate tax purposes, even though the estate tax may be based on a special value [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 20111*].

[2] Exceptions

[a] When Federal Law Directs Method of Proration

An exception in *Prob. Code §§ 20110(b)* and *20210(b)* provides that the proration methods in *Prob. Code §§ 20110-20117* and *20210-20215* do not apply when federal law directs another manner of proration [*see, e.g., I.R.C. § 2207A* (recovery by estate of tax on property on which previous marital deduction was taken)]. In that case, the California estate or GST tax must be prorated in the manner directed by federal law for the proration of federal estate or GST tax [*Prob. Code §§ 20110(b)(2)* (estate tax), 20210(b)(2) (GST tax); *see, e.g., Estate of Libeu (1988) 205 Cal. App. 3d 1436, 1443-1445, 253 Cal. Rptr. 456* (decided under prior California law, and holding former Prob. Code § 973 (*now see Prob. Code § 20113*) preempted by *I.R.C. § 2032A(c)(5)*); *see also Prob. Code § 20114(c)* (discussed in *§*

452.13[5]), which currently governs situation considered in *Libeu*, apparently conforms to federal law].

[b] When Decedent Directed Method of Apportionment

Prob. Code §§ 20110(b)(1) and *21210(b)(1)* provide that the general rule of equitable proration does not apply to the extent that the decedent or transferor in a written inter vivos or testamentary instrument disposing of or transferring property "specifically directs that the property be applied to the satisfaction" of the estate or GST tax or that the tax "be prorated to the property in the manner provided in the instrument." Before the adoption of these statutes, the California Supreme Court held in *Estate of Armstrong* [*Estate of Armstrong (1961) 56 Cal. 2d 796, 17 Cal. Rptr. 138, 366 P.2d 490]* that, absent a "clear and unambiguous direction" by the decedent of an intention to the contrary, the general rule of equitable proration applies so that the tax burden is equitably allocated among those who are benefitted [*Estate of Armstrong (1961) 56 Cal. 2d 796, 800, 802, 17 Cal. Rptr. 138, 366 P.2d 490]* . In *Estate of Wathen* [*Estate of Wathen (1997) 56 Cal. App. 4th 48, 64 Cal. Rptr. 2d 805]* , the Court of Appeal was asked to apply *Estate of Armstrong* to an ambiguous estate tax proration clause contained in a will that "poured over" the decedent's property to an inter vivos trust. Although it was clear that the will was intended to give directions with respect to tax proration, it was not clear how the directions were intended to apply. One of the beneficiaries under the trust argued that since the proration directions were was not clear and unambiguous, *Estate of Armstrong* required the court to apply the general rule of equitable proration and prohibited it from considering extrinsic evidence on the question. The trial court disagreed and admitted extrinsicevidence that the testator-settlor had intended by the will to require that all of the death taxes be paid out of the residue of the trust. The Court of Appeal agreed with the trial court, holding that *Estate of Armstrong* required the application of the general rule of equitable proration only when the dispositive instrument failed altogether to refer to tax proration. When the existence of a tax proration clause is clear but its terms are ambiguous, it is proper to consider extrinsic evidence to determine the decedent's intentions with respect to proration [*Estate of Wathen (1997) 56 Cal. App. 4th 48, 53, 64 Cal. Rptr. 2d 805]* .

The objecting beneficiary in *Estate of Wathen* offered a second objection to the trial court's ruling on proration. Since the proration clause was in the will and not in the inter vivos trust instrument, the beneficiary argued that the provision had no application to the trust assets. Again the Court of Appeal disagreed, pointing out that the will and the inter vivos trust instrument were executed on the same day and as part of an "integrated testamentary plan" intended to accomplish the same purpose. Accordingly, both documents had to be considered to determine whether the decedent had expressed a clear direction against statutory proration. When there is an "integrated testamentary plan" consisting of a will and a trust, it is sufficient if the tax proration directions are contained in either document; there is no requirement that they be contained in both [*Estate of Wathen (1997) 56 Cal. App. 4th 48, 53-54, 64 Cal. Rptr. 2d 805]* .

[3] Adjustments to General Proration Formula for Credits, Deductions, Exemptions, Interest, and Penalties

In making a proration of the federal estate tax or of the federal or California GST tax, allowances must be made for credits, exemptions, and deductions allowed for the purpose of determining the tax payable [*Prob. Code §§ 20112(a)* (estate tax), 20212(a) (GST tax)]. In the case of federal estate taxes, these include credits allowed for state or foreign death taxes [*Prob. Code § 20112(a)*].

In making a proration of the California estate tax, allowances must be made for (1) credits (other than the credits for state death taxes paid) allowed by the federal estate tax law, and attributable to property located in California; and (2) exemptions and deductions allowed by the federal estate tax law for the purpose of determining the taxable estate, and attributable to property located in California [*Prob. Code § 20112(b)*].

In making a proration of any estate or GST tax, interest for extensions of estate taxes, and interest and penalties on any deficiency, must be charged to equitably reflect the benefits and burdens of the extension or deficiency, and of any tax deductions associated with the interest and penalties [*Prob. Code §§ 20112(c)* (estate tax), 20212(b) (GST tax)].

Former Prob. Code §§ 970, 972 (*now see Prob. Code § 20112(a),(b)*) have been interpreted to require federal estate taxes to be prorated only among those persons whose gifts or legacies actually create the tax [*Estate of Lock (1981) 122 Cal. App. 3d 892, 901-902, 176 Cal. Rptr. 358* ; *Estate of Pearson (1949) 90 Cal. App. 2d 436, 439, 203 P.2d 52]* . Because the purpose of the proration statutes is to apportion the tax burden equitably among those whose gifts contribute to the tax burden, legacies that do not create or add to the tax are exempt from proration [*Estate of Buckhantz (1953) 120 Cal. App. 2d 92, 99, 260 P.2d 794]* . Property for which a marital deduction is taken does not contribute to the federal estate tax burden, and thus a marital deduction gift is exempt from proration under the statutory proration scheme [*Estate of Wakefield (1968) 258 Cal. App. 2d 274, 277-279, 65 Cal. Rptr. 664* ; *Estate of Buckhantz (1953) 120 Cal. App. 2d 92, 101-102, 260 P.2d 794* (dicta, martial deduction held not proper)].

It is arguable that a charitable bequest is also free from apportionment [*see Estate of Neider (1966) 243 Cal. App. 2d 102, 109-111, 52 Cal. Rptr. 47* (dicta, determined only that residue, of which charity took 50 percent, should be calculated after proration of tax to all legatees; it could not be argued that testator intended equal tax burden, as it must be presumed that testator knew that gift to charity would be deducted from estate for estate tax purposes and must have intended gross equality or equality prior to taxes rather than net equality or equality after tax burden)]. Often, however, the testator will provide that taxes be paid from the residue, or that tax attributable to specific devises be paid from the residue. In those situations, a residuary charitable legatee will bear the burden of taxes [*see, e.g., Estate of Silveira (1983) 149 Cal. App. 3d 604, 612-613, 197 Cal. Rptr. 121* (unambiguous instruction required that, because residue was insufficient to pay all taxes, deficiency be shared by all devisees and legatees, including charitable devisees)].

[4] Prorations for Trusts and Temporary Interests

If a trust is created or other provision made whereby a person (in the case of estate tax) or a transferee (in the case of GST tax) is given an interest in income, an estate for years or for life, or other temporary interest in property, the estate and GST tax on both the temporary interest and on the remainder or other interests in the property must be charged against and paid out of the corpus of the property without apportionment between remainders or other interests and the temporary estates [*Prob. Code §§ 20113* (estate tax), 20213 (GST tax); *but see I.R.C. § 2032A(c)(5)*; *Prob. Code § 20114(c)*; *Estate of Libeu (1988) 205 Cal. App. 3d 1436, 1443-1445, 253 Cal. Rptr. 456* (different rule applicable to apportionment of tax on early disposition of special use property held in trust)]. *Prob. Code § 20113* does not create an exception to the general proration statute. Rather, it is a determination by the legislature that the most equitable approach to the proration of successive interests is to direct the allocable tax to the asset itself and to permit the impact of the payment to adjust itself between holders of the successiveinterests over time [*see Estate of Malpas (1992) 7 Cal. App. 4th 1901, 1908-1910, 9 Cal. Rptr. 2d 806]* .

An annuity is not an income interest for life qualifying for statutory exemptions from proration of estate tax under *Prob. Code § 20113*. The distinction between an annuity and a gift of an income interest that qualifies for exemption under *Prob. Code § 20113* is that a qualifying gift of income is usually contingent, dependent on the existence of income, while an annuity is certain and payable out of a specific fund [*Estate of Steele (1981) 113 Cal. App. 3d 106, 116-117, 169 Cal. Rptr. 635* (decided under former Prob. Code § 973)].

[5] Adjustments for Election Under I.R.C. § 2032A

If an election is made pursuant to *I.R.C. § 2032A*, the proration is to be based on the amount of federal estate tax that would be payable but for the election. The amount of the reduction in federal estate tax resulting from an election pursuant to *I.R.C. § 2032A* reduces the tax that is otherwise attributable to the qualified real property that is the subject of the election [*Prob. Code § 20114(b)*]. If the tax that is otherwise attributable to the "qualified real property," as defined in *I.R.C. § 2032A* [*Prob. Code § 20114(a)*], is reduced to zero, then any excess amount of reduction will reduce the tax otherwise payable with respect to the other property, and this amount is to be equitably prorated in accordance with *Prob. Code § 20111* (discussed in *§ 452.13[1]*) [*Prob. Code § 20114(b)*].

If additional federal estate tax is imposed under *I.R.C. § 2032A(c)* by reason of early disposition or cessation of qualified use, the additional tax will be a charge against the portion of the qualified real property to which the additional tax is attributable and will be equitably prorated among the persons interested in that portion of the qualified real property in proportion to their interests [*Prob. Code § 20114(c)*; *see Estate of Libeu (1988) 205 Cal. App. 3d 1436, 1443-1445, 253 Cal. Rptr. 456* (*I.R.C. § 2032A(c)* requires adjusted tax difference caused by recapture tax owed for special use value property held in trust to be allocated among trust beneficiaries in proportion to respective values of property interest held by each)].

Prob. Code § 20114 has no counterpart in the prior law, and makes clear that when an election is made under *I.R.C. § 2032A*, the qualified heirs who receive the qualified special use property also receive the entire benefit of the estate tax reduction resulting from the election. Similarly, *Prob. Code § 20114(c)* makes clear that they are responsible for any additional tax subsequently imposed because of an early disposition by the qualified heiror early cessation of the qualified use [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 20114*]. For example, assume an estate in which, absent a special valuation election, each beneficiary receives property of equal value and shares equally in the prorated estate taxes. If one beneficiary makes a special valuation election that reduces the total estate tax, the amount of the reduction must be allocated entirely to that beneficiary, and the others must pay the amount for which they would have been liable in the absence of the special valuation election [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 20114*].

For another example, assume a decedent dies in 1986, leaving an estate consisting of $500,000 cash and real property having a fair market value of $500,000 and a value of $250,000 under *I.R.C. § 2032A*. The decedent's will leaves the real property to A and the cash to B. *Prob. Code § 20114* provides the following results [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 20114*]:

- If no election is made under *I.R.C. § 2032A*, the taxable estate is $1,000,000. The estate tax is $190,000, which is prorated $95,000 to A and $95,000 to B.

- If an election is made under *I.R.C. § 2032A*, the taxable estate is $750,000. The estate tax is $92,500; the reduction is $97,500. A is credited with $95,000 against the fair market value proration. This represents the amount of the reduction in tax resulting from the election to the extent of the tax that would be attributable to the qualified real property but for the election. A pays no tax; and B pays the full tax of $92,500, which represents a reduction in B's liability of $2,500.

Prob. Code § 20114(b) assures that the qualified heir receiving the qualified real property receives the benefit of the tax relief under *I.R.C. § 2032A* up to the amount of the tax that would have been prorated to the fair market value of the qualified real property. B also benefits from the election, but no further compensating adjustment is required, except that if B shares in the devise with other persons, the tax obligation of each is reduced by a proportionate share of the $2,500 savings. If A causes the full additional tax to be assessed under *I.R.C. § 2032A(c)*, application of *Prob. Code § 20114(c)* will cause the entire additional tax of $97,500 to be prorated to A. This is true even though B also benefited from the election under *I.R.C. § 2032A* [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 20114*].

[6] Proration of Additional Tax on Excess Retirement Accumulations

Prob. Code § 20114.5(b) establishes the rule for prorating increases in estate tax due to "excess retirement accumulations." Under this rule, if the federal estate tax is increased under former *I.R.C. § 4980A(d)* or its predecessor, former I.R.C. § 4981A [*see Prob. Code § 20114.5(a)(1)*], the amount of the increase must be charged against the persons who receive the "excess retirement accumulation" that gives rise to the increase and must be equitably prorated among all persons who receive interests in qualified employer plans and individual retirement plans to which the excess retirement accumulation is attributable [Prob. Code §20114.5(b)]. As used in *Prob. Code § 20114.5*, "excess retirement accumulation" has the meaning given to it in former *I.R.C. § 4980A(d)(3)* [*Prob. Code § 20114.5(a)(2)*]. Note, however,

that the tax on excess retirement accumulations was repealed by the Taxpayer Relief Act of 1997 [Pub. L. No. 105-34, § 1073(a), repealing *I.R.C. § 4980A(d)*] for estates of decedents dying after December 31, 1996. Thus, only the estates of decedents dying prior to that date face any potential liability for this added tax, and proration will be an issue only in those cases.

[7] Responsibility for Extended Estate Tax

If the payment of any portion of the federal estate tax is extended under the provisions of the federal estate tax law [*see, e.g., I.R.C. §§ 6163(a), 6166*], the amount of extended tax shall be a charge against the persons who receive the specific property that gives rise to the extensions [*Prob. Code § 20115*].

Prob. Code § 20115 ensures that the persons who receive property that gives rise to the extension of estate tax are the persons who benefit from the extension privilege and makes clear that when a decedent's estate consists of a closely held business with respect to which estate taxes may be extended, the deferred tax and any interest on that tax follow the business [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 20115*; *see Prob. Code § 20112* (allowance and charges for interest), discussed in *§ 452.13[3]*]. If the persons who receive the property fail to pay the tax when due and the tax is collected from persons other than those to whom it is prorated, the persons from whom it was collected have a right of reimbursement against those to whom the tax is prorated [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 20115*; *see also Prob. Code §§ 20116, 20117*, discussed in *§ 452.14* and *§ 452.15*]. On the other hand, proration of an extended estate tax may be made prior to actual payment of the tax [*see Recommendation Relating to Proration of Estate Taxes*, 18 Cal. L. Revision Comm'n Reports 1131 (1986)].

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§ 452.14 Tax on Property Not in Possession of Personal Representative

If all property does not come into the possession of the personal representative in the case of estate tax, or into possession of the trustee in the case of GST tax, the personal representative or trustee is entitled, and has the duty, to recover from the persons interested in the estate, or from the transferees, the proportionate amount of the estate or GST tax with which the persons or transferees are chargeable under *Prob. Code §§ 20100-20125* or *20200-20225* [*Prob. Code §§ 20116(a)* (estate tax), 20214(a) (GST tax)]. Failure of the personal representative to make a good faith effort to collect taxes prorated against a person is a breach of the fiduciary obligation of the personal representative, for which the representative is personally liable and on the bond, if any [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 20116*]. The court may by order direct payment of the amount of taxes owed by a person to the personal representative [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 20116*; for discussion *see § 452.16*].

If the personal representative, in the case of estate tax, or the trustee, in the case of GST tax, cannot collect from any person interested in the estate or from any transferee the amount of an estate or GST tax apportioned to that person or transferee, the amount not recoverable shall be equitably prorated among the other persons interested in the estate, or among the other transferees, in the case of GST tax, who are subject to proration [*Prob. Code §§ 20116(b)* (estate tax), 20214(b) (GST tax)].

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§ 452.15 Right of Reimbursement

If a person is charged with or required to pay an estate or GST tax greater than the amount prorated to that person because another person does not pay the amount of estate or GST tax prorated to the other person, the person charged with or required to pay the greater amount has a right of reimbursement against the other person [*Prob. Code §§ 20117(a)* (estate tax), 20215(a) (GST tax)]. This right may be enforced through the personal representative in the case of estate tax, or through the trustee in the case of GST tax, in the personal representative's or trustee's discretion, or may be enforced directly by the person charged with or required to pay the greater amount, and for the purpose of direct enforcement the person is subrogated to the position of the personal representative or the trustee [*Prob. Code §§ 20117(b)* (estate tax), 20215(b) (GST tax); for discussion and forms for use in subrogated actions, see Ch. 536, *Subrogation*].

The personal representative, the trustee, or the person who has a right of reimbursement may commence a proceeding to have a court determine the right of reimbursement [*Prob. Code §§ 20117(b)* (estate tax), 20215(b) (GST tax)]. *Prob. Code §§ 20120-20125* in the case of estate taxes or *Prob. Code §§ 20220-20225* in the case of GST taxes (discussed in *§ 452.16*), with changes necessary to make those provisions appropriate, govern the proceeding for determination of the right of reimbursement, and the court order determining the right of reimbursement is an enforceable judgment [*Prob. Code §§ 20117(c)* (estate tax), 20215(c) (GST tax)].

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§ 452.16 Court Proceeding to Determine Proration

[1] Who May Commence

The personal representative or any person interested in the estate may commence a proceeding to have a court determine the proration of estate tax [*Prob. Code § 20120(a)*]. The trustee or any transferee may commence a proceeding to have a court determine the proration of GST tax [*Prob. Code § 20220(a)*]. In both cases, the proceeding is commenced by filing a verified petitionthat sets forth the jurisdictional facts and other facts necessary for the court to determine the proration [*Prob. Code §§ 20121* (estate tax), 20221 (GST tax); *see Prob. Code § 1021(a)(1)* (requiring petitions to be verified)].

[2] Proper Court

The petition may be filed in the court in which the estate of the decedent was administered or, if no administration proceedings have been commenced, in the superior court of any county in which the estate of the decedent may be administered [*Prob. Code §§ 20120(b)* (estate tax), 20220(b) (GST tax)].

If proceedings for the administration of the decedent's estate are pending, the petition for determination of proration is combined with the administration proceedings, and if the petition is filed before final distribution, there will be no additional filing fee [*Prob. Code §§ 20120(c)* (estate tax), 20220(c) (GST tax)].

[3] Notice of Hearing of Petition

Not less than 30 days before the hearing, the petitioner must cause a notice of hearing and a copy of the petition to be mailed to the personal representative, or trustee, and to each person interested in the estate in the case of estate taxes, or to each transferee in the case of GST taxes, against whom prorated amounts may be charged pursuant to *Prob. Code § 20123(a)(1)* or *20223(a)(1)*, discussed in *§ 452.17* [*Prob. Code §§ 20122(a)* (estate tax), 20222(a) (GST tax); *see Prob. Code § 1201* (petitioner otherwise entitled to notice need not give notice to self)]. In addition, not less than 30 days before the hearing, the petitioner must cause a summons and a copy of the petition to be served on each person interested in the estate or transferee who may be directed to pay prorated amounts pursuant to *Prob. Code § 20123(a)(2)* or *20223(a)(2)*, discussed in *§ 452.17* [*Prob. Code § 20122(b)* (estate tax), 20222(b) (GST tax)]. The summons must be

in the form and served in the manner prescribed in *Code Civ. Proc. §§ 410.10-418.11* [*Prob. Code §§ 20122(b)* (estate tax), 20222(b) (GST tax); *see* Ch. 518, *Service of Summons and Papers*].

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§ 452.17 Court Order to Effectuate Proration

On determining the proration, the court must make an order for the following [*Prob. Code §§ 20123(a)* (estate tax), 20223(a) (GST tax)]:

- Directing the personal representative, or in the case of GST taxes, the trustee, to charge the persons or transferees against whom an estate or GST tax has been prorated the prorated amounts insofar as the personal representative or trustee is in possession of any property or interests of the persons or transferees against whom the charge may be made; and

- Summarily directing all other persons or transferees against whom an estate or GST tax has been prorated to pay the prorated amounts to the personal representative, or in the case of GST tax, to the trustee.

The court's order or refusal to make an order is appealable [*Prob. Code § 1300(c)*]. If an order of proration is made, it is a judgment enforceable against the person against whom an estate or GST tax has been prorated [*Prob. Code §§ 20123(b)* (estate tax), 20223(b) (GST tax)].

The order prorating an estate tax includes interest and penalties [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 20123*; *see Prob. Code § 20112* (adjustments)]. Costs of enforcing a proration order are recoverable under *Code Civ. Proc. § 685.040* [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 20116*].

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§ 452.18 Modification of Proration Order

Whenever it appears that the amount of estate or GST tax as actually determined is different from the amount of estate or GST tax on which the court based an order determining proration, the court must, on the petition of the personal representative, trustee, transferee, or any person interested in the estate, modify its original order [*Prob. Code §§ 20124* (estate tax), 20224 (GST tax)].

Prob. Code § 20124 provides for the possibility that subsequent to the making of an order, the taxes may be adjusted as the result of audit or the filing of an amended return. It does not apply to any additional tax under *I.R.C. § 2032A(c)* resulting from a disposition or cessation of qualified use of specially valued property [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 20124*; *see Prob. Code § 20114(c)* (responsibility for additional tax under *I.R.C. § 2032A(c)*)].

Prob. Code § 20124 does not provide a limitation period for modification of a proration order; the matter is left to laches and other equitable doctrines within the discretion of the court [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 20124*].

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Chapter 452 PROBATE: PRORATION OF ESTATE AND GENERATION-SKIPPING TRANSFER TAXES
PART II. LEGAL BACKGROUND

38-452 California Forms of Pleading and Practice--Annotated § 452.19

§ 452.19 Action by Foreign Representative or Trustee

A personal representative in the case of estate tax, or a trustee in the case of GST tax, acting or resident in another state may commence an action in California to recover from a person interested in the estate, or from a transferee, who either is resident in California or owns property in California, the amount of the federal estate or GST tax, or an estate or GST tax or death duty payable to another state, apportioned to the person [*Prob. Code §§ 20125(a)* (estate tax), 20225(a) (GST tax); *see also Code Civ. Proc. §§ 1710.10-1710.65* (enforcement of sister-state money judgments, discussed in *Ch. 318, Judgments, § 318.180* et seq.]. The action is commenced in the superior court of any county in which administration of the estate of the decedent would be proper or, if none, in which any defendant resides [*Prob. Code §§ 20125(b)* (estate tax), 20225(a) (GST tax)]. For purposes of the action the apportionment by the court having jurisdiction of the administration of the decedent's estate in the other state is prima facie correct [*Prob. Code §§ 20125(c)* (estate tax), 20225(a) (GST tax)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesForeign RepresentativesTax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)Tax LawState & Local TaxesEstate & Gift TaxGeneration-Skipping Transfer Taxes

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[Reserved]

§§ 452.20[Reserved]

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38-452 California Forms of Pleading and Practice--Annotated § 452.40

§ 452.40 State Statutes

[1] Proration of Estate Taxes

Definitions. *Prob. Code § 20100*

Transition provisions. *Prob. Code § 20101*

Proration in general. *Prob. Code §§ 20110, 20111*

Adjustments for credits, exemptions, deductions, interest and penalties. *Prob. Code § 20112*

Trusts and temporary interests. *Prob. Code § 20113*

Adjustment for election under *I.R.C. § 2032A. Prob. Code § 20114*

Proration of additional tax on excess retirement accumulation. *Prob. Code § 20114.5*

Proration of extended tax. *Prob. Code § 20115*

Collection of proration against property not in possession of personal representative. *Prob. Code § 20116*

Rights of reimbursement. *Prob. Code § 20117*

Petition for determination of proration. *Prob. Code §§ 20120-20124*

Enforcement of sister state proration order. *Prob. Code § 20125*

[2] Proration of Generation-Skipping Transfer Taxes

Definitions. *Prob. Code § 20200*

Transition provisions. *Prob. Code § 20201*

Proration in general. *Prob. Code §§ 20210, 20211*

Adjustments for credits, exemptions, deductions, interest and penalties. *Prob. Code § 20212*

Trusts and temporary interests. *Prob. Code § 20213*

Collection of proration against property not in possession of trustee. *Prob. Code § 20214*

Rights of reimbursement. *Prob. Code § 20215*

Petition for determination of proration. *Prob. Code §§ 20220-20224*

Enforcement of sister-state proration order. *Prob. Code § 20225*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewTax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)Tax LawState & Local TaxesEstate & Gift TaxGeneration-Skipping Transfer Taxes

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38-452 California Forms of Pleading and Practice--Annotated § 452.41

§ 452.41 Decisions

[1] Adjustments

Statutory proration scheme ordinarily requires federal estate taxes to be prorated onlyamong those whose gifts or legacies create tax. *Hoover v. Hartman (1982) 136 Cal. App. 3d 1019, 1029, 186 Cal. Rptr. 669* (decided under former Prob. Code § 970); *Security First Nat. Bank v. Wellslager (1948) 88 Cal. App. 2d 210, 213-214, 198 P.2d 700* (decided under former Prob. Code § 970)

[2] Delinquent Taxes

Prob. Code § 20113 proration rule is applicable to interest payments on delinquent taxes as well as tax payment itself. *Simpson v. White (1997) 57 Cal. App. 4th 814, 67 Cal. Rptr. 2d 361*

[3] Direction Usurping Statutory Scheme

Unless testator specifically directs otherwise, apportionment is required even if proration would frustrate testator's donative intent. *Estate of Malpas (1992) 7 Cal. App. 4th 1901, 1906, 9 Cal. Rptr. 2d 806*

Ambiguity regarding term "residue" requires admission of extrinsic evidence. *Hoover v. Hartman (1982) 136 Cal. App. 3d 1019, 1027, 186 Cal. Rptr. 669* (decided under former Prob. Code § 970)

Direction that trustee pay trust's ratable share of tax out of principal is not direction usurping proration. *California First Bank v. Townsend (1981) 124 Cal. App. 3d 922, 933, 177 Cal. Rptr. 723* (decided under former Prob. Code § 970); *Security First Nat. Bank v. Wellslager (1948) 88 Cal. App. 2d 210, 219, 198 P.2d 700* (decided under former Prob. Code § 970)

Specific bequest does not imply that gift is to pass free of burden of its share of taxes. *California First Bank v.*

Townsend (1981) 124 Cal. App. 3d 922, 930-932, 177 Cal. Rptr. 723 (decided under former Prob. Code § 970)

Court of appeal is not bound by trial court's interpretation of ambiguous direction when extrinsic evidence is not in conflict and no issue of credibility is involved; in this situation, appellate court may make independent interpretation. *Estate of Steele (1981) 113 Cal. App. 3d 106, 117, 169 Cal. Rptr. 635*

Admission of extrinsic evidence in absence of instruction regarding payment of taxes is error; when there is no instruction, taxes must be prorated in accordance with statutory scheme. *Estate of Hendricks (1970) 11 Cal. App. 3d 204, 209, 89 Cal. Rptr. 748* (decided under former Prob. Code § 970)

Direction for payment of taxes by estate requires payment from residue before its division, and charitable residuary legatee's share was not to be exempted, or calculated without respect to charges for tax, as it might have been under statutory proration. *Estate of McAuliffe (1955) 132 Cal. App. 2d 476, 481-482, 282 P.2d 541* (decided under former Prob. Code § 972)

Direction that taxes and expenses be paid by estate and not chargeable to beneficiaries usurps proration; by putting taxes in same category as expenses, direction to usurp proration was clear. *Estate of McAuliffe (1955) 132 Cal. App. 2d 476, 479, 480, 282 P.2d 541* (decided under former Prob. Code § 970)

[4] Trusts and Temporary Interests

Prob. Code § 20113, allocating estate tax between successive interests, applies even though it requires sale of asset. *Estate of Malpas (1992) 7 Cal. App.4th 1901, 1908-1910, 9 Cal. Rptr. 2d 806* (house must be sold and sale proceeds divided between life tenant and remainder holder)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewTax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)Tax LawState & Local TaxesEstate & Gift TaxEstate TaxGeneral OverviewTax LawState & Local TaxesEstate & Gift TaxGeneration-Skipping Transfer Taxes

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38-452 California Forms of Pleading and Practice--Annotated § 452.42

§ 452.42 Law Reviews

Service Determines Who Pays Estate Taxes When Will Doesn't, 17 Est. Plan. 270(1) (1990)

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38-452 California Forms of Pleading and Practice--Annotated §§ 452.43-452.59

[Reserved]

§§ 452.43[Reserved]

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38-452 California Forms of Pleading and Practice--Annotated § 452.60

§ 452.60 Petition to Determine Proration of Estate Tax [Prob. Code §§ 20120, 20121]

[1] FORM Petition to Determine Proration of Estate Tax [Prob. Code §§ 20120, 20121]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____[*name*],	)	PETITION FOR DETERMINATION OF PRORA-
Deceased.	)	TION OF ESTATE TAX

_____

Petitioner, _____ [*name*], alleges that:

1. Petitioner is _____ [the personal representative *or specify other relationship that establishes petitioner as person interested in estate, e.g.,* the son of and a person interested in the estate] of _____ [*name of decedent*], who died on _____ [*date*], a resident of _____ County, California, and whose estate is being administered herein.

2. _____ [Petitioner *or* The personal representative *or* At the request of the _____ (petitioner *or* personal representative), _____ (*name and specialty, e.g.,* John Doe of Ace Associates, tax preparers),] prepared the [California estate tax return and the] federal estate and generation-skipping transfer tax return for decedent's estate. A copy of that federal return is attached as Exhibit "A," and made a part hereof. [A copy of that California estate tax return is attached as Exhibit "B," and made a part hereof.]

3. On _____ [*date*], _____ [petitioner *or* the personal representative] caused the federal estate and generation-skipping transfer tax return to be filed and paid federal estate taxes due in respect of decedent's estate in the amount of $_____. [Those taxes were paid from cash of the estate in _____ (petitioner's *or* the personal representative's) possession].

[4. On _____ (*date*), _____ (petitioner *or* the personal representative) caused the California estate tax return to be filed and paid the California estate taxes due in respect of decedent's estate in the amount of $_____. (Those taxes were paid from cash of the estate in _____ [petitioner's *or* the personal representative's] possession).]

[5. The federal estate tax as calculated on Exhibit "A" reflects a credit of $_____ for state estate tax payable to the state of California.]

[6. _____ (*Describe any other allowance for credits, exemptions, and deductions, that must be accounted for in apportioning the tax under Prob. Code § 20112, using a separate paragraph for each if necessary, e.g.,* The federal estate tax as calculated on Exhibit "A" reflects a marital deduction of $_____ taken for property included in decedent's taxable estate, located in California, and passing to the surviving spouse. (That marital deduction is also reflected in the calculation of the California estate tax on Exhibit "B."))]

[*EITHER*]

7. Neither decedent's will nor any other inter vivos instrument executed by decedent contained directions regarding the payment of estate taxes.

[*OR*]

7. _____ [*Describe instrument, e.g.,* Decedent's last will and testament] provided at Paragraph _____ that _____ [*specify decedent's directions usurping statutory scheme of proration, e.g.,* all expenses were to be paid from the residuary estate].

[*CONTINUE*]

8. Petitioner contends that the equitable apportionment of [California and] federal estate tax[es] among all persons interested in decedent's estate in proportion to the value of the property received by each, and after allowance for the credits, exemptions, and deductions already described, results in each person's being chargeable with taxes in the following amounts:

Name	Net Value of Property Received	Federal Estate Tax	California Estate Tax
	$	$	$
	$	$	$
	$	$	$
	$_____	$_____	$_____
TOTALS	$	$	$

9. The net values received by each person shown in the preceding paragraph were calculated as follows:

	Surviving Spouse	Name	Name	Charity
Gross Value	$	$	$	$

Less:				
Deductions	$	$	$	$
Exemptions	$	$	$	$
Credits	$_____	$_____	$_____	$_____
Total Reductions	$	$	$	$
Net Taxable Share	$	$	$	$

10. _____ [*Specify facts necessitating court determination of proration, e.g.,* The estate is ready for distribution. To make distribution in accordance with the proper apportionment of estate taxes, petitioner requires a determination of the proration of estate taxes. A determination is necessary because _____ (*names of persons interested in the estate or* the personal representative) contend(s) that petitioner's method of apportionment is incorrect and that _____ (*describe effect of other method of apportionment, e.g.,* their interests in decedent's estate should only be chargeable with $ _____ and $_____, respectively, for the payment of estate taxes)].

WHEREFORE, petitioner prays for an order apportioning estate taxes among the persons interested in decedent's estate in the manner and amounts set forth above and authorizing _____ [petitioner *or* the personal representative] to charge the persons against whom an estate tax is prorated the prorated amounts to the extent that _____ [petitioner *or* the personal representative] is in possession of any property or interests of those persons [and otherwise to require those persons to summarily pay the amount of estate tax prorated against them to the _____ (petitioner *or* personal representative)], and additionally authorizing the _____ [petitioner *or* personal representative] to do all acts necessary or convenient to carry out the apportionment.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

CAUTION:
The petition set forth above must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This petition is for use by the personal representative, or by any person interested in the estate, to petition the court in which the estate is being administered for a determination of the proration of estate taxes [*Prob. Code § 20120(a)*]. This form is phrased as if the estate had not yet been distributed, but a petition for proration may be brought at any time, and the form may be adapted for use at other times, including when no estate administration has been commenced [*see Prob. Code § 20120(b)* (*see § 452.16[2]*)].

The proration calculations in Paragraphs 8 and 9 assume that the marital and charitable gifts are exonerated from proration to the extent of any marital deduction or charitable deduction taken on the federal return [*see § 452.13[3]*].

When the proceeding to determine proration is brought during the pendency of the administration of the decedent's estate, the petition is combined with the administration proceedings, and if the petition is filed before distribution, there is no additional filing fee [*Prob. Code § 20120(c)*].

[3] Court Action Required

On determining the proration, the court must make an order (1) directing the personal representative to charge the persons against whom an estate tax has been prorated the prorated amounts insofar as the personal representative is in possession of any property or interests of those persons, and (2) summarily directing all other persons against whom an estate tax has been prorated to pay the prorated amounts to the personal representative [*Prob. Code § 20123(a)*].

The court's order or refusal to make an order is appealable [*Prob. Code § 1300(c)*].

[4] Contents of Petition

The petition for determination of proration must set forth the jurisdictional facts (Paragraph 1) and other facts necessary for the court to determine the proration (Paragraphs 2-10) [*Prob. Code § 20121*].

[5] Verification

This petition must be verified by the petitioner [*Prob. Code § 1021(a)(1)*] or, if more than one person joins in the petition, by any one of them [*Prob. Code § 1021(b)(1)*; *see also Prob. Code § 1021(b)(1), 1023* (when verification may be made by petitioner's attorney)].

[6] Summons and Notice of Hearing

Not less than 30 days before the hearing, the petitioner must cause a notice ofhearing and a copy of the petition to be mailed to the personal representative and to each person interested in the estate against whom prorated amounts may be charged pursuant to *Prob. Code § 20123(a)(1)* [*Prob. Code § 20122(a)*; *see Prob. Code § 1201* (petitioner who is entitled to notice need not give notice to self)].

Not less than 30 days before the hearing, the petitioner also must cause a summons and a copy of the petition to be served on each person interested in the estate who may be directed to pay prorated amounts pursuant to *Prob. Code § 20123(a)(2)*. The summons must be in the form and served in the manner prescribed in *Code Civ. Proc. §§ 410.10-418.11* [*Prob. Code § 20122(b)*; *see* Ch. 518, *Service of Summons and Papers*].

[7] Reimbursement and Property Not in Possession of Representative

When all property of the taxable estate does not come into the possession of the personal representative, as may be the case, for instance, with joint tenancy property, the personal representative is entitled, and has the duty, to recover from the persons interested in the estate, for example, a surviving joint tenant, the proportionate amount of the estate tax with which those persons are chargeable [*Prob. Code § 20116(a)*]. *Prob. Code § 20116* does not specify any particular type of proceeding for the personal representative to use to collect, but the Law Revision Commission's Comment on the section refers to *Prob. Code § 20123* and states that the court may order direct payment of the amount of taxes owed by a person to the personal representative [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 20116*]. A person from whose interest an excess share of taxes is paid, or against whose interest an excess is charged, is entitled to reimbursement from the persons who never paid, or whose interests were never charged with, their share of prorated taxes [*Prob. Code § 20117(a)*]. In seeking to collect the taxes charged against property that never came into his or her possession, a personal representative is in effect enforcing the right of reimbursement that the persons whose interests actually bore the burden of the taxes have against those who took outside probate without paying their share of taxes. The personal representative has the authority to enforce the right of reimbursement on behalf of a person interested in the estate [*Prob. Code § 20117(b)*], and may exercise that authority by bringing a proceeding under *Prob. Code §§ 20120-20125* [*Prob. Code § 20117(c)*].

Thus, with the addition of appropriate allegations describing the extent to which property not in the possession of the personal representative was chargeable with tax and/or the extent to which efforts to collect that amount had been unsuccessful, the foregoing form of petition could be modified for use in situations addressed by *Prob. Code §§ 20116* and *20117*.

[8] State Statutes

Collection of estate taxes proratable against property that does not come into possession of personal representative. *Prob. Code § 20116*

Right of reimbursement; enforcement. *Prob. Code § 20117*

Petition for determination of proration of estate taxes. *Prob. Code §§ 20120, 20121*

Service and notice of hearing of petition for determination of proration of estate taxes. *Prob. Code § 20122*

Orders determining proration, requiring payment. *Prob. Code § 20123*

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38-452 California Forms of Pleading and Practice--Annotated § 452.61

§ 452.61 Order Determining Proration of Estate Tax [Prob. Code § 20123]

[1] FORM Order Determining Proration of Estate Tax [Prob. Code § 20123]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____[*name*],	)	ORDER DETERMINING PRORATION OF ES-
Deceased.	)	TATE
	)	TAX

_____

The petition of _____ [*name*], as _____ [the personal representative of *or* a person interested in] the estate of _____ [*name*], deceased, to determine the proration of estate taxes [and to require that payments for some of those taxes be made to the personal representative] came on regularly for hearing this date by the court. _____ [Objections to the petition were presented by _____ (*name and capacity of objector*)]. Petitioner _____ [appeared personally *or* was represented by _____ (*name of attorney*)]. _____ [Objecter _____ (appeared personally *or* was represented by _____ (*name of attorney*))].

Proof having been made to the satisfaction of the court,

THE COURT FINDS that

1. Notice of the time and place of the hearing of the petition was given, and service of the petition and summons thereon were made, as required by *Probate Code Section 20122*.

2. All facts set forth in the petition are true and correct.

[*EITHER, if decedent's will does not direct proration*]

3. Neither decedent's will nor any other instrument executed by decedent contained directions regarding the payment of estate taxes.

[*OR, if decedent's will directs proration*]

3. _____ [*Describe instrument, e.g.,* Decedent's last will and testament] provided at Paragraph _____ that _____ [*specify decedent's directions usurping statutory scheme of proration, e.g.,* all expenses were to be paid from the residuary estate].

[*CONTINUE*]

[4. Decedent created successive interests in the following property: _____ (*describe property, e.g.,* the residence of the decedent located at _____ (*address*)).]

5. Federal estate tax owed in respect of decedent's estate _____ [and paid on _____ (*date*) *or* as shown on the federal estate and generation-skipping transfer tax return prepared by _____ (*name*), dated _____ (*date*)] amounts to $ _____.

[6. California estate tax owed in respect of decedent's estate _____ [and paid on _____ (*date*) *or* as shown on the return prepared by _____ (*name*), dated _____ (*date*)] amounts to $ _____.]

7. Those taxes were paid by _____ [*e.g.,* the personal representative] with _____ [*specify, e.g.,* cash of the estate in his/her possession].

[*EITHER*]

8. The values of the interests of each person in the gross taxable estate, the exemptions, deductions, credits, and adjustments allocable to each, and the net taxable share of each are as alleged in the petition.

[*OR*]

8. The value of the gross taxable estate was $ _____. The interests of the various persons in that estate are as follows:

Name	Value of Share in Gross Estate
$	
$	
$_____	
_____	
TOTAL	$

[*AND*]

9. After deductions, credits, exemptions, and adjustments allocable to the interests of the various persons in the estate in the following amounts, the net taxable value of the property received by each is as follows:

Name	Amount and Type of Adjustments	Net Value
	$_____, _____ [*e.g.*, marital deduction]	$_____ _____
	$_____, _____	$_____ _____
	$_____, _____	$_____ _____
TOTAL		$_____ _____

[*CONTINUE, if necessary*]

[10. _____(*Detail any circumstances entitling personal representative to collect from person for share of taxes, e.g.,* Property passing to_____(name) and having a value for federal estate tax purposes of $ _____never came into the possession of the personal representative. Prorated taxes chargeable to that interest and paid by the personal representative from cash of the estate in his/her possession amount to $_____).]

IT IS ORDERED that:

[*EITHER*]

1. Federal [and California] estate tax _____ [paid *or* payable] in respect of decedent's estate be prorated against the interests of the various persons in that taxable estate as follows:

Name	Federal Estate Tax	California Estate Tax
$	$	
$	$	
$_____ _____	$ _____	
TOTALS	$	$

[*AND/OR*]

2. Federal [and California] estate tax _____ [paid *or* payable] in respect of decedent's estate be prorated against the corpus of the following estate property that is the subject of successive interests:

Property	Federal Estate Tax	California Estate Tax
$	$	
$	$	
$_____	$ _____	
_____		
TOTALS	$	$

[*CONTINUE*]

3. The personal representative is directed and authorized to charge the foregoing prorated amounts against _____ [property of those persons in the possession of the personal representative *or* the corpus of property subject to successive interests and in the possession of the personal representative].

[4. _____(*Name*) shall summarily pay to the personal representative $_____, as his/her share of prorated tax.]
Dated: _____.

_____[*signature*]

Judge of the Superior Court

[2] Use of Form

This form is an order that may be submitted to the court when the court has determined the proration of estate taxes. On determining the proration, the court must make an order (1) directing the personal representative to charge the persons against whom an estate tax has been prorated the prorated amounts insofar as the personal representative is in possession of any property or interests of those persons, and (2) summarily directing all other persons against whom an estate tax has been prorated to pay the prorated amounts to the personal representative [*Prob. Code § 20123(a)*].

An order prorating an estate tax may include interest and penalties [*see* Cal. L. Revision Comm'n Comment to *Prob. Code § 20123*; *see also Prob. Code § 20112* (adjustments)].

[3] Effect of Order

An order of proration is a judgment, enforceable against the persons against whom an estate tax is prorated [*Prob. Code § 20123(c)*]. Costs of enforcing a proration order are recoverable under *Code Civ. Proc. § 685.040* [*see* Cal. L. Revision Comm'n Comment to *Prob. Code § 20116*].

[4] Order Appealable

The court's order or refusal to make an order is appealable [*Prob. Code § 20123(b)*].

[5] State Statutes

Orders in probate proceedings. *Prob. Code §§ 1046-1050*

Requirements for proration of successive interests. *Prob. Code § 20113*

Order determining proration. *Prob. Code § 20123*

Modification of order determining proration. *Prob. Code § 20124*

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SPECIAL ALERT TO CHAPTER 453 Status of the Federal Estate Tax, GST Tax, and Gift Tax in 2010

38-453SA California Forms of Pleading and Practice--Annotated Scope

Scope

Background:

The Economic Growth and Tax Relief Reconciliation Act (EGTRRA), enacted in 2001, provided for gradual increases in estate and gift tax exemption amounts and decreases in maximum tax rates. That law mandated repeal, only for the year 2010, of the estate tax and generation-skipping transfer tax, but not the gift tax. It was long assumed that this repeal would never be permitted--that Congress would act to either extend the law as it existed in 2009, or possibly enact a new law on a similar basis but with different exclusion and tax rates.

As late as December 2009, Congress expressed its intent to pass legislation to prevent repeal. However, Congress failed to act and, as of this writing, there is no estate tax or generation-skipping transfer (GST) tax.

EGTRRA also provided that, in 2011, the estate tax and GST tax would be reinstated, but with only a $1 million applicable exclusion amount for each.

The estate tax applicable exclusion amount was $3.5 million per person in 2009, and the GST tax exemption was also $3.5 million. In 2010, both taxes were repealed, allowing unlimited bequests free of these taxes.

Unlike the estate and GSTs taxes, the gift tax was not repealed for 2010. The amount of lifetime gifts that may be made free from gift tax using the gift tax applicable exclusion amount (after any annual gift tax exclusion amounts) remains at $1 million in 2010, and any excess is subject to tax at the highest individual income tax rate, currently 35 percent. The maximum rate for federal estate tax and GST tax in 2009 was 45 percent. Because of the repeal, there is no estate or GST tax in 2010. In 2011, if new legislation is not enacted, the estate tax and GST tax each will carry a maximum rate of 55 percent, and the maximum rate for gift tax will climb to 55 percent.

The annual gift tax exclusion amount permits individuals to make gifts up to that amount, per donee, without incurring gift tax or using any of their lifetime applicable exclusion amount against estate and gift tax. This exclusion remains at $13,000 per donee in 2010. Because a husband and wife may agree to combine their gifts, together they will be able to gift $26,000 to each done in 2010. The annual gift tax exclusion with respect to gifts made to non-citizen spouses is $134,000 in 2010.

Another effect of EGTRRA in 2010 was to significantly limit the step-up in basis of appreciated assets that had long been granted to the beneficiary of a decedent. In 2010, the beneficiary will receive a step-up only for the first $1.3 million of unrealized gain or appreciation. A surviving spouse will receive a step-up in the basis of acquired assets for an additional $3 million of unrealized gain or appreciation. Assets exceeding this amount take a carryover basis, thus making it much more likely for at least part of the distribution to be subject to capital gains tax. The gift tax laws have always conveyed a carryover basis; the step-up in basis for property acquired from a decedent had long been a benefit to a decedent's beneficiaries. Allocation of the stepped-up basis will be made by the executor or trustee. It is anticipated that administrative difficulties will arise, in terms of determining and reporting the basis of assets when acquired as well as their fair market value at the time of decedent's death.

Planning Ideas and Cautions:

Certain estate planning techniques require caution, in light of the unknown future of the estate and GST taxes.

One major caution concerns wills that use a formula to divide an estate between marital and by-pass trusts. If the by-pass trust is not capped, i.e., if the formula does not set a maximum funding for the by-pass trust, the portion intended for the surviving spouse may be largely or entirely depleted.

Similarly, a will that defines a charitable bequest in terms of the charitable deduction allowed under the now-repealed estate tax laws may produce unintended results.

Other techniques are still viable, whether there is an estate tax or not.

For example, a discounted and leveraged gift of a residence or second home may still be effected through a qualified personal residence trust (QPRT). The donor may reside in the home until the end of the QPRT, and may even be able to lease back the property at fair market value from the new owners.

The donor of a gift to a charitable remainder trust may retain a life payment of up to 90 percent of the value of the gifted property. The donor would receive an income tax deduction equal to the value of the gifted property not retained. There is no gain or loss recognized by the charitable remainder trust on sale of the property. Payments to the donor from the trust will be taxed partly as income, partly as capital gain; it is possible that a portion of the payments will be considered a distribution from principal and thus not taxable.

If new legislation is not enacted, the GST tax exemption will drop to $1 million in 2011. Therefore, it might be expedient to make lifetime gifts now. Of course, if Congress acts before the end of 2010, this strategy may lose its effectiveness.

***For continuing coverage of developments on Capitol Hill affecting the estate and GST taxes, please visit our FREE website*, the LexisNexis Estate Practice & Elder Law Center, at http://law.lexisnexis.com/practiceareas/Estate-Practice-Elder-Law**.

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Chapter 453 PROBATE: ESTATE TAX

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Chapter 453 PROBATE: ESTATE TAX
PART I. SCOPE

38-453 California Forms of Pleading and Practice--Annotated § 453.01

§ 453.01 Scope of Chapter

This chapter discusses the preparation of the United States Estate and Generation-Skipping Transfer Tax Return (IRS Form 706) and the payment of the federal estate tax and any generation-skipping transfer tax by a decedent's estate or a trust from which a taxable direct skip occurred as a result of the decedent's death. Note that generation-skipping transfer tax liability also may arise because of taxable distributions or taxable terminations that resulted from or at the same time as a decedent's death, but those are not addressed here [*see Treas. Reg. § 26.2662-1(b)(1), (2)*; IRS Forms 706GS(D), 706GS(D-1), 706GS(T)].

The Legal Background discussion provides a brief discussion of the nature and method of computing and reporting the taxes [*see § 453.10* et seq.]. The Research Guide lists related provisions of the Internal Revenue Code and Treasury Regulations to which the practitioner may wish to refer directly [*see § 453.60* et seq.].

The August 2005 version of the estate and generation-skipping transfer tax return, IRS Form 706, and related instructions, are reproduced in their entirety [§§ 453.190, 453.191]. Also included is the federal estate and generation-skipping transfer tax return for nonresident aliens, and the instructions to it [*see § 453.192*].

This chapter also contains forms that are necessary in some cases for supplementation of the estate and generation-skipping transfer tax return [*see §§ 453.193 -453.195*, 467- 469], the determination of the amount of tax due and the release of the personal representative of the estate from personal liability for the tax [*see § 453.196*], and the extension of the time for filing the return and/or for the payment of the tax [*see § 453.197*].

For detailed analysis and commentary of federal estate and generation-skipping transfer taxes, see Rabkin and Johnson, Federal Income, Gift, And Estate Taxation(Matthew Bender). See also California Probate Practice, Ch. 15, *Taxation of Estates* (Matthew Bender). For a good basic overview of the structure and operation of the federal estate and gift tax, see California Wills & Trusts, Ch. 2, *Overview of Tax Laws Affecting the Disposition of Estates* (Matthew Bender).

This chapter also discusses the preparation of the California Estate Tax Return (State Form ET-1) and, if needed for the estate of a nonresident who died owning property in California, the California Declaration Concerning Residence (IT-2) [*see § 453.40* et seq.]. The discussion relates to the payment of the California estate tax as it applies to estates of

decedents who died after 8:00 p.m. on June 8, 1982. California imposes a generation-skipping transfer tax, but not on "direct skips," which are the only type of generation-skipping transfers reportable on the federal estate and generation-skipping transfer tax return (IRS Form 706) [*see I.R.C. § 2604(a)* (no credit allowed for state generation-skipping transfer tax paid that was attributable to direct skip occurring at same time as and as result of death); *Rev. & Tax. Code § 16710* (imposing California generation-skipping transfer tax to extent of federal credit allowed for it under *I.R.C. § 2604*)]. Thus, the California generation-skipping transfer tax is not discussed.

California generation-skipping transfer tax may be due on taxable terminations or taxable distributions that occur at the same time as or as a result of the decedent's death [*see Rev. & Tax. Code §§ 16702* (adopting federal definitions of transfers), 16751 (imposing tax)], but those types of terminations or distributions are not discussed in this chapter.

For further discussion and forms relating to California estate taxes, as well as to California fiduciary income taxes, see California Probate Practice, Ch. 15, *Taxation of Estates* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewTax LawFederal Estate & Gift TaxesGeneral OverviewTax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)Tax LawState & Local TaxesEstate & Gift TaxGeneration-Skipping Transfer Taxes

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[Reserved]

§§ 453.02[Reserved]

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PART II. LEGAL BACKGROUND
A. Federal Estate And Generation-Skipping Taxes

38-453 California Forms of Pleading and Practice--Annotated § 453.10

§ 453.10 Nature and Structure of Federal Estate Tax

[1] Basic Structure

The federal estate tax is imposed on the transmission, as distinguished from the receipt, of the property of the deceased [*Treas. Reg. § 20.0-2(a)*]. The estate tax is not a tax on the property itself. The tax is measured by the value of the property transferred.

A single, unified transfer tax is imposed on estates and gifts [*see I.R.C. §§ 2001, 2501*]. The unified tax rates are progressive [*see I.R.C. § 2001*; *see also I.R.C. § 2502(a)*, before amendment by Pub. Law 107-16; *see also* Table A in Instructions for IRS Form 706]. The estate tax is repealed for decedents dying after 2009 [*I.R.C. § 2210*]. For taxable gifts made after 2009, a gift tax will be imposed, but the gift tax rates will range from 18 percent (for taxable gifts of less than $10,000) to 35 percent (for taxable gifts exceeding $500,000) [*I.R.C. § 2502(a)*].

The Economic Growth and Tax Relief Reconciliation Act (EGTRRA) [Pub. Law 107-16, 115 Stat. 38], enacted in 2001, had a substantial impact on the estate tax. However, in the absence of further Congressional action, this law will be inapplicable to the estates of decedents dying, gifts made, or generation-skipping transfers made, after December 31, 2010 [Pub. Law 107-16, § 901]. For additional discussion of the status of the federal estate tax in 2010, see *§ 453.10[4]*.

[2] Unified Credit

A unified credit applies to both gifts and estates. The estate and gift tax unified credit are the same through 2003 [*I.R.C. §§ 2010(c), 2505(a)(1)*]. The gift tax unified credit effective exemption amount remains $1 million after 2003 [*I.R.C. § 2505(a)(1)*]. The estate tax unified credit effective exemption amount increases after 2003, as noted in the table below [*I.R.C. § 2010(c)*]. Although different in amount after 2003, the two credits are still "unified" in that any gift tax unified credit used during a taxpayer's life reduces the available estate tax unified credit available to that taxpayer's estate [*see I.R.C. §§ 2010(c), 2505*].

The amount of the unified credit depends on the year a gift is made or the year a decedent dies. The unified credit shelters a specified amount--referred to as the "applicable credit amount"--from gift or estate taxation. The "applicable

credit amount" is the amount of credit that will exclude the "applicable exclusion amount" according to the following table [*I.R.C. § 2010(c)*]:

Year Decedent Died and Gifts Made	**Applicable Exclusion Amount**
Before 1998	$600,000
1998	$625,000
1999	$650,000
2000 and 2001	$675,000
2002 and 2003	$1,000,000

After 2003, the gift tax unified credit exemption amount remains at $1 million [*I.R.C. § 2505(a)(1)*]. The estate tax unified credit exemption amount is as follows [*I.R.C. § 2010(c)*]:

Estate Tax Unified Credit Exemption Amount

Year Decedent Died	Applicable Exclusion Amount
2004-2005	$1.5 million
2006-2008	$2 million
2009	$3.5 million
2010	N/A (estate tax repealed)

The unified credit against estate taxes works in conjunction with the unified credit against gift taxes. To the extent that the gift tax credit is depleted by lifetime gifts, however, the amount of the estate tax credit is reduced. If none of the gift tax credit is used during the decedent's lifetime, an estate tax credit equal to the full "applicable exclusion amount" will be available on the decedent's death. If part of the gift tax credit is used during the decedent's lifetime, only part of the estate tax credit will be available on the decedent's death [*see I.R.C. §§ 2010(c), 2505(a)*].

[3] Computation of Tax

Computation of the tax is made on the Tax Computation section of the United States Estate and Generation-Skipping Transfer Tax Return (IRS Form 706). First, a tentative tax is computed under the unified rate schedule by applying the schedule to the sum of decedent's taxable estate (gross estate minus deductions provided by *I.R.C. §§ 2051*-2058) and the amount of taxable gifts (within the meaning of *I.R.C. § 2503*) made by the decedent after 1976 that are not already included in decedent's gross estate ("adjusted taxable gifts"). Estate tax rates begin at 18 percent. The maximum rate is 55 percent for decedents dying before 2002, 50 percent for decedents dying in 2002, 49 percent for decedents dying in 2003, 48 percent for decedents dying in 2004, 47 percent for decedents dying in 2005, 46 percent for decedents dying in 2006, and 45 percent for decedents dying in 2007 through 2009 [*I.R.C. § 2001(c)(1), (2)*]; however, due to the effect of the unified credit, the very first dollar actually exposed to tax is taxed at a 37 percent rate [*see I.R.C. § 2001(c)*]. The graduated rates below 37 percent have no practical application except in the case of nonresident aliens, who have a lower unified credit [*see I.R.C. § 2102(b)*].

If the tax base exceeds $10 million and the decedent died before January 1, 1998, an additional 5 percent tax is imposed on any amount over $10 million but less than $21.04 million [*see I.R.C. § 2001(c)(2)* before amendment by Pub. L. No. 105-34, § 501(a)(1)(D)]. If the tax base exceeds $10 million and the decedent died on or after January 1, 1998, and

before January 1, 2002, the maximum amount to which the additional 5 percent tax applies will increase each year that the "applicable exclusion amount" [*see I.R.C. § 2010(c)* (table of graduated amounts)] increases until it reaches an amount at which the average rate of tax is 55 percent [*see I.R.C. § 2001(c)(2)*, before repeal by Pub. Law 107-16, § 511(b)]. The effect of this additional 5 percent tax is to reduce the tax savings provided by the unified credit for large estates, and ultimately eliminate the unified credit entirely for estates above the maximum amount [*I.R.C. § 2001(c)(2)*, before repeal by Pub. Law 107-16, § 511(b)]. This phaseout of the graduated rates and unified credit is repealed for estates of decedents dying and gifts made after December 31, 2001 [*I.R.C. § 2001(c)(2)*, repealed by Pub. Law 107-16, § 511(b)].

The total tentative tax is then reduced by the aggregate amount of gift taxes payable on post-1976 gifts made by the decedent [*I.R.C. § 2001(b)(2)*]. The amount thus derived is referred to as the gross federal estate tax. The gross federal estate tax is then reduced by various credits, including the unified credit, to arrive at the net estate tax [*see I.R.C. §§ 2010*-2015 (credits)]. Then, any generation-skipping transfer tax payable by the estate [*I.R.C. §§ 2603*, *2662*; *Treas. Reg. § 26.2662-1(b)*, *(c)*; *see* IRS Form 706, Schedule R] is added to determine the estate's total liability.

[4] Status of Federal Estate Tax, GST Tax, and Gift Tax in 2010

[a] Background and Effect of 2001 Legislation

The Economic Growth and Tax Relief Reconciliation Act (EGTRRA) [Pub. Law 107-16, 115 Stat. 38], enacted in 2001, provided for gradual increases in estate and gift tax exemption amounts and decreases in maximum tax rates. That law mandated repeal, only for the year 2010, of the estate tax and generation-skipping transfer tax, but not the gift tax. It was long assumed that this repeal would never be permitted, that Congress would act to either extend the law as it existed in 2009, or possibly enact a new law on a similar basis but with different exclusion and tax rates.

As late as December 2009, Congress expressed its intent to pass legislation to prevent repeal. However, Congress failed to act and, as of early 2010, there is no estate tax or generation-skipping transfer (GST) tax.

EGTRRA also provided that, in 2011, the estate tax and GST tax would be reinstated, but with only a $1 million applicable exclusion amount for each.

The estate tax applicable exclusion amount was $3.5 million per person in 2009, and the GST tax exemption was also $3.5 million. In 2010, both taxes were repealed, allowing unlimited devises free of these taxes.

Unlike the estate and GST taxes, the gift tax was not repealed for 2010. The amount of lifetime gifts that may be made free from gift tax using the gift tax applicable exclusion amount (after any annual gift tax exclusion amounts) remains at $1 million in 2010, and any excess is subject to tax at the highest individual income tax rate, currently 35 percent. The maximum rate for federal estate tax and GST tax in 2009 was 45 percent. Because of the repeal, there is no estate or GST tax in 2010. In 2011, if new legislation is not enacted, the estate tax and GST tax each will carry a maximum rate of 55 percent, and the maximum rate for gift tax will climb to 55 percent.

The annual gift tax exclusion amount permits individuals to make gifts up to that amount, per donee, without incurring gift tax or using any of their lifetime applicable exclusion amount against estate and gift tax. This exclusion remains at $13,000 per donee in 2010. Because a husband and wife may agree to combine their gifts, together they will be able to gift $26,000 to each done in 2010. The annual gift tax exclusion with respect to gifts made to non-citizen spouses is $134,000 in 2010.

Another effect of EGTRRA in 2010 was to significantly limit the step-up in basis of appreciated assets that had long been granted to the beneficiary of a decedent. In 2010, the beneficiary will receive a step-up only for the first $1.3 million of unrealized gain or appreciation. A surviving spouse will receive a step-up in the basis of acquired assets for

an additional $3 million of unrealized gain or appreciation. Assets exceeding this amount take a carryover basis, thus making it much more likely for at least part of the distribution to be subject to capital gains tax. The gift tax laws have always conveyed a carryover basis; the step-up in basis for property acquired from a decedent had long been a benefit to a decedent's beneficiaries. Allocation of the stepped-up basis will be made by the executor or trustee. It is anticipated that administrative difficulties will arise, in terms of determining and reporting the basis of assets when acquired as well as their fair market value at the time of decedent's death.

[b] Planning Ideas and Cautions

Certain estate planning techniques require caution, in light of the unknown future of the estate and GST taxes.

One major caution concerns wills that use a formula to divide an estate between marital and by-pass trusts. If the by-pass trust is not capped, i.e., if the formula does not set a maximum funding for the by-pass trust, the portion intended for the surviving spouse may be largely or entirely depleted.

Similarly, a will that defines a charitable bequest in terms of the charitable deduction allowed under the now repealed estate tax laws may produce unintended results.

Other techniques are still viable, whether there is an estate tax or not.

For example, a discounted and leveraged gift of a residence or second home may still be effected through a qualified personal residence trust (QPRT). The donor may reside in the home until the end of the QPRT, and may even be able to lease back the property at fair market value from the new owners.

The donor of a gift to a charitable remainder trust may retain a life payment of up to 90 percent of the value of the donated property. The donor would receive an income tax deduction equal to the value of the donated property not retained. There is no gain or loss recognized by the charitable remainder trust on sale of the property. Payments to the donor from the trust will be taxed partly as income, partly as capital gain; it is possible that a portion of the payments will be considered a distribution from principal and thus not taxable.

If new legislation is not enacted, the GST tax exemption will drop to $1 million in 2011. Therefore, it might be expedient to make lifetime gifts now. Of course, if Congress acts before the end of 2010, this strategy may lose its effectiveness.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewTax LawFederal Estate & Gift TaxesDefinition of Taxable EstateTax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)Tax LawState & Local TaxesEstate & Gift TaxGeneration-Skipping Transfer TaxesTax LawState & Local TaxesEstate & Gift TaxGross Estate

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PART II. LEGAL BACKGROUND
A. Federal Estate And Generation-Skipping Taxes

38-453 California Forms of Pleading and Practice--Annotated § 453.11

§ 453.11 Nature and Measure of Federal Generation-Skipping Transfer Tax

NOTE REGARDING GENERATION-SKIPPING TRANSFER TAX REPEAL:

The generation-skipping transfer tax (GST tax) has been repealed, effective for generation-skipping transfers after 2009 [*I.R.C. § 2664*]. Similarly, the estate tax has been repealed, effective for decedents dying after 2009 [*I.R.C. § 2210(a)*]. However, under a sunset provision of the 2001 legislation that enacted the repeals, all provisions of the legislation--including the repeal of the GST tax and the estate tax--do not apply to generation-skipping transfers, or to estates of decedents dying, after December 31, 2010 [Pub. Law 107-16, § 901]. Thus, unless the provisions repealing the GST tax and estate tax are re-enacted before 2010, the GST tax law in effect before enactment of the 2001 legislation will apply once again after 2010 [*see* Pub. Law 107-16, § 901; *see I.R.C. §§ 2601* through 2663, before amendment by Pub. Law 107-16]. Most commentators believe that significant changes will be made to the estate tax law, and probably the GST tax; however, as of early 2010, Congress had yet to pass any such legislation.

For now, planning around the GST tax after 2001 involves to some degree guessing how long a client will live. For transfers made in 2010, under the law as currently constituted, no GST tax will be due [I.R.C. § 2264]. For clients who are likely to live past 2010 and make taxable transfers after that time, the same GST tax considerations apply as under the law that was in effect before the 2001 legislation because the law will be the same [Pub. Law 107-16, § 901].

For additional discussion of the GST tax and the status of the federal estate tax in 2010, see *§ 453.10[4]*.

The federal generation-skipping transfer tax [*I.R.C. §§ 2601*-2664] is separate and distinct from the federal estate tax. It is designed to ensure that a transfer tax is paid at each generational level in the line of a transfer of wealth, whether or not the intervening generations ever had any actual interest in the transferred property. Thus, it will apply in some circumstances under which no federal gift tax will be imposed (for example, when a trust created by a parent terminates on the death of a child who is a life income beneficiary, and the trust remainder passes to a grandchild), as well as to some transfers that are also subject to federal estate or gift tax (for example, direct transfers by grandparents to grandchildren whose parents are still living) [*see I.R.C. §§ 2611(a), 2612*].

The GST was first enacted in 1976, but the original version proved to be unworkable and was repealed retroactively in 1986 without ever having been enforced. In its present form, the GST tax is imposed on "generation-skipping transfers" [*I.R.C. § 2601*]. Generation-skipping transfers include "taxable terminations" [*see I.R.C. § 2612(a)*], "taxable distributions" [*see I.R.C. § 2612(b)*], and "direct skips" [*I.R.C. § 2611(a)*; *see I.R.C. § 2612(c)*].

GST tax liability reportable on the federal estate and generation-skipping transfer tax return (IRS Form 706) is imposed only on transfers of property from decedent's taxable gross estate that occur as a result of decedent's death and are in the form of direct skips to a "skip person" [*I.R.C. § 2612(c)*; *see I.R.C. § 2613* (defining skip persons); *Treas. Reg. § 26.2662-1(b)(3)(ii)* (GSTs reportable on IRS Form 706)]. A "skip person" is a natural person assigned to a generation that is two or more generations below the generation assigned to the transferor [*I.R.C. § 2613(a)(1)*]. Trusts may also be skip persons [*I.R.C. § 2613(a)(2)*].

Unlike the federal estate and gift tax, the generation-skipping transfer tax does not utilize a graduated rate schedule. The GST is imposed at a flat rate, which is the maximum estate tax rate in effect at the time of the transfer multiplied by the inclusion ratio with respect to the transfer [*I.R.C. § 2641*]. The maximum estate tax rate is 55 percent for decedents dying before 2002, 50 percent for decedents dying in 2002, 49 percent for decedents dying in 2003, 48 percent for decedents dying in 2004, 47 percent for decedents dying in 2005, 46 percent for decedents dying in 2006, and 45 percent for decedents dying in 2007 through 2009 [*I.R.C. § 2001(c)(1), (2)*].

There is a GST lifetime exemption, which may be allocated by the decedent to lifetime gifts made by the decedent or by the personal representative on the estate tax return [*I.R.C. §§ 2631(a), 2632(a)*]. The GST exemption amount depends on the year of the transfer. The exemption amount is $1 million for 1998 [*I.R.C. § 2631(a)*, before amendment by Pub Law 107-16], $1,010,000 in 1999, $1,030,000 for 2000 [*see Rev Proc 99-42* , § 3.18, *1999-46 I.R.B. 568*], and $1,060,000 for 2001 [*see Rev Proc 2001-13* , § 3.18, *2001-3 I.R.B. 337*]. The exemption amount for 2002 is $1,100,000 [*Rev. Proc. 2001-59, 2001-52 I.R.B. 623*] and for 2003 is $1,120,000 [*Rev. Proc. 2002-70*]. Beginning for generation-skipping transfers after 2003, the exemption amount is determined by the estate tax exclusion amount for the calendar year [*I.R.C. § 2631(c)*]. For 2004 and 2005, the estate tax exclusion amount is $1.5 million; for 2006 through 2008, the amount is $2 million; for 2009, the amount is $3.5 million [*I.R.C. §§ 2010(c), 2631(a), (c)*]. When a husband and wife make generation-skipping transfers, each is entitled to a separate exemption. Thus, married persons may transfer up to twice the amount of the GST exemption without subjecting any of the transfer to the GST tax [*see I.R.C. § 2631(a)*].

For further discussion of the GST tax, see *§ 453.21* explanation of the history and operation of the GST, see California Wills & Trusts, Ch. 113, *Generation-Skipping Transfers and Trust Strategies* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewTax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)Tax LawState & Local TaxesEstate & Gift TaxGeneration-Skipping Transfer TaxesTax LawState & Local TaxesEstate & Gift TaxGross Estate

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38-453 California Forms of Pleading and Practice--Annotated § 453.12

§ 453.12 Estates for Which Returns Must Be Filed

The estate tax applies to the estate of any person who dies leaving property having a taxable situs within the United States. An estate and generation-skipping transfer tax return (IRS Form IRS Form 706) must be filed if the decedent's grossestate, plus adjusted taxable gifts and the specific exemption, exceeds the "applicable exclusion amount" [*I.R.C. § 6018(a)(1), (3)*; *see I.R.C. § 2010(c)* (table of graduated amounts); *see § 453.10*; *see also 453.191* (Instructions for IRS Form 706) for a more detailed description of this calculation].

In the case of a nonresident alien, an estate and generation-skipping transfer tax return (IRS Form 706) must be filed if the part of the gross estate that is situated in the United States, plus the sum of (1) the gift tax exemption allowed with respect to gifts made between September 9, 1976, and December 31, 1976, inclusive [*see* former *I.R.C. § 2521*], and (2) the total adjusted taxable gifts [*see I.R.C. § 2001(b)*] made after December 31, 1976, that are not included in the gross estate, exceeds $60,000 [*I.R.C. §§ 2101*-2108, 6018(a)(2); *see I.R.C. §§ 2104, 2105* (situs rules)]. See *§ 453.192* for a reproduction of IRS Form 706.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewTax LawFederal Estate & Gift TaxesEstate Tax ReturnsFilingTax LawFederal Estate & Gift TaxesEstate Tax ReturnsImposition of TaxesTax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)Tax LawState & Local TaxesEstate & Gift TaxGeneration-Skipping Transfer TaxesTax LawState & Local TaxesEstate & Gift TaxGross Estate

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38-453 California Forms of Pleading and Practice--Annotated § 453.13

§ 453.13 Property Included in Gross Estate

[1] In General

The starting point in determining the estate tax is the computation of the gross estate of the decedent. The value of the gross estate is determined by including, to the extent provided in *I.R.C. §§ 2033*-2045, the value at the time of the decedent's death (or on the alternate valuation date [*see I.R.C. § 2032*]) of all property, real or personal, tangible or intangible, wherever situated [*I.R.C. § 2031*; *Treas. Reg. § 20.2031-1(a)*].

Property that a decedent owns at death is the most obvious example of property that is included in the decedent's gross estate. This may include a home, investments, and bank accounts, but it may also extend to amounts owing to the decedent, such as the principal of any loans made by the decedent to another during life (plus accrued interest), accrued salary, and installment obligations owed to the decedent on property sold during life [*see I.R.C. §§ 2031(a), 2033*].

The decedent need not have owned the property solely or outright for it to be included in his or her gross estate. The value of a decedent's share of community property [*see I.R.C. § 2033, see U.S. v. Goodyear (9th Cir. 1938) 99 F.2d 523]* or his or her interest in property owned as a joint tenant with another [*see I.R.C. § 2040*], or the value of a future interest, may have to be included in the gross estate.

The gross estate may also include the value of property interests transferred during the decedent's lifetime when the transfer is, in effect, of a testamentary nature, as well as the value of property that is transmitted on account of the decedent's death and over which the decedent enjoyed the requisite ownership or control at death. Thus, property transferred in such lifetime transfers as transfers of life insurance [*I.R.C. § 2042*], revocable transfers [*see I.R.C. § 2038*], and transfers with a retained life estate [*see I.R.C. § 2036*] is included in valuing the gross estate.

Because the complex provisions of the Internal Revenue Code that describe the various categories of interests includable in the gross estate sometimes overlap and also contain similarities, the fact that a given property interest falls within a technical exclusion from one category does not prevent it from being included in the gross estate under another code provision. Similarly, a property interest may be included in the gross estate under more than one code provision,

although its value is taken into account only once in computing the gross estate.

[2] Effect of State Law on Includability

It is often necessary to refer to state law in determining the includability of an interest in a decedent's gross estate. State law, for these purposes, includes both statutes and state court decisions interpreting statutes. In federal estate tax cases, state law determines the rights and interests of the parties, whereas federal law determines whether the rights and interests created are of a kind that are includable in the gross estate [*see Estate of Davis (1985) 171 Cal. App. 3d 854, 857-858, 217 Cal. Rptr. 734* (federal estate tax law notwithstanding, IRA was not property of probate estate but of named beneficiary); *see also* Estate of Frazier v. Comm'r (9th Cir. 2003) 83 Fed. App. 164, 165 (structures built on decedent's property were not includable in decedent's gross estate because they were removable trade fixtures under California law)]. For example, state law will apply to determine whether a decedent has title to property, whereas federal law will determine the includability of that property in the decedent's gross estate.

Only the decisions of the highest court of a state have a binding effect for federal estate tax purposes [*Commissioner v. Bosch (1967) 387 U.S. 456, 464-465, 87 S. Ct. 1776, 18 L. Ed. 2d 886]* . The decision of the state's highest court may involve the actual interest to be reported on the decedent's estate tax return or it may involve a different case of precedent. It is not clear whether the denial of a hearing by the state's highest court of an appellate court decision is considered to be a decision of the state's highest court. *Bosch*, however, speaks of a *decision* of the state's highest court, and this would seem to indicate that the highest court must actually issue an opinion on the matter after an adversarial proceeding before that court.

Although lower state court decisions are not binding for estate tax purposes, in the absence of a decision by a state's highest court, lower state court decisions must be given some regard by a federal court [*see Commissioner v. Bosch (1967) 387 U.S. 456, 464-465, 87 S. Ct. 1776, 18 L. Ed. 2d 886]* . This principle does not apply to a determination of rights and interests settled by local adjudication and res judicata at a time before the occurrence of events raising a federal tax question [*Rev. Rul. 73-142, 1973-1 C.B. 405*]. In Revenue Ruling 1973-1, a grantor-decedent held a power that would have caused the property subject to the power to be included in the gross estate. A lower state court, however, had effectively extinguished the power in a decision rendered before the time of the event giving rise to the tax. The Internal Revenue Service ruled that the lower state court decision had to be followed in the subsequent tax controversy [*Rev. Rul. 73-142, 1973-1 C.B. 405*].

[3] Property in Which Decedent Had Interest

The value of the gross estate includes the value of all property to the extent of the decedent's interest therein at the time of his or her death [*I.R.C. § 2033*]. Property that the decedent beneficially owns at his or her death and that can pass by inheritance or under the terms of the decedent's will would be routinely included in his or her estate. Thus, if a decedent is the sole owner of real property, it is included in his or her estate whether it came into the possession and control of the personal representative or passed directly to heirs [*Treas. Reg. § 20.2033-1(a)*]. Tangible personal property, such as household and personal effects, and intangible property interests, such as the balance remaining in a personal checking and savings account, stocks and bonds, and certificates of deposit, owned solely by the decedent at his or her death, are includable in the gross estate. In addition, notes, items of income payable to the decedent, or other claims held by the decedent are included even though they are canceled by the decedent's will [*Treas. Reg. § 20.2033-1(b)*]. The interest of the decedent to which *I.R.C. § 2033* applies is, of course, a beneficial interest [*Treas. Reg. § 20.2033-1(a)*].

If the decedent's interest in property terminates by reason of his or her death, it is not includable in the gross estate under *I.R.C. § 2033*, although it may be includable under another estate tax provision [*see I.R.C. §§ 2036*-2038]. The question of whether the decedent's interest has ceased at his or her death is concerned mainly with the duration of the decedent's interest and with interests that have begun to accrue or that have come into existence about the time of the decedent's death, but that have not yet come into the decedent's possession [*see, e.g., Rev. Rul. 55-87, 1955-1 C.B. 112*

]. Wrongful death claims arising out of decedent's death are not includable [*Rev. Rul. 54-19, 1954-1 C.B. 179*], nor is income accrued after the date of death [*see Treas. Reg. §§ 20.2031-4*, 20.2033-1, 20.6018-3(b)].

[4] Concurrent Interests

[a] In General

Generally, if a decedent shares ownership of property with another that he or she can pass on to another at his or her death, the interest is within the scope of *I.R.C. § 2033*. Thus, the value of the decedent's fractional interest in property held as a tenant in common with another is includable in the gross estate because that interest will pass as the decedent directs by will or by the laws of intestacy [*Smith v. Commissioner (1941) 45 B.T.A. 59, 63 , acq., 1942-1 C.B. 15*].

A decedent's interest in community property is treated similarly because it is also an inheritable or bequeathable interest. One half of the community property is considered owned by the decedent and is thus includable in the gross estate [*I.R.C. § 2034*; *Hurley v. Hartley (10th Cir. 1967) 379 F.2d 205, 207* ; *see Eichstedt v. United States (N.D. Cal. 1972) 354 F. Supp. 484, 487-488]* . The other one half of the community property belongs to the surviving spouse, does not devolve by reason of death, and is not includable in the gross estate [*Trust Services of America, Inc. v. United States (9th Cir. 1989) 885 F.2d 561, 566* ; *see Katz v. United States (9th Cir. 1967) 382 F.2d 723, 728]* . Note that there is no separate schedule on IRS Form 706 for the decedent's community property interests. Community property interests are not includable on Schedule E. Instead, each asset held by the decedent and his or her spouse as community property should be included on the schedule on which it would be listed (for example, Schedule A for real property, Schedule B for stocks and bonds, etc.), with the descriptive notation that it was held as community property. Only the value of the decedent's half interest should be listed in the appropriate value column [*see* IRS Form 706, Instructions for Schedule E]. For a general discussion of the possible forms of community property, § 453.13[5], and Ch. 122, *Community Property*.

A decedent's interest in a joint tenancy or in a tenancy by the entirety is not within the scope of *I.R.C. § 2033* as property in which the decedent had an interest. Nevertheless, those interests are includable in the gross estate by virtue of *I.R.C. § 2040* [*see § 453.13*]. For a general discussion of joint tenancies, see Ch. 316, *Joint Tenancy and Tenancy in Common* .

[b] Joint Interests With Rights of Survivorship

Pursuant to *I.R.C. § 2040*, a decedent's gross estate includes the value of property held jointly at the time of the decedent's death by the decedent and another person or persons with rights of survivorship [*I.R.C. § 2040(a)*]. Joint interests with right of survivorship are reportable on Schedule E.

Contrary to ordinary property law, estate tax law regards the interests of joint tenants or tenants by the entirety as equal only if the property was acquired by gift, devise, bequest, or inheritance [*Treas. Reg. § 20.2040-1(a)(1)*]. In all other cases (with the exception of qualified joint interests, discussed *below*), on the death of a joint tenant the entire value of property owned in joint tenancy is included in a decedent's gross estate except to the extent that the personal representative can prove the amount of consideration used by the survivor to acquire his or her interest. Thus, if the decedent furnished the entire purchase price of the jointly owned property, the value of the entire property is included in his or her gross estate. If it can be demonstrated that the survivor furnished part of the purchase price, only a portion of the value of the property is included in the decedent's gross estate [*I.R.C. § 2040(a)*].

A special rule regarding inclusion in a decedent's gross estate applies for qualified joint interests in property [*I.R.C. § 2040(b)*]. A "qualified joint interest" is any interest in property held by the decedent and the decedent's spouse as (1) tenants by the entirety or (2) joint tenants with right of survivorship, when the decedent and the decedent's spouse are the only joint tenants [*I.R.C. § 2040(b)(2)*].

Only one-half of the value of a qualified joint interest in property is included in the decedent's gross estate [*I.R.C. § 2040(b)(1)*].

This special rule regarding qualified joint interests in property [*see I.R.C. § 2040(b)(1)*] generally does not apply if the surviving spouse of the decedent is not a citizen of the United States [*I.R.C. § 2056(d)(1)(B)*]. Therefore, the entire value of the property ordinarily will be included in the decedent's estate [*see I.R.C. §§ 2040(a), 2056(b)(1)(B)*]. The special rule regarding qualified joint interests in property [*I.R.C. § 2040(b)*] does apply, however, if the property passes to the non-U.S. citizen surviving spouse in a qualified domestic trust before the date the estate tax return is filed [*I.R.C. § 2056(d)(2)*; *see I.R.C. § 2056A* (qualified domestic trust)].

[5] Community Property With Right of Survivorship

Effective July 1, 2001, California law permits spouses to hold title to real and personal property as community property with right of survivorship [*Civ. Code § 682.1*; *but see Civ. Code § 682.1(b)* (statute inapplicable to certain joint accounts)]. This form of title has all the tax benefits of community property, specifically a step-up in basis on both halves of the property on the death of one spouse [*see I.R.C. § 1014(a)(1), (b)(6)*; *see I.R.C. § 1022* (modified carryover basis applies for property received from decedents dying after 2009)], and a right of survivorship that allows the property to avoid probate administration and its attendant costs. One half of the community property held in this manner is includable in the decedent's gross estate [*see I.R.C. § 2034, 2040(b)*]. For further discussion, see Ch. 122, *Community Property* , and Ch. 316, *Joint Tenancy and Tenancy in Common* .

[6] Gifts Made Under California Uniform Transfers to Minors Act

If a decedent was the donor of a gift to a minor and was also the custodian, and was acting in that capacity at the time of his or her death, the gift will be included in the decedent's gross estate. The custodian's power to accumulate or distribute the income and custodial property [*see Prob. Code § 3914*] is sufficient retention of a power to alter, amend, revoke, or terminate within the meaning of *I.R.C. § 2038* to require that property transferred in a revocable transfer by gift be included in the gross estate [*Eichstedt v. United States (N.D. Cal. 1972) 354 F. Supp. 484, 487-488* ; *Rev. Rul. 59-357, 1959-2 C.B. 212* ; *Rev. Rul. 57-366, 1957-2 C.B. 618* ; *see also Rev. Rul. 70-348, 1970-2 C.B. 193* (inclusion in estate of successor custodian)]. If the gift was not made with community property and the nondonor parent is made the custodian, the custodial property will not be included in either parent's estate, even if the spouses agreed to gift splitting [*see Rev. Rul. 74-556, 1974-2 C.B. 300*]. If the gift was made with community property, however, one half of the value of the custodial property will be included in the gross estate of the donor who dies while acting as custodian [*Eichstedt v. United States (N.D. Cal. 1972) 354 F. Supp. 484, 487-488]* .

Another unique aspect of the gift tax consequences of gifts to minors should be taken into account when calculating adjusted taxable gifts [*see I.R.C. § 2001(b)*]. Gifts of future interests, that is, interests that the donee cannot possess or enjoy until some time in the future, generally are not eligible for the federal gift tax annual exclusion [*see I.R.C. § 2503(b)*]. In the case of gifts made under the California Uniform Transfers to Minors Act (*Prob. Code § 3900 et seq.*), however, the gift will qualify for the annual gift tax exclusion unless the minor's possession of the custodial property is postponed until he or she is over the age of 21 [*I.R.C. § 2503(c)*; *see Prob. Code § 3920.5* (allowing postponement)].

For a general discussion of the Uniform Transfers to Minors Act, see Ch. 278, *Gifts* ; *see also* California Legal Forms, Ch. 60A, *Gifts* (Matthew Bender), and *California Wills & Trusts, Ch. 28, Devises to Minors, § 28.04[3]* (Matthew Bender).

[7] Successive Interests in Gross Estate

The value of a decedent's interest in a leasehold estate, life estate, remainder interest, or reversion may constitute a part

of the gross estate if that interest did not terminate by reason of the decedent's death. Thus, the value of a life interest held by the decedent and created by another would not be includable in the gross estate because the interest would terminate as a result of the decedent's death [*see Rev. Rul. 66-86, 1966-1 C.B. 216* ; *Williams v U.S., (Ct. Cl. 1930) 41 F.2d 895]* . Nevertheless, the value of a decedent's interest in a leasehold estate or an estate measured by another person's life is includable in the gross estate because either interest is inheritable or bequeathable. Any remainder interest or reversion held by the decedent at his or her death, whether or not contingent, is within the scope of *I.R.C. § 2033* unless the interest is contingent on the decedent's survival [*see Rev. Rul. 55-438, 1955-2 C.B. 601*].

Contingent interests may present special problems with respect to whether the contingencies affect the includability of those interests in the gross estate or the valuation of those interests once they are identified as part of the gross estate. Generally, a contingency will affect the value of the interest, which will still be included in the gross estate [*see Rev. Rul. 67-370, 1967-2 C.B. 324*]. Only interests subject to contingencies that are extremely remote will be excluded from the gross estate [*see Estate of Williams (1974) 62 T.C. 400, 410]* .

[8] Life Insurance in Gross Estate

[a] Policies on Decedent's Life

The proceeds of insurance policies on a decedent's life are includable in the gross estate on either of the following conditions [*I.R.C. § 2042*]:

- The proceeds are receivable by or for the benefit of the estate, regardless of who possessed the incidents of ownership over the policy or who paid the premiums. The estate does not have to be specifically named as the beneficiary under the terms of the policy to have the proceeds includable in the gross estate. Proceeds are deemed receivable by the executor if they are receivable by another beneficiary but are subject to a leally binding obligation to pay taxes, debts, or other charges enforceable against the estate. In such a case, the amount includable in the gross estate is the amount required to pay the taxes, debts, or other charges in full. Proceeds also will be includable if the policy is purchased in favor of another person or corporation as collateral for a loan. The proceeds are considered to be receivable for the benefit of the estate, and the amount of the loan outstanding at the date of the decedent's death with accrued interest will be deductible in determining the taxable estate [*see Treas. Reg. § 20.2042-1(b)(1)*].

- The proceeds are receivable by some other beneficiary and the decedent possessed incidents of ownership in the policy, alone or in conjunction with another person, at the time of his or her death. An "incident of ownership" is a power or right to change the beneficiary of the policy, surrender or cancel the policy, assign the policy, revoke an assignment of the policy, pledge the policy for a loan, or obtain a loan from the insurer against the surrender value of the policy [*see Treas. Reg. § 20.2042-1(c)(1)*-(4); *see also* I.R.S. Letter Rul. 200518005 (taxpayer did not possess incidents of ownership over life insurance policies insuring her life that were purchased by trust, when she renounced her rights as co-trustee in connection with these policies, subsequently resigned as co-trustee, and did not contribute assets to trust or commingle life insurance policies held as trust assets with her personal assets)].

When insurance proceeds are includable in the decedent's gross estate, the amount to be included generally is the full amount receivable under the policy. If the proceeds are payable to a beneficiary as an annuity for life or for a term of years, however, the amount to be included is either an optional lump sum payment, if one is provided by the policy, or the amount used by the insurer in determining the amount of the annuity if there is no lump sum option in the policy [*Treas. Reg. § 20.2042-1(a)(3)*]. If the proceeds of a policy made payable to the decedent's estate are community property, only one half of the proceeds is includable, since only one half is considered received by or for the benefit of the decedent's

estate [*Treas. Reg. § 20.2042-1(b)(2)*; *Rev. Rul. 2003-40, 2003-17 I.R.B. 813* (if surviving spouse is beneficiary, marital deduction would be available for decedent's half that is included in decedent's estate)].

Policies includable in the gross estate by virtue of *I.R.C. § 2042* are reportable on Schedule D. The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies operating under the lodge system [*Treas. Reg. § 20.2042-1(a)(1)*]. Death benefits paid under no-fault automobile insurance policies are includable if the no-fault insurer was unconditionally bound to pay the benefit in the event of the insured's death [*Rev. Rul. 83-44, 1983-1 C.B. 228* ; *but see* *Rev. Rul. 68-88, 1968-1 C.B. 397* (compulsory policy that provides substitute for what could be recovered in wrongful death action as not included in gross estate)]. Even if a policy of insurance on the decedent's life is not included in the gross estate, it must be listed on Schedule D, and the personal representative must explain why the proceeds are not includable in the gross estate [IRS Form 706, Instructions for Schedule D].

[b] Decedent's Interest in Policies on Life of Another

A decedent's interest in a policy of life insurance on the life of another is also includable in the decedent's gross estate [*see I.R.C. §§ 2031, 2033*; *Treas. Reg. § 20.2031-8(a)*]. Only one half of the value of insurance on the life of another owned by the decedent is included in the gross estate if the insurance was purchased with community funds [*see* *Rev. Rul. 75-100, 1975-1 C.B. 303*]. Life insurance policies includable in the gross estate by virtue of *I.R.C. § 2033* are reportable on Schedule F.

[c] Inclusion Under Other Provisions

Life insurance not includable in the gross estate under *I.R.C. §§ 2033* or *2042* may be includable under some other section of the Internal Revenue Code. For instance, a life insurance policy could be transferred by the decedent in such a way that it would be includable in the gross estate under *I.R.C. §§ 2036*, *2037*, or *2038*, and thus reportable on Schedule G.

[d] Insurance-Reporting Requirements

For every policy of life insurance listed on Schedule D (insurance on decedent's life), Schedule F (insurance owned by decedent on the life or another), or any other schedule that constitutes a part of the gross estate, the personal representative of the decedent must (1) request a statement on IRS Form 712 [*see § 453.194*] from the company that issued the policy, and (2) attach the completed IRS Form 712 to the back of the appropriate schedule in the return [*see* IRS Form 706, Instructions for Schedules D and F]. To have the completed IRS Forms 712available for timely filing of the estate and generation-skipping transfer tax return, they should be requested as soon as possible.

[9] Annuities

Except as otherwise provided for annuities purchased through qualified plans or trusts and individual retirement accounts [*see I.R.C. §§ 401, 408*], the gross estate includes the value of any annuity or other payment receivable by any beneficiary by reason of surviving the decedent under a contract or agreement if, under the contract or agreement, an annuity or other payment was payable to the decedent, or the decedent had the right to receive an annuity or payment, either alone or in conjunction with another person for the decedent's life, for any period not ascertainable without reference to the decedent's death, or for any period that does not in fact end before the decedent's death [*I.R.C. § 2039(a)*].

The amount that is includable in the gross estate is equal to that part of the value of the annuity or other payment receivable under a contract or agreement as is proportionate to that part of the purchase price contributed by the decedent. Except in the case of annuities under approved plans, contributions to the plan made by reason of the

decedent's employment, whether made by the decedent or by the employer on his or her behalf, are considered to have been made by the decedent [*I.R.C. § 2039(b)*; *Treas. Reg. § 20.2039-1(b)*].

[10] Income Interest With Remainder to Third Party

A terminable interest is created when the donor or decedent transfers an income interest to the surviving spouse and transfers the remainder, without adequate consideration, to a third party. Qualifying terminable interest property that is deducted from the value of the taxable estate under *I.R.C. § 2056(b)(7)* [§ 453.65[3]] must be included in the gross estate of the surviving spouse at his or her death [*I.R.C. § 2044(b)(1)(A)*].

Gifts made during life of qualified terminable interest property under *I.R.C. § 2523(f)* must also be included in the gross estate of the surviving spouse [*I.R.C. § 2044(b)(1)(B)*]. These interests must be included in the gross estate, however, only if the original transfer was not subject to the provisions of *I.R.C. § 2519* (concerning gifts of qualifying life interests). Property that is included in the gross estate of a decedent under these provisions is deemed to have passed from the decedent for estate tax and generation-skipping transfer tax purposes [*I.R.C. § 2044(c)*].

[11] Business Interests in Gross Estate

Any business interest owned by the decedent at the time of his or her death must be included in the gross estate pursuant to *I.R.C. § 2033*. The business interests that are includable in the gross estate include the decedent's interest as a sole proprietor in a business, the interest of the decedent in a partnership of which he or she is a partner, and the decedent's interest as a shareholder in a corporation. The partnership interest to be included in the gross estate may vary depending on the presence or absence of relevant provisions in a partnership agreement [*see Treas. Reg. § 20.2031-3*; *see also* IRS Form 706, Instructions for Schedule F]. For the most part, business interests other than stock are reportable on Schedule F. Stocks and bonds are reported on Schedule B.

[12] Lifetime Transfers in Gross Estate

[a] Types

The gross estate includes not only the value of property in which a decedent had an interest at death [*see I.R.C. § 2033*], but may also include the value of property interests transferred during the decedent's lifetime if the transfer is, in effect, of a testamentary nature or if the decedent retained the requisite ownership or control [*see I.R.C. §§ 2035*-2038, 2042]. These transfers are generally reportable on Schedule G.

The types of lifetime transfers that are a part of the gross estate and thereby subject to the estate tax are all transfers, in trust or otherwise, without an adequate and full consideration in money or money's worth [*see I.R.C. § 2043* (discussed in *§ 453.13[14]*)]. These transfers include the following:

- Any transfer by a decedent of a life insurance policy within three years before death [*I.R.C. §§ 2035(a)(2), 2042*];

- Any transfer by a decedent within three years before death of a retained life estate [*see I.R.C. § 2036*], reversionary interest [*see I.R.C. § 2037*], or power to revoke [*see I.R.C. § 2038*], if the property subject to the life estate, interest, or power would have been included in the gross estate had the decedent continued to possess the life estate, interest, or power until death [*I.R.C. § 2035(a)(2)*];

- The taxes on gifts made by a decedent or the decedent's spouse within three years before death [*I.R.C. § 2035(b)*];

- Transfers under which a decedent reserved or retained (in whole or in part) the use, possession,

income, or enjoyment of the transferred property for his or her life, or for a period not ascertainable without reference to his or her death, or for a period of such duration as to evidence an intention that it should extend to his or her death [*I.R.C. § 2036(a)*];

- Transfers under which a decedent retained the right, either alone or in conjunction with another person or persons, to designate who should possess or enjoy the property or the income therefrom [*I.R.C. § 2036(a)*];

- Transfers intended to take effect in possession or enjoyment at or afterdeath or after which decedent retained a reversionary interst worth more than 5 percent of total value [*I.R.C. § 2037*; *Treas. Reg. 20.2037-1*]; and

- Transfers under which the enjoyment of the transferred property was subject at the decedent's death to a change through exercise, either by the decedent alone or in conjunction with another person or persons, of a power to alter, amend, revoke, or terminate, or when such a power was relinquished in contemplation of death [*I.R.C. § 2038*].

[b] Transfers Within Three Years of Death

The value of certain gifts made within three years of a decedent's death must be included in the decedent's gross estate. These gifts include transfers of an interest in property or the relinquishment of a power that would have been included in the decedent's gross estate if retained at death, including [*I.R.C. § 2035(a)(2)*]:

- Transfers with a retained life interest [*I.R.C. § 2036*].

- Transfers taking effect at death [*I.R.C. § 2037*].

- Revocable transfers [*I.R.C. § 2038*].

- Proceeds of life insurance [*I.R.C. § 2035(a)*; *see I.R.C. § 2042*; *see also* I.R.S. Letter Rul. 200432015 (entire amount payable on insurance policy on decedent's life was includable in decedent's gross estate and estate was not entitled to estate tax marital deduction when proceeds of policy were payable to limited liability company)].

The inclusion rule, however, does not apply if the decedent made a bona fide sale for full and adequate consideration [*I.R.C. § 2035(d)*]. The value of any gift tax on gifts made within three years of death must also be included in the decedent's estate [*I.R.C. § 2035(b)*].

In addition to the inclusion rules concerning retained interests, the value of gifts made within three years of death must be included in the transferor's gross estate for other special purposes. The value of these gifts must be included for application of the rules with respect to redemption of stock to pay death taxes [*I.R.C. § 2035(c)(1)(A)*; *see I.R.C. § 303*], the special valuation provisions for certain types of farm and real property [*I.R.C. § 2035(c)(1)(B)*; *see I.R.C. § 2032A*], the provisions determining property subject to estate tax liens [*I.R.C. § 2035(c)(1)(C)*; *see I.R.C. § 6320* et seq.], and the provisions allowing an extension of time to pay estate taxes when the estate consists largely of an interest in a closely held business [*I.R.C. § 2035(c)(2)*]. The rules requiring inclusion for purposes of stock redemption, special valuation, and tax liens do not apply to gifts (except to transfers of life insurance policies) if no gift tax return was filed because the value of the gift was less than the annual gift tax exclusion [*I.R.C. § 2035(c)(3)*; *see I.R.C. § 6019(1)*].

[c] Transfers With Retained Life Estate

The gross estate includes lifetime transfers made by a decedent (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), in trust or otherwise, under which the decedent has retained for his or her life, or for any period not ascertainable without reference to his or her death, or for any period that does not in fact end before his or her death, the following rights [*I.R.C. § 2036(a)*; *Treas. Reg. § 20.2036-1(a)*]:

- Possession or enjoyment of, or the right to the income from, the property; or

- The right, either alone or in conjunction with any person, to designate who will possess or enjoy the property or the income from the property (except that, if the transfer was made before June 7, 1932, the right to designate must be retained by or reserved to the decedent alone).

A transferor retains "possession or enjoyment" of property within the meaning of *I.R.C. § 2036(a)* if the transferor retains a substantial present economic benefit from the property rather than a speculative contingent benefit that may or may not be realized [*Strangi v. Comm'r of Internal Revenue (5th Cir. 2005) 417 F.3d 468, 476* (benefits transferor retained, including periodic payments made before his death, continued use of transferred property, and post-death payment of various debts and expenses, were clearly substantial and present benefits, not speculative or contingent benefits)]. In addition, there must be an express or implied agreement at the time of the transfer that the transferor will retain possession or enjoyment of the property [*Treas. Reg. § 20.2036-1(a)*].

If the decedent retained or reserved one or more of these rights or interests as to all of the property transferred by him or her, the amount includable in the gross estate is the value of the entire property transferred, less the value of any outstanding income interest that is not subject to the decedent's interest or right and that is actually being enjoyed by another person at the time of his or her death [*Gradow v. United States (9th Cir. 1990) 897 F.2d 516, 518-519* ; *Estate of Bigelow (9th Cir. 2007) 503 F.3d 955, 966-967* (full value of real property transferred to family limited partnership was included in gross estate when decedent and her children had an implied agreement that decedent would retain income and economic enjoyment of the transferred asset and that the inter vivos transfer was not a bona fide sale for adequate and full consideration); *see, e.g.,* *Strangi v. Comm'r of Internal Revenue (5th Cir. 2005) 417 F.3d 468, 477-478* (full value of property decedent transferred to limited partnership was includible in decedent's gross estate because documents governing limited partnership did not prevent decedent from being designated as recipient of income from limited partnership, and implied agreement among parties provided that decedent would maintain economic benefit of transferred property); *Estate of Abraham v. Comm'r (1st Cir. 2005) 408 F.3d 26* (decedent need not have retained legally enforceable interest in transferred property; inclusion can be triggered under *I.R.C. § 2036* if enjoyment of transferred property is retained under an arrangement or understanding); *Estate of Schutt v. Comm'r, T.C. Memo. 2005-126* (fair market value of stock decedent contributed through revocable trust to Delaware business trust was not includable in his gross estate because stock transfers were bona fide for adequate and full consideration; decedent was not financially dependent ondistributions from business trust because he retained sufficient assets outside of trust to amply support his needs); *Estate of Korby v. Comm'r, T.C. Memo 2005-102, 2005-103* (value of property transferred to family limited partnership by deceased husband and wife was included in their respective gross estates when there was implied agreement between spouses and their children that they would retain right to income from transferred property as long as they needed it, and they retained insignificant income-producing assets in their names to meet their needs)]. If the decedent retained or reserved an interest or right as to only a part of the property transferred, the amount includable in his or her gross estate is only a corresponding proportion of the entire value of the property [*Treas. Reg. § 20.2036-1(a)*].

I.R.C. § 2036 is applicable only with regard to an interest in property that has been transferred *by the decedent*. Transfers by others, which create rights in the decedent, are not circumscribed by *I.R.C. § 2036*.

A decedent's retention of direct or indirect voting rights in a stock of a controlled corporation is also treated as the retention of the enjoyment of the property that causes the value of the stock to be included in the decedent's gross estate [*I.R.C. § 2036(b)(1)*]. A corporation is controlled if the decedent owned or had the right to vote stock possessing at least

20 percent of the total combined voting power of all classes of stock of the corporation within three years of the decedent's death [*I.R.C. § 2036(b)(2)*]. The relinquishment or cessation of these voting rights is deemed a transfer of the property, which begins the three-year time period to determine whether the transfer of property was made within three years of the decedent's death [*I.R.C. § 2036(b)(3)*]. The value of the stock will not be included in the decedent's estate if the decedent dies more than three years after the transfer of the voting rights [*I.R.C. § 2035(a)(2)* (discussed in *§ 453.13[12][b]*].

[d] Transfers Taking Effect at Death

The gross estate includes the value of any interest in property transferred by a decedent (except in the case of a bona fide sale for an adequate and full consideration in money or money's worth), in trust or otherwise, that is intended to take effect at death [*see I.R.C. § 2037(a)*]. All three of the following elements must be present before transfer is considered as being intended to take effect at death [*I.R.C. § 2037(a)*]:

- Possession or enjoyment of the property can, through ownership of that interest, be obtained only by surviving the decedent;

- The decedent has retained a possibility (hereinafter referred to as a "reversionary interest") that the property, other than the income alone, will return to the decedent or his or her estate or will be subject to a power of disposition by the decedent [*see Treas. Reg. § 20.2037-1(c)(2)* (what constitutes reversionary interest retained by decedent)]; and

- The value of the reversionary interest retained by the decedent immediately before the decedent's death exceeds 5 percent of the value of the entire property.

The value of an interest in transferred property is not included in a decedent's gross estate under *I.R.C. § 2037* unless possession or enjoyment of the property could, through ownership of that interest, have been obtained only by surviving the decedent. Thus, property is not included in the decedent's gross estate if, immediately before the decedent's death, possession or enjoyment of the property could have been obtained by any beneficiary either by surviving the decedent or through the occurrence of some other event such as the expiration of a term of years [*Treas. Reg. § 20.2037-1(b)*].

Any transfer intended to take effect at death will not be included in the decedent's estate if possession or enjoyment of the property could have been obtained by any beneficiary during the decedent's lifetime through the exercise of a general power of appointment that was exercisable immediately before the decedent's death [*I.R.C. § 2037(b)*; *but see Treas. Reg. §§ 20.2037-1(b)*, 20.2037-1(e), Example (5) (if event other than surviving decedent, which conditions possession or enjoyment of property, is unrealistic and death of decedent occurs before other event, property transferred as includable in gross estate)].

[e] Revocable Transfers

A decedent's gross estate includes the value of any interest in property transferred by the decedent during his or her lifetime (except in the case of a bona fide sale for an adequate and full consideration in money or money's worth), in trust or otherwise, if, at the time of his or her death, the enjoyment of the property is subject to change through the exercise of a power to alter, amend, revoke, or terminate by the decedent alone or by the decedent in conjunction with another person [*I.R.C. § 2038(a)(1)*]. For such a transfer to be included in the gross estate, three elements must exist [*I.R.C. § 2038(a)(1)*]:

- The decedent must have made a transfer, the enjoyment of which was subject to a power to alter, amend, revoke, or terminate;

- The power could be exercised by the decedent alone or in conjunction with some other person; and

- The power was in existence at the decedent's death, or had been released within the three-year period ending on the date of the decedent's death.

Only powers that are exercisable by the decedent alone or in conjunction with some other person are within the scope of *I.R.C. § 2038*. Thus, *I.R.C. § 2038* does not apply to powers held solely by a person other than the decedent. But, for example, if the decedent had the unrestricted power to remove or discharge a trustee at any time and to appoint himself or herself trustee, the decedent is considered as having the powers of the trustee. This result would not follow if he or she only had the power to appoint himself or herself trustee under limited conditions that did not exist at the time of his or her death. In addition, no tax will result if the decedent's power can be exercised only with the consent of all parties having an interest, vested or contingent, in the transferred property [*Treas. Reg. § 20.2038-1(a)*].

If a decedent was the donor of the gift to a minor and was also the custodian, and acting in that capacity at the time of his or her death, the gift will be included in the decedent's gross estate [*Eichstedt v. United States (N.D. Cal. 1972) 354 F. Supp. 484, 487-488* ; *see § 453.13[6]*].

[13] Powers of Appointment in Gross Estate

In general, the value of all property over which a decedent possessed a general power of appointment at the time of his or her death is includable in the decedent's gross estate [*I.R.C. § 2041(a)*]. A power of appointment is a general power if it can be exercised in favor of the decedent, the decedent's estate or creditors, or creditors of the decedent's estate [*I.R.C. § 2041(b)(1)*]. For estate tax purposes, all powers that are general powers of appointment in substance and effect will be treated as general powers, regardless of the nomenclature used in creating them and regardless of whether they would qualify as powers of appointment under local law [*Treas. Reg. § 20.2041-1(b)(1)*]. For example, a power to consume or appropriate the principal of a trust will be treated as a general power of appointment, regardless of whether it is denominated as such in the governing instrument [*Treas. Reg. § 20.2041-1(b)(1)*].

The Internal Revenue Code provides an important exception to the general rule of includability of property subject to a general power of appointment. Under this exception, if a person has the power to consume, invade, or appropriate property for himself or herself (or for another person), and if the power is limited by an "ascertainable standard" relating to the health, education, support, or maintenance of the person for whom the power may be exercised, the power is not a general power of appointment for estate or gift tax purposes [*I.R.C. §§ 2041(b)(1)(A), 2514(c)(1)*]. The Treasury Regulations state that a power is limited by an "ascertainable standard" if the extent of the holder's duty to exercise the power is reasonably measurable in terms of the beneficiary's needs for health, education, or support (or any combination of those things). Under those regulations, it is acceptable to define the "ascertainable standard" in terms of the beneficiary's "support," "support in reasonable comfort," "maintenance in health and reasonable comfort," "support in his [or her] accustomed manner of living," "education, including college and professional education," "health," and "medical, dental, hospital and nursing expenses and expenses of invalidism." However, it is not acceptable to define the duty in terms of the beneficiary's "comfort," "welfare," or "happiness," as those words are too indefinite to constitute an "ascertainable standard" [*Treas. Reg. § 20.2041-1(c)(2)*]. For this reason, drafters of powers of appointment commonly limit exercise of the power to amounts necessary for the "health, education, support, or maintenance" (or similar language) of the beneficiary.

[14] Transfers for Insufficient Consideration

[a] In General

The transfers, trusts, interests, rights, or powers enumerated and described in *I.R.C. §§ 2035* (transfers within three years of death), 2036 (transfers with retained life estate), 2037 (transfers taking effect at death), 2038 (revocable

transfers), and 2041 (powers of appointment) are not includable in the gross estate if made, created, exercised, or relinquished in a transaction that constituted a bona fide sale for an adequate and full consideration in money or money's worth [*I.R.C. § 2035(d)*]. To constitute a bona fide sale for an adequate and full consideration in money or money's worth, the transfer must have been made in good faith, and the price must have been an adequate and full equivalent reducible to a money value. If the price was less than full and adequate consideration, only the excess of the fair market value of the property (as of the applicable estate valuation date) over the price received by the decedent is included in ascertaining the value of his or her gross estate [*I.R.C. § 2043(a)*; *Treas. Reg. § 20.2043-1(a)*].

[b] Relinquishment of Marital Rights

For estate tax purposes, the relinquishment or promised relinquishment of a dower, curtesy, statutory estate created in lieu of dower or curtesy, or other marital rights in a decedent's property or estate is not consideration in money or money's worth, except that, for purposes of *I.R.C. § 2053* (relating to expenses, indebtedness, and taxes), a transfer of property made under a written separation agreement [*see I.R.C. § 2516*] executed not more than two years before divorce is viewed as having been made for full and adequate consideration in money or money's worth [*I.R.C. § 2043(b)*]. Thus, even if a transfer or relinquishment is made for a consideration sufficient to support the obligation of a contract under local law, exclusion of the transferred property from the gross estate is still subject to the other tests for taxability contained in *I.R.C. §§ 2035*-2038 and 2041.

Under *I.R.C. § 2043(b)*, a spouse's relinquishment of his or her interest in community property is treated as consideration [*see United States v. Past (9th Cir. 1965) 347 F.2d 7, 12-15* (but consideration contributed by decedent was less than value of interest decedent received in trust, so excess as includable in decedent's estate)]. In addition, a spouse's relinquishment of rights to support and maintenance is treated as consideration [*Estate of Davis (3rd Cir. 1971) 440 F.2d 896, 899-900]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Forms of Pleading and Practice--Annotated

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§ 453.14 Property Excluded From Gross Estate--Qualified Conservation Easement

[1] In General

Certain items may be excluded from the value of the gross estate [*see I.R.C. § 2031(a)* (definition of gross estate)].

In the case of decedents dying on or after January 1, 1998, an exclusion is available for a "qualified conservation easement" as defined in *I.R.C. § 2031(c)*. A qualified conservation easement is a contribution of a "qualified real property interest" to a charity exclusively for conservation purposes [*I.R.C. § 2031(c)(8)(B)*; *see I.R.C. § 170(h)* (income tax deduction for qualified conservation contribution)].

For purposes of the estate tax exclusion, "conservation purpose" means any of the following that will yield a significant public benefit [*I.R.C. §§ 170(h)(4)(A), 2031(c)(8)(B)*]:

- Preservation of land areas for outdoor recreation by, or the education of, the general public.

- Protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem. A contribution of property for this purpose is deductible even if the public's access to the property is restricted [*Treas. Reg. § 1.170A-14(d)(3)*].

- Preservation of open space (including farmland and forest land) for the scenic enjoyment of the public, or under a clearly delineated federal, state, or local governmental conservation policy.

The requirement that the easement be used exclusively for conservation purposes is intended to limit deductible contributions to those transfers that require the donee to hold the easement exclusively for conservation purposes--that is, they may not be transferable by the donee in exchange for money, other property, or services. A contribution of a qualified real property interest may be exclusively for conservation purposes only if it is protected in perpetuity [*I.R.C. § 170(h)(5)(A)*; *see Hurst v. Comm'r (2005) 124 T.C. 16* (charitable contributions of conservation easements on undeveloped lakefront property to nonprofit nature conservancy were qualified conservation contributions; donee was

long-standing nature conservancy, holding of conservation easements was directly related to its tax-exempt purposes, and donee agreed to enforce preservation-related restrictions included in easements in perpetuity)].

In addition, for purposes of the federal estate tax exclusion, the easement must include a prohibition on more than a de minimis use for commercial recreation activity [*I.R.C. § 2031(c)(8)(B)*].

If the executor makes an election on the estate tax return on or before the due date (including extensions) for filing the return [*I.R.C. § 2031(c)(1), (6)*], a specified percentage of the value of the land subject to the qualified contribution easement (reduced by the value of any charitable deduction with respect to the land) may be excluded from the value of the gross estate [*I.R.C. § 2031(c)(1), (2)*; *see I.R.C. § 2055(f)* (estate tax charitable deduction for transfer of qualified real property interest)]. Once an election is made to take the exclusion, it is irrevocable [*I.R.C. § 2031(c)(6)*].

[2] Amount of Exclusion

The exclusion is limited to the lesser of the following [*I.R.C. § 2031(c)(1)*; *see I.R.C. § 2031(c)(2)* ("applicable percentage"), (3) ("exclusion limitation")]:

- 40 percent of the value of the land, reduced by 2 percentage points for each percentage point (or fraction of a percentage point) by which the value of the qualified conservation easement is less than 30 percent of the value of the land (determined without regard to the value of the easement and reduced by the value of any retained development rights). The values taken into account are those as of the date of the contribution of the property.

- The amount of the "exclusion limitation" available in the year of the decedent's death.

The "exclusion limitation" is determined in accordance with the following table [*I.R.C. § 2031(c)(3)*]:

Year of Decedent's Death	Exclusion Limitation
1998	$100,000
1999	$200,000
2000	$300,000
2001	$400,000
2002 or thereafter	$500,000

[3] Requirements Relating to Ownership and Donee

The land subject to the qualified conservation easement must have been owned by the decedent or a member of the decedent's family for three continuous years before the decedent's death [*I.R.C. § 2031(c)(8)(A)(ii)*], and the contribution must have been made by the decedent, the executor of the decedent's estate, thetrustee of a trust that includes the land subject to the easement, or members of the decedent's family [*I.R.C. § 2031(c)(8)(C)*]. For these purposes, "member of the decedent's family" means one or more of the following [*I.R.C. § 2031(c)(8)(C)*; *see I.R.C. § 2032A(e)(2)*]:

- An ancestor, spouse, or lineal descendant of the decedent.

- A lineal descendant of the decedent's spouse or parent.

- A spouse of any lineal descendant of the decedent, the decedent's spouse, or the decedent's parent.

[4] Location of Land

Effective for decedents dying after 2000, the conservation easement may be claimed with respect to any land that is located in the United States or its possessions [*I.R.C. § 2031(c)(8)(A)(I)*]. For decedents dying before 2001, the easement could be claimed only on land located within 25 miles of a metropolitan area (as defined by the Office of Management and Budget) or a national park or wilderness area, or within 10 miles of an Urban National Forest (as designated by the Forest Service of the U.S. Department of Agriculture) [*I.R.C. § 2031(c)(8)(A)(8)(I)*, before amendment by Pub. Law 107-16].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewTax LawFederal Estate & Gift TaxesDeductionsGeneral OverviewTax LawFederal Estate & Gift TaxesDeductionsAdministrative Expenses, Losses & Related Deductions (IRC secs. 2053-2054)Tax LawFederal Estate & Gift TaxesDeductionsCharitable Deductions (IRC secs. 2055, 2522, 2524)General OverviewTax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)Tax LawFederal Income Tax ComputationDeductions for Nonbusiness ExpensesCharitable Contributions (IRC sec. 170)General OverviewTax LawState & Local TaxesEstate & Gift TaxGeneration-Skipping Transfer TaxesTax LawState & Local TaxesEstate & Gift TaxGross Estate

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38-453 California Forms of Pleading and Practice--Annotated § 453.15

§ 453.15 Valuation Date

[1] Date of Death

The value of the gross estate of a decedent for estate tax purposes must be determined as of the date of the decedent's death or, at the election of the decedent's personal representative, at the alternate valuation date, which is generally six months after the decedent's death [*I.R.C. §§ 2031, 2032*; *see* the Research Guide for a list of authorities relating to valuation methods]. The election to value the gross estate as of the alternate valuation date is exercisable by the decedent's personal representative on a timely filed estate tax return [*I.R.C. § 2032(d)*].

[2] Alternate Valuation Date

The sum of the estate tax and the generation-skipping transfer tax due in respect to the property included in a decedent's gross estate may be reduced by electing the alternate valuation date [*see I.R.C. § 2032*]. Under the alternate valuation date election, all property included in the gross estate is valued as of six months after the decedent's death, except for property sold, distributed, exchanged, or otherwise disposed of during the six months, which is valued as of the date of disposition [*I.R.C. § 2032(a)(1), (2)*]. Adjustments in value due to a mere lapse of time are not allowed [*see I.R.C. § 2032(a)(3)*; *Treas. Reg. § 20.2032-1(f)*].

The alternate valuation date election can only be made if it will reduce both the value of the gross estate and the sum of the estate tax imposed and the tax on generation-skipping transfers [*see I.R.C. §§ 2601*-2663] with respect to property that is includable in decedent's gross estate [*I.R.C. § 2032(c)*]. The election must be made with respect to all property included in the gross estate on the date of the decedent's death. It cannot be applied only to a portion of the estate property [*see I.R.C. § 2032(a)*; *Treas. Reg. § 20.2032-1(b)(2)*].

The alternate valuation date election is made on the federal estate and generation-skipping transfer tax return. Once the return is filed, the election cannot be revoked [*I.R.C. § 2032(d)(1)*]. The alternate valuation date election may be made on a return that is filed up to one year (including extensions) after its due date [*I.R.C. § 2032(d)(2)*]. For further authorities relating to this election, see the Research Guide to this Part. If the alternative valuation date election is made, the property will be listed on all schedules of the return at the alternate value. For discussion of other possible

ramifications for heirs and devisees if this election is made, see *§ 453.27*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewReal Property LawProperty ValuationTax LawFederal Estate & Gift TaxesAlternative & Special Use Valuation (IRC secs. 2032, 2032A, 2701-2704)Alternative ValuationTax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)Tax LawState & Local TaxesEstate & Gift TaxGeneration-Skipping Transfer TaxesTax LawState & Local TaxesEstate & Gift TaxGross EstateTax LawState & Local TaxesEstate & Gift TaxValuationGeneral Overview

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38-453 California Forms of Pleading and Practice--Annotated § 453.16

§ 453.16 Valuation of Gross Estate

[1] Fair Market Value

The value of every property interest included in a decedent's gross estate under *I.R.C. §§ 2033*-2043 is its fair market value at the time of the decedent's death (or at the alternate valuation date if the personal representative so elects). The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. The fair market value of a particular item is not to be determined by a forced sale, or by the sale price of the item in a market other than that in which it is most commonly sold to the public, taking into account the location of the item wherever appropriate. Thus, in the case of an item of property includable in the gross estate that is generally obtained by the public in the retail market, the fair market value is the price at which the item or comparable item would be sold at retail. All relevant facts and elements of value as of the applicable valuation date must be considered [*Treas. Reg. § 20.2031-1(b)*]. Those factors include income yield, appraisals, sales prices of similar property near the time of death, bids made for the property, and general economic conditions [*see Treas. Reg. §§ 20.2031-2*-20.2031-8; *Estate of Noble v. Comm'r, T.C. Memo. 2005-2* (fair market value of decedent's interest in closely held stock was determined using actual sales price of stock in arm's-length transaction that occurred approximately one year after decedent's death); *Estate of Thompson v. Comm'r, T.C. Memo. 2004-174 , vacated and remanded on other grounds, 499 F.3d 129, 136* (capitalization of income approach used to value decedent's 20 percent interest in closely held company)].

Valuation rules specific to a particular type of property are listed in the Research Guide. They are also discussed in IRS Form 706 [*see § 453.190*] and in the Instructions for IRS Form 706 [*see § 453.191*].

[2] Special Valuation of Farms and Closely Held Businesses

If specified conditions are met, the personal representative may elect to value qualified real property included in a decedent's gross estate at its value based on the current use being made of the property rather than on the basis of its highest and best use [*I.R.C. § 2032A(a)*]. Qualified real property must be located in the United States and must be used for farming or for another closely held trade or business [*I.R.C. § 2032A(b)*]. In either case, there must be a trade or business use. Mere passive rental of property will not qualify [*see I.R.C. § 2032A(b)(1)(C)*; *Treas. Reg. § 20.2032A-3*;

Williamson v. C. I. R. (9th Cir. 1992) 974 F.2d 1525, 1530 ; *but see I.R.C. § 2032A(c)(7)(E)* (rental by surviving spouse or lineal decedent after decedent's death may be qualified use)].

To qualify, the property must pass to a qualified heir (a family member) [*I.R.C. § 2032A(e)(1), (2)*], who must continue the qualified use [*I.R.C. § 2032A(a)-(c)*]. *I.R.C. § 2032A* provides specific methods for valuing qualified real property [*see I.R.C. § 2032A(e)*]. The special valuation method may not be used to decrease the value of the qualified real property in the decedent's gross estate by more than $750,000, subject to inflation adjustments for decedents dying after 1998. [*I.R.C. § 2032A(a)(2)*]. For decedents dying in 1999, the figure is $760,000 [*Rev. Proc. 98-61* , § 3.15, 98-2 C.B. 758]. For decedents dying in 2000, the figure is $770,000 [*Rev. Proc. 99-42* , § 3.16, *1999-46 I.R.B. 568*]. For decedents dying in 2001, the figure is $800,000 [*Rev. Proc. 2001-13* , § 3.16, *2001-3 I.R.B. 337*]. For decedents dying in 2003, the figure is $840,000 [*Rev. Proc. 2002-70, 2002-46 I.R.B. 845*]. For decedents dying in 2004, the figure is $850,000; for decedents dying in 2005, the figure is $870,000 [*Rev. Proc. 2004-71* , § 3.27, *2004-50 I.R.B. 970*], and for decedents dying in 2006, the figure is $900,000 [*Rev. Proc. 2005-70, 2005-47 I.R.B. 979* § 3.27]. The tax savings from the special use valuation election are recaptured if the property is disposed of to nonfamily members or ceases to be used for farming or closely held business purposes within 10 years after the decedent's death (with certain adjustments for qualified heirs who commence active participation in the farm or business within two years after the decedent's death). [*I.R.C. § 2032A(c)*]. This election is made on the federal estate and generation-skipping transfer tax return and requires completion of Schedule A-1.

For discussion of other considerations relevant to heirs and devisees if this election is made, see *§ 453.27*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewTax LawFederal Estate & Gift TaxesAlternative & Special Use Valuation (IRC secs. 2032, 2032A, 2701-2704)General OverviewTax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)Tax LawFederal Income Tax ComputationValuationReal PropertyTax LawState & Local TaxesEstate & Gift TaxGeneration-Skipping Transfer TaxesTax LawState & Local TaxesEstate & Gift TaxGross EstateTax LawState & Local TaxesEstate & Gift TaxValuationGeneral Overview

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38-453 California Forms of Pleading and Practice--Annotated § 453.17

§ 453.17 Request for Basis of Estate Valuation

The Internal Revenue Service must furnish, on the written request of the personal representative or other person required to file the return, a written statement explaining any determination or proposed determination of the value of an item of property included in the estate. The statement must be furnished no later than 45 days after the personal representative's written request or 45 days after the determination or proposed determination, whichever is later [*I.R.C. § 7517(a)*]. The written statement by the IRS must (1) explain the basis on which the valuation was determined or proposed, (2) set forth any computation used in arriving at that value, and (3) include a copy of any expert appraisal [*I.R.C. § 7517(b)*]. Note, however, that the method employed in arriving at any valuation is not binding on the IRS [*I.R.C. § 7517(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewTax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)Tax LawState & Local TaxesEstate & Gift TaxGeneration-Skipping Transfer Taxes

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38-453 California Forms of Pleading and Practice--Annotated § 453.18

§ 453.18 Ascertaining Value of Taxable Estate

[1] Deductions in General

After computing a decedent's gross estate, the second step in determining the federal estate tax is to ascertain the value of the taxable estate of the deceased [*Treas. Reg. § 20.0-2(b)(3)*]. This value is determined by subtracting the allowable deductions, as derived from Schedules J--T, from the value of the gross estate [*I.R.C. §§ 2051*-2056; *Treas. Reg. § 20.0-2(b)(3)*]. Deductions are allowed for the following items:

- Expenses, indebtedness, and taxes [*I.R.C. § 2053* (Schedules J--L); *see Estate of Gilman v. Comm'r, T.C. Memo. 2004-286* (interest and costs associated with loan used to pay estate taxes may be deductible as administration expenses when loan is necessary to pay estate taxes due to estate's illiquidity); *but see Tech. Adv. Mem. 200513028* (interest on loan that was *not* necessary to administration of estate is not deductible as administration expense; decedent's estate consisted primarily of 99% interest in limited partnership which had substantial liquid assets available to pay estate tax); I.R.S. Letter Rul. 200444021 (estate tax deduction is not allowed for income taxes estate paid on amounts it was forced to withdraw from decedent's IRA to pay estate tax); *see also* I.R.S. Letter Rul. 200532049 (attorney's fees and litigation expenses incurred by personal representative of estate in malpractice suit connected with estate are deductible as administration expenses)].

- Losses [*I.R.C. § 2054* (Schedule L)].

- Certain transfers to a surviving spouse [*I.R.C. § 2056* (Schedule M)].

- Charitable transfers [*I.R.C. § 2055* (Schedule O)].

- Qualified family-owned business deduction [*I.R.C. § 2057* (Schedule T)].

- Effective for estates of decedents dying after 2004, a deduction for state death taxes [*I.R.C. § 2058*].

[2] Estate Tax Versus Income Tax Deduction of Certain Expenses

There are two general categories of deductions for funeral expenses, expenses of administering the estate, claims against the estate, and indebtedness calculated on Schedules J--L. Only actual expenses may be deducted, but an item may be entered on the return for a deduction although its exact amount is not then known, provided it is ascertainable with reasonable certainty and will be paid [*Treas. Reg. § 20.2053-1(b)(3)*].

Interest and costs associated with a loan taken out by the estate to pay estate taxes may be deductible as administration expenses when the loan is necessary to pay the taxes due to the estate's illiquidity [*see Estate of Gilman v. Comm'r, T.C. Memo. 2004-286*); Letter Rul. 200449031 (interest on loan used to pay estate tax is deductible as administration expense if loan was necessary for administration of estate, but amount of loan should reflect any reduction in tax liability resulting from deductibility of interest)]. However, an estate may not claim an estate tax deduction under *I.R.C. § 2053* for income taxes the estate paid on amounts it was compelled to withdraw from the decedent's IRAs in order to pay the estate tax [Letter Rul. 200444021 (only excise taxes are deductible as administrative expenses, and no deduction is allowed for income taxes paid on income received after decedent's death)].

Casualty losses suffered during the settlement of the estate are deductible on Schedule L to the extent that any loss was not covered by insurance [*I.R.C. § 2054*; *Treas. Reg. § 20.2054-1*].

Some of the foregoing expenses and debts that are deductible on the estate tax return may also be deductible either on the decedent's last income tax return (IRS Form 1040) or on the estate's fiduciary income tax return (IRS Form 1041). No double deduction, however, is allowed [*I.R.C. § 642(g)*]. The personal representative must elect to deduct the expenses either on the income tax return or on the estate tax return and may not deduct them on both returns [*see I.R.C. § 642(g)*]. Substantial tax savings may be effected by shifting deductions from the estate tax return to the income tax return. The Research Guide contains authorities relating to the items that may be deducted on Schedules J--L of the estate tax return.

[3] Marital Deduction

Since 1982, an unlimited marital deduction has been allowed for undivided interests in property included in a decedent's gross estate that pass to the surviving spouse [*I.R.C. § 2056(a)*]. The gift tax marital deduction has also been unlimited since 1982, so there is no special adjustment to the estate tax marital deduction for interspousal gifts [*see I.R.C. § 2523*]. It should be noted that, except for property passing to a surviving spouse in a qualified domestic trust [*I.R.C. § 2056(d)(2)*; *see I.R.C. § 2056A* (definition and tax treatment of qualified domestic trust)], the marital deduction is not allowed if the surviving spouse is not a citizen of the United States [*I.R.C. § 2056(d)(1)*].

The purpose of the marital deduction is to treat a husband and wife as a single unit for computing estate taxation. Any assets not taxed in a decedent's estate are taxable in the surviving spouse's estate under *I.R.C. § 2044* [Davis v. Comr. of Int. Rev. (9th Cir. [Cal.] 2005) *394 F.3d 1294, 1297 fn. 1*].

Property passing to the surviving spouse encompasses community property, or interests acquired under a will or by intestacy; by dower, homestead, or election against the will; by gift or through a power of appointment; or by right of survivorship of the co-owner [*see I.R.C. § 2056(c)*]. The marital deduction generally contemplates that the surviving spouse receive the entire interest in the property. If less is received, there may be a terminable interest that does not qualify for the marital deduction [*see I.R.C. § 2056(b)*]. For example, a surviving spouse's interest in a trust funded with the spouses' community property qualifies for the estate tax marital deduction if the surviving spouse is entitled to all of the trust income for life and possesses a general power of appointment over the trust property [Letter Rul. 200444023 (surviving spouse's right to withdraw entire corpus of trust at any time constitutes general power of appointment and also satisfies requirement that surviving spouse must be entitled to all income for life)]. However, a trust does not qualify for the marital deduction if the surviving spouse's interest does not constitute a qualifying income interest for

life because the extent to which the trust income is to be paid to the surviving spouse is within the trustee's discretion [Letter Rul. 200444023].

Nevertheless, some terminable interests, referred to as qualified terminable interest property, or "QTIP," qualify for the marital deduction [*I.R.C. § 2056(b)(7), (8)*]. Because the marital deduction is "strictly construed and applied," every condition for this exception must be met [*see* Davis v. Comr. of Int. Rev. (9th Cir. [Cal.] 2005) *394 F.3d 1294, 1298 fn. 2*]. In determining whether an interest that passes in a trust to a surviving spouse qualifies for a QTIP deduction under *I.R.C. § 2056(b)(7)*, a court first looks to state law to determine the nature and extent of the property interest granted to the surviving spouse, then to federal law to determine whether these property rights are ultimately subject to taxation [*United States v. Craft (2002) 535 U.S. 274, 278, 122 S. Ct. 1414, 152 L. Ed.2d 437* ; Davis v. Comr. of Int Rev. (9th Cir. [Cal.] 2005) *394 F.3d 1294, 1299]* .

The personal representative may elect to deduct QTIP property [*I.R.C. § 2056(b)(7)(B)(v)*; *see I.R.C. § 2056(b)(7)(C)* (automatic election for qualifying income interests under annuities); *see also Prob. Code §§ 21521, 21526* (liability or immunity of personal representative for making or not making election)], butthe effect of the election is to make the property subject to taxation under *I.R.C. § 2044* in the estate of the surviving spouse. The marital deduction is taken on Schedule M.

[4] Charitable Deduction

A charitable deduction is allowed for the value of property included in the gross estate that was transferred to or for the use of certain public, charitable, or religious organizations [*I.R.C. § 2055(a)*]. A charitable deduction will be allowed for any interest that becomes part of a contribution as a result of a qualified disclaimer [*I.R.C. § 2055(a)*; *see I.R.C. §§ 2046, 2518*; *Treas. Reg. §§ 25.2518-1*-25.2518-3 (requirements for making qualified disclaimer); *see Estate of Engelman v. Commissioner (2003) 121 T.C. 54* (attempted disclaimer of property by executor of decedent's estate on decedent's behalf was not qualified disclaimer; decedent's exercise of power of appointment over property, effective on her death, constituted acceptance of property under California law); *see also* Letter Rul. 200333023 (example of qualified disclaimer)]. Property that is included in the gross estate because the decedent possessed a power of appointment over it [*see I.R.C. § 2041*], and which passes to a qualified charitable beneficiary, is considered to be a bequest by the decedent and is also deductible as a charitable transfer [*I.R.C. § 2055(b)*]. Charitable deductions are listed on Schedule O.

[5] Qualified Family-Owned Business Deduction

[a] In General

For decedents dying on or after January 1, 1998, and before 2004 [*I.R.C. § 2057(j)*], who were citizens or residents of the United States, the value of the taxable estate may be determined by applying the "family-owned business" deduction [*I.R.C. § 2057(a)*]. The deduction is reported on Schedule T of the federal estate tax return [IRS Form 706]. The deduction is not available for decedents dying after 2003 [*I.R.C. § 2057(j)*].

This deduction may not exceed $675,000 [*I.R.C. § 2057(a)(2)*], and, when the deduction applies, the applicable exclusion amount under *I.R.C. § 2010* will be $625,000 [*I.R.C. § 2057(a)(3)(A)*]. However, if the deduction is less than $675,000, the amount of the applicable exclusion amount will be increased (but not above the amount which would apply to the estate without regard to the family-owned business interest deduction) by the excess of $675,000 over the amount of the deduction allowed [*I.R.C. § 2057(a)(3)(B)*; *see also § 453.10*].

The family-owned business deduction is available only if the adjusted value of the qualified family-owned business interests (and any lifetime gifts of such interests made by the decedent) exceeds 50 percent of the adjusted gross estate [*I.R.C. § 2057(b)(1)(C)*]. Further, there must have been at least five years out of the eight years immediately preceding

the decedent's death during which the qualified family-owned business interests were owned by the decedent or members of the decedent's family and the decedent or members of his or her family "materially participated" in the business [*I.R.C. § 2057(b)(1)(D)*]. For this purpose, "material participation" generally means the kind of activities that give use to earnings from self-employment [*I.R.C. § 2057(b)(1)(D)(ii)*; *see I.R.C. §§ 1402(a)(1), 2057(e)(6)*]. For additional discussion of this complex deduction, see *California Wills & Trusts, Ch. 2, Overviews of Tax Laws Affecting Disposition of Estates, § 2.07[4]* (Matthew Bender).

[b] "Qualified Heir" of Decedent

The qualified family-owned business interests must be acquired by a qualified heir or heirs from the decedent [*I.R.C. § 2057(b)(2)(B)*]. For this purpose, a "qualified heir" is any of the following [*I.R.C. § 2032A(e)(2), 2057(i)(2)*]:

- An ancestor, spouse, or lineal descendant of the decedent.
- A lineal descendant of the decedent's spouse or parent.
- A spouse of any lineal descendant of the decedent, the decedent's spouse, or the decedent's parent.
- Any person who has been an active employee of the business for at least 10 years before the date of the decedent's death.

[c] Qualifying Businesses

A "qualified family-owned business" may be an interest as a proprietor in a trade or business carried on as a proprietorship [*I.R.C. § 2057(e)(1)(A)*] or an interest in an entity carrying on a trade or business when the following family-ownership requirements are met [*I.R.C. § 2057(e)(1)(B)*]:

- At least 50 percent of the entity is owned directly or indirectly by the decedent and members of the decedent's family.
- At least 70 percent of the entity is owned directly or indirectly by two families and at least 30 percent is owned directly or indirectly by the decedent and members of the decedent's family.
- At least 90 percent of the entity is owned directly or indirectly by three families and at least 30 percent is owned directly or indirectly by the decedent and members of the decedent's family.

The term "interest in an entity" means an equity or ownership interest in the entity; therefore, promissory notes issued by a family-owned business cannot be deducted as qualified family-owned business interests [I.R.S. Letter Rul. 200410002].

For this purpose, a "member of the family" is any one or more of the following [*I.R.C. §§ 2032A(e)(2), 2057(i)(2)*]:

- An ancestor, spouse, or lineal descendant of the decedent.
- A lineal descendant of the decedent's spouse or parent.
- A spouse of any lineal descendant of the decedent, the decedent's spouse, or the decedent's parent.

The trade or business must have its principal place of business in the United States [*I.R.C. § 2057(e)(2)(A)*], and its stock cannot have been traded on an established securities market at any time within three years of the date of the

decedent's death [*I.R.C. § 2057(e)(2)(B)*]. Further, no more than 35 percent of its adjusted ordinary gross income may qualify as "personal holding company income" [*I.R.C. § 2057(e)(2)(C)*; *see I.R.C. § 543(a)* (personal holding company income)].

[d] Election; Recapture Tax

The family-owned business deduction is available only if the executor elects the deduction on the decedent's estate tax return and files a written agreement signed by each qualified heir that a recapture tax will be imposed if, within 10 years after the decedent's death and before the heir's death, any of the following occurs [*I.R.C. § 2057(b)(1)(B), (f), (h)*; *see I.R.C. § 2032A(c)(6)(B)*; *see also* I.R.S. Letter Rul. 200328012 (decedent's estate granted extension of time to make election under *I.R.C. § 2057* to deduct adjusted value of decedent's qualified family-owned business interests, when law firm hired by trustee to provide legal and tax advice regarding administration of decedent's estate failed to make election on original federal estate tax return)]:

- The heir ceases to meet the "material participation" requirements of the exclusion. These requirements are generally met if the heir "materially participates" in the trade or business for at least five years of any eight-year period within the 10-year period following the decedent's death [*I.R.C. §§ 2032A(c)(6)(B), 2057(f)(1)(A)*]. For this purpose, "material participation" means actively participating in the work or management decisions of the farm or business, either personally or through a fiduciary [*I.R.C. §§ 2032A(c)(6)(B), (7)(B), 2033(f)(1)(A)*].

- The heir disposes of any portion of the interest, other than to a member of the heir's family or through a qualified conservation contribution [*see I.R.C. § 170(h)* (qualified conservation contribution)].

- The heir loses U.S. citizenship.

- The principal place of business of the trade or business ceases to be located in the United States.

[6] Deduction for State Death Taxes

For estates of individuals dying after 2004, the value of the taxable estate is determined by deducting from the gross estate any estate, inheritance, legacy, or succession taxes actually paid to any state or the District of Columbia for any property included in the gross estate, but not including any taxes paid for the estate of a person other than the decedent [*I.R.C. § 2058*; *see* IRS Form 706, Line 3b]. A deduction for state death taxes is allowed only for taxes actually paid and claimed as a deduction during the time period that ends before the later of the following time periods [*I.R.C. § 2058(b)*]:

- Four years after the estate tax return is filed;

- 60 days after a decision of the tax court becomes final if a timely petition for redetermination of a deficiency has been filed;

- The expiration date of any extension of time that has been granted for payment of the tax; or

- If a timely claim for a refund or credit of an overpayment of tax has been filed, the latest of:

    - 60 days after a notice of disallowance is mailed;

    - 60 days after the decision of the court becomes final as to a timely suit started on the claim; or

- Two years after a notice of the waiver of disallowance is filed.

No dollar limits are imposed on the amount of this deduction.

The certificate of the proper taxing authority should be submitted with the estate tax return to support the claimed deduction. This certificate should show the total amount of the tax imposed, the amount of discount allowed, the amount of penalties and interest imposed or charged, the total amount actually paid in cash, and the date of payment [*see* Instructions for Form 706, Line 3b--State Death Tax Deduction].

For estates of individuals dying before 2005, a *credit* for state death taxes is allowed [*I.R.C. § 2011(b)*], rather than a deduction.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewTax LawFederal Estate & Gift TaxesDeductionsGeneral OverviewTax LawFederal Estate & Gift TaxesDefinition of Taxable EstateTax LawState & Local TaxesEstate & Gift TaxGross EstateTax LawState & Local TaxesEstate & Gift TaxTaxable Estate

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§ 453.19 Computing Gross Estate Tax

After determining the taxable estate by subtracting allowable deductions (Schedules J--T) from the amount of the gross estate (Schedules A--I), the gross amount of estate tax is determined [*see also § 453.10*]. This is done by applying the unified rate schedule [*see I.R.C. § 2001*; Table A in Instructions for IRS Form 706] to the sum of the taxable estate and the amount of adjusted taxable gifts to determine the tentative tax liability. Then, the aggregate amount of gift tax payable on post-1976 gifts made by the decedent is subtracted from the tentative tax liability [*I.R.C. § 2001(b)*]. The figure derived is referred to as the gross estatetax. For an expanded description of the process, see *§ 453.10*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewTax LawFederal Estate & Gift TaxesGeneral OverviewTax LawState & Local TaxesEstate & Gift TaxGross EstateTax LawState & Local TaxesEstate & Gift TaxTaxable Estate

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38-453 California Forms of Pleading and Practice--Annotated § 453.20

§ 453.20 Credits and Computing Net Estate Tax Payable

The amount of net estate tax payable is determined by subtracting from the gross estate tax the authorized credits against the tax. The authorized credits are the unified credit against estate tax [*I.R.C. § 2010*], the credit for state death taxes paid (repealed for estates of decedents dying after 2004) [*I.R.C. § 2011*], the credit for gift taxes paid on pre-1977 gifts [*I.R.C. § 2012*], the credit for taxes paid on previously taxed transfers [*I.R.C. § 2013* (Schedule Q)], and the credit for foreign death taxes paid [*I.R.C. § 2014* (Schedule P)].

The estate tax unified credit available depends on the year of the decedent's death. The estate tax unified credit shelters transfers of property equal to $600,000 for decedents dying before 1998, $625,000 for decedents dying in 1998, $650,000 for decedents dying in 1999, $675,000 for decedents dying in 2000 and 2001, $1.5 million for decedents dying in 2004 and 2005, $2 million for decedents dying in 2006, 2007, and 2008, and $3.5 million for decedents dying in 2009 [*I.R.C. § 2010(c)*]. The available unified credit available to a decedent's estate is reduced by any gift tax unified credit used by the decedent during his or her lifetime [*see I.R.C. §§ 2010(c), 2505*; *see also § 453.10*].

Husbands and wives are each entitled to a separate unified credit. The amount each spouse can shelter depends on the year of death [*I.R.C. § 2010(c)*].

If the foreign death tax has not been paid at the time the estate tax return is filed, an estimated credit must be taken. Before the credit is finally allowed, however, evidence must be submitted, in the form of an IRS Form 706 [*see § 453.195*], certified by the appropriate official of the foreign country, regarding the amounts of tax, credits, refunds, dates of payment, and descriptions of property [*Treas. Reg. § 20.2014-5*].

Credit for taxes on prior transfers is available if the decedent was the transferee of property that was subject to estate tax in the estate of another decedent (the transferor) who died within 10 years before, or within two years after, the present decedent's death [*I.R.C. § 2013(a)* (Schedule Q)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewTax LawFederal Estate & Gift TaxesGeneral OverviewTax LawFederal Estate & Gift TaxesCredits (IRC secs. 2010-2016, 2505)Tax LawFederal Estate & Gift TaxesEstate Tax ReturnsGeneral Overview

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38-453 California Forms of Pleading and Practice--Annotated § 453.21

§ 453.21 Additions to Tax--Generation-Skipping Transfer Tax

The total transfer taxes imposed because of a decedent's death and reportable on the the federal estate and generation-skipping transfer tax return (IRS Form 706) includes the amount of generation-skipping transfer tax (GST tax) imposed on transfers of property from the decedent's taxable gross estate that occur as a result of, or at the time of, decedent's death and are in the form of direct skips to a "skip person" [*I.R.C. § 2612(c)*; *see I.R.C. § 2613* (defining skip persons; § 453.11); *Treas. Reg. § 26.2662-1(b)(3)(ii)* (GSTs reportable on IRS Form 706)]. This liability, and the liability of any trust from which a direct skip occurs at the time of, or as a result of, decedent's death, are to be computed by the personal representative on Schedules R and R-1. The personal representative then forwards the completed Schedule R-1 to the trustee, who uses it as a payment voucher for GST tax payable by the estate [*see Treas. Reg. § 26.2662-1(b), (c)*; IRS Form 706, Schedule R-1, Instructions for Fiduciary]. If direct skips from a trust arrangement [*see Treas. Reg. § 26.2662-1(c)(2)(ii)*] involve property with a total value of less than $100,000, however, the personal representative reports those transfers on Schedule R and is liable for the tax [*Treas. Reg. § 26.2662-1(c)(2)*].

GST tax payable by the estate is due at the same time as the estate tax [*Treas. Reg. § 26.2662-1(d)*]. The trustee has until two months after the due date of the federal estate (and generation-skipping transfer) tax return, including any applicable extensions, to pay the portion of GST tax reportable on Schedule R-1 [IRS Form 706, Schedule R-1, Instructions for Fiduciary].

Note that GST tax liability also may arise because of taxable distributions or taxable terminations that resulted from or at the same time as the decedent's death, but those are not addressed here [*see Treas. Reg. § 26.2662-1(b)(1), (2)*; IRS Forms 706GS(D), 706GS(D-1), 706GS(T)]. The transferee is liable for payment of any GST tax imposed because of a taxable distribution, but the trustee must complete the IRS Form 706 GS(D-1) and forward it to the transferee if the distribution is from a trust [*see I.R.C. § 2603(a)(1)*; *Treas. Reg. § 26.2662-1(b)(1)*]. The trustee is liable for payment of GST tax imposed because of a taxable termination from a trust [*I.R.C. § 2603(a)(2)*].

The amount of GST tax liability in any case is the taxable amount of the transfer, less any portion of exemptions allocated to the particular transfer [*see I.R.C. §§ 2631, 2632* (GST exemption)], multiplied by the applicable rate of tax [*I.R.C. § 2602*; *see I.R.C. §§ 2641* (rate), 2642 (inclusion ratio)]. The GST lifetime exemption may be allocated by the

decedent to lifetime gifts made by the decedent or by the personal representative on the estate tax return [*I.R.C. §§ 2631(a), 2632(a)*]. Once made, an allocation is irrevocable [*I.R.C. § 2631(b)*]. Unless an individual elects to have them not apply [*see I.R.C. § 2632(b)(3), (c)(5)*], statutory allocation rules apply to allocate the GST tax exemption with respect to direct skips [*I.R.C. § 2632(b)*] and indirect skips made while a donor is living [*I.R.C. § 2632(c)*, effective for transfers subject to estate or gift tax made after December 31, 2000, and to estate tax inclusion periods ending after December 31, 2000]. Retroactive allocations of the exemption are allowed when there is an unnatural order of death [*I.R.C. § 2632(d)(1)*, effective for deaths of non-skip persons occurring after December 31, 2000]. Any portion of a GST exemption that is not allocated before the time for filing an individual's estate tax return (determined with regard to extensions) [*see I.R.C. § 2632(a)*] is deemedallocated first to property that is the subject of a direct skip at the individual's death, and second to trusts with respect to which the individual is the transferor and from which a taxable distribution or taxable termination might occur at or after the individual's death [*I.R.C. § 2632(e)(1)*].

In the case of a direct skip, the taxable amount of the transfer is the value of the property received by the transferee as of the time of the transfer, reduced by the amount of any consideration furnished by the transferee [*I.R.C. §§ 2623, 2624(a), (d)*]. In the case of direct skips reportable on the federal estate and generation-skipping transfer tax return (IRS Form 706), the value of the property is determined as of the date of death, unless an alternate valuation date [*see I.R.C. § 2032*, discussed in *§ 453.62[1]*] was elected by the personal representative for estate tax purposes [*I.R.C. § 2624(a), (b)*]. The special use value [*see I.R.C. § 2032A*, discussed in *§ 453.16[2]*] may also be applied to direct skips of farm property or closely held business property [*I.R.C. § 2624(b)*].

The applicable rate of tax for direct skips occurring as a result of, or at, a decedent's death is the maximum federal estate tax rate in effect on the date of death multiplied by the "inclusion ratio" [*I.R.C. § 2641*]. The inclusion ratio is the excess of one over a fraction [*I.R.C. § 2642(a)(1)*]. The numerator of the fraction is the amount of the GST exemption [*see I.R.C. §§ 2631, 2632*] allocated to the trust or, in the case of a direct skip, allocated to the property transferred in that skip [*I.R.C. § 2642(a)(2)(A)*]. The denominator of the fraction is the value of the property transferred in trust or involved in the direct skip reduced by the sum of (1) any federal estate tax or state death tax actually recovered from the trust attributable to such property, and (2) any charitable deduction allowed [*see I.R.C. §§ 2055, 2522*] with respect to the property [*I.R.C. § 2642(a)(2)(B)*].

An existing trust can be severed in a "qualified severance" into two trusts, each of which will be treated as separate trusts [*I.R.C. § 2642(a)(3)(A)*, effective for severances after December 31, 2000]. A qualified severance is defined as the division of a single trust and the creation of two or more trusts if (1) the single trust was divided on a fractional basis, and (2) the terms of the new trusts, in the aggregate, provide for the same succession of interests of beneficiaries as are provided in the original trust. If a trust has an inclusion ratio of greater than zero and less than one, a severance is a qualified severance only if the single trust is divided into two trusts, one of which receives a fractional share of the total value of all trust assets equal to the applicable fraction of the single trust immediately before the severance. In that case, the trust receiving such a fractional share will have an inclusion ratio of zero and the other trust will have an inclusion ratio of one [*I.R.C. § 2642(a)(3)(B)*]. A trustee may elect to sever a trust in a qualified severance at any time [*I.R.C. § 2642(a)(3)(C)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewTax LawFederal Estate & Gift TaxesGeneral OverviewTax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)Tax LawState & Local TaxesEstate & Gift TaxGeneration-Skipping Transfer TaxesTax LawState & Local TaxesEstate & Gift TaxGross EstateTax LawState & Local TaxesEstate & Gift TaxValuationGeneral Overview

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§ 453.22 Requirements for Filing Return

The personal representative must file the federal estate and generation-skipping transfer tax return [*I.R.C. § 6018(a), (b)*; *Treas. Reg. § 20.6018-2*; *see also Sarto v. United States (N.D. Cal. 1983) 563 F. Supp. 476, 478* (duty as nondelegable duty); *see also I.R.C. §§ 2208, 2209* (citizens and residents of United States possession); *see § 453.192* (separate form for nonresident aliens)].

The estate and generation-skipping transfer tax return must be filed within nine months after the date of the decedent's death, unless an extension is granted [*I.R.C. § 6075*; *Treas. Reg. § 20.6075-1* (estate tax); *I.R.C. § 2612(c)*; *Treas. Reg. § 26.2662-1(d)* (generation-skipping transfer tax)]. If the return is not filed by the due date, a penalty of 5 percent a month will be imposed on the amount of estate tax due, up to a maximum of 25 percent, until the return is filed. The penalty does not apply if the personal representative can show that the failure to file is due to reasonable cause and not willful neglect [*I.R.C. § 6651(a)*; *see Sarto v. United States (N.D. Cal. 1983) 563 F. Supp. 476, 478* (reliance on erroneous advice of attorney was not reasonable cause for failure to file return on time); *see also I.R.C. § 6651(f)* (additional penalty for fraudulent failure to file)]. An extension of time to file the estate and generation-skipping transfer tax return may be granted if it is impossible or impracticable for the personal representative to file a reasonably complete return within nine months [*see I.R.C. § 6081*]. See the Comments to *see § 453.197* for discussion of the grounds for extension and the length of extension generally permitted. An extension of time for filing the return does not operate to extend the time for payment of the tax [*Treas. Reg. § 20.6081-1(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewTax LawFederal Estate & Gift TaxesEstate Tax ReturnsFilingTax LawFederal Tax Administration & ProcedureAdministrationTax Payment & Tax Return Requirements (IRC secs. 6071-6091, 6151-6167)General Overview

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38-453 California Forms of Pleading and Practice--Annotated § 453.23

§ 453.23 Paying the Tax

[1] In General

The estate tax is due and payable at the same time the return is due and at the same place, unless an extension of time for payment has been granted or the personal representative has elected to defer a portion of the taxes [*I.R.C. § 6151(a)*; *see I.R.C. § 6163*, discussed in *§ 453.23[3]*] or pay them in installments [*Treas. Reg. § 20.6161-1(a), (b)*; *see I.R.C. § 6166*, discussed in *§ 453.41[1]*]. Thus, the estate tax payment is due nine months after the date of the decedent's death [*I.R.C. § 6075(a)*; *see I.R.C. § 6311* (payment of tax by commercially acceptable means)]. The Internal Revenue Service will impose a penalty of one half of 1 percent of the amount of tax due per month, up to a maximum of 25 percent, for failure to pay the tax with the return when it is due, unless the estate can show that the failure to pay the tax is due to reasonable cause and not willful neglect [*I.R.C. § 6651(a)(2)*].

[2] Deferral of Tax Attributable to Closely Held Business Interests

If more than 35 percent of the decedent's adjusted gross estate (gross estateminus deductions for debts, expenses, claims, and losses) consists of the value of an interest in a closely held business, a personal representative may elect to defer taxes attributable to those interests for five years (paying interest only on the tax due), and thereafter pay the tax in equal installments over the next two or more (but not exceeding 10) years [*I.R.C. § 6166(a)*; *see I.R.C. § 2661(2)* (making provision applicable to generation-skipping transfer tax); *see also I.R.C. § 6166(c)* (rule for two or more closely held businesses)]. For purposes of this provision, an "interest in a closely held business" includes any interest in a proprietorship, or a partnership or corporation, that has no more than 45 partners or shareholders (15 partners or shareholders for decedents dying before 2002), or in which 20 percent or more of its assets or voting stock is included in the decedent's gross estate [*I.R.C. § 6166(b)(1)*]. Only that portion of the total estate tax that is attributable to closely held business interests may be paid in installments [*see I.R.C. § 6166(a)(2)*].

This election is made by checking the appropriate line on a timely filed estate tax return, which must be accompanied by a notice of election containing the following information [*I.R.C. § 6166(d)*; *Treas. Reg. 20.6166-1(b)*]:

- The decedent's name and taxpayer identification number as they appear on the estate (and

generation-skipping transfer) tax return;

- The amount of the tax that is to be paid in installments;

- The date selected for payment of the first installment;

- The number of total installments, including the first installment, in which the tax is to be paid;

- The properties shown on the estate (and generation-skipping transfer) tax return that constitute the closely held business interest (identified by schedule and item number); and

- The facts that formed the basis for the personal representative's conclusion that the estate qualifies for payment of the estate (and generation-skipping transfer) tax in installments.

If the installment payment election is made, a special lien procedure is available that relieves the personal representative from personal liability for the entire installment period. The personal representative and beneficiaries must file a written agreement consenting to creation of the lien in favor of the government, in lieu of a bond. The agreement must designate a responsible person to deal with the IRS as an agent for the beneficiaries and any other parties who consented to the lien. The IRS may not require a bond except to the extent that there is no adequate security for the unpaid principal plus interest [*see I.R.C. § 6324A*; *see also I.R.C. § 2661(2)* (provision is applicable to generation-skipping transfer tax)].

[3] Deferral of Tax Attributable to Reversionary or Remainder Interests

Any portion of the estate (or generating-skipping transfer) tax attributable to a reversionary or remainder interest held by the decedent and included in his or her gross estate may be postponed until six months after the termination of the intervening interest or interests in the property [*I.R.C. § 6163(a)*; *Treas. Reg. § 20.6163-1(a)(1)*; *see I.R.C. § 2661(2)* (generation-skipping transfer tax)]. The amount of the tax that may be postponed is that portion of the estate tax that bears the same ratio that the remainder or reversionary interest, reduced by specified claims, losses, and any charitable or marital deduction allowed with respect to that interest, bears to the gross estate, reduced by similar deductions [*Treas. Reg. § 20.6163-1(c)*].

This extension is a matter of election by the personal representative and is not in the discretion of the IRS. Nevertheless, a further extension for a reasonable period not in excess of three years from the expiration of the original six-month period of postponement may be granted by the IRS on a showing of reasonable cause [*I.R.C. § 6163(b)*].

Notice of the exercise of the election to postpone the payment of the tax attributable to a reversionary or remainder interest must be filed with the district director before the date prescribed for payment of the tax. The notice of election may be made in the form of a letter addressed to the district director. There must be filed with the notice of election a certified copy of the will or other instrument under which the reversionary or remainder interest was created, or a copy verified by the personal representative if the instrument is not filed of record. The district director may require the submission of additional proof if he or she deems it necessary to disclose the complete facts. If the duration of the precedent interest is dependent on the life of any person, the notice of election must show the date of birth of that person [*Treas. Reg. § 20.6163-1(b)*].

An extension may require the furnishing of a bond [*I.R.C. §§ 6163(c), 6165*].

[4] Flower Bonds

Certain issues of treasury bonds, called "flower bonds," issued prior to March 4, 1971, are acceptable at par plus

accrued interest in payment of estate taxes if the bonds were owned by the decedent at the time of his or her death [*see* former *I.R.C. § 6312*; Pub. L. No. 92-5 § 4(a)(2)]. IRS Form PD 1782, which is available from Federal Reserve Banks and is reproduced at Form 467, must be submitted as an application for redemption of the bonds in payment of the estate tax. All eligible bonds are described in the Comments to Form 467. It is suggested that the application for redemption be submitted several weeks prior to the date on which the return is filed to facilitate calculation of the amount of tax that will have to be paid from other sources.

[5] Redemption of Stock to Pay Death Taxes and Expenses

The redemption of stock in a closely held corporation, the value of which was included in a decedent's gross estate (or of stock that takes as its basis the basis of stock that was included in the gross estate), may be treated as a distribution in full payment in exchange for the stock so redeemed, rather than as a dividend, if it does not exceed in amount the sum of the estate, inheritance, and succession taxes on the estate, plus the funeral and administrator's expenses allowable as deductions from the gross estate under *I.R.C. § 2053* (or 2106 in the case of a nonresident, not a citizen) for federal estate tax purposes [*I.R.C. § 303(a)*]. The effect of *I.R.C. § 303* is to treat any distribution in redemption of the stock as a capital gain to the extent the amount distributed exceeds the basis of the stock that is redeemed [*I.R.C. § 303(a)*].

The stock must be redeemed from the personal representative of an estate or from a shareholder who acquired the stock from the estate, including an heir, legatee, or donee of the decedent; a surviving joint tenant, surviving spouse, appointee, or taker in default of appointment; or a trustee of a trust created by the decedent. A shareholder who has acquired the shares by gift or purchase from any person to whom those shares have passed from the decedent or from the personal representative in satisfaction of a specific monetary bequest, however, is not eligible for the benefits of *I.R.C. § 303* [*Treas. Reg. § 1.303-2(f)*]. *I.R.C. § 303* is applicable only if the value of the stock included in the gross estate exceeds 35 percent of the adjusted gross estate (the gross estate minus the deductions for expenses and losses). The redemption must take place within a specified period of time in order to be eligible [*I.R.C. § 303(b)(1)*]. Although there is no requirement that the proceeds must be used to pay the taxes or expenses or that the shareholder whose stock is redeemed should have paid the expenses or taxes, the stock that can qualify for capital gain treatment is limited to stock that is redeemed from a shareholder whose interest in the estate is reduced (either directly or through a binding obligation to contribute) by the payment of the death taxes and expenses [*I.R.C. § 303(b)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Estate & Gift TaxesGeneral OverviewTax LawFederal Estate & Gift TaxesEstate Tax ReturnsPaymentsTax LawFederal Tax Administration & ProcedureAdministrationIdentification Numbers & Information Returns (IRC secs. 6031-6065)General OverviewTax LawFederal Tax Administration & ProcedureAdministrationTax Payment & Tax Return Requirements (IRC secs. 6071-6091, 6151-6167)Extensions of Time

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§ 453.24 Discharge of Personal Representative From Personal Liability

The personal representative may be discharged from personal liability for the estate and generation-skipping transfer tax by paying the amount of tax determined to be due within nine months after he or she applies for discharge or nine months after filing the return, whichever is later [*I.R.C. § 2204(a)*; *see I.R.C. § 2661(2)*]. For a sample letter requesting early determination of the tax and discharge, see *§ 453.196*. Generally, the discharge will apply to any deficiency assessed after the applicable nine-month period [*see I.R.C. § 2204*]. The personal representative may have to furnish a bond if payment of the tax has been extended under *I.R.C. § 6161, 6163,* or *6166* [*I.R.C. § 2204(a)*; *Treas. Reg. § 20.2204-1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewTax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)

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38-453 California Forms of Pleading and Practice--Annotated § 453.25

§ 453.25 Return Requirements for Nonresident Aliens

An estate and generation-skipping transfer tax return must be filed for the estate of a nonresident alien if the part of his or her gross estate having a situs in the United States, plus the sum of (1) the gift tax exemption allowed with respect to gifts made between September 9, 1976, and December 31, 1976, inclusive [*see* former *I.R.C. § 2521*], and (2) the total taxable gifts [*see I.R.C. § 2001(b)*] made after December 31, 1976, that are not included in the gross estate, exceeds $60,000 [*I.R.C. § 6018(a)(2), (3)*].

IRS Form 706 NA [*see § 453.192*] is used for the estates of nonresident aliens. This return must be filed and the estate and generation-skipping transfer tax paid within nine months after a decedent's death. In general, nonresident aliens are entitled to the same filing and payment extensions as United States citizens and residents, with the exception of the installment payment extensions [*see I.R.C. § 6166(a)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)Tax LawFederal Estate & Gift TaxesNonresident Aliens (IRC secs. 2101-2108)General OverviewTax LawFederal Estate & Gift TaxesNonresident Aliens (IRC secs. 2101-2108)Gross & Taxable EstatesTax LawInternational TaxesForeign Persons' Activities in the United StatesNonresident & Resident Aliens (IRC secs. 864, 871-880)General OverviewTax LawInternational TaxesForeign Persons' Activities in the United StatesNonresident & Resident Aliens (IRC secs. 864, 871-880)Nonresident Aliens

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38-453 California Forms of Pleading and Practice--Annotated § 453.26

§ 453.26 Postmortem Tax Planning

[1] In General

The death of an individual has many tax consequences. Careful planning during administration of the estate with the purpose of limiting both estate and income tax liabilities is necessary. Tax considerations should weigh heavily in making any postmortem decisions with respect to the decedent's estate. Decisions may effect substantial tax savings with respect to (1) the decedent's final income tax return, (2) the decedent's estate and generation-skipping transfer tax return, (3) the fiduciary income tax return of the estate, and (4) the income and estate tax returns of the estate's beneficiaries. For further discussion of such tax planning, and discussion and forms relating to estate income taxes, see California Probate Practice, Ch. 15, *Taxation of Estates* (Matthew Bender).

[2] Decedent's Final Income Tax Return

A decedent's final income tax return must be filed on the same day it would have been due had the decedent lived [*Treas. Reg. § 1.6072-1(b)*]. If the decedent's surviving spouse does not remarry before the close of the tax year, the personal representative may file a joint return with the surviving spouse or a separate return for the decedent [*I.R.C. § 6013(a)(2)*]. Although a decedent's separate return will include only the separate income and deductions of the decedent that were properly realized or paid before death, a joint return may produce a lower tax because it permits the spouse to offset income received after the decedent's death against deductions claimed by the decedent. The decedent's deductions could be lost on a separate return because the decedent's death cuts off his or her income, possibly leaving an insufficient amount of income to offset against the deductions [*see also Rev. Rul. 74-175, 1974-1 C.B. 52* (current capitallosses and expiring capital loss carryovers of decedent may not be utilized by estate, but must be recognized on decedent's final income tax return or lost)].

The personal representative may also have an election to make with respect to Series "E" or "EE" bonds. A cash-basis taxpayer who owns those bonds may elect to report annually the increase in the bonds' value or may defer the reporting of the income, as interest, until the bonds are redeemed [*I.R.C. § 454(a)*]. If the decedent was a cash-basis taxpayer and had not reported bond interest as income annually before his or her death, the person who files decedent's final income tax return may make the election to report as income on that return all interest earned prior to the decedent's date of

death in the current year [*see Treas. Reg. § 1.451-1(a)* (taxable year ends on date of death); *see also IRS Ltr. Rul. 7801001* (no income tax deduction for estate tax attributable to interest)].

The personal representative also has a choice with respect to medical expenses of the decedent paid within one year after the date of the decedent's death. Those expenses may be deducted either on the decedent's final income tax return or on the estate tax return [*see I.R.C. § 213(c)*]. Consideration should be given to which deduction will yield the greatest tax savings [*see I.R.C. § 213(a)* (medical expenses as deductible for income tax purposes only to extent that they exceed 7.5 percent of adjusted gross; thus, deduction as usually more beneficial if taken on estate tax return)].

[3] Decedent's Estate and Generation-Skipping Transfer Tax Return

Perhaps the most important election that must be made with respect to a decedent's estate and generation-skipping transfer tax return is the election of the valuation date for purposes of valuing the gross estate. The personal representative may elect to value the decedent's estate either at the date of death or at the alternate valuation date [*see I.R.C. § 2032*, discussed in *§ 453.62[1]*]. This election, of course, has the effect of increasing or decreasing the estate tax base. The special valuation provision for farms and closely held businesses may also be elected if applicable [*see I.R.C. § 2032A*, discussed in *§ 453.16[2]*].

In addition, several options are available in connection with the payment of estate and generation-skipping transfer taxes. For example, it may be appropriate to utilize the special provision for redeeming stock to pay death taxes [*see I.R.C. § 303*, discussed in *§ 453.23[5]*]; or to elect to pay estate and qualifying generation-skipping transfer taxes in installments over an extended period of time [*see I.R.C. § 6166*, discussed in *§ 453.41[1]*].

[4] Fiduciary Income Tax Return

An estate is a new taxable entity and accordingly may choose any fiscal year for its first taxable period [*see I.R.C. § 641*]. It is not required to use the same tax year as the decedent or to maintain its accounting records on the same basis as those of the decedent. The only rules that must be observed are that the fiscal year cannot be longer than 12 months and that it must end on the last day of a month [*see I.R.C. § 441*; *but see I.R.C. § 443(a)(2)*; Treas. Reg. § 1.441-1T (short final year)]. There are several benefits that may be derived from the choice of a fiscal year. If the income of the estate is large, the choice of a short first fiscal year, for example, six months, may afford income tax advantages by taxing that portion of the income at lower income tax rates. In addition, if income is being distributed to the beneficiaries, the time for the payment of the tax on that income can be postponed. Income from an estate is taxable to the beneficiary in the taxable year with which or within which the taxable year of the estate ends [*see I.R.C. § 662*].

The personal representative must also make the election regarding deduction of expenses of administration and losses during administration of the estate. These deductions may be taken either on the estate tax return or the fiduciary return, but not on both. Although substantial tax savings may be accomplished by the shifting of deductions from the estate tax return to the income tax return of the estate, the personal representative should be extremely cautious in making such a move as shifting the deductions may increase the estate tax and decrease the allowable marital deduction [*see* California Probate Practice, Ch. 15, *Taxation of Estates* (Matthew Bender)].

[5] Distributions to Beneficiaries

In the absence of specific bequests, the personal representative is customarily authorized to determine whether high-basis or low-basis property is to be distributed to a beneficiary. Distributing low-basis property to certain beneficiaries has the effect of distributing built-in tax liability to them. Distribution decisions will, therefore, affect the income taxes payable on subsequent sales of the distributed assets by the beneficiaries [*see* California Probate Practice, Ch. 15, *Taxation of Estates* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewTax LawFederal Estate & Gift TaxesGeneral OverviewTax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)Tax LawState & Local TaxesEstate & Gift TaxGross Estate

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§ 453.27 Basis of Property Acquired at Death

[1] Taken by Beneficiary

The basis of property acquired from a decedent by bequest, inheritance, and the like is generally its fair market value at the date of the decedent's death [*I.R.C. § 1014(a)*]. If the personal representative elects to value the estate by using the alternate valuation method under *I.R.C. § 2032*, however, the value used to determine the basis of the property will be the value at the date six months after the date of death if the property is not sold, distributed, or otherwise disposed of within six months after the decedent's death [*I.R.C. § 2032(a)(2)*]. If the property is disposed of within six months, the value of the property is the value at the time of its disposition [*I.R.C. § 2032(a)(1)*]. The valuation of property for estate tax purposes must also be used by the heir or devisee in determining the basis of theinherited property, regardless of whether that value is greater or less than the decedent's basis for the property. Finally, if the personal representative elects to value a farm or closely held business using the special valuation method under *I.R.C. § 2032A*, the value of the property for purposes of determining basis will be established under the special rules of that method, that is, by reference to the property's actual use [*see I.R.C. § 2032A*]. Property received from decedents dying after 2009 does not receive and automatic stepped-up basis [*I.R.C. § 1014(f)*]. Instead, a modified carryover basis rule applies, under which the basis of the property is the lesser of the decedent's adjusted basis or the fair market value of the property at the decedent's death [*I.R.C. § 1022(a)(2)*].

[2] Exception for Gifts of Appreciated Property Made to Decedent Within One Year of Death

The stepped-up basis rules of *I.R.C. § 1014* do not apply to appreciated property acquired by a decedent as a gift within one year of his or her death if the property passes, directly or indirectly, from the donee-decedent back to the original donor or the donor's spouse [*I.R.C. § 1014(e)*]. The denial of a stepped-up basis applies if the donor-beneficiary receives the benefit of the appreciated property regardless of whether the bequest by the decedent to the donor is specific, general, pecuniary, or residuary [Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, H.R. Comm. Rep. No. 201, 97th Cong., 1st Sess. 188-189 (1981)]. In the case of a pecuniary bequest, however, a stepped-up basis will be denied only if the inclusion of the appreciated property in the estate of the decedent affects the amount that the donor-beneficiary receives under the pecuniary bequest. In addition, if the donor beneficiary is only entitled to receive a portion of the appreciated property, the rule applies only on a pro rata basis [*see I.R.C. § 1014(e)(2)(A)* (pecuniary gift is

unlikely to constitute appreciated property)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewTax LawFederal Estate & Gift TaxesBasis of Property Acquired From Decedents (IRC sec. 1014)General OverviewTax LawFederal Estate & Gift TaxesBasis of Property Acquired From Decedents (IRC sec. 1014)Decedent's DeathTax LawFederal Income Tax ComputationSales & ExchangesBasis (IRC secs. 1011-1017, 1019, 1021, 1023)Property From DecedentsTax LawFederal Income Tax ComputationValuationPersonal Property

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[Reserved]

§§ 453.28[Reserved]

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§ 453.40 California Estate Tax Imposed

No gift or inheritance tax is imposed in California, except as described below [*Rev. & Tax. Code § 13301*; *see* CA Form ET-1]. If federal estate tax is payable, a California estate tax is imposed that is equal to the portion, if any, of the maximum allowable federal credit for state death taxes paid that is attributable to property located in California [*Rev. & Tax. Code § 13302*]. The imposition of the California estate tax is not intended to increase the total state and federal estate tax due over what would have been payable without the imposition of a California estate tax [*Rev. & Tax. Code § 13302*].

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38-453 California Forms of Pleading and Practice--Annotated § 453.41

§ 453.41 Property Subject to Tax

[1] In General

The property of a California resident decedent that is subject to the California estate tax includes real property located in California, tangible personal property actually located in California, and all intangible personal property, whether located within or without California, or subject to California's jurisdiction [*Rev. & Tax. Code §§ 13402, 13407*]. If the decedent was a resident of the United States but not a resident of California, real property and tangible personal property located in California are subject to the California estate tax [*see Rev. & Tax. Code §§ 13402, 13408*]. A decedent is treated as a California resident if he or she was domiciled in California at the time of death [*Rev. & Tax. Code §§ 13407, 13408*].

The estates of decedents who were not residents of the United States are subject to California estate tax to the extent of real property and tangible personal property actually located in California and intangible personal property in California. In this context, intangible personal property located in California includes the stock of a corporation organized, having its principal place of business, or doing the major portion of its business in California, and the stock of a federal corporation or national bank that has its principal place of business or does the major part of its business in California [*Rev. & Tax. Code § 13402(b)*]. Nevertheless, intangible personal property consisting of savings accounts in savings and loan associations operated under the Division of Savings and Loan or the Federal Home Loan Bank Board and bank deposits, unless the bank deposits are held and used in connection with a business that is wholly or partially conducted in California, are not subject to the California estate tax [*Rev. & Tax. Code § 13402(b)*].

For a discussion of specific items of estate property that are subject to the California and federal estate taxes, see *§ 453.10 et seq. and § 453.40* et seq.

[2] Deferral of Tax Attributable to Closely Held Business Interests

For decedents dying on or after January 1, 1999, the provisions of *I.R.C. § 6166*, as in effect on January 1, 1998, apply to permit payment of state estate taxes in installments [*Rev. & Tax. Code § 13534*; *see I.R.C. § 6166*, before amendment by P.L. 105-206, § 6007(c) (July 22, 1998); *see also § 453.23[2]*]. In addition, the provisions of *I.R.C. § 6601(j)*, which

provide for a lower rate of interest on installments of estate tax attributable to a closely held business interest, apply in lieu of the rate provided in *Rev. & Tax. Code § 13550* [*Rev. & Tax. Code § 13534*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewTax LawFederal Estate & Gift TaxesGeneral Overview

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38-453 California Forms of Pleading and Practice--Annotated § 453.42

§ 453.42 Filing Requirements

A federal estate (and generation-skipping transfer) tax return (IRS Form 706) must be filed with the California return [*Rev. & Tax. Code § 13501*; *see § 453.190*]. The time for filing the California return is the same as the filing period, including extensions, for federal estate (and generation-skipping transfer) tax returns [*Rev. & Tax. Code § 13502*]. If the California return is not filed within the requisite period, a penalty of 5 percent of the tax due is assessed each month, not to exceed an aggregate of 25 percent, together with any interest due with respect to the nonpayment of tax [*Rev. & Tax. Code § 13510*; *see Rev. & Tax. Code § 13550*]. The penalty will not be imposed, however, if the failure to file the return is due to reasonable cause [*Rev. & Tax. Code § 13510*]. If the federal penalty for failure to file a timely return is waived, that waiver is deemed to constitute reasonable cause under California law [*Rev. & Tax. Code § 13510*].

If a decedent was not a resident of California on the date of death, the personal representative must file a Declaration Concerning Residence on California State Form IT-2 [*18 Cal. Code Reg. § 14501(a)-(e)*; *see § 453.221*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 453.43 Payment of Tax

Any California estate tax due must be paid within nine months after the date of a decedent's death [*Rev. & Tax. Code §§ 13531, 13532*]. If payment is delinquent, interest at the rate for underpayment of estate tax provided in *I.R.C. § 6621(a)(2)* is imposed beginning on the date on which payment became delinquent and continuing until payment is made. Interest on a delinquent payment is compounded daily [*Rev. & Tax. Code § 13550(a)*]. The underpayment rate under *I.R.C. § 6621(a)(2)* is the *I.R.C. § 1274(d)* federal short-term rate plus three percentage points. For delinquent amounts unpaid on or after January 1, 1999, to and including December 31, 2000, interest was payable at the underpayment rate provided in *I.R.C. § 6621(a)(2)* as in effect on January 1, 1998 [*Rev. & Tax. Code § 13550(b)*; *see Rev. & Tax. Code § 13550* before amendment by Stats. 2000, Ch. 363]. The applicable underpayment rate as of that date was the *I.R.C. § 1274(d)* federal short-term rate plus two percentage points [*I.R.C. § 6621(a)(2)*, before amendment by P.L. 105-206, § 3302(a) (July 22, 1998)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 453.44 Deficiency Determination

In the case of a false or fraudulent return or a failure to file a return, the Controller may determine the tax at any time [*Rev. & Tax. Code § 13517*]. In all other cases, the Controller may determine if a deficiency is due up to four years after the filing of a return [*Rev. & Tax. Code § 13516*]. If a deficiency is determined in an erroneous amount, the Controller may, within three years after the erroneous determination was made, set aside the determination or issue an amended determination in the correct amount [*Rev. & Tax. Code § 13518*]. In any case in which it is claimed that a deficiency has been determined in an erroneous amount, any person who is liable for the tax may, within three years after the deficiency determination is made, bring an action against the state in the proper superior court to have the tax modified in whole or in part [*Rev. & Tax. Code § 13520*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewTax LawFederal Estate & Gift TaxesGeneral OverviewTax LawFederal Estate & Gift TaxesEstate Tax ReturnsPaymentsTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesDeficiencies (IRC secs. 6211-6216)General OverviewTax LawState & Local TaxesAdministration & ProceedingsFailure to File Return

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§ 453.45 Refund of Tax

When the Controller determines that the California estate tax has been overpaid, the person making payment is entitled to a refund of the amount erroneously paid on presenting satisfactory proof to the Controller that he or she is entitled to a refund [*Rev. & Tax. Code § 13560*]. An application for the refund must be made to the Controller within one year after the date on which the federal estate tax has been finally determined [*Rev. & Tax. Code § 13561*]. Interest is paid on any overpayment of tax in the same manner as provided in *I.R.C. §§ 6621(a)(1)* and *6622* for periods beginning before July 1, 2002 [*Rev. & Tax. Code § 13563(a)*]. Under *I.R.C. § 6621(a)(1)*, the interest rate for overpayments of tax is the federal short-term rate plus three percentage points. The interest is compounded daily [*I.R.C. § 6622*]. Interest on overpayments for periods beginning on or after July 1, 2002 is computed as provided in *Rev. & Tax. Code § 13563(b)* and *(c)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 453.46 Lien of Tax

If any personal representative fails to pay any California estate tax, interest, or penalty at the time those amounts become due and payable, the amounts, together with any additional costs, become a perfected and enforceable state tax lien [*Rev. & Tax. Code § 13610(a)*]. The lien continues in effect for 10 years from the time at which a deficiency determination is issued [*Rev. & Tax. Code § 13610(b)(1)*]. The lien is extinguished at the termination of that 10-year period, unless it is released or otherwise discharged at an earlier date [*Rev. & Tax. Code § 13610(b)(1)*]. The lien is preserved if it is recorded or filed pursuant to *Gov. Code § 7171* [*Rev. & Tax. Code § 13610(b)(1)*]. At any time within the 10-year period, or within 10 years subsequent to that period if the lien has been properly recorded or filed, the Controller may issue a warrant for the enforcement of any liens and for the collection of any amount required to be paid [*Rev. & Tax. Code § 13615*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 453.47 Allocation of State Tax Credit Among Several States

When a decedent leaves properties located in other states as well as in California, the federal state death tax credit is allocated among the states to determine the maximum California estate tax payable [*Rev. & Tax. Code § 13303*]. For purposes of allocating the maximum state death tax credit, thegross value of property constitutes the value finally determined for federal estate tax purposes [*Rev. & Tax. Code § 13303(a)*]. The maximum state death tax credit allowable that is attributable to property having a situs in California is the product of the total state death tax credit allowable multiplied by the percentage that the gross value of property located in California bears to the gross value of the entire estate subject to federal estate tax [*Rev. & Tax. Code § 13303(b), (c)*].

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§ 453.48 Determination of Decedent's Domicile

[1] Three Methods Available

California has adopted the Uniform Act on Interstate Compromise of Death Taxes (*Rev. & Tax. Code § 13801 et seq.*), the Uniform Act on Interstate Arbitration of Death Taxes (*Rev. & Tax. Code § 13820 et seq.*), and an alternative method for determining a decedent's domicile by arbitration (*Rev. & Tax. Code § 13830 et seq.*). These provisions establish three methods of determining the amount of California estate tax and death taxes due to another state when a controversy exists as to where the decedent was domiciled at the time of death [*see Rev. & Tax. Code §§ 13801-13830.13*].

Both uniform acts apply to estates, whether the decedent died before or after their enactment in California [*Rev. & Tax. Code §§ 13810.4, 13820.13*]. *Rev. & Tax. Code § 13830 et seq.*, establishing the alternative arbitration procedure, does not include an express provision extending its operation to the estates of decedents who died prior to its enactment [*but see* Stats. 1982, ch. 1535, § 17 (statutes will apply only to estates of decedents dying after effective date, to transfers occuring by reason of death occuring after effective date, and to gifts completed after effective date if appellate court holds earlier application to be invalid)].

[2] Uniform Act on Interstate Compromise of Death Taxes

Under the Uniform Act on Interstate Compromise of Death Taxes (*Rev. & Tax. Code § 13801 et seq.*), the Controller, the taxing authorities of the other state, and the personal representative of the estate make a written agreement that stipulates that a certain sum is to be accepted in full satisfaction of any and all death taxes imposed by California, including any interest to the date of filing the agreement, and that a certain amount is to be accepted by the other states in full satisfaction of death taxes [*Rev. & Tax. Code § 13810*]. The stipulated amount is to be paid within 90 days of the filing of the agreement, after which period interest begins to accrue [*Rev. & Tax. Code § 13810*]. The time between the decedent's death and the filing of the agreement is not included in the subsequent interest computation [*Rev. & Tax. Code § 13810*].

[3] Uniform Act on Interstate Arbitration of Death Taxes

Under the Uniform Act on Interstate Arbitration of Death Taxes (*Rev. & Tax. Code § 13820 et seq.*), the California Controller, the appropriate taxing authorities of the other state, and the personal representative of the estate make a written agreement that stipulates that the issue of the decedent's domicile at the time of death is to be submitted to a board of arbitrators [*Rev. & Tax. Code § 13820*].

The parties at any time may make an agreement fixing the amounts to be accepted by California and any other state involved in full satisfaction of death taxes [*Rev. & Tax. Code § 13820.7*]. If no agreement is forthcoming, the board has authority to hold hearings on the issue and determine by majority vote the decedent's domicile at the time of death [*Rev. & Tax. Code §§ 13820.1-13820.3*]. The board's determination is final only for the purposes of imposing and collecting death taxes [*Rev. & Tax. Code § 13820.3*]. If the board determines that the decedent died domiciled in California, interest, if any, for nonpayment of death taxes between the date of the parties' agreement and the board's determination is not to exceed 10 percent per annum [*Rev. & Tax. Code § 13820.6*].

The Uniform Act on Interstate Arbitration of Death Taxes is only applicable if each state involved has a law identical or substantially similar to the uniform act [*Rev. & Tax. Code § 13820.9*].

[4] Alternative Arbitration Method

Under the alternative method for determining a decedent's domicile by arbitration, the personal representative or the taxing official of any state that claims to be the decedent's domicile may elect to have a special arbitration board appointed [*Rev. & Tax. Code § 13830.1*]. All interested parties must be notified of the election by registered mail, including the taxing official of each state claiming to be the decedent's domiciliary, each personal representative and ancillary administrator, and any other interested persons [*Rev. & Tax. Code § 13830.1*]. Any personal representative may reject the election within 40 days after receipt of the notice of election by sending a notice, by registered mail, to all persons originally required to be sent a notice of election [*Rev. & Tax. Code § 13830.1*]. If an election is rejected by a personal representative, the alternative arbitration method may not be utilized [*Rev. & Tax. Code § 13830.1*]. If the election is not rejected within the 40-day period, the dispute regarding death taxes is determined solely under the alternative arbitration method. No other proceedings to determine or assess death taxes may thereafter be prosecuted in any court of California or otherwise [*Rev. & Tax. Code § 13830.1*].

If the election is not rejected, the Controller, the other state's taxing officials, and the personal representatives may enter into a written agreement to accept a certain sum in full payment of any death taxes, together with interest and penalties, provided that the amount to be paid other states as well as the amount to be paid to California is fixed [*Rev. & Tax. Code § 13830.2*]. If the aggregate amount payable under the agreement is less than the minimum credit allowable tothe estate against the federal estate tax imposed, the personal representative must also pay to California the same percentage of the difference between that aggregate amount and the amount of that credit as the amount payable to California under the agreement bears to the aggregate amount found to be due [*Rev. & Tax. Code § 13830.11*].

If the parties cannot reach an agreement within one year after the date of the election, the issue of the decedent's domicile is to be submitted to a board of arbitrators [*Rev. & Tax. Code § 13830.3*]. If California and only one other state are involved, the Controller and the taxing official of the other state each appoint a board member, and these members then appoint a third member [*Rev. & Tax. Code § 13830.4*]. If California and more than one other state are involved, the taxing officials of each state must agree on three states not involved in the dispute, and the taxing officials of those three states each appoint three board members [*Rev. & Tax. Code § 13830.4*]. The board has authority to hold hearings on the issue, applying federal rules of evidence whenever practicable, and to determine the decedent's domicile at the time of death [*Rev. & Tax. Code §§ 13830.6-13830.8*]. The board's determination is final, conclusive, and binding on the state of California and all of its judicial and administrative officials [*Rev. & Tax. Code § 13830.8*]. If, however, the board does not render a determination within one year from the time at which it is fully constituted, the board's authority is terminated, and court proceedings may be initiated [*Rev. & Tax. Code § 13830.8*; *see Rev. & Tax. Code §§*

14000-14013]. If the board determines that the decedent was domiciled in the state of California, the total amount of interest and penalties for nonpayment of the tax between the date of the election to utilize the alternative arbitration method and the board's final determination is not to exceed 12 percent per annum [*Rev. & Tax. Code § 13830.12*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Forms of Pleading and Practice--Annotated

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Volume 38: Probate: Is Probate Necessary? thru Probate: Estate Tax-Chs. 440-453
Chapter 453 PROBATE: ESTATE TAX
PART II. LEGAL BACKGROUND
B. California Estate Tax

38-453 California Forms of Pleading and Practice--Annotated §§ 453.49-453.59

[Reserved]

§§ 453.49[Reserved]

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Volume 38: Probate: Is Probate Necessary? thru Probate: Estate Tax-Chs. 440-453
Chapter 453 PROBATE: ESTATE TAX
PART III. RESEARCH GUIDE
A. Federal Estate And Generation-Skipping Taxes

38-453 California Forms of Pleading and Practice--Annotated § 453.60

§ 453.60 Federal Statutes and Treasury Regulations

[1] Alternate Valuation Date

Alternate valuation date; dates as of which alternate valuation is made. *I.R.C. § 2032(a)(1), (2)*; Treas. Reg. § 20.2032-1(a) (*see* Instructions for IRS Form 706)

Alternate valuation is not affected by "mere lapse of time." *I.R.C. § 2032(a)(3)*; *Treas. Reg. § 20.2032-1(f)*

Deduction is prohibited if amount is taken into account by election of alternate valuation method. *I.R.C. § 2032(b)*; *Treas. Reg. § 20.2032-1(g)*

When alternate valuation date election is permitted. *I.R.C. § 2032(c)*

When and how alternate valuation date election is made. *I.R.C. § 2032(d)*

Election is applicable to all property included in gross estate. *Treas. Reg. § 20.2032-1(b)(2)*

Meaning of "distributed, sold, exchanged, or otherwise disposed of." *Treas. Reg. § 20.2032-1(c)*

Property earned or accrued (whether received or not) after date of death and during alternate valuation, which does not represent change in form of the included property itself, is excluded valuing estate under alternate valuation method. *Treas. Reg. § 20.2032-1(d)*

Exclusion of interest and rent accruing during alternative valuation period. *Treas. Reg. § 20.2032-1(d)* (*see* Instructions for IRS Form 706)

Rules regarding inclusion of dividends. *Treas. Reg. § 20.2032-1(d)(4)* (*see* Instructions for IRS Form 706)

Alternate valuation of future interests. *Treas. Reg. § 20.2032-1(f)*

[2] Annuities (Schedule I)

Conditions for inclusion of annuity in gross estate. *I.R.C. § 2039(a)*; *Treas. Reg. § 20.2039-1(b)* (annuity contracts defined) (*see* Instructions for IRS Form 706)

Rate for valuation of annuities, life estates, terms for years, remainders, and reversions. *I.R.C. § 7520*; *Treas. Reg. §§ 1.7520-1* (valuation dates post-April 30, 1999), 20.2031-7A (valuation dates pre-May 1, 1999), 20.2031-7, 20.7520-1, 20.7520-4

Manner of payment (lump sum or installments) and whether payments to survivor are in different amount than those to decedent is immaterial in determining whether annuity is includable. *Treas. Reg. § 20.2039-1(b)*

Portion of annuity includable when decedent contributed only portion of purchaseprice. *Treas. Reg. § 20.2039-1(c)* (*see* Instructions for IRS Form 706)

[3] Annuity Combined With Life Insurance (Schedule D or I)

Proceeds of annuity that are substantially proceeds of life insurance policy on decedent are includable in gross estate as insurance. *Treas. Reg. § 20.2039-1(d)*

Combination annuity contract/life insurance policy on decedent's life (e.g., "retirement income" policy with death benefits) that matured during decedent's lifetime and no longer had insurance element at date of death are includable as annuity. *Treas. Reg. § 20.2039-1(d)*

If combination annuity contract/life insurance policy did not mature during decedent's lifetime and decedent died before reserve value equaled death benefit, contract is considered insurance policy. *Treas. Reg. § 20.2039-1(d)*

If combination annuity contract/life insurance policy did not mature during decedent's lifetime and decedent died after reserve value equaled death benefit, contract is considered to be an annuity. *Treas. Reg. § 20.2039-1(d)*

Notwithstanding relation of reserve value to value of death benefit, contract under which death benefit could never exceed total premiums paid, plus interest, is annuity. *Treas. Reg. § 20.2039-1(d)*

[4] Bona Fide Sales

Only excess of fair market value (as of date of death or alternate valuation date) of property transfered by decedent over value of consideration received by decedent is includable in gross estate. *I.R.C. § 2043(a)*

Relinquishment of dower, curtesy, equivalent statutory estate, or other marital rights in decedent's property or estate is not consideration; exception for transfer made under written separation agreement executed not more than two years before divorce. *I.R.C. § 2043(b)*

Lifetime transfer made in good faith for adequate and full consideration in money or money's worth is bona fide sale and thus not includable in transferor's gross estate. *Treas. Reg. § 20.2043-1(a)*

[5] Mortgages, Notes and Cash (Schedule C)

Valuation of notes in estate. Treas. Reg. § 1.2031-4

Valuation of cash on hand or on deposit; checks outstanding on date of death and given in discharge of bona fide legal obligation of decedent is deductible from date-of-death account balance if subsequently paid and if no deduction is taken on estate tax return for debt thus discharged. *Treas. Reg. § 20.2031-5*

If alternative valuation date is used and checking account balance decreases between date of death and alternate valuation date because of payment for expenses, no deduction is allowed for those expenses. *Treas. Reg. § 20.2032-1(g)*

[6] Charitable Deduction (Schedule O)

Charitable deduction; qualifying recipients. *I.R.C. § 2055(a)*

Charitable deduction is reduced by any taxes payable out of charitable bequest. *I.R.C. § 2055(c)* (*see* Instructions for IRS Form 706)

No charitable deduction is allowed for contribution to private foundation that has had its private foundation status terminated. *I.R.C. § 2055(e)(1)*; *see I.R.C. § 507(b)*

No charitable deduction is allowed for contribution to organization described in *I.R.C. § 508(d)* or *4948(c)* (prohibited transactions). *I.R.C. § 2055(e)(1)*

No charitable deduction is allowed for gift of remainder interest in trust if there is noncharitable income beneficiary; exception for charitable remainder annuity trust, charitable remainder unitrust, or pooled income fund. *I.R.C. § 2055(e)(2)(A)*; *see I.R.C. §§ 642(c)(5)* (pooled-income fund), 664 (charitable remainder unitrust)

No charitable deduction is allowed for gift of income interest in trust to charity with noncharitable remainder; exceptions if guaranteed annuity or fixed percentage distribution is made annually. *I.R.C. § 2055(e)(2)(B)*

Charitable deduction is allowed for contribution of real property interest that meets conservation purpose requirements of *I.R.C. § 170(h)* to charitable organizations, United States, state, or local government. *I.R.C. § 2055(f)*; *see also Treas. Reg. § 1.170A-14*

No charitable deduction is allowed for transfer subject to power to divert property to noncharitable purposes. *Treas. Reg. § 20.2055-2(b)(1)*

[7] Credit for Estate Tax Paid on Prior Transfers (Schedule Q)

When credit is allowable. *I.R.C. § 2013(a)*; *Treas. Reg. § 20.2013-1(a)* (*see* Instructions for IRS Form 706)

Computation of and limitations on credit. *I.R.C. § 2013(a)-(d)*; *Treas. Reg. §§ 20.2013-1(b), (c)*, 20.2013-2-20.2013-4 (*see* Instructions for IRS Form 706); *see also Rev. Rul. 83-15, 1983-1 C.B. 224*

Property with respect to which credit is allowed. *I.R.C. § 2013(a), (e)*; *Treas. Reg. § 20.2013-5* (*see* Instructions for IRS Form 706)

Computation of credit if property was received from two or more transferors. *I.R.C. § 2013(c)(2)*; *Treas. Reg. §§ 20.2013-2(d)*, 20.2013-3(c), 20.2013-6 Examples 2(b) and 2(c)

Computation of credit if special use valuation was elected. *I.R.C. § 2013(f)*

[8] Credit for Federal Gift Taxes (Pre-1977 Gifts)

Credit allowed for federal gift tax paid on gift made by decedent prior to 1977 of property subsequently included in decedent's gross estate; computation of credit. *I.R.C. § 2012* (*see* Instructions for IRS Form 706)

Credit limited to smaller of amount of gift tax paid on gift or amount of estate tax attributable to inclusion of gift in gross estate. *I.R.C. § 2012(a)*

"Second limitation" limits credit to amount that bears same ratio to gross estate tax (less unified credit [*I.R.C. § 2010*] and, for decedents dying before 2004 [*I.R.C. § 2011(f)*], and credit for state death taxes [*I.R.C. § 2011*]) is includable value ofgift (at time of gift or at time of death, whichever is lower in value) bears to value of entire gross estate (less any charitable and marital deductions [*I.R.C. §§ 2055, 2056, 2106(a)(2)*]). *I.R.C. § 2012(a)*; *see Treas. Reg. § 20.2012-1(d)* (computation)

If decedent made gift of property that is thereafter included in gross estate and gift was considered as made one half by decedent and one half by decedent's spouse [*see I.R.C. § 2513* (gift-splitting)], credit is allowed for gift tax paid with respect to both halves of gift. *I.R.C. § 2012(c)*; *Treas. Reg. § 20.2012-1(e)*

Credit under *I.R.C. § 2012* is allowable even if gift tax is paid after decedent's death and amount of gift tax is deductible from gross estate as debt of decedent. *Treas. Reg. § 20.2012-1(a)*

When more than one gift is included in gross estate, separate computation of limitation is required for each gift. *Treas. Reg. § 20.2012-1(b)*

"First limitation" limits credit to amount of gift tax paid for calendar quarter or calendar year in which gift was made. *Treas. Reg. § 20.2012-1(c)*

If more than one gift was made during calendar quarter or calendar year, "first limitation" with respect to any one gift that is included in decedent's gross estate limits credit to gift tax allocable to that gift. *Treas. Reg. § 20.2012-1(c)*

[9] Credit for Foreign Death Taxes (Schedule P, IRS Form 706CE)

Amount of credit; credit calculable under statute or treaty. *I.R.C. § 2014(a), (b)*; *Treas. Reg. § 20.2014-4* (*see* Instructions for IRS Form 706)

Limits on credit. *I.R.C. § 2014(b), (e), (f)*; *Treas. Reg. §§ 20.2014-1*-20.2014-3, 20.2014-6 (*see* Instructions for IRS Form 706)

Credit limited if deduction is allowed under *I.R.C. § 2053(d)* for tax imposed on charitable gift. *I.R.C. § 2014(f)*; *Treas. Reg. § 20.2014-7*

If foreign death taxes claimed as credit are refunded, notice must be given to IRS within 30 days; federal estate tax then redetermined; contents of notice of refund. *I.R.C. § 2016*; *Treas. Reg. §§ 20.2014-5*, 20.2016-1

Computation of credit when death taxes are paid to more than one foreign country; credit allowable in respect of property subject to death taxes by two or more foreign countries is limited to amount of estate tax attributable to that

property. *Treas. Reg. §§ 20.2014-1(a)(2)*, 20.2014-4(c) (*see* Instructions for IRS Form 706)

Procedure and proof for obtaining credit. *Treas. Reg. § 20.2014-5* (*see* Instructions for IRS Form 706)

Limitation period for claiming credit when estate tax on reversionary or remainder interest is extended. *Treas. Reg. § 20.2014-6*

[10] Credit for State Death Taxes

Credit repealed for estates of decedents dying after 2004. *I.R.C. § 2011(g).*

Credit for amount of taxes paid. *I.R.C. § 2011(a)* (*see* Instructions for IRS Form 706)

Limits on credit. *I.R.C. § 2011(b), (d), (e)* (*see* Instructions for IRS Form 706)

Credit limited if deduction is allowed under *I.R.C. § 2053(d)* for tax imposed on charitable gift. *I.R.C. § 2011(d)*

If time for payment of estate tax on reversionary or remainder interest is extended beyond termination of precedent interest, time for payment of state death taxes on that interest and time for claiming credit for state death tax are extended for same period. *I.R.C. § 2015*; *see I.R.C. §§ 2661(2), 6163* (application of estate tax provisions to generation-skipping transfer tax; extension of estate tax attributable to reversionary or remainder interest)

If state death taxes claimed as credit are refunded, notice must be given to IRS within 30 days; federal estate tax then redetermined; contents of notice of refund (notice requirement repealed for estates of decedents dying after 2004). *I.R.C. § 2016*; *Treas. Reg. § 20.2016-1*

Procedure and proof for obtaining credit. *Treas. Reg. § 20.2011-1(c)* (*see* Instructions for IRS Form 706)

[11] Deductions for Debts and Expenses

[a] In General

Deduction for funeral expenses (Schedule J); expenses incurred in administering property subject to claims; claims against the estate; and unpaid mortgages or indebtedness on property of gross estate. *I.R.C. § 2053(a)*; *Treas. Reg. § 20.2053-1(a)(1)*

Deduction for expenses of administering property in gross estate but that is not subject to claims is allowed if it (a) would be allowed if it were against property being administered that is subject to claims, and (b) is paid before expiration of assessment period. *I.R.C. § 2053(b)*; *Treas. Reg. §§ 20.2053-1(a)(2)*, 20.2053-8(a)(2), (b); *see I.R.C. § 6501(a)* (assessment period as generally three years after return is filed)

Deductions under *I.R.C. § 2053(a)* are limited to sum of (a) value of property both included in gross estate and subject to claims, plus (b) amounts paid out of property not subject to claims within nine months after decedent's death (or any granted extension of time for filing return). *I.R.C. § 2053(c)(2)*; *Treas. Reg. § 20.2053-1(c)*

Deductions for administering property not subject to claims are allowed only if occasioned by decedent's death and incurred in settling decedent's interest in property or vesting good title to beneficiaries; expenses incurred on behalf of transferees as not deductible. *Treas. Reg. § 20.2053-8(b)*; *see Treas. Reg. § 20.2053-8(d)* (examples)

[b] Administration Expenses

Court costs, surrogates' fees, accountants' fees, appraisers' fees, hiring of clerks; expenses necessarily incurred in preserving (but not improving) and distributing estate are deductible, including cost of storing or maintaining estate property when immediate distribution is not possible. *Treas. Reg. § 20.2053-3(d)(1)*

[c] Attorney's Fees

Attorney's fees incurred by beneficiaries because of litigation regarding their respective interests in estate are not deductible unless litigation was essential to proper settlement of estate, but are charged against beneficiaries personally. *Treas. Reg. § 20.2053-3(c)(3)*

[d] Debts, Mortgages, and Liens

Claims by remainder beneficaries relating to property described in *I.R.C. § 2044* (marital deduction was allowed to estate of predeceased spouse for life estate passing to decedent) are not deductible. *I.R.C. § 2053(c)(1)(C)*

Deduction only allowed to extent decedent's obligation was contracted bona fide, for adequate and full consideration in money or money's worth; exception if promise, pledge, or subscription constitutes charitable deduction. *Treas. Reg. §§ 20.2053-4*, 20.2053-5

Mortgages on, or any indebtedness with respect to, property included in gross estate are deductible only to extent that liability was contracted bona fide, for adequate and full consideration in money or money's worth. *Treas. Reg. § 20.2053-7*

[e] Estate Tax Deduction Versus Income Tax Deduction

Administration and other expenses are deductible either on federal estate tax return or on fiduciary (estate's) income tax return (IRS Form 1041); income tax deduction requires fiduciary to file waiver of right to take them on estate tax return. *I.R.C. § 642(g)*; *Treas. Reg. § 1.642(g)-1*

Total amount of one deduction, or of all deductions, are not required to be treated in same way. *Treas. Reg. § 1.642(g)-2*

[f] Estimated Expenses

Deduction is allowed although exact amount is not known when return is filed, provided it is ascertainable with reasonable certainty and will be paid; if amount of is not ascertainable at time of final audit, deduction is not allowed; petition for relief of refund [*see I.R.C. § 6213(a)* or *6511*] is proper if amount becomes ascertainable after final audit. *Treas. Reg. § 20.2053-1(b)(3)*

[g] Funeral Expenses (Schedule J)

Funeral expenses are deductible if they (a) are actually expended, (b) would be properly allowable out of property subject to claims under local law, and (c) do not exceed the limitation on deductions allowable out of property subject to claims. *Treas. Reg. § 20.2053-2*

Expenditure for tombstone, monument, mausoleum, or burial lot for decedent or his or her family, including reasonable expenditure for its future care, are deductible funeral expenses, provided such expenditure is allowable by local law. *Treas. Reg. § 20.2053-2*

Cost of transportation of person bringing body to place of burial is deductible funeral expense. *Treas. Reg. § 20.2053-2*

[h] Medical Expenses

Entire amount of decedent's medical expenses are deductible on estate tax return, but on decedent's income tax return only excess over 7.5 percent of adjusted gross income are deductible. *I.R.C. § 213(a), (b)*; *cf. I.R.C. § 2053*

Medical expenses incurred by decedent but unpaid at death are deductible on estate tax return or, if paid within one year after date of death, on decedent's income tax return for year in which incurred. *I.R.C. §§ 213(c), 2053(a)*; *see I.R.C. § 691(b)* (decedent's medical expenses are never deductible on income tax return of estate)

[i] Selling Expenses

Selling expenses deducted for federal estate tax purposes are not allowed to be offset against sales price of estate property in determining gain or loss for federal income tax purposes; only one deduction (or offset) as allowable. *I.R.C. § 642(g)*

Expenses of selling estate property is deductible if sale is necessary to pay decedent's debts, expenses of administration, or taxes, to preserve estate, or to effect distribution. *Treas. Reg. § 20.2053-3(d)(2)*

If item of estate property is disposed of in bona fide sale (including redemption) to dealer at price below its fair market value, lesser of (a) amount by which fair market value on applicable valuation date exceeds proceeds of the sale or (b) amount by which fair market value on date of sale exceeds proceeds is deductible. *Treas. Reg. § 20.2053-3(d)(2)*

[j] Taxes Deductible for Estate Tax Purposes

State and foreign death taxes imposed on amounts passing to charitable organizations are deductible if not claimed as credit under I.R.C. *§ 2011(d)* or *2014(f), I.R.C. § 2053(d)*. For estates of decedents dying after 2004, separate deduction for state death taxes replaces credit for state taxes. *I.R.C. § 2058*; *see I.R.C. § 2011(f)*

Property taxes accrued before decedent's death are deductible if they were enforceable obligation of decedent at time of death. *Treas. Reg. § 20.2053-6(b)*

Estate, succession, legacy, or inheritance tax payable by reason of decedent's death are not deductible, except certain state death taxes on charitable transfers. *Treas. Reg. § 20.2053-6(c)*; *but see I.R.C. §§ 2011, 2014* (credits for state and foreign death taxes)

Gift taxes on gifts made by decedent before his or her death but not paid before death are deductible. *Treas. Reg. § 20.2053-6(d)*

Excise taxes incurred in selling estate property or distributing it in kind are deductible administration expense if sale is necessary. *Treas. Reg. § 20.2053-6(e)*

Income taxes are deductible if they are on income received by decedent before his or her death; rules for apportionment between decedent and surviving spouse. *Treas. Reg. § 20.2053-6(f)*

[12] Estates for Which Returns Must Be Filed

One who is citizen or resident of possession at time of death is "citizen" unlessdecedent acquired United States citizenship solely because he or she was citizen of possession or was born in or resident of possession. *I.R.C. §§ 2208, 2209* (*see* Instructions for IRS Form 706)

Calculation of value of estates for which return must be filed. *I.R.C. § 6018(a)* (*see* Instructions for IRS Forms 706 and 706NA)

Calculation is based on value at date of decedent's death, regardless of whether subsequent election is made to alternate valuation date under *I.R.C. § 2032*. *Treas. Reg. § 20.6018-1(a)* (*see* Instructions for IRS Form 706)

United States citizen or resident at date of death. *Treas. Reg. § 20.6018-1(a)* (*see* Instructions for IRS Form 706)

Nonresident alien is one who was neither citizen nor resident of United States at time of death. *Treas. Reg. § 20.6018-1(b)* (*see* Instructions for IRS Form 706)

[13] Generation-Skipping Transfer (GST) Tax (Schedules R, R-1)

GST tax on direct skips from trust, as defined for GST tax purposes, is payable by trustee, not by estate. *I.R.C. § 2603(a)(2)*

Unless governing instrument provides otherwise, GST tax is to be charged to property constituting transfer. *I.R.C. § 2603(b)*

GST tax liability resulting from death is imposed only on "direct skips" of property from decedent's estate to "skip persons." *I.R.C. § 2612(c)(1)*

For purposes of determining whether transfer to trust is direct skip, *I.R.C. § 2651(f)(2)* (when entity has interest in property, each individual having interest in entity has interest in property of entity) is inapplicable. *I.R.C. § 2612(c)(2)*

Skip person defined. *I.R.C. §§ 2613(a), 2642(e)* (exclusion for specified transfers to charity) (*see* Instructions for IRS Form 706)

Nonskip person defined. *I.R.C. § 2613(b)* (*see* Instructions for IRS Form 706)

GST exemption amount. *I.R.C. § 2631*

Rules for allocation of GST exemption. *I.R.C. § 2632* (*see* Instructions for IRS Form 706)

Election not to have automatic allocation rules apply. *Treas. Reg. § 26.2632-1(b)(2)(iii)*

GST tax rate is product of maximum federal estate tax rate and inclusion ratio applicable to transfer. *I.R.C. § 2641(a)*; *see I.R.C. § 2642* (inclusion ratio)

Generation assignment of transferee. *I.R.C. § 2651* (*see* Instructions for IRS Form 706)

Generation assignment when intervening parent is dead. *I.R.C. § 2651(e)*; *Treas. Reg. §§ 26.2651-1*-26.2571-3; (*see* Instructions for IRS Form 706)

Special QTIP election. *I.R.C. § 2652(a)(3)* (*see* Instructions for IRS Form 706); *see also I.R.C. § 2056(b)(7)* (regular QTIP election)

Trust defined. *I.R.C. § 2652(b)(1)* (*see* Instructions to IRS Form 706)

When person has interest in property transferred to trust. *I.R.C. § 2652(c)(1)* (*see* Instructions for IRS Form 706)

Support obligations disregarded in determining whether person has interest in trust. *I.R.C. § 2652(c)(3)*

Portions of trust attributable to different transferors treated as separate trusts. *I.R.C. § 2654(b)*

Explicit trust defined; exceptions. *Treas. Reg. § 301.7701-4(a)*, (d)

Filing requirements for Schedules R and R-1. *Treas. Reg. § 26.2662-1(b)(3)(ii), (c)(2)(iii)* (*see* Instructions to IRS Form 706, IRS Form 706)

[14] Household Goods and Personal Effects (Schedule F)

Decedent's household goods and personal effects are valued at price that willing buyer would pay willing seller, neither being under any compulsion to buy or to sell and both having a reasonable knowledge of relevant facts. *Treas. Reg. § 20.2031-6(a)*

Room-by-room itemization of household goods and personal effects is desirable; articles worth less than $100 may be grouped; personal representative's declaration supported by appraisal penalty of perjury supported by competent appraisal by appraiser of recognized standing and ability or by dealer in class of personalty involved. *Treas. Reg. § 20.2031-6(a)*

Appraisal required for any collectible and article with artistic or intrinsic value worth more than $3,000, or any collection of similar articles worth more than $10,000. *Treas. Reg. § 20.2031-6(b)* (*see* IRS Form 706, Instructions for Schedule F)

District director of Internal Revenue Service is entitled to notification if household goods or personal effects will be distributed or sold before investigation by IRS officer; appraisal, under oath, is required to accompany notice. *Treas. Reg. § 20.2031-6(c)*

Appraisal standards and detail required. *Treas. Reg. § 20.2031-6(d)*

[15] Insurance on Decedent's Life (Schedule D)

Insurance on decedent's life includable in gross estate. *I.R.C. § 2042*; *Treas. Reg. § 20.2042-1*; *Rev. Rul. 83-44, 1983-1 C.B. 228* ; *but see Rev. Rul. 68-88, 1968-1 C.B. 397* (excluded; *see* IRS Form 706, Instructions to Schedule D)

Except for policy held by corporation of which decedent is sole or controlling shareholder [*see Treas. Reg. § 20.2042-1(c)(6)*], full amount of proceeds is includable in gross estate; amount includable if proceeds are payable to beneficiary in form of annuity for life or for term of years. *Treas. Reg. § 20.2042-1(a)(3)*

If proceeds of insurance policy payable to estate are community assets under local law, one half of proceeds is includable in gross estate. *Treas. Reg. § 20.2042-1(b)(2)*

Community property rules are applicable to policy on decedent's life not receivable by or for benefit of estate but to which decedent possessed incidents of ownership; thus, if proceeds are payable to beneficiary other than estate and policy is community property, only one half of proceeds is includable in gross estate. *Treas. Reg. § 20.2042-1(c)(5)*

Effect of local law on inclusion of insurance proceeds. *Treas. Reg. § 20.2042-1(c)(5)*

Rules relating to inclusion of proceeds of life insurance held by corporation of which decedent was sole or controlling shareholder. *Treas. Reg. § 20.2042-1(c)(6)*

[16] Insurance on Life of Another (Schedule F; IRS Form 712)

Insurance policy on life of another (owned by decedent) is included in gross estate; value is price insurer would charge for comparable policy on date of decedent's death. *I.R.C. § 2033*; *Treas. Reg. § 20.2031-8(a)(1)*

If value of insurance policy on life of another cannot be determined by reference to comparable contracts, value of decedent's interest is approximated by adding to interpolated terminal reserve at valuation date proportionate part of gross premium last paid before date of the decedent's death that covers period extending beyond that date. *Treas. Reg. § 20.2031-8(a)(2)*

[17] Jointly Owned Property (Schedule E)

General rule regarding inclusion of jointly owned property with rights of survivorship. *I.R.C. § 2040(a)*; *see Treas. Reg. § 20.2040-1(a)(1)* (valuation)

Exception for "qualified joint interests." *I.R.C. §§ 2040(b), 2056(d)*; *see* Pub. L. No. 100-647, § 5033(d)(1) (effective date)

Burden of proving contributions as on personal representative; proof of extent, origin, and nature of decedent's interest and interests of cotenant is required to accompany return. *Treas. Reg. § 20.2040-1(a)*

Value of joint tenancy property includable in gross estate. *Treas. Reg. § 20.2040-1(a), (c)* (*see* IRS Form 706, Instructions to Schedule E); *see also Treas. Reg. § 20.2043-1* (adequacy of consideration; relinquishment of marital rights is not consideration in money or money's worth)

Inclusion rules for property acquired by gift, bequest, devise, or inheritance. *Treas. Reg. § 20.2040-1(a)(1)* (*see* IRS Form 706, Instructions to Schedule E)

[18] Marital Deduction (Schedule M)

[a] In General

Property interest that is disclaimed by surviving spouse does not qualify for marital deduction. *I.R.C. §§ 2046, 2518(a)* (disclaimers) (*see* Instructions for IRS Form 706)

Deduction for property in gross estate that passes to surviving spouse. *I.R.C. § 2056(a)-(c)*; *see I.R.C. § 2056(d)(1)* (deduction not allowed unless decedent's surviving spouse is United States citizen); *see also Prob. Code §§ 21520-21526* (conditions and rules of construction for marital deduction gifts and transfers)

After December 31, 1981, decedent's interest in community property is part of gross estate and qualifies for unlimited marital deduction. *I.R.C. § 2056(a), (c)*; *see also Hurley v. Hartley (10th Cir. 1967) 379 F.2d 205, 207* (decided under prior law)

Characteristics of nondeductible terminable interest. *I.R.C. § 2056(b)(1)*; *Treas. Reg. § 20.2056(b)-1(f), (g)* (*see* Instructions for IRS Form 706)

Interest conditioned on spouse's survival or common disaster limitation qualifies for marital deduction if spouse survives beyond stated period or does not die as result of common disaster. *I.R.C. § 2056(b)(3)*; *Treas. Reg. §§ 20.2056(b)-3*, 20.2056(b)-5(h); *see also Prob. Code § 21525* (limiting stated survival periods)

Marital deduction for qualified terminable interest property (QTIP). *I.R.C. § 2056(b)(7)*; *Treas. Reg. § 20.2056(b)-7* (*see* Instructions for IRS Form 706)

For annuity, personal representative is deemed to have made election to take marital deduction under *I.R.C. § 2056(b)(7)* unless he or she makes contrary election on estate tax return. *I.R.C. § 2056(b)(7)(C)*

When interest in charitable remainder trust does not qualify as deductible terminable interest. *I.R.C. § 2056(b)(8)* (*see* Instructions for IRS Form 706)

Definition of qualified domestic trust (QDT). *I.R.C. § 2056A(a)* (*see* Instructions for IRS Form 706)

Estate tax as imposed on distributions, other than required income distributions, from QDT before death of surviving spouse and on value of property remaining in QDT on death of surviving spouse. *I.R.C. § 2056A(b)(1)*

Marital deduction is allowed for life estate with power of appointment in surviving spouse. *Treas. Reg. § 20.2056(b)-5* (*see* Instructions for IRS Form 706)

Marital deduction generally unavailable for partial interests in property; exception for qualifying fractional or percentage shares. *Treas. Reg. § 20.2056(b)-5(c)*

Partial election permitted for qualified terminable interest property (QTIP); limitations on availability of partial election. *Treas. Reg. § 20.2056(b)-5(c), (d)* (meaning of "specific portion" and "entire interest" for purposes of election)

Marital deduction allowed for life insurance, endowment, and annuities with power of appointment in surviving spouse. *Treas. Reg. § 20.2056(b)-6* (*see* Instructions for IRS Form 706)

[b] Computation of Marital Deduction Under Transitional Rules

If property passes to surviving spouse under maximum marital deduction formula provision in instrument executed before September 12, 1981, that meets specified requirements, deduction is figured under transitional rule. Pub. L. No. 97-34, § 403(e)(3) (Economic Recovery Tax Act of 1981) (*see* Instructions to IRS Form 706)

Transition rule applicable to maximum marital deduction formula if (1) decedent dies after December 31, 1981; (2) decedent's will was executed (or trust created) before September 12, 1981, and provides for spouse to receive maximum

amount of property qualifying for marital deduction allowable; (3) that formula was not amended (after September 12, 1981, and before the decedent's death) to refer specifically to unlimited marital deduction; and (4) the state did not enact statute that construes this type of formula, refers to unlimited marital deduction allowable under federal law. Pub. L. No. 97-34, § 403(e)(3); *see Prob. Code § 21523* (California statute providing that formula be construed to pass maximum amountdeductible under federal law as it existed before August 13, 1981)

[19] Net Losses During Administration

Casualty and theft losses suffered during period of administration are deductible on estate's fiduciary income tax return if waiver of right to take estate tax deduction for same loss is submitted. *I.R.C. §§ 165(c)(3), (h)(4), 642(g)*; *see Treas. Reg. § 1.642(g)-1* (statement required)

Deduction allowed for losses incurred during settlement of estate arising from casualties, to extent loss is not compensated by insurance or otherwise. *Treas. Reg. § 20.2054-1* (*see* Instructions for IRS Form 706)

To be deductible, loss must occur during settlement of estate; loss with respect to asset already distributed is not deductible even if it occurs during settlement period for estate as whole. *Treas. Reg. § 20.2054-1*; *see also Rev. Rul. 74-175, 1974-1 C.B. 52* (loss sustained by decedent during his or her lifetime is deductible only on decedent's final income tax return)

[20] Notes and Mortgages Payable to Decedent (Schedule C)

Value of promissory notes, mortgages, or mortgage participation certificates is presumed to be amount of unpaid principal, plus interest accrued to date of death; satisfactory evidence is required to be submitted by personal representative to establish lower value. *Treas. Reg. § 20.2031-4*; *see Rev. Rul. 67-276, 1967-2 C.B. 321* (factors considered pertinent in fixing correct value); *see also Harper v. Commissioner (1948) 11 T.C. 717, 719-720* (value limited to value of property held as security); *Estate of Lincoln (1942) 1 T.C.M. 326, 332* (debtor insolvent)

[21] Other Miscellaneous Property (Schedule F)

Valuation of business interests; supporting documentation required. *Treas. Reg. §§ 20.2031-2(f), (h)*, 20.2031-3; *see Rev. Rul. 68-609, 1968-2 C.B. 327* (factors used to value closely held stocks and bonds as equally applicable to value unincorporated business interests)

Description and valuation of judgments owing to decedent. *Treas. Reg. § 20.6018-3(c)(5)*

[22] Payment of Tax

[a] Deferral of Tax on Closely Held Business Interests

If interest in closely held business is subject of direct skip occurring at same time and as result of decedent's death, installment election is permitted with respect to generation-skipping transfer tax. *I.R.C. §§ 2661(2), 6166(i)*

When tax attributable to closely held business interests may be deferred. *I.R.C. § 6166(a)*

"Interest in a closely held business" defined. *I.R.C. § 6166(b)(1)*

Interest is payable annually on amount of tax during deferral period. *I.R.C. § 6166(f)(1)*

Due date is accelerated by disposition of 50 percent of value of decedent's interest in closely held business or aggregate withdrawals of 50 percent of decedent's interest in money or other property. *I.R.C. § 6166(g)(1)*

Lien to secure 15-year installment payments. *I.R.C. § 6324A*; *see also I.R.C. § 2661(2)* (generation-skipping transfer tax)

Two percent interest rate when time for payment of tax on qualifying closely held business interest is extended. *I.R.C. §§ 6601(j), 6166*; *see I.R.C. §§ 6601(a), 6621* (normal underpayment rate applicable to excess)

Manner of making installment election. *Treas. Reg. 20.6166-1(b)*

Protective installment election is available to defer payment of (1) any part of tax remaining unpaid when values are finally determined (or agreed), and (2) any deficiencies attributable to closely held business; final notice of election is due within 60 days after values are finally determined or agreed. *Treas. Reg. § 20.6166-1(d)*

Protective election does not extend time for payment of tax; previously unpaid tax and interest (1) that would have been due had installment election been made when return was filed, and (2) not attributable to closely held business interests and not eligible for further extension under any other provision as payable with final notice of election. *Treas. Reg. § 20.6166-1(d)*; *see Treas. Reg. § 20.6166-1(e), (f)* (calculation of installments and interest as if election was made when return was filed)

[b] Deferral of Tax on Reversionary or Remainder Interests

When taxes attributable to reversionary or remainder interest may be deferred. *I.R.C. § 6163(a)*; *Treas. Reg. § 20.6163-1(a)(1)*; *see I.R.C. § 2661(2)* (generation-skipping transfer tax)

Manner of making election. *I.R.C. § 6163(b)*; *Treas. Reg. § 20.6163-1(b)*; *see I.R.C. §§ 6163(c), 6165* (extension may require furnishing of bond)

Calculation of amount that may be deferred. *Treas. Reg. § 20.6163-1(c)*

[23] Powers of Appointment (Schedule H)

Property subject to general power of appointment created on or before October 21, 1942, is included in gross estate only if decedent exercised power by will or by disposition, which, if transfer of property owned by decedent, would be includable pursuant to *I.R.C. §§ 2035*-2038. *I.R.C. § 2041(a)(1)*

Failure to exercise general power created on or before October 21, 1942, or to complete release of such a power is not deemed to be exercise of power. *I.R.C. § 2041(a)(1)*; *see Treas. Reg. § 20.2041-2(d)* (release or lapse)

If general power created on or before October 21, 1942, has been partially released, exercise of such a power is not deemed to be exercise of general power, and thus property subject to power is not includable in gross estate. *I.R.C. § 2041(a)(1)*; *Treas. Reg. § 20.2041-2(e)*

General power created after October 21, 1942, is considered to exist on date ofdecedent's death (and thus property subject to power is included in gross estate) even though (1) exercise is subject to precedent giving of notice or (2) exercise takes effect only on expiration of stated period. *I.R.C. § 2041(a)(2)*

When property over which decedent possessed general power of appointment created after October 21, 1942, may be excluded from gross estate. *I.R.C. § 2041(a)(2), (b)* (*see* Instructions to IRS Form 706)

General power of appointment defined; exceptions. *I.R.C. § 2041(b)* (*see* Instructions for Form IRS 706)

Partial release of post-1942 general power during decedent's life does not prevent inclusion of property subject to power in gross estate; lapse as release during any calendar year to extent value of property that could have been appointed by exercise of lapsed powers exceeded (at time of lapse) greater of (1) $5,000 or (2) 5 percent of value of property subject to power. *I.R.C. § 2041(b)(2)*

Disclaimer or renunciation of general power created after October 21, 1942, but prior to January 1, 1977, is not considered taxable release of power. Pub. L. No. 94-455, § 2009(b)(4), (e)(2); former *I.R.C. § 2041(a)(2)*; *see Treas. Reg. § 20.2041-3(d)(6)(ii)* (further defining disclaimer)

If power exists over part of group of assets or limited interest in single property, only that part is included in gross estate tax. *Treas. Reg. § 20.2041-1(b)(3)*

Date power created. *Treas. Reg. § 20.2041-1(e)* (*see* Instructions for IRS Form 706)

Partial exercise of general power created on or before October 21, 1942, results in inclusion in gross estate only to extent of value of portion affected by exercise. *Treas. Reg. § 20.2041-2(f)*

Only qualified disclaimer is not considered taxable release of power created after December 31, 1976, including powers created on or after December 31, 1997; disclaimer or renunciation other than qualified disclaimer is release of the power by disclaimant. *Treas. Reg. § 20.2041-3(d)(6)(i), (iii)*; *see I.R.C. § 2518(b)* (qualified disclaimer)

[24] Real Property Interests (Schedule A)

Real property interests includable in gross estate. *I.R.C. §§ 2031, 2033, 2035*-2038, 2041; *Treas. Reg. § 20.2033-1(b)* (*see* IRS Form 706, Instructions to Schedules A, E, F, H); *see also Treas. Reg. § 20.2031-1(a), (c)* (exceptions to inclusion of property situated outside the United States)

Fair market value of real estate is determined by all facts and circumstances; assessed value for local tax purposes is not determinative of value for estate tax purposes, although it may be considered. *Treas. Reg. § 20.2031-1(b)*

Reporting and valuation of real estate subject to homestead or other exemption, dower, curtesy, or other statutory estate. *Treas. Reg. §§ 20.2033-1(b)*, 20.2034-1 (*see* IRS Form 706, Instructions to Schedule A)

Reporting and valuation of mortgaged property; related deduction. *Treas. Reg. § 20.2053-7* (IRS Form 706, Instructions to Schedule A; Instructions to IRS Form 706)

Description of real estate required for return. *Treas. Reg. § 20.6018-3(c)(1)* (*see* IRS Form 706, Instructions for Schedule A)

[25] Requirements for Filing Return

"Executor" defined. *I.R.C. § 2203* (*see* Instructions for IRS Form 706)

"Legal holiday" is legal holiday in District of Columbia or, for return required to be filed at IRS office located outside

District of Columbia, statewide legal holiday in state where office is located. *I.R.C. § 7503*

"Person in actual or constructive possession of any property of decedent" includes decedent's agents and representatives, safe-deposit companies, warehouse companies and other custodians of property in United States, brokers holding securities belonging to decedent as collateral, and debtors of decedent in United States. *Treas. Reg. § 20.2203-1*

Who files if there is joint representives or if there is no representative. *Treas. Reg. § 20.6018-2* (*see* Instructions for IRS Form 706)

If persons required to file return cannot join in making one complete return, each is required to file. *Treas. Reg. § 20.6018-2* (*see* Instructions for IRS Form 706)

Requirements when sole representative is unable to make complete return as to any part of gross estate. *Treas. Reg. § 20.6018-2* (*see* Instructions for IRS Form 706)

If due date for filing return falls on Saturday, Sunday, or legal holiday, return is due next succeeding day that is not Saturday, Sunday, or legal holiday. *Treas. Reg. § 20.6075-1*

Place for filing return. *Treas. Reg. § 20.6091-1(a)* (*see* Instructions for IRS Form 706)

Due date for filing Schedule R-1 (direct skip from trust). *Treas. Reg. § 26.2662-1(b), (c)* (*see* Instructions for IRS Form 706)

[26] "Section 2044" Property (Schedule F)

Gross estate of surviving spouse includes property that avoided taxation in estate of predeceased spouse under marital deduction for qualified terminable interest (QTIP) [*see I.R.C. §§ 2056(b)(7), 2523(f)*] or for which similar gift tax election was made. *I.R.C. § 2044*

[27] Special Use Valuation (Schedule A-1)

[a] In General

Waiver of statute of limitations for a claim for refund or credit of any overpayment of tax resulting from application of net cash lease provisions for spouses and lineal descendants [*see I.R.C. § 2032A(c)(7)(E)*] if claim is filed by June 6, 2002. Pub. Law 107-16, § 581.

When farm or closely held business real property may be specially valued. *I.R.C. § 2032A(a)-(c)*

Agreement to special valuation and to consent to liability for recapture is required by all persons with interest in property being valued based on its qualified use. *I.R.C.§ 2032A(a)(1)(B), (d)(2)*; *Treas. Reg. § 20.2032A-8(c)* (*see* IRS Form 706 Schedule A-1, Part 3, and related instructions)

Additional requirements for qualification. *I.R.C. § 2032A(b)* (*see* Instructions for IRS Form 706); *see also I.R.C. § 2032A(e)(6)* (material participation)

Special use election need not include all eligible property but must include real and personal farm property whose value comprises 50 percent of gross estate and farm real estate whose value constitutes 25 percent of gross estate; for purposes

of these calculations, encumbrances are deducted. *I.R.C. § 2032A(b)(1)(A), (B), (3)*; *Treas. Reg. § 20.2053-7* (*see* Instructions for IRS Form 706)

During five of eight years preceding decedent's death, decedent or family member is required to have made or materially participated in qualified use of property. *I.R.C. § 2032A(b)(1)(C)*; *but see I.R.C. § 2032A(b)(4), (5)* (exceptions)

Surviving spouse or lineal descendant who rents special use property to family member family on net cash basis not treated as failing to meet qualified use requirement. *I.R.C. § 2032A(c)(7)(E)*

Three valuation methods applicable to farms or closely held businesses that qualify for special use valuation; each required or prohibited in certain situations. *I.R.C. § 2032A(e)(7), (8)*; *Treas. Reg. § 20.2032A-4*

Formula for valuation of farm property, if there is comparable land from which average gross annual rental may be determined and personal representative does not elect to have value determined under multiple factor method. *I.R.C. § 2032A(e)(7)(A), (C)*

"Net share rental" method applicable if there is no comparable land from which average annual gross cash rental may be determined, but there is land from which average net share rental may be determined, and if personal representative elects not to use multiple factor method of valuation. *I.R.C. § 2032A(e)(7)(B), (C)*

Multiple-factor method for specially valuing farms and qualified businesses. *I.R.C. § 2032A(e)(8)*

Special use valuation election allowed for "qualified woodlands." *I.R.C. § 2032A(e)(13)*

Lien imposed on all qualified farm or closely held business property with respect to which special use valuation election is made; lien arises when election is filed and continues until tax benefit is recaptured or until potential liability for recapture ceases. *I.R.C. § 6324B*

Special use valuation election allowed with respect to one or more qualified heir's joint or undivided interest if electing heir's interest plus other property to be specially valued satisfies 25-percent requirements of *I.R.C. § 2032A(b)(1)(B). Treas. Reg. § 20.2032A-8(a)(2)* (*see* Instructions for IRS Form 706)

When election may be made for successive interests. *Treas. Reg. § 20.2032A-8(a)(2)* (*see* Instructions for IRS Form 706); *see also I.R.C. § 2032A(e)(1), (2)*

[b] Definitions Regarding Special Use Valuation

"Qualified heir" is member of decedent's family who acquired real property from decedent or to whom property has passed; if further disposition of any interest in property is made from qualified heir to member of his or her family, transferee is qualified heir. *I.R.C. § 2032A(e)(1)*

"Member of decedent's family" includes individual's ancestors, spouse, and lineal descendants, lineal descendants of individual's parents and of individual's spouse, and spouses of any these lineal descendants; legally adopted child of individual deemed to be that individual's child by blood. *I.R.C. § 2032A(e)(2)*

What constituties "real property" that qualifies for special use valuation. *I.R.C. § 2032A(e)(3)*

What constituties "farming." *I.R.C. § 2032A(e)(4), (5)*

[c] Liability for Tax on Recapture

Waiver of statute of limitations for a claim for refund or credit of any overpayment of tax resulting from application of net cash lease provisions for spouses and lineal descendants [*see I.R.C. § 2032A(c)(7)(E)*] if claim is filed by June 6, 2002. Pub. Law 107-16, § 581]

Tax benefits obtained by using special valuation procedure are subject to recapture on disposition or cesssation of qualified use. *I.R.C. § 2032A(c)(1)*; *see I.R.C. § 2032A(c)(7)(A)* (extension of 10-year period if qualified heir's use of qualified real property commences within two years after decedent's death)

Potential recapture liability expires if qualified heir dies without disposing of property or ceasing qualified use, or 10 years (or 15 years if decedent died before January 1, 1982) after decedent's death. *I.R.C. § 2032A(c)(1)*

If qualified heir disposes of, or ceases to make qualified use of, any part of the specially valued property, within 10 years after decedent's death, heir is required to file IRS Form 706-A and pay additional tax within six months of disposition or cessation. *I.R.C. § 2032A(c)(1), (4)* (*see* Instructions for IRS Form 706-A, reproduced at *see § 453.193*)

Amount of tax benefit potentially subject to recapture is lesser of (a) "adjusted tax difference" (defined by *I.R.C. § 2032A(c)(2)(B)*), or (b) excess of amount realized with respect to that interest (or, in case other than sale or exchange at arm's length, fair market value of interest) over special use value. *I.R.C. § 2032A(c)(2)(A)*

"Adjusted tax difference" is allocation to particular interest of its proportionate share of tax saving that resulted to estate from special use election. *I.R.C. § 2032A(c)(2)(B), (C)*

Qualified heir is personally liable for additional tax on recapture with respect to his or her interest unless he or she furnishes bond that meets requirements of *I.R.C. § 2032A(e)(11)*. *I.R.C. § 2032A(c)(5)*

[d] Protective Election

Protective election is available to preserve right to claim special use valuation depending on whether values finally determined (or agreed to after examination of return) meet requirements of *I.R.C. § 2032A*. *Treas. Reg. § 20.2032A-8(b)* (*see* Instructions for IRS Form 706; IRS Form 706, Instructions to Schedule A-1)

Protective election does not extend time to pay taxes shown due (based on fair market values) on return; if estate qualifies for special use valuation based on values as finally determined (or agreed on), amended return as due within 60 days after date of determination. *Treas. Reg. § 20.2032A-8(b)* (*see* Instructions for IRS Form 706)

[28] Stocks and Bonds (Schedule B)

Valuation of relatively active listed stocks and bonds. *Treas. Reg. § 20.2031-2(a), (b)* (*see* Instructions for IRS Form 706)

Valuation of stocks or bonds listed on more than one exchange. *Treas. Reg. § 20.2031-2(b)(1)* (*see* Instructions for IRS Form 706)

Valuation of active listed bonds if only closing selling price on valuation date (rather than highest and lowest selling prices) are available; if there were no sales on valuation date. *Treas. Reg. § 20.2031-2(b)(2)*

Valuation of relatively inactive listed stocks and bonds. *Treas. Reg. § 20.2031-2(c), (d)* (*see* Instructions for IRS Form 706)

Valuation rules applicable when selling or bid and asked prices do not reflect true value. *Treas. Reg. § 20.2031-2(e)*; *see Bull v. Smith (2nd Cir. 1941) 119 F.2d 490, 492* (block discount not determined as if sale was in one day, but over reasonable period)

Financial and other data (including reports by accountants, engineers, or any technical experts) on which valuation of inactive or closely held corporation securities is based is required to be submitted with return. *Treas. Reg. § 20.2031-2(f)* (*see* Instructions for IRS Form 706)

Totally inactive and close corporation stocks and bonds are not valued under any set formula [*see Rev. Rul. 83-120, 1983-2 C.B. 170* ; *Rev. Rul. 77-287, 1977-2 C.B. 319* ; *Rev. Rul. 59-60, 1959-1 C.B. 237 , modified, Rev. Rul. 65-193, 1965-2 C.B. 370*], but certain factors are taken into consideration, though weight given each factor may vary. *Treas. Reg. § 20.2031-2(f)*

Pledged and margin securities are included in gross estate at their fair market value on applicable valuation date; deduction for indebtedness is possible in accordance with *Treas. Reg. § 20.2053-1* or 20.2106-1 (for estate of nonresidents who are not citizens). *Treas. Reg. § 20.2031-2(g)*

Price under option or purchase contract is not necessarily determinative of value. *Treas. Reg. § 20.2031-2(h)*

Disregarding contract or option price is allowed when determining value of closely held securities unless agreement is bona fide business arrangement, not device to pass shares to natural objects of decedent's bounty for less than adequate and full consideration in money or money's worth. *Treas. Reg. § 20.2031-2(h)*

Stock sale is "ex-dividend" if made before record date of dividend and seller is entitled to dividend; price of stock is decreased to reflect amount of particular dividend; thus, if decedent dies after ex-dividend date but before date of record, ex-dividend is included in gross estate by increasing value (ex-dividend quotation) of stock by amount of dividend. *Treas. Reg. § 20.2031-2(i)* (*see* Instructions for IRS Form 706)

Interest on bonds is prorated so that interest accrued at date death is included in gross estate. *Treas. Reg. § 20.2033-1(b)* (*see* Instructions for IRS Form 706)

Uncollected dividends payable to decedent or estate are included in gross estate if date of decedent's death was on or after record date for determining shareholders entitled to dividend. *Treas. Reg. § 20.2033-1(b)* (*see* Instructions for IRS Form 706)

Particulars required in description of stocks and bonds. *Treas. Reg. § 20.6018-3(c)(2)* (*see* Instructions for IRS Form 706)

[29] Transfers During Decedent's Life (Schedule G)

Gift tax paid by decedent or estate on gifts made by decedent or decedent's spouse within three years before decedent's death as includable in gross estate. *I.R.C. § 2035(b)*

Transfers with retained life estate. *I.R.C. § 2036*

Valuation of reversionary interest. *I.R.C. § 2037(b)*; *Treas. Reg. § 20.2037-1(c)(3)*, (4)

Revocable transfers includable in gross estate. *I.R.C. § 2038*; *Treas. Reg. § 20.2038-1* (*see* Instructions to IRS Form 706)

Only value of interest in property subject to power to which *I.R.C. § 2038* applies is includable in gross estate. *Treas. Reg. § 20.2038-1* (*see* Instructions to IRS Form 706)

I.R.C. § 2038 is applicable to any power affecting time or manner of enjoyment of property or its income, even if identity of beneficiary is not affected. *Treas. Reg. § 20.2038-1(a)*

I.R.C. § 2038 is not applicable to power exercise of which was subject to contingency beyond decedent's control that did not occur before death. *Treas. Reg. § 20.2038-1(b)*

[30] Unified Credit

Unified credit. *I.R.C. §§ 2010, 2505*

Reduction of unified credit to reflect gifts made by decedent (including "split gifts" made by decedent's spouse) between September 8, 1976, and January 1, 1977, for which specific exemption was claimed. *I.R.C. § 2010(b)* (*see* Instructions for IRS Form 706)

Allowable unified credit is limited to amount of gross estate tax. *I.R.C. § 2010(d)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewTax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)Tax LawState & Local TaxesEstate & Gift TaxGeneration-Skipping Transfer TaxesTax LawState & Local TaxesEstate & Gift TaxValuationGeneral Overview

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Volume 38: Probate: Is Probate Necessary? thru Probate: Estate Tax-Chs. 440-453
Chapter 453 PROBATE: ESTATE TAX
PART III. RESEARCH GUIDE
A. Federal Estate And Generation-Skipping Taxes

38-453 California Forms of Pleading and Practice--Annotated § 453.61

§ 453.61 State Statutes

California adjustments for (1) deductions taken for spousal gifts made after December 31, 1976, and (2) final federal estate tax value of other gifts, except property subject to QTIP election. *Prob. Code § 21523*; *see Prob. Code § 21501* (Prob.Code § 21523 is effective for distributions made on or after January 1, 1988); *see also* former Prob. Code § 1034 (substantially similar rule applicable earlier)

Fiduciary not liable for good faith decision to make or not to make QTIP election. *Prob. Code § 21526*

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For related research and practice materials, see the following legal topics:
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38-453 California Forms of Pleading and Practice--Annotated § 453.62

§ 453.62 Revenue Rulings

[1] Alternate Valuation Date

Valuation of insurance policies owned by decedent on life of another when alternate valuation date is elected. *Rev. Rul. 55-379, 1955-1 C.B. 449* ; *Rev. Rul. 63-52, 1963-1 C.B. 173*

[2] Annuities

If owner-annuitant of deferred annuity contract dies before starting date of annuity, and beneficiary receives death benefit under annuity contract, amount beneficiary receives in lump sum in excess of owner-annuitant's investment in contract is includible in beneficiary's gross income as income in respect of a decedent under *I.R.C. § 691*. *Rev. Rul. 2005-30, 2005-20 I.R.B. 1015* .

[3] Credit for Tax on Prior Transfers Subject to Estate Tax (Schedule Q)

Computation of credit if transferor's estate elected to pay federal estate tax in installments, not all of which have been paid at time decedent's estate tax return is filed. *Rev. Rul. 83-15, 1983-1 C.B. 224*

Credit for tax on prior transfers does not apply to life insurance policy on decedent's life that was included in predeceased spouse's residuary estate and bequeathed to decedent spouse as trustee of residuary trust with powers sufficiently broad as to be termed incidents of ownership within meaning of *I.R.C. § 2042*. *Rev. Rul. 77-156, 1977-1 C.B. 268*

Method of computing limitation on credit for tax on prior transfers prescribed in *I.R.C. § 2013(c)(1)* for estate having both community and separate property. *Rev. Rul. 76-311, 1976-2 C.B. 261*

Each eligible transfer of property is necessary factor in computation of credit for tax on prior transfer under *I.R.C. § 2013*. *Rev. Rul. 73-47, 1973-1 C.B. 397*

If decedent-transferee received property interest that could not be valued by recognized valuation principles on transferor's date of death, credit under *I.R.C. § 2013* for federal estate tax paid on transfer of that interest from estate of transferor is not allowed against federal estate tax imposed on estate of decedent-transferee. *Rev. Rul. 67-53, 1967-1 C.B. 265*

Administration expenses deducted under *I.R.C. § 2053* is required to be used to reduce value of residuary estate for purposes of computing credit for tax on prior transfers. *Rev. Rul. 66-233, 1966-2 C.B. 428 , modified, Rev. Rul. 93-48, 1993-2 C.B. 271* , to apply to administration expenses other than interest accruing on obligations payable from residuary devise

[4] Deductible Debts and Expenses

Full amount of funeral expenses of California decedent is deductible from gross estate whether or not surviving spouse or any other person is liable for them in addition to estate. *Rev. Rul. 71-168, 1971-1 C.B. 271*

Election to treat administration expenses as income or estate tax deductions is available on year-to-year basis if required waiver is filed. *Rev. Rul. 70-361, 1970-2 C.B. 133*

[5] Insurance Owned by Decedent on Life of Another (Schedule F)

If surrender value of insurance policy on life of another (owned by decedent) exceeds its replacement cost, full economic value of policy is reportable. *Rev. Rul. 78-137, 1978-1 C.B. 280*

Only one half of value of insurance on life of another owned by decedent is included in gross estate if insurance was purchased with community funds. *Rev. Rul. 75-100, 1975-1 C.B. 303*

If alternate valuation date is elected and insured under policy dies during alternate valuation period, proceeds are fully includable in estate because event has merely increased value of policy to face value. *Rev. Rul. 63-52, 1963-1 C.B. 173*

If alternate valuation date is elected, value of policy on life of another is detemined by cause of increase in value; increase during alternate valuation period is not included in gross estate to extent that it is attributable to premium payments or interest earned. *Rev. Rul. 55-379, 1955-1 C.B. 449*

[6] Marital Deduction (Schedule M)

Individual retirement account (IRA) and trust may be treated as QTIP if trustee of trust is named beneficiary of IRA and surviving spouse can compel trustee to withdraw from IRA and distribute to spouse an amount equal to all income earned on IRA assets at least annually. *Rev. Rul. 2000-2, 2000-3 IRB 305*

Marital deduction is not allowable with respect to trust providing for income of one year to be distributed during next year rather than currently. *Rev. Rul. 72-283, 1972-1 C.B. 311*

[7] Stocks and Bonds (Schedule B)

Actual selling price of stock or bonds is value for estate tax purposes when such stock or bond sold in arm's-length transaction during period between date of death and alternate valuation date. *Rev. Rul. 70-512, 1970-2 C.B. 192*

Valuing securities of closely held company by comparison with listed securities of company in same business as appropriate if stock or bond value is based on value of underlying assets, no separate appraisal of which is possible. *Rev. Rul. 65-193, 1965-2 C.B. 370* ; *see Estate of Littick (1958) 31 T.C. 181, 185, 188* (restrictive sales agreement among shareholders of close corporation may fix value of shares)

Dividends declared on shares of stock prior to death and payable to stockholders of record on date after decedent's death are not includable in gross estate, unless theywere trading "ex-dividend" on date of death. *Rev. Rul. 54-399, 1954-2 C.B. 279* (*see* Instructions for IRS Form 706)

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§ 453.63 Letter Rulings

[1] Bona Fide Sales

Decedent's transfer of property with retained life estate is not included in gross estate if transfer is bona fide sale for adequate and full consideration. Letter Rul. 9133001

[2] Deductible Debts and Expenses

To qualify for deduction, administrative expenses must be incurred in settling estate affairs, not for benefit of beneficiaries of estate. Letter Rul. 9132003

[3] Marital Deduction--QTIP

Residuary trust does not qualify for QTIP election because surviving spouse was only entitled to income of certain types of assets and trustee was not required to retain those assets. Letter Rul. 9206001

[4] Payment of Tax

Interest on loan used to pay estate tax is deductible as administration expense if loan was necessary for administration of estate, but amount of loan should reflect any reduction in tax liability resulting from deductibility of interest. Letter Rul. 200449031

Estate may not claim estate tax deduction under *I.R.C. § 2053* for income taxes estate paid on amounts it was compelled to withdraw from decedent's IRAs in order to pay estate tax. Letter Rul. 200444021

Active development of oil and gas properties constitutes trade or business that qualifies for estate tax installment

payments. Letter Rul. 9214010; *see* *Rev. Rul. 61-55, 1961-1 C.B. 713*

Royalty interests in oil and gas production do not qualify as trade or business that may make estate tax payments in installments. Letter Rul. 9214010

Use of farm property for conservation purposes under a government program is business that qualifies for estate tax installment payments. Letter Rul. 9212001

Business of managing apartment buildings is qualified business for purpose of installment tax payments if decedent and decedent's agents carried on day-to-day activities of business. Letter Rul. 9130001

[5] Property Included in Gross Estate

Gross estate includes stolen artwork in decedent's possession. Letter Rul. 9152005

Legal Topics:

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

[1] Bona Fide Sales

Decedent's gross estate should have included full value of real property transferred to family limited partnership, when decedent and her children had an implied agreement that decedent would retain income and economic enjoyment of the transferred asset and that the inter vivos transfer was not a bona fide sale for adequate and full consideration under *I.R.C. § 2036(a)*. *Estate of Bigelow (9th Cir. 2007) 503 F.3d 955, 966-967*

Transfer of surviving spouse's half of community property to testamentary trust created by decedent in return for right to receive income from all community property for life is not bona fide sale for adequate and full consideration [*see I.R.C. § 2036(a)*]; on survivor's death, survivor's half of community property is includable in survivor's taxable estate, with credit allowed equal to value of life estate in original decedent's half of trust corpus. *Gradow v. United States (9th Cir. 1990) 897 F.2d 516, 518-519*

Decedent's transfer of property with retained life estate is not included in gross estate if transfer is bona fide sale for adequate and full consideration. *Gradow v. United States (9th Cir. 1990) 897 F.2d 516, 518-519*

[2] Charitable Deduction (Schedule O)

Charitable gift deduction is allowable if gift is unconditional and gift amount is ascertainable as of date of decedent's death. *Estate of Marine v. C.I.R. (4th Cir. [T.C.] 1993) 990 F.2d 136, 138-140*

Contributions and gifts to foreign cities for exclusively charitable purposes is allowable deductions from the gross estate under *I.R.C. § 2055*. *National Savings and Trust Company v. United States (Ct. Cl. 1971) 436 F.2d 458, 461*

Contribution of future interest to charity is deductible from gross estate if value of that interest is predictable with reasonable reliability. *Kate Froman Trust (1972) 58 T.C. 512, 515*

[3] Credit for Tax on Prior Transfers Subject to Estate Tax (Schedule Q)

Credit for tax on prior transfers is not available for life estate if transferor and transferee died simultaneously. *Estate of Lion v. Commissioner of Internal Revenue (4th Cir. 1971) 438 F.2d 56, 58-62*

[4] Deductions Under I.R.C. § 2053

Estate cannot deduct payments made to decedent's decendents for interference with inheritance claims. *Lindberg v. United States (10th Cir. 1999) 164 F. 3d 1312*

No deduction are allowable under *I.R.C. § 2053(a)(3)* for sums paid to settle surviving spouse's claim that increase in value of decedent's separate property stock was community property because relinquishment of marital rights is not consideration in money or money's worth [*see I.R.C. § 2043(b)(1)*]. *Trust Services of America, Inc. v. United States (9th Cir. 1989) 885 F.2d 561, 568*

Costs deductible as administration expenses under *I.R.C. § 2053* are determined by definition of term "administration expense" under state law, rather than by *Treas. Reg. § 20.2053-3(a)*, providing that expenditures not essential to the proper settlement of the estate but incurred for individual benefit of heirs, legatees, or devisees may not be taken as deductions. *Hibernia Bank v. United States (9th Cir. 1978) 581 F.2d 741, 746-747* ; *Estate of Park v. C. I. R. (6th Cir. 1973) 475 F.2d673, 676* ; *Todd v. Commissioner (1971) 57 T.C. 288, 295*

Sums paid for erection of plaque and saying of Kaddish for year after death and on each anniversary of death are not properly chargeable against estate as funeral expenses. *Estate of Silverstein (1984) 159 Cal. App. 3d 221, 226-227, 205 Cal. Rptr. 294*

[5] Filing Requirements

Personal representative's duty to file estate tax return on time is nondelegable; reliance on erroneous advice of attorney does not constitute reasonable cause for late filing sufficient to absolve penalty. *Sarto v. United States (N.D. Cal. 1983) 563 F. Supp. 476, 478*

[6] Marital Deduction (Schedule M)

[a] In General

Marital deduction is not allowable for sums paid in settlement of claim by surviving spouse that increase in value of decedent's separate property stock was community property because surviving spouse had no enforceable claim under state law if stock was passive investment, decedent's attendance at board meetings notwithstandng. *Trust Services of America, Inc. v. United States (9th Cir. 1989) 885 F.2d 561, 567*

Intent of donor controls validity of gift from one spouse to other of spouse's one-half share of community-held insurance policy on life of donor spouse. Lutich v. United States (N.D. Cal. 1972) 72-1 U.S. Tax Cas. (CCH) P12852

Marital deduction is valid when personal representative has duty, imposed either by will or state law, to distribute assets representative of appreciation or depreciation in value of all property available for distribution. *Estate of Hamelsky (1972) 58 T.C. 741, 744*

If will directed fractional share marital deduction bequest to be based on valuations used in settling estate tax liabilities, applicable fraction is calculated using special use value of woodlands shown on estate tax return rather than value assigned by probate inventory and appraisal. *Estate of Libeu (1988) 205 Cal. App. 3d 1436, 1447-1451, 253 Cal. Rptr. 456*

[b] Computation of Marital Deduction Under Transitional Rules

Will executed in 1980 by decedent who died in 1982 that expressed formula marital gift as minimum amount necessary to ensure that decedent's estate pay least amount of federal estate tax was not subject to transition rule but does allow for unlimited marital deduction. *Estate of Neisen v. Commissioner (1987) 89 T.C. 939, 942-943*

California statute [*Prob. Code § 21523*] and transition rule reflects presumption that decedents with pre-ERTA wills probably intended to pass marital deduction in amount calculated under pre-ERTA formula, namely, greater of $250,000 or one half of value of adjusted gross estate. *Estate of Libeu (1988) 205 Cal. App. 3d 1436, 1446, 253 Cal. Rptr. 456*

Section 403(e)(3) of Economic Recovery Tax Act of 1981 (Pub. L. No. 97-34; hereinafter "ERTA") and former Prob. Code § 1034 (*now see Prob. Code § 21523*) is only applicable to require use of former *I.R.C. § 2056* to calculate marital deduction under pre-ERTA will; thus, entire pre-ERTA estate tax law as applicable. *Estate of Libeu (1988) 205 Cal. App. 3d 1436, 1448-1449, 253 Cal. Rptr. 456*

[c] QTIP

QTIP election not available when trust allowed discretionary distributions to daughter. *Estate of Manscill (1992) 98 T.C. 413*

[7] Other Miscellaneous Property (Schedule F)

Value of leaseholds, reversions, or remainder interests are determined by referring to actuarial tables, although tables may not be adhered to if more realistic and reliable measures are available. *Jennings v. Commissioner (1948) 10 T.C. 323, 327-328* (value derived from tables disputed based on health particular individual)

National Automobile Dealers' "Blue Book" provides evidence of value of automobile. *Estate of Adams (1973) 32 T.C.M. 503, 506*

[8] Real Property Interests (Schedule A)

In valuing realty, consideration is given to nature of property, its location, improvements and their condition, its use, and related development and economic trends; realty is generally valued at its "highest and best use." *Estate of Mitchell (1968) 27 T.C.M. 1568, 1569-1570* ; *Flanders v. United States (N.D. Cal. 1972) 347 F. Supp. 95, 97* ; *but see I.R.C. § 2032A* (may be used to alleviate severity of general approach)

Amount received from sale of real estate (made within reasonable period after decedent's death in manner calculated to ensure highest possible price) establishes value; sale of similar property in vicinity is relevant evidence of value; market activity immediately prior to and subsequent to death is valid consideration. *Wilson v. Commissioner (1926) 5 B.T.A. 615, 615-616*

[9] Special Use Value Election

[a] Effect on Marital Deduction

If will directed fractional share marital deduction bequest to be based on valuations used in settling estate tax liabilities, applicable fraction is calculated using special use value of woodlands shown on estate tax return rather than value assigned by probate inventory and appraisal. *Estate of Libeu (1988) 205 Cal. App. 3d 1436, 1447-1451, 253 Cal. Rptr. 456*

[b] Liability for Tax on Recapture

I.R.C. § 2032A(c)(5), making qualified heir personally responsible for recapture tax, preempts former Code Civ. Proc. § 730.13(c) (*now see Prob. Code § 16312(d)(5)*) and former Prob. Code § 973 (*now see Prob. Code § 20113*); thus, if recapture tax is owed for special use value property held in trust, adjusted tax difference isallocated among trust beneficiaries in proportion to respective values of property interest held by each. *Estate of Libeu (1988) 205 Cal. App. 3d 1436, 1443-1445, 253 Cal. Rptr. 456*

[c] Qualified Heirs

Special use valuation is available if special use property is devised to trust, as long as all beneficiaries of trust are qualified heirs. *Estate of Libeu (1988) 205 Cal. App. 3d 1436, 1442, 253 Cal. Rptr. 456*

[d] Woodlands

Section 403(e)(3) of Economic Recovery Tax Act of 1981 (Pub. L. No. 97-34; hereinafter "ERTA") and former Prob. Code § 1034 (*now see Prob. Code § 21523*) are only applicable to require use of former *I.R.C. § 2056* to calculate marital deduction under pre-ERTA will; thus, entire pre-ERTA estate tax law is applicable, and special use valuation of woodlands, first permitted by ERTA, is available for return of decedent who died in 1982 having pre-ERTA will. *Estate of Libeu (1988) 205 Cal. App. 3d 1436, 1448-1449, 253 Cal. Rptr. 456*

[10] Stocks and Bonds (Schedule B)

Redemption price provides basis of valuation for mutual fund shares (as distinguished from asking price as specified in *Treas. Reg. § 20.2031-8(b)*). *United States v. Cartwright (1973) 411 U.S. 546, 552, 557, 93 S. Ct. 1713, 36 L. Ed. 2d 528*

Bid and asked prices of 35-percent interest in unregistered stock are properly discounted to reflect restrictions on trading; fact that stock was acquired one year after decedent's death for twice estate tax value is irrelevant because acquisition was not foreseeable at date of death. *Trust Services of America, Inc. v. United States (9th Cir. 1989) 885 F.2d 561, 568-569*

Sales, not at arm's length, of shares of unlisted, closely held stock did not control value of those shares for estate tax purposes. *Righter v. United States (Ct. Cl. 1971) 439 F.2d 1204, 1209*

Burden of proof in valuing close corporation stocks and bonds rests on estate. *Gamble v. Commissioner of Internal Revenue (6th Cir. 1939) 101 F.2d 565, 567 , cert. denied, 306 U.S. 664*

[11] Successive Interests

Prob. Code § 20113 requires court to order personal representative to charge the estate taxes directly against corpus of property that is owned by successive interests without apportioning tax between holders of remainder and of temporary estates. *Estate of Malpas (1992) 7 Cal. App. 4th 1901, 1908-1910, 9 Cal. Rptr. 2d 806*

[12] Transfers During Decedent's Life (Schedule G)

Property is includable in gross estate if only effect of exercise of decedent's power to revoke would be to accelerate enjoyment of principal by beneficiaries. *Helvering v. City Bank Farmers Trust Co. (1935) 296 U.S. 85, 89-92, 56 S. Ct. 70, 80 L. Ed. 62 , reh'g denied, 296 U.S. 664, 56 S. Ct. 303, 80 L. Ed. 473*

Value of trust property over which trustor had power of direction is included in gross estate under *I.R.C. § 2038(a)(1)* even though power could be exercised only in conjunction with some of beneficiaries. *Swain v. U.S. (1998) 147 F.3d 564, 565* ; *see also Bowgren v. Commissioner (7th Cir. 1997) 105 F.3d 1156* (leaving open question of whether power to direct trustee in conjunction with *all* beneficiaries would cause property to be included in gross estate)

Gift under former California Uniform Gifts to Minors Act (*Civ. Code § 1154 et seq.*) of which decedent was custodian on date of death is includable in donor's gross estate as transfer with retained life interest under *I.R.C. § 2038*. *Eichstedt v. United States (N.D. Cal. 1972) 354 F. Supp. 484, 488*

Critical question regarding when lifetime transfer was intended to take effect is when significant change of possession and enjoyment occurs; inter vivos transfer vesting trustee with full rights of management and control of corpus, except requiring trustee to obtain beneficiaries' consent before selling property, and directing full distribution of trust assets at decedent's death, takes effect at decedent's death and thus is includable in decedent's gross estate. *Estate of Butler (1980) 27 Cal. 3d 781, 789-790, 166 Cal. Rptr. 711, 613 P.2d 1245*

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§ 453.65 Law Reviews

[1] Charitable Deduction

Note, *Gift of Preferred Stock Denied Charitable Deduction, 14 Est. Plan. 349 (1987)*

Schlenger et al., *Estate Is Entitled to Both an Estate Tax and Income Tax Deduction for the Same Distribution to Charity, 13 Est. Plan. 46 (1986)*

Bateman and Kligman, *Estate Charitable Deductions Under Section 2055*, 26(5) Prac. Law. 71 (1980)

[2] Federal Estate and Gift Tax

Ward, *Estate Freezing 1991: An Old Problem, a New Statute (Part 1)*, 37(2) Prac. Law. 79 (1991)

Ehrlichman, *Section 1041 and Its Estate Planning Opportunities for Clients Contemplating Divorce, 25 Real Prop. Prob. & Tr. J. 481 (1990)*

Hess, *The Federal Transfer Tax Consequences of Joint and Mutual Wills, 24 Real Prop. Prob. & Tr. J. 469 (1990)*

McDaniel, *Tax Court Allows IRS to Revalue Prior Taxable Gifts on Estate Tax Return 17 Est. Plan. 322 (1990)*

Note, *Death Tax Credit Denied Until State Taxes Paid, 17 Est. Plan. 149*(1) (1990)

Schlenger et al., *Statute of Limitations for Gift Tax Affects Estate Tax, 16 Est. Plan. 178 (1989)*

Note, *Election Against Will Can Save Estate Taxes, 16 Est. Plan. 24 (1989)*

Note, *Estate Tax Avoided on Life Estate of Disclaimed Property, 16 Est. Plan. 7 (1989)*

Piling, *Recent Ruling Now Makes Redemption of Stock to Pay Estate Tax MoreFavorable, 15 Est. Plan. 214 (1988)*

Rubenstein, *Factors That Affect the Estate Tax Treatment of Checks Written Prior to Death, 15 Est. Plan. 338 (1988)*

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Multi-State Death Tax Problems of Estate and Trusts, 21 Real Prop. Prob. & Tr. J. 527 (1986)

Note, *Survivor's Life Estate Under Joint Will Leads to Gift Tax, 13 Est. Plan. 36 (1986)*

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[3] Marital Deduction

Kupferberg, *How to Meet the QTIP Requirement That All Income Must Be Payable to the Spouse, 17 Est. Plan. 202 (1990)*

Plaine and Siegler, *The Federal Gift and Estate Tax Marital Deduction for Non-United States Citizen Recipient Spouses, 25 Real Prop. Prob. & Tr. J. 385 (1990)*

Christensen, *Under the Marital Deduction Law, a Substantial Amount of Property Can Escape Federal Estate Taxation at the Death of an Estate Owner*, 128 Tr. and Est. 73(2) (1989)

Arnold and Cremer, *The Unlimited Marital Deduction: Some Community Property/Common Law Disparities Still Remain*, 12 Com. Prop. J. 129 (1985)

Dobris, *Do Contractual Will Arrangements Qualify for Qualified Terminable Interest Treatment Under ERTA? 19 Real Prop. Prob. & Tr. J. 625 (1984)*

Comment, *Pre-September 12, 1981 Marital Deduction Formula Clauses After the Economic Recovery Tax Act of 1981, 18 Real Prop. Prob. & Tr. J. 512 (1983)*

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Returns. *Rev. & Tax. Code § 13501 et seq.*

Deficiency determinations. *Rev. & Tax. Code § 13516 et seq.*

Payment of tax. *Rev. & Tax. Code § 13530 et seq.*

Interest. *Rev. & Tax. Code § 13550 et seq.*

Delinquent tax bond. *Rev. & Tax. Code § 13555 et seq.*

Refunds. *Rev. & Tax. Code § 13560 et seq.*

Suit for tax. *Rev. & Tax. Code § 13601*

Collection of tax. *Rev. & Tax. Code § 13601 et seq.*

Lien of tax. *Rev. & Tax. Code § 13610*

Warrant for collection of tax. *Rev. & Tax. Code § 13615 et seq.*

Writ of execution. *Rev. & Tax. Code § 13620 et seq.*

Uniform Act on Interstate Arbitration of Death Taxes. *Rev. & Tax. Code § 13820 et seq.*

Determination of domicile by arbitration: alternative method. *Rev. & Tax. Code § 13830 et seq.*

Court jurisdiction. *Rev. & Tax. Code § 14000 et seq.*

Court procedure generally. *Rev. & Tax. Code § 14010 et seq.*

Administration. *Rev. & Tax. Code § 14101 et seq.*

Disposition of proceeds. *Rev. & Tax. Code § 14301 et seq.*

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§ 453.100 Determine Whether Return Required

1. A return must be filed for estates of citizens or residents of the United States if the gross estate, plus (1) adjusted taxable gifts made by the decedent after December 31, 1976 [*see I.R.C. § 2001(b)*], and (2) the amount of the specific exemption under prior gift tax law that was used by the decedent after September 8, 1976, and before January 1, 1977 [*see* former *I.R.C. § 2521*], exceeds the applicable amount in effect under *I.R.C. § 2010(c)* [*I.R.C. § 6018(a)*; *see § 453.10*].

2. Returns must be filed for estates of nonresidents who are not citizens of the United States if the value of that part of the gross estate that is situated in the United States, plus (1) adjusted taxable gifts made by the decedent after December 31, 1976 [*see I.R.C. § 2001(b)*], and (2) the amount of the specific exemption under prior gift tax law that was used by the decedent after September 8, 1976, and before January 1, 1977 [*see* former *I.R.C. § 2521*], exceeds $60,000 at the date of the decedent's death [*I.R.C. § 6018(a)(2), (3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Estate & Gift TaxesGeneral OverviewTax LawFederal Estate & Gift TaxesEstate Tax ReturnsImposition of TaxesTax LawFederal Estate & Gift TaxesNonresident Aliens (IRC secs. 2101-2108)Gross & Taxable EstatesTax LawState & Local TaxesEstate & Gift TaxGross Estate

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38-453 California Forms of Pleading and Practice--Annotated § 453.101

§ 453.101 Obtain List of Assets Includable in Gross Estate

1. Property that the decedent owned at death [*I.R.C. § 2031*; *see § 453.13*].

NOTE:

Property held by the decedent and surviving spouse as community property is includable in the gross estate to the extent of the decedent's interest in that property under the applicable law of the state or possession of the United States or of the foreign country [*see I.R.C. § 2033*; *Hurley v. Hartley (10th Cir. 1967) 379 F.2d 205, 207* ; *Eichstedt v. United States (N.D. Cal. 1972) 354 F. Supp. 484, 487-488* ; *see U.S. v. Goodyear (9th Cir. 1938) 99 F.2d 523]* .

2. Transfers made by the decedent during life [*I.R.C. §§ 2035*-2038; *see § 453.190*, Schedule G].

NOTE:

A transfer made during the decedent's life and constituting a bona fide sale for an adequate consideration in money or money's worth will remove the transferred property from the estate of the transferor. To constitute a bona fide sale for an adequate and full consideration in money or money's worth, a transfer must have been made in good faith, and the price must have been an adequate and full equivalent and reducible to a money value. If the price was less than an adequate and full equivalent, only the excess of the fair market value of the property, as of the valuation date, over the price received by the decedent should be included in the gross estate [*I.R.C. § 2043*].

a. Taxes paid by the decedent or decedent's estate on gifts made by the decedent or the decedent's spouse within three years before the date of the decedent's death [*I.R.C. § 2035(b)*; *see § 453.13[12]*]. Counsel should obtain copies of the gift tax returns (IRS Form 709) filed by decedent and his or her spouse covering the three-year period ending

on the date of death [*see § 453.191*, Instructions for Schedule G].

b. Certain transfers made by decedent within three years before death, in trust or otherwise, that were not bona fide sales [*I.R.C. § 2035(a)*; *see § 453.13[12][b]*].

NOTE:
Except for certain types of transfers [*see I.R.C. §§ 2036*-2042], most interests transferred and within three years before the date of the decedent's death are not included in the decedent's gross estate [*I.R.C. § 2035(a)*].

c. Transfers with retained life estate [*I.R.C. § 2036*; *see § 453.13[9][c]*].

d. Transfers taking effect at the decedent's death [*I.R.C. § 2037*; *see § 453.13[9][d]*].

e. Revocable transfers [*I.R.C. § 2038*; *see § 453.13[9][e]*].

3. Annuities [*I.R.C. § 2039*; *see § 453.190*, Schedule I and discussion in *§ 453.13[9]*].

4. Joint interests with rights of survivorship [*I.R.C. § 2040*; *see § 453.190*, Schedule E, and discussion in *§ 453.13[4][b]*].

5. Property over which the decedent possessed a general power of appointment [*I.R.C. § 2041*; *see § 453.190*, Schedule H, and discussion in *§ 453.13[13]*].

NOTE:
The includability of a general power of appointment in the decedent's gross estate may depend on when the power was created [*I.R.C. § 2041*].

6. Proceeds of life insurance on the decedent's life [*I.R.C. § 2042*; *see § 453.190*, Schedule D, and discussion in *§ 453.13[8][a]*].

7. Life insurance policies owned by the decedent insuring the life of another [*I.R.C. §§ 2031, 2033*; *Treas. Reg. § 20.2031-8(a)*; *see § 453.190*, Schedule F, and discussion in *§ 453.13[8][b]*].

8. Signature cards; stock certificates; gift tax returns; other agreements, statements, or receipts relating to gifts made by the decedent; or community property gifts by the decedent and/or decedent's spouse, under California Uniform Transfers to Minors Act, and for which the decedent was acting as custodian at the time of his or her death [*see I.R.C. § 2038*; *Eichstedt v. United States (N.D. Cal. 1972) 354 F. Supp. 484, 487-488* ; *see also § 453.13[6]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewReal Property LawProperty ValuationTax LawFederal Estate & Gift TaxesGeneral OverviewTax LawFederal Estate & Gift TaxesTaxable PropertyProperty Held at Death (IRC secs. 2033, 2044)Extent of Decedent's InterestTax LawState & Local TaxesEstate & Gift TaxGross Estate

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38-453 California Forms of Pleading and Practice--Annotated § 453.102

§ 453.102 Obtain List of Assets Excludable from Gross Estate

1. Qualified conservation easements [*I.R.C. § 2031(c)*; *see § 453.14*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewTax LawState & Local TaxesEstate & Gift TaxEstate TaxGeneral OverviewTax LawState & Local TaxesEstate & Gift TaxGross Estate

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38-453 California Forms of Pleading and Practice--Annotated § 453.103

§ 453.103 Obtain List of Obligations Deductible From Gross Estate

1. Funeral expenses [*I.R.C. § 2053(a)(1)*; *see § 453.190*, Schedule J].

2. Administration expenses [*I.R.C. § 2053(a)(2)*; *see § 453.190*, Schedule J].

3. Claims against the estate [*I.R.C. § 2053(a)(3)*; *see § 453.190*, Schedule K].

4. Mortgages and liens [*I.R.C. § 2053(a)(4)*; *see § 453.190*, Schedule K].

NOTE:
The amount of a mortgage or lien is a deduction from the gross estate only if the decedent's estate is liable for the amount of the indebtedness secured by that mortgage or lien. If the decedent's estate is not liable, the property subject to the mortgage or lien is included in the gross estate only at the value of the equity of redemption (that is, the value of the property less the amount of the debt) [*Treas. Reg. § 20.2053-7*].

5. Losses occurring during settlement of the estate not compensated for by insurance or otherwise [*I.R.C. § 2054*; *see § 453.190*, Schedule L].

6. Expenses incurred in administering property not subject to claims [*I.R.C. § 2053(b)*; *see § 453.190*, Schedule L].

NOTE:
The amount of expenses incurred in administering property not subject to claims is subject to a limitation [*I.R.C. § 2053(b), (c)*].

7. Certain bequests to a surviving spouse [*I.R.C. § 2056*; *see § 453.190*, Schedule M, and discussion in *§ 453.18[3]*].

8. Qualifying bequests to charitable organizations [*I.R.C. § 2055*; *see § 453.190*, Schedule O, and discussion in *§ 453.18[4]*].

9. Qualified family-owned business interests [*I.R.C. § 2057*; *see § 453.18[5]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesEstate, Gift & Trust LawProbateGeneral OverviewTax LawState & Local TaxesEstate & Gift TaxEstate TaxGeneral OverviewTax LawState & Local TaxesEstate & Gift TaxGross Estate

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38-453 California Forms of Pleading and Practice--Annotated § 453.104

§ 453.104 Obtain Other Personal Information

Obtain personal and other information not related to assets or obligations of the decedent for pages 1 and 2 of the estate tax return [*see §§ 453.190, 453.191*].

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38-453 California Forms of Pleading and Practice--Annotated § 453.105

§ 453.105 Determine Valuation Date

Determine whether to value assets as of the date of the decedent's death or as of the alternate valuation date. In general, the alternate valuation date is six months after the date of death; in the case of assets disposed of between the date of death and the alternate valuation date, it is the date of disposition [*I.R.C. § 2032(a)*]. The election of the alternate valuation date must be made on a return that is filed up to one year (including extensions) after the due date [*I.R.C. § 2032(d)(2)*; *see §§ 453.190*, *453.191*, and *§ 453.15*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Estate & Gift TaxesAlternative & Special Use Valuation (IRC secs. 2032, 2032A, 2701-2704)General OverviewTax LawFederal Estate & Gift TaxesAlternative & Special Use Valuation (IRC secs. 2032, 2032A, 2701-2704)Alternative ValuationTax LawState & Local TaxesEstate & Gift TaxValuationGeneral Overview

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38-453 California Forms of Pleading and Practice--Annotated § 453.106

§ 453.106 Determine Whether Special Use Valuation Applies

Determine whether any portion of the decedent's gross estate qualifies for the special use valuation for farms and closely held businesses, and whether the special use valuation should be elected [*I.R.C. § 2032A(a)*]. If certain conditions are met, the personal representative may elect to value qualified real property included in the decedent's estate on the basis of its current use rather than on the basis of its highest and best use [*I.R.C. § 2032A(a)*]. Qualified real property includes property used for farming or other closely held business use [*I.R.C. § 2032A(b)*; *see § 453.190*, Schedule A-1, and discussion in *§ 453.16[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewTax LawFederal Estate & Gift TaxesAlternative & Special Use Valuation (IRC secs. 2032, 2032A, 2701-2704)Special Use ValuationGeneral OverviewTax LawFederal Estate & Gift TaxesAlternative & Special Use Valuation (IRC secs. 2032, 2032A, 2701-2704)Special Use ValuationProcedural RequirementsTax LawState & Local TaxesEstate & Gift TaxValuationGeneral Overview

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38-453 California Forms of Pleading and Practice--Annotated § 453.107

§ 453.107 Compute Value of Assets in Gross Estate

Value all assets includable in the gross estate, and ascertain the amount of all deductible obligations and credits. See generally Ch. 451, *Probate: Inventory and Appraisal* . For discussion of and regulations relating to specific valuation problems, see the Introduction and Research Guide.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewTax LawState & Local TaxesEstate & Gift TaxEstate TaxGeneral OverviewTax LawState & Local TaxesEstate & Gift TaxGross Estate

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38-453 California Forms of Pleading and Practice--Annotated § 453.108

§ 453.108 Obtain Supplemental Documents and Forms

Obtain applicable supplemental documents and forms to be filed with the estate tax return, such as the following:

NOTE:
Unless otherwise noted, the following IRS forms may be obtained from the office of any district director of the Internal Revenue Service.

1. All IRS Forms 709, Federal Gift Tax Returns, of decedent and his or her spouse, (i) used to calculate adjusted taxable gifts made after December 31, 1976; (ii) reflecting payment of taxes on pre-1977 gifts for which credit is sought [*see § 453.191*]; (iii) reflecting gift taxes that are included in the gross estate under *I.R.C. § 2035(b)* [*see § 453.190*, Schedule G; *see § 453.191*]; or (iv) on which any part of the exemption from the generation-skipping transfer tax was used or allocated by the decedent [*I.R.C. §§ 2631(a), 2632(a)*; *see § 453.190*, Schedule R; *see § 453.191*; *see also § 453.21*].

2. IRS Form 712, Life Insurance Statement [*Treas. Reg. § 20.6018-4(d)*; *see § 453.194*].

NOTE:
An IRS Form 712 must be executed by and obtained from theinsurance company that issued each insurance policy.

3. IRS Form 4421, Declaration--Executor's Commissions and Attorney's Fees [Form IRS Form 463].

4. IRS Form 706CE, Certificate of Payment of Foreign Death Tax [*see § 453.195*].

5. IRS Form 4768, Application for Extension of Time to File United States Estate (and Generation-Skipping Transfer) Tax Return and/or Pay Estate (and Generation-Skipping Transfer) Tax [*see § 453.197*].

6. IRS Form PD 1782, Application for Redemption at Par of United States Treasury Bonds Eligible for Payment of Federal Estate Tax [Form 467].

NOTE:
IRS Form PD 1782 may be obtained from any federal reserve bank or branch.

7. IRS Form 2848, Power of Attorney [*see § 453.198*].

8. IRS Form 8821, Tax Information Authorization [*see § 453.199*].

9. If a grandfather election was made by the decedent during his or her lifetime with respect to excess retirement accumulations [*see § 453.190*, Schedule S], the IRS Form 5329 on which is was made.

10. Certified copy of decedent's will [*Treas. Reg. § 20.6018-4(a)*].

11. Real and personal property appraisals.

12. Records regarding stock or bond prices, bid and asked quotations for securities owned by decedent, including whether any dividends were declared before decedent's date of death as of a record date after the date of death.

13. Balance sheets, earnings statements, and other documents pertaining to the value of closely held businesses.

14. Trust and power of appointment instruments.

15. Death certificate.

16. Certificate of payment of state death taxes.

17. Copies of all Notices of Allocation of generation-skipping transfer tax exemption [*see I.R.C. §§ 2631, 2632*] made by the decedent for inter vivos transfers that were not direct skips but to which the decedent allocated the GST exemption [*see § 453.190*, Schedule R; § 453.191; *see also § 453.21*].

18. In addition, if the decedent was a nonresident citizen of the United States [*Treas. Reg. § 20.6018-4(b)*; *see also § 453.191*]:

a. A copy of the inventory of property and the schedule of liabilities, claims against the estate, and expenses of administration filed with the foreign court of probate jurisdiction, certified by a proper official of that court.

b. A copy of the return filed under the appropriate foreign death-tax act, certified by a proper official of the foreign tax department, if the estate is subject to a foreign tax.

19. In addition, if the decedent was a nonresident and not a citizen of the United States:

a. A certified copy of any foreign death-tax return that was filed [*Treas. Reg. § 20.6018-4(c)*].

b. If no foreign death-tax return was filed, a certified copy of the inventory of the estate

and the schedule of debts and charges filed with the foreign probate court as part of the estate's administration proceedings [*Treas. Reg. § 20.6018-4(c)*].

c. If the decedent was a United States citizen, but lost his or her citizenship after March 8, 1965, and within 10 years before his or her death, and tax avoidance was a principal purpose for the loss of citizenship, supplemental documents to sustain the burden of proving that tax avoidance was not the principal purpose [*see I.R.C. § 2107(e)*; Treas. Reg. §§ 20.2017-1(a) (imposition of tax on estates of certain expatriate former U.S. citizens), (d) (decedents subject to tax), 20.2101-1 (rate of tax); *see also* Instructions for IRS Form 706NA, United States Estate (and Generation-Skipping) Tax Return, Estate of Nonresident Not a Citizen of the United States, reproduced in § 453.192].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewTax LawFederal Estate & Gift TaxesGeneral OverviewTax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)Tax LawState & Local TaxesEstate & Gift TaxGross Estate

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§ 453.109 Extension for Filing

Determine whether an extension of time for filing the return is desired or necessary. The due date for filing the estate and generation-skipping transfer tax return is nine months after the date of the decedent's death [*I.R.C. § 6075(a)*; *see §§ 453.191, 453.197*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsTax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)Tax LawFederal Tax Administration & ProcedureAdministrationTax Payment & Tax Return Requirements (IRC secs. 6071-6091, 6151-6167)Extensions of Time

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38-453 California Forms of Pleading and Practice--Annotated § 453.110

§ 453.110 Extension for Payment

Determine whether an extension of time to pay the tax is desired or necessary. The tax is due at the same time as the due date of the return (without regard to extensions) [*I.R.C. § 6151(a)*]. An extension of time for filing the estate and generation-skipping transfer tax return does not operate to extend the time for payment of the estate and generation-skipping transfer taxes [*Treas. Reg. § 20.6081-1(c)*; *see § 453.197*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-453 California Forms of Pleading and Practice--Annotated § 453.111

§ 453.111 Election to Defer Tax and to Pay in Installments

If the value of an interest in a closely held business that is included in the gross estate of a decedent who was a United States citizen or resident at the date of death exceeds 35 percent of the decedent's adjusted gross estate (gross estate minus deductions for debts, expenses, claims, and losses), determine whether to elect to defer estate and generation-skipping transfer tax attributable to those interests for five years (paying interest only on the tax due), and thereafter to pay the tax in equal installments over the next two or more (but not exceeding 10) years [*I.R.C. § 6166*; *see I.R.C. § 2661(2)* (provisions applicable to generation-skipping transfer tax); *see also § 453.23[2]*.

NOTE:

The notice of election to pay the estate and generation-skipping transfer tax in installments must be filed with the district director on or before the due date of the estate tax return [*Treas. Reg. § 20.6166-1(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Estate & Gift TaxesGeneral OverviewTax LawFederal Estate & Gift TaxesGeneration-Skipping Transfer Taxes (IRC secs. 2601-2663)Tax LawFederal Tax Administration & ProcedureAdministrationTax Payment & Tax Return Requirements (IRC secs. 6071-6091, 6151-6167)Extensions of Time

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[Reserved]

§§ 453.112[Reserved]

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38-453 California Forms of Pleading and Practice--Annotated § 453.130

§ 453.130 Complete Return

Complete return in accordance with prescribed format [*see §§ 453.190, 453.191*].

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38-453 California Forms of Pleading and Practice--Annotated § 453.131

§ 453.131 Signatures

1. Have all personal representatives sign and verify the return [*see § 453.191*].

2. If person other than personal representative has prepared the return, that person must sign the return as preparer [*see § 453.191*].

3. If generation-skipping transfer tax is payable by a trust and thus is reportable on Schedule R-1, Schedule R-1 must be signed both by the personal representative(s) and by the trustee or other fiduciary [*see §§ 453.190, 453.191*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-453 California Forms of Pleading and Practice--Annotated §§ 453.132-453.149

[Reserved]

§§ 453.132[Reserved]

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C. Filing Return And Payment Of Taxes

38-453 California Forms of Pleading and Practice--Annotated § 453.150

§ 453.150 Time for Filing

Unless an extension of time is obtained [*I.R.C. § 6081*], file the estate and generation-skipping transfer tax return within nine months of the date of the decedent's death [*I.R.C. § 6075(a)*; *see § 453.191*].

NOTE:

Schedule R-1 is due at the same time as the main portion of the return [*Treas. Reg. § 26.2662-1(d)(1)(i)*], and must be filed by the trustee of any trust by which generation-skipping transfer tax is payable [*Treas. Reg. § 26.2662-1(b)(3)(ii)(B), (c)(1)(iv)*]. There is an automatic extension, however, until two months after the due date (with extensions) for filing the main part of the return [*see* IRS Form 706, Schedule R-1, Instructions for Fiduciary; § 453.190].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsTax LawFederal Estate & Gift TaxesGeneral OverviewTax LawFederal Estate & Gift TaxesEstate Tax ReturnsFilingTax LawFederal Estate & Gift TaxesEstate Tax ReturnsPayments

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38-453 California Forms of Pleading and Practice--Annotated § 453.151

§ 453.151 Manner of Filing

File the return either by hand-carrying it to the office of the district director in whose district the decedent was domiciled at the time of death [*I.R.C. § 6091(b)(4)*; *see § 453.191*], or by mailing it to the Internal Revenue Service Center serving the district in which the decedent was domiciled at the time of his or her death [*I.R.C. § 6091(b)(3)(A)*; *see § 453.191*]. Schedule R-1 is filed with the same service center at which the main portion of the return is filed [*see* IRS Form 706, Schedule R-1, Instructions for Fiduciary; § 453.190].

Legal Topics:

For related research and practice materials, see the following legal topics:
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38-453 California Forms of Pleading and Practice--Annotated § 453.152

§ 453.152 Time for Payment

Unless an extension of time for payment of the tax(es) or permission to pay the tax(es) in installments is obtained [*I.R.C. §§ 6161(a), 6163, 6166*], pay the tax(es) within nine months after the date of the decedent's death [*I.R.C. § 6151*; *see § 453.191*].

NOTE:

Generation-skipping transfer tax payable by a trust and reportable on Schedule R-1 is due at the same time as the main portion of the return [*Treas. Reg. § 26.2662-1(b)*-(d)]. There is an automatic extension for payment of any tax by a trust until two months after the due date (with extensions) for filing the main part of the return, so no penalties will accrue before that time. Nevertheless, interest will be charged on any generation-skipping transfer tax paid more than nine months after the date of decedent's death [*see* IRS Form 706, Schedule R-1, Instructions for Fiduciary; § 453.190].

Request duplicate receipts for the payment of the tax(es) [*I.R.C. § 6314(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Estate & Gift TaxesGeneral OverviewTax LawFederal Estate & Gift TaxesEstate Tax ReturnsPaymentsTax LawFederal Tax Administration & ProcedureAdministrationTax Payment & Tax Return Requirements (IRC secs. 6071-6091, 6151-6167)Extensions of TimeTax LawState & Local TaxesEstate & Gift TaxEstate TaxGeneral Overview

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[Reserved]

§§ 453.153[Reserved]

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38-453 California Forms of Pleading and Practice--Annotated § 453.170

§ 453.170 Early Determination of Tax and Discharge

Determine whether to request an early determination of the estate and/or generation-skipping transfer tax and discharge of the personal representativeand/or trustee from personal liability [*I.R.C. §§ 2204, 2661(2)*; *see § 453.196*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesClaims By & AgainstTax LawFederal Estate & Gift TaxesGeneral OverviewTax LawState & Local TaxesEstate & Gift TaxEstate TaxGeneral Overview

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38-453 California Forms of Pleading and Practice--Annotated § 453.171

§ 453.171 Pay Tax and Furnish Bond

If satisfactory determination of amount of tax is arrived at, pay tax and furnish bond, if required.

NOTE:

The personal representative, trustee, or other fiduciary is discharged from personal liability for the payment of any deficiency in tax found to be due after payment of the amount that he or she is notified by the Internal Revenue Service is due and the posting of any bond that is required for any amount for which the time for payment is extended [*I.R.C. §§ 2204(a), 2661(2)*; *see* *§ 453.196*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Estate & Gift TaxesGeneral OverviewTax LawFederal Estate & Gift TaxesEstate Tax ReturnsPaymentsTax LawState & Local TaxesEstate & Gift TaxEstate TaxGeneral Overview

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[Reserved]

§§ 453.172[Reserved]

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38-453 California Forms of Pleading and Practice--Annotated § 453.190

§ 453.190 United States Estate (and Generation-Skipping Transfer) Tax Return [I.R.C. §§ 2001, 2010-2016, 2051]--IRS Form 706

[1] FORM United States Estate (and Generation-Skipping Transfer) Tax Return [I.R.C. §§ 2001, 2010-2016, 2051]--IRS Form 706

Click here to view image.

[2] Use of Form

This form is the August 2005 version of IRS Form 706, the IRS Estate and Generation-Skipping Transfer Tax Return. For the official IRS instructions to Form 706, *see § 453.191*.

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38-453 California Forms of Pleading and Practice--Annotated § 453.191

§ 453.191 Instructions for IRS Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return

[1] FORM Instructions for IRS Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return

Click here to view image.

[2] Use of Form

This form is the August 2005 version of the official IRS instructions to Form 706, the IRS Estate and Generation-Skipping Transfer Tax Return. IRS Form 706is reproduced in this chapter as *see § 453.190*.

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38-453 California Forms of Pleading and Practice--Annotated § 453.192

§ 453.192 United States Estate (and Generation-Skipping Transfer) Tax Return [I.R.C. §§ 2001, 2010-2016, 2051]--Estate of Nonresident Not a Citizen of the United States [I.R.C. §§ 2101-2108, 6018(a)(2)]--IRS Form 706NA and Instructions

[1] FORM United States Estate (and Generation-Skipping Transfer) Tax Return [I.R.C. §§ 2001, 2010-2016, 2051]--Estate of Nonresident Not a Citizen of the United States [I.R.C. §§ 2101-2108, 6018(a)(2)]--IRS Form 706NA and Instructions

Click here to view image.

[2] Use of Form

This format is a reproduction of IRS Form 706NA, the United States Estate (and Generation-Skipping Transfer) Tax Return, Estate of Nonresident Not a Citizen of the United States. This return must be filed for the estate of every nonresident not a citizen of the United States if the value of that part of the gross estate located (or assigned a situs) in the United States on the date of the decedent's death, plus the sum of (1) the gift tax exemption allowed with respect to gifts made between September 9, 1976, and December 31, 1976, inclusive [*see* former *I.R.C. § 2521*], and (2) the total taxable gifts [*see I.R.C. § 2001(b)*] made after December 31, 1976, that are not included in the gross estate, exceeds $60,000 [*I.R.C. § 6018(a)(2), (3); see I.R.C. §§ 2104, 2105* (situs rules)]. The instructions to IRS Form 706NA are also reproduced.

The personal representative of the nonresident's estate should obtain the United States Estate (and Generation-Skipping Transfer) Tax Return (IRS Form 706) and the instructions for it to use in completing the nonresident return. Schedules from IRS Form 706 must be attached to the nonresident return to substantiate a marital or chartiable deduction or a credit on prior transfers. Schedules E, G, H, R, and/or R-1 may also have to be attached to the nonresident return in a particular situation [*see* Instructions to IRS Form 706NA].

Note that the marital deduction is only allowed with respect to property that is situated in the United States at the time of the decedent's death and passes to a surviving spouse who is a resident of the United States or to a qualified domestic trust [*I.R.C. §§ 2056(d), 2106(a)(3); see I.R.C. § 2056A(a)* (qualified domestic trust)].

Minor revisions to this form are occasionally made by the Internal Revenue Service, so care should be exercised to use only the latest form.

[3] Method of Determining Tax on Estate of Nonresident Aliens

The method of determining the tax imposed on the transfer of an estate of a nonresident decedent not a citizen of the United States is generally similar to the manner in which the tax is calculated with respect to the estate of a citizen or resident [*Treas. Reg. § 20.0-2(c)*]. Briefly stated, the following steps are involved:

(1) Ascertain the value of that part of the entire gross estate that, at the time of death, was situated in the United States [*I.R.C. §§ 2103*-2105];

(2) Ascertain the value of the taxable estate by subtracting from the value of the portion of the gross estate situated in the United States the amount of allowable deductions [*I.R.C. § 2106*];

(3) Compute the gross estate tax by applying the unified rate schedule to the sum of the amount of the taxable estate and the amount of adjusted taxable gifts (post-1976 gifts), and then subtract from such tentative tax liability a tentative tax computed by applying the rate schedule to the amount of adjusted taxable gifts [*I.R.C. § 2101*]; and

(4) Subtract from the gross estate tax the total amount of any allowable credits in order to arrive at the net estate tax payable [*I.R.C. § 2102*].

[4] Federal Statutes

Computation of tax on estates of nonresident decedents. *I.R.C. § 2101(b)*

Unified credit calculated for nonresident decedent who is not U.S. citizen. *I.R.C. § 2102(c)(2) redesignated as I.R.C. § 2102(b)(2)*, effective for estates of decedents dying and generation-skipping transfers after 12/31/04 (*see* Instructions to IRS Form 706NA)

[5] Decisions

Amount of unified credit allowed to estate of deceased French citizen as matter of construction of treaty [32 U.S.T. 1935, T.I.A.S. No. 9812]; election to take marital deduction and use higher tax rates as not also encompassing right to higher unified credit; only unified credit of $3,600 is allowed. *Estate of Arnaud v. C. I. R. (9th Cir. 1990) 895 F.2d 624, 625, 626*

[6] Text References

Rabkin and Johnson, Federal Income, Gift, and Estate Taxation, Ch. 52, *Estate Taxes* (Matthew Bender)

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38-453 California Forms of Pleading and Practice--Annotated § 453.193

§ 453.193 United States Additional Estate (and Generation-Skipping Transfer) Tax Return [I.R.C. § 2032A]--IRS Form 706-A and Instructions

[1] FORM United States Additional Estate (and Generation-Skipping Transfer) Tax Return [I.R.C. § 2032A]--IRS Form 706-A and Instructions

Click here to view image.

[2] Use of Form

This form is a reproduction of United States Additional Estate (and Generation-Skipping Transfer) Tax Return, IRS Form 706-A. IRS Form 706-A must be filed whenever property that was assigned a special use value under *I.R.C. § 2032A* for purposes of calculating the estate or generation-skipping transfer tax is disposed of or used for nonqualifying purposes within 10 years after the decedent's death [*I.R.C. § 2032A(c)(1)*]. The return must be filed, and the tax paid, by the heir who disposes of the property or ceases the qualifying use within six months after the disposition of the property or cessation of the qualifying use, unless an extension is granted. IRS Form 706-A is filed with the office where the original estate tax return was filed [*I.R.C. § 2032A(c)(4)*].

The additional estate tax is calculated based on the tax savings accrued to the estate due to the special valuation under *I.R.C. § 2032A* [*I.R.C. § 2032A(c)*]. Special treatment is available if the property was subject to an involuntary conversion [*I.R.C. §§ 2032A(h)*].

Minor revisions to this form are occasionally made by the Internal Revenue Service, so care should be exercised to use only the latest form.

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38-453 California Forms of Pleading and Practice--Annotated § 453.194

§ 453.194 Life Insurance Statement [I.R.C. § 2042; Treas. Reg. § 20.2031-8(a)]--IRS Form 712

[1] FORM Life Insurance Statement [I.R.C. § 2042; Treas. Reg. § 20.2031-8(a)]--IRS Form 712

Click here to view image.

[2] Use of Form

This form is a reproduction of IRS Form 712, Life Insurance Statement. For every policy of life insurance listed on Schedule D (insurance on the decedent's life), Schedule F (insurance owned by the decedent on the life or another), or any other schedule that constitutes a part of the gross estate, the personal representative must request a statement on IRS Form 712 from the company that issued the policy and attach the completed IRS Form 712 to the back of the appropriate schedule in the return [*see* IRS Form 706 and related Instructions; *see also I.R.C. § 2042*; *Treas. Reg. §§ 20.2031-8(a)*, 20.2042-1].

Minor revisions to this form are occasionally made by the Internal Revenue Service, so care should be exercised to use only the latest form.

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38-453 California Forms of Pleading and Practice--Annotated § 453.195

§ 453.195 Certificate of Payment of Foreign Death Tax [I.R.C. § 2014]--IRS Form 706CE

[1] FORM Certificate of Payment of Foreign Death Tax [I.R.C. § 2014]--IRS Form 706CE

Click here to view image.

[2] Use of Form

This form is a reproduction of IRS Form 706CE, Certificate of Payment of Foreign Death Tax. IRS Form 706CE must be submitted to support any credit forpayment of foreign death taxes claimed on Schedule P [*see* Instructions for IRS Form 706]. An IRS Form 706CE must be submitted for each foreign death tax for which credit is sought [*see* Instructions to IRS Form 706CE].

If the foreign death tax has not been determined and paid by the time the federal estate and generation-skipping transfer tax return is filed, the credit for the tax may be claimed on the return in an estimated amount. Before the credit is finally allowed, however, satisfactory evidence, certified by an authorized official of each country, possession, or political subdivision imposing the tax, must be submitted [*Treas. Reg. § 20.2014-5(a)*]. The statement must certify the information contained in items 1-7 of the form, including any attached schedules pertaining to them [*see Treas. Reg. § 20.2014-5(a)*].

Minor revisions to this form are occasionally made by the IRS, so care should be exercised to use only the latest version.

[3] Federal Statutes and Regulations

If foreign death taxes claimed as credit are refunded, notice must be given to IRS within 30 days; federal estate tax then redetermined; contents of notice of refund. *I.R.C. § 2016*; *Treas. Reg. §§ 20.2014-5*, 20.2016-1

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§ 453.196 Letter Requesting Early Determination of Estate (and Generation-Skipping Transfer) Tax [I.R.C. §§ 2204(a), 2661(2); Treas. Reg.. §§ 20.2204-1, 20.2204-2]

[1] FORM Letter Requesting Early Determination of Estate (and Generation-Skipping Transfer) Tax [I.R.C. §§ 2204(a), 2661(2); Treas. Reg.. §§ 20.2204-1, 20.2204-2]

_____[*date*]

Internal Revenue Service
Internal Revenue Service Center
_____ [*city, state, zip*]

Re: Estate of _____ [*name*], Deceased
Date of Death: _____
Social Security No.: _____
United States Estate (and Generation-Skipping Transfer)
Tax Return (IRS Form 706)

Dear Sir or Madam:

I am the personal representative of the estate of the above-named decedent who died on _____ [*date*].

The _____ [original *or* amended] United States Estate (and Generation-Skipping Transfer) Tax Return for the above-named decedent's estate _____ [is filed herewith *or* was filed in your office on _____ (*date*)].

Pursuant to the provisions of *Internal Revenue Code, Section 2204* I hereby make application for the prompt determination of the amount of federal estate [and generation-skipping transfer] tax due, and for my discharge from

personal liability for _____ [that tax *or* those taxes].

I also request that all correspondence relating to this matter be sent to the office of my attorney, whose name and address are as follows:

_____ [*name*]

_____ [*street address*]

_____ [*city, state, zip*]

Sincerely,

_____ [*signature*]

Personal Representative

[2] Use of Form

This form is a sample letter that may be used by the personal representative of a decedent's estate to make written application to the District Director of the Internal Revenue district in which the estate and generation-skipping transfer taxreturn is filed for a determination of the federal estate and generation-skipping transfer tax and for a discharge of personal liability for those taxes.

Within nine months after receipt of the application or, if the application is made before the return is filed, within nine months after the return is filed, the personal representative will be notified of the amount of the taxes. After paying that amount and after furnishing a bond that may be required for any amount of the taxes for which time for payment is extended [*see I.R.C. §§ 6161, 6163, 6166*], he or she will be discharged from personal liability for any deficiency in the tax thereafter found to be due [*I.R.C. § 2204(a)*; *see I.R.C. § 2661(2)* (penalty and liability provisions applicable to generation-skipping transfer tax)].

If no notification is received, the personal representative is discharged at the end of the nine-month period from personal liability for any deficiency thereafter found to be due. The discharge of the personal representative from personal liability applies only to the personal representative in his or her personal capacity and to his or her personal assets. The discharge is not applicable to his or her liability as personal representative to the extent of the assets of the estate in his or her possession or control. Further, the discharge is not to operate as a release of any part of the gross estate from the lien for estate tax for any deficiency that may thereafter be determined to be due [*Treas. Reg. § 20.2204-1(a)*].

[3] Effect of Extensions of Time to Pay Tax

The personal representative may obtain the discharge from personal liability even though the time for payment of the estate tax has been extended under *I.R.C. §§ 6161, 6163*, or *6166*. If an extension has been given, the personal representative must, in order to obtain the discharge, pay the amount of any estate (and generation-skipping transfer) tax not subject to the extension and furnish a bond, if one is requested by the Internal Revenue Service, for any tax for which the time of payment has been extended [*I.R.C. § 2204(a)*; *Treas. Reg. § 20.2204-1*; *see Treas. Reg. § 301.7101-1* (form of bond)]. On payment of any tax not subject to extension and furnishing of the bond or notification that no bond is required, the personal representative is discharged from personal liability for the estate and generation-skipping transfer tax. If no notification is received, the personal representative is discharged at the end of the applicable nine-month period from personal liability for the tax, even if payment of the tax has been extended [*Treas. Reg. § 20.2204-1(b)*].

[4] Discharge of Personal Representative's Liability for Tax

A personal representative who has made written application to the Internal Revenue Service for determination of the amount of the estate and generation-skipping transfer tax, and for discharge from personal liability for the tax, is discharged from personal liability for any deficiency in tax thereafter found to be due, on payment of the amount of estate tax of which he or she is notified. IRS Form Letter 626 is used by the Internal Revenue Service to notify the personal representative of the amount of estate tax due. The personal representative may use the form received from the IRS, together with proof of payment of the tax, to establish that his or her personal liability for the estate and generation-skipping tax has been satisfied [*Rev. Proc. 70-10, 1970-1 C.B. 437*].

The personal representative is also entitled to a receipt or writing showing his or her discharge from personal liability. The United States estate tax certificate of release from personal liability (IRS Form 7990) is used for this purpose.

The personal representative will not be personally liable for any deficiency in tax due that is attributable to adjusted taxable gifts made more than three years before the date of the decedent's death if he or she relies in good faith on the gift tax returns furnished under *I.R.C. § 6103(e)(3)* to determine the decedent's adjusted taxable gifts [*I.R.C. § 2204(d)*].

[5] Other Fiduciaries

Other fiduciaries, such as trustees, may be discharged in a manner similar to that in which the personal representative is discharged, except that, in the case of another fiduciary, the request for discharge must be accompanied by a copy of the instrument under which he or she is acting. The discharge of the other fiduciary may be granted after the personal representative has been discharged or, if later, six months after the application for discharge is submitted [*I.R.C. § 2204(b)*; *Treas. Reg. § 20.2204-2*; *see I.R.C. §§ 2603, 2661(2)*; *Treas. Reg. § 26.2662-1(c)*-(f) (generation-skipping transfer tax)].

[6] Federal Statutes

Personal representative who knowingly pays other debts of estate at expense of federal estate tax is personally liable for estate tax. *31 U.S.C. § 3713*

[7] Revenue Rulings

Personal representative who does not apply for discharge under *I.R.C. § 2204(a)* is liable on successor representative's default in installment payments of estate tax. *Rev. Rul. 76-114, 1976-1 C.B. 290*

[8] Text References

Blaylock, Pearson, Schoknecht, Stikker, *California Probate Practice, Ch. 15, Taxation of Estates, § 15.10[2]*.

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38-453 California Forms of Pleading and Practice--Annotated § 453.197

§ 453.197 Application for Extension of Time to File United States Estate (and Generation-Skipping Transfer) Tax Return and/or Pay Estate (and Generation-Skipping Transfer) Taxes [I.R.C. §§ 2601(c), 2661(2), 6081, 6161]--IRS Form 4768

[1] FORM Application for Extension of Time to File United States Estate (and Generation-Skipping Transfer) Tax Return and/or Pay Estate (and Generation-Skipping Transfer) Taxes [I.R.C. §§ 2601(c), 2661(2), 6081, 6161]--IRS Form 4768

Click here to view image.

[2] Use of Form

This form is a reproduction of IRS Form 4768, Application for Extension of Time to File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes. IRS Form 4768 may be used as an application for an extension of time for either or both (1) the filing of the estate and generation-skipping transfer tax return; and/or (2) the payment of the estate and GST tax imposed on direct skipsoccurring at the same time as or as a result of the decedent's death [*see § 453.21*]. An extension of time for filing the return does not operate to extend the time for payment of the tax [*Treas. Reg. § 20.6081-1(c)*]. If this form is used only to seek an extension of the time to file the return, payment of the amount of estate and GST tax estimated to be due must accompany the application for extension [*see* Instructions for IRS Form 4768].

An extension of the time for paying the tax does not relieve the personal representative from the duty of filing the return on or before the due date provided in *Treas. Reg. § 20.6075-1* (but due date may include grant of extension) [*Treas. Reg. § 20.6161-1(c)(3)*].

The IRS has suggested that an extension of six months should be sought if there is a ruling request pending that affects the estate and generation-skipping transfer tax return [*Rev. Proc. 82-37, 1982-1 C.B. 491*].

Note that a written statement must be attached to the IRS Form 4768 explaining why it is impossible or impractical to file the return within nine months after decedent's date of death or why it is impossible or impractical to pay the taxes by

then [*see* IRS Form 4768]. For a sample statement, see Blaylock, Pearson, Schoknecht, Stikker, *California Probate Practice, Ch. 15, Taxation of Estates § 15.09[1][d]* (Matthew Bender).

Minor revisions to Form 4768 are occasionally made by the IRS, so care should be taken to use only the latest version.

[3] Interest Charged on Payment of Tax After Due Date

Even if an extension of time to pay the estate (and GST) tax is granted, the estate is still liable for interest on the amount of the tax during the period of the extension [*Treas. Reg. § 20.6161-1(c)(2)*]. The rate of interest charged is based on the rate established semiannually pursuant to *I.R.C. § 6621* [*I.R.C. § 6601*].

[4] Extensions of Time for Filing Return

If it is impossible or impracticable for the personal representative to file a reasonably complete return within nine months from the date of the decedent's death, the District Director or the director of a service center where the estate and generation-skipping transfer tax return must be filed may, on a showing of good and sufficient cause, grant a reasonable extension of time for filing the return. Unless the personal representative is abroad, the extension may not be for more than six months from the date for filing. Therefore, unless the personal representative is abroad, the due date for filing the return under any extension granted by a District Director or a director of a service center may not be later than 15 months from the date of the decedent's death. The extension may, of course, be for a lesser period of time [*Treas. Reg. § 20.6081-1(a)*].

[5] Extension of Time for Paying Tax

[a] Reasonable Cause

The District Director or the director of a service center may grant an extension of time beyond the due date to pay any part of the estate (and generation-skipping transfer) tax. An extension may be granted for a reasonable period of time, not to exceed 12 months, at the request of the personal representative of the estate, if an examination of all the facts and circumstances discloses that the request is based on reasonable cause. Examples of reasonable cause for granting an extension of time to pay the taxes provided in *Treas. Reg. § 20.6161-1(a)(1)* are set forth in the Instructions to IRS Form 4768 [*see also I.R.C. 6161(a)(1)*]. The extension will be limited to the amount of the cash shortage. Payment of the amount of taxes due in excess of the shortage, as calculated on Part IV of IRS Form 4768, must accompany the application for extension [S. Rep. No. 1444, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5701; *see also* Instructions to IRS Form 4768].

[b] Extensions up to 10 Years

The time for payment of (1) any part of the estate (and GST) tax owing, or (2) any part of any installment under *I.R.C. § 6166* (including any part of a deficiency prorated to any installment under *I.R.C. § 6166*) may be extended for reasonable cause for any reasonable period not in excess of 10 years from the date prescribed for payment of the estate tax [*I.R.C. § 6161(a)(2)*]. In the case of installment payments under *I.R.C. § 6166* due after the 10-year period, the time for payment may be extended for a period up to 12 months after the due date for the last installment [*I.R.C. § 6161(a)(2)*; *see I.R.C. § 2661* (making estate tax provisions applicable to GST)].

[6] Text References

Blaylock, Pearson, Schoknecht, Stikker, *California Probate Practice, Ch. 15, Taxation of Estates § 15.09[1][c], [d], [2][a], [b]* (Matthew Bender)

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38-453 California Forms of Pleading and Practice--Annotated § 453.198

§ 453.198 Power of Attorney and Declaration of Representative [Treas. Reg. § 601.504]--IRS Form 2848

[1] FORM Power of Attorney and Declaration of Representative [Treas. Reg. § 601.504]--IRS Form 2848

Click here to view image.

[2] Use of Form

This form is a reproduction of IRS Form 2848. IRS Form 2848 may be used, but it is not required, to authorize an attorney in fact (hereinafter "agent") to do any of the acts the personal representative could do with respect to the estate's tax returns, except an agent cannot be authorized to endorse refund checks and or to sign tax returns [*see* Instructions to IRS Form 2848; *but see Treas. Reg.§ 1.6012-1(a)(5)* (when agent is authorized to sign return)]. The person appointed as agent on IRS Form 2848 must be a member of one of the classes listed in Part II of Form 2848. If the personal representative wants to appoint some one else, he or she must use IIRS Form 8821 (reproduced at *see § 453.199*), and, even then, the authority of such an agent is not as broad as the authority of an agent who is qualified to practice before the IRS.

Minor revisions to this form are occasionally made by the IRS, so care should be taken to obtain the latest version of the form.

[3] Other Forms Permitted

Any form of power of attorney that complies with the IRS conference and practice regulations [*Treas. Reg. § 601.501* et seq.] may be used instead of IRS Form 2848 to appoint the agent [*see* Instructions to IRS Form 2848].

[4] When Not to Use IRS Forms 2848

If the personal representative only wants to authorize one person to receive confidential information and/or to make written or oral presentations of fact or argument on his or her behalf, he or she does not have to file IRS Form 2848. Completing the authorization on Part 4 of IRS Form 706 [reproduced at *see § 453.190*] is sufficient. The authorization

and appointment in Part 4 of IRS Form 706 will not be sufficient, however, to authorize the agent to execute closing agreements [*see I.R.C. § 7121*] on behalf of the estate. Appointment on IRS Form 2848, or some other express delegation of that authority, is necessary to delegate the authority to execute closing agreements [*see Rev. Proc. 68-16* , § 6.07, *1968-1 C.B. 770* ; Instructions for IRS Form 706]. Similarly, if more than one person is going to be authorized to receive confidential information or represent the estate, then IRS Form 2848 will have to be filed [*see* IRS Form 2848; Instructions for IRS Form 706].

[5] Powers Granted by IRS Form 2848

The IRS Form 2848 is sufficient to grant the attorney in fact the power to do the following [*Treas. Reg. § 601.502(c)(1)*]:

- Receive, but not endorse, a check in payment of any refund of internal revenue taxes, penalties, or interest;

- Execute a waiver or offer of a waiver of restriction on assessment or collection of a deficiency in tax, or a waiver of notice of disallowance of a claim for credit or refund;

- Execute a consent to extend the statutory period for assessment or collection of a tax; and

- Execute closing agreements under *I.R.C. § 7121*.

The power to receive checks must be specifically noted on the Form 2848. If the personal representative wishes to exclude any authority, the specifically excluded authority must be listed on IRS Form 2848 in the place provided [*Treas. Reg. § 601.502(c)(1)*]. That space may also be used to grant authority to the attorney in fact to sign returns [*see* Instructions to IRS Form 2848].

A return may be signed by an agent under any of the following circumstances [*Treas. Reg. § 1.6012-1(a)(5)*]:

- By reason of injury or disease, the person liable for making the return is unable to make it.

- The taxpayer is unable to make the return by virtue of continuous absence from the United States (including Puerto Rico) for a period of at least 60 days prior to the date on which the return is due.

- The taxpayer requests permission in writing from the district director for the internal revenue district in which the legal residence or principal place of business of the person liable for making the return is located, and the director determines that good cause exists for permitting the return to be made by the agent.

A return made by an agent must be accompanied by a power of attorney, or a copy of a power of attorney, authorizing him or her to make, execute, or file the return. IRS Form 2848 is sufficient for this purpose [*Treas. Reg. § 1.6012-1(a)(5)*].

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Volume 38: Probate: Is Probate Necessary? thru Probate: Estate Tax-Chs. 440-453
Chapter 453 PROBATE: ESTATE TAX
PART V. FORMS
A. Federal Estate And Generation-Skipping Taxes

38-453 California Forms of Pleading and Practice--Annotated § 453.199

§ 453.199 Tax Information Authorization [Treas. Reg. § 601.504]--IRS Form 8821

[1] FORM Tax Information Authorization [Treas. Reg. § 601.504]--IRS Form 8821

Click here to view image.

[2] Use of Form

This form is a reproduction of IRS Form 8821. IRS Form 8821 may be used to authorize someone other than the personal representative to inspect and receive confidential tax information. IRS Form 2848 should be used if the personal representative wants to delegate broader authority to an attorney, accountant, enrolled agent, or someone authorized to practice before the IRS [*see* IRS Form2848, reproduced at *see § 453.198*]. If the personal representative only wants to authorize one person to receive confidential information, completing the authorization on Part 4 of IRS Form 706 [reproduced at *see § 453.190*] is sufficient [*see* Instructions for IRS Form 706].

Minor revisions to this form are occasionally made by the IRS, so care should be taken to obtain the latest version of the form.

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Chapter 453 PROBATE: ESTATE TAX
PART V. FORMS
A. Federal Estate And Generation-Skipping Taxes

38-453 California Forms of Pleading and Practice--Annotated §§ 453.200-453.219

[Reserved]

§§ 453.200[Reserved]

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B. California Estate Tax

38-453 California Forms of Pleading and Practice--Annotated § 453.220

§ 453.220 California Estate Tax Return [Rev. & Tax. Code § 13501]--State Form ET-1

[1] FORM California Estate Tax Return [Rev. & Tax. Code § 13501]--State Form ET-1

Click here to view image.

[2] Use of Form

This form is the State of California Estate Tax Return (State Form ET-1) and instructions. This form must be filed by the personal representative of the estate of every decedent with property in California who died after 8:00 p.m. on June 8, 1982, if the United States Estate (and Generation-Skipping Transfer) Tax Return (IRS Form 706) must be filed [*Rev. & Tax. Code § 13501*]. See *§ 453.10 et seq. and § 453.60* et seq/ for discussion listings relating to the federal filing requirements.

[3] Filing Requirements

Unless an extension of time is granted, the California Estate Tax Return must be filed with a copy of the United States Estate (and Generation-Skipping Transfer) Tax Return within nine months from the date of death [*Rev. & Tax. Code §§ 13501, 13532*; *see I.R.C. § 6075(a)*]. The California estate tax is payable at the date of death [*Rev. & Tax. Code § 13531*], but payment is not delinquent until the expiration of the nine-month period allowed for filing the return [*Rev. & Tax. Code § 13532*]. If the tax is not paid within the nine-month period, interest is imposed at the rate for underpayment of estate tax provided in *I.R.C. § 6621(a)(2)*, beginning on the date on which payment became delinquent and continuing until payment is made. Interest on a delinquent payment is compounded daily [*Rev. & Tax. Code § 13550(a)*; *see Rev. & Tax. Code § 13510* (penalty; discussed in *§ 453.220[5]*)]. The underpayment rate under *I.R.C. § 6621(a)(2)* is the *I.R.C. § 1274(d)* federal short-term rate plus three percentage points. For delinquent amounts unpaid on or after January 1, 1999, to and including December 31, 2000, interest was payable at the underpayment rate provided in *I.R.C. § 6621(a)(2)* as in effect on January 1, 1998 [*Rev. & Tax. Code § 13550(b)*; *see Rev. & Tax. Code § 13550*, before amendment by Stats. 2000, Ch. 363]. The applicable underpayment rate as of that date was the *I.R.C. § 1274(d)* federal short-term rate plus two percentage points [*I.R.C. § 6621(a)(2)*, prior to amendment by P.L. 105-206, § 3302(a) (July 22, 1998)].

[4] Extensions of Time and Amended Returns

If the Internal Revenue Service has granted an extension of time to file the United States Estate (and Generation-Skipping Transfer) Tax Return (IRS Form 706), an extension for the same period will be granted to file the California Estate Tax Return when a copy of the federal extension is filed with the State Controller [*Rev. & Tax. Code § 13502*]. See *§ 453.197* for a discussion of the federal grounds for extensions.

If an amended federal estate and generation-skipping transfer tax return is filed, the personal representative of the estate must also file an amended California return and a copy of the amended federal return with the State Controller, and pay any additional tax based on the amended return [*Rev. & Tax. Code § 13503*].

[5] Penalties

Unless reasonable cause exists for a failure to file the California Estate TaxReturn within the nine-month period or within an authorized extension period, a penalty is imposed in addition to the interest imposed for late payment of the tax. The penalty is calculated at the rate of 5 percent of the tax due, as finally determined, for each month or portion of a month in which the failure to file continues, up to an aggregate of 25 percent [*Rev. & Tax. Code § 13510*].

[6] Domicile at Date of Death

State Form ET-1 requires attachment of State Form IT-2 if it is claimed that the decedent was not domiciled in California at the time of death [*see* first page of State Form ET-1, instruction in "Domicile" box]. For an illustration of State Form IT-2, *see § 453.221*.

[7] Calculation of Tax

The amount of the California estate tax is based on the maximum amount allowed for the federal credit for state death taxes [*Rev. & Tax. Code § 13302*]. Thus, the United States Estate (and Generation-Skipping Transfer) Tax Return (IRS Form 706) should be completed before this form is prepared. See *§§ 453.60 et seq., 453.190*, and *453.191* for information regarding the state death tax credit allowed on the federal estate tax return.

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38-453 California Forms of Pleading and Practice--Annotated § 453.221

§ 453.221 Declaration Concerning Residence [18 Cal. Code Reg. § 14501(a)-(e)]--State Form IT-2

[1] FORM Declaration Concerning Residence [18 Cal. Code Reg. § 14501(a)-(e)]--State Form IT-2

Click here to view image.

[2] Use of Form

This form reproduces the State of California Estate Tax Declaration Concerning Residence (IT-2). A completed State Form IT-2 must be submitted with the California Estate Tax Return [ET-1; *see § 453.220*] if it is claimed that the decedent was not a resident of the State of California at the time of his or her death [*18 Cal. Code Reg. § 14501(a)-(e)*].

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Chapter 454 PROBATE: CLAIMS AGAINST THE ESTATE

39-454 California Forms of Pleading and Practice--Annotated 454.syn

§ 454.syn Synopsis to Chapter 454: PROBATE: CLAIMS AGAINST THE ESTATE

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§ 454.02 Cross References

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§ 454.52 Form of Claim

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[4] Claim Based on Written Instrument

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[2] Limitation on Personal Representative's Authority

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[3] Action to Establish Decedent's Insured Liability

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[5] Claims by Public Entities

[6] Claims Established by Judgment

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[8] Contest and Allowance of Claims on Settlement of Account

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[10] Notice to Creditors

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[1] FORM

[2] Source of Form

[3] Use of Form

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[1] FORM

[2] Source of Form

[3] Use of Form

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§ 454.292 Allowance or Rejection of Creditor's Claim and Proof of Service [Prob. Code § 9250]--Judicial Council Form DE-174

[1] FORM

[2] Source of Form

[3] Use of Form

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[1] FORM

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[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

[5] Decisions

[6] Text References

[7] Cross References

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[1] FORM

[2] Use of Form

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[5] Cross References

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[2] Use of Form

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[1] FORM

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[2] Use of Form

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[6] Cross References

§ 454.303 Order Authorizing Compromise of Claim by Creditor or Other Claimant Against Estate [Prob. Code § 9837]--Conveyance of Estate Property to Cancel Note and Trust Deed

[1] FORM

[2] Use of Form

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§ 454.304 Order Authorizing Compromise of Action Instituted Against Personal Representative [Prob. Code § 9837]

[1] FORM

[2] Use of Form

[3] Cross References

§ 454.305 Petition for Order Determining Liability of Personal Representative for Failure to Give Notice to Creditor of Administration of Estate [Prob. Code § 9053(b)(3)(A)]

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Chapter 454 PROBATE: CLAIMS AGAINST THE ESTATE
PART I. SCOPE

39-454 California Forms of Pleading and Practice--Annotated § 454.01

§ 454.01 Scope of Chapter

This chapter discusses the filing of creditor claims against a decedent's estate, the personal representative's allowance and payment, or rejection, of those claims, creditors' actions on claims, and the compromise and summary determination of disputed claims. The chapter includes forms for use in notifying creditors of the administration of decedent's estate [*see § 454.290*], and in filing, allowing, and rejecting claims [*see §§ 454.291 -454.292*]. It also includes a complaint [§ 454.294], notice of pendency of action [*see § 454.295*], demurrers [§§ 454.296, 454.297], and affirmative defense [*see § 454.298*] for use in prosecuting and defending a creditor's action on a rejected claim. The chapter also contains forms for use in proceedings to compromise a claim [*see §§ 454.299 -454.304*]. Finally, the chapter contains a form of petition by a creditor known to the personal representative to impose liability on the representative for failure to give notice of the estate proceedings [*see § 454.305*].

For forms for use under *Code Civ. Proc. §§ 368.5, 377.40*, and *377.41* and *Prob. Code §§ 550-555* and *9370* to substitute a personal representative for a deceased defendant or a deceased defendant's estate in an action pending against the defendant or his or her estate and to continue the action against the personal representative, see Ch. 21, *Amended and Supplemental Pleadings* .

For forms for use under *Prob. Code § 850(a)(2)(C), (D)* when a decedent dies in possession of or holding title to property claimed to belong to another, *see* Ch. 456, *Probate: Management of Estate Assets* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral Overview

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39-454 California Forms of Pleading and Practice--Annotated § 454.02

§ 454.02 Cross References

For discussion and forms relating to the continuation against a personal representative of a pending action against a deceased defendant, see Ch. 21, *Amended and Supplemental Pleadings*

For discussion and forms relating to the claim of exemptions asserted against an application for an attachment order, see Ch. 62, *Attachment*

For discussion and forms relating to enforcement of nonmoney judgments, see Ch. 254, *Executions and Enforcement of Judgments*

For discussion and forms relating to statutes of limitations, see Ch. 345, *Limitation of Actions*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbateGeneral Overview

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39-454 California Forms of Pleading and Practice--Annotated §§ 454.03-454.09

[Reserved]

§§ 454.03[Reserved]

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PART II. LEGAL BACKGROUND
A. In General

39-454 California Forms of Pleading and Practice--Annotated § 454.10

§ 454.10 Governing Law

Prob. Code §§ 9000-9304 govern creditors' claims against a decedent in any proceeding for administration of the decedent's estate commenced on or after July 1, 1988 [*see Prob. Code § 9004(a)*]. *Prob. Code §§ 9620, 9621* govern the summary determination of disputes involving claims against the decedent. *Prob. Code §§ 9830-9839* govern the compromise or settlement of a claim, action, or proceeding against the decedent, personal representative, or estate. *Prob. Code § 11400 et seq.* govern the payment of debts, including claims that are established or otherwise payable in the course of administration, by the personal representative, in any proceeding for the administration of a decedent's estate commenced on or after July 1, 1988 [*see Prob. Code § 11405(a)*].

Prob. Code §§ 550-555 and *9390* govern litigation in actions to establish a decedent's liability for which the decedent was protected by insurance, and apply only to actions commenced on or after July 1, 1989. The applicable law in effect before July 1, 1989 [*see* former *Code Civ. Proc. § 385(b)* and former Prob. Code §§ 707, 709, 709.1, 721 (all operative July1, 1988, and repealed operative July 1, 1989)], continues to apply to an action commenced before July 1, 1989, despite its repeal by Stats. 1988, ch. 1199 [*see Prob. Code §§ 555, 9399*].

Prob. Code §§ 9350-9399 govern litigation in actions on rejected claims, and also apply to actions commenced on or after July 1, 1989. The applicable law in effect before July 1, 1989 [*see* former Prob. Code §§ 709, *716, 9002, 9253*, 9257 (all operative July 1, 1988, and repealed operative July 1, 1989)], continues to apply to an action commenced before July 1, 1989, despite its repeal by Stats. 1988, ch. 1199 [*see Prob. Code § 9399*].

Code Civ. Proc. §§ 377.40-377.43, governing causes of action against a decedent, apply to the actions or proceedings commenced on or after January 1, 1993, against the decedent's personal representative or successor in interest, and to motions made on or after January 1, 1993, to continue a pending action or proceeding against the decedent's personal representative or successor in interest, regardless of whether the decedent died before, on, or after that date [*Code Civ. Proc. § 377.43*].

Cal. Rules of Ct., Rule 7.401 governs the procedure for allowing or rejecting a claim. *Cal. Rules of Ct., Rule 7.401* governs the procedure when acting under the Independent Administration of Estates Act. *Cal. Rules of Ct., Rule 7.403*

governs the statement in the final report or petition for final distribution, regarding claims. Some counties may have local court rules governing other aspects of the procedure regarding claims, which should also be consulted.

The law in effect before July 1, 1988, continues to apply in any proceeding for administration of a decedent's estate commenced before July 1, 1988, notwithstanding its repeal by Stats. 1987, ch. 923 [*Prob. Code §§ 9004(b), 11405(b)*]. The provisions governing presentation, filing, and payment of claims for proceedings commenced before July 1, 1988, are contained in former *Prob. Code §§ 700-738*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral Overview

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§ 454.11 "Claim" Defined

As used in the statutes governing administration of decedents' estates [*see Prob. Code § 9000 et seq.*], "claim" means a demand for payment of any of the following, whether due or not due, accrued or not accrued, or contingent, and whether liquidated or unliquidated [*Prob. Code § 9000(a)*]:

- Liability of the decedent, whether arising in contract, tort, or otherwise;

- Liability for taxes incurred before the decedent's death, whether assessed before or after the decedent's death, other than property taxes and assessments secured by real property liens;

- Liability of the estate for funeral expenses of the decedent.

"Claim" does not include a dispute regarding a decedent's title to specific property alleged to be included in the decedent's estate [*Prob. Code § 9000(b)*; for discussion of *Prob. Code §§ 850 et seq., see* Ch. 450, *Probate: Collecting Assets*].

Under *Prob. Code § 9000(a)(1)*, the broad definition of "claim" in *Prob. Code § 9000(a)* includes all claims against the decedent, whether in contract, tort, or otherwise, including claims for damages for injuries to or the death of a person, or injury to property, and all claims against the personal representative of a decedent who, in his or her lifetime, has wasted, destroyed, taken or carried away, or converted to his or her own use the property of another person, or who has committed any trespass on the real property of another person [*see* Cal. L. Revision Comm'n Comment to *Prob. Code § 9000*].

A claim against an estate for breach of contract based on an alleged agreement to make a specific bequest in the will constitutes a "claim" for purposes of the claim filing requirements and, therefore, the claimant must file a timely claim against the estate or be forever barred from maintaining an action for breach of contract [*Wilkison v. Wiederkehr (2002) 101 Cal. App. 4th 822, 833-834, 124 Cal. Rptr. 2d 631]* .

Under *Prob. Code § 9000(a)(2)*, a claim for a tax liability is required only as to liabilities against the decedent at the time of death. Those arising after death as estate and gift taxes are not subject to claim requirements. Secured property taxes and assessments, whether incurred before or after death, are also not subject to claim requirements [*see* Cal. L. Revision Comm'n Comment to *Prob. Code § 9000*].

"Claim" under *Prob. Code § 9000* may be reasonably interpreted to include liabilities arising after, as well as before, a decedent's death. Thus, it includes the liability of a decedent's estate, pursuant to *Welf. & Inst. Code § 14009.5*, for reimbursement to the state Department of Health Services of Medi-Cal payments made to the decedent during his or her lifetime, even though this liability arises at the time of the decedent's death [*Kizer v. Hanna (1989) 48 Cal. 3d 1, 12, 255 Cal. Rptr. 412, 767 P.2d 679]* . For further discussion of claims under *Welf. & Inst. Code § 14009.5*, see *§ 454.72[3]*.

Under *Prob. Code § 9000(a)(3)*, funeral expenses fall within the definition of "claim," but administration expenses, such as personal representative and attorney's fees, do not [*see* Cal. L. Revision Comm'n Comment to *Prob. Code § 9000*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewTax LawState & Local TaxesEstate & Gift TaxGeneral Overview

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[Reserved]

§§ 454.12[Reserved]

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39-454 California Forms of Pleading and Practice--Annotated § 454.30

§ 454.30 Notice to Creditors

[1] In General

Publication of notice under *Prob. Code § 8120* (discussed in *§ 454.30[2]*) and the giving of notice of administration of the decedent's estate under *Prob. Code §§ 9050-9054* (discussed in *§ 454.30[3]*) constitute notice to creditors of the commencement of administration of the estate and the time, place, and manner for filing claims [*see Prob. Code §§ 9001(a), 9052*]. Nothing in *Prob. Code § 9001(a)* affects a notice or a request to a public entity required by *Prob. Code §§ 9200-9205* [*Prob. Code § 9001(b)*; *see § 454.72*].

The Probate Code takes a two-tiered approach to giving notice to creditors. First, the personal representative must publish notice to all creditors, regardless of whether they are known or unknown, unascertainable or reasonably ascertainable. This requirement helps achieve the in rem effect of probate, which makes the proceedings binding on all persons [*see Prob. Code § 9001*; *see also* Recommendation Relating to Creditor Claims Against Decedent's Estate, 19 Cal. L. Revision Com'n Reports 299, 303-304 (1988)]. Second, the personal representative must give notice of administration of the estate to the known or reasonably ascertainable creditors of the decedent [*Prob. Code § 9050(a)*].

Under constitutional principles of due process, publication alone is not a sufficient form of notice to known or reasonably ascertainable creditors of the decedent. These creditors must be given actual notice, such as notice by mail [*see Tulsa Collection Servs. v. Pope (1988) 485 U.S. 478, 489-491, 108 S. Ct. 1340, 99 L. Ed. 2d 565]* . For discussion of the relation between *Prob. Code § 9050*'s requirement of notice to known creditors and the constitutional requirement of notice to known and "reasonably ascertainable" creditors, *see § 454.30[3][b]*.

[2] By Publication

Publication by the personal representative of notice of hearing of a petition for administration of the decedent's estate under *Prob. Code §§ 8120-8125* constitutes notice to creditors of the requirements of *Prob. Code §§ 9000-9399* [*see Prob. Code § 9001(a)*; *see also Prob. Code § 8100* (contents of notice)]. Notice by publication under *Prob. Code §§ 8120-8125* is sufficient notice to creditors of whom the personal representative has no actual knowledge [*see Prob. Code §§ 9001, 9050*]. For a discussion of additional notice requirements applicable to known or reasonably

ascertainable creditors, *see § 454.30[3]*. For a form for notice under *Prob. Code § 8100-8125*, together with a discussion of the manner of publication and period of notice, *see* Ch. 442, *Probate: Initiating Probate Administration* .

[3] By Mail or Personal Delivery

[a] To Known Creditors

The personal representative has a duty to give notice of administration of the estate to the known or reasonably ascertainable creditors [*Prob. Code § 9050(a)*; § 454.30[3][b]]. However, notice generally is not required if the creditor has already filed a claim [*see Prob. Code § 9054*, discussed in *§ 454.30[3][e]*]. The requirement that notice be given to known or reasonably ascertainable creditors is in addition to the requirement that notice to creditors be published [*Prob. Code § 9050(b)*; § 454.30[2]]. It is designed to satisfy due process requirements by ensuring reasonable notice to creditors within the practicalities of administration of a decedent's estate [*see* Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9050*; *but see § 454.30[3][b]*].

The notice must be given as provided in *Prob. Code § 1215* for mailing of notices [*see Prob. Code § 9050(a)*]. The notice may also be given by personal delivery, since personal delivery of a notice or other paper required or permitted to be mailed satisfies any statutory provision under the Probate Code requiring or permitting the mailing of the notice or paper [*see Prob. Code § 1216*; *see also* Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9050*].

For a Judicial Council form for notice of administration to creditors, *see § 454.290*. For a discussion of notice requirements and procedures under the Probate Code, *see* Ch. 447, *Probate: Statutory Notice Requirements* .

[b] What Constitutes Knowledge of Creditors

The personal representative has a duty to make reasonably diligent efforts to identify reasonably ascertainable creditors of the decedent [*Prob. Code § 9053(d)*, operative January 1, 1997]. This requirement appears to be designed to satisfy due process requirements under *U.S. Const., amend. XIV*, as articulated by the United States Supreme Court in *Tulsa Collection Servs. v. Pope (1988) 485 U.S. 478* . In *Tulsa*, the Court examined Oklahoma's "nonclaim" statute, which cut off creditor claims two months after receiving notice of the administration of the estate, and Oklahoma's notice statute, which required the executor to give notice to creditors, by publication, immediately after his or her appointment by the probate court. The Court held that because the nonclaim statute cut off property rights and was activated by the probate court's involvement or by state action, due process guarantees applied [*Tulsa Collection Servs. v. Pope (1988) 485 U.S. 478, 485-487, 108 S. Ct. 1340, 99 L. Ed. 2d 565]* . Due process requires that actual, not publication, notice be given to known or reasonably ascertainable creditors. Impracticable and extended searches are not required, however. All the executor needs to do is make reasonably diligent efforts to uncover the identities of creditors. Not everyone who may conceivably be considered a creditor is entitled to actual notice, and it is reasonable to dispense with notice to those with mere conjectural claims [*Tulsa Collection Servs. v. Pope (1988) 485 U.S. 478, 490-491, 108 S. Ct. 1340, 99 L. Ed. 2d 565]* .

[c] Deadline for Giving Notice

Notice to the decedent's creditors must be given within the later of the following [*Prob. Code § 9051*]:

- Four months after the date letters are first issued.
- Thirty days after the personal representative first has knowledge of the creditor.

The failure of the personal representative to give a timely notice does not preclude a creditor from filing a timely claim [*see* Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9051*].

[d] Immunity for Giving or Failing to Give Notice

[i] In General

If the personal representative believes that notice to a particular creditor is or may be required and gives notice based on that belief, the personal representative is not liable to any person for giving the notice, regardless of whether it was actually required [*Prob. Code § 9053(a)*]. This provision is designed to encourage full and adequate notice when it is a close question whether a particular creditor is known or reasonably ascertainable.

If the personal representative fails to give notice when it is required, the personal representative is not liable to any person for the failure unless a creditor establishes all of the following [*Prob. Code § 9053(b)*]:

- That the failure was in bad faith.

- That the creditor had no actual knowledge of the administration of the estate before expiration of the time for filing a claim, and payment would have been made on the claim in the course of administration if the claim had been properly filed.

- That, within 16 months after letters were first issued to a general personal representative, the creditor did both of the following [*Prob. Code § 9053(a)(3)*]:

  - Filed a petition requesting that the court in which the estate was administered make an order determining the liability of the personal representative; and

  - Caused notice of the hearing and a copy of the petition to be served on the personal representative at least 30 days before the hearing [*see Code Civ. Proc. §§ 413.10 et seq.* (service of summons in civil actions)].

The above rule does not affect any liability the estate itself may have had for the claim of a creditor [*Prob. Code § 9053(c)*]. Further, the personal representative is not liable for any claim to the extent it is paid out of the estate or could be paid out of the estate if a late claim were filed under *Prob. Code § 9103* [*Prob. Code § 9053(c)*; *see § 454.50[4]*].

[ii] Creditor's Petition to Establish Liability

To impose liability on the personal representative for failure to give notice to a creditor under *Prob. Code §§ 9050-9054*, the creditor must establish both that (1) the failure to give notice was in bad faith, and (2) the creditor had no actual knowledge of the administration of the estate before expiration of the time for filing a claim, and payment would have been made on the creditor's claim in the course of administration if the claim had been properly filed [*Prob. Code § 9053(b)(1), (2)*].

This liability may only be enforced if, within 16 months after letters are first issued to a general personal representative, the creditor both (1) files a petition requesting that the court in which the estate is administered make an order determining the personal representative's liability under *Prob. Code § 9053(b)*, and *(2)* at least 30 days before the hearing on the petition, causes notice of the hearing and a copy of the petition to be served on the personal representative in the manner provided in *Code Civ. Proc. §§ 413.10-417.40* (service of summons) [*Prob. Code § 9053(b)(3)*; *see Prob. Code § 58(b)* (defining "general personal representative" to exclude special administrator unless special administrator has general powers)]. For a petition, *see § 454.305*.

[e] When Notice Is Not Required

Notwithstanding *Prob. Code § 9050*, the personal representative need not give notice to a creditor even though the personal representative has knowledge of the creditor if either of the following conditions is satisfied [*Prob. Code § 9054*]:

- The creditor has filed a claim as provided in *Prob. Code §§ 9000-9399*; or

- The creditor has demanded payment, and the personal representative elects to treat the demand as a claim under *Prob. Code § 9154* (waiver of formal defects in claim).

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesNotice to CreditorsEstate, Gift & Trust LawProbateGeneral Overview

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[Reserved]

§§ 454.31[Reserved]

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39-454 California Forms of Pleading and Practice--Annotated § 454.50

§ 454.50 Time for Filing Claims

[1] Claim Period

A creditor's claim must be filed before expiration of the later of the following times [*Prob. Code § 9100(a)*]:

- Four months after the date letters are first issued to a general personal representative.

- Sixty days after the date notice of administration is mailed or personally delivered to the creditor.

This rule does not extend the time provided in *Code Civ. Proc. § 366.2*.

A reference in a statute to "the time for filing a claim" means four months after the date letters are first issued to a general personal representative, as set forth in *Prob. Code § 9100(a)(1)* [*Prob. Code § 9100(b)*].

If letters are issued by more than one court, or if subsequent letters are issued by the same court, the four-month period commences on the first issuance of letters to a general personal representative. In the case of a special administrator granted the powers of a general personal representative, the claim period commences to run on first issuance of letters reciting the general powers of the special administrator [*see* Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9100*].

In *Varney v. Superior Court (1992) 10 Cal. App. 4th 1092, 1101-1102* , 12 Cal. Rp tr. 2d 865, the court recognized a limited except to the general requirement that a claim be filed within the time requirements of *Prob. Code § 9100*. The court held that it had jurisdiction to toll the expiration of the time for filing a creditor's claim when the creditor applies for a determination under *Prob. Code § 21230* as to whether filing a creditor's claim constitutes a contest within the meaning of a no-contest clause. Since the time for submitting creditor's claims is short, and since the probate court ruled that submitting a creditor's claim would violate the clause, the appellate could ruled that it would be impossible to obtain meaningful review of the probate court's order unless the time for filing claims was extended pending the appeal. However, the court emphasized that the creditor's petition and the court's stay of the expiration of the time for filing the claim were both made before the claim period expired and that, if this were not the case, a different result might have

been reached [*Varney v. Superior Court (1992) 10 Cal. App. 4th 1092, 1101-1102, 12 Cal. Rptr. 2d 865]* .

[2] No Extension for Vacancy in Office

A vacancy in the office of the personal representative that occurs before expiration of the time for filing a claim does not extend the time [*Prob. Code § 9101*]. A vacancy includes the resignation, death, or removal of the personal representative from office [*see* Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9101, 20* Cal. L. Revision Com'n Reports 1568-1569 (1990)].

[3] Action on Claim After Expiration of Claim Period

A claim that is filed before expiration of the time for filing the claim is timely even if acted on by the personal representative or by the court after expiration of the time for filing claims [*Prob. Code § 9102*].

[4] Late Claims

The Probate Code contains rules allowing late claims to be filed in specified cases [*see Prob. Code § 9103*]. These rules permit a creditor or the personal representative to petition the court for an order allowing a claim to be filed after expiration of the time for filing a claims [*see Prob. Code § 9100*], and they authorize the court to grant the petition if either of the following conditions is satisfied [*Prob. Code § 9103(a)*]:

- The personal representative failed to send proper and timely notice of administration of the estate to the creditor, and the petition is filed within 60 days after the creditor has actual knowledge of the administration of the estate; or

- The creditor had no knowledge of the facts reasonably giving rise to the existence of the claim more than 30 days before the time for filing a claim as provided in *Prob. Code § 9100* and the petition is filed within 60 days after the creditor has actual knowledge of both of the following [*Prob. Code § 9103(a)(2)*]:

  - The existence of the facts reasonably giving rise to the existence of the claim.

  - The administration of the estate.

Notwithstanding the above rules, the court may not allow a late claim to be filed after the court makes an order for final distribution of the estate [*Prob. Code § 9103(f)*]. Nothing in the above rules authorizes allowance or approval of a claim barred by *Code Civ. Proc. § 366.2*, the general statue of limitations for actions brought on a liability of a deceased person [*Prob. Code § 9103(f)*].

A creditor has knowledge of the administration of an estate within the meaning of these rules if the creditor has actual knowledge of the administration through receipt of notice given under *Prob. Code § 9050* or otherwise, such as through information from a newspaper clipping service that comes to the attention of the creditor. Constructive knowledge through publication of a notice of death or other information that does not come to the attention of the creditor is not knowledge for this purpose [*see* Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9103, 20* Cal. L. Revision Com'n Reports 1569-1570 (1990)].

The standard applicable to the creditor's attorney is different. The attorney is not held responsible for any actual knowledge the attorney may have of the decedent's death unless the attorney is representing the creditor in the matter involving the decedent [*see* Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9103, 20* Cal. L. Revision Com'n Reports 1569-1570 (1990)].

The court may condition the claim on terms that are just and equitable, and may require the appointment or reappointment of a personal representative, if necessary. The court may deny the creditor's petition if a payment to general creditors has been made and it appears that the filing or establishment of the claim would cause, or tend to cause, unequal treatment among beneficiaries or creditors [*Prob. Code § 9103(c)*].

Regardless of whether the claim is later established in whole or in part, payments otherwise properly made before a claim is filed under *Prob. Code § 9103* are not subject to the claim. The personal representative or payee is not liable on account of the prior payment, except to the extent provided in *Prob. Code § 9392* (liability of distributee for unfiled creditor's claims) and subject to *Prob. Code § 9053* (immunity of personal representative for giving or not giving notice). *Prob. Code § 9103(d)* does not limit the liability of a person who receives a preliminary distribution of property to restore to the estate an amount sufficient for payment of the distributee's proper share of the claim, not exceeding the amount distributed [*Prob. Code § 9103(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 454.51 Filing of Claims

[1] Who May File

A claim may be filed by the creditor or a person acting on behalf of the creditor [*Prob. Code § 9150(a)*]. A person acting on behalf of the creditor may include the personal representative or the guardian or conservator of the estate of the creditor [*see* Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9150, 20* Cal. L. Revision Com'n Reports 1571 (1990)].

[2] Manner of Filing

A claim must be filed with the court, and a copy must be served on the personal representative, or on a person who is later appointed and qualified as personal representative [*Prob. Code § 9150(b)*]. Service on the personal representative must be made within the later of 30 days after filing of the claim or four months after letters issue to a personal representative with general powers [*Prob. Code § 9150(c)*]. If the creditor does not file the claim with the court and serve the claim on the personal representative in this manner, the claim will be invalid [*Prob. Code § 9150(d)*]. However, service is not required if the claim has already been allowed or rejected [*Prob. Code § 9150(c)*].

[3] Waiver of Formal Defects

Notwithstanding any other provision of *Prob. Code §§ 9000-9399*, if a creditor makes a written demand for payment within four months after the date letters are first issued to a general personal representative, the personal representative may waive formal defects and elect to treat the demand as a claim that is filed and established by paying the amount demanded before the expiration of 30 days after the four-month period if all the following conditions are satisfied [*Prob. Code § 9154*]:

- The debt was justly due.
- The debt was paid in good faith.

- The amount paid was the true amount of the indebtedness over and above all payments and offsets.
- The estate is solvent.

Nothing in *Prob. Code § 9154* limits application of the doctrines of waiver, estoppel, laches, or detrimental reliance, or of any other equitable principle [*Prob. Code § 9154(b)*]. If the personal representative elects to treat a demand as a claim under *Prob. Code § 9154*, the provisions of *Prob. Code § 9250* (acceptance and rejection of claims) do not apply [*Prob. Code § 9250(e)*].

When the personal representative's account is settled, claims paid in accordance with *Prob. Code § 9154* will be allowed [*see Prob. Code § 11005*; for discussion, *see § 454.190[6]*].

[4] Statute of Limitations Tolled

The filing of a claim or a petition under *Prob. Code § 9103* to file a claim tolls the statute of limitations otherwise applicable to the claim until allowance, approval, or rejection [*Prob. Code § 9352(a)*]. This provision, formerly contained in *Prob. Code § 9253* prior to its 1988 amendment, reversed existing case law that held that the filing of a claim did not toll the statute of limitations [*see Recommendations Relating to Probate Law*, 19 Cal. Law Revision Comm'n Reports 333 (1988) (citing *Nally v. McDonald (1885) 66 Cal. 530, 6 P. 390*)].

The uniform one-year statute of limitations in *Code Civ. Proc. § 366.2* applies to actions on all claims against a decedent that survive the decedent's death; but this limitations period is tolled by (1) the timely filing of a creditor's claim, (2) the filing of a petition for payment of debts, claims, or expenses, or (3) a proceeding to construe a no contest provision judicially [*Levine v. Levine (2002) 102 Cal. App. 4th 1256, 1261, 126 Cal. Rptr. 2d 255]* . If a claim is timely filed in the probate proceedings, it remains timely filed, even though the representative or the court acts on the claim after the expiration of the limitations period [*Levine v. Levine (2002) 102 Cal. App. 4th 1256, 1261, 126 Cal. Rptr. 2d 255]* . If a claim is not filed in the probate proceedings within either the claims filing period of *Prob. Code § 9100* or the one-year limitations period of *Code Civ. Proc. § 366.2*, the creditor is barred from asserting a claim against the decedent [*Levine v. Levine (2002) 102 Cal. App. 4th 1256, 1261-1265, 126 Cal. Rptr. 2d 255* (action against trustee by decedent's grandchildren on their claims as beneficiaries of decedent's irrevocable trust was barred by one-year statute of limitations of *Code Civ Proc. § 366.2*, even though there had been no proceeding to administer decedent's estate and no notice to creditors; statute applies to all debts of decedent, regardless of whom claims are brought against; statute was not tolled by grandchildren's minority); *see also* *Wagner v. Wagner (2008) 162 Cal. App. 4th 249, 257, 75 Cal. Rptr. 3d 511* (trustor was prohibited from allowing her own creditor's claim for compensation for caring for decedent, her mother, during the four years prior to decedent's death as the claim was not timely under *Code Civ. Proc. § 366.2*, and trustee's assertion that she was entitled to submit an oral claim did not satisfy Probate Code requirements); *see also* *Stoltenberg v. Newman (2009) 179 Cal. App. 4th 287, 296, 101 Cal. Rptr. 3d 606* (action for breach of fiduciary duty and accounting against successor trustee, which alleged that decedent trustee had concealed financial information, was timed barred under *Code Civ. Proc. § 366.2* because it could have been brought as a claim on a liability of the person)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 454.52 Form of Claim

[1] Judicial Council Form

The Judicial Council has prescribed a mandatory form for creditor's claims [form DE-172]. Use of this form is deemed to satisfy the requirements of *Prob. Code §§ 9150-9154* (filing of claims) [*Prob. Code § 9153*]. For an illustration of the Judicial Council form for a creditor's claim for use in estate proceedings commenced on or after July 1, 1988, *see § 454.291*.

[2] Supporting Affidavit

A claim must be supported by the affidavit of the creditor, or by the person acting on behalf of the creditor, stating the following [*Prob. Code § 9151(a)*]:

- The claim is a just claim.
- If the claim is due, the facts supporting the claim, the amount of the claim, and that all payments on and offsets to the claim have been credited.
- If the claim is not due or contingent, or the amount is not yet ascertainable, the facts supporting the claim.
- If the affidavit is made by a person other than the creditor, the reason it is not made by the creditor.

The claim may be supported by a declaration under penalty of perjury, under *Code Civ. Proc. § 2015.5*, in lieu of an affidavit. The affidavit or declaration may be made on information and belief [*see* Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9151*, *20* Cal. L. Revision Com'n Reports 1572 (1990)].

[3] Supporting Vouchers or Other Proof

The personal representative may require satisfactory vouchers or proof to be produced to support the claim. An original voucher may be withdrawn after a copy is provided. If provided, the copy must be attached to the claim [*Prob. Code § 9151(b)*].

[4] Claim Based on Written Instrument

If a claim is based on a written instrument, either the original or a copy of the original with all endorsements must be attached to the claim. If a copy is attached, the original instrument must be exhibited to the personal representative or court or judge on demand, unless it is lost or destroyed. If the original is lost or destroyed, then that fact must be stated in the claim [*Prob. Code § 9152(a)*].

If the claim, or part of it, is secured by a mortgage, deed of trust, or other lien that is recorded in the office of the recorder of the county in which the property subject to the lien is located, it is sufficient to describe the mortgage, deed of trust, or lien, and the recording reference for the instrument that created the mortgage, deed of trust, or other lien [*Prob. Code § 9152(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-454 California Forms of Pleading and Practice--Annotated § 454.53

§ 454.53 Amendment or Revision of Claim

[1] When Permitted

If a claim is filed within the time provided in *Prob. Code §§ 9100-9104* (time for filing claims), the creditor may later amend or revise the claim, subject to exceptions discussed in *§ 454.72[3][c]*. The amendment or revision must be filed in the same manner as the claim [*see Prob. Code § 9104(a)*].

[2] When Prohibited

An amendment or revision may not be made to increase the amount of the claim after the time for filing a claim has expired. An amendment or revision to specify the amount of a claim that, at the time of filing, was not due, was contingent, or was not yet ascertainable, however, is not an increase in the amount of the claim within the meaning of this provision [*Prob. Code § 9104(b)*].

An amendment or revision may not be made for any purpose after the earlier of the following times [*Prob. Code § 9104(c)*]:

- The time the court makes an order for final distribution of the estate;

- One year after letters are first issued to a general personal representative (however, this provision does not extend the time provided by *CCP § 366.2* or authorize allowance or approval of a claim barred by that section).

If letters are issued by more than one court, or if subsequent letters are issued by the same court, then the one-year amendment or revision period commences on the first issuance of letters to a general personal representative. In the case of a special administrator granted the powers of a general personal representative, the period commences to run on the first issuance of letters reciting the general powers of the special administrator [*see* Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9104, 20* Cal. L. Revision Com'n Reports 1570-1571 (1990)].

Legal Topics:

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

§§ 454.54[Reserved]

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39-454 California Forms of Pleading and Practice--Annotated § 454.70

§ 454.70 Decedent's Liability Covered by Insurance

[1] Recovery Within Policy Limits

An action to establish the decedent's liability for which the decedent was protected by insurance may be commenced or continued under *Prob. Code § 550*, and a judgment in the action may be enforced against the insurer, without first filing a claim against the estate [*Prob. Code § 9390(a)*; *see Prob. Code § 554(a)*]. However, the damages sought in the action must be within the limits and coverage of the insurance or recovery of damages outside the limits or coverage of the insurance must be waived [*see Prob. Code § 554(a)*].

This exception to the claim-filing requirement applies in any case in which there is a "claim" (as that term is defined in *Prob. Code § 9000* and discussed in *§ 454.11*) for damages for which the decedent was insured, whether for injury to or the death of a person caused by the decedent's wrongful act or neglect, or otherwise. Furthermore, this exception excuses a claim in probate only when the plaintiff is proceeding under *Prob. Code §§ 550-555*, whether or not the insurer has otherwise accepted defense of the cause or an appearance has been made on the decedent's behalf [*see* Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code §§ 550-555*, *20* Cal. L. Revision Com'n Reports 1203-1205 (1990)].

For discussion of the procedural aspects of actions under *Prob. Code §§ 550-555*, see *§ 454.130*.

[2] Recovery in Excess of Policy Limits

An action to establish the decedent's liability outside the limits or overage of the insurance may not be commenced or continued under *Prob. Code § 550* unless a claim is first made [*Prob. Code § 9390(b)*; *see Prob. Code § 554*].

[3] Insurer's Reimbursement

If the insurer seeks reimbursement under the insurance contract for any liability of the decedent including, but not limited to, deductible amounts in the insurance coverage and costs and attorney's fees for which the decedent is liable under the contract, an insurer defending an action under *Prob. Code § 550* must file a claim against the decedent's

estate. Failure to file a claim is a waiver of reimbursement under the insurance contract for any liability of the decedent [*Prob. Code § 9390(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 454.71 Enforcement of Security Interest in Estate Property

The holder of a mortgage or other lien on estate property (including a judgment lien) may commence an action to enforce the lien without first filing a claim, if in the complaint the lien holder expressly waives all recourse against other property in the estate [*Prob. Code § 9391*]. *Code Civ. Proc. § 366.2*, the general statue of limitations for actions brought on a liability of a deceased person, does not apply to such an action [*Prob. Code § 9391*; for discussion of *Code Civ. Proc. § 366.2*, see Ch. 345, *Limitation of Actions*]. However, the personal representative may petition the court to enjoin the action [*Prob. Code § 9391*]. The personal representative or any interested party may also request that the court determine the amount of expenses of administration that are reasonably related to the administration of the encumbered property, which are entitled to be paid before the lien is satisfied [*Prob. Code §§ 9391, 10361.5*; *see Prob. Code § 11420(a)(1)* (priority of payment of expenses of administration reasonably related to property encumbered by lien)]. For further discussion, see *Ch. 455, Probate: Sale of Estate Property, § 455.26*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-454 California Forms of Pleading and Practice--Annotated § 454.72

§ 454.72 Claims by Public Entities

[1] In General

With certain exceptions listed in *Prob. Code § 9201*, a claim by a public entity must be filed within the time otherwise provided in *Prob. Code §§ 9000-9399* [*Prob. Code § 9200(a)*; for discussion of when claims must be filed, *see § 454.50[1]*]. A claim not so filed is barred, including any lien imposed for the claim [*Prob. Code § 9200(a)*].

As used in *Prob. Code §§ 9200-9205* (claims by public entities), "public entity" has the meaning provided in *Gov. Code § 811.2*, and includes an officer authorized to act on behalf of the public entity [*Prob. Code § 9200(b)*]. *Gov. Code § 811.2* defines "public entity" to include the state, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state. *Prob. Code § 9200* does not govern obligations owed to the United States, which are governed by federal law [*see* Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9200*].

[2] Claims Governed by Special Statutes

Notwithstanding any other statute, if a claim of a public entity arises under a law, act, or code listed in *Prob. Code § 9201(b)*, the public entity may provide a form to be used for the written notice or request to the public entity required by *Prob. Code §§ 9200-9205*. When appropriate, the form may require the decedent's social security number, if known [*Prob. Code § 9201(a)(1)*]. The claim is barred only after written notice or request to the public entity and expiration of the period provided in the applicable section. If no written notice or request is made, the claim is enforceable by the remedies, and is barred at the time otherwise provided in the law, act, or code [*Prob. Code § 9201(a)(2)*].

The following special statutes govern claims against public entities [*see Prob. Code § 9201(b)*]:

Law, Act, or Code	Applicable Section
Sales and Use Tax Law [Rev. & Tax. Code §§ 6001-7176]	Rev. & Tax. Code § 6487.1
Bradley-Burns Uniform Local Sales and Use Tax	Rev. & Tax. Code § 6487.1

Law [Rev. & Tax. Code §§ 7200-7226]	
Transactions and Use Tax Law [Rev. & Tax. Code §§ 7251-7279.9]	Rev. & Tax. Code § 6487.1
Motor Vehicle Fuel License Tax Law [Rev. & Tax. Code §§ 7301-8526]	Rev. & Tax. Code § 7675.1
Use Fuel Tax Law [Rev. & Tax. Code §§ 8601-9355]	Rev. & Tax. Code § 8782.1
Administration of Franchise and Income Tax [Rev. & Tax. Code § 18401 et seq.]	
Cigarette Tax Law [Rev. & Tax. Code §§ 30001-30481]	Rev. & Tax. Code § 30207.1
Alcoholic Beverage Tax Law [Rev. & Tax. Code §§ 32001-32557]	Rev. & Tax. Code § 32272.1
State Hospitals for the Mentally Disordered [Welf. & Inst. Code §§ 7200-7375]	Welf. & Inst. Code § 7277.1
Medi-Cal Act [Welf. & Inst. Code §§ 14000-14198.2]	Prob. Code § 9202
Waxman-Duffy Prepaid Health Plan Act [Welf. & Inst. Code §§ 14200-14499.77]	Prob. Code § 9202

[3] Claim by State Department of Health Services

[a] Against Estate or Recipients of Decedent's Property

When a decedent has received health care services under the Medi-Cal Act (*Welf. & Inst. Code § 14000 et seq.*) or the Waxman-Duffy Prepaid Health Plan Act (*Welf. & Inst. Code § 14200 et seq.*), the California Department of Health Services may make a claim against the decedent's estate, or against any recipient of the decedent's property by distribution or survival, in an amount equal to the payments for the health care services received or the value of the property received by the recipient, whichever is less [*Welf. & Inst. Code § 14009.5(a)*].

The department can claim reimbursement from a Medi-Cal recipient's estate for benefits paid before June 28, 1981, the effective date of *Welf. & Inst. Code § 14009.5*, when the recipient died after that date [*Kizer v. Hanna (1989) 48 Cal. 3d 1, 13, 255 Cal. Rptr. 412, 767 P.2d 679* (disapproving *Estate of Messner (1987) 190 Cal. App. 3d 818, 235 Cal. Rptr. 495*); *Department of Health Services v. Fontes (1985) 169 Cal. App. 3d 301, 215 Cal. Rptr 14]* . Reimbursement for benefits paid before June 28, 1981, is authorized by *Welf. & Inst. Code § 14009.5* and constitutes neither an impermissible retroactive application of the statute nor an after-the-fact debt or liability of the recipient [*Kizer v. Hanna (1989) 48 Cal. 3d 1, 8-11, 255 Cal. Rptr. 412, 767 P.2d 679]* .

For purposes of Medi-Cal reimbursement, the term "estate" is broadly construed; recovery does not turn on technical differences in the character of how property is owned by a recipient of Medi-Cal benefits in order to permit recovery [*Bonta v. Burke (2002) 98 Cal. App. 4th 788, 793-794, 120 Cal. Rptr. 2d 72]* . The regulations define "estate" as all real and personal property and other assets in which the decedent had any legal title or interest at the time of death (to the extent of that interest), including assets conveyed to a dependent, survivor, heir, or assignee of the through joint tenancy, tenancy in common, survivorship, life estate, living trust, or annuities purchased on or after September 1, 2004 [*22 Cal. Code Reg. § 50960(d)(1)*]. Thus, for example, it has been held that the state has a claim for reimbursement of Medi-Cal expenses against the beneficiaries of real property conveyed to them by a recipient of health services who retained a life estate in the property and a right to revoke their interest [*Bonta v. Burke (2002) 98 Cal. App. 4th 788,*

789, 793-794,120 Cal. Rptr. 2d 72 (allowing state to recover as much as possible of costs of medical services provided to low-income persons also furthers purpose of Medicaid and Medi-Cal programs because recovered costs replenish program and allow state to provide future services)].

However, the Department of Health Services may not assert a Medi-Cal lien for costs incurred in treating a decedent's final illness against a recovery in a wrongful death action when this recovery does not and could not include these medical expenses. The statutes governing Medi-Cal liens in actions against third parties [*Welf. & Inst. Code § 14124.70 et seq.*] do not authorize these liens in wrongful death actions in which the plaintiff's recovery does not include medical expenses incurred by the decedent. Because the damages awarded in a wrongful death action are for the harm done to the survivors, not to the decedent, medical expenses for treating the decedent's final illness or injury are not recoverable. *Welf. & Inst. Code § 14124.71(a)* provides that when Medi-Cal benefits are provided to a beneficiary because of an injury for which another person is liable, the Department of Health Services has a right to recover from that person the reasonable value of the benefits provided. Because the damages awarded in a wrongful death action are compensation for the harm to the survivors rather than to the decedent, and because these damages do not include medical expenses in treating the decedent, the Department is not allowed to recover the decedent's medical expenses from the wrongful death damages. *Welf. & Inst. Code § 14124.72(c)* authorizes the Department to use the lien procedure to recover the value of Medi-Cal benefits only from a third party who may be liable for causing the beneficiary's death, not from the decedent's innocent survivors who have brought an action against the third party. Lien recovery is permitted only when the damages recovered from the third party include the cost of medical treatment or other benefits provided by Medi-Cal [*Fitch v. Select Products Co. (2005) 36 Cal. 4th 812, 819-822, 31 Cal. Rptr. 3d 591, 115 P.3d 1233]* .

[b] Against Surviving Spouse

If a Medi-Cal recipient dies leaving a surviving spouse, the department cannot make a claim against the surviving spouse during his or her lifetime [*Welf. & Inst. Code § 14009.5(b)(2)(A)*]. However, when the surviving spouse dies, the department is required to make a claim against the surviving spouse's estate, or against any person who received property from the surviving spouse by distribution or survival [*Welf. & Inst. Code § 14009.5(b)(2)(A)*]. The amount of the claim will be the amount paid for the medical assistance given to the recipient or the value of any of the recipient's property received by the surviving spouse through distribution or survival, whichever is less [*Welf. & Inst. Code § 14009.5(b)(2)(A)*]. Any statute of limitations that purports to limit the ability to recover for medical assistance does not apply to any claim made for reimbursement [*Welf. & Inst. Code § 14009.5(b)(2)(A)*].

[c] When Prohibited

The Department may not make a claim against the decedent's estate in any of the following circumstances:

- The decedent was under the age of 55 when the services were received, except where the decedent was an inpatient in a nursing facility [*Welf. & Inst. Code § 14009.5(b)(1)*].

- There is a surviving child who is under the age of 21 [*Welf. & Inst. Code § 14009.5(b)(2)(B)*].

- There is a surviving child who is blind, or permanently and totally disabled within the meaning of *42 U.S.C. § 1382c* [*Welf. & Inst. Code § 14009.5(b)(2)(C)*].

- During the lifetime of the surviving spouse, if any [*Welf. & Inst. Code § 14009.5(b)(2)(A)*; § 454.72[3][b]].

[d] Waiver of Claim

The Department of Health Services must waive its claim, in whole or in part, if it determines that enforcement of the

claim would result in substantial hardship to other dependents, heirs, or survivors of the decedent against whose estate the claim exists [*Welf. & Inst. Code § 14009.5(c)(1)*]. Furthermore, the department must notify individuals of this waiver provision and of the opportunity for a hearing to establish that a waiver should be granted [*Welf. & Inst. Code § 14009.5(c)(2)*].

For the purposes of *Welf. & Inst. Code § 14009.5*, the term "dependents" includes, but is not limited to, immediate family or blood relatives of the decedent [*Welf. & Inst. Code § 14009.5(d)(2)*].

[e] Notice and Filing of Claim

Not later than 90 days after the date letters are first issued to a general personal representative, the personal representative must give the Director of Health Services notice of the decedent's death in the manner provided in *Prob. Code § 215* if the personal representative knows or has reason to believe that the decedent received health care under the provisions of *Welf. & Inst. Code § 14000 et seq.* (the Medi-Cal Act) or 14200 et seq. (the Waxman-Duffy Prepaid Health Plan Act). Notice must also be given if the decedent was the surviving spouse of a person who received that health care [*Prob. Code § 9202(a)*; § 454.72[3][b]]. The director has four months after notice is given in which to file a claim [*Prob. Code § 9202(a)*]. To simplify administration, the time within which the notice must be made to the director runs from the date of issuance of letters rather than from the date of death [*see* Cal. L. Revision Comm'n Comment to 1987 enactment of *Prob. Code § 9202*].

The statute of limitations for a recovery action by the Department of Health Services seeking reimbursement for Medi-Cal benefits provided to a decedent begins running on the date on which notice under *Prob. Code § 215* is given, not on the date of the decedent's death [*Shewry v. Begil (2005) 128 Cal. App. 4th 639, 645, 27 Cal. Rptr. 3d 209]* . The three-year statute of limitations under *Code Civ. Proc. § 338(a)* applies to such an action, not the one-year statute of limitations under *Code Civ. Proc. § 366.2* [*Shewry v. Begil (2005) 128 Cal. App. 4th 639, 643-644, 27 Cal. Rptr. 3d 209]* . Laches is not available as a defense to the action [*Shewry v. Begil (2005) 128 Cal. App. 4th 639, 645-646, 27 Cal. Rptr. 3d 209]* . Prejudgment interest under *Civ. Code § 3287* may be awarded to the Department [*Shewry v. Begil (2005) 128 Cal. App. 4th 639, 646, 27 Cal. Rptr. 3d 209]* .

[4] Claim by Director of California Victim Compensation and Government Claims Board

Not later than 90 days after the date letters are first issued to a general personal representative, that representative or the estate attorney must give the Director of the California Victim Compensation and Government Claims Board notice of the decedent's death if the general personal representative or the estate attorney knows or has reason to believe that an heir of the decedent is confined in a prison or facility under the jurisdiction of the Department of Corrections or the Department of the Youth Authority, or is confined in any local correctional facility [*Prob. Code § 9202(b)*]. The notice must include a copy of the decedent's death certificate and must be mailed in accordance with the requirements of *Prob. Code § 1215* [*Prob. Code § 216*]. The Director has four months after notice is received within which to pursue collection of any outstanding restitution fines or orders [*Prob. Code § 9202(b)*].

[5] Claim by Franchise Tax Board

For those estates in which letters are first issued on or after July 1, 2008, no later than 90 days after the date letters are first issued to a general personal representative, that representative or estate attorney must give the Franchise Tax Board notice of the administration of the estate [*Prob. Code § 9202 (c)*]. The notice must be given in accordance with *Prob. Code § 1215* [for discussion, *see Ch. 447, Probate: Statutory Notice Requirements, § 447.17[2*]].

[6] Distribution Before Claim

Failure of a person to give the written notice or request required by *Prob. Code §§ 9200-9205* for claims by public entities does not affect the validity of any proceeding for the administration of a decedent's estate [*Prob. Code § 9203(a)*

].

If property in the estate is distributed before expiration of the time allowed a public entity to file a claim, the public entity has a claim against the distributees to the full extent of the public entity's claim, or of each distributee's share of the distributed property, whichever is less. The public entity's claim against distributees includes interest at the rate specified in *Rev. & Tax. Code § 19521* and any accruing costs that could be collected in the case of enforcement of a money judgment. The interest runs from the date of distribution or the date of filing the claim by the public entity, whichever is later [*Prob. Code § 9203(b)*].

[7] Effect on Priority of Claims

Nothing in *Prob. Code §§ 9200-9205* is to be construed to affect the order of priority of claims provided for under other provisions of law [*Prob. Code § 9204*].

[8] Limitations on Claims

Prob. Code §§ 9200-9205 do not apply to liability for the restitution of amounts illegally acquired through the means of a fraudulent, false, or incorrect representation, or through a forged or unauthorized endorsement [*Prob. Code § 9205*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLocal GovernmentsClaims By & Against

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[Reserved]

§§ 454.73[Reserved]

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§ 454.90 Allowance and Rejection of Claims by Personal Representative

[1] In General

When a claim is filed, the personal representative must allow or reject the claim in whole or in part [*Prob. Code § 9250(a)*; *Cal. Rules of Ct., Rule 7.401(1)*]. The allowance or rejection must be in writing [*Prob. Code § 9250(b)*; *Cal. Rules of Ct., Rule 7.401(1)*]. The personal representative must serve notice of and a copy of the allowance or rejection on the creditor and the creditor's attorney, and file the allowance or rejection, with a proof of service, with the court [*Prob. Code § 9250(b)*; *Cal. Rules of Ct., Rule 7.401(2), (3)*].

Prob. Code § 9250 does not apply to a demand the personal representative elects to treat as a claim under *Prob. Code § 9154* [*Prob. Code § 9250(e)*; *see § 454.51[3]*].

[2] Contents of Allowance or Rejection

The allowance or rejection must contain the following information [*Prob. Code § 9250(c)*]:

- The name of the creditor;
- The total amount of the claim;
- The date of issuance of letters;
- The date of the decedent's death;
- The estimated value of the decedent's estate;
- The amount allowed or rejected by the personal representative;
- Whether the personal representative is authorized to act under the Independent Administration of

Estates Act; and

- A statement that the creditor has 90 days in which to act on a rejected claim.

The Judicial Council may prescribe an allowance or rejection form, which may be part of the claim form. Use of a form prescribed by the Judicial Council is deemed to satisfy the requirements of *Prob. Code § 9250* [*Prob. Code § 9250(d)*]. For an illustration of the Judicial Council form for allowance or rejection, see *§ 454.292*.

[3] Notice of Allowance or Rejection

The personal representative must serve notice of and a copy of the allowance or rejection on the creditor and the creditor's attorney [*Prob. Code § 9250(b)* (notice to be pursuant to *Prob. Code § 1200 et seq.*; *Cal. Rules of Ct., Rule 7.401(2)* (service of copy on creditor and creditor's attorney)]. Neither the statute nor the rule requires that notice be given to any other person. For further discussion of the notice requirements, see Ch. 447, *Probate: Statutory Notice Requirements* .

[4] When Court Supervision Not Required

Under the Independent Administration of Estates Act (*Prob. Code § 10400 et seq.*), the personal representative may allow, pay, reject, contest, or compromise any claim without court supervision [*see* Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9250*; *see also Prob. Code § 10552* (power to act on claims against estate under independent administration authority)]. Except as to claims of the personal representative or the attorney, if the personal representative has authority to act under the Independent Administration of Estates Act, the court will not act on the personal representative's allowance or rejection of a creditor's claim, unless good cause is shown [*Cal. Rules of Ct., Rule 7.402*; *see also Prob. Code § 9252*, discussed in *§ 454.91[2]*]. However, court supervision is necessary when the personal representative is the creditor [*see* Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9250*; *see also Prob. Code § 9252*, discussed in *§ 454.91[2]*]. For further discussion of the Independent Administration of Estates Act, *see* Ch. 445, *Probate: Independent Administration of Estates* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 454.91 Allowance or Rejection of Claims by Court

[1] When Personal Representative Not Authorized to Act

If the personal representative is not authorized to act under the Independent Administration of Estates Act (*Prob. Code § 10400 et seq.*), then immediately on the filing of the allowance of a claim, the clerk must present the claim and allowance to the court or judge for approval or rejection [*Prob. Code § 9251(a)*]. On presentation of a claim and allowance, the court or judge may, in its discretion, examine the creditor and others on oath and receive any evidence relevant to the validity of the claim. The court or judge endorses on the claim whether the claim is approved or rejected, and the date [*Prob. Code § 9251(b)*].

[2] When Personal Representative Is Creditor

If the personal representative, or the attorney for the personal representative, is a creditor of the decedent, the clerk must present the claim to the court or judge for approval or rejection. The court or judge may, in its discretion, require the creditor to file a petition and give notice of hearing [*Prob. Code § 9252(a)*; for discussion of giving notice of hearing, *see* Ch. 447, *Probate: Statutory Notice Requirements*].

If the court or judge approves the claim, the claim is established and must be included with other established claims to be paid in the course of administration [*Prob. Code § 9252(b)*].

[3] Partial Allowance or Approval of Claim

The personal representative may allow a claim, or the court or judge may approve a claim, in part. The allowance or approval must state the amount for which the claim is allowed or approved [*Prob. Code § 9255(a)*; *see, e.g., § 454.292* (Judicial Council form of allowance or rejection)].

Legal Topics:

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

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§ 454.92 Effect of Statute of Limitations

A claim barred by the statute of limitations may not be allowed by the personal representative or approved by the court or judge [*Prob. Code § 9253*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationClaims Against EstatesRejected ClaimsEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesTime LimitationsEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral Overview

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39-454 California Forms of Pleading and Practice--Annotated § 454.93

§ 454.93 Effect of Failure to Act on Claim

If, within 30 days after a claim is filed, the personal representative or the court or judge has refused or neglected to act on the claim, then the refusal or neglect may, at the creditor's option, be deemed equivalent to giving a notice of rejection on the 30th day [*Prob. Code § 9256*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationClaims Against EstatesRejected ClaimsEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesTime LimitationsEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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39-454 California Forms of Pleading and Practice--Annotated §§ 454.94-454.109

[Reserved]

§§ 454.94[Reserved]

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39-454 California Forms of Pleading and Practice--Annotated § 454.110

§ 454.110 Action on Rejected Claim

[1] In General

A creditor who refuses to accept the amount allowed or approved in satisfaction of a claim may bring an action on the claim in the manner provided in *Prob. Code §§ 9350-9399* [*Prob. Code § 9255(b)*].

Prob. Code §§ 9350-9399 set forth procedures for actions on rejected claims in three situations:

- An action commenced against a decedent's personal representative on a cause of action against the decedent [*see Prob. Code §§ 9350-9354*];

- An action pending against the decedent at the time of death and continued against the decedent's personal representative [*see Prob. Code § 9370*]; or

- An action under *Prob. Code § 550* to establish the decedent's liability for which he or she was protected by insurance, whether or not pending at the time of death, with respect to amounts in excess of the insurance coverage [*see Prob. Code § 9390(b)*].

[2] Applicable Law

Prob. Code §§ 9350-9399 do not apply to actions commenced before July 1, 1989. The law in effect before July 1, 1989, continues to apply to an action commenced before July 1, 1989, notwithstanding its repeal by Stats. 1988, ch. 1199 [*Prob. Code § 9399*; *see generally* former *Prob. Code §§ 714* (for estate proceedings commenced before July 1, 1988) and 9257 (for estate proceedings commenced after July 1, 1988, but before July 1, 1989)].

[3] When Personal Representative Is Creditor

If the court or judge rejects a claim of the personal representative, or his or her attorney, as a creditor of the estate, the

personal representative, or the attorney, may bring an action against the estate. Summons is served on the judge, who then appoints an attorney, at the estate's expense, to defend the action [*Prob. Code § 9252(c)*]. If the personal representative or attorney fails to recover in the action on the claim, the personal representative or attorney must pay costs, and may be required to pay reasonable litigation expenses, including attorney's fees [Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9252*; *see Prob. Code § 9354(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-454 California Forms of Pleading and Practice--Annotated § 454.111

§ 454.111 Claim on Action Commenced After Death

[1] Prerequisite to Suit

Subject to *Prob. Code § 9000 et seq.* (creditor claims), a cause of action against a decedent that survives may be asserted against the decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest [*Code Civ. Proc. § 377.40*]. Such a cause of action may not be commenced unless a claim is first filed under Section 9000 et seq. and the claim is rejected in whole or in part [*Prob. Code § 9351*].

Prob. Code § 9351 relates only to an action against the personal representative. It does not affect actions against other persons who may be liable for the decedent's debts, such as those under *Prob. Code §§ 550-554* (liability of decedent covered by insurance), 13100-13116 (affidavit procedure for collection or transfer of personal property), and 13550-13554 (affidavit procedure for collection of debts owed deceased spouse) [*see* Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9351*].

[2] Time for Commencement

A claim rejected in whole or in part is barred as to the part rejected unless, within the following times, the creditor commences an action on the claim, or the matter is referred to a referee or to arbitration, excluding the time during which there is a vacancy in the office of the personal representative [*Prob. Code § 9353*]:

- If the claim is due at the time the notice of rejection is given, 90 days after the notice is given;

- If the claim is not due at the time the notice of rejection is given, 90 days after the claim becomes due.

An action on a rejected claim must be commenced within the time prescribed above, regardless of whether the statute of limitations otherwise applicable to the claim will expire before or after the foregoing times [*see Prob. Code § 9353(a)*].

At one time, the California courts held that a "nonclaim statute" (*i.e.*, a statute barring a judicial action unless it is commenced within a specified period after rejection of a claim) may shorten but cannot lengthen the limitations period otherwise applicable to a claim [*see, e.g., Barclay v. Blackinton (1899) 127 Cal. 189, 193, 59 P. 834]* . However, the Court of Appeal has held that this former rule has no application to the current statutory scheme. *Prob. Code § 9353(a)* clearly states that the three-month period applies "regardless of whether the statute of limitations otherwise applicable to a claim will expire before or after" that time. Thus, the Court of Appeal has held that an action is not barred if it is brought within three months after notice of rejection is given, even when the statute of limitations otherwise applicable expires before the end of the three months, or before the creditor's claim was filed [*Anderson v. Anderson (1995) 41 Cal. App. 4th 135, 138-140, 48 Cal. Rptr. 2d 642]* .

The filing of a claim, or a petition under *Prob. Code § 9103* to file a claim, tolls the statute of limitations otherwise applicable to the claim until allowance, approval, or rejection [*Prob. Code § 9352(a)*; for discussion of *Code Civ. Proc. § 366.2*, the statute of limitations "otherwise applicable" in an action against a decedent, *see* Ch. 345, *Limitation of Actions*]. Additionally, the allowance or approval of a claim in whole or in part further tolls the statute of limitations during the administration of the estate as to the part allowed or approved [*Prob. Code § 9352(b)*].

For a complaint against a personal representative on a rejected claim, see *§ 454.294*. For demurrers to the complaint for failure to allege the filing of the claim or failure to commence the action within the statutory period, see *§§ 454.296* and *454.297*, respectively. For an affirmative defense for failure to sue on the rejected claim within the statutory period, see *§ 454.298*.

[3] Venue

In addition to any other county in which an action may be commenced, an action on the claim may be commenced in the county in which the proceeding for administration of the decedent's estate is pending [*Prob. Code § 9354(a)*].

[4] Notice of Pendency of Action

The plaintiff must file a notice of the pendency of the action with the court clerk in the estate proceeding, together with proof of giving a copy of the notice to the personal representative as provided in *Prob. Code § 1215* (notice by mail). Personal service of a copy of the summons and complaint on the personal representative is equivalent to the filing and giving of the notice [*Prob. Code § 9354(b)*]. For a notice of pendency of the action, see *§ 454.295*.

Any property distributed under court order, or any payment properly made before the notice of pendency of action is filed and given is not subject to the claim. The personal representative, distributee, or payee is not liable on account of the prior distribution or payment [*Prob. Code § 9354(b)*].

[5] Costs and Attorney's Fees

The prevailing party in the action shall be awarded court costs. Additionally, if the court determines that the prosecution or defense of the action against the prevailing party was unreasonable, the prevailing party must be awarded reasonable litigation expenses, including attorney's fees [*Prob. Code § 9354(c)*]. However, the creditor may not recover costs in the action unless he or she recovers an amount greater than that allowed or approved [*Prob. Code § 9255(b)*].

Legal Topics:

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39-454 California Forms of Pleading and Practice--Annotated § 454.112

§ 454.112 Summary Determination of Disputed Claim

[1] In General

As an alternative to litigation of a disputed claim in an independent action under *Prob. Code § 9353* [*see § 454.111*], the disputed claim may be submitted for summary determination to a temporary judge or consenting judge, or to arbitration, under *Prob. Code § 9620* or *9621* [*see Prob. Code §§ 9353(a), 9620, 9621*].

[2] Submission of Dispute to Temporary Judge

If there is a dispute relating to the estate between the personal representative and a third person, the personal representative may enter into an agreement in writing with the third person to refer the dispute to a temporary judge designated in the agreement. The agreement must be filed with the clerk, who then, with the approval of the court, enters an order referring the matter to the designated person. The temporary judge must proceed promptly to hear and determine the matter in controversy by summary procedure, without pleadings or discovery [*Prob. Code § 9620(a)*]. Summary proceedings under *Prob. Code § 9620* do not include a right to a jury trial [*see* Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9620*; *see also Estate of Beach (1975) 15 Cal. 3d 623, 642, 125 Cal. Rptr. 570, 542 P.2d 994]* .

The decision of the designated person is subject to the requirements of *Code Civ. Proc. § 632* (statement of decision) [*see* Ch. 529, *Statement of Decision* , for further discussion]. Judgment is entered on the decision, and is valid and effective as if rendered by a judge of the court in an action against the personal representative or the third person commenced by ordinary process [*Prob. Code § 9620(a)*].

Under *Prob. Code § 9620*, any member of the State Bar, including a court commissioner or referee, may be appointed as a temporary judge. Additionally, *Prob. Code § 9620* does not require that the temporary judge try the matter in a regular courtroom; the temporary judge may try the matter at his or her office or at any other place [*see* Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9620*].

[3] Submission of Dispute to Consenting Judge

As an alternative to submitting the dispute to a temporary judge, the personal representative may enter into a written agreement with the third person that a judge may hear and determine the dispute pursuant to the procedure provided in *Prob. Code § 9620(a)* [*Prob. Code § 9620(b)*; *see* discussion of procedure in § 454.112[2]]. The written consent of the judge to hear and determine the dispute pursuant to the agreement is required. Both the agreement and the judge's consent must be filed with the clerk within the time specified in *Prob. Code § 9353* (action on rejected claim) for bringing an independent suit on the matter in dispute [*Prob. Code § 9620(b)*; *see* discussion on time requirements in § 454.111[2]].

[4] Submission of Dispute to Arbitration

If there is a dispute relating to the estate between the personal representative and a third person, the personal representative may enter into an agreement in writing with the third person to submit the dispute to arbitration under *Code Civ. Proc. § 1280 et seq.* However, the agreement is not effective unless it is first approved by the court and a copy of the approved agreement is filed with the court [*Prob. Code § 9621*].

Notice of the hearing on the petition for approval of the agreement must be given as provided in *Prob. Code § 1220* (mailing notice of hearing). The order approving the agreement may be made ex parte [*Prob. Code § 9621*; *see* discussion and forms relating to notice in Ch. 447, *Probate: Statutory Notice Requirements*].

In conventional arbitration pursuant to *Code Civ. Proc. §§ 1280-1294.2*, there is no right to trial de novo, and even though the court may correct or vacate an award, the grounds for doing so are limited. Furthermore, there is no right to a jury trial when an arbitration award as contemplated by *Prob. Code § 9621* is confirmed [*see* Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9621*]. For further discussion and forms for use in arbitration proceedings, see Ch. 34, *Contractual Arbitration: Judicial Review* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-454 California Forms of Pleading and Practice--Annotated § 454.113

§ 454.113 Claim on Action or Proceeding Pending at Death

On motion, the court must allow a pending action or proceeding against the decedent that does not abate to be continued against the decedent's personal representative or, to the extent provided by statute, against the decedent's successor in interest. However, the court may not permit an action or proceeding to be continued against the personal representative unless proof of compliance with *Prob. Code § 9000 et seq.* (creditor claims) is first made [*Code Civ. Proc. § 377.41*]. Specifically, the following conditions must be satisfied [*Prob. Code § 9370(a)*]:

- A claim has been first filed as provided in *Prob. Code §§ 9000-9399*;

- The claim has been rejected in whole or in part; and

- Within three months after the notice of rejection is given, the plaintiff applies to the court in which the action or proceeding is pending for an order to substitute the personal representative in the action or proceeding. This subparagraph only applies if the notice of rejection contains a statement that the plaintiff has three months within which to apply for an order for substitution. For forms for use in substituting a personal representative in a pending action or proceeding, see Ch. 21, *Amended and Supplemental Pleadings* .

No recovery is allowed in the action against property in the decedent's estate unless proof is made of compliance with *Prob. Code § 9370* [*Prob. Code § 9370(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSubstitutionsDeath of PartyEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesRejected ClaimsEstate, Gift & Trust LawProbateProcedures in

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39-454 California Forms of Pleading and Practice--Annotated §§ 454.114-454.129

[Reserved]

§§ 454.114[Reserved]

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2. Action To Establish Decedent's Insured Liability

39-454 California Forms of Pleading and Practice--Annotated § 454.130

§ 454.130 Liability Covered by Insurance

[1] In General

Subject to the provisions of *Prob. Code §§ 550-555*, an action to establish the decedent's liability for which the decedent was protected by insurance may be commenced or continued against the decedent's estate without the need to join as a party the decedent's personal representative or successor in interest [*Prob. Code § 550(a)*]. This remedy is cumulative and may be pursued concurrently with other remedies [*see Prob. Code § 550(b)*].

Prob. Code §§ 550-555 apply uniformly to actions pending at the decedent's death and actions commenced after the decedent's death [*see Prob. Code § 550(a)*]. *Prob. Code §§ 550-555* do not apply to an action commenced before July 1, 1989 [*Prob. Code § 555(a)*]. The applicable law in effect before July 1, 1989, continues to apply to an action commenced before that date, notwithstanding its repeal by Stats. 1988, ch. 1199 [*Prob. Code § 555(a)*; *see generally* former *Code Civ. Proc. § 385(b)* (continuation of action against decedent on liability covered by insurance); former Prob. Code §§ 707, 709.1, 709, 721].

[2] Statute of Limitations

If the limitation period otherwise applicable to the action has not expired at the time of the decedent's death, an action underProb. Code §§ 550-555may be commenced within one year after the expiration of the limitation period otherwise applicable [*Prob. Code § 551*]. This provision applies notwithstanding *Code Civ. Proc. § 366.2* (time for commencing action if prospective defendant dies before expiration of statute of limitations), which normally overrides the statute of limitations otherwise applicable to provide that the action must be commenced within one year after the decedent's death [*see Prob. Code § 551*; *see also Code Civ. Proc. § 366.2*, discussed in Ch. 345, *Limitation of Actions*].

[3] Procedure

[a] Named Defendant and Service of Summons

An action under *Prob. Code §§ 550-555* names "Estate of (name of decedent), Deceased" as the defendant. Summons is served on a person designated in writing by the insurer; if none is designated, summons is served on the insurer. Further proceedings are in the estate's name, and are otherwise conducted in the same manner as if the action were against the personal representative [*Prob. Code § 552(a)*].

[b] Appointment and Substitution of Personal Representative

On motion of an interested person, or on its own motion, the court in which the action is pending may, for good cause, order the appointment and substitution of a personal representative as the defendant [*Prob. Code § 552(b)*]. For forms for use in appointing and substituting a personal representative as defendant in a pending action, see Ch. 21, *Amended and Supplemental Pleadings* .

[c] Consolidation

An action against the decedent's estate under *Prob. Code §§ 550-555* directed toward collecting from the insurance proceeds may be consolidated with an action against the personal representative for collection of amounts in excess of the insurance proceeds. Consolidation may be appropriate since the issues relating to liability are the same [*see Prob. Code § 552(c)*; *see also* Cal. L. Revision Comm'n Comment to *Prob. Code § 552*]. For further discussion of the consolidation of actions, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

[4] Defense of Action

The insurer may deny or otherwise contest its liability in an action under *Prob. Code §§ 550-555* or by an independent action. Unless the personal representative is joined as a party, a judgment in either type of action does not adjudicate rights by or against the estate [*Prob. Code § 553*].

[5] Damages

Except as discussed below, either the damages sought in an action under *Prob. Code §§ 550-555* must be within the limits and coverage of the insurance, or recovery of damages outside the limits or coverage of the insurance must be waived. A judgment in favor of the plaintiff in the action is enforceable only from the insurance coverage, and not against property in the estate [*Prob. Code § 554(a)*].

When the amount of damages sought in the action exceeds the coverage of the insurance, the foregoing limitations do not apply if both of the following conditions are satisfied [*Prob. Code § 554(b)*]:

- The personal representative is joined as a party to the action; and
- The plaintiff files a claim in compliance with *Prob. Code § 9390*.

Legal Topics:

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

§§ 454.131[Reserved]

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3. Small Estate Set-Aside

39-454 California Forms of Pleading and Practice--Annotated § 454.150

§ 454.150 Unsecured Creditor's Action in Case of Small Estate Set-Aside

Prob. Code §§ 6600-6615 establish a procedure for setting aside a decedent's estate to his or her surviving spouse and minor children, or one or more of them, if the net estate, as defined, does not exceed $20,000 [*see Prob. Code §§ 6602, 6609*; for discussion and forms, *see* Ch. 441, *Probate: Disposition Without Administration*].

The person or persons who take title under an order setting aside a small estate are personally liable for the unsecured debts of the decedent [*Prob. Code § 6611(a)*]. This liability is limited, however, to the fair market value at the date of the decedent's death of the property title to which vested in that person pursuant to *Prob. Code § 6609*, less the total of all of the following [*Prob. Code § 6611(b)*]:

- The amount of any liens and encumbrances on that property;

- The value of any probate homestead interest set apart under *Prob. Code § 6520* out of that property; and

- The value of any other property set aside under *Prob. Code § 6510* out of that property.

The decedent's surviving spouse, child or children, or the guardian of the decedent's minor child or children, may assert any defense, cross complaint, or setoff that would have been available to the decedent [*Prob. Code § 6611(c)*].

If proceedings are commenced for the administration of a decedent's estate and the time for filing or presenting claims has commenced, any action on the personal liability of a person for the decedent's unsecured debts is generally barred to the same extent as provided for claims under *Prob. Code §§ 9000-9399* [*Prob. Code § 6611(d)*]. The following creditors, however, are specifically excepted from this bar and may bring an action against the person who is liable [*Prob. Code § 6611(d)*]:

- Creditors who commence judicial proceedings for the enforcement of the debt and serve the person

liable with the complaint prior to the expiration of the time for filing claims;

- Creditors who have or secure an acknowledgment in writing of the person liable that that person is liable for the debts; or

- Creditors who file a timely claim in the proceedings for the administration of the estate of the decedent.

An action brought under *Prob. Code § 6611(d)* is governed by the statute of limitations established in *Code Civ. Proc. § 366.2* [*see Prob. Code § 6611(e)*]. *Code Civ. Proc. § 366.2* provides that, if a person against whom an action may be brought on the liability of the person dies before expiration of the applicable limitation period, and if the cause of action survives, an action may be commenced within one year after the date of death, and the limitation period that would have been applicable does not apply [*Code Civ. Proc. § 366.2(a)*]. This limitation period applies to all types of actions, whether they arise in contract, tort, or otherwise, and whether they are accrued or not accrued [*Code Civ. Proc. § 366.2(a)*].

The limitations period under *Code Civ. Proc. § 366.2* cannot be tolled or extended for any reason except as follows [*Code Civ. Proc. § 366.2(b)*]:

- The statutes governing claims against the probate estate [*see Prob. Code § 9000 et seq.* (creditor claims in administration of estates of decedents); which are discussed in this chapter];

- The statutes governing claims against the assets of revocable trusts [*see Prob. Code § 19000 et seq.* (payment of claims debts, and expenses from revocable trust of deceased settlor); for discussion, see Ch. 560, *Trusts*]; and

- The former statutes governing no contest clauses, as they read prior to repeal by Stats 2008 ch. 174, effective January 1, 2010 [*see* former *Prob. Code § 21300* (no contest clauses; repealed 1/1/2010); for discussion, *see* Ch. 444, *Probate: Will Contests*].

Code Civ. Proc. § 366.2 applies only to actions founded on the liability of persons who died on or after January 1, 1993 [*Code Civ. Proc. § 366.2(c)*]. A comparable one-year statute applies to actions founded on the liability of persons who died on or after January 1, 1991, but before January 1, 1993 [*compare* former *Code Civ. Proc. § 366.2 with* former *Code Civ. Proc. § 353(b)*]. Longer limitation period may apply to actions founded on the liability of persons who died before January 1, 1991 [*see* former *Code Civ. Proc. § 353(c), (d)* (setting forth different limitation periods)].

Legal Topics:

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[Reserved]

§§ 454.151[Reserved]

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39-454 California Forms of Pleading and Practice--Annotated § 454.170

§ 454.170 Compromise of Claims

[1] Without Court Authorization

Unless *Prob. Code §§ 9830-9839* (governing the compromise of claims and actions) or some other applicable statute requires court authorization or approval, the personal representative may, without court authorization, instruction, approval, or confirmation, compromise or settle a claim, action or proceeding against the decedent, the personal representative, or the estate if it is to the advantage of the estate [*see Prob. Code § 9830(a)*]. The personal representative must exercise ordinary care and diligence in determining whether to exercise and in exercising a power granted by *Prob. Code § 9830* [*see* Cal. Law Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9830*].

The personal representative is not precluded from seeking court authorization, pursuant to the provisions of *Prob. Code §§ 9830-9839*, to exercise any of the powers granted by *Prob. Code § 9830* [*Prob. Code § 9830(b)*], and may find it to his or her advantage to do so, especially when in doubt as to the appropriate action to take [*see Prob. Code § 7250* (order as releasing personal representative from liability), discussed in *§ 454.170[4][d]*; *see also* Cal. Law Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9830*].

If the estate proceedings were commenced before July 1, 1988, the executor or administrator may similarly compromise a claim, but only after the lapse of 60 days from the issuance of letters testamentary or of administration, and only on approval of the court [*see* former Prob. Code § 718.5].

For discussion of a personal representative's power to compromise claims by or for the benefit of the estate, see Ch. 450, *Probate: Collecting Assets* .

[2] Limitation on Personal Representative's Authority

On the petition of an interested person, or on the court's own motion, the court may limit the authority of the personal representative under *Prob. Code § 9830(a)*. Notice of the hearing on the petition must be given as provided in *Prob. Code § 1220* (mailed notice of hearing) [*Prob. Code § 9830(c)*; *see* discussion and forms relating to notice in Ch. 447,

Probate: Statutory Notice Requirements].

Under *Prob. Code § 9830(c)*, the court may require, for example, prior authorization for any compromise or settlement of a particular matter or a particular kind of matter; the court may even order that no compromise or settlement be made unless it has first been authorized by the court. Additionally, a creditor or other interested person may seek an order that limits the personal representative's authority to take action under *Prob. Code § 9830* without prior authorization [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 9830*].

[3] When Court Authorization Required

[a] Claim Period Not Expired

Unless the time for filing creditor's claims has expired, authorization by court order is required for a compromise or settlement of a claim, action, or proceeding against the decedent, the personal representative, or the estate [*Prob. Code § 9831*].

[b] Matters Affecting Real Property

Except as provided in *Prob. Code § 9832(b)*, relating to leases, authorization by court order is required for a compromise, settlement, extension, renewal, or modification that affects any of the following [*Prob. Code § 9832(a)*]:

- Title to real property;
- An interest in real property or a lien or encumbrance on real property;
- An option to purchase real property or an interest in real property.

For discussion of a personal representative's power to extend, renew, or modify specified leases of real property without prior authorization, *see* Ch. 450, *Probate: Collecting Assets* .

[c] Transaction in Excess of $25,000

Authorization by order of court is required for a compromise or settlement of a matter when the transaction requires the transfer or encumbrance of property of the estate, or the creation of an unsecured liability of the estate, or both, in an amount or value in excess of $25,000 [*Prob. Code § 9833*].

Even though *Prob. Code § 9833* does not require court authorization for a compromise or settlement when the amount to be paid or charged against the estate is not more than $25,000, another provision of the Probate Code may require court authorization in the particular case, for example under *Prob. Code § 9832* (discussed in *§ 454.170[3][b]*) [*see* Cal. Law Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9833*].

[4] Procedure to Obtain Authorization

[a] Jurisdiction

The court authorization required by *Prob. Code § 9830 et seq.* must be obtained from the court in which the estate is being administered [*Prob. Code § 9836*]. *Prob. Code § 9836* applies whether or not the claim or matter is the subject of a pending action or proceeding [*see* Cal. Law Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9836*].

[B] Petition for Authorization

A petition for an order authorizing a compromise, settlement, extension, renewal, or modification under *Prob. Code § 9830* may be filed by the personal representative or by any interested person who has the personal representative's written approval to file the petition [*Prob. Code § 9837(a)*; *see Prob. Code § 48* (definition of "interested person")].

The petition must show the terms of the compromise, settlement, extension, renewal, or modification and its advantage to the estate [*Prob. Code § 9837(b)*]. At least 15 days before the hearing, notice of the time and place of the hearing must be given as provided in *Prob. Code § 1220* [*Prob. Code § 9837(c)*]. For further discussion of notice requirements, see Ch. 447, *Probate: Statutory Notice Requirements* .

For a form of petition to authorize a compromise, and for forms of sample allegations for use in the petition, see *§§ 454.299 -454.301*. For orders authorizing a compromise, see *§§ 454.302 -454.304*.

[c] Transfer of Estate Real Property

If an order made under *Prob. Code § 9837* authorizes a compromise or settlement that requires the transfer of real property of the estate, the personal representative shall execute a conveyance of the real property to the person entitled to it under the compromise or settlement. The conveyance must refer to the order authorizing the compromise or settlement and directing that the conveyance be executed. A certified copy of the order must be recorded in the office of the recorder of the county in which the real property or any portion of it lies [*Prob. Code § 9838(a)*].

A conveyance made in compliance with the court order authorizing the compromise or settlement and directing the conveyance to be executed vests both of the following in the person to whom the property is transferred [*Prob. Code § 9838(b)*]:

- All the right, title, and interest that the decedent had in the property at the time of the decedent's death;

- Any other or additional right, title, or interest in the property acquired by the decedent's estate, by operation of law or otherwise, prior to the transfer.

[d] Effect of Order

When an order affecting the administration of a decedent's estate becomes final, it releases the personal representative and the sureties from all claims of the heirs or devisees and of any persons affected thereby based on any act or omission directly authorized, approved, or confirmed in the order [*see Prob. Code § 7250(a)*]. If the judgment or order was obtained by fraud, conspiracy, or misrepresentation as to a material fact, Section 7250 does not provide any release [*see Prob. Code § 7250(c)*].

[5] Claim Paid for Less Than Full Amount

If the personal representative pays a claim for less than its full amount, the personal representative's accounts may be credited only for the amount actually paid [*Prob. Code § 9839*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesClaims By & AgainstEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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Chapter 454 PROBATE: CLAIMS AGAINST THE ESTATE
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F. Claims in Litigation
4. Compromise Of Claims Against Estate

39-454 California Forms of Pleading and Practice--Annotated §§ 454.171-454.189

[Reserved]

§§ 454.171[Reserved]

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39-454 California Forms of Pleading and Practice--Annotated § 454.190

§ 454.190 Contest of Allowed and Approved Claims

[1] In General

The validity of an allowed or approved claim, other than a claim established by a judgment, may be contested by any interested person at any time before settlement of the report or account of the personal representative in which it is first reported as an allowed or approved claim [*Prob. Code § 9254*; *see also Prob. Code § 11001(a)* (all matters relating to an account may be contested for cause shown, including the validity of an allowed or approved claim not reported in a previous account and not established by judgment)]. The burden of proof is on the contestant, except when the personal representative has acted under the Independent Administration of Estates Act, in which case the burden of proof is on the personal representative [*Prob. Code § 9254*].

The sections below generally discuss procedures for contesting allowed or approved claims under *Prob. Code §§ 11000-11005*. For further discussion of and forms for use in contesting other aspects of accounts, *see* Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation* .

[2] By Interested Person

An interested person may, for cause shown, contest all matters relating to an account, including the validity of an allowed or approved claim not reported in a previous account and not established by judgment [*Prob. Code § 11001(a)*; *see Prob. Code § 1043(a),(b)*]. A creditor is an interested person [*see Prob. Code § 48* (defining "interested person"); *Estate of McMillin (1956) 46 Cal. 2d 121, 127, 292 P.2d 881* (construing former Prob. Code § 927)].

[3] Manner of Objecting

An interested person may appear and respond or object to the account [*see Prob. Code §§ 1040, 1043*]. The objection is required to be in writing and verified; it may be filed at or before the hearing on the account [*see Prob. Code §§ 1020, 1021*; *but see Prob. Code § 1043(b),(c)* (authorizing oral response or objection at hearing and allowing court to hear and determine issue or grant continuance to allow response or objection to be made in writing, but providing that request for

continuance does not constitute a response or an objection)].

[4] Hearing on Account

The court may conduct any hearing that may be necessary to settle the account, and may cite the personal representative to appear before it for examination [*Prob. Code § 11002(a)*]. There is no right to a jury trial in the proceeding [*see Prob. Code § 825*; *see also* Cal. Law Revision Comm'n Comment to *Prob. Code § 11002*]. The court may appoint one or more referees to examine and make a report on the account, subject to court confirmation, and may allow a reasonable compensation to the referee or referees to be paid out of the estate [*Prob. Code § 11002(b)*]. Finally, the court may make any orders it deems necessary to effectuate the above provisions [*Prob. Code § 11002(c)*].

For discussion of other procedural issues involved in contesting an account, including notice of the hearing on the settlement of the account and the scope and content of orders, see Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation* .

[5] Sanctions

[a] For Bad Faith Contest of Claim

If the court determines that the contest of a claim was without reasonable cause and in bad faith, the court may award against the contestant the personal representative's compensation and costs, together with other expenses and costs of litigation incurred to defend the account, including attorney's fees. The amount awarded is a charge against the contestant's interest, if any, in the estate, and the contestant is personally liable for any amount that remains unsatisfied [*Prob. Code § 11003(a)*].

[b] For Bad Faith Opposition to Contest of Claim

If, on the other hand, the court determines that the opposition to the contest was without reasonable cause and in bad faith, the court may award the contestant his or her costs, together with other expenses and costs of litigation, including attorney's fees, incurred to contest the claim. The amount awarded is a charge against the compensation or other interest of the personal representative in the estate. The personal representative is liable personally and on his or her bond, if any, for any amount that remains unsatisfied [*Prob. Code § 11003(b)*].

[6] Payment of Claims Not Properly Filed

If a debt has been paid within the time prescribed in *Prob. Code § 9154* (claim filing period plus 30 days) but without a claim having been filed and established in the manner prescribed by statute, in settling the account the court shall allow the amount paid if all of the following are proven [*Prob. Code § 11005*]:

- The debt was justly due.
- The debt was paid in good faith.
- The amount paid did not exceed the amount reasonably necessary to satisfy the indebtedness.
- The estate is solvent.

The requirement that the debt must have been paid within the time prescribed in *Prob. Code § 9154* codifies the effect of existing case law [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 11005* (citing *Estate of Erwin (1953) 117 Cal. App. 2d 203, 205, 255 P.2d 97*)]. If the personal representative recognizes or acknowledges the debt, for example by partial payment of it, within the time prescribed in *Prob. Code § 9154*, then it appears that, if the amount

paid meets the requirements of *Prob. Code § 11005* set forth above, the court should have the authority to approve full payment of the debt [*see Estate of Sturm (1988) 201 Cal. App. 3d 14, 18, 246 Cal. Rptr. 852* (decided under prior law, but explicitly relying on Estate of Erwin)].

[7] Conclusiveness of Order

Generally, an order settling an account is conclusive against all interested persons [*see* Prob. Code § 11006(a)]. However, a person under legal disability has the right, at any time before entry of an order for final distribution of the estate, to move for cause to reopen and examine the account, or to proceed by action against the personal representative or the sureties on the bond. In that action, the order settling the account is prima facie evidence of the correctness of the account [Prob. Code § 11006(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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[Reserved]

§§ 454.191[Reserved]

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39-454 California Forms of Pleading and Practice--Annotated § 454.210

§ 454.210 Payment of Debts

[1] Definitions

A "debt" means any of the following [*Prob. Code § 11401*]:

- A claim that is established under *Prob. Code §§ 9000-9399* (creditor claims) or that is otherwise payable in the course of administration;
- An expense of administration;
- A charge against the estate including, but not limited to, taxes, expenses of last illness, and family allowance.

A "wage claim" means a claim for wages, not exceeding $2,000, of each employee of the decedent for work done or personal services rendered within 90 days before the decedent's death [*Prob. Code § 11402*].

[2] Priority for Payment

Debts must be paid in the following order of priority among classes of debts, except that debts owed to the United States or to California that have preference under federal or state law must be given the preference required by those laws [*Prob. Code § 11420(a)*; *see, e.g., Rev. & Tax Code § 19516* (priority of tax claims)]:

- Expenses of administration.
- Obligations secured by a mortgage, deed of trust, or other lien, including, but not limited to, a judgment lien, in the order of their priority, so far as they may be paid out of the proceeds of the property subject to the lien. If the proceeds are insufficient, the part of the obligation remaining unsatisfied must be classed with general debts, below.

- Funeral expenses.
- Expenses of last illness.
- Family allowance.
- Wage claims.
- General debts, including judgments not secured by a lien and all other debts not included in a prior class.

With respect to obligations secured by a mortgage, deed of trust, or other lien (the second category above), only expenses of administration (the first category, above) that are reasonably related to the administration of the property by which the obligations are secured are entitled to priority over those obligations [*Prob. Code § 11420(a)(1)*]. When encumbered property is sold, the personal representative or any interested party may petition the court for an order determining the amount of the expenses of administration that are reasonably related to the administration of the encumbered property [*Prob. Code § 10361.5*]. However, the petition must be made before payment is made to satisfy the liens [*Prob. Code § 10361.5*]. For further discussion, see *Ch. 455, Probate: Sale of Estate Property, § 455.26*.

Except as otherwise provided by statute, the debts of each class are without preference or priority one over another. No debt of any class may be paid until all those of prior classes are paid in full. If property in the estate is insufficient to pay all debts of any class in full, each debt in that class must be paid a proportionate share [*Prob. Code § 11420(b)*].

A claim for federal taxes is entitled to priority over other claims against an estate, including claims that have previously been reduced to judgment liens, even when no notice of the tax claim has been given. *I.R.C. § 6323(a)*, which provides that a tax lien is not valid against a judgment lien creditor until notice of the tax lien has been properly filed, does not operate as an exception to *31 U.S.C. § 3713*, the federal insolvency statute, which provides that a claim of the United States government must be paid first when the estate of the deceased debtor is not enough to pay all debts of the deceased debtor [*Estate of Silberman (1995) 39 Cal. App. 4th 1533, 1542, 46 Cal. Rptr. 2d 610]* .

[3] Immediate Payment of Priority Debts

Subject to *Prob. Code § 11420* (priority for payment of debts), as soon as the personal representative has sufficient funds, after retaining sufficient funds to pay expenses of administration, the personal representative must pay the following [*Prob. Code § 11421*]:

- Funeral expenses.
- Expenses of last illness.
- Family allowance.
- Wage claims.

[4] Payment of Debts on Court Order

Except as provided in *Prob. Code § 11421* (immediate payment of priority debts, discussed in *§ 454.210[3]*), the personal representative is not required to pay a debt until payment has been ordered by the court [*Prob. Code § 11422(a)*].

On the settlement of any account of the personal representative after the expiration of four months after the date letters are first issued to a general personal representative, the court will order payment of debts as the circumstances of the estate permit. If the property in the estate is insufficient to pay all the debts, the order must specify the amount to be paid to each creditor [*Prob. Code § 11422(b)*].

For further discussion of settlement of accounts, *see* Ch. 458C, *Probate: Preliminary Distribution and Partial Allowance of Compensation* , and Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation* .

[5] Accrual of Interest on Debts

Generally, interest accrues on a debt from the date the court orders payment of the debt until the date the debt is paid. Interest accrues at the legal rate on judgments [*Prob. Code § 11423(a)*; *see Code Civ. Proc. § 685.010*; *see also* Ch. 318, *Judgments*].

In the case of a debt based on a written contract, interest accrues at the rate specified in and in accordance with the terms of the contract. The personal representative may, by order of the court, pay all or part of the interest accumulated and unpaid at any time when there are sufficient funds, whether the debt is then due or not [*Prob. Code § 11423(b)*].

In the case of a debt for unpaid taxes, or any other debt for which interest is expressly provided by statute, interest accrues at the rate and in accordance with the terms of the statute [*Prob. Code § 11423(c)*].

[6] Enforcement of Order for Payment

The personal representative must pay a debt to the extent of the order for payment of the debt, and is liable personally and on the bond, if any, for failure to make the payment [*Prob. Code § 11424(a)*].

[7] Payment of Debts That Are Contingent, Disputed, or Not Due

[a] In General

When all other debts have been paid and the estate is otherwise in a condition to be closed, on petition by an interested person, the probate court may make or modify an order or a combination of orders under *Prob. Code § 11460 et seq.* that the court, in its discretion, determines is appropriate to provide adequately for the contingent, disputed, or not-due debt, if the debt becomes absolute, established, or due [*Prob. Code § 11461*].

A debt is "contingent" if it is established as a claim against the estate under *Prob. Code § 9000 et seq.* in either a fixed or an uncertain amount and will become absolute on the occurrence of a stated event other than the passage of time. A contingent debt includes a secured obligation for which there may be recourse against property in the estate, other than the property that is the security, if the security is insufficient [*Prob. Code § 11460(a)*].

A debt is "disputed" if it is a claim rejected in whole or in part as a claim against the estate under *Prob. Code § 9000 et seq.* and the creditor commences an action on the rejected part of the claim or refers the rejected part of the claim to a referee or arbitration within the time periods set forth in *Prob. Code § 9353* [*Prob. Code § 11460(b)*].

A debt is "not due" if it is established as a claim against the estate under *Prob. Code § 9000 et seq.* and will become due on the passage of time. A debt that is not due includes a debt payable in installments [*Prob. Code § 11460(c)*].

[b] Continuing Estate Administration

The court may order that the administration of the estate continue until the contingency, dispute, or passage of time of a debt that is contingent, disputed, or not due is resolved [*Prob. Code § 11467*].

[c] Agreement Among Interested Persons to Provide for Debt

The persons interested in the estate can arrive at an agreement among themselves as to the way they choose to provide for the payment of a debt that is contingent, disputed, or not yet due [*see Prob. Code § 11462*].

Regardless of the other techniques available in *Prob. Code § 11461 et seq.* for securing payment of debts that are contingent, disputed, or not due, the probate court is required to ratify an agreement between or among persons interested in the estate that provides for resolution of such a debt if the court determines that (1) all the interested persons agree to the manner of providing for the debt, (2) the agreement reasonably protects all interested persons, and (3) the agreement will not extend administration of the estate unreasonably [*Prob. Code § 11462*].

[d] Deposit of Amount of Debt in Blocked Account

Payment of a debt that is contingent, disputed, or not yet due may be secured by deposit in a financial institution, as provided in *Prob. Code § 9700 et seq.*, of an amount that would be payable if the debt became absolute, established, or due [*see Prob. Code § 11463*]. The order must provide that the amount deposited can only be withdrawn on court authorization, and that, on withdrawal, the amount must be either paid to the creditor when the debt becomes absolute, established, or due, or if the debt does not become absolute or established, distributed in the manner provided in *Prob. Code § 11642* for property acquired or discovered after final distribution has been ordered [*see Prob. Code § 11463*; for discussion of *Prob. Code § 11642*, *see* Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation*].

[e] Appointment of Trustee to Receive Payment

Payment of a debt that is contingent, disputed, or not yet due may be secured by obtaining a court order appointing a trustee to receive payment for the debt. In determining the amount paid to the trustee, the probate court is required to compute the present value of the debt, giving consideration to a reasonable return on the amount to be invested. The trustee must invest the payment either in investments that would be proper for a personal representative or as authorized in the order [*Prob. Code § 11465(a)*].

The trustee must pay the debt as provided in the order. On completion of payment, any excess in possession of the trustee is to be distributed in the manner provided in *Prob. Code § 11642* for property acquired or discovered after final distribution has been ordered [*Prob. Code § 11465(a)*; for discussion of *Prob. Code § 11642*, *see* Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation*].

[f] Distribution Subject to Distributee's Assumption of Liability for Payment of Debt

Payment of a debt that is contingent or disputed may be secured in the court's order for final distribution of property in the estate by making distribution conditional on the distributee filing with the court an assumption of liability for the debt [*Prob. Code § 11464(a)*; for a petition for final distribution with optional language requesting this relief, *see* Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation*]. The court may impose anyother conditions that, in its discretion, it determines are just, including the condition that the distributee give a security interest in all or part of the property distributed. The court may also impose the condition that the distributee give a bond in an amount determined by the court [*Prob. Code § 11464(a)*]. The bond requirement may be satisfied by a cash deposit [*see Code Civ. Proc. § 995.710* (deposit in lieu of bond); Cal. L. Revision Comm'n Comment to enactment of *Prob. Code § 11464*].

As a condition for the order, each distributee must file with the probate court a signed and acknowledged agreement assuming personal liability for the contingent or disputed debt and consenting to jurisdiction within California for the enforcement of the debt if it becomes absolute or established. The personal liability of each distributee is not to exceed the fair market value on the date of distribution of the property received by the distributee, less the amount of liens and

encumbrances on the property. If there is more than one distributee, the personal liability of the distributees is joint and several [*Prob. Code § 11464(b)*].

Once the debt becomes absolute or established, it may be enforced against each distributee in the same manner as it could have been enforced against the decedent if the decedent were alive. In an action based on the debt, the distributee can assert any defense, cross complaint, or setoff that would have been available to the decedent if the decedent were alive [*Prob. Code § 11464(c)*].

The statute of limitations applicable to a contingent debt is tolled from the time the creditor's claim is filed until 30 days after the order for distribution becomes final. The signing of the agreement to assume personal liability for the debt neither extends nor revives any limitation period [*Prob. Code § 11464(c)*].

[g] Distribution Subject to Bond Conditioned on Payment of Debt

Payment of a debt that is contingent or disputed may be secured in the court's order for final distribution by requiring the person entitled to distribution of the property to give a bond conditioned on payment by that person of the amount of the debt that becomes absolute or established [*Prob. Code § 11466*; for a form of petition for final distribution with optional language requesting this relief, *see* Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation*]. The amount of the bond is determined by the court. However, the amount is not to exceed the fair market value on the date of distribution of the property received by the distributee, less the amount of liens and encumbrances on the property. In the case of a disputed debt or in the case of a contingent debt in which litigation is required to establish the contingency, the cost of the bond is recoverable from the unsuccessful party as a cost of litigation [*Prob. Code § 11466*].

[8] Allocation of Debts Between Estate and Surviving Spouse

If a debt of the decedent appears to have been paid or to be payable in whole or in part by the surviving spouse [*see Prob. Code §§ 13550-13554*], or that a debt of the surviving spouse appears to have been paid or to be payable in whole or in part from property in the decedent's estate, then the personal representative, the surviving spouse, or a beneficiary may, at any time before an order for final distribution is made, petition for an order to allocate the debt [*Prob. Code § 11440*]. For further discussion and forms related to the allocation of debts between the estate and the surviving spouse, *see* Ch. 441, *Probate: Disposition Without Administration* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesPriority of ClaimsEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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39-454 California Forms of Pleading and Practice--Annotated § 454.211

§ 454.211 Claims Established by Judgment

[1] Money Judgment Against Decedent

After a judgment debtor's death, the judgment creditor's ability to reach property of the deceased debtor in satisfaction of the judgment is governed by the Probate Code, not by the Enforcement of Judgments Law (*Code Civ. Proc. §§ 680.010 et seq.*) [*Prob. Code § 9300(a)*]. Except with respect to liens that have already been executed, any judgment creditor that seeks to satisfy its money judgment with the decedent's property must file a timely claim in the probate proceeding under *Prob. Code § 9100* or in connection with a trust claims procedure under *Prob. Code § 19103*, if such a proceeding has been initiated [*Embree v. Embree (2004) 125 Cal. App. 4th 487, 493, 22 Cal. Rptr. 3d 782]* . The judgment is then paid to the judgment creditor in the ordinary course of administration of the estate or trust [*Prob. Code § 9300(a)*; *Embree v. Embree (2004) 125 Cal. App. 4th 487, 493-494, 22 Cal. Rptr. 3d 782]* . Failure to file a timely claim in the probate or trust claims proceeding bars the judgment creditor from recovering against the decedent's property whether or not it has been distributed [*Prob. Code §§ 9002, 19004*; *Embree v. Embree (2004) 125 Cal. App. 4th 487, 494, 22 Cal. Rptr. 3d 782]* .

Subject to *Prob. Code § 9301*, a money judgment against the decedent or personal representative must be filed in the same manner as other claims [*Prob. Code § 9300(b)*; *see* discussion of claim filing in § 454.50 et seq.].

[2] Money Judgment Against Personal Representative

When a money judgment against a personal representative in a representative capacity becomes final, it conclusively establishes the validity of the claim for the amount of the judgment. The judgment must provide that it is payable out of property in the decedent's estates in the course of administration. Additionally, an abstract of the judgment must be filed in the administration proceedings [*Prob. Code § 9301*].

[3] Enforcement of Nonmoney Judgment

Notwithstanding the death of the decedent, a judgment for possession of property or a judgment for sale of property may be enforced under the Enforcement of Judgments Law (*Code Civ. Proc. §§ 680.010-724.260*). Enforcement of the

judgment, however, may only be directed against the property described in the judgment for possession or sale [*Prob. Code § 9302(a)*]. For further discussion and forms relating to enforcement of nonmoney judgments, see Ch. 254, *Executions and Enforcement of Judgments* .

After the death of the decedent, a demand for money that is not satisfied from the property described in a judgment for sale of property must be filed as a claim in the same manner as other claims, and is payable in the course of administration [*Prob. Code § 9302(b)*; *see* discussion of claim filing in § 454.50 et seq.].

[4] Property Subject to Execution Lien

If property of the decedent is subject to an execution lien at the time of the decedent's death, then enforcement against the property may proceed under the Enforcement of Judgments Law to satisfy the judgment. The levying officer must account to the personal representative for any surplus. If the judgment is not satisfied, then the balance of the judgment remaining unsatisfied is payable in the course of administration [*Prob. Code § 9303*]. For further discussion and forms relating to enforcement of nonmoney judgments, see Ch. 254, *Executions and Enforcement of Judgments* .

[5] Converting Attachment Lien to Judgment Lien

An attachment lien may be converted into a judgment lien on property in the estate subject to the attachment lien, with the same priority as the attachment lien, in either of the following cases [*Prob. Code § 9304(a)*]:

- When the judgment debtor dies after entry of judgment in an action in which the property was attached;

- When a judgment is entered after the death of the defendant in an action in which the property was attached.

To convert the attachment lien into a judgment lien, the levying officer must, after entry of judgment in the action in which the property was attached and before the expiration of the attachment lien, do one of the following [*Prob. Code § 9304(b)*]:

- Serve an abstract of the judgment, and a notice that the attachment lien has become a judgment lien, on the person holding property subject to the attachment lien.

- Record or file an abstract of the judgment and a notice that the attachment lien has become a judgment lien in any office where the writ of attachment and notice of attachment are recorded or filed. If the attached property is real property, the plaintiff or the plaintiff's attorney may record the required abstract and notice with the same effect as if recorded by the levying officer.

After the death of the decedent, any members of the decedent's family who were supported in whole or in part by the decedent may claim an exemption provided in *Code Civ. Proc. § 487.020* for property levied on under the writ of attachment if the right to the exemption exists at the time the exemption is claimed. The personal representative may claim the exemption on behalf of members of the decedent's family. The claim of exemption may be made at any time before the time the abstract and notice are served, recorded, or filed under *Prob. Code § 9304(b)* with respect to the property claimed to be exempt. The claim of exemption must be made in the same manner as an exemption is claimed under *Code Civ. Proc. § 482.100* [*Prob. Code § 9304(c)*]. For further discussion and forms relating to the claim of exemptions, see Ch. 62, *Attachment* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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PART II. LEGAL BACKGROUND
G. Payment Or Settlement Of Claims

39-454 California Forms of Pleading and Practice--Annotated §§ 454.212-454.229

[Reserved]

§§ 454.212[Reserved]

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H. Listing Claims In Final Report

39-454 California Forms of Pleading and Practice--Annotated § 454.230

§ 454.230 Requirement and Contents

In the final report or in a petition for final distribution, the personal representative must make certain statements about each claim presented [*Cal. Rules of Ct., Rule 7.403*]. These statements about each claim in the final report or petition for final distribution must include the following [*Cal. Rules of Ct., Rule 7.403*]:

- The claimant's name.
- The date of filing of the claim.
- The nature of the claim.
- The amount claimed.
- The disposition of the claim.
- If the claim was rejected, the date of service of the rejection and whether or not a lawsuit was filed.

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[Reserved]

§§ 454.231[Reserved]

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§ 454.250 State Statutes

[1] Actions on Rejected Claims

[a] General Authorization

Creditor's action on rejected claim. *Prob. Code § 9255(b)*

Transitional provision. *Prob. Code § 9399*

[b] Action Not Pending Against Decedent at Death

Applicable law. *Prob. Code § 9350*

Filing and rejection of claim as prerequisite to suit. *Prob. Code § 9351*

Effect of allowance or approval of claim on statute of limitations. *Prob. Code § 9352*

Time for commencement of action. *Prob. Code § 9353*

Venue and procedure in action. *Prob. Code § 9354*

[c] Action Pending Against Decedent at Death

[i] No Insurance Coverage

Continuation of action pending against decedent at time of death. *Prob. Code § 9370*

[ii] Insurance Coverage

Continuation of action pending against decedent at time of death to recover against decedent's estate as well as against insurance carrier. *Prob. Code §§ 550-554, 9370, 9390*

[2] Action to Enforce Security Interest in Estate Property

Enforcing security interest in estate property. *Prob. Code § 9391*

[3] Action to Establish Decedent's Insured Liability

Commencing or continuing action against decedent's estate. *Prob. Code §§ 550, 9390(a)*

Limitation period. *Prob. Code § 551*

Named defendant and service of summons. *Prob. Code § 552*

Contest by insurer. *Prob. Code § 553*

Limits on recovery. *Prob. Code §§ 554, 9390(b)*

Transitional provision. *Prob. Code § 555*

Reimbursement to insurer for decedent's liability. *Prob. Code § 9390(c)*

[4] Allowance and Rejection of Claims

Procedure by personal representative. *Prob. Code § 9250*

Procedure by court. *Prob. Code § 9251*

When personal representative is creditor. *Prob. Code § 9252*

Effect of statute of limitations. *Prob. Code § 9253*

Contest of allowed or approved claims. *Prob. Code § 9254*

Partial allowance of claim. *Prob. Code § 9255*

Failure of personal representative's or court's action on claim. *Prob. Code § 9256*

[5] Claims by Public Entities

Filing required. *Prob. Code § 9200*

Claims governed by special statutes. *Prob. Code § 9201*

Claim by State Director of Health Services. *Prob. Code § 9202(a)*; *Welf. & Inst. Code § 14009.5*

Claim by Director of California Victim Compensation and Government Claims Board. *Prob. Code §§ 216, 9202(b)*

Claim by Franchise Tax Board. *Prob. Code § 9202(c)*

Distribution before claim. *Prob. Code § 9203*

Effect on priority of claims. *Prob. Code § 9204*

Limitations. *Prob. Code § 9205*

[6] Claims Established by Judgment

Money judgment against decedent. *Prob. Code § 9300*

Money judgment against personal representative. *Prob. Code § 9301*

Enforcement of nonmoney judgment. *Prob. Code § 9302*

Property subject to execution lien. *Prob. Code § 9303*

Converting attachment lien to judgment lien. *Prob. Code § 9304*

[7] Compromise of Claims

Personal representative permitted to compromise claim without court authority. *Prob. Code § 9830*

Court order required for compromise of claim before expiration of creditor claim period. *Prob. Code § 9831*

Compromise of claim relating to real property. *Prob. Code § 9832*

Court order required for compromise of claim in excess of $25,000. *Prob. Code § 9833*

Court order required for compromise of claim against personal representative. *Prob. Code § 9834(a)*

Court order required for extension, renewal, or modification of terms of personal representative's debt owing to estate. *Prob. Code § 9834(b)*

Court order required for compromise of claim for wrongful death or injury of decedent. *Prob. Code § 9835*

Court from which authorization of compromise must be obtained. *Prob. Code § 9836*

Requirements of petition for court authorization of compromise. *Prob. Code § 9837*

Requirements for transfer of property to effect court authorization of compromise related to real property. *Prob. Code § 9838*

Claim paid for less than full amount. *Prob. Code § 9839*

[8] Contest and Allowance of Claims on Settlement of Account

Contest of allowed and approved claims. *Prob. Code § 11001*

Hearing on contest. *Prob. Code § 11002*

Sanctions for bad faith contest and bad faith opposition to contest. *Prob. Code § 11003*

Allowance of claims not properly filed. *Prob. Code § 11005*

Conclusiveness of order. Prob. Code § 11006

[9] Filing Claims

"Claim" defined. *Prob. Code § 9000*

Claim filing requirement. *Prob. Code § 9002*

Manner of filing. *Prob. Code § 9150*

Documentation of claim. *Prob. Code § 9151*

Claim based on written instrument. *Prob. Code § 9152*

Form of claim. *Prob. Code § 9153*

Waiver of formal defects. *Prob. Code § 9154*

[10] Notice to Creditors

Notice to all creditors. *Prob. Code § 9001*

Notice to known or reasonably ascertainable creditors. *Prob. Code § 9050*

Time of notice to known creditors. *Prob. Code § 9051*

Form of notice to known creditors. *Prob. Code § 9052*

Immunity of personal representative and attorney. *Prob. Code § 9053*

When notice not required. *Prob. Code § 9054*

[11] Payment of Debts

[a] Definitions

Application of definitions in *Prob. Code §§ 11400-11402*. *Prob. Code § 11400*

"Debt" defined to include "claim." *Prob. Code § 11401*

"Wage claim" defined. *Prob. Code § 11402*

[b] Procedure

Priority of payment. *Prob. Code § 11420*

Immediate payment of priority debts. *Prob. Code § 11421*

Payment of debts on court order. *Prob. Code § 11422*

Accrual of interest on debt. *Prob. Code § 11423*

Enforcement of order for payment of debt. *Prob. Code § 11424*

Allocation of debts between estate and surviving spouse. *Prob. Code § 11440*

Payment of contingent, disputed, or not-due debts. *Prob. Code §§ 11460 et seq.*

[12] Small Estates

Actions against small estates prior to expiration of claims period. *Prob. Code § 6611(d)*

[13] Survival of Actions and Substitution of Parties

Time for commencing action after person's death. *Code Civ. Proc. §§ 366.1, 366.2*

Survival of actions. *Code Civ. Proc. §§ 377.20-377.22*

Commencement of action against deceased defendants' personal representative of successor in interest. *Code Civ. Proc. § 377.40*

Substitution of parties. *Code Civ. Proc. § 368.5*

[14] Time for Filing Claims

Claim period. *Prob. Code § 9100*

Effect of vacancy in office of personal representative. *Prob. Code § 9101*

Effect of personal representative's action on claim after expiration of filing time. *Prob. Code § 9102*

Late claims. *Prob. Code § 9103*

Amended or revised claim. *Prob. Code § 9104*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 454.251 California Rules of Court

Filing and service of allowance or rejection of claim. *Cal. Rules of Ct., Rule 7.401*

Court action on claim when personal representative has authority under Independent Administration of Estates Act. *Cal. Rules of Ct., Rule 7.402*

Listing claims in final report or petition for final distribution. *Cal. Rules of Ct., Rule 7.403*

Court may deem objections or responses waived if court continued matter to allow written objection or response to be made and responding or objecting party failed to serve and file a timely objection or response. *Cal. Rules of Ct., Rule 7.801*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 454.252 Local Rules of Court

[1] Los Angeles County

Creditors' claims. Los Angeles Co. Super. Ct. Rules, Rule 10.79 et seq.

[2] Orange County

Creditors' claims. Orange Co. Super. Ct. Rules, Div. VI, Rule 605.01 et seq.

[3] Riverside County

Creditors' claims. Riverside Co. Consol. Ct. Rules, Rule 6.0801 et seq.

[4] Sacramento County

Creditors' claims. Sacramento Co. Super. Ct. Rules, Rule 15.49 et seq.

[5] San Francisco

Claims. San Francisco Uniform Local Ct. Rules, Rules 14.59, 14.62

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§ 454.253 Decisions

[1] Action Pending Against Decedent at Time of Death

Although notice of remittitur and copy of attorney's declaration supporting motion in municipal court for determination of attorney's fees did not constitute sufficient notice of claim under former Prob. Code § 709 (*now see Prob. Code § 9370*), executrix was estopped from asserting excess of jurisdiction when she failed to request rehearing of motion in appellate department of superior court and did not seek review of appellate department's decision or amended judgment in municipal court. *Heywood v. Municipal Court (1988) 198 Cal. App. 3d 1438, 1443-1445, 244 Cal. Rptr. 435*

[2] Action to Establish Decedent's Insured Liability

Action under former Prob. Code § 721 (*now see Prob. Code §§ 550-555*) to establish decedent's insured liability does not require plaintiff to make election of remedies, because remedy is cumulative and can be pursued concurrently with other remedies. *Delgado v. Estate of Espinoza (1988) 205 Cal. App. 3d 261, 265, 252 Cal. Rptr. 186*

In action under former Prob. Code § 721 (*now see Prob. Code §§ 550-555*) against estate to establish liability of decedent on insured claim, summary judgment for estate on ground action barred by statute of limitations under former *Code Civ. Proc. § 353* was proper because action was commenced more than two years after accident, and amendment of Doe allegations in complaint to name estate as defendant did not relate back to original filing when plaintiff was not ignorant of facts giving rise to cause of action against estate. *Von Gibson v. Estate of Lynch (1988) 197 Cal. App. 3d 725, 729-730, 243 Cal. Rptr. 50*

[3] Allowance and Rejection of Claims

Large national corporation not entitled to file late creditor's claim again estate when notice of administration was properly mailed to corporation's lock box address and corporation failed to file claim within statutory time; corporation's claim that it did not have actual knowledge of administration more than 15 days before expiration of time

provided in statute was not established by claims that notice should have been received by corporation's legal department within prescribed time. *Gertner v. Superior Court (1993) 20 Cal. App. 4th 927, 931-932, 25 Cal. Rptr. 2d 47*

Former Prob. Code § 929 (*now see Prob. Code § 11005*) does not extend time for paying bona fide debts when no claim has been filed or acknowledged by personal representative; however, if debt has been partially paid by personal representative within claim-filing period, court has authority, in settling account, to allow amount paid. *Estate of Sturm (1988) 201 Cal. App. 3d 14, 18, 246 Cal. Rptr. 852*

Trial court's order surcharging executor for payments of inflated real estate commissions affirmed on basis of substantial evidence for refusing to find that commissions had been justly due or paid in good faith under former Prob. Code § 929 (*now see Prob Code § 11005*). *Estate of Cross (1975) 51 Cal. App. 3d 80, 87, 123 Cal. Rptr. 825*

Administratrix and probate judge are duty-bound to protect estate from collection of debt that is barred by former Prob. Code § 707 (*now see Prob. Code § 9002(b)*), requiring timely filing of claim. *Estate of Erwin (1953) 117 Cal. App. 2d 203, 205, 255 P.2d 97*

[4] Appeal

Order allowing filing of amended claim in probate proceeding is nonappealable under former *Prob. Code § 1240* (*now see Prob. Code § 7240*). *Estate of Vose (1970) 4 Cal. App. 3d 454, 456, 84 Cal. Rptr. 347*

Former Prob. Code § 1233 (*now see Prob. Code § 1000*), applying specified rules of practice under the Code of Civil Procedure to probate proceedings, requires that appellant from order in probate be party to probate proceeding. *Estate of Partridge (1968) 261 Cal. App. 2d 58, 60, 67 Cal. Rptr. 433*

[5] Compromise of Claims

Executor or administrator having agreed to compromise of existing claim and having fraudulently or mistakenly advised creditor that he need not file claim against estate, was not permitted to repudiate settlement after time to file claim expired. *Katz v. A.J. Ruhlman & Co. (1945) 69 Cal. App. 2d 541, 545-546, 159 P.2d 426*

[6] Contribution From Estate

Motion for contribution from personal representative of deceased coobligor on promissory note was timely although not filed within four-month period of former Prob. Code § 707(a) (*now see Prob. Code § 9100(a)*) because right to contribution only arose on actual payment of judgment two years after decedent's death. *Borba Farms, Inc. v. Acheson (1988) 197 Cal. App. 3d 597, 601-603, 242 Cal. Rptr. 880*

[7] Creditors' Claims

[a] Definitions

Legislature intended definition of "claim" in *Prob. Code § 9000* to be broadly rather than restrictively interpreted. *Kizer v. Hanna (1989) 48 Cal. 3d 1, 12, 255 Cal. Rptr. 412, 767 P.2d 679*

[b] Department of Health Services

Department of Health Services may not assert Medi-Cal lien for costs incurred in treating decedent's final illness against recovery in wrongful death action when recovery does not and could not include these medical expenses. *Fitch v. Select Products Co. (2005) 36 Cal. 4th 812, 822, 31 Cal. Rptr. 3d 591, 115 P.3d 1233*

Welf. & Inst. Code § 14009.5 permits Department of Health Services to claim reimbursement from Medi-Cal recipient's estate for benefits paid prior to effective date of statute when recipient died after that date. *Kizer v. Hanna (1989) 48 Cal. 3d 1, 13, 255 Cal. Rptr. 412, 767 P.2d 679* (disapproving *Estate of Messner (1987) 190 Cal. App. 3d 818, 235 Cal. Rptr. 495*); *Department of Health Services v. Fontes (1985) 169 Cal. App. 3d 301, 215 Cal. Rptr. 14*

Statute of limitations for action by the Department of Health Services seeking reimbursement for Medi-Cal benefits provided to decedent begins running on date on which notice under *Prob. Code § 215* is given. *Shewry v. Begil (2005) 128 Cal. App. 4th 639, 645, 27 Cal. Rptr. 3d 209*

When personal representative fraudulently represents to probate court that decedent had not received Medi-Cal benefits, public entity may proceed under doctrine of extrinsic fraud against personal representative and surety, rather than against distributees under *Prob. Code § 9203(b)*. *Estate of Starkweather (1998) 64 Cal. App. 4th 580, 591-593, 75 Cal. Rptr. 2d 766*

[c] When Required or Not Required

Action against personal representative of deceased seller of real property pursuant to *Civ. Code § 1691* to enforce rescission of contract (restitution) is not a claim arising on contract within meaning of former Prob. Code § 707 (*now see Prob. Code §§ 9000(a)(1), 9002*), defining and requiring filing of claims, and hence as not necessitating filing of creditor's claim. *Pay Less Drug Stores v. Bechdolt (1979) 92 Cal. App. 3d 496, 502, 155 Cal. Rptr. 58* (applying by analogy holdings of cases to same effect with respect to actions for specific performance, actions to quiet title, and actions to impose constructive or resulting trust)

When wife who enjoyed present existing interest in husband's partnership interest left her interest in property to several devisees, those devisees had a present interest and not a mere money claim; consequently former Prob. Code § 707 (*now see Prob. Code § 9002*) requiring that claims against estate be filed in probate proceeding is not applicable to them. *Kenworthy v. Hadden (1978) 87 Cal. App. 3d 696, 701, 151 Cal. Rptr. 169*

[8] Nonclaim Statute

Nonclaim statute is not self-executing statute of limitations; but rather operates in connection with state's probate proceedings to potentially adversely affect creditor's property interest in claim against decedent's estate. *Tulsa Collection Servs. v. Pope (1988) 485 U.S. 478, 491, 108 S. Ct. 1340, 99 L. Ed. 2d 565*

California nonclaim statute [*see Prob. Code § 9353*] extends time to commence action on claim against estate to three months after notice of rejection of claim, even when statute of limitations otherwise applicable expires before the end of the three months, or before the creditor's claim was filed. *Anderson v. Anderson (1995) 41 Cal. App. 4th 135, 138-140, 48 Cal. Rptr. 2d 642*

[9] Notice to Creditors

Due process clause of Fourteenth Amendment requires that actual notice be given to creditor whose identity is known to or reasonably ascertainable by personal representative. *Tulsa Collection Servs. v. Pope (1988) 485 U.S. 478, 491,*

108 S. Ct. 1340, 99 L. Ed. 2d 565

[10] Priority of Claims

Claim for federal taxes entitled to priority over other claims, including claims that have previously been reduced to judgment liens, even when no notice of tax claim has been given; *I.R.C. § 6323(a)*, which provides that tax lien is not valid against judgment lien creditor until notice of lien has been properly filed, does not constitute an exception to *31 U.S.C. § 3713*, which provides that claim of United States government must be paid first when estate of deceased debtor is not enough to pay all debts. *Estate of Silberman (1995) 39 Cal. App. 4th 1533, 1542, 46 Cal. Rptr. 2d 610*

[11] Satisfaction of Judgment Against Estate

IRA as not property of probate estate but of named beneficiary and therefore may not be used to satisfy judgment against estate. *Estate of Davis (1985) 171 Cal. App. 3d 854, 857-858, 217 Cal. Rptr. 734* (decided under prior law)

[12] Statute of Limitations

Action for breach of fiduciary duty and accounting filed against successor trustee, alleging that decedent trustee had concealed financial information, was timed barred under *Code Civ. Proc. § 366.2* because it could have been brought as a claim on a liability of the person. *Stoltenberg v. Newman (2009) 179 Cal. App. 4th 287, 296, 101 Cal. Rptr. 3d 606*

Settlor was prohibited from allowing her own creditor's claim for compensation for caring for decedent, her mother, during the four years prior to decedent's death; claim was not timely under *Code Civ. Proc. § 366.2*, and trustee's assertion that she was entitled to submit an oral claim did not satisfy Probate Code requirements. *Wagner v. Wagner (2008) 162 Cal. App. 4th 249, 257, 75 Cal. Rptr. 3d 511*

One-year statute of limitations in *Code Civ. Proc. § 366.2* applies to actions on all claims against decedent that survive decedent's death; this limitations period is tolled by timely filing of creditor's claim, filing of petition for payment of debts, claims, or expenses, or proceeding to construe no contest provision judicially. *Levine v. Levine (2002) 102 Cal. App. 4th 1256, 1261, 126 Cal. Rptr. 2d 255*

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-454 California Forms of Pleading and Practice--Annotated § 454.254

§ 454.254 Law Reviews

Reutlinger, *State Action, Due Process, and the New Nonclaim Statutes: Can No Notice Be Good Notice if Some Notice Is Not? 24 Real. Prop., Prob. & Tr. J. 443 (1990)*

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39-454 California Forms of Pleading and Practice--Annotated § 454.255

§ 454.255 Text References

Witkin, California Procedure, vol. 3, *Actions*, §§ 184, 210 (4th ed. 1996)

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, §§ 472, 509, *612-650*, 745, 748-754, 757-761 (10th ed. 2005)

Legal Topics:

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§§ 454.256[Reserved]

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39-454 California Forms of Pleading and Practice--Annotated § 454.270

§ 454.270 Notice to Creditors

1. Publish notice of hearing of petition for administration of decedent's estate under *Prob. Code §§ 8120-8125* [*Prob. Code § 9001(a)*].

2. Make reasonably diligent efforts to identify reasonably ascertainable creditors of decedent [*Prob. Code § 9053(d)*; *see Tulsa Professional Collection Services, Inc. v. Pope (1988) 485 U.S. 478, 490-491, 108 S. Ct. 1340* (due process requirement)].

3. Give notice of administration to all known or reasonably ascertainable creditors under *Prob. Code § 1215* (notice by mail) [*Prob. Code § 9050(a)*; *see § 454.290*].

NOTE:
A creditor is "known" if the personal representative is aware that the creditor has demanded payment from the decedent or the estate [*Prob. Code § 9050(a)*. If the personal representative fails to give notice to a known or reasonably ascertainable creditor, the creditor may petition for an order determining the representative's liability for bad faith failure to give notice [*see* *Prob. Code § 9053(b)*]. However, notice need not be given to a creditor who has filed a claim or to a creditor who has made a demand for payment that the personal representative has elected to treat as a claim under *Prob. Code § 9154* [*Prob. Code § 9054*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-454 California Forms of Pleading and Practice--Annotated § 454.271

§ 454.271 Filing and Allowance or Rejection of Claims

1. Claim must be filed within the later of (1) four months after the date letters are first issued or (2) 30 days after the personal representative first has knowledge of the creditor [*Prob. Code § 9051*; *see § 454.291*].

a. Claim may be filed by creditor or person acting on behalf of creditor [*Prob. Code § 9150(a)*]. Claim must be filed with court and copy served on personal representative, or on person later appointed and qualified as personal representative [*Prob. Code § 9150(b)*].

NOTE:
If the creditor makes written demand for payment within four months after letters are first issued, the personal representative may waive formal defects and elect to treat the demand as a filed and established claim by paying the amount demanded before expiration of 30 days after the four-month period. Statutory conditions must be met [*Prob. Code § 9154*].

b. Creditor may petition to file late claim [*Prob. Code § 9103*] and may file amended or revised claim [*Prob. Code § 9104*].

2. Allow or reject claim, in whole or in part, in writing within 30 days [*Prob. Code §§ 9250, 9255, 9256*; *see Cal. Rules of Ct., Rule 7.401(1)*; *see also § 454.292*].

NOTE:
The personal representative cannot allow claim barred by statute of limitations [*Prob. Code § 9253*].

The personal representative's refusal or neglect to act a on claim within 30 days after the claim is filed may, at the creditor's option, be deemed equivalent to giving notice of rejection on 30th day [*Prob. Code § 9256*].

a. Give notice to creditor and to creditor's attorney of allowance and/or rejection, pursuant to *Prob. Code § 1210 et seq.*, together with a copy of the allowance and/or rejection [*Prob. Code § 9250(b)*; *Cal. Rules of Ct., Rule 7.401(b)*].

b. File allowance and/or rejection with court clerk, along with proof of service [*Prob. Code § 9250(b)*; *Cal. Rules of Ct., Rule 7.401(c)*].

c. Consider referring doubtful and rejected claims to temporary judge or arbitration for summary determination of dispute [*Prob. Code §§ 9620, 9621*].

3. If personal representative is not authorized to act under Independent Administration of Estates Act:

a. Immediately after personal representative files allowance with court clerk, clerk presents claim and allowance to court for approval or rejection [*Prob. Code § 9251(a)*].

b. On presentation of claim and allowance, court may examine creditor and take evidence on claim's validity. Court must endorse on claim whether claim is approved or rejected, and date [*Prob. Code § 9251(b)*].

NOTE:
The court's refusal or neglect to act on a claim within 30 days after the claim is filed may, at the creditor's option, be deemed equivalent to giving notice of rejection on the 30th day [*Prob. Code § 9256*].

4. If personal representative, or his/her attorney, is creditor:

a. Clerk presents claim to court for approval or rejection. Court may require creditor to file petition and give notice of hearing [*Prob. Code § 9252(a)*].

b. If court approves claim, claim is established and included with other established claims to be paid in course of administration [*Prob. Code § 9252(b)*].

c. If claim is rejected, personal representative or attorney can bring action against estate. Summons is served on judge, who appoints attorney at estate's expense to defend action [*Prob. Code § 9252(c)*].

NOTE:
The court's refusal or neglect to act on the claim within 30 days after claim is filed may, at the creditor's option, be deemed equivalent to giving notice of rejection on 30th day [*Prob. Code § 9256*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesRejected ClaimsEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesTime LimitationsEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral Overview

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PART IV. PROCEDURAL CHECKLIST

39-454 California Forms of Pleading and Practice--Annotated § 454.272

§ 454.272 Payment of Claims

1. If cash permits and estate is solvent, personal representative should pay all allowed and approved claims.

NOTE:
The order of priority for payment of debts, expenses, and charges is set forth in *Prob. Code §§ 11420* and *11421*. No debt of any class may be paid until those of prior classes are paid in full [*Prob. Code § 11420(b)*]. If property in the estate is insufficient to pay all debts of any class in full, each debt in that class must be paid a proportionate share [*Prob. Code § 11420(b)*].

2. If claim is doubtful, but there are funds for settling it, arrange to compromise it [*Prob. Code § 9837*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-454 California Forms of Pleading and Practice--Annotated § 454.273

§ 454.273 Compromise of Claim

1. If court authorization is required or desired, prepare petition for order authorizing compromise, making certain that it contains an allegation showing advantage to the estate [*Prob. Code § 9837*; *see § 454.299*].

2. Have petition verified [*Prob. Code § 1021(a)(1)*; *see Prob. Code § 1023*].
Prepare order authorizing compromise or settlement of claim [*see § 454.302*].

3. File original of petition with county clerk.

4. Determine that notice of hearing has been given in accordance with *Prob. Code § 1220* (mailed notice of hearing) [*Prob. Code § 9837(c)*].

5. Determine whether special notice is requested or required and, if so, that it is given in accordance with *Prob. Code § 1252*.

6. At hearing, make proof of service and of the allegations of the petition.

7. Obtain order authorizing compromise or settlement and file original with clerk, securing certified or conformed copies as required.

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39-454 California Forms of Pleading and Practice--Annotated § 454.274

§ 454.274 Listing Claims in Final Report or Petition for Final Distribution

1. List information about each claim in final report or petition for final distribution [*Cal. Rules of Ct., Rule 7.403*].

2. Information to be listed includes [*Cal. Rules of Ct., Rule 7.403*]:

a. Claimant's name.

b. Date of filing of claim.

c. Nature of claim.

d. Amount claimed.

e. Disposition of claim.

f. If claim was rejected, date of service of the rejection and whether or not a lawsuit was filed.

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39-454 California Forms of Pleading and Practice--Annotated §§ 454.275-454.289

[Reserved]

§§ 454.275[Reserved]

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39-454 California Forms of Pleading and Practice--Annotated § 454.290

§ 454.290 Notice of Administration to Creditors and Proof of Service [Prob. Code §§ 9050, 9052]--Judicial Council Form DE-157

[1] FORM Notice of Administration to Creditors and Proof of Service [Prob. Code §§ 9050, 9052]--Judicial Council Form DE-157

Click here to view image.

[2] Source of Form

This form is the Judicial Council form of notice to a decedent's known creditors of the administration of decedent's estate, and proof of service of the notice.. The form has been approved for use by the Judicial Council [*Cal. Rules of Ct., Rule 1.30*] This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Use of Form

This form is for use by the personal representative to notify known or reasonably ascertainable creditors of the decedent of the administration of the decedent's estate and the necessity for filing claims against the estate [*see Prob. Code § 9050*]. The personal representative has a duty to give this notice to the known or reasonably ascertainable creditors of the decedent [*Prob. Code § 9050(a)*]. The personal representative also has a duty to make reasonably diligent efforts to identify reasonably ascertainable creditors of the decedent [*Prob. Code § 9053(d)*].

Notice need not be given to a creditor who has already filed a claim or has made a demand that the personal representative is treating as a claim [*Prob. Code § 9054*; *see Prob. Code § 9154* (waiver of formal defects in claim form)].

The requirement that this notice be given to known or reasonably ascertainable creditors is in addition to the requirement that notice to creditors be published [*Prob. Code § 9050(b)*]. Notice must be given by mail or by personal delivery as provided in *Prob. Code § 1215* [*see Prob. Code § 9050(a)*].

Notice to the decedent's creditors must be given within the later of the following [*Prob. Code § 9051*]:

- Four months after the date letters are first issued.
- Thirty days after the personal representative first has knowledge of the creditor.

The failure of the personal representative to give a timely notice does not preclude a creditor from filing a timely claim [*see* Cal. L. Revision Comm'n Comment to 1990 enactment of *Prob. Code § 9051*].

Use of these Judicial Council forms is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*].

[4] State Statutes

Immunity of personal representative or attorney for giving or failing to give notice. *Prob. Code § 9053*

When notice is not required. *Prob. Code § 9054*

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39-454 California Forms of Pleading and Practice--Annotated § 454.291

§ 454.291 Creditor's Claim and Proof of Service [Prob. Code § 9153]--Judicial Council Form DE-172

[1] FORM Creditor's Claim and Proof of Service [Prob. Code § 9153]--Judicial Council Form DE-172

Click here to view image.

[2] Source of Form

This form is an illustration of the Judicial Council form for creditor's claim and proof of service of the claim on the personal representative or the personal representative's attorney. The form has been approved for use by the Judicial Council [*Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Use of Form

This form is for use by a decedent's creditor, or by a person acting on the creditor's behalf, to file a claim with the court clerk against decedent's estate and to provide proof of service or delivery of a copy of the claim on the personal representative [*see Prob. Code §§ 9150, 9153*]. Use of this Judicial Council form is mandatory [*see Cal. Rules of Ct., Rule 1.31*].

This form includes a proof of mailing or delivery of a copy of the claim to the personal representative, which the creditor may complete [*Prob. Code § 9153*].

[4] Claim Period

A creditor's claim must be filed before expiration of the later of the following times [*Prob. Code § 9100(a)*]:

- Four months after the date letters are first issued to a general personal representative.

- Sixty days after the date notice of administration is mailed or personally delivered to the creditor.

This rule does not extend the time provided in *Code Civ. Proc. § 366.2*.

A reference in a statute to "the time for filing a claim" means four months after the date letters are first issued to a general personal representative, as set forth in *Prob. Code § 9100(a)(1)* [*Prob. Code § 9100(b)*].

For further discussion, see *§ 454.50* et seq.

[5] State Statutes

Method of filing claim. *Prob. Code § 9150*

Supporting affidavit required. *Prob. Code § 9151*

Supporting documentation required when claim based on written instrument. *Prob. Code § 9152*

Judicial Council claim form required. *Prob. Code § 9153*

Waiver of formal defects in claim form. *Prob. Code § 9154*

Effect of claim filing on statute of limitations otherwise applicable to claim. *Prob. Code § 9253(a)*

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39-454 California Forms of Pleading and Practice--Annotated § 454.292

§ 454.292 Allowance or Rejection of Creditor's Claim and Proof of Service [Prob. Code § 9250]--Judicial Council Form DE-174

[1] FORM Allowance or Rejection of Creditor's Claim and Proof of Service [Prob. Code § 9250]--Judicial Council Form DE-174

Click here to view image.

[2] Source of Form

This form is a reproduction of the Judicial Council form for allowance or rejection of a creditor's claim and proof of service of the allowance or rejection on the creditor. The form has been approved for use by the Judicial Council [*Cal. Rules of Ct., Rules 1.31, 7.101*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Use of Form

This form is for use by the personal representative of a decedent's estate to allow and/or reject a creditor's claim against decedent [*see Prob. Code § 9250*]. Use of the Judicial Council form is deemed to satisfy the requirements of *Prob. Code § 9250* [*Prob. Code § 9250(d)*].

The personal representative can allow or reject the claim in whole or in part [*see Prob. Code §§ 9250(a), 9255(a)*; *Cal. Rule of Ct., Rule 7.401(1)*]. The personal representative must file the allowance and/or rejection with the court clerk and give notice to the creditor, together with a copy of the allowance and/or rejection [*see Prob. Code § 9250(b). Cal. Rules of Ct., Rule 7.401(2), (3)*]. In practice, notice is given simply by mailing or delivering a copy of this form to the creditor as specified in Paragraph 3 of the form [*see Prob. Code § 9250(d)* (use of Judicial Council form deemed to satisfy statutory requirements of *Prob. Code § 9250(d)*)].

CAUTION:
The Judicial Council Form does not provide for proof of service on the creditor's attorney, as is required

by *Cal. Rules of Ct., Rule 7.401(2)*. Until such time as it is amended to so provide, the attorney should attach an additional proof of service to show proof of service to the creditor's attorney.

If within 30 days after a claim is filed, the personal representative or the court or judge has refused or neglected to act on a claim, then the refusal or neglect may, at the creditor's option, be deemed equivalent to the giving of a notice of rejection on the 30th day [*Prob. Code § 9256*].

Use of this Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*].

[4] Court Approval or Rejection

Court approval or rejection is required if the personal representative is not authorized to act under the Independent Administration of Estates Act (*Prob. Code §§ 10400 et seq.*) [*see Prob. Code § 9251*], and when the personal representative or his or her attorney is a creditor of the decedent [*see Prob. Code § 9252*].

Court approval also may be required when the personal representative has authority to act under the Independent Administration of Estates Act, if good cause is shown [*Cal. Rules of Ct., Rule 7.402*]. For further discussion, see *§ 454.91*.

[5] State Statutes

Claim barred by statute of limitations is not allowable. *Prob. Code § 9253(b)*

Effect of allowance of claim on statute of limitations otherwise applicable to claim. *Prob. Code § 9253(c)*

[6] California Rules of Court

Filing and service of allowance or rejection of claim. *Cal. Rules of Ct., Rule 7.401*

Court action on claim when personal representative has authority under Independent Administration of Estates Act. *Cal. Rules of Ct., Rule 7.402*

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[Reserved]

§ 454.293[Reserved]

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39-454 California Forms of Pleading and Practice--Annotated § 454.294

§ 454.294 Complaint in Action Against Personal Representative on Rejected Claim [Prob. Code § 9354]--General Form

[1] FORM Complaint in Action Against Personal Representative on Rejected Claim [Prob. Code § 9354]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT ON
vs.	)	REJECTED CLAIM FOR
_____[*name*], Personal	)	_____ [*e.g.*, DAMAGES FOR
Representative of _____	)	BREACH OF
[*name*], Deceased,	)	CONTRACT]
Defendant.	)	
	)	
	)	
	)	

Plaintiff alleges:

1. On _____ [*date*], _____ [*name*], decedent, died. Administration of his/her estate is now pending in a proceeding in the Superior Court of _____ County, California, entitled _____, No. _____.

2. Defendant _____ [*name*] is the duly appointed, qualified, and acting personal representative of the estate of decedent.

3. On _____ [*date*], _____ [plaintiff *or* _____ (*name*), on plaintiff's behalf,] filed a claim in the amount of $_____ against decedent's estate with the clerk of the court in the above-mentioned estate proceeding. On _____ [*date*], _____ [plaintiff *or* _____ (*name*), on plaintiff's behalf,] also _____ [mailed *or* delivered] a copy of the claim to _____ [defendant *or* _____ (*name*), defendant's attorney]. A copy of the claim as so filed is marked as Exhibit "A," attached hereto, and made a part hereof.

[*EITHER, if claim is rejected by personal representative*]

4. On _____ [*date*], defendant rejected the claim _____ [in its entirety *or* in the amount of $_____ and allowed it in the amount of $_____], filed the [allowance and] rejection with the clerk of the court in the above-mentioned estate proceeding, and served plaintiff with written notice of the [partial] rejection on _____ [*date*].

[*OR, if claim is rejected by court*]

4. On _____ [*date*], defendant allowed the claim in its entirety and filed the allowance with the clerk of the court in the above-mentioned estate proceeding. The clerk, in turn, presented the allowance to the judge of that court who endorsed a rejection on the claim [after _____ (*describe court action, e.g.*, examining plaintiff and others on oath and receiving evidence relevant to the validity of the claim]. On _____ [*date*], defendant served plaintiff with written notice of the rejection.

[*OR, if plaintiff treats inaction on claim as rejection of claim*]

4. Thirty days have passed since _____ [plaintiff *or* _____ (*name*), on plaintiff's behalf,] filed the claim with the clerk of the court in the above-mentioned estate proceeding and provided defendant with a copy of the claim. _____[Defendant *and/or* The judge in the above-mentioned estate proceeding] _____ [has *or* have] refused or neglected to act on the claim. Pursuant to *Probate Code Section 9256*, plaintiff elects to treat this inaction on the claim as equivalent to notice of rejection of the claim.

[*CONTINUE*]

5. During the lifetime of decedent, and on or about _____ [*date*], _____ [*allege here, and in subsequent paragraphs, all allegations necessary to a complete cause of action for damages for breach of contract or for personal injuries, or other, as appropriate, just as would be done in an action against decedent while alive*].

6. _____ [No part *or* Only the partial amount of $_____ (*set forth amount allowed and paid*)] of the sum of $_____, which is the total amount of plaintiff's claim as filed, has been paid by decedent, by defendant as the personal representative of decedent's estate, or otherwise.

WHEREFORE, plaintiff prays judgment against defendant, as personal representative of decedent's estate, as follows:

[*EITHER, if claim is presently due and payable*]

1. For judgment in the sum of $_____;

[*OR, if claim is not presently due and payable*]

1. For judgment declaring that the plaintiff's claim in the sum of $ _____ is valid, subject to _____ [*specify contingency or unmatured status of claim, e.g.*, the maturity of installments not yet due and payable];

2. For costs of suit herein incurred;

3. For reasonable litigation expenses, including attorney's fees, expended in this action; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Add verification if desired.*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

This form is a complaint for use by decedent's creditor to commence an action on a claim that is presently due against the estate and that has been rejected, in whole or in part, by the personal representative or the court [*see Prob. Code § 9354*; *see also Prob. Code §§ 9255* (partial rejection of claim), 9350 (*Prob. Code §§ 9350-9354* are applicable to any claim other than a claim on an action or proceeding pending against decedent at the time of death)]. The form is designed for use by a creditor who is neither the personal representative nor the personal representative's attorney, but it may be adapted for use by either of these types of creditors [*see Prob. Code § 9252(c)*].

[3] Time for Commencing Action

If the claim is due when notice of its rejection is given, the creditor must commence an action on the claim, or refer the matter to a refereeor arbitration under *Prob. Code §§ 9620* or *9621*, within three months after notice of rejection is

given [*see Prob. Code § 9353(a)*; for further discussion, *see § 454.111[2]*].

[4] Personal Representative as Defendant

The action is always filed against the personal representative in his or her official capacity, and not against the estate, because the estate is not an entity known to the law [*Tanner v. Best (1940) 40 Cal. App. 2d 442, 445, 104 P.2d 1084]* . The term "estate" is merely a name to indicate the sum total of the assets and liabilities of a deceased.

It is not clear who the named defendant is when the personal representative, as a creditor of the estate, brings an action on his or her rejected claim [*see Prob. Code § 9252(c)*]. When the personal representative or his or her attorney brings an action on a rejected claim, summons is served on the judge who rejected the claim, who in turn appoints an attorney to defend the action at the expense of the estate [*see Prob. Code § 9252(c)*].

[5] Necessary Allegations

Filing and rejection of the claim must be alleged, as in Paragraph 3 and any alternative Paragraph 4, because the action cannot be commenced unless the claim is first filed and rejected in whole or in part [*see Prob. Code § 9351*].

Even though a copy of the claim as filed is attached to the complaint, as alleged in Paragraph 3, it is necessary for plaintiff to allege his or her cause of action, as illustrated in Paragraph 5, because the claim is not a substitute for the necessary allegations of the cause of action.

[6] Notice of Pendency of Action

Plaintiff must file a notice of the pendency of the action with the court clerk, together with proof of giving a copy of the notice to the personal representative [*see Prob. Code § 9354(b)*]. For a form for this notice, *see § 454.295*. For further discussion of the notice, see *§ 454.111[4]*.

[7] Costs and Litigation Expenses

The prevailing party in the action will be awarded court costs. Additionally, if the court determines that the prosecution or defense of the action against the prevailing party was unreasonable, the prevailing party will be awarded reasonable litigation expenses, including attorney's fees [*Prob. Code § 9354(c)*].

Regardless of the foregoing, a plaintiff who is suing on a partial rejection of a claim may not recover costs at all unless he or she recovers an amount greater than that allowed or approved [*see Prob. Code § 9255(b)*].

[8] Jurisdiction and Venue

The complaint may be filed in municipal or superior court, depending on the amount in controversy, in the county having jurisdiction of the estate, except as otherwise provided in *Prob. Code § 17005* pertaining to trustees [*Code Civ. Proc. § 395.1*; *see Prob. Code § 17005*; *see also Prob. Code §§ 82* (definition of "trust"), 17300-17302 (continuing jurisdiction of testamentary trust)]. In addition to any other county in which an action may be brought, the action on the claim may be brought in the county in which the proceeding for administration of the decedent's estate is pending [*Prob. Code § 9354(a)*].

[9] Cross References

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue*

[10] State Statutes

Authorization for creditor's action on rejected claim and recoverable costs. *Prob. Code § 9255(b)*

Applicable law. *Prob. Code § 9350*

Filing and rejection of claim as prerequisite to suit. *Prob. Code § 9351*

Effect of allowance or approval of claim on statute of limitations. *Prob. Code § 9352*

Time for commencement of action. *Prob. Code § 9353*

Venue. *Prob. Code § 9354(a)*

Notice of pendency of action. *Prob. Code § 9354(b)*

Award of costs, expenses, and attorney's fees to prevailing party. *Prob. Code § 9354(c)*

[11] Decisions

Nonpayment of claim by representative is not an essential allegation. *Wise v. Hogan (1888) 77 Cal. 184, 188*

In creditor's California action on claim rejected by Arizona court, California courts have jurisdiction pursuant to *Code Civ. Proc. § 410.10* over Arizona personal representative when decedent had requisite minimum contacts with California, notwithstanding limitation of *Code Civ. Proc. § 1913* (prior to its 1988 amendment). *Mitsui Manufacturers Bank v. Tucker (1984) 152 Cal. App. 3d 428, 430-432, 199 Cal. Rptr. 517*

Action timely filed against executors and administrator is not barred by former *Prob. Code § 714* (now see *Prob. Code § 9353*) merely because action named defendants as individuals; allegation of capacities in body of complaint as sufficient. *Plumlee v. Poag (1984) 150 Cal. App. 3d 541, 546-547, 198 Cal. Rptr. 66*

Court's grant of judgment against estate when creditor's claim not filed is act in excess of jurisdiction; executor estopped to complain of court's action when suit filed within claim period and issue of failure to file claim not raised until after judgment became final. *Rogers v. Hirschi (1983) 141 Cal. App. 3d 847, 852-853, 190 Cal. Rptr. 575*

Discharged executor of estate is not subject to service of process in representative capacity even though action against estate was filed prior to discharge; requirement of serving summons and complaint as not satisfied by giving notice of pending action pursuant to former *Prob. Code § 714* (*now see Prob. Code § 9354(b)*). *Independent Bankers Trust Co. v. Superior Court (1982) 138 Cal. App. 3d 238, 241-242, 188 Cal. Rptr. 14*

Filing action against personal representative in official capacity on rejected claim against estate. *Lazar v. Estate of Lazar (1962) 208 Cal. App. 2d 554, 555-561, 25 Cal. Rptr. 354* ; *Tanner v. Best (1940) 40 Cal. App. 2d 442, 445, 104 P.2d 1084*

Allegation of timely presentment of claim is essential to stating cause of action against estate on contract. *Hays v. Bank of America (1945) 71 Cal. App. 2d 301, 304, 162 P.2d 679*

Allegation that defendant is executor or administrator is sufficient without elaboration on how he was appointed. *Grisingher v. Shaeffer (1938) 25 Cal. App. 2d 5, 9, 76 P.2d 149*

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39-454 California Forms of Pleading and Practice--Annotated § 454.295

§ 454.295 Notice of Pendency of Action Against Personal Representative on Rejected Claim [Prob. Code § 9354(b)]

[1] FORM Notice of Pendency of Action Against Personal Representative on Rejected Claim [Prob. Code § 9354(b)]

[*Caption. See § 454.294.*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], an action on a claim was filed and is pending in the Superior Court of _____ County, California, entitled _____[*name*], Plaintiff vs. _____ [*name*], as personal representative of the estate of _____ [*name*], deceased, Defendant, No. _____.
Dated: _____.

_____ [*signature*]

Attorney for Plaintiff

[2] Use of Form

This form is a notice of pendency of action on a rejected claim. It is for use by a creditor to notify the personal representative of the creditor's action against the personal representative on a rejected claim against decedent's estate [*see Prob. Code § 9354(b)*]. Plaintiff must file the notice with the court clerk in the estate proceeding, together with proof of giving a copy of the notice to the personal representative as provided in *Prob. Code § 1215* (notice by mail) [*Prob. Code § 9354(b)*; *see* Ch. 447, *Probate: Statutory Notice Requirements*]. However, personal service of a copy of the summons and complaint on the personal representative is equivalent to the filing and giving of the notice [*Prob. Code § 9354(b)*]. For discussion of the effect of distributions or payments made before the notice is filed, *see § 454.111[4]*.

[3] Cross References

For a related form, see *§ 454.294*.

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39-454 California Forms of Pleading and Practice--Annotated § 454.296

§ 454.296 Demurrer for Failure to State Facts Sufficient to Constitute Cause of Action [Code Civ. Proc. § 430.10(e)]--Failure of Creditor Suing on Rejected Claim to Allege Filing and Rejection of Claim [Prob. Code §§ 9351, 9370]

[1] FORM Demurrer for Failure to State Facts Sufficient to Constitute Cause of Action [Code Civ. Proc. § 430.10(e)]--Failure of Creditor Suing on Rejected Claim to Allege Filing and Rejection of Claim [Prob. Code §§ 9351, 9370]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DEMURRER OF DEFENDANT
vs.	)	_____
_____ [*name*],	)	[*name*] TO COMPLAINT OF
Personal Representative of	)	_____ [*name*] ON REJECTED
_____ [*name*], Deceased,	)	CLAIM
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Trial Date: _____]

_____

Defendant demurs to the complaint on the ground that it does not state facts sufficient to constitute a cause of action in that the complaint fails to state that plaintiff's claim was timely filed as provided in *Probate Code Sections 9000-9399*, and rejected in whole or in part.

[WHEREFORE, defendant prays that this demurrer be sustained, that plaintiff take nothing by his/her/its complaint, that defendant have judgment for his/her/its costs, and for all other proper relief.]

[Dated: _____.]

_____ [*signature*]

Attorney for Defendant

CAUTION:

A memorandum must accompany a demurrer [*Cal. Rules of Ct., Rules 3.1100, 3.1103*]. Unless the context or subject matter otherwise requires, the law and motion rules (*Cal. Rules of Ct., Rules 3.1100 et seq.*) apply to demurrers [*Cal. Rules of Ct., Rule 3.1113*; *see Code Civ. Proc. §§ 430.10-430.80* (demurrers); for discussion and forms, *see* Ch. 417, *Points and Authorities*].

[2] Use of Form

This form is a demurrer for use by the personal representative to demur to a creditor's suit on a rejected claim on the ground that the complaint fails to state facts sufficient to state a cause of action because the complaint fails to allege the timely filing, and rejection in whole or in part, of the creditor's claim [*see Code Civ. Proc. § 430.10(e)*; *see also Prob. Code §§ 9351, 9370*]. When the filing of a claim against the estate is essential, a complaint that does not allege that the claim has been filed fails to state a cause of action [*Morrison v. Land (1915) 169 Cal. 580, 585, 147 P. 259]* .

The form may be used to demur to a complaint in an action that is commenced after the decedent's death [*see Prob. Code § 9350*]. Alternatively, it may be used in an action or proceeding pending against the decedent at the time of death to demur to a supplemental complaint that substitutes the personal representative for the deceased defendant [*see Prob. Code § 9370*]. In either case, the action or proceeding may not be commenced or continued against the decedent's personal representative unless, among other requirements, the claim is first filed as provided in *Prob. Code §§ 9000-9399* and rejected in whole or in part [*see Prob. Code §§ 9351, 9370*]. For discussion of actions on these types of claims, see *§§ 454.111, 454.113*.

[3] Cross References

For discussion and forms relating to demurrers and their required supporting papers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

[4] State Statutes

Holder of claim is not permitted to commence action on claim against personal representative unless claim is first filed and rejected. *Prob. Code § 9351*

Holder of claim is not permitted to continue pending action against decedent against personal representative unless claim is first filed and rejected. *Prob. Code § 9370*

[5] Decisions

Defense that suit was commenced before the presentation and rejection of claim is a matter of abatement. *Radar v. Rogers (1957) 49 Cal. 2d 243, 250, 317 P.2d 17*

Failure to allege filing of claim against estate is failure to state facts sufficient to constitute cause of action. *Morrison*

v. Land (1915) 169 Cal. 580, 585, 147 P. 259 ; *Hays v. Bank of America (1945) 71 Cal. App. 2d 301, 304, 162 P.2d 679*

[6] Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate, § 612, 613* (10th ed. 2005)

[7] Cross References

For a related form, see *§ 454.294*.

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39-454 California Forms of Pleading and Practice--Annotated § 454.297

§ 454.297 Demurrer for Failure to State Facts Sufficient to Constitute Cause of Action [Code Civ. Proc. § 430.10(e)]--Bar of Statute of Limitations Appears on Face of Complaint [Prob. Code § 9353]

[1] FORM Demurrer for Failure to State Facts Sufficient to Constitute Cause of Action [Code Civ. Proc. § 430.10(e)]--Bar of Statute of Limitations Appears on Face of Complaint [Prob. Code § 9353]

[*Caption. See § 454.296.*]

Defendant demurs to the complaint on the ground that it does not state facts sufficient to constitute a cause of action in that it appears from the face of the complaint that plaintiff commenced this action on the rejected claim on _____ [*date*], more than three months after _____ [notice of rejection of the claim was given *or* the claim became due].

[*Prayer, if desired. See § 454.296.*]

Dated: _____.

_____ [*signature*]

Attorney for Defendant

[*CAUTION. See § 454.296.*]

[2] Use of Form

This form is a demurrer for use by the personal representative to demur to a creditor's suit on a rejected claim, other than a claim on an action or proceeding pending against the decedent at the time of death, on the ground that the complaint fails to state facts sufficient to constitute a cause of action in that it appears from the face of the complaint that the action was not commenced within the limitation period prescribed by statute [*see Code Civ. Proc. § 430.10(e)*; *see also Prob. Code §§ 9350, 9353*]. If the claim is due at the time the notice of rejection is given, the creditor's action

must be commenced within 90 days after the notice is given. If the claim is not due at the time the notice of rejection is given, the action must be commenced within 90 days months after the claim becomes due. These limitation periods do not include the time during which there is a vacancy in the office of the personal representative [*see Prob. Code § 9353*; for further discussion, *see § 454.111[2]*].

For an affirmative defense for use when it does not appear from the face of the complaint that the creditor's action is time-barred, *see § 454.298*.

[3] State Statutes

Time for commencing action on rejected claim, other than claim on action pending against decedent at time of death. *Prob. Code § 9353*

[4] Decisions

Demurrer is proper challenge to complaint when complaint shows on its face that action was not commenced within prescribed limitation period. *Levy v. National Auto. & Cas. Ins. Co. (1948) 86 Cal. App. 2d 632, 634, 195 P.2d 51*

[5] Cross References

For related forms, *see §§ 454.294* and *454.296*.

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39-454 California Forms of Pleading and Practice--Annotated § 454.298

§ 454.298 Affirmative Defense--Failure to Sue on Rejected Claim Within Statutory Period [Prob. Code § 9353]

[1] FORM Affirmative Defense--Failure to Sue on Rejected Claim Within Statutory Period [Prob. Code § 9353]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff commenced this action on the rejected claim on _____ [*date*], more than 90 days after _____ [notice of rejection of the claim was given *or* the claim became due].

[2] Use of Form

This form is an affirmative defense for insertion in an answer to a creditor's complaint on a rejected claim, other than a claim on an action or proceeding pending against the decedent at the time of death, to raise the defense that the creditor's action is barred because the creditor failed to commence the action within the time specified in *Prob. Code § 9353*.

For a demurrer to a creditor's complaint on a rejected claim when it appears from the face of the complaint that the action is time-barred, *see § 454.297*.

[3] Cross References

For related forms, *see §§ 454.294* and *454.297*.

For discussion and forms relating to answers in general, see Ch. 26, *Answers*

[4] Decisions

Affirmative defense, rather than demurrer, is proper challenge to complaint when it did not appear on face of complaint

that creditor's action on rejected claim was time-barred by former *Prob. Code § 714* (*see Prob. Code § 9353*). *Anderson v. McNally (1957) 150 Cal. App. 2d 778, 784, 310 P.2d 975* (decided under prior law)

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39-454 California Forms of Pleading and Practice--Annotated § 454.299

§ 454.299 Petition for Order Authorizing Compromise of Claim by Creditor or Other Claimant Against Estate [Prob. Code § 9837]--Before Suit

[1] FORM Petition for Order Authorizing Compromise of Claim by Creditor or Other Claimant Against Estate [Prob. Code § 9837]--Before Suit

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION TO AUTHORIZE COMPROMISE OF
	)	CLAIM AGAINST ESTATE
Estate of _____ [*name*],	)	Date: _____
Deceased.	)	Time: _____
	)	Location: _____
	)	Judge: _____

_____

Petitioner, _____ [*name*], respectfully represents:

[*EITHER*]

1. Petitioner is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

[*OR*]

1. Petitioner is a person interested in the estate of _____ [*name*], deceased, in that _____ [*specify status and interest, pursuant to Prob. Code § 48, e.g.,* he/she is an heir of deceased] who has obtained the written approval of _____ (*name*), the duly appointed, qualified, and acting personal representative of the deceased. [A copy of the written approval is attached to this petition as Exhibit "_____."]

[*CONTINUE*]

2. The time for filing creditor's claims _____ [will expire *or* expired] on _____ [*date*].

3. An inventory and appraisal of the property of the estate of the deceased was filed on _____ [*date*], and lists assets appraised at a total value of $_____.

4. A claim against the estate has been duly filed by _____ [*name*], as follows: _____ [*set forth nature of claim*].

[*EITHER*]

5. Court authorization is not required for this action, pursuant to *Probate Code section 9830(a),* because it involves compromise of a claim against the _____ [decedent *or* decedent's estate], [the time for filing a creditor's claim has expired,] it is to the advantage to the estate, and no other statute requires court authorization for the action. Petitioner, however, elects to seek a prior court order authorizing the action, pursuant to *Probate Code section 9830(b).*

[*OR*]

5. Authorization by order of the court is required for this action pursuant to Probate Code section _____ [*specify, e.g.,* 9831] because _____ [*specify statutory basis under Prob. Code §§ 9831-9835 that requires prior court authorization, e.g.,* the time for filing a creditor's claim has not expired].

[*CONTINUE*]

6. _____ [Petitioner *or* _____ (*Name*), the personal representative of the estate,] has not allowed the claim for the following reasons: _____ [*describe reasons*].

7. _____ [Petitioner *or* The personal representative] and _____ [*name of claimant*] propose to dispose of the claim by compromise and settlement, subject to approval of the court, on the following terms: _____ [*summarize terms*]. A copy of the agreement of compromise and settlement, signed by _____ [*name of claimant*], is marked as Exhibit "_____," attached hereto, and made a part hereof.

8. The advantage of the compromise and settlement to decedent's _____ [devisees *and/or* heirs] and to the estate is as follows: _____ [*set forth advantage, including avoidance of time, expense, and uncertainties of litigation*].

9. _____ [Petitioner *or* The personal representative of the estate] has thoroughly investigated and considered the compromise and settlement in question and is of the opinion that this disposition of the claim is just and in the best interest of the estate and of all interested persons, and should be approved.

10. A request for special notice has _____ [not been filed herein *or* been filed herein by _____ (*name*) and notice of the time and place of hearing will be given as required by *Probate Code section 1252 or* been filed herein and waived by _____(*name*)].

WHEREFORE, petitioner prays that the court approve the compromise and settlement of the claim against the estate and authorize _____ [petitioner *or* _____ (*name*), the personal representative of the estate,] to do all acts and execute all documents necessary or convenient to consummate the same.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is a petition for use by the personal representative or by any interested person who has the personal representative's written approval to obtain court approval of a compromise of a creditor's claim against decedent's estate [*see Prob. Code § 9837(a)*]. The petition must show the terms of the compromise (Paragraph 7), and its advantage to the heirs or devisees and the estate (Paragraphs 8 and 9) [*see Prob. Code § 9837(b)*]. Notice of the hearing on the petition must be given at least 15 days before the time set for the hearing as provided in *Prob. Code § 1220* [*Prob. Code § 9837(c)*; see discussion in Ch. 447, *Probate: Statutory Notice Requirements*].

[3] When Court Authorization Required

Generally, the personal representative may compromise and settle claims and actions without court approval, except for the matters governed by *Prob. Code §§ 9831-9835*. For further discussion of when court authorization is required to

compromise claims against the decedent or estate, see *§ 454.170* et seq. For discussion and forms relating to the compromise of claims or actions by or for the benefit of the decedent or estate, or the extension, renewal, or modification of obligations owing to or in favor of the decedent or estate, see Ch. 450, *Probate: Collecting Assets* .

The personal representative may choose to seek court authorization of a compromise for which authorization is not statutorily required because, once final, an order authorizing a compromise releases the personal representative and the sureties from all claims of the heirs, devisees, or any affected person based on any act or omission directly authorized in the order [*see Prob. Code § 7250*; *see also § 454.170[4][d]*].

[4] State Statutes

Notice of hearing on petition. *Prob. Code §§ 1220, 1252*

Petition as required to be verified. *Prob. Code § 1021(a)*

Who may verify petition. *Prob. Code §§ 1021(b), 1023*

Court from which authorization to compromise must be obtained. *Prob. Code § 9836*

[5] Decisions

Showing of advantage to estate is prerequisite to securing order of approval of compromise with claimant against estate. *Estate of Lucas (1943) 23 Cal. 2d 454, 467, 144 P.2d 340* (decided under prior law)

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39-454 California Forms of Pleading and Practice--Annotated § 454.300

§ 454.300 Allegations--Conveyance of Estate Property to Cancel Note and Trust Deed

[1] FORM Allegations--Conveyance of Estate Property to Cancel Note and Trust Deed

1. Among the items so listed in the inventory and appraisement is certain encumbered real property described and appraised as follows: _____ [*set forth legal and common description and appraised value*].

2. The real property is subject to a _____ [deed of trust *or* mortgage] securing an indebtedness evidenced by a promissory note made by _____ [*name*], dated _____, in the original amount of $_____, with interest at _____ percent per annum, payable _____ [*specify terms of payment*]. The _____[deed of trust *or* mortgage] is recorded in the office of the county recorder of _____ County, California, in Book _____ [*number*], page _____ [*number*], of the Official Records of the county. There is a balance of principal and interest due and unpaid in the sum of $_____. The note is owned and held by _____ [*name*].

3. The owner of the note has duly filed a creditor's claim in the sum of $_____, which _____ [petitioner *or* the personal representative] has allowed and the court has approved.

4. _____ [Petitioner *or* The personal representative] and the owner of the note propose to dispose of the claim by compromise and settlement, subject to approval of the court, conveying the real property to the owner of the note in consideration of the cancellation and release of the full remaining indebtedness as payment of the claim _____ [in full *or* on the following terms: _____ (*describe terms*)]. A copy of the agreement of compromise and settlement, signed by the owner of the note, is attached hereto, marked Exhibit "_____," and made a part hereof.

[2] Use of Form

These allegations are for use in a petition seeking court approval of a compromise of a claim against decedent's estate when the compromise involves the estate's conveyance of real property to a creditor in exchange for the creditor's cancellation of the note and trust deed securing the property. These allegations may be used in the *form in § 454.299* in

lieu of Paragraphs 4-7 of that form. Because a compromise containing the foregoing allegations relates to title to, interest in, or a lien or encumbrance on real property, this type of compromise requires court approval [*see Prob. Code § 9832(a)*]. For further discussion, see *§ 454.170[3][b]*.

[3] Cross References

For a related form, see *§ 454.299*.

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39-454 California Forms of Pleading and Practice--Annotated § 454.301

§ 454.301 Allegations and Prayer--Action Instituted Against Personal Representative

[1] FORM Allegations and Prayer--Action Instituted Against Personal Representative

1. On _____ [*date*], an action was commenced against _____ [petitioner *or name*], as personal representative of the estate of the deceased, in the _____ [*name of superior or municipal court*], entitled _____ [*name*], Plaintiff, vs. _____ [*name*], Defendant, No. _____.

2. The action is on a claim _____ [heretofore filed against the estate but not allowed by _____ (petitioner *or* the personal representative) *or* being asserted against the estate] for _____ [*set forth nature of claim*]. The complaint seeks _____ [*state nature of relief sought*].

3. _____ [Petitioner *or* The personal representative], by his/her attorney, _____ [*name*], has answered the complaint as follows: _____ [*specify personal representative's position, avoiding verbatim repetition of answer*]. The present calendar status of the case is _____ [*specify*].

4. _____ [Petitioner *or* The personal representative] and plaintiff propose to dispose of the claim and action by compromise and settlement, subject to approval of the court, on the following terms: _____ [*summarize terms*]. A copy of the agreement of compromise and settlement, signed by plaintiff, is attached hereto, marked Exhibit "_____," and made a part hereof.

WHEREFORE, petitioner prays that the court approve the compromise and settlement of the claim and action against _____[petitioner *or name*], as personal representative of the estate of the deceased, and authorize _____[petitioner *or* the personal representative] to do all acts and execute all documents necessary or convenient to consummate the same.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 454.299* .]

[2] Use of Form

These allegations are for use in a petition seeking court approval of a compromise of a creditor's suit against the personal representative on a rejected claim against the estate [*see Prob. Code §§ 9830, 9837*]. These allegations and prayer may be used in § 454.299 in lieu of Paragraphs 4-7 and the prayer of that form.

[3] Cross References

For a related form, see *§ 454.299*.

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39-454 California Forms of Pleading and Practice--Annotated § 454.302

§ 454.302 Order Authorizing Compromise of Claim by Creditor or Other Claimant Against Estate [Prob. Code § 9837]--Before Suit

[1] FORM Order Authorizing Compromise of Claim by Creditor or Other Claimant Against Estate [Prob. Code § 9837]--Before Suit

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER
	)	[*Prob. Code § 9837*]
Estate of _____ [*name*],	)	Date: _____
Deceased.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	

_____

The verified petition of _____ [*name*][, as personal representative of the estate of _____ (*name*), deceased,] for authorization to compromise a claim by _____ [*name*], claimant, against the estate of the deceased, came on regularly for hearing by the court on _____ [*date*]. Petitioner appeared by counsel _____ [*name; specify other appearance, if any*].

The court finds from proof made to the satisfaction of the court:

1. Notice of the time and place of the hearing was given as required by *Probate Code Section 9837(c)*. [Special notice was _____ (given to _____ (*name(s)*), as requested *or* requested and waived by _____ (*name(s)*).]

2. The time for filing creditor's claims _____ [expired *or* will expire] on _____ [*date*].

3. A claim against the estate of the deceased has been duly filed by _____ [*name*] for _____ [*summarize nature of claim*] in the sum of $_____.

4. _____ [Petitioner *or* The personal representative] and claimant have negotiated an agreement of compromise and settlement of the claim, subject to approval of the court, whereby _____ [*summarize terms*]. A copy of the agreement of compromise and settlement, signed by claimant, is attached to the petition filed herein as Exhibit "_____."

5. It is to the advantage of decedent's _____ [devisees *and/or* heirs] and to the estate that the compromise and settlement be authorized.

IT IS ORDERED, as follows:

1. The compromise and settlement of the claim by _____ [*name*] _____ against the estate of _____ [*name*], deceased, for_____ [*summarize nature of claim*], is authorized as follows: _____ [*set forth terms of compromise and settlement*].

2. _____ [Petitioner *or Name*], as personal representative of the estate of the deceased, is authorized to execute the agreement and to do all other acts and to execute all other documents necessary or convenient to consummate the compromise and settlement.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is an order for use when the court has granted a petition seeking authorization of the compromise and settlement of a claim against the estate [*see Prob. Code § 9837*]. This form is designed for use with the *form in § 454.299*. For a discussion of the effect of an order authorizing the compromise of a claim on the liability of the personal representative, see *§ 454.170[4][d]*.

[3] Text References

For discussion and forms relating to orders, see Ch. 372, *Motions and Orders*

[4] State Statutes

Finding of giving or waiver of notice as required. *Prob. Code § 1260(b)*

Content of orders in probate proceedings. *Prob. Code § 1047*

Entry and filing of orders in probate proceedings. *Prob. Code § 1048*

Appealable orders in probate proceedings. *Prob. Code § 1300 et seq.*

[5] Local Rules of Court

Orders are required to be complete in themselves and set forth all matters actually passed on by court, date of hearing, relief granted, and names of persons and descriptions of property or amounts of money affected. Los Angeles Co. Super. Ct. Rules, Rule § 10.42; San Francisco Uniform Local Ct. Rules, Rule 14.27

Orders are required to be submitted to probate courtroom two weeks in advance of hearing date and to note hearing date on face sheet. San Francisco Uniform Local Ct. Rules, Rule 14.6

Any exhibits to order are required to appear before court's signature. San Francisco Uniform Local Ct. Rules, Rule 14.27

[6] Cross References

For a related form, see *§ 454.299*.

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39-454 California Forms of Pleading and Practice--Annotated § 454.303

§ 454.303 Order Authorizing Compromise of Claim by Creditor or Other Claimant Against Estate [Prob. Code § 9837]--Conveyance of Estate Property to Cancel Note and Trust Deed

[1] FORM Order Authorizing Compromise of Claim by Creditor or Other Claimant Against Estate [Prob. Code § 9837]--Conveyance of Estate Property to Cancel Note and Trust Deed

[*Caption. See § 454.302*].

The verified petition of _____ [*name*][, as personal representative of the estate of _____ (*name*), deceased,] for approval of compromise of a claim by _____ [*name*] against the estate of the deceased on a promissory note secured by a _____ [deed of trust *or* mortgage] on real property of the estate, came on regularly for hearing by the court on _____ [*date*]. Petitioner appeared by counsel _____ [*name; specify other appearance, if any*].

The court finds from proof made to the satisfaction of the court:

1. [*Giving or waiver of notice. See § 454.302, Finding 1.*]

2. [*Expiration of claim period. See § 454.302, Finding 2.*]

3. Among the assets of the estate is certain encumbered real property hereinafter described, which is appraised in the inventory and appraisement on file at the sum of $_____.

4. The real property is subject to a _____ [deed of trust *or* mortgage] securing an indebtedness evidenced by a promissory note dated _____, in the original amount of $_____, with interest at _____ percent per annum, payable _____ [*specify terms of payment*]. The _____ [deed of trust *or* mortgage] is recorded as hereinafter set out. There is a balance of principal and interest due and unpaid in the sum of $_____; the note is owned and held by _____ [*name*].

5. The owner of the note has duly filed a creditor's claim in the sum of $_____, which heretofore _____ [petitioner *or* the personal representative] has allowed and the court has approved.

6. _____ [Petitioner *or* The personal representative] and the owner of the note have negotiated an agreement of compromise and settlement of the claim, subject to approval of the court, which would dispose of the claim by conveying the real property to the owner of the note in consideration of the cancellation and release of the full remaining indebtedness _____ [as payment of the claim in full *or* on the following *terms* : _____ (*describe terms*)]. A copy of the agreement of compromise and settlement, signed by _____ [*name of claimant*], is attached to the petition filed herein as Exhibit "_____."

7. [*Advantage to estate of compromise. See § 454.302, Finding 5.*]

IT IS ORDERED, as follows:

1. The compromise and settlement of the claim by _____ [*name*] against the estate of _____ [*name*], deceased, on a promissory note secured by a _____ [deed of trust *or* mortgage] on real property of the estate is authorized as follows: _____ [*set forth terms of compromise and settlement*].

2. _____ [Petitioner *or* _____ (*Name*)], as personal representative of the estate of the deceased, is authorized to execute the agreement and the conveyance and to do all other acts and to execute all other documents necessary or convenient to consummate the compromise and settlement.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is an order for use when the court has granted a petition seeking authorization of the compromise and settlement of a claim against the estate involving the conveyance of estate real property [*see Prob. Code §§ 9832, 9837*]. For allegations for use in a petition to authorize the conveyance of property, see *§ 454.300*. For a discussion of the effect of an order authorizing the compromise of a claim on the personal representative's liability, see *§ 454.170[4][d]*.

[3] State Statutes

Recordation of order when real property affected. *Prob. Code § 7263*

Manner of executing conveyance. *Prob. Code § 9838(a)*

Effect of conveyance made in compliance with court order authorizing compromise. *Prob. Code § 9838(b)*

[4] Cross References

For related forms, see *§§ 454.299*, *454.300*, and *454.302*.

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39-454 California Forms of Pleading and Practice--Annotated § 454.304

§ 454.304 Order Authorizing Compromise of Action Instituted Against Personal Representative [Prob. Code § 9837]

[1] FORM Order Authorizing Compromise of Action Instituted Against Personal Representative [Prob. Code § 9837]

[*Caption. See § 454.302* .]

The verified petition of _____ [*name*][, as personal representative of the estate of _____ (*name*), deceased,] for authorization of compromise of an action instituted against _____ [petitioner *or* the personal representative] on a claim for _____ *describe claim*], came on regularly for hearing by the court on _____ [*date*]. Petitioner appeared by counsel _____ [*name; specify other appearances, if any*].

The court finds from proof made to the satisfaction of the court:

1. [*Giving or waiver of notice. See § 454.302, Finding 1.*]

2. [*Expiration of claim period. See § 454.302, Finding 2.*]

3. An action has been instituted against _____ [petitioner *or* _____ (*name*)], as personal representative, in the _____ [*name of superior or municipal court*], entitled _____ [*name*], Plaintiff vs. _____ [*name*], as Personal Representative of _____ [*name*], Deceased, Defendant, No. _____, on a claim for _____ [*describe claim*], in the sum of $ _____.

4. _____ [Petitioner *or* The personal representative] and plaintiff have negotiated an agreement of compromise and settlement of the claim and action, subject to approval of the court, whereby _____ [*summarize terms*]. A copy of the agreement of compromise and settlement, signed by plaintiff, is attached to the

petition filed herein as Exhibit "_____."

5. [*Advantage to estate of compromise. See § 454.302, Finding 5.*]

IT IS ORDERED as follows:

1. The compromise and settlement of the action against _____ [*name*], as personal representative, in the _____ [*court*], entitled _____ [*name*], Plaintiff vs. _____ [*name*], as Personal Representative of _____ [*name*], Deceased, Defendant, No. _____, is approved as follows: _____ [*set forth terms of compromise and settlement*].

2. [*Order to execute agreement and document. See § 454.302, Order 2.*]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is an order for use when the court has granted a petition seeking authorization of the compromise and settlement of an action against the personal representative [*see Prob. Code § 9837*]. For allegations and prayer that can used in a petition to compromise an action, see *§ 454.301*. For discussion of the effect of an order authorizing the compromise of a claim on the personal representative's liability, see *§ 454.170[4][d]*.

[3] Cross References

For related forms, see *§§ 454.299*, *454.301*, and *454.302*.

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California Forms of Pleading and Practice--Annotated

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Volume 39: Probate: Claims Against the Estate thru Probate: Discharge-Chs. 454-459
Chapter 454 PROBATE: CLAIMS AGAINST THE ESTATE
PART V. FORMS

39-454 California Forms of Pleading and Practice--Annotated § 454.305

§ 454.305 Petition for Order Determining Liability of Personal Representative for Failure to Give Notice to Creditor of Administration of Estate [Prob. Code § 9053(b)(3)(A)]

[1] FORM Petition for Order Determining Liability of Personal Representative for Failure to Give Notice to Creditor of Administration of Estate [Prob. Code § 9053(b)(3)(A)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
Estate of _____ [*name*],	)	NO. _____
Deceased.	)	PETITION FOR ORDER DETERMINING
_____ [*name*],	)	LIABILITY OF
Petitioner,	)	PERSONAL
vs.	)	REPRESENTATIVE FOR FAILURE TO GIVE NO-
_____ [*name*],	)	TICE TO CREDITOR OF ADMINISTRATION OF
Respondent.	)	ESTATE
	)	Date: _____
	)	Time: _____
		Location: _____

_____

Petitioner respectfully represents:

1. _____ [*Name*], hereinafter referred to as "decedent," died on _____ [*date*].

2. On _____ [*date within 16 months of filing of petition*], letters _____ [*specify type of letters, e.g.,* testamentary] were issued to _____ [*name*], as _____ [*specify type of personal representative, e.g.,* executor of decedent's will].

3. _____ [*Allege facts showing petititioner's status as a creditor of decedent, e.g.,* Decedent borrowed $_____from petitioner _____ (*name*) at _____ percent simple interest, and executed a demand note naming petitioner as payee. (A copy of the note is attached to this petition as Exhibit _____ and made a part hereof.)]

4. On _____ [*date*], the above-entitled court made an order for final distribution of decedent's estate.

5. The personal representative failed to give notice of the administration of the estate to petitioner, although petitioner was known to or reasonably ascertainable by the personal representative.

6. Neither petitioner nor _____ [*name*], petitioner's attorney in the above-entitled matter, had actual knowledge of the administration of the estate before expiration of the time for filing a claim.

7. Payment would have been made on petitioner's claim in the course of administration if petitioner had properly filed his/her claim, because _____ [*allege reasons*].

8. Within four months after the date letters were first issued to _____ [*name of personal representative*], he/she became aware that petitioner was a creditor of decedent in that _____ [*set forth facts showing personal representative's awareness creditor's existence*].

9. The failure of _____ [*name of personal representative*] to give petitioner notice of the administration of decedent's estate, as required by *Section 9050 of the Probate Code*, was in bad faith in that _____ [*allege facts supporting claim of bad faith*].

WHEREFORE, petitioner prays for an order as follows:

1. Determining that _____ [*name of personal representative*] is liable to petitioner for $ _____, [and for $_____ in interest,] on petitioner's claim against decedent's estate, for failure to duly notify petitioner of the administration of the estate.

2. Granting any other relief that the court deems necessary and proper.

_____ [*signature*]

Petitioner

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 454.299.*]

CAUTION:
Petitions in proceedings under the Probate Code must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This petition is for use by a creditor of a decedent to request the court in which the decedent's estate was administered to make an order determining the liability of the personal representative for failing to give notice to the creditor [*Prob. Code § 9053(b)*]. The personal representative has a duty to give notice to the known or reasonably ascertainable creditors of the decedent [*Prob. Code § 9050(a)*]. Further, the personal representative has a duty to make reasonably diligent efforts to identify reasonably ascertainable creditors of the decedent [*Prob. Code § 9053(d)*].

[3] Required Allegations

The petitioning creditor must establish all of the following:

- That the personal representative failed to give the required notice to creditors (Paragraph 5) [*Prob. Code § 9053(b)*].

- That the failure to give the required notice was in bad faith (Paragraph 9) [*Prob. Code § 9053(b)(1)*].

- That the creditor had no actual knowledge of the administration of the estate before expiration of the time for filing a claim (Paragraph 6) [*Prob. Code § 9053(b)(2)*].

- That payment would have been made on the claim in the course of administration if the claim had been properly filed (Paragraph 7) [*Prob. Code § 9053(b)(2)*].

[4] Deadline for Filing Petition and Serving Notice

If the personal representative is a general personal representative, this petition must be filed within 16 months after letters were first issued to the representative (Paragraph 2) [*Prob. Code § 9053(b)(3)*].

At least 30 days before the hearing, notice of the hearing and a copy of the petition must be served on the personal representative in the manner required for service of summons in civil actions [*Prob. Code § 9053(b)(3)(B)*; *see Code Civ. Proc. §§ 413.10 et seq.* (service of summons in civil actions)]. For discussions and forms for use in serving the required notice, see Ch. 518, *Service of Summons and Papers* .

[5] Cross References

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to various types of orders, see Ch. 372, *Motions and Orders*

For alternative forms of prayers, see Ch. 420, *Prayers*

[6] State Statutes

Verified petition as evidence in uncontested proceeding. *Prob. Code § 1022*

Personal representative's liability for bad faith failure to notify creditor of estate administration. *Prob. Code § 9053(b)*

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Chapter 455 PROBATE: SALE OF ESTATE PROPERTY

39-455 California Forms of Pleading and Practice--Annotated 455.syn

§ 455.syn Synopsis to Chapter 455: PROBATE: SALE OF ESTATE PROPERTY

§ 455.01 Scope of Chapter

§ 455.02 Cross References

§§ 455.03-455.09 [Reserved]

§ 455.10 Governing Law

§ 455.11 When Estate Property May Be Sold

§ 455.12 Manner of Sale

§ 455.13 Selection of Property to Sell

[1] In General

[2] Rules of Abatement

[a] Necessity for Abatement

[b] Abatement if Decedent Died Before July 1, 1989

[c] Abatement if Decedent Dies on or After July 1, 1989

§ 455.14 Sale for More or Less Than Appraised Value

§ 455.15 Sale and Appraisal of Assets as Unit

§ 455.16 Purchase by Personal Representative or Attorney

§ 455.17 Sales of Realty--Bond Requirements

§ 455.18 Opportunity to Inspect Property

§ 455.19 Notice Requirements

[1] Generally

[2] Public Auction of Realty

[3] Private Sale of Realty

[4] Court Confirmation of Sale of Realty

[a] Generally

[b] Overbids for Realty

[c] Order Confirming or Vacating Sale of Realty

[5] Conveyance of Realty After Confirmation

[6] Sale of Realty on Credit

[7] Sale of Pasture or Grazing Land

§ 455.20 Sales of Personal Property

[1] Opportunity to Inspect Property

[2] Notice Requirements

[3] Public Auction of Personalty

[4] Private Sale of Personalty

[5] Bids to Comply With Notice

[6] Manner of Payment of Purchase Price: Cash or Credit

[7] Passage of Title to Personal Property Without Court Confirmation

[8] Requirement of Court Confirmation of Sale of Personal Property

[a] Generally

[b] Sale of Partnership Interest

[c] Overbids for Personal Property

§ 455.21 Disposition of Securities

§ 455.22 Sale or Withdrawal of Savings Accounts and Mutual Capital Certificates

§ 455.23 Sale of Decedent's Leasehold Interest

§ 455.24 Decedent's Contract Right to Purchase Real Property

§ 455.25 Default by Purchaser

[1] Within 60 Days of Confirmation

[2] More than 60 Days After Confirmation

[3] Liability of Defaulting Purchaser

§ 455.26 Sale of Encumbered Property

[1] Application of Proceeds

[2] Sale to Lienholder

§ 455.27 Personal Representative's Liability for Negligent or Fraudulent Sale

§ 455.28 Recovery of Property by Heir

§ 455.29 Contract With Agent or Broker

[1] To Sell Real Property

[2] To Sell Personal Property

[3] Fee, Commission, or Other Compensation

[4] Exclusive Listing Contract

§ 455.30 Contract With Auctioneer

§ 455.31 Compensation of Broker, Agent, or Auctioneer

[1] In General

[2] If Only One Agent or Broker Is Involved

[3] If More Than One Agent or Broker Is Involved

[4] Agreement Among Cooperating Agents or Brokers

§§ 455.32-455.49 [Reserved]

§ 455.50 State Statutes

[1] Contract With Agent, Broker, or Auctioneer

[2] Disposition of Lien on Property

[3] General Provisions for Sales of Estate Property

[4] Improper Sale of Property

[5] Rules of Abatement

[6] Sales of Personal Property

[7] Sales of Real Property

[8] Vacating Sale for Purchaser's Default

[9] California Rules of Court

§ 455.51 Local Rules of Court

[1] Alameda County

[2] Contra Costa County

[3] Los Angeles County

[4] Orange County

[5] Riverside County

[6] Sacramento County

[7] San Bernardino County

[8] San Diego County

[9] San Francisco County and City

[10] Santa Clara County

§ 455.52 Decisions

[1] Abatement

[2] Appeal

[3] Authority to Sell Estate Property

[4] Brokers

[5] Confirmation of Sale

[a] Burden of Proof

[b] Standard for Confirmation

[c] Substantial Compliance

[6] Liability of Defaulting Purchaser

[7] Liability of Personal Representative

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§ 455.53 Law Reviews

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§§ 455.55-455.69 [Reserved]

§ 455.70 Preliminary Determinations

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§ 455.73 Conveyance of Title to Real Property

§ 455.74 Authorization for Sale of Securities

§§ 455.75-455.89 [Reserved]

§ 455.90 Notice of Sale of Personal Property [Prob. Code §§ 10250, 10253]--Private Sale

[1] FORM

[2] Use of Form

[3] Contents

[4] Determination of Date of Sale

[5] Proof of Notice of Sale

[6] State Statutes

§ 455.91 Notice of Sale of Personal Property [Prob. Code §§ 10250, 10253]--Public Auction

[1] FORM

[2] Use of Form

[3] Date of Auction

[4] Cross References

§ 455.92 Notice of Sale of Real Property [Prob. Code §§ 10300, 10304]--Private Sale

[1] FORM

[2] Use of Form

[3] Contents

[4] Determination of Date of Sale

[5] Proof of Notice of Sale

[6] State Statutes

§ 455.93 Notice of Sale of Real Property [Prob. Code §§ 10300, 10304]--Public Auction

[1] FORM

[2] Use of Form

[3] Date of Auction

[4] State Statutes

[5] Cross References

§ 455.94 Notice of Sale of Unit of Real and Personal Property at Private Sale [Prob. Code § 10004(c)]

[1] FORM

[2] Use of Form

[3] Manner of Giving Notice

[4] State Statutes

[5] Cross References

§§ 455.95-455.110 [Reserved]

§ 455.111 Petition to Exempt Specific Gift from Operation of Rules of Abatement [Prob. Code § 21402]

[1] FORM

[2] Use of Form

[3] Abatement of Specific Gifts

[4] State Statutes

[5] Cross References

§ 455.112 Order Exempting Specifically Devised Property From Operation of Rules of Abatement [Prob. Code § 21402]

[1] FORM

[2] Use of Form

§ 455.113 Petition to Approve Purchase of Estate Property by Personal Representative [Prob. Code § 9883]

[1] FORM

[2] Use of Form

[3] Purchase of Estate Property by Personal Representative or Attorney

[4] State Statutes

[5] Cross References

§ 455.114 Order Approving Purchase of Estate Property by Personal Representative [Prob. Code § 9883]

[1] FORM

[2] Use of Form

[3] Order Approving Sale to Personal Representative or Attorney

[4] State Statutes

[5] Cross References

§ 455.115 Petition to Compel Personal Representative to Sell Estate Property [Prob. Code § 10001]

[1] FORM

[2] Use of Form

[3] Compelling Sale of Estate Property

[4] State Statutes

[5] Cross References

§ 455.116 Order Requiring Sale of Estate Property [Prob. Code § 10001]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 455.117 Petition to Deviate From Testamentary Instructions Regarding Sale of Estate Property [Prob. Code § 10002(b)]

[1] FORM

[2] Use of Form

[3] Judicial Relief From Testamentary Directions

[4] State Statutes

[5] Cross References

§ 455.118 Order Authorizing Deviation From Testamentary Instructions Regarding Sale of Estate Property [Prob. Code § 10002(b)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 455.119 Petition to Sell Real and Personal Property as Unit [Prob. Code § 10004(b)]

[1] FORM

[2] Use of Form

[3] Sale of Unit of Realty and Personalty

[4] State Statutes

[5] Cross References

§ 455.120 Order Approving Sale of Unit of Real and Personal Property [Prob. Code § 10004(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 455.121 Petition for Order Authorizing Sale of Securities [Prob. Code § 10200]

[1] FORM

[2] Use of Form

[3] Contents

[4] Notice

[5] State Statutes

[6] Cross References

§ 455.122 Order Authorizing Sale of Securities [Prob. Code § 10200]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 455.123 Petition for Order Shortening Time of Notice of Sale [Prob. Code §§ 10251, 10302]

[1] FORM

[2] Use of Form

[3] Order Shortening Time

[4] State Statutes

[5] Cross References

§ 455.124 Order Shortening Time of Notice of Sale [Prob. Code §§ 10251, 10302]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 455.125 Petition to Deviate From Public-Auction Requirements for Sale of Personal Property [Prob. Code § 10254(b)]

[1] FORM

[2] Use of Form

[3] Sale of Personal Property at Public Auction

[4] State Statutes

[5] Cross References

§ 455.126 Order Authorizing Deviation From Statutory Requirements for Conduct of Sale of Personal Property by Public Auction [Prob. Code § 10254(b)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 455.127 Petition by Personal Representative to Dispense With Requirements for Sale of Personal Property on Credit [Prob. Code § 10258]

[1] FORM

[2] Use of Form

[3] Sale of Personal Property on Credit

[4] State Statutes

[5] Cross References

§ 455.128 Order Dispensing With Statutory Requirements for Sale of Personal Property on Credit [Prob. Code § 10258]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 455.129 Report of Sale of Personal Property and Petition for Confirmation [Prob. Code §§ 10259(c), 10260]

[1] FORM

[2] Use of Form

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§ 455.130 Order Confirming Sale of Personal Property [Prob. Code § 10261]

[1] FORM

[2] Use of Form

[3] Contents

[4] Manner of Listing Property

[5] State Statutes

[6] California Rules of Court

[7] Cross References

§ 455.131 Report of Sale and Petition for Confirmation of Sale of Real Property [Prob. Code § 10308]--Judicial Council Form DE-260

[1] FORM

[2] Use of Form

[3] Contents

[a] Matters Allowing Court to Evaluate Sale

[b] Grounds for Sale

[c] Terms of Sale

[d] Broker's Commission

[e] Requirement of Additional Bond

[4] State Statutes

[5] California Rules of Court

§ 455.132 Order Confirming Sale of Real Property [Prob. Code § 10313]--Judicial Council Form DE-265

[1] FORM

[2] Use of Form

[3] Contents

[4] State Statutes

§ 455.133 Petition to Vacate Order Confirming Sale and to Order Resale and to Award Damages [Prob. Code § 10350]

[1] FORM

[2] Use of Form

[3] Vacation of Sale and Resale

[4] State Statutes

[5] Cross References

§ 455.134 Order Vacating Sale of Estate Real Property and Ordering Resale and Awarding Damages [Prob. Code § 10350]

[1] FORM

[2] Use of Form

[3] Cross References

§ 455.135 Petition to Vacate Order Confirming Sale and to Confirm Sale to New High Bidder [Prob. Code § 10351]

[1] FORM

[2] Use of Form

[3] Vacation of Sale and Confirmation to New High Bidder

[4] Broker's Commission

[5] State Statutes

[6] Cross References

§ 455.136 Order Vacating Sale of Estate Real Property and Confirming Sale to New High Bidder [Prob. Code § 10351]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§§ 455.137-455.149 [Reserved]

§ 455.150 Objections to Confirmation of Sale of Estate Property [Prob. Code §§ 10261(b), 10310(c)]--Objection to

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[1] FORM

[2] Use of Form

[3] Prohibiting Sale of Estate Property

[4] State Statutes

[5] California Rules of Court

[6] Cross References

§ 455.151 Order Vacating Sale and Prohibiting Sale of Property

[1] FORM

[2] Use of Form

[3] Order Prohibiting Sale of Estate Property

[4] State Statutes

[5] Cross References

§ 455.152 Objections to Confirmation of Sale of Real Property [Prob. Code § 10310(c)]--Objection to Sale Reported to Court

[1] FORM

[2] Use of Form

[3] Grounds for Opposing Particular Sale of Realty

[4] State Statutes

[5] Cross References

§ 455.153 Order Vacating Sale of Real Property and Ordering New Sale [Prob. Code § 10313(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§§ 455.154-455.169 [Reserved]

§ 455.170 Ex Parte Application to Enter Into Exclusive-Listing Agreement With Broker [Prob. Code § 10150(c)]

[1] FORM

[2] Use of Form

[3] Exclusive-Right Agreement With Broker or Agent

[4] Alleging Special Notice

[5] Verification

[6] State Statutes

[7] California Rules of Court

[8] Cross References

§ 455.171 Order Granting Application for Permission to Enter Into Exclusive Listing Agreement [Prob. Code § 10150(c)]

[1] FORM

[2] Use of Form

[3] Broker's Commission

[4] Cross References

§ 455.172 Written Form of Overbid in Open Court at Hearing on Confirmation [Prob. Code § 10311]

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[2] Use of Form

[3] Amount of Overbid

[4] State Statutes

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Chapter 455 PROBATE: SALE OF ESTATE PROPERTY
PART I. SCOPE

39-455 California Forms of Pleading and Practice--Annotated § 455.01

§ 455.01 Scope of Chapter

This chapter covers sales of estate property at private sale and public auction. Rules for sale of all real and personal property are considered, including all kinds of property for which special rules are applicable, such as securities, depreciable property, and perishable property. Requirements for notice of sale are discussed and forms of notice are provided [*see §§ 455.90 -455.94*]. Requirements for court confirmation of sale are also discussed, and forms to petition the court for confirmation of sale are provided [*see §§ 455.129 -455.131*]. Forms for other petitions and orders that are authorized by statute with regard to sales of estate property are also provided [*see §§ 455.111 -455.127*, 542- 543]. For forms to give notice of any court hearing on petitions involving sales, see Ch. 477, *Probate: Statutory Notice Requirements* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-455 California Forms of Pleading and Practice--Annotated § 455.02

§ 455.02 Cross References

For discussion of the conduct of an auction sale, see Ch. 77, *Auctions and Auctioneers*

For discussion of and forms for sales of estate property under the Independent Administration of Estates Act, see Ch. 442, *Probate: Initiatory Probate Administration*

For discussion of and forms for notice requirements, see Ch. 447, *Probate: Statutory Notice Requirements*

For discussion of sales of personal property, see generally Ch. 500, *Sales and Secured Transactions*

For discussion of sales of real property, see generally Ch. 500, *Vendor and Purchaser*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-455 California Forms of Pleading and Practice--Annotated §§ 455.03-455.09

[Reserved]

§§ 455.03[Reserved]

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39-455 California Forms of Pleading and Practice--Annotated § 455.10

§ 455.10 Governing Law

Sales of estate property are governed by *Prob. Code §§ 10000-10382*. Sales are also subject to provisions of local rules of court, often contained in special probate policy manuals or memoranda.

The written disclosures that are generally required to be made to buyers when residential real property is sold in California [*see Civ. Code §§ 1102-1102.15*] do not apply to sales made pursuant to the order of a probate court in the administration of an estate [*Civ. Code § 1102.2(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-455 California Forms of Pleading and Practice--Annotated § 455.11

§ 455.11 When Estate Property May Be Sold

In general, a decedent's personal representative has broad powers to sell estate property. The personal representative may sell real or personal property of the estate if the sale is to the advantage of the estate and is in the best interest of the interested persons [*Prob. Code § 10000(b)*]. Interested persons include any heir, devisee, child or spouse, creditor, beneficiary, or other person who has a property right in or claim against the estate that may be affected by the sale. Interested persons also include any person who has a priority for appointment as personal representative or any fiduciary who represents another interested person [*Prob. Code § 48(a)*; *see Prob. Code § 20* (applicability of definitions)].

Sales of estate property are also expressly authorized by statute if necessary to pay debts, devises, family allowances, expenses of administration, or taxes [*Prob. Code § 10000(a)*], or if the will expressly directs or authorizes the sale of the property [*Prob. Code § 10000(c), (d)*].

If the personal representative neglects or refuses to sell estate property, any interested person may petition for a court order to compel a sale [*see § 455.115*]. In such a proceeding, it need only be shown that the sale is to the advantage of the estate and is in the best interest of the interested persons. A sale may also be compelled if necessary to pay debts, devises, the family allowance, expenses of administration, or taxes, or if the decedent directed that the property be sold in his or her will [*Prob. Code § 10001(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesAppointment

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39-455 California Forms of Pleading and Practice--Annotated § 455.12

§ 455.12 Manner of Sale

In general, the personal representative must comply with directions in the will as to the manner of sale of estate property. However, the personal representative or any interested person may petition the court for an order that relieves the personal representative from the duty to comply with directions in the will [*see § 455.117*]. The court may grant the order if it determines that the deviation would be to the advantage of the estate and in the best interest of the interested persons. The order must specify the mode and the terms and conditions of sale [*Prob. Code § 10002*; *see § 455.118*].

If the will is silent in regard to sale of property, the personal representative has discretion as to the manner of sale. The entire interest of the estate or any lesser interest in any particular property may be sold [*Prob. Code § 10003(b)*]. Property may be sold at either public auction or private sale [*Prob. Code § 10003(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-455 California Forms of Pleading and Practice--Annotated § 455.13

§ 455.13 Selection of Property to Sell

[1] In General

Unless the rules of abatement apply, a personal representative has discretion as to what property of the estate should be sold and in what order [*Prob. Code § 10003(a)*; *see § 455.50[5]*]. The personal representative must generally follow directions in the will as to particular property to be sold [*Prob. Code § 10002(a)*]. However, the personal representative or any interested person may petition the court for an order that relieves the personal representative from the duty to comply with the testamentary directions. The court may grant the order if it determines that the deviation would be to the advantage of the estate and in the best interest of the interested persons. The order must specify particular property to be sold [*Prob. Code § 10002(b)*].

An ex parte application by the personal representative for authority to sell tangible or intangible personal property must state whether the property is specifically devised [*Cal. Rules of Ct., Rule 7.454*]. If it is specifically devised, the devisee's written consent to the sale must be filed [*Cal. Rules of Ct., Rule 7.454*].

[2] Rules of Abatement

[a] Necessity for Abatement

Abatement refers to an insufficiency of assets in an estate to pay all expenses and testamentary gifts [*see Estate of Buck (1948) 32 Cal. 2d 372, 376, 196 P.2d 769]* . If the statutory rules of abatement apply, they may require the personal representative to sell property that is the subject of a particular testamentary gift in order to pay debts, expenses, or another gift that has a higher statutory priority [*see, e.g.*, Prob. Code § 752 (decedents dying before July 1, 1989); *Prob. Code §§ 21400, 21402* (decedents dying on or after July 1, 1989)]. The rules of abatement governing estates of decedents dying on or after July 1, 1989 apply not only to wills and testamentary gifts, but also to trusts, deeds, and any other instrument [*Prob. Code § 21101*].

[b] Abatement if Decedent Died Before July 1, 1989

Although former *Prob. Code §§ 662*, 750-753 were repealed as of July 1, 1989, they continue to govern abatement in

estates of decedents who died before that date [*Prob. Code § 21406*].

A specific gift is one of a particular thing, specified and distinguished from all others of the same kind belonging to the testator [*Prob. Code § 662(a)*]. Specific gifts may be exempted from abatement for the payment of debts, expenses, and the family allowance if it appears necessary to the court in order to carry out the intent of the testator and there is other sufficient estate [Prob. Code § 750; *see § 455.111*]. All beneficiaries must contribute according to their respective interests to any beneficiary whose specific gift was sold in order to pay debts, administrative expenses, or the family allowance [Prob. Code § 753].

[c] Abatement if Decedent Dies on or After July 1, 1989

Prob. Code §§ 21400-21406 govern abatement with respect to gifts made on or after July 1, 1989, whether by will, trust, deed, or any other instrument [*Prob. Code §§ 21101, 21406(a)*]. A gift by will is made on the date of the decedent's death [*Prob. Code § 21406(b)*]. If the instrument provides for abatement, or if the transferor's plan or the purpose of the transfer would be defeated by abatement as provided in *Prob. Code §§ 21400-21406*, the shares of beneficiaries abate as is necessary to effectuate the instrument, plan, or transferor's purpose [*Prob. Code § 21400*].

With the exceptions noted below, shares of beneficiaries abate in accordance with *Prob. Code §§ 21400-21406* for all purposes, including payment of the debts, expenses, and charges specified in *Prob. Code § 11420* (expenses of administration, funeral expenses, expenses of last illness, family allowance, wage claims, mortgages and secured obligations, and general debts), satisfaction of gifts, and payment of expenses on specifically devised property pursuant to *Prob. Code § 12002*. Shares abate without any priority as between real and personal property [*Prob. Code § 21401*]. Abatement in the following situations is not governed by *Prob. Code §§ 21400-21406*, but by the following specified provisions [*Prob. Code § 21401*]:

- *Prob. Code § 21612* governs abatement to provide for an omitted spouse.
- *Prob. Code § 6573* governs abatement to provide for omitted children.
- *Prob. Code §§ 20100-20225* governs abatement relating to proration of taxes.

When *Prob. Code §§ 21400-21406* apply, beneficiaries' shares abate in the following order [*Prob. Code § 21402(a)*]:

- Property not disposed of by the instrument.
- Residuary gifts.
- General gifts to persons other than the transferor's relatives.
- General gifts to the transferor's relatives.
- Specific gifts to persons other than the transferor's relatives.
- Specific gifts to the transferor's relatives.

A general gift is a gift from the general assets of the estate that does not give specific property [*Prob. Code § 21117(b)*]. A specific gift is a transfer of specifically identifiable property [*Prob. Code § 21117(a)*]. A person is regarded as a "relative" of the decedent if the decedent's property would pass to that person under the rules of intestate succession if the decedent died intestate and there were no other persons having priority [*Prob. Code § 21402(b)*; *see Prob. Code §§ 6401, 6402* (intestate shares of surviving spouse and other heirs)].

Subject to *Prob. Code § 21403(b)*, shares of beneficiaries abate pro rata within each class specified in *Prob. Code § 21402* [*Prob. Code § 21403(a)*]. Gifts of annuities and demonstrative gifts are treated as specific gifts to the extent they are satisfied out of the fund or property specified in the gift and as general gifts to the extent they are satisfied out of property other than the fund or property specified in the gift [*Prob. Code § 21403(b)*; *see Prob. Code § 21117(c)* (demonstrative gift as general gift that specifies fund or property from which it is primarily to be made)].

If an instrument requires property that is the subject of a specific gift to be exonerated from a mortgage, deed of trust, or other lien, a specific gift of other property does not abate for the purpose of exonerating the encumbered property [*Prob. Code § 21404*]. In any case in which there is abatement when a distribution is made during estate administration, the court must fix the amount each distributee must contribute for abatement. The personal representative then must reduce the distributee's share by that amount [*Prob. Code § 21405(a)*]. If a specific gift must be abated, the beneficiary of the specific gift may satisfy the contribution for abatement out of the beneficiary's property other than the property that is the subject of the specific gift [*Prob. Code § 21405(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-455 California Forms of Pleading and Practice--Annotated § 455.14

§ 455.14 Sale for More or Less Than Appraised Value

If any estate property is sold for more than its appraised value, the personal representative must account for the proceeds of sale, including the excess over the appraised value. If any property is sold for less than appraised value, the personal representative is not responsible for the loss, provided that the sale was made in accordance with law [*Prob. Code § 10005*; *see §§ 455.17, 455.20*].

Legal Topics:

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39-455 California Forms of Pleading and Practice--Annotated § 455.15

§ 455.15 Sale and Appraisal of Assets as Unit

If the personal representative determines in his or her discretion that particular assets in the estate, whether real or personal, constitute a unit for purposes of sale, the property may be appraised as a unit. Whether or not the assets have been appraised as a unit, the personal representative may sell the assets as a unit and under one bid if the court finds the sale of the assets as a unit to be to the advantage of the estate. Any private sale of assets as a unit that were appraised separately must be made for at least 90 percent of the sum of the appraised values of all real and personal property in the unit. If the assets were appraised as a unit, any private sale must be for at least 90 percent of the appraised value of the unit. If the unit contains any real property, the sale of the unit must conform to the statutory requirements for sales of realty, discussed in *§ 455.17*. If the unit contains only personal property, the sale must conform to the requirements for sales of personalty, discussed in *§ 455.20* [*Prob. Code § 10004*]. For a form for notice of sale of a unit of real and personal property, see *§ 455.94*. For a form for a petition to sell such a unit, see *§ 455.119*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-455 California Forms of Pleading and Practice--Annotated § 455.16

§ 455.16 Purchase by Personal Representative or Attorney

As a general rule, neither the personal representative nor the personal representative's attorney may purchase any property of the estate, or any claim against the estate, directly or indirectly, or be interested in any such purchase [*Prob. Code § 9880*]. However, procedures exist to obtain court approval of such a sale.

The personal representative may file a petition for a court order approving a sale to him or her or to his or her attorney [*Prob. Code § 9883(a)*; *see § 455.113*]. The court may issue the order if a sale to the personal representative or attorney is authorized in the decedent's will [*Prob. Code § 9882*]. The order may also be issued if consent to the purchase, signed by each known heir and devisee whose interest in the estate would be affected by the proposed purchase, is filed with the court, and the purchase is shown to be to the advantage of the estate [*Prob. Code § 9881*]. For a form for such an order, *see § 455.114*.

If the court is satisfied that the purchase should be authorized, it must make an order to that effect on specified terms and conditions. The personal representative may execute a conveyance or transfer according to the terms of the order. Unless otherwise specified in the will or order, the sale must be made in the same manner as other property of the estate of the same nature [*Prob. Code § 9883(d)*]. If court confirmation of the sale is otherwise required, the order approving sale to the personal representative or attorney may be made at the time of confirmation [*Prob. Code § 9883(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 455.17 Sales of Realty--Bond Requirements

If the personal representative requests or has been granted an independent power to sell or hypothecate real estate or to lease it for a term of more than one year, the personal representative is required to state in the request to fix the amount of the bond the value of the real property less encumbrances [*Cal. Rules of Ct., Rule 7.205*].

If a bond or additional bond is required in an order confirming sale of real estate, the court must not file the order until the additional bond is filed [*Cal. Rules of Ct., Rule 7.206*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 455.18 Opportunity to Inspect Property

The fiduciary should allow bona fide prospective buyers and their brokers a reasonable opportunity to inspect the property. If there is a showing that the fiduciary has denied any such person a reasonable opportunity to inspect the property, the court will be required to not confirm the sale and instead will be required to continue the sale to allow the inspection, unless good cause is shown for the court to confirm the sale [*Cal. Rules of Ct., Rule 7.451*; *see* discussion of confirmation in § 455.19[3]].

Legal Topics:

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§ 455.19 Notice Requirements

[1] Generally

Under most circumstances, real property of an estate may be sold only after notice of sale has been published for at least 10 days in a newspaper published in the county in which the property, or some part of it, is located or, if there is no such newspaper, in a newspaper as directed by the court [*Prob. Code § 10300(a)*; *see Gov. Code § 6063a*]. If it appears from the inventory and appraisal that the value of the realty does not exceed $5,000, notice of sale may be given by posting at the courthouse in the county in which the property or some portion of it is located, instead of by publication [*Prob. Code § 10301(a)*]. If the will either directs or authorizes sale of the property, the sale may proceed without notice at the option of the personal representative [*Prob. Code § 10303*].

If publication is required, notice must be completed before the date of a public auction, or in the case of a private sale, before the date specified in the notice as the day on or after which the sale is to be made [*Prob. Code § 10300(b)*]. If posting is sufficient, the posting must be for at least 15 days before the date of auction or the specified date of private sale [*Prob. Code § 10301(b)*]. If it is to the advantage of the estate, the court may, by order, shorten the time of notice of sale to not less than five days [*Prob. Code § 10302(a)*; *see Gov. Code § 6061*; *see also § 455.123*]. For forms for notice of sale of real property, *see §§ 455.92* and *455.93*.

[2] Public Auction of Realty

A sale by public auction must be conducted in the county in which the property is located, or in any county in which property that overlaps county lines is located [*Prob. Code § 10305(a)*]. The auction must be conducted between the hours of 9:00 a.m. and 9:00 p.m. on the date specified in the notice unless the sale is postponed [*Prob. Code § 10305(b)*]. The personal representative may postpone the sale if all of the following conditions are satisfied [*Prob. Code § 10305(c)*]:

- The personal representative believes that the postponement is to the advantage of the estate;
- Notice of the postponement is given by public declaration at the time and place of the auction;

- The postponement, together with previous postponements, does not exceed three months in all.

[3] Private Sale of Realty

A private sale of real property may not be made before the day stated in the notice of sale as the date on which sale will be made, nor later than one year after that day. The bids or offers must be in writing. They must be left at the place designated in the notice of sale or delivered to the personal representative personally or to a person specified in the notice at any time after the first publication or posting of notice and before the making of the sale [*Prob. Code § 10306*].

[4] Court Confirmation of Sale of Realty

[a] Generally

Unless a personal representative has been granted authority to proceed under the Independent Administration of Estates Act [*see Prob. Code § 10503*], all sales of realty must be reported to and confirmed by the court in order to pass title to the purchaser [*see § 455.131* (Judicial Council form)]. Court confirmation is required whether the sale is private or by public auction, and regardless of any direction to sell or authority to sell expressed in the will [*Prob. Code § 10308(a)*]. If by 30 days after the sale the personal representative has not filed a petition for confirmation, it may be filed by the purchaser [*Prob. Code § 10308(b)*].

A private sale of realty must meet the following requirements to be confirmed by the court [*Prob. Code § 10309(a)*]:

- The property must have been appraised within one year prior to the date of the confirmation hearing;
- The valuation date used in the appraisal must have been within one year of the date of the hearing;
- The sale price must be at least 90 percent of the appraised value.

If the property was not previously appraised, it may be appraised at any time before confirmation of sale. The property may be reappraised before confirmation if the prior appraisal date or valuation date was more than one year before the hearing, or if the court is satisfied that the most recent appraisal is too high or too low [*Prob. Code § 10309(b)*; *see Prob. Code § 10309(c)* (procedures for reappraisal)].

Various bond requirements must be met before the court may confirm the sale [*see Cal. Rules of Ct., Rules 7.205, 7.206*], as discussed in *§ 455.17[1]*.

The court will not proceed with the hearing on the petition to confirm the sale of property, unless the petitioner's attorney or the petitioner, if unrepresented, is present [*Cal. Rules of Ct., Rule 7.452*].

Any interested person may file written objections to the confirmation of the sale at or before the hearing and may testify and produce witnesses in support of the objections [*Prob. Code § 10310(c)*; *see §§ 455.150* and *455.152*]. Unless the decedent's will directed or authorized the sale, the personal representative must make a showing of the necessity for the sale or the advantage to the estate and the benefit to the interested persons in making the sale [*Prob. Code § 10310(a)*]. The court must investigate the efforts of the personal representative to obtain the best price for the property that is reasonably attainable [*Prob. Code § 10310(b)*]. Proof of any required notice of sale must also be made [*Prob. Code § 10312*].

[b] Overbids for Realty

At the confirmation hearing, any person may submit a written overbid to purchase the property [*see § 455.172*]. The court must confirm the sale to the overbidder if all of the following conditions are satisfied [*Prob. Code § 10311(a)*].

- The offer is for an amount at least 10 percent more on the first $10,000 of the original offer and five percent more on the amount of the balance of the original offer.

- The offer is made by a responsible person.

- The offer complies with all provisions of law.

If more than one overbid that satisfies these criteria is made, the sale must be confirmed to the highest bidder [*Prob. Code § 10311(b)*]. The amount of a bid is determined without regard to any real estate commission or fee [*Prob. Code § 10311(e)*]. The court may, in its discretion, decline to accept an overbid, even if all the requirements are satisfied. In such a case, the court must order a new sale [*Prob. Code § 10311(c)*].

If the sale returned for confirmation is on credit and the overbid is either for cash or on credit, whether on the same or different credit terms, the court may not consider the overbid unless the personal representative is willing to accept the higher offer. The personal representative must also be willing to accept a higher offer on credit over an original cash sale [*Prob. Code § 10311(d)*].

[c] Order Confirming or Vacating Sale of Realty

The court must confirm a sale to the person making the highest offer that satisfies all legal requirements if all of the following requirements have been met [*Prob. Code § 10313(a)*]:

- Either the sale was directed or authorized by the decedent's will or good reason exists for the sale.

- Proof of any required notice of sale has been made.

- The sale was legally made and fairly conducted.

- The sale price is not disproportionate to the value of the property.

- In the case of a private sale, the sale price meets the required percentage of appraised value.

- If the sale is confirmed to the original offeror, it does not appear that a valid overbid may be obtained.

The court must also fix the compensation of any real estate agent or broker, either in the order confirming sale or in a subsequent order [*Prob. Code § 10313(b)*]. For the form for a court order confirming sale, *see § 455.131*.5 (Judicial Council form). No omission, error, or irregularity in the proceedings under *Prob. Code §§ 10300-10316* impairs or invalidates the proceedings or the sale pursuant to an order made under *Prob. Code §§ 10300-10316* [*Prob. Code § 10316*].

If it appears to the court that any requirement for confirmation has not been satisfied, the court must vacate the sale and order a new sale [*Prob. Code § 10313(c)*; *see § 455.153*]. If a new sale is ordered, notice of the new sale must be given, and the new sale, in all respects, must be conducted as if no previous sale had taken place [*Prob. Code § 10313(d)*].

A party moving to vacate a confirmation order must be an "interested person" within the scope of *Prob. Code § 48*. Just as one must be an "interested person" to file written objections to the sale's confirmation under *Prob. Code § 10310*, it logically follows that one must be an "interested person" to seek to vacate the order resulting from such a hearing [*Estate of Maniscalco (1992) 9 Cal. App. 4th 520, 523, 11 Cal. Rptr. 2d 803]* .

[5] Conveyance of Realty After Confirmation

On confirmation of a sale, the personal representative must execute a conveyance to the purchaser that refers to the order confirming the sale and directing the conveyance to be executed [*Prob. Code § 10314(a)*]. The conveyance vests in the purchaser all the right, title, and interest that the decedent had in the property at death and any other or additional right, title, and interest in the property acquired by the estate, by operation of law or otherwise, prior to the sale [*Prob. Code § 10314(c)*].

[6] Sale of Realty on Credit

If a sale is made on credit, the personal representative must take the purchaser's note for the unpaid balance and a mortgage or deed of trust to secure payment of the note. The estate's security interest may be subject only to encumbrances existing as of the date of sale and such other encumbrances as the court may approve. If the property sold on credit consists of any interest less than the entire ownership and the other owners join in the sale, the note and security interest may be made to the personal representative and the other owners. The interest of the personal representative in the note and security interest is that of the estate in the property prior to the sale [*Prob. Code § 10315*].

[7] Sale of Pasture or Grazing Land

Real property suitable for a shift-in-land-use loan to develop grazing or pasture facilities may be sold by a personal representative to a grazing or pasture association in conformity with the federal Consolidated Farm and Rural Development Act [*see 7 U.S.C.S. § 1921 et seq.*], with the consent of the interested heirs or devisees or pursuant to the will of the decedent, and on a finding by the court that the rights of creditors will not be jeopardized [*Prob. Code § 10207(a), (c)*]. The price of the sale may not be less than the value of the land as established by an independent and competent appraiser mutually acceptable to the federal government, the grazing or pasture association, and the personal representative [*Prob. Code § 10207(d)(2)*]. The sale must be confirmed by the court as with any other sale of estate real property. However, the sale may be made to the association regardless of whether an overbid is made at the hearing on the petition to confirm the sale [*Prob. Code § 10207(d)(3)*].

Legal Topics:

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§ 455.20 Sales of Personal Property

[1] Opportunity to Inspect Property

The fiduciary should allow bona fide prospective buyers and their brokers a reasonable opportunity to inspect the property. If there is a showing that the fiduciary has denied any such person a reasonable opportunity to inspect the property, the court will be required to not confirm the sale, when confirmation is required, and instead will be required to continue the sale to allow the inspection, unless good cause is shown for the court to confirm the sale [*Cal. Rules of Ct., Rule 7.451*; *see* discussion of confirmation in §§ 455.20[7], [8]].

[2] Notice Requirements

In general, personal property of the estate may be sold only after notice of sale is given either by posting or publication, at the option of the personal representative. Posting must be made at the county courthouse of the county in which the proceedings are pending at least 15 days before the date of a public auction sale, or in the case of a private sale, the date specified in the notice as the day on or after which the sale is to be made [*Prob. Code § 10250(a)*]. Publication must be for a 10-day period in a newspaper in the county in which the proceedings are pending and must be completed before the date of a public auction sale, or in the case of a private sale, the date specified in the notice as the day on or after which the sale is to be made [*Prob. Code § 10250(b)*; *see Gov. Code § 6063a*]. If it is to the advantage of the estate, the court may, by order, shorten the time of notice of sale to not less than five days [*Prob. Code § 10251(a)*; *see Gov. Code § 6061*; *see also § 455.123*].

Notice is not required if the decedent's will either directs or authorizes sale of the property. Notice is also not required if the property is perishable, will depreciate in value if not disposed of promptly, or will incur loss or expense by being kept; or if sale is necessary to provide for payment of the family allowance [*Prob. Code § 10252*].

For forms for a notice of sale of personal property, see *§§ 455.90* and *455.91*. For a list of the required contents of such a notice, see *§ 455.90*.

[3] Public Auction of Personalty

A sale of personal property at public auction must be made within California at a public place, including the courthouse door or the auction house, or at the residence of the decedent. Any tangible personal property that is to be sold must be present at the time of the auction [*Prob. Code § 10254(a)*]. These requirements may be dispensed with by order of the court on petition of the personal representative or of any interested person [*Prob. Code § 10254(b)*; *see § 455.125*; for the definition of "interested persons," *see § 455.11*].

The personal representative may postpone a public-auction sale of personal property from time to time if all of the following conditions are satisfied [*Prob. Code § 10254(c)*]:

- The personal representative believes that the postponement is to the advantage of the estate.
- Notice of the postponement is given by public declaration at the time and place of the auction.
- The postponement, together with all previous postponements of sale of the property, does not exceed three months.

[4] Private Sale of Personalty

A private sale of personal property may not be made before the date stated in the notice of sale as the day on or after which the sale will be made, nor later than one year after that day. Any bids or offers must be in writing. They must be left at a place designated in the notice of sale or delivered to the personal representative personally or to a person who is specified in the notice of sale at any time after the first publication or posting of notice and before the making of the sale [*Prob. Code § 10255*].

[5] Bids to Comply With Notice

All bids must substantially comply with any terms that are specified in the notice of sale. This requirement applies both to public auctions and private sales [*Prob. Code § 10256*].

[6] Manner of Payment of Purchase Price: Cash or Credit

Personal property may be sold for cash or on credit [*Prob. Code § 10257(a)*]. If a sale is made on credit, not less than 25 percent of the purchase price must be paid in cash at the time of sale. The personal representative must either take the purchaser's note and security interest in the property sold to secure the note or enter into a conditional sale contract under which the estate retains title until the balance is paid [*Prob. Code § 10257(b)*]. Any of these requirements may be waived or modified by the court on petition of the personal representative. Waiver or modification requires a showing that the terms are to the advantage of the estate and that the property to be sold is of such a nature that it is impracticable to sell the property for a larger cash payment at the time of sale or to retain a security interest or other lien in the property [*Prob. Code § 10258(a)*; *see § 455.127*]. The terms of any note and security interest or conditional-sales contract must be approved by the court at the time of confirmation of the sale [*Prob. Code § 10257(c)*; *see § 455.20[8]*].

If the property sold on credit consists of any interest less than the entire ownership and the other owners join in the sale, the note and security interest may be made to the personal representative and the other owners. The interest of the personal representative in the note and security interest is that of the estate in the property prior to the sale [*Prob. Code § 10257(d)*].

[7] Passage of Title to Personal Property Without Court Confirmation

Court confirmation is not required to pass valid title to securities, including subscription rights, savings accounts, and mutual capital certificates [*Prob. Code §§ 10200(b), 10201(b), 10202*]. Court confirmation is also not required if the personal representative has been granted the authority to administer the estate under the Independent Administration of

Estates Act [*Prob. Code § 10503*].

Title to the following personal property may also be passed to a purchaser without the need for court confirmation or approval [*Prob. Code § 10259(a)*]:

- Perishable property.
- Property that will depreciate in value if not disposed of promptly.
- Property that will incur loss or expense by being kept.
- Property that must be sold in order to provide for the payment of a family allowance pending receipt of other sufficient funds.

In addition, title to personal property sold at public auction passes without the need for court confirmation or approval on receipt of the purchase price and delivery of the property to the purchaser, or, in the case of intangible property, delivery of the instrument that transfers title [*Prob. Code § 10259(b)*]. The personal representative is responsible for the actual value of any of these categories of property unless the sale is reported to and approved by the court [*Prob. Code § 10259(c)*]. Therefore, court approval is recommended if the purchase price is significantly less than appraised value for any item of personalty for which court confirmation is otherwise not required.

[8] Requirement of Court Confirmation of Sale of Personal Property

[a] Generally

Unless exempted [*see § 455.20[7]*], sales of personal property must be reported to and confirmed by the court in order to pass title to the purchaser [*see § 455.129*]. Court confirmation is required even if the decedent's will directed or authorized the sale of the property [*Prob. Code § 10260(a)*]. If the personal representative fails to file the report and petition for confirmation of sale within 30 days after the sale, the purchaser may file and petition for confirmation [*Prob. Code § 10260(b)*].

The court will not proceed with the hearing on the petition to confirm the sale of property, unless the petitioner's attorney or the petitioner, if unrepresented, is present [*Cal. Rules of Ct., Rule 7.452*].

Any interested person may file written objections to the confirmation of the sale at or before the hearing and may testify and produce witnesses in support of the objections [*Prob. Code § 10261(c)*; *see § 455.150*]. Unless the decedent's will directed or authorized the sale, the personal representative must make a showing of the necessity for the sale or the advantage to the estate and the benefit to the interested persons in making the sale [*Prob. Code § 10261(a)*]. Proof of any required notice of sale must also be made [*Prob. Code § 10263*].

The court must also fix the compensation of any agent or broker, either in the order confirming sale or in a subsequent order [*Prob. Code § 10261(d)*]. No omission, error, or irregularity in the proceedings under *Prob. Code §§ 10250-10264* impairs or invalidates the proceedings or the sale pursuant to an order made under *Prob. Code §§ 10250-10264* [*Prob. Code § 10264*].

[b] Sale of Partnership Interest

Before confirming the sale of a partnership interest [*see Prob. Code § 10204* (partnership interest may be sold in same manner as other personal property)], whether to a surviving partner or to any other person, the court must inquire into the condition of the partnership and examine any surviving partner if the partner is a resident of California at the time of

the hearing and able to be present in court. The court may issue a citation to compel a surviving partner to attend the hearing [*Prob. Code § 10261(c)*].

[c] Overbids for Personal Property

At the confirmation hearing, any person may submit an overbid that is at least 10 percent more than the pending sale price to purchase the property. The court, in its discretion, may accept the new bid and confirm the sale to the overbidder or may order a new sale if all of the following conditions are satisfied [*Prob. Code § 10262(a)*]:

- The original bid is more than $100, or if the original bid is less than $100, the new bid is at least $100 more than the original bid.
- The new bid is made by a responsible person.
- The new bid complies with all provisions of law.

If there is more than one offer that satisfies these requirements, the court must either accept the accept the highest offer and confirm the sale to that offeror or order a new sale [*Prob. Code § 10262(b)*].

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§ 455.21 Disposition of Securities

The sale or surrender for redemption or conversion of securities requires court authorization. After authorization has been obtained, title to securities that are sold or surrendered passes without the need for subsequent court confirmation [*Prob. Code § 10200(b)*; *see Prob. Code §§ 70, 10200(a)* (definition of "securities" to which requirement applies)]. However, subscription rights for the purchase of additional securities held by the estate pursuant to securities owned by the estate may be sold, in whole or in part, without notice of sale, prior order of the court, or subsequent confirmation of the court [*Prob. Code § 10202*].

To obtain court authorization for the disposition of securities, the personal representative or any interested person must file a petition that states the terms and conditions of sale and the advantage to the estate of the proposed sale or redemption or conversion [*see § 455.121*]. The court's order must fix the terms and conditions of sale, redemption, or conversion [*Prob. Code § 10200(c)*; *see § 455.122*].

After court authorization has been obtained, no notice of sale is required if any of the following conditions are satisfied [*Prob. Code § 10200(e)*]:

- The minimum selling price is set by the court;
- The securities are to be sold on an established stock or bond exchange; or
- The securities to be sold are designated as national market system securities on an interdealer quotation system or subsystem by the National Association of Securities Dealers, Inc., sold through a broker-dealer registered under the Securities Exchange Act of 1934 during the regular course of business of the broker-dealer.

No notice of surrender for redemption, or conversion is required [*Prob. Code § 10200(e)(4)*].

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§ 455.22 Sale or Withdrawal of Savings Accounts and Mutual Capital Certificates

Savings accounts and mutual capital certificates of a savings association or federal association may be sold or surrendered for withdrawal by the personal representative and title passed without notice of sale, prior order of the court, or subsequent confirmation by the court as long as the amount of money obtained on sale or withdrawal is not less than the withdrawal value of the savings account or the value of the mutual capital certificate [*Prob. Code § 10201(b)*; *see Prob. Code § 10201(a)*; *Fin. Code §§ 5111, 5116, 5124* (definitions of savings account, mutual capital certificate, and withdrawal value)]. The personal representative has the same discretion with regard to credit-union share accounts and certificates for funds as long as the amount of money obtained on sale or withdrawal is not less than the withdrawal value of the share account or the value of the certificate [*Prob. Code § 10201(c)*].

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§ 455.23 Sale of Decedent's Leasehold Interest

Under most circumstances, a leasehold interest held by the decedent at the time of death may be sold subject to all requirements for the sale of personal property [*Prob. Code § 10203(a)*; *see § 455.20*]. However, a leasehold interest must be sold in accordance with the requirements for a sale of realty if the interest to be sold consists of any of the following: following [*Prob. Code § 10203(b)*; *see § 455.17*]:

- A leasehold interest in real property with an unexpired term of 10 years or longer, considering any term to which the lessee has the right to extend the lease.

- A leasehold interest in real property together with an option to purchase the property or part of it.

- A lease for the purpose of production of minerals, oil, gas, other hydrocarbon substances, or geothermal energy.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 455.24 Decedent's Contract Right to Purchase Real Property

If a decedent at the time of death was the buyer under a contract for the purchase of real property, and the decedent's interest in the property and under the contract is to be sold by the personal representative, the sale must be made in conformance with the requirements for sales of real property of the estate [*Prob. Code § 10206(a)*; *see § 455.17*]. The sale must be made subject to all payments that are due at the time of sale or that may subsequently become due on the contract. If there are any such payments, the court may not confirm the sale until the purchaser of the decedent's interest executes a bond to indemnify the personal representative in case the purchaser does not fulfill the decedent's obligations under the contract [*Prob. Code § 10206(b)*; *see Prob. Code § 10206(c)* (conditions of bond)]. Bond is not required if no claims have been made against the estate on the contract and the time filing claims has expired, or if the vendor or other person entitled to payment under the contract waives all recourse to the assets of the estate for payment and releases the estate and the personal representative from liability for payment [*Prob. Code § 10206(d)*].

On court confirmation of the sale of the decedent's interest under the contract, and after any required bond has been given, the personal representative must execute an assignment of the contract to the purchaser [*Prob. Code § 10314(b)*]. The assignment vests in the purchaser all the right, title, and interest of the estate or of the persons entitled to the interest of the decedent at the time of sale in the property assigned. The purchaser then has the same rights and remedies against the vendor of the property as the decedent would have had if living [*Prob. Code § 10314(d)*].

Legal Topics:

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§ 455.25 Default by Purchaser

[1] Within 60 Days of Confirmation

If within 60 days after the original confirmation of sale of real or personal property the purchaser has failed to complete the purchase, the personal representative may petition to vacate the confirmation of sale and report an offer from a new high bidder [*see § 455.135*]. The court may confirm a sale to the new bidder if the bid is for the same or a higher amount, on the same or better terms, and in the manner prescribed in the original notice of sale [*Prob. Code § 10351(a)(1)*; *see § 455.136*]. At least 15 days before the hearing, notice of the time and place of the hearing must be given to any nonpetitioning personal representative and to all persons who have requested special notice in the estate proceeding pursuant to Prob. Code § 1254 [*Prob. Code § 10351(b)*; *see Prob. Code § 1220(a)(1), (2)*]. In addition, the notice and a copy of the petition must be given to the buyers and brokers named in the order confirming sale, although notice need not be given to a defaulting purchaser whose written consent to the vacation of the order confirming sale is filed with the court before the hearing [*Prob. Code § 10351(b)*].

[2] More than 60 Days After Confirmation

If more than 60 days have passed since the date of court confirmation, the personal representative may not, on the default of the purchaser, report a sale to a new high bidder for confirmation [*Prob. Code § 10351(c)*]. Instead, the personal representative may petition the court for an order vacating the confirmation of sale, ordering a resale of the property, and awarding damages to the estate against the purchaser [*Prob. Code § 10350(a)*; *see § 455.133*]. At least 15 days before the hearing, notice of the time and place of the hearing must be given to any nonpetitioning personal representative and to all persons who have requested special notice in the estate proceeding pursuant to Prob. Code § 1254 [*Prob. Code § 10351(b)*; *see Prob. Code § 1220(a)(1), (2)*]. In addition, the notice and a copy of the petition must be given to the buyers and brokers named in the order confirming sale, although notice need not be given to a defaulting purchaser whose written consent to the petition is filed with the court before the hearing [*Prob. Code § 10350(b)*]. Any resale ordered by the court must be made in conformance with the applicable statutory sales requirements [*Prob. Code § 10350(c), (d)*].

[3] Liability of Defaulting Purchaser

If the property is resold, the defaulting purchaser is liable to the estate for damages equal to the sum of the following: (1) the difference between the contract price of the first sale and that of the resale; (2) expenses made necessary by the breach; and (3) other consequential damages [*Prob. Code § 10350(e)*; *see also Estate of Felder (2008) 167 Cal. App. 4th 518, 522, 84 Cal. Rptr. 3d 220* (probate court authorized to award estate damages in an amount equal to the difference between defaulting and purchase price; estate entitled to retain defaulting buyer's deposit as statutory award for damages)].

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§ 455.26 Sale of Encumbered Property

[1] Application of Proceeds

Estate property is encumbered if it is subject to a lien for a secured debt that is a valid claim against the estate and that has been allowed or approved [*Prob. Code § 10360(b)*]. If encumbered property is sold, the purchase money must be applied in the following order [*Prob. Code § 10361(a)*]:

- First, to expenses of administration that are reasonably related to the administration of the property sold as provided in *Prob. Code § 11420(a)*;
- Second, to payment of the expenses of the sale;
- Third, to payment and satisfaction of the amount secured by the lien on the property sold, if payment and satisfaction of the lien is required under the terms of the sale; and
- Fourth, to application in the course of administration.

At any time before payment is made to satisfy all liens on the encumbered property sold, the personal representative or any interested party may petition the court for an order determining the amount of expenses of administration that are reasonably related to the administration of the encumbered property as provided in *Prob. Code § 11420(a)(1)*. The petition may be heard separately or as part of a petition for confirmation of sale of real or personal property as provided in *Prob. Code §§ 10260* or *10308* [*Prob. Code § 10361.5*].

After payment of the first two categories of expenses set forth above, the purchase money received from the sale of the encumbered property must be applied without delay to payment and satisfaction on the amount secured by the lien on the property sold [*Prob. Code § 10361(b)*]. The property remains subject to the lien until the purchase money has actually been so applied, unless the personal representative elects to pay the purchase money (or so much of it as is sufficient to satisfy the expenses of sale and the lien on the property sold) to the clerk of the court [*Prob. Code §§ 10361(b), 10362(a)*]. If payment is made to the clerk, the lien will immediately cease [*Prob. Code § 10362(a)*]. The

clerk must use the money to pay the expenses of the sale and satisfy the amount secured by the lien on the property sold without delay. If there is a surplus, the clerk must return it to the personal representative, unless the court for good cause and after notice to the personal representative orders otherwise [*Prob. Code § 10362*].

[2] Sale to Lienholder

A lienholder may purchase the real or personal property encumbered by the lien regardless of whether a claim for the amount secured by the lien has been, or could have been, filed, allowed, or approved [*Prob. Code § 10363(a)*]. Unless the property is sold subject to the lien, if the lienholder purchases the property the following procedures apply [*Prob. Code § 10363(b)*]:

- If the amount secured by the lien is a valid claim against the estate and has been allowed or approved, the lienholder's receipt for the amount due the lienholder from the sale proceeds is considered as payment pro tanto of the debt.

- If no claim on the amount secured by the lien has been filed, approved, or allowed, the court may, at the hearing on the petition for confirmation of the sale, examine the validity and enforceability of the lien and the amount secured by the lien, and may authorize the personal representative to accept the receipt of the lienholder for the amount secured by the lien as payment pro tanto.

- Whether or not a claim for the amount secured has been filed, approved, or allowed, if the amount for which the property is purchased is insufficient to discharge the lien and to pay the expenses of sale, the lienholder must pay to the court clerk an amount sufficient to cover the expenses of the sale.

Nothing permitted under *Prob. Code § 10363* constitutes an allowance or approval of a claim based on the lien or the amount secured by the lien [*Prob. Code § 10363(c)*].

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§ 455.27 Personal Representative's Liability for Negligent or Fraudulent Sale

The personal representative is liable to an interested person for any damages suffered because of the neglect or misconduct of the personal representative in proceedings involving a sale of estate property [*Prob. Code § 10380*; for the definition of "interested persons," *see § 455.11*]. If the personal representative fraudulently sells real property of the estate contrary to or in violation of *Prob. Code §§ 10000-10382*, a person having an estate of inheritance in the property may recover, as liquidated damages, an amount equal to double the fair market value of the property on the date of sale. These liquidated damages are in addition to any other damages for which the personal representative is liable [*Prob. Code § 10381*].

Legal Topics:

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§ 455.28 Recovery of Property by Heir

An heir or other person claiming under the decedent may bring an action to recover estate property that was sold by the personal representative on the ground that the sale is void. Such an action must be commenced within three years after the settlement of the personal representative's final account or three years after the discovery of any fraud on which the action is based, whichever is later [*Prob. Code § 10382(a)*]. This limitation period may not be tolled for any reason [*Prob. Code § 10382(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 455.29 Contract With Agent or Broker

[1] To Sell Real Property

A personal representative may enter into a written contract with a licensed real estate broker in order to secure a purchaser for any real property of the estate. The broker may associate other licensed brokers and may use a multiple-listing service [*Prob. Code § 10150(a)(1)*; *see Civ. Code § 1087* (definition of "multiple-listing service"].

[2] To Sell Personal Property

The personal representative may also enter into a written contract with one or more agents or brokers to secure a purchaser for any personal property of the estate. If the particular property to be sold or the particular manner of sale requires the agent or broker to be licensed, the contract may be made only with a licensed person [*Prob. Code § 10150(a)(2)*].

[3] Fee, Commission, or Other Compensation

The contract with an agent or broker may provide for payment of a fee, commission, or other compensation out of the proceeds of sale. However, the contract is binding and valid against the estate only for the amount of compensation allowed by the court [*see § 455.31*]. If court confirmation of the sale is required, the estate has no liability on the contract unless a sale is confirmed. The personal representative is not personally liable on the contract solely by having executed it [*Prob. Code § 10150(b)*].

[4] Exclusive Listing Contract

The contract may grant an exclusive right to sell property only if the personal representative obtains the prior permission of the court [*see § 455.170*]. Permission may be granted ex parte at the time the personal representative is appointed or at any subsequent time. The personal representative must make a showing of necessity and advantage to the estate. [*Prob. Code § 10150(c)*].

A petition for approval of an exclusive listing under *Prob. Code § 10150(c)* is required to state the following [*Cal. Rules*

of Ct., Rule 7.453]:

- A description of the property to be sold;
- The name of the broker to be employed;
- A summary of the terms of the exclusive listing agreement or include a copy of the listing agreement; and
- A detailed statement of the facts supporting the "necessity and advantage" to the estate of having the exclusive listing.

An exclusive listing may not be granted for more than 90 days at a time. Additional 90-day extensions may be granted by the court under the same procedures and standards as the original grant of permission [*Prob. Code § 10150(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 455.30 Contract With Auctioneer

A personal representative may enter into a written contract with a licensed auctioneer to conduct a public auction of any personal property of the estate that is to be sold [*Prob. Code § 10151(a)(1)*]. If the auction is to be held outside of California, the auctioneer must be legally permitted to conduct a public auction in the jurisdiction of the sale [*Prob. Code § 10151(a)(2)*]. The contract must be legally enforceable under the law of the jurisdiction where it is made [*Prob. Code § 10151(b)*].

A contract with an auctioneer may provide for payment of a fee, commission, or other compensation out of the proceeds of sale and for reimbursement of expenses. However, the contract is binding and valid against the estate only for the amount of compensation allowed by the court [*see § 455.31*]. If court confirmation of the sale is required, the estate has no liability on the contract unless a sale is confirmed. The personal representative is not personally liable on the contract solely by having executed it [*Prob. Code § 10151(c)*].

The contract may provide that personal property of two or more estates being administered by the same personal representative may be sold at the same public auction. Particular items may be sold separately or in a lot with other items from the same estate. A sale pursuant to the contract must be with reserve. The auctioneer must comply with the instructions of the personal representative with respect to withdrawal of items, risk of loss, place of delivery, warranties, and other matters [*Prob. Code § 10151(d)*].

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§ 455.31 Compensation of Broker, Agent, or Auctioneer

[1] In General

Regardless of the terms of any contract, an estate is not liable to a broker, agent, or auctioneer for any fee, commission, or other compensation or expenses in connection with a sale of property unless an actual sale is made to and consummated by a purchaser, and court confirmation, if required, is obtained [*Prob. Code § 10160*; *Sullivan v. Dorsa (2005) 128 Cal. App. 4th 947, 956, 963, 27 Cal. Rptr. 3d 547* (broker's commission cannot be awarded on unconsummated sale of real property)]. However, the estate is not liable to an agent or broker under a contract for the sale of real property or for any fee, commission, or other compensation or expenses in connection with sale of the property when the agent or broker, directly or indirectly, is the purchaser of the property, or when the agent or broker representing the purchaser to whom the sale is confirmed has any interest in the purchaser [*Prob. Code § 10160.5*].

The amount of any fee, commission, or other compensation of a broker or agent in connection with a sale of property must be established by the court. The court has the discretion to fix reasonable compensation for the services of the broker, agent, or auctioneer to the estate [*Prob. Code §§ 10161(a), 10167(a)*]. However, the amount of compensation may not exceed an amount specified in the contract between the broker, agent, or auctioneer and the estate [*Prob. Code §§ 10161(c), 10167(b)*]. No condition in any bid that a certain percent of the bid be paid to an agent or broker is binding on the court, although the bidder is bound to the full amount of the bid even if any part of the agent or broker's compensation is disallowed [*Prob. Code § 10166*].

An agent or broker is entitled to compensation for services to the estate in connection with a sale only under one of the following circumstances [*Prob. Code § 10161(b)*]:

- The agent or broker produces the original bid that is returned to the court for confirmation;
- The agent or broker produces a successful overbidder at the confirmation hearing; or
- The agent or broker has a contract granting an exclusive right to sell the property.

[2] If Only One Agent or Broker Is Involved

If the court confirms a sale on the original offer to buy that is reported to the court by the personal representative or on an increased offer made at the time of the hearing on the petition for confirmation of the sale and there is no agent or broker who holds an exclusive-right contract, the agent who procured the original offeror is entitled to compensation on the full amount for which the sale is confirmed [*Prob. Code § 10162.3*]. If the sale is confirmed to an overbidder at hearing, the agent or broker who procured the original offeror is entitled to compensation on the full amount of the original offer if the overbidder is not represented by an agent or broker and no agent or broker holds an exclusive-right contract [*Prob. Code § 10164*].

Subject to *Prob. Code §§ 10162* and *10162.6*, if the original bid returned to the court for confirmation was made by a purchaser who was not procured by an agent or broker, the court must allow compensation on the full amount for which the sale is confirmed if either of the following conditions is satisfied [*Prob. Code § 10163*]:

- The court confirms a sale on an increased bid made at the time of the hearing on the petition for confirmation to a purchaser procured by an agent or broker holding an exclusive-right contract; or

- No agent or broker holds an exclusive-right contract and the court confirms a sale on an increased bid made at the time of the hearing to a purchaser procured by a bona fide agent or broker. However, the compensation of the agent or broker who procured the overbidder may not exceed one-half of the difference between the amount of the original offer and the amount of the successful overbid [*Prob. Code § 10162(a)*].

On the other hand, no compensation is payable to an agent or broker who holds a contract that grants an exclusive right to sell the property when the contract provides that no compensation is payable if sale is confirmed to a person named in the contract, and the court confirms the sale to the purchaser named in the contract [*Prob. Code § 10162.6(a), (b)* (discussed more fully under § 455.31[3]]. Subject to *Prob. Code § 10162.6*, an agent or broker who holds a contract that grants an exclusive right to sell the property is entitled to compensation on the full amount for which the sale is confirmed if the bid returned to the court for confirmation either (1) is made by a purchaser not represented by an agent or broker and the court confirms the sale to that purchaser on that bid, or (2) is made by a purchaser who is represented by the agent or broker holding the contract and the court confirms the sale to that purchaser on an increased bid made at the time of the hearing on the confirmation [*Prob. Code § 10162.5(a)*]. Subject to *Prob. Code § 10162.6*, the agent or broker with an exclusive-right contract is entitled to compensation on the amount of the original bid if (1) the bid returned to court for confirmation is made by a purchaser who is not represented by an agent or broker or who is represented by an agent or broker holding an exclusive-right contract, and (2) the court confirms the sale on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser who was not procured by a bona fide agent or broker [*Prob. Code § 10162.5(b)*].

[3] If More Than One Agent or Broker Is Involved

When an agent or broker holds a contract under *Prob. Code § 10150* granting the exclusive right to sell the property, the contract provides that no compensation is payable to the agent or broker holding the contract if sale is confirmed to a particular person named in the contract, and the court confirms the sale to the purchaser named in the contract, whether on an original bid returned to the court or on an increased bid made at the time of the hearing on the petition for confirmation, the compensation of any agents or brokers involved in the sale is determined as provided in *Prob. Code §§ 10160-10168*, except that no compensation is payable to the agent or broker holding the contract [*Prob. Code § 10162.6(a), (b)*]. However, if the court confirms the sale to a purchaser other than the person named in the contract, whether on an original bid returned to the court or on an increased bid made at the time of the hearing on the petition for confirmation, the compensation of the agent or broker holding the contract, and of any other agents or brokers involved in the sale, is determined under *Prob. Code §§ 10160-10168* as if the limitation in the contract did not exist [*Prob. Code § 10162.6(c)*].

Subject to *Prob. Code § 10162.6*, if one agent or broker has a court-authorized exclusive-right contract and the sale is confirmed to an original offeror who was procured by a different agent or broker, the court must allow compensation on the full amount for which the sale is confirmed, the amount to be divided between the two agents or brokers [*Prob. Code § 10162.7*]. If the sale is confirmed to an overbidder who is not procured by an agent or broker, the compensation is also divided between the other two agents or brokers [*Prob. Code § 10164(c)*]. The compensation allowed is to be divided equally or as provided in any agreement between the agents or brokers [*Prob. Code §§ 10162.7(b), 10164(c)*]. Subject to *Prob. Code § 10162.6, above*, if there is no agreement, the compensation on the amount of the original bid returned to the court must be divided equally between the agent or broker holding the contract and the other agent or broker. If the sale is confirmed on an increased bid, the other agent or broker must be paid all of the compensation on the difference between the original bid and the amount for which the sale is confirmed [*Prob. Code § 10162.7(b)*].

Subject to *Prob. Code § 10162.6* (discussed *above*), if the sale is confirmed to an overbidder who was procured by an agent or broker, the court must allow compensation determined on the full amount for which the sale is confirmed, if either (1) the original bid was made by a purchaser who was procured by another agent or broker or (2) the original bid was made by a purchaser who was not represented by an agent or broker, and another agent or broker holds an exclusive-right contract to sell the property [*Prob. Code § 10165(a)*].

The agent or broker who procured the overbidder is entitled to one-half of the compensation on the amount of the original bid and all of the compensation on the difference between the original bid and the overbid [*Prob. Code § 10165(b)*]. If the only other agent or broker involved is the one who procured the original offeror, either as the holder of an exclusive-right contract or otherwise, that agent or broker is entitled to the balance of the total amount of compensation allowed by the court [*Prob. Code § 10165(c)(1), (2)*]. If there are two other agents or brokers involved, both one with an exclusive-right contract and one who procured the original offeror, the balance must be divided between them, either equally or according to the terms of any agreement between them [*Prob. Code § 10165(c)(3)*].

If there is an agent or broker who holds an exclusive-right contract to sell the property and the original bid returned to the court is made by a purchaser who is not represented by an agent or broker and the court confirms the sale on an increased bid, made at the time of the hearing on the petition for confirmation, to a purchaser procured by another agent or broker, the entire one half of the compensation on the original bid must be paid to the agent or broker holding the exclusive-right contract [*Prob. Code § 10165(c)(4)*]. If the agent or broker compensated under *Prob. Code § 10165(b)* holds an exclusive-right to sell the property, the entire one half of the compensation on the original bid must be paid to the other agent or broker who procured the original bid [*Prob. Code § 10165(c)(5)*].

[4] Agreement Among Cooperating Agents or Brokers

The provisions of *Prob. Code §§ 10160-10167* do not supersede any agreement cooperating agents and brokers may have among themselves to divide the compensation payable under those provisions [*Prob. Code § 10168*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-455 California Forms of Pleading and Practice--Annotated § 455.50

§ 455.50 State Statutes

[1] Contract With Agent, Broker, or Auctioneer

Contract with agent or broker. *Prob. Code § 10150*

Contract with auctioneer. *Prob. Code § 10151*

Liability of estate on contract with agent, broker, or auctioneer. *Prob. Code §§ 10160, 10160.5*

Compensation and fees in general. *Prob. Code § 10161*

Compensation of agent or broker in specific situations. *Prob. Code §§ 10162-10165*

Compensation when agent or broker holds contract granting exclusive right to sell property, contract provides that no compensation is payable to agent or broker holding contract, and court confirms sale to purchaser named in contract or to purchaser other than person named in contract. *Prob. Code § 10162.6*

Effect of bid condition that specified amount be paid to agent or broker. *Prob. Code § 10166*

Compensation and expenses of auctioneer. *Prob. Code § 10167*

Prob. Code §§ 10160-10167, relating to compensation of agents and brokers, do not supersede any agreement cooperating agents or brokers have among themselves to divide compensation. *Prob. Code § 10168*

[2] Disposition of Lien on Property

Definitions of terms related to dispositions of liens. *Prob. Code § 10360*

Application of proceeds of sale of encumbered property. *Prob. Code § 10361*

Payment of proceeds of sale of encumbered property into court. *Prob. Code § 10362*

Sale to lienholder. *Prob. Code § 10363*

[3] General Provisions for Sales of Estate Property

When estate property may be sold. *Prob. Code § 10000*

Compelling personal representative to sell property. *Prob. Code § 10001*

Deviation from instructions in will as to mode of sale. *Prob. Code § 10002*

Discretion of personal representative regarding sale of estate property. *Prob. Code § 10003*

Sale and appraisal of assets as a unit. *Prob. Code § 10004*

Sale for more or less than appraised value. *Prob. Code § 10005*

[4] Improper Sale of Property

Liability of personal representative for neglect or misconduct regarding sale of estate property. *Prob. Code § 10380*

Liquidated damages in case of personal representative's fraudulent conduct. *Prob. Code § 10381*

Action to recover property improperly sold. *Prob. Code § 10382*

[5] Rules of Abatement

Abatement in accordance with instrument or transferor's intent. *Prob. Code § 21400*

When abatement required. *Prob. Code § 21401*

Order of abatement. *Prob. Code § 21402*

Abatement within each class as pro rata. *Prob. Code § 21403*

Specific gift as not abated to exonerate another specific gift from lien. *Prob. Code § 21404*

Contributions for abatement on distribution. *Prob. Code § 21405*

Transitional provisions. *Prob. Code § 21406*

[6] Sales of Personal Property

Sale, redemption, or conversion of securities. *Prob. Code § 10200*

Sale or withdrawal of savings accounts and mutual capital certificates. *Prob. Code § 10201*

Sale of subscription rights. *Prob. Code § 10202*

Decedent's leasehold interest. *Prob. Code § 10203*

Decedent's partnership interest. *Prob. Code § 10204*

Decedent's chose in action. *Prob. Code § 10205*

Decedent's contract right to purchase real property. *Prob. Code § 10206*

Notice requirements. *Prob. Code §§ 10250-10253*

Sale at public auction. *Prob. Code § 10254*

Private sale. *Prob. Code § 10255*

Compliance of bids with terms stated in notice. *Prob. Code § 10256*

Sale for cash or on credit. *Prob. Code § 10257*

Court order relaxing requirements for sale on credit. *Prob. Code § 10258*

When title may pass without court confirmation. *Prob. Code § 10259*

Report of sale and petition for court confirmation. *Prob. Code § 10260*

Hearing on petition for confirmation of sale. *Prob. Code § 10261*

Overbids. *Prob. Code § 10262*

Proof of notice of sale. *Prob. Code § 10263*

Effect of procedural error on sale. *Prob. Code § 10264*

[7] Sales of Real Property

Sale to grazing or pasture association. *Prob. Code § 10207*

Notice requirements. *Prob. Code §§ 10300-10304*

Sale at public auction. *Prob. Code § 10305*

Private sale. *Prob. Code § 10306*

Compliance of bids with terms stated in notice. *Prob. Code § 10307*

Report of sale and petition for court confirmation. *Prob. Code § 10308*

Minimum price for realty sold privately. *Prob. Code § 10309*

Hearing on petition for confirmation. *Prob. Code § 10310*

Overbids. *Prob. Code § 10311*

Proof of notice of sale. *Prob. Code § 10312*

Order confirming or vacating sale. *Prob. Code § 10313*

Conveyance or assignment after confirmation. *Prob. Code § 10314*

Sale on credit. *Prob. Code § 10315*

Effect of procedural error on sale. *Prob. Code § 10316*

[8] Vacating Sale for Purchaser's Default

Order vacating sale and directing resale and scope of defaulting purchaser's liability. *Prob. Code § 10350*

Order vacating sale and confirming sale to new high bidder. *Prob. Code § 10351*

[9] California Rules of Court

Fixing amount of bond when personal representative has independent power to sell real property. *Cal. Rules of Ct., Rule 7.205*

Additional bond required for order confirming sale of real estate. *Cal. Rules of Ct., Rule 7.206*

Allowing bona fide buyers and their brokers reasonable opportunity to inspect property to be sold. *Cal. Rules of Ct., Rule 7.451*

Presence of petitioner's attorney or petitioner at hearing to confirm sale of property. *Cal. Rules of Ct., Rule 7.452*

Petition for exclusive listing. *Cal. Rules of Ct., Rule 7.453*

Ex parte application for authority to sell or surrender tangible or intangible personal property. *Cal. Rules of Ct., Rule 7.454*

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-455 California Forms of Pleading and Practice--Annotated § 455.51

§ 455.51 Local Rules of Court

[1] Alameda County

Sales by executors and administrators. Alameda Co. Unified Super. Ct. Rules, Rule 12.8

[2] Contra Costa County

Sales of real and personal property. Contra Costa Co. Prob. Pol. Man. §§ 501-507

[3] Los Angeles County

Sales of estate property. Los Angeles Co. Super. Ct. Rules, Rule 10.88

[4] Orange County

Sales of estate property. Orange Co. Super. Ct. Rules, Rule 606.01 et seq.

[5] Riverside County

Sales of estate property. Riverside Co. Super. Ct. Rules, §§ 6.0901 et seq.

[6] Sacramento County

Sales of estate property. Sacramento Co. Super. Ct. Rules, Rule 15.55 et seq.

[7] San Bernardino County

Sales of estate property. San Bernardino Co. Prob. Pol. Mem. § 801 et seq.

[8] San Diego County

Sales of estate property. San Diego Co. Super. Ct. Rules, Div. IV, Rule 4.67 et seq.

[9] San Francisco County and City

Sales of estate property. San Francisco Co. Uniform Local Ct. Rules, Rule 14.66 et seq.

[10] Santa Clara County

Sale under court supervision. Santa Clara Co. Super. Ct. Rules, Rule 5.7

Legal Topics:

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§ 455.52 Decisions

[1] Abatement

Court order establishing abatement must be based on petition that adequately gives notice to beneficiary that his or her testamentary gift may be subject to abatement. *Estate of Jenanyan (1982) 31 Cal. 3d 703, 708-711, 183 Cal. Rptr. 525, 646 P.2d 196*

Statutory rules of abatement are applicable to insufficiency of estate due to disposition of property by conservator of testator who became incompetent before death. *Estate of Mason (1965) 62 Cal. 2d 213, 217, 42 Cal. Rptr. 13, 397 P.2d 1005*

[2] Appeal

Unsuccessful bidder in estate sale, who claimed that he would have made higher bid had he known that radical changes would be made in conditions of sale, was aggrieved party with standing to appeal order affirming sale. *Estate of Cahoon (1980) 101 Cal. App. 3d 434, 437, 438, 161 Cal. Rptr. 651*

Order confirming sale of estate real property is appealable and not subject to collateral attack except on ground of lack of jurisdiction of court making order. *Freeman v. McClung (1963) 217 Cal. App. 2d 31, 33, 31 Cal. Rptr. 578*

[3] Authority to Sell Estate Property

Authority of personal representative to sell estate property is not limited to situations in which sale is required to pay debts and expenses of administration. *Estate of Barthelmess (1988) 198 Cal. App. 3d 728, 735, 243 Cal. Rptr. 832* (decided under prior, but substantially similar statutes)

[4] Brokers

Fact that lessees purchased estate property pursuant to right of first refusal does not alter fact that sale was required to be confirmed, and entitled broker with exclusive listing agreement to commission. *Estate of Patterson (1980) 108 Cal. App. 3d 197, 208-210, 166 Cal. Rptr. 435*

[5] Confirmation of Sale

[a] Burden of Proof

Burden is on person contesting sale to prove that sale is not in best interests of estate. *Estate of Barthelmess (1988) 198 Cal. App. 3d 728, 735, 243 Cal. Rptr. 832* (decided under prior, but substantially similar statutes)

[b] Standard for Confirmation

Court has no discretion to deny confirmation of sale if it believes petition to be true, all statutory requirements have been met, and no objections have been filed. *Estate of Mitchell (1970) 12 Cal. App. 3d 1169, 1171-1172, 91 Cal. Rptr. 334*

[c] Substantial Compliance

Substantial compliance with provisions of probate code relating to sales of estate property are sufficient to sustain order confirming sale as against collateral attack for want of jurisdiction. *Freeman v. McClung (1963) 217 Cal. App. 2d 31, 35, 31 Cal. Rptr. 578*

Substantial compliance with terms of sale as set forth in notice of sale is sufficient to confirm sale. *Estate of Hunter (1961) 194 Cal. App. 2d 859, 866-868, 15 Cal. Rptr. 556*

[6] Liability of Defaulting Purchaser

Estate is entitled to retain down payment of defaulting purchaser pending resale as security for damages for which defaulting purchaser may be liable. *Estate of Mesner (1951) 37 Cal. 2d 563, 567, 233 P.2d 551* (construing prior but substantially similar law)

After first purchaser of real property at probate sale defaulted and property ultimately was resold at a lower price, probate court was authorized under *Prob. Code § 10350(e)(1)* to award damages to estate in an amount equal to the difference between the original contractual purchase price and the ultimate purchase price; estate was entitled to retain defaulting buyer's entire deposit as statutory award for damages, including portion of deposit attributable to the one-half interest in the real property *not* owned by the estate. *Estate of Felder (2008) 167 Cal. App. 4th 518, 522, 84 Cal. Rptr. 3d 220*

[7] Liability of Personal Representative

Executor's failure to notify beneficiaries of tax consequences of sale and revaluation of property's value justified award of damages to beneficiaries despite final order confirming sale; equitable considerations outweighed res judicata effect of order. *Estate of Anderson (1983) 149 Cal. App. 3d 336, 348-349, 196 Cal. Rptr. 782*

[8] Need for Court Approval of Sale

United States tax lien is enforceable against purchaser of gas station and lease sold by executor without approval of probate court as required under former Prob. Code § 755 (now see *Prob. Code §§ 10260, 10308*). Chevron, U.S.A., Inc. v. U.S. (9th Cir. [Cal] 1983) *705 F.2d 1487*

[9] Overbids

Tender of cashier's check by overbidder is insufficient to satisfy requirement that overbid be in writing; *Prob. Code § 10311* as specifically requiring written "offer." *Estate of Roberts (1990) 225 Cal. App. 3d 1017, 1021, 275 Cal. Rptr. 575*

Successful oral overbidder who refuses to sign written overbid is not liable for any deficiency, because no sale should be confirmed on basis of oral bid, even if oral bidding is local practice. *Estate of Sampo (1985) 171 Cal. App. 3d 767, 772-774, 217 Cal. Rptr. 713*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 455.53 Law Reviews

Wall, "Vacating a Probate Sale After Confirmation by the Court Absent Default," 13 Bev Hills BJ 221 (1979)

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-455 California Forms of Pleading and Practice--Annotated § 455.54

§ 455.54 Text References

Witkin, Summary of California Law, Vol. 14, *Wills and Probate, § 670 et seq.* (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§§ 455.55[Reserved]

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§ 455.70 Preliminary Determinations

1. Determine provisions of decedent's will regarding sales of estate property, such as:

    a. Requirement that particular property be sold.

    b. Authorization to sell particular property.

    c. Grant of discretionary power to personal representative to sell property if necessary.

    d. Prohibition on sale of particular property.

2. Identify all property in estate that is specifically given to designated beneficiary by decedent in will.

3. Determine cash requirements of estate, considering:

    a. Valid claims against estate.

    b. Death taxes.

    c. Family allowance.

    d. All costs of administration, including
    (1) Personal representative's fees.

    (2) Attorneys' fees.

    e. Testamentary gifts of specific amounts of money.

4. Determine whether liquid assets of estate are sufficient to meet all cash requirements without sale of property.

5. If liquid assets are sufficient to meet cash requirements, determine whether some estate property should be sold for other reasons, such as:

a. Property is perishable.

b. Property is likely to depreciate in value before distribution can be made.

c. Property will incur loss or expense by being kept.

6. If liquid assets are insufficient to meet cash requirements:

a. Determine whether testator made provision in will for sale of sufficient particular property to pay debts, expenses of administration, and family allowance, and if so, proceed with sale of that property [*see Prob. Code § 21400*].

b. Determine whether testator made provision in will for sale or distribution of sufficient particular property in order to satisfy testamentary gifts of specific sums of money, and if so, proceed with sale or set aside property for distribution in lieu of cash [*see Prob. Code §§ 21400, 21401*].

c. If after all testamentary directions have been followed estate still has insufficient cash, determine whether deficiency is one of:

(1) Liquidity alone, which may be resolved solely by sale of property; or

(2) Insufficient economic value in estate to pay all costs and distribute all gifts, which requires both sale of property and application of rules of abatement [*see Prob. Code §§ 21400-21406*].

NOTE:
The problem is one of liquidity only if there is a residuary estate consisting primarily of real and personal property, the sale of which will not defeat the testator's intent regarding the residuary beneficiaries. However, the reduction of the residuary estate because of the need to sell property to pay costs and make cash distributions to other beneficiaries may conflict with the testator's primary intent. If the residue is devised to the primary objects of the testator's bounty, such as the spouse or children, the sale of much of the property from the residue in order to pay specific gifts to charity or more distant relatives may be contrary to the testamentary plan. In such a case, the problem is one of insufficient value rather than simply one of liquidity. The personal representative should consider whether the will may be construed to permit abatement of the specific cash gifts in order to preserve the residue and petition the court for instructions.

d. If deficiency is one of liquidity only:

(1) Determine whether beneficiary of cash gift will accept distribution of property of equal value in lieu of cash).

NOTE:
It is not clear under the Probate Code whether a beneficiary of a testamentary gift

of a specific sum of money can be required to accept property in lieu of cash if the personal representative is not given the authority to make such a distribution in the will.

(2) If distribution of property is not acceptable or feasible, select property from residue that is amenable to sale and proceed with sale.

(e) If deficiency is such that abatement is necessary:

(1) Determine whether will provides for abatement of testamentary gifts other than according to statute.

(2) If statutory rules of abatement apply select property from categories in the following order and proceed with sale [*see Prob. Code § 21402*]:

(a) Property not disposed of by will.

(b) Property in residue.

(c) General gifts to nonrelatives.

(d) General gifts to relatives.

(e) Specific gifts to nonrelatives.

(f) Specific gifts to relatives.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 455.71 Conducting Sale

CAUTION:
In addition to the following procedures, local court rules should always be consulted for any additional requirements. Also, different rules apply if the estate is being administered under the Independent Administration of Estates Act [*Prob. Code § 10400 et seq.*]. For procedures under that act, see Ch. 445, *Probate: Independent Administration of Estate* .

1. Decide whether to sell property by public auction or by private sale.

NOTE:
If the property is such that it has a small and specific market, such as with collectibles, any auction should be conducted through channels that are connected to that market, such as trade publications, rather than at a general auction with other personal property.

2. Set minimum sale price of property to be sold.

a. Actual (appraised) value of following personal property, for which court confirmation of sale is not required [*see Prob. Code § 10259(c)*]:
(1) Persishable property.

(2) Property that will depreciate in value if not disposed of promptly.

(3) Property that will incur loss or expense by being kept.

(4) Property that must be sold to provide for payment of family allowance pending receipt of other sufficient funds.

(5) Property sold at public auction.

b. No particular minimum sale price for the following:

(1) Personal property for which confirmation is required [*see Prob. Code § 10005(b)*].

(2) Securities, including subscription rights, sold with prior court authorization [see *Prob. Code §§ 10200, 10202*].

c. Ninety percent of appraised value of real property [see *Prob. Code § 10309(a)(3)*].

3. Determine whether sale should be for cash only or may be for credit, considering:

a. For realty, requirement that credit sale be adequately secured [*see Prob. Code § 10315*].

b. For personalty, requirement that 25 percent of sale price be paid in cash and that note for balance be adequately secured [*see Prob. Code § 10257*]:

4. Enter into contract with person to locate buyers and solicit sales, such as:

a. Licensed auctioneer.

b. Licensed real estate broker or agent.

c. Agent or broker for items of personal property, who is licensed if particular property to be sold or manner of sale so requires.

5. Set date of public auction.

6. For private sale requiring court confirmation:

a. Find buyer.

b. Reach complete agreement with buyer as to terms and conditions of sale.

c. Determine appropriate date on or after which sale is to be made, allowing required lapse of time for giving of notice [See *Prob. Code §§ 10250(a)(1), 10300(b)(1)*; see also Paragraphs (9) and (10), below].

d. Advise buyer that offer is accepted subject to condition of nonreceipt of better offer during time that notice of sale is pending.

e. Execute all documents to finalize sale only after expiration of period of time specified in notice [*Prob. Code § 10306(a)*].

7. Determine whether property to be sold is of any of the following kinds, for which no notice of sale is required [*see Prob. Code §§ 10252, 10303*]:

a. Real or personal property whose sale is either directed or authorized by will.

b. Perishable personal property.

c. Personal property that will depreciate in value if not disposed of promptly.

d. Personal property that will incur loss or expense by being kept.

e. Personal property whose sale is required to pay family allowance pending receipt of other sufficient funds.

8. If notice of sale is required, determine required manner of giving notice.

a. For personal property, either posting or publication as personal representative may determine [*see Prob. Code § 10250*].

b. For real property appraised at more than $5,000, by publication.

c. For real property appraised at less than $5,000, by posting.

9. Draft notice of sale [*see §§ 455.92, 455.93*].

10. If notice may be given by posting, post notice at least 15 days before date of auction or date on or after which private sale is to be made at:

a. For real property, county courthouse of county in which property or any part of it is located [*Prob. Code § 10301*].

b. For personal property, county courthouse of county in which proceedings are pending [*Prob. Code § 10250(a)*].

11. If notice must be given by publication, present notice to a newspaper for publication to be completed before date of auction or date on or after which private sale is to be made in one of following:

a. For real property, newspaper published in county in which any part of property to be sold is located, or if none, in newspaper as directed by court [*see Prob. Code § 10300(a)*].

b. For personal property, newspaper in county where proceedings are pending [*see Prob. Code § 10251(b)*].

NOTE:
Publication must be for a period of at least 10 days. Three publications in a newspaper published once a week or more often, with at least five days intervening between the first and last publication dates not counting the publication dates, are sufficient. The period of notice commences on the first day of publication and ends either at the end of the day of the third publication or at the end of the tenth day, whichever is longer [*Gov. Code § 6063a*].

12. Obtain proof of publication from newspaper or prepare other proof of notice and file with court [*see Prob. Code §§ 10263, 10312*].

13. In case of private sale, enter into valid contract of sale with original offeror or subsequent offeror who has made higher offer that complies with any terms set forth in notice, subject to condition that sale be confirmed by court [*see Prob. Code §§ 10255(b), 10306(b)*].

14. In case of sale at public auction:

a. Hold auction of personal property at one of following [*Prob. Code § 10254(a)(1)*]:

(1) Courthouse door.

(2) Auction house.

(3) Other public place.

(4) Residence of decedent.

b. Hold auction of real property anywhere in county in which property is located between 9:00 a.m. and 9:00 p.m. on day specified in notice [*Prob. Code § 10305(a), (b)*].

c. Have all tangible personal property to be sold present at time of sale [*Prob. Code § 10254(a)(2)*].

15. If sale is other than for all cash, obtain adequate security interest in property sold, in form of:

a. For real property, note and deed of trust subject only to encumbrances of record at date of sale [*see Prob. Code § 10315*].

b. For personal property, security interest in property sold; or retention of title of property sold until balance is paid under conditional sale contract [*see Prob. Code § 10257*].

16. Allow all bona fide prospective buyers and their brokers a reasonable opportunity to inspect property [*see Cal. Rules of Ct., Rule 7.451*].

17. In a sale of real property, be sure that bond requirements have been met [*see Cal. Rules of Ct., Rules 7.205, 7.206*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewReal Property LawPurchase & SaleGeneral Overview

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39-455 California Forms of Pleading and Practice--Annotated § 455.72

§ 455.72 Confirmation of Sale by Court

CAUTION:
In addition to the following procedures, local court rules should always be consulted for any additional requirements. Also, different rules apply if the estate is being administered under the Independent Administration of Estates Act [*see* *Prob. Code § 10400 et seq.*]. For procedures under that act, see Ch. 445, *Probate: Independent Administration of Estate* .

1. Determine whether court confirmation of sale is required, considering:

a. Court confirmation of following property is not required in order to convey good title:
(1) Perishable personal property [*see Prob. Code § 10259(a)(1)*].

(2) Personal property that will depreciate in value if not disposed of promptly [*see Prob. Code § 10259(a)(1)*].

(3) Personal property that will incur loss or expense by being kept [*see Prob. Code § 10259(a)(1)*].

(4) Sale of personal property that is required to pay family allowance pending receipt of other sufficient funds [*see Prob. Code § 10259(a)(2)*].

(5) Tangible personal property sold at public auction and delivered to purchaser [*see Prob. Code § 10259(b)(1)*].

(6) Intangible personal property sold at public auction for which instrument of transfer of title is delivered to purchaser [*see Prob. Code § 10259(b)(2)*].

NOTE:
If any of the above items of personal property are sold for less than the appraised

value, the personal representative will be charged with the amount of the loss unless the sale is approved by the court [*Prob. Code § 10259(c)*].

(7) Securities, for which prior authorization rather than subsequent confirmation is required [*see Prob. Code § 10200*; *see* also Paragraph (E), *below*].

(8) Subscription rights of securities for purchase of additional securities [*see Prob. Code § 10202*].

(9) Savings accounts, mutual capital accounts, credit union share accounts and credit union certificates [*see Prob. Code § 10201*].

b. Sale of all other personal property must be confirmed by court even if property is directed or authorized to be sold by will [*see Prob. Code § 10260(a)*].

c. Court confirmation of sale of real property is required [*see Prob. Code § 10308*].

2. Prepare report of sale and petition for confirmation [*see §§ 455.129 -455.131*].

3. File verified petition for confirmation within 30 days after sale [*see Prob. Code §§ 1021(a)(1), 10260(b), 10308(b)*].

NOTE:
A verified petition must be received as evidence if offered in any uncontested probate proceeding [*Prob. Code § 1022*].

4. Calendar hearing date on petition according to local court procedure.

5. Give and post notice of hearing as required [*Prob. Code §§ 10260(c), 10308(c)*; *see Prob. Code §§ 1220, 1230*; *see also* Ch. 447, *Probate: Statutory Notice Requirements*].

6. Advise purchaser and any agent or broker who procured purchaser of time and place of hearing and of right of others to submit overbids.

7. Before scheduled date of hearing, periodically check with court to determine whether objections to confirmation of sale have been filed by any interested person [*see Prob. Code §§ 10261(b), 10310(c)*].

8. If objections have been filed, determine whether sufficient time remains before date of hearing to prepare for adversary proceeding.

9. If insufficient time remains, prepare to obtain continuance to another date so as to allow for adequate preparation [*see* Ch. 136, *Continuances*].

10. Arrange for witnesses and declarations, as necessary, to establish at least one of following grounds for sale of property:

a. Sale is necessary to pay debts, devises, family allowance, expenses of administration, or taxes [*Prob. Code §§ 10000(a), 10261(a), 10310(a)*].

b. Sale is to advantage of estate and in best interests of interested persons [*Prob. Code §§ 10000(b), 10261(a), 10310(a)*].

c. Sale is directed or authorized by decedent in will [*see Prob. Code §§ 10000(c), (d), 10261(a), 10310(a)*].

11. Arrange for witnesses and declarations, as necessary, to establish that sale price of real property is highest and best price reasonably attainable [*Prob. Code § 10310(b)*].

NOTE:
Proof of reasonableness of sale price may require the testimony of a real estate expert based on sales of comparable property in the general area where the property is located.

12. If sale is of decedent's partnership interest, arrange for attendance of surviving partners and be prepared to disclose condition of partnership affairs [*see Prob. Code § 10261(c)*].

13. Discuss possibility of overbid with personal representative and determine whether personal representative will accept sale of real property to overbidder under following circumstances [*see Prob. Code § 10311(d)*]:

a. In case of original offer for cash, overbid tendered for higher amount but on credit.

b. In case of original offer on credit, overbid tendered for higher amount, either on cash or credit.

14. Prepare order confirming sale to original offeror prior to hearing [*see § 455.132*].

15. Attend hearing and present evidence, as necessary, to establish reason for sale and reasonableness of sale price of real property [*see* Paragraphs (10), (11), *above*].

16. Respond, as appropriate, to any overbid submitted at hearing [*see* Paragraph (13), *above*].

17. If sale is confirmed to original offeror, present predrafted order to court for signature, provided that terms of order as expressed by court conform to those in written order.

18. If sale is confirmed to overbidder, or if actual order of court deviates from predrafted order, prepare new order and submit to court for signature.

19. File signed order with court and obtain sufficient endorsed filed copies.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-455 California Forms of Pleading and Practice--Annotated § 455.73

§ 455.73 Conveyance of Title to Real Property

1. Record certified copy of order confirming sale in office of recorder of county in which real property is located [*See Prob. Code § 10314(a)*].

2. Open escrow if not previously done pursuant to execution of contract of sale and prepare escrow instructions [*see* California Legal Forms, Ch. 26, *Real Property Escrows*].

3. Prepare conveyance to purchaser that specifically refers to order confirming sale [*see* California Legal Forms, Ch. 27, *Deeds, and Recording*].

4. Have personal representative execute conveyance before notary public who will acknowledge signature.

5. Submit conveyance, copy of order confirming sale, and escrow instructions to escrow officer.

6. After close of escrow, verify that conveyance has been recorded in office of recorder of county in which property is located.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-455 California Forms of Pleading and Practice--Annotated § 455.74

§ 455.74 Authorization for Sale of Securities

1. Determine whether securities in estate should be sold.

NOTE:
By local court rule, payment of taxes, expenses of administration, or an indivisible number of shares may justify a sale [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 10.103].

2. Determine whether sale is authorized or directed in decedent's will.

NOTE:
In general, instructions in the will as to particular property to be sold must be followed [*Prob. Code § 10002*]. However, a petition for authorization to sell securities must show the advantage to the estate [*Prob. Code § 10200*]. There is no express exception in the case of securities authorized or directed to be sold by will [*cf.* *Prob. Code §§ 10261, 10310* (no showing of necessity or advantage of sale of real and other personal property is required if property is authorized or directed to be sold in will)].

3. If securities are commonly traded, determine exchange on which they are listed.

4. If securities are not commonly traded, determine most recent bid and asked price.

5. If securities are shares in closely held corporation, determine value.

NOTE:
Local court rules may require that, unless a security is commonly traded, it must be appraised before sale will be authorized [*see e.g.,* Los Angeles Co. Super. Ct. Rule, Rule 10.103(b)].

6. Determine whether any of the securities to be sold are the subject of a specific gift in decedent's will.

7. Draft verified petition requesting court authorization for sale of securities [*see Prob. Code § 10200(c)*; *see also § 455.121*].

8. File petition and have it set for hearing.

9. Give notice of hearing on petition as required by law unless court order dispenses with notice [*see Prob. Code § 10200(d)*; *see also Prob. Code §§ 1220, 1230*; *see also* Ch. 447, *Probate: Statutory Notice Requirements*].

10. Draft order authorizing sale of securities [*see § 455.121*.5].

NOTE:
Local court rules may require that proposed orders be submitted for the court's review prior to the date of hearing [*see, e.g.,* Alameda Co. Unified Super. Ct. Rules, Rule 12.1.5].

11. Prepare for and attend hearing, and obtain signed order if authorization of sale is granted.

12. File original of order and obtain one certified copy of order and one certified copy of letters for each transfer agent to be involved with sale.

13. Determine whether notice of sale may be dispensed with because of applicability of one of following exceptions to notice requirement [*see Prob. Code § 10200(e)*]:

a. Minimum selling price was fixed by court in order authorizing sale.

b. Securities are to be sold on established stock or bond exchange.

c. Securities to be sold are designated as national-market-system security on interdealer quotation system or subsystem by National Association of Securities Dealers and are to be sold through registered broker-dealer during regular course of business.

d. Securities are to be surrendered for redemption or conversion.

14. Give notice of sale, if required.

NOTE:
Presumably, if notice is required, it must comply with the requirements otherwise applicable in sales of personal property [*see* *Prob. Code § 10250*].

15. Have personal representative execute transfer endorsement on certificate and deliver it to transfer agent.

NOTE:
If there are conditions or limitations on the sale, review them in detail with broker.

16. Request notification when sale is complete and confirm procedure for delivery of purchase price, less broker's commission.

17. Deposit purchase price in appropriate estate account.

NOTE:
No court confirmation of sale is required in order to pass title [*Prob. Code § 10200(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewSecurities LawSelf-Regulating EntitiesNational Association of Securities Dealers

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39-455 California Forms of Pleading and Practice--Annotated §§ 455.75-455.89

[Reserved]

§§ 455.75[Reserved]

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39-455 California Forms of Pleading and Practice--Annotated § 455.90

§ 455.90 Notice of Sale of Personal Property [Prob. Code §§ 10250, 10253]--Private Sale

[1] FORM Notice of Sale of Personal Property [Prob. Code §§ 10250, 10253]--Private Sale

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	NOTICE OF SALE OF PERSONAL PROPERTY
Deceased	)	AND PROOF OF NOTICE
	)	[*Prob. Code §§ 10250, 10253*]

_____

Please take notice that _____ [*name*], as the personal representative of the estate of _____ [*name*], deceased, will sell at private sale, under the terms and conditions specified below, the personal property described on the attached page. This property is available for inspection at _____ [*specify location*]. Written bids or offers for this property will be received at _____ [*specify, e.g.,* the office of _____ (*name*), attorney for the personal representative, at _____ (*address*)] or may be delivered to _____ [*name of personal representative*] personally, on or before _____ [*specify date at least 10 days from initial date of publication or at least 15 days from date of posting, depending on manner in which notice is to be given*]. Sale will be made on _____ [*date immediately following final date for submitting offers*] to the person making the highest and best offer for each item of property listed.

The terms and conditions of sale are: _____ [*specify, e.g.,* all cash, in lawful money of the United States of America with 10 percent of the amount offered to accompany the offer and the balance to be paid on delivery *or* part cash and part credit on terms acceptable to the personal representative]. The personal representative reserves the right to reject any bid that is less than the appraised value of the property. For further information please contact the

attorney for the personal representative at _____ [*telephone number*].

[All sales are subject to confirmation by the superior court, and no sale may be consummated and no property may be delivered to a purchaser until court confirmation has been acquired by the personal representative.]
Dated: _____.

_____ [*signature*]

Personal Representative of the Estate of

_____ [*name*], Deceased

_____ [*signature*]

Attorney for Personal Representative

_____ [*address*]

[*Attach separate page listing and describing all property to be sold with sufficient specificity so as to distinguish each item from all other similar items. Indicate the appraised value of each item as the minimum amount that must be offered for that item.*]

[2] Use of Form

The foregoing form is for use by a personal representative to give notice of a private sale of estate personal property [*see Prob. Code § 10250*]. For discussion of when court confirmation of a sale of personal property is not required, see *§§ 455.20[7], [8]*. For a form for notice of sale of estate personal property by public auction, see *§ 455.91*. For forms for sale of estate real property, see *§§ 455.92* and *455.93*. For a form for a notice of sale of real and personal property at private sale as a unit, see *§ 455.94*.

[3] Contents

The notice of sale must state the following: (1) whether the sale is to be by public auction or by private sale; (2) the time and place of the public auction, or, in the case of a private sale, the place where bids or offers will be received and a day on or after which the sale will be made; (3) a brief description of the personal property to be sold [*Prob. Code § 10253(a)*]. The notice may include additional information, including the terms and conditions of sale [*Prob. Code § 10253(b)*].

[4] Determination of Date of Sale

The procedure for a private sale is to allow a certain period of time for the submission of offers to purchase the property to be sold. At the end of that time, the highest bids are accepted. The date on which the determination of the highest bid is made is the date on which the sale is made. Care must be taken to ensure that this date does not occur before the required period for giving notice of sale has expired.

Notice of sale must be given by either publication or posting at the discretion of the personal representative [*Prob. Code § 10250*; for discussion, see *§ 455.20[2]*]. Notice by publication must run for 10 days before the date on or after which the sale is to be made [*Prob. Code § 10250(b)(1)*; *see Gov. Code § 6063a*]. Notice by posting must run for 15 days [*Prob. Code § 10250(a)(1)*]. Therefore, the date given in the notice as the date on which the high bids are to be determined and the sale made must be at least 10 or 15 days after the initial publication or posting, depending on the

manner of giving notice.

[5] Proof of Notice of Sale

An order confirming a sale of personal property must indicate that proof of notice was made to the satisfaction of the court [*Prob. Code § 10263*]. In the case of notice by publication, the newspaper in which the notice was published provides an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of proof of publication [*see Prob. Code § 1262*]. In the case of notice by posting, proof of posting may be made by the affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of the person who posted the notice [*Prob. Code § 1263*]. If the posting is actually done by a court official, counsel should contact the clerk of court to determine if a form for proof of notice by posting should be prepared and submitted.

[6] State Statutes

Publication for 10 days in a newspaper published once per week or more often. *Gov. Code § 6063a*

Requirement that notice of sale of personal property must be given. *Prob. Code § 10250*

When notice of sale of personal property is not required. *Prob. Code § 10252*

Contents of notice of sale. *Prob. Code § 10253*

Requirement that offers to buy estate personal property at private sale must be in writing. *Prob. Code § 10255(b)*

When title to personal property passes to purchaser without court confirmation of sale. *Prob. Code § 10259*

When court confirmation of sale of personal property is required. *Prob. Code § 10260*

Proof of notice. *Prob. Code § 10263*

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39-455 California Forms of Pleading and Practice--Annotated § 455.91

§ 455.91 Notice of Sale of Personal Property [Prob. Code §§ 10250, 10253]--Public Auction

[1] FORM Notice of Sale of Personal Property [Prob. Code §§ 10250, 10253]--Public Auction

[*Caption, if desired. See § 455.90.*]

Please take notice that, on _____ [*date*] at _____ [*place of auction*] at _____ [*time*], _____ [*name*], as the personal representative of the estate of _____ [*name*], deceased, will sell at public auction, under the terms and conditions specified below, the personal property described on the attached page. This property is available for inspection at _____ [*specify location*] and will be present at the auction.

The terms and conditions of sale are: _____ [*specify, e.g.,* all cash, in lawful money of the United States of America with 10 percent of the amount bid to be paid at the time of the auction and the balance to be paid on delivery *or* at least 25 percent of the amount bid in cash and the balance on credit on terms acceptable to the personal representative]. The personal representative reserves the right to reject any bid in an amount that is less than the minimum bid as shown on the attached page. Should such a bid be accepted, the sale is conditioned on confirmation and approval by the court. Court confirmation is also required for any sale involving an extension of credit. For further information please contact the attorney for the personal representative at _____ [*telephone number*].
Dated: _____.

_____ [*signature*]

Personal Representative of the Estate of

_____ [*name*], Deceased

_____ [*signature*]

Attorney for Personal Representative

_____ [*address*]

[*ATTACH separate page listing and describing all property to be sold at auction with sufficient specificity so as to distinguish each item from all other similar items. Indicate the minimum bid for each item, which should be no less than the appraised value of the item.*]

[2] Use of Form

The foregoing form is for use by a personal representative to give notice of a public auction sale of estate personal property. For discussion of public auction sales, see *§ 455.20[3]*. For a discussion of when court confirmation of a sale of personal property at public auction is required, see *§ 455.20[7]*.

For a form for notice of sale of estate personal property by private sale, see *§ 455.90*. For forms for sale of estate real property, see *§§ 455.92* and *455.93*. For a form for a notice of sale of real and personal property at private sale as a unit, see *§ 455.94*.

[3] Date of Auction

Notice of sale must be given by either publication or posting at the discretion of the personal representative [*Prob. Code § 10250*; *see § 455.20[2][a]*]. Notice by publication must run for 10 days before the date of the auction [*Prob. Code § 10250(b)(2)*; *see Gov. Code § 6063a*]. Notice by posting must run for 15 days before the day of the auction [*Prob. Code § 10250(a)(2)*]. Therefore, the date of the auction must be at least 10 or 15 days after the initial publication or posting, depending on the manner of giving notice.

[4] Cross References

For a related form, *see § 455.90*

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A. Notices Of Sale

39-455 California Forms of Pleading and Practice--Annotated § 455.92

§ 455.92 Notice of Sale of Real Property [Prob. Code §§ 10300, 10304]--Private Sale

[1] FORM Notice of Sale of Real Property [Prob. Code §§ 10300, 10304]--Private Sale

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*]	)	NOTICE OF SALE OF REAL PROPERTY
Deceased	)	[*Prob. Code §§ 10300, 10304*]
	)	

_____

Please take notice that _____ [*name*], as the personal representative of the estate of _____ [*name*], deceased, will sell at private sale, under the terms and conditions specified below, real property of the estate situated in the City of _____, _____ County, California, and described as follows: _____ [*describe by legal description and street address, if any*]. Written offers for this property will be received at _____ [*specify, e.g.,* the office of _____ (*name*), attorney for the personal representative, at _____ (*address*)] or may be delivered to _____ [*name of personal representative*] personally, on or before _____ [*specify date at least 10 days from initial date of publication or at least 15 days from date of posting, depending on manner in which notice is to be given*]. Sale will be made on _____ [*date immediately following final date for submitting offers*] to the person making the highest and best offer for the property.

The terms and conditions of sale are: _____ [*specify, e.g.,* all cash, in lawful money of the United States of America with 10 percent of the amount offered to accompany the offer and the balance to be paid on close of escrow *or* part cash and part credit on terms acceptable to the personal representative]. The personal representative reserves the right to reject any bid that is less than $_____, which is the appraised value of the

property. For further information please contact the attorney for the personal representative at _____ [*telephone number*].

All sales are subject to confirmation by the superior court, and no sale may be consummated and no deed may be recorded and delivered to a purchaser until court confirmation has been acquired by the personal representative.
Dated: _____.

_____ [*signature*]

Personal Representative of the Estate of

_____ [*name*], Deceased

_____ [*signature*]

Attorney for Personal Representative

_____ [*address*]

[2] Use of Form

The foregoing form is for use by a personal representative to give notice of a private sale of real property in an estate [see *Prob. Code § 10303*]. Notice of sale is required unless the decedent's will either directs or authorizes that the property be sold [*Prob. Code § 10303*]. For a form for notice of sale of estate real property by public auction, see *§ 455.93*. For forms for notice of sale of estate personal property, see *§§ 455.90* and *455.91*. For a form for a notice of sale of real and personal property at private sale as a unit, *see § 455.94*.

[3] Contents

The notice of sale must state the following: (1) whether the sale is to be by public auction or by private sale; (2) the time and place of the public auction, or, in the case of a private sale, the place where bids or offers will be received and a day on or after which the sale will be made; (3) the street address or other common designation, or if none, a legal description of the real property to be sold [*Prob. Code § 10304(a)*]. The notice may include additional information, including the terms and conditions of sale [*Prob. Code § 10304(b)*].

[4] Determination of Date of Sale

The procedure for a private sale is to allow a certain period of time for the submission of offers to purchase the property to be sold. At the end of that time, the highest bid is accepted. The date on which the determination of the highest bid is made is the date on which the sale is made. Care must be taken to ensure that this date does not occur before the required period for giving notice of sale has expired.

Notice of sale must be given by publication unless the property to be sold has been appraised at not more than $5,000, in which case notice may be given by posting [*Prob. Code §§ 10300, 10301*; see *§ 455.19*]. Notice by publication must run for 10 days before the date on or after which the sale is to be made [*Prob. Code § 10300(b)(1)*; *see Gov. Code § 6063a*]. Notice by posting must run for 15 days [*Prob. Code § 10301(b)(1)*]. Therefore, the date given in the notice as the date on which the highest offer is to be determined and the sale made must be at least 10 or 15 days after the initial publication or posting, depending on the manner of giving notice.

[5] Proof of Notice of Sale

An order confirming a sale of real property must indicate that proof of notice was made to the satisfaction of the court [*Prob. Code § 10312*]. In the case of notice by publication, the newspaper in which the notice was published provides an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of proof of publication [*see Prob. Code § 1262*]. In the case of notice by posting, proof of posting may be made by the affidavit (or declaration) of the person who posted the notice [*Prob. Code § 1263*]. If the posting is actually done by a court official, counsel should contact the clerk of court to determine if a form for proof of notice by posting should be prepared and submitted.

[6] State Statutes

Requirement that notice of sale of real property be published. *Prob. Code § 10300*

Posting instead of publication of notice as permitted when appraised value of property to be sold does not exceed $5,000. *Prob. Code § 10301*

When notice of sale of real property is not required. *Prob. Code § 10303*

Contents of notice of sale. *Prob. Code § 10304*

Requirement that offers to buy estate real property at private sale must be in writing. *Prob. Code § 10306(b)*

Proof of notice. *Prob. Code § 10312*

Publication for 10 days in a newspaper published once per week or more often. *Gov. Code § 6063a*

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39-455 California Forms of Pleading and Practice--Annotated § 455.93

§ 455.93 Notice of Sale of Real Property [Prob. Code §§ 10300, 10304]--Public Auction

[1] FORM Notice of Sale of Real Property [Prob. Code §§ 10300, 10304]--Public Auction

[*Caption, if desired. See § 455.94.*]

Please take notice that, on _____ [*date*] at _____ [*place of auction*] at _____ [*time*], _____ [*name*], as the personal representative of the estate of _____ [*name*], deceased, will sell at public auction, under the terms and conditions specified below, real property of the estate situated in the City of _____, _____ County, California, and described as follows: _____ [*describe by legal description and street address, if any*].

The terms and conditions of sale are: _____ [*specify, e.g.,* all cash, in lawful money of the United States of America with 10 percent of the amount bid to be paid at the time of the auction and the balance to be paid on delivery *or* at least 20 percent of the amount bid in cash and the balance on credit on terms acceptable to the personal representative]. The personal representative reserves the right to reject any bid in an amount that is less than $_____, which is the appraised value of the property. For further information please contact the attorney for the personal representative at _____ [*telephone number*].
Dated: _____.

_____ [*signature*]

Personal Representative of the Estate of

_____ [*name*], Deceased

_____ [*signature*]

Attorney for Personal Representative

_____ [*address*]

[2] Use of Form

The foregoing form is for use by the personal representative to give notice of a public auction sale of estate real property [*see Prob. Code § 10300*]. For discussion of public auction sales, see *§ 455.19[1]*.

For a form for notice of sale of estate real property by private sale, see *§ 455.92*. For forms for sale of estate personal property, see *§§ 455.90* and *455.91*. For a form for a notice of sale of real and personal property at private sale as a unit, see *§ 455.94*.

[3] Date of Auction

Notice of sale must be given by publication if it appears from the inventory and appraisal that the value of the property to be sold is more than $5,000 [Prob. Code § 10300]. Otherwise, notice may be given by posting [*Prob. Code § 10301*; *see § 455.19*]. Notice by publication must run for 10 days before the date of the auction [*Prob. Code § 10300(b)(2)*; *see* Gov. Code. § 6063a]. Notice by posting must run for 15 days before the day of the auction [*Prob. Code § 10301(b)(2)*]. Therefore, the date of the auction must be at least 10 or 15 days after the initial publication or posting, depending on the manner of giving notice.

[4] State Statutes

Requirements of sale by public auction. *Prob. Code § 10305*

[5] Cross References

For a related form, *see § 455.92*

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39-455 California Forms of Pleading and Practice--Annotated § 455.94

§ 455.94 Notice of Sale of Unit of Real and Personal Property at Private Sale [Prob. Code § 10004(c)]

[1] FORM Notice of Sale of Unit of Real and Personal Property at Private Sale [Prob. Code § 10004(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	NOTICE OF SALE OF REAL AND PERSONAL
Deceased	)	PROPERTY AS UNIT
	)	[*Prob. Code § 10004(c)*]

_____

Please take notice that _____ [*name*], as the personal representative of the estate of _____ [*name*], deceased, will sell at private sale, under the terms and conditions specified below, a single unit of real and personal property of the estate. The real property is situated in the City of _____, _____ County, California, and described as follows: _____ [*describe by legal description and street address, if any*]. The personal property is listed on the attached page. Written offers for this unit of real and personal property will be received at _____ [*specify, e.g.*, the office of _____ (*name*), attorney for the personal representative, at _____ (*address*)] or may be delivered to _____ [*name of personal representative*] personally, on or before _____ [*specify date at least 10 days from initial date of publication or at least 15 days from date of posting, depending on manner in which notice is to be given*]. Sale will be made on _____ [*date immediately following final date for submitting offers*] to the person making the highest and best offer for each item of property listed.

Offers must be for the entire unit, including the real property and all listed personal property. Bids for individual items will not be considered. [The real and personal property has been appraised together as a unit at a value of

$_____ *or* Each item or real and personal property has been appraised separately, the real property at a value of $_____ and the personal property at the values indicated on the attached list.] The minimum offer acceptable is $_____ [*specify amount at least 90 percent of appraised value of unit or of sum of appraised values of all property in unit*]. The terms and conditions of sale are: _____ [*specify, e.g.,* all cash, in lawful money of the United States of America with 10 percent of the amount offered to accompany the offer and the balance to be paid on close of escrow *or* part cash and part credit on terms acceptable to the personal representative]. For further information please contact the attorney for the personal representative at _____ [*telephone number*].

All sales are subject to confirmation by the superior court, and no sale may be consummated and no deed may be recorded and delivered to a purchaser until the sale has been confirmed by the court.
Dated: _____.

_____ [*signature*]

Personal Representative of the Estate of

_____ [*name*], Deceased

_____ [*signature*]

Attorney for Personal Representative

_____ [*address*]

[*ATTACH separate page listing and describing all personal property in the unit with sufficient specificity so as to distinguish each item from all other similar items. Indicate the appraised value of each item.*]

[2] Use of Form

The foregoing form is for use by a personal representative to give notice of a private sale of a unit of real and personal property. It may be adapted for use if the sale is to be by public auction by reference to a date of auction instead of a date on which a sale is to be made based on offers previously submitted [*see § 455.93*].

[3] Manner of Giving Notice

Sales of a unit of realty and personalty are subject to the applicable limitations and restrictions established for the sale of real property [*Prob. Code § 10004(d)*]. Therefore, notice must be by publication unless the appraised value of the real property, as shown on the inventory and appraisal, is not more than $5,000, in which case it may be by posting [*Prob. Code §§ 10300, 10301*]. For further discussion, see *§ 455.92*.

[4] State Statutes

Appraisal and sale of assets as a unit. *Prob. Code § 10004*

[5] Cross References

For related forms, *see §§ 455.119, 455.120*

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39-455 California Forms of Pleading and Practice--Annotated §§ 455.95-455.110

[Reserved]

§§ 455.95[Reserved]

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39-455 California Forms of Pleading and Practice--Annotated § 455.111

§ 455.111 Petition to Exempt Specific Gift from Operation of Rules of Abatement [Prob. Code § 21402]

[1] FORM Petition to Exempt Specific Gift from Operation of Rules of Abatement [Prob. Code § 21402]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of_____ [*name*],	)	PETITION TO EXEMPT
Deceased	)	SPECIFIC GIFT FROM ABATEMENT
	)	

_____

Petitioner alleges:

1. Petitioner, _____ [*name*], is the specific devisee under the will of _____ [*name*], deceased, of _____ [*specify and describe property that is subject of testamentary gift, e.g.,* decedent's residence, located at _____ (*street address*), and more particularly described as _____ (*set forth legal description*)].

2. Petitioner is informed and believes and on that basis alleges that in order to pay debts, expenses, taxes, or any family allowance allowed by the court, or to satisfy other gifts from the decedent's estate, it may be necessary to effect an abatement of testamentary gifts under the provisions of *Probate Code § 21402*.

3. Petitioner is further informed and believes and on that basis alleges that after first applying any estate specifically designated in decedent's will, any property not disposed of by the will, residuary gifts, general gifts, and specific gifts to persons who are not relatives of the deceased, it may still be necessary to abate other testamentary gifts in order to pay debts, expenses of administration, and the family allowance.

4. _____ [*State facts that show that abatement of gift to petitioner would defeat decedent's testamentary intent, e.g.,* Petitioner, who is decedent's daughter, lived with decedent in the real property that is the subject of this specific testamentary gift during his lifetime and continues to live in the property. Petitioner is a person of limited economic resources and has no other means of obtaining housing. The property is free and clear of all debts and encumbrances, and by reason of this free housing, Petitioner is able to manage on monthly social security income. Decedent made no other significant provision for Petitioner in his will].

5. It is necessary to exempt the real property that is the subject of the te stamentary gift to Petitioner from abatement and sale in order to carry into effect the intention of the decedent _____ [*specify, e.g.* to provide free housing for Petitioner after decedent's death].

6. Petitioner is informed and believes, and on that basis alleges that there is other sufficient estate to pay debts, expenses of administration, and family allowance without the necessity of sale and abatement of Petitioner's testamentary gift.

WHEREFORE, Petitioner prays for an order exempting Petitioner's specific testamentary gift from the operation of the rules of abatement and from sale by the personal representative, and for such other orders as the court deems proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

VERIFICATION

I _____ [*name of personal representative*] declare:

I am the Petitioner in this matter. I have read this Petition and know its contents. From my own knowledge, I know that they are true, except as to those matters that are stated on information and belief. As to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

Petitioner

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form may be used to request the court to exempt a specific testamentary gift from the statutory rules of abatement [

see Prob. Code §§ 21400-21406 (abatement); *see also Prob. Code § 21117(a)* ("specific gift" defined)]. The form is based on *Prob. Code § 21402*, which prescribes the order of abatement of gifts made on or after July 1, 1989 [*see Prob. Code § 21406*]. Gifts made before that date are governed by former *Prob. Code §§ 682*, 750, which were repealed as of July 1, 1989, but which continue to govern abatement in the estates of decedents dying before that date [*see* Stats. 1988, ch. 1199, §§ 52, 53.5; *Prob. Code § 21406*]. For further discussion, *see § 455.13[2][c]*.

[3] Abatement of Specific Gifts

It may be necessary from time to time to sell property in a decedent's estate to pay debts, expenses, taxes, or any family allowance allowed by the court, or to satisfy other gifts from the decedent's estate [*Prob. Code § 21401*; *see Prob. Code § 11420* (priority for payment)]. When it is necessary to do this, the property must be sold in accordance with any explicit directions set forth in the will; or, if there are no explicit directions, in such a way as to effectuate the purposes or plan of the decedent as revealed in the will [*see Prob. Code § 21400*]. If there are no explicit directions, and no plan or purpose is revealed by the will, the decedent's property may be sold according to the statutory order of priority set forth in *Prob. Code § 21402*. Under this section, property not disposed of by the will, residuary gifts, general gifts to persons other than the decedent's relatives, and general gifts to the transferor's relatives must be resorted to before property that is the subject of specific gifts to the transferor's relatives [*Prob. Code § 21402(a)*]. A person is regarded as a "relative" of the decedent for purposes of this rule if the decedent's property would pass to that person under the statutory rules of intestate succession if the decedent died intestate and there were no other persons having priority [*Prob. Code § 21402(b)*; *see Prob. Code §§ 6401, 6402* (intestate shares of surviving spouse and other heirs)]. A specific gift is a gift of specifically identifiable property [*Prob. Code § 21117(a)*].

[4] State Statutes

Order of resort to estate property to pay debts, expenses, taxes, or family allowance, or to satisfy other gifts from estate of decedent who died before July 1, 1989. Former Prob. Code § 750

Verified petition as admissible evidence in uncontested proceedings. *Prob. Code § 1022*

Requirement that petition be verified. *Prob. Code § 1021(a)(1)*

Abatement in accordance with instrument or transferor's intent. *Prob. Code § 21400*

Order of resort to estate property to pay debts, expenses, taxes, or family allowance, or to satisfy other gifts from estate of decedent who died on or after July 1, 1989. *Prob. Code § 21402*

Rules of *Prob. Code §§ 21400-21406* applicable only to gifts made on or after July 1, 1989. *Prob. Code § 21406*

[5] Cross References

For a related form, *see § 455.112*

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39-455 California Forms of Pleading and Practice--Annotated § 455.112

§ 455.112 Order Exempting Specifically Devised Property From Operation of Rules of Abatement [Prob. Code § 21402]

[1] FORM Order Exempting Specifically Devised Property From Operation of Rules of Abatement [Prob. Code § 21402]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER EXEMPTING SPECIFICALLY DEVISED
Estate of_____ [*name*],	)	PROPERTY FROM
Deceased	)	ABATEMENT
	)	

_____

The verified petition of _____ [*name*], praying for an order exempting decedent's testamentary gift of specific property from abatement and sale came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. [Objection to the petition was filed by _____ (*name and description of objector, e.g.*, John Jones, a creditor of the estate), who appeared by counsel _____ (*name*).]

The Court finds from proof made to the satisfaction of the Court that:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. Petitioner is the beneficiary of a specific testamentary gift of the following property: _____ [*specify and describe*].

3. Property specifically designated for the payment of decedent's debts, expenses of administration, and the family allowance in decedent's will appears to be insufficient to meet all such obligations.

4. After the value of any property specifically designated in decedent's will for the payment of decedent's debts, expenses of administration, and the family allowance is added to the value of all property not disposed of by the will, all property subject to residuary gifts, all property subject to general gifts, and all property subject to specific gifts to persons who are not relatives of the deceased, it may still be necessary to abate other testamentary gifts in order to pay debts, expenses of administration, and the family allowance.

5. It appears at this time that it will be necessary for the personal representative to appropriate other property devised by the testator in order to meet the estate's obligations for the payment of debts, expenses of administration, and the family allowance, under the applicable rules of abatement as set forth in the Probate Code.

6. Appropriation of the property that is the subject of the specific gift devised to petitioner would require sale of the property.

7. It was decedent's intent to benefit petitioner by this specific gift _____ [*specify, e.g.,* by providing her with free housing so that she may use her limited income for other purposes].

8. Abatement and sale of this property would defeat decedent's testamentary intent in that _____ [*specify, e.g.,* the proceeds of sale that would pass to petitioner after abatement would be insufficient to allow her to obtain other comparable housing free of monthly payment obligations].

9. There is other sufficient estate from which decedent's debts, expenses of administration, and the family allowance may be paid.

WHEREFORE, IT IS ORDERED that the property that is the subject of the specific testamentary gift that is described above is exempt from abatement and that this property shall not be sold by the personal representative in order to pay debts, expenses of administration, and the family allowance.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is a court order exempting property that is subject to a specific testamentary gift from the statutory rules of abatement [*see Prob. Code §§ 21400-21406* (abatement); *see also Prob. Code § 21117(a)* ("specific gift" defined)]. The form is based on *Prob. Code § 21402*, which prescribes the order of abatement of gifts made on or after July 1, 1989 [*see Prob. Code § 21406*]. Gifts made before that date are governed by former *Prob. Code §§ 682*, 750, which were repealed as of July 1, 1989, but which continue to govern abatement in the estates of decedents dying before that date [*see* Stats. 1988, ch. 1199, §§ 52, 53.5; *Prob. Code § 21406*]. For further discussion, *see § 455.13[2][c]*. The form is drafted assuming that the beneficiary of the specific gift is to be the petitioner. It may be adapted for use if the petitioner is some other person, such as the personal representative.

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39-455 California Forms of Pleading and Practice--Annotated § 455.113

§ 455.113 Petition to Approve Purchase of Estate Property by Personal Representative [Prob. Code § 9883]

[1] FORM Petition to Approve Purchase of Estate Property by Personal Representative [Prob. Code § 9883]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION TO APPROVE PURCHASE OF ES-
Estate of _____ [*name*],	)	TATE PROPERTY BY
Deceased	)	PERSONAL
	)	REPRESENTATIVE

_____

Petitioner alleges:

1. Petitioner, _____ [*name*], is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. Petitioner holds and intends to sell the following property of the estate: _____ [*specify by description sufficient to distinguish property from any other property of similar nature*].

3. Petitioner wishes to purchase this property.

[*EITHER*]

4. Purchase of this property by Petitioner is authorized by Paragraph _____ of decedent's will, a copy of which is

attached as Exhibit A and made a part hereof.

[*OR*]

4. Each known heir and devisee whose interest in the estate is affected by this proposed purchase has executed a written consent to the purchase. These consents have been filed in this matter, and copies are attached hereto as Exhibits A through _____ and made a part hereof. The purchase is to the advantage of the estate because _____ [*specify, e.g.,* Petitioner will pay the full appraised value of the property].

WHEREFORE, Petitioner prays for an order approving purchase of the property described above by Petitioner, and for such other orders as the court deems proper.
Dated: _____

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 455.111.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This petition is for use to request court approval of a purchase of estate property by the personal representative [*see Prob. Code § 9883*]. It may be adapted for use to request approval of a purchase by the attorney for the personal representative.

[3] Purchase of Estate Property by Personal Representative or Attorney

In general, neither the personal representative nor his or her attorney may purchase property of the estate [*Prob. Code § 9880*]. However, the personal representative may file a petition for court approval of such a purchase under certain circumstances [*Prob. Code § 9883(a)*]. The purchase may be approved if authorized in the decedent's will [*Prob. Code § 9882*]. Alternatively, the written consent of all heirs and devisees whose interest in the estate would be affected by the sale may be filed and a showing made that the purchase is to the advantage of the estate [*Prob. Code § 9881*].

If court confirmation of the sale is required, the court may approve the sale at the time of confirmation [*Prob. Code § 9883(b)*]. Under these circumstances, it is not clear whether a separate petition has to be filed, or whether approval can be requested in the report of sale and petition for confirmation [*see §§ 455.129, 455.131*].

At least 15 days' notice of the hearing must be given as provided in *Prob. Code § 1220 to (1)* each person listed in *Prob. Code § 1220*; (2) each known heir whose interest in the estate would be affected by the proposed purchase; and (3) each known devisee whose interest in the estate would be affected by the proposed purchase [*Prob. Code § 9883(c)*]. If any person entitled to notice is represented by an attorney of record, the notice must also be given to that attorney [*Prob. Code § 1214*]. For discussion of *Prob. Code § 1220* notice and a form for notice of hearing, see Ch. 447, *Probate:*

Statutory Notice Requirements .

[4] State Statutes

Verified petition is admissible evidence in uncontested proceeding. *Prob. Code § 1022*

Requirement that petition be verified. *Prob. Code § 1021(a)(1)*

General prohibition against purchase of estate property by personal representative or attorney. *Prob. Code § 9880*

Purchase of estate property by personal representative or attorney is permitted with consent of all heirs and devisees. *Prob. Code § 9881*

Purchase of estate property by personal representative or attorney is permitted if authorized by will. *Prob. Code § 9882*

Petition for court approval of purchase of estate property by personal representative or attorney. *Prob. Code § 9883*

Purchase of estate property by personal representative or attorney pursuant to contract of sale entered into by decedent before death is permitted. *Prob. Code § 9884*

Option to purchase estate property given by decedent to personal representative or attorney in will is exercisable. *Prob. Code § 9885*

[5] Cross References

For a related form, *see § 455.114*

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39-455 California Forms of Pleading and Practice--Annotated § 455.114

§ 455.114 Order Approving Purchase of Estate Property by Personal Representative [Prob. Code § 9883]

[1] FORM Order Approving Purchase of Estate Property by Personal Representative [Prob. Code § 9883]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER APPROVING PURCHASE OF ESTATE
Deceased	)	PROPERTY BY PERSONAL REPRESENTATIVE
	)	[*Prob. Code § 9883*]

_____

The verified petition of _____ [*name*], as personal representative of the estate of _____ [*name*], deceased, praying for an order approving his/her personal purchase of property of the estate came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. [*Add if appropriate:* Objection to the petition was filed by _____ (*name and description of objector, e.g.,* John Jones, a residuary beneficiary of the estate), who appeared by counsel _____ (*name*).]

The Court finds from proof made to the satisfaction of the Court that:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. Petitioner wishes to purchase the following property of the estate personally: _____ [*specify by*

sufficient description].

[*EITHER*]

3. Purchase of this property by petitioner is authorized in decedent's will.

[*OR*]

3. Written consent to the purchase of this property by petitioner has been signed by all known heirs and devisees whose interest in the estate would be affected by the proposed purchase. These consents have been filed with the court. The purchase is to the advantage of the estate because _____ [*specify, e.g.,* petitioner will pay the appraised value of the property, which is the highest and best price reasonably attainable for the property].

WHEREFORE IT IS ORDERED as follows:

1. Petitioner may purchase the property described above _____ [*specify terms and conditions, e.g.,* for a purchase price of $_____, cash on delivery].

[*EITHER, if sale may be legally made without further proceedings*]

2. Petitioner may execute a _____ [conveyance *or* transfer of title] in his/her representative capacity to himself/herself personally.

[*OR, if sale remains subject to legal requirements such as notice or court confirmation*]

2. Sale shall be made in the same manner as sale of other estate property of the same nature [except that _____ (*specify, e.g.,* notice of sale need not be given)].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The foregoing form of order is for use to approve the purchase of estate property by the personal representative personally [*see Prob. Code § 9883(d)*]. It may be adapted for use for a purchase of property by the attorney for the personal representative.

[3] Order Approving Sale to Personal Representative or Attorney

If the court is satisfied that the purchase of estate property by the personal representative or by his or her attorney should be approved, the court must make an order authorizing the purchase on specified terms and conditions. Unless otherwise provided in the will or in the order, the sale must be made in the same manner as sale of other estate property

of the same nature [*Prob. Code § 9883(d)*]. Therefore, all applicable legal requirements, such as for notice, hearing, overbid, and confirmation must be followed. The personal representative may then execute a conveyance or transfer according to the terms of the order [*Prob. Code § 9883(d)*]. The order should reflect whether there remain legal requirements that must be followed before the sale can be finalized and title transferred.

[4] State Statutes

Finding of giving or waiver of notice as required to be stated in order. *Prob. Code § 1260(b)*

Court order approving sale of estate property to personal representative or attorney. *Prob. Code § 9883(d)*

[5] Cross References

For a related form, *see § 455.113*

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39-455 California Forms of Pleading and Practice--Annotated § 455.115

§ 455.115 Petition to Compel Personal Representative to Sell Estate Property [Prob. Code § 10001]

[1] FORM Petition to Compel Personal Representative to Sell Estate Property [Prob. Code § 10001]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	PETITION TO COMPEL PERSONAL REPRES-
Deceased	)	ENTATIVE TO SELL ESTATE PROPERTY
	)	[*Prob. Code § 10001*]

_____

Petitioner alleges:

1. Petitioner, _____ [*name*] is _____ [*specify status as person interested in estate, e.g.*, a residuary beneficiary of this estate].

2. _____ [*Name of personal representative*] in his/her capacity as personal representative of this estate holds the following _____ [real *or* personal] property: _____ [*specify property whose sale is sought by sufficient description to distinguish it from all property of estate of similar nature*].

3. The appraised value of this property, as shown on the Inventory and Appraisal on file in this matter is $_____.

[*EITHER*]

4. Sale of this property is directed in decedent's will.

[*OR*]

4. Sale of this property is necessary in order for this estate to obtain sufficient liquid assets to pay all debts, devises, expenses of administration, taxes, and the family allowance.

[*OR*]

4. Sale of this property at this time is to the advantage of the estate and in the best interests of persons interested in the estate because _____ [*state reasons, e.g.,* the current market value of the property is $_____, which is far in excess of the appraised value of the property, and there is no certainty that this current value will not begin to decline].

5. Despite the above factors, the personal representative has neglected or refused, and continues to neglect or refuse to sell this property.

WHEREFORE, Petitioner prays for an order requiring the personal representative to sell the property described above on such terms and conditions and under such procedures as are required by law or as directed by this court, and for such other orders as the court deems proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 455.91.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

The foregoing form of petition is for use by a person who is interested in the estate, other than the personal representative, to request the court to require the personal representative to sell particular estate property [*see Prob. Code § 10001*].

[3] Compelling Sale of Estate Property

If the personal representative neglects or refuses to sell real or personal property of the estate that should be sold, any interested person may petition the court for an order requiring the sale [*Prob. Code § 10001(a)*]. An interested person includes any heir, devisee, child, spouse, creditor, beneficiary, or other person having a property right or claim against the estate that may be affected by the proceeding [*Prob. Code § 48(a)(1)*]. Sale may be required if necessary to pay debts, devises, the family allowance, expenses of administration, or taxes; if it is to the advantage of the estate and in the best interest of the interested persons; or if the property is directed to be sold in decedent's will [*Prob. Code §*

10001(a)].

Fifteen days' notice of the hearing on the petition must be given by mail [*Prob. Code § 10001(b)*; *see Prob. Code § 1220*; *see also* Ch. 447, *Probate: Statutory Notice Requirements*]. Notice of the hearing must also be given to the personal representative by citation served at least five days before the hearing [*Prob. Code § 10001(c)*].

[4] State Statutes

Definition of "interested persons." *Prob. Code § 48*

Requirement that petition be verified. *Prob. Code § 1021(a)(1)*

Verified petition as admissible evidence in uncontested proceeding. *Prob. Code § 1022*

Court order requiring sale of property. *Prob. Code § 10001*

[5] Cross References

For a related form, *see § 455.116*

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39-455 California Forms of Pleading and Practice--Annotated § 455.116

§ 455.116 Order Requiring Sale of Estate Property [Prob. Code § 10001]

[1] FORM Order Requiring Sale of Estate Property [Prob. Code § 10001]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*]	)	ORDER REQUIRING SALE OF ESTATE PROP-
Deceased	)	ERTY
	)	[*Prob. Code § 10001*]

_____

The verified petition of _____ [*name*], praying for an order requiring _____ [*name*], the personal representative of this estate, to sell property of the estate came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. [Objection to the petition was filed by _____ (*name and description of objector, e.g.*, John Jones, the personal representative), who appeared by counsel _____ (*name*).]

The court finds from proof made to the satisfaction of the court that:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. Petitioner is _____ [*status qualifying petitioner as person interested in estate, e.g.*, a residuary beneficiary of the estate].

3. _____ [*Name of personal representative*] in his/her capacity as personal representative of this estate holds the following _____ [real *or* personal] property: _____ [*specify property whose sale is sought by sufficient description to distinguish it from all property of estate of similar nature*].

[*EITHER*]

4. Sale of this property is directed in decedent's will.

[*OR*]

4. Sale of this property is necessary in order for this estate to obtain sufficient liquid assets to pay all debts, devises, expenses of administration, taxes, and the family allowance.

[*OR*]

4. Sale of this property at this time is to the advantage of the estate and in the best interests of persons interested in the estate because _____ [*state reasons, e.g.,* the current market value of the property is $_____, which is far in excess of the appraised value of the property, and there is no certainty that this current value will not begin to decline].

5. The personal representative will not sell this property unless ordered to do so by this Court.

WHEREFORE, IT IS ORDERED that the personal representative shall sell the property described above in conformance with all requirements of law.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The foregoing form of order is for use to require the personal representative to sell specific real or personal property of the estate [*see Prob. Code § 10001*].

[3] State Statutes

Finding of giving or waiver of notice as required in order. *Prob. Code § 1260(b)*

[4] Cross References

For a related form, *see § 455.115*

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39-455 California Forms of Pleading and Practice--Annotated § 455.117

§ 455.117 Petition to Deviate From Testamentary Instructions Regarding Sale of Estate Property [Prob. Code § 10002(b)]

[1] FORM Petition to Deviate From Testamentary Instructions Regarding Sale of Estate Property [Prob. Code § 10002(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*]	)	PETITION TO DEVIATE FROM TESTAMENT-
Deceased	)	ARY INSTRUCTIONS REGARDING SALE OF
	)	PROPERTY
		[*Prob. Code § 10002(b)*]

_____

Petitioner alleges:

1. Petitioner, _____ [*name*], is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. Under the Will of _____ [*name of decedent*], _____ [*specify provision in will from which deviation is sought, e.g.,* Petitioner is directed to sell certain specified securities in order to pay decedent's debts, costs of administration, and taxes]. A copy of this provision in the will is attached as Exhibit A and made a part hereof.

3. Petitioner is informed and believes, and on that basis alleges that the sale as directed in decedent's will is not to the advantage of the estate nor in the best interests of interested persons because _____ [*specify, e.g.,* it is not necessary to sell this property in order to pay decedent's debts, expenses of administration, and taxes, and the market

for the specified securities is currently in a state of fluctuation, making it uncertain that the securities will be sold for their highest and best price].

WHEREFORE, petitioner prays for an order relieving him/her of the duty to follow testamentary instructions _____ [*specify, e.g.,* to sell the securities] and for such other order as the court deems proper.
Dated: _____.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 455.111.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

The foregoing form of petition is for use to request court permission to deviate from testamentary instructions regarding sale of estate property. The example set forth in the form involves a testamentary direction that certain property be sold. The form may be modified for use in requesting deviation from a particular testamentary direction regarding manner of sale [*see Prob. Code § 10002*].

[3] Judicial Relief From Testamentary Directions

In general, a personal representative is required to follow testamentary directions as to the mode of selling estate property or particular property to be sold [*Prob. Code § 10002(a)*]. However, the personal representative or any interested person may file a petition for judicial relief from testamentary directions. It must be shown that it is to the advantage of the estate and in the best interest of interested persons that the personal representative be relieved of the duty to follow the directions. Fifteen days' notice by mail is required [*Prob. Code § 10002(b)*; *see Prob. Code § 1220*].

[4] State Statutes

Requirement that petition be verified. *Prob. Code § 1021(a)(1)*

Verified petition as admissible evidence in uncontested proceeding. *Prob. Code § 1022*

Relief from directions in will as to mode of selling property or property to be sold. *Prob. Code § 10002*

[5] Cross References

For a related form, *see § 455.118*

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39-455 California Forms of Pleading and Practice--Annotated § 455.118

§ 455.118 Order Authorizing Deviation From Testamentary Instructions Regarding Sale of Estate Property [Prob. Code § 10002(b)]

[1] FORM Order Authorizing Deviation From Testamentary Instructions Regarding Sale of Estate Property [Prob. Code § 10002(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*]	)	ORDER RELIEVING PERSONAL REPRESENT-
Deceased	)	ATIVE OF DUTY TO FOLLOW TESTAMENT-
	)	ARY DIRECTIONS REGARDING SALE OF PROPERTY
		[*Prob. Code § 10002(b)*]

_____

The verified petition of _____ [*name*], as personal representative of the estate of _____ [*name*], deceased, praying for an order relieving him/her of the duty of complying with testamentary directions regarding sale of estate property came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. [Objection to the petition was filed by _____ (*name and description of objector, e.g.,* John Jones, a residuary beneficiary of the estate), who appeared by counsel _____ (*name*).]

The Court finds from proof made to the satisfaction of the Court that:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____

(given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. The will of _____ [*name of decedent*] requires _____ [*specify testamentary directions compliance with which is to be excused, e.g.,* the personal representative to sell all personal property of the estate, including decedent's coin collection, at public auction].

3. It is to the advantage of the estate and in the best interest of persons interested in the estate that this testamentary direction not be followed because _____ [*specify, e.g.,* the coin collection is more likely to bring a higher sale price if sold by a mail auction conducted through a publication that is commonly subscribed to by persons who are engaged in the hobby of coin collecting].

WHEREFORE, IT IS ORDERED as follows:

1. Petitioner is relieved of the duty of complying with the decedent's testamentary direction to _____ [*specify, e.g.,* sell decedent's coin collection at public auction].

2. _____ [*Specify mode of sale, terms and conditions of sale, or property to be sold, e.g.,* Petitioner shall sell decedent's coin collection through a mail auction to be advertised in _____ (*specify publication*) with a minimum bid of $_____ (*appraised value*).]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This court order is for use to relieve the personal representative from the duty to comply with directions in the decedent's will regarding sale of estate property. The example set forth in the form involves a testamentary direction regarding manner of sale. The form may be modified for use in requesting deviation from a particular testamentary direction regarding particular property to be sold [*see Prob. Code § 10002*]. The order must specify the mode, terms, and conditions of sale or the particular property to be sold, or both.

[3] State Statutes

Finding of giving or waiver of notice as required to be stated in order. *Prob. Code § 1260(b)*

Relief from directions in will as to mode of selling property or property to be sold. *Prob. Code § 10002*

[4] Cross References

For a related form, *see § 455.117*

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39-455 California Forms of Pleading and Practice--Annotated § 455.119

§ 455.119 Petition to Sell Real and Personal Property as Unit [Prob. Code § 10004(b)]

[1] FORM Petition to Sell Real and Personal Property as Unit [Prob. Code § 10004(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*]	)	PETITION TO SELL REAL AND PERSONAL
Deceased	)	PROPERTY AS UNIT
	)	[*Prob. Code § 10004(b)*]

_____

Petitioner alleges:

1. Petitioner is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. Petitioner currently holds real property belonging to the estate commonly known as _____ [*street address*] and more particularly described as _____ [*legal description*].

3. Petitioner currently holds personal property belonging to the estate as shown on Exhibit A, which is attached hereto and made a part hereof. [*Add if applicable:* The personal property listed on Exhibit A consists of the contents of the real property as stated in Paragraph 1 of this Petition.]

[*EITHER*]

4. The real property as set forth in Paragraph 1 of this Petition and all the personal property as set forth in Paragraph 2 of this Petition have been appraised as a unit in the sum of $_____, as shown on the Inventory and Appraisal on file in this matter.

[*OR*]

4. The real property as set forth in Paragraph 1 of this Petition has an appraised value of $_____, as shown on the Inventory and Appraisal on file in this matter. The items of personal property as set forth in Paragraph 2 of this Petition have the appraised values as shown on Exhibit A and as also shown on the Inventory and Appraisal on file in this matter.

[*CONTINUE*]

5. All this real and personal property of the estate may be sold because _____ [*specify grounds, e.g.,* sale of the property is authorized by the will of decedent].

6. It is to the advantage of the estate that this real and personal property be sold as a unit because _____ [*specify reasons, e.g.,* the personal property, which consists of the contents of the real property, has little separate value, and it would require significant expense to remove, store, and separately sell this property].

7. Petitioner proposes to sell this real and personal property as a unit at _____ [private sale for a minimum price of $_____ (*amount equal to 90 percent of appraised value of unit or of sum of appraised values of all real and personal property appraised separately*) *or* public auction].

WHEREFORE, petitioner prays for an order approving sale of the real and personal property as set forth in this Petition as a unit at _____ [private sale *or* public auction] and for such other order as the court deems proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 455.111.*]

EXHIBIT A

PERSONAL PROPERTY

Description of Property	Appraised Value
_____	$_____
_____	$_____

_____ $_____
_____ $_____

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

The foregoing form is for use by a personal representative to petition for an order authorizing the sale of real and personal property as a unit [*see Prob. Code § 10004(b)*]. The most common situation in which such a unit sale is likely to be advantageous involves the sale of the decedent's real property together with its contents.

[3] Sale of Unit of Realty and Personalty

A personal representative may sell real and personal property together as a unit and under one bid if the court finds the sale of the assets as a unit to be to the advantage of the estate [*Prob. Code § 10004(b)*]. There is no statutory guidance as to whether a request for court approval may be by ex parte application or by petition for hearing with notice [but see Cal. Law Revision Comm'n Comment to *Prob. Code § 10004* (personal representative must file petition with court)]. Therefore, local court rules should be consulted. In the absence of rules on point, it is recommended that the personal representative proceed by verified petition with notice [*see* Ch. 447, *Probate: Statutory Notice Requirements*].

Sale of a unit of realty and personal property must be made in the manner provided for the sale of real property [*Prob. Code § 10004(d)*; *see § 455.17*; *see also § 455.131*]. The real and personal property may be appraised as a unit or separately, in the discretion of the personal representative [*Prob. Code § 10004(a)*]. If the property is to be sold at private sale, the unit sale price must be at least 90 percent of the appraised value of the unit or, if not appraised as a unit, of the sum of the appraised values of all items of real and personal property contained in the unit [*Prob. Code § 10004(c)*].

[4] State Statutes

Requirement that petition be verified. *Prob. Code § 1021(a)(1)*

Verified petition as admissible evidence in uncontested proceeding. *Prob. Code § 1022*

Requirement that petition be verified. *Prob. Code § 1021(a)(1)*

Sale and appraisal of assets as unit. *Prob. Code § 10004*

[5] Cross References

For related forms, *see §§ 455.94, 455.120*

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39-455 California Forms of Pleading and Practice--Annotated § 455.120

§ 455.120 Order Approving Sale of Unit of Real and Personal Property [Prob. Code § 10004(c)]

[1] FORM Order Approving Sale of Unit of Real and Personal Property [Prob. Code § 10004(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*]	)	ORDER APPROVING SALE OF REAL AND PER-
Deceased	)	SONAL PROPERTY AS UNIT
	)	[*Prob. Code § 10004(c)*]

_____

The verified petition of _____ [*name*], as personal representative of the estate of _____ [*name*], deceased, praying for an order approving the sale of certain real and personal property of the estate as a unit came on regularly for hearing on _____ [*date*] in Department _____ of this court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. [*Add if appropriate:* Objection to the petition was filed by _____ (*name and description of objector, e.g.*, John Jones, a residuary beneficiary of the estate), who appeared by counsel _____ (*name*).]

The court finds from proof made to the satisfaction of the court that:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. Petitioner, as personal representative of the estate of _____ [*name of decedent*], holds the real property commonly known as _____ [*street address*] and more particularly described as:

_____ [*legal description*].

3. Petitioner, as personal representative of the estate of _____ [*name of decedent*], also holds the following personal property: _____ [*list and describe with sufficient specificity to distinguish each item from all other similar items of the estate*].

4. Sale of this real and personal property as a unit is advantageous to the estate because _____ [*specify reason, e.g.,* the personal property, which consists of the contents of the real property, has little separate value, and it would require significant expense to remove, store, and separately sell this property].

WHEREFORE, IT IS ORDERED that Petitioner may sell this real and personal property as a unit at _____ [private sale for a minimum price of $_____ (*amount equal to 90 percent of appraised value of unit or of sum of appraised values of all real and personal property appraised separately*) *or* public auction].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The foregoing form of order is for use to grant the personal representative's petition for approval to sell certain real and personal property of the estate together as a unit. Local court rules may both prohibit exhibits or attachments to an order and require the order to be complete in and of itself [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rules 10.41, 10.42]. In such a case, all of the property whose sale as a unit is authorized must be listed in the body of the order.

[3] State Statutes

Finding of giving or waiver of notice as required to be stated in order. *Prob. Code § 1260(b)*

[4] Cross References

For related forms, *see §§ 455.94*

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39-455 California Forms of Pleading and Practice--Annotated § 455.121

§ 455.121 Petition for Order Authorizing Sale of Securities [Prob. Code § 10200]

[1] FORM Petition for Order Authorizing Sale of Securities [Prob. Code § 10200]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*]	)	PETITION TO AUTHORIZE SALE OF SECURIT-
Deceased	)	IES
	)	[*Prob. Code § 10200*]

_____

Petitioner alleges:

1. Petitioner, _____ [*name*], is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. Petitioner holds the following securities of the estate: _____ [*specify as securities appear on inventory and appraisal, and show appraised value*]. The values of these securities, as shown on the inventory and appraisal are based on _____ [*specify, e.g.,* the Pacific Stock Exchange closing price on _____ (*date*)].

[*EITHER*]

3. These securities are listed on the _____ [*name of established stock or bond exchange, e.g.,* Pacific Stock Exchange].

[*OR*]

3. These securities are not listed on an established stock or bond exchange.

[*CONTINUE*]

4. Petitioner wishes to _____ [sell these securities *or* surrender these securities for _____ (redemption *or* conversion)].

5. The terms and conditions of the proposed _____ [sale *or* redemption *or* conversion] are as follows: _____ [*specify, e.g.,* to be arranged by a licensed stock broker on the Pacific Stock Exchange with instructions to sell for no less than the value shown on the inventory and appraisal].

6. This proposed sale is to the advantage of the estate in that _____ [*specify e.g.,* the Pacific Stock Exchange closing price on _____ (*date*) was $_____ a share, which is far in excess of appraised value. Petitioner has received advice from a licensed stock broker to sell at this time because it is not projected that the price per share will go significantly higher and it may begin to decline].

WHEREFORE, Petitioner prays for an order authorizing Petitioner to sell the securities under the terms and conditions set forth, and for such other orders as the court deems proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 455.111.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

The foregoing form of petition is for use to seek prior court authorization for the sale of securities belonging to the estate [*see Prob. Code § 10200*]. A sale or surrender for redemption or conversion of securities owned by the estate requires prior authorization by the court rather than subsequent confirmation [*Prob. Code § 10200(b)*]. The form is drafted with the personal representative as petitioner. It may be adapted for use by any interested person [*see Prob. Code § 10200(c)*].

There is also a Judicial Council form for an ex parte petition and order authorizing sale of securities. However, the form has not yet been modified to reflect changes in the law effective July 1, 1988.

[3] Contents

The petition must state the terms and conditions and the advantage to the estate of the proposed transaction [*Prob. Code § 10200(c)*]. *Prob. Code § 10200* does not provide any express exception to the requirement that advantage to the estate must be shown in the case of securities that are authorized or directed to be sold in the will [cf. *Prob. Code §§ 10261, 10310* (no showing of necessity or advantage of sale of real and other personal property is required if property is authorized or directed to be sold in will)].

The petition should state whether or not the securities are traded on a established stock or bond exchange. The basis for valuing the securities should be given, particularly if they are not listed on an exchange or are shares of a closely held corporation [*see* Los Angeles Co. Super. Ct. Rules, Rule 10.103(b), (c)].

[4] Notice

Fifteen days notice of the hearing must be given by both mail and posting [*Prob. Code § 10200(d)*; *see Prob. Code §§ 1220, 1230*; see also Ch. 447, *Probate: Statutory Notice Requirements*]. The court may order that notice be given for a shorter time or dispensed with [*Prob. Code § 10200(d)*]. For discussion of whether notice of sale is required, see *§ 455.21*. For a form for a notice of sale of personal property that may be adapted for a sale of securities, *see § 455.90*.

[5] State Statutes

General definition of "interested person." *Prob. Code § 48*

General definition of "securities." *Prob. Code § 70*

Requirement that petition be verified. *Prob. Code § 1021(a)(1)*

Verified petition as admissible evidence in uncontested proceeding. *Prob. Code § 1022*

Sale or surrender for redemption or conversion of securities. *Prob. Code § 10200*

Sale of subscription rights. *Prob. Code § 10202*

[6] Cross References

For a related form, *see § 455.122*

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39-455 California Forms of Pleading and Practice--Annotated § 455.122

§ 455.122 Order Authorizing Sale of Securities [Prob. Code § 10200]

[1] FORM Order Authorizing Sale of Securities [Prob. Code § 10200]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*]	)	ORDER AUTHORIZING SALE OF SECURITIES
Deceased	)	[*Prob. Code § 10200*]
	)	

_____

The verified petition of _____ [*name*], as personal representative of the estate of _____ [*name*], deceased, praying for an order authorizing sale of securities of the estate came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. [Objection to the petition was filed by _____ (*name and description of objector, e.g.,* John Jones, a residuary beneficiary of the estate), who appeared by counsel _____ (*name*).]

The Court finds from proof made to the satisfaction of the Court that:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. Petitioner holds the following securities of the estate, appraised at the values shown: _____ [*specify as securities appear on inventory and appraisal, and show appraised value*]. Petitioner wishes to _____ [sell these securities *or* surrender these securities for _____ (redemption *or*

conversion)].

3. The values of these securities are based on _____ [*specify, e.g.,* the Pacific Stock Exchange closing price on _____ (*date*)].

4. These securities _____ [are *or* are not] listed on an established stock or bond exchange.

5. The proposed sale is to the advantage of the estate in that _____ [*specify e.g.,* the Pacific Stock Exchange closing price on _____ (*date*) was $_____ a share, which is far in excess of appraised value. Sale at this time is likely to substantially increase the value of the estate, and the failure to sell might result in eventual loss to the estate].

WHEREFORE IT IS ORDERED that petitioner is authorized to _____ [sell *or* redeem *or* convert] the securities listed above under the following terms and conditions: _____ [*specify, e.g.,* disposition shall be arranged by a licensed stock broker on the Pacific Stock Exchange withinstructions to sell for no less than the value shown on the inventory and appraisal].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The foregoing form of order is for use to authorize sale of estate securities or surrender of estate securities for redemption or conversion. The form is drafted for use by the personal representative as petitioner. It may be adapted for use if the petition was filed by some other interested person [*see Prob. Code § 10200(c)*].

If the court authorizes the sale, redemption, or conversion, the order must fix the terms and conditions of the disposition [*Prob. Code § 10200(c)*].

[3] State Statutes

Finding of giving or waiver of notice as required in order. *Prob. Code § 1260(b)*

Sale or surrender for redemption or conversion of securities. *Prob. Code § 10200*

[4] Cross References

For a related form, *see § 455.121*

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39-455 California Forms of Pleading and Practice--Annotated § 455.123

§ 455.123 Petition for Order Shortening Time of Notice of Sale [Prob. Code §§ 10251, 10302]

[1] FORM Petition for Order Shortening Time of Notice of Sale [Prob. Code §§ 10251, 10302]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*]	)	PETITION FOR ORDER SHORTENING TIME OF
Deceased	)	NOTICE OF SALE
	)	[Prob. Code § _____ (10251 *or* 10302)]

_____

Petitioner alleges:

1. Petitioner is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. Petitioner currently holds _____ [real *or* personal] property belonging to the estate as follows: _____ [*identify all real or personal property to be sold, or in case of many items of personal property, attach list as Exhibit A*].

3. Petitioner may sell this property because _____ [*specify grounds, e.g.,* sale is to the advantage of the estate and in the best interests of interested persons].

4. Petitioner intends to sell this property at _____ [private sale *or* public auction].

5. Notice of sale is required by law to be given by _____ [posting *or* publication].

6. It is to the advantage of the estate that the time for which notice of sale must be given be shortened because _____ [*specify reasons, e.g.,* Petitioner has a pending offer to purchase the property at a sale price in excess of appraised value that will expire in 10 days].

WHEREFORE, petitioner prays for an order shortening time to give notice of sale to five days and for such other orders as the court deems proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 455.111.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

The foregoing form is for use to petition the court for an order shortening the time for which notice of sale must be given. It may be used for sales of either real or personal property, at private sale or at public auction, and regardless of whether notice must be given by publication or may be given by posting [*see Prob. Code §§ 10251, 10302*].

Prob. Code §§ 10251, 10302 do not state whether an order shortening time may be granted on ex parte application or requires a verified petition and noticed hearing. Therefore, local court rules should be consulted to determine the appropriate local procedure.

[3] Order Shortening Time

If it is shown that it will be to the advantage of the estate, the court or judge may, by order, shorten the time of notice of sale of estate real or personal property to not less than five days [*Prob. Code §§ 10251(a), 10302(a)*]. If notice by publication is required, as is the case for a sale of real property appraised at more than $5,000 [*see Prob. Code § 10300*], the time of publication may be shortened from ten days prior to the date of sale to a single instance of publication prior to the sale [*Prob. Code § 10302(b)*; *see Gov. Code § 6061*]. If notice by posting is sufficient, as is the case for sales of personal property and of real property appraised at not more than $5,000 [*see Prob. Code §§ 10250, 10301*], the time of posting may be shortened from 15 to five days prior to the date of sale [*Prob. Code §§ 10251(b)(1), 10302(c)*].

[4] State Statutes

Single instance of publication as adequate if time is shortened. Gov. Code. § 6061

Requirement that petition be verified. *Prob. Code § 1021(a)(1)*

Verified petition as admissible evidence in uncontested hearing. *Prob. Code § 1022*

Order shortening time for notice of sale of personal property. *Prob. Code § 10251*

Order shortening time for notice of sale of real property. *Prob. Code § 10302*

[5] Cross References

For a related form, *see § 455.124*

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Volume 39: Probate: Claims Against the Estate thru Probate: Discharge-Chs. 454-459
Chapter 455 PROBATE: SALE OF ESTATE PROPERTY
PART V. FORMS
B. Petitions And Orders Granting Petitions

39-455 California Forms of Pleading and Practice--Annotated § 455.124

§ 455.124 Order Shortening Time of Notice of Sale [Prob. Code §§ 10251, 10302]

[1] FORM Order Shortening Time of Notice of Sale [Prob. Code §§ 10251, 10302]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*]	)	ORDER SHORTENING TIME OF NOTICE OF SALE
Deceased	)	
	)	[Prob. Code § _____ (10251 *or* 10302)]

_____

The verified petition of _____ [*name*], as personal representative of the estate of _____ [*name*], deceased, praying for an order shortening time of notice of sale by _____ [public sale *or* private auction] of _____ [real *or* personal] property of the estate came on regularly for hearing on _____ [*date*] in Department _____ of this court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. [*Add if appropriate:* Objections to shortening time were filed by _____ (*name and description of objector, e.g.*, John Jones, a residuary beneficiary of the estate), who appeared by counsel _____ (*name*).]

The court finds from proof made to the satisfaction of the court:

1. Notice of the time and place of the hearing was given as required by law. [*Add if applicable:* Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. Petitioner may sell the following property of the estate: _____ [*list property for which sale on shortened time of notice is sought*].

3. It is to the advantage of the estate that time of notice be shortened because _____ [*specify reasons, e.g.,* petitioner has a pending offer to purchase the property at a sale price in excess of appraised value that will expire in ten days].

WHEREFORE, IT IS ORDERED that the time of notice of sale is shortened, and that notice may be given by _____ [a single publication in _____ (*name of newspaper*) before sale is made *or* posting at the courthouse of _____ County, California for a period of five days before sale is made].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The foregoing form of order is for use to shorten the time of notice of sale. It may be used for real or personal property, whether sold at private sale or public auction, and regardless of whether notice must be given by publication or by posting [*see Prob. Code §§ 10251, 10302*].

[3] State Statutes

Finding of giving or waiver of notice as required in order. *Prob. Code § 1260(b)*

Place where notice of sale of personal property must be posted or published. *Prob. Code § 10250*

Place where notice of sale of real property must be published. *Prob. Code § 10300*

[4] Cross References

For a related form, *see § 455.123*

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39-455 California Forms of Pleading and Practice--Annotated § 455.125

§ 455.125 Petition to Deviate From Public-Auction Requirements for Sale of Personal Property [Prob. Code § 10254(b)]

[1] FORM Petition to Deviate From Public-Auction Requirements for Sale of Personal Property [Prob. Code § 10254(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*]	)	PETITION TO DEVIATE FROM PUBLIC-AUC-
Deceased	)	TION REQUIREMENTS FOR SALE OF PERSON-
	)	AL PROPERTY
		[*Prob. Code § 10254(b)*]

_____

Petitioner alleges:

1. Petitioner, _____ [*name*], is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. Petitioner intends to sell the following personal property of the estate at public auction _____ [*specify, e.g., decedent's modern art collection*].

[*EITHER*]

3. The public auction should be held _____ [*specify location outside of California, e.g.,* London,

England] because _____ [*specify reason, e.g.,* of the availability in that jurisdiction of an auction house that specializes in international art auctions].

[*AND/OR*]

4. The necessity of having _____ [*specify tangible personal property, e.g.,* the art collection] present at the auction places an undue burden on the estate because _____ [*specify reason, e.g.,* the cost of insurance would be prohibitive].

WHEREFORE, petitioner prays for an order _____ [permitting sale by public auction to be conducted in _____ (*specify location, e.g.,* London, England), *and/or* dispensing with the requirement that _____ (*specify property, e.g.,* decedent's art collection) be present at the time and place of auction].
Dated: _____.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 455.111.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

The foregoing form of petition is for use to request court permission to dispense with statutory requirements for the sale of personal property by public auction [*see Prob. Code § 10254(b)*].

[3] Sale of Personal Property at Public Auction

Unless the court orders otherwise, a sale of personal property at public auction must be made within California [*Prob. Code § 10254(a)(1)*], and all tangible personal property to be auctioned must be present at the time of the auction [*Prob. Code § 10254(a)(2)*]. The personal representative or any interested person may petition for court permission to hold the auction at any place within or without the United States, or for an order that tangible personal property need not be present at the time of sale, or for relief from both requirements [*Prob. Code § 10254(b)*].

[4] State Statutes

Requirement that petition be verified. *Prob. Code § 1021(a)(1)*

Verified petition as admissible evidence in uncontested proceeding. *Prob. Code § 1022*

Relief from statutory requirements for public auction of personal property. *Prob. Code § 10254(b)*

[5] Cross References

For a related form, *see § 455.126*

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39-455 California Forms of Pleading and Practice--Annotated § 455.126

§ 455.126 Order Authorizing Deviation From Statutory Requirements for Conduct of Sale of Personal Property by Public Auction [Prob. Code § 10254(b)]

[1] FORM Order Authorizing Deviation From Statutory Requirements for Conduct of Sale of Personal Property by Public Auction [Prob. Code § 10254(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*]	)	ORDER REGARDING CONDUCT OF SALE OF
Deceased	)	PERSONAL PROPERTY BY PUBLIC AUCTION
	)	[*Prob. Code § 10254(b)*]

_____

The verified petition of _____ [*name*], as personal representative of the estate of _____ [*name*], deceased, praying for an order for variance from the statutory requirements for the conduct of sale of estate personal property by public auction came on regularly for hearing on _____ [*date*] in Department _____ of this court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. [Objection to the petition was filed by _____ (*name and description of objector, e.g.*, John Jones, a residuary beneficiary of the estate), who appeared by counsel _____ (*name*).]

The Court finds from proof made to the satisfaction of the Court that:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

[*EITHER*]

2. It is to the advantage of the estate that sale by public auction of _____ [*specify personal property, e.g.,* decedent's collection of modern art be conducted at _____ [*specify location, e.g.,* London, England] because _____ [*specify reason, e.g.,* of the availability in that jurisdiction of an auction house that specializes in international art auctions].

[*AND/OR*]

3. It is to the advantage of the estate that _____ [*specify personal property, e.g.,* decedent's art collection] not be present at the time of sale because _____ [*specify reason, e.g.,* the cost of insurance would be prohibitive].

WHEREFORE, IT IS ORDERED as follows:

[*EITHER*]

1. Sale of _____ [*specify property, e.g.,* decedent's art collection] by public auction may be held in _____ [*specify location, e.g.,* London, England].

[*AND/OR*]

2. _____ [*Specify property, e.g.,* The art collection] need not be present at the time of auction.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The foregoing form of order is for use to permit variations of the otherwise-applicable statutory requirements for the sale of personal property by public auction [*see Prob. Code § 10254(b)*].

[3] State Statutes

Finding of giving or waiver of notice as required to be stated in order. *Prob. Code § 1260(b)*

Relief from statutory requirements for sale of personal property by public auction. *Prob. Code § 10254(b)*

[4] Cross References

For a related form, *see § 455.125*

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39-455 California Forms of Pleading and Practice--Annotated § 455.127

§ 455.127 Petition by Personal Representative to Dispense With Requirements for Sale of Personal Property on Credit [Prob. Code § 10258]

[1] FORM Petition by Personal Representative to Dispense With Requirements for Sale of Personal Property on Credit [Prob. Code § 10258]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION TO DISPENSE
Estate of _____ [*name*],	)	WITH STATUTORY REQUIREMENTS FOR
Deceased	)	SALE OF PERSONAL PROPERTY ON CREDIT
	)	[*Prob. Code § 10258*]
	)	

_____

Petitioner alleges:

1. Petitioner, _____ [*name*], is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. Petitioner holds and wishes to sell the following personal property of the estate: _____ [*specify*], which has been appraised at a value of $_____.

3. Petitioner has offered this property for sale at _____ [public auction *or* private sale] on the condition that _____ [*specify terms, e.g.*, the sale price be for at least the appraised value of the property, with 25 percent to be paid in cash at the time of sale, and with the purchaser granting the estate a security interest in the property

sold until the full purchase price is received].

4. _____ [*Allege facts showing impracticability of selling property on terms prescribed by statute, e.g.,* Petitioner has received no offers to purchase this property on these terms]. Petitioner is informed and believes, and on that basis alleges that no sale of the property is possible on these terms.

5. Petitioner has received an offer to purchase this property on the following terms: _____ [*specify manner in which offer varies from statutory requirements for sale on credit, e.g.,* for a sale price of $_____ with 10 percent of the price to be paid in cash and the balance due under an unsecured demand note bearing interest at 15 percent per year].

6. Petitioner is informed and believes and on that basis alleges that this offer is on the most favorable terms that may reasonably be attained for the sale of this property, and that therefore, it is to the advantage of the estate that the property be sold on these terms.

WHEREFORE, petitioner prays for an order authorizing the sale of this personal property on credit, on the terms stated above, and for such other orders as the court deems proper.
Dated: _____.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 455.111.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This petition is for use to request court permission to dispense with the otherwise-applicable statutory requirements for the sale of personal property on credit [*see Prob. Code § 10257*].

[3] Sale of Personal Property on Credit

Unless otherwise ordered by the court, if any personal property of the estate is sold on credit, at least 25 percent of the sale price must be paid in cash at the time of sale. The estate's interest in the balance of the sale price must be secured by either a security interest in the property sold or by the retention of title in the property under a conditional sales contract [*Prob. Code § 10257(b)*].

The personal representative may petition for court authorization of sale on terms that do not comply with these statutory conditions. A showing must be made that the terms are to the advantage of the estate and that the property to be sold is of such a nature that it is impracticable to sell the property for a larger cash payment or to retain a security interest or other lien in the property [*Prob. Code § 10258(a)*].

Fifteen days' notice of the hearing must be given by both mail and posting [*Prob. Code § 10258(b)*; *see Prob. Code §§*

1220, *1230*]. Notice by mail must be given to (1) each person listed in *Prob. Code § 1220*; (2) each known heir whose interest in the estate would be affected by the sale; and (3) each known devisee whose interest in the estate would be affected by the sale [*Prob. Code § 10258(b)*]. If any person entitled to notice is represented by an attorney of record, the notice must also be given to that attorney [*Prob. Code § 1214*]. For discussion of service under *Prob. Code § 1220* and forms for notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

[4] State Statutes

Verified petition is admissible evidence in uncontested proceeding. *Prob. Code § 1022*

Requirement that petition be verified. *Prob. Code § 1021(a)(1)*

Requirements for sale of personal property on credit. *Prob. Code § 10257*

Court order relaxing requirements for sale of personal property on credit. *Prob. Code § 10258*

[5] Cross References

For a related form, *see § 455.128*

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39-455 California Forms of Pleading and Practice--Annotated § 455.128

§ 455.128 Order Dispensing With Statutory Requirements for Sale of Personal Property on Credit [Prob. Code § 10258]

[1] FORM Order Dispensing With Statutory Requirements for Sale of Personal Property on Credit [Prob. Code § 10258]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*]	)	ORDER DISPENSING WITH REQUIREMENTS
Deceased	)	FOR SALE OF PERSONAL PROPERTY ON
	)	CREDIT
		[*Prob. Code § 10258*]

_____

The verified petition of _____ [*name*], as personal representative of the estate of _____ [*name*], deceased, praying for an order relaxing the statutory requirements for the sale of estate personal property on credit came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. [Objection to the petition was filed by _____ (*name and description of objector, e.g.,* John Jones, a residuary beneficiary of the estate), who appeared by counsel _____ (*name*).]

The Court finds from proof made to the satisfaction of the Court that:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. _____ [*Specify facts constituting grounds for dispensing with statutory requirements, e.g.,* Petitioner has received no offers to purchase _____ (*specify property*) on terms that comply with the requirements of law for the sale of personal property of an estate on credit].

3. Petitioner has received an offer to purchase this property on the following terms: _____ [*specify, e.g.,* for a sale price of $_____, with 10 percent of the price to be paid in cash and the balance due under an unsecured demand note bearing interest at 15 percent per year.

4. These terms are to the advantage of the estate, and the property to be sold is of such a nature that it is impracticable to sell the property on terms that conform to the legal requirements.

WHEREFORE, IT IS ORDERED that petitioner may sell _____ [*specify property*] on the following terms and conditions: _____ [*specify*].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The foregoing form of court order is for use to relax the otherwise applicable statutory requirements for the sale of personal property on credit. The order must fix the terms and conditions of sale [*Prob. Code § 10258(a)*].

[3] State Statutes

Finding of giving or waiver of notice as required to be stated in order. *Prob. Code § 1260(b)*

Court order relaxing requirements for credit sale of personal property. *Prob. Code § 10258*

[4] Cross References

For a related form, *see § 455.127*

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39-455 California Forms of Pleading and Practice--Annotated § 455.129

§ 455.129 Report of Sale of Personal Property and Petition for Confirmation [Prob. Code §§ 10259(c), 10260]

[1] FORM Report of Sale of Personal Property and Petition for Confirmation [Prob. Code §§ 10259(c), 10260]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*]	)	REPORT OF SALE OF PERSONAL PROPERTY
Deceased	)	AND PETITION FOR CONFIRMATION
	)	[*Prob. Code §§ 10259(c), 10260*]

_____

Petitioner alleges:

1. Petitioner, _____ [*name*], is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. On _____ [*date of sale*] Petitioner sold at _____ [private sale *or* public auction], subject to confirmation by the court, personal property of this estate as shown on Exhibit A, attached hereto and made a part hereof, to the persons and for the prices as shown on Exhibit A.

[*EITHER*]

3. Under the will of _____ [*name of deceased*], Petitioner is _____ [directed *or* authorized] to sell all of the property shown in Exhibit A.

[*OR*]

3. This sale is necessary in order to pay all debts, devises, expenses of administration, taxes, and the family allowance because this estate currently has insufficient liquid assets to meet these obligations.

[*OR*]

3. The sale is to the advantage of this estate and for the benefit of all persons interested in this estate in that _____ [*specify sufficient facts to show advantage, e.g.,* the total purchase price exceeds the total appraised value of the property].

[*EITHER*]

4. Prior notice of sale was not required because _____ [*specify grounds excusing notice, e.g.,* sale of all property shown in Exhibit A was _____ (directed *or* authorized) by decedent's will].

[*OR*]

4. Prior notice of sale was duly given as required by law as shown by _____ [*specify paper used for proof of service, e.g.,* the declaration of publication of notice of the _____ (*name of newspaper*)], which has been filed with the court.

[*EITHER*]

5. The terms of sale require that the full amount of the purchase price of all property sold be paid to this estate in cash.

[*OR*]

5. The terms of sale require payment of _____ [*specify percent of purchase price to be paid in cash, which must be no less than 25 percent unless special court authorization has been obtained*] percent of the purchase price in cash with the purchaser executing a note for the balance. A copy of the note is attached as Exhibit B and made a part hereof. This estate is to be secured for the balance of the purchase price by _____ [receiving a security interest in the property sold *or* retention of title in the property sold under a conditional sales contract until the balance is paid]. A copy of _____ [*specify writing creating security interest, e.g.,* a financing statement that may be filed under the provisions of the California Commercial Code to create a valid security interest in the property sold] is attached as Exhibit C and made a part hereof.

[*CONTINUE*]

[6. Petitioner also sold at _____ (private sale *or* public auction) personal property as shown on Exhibit D, which is attached to and made a part of this Petition, for less than the appraised value of the property. _____ (*State facts that indicate why higher price could not be obtained, e.g.,* The price obtained represents the highest and best bid made at a public auction attended by approximately _____

persons). Petitioner believes that the sale price, rather than the appraised value, represents the true value of the property.]

7. All notices of this hearing have been given and posted as required by law.

WHEREFORE, petitioner prays for an order as follows:

1. Confirming sale to the purchasers, for the amounts, and on the terms as set forth above;

[2. Approving the terms of the purchaser's note for the balance of the purchase price and this estate's security interest for payment of the balance;]

[3. Directing that the personal representative is not responsible for any difference between the purchase price and the appraised value of property sold for less than appraised value;]

4. For such other and further orders as the court may deem proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 455.111.*]

EXHIBIT A

REPORT OF PERSONAL PROPERTY SOLD

Description of Property	Purchaser	Appraised Value	Sale Price
_____	_____	$_____	$_____
_____	_____	$_____	$_____
_____	_____	$_____	$_____
_____	_____	$_____	$_____

EXHIBIT B

[*ATTACH copy of purchaser's promissory note, if any.*]

EXHIBIT C

[*ATTACH copy of document that gives state adequate security, if any.*]

EXHIBIT D

PERSONAL PROPERTY SOLD FOR LESS THAN APPRAISED VALUE

Description of Property	Purchaser	Appraised Value	Sale Price	Difference
_____	_____	$_____	$_____	$_____
	_____	_____	_____	_____
_____	_____	$_____	$_____	$_____
	_____	_____	_____	_____
_____	_____	$_____	$_____	$_____
	_____	_____	_____	_____
_____	_____	$_____	$_____	$_____
	_____	_____	_____	_____

CAUTION:
Petitions and reports in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

The foregoing form is for use to report a sale of personal property to the court and to petition for confirmation of the sale [*see Prob. Code § 10260(a)*]. The form includes an optional allegation and attachment for use to obtain court approval of a sale of personal property for which court confirmation is not otherwise required, but is desired to insulate the personal representative from liability because the sale price was less than appraised value (Paragraph 6; Exhibit D) [*see Prob. Code § 10259(c)*]. For discussion of when court confirmation of a sale of personal property is required, see *§§ 455.20[7], [8]*. For forms to report a sale of real property and to petition for court confirmation, see *§ 455.131* (Judicial Council form). For a discussion of notice requirements and forms for use to give notice of the hearing on the petition [*see Prob. Code § 10260(c)*], see Ch. 447, *Probate: Statutory Notice Requirements* . For a discussion of when prior notice of sale must be given [*see Prob. Code § 10252*], see *§ 455.90*.

[3] Contents

There are no specific statutory requirements for the contents of a petition for confirmation of sale of personal property. However, the petition should allege sufficient facts to establish grounds for the sale. If the sale is directed or authorized in the decedent's will, that fact alone is sufficient to confirm the sale. Otherwise, the petitioner must make a showing that the sale is necessary or to the advantage of the estate and for the benefit of interested persons (Alternative Paragraphs 2) [*Prob. Code § 10261(a)*].

The form also includes an optional paragraph to request approval of any extensions of credit involved in the sale

(Paragraph 5) [*see Prob. Code § 10257(c)*].

The form uses exhibit pages to list, describe, and value the property sold. If the sale involves only a few items of property, the description may be included in the body of the petition rather than in an exhibit.

[4] State Statutes

Requirement that petition or report be verified. *Prob. Code § 1021(a)(1)*

Verified petition as admissible evidence in uncontested proceeding. *Prob. Code § 1022*

Sale of personal property for credit. *Prob. Code § 10257*

Personal representative as responsible for actual value of property for which court confirmation is not otherwise required unless sale is reported to and approved by court. *Prob. Code § 10259(c)*

Requirement of report and petition for confirmation of sale. *Prob. Code § 10260*

Showing that must be made to obtain court confirmation of sale of personal property. *Prob. Code § 10261(a)*

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39-455 California Forms of Pleading and Practice--Annotated § 455.130

§ 455.130 Order Confirming Sale of Personal Property [Prob. Code § 10261]

[1] FORM Order Confirming Sale of Personal Property [Prob. Code § 10261]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*]	)	ORDER CONFIRMING SALE OF PERSONAL
Deceased	)	PROPERTY
	)	[*Prob. Code § 10261*]

_____

The verified report of sale and petition of _____ [*name*], as personal representative of the estate of _____ [*name*], deceased, praying for an order confirming sale of personal property, came on regularly for hearing on _____ [*date*] in Department _____ of this court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. [Objection to the confirmation of sale was filed by _____ (*name and description of objector, e.g.*, John Jones, a residuary beneficiary of the estate), who appeared by counsel _____ (*name*).)

The court finds from proof made to the satisfaction of the court:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. On _____ [*date*], the personal representative sold at _____ [private sale *or* public auction], the following personal property of the estate: _____ [*list and describe with sufficient particularity to distinguish each item from all similar items held by the personal representative, and give sale price of*

each item] to _____ [*name of purchaser*], for the sums indicated.

[*EITHER*]

3. Prior notice of sale was duly given as required by law.

[*OR*]

3. Prior notice of sale was not required because _____ [*specify ground, e.g.,* the sale was authorized by decedent's will].

[*CONTINUE*]

4. The sale was legally made and fairly conducted.

[*EITHER*]

5. The sale was made for all cash and involved no extension of credit by the personal representative on behalf of the estate.

[*OR*]

5. _____ [*Number not less than 25*] percent of the purchase price was paid to the personal representative in cash, and the purchaser executed his/her note, payable to the personal representative as representative of the estate, for the balance. The interest of the estate in the unpaid balance is secured by _____ [a security interest in the property sold *or* the retention of title of the property sold under a conditional sales contract].

[*EITHER*]

6. Sale of this property is _____ [directed *or* authorized] in the will of decedent.

[*OR*]

6. Sale of this property is necessary in order to obtain sufficient funds to pay debts, devises, expenses of administration, taxes, and the family allowance.

[*OR*]

6. Sale of this property is to the advantage of the estate and for the benefit of its interested persons because _____ [*specify reasons, e.g.,* the total purchase price of all property sold exceeds the total appraised value].

[*CONTINUE*]

[7. With regard to all property sold for less than its appraised value as shown on the Inventory and Appraisal on file in this matter, the purchase price is the highest and best price obtainable for the property.]

[*EITHER*]

8. At the hearing on the petition for confirmation of sale, no person made an overbid in conformance with law.

[*OR*]

8. At the hearing on the petition for confirmation of sale, _____ [*name*], a responsible person, made a written offer to purchase _____ [*specify property to be sold to overbidder*] for the sum of $_____, an amount that exceeds the offer reported to the court in the petition for this property by at least 10 percent. This offer complies with all other applicable provisions of law.

WHEREFORE, IT IS ORDERED as follows:

1. The sale of the personal property as set forth in Exhibit A is confirmed to _____ [*name of purchaser, either maker of original offer or overbidder*], for the sum of $_____.

[2. The terms of the purchaser's note for the unpaid balance of the purchase price attached as Exhibit B, and of the estate's security interest for this balance as represented by _____ (a financing statement thatmay be filed to create a valid security interest in the property sold *or* a conditional sales contract under which title to the property sold is to be retained by the estate until payment in full is received), attached as Exhibit C, are approved.]

[3. In the case of the property sold for a purchase price less that its appraised value as shown on the attached Exhibit D, the personal representative is responsible only for the price to be paid under the sale as confirmed and not for the actual appraised value of any property.]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This foregoing form of order is for use to confirm a sale of personal property [*see Prob. Code § 10261*].

[3] Contents

The order confirming sale must show that proper notice of sale was given, if required (Alternative Paragraphs 3) [*Prob. Code § 10263*]. If a sale is made on credit, the terms of the note and document that establishes the estate's valid security interest must be approved at the time of confirmation (Second Alternative Paragraph 5) [*Prob. Code § 10257(c)*]. There are no further statutory requirements for the contents of the order. However, the order should refer to the specific grounds that support the sale, particularly if the sale was contested and there is any possibility of appeal (Paragraph 6).

[4] Manner of Listing Property

The specific property whose sale is confirmed by the order must be made clear. Local court rules may both prohibit exhibits or attachments to an order and require the order to be complete in and of itself [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rules 10.41, 10.42]. In such a case, all of the property whose sale is confirmed must be listed in the body of the order. If the sale is confirmed to an overbidder on credit [*see Prob. Code § 10262*], copies of the purchaser's note and document that creates the estate's security interest should be filed with the court before the order is signed.

[5] State Statutes

Finding of giving or waiver of notice is required in order. *Prob. Code § 1260(b)*

Requirement that terms of any note and security interest be approved at time of confirmation of sale. *Prob. Code § 10257(c)*

Requirement that order confirming sale refer to proof that notice of sale was given. *Prob. Code § 10263*

[6] California Rules of Court

Allowing bona fide buyers and their brokers reasonable opportunity to inspect property to be sold. *Cal. Rules of Ct., Rule 7.451*

Presence of petitioner's attorney or petitioner at hearing to confirm sale of property. *Cal. Rules of Ct., Rule 7.452*

[7] Cross References

For a related form, *see § 455.129*

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39-455 California Forms of Pleading and Practice--Annotated § 455.131

§ 455.131 Report of Sale and Petition for Confirmation of Sale of Real Property [Prob. Code § 10308]--Judicial Council Form DE-260

[1] FORM Report of Sale and Petition for Confirmation of Sale of Real Property [Prob. Code § 10308]--Judicial Council Form DE-260

Click here to view image.

[2] Use of Form

This form is an illustration of the Judicial Council form for use to petition for confirmation of a sale of real property. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Form* s, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*].

[3] Contents

[a] Matters Allowing Court to Evaluate Sale

Prob. Code § 10308 does not require any particular contents for a petition reporting a sale of estate real property and requesting confirmation of sale. However, the petition should set forth all matters necessary for the court to properly evaluate the sale according to the applicable statutory requirements.

[b] Grounds for Sale

If the sale is directed or authorized in the decedent's will, no further showing is required in order to obtain court confirmation of the sale (*see* Paragraph 7). Otherwise, the petitioner must make a showing that the sale is necessary or to the advantage of the estate and for the benefit of interested persons [*Prob. Code § 10310(a)*]. The court must also

investigate the efforts of the personal representative to obtain the highest and best price for the property that is reasonably attainable (Paragraph 12) [*Prob. Code § 10310(b)*].

[c] Terms of Sale

It is not necessary to state all the terms and conditions of sale in the body of the petition. However, a copy of the real property sales agreement entered into by the purchaser and the personal representative should be attached (Paragraph 4f; Attachment 4f). If the sale involves any extension of credit by the estate to the purchaser, the estate must be adequately secured by the purchaser's note and deed of trust or mortgage [*Prob. Code § 10315*]. Copies of these documents should also be attached (Paragraph 4e; Attachment 4e), although there is no express statutory requirement that their contents be approved by the court [*compare Prob. Code § 10257(c)* (terms of note and estate's security interest in personal property must be specifically approved)]. The deed of trust or mortgage may be subject only to encumbrances existing at the date of sale and to such other encumbrances as the court may approve [*Prob. Code § 10315(a)*].

[d] Broker's Commission

Paragraph 5 of this form contains information on commissions. At the confirmation hearing, the court may fix the commissions of one or more brokers who are entitled to compensation in connection with the sale. Commissions may also be allowed at another time [*Prob. Code § 10313(b)*]. Court approval of the amount of a broker's commission is required regardless of the terms of any offer to purchase or contract between a broker and a personal representative [*Prob. Code §§ 10150(b), 10166*]. The allowable percentage of a broker's commission is generally controlled by local court rule or practice. For further discussion of the allowance of brokers' commissions, see *§ 455.31*.

[e] Requirement of Additional Bond

The form contains alternative provisions concerning the possibility of an additional bond requirement as a result of the sale of estate real property (Paragraph 6). Before a sale of any real property of an estate is confirmed, the court must determine if additional bond is required [*Prob. Code § 8482(d)*].

If bond was originally required, the amount fixed may not have taken into account the value of any real property of the estate [*see Prob. Code § 8482(a), (b)* (amount of bond must be fixed at not less than value of personal property and value of probable annual gross income of all property, plus, if independent administration is granted as to real property, the estimated net proceeds of real property authorized to be sold under *Prob. Code § 10400 et seq.*, relating to independent administration of estates)]. The conversion of the value of real property into personal property may cause the prior amount of the bond to be insufficient [*see Prob. Code § 8482(a), (b)*].

However, if the personal representative has been granted an independent power to sell or hypothecate real estate or to lease it for a term of more than one year, the personal representative will have been required to state in the request to fix the amount of the bond the value of the real property less encumbrances [*Cal. Rules of Ct., Rule 7.205*].

The conversion of the value of real property into personal property may cause the prior amount of the bond to be insufficient [see *Prob. Code § 8482(a), (b)*]. Before a sale of any real property of an estate is confirmed, the court must determine if additional bond is required [*Prob. Code § 8482(d)*]. If required, the court will not file the order until the additional bond is filed [*Cal. Rules of Ct., Rule 7.206*].

[4] State Statutes

Verified petition admissible as evidence in uncontested proceeding. *Prob. Code § 1022*

Requirement that petition be verified. *Prob. Code § 1021(a)(1)*

Sale of real and personal property as unit. *Prob. Code § 10004*

Report of sale of real property, and petition for confirmation. *Prob. Code § 10308*

Minimum price for private sale of real property. *Prob. Code § 10309*

Standards for confirmation of sale of estate real property. *Prob. Code § 10310*

Broker's commission as allowable at confirmation hearing. *Prob. Code § 10313(b)*

Requirement of express court approval of subordination of estate's deed of trust to encumbrances not of record as of date of sale. *Prob. Code § 10315*

[5] California Rules of Court

Fixing amount of bond when personal representative has independent power to sell real property. *Cal. Rules of Ct., Rule 7.205*

Additional bond required for order confirming sale of real estate. *Cal. Rules of Ct., Rule 7.206*

Allowing bona fide buyers and their brokers reasonable opportunity to inspect property to be sold. *Cal. Rules of Ct., Rule 7.451*

Presence of petitioner's attorney or petitioner at hearing to confirm sale of property. *Cal. Rules of Ct., Rule 7.452*

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39-455 California Forms of Pleading and Practice--Annotated § 455.132

§ 455.132 Order Confirming Sale of Real Property [Prob. Code § 10313]--Judicial Council Form DE-265

[1] FORM Order Confirming Sale of Real Property [Prob. Code § 10313]--Judicial Council Form

Click here to view image.

[2] Use of Form

This form is an illustration of the Judicial Council form for an order confirming sale of real property. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 2.101*].

[3] Contents

An order confirming sale, whether to the person who made the original offer or to an overbidder, should state the following [*Prob. Code § 10313(a)*]:

- Either that the sale is authorized or directed in decedent's will or that good cause exists for the sale.
- That any required notice of sale was given as required by law.
- That the sale was legally made and fairly conducted.
- That the amount for which the sale is to be confirmed is not disproportionate to the value of the property.
- In the case of a private sale, that the sale price is at least 90 percent of appraised value based on an

appraisal date and valuation date within a year of the hearing [*see Prob. Code § 10309*].

- If the sale is to be confirmed on the original offer, that no higher overbid that complies with all legal requirements can be obtained.

A broker's commission also may be allowed in the order or at any subsequent time [*Prob. Code § 10313(b)*].

If the estate is to take the purchaser's note secured by a deed of trust for any part of the purchase price, any subordination of the deed of trust to encumbrances not existing as of the date of sale must be approved by the court [*see Prob. Code § 10315(a)*]. The form also states that the personal representative has made adequate efforts to obtain the highest and best price for the property that is reasonably attainable [*see Prob. Code § 10310(b)*], and should set forth any additional bond requirement [*see* Prob. Code § 542].

[4] State Statutes

Finding of giving or waiver of notice is required in court order. *Prob. Code § 1260(b)*.

Sale of real and personal property as unit. *Prob. Code § 10004*

Order confirming sale of estate real property. *Prob. Code § 10313*

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39-455 California Forms of Pleading and Practice--Annotated § 455.133

§ 455.133 Petition to Vacate Order Confirming Sale and to Order Resale and to Award Damages [Prob. Code § 10350]

[1] FORM Petition to Vacate Order Confirming Sale and to Order Resale and to Award Damages [Prob. Code § 10350]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	PETITION TO VACATE ORDER CONFIRMING
Deceased	)	SALE AND TO ORDER RESALE AND TO AWARD DAMAGES

_____

Petitioner alleges:

1. Petitioner, _____ [*name*], is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. By order of this court dated _____, a copy of which is attached as Exhibit "A" and made a part hereof, the sale of real property of the estate to _____ [*name of purchaser*] was confirmed. The property sold is commonly known as _____ [*street address or other description*], and is more particularly described as _____ [*set forth legal description*].

3. The terms of the sale required, among other things, that _____ [*specify term or condition, the breach of which constitutes grounds to set aside sale, e.g.,* the purchaser deposit the entire purchase price into an escrow account on or before _____ (*date*)].

4. Since that time, purchaser has refused and neglected, and continues to refuse and neglect, to comply with the terms of sale in that _____ [*specify, e.g.,* purchaser has not deposited the full amount of the purchase price into escrow].

[5. As part of the court's order, the sum of $_____ was awarded to _____ [*name*], a real estate broker as a commission for services rendered in procuring the purchaser who has now defaulted. No portion of that commission has as yet been paid.]

[6. The defaulting purchaser consents to the petition. A copy of the written consent is attached hereto as Exhibit "C" and made a part hereof.]

[7. Because of the failure of _____ (*name of defaulting purchaser*) to comply with the terms of the sale, the estate has sustained the following damages: _____ (*describe*).]

WHEREFORE, petitioner prays for an order of this court as follows:

1. That the order of _____ [*date*], confirming the sale of estate property to _____ [*name of defaulting purchaser*] [and approving a broker's commission to _____ (*name*)] be vacated;

2. That a resale of the property be ordered;

[3. That damages be awarded to the estate against _____ (*name of defaulting purchaser*);]

4. For such other orders as the court deems proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 455.111.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

The foregoing form of petition is for use to request an order vacating a prior court order that confirmed the sale of real property to a purchaser who then defaulted on the contract of purchase. The form also requests that a resale be ordered [*see Prob. Code § 10350*]. If the estate incurred damages because of the purchaser's default, the petition may also seek to recover damages against the purchaser [*see Prob. Code § 10350(a)*]. In alleging damages, however, the petitioner should be aware of limits placed on the defaulting purchaser's liability [*see Prob. Code § 10350(e)*]. For a form for a petition for an order vacating a confirmation order and confirming sale to a new high bidder, *see § 455.152*.

[3] Vacation of Sale and Resale

The court may vacate the order of confirmation of sale of real or personal property, order a resale of the property, and award damages to the estate against the purchaser if the original purchaser has failed to complete the purchase [*Prob. Code § 10350(a)*]. Notice of the hearing on the petition must be given as provided in *Prob. Code § 1220* to the persons designated by that section. In addition, the notice and a copy of the petition must be given to the buyers and brokers named in the order confirming sale, although notice need not be given to a defaulting purchaser whose written consent to the petition is filed with the court before the hearing [*Prob. Code § 10350(b)*; for a form of order prescribing notice, *see* Ch. 447, *Probate: Statutory Notice Requirements*]. On resale, all notice and procedural requirements apply as with a sale in the first instance [*Prob. Code § 10350(c), (d)*].

[4] State Statutes

Requirement that petition be verified. *Prob. Code § 1021(a)(1)*

Verified petition as admissible evidence in uncontested proceeding. *Prob. Code § 1022*

Vacating prior sale and ordering resale. *Prob. Code § 10351*

[5] Cross References

For a related form, *see § 455.134*

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39-455 California Forms of Pleading and Practice--Annotated § 455.134

§ 455.134 Order Vacating Sale of Estate Real Property and Ordering Resale and Awarding Damages [Prob. Code § 10350]

[1] FORM Order Vacating Sale of Estate Real Property and Ordering Resale and Awarding Damages [Prob. Code § 10350]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____[*name*],	)	ORDER VACATING SALE OF REAL PROPERTY
Deceased	)	AND ORDERING RESALE AND AWARDING DAMAGES

_____

Petitioner alleges:

The verified report of sale and petition of _____[*name*], as personal representative of the estate of _____[*name*], deceased, praying for an order vacating this court's prior order of _____[*date*] confirming sale of estate real property to _____[*name of original purchaser*] and ordering resale of the property came on regularly for hearing on _____[*date*] in Department _____ of this court, the Honorable _____[*name of judge*], presiding. Petitioner appeared by counsel _____[*name*]. [Objections were filed by _____ (*name and description of objector, e.g.,* John Jones, a residuary beneficiary of the estate), who appeared by counsel _____(*name*).]

The court finds from proof made to the satisfaction of the court:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____(given to _____(*names*), as requested *or* requested and waived by _____(*names*)).] [The written consent of _____(*name of original purchaser*) to the petition has been filed and, therefore, notice to him/her was not required.]

2. On _____[*date*], _____[by private sale *or* at public auction], the personal representative sold to _____[*name of original purchaser*], for the sum of $_____, real property of the estate commonly known as _____[*street address*] and more particularly described as _____[*legal description*].

3. On _____[*date*], the sale was confirmed by this court.

[4. The order confirming sale provided for a real estate broker's commission to be paid to _____(*name*) in the amount of $_____.]

5. As a condition of the sale, _____[*name or original purchaser*] was required _____[*set forth provision in contract of sale that has not been fullfilled by purchaser, e.g.,* to deposit the entire purchase price in an escrow account within 15 days of the date of confirmation].

6. _____[*Name of original purchaser*] has not complied with this condition, and thus, has failed to complete the purchase.

[7. As a result of the failure of _____(*name of defaulting purchaser*) to comply with terms of the sale, the estate incurred damages in the amount of $_____.]

WHEREFORE, IT IS ORDERED as follows:

1. The court's order of _____[*date*], confirming sale of the real property described above to _____[*name of original purchaser*] is vacated.

[2. The real estate broker's commission in the amount of $_____ that was allowed in the order now vacated is also expressly vacated and may no longer be paid by the personal representative.]

3. The personal representative shall proceed with a resale of the property in the manner required by law.

[4. Damages are awarded to the Estate of _____(*name of decedent*) against _____(*name of defaulting purchaser*) in the amount of $_____.]
Dated: _____.

_____[*signature*]

Judge of the Superior Court

[2] Use of Form

The foregoing form is for use as a court order vacating the original order confirming sale of estate real property and ordering a resale of the property [*see Prob. Code § 10350*]. If damages were sought in the petition, the order should also include language awarding damages (optional Paragraph 7) [*see Prob. Code § 10350(a)*].

[3] Cross References

For a related form, *see § 455.133*

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§ 455.135 Petition to Vacate Order Confirming Sale and to Confirm Sale to New High Bidder [Prob. Code § 10351]

[1] FORM Petition to Vacate Order Confirming Sale and to Confirm Sale to New High Bidder [Prob. Code § 10351]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION TO VACATE ORDER CONFIRMING
Estate of _____[*name*],	)	SALE AND TO CONFIRM
Deceased	)	SALE TO NEW HIGH
	)	BIDDER
	)	

_____

Petitioner alleges:

1. Petitioner, _____[*name*], is the duly appointed, qualified, and acting personal representative of the estate of _____[*name*], deceased.

2. [*Prior order, with description of property. See § 455.133, Paragraph 2.*]

3. [*Sale term or condition that has been breached. See § 455.133, Paragraph 3.*]

4. [*Breach. See § 455.133, Paragraph 4.*]

5. A new offer has now been made by _____[*name*] to purchase this property. The terms and conditions of this offer are set forth in the real property sales agreement, which is attached hereto as Exhibit B and made a part hereof. This offer is for _____[the same *or* a higher] amount as the bid previously confirmed by the court, and on _____[the same *or* better] terms.

[6. *Prior award of broker's commission. See § 455.133, Paragraph 5.*]

[7. The offer of _____(*name of new high bidder*) was produced by _____(*name*), a licensed real estate broker.]

[8. *Defaulting purchaser's consent. See § 455.133, Paragraph 6.*]

WHEREFORE, petitioner prays for an order of this court as follows:

1. That the order of _____[*date*], confirming the sale of estate property to _____[*name of defaulting purchaser*] [and approving a broker's commission to _____(*name*)] be vacated;

2. That sale of this same property be confirmed to _____[*name*] on the terms and conditions and for the price as set forth in Exhibit B;

[3. That a real estate broker's commission in the amount of $_____, which is _____ percent of the sale price, be allowed to _____ (*name*)];

4. And for such other orders as the court deems proper.

_____[*signature*]

Petitioner

_____[*signature*]

Attorney for Petitioner

[*Verification. See § 455.111.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form of petition is for use to request an order vacating a prior court order that confirmed the sale of real property to a purchaser who then defaulted on the contract of purchase. The form also requests confirmation of sale to a new high bidder [*see Prob. Code § 10351*]. For a form for a petition for an order vacating a confirmation order and ordering resale, see *§ 455.123*.

[3] Vacation of Sale and Confirmation to New High Bidder

The court may vacate the order of confirmation of sale of real or personal property and simultaneously confirm the sale to a new high bidder if the original purchaser has failed to complete the purchase, and a new bid has been made for the

property for the same or a higher purchase price, on the same or better terms, and in the manner prescribed in any original notice of sale. The petition must be filed within 60 days after the original confirmation of sale [*Prob. Code § 10351(a)(1)*]. This procedure is not available if the sale was previously vacated and a resale ordered [*Prob. Code § 10351(a)(2)*; *see Prob. Code § 10350*].

Notice of the hearing on the petition must be given as provided in *Prob. Code § 1220* to the persons designated by that section. In addition, the notice and a copy of the petition must be given to the buyers and brokers named in the order confirming sale, although notice need not be given to a defaulting purchaser whose written consent to the vacation of the order confirming sale is filed with the court before the hearing [*Prob. Code § 10351(b)*; for general discussion of notice requirements in probate proceedings, and forms for notice, *see* Ch. 447, *Probate: Statutory Notice Requirements*].

If any person entitled to notice is represented by an attorney of record, the notice must also be given to that attorney [*Prob. Code § 1214*].

[4] Broker's Commission

There is no express authority for the award of a broker's commission to a broker who produces a new high bidder after the original purchaser has defaulted. In fact, a strict construction of the statutory language would seem to preclude a commission to such a broker. The only brokers who are entitled to a commission are those who: (1) have a contract that grants an exclusive right to sell the property; (2) produce the original bid that is returned to the court for confirmation; or (3) procure an increased bid made at the time of the hearing on the petition for confirmation [*Prob. Code § 10161(b)*]. Nevertheless, there seems to be no policy reason to disallow a commission to a broker who finds another buyer after the original buyer has defaulted. The broker who produced the original buyer will lose his or her commission because the sale was not consummated [*Prob. Code § 10160(c)*]. Therefore, there is no added expense to the estate in allowing a commission to the new high bidder's broker, and in fact, the estate would receive a windfall by the disallowance of the commission. Such a limitation is not conducive to the maximum marketability of estate real property. There is the possibility that the lack of the right of the broker who procures a new high bidder to receive a commission is merely a legislative oversight. For this reason, this form includes an optional provision to request a broker's commission.

[5] State Statutes

Verified petition is admissible evidence in uncontested proceeding. *Prob. Code § 1022*

Requirement that petition be verified. *Prob. Code § 1021(a)(1)*

Requirement that sale be consummated in order for broker to be entitled to commission. *Prob. Code § 10160(c)*

Enumeration of brokers entitled to receive commission on estate sale. *Prob. Code § 10161(b)*

Vacating prior sale and confirming sale to new high bidder *Prob. Code § 10351*

[6] Cross References

For a related form, *see § 455.136*

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§ 455.136 Order Vacating Sale of Estate Real Property and Confirming Sale to New High Bidder [Prob. Code § 10351]

[1] FORM Order Vacating Sale of Estate Real Property and Confirming Sale to New High Bidder [Prob. Code § 10351]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER VACATING SALE
	)	OF REAL PROPERTY
Estate of _____[*name*],	)	AND CONFIRMING SALE
Deceased	)	TO NEW HIGH BIDDER
	)	[*Prob. Code § 10351*]
	)	

_____

The verified report of sale and petition of _____ [*name*], as personal representative of the estate of _____ [*name*], deceased, praying for an order vacating this court's prior order of _____ [*date*] confirming sale of estate real property to _____ [*name of original purchaser*], and further praying for confirmation of sale to _____ [*name of new high bidder*], came on regularly for hearing on _____ [*date*] in Department _____ of this court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. [Objections were filed by _____(*name and description of objector, e.g.,* John Jones, a residuary beneficiary of the estate), who appeared by counsel _____ (*name*).]

The court finds from proof made to the satisfaction of the court:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____(*names*), as requested *or* requested and waived by _____(*names*)).] [The written consent of _____ (*name of original purchaser*) to the vacation of sale has been filed and, therefore, no notice to him/her need have been given.]

2. On _____ [*date*], _____[by private sale *or* at public auction], the personal representative sold to _____[*name of original purchaser*], for the sum of $_____ real property of the estate commonly known as _____ [*street address*] and more particularly described as _____ [*legal description*].

3. On _____ [*date*], this sale was confirmed by this court.

[4. The order confirming sale provided for a real estate broker's commission to be paid to _____ (*name*) in the amount of $_____.]

5. As a condition of this sale, _____[*name or original purchaser*] was required _____ [*set forth provision in contract of sale that has not been fulfilled by purchaser, e.g.,* to deposit the entire purchase price in an escrow account within 15 days of the date of confirmation].

6. _____ [*Name of original purchaser*] has not complied with this condition and thus, has failed to complete the purchase.

7. On _____ [*date*], _____ [*name of new high bidder*] made an offer to purchase this same property for a purchase price of $_____. The terms and conditions of sale are set forth in a real property sales agreement.

8. The amount of this offer is _____ [the same *or* higher] than the original sales price, and the terms of sale are _____ [the same *or* better] than those of the original sale confirmed by this court. [The new high offer complies with the manner of sale as set forth in the notice of sale.]

[*EITHER*]

9. The new high bid is for all cash and involves no extension of credit by the personal representative on behalf of the estate.

[*OR*]

9. The new high bid requires the purchaser to pay _____ percent of the purchase price to the personal representative in cash, and to execute his/her note, payable to the personal representative as representative of the estate, for the balance. The interest of the estate in the unpaid balance is secured by a deed of trust subject to encumbrances existing as of the date of sale [and to the following other encumbrances: _____ (*specify*)].

[*CONTINUE*]

[10. The new high bid was produced by _____ (*name*), a licensed real estate broker. The original offer to purchase this property that was reported to the court was _____ (not produced by *or* produced by

_____ (*name*),) a licensed real estate broker. (Petitioner has entered into a written contract, approved by the court, granting _____ (*name*), a licensed real estate broker, the exclusive right to obtain a purchaser for the property.)]

11. As a result of this sale, _____[no additional bond *or* additional bond in the amount of $_____] is required.

WHEREFORE, IT IS ORDERED as follows:

1. The court's order of _____ [*date*] confirming sale of the real property described above to _____ [*name of original purchaser*] is vacated.

2. Sale of this property is confirmed to _____ [*name of new high bidder*] for the sum of $_____, under the terms and conditions as set forth in the real property sales agreement.

3. On receipt of all consideration for the sale, Petitioner shall execute and deliver a conveyance to _____ [*name(s) and manner of taking title, e.g.,* Charles Smith, an unmarried man].

[*EITHER*]

4. No additional bond is required.

[*OR*]

4. Petitioner shall give additional bond in the amount of $_____ in the manner provided by law.

[*CONTINUE*]

[5. The real estate broker's commission in the amount of $_____ that was allowed in the order now vacated is also expressly vacated and may no longer be paid by the personal representative.]

[*EITHER*]

6. No broker's commission is payable as a result of the confirmation of sale to _____ [*name of new high bidder*].

[*OR*]

6. A broker's commission in the amount of $_____, which is _____ percent of the purchase price, is approved and shall be paid as follows: _____ [*set forth disposition of commission, either to single broker who produced new high bidder or divided between or among more than one broker, e.g.,* 50 percent to _____(*name*), the broker who produced the new high offer to purchase on which sale is confirmed, and 50 percent to _____ (*name*), the broker who holds an exclusive right to sell the property].

[*CONTINUE*]

[7. The purchaser shall execute a note in favor of the estate for the unpaid balance of the purchase price in a principal amount of $_____. The purchaser shall also execute a deed of trust that secures the estate's interest in the property under the note. (The deed of trust may be subordinated to the following encumbrances, in addition to those existing as of the date of sale: _____ [*specify*]).]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The foregoing form of order is for use to vacate the original order that confirmed the sale of estate real property and to confirm sale of the same property to a new high bidder. For a form for an order that vacates a sale and orders a resale, *see § 455.127*.

[3] State Statutes

Finding of giving or waiver of notice as required in order. *Prob. Code § 1260(b)*

[4] Cross References

For a related form, *see § 455.125*

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[Reserved]

§§ 455.137[Reserved]

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39-455 California Forms of Pleading and Practice--Annotated § 455.150

§ 455.150 Objections to Confirmation of Sale of Estate Property [Prob. Code §§ 10261(b), 10310(c)]--Objection to Any Sale

[1] FORM Objections to Confirmation of Sale of Estate Property [Prob. Code §§ 10261(b), 10310(c)]--Objection to Any Sale

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*]	)	OBJECTIONS TO CONFIRMATION OF SALE OF
Deceased	)	ESTATE PROPERTY
	)	[Prob. Code § _____ (10261(b) *or* 10310(c)]

_____

_____ [*Name of objector*] objects as follows:

1. Objector is _____ [*specify status establishing objector as person interested in estate, e.g.,* a residuary beneficiary of this estate].

2. The sale of _____ [real *or* personal] property of this estate to _____ [*name of purchaser*], as set forth in the report of sale and petition for confirmation, is neither authorized nor directed in decedent's will.

3. Sale of the particular property reported to the court for confirmation is not necessary in that the estate has sufficient assets to pay all debts, devises, expenses of administration, taxes, and the family allowance.

4. The sale reported to the court for confirmation is neither to the advantage of the estate nor in the best interest of interested persons, including Objector, at this time because: _____ [*specify reasons, e.g.,* the area in which the real property is located is currently zoned for agricultural use only. Objector is informed and believes and on that basis alleges that the area is about to be annexed into _____ (*name of governmental entity*), and that the area will then be zoned to allow for residential or commercial use].

WHEREFORE, Objector prays for an order of the court as follows:

1. Vacating the sale reported to the court;

2. Prohibiting the personal representative from selling the property until further order of this court;

And for such other orders as the court deems proper.

_____ [*signature*]

Objector

_____ [*signature*]

Attorney for Objector

[*Verification. See § 455.111.*]

CAUTION:
An objection to a probate petition must be verified [*Prob. Code § 1021(a)(2)*].

[2] Use of Form

The foregoing form is for use to object to a sale of either personal or real property of the estate. It is filed in response to a personal representative's report of sale of estate property and petition for court confirmation [*see Prob. Code § 10261(b)* (personal), 10310(c) (real)]. It is for use when the objector wishes the personal representative to retain the property in the estate and objects to any sale of the property. For a form for objection only to the particular sale reported to the court for confirmation, *see § 455.152*.

[3] Prohibiting Sale of Estate Property

The burden on an objector who wishes to compel the personal representative to retain rather than sell property of the estate is great. Sale is permitted if authorized or directed in decedent's will; if it is necessary to pay debts, devises, expenses of administration, taxes, and the family allowance; or if it is to the advantage of the estate and in the best interest of the interested persons [*Prob. Code § 10000*]. A prohibition of sale requires a negation of all of these possible grounds.

If the sale is directed or authorized in decedent's will, the objector may petition to relieve the personal representative of the duty of complying with the directions [*Prob. Code § 10002*; *see § 455.117*]. In such a case, the petition should be combined with the objections. The objector must still show lack of necessity and lack of advantage and benefit.

[4] State Statutes

Definition of "interested persons." *Prob. Code § 48*

Requirement that objections to petition be verified. *Prob. Code § 1021(a)(2)*

When estate property may be sold. *Prob. Code § 10000*

Right of interested person to petition for relief from direction in will that property be sold. *Prob. Code § 10002(b)*

Objection to sale of personal property. *Prob. Code § 10261(b)*

Objection to sale of real property. *Prob. Code § 10310(c)*

[5] California Rules of Court

Objections or responses waived if not timely filed after matter continued to allow for their filing. *Cal. Rules of Ct., Rule 7.801*

[6] Cross References

For a related form, *see § 455.151*

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39-455 California Forms of Pleading and Practice--Annotated § 455.151

§ 455.151 Order Vacating Sale and Prohibiting Sale of Property

[1] FORM Order Vacating Sale and Prohibiting Sale of Property

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*]	)	ORDER VACATING SALE AND PROHIBITING
Deceased	)	SALE OF ESTATE PROPERTY
	)	[*Prob. Code § 10000*]

_____

The verified report of sale and petition of _____ [*name*], as personal representative of the estate of _____ [*name*], deceased, praying for an order confirming sale of _____ [real *or* personal] property, came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of Judge*], presiding. Petitioner appeared by counsel _____ [*name*]. Objection to the confirmation of sale was filed by _____ [*name and description of objector, e.g.*, John Jones, a residuary beneficiary of the estate], who appeared by counsel _____ [*name*].

The Court finds from proof made to the satisfaction of the Court:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. On _____ [*date*], the personal representative sold at _____ [private sale *or* public auction], the _____ [real *or* personal] property as set forth in the petition.

3. Sale of this property is neither authorized nor directed in decedent's will.

4. Sale of this property is not necessary to pay debts, devises, expenses of administration, taxes, or the family allowance.

5. Sale of this property at this time is neither to the advantage of the estate nor in the best interests of persons interested in the estate because _____ [*state reasons, e.g.,* the area in which the real property is located is currently zoned for agricultural use only. The area is about to be annexed into _____ (*name of governmental entity*), and the area will then be zoned to allow for residential or commercial use, at which time, the value of the property will increase significantly].

WHEREFORE, IT IS ORDERED as follows:

1. The sale of _____ [*specify property reported in petition*] to _____ [*name of purchaser*], as reported to this Court, is vacated.

2. Petitioner shall not sell this property until permitted by further order of this Court.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The foregoing form of order is for use to vacate a sale of estate property that has been reported to the court for confirmation and to prohibit any further sale of the property until further order of the court. It may be used to vacate a sale of either real or personal property. For a form vacating sale and ordering a new sale, *see § 455.153*.

[3] Order Prohibiting Sale of Estate Property

There is no express authority for a court order that prohibits a personal representative from selling property of the estate [cf. *Prob. Code § 10313* (court may vacate sale of estate real property and order new sale)]. However, the authority to deny sale is implicit in *Prob. Code § 10000*, which sets forth the circumstances under which estate property may be sold [*see § 455.150*]. If none of these circumstances can be established, the court must certainly have the authority to order the personal representative to retain the property [*see Estate of Harabedian (1963) 220 Cal. App. 2d 1, 34 Cal. Rptr. 668* (decided under prior but substantially similar law); *see also Prob. Code §§ 10261(b), 10310(c)* (right to object to petition for confirmation of sale)].

[4] State Statutes

Finding of giving or waiver of notice as required in order. *Prob. Code § 1260(b)*

Circumstances under which estate property may be sold. *Prob. Code § 10000*

[5] Cross References

For a related form, *see § 455.150*

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39-455 California Forms of Pleading and Practice--Annotated § 455.152

§ 455.152 Objections to Confirmation of Sale of Real Property [Prob. Code § 10310(c)]--Objection to Sale Reported to Court

[1] FORM Objections to Confirmation of Sale of Real Property [Prob. Code § 10310(c)]--Objection to Sale Reported to Court

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*]	)	OBJECTIONS TO CONFIRMATION OF SALE OF
Deceased	)	REAL PROPERTY
	)	[*Prob. Code § 10310(c)*]

_____

_____ [*name*], objects as follows:

1. Objector is _____ [*specify status establishing objector as person interested in estate, e.g.,* a residuary beneficiary of this estate].

2. Objector agrees that the personal representative is entitled by law to sell the real property described in the petition and that the property should be sold. However, objection is made to the particular sale reported to the court for confirmation.

3. Sale of this property is neither directed nor authorized in decedent's will. Further, sale is not necessary in order to pay debts, devises, expenses of administration, taxes, and the family allowance.

4. The sale reported to the court for confirmation is neither to the advantage of the estate nor in the best interest of

interested persons, including Objector, because _____ [*specify reasons, e.g.,* the terms of sale require the estate to accept the purchaser's 15-year note secured by a deed of trust for 80 percent of the purchase price. Such a sale on credit is prejudicial to the residuary beneficiaries because it means that these beneficiaries will have to defer receipt of their full distributive share of the residue for 15 years. Objector is of advanced age and is unlikely to ever come into possession and enjoyment of his/her full share of the residue under these terms].

WHEREFORE, Objector prays for an order of the court as follows:

1. Vacating the sale reported to the court;

2. Ordering a new sale of the property;

3. And for such other orders as the court deems proper.

_____ [*signature*]

Objector

_____ [*signature*]

Attorney for Objector

[*Verification. See § 455.111*.]

CAUTION:
Written objections to petitions in probate matters must be verified [*Prob. Code § 1021(a)(2)*].

[2] Use of Form

The foregoing form is for use to make written objections to a personal representative's report of sale of real property of the estate and petition for court confirmation. It requests the court to order a new sale of the property. The form is based on a statute that is limited to real property [*see Prob. Code § 10313*]. However, because of substantially similar standards for the confirmation of sale of personal property [*cf. Prob. Code § 10261(b)*], it may be argued that the procedure could be used in connection with personal property. If desired, the form may be adapted for this use.

The form is for use by an objector who objects only to the particular sale of the property reported to the court. For a form for objection to any sale of the property, *see § 455.150*.

[3] Grounds for Opposing Particular Sale of Realty

There is some uncertainty as to the grounds on which an objector may succeed in vacating a particular sale of estate real property. Under current law, it appears that the personal representative must make both a threshold showing of the reason for sale [*see Prob. Code §§ 10310(a), 10313(a)(1)*] and also prove five other matters, primarily related to the statutorily required procedures for the sale [*see Prob. Code § 10313(a)(2)-(6)*].

At the threshold level, the personal representative must show either that the sale was authorized or directed to be made in decedent's will or that good reason exists for the sale [*Prob. Code § 10313(a)(1)*]. The alternative requirement of good reason most probably relates back to the personal representative's burden of showing either the necessity of the sale or the advantage to the estate and benefit to interested persons in making the sale [*see Prob. Code § 10310(a)*; *see also Prob. Code § 10000*]. The additional requirements involve three points related specifically to compliance with the

statutory procedures of notice, appraisal, and overbid [*see Prob. Code § 10313(a)(2), (5), (6)*]. The final two requirements are that the court find that the sale was legally made and fairly conducted, and that the amount for which the sale is to be confirmed is not disproportionate to the value of the property [*Prob. Code § 10313(a)(2), (3)*].

The apparent result of this set of requirements is that an objector whose position is that the terms of a particular sale are not advantageous to the estate or of benefit to the beneficiaries may be foreclosed from vacating sale. For example, assume the sale is authorized in the will and the personal representative sells the property on credit, taking back a note secured by a deed of trust for 95 percent of the sale price, as permitted by statute [*see Prob. Code § 10315*]. An elderly residuary beneficiary objects to the sale on credit because he or she wants cash now rather than later and believes an all-cash sale is attainable (see Paragraph 4). Because the sale is authorized in the will, the question of advantage to the estate and benefit to interested persons is foreclosed. The same result occurs if the sale is necessary to raise cash to pay expenses. Only if neither of these factors exist can the objector challenge the terms of a particular sale on grounds other than procedural error or disproportionate sale price. The one possible argument is that a sale made on terms unfavorable to the beneficiaries has not been "fairly conducted" [*see Prob. Code § 10313(a)(3)*].

[4] State Statutes

Order vacating sale of real property and ordering new sale. *Prob. Code § 10313*

[5] Cross References

For related forms, *see §§ 455.150* and *455.153*.

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39-455 California Forms of Pleading and Practice--Annotated § 455.153

§ 455.153 Order Vacating Sale of Real Property and Ordering New Sale [Prob. Code § 10313(c)]

[1] FORM Order Vacating Sale of Real Property and Ordering New Sale [Prob. Code § 10313(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*]	)	ORDER VACATING SALE OF REAL PROPERTY
Deceased	)	AND ORDERING NEW SALE
	)	[*Prob. Code § 10313(c)*]

_____

The verified report of sale and petition of _____ [*name*], as personal representative of the estate of _____ [*name*], deceased, praying for an order confirming sale of real property, came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. Objection to the confirmation of sale was filed by _____ [*name and description of objector, e.g.*, John Jones, a residuary beneficiary of the estate], who appeared by counsel _____ [*name*].

The Court finds from proof made to the satisfaction of the Court:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. On _____ [*date*], the personal representative sold at _____ [private sale *or* public auction], the _____ [real *or* personal] property as set forth in the petition.

3. Sale of this property is neither directed nor authorized in decedent's will.

4. Sale of this property is not necessary to pay debts, devises, expenses of administration, taxes, and the family allowance.

5. The particular sale reported to the court to _____ [*name of purchaser*] for a sale price of $_____ is neither to the advantage of the estate nor in the best interests of persons interested in the estate because _____ [*state reasons, e.g.,* the terms of sale call for only 5 percent of the sale price to be paid in cash, with the personal representative taking the purchaser's note, secured by a deed of trust, for the balance. An all-cash sale is attainable and in the best interests of the beneficiaries because they are unlikely to receive full benefit of the proposed payments under the note].

WHEREFORE, IT IS ORDERED as follows:

1. The sale of _____ [*describe property reported in petition by street address, if any, and legal description*] to _____ [*name of purchaser*], as reported to this court, is vacated.

2. Petitioner shall immediately commence a new sale of this property in compliance with all requirements of law.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The foregoing form of order is for use to vacate a sale of estate property that has been reported to the court for confirmation and to order a new sale of the property [*see Prob. Code § 10313*]. It is designed for use to vacate a sale of real property. However, because of similar requirements for confirmation of sale [*see Prob. Code § 10261(a)*], it may be argued that the procedure could be used in connection with personal property. If desired, the form may be adapted for this use. For a form for an order vacating sale and prohibiting the personal representative from selling the property at all, *see § 455.151*.

[3] State Statutes

Finding of giving or waiver of notice as required in order. *Prob. Code § 1260(b)*

Order vacating sale of real property and ordering new sale. *Prob. Code § 10313*

[4] Cross References

For a related form, *see § 455.152*

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[Reserved]

§§ 455.154[Reserved]

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39-455 California Forms of Pleading and Practice--Annotated § 455.170

§ 455.170 Ex Parte Application to Enter Into Exclusive-Listing Agreement With Broker [Prob. Code § 10150(c)]

[1] FORM Ex Parte Application to Enter Into Exclusive-Listing Agreement With Broker [Prob. Code § 10150(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*]	)	EX PARTE APPLICATION FOR PERMISSION TO
Deceased	)	ENTER INTO EXCLUSIVE-LISTING AGREE-
	)	MENT
		[*Prob. Code § 10150(c)*]

_____

Applicant, _____ [*name*], respectfully represents:

1. Applicant is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. Applicant requests permission to enter into a written contract with _____ [*name of broker*], a _____ licensed real estate broker, whose place of business is _____ [*address*], to grant him/her an exclusive right, for a period of 90 days, to sell the following real property of the estate: _____ [*street address, if any, and legal description*]. The contract will provide for compensation of the broker as permitted by law and confirmed by the court, not to exceed _____ percent of the sale price, to be paid from the proceeds of sale. A copy of the proposed contract is attached as Exhibit A and made a part hereof.

3. This exclusive agreement is necessary and advantageous to the estate because _____ [*specify, e.g.,* such an agreement maximizes the exposure of the property to the market].

[*EITHER*]

4. No special notice has been requested.

[*OR*]

4. The following parties have waived their request for special notice; _____ [*list by name and description, e.g.,* John Jones, a creditor of the estate]. Copies of the waivers are attached as Exhibits _____ through _____ and made a part hereof.

WHEREFORE, Applicant prays for an order granting him/her permission to enter into a written 90 day exclusive-listing agreement for the sale of the stated estate property with _____ [*name of broker*], and for such other orders as the court deems proper.

_____ [*signature*]

Personal Representative

_____ [*signature*]

Attorney for Personal Representative

[*Verification. See § 455.111.*]

[2] Use of Form

This ex parte application is for use by the personal representative of an estate to obtain prior permission of the court to enter into a written 90-day exclusive listing agreement with a licensed real estate broker for the sale of real property of the estate [*see Prob. Code § 10150(c)*].

[3] Exclusive-Right Agreement With Broker or Agent

The personal representative may enter into a written contract with a licensed real estate broker to secure a purchaser for any real property of the estate or with one or more agents or brokers to secure a purchaser for any personal property of the estate [*Prob. Code § 10150(a)*; see also *Cal. Rules of Ct., Rule 7.453*]. The contract may grant an exclusive right to sell the property for a period of not more than 90 days if prior court approval is obtained. Permission may be requested by ex parte application. The personal representative must make a showing of necessity and advantage to the estate. Additional 90-day extensions of the exclusive right agreement may be obtained by the same procedure [*Prob. Code § 10150(c)*].

A petition for approval of an exclusive listing under *Prob. Code § 10150(c)* is required to state the following [*Cal. Rules of Ct., Rule 7.453*]:

- A description of the property to be sold (see Paragraph 2).
- The name of the broker to be employed (see Paragraph 2).

- A summary of the terms of the exclusive listing agreement or include a copy of the listing agreement (see Paragraph 2).

- A detailed statement of the facts supporting the "necessity and advantage" to the estate of having the exclusive listing (see Paragraph 3).

[4] Alleging Special Notice

Although permission to enter into an exclusive listing agreement may be made on an ex parte petition, local court rules may require that any petition for an ex parte order either allege that no special notice had been requested or list the parties who have waived their request for special notice (Alternative Paragraphs 4) [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 10.38; San Francisco Uniform Local Ct. Rules, Rule 14.20].

[5] Verification

The statutory requirements for an exclusive-listing agreement allow the personal representative to seek court authorization by ex parte application rather than by petition [*Prob. Code § 10150(c)*]. Such an application is not among the filings that must be verified [*see Prob. Code § 1021(a)*]. Nevertheless, local court rules and procedure should be consulted before verification is omitted.

[6] State Statutes

Ex parte application for permission to enter into 90-day exclusive listing agreement. *Prob. Code § 10150(c)*

Efforts of personal representative to obtain highest and best price for real property that is reasonably attainable as required to be shown on petition for confirmation. *Prob. Code § 10310(b)*

[7] California Rules of Court

Petition for exclusive listing. *Cal. Rules of Ct., Rule 7.453*

[8] Cross References

For a related form, *see § 455.171*

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39-455 California Forms of Pleading and Practice--Annotated § 455.171

§ 455.171 Order Granting Application for Permission to Enter Into Exclusive Listing Agreement [Prob. Code § 10150(c)]

[1] FORM Order Granting Application for Permission to Enter Into Exclusive Listing Agreement [Prob. Code § 10150(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*]	)	ORDER GRANTING APPLICATION FOR PER-
Deceased	)	MISSION TO ENTER INTO EXCLUSIVE-LIST-
	)	ING AGREEMENT
		[*Prob. Code § 10150(c)*]

_____

Applicant, as personal representative of the estate of _____ [*name*], deceased, having submitted his/her application for an order granting him/her permission to enter into a written 90-day exclusive listing agreement with _____ [*name of broker*] for the sale of the following real property of the estate: _____ [*street address, if any and legal description*], this Court finds:

1. [No persons have requested special notice in this matter *or* All persons who have requested special notice in this matter have _____ (received *or* waived) notice.]

2. The exclusive-listing agreement applied for is necessary and to the advantage of the estate in that _____ [*specify reasons*].

WHEREFORE, IT IS ORDERED as follows:

1. Applicant may enter into the exclusive listing agreement;

2. A reasonable broker's commission will be determined by the court at the time of the confirmation of any sale pursuant to the exclusive listing agreement.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The foregoing form of order is for use to grant the personal representative permission to enter into an exclusive listing agreement with a licensed real estate broker for the sale of real property belonging to the estate. Under common practice of probate courts, the order should be attached to the petition as a separate document [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 10.37(d); San Francisco Uniform Local Ct. Rules, Rule 14.20].

[3] Broker's Commission

Regardless of the terms of the agreement, the broker's compensation will be fixed by the court concurrent with the confirmation of sale [*Prob. Code § 10150(b)*]. In Los Angeles County, it is required to include a provision to this effect in the order [*see* Los Angeles Co. Super. Ct. Rules, Rule 10.91].

[4] Cross References

For a related form, *see § 455.93*

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39-455 California Forms of Pleading and Practice--Annotated § 455.172

§ 455.172 Written Form of Overbid in Open Court at Hearing on Confirmation [Prob. Code § 10311]

[1] FORM Written Form of Overbid in Open Court at Hearing on Confirmation [Prob. Code § 10311]

The undersigned bids the sum of $_____, for the property of the estate of _____ [*name*], deceased, the confirmation of sale of which is pending before the court. The amount of this bid exceeds the amount of the original offer that was reported to the court by at least 10 percent on the first $10,000 and by at least 5 percent on the balance of the offer.

The undersigned agrees to execute a complete real property sales agreement within _____ days of this hearing, the terms of which will be no less favorable to the estate than the terms of the agreement of sale pursuant to the amount of the original offer reported to this court for confirmation.
Dated: _____.

_____ [*signature*]

[2] Use of Form

The foregoing form is use to make an overbid at the confirmation hearing. The preferred practice is that the overbidder attend the confirmation hearing with a completed real property sales agreement that sets forth all terms and conditions of sale in addition to offering the required amount of the overbid. Forms for these agreements are commonly provided by real estate brokers or may be found in California Legal Forms, Ch 23, *Real Property Sales Agreements*. However, under some circumstances it may be impossible for the overbidder to prepare such an agreement before the hearing. In such a case, this form meets the requirement that an overbid be submitted in writing [*see Prob. Code § 10311(a)*]. *Prob. Code § 10311* does not require the written overbid to set forth the complete terms and conditions of sale. However, local rules and practice should be consulted. Some counties provide preprinted forms on which to submit an overbid. The parties should enter into a complete sales agreement as soon as possible after the hearing.

[3] Amount of Overbid

An overbid must be for an amount of at least 10 percent more on the first $10,000 of the original bid and 5 percent more on the amount of the original bid in excess of $10,000 [*Prob. Code § 10311(a)(1)*]. The overbid must be made by a responsible person and comply with all provisions of law [*Prob. Code § 10311(a)(2), (3)*]. For further discussion of overbids, *see § 455.19[3][a]*.

[4] State Statutes

Overbids for real property. *Prob. Code § 10311*

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Chapter 456 PROBATE: MANAGEMENT OF ESTATE ASSETS

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[1] Exercise of Option Given by Testator

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[1] Duties and Liabilities of Personal Representative

[2] Court Supervision

[3] Joint Personal Representatives

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[6] Investments and Purchase of Property

[7] Operation of Decedent's Business

[8] Abandonment of Tangible Personal Property

[9] Borrowing Money and Encumbering Property

[10] Mortgage or Deed of Trust Held by Estate

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[14] Lease of Estate Property

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[1] FORM

[2] Use of Form

[3] Persons Interested in the Estate

[4] Notice Requirements

[5] State Statutes

[6] Cross References

§ 456.61 Order Directing Personal Representative to Act or to Refrain From Acting [Prob. Code § 9613]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

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[1] FORM

[2] Use of Form

[3] Contents

[4] Authorized Investments

[5] Notice Requirements

[6] State Statutes

[7] Cross References

§ 456.63 Order Authorizing Investment in Securities [Prob. Code § 9731]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 456.64 Petition for Order Authorizing Investments Provided for in Will [Prob. Code § 9732]

[1] FORM

[2] Use of Form

[3] Contents

[4] Notice Requirements

[5] Objections

[6] State Statutes

[7] Cross References

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[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 456.66 Petition for Order Authorizing Purchase of Annuity to Satisfy Devise [Prob. Code § 9733]

[1] FORM

[2] Use of Form

[3] Gift of Annuity or Periodic Payments

[4] Notice Requirements

[5] State Statutes

[6] Cross References

§ 456.67 Order Authorizing Purchase of Annuity [Prob. Code § 9733]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 456.68 Petition for Order Authorizing Continued Operation of Decedent's Proprietorship Business [Prob. Code § 9760]

[1] FORM

[2] Use of Form

[3] Disposition of Sole Proprietorship

[4] Notice Requirements

[5] State Statutes

[6] Cross References

§ 456.69 Order Authorizing Continued Operation of Decedent's Proprietorship Business [Prob. Code § 9760]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 456.70 Petition for Order Directing Personal Representative to Discontinue Operation of Decedent's Proprietorship Business [Prob. Code § 9760]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

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[1] FORM

[2] Use of Form

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[4] Cross References

§ 456.72 Petition for Order Authorizing Personal Representative to Continue as Partner in Decedent's Partnership [Prob. Code § 9762]

[1] FORM

[2] Use of Form

[3] Partnership Business

[4] Notice Requirements

[5] State Statutes

[6] Cross References

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[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

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[2] Use of Form

[3] Contents

[4] Notice of Abandonment of Tangible Personal Property

[5] State Statutes

[6] Cross References

§ 456.75 Petition for Order Authorizing Personal Representative to Abandon Tangible Personal Property [Prob. Code §§ 9611, 9783]

[1] FORM

[2] Use of Form

[3] Proceedings After Receipt of Objection to Abandonment

[4] Notice Requirements

[5] State Statutes

[6] Cross References

§ 456.76 Order Authorizing Abandonment of Tangible Personal Property [Prob. Code §§ 9611, 9783]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 456.77 Ex Parte Application for Order Restraining Personal Representative From Abandoning Tangible Personal Property [Prob. Code § 9784]

[1] FORM

[2] Use of Form

[3] Order Restraining Abandonment

[4] Alleging Special Notice

[5] Verification

[6] Alternative Procedure; Written Objection

[7] State Statutes

[8] Cross References

§ 456.78 Order Restraining Personal Representative From Abandoning Tangible Personal Property [Prob. Code § 9784]

[1] FORM

[2] Use of Form

[3] Service of Order

[4] State Statutes

[5] Cross References

§ 456.79 Petition for Order Authorizing Personal Representative to Borrow Money and to Encumber Estate Property [Prob. Code § 9802]

[1] FORM

[2] Use of Form

[3] Contents

[4] Notice Requirements

[5] State Statutes

[6] Cross References

§ 456.80 Order Authorizing Personal Representative to Borrow Money and to Encumber Estate Property [Prob. Code §§ 9800, 9804]

[1] FORM

[2] Use of Form

[3] Contents

[4] State Statutes

[5] Cross References

§ 456.81 Petition for Order Directing Personal Representative to Convey or Transfer Estate Property to Another [Prob. Code § 850(a)(2)(A)-(C)]

[1] FORM

[2] Use of Form

[3] Civil Action as Alternative

[4] Enforceability of Contract

[5] Notice Requirements

[6] State Statutes

[7] Decisions

[8] Cross References

§ 456.82 Order Directing Personal Representative to Convey or Transfer Estate Property to Another [Prob. Code §§ 850(a)(2)(A)-(C), 856]

[1] FORM

[2] Use of Form

[3] Objection Based on Venue

[4] Abatement if Civil Action Is Pending

[5] State Statutes

[6] Cross References

§ 456.83 Petition by Personal Representative for Order Directing Conveyance or Transfer of Property to Estate [Prob. Code § 850(a)(2)(D)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 456.84 Order Directing Conveyance or Transfer of Property to Estate [Prob. Code §§ 850(a)(2)(D), 856]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 456.85 Petition for Order Authorizing Dedication or Conveyance of Easement [Prob. Code § 9900]

[1] FORM

[2] Use of Form

[3] Notice Requirements

[4] State Statutes

[5] Cross References

§ 456.86 Order Authorizing Dedication or Conveyance of Easement [Prob. Code § 9900]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 456.87 Petition for Order Authorizing Exchange of Estate Property for Other Property [Prob. Code § 9921]

[1] FORM

[2] Use of Form

[3] Contents

[4] Notice Requirements

[5] Bond

[6] State Statutes

[7] Cross References

§ 456.88 Order Authorizing Exchange of Estate Property for Other Property [Prob. Code § 9920]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 456.89 Petition for Order Authorizing Lease of Estate Property [Prob. Code § 9943]

[1] FORM

[2] Use of Form

[3] Contents

[4] Notice Requirements

[5] Bond

[6] State Statutes

[7] Cross References

§ 456.90 Order Authorizing Lease of Estate Property [Prob. Code §§ 9945, 9946]

[1] FORM

[2] Use of Form

[3] Contents

[4] State Statutes

[5] Cross References

§ 456.91 Petition for Partition of Estate Property [Prob. Code § 11951]

[1] FORM

[2] Use of Form

[3] Contents

[4] Notice and Hearing

[5] State Statutes

[6] Cross References

§ 456.92 Decree of Partition of Estate Property [Prob. Code § 11953]

[1] FORM

[2] Use of Form

[3] Decree of Partition

[4] State Statutes

[5] Cross References

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39-456 California Forms of Pleading and Practice--Annotated § 456.01

§ 456.01 Scope of Chapter

This chapter covers management of estate property by the personal representative. The chapter includes forms on investments [*see §§ 456.62 -456.65*], operation of decedent's business [*see §§ 456.68 -456.71*], abandonment of personal property [*see §§ 456.74 -456.78*], borrowing money and encumbering property [*see §§ 456.79 -456.80*], disputes between the estate and third persons over ownership or possession of property [*see §§ 456.81 -456.84*], dedication of easements or access rights over estate property [*see § 456.85*- 573.5], exchanges of estate property [*see §§ 456.87 -456.88*], leases of estate property [*see §§ 456.89 -456.90*], partition of property [*see §§ 456.91 -456.92*], and options to purchase estate property.

Collection of the decedent's property by the personal representative is discussed in Ch. 450, *Probate: Collecting Assets* . Compromising claims against the estate is covered in Ch. 445, *Probate: Claims Against the Estate* . Sales of estate property are discussed and forms provided in Ch. 446, *Probate: Sale of Estate Property*. Forms for giving notice of hearings on petitions in probate proceedings and provisions relating to notice generally are found in Ch. 447, *Probate: Statutory Notice Requirements* . For discussion of and forms for management of estate property under the Independent Administration of Estates Act, see Ch. 442, *Probate: Initiating Probate Administration* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral Overview

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39-456 California Forms of Pleading and Practice--Annotated § 456.02

§ 456.02 Cross References

For general discussion of granting easements and access rights, see Ch. 240, *Easements*

For general discussion of encumbrances on property, see Ch. 342, *Liens and Wage Preferences*

For general discussion and forms relating to recording notice of the pendency of litigation, see Ch. 348, *Lis Pendens*

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-456 California Forms of Pleading and Practice--Annotated §§ 456.03-456.09

[Reserved]

§§ 456.03[Reserved]

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39-456 California Forms of Pleading and Practice--Annotated § 456.10

§ 456.10 Governing Law

Management of estate property is governed generally by *Prob. Code §§ 850-859* and *9600-10382*. Provisions discussed in this chapter include Part 19 of Division 2 relating to conveyance or transfer of property claimed to belong to decedent or other person [*see Prob. Code §§ 850-859*]; Chapters 1 and 2 of Part 5 of Division 7, containing general provisions related to estate management [*see Prob. Code §§ 9600-9657*]; Chapter 3 of Division 7, on deposits of money and personal property with financial institutions [*see Prob. Code §§ 9700-9705*]; Chapter 4 of Division 7, on investments and purchases of property [*see Prob. Code §§ 9730-9737*]; Chapter 5 of Division 7, on the operation of decedent's business [*see Prob. Code §§ 9760-9764*]; Chapter 6 of Division 7, on abandonment of tangible personal property [*see Prob. Code §§ 9780-9788*]; Chapter 7 of Division 7, on borrowing, refinancing, and encumbering property [*see Prob. Code §§ 9800-9807*]; Chapter 10 of Division 7, on acceptance of deed in lieu of foreclosure or trustee's sale [*see Prob. Code §§ 9850-9851*]; Chapter 13 of Division 7, on dedication or conveyance of easement or access rights to a governmental entity [*see Prob. Code §§ 9900, 9901*]; Chapter 14 of Division 7, on exchanges of estate property [*see Prob. Code §§ 9920-9923*]; Chapter 15 of Division 7, on leases [*see Prob. Code §§ 9940-9948*]; and Chapters 16 and 17 of Division 7, on options [*Prob. Code §§ 9960-9983*]. Statutes regarding partition of estate property are set forth in *Prob. Code §§ 11950-11956*.

A wide variety of local court rules govern probate procedures. To ensure complete compliance, the attorney should consult the applicable rules.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-456 California Forms of Pleading and Practice--Annotated § 456.11

§ 456.11 Duties and Liabilities of Personal Representative

[1] In General

In the management and control of the estate, a personal representative must use ordinary care and diligence. What constitutes ordinary care and diligence is determined by all the circumstances of the particular estate [*Prob. Code § 9600(a)*]. The personal representative must either exercise or refrain from exercising a power to the extent that ordinary care and diligence indicate that the power should or should not be exercised [*Prob. Code § 9600(b)*].

A personal representative who breaches a fiduciary duty is chargeable with any loss or depreciation in value of the estate that results from the breach, plus interest on the loss; for any profit made personally because of the breach, plus interest on the profit; and for any lost profit that would have accrued to the estate but for the breach [*Prob. Code § 9601(a)*]. Interest for which the personal representative is liable is the amount that accrues at the legal rate on judgments or the amount that was actually received, whichever is greater [*Prob. Code § 9602*]. In addition, the personal representative remains subject to any other remedy that may be available under other law [*Prob. Code § 9603*]. The court may excuse the personal representative from liability if the personal representative has acted reasonably and in good faith under the circumstances as known to him or to her [*Prob. Code §§ 9601(b), 9602(b)*].

Unless otherwise provided in the instrument or in Division 7 of the Probate Code (*Prob. Code § 7000 et seq.*), however, a personal representative is not personally liable on an instrument, including but not limited to a note, mortgage, deed of trust, or other contract, properly entered into in the personal representative's fiduciary capacity in the course of administration of the estate unless the personal representative fails to reveal his or her representative capacity or identify the estate in the instrument [*Prob. Code § 9606*].

[2] Managerial Duties

The personal representative must collect the assets of the estate [*Prob. Code § 9650(a)*; *see* Ch. 450, *Probate: Collecting Assets*]. The personal representative is entitled to receive the rents, issues, and profits from all property in the estate until the estate is settled or delivered over by order of the court to the heirs or devisees [*Prob. Code § 9650(a)(2)*]. The personal representative must pay taxes on and take all steps reasonably necessary for the management, protection, and preservation of estate property [*Prob. Code § 9650(b)*]. The personal representative may insure any

property of the estate against damage or loss, and may insure himself or herself against liability to third persons [*Prob. Code § 9656*].

Real property or tangible personal property may be left with or surrendered to the person presumptively entitled to it unless or until, in the judgment of the personal representative, possession by the personal representative becomes necessary for the proper administration of the estate. The person who has the property must surrender it on request by the personal representative [*Prob. Code § 9650(c)*].

[3] Duty Regarding Funds on Hand

Unless the decedent's will provides otherwise, the personal representative must keep all cash of the estate in his or her possession invested in interest-bearing accounts or in other investments authorized by law. The duty to invest does not apply to the amount of cash that is reasonably necessary for the orderly administration of the estate [*Prob. Code § 9652*]. For further discussion of the investment of estate property, see *§ 456.15*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-456 California Forms of Pleading and Practice--Annotated § 456.12

§ 456.12 Court Supervision

In general, a personal representative may manage the estate without express court authorization, instruction, approval, or confirmation unless the Probate Code specifies that a particular act must be passed on by the court [*Prob. Code § 9610*; *see, e.g., Prob. Code § 10200* (court authorization required for sale of securities)]. However, even in the absence of a specific requirement, the personal representative may always seek court authorization, instructions, approval, or confirmation of a particular managerial act [*Prob. Code § 9610*; *see Prob. Code § 9611*; *see also* Ch. 457, *Probate: Instructions to Personal Representative*]. When a judgment or order concerning the administration of the estate becomes final, it releases the personal representative and any sureties on the personal representative's bond from any claims of heirs, devisees, or other affected persons based upon any act or omission directly authorized, approved, or confirmed in the judgment or order [*Prob. Code § 7250(a)*]. However, a judgment or order will not release the personal representative or the sureties from claims if it was obtained by fraud or conspiracy, or by misrepresentation of any material fact in a petition or account. Failure to disclose a material fact also constitutes misrepresentation for this purpose [*Prob. Code § 7250(c)*].

Any interested person may file a petition for a court order directing the personal representative to take or to refrain from taking a particular act [*Prob. Code § 9613(a)*; *see § 456.60*]. Interested persons include an heir, devisee, child, spouse, creditor, or beneficiary of the decedent, or any other person who has a property right in or claim against the estate [*Prob. Code § 48*]. The petitioner must show that if the petition is not granted, the estate will suffer great or irreparable injury. The order may include such terms and conditions as the court considers appropriate under the circumstances [*Prob. Code § 9613(a)*; *see § 456.61*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 456.13 Multiple Personal Representatives

If the estate is administered by two personal representatives, both must concur to exercise a power. If there are more than two, a majority must concur [*Prob. Code § 9630(a)*]. A personal representative may oppose any petition filed by another personal representative or other person and may petition for an order directing the personal representatives to take or to refrain from taking a particular act [*Prob. Code § 9630(d)*].

In general, one personal representative is not liable for a breach of fiduciary duty committed by another [*Prob. Code § 9631(a)*]. However, this rule is subject to the following exceptions [*Prob. Code § 9631(b)*]:

- If the personal representative to be charged participates in the breach of duty;
- If the personal representative to be charged improperly delegated administration of the estate to the other;
- If the personal representative to be charged approved, knowingly acquiesced in, or concealed the breach of duty;
- If the personal representative to be charged negligently enabled the other to commit the breach; or
- If the personal representative to be charged knew or had information from which he or she reasonably should have known of the other's breach of duty, and failed to take reasonable steps to compel the other to redress the breach.

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-456 California Forms of Pleading and Practice--Annotated § 456.14

§ 456.14 Deposits of Money and Property

The personal representative may deposit money of the estate in a California financial institution and may make withdrawals without order of the court [*Prob. Code § 9700*]. Similarly, the personal representative may deposit personal property of the estate with a trust company for safe keeping [*Prob. Code § 9701*]. Securities may be deposited in a securities depository [*see Prob. Code § 9702*; *see also Fin. Code § 1592*].

The personal representative may apply ex parte for an order prohibiting withdrawals of money or property other than on express authorization of the court [*Prob. Code § 9703(a)*]. A copy of the court order must be delivered to the financial institution or trust company at the time that the deposit is made [*Prob. Code § 9703(b)*]. The financial institution or trust company is not considered to be on notice as to the limitation on withdrawals unless it has actual notice of the order [*Prob. Code § 9703(c)*].

When the court makes an order distributing deposited money, securities, or other property, the financial institution or trust company may deliver the money or property directly to the distributee. The distributee's receipt must be filed with the clerk of court [*Prob. Code § 9704*].

If a trust company is the personal representative and deposits money of the estate in an account of its own, it is chargeable with interest on the account at the rate prevailing among banks of the locality on such deposits. If it is to the estate's advantage, an amount of cash that is reasonably necessary for the orderly administration of the estate may be left in a noninterest-bearing checking account [*Prob. Code § 9705*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDeposits in CourtEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersSales of AssetsEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-456 California Forms of Pleading and Practice--Annotated § 456.15

§ 456.15 Investments

Pending distribution of the estate, money of the estate may be placed in certain specified conservative investments, principally government bonds and other governmental obligations, without court authorization [*see Prob. Code § 9730*]. Investments in securities require prior court authorization [*Prob. Code § 9731(a)*; *see Prob. Code § 70* (definition of securities)]. A petition for investment authorization may be filed by the personal representative or by any interested person [*see Prob. Code § 48* ("interested persons" defined)], and must state the types of securities that are proposed to be purchased and the advantage to the estate of the purchase [*Prob. Code § 9731(b)*; *see § 456.62*].

The fact that a particular investment is provided for by the decedent in the will does not relieve the personal representative of the obligation to seek court authorization for the investment. The investment will only be allowed if the time for filing claims has expired, all debts (as defined in *Prob. Code § 11401*) have been paid or secured or there is other available cash from which they can be paid, and the estate is not in a condition to be finally distributed [*Prob. Code § 9732(a)*]. A petition for authorization may be filed by the personal representative or by any interested person and must show the general condition of the estate and the types of investments that are proposed to be made [*Prob. Code § 9732(b)*; *see § 456.64*]. If there is no objection, the court may authorize the investment of as much of the estate as the court deems advisable in the manner provided in the will. If there is no objection and no substantial reason why some or all of the investment powers given in the will should not be exercised, the court must authorize the investments. The order of authorization may be for a limited period of time or until the administration of the estate is completed. The personal representative or other interested person may petition at any time for the renewal, modification, or termination of the order [*Prob. Code § 9732(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-456 California Forms of Pleading and Practice--Annotated § 456.16

§ 456.16 Management of Securities

With respect to a share of stock of a domestic or foreign corporation, a membership in a nonprofit corporation, or other property held by the estate, the personal representative may do any of the following [*Prob. Code § 9655*]:

- Exercise in person or by proxy any voting rights.
- Waive notice of a meeting or give consent to the holding of a meeting.
- Authorize, ratify, approve, or confirm any action that could be taken by shareholders, members, or property owners.

The personal representative may hold a security of the estate in the name of a nominee or in any other form without disclosure of the estate, so that title to the security may pass by delivery [*Prob. Code § 9736*].

If the estate owns subscription rights for the purchase of additional securities, the rights may be exercised only with court authorization on a showing that it is to the estate's advantage [*Prob. Code § 9737(a)*]. To obtain authorization, the personal representative or any interested person [*see Prob. Code § 48* ("interested person" defined)] must file a petition stating the nature of the subscription rights and the advantage to the estate of exercising them [*Prob. Code § 9737(b)*; *see Prob. Code § 9737(c)* (notice of hearing must be given as provided in *Prob. Code § 1220*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-456 California Forms of Pleading and Practice--Annotated § 456.17

§ 456.17 Operation of Business Owned by Decedent as Sole Proprietor

The continued operation of a business of the decedent that was operated in sole proprietorship form involves some risk to the estate. The assets of the estate are liable for the obligations of the business incurred during the period of estate administration [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 9760*]. The personal representative may continue the operation of the decedent's proprietorship for a period of six months from the date on which letters were first issued with or without court authorization. However, any operation beyond the six-month period requires court authorization [*Prob. Code § 9760(b)*].

The personal representative or any other interested person [*see Prob. Code § 48* ("interested person" defined)] may petition for an order either authorizing the continuation of the business or directing the personal representative to discontinue the operation of the business. The petition must show the advantage to the estate and the benefit to the interested persons of the order requested [*Prob. Code § 9760(c)*; *see §§ 456.68 -456.71*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-456 California Forms of Pleading and Practice--Annotated § 456.18

§ 456.18 Business in Which Decedent Was General Partner

[1] Governing Law

Currently, the rights and duties of general partners in all California general partnerships are governed by the Uniform Partnership Act of 1994 (UPA'94) [*Corp. Code § 16100 et seq.*], regardless of whether the partnership in question was formed before or after the effective date of the UPA'94 (January 1, 1997). Prior to January 1, 1997, the earlier version of the Uniform Partnership Act (former UPA) [former *Corp. Code § 15001 et. seq.*, repealed effective January 1, 1999] governed the operation of all California general partnerships. When the UPA'94 took effect on January 1, 1997, it provided a grace period from January 1, 1997, to January 1, 1999, during which general partnerships formed prior to January 1, 1997, would continue to be governed by the former UPA unless they elected to be governed by the UPA'94 [*Corp. Code § 16111(a)*]. That grace period has now expired, and since January 1, 1999, all California general partnerships have been governed by the UPA'94 [*Corp. Code § 16111(b)*]. Nevertheless, since issues involving acts and events occurring prior to 1999 may exist for some time to come, a determination of which version of the UPA governed the partnership at the time in question may still be necessary. Thus, this chapter still contains discussion of the law as set forth in the former UPA. The UPA'94 substantially changed several key aspects of California partnership law; for discussion of the UPA'94 and its effects, see Ch. 400, *Partnerships: Governing Statutes* .

[2] Importance of Partnership Agreement

When a general partner dies, it is essential under both of the former UPA and the UPA'94 [§ 456.18[1]] to determine whether there is a written partnership agreement and, if so, whether it makes any provisions for the death of a partner. If there is a partnership agreement, and if it makes provisions for the death of a partner, those provisions generally will govern the rights and obligations of the surviving partners and the deceased partner's personal representative [former Corp. Code § 15108 (former UPA, repealed eff. Jan. 1, 1999); *Corp. Code § 16103(a)* (UPA'94, effective Jan. 1, 1997)].

The agreement may call for a dissolution of the partnership business and a distribution of its assets, or for a purchase of the deceased partner's interest by the surviving partners, with the surviving partners thereafter continuing the business. The agreement may permit the deceased partnership to devise his or her interest in the partnership, or forbid such a devise.

An agreement that calls for the purchase of a deceased partner's interest is often called a "buyout" or "buy-sell" agreement. Agreements of this kind are common in partnerships. The purchase of the deceased partner's interest is often financed by insurance on the life of the deceased partner. For discussion, see California Wills & Trusts, Ch. 29, *Devises of Businesses and Business Interests* (Matthew Bender).

[3] No Interest in Specific Partnership Property

Both the former UPA and the UPA'94 [§ 456.18[1]] make it clear that a deceased partner has no interest in specific partnership property, but merely owns an interest in the partnership business, with a right to participate in its profits, losses, and distributions [former *Corp. Code § 15025(2)(d)* (former UPA, repealed eff. Jan. 1, 1999); *Corp. Code §§ 16203, 16401, 16502* (UPA'94, effective Jan. 1, 1997)].

[4] Dissolution or Dissociation

Under the former UPA [§ 456.18[1]], a general partnership was dissolved by the death of a partner, unless there was a written agreement of the partners providing otherwise, or unless the probate court ordered the personal representative to continue as a partner [former *Corp. Code § 15031(4)*, repealed eff. Jan. 1, 1999; *see Prob. Code § 9762*]. The probate court may make such an order only upon a showing that it would be to the advantage of the estate and in the best interest of the interested persons [*Prob. Code § 9762(a)*;§ 456.18[5]].

Under the UPA'94 [§ 456.18[1]], the death of a partner does not cause the dissolution of the partnership, but merely "dissociates" the deceased partner from it [*Corp. Code § 16601(7)(A)*]. The surviving partners have the right to continue the partnership business, but the partnership has an obligation to buy out the deceased partner's interest [*Corp. Code § 16701(a)*]. The buyout price is the amount that would have been distributable to the deceased partner if, on the date of the deceased partner's death, the assets of the partnership were sold at the greater of their liquidation value or the value of the entire business as a going concern without the deceased partner and the partnership was wound up as of that date [*Corp. Code § 16701(b)*].

The UPA'94 contemplates that the surviving partners and the deceased partner's personal representative will try to agree on a definite price for the deceased partner's interest [*see Corp. Code § 16701(e)*]. If they do not do so within 120 days after a written demand for payment, however, the partnership must make a cash payment of the amount it estimates to be the buyout price, plus accrued interest and reduced by any offsets [*Corp. Code § 16701(e)*]. The payment or tender must be accompanied by a statement of partnership assets and liabilities as of the date of the deceased partner's death, the latest available partnership balance sheet and income statement, an explanation of how the estimated amount of the payment was calculated, and a written notice that the payment is in full satisfaction of the obligation to purchase unless, within 120 days, the deceased partner's personal representative commences an action to determine the buyout price [*Corp. Code § 16701(g)*]. Any such action must be commenced within the 120 days, or within one year after written demand for payment if no payment or offer to pay is tendered [*Corp. Code § 16701(i)*]. In the action, the court may determine the buyout price, any offsets that the partnership is entitled to, and accrued interest that the deceased partner's personal representative is entitled to, and enter judgment for any additional payment or refund [*Corp. Code § 16701(i)*].

However, the UPA'94 makes it clear that the partnership has no obligation to buy out the deceased partner's interest in the partnership if the partnership is dissolved and its business is wound up within 90 days after the deceased partner's death [*Corp. Code § 16701.5*]. In such an event, the partnership's assets and liabilities will be distributed as in the case of any other windup and dissolution of a partnership business [*see Corp. Code § 16801*].

For further discussion and forms relating to dissociation, see Ch. 403, *Partnerships: Actions by and Against Dissociated Partners* .

[5] Court Order Authorizing Representative to Act as Partner

When the partnership was subject to the former UPA [§ 456.18[1]], the probate court could order the personal representative to continue as a general partner in the partnership [*see Prob. Code § 9762*]. The probate court had discretion in ordering the personal representative to continue as a general partner to specify the terms and conditions of that continuation [*Prob. Code § 9762(a)*]. If there was a written partnership agreement giving the personal representative the right to participate as a partner, the personal representative would have all of the rights, powers, duties, and obligations provided in it, except as otherwise ordered by the court [*Prob. Code § 9762(b)*]. If there was no such agreement, the court would specify the personal representative's rights, powers, duties and obligations [*Prob. Code § 9762(c)*]. For a petition for such an order, see *§ 456.72*.

Under UPA'94 [§ 456.18[1]], the court's authority to make such an order is not clear. The UPA'94 specifically provides that the rights and duties of surviving partners and the legal representatives of deceased partners created by or defined in the Act "shall be given full force and effect notwithstanding any inconsistent provisions of the Probate Code" [*Corp. Code § 16109*]. But the Act also provides that nothing in the Act "shall otherwise affect any provision of the Probate Code" [*Corp. Code § 16109*]. The UPA'94 explicitly provides that a person may become a partner only with the consent of all of the partners [*Corp. Code § 16401(l)*]. A court order permitting the personal representative to act as a partner without the consent of all of the surviving partners would clearly seem to violate the rights of the surviving partners. If the surviving partners consent, there would seem to be no obstacle to such an order. If they do not consent, however, the propriety of such an order would be uncertain.

[6] Continuation of Partnership Business

The death of a general partner does not cause immediate termination of the partnership business. Even if the death caused the dissolution of the partnership under the former UPA [*see* former *Corp. Code § 15031(4)* (death causes dissolution unless written agreement provides otherwise); for effective date of former UPA, *see also § 456.18[1]*], the business may continue until there is a windup of partnership affairs [former *Corp. Code § 15030*]. Under the Former UPA, the business may be continued by the remaining partners indefinitely, with or without new partners, thus creating a new partnership, which assumes the obligations of the old partnership [*see* former *Corp. Code § 15041(a), (2)*, repealed eff. Jan. 1, 1999)].

Under the UPA'94 [§ 456.18[1]], the partnership may continue after the death of a partner, subject to its obligation to purchase the interest of the deceased partner [*see Corp. Code § 16701* and discussion in *§ 456.18[4]*].

[7] Right to Accounting and Other Actions

If a partnership existed between the decedent and another person at the time of the decedent's death, on the personal representative's application, the court may order any surviving partner to render an account under *Corp. Code § § 15510, 15634*, or *16807* [*Prob. Code § 9761*; *see also Corp. Code § 15903.04* (providing rights, similar to those specified in *Corp. Code §§ 15510* and *15634*, for limited partners in partnerships governed by Uniform Limited Partnership Act of 2008)]. Any such order is enforceable by contempt [*Prob. Code § 9761*]. The personal representative may commence and maintain any action against a surviving partner that the deceased partner could have commenced or maintained [*Prob. Code § 9763(a)*].

[8] Liability for Partnership Debts

Under the former UPA [§ 456.18[1]], the individual property of a deceased partner is liable for all obligations of the partnership incurred while the decedent was a partner. However, partnership debts are subordinate to the decedent's nonpartnership debts [former Corp. Code § 15063(4)]. If the partnership is liquidated after a partner's death, the individual property of the deceased partner is liable for contribution to pay partnership liabilities if partnership property is insufficient [former *Corp. Code § 15040(d), (g)*].

Under the UPA'94 [§ 456.18[1]], a deceased partner's estate is liable for partnership obligations incurred before death, but generally is not liable for those incurred thereafter [*Corp. Code § 16703(a), (b)*].

Of course, if the personal representative or estate acts as a general partner, the representative or the estate will assume liability for partnership obligations to the same extent as any other general partner.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionDeath & IncapacityBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpDistribution of Estate PropertyEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-456 California Forms of Pleading and Practice--Annotated § 456.19

§ 456.19 Business in Which Decedent Was Limited Partner

[1] In General

Until January 1, 2010, the Uniform Limited Partnership Act (ULPA) [*Corp. Code § 15501 et seq.* (ULPA)] generally governs limited partnerships formed before July 1, 1984, the operative date of the California Revised Limited Partnership Act (CRLPA) [*Corp. Code §§ 15534* (ULPA), 15711 (CRLPA); *see Corp. Code § 15611 et seq.* (CRLPA); *but see Corp. Code § 15712(b)(1)* (CRLPA) (limited partnership formed under ULPA could elect to be governed by CRLPA); *Corp. Code § 15912.06(a)(2)* (ULPA '08) (limited partnership originally formed under ULPA could elect to be governed by ULPA '08)]. Until January 1, 2010, the CRLPA generally governs limited partnerships formed on or after July 1, 1984, and before January 1, 2008, the operative date of the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code §§ 15711, 15714, 15724* (CRLPA), 15912.06(a)(1) (ULPA '08); *see Corp. Code § 15900 et seq.* (ULPA '08); *but see Corp. Code § 15912.06(a)(2)* (ULPA '08) (limited partnership governed by CRLPA could elect to be governed by ULPA '08)]. Effective January 1, 2010, the ULPA and the CRLPA are repealed [*Corp. Code § 15534* (ULPA); *Corp. Code § 15724* (CRLPA)], and all limited partnerships, regardless of the date of formation, will be governed by the ULPA '08, except as specified by the ULPA '08 [*Corp. Code § 15912.06(b)* (ULPA '08); *see Corp. Code § 15912.06(c)* (ULPA '08) (exceptions)].

The court may authorize a personal representative to take the place of the decedent as a general or limited partner in a limited partnership [*Prob. Code § 9762(a)*; *see § 456.18[5]*]. However, under the CRLPA, the addition of a new general partner is subject to certain consent requirements of the general and limited partners unless the limited partnership agreement provides to the contrary [*Corp. Code §§ 15636, 15641* (CRLPA); *see Corp. Code §§ 15901.10, 15904.01(d)* (ULPA '08)].

[2] Limited Partnership in Which Decedent Was Limited Partner

The death of a limited partner generally does not cause the dissolution of a limited partnership [*see Corp. Code § 15681* (CRLPA); *Corp. Code § 15908.01* (ULPA '08)]. However, the personal representative of a limited partner may exercise all the decedent's rights as a limited partner for the purpose of settling the estate or administering the limited partner's property [*Prob. Code § 9763(b)* (specifically referring to *Corp. Code § 15675* (CRLPA)); *see also Corp. Code § 15907.04* (ULPA '08)]. The personal representative may apply to the court for an accounting of the partnership business

as permitted under the limited partnership provisions of the Corporations Code [*Prob. Code § 9761*; *see Corp. Code §§ 15510, 15634* (CRLPA); *see also Corp. Code § 15903.04* (ULPA '08)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawLimited PartnershipsDissolution & Winding UpEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersSales of AssetsEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-456 California Forms of Pleading and Practice--Annotated § 456.20

§ 456.20 Abandonment of Tangible Personal Property

Unless tangible personal property has been specifically devised, the personal representative may dispose of it or abandon it if the cost of collecting, maintaining, and safeguarding the property would exceed its fair market value [*Prob. Code § 9780*]. Prior court authorization is not required unless provided for in the will [*Prob. Code § 9781*]. However, prior notice must be given to each known heir or devisee whose interest in the estate would be affected by the proposed abandonment, and to each person who has filed a request for special notice. Prior notice also must be given to the Attorney General of California at the Attorney General's office in Sacramento if any portion of the estate is to escheat to the state, and if the state's interest in the estate is affected by the proposed abandonment [*Prob. Code § 9782(a)*]. Notice may either be personally delivered at least five days prior to the date specified in the notice as the date on which the property will be disposed of or abandoned, or deposited in the mail at least 10 days prior to that date [*Prob. Code § 9782(c)*]. Prior notice need not be given to a person who consents in writing to the proposed abandonment or who waives the right to notice in writing [*Prob. Code § 9785*]. For a form for a notice of proposed abandonment of estate property, see *§ 456.74*.

A person who is entitled to prior notice may serve a written objection to the abandonment on the personal representative on or before the date specified in the notice as the date of disposition or abandonment. On receipt of written objection, the personal representative may not dispose of or abandon the property without authorization of the court [*Prob. Code § 9783*]. For a form for a petition for court authorization to abandon property, see *§ 456.75*.

The objector may also seek an order from the court restraining the personal representative from disposing of or abandoning the property without court authorization [*Prob. Code § 9784(a)*; *see § 456.77*]. The restraining order must be granted if the court is satisfied that the estate will not suffer any loss or unreasonable expense if the order is granted. As a condition of granting the order, the court may require the objector to pay the costs of storing and protecting the property or to provide security by bond or cash deposit that these costs will be paid [*Prob. Code § 9784(b)*]. The failure to either serve the personal representative with a written objection or obtain a restraining order waives the right to have the court review the disposition or abandonment [*Prob. Code § 9787(a)*].

If the personal representative so requests, the objector must take possession of the property within 10 days of the request. The failure to take possession relieves the personal representative of the duty of obtaining court authorization

for the abandonment [*Prob. Code § 9788(a)*]. An objector who takes possession is liable for the safekeeping of the property until a court order is made relieving him or her of the obligation [*Prob. Code § 9788(b)*].

Legal Topics:

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39-456 California Forms of Pleading and Practice--Annotated § 456.21

§ 456.21 Borrowing Money and Encumbering Property

With court authorization on a showing of advantage to the estate, the personal representative may borrow money to do any of the following: (1) pay the debts of the decedent or the estate, devises, expenses of administration, and charges against the estate; (2) pay, reduce, extend, or renew a security interest, lien, mortgage, or deed of trust already existing on property of the estate; (3) improve, use, operate, or preserve property of the estate. The personal representative may borrow on either a secured or unsecured note. Any security given may be by a security interest or other lien on personal property, or by a mortgage or deed of trust on real property [*Prob. Code § 9800*].

If the surviving spouse has elected to have his or her share of the community real property administered in the decedent's estate, the personal representative may borrow money to be secured by the real property only with the written consent of the spouse [*Prob. Code § 9800(c)*]. This consent must be filed with the court [*see Prob. Code § 9804(c)*]. Similarly, if the interest of the estate is less than the entire fee, the personal representative must join with the owners of the other interests in borrowing money on the security of the property [*see Prob. Code § 9801*].

A petition for authorization to borrow and encumber may be filed by the personal representative or by any other interested person [*Prob. Code § 9802(a)*; *see Prob. Code § 48* ("interested person" defined)]. The petition must state the purpose for which the order is sought and the necessity for or the advantage to accrue from the order. The petition must also show the amount of money proposed to be borrowed, the rate of interest to be paid, the length of time the note is to run, and a general description of the property that is proposed to be encumbered [*Prob. Code § 9802(b)*; *see § 456.79*].

If satisfied that it is to the advantage of the estate, the court must make an order authorizing or requiring the personal representative to do any one or more of the following [*Prob. Code § 9804(a)*]:

- Borrow money and execute a note.

- Execute a mortgage or deed of trust or give other security by security interest or lien.

- Pay, reduce, extend, or renew a security interest, lien, mortgage, or deed of trust already existing on property of the estate.

The court in its order may also do any one or more of the following [*Prob. Code § 9804(b)*]:

- Order that the amount specified in the petition, or a lesser amount, be borrowed.
- Prescribe the maximum rate of interest and the period of the loan.
- Require that the interest and the whole or any part of the principal be paid from time to time out of the estate.
- Require that the property to be encumbered, except unimproved real property, be insured for the further security of the lender, with the premiums to be paid out of the estate.
- Specify the purpose for which the money to be borrowed is to be applied.
- Specify the terms and conditions of any extension or renewal agreement.
- Prescribe other terms and conditions concerning the transaction the court determines to be to the advantage of the estate.

The personal representative must execute and deliver the instrument that creates the security interest in estate property. The instrument must refer to the order authorizing the encumbrance and give the date of the order [*Prob. Code § 9805(a)*].

An encumbrance of estate property extends to all of the decedent's interest in the property at the time of death and also to any interest acquired by the estate after the decedent's death, and to any interest in the community real property belonging to the decedent's surviving spouse whose written consent has been filed with the court and that is referred to in the court order obtained under *Prob. Code §§ 9800-9807* [*Prob. Code § 9806(a)*]. No omission, error, or irregularity in the proceedings impairs or invalidates the proceedings, the note, or the instrument that creates a security interest in estate property. The holder of the security interest has the same rights and remedies as if it had been made by the decedent prior to his or her death [*Prob. Code § 9806(c)*].

In general, no deficiency judgment is allowed against the personal representative or the estate if the proceeds of a foreclosure sale of encumbered property are insufficient to discharge the estate's debt on a secured note [*Prob. Code § 9807(a)*]. However, if the note and encumbrance were executed to pay, reduce, extend, or renew an encumbrance on the property that was in existence at the time of decedent's death and the indebtedness secured is a claim established under *Prob. Code §§ 9000-9399* (creditor claims), the part of the indebtedness remaining unsatisfied must be classed with other established claims [*Prob. Code § 9804(b)*; *see* Ch. 445, *Probate: Claims Against the Estate*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 456.22 Property in Which Estate Has Security Interest

If it is to the advantage of the estate, the personal representative may accept a deed to real property that secures a debt to the estate instead of foreclosing or conducting a trustee's sale. The deed must convey the property to the heirs or devisees of the decedent, subject to administration [*Prob. Code § 9850(a)*]. *Prob. Code § 9850* does not provide express authority for the acceptance of personal property in lieu of enforcement of a security interest under the California Commercial Code.

Acceptance of the deed by the personal representative must be authorized by the court [*Prob. Code § 9850(a)*]. The personal representative or any interested person [*see Prob. Code § 48* ("interested person" defined)] may file a petition stating the advantage to the estate of accepting the deed [*Prob. Code § 9850(b)* (notice of hearing on petition to be given as provided in *Prob. Code § 1220*)]. The advantage must be established by clear and convincing evidence [*Prob. Code § 9850(c)*]. The court's order may impose any terms and conditions of acceptance as the court deems appropriate [*Prob. Code § 9850(a)*].

With court authorization, the personal representative may also give a partial satisfaction of a mortgage or cause a partial reconveyance to be executed by a trustee under a deed of trust held by the estate [*Prob. Code § 9851(a)*]. The personal representative or any interested person may file a petition stating the advantage to the estate of the partial satisfaction or partial reconveyance [*Prob. Code § 9851(b)* (notice of hearing on petition to be given as provided in *Prob. Code § 1220*)]. Court authorization is not required if the partial satisfaction or partial reconveyance is executed pursuant to the terms of the mortgage or deed of trust [*Prob. Code § 9851(c)*].

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39-456 California Forms of Pleading and Practice--Annotated § 456.23

§ 456.23 Conveyance or Transfer of Property, Title or Possession to Which Is Disputed

At death, the decedent may have held possession or title to property to which another has a claim or right. The decedent also may have claimed an interest in property, possession or title of which was held by another. In such a case, the personal representative or any interested person [*see Prob. Code § 48* ("interested person" defined)] may file a petition requesting the court to compel the person with possession of or title to the property to convey or transfer it to the person entitled to it [*Prob. Code § 850(a)(2)*]. Such a conveyance or transfer is distinct from a conveyance or transfer in accordance with a sale of estate property made by the personal representative [*see* Ch. 446, *Probate: Sale of Estate Property*].

The court may order a conveyance or transfer under any of the following circumstances [*Prob. Code § 850(a)(2)*]:

- If the decedent, while living, is bound by a written contract to convey real property or to transfer personal property and dies before making the conveyance or transfer, and the decedent could have been compelled to make the conveyance or transfer.

- If the decedent, while living, bound himself or herself or his or her personal representative by written contract to convey or transfer property on or after his or her death to another and the contract is one that can be specifically enforced.

- If the decedent died in possession of or holding title to property, and the property or some interest in it is claimed by another.

- If the decedent died having a claim to property, title or possession of which is held by another.

The relief requested under the fourth circumstance is that the person holding possession or title convey or transfer the property to the personal representative [*see Prob. Code § 857* (personal representative or other person may be ordered to convey or transfer)]. For petitions requesting a court order of conveyance or transfer of property, *see §§ 456.81* and *456.83*. The action may include claims, causes of action, or matters that are normally raised in a civil action to the extent the matters are related factually to the subject matter of the petition [*Prob. Code § 855*].

If the matter concerns real property, a lis pendens may be filed, in accordance with *Code Civ. Proc. §§ 405-405.61* [*Prob. Code § 1004*]. An interested person may request time for filing a response to the petition, for discovery proceedings, or for other preparation for the hearing. A reasonable continuance must be granted for these purposes [*Prob. Code § 852*].

At or before the hearing, a person who has or claims title to or an interest in the property at issue may object to the petition on the ground that the petition was filed in a court that is not the proper court under any other provision of law for the trial of a civil action seeking the same relief. If the objection is established, the court may not grant the relief requested in the petition [*Prob. Code § 853*].

If a civil action has previously been filed with respect to the property for which a petition is filed, and jurisdiction lies in the court in which the civil action is pending, any party to the civil action may request that proceedings on the petition be abated. The court must then abate the probate proceedings until the conclusion of the civil action unless it determines that the civil action was filed for the purpose of delay [*Prob. Code § 854*]. Even if no civil action was filed, the court sitting in probate may determine that the subject of the petition should be determined in a civil action rather than in a probate proceeding, in which case it may not grant the petition [*Prob. Code § 856.5*].

In addition, an applicable statute of limitations may be a defense to the petition. Although *Prob. Code § 850* does not contain a limitations period, at least one court has applied the *Code. Civ. Proc. § 339(1)* two-year statute of limitations for oral agreements to Section 850 petitions [*see Parker v. Walker (1992) 5 Cal. App. 4th 1173, 1184-1186, 6 Cal. Rptr. 2d 908* (applying *Prob. Code § 1000*, which provides that rules of practice applicable to civil actions apply to rules of practice in proceedings under Probate Code)].

If the court is satisfied that a conveyance, transfer, or other order should be made, it must issue its order authorizing and directing the personal representative or other person who has title or possession of the property to execute a conveyance or transfer to the person entitled to the property or granting other appropriate relief [*Prob. Code § 856*; *see §§ 456.82* and *456.84*]. The order is prima facie evidence of the correctness of the proceedings and of the authority of the conveyor or transferor to make the conveyance or transfer [*Prob. Code § 857(a)*]. After entry of the order, the person entitled to the property under the order has the right to title to and possession of the property as if the property had been conveyed or transferred in accordance with the terms of the order. The conveyance or transfer of the personal representative passes title to the property as fully as if the decedent had executed it while living [*Prob. Code § 857(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersSales of AssetsEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-456 California Forms of Pleading and Practice--Annotated § 456.24

§ 456.24 Dedication or Conveyance of Easement or Access Right

With court authorization, the personal representative may do any of the following, either with or without consideration: (1) dedicate or convey real property of the estate for any purpose to the State of California or any public entity in California or to the United States or any of its agencies or instrumentalities; (2) dedicate or convey an easement over real property of the estate to any person for any purpose; (3) convey, release, or relinquish to the State of California or any public entity in California any access rights to any street, highway, or freeway from any real property in the estate; or (4) consent as a lienholder to any such dedication, conveyance, release, or relinquishment by the owner of the property that is subject to the lien [*Prob. Code § 9900*].

The personal representative or any interested person [*see Prob. Code § 48* ("interested person" defined)] may file a petition for court authorization of a dedication or conveyance of easement or access rights [*Prob. Code § 9901(a)*; *see § 456.85*]. A showing must be made that the proposed action is to the advantage of the estate and in the best interest of the interested persons [*Prob. Code § 9900*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewReal Property LawLimited Use RightsGeneral OverviewReal Property LawLimited Use RightsEasementsTermination of EasementsReal Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral Overview

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39-456 California Forms of Pleading and Practice--Annotated § 456.25

§ 456.25 Exchange of Property

With court authorization, the personal representative may exchange property of the estate for other property. The court may prescribe appropriate terms and conditions of the exchange, including a requirement that the personal representative make or receive a partial cash payment pursuant to the exchange [*Prob. Code § 9920*].

The personal representative or any interested person [*see Prob. Code § 48* ("interested person" defined)] may file a petition for court authorization of the proposed exchange. The petition must describe all property to be exchanged, set forth the terms and conditions of the proposed exchange, and show that the proposed exchange is to the advantage of the estate [*Prob. Code § 9921*; *see § 456.87*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersSales of Assets

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39-456 California Forms of Pleading and Practice--Annotated § 456.26

§ 456.26 Lease of Estate Real Property

The personal representative may lease real property of the estate without court authorization from month to month, regardless of the amount of the rental, and for a term not to exceed one year if the monthly rent does not exceed $5,000 [*Prob. Code § 9941*]. If the lease gives the lessee the right to extend the term of the lease, the length of the term is considered as if the right to extend had been exercised [*Prob. Code § 9940(b)*].

Any other lease of estate real property requires court authorization on a showing of advantage to the estate [*Prob. Code § 9942(a)*]. If the proposed lease includes an option to purchase, the petition to authorize the lease is filed under *Prob. Code §§ 9940-9948*, but the lease must satisfy the requirements for court approval of both leases and options before the transaction may be authorized by the court [*Prob. Code § 9942(b)*]. For discussion of court authorization of an option to purchase estate real property, see *§ 456.27*.

The personal representative or any interested person [*see Prob. Code § 48* ("interested person" defined)] may file a petition for court authorization of the proposed lease. The petition must include a general description of the real property to be leased, state the term, rental, and general conditions of the proposed lease, and show that the proposed lease is to the advantage of the estate [*Prob. Code § 9943(a)*; *see § 456.89*]. If the proposed lease is for a term in excess of 10 years, the petition must also state facts that show the need for the longer lease, its advantage to the estate, and its benefit to the interested persons [*Prob. Code § 9943(b)*].

At the hearing on the petition, the court must entertain and consider any other offer made in good faith at the hearing to lease the same property on more favorable terms [*Prob. Code § 9945(a)*]. However, the court may not order the property to be leased to anyone other than the proposed lessee named in the petition unless the offer made at the hearing is acceptable to the personal representative [*Prob. Code § 9945(b)*].

The court must authorize the proposed lease if it is satisfied that it will be to the advantage of the estate. If the lease is for a term in excess of 10 years, the court must also find the lease to be to the benefit of interested persons [*Prob. Code § 9945(b)*].

The court's order must set forth the minimum rent or royalty or both and the term of the lease [*Prob. Code § 9946(a)*].

The term of the lease may be for such a period as the court may authorize [*Prob. Code § 9947(a)*]. However, a term in excess of 10 years may not be authorized over the objection of any heir or devisee who has an interest in the property that is to be leased [*Prob. Code § 9947(b)*]. A term other than for a fixed period may be authorized in the case of a lease for the exploration, production, or removal of natural resources [*see Prob. Code § 9947(c)*].

Other terms and conditions of the lease may be specified in the order as the court deems appropriate [*Prob. Code § 9946(b)*]. If the lease covers additional property owned by other persons or an interest of the decedent that is less than the entire ownership in the property, the order may authorize the lease to provide for a division of rental and royalty income in the proportion that the land or interest of each owner bears to the total area of the land or total interest covered by the lease [*Prob. Code § 9946(c)*].

The personal representative must execute, acknowledge, and deliver the lease as directed by the court's order. The lease must specify that it is made by authority of the court order and state the date of the order [*Prob. Code § 9948(a)*]. The lease is effective to lease the premises at the rent, for the term, and on the terms and conditions prescribed in the order [*Prob. Code § 9948(b)*]. The probate jurisdiction of the court vests the court with jurisdiction to make the order for the lease. This jurisdiction conclusively inures to the benefit of the lessee and of the lessee's heirs and assigns [*Prob. Code § 9948(c)*]. No omission, error, or irregularity in the proceedings impairs or invalidates the lease [*Prob. Code § 9948(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsLease AgreementsGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-456 California Forms of Pleading and Practice--Annotated § 456.27

§ 456.27 Option to Purchase Real Property

[1] Exercise of Option Given by Testator

If an option to purchase real or personal property of the decedent is given in the will, the person given the option has the right to exercise it at any time within any limits provided in the will. If a time limitation in the will is measured from the death of the testator, that time is extended by the period between the testator's death and the issuance of letters, or by six months, whichever is the shorter period [*Prob. Code § 9980(a)*]. If the will is silent as to the period in which the option may be exercised, a time limit of one year from the death of the testator is imposed by law [*Prob. Code § 9980(b)*]. If the estate is closed before the expiration of the period within which the option may be exercised, the property must be distributed subject to the option [*Prob. Code § 9980(c)*].

Either the personal representative or the person given the option may file a petition for a court order directing the personal representative to transfer or convey the property in accordance with the terms of the will [*Prob. Code § 9981*]. The court must either determine that the rights of the creditors of the estate will not be impaired by the exercise of the option or require a bond in an amount and with such a surety as the court may direct or approve [*Prob. Code § 9982*]. No omission, error, or irregularity in the proceedings impairs or invalidates a transfer or conveyance made under an order directing the transfer or conveyance [*Prob. Code § 9983*].

[2] Grant of Option by Personal Representative

With court authorization, the personal representative may grant an option to purchase real property of the estate for a period within or beyond the period of administration [*Prob. Code § 9960*]. To obtain court authorization, the personal representative must file a petition that describes the property, states the terms and conditions of the proposed option, and shows that granting the option is to the advantage of the estate [*Prob. Code § 9961*].

The purchase price of the property on which the option to purchase is proposed to be given must be at least 90 percent of the appraised value of the property. The appraisal on which the value is based must have been made in the manner prescribed by *Prob. Code § 10309(c)* within one year prior to the hearing on the petition [*Prob. Code § 9962*].

To authorize the option, the court must find that good reason exists to grant it and that it is to the advantage of the estate

[*Prob. Code § 9964(a)(1)*]. The court must also find that it does not appear that an offer for the property that exceeds the option price by 10 percent on the first $10,000 and 5 percent on the balance may be obtained [*Prob. Code § 9964(a)(2)*; *see Prob. Code § 10311*]. The court must also be satisfied that it does not appear that an offer to purchase the property on better terms than those of the proposed option may be obtained. An offer is better only if it is materially more advantageous to the estate [*Prob. Code § 9964(a)(3)*]. A higher offer made either for cash or on the same or different credit terms, or a better offer, may be considered only if the personal representative informs the court that the offer is acceptable before the court makes its order authorizing the option [*Prob. Code § 9964(b)*].

A recorded but unexercised option granted by the personal representative expires of record if not exercised within the statutory limits applicable to unexercised options in general [*Prob. Code § 9965*; *see Civ. Code §§ 884.010-884.030*]. No omission, error, or irregularity in the proceedings impairs or invalidates the option [*Prob. Code § 9966*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-456 California Forms of Pleading and Practice--Annotated § 456.28

§ 456.28 Partition

If two or more beneficiaries are entitled to the distribution of undivided interests in estate property and they cannot agree among themselves to a partition, allotment, or other division of the property, any one of them may petition the court, or request the personal representative to petition the court, for partition of the property, or for any other division that will be equitable and avoid the distribution of undivided interests [*Prob. Code § 11950(a)*; *see § 456.91*]. The petition may be filed at any time before an order for distribution of the affected property becomes final [*Prob. Code § 11951(a)*]. It may even be filed before the time to make claims has expired [*see* Cal. L. Revision Comm'n Comments to *Prob. Code § 11951*]. The proceeding is limited to interests in the property that are subject to administration. The proceeding does not include other interests except to the extent that the owners of other interests consent to be bound by the partition, allotment, or other division [*see Prob. Code § 11950(b)*].

After an evidentiary hearing [*see Prob. Code § 11952*], the court must partition, allot, or divide the property so that each party receives property with a value proportionate to the value of his or her interest in the whole. The court may direct the personal representative to sell the property if, under the circumstances, sale would be more equitable than partition and the property cannot conveniently be allotted to any one party. The sale must be conducted in the same manner as other sales made during administration of an estate. Any two or more parties may agree to accept the undivided interests [*Prob. Code § 11953*; for sales of estate property, *see* Ch. 446, *Probate: Sale of Estate Property*].

If requested to do so by any party, the court, in its discretion, may appoint one or three referees to partition the property. The number of referees appointed must conform to the request of at least one of the parties. The referees have the powers and duties of referees in other civil actions for the partition, and the courts have the same powers with respect to the referees' report [*Prob. Code § 11954*; for discussion of referees' powers, duties, and reports, *see* Ch. 397, *Partition*].

The expenses of partition must be equitably apportioned by the court among the parties. The amount charged to each party must be included and specified in the order and, to the extent unpaid, constitutes a lien on the property allotted to the party [*Prob. Code § 11955*].

The partition, allotment, or other division made by the court controls in any proceedings for distribution, unless modified for good cause and on reasonable notice. The proceedings may be reviewed on appeal from the order for

distribution [*Prob. Code § 11956*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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[Reserved]

§§ 456.29[Reserved]

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§ 456.40 State Statutes

[1] Duties and Liabilities of Personal Representative

Standard of care to manage estate. *Prob. Code § 9600*

Liability for breach of fiduciary duty. *Prob. Code § 9601*

Liability for interest. *Prob. Code § 9602*

Availability of other remedies for breach of fiduciary duty. *Prob. Code § 9603*

Personal representative's promise to pay for decedent's liability or debts. *Prob. Code § 9604*

[2] Court Supervision

Personal representative released from claims when judgment or order becomes final. *Prob. Code § 7250*

Extent of court supervision. *Prob. Code § 9610*

Instructions from or confirmation by court. *Prob. Code § 9611*

Order directing personal representative to act or not to act. *Prob. Code § 9613*

Summary determination of disputes by temporary judge. *Prob. Code § 9620*

Summary determination of disputes by arbitration. [*Prob. Code § 9621*

[3] Joint Personal Representatives

Authority of joint personal representatives to act. *Prob. Code § 9630*

Liability of one of joint personal representatives for breach of duty by another. *Prob. Code § 9631*

[4] General Management Duties of Personal Representative

Possession and management of decedent's estate. *Prob. Code § 9650*

Taking possession of property in good faith. *Prob. Code § 9651*

Duty to keep cash invested. *Prob. Code § 9652*

Duty to recover property transferred in fraud of creditors. *Prob. Code § 9653*

Right to bring action for possession of property or to quiet title. *Prob. Code § 9654*

Rights pursuant to corporate shares in estate. *Prob. Code § 9655*

Power to procure insurance. *Prob. Code § 9656*

Effect of profit or loss to estate. *Prob. Code § 9657*

[5] Deposit of Money and Personal Property With Financial Institution

Deposit of money in insured account. *Prob. Code § 9700*

Deposit of personal property with trust company. *Prob. Code § 9701*

Deposit of securities in securities depository. *Prob. Code § 9702*

When court authorization is required for withdrawal of money or personal property. *Prob. Code § 9703*

Direct distribution by depository. *Prob. Code § 9704*

Interest on deposits by trust company. *Prob. Code § 9705*

[6] Investments and Purchase of Property

Investments permitted without court authorization. *Prob. Code § 9730*

Court authorization for investment in securities. *Prob. Code § 9731*

Investments in manner provided by will. *Prob. Code § 9732*

Purchase of annuity as required by will. *Prob. Code § 9733*

Exercise of option right by personal representative *Prob. Code § 9734*

Purchase of securities or commodities sold short. *Prob. Code § 9735*

Right of personal representative to hold securities in nominee form. *Prob. Code § 9736*

Exercise of subscription rights by personal representative. *Prob. Code § 9737*

[7] Operation of Decedent's Business

Uniform Partnership Act (repealed eff. January 1, 1999). former *Corp. Code §§ 15001 et seq.*

Partnership agreement governs rights of successor of deceased partner. former *Corp. Code § 15018*

Deceased partner's rights in specific partnership property vests in surviving partners. former *Corp. Code § 15025(2)(d)*

Effect of death of general partner on dissolution of partnership. former *Corp. Code § 15031(4)*

Liability of individual property of deceased partner for partnership debts incurred before death. *Corp. Code § 15036(4)*

Liability of individual property of deceased partner for contribution to pay partnership liabilities liquidated after death. former *Corp. Code § 15040(d), (g)*

Continuation of business after partner's death. former *Corp. Code § 15041*

Uniform Partnership Act of 1994 (effective January 1, 1997, and applicable to all general partnerships on and after January 1, 1999). *Corp. Code § 16100 et seq.*

Relations among and between partners governed by partnership agreement. *Corp. Code § 16103(a)*

Rights and duties of surviving partners, legal representatives of deceased partners, and their creditors to be given full force and effect, notwithstanding inconsistent provisions of Probate Code. *Corp. Code § 16109*

Effective dates of Act, and partnerships to which it applies. *Corp. Code § 16111*

Property acquired by partnership as property of partnership and not of partners individually. *Corp. Code § 16203*

All partners jointly and severally liable for partnership obligations. *Corp. Code § 16306(a)*

Person may become partner only with consent of all partners. *Corp. Code § 16401(i)*

Right to share of profits, losses, and distributions is only transferable interest of partner. *Corp. Code § 16502*

Individual who is partner is dissociated from partnership upon death. *Corp. Code § 16601(7)(a)*

Rights of dissociated partner. *Corp. Code § 16603*

Partnership's obligation to purchase deceased partnership's interest in partnership. *Corp. Code §§ 16701, 16701.5*

Personal representative's right to accounting of partnership affairs. *Prob. Code § 9761*

Probate court's authority to order that personal representative act as partner. *Prob. Code § 9762*

Personal representative's right to commence and maintain any action against surviving partners that deceased partner could have commenced and maintained. *Prob. Code § 9763*

[8] Abandonment of Tangible Personal Property

Authority to abandon estate property. *Prob. Code § 9780*

Right of personal representative to abandon estate property without court authorization. *Prob. Code § 9781*

Notice of abandonment. *Prob. Code §§ 9782, 9785*

Objection to abandonment. *Prob. Code § 9783*

Restraining order available to objector. *Prob. Code § 9784*

Notice of hearing. *Prob. Code § 9786*

Waiver of right to court review of abandonment. *Prob. Code § 9787*

Tender of possession of property to person objecting to abandonment. *Prob. Code § 9788*

[9] Borrowing Money and Encumbering Property

Authority to encumber estate property as security for borrowed funds. *Prob. Code § 9800*

Encumbrances on jointly owned property. *Prob. Code § 9801*

Petition to borrow and encumber. *Prob. Code § 9802*

Notice of hearing. *Prob. Code § 9803*

Hearing and order on petition. *Prob. Code § 9804*

Effect of encumbrance. *Prob. Code § 9806*

Deficiency judgment. *Prob. Code § 9807*

[10] Mortgage or Deed of Trust Held by Estate

Acceptance of deed in lieu of foreclosure or trustee's sale. *Prob. Code § 9850*

Grant of partial satisfaction or partial reconveyance. *Prob. Code § 9851*

[11] Title to Disputed Property

Petition to compel transfer or conveyance of property subject to dispute of title or possession. *Prob. Code § 850*

Notice of hearing. *Prob. Code § 851*

Continuance to prepare for hearing. *Prob. Code § 852*

Objection based on venue. *Prob. Code § 853*

Abatement if civil action is pending. *Prob. Code § 854*

Inclusion of claims which are related factually to the subject matter of the petition. *Prob. Code § 855*

Denial of petition if matter should be determined by civil action. *Prob. Code § 856.5*

Issuance of order. *Prob. Code § 856*

Effect of order and conveyance or transfer. *Prob. Code § 857*

Filing of lis pendens. *Prob. Code § 1004*

[12] Dedication or Conveyance of Easement or Access Right

Right of personal representative to dedicate or convey easement in estate real property. *Prob. Code § 9900*

Petition and notice of hearing for court authorization. *Prob. Code § 9901*

[13] Exchange of Estate Property

Exchange of estate property with court authorization. *Prob. Code § 9920*

Petition for order to exchange property. *Prob. Code § 9921*

Notice of hearing. *Prob. Code § 9922*

Effect of procedural error on exchange. *Prob. Code § 9923*

[14] Lease of Estate Property

Definition of terms related to leases. *Prob. Code § 9940*

Leases without court authorization. *Prob. Code § 9941*

Leases requiring court authorization. *Prob. Code § 9942*

Petition for order authorizing lease. *Prob. Code § 9943*

Notice of hearing. *Prob. Code § 9944*

Hearing and order authorizing lease of estate property. *Prob. Code § 9945*

Terms and conditions of lease in court order. *Prob. Code § 9946*

Maximum term of lease. *Prob. Code § 9947*

Effect of lease. *Prob. Code § 9948*

[15] Option to Purchase Estate Property

Court authorization of lease including option to purchase estate real property. *Prob. Code § 9942(b)*

Court authorization for personal representative to grant option to purchase estate real property. *Prob. Code § 9960*

Petition for order authorizing grant of option to purchase estate real property. *Prob. Code § 9961*

Minimum purchase price pursuant to option to purchase estate real property. *Prob. Code § 9962*

Notice of hearing. *Prob. Code § 9963*

Order authorizing option to purchase estate real property. *Prob. Code § 9964*

Expiration of record of recorded option. *Prob. Code § 9965*

Effect of procedural error on granting of option under court order. *Prob. Code § 9966*

Exercise of option to purchase estate real or personal property given in will. *Prob. Code § 9980*

Petition, notice, and order directing personal representative to transfer or convey property to optionee. *Prob. Code § 9981*

Protection of creditor rights. *Prob. Code § 9982*

Effect of procedural error on transfer or conveyance of property to person given option in will. *Prob. Code § 9983*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionDeath & IncapacityBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpWinding UpDistribution of Estate PropertyEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewReal Property LawEstatesGeneral Overview

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39-456 California Forms of Pleading and Practice--Annotated § 456.41

§ 456.41 Local Rules of Court

[1] Los Angeles County

Petition to determine title to estate property. Los Angeles Co. Super. Ct. Rules, Rule 10.73

Petition for permission to operate business. Los Angeles Co. Super. Ct. Rules, Rule 10.76

Bond on petition for authority to borrow money. Los Angeles Co. Super. Ct. Rules, Rule 10.77

[2] Orange County

Sales. Orange Co. Super. Ct. Rules, Rule 606.01 et seq.

Petitions for authority to borrow money. Orange Co. Super. Ct. Rules, Rule 607.02

Petitions to determine title to real or personal property pursuant to *Prob. Code § 850*. Orange Co. Super. Ct. Rules, Rule 607.03

Petitions for permission to continue operation of a decedent's business. Orange Co. Super. Ct. Rules, Rule 607.04

[3] Riverside County

Petition for authority to operate business. Riverside Co. Consol. Ct. Rules, Rule 6.0703

Sales. Riverside Co. Consol. Ct. Rules, Rule 6.0901

[4] San Francisco

Sales. San Francisco Uniform Super. Ct. Rules, Rules 14.64, 14.65

Borrowing money. San Francisco Uniform Super. Ct. Rules, Rule 14.97

Operating a business. San Francisco Uniform Super. Ct. Rules, Rule 14.98

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39-456 California Forms of Pleading and Practice--Annotated § 456.42

§ 456.42 Decisions

[1] Jurisdiction to Determine Right to Property

Probate court lacks jurisdiction to order person in possession, under disputed joint tenancy deed, of property claimed by estate to surrender property to personal representative before claim is adjudicated; petition to compel conveyance and recording of lis pendens as sole procedure to prevent alienation. *Maltaman v. State Bar (1987) 43 Cal. 3d 924, 952, 239 Cal. Rptr. 687, 741 P.2d 185* (decided under prior, but substantially similar law)

Beneficiary who claimed co-beneficiaries had stolen funds from trust estate was entitled to conduct discovery relevant to her objections and was not required to file petition under *Prob. Code § 850* to establish entitlement to an offset against accused co-beneficiaries' shares of trust estate, because beneficiary did not actually seek order transferring funds to her or to the estate. *Mota v. Superior Court (2007) 156 Cal App 4th 351, 67 Cal Rptr. 3d 303*

Probate court has jurisdiction to determine rights in proceeds of sale of property, title to which was disputed by estate and other claimant. *Estate of Blair (1988) 199 Cal. App. 3d 161, 165-166, 244 Cal. Rptr. 627* (decided under prior, but substantially similar law)

By implication, probate court has jurisdiction to determine rights of persons who are beneficiaries both of estate and of Totten trust bank account as against claim of cotrustee of account. *Estate of Fisher (1988) 198 Cal. App. 3d 418, 244 Cal. Rptr. 5* (decided under prior, but substantially similar law; question of whether funds could, under any theory, be considered as probate property not considered)

Probate court lacks jurisdiction to determine claim of executor (spouse of decedent) for recovery of his or her own community property interest in property transferred by decedent to another prior to death. *Estate of Scott (1987) 197 Cal. App. 3d 913, 918-920, 243 Cal. Rptr. 93* (decided under prior but substantially similar law)

Probate court has jurisdiction to determine adverse claims to property claimed by estate; complete civil trial required. *Dixon v. Superior Court (1987) 195 Cal. App. 3d 758, 764, 240 Cal. Rptr. 897* (decided under prior, but substantially similar law)

Probate court lacks jurisdiction to determine reasonable value of services rendered by decedent under contingent fee agreement for legal services, which had not been fully performed as of decedent's death, as right to fees does not arise until contract is completed and thus decedent had no claim as of death. *Estate of Linnick (1985) 171 Cal. App. 3d 752, 760-764, 217 Cal. Rptr. 552* (decided under prior, but substantially similar law)

Proceeding by will beneficiary to assert claim to estate property based on source of right independent of will does not constitute will contest that would invoke no-contest clause. *Estate of Black (1984) 160 Cal. App. 3d 582, 590, 206 Cal. Rptr. 663* (decided under prior, but substantially similar law)

Security interest in property is insufficient to constitute interest in property conferring jurisdiction on probate court to determine holder's right to property. *Estate of Sayles (1982) 130 Cal. App. 3d 275, 279-280, 181 Cal. Rptr. 543* (decided under prior, but substantially similar law)

Parties in probate proceeding to determine title to property are entitled to jury trial. *Heiser v. Superior Court (1979) 88 Cal. App. 3d 276, 279-282, 151 Cal. Rptr. 745* (decided under prior, but substantially similar law)

Advantage to trial of disputed title to property in probate proceeding rather than in civil action as conclusiveness of judgment in probate against "whole world" rather than as to parties only. *Heiser v. Superior Court (1979) 88 Cal. App. 3d 276, 278, 151 Cal. Rptr. 745* (decided under prior, but substantially similar law)

[2] Partnership Interest of Decedent

Terms of partnership agreement concerning disposition of interest of deceased partner is enforceable. *Estate of Foreman (1969) 269 Cal. App. 2d 180, 181-192, 74 Cal. Rptr. 699*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateJurisdiction & VenueGeneral Overview

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PART III. RESEARCH GUIDE

39-456 California Forms of Pleading and Practice--Annotated § 456.43

§ 456.43 Law Reviews

Schwartzel, *Continuing a Decedent's Business: Selected Creditors' Rights and Fiduciary Liability Issues*, *26 Real. Prop., Prob. & Tr. J. 775 (1992)*.

Leydorf, *The Subchapter S Corporation-- Some Probate Aspects*, 47 LA Bar B. 193 (1972)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-456 California Forms of Pleading and Practice--Annotated § 456.44

§ 456.44 Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, §§ 413, 414, 475-514 (10th ed. 2005).

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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[Reserved]

§§ 456.45[Reserved]

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39-456 California Forms of Pleading and Practice--Annotated § 456.60

§ 456.60 Petition for Order Directing Personal Representative to Act or to Refrain From Acting [Prob. Code § 9613]

[1] FORM Petition for Order Directing Personal Representative to Act or to Refrain From Acting [Prob. Code § 9613]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	PETITION FOR ORDER DIRECTING PERSONAL
Deceased.	)	REPRESENTATIVE TO _____
	)	[ACT *or*
		REFRAIN FROM ACTING]

_____

Petitioner alleges:

1. Petitioner, _____ [*name*], is _____ [*specify petitioner's status as person interested in estate, e.g.,* a residuary beneficiary of the estate of _____ (*name*), deceased].

2. _____ [*Name*], the duly appointed personal representative of this estate, _____ [proposes *or* refuses] to take the following action in the course of estate administration: _____ [*specify, e.g.,* to lease residential real property of the estate located at _____ (*address*) for a term of one year].

3. Unless the personal representative is _____ [ordered to take *or* prohibited from taking] this action by the court, the estate will suffer great or irreparable injury because _____ [*specify reason, e.g.,* income from the property will be lost during the period of administration *or* the personal representative will be unable

to deliver possession of the property to petitioner until after the term of the lease expires].

WHEREFORE, petitioner prays for an order of this court _____ [directing *or* prohibiting] the personal representative _____ [*specify act, e.g.,* from leasing the real property of the estate located at _____ (*address*) for a term of one year], and for such other orders as the court deems proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name of personal representative*], declare:

I am the Petitioner in this matter. I have read this Petition and know its contents. From my own knowledge, I know that they are true, except as to those matters that are stated on information and belief. As to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is for use by a person interested in an estate to petition the court to either direct the personal representative to take a particular action or to prohibit the personal representative from taking a proposed action [*see Prob. Code § 9613(a)*]. If the petitioner proposes to restrain a proposed act, it should first be determined whether the act is one that otherwise requires court authorization [*see, e.g., Prob. Code § 9941(a)* (when real property may be leased for term not exceeding one year without court authorization)]. If court authorization is required, it is not necessary to file a petition for court prohibition. Rather, objections can be filed in response to the personal representative's petition for authorization.

[3] Persons Interested in the Estate

This petition may be filed by anyone who is an "interested" person in the estate. Interested persons include any heir, devisee, child, spouse, creditor, or beneficiary of the decedent and any other person who has a property right in or claim against the estate that may be affected by the proceeding [*Prob. Code § 48(a)(1)*]. The meaning of "interested persons" as it relates to particular persons may vary from time to time, and must be determined according to the particular

purposes and matters involved in any proceeding [*Prob. Code § 48(b)*].

[4] Notice Requirements

Notice of the hearing must be given by mail at least 15 days before the date of the hearing [*Prob. Code § 9613(b)*; *see Prob. Code § 1220*]. For further discussion of the notice requirement and for forms of notice, *see* Ch. 447, *Probate: Statutory Notice Requirements* .

[5] State Statutes

Verified petition as admissible evidence in uncontested proceeding. *Prob. Code § 1022*

Order directing personal representative to act or not to act concerning the estate. *Prob. Code § 9613*

[6] Cross References

For a related form, see *§ 456.61*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.61

§ 456.61 Order Directing Personal Representative to Act or to Refrain From Acting [Prob. Code § 9613]

[1] FORM Order Directing Personal Representative to Act or to Refrain From Acting [Prob. Code § 9613]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER DIRECTING PERSONAL
Estate of _____ [*name*],	)	REPRESENTATIVE TO _____
Deceased.	)	[ACT *or* REFRAIN FROM ACTING]
	)	[*Prob. Code § 9613*]

_____

The verified petition of _____ [*name*], an interested person in the estate of _____ [*name*], deceased, praying for an order directing the personal representative to _____ [act *or* refrain from acting], came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. Objection to the petition was filed by _____ [*name*], the duly appointed personal representative of this estate.

The Court finds from proof made to the satisfaction of the Court:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. The personal representative of this estate _____ [proposes *or* refuses] to _____ [*specify action, e.g.,* lease residential real property of the estate located at _____ (*address*) for a term of one year].

3. Unless the personal representative _____ [takes *or* refrains from taking] this action, the estate will suffer great or irreparable injury because _____ [*specify reason, e.g.,* income from the property will be lost during the period of administration *or* the personal representative will be unable to de liver possession of the property to petitioner until after the term of the lease expires].

WHEREFORE, IT IS ORDERED as follows:

1. The personal representative _____ [shall *or* shall not] _____ [*specify act, e.g.,* enter into a lease of the real property of the estate located at _____ (*address*) for a term of one year].

[2. _____ (*Specify any appropriate terms and conditions of required act, e.g.,* The lease shall provide for the right of the personal representative to assign the lessor's interest to the devisee of the property).]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use as a court order that either requires the personal representative to take a given action in the course of estate administration or prohibits the personal representative from taking the action. The order may include any terms and conditions that the court deems appropriate under the circumstances [*Prob. Code § 9613*].

[3] State Statutes

Finding of giving or waiver of notice as required in probate orders. *Prob. Code § 1260(b)*

Order directing personal representative to act or to refrain from acting. *Prob. Code § 9613*

[4] Cross References

For a related form, see *§ 456.60*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.62

§ 456.62 Petition for Authority to Invest in Securities [Prob. Code § 9731]

[1] FORM Petition for Authority to Invest in Securities [Prob. Code § 9731]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR
Estate of _____ [*name*],	)	AUTHORITY TO INVEST IN SECURITIES
Deceased.	)	[*Prob. Code § 9731*]
	)	

_____

Petitioner alleges:

1. Petitioner is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. This estate is not in a condition to be finally distributed for at least _____ [*specify time, e.g.,* one year] because _____ [*specify reason, e.g.,* it does not appear that the will contest filed in this matter will be resolved within a shorter period of time].

3. Petitioner has on hand money of the estate in the sum of $_____. Of this amount, the sum of $_____ is required for reserve in meeting all debts, devises, expenses of administration, taxes, and the family allowance, leaving a balance of $_____. Petitioner is under a duty to keep this amount invested in interest-bearing accounts or other investments authorized by law.

4. Petitioner proposes to invest this sum in _____ [*specify particular securities in which investment is*

sought, e.g., 100 shares of common stock in Giantco, Inc., a federally registered securities issue].

5. This proposed investment is to the advantage of the estate because _____ [*state reason, e.g.,* Giantco, Inc., common stock has performed well over recent months, and market projections indicate that the likely rate of return on this investment should greatly exceed that available on investments in direct governmental obligations or on interest-bearing savings accounts].

WHEREFORE, petitioner prays for an order authorizing investment in the sum of $_____ in _____ [*specify securities*], pending the distribution of the estate, and for such other orders as the court deems proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 456.60.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is for use by the personal representative to request an order authorizing the investment of estate funds in securities [*see Prob. Code § 9731*]. This petition may be also be filed by any person who is interested in the estate [*Prob. Code § 9731(b)*]. For the definition of "interested persons," see *§ 456.60*.

[3] Contents

The petition must state the types of securities that are proposed to be purchased (Paragraph 4) and the advantage to the estate of the purchase (Paragraph 5) [*Prob. Code § 9731(b)*].

[4] Authorized Investments

In general, it is the duty of the personal representative to keep estate funds invested in interest-bearing accounts or other investments authorized by law [*Prob. Code § 9652(a)*]. The duty of the personal representative is to preserve estate assets rather than to increase the value of the estate through speculative investments [*Estate of McSweeney (1954) 123 Cal. App. 2d 787, 793, 268 P.2d 107]* . However, investments in governmental obligations may be undertaken without court authorization [*Prob. Code § 9730*]. Investment in securities may be made only with court authorization [*Prob. Code § 9731*].

[5] Notice Requirements

Notice of the hearing must be given by mail at least 15 days before the date of the hearing [*Prob. Code § 9731(c)*; *see Prob. Code § 1220*]. For further discussion of the notice requirement and for forms of notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

[6] State Statutes

Verified petition as admissible evidence in uncontested proceeding. *Prob. Code § 1022*

Duty of personal representative to keep cash invested. *Prob. Code § 9652*

Investments permitted without court authorization. *Prob. Code § 9730*

Investments in securities with court authorization. *Prob. Code § 9731*

[7] Cross References

For a related form, see *§ 456.63*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.63

§ 456.63 Order Authorizing Investment in Securities [Prob. Code § 9731]

[1] FORM Order Authorizing Investment in Securities [Prob. Code § 9731]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER AUTHORIZING INVESTMENT IN SE-
Deceased.	)	CURITIES
	)	[*Prob. Code § 9731*]

_____

The verified petition of _____ [*name*], the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased, praying for an order authorizing the investment of estate funds in certain securities, came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. [Objections were filed by _____ (*name and description of objector, e.g.,* John Jones, a residuary beneficiary of the estate), who appeared by counsel _____ (*name*).]

The Court finds from proof made to the satisfaction of the Court:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. This estate may not be finally distributed for a period of at least _____ [*time*] because _____ [*specify reason*].

3. Petitioner currently holds funds in the amount of $_____. The maximum amount of funds that is reasonably likely to be required to pay all debts, devises, expenses of administration, taxes, and the family allowance is $_____.

4. The amount of $_____, which represents the excess of available funds over funds needed to pay all debts, devises, expenses of administration, taxes, and the family allowance, is available for investment by petitioner.

5. _____ [*Specify investment to be authorized, e.g.,* The common stock of Giantco., Inc.,] is a duly registered security of _____ [the United States *or* California].

6. Investment of estate funds in _____ [*specify, e.g.,* the common stock of Giantco., Inc.,] is to the advantage of the estate because _____ [*specify reason, e.g.,* Giantco, Inc., common stock has performed well over recent months, and market projections indicate that the likely rate of return on this investment should greatly exceed that available on investments in direct governmental obligations or on interest-bearing savings accounts).

WHEREFORE, IT IS ORDERED that _____ [*name*], as personal representative of the estate of _____ [*name*], deceased, may invest the sum of $_____ for the benefit of the estate, pending its final distribution, in the following securities: _____ [*specify*].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use as a court order that authorizes the personal representative to invest in securities [*Prob. Code § 9731*].

[3] State Statutes

Finding of giving or waiver of notice as required in order. *Prob. Code § 1260(b)*

Investment in federal or state securities permitted with court authorization. *Prob. Code § 9731*

[4] Cross References

For a related form, see *§ 456.62*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.64

§ 456.64 Petition for Order Authorizing Investments Provided for in Will [Prob. Code § 9732]

[1] FORM Petition for Order Authorizing Investments Provided for in Will [Prob. Code § 9732]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR
Estate of _____ [*name*],	)	AUTHORITY TO INVEST
Deceased.	)	AS PROVIDED IN WILL
	)	[*Prob. Code § 9732*]
	)	

_____

Petitioner alleges:

1. Petitioner is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. Petitioner has on hand funds of the estate in the sum of $_____. Of this amount, the sum of $_____ is required for reserve in meeting all debts, devises, expenses of administration, taxes, and the family allowance, leaving a balance of $_____.

3. The time for filing claims has expired.

[*EITHER*]

4. All debts (as defined in *Probate Code § 11401*) have either been paid or are sufficiently secured.

[*OR*]

4. There is sufficient cash in the estate, apart from the funds for which investment authorization is sought in this Petition, to ensure that all debts (as defined in *Probate Code § 11401*) will be paid.

[*CONTINUE*]

5. This estate is not in a condition to be finally distributed for at least _____ [*specify time, e.g.,* one year] because _____ [*specify reason, e.g.,* it does not appear that the will contest filed in this matter will be resolved within a shorter period of time].

6. Decedent's will provides that funds of the estate _____ [may *or* shall] be invested in the following manner: _____ [*specify, e.g.,* in the common stock of Aggressive Dynamics, Inc., a corporation of which decedent was a director]. A copy of the paragraph of decedent's will that contains this provision is attached as Exhibit A and made a part hereof.

WHEREFORE, Petitioner prays for an order of this court authorizing the investment of estate funds in the amount of $_____ in the manners provided for in decedent's will, and for such other orders as the court deems proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 456.60.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is for use by the personal representative to request an order authorizing the investment of estate funds in the manner provided for in the decedent's will [*see Prob. Code § 9732*]. This petition may be filed by the personal representative or by any person who is interested in the estate [*Prob. Code § 9732(b)*]. For the definition of "interested persons," see *§ 456.60*.

[3] Contents

The petition must show the general condition of the estate (Paragraph 2) and the types of investments that are proposed to be made (Paragraph 6) [*Prob. Code § 9732(b)*]. The petition also states that (1) the time for filing claims has expired (Paragraph 3); (2) all debts (as defined in *Probate Code § 11401*) have been paid or are sufficiently secured or there is sufficient cash in the estate, aside from the money to be invested, to pay all debts (Paragraph 4); and (3) the estate is not

in a condition to be finally distributed (Paragraph 5) [*Prob. Code § 9732(a)*].

[4] Notice Requirements

Notice of the hearing must be given by mail at least 15 days before the date of the hearing [*Prob. Code § 9732(c)*; *see Prob. Code § 1220*]. Notice is specifically required to be served by mail on all known devisees of the property that is proposed to be invested. If the property is devised in trust, notice must be mailed to the trustee or, if the trustee has not yet accepted the trust, to the person named in the will as trustee [*Prob. Code § 9732(c)*]. For further discussion of the notice requirement and for forms of notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

[5] Objections

If an interested person objects to the investments, it appears from the language of the statute that the court must uphold the objection and deny authority to make the investments. Even if no objection is filed, the court may still deny the investment unless it finds that there is no substantial reason why the investment powers given by the will should not be exercised [*Prob. Code § 9732(d)*]. For additional discussion, see *§ 456.15*.

[6] State Statutes

Verified petition as admissible evidence in uncontested proceeding. *Prob. Code § 1022*

Investment of money as provided in will. *Prob. Code § 9732*

[7] Cross References

For a related form, see *§ 456.65*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.65

§ 456.65 Order Authorizing Investments Provided for in Will [Prob. Code § 9732]

[1] FORM Order Authorizing Investments Provided for in Will [Prob. Code § 9732]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER AUTHORIZING INVESTMENTS
Estate of _____ [*name*],	)	PROVIDED FOR IN WILL
Deceased.	)	[*Prob. Code § 9732*]
	)	

The verified petition of _____ [*name*], the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased, praying for an order authorizing the investment of estate funds as provided for in decedent's will, came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*].

The Court finds from proof made to the satisfaction of the Court:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. The will of decedent provides _____ [*specify, e.g.*, that funds of the estate may be invested in the common stock of Aggressive Dynamics, Inc., a corporation in which decedent was a director].

3. The time for filing claims in this matter has expired.

[*EITHER*]

4. All debts (as defined in *Probate Code § 11401*) have either been paid or are sufficiently secured.

[*OR*]

4. There is sufficient cash in the estate, apart from the funds for which investment authorization is sought in the petition, to ensure that all debts (as defined in *Probate Code § 11401*) will be paid.

[*CONTINUE*]

5. This estate is not in a condition to be finally distributed for at least _____[*specify time, e.g.,* one year] because _____ [*specify reason, e.g.,* it does not appear that the will contest filed in this matter will be resolved within a shorter period of time].

6. No objection to the petition has been filed in this matter, and there is no substantial reason why the investment powers given by the will should not be exercised.

WHEREFORE, IT IS ORDERED that the personal representative shall invest funds of the estate in the amount of $_____ in _____ [*specify, e.g.,* the common stock of Aggressive Dynamics, Inc.] as provided in decedent's will _____ [for a period of _____ (*time*) *or* until the administration of the estate is completed].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is a court order that authorizes the personal representative to make investments as provided in decedent's will [*see Prob. Code § 9732*]. The order may be for a limited period or until administration of the estate is completed [*Prob. Code § 9732(d)*].

[3] State Statutes

Finding of giving or waiver of notice as required in order. *Prob. Code § 1260(b)*

Investment of money as provided in will. *Prob. Code § 9732*

[4] Cross References

For a related form, see *§ 456.64*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.66

§ 456.66 Petition for Order Authorizing Purchase of Annuity to Satisfy Devise [Prob. Code § 9733]

[1] FORM Petition for Order Authorizing Purchase of Annuity to Satisfy Devise [Prob. Code § 9733]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR ORDER AUTHORIZING
Estate of _____ [*name*],	)	PURCHASE OF ANNUITY
Deceased.	)	[*Prob. Code § 9733*]
	)	

_____

Petitioner alleges:

1. Petitioner, _____ [*name*], is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. In Paragraph _____ of his/her will, a copy of which is attached as Exhibit A and made a part hereof, decedent provided for a testamentary gift to _____ [*name of beneficiary*] in the form of _____ [an annuity *or* periodic payments]. Under this provision, the beneficiary is to receive the amount of $_____ each _____ [*period, e.g.,* month] for _____ [*duration, e.g.,* the life of the beneficiary].

[*EITHER*]

3. The decedent did not specify any particular fund or asset out of which the _____ [annuity *or*

periodic payments] should be paid.

[*OR*]

3. The decedent specified that this gift should be satisfied through _____ [*specify, e.g.,* the purchase of a commercial annuity policy *or* retention of sufficient funds from the residue of the estate in trust so as to produce sufficient income to make the required payments].

[*CONTINUE*]

4. Petitioner proposes to purchase a commercial annuity out of _____ [*specify source, e.g.,* the residuary estate] in order to satisfy this testamentary gift. Petitioner proposes to purchase this annuity from _____ [*name of insurer*], an insurer admitted to do business in California, at a cost of _____ [*specify, e.g.,* a single premium in the amount of $_____]. The annuity would then be sufficient to provide all payments required to be made to _____ [*name of beneficiary*] under decedent's will. A copy of the proposed annuity policy is attached as Exhibit B and made a part hereof.

5. This estate has sufficient funds to pay all debts, devises, expenses of administration, taxes, and the family allowance and to also pay the required premium to purchase the annuity.

6. Good cause exists for the purchase of this annuity because _____ [*specify reason, e.g.,* the cost of administration of the funds needed to make the payments will be borne by the insurer rather than by the estate. All property of the estate can be distributed and the estate closed].

7. The beneficiary _____ [has *or* has not] agreed in writing to the purchase of the annuity. [A copy of the consent is attached as Exhibit C and made a part hereof.]

WHEREFORE, petitioner prays for an order authorizing the purchase of this annuity policy, and for all other orders as the court deems proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 456.60.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is for use by the personal representative as a petition to request an order authorizing the purchase of a commercial annuity policy [*see Prob. Code § 9733*]. The petition may be filed by the personal representative or by any

person who is interested in the estate [*Prob. Code § 9733(a)*]. For the definition of "interested persons," see *§ 456.60*.

[3] Gift of Annuity or Periodic Payments

The purchase of a commercial annuity requires court authorization on a showing of good cause, even if the decedent expressly makes a gift in the form of an annuity in his or her will. Purchase of a commercial annuity may also be authorized to satisfy any testamentary gift in the form of periodic payments [*Prob. Code § 9733(a)*]. The court may order the purchase pending distribution or at the time it orders final distribution of the estate [*Prob. Code § 9733(a)*].

A commercial annuity may fulfill the testator's intent that the beneficiary receive a specific minimum income without the necessity of retaining sufficient funds in the estate to produce the income. Therefore, such an annuity may allow for final distribution of the estate, when it might otherwise be necessary to continue administration until the gift had been satisfied in full, perhaps until the death of the beneficiary.

Under prior law [*see* former Prob. Code § 584], a commercial annuity could only be purchased to fulfill a testamentary gift of an annuity [*see Prob. Code § 21117(e)*]. Under this limited statutory language, it was held that a commercial annuity could not be purchased to satisfy a testamentary gift of periodic payments from a trust, at least without the consent of the beneficiary to the termination of the trust [*see Estate of Feuereisen (1971) 17 Cal. App. 3d 717, 722-723, 95 Cal. Rptr. 165]* . The current statute allows for a commercial annuity to satisfy any direction in the will for periodic payments without limitation as to the specified form in which the payments are to be made [*Prob. Code § 9733(a)*]. This language may be broad enough to encompass periodic payments of trust income, although other issues may remain if the trust has other purposes apart from the production of periodic income. It does not appear from the statute that the consent of the specific beneficiary of the payments or of any other person interested in the estate is required, if good cause otherwise exists for the purchase.

[4] Notice Requirements

Notice of the hearing must be given by mail at least 15 days before the date of the hearing [*Prob. Code § 9733(b)*; *see Prob. Code § 1220*]. For further discussion of the notice requirement and for forms of notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

[5] State Statutes

Verified petition is admissible evidence in uncontested proceeding. *Prob. Code § 1022*

Purchase of annuity to satisfy specified instructions in will. *Prob. Code § 9733*

Definition of gift of "annuity." *Prob. Code § 21117(e)*

[6] Cross References

For a related form, see *§ 456.67*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.67

§ 456.67 Order Authorizing Purchase of Annuity [Prob. Code § 9733]

[1] FORM Order Authorizing Purchase of Annuity [Prob. Code § 9733]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER AUTHORIZING PURCHASE OF ANNU-
Deceased.	)	ITY
	)	[*Prob. Code § 9733*]

_____

The verified petition of _____ [*name*], the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased, praying for an order authorizing the purchase of a commercial annuity, came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. [Objections were filed by _____ (*name and description of objector, e.g.,* John Jones, a residuary beneficiary of the estate), who appeared by counsel _____ (*name*).]

The Court finds from proof made to the satisfaction of the Court:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. Decedent's will provides for a testamentary gift of _____ [an annuity *or* periodic payments] to _____ [*name of beneficiary*], under which the beneficiary is to receive the sum of $_____ each _____ [*period, e.g.,* month] for _____ [*duration e.g.,*

the rest of his/her life].

3. Good cause exists for the satisfaction of this testamentary gift through the purchase of a commercial annuity policy because _____ [*state reason, e.g.,* otherwise it will be necessary to retain sufficient estate property under administration in order to produce income from which payment can be made].

4. _____ [*Name of insurer who is to issue annuity policy*] is an insurer admitted to do business in California and qualified to underwrite commercial annuity policies.

5. This estate has sufficient funds to pay all debts, devises, expenses of administration, taxes, and the family allowance and to also pay the premium(s) on a commercial annuity of sufficient value to provide for the payments required under decedent's will.

WHEREFORE, IT IS ORDERED:

1. The personal representative shall satisfy the decedent's testamentary gift of _____ [an annuity *or* periodic payments] to _____ [*name of beneficiary*] through the purchase of a commercial annuity policy from _____ [*name of insurer*].

2. The total cost of the premiums of this annuity shall not exceed the sum of $_____.

[3. _____ (*Specify any other required terms and conditions of annuity policy.*)]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use as a court order that authorizes the personal representative to purchase a commercial annuity in order to satisfy a testamentary gift for periodic payments to a beneficiary [*Prob. Code § 9733(a)*].

[3] State Statutes

Finding of giving or waiver of notice as required in order. *Prob. Code § 1260(b)*

Purchase of annuity to satisfy specified instructions in will. *Prob. Code § 9733*

[4] Cross References

For a related form, see *§ 456.66*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.68

§ 456.68 Petition for Order Authorizing Continued Operation of Decedent's Proprietorship Business [Prob. Code § 9760]

[1] FORM Petition for Order Authorizing Continued Operation of Decedent's Proprietorship Business [Prob. Code § 9760]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR ORDER AUTHORIZING
	)	CONTINUED OPERATION
Estate of _____ [*name*],	)	OF DEDEDENT'S
Deceased.	)	BUSINESS
	)	[*Prob. Code § 9760*]
	)	

_____

Petitioner alleges:

1. Petitioner, _____ [*name*], is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. At the time of death, decedent was the proprietor of a certain business commonly known as _____ [*name of business*] at _____ [*street address*], in _____ [*city*], _____ County, California. This business has not been incorporated and is not the subject of any partnership agreement, written or otherwise, between decedent and any other person.

[3. Decedent's testamentary disposition of this business is as follows: _____ (*specify, e.g.*, the

business, including all its property, assets, and good will, has been devised to decedent's daughter, Sara Smith).]

4. Since decedent's death, _____ [*specify current status of business operation, e.g.,* petitioner has continued the operation of decedent's business without cessation or interruption under the daily management of decedent's daughter, Sara Smith].

5. Since decedent's death, the business _____ [*describe generally the financial status of the business, e.g.,* has been a profitable asset of this estate. It regularly produces income that is more than sufficient to pay all debts and obligations incurred in the ordinary course of business operation].

6. It is to the advantage of this estate and in the best interest of persons interested in this estate that Petitioner, in a representative capacity, continue operation of the business during administration of the estate because _____ [*state reason, e.g.,* business profits earned during the period of administration will inure to the benefit of this estate and its interested persons].

WHEREFORE, petitioner prays for an order authorizing him/her, as personal representative, to continue operation of decedent's business, and for such other orders as the court deems proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 456.60.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is for use by the personal representative as a petition to request an order authorizing the continued operation of decedent's sole proprietorship business during the period of estate administration [*see Prob. Code § 9760*]. The petition may be filed by the personal representative or by any person who is interested in the estate [*Prob. Code § 9760(c)*]. For the definition of "interested persons," see *§ 456.60*. For a form for a petition that may be filed by an interested person to prohibit the personal representative from continuing decedent's business, see *§ 456.70*. For a form for a petition empowering the personal representative to assume the decedent's position as a general partner in a business operated in partnership form, see *§ 456.72*.

[3] Disposition of Sole Proprietorship

The proper disposition of a business of decedent operated in proprietorship form depends primarily on the profitability of the business and secondarily on the eventual disposition of the business and the likely period of estate administration. If the personal representative is properly operating the business, the assets of the estate are liable for the obligations of the business incurred during the period of estate ad ministration [*Bartlett v. Superior Court (1958) 163 Cal. App. 2d 181, 183, 328 P.2d 840* ; *see* Cal. Law Revision Comm'n Comment to *Prob. Code § 9760*]. Therefore, the continued operation of an unprofitable business may subject the estate to significant liability. On the other hand, if the business has been specifically devised, liquidation may deprive the devisee of his or her primary means of support.

The personal representative may continue operation of the business for up to six months from the date of issuance of letters with or without court authorization [*Prob. Code § 9760(b)*]. Within this period, it may be possible to distribute the business to its devisee at minimum risk to the estate. If the business is operated without court authorization for this period, presumably the personal representative is not personally liable for business debts.

Operation for any lengthier period requires court authorization on a showing of advantage to the estate and the benefit to the interested persons [*Prob. Code § 9760(c)*].

[4] Notice Requirements

Notice of the hearing must be given by mail at least 15 days before the date of the hearing [*Prob. Code § 9760(c)*; *see Prob. Code § 1220*]. It is advisable to give notice to creditors of the business, although this is not required unless they have requested special notice in the estate proceeding pursuant to *Prob. Code § 1250* [*Prob. Code § 1220(a)(2)(B)*]. For further discussion of the notice requirement and for forms of notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

[5] State Statutes

Verified petition as admissible evidence in uncontested proceeding. *Prob. Code § 1022*

Authority to operate decedent's sole proprietorship business. *Prob. Code § 9760*

[6] Cross References

For a related form, see *§ 456.69*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.69

§ 456.69 Order Authorizing Continued Operation of Decedent's Proprietorship Business [Prob. Code § 9760]

[1] FORM Order Authorizing Continued Operation of Decedent's Proprietorship Business [Prob. Code § 9760]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER AUTHORIZING CONTINUED OPERA-
Estate of _____ [*name*],	)	TION OF DECEDENT'S
Deceased.	)	BUSINESS
	)	[*Prob. Code § 9760*]

_____

The verified petition of _____ [*name*], the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased, praying for an order authorizing continued operation of decedent's business, came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. [Objections were filed by _____ (*name and description of objector, e.g.,* John Jones, a residuary beneficiary of the estate), who appeared by counsel _____ (*name*).]

The Court finds from proof made to the satisfaction of the Court:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. At the time of death, decedent was the proprietor of a certain business commonly known as _____ [*name of business*] at _____ [*street address*], in _____ [*city*], _____

County, California. This business has not been incorporated and is not the subject of any partnership agreement, written or otherwise, between decedent and any other person.

3. Since decedent's death, _____ [*specify current status of business operation, e.g.,* petitioner has continued the operation of decedent's business without cessation or interruption under the daily management of decedent's daughter, Sara Smith].

4. Since decedent's death, _____ [*describe generally the financial status of the business, e.g.,* business income has been sufficient to pay all debts and obligations incurred in the course of business operation, and there are no current claims against the estate that arose from the continued operation of decedent's business].

5. It is to the advantage of this estate and in the best interest of persons interested in this estate that petitioner, in a representative capacity, continue operation of the business during administration of the estate because _____ [*state reason, e.g.,* business profits earned during the period of administration will inure to the benefit of this estate and its interested persons].

WHEREFORE, IT IS ORDERED:

1. _____ [*Name*], in a representative capacity, is authorized to continue operation of this business of decedent _____ [*specify duration, e.g.,* until such time as the business is distributed to its devisee].

[2. _____ (*Set forth any restrictions, terms, or conditions, e.g.,* Should during any calendar month the income of the business be insufficient to pay the obligations incurred during the ordinary course of business during that month, the personal representative shall either cease operation of the business or seek further instructions from this Court).]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use as a court order that authorizes the personal representative to continue to operate decedent's business during the period of estate administration [*see Prob. Code § 9760*]. The court may make this order to such an extent and subject to such restrictions as the court determines to be for the advantage of the estate and in the best interest of interested persons.

[3] State Statutes

Finding of giving or waiver of notice as required in order. *Prob. Code § 1260(b)*

Authority to operate decedent's proprietorship business. *Prob. Code § 9760*

[4] Cross References

For a related form, see *§ 456.68*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.70

§ 456.70 Petition for Order Directing Personal Representative to Discontinue Operation of Decedent's Proprietorship Business [Prob. Code § 9760]

[1] FORM Petition for Order Directing Personal Representative to Discontinue Operation of Decedent's Proprietorship Business [Prob. Code § 9760]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR ORDER DIRECTING PERSONAL
Estate of _____ [*name*],	)	REPRESENTATIVE TO DISCONTINUE
Deceased.	)	OPERATION OF
	)	DECEDENT'S BUSINESS
	)	[*Prob. Code § 9760*]

_____

Petitioner alleges:

1. Petitioner, _____ [*name*], is _____ [*specify status of petitioner as person interested in estate, e.g.,* a residuary beneficiary of this estate].

2. At the time of death, decedent was the proprietor of a certain business commonly known as _____ [*name of business*] at _____ [*street address*], in _____ [*city*], _____ County, California. This business has not been incorporated and is not the subject of any partnership agreement, written or otherwise, between decedent and any other person.

[3. Decedent's testamentary disposition of this business is as follows: _____ (*specify, e.g.,* the business is to be liquidated, with the proceeds of sale to become part of the residuary estate).]

4. Since decedent's death, the personal representative has continued the operation of decedent's business without cessation or interruption.

5. _____ [*Specify current economic status of business, e.g.,* Since decedent's death, the business has not produced sufficient income to pay all debts and obligations incurred in the ordinary course of business operation, and claims against this estate have been filed by creditors of the business.]

6. It is to the advantage of this estate and in the best interests of persons interested in this estate that the personal representative discontinue operation of the business because _____ [*state reason, e.g.,* otherwise the debts and obligations of the business may deplete the other assets of this estate].

WHEREFORE, Petitioner prays for an order directing the personal representative to discontinue operation of decedent's business _____ [*specify time, e.g.,* immediately], and for such other orders as the court deems proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 456.60.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is for use as a petition by a person who is interested in an estate to request an order directing the personal representative to discontinue operation of decedent's sole proprietorship business [*see Prob. Code § 9760*]. For the definition of "interested persons," see *§ 456.60*.

A petition to discontinue operation of the decedent's business may also be filed by the personal representative, although *Prob. Code § 9760* does not specifically require the personal representative to obtain court authorization to discontinue operation of a business [*see Prob. Code § 9760(c)*]. The personal representative might wish to seek court direction to discontinue operation of an unprofitable business that is being operated under a testamentary requirement.

For a form for a petition that may be filed by the personal representative for authorization to continue to operate decedent's business, see *§ 456.68*.

[3] State Statutes

Verified petition as admissible evidence in uncontested proceeding. *Prob. Code § 1022*

Authority to operate decedent's sole proprietorship business. *Prob. Code § 9760*

[4] Cross References

For a related form, see *§ 456.71*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.71

§ 456.71 Order Directing Personal Representative to Discontinue Operation of Decedent's Proprietorship Business [Prob. Code § 9760]

[1] FORM Order Directing Personal Representative to Discontinue Operation of Decedent's Proprietorship Business [Prob. Code § 9760]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER DIRECTING PERSONAL REPRESENT-
Estate of _____ [*name*],	)	ATIVE TO DISCONTINUE
Deceased.	)	OPERATION OF
	)	DECEDENT'S BUSINESS
	)	[*Prob. Code § 9760*]

_____

The verified petition of _____ [*name*], _____ [*status, e.g.,* a residuary beneficiary] of the estate of _____ [*name*], deceased, praying for an order directing the personal representative to discontinue operation of decedent's business, came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. [Objections were filed by _____ (*name and description of objector, e.g.,* John Jones, the personal representative of the estate), who appeared by counsel _____ (*name*).]

The Court finds from proof made to the satisfaction of the Court:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. At the time of death, decedent was the proprietor of a certain business commonly known as _____ [*name of business*] at _____ [*street address*], in _____ [*city*], _____ County, California. This business has not been incorporated and is not the subject of any partnership agreement, written or otherwise, between decedent and any other person.

3. Since decedent's death, the personal representative has continued the operation of decedent's business without cessation or interruption.

4. Since decedent's death, _____ [*state current economic condition of business, e.g.,* business income has been insufficient to pay all debts and obligations incurred in the course of business operation, and there currently are claims against the estate that arose from the continued operation of decedent's business].

5. It is to the advantage of this estate and in the best interests of persons interested in this estate that continued operation of the business be discontinued because _____ [*state reason, e.g.,* the debts and obligations of the business are likely to deplete the assets of this estate].

WHEREFORE, IT IS ORDERED:

1. The personal representative shall discontinue operation of this business of decedent _____ [*specify time, e.g.,* immediately].

[2. _____ (*Set forth any other applicable directions to wind up affairs of business, e.g.,* All property and other assets of the business shall be sold in the manner provided by law, and the proceeds of sale shall be administered and distributed as a part of the residue of this estate).]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use as a court order that directs the personal representative to discontinue operation of decedent's business. The court may direct the personal representative to discontinue the operation of decedent's business within the time specified in and in accordance with the provisions of the order [*Prob. Code § 9760(d)*].

[3] State Statutes

Finding of giving or waiver of notice as required in order. *Prob. Code § 1260(b)*

Authority to operate decedent's proprietorship business. *Prob. Code § 9760*

[4] Cross References

For related forms, see *§§ 456.68* and *456.70*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.72

§ 456.72 Petition for Order Authorizing Personal Representative to Continue as Partner in Decedent's Partnership [Prob. Code § 9762]

[1] FORM Petition for Order Authorizing Personal Representative to Continue as Partner in Decedent's Partnership [Prob. Code § 9762]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR ORDER AUTHORIZING
Estate of _____ [*name*],	)	PERSONAL REPRESENTATIVE TO CONTINUE
Deceased.	)	AS PARTNER IN DECEDENT'S
	)	PARTNERSHIP
	)	[*Prob. Code § 9762*]

_____

Petitioner alleges:

1. Petitioner, _____ [*name*], is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. At the time of death, decedent was a general partner in a certain _____ [general *or* limited] partnership doing business as _____ [*name of partnership business*] at _____ [*street address*], in _____ [*city*], _____ County, California.

3. The surviving general partners of the partnership are _____ [*names*].

4. The partnership _____ [is *or* is not] subject to a written partnership agreement.

[*EITHER*]

5. Under the terms of the written partnership agreement, the personal representative of any deceased general partner may become a _____ [general *or* limited] partner in the partnership for the purposes of avoiding dissolution of the partnership by reason of the death of a partner. A copy of the partnership agreement is attached as Exhibit A and made a part hereof.

[*OR*]

5. All surviving partners have consented to petitioner's becoming a _____ [general *or* limited] partner in the partnership. These written consents are attached as Exhibits A through _____ and made a part hereof.

[*CONTINUE*]

[6. Decedent's testamentary disposition of his/her partnership interest is as follows: _____ (*specify, e.g.,* the interest is devised to decedent's son, John Jones, Jr., as authorized by the written partnership agreement).]

7. _____ [*Specify current economic status of business, e.g.,* Decedent's partnership interest is a valuable asset of this estate. Since decedent's death, the partnership business has produced sufficient income to pay all debts and obligations incurred in the ordinary course of business operation. No claims against this estate have been filed by creditors of the partnership business].

8. It is to the advantage of this estate and in the best interests of persons interested in this estate that the personal representative become a _____ [general *or* limited] partner in decedent's partnership because _____ [*state reason, e.g.,* the partnership need not be dissolved, the partnership business may continue, and this estate will become entitled to decedent's share of partnership profits earned during the period of administration].

WHEREFORE, Petitioner prays for an order as follows:

1. Authorizing petitioner to become a _____ [general *or* limited] partner in decedent's partnership;

[*EITHER*]

2. Confirming all rights, powers, duties, and obligations of petitioner with regard to the partnership granted to petitioner in the partnership agreement.

[*OR*]

2. Granting petitioner the following rights, powers, duties, and obligations with regard to the partnership: _____ [*specify*].

[*CONTINUE*]

3. And for such other orders as the court deems proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 456.60.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is a petition by the personal representative to request an order authorizing the personal representative to continue as a general or limited partner in a partnership in which the decedent was a general partner at the time of death [*see* Prob. Code § 9672]. This petition may be filed by the personal representative or by any person who is interested in the estate [*Prob. Code § 9762(d)*]. For the definition of "interested persons," see *§ 456.60*. For forms of petitions involving decedent's proprietorship business, see *§§ 456.68* and *456.70*.

This form may be used for either a general or limited partnership in which the decedent was a general partner. It may not be used if the decedent was a limited partner [*see Prob. Code § 9762(a)*]. If the personal representative is to become a limited partner in the decedent's general partnership, the partnership is changed in form to a limited partnership. In that case, compliance with the Uniform Limited Partnership Act of 2008 (ULPA '08) [*Corp. Code § 15900 et seq.*] is required [*see Corp. Code § 15912.06(a)* (ULPA '08) (ULPA '08 governs limited partnerships formed on or after January 1, 2008); *see also* Ch. 400, *Partnerships: Governing Statutes* ; Ch. 404, *Partnerships: Actions Between Limited Partners and Partnerships* (discussing reorganizations in which surviving entity is limited partnership)].

[3] Partnership Business

Until January 1, 1999, partnerships formed before January 1, 1997, generally were governed by the former version of the Uniform Partnership Act (former UPA) [former *Corp. Code § 15001 et. seq.*, repealed effective January 1, 1999] unless they elected to be governed by the Uniform Partnership Act of 1994 (UPA'94) [*Corp. Code § 16100 et seq.*]. [*Corp. Code § 16111(a)*]. On and after January 1, 1999, all partnerships are governed by the UPA'94, regardless of when they were formed [*Corp. Code § 16111(b)*]. For more detailed discussion of these two laws, see *§ 456.18[1]* et seq.

Under the former UPA, the probate court could order the personal representative to continue as a general partner in the partnership [*see Prob. Code § 9762*]. The probate court had discretion in ordering the personal representative to continue as a general partner to specify the terms and conditions of that continuation [*Prob. Code § 9762(a)*]. If there was a written partnership agreement giving the personal representative the right to participate as a partner, the personal representative would have all of the rights, powers, duties, and obligations provided in it, except as otherwise ordered by the court [*Prob. Code § 9762(b)*]. If there was no such agreement, the court could specify the personal representative's rights, powers, duties and obligations [*Prob. Code § 9762(c)*].

Under the UPA'94, it is not clear if the court has authority to make this type of order. The UPA'94 explicitly provides

that a person may become a partner *only with the consent of all of the partners* [*Corp. Code § 16401(i)*]. It further provides that the provisions of the Act "shall be given full force and effect notwithstanding any inconsistent provisions of the Probate Code" [*Corp. Code § 16109*]. If the surviving partners consent to the personal representative becoming a partner, there would seem to be no obstacle to such an order. If they do not consent, however, it is uncertain whether the court could make such an order. For further discussion, see *§ 456.18[5]*.

[4] Notice Requirements

Notice of the hearing must be given by mail at least 15 days before the date of the hearing [*Prob. Code § 9762(d)*; *see Prob. Code § 1220*]. This notice must be given to each surviving general partner at his or her last known address, in addition to those otherwise entitled to notice [*Prob. Code § 9762(d)*]. For further discussion of the notice requirement and forms for giving notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

[5] State Statutes

Uniform Partnership Act (repealed eff. January 1, 1999). former *Corp. Code § 15001 et seq.*

Partnership agreement governs rights of successor of deceased partner. former *Corp. Code § 15018*

Effect of death of general partner on dissolution of partnership. *Corp. Code § 15031(4)*

Continuation of business after partner's death. former *Corp. Code § 15041*

Uniform Partnership Act of 1994. *Corp. Code § 16100 et seq.*

Relations among and between partners governed by partnership agreement. *Corp. Code § 16103(a)*

Rights and duties of surviving partners, legal representatives of deceased partners, and their creditors to be given full forceand effect, notwithstanding inconsistent provisions of Probate Code. *Corp. Code § 16109*

Effective dates of Act, and partnerships to which it applies. *Corp. Code § 16111*

Person may become partner only with consent of all partners. *Corp. Code § 16401(i)*

Right to share of profits, losses, and distributions are only transferable interest of partner. *Corp. Code § 16502*

Individual who is partner is dissociated from partnership upon death. *Corp. Code § 16601(7)(A)*

Rights of dissociated partner. *Corp. Code § 16603*

Partnership's obligation to purchase deceased partnership's interest in partnership. *Corp. Code §§ 16701, 16701.5*

Verified petition admissible evidence in uncontested proceeding. *Prob. Code § 1022*

Personal representative's right to accounting of partnership affairs. *Prob. Code § 9761*

Probate court's authority to order that personal representative act as partner. *Prob. Code § 9762*

Exercise of decedent's partnership rights against surviving partners. *Prob. Code § 9763*

[6] Cross References

For a related form, see *§ 456.73*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.73

§ 456.73 Order Authorizing Personal Representative to Continue as Partner in Decedent's Partnership [Prob. Code § 9762]

[1] FORM Order Authorizing Personal Representative to Continue as Partner in Decedent's Partnership [Prob. Code § 9762]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER AUTHORIZING PERSONAL REPRES-
Deceased.	)	ENTATIVE TO CONTINUE AS PARTNER IN DE-
	)	CEDENT'S
		PARTNERSHIP

_____

The verified petition of _____ [*name*], the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased, praying for an order authorizing him/her to continue as a partner in decedent's general partnership, came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. [Objections were filed by _____ (*name and description of objector, e.g.*, John Jones, a residuary beneficiary of the estate), who appeared by counsel _____ (*name*).]

The Court finds from proof made to the satisfaction of the Court:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. At the time of death, decedent was a general partner in a certain partnership doing business as _____ [*name of partnership business*] at _____ [*street address*], in _____ [*city*], _____ County, California.

3. The surviving general partners of the partnership are _____ [*names*].

4. The partnership _____ [is *or* is not] subject to a written partnership agreement.

[*EITHER*]

5. Under the terms of the written partnership agreement, the personal representative of any deceased general partner may become a _____ [general *or* limited] partner in the partnership.

[*OR*]

5. The written consents of all surviving partners to petitioner's becoming a _____ [general *or* limited] partner in the partnership have been filed in this matter.

[*CONTINUE*]

6. _____ [*Specify current economic status of business, e.g.,* Since decedent's death, the partnership business has produced sufficient income to pay all debts and obligations incurred in the ordinary course of business operation. No claims against this estate have been filed by creditors of the partnership business].

7. It is to the advantage of this estate and in the best interests of persons interested in this estate that the personal representative become a _____ [general *or* limited] partner in decedent's partnership because _____ [*state reason, e.g.,* the partnership need not be dissolved, the partnership business may continue, and this estate will become entitled to decedent's share of partnership profits earned during the period of administration].

WHEREFORE, IT IS ORDERED as follows:

1. The personal representative, in a representative capacity, may continue as a _____ [general *or* limited] partner in the partnership of decedent.

[*EITHER*]

2. The personal representative shall have the rights, powers, duties, and obligations as specified in the written partnership agreement.

[*OR*]

2. The personal representative, shall have the following rights, powers, duties, and obligations: _____ [*specify*].

[*CONTINUE*]

[3. The personal representative's participation as partner is subject to the following terms and conditions: _____ (*specify any terms and conditions determined to be to advantage of estate and in best interest of interested persons that are either not in conflict with written partnership agreement or consented to by all surviving partners, e.g.,* the personal representatives's authority to continue as partner under this Order shall expire on distribution of decedent's partnership interest as directed in the will or six months from the date of this Order, whichever is earlier).]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use as a court order that authorizes the personal representative to continue as a general or limited partner in decedent's general partnership in any partnership in which the decedent was a general partner [*see Prob. Code § 9762*]. In its order, the court may specify any terms and conditions of the personal representative's participation as partner that it determines to be to the advantage of the estate and in the best interest of interested persons. However, any terms and conditions that are inconsistent with a written partnership agreement are subject to the written consent of all of the surviving partners [*Prob. Code § 9762(a)*].

[3] State Statutes

Finding of giving or waiver of notice is required in order. *Prob. Code § 1260(b)*

Personal representative continuing as partner in decedent's general partnership. *Prob. Code § 9762*

[4] Cross References

For a related form, see *§ 456.72*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.74

§ 456.74 Notice of Proposed Abandonment of Tangible Personal Property [Prob. Code § 9782]

[1] FORM Notice of Proposed Abandonment of Tangible Personal Property [Prob. Code § 9782]

PLEASE TAKE NOTICE that _____ [*name*], the personal representative of the estate of _____ [*name*], deceased, intends to abandon the following property of the estate: _____ [*specify, e.g.,* one 1974 Datsun 1200 automobile]. Unless objection is received, abandonment will take place on or after _____ [*date*] by _____ [*specify manner of abandonment, e.g.,* surrendering the vehicle to Joe's Auto Wrecking for salvage value].

Written objection to this proposed abandonment must be personally delivered or mailed to _____ [*name of personal representative*] at _____ [*address*] before the date stated above. Should objection be received, the proposed abandonment will not be carried out, pending resolution of the disposition of this property among all interested parties or by the probate court.
Dated: _____.

_____ [*signature*]

Personal Representative of the Estate of _____
[*name*], Deceased

_____ [*signature*]

Attorney for Personal Representative

[2] Use of Form

This form is for use by the personal representative to give notice of a proposed abandonment or other disposition of tangible personal property of the estate [*see Prob. Code §§ 9780, 9782*]. For a form for a petition for court authorization to abandon property, see *§ 456.75*, and for an order authorizing the abandonment, see *§ 456.76*. For forms to oppose abandonment, see *§§ 456.77* and *456.78*.

[3] Contents

A notice of proposed abandonment of property must describe the property, must indicate the manner in which it is to be disposed of or abandoned, and must specify the date on or after which the property is to be disposed of or abandoned [*Prob. Code § 9782(b)*].

[4] Notice of Abandonment of Tangible Personal Property

Unless the property is specifically devised, the personal representative may dispose of or abandon tangible personal property if the cost of collecting, maintaining, and safeguarding the property would exceed its fair market value [*Prob. Code § 9780*]. Prior court authorization is not required unless objection to the proposed action is made or the will so provides [*Prob. Code § 9781*].

Notice of the proposed abandonment must be given to each known devisee or heir whose interest in the estate would be affected by the proposed action, to each person who has filed a request for special notice, and to the Attorney General, at the Office of the Attorney General in Sacramento if any portion of the estate is to escheat to it and its interest in the estate would be affected by the proposed action [*Prob. Code § 9782(a)*]. Notice need not be given to a person who has executed a written consent to the proposed abandonment or a written waiver to the right to notice [*Prob. Code § 9785*].

The notice must be delivered personally or mailed to the recipient's last known address. Personal delivery must be made not less than five days before the date specified in the notice as the date on which the abandonment is to take place. Notice by mail must be deposited not less than 10 days before that date [*Prob. Code § 9782(c)*]. If written objections are received before the date of abandonment, the abandonment may not take place without further proceedings [*see Prob. Code § 9782(c)*; *see § 456.75*].

[5] State Statutes

Authority to dispose of or abandon tangible personal property. *Prob. Code § 9780*

Court authorization as not required to abandon tangible personal property. *Prob. Code § 9781*

Notice of proposed abandonment of tangible personal property. *Prob. Code § 9782*

Objection to proposed abandonment of tangible personal property. *Prob. Code § 9783*

Persons to whom notice of proposed abandonment of tangible personal property need not be given *Prob. Code § 9785*

[6] Cross References

For related forms, see *§§ 456.75* and *456.77*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.75

§ 456.75 Petition for Order Authorizing Personal Representative to Abandon Tangible Personal Property [Prob. Code §§ 9611, 9783]

[1] FORM Petition for Order Authorizing Personal Representative to Abandon Tangible Personal Property [Prob. Code §§ 9611, 9783]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR ORDER AUTHORIZING
Estate of _____ [*name*],	)	ABANDONMENT OF TANGIBLE PERSONAL
Deceased.	)	PROPERTY
	)	[*Prob. Code § 9611, 9783*]

_____

Petitioner alleges:

1. Petitioner, _____ [*name*], is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. Petitioner holds the following property of the estate: _____ [*describe, e.g.,* a 1974 Datsun 1200 automobile, vehicle registration number _____]. This property has an appraised value of $_____ as shown on the Inventory and Appraisal on file in this matter.

3. This property is not the subject of any specific devise in the will of decedent.

4. Petitioner is informed and believes and thereon states that the cost of collecting, maintaining, and safeguarding this property exceeds its value, and therefore has proposed that this property be disposed of by _____ [

specify manner of abandonment, e.g., surrendering it to an auto wrecking company for salvage value only].

5. On _____ [*date*] written notice of this proposed disposition was _____ [personally delivered *or* mailed] to those persons entitled by law to receive notice. In the notice, _____ [*date*] was specified as the date on or after which the proposed disposition would take place. A copy of this notice is attached as Exhibit A and made a part hereof.

6. On _____ [*date*], petitioner received timely written objection to the proposed disposition of this property from _____ [*name of objector*]. A copy of this objection is attached as Exhibit B and made a part hereof. For this reason, the property was not disposed of as proposed.

7. Possession of the property _____ [has *or* has not] been tendered to the objector pending resolution of this issue by the court. [Objector has taken possession of the property pursuant to the tender.]

WHEREFORE, Petitioner prays for an order authorizing the abandonment of this property as proposed, or for further instructions from the court as to the disposition of this property, and for such other orders as the court deems proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 456.60.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is for use as a petition by the personal representative to seek court authorization to abandon tangible personal property of the estate after an objection to abandonment has been made [*see Prob. Code § 9783*]. For a form for notice of proposed abandonment, see *§ 456.74*.

[3] Proceedings After Receipt of Objection to Abandonment

If written objection to a proposed abandonment of tangible personal property of the estate is timely received by the personal representative, the proposed abandonment may not be carried out. Instead, the personal representative must seek court authorization of abandonment through a petition for instructions [*Prob. Code § 9783*; *see Prob. Code § 9611*]. Alternatively, the objector may seek a restraining order [*Prob. Code § 9784*; *see § 456.77*].

The personal representative may tender possession of the property to the objector pending resolution of the dispute. If the objector fails to take possession, the property may then be abandoned without court authorization. If the objector takes possession, he or she is liable for the safekeeping of the property pending court resolution [*Prob. Code § 9788*].

[4] Notice Requirements

Notice of the hearing must be given by mail at least 15 days before the date of the hearing [*Prob. Code § 9611(b)*; *see*

Prob. Code § 1220]. In addition to all persons otherwise entitled, notice must be given to the objector [*Prob. Code § 9786*]. For further discussion of the notice requirement and for forms of notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

[5] State Statutes

Verified petition as admissible evidence in uncontested proceeding. *Prob. Code § 1022*

Petition for instructions. *Prob. Code § 9611*

Notice of hearing on petition for abandonment of tangible personal property. *Prob. Code § 9786*

Waiver of right to court review of abandonment of tangible personal property. *Prob. Code § 9787*

Tender of possession of property to person objecting to abandonment *Prob. Code § 9788*

[6] Cross References

For related forms, see *§§ 456.74*, *456.76*, and *456.77*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.76

§ 456.76 Order Authorizing Abandonment of Tangible Personal Property [Prob. Code §§ 9611, 9783]

[1] FORM Order Authorizing Abandonment of Tangible Personal Property [Prob. Code §§ 9611, 9783]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER AUTHORIZING ABANDONMENT OF
Deceased.	)	TANGIBLE PERSONAL PROPERTY
	)	[*Prob. Code §§ 9611, 9783*]

_____

The verified petition of _____ [*name*], the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased, praying for an order authorizing abandonment of certain tangible personal property of the estate, came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. Objector _____ [*name and description, e.g.,* John Jones, a residuary beneficiary of the estate], appeared by counsel _____ [*name*].

The Court finds from proof made to the satisfaction of the Court:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. The personal representative holds the following property of the estate: _____ [*describe, e.g.,* a 1974 Datsun 1200 automobile, vehicle registration number _____], which has been appraised at a value of $_____ as shown on the Inventory and Appraisal on file in this matter.

3. This property is not the subject of any specific devise in the will of decedent.

4. The personal representative has proposed that this property be disposed of by _____ [*specify manner of abandonment, e.g.,* surrender to an auto wrecking company for salvage value only].

5. Written notice of this proposed disposition was given as required by law.

6. The cost of collecting, maintaining, and safeguarding this property exceeds its value because _____ [*state facts showing excessive cost, e.g.,* the car is inoperable, and the cost of repair greatly exceeds its blue book value. In its unrepaired state, the car has only salvage value. If the property is not abandoned, the estate will incur an expense of $100 per month in storage fees].

WHEREFORE, IT IS ORDERED as follows:

1. The personal representative shall dispose of this property in the following manner: _____ [*specify*].

[2. The personal representative need not account for the value of the property as set forth in the Inventory and Appraisal on file in this matter except to the extent of any consideration received in the disposition of the property.]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use as a court order to authorize the personal representative to abandon tangible personal property of the estate [*see Prob. Code §§ 9611, 9783*]. If the property has been appraised for an amount in excess of any salvage value to be realized from the abandonment, the order should state that the personal representative is not responsible for the difference.

[3] State Statutes

Finding of giving or waiver of notice as required in order. *Prob. Code § 1260(b)*

Court order authorizing abandonment of tangible personal property. *Prob. Code § 9783*

[4] Cross References

For related forms, see *§§ 456.74* and *456.75*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.77

§ 456.77 Ex Parte Application for Order Restraining Personal Representative From Abandoning Tangible Personal Property [Prob. Code § 9784]

[1] FORM Ex Parte Application for Order Restraining Personal Representative From Abandoning Tangible Personal Property [Prob. Code § 9784]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	EX PARTE APPLICATION FOR ORDER
	)	RESTRAINING
Estate of _____ [*name*],	)	PERSONAL
Deceased.	)	REPRESENTATIVE FROM ABANDONING TAN-
	)	GIBLE PERSONAL PROPERTY
	)	[*Prob. Code § 9784*]

_____

Applicant alleges:

1. Applicant, _____ [*name*], is _____ [*specify status establishing applicant as person entitled to object to abandonment, e.g.,* a residuary beneficiary] of this estate.

2. _____ [*Name of personal representative*], as personal representative, holds the following property of this estate: _____ [*describe, e.g.,* a 1974 Datsun 1200 automobile, vehicle registration number _____]. This property has an appraised value of $_____ as shown on the Inventory and Appraisal on file in this matter.

3. Applicant has received written notice that on _____ [*date*], the personal representative proposes to

dispose of this property by _____ [*specify manner of disposition, e.g.,* surrender to an auto wrecking and salvage company for salvage value only]. A copy of this notice is attached as Exhibit A and made a part hereof.

4. Applicant objects to this proposed disposition because _____ [*state reason, e.g.,* the value of the property, as stated above, is far greater than its salvage value, and the property should be sold in the manner provided by law].

5. This estate will not suffer any loss or unreasonable expense if the personal representative is restrained from immediately disposing of this property because _____ [*state reason, e.g.,* the vehicle is currently being stored in the personal representative's own garage at no cost to the estate].

[*EITHER*]

6. No special notice has been requested.

[*OR*]

6. The following parties have waived their request for special notice: _____ [*list by name and description, e.g.,* John Jones, a creditor of the estate]. Copies of the waivers are attached as Exhibits _____ through _____ and made a part hereof.

[*CONTINUE*]

WHEREFORE, Applicant prays for an order restraining the personal representative from disposing of this property without prior court authorization, and for such other orders as the court deems proper.

_____ [*signature*]

Applicant

_____ [*signature*]

Attorney for Applicant

[*Verification, if desired. See § 456.60.*]

[2] Use of Form

This form is for use by a person who objects to a proposed abandonment of tangible personal property of the estate to apply for an order restraining the personal representative from proceeding with the abandonment [*Prob. Code § 9784*].

[3] Order Restraining Abandonment

A person who is entitled to notice of a proposed abandonment of tangible personal property of the estate may apply for an order restraining the abandonment until the matter may be determined by the court [*Prob. Code § 9784(a)*; *see Prob. Code § 9782* (persons entitled to notice)]. However, a restraining order is not required. The objector need only serve the

personal representative with written objection in order to stop the proposed abandonment pending court review [*see Prob. Code § 9783*].

The restraining order may be granted without requiring notice to the personal representative and without cause being shown if the court is satisfied that the estate will not suffer any loss or unreasonable expense if the order is granted [*Prob. Code § 9784(b)*]. As a condition of the order, the court may require the applicant to pay the costs of storing and protecting the property or to provide security by bond or cash deposit that these costs will be paid [*Prob. Code § 9784(b)*].

[4] Alleging Special Notice

Local court rules may require that any petition for an ex parte order either allege that no special notice has been requested or list the parties who have waived their request for special notice (Paragraph 4) [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 10.38; San Francisco Uniform Local Ct. Rules, Rule 14.20].

[5] Verification

Although the application for an order restraining abandonment is not expressly referred to in the statute as an ex parte matter, there is no reference to a "petition," and the order may be granted without notice to the personal representative [*see Prob. Code § 9784(b)*]. Such an application is not among the filings that must be verified [*Prob. Code § 1021(a)* (petitions must be verified)]. Nevertheless, local court rules and procedure should be consulted before verification is omitted.

[6] Alternative Procedure; Written Objection

Rather than seeking a restraining order, a person objecting to the disposal or abandonment of property may merely deliver or mail a written objection to the personal representative [*Prob. Code § 9783*]. This will require the personal representative either (1) to petition the court under *Prob. Code § 9611* for authorization to dispose of or abandon the property [*Prob. Code § 9783*], or (2) to tender the property to the objector for safekeeping until the court relieves the objector of that obligation [*see Prob. Code § 9788*].

Written objection to the proposed abandonment may be served on the personal representative by mail. However, for it to be effective, it appears that it must be actually received before the date of the proposed abandonment [*Prob. Code §§ 9783, 9784(c)*]. Thus, because only five days notice of the proposed abandonment need be given by the personal representative (10 days if by mail), personal service of objections is virtually required [*see Prob. Code § 9782(c)*]. Otherwise, the date on which the abandonment is to be carried out may well occur before objection served by mail is received.

[7] State Statutes

Objection to proposed abandonment of tangible personal property. *Prob. Code § 9783*

Order restraining proposed abandonment of tangible personal property. *Prob. Code § 9784*

Person obtaining restraining order as entitled to notice of hearing on petition to authorize abandonment of tangible personal property. *Prob. Code § 9786*

Objection as waived if objector neither serves written objection nor obtains restraining order to abandonment of tangible personal property. *Prob. Code § 9787*

Tender of possession to person who obtains restraining order pending resolution of proposed abandonment of tangible personal property. *Prob. Code § 9788*]

[8] Cross References

For related forms, see *§§ 456.74*, *456.75*, and *456.78*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.78

§ 456.78 Order Restraining Personal Representative From Abandoning Tangible Personal Property [Prob. Code § 9784]

[1] FORM Order Restraining Personal Representative From Abandoning Tangible Personal Property [Prob. Code § 9784]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER RESTRAINING ABANDONMENT OF
Deceased.	)	TANGIBLE PERSONAL PROPERTY
	)	[*Prob. Code § 9784*]

_____

On _____ [*date*], applicant, _____ [*name and status as interested person, e.g.,* John Jones, a residuary beneficiary of this estate] appeared ex parte and submitted his/her application for an order restraining the personal representative from abandoning certain tangible personal property of this estate.

The Court finds from proof made to the satisfaction of the Court:

1. _____ [No persons have requested special notice in this matter *or* All persons who have requested special notice in this matter have _____ (received *or* waived) notice.]

2. _____ [*name*], as personal representative, holds the following property of this estate: _____ [*describe, e.g.,* a 1974 Datsun 1200 automobile, vehicle registration number _____].

3. The personal representative has proposed that this property be disposed of by _____ [*specify*

manner of abandonment, e.g., surrendering it to an auto wrecking company for salvage value only].

4. Written notice of this proposed disposition was given as required by law.

5. Applicant objects to the proposed disposition of the property.

6. The estate will not suffer any loss or unreasonable expense if the proposed disposition is restrained pending further proceedings before this Court because _____ [the cost of safeguarding the property pending hearing is minimal *or* applicant has agreed to assume the cost of storing and protecting the property pending hearing *or* applicant has provided adequate security by _____ (bond *or* cash deposit) to ensure payment of the cost of storing and protecting the property pending hearing].

WHEREFORE, IT IS ORDERED as follows:

1. The personal representative shall not dispose of this property in the manner as set forth in the notice of proposed abandonment until authorized to do so by further order of this court.

[2. Applicant shall _____ (immediately forward the sum of $_____ to the personal representative *or* provide security by _____ (bond *or* cash deposit) in the amount of $_____) for the cost of storing and protecting the property pending further proceedings in this court.]

[3. Service of this order shall be made on the personal representative by _____ (*specify*).]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use as a court order to restrain the personal representative from disposing of tangible personal property of the estate without court authorization [*Prob. Code § 9784*]. The issuance of this restraining order does not resolve the issue of the final disposition of the property. Rather, the proposed disposition is merely restrained until a hearing may be conducted to resolve the matter [*see Prob. Code § 9786*].

[3] Service of Order

The personal representative is deemed to have notice of the restraining order if it is served in the manner provided for personal service of summons in a civil action before the date specified in the notice as the date on or after which the property will be abandoned [*Prob. Code § 9784(c)*; *see Code Civ. Proc. § 415.10*]. The manner of service may also be specified in the order [*Prob. Code § 9784(c)*].

The personal representative is also deemed to have notice if the restraining order is served by mail before the date of abandonment in the manner provided for service of summons by mail with acknowledgment of receipt [*Prob. Code § 9784(c)*; *see Code Civ. Proc. § 415.30*]. However, the time frame within which the objector must act is very short because the personal representative need give only five days' notice of the date on which the property is to be abandoned (10 days if notice is by mail) [*Prob. Code § 9782(c)*]. If service of the order is made by mail, it may not be received until after the date of abandonment has passed. Thus, immediate personal service of the restraining order would seem to be essential.

[4] State Statutes

Order restraining personal representative from abandoning tangible personal property without court authorization. *Prob. Code § 9784*

[5] Cross References

For a related form, see *§ 456.77*.

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PART IV. FORMS

39-456 California Forms of Pleading and Practice--Annotated § 456.79

§ 456.79 Petition for Order Authorizing Personal Representative to Borrow Money and to Encumber Estate Property [Prob. Code § 9802]

[1] FORM Petition for Order Authorizing Personal Representative to Borrow Money and to Encumber Estate Property [Prob. Code § 9802]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR ORDER AUTHORIZING
Estate of _____ [*name*],	)	PERSONAL
Deceased.	)	REPRESENTATIVE TO BORROW MONEY ON
	)	SECURITY OF ESTATE PROPERTY
	)	[*Prob. Code §§ 9800, 9802*]

_____

Petitioner alleges:

1. Petitioner, _____ [*name*], is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. Petitioner holds the following _____ [real *or* personal] property of the estate: _____ [*specify by sufficient description so as to distinguish from all other property of estate of similar nature, e.g.,* decedent's residence located at _____ (*address*) and more particularly described as _____ (*legal description*)].

3. This property is appraised at the value of $_____, as shown by the Inventory and Appraisal on file in this matter.

4. Petitioner now proposes to borrow the sum of $_____at _____ percent interest for a term of _____ [*number of years or months of term of loan*] from _____ [*name of lender*] on the security of this property and to execute a promissory note in a representative capacity for this purpose. The proposed note is attached as Exhibit A and made a part hereof.

5. Petitioner further proposes to execute a _____ [deed of trust *or* Uniform Commercial Code financing statement *or specify other instrument creating security interest in property*] on the property to secure this loan. The proposed _____ [*e.g.,* deed of trust] is attached as Exhibit B and made a part hereof.

6. The purpose of the proposed loan is _____ [*specify, e.g.,* to obtain funds with which to remodel and renovate the kitchen and bathroom of the real property].

7. It is to the advantage of this estate that funds be borrowed for this purpose because _____ [*state reason, e.g.,* the current kitchen and bathroom contain the original fixtures installed in 1925. The appraiser who appraised the property believes that the sale value of the property would be increased by $50,000 if these features were modernized. The cost of the remodeling is far less than the benefit likely to accrue to the estate through this appreciation in value].

WHEREFORE, Petitioner prays for an order authorizing petitioner to borrow the sum of $_____ and to evidence and secure the loan by executing a note and _____ [*e.g.,* deed of trust] as set forth in Exhibits A and B, and for such other orders as the court deems proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 456.60.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is for use as a petition by the personal representative to seek court authorization to borrow money on the security of estate property and to encumber the property to secure the loan [*see Prob. Code § 9800*]. This petition may be filed by the personal representative or by any person who is interested in the estate [*Prob. Code § 9802(a)*]. For the definition of "interested persons," see *§ 456.60*. For further discussion, see *§ 456.21*.

[3] Contents

The petition must state the purpose for which the order is sought (Paragraph 6) and the necessity for or the advantage to accrue from the order (Paragraph 7). If applicable, the petition must also show the amount of money proposed to be borrowed, the rate of interest to be paid, and the length of time the note is to run (Paragraph 4). It should also contain a general description of the property proposed to be encumbered (Paragraph 2) [*Prob. Code § 9802(b)*].

[4] Notice Requirements

Notice of the hearing must be given by mail at least 15 days before the date of the hearing [*Prob. Code § 9803*; *see Prob. Code § 1220*]. For further discussion of the notice requirement and for forms of notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

[5] State Statutes

Verified petition as admissible evidence in uncontested proceeding. *Prob. Code § 1022*

Authority to encumber estate property as security for borrowed funds. *Prob. Code § 9800*

Authority to act jointly with other owners of interests in estate property. *Prob. Code § 9801*

Filing of petition for order authorizing loan and encumbrance. *Prob. Code § 9802*

Notice of hearing on petition. *Prob. Code § 9803*

Hearing and order on petition. *Prob. Code § 9804*

Effect of encumbrance on estate property. *Prob. Code § 9806*

Deficiency judgment or claim in case of foreclosure or sale under instrument encumbering estate property. *Prob. Code § 9807*

[6] Cross References

For a related form, see *§ 456.80*.

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PART IV. FORMS

39-456 California Forms of Pleading and Practice--Annotated § 456.80

§ 456.80 Order Authorizing Personal Representative to Borrow Money and to Encumber Estate Property [Prob. Code §§ 9800, 9804]

[1] FORM Order Authorizing Personal Representative to Borrow Money and to Encumber Estate Property [Prob. Code §§ 9800, 9804]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER AUTHORIZING PERSONAL REPRES-
Deceased.	)	ENTATIVE TO BORROW MONEY ON SECUR-
	)	ITY OF ESTATE PROPERTY
		[*Prob. Code §§ 9800, 9804*]

_____

The verified petition of _____ [*name*], the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased, praying for an order authorizing a loan on the security of estate property and an encumbrance of the property, came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. [Objector _____ (*name and description, e.g.,* John Jones, a residuary beneficiary of the estate) appeared by counsel _____ (*name*)].

The Court finds from proof made to the satisfaction of the Court:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. The personal representative holds the following property of the estate: _____ [*describe, e.g.,* real property at _____ (*street address*) and more particularly described as _____ (*legal description*)].

3. Petitioner has arranged to borrow the sum of $_____ at _____ percent interest for a term of _____ [*number of years or months of term of loan*] from _____ [*name of lender*] on the security of this property and to execute a promissory note in a representative capacity for this purpose.

4. Petitioner further has arranged to execute a _____ [deed of trust *or* Uniform Commercial Code financing statement *or specify other instrument creating security interest in property*] on the property to secure this loan.

5. The purpose of the proposed loan is _____ [*specify, e.g.,* to obtain funds with which to remodel and renovate the kitchen and bathroom of the real property].

6. This loan and encumbrance is to the advantage of this estate because _____ [*specify reason, e.g.,* the current kitchen and bathroom contain the original fixtures installed in 1925. The sale value of the property should increase substantially if these features are modernized. The cost of the remodeling is far less than the benefit likely to accrue to the estate through appreciation in value].

WHEREFORE, IT IS ORDERED as follows:

1. _____ [*Name*], as personal representative of this estate, is _____ [directed *or* authorized] to borrow the sum of $_____ from _____ [*name of lender*], with interest at the rate of _____ percent per year for a term of _____ [*number*] _____ [years *or* months] and to execute a note for this purpose and under these terms.

2. The personal representative is also _____ [directed *or* authorized] to execute a _____ [*specify instrument creating encumbrance, e.g.,* deed of trust] on _____ [*specify and describe property to be encumbered*] for the purpose of securing the loan.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use as a court order to either direct or authorize the personal representative to borrow money on the security of estate property and to execute an instrument encumbering the property for that purpose [*Prob. Code § 9804*].

[3] Contents

If a showing of advantage to the estate is made, the court may either authorize or require the personal representative to borrow money on the security of estate property and to execute a note and security instrument. The court may also authorize or require the personal representative to refinance an existing debt encumbering estate property [*Prob. Code § 9804(a)*].

The court, in its order, may also do any one or more of the following [*Prob. Code § 9804(b)*]:

- Order that the amount specified in the petition or a lesser amount, be borrowed.
- Prescribe the maximum rate of interest and the period of the loan.
- Require that the interest and the whole or any part of the principal be paid from time to time out of the estate.
- Require that the property to be encumbered, except unimproved real property, be insured for the further security of the lender, with the premiums to be paid out of the estate.
- Specify the purpose for which the money to be borrowed is to be applied.
- Specify the terms and conditions of any extension or renewal agreement.
- Prescribe other terms and conditions concerning the transaction as the court determines to be to the advantage of the estate.

[4] State Statutes

Finding of giving or waiver of notice as required in order. *Prob. Code § 1260(b)*

Order authorizing or requiring personal representative to borrow money and encumber estate property. *Prob. Code § 9804*

[5] Cross References

For a related form, see *§ 456.79*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.81

§ 456.81 Petition for Order Directing Personal Representative to Convey or Transfer Estate Property to Another [Prob. Code § 850(a)(2)(A)-(C)]

[1] FORM Petition for Order Directing Personal Representative to Convey or Transfer Estate Property to Another [Prob. Code § 850(a)(2)(A)-(C)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	PETITION FOR ORDER DIRECTING PERSONAL
Deceased.	)	REPRESENTATIVE TO _____
	)	[CONVEY *or* TRANSFER] PROPERTY
		[*Prob. Code § 850*]

_____

Petitioner alleges:

1. Petitioner, _____ [*name*], is a person who is interested in the estate of _____ [*name*], deceased, by virtue of having a right in property currently subject to administration in this estate.

2. _____ [*Name*], as personal representative of this estate, holds _____ [title *or* possession *or* title and possession] to certain _____ [real *or* personal] property more particularly described as follows: _____ [*describe sufficiently to distinguish property from all other property of similar nature in estate*].

3. Petitioner claims the right to _____ [title *or* possession *or* title and possession] pursuant to _____ [*specify interest in property claimed, e.g.,* a fee interest] in this property.

[*EITHER*]

4. Petitioner's claim is based on a written contract entered into by decedent during his/her lifetime, under which _____ [*specify terms of contract on which claim is based, e.g.,* decedent agreed to _____ (convey *or* transfer) this property to claimant for a consideration]. A copy of this contract is attached as Exhibit A and made a part hereof. Decedent died before making the _____ [conveyance *or* transfer] required by the contract. The decedent could have been compelled to make the conveyance or transfer had he or she lived because _____ [*allege facts to show that the contract was specifically enforceable against the decedent, e.g.,* the consideration set forth in the contract was the fair and reasonable value of the decedent's property at the time the agreement was entered into, the contract was just and reasonable as to the decedent, and petitioner has performed all conditions, covenants, and promises that are required to be performed by him/her in accordance with the terms and conditions of the contract].

[*OR*]

4. Petitioner's claim is based on a written contract entered into by the decedent during his/her lifetime obligating decedent or his/her personal representative to _____ [convey *or* transfer] the property on or after decedent's death to Petitioner. A copy of this contract is attached as Exhibit A and made a part hereof. _____ [*Specify all facts necessary to establish right to specific enforcement of contract (see Ch. 528, Specific Performance*)].

[*OR*]

4. _____ [*Specify other facts on which claim that decedent died holding title or possession or both of property belonging to petitioner is based, e.g.,* Decedent died while in possession of the above property only as bailee for Petitioner. Petitioner had loaned the property to decedent before his/her death with the understanding that the property would be returned to Petitioner on demand].

[*CONTINUE*]

WHEREFORE, Petitioner prays for an order as follows:

1. Directing the personal representative to _____ [convey *or* transfer] this property to Petitioner and to execute any documents necessary in order to fully complete the _____ [conveyance *or* transfer];

[2. Directing the personal representative to immediately deliver possession of this property to Petitioner;]

[3. _____ (*Specify any acts required of petitioner to fully perform under contract or to complete transaction*);] and

4. For such other orders as the court deems proper.
Dated: _____.

_____ [*signature*]

Petitioner

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 456.60.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is for use by a person who has a claim to particular property of the estate to petition for court determination of the claim [*see Prob. Code § 850*]. For further discussion, see *§ 456.23*.

This petition may be filed by any "interested person" [*Prob. Code § 850(a)(2)*]. Interested persons include any person who has a property right in the estate of a decedent [*Prob. Code § 48(a)(1)*].

This petition may also be filed by the personal representative. If the claim is undisputed, it does not appear that court authorization to convey or transfer the property is required, as the statutory language is permissive rather than mandatory [*see Prob. Code § 850(a)(2)*]. However, the personal representative might wish to seek a judicial determination of title as protection against a subsequent challenge to the appropriateness of the transfer. In the case of real property, a court order that can be recorded may be necessary in order to obtain title insurance.

[3] Civil Action as Alternative

A claimant to estate property is not required to pursue the claim solely in probate jurisdiction. Alternatively, the claimant may file an action for specific performance of a contract or to quiet title to real property, or for specific recovery of personal property [*see Prob. Code § 854*; *see also* Ch. 119, *Claim and Delivery* ; Ch. 482, *Quieting Title* ; Ch. 528, *Specific Performance*]. However, proceeding in probate has the advantage that any judgment or order is conclusive as against all persons, whereas a judgment in a civil action is binding only on the parties [*see Heiser v. Superior Court (1979) 88 Cal. App. 3d 276, 278, 151 Cal. Rptr. 745]* .

[4] Enforceability of Contract

In the case of a contract to convey realty or transfer personal property, there must be a showing that the decedent, if living, could have been compelled to make the conveyance or transfer (Paragraph 4, first alternative) [*Prob. Code § 850(a)(2)(A)*]. In the case of a contract to convey or transfer property on or after death, there must be a showing that the contract is one that can be specifically enforced (Paragraph 4, second alternative) [*Prob. Code § 850(a)(2)(B)*]. Therefore, enough facts must be alleged regarding the contract to show that it is enforceable. For essential allegations, see Ch. 140, *Contracts* , and Ch. 528, *Specific Performance* .

[5] Notice Requirements

At least 30 days before the hearing, the petitioner must cause notice of the hearing and a copy of the petition to be served on the personal representative and each person who claims an interest in, or has title to or possession of, the property [*Prob. Code § 851(a)*]. This must be served in the manner required for service of summons in civil cases [*Prob. Code § 851(a)*; *see Code Civ. Proc. § 413.10 et seq.* (service of summons); for discussion and forms, *see* Ch. 518, *Service of Summons and Papers*].

In addition, at least 15 days before the hearing, notice of the hearing and a copy of the petition must be given to any persons who have requested special notice in the estate proceeding pursuant to Prob. Code § 1254 and to all known heirs and devisees whose interests in the estate would be affected by the proposed purchase [*Prob. Code § 851(b)*; *see Prob. Code § 1220(a)(1), (2)*]. However, this notice need not be given any persons who have received notice at least 30 days before the hearing as specified above [*Prob. Code § 851(b)*]. If any person entitled to notice is represented by an attorney of record, the notice must also be given to that attorney [*Prob. Code § 1214*]. The court is not authorized to shorten these notice periods [*Prob. Code § 851(c)*]. For further discussion of the notice requirement and for forms of notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

[6] State Statutes

Petition for order of conveyance or transfer of property claimed to belong to other person. *Prob. Code § 850*

Notice of hearing. *Prob. Code § 851*

Continuance for preparation for hearing. *Prob. Code § 852*

Mandatory denial of petition if objection based on venue is established. *Prob. Code § 853*

Mandatory abatement of petition if civil action is pending. *Prob. Code § 854*

Issuance of order. *Prob. Code § 856*

Mandatory denial of petition on finding that matter should be determined by civil action. *Prob. Code § 856.5*

Effect of order and execution and effect of conveyance or transfer. *Prob. Code § 857*

Filing of notice of lis pendens. [*Prob. Code § 1004*].

Verified petition is admissible evidence in uncontested proceeding. [*Prob. Code § 1022*].

[7] Decisions

Under former Prob. Code § 851.5 (*now Prob. Code § 850(a)*), petition to resolve claim was properly filed by either claimant or administrator of estate; lis pendens pursuant to former *Code Civ. Proc. § 409* (*see Code Civ. Proc. § 405.20*) was properly recorded to disclose any title dispute with respect to real property, and was statutory means of preventing alienation until dispute is resolved. *Maltaman v. State Bar (1987) 43 Cal. 3d 924, 952, 239 Cal. Rptr. 687, 741 P.2d 185*

[8] Cross References

For a related form, *see § 456.82*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.82

§ 456.82 Order Directing Personal Representative to Convey or Transfer Estate Property to Another [Prob. Code §§ 850(a)(2)(A)-(C), 856]

[1] FORM Order Directing Personal Representative to Convey or Transfer Estate Property to Another [Prob. Code §§ 850(a)(2)(A)-(C), 856]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER DIRECTING PERSONAL REPRESENT-
Deceased.	)	ATIVE TO _____ [CONVEY *or* TRANSFER] PROPERTY

_____

The verified petition of _____ [*name*], a person who claims a right in certain property of the estate of _____ [*name*], deceased, praying for an order directing the personal representative to _____ [convey *or* transfer] the property, came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. [_____ (*Name*), the personal representative, appeared by counsel _____ (*name*)].

The Court finds from proof made to the satisfaction of the Court:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. Venue in this court would be proper for the trial of a civil action seeking the same relief as is sought in the petition in this matter.

3. No civil action was pending with respect to the subject matter of the petition in this matter prior to the date on which the petition was filed.

4. _____ [*Name*], as personal representative, holds _____ [title *or* possession *or* title and possession] to certain _____ [real *or* personal] property more particularly described as follows: _____ [*describe*].

[*EITHER*]

5. During his/her lifetime, decedent entered into a written contract with petitioner under which _____ [*specify terms of contract on which claim is based, e.g.,* decedent agreed to _____ (convey *or* transfer) this property to petitioner for a consideration]. Had decedent lived, he/she could have been compelled to _____ [convey *or* transfer] this property to petitioner.

[*OR*]

5. During his/her lifetime decedent entered into a written contract with petitioner under which decedent or his/her personal representative became obligated to _____ [convey *or* transfer] this property on or after decedent's death to petitioner. This contract is specifically enforceable.

[*OR*]

5. _____ [*Specify other facts on which claim that decedent died holding title or possession or both of property belonging to claimant is based, e.g.,* Decedent died while in possession of this property only as bailee for petitioner. Petitioner had loaned the property to decedent before his/her death with the understanding that the property would be returned to petitioner on demand].

[*CONTINUE*]

6. Petitioner is the owner of _____ [*specify interest, e.g.,* a fee interest in this property and is entitled to _____ title *or* possession *or* title and possession] of the property.

WHEREFORE, IT IS ORDERED as follows:

1. The personal representative shall immediately _____ [convey title *or* transfer title *or* deliver possession *or* convey title and deliver possession *or* transfer title and deliver possession] of the above property to petitioner.

2. The personal representative shall execute all documents that may be necessary to accomplish this _____ [conveyance *or* transfer].

[3. _____ (*Specify any acts required of claimant to fully perform under contract or to complete transaction*).]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use as a court order to direct the personal representative to convey or transfer property being administered in the estate to a claimant whose right to the property has been established and to deliver the property to the claimant [*see Prob. Code § 856*]. Some care must be taken in the wording of the order depending on the nature of the claimant's interest in the property. Attention must be paid as to whether the claim entitles the claimant to both title and possession, or to title only (if, for example, the property is subject to a valid lease) or to possession only (if, for example, the claimant claims only a leasehold interest). The order should reflect only the rights that the interest claimed bestows on the claimant.

[3] Objection Based on Venue

The matter may not proceed in probate court if venue in the county in which the court is located would not be proper for the trial of a civil action seeking the same relief (Paragraph 2) [*Prob. Code § 853*].

[4] Abatement if Civil Action Is Pending

This form contains a provision stating that no civil action regarding the same property is pending (Paragraph 3). If a civil action is pending with respect to the subject matter of the petition and jurisdiction has been obtained in that court prior to the filing of the petition, the probate court must abate the petition until the conclusion of the civil action. However, abatement is not required if the court determines that the civil action was filed for the purpose of delay [*Prob. Code § 854*]. If the court determines that the matter should be determined by a civil action, it may not grant the order of conveyance or transfer [*Prob. Code § 854*].

[5] State Statutes

Issuance of order directing conveyance or transfer of estate property. *Prob. Code § 856*

Effect of order and execution and effect of conveyance or transfer. *Prob. Code § 857*

Finding of giving or waiver of notice as required in order. [*Prob. Code § 1260(b)*].

[6] Cross References

For a related form, see *§ 456.81*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.83

§ 456.83 Petition by Personal Representative for Order Directing Conveyance or Transfer of Property to Estate [Prob. Code § 850(a)(2)(D)]

[1] FORM Petition by Personal Representative for Order Directing Conveyance or Transfer of Property to Estate [Prob. Code § 850(a)(2)(D)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR ORDER DIRECTING
Estate of _____ [*name*],	)	_____ [CONVEYANCE *or*
Deceased.	)	TRANSFER] OF PROPERTY TO ESTATE
	)	[*Prob. Code § 850(a)(2)(D)*]

_____

Petitioner alleges:

1. Petitioner, _____ [*name*], is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. _____ [*Name of person against whom property right is asserted*] holds _____ [title *or* possession *or* title and possession] to certain _____ [real *or* personal] property more particularly described as follows: _____ [*describe sufficiently to distinguish property from all other property of similar nature*].

3. Petitioner claims the right to _____ [title *or* possession *or* title and possession] pursuant to _____ [*specify interest in property claimed, e.g.,* a fee interest] in this property held by decedent during his/her lifetime.

4. _____ [*Specify all facts on which claim that decedent died having claim to property is based, e.g.,* Decedent died while _____ [*name*] was in possession of the above property only as bailee for decedent. Before his/her death, decedent had loaned the property to _____ [*name*] with the understanding that the property would be returned to decedent on demand].

WHEREFORE, Petitioner prays for an order as follows:

1. Directing _____ [*name*] to _____ [convey *or* transfer] this property to petitioner, as personal representative of this estate, and to execute any documents necessary in order to fully complete the _____ [conveyance *or* transfer];

2. Directing _____ [*name*] to immediately deliver possession of this property to petitioner;

[3. _____ (*Specify any acts required of petitioner to complete transaction*);] and

4. For such other orders as the court deems proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 456.60.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is for use by the personal representative to petition for court determination of a claim of decedent to property, title or possession of which is held by another person [*see Prob. Code § 850(a)(2)(D)*]. For further discussion, see *§ 456.23*.

This petition may be filed by the personal representative or by any "interested person" [*Prob. Code § 850(a)*; *see Prob. Code § 48*]. For discussion of persons interested in an estate, see *§ 456.60*.

[3] State Statutes

Petition for order of conveyance or transfer of property claimed to belong to decedent. *Prob. Code § 850(a)(2)(D)*

Verified petition is admissible evidence in uncontested proceeding. *Prob. Code § 1022*

[4] Cross References

For related forms, see *§§ 456.81* and *456.84*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.84

§ 456.84 Order Directing Conveyance or Transfer of Property to Estate [Prob. Code §§ 850(a)(2)(D), 856]

[1] FORM Order Directing Conveyance or Transfer of Property to Estate [Prob. Code §§ 850(a)(2)(D), 856]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER DIRECTING _____
Deceased.	)	[CONVEYANCE *or* TRANSFER] OF PROPERTY
	)	TO ESTATE
		[*Prob. Code § 856*]

_____

The verified petition of _____ [*name*], the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased, praying for an order directing _____ [*name of person holding title or possession of property*] to _____ [convey real property *or* transfer personal property] to the estate, came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. _____ [*Name of person holding title or possession of property claimed by estate*] appeared by counsel _____ [*name*].

The Court finds from proof made to the satisfaction of the Court:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. Venue in this court would be proper for the trial of a civil action seeking the same relief as is sought in the petition in this matter.

3. No civil action was pending with respect to the subject matter of the petition in this matter prior to the date on which the petition was filed.

4. _____ [*Name*] holds _____ [title *or* possession *or* title and possession] to certain _____ [real *or* personal] property more particularly described as follows: _____ [*describe*].

5. _____ [*Specify facts on which claim that decedent died having claim to title or possession of property is based, e.g.,* Decedent died while _____ [*name*] was in possession of the above property only as bailee for decedent. Before his/her death, decedent had loaned the property to _____ [*name*] with the understanding that the property would be returned to decedent on demand].

6. At the time of his/her death, decedent was the owner of _____ [*specify interest, e.g.,* a fee interest in this property, and as his/her personal representative, petitioner is entitled to _____ title *or* possession *or* title and possession] of the property.

WHEREFORE, IT IS ORDERED as follows:

1. _____ [*Name*] shall immediately _____ [convey title *or* transfer title *or* deliver possession *or* convey title and deliver possession *or* transfer title and deliver possession] of the above property to petitioner.

2. _____ [*Name*] shall execute all documents as may be necessary to accomplish this _____ [conveyance *or* transfer].

[3. _____ (*Specify any acts required of personal representative to complete transaction*).]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is a court order to direct a conveyance or transfer to the estate of property with respect to which the decedent died having a claim [*see Prob. Code § 850(a)(2)(D)*].

[3] State Statutes

Issuance of order directing conveyance or transfer of estate property. *Prob. Code § 856*

Effect of order and execution and effect of conveyance or transfer. *Prob. Code § 857*

Finding of giving or waiver of notice is required in order. *Prob. Code § 1260(b)*

[4] Cross References

For related forms, *see §§ 456.81* and *456.83*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.85

§ 456.85 Petition for Order Authorizing Dedication or Conveyance of Easement [Prob. Code § 9900]

[1] FORM Petition for Order Authorizing Dedication or Conveyance of Easement [Prob. Code § 9900]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR ORDER AUTHORIZING
Estate of _____ [*name*],	)	_____ [DEDICATION *or*
Deceased.	)	CONVEYANCE] OF
	)	EASEMENT
	)	[*Prob. Code § 9900*]

_____

Petitioner alleges:

1. Petitioner, _____ [*name*], is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. Petitioner holds certain real property of this estate located at _____ [*street address*], _____ County, California, more particularly described as follows: _____ [*legal description*].

3. Petitioner proposes to _____ [dedicate *or* convey] an easement over this real property to _____ [*name*] for the purpose of _____ [*specify, e.g.,* the installation of natural gas lines to serve the property and adjoining properties]. The complete legal description of this easement is as follows: _____ [*legal description*].

[*EITHER*]

4. Petitioner proposes to grant this easement without the receipt of consideration by the estate.

[*OR*]

4. The estate will receive the sum of $_____ as consideration for the easement.

[*CONTINUE*]

5. It is to the advantage of the estate and in the best interest of persons interested in this estate that this easement be _____ [dedicated *or* conveyed] because _____ [*state reason, e.g.,* the easement will increase rather than decrease the value of the property because of availability of natural gas to the property].

WHEREFORE, petitioner prays for an order authorizing a _____ [dedication *or* conveyance] of the easement described above to _____ [*name*] for the purpose of _____ [*specify*] and for such other orders as the court deems proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 456.60.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is for use by the personal representative to petition for an order authorizing the dedication or conveyance of an easement over real property of the estate [*see Prob. Code § 9900(b)*]. The petition may be filed by the personal representative or by any person who is interested in the estate [*Prob. Code § 9901(a)*]. For the definition of "interested persons," see *§ 456.60*.

The form may be used whether the grantee of the easement is a public entity or a private party [*see Prob. Code § 9900(b)*]. It may be adapted to convey, release, or relinquish to a public entity access rights to any street, highway, or freeway from any real property of the estate [*see Prob. Code § 9900(c)*]. For further discussion, see *§ 456.24*.

[3] Notice Requirements

Notice of the hearing must be given by mail at least 15 days before the date of the hearing [*Prob. Code § 9901(b)*; *see Prob. Code § 1220*]. For further discussion of the notice requirement and for forms of notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

[4] State Statutes

Verified petition is admissible evidence in uncontested proceeding. *Prob. Code § 1022*

Dedication or conveyance of real property or easement, with or without consideration. *Prob. Code § 9900*

Filing of petition and notice of hearing on petition. *Prob. Code § 9901*

[5] Cross References

For a related form, *see § 456.86*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.86

§ 456.86 Order Authorizing Dedication or Conveyance of Easement [Prob. Code § 9900]

[1] FORM Order Authorizing Dedication or Conveyance of Easement [Prob. Code § 9900]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER AUTHORIZING _____
Deceased.	)	[DEDICATION *or* CONVEYANCE] OF EASE-
	)	MENT
		[*Prob. Code § 9900*]

_____

The verified petition of _____ [*name*], the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased, praying for an order authorizing _____ [conveyance *or* dedication] of an easement to _____ [*name*], came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. [Objections were filed by _____ (*name and description of objector, e.g.,* John Jones, a residuary beneficiary of the estate), who appeared by counsel _____ (*name*).]

The Court finds from proof made to the satisfaction of the Court:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. Petitioner holds certain real property of this estate located at _____ [*street address*], _____ County, California, more particularly described as follows: _____ [*legal*

description].

3. It is to the advantage of this estate and in the best interest of its interested persons that petitioner _____ [dedicate *or* convey] an easement over this real property to _____ [*name*] for the purpose of _____ [*specify, e.g.,* the installation of natural gas lines to serve the property and adjoining properties] because _____ [*state reason*, e.g., the availability of natural gas to the property is likely to increase the value of the property].

WHEREFORE, IT IS ORDERED as follows:

1. The personal representative shall _____ [dedicate *or* convey] the easement described below over real property of the estate to _____ [*name*]: _____ [*legal description of easement*].

2. This easement shall be _____ [dedicated *or* conveyed] _____ [without consideration *or* in consideration of the sum of $_____, to be received by the estate as a condition precedent to the _____ (dedication *or* conveyance) of the easement].

3. The personal representative shall execute, as representative of the estate, all instruments and documents of transfer required to give legal effect to and allow recording of this easement.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use as a court order to authorize the personal representative to dedicate or convey an easement over real property of the estate [*see Prob. Code § 9900(b)*]. The court may prescribe any terms and conditions of the dedication or conveyance as it deems proper in the order [*Prob. Code § 9900*].

[3] State Statutes

Finding of giving or waiver of notice is required in order. *Prob. Code § 1260(b)*

Dedication or conveyance of easement with or without consideration. *Prob. Code § 9900*

[4] Cross References

For a related form, see *§ 456.85*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.87

§ 456.87 Petition for Order Authorizing Exchange of Estate Property for Other Property [Prob. Code § 9921]

[1] FORM Petition for Order Authorizing Exchange of Estate Property for Other Property [Prob. Code § 9921]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR ORDER AUTHORIZING
Estate of _____ [*name*],	)	EXCHANGE OF ESTATE PROPERTY FOR OTH-
Deceased.	)	ER PROPERTY
	)	[*Prob. Code § 9921*]

_____

Petitioner alleges:

1. Petitioner, _____ [*name*], is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. Petitioner holds the following _____ [real *or* personal] property of this estate: _____ [*describe sufficiently to distinguish property from all other property of estate of similar nature, e.g.,* decedent's residence located at _____ (*street address*), _____ County, California, more particularly described as follows: _____ (*legal description*)].

3. _____ [*Name*] is the owner of the following _____ [real *or* personal] property: _____ [*describe sufficiently to distinguish property from other property of similar nature, e.g.,* a duplex located at _____ (*street address*), _____ County, California, more particularly described as follows: _____ (*legal description*)].

4. The above property of this estate was appraised at a value of $_____ on _____ [*date of appraisal*] using an evaluation date of _____ [*date*], as shown on the Inventory and Appraisal on file in this matter. The property is currently subject to the following encumbrances: _____ [*specify*]. The value of the interest of the estate, after reduction for encumbrances, is $_____ as of the date of this Petition.

5. The above property of _____ [*name*] was appraised at a value of $_____ on _____ [*date of appraisal*] using an evaluation date of _____ [*date*]. The property is currently subject to the following encumbrances: _____ [*specify*]. The value of the interest of _____ [*name*], after reduction for encumbrances, is $_____ as of the date of this Petition.

6. Petitioner and _____ [*name*] propose to exchange the property of this estate for the property of _____ [*name*] under the following terms and conditions: _____ [*specify, e.g.,* Petitioner will receive, as personal representative of this estate, the property of _____ (*name*) in exchange for the property of the estate plus the sum of $_____ cash].

7. It is to the advantage of this estate to make this exchange of property because _____ [*state reason, e.g.,* the duplex currently produces net monthly rental income of $_____. The rental income from the duplex that will accrue to this estate during the period of administration will exceed the cash cost to the estate of making the exchange].

[*EITHER*]

8. Petitioner has executed a bond for the amount of $_____, which has been given by _____ [personal sureties *or* an admitted surety insurer]. On completion of the proposed exchange of properties, the value of the personal property and the value of the probable annual gross income of all of the property of this estate will be $_____. An additional bond is _____ [not required *or* required in the sum of $_____].

[*OR*]

8. Bond for petitioner has been waived pursuant to _____ [decedent's will *or Probate Code Section 8481(a)(2)*].

[*CONTINUE*]

WHEREFORE, Petitioner prays for an order of the court as follows:

1. Authorizing the exchange of estate property for the property of _____ [*name*], as set forth above;

2. Directing execution of all documents necessary in order to give effect to the exchange;

3. For such other orders as the court deems proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 456.60.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is for use by the personal representative to petition for an order authorizing an exchange of estate property for other property [*see Prob. Code § 9920*]. The petition may be filed by the personal representative or by any person who is interested in the estate [*Prob. Code § 9921*]. For the definition of "interested persons," see *§ 456.60*. For further discussion, see *§ 456.25*.

Real property exchanges have significant tax consequences. For discussion of the tax implications, *see* California Legal Forms, Ch. 24, *Exchanges of Real Property* (Matthew Bender).

[3] Contents

A petition for authorization of an exchange of properties must contain [*Prob. Code § 9921*]:

- A description of the property (Paragraphs 2 and 3);
- The terms and conditions of the proposed exchange (Paragraph 7); and
- A showing that the proposed exchange is to the advantage of the estate (Paragraph 8).

[4] Notice Requirements

Notice of the hearing must be given by mail at least 15 days before the date of the hearing [*Prob. Code § 9922(a)*; *see Prob. Code § 1220*]. If the exchange involves an exchange of securities, the court, on a showing of good cause, may ex parte order that the notice be given for a shorter period or that notice be dispensed with [*Prob. Code § 9922(b)*; *see Prob. Code § 10200* ("securities" defined)]. For further discussion of the notice requirement and for forms of notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

[5] Bond

The court has discretion to fix the amount of the bond. However, the amount of the bond cannot be more than the sum of the following [*see Prob. Code § 8482(a)*]:

- The estimated value of the personal property.
- The probable annual gross income of the estate.
- The estimated net proceeds of the real property authorized to be sold under the Independent Administration of Estates Act (*Prob. Code § 10400 et seq.*), if independent administration is granted as

to real property.

Notwithstanding *Prob. Code § 8482(a)*, if the bond is given by an admitted surety insurer, the court may establish a fixed minimum amount for the bond, based on the minimum premium required by the admitted surety insurer [*Prob. Code § 8482(b)*]. If the bond is given by personal sureties, the amount of the bond must be twice the amount fixed by the court under *Prob. Code § 8482(a)* [*see Prob. Code § 8482(c)*]. If the exchange involves the receipt of income-producing property by the estate, bond may become insufficient. Therefore, this form contains an optional provision that sets forth the effect of the transaction on bond requirements (Paragraphs 8).

[6] State Statutes

Verified petition is admissible evidence in uncontested proceeding. *Prob. Code § 1022*

Court authorization for exchange of property of estate for other property. *Prob. Code § 9920*

Petition for order to exchange. *Prob. Code § 9921*

Notice of hearing on petition. *Prob. Code § 9922*

Effect of procedural error on exchange. *Prob. Code § 9923*

[7] Cross References

For a related form, see *§ 456.88*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.88

§ 456.88 Order Authorizing Exchange of Estate Property for Other Property [Prob. Code § 9920]

[1] FORM Order Authorizing Exchange of Estate Property for Other Property [Prob. Code § 9920]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER AUTHORIZING EXCHANGE OF ES-
Deceased.	)	TATE PROPERTY
	)	[*Prob. Code § 9920*]

_____

The verified petition of _____ [*name*], the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased, praying for an order authorizing an exchange of property of the estate for other property, came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. [Objections were filed by _____ (*name and description of objector, e.g.,* John Jones, a residuary beneficiary of the estate), who appeared by counsel _____ (*name*).]

The Court finds from proof made to the satisfaction of the Court:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. The personal representative holds the following _____ [real *or* personal] property of this estate: _____ [*describe sufficiently to distinguish property from all other property of estate of similar nature, e.g.,* decedent's residence located at _____ (*street address*), _____ County,

California, more particularly described as follows: _____ (*legal description*)].

3. This property currently has a market value of $_____. [The value of the estate's interest in this property after encumbrances is $_____.]

4. _____ [*Name*] is the owner of the following _____ [real *or* personal] property: _____ [*describe sufficiently to distinguish property from other property of similar nature, e.g.,* a duplex located at _____ (*street address*), _____ County, California, more particularly described as follows: _____ (*legal description*)].

5. This property currently has a market value of $_____. [The value of the owner's interest in this property after encumbrances is $_____.]

6. It is to the advantage of this estate that the personal representative be authorized to exchange the above property of the estate for the above property of _____ [*name*] because _____ [*state reason, e.g.,* the duplex currently produces net monthly rental income of $_____. The rental income from the duplex that will accrue to this estate during the period of administration will exceed the cash cost to the estate of making the exchange].

[*EITHER*]

7. Petitioner has executed a bond for the amount of $_____, which has been given by _____ [personal sureties *or* an admitted surety insurer]. On completion of the exchange of properties, the value of the personal property and the value of the probable annual gross income of all of the property of this estate will be $_____. An additional bond is _____ [not required *or* required in the sum of $_____].

[*OR*]

7. Bond for petitioner has been waived pursuant to _____ [decedent's will *or Probate Code Section 8481(a)(2)*].

[*CONTINUE*]

WHEREFORE, IT IS ORDERED as follows:

1. _____ [*Name*], as personal representative of this estate, is authorized to exchange the above property of the estate for the above property of _____ [*name*], under the following terms and conditions: _____ [*specify, e.g.,* the personal representative shall convey the property and also pay the sum of $_____ to _____ (*name*) in exchange for a conveyance of the property of _____ (*name*) to the estate. The properties are to be exchanged subject to all existing encumbrances of record and with the consent of the holders of such encumbrances. Should any encumbrance holder fail or refuse to consent in writing to the exchange, this order is void and the exchange shall not be carried out].

2. The personal representative and _____ [*name of owner of other property*] are directed to execute all documents necessary in order to give effect to this exchange and to _____ [convey *or* transfer] title and possession of the respective properties to the other.

[3. The personal representative shall give an additional surety bond in the sum of $_____.]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use as a court order to authorize the personal representative to exchange property of the estate for other property [*see Prob. Code § 9920*]. The court may prescribe any terms and conditions of the exchange as it deems proper in the order, including a cash payment either by or to the estate as consideration for the exchange [*Prob. Code § 9920*].

[3] State Statutes

Finding of giving or waiver of notice is required in order. *Prob. Code § 1260(b)*

Court authorization for exchange of property. *Prob. Code § 9920*

[4] Cross References

For a related form, see *§ 456.85*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.89

§ 456.89 Petition for Order Authorizing Lease of Estate Property [Prob. Code § 9943]

[1] FORM Petition for Order Authorizing Lease of Estate Property [Prob. Code § 9943]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR ORDER AUTHORIZING LEASE
Estate of _____ [*name*],	)	OF REAL PROPERTY OF
Deceased.	)	ESTATE
	)	[*Prob. Code § 9943*]

_____

Petitioner alleges:

1. Petitioner, _____ [*name*], is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. Petitioner holds certain real property of this estate located at _____ [*street address*], _____ County, California, more particularly described as follows: _____ [*legal description*].

3. Petitioner proposes to lease this property to _____ [*name of lessee*] for a term of _____ [one year *or* _____ years] commencing _____ [*date*] and ending _____ [*date*] and for a monthly rental of $_____ dollars. A copy of this proposed lease is attached as Exhibit A and made a part hereof.

4. This proposed lease is to the advantage of the estate because _____ [*state reason, e.g.*, the income

to be received under the lease will accrue to the advantage of the estate. To the extent that the term of the lease exceeds the period of administration, the devisee of the property to be leased consents to the lease].

[5. A lease term in excess of 10 years is needed, and is to the advantage of the estate and for the benefit of persons interested in this estate because _____ (*state reasons, e.g.,* under the lease, the lessee must install improvements on the property that will inure to the long-term benefit of the estate and its interested persons through an increase in the value of the property at the end of the term).]

[*EITHER*]

6. Petitioner has executed a bond for the amount of $_____, which has been given by _____ [personal sureties *or* an admitted surety insurer]. On execution of the proposed lease, the value of the personal property and the value of the probable annual gross income of all of the property of this estate will be $_____. An additional bond is _____ [not required *or* required in the sum of $_____].

[*OR*]

6. Bond for petitioner has been waived pursuant to _____ [decedent's will *or Probate Code Section 8481(a)(2)*].

[*CONTINUE*]

WHEREFORE, Petitioner prays for an order of the court authorizing a lease of the above property as set forth above and for such other orders as the court deems proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See Form No. 560.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is for use by the personal representative to petition for an order authorizing a lease of estate real property [*see Prob. Code § 9943*]. Court authorization is not required in the case of a month-to-month tenancy or if the term does not exceed one year and the monthly rent does not exceed $5,000 [*Prob. Code § 9941*].

The petition may be filed by the personal representative or by any person who is interested in the estate [*Prob. Code §*

9943(a)]. For the definition of "interested persons," see *§ 456.60*. For further discussion, see *§ 456.26*.

[3] Contents

A petition for authorization of a lease of estate real property must contain all of the following [*Prob. Code § 9943(a)*]:

- A general description of the real property proposed to be leased (Paragraph 2).
- The term, rental, and general conditions of the proposed lease (Paragraph 3).
- A showing that the proposed lease is to the advantage of the estate (Paragraph 4).

If the term of the proposed lease exceeds 10 years, the petition must also state facts showing the need for the longer lease, its advantage to the estate, and its benefit to the interested persons (Paragraph 5) [*Prob. Code § 9943(b)*].

[4] Notice Requirements

Notice of the hearing must be given by mail at least 15 days before the date of the hearing and also posted at least 15 days before the hearing [*Prob. Code§ 9944(a)*; *see Prob. Code §§ 1220, 1230*]. Notice must also be published unless the will authorizes or directs the personal representative to lease the property [*Prob. Code § 9944(b)*; *see Prob. Code § 10300*]. If the lease term is longer than 10 years, notice by mail must be given to each known heir or devisee whose interest in the estate would be affected by the proposed lease [*Prob. Code § 9944(c)*]. For further discussion of the notice requirement and for forms of notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

[5] Bond

The court has discretion to fix the amount of the bond. However, the amount of the bond cannot be more than the sum of the following [*see Prob. Code § 8482(a)*]:

- The estimated value of the personal property.
- The probable annual gross income of the estate.
- The estimated net proceeds of the real property authorized to be sold under the Independent Administration of Estates Act (*Prob. Code § 10400 et seq.*), if independent administration is granted as to real property.

Notwithstanding *Prob. Code § 8482(a)*, if the bond is given by an admitted surety insurer, the court may establish a fixed minimum amount for the bond, based on the minimum premium required by the admitted surety insurer [*Prob. Code § 8482(b)*]. If the bond is given by personal sureties, the amount of the bond must be twice the amount fixed by the court under *Prob. Code § 8482(a)* [*see Prob. Code § 8482(c)*]. Because a lease of real property increases the annual gross income of the estate, bond may become insufficient. Therefore, this form contains an optional provision that sets forth the effect of the lease on bond requirements (Paragraph 6).

[6] State Statutes

Verified petition is admissible evidence in uncontested proceeding. *Prob. Code § 1022*

"Lease" defined and extension of lease term. *Prob. Code § 9940*

Lease of estate real property without court authorization. *Prob. Code § 9941*

Lease of estate real property with court authorization. *Prob. Code § 9942*

Petition for order authorizing lease. *Prob. Code § 9943*

Notice of hearing on petition authorizing lease. *Prob. Code § 9944*

Hearing and order on petition authorizing lease. *Prob. Code § 9945*

Terms and conditions of lease ordered by court. *Prob. Code § 9946*

Maximum term of lease. *Prob. Code § 9947*

Effect of lease. *Prob. Code § 9948*

[7] Cross References

For a related form, see *§ 456.90*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.90

§ 456.90 Order Authorizing Lease of Estate Property [Prob. Code §§ 9945, 9946]

[1] FORM Order Authorizing Lease of Estate Property [Prob. Code §§ 9945, 9946]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER AUTHORIZING LEASE OF ESTATE
Deceased.	)	PROPERTY
	)	[*Prob. Code §§ 9945, 9946*]

_____

The verified petition of _____ [*name*], the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased, praying for an order authorizing a lease of real property of the estate, came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. [Objections were filed by _____ (*name and description of objector, e.g.,* John Jones, a residuary beneficiary of the estate), who appeared by counsel _____ (*name*).]

The Court finds from proof made to the satisfaction of the Court:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. The personal representative holds real property of this estate located at _____ [*street address*], _____ County, California, more particularly described as follows: _____ [*legal description*].

3. It is to the advantage of the estate to lease this real property to _____ [*name of lessee*] because _____ [*state reason, e.g.,* the rental income from the property to be received under the lease during the period of estate administration will accrue to the benefit of the estate. The term of the lease is not likely to extend beyond the period of administration].

[4. A lease term in excess of 10 years is to the benefit of persons interested in this estate because _____ (*state reason, e.g.,* the improvements required to be made by the lessee under the lease will greatly increase the value of the property when it reverts to its devisees at the end of the 15-year term).]

[5. The property to be leased includes property _____ (owned by _____ (*name*) *or* in which _____ (*name*) has an interest). The percentage that the property subject to administration in this estate bears to the whole of the property to be leased is _____ percent.]

[*EITHER*]

6. Petitioner has executed a bond for the amount of $_____, which has been given by _____ [personal sureties *or* an admitted surety insurer]. After execution of the lease, the value of the personal property and the value of the probable annual gross income of all of the property of this estate will be $_____. An additional bond is _____ [not required *or* required in the sum of $_____].

[*OR*]

6. Bond for the petitioner has been waived pursuant to _____ [decedent's will *or Probate Code Section 8481(a)(2)*].

[*CONTINUE*]

WHEREFORE, IT IS ORDERED as follows:

1. _____ [*Name*], as personal representative of this estate, is authorized to lease the above property of the estate to _____ [*name of lessee*] for a term of _____ [one year *or* _____ years], commencing _____ [*date*] and ending _____ [*date*], at a rental of $_____ per month.

[2. _____ (*Set forth other terms and conditions of lease as required by court*).]

[3. The rental income to be received under the lease shall be divided between the personal representative and _____ (*name of other persons holding interest in property*) in the following proportions: _____percent to the personal representative and _____ percent to _____ (*name*).]

[4. The personal representative shall give an additional surety bond in the sum of $_____.]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use as a court order to authorize the personal representative to lease real property of the estate [*see Prob. Code §§ 9942, 9945*].

[3] Contents

An order authorizing the execution of a lease must set forth the minimum rental or royalty and the period of the lease [*Prob. Code § 9946(a)*]. The order may also authorize other terms and conditions of the lease as the court deems proper, including certain statutorily specified provisions for leases involving exploration for and development of natural resources [*see Prob. Code § 9946(b)*]. If the lease covers additional property owned by other persons or an undivided or other interest of the decedent less than the entire ownership of the property, the court may authorize the lease to provide for division of rental and royalty in the proportion that the land or interest of each owner bears to the total area of the land or total interest covered by the lease [*Prob. Code § 9946(c)*].

[4] State Statutes

Finding of giving or waiver of notice as required in order. *Prob. Code § 1260(b)*

Order authorizing lease of real property of estate. *Prob. Code § 9945*

Terms and conditions of lease ordered by court. *Prob. Code § 9946*

[5] Cross References

For a related form, see *§ 456.85*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.91

§ 456.91 Petition for Partition of Estate Property [Prob. Code § 11951]

[1] FORM Petition for Partition of Estate Property [Prob. Code § 11951]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR ORDER AUTHORIZING
Estate of _____ [*name*],	)	PARTITION OF ESTATE PROPERTY
Deceased.	)	[*Prob. Code § 11950*]
	)	

_____

Petitioner alleges:

1. Petitioner, _____ [*name*], is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. Petitioner holds the following _____ [real *or* personal] property of this estate: _____ [*describe sufficiently to distinguish property from all other property of estate of similar nature, e.g.,* decedent's residence located at _____ (*street address*), _____ County, California, more particularly described as follows: _____ (*legal description*)].

3. The following persons are entitled to the distribution of undivided _____ [*specify, e.g.,* one-half] interests _____ [*specify nature of interest, e.g.,* in fee] in the above property: _____ [*names of heirs or devisees*], _____ [*specify relationship to deceased, e.g.,* children of decedent].

4. The above-named persons have been unable to agree to a partition, allotment, or other division of the property, and

therefore, Petitioner desires this court to order a partition, allotment, or other division of the property _____ [between *or* among] them as will be equitable and just and will avoid the distribution of undivided interests in the property.

5. No order for distribution of the above-described property has _____ [been entered *or* become final].

WHEREFORE, petitioner prays for an order partitioning, allotting, or otherwise dividing this property of the estate in such a manner that each person entitled to an undivided interest in the property shall receive property, the value of which will be proportionate to the value of his or her undivided interest in the whole, and for such other orders as the court deems proper.
Dated: _____.

_____ [*signature*]

Petitioner

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 456.60.*]

CAUTION:
Petitions in probate matters must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is a petition for use by the personal representative to request an order or decree partitioning or allotting or dividing property of the estate to which various beneficiaries are entitled to undivided interests [*see Prob. Code § 11950*]. The petition may be filed by any beneficiary who is entitled to the distribution of an undivided interest in the property, or by the personal representative at the request of such a person [*Prob. Code § 11950*]. For further discussion, see *§ 456.28*.

[3] Contents

A petition for partition must [*Prob. Code § 11951(b)*]:

- Describe the property (Paragraph 2);
- Give the names of the persons having or claiming the undivided interests (Paragraph 3); and
- State what those interests are so far as known to the petitioner (Paragraph 3).

[4] Notice and Hearing

Notice of hearing on the petition must be given as provided in *Prob. Code § 1220* to the personal representative and to the persons entitled to distribution of the undivided interests [*Prob. Code § 11952(a)*]. For further discussion of notice requirements and for forms of notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

At the hearing, the persons entitled to distribution of the undivided interests are considered parties to the proceeding whether or not they have appeared or filed a responsive pleading. No one is considered as a plaintiff or defendant [*Prob. Code § 11952(b)*]. Any objection to the court's jurisdiction must be made and resolved in the manner prescribed in *Prob. Code §§ 850 et seq.*, discussed in *§ 456.23* [*Prob. Code § 11952(c)*].

[5] State Statutes

Verified petition is admissible evidence in uncontested proceeding. *Prob. Code § 1022*

Petition for partition, allotment, or division. *Prob. Code § 11950*

Filing and contents of petition. *Prob. Code § 11951*

Hearing on petition, parties, and notice. *Prob. Code § 11952*

Decree after hearing. *Prob. Code § 11953*

Appointment of referees to partition property. *Prob. Code § 11954*

Apportionment of expense of partition and lien on property. *Prob. Code § 11955*

Operation and effect of allotment made by court. *Prob. Code § 11956*

[6] Cross References

For a related form, see *§ 456.92*.

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39-456 California Forms of Pleading and Practice--Annotated § 456.92

§ 456.92 Decree of Partition of Estate Property [Prob. Code § 11953]

[1] FORM Decree of Partition of Estate Property [Prob. Code § 11953]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	DECREE OF PARTITION
Deceased.	)	[*Prob. Code § 11953*]
	)	

_____

The verified petition of _____ [*name*], the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased, praying for a decree of partition, came on regularly for hearing on _____ [*date*] in Department _____ of this Court, the Honorable _____ [*name of judge*], presiding. Petitioner appeared by counsel _____ [*name*]. _____ [*Set forth name of each person entitled to undivided interest in property who appeared in matter and counsel for each*].

The Court finds from proof made to the satisfaction of the Court:

1. Notice of the time and place of the hearing was given as required by law. [Special notice was _____ (given to _____ (*names*), as requested *or* requested and waived by _____ (*names*)).]

2. Petitioner holds the following _____ [real *or* personal] property of this estate: _____ [*describe, e.g.,* decedent's residence located at _____ (*street address*), _____ County, California, more particularly described as follows: _____ (*legal description*)].

3. The following persons are entitled to the distribution of undivided _____ [*specify nature of interest, e.g.,* one-half interests in fee] in the above property: _____ [*names of heirs or devisees*], _____ [*specify relationship to deceased, e.g.,* children of decedent].

4. The above-named persons have been unable to agree to a partition, allotment, or other division of the property.

5. No order for distribution of the above-described property has _____ [been entered *or* become final].

WHEREFORE, IT IS ORDERED as follows:

1. Partition shall be made of the above property of this estate.

2. There shall be partitioned and allotted to _____ [*name*] in lieu of his/her undivided _____ [*specify, e.g.,* one-half interest in fee] in the property, the property described as follows: _____ [*describe*].

3. [*Continue for each person having undivided interest in property*.]

4. On final settlement and distribution of this estate, the property shall be distributed in conformity with this partition and allotment.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use as a decree to partition and allot property of the estate in which various persons are entitled to undivided interests [*see Prob. Code § 11953*].

[3] Decree of Partition

The court must take evidence and partition, allot, and divide the property so that each party receives property of a value proportionate to his or her interest in the whole. Any two or more parties may agree to accept undivided interests. If necessary, the court may order the personal representative to sell the property, if sale would be more equitable than partition, and if the property cannot equitably be allotted to any one party. Sale must be conducted and confirmed in the same manner as other probate sales [*Prob. Code § 11953*]. For discussion of probate sales, see Ch. 445, *Probate: Sale of Estate Property* .

[4] State Statutes

Decree of partition. *Prob. Code § 11953*

Finding of giving or waiver of notice is required in order. *Prob. Code § 1260(b)*

[5] Cross References

For a related form, see *§ 456.91*.

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§ 457.syn Synopsis to Chapter 457: PROBATE: INSTRUCTIONS TO PERSONAL REPRESENTATIVE

§ 457.01 Scope of Chapter

§§ 457.02-457.09 [Reserved]

§ 457.10 Governing Law

[1] On or After July 1, 1988

[2] Before July 1, 1988

§ 457.11 Petition for Instructions or Confirmation

[1] In General

[2] By Personal Representative

[3] No Other Procedure Available

[4] Determination of Title to Property

[5] Notice of Hearing on Petition for Instructions

[6] Exercise of Court's Discretion to Instruct

§ 457.12 Petition for Directions

[1] In General

[2] By Interested Person

[3] Notice of Hearing on Petition for Directions

§ 457.13 Effect of Order on Petition

§ 457.14 Appeal of Order

§§ 457.14-457.29 [Reserved]

§ 457.30 State Statutes

§ 457.31 Local Court Rules

§ 457.32 Decisions

[1] Appeal of Order of Instructions

[2] Nonavailability of Petition for Instructions

[3] Propriety of Instructions

[4] Right to Court Instructions

[5] Title to Property

[6] Who May File Petition for Instructions

§§ 457.33-457.49 [Reserved]

§ 457.50 Personal Representative's Petition for Instructions or Confirmation

§ 457.51 Preliminary Determinations

§ 457.52 Petition for Instructions or Confirmation

§§ 457.53-457.69 [Reserved]

§ 457.70 Preliminary Determinations

§ 457.71 Petition for Directions

§§ 457.72-457.89 [Reserved]

§ 457.90 Petition by Personal Representative for Instructions or Confirmation [Prob. Code § 9611]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Local Rules of Court

[5] Decisions

§ 457.91 Objections to Petition for Instructions or Confirmation [Prob. Code § 9611]--Other Statutory Procedure Available

[1] FORM

[2] Use of Form

[3] Authority for Form

[4] Notice of Filing Objections

[5] State Statutes

[6] Cross References

§ 457.92 Order Instructing Personal Representative or Confirming Acts [Prob. Code § 9611]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Local Court Rules

[5] Cross References

§ 457.93 Petition by Interested Person for Directions to Personal Representative [Prob. Code § 9613]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 457.94 Order Directing Personal Representative To Act or Not To Act Concerning Estate [Prob. Code § 9613]

[1] FORM

[2] Use of Form

[3] Cross References

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39-457 California Forms of Pleading and Practice--Annotated § 457.01

§ 457.01 Scope of Chapter

This chapter discusses the procedure by which the personal representative obtains from the court instructions to act, or confirmation of actions already taken, on matters concerning the estate when no other procedure for these actions is provided by statute. It also discusses the procedure by which an interested person may petition the court for an order directing the personal representative to act or not to act concerning the estate. The chapter contains forms of petition for instructions [*see § 457.90*], objections to the petition [*see § 457.91*], and an order instructing the personal representative [*see § 457.92*]. It also contains forms of petition for directions [*see § 457.93*] and an order directing the personal representative [*see § 457.94*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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[Reserved]

§§ 457.02[Reserved]

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§ 457.10 Governing Law

[1] On or After July 1, 1988

Prob. Code § 9611 governs the procedure by which the personal representative petitions the court for instructions. *Prob. Code § 9613* governs the procedure by which an interested person petitions the court for an order directing the personal representative to act or not to act concerning the estate. *Prob. Code § 7250* governs the effect of any probate order concerning the administration of the decedent's estate, including orders under *Prob. Code §§ 9611* and *9613*.

Additionally, there are a wide variety of local court rules governing probate practice. To insure complete compliance, the attorney should consult the applicable rules.

[2] Before July 1, 1988

Subject to exceptions discussed below, any petition or other matter filed or commenced before July 1, 1988, will be continued under the estate management statutes (*Prob. Code §§ 9600-10382*), as far as applicable, except when the court determines that application of a particular provision of the estate management statutes would substantially interfere with the rights of the parties or other interested persons. If the rights of these parties or persons would be substantially interfered with, then the particular provision does not apply; rather, the applicable law in effect before July 1, 1988, applies [*see Prob. Code § 9645(a)*].

Nothing in the estate management statutes affects any order, judgment, or decree made, or any action taken, before July 1, 1988 [*see Prob. Code § 9645(b)*]. Additionally, an order, judgment, or decree made before July 1, 1988, continues in full force and effect in accordance with its term or until modified or terminated by the court [*see Prob. Code § 9645(c)(1)*]. The validity of an order, judgment, or decree made or action taken before July 1, 1988, is determined by the applicable law in effect before July 1, 1988, and not by the estate management statutes [*see Prob. Code § 9645(c)(2),(3)*].

Legal Topics:

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

Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-457 California Forms of Pleading and Practice--Annotated § 457.11

§ 457.11 Petition for Instructions or Confirmation

[1] In General

In all cases in which no other procedure is provided by statute, on petition of the personal representative, the court may authorize and instruct the personal representative, or approve and confirm the acts of the personal representative, in the administration, management, investment, disposition, care, protection, operation, or preservation of the estate, or the incurring or payment of costs, fees, orexpenses in connection therewith [*see Prob. Code § 9611(a)*]. The court may not only instruct the personal representative in advance, but it may also confirm actions already taken [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 9611*]. For a petition, see *§ 457.90*. For an order, see *§ 457.92*.

There is no limit on the number of times instructions or confirmations can be requested [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 9611*]. Additionally, *Prob. Code § 9613*, which permits an interested person to petition the court to direct the personal representative to act or not to act concerning the estate, does not preclude a petition for instructions [*Prob. Code § 9611*; *see § 457.12*)].

[2] By Personal Representative

Only the personal representative may petition for instructions concerning the estate [*see Prob. Code § 9611(a)*; Cal. Law Revision Comm'n Comment to *Prob. Code § 9611*]. No other person interested in the estate may do so [*Estate of Webb (1969) 269 Cal. App. 2d 172, 174, 74 Cal. Rptr. 710* (decided under former Prob. Code § 588; *now see Prob. Code § 9611*)].

[3] No Other Procedure Available

Prob. Code § 9611 permits a petition for authorization and instruction to act on approval and confirmation of past action only when no other procedure is provided by statute [*see Prob. Code § 9611(a)*]. If some other procedure is provided by statute but the personal representative is uncertain whether the statute providing the other procedure is applicable to the particular case, the personal representative may petition in the alternative, giving notice that is sufficient to satisfy the requirements both of *Prob. Code § 9611* and the other possibly applicable statute [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 9611*].

An example of an appropriate subject for a petition under *Prob. Code § 9611* would be a petition for instructions to obtain court authorization to incorporate the decedent's unincorporated business; there is no specific statutory provision governing that matter [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 9611*; *cf. Prob. Code § 10512* (power to incorporate is available when personal representative has been granted independent administration authority under *Prob. Code § 10400 et seq.*)].

[4] Determination of Title to Property

There is no express statutory procedure for determining an issue of title as between the personal representative and the estate [*Estate of Howe (1948) 31 Cal. 2d 395, 397, 189 P.2d 5* (decided under former Prob. Code § 588; *now see Prob. Code § 9611*)]. If the personal representative petitions the court to be instructed pursuant to *Prob. Code § 9611* on whether to include the property in the inventory, the probate court acquires jurisdiction to determine title as between the personal representative and the estate [*Estate of Howe (1948) 31 Cal. 2d 395, 397, 189 P.2d 5* ; *Estate of Putnam (1959) 175 Cal. App. 2d 781, 783, 346 P.2d 841* (decided under former Prob. Code § 588; *now see Prob. Code § 9611*)].

There is a statutory procedure for determining an issue of title as between the estate and third parties [*see Prob. Code § 850*; *see* discussion and forms in Ch. 456, *Probate: Management of Estate Assets*]. Therefore, a petition for instructions pursuant to *Prob. Code § 9611* is not available to resolve title disputes with third parties [*see* Los Angeles Co. Super. Ct. Rules, Rule 10.72(a)].

[5] Notice of Hearing on Petition for Instructions

Notice of the hearing on the petition must be given as provided in *Prob. Code § 1220* [*Prob. Code § 9611(b)*]. When the petition is filed with the clerk of the court, the clerk sets the matter for hearing [*Prob. Code § 1041*]. *Prob. Code § 1220* notice must be given at least 15 days before the time set for the hearing [*Prob. Code § 1220(a)(1)*]. The notice must be given to all persons who have requested special notice in the estate proceeding pursuant to *Prob. Code § 1250* [*Prob. Code § 1220(a)(2)(B), 1252(a)*]. If any person entitled to notice is represented by an attorney of record, the notice must also be given to that attorney [*Prob. Code § 1214*]. The personal representative need not give notice to himself or herself [*see Prob. Code § 1201*]. The contents of the notice are set forth in *Prob. Code § 1211* [*see Prob. Code § 1211*].

It appears that any person who receives notice of the hearing may file and serve written objections to the petition [*see § 457.91*].

For further discussion and forms for notice, including special notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

[6] Exercise of Court's Discretion to Instruct

The language of *Prob. Code § 9611* indicates that the exercise of the court's power to instruct is permissive and not mandatory. It has always been so interpreted. The action of the probate court with respect to a petition for instructions will be upheld in the absence of an abuse of discretion [*Estate of Denton (1971) 17 Cal. App. 3d 1070, 1074-1075, 95 Cal. Rptr. 347* (decided under former Prob. Code § 588; *now see Prob. Code § 9611*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateJudicial

Review

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39-457 California Forms of Pleading and Practice--Annotated § 457.12

§ 457.12 Petition for Directions

[1] In General

On petition of any interested person, and on a showing that the estate will suffer great or irreparable injury if the petition is not granted, the court may direct thepersonal representative to act or not to act concerning the estate. The order may include such terms and conditions as the court determines to be appropriate under the circumstances [*Prob. Code § 9613(a)*]. The existence of a remedy under *Prob. Code § 9613* does not limit the right of a personal representative to petition for instructions under *Prob. Code § 9611* [*see Prob. Code § 9611(a)*; Cal. Law Revision Comm'n Comments to *Prob. Code § 9613*].

The showing of irreparable injury is analogous to the irreparable injury that must be shown for injunctive relief under, for example, *Code Civ. Proc. § 526(a)(2)* (waste or great or irreparable injury threatened to party in action) [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 9613*].

For a form of petition by an interested person for directions to the personal representative, see *§ 457.93*. For a form of order directing the personal representative to act or not act, see *§ 457.94*.

[2] By Interested Person

Any interested person may petition for directions to the personal representative [*see Prob. Code § 9613(a)*]. "Interested person" includes any of the following [*Prob. Code § 48(a)*]:

- An heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding.
- Any person having priority for appointment as personal representative.
- A fiduciary representing an interested person.

Despite the foregoing definition, the meaning of "interested person" as it relates to particular persons may vary from

time to time and is determined according to the particular purposes of, and matter involved in any proceeding [*Prob. Code § 48(b)*].

[3] Notice of Hearing on Petition for Directions

Notice of the hearing on the petition must be given as provided in *Prob. Code § 1220* [*Prob. Code § 9613(b)*]. When the petition is filed with the clerk of the court, the clerk sets the matter for hearing [*Prob. Code § 1041*]. *Prob. Code § 1220* notice must be given at least 15 days before the time set for the hearing [*Prob. Code § 1220(a)(1)*]. The notice must be given to any nonpetitioning personal representative and to all persons who have requested special notice in the estate proceeding pursuant to *Prob. Code § 1250* [*Prob. Code § 1220(a)(2)(B), 1252(a)*]. If any person entitled to notice is represented by an attorney of record, the notice must also be given to that attorney [*Prob. Code § 1214*]. The petitioner need not give notice to himself or herself, or to any other person who joins in the petition [*see Prob. Code § 1201*].

For further discussion and forms for notice, including special notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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§ 457.13 Effect of Order on Petition

When an order made in response to a petition under *Prob. Code § 9611* or *9613* becomes final, it releases the personal representative and the sureties from all claims of the heirs or devisees and of any persons affected thereby based on any act or omission directly authorized, approved, or confirmed in the order [*see Prob. Code § 7250(a)*]. However, the order will not effect a release if it was obtained by fraud or conspiracy, or by any misrepresentation in the petition of a material fact [*Prob. Code § 7250(c)*]. The omission of a material fact qualifies as a misrepresentation for this purpose [*Prob. Code § 7250(c)*].

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§ 457.14 Appeal of Order

An appeal may be taken from an order or from the refusal to make an order instructing or directing a personal representative [*Prob. Code § 7240(k)*].

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39-457 California Forms of Pleading and Practice--Annotated §§ 457.14-457.29

[Reserved]

§§ 457.14[Reserved]

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39-457 California Forms of Pleading and Practice--Annotated § 457.30

§ 457.30 State Statutes

"Interested person" defined. *Prob. Code § 48*

Appealability of order instructing or directing personal representative. *Prob. Code § 7240(k)*

Personal representative's petition for instructions. *Prob. Code § 9611*

Effect of court order under *Prob. Code § 9611* or *9613* on liability of personal representative and sureties. *Prob. Code § 7250*

Interested person's petition for directions to personal representative. *Prob. Code § 9613*

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39-457 California Forms of Pleading and Practice--Annotated § 457.31

§ 457.31 Local Court Rules

Alameda Co. Unified Super. Ct. Rules, Rule 12.13.2

Fresno Co. Super. Ct. Rules, Rule 79.3

Los Angeles Co. Super. Ct. Rules, Rule 10.72

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39-457 California Forms of Pleading and Practice--Annotated § 457.32

§ 457.32 Decisions

[1] Appeal of Order of Instructions

Order of trial court in response to petition for instructions are appealable. *Estate of Putnam (1959) 175 Cal. App. 2d 781, 784, 346 P.2d 841*

[2] Nonavailability of Petition for Instructions

Nonavailability of petition for instructions to determine heirship. *Estate of Hoffman (1968) 265 Cal. App. 2d 135, 141, 71 Cal. Rptr. 230*

Lack of power of court to instruct the manner in which an estate should be distributed. *Estate of Thramm (1945) 67 Cal. App. 2d 657, 658, 155 P.2d 119*

Instruction procedure not available when statutory remedy is directly available. *Estate of Schneider (1944) 62 Cal. App. 2d 463, 465, 145 P.2d 90*

[3] Propriety of Instructions

Trial court properly instructed administrator of estate to resist petition by husband of deceased to declare certain items community property since administrator, not knowing status of property alleged to be community property, has duty on behalf of creditors and legatees to resist claim that could deprive estate of assets. *Estate of Denman (1979) 94 Cal. App. 3d 289, 292, 156 Cal. Rptr. 341*

[4] Right to Court Instructions

Exercise of power under former Prob. Code § 588 (now see *Prob. Code § 9611*) is permissive rather than mandatory.

Estate of Denton (1971) 17 Cal. App. 3d 1070, 1074-1075, 95 Cal. Rptr. 347

Procedure under former Prob. Code § 588 (now see *Prob. Code § 9611*) is only available when no other statutory procedure is specified. *Estate of Feierman (1962) 202 Cal. App. 2d 552, 558, 20 Cal. Rptr. 883*

[5] Title to Property

Use of instruction procedure to determine issue of title between executor and estate. *Estate of Howe (1948) 31 Cal. 2d 395, 397, 189 P.2d 5*

Former Prob. Code § 588 (now see *Prob. Code § 9611*) was properly used to adjudicate ownership of property as between executrix and estate she is administering. *Estate of Putnam (1959) 175 Cal. App. 2d 781, 786, 346 P.2d 841*

[6] Who May File Petition for Instructions

Only personal representative is permitted to file petition for instructions under former Prob. Code § 588 (now see *Prob. Code § 9611*). *Estate of Webb (1969) 269 Cal. App. 2d 172, 174, 74 Cal. Rptr. 710*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-457 California Forms of Pleading and Practice--Annotated §§ 457.33-457.49

[Reserved]

§§ 457.33[Reserved]

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PART IV. PROCEDURAL CHECKLIST
A. Personal Representative's Petition For Instructions Or Confirmation

39-457 California Forms of Pleading and Practice--Annotated § 457.50

§ 457.50 Personal Representative's Petition for Instructions or Confirmation

NOTE:
If the order sought will affect how property will be distributed or who will take, a Petition for Determination of Entitlement to Distribution of Estate must be used [*see* *Prob. Code § 11700*; ***see also*** Ch. 458, ***Probate: Determination of Heirship***].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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PART IV. PROCEDURAL CHECKLIST
A. Personal Representative's Petition For Instructions Or Confirmation

39-457 California Forms of Pleading and Practice--Annotated § 457.51

§ 457.51 Preliminary Determinations

1. Confirm that there is a substantial question involved in determining the personal representative's course of action or in confirming his or her acts.

2. Confirm that no other statutory procedure is available to resolve the question [*see Prob. Code § 9611(a)*].

3. Ascertain the names and addresses of all persons who have requested special notice.

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PART IV. PROCEDURAL CHECKLIST
A. Personal Representative's Petition For Instructions Or Confirmation

39-457 California Forms of Pleading and Practice--Annotated § 457.52

§ 457.52 Petition for Instructions or Confirmation

1. Prepare petition [*Prob. Code § 9611(a)*; *see § 457.90*].

2. Petition must be verified by petitioner [*see Prob. Code § 1021(a)(1)*]; it can then be used as evidence if proceeding is uncontested [*Prob. Code § 1022*].

3. Prepare order instructing personal representative or confirming personal representative's acts [*see Prob. Code § 9611(a)*; *see § 457.92*].

4. Notice of hearing on petition [*Prob. Code § 9611(b)*].

a. Mail copy of petition and notice of time and place of hearing at least 15 days before hearing to all persons who have requested special notice in proceedings pursuant to *Prob. Code § 1250* [*Prob. Code §§ 1220(a)(1),(2), 1252(a)*].

b. If any person is represented by attorney of record, mail copy of petition and notice to that attorney [*Prob. Code § 1218*].

c. Any person receiving notice may file and serve written objections to petition [*see § 457.91*].

5. Attend the hearing, making proof of notice and of the allegations of the petition.

6. If order instructing the personal representative is granted, file original with county clerk and secure certified or endorsed copies as required.

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A. Personal Representative's Petition For Instructions Or Confirmation

39-457 California Forms of Pleading and Practice--Annotated §§ 457.53-457.69

[Reserved]

§§ 457.53[Reserved]

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PART IV. PROCEDURAL CHECKLIST
B. Interested Person's Petition for Directions

39-457 California Forms of Pleading and Practice--Annotated § 457.70

§ 457.70 Preliminary Determinations

1. Confirm that the estate will suffer great or irreparable injury if order directing personal representative is not granted [*see Prob. Code § 9613(a)*].

2. Ascertain the names and addresses of all persons who have requested special notice.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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PART IV. PROCEDURAL CHECKLIST
B. Interested Person's Petition for Directions

39-457 California Forms of Pleading and Practice--Annotated § 457.71

§ 457.71 Petition for Directions

1. Prepare petition [*Prob. Code § 9613(a)*; *see § 457.93*].

2. Petition must be verified by petitioner [*Prob. Code § 1021(a)(1)*]; it can then be used as evidence if proceeding is uncontested [*Prob. Code § 1022*].

3. Prepare order directing personal representative to act or refrain from acting [*see Prob. Code § 9613(a)*; *see § 457.93*].

4. Notice of hearing on petition [*Prob. Code § 9613(b)*].

a. At least 15 days before hearing, mail copy of petition and notice of time and place of hearing to all persons who have requested special notice in proceedings pursuant to *Prob. Code § 1250* [*Prob. Code §§ 1220(a)(1),(2), 1252(a)*].

b. If any person is represented by attorney of record, mail copy of petition and notice to that attorney [*Prob. Code § 1214*].

5. Attend the hearing, making proof of notice and of the allegations of the petition.

6. If order directing personal representative is granted, file original with county clerk and secure certified or endorsed copies as required.

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B. Interested Person's Petition for Directions

39-457 California Forms of Pleading and Practice--Annotated §§ 457.72-457.89

[Reserved]

§§ 457.72[Reserved]

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PART V. FORMS

39-457 California Forms of Pleading and Practice--Annotated § 457.90

§ 457.90 Petition by Personal Representative for Instructions or Confirmation [Prob. Code § 9611]

[1] FORM Petition by Personal Representative for Instructions or Confirmation [Prob. Code § 9611]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR
Estate of _____ [*name*],	)	_____
Deceased.	)	[INSTRUCTIONS *and/or* CONFIRMATION]
	)	

_____

Petitioner, _____ [*name*], respectfully represents:

1. Petitioner is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. [*Set forth the matters not governed by any other statutory procedure on which authorization and instructions and/or approval and confirmation are sought.*]

[*EITHER*]

3. Petitioner is in doubt and should be authorized and instructed by the court as to the following alternatives: _____ [*set forth*].

[*AND/OR*]

4. Petitioner seeks approval and confirmation of _____ [*specify acts already taken by personal representative*] before taking further actions in the administration and management of the estate.

[*CONTINUE*]

5. Petitioner believes that it would be for the best interests of the estate and those interested in it for the court to _____ [authorize and instruct petitioner as follows: _____ (*set forth recommended instruction*) *and/or* approve and confirm the actions taken by petitioner].

6. A request for special notice has _____ [not been filed herein *or* been filed herein by _____ (*name*) and notice of the time and place of hearing on this petition has been given as required by law].

WHEREFORE, petitioner prays for an order _____ [authorizing and instructing him/her as to the matters *and/or* approving and confirming the actions taken] that are the subject of this petition and for all other proper orders.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

CAUTION:
If the order sought will affect how property will be distributed or who will take, a Petition for Determination of Entitlement to Distribution of Estate must be used [*see Prob. Code § 11700*; *see also* Ch. 458, *Probate: Determination of Heirship*].

[2] Use of Form

This form is for use by the personal representative to obtain from the court authorization and instructions to act, or

approval and confirmation of actions taken, in the administration, management, investment, disposition, care, protection, operation, or preservation of the estate, or the incurring or payment of costs, fees, or expenses in connection therewith. The personal representative, however, may only seek instructions or confirmation when no other procedure is provided by statute [*see Prob. Code § 9611(a)*]. The petition must be verified by the personal representative [*see Prob. Code § 1021(a)(1)*]. For further discussion of appropriate subjects for instruction, see *§§ 457.11* and *457.52*.

Notice of the hearing on the petition is to be given as provided in *Prob. Code § 1220* [*Prob. Code § 9611(b)*]. For further discussion, see *§ 457.11[5]*.

[3] State Statutes

Petitions required to be verified. *Prob. Code § 1021(a)(1)*

[4] Local Rules of Court

Department number and date of hearing must be placed immediately below title ofdocument on first page of document filed. Los Angeles Co. Super. Ct. Rules, Rule 10.10

Petitions required to be set for hearing must have self-addressed, stamped envelope attached. Los Angeles Co. Super. Ct. Rules, Rule 10.31(a) (or attach fax cover sheet; *see* Los Angeles Co. Super. Ct. Rules, Rule 10.31(b))

[5] Decisions

Use of instruction procedure to determine issue of title between an executor and estate. *Estate of Howe (1948) 31 Cal. 2d 395, 397, 189 P.2d 5*

Nonavailability of petition for instructions to determine identity of grandchildren entitled to share in residue of estate. *Estate of Hoffman (1968) 265 Cal. App. 2d 135, 137-145, 71 Cal. Rptr. 230*

Instruction procedure not available when statutory remedy is directly applicable. *Estate of Schneider (1944) 62 Cal. App. 2d 463, 465, 145 P.2d 90*

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39-457 California Forms of Pleading and Practice--Annotated § 457.91

§ 457.91 Objections to Petition for Instructions or Confirmation [Prob. Code § 9611]--Other Statutory Procedure Available

[1] FORM Objections to Petition for Instructions or Confirmation [Prob. Code § 9611]--Other Statutory Procedure Available

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	OBJECTIONS TO PETITION FOR
Estate of _____ [*name*],	)	_____
Deceased.	)	[INSTRUCTIONS *and/or* CONFIRMATION]
	)	

_____

Objector, _____ [*name*], objects to the petition of _____ [*name*], personal representative of the estate of _____ [*name*], deceased, for _____ [instructions *and/or* confirmation of actions] on the following grounds:

1. Objector is a person interested in the estate in that he/she is a _____ [*describe status as interested person, e.g.,* devisee under decedent's will].

2. The petition seeks an order _____ [authorizing and instructing petitioner as to _____ (*describe authorization and instructions sought*) *and/or* approving and confirming the following act(s) by petitioner: _____ (*describe act(s) taken by personal representative*)]. The petition therefore seeks a determination of the issue of _____ [*describe issue, e.g.,* entitlement to distribution of estate of the deceased].

3. An express procedure is provided by statute for the determination of this issue _____ [*specify procedure, e.g.*, either through a petition for determination of entitlement to distribution under *Probate Code Sections 11700-11705*, or through a petition for distribution under *Probate Code Sections 11600-11642*].

4. *Probate Code Section 9611* provides for _____ [authorizing and instructing *and/or* approving and confirming the acts of] a personal representative only when no other procedure is provided by statute. Inasmuch as other express procedures are provided, the _____ [instruction *and/or* confirmation] procedure is not available to petitioner.

WHEREFORE, objector prays that the petition for _____ [instructions *and/or* confirmation] be denied.

_____ [*signature*]
Objector

_____ [*signature*]
Attorney for Objector

[*Verification. See § 457.90.*]

[2] Use of Form

This form is for use by any interested person to place his or her objections to the personal representative's petition for instructions or confirmation of acts before the court. The objections must be verified by the objector [*see Prob. Code § 1021(a)(2)*]. The verification in § 457.90 must be adapted for use by an objector instead of a petitioner.

[3] Authority for Form

Prob. Code § 9611 does not prescribe any procedure or paper for opposing a petition for instructions or confirmation. In the absence of a statutory provision prescribing the form, it is customary in probate proceedings to state opposition to a petition in the form of "objections" [*see Estate of Howe (1948) 31 Cal. 2d 395, 396, 189 P.2d 5* (objections presented as general demurrer to petition, which is inappropriate form; Supreme Court referred throughout its opinion to "objections"); *Estate of Winder (1950) 99 Cal. App. 2d 83, 84, 221 P.2d 193* (objections were designated as such)].

[4] Notice of Filing Objections

There is no direct statutory authority requiring notice of the filing of objections. However, because the hearing on the petition to which the objections are raised must be noticed [*see Prob. Code § 9611(b)*], counsel for the objector would be well-advised to give notice of the filing of the objections.

If a notice or other paper is required to be served or otherwise given and no other manner of giving the notice or other paper is specified by statute, the notice or other paper must be mailed or personally delivered as provided in *Prob. Code §§ 1215-1217* [*Prob. Code § 1217*]. Special notice is governed by *Prob. Code §§ 1250-1252*. For further discussion of and forms for use in giving notice and special notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

Local procedure should be checked to determine if there is a deadline for serving and filing opposition papers. In general civil matters, opposition papers are filed at least nine court days before the hearing [*see Cal. Rules of Ct., Rule 3.1300*; *Code Civ. Proc. § 1005(b)*].

[5] State Statutes

"Interested person" defined. *Prob. Code § 48*

Objections as required to be verified. *Prob. Code § 1021(a)(2)*

[6] Cross References

For a related form, *see § 457.90*.

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39-457 California Forms of Pleading and Practice--Annotated § 457.92

§ 457.92 Order Instructing Personal Representative or Confirming Acts [Prob. Code § 9611]

[1] FORM Order Instructing Personal Representative or Confirming Acts [Prob. Code § 9611]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER _____
Estate of _____ [*name*],	)	[INSTRUCTIONS *and/or* CONFIRMING ACTS
Deceased.	)	OF] PERSONAL REPRESENTATIVE
	)	

_____

The petition of _____ [*name*], as personal representative of the estate of _____ [*name*], deceased, for _____ [instructions as to _____ (*describe subject matter in general terms and/or* confirmation of _____ (*describe acts taken*)] came on regularly for hearing by the court this date. Petitioner appeared by counsel _____ [*name; specify other appearance, if any*].

The court finds from proof made to the satisfaction of the court:

1. Notice of the time and place of the hearing was given as required by *Probate Code Section 9611(b)*. [Special notice was _____ (given to _____ (*name* (*s*)), as requested *or* requested and waived by _____ (*names* (*s*))).]

2. [*Here and subsequently set forth specific findings as relevant to the subject matter.*]

[*EITHER*]

IT IS ORDERED that _____ [*name*], as personal representative of the estate of _____ [*name*], deceased, is authorized and instructed as follow(s): _____ [*list each instruction in a separate, numbered subparagraph*].

[*AND/OR*]

IT IS [FURTHER] ORDERED that the following act(s) by _____ [*name*], as personal representative of the estate of _____ [*name*], deceased, _____ [is *or* are] approved and confirmed: _____ [*list each act in a separate, numbered subparagraph*].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is an order for use by the court in issuing to the personal representative instructions on actions to be taken or not taken, or confirmation of actions previously taken concerning the estate [*see Prob. Code § 9611(a)*]. It is for use in conjunction with § 457.90. This is the order the attorney will submit to the court for the judge's signature once the matter has been heard and ruled on.

[3] State Statutes

Mailing and filing of notice of entry of order or judgment. *Code Civ. Proc. § 664.5*

Finding of giving or waiver of notice as required. *Prob. Code § 1260(b)*.

Contents of order. *Prob. Code § 1047*

Entry and filing of order. *Prob. Code § 1048*

Appealability of order. *Prob. Code § 1300(a)*

Effect of order on liability of personal representative or surety. *Prob. Code § 7250*

Recordation of order when real property affected. *Prob. Code § 7263*

[4] Local Court Rules

Orders to be complete in themselves and set forth all matters actually passed on by court, date of hearing, relief granted, and names of persons and descriptions of property or amounts of money affected. Los Angeles Co. Super. Ct. Rules, Rule 10.42; San Francisco Uniform Local Ct. Rules, Rule 14.27

Orders to be submitted to probate courtroom two weeks in advance of scheduled hearing date and to state hearing date on face sheet. San Francisco Uniform Local Ct. Rules, Rule 14.6

[5] Cross References

For a related form, *see § 457.90*.

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39-457 California Forms of Pleading and Practice--Annotated § 457.93

§ 457.93 Petition by Interested Person for Directions to Personal Representative [Prob. Code § 9613]

[1] FORM Petition by Interested Person for Directions to Personal Representative [Prob. Code § 9613]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	PETITION FOR DIRECTIONS
Deceased.	)	

_____

Petitioner, _____ [*name*], respectfully represents:

1. Petitioner is a person interested in the estate in that he/she is a _____ [*describe status as interested person, e.g.,* devisee under decedent's will].

2. _____ [*Name*], is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

3. [*Set forth the matters on which directions are sought.*]

4. Petitioner believes that it would be for the best interests of the estate and those interested therein for the court to direct the personal representative as follows: _____ [*set forth recommended directions to act or not act, including any terms and conditions*].

5. Unless this petition is granted, decedent's estate will suffer _____ [great *and/or* irreparable] injury in that _____ [*describe injury to estate*].

WHEREFORE, petitioner prays for an order directing the personal representative as to the matters alleged above and for all other proper orders.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 457.90.*]

[2] Use of Form

This form is a petition for use by any person interested in the estate to obtain an order from the court directing the personal representative to act or not to act concerning the estate [*see Prob. Code § 9613(a)*; *see also Prob. Code § 48* ("interested person" defined)].

Petitioner must make a showing that if the petition is not granted, the estate will suffer great or irreparable injury [*see Prob. Code § 9613(a)*]. The showing of irreparable injury is analogous to that which must be shown for injunctive relief [*see Code Civ. Proc. § 526(a)(2)*; Cal. Law Revision Comm'n Comment to *Prob. Code § 9613*].

Notice of the hearing on the petition is to be given as provided in *Prob. Code § 1220* [*Prob. Code § 9613(b)*; *see* discussion in *§ 457.12[3]*].

[3] State Statutes

"Interested person" defined. *Prob. Code § 48*

Petition must be verified by petitioner. *Prob. Code § 1021*

Interested person's petition for directions under *Prob. Code § 9613* does not preclude personal representative's petition for instructions under *Prob. Code § 9611*. *Prob. Code § 9611(a)*

[4] Cross References

For a discussion of the required showing of irreparable injury sufficient to obtain injunctive relief, see Ch. 393, *Injunctions* .

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39-457 California Forms of Pleading and Practice--Annotated § 457.94

§ 457.94 Order Directing Personal Representative To Act or Not To Act Concerning Estate [Prob. Code § 9613]

[1] FORM Order Directing Personal Representative To Act or Not To Act Concerning Estate [Prob. Code § 9613]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER DIRECTING PERSONAL REPRESENT-
Deceased.	)	ATIVE

_____

The petition of _____ [*name*], as _____ [*specify petitioner's status as interested person, e.g.,* a devisee under decedent's will], for an order directing _____ [*name*], as personal representative of decedent's estate, to _____ [*describe directions sought in general terms*] came on regularly for hearing by the court this date. Petitioner appeared by counsel, _____ [*name*]; the personal representative appeared by counsel, _____ [*name*].

The court finds from proof made to the satisfaction of the court:

1. [*Finding as to the giving or waiving of notice. See § 457.92, Paragraph 1.*]

2. Decedent's estate will suffer _____ [great *and/or* irreparable] injury if the direction(s) sought in petitioner's petition _____ [is *or* are] not granted.

3. [*Here and subsequently set forth specific findings as relevant to the subject matter.*]

IT IS ORDERED that _____ [*name*], as personal representative of the estate of _____ [*name*], deceased, is directed as follow(s): _____ [*list each direction in a*

separate, numbered subparagraph].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is an order for use when the petition of an interested person seeking an order directing the personal representative to act or not to act concerning the estate is granted. The order may include such terms and conditions as the court determines to be appropriate under the circumstances [*see Prob. Code § 9613(a)*]. The form is for use in conjunction with the form of petition in § 457.93.

[3] Cross References

For related forms, *see §§ 457.92* and *457.93*.

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39-458 California Forms of Pleading and Practice--Annotated 458.syn

§ 458.syn Synopsis to Chapter 458: PROBATE: DETERMINATION OF HEIRSHIP

§ 458.01 Scope of Chapter

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[1] Generally

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[1] Generally

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§ 458.20 Costs

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§§ 458.22- 458.39 [Reserved]

§ 458.40 State Statutes

§ 458.41 Local Rules of Court

§ 458.42 Decisions

[1] Determination of Persons Entitled to Distribution of Estate (formerly, Heirship Proceedings)

[a] In General

[b] Adopted Child

[c] Costs

[d] Discovery

[e] Evidence

[f] Nature of Proceeding

[g] Omitted Spouse

[h] Order

[i] Parent-Child Relationship

[j] Parties

[k] Putative Spouse

[l] Stepchild

[m] Surviving Spouse

[2] Jurisdiction

[a] In General

[b] To Determine Ademption of Devise

[c] To Determine Character of Property

[d] To Determine Community Property Rights

[e] To Determine Disputed Claims

[f] To Interpret Will

[g] To Review Exercise of Special Power of Appointment

[3] Litigation of Portion of Estate

[4] No-Contest Clause

[5] Person Intentionally Causing Decedent's Death

[6] Wills

§ 458.43 Law Reviews

§ 458.44 Text References

§§ 458.45-458.59 [Reserved]

§ 458.60 Petition to Determine Persons Entitled to Distribution of Estate

§ 458.61 Responsive Statement

§ 458.62 Hearing and Order

§§ 458.63 -457.79 [Reserved]

§ 458.80 Petition to Determine Persons Entitled to Distribution of Estate [Prob. Code § 11700]--By Personal Representative to Determine Character of Property as Community or Separate

[1] FORM

[2] Use of Form

[3] Time for Filing

[4] Notice of Hearing

[5] Adjudication of Character of Property

[6] State Statutes

[7] Local Rules of Court

[8] Text References

§ 458.81 Petition to Determine Persons Entitled to Distribution of Estate [Prob. Code § 11700]--By Surviving Spouse or Registered Domestic Partner Claiming Community Interest in Deceased Spouse's Estate or Claiming as Omitted Spouse [Prob. Code § 6560; Fam. Code § 297.5]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

§ 458.82 Petition to Determine Persons Entitled to Distribution of Estate [Prob. Code § 11700]--Devise Subject to Agreement by Devisee to Make Will Leaving Devised Property to Petitioner

[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

§ 458.83 Petition to Determine Persons Entitled to Distribution of Estate [Prob. Code § 11700]--By Heir of Predeceased Spouse or Registered Domestic Partner of Intestate Decedent [Prob. Code § 6402.5; Fam. Code § 297.5]

[1] FORM

[2] Use of Form

[3] Distribution When Decedent Died Without Surviving Spouse or Registered Domestic Partner or Issue

[4] State Statutes

[5] Local Rules of Court

[6] Decisions

[7] Cross References

§ 458.84 Statement of Interest in Estate by Person Other Than Petitioner for Determination of Persons Entitled to Distribution [Prob. Code § 11702]--General Form

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

§ 458.85 Statement of Interest in Estate by Person Other Than Petitioner for Determination of Persons Entitled to Distribution [Prob. Code § 11702]--By Heir of Deceased Dying Intestate Without Surviving Spouse or Registered Domestic Partner or Issue

[1] FORM

[2] Use of Form

[3] Cross References

§ 458.86 Order Determining Persons Entitled to Distribution of Decedent's Estate [Prob. Code § 11705]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

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PART I. SCOPE

39-458 California Forms of Pleading and Practice--Annotated § 458.01

§ 458.01 Scope of Chapter

This chapter deals with the procedure for determining persons entitled to distribution of an estate. Included are forms for petitions [*see §§ 458.80, 458.81*, 598, 599], responsive statements [*see §§ 458.84, 458.85*], and an order [*see § 458.86*].

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39-458 California Forms of Pleading and Practice--Annotated §§ 458.02- 458.09

[Reserved]

§§ 458.02[Reserved]

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39-458 California Forms of Pleading and Practice--Annotated § 458.10

§ 458.10 Governing Law

Proceedings to determine persons entitled to distribution are governed by *Prob. Code §§ 11700-11705*. To the extent the Probate Code does not provide rules, the rules of practice that apply to civil actions generally also govern proceedings under *Prob. Code §§ 11700-11705* [*Prob. Code § 1000*].

Subject to the requirement that Judicial Council and local court rules be consistent with the applicable statutes, the Judicial Council may provide by rule for the practice and procedure under the Probate Code, and, unless disapproved by the Judicial Council, a court may do likewise by local rule [*see Prob. Code § 1001(a)*]. Many courts have local rules governing multiple aspects of probate practice and these should be consulted.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawWillsInterpretationRules of ConstructionConstruction Favoring HeirsEstate, Gift & Trust LawWillsInterpretationRules of ConstructionStatutory RulesGovernmentsCourtsRule Application & Interpretation

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39-458 California Forms of Pleading and Practice--Annotated § 458.11

§ 458.11 Repealed Statutes

The former statutes to determine heirship (former Prob. Code §§ 1080-1082) were repealed and replaced by *Prob. Code §§ 11700-11705* by Stats. 1988, ch. 1199, operative July 1, 1989. Also repealed but not replaced were former Prob. Code §§ 1190-1192, which authorized a proceeding to establish the identity of heirs when title to real or personal property, or any interest in it, vested, other than by the laws of intestate succession, in the heirs, heirs of the body, issue, or children of any person, without other description or means of identification of the persons embraced in the description. In commenting on this repeal, the California Law Revision Commission explained that (1) the procedure provided by these statutes for determining membership in certain classes entitled to property other than by intestate succession was omitted as unnecessary; (2) when proceedings for administration of a decedent's estate are pending, this issue is determined in proceedings for distribution; and (3) if proceedings for administration are not pending, an action to quiet title may be appropriate [19 Cal. Law Revision Comm'n Reports 1081 (1988)]. For discussion of preliminary distribution and final distribution, see respectively Ch. 458C, *Probate: Preliminary Distribution and Partial Allowance of Compensation* , and Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewGovernmentsLegislationExpirations, Repeals & Suspensions

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39-458 California Forms of Pleading and Practice--Annotated § 458.12

§ 458.12 Petition for Determination of Persons Entitled to Distribution

[1] Who May Petition and When

At any time after letters are first issued to a general personal representative and before an order for final distribution is made, the personal representative, or any person claiming to be a beneficiary or otherwise entitled to distribution of a share of the estate, may file a petition for a court determination of the persons entitledto distribution of the decedent's estate [*Prob. Code § 11700*; *see Prob. Code § 58(b)* ("general personal representative" excludes a special administrator unless the special administrator has the powers, duties, and obligations of a general personal representative under *Prob. Code § 8545*)].

The provision in *Prob. Code § 11700*, permitting the filing of the petition before an order for final distribution is made, is jurisdictional [*see Prob. Code § 11704* (discussed in *§ 458.18*); *see also* 19 Cal. Law Revision Comm'n Reports 970 (1988)]. This is a departure from prior law [*see Estate of Stehr (1986) 181 Cal. App. 3d 1131, 1134-1135, 226 Cal. Rptr. 806* (holding that the similar provision under former Prob. Code § 1080, the predecessor to *Prob. Code § 11700*, was not jurisdictional or mandatory, but merely directory)].

The petition must include a statement of the basis for the petitioner's claim [*Prob. Code § 11700*]. For forms of petition, see *§§ 458.80 -458.83*.

[2] When Attorney General Is Deemed Person Entitled to Distribution

The Attorney General is deemed to be a person entitled to distribution of the estate for purposes of *Prob. Code §§ 11700-11705* if the estate involves or may involve any of the following [*Prob. Code § 11703*]:

- A charitable trust, other than a charitable trust with a designated trustee that may lawfully accept the trust.
- A devise for a charitable purpose without an identified beneficiary.
- An escheat to the State of California.

[3] Claim to Severable Portion of Estate

It is permissible for parties interested in a severable portion of an estate to litigate their claims as to it, and thus be in a position at a later date to request a partial distribution of that asset, without waiting for rights in other assets, depending on other facts and issues, to be litigated [*Estate of Brissel (1963) 218 Cal. App. 2d 841, 843-844, 32 Cal. Rptr. 458]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistribution

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39-458 California Forms of Pleading and Practice--Annotated § 458.13

§ 458.13 Participation by Personal Representative

The personal representative may file papers and otherwise participate in the proceedings as a party to assist the court [*Prob. Code § 11704(b)*]. Unlike former Prob. Code § 1081, no prior court order is required for the participation of the personal representative [*see* 19 Cal. Law Revision Comm'n Reports 972 (1988)].

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39-458 California Forms of Pleading and Practice--Annotated § 458.14

§ 458.14 Notice of Hearing

When the petition is filed, the court clerk sets the matter for hearing [*Prob. Code § 1041*]. At least 15 days before the hearing on the petition, notice of the time and place of the hearing must be given pursuant to *Prob. Code § 1220* to the following persons [*Prob. Code § 11701*; *see Prob. Code § 1220(a)(2)*]:

- The personal representative.

- All persons who have requested special notice in the estate proceeding pursuant to *Prob. Code § 1250*.

- All known heirs [*see Prob. Code § 44* ("heir" defined)] and devisees [*see Prob. Code § 34* ("devisee" defined)] whose interests in the estate would be affected by the petition [*see also Prob. Code §§ 1206, 1207*].

- The Attorney General, if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the petition.

In the case of persons requesting special notice, the notice must be mailed to the address set forth in the request [*Prob. Code § 1252(a)*]. In the case of the Attorney General, notice is to be given at the office of the Attorney General in Sacramento [*Prob. Code § 11701(d)*]. In the case of others entitled to notice, the notice must be mailed to the person's business or residence address, if known; if not known, the court may order that the notice be given in a manner reasonably calculated to give actual notice to that person [*Prob. Code § 1212, 1220(a)(3)*; *see Code Civ. Proc. § 413.30*]. If any person entitled to notice is represented by an attorney of record, the notice must also be given to that attorney [*Prob. Code § 1218*].

Personal delivery may be used instead of mail [*Prob. Code §§ 1215(a), 1214*].

The court may, for good cause, may dispense with the notice required to be given to a person [*Prob. Code §§ 1220(c), 1252(a)*].

For further discussion and forms for giving notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawWillsInterpretationRules of ConstructionConstruction Favoring Heirs

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39-458 California Forms of Pleading and Practice--Annotated § 458.15

§ 458.15 Responsive Statement

Any interested person may appear and, at or before the time of the hearing, file a written statement of the person's interest in the estate [*Prob. Code § 11702(a)*; *see §§ 458.84, 458.85*]. The written statement may be in support of, or in opposition to, the petition. No other pleadings are necessary and the written statement of each claimant will be deemed denied by each of the other claimants to the extent the written statements conflict [*Prob. Code § 11702(a)*]. *Prob. Code § 11702(a)* restates the applicable provisions in former Prob. Code § 1080 without substantive change and with the clarification that the written statement may be in support of or in opposition to the petition [19 Cal. Law Revision Comm'n Reports 971 (1988)].

Should a person fail to file a timely written statement, the case is neverthelessat issue and may proceed on the petition and written statements filed by the time of the hearing, and no further pleadings by other persons are necessary [*Prob. Code § 11702(b)(1)*]. In addition, the person may not participate further in the proceeding for distribution, although his or her interest in the estate is not otherwise affected, and he or she is bound by the decision in the proceeding [*see Prob. Code § 11702(b)(2), (3)*]. *Prob. Code § 11702(b)* is new and is comparable to *Prob. Code § 8251(c)* (relating to a will contest) [19 Cal. Law Revision Reports 971 (1988)].

The court may continue a matter to allow a written objection or response to be made. If the court does so, however, and the responding or objecting party fails to serve and file a timely objection or response, the court may deem the objections or responses waived [*Cal. Rules of Ct., Rule 7.801*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral Overview

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39-458 California Forms of Pleading and Practice--Annotated § 458.16

§ 458.16 Jury Trial and New Trial

Unlike former Prob. Code § 1081, which provided that "a trial of the facts must be by jury," *Prob. Code §§ 11700-11705* do not provide for trial by jury. Because *Prob. Code § 825* provides that, except as otherwise expressly provided in the Probate Code, there is no right to a jury trial in proceedings under the code, it would appear that there is no longer a right to a trial by jury of the facts in a proceeding to determine persons entitled to distribution of an estate. Because no right to a jury trial is expressly granted, a motion for new trial may not be made [*see Prob. Code § 7220(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateRight to Jury Trial

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39-458 California Forms of Pleading and Practice--Annotated § 458.17

§ 458.17 Jurisdiction of Court

[1] Generally

The superior court has jurisdiction of proceedings under the Probate Code concerning the administration of decedents; estates [*Prob. Code § 7050*]. When acting in proceedings under the Probate Code, the court is a court of general jurisdiction, and it has the same power and authority with respect to the proceedings as otherwise provided by law for a superior court (or a judge of the superior court), including all of the statutory powers listed in *Code Civ. Proc. § 128* [*Prob. Code § 800*].

In commenting on this issue, the California Law Revision Commission has stated that *Prob. Code § 7050* expands a provision of former Prob. Code § 321 (the judge may make and issue all necessary orders and writs to enforce the production of wills and the attendance of witnesses) and abandons the former rule that the superior court "sitting in probate" was a court of limited jurisdiction. Hence, while preserving the division of business among different departments of the superior court, this section rejects the limitation on the powers of the probate court that has been cited in appellate decisions, for example *Copley v. Copley (1978) 80 Cal. App. 3d 97, 106-107, 145 Cal. Rptr 437* [19 Cal. Law Revision Comm'n Reports 941 (1988)].

[2] Disputes Between Estate and Strangers

Although it has been pointed out that, as a general rule, the superior court sitting in probate is without power to decide a disputed claim between an estate and a stranger to the estate, it has been held that if the controversy is between the estate and those not strangers to probate proceedings relating to the estate, the court, sitting in probate, has the power to entertain the action and adjudicate the conflicting claims [*Estate of Hartnett (1957) 155 Cal. App. 2d 280, 282, 318 P.2d 81* (decided under former Prob. Code § 1080, the predecessor to *Prob. Code § 11700*)].

Moreover, when a party invokes the jurisdiction of the probate court by asserting a substantive right in a particular piece of estate property or in certain assets as an heir or devisee pursuant to *Prob. Code § 11700*, he or she may also obtain a determination in that court of any additional claims that he or she asserts against those in privity with the estate in the same property [*Estate of Baglione (1966) 65 Cal. 2d 192, 196, 53 Cal. Rptr. 139, 417 P.2d 683* (involving former Prob. Code § 1080, the predecessor to *Prob. Code § 11700*)].

[3] Interpretation of Will and Determination of Character of Property

In a proceeding to determine persons entitled to distribution, the court has jurisdiction to interpret the decedent's will and to determine the character of the property as community or separate [*Estate of Russ (1965) 231 Cal. App. 2d 917, 919, 42 Cal. Rptr. 471* (decided under former Prob. Code § 1080, the predecessor to *Prob. Code § 11700*); *see also Estate of Hartnett (1957) 155 Cal. App. 2d 280, 282-283, 318 P.2d 81* (same)].

The proceeding is, however, separate and distinct from the proceeding admitting a will to probate and cannot be used to challenge the validity of a will after the time for contest has expired [*Estate of Caruch (1956) 139 Cal. App. 2d 178, 186, 293 P.2d 514* (involving former Prob. Code § 1080, the predecessor to *Prob. Code §§ 11700-11703*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateJurisdiction & VenueGeneral Overview

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39-458 California Forms of Pleading and Practice--Annotated § 458.18

§ 458.18 Hearing

The court must not hear or consider a petition to determine persons entitled to distribution of an estate filed after an order for final distribution has been made [*Prob. Code § 11704(a)*]. Otherwise, the court is required to consider as evidence in the proceeding any statement made in the petition or in any statement of interest [*Prob. Code § 11704(a)*].

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39-458 California Forms of Pleading and Practice--Annotated § 458.19

§ 458.19 Order on Petition

[1] Generally

The determination of persons entitled to distribution of an estate is a statutory proceeding in rem that is indivisible, and there can, therefore, be only one order [*Bodine v. Superior Court of Santa Barbara County (1962) 209 Cal. App. 2d 354, 358-359, 26 Cal. Rptr. 260* ; *see also* *Estate of Russ (1965) 231 Cal. App. 2d 917, 919, 42 Cal. Rptr. 471]* . Thus, while the court has power to determine the character of property as community or separate, it does not have authority to bifurcate the hearing and make two orders, one on each issue, which are separately appealable; in this type of case there can be but one final appealable order [*Estate of Russ (1965) 231 Cal. App. 2d 917, 919, 42 Cal. Rptr. 471* (involving former Prob. Code § 1080, the predecessor to *Prob. Code §§ 11700-11703*)].

However, an order determining persons entitled to distribution of a severable portion of estate property that does not determine the persons entitled to the other interests does not prevent the filing of a later petition for determination of persons entitled to those other interests, nor does it prevent an appeal from the order relating to the severable portion pending the later determination of other persons entitled to distribution from the estate [*see* *Estate of Brissel (1963) 218 Cal. App. 2d 841, 843-845, 32 Cal. Rptr 458* (decided under former Prob. Code §§ 1080-1082, the predecessor statutes to *Prob. Code §§ 11700-11705*)].

[2] Effect of Order

When the court's order becomes final, it binds and is conclusive as to the rights of all interested persons [*Prob. Code § 11705(b)*; *see also* *Bodine v. Superior Court (1962) 209 Cal. App. 2d 354, 359-360, 26 Cal. Rptr. 260* (involving former Prob. Code §§ 1080-1082, the predecessor statutes to *Prob. Code §§ 11700-11705*)].

[3] Entry or Filing

The order must be either entered at length in the court's minute book or signed by the judge and filed [*see Prob. Code § 1048(a)*].

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39-458 California Forms of Pleading and Practice--Annotated § 458.20

§ 458.20 Costs

Unless otherwise provided by the Probate Code or by rules adopted by the Judicial Council, either the superior court or the court of appeal may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require [*Prob. Code § 1002*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateCosts & Expenses

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39-458 California Forms of Pleading and Practice--Annotated § 458.21

§ 458.21 Appeal

An appeal may be taken from an order determining, or refusing to determine, heirship or the persons to whom distribution should be made [*see Prob. Code § 7240(m)*].

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[Reserved]

§§ 458.22[Reserved]

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39-458 California Forms of Pleading and Practice--Annotated § 458.40

§ 458.40 State Statutes

Petition, notice, and hearing to establish simultaneous death. *Prob. Code §§ 220-234*

Procedure to determine entitlement to distribution of the estate. *Prob. Code §§ 11700-11704*

Hearing and determination. *Prob. Code §§ 11704, 11705(a)*

Conclusiveness of decree. *Prob. Code § 11705(b)*

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39-458 California Forms of Pleading and Practice--Annotated § 458.41

§ 458.41 Local Rules of Court

Petition to determine heirship (now, persons entitled to distribution):

Los Angeles Co. Super. Ct. Rules, Rule 10.74

Marin Co. Rule, Probate 11.06

Orange Co. Super. Ct. Rules, Rule § 607.05

San Bernardino Co. Prob. Pol. Mem. § 604

San Diego Co. Super. Ct. Rules, Div. IV, § 1.63

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral Overview

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39-458 California Forms of Pleading and Practice--Annotated § 458.42

§ 458.42 Decisions

[1] Determination of Persons Entitled to Distribution of Estate (formerly, Heirship Proceedings)

[a] In General

Power of court on distribution of estate, when no proceedings were held pursuant to former Prob. Code § 1080 (repealed by Stats. 1988, ch. 1199, operative July 1, 1989; *now see Prob. Code § 11700*), to determine persons entitled to estate by law; former Prob. Code § 1080 did not provide exclusive method of determining heirship. *Estate of Simmons (1966) 64 Cal. 2d 217, 220, 49 Cal. Rptr. 369, 411 P.2d 97*

Availability of former heirship proceeding to compel personal representative to pay debt constituting lien on specifically devised property. *Estate of Dolley (1968) 265 Cal. App. 2d 63, 68-75, 71 Cal. Rptr. 56*

Determination of heirship proceeding is statutory. *Bodine v. Superior Court (1962) 209 Cal. App. 2d 354, 359-360, 26 Cal. Rptr. 260* (involving former law)

[b] Adopted Child

Equitably adopted child does not have right to inherit property of testate "grandparent," whose will directs that her property is to go to "surviving issue" of her children; doctrine of equitable adoption creates contractual right to receive property from estate of deceased parent, but does not give equitable child rights of an heir under Probate Code to inherit property of third parties through the parent [*Estate of Furia (2002) 103 Cal. App. 4th 1, 5-6, 126 Cal. Rptr. 2d 384*

Oklahoma Supreme Court decision finding valid adoption by Oklahoma stepfather is entitled to full faith and credit in California, and adopted child was not permitted to take intestate share of estate of his natural father, a California decedent. *Estate of Hart (1984) 165 Cal. App. 3d 392, 395-398, 209 Cal. Rptr. 272*

[c] Costs

Costs are awardable in heirship proceedings, but interest is not. *Estate of Neilson (1962) 57 Cal. 2d 733, 748, 22 Cal. Rptr. 1, 371 P.2d 745* (involving prior law; *now see Prob. Code § 1002*)

[d] Discovery

Admissibility of amended answers to interrogatories in former heirship proceeding (*now* proceeding to determine persons entitled to distribution). *Estate of Horman (1968) 265 Cal. App. 2d 796, 805, 71 Cal. Rptr. 780*

[e] Evidence

Stipulation as to meaning of ambiguous will clause is binding on court unless contrary to public policy. *Estate of Burson (1975) 51 Cal. App. 3d 300, 306, 124 Cal. Rptr. 105*

Payment of taxes on property does not, by itself, establish ownership in a prior personal representative, individually. *Marsh v. Edelstein (1970) 9 Cal. App. 3d 132, 140, 88 Cal. Rptr. 26*

Letter by testatrix was admissible and established her understanding of language of will. *Estate of Mohr (1970) 7 Cal. App. 3d 641, 647-649, 86 Cal. Rptr. 731*

Title of savings account in name of woman as trustee for her husband did not determine question of ownership of funds in account when she predeceased him; title was significant only as it might have given rise to disputable presumption, had facts been undisclosed. *Roberts v. Goetz (1970) 5 Cal. App. 3d 364, 368, 85 Cal. Rptr. 84*

[f] Nature of Proceeding

Former heirship proceeding is specialized proceeding in rem. *Bodine v. Superior Court (1962) 209 Cal. App. 2d 354, 359-360, 26 Cal. Rptr. 260*

[g] Omitted Spouse

Putative spouse was omitted spouse within meaning of former *Prob. Code § 6560* [*now see Prob. Code § 21610*]. *Estate of Sax (1989) 214 Cal. App. 3d 1300, 1303, 263 Cal. Rptr. 190*

Proceeding to determine heirship (now proceeding to determine persons entitled to distribution of estate) by husband seeking portion of deceased wife's estate as omitted spouse under former *Prob. Code § 6560* [*now see Prob. Code § 21610*]. *Estate of Butler (1988) 205 Cal. App. 3d 311, 313, 252 Cal. Rptr. 210*

[h] Order

Judgment entered in proceeding under former Prob. Code § 1080 (repealed; *now see Prob. Code § 11700*) did not bar malpractice action against attorney who drafted will under doctrine of collateral estoppel because malpractice action presented different issues and attorney was not party to proceeding. *Garcia v. Borelli (1982) 129 Cal. App. 3d 24, 32, 180 Cal. Rptr. 768*

In proceeding to determine heirship (now persons entitled to distribution), any person entitled to distribution of estate or any part of it who files petition in which he or she prays that court determine who persons entitled to distribution are

is permitted to obtain decision binding on any other person interested in estate as to how estate will be distributed. *Estate of Hartnett (1957) 155 Cal. App. 2d 280, 282-283, 318 P.2d 81*

[i] Parent-Child Relationship

Decedent's acknowledgements during his lifetime of son born out of wedlock, which included (1) decedent's written acknowledgement that he was a party to conception; (2) that he had asked the child's mother to marry him; and (3) his admissions to his own mother, brother, and sister, as well as to the child himself and his mother, that the child was the decedent's son, were sufficient to meet the evidentiary burden of *Prob. Code § 6453(b)(2). Estate of Burden (2007) 146 Cal. App. 4th 1021, 1030* ; *53 Cal. Rptr. 3d 390*

Father of child born out of wedlock "acknowledged the child" for purposes of *Prob. Code § 6452* by confessing to paternity in out-of-state court and making no other acts of acknowledgment or disavowal, resulting in father's heirs sharing in the child's intestate estate. *Estate of Griswold (2001) 25 Cal. 4th 904, 924, 108 Cal. Rptr. 2d 165, 24 P.3d 1191*

Determination of whether children born to decedent out of wedlock might be heirs, and therefore entitled to notice, must be made by court, not by petitioner for administration of estate. *Estate of Carter (2003) 111 Cal. App. 4th 1139, 1147-1148, 1152-1153, 4 Cal. Rptr. 3d 490*

Parentage finding adjudicated in dissolution proceeding is identical with issue that would have been presented in Uniform Parentage Act proceeding, and therefore established intestacy rights under *Prob. Code § 6453(b)(1)* based on parent-child relationship. *Weir v Ferreira (1997) 59 Cal. App. 4th 1509, 1518-1521, 70 Cal. Rptr. 2d 33*

[j] Parties

Petition to determine heirship under former Prob. Code § 1080 (*now* petition to determine persons entitled to distribution under *Prob. Code § 11700*) was properly brought in name of alleged heir as real party in interest, instead of name of his attorney. *Estate of Brainard (1946) 76 Cal. App. 2d 850, 852-853, 174 P.2d 702*

[k] Putative Spouse

Putative spouse (*see Fam. Code § 2251*) of decedent was entitled to share of intestate decedent's separate property. *Estate of Leslie (1984) 37 Cal. 3d 186, 197, 204, 207 Cal. Rptr. 561, 689 P.2d 133* (decided under former *Prob. Code § 221*)

When day before decedent's death from terminal illness, hospital chaplain performed marriage ceremony for petitioner and decedent, but they had not obtained marriage license because of imminence of her death, there was no valid marriage, nor was petitioner a putative spouse. *Estate of DePasse (2002) 97 Cal. App. 4th 92, 107-108, 118 Cal. Rptr. 2d 143*

As between surviving legal spouse and children, and surviving putative spouse and child, of bigamous husband, one half of decedent's intestate estate goes to surviving spouse and all children of decedent as decedent's separate property under former *Prob. Code § 221*, and one half goes to surviving putative spouse as quasi-marital property under former *Civ. Code § 4452* (*now see Fam. Code § 2251*) and former *Prob. Code § 201*. *Estate of Hafner (1986) 184 Cal. App. 3d 1371, 1377, 229 Cal. Rptr. 676*

[l] Stepchild

Former *Prob. Code § 6408(a)(3)* (*now see Prob. Code § 6454*), specifying for purposes of intestate succession when relationship between person and foster parent or stepparent has same effect as adoptive relationship, was adopted to address those situations in which custodial parent remarries, and stepparent takes children into home, raising them as his or her own, but is refused right to adopt by noncustodial adoptive parent. *Estate of Claffey (1989) 209 Cal. App. 3d 254, 258 n.4, 257 Cal. Rptr. 197*

[m] Surviving Spouse

Use of former heirship proceeding by surviving husband taking against deceased wife's will and claiming community interest in her estate. *Woods v. Security-First Nat. Bank (1956) 46 Cal. 2d 697, 699-704, 299 P.2d 657*

Decedent's former wife was not entitled to inherit from decedent's estate because she was a party to a valid dissolution proceeding that concluded in an order terminating all marital property rights; therefore she was not a surviving spouse under *Prob. Code § 78(d)* at the time of decedent's death. *Estate of McDaniel (2008) 161 Cal. App. 4th 458, 463, 73 Cal. Rptr. 3d 907*

When day before decedent's death from terminal illness, hospital chaplain performed marriage ceremony for petitioner and decedent, but they had not obtained marriage license because of imminence of her death, there was no valid marriage and petitioner could not qualify as surviving spouse. A license is a mandatory requirement for valid marriage in *California. Estate of DePasse (2002) 97 Cal. App. 4th 92, 107, 118 Cal. Rptr. 2d 143*

Probate court in former heirship proceeding by surviving spouse seeking determination of community property interest in husband's estate under former Prob. Code § 1080 (repealed by Stats. 1988, ch. 1199, operative July 1, 1989; *now see Prob. Code § 11700*) has power to determine whole controversy, including spouse's claim under alleged *Marvin* agreements during period before marriage. *Estate of Fincher (1981) 119 Cal. App. 3d 343, 350, 174 Cal. Rptr. 18* ; *see* *Marvin v. Marvin (1976) 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106*

[2] Jurisdiction

[a] In General

Nature of former heirship proceeding (now proceeding to determine persons entitled to distribution); jurisdictional recitals. *Estate of Wise (1949) 34 Cal. 2d 376, 381-382, 210 P.2d 497*

Under former Prob. Code §§ 1080-1082 (repealed by Stats. 1988, ch. 1199, operative July 1, 1989; *now see Prob. Code §§ 11700-11705*), jurisdiction of superior court, sitting in probate, is exclusive as to matters committed to it by law; matter of determining who is entitled to distribution of estate is vested in superior court sitting in probate. *Marsh v. Edelstein (1970) 9 Cal. App. 3d 132, 142, 88 Cal. Rptr. 26*

[b] To Determine Ademption of Devise

Prob. Code § 21134(a) and case law prohibit ademption of specific gifts of corporate stock contained in living trust due to liquidation and dissolution of the corporation, when settlor's conservator, acting as trustee of the revocable trust, participates in the sale of the corporations assets. *Brown v. Labow (2008) 157 Cal. App. 4th 795, 816, 69 Cal. Rptr. 3d 417*

Probate court has jurisdiction to determine, on petition to determine heirship (now petition to determine persons

entitled to distribution), whether or not devise of property has been adeemed by its sale during lifetime of testator. *Estate of Hagberg (1969) 276 Cal. App. 2d 622, 628, 81 Cal. Rptr. 107*

[c] To Determine Character of Property

In proceeding to determine heirship (now persons entitled to distribution of estate), court has jurisdiction to determine the character of property as community or separate. *Estate of Russ (1965) 231 Cal. App. 2d 917, 919, 42 Cal. Rptr. 471* (decided under former Prob. Code § 1080, the predecessor to *Prob. Code § 11700*); *see also Estate of Hartnett (1957) 155 Cal. App. 2d 280, 282-283, 318 P.2d 81* (same)

[d] To Determine Community Property Rights

In proceeding to determine heirship (now to determine persons entitled to distribution of estate), jurisdiction of court includes power to adjudicate community property rights. *Estate of Hartnett (1957) 155 Cal. App. 2d 280, 282-283, 318 P.2d 81*

[e] To Determine Disputed Claims

Determination in proceeding to determine heirship (*now* proceeding to determine persons entitled to distribution) of additional claims petitioner asserts against those in privity with estate relating to same property. *Estate of Baglione (1966) 65 Cal. 2d 192, 196, 53 Cal. Rptr. 139, 417 P.2d 683*

Probate court has jurisdiction to determine surviving spouse's claim to property under nonmarital agreement relating to period of cohabitation with decedent when spouse also asserts true community property claim. *Estate of Fincher (1981) 119 Cal. App. 3d 343, 349-350, 174 Cal. Rptr. 18*

Superior court sitting in probate is without jurisdiction to try title to property as between representative of estate and stranger to estate who does not invoke jurisdiction of court; spouse claiming property as surviving joint tenant has status of stranger to estate. *Estate of Hagberg (1969) 276 Cal. App. 2d 622, 626-627, 81 Cal. Rptr. 107* (involving former law)

Jurisdiction of probate court to decide claim by party to action that he is entitled to property of intestate wife's estate as community property. *Estate of Plum (1967) 255 Cal. App. 2d 357, 360-363, 63 Cal. Rptr. 241*

Probate court is not able to decide disputed claim between estate and stranger to it, but as able to decide dispute between estate and those not strangers to it. *Estate of Hartnett (1957) 155 Cal. App. 2d 280, 282, 318 P.2d 81* (involving former law)

[f] To Interpret Will

In proceeding to determine heirship (now persons entitled to distribution of estate), court has jurisdiction to interpret decedent's will. *Estate of Russ (1965) 231 Cal. App. 2d 917, 919, 42 Cal. Rptr. 471* (decided under former Prob. Code § 1080, the predecessor to *Prob. Code § 11700*)

[g] To Review Exercise of Special Power of Appointment

Will giving executor sole power to determine which persons are qualified to receive bequest to individuals who

rendered personal services to decedent as created special power of appointment in executor requiring showing of bad faith to overturn executor's determination. *Estate of Dailey (1982) 130 Cal. App. 3d 993, 998-999, 182 Cal. Rptr. 95*

[3] Litigation of Portion of Estate

Parties interested in severable portion of estate are permitted to litigate their claims as to it without waiting for rights in other assets to be litigated. *Estate of Brissel (1963) 218 Cal. App. 2d 841, 843-844, 32 Cal. Rptr. 458*

[4] No-Contest Clause

Neither petition to determine heirship under former Prob. Code § 1080 (repealed by Stats. 1988, ch. 1199, operative July 1, 1989; *now see Prob. Code § 11700*) nor petition claiming one half of property possessed by decedent at his death on theory of implied domestic partnership under former Prob. Code § 851.5 (repealed by Stats. 1987, ch. 923, operative July 1, 1988; *now see Prob. Code § 850*) trigger no-contest clause in will. *Estate of Black (1984) 160 Cal. App. 3d 582, 588-589, 206 Cal. Rptr. 663*

[5] Person Intentionally Causing Decedent's Death

Judgment after finding of insanity is acquittal under former *Prob. Code § 258* (no inheritance by person causing decedent's death; repealed by Stats. 1983, ch. 842, operative Jan. 1, 1985; *now see Prob. Code § 250*), and mother found by jury to have murdered sons and then found by court to have been insane at time of murder was not precluded by *Prob. Code § 258* from inheriting from them. *Estate of Ladd (1979) 91 Cal. App. 3d 219, 224-227, 153 Cal. Rptr. 888*

[6] Wills

Interpretation of wills; specific over general. *Estate of Cunningham (1969) 271 Cal. App. 2d 23, 27, 76 Cal. Rptr. 272* ; *Estate of Becker (1969) 270 Cal. App. 2d 31, 33-37, 75 Cal. Rptr. 359*

Agreement to make will; enforcement; distribution in trust. *Wurche v. Stenzel (1969) 270 Cal. App. 2d 499, 500-506, 75 Cal. Rptr. 856*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateJurisdiction & VenueGeneral Overview

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§ 458.43 Law Reviews

Wild, *The Felonious Heir in California*, 49 Cal. St. B.J. 528 (1974)

Note, *Cy Pres and the Discriminatory Trust*, *23 Hastings L.J. 604 (1972)*

Note, *Inheritance Tax: Heirship Proceeding--Judgment in Rem Binding on the Taxing Authorities*, *45 Cal. L. Rev. 551 (1957)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458.44 Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, § 719 (10th ed. 2005)

Legal Topics:

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[Reserved]

§§ 458.45[Reserved]

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§ 458.60 Petition to Determine Persons Entitled to Distribution of Estate

NOTE:
The following guide is illustrative only and not exhaustive.

The personal representative or any person claiming to be a beneficiary or otherwise entitled to distribution of a share of the estate may file the petition [*Prob. Code § 11700*]. For discussion of when the Attorney General of California is deemed a person entitled to distribution of the estate, see *Prob. Code § 11703,* discussed in the Introduction under § 458.12[2].

1. Preliminary Determinations.

a. Determine whether petition is timely.

NOTE:
The petition may be filed at any time after letters are first issued to a general personal representative and before an order for final distribution is made [***see*** *Prob. Code § 11700*]. This time period is jurisdictional [***see*** *Prob. Code § 11704(a)*].

b. Ascertain basis of petitioner's claim.

NOTE:
The petition must include a statement of the basis for the petitioner's claim [*Prob. Code § 11700*].

2. Preparation of Petition.

a. Prepare petition in an original for filing (with any copies that may be required by the court), and sufficient copies to serve one on any person on whom service is required by law, a copy for client, and an office copy [*Prob. Code § 11700*; *see §§ 458.80 -458.83*].

NOTE:
For when a copy of the petition must be served, see discussion in *§ 458.14*.

b. Have petitioner sign petition and verification.

NOTE:
The petition must be signed by all of the petitioners [*Prob. Code § 1020*] and verified by the petitioner or by one of them if there is more than one [*Prob. Code § 1021(a)(1), (b)(1)*]. Nevertheless, verification of a document constitutes signature of that document unless expressly provided to the contrary [*Prob. Code § 1020*]. If the petitioner is not a fiduciary (a personal representative is a fiduciary [***see*** *Prob. Code § 39*]), and if the petitioner is absent from the county or for some other cause is unable to sign or verify the petition, it may be signed and verified by the petitioner's attorney [***see*** *Prob. Code § 1023*].

3. Filing and Hearing Date

a. File original of petition, together with any copies that may be required by court, with court clerk.

b. Secure a hearing date from the court clerk.

NOTE:
On the filing of the petition, the clerk is required to set the matter for hearing [*Prob. Code § 1041*].

4. Notice of hearing on petition.

a. Prepare the notice of hearing in an original for filing with sufficient copies to serve one on each person to whom notice must be given, a copy for the client, and an office copy.

NOTE:
Notice of hearing is required by *Prob. Code § 11701*. For the persons to whom the notice must be given, see *§ 458.14*.

b. Prepare the proof of service.

NOTE:
Proof that notice of the hearing was given must be made to the satisfaction of the court at or before the hearing [*Prob. Code § 1260(a)*]. Proof of service by mail may be made in the manner prescribed in *Code Civ. Proc. § 1013a* [*Prob. Code § 1261*; for forms of proof of service by mail under *Code Civ. Proc. § 1013a*, which may be adapted for use in a probate proceeding, ***see*** Ch. 518, ***Service of Summons and Papers***]. For proof of service by publication, posting, or personal delivery, see *Prob. Code §§ 1262, 1263*, and *1264*, respectively.

c. At least 15 days before the date of hearing, mail (or personally deliver) to each person to be given notice a copy of the notice of hearing [*see Prob. Code §§ 1215, 1216, 1220, 11701*], together with an unsigned copy of the proof of service [*see Code Civ. Proc. §§ 1013(b)*; *Prob. Code § 1000*], and a copy of the petition when required by law [*see, e.g., Prob. Code § 1252(a)* (persons requesting special notice); *see also § 458.14*].

d. File the executed proof or proofs of service with the court clerk or present them as evidence at the hearing.

NOTE:

The proof of service may be filed with the court [***see*** *Code Civ. Proc. §§ 1013a, 2011*; *Prob. Code §§ 1000, 1261*] or presented as evidence at the hearing [*Prob. Code § 1265*; *see Prob. Code § 1260(a)*; *see also Code Civ. Proc. §§ 2009, 2010, 2011, 2015.3, 2015.5* (use of affidavits or declarations under penalty of perjury to prove service of notice)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProceduresPleading & PracticeService of ProcessMethodsPublicationCivil ProceduresPleading & PracticeService of ProcessProofGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral Overview

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§ 458.61 Responsive Statement

NOTE:
Any interested person may appear in the proceeding to determine persons entitled to distribution and file a written statement of his or her interest in the estate [*Prob. Code § 11702(a)*].

1. Preliminary Determinations.

a. Determine whether the statement is timely.

NOTE:
A written statement of the person's interest may be filed at any time at or before the time of the hearing on the petition [***see*** *Prob. Code § 11702(a)*].

b. Ascertain the basis of the claimant's interest or claim in the estate.

NOTE:
The written statement may be in support of, or in opposition to, the petition [*Prob. Code § 11702(a)*].

2. Preparation and Filing of Statement.

a. Prepare the statement in an original for filing (with any copies that may be required by the court), a copy for the client, and an office copy [*Prob. Code § 11702*; *see §§ 458.84*, *458.85*].

NOTE:
Although *Prob. Code § 11702* characterizes the written statement as a "pleading" by providing that "[n]o other pleadings are necessary," the statute does not expressly require that a copy of the statement be served on the petitioner or other interested persons. Moreover, the statute expressly authorizes the filing of the statement at, as well as before, the hearing [***see*** *Prob. Code § 11702(a)*].

b. Have the claimant sign the written statement and verification.

NOTE:
The statement, as a "response," must be signed by all of the claimants [***see*** *Prob. Code § 1020*] and verified by the claimant or by one of them if there is more than one [***see*** *Prob. Code § 1021(a)(1), (b)(1)*]. Nevertheless, verification of a document constitutes signature of that document unless expressly provided to the contrary [*Prob. Code § 1020*]. If the claimant is not a fiduciary (a personal representative is a fiduciary [***see*** *Prob. Code § 39*]), and if the claimant is absent from the county or for some other cause is unable to sign or verify the statement, it may be signed and verified by the claimant's attorney [***see*** *Prob. Code § 1023*].

c. File the original of the statement, together with any copies that may be required by the court, with the court clerk or the courtroom clerk.

NOTE:
The statement may be filed at or before the time of the hearing [***see*** *Prob. Code § 11702(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral Overview

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§ 458.62 Hearing and Order

NOTE:
The court must consider as evidence in the proceeding any statement made in a petition filed under *Prob. Code § 11700* and any statement of interest filed under *Prob. Code § 11702* [*Prob. Code § 11704(a)*].

1. Attend the hearing. If proof of service of the notice of hearing has not been filed before the hearing, petitioner should be prepared to prove to the satisfaction of the court that the notice was given as required by law [*see Prob. Code § 1260(a)*].

NOTE:
An affidavit (or declaration under penalty of perjury [***see*** *Code Civ. Proc. § 2015.5*]) must be received at the hearing as evidence if the proceedingis uncontested [***see*** *Prob. Code § 1022*]. This provision apparently would apply to an affidavit or declaration of service.

2. Prepare for the judge's signature and in accordance with the judge's instructions the formal order determining the persons entitled to distribution and specifying their shares in an original for filing (together with any copies required by the court), a copy for each party (or the party's attorney if the party was represented by counsel) who appeared at the hearing, a copy for the client, and an office copy.

NOTE:
The court's order must determine the persons entitled to distribution of the decedent's estate and specify their shares [*Prob. Code § 11705(a)*; ***see*** *§ 458.86*].

3. Present the original to the judge's courtroom clerk for the judge's signature and, when it is signed, have the clerk conform the copies.

4. Serve any copies of the order as specified above.

NOTE:

When the order becomes final, it is binding and conclusive as to the rights of all interested persons [*Prob. Code § 11705(b)*; ***see also*** *Prob. Code § 11702(b)(3)* (person who failed to file statement of interest).

Legal Topics:

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[Reserved]

§§ 458.63[Reserved]

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§ 458.80 Petition to Determine Persons Entitled to Distribution of Estate [Prob. Code § 11700]--By Personal Representative to Determine Character of Property as Community or Separate

[1] FORM Petition to Determine Persons Entitled to Distribution of Estate [Prob. Code § 11700]--By Personal Representative to Determine Character of Property as Community or Separate

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	PETITION TO DETERMINE PERSONS EN-
Deceased.	)	TITLED TO DISTRIBUTION OF ESTATE

_____

Petitioner, _____ [*name*], respectfully represents:

1. Petitioner is the duly appointed, qualified, and acting general personal representative of the estate of _____ [*name*], deceased.

2. Letters were issued to petitioner on _____ [*date*].

3. The deceased left estate consisting of real and personal property situated in _____ County, California, as set forth in the inventory and appraisal filed herein on _____ [*date*].

4. _____ [*Specify basis of claim, e.g.:* A dispute exists among the devisees under the decedent's will and _____ (*name*), the decedent's surviving wife, concerning whether the following described property was the community property of the decedent and his surviving wife or the decedent's separate property, and concerning the persons entitled to its distribution: _____ (*describe property*).]

5. The names, relationships, and addresses of the devisees under the will and of all other persons entitled to notice of the time and place of hearing this petition, so far as known to petitioner, are:

Name & Address	Age & Relationship
_____	_____
_____	_____
_____	_____

6. A request for special notice has _____ [not been filed herein *or* been filed herein by _____ (*name*) and notice of the time and place of hearingon this petition will be given as required by law].

WHEREFORE, petitioner prays that the court make an order determining the persons who are entitled to distribution of the estate, and specifically of the above-described property, and for all other proper orders.
Dated: _____.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form is for use by a general personal representative when there is some dispute as to who is entitled to property in the decedent's estate and a court determination of the person or persons entitled to it is necessary [*see Prob. Code § 11700*]. The petition may be filed by a general personal representative (defined in *Prob. Code § 58(b)*), as in the above form, or by any person claiming to be a beneficiary or otherwise entitled to distribution of a share of the estate [*Prob. Code § 11700*; *see §§ 458.81 -458.83*].

The petition must be signed and verified by the petitioner, although, unless expressly provided to the contrary, verification of a document constitutes signature of that document [*see Prob. Code §§ 1020, 1021(a)(1), 1021(b)(1)*]. It

must also include a statement of the basis for the petitioner's claim [*Prob. Code § 11700*].

This petition should not be confused with a petition to identify heirs under *Prob. Code § 248*, which applies if there is no pending proceeding to administer a decedent's estate and it is necessary to determine membership in certain classes entitled to property other than by succession [*see Prob. Code §§ 248-249*]. For a discussion of the proceedings authorized by *Prob. Code §§ 248-249*, including a petition to identify heirs, see Ch. 444, *Probate: Disposition Without Administration* .

[3] Time for Filing

The petition may be filed at any time after letters (defined in *Prob. Code § 52*) were first issued to a general personal representative and before an order for final distribution is made [*Prob. Code § 11700*]. A petition filed after an order for final distribution is made may not be considered by the court [*see Prob. Code § 11704(a)*].

[4] Notice of Hearing

Notice of the hearing on the petition must be given as provided in *Prob. Code § 1220* to all of the following persons [*Prob. Code § 11701*]: (a) each person listed in *Prob. Code § 1220*; (b) each known heir whose interest in the estate would be affected by the petition; (c) each known devisee whose interest in the estate would be affected by the petition; and (d) the Attorney General, at the Office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the petition. For further discussion of notice, see *§ 458.14*. For when the attorney general is deemed a person entitled to distribution of the estate, see *Prob. Code § 11703*, in § 458.12[2].

[5] Adjudication of Character of Property

In seeking an adjudication of property as community or separate in character, it was held, under prior law, that a personal representative could file a petition to determine heirship under former Prob. Code § 1080 (the predecessor to *Prob. Code § 11700*) [*see, e.g., Estate of Hartnett (1957) 155 Cal. App. 2d 280, 282-283, 318 P.2d 81]* or a petition for instructions under former Prob. Code § 588 (the predecessor to *Prob. Code § 9611*) [*see, e.g., Estate of Putnam (1959) 175 Cal. App. 2d 781, 784, 346 P.2d 841]* , but that, under the latter section, the exercise of the court's power was permissive and the court therefore could refuse to make the order sought [*Estate of Putnam (1959) 175 Cal. App. 2d 781, 784, 346 P.2d 841* ; *see also* Ch. 457, *Probate: Instructions to Personal Representative*].

[6] State Statutes

Petition must be signed by all petitioners. *Prob. Code § 1020*

Verification of petition. *Prob. Code § 1021*

When petition may be signed or verified by petitioner's attorney. *Prob. Code § 1023*

Duty of court clerk on filing petition to set matter for hearing. *Prob. Code § 1041*

Petition to determine persons entitled to distribution of decedent's estate. *Prob. Code § 11700*

Notice of hearing. *Prob. Code § 11701*

Attorney General as party. *Prob. Code § 11703*

Surviving registered domestic partner has same rights, responsibilities, protections, and benefits as surviving spouse. *Fam. Code § 297.5(c)*

[7] Local Rules of Court

Petitions required to be set for hearing must have self-addressed, stamped envelope attached. Los Angeles Co. Super. Ct. Rules, Rule 10.31(a) (or attach fax cover sheet; see Los Angeles Co. Super. Ct. Rules, Rule 10.31(b))

When issue of relationship is involved, petitioner must file genealogical chart under separate cover. Los Angeles Co. Super. Ct. Rules, Rule 10.74(f)

[8] Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, § 719 (10th ed. 2005)

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39-458 California Forms of Pleading and Practice--Annotated § 458.81

§ 458.81 Petition to Determine Persons Entitled to Distribution of Estate [Prob. Code § 11700]--By Surviving Spouse or Registered Domestic Partner Claiming Community Interest in Deceased Spouse's Estate or Claiming as Omitted Spouse [Prob. Code § 6560; Fam. Code § 297.5]

[1] FORM Petition to Determine Persons Entitled to Distribution of Estate [Prob. Code § 11700]--By Surviving Spouse or Registered Domestic Partner Claiming Community Interest in Deceased Spouse's Estate or Claiming as Omitted Spouse [Prob. Code § 6560; Fam. Code § 297.5]

[*Caption. See § 458.80.*]

Petitioner, _____ [*name*], respectfully represents:

1. Petitioner is the surviving _____ [husband *or* wife *or* registered domestic partner] of _____ [*name*], deceased, and is entitled to distribution of a part of the deceased's estate as hereinafter alleged.

2. Letters were issued on _____ [*date*] to _____ [*name*] and he/she is the duly appointed, qualified, and acting general personal representative of the deceased's estate.

3. The deceased left estate consisting of the following described real and personal property, which[, although standing in the name of the deceased alone,] was the community property of petitioner and deceased, in that _____ [*specify, e.g.,* it was acquired by petitioner and the decedent during their marriage as the result of their joint efforts and title was taken in the deceased's name for business purposes only]: _____ [*describe property by item as set forth in the inventory and appraisal*].

4. [Petitioner and the deceased were married on _____ (*date*). The deceased's will that was admitted to probate was executed prior to that date on _____ (*date*), and it devised all of the deceased's estate to beneficiaries other than petitioner. It does not appear from the will that the failure to provide for petitioner was intentional. Nor did the deceased make any provision for the petitioner by a transfer outside the will, and petitioner

made no agreement waiving his/her right to share in the deceased's estate.]

5. [By reason of the marriage of petitioner and the deceased after the date the will was executed and the facts alleged in Paragraph 4, petitioner is entitled to that share of the property in the deceased's estate as set forth in *Probate Code Section 6560*.]

6. [*Allegation of notice. See § 458.80, Paragraph 5.*]

7. [*Allegation of special notice. See § 458.80, Paragraph 6.*]

WHEREFORE, petitioner prays that the court determine the persons who are entitled to distribution of the deceased's estate, and specifically that it determine that the above-described property is the community property of petitioner and thedeceased, that one half of it belongs to petitioner, and that petitioner is entitled to distribution of the deceased's one-half interest of the community property[, as well as _____ (*e.g.*, one half) of the deceased's separate property,] under the provisions of *Probate Code § 6560*.
Dated: _____.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 458.80.*]

[2] Use of Form

This form is for use when a surviving spouse or registered domestic partner claims that property in the deceased spouse's estate is community property, or that he or she is an omitted spouse in that the decedent failed to provide for him or her by will and the parties were married after the will was executed [*see Prob. Code § 6560*; *Fam. Code § 297.5*], or both.

[3] State Statutes

Intestate share of surviving spouse. *Prob. Code § 6401*

Share to which spouse omitted from will is entitled when parties married subsequent to execution of will and no provision for surviving spouse was made by will. *Prob. Code § 6560*

When omitted spouse may not receive share of estate under *Prob. Code § 6560*. *Prob. Code § 6561*

Surviving registered domestic partner has same rights, responsibilities, protections, and benefits as surviving spouse. *Fam. Code § 297.5(c)*

[4] Decisions

Surviving husband who married decedent after will was executed and who was excluded from will executed some four years before the marriage by a codicil to the will executed two months after the will was executed properly invoked jurisdiction of court by petition to determine heirship under former Prob. Code § 1080 [repealed and replaced by *Prob. Code § 11700* by Stats. 1988, ch. 1199]. *Woods v. Security-First Nat. Bank (1956) 46 Cal. 2d 697, 703, 299 P.2d 657*

Putative spouse as omitted spouse within meaning of *Prob. Code § 6560*. *Estate of Sax (1989) 214 Cal. App. 3d 1300, 1303, 263 Cal. Rptr. 190*

In proceeding to determine heirship under former Prob. Code § 1080 [repealed and replaced by *Prob. Code § 11700* by Stats. 1988, ch. 1199], court's jurisdiction included power to adjudicate community property rights, and fact that petitioner sought to have adjudication as to property held in joint tenancy did not deprive court of jurisdiction to determine what was and was not community property. *Estate of Hartnett (1957) 155 Cal. App. 2d 280, 318 P.2d 81*

[5] Cross References

For a related form, *see § 458.80*.

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39-458 California Forms of Pleading and Practice--Annotated § 458.82

§ 458.82 Petition to Determine Persons Entitled to Distribution of Estate [Prob. Code § 11700]--Devise Subject to Agreement by Devisee to Make Will Leaving Devised Property to Petitioner

[1] FORM Petition to Determine Persons Entitled to Distribution of Estate [Prob. Code § 11700]--Devise Subject to Agreement by Devisee to Make Will Leaving Devised Property to Petitioner

[*Caption. See § 458.80.*]

Petitioner, _____ [*name*], respectfully represents:

1. Petitioner is a beneficiary under the decedent's will of a remainder interest in the deceased's estate as hereinafter alleged.

2. Letters were issued on _____ [*date*] to _____ [*name*] and he/she is the duly appointed, qualified, and acting general personal representative of the deceased's estate.

3. The deceased left a will devising certain personal and real property to _____ [*name*] (hereinafter, "the devisee"), which was expressly stated to have been made to comply with, and was made subject to, a written agreement dated _____ [*specify*], between the deceased and the devisee by the terms of which the devisee, in consideration of the deceased devising the property to him/her, agreed that he/she would make, and have in effect at all times during his/her lifetime, a will leaving all of the property so devised to the petitioner. A copy of the deceased's will and a copy of the contract between the deceased and the devisee are attached as Exhibits "A" and "B," respectively, and incorporated by reference.

4. The property so devised is described as follows: _____ [*description*].

5. A dispute exists between the devisee and petitioner as to the interest that is to be distributed to the devisee in that the devisee claims that he/she is entitled to receive the property in fee simple, whereas petitioner claims that he/she is entitled to only a life estate in the property, holding the remainder in trust for the benefit of the petitioner.

6. [*Allegation of notice. See § 458.80, Paragraph 5.*]

7. [*Allegation of special notice. See § 458.80, Paragraph 6.*]

WHEREFORE, petitioner prays that the court make an order declaring that decedent's will created but a life estate in the devisee and that the property is to be distributed to the devisee as trustee for the benefit of the petitioner with a right to a life estate for the lifetime of the devisee and with remainder over to petitioner, and for all other proper orders.
Dated: _____.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 458.80.*]

[2] Use of Form

This form is for use by a petitioner who claims to be the beneficiary of a remainder interest in a decedent's estate by virtue of a contract, described and incorporated into the decedent's will, between the decedent and a third party who was a devisee under the decedent's will, under which the decedent agreed to devise the property in question to the devisee upon condition that the devisee agreed to make, and keep in effect during the devisee's lifetime, a will devising the property to petitioner on the devisee's death [*see Estate of Smith (1961) 196 Cal. App. 2d 544, 546-548, 16 Cal. Rptr. 681]* .

[3] Decisions

Agreement to make will; enforcement; distribution in trust. *Wurche v. Stenzel (1969) 270 Cal. App. 2d 499, 500-506, 75 Cal. Rptr. 856*

Will devising in qualified terms and followed by direction for devisee to leave property to third person created life estate in devisee with remainder over to third person. *Estate of Smith (1961) 196 Cal. App. 2d 544, 549, 16 Cal. Rptr. 681*

Court has no power to create a testamentary trust unless required to do so by will, but court may create trust when trust results from contract between the testator and a devisee under the will, under which the devisee agreed to leave property to a third party as a condition of receiving the devise, and testor in effect incorporated that contract into the will. *Estate of Smith (1961) 196 Cal. App. 2d 544, 550, 16 Cal. Rptr. 681*

[4] Cross References

For a related form, *see § 458.80*.

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39-458 California Forms of Pleading and Practice--Annotated § 458.83

§ 458.83 Petition to Determine Persons Entitled to Distribution of Estate [Prob. Code § 11700]--By Heir of Predeceased Spouse or Registered Domestic Partner of Intestate Decedent [Prob. Code § 6402.5; Fam. Code § 297.5]

[1] FORM Petition to Determine Persons Entitled to Distribution of Estate [Prob. Code § 11700]--By Heir of Predeceased Spouse or Registered Domestic Partner of Intestate Decedent [Prob. Code § 6402.5; Fam. Code § 297.5]

[*Caption. See § 458.80.*]

Petitioner, _____ [*name*], respectfully represents:

1. As shown by the records and file herein, the above-named decedent died intestate on _____ [*date*] without a surviving _____ [spouse or registered domestic partner] or issue.

2. On _____ [*date*], letters were issued to _____ [*name*], and he/she is is the duly appointed, qualified, and acting general personal representative of the decedent's estate.

3. The decedent and _____ [*name of decedent's predeceased spouse or predeceased domestic partner*] _____ [were married to one another *or* formed a domestic partnership by filing a Declaration of Domestic Partnership with the California Secretary of State] on _____ [*date*]. _____ [*name of decedent's predeceased spouse or predeceased domestic partner*] died on _____ [*if real property is involved, date not more than 15 years before date of decedent's death or, if personal property is involved, date not more than 5 years before decedent's death*], while still _____ [married to decedent *or* decedent's domestic partner].

4. Petitioner is _____ [*specify relationship, e.g.,* son *or* daughter *or* grandchild] [and only issue] of _____ [*name of predeceased spouse or predeceased domestic partner*] and, as such, is entitled to that portion of the decedent's estate that is attributable to _____ [*name of decedent's predeceased spouse or* predeceased domestic partner].

5. The following described property now in the decedent's estate was the community property of the decedent and _____ [*name of decedent's predeceased spouse or predeceased domestic partner*]: _____ [*description*]. The following described property in the decedent's estate was the separate property of _____ [*name of decedent's predeceased spouse or predeceased domestic partner*]: _____ [*description*]. By reason of the respective community and separate characters of the property, petitioner has an interest in all such property under the provisions of *Probate Code Section 6402.5*.

6. Various persons claim an interest in the decedent's estate, including an interest in the above-described property; the rights of persons so claiming have not been determined by any judgment, order, or decree of any court of competent jurisdiction.

7. [*Allegation of notice. See § 458.80, Paragraph 5.*]

8. [*Allegation of special notice. See § 458.80, Paragraph 6.*]

WHEREFORE, petitioner prays that the court determine the persons entitled to distribution of the decedent's estate and the share of each, and for all other proper orders.
Dated: _____.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 458.80.*]

[2] Use of Form

This form is for use by one or more of the heirs of the decedent's predeceased spouse [*see Prob. Code § 59* (defining "predeceased spouse")] who died not more than 15 years before the decedent when the decedent left surviving neither a spouse or domestic partner nor issue, and a portion of the decedent's estate includes property attributable to the predeceased spouse or domestic partner. The fact situation illustrated is that set forth in *Prob. Code § 6402.5(a)(1), (b)(1)*, namely, that the decedent is survived by issue of the predeceased spouse. With appropriate modifications, this form may be used by any of the persons listed in *Prob. Code § 6402.5* when the required conditions exist.

As of January 1, 2005, surviving registered domestic partners have the same rights, responsibilities, protections, and benefits as surviving spouses [*Fam. Code § 297.5(c)*].

For purposes of disposing of personal property under *Prob. Code § 6402.5(b)*, the claimant heir bears the burden of proof to show the exact personal property to be disposed of to the heir [*Prob. Code § 6402.5(c)*].

[3] Distribution When Decedent Died Without Surviving Spouse or Registered Domestic Partner or Issue

Under *Prob. Code § 6402.5*, when a decedent dies without leaving a surviving spouse or domestic partner or issue, the heirs of the predeceased spouse are entitled to distribution of real property from the decedent's estate that is attributable

to the predeceased spouse or domestic partner only if the predeceased spouse or domestic partner died not more than 15 years before the decedent [*see Prob. Code § 6402.5(a)*]. They are also entitled to distribution of personalproperty attributable to the predeceased spouse or domestic partner, if the predeceased spouse or domestic partner died not more than five years before the decedent [*see Prob. Code § 6402.5(b)*]. In this context, "personal property" means that personal property in which there is a written record of title or ownership and the value of which in the aggregate is $10,000 or more [*Prob. Code § 6402.5(e)*].

As of January 1, 2005, surviving registered domestic partners have the same rights, responsibilities, protections, and benefits as surviving spouses [*Fam. Code § 297.5(c)*].

For the purposes of providing notice with respect to an estate that may include personal property subject to distribution under *Prob. Code § 6402.5(b)*, if the aggregate fair market value of tangible and intangible personal property with a written record of title or ownership in the estate is believed in good faith by the petitioning party to be less than $10,000, the petitioning party need not give notice to the issue or next of kin of the predeceased spouse or domestic partner. If the personal property is subsequently determined to have an aggregate fair market value in excess of $10,000, notice must be given to the issue or next of kin of the predeceased spouse or domestic partner as provided by law [*Prob. Code § 6402.5(d)*].

[4] State Statutes

"Predeceased spouse" defined. *Prob. Code § 59*

Descent of property inherited from predeceased spouse on death without spouse or issue. *Prob. Code § 6402.5*

Surviving registered domestic partner has same rights, responsibilities, protections, and benefits as surviving spouse. *Fam. Code § 297.5(c)*

[5] Local Rules of Court

Petitions to be set for hearing must have self-addressed, stamped envelope attached. Los Angeles Co. Super. Ct. Rules, Rule 10.31(a) (or attach fax cover sheet; see Los Angeles Co. Super. Ct. Rules, Rule 10.31(b))

[6] Decisions

Fact that predeceased spouse and sister of predeceased spouse had been alienated for 28 years did not amount to an equitable consideration that could alter application of former Prob. Code § 229; when neither decedent nor predeceased spouse left issue, community property attributable to predeceased spouse devolved on sister of predeceased spouse. *Estate of McInnis (1986) 182 Cal. App. 3d 949, 956-959, 227 Cal. Rptr. 604*

Burden of proof is on relatives of predeceased spouse claiming as statutory heirs of surviving spouse dying intestate. *Estate of McGee (1959) 168 Cal. App. 2d 670, 674, 336 P.2d 622*

[7] Cross References

For a related form, *see § 458.80*.

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39-458 California Forms of Pleading and Practice--Annotated § 458.84

§ 458.84 Statement of Interest in Estate by Person Other Than Petitioner for Determination of Persons Entitled to Distribution [Prob. Code § 11702]--General Form

[1] FORM Statement of Interest in Estate by Person Other Than Petitioner for Determination of Persons Entitled to Distribution [Prob. Code § 11702]--General Form

[*Caption. See § 458.80.*]

Claimant _____ [*name*], in _____ [support of *or* opposition to] the petition for determination of persons entitled to distribution filed by _____ [*name*], hereby submits this statement of interest as follows:

1. Claimant is _____ [*specify relationship to the deceased, e.g.,* the sister of the predeceased _____ (spouse *or* registered domestic partner) of the above-named deceased].

2. The deceased's estate consists of _____ [*specify character of property, e.g.,* community property of the deceased and her predeceased spouse _____ (spouse *or* registered domestic partner)].

3. _____ [*Identify property in which claimant has an interest, e.g.:* The community property referred to above consists of the following: _____ [*describe, including inventory item numbers*].

4. _____ [*State facts giving rise to need for filing statement, e.g.,* Petitioners are three nieces of the deceased, who claim to be entitled to all of the deceased's estate. By this petition, they are challenging claimant's belief that she is entitled to one half of decedent's estate and have refused to include claimant as a person entitled to distribution.]

5. _____ [*State basis of interest, e.g.,* Decedent's estate consists entirely of community property of decedent and her predeceased _____ (spouse *or* registered domestic partner). Decedent left no issue or spouse. As sister of decedent's predeceased spouse, claimant is entitled to receive the portion of community property

attributable to the predeceased _____ (spouse *or* registered domestic partner), i.e., one half of decedent's estate.]

WHEREFORE, claimant prays for an order _____ [*specify, e.g.,* confirming that claimant is the owner of one half of the community property hereinabove described and denying the petition seeking a determination that all of what is in fact community property should be distributed to them], and for all other proper orders.
Dated: _____.

_____ [*signature*]

Claimant

_____ [*signature*]

Attorney for Claimant

[*Verification. See § 458.80* .]

[2] Use of Form

This form is for use by an interested person to respond to a petition to determine the persons entitled to distribution of the estate [*Prob. Code § 11702(a)*].

No other pleadings are necessary, and the written statement of each claimant is deemed denied by each of the other claimants to the extent the written statements conflict [*Prob. Code § 11702(a)*].

[3] State Statutes

Filing statement of interest by claimants in proceeding to determine heirship. *Prob. Code § 11702*

Proceedings for determination or confirmation of property passing or belonging to surviving spouse when proceedings for administration of deceased spouse's estate are or are not pending. *Prob. Code §§ 13650-13660* (relating to passage of property to surviving spouse without administration)

[4] Decisions

Effect of remarriage on will. *Estate of Stewart (1968) 69 Cal. 2d 296, 297-300, 70 Cal. Rptr. 545* ; *Estate of Dawkins (1968) 267 Cal. App. 2d 119, 120, 72 Cal. Rptr. 612*

[5] Cross References

For a related form, *see § 458.80*.

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39-458 California Forms of Pleading and Practice--Annotated § 458.85

§ 458.85 Statement of Interest in Estate by Person Other Than Petitioner for Determination of Persons Entitled to Distribution [Prob. Code § 11702]--By Heir of Deceased Dying Intestate Without Surviving Spouse or Registered Domestic Partner or Issue

[1] FORM Statement of Interest in Estate by Person Other Than Petitioner for Determination of Persons Entitled to Distribution [Prob. Code § 11702]--By Heir of Deceased Dying Intestate Without Surviving Spouse or Registered Domestic Partner or Issue

[*Caption. See § 458.80* .]

Claimant _____ [*name*], in opposition to the petition for determination of persons entitled to distribution filed by _____ [*name*], hereby submits this statement of interest as follows:

1. The deceased died intestate, without surviving _____ [spouse *or* registered domestic partner], his/her _____ [wife *or* husband *or* registered domestic partner] having predeceased him/her, and without leaving issue of himself/herself and his/her predeceased _____ [wife *or* husband *or* registered domestic partner].

2. Claimant is _____ [*specify relationship to the deceased*] and under the provisions of *Probate Code Section 6402*] is an heir and entitled to distribution of _____ [all *or* a part] of the deceased's estate.

3. The property of the deceased is described as follows: _____ [*describe, including inventory item numbers*].

WHEREFORE, claimant prays for an order that claimant is _____ [a *or* the] deceased's [sole] heir and entitled to distribution of _____ [all *or* a part] of the decedent's estate[, specifying the share to which claimant is entitled], and for all other proper orders.
Dated: _____.

_____ [*signature*]

Claimant

_____ [*signature*]

Attorney for Claimant

[*Verification. See § 458.80* .]

[2] Use of Form

This form is a statement for use by a claimant responding to a petition for an order determining the persons entitled to distribution of a share of the deceased's estate to determine his or her entitlement to distribution.

[3] Cross References

For a related form, *see § 458.84*.

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39-458 California Forms of Pleading and Practice--Annotated § 458.86

§ 458.86 Order Determining Persons Entitled to Distribution of Decedent's Estate [Prob. Code § 11705]

[1] FORM Order Determining Persons Entitled to Distribution of Decedent's Estate [Prob. Code § 11705]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER DETERMINING PERSONS ENTITLED
Deceased.	)	TO DISTRIBUTION

_____

The petition of _____ [*name*], as _____ [*specify, e.g.,* personal representative of the estate of _____ (*name*), deceased], for determination of persons entitled to distribution of the deceased's estate, and the statement(s) of interest of claimant(s) _____ [*name(s)*], came on regularly for hearing in [Department _____ of the] above-entitled court on _____ [*date*], the Honorable _____, presiding. Petitioner appeared by counsel _____ [*name*]; claimant(s) appeared by counsel _____ [*name(s)*].

On proof made to the satisfaction of the court, the court finds that [notice of the hearing was waived _____ (by all persons entitled to notice *or* by _____ (*name(s)*),] [notice of the time and place of the hearing was regularly given as required by *Probate Code Sections 1220* and *11701* to all (other) persons entitled to it], [and that pursuant to his/her/their request special notice of the hearing was given to _____ (*name(s)*), as required by *Probate Code Section 1252(a)*].

IT IS ORDERED as follows:

1. The deceased, _____ [*name*], died on _____ [*date*], leaving estate consisting of _____ [*specify, e.g.,* separate property of the deceased and community property of the deceased and

claimant _____ (*name*), his/her _____ (spouse *or* registered domestic partner)].

2. The separate property of the deceased is described as follows: _____ [*description*].

3. The community property of deceased and claimant is described as follows: _____ [*description*].

4. [The deceased left surviving as his/her only heirs the persons whose names and relationship to the deceased are as follows: _____ (*specify names and relationships*).]

[*EITHER*]

5. The deceased left a will that has been duly admitted to probate herein.

[*OR*]

5. The deceased died intestate.

[*EITHER*]

6. By the terms of his/her will, the deceased devised the whole of his/her estate to the following named devisees who are entitled on distribution to the following respective shares of the estate: _____ [*specify*].

[*OR*]

6. On his/her death intestate, the estate of the deceased descended to his/her heirs, and is now vested in them, subject to administration, as follows: _____ [*specify*].

[*CONTINUE*]

7. [By the terms of his/her will, the deceased undertook to devise all of the community property to beneficiaries other than his/her spouse, claimant _____ (*name*), and he/she is entitled on distribution to one half thereof: _____ (*description*).]

8. [The expenses of administration and debts of the deceased shall be prorated as follows: _____ (*specify*).]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form of order is for use in preparing an order for the court after a hearing to determine the persons entitled to distribution of an estate under *Prob. Code §§ 11700-11704*. The order must determine the persons entitled to

distribution and must specify their shares [*Prob. Code § 11705*; for further discussion, *see § 458.19*].

[3] State Statutes

Award of costs. *Prob. Code § 1002*

Court must hear and determine any matter at issue, and any response presented, consider evidence presented, and make appropriate order. *Prob. Code § 1046*

Except as otherwise provided in Probate Code, order need not recite existence of facts, or performance of acts, on which jurisdiction depends, but need only contain matters ordered. *Prob. Code § 1047*

Order, other than order for distribution, must either be entered at length in minute book or signed by judge and filed. *Prob. Code § 1048(a)*

Finding required re giving of notice. *Prob. Code § 1260(b)*

Order determining persons entitled to distribution of deceased's estate. *Prob. Code § 11705(a)*

Order, on becoming final, is binding and conclusive as to rights of all interested persons. *Prob. Code § 11705(b)*

[4] Decisions

Heirship proceeding under former Prob. Code §§ 1080-1082 (repealed and replaced by *Prob. Code §§ 11700-11705* by Stats. 1988, ch. 1199) is a specialized proceeding in rem, res being right of heirship and distribution and, as to that issue, decree is binding on whole world, is conclusive against all persons, and is basis for decree of distribution which is to follow. *Estate of Radovich (1957) 48 Cal. 2d 116, 120, 308 P.2d 14*

Established rule is that when appropriate petition to establish heirship under former Prob. Code § 1080 (repealed and replaced by *Prob. Code § 11700* by Stats. 1988, ch. 1199) was filed and prescribed statutory notice of hearing was given, probate court had jurisdiction to proceed with whole matter of heirship in decedent's estate. *Estate of Wise (1949) 34 Cal.2d 376, 382, 210 P.2d 497*

[5] Cross References

For form of notice of appeal from judgment determining heirship, *see* Ch. 42, *Appeal: Notice of Appeal*

For a related form, *see § 458.80*.

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§ 458A.syn Synopsis to Chapter 458A: PROBATE: SIMULTANEOUS DEATH

§ 458A.01 Scope of Chapter

§§ 458A.02-458A.09 [Reserved]

§ 458A.10 Governing Statutes

§ 458A.11 Property Rights Dependent on Sequential Death

§ 458A.12 Applicability of Prob. Code §§ 220-226

§ 458A.13 Community Property

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[1] Procedure

[a] In General

[b] Jurisdiction

[c] Notice of Hearing

[d] Objections to Petition

[e] Order

[f] Petition

[g] Petitioner

[h] Proper Proceeding for Filing of Petition

[2] Proceeding to Determine Heirship

[3] Substantive Rules

[a] Application

[b] Designated Conditional Beneficiaries

[c] Designated Successive Beneficiaries

[d] General Rule

[e] Insured and Beneficiary

[f] Joint Tenants

[g] Spouses

§ 458A.41 Decisions

[1] Application of Substantive Rules

[a] In General

[b] Insurance

[c] Joint Tenants

[d] Spouses

[2] Constitutionality

[3] Definitions

[4] Effect of Uniform Simultaneous Death Act on Other Statutes of Succession

[5] Evidence

[6] Nature of Proceeding

[7] Objections to Petition

[8] Order

[9] Purpose of Uniform Simultaneous Death Act

§ 458A.42 Text References

§§ 458A.43-458A.59 [Reserved]

§ 458A.60 Petition to Establish Lack of Evidence of Sequential Deaths [Prob. Code § 230; former Prob. Code § 296]

[1] FORM

[2] Use of Form

[3] Jurisdiction

[4] Parties

[5] Allegations

[a] Standing to Sue

[b] Deaths

[c] Pending Administration of Other Person's Estate

[d] Relationship Between Decedent and Other Person

[e] Special Notice

[f] Heirs and Devisees of Other Deceased Person

[6] Prayer

[7] Verification

[8] State Statutes

[a] Application of Substantive Rules

[b] Procedure

[i] Jurisdiction

[ii] Allegations

[iii] Notice of Hearing

[iv] Petition

[v] Petitioner

[9] Local Rules of Court

[10] Decisions

§ 458A.61 Petition to Determine Whether or Not One Person Survived Another [Prob. Code §§ 220, 230]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Prayer

[5] State Statutes

[6] Cross References

§ 458A.62 Objections to Petition to Establish Lack of Evidence of Sequential Deaths [Prob. Code § 234]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Prayer

[5] Verification

[6] State Statutes

[7] Cross References

§ 458A.63 Allegation--One Person's Survival of Another Established by Clear and Convincing Evidence [Prob. Code § 234]

[1] FORM

[2] Use of Form

[3] Contents of Allegation

[4] Cross References

§ 458A.64 Order Determining Lack of Evidence of Sequential Deaths [Prob. Code § 234; former Prob. Code § 296]

[1] FORM

[2] Use of Form

[3] Binding Effect of Order

[4] Appeal From Order

[5] State Statutes

§ 458A.65 Order Determining That It Has Not Been Established by Clear and Convincing Evidence That One Person Survived Another [Prob. Code § 234]

[1] FORM

[2] Use of Form

[3] Cross References

§ 458A.66 Order Determining Sequence of Deaths [Prob. Code § 234]

[1] FORM

[2] Use of Form

[3] Local Rules of Court

[4] Cross References

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39-458A California Forms of Pleading and Practice--Annotated § 458A.01

§ 458A.01 Scope of Chapter

This chapter explains the procedure for, and provides forms for use in, obtaining a judicial determination either that there is no sufficient evidence that two or more persons died otherwise than simultaneously or that those persons died in a certain sequence. Included are forms for petition [§§ 458A.60, 458A.61]; objections to the petition [*see § 458A.62*]; and orders [§§ 458A.64, 458A.66]. The procedure is set out in the Uniform Simultaneous Death Act [former Prob. Code §§ 296-296.8 (applicable only if none of the persons whose death is at issue died on or after January 1, 1985); *see Prob. Code § 226*], and its successor provisions in *Prob. Code §§ 220-234* (applicable when any of the persons whose death is at issue died on or after January 1, 1985).

Rules set out for determining the title to property or the devolution thereof, when the sequence of two or more deaths is determinative and there is no sufficient evidence that they occurred otherwise than simultaneously, are included.

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39-458A California Forms of Pleading and Practice--Annotated §§ 458A.02-458A.09

[Reserved]

§§ 458A.02[Reserved]

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§ 458A.10 Governing Statutes

The determination that two or more deaths were sequential or that there is no sufficient evidence that they were not simultaneous, and the substantive rights that depend on such a determination, are governed by former Prob. Code §§ 296-296.8 if none of the persons whose death is at issue died on or after January 1, 1985, and by *Prob. Code §§ 220-234* when any of the persons whose death is at issue died on or after that date [*see Prob. Code § 226* (effective date; applicability of former law)]. Many of the provisions of the former law have been retained in the new statutes, but others have been changed; this part covers both the former law and the new provisions.

In addition, a wide variety of local court rules govern probate practice. To insure complete compliance, the attorney should consult the applicable rules. In the notes to the forms, references are made to some of the rules of the major counties, particularly Los Angeles and San Francisco.

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39-458A California Forms of Pleading and Practice--Annotated § 458A.11

§ 458A.11 Property Rights Dependent on Sequential Death

When two or more persons have died before January 1, 1985, and under circumstances in which there is no sufficient evidence that they died otherwise than simultaneously, and the title to or devolution of property depends on the sequence of their deaths, the property of each person is required to be disposed of as though he had survived the other or others [former Prob. Code § 296]. When at least one of the decedents died on or after January 1, 1985, the focus of the determination appears to shift somewhat. Under the new legislation, the property of each person is administered, distributed, or otherwise dealt with as if that person had survived the other if it cannot be established by clear and convincing evidence that one of the persons survived the other [*Prob. Code § 220*]. It is not apparent whether the "clear and convincing evidence" requirement is meant to be more stringent than the former "sufficient evidence" standard, or merely definitional of that standard. At least some support for the view that the new standard is more stringent may be inferred from the case of Estate of Schmidt, in which it was held that survivorship may be proved by a preponderance of the evidence, and only if survivorship is not so proved is the statute applicable [*Estate of Schmidt (1968) 261 Cal. App. 2d 262, 270-271, 67 Cal. Rptr. 847* (applying former Prob. Code §§ 296-296.8)]. The clear and convincing evidence standard would not be satisfied by a bare showing by a preponderance of the evidence [*see In re Angelia P. (1981) 28 Cal. 3d 908, 919, 171 Cal. Rptr. 637, 623 P.2d 198* (defining showing required to satisfy clear and convincing evidence standard)].

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§ 458A.12 Applicability of Prob. Code §§ 220-226

Prob. Code §§ 220-226, which apply generally when one or more of the persons whose death is at issue died on or after January 1, 1985, do not apply in any case when *Prob. Code §§ 103* (community or quasi-community property), *Prob. Code § 6211* (construing reference in California statutory will to person "if living" or who "survives me" as meaning person who survives decedent by 120 hours), or 21109 (heir as required to survive decedent) apply [*Prob. Code § 221(a)*; *see also Prob. Code § 226* (effective date of chapter)]. The provisions of *Prob. Code §§ 220-226* also do not apply in the case of a trust, deed, or contract of insurance, or any other situation, when (1) provision is made dealing explicitly with simultaneous deaths or deaths in a common disaster or otherwise providing for distribution of property different from the provisions of *Prob. Code §§ 220-226 (2)* provision is made requiring one person to survive another for a stated period in order to take property or providing for a presumption as to survivorship that results in a distribution of property different from that provided by *Prob. Code §§ 220-226* [*Prob. Code § 221(b)*].

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§ 458A.13 Community Property

When spouses died before January 1, 1985, under circumstances in which there is no sufficient evidence that they died otherwise than simultaneously, and they died leaving community property other than a life insurance policy on one of them of which the other was the named beneficiary, the community property is required to be dealt with as though one half of it were the husband's separate property and the wife died first, and as though the other one half were the wife's separate property and the husband died first [former Prob. Code § 296.4].

If spouses died on or after January 1, 1985, leaving community or quasi-community property, and it cannot be determined by clear and convincing evidence that one spouse survived the other, one-half of the community property and one-half of the quasi-community property is administered or distributed, or otherwise dealt with, as if one spouse had survived and as if that half belonged to that spouse [*Prob. Code § 103(a)*]. The other half of the community property and the other half of the quasi-community is administered or distributed, or otherwise dealt with, as if the other spouse had survived and as if that half belonged to that spouse [*Prob. Code § 103(b)*]. When *Prob. Code § 103* applies in a given situation, *Prob. Code §§ 220-234* do not apply [*Prob. Code § 221(a)*]. However, the provisions of *Prob. Code § 224* do supercede those of *Prob. Code § 103* [*see Prob. Code § 103*; *see also Prob. Code § 224*, discussed in *§ 458A.14*].

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§ 458A.14 Life or Accident Insurance

When the insured and the beneficiary under a policy of life or accident insurance have died before January 1, 1985 under circumstances in which there is no sufficient evidence that they died otherwise than simultaneously, the proceeds of the insurance are required to be distributed as though the insured had survived the beneficiary [former Prob. Code § 296.3]. If the insured and the beneficiary were spouses and the policy was community property, this rule supersedes the rule of former Prob. Code § 296.4 regarding community property in general [former Prob. Code § 296.4].

When the insured and the beneficiary died on or after January 1, 1985, and it cannot be established by clear and convincing evidence that the beneficiary survived the insured, the proceeds of the policy are administered, distributed, or otherwise dealt with, as if the insured survived the beneficiary [*Prob. Code § 224*]. However, if the policy is community property or quasi-community property of the insured and the insured's spouse and there is no alternative beneficiary except the estate or the personal representatives of the insured, the proceeds are distributed as community property under *Prob. Code § 103* [*Prob. Code § 224*; *see also § 458A.13*].

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§ 458A.15 Joint Tenancy

When joint tenants have died before January 1, 1985 under circumstances in which there is no sufficient evidence that they died otherwise than simultaneously, the property owned by them in joint tenancy is required to be dealt with in as many equal portions as there were simultaneously dying joint tenants. Each portion is to be dealt with as though, as to that portion, one of the joint tenants survived the other or others [*see* former Prob. Code § 296.2]. If the joint tenants died on or after January 1, 1985, the rule is much the same as under the former law [*see Prob. Code § 223(b), (c)*]. The post-1984 law does change the showing required to invoke the presumption from no sufficient evidence to a lack of clear and convincing evidence; the extent to which this represents a substantive change in the law is open to question [*see § 458A.11*]. The post-1984 law also defines joint tenants to include owners of property held under circumstances that entitle one or more to the whole of the property on the death of the other or others [*Prob. Code § 223(a)*].

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§ 458A.16 Rights as Successive Beneficiaries

When two or more persons died before January 1, 1985 under circumstances in which there is no sufficient evidence that they died otherwise than simultaneously, and they are designated to take property successively by reason of survivorship under another person's disposition of property, the property is required to be divided into as many equal portions as there were such successive beneficiaries, and those portions are required to be distributed "... respectively to those who would have taken in the event that each designated beneficiary had survived" [former Prob. Code § 296.1]. If the persons died on or after January 1, 1985, and it cannot be established by clear and convincing evidence that any beneficiary survived any other beneficiary, the property is divided into as many equal portions as there are beneficiaries and the portion of each beneficiary is administered or distributed, or otherwise dealt with, as if that beneficiary had survived the other beneficiaries [*Prob. Code § 222(b)*]. These post-1984 provisions do not seem to change the result reached under the former law, except in the threshold issue of the inability to establish by clear and convincing evidence that any beneficiary survived any other [*see § 458A.11*].

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§ 458A.17 Rights as Conditional Beneficiary

If the person whose death is at issue died on or after January 1, 1985, if property is so disposed of that the right of a beneficiary to succeed to any interest in the property is conditional on surviving another person and it cannot be established by clear and convincing evidence that the beneficiary survived the other person, the beneficiary is deemed not to have survived the other person [*Prob. Code § 222(a)*; *see Prob. Code § 226* (effective date)].

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§ 458A.18 Provision Precluding Escheat

When the person whose death is at issue died before January 1, 1985, if a portion of the estate that was community property of the spouses, or was separate property of a predeceased spouse that came to the decedent by gift, descent, devise, or bequest of the predeceased spouse, or vested in the decedent on the death of the predeceased spouse by right of survivorship, would otherwise escheat to the state under former Prob. Code §§ 201, 229(e), 231, and 296.4 because there is no relative, including next of kin, of one of the spouses to succeed to it, then it is required to be distributed in equal shares to the children of the other spouse and to their descendants by right of representation, or if the other spouse leaves no children, nor descendants of a deceased child, in equal shares to the parents of the other spouse, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of the other spouse and to their descendants by right of representation, or if the other spouse leaves neither parent, brother, sister, nor descendant of a deceased brother or sister, the portion of the estate goes to the next of kin of the other spouse in equal degree, except that when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote [former Prob. Code § 296.4; *see also Prob. Code § 226* (effective date)].

If the person whose death is at issue died on or after January 1, 1985, the estate is distributed according to the new intestate succession rules, which include the distribution mandated by former Prob. Code § 296.4 [*see Prob. Code § 6402*].

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§ 458A.19 Proceedings in Which Determination May Be Made

The substantive provisions of the former Uniform Simultaneous Death Act [former Prob. Code §§ 296-296.4; *now see Prob. Code §§ 220-226*], used to determine title to property in cases which the sequence of deaths is determinative, have been used not only in a proceeding for the administration of a decedent's estate but also in:

- An action to quiet title to real or personal property [*see Thomas v. Anderson (1950) 96 Cal. App. 2d 371, 372-376, 215 P.2d 478]* .

- An action to recover proceeds of insurance [*see* Azvedo v. Benevolent Soc'y of Cal. (1954) 125 Cal. App. 2d Supp. 894, 900, *125 Cal. App. 2d Supp. 894, 270 P.2d 948]* .

- A proceeding to determine heirship under Prob. Code §§ 1080-1082 [*see Estate of Sugino (1968) 267 Cal. App. 2d 591, 592, 73 Cal. Rptr. 150* ; *Estate of Hudson (1958) 158 Cal. App. 2d 385, 387-391, 322 P.2d 987* ; *Estate of Wedemeyer (1952) 109 Cal. App. 2d 67, 71, 240 P.2d 8]* .

The procedural provisions effective January 1, 1985, specify that a petition under *Prob. Code §§ 230-234* may be filed for any one or more of the following purposes [*Prob. Code § 230*]:

- To determine for the purposes of *Prob. Code §§ 103, 220, 222, 223, 224, 6211, 6242, 6243, 6403, 21109, 21110*, or any other provision of the Probate Code whether or not one person survived another.

- To determine for the purposes of *Prob. Code § 673* whether or not issue of an appointee survived the donee.

- To determine for the purposes of *Educ. Code § 24611* whether or not a person has survived in order to receive benefits payable under the State Teachers' Retirement System.

- To determine for the purposes of *Gov. Code § 21509* whether or not a person has survived in order to receive money payable under the Public Employees' Retirement System.

- To determine for the purposes of a case governed by former Prob. Code §§ 296-296.8 whether or not persons have died other than simultaneously.

Given the foregoing provisions, it is unclear whether or not the cases cited above will be found persuasive in actions governed by *Prob. Code §§ 220-234*, especially in quiet title actions or actions to recover insurance proceeds, as those actions are not mentioned in *Prob. Code § 230*. Counsel should also note the provisions of former Prob. Code § 296.41 and *Prob. Code § 232(a)*, which by their terms require that a petition be filed only in a pending estate proceeding, and seem to preclude the use of a petition as an independent action or in a nonestate proceeding [*see* former Prob. Code § 296.41 and *Prob. Code § 232(a)*].

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§ 458A.20 Who May File Petition

A petition may be filed under *Prob. Code §§ 230-234* by any of the following [*Prob. Code § 231*]:

- The personal representative of any person the priority of whose death is in issue under the applicable provision referred to in *Prob. Code § 230*.

- Any other person interested in the estate of any such person.

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§ 458A.21 Where Petition Must Be Filed

The petition must be filed in the estate proceeding in which the person filing the petition received his or her appointment or in the estate proceeding for the estate in which the person filing the petition claims an interest [*Prob. Code § 232(a)*]. The court that first acquires jurisdiction under this section has exclusive jurisdiction for the purposes of *Prob. Code §§ 230-234* [*Prob. Code § 232(b)*].

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§ 458A.22 Proceeding as Distinct From Proceeding to Determine Heirship

Despite some cases that have suggested otherwise [*see, e.g., Estate of Schmidt (1968) 261 Cal. App. 2d 262, 264, 67 Cal. Rptr. 847* (speaking of "this proceeding to determine heirship, pursuant to the Uniform Simultaneous Death Act")], a petition filed pursuant to former Prob. Code § 296.41 or to *Prob. Code § 230* does not authorize the court to determine heirship, or, in other words, to determine the title to property or the devolution thereof. The court is limited to a determination that the named persons are dead and that it has not been established by clear and convincing evidence that one person survived the other; or, on the other hand, that there is clear and convincing evidence that one person survived the other [*Prob. Code § 234*]. Additionally, although not specifically authorized by *Prob. Code § 234*, in a case governed by former Prob. Code §§ 296-296.8 the court may presumably determine whether or not the previous standard of sufficient evidence that the persons died other than simultaneously was met [*see Prob. Code § 230(e)* (availability of petition to determine whether deaths were other than simultaneous under former law); *see also* former Prob. Code § 296.42].

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§ 458A.23 Notice of Hearing

When the petition is filed, the clerk is required to set it for hearing [*Prob. Code § 1041*]. Notice of the hearing on the petition must be given as provided in *Prob. Code § 1220* to all of the following:

- The personal representative of each person the priority of whose death is in issue, if there is a personal representative for the person [*Prob. Code § 233(a)*];

- Each known devisee of each person the priority of whose death is in issue [*Prob. Code § 233(b)*];

- Each known heir of each person the priority of whose death is in issue [*Prob. Code § 233(c)*];

- All persons (or their attorneys if they have appeared by attorneys) who have requested special notice as provided in *Prob. Code § 1250* in the proceeding in which the petition is filed or who have given notice of appearance in person or by attorney in that proceeding [*Prob. Code § 233(d)*].

Prob. Code § 1220 calls for the notice to be mailed 15 days before the time set for hearing on the petition [*Prob. Code § 1220(a)*]. In the case of persons requesting special notice, the notice is sent to the address set out in the request [*Prob. Code § 1252(a)*]. In the case of other persons entitled to notice, the notice must be mailed to the person's business or residence address, if known; however, if a person's business or residence address is not known, the court may order that the notice be given in a manner reasonably calculated to give actual notice to that person [*Prob. Code §§ 1212, 1215(d), 1220(a)(3), 1252*; *see Code Civ. Proc. § 413.30*]. If any person entitled to notice is represented by an attorney of record, the notice must also be given to that attorney [*Prob. Code § 1214*]. In lieu of mailing, the notice may be personally delivered [*see Prob. Code § 1216*].

The petitioner need not give notice to himself or herself, or to any other person joining in the petition [*Prob. Code § 1201*].

For a detailed discussion and forms for giving notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

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39-458A California Forms of Pleading and Practice--Annotated § 458A.24

§ 458A.24 Objections to Petition

Any interested person may appear and object to the petition at or before the hearing [*Prob. Code § 1043*]. An objection may be oral or in writing [*Prob. Code § 1043(a), (b)*]. If it is in writing, it must be signed by all of the objectors and filed with the clerk of the court [*Prob. Code § 1020*]. A written objection must also be verified by at least one of the objectors [*Prob. Code § 1021*]. However, if an objector is absent from the county, or for some other cause is unable to sign or verify the objection, the objector's attorney may sign or verify the objection, unless the objector is a fiduciary appointed in the proceeding [*Prob. Code § 1023*].

The court may continue a matter to allow a written objection or response to be made. If the court does so, however, and the responding or objecting party fails to serve and file a timely objection or response, the court may deem the objections or responses waived [*Cal. Rules of Ct., Rule 7.801*].

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§ 458A.25 Hearing

At or before the hearing, proof of giving notice of the hearing must be made to the satisfaction of the court [*Prob. Code § 1260(a)*; *see also Prob. Code §§ 1261* (proof of mailing), 1264 (proof of notice by personal delivery); for further discussion, *see* Ch. 447, *Probate: Statutory Notice Requirements*].

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§ 458A.26 Burden of Proof

In the absence of objections, it would appear that the only burden cast on the petitioner is to sustain his or her own view of the circumstances, if he or she has one. When an objection to a finding of simultaneous deaths is made, the burden that must be sustained by the objector depends on when the deaths took place. If any of the persons died on or after January 1, 1985, the objector must establish by clear and convincing evidence that one of the persons survived the other [*see Prob. Code §§ 220, 234*]. If none of the persons the priority of whose death is at issue died on or after that date [*see Prob. Code § 226*], the objector need only prove the contention that one person survived the other person or persons by a preponderance of the evidence [*see Estate of Rowley (1967) 257 Cal. App. 2d 324, 333, 65 Cal. Rptr. 139]* . For a discussion of the effect of the change in the standard of proof, see *§ 458A.11*.

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§ 458A.27 Findings

The court must make all of the following determinations at the hearing [*see Prob. Code § 234*]:

- Whether the persons whose relative times of death are in question have actually died.
- Whether or not it has been established by clear and convincing evidence that one person survived another.
- If it has, in what sequence they died.

If the court determines that the named persons are dead and that it has not been established by clear and convincing evidence that one person survived another, it must make an order to that effect. If the court determines that the named persons are dead and that there is clear and convincing evidence that one person survived another, it must make an order setting forth the order in which the persons died [*Prob. Code § 234*].

The court's order, when it becomes final, is a binding determination of the facts set forth in the order and is conclusive as against the personal representative of the deceased persons named in the order and against all persons claiming by, through, or under any of the deceased persons [*Prob. Code § 234*].

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§ 458A.40 State Statutes

[1] Procedure

[a] In General

Procedure for determination whether deaths were sequential or whether evidence insufficient that deaths not simultaneous. *Prob. Code §§ 230-234*

[b] Jurisdiction

Petition to establish that it cannot be established by clear and convincing evidence that one person survived another under *Prob. Code § 220* (if one of the persons died on or after January 1, 1985), or lack of sufficient evidence that deaths were not simultaneous under former Prob. Code § 296 (if none of the persons died on or after January 1, 1985), is required to be filed in estate proceeding involving estate of one of deceased persons. *Prob. Code § 232(a)*

Probate court first acquiring jurisdiction under *Prob. Code § 232* has exclusive jurisdiction to determine issues. *Prob. Code § 232(b)*

[c] Notice of Hearing

Persons entitled to notice of hearing on petition to determine survival. *Prob. Code § 233*

Proof of notice is required at or before hearing. *Prob. Code § 1260(a)*

[d] Objections to Petition

Objections to petitions. *Prob. Code §§ 1020, 1021, 1023, 1043*

[e] Order

Determinations to be made by court order. *Prob. Code § 234*

Order, when final, is binding determination of facts stated therein and conclusive against personal representatives of persons named and against all persons claiming by, through, or under such persons. *Prob. Code § 234*

[f] Petition

Proceedings are begun by filing petition for appropriate determination. *Prob. Code § 230*

[g] Petitioner

Petitioner may be either personal representative of estate of one of deceased persons or any person interested in estate. *Prob. Code § 231*

[h] Proper Proceeding for Filing of Petition

Petition is properly filed in estate proceeding in which petitioner received appointment or in estate proceeding for estate in which petitioner claims interest. *Prob. Code § 232(a)*

[2] Proceeding to Determine Heirship

Proceeding to determine heirship. *Prob. Code § 11700 et seq.*

[3] Substantive Rules

[a] Application

Substantive rules for determining title to property or devolution thereof when sequence of two or more deaths is determinative, order of death cannot be established by clear and convincing evidence, and contrary rules not provided by will or other governing instrument. *Prob. Code §§ 220-226*

Substantive rules of *Prob. Code § 220 et seq.* is not applicable in any case when *Prob. Code §§ 103*, *6211*, or *6403* apply. *Prob. Code § 221(a)* (if one of the persons died on or after January 1, 1985)

Substantive rules of *Prob. Code § 220 et seq.* is not applicable in case of trust, deed, contract of insurance, or any other situation when different distribution provided for. *Prob. Code § 221(b)* (if one of the persons died on or after January 1, 1985)

Applicability of substantive rules of former Prob. Code § 296 et seq. or *Prob. Code § 220 et seq.* depending on date of death of persons whose death is in issue. *Prob. Code § 226*

Substantive rules for determining title to property or devolution thereof when sequence of two or more deaths determinative, evidence of sequence is insufficient, and contrary rules are not provided by will or other governing instrument. Former Prob. Code §§ 296-296.4 (if none of the persons the priority of whose death is in issue died on or

after January 1, 1985)

Substantive rules in Uniform Simultaneous Death Act [former Prob. Code §§ 296-296.8] is inapplicable when different rules provided in will, inter vivos trust instrument, deed, or insurance contract. Former Prob. Code § 296.6 (if none of the persons the priority of whose death is in issue died on or after January 1, 1985)

[b] Designated Conditional Beneficiaries

Beneficiary whose right to succeed to interest in property conditional on surviving another person is deemed not to have survived other person when it cannot be established by clear and convincing evidence that beneficiary survived other person. *Prob. Code § 221(b)* (if one of the persons died on or after January 1, 1985)

[c] Designated Successive Beneficiaries

Property designated to be taken successively by reason of survivorship under another person's disposition, by simultaneously dead beneficiaries, is required to be disposed of in equal portions, one for each beneficiary, to those who would have taken if each beneficiary had survived. Former Prob. Code § 296.1 (if none of the persons the priority of whose death is in issue died on or after January 1, 1985); *Prob. Code § 222(b)* (if any of the persons the priority of whose death is in issue died on or after January 1, 1985)

[d] General Rule

Property of each person administered, distributed, or otherwise dealt with as though that person survived other or others, if it cannot be established by clear and convincing evidence that one person survived other or others. *Prob. Code § 220* (if any of the persons the priority of whose death is in issue died on or after January 1, 1985)

Property of each person is required to be disposed of as though he survived other or others, where two or more persons died, there is no sufficient evidence they did not die simultaneously, and title to property or devolution thereof depends on sequence of their deaths. Former Prob. Code § 296 (if none of the persons the priority of whose death is in issue died on or after January 1, 1985)

[e] Insured and Beneficiary

Insured is presumed to have survived simultaneously dead beneficiary of life or accident insurance policy. Former Prob. Code § 296.3 (if none of the persons the priority of whose death is in issue died on or after January 1, 1985); *Prob. Code § 224* (if any of the persons the priority of whose death is in issue died on or after January 1, 1985)

Life or accident insurance policy held as community or quasi-community property of insured and spouse, with no alternative beneficiary except estate or personal representatives of insured; proceeds as distributed as community property under *Prob. Code § 103*. *Prob. Code § 224* (if any of the persons the priority of whose death is in issue died on or after January 1, 1985)

Life or accident insurance policy held as community property is governed by former Prob. Code § 296.3, not former Prob. Code § 296.4. Former Prob. Code § 296.4 (if none of the persons the priority of whose death is in issue died on or after January 1, 1985)

[f] Joint Tenants

Property held by simultaneously dead joint tenants is required to be disposed of in equal portions, one for each tenant, as though each had in turn survived all others. Former Prob. Code § 296.2 (if none of the persons the priority of whose death is in issue died on or after January 1, 1985); *Prob. Code § 223* (if any of the persons the priority of whose death is in issue died on or after January 1, 1985)

[g] Spouses

Descent of community property of spouses who died simultaneously. *Prob. Code §§ 103, 6402* (if decedent died on or after January 1, 1985)

Escheat of property subject to distribution under former Prob. Code §§ 201, 229(e), 231, and 296.4 as precluded. Former Prob. Code § 296.4

Property of simultaneously deceased spouses leaving community property is required to be disposed of one half as husband's separate property, he surviving, and one half as wife's separate property, she surviving. Former Prob. Code § 296.4 (if none of the persons the priority of whose death is in issue died on or after January 1, 1985) (if none of the persons the priority of whose death is in issue died on or after January 1, 1985)

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§ 458A.41 Decisions

[1] Application of Substantive Rules

[a] In General

Wills of simultaneously deceased spouses are effective to dispose of property after application of Uniform Simultaneous Death Act [former Prob. Code §§ 296-296.8] to determine what property each had at death to dispose of. *Estate of Meade (1964) 228 Cal. App. 2d 169, 172-174, 39 Cal. Rptr. 278* (no provisions in wills for simultaneous deaths)

Substantive rules of Uniform Simultaneous Death Act [former Prob. Code §§ 296-296.8] are applicable in proceeding to determine heirship [former Prob. Code §§ 1080-1082 (*now see Prob. Code §§ 11700-11705*)]. *Estate of Sugino (1968) 267 Cal. App. 2d 591, 591-597, 73 Cal. Rptr. 150* ; *Estate of Hudson (1958) 158 Cal. App. 2d 385, 386-390, 322 P.2d 987* ; *Estate of Wedemeyer (1952) 109 Cal. App. 2d 67, 68-72, 240 P.2d 8*

Absence of sufficient evidence that two persons died otherwise than simultaneously is condition precedent to application of Uniform Simultaneous Death Act [former Prob. Code §§ 296-296.8]. Azvedo v. Benevolent Soc'y of Cal. (1954) 125 Cal. App. 2d Supp. 894, 899, *125 Cal. App. 2d Supp. 894, 270 P.2d 948* (applying former Prob. Code § 296.3)

Uniform Simultaneous Death Act [former Prob. Code §§ 296-296.8] is inapplicable if there is any sufficient evidence that one person survived another, even when deaths occurred at substantially the same time, and question of survivorship must be determined in such case. Azvedo v. Benevolent Soc'y of Cal. (1954) 125 Cal. App. 2d Supp. 894, 900, *125 Cal. App. 2d Supp. 894, 270 P.2d 948* (reporting case law)

Action to quiet title to real and personal property [*Code Civ. Proc. § 738*]. *Thomas v. Anderson (1950) 96 Cal. App. 2d 371, 372-377, 215 P.2d 478* (decided under former Prob. Code §§ 296-296.8, but before enactment of former Prob. Code § 296.41, which limited petition to estate proceeding)

[b] Insurance

Proceeds of insurance on husband's life, purchased with community funds and payable to his estate, passed one half through husband's estate and one half through wife's estate under former Prob. Code § 296.4. *Estate of Sugino (1968) 267 Cal. App. 2d 591, 592-597, 73 Cal. Rptr. 150* (affirming ultimate distribution under former Prob. Code § 228; now see *Prob. Code § 6402.5*)

Proceeds of life insurance on wife, husband being beneficiary, belonged in wife's estate under Prob. Code § 296.3. *Estate of Hudson (1958) 158 Cal. App. 2d 385, 387, 322 P.2d 987* (ultimately distributed under former Prob. Code § 228; now see *Prob. Code § 6402.5*)

Proceeds of life insurance on life of one spouse are distributable under former Prob. Code § 296.4 when spouses owned policy as community property, died intestate simultaneously, and policy named insured spouse's estate as beneficiary. *Estate of Wedemeyer (1952) 109 Cal. App. 2d 67, 72, 240 P.2d 8* (applying former Prob. Code § 296.4 as existing before 1951 amendment changing character of property affected by that section from community to separate)

Proceeds of life insurance on life of one spouse, when policy was community property, other spouse was named beneficiary, and spouses died intestate simultaneously, are distributable (as community asset) through estate of insured spouse. *Estate of Wedemeyer (1952) 109 Cal. App. 2d 67, 71, 240 P.2d 8* (applying former Prob. Code §§ 201, 296.3)

[c] Joint Tenants

Personal representatives of simultaneously deceased spouses leaving property in joint tenancy each had right to administer and distribute half of such property. *Estate of Meade (1964) 228 Cal. App. 2d 169, 174-175, 39 Cal. Rptr. 278* (applying former Prob. Code § 296.2)

[d] Spouses

Decedent spouse's share of community property, when spouses die simultaneously each leaving valid will, must be disposed of as though each testator had survived and such share constituted his whole estate, he never having inherited from the other. *Estate of Meade (1964) 228 Cal. App. 2d 169, 175, 39 Cal. Rptr. 278* (applying Prob. Code § 296.4)

Allocation of property to spouses' estates under former Prob. Code § 296.4 did not preclude ultimate disposition under former Prob. Code § 228 (now see *Prob. Code § 6402.5*) in proper case. *Estate of Hudson (1958) 158 Cal. App. 2d 385, 389, 322 P.2d 987*

Property of simultaneously deceased spouses held in joint tenancy form but actually community property is governed by former Prob. Code § 296.4, not former Prob. Code § 296.2. *Estate of Hudson (1958) 158 Cal. App. 2d 385, 388, 322 P.2d 987*

[2] Constitutionality

Uniform Simultaneous Death Act [former Prob. Code §§ 296-296.8] is constitutional. *Estate of Meade (1964) 228 Cal. App. 2d 169, 177, 39 Cal. Rptr. 278*

[3] Definitions

Death, for purposes of applying Uniform Simultaneous Death Act [former Prob. Code §§ 296-296.8], is total stoppage of circulation of blood and cessation of animal and vital functions of body such as respiration and pulsation. *Estate of Schmidt (1968) 261 Cal. App. 2d 262, 273, 67 Cal. Rptr. 847* (approving reliance on definition in Black's Law Dictionary (3d ed))

"Simultaneously," as used in Uniform Simultaneous Death Act [former Prob. Code §§ 296-296.8], means "at precisely the same instant" or "at substantially the same time" even though not at the same instant, not "approximately at the same time." *Thomas v. Anderson (1950) 96 Cal. App. 2d 371, 375, 215 P.2d 478* (construing former Prob. Code § 296.2)

[4] Effect of Uniform Simultaneous Death Act on Other Statutes of Succession

Uniform Simultaneous Death Act provisions [former Prob. Code §§ 296-296.8] are statutes of succession, but succession thereunder is ultimately, in proper case, governable by older statutes of succession. *Estate of Hudson (1958) 158 Cal. App. 2d 385, 389, 322 P.2d 987* (ultimate distribution under former Prob. Code § 228 (*now see Prob. Code § 6402.5*))

Former Prob. Code §§ 296.3 and 296.4 did not supersede former Prob. Code §§ 201 (surviving spouse's right to one half of community property; now see *Prob. Code § 100*) and 228 (descent of community property in absence of spouse or issue of marriage; *now see Prob. Code §§ 6402, 6402.5*); latter two sections designate persons who succeed to property on determination under former two sections which spouse died first. *Estate of Wedemeyer (1952) 109 Cal. App. 2d 67, 70, 71, 240 P.2d 8*

[5] Evidence

Evidence held sufficient to show that deaths occurred in sequence. *Estate of Schmidt (1968) 261 Cal. App. 2d 262, 271-272, 67 Cal. Rptr. 847* ; *Estate of Rowley (1967) 257 Cal. App. 2d 324, 327-328, 334, 65 Cal. Rptr. 139*

Objector contending deaths occurred in certain sequence has burden of proving contention by preponderance of evidence. *Estate of Rowley (1967) 257 Cal. App. 2d 324, 333, 65 Cal. Rptr. 139* (relying on case law from other jurisdictions)

Physicians giving expert testimony is permitted to testify how injuries occurred, in giving medically based testimony partially based on physical evidence gathered from decedent's body. *Estate of Rowley (1967) 257 Cal. App. 2d 324, 338-341, 65 Cal. Rptr. 139*

Testimony of lay witnesses not physicians held sufficient evidence multiple deaths were not simultaneous, despite physician's testimony (as expert, not eyewitness) that circumstances do not necessarily indicate sequence of deaths, where circumstances reasonably show deaths were sequential. *Thomas v. Anderson (1950) 96 Cal. App. 2d 371, 375, 215 P.2d 478*

[6] Nature of Proceeding

Proceeding under former Prob. Code §§ 296.41, 296.42 characterized as proceeding to determine heirship under Uniform Simultaneous Death Act [former Prob. Code §§ 296-296.8]. *Estate of Schmidt (1968) 261 Cal. App. 2d 262, 264, 67 Cal. Rptr. 847*

Object of proceeding under former Prob. Code §§ 296.41, 296.42 is to determine whether substantive rules of Uniform Simultaneous Death Act [former Prob. Code §§ 296-296.8] should be applied. *Estate of Hudson (1958) 158 Cal. App.*

2d 385, 390, 322 P.2d 987

[7] Objections to Petition

Person making objections is appropriately designated objector. *Estate of Sugino (1968) 267 Cal. App. 2d 591, 73 Cal. Rptr. 150*

[8] Order

Order is appealable under former Prob. Code § 1240 (*now see Prob. Code § 7240*), as order directing or instructing executor or administrator, or as order determining heirship or persons to whom distribution should be made. *Estate of Rowley (1967) 257 Cal. App. 2d 324, 327 n. 1, 65 Cal. Rptr. 139*

Court is not authorized in hearing on petition filed pursuant to former Prob. Code § 296.41 to determine that persons in question died simultaneously. Estate of Hudson (1958) Cal. App. 2d 385, 390, *158 Cal. App. 2d 385, 322 P.2d 987*

[9] Purpose of Uniform Simultaneous Death Act

Purpose of Uniform Simultaneous Death Act [former Prob. Code §§ 296-296.8] is to supplant arbitrary, complicated presumptions of survivorship with effective, workable, equitable rules applicable when two or more persons have died and there is no sufficient evidence to indicate they died otherwise than simultaneously. Azvedo v. Benevolent Soc'y of Cal. (1954) 125 Cal. App. 2d Supp. 894, 901, *125 Cal. App. 2d Supp. 894, 270 P.2d 948* (dictum)

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§ 458A.42 Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate, §§ 11, 12, 288-290*, 292 (10th ed. 2005)

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[Reserved]

§§ 458A.43[Reserved]

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PART IV. FORMS

39-458A California Forms of Pleading and Practice--Annotated § 458A.60

§ 458A.60 Petition to Establish Lack of Evidence of Sequential Deaths [Prob. Code § 230; former Prob. Code § 296]

[1] FORM Petition to Establish Lack of Evidence of Sequential Deaths [Prob. Code § 230; former Prob. Code § 296]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	PETITION TO ESTABLISH LACK OF EVIDENCE
Deceased.	)	OF SEQUENTIAL DEATHS

_____

Petitioner, _____ [*name*], respectfully represents:

1. Petitioner is _____ [the duly appointed, qualified, and acting personal representative of the estate of _____ (*name*), deceased *or* interested in the estate of _____ (*name*), deceased, in that _____ (*specify, e.g.*, petitioner is the nephew and the nearest living relative of decedent)].

2. On or about _____ [*date*], decedent and _____ [*name*] died under the following circumstances: _____ [*specify circumstances, e.g.*, they were both killed in an automobile accident that occurred on or about the above mentioned date in _____ County. An officer of the California Highway Patrol was the first person to arrive at the scene after the accident. He found both decedent and _____ (*name of other deceased person*) dead in the wreckage of the automobile]. There appears to be no sufficient evidence that they died otherwise than simultaneously.

3. The estate of _____ [*name of other deceased person*] is pending administration in _____ [*either* this court *or* the Superior Court of _____ County] in a proceeding

entitled Estate of _____ [*name of other deceased person*], Deceased, No. _____. _____ [*Either* Petitioner *or name of person acting as personal representative*] is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name of other deceased person*].

4. Title to property of the decedent and _____ [*name of other deceased person*] and its devolution depends upon the priority of their deaths in that _____ [*specify, e.g.*, they were designated to take property as successive beneficiaries by reason of survivorship under a _____ (*specify instrument disposing of property*) executed by _____ (*name of person, other than decedent or other deceased person, executing instrument*) *or* they were owners of property in joint tenancy].

[*EITHER*]

5. No request for special notice has been filed in this estate or in the estate of _____ [*name of other deceased person*].

[*OR*]

5. A request for special notice has been filed by _____ [*name*] in _____ [*either* this estate *or* the estate of _____ (*name of other deceased person*)] and notice of the time and place of hearing on this petition will be given.

6. The names of the heirs and devisees of _____ [*name of other deceased person*], as far as they are known to petitioner, are as follows: _____ [none *or names of known heirs and devisees*].

WHEREFORE, petitioner prays for an order determining that decedent and _____ [*name of other deceased person*] died on _____ [*date*], and that there is no sufficient evidence that they died otherwise than simultaneously, and for all other proper orders.

_____ [*signature*]

Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*signature*]

Attorney for Petitioner

CAUTION:

The foregoing form is for use only when none of the persons the priority of whose death is at issue died on or after January 1, 1985 [*Prob. Code § 226*]. If one of the persons died on or after that date, the provisions of *Prob. Code §§ 220-226* apply [*Prob. Code § 226*]. Counsel should see *§ 458A.61* in such a case.

[2] Use of Form

This petition may be used by the personal representative of a decedent's estate or another interested person to obtain a determination that his decedent and another person died under circumstances in which there is no sufficient evidence that they died otherwise than simultaneously [*see Prob. Code § 230(e)*; *see also* former Prob. Code § 296]. A determination under *Prob. Code § 230(e)* is proper only if none of the persons the priority of whose death is at issue died on or after January 1, 1985 [*Prob. Code § 226*]. If one of the persons died on or after that date, the provisions of *Prob. Code §§ 220-226* apply [*Prob. Code § 226*; *see § 458A.61*].

[3] Jurisdiction

This petition must be filed in the "estate proceeding" in which the petitioner received his appointment as personal representative or in the estate proceeding in which the petitioner claims an interest [*see Prob. Code § 232(a)*]. If a similar petition is filed in the proceeding in which the estate of the other person is being administered, then the court which first acquired jurisdiction has exclusive jurisdiction to determine either that the deaths in question were sequential or that there is no sufficient evidence that the persons died otherwise than simultaneously [*see Prob. Code § 232(b)*].

[4] Parties

The petition may be filed by the personal representative of any of the decedents whose time of death is in question, or by any other person interested in the estate of such a decedent [*Prob. Code § 231*].

[5] Allegations

[a] Standing to Sue

The petition should allege that the petitioner is the duly appointed, qualified, and acting personal representative of the estate of one of the persons whose time of death is in question or that the petitioner is otherwise interested in the estate of one of the persons, explaining the nature of the interest (Paragraph 1) [*Prob. Code § 231*]. The petition is filed in the proper proceeding as long as it is in the estate proceeding in which the person filing the petition received his or her appointment or in the estate proceeding for the estate in which the person filing the petition claims an interest [*Prob. Code § 232(a)*].

[b] Deaths

The petition must allege that the petitioner's decedent and another person died under circumstances in which there appears to be no sufficient evidence that they died otherwise than simultaneously (Paragraph 2) [*see* former Prob. Code § 296; *Prob. Code § 230(e)*].

[c] Pending Administration of Other Person's Estate

The petition should allege in what proceeding the administration of the estate of the other deceased person is pending

and who is the personal representative (Paragraph 3). This will facilitate determining whether another petition has been filed in the other proceeding, which affects the court's jurisdiction [*see Prob. Code § 232(b)*]; and it will determine whether notice of the hearing on the petition must be personally served on him or whether, instead, notice must be mailed to the heirs and devisees of the other person [*see Prob. Code § 233(b), (c)*].

[d] Relationship Between Decedent and Other Person

The petition must allege facts showing that because of the relationship between the decedent and the other deceased person, the title to property or the devolution thereof depends on the sequence in which they died (Paragraph 4) [*see Prob. Code §§ 220, 230*]. If there was no such relationship between the decedent and the other deceased person, then the sequence of their deaths will be irrelevant, and an order of the court determining that sequence or the absence of sufficient evidence that they died otherwise than simultaneously would serve no purpose.

[e] Special Notice

The petition alleges that notice of the hearing on the petition will be given as required by *Prob. Code § 1252* to all persons (or their attorneys if they have appeared by attorneys) who have requested special notice as provided in *Prob. Code § 1250* in the proceeding in which the petition is filed (Paragraph 5) [*Prob. Code § 233(d)*].

[f] Heirs and Devisees of Other Deceased Person

The petition should allege the names, as far as the petitioner knows them, of the heirs and devisees of the other person (Paragraph 6). This is necessary because notice of the hearing on the petition must be mailed to those known heirs and devisees [*see Prob. Code § 233(b), (c)*], and at or before the hearing due notice must be proved [*see Prob. Code § 1260(a)*].

[6] Prayer

In a proceeding under *Prob. Code § 230(e)* the court is authorized to determine either that the deaths in question occurred in a certain sequence or that there is no sufficient evidence that those deaths occurred otherwise than simultaneously [*see Prob. Code § 234*; former Prob. Code § 296]. The court is not authorized to determine that the deaths occurred simultaneously [*see Estate of Hudson (1958) 158 Cal. App. 2d 385, 390, 322 P.2d 987]* . The prayer should ask for an order determining that the decedents died and that there is no sufficient evidence that they died otherwise than simultaneously [*see* former Prob. Code § 296].

[7] Verification

The petition must be verified by the petitioner [*Prob. Code § 1021*]. Furthermore, if the proceeding is uncontested, the court is required to accept the allegations of a verified petition as evidence, thus avoiding the need for testimony [*Prob. Code § 1022*; *see Code Civ. Proc. §§ 446, 2015.5* (form of verification)].

[8] State Statutes

[a] Application of Substantive Rules

Substantive rules in Uniform Simultaneous Death Act [former Prob. Code §§ 296-296.8] apply when title to property or devolution thereof depends on sequence of deaths and there is no sufficient evidence deaths occurred otherwise than simultaneously; former Prob. Code §§ 296-296.4 is applicable when none of the persons the priority of whose death is in issue died on or after January 1, 1985. *Prob. Code § 226*

[b] Procedure

[i] Jurisdiction

Probate court first acquiring jurisdiction under *Prob. Code § 230* has exclusive jurisdiction to determine issues. *Prob. Code § 230*

[ii] Allegations

Petition under former Prob. Code § 296.41 is required to allege two or more deaths under circumstances in which there is no sufficient evidence they occurred otherwise than simultaneously. Former Prob. Code § 296.41

[iii] Notice of Hearing

Personal representative of each person the priority of whose death is in issue, if any, is entitled to notice of hearing on petition. *Prob. Code § 233(a)*

Known heirs and devisees of other deceased person is entitled to notice by mail if petitioner is personal representative of estate of that other person. *Prob. Code § 233(b), (c)*

All persons (or their attorneys if they have appeared by attorneys) who have requested special notice under *Prob. Code § 1250* in proceeding in which petition is filed or who have given notice of appearance in person or by attorney in proceeding are entitled to notice of hearing on petition. *Prob. Code § 233(d)*

Proof of notice must be made at or before hearing on petition. *Prob. Code § 1260(a)*

[iv] Petition

Petition under *Prob. Code § 230* must be filed in pending estate proceeding in which petitioner received appointment as personal representative or in which petitioner is interested. *Prob. Code § 232(a)*

[v] Petitioner

Petition under *Prob. Code § 230* is properly filed by either personal representative of estate of one of persons whose relative time of death is in question or any person interested in that person's estate. *Prob. Code § 231*

[9] Local Rules of Court

Petitions required to be set for hearing must have self-addressed, stamped envelope attached. Los Angeles Co. Super. Ct. Rules, Rule 10.31(a) (or attach fax cover sheet; *see*Los Angeles Co. Super. Ct. Rules, Rule 10.31(b))

[10] Decisions

Court in proceeding under former Prob. Code §§ 296.41, 296.42 (now see *Prob. Code §§ 230-234*) is not authorized to determine that deaths occurred simultaneously. *Estate of Hudson (1958) 158 Cal. App. 2d 385, 390, 322 P.2d 987*

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39-458A California Forms of Pleading and Practice--Annotated § 458A.61

§ 458A.61 Petition to Determine Whether or Not One Person Survived Another [Prob. Code §§ 220, 230]

[1] FORM Petition to Determine Whether or Not One Person Survived Another [Prob. Code §§ 220, 230]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	PETITION TO DETERMINE WHETHER OR NOT
Deceased.	)	ONE PERSON SURVIVED ANOTHER

_____

Petitioner, _____ [*name*], respectfully represents:

1. [*Status of Petitioner. See § 458A.60, Paragraph 1.*]

2. On or about _____ [*date*], decedent and _____ [*name*] died under the following circumstances: _____ [*specify circumstances, e.g.,* they were both killed in an automobile accident that occurred on or about the above-mentioned date in _____ County. An officer of the California Highway Patrol was the first person to arrive at the scene after the accident, and he/she found both decedent and _____ (*name of other person*) dead in the wreckage of the automobile]. There appears to be no clear and convincing evidence that either one of the persons survived the other.

3. [*Allegation that other person's estate is pending administration. See § 458A.60, Paragraph 3.*]

4. [*Allegation that title to property and its devolution depends on priority of death. See § 458A.60, Paragraph 4.*]

5. [*Special notice allegation. See § 458A.60, Paragraph 5.*]

6. [*Names of known heirs and devisees. See § 458A.60, Paragraph 6.*]

WHEREFORE, petitioner prays for an order determining that decedent and _____ [*name of other deceased person*] died on _____ [*date*], and that there is no clear and convincing evidence that one of the persons survived the other, and for all other proper orders.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 458A.60.*]

CAUTION:

The foregoing form is for use only when at least one of the persons the priority of whose death is at issue died on or after January 1, 1985 [*Prob. Code § 226*]. If none of the persons died on or after that date, the provisions of former Prob. Code §§ 296-296.4 apply [*Prob. Code § 226*]. Counsel should see *§ 458A.60* in such a case.

[2] Use of Form

This petition is for use by the personal representative of a decedent's estate or another person interested in the estate of the decedent to obtain a determination that it cannot be established by clear and convincing evidence that one person survived another [*see Prob. Code § 220, 230(a)*]. The determination under *Prob. Code § 230(a)* is proper when any of the persons the priority of whose death is at issue died on or after January 1, 1985 [*Prob. Code § 226*]. If none of the persons died on or after that date, the provisions of former Prob. Code §§ 296-296.4 apply [*Prob. Code § 226*; *see § 458A.60*].

[3] Allegations

The basic allegations of the petition are the same as those of *see § 458A.60*, except that the substantive determination petitioned for has been changed to reflect the requirement that the court determine that it cannot be established by clear and convincing evidence that one of the persons survived the other before dealing with each person's property as if that person survived the other [*Prob. Code § 220*; *see § 458A.11*].

[4] Prayer

In a proceeding under *Prob. Code § 230* the court is authorized to determine either that the deaths occurred in a certain sequence or that it has not been established by clear and convincing evidence that one person survived another [*Prob. Code § 234*]. The court is not authorized to determine that the deaths occurred simultaneously [*see Estate of Hudson (1958) 158 Cal. App. 2d 385, 390, 322 P.2d 987* (interpreting former Prob. Code § 296.42)]. The prayer should ask for an order determining that the decedents died and that it cannot be established by clear and convincing evidence that one of the persons survived the other [*see Prob. Code § 220*].

[5] State Statutes

Substantive rules of *Prob. Code §§ 220-226* apply when person the priority of whose death at issue died on or after January 1, 1985. *Prob. Code § 226*

[6] Cross References

For a related form, *see § 458A.60*.

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39-458A California Forms of Pleading and Practice--Annotated § 458A.62

§ 458A.62 Objections to Petition to Establish Lack of Evidence of Sequential Deaths [Prob. Code § 234]

[1] FORM Objections to Petition to Establish Lack of Evidence of Sequential Deaths [Prob. Code § 234]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*Name*],	)	OBJECTIONS TO PETITION TO ESTABLISH
Deceased.	)	LACK OF EVIDENCE OF SEQUENTIAL DEATHS

_____

_____ [*Name of objector*], objecting to the petition of _____ [*name of petitioner*] filed herein to establish the lack of sufficient evidence that _____ [*name of decedent*] and [*name of other deceased person*] died otherwise than simultaneously, respectfully represents:

1. Objector is _____ [*allege objector's standing to file objections, e.g.,* the duly appointed, qualified, and acting personal representative of the estate of _____ (*name of other deceased person*), deceased].

2. [*Allege procedural objections, if any, e.g.,* On _____ (*date prior to filing of petition objected to*), objector filed, in a proceeding in _____ (this court *or* the Superior Court of _____ County) entitled Estate of _____ (*name of other deceased person*), Deceased, No. _____, a petition to establish the lack of sufficient evidence that _____ (*name of decedent*) and _____ (*name of other deceased person*) died otherwise than simultaneously.]

3. [*Allege the existence of sufficient evidence, if any, that deaths were sequential, e.g.,* On or about _____ (*date*), _____ (*name of decedent*) and _____ (*name of other deceased person*) both died, each from a gunshot wound in the head. The gun that fired the fatal shots was discovered lying near the right hand of _____ (*name*). It was closer to his right hand than to the left hand of

_____ (*name of other deceased person*). _____ (*Name*) was right handed; _____ (*name of other deceased person*) was left handed.]

4. [*Allege facts, if any, contradicting allegation in petition of relationship making title to property or devolution thereof depend on sequence of deaths, e.g.,* _____ (*Name of decedent*) and _____ (*name of other deceased person*) owned no property in joint tenancy.]

WHEREFORE, objector prays for an order _____ [declining to hear the petition on the ground of lack of jurisdiction *or* denying the petition on the ground that neither the title to property nor the devolution thereof depends on the sequence of the deaths alleged in the petition *or* determining that the death of _____ (*name*) preceded the death of _____ (*name*)] and for all other proper orders.

_____ [*signature*]

Objector

VERIFICATION [*Code Civ. Proc. §§ 446, 2015.5*]

I, _____ [*name*], am the objector in the above-entitled proceeding. I have read the foregoing objections and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*signature*]

Objector

CAUTION:

The foregoing form is for use only when none of the persons the priority of whose death is at issue died on or after January 1, 1985 [*Prob. Code § 226*]. If one of the persons died on or after that date, the provisions of *Prob. Code §§ 220-226* apply [*Prob. Code § 226*]. Counsel should use the allegation *set forth in § 458A.63* in place of Paragraph 3 in this form in such a case.

[2] Use of Form

This form may be used to state objections to the petition to establish the lack of evidence that deaths were other than simultaneous [*see Prob. Code § 1043*]. The objections may be served by mail or by personal delivery [*see, e.g., Prob. Code § 1217* (service by mail or delivery when paper is required to be served or otherwise given and no other manner of giving paper is specified by statute)].

[3] Allegations

There is no statutory provision stating who may make objections to a petition or on what grounds objections may be based. It would appear that any person who could file a petition would be entitled to make objections. Certainly the personal representative of the estate of the other deceased person, if he or she has earlier filed a petition, can object on the ground of lack of jurisdiction (Paragraph 2) [*see Prob. Code § 232(b)*]. The grounds for objection (Paragraphs 3, 4)

will depend on the facts of the particular case. In most cases, objection would probably be based on either the absence of a relationship between the two deceased persons making the title to property or the devolution thereof depend on the sequence of their deaths (Paragraph 3) [*see* former Prob. Code § 296] or the existence of sufficient evidence that the deaths were sequential (Paragraph 4).

[4] Prayer

There is no requirement that the paper stating objections should contain a prayer for any relief, but a prayer is recommended as a means of stating the objector's purpose. The content of the prayer is adaptable to the facts of the particular case. Requests that might be set out in the prayer in the usual case would be that the court decline to hear the petition because the court lacks jurisdiction [*see Prob. Code § 232(b)*]; that the court deny the petition because there was no relationship between the deceased persons making the title to property or the devolution thereof depend on the sequence of their deaths [*see* former Prob. Code § 296]; and that the court determine that the deaths in question occurred in a certain sequence.

[5] Verification

The objections must be verified by the objector [*see Prob. Code § 1021(a)(2)*].

[6] State Statutes

Former Prob. Code §§ 296-296.4 is applicable when no person the priority of whose death at issue died on or after January 1, 1985. *Prob. Code § 226*

Probate court first acquiring jurisdiction under *Prob. Code § 232* has exclusive jurisdiction to determine issues. *Prob. Code § 232(b)*

Substantive rules in former Uniform Simultaneous Death Act is applicable when title to property or devolution thereof depends on sequence of two or more deaths and there is no sufficient evidence they occurred otherwise than simultaneously. Former Prob. Code § 296

[7] Cross References

For related forms, *see §§ 458A.60* and *458A.61*.

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39-458A California Forms of Pleading and Practice--Annotated § 458A.63

§ 458A.63 Allegation--One Person's Survival of Another Established by Clear and Convincing Evidence [Prob. Code § 234]

[1] FORM Allegation--One Person's Survival of Another Established by Clear and Convincing Evidence [Prob. Code § 234]

_____ [*Allege assertedly clear and convincing evidence that one person survived another, e.g.,* On or about _____ (*date*), decedent and _____ (*name*) died under the following circumstances: _____ (*specify circumstances, e.g.,* they were both killed in an automobile accident that occurred on or about the above-mentioned date in _____ County. An officer of the California Highway Patrol was the first person to arrive at the scene after the accident, and he/she found both decedent and _____ (*name of other person*) in the wreckage. Although _____ (*name of other person*) was dead, decedent was alive when the officer arrived, and died later).]

CAUTION:

This form of allegation is for use only when at least one of the persons the priority of whose death is at issue died on or after January 1, 1985 [*Prob. Code § 226*]. If none of the persons died on or after that date, the provisions of former Prob. Code §§ 296-296.4 apply [*Prob. Code § 226*]. Counsel should see *§ 458A.62* in such a case.

[2] Use of Form

This allegation should be substituted for Paragraph 3 in § 458A.62 when one or more of the persons whose deaths are in issue died on or after January 1, 1985, and the basis for the objection to the petition is that it can be established by clear and convincing evidence that one person survived the other [*Prob. Code §§ 220, 234*]. If this allegation is used, the prayer set forth in Form 607 should be changed to conform with the language of *Prob. Code § 234*.

[3] Contents of Allegation

This allegation should include the evidentiary support for the requested conclusion of the court that there is clear and convincing evidence that one person survived another [*see Prob. Code § 234*]. For a discussion of the substantive

requirements inherent in such a finding, see *§ 458A.11*.

[4] Cross References

For a related form, *see § 458A.62*.

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39-458A California Forms of Pleading and Practice--Annotated § 458A.64

§ 458A.64 Order Determining Lack of Evidence of Sequential Deaths [Prob. Code § 234; former Prob. Code § 296]

[1] FORM Order Determining Lack of Evidence of Sequential Deaths [Prob. Code § 234; former Prob. Code § 296]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER DETERMINING LACK OF EVIDENCE
Deceased.	)	OF SEQUENTIAL DEATHS

_____

The petition of _____ [*name*], as _____ [the personal representative of *or* a person interested in] the estate of _____ [*name*], deceased, to establish the lack of sufficient evidence that _____ [*name of decedent*], and _____ [*name of other deceased person*] died otherwise than simultaneously came on regularly for hearing this date by the court. _____ [*Insert, if appropriate:* Objections thereto were presented by _____ (*name of objector*), as _____ (*capacity in which objector appeared*).] Petitioner _____ [appeared personally *or* was represented by _____ (*name of attorney*)]. _____ [*Insert, if objections were presented:* Objector _____ (appeared personally *or* was represented by _____ (*name of attorney*)).]

Proof having been made to the satisfaction of the court,

THE COURT FINDS that

1. Notice of the time and place of the hearing was given as required by *Probate Code Section 233*. [Special notice was

_____ (given to _____ (*name(s)*), as requested *or* requested and waived by _____ (*names(s)*)).]

2. On or about _____ [*date*], _____ [*name of decedent*] and _____ [*name of other deceased person*] both died _____ [*specify circumstances of deaths, e.g.,* in an automobile accident that occurred on or about that date in _____ County, California].

3. The title to property or the devolution thereof depends on the sequence in which _____ [*name of decedent*] and _____ [*name of other deceased person*] died.

4. Petitioner is _____ [the duly appointed, qualified, and acting personal representative of *or* a person properly interested in] the estate of _____ [*name*], deceased.

5. There is no sufficient evidence that _____ [*name of decedent*] and _____ [*name of other deceased person*] died otherwise than simultaneously.

6. Except as otherwise specifically found above, the allegations of the petition are true.

IT IS ORDERED that

1. _____ [*Name of decedent*] and _____ [*name of other deceased person*] died on _____ [*date*].

2. There is no sufficient evidence that _____ [*name of decedent*] and _____ [*name of other deceased person*] died otherwise than simultaneously.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

CAUTION:

This form is for use only if none of the persons the priority of whose death is at issue died on or after January 1, 1985 [*Prob. Code § 226*]. If one of the persons died on or after that date, the provisions of *Prob. Code §§ 220-226* apply [*Prob. Code § 226*]. Counsel should see *§ 458A.65* in such a case.

[2] Use of Form

This order may be submitted to the court when the court has determined that there is no sufficient evidence that the deaths in question occurred otherwise than simultaneously. The order is required to be to the effect that the persons in question are dead and that there is no sufficient evidence that they died otherwise than simultaneously [*see* former Prob. Code § 296; see also *Prob. Code §§ 226* (continued effect of former law), 230(e) (availability of petition to determine whether persons died other than simultaneously under former law)].

[3] Binding Effect of Order

The order, when it becomes final, constitutes a binding determination of the facts that it sets forth and is conclusive against the personal representatives of the deceased persons named in the order and against all persons claiming by, through, or under any of those deceased persons [*see Prob. Code § 234*]. The statute does not state when the order

becomes final.

[4] Appeal From Order

At least one court has observed (without actually holding) that the order made under former Prob. Code § 296.42 is an order "instructing or directing an executor or administrator" and thus is appealable under former Prob. Code § 1240 (*now see* Prob. Code § 1297) [*see* *Estate of Rowley (1967) 257 Cal. App. 2d 324, 327 n. 1, 65 Cal. Rptr. 139* (petitioner was executor; order also characterized as one "determining heirship or the persons to whom distribution should be made [*see* Prob. Code § 1297]")].

[5] State Statutes

Requirements for order. *Prob. Code § 234*

Finding of giving or waiver of notice as required. *Prob. Code § 1260(b)*.

Contents of order in probate proceedings. *Prob. Code § 1047*

Entry and filing of order. *Prob. Code § 1048*

Appealable orders. *Prob. Code § 1300*

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39-458A California Forms of Pleading and Practice--Annotated § 458A.65

§ 458A.65 Order Determining That It Has Not Been Established by Clear and Convincing Evidence That One Person Survived Another [Prob. Code § 234]

[1] FORM Order Determining That It Has Not Been Established by Clear and Convincing Evidence That One Person Survived Another [Prob. Code § 234]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER DETERMINING THAT IT HAS NOT
Deceased.	)	BEEN ESTABLISHED BY CLEAR AND CONVIN-CING EVIDENCE THAT ONE PERSON SUR-VIVED ANOTHER

_____

[*Introductory paragraph. See § 458A.64.*]

Proof having been made to the satisfaction of the court, the court makes the following determinations:

1. [*See § 458A.64, Finding No. 1.*]

2. [*See § 458A.64, Finding No. 2.*]

3. [*See § 458A.64, Finding No. 3.*]

4. [*See § 458A.64, Finding No. 4.*]

5. It has not been established by clear and convincing evidence that either _____ [*name of decedent*] or

_____ [*name of other person*] survived the other.

6. Except as otherwise specifically provided above, the allegations of the petition are true.

IT IS ORDERED that

1. _____ [*Name of decedent*] and _____ [*name of other person*] died on _____ [*date*].

2. It has not been established by clear and convincing evidence that either _____ [*name of decedent*] or _____ [*name of other person*] survived the other.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

CAUTION:
This form is for use only if at least one of the persons the priority of whose death is at issue died on or after January 1, 1985 [*Prob. Code § 226*]. If none of the persons died on or after that date, the provisions of former Prob. Code §§ 296-296.4 apply [*Prob. Code § 226*]. Counsel should see *§ 458A.66* in such a case.

[2] Use of Form

This order may be submitted to the court when the court has determined that it has not been established by clear and convincing evidence that one person survived another. The order is required to be to the effect that the persons in question are dead and that it has not been established by clear and convincing evidence that one person survived another [*see Prob. Code § 234*].

[3] Cross References

For a related form, *see § 458A.64*.

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39-458A California Forms of Pleading and Practice--Annotated § 458A.66

§ 458A.66 Order Determining Sequence of Deaths [Prob. Code § 234]

[1] FORM Order Determining Sequence of Deaths [Prob. Code § 234]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER DETERMINING SEQUENCE OF
Deceased.	)	DEATHS

_____

[*Introductory paragraph. See § 458A.64.*]

Proof having been made to the satisfaction of the court, the court makes the following determinations:

1. [*See § 458A.64, Finding No. 1.*]

2. [*See § 458A.64, Finding No. 2.*]

3. [*See § 458A.64, Finding No. 3.*]

4. [*See § 458A.64, Finding No. 4.*]

[*EITHER*]

5. It has been established by clear and convincing evidence that _____ [*name of person who died last*] survived _____ [*name of other deceased person*]. _____ [*Name of person who died*

first] died before _____ [*name of other deceased person*] died.

[*OR*]

5. _____ [*Name of decedent*] and _____ [*name of other deceased person*] did not die simultaneously. _____ [*Name of person who died first*] died before _____ [*name of other deceased person*] died.

6. Except as otherwise specifically found above, the allegations of the petition are _____ [true *or* not true] _____ [*insert, if appropriate* : and the objections thereto are _____ (*either* sustained *or* not sustained)].

IT IS ORDERED that

1. _____ [*Name of decedent*] died on _____ [*date*], and _____ [*name of other deceased person*] died on _____ [*date*].

[*EITHER*]

2. _____ [*Name of person who died last*] survived _____ [*name of other deceased person*].

[*OR*]

2. _____ [*Name of decedent*] and _____ [*name of other deceased person*] did not die simultaneously.

3. _____ [*Name of person who died first*] died before _____ [*name of other deceased person*] died.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This order may be submitted to the court when the court has determined that one of the decedents died before the other. The form of the order and its exact conclusion depends on whether or not any of the persons whose death is in issue died on or after January 1, 1985 [*see Prob. Code § 226*]. If any of the persons died on or after that date, the provisions of *Prob. Code §§ 220-226* apply, requiring that there be clear and convincing evidence that one person survived another [*see Prob. Code §§ 220, 234*]. In such a case, the first alternative Finding No. 5 and Order No. 2 should be used. However, if none of the persons whose death is in issue died on or after January 1, 1985, the provisions of former Prob. Code §§ 296-296.4 apply, requiring only that there be no sufficient evidence that the deaths were other than simultaneous [*see* former Prob. Code § 296]. Thus, in such a case, the second alternative Finding No. 5 and Order No. 2 are appropriate. For discussion of the difference between the standards, see *§ 458A.11*.

[3] Local Rules of Court

Material to be included in probate orders. Los Angeles Co. Super. Ct. Rules, Rule 10.42; San Francisco Uniform Local Ct. Rules, Rule 14.27

Procedure on submission of proposed orders in advance of hearing date. San Francisco Uniform Local Ct. Rules, Rule 14.6

[4] Cross References

For related forms, *see §§ 458A.62* and *458A.63*.

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39-458B California Forms of Pleading and Practice--Annotated 458B.syn

§ 458B.syn Synopsis to Chapter 458B: PROBATE: SUSPENSION, REMOVAL, AND RESIGNATION

§ 458B.01 Scope of Chapter

§§ 458B.02-458B.09 [Reserved]

§ 458B.10 Governing Law

§ 458B.11 Vacancy in Office of Personal Representative--Death, Resignation, or Removal

§ 458B.12 Removal

[1] Statutory Grounds

[a] Wrongdoing, Neglect, or Incapacity

[b] Removal in Favor of Person With Higher Priority

[i] In General

[ii] Petition to Probate Will After Administration Has Commenced

[2] Nonstatutory Grounds

[3] Order to Show Cause

[4] Hearing

[5] Removal and Revocation of Letters

§ 458B.13 Validity of Acts Preceding Vacancy in Office

§ 458B.14 Interim Protection of Estate

§ 458B.15 Appointment of Successor Personal Representative When Vacancy Occurs

§ 458B.16 Authority of Successor Personal Representative

§§ 458B.17-458B.29 [Reserved]

§ 458B.30 State Statutes

[1] Citations

[2] Removal From Office

[3] Changes in Administration

§ 458B.31 Decisions

[1] Appeal

[2] Burden of Proof

[3] Demurrer

[4] Grounds for Removal

[5] Petitioner's Costs

[6] Right to Hearing

§ 458B.32 Text References

§§ 458B.33-458B.49 [Reserved]

§ 458B.50 Petition for Removal of Personal Representative and Suspension of Powers Pending Hearing [Prob. Code §§ 8500, 8502]--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Notice of Hearing on Petition

[5] State Statutes

[6] Local Rules of Court

[7] Decisions

[8] Text References

[9] Cross References

§ 458B.51 Petition for Removal of Administrator [Prob. Code § 8503] and Revocation of Letters of Administration [Prob. Code § 8501]--By Person With Higher Priority for Appointment

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Text References

§ 458B.52 Order That Citation Issue [Prob. Code § 8500]

[1] FORM

[2] Use of Form

[3] Service of Citation

[4] Cross References

§ 458B.53 Order Suspending Powers of Personal Representative and Making Further Orders as Necessary to Deal With the Property Pending Hearing on Petition for Removal [Prob. Code §§ 8500, 8502]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Local Rules of Court

[5] Cross References

§ 458B.54 Answer of Personal Representative to Petition for Removal [Prob. Code §§ 8500, 8502]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 458B.55 Order Removing Personal Representative [Prob. Code § 8500]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Local Rules of Court

[5] Cross References

§ 458B.56 Petition by Personal Representative for Leave to Resign [Prob. Code §§ 8520, 8523, 8525(b)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Text References

§ 458B.57 Order Granting Personal Representative Leave to Resign [Prob. Code §§ 8520, 8523, 8525(b)]

[1] FORM

[2] Use of Form

[3] Local Rules of Court

[4] Cross References

§ 458B.58 Petition for Appointment of Successor Personal Representative [Prob. Code § 8522] and Issuance of Letters [Prob. Code §§ 8400(a), 8405]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Text References

[5] Cross References

§ 458B.59 Order Appointing Successor Personal Representative and Issuing Letters [Prob. Code §§ 8422, 8440, 8460, 8522]

[1] FORM

[2] Use of Form

[3] Cross References

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PART I. SCOPE

39-458B California Forms of Pleading and Practice--Annotated § 458B.01

§ 458B.01 Scope of Chapter

This chapter discusses and sets forth forms dealing with suspension and removal of the personal representative on petition by a person interested in the estate or the voluntary resignation of the personal representative. It includes a form of petition for removal [*see § 458B.50*], an order that citation issue [*see § 458B.52*], an order suspending powers pending hearing [*see § 458B.53*], an answer of the personal representative [*see § 458B.54*], an order removing the personal representative for cause [*see § 458B.55*], a petition for leave to resign [*see § 458B.56*], an order granting leave to resign [*see § 458B.57*], a petition for appointment of a successor personal representative [*see § 458B.58*], and an order appointing a successor personal representative [*see § 458B.59*]. The procedures discussed for replacing the personal representative apply if the representative dies or resigns, as well as in the case of removal [*see Prob. Code §§ 8520* (vacancy in office includes death and resignation) and 8521-8525 (procedures relating to vacancy)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationVoluntary Resignation

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39-458B California Forms of Pleading and Practice--Annotated §§ 458B.02-458B.09

[Reserved]

§§ 458B.02[Reserved]

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39-458B California Forms of Pleading and Practice--Annotated § 458B.10

§ 458B.10 Governing Law

The resignation, suspension, or removal of a personal representative is governed generally by *Prob. Code §§ 8500-8525*. The revocation of the personal representative's letters on various grounds is authorized by *Prob. Code §§ 8480(c)* (failure to give added security), 8505 (contempt of court), 8804 (failure to file inventory and appraisal in a timely manner), 10900, 10950, 11052, and *Code Civ. Proc. § 166* (failure to render account when required), and *Prob. Code §§ 11051(b), 11052* (purposeful evasion of personal service of citation or neglecting to render account).

Additionally, there are a wide variety of local court rules governing probate practice. To insure complete compliance, the attorney should consult the applicable rules.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationVoluntary ResignationEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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39-458B California Forms of Pleading and Practice--Annotated § 458B.11

§ 458B.11 Vacancy in Office of Personal Representative--Death, Resignation, or Removal

A vacancy occurs in the office of a personal representative who resigns, dies, or is removed from office pursuant to *Prob. Code §§ 8500-8505*, or whose authority is otherwise terminated [*Prob. Code § 8520*; *but see Prob. Code §§ 8523* (interim protection of estate), 8525(b) (continuing liability of personal representative)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationVoluntary ResignationEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-458B California Forms of Pleading and Practice--Annotated § 458B.12

§ 458B.12 Removal

[1] Statutory Grounds

[a] Wrongdoing, Neglect, or Incapacity

The main grounds for removal of a personal representative are for any of the following causes [*Prob. Code § 8502*]:

- The personal representative has wasted, embezzled, mismanaged, or committed a fraud on the estate, or is about to do so.
- The personal representative is incapable of properly executing the duties of the office, or is otherwise not qualified for appointment as personal representative.
- The personal representative has wrongfully neglected the estate, or has long neglected to perform any act as personal representative.
- Removal is otherwise necessary to protect the estate or interested persons.
- Any other cause provided by statute.

In addition to this basic statute, there are miscellaneous provisions that establish other grounds for the removal of the personal representative. The additional grounds are as follows:

- Failure to give sufficient or additional bond ordered [*Prob. Code § 8480(c)*].
- Being found in contempt for disobeying an order of the court [*Prob. Code § 8505*].
- Failure to file inventory and appraisal within the prescribed time [*Prob. Code § 8804(b)*].
- Failure to render an account [*Prob. Code §§ 11051(b), 11052*].

- For nonresident personal representatives only, failure to comply with the statement of permanent address requirements [*Prob. Code § 8577(a)*].

[b] Removal in Favor of Person With Higher Priority

[i] In General

A surviving spouse or relative entitled to succeed to all or part of the estate, or a nominee of such a person, may petition for the removal of a previously appointed administrator if the surviving spouse or relative is higher in priority than the incumbent administrator [*Prob. Code § 8503(a)*; *see Prob. Code §§ 8461-8468* (priority for appointment as administrator); *see § 458B.51*]. However, the court in its discretion may refuse to grant the petition if [*see Prob. Code § 8503(b)*]:

- The petition is by a person or the nominee of a person who had actual notice of the proceeding in which the administrator was appointed and had an opportunity to contest the appointment;

- To do so would be contrary to the sound administration of the estate, as for example, when administration is nearly complete or has otherwise progressed to a point at which replacement of the administrator would be inappropriate [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 8503*].

[ii] Petition to Probate Will After Administration Has Commenced

If an administrator has been appointed on the ground of intestacy, and a will is subsequently admitted to probate, the administrator must be removed from office [*see Prob. Code § 8504(a)*].

If an executor or administrator with the will annexed has been appointed, the subsequent admission of a different will terminates the powers of that previously appointed personal representative [*see Prob. Code §§ 8272(b), 8504(b)*; for discussion and forms, *see* Ch. 444, *Probate: Will Contests*].

[2] Nonstatutory Grounds

Apart from the statutory grounds enumerated, the court has the power to remove a personal representative for other cause, for example, adverse interest or hostile acts [*Luckey v. Superior Court (1930) 209 Cal. 360, 369-370, 287 P. 450* ; *Estate of Palm (1945) 68 Cal. App. 2d 204, 210, 156 P.2d 62]* . The statutory provisions are viewed as not placing any limitations on the court's inherent power to remove one of its officers whose self interest is so opposed to his or her trust as to render the officer unfit to act [*Estate of Guzzetta (1950) 97 Cal. App. 2d 169, 173, 217 P.2d 460]* .

[3] Order to Show Cause

On petition for removal by any interested person [*see Prob. Code §§ 48, 8500(a)*], or whenever the court has reason to believe from its own knowledge or from other credible information that grounds for removal exist, whether on the settlement of an account or otherwise, the court must issue a citation to the personal representative to appear and show cause why the personal representative should not be removed. The court may suspend the powers of the personal representative and make any other orders necessary to deal with the property pending the hearing on the matter [*Prob. Code § 8500(b)*; *see Prob. Code § 1242* (service of citation)].

[4] Hearing

Any interested person may appear at the hearing and file a written declaration showing that the personal representative

should be removed or retained. The personal representative may demur to, or answer, the declaration. The court may compel the personal representative to attend the hearing, and may compel the personal representative to answer questions, under oath, concerning administration of the estate [*Prob. Code § 8500(c)*; *see Prob. Code § 48* (interested person defined)].

[5] Removal and Revocation of Letters

Failure to attend the hearing or answer is cause for removal of the personal representative [*Prob. Code § 8500(c)*]. The issues must be heard and determined by the court. The court is required to remove the personal representative from office if the court is satisfied from the evidence that the citation has been duly served and cause exists for removal [*Prob. Code § 8500(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationDisabilityEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationRemoval for CauseEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationVoluntary Resignation

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39-458B California Forms of Pleading and Practice--Annotated § 458B.13

§ 458B.13 Validity of Acts Preceding Vacancy in Office

All acts of a personal representative before a vacancy occurs are valid to the same extent as if no vacancy had later occurred. The liability of a personal representative whose office is vacant, or of the surety on the bond, is not discharged, released, or affected by the vacancy or by the appointment of a successor. Instead, it continues until settlement of the personal representative's accounts and delivery of all the estate of the decedent to the successor personal representative or other person appointed by the court to receive it. In addition, the personal representative must render an account of the administration within the period of time that the court directs [*Prob. Code § 8525*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationVoluntary Resignation

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§ 458B.14 Interim Protection of Estate

The court may make any necessary orders, including appointment of a special administrator, to deal with the estate of the decedent between the time a vacancy occurs in the office of personal representative and appointment of a successor. [*Prob. Code § 8523*; *see Prob. Code §§ 8540-8547* (special administrators)].

The liability of the outgoing personal representative, or of the sureties on his or her bond, is not discharged, released, or affected by the vacancy or by appointment of a successor, but continues until settlement of the personal representative's accounts and delivery of all the estate of the decedent to the successor personal representative or other person appointed by the court to receive it [*Prob. Code § 8525(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationVoluntary Resignation

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39-458B California Forms of Pleading and Practice--Annotated § 458B.15

§ 458B.15 Appointment of Successor Personal Representative When Vacancy Occurs

If a vacancy occurs in the office of fewer than all personal representatives, the remaining personal representatives must complete the administration of the estate unless the will provides otherwise, or unless the court exercises its discretion to enter a contrary order. In such cases, on the filing of a petition, the court may order the clerk to issue appropriate amended letters to the remaining personal representatives [*Prob. Code § 8521*].

If a vacancy occurs in the office of a personal representative and there are no other personal representatives, however, the court must appoint a successor personal representative. The appointment must be made on petition and service of notice on interested persons in the manner provided in *Prob. Code §§ 8110-8113*. Successor appointments are subject to the same priority as for an original appointment of a personal representative. Personal representatives of deceased personal representatives are not, as such, entitled to appointment as successor personal representatives [*Prob. Code § 8522*; *see* Ch. 442, *Probate: Initiating Probate Administration*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesAppointmentEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationGeneral Overview

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39-458B California Forms of Pleading and Practice--Annotated § 458B.16

§ 458B.16 Authority of Successor Personal Representative

Except as provided in *Prob. Code § 8442(b)* (authority of administrator with will annexed) or as otherwise ordered by the court, the successor personal representative has the same powers and duties with respect to the continued administration that the former personal representative would have had [*Prob. Code § 8524(c)*]. Thus, a successor personal representative is entitled to demand, sue for, recover and collect all the decedent's estate remaining unadministered, and may prosecute to final judgment any suit commenced by the former personal representative before the vacancy [*Prob. Code § 8524(a)*]. In addition, no notice, process, or claim given to or served on the former personal representative need be given to or served on the successor to preserve any position or right the person giving the notice or filing the claim may have obtained or preserved with reference to the former personal representative [*Prob. Code § 8524(b)*].

A successor fiduciary of an estate in probate has the authority to assert a professional negligence claim against an attorney retained by a predecessor fiduciary to provide tax assistance for the benefit of the estate [*Borissoff v. Taylor & Faust (2004) 33 Cal. 4th 523, 528-529, 15 Cal. Rptr. 3d 735, 93 P.3d 337]* . A successor fiduciary's power to sue for malpractice is no different than the successor's power to sue for nonperformance a person hired by the predecessor to fix the roof of a house belonging to the estate. The successor has the same powers and duties as the predecessor, including the power to sue, even though there is no privity of contract [*Borissoff v. Taylor & Faust (2004) 33 Cal. 4th 523, 530, 535, 15 Cal. Rptr. 3d 735,93 P.3d 337]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-458B California Forms of Pleading and Practice--Annotated §§ 458B.17-458B.29

[Reserved]

§§ 458B.17[Reserved]

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39-458B California Forms of Pleading and Practice--Annotated § 458B.30

§ 458B.30 State Statutes

[1] Citations

Service of citation on personal representative. *Prob. Code § 1242*

[2] Removal From Office

Removal for failure to give additional bond. *Prob. Code § 8480(c)*

Procedure for removal from office. *Prob. Code § 8500*

Revocation of letters on removal from office. *Prob. Code § 8501*

General grounds for removal from office. *Prob. Code § 8502*

Removal for contempt of court. *Prob. Code § 8505*

Removal of nonresident personal representative for noncompliance with statement of permanent address requirement. *Prob. Code § 8577*

Removal for failure to file inventory and appraisal in a timely manner. *Prob. Code § 8804*

Removal for failure to render account when required. *Prob. Code §§ 11051(b), 11052*

[3] Changes in Administration

Vacancy in office of personal representative by resignation, death, or removal from office. *Prob. Code § 8520*

Interim protection of estate during vacancy. *Prob. Code § 8523*

Powers and duties of successor personal representative. *Prob. Code § 8524*

Effect of vacancy in office of personal representative. *Prob. Code § 8525*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationVoluntary ResignationEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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PART III. RESEARCH GUIDE

39-458B California Forms of Pleading and Practice--Annotated § 458B.31

§ 458B.31 Decisions

[1] Appeal

Order denying petition by creditor to remove personal representative is appealable, and when not appealed, it becomes final and conclusive. *Estate of Exterstein (1934) 2 Cal. 2d 13, 16, 38 P.2d 151*

Appeal from order removing personal representative merely suspends personal representative from office and permits only appointment of special personal representative. *In re Moore (1890) 86 Cal. 72, 73, 24 P. 846* (decided under former *Code Civ. Proc. § 1411*; *now see Prob. Code §§ 8540, 8541, 8544*)

Probate court's decision whether circumstances warrant removal of executor is not subject to interference on appeal except for clear abuse. *Estate of Effron (1981) 117 Cal. App. 3d 915, 930, 173 Cal. Rptr. 93*

When personal representative is removed and another appointed, on filing of notice of appeal by first personal representative, general powers of subsequent one are suspended and replaced with special powers. *Estate of Kromrey (1950) 98 Cal. App. 2d 639, 647, 220 P.2d 805*

[2] Burden of Proof

In hearing on removal of personal representative, burden of proof is on petitioner. *Estate of Buchman (1954) 123 Cal. App. 2d 546, 554, 267 P.2d 73*

[3] Demurrer

Personal representative's demurrer to petition for removal on general grounds and on special ground that petition was uncertain granted. *Estate of Wacholder (1946) 76 Cal. App. 2d 452, 455, 173 P.2d 359*

On demurrer to petition to revoke personal representative's letters, court required to accept as true allegations in petition. *Estate of Calhoun (1938) 27 Cal. App. 2d 706, 709-710, 81 P.2d 605*

[4] Grounds for Removal

Fact that action was pending by decedent's estate against employer of person nominated in will as personal representative did not disqualify the nominee from appointment. *Estate of Daigh (1963) 59 Cal. 2d 367, 368-369, 29 Cal. Rptr. 273, 379 P.2d 761*

Probate court has duty to scrutinize accounts of personal representatives, and to revoke letters on mismanagement. *Estate of Gainfort (1938) 11 Cal. 2d 298, 300-301, 79 P.2d 97*

Personal representative judged insane by county court was incapable, not merely incompetent to act, and probate court was able to revoke his letters and grant new ones without citation to him to show cause. *In re Blinn (1893) 99 Cal. 216, 219-222, 33 P. 841* (decided under former §§ 5791, 5795, 5979 of Hittell's General Laws; *now see Prob. Code §§ 8520-8523, 8525(b)*)

Surviving spouse's nominated son had priority over decedent's daughter in obtaining letters of administration under *Prob. Code § 8461* when the past filing of a dissolution action by surviving spouse was dismissed for lack of prosecution, resulting in surviving spouse having priority under *Prob. Code § 8463* as well as her son, as nominee, having priority under *Prob. Code § 8465*. *Estate of Garrett (2008) 159 Cal. App. 4th 831, 839, 71 Cal. Rptr. 3d 864*

Executor is subject to removal for conflict of interest in asserting claim adverse to estate and its principal beneficiary and for breach of fiduciary duties in failing to file timely inventory that would have shown he improperly paid himself travel expenses, in causing beneficiary to personally obligate herself to pay attorney's fees, and in failing to obtain prior court approval for payment of attorney fees. *Estate of Hammer (1993) 19 Cal. App. 4th 1621, 24 Cal. Rptr. 2d 190*

Court has inherent power, independent of statute, to remove trustee who acquires interest or becomes charged with duty adverse to interest of beneficiary, but mere potential conflict unaccompanied by adverse action is not sufficient to justify removal. *Estate of Feeney (1983) 139 Cal. App. 3d 812, 818, 189 Cal. Rptr. 84*

Statutory provision for removal of executor or administrator in certain instances is designed to deal with administrative malfeasance amounting to moral wrong; removal for refusing to sign petition to vacate sale of property and confirm new sale was improper when court could issue order requiring executrix to execute petitions pursuant to former Prob. Code § 758. *Estate of Feeney (1983) 139 Cal. App. 3d 812, 818 , 189 Cal. Rptr. 84* (decided under former Prob. Code § 521; *now see Prob. Code §§ 8500(b), 8502*)

Mere conflict in interest between one named as executor who is charged with holding property adversely to estate and heirs of testator does not necessarily amount to such a want of integrity as to render that person incompetent to serve as executor; but fact that one seeking appointment as administrator is claiming property transferred to him or her by decedent under circumstances that make it apparent that action would have to be maintained against him or her by estate to determine ownership of that property is a circumstance, though not disqualifying, which should be taken into account by probate court in exercising its discretion in choosing between applicants. *Estate of Muller (1969) 2 Cal. App. 3d 259, 276, 82 Cal. Rptr. 531*

Probate court not advised to remove testator's chosen personal representative for trivial causes, particularly for matters subject to ready adjustment in settlement of accounts. *Estate of Cole (1966) 240 Cal. App. 2d 324, 332, 49 Cal. Rptr. 419*

Court's refusal to remove personal representative only reversible on showing of abuse of discretion. *Estate of Hirschberg (1964) 224 Cal. App. 2d 449, 462, 36 Cal. Rptr. 661*

Trial judge was wide discretion in determining whether facts of particular case warrant removal of personal representative. *Estate of Meyers (1958) 159 Cal. App. 2d 764, 769, 324 P.2d 597*

Law does not hold personal representative responsible for consequences of mistakes that are the result of imperfection of human judgment and do not proceed from fraud, gross carelessness, or indifference to duty. *Estate of Buchman (1954) 123 Cal. App. 2d 546, 556, 267 P.2d 73*

Nonstatutory grounds for removal of personal representative. *Estate of Guzzetta (1950) 97 Cal. App. 2d 169, 173, 217 P.2d 460* ; see also *Luckey v. Superior Court (1930) 209 Cal. 360, 369-370, 287 P. 450*

What constitutes mismanagement. *Estate of Palm (1945) 68 Cal. App. 2d 204, 210, 156 P.2d 62* ; see also *Buss v. J. O. Martin Co. (1966) 241 Cal. App. 2d 123, 134, 50 Cal. Rptr. 206*

[5] Petitioner's Costs

Heir who successfully prosecutes action for removal of personal representative is not entitled to payment out of estate of expenditures incurred in removal action. *Estate of Bell (1905) 145 Cal. 646, 650, 79 P. 358*

[6] Right to Hearing

Court is not able on its own motion to remove personal representative without giving personal representative opportunity to be heard. *In re Moore (1890) 83 Cal. 583, 586, 23 P. 794* (decided under former Code Civ. Proc. §§ 1436-1440; *now see Prob. Code §§ 8500, 8502*)

Personal representative has right to hearing before removal, and court required to have some fact legally before it in order to justify removal. *Estate of Buchman (1954) 123 Cal. App. 2d 546, 554-557, 267 P.2d 73*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationDisabilityEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationRemoval for CauseEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationVoluntary Resignation

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39-458B California Forms of Pleading and Practice--Annotated § 458B.32

§ 458B.32 Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate, §§ 451-463* (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationVoluntary ResignationEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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[Reserved]

§§ 458B.33[Reserved]

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PART IV. FORMS

39-458B California Forms of Pleading and Practice--Annotated § 458B.50

§ 458B.50 Petition for Removal of Personal Representative and Suspension of Powers Pending Hearing [Prob. Code §§ 8500, 8502]--General Form

[1] FORM Petition for Removal of Personal Representative and Suspension of Powers Pending Hearing [Prob. Code §§ 8500, 8502]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR REMOVAL OF PERSONAL
	)	REPRESENTATIVE AND SUSPENSION OF
Estate of _____ [*name*],	)	POWERS PENDING
Deceased.	)	HEARING
	)	[*Prob. Code §§ 8500, 8502*]
	)	

_____

Petitioner, _____ [*name*], respectfully represents:

1. Petitioner is _____ [*state facts showing that petitioner is an interested person within the meaning of Prob. Code § 48, e.g.,* a devisee under the decedent's will].

2. _____ [*Name*] is the duly appointed, qualified, and acting personal representative of the above entitled estate. Letters were issued on _____ [*date*].

3. Petitioner [is informed and believes and thereon] alleges that the personal representative _____ [*set forth grounds for removal, e.g.,* is incapable of properly executing the duties of the office because he/she is hospitalized in a comatose condition after a traffic accident. It is unknown when or if he/she will regain consciousness, and if and

when he/she does, a long period of recuperation is anticipated].

[4. Pending the hearing on the cause for removal, the powers of the personal representative should be suspended for the best interest of the estate of _____ [*name*], deceased.]

[5. _____ (*State facts showing the necessity for an order to deal with the property pending the hearing*).]

[6. _____ (*State facts showing the necessity for appointment of a special administrator and/or for an order to deal with the property between the time the personal representative is removed and the appointment of a successor*).]

[7. _____ (*Name of person entitled to be appointed personal representative*) is entitled to appointment as special administrator because he/she is _____ (*describe status of person that entitles him or her to be appointed administrator under Prob. Code §§ 8441, 8461, e.g.,* the nominee of the decedent's surviving spouse).]

WHEREFORE, petitioner prays:

1. That citation issue to _____ [*name of personal representative*] to show cause why he/she should not be removed as personal representative.

[2. For an order suspending the powers of _____ (*name of personal representative*) pending the hearing on the charges.]

[3. For an order that _____ (*specify order necessary to deal with the property pending the hearing*).]

[4. For an order that _____ (*specify order necessary to deal with the property between the time of removal and the appointment of a successor*).]

[5. For an order that _____ (*name*) be appointed special administrator (_____ (*if special administrator is to have more or less power than provided for in Prob. Code § 8544 or is to be required to perform particular acts under Prob. Code §§ 8540(b), 8541(c), specify particular power to be conferred or act to be done*)) pending appointment of a successor.]

6. For an order that _____ [*name of personal representative*] make an accounting and surrender all property in his/her/its possession belonging to the estate of _____ [*name*], deceased, to _____ [his/her/its duly appointed and qualified successor *or* the special administrator appointed by this Court],

7. For such other relief as the court deems proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the con tents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form is for use by an interested person to petition the court for an order requiring the personal representative to appear and show cause why he or she should not be removed from office and his or her letters revoked [*Prob. Code§§ 8500, 8501*]. The petition must be verified by the petitioner [*see Prob. Code § 1021*].

The petition for removal may be combined with a petition for appointment of a successor [*Prob. Code § 8500(a)*; *see § 458B.58*]. Appointment of a successor is made on service of notice on interested persons in the manner provided in *Prob. Code §§ 8110-8113* (notice of petition for administration of estate). For discussion and forms, see Ch. 442, *Probate: Initiating Probate Administration* .

[3] Allegations

The petition alleges the petitioner's standing as an interested person (Paragraph 1) [*see Prob. Code §§ 48, 8500(a)*] and identifies the personal representative and states facts supporting grounds for removal (Paragraphs 2 and 3) [*see, e.g., Prob. Code § 8502*; for discussion, *see* § 458B12[1], [3]]. In addition to the grounds specified in the petition, the personal representative may be removed for failing to attend the hearing or to answer questions under oath concerning the administration of the estate [*Prob. Code § 8500(c)*].

The form includes optional allegations to request:

- Suspension of the personal representative's powers (Paragraph 4) [*see Prob. Code § 8500(b)*].

- Any necessary orders to deal with property pending the hearing on the petition for removal (Paragraph 5) [*see Prob. Code § 8500(b)*].

- Any necessary orders to deal with the estate of the decedent after the removal of the personal representative until appointment of a successor, which may include appointment of a special administrator (Paragraph 6) [*see Prob. Code § 8523*].

In appointing a special administrator, the court will ordinarily give preference to the person entitled to appointment as personal representative, but is also empowered to appoint the public administrator [*see Prob. Code § 8541(b)*]. Thus, the form includes optional language to identify the person entitled to appointment (Paragraph 7) [*see Prob. Code §§ 8441, 8461* (priority of entitlement to appoint as administrator; *see Prob. Code §§ 8420-8425* (appointment of executor)]. If the petitioner is entitled to appointment, he or she may nominate an administrator [*see Prob. Code § 8465* (priority of nominees)]. If appointment of a special administrator is sought and the petitioner wants the special administrator to have more or less powers than such an administrator ordinarily has, or wants an order approving a

particular act or acts, the optional language within Paragraph 5 of the prayer should be included [*see Prob. Code §§ 8540, 8541(c), 8544*]. For further discussion of special administrators and forms relating to their appointment, see Ch. 442, *Probate: Initiating Probate Administration* .

[4] Notice of Hearing on Petition

Notice of the petition is given to the personal representative in the form of a citation and order to show cause issued by the court [*Prob. Code § 8500(b)*]. *Prob. Code §§ 8500-8505* do not require that notice be given of the petition for removal, but notice may be required by other provisions. If anyone has requested special notice of petitions filed in the administration proceeding, at least 15 days' notice will have to be given to them, unless notice has been dispensed with by court order [*see Prob. Code §§ 1250(c)(1),(d), 1252(a)*; *see* Ch. 447, *Probate: Statutory Notice Requirements*]. If appointment of a special administrator is requested, it may be done without notice or on such notice as the court deems reasonable [*see Prob. Code § 8541(a)*]. If appointment of a successor personal representative is requested, the petitioner must comply with the more extensive notice requirements of *Prob. Code §§ 8110-8113* [*see Prob. Code § 8522(b)*; for discussion, *see* Ch. 442, *Probate: Initiating Probate Administration*].

[5] State Statutes

Failure to give added security. *Prob. Code § 8480(c)*

Procedure for removal of personal representative. *Prob. Code § 8500*

Removal for failure to attend hearing or answer questions on petition for removal. *Prob. Code § 8500(c)*

General grounds for removal. *Prob. Code § 8502*

Removal for contempt of court. *Prob. Code § 8505*

Removal for failure to file inventory and appraisal in a timely manner. *Prob. Code § 8804(b)*

Removal for failure to render account when required. *Prob. Code §§ 11051(b), 11052*

[6] Local Rules of Court

Petitions required to be set for hearing as required to have self-addressed, stamped envelope attached. Los Angeles Co. Super. Ct. Rules, Rules 10.31(a) (or attach fax cover sheet; see Los Angeles Co. Super. Ct. Rules, Rule 10.31(b))

[7] Decisions

Nonstatutory grounds for removal of personal representative. *Estate of Guzzetta (1950) 97 Cal. App. 2d 169, 173, 217 P.2d 460*

[8] Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate, §§ 451-459* (10th ed. 2005)

[9] Cross References

For related forms, *see §§ 458B.52 -458B.55*.

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39-458B California Forms of Pleading and Practice--Annotated § 458B.51

§ 458B.51 Petition for Removal of Administrator [Prob. Code § 8503] and Revocation of Letters of Administration [Prob. Code § 8501]--By Person With Higher Priority for Appointment

[1] FORM Petition for Removal of Administrator [Prob. Code § 8503] and Revocation of Letters of Administration [Prob. Code § 8501]--By Person With Higher Priority for Appointment

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR REMOVAL OF ADMINISTRAT-
Estate of _____ [*name*],	)	OR AND REVOCATION OF
Deceased.	)	LETTERS OF
	)	ADMINISTRATION
	)	[*Prob. Code §§ 8501, 8503*]

_____

Petitioner, _____ [*name*], respectfully represents:

1. Petitioner is _____ [*describe relationship to decedent as set forth in Prob. Code § 8503(a), e.g.,* the brother of _____ (*name*), deceased].

2. On _____ [*date*], the court appointed _____ [*name*] as administrator of decedent's estate. On _____ [*date*], _____ [*name*] qualified, took the oath, [*add, if appropriate:* furnished bond as required in the order,] and received letters of administration.

3. _____ [*Name of administrator*] is _____ [*describe relationship to decedent, e.g.,* a nephew of decedent *or* a stranger to decedent, to wit: a creditor].

4. Petitioner is entitled to succeed to part of the estate and is over the age of 18, a resident of California, and otherwise qualified to serve as administrator of the estate.

5. Pursuant to _____ [*cite statutory authority for petitioner's priority, e.g., Section 8461 of the Probate Code*], petitioner has priority over _____ [*name of administrator*] for appointment as administrator of the estate.

[6. Petitioner had neither actual notice of the proceeding in which _____ (*name of administrator*) was appointed nor an opportunity to contest the appointment.]

[7. *Suspension of powers, if desired. See § 458B.50, Paragraph 4.*]

[8. *Necessity for order to deal with property pending hearing, if desired. See § 458B.50, Paragraph 5.*]

[9. *Necessity for appointment of special administrator and/or order to deal with property after removal and before qualification of successor, if desired. See § 458B.50, Paragraph 6.*]

10. A request for special notice _____ [has not been filed herein *or* has been filed herein by _____ (*name(s*)) and notice of the time and place of hearing will be given as required by *Section 1252 of the Probate Code or* has been filed herein and waived by _____ (*name(s*))].

WHEREFORE, petitioner prays:

1. That citation issue to _____ [*name of administrator*] to show cause why he/she/it should not be removed as administrator and his/her/its letters of administration should not be revoked.

[2. For an order suspending the powers of _____ (*name of administrator*) pending the hearing on the petition.]

[3. For an order that _____ (*specify order necessary to deal with the property pending the hearing*).]

[4. For an order that _____ (*specify order necessary to deal with the property between the time of removal and the appointment of a successor*).]

[5. For an order that _____ (*name*) be appointed special administrator (_____ (*if special administrator is to have more or less power than provided for in Prob. Code § 8544 or is to be required to perform particular acts under Prob. Code §§ 8540(b), 8541(c), specify particular power to be conferred or act to be done*)) pending appointment of a successor.]

6. For an order that _____ [*name of administrator*] make an accounting and surrender all property in his/her/its possession belonging to the estate to his/her/its duly appointed and qualified successor.

7. For such other relief as the court deems proper.
Dated: _____.

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 458B.50* .]

CAUTION:
The foregoing petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is a petition for use by a surviving spouse or relative entitled to succeed to all or part the estate to obtain an order removing a previously appointed administrator if the surviving spouse or relative has a higher priority than the incumbent administrator. The form may also be used by the nominee of a surviving spouse or relative with higher priority than the incumbent administrator [*see Prob. Code § 8503(a)*].

This petition should be accompanied by a petition for appointment of a successor who has a higher priority for appointment than the existing administrator [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 8503*; *see also Prob. Code § 8500(a)* (petition for removal as permitted to be combined with petition for appointment of successor personal representative); *see § 458B.58*].

[3] State Statutes

Petition for removal of administrator by person with higher priority. *Prob. Code § 8503*

Combination of petition for removal with petition to appoint successor. *Prob. Code § 8500*

[4] Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, § 455 (10th ed. 2005)

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39-458B California Forms of Pleading and Practice--Annotated § 458B.52

§ 458B.52 Order That Citation Issue [Prob. Code § 8500]

[1] FORM Order That Citation Issue [Prob. Code § 8500]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER
Deceased.	)	[*Prob. Code § 8500*]
	)	

_____

To the clerk:

_____ [*Name of petitioner*] having appeared and having filed written grounds for the removal of _____ [*name of personal representative*] as personal representative:

IT IS ORDERED that citation issue to _____ [*name of personal representative*], requiring that he/she personally appear at _____ [*time*], on _____ [*date*], in [Department _____ (*number*) of] this court to show cause, if any, why he/she/it should not be removed from the position of personal representative and his/her/its letters should not be revoked.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use to prepare a separate order for the judge to sign that directs the clerk to issue a citation to the personal representative requiring that he or she personally appear and show cause why he or she should not be removed from the position of personal representative of the estate, and why the personal representative's letters should not be revoked [*Prob. Code § 8500(b)*]. Local court practice should be consulted as to the form of the order.

For an illustration of a form of citation for use in probate proceedings approved by the Judicial Council, see Ch. 447, *Probate: Statutory Notice Requirements* . This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Service of Citation

The citation must be served on the person cited in the same manner as a summons in a civil action. Except as otherwise provided by statute, it must be served at least five days before its return day [*Prob. Code § 1242*].

[4] Cross References

For a related form, see *§ 458B.50*.

For discussion of the service of summons in civil actions, see Ch. 518, *Service of Summons and Papers*

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39-458B California Forms of Pleading and Practice--Annotated § 458B.53

§ 458B.53 Order Suspending Powers of Personal Representative and Making Further Orders as Necessary to Deal With the Property Pending Hearing on Petition for Removal [Prob. Code §§ 8500, 8502]

[1] FORM Order Suspending Powers of Personal Representative and Making Further Orders as Necessary to Deal With the Property Pending Hearing on Petition for Removal [Prob. Code §§ 8500, 8502]

[*Caption. See § 458B.52.*]

_____ [*Name of petitioner*] has filed herein a verified petition for removal of _____ [*name*] as personal representative of the estate of _____ [*name*], deceased, and suspending the powers of the personal representative pending the hearing on removal.

[The court finds that special notice of the time and place of the hearing was _____ (given to _____ (*name(s)*), as requested *or* requested and waived by _____ (*names(s)*).]

[The court (further) finds that notice of the time and place of the hearing was given as required by _____ (*specify, e.g.,* the court's order prescribing notice of hearing).]

_____ [*Set forth one or more of the following grounds for the court to issue a citation under Prob. Code § 8500(b):* A petition for removal having been filed *or* (The court having reason to believe from the court's own knowledge *or* The court having reason to believe from _____ (*specify the source of the credible information justifying the court's belief, e.g.,* the settlement of an account) that grounds for removal exist], the court hereby suspends the powers of the personal representative as follows:

IT IS ORDERED that, effective immediately, the powers of _____ [*name*], as personal representative of the estate of _____ [*name*], deceased, are hereby suspended pending the hearing on the petition for removal [*if less than all powers are suspended, add,* as follows: _____ (*specify*)].

[IT IS FURTHER ORDERED that, effective immediately, _____ (*set out any additional orders*

necessary to deal with the property pending the hearing on the petition for removal).]
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is an order for use to suspend the personal representative's powers pending a hearing on a petition for the removal of the personal representative [*see Prob. Code § 8500(b)*]. If notice of hearing on the petition to suspend and remove has been given or waived, the court shall so find in its order [*Prob. Code § 1260(b)*].

[3] State Statutes

Finding of giving or waiver of notice as required. *Prob. Code § 1260(b)*.

Appealable orders. *Prob. Code § 7240*

[4] Local Rules of Court

Orders must be complete in themselves. Los Angeles Co. Super. Ct. Rules, Rule 10.42; San Francisco Uniform Local Ct. Rules, Rule 14.27(A)

Orders required to be submitted to Probate Courtroom at least two weeks in advance of scheduled hearing date, and required to note hearing date on face sheet. San Francisco Uniform Local Ct. Rules, Rule 14.6

[5] Cross References

For a related form, see *§ 458B.50*.

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39-458B California Forms of Pleading and Practice--Annotated § 458B.54

§ 458B.54 Answer of Personal Representative to Petition for Removal [Prob. Code §§ 8500, 8502]

[1] FORM Answer of Personal Representative to Petition for Removal [Prob. Code §§ 8500, 8502]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ANSWER OF PERSONAL REPRESENTATIVE
Deceased.	)	[*Prob. Code §§ 8500, 8502*]
	)	

_____

For return and answer to the petition filed for his/her/its removal [and for suspension of his/her/its powers,] and to the citation issued thereon, _____ [*name*], personal representative of the estate of _____ [*name*], deceased, admits, denies, and alleges:

1. [Admits *or* Denies] the allegation of Paragraph _____ [*specify*] of the petition that petitioner is an interested person within the meaning of *Probate Code Section 48*.

2. Admits the allegation of Paragraph _____ [*specify*] of the petition and, in addition, alleges that he/she/it is now, and at all times since being appointed as personal representative, and qualifying therefore, has been, the duly qualified personal representative of the estate of _____ [*name*], deceased.

3. [*Set forth here and in subsequent paragraphs, other general and specific admissions, denials, contravening allegations, and affirmative defenses as appropriate.*]

WHEREFORE, _____ [*name*], the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased, prays for an order and judgment denying and dismissing the petition

and withdrawing the citation [and order suspending his/her/its powers].

_____ [*signature*]

Personal Representative of the

Estate of _____ [*name*],

Deceased

_____ [*signature*]

Attorney for Personal Representative

[*Verification. See § 458B.50.*]

[2] Use of Form

This form is for use by the personal representative to respond to the petition for removal and suspension of powers [*see § 458B.50*] by denying specific allegations in the petition and raising any available affirmative defenses [*see Prob. Code § 8500(c)*].

[3] State Statutes

Answer or demurrer of personal representative to petition for removal. *Prob. Code § 8500(c)*

[4] Cross References

For a related form, see *§ 458B.50*.

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39-458B California Forms of Pleading and Practice--Annotated § 458B.55

§ 458B.55 Order Removing Personal Representative [Prob. Code § 8500]

[1] FORM Order Removing Personal Representative [Prob. Code § 8500]

[*Caption. See § 458B.52.*]

This proceeding for removing _____ [*name*] as the personal representative of the estate of _____ [*name*], deceased, on the petition of _____ [*name*] and on the return and answer of the personal representative came on regularly for hearing on _____ [*date*], before this court, sitting without a jury. Petitioner appeared by counsel _____ [*name*]; the personal representative appeared by counsel _____ [*name*].

[The court finds that special notice of the time and place of the hearing was _____ (given to _____ (*name(s)*), as requested *or* requested and waived by _____ (*names(s)*).]

[The court (further) finds that notice of the time and place of the hearing was given as required by _____ (*specify, e.g.,* the court's order prescribing notice of hearing).]

It appearing to the satisfaction of the court from the evidence presented that the citation was duly served and that cause for removal exists,

IT IS ORDERED that:

1. _____ [*Name*], personal representative, is removed, effective immediately, as the personal representative of the estate of _____ [*name*], deceased.

2. Effective immediately, the letters of the personal representative are revoked.

3. The personal representative file a final account of the estate of the _____ [*name*], deceased, within

_____ [*number*] days, and on settlement of the account, surrender the assets of the estate to _____ [his/her/its duly appointed and qualified successor *or* the duly appointed and qualified special administrator of this estate].

4. Petitioner recover his/her cost from _____ [*name*], taxed at $ _____.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is an order granting a petition for the removal of the personal representative [*Prob. Code § 8500(d)*; *see §§ 458B.50*, *458B.51*]. For a form of order appointing a special administrator, see Ch. 442, *Probate: Initiating Probate Administration* . For an order appointing a successor personal representative that may be combined with this form, see *§ 458B.59*.

[3] State Statutes

Award of costs. *Prob. Code § 1002*

Finding of giving or waiver of notice is required. *Prob. Code § 1260(b)*

Order revoking letters is appealable. *Prob. Code § 7240(a)*

Validity of acts before revocation of personal representative's letters. *Prob. Code § 8525(a)*

[4] Local Rules of Court

Orders must be complete in themselves and set forth all matters actually passed on by court, date of hearing, relief granted, and names of persons and descriptions of property or amounts of money affected. Los Angeles Co. Super. Ct. Rules, Rule 10.42; San Francisco Uniform Local Ct. Rules, Rule 14.27(A)

Orders required to be submitted to Probate Courtroom at least two weeks in advance of scheduled hearing date, and required to note hearing date on face sheet. San Francisco Uniform Local Ct. Rules, Rule 14.6

[5] Cross References

For related forms, see *§§ 458B.50* and *458B.53*.

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39-458B California Forms of Pleading and Practice--Annotated § 458B.56

§ 458B.56 Petition by Personal Representative for Leave to Resign [Prob. Code §§ 8520, 8523, 8525(b)]

[1] FORM Petition by Personal Representative for Leave to Resign [Prob. Code §§ 8520, 8523, 8525(b)]

[*Caption. See § 458B.50.*]

Petitioner, _____ [*name*], respectfully represents:

1. Petitioner is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

2. Petitioner has been serving as personal representative since his/her appointment and qualification on _____ [*date*], amounting to a period of approximately _____ [*number*] _____ [months *or* years].

3. By reason _____ [of urgent and compelling personal business *or specify other reasons*] that has arisen, it is necessary that petitioner resign as the personal representative at the earliest convenience of the court.

4. Petitioner has brought the matter of necessity for his/her resignation and the appointment of another representative of the estate of the deceased, in his/her place, to the attention of the following named _____ [devisees *or* heirs] of the deceased: _____ [*list names and addresses*]. Petitioner understands that application for appointment of another as representative of the estate of the deceased is being made _____ [*either* contemporaneously herewith *or* forthwith].

[*EITHER*]

5. To apprise the court of the current status of the estate of the deceased, petitioner is filing contemporaneously herewith a current account and report of his/her acts as personal representative and on granting of leave to petitioner to resign,

petitioner will render forthwith a final account and report of his/her acts as the personal representative and will pay over, transfer, and deliver the assets of the estate in his/her possession to the person directed by the court.

[*or*]

5. Petitioner is filing contemporaneously herewith a final account and report of his/her acts as personal representative.

[*CONTINUE*]

6. A request for special notice has _____ [not been filed herein *or* been filed herein by _____ (*name*) and notice of the time and place of hearing on this petition will be given as required by law].

WHEREFORE, petitioner prays for an order granting leave to petitioner to resign as personal representative and for such other order as the court deems proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 458B.50.*]

[2] Use of Form

This form is for use to obtain a court order permitting the personal representative to resign. The personal representative may resign his or her appointment at any time. The court does not have power to accept or reject the resignation [*see Estate of Grafmiller (1938) 27 Cal. App. 2d 253, 257-258, 81 P.2d 181* (construing the first sentence of former Prob. Code § 520, which, according to the Law Revision Comm'n Comments to the repeal of that section, is continued without substantive change in *Prob. Code §§ 8520* and *8525(b)*]. However, the court retains jurisdiction and the resignation is not effective to terminate the continuing liability of the personal representative and that of his or her sureties until the personal representative settles his or her accounts and delivers all the property to the successor or other person appointed by the court to receive it. The personal representative must render an account of the administration within the time that the court directs [*see Prob. Code §§ 8520, 8523, 8525(b)*].

[3] State Statutes

Vacancy in office of personal representative occurring on resignation of personal representative. *Prob. Code § 8520*

Interim protection of estate following vacancy in office of personal representative and before appointment of successor. *Prob. Code § 8523*

Continuing liability of personal representative whose office is vacant. *Prob. Code § 8525(b)*

[4] Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, § 460 (10th ed. 2005)

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39-458B California Forms of Pleading and Practice--Annotated § 458B.57

§ 458B.57 Order Granting Personal Representative Leave to Resign [Prob. Code §§ 8520, 8523, 8525(b)]

[1] FORM Order Granting Personal Representative Leave to Resign [Prob. Code §§ 8520, 8523, 8525(b)]

[*Caption. See § 458B.52.*]

The petition of _____ [*name*], personal representative of the estate of _____ [*name*], deceased, for leave to resign as personal representative, came on regularly for hearing by the court on this date. Petitioner appeared by counsel _____ [*name; if appearance by new applicant for appointment, so specify*].

The court finds from proof made to the satisfaction of the court:

1. Due notice of the time and place of the hearing has been given as required by law and ordered by the court, [and special notice thereof has been regularly given to _____ (*names*) in accordance with request filed].

2. All the facts alleged in the petition are true, and it is proper to allow the personal representative to resign as requested.

IT IS ORDERED that

1. Leave is granted to _____ [*name*] to resign as personal representative of the estate of _____ [*name*], deceased, and his/her resignation is accepted, effective on the settlement of his/her accounts.

2. _____ [*Name*] render a final account and report of his/her acts as the personal representative _____ [forthwith *or* within a period of _____ (*number*) days], and on settlement and allowance of the account, pay over, transfer, and deliver the assets of the estate of _____ [*name*], deceased, in his/her possession, to _____ [*name*] as directed by the court.

Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is an order permitting the personal representative to resign. The appointment of another personal representative should be made in a separate order.

[3] Local Rules of Court

Orders as required to be complete in themselves and set forth all matters actually passed on by court, date of hearing, relief granted, and names of persons and descriptions of property or amounts of money affected. Los Angeles Co. Super. Ct. Rules, Rule 10.42; San Francisco Uniform Local Ct. Rules, Rule 14.27(A)

Orders must be submitted to Probate Courtroom at least two weeks in advance of scheduled hearing date, and required to note hearing date on face sheet. San Francisco Uniform Local Ct. Rules, Rule 14.6

[4] Cross References

For a related form, see *§ 458B.56*.

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Chapter 458B PROBATE: SUSPENSION, REMOVAL, AND RESIGNATION
PART IV. FORMS

39-458B California Forms of Pleading and Practice--Annotated § 458B.58

§ 458B.58 Petition for Appointment of Successor Personal Representative [Prob. Code § 8522] and Issuance of Letters [Prob. Code §§ 8400(a), 8405]

[1] FORM Petition for Appointment of Successor Personal Representative [Prob. Code § 8522] and Issuance of Letters [Prob. Code §§ 8400(a), 8405]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR
	)	APPOINTMENT OF
Estate of _____ [*name*],	)	SUCCESSOR PERSONAL REPRESENTATIVE
also known as _____ [*name*],	)	AND ISSUANCE OF LETTERS
Deceased.	)	_____
	)	[TESTAMENTARY *or* OF ADMINISTRATION
	)	WITH WILL ANNEXED *or* OF
		ADMINISTRATION]
		[*Prob. Code § 8522*]

_____

Petitioner _____ [*name*] respectfully represents:

1. A vacancy has occurred in the office of personal representative of the estate of _____ [*name*], deceased, due to the _____ [death *or* resignation *or* removal from office] of _____ [*name*] on _____ [*date*] [*add, if applicable,* by order of this court dated _____]. There are no other personal representatives of the estate of _____ [*name*], deceased.

[*EITHER*]

2. The will of decedent, at page _____ [*number*], Paragraph _____ [*identify*] expressly waives bond for petitioner.

[*or*]

2. All of the beneficiaries of decedent under the decedent's will have expressly waived the filing of a bond.

[*or*]

2. Bond for petitioner should be fixed at $ _____ if executed by an authorized corporate surety or in twice that sum if executed by individual sureties. [A deposit receipt for assets having a value of $ _____ will be filed with the court prior to the hearing on the petition.]

[*CONTINUE*]

3. A request for special notice has _____ [not been filed herein *or* been filed herein by _____ (*name*) and notice of the time and place of hearing on this petition will be given as required by law].

[*EITHER*]

4. Petitioner is [one of the persons] nominated in the will to act as _____ [executor *or* coexecutor] in the event that _____ [*specify condition of succession stated in will, e.g.,* _____ (*name*) who is nominated first in the will to act as executor, should for any reason fail to qualify or cease to act as executor]. Petitioner consents to act as _____ [executor *or* coexecutor]. Petitioner is _____ [over the age of majority *or* a corporation organized and existing under the laws of the State of California, with its principal place of business in _____ [*city*], _____ County, California, and is authorized under the laws of the State of California to act as _____ [executor *or* coexecutor].

[*or*]

4. No person is nominated in the will to act as executor in the event that _____ [*specify condition of succession stated in will, e.g.,* _____ (*name*) who is nominated first in the will to act as executor, should for any reason fail to qualify or cease to act as executor].

[*or*]

4. _____ [*Name*] is nominated in the will to act as executor in the event that _____ [*specify condition of succession stated in will, e.g.,* _____ (*name*) who is nominated first in the will to act as executor, should for any reason fail to qualify or cease to act as executor], but is _____ [dead *or* incompetent].

[*or*]

4. _____ [*Name*] is nominated in the will to act as executor in the event that _____ [*specify condition of succession stated in will, e.g.,* _____ (*name*) who is nominated first in the will to act as executor, should for any reason fail to qualify or cease to act as executor], but has declined to act and has executed a declination and renunciation. The declination and renunciation has been filed.

[*AND, if seeking authority under Independent Administration of Estates Act in testate estate*]

5. Decedent's will does not preclude administration of the estate under the In dependent Administration of Estates Act.

[*CONTINUE, if appointing administrator rather than executor, with EITHER*]

6. Petitioner is over the age of majority, is a resident of the United States, is in all other respects qualified to act as administrator, and consents to act as such.

[*or*]

6. Petitioner is a corporation organized and existing under the laws of the State of California, has its principal place of business in _____ [*city*], _____ County, California, is authorized under the laws of the State of California to act as administrator, and consents to act as such.

[*CONTINUE*]

WHEREFORE, petitioner prays that:

1. Petitioner, _____ [*name*], be appointed _____ [executor *or* administrator with will annexed].

2. Bond be _____ [not required of petitioner *or* fixed at $_____ if executed by an authorized corporate surety or in twice that sum if executed by individual sureties].

[3. _____ (Full *or* Limited) authority be granted to petitioner to administer the estate without court supervision under the Independent Administration of Estates Act.]

4. Letters _____ [testamentary *or* of administration with the will annexed] issue to petitioner on qualification.

5. Such other orders as the court may deem proper.

_____ [*date*]

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 458B.50.*]

CAUTION:
This petition must be verified [*see Prob. Code § 1021(a)(1)*]. Verification renders a petition admissible as evidence in an uncontested proceeding [*see Prob. Code § 1022*].

[2] Use of Form

This form is a petition for use to apply for appointment as a successor personal representative and for issuance of letters when there are no other personal representatives. The court makes the appointment on petition and service of notice on interested persons in the manner provided in *Prob. Code §§ 8110-8113* [*see Prob. Code § 8522*]. Successor appointments are subject to the same priority as for an original appointment of a personal representative [*Prob. Code § 8522*; *see Prob. Code §§ 8420-8469*; for discussion, *see* Ch. 442, *Probate: Initiating Probate Administration*].

This form also may be modified for use in situations in which a vacancy occurs in the office of fewer than all personal representatives. In such cases, the remaining personal representatives must complete the administration of the estate unless the will provides otherwise, or unless the court exercises its discretion to enter a contrary order. On the filing of a petition, the court may order the clerk to issue appropriate amended letters to the remaining personal representatives [*Prob. Code § 8521*].

For discussion of requirements governing appointments of personal representatives, bonds, and letters, see Ch. 442, *Probate: Initiating Probate Administration* .

[3] State Statutes

Appointment of administrator with will annexed. *Prob. Code § 8440*

Testator's power to designate executor. *Prob. Code § 8422*

Vacancy in office of personal representative by resignation, death, or removal from office. *Prob. Code § 8520*

Interim protection of estate after vacancy occurs in office of personal representative. *Prob. Code § 8523*

Powers and duties of successor personal representative. *Prob. Code § 8524*

Effect of vacancy in office of personal representative. *Prob. Code § 8525*

Petition for authority under Independent Administration of Estates Act. *Prob. Code § 10450(a)*

[4] Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, §§ 462, 463 (10th ed. 2005)

[5] Cross References

For related forms, see *§§ 458B.50, 458B.51*.

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39-458B California Forms of Pleading and Practice--Annotated § 458B.59

§ 458B.59 Order Appointing Successor Personal Representative and Issuing Letters [Prob. Code §§ 8422, 8440, 8460, 8522]

[1] FORM Order Appointing Successor Personal Representative and Issuing Letters [Prob. Code §§ 8422, 8440, 8460, 8522]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER APPOINTING
	)	SUCCESSOR PERSONAL REPRESENTATIVE
Estate of _____ [*name*],	)	AND ISSUING LETTERS
also known as _____ [*name*],	)	_____
Deceased.	)	[TESTAMENTARY *or* OF ADMINISTRATION
	)	WITH WILL ANNEXED *or* OF
	)	ADMINISTRATION]
		[*Prob. Code § 8522*]

_____

This proceeding to appoint _____ [*name*] as the successor personal representative of the estate of _____ [*name*], deceased, and to issue letters _____ [testamentary *or* of administration with the will annexed *or* of administration], on the petition of _____ [*name*], came on regularly for hearing before this court, sitting without a jury, on _____ [*date*]. Petitioner appeared by counsel _____ [*name*] [, and _____ (specify other parties, if any, who appeared) also appeared].

[The court finds that special notice of the time and place of the hearing was _____ (given to _____ (*name(s)*), as requested *or* requested and waived by _____ (*names(s)*)).]

[The court (further) finds that notice of the time and place of the hearing was given as required by _____ (*specify, e.g.,* the court's order prescribing notice of hearing).]

On proof made to the satisfaction of the court, the court finds that the facts alleged in the petition are true, and grants the petition as follows:

IT IS ORDERED that:

_____ [*Name*] is appointed _____ [executor *or* administrator with will annexed *or* administrator], [with _____ (full *or* limited) authority to administer the estate under the Independent Administration of Estates Act] and letters _____ [testamentary *or* of administration with will annexed *or* of administration] shall be issued to _____ [*name*] on his/her taking the oath required by law _____ [, bond having been waived and no bond being necessary *or* and giving bond in the sum of $ _____ if executed by an authorized corporate surety or in twice that sum if executed by individual sureties].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is an order for use when appointing a successor personal representative to take the place of a personal representative who has resigned or died, or who has been removed from office [*see Prob. Code §§ 8520-8522*].

[3] Cross References

For a related form, see *§ 458B.58*.

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Chapter 458C PROBATE: PRELIMINARY DISTRIBUTION AND PARTIAL ALLOWANCE OF COMPENSATION

39-458C California Forms of Pleading and Practice--Annotated 458C.syn

§ 458C.syn Synopsis to Chapter 458C: PROBATE: PRELIMINARY DISTRIBUTION AND PARTIAL ALLOWANCE OF COMPENSATION

§ 458C.01 Scope of Chapter

§§ 458C.02-458C.09 [Reserved]

§ 458C.10 Governing Statutes

§ 458C.11 "Personal Representative," "General Personal Representative," and "Interested Person" Defined

§ 458C.12 Petition for Preliminary Distribution

[1] Availability in General

[2] Distribution to Estate of Nonresident Decedent

[3] Time for Filing

[4] Notice of Hearing

§ 458C.13 Objection to Petition

[1] By Interested Persons

[2] By Personal Representative

[3] Manner of Objecting

[4] Grounds for Objection

[a] In General

[b] Challenging Provisions of Will

[c] Challenging Petitioner's Right to Property

[d] Character of Property

[e] Equitable Defenses

[f] Insufficiency of Petition

[g] Lack of Sufficient Cash to Pay Expenses, Claims, and Devises

§ 458C.14 Effect of Previous Determination of Heirship

§ 458C.15 Effect of Pending Will Contest on Preliminary Distribution

§ 458C.16 Conditions Precedent to Ordering Preliminary Distribution

[1] Statutory Requirements

[2] Loss to Creditors

[3] Injury to Estate or Interested Person

[4] Additional Determinations

§ 458C.17 Order

[1] In General

[2] Contribution in Case of Abatement

[3] Payment of Debts on Settlement of Account

[4] Writ of Mandate to Compel Distribution

[5] Modification of Order

[6] Conclusiveness of Order

§ 458C.18 Bond

[1] When Necessary

[2] When Discretionary

[3] Giving and Filing

[4] Conditions of Bond

[5] Stay of Order Pending Filing

§ 458C.19 Costs

§ 458C.20 Distribution

§ 458C.21 Petition for Preliminary Distribution of Independently Administered Estate

§ 458C.22 Partial Allowance of Personal Representative's Compensation

[1] In General

[2] Notice Requirement Regarding Personal Representative's Compensation

[3] Amount of Personal Representative's Compensation Allowed

[4] Special Administrator's Compensation

§ 458C.23 Partial Allowance of Attorney's Compensation

[1] In General

[2] Notice Requirement Regarding Attorney's Compensation

[3] Amount of Attorney's Compensation Allowed

§§ 458C.24-458C.39 [Reserved]

§ 458C.40 State Statutes

[1] Account

[2] Appeal

[3] Cash

[4] Compensation

[a] Attorney

[b] Personal Representative

[5] Hearings Generally

[6] Heirship

[7] Notice

[a] In General

[b] Petition for Partial Allowance of Attorney's Compensation

[c] Petition for Partial Allowance of Personal Representative's Compensation

[d] Petition for Preliminary Distribution

[8] Objections and Responses

[9] Orders in General

[10] Parties

[11] Petitions

[12] Preliminary Distribution

[a] In General

[b] Bond

[c] Costs

[d] Order

[13] Procedure in General

[14] Verification

§ 458C.41 California Rules of Court

§ 458C.42 Decisions

[1] Compensation

[2] Preliminary Distribution

[a] Bond

[b] Creditors' Rights

[c] Duty of Personal Representative

[d] Hearing

[i] Effect of Pending Petition to Determine Heirship

[ii] Effect of Pending Will Contest

[iii] Evidence

[iv] Jury Trial

[v] Questions of Fact

[vi] Scope of Inquiry

[e] Jurisdiction

[f] Nature of Proceeding

[g] Notice

[h] Objections

[i] Grounds

[ii] Manner of Making Objections

[iii] Persons Entitled to Object

[i] Order

[i] Conclusiveness

[ii] Conditions Precedent

[iii] Form of Order

[iv] Mandatory Nature of Order

[v] Modification of Order

[vi] Scope of Order

[j] Property Subject to Distribution

[k] Public Policy

§§ 458C.43-458C.59 [Reserved]

§ 458C.60 Petition for Preliminary Distribution of Decedent's Estate [Prob. Code § 11600]

[1] FORM

[2] Use of Form

[3] Signing and Verification

[4] Who May File Petition

[5] When Petition May Be Filed

[6] Account

[7] Contents of Petition

[a] State Law

[b] Local Court Rules

[8] Allegations

[a] Identity of Petitioner (Paragraph 1)

[b] Residence and Date of Death (Paragraph 2)

[c] Whether Decedent Died Testate or Intestate (Paragraphs 3)

[d] Inventory and Appraisal (Paragraph 4)

[e] Heirs and Devisees (Paragraph 5)

[f] Issuance of Letters (Paragraph 6)

[g] Notice to Creditors and Claims (Paragraphs 7-9)

[h] Federal Estate Tax (Paragraphs 10)

[i] Property on Hand (Paragraph 11)

[j] Proposed Distribution (Paragraph 12)

[i] Description of Distributees

[ii] Description of Property

[k] Value of Remaining Estate (Paragraph 13)

[l] Condition Preventing Closing of Estate (Paragraph 14)

[m] Bond (Paragraphs 15)

[n] Prior Distribution (Paragraph 16)

[9] Assignment or Transfer of Interest by Beneficiary

[10] Partial Allowance of Commission or Fees

[11] State Statutes

[12] Local Rules of Court

[a] Alameda County

[b] Los Angeles County

[c] Orange County

[d] City & County of San Francisco

[e] Santa Clara County

[13] Decisions

[a] Petition

[b] Petitioner

§ 458C.61 Order for Preliminary Distribution of Decedent's Estate [Prob. Code §§ 11621, 11622]

[1] FORM

[2] Use of Form

[3] Contents of Order

[a] In General

[b] Drafting

[c] Findings

[i] Sufficiency

[ii] Notice of Hearing

[d] Order

[4] State Statutes

[5] Local Court Rules

[a] Alameda County

[b] Los Angeles County

[c] Orange County

[d] City & County of San Francisco

[e] Santa Clara County

[6] Decisions

[7] Cross References

§ 458C.62 Petition for Partial Allowance of Compensation for Ordinary and Extraordinary Services [Prob. Code §§ 10801, 10811, 10830(a)(1), (2) (Proceeding Commenced on or After July 1, 1991); Former Prob. Code §§ 901, 902, 904, 910, 911 (Proceeding Commenced Before July 1, 1991)]

[1] FORM

[2] Use of Form

[3] Time for Filing Petition

[4] Who May File Petition

[5] Showing Required

[6] Extra Allowances for Extraordinary Services

[7] Form and Contents of Petition

[8] Verification of Petition

[9] Combined Petition

[10] Limitations on Request

[a] Ordinary Fees and Commissions

[b] Extraordinary Services

[11] Notice of Hearing

[12] State Statutes

[13] Local Court Rules

[a] Alameda County

[b] Los Angeles County

[c] Orange County

[d] City and County of San Francisco

[e] Santa Clara County

[14] Decisions

[a] Generally

[b] Attorney's Fees

[c] Constitutionality of Statutes

[d] Extraordinary Services

[e] Final Account

[f] Nature of Allowance on Account

[g] Personal Representative's Commissions

[15] Cross References

§ 458C.63 Order for Partial Allowance of Compensation for Ordinary and Extraordinary Services [Prob. Code §§ 10801, 10811, 10830(a)(1), (2) (Proceeding Commenced on or After July 1, 1991); Former Prob. Code §§ 901, 902, 904, 910, 911 (Proceeding Commenced Before July 1, 1991)]

[1] FORM

[2] Use of Form

[3] Cross References

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Volume 39: Probate: Claims Against the Estate thru Probate: Discharge-Chs. 454-459

Chapter 458C PROBATE: PRELIMINARY DISTRIBUTION AND PARTIAL ALLOWANCE OF COMPENSATION

PART I. SCOPE

39-458C California Forms of Pleading and Practice--Annotated § 458C.01

§ 458C.01 Scope of Chapter

This chapter describes procedures for use in obtaining a distribution of property from a decedent's estate before the estate is ready to be closed. Interim accounts are mentioned in this chapter because they are often required to be on file when an order for preliminary distribution is made and may actually be combined with a petition for preliminary distribution. For a detailed discussion of accounts together with a combined form for an account and petition for final distribution, see Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation* . Preliminary distribution of an estate administered under the Independent Administration of Estates Act (*Prob. Code § 10400 et seq.*) is discussed in *§ 458C.21* and in the comments to § 458C.60. For a detailed discussion of the Independent Administration of Estates Act, see Ch. 445, *Probate: Independent Administration of Estates* .

Because a partial allowance on the statutory compensation to which the personal representative and his or her attorney are entitled is frequently sought with preliminary distribution, that topic is also discussed in this chapter. Compensation, including compensation for extraordinary service, is discussed in detail in Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation* , and appropriate forms are included in that chapter.

This chapter contains a petition for preliminary distribution [*see § 458C.60*], an order directing preliminary distribution [*see 458C.61*], a petition for partial allowance on the statutory compensation for ordinary services of an executor or administrator or attorney and compensation for extraordinary services [*see § 458C.62*], and an order granting the petition [*see § 458C.63*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesCompensation

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PART I. SCOPE

39-458C California Forms of Pleading and Practice--Annotated §§ 458C.02-458C.09

[Reserved]

§§ 458C.02[Reserved]

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PART II. LEGAL BACKGROUND

39-458C California Forms of Pleading and Practice--Annotated § 458C.10

§ 458C.10 Governing Statutes

Preliminary distribution of estate property is governed by *Prob. Code §§ 11600-11624*. Distribution of property to a sister-state personal representative is governed by *Prob. Code §§ 12540-12542*.

The Probate Code was repealed and a new Probate Code enacted by Stats. 1990, ch. 79, §§ 13 and 14. Notwithstanding their repeal, former Prob. Code §§ 900-904 as they existed on June 30, 1991, govern the partial allowance of the personal representative's statutory commission in proceedings commenced before July 1, 1991, and former Prob. Code §§ 900, 901, 910, and 911, as they existed on June 30, 1991, govern the partial allowance of the attorney's statutory fee in proceedings commenced before July 1, 1991 [*Prob. Code §§ 900(a)*]. Compensation for extraordinary services in such proceedings is governed by former Prob. Code §§ 902 (personal representative) and 902, 910 (attorney). That is, the applicable law in effect before July 1, 1991, governing compensation of the personal representative and his or her attorney continues to apply in any proceeding for administration of a decedent's estate commenced before July 1, 1991 [*Prob. Code § 10850(b)*].

In proceedings commenced on or after July 1, 1991, compensation of the personal representative is governed by *Prob. Code §§ 10800-10805* and compensation of the attorney for the personal representative is governed by *Prob. Code §§ 10804* and *10810*. Compensation for extraordinary services is governed by *Prob. Code §§ 10801* (personal representative) and 10810 (attorney). Partial allowance of the personal representative's compensation is governed by *Prob. Code § 10830(a)(1)*, and that of the attorney by *Prob. Code § 10830(a)(2)*. *Prob. Code §§ 10800-10850* do not apply in any proceeding for administration of a decedent's estate commenced before July 1, 1991 [*Prob. Code § 10850(a)*].

Accounts filed under the Probate Code are governed by *Prob. Code §§ 1060-1064*, which became operative on July 1, 1997 [*Prob. Code § 1060.5*]. Sanctions for failure to account are governed by *Prob. Code §§ 11050-11052*.

Cal. Rules of Ct., Rule 7.250 governs the listings needed in a petition for preliminary distribution when the petitioner is acting under the Independent Administration of Estates Act.

A wide variety of local court rules also govern probate practice. To ensure complete compliance, the attorney should consult the applicable rules.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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Chapter 458C PROBATE: PRELIMINARY DISTRIBUTION AND PARTIAL ALLOWANCE OF COMPENSATION
PART II. LEGAL BACKGROUND

39-458C California Forms of Pleading and Practice--Annotated § 458C.11

§ 458C.11 "Personal Representative," "General Personal Representative," and "Interested Person" Defined

"Personal representative" means executor, administrator, administrator with the will annexed, special administrator, successor personal representative, public administrator acting under *Prob. Code § 7660*, or a person who performs substantially the same function under the law of another jurisdiction governing the person's status [*Prob. Code § 58(a)*]. The term "general personal representative" excludes a special administrator unless the special administrator has the powers, duties, and obligations of a general personal representative under *Prob. Code § 8545* [*Prob. Code § 58(b)*].

"Interested person" includes any of the following [*Prob. Code § 48(a)*]:

- An heir, devisee (defined in *Prob. Code § 34*; *see also Prob. Code § 32*), child (defined in *Prob. Code § 26*), spouse, creditor, beneficiary (defined in *Prob. Code § 24*), and any other person having a property right in or claim against a trust estate or the estate of a decedent that may be affected by the proceeding;

- Any person having priority for appointment as personal representative; and

- A fiduciary representing an interested person.

The meaning of "interested person" as it relates to particular persons may vary from time to time and is to be determined according to the particular purposes of, and matter involved in, the proceeding in which the question arises [*Prob. Code § 48(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesAppointmentEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in

ProbateGeneral Overview

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PART II. LEGAL BACKGROUND

39-458C California Forms of Pleading and Practice--Annotated § 458C.12

§ 458C.12 Petition for Preliminary Distribution

[1] Availability in General

The personal representative or an interested person may petition the court for an order for preliminary distribution of the decedent's estate to the persons entitled to it [*Prob. Code § 11600*]. Preliminary distribution of an estate administered without court supervision under the Independent Administration of Estates Act (*Prob. Code § 10400 et seq.*) is discussed in *§ 458C.21*.

A petition for partial allowance of compensation [*see Prob. Code § 10830(a)(1)* (personal representative), (2) (attorney)] if the proceeding was commenced on or after July 1, 1991, or of commission and fees [*see* former Prob. Code §§ 904 (personal representative), 911(attorney)] if the proceeding was commenced before July 1, 1991 [*see Prob. Code §§ 900(a), 10850*], as well as a first or interim account [*see Prob. Code §§ 1060-1064*], may be combined with the petition for preliminary distribution.

The interest of an assignee of a "legatee" (now devisee), entitling the assignee to petition for preliminary distribution of the "legacy" (now devise) to himself or herself, cannot be defeated by the fact that the legatee was indebted to the estate, and the amount of the debt cannot be set off against the amount of the legacy, when the cause of action on the debt is barred by the statute of limitation [*see Estate of Clifford (1936) 16 Cal. App. 2d 123, 125-126, 60 P.2d 302* (dictum), citing *Estate of Cates (1925) 195 Cal. 319, 232 P. 972* , and *In re Estate of Smith (1895) 108 Cal. 115, 40 P. 1037]* .

A successor in interest need not be entitled to all attributes of ownership in the property in question but, rather, may file a petition for preliminary distribution even though his or her interest amounts to less than title, that is, a right merely to possession [*Estate of Baldwin (1943) 21 Cal. 2d 586, 591-592, 134 P.2d 259* (receiver is entitled to possession of legacy only, entitled to file petition; construing a former statutory provision, *now see Prob. Code § 11600*)].

Case law has held that the following persons also may file a petition for preliminary distribution:

- A special administrator having general powers pursuant to Prob. Code § 465 (repealed, *now see*

Prob. Code § 8545) [*see Estate of Buchman (1955) 132 Cal. App. 2d 81, 105, 281 P.2d 608* (implication from ruling that court has jurisdiction to determine petition filed by distributee, when executor was thereafter removed and replaced with special administrator having general powers)]. This is now confirmed by statute. *Prob. Code § 11600* authorizes the filing of a petition for preliminary distribution by the "personal representative," which is defined in *Prob. Code § 58(a)* as including a special administrator. *Prob. Code § 11620* authorizes the filing of the petition when two months have elapsed after letters are first issued to a "general personal representative"; that term is defined in *Prob. Code § 58(b)* as excluding a special administrator unless the special administrator has the powers, duties, and obligations of a general personal representative under *Prob. Code § 8545*.

- A beneficiary of a testamentary trust (distribution to be made to the *trustee*) [*Estate of McGirl (1932) 125 Cal. App. 310, 313, 13 P.2d 746* (dictum), citing *In re Mackay (1895) 107 Cal. 303, 307, 40 P. 558]* . This also appears now to be confirmed by statute. *Prob. Code § 11600* authorizes the filing of the petition by an interested person and *Prob. Code § 48(a)(1)* defines "interested person" as including a "beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding." In addition, "beneficiary" is defined as a person to whom a donative transfer of property is made or that person's successor in interest and, as it relates to a trust, means a person who has any present or future interest, vested or contingent [*Prob. Code § 24(c)*].

[2] Distribution to Estate of Nonresident Decedent

If a person dies while domiciled in a sister state, the court in an ancillary administration proceeding [*see Prob. Code §§ 8000 et seq., 12520(b), 12500-12530*] may make an order for preliminary or final distribution of all or part of the decedent's personal property in this state to the sister-state personal representative if distribution is in the best interest of the estate or interested persons [*Prob. Code § 12540(a)*; final distribution is discussed in Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation*].

The order is made as provided in, and is subject to, *Prob. Code §§ 11600-11642* (relating to preliminary and final distribution of the decedent's estate) [*Prob. Code § 12540(b)*]. If necessary to make distribution, real property in the nondomiciliary decedent's estate may be sold, and the court may order the proceeds to be distributed to the sister state personal representative (defined in *Prob. Code § 12507*). The sale is made in the same manner as other sales of a decedent's real property [*Prob. Code § 12541*]. If the nondomiciliary decedent's estate in the sister state where the decedent was domiciled is insolvent, distribution may be made only to the sister state personal representative and not to the beneficiaries [*Prob. Code § 12542*].

[3] Time for Filing

A petition for preliminary distribution may be filed at any time after two months have elapsed since the date letters (defined in *Prob. Code § 52(a)*) were first issued to a general personal representative as defined in *Prob. Code § 58(b)* (discussed in *§ 458C.11*) [*Prob. Code § 11620*]. The petition must be signed and verified (although, unless expressly provided to the contrary, verification of a document constitutes signature of that document) [*Prob. Code §§ 1020, 1021*].

[4] Notice of Hearing

When the petition is filed, the court clerk sets the matter for hearing [*Prob. Code § 1041*]. The petitioner must cause notice of the hearing to be given at least 15 days before the time set for the hearing as provided in *Prob. Code § 1220* [*Prob. Code § 11601*]. In addition, the same notice must be given to all of the following persons:

- Each person listed in *Prob. Code § 1220* [*Prob. Code § 11601(a)*];

- Each known heir (defined in *Prob. Code § 44*) and each known devisee (defined in *Prob. Code § 34*) whose interest in the estate would be affected by the petition for distribution [*Prob. Code § 11601(b), (c)*; *see Prob. Code §§ 1206* (heirs or devisees to whom notice must be given), 1207 (exceptions); *see also* Ch. 447, *Probate: Statutory Notice Requirements*];

- The Attorney General, at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the petition [*Prob. Code § 11601(d)*]; and

- The Controller, if property is to be distributed to the state because there is no known beneficiary or if property is to be distributed to a beneficiary whose whereabouts is unknown [*Prob. Code § 11601(e)* (a copy of the latest account filed with the court must be served on the Controller with the notice)].

Unless notice has been dispensed with by court order, notice must also be given to all persons who have requested special notice pursuant to *Prob. Code § 1250* [*Prob. Code §§ 1220(a)(2)(B), (c), 1252(a)*].

For further discussion and forms for giving notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458C.13 Objection to Petition

[1] By Interested Persons

Any interested person may oppose the petition [*Prob. Code § 11602*; *see Prob. Code § 48* (discussed in *§ 458C.11*)].

Several cases decided prior to the original enactment of Prob. Code § 48 [Stats. 1983, ch. 842, effective January 1, 1985] discussed whether a party is sufficiently interested in the matter to entitle him or her to object to an application for preliminary distribution. It appears that the holdings in these cases are consistent with *Prob. Code § 48(a)(1)* by requiring that an objector have at least an interest in the property sought to be distributed that would be impaired by the distribution before he or she is entitled to resist an application for preliminary distribution. For example, a person is "interested in the estate" if he or she has at least a direct contingent interest in the subject in question [*see Estate of Sandy (1964) 230 Cal. App. 2d 309, 314, 40 Cal. Rptr. 837* (reviewing case law; collateral heirs of decedent's deceased wife not sufficiently interested in decedent's estate to object to preliminary distribution)]. As a general rule, a person who has an interest sufficient to entitle him or her to contest decedent's purported will has an interest sufficient to entitle him or her to resist an application for preliminary distribution [*Estate of Molera (1972) 23 Cal. App. 3d 993, 999, 100 Cal. Rptr. 696]* . However, if a contest is pending when the preliminary distribution is sought, the court may look to the asserted grounds for contest when determining whether the contestant has a sufficient interest to entitle him or her to resist the application for preliminary distribution. If it appears that the requested distribution would not impair the rights of the contestant, then the court may find that the contestant is not sufficiently interested to resist the application for the preliminary distribution [*see Estate of Molera (1972) 23 Cal. App. 3d 993, 999-1002, 100 Cal. Rptr. 696* (concluding contest did not affect portion of will bequeathing property sought to be preliminarily distributed)].

[2] By Personal Representative

The personal representative may oppose the petition [*Prob. Code § 11602*; *see also Estate of Baldwin (1943) 21 Cal. 2d 586, 593, 134 P.2d 259* (construing former legislation)]. If the objecting personal representative is also a devisee or an heir, then he or she should be careful to make clear whether he or she resists as the personal representative or as a devisee or an heir. If resistance is made in both capacities, then two papers setting out objections should be filed [*see Estate of Murphy (1904) 145 Cal. 464, 465-468, 78 P. 960* (order for preliminary distribution held conclusive against

executrix as defaulting legatee (now devisee), when she resisted in official capacity only)].

[3] Manner of Objecting

An interested person (*see § 458C.11*) may appear and respond or object to the petition [*see Prob. Code §§ 1040, 1043*]. The objection is required to be in writing and verified; it may be filed at or before the hearing on the petition [*see Prob. Code §§ 1020, 1021*; *but see Prob. Code § 1043(b), (c)* (authorizing oral response or objection at hearing and allowing court to hear and determine issue or grant continuance to allow response or objection to be made in writing, but providing that request for continuance does not constitute a response or an objection)].

The court may continue a matter to allow a written objection or response to be made. If the court does so, however, and the responding or objecting party fails to serve and file a timely objection or response, the court may deem the objections or responses waived [*Cal. Rules of Ct., Rule 7.801*].

[4] Grounds for Objection

[a] In General

There is no statutory statement of the grounds on which objection to an application for preliminary distribution may be based. However, certain conditions are required to exist before a preliminary distribution can be ordered [*see Prob. Code §§ 11603(a), 11621, 11622* (discussed in *§ 458C.16*)]. The absence of any one of those conditions would be a ground for objection to the distribution.

An objection may not be made in the nature of a plea in abatement. The only purpose of an objection to an application for preliminary distribution is to rebut the evidence of the applicant that the required conditions exist [*see In re Painter (1897) 115 Cal. 635, 639, 640, 47 P. 700* (construing and applying former Code Civ. Proc. § 1661, a predecessor to *Prob. Code §§ 11603(a), 11621,* and *11622*)].

[b] Challenging Provisions of Will

An objection to the preliminary distribution on the ground that the provisions in the will on which petitioner bases his or her right to the property had been revoked by decedent cannot be raised in a proceeding for preliminary distribution. Such an objection is in the nature of a will contest which is subject to the procedural requirements and 120-day period of limitation provided for in former Prob. Code § 380 (*now see Prob. Code § 8270(a)*) [*see* Ch. 444, *Probate: Will Contests*]. The objection, therefore, cannot be raised because it would impugn the prior order admitting the will [*see In re Estate of Parsons (1925) 196 Cal. 294, 299-300, 237 P. 744]* .

[c] Challenging Petitioner's Right to Property

It is not a ground for objection that the petitioner's asserted right to receive property in a preliminary distribution is invalid or nonexistent if the source of the asserted right is regular on its face. The court does not have jurisdiction, in a proceeding for preliminary distribution, to determine a controversy involving the asserted right, other than to determine whether it is in conformity with the terms of the will or the laws of succession. Thus, for example, the court cannot question the validity of an order, regular on its face, entitling the petitioner to possession of the property sought in the preliminary distribution proceeding [*see Estate of Baldwin (1943) 21 Cal. 2d 586, 592-593, 134 P.2d 259* (order appointing receiver, the petitioner, and entitling him to possession of legacy is not subject to collateral attack by objecting legatee in proceeding for preliminary distribution)].

However, if an objector files a complaint seeking adjudication of petitioner's asserted right to receive the property sought to be distributed, then that action may be pursued simultaneously with, and in the same court that hears, the proceeding for preliminary distribution, if all parties and the court agree to do it [*Estate of Arms (1921) 186 Cal. 554,*

557-558, 199 P. 1053 (complaint by widow, also objector to preliminary distribution, asserting property sought to be distributed was community property, not decedent's separate property)].

[d] Character of Property

The character of the property sought to be distributed, that is, whether it is separate or community property, is an issue that may be raised in the form of a ground for objection to the petition [*see Estate of Raphael (1949) 91 Cal. App. 2d 931, 935, 206 P.2d 391* (objection raised)]. The character of the property may be relevant to both who is entitled to receive a distribution and what property or share of the estate that person is entitled to receive.

[e] Equitable Defenses

Equitable defenses, such as estoppel, may be raised in opposition to a petition for preliminary distribution [*see Estate of Glenn (1908) 153 Cal. 77, 79-81, 94 P. 230* (petitioner held estopped to claim share of estate preliminarily, when result would have been injury to other interested persons who made agreement with petitioner dependent on his not receiving preliminary distribution)].

[f] Insufficiency of Petition

If the petition for preliminary distribution is insufficient, the defect must be brought to the attention of the probate court. It cannot be raised for the first time in the appellate court [*Estate of Morelli (1951) 102 Cal. App. 2d 39, 43, 226 P.2d 716]* .

The personal representative cannot object that the petition is insufficient if it is worded in statutory language and alleges the ultimate facts that the court is required to find in order to direct a preliminary distribution. The personal representative is presumed to have greater knowledge of the value and character of the property, the amount of cash on hand, and the amount of indebtedness than any other person and, therefore, cannot object if the petition omits to allege these matters in any detail [*Estate of Murphy (1904) 145 Cal. 464, 465-468, 78 P. 960]* .

[g] Lack of Sufficient Cash to Pay Expenses, Claims, and Devises

It is a valid ground for objection that there is not enough cash in the estate to pay the expenses of administration, the claims presented and allowed, and the "legacies" (now devises) payable under the will, and that after the estate assets have been converted to cash it will be necessary to distribute prorated portions of the legacies instead of the full amounts [*In re Estate of Parsons (1925) 196 Cal. 294, 300, 237 P. 744]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWill ContestsStandingGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 458C.14 Effect of Previous Determination of Heirship

If a determination of heirship has already been made pursuant to former Prob. Code §§ 1080-1082 (*now see Prob. Code §§ 11700-11705*), it appears that the issue is foreclosed in a later proceeding for preliminary distribution, at least as to those persons covered by the earlier order determining heirship [*see Estate of Simmons (1966) 64 Cal. 2d 217, 220, 49 Cal. Rptr. 369, 411 P.2d 97* (dictum reporting case law)].

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§ 458C.15 Effect of Pending Will Contest on Preliminary Distribution

If a will contest is pending when the court undertakes to hear the petition for preliminary distribution, and if the petitioner's right to receive a share of the estate may be defeated by the decision in the will contest, then the court must not order a preliminary distribution until the contest has been decided and the right of the petitioner to receive a share of the estate has thereby been affirmed [*see Estate of Hill (1928) 94 Cal. App. 113, 116-118, 270 P. 708* (order for preliminary distribution reversed with direction to trial court to suspend distribution until contest decided and petitioner's right to receive share of estate affirmed)].

However, the mere fact that the will may still be open to contest does not necessarily preclude a partial distribution. If the conditions of the governing statutes (former Prob. Code §§ 1000 and 1001 (*now see Prob. Code §§ 11603(a), 11621*, and *11622*)) are met, the court, by virtue of the mandate of those statutes, which implement the public policy of California favoring the earliest possible distribution of estates, must make an order of preliminary distribution [*Estate of Molera (1972) 23 Cal. App. 3d 993, 999-1000, 100 Cal. Rptr. 696* (affirming decrees of preliminary distribution on ground that successful contest of portion of will under attack would have no affect on right of parties seeking preliminary distribution to receive their bequests)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-458C California Forms of Pleading and Practice--Annotated § 458C.16

§ 458C.16 Conditions Precedent to Ordering Preliminary Distribution

[1] Statutory Requirements

To order a preliminary distribution of the decedent's estate, the court must determine that the requirements for distribution are satisfied [*see Prob. Code §§ 11603(a), 11620*]. Thus, the court must determine that:

- When the petition was filed, at least two months had elapsed from the time letters were first issued to a general personal representative [*Prob. Code § 11620*];

- The beneficiary is entitled to the share of the decedent's estate to be distributed to him or her [*Prob. Code § 11620*];

- Distribution may be made without loss to creditors [*Prob. Code § 11621(a)*];

- Distribution may be made without injury to the estate [*Prob. Code § 11621(a)*]; and

- Distribution may be made without injury to any interested person [*Prob. Code § 11621(a)*].

If a preliminary distribution is to be ordered less than four months after letters were first issued to a general personal representative, the court must require a bond from the distributee in the amount of the distribution [*Prob. Code § 11622(a), (c)*, discussed in *§ 458C.18[1]*].

[2] Loss to Creditors

One of the statutory requirements for preliminary distribution is that the distribution can be made without loss to creditors [*Prob. Code § 11621(a)*]. Under a prior statute (former Prob. Code § 1001), it was held that, although the debts of the estate may, in the aggregate, amount to a large sum, the creditors cannot prevent a partial distribution if enough assets remain in the estate to render them secure [*Estate of Morelli (1951) 102 Cal. App. 2d 39, 42, 226 P.2d 716]* . It would appear that this rule would continue to apply to a distribution ordered under *Prob. Code § 11621(a)*.

Moreover, it would appear that if a bond is posted [*see* discussion in *§ 458C.18*] in the amount of the distribution, the creditors would be adequately secured insofar as the preliminary distribution is concerned.

[3] Injury to Estate or Interested Person

Preliminary distribution of income producing property, which would deprive the personal representative of the opportunity to continue receiving income for the benefit of the estate over as long a period as possible before final distribution became necessary, is not injurious to the estate or persons interested in it if the estate would not be rendered insolvent by the distribution. "Injury to the estate or any person interested therein," as that phrase was used in former Prob. Code § 1001 [*now see Prob. Code § 11621(a)*] (substituting the term, "injury to the estate or any interested person"), is not equivalent to depriving the estate of income which is not needed for the payment of creditors' claims [*see Estate of Brickell (1935) 4 Cal. App. 2d 54, 57-58, 40 P.2d 579]* .

When considering whether a preliminary distribution can be made without injury to any person interested in the estate, the court may properly insist that enough property or cash be left in the estate to pay the personal representative's commission and the attorney's fee [*see Estate of Straus (1904) 144 Cal. 553, 556, 77 P. 1122]* .

[4] Additional Determinations

In addition to the statutory requirements discussed in [1]-[3], *above*, the court on a petition for preliminary distribution is called on to determine whether distribution should then be made. A showing that distribution cannot be then made is a complete answer to the application [*Estate of Molera (1972) 23 Cal. App. 3d 993, 1000, 100 Cal. Rptr. 696]* .

Moreover, before a court can make a preliminary distribution, it must know who the parties entitled to the estate are, and, in such a proceeding, the court may determine who the heirs are and to what proportion of the estate each is entitled [*Estate of Molera (1972) 23 Cal. App. 3d 993, 1000, 100 Cal. Rptr. 696* ; *Estate of Stephenson (1944) 65 Cal. App. 2d 120, 123-124, 150 P.2d 222* ; proceedings to determine heirship (*Prob. Code §§ 11700-11705*) are discussed in Ch. 458, *Probate: Determination of Heirship*]. In making these determinations, the court will rely on the same considerations as bear on those issues in a proceeding for final distribution [*Estate of Stephenson (1944) 65 Cal. App. 2d 120, 124, 150 P.2d 222* ; *see* Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation*].

Other relevant questions may present themselves at the hearing, among which are such questions of law as the construction of a will [*Estate of Molera (1972) 23 Cal. App. 3d 993, 1000, 100 Cal. Rptr. 696]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWillsInterpretationGeneral OverviewEstate, Gift & Trust LawWillsInterpretationRules of ConstructionGeneral Overview

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§ 458C.17 Order

[1] In General

If it appears at the hearing that the conditions prescribed in *Prob. Code §§ 11603(a)* and *11621* exist, then the court must order the personal representative to deliver the property to the person entitled to it [*Prob. Code § 11603(a)*; *see Prob. Code §§ 12* (defining "shall" as mandatory), 11621(a); *see also Estate of Stephenson (1944) 65 Cal. App. 2d 120, 123, 150 P.2d 222* (involving a predecessor statute)]. For a form of order of preliminary distribution, see *§ 458C.61*.

[2] Contribution in Case of Abatement

In any case in which there is abatement when a distribution is made during estate administration, the court must fix the amount each distributee must contribute for abatement, and the personal representative must reduce the distributee's share by that amount [*Prob. Code § 21405(a)*]. If a specific gift must be abated, the beneficiary of the gift may satisfy the contribution for abatement out of the beneficiary's property other than the property that is the subject of the specific gift [*Prob. Code § 21405(b)*]. The foregoing applies only to gifts made on or after July 1, 1989 (that is, to gifts by will of a decedent who dies on or after that date (*see Prob. Code § 21406(b)*), and prior law applies to gifts made before that date [*Prob. Code § 21406(a)*].

[3] Payment of Debts on Settlement of Account

On the settlement of any account of the personal representative after the expiration of four months after letters are first issued to a general personal representative, the court must order payment of debts, as the circumstances of the estate permit. If property in the estate is insufficient to pay all the debts, the order must specify the amount to be paid to each creditor [*Prob. Code § 11422(b)*]. For further discussion and forms regarding payment of debts of the estate, see Ch. 454, *Probate: Claims Against the Estate* .

Because distribution can be ordered only if it appears at the hearing that it can be made without loss to creditors [*see § 458.16[2]*], it appears unlikely that *Prob. Code § 11422(b)* applies to an order settling an interim account that

accompanies a petition for partial distribution. However, counsel should be aware that the statute refers to "any account," and thus might be applicable if an interim account is included with the petition or is filed pursuant to a court order [*see Prob. Code § 10950(a)*] as a condition to ordering a preliminary distribution [*see* Comments to § 458C.60].

[4] Writ of Mandate to Compel Distribution

If the court refuses to act on a petition for preliminary distribution, then the court may be compelled by writ of mandate to hear the petition and make an order on the merits [*see Lissner v. Superior Court (1944) 23 Cal. 2d 711, 717-718, 146 P.2d 232]* . *Lissner* involved a petition by a receiver, appointed to take charge of the parties' community property and the husband's separate property in a divorce action, which he filed in the probate court for ratable distribution of a monthly bequest to the husband in his mother's will. The Supreme Court pointed out that, although former Prob. Code § 1240 (now *Prob. Code § 7240*) authorized an appeal from "an order refusing to make an order distributing property," a writ of mandate may issue to compel the probate court to pass on a petition for ratable distribution, a matter properly before the court for decision, when, in declining to act, the court neither granted nor denied the petition, but refused to act on the petition on the ground it lacked subject matter jurisdiction [*Lissner v. Superior Court of Los Angeles County (1944) 23 Cal. 2d 711, 146 P.2d 232]* .

[5] Modification of Order

If facts come to light after the order for preliminary distribution has been made, and it appears that the conditions precedent specified in former Prob. Code § 1001 (*now see Prob. Code § 11621(a)*) did not exist, or no longer exist, then the petitioner may apply to the court for an appropriate modification of the order [*see Estate of Johnson (1933) 218 Cal. 501, 504, 23 P.2d 1012* (personal representative, the petitioner, as entitled to apply for modification of order if facts reveal existence of liability for payment of inheritance tax and order made no provision therefor)].

[6] Conclusiveness of Order

When the order becomes final, it binds and is conclusive as to the rights of all interested persons [*Prob. Code § 11605*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWillsFailure of BequestsAbatementsFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionClassificationInheritances

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§ 458C.18 Bond

[1] When Necessary

If the court orders distribution before four months have elapsed after letters are first issued to a general personal representative (defined in *Prob. Code § 58(b)*), the court must require a bond in the amount of the distribution [*Prob. Code §§ 12, 11622(a), (c)*].

[2] When Discretionary

If the court orders distribution after four months have elapsed since letters were first issued to a general personal representative (defined in *Prob. Code § 58(b)*), the court may require a bond in such amount as the court orders [*Prob. Code § 11622(b)*].

[3] Giving and Filing

Any bond required by the court must be given by the distributee and filed with the court [*Prob. Code §§ 12, 11622(c)*].

[4] Conditions of Bond

The bond must be conditioned on payment of the distributee's proper share of the debts of the estate, not exceeding the amount distributed [*Prob. Code §§ 12, 11622(c)*].

[5] Stay of Order Pending Filing

The order for distribution must be stayed until any bond required by the court is filed [*Prob. Code §§ 12, 11621(b)*].

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§ 458C.19 Costs

The costs of a proceeding for preliminary distribution of a decedent's estate are paid by the distributee or the estate in proportions determined by the court [*Prob. Code § 11624*].

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§ 458C.20 Distribution

Distribution in compliance with the court order entitles the personal representative to a full discharge with respect to the property included in the order [*Prob. Code § 11753(a)*].

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§ 458C.21 Petition for Preliminary Distribution of Independently Administered Estate

Notwithstanding *Prob. Code § 11601*, relating to notice of hearings on petitions for distribution generally, the personal representative to whom authority has been granted to administer an estate without court supervision under the Independent Administration of Estates Act (*Prob. Code § 10400 et seq.*), may petition the court for an order for preliminary distribution on notice as provided in *Prob. Code § 1220*, except that the court may not dispense with notice as provided in *Prob. Code § 1220(c)* unless the time for filing creditor claims has expired [*Prob. Code § 11623(a)(1)*].

The aggregate of all property distributed, however, must not exceed 50 percent of the net value of the estate [*Prob. Code § 11623(a)(2)*]. "Net value of the estate" means the excess of the value of the property in the estate, as determined by all inventories and appraisals on file with the court, over the total amount of all creditor claims and of all liens and encumbrances recorded or known to the personal representative not included in a creditor claim, excluding any estate tax lien occasioned by the decedent's death [*Prob. Code § 11623(a)(2)*].

In the petition for preliminary distribution, the petitioner is required to list and describe all actions taken without prior court approval under the Independent Administration of Estates Act if notice of the proposed action was required [*Cal. Rules of Ct., Rule 7.250(a)*]. The description of the action is required to include the following [*Cal. Rules of Ct., Rule 7.250(a)*]:

- The nature of the action.
- When the action was taken.
- A statement of when and to whom notice was given.
- Whether notice was waived, and if so, by whom.
- Whether any objections were received.

An action taken under the Independent Administration of Estates Act that was properly listed and described in a prior accounting, report, or petition for distribution, and that was approved by the court, need not be listed and described in a subsequent account, report, or petition for distribution [*Cal. Rules of Ct., Rule 7.250(b)*].

In addition to a *Prob. Code § 11601* petition, which is subject to general notice of hearing requirements [*see Prob. Code § 11623(a)(1)*; *see also Prob. Code § 1220*], the personal representative of an independently administered estate has the power to make preliminary distributions of certain property upon giving a notice of proposed action [*see Prob. Code §§ 10510, 10520, 10580 et seq.*; for discussion of the powers exercisable after giving notice of proposed action, *see* Ch. 445, *Probate: Independent Administration of Estates*]. However, this type of preliminary distribution may be made only if the time for filing claims has expired and it appears that distribution may be made without loss to creditors or injury to the estate or any interested person [*see Prob. Code § 10520*].

For discussion and a petition for preliminary distribution that may be adapted for use in petitioning for preliminary distribution of an estate under *Prob. Code § 11623*, *see § 458C.60*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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PART II. LEGAL BACKGROUND

39-458C California Forms of Pleading and Practice--Annotated § 458C.22

§ 458C.22 Partial Allowance of Personal Representative's Compensation

[1] In General

At any time after four months from the issuance of the letters in any proceeding for administration of a decedent's estate commenced on or after July 1, 1991, the personal representative, or any personal representative if there are two or more, may file a petition requesting an allowance on his or her compensation for ordinary services [*Prob. Code § 10830(a)(1)*; *see also Prob. Code § 10832*]. If the proceeding was commenced before July 1, 1991, the personal representative may petition the court for an allowance on account of his or her commission under former Prob. Code § 904 [*see Prob. Code § 10850*].

If the administration continues over a lengthy period of time, successive petitions for partial allowances may be filed [*see Estate of Hilton (1996) 44 Cal. App. 4th 890, 914, 52 Cal. Rptr. 2d 491]* . Any compensation granted before the final account is merely a partial allowance toward the full fee allowable for ordinary for ordinary services. When the full amount due the personal representative is determined on the final account, any partial allowances previously made will be deducted from the amount allowed [*see Estate of Heck (1958) 160 Cal. App.2d 162, 165-166, 324 P.2d 733]* .

It is important to distinguish between a petition for a partial allowance on account of compensation for ordinary services and a petition for compensation for extraordinary services [for extraordinary compensation, *see Prob. Code § 10801*; *see also* discussion of extraordinary compensation in Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation*]. A petition for a partial allowance for ordinary services is a request for an advance against the statutory compensation provided for ordinary services in the administration of the estate [*see Prob. Code § 10800*]. At the time the petition is filed, some of the ordinary services may have been performed and others may yet remain to be performed. A petition for compensation for extraordinary services is a request for compensation for extraordinary services already performed. Extraordinary services are not covered by the statutory compensation and rest in the sound discretion of the court [*see Estate of Hilton (1996) 44 Cal. App. 4th 890, 918-919, 52 Cal. Rptr. 2d 491]* . Both types of petitions may be filed before the final account, and both types of compensation may be the subject of successive petitions [*see Estate of Hilton (1996) 44 Cal. App. 4th 890, 52 Cal. Rptr. 2d 491]* . For calculation of the compensation, see Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation* .

[2] Notice Requirement Regarding Personal Representative's Compensation

When the petition is filed, the court clerk sets the matter for hearing [*Prob. Code § 1041*]. The petitioner must cause notice of the hearing to be given at least 15 days before the time set for the hearing as provided in *Prob. Code § 1220* [*Prob. Code § 10830(b)* (proceeding for estate administration commenced on or after July 1, 1991); former Prob. Code § 904(b) (proceeding commenced before July 1, 1991); *see Prob. Code § 10850*].

In addition, the same notice must be given to all of the following persons:

- Each person listed in *Prob. Code § 1220* [*Prob. Code § 10830(b)(1)* (proceeding commenced on or after July 1, 1991)];

- Each known heir (defined in *Prob. Code § 44*) and each known devisee (defined in *Prob. Code § 34*) whose interest in the estate would be affected by the payment of the compensation [*Prob. Code § 10830(b)(2), (3)* (proceeding commenced on or after July 1, 1991)] or commission [former Prob. Code § 904(c)(1), (2) (proceeding commenced before July 1, 1991); *see Prob. Code §§ 900(a), 10850*; *see also Prob. Code §§ 1206* (heirs or devisees to whom notice must be given), 1207 (exceptions); for further discussion, *see* Ch. 447, *Probate: Statutory Notice Requirements*]; and

- The Attorney General, at the office of the Attorney General in Sacramento (proceeding commenced on or after July 1, 1991) or the State of California (proceeding commenced before July 1, 1991), if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the petition [*Prob. Code § 10830(b)*; former Prob. Code § 904(c)(3); *see Prob. Code § 10850*].

Unless notice has been dispensed with by court order, notice must also be given to all persons who have requested special notice pursuant to *Prob. Code § 1250* [*Prob. Code §§ 1220(a)(2)(B), (c), 1252(a)*].

For further discussion, see *§ 458C.12[4]* and Ch. 447, *Probate: Statutory Notice Requirements* .

[3] Amount of Personal Representative's Compensation Allowed

The court is authorized by *Prob. Code § 10830(c)* and former Prob. Code § 904 to allow such portion of the compensation or commission for ordinary services as it deems proper for services rendered up to the time of the hearing. In deciding whether to make a partial allowance, the court is not required to fix partial compensation on the basis of the statutory schedules in *Prob. Code § 10800* and former Prob. Code § 901 [*Estate of Heck (1958) 160 Cal. App.2d 162, 165-166, 324 P.2d 733]* . Nor is it required to fix a precise value on the services performed to date [*Estate of Hilton (1996) 44 Cal. App. 4th 890, 914, 52 Cal. Rptr. 2d 491]* . It may simply estimate the total ordinary services that will be required in the administration of the estate and endeavor to make certain that the services performed to date are a large enough proportion of the total services to justify the partial award [*Estate of Hilton (1996) 44 Cal. App. 4th 890, 914, 52 Cal. Rptr. 2d 491]* .

An order granting a partial allowance is appealable [*Prob. Code § 7240(l)*]. Once the time for appeal has expired, however, a partial allowance is not subject to downward modification [*Estate of Hilton (1996) 44 Cal. App. 4th 890, 909-910, 52 Cal. Rptr. 2d 491]* . The personal representative is entitled to know the amount of the ordinary compensation that has been earned to date; and, after a partial allowance has become final, the court has no power to require that any part of the fees paid pursuant to the allowance be refunded [*Estate of Hilton (1996) 44 Cal. App. 4th 890, 909-910, 52 Cal. Rptr. 2d 491]* .

[4] Special Administrator's Compensation

The special administrator's compensation will not be allowed until the close of administration unless the general personal representative joins in the petition for allowance of the special administrator's compensation or the court in its discretion so allows [*Prob. Code § 8547(b)*; for further discussion, *see* Ch. 458D *Probate: Accounts, Final Distribution, and Compensation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesCompensationEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistribution

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§ 458C.23 Partial Allowance of Attorney's Compensation

[1] In General

At any time after four months from the issuance of letters, the personal representative or the attorney for the personal representative may petition for an allowance on the attorney's compensation for ordinary services [*Prob. Code § 10830(a)(2)* (proceeding commenced on or after July 1, 1991)]; or any attorney who has rendered services to the personal representative may apply to the court for an allowance on the attorney's fee for ordinary services [former Prob. Code § 911 (proceeding commenced before July 1, 1991); *see Prob. Code §§ 900(a), 10850*]. A petition for a partial allowance on account of the attorney's compensation, like a petition for a partial allowance on account of the personal representative's compensation, is addressed to the sound discretion of the court [*see § 458C.22[1]*]. Partial allowances are not determined by the statutory schedules in *Prob. Code § 10800* and former Prob. Code § 901 [*Estate of Heck (1958) 160 Cal. App.2d 162, 165-166, 324 P.2d 733]* , nor do they require that the court precisely value the services performed to date [*Estate of Hilton (1996) 44 Cal. App. 4th 890, 914, 52 Cal. Rptr. 2d 491]* . An estimate of the total services that will be required in the administration of the estate will suffice, provided the court makes sure that the services performed to date are substantial enough to justify the partial award [*Estate of Hilton (1996) 44 Cal. App. 4th 890, 914, 52 Cal. Rptr. 2d 491]* . Once a partial award has become final, it may not later be reduced [*Estate of Hilton (1996) 44 Cal. App. 4th 890, 909-910, 52 Cal. Rptr. 2d 491* ; *see § 458C.22[1]*]. Regarding calculation of the fee, see Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation* .

[2] Notice Requirement Regarding Attorney's Compensation

When the petition is filed, the court clerk sets the matter for hearing [*Prob. Code § 1041*]. The petitioner must cause notice of the hearing to be given at least 15 days before the time set for the hearing as provided in *Prob. Code § 1220* [*Prob. Code § 10830(b)* (proceeding for estate administration commenced on or after July 1, 1991); former Prob. Code § 911(b) (proceeding commenced before July 1, 1991); *see Prob. Code § 10850*].

In addition, the same notice must be given to all of the following persons:

- Each person listed in *Prob. Code § 1220* [*Prob. Code § 10830(b)(1)* (proceeding commenced on or

after July 1, 1991)];

- Each known heir (defined in *Prob. Code § 44*) and each known devisee (defined in *Prob. Code § 34*) whose interest in the estate would be affected by the payment of the compensation [*Prob. Code § 10830(b)(2), (3)* (proceeding commenced on or after July 1, 1991)] or commission [former Prob. Code § 911(c)(1), (2) (proceeding commenced before July 1, 1991); *see Prob. Code §§ 900(a), 10850*; *see also Prob. Code §§ 1206* (heirs or devisees to whom notice must be given), 1207 (exceptions); for further discussion, see Ch. 447, *Probate: Statutory Notice Requirements*]; and

- The Attorney General, at the office of the Attorney General in Sacramento (proceeding commenced on or after July 1, 1991) or the State of California (proceeding commenced before July 1, 1991), if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the petition [*Prob. Code § 10830(b)*; former Prob. Code § 911(c)(3); *see Prob. Code § 10850*].

Unless notice has been dispensed with by court order, notice must also be given to all persons who have requested special notice pursuant to *Prob. Code § 1250* [*Prob. Code §§ 1220(a)(2)(B), (c), 1252(a)*].

For further discussion, see *§ 458C.12[4]* and Ch. 447, *Probate: Statutory Notice Requirements* .

[3] Amount of Attorney's Compensation Allowed

In determining what portion of the compensation or fee should properly be allowed for services rendered up to the time of the hearing, the court is not required to fix that partial compensation on the basis of the provisions of *Prob. Code §§ 10800* and *10810* or former Prob. Code § 901, which establish a graduated scale by which the total compensation or fee is to be calculated [*Estate of Heck (1958) 160 Cal. App. 2d 162, 165-166, 324 P.2d 733]* . If partial allowance of the compensation or commission is given to the personal representative under *Prob. Code § 10830(a)(2)* or former Prob. Code § 904, the court may also give the same amount as a partial allowance of the attorney's fee under former Prob. Code § 911 [*see* *Estate of Heck (1958) 160 Cal. App. 2d 162, 164, 324 P.2d 733* (award of fees under former Prob. Code § 904)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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[Reserved]

§§ 458C.24[Reserved]

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§ 458C.40 State Statutes

[1] Account

Signing and verification of account. *Prob. Code §§ 1020, 1021*

Contents of account. *Prob. Code § 10900*

When account is required. *Prob. Code §§ 10950-10954*

Settlement of account. *Prob. Code §§ 11000-11005*

Compelling account. *Prob. Code §§ 11050, 11051*

[2] Appeal

Order distributing or refusing to distribute property as appealable. *Prob. Code § 7240(n)*; *see also Prob. Code § 17207* (appealable orders regarding trusts)

[3] Cash

Personal representative's duty to keep cash invested. *Prob. Code § 9652*

[4] Compensation

[a] Attorney

Compensation of attorney for personal representative. *Prob. Code §§ 10800, 10810, 10830(a)(2)* (proceeding commenced on or after July 1, 1991); former Prob. Code §§ 910, 911 (proceeding commenced before July 1, 1991 [*see Prob. Code § 10850*])

Compensation to attorney for ordinary and extraordinary services, including extraordinary services of paralegals. *Prob. Code § 10810* (proceeding commenced on or after July 1, 1991); former Prob. Code § 910 (proceeding commenced before July 1, 1991 [*see Prob. Code § 10850*])

Personal representative or attorney for personal representative is entitled to petition for allowance on attorney's compensation at any time after four months from issuance of letters. *Prob. Code § 10830(a)(2)* (proceeding commenced on or after July 1, 1991)

Notice requirements for petition for allowance on attorney's compensation. *Prob. Code § 10830(b)* (proceeding commenced on or after July 1, 1991); former Prob. Code § 911(b), (c) (proceeding commenced before July 1, 1991 [*see Prob. Code § 10850*])

Court is permitted, on hearing petition for allowance on attorney's compensation, to make order allowing portion of compensation on account of services rendered up to that time as court deems proper, and order is required to authorize personal representative to charge against estate amount allowed. *Prob. Code § 10830(c)* (proceeding commenced on or after July 1, 1991)

Attorney who has rendered services to personal representative is entitled to apply to court, any time after four months from the issuance of letters, for allowance on fee. Former Prob. Code § 911(a) (proceeding commenced before July 1, 1991 [*see Prob. Code § 10850*])

Court is required, on hearing application for allowance on fee, to order personal representative to pay attorney out of estate such compensation, on account of services rendered up to that time, as court deems proper; payment must be made forthwith. Former Prob. Code § 911(a) (proceeding commenced before July 1, 1991 [*see Prob. Code § 10850*])

[b] Personal Representative

Compensation of public administrator. *Prob. Code §§ 7604, 7623, 7666*

Compensation of special administrator. *Prob. Code § 8547*

Compensation of personal representative. *Prob. Code §§ 10800-10805, 10830(a)(1)* (proceeding commenced on or after July 1, 1991); former Prob. Code §§ 900-904 (proceeding commenced before July 1, 1991 [*see Prob. Code § 10850*])

Compensation to personal representative for extraordinary services. *Prob. Code § 10801(a)* (proceeding commenced on or after July 1, 1991); former Prob. Code § 902 (proceeding commenced before July 1, 1991 [*see Prob. Code § 10850*])

Retention and payment of tax experts. *Prob. Code § 10801(b)* (proceedings commenced on or after July 1, 1991); former Prob. Code § 902 (proceedings commenced before July 1, 1991)

Personal representative is entitled to petition for allowance on his or her compensation at any time after four months from issuance of letters. *Prob. Code § 10830(a)(1)* (proceeding commenced on or after July 1, 1991)

Notice requirements for petition for allowance on personal representative's compensation. *Prob. Code § 10830(b)*

(proceeding commenced on or after July 1, 1991); former Prob. Code § 904(b), (c) (proceeding commenced before July 1, 1991 [*see Prob. Code § 10850*])

Court is permitted, on hearing petition for allowance on compensation to personal representative, to make order allowing portion of compensation on account of services rendered up to that time as court deems proper, and order as required to authorize personal representative to charge against estate amount allowed. *Prob. Code § 10830(c)* (proceeding commenced on or after July 1, 1991)

Personal representative is entitled to apply to court, any time after four months from the issuance of letters, for allowance on commission. Former Prob. Code § 904(a) (proceeding commenced before July 1, 1991 [*see Prob. Code § 10850*])

Court is required, on hearing application for allowance on commission, to allow such portion of commission, for services rendered up to that time, as court deems proper; portion allowed is thereupon chargeable against estate. Former Prob. Code § 904(a) (proceeding commenced before July 1, 1991 [*see Prob. Code § 10850*])

[5] Hearings Generally

Setting matters for hearing. *Prob. Code § 1041*

Hearing must be on notice unless statute that provides for hearing dispenses with notice. *Prob. Code § 1042*

Continuance or postponement of hearing. *Prob. Code § 1045*

Matters to be heard and determined. *Prob. Code § 1046*

[6] Heirship

Determination of heirship. *Prob. Code §§ 11700-11705*

[7] Notice

[a] In General

General notice provisions. *Prob. Code §§ 1200-1221*

Proof of giving notice. *Prob. Code §§ 1260-1265*

[b] Petition for Partial Allowance of Attorney's Compensation

Notice of hearing on petition for partial allowance of attorney's compensation in proceeding commenced on or after July 1, 1991. *Prob. Code § 10830(b)*

Notice of hearing on petition for partial allowance of attorney's fees commenced before July 1, 1991. Former Prob. Code § 911(b), (c) [*see Prob. Code § 10850*].

[c] Petition for Partial Allowance of Personal Representative's Compensation

Notice of hearing on petition for partial allowance of personal representative's compensation in proceeding commenced on or after July 1, 1991. *Prob. Code § 10830(b)*

Notice of hearing on petition for partial allowance of commission to personal representative commenced before July 1, 1991. Former Prob. Code § 911(b), (c) [*see Prob. Code § 10850*].

[d] Petition for Preliminary Distribution

Notice of hearing on petition for preliminary distribution. *Prob. Code § 11601*

[8] Objections and Responses

Form and signature. *Prob. Code §§ 1020, 1023*

Verification. *Prob. Code §§ 1021, 1023*

Objection or response to petition by interested person. *Prob. Code § 1043*

[9] Orders in General

Contents. *Prob. Code § 1047*

Entry and filing. *Prob. Code § 1048*

Recordation when real property affected. *Prob. Code § 7263*

Delivery of order to county treasurer. *Prob. Code § 11853*

[10] Parties

Petitioner or other party affirming is plaintiff and party objecting or responding is defendant. *Prob. Code § 1044*

[11] Petitions

Petition for partial allowance of personal representative's or attorney's compensation in proceeding commenced on or after July 1, 1991. *Prob. Code § 10830(a)*

Petition for preliminary distribution of decedent's estate to persons entitled to it. *Prob. Code § 11600*

Petition for partial allowance of personal representative's commission in proceeding commenced before July 1, 1991. Former Prob. Code § 904 [*see Prob. Code § 10850*].

Petition for partial allowance of attorney's fees in proceeding commenced before July 1, 1991. Former Prob. Code § 911 [*see Prob. Code § 10850*].

[12] Preliminary Distribution

[a] In General

Personal representative or interested person is authorized to petition court for order for preliminary distribution of estate to persons entitled to it. *Prob. Code § 11600*

Preliminary distribution of decedent's estate. *Prob. Code §§ 11600-11624*

Delivery by personal representative in accordance with order for preliminary distribution fully discharges personal representative in relation to all property embraced in order. *Prob. Code § 11753(a)*

[b] Bond

Bond requirement if court orders distribution before four months have elapsed after letters were first issued to general personal representative. *Prob. Code § 11622(a)*

Authority of court to order bond if distribution is ordered after four months have elapsed after letters are first issued to general personal representative. *Prob. Code § 11622(b)*

Any bond as given by distributee; terms of bond; filing. *Prob. Code § 11622(c)*

[c] Costs

Unless otherwise provided by Probate Code or rules adopted by Judicial Council, either superior court or court of appeal has discretion to order payment of costs by any party or out of estate assets. *Prob. Code § 1002*

Costs of proceeding for preliminary distribution is to be paid by distributee or estate in proportions determined by court. *Prob. Code § 11624*

[d] Order

On determination that requirements for distribution are satisfied, court is required to order distribution of estate, or such portion as court directs, to person entitled to it. *Prob. Code § 11603(a)*

Contents of order. *Prob. Code § 11603(b)*

Procedure if whereabouts of beneficiary named in order is unknown. *Prob. Code § 11603(c)*

Procedure if distribution is to be made to beneficiary's transferee or any person other than beneficiary under agreement or request of beneficiary. *Prob. Code § 11604*

Order, on becoming final, is binding and conclusive on rights of all interested persons. *Prob. Code § 11605*

If it appears at hearing on petition for preliminary distribution that preliminary distribution may be made without loss to creditors or injury to estate or any interested person, court is required to order distribution. *Prob. Code § 11621(a)*

Order for preliminary distribution is stayed until any bond required by court is filed. *Prob. Code § 11621(b)*

Procedure when authority is granted to administer estate under Independent Administration of Estates Act (*Prob. Code §§ 10400-10592*). *Prob. Code § 11623*

[13] Procedure in General

Applicability of rules of practice applicable to civil actions in proceedings under Probate Code. *Prob. Code § 1000*

[14] Verification

Verification of petition, report, plan, or account and of objection or response to petition, report, plan, or account. *Prob. Code § 1021(a)*

Who may verify. *Prob. Code § 1021(b)*

Signing and verification when party is absent from county or otherwise unable to verify. *Prob. Code § 1023*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesCompensationEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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§ 458C.41 California Rules of Court

Listing required for petition for preliminary distribution when acting under Independent Administration of Estates Act.
Cal. Rules of Ct., Rule 7.250

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39-458C California Forms of Pleading and Practice--Annotated § 458C.42

§ 458C.42 Decisions

[1] Compensation

Rules governing compensation for attorney services for decedents' estates do not arise from contract but are founded on statutory enactment; compensation awarded for extraordinary services requires exercise of judicial discretion to determine what amount is just and reasonable; because attorney who has performed probate work is person interested in estate, fee petition is not required to be presented by representative, but may be presented directly by attorney, who may appeal from adverse ruling; moreover, when right to counsel fees is based on statute, recovery for fee-related services is allowed. *Estate of Trynin (1989) 49 Cal. 3d 868, 873-874, 264 Cal. Rptr. 93, 782 P.2d 232* (extraordinary services compensable under former Prob. Code § 910 (*now see Prob. Code § 10810*) include work reasonably performed by attorney to establish and defend his or her fee claim)

Statutory compensation of administrator based on 1948 appraised values of estate's real property rather than 1978 values, when testator died in 1948 and executor died in 1978, was proper because former Prob. Code § 600 (*now see Prob. Code § 8850*) (providing that inventory must be based on date of death of testator) and former Prob. Code § 901 (*now see Prob. Code § 10800*) (providing that compensation must be based on total amount of inventory) must be read together and are mandatory. *Estate of Downing (1982) 134 Cal. App. 3d 256, 264-266, 184 Cal. Rptr. 511*

Partial allowance of commission under former Prob. Code § 904 (*now see Prob. Code § 10830*) is within court's discretion, and court is not required to measure appropriate amount according to schedule in former Prob. Code § 901 (*now see Prob. Code § 10800*). *Estate of Heck (1958) 160 Cal. App. 2d 162, 165, 324 P.2d 733* (partial allowance, prior to final account and settlement, as merely advance on total commission)

Special administrator is not entitled to allowance of commission before issuance of general letters, regardless of being special administrator with general powers and having nearly completed administration. *Kohn v. Superior Court (1937) 21 Cal. App. 2d 100, 101-103, 68 P.2d 755* (applying former Prob. Code § 467 (*now see Prob. Code § 8547*))

[2] Preliminary Distribution

[a] Bond

Bond is required except when time for presenting claims has expired and all claims paid or sufficiently secured. *Estate of Mitchell (1898) 121 Cal. 391, 394, 53 P. 810* (decided under former statutes (*now see Prob. Code § 11622*))

Evidence supported court's discretionary decision not to require bond from preliminary distributee, when time for filing claims had passed. *Estate of Buchman (1955) 132 Cal. App. 2d 81, 107, 281 P.2d 608* (decided under former statutes (*now see Prob. Code § 11622*))

[b] Creditors' Rights

Court had inherent power on petition of creditor to order sole distributee, who was also executrix, to whom apartment house had been distributed under decree of partial distribution, to pay estate specified sum of money to discharge creditors' claims when creditors' consent to distribution and waiver of any right for repayment or redelivery of property by distributee was given on consideration (in addition to statutory bond) that distributee warranted to creditors that their claims would be paid and claims were not paid. *Estate of Bettingen (1935) 7 Cal. App. 2d 276, 278-279, 46 P.2d 793* (decided under former Prob. Code §§ 1001, 1002 (*now see Prob. Code §§ 11603(a), 11621, 11622, 11624*))

[c] Duty of Personal Representative

Failure of executor to inform court of existence of known heir is extrinsic fraud justifying imposition of constructive trust. *Stevens v. Torregano (1961) 192 Cal. App. 2d 105, 122-123, 13 Cal. Rptr. 604* (dictum)

Failure of personal representative carrying on administration in normal course to file prompt petition for preliminary distribution to each interested person entitled thereto does not constitute neglect of duty. *Estate of Phelps (1955) 132 Cal. App. 2d 850, 853, 283 P.2d 293*

Personal representative was not responsible to attaching creditor of legatee for distribution made before order therefor, when premature distribution was approved in later order for preliminary distribution. *Estate of Stern (1937) 24 Cal. App. 2d 282, 284, 74 P.2d 799*

[d] Hearing

[i] Effect of Pending Petition to Determine Heirship

Filing of petition to determine heirship under Prob. Code § 1080 (repealed; now see *Prob. Code § 11700*), after petition for preliminary distribution had been filed, as not divesting court of jurisdiction to determine heirship in proceeding for preliminary distribution. *Estate of Stephenson (1944) 65 Cal. App. 2d 120, 124, 150 P.2d 222*

[ii] Effect of Pending Will Contest

Mere fact that will may still be open to contest does not necessarily preclude preliminary distribution. *Estate of Molera (1972) 23 Cal. App. 3d 993, 999-1000, 100 Cal. Rptr 696*

Court is disabled from ordering preliminary distribution until after pending will contest, which may defeat petitioner's right to receive share of estate, has been determined and petitioner's right was thus affirmed. *Estate of Hill (1928) 94 Cal. App. 113, 116-118, 270 P. 708*

[iii] Evidence

Determination whether estate is but little indebted and whether preliminary distribution can be made without loss to creditors or injury to estate or person interested in it depends on comparison of value of estate with amount of debts, on character of property, expense of maintaining it and, if part of business venture, operating it, and net income, among other evidence. *Estate of Buchman (1955) 132 Cal. App. 2d 81, 106-107, 281 P.2d 608* (involving former Prob. Code § 1001 (*now see Prob. Code § 11621(a)*)), *citing Estate of Hinkel (1917) 176 Cal. 563, 567, 169 P. 70*

[iv] Jury Trial

Either party in proceeding for partial distribution is entitled to demand trial by jury of any issue of fact. *Estate of Buchman (1955) 132 Cal. App. 2d 81, 101, 281 P.2d 608* , *citing Estate of Perkins (1943) 21 Cal. 2d 561, 567, 134 P.2d 231* , and *Estate of Baird (1916) 173 Cal. 617, 623, 160 P. 1078*

[v] Questions of Fact

Propriety of preliminary distribution is question of fact, and probate court is not required to delay partial distribution because litigation is pending against estate; in such cases, court is influenced by well-established maxim that public policy favors speedy distribution of probate estates. *Estate of Anderson (1977) 68 Cal. App. 3d 1010, 1016, 137 Cal. Rptr. 727*

Whether estate is but little indebted, and whether preliminary distribution can be made without loss to creditors or injury to estate or person interested in it are questions of fact. *Estate of Buchman (1955) 132 Cal. App. 2d 81, 106-107, 281 P.2d 608* (involving former Prob. Code § 1001 (*now see Prob. Code § 11621(a)*)), *citing Estate of Hinkel (1917) 176 Cal. 563, 567, 169 P. 70*

[vi] Scope of Inquiry

Determination of who is entitled to property is proper in proceeding for preliminary distribution, when there has been no determination of heirship under Prob. Code § 1080 (repealed, now see *Prob. Code § 11700*). *Estate of Simmons (1966) 64 Cal. 2d 217, 220, 49 Cal. Rptr. 369, 411 P.2d 97*

Court, before it can make order for preliminary distribution, is required to determine that distribution can then be made and to know who parties entitled to estate are, and in that proceeding, court is able to determine who heirs are and to what proportion of estate each is entitled; other questions that may arise include questions of law, such as construction of will. *Estate of Molera (1972) 23 Cal. App. 3d 993, 1000, 100 Cal. Rptr. 696*

Court, before it can make order for partial distribution, is required to know whether proposed distributee is entitled to any part of estate. *Estate of Buchman (1955) 132 Cal. App. 2d 81, 101, 281 P.2d 608*

Court, in order to exercise power given by Probate Code to make partial distribution of estate, is required to determine what persons are entitled to order and what portion or portions of estate should be distributed to them. *Estate of Stephenson (1944) 65 Cal. App. 2d 120, 123-124, 150 P.2d 222*

Determination of issues in proceeding for preliminary distribution are dependent on same considerations as determination of issues in proceeding for final distribution. *Estate of Stephenson (1944) 65 Cal. App. 2d 120, 124, 150 P.2d 222*

[e] Jurisdiction

Court hearing petition for preliminary distribution is without jurisdiction to determine controversy involving asserted right to receive distribution on basis other than terms of will or laws of intestate succession. Estate of Baldwin (1943) 21 Cal. 2d 586, 592-593, *21 Cal. 2d 586, 134 P.2d 259* (stating rule, but holding it inapplicable to case before it)

Court sitting in probate had jurisdiction to hear and decide simultaneously both petition for preliminary distribution of property in California and complaint in equity by objector, decedent's widow and one of his heirs, seeking to impose constructive trust on California property, which she alleged was community property or her separate property, when all parties consented to it. *Estate of Arms (1921) 186 Cal. 554, 557-558, 199 P. 1053*

Pending appeal of order admitting document to probate as codicil to decedent's will did not stay proceeding for preliminary distribution. *Estate of Duraind (1942) 51 Cal. App. 2d 206, 211, 124 P.2d 330* (former Code Civ. Proc. § 949 (*now see Code Civ. Proc. § 916(a)*; *see also Prob. Code § 7241*), providing that appeal stays proceedings on judgment or order appealed from, as not applicable)

[f] Nature of Proceeding

Proceeding for distribution of estate in probate is in nature of proceeding in rem, res being estate that is in hands of executor under control of court and that executor brings before court for purpose of receiving directions as to its final disposition; by giving notice directed by statute, entire world is called before court, and court acquires jurisdiction over all persons for purpose of determining their rights to any portion of estate. *Gladding v. Superior Court (1936) 7 Cal. 2d 408, 416, 60 P.2d 857*

Nature of proceeding for preliminary distribution explained. *In re Painter (1897) 115 Cal. 635, 639-640, 641, 47 P. 700*

[g] Notice

Heirs are not entitled to personal notice of petition for distribution unless they have filed request for special notice. Estate of Lor ing *(1947) 29 Cal. 2d 423, 429, 175 P.2d 524* ; *Miller v. Pitman (1919) 180 Cal. 540, 543, 182 P. 50* ; *Stevens v. Torregano (1961) 192 Cal. App. 2d 105, 122, 13 Cal. Rptr. 604 , citing Federal Farm Mortgage Corp. v. Sandberg (1950) 35 Cal. 2d 1, 5, 215 P.2d 721*

Personal notice to interested persons is not necessary unless required by statute, and absence of statutory requirement for personal notice in probate proceedings does not deprive interested person of any constitutional right. *Lilienkamp v. Superior Court (1939) 14 Cal. 2d 293, 298, 93 P.2d 1008*

[h] Objections

[i] Grounds

Order admitting will to probate as decedent's will is conclusive, in later proceeding for preliminary distribution, on issue whether certain provisions in will had been revoked. *In re Estate of Parsons (1925) 196 Cal. 294, 299-300, 237 P. 744*

Insufficient cash in estate to pay expenses of administration, claims, and legacies, and necessity of paying legacies in

prorated portions rather than full amount once assets have been converted to cash, is valid ground for objection to preliminary distribution. *In re Estate of Parsons (1925) 196 Cal. 294, 300, 237 P. 744*

Equitable defenses in opposition to petition for preliminary distribution. *Estate of Glenn (1908) 153 Cal. 77, 79-81, 94 P. 230*

Personal representative is not entitled to object that petition is worded in statutory language; personal representative is presumed to know details as to value and character of property, cash on hand, and indebtedness. *Estate of Murphy (1904) 145 Cal. 464, 465-468, 78 P. 960*

Objection that petition for preliminary distribution is insufficient is not raisable in appellate court unless presented to trial court. *Estate of Morelli (1951) 102 Cal. App. 2d 39, 43, 226 P.2d 716*

Inability to distribute property, because of its character, in manner prayed for is valid ground of objection. *Estate of Raphael (1949) 91 Cal. App. 2d 931, 935, 206 P.2d 391*

Issue whether property is community or separate is raisable in form of ground for objection to petition for preliminary distribution. *Estate of Raphael (1949) 91 Cal. App. 2d 931, 935, 206 P.2d 391*

[ii] Manner of Making Objections

Written objections to petition for preliminary distribution is not required; appearance at hearing for purpose of resisting petition is sufficient. *Estate of Levy (1935) 4 Cal. 2d 223, 225-226, 48 P.2d 675* (applying former statutory provision; form of objections is now covered in *Prob. Code §§ 1020, 1021, 1023, 1043*; *Prob. Code § 11602* provides that personal representative or any interested person may oppose petition for preliminary distribution)

[iii] Persons Entitled to Object

Receiver authorized to take possession of legacy that legatee seeks to have preliminarily distributed to himself is entitled to resist petition for preliminary distribution. *Estate of Baldwin (1943) 21 Cal. 2d 586, 594-595, 134 P.2d 259* (construing former statutory provision; now see *Prob. Code § 11602*)

Personal representative is entitled to resist petition for preliminary distribution filed by someone else not a coexecutor or coadministrator. *Estate of Baldwin (1943) 21 Cal. 2d 586, 594-595, 134 P.2d 259* (construing former statutory provision; now see *Prob. Code § 11602*)

Person entitled to contest decedent's will generally has interest sufficient to allow him or her to resist application for preliminary distribution. *Estate of Molera (1972) 23 Cal. App. 3d 993, 999, 100 Cal. Rptr. 696*

Court is entitled to look to purported ground for contest of will, if contest pending, when determining whether contestant has sufficient interest to allow resistance to petition for preliminary distribution; and is entitled to find contestant not sufficiently interested if distribution would not impair his or her rights even if contest successful. *Estate of Molera (1972) 23 Cal. App. 3d 993, 999-1002, 100 Cal. Rptr. 696*

Person is "interested in estate" if having at least direct contingent interest in subject in question. *Estate of Sandy (1964) 230 Cal. App. 2d 309, 314, 40 Cal. Rptr. 837* (reviewing case law)

[i] Order

[i] Conclusiveness

Order for preliminary distribution purporting to determine matter not essential to preliminary distribution is not conclusive respecting such nonessential determination and does not bar later determination of same matter raised in different proceeding. *Estate of Simmons (1966) 64 Cal. 2d 217, 220, 49 Cal. Rptr. 369, 411 P.2d 97*

When personal representative is also legatee, order is conclusive against personal representative in capacity of legatee when he or she did not oppose petition for preliminary distribution in capacity of legatee. *Estate of Murphy (1904) 145 Cal. 464, 465-468, 78 P. 960*

Unless heirship is specifically in issue, order for preliminary distribution is conclusive as to rights of all persons claiming interest in property distributed thereunder; rule limiting conclusiveness of order for preliminary distribution to rights in assets distributed thereunder is consistent with policy that Probate Code sections permitting preliminary distribution were designed to encourage early distribution of property to legatees whenever it can be accomplished without jeopardizing rights of others interested in estate; of course, if construction of will has been litigated and determined in proceeding for preliminary distribution, that determination as res judicata and controlling final decree for distribution. *Estate of McCallen (1975) 53 Cal. App. 3d 142, 148, 125 Cal. Rptr. 645*

Order for preliminary distribution directing executor to withhold stated sum for purpose of paying expenses of defending legal action against executor is not conclusive distribution of that sum, even when order has become final; executor remains accountable for portion of sum not legitimately used for stated purpose. *Estate of Miller (1964) 230 Cal. App. 2d 888, 904-906, 41 Cal. Rptr. 410*

Order for preliminary distribution is final if no appeal taken and no motion timely made to modify or set aside. *Estate of O'Connor (1958) 158 Cal. App. 2d 187, 192, 322 P.2d 616*

Order allowing attorney's fee is conclusive when final and not subject to attack thereafter in objections to account listing payment; liability for payment has status of approved claim; payment is properly included in next account. *Estate of Olcese (1934) 1 Cal. App. 2d 72, 79-80, 36 P.2d 215*

[ii] Conditions Precedent

Specific finding that inheritance taxes are paid or due is unnecessary when order states finding that distribution can be made without injury to any person interested in estate. *Estate of Johnson (1933) 218 Cal. 501, 504, 23 P.2d 1012* (decided prior to repeal of California Inheritance Tax Law)

Requirement that estate be "but little indebted" is protection of rights to creditors. *Estate of Hinkel (1917) 176 Cal. 563, 567, 169 P. 70* (construing former Code Civ. Proc. § 1661; now see *Prob. Code § 11621(a)*)

Personal representative's commission and attorney's fee are proper subjects for protection when court considers whether preliminary distribution can be made without injury to persons interested in estate. *Estate of Straus (1904) 144 Cal. 553, 556, 77 P. 1122*

Requirement that estate be "but little indebted" means that estate's debts be relatively small compared to value of estate. *In re Crocker (1895) 105 Cal. 368, 372, 38 P. 954* (construing former Code Civ. Proc. § 1661; now see *Prob. Code § 11621(a)*)

Evidence shows estate to be but little indebted and that preliminary distribution could be made without loss to creditors

or injury to estate or person interested in it. *Estate of Buchman (1955) 132 Cal. App. 2d 81, 107, 281 P.2d 608* (construing former Prob. Code § 1001; now see *Prob. Code § 11621(a)*)

Creditors unable to prevent preliminary distribution, although debts aggregate large sum, if enough assets remain in estate to secure creditors. *Estate of Morelli (1951) 102 Cal. App. 2d 39, 42, 226 P.2d 716*

Injury to estate or person interested in it is not necessarily equivalent to loss of profit that could be gained if preliminary distribution was denied and executor was permitted to retain income-producing property as long as possible. *Estate of Brickell (1935) 4 Cal. App. 2d 54, 57-58, 40 P.2d 579*

[iii] Form of Order

Specific finding recited in order is controlling contradictory general finding. *Estate of Ross (1921) 187 Cal. 454, 468, 202 P. 641* (specific findings as to identities of heirs as controlling contradictory general finding that all allegations of petition are true)

Order is required to recite what sum or other property is to be distributed to each distributee, and failure to deduct amount already paid as partial payment, if acknowledged by distributee, is error. *Estate of Mitchell (1898) 121 Cal. 391, 395, 53 P. 810*

Order is sufficient if stating findings required by statute; statutory language in order is appropriate and implies all specific findings necessary to support those general findings. *Estate of Clifford (1936) 16 Cal. App. 2d 123, 126-127, 60 P.2d 302* (applying former Prob. Code §§ 1000, 1001; now see *Prob. Code §§ 11603(a), 11620, 11621*)

Finding stated in order that on proof made to the satisfaction of the court, notice was duly given as required by law, was conclusive on appeal in absence of contradictory evidence in record. *Estate of Dam (1932) 126 Cal. App. 70, 73-75, 14 P.2d 162*

[iv] Mandatory Nature of Order

Mandate is appropriate remedy when court refuses to act on petition for preliminary distribution, rather than denying petition. *Lissner v. Superior Court (1944) 23 Cal. 2d 711, 717-718, 146 P.2d 232* (order declining to act on ground of lack of jurisdiction as not appealable under *Prob. Code § 1240* (repealed, now see *Prob. Code § 7240*))

Order directing preliminary distribution is mandatory when prescribed conditions exist. *Estate of Stephenson (1944) 65 Cal. App. 2d 120, 123, 150 P.2d 222* (construing former statutory provision; now see *Prob. Code § 11621(a)*)

[v] Modification of Order

Petitioner is entitled to apply for modification of order for preliminary distribution when facts show necessity therefor. *Estate of Johnson (1933) 218 Cal. 501, 504, 23 P.2d 1012*

Set aside of settlement agreement effectively set aside order for preliminary distribution derived from settlement. *Estate of Beard (1999) 71 Cal. App. 4th 753, 84 Cal. Rptr. 2d 276*

[vi] Scope of Order

Order for preliminary distribution to life beneficiary under decedent's will distributed only life estate in property covered by order; order was not a determination that distributed property represents value of distributee's life interest in bequest. *Estate of Toler (1957) 49 Cal. 2d 460, 465, 319 P.2d 337*

[j] Property Subject to Distribution

Chose in action that personal representative is trying to enforce in pending action was improper, but not unlawful, subject of distribution, when personal representative and certain parties in interest oppose distributing it. *In re Estate of Colton (1912) 164 Cal. 1, 4, 127 P. 643*

Complete distribution in proceeding for preliminary distribution is contrary to intent of law. *In re Estate of Gird (1910) 157 Cal. 534, 550, 108 P. 499*

[k] Public Policy

Established policy of California is to encourage distribution of property to legatees as soon as it can be done without jeopardizing rights of others interested in estate. *Estate of Beach (1975) 15 Cal. 3d 623, 641, 125 Cal. Rptr. 570, 542 P.2d 994 , cert. denied, 434 U.S. 1046, 98 S. Ct. 891, 54 L. Ed. 2d 797*

Petition for partial distribution implements policy of law favoring earliest possible delivery of inherited property to legatees or devisees consistent with proper administration. *Estate of Buchman (1955) 132 Cal. App. 2d 81, 100-101, 281 P.2d 608 , cert. denied, 350 U.S. 873, 76 S. Ct. 118, 100 L. Ed. 772*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 39: Probate: Claims Against the Estate thru Probate: Discharge-Chs. 454-459
Chapter 458C PROBATE: PRELIMINARY DISTRIBUTION AND PARTIAL ALLOWANCE OF COMPENSATION
PART III. RESEARCH GUIDE

39-458C California Forms of Pleading and Practice--Annotated §§ 458C.43-458C.59

[Reserved]

§§ 458C.43[Reserved]

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Volume 39: Probate: Claims Against the Estate thru Probate: Discharge-Chs. 454-459
Chapter 458C PROBATE: PRELIMINARY DISTRIBUTION AND PARTIAL ALLOWANCE OF COMPENSATION
PART IV. FORMS

39-458C California Forms of Pleading and Practice--Annotated § 458C.60

§ 458C.60 Petition for Preliminary Distribution of Decedent's Estate [Prob. Code § 11600]

[1] FORM Petition for Preliminary Distribution of Decedent's Estate [Prob. Code § 11600]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	PETITION FOR PRELIMINARY DISTRIBUTION
Deceased.	)	

_____

Petitioner(s) _____ [*name(s)*] hereby petition(s) the court for an order for a preliminary distribution of the above-entitled estate and, in support thereof, respectfully represent(s):

1. Petitioner(s) _____ [*name(s)*] is/are _____ [the duly qualified, appointed, and acting personal representative(s) *or specify relationship showing that petitioner(s) is/are interested person(s) within the meaning of Prob. Code § 48, e.g.,* devisees] of [the estate of] _____ [*name*], deceased (hereinafter, "the decedent").

2. The decedent died on _____ [*date*], and at the time of death was a resident of _____ [*specify, e.g.,* _____ County, California].

[*EITHER*]

3. The decedent's will was admitted to probate by order of this court on _____ [*date*].

[*OR*]

3. The decedent died intestate.

[*ADD, if the Inventory and Appraisal has been filed*]

4. The Inventory and Appraisal was duly filed herein on _____ [*date*], and shows that the assets of the estate are valued at $_____.

[*CONTINUE*]

5. The name, age, address, and relationship to the decedent, of each _____ [heir *or* devisee] are _____ [set forth in Exhibit A, which is attached hereto and made a part hereof *or* as follows: _____ (*specify*)].

6. Letters _____ [testamentary *or* of administration *or* of administration with the will annexed] were issued to _____ [petitioner(s) *or* _____(*name(s)*) (hereinafter, "the personal representative(s)")] on _____ [*date at least two months before this petition is filed*], and are still in full force and effect.

7. Notice to creditors _____ [has not yet been published *or* was published in the manner prescribed by *Probate Code Section 9001*]. Notice of administration under *Probate Code Sections 9050-9052* _____ [is not required in this matter *or* was duly mailed to all known and reasonably ascertainable creditors of the decedent, other than those described in *Probate Code Section 9054*, on _____ (*date*)].

8. The statutory period for filing creditors' claims _____[has *or* has not] expired.

[*EITHER*]

9. No claims have been presented or filed against the decedent's estate.

[*OR*]

9. The status of each claim against the estate filed or presented, including the name of the claimant, the amount claimed, and the disposition, is _____ [set out in Exhibit B, attached hereto and made a part hereof *or* as follows: _____ (*specify*)].

[*EITHER*]

10. No federal estate tax return is required to be filed for the estate.

[*OR*]

10. A federal estate tax return _____ [has been *or* will be] filed for the estate showing that no estate tax is due.

[*OR*]

10. A federal estate tax return has not been filed for the estate, but one will be filed. The estimated total tax due is $_____ [and $_____ has been prepaid on account].

[*CONTINUE*]

11. The property of the estate in _____ [my hands *or* the hands of the personal representative(s)] is _____ [set forth in Exhibit C, which is attached hereto and made a part hereof *or* as follows: _____ (*describe each item, or group of items, of property and appraised value of each*)].

12. The following described property can be distributed to the _____ [petitioner(s) *or* below-named _____ (beneficiary *or* beneficiaries)] in accordance with the _____ [decedent's will *or* law of intestate succession] without loss to creditors or injury to the estate or any interested person for the reasons hereinafter specified: _____[*specifically describe property and state the name and address of the heir or devisee to whom it is to be distributed; if any distributee is a minor, so state, giving the date of birth*].

13. The value of the estate remaining in _____ [my hands *or* the hands of the personal representative(s)] after the preliminary distribution will be $_____, which is [more than] sufficient to pay all [anticipated] creditors' claims, [all other devises,] and all commissions, fees, and costs of administration.

14. The estate is not in a condition to be closed because _____ [*specify, e.g.*, the time for filing claims against the estate has not yet expired].

15. To satisfy the statutory requirement that a bond be posted, [or that a bond may be required,] the _____ [petitioner(s) *or* distributee(s), _____ (*name(s)*)], _____ [agree(s) *or* has agreed *or* have agreed] to post a corporate surety bond in the amount(s) and on the conditions required by law.

[*EITHER, if no prior distribution has been made*]

16. No prior distributions have been made in this matter.

[*OR, if prior distribution has been made*]

16. _____ [*number, e.g.*, One] prior distribution was/were made in this matter on _____ [*date*].

[*CONTINUE*]

WHEREFORE, petitioner prays as follows:

1. That portion of the decedent's estate listed in Paragraph 12 be ordered distributed to the _____ [petitioner(s) *or* beneficiary named *or* beneficiaries named], and in the manner set out, in that paragraph.

2. The costs of this proceeding be ordered paid by the _____ [petitioner(s) *or* distributee(s)] or the estate in proportions determined by the Court.

3. For all other proper orders.
Dated: _____.

_____ [*signature*]

Petitioner

[*ADD separate signature blocks for each petitioner, if more than one*]

_____ [*signature*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am [one of] the petitioner(s) in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

This petition is for use by the personal representative of the decedent's estate or an interested person to secure a court order for distribution of all or a portion of the share of a decedent's estate to which a beneficiary is entitled prior to the time of final distribution [*see Prob. Code §§ 11600, 11620*]. "Beneficiary" is defined as a person to whom a donative transfer of property is made or that person's successor in interest and, as it relates to the estate of a decedent who died intestate, means an "heir," and, as it relates to the estate of a decedent who died testate, means a "devisee" [*Prob. Code § 24(a), (b)*]. For the required notice that must be given of the hearing, see *§ 458C.12[4]*.

This form may also be used by the personal representative to petition for preliminary distribution of an estate being administered under the Independent Administration of Estates Act (*Prob. Code § 10400 et seq.*) by;

- Changing the title of the petition to "PETITION FOR PRELIMINARY DISTRIBUTION (ESTATE ADMINISTERED WITHOUT COURT SUPERVISION)."

- Changing the code section cited in the caption to *Prob. Code § 11623*.

- Changing Paragraph 1 to read "Petitioner is the duly qualified, appointed, and acting personal representative of the [the estate of] _____ [*name*], deceased (hereinafter "the decedent"), and on _____[*date*], petitioner was granted _____ [full *or* limited] authority under the Independent Administration of Estates Act to administer the decedent's estate without court supervision."

- Adding a new Paragraph 10 to read "Petitioner has taken certain actions without prior court approval, under the Independent Administration of Estates Act, for which notice of the proposed action was required. These actions are as follows: _____ [*describe each action not yet listed in a prior accounting, report, or petition for preliminary distribution that was approved by the court; list each separately, including the nature of the action, when the action was taken, a statement of when and to whom notice was given, whether notice was waived and if so, by whom, and whether any objections were received*]." (Renumbering the paragraphs that follow accordingly) [*see Cal. Rules of Ct., Rule 7.250*].

- Including a statement of facts in Paragraph 12 showing the value of the portion of the estate sought to be preliminarily distributed and that it is less than 50 percent of the net value of the estate [*see Prob. Code § 11623*, discussed in *§ 458C.21*].

Before drafting the petition, counsel should check the local rules of the court in which the proceeding is pending to be sure he or she complies with any rules that apply in that court to petitions for preliminary distribution of estates being administered under the Independent Administration of Estates Act [*see, e.g.*, Los Angeles Co. Super. Ct. Rules, Rule 10.69].

[3] Signing and Verification

The petition must be signed by all petitioners [*Prob. Code § 1020*] and verified [*Prob. Code § 1021(a)(1)*; *but see Prob. Code § 1020* (verification of document constitutes signature of that document)] by the petitioner or by one of them if there is more than one [*Prob. Code § 1021(b)(1)*]. However, if the petitioner is absent from the county or for some other cause is unable to sign or verify the petition, the petition may be signed or verified by the petitioner's attorney, but this does not apply if the petitioner is a fiduciary. This term includes the personal representative [*Prob. Code §§ 39, 1023*].

[4] Who May File Petition

A petition for preliminary distribution may be filed by the personal representative (defined in *Prob. Code § 58(a)*) or by an interested person (defined in *Prob. Code § 48*) [*Prob. Code § 11600*]. If the estate is being administered under the Independent Administration of Estates Act, a petition for preliminary distribution may be filed only by the personal representative [*see Prob. Code § 11623(a)*].

[5] When Petition May Be Filed

A petition for preliminary distribution may not be filed unless at least two months have elapsed after letters are first issued to a "general personal representative" (defined in *Prob. Code § 58(b)*) [*Prob. Code § 11620*].

[6] Account

The statutory provisions governing preliminary distribution [Prob. Code §§ 11600-11624] do not require that an account be filed before a preliminary distribution can be made. Nevertheless, statute does provide that the court may, on its own

motion or on petition of an interested person, order an account at any time [*Prob. Code § 10950(a)*].

Moreover, it appears that even without a court order an account may be included with a petition for preliminary distribution by the personal representative [*see, e.g.,* Alameda Co. Super. Ct. Rules, Rule 12.11.1.2]. For an account that may be adapted for use as a First Account and incorporated into this petition, see Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation* . For discussion of when an account may be waived, see *Prob. Code § 10954*.

If an interim or first account is included with the foregoing petition by the personal representative, the description of the nature of the paper in the title of the form in the caption should reflect that fact [*see Cal. Rules of Ct., Rule 2.111(6)*; *see also, e.g.,*Los Angeles Co. Super. Ct. Rules, Rule 10.9; Orange Co. Super. Ct. Rules, Rule 601.05.

[7] Contents of Petition

[a] State Law

Although a preliminary distribution may be made without the filing of an account, sufficient facts must be set forth in the petition to allow the court to ascertain that the requirements for distribution are satisfied [*see Prob. Code § 11603*]. Although the statutes authorizing a petition for preliminary distribution do not specify the matters the petition must contain, the statute does provide that the court "shall" order preliminary distribution if at the hearing it appears that the distribution may be made without loss to creditors or injury to the estate or any interested person [*Prob. Code § 11621*; *see Prob. Code § 12*, defining "shall" as mandatory]. It would therefore appear that, at a minimum, the petition should allege facts sufficient to show not only that the distribution is in accordance with the will [*see Prob. Code §§ 6100-6390*] or the laws of intestate succession [*see Prob. Code §§ 6400-6455*], but also that the preliminary distribution may be made without loss to creditors or injury to the estate or any interested person, that is, that the estate is solvent [*see, e.g.,* Orange Co. Super. Ct. Rules, Rule 608.02].

[b] Local Court Rules

Local court rules to a large extent have filled in the legislative gap with respect to matters that the petition must contain. Consequently, before drafting the petition, counsel should check the local rules of the court in which the estate is being probated for any rules, memoranda, or policies that apply to preliminary distributions. Some of these are discussed below.

[8] Allegations

[a] Identity of Petitioner (Paragraph 1)

There is no express statutory requirement that the identity of the petitioner be alleged in the body of the form, but this is frequently included for the sake of clarity and precision in pleading.

[b] Residence and Date of Death (Paragraph 2)

There is no requirement that decedent's date of death or residence at the time of death be alleged because these facts are a matter of record appearing in the petition to administer the estate [*see Prob. Code § 8002(a)(1), (2)*]. Nevertheless, they are frequently included to advise the court of the status of the estate.

[c] Whether Decedent Died Testate or Intestate (Paragraphs 3)

The allegation as to whether decedent died testate or intestate is another fact of record [*see Prob. Code §§ 8000, 8002(b), 8005(a)(4), 8422, 8440, 8460*] that need not be, but frequently is, included in the petition. It may be helpful to the court to have before it a statement as to whether distribution is governed by a will [*see Prob. Code §§ 6100-6390*] or

by the laws of intestate succession [*see Prob. Code §§ 6400-6455*].

[D] Inventory and Appraisal (Paragraph 4)

An inventory and appraisal must be filed within four months, or such other reasonable time as the court allows, after letters are first issued to a general personal representative [*Prob. Code § 8800(b)*]. Some courts by local rule require that before a preliminary distribution can be ordered, an inventory and appraisal must be on file [*see, e.g.,* Orange Co. Super. Ct. Rules, Rule 608.21(8)] or that it should be on file [*see, e.g.,* San Francisco Uniform Local Ct. Rules, Rule 14.83]. If this rule exists and the inventory and appraisal has been filed, its filing should be alleged for the information of the court. For discussion and forms for inventory and appraisal, see Ch. 451, *Probate: Inventory and Appraisal* .

[e] Heirs and Devisees (Paragraph 5)

The names, ages, addresses, and relationship to the decedent of the heirs and devisees are matters of record appearing in the petition for administration [*see Prob. Code § 8002(a)(3)*] and need not normally be alleged in a petition for preliminary distribution. Nevertheless, they are frequently included because preliminary distribution can be ordered only if the court determines that distribution may be made without, among other things, injury to any interested person, which term is defined as including, among others, heirs and devisees [*Prob. Code § 11621(a)*; *see Prob. Code § 48(a)(1)*].

[f] Issuance of Letters (Paragraph 6)

The issuance of letters is a fact appearing of record [*see Prob. Code §§ 8400, 8405*] but should be alleged because the petition cannot be filed until at least two months have elapsed after the letters were issued, and whether the bond requirement is mandatory or left to the court's discretion depends on when the order for distribution is made with respect to the issuance of letters [*see Prob. Code §§ 11620, 11622*; *see also § 458C.18*].

[g] Notice to Creditors and Claims (Paragraphs 7-9)

The giving of notice to creditors and the filing of any claims [*see Prob. Code §§ 9000-9399*], as well as their disposition, should be alleged in a petition by the personal representative, because distribution can be ordered only when it appears that it can be done without loss to creditors [*see Prob. Code § 11621(a)*]. For the same reason, this information, if known, should also be alleged in a petition by an interested person.

Some courts by local rule expressly provide that it is not sufficient in a petition for preliminary distribution to allege merely that all claims have been paid, but, rather, that the claims presented must be listed, showing the claimant, the amount claimed, and the disposition of each claim, and that, if any claim has been rejected, the date of service of the notice of rejection of claim must be stated [*see, e.g.,* Santa Clara Co. Super. Ct. Rules, Rule 5.9(L)].

[h] Federal Estate Tax (Paragraphs 10)

An allegation concerning federal estate tax is normally included in a petition by the personal representative because, if a tax liability exists and has not been fully paid, its subsequent payment might impact on the amount of property available for distribution to the heirs or devisees, and, in ruling on the petition for preliminary distribution, the court must determine whether the distribution can be made without loss to creditors or injury to the estate or to any interested person [*see Prob. Code § 11621(a)*; *see also, e.g.,*San Francisco Uniform Local Ct. Rules, Rule 14.83 (petition required to state estimate of total amount of unpaid taxes)].

[i] Property on Hand (Paragraph 11)

A listing of the property on hand and its appraised value are not specifically required by statute, but should be included

since distribution can be ordered only when it can be done without loss to creditors or injury to the estate or to any interested person [*see Prob. Code § 11621(a)*].

[j] Proposed Distribution (Paragraph 12)

[i] Description of Distributees

The petition for preliminary distribution must identify the distributees by name, and this is expressly required by some local court rules [*see, e.g.,* Alameda Co. Super. Ct. Rules, Rule 12.11.2]. Heirs who take by virtue of intestacy must also be sufficiently described to permit the court to determine if the laws of intestate succession [*see Prob. Code §§ 6400-6455*, discussed in Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation*] have been properly applied [*see, e.g.,* Alameda Co. Super. Ct. Rules, Rule 12.11.4].

[ii] Description of Property

The petition must also list and describe in detail the property to be distributed, either in the body of the petition, or in the prayer, or by a schedule in an account incorporated in the petition by reference Orange Co. Super. Ct. Rules, Rule 608.20; Santa Clara Co. Super. Ct. Rules, Rule 5.9(I). Describing the property by reference to the inventory is generally not acceptable [*see, e.g.,* Alameda Co. Super. Ct. Rules, Rule 12.11.1.2 (prohibiting description by reference to the will or inventory); Los Angeles Co. Super. Ct. Rules, Rule 10.111 (prohibiting description by reference to the inventory); Orange Co. Super. Ct. Rules, Rule 608.12 (same); San Francisco Uniform Local Ct. Rules, Rule 14.85(A) (same)].

Some courts further require that a petition for distribution contain an allegation as to the character of the property, whether separate or community, in all cases in which its character may or will affect distribution [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 10.114; Orange Co. Super. Ct. Rules, Rule 608.12; San Francisco Uniform Local Ct. Rules, Rule 14.86], and that, if some portion of the assets consists of community property (defined in *Prob. Code § 28*), the allegation must show whether the interest included is only the decedent's one-half interest in the community property or 100 percent of the community property of both spouses [*see* Los Angeles Co. Super. Ct. Rules, Rule 10.114].

[k] Value of Remaining Estate (Paragraph 13)

Some courts require that the petition state the approximate value of the property remaining in the estate after the proposed distribution [*see, e.g.,* San Francisco Uniform Local Ct. Rules, Rule 14.83].

[l] Condition Preventing Closing of Estate (Paragraph 14)

Although there is no statute expressly requiring that this fact be alleged, the petition should state why the estate cannot be closed. If the estate is in condition to be closed, a petition for preliminary distribution would appear to be unnecessary [*see Prob. Code §§ 11640, 12200*].

[m] Bond (Paragraphs 15)

If the court orders distribution before four months have elapsed after letters are first issued, it must require the distributee to file a bond in the amount of the distribution conditioned on payment of the distributee's proper share of the debts of the estate, not exceeding the amount distributed [*Prob. Code § 11622(a), (c)*]. If distribution is ordered after four months have elapsed, the court may require a bond in such amount as it orders [*Prob. Code § 11621(b)*]. In this latter situation, some courts may require a distributee's bond unless an account has been filed, and approved, showing the estate to be solvent [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 10.122].

[n] Prior Distribution (Paragraph 16)

This statement as to whether there have been any prior distributions is not required by statute but is frequently included to further advise the court of the estate's status.

[9] Assignment or Transfer of Interest by Beneficiary

Special requirements apply when distribution is to be made to the transferee of a beneficiary (defined in *Prob. Code § 24*) or to any person other than the beneficiary under an agreement, request, or instructions of a beneficiary or a beneficiary's attorney in fact [*see Prob. Code § 11604(a)*]. In such a case, the court on its own motion, or on motion of the personal representative or other interested person or of the public administrator, may inquire into the circumstances surrounding the execution of, and the consideration for, the transfer, agreement, request, or instructions, and the amount of any fees, charges, or consideration paid or agreed to be paid by the beneficiary [*Prob. Code § 11604(b)*]. If the court finds either that (1) the fees, charges, or consideration paid or agreed to be paid by a beneficiary are grossly unreasonable, or (2) the transfer, agreement, request, or instructions were obtained by duress, fraud, or undue influence, it may refuse to order distribution, or may order distribution on any terms it deems just and equitable [*Prob. Code § 11604(c)*]. A $122,000 distribution to an heir hunter was not grossly unreasonable even though the probate court had authorized a $5,000 fee to an heir hunter employed by the estate. The heir hunter who actually located the heir spent approximately 150 hours searching data bases and interviewing leads and had spent two days searching for the heir. The heir's assignment of her interest in the estate was also not obtained by duress, fraud or undue influence where the heir hunter gave the heir time to consider the matter and gave her his cell phone number [*Estate of Wright (2001) 90 Cal. App. 4th 228, 239, 108 Cal. Rptr. 2d 572]* .

Notice of the hearing on the motion must be served on the beneficiary and on the persons described in *Prob. Code § 11604(a)* at least 15 days before the hearing in the manner provided in *Code Civ. Proc. § 415.10* (personal delivery) or 415.30 (mail and acknowledgment of receipt), as the court may direct [*Prob. Code § 11604(d)*].

Local courts may impose additional requirements. For example, in Los Angeles County, in any case in which the estate representative has reasonable cause to believe that there exists an assignment or transfer of the estate interest of any heir, devisee, or legatee, the estate representative, prior to or concurrently with the filing of, or hearing on, a petition for preliminary distribution, shall advise the court thereof by a verified instrument in writing setting forth the facts and circumstances of the assignment or transfer then known to the representative [Los Angeles Co. Super. Ct. Rules, Rule 10.118(a)].

[10] Partial Allowance of Commission or Fees

A petition for an allowance on the personal representative's compensation or commission [*see Prob. Code § 10830(a)(1)* (proceeding commenced on or after July 1, 1991); former Prob. Code § 904 (proceeding commenced before July 1, 1991); *see also Prob. Code § 10850*] or on the attorney's compensation or fee [*see Prob. Code 10830(a)(2)*(proceeding commenced on or after July 1, 1991); former Prob. Code § 911 (proceeding commenced before July 1, 1991); *see also Prob. Code § 10850*] is sometimes included with a petition for preliminary distribution. In this event, the notice provisions of *Prob. Code § 10830(b)* (proceeding commenced on or after July 1, 1991) or former Prob. Code §§ 904, 911 (proceeding commenced before July 1, 1991) [*see Prob. Code § 10850*], and *Prob. Code § 11601*, as the same may apply, must be complied with. For a form of petition for allowance on account of commissions or fees that may be included in the petition, *see § 458C.62*.

If the petitions are combined, the nature of the paper in the caption must identify both and the relief sought by each [*see Cal. Rules of Ct., Rules 2.111(6)*; *see also, e.g.,*Los Angeles Co. Super. Ct. Rules, Rule 10.9; Orange Co. Super. Ct. Rules, Rule 601.05; San Francisco Uniform Local Ct. Rules, Rule 14.117].

[11] State Statutes

"Beneficiary" defined. *Prob. Code § 24*

"Devise" defined. *Prob. Code § 32*

"Devisee" defined. *Prob. Code § 34*

"Heirs" defined. *Prob. Code § 40*

"Interested person" defined. *Prob. Code § 48*

"Personal representative" and "general personal representative" defined. *Prob. Code § 58*

Requirement that inventory and appraisal be filed within four months after letters are first issued to general personal representative. *Prob. Code § 8800(b)*

"Full" and "limited" authority of personal representative administering estate without court supervision defined. *Prob. Code §§ 10402, 10403*

Requirement that personal representative administering estate without court supervision, whether granted full or limited authority, obtain court supervision for preliminary distribution. *Prob. Code § 10501(a)(4)*

Petition for preliminary distribution of decedent's estate. *Prob. Code § 11600*

Notice of hearing on petition. *Prob. Code § 11601*

Who may oppose petition. *Prob. Code § 11602*

Conditions requiring granting of petition. *Prob. Code §§ 11603(a), 11621(a)*

When petition may be filed. *Prob. Code § 11620*

When bond must or may be required. *Prob. Code § 11622*

Preliminary distribution of estate under Independent Administration of Estates Act (*Prob. Code § 10400 et seq.*). *Prob. Code § 11623*

Allocation of costs of proceeding. *Prob. Code § 11624*

[12] Local Rules of Court

[a] Alameda County

Titles and preparation of petitions. Alameda Co. Super. Ct. Rules, Rule 12.1.10

Prior court order required before assets from decedent's estate may be distributed by personal representative. Alameda Co. Super. Ct. Rules, Rule 12.11.1.1

Description of property in petition for distribution. Alameda Co. Super. Ct. Rules, Rule 12.11.1.2

Names of distributees and assets to be distributed must be set forth in petition or attached schedule incorporated by reference. Alameda Co. Super. Ct. Rules, Rule 12.11.2.1

Cash distributions. Alameda Co. Super. Ct. Rules, Rule 12.11.2.2

Description of distributees. Alameda Co. Super. Ct. Rules, Rule 12.11.3

Heirs who take by intestacy. Alameda Co. Super. Ct. Rules, Rule 12.11.4

Property of predeceased spouse. Alameda Co. Super. Ct. Rules, Rule 12.11.5

Allegation whether property is separate or community and which items can be traced from prior marriage of decedent. Alameda Co. Super. Ct. Rules, Rule 12.11.6

Distribution to minors, deceased heir or devisee, missing heir, or when civil suit pending against estate. Alameda Co. Super. Ct. Rules, Rule 12.11.11-12.11.14

Payment of federal estate tax with relation to distribution. Alameda Co. Super. Ct. Rules, Rule 12.11.15

[b] Los Angeles County

Caption of petition is required to be all-inclusive as to relief sought. Los Angeles Co. Super. Ct. Rules, Rule 10.9

Description of property to be distributed. Los Angeles Co. Super. Ct. Rules, Rule 10.111

Allegation as to whether property is separate or community. Los Angeles Co. Super. Ct. Rules, Rule 10.114

Description of distributees. Los Angeles Co. Super. Ct. Rules, Rule 10.115

Requirements when estate representative has reasonable cause to believe assignment or transfer of estate interest of heir or devisee exists. Los Angeles Co. Super. Ct. Rules, Rule 10.118

Distribution on minor's behalf. Los Angeles Co. Super. Ct. Rules, Rule 10.120

Distribution establishing testamentary trust. Los Angeles Co. Super. Ct. Rules, Rule 10.121

Preliminary distribution bond. Los Angeles Co. Super. Ct. Rules, Rule 10.122

[c] Orange County

Caption of petition is required to be all-inclusive as to relief sought in petition. Orange Co. Super. Ct. Rules, Rule 601.05

Verification of petitions. Orange Co. Super. Ct. Rules, Rule 601.11

Petition for distribution as required to contain allegation concerning separate or community property nature of assets. Orange Co. Super. Ct. Rules, Rule 608.12

Description of property to be distributed. Orange Co. Super. Ct. Rules, Rule 608.20

Documents to be on file before distribution ordered. Orange Co. Super. Ct. Rules, Rule 608.21

[d] City & County of San Francisco

Caption of pleading are required to disclose nature of all relief sought or actions taken. San Francisco Uniform Local Ct. Rules, Rule 14.24

Description of assets in petition for distribution. San Francisco Uniform Local Ct. Rules, Rule 14.85(A)

Petition for distribution is required to state how estate is to be distributed. San Francisco Uniform Local Ct. Rules, Rule 14.85(B)

Petition for distribution is required to allege separate or community character of property. San Francisco Uniform Local Ct. Rules, Rule 14.86

Agreement required to be on file if distribution is to be other than according to will or laws of intestate succession. San Francisco Uniform Local Ct. Rules, Rule 14.87

Assignment is required to be on file if distribution is to be made to assignee of heir or devisee. San Francisco Uniform Local Ct. Rules, Rule 14.88

Distribution to persons under conservatorship or guardianship. San Francisco Uniform Local Ct. Rules, Rule 14.89

Distribution to minors. San Francisco Uniform Local Ct. Rules, Rule 14.90

Distribution to trustee. San Francisco Uniform Local Ct. Rules, Rule 14.91

Distribution to representative of deceased heir or beneficiary. San Francisco Uniform Local Ct. Rules, Rule 14.92

Distribution to intestate heirs. San Francisco Uniform Local Ct. Rules, Rule 14.93

[e] Santa Clara County

Allegation reclaims. Santa Clara Co. Super. Ct. Rules, Rule 5.9(B)

Description of property to be distributed and distributees. Santa Clara Co. Super. Ct. Rules, Rule 5.9(I)

[13] Decisions

[a] Petition

Sufficiency of petition for preliminary distribution is dependent on both allegations and prayer; petition is sufficient if prayer is for necessary findings and order; allegations conforming with statutory requirements for maintenance of proceeding are appropriate. *Gladding v. Superior Court (1936) 7 Cal. 2d 408, 414-415, 60 P.2d 857* (involving former Code Civ. Proc. §§ 1658, 1663; *now see Prob. Code §§ 11603(a), 11620, 11621(a)*)

Petition for order directing preliminary distribution is required to show existence of situation within contemplation of

statute. *Estate of Ross (1921) 187 Cal. 454, 465, 202 P. 641*

Petition worded in statutory language is sufficient as against personal representative when it alleges ultimate facts that court must find in order to direct preliminary distribution. *Estate of Murphy (1904) 145 Cal. 464, 465-468, 78 P. 960*

Former Prob. Code § 1000 (*now see Prob. Code § 11621(a)*) does not require any particular allegations in petition for preliminary distribution but as requiring only that certain facts should appear at the hearing. *Estate of Brown (1942) 54 Cal. App. 2d 575, 579, 129 P.2d 713* (construing former statutes)

[b] Petitioner

Receiver succeeding to right of possession of legacy is entitled to petition for preliminary distribution, notwithstanding receiver's failure to acquire legatee's title. *Estate of Baldwin (1943) 21 Cal. 2d 586, 590-592, 134 P.2d 259* (construing former statutory provision; *now see Prob. Code §§ 48, 11600*)

Petition of surviving spouse in capacity of legatee seeking preliminary distribution is governed by Prob. Code §§ 1658, 1663 (repealed; *now see Prob. Code §§ 11600-11624*). *Gladding v. Superior Court (1936) 7 Cal. 2d 408, 413-414, 60 P.2d 857*

Person whose only interest in estate is as potential creditor of devisee has no sufficient interest to entitle him to petition for preliminary distribution. *Estate of Schlegel (1970) 10 Cal. App. 3d 255, 257, 88 Cal. Rptr. 734*

Special administrator having general powers pursuant to former Prob. Code § 465 (*now see Prob. Code § 8545*) is entitled to file petition for preliminary distribution. *Estate of Buchman (1955) 132 Cal. App. 2d 81, 105, 281 P.2d 608*

Petition of surviving spouse for distribution of half of community property belonging to that spouse is not required to conform to petition for preliminary distribution under former Prob. Code §§ 1000-1003 (*now see Prob. Code §§ 11600, 11603(a), 11620, 11621(a)*); distribution of such property not governed by those sections but by *Prob. Code § 201* (repealed; *now see Prob. Code § 100*). *Estate of Brown (1942) 54 Cal. App. 2d 575, 579, 129 P.2d 713*

Beneficiary of testamentary trust is entitled to petition for preliminary distribution to trustee. *Estate of McGirl (1932) 125 Cal. App. 310, 313, 13 P.2d 746* , citing *In re Mackay (1895) 107 Cal. 303, 307, 40 P. 558*

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Volume 39: Probate: Claims Against the Estate thru Probate: Discharge-Chs. 454-459
Chapter 458C PROBATE: PRELIMINARY DISTRIBUTION AND PARTIAL ALLOWANCE OF COMPENSATION
PART IV. FORMS

39-458C California Forms of Pleading and Practice--Annotated § 458C.61

§ 458C.61 Order for Preliminary Distribution of Decedent's Estate [Prob. Code §§ 11621, 11622]

[1] FORM Order for Preliminary Distribution of Decedent's Estate [Prob. Code §§ 11621, 11622]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER FOR PRELIMINARY DISTRIBUTION
Deceased.	)	

_____

The petition of _____ [*name(s)*] for preliminary distribution of _____ [all *or* a portion of] the share of the above-entitled estate to which _____ [petitioner(s) *or name(s)*] is/are entitled came on regularly for hearing [in Department _____ (*number*)] of the above-entitled Court, on _____ [this date *or specify date*], the Honorable _____ [*name*] presiding. Petitioner appeared [in person and] by his/her attorney, _____ [*name*]. _____ [There was no opposition to the petition *or* _____(*name*), _____ (*specify relationship showing that opposing party is an interested person within the meaning of Prob. Code § 48, e.g.,* a devisee under the decedent's will,) (filed written objections and) appeared (in person) and by his/her attorney, _____(*name*), in opposition to the petition].

On evidence given to the satisfaction of the court, THE COURT FINDS as follows:

1. Notice of the time and place of the hearing was _____[given as required by *Probate Code Section 11601 or* waived by the person(s) entitled to it]. [Special notice, was _____(given to _____ (*name(s)*), as requested *or* requested and waived by _____ (*name(s)*)).]

2. Notice to creditors was given as required by _____ [law *or Probate Code Sections 8120, 9001*, and *9050-9054*].

3. Notice to creditors _____ [has not yet been published *or* was published in the manner prescribed by *Probate Code Section 9001*]. Notice of administration under *Probate Code Sections 9050-9052* _____ [is not required in this matter *or* was duly mailed to all known and reasonably ascertainable creditors of the decedent, other than those described in *Probate Code Section 9054*, on _____ (*date*)].

4. The time for filing claims against the above-named estate _____ [has *or* has not] expired.

5. All claims filed have been paid or are sufficiently secured[, except as follows: _____ (*specify*)].

6. The estate is not in a condition to be finally closed and distributed at this time because _____ [*specify*].

7. _____ [Petitioner(s) *or Name(s)*] is/are _____ [a beneficiary *or* beneficiaries] entitled to a share of the above-named estate under the _____ [decedent's will *or* laws of intestate succession] in that _____ [he/she is a *or* they are] _____ [*specify, e.g.*, devisee(s) under the decedent's will] entitled to the property described below.

8. The property described below may be distributed to the above-named _____ [petitioner(s) *or* beneficiary *or* beneficiaries] at this time without loss to the creditors or injury to the estate or any interested person because the value of the estate remaining in the hands of the personal representative after the preliminary distribution is $_____, which is more than sufficient to pay all [anticipated] creditors' claims[, all other devises,] and all commissions, fees, and costs of administration of the decedent's estate[, and, as a condition precedent to distribution, _____(the *or* each) distributee will give and file a bond in an amount equal to the _____ (amount of money and/*or* value of the property) distributed to him/her].

IT IS, THEREFORE, ORDERED that

1. _____ [Petitioner *or Name*], the decedent's personal representative, distribute the following property in the decedent's estate to the following person(s):

a. _____ [*Describe particularly, in separate paragraphs for each item, what property is to be distributed and to whom, indicating whether the distribution is in accord with the will or with the laws of intestate succession, e.g.:* To John J. Doe, as a portion of a devise of $5,000 given to him in Paragraph 10 of the will, the sum of $2,500 in cash].

b. _____ [*Continuing example:* To Mary H. Roe, as the devise to her in Paragraph 17 of the will, the real property described as follows: _____ (*legal and common descriptions*), having an appraised value of $_____].

c. _____ [*Example of intestate succession:* To Mary Doe, the surviving spouse of the decedent, and John Doe, the only surviving child of decedent, each an undivided one-half interest in all the real property located at _____ (*street address and city*), more particularly described as _____ (*full legal description*), having an appraised value of $_____].

d. _____ [*Continue in manner illustrated above*].

[*EITHER, if a bond is required*]

2. _____ [The *or* Each] _____ [petitioner *or* distributee] shall give and file with the court a bond in _____ [*either, if order is made less than four months after letters were first issued*, an amount equal to the amount of money and/or appraised value of the property to be received by him/her pursuant to this order *or, if order is made more than four months after letters were first issued*, the following amount(s): _____(*specify*)], conditioned on payment of _____ [the *or* each] _____ [petitioner's *or* distributee's] proper share of the debts of the estate, not exceeding the _____ [*specify, e.g.*, amount of money and/or appraised value of the property] distributed to him/her].

[*OR, if no bond is required*]

2. No bond shall be required of the _____ [petitioner(s) *or* distributee(s)] on the distribution.

[*CONTINUE*]

3. _____ [The estate *and/or name(s) of distributee(s)*] shall pay the costs of this proceeding in the amount of $_____ [in the following proportions: _____(*specify, e.g.*, $_____ payable by _____ (*name*) and $_____ payable by _____ (*name*))].

[*ADD, if bond is required*]

4. This order is stayed until _____ [the bond *or* all bonds] required by this order is/are filed.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is for use when the court grants a petition for preliminary distribution of a portion of the decedent's estate to the person or persons entitled to it [*see Prob. Code §§ 11600, 11603(a), 11621(b), 11622*].

In some counties, the clerk will prepare the order [*see, e.g.*, Los Angeles Co. Super. Ct. Rules, Rule 10.39(a)]. Some courts may provide a printed form of the above order in blank available at the court clerk's office, and, if available, should be used.

[3] Contents of Order

[a] In General

Orders in probate proceedings normally include the date of the hearing and the name and department if any of the judge presiding [*see, e.g.*, Los Angeles Co. Super. Ct. Rules, Rule 10.42(a)]. As a general rule, they also include the appearances of the parties and/or their attorneys.

[b] Drafting

Courts generally require that orders of distribution be so drawn that their full extent may be determined without reference to the petition on which they are based, and without reference to any documents which are not part of the order [*see, e.g.,* Alameda Co. Unified Super. Ct. Rules, Rule 12.11.7; Los Angeles Co. Super. Ct. Rules, Rule 10.42(a); Santa Clara Co. Super. Ct. Rules, 5.9(I)].

[c] Findings

[i] Sufficiency

The order will be sufficient if it makes findings of the ultimate facts required by *Prob. Code §§ 11603(a), 11620,* and *11621*, and a statement of those findings in the language of the statute, although general in form, is sufficient. Such a statement of findings in general statutory language will be taken as implying all specific findings necessary to support the general findings [*see Estate of Clifford (1936) 16 Cal. App. 2d 123, 126-127, 60 P.2d 302* (involving predecessor statutes)].

However, a specific finding will be taken as controlling a contradictory general finding [*In re Estate of Ross (1921) 187 Cal. 454, 468, 202 P. 641* (specific findings as to identities of heirs as controlling contradictory general finding that all allegations of petition are true)].

[ii] Notice of Hearing

Proof of giving notice of the hearing must be made to the satisfaction of the court at or before the hearing, and a finding that notice was regularly given, or that the party entitled to notice has waived it, must be made in the court's order [*see Prob. Code § 1260(b)*]. When the order becomes final, the finding is conclusive on all parties [*Prob. Code § 1260(c)*; *see also Estate of Dam (1932) 126 Cal. App. 70, 73-75, 14 P.2d 162* (decided under a predecessor statute and holding that in the absence of contradictory evidence in the record, such a statement in the order will be taken as conclusive if the order is reviewed on appeal, foreclosing the issue whether the trial court had jurisdiction pursuant to proper notice)].

[d] Order

The order must set forth the names of the distributees and the share to which each is entitled [*Prob. Code § 11603(b)(1)*]; and, if partial payment has already been made and acknowledged by the distributee, it is in error not to deduct the amount already paid from the sum to be distributed [*Estate of Mitchell (1898) 121 Cal. 391, 395, 53 P. 810]* . Some courts by local rule require that the names of persons and the descriptions of property or amounts of money affected be set forth with the same particularity required of judgments in civil matters [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 10.42(a)], or that the order contain complete legal descriptions of the assets distributed and set forth the full names of the distributees [*see, e.g.,* Santa Clara Co. Super. Ct. Rules, Rule 5.9(I)].

The order should also specify in what proportions the costs are to be paid by the distributee or the estate [*see Prob. Code § 11624*].

[4] State Statutes

Finding that notice of hearing was regularly given or waived and conclusiveness of finding. *Prob. Code § 1260*

Order distributing or refusing to distribute property as appealable. *Prob. Code § 7240(n)*

Contents of order of distribution. *Prob. Code § 11603(b)*

Procedure if whereabouts of beneficiary named in order is unknown. *Prob. Code § 11603(c)*

Stay of preliminary order for distribution until any required bond is filed. *Prob. Code § 11621(b)*

Allocation of costs of proceeding for preliminary distribution. *Prob. Code § 11624*

[5] Local Court Rules

[a] Alameda County

Court order is required for preliminary distribution of assets from decedent's estate. Alameda Co. Unified Super. Ct. Rules, Rule 12.11.1

Form of decree of distribution. Alameda Co. Unified Super. Ct. Rules, Rule 12.11.7

Distribution establishing testamentary trust. Alameda Co. Unified Super. Ct. Rules, Rule 12.11.8

Preliminary distribution bond. Alameda Co. Unified Super. Ct. Rules, Rule 12.11.18

[b] Los Angeles County

Orders that are to be prepared by court clerk or by attorney and listing of printed forms of orders available. Los Angeles Co. Super. Ct. Rules, Rule 10.39

Contents of orders. Los Angeles Co. Super. Ct. Rules, Rule 10.42(a)

Preliminary distribution bond. Los Angeles Co. Super. Ct. Rules, Rule 10.122

[c] Orange County

Form and content of probate orders. Orange Co. Super. Ct. Rules, Rule 601.14

[d] City & County of San Francisco

Submission of proposed order before hearing. San Francisco Uniform Local Ct. Rules, Rule 14.6

Form and content of probate orders. San Francisco Uniform Local Ct. Rules, Rule 14.27

[e] Santa Clara County

Preparation of orders and printed probate forms. Santa Clara Co. Super. Ct. Rules, Rule 5.2(A)

Orders of distribution establishing testamentary trusts. Santa Clara Co. Super. Ct. Rules, Rule 5.9(J)

[6] Decisions

In granting petition for preliminary distribution, court is required to make findings as to ultimate facts that are prerequisite to preliminary distribution, and findings are permitted to be contained in preliminary distribution order itself and are not required to be formally set forth in separate document. *Estate of Downing (1982) 134 Cal. App. 3d 256, 270-271, 184 Cal. Rptr. 511* (court's failure to make findings when expressly requested to do so resulted in postponing time to appeal until order was set forth in final account)

Person aggrieved by judgment adverse to his or her interest on petition for preliminary distribution and who was properly a party to hearing on petition is permitted to appeal. *Estate of Effron (1981) 117 Cal. App. 3d 915, 921 n.3, 173 Cal. Rptr. 93 , appeal dismissed, 454 U.S. 1070, 102 S. Ct. 622, 70 L. Ed. 2d 606*

[7] Cross References

For discussion and forms of orders generally, see Ch. 372, *Motions and Orders*

For discussion and forms of bonds and undertakings, see Ch. 538, *Suretyship, Bonds, and Undertakings*

For a related form, see *§ 458C.60*.

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California Forms of Pleading and Practice--Annotated

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Volume 39: Probate: Claims Against the Estate thru Probate: Discharge-Chs. 454-459
Chapter 458C PROBATE: PRELIMINARY DISTRIBUTION AND PARTIAL ALLOWANCE OF COMPENSATION
PART IV. FORMS

39-458C California Forms of Pleading and Practice--Annotated § 458C.62

§ 458C.62 Petition for Partial Allowance of Compensation for Ordinary and Extraordinary Services [Prob. Code §§ 10801, 10811, 10830(a)(1), (2) (Proceeding Commenced on or After July 1, 1991); Former Prob. Code §§ 901, 902, 904, 910, 911 (Proceeding Commenced Before July 1, 1991)]

[1] FORM Petition for Partial Allowance of Compensation for Ordinary and Extraordinary Services [Prob. Code §§ 10801, 10811, 10830(a)(1), (2) (Proceeding Commenced on or After July 1, 1991); Former Prob. Code §§ 901, 902, 904, 910, 911 (Proceeding Commenced Before July 1, 1991)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR PARTIAL ALLOWANCE OF
Estate of _____ [*name*],	)	COMPENSATION FOR ORDINARY [AND EX-
Deceased.	)	TRAORDINARY] SERVICES
		[Prob. Code §§ (10801,) (10811,) 10830(a)(1), (2) (Proceeding Commenced on or After July 1, 1991) *or* Former Prob. Code §§ 901, (902,) 904, (910,) 911 (Proceeding Commenced Before July 1, 1991)]

_____

Petitioner _____ [*name*] hereby petitions the court for an order for partial allowance of _____ [compensation *if proceeding was commenced on or after July 1, 1991, or* commissions or fees *if proceeding was commenced before July 1, 1991*] and, in support thereof, respectfully represents:

1. Petitioner is the [attorney for the] personal representative of the estate of _____ [*name*], deceased.

2. Letters _____ [testamentary *or* of administration *or* of administration with will annexed] were

issued to _____ [petitioner *or* _____ (*name of personal representative*)] on _____ [*date*], and are in full force and effect.

3. As shown by the Inventory and Appraisal herein filed, the appraised value of the estate is $_____.

4. The estimated total statutory compensation due to petitioner should be calculated on the basis of $_____ [*total amount of inventory; and, if account has been filed, add gains over appraised value on sales, plus receipts, less losses on sales, without reference to encumbrances or other obligations on the property in the estate*] as follows:

Amount of Estate		Compensation
[*Set out calculation according to schedule in Prob. Code § 901, as in following example for basis of $237,220.13:*]		
$ 15,000.00	at 4%	$ 600.00
85,000.00	at 3%	2,550.00
137,220.13	at 2%	2,744.40
$237,220.13	.....	$5,894.40

5. Petitioner is entitled to receive a partial allowance, as prayed for, on an estimated total statutory _____ [commission *or* fee] of $_____ [*specify, e.g.,* $5,894.40].

[*ADD, if compensation is sought for extraordinary services*]

6. Petitioner has performed the extraordinary services set out in Exhibit A, which is attached hereto and made a part hereof, on behalf of the estate, for which petitioner should be allowed a reasonable further compensation, in addition to the statutory _____ [compensation *if proceeding was commenced on or after July 1, 1991, or* commission or fee *if proceeding was commenced before July 1, 1991*] to which petitioner is entitled. The reasonable compensation for such extraordinary services is $_____.

[*CONTINUE*]

7. The estate is not in a condition to be closed because _____ [*specify what remains to be done before the estate can be closed*].

8. Notice of the time and place of the hearing will be given as required by _____ [*Probate Code Section 10830(b) if proceeding was commenced on or after July 1, 1991, or*former Probate Code Section 904(b), (c) *or* 911(b), (c)*if proceeding was commenced before July 1, 1991*]. [Special notice will be given as required by *Probate Code Section 1252* to _____ (*name(s)*) pursuant to their request(s) filed herein pursuant to *Probate Code Section 1250*.]

WHEREFORE, Petitioner prays for an order as follows:

1. That petitioner be allowed a partial allowance in the sum of $_____, on account of the statutory _____ [compensation *if proceeding was commenced on or after July 1, 1991, or* commission or fee *if proceeding was commenced before July 1, 1991*] to which petitioner is entitled;

[2. That petitioner be allowed the sum of $_____, as compensation on account of the extraordinary services rendered as alleged in this petition;] and

3. For all other proper orders.

_____ [*signature*]

Petitioner

[*Verification. See § 458C.60.*]

EXHIBIT A--EXTRAORDINARY SERVICES

[*Describe the extraordinary services rendered, showing that they were necessary or beneficial to the estate. See former Prob. Code § 902 for an illustrative list of extraordinary services by a personal representative (Prob. Code § 10801, which applies to proceedings commenced on or after July 1, 1991, omits the list), and see Prob. Code § 10811 (proceeding commenced on or after July 1, 1991) or former Prob. Code § 910 (proceeding commenced before July 1, 1991; see Prob. Code § 10850) for the authority of the court to award fees for extraordinary legal services, including the service of any paralegal performing the extraordinary services under the direction and supervision of the attorney. Former Prob. Code § 910, by virtue of its reference to the "previous article," makes former Prob. Code § 902 (which applies to proceedings commenced before July 1, 1991) applicable to legal services, as well as to the services of the executor or administrator (Estate of Schuster (1984) 163 Cal. App. 3d 337, 341-342, 209 Cal. Rptr. 289).*]

[2] Use of Form

This petition may be used by the executor or administrator of an estate or by his or her attorney to petition the probate court for a partial allowance on either the statutory compensation or commission to which the executor or administrator is entitled [*see Prob. Code §§ 10800, 10830(a)(1)* (proceeding commenced on or after July 1, 1991); former Prob. Code §§ 901, 904 (proceeding commenced before July 1, 1991); *see also Prob. Code § 10850*], or for the statutory compensation or fee to which the attorney is entitled [*see Prob. Code §§ 10810, 10811, 10830(a)(2)* (proceeding commenced on or after July 1, 1991); former Prob. Code §§ 901, 910, 911 (proceeding commenced before July 1, 1991)]. In either case, the petition may include a request for compensation for extraordinary services rendered by the executor or administrator or the attorney [*see Prob. Code §§ 10801, 10811* (proceeding commenced on or after July 1, 1991); former Prob. Code §§ 902, 910 (proceeding commenced before July 1, 1991); *see also Prob. Code § 10850*].

[3] Time for Filing Petition

A petition for partial allowance on the statutory compensation to which the executor or administrator or the attorney is entitled may be filed at any time after four months have elapsed since letters were issued [*Prob. Code § 10830(a)* (proceeding commenced on or after July 1, 1991); former Prob. Code §§ 904, 911 (proceeding commenced before July 1, 1991; *see Prob. Code § 10850*]. No time period for requesting compensation for extraordinary services is specified in the relevant code sections [*see Prob. Code §§ 10801, 10811, 10830(a)* (proceeding commenced on or after July 1, 1991); former Prob. Code §§ 902, 904, 910, 911 (proceeding commenced before July 1, 1991)].

[4] Who May File Petition

If the executor or administrator is not also the attorney representing the estate, a petition for a partial allowance of

compensation is prepared by the attorney for signature and verification by the executor or administrator, and the attorney represents the executor or administrator at the hearing.

An application for a partial allowance of attorney's compensation may be made directly by the attorney [*Prob. Code § 10830(a)(2)* (proceeding commenced on or after July 1, 1991); former Prob. Code § 911 (proceeding commenced before July 1, 1991); *see Prob. Code § 10850*; *Hutchinson v. Gertsch (1979) 97 Cal. App. 3d 605, 614, 159 Cal. Rptr. 40* ; *see also Hatch v. Bush (1963) 215 Cal. App. 2d 692, 704, 706, 30 Cal. Rptr. 397* ; *Estate of De Barry (1941) 43 Cal. App. 2d 715, 725, 111 P.2d 728]* . However, an executor or administrator who is a lawyer and acts as his or her own attorney in the probate of the estate is entitled to the executor's or administrator's compensation but not to compensation for his or her legal services [*see Estate of Downing (1982) 134 Cal. App. 3d 256, 263, 269, 184 Cal. Rptr. 511* (distinguishing *Estate of Lankershim (1936) 6 Cal. 2d 568, 573-574, 58 P.2d 1282* , which recognized the foregoing general rule but involved an exception in that, in *Lankershim*, the executor, at the time of his appointment with the consent of all parties, waived his commission and agreed to seek only such compensation as might be allowed as attorney's fees)].

[5] Showing Required

The only showings required to grant the petition for partial allowance are that services were performed and estate funds are available to pay for them [*see Estate of Algee (1958) 158 Cal. App. 2d 691, 696, 323 P.2d 221]* .

[6] Extra Allowances for Extraordinary Services

Additional allowances for extraordinary services are authorized by *Prob. Code §§ 10801, 10811* (personal representatives and attorneys, respectively, in proceedings commenced on or after July 1, 1991) and former Prob. Code §§ 902, 910 (personal representatives and attorneys, respectively, in proceedings commenced before July 1, 1991 [*see Prob. Code § 10850*]). Former Prob. Code § 902, relating to personal representatives, lists a number of services constituting extraordinary services and, by the reference in former Prob. Code § 910 to the "previous article" (*i.e.*, to former Prob. Code §§ 900-904), has been held to apply to attorneys as well [*see Estate of Schuster (1984) 163 Cal. App. 3d 337, 341-342, 209 Cal. Rptr. 289]* . The services listed in former Prob. Code § 902 are not, however, carried over into *Prob. Code § 10801*, the superseding statute.

[7] Form and Contents of Petition

Neither former Prob. Code § 904 nor former Prob. Code § 911 imposes any requirements on the form or contents of the petition, and this is also true of the superseding legislation, *Prob. Code § 10830*. Local courts, however, frequently do.

For example, most courts require that the captions of all petitions filed in probate proceedings be all-inclusive as to the relief sought so that the matter may be properly calendared and posted and filing fees, if any, determined [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 10.9; Orange Co. Super. Ct. Rules, Rule 601.05; San Francisco Uniform Local Ct. Rules, Rule 14.24].

In addition, many courts impose specific requirements on petitions for commissions or fees. For example, in Los Angeles County, in all petitions requesting both ordinary and extraordinary fees or commissions, a specific sum must be requested, not merely "a reasonable amount" [Los Angeles Co. Super. Ct. Rules, Rule 10.133, 10.141; *see also*San Francisco Uniform Local Ct. Rules, Rule 14.117]. And an application for compensation for extraordinary services will not be considered unless the prayer of the petition contains a reference to the application for extraordinary fees or commissions [Los Angeles Co. Super. Ct. Rules, Rule 10.133, 10.141]. In Alameda County, an application for compensation for extraordinary services will not be considered unless both the caption and the prayer of the petition contain a reference to the application for extraordinary compensation [Alameda Co. Unified Super. Ct. Rules, Rule 12.10.6.1]. In Santa Clara County, the calculation of the fees or commissions must be set forth in the petition in which

they are sought, and the court prefers that the extraordinary services for which additional compensation is requested be separately stated and the amount of compensation for the services also be separately stated [Santa Clara Co. Super. Ct. Rules, Rule 5.9(E), (G)].

With respect to extraordinary services, the petition need not state the supporting facts with all the preciseness and detail required in a complaint, and the sufficiency of the petition need not be tested by the rules applicable to pleadings. Nevertheless, the petitioner has the duty to state his or her claim with sufficient particularity so that the court, as well as those interested in the estate and authorized to object to it, may be informed fully of the nature of the extraordinary services allegedly rendered, as well as of their necessity and value to the estate, and be thereby enabled to distinguish the items that are a proper charge from those that may be unjust and improper. The petitioner is charged with the burden of proof as to the necessity of the services, and there should be a full and complete disclosure of their extent and character, from which the court may properly determine the just and reasonable amount to be allowed [*Estate of Herbst (1938) 26 Cal. App. 2d 249, 251, 79 P.2d 139]* .

[8] Verification of Petition

The petition must be verified [*Prob. Code § 1021(a)(1)*; *see also* discussion in Comments to § 458C.60].

[9] Combined Petition

Requests for an allowance on the compensation of both the personal representative and the attorney [*see Prob. Code § 10830(a)*] or, in the language of the former statutes, on both commissions and fees [*see* former Prob. Code §§ 904, 911] may be combined in the same petition and brought in the name of the executor or administrator alone [*see, e.g., Estate of Effron (1981) 117 Cal. App. 3d 915, 919, 173 Cal. Rptr. 93 , appeal dismissed, 454 U.S. 1070, 102 S. Ct. 622, 70 L. Ed. 2d 606]* . However, under former law (which continues to apply to proceedings commenced before July 1, 1991), it would appear that, if allowances on both commissions and fees are sought at the same time, the better practice would be for the executor or administrator and the attorney to petition separately or to join as petitioners in the same petition, each seeking a partial allowance on his or her commissions or fees, respectively. The reasons are the following: (1) the petition must be signed by all petitioners [*see Prob. Code § 1020*]; (2) it must be verified by the petitioner, or by one of them if there is more than one [*see Prob. Code § 1021(a)(1), (b)(1)*]; (3) the petition must allege sufficient facts to warrant the order granting the partial allowance [*see* discussion in *§ 458C.62[7]*]; and (4) not all the facts respecting the other's claims may be within the personal knowledge of the executor or administrator or attorney, as the case may be. If a single petition in which both the executor or administrator and the attorney are petitioners is filed, the introductory phrase to the body of the combined petition may read, "Petitioners, each for himself/herself, alleges:" etc. The petition should then be signed by each as a petitioner [*see Prob. Code § 1020*]. If all the facts set forth in the petition are within the personal knowledge of either the attorney or the personal representative, then either could verify the entire petition [*see Prob. Code § 1021(b)(1)*]. If they are not, then each should verify that portion of the petition relating to his or her claim for an allowance.

Under the current law, which applies in proceedings commenced on or after July 1, 1991 [*see Prob. Code § 10850*], statute expressly provides that (1) the personal representative may file a petition requesting an allowance on the compensation of the personal representative, and (2) the personal representative or the attorney for the personal represenative may file a petition requesting an allowance on the compensation of the personal representative's attorney [*Prob. Code § 10830(a)*].

[10] Limitations on Request

[a] Ordinary Fees and Commissions

Some courts impose limitations on allowances for fees and commissions. For example, in Los Angeles County, the policy of the court is to allow payment on account of statutory fees or commissions only in proportion to the work

actually completed, and, in any event, not to allow payment of the last 30 percent of the statutory fees or commissions prior to the approval of the final account and the decree of distribution. The reason stated is that, until the final account is settled, the court is unable to fix the total amount of the statutory fees and commissions and any allowance made prior to that time must be low enough to avoid the possibility of overpayment [Los Angeles Co. Super. Ct. Rules, Rule 10.132, 10.141].

The San Francisco, Alameda County, and Orange County Superior Courts follow a similar policy, except that the last 25 percent of the statutory fees or commissions will not ordinarily be allowed before the approval of the final account and the decree of distribution [San Francisco Uniform Local Ct. Rules, Rule 14.116; Alameda Co. Unified Super. Ct. Rules, Rule 12.10.3; Orange Co. Super. Ct. Rules, Rule 608.03; *see also*Santa Clara Co. Super. Ct. Rules, Rule 5.9(G) (allowances on account of statutory compensation will be allowed in proportion to the work completed)]. In Alameda County, the full statutory fee will be allowed only in cases in which the estate or heirs will benefit, for example, when it would be beneficial to reduce income taxes in a given fiscal year [Alameda Co. Unified Super. Ct. Rules, Rule 12.10.3].

If apportionment of statutory fees among multiple executors or administrators or attorneys is necessary [*see Prob. Code § 10805, 10814* (proceedings commenced on or after July 1, 1991); former Prob. Code §§ 901, 910 (proceedings commenced before July 1, 1991); *see also Prob. Code § 10850*], the policy of the Los Angeles County Superior Court is ordinarily not to allow partial payment but to defer all statutory fees until the final account is settled [Los Angeles Co. Super. Ct. Rules, Rule 10.134, 10.141].

[b] Extraordinary Services

Some courts impose limitations on when they will allow compensation for extraordinary services. In Alameda County, for example, such compensation will not be approved before the final account, except in cases in which the estate or heirs will benefit, for example, when it would be beneficial to reduce income taxes in a given fiscal period [Alameda Co. Unified Super. Ct. Rules, Rule 12.10.6.3]. In the San Francisco Superior Court, extraordinary compensation will be allowed before final distribution only when it appears likely that the estate will remain in probate for an unusually long time, whether because of litigation or other cause, or on a showing that present payment will benefit the beneficiaries of the estate [San Francisco Uniform Local Ct. Rules, Rule 14.116]. In Orange County, the court prefers to reserve determination of all requests for compensation for extraordinary services to the time of final distribution [Orange Co. Super. Ct. Rules, Rule 608.03; *see also*Santa Clara Co. Super. Ct. Rules, Rule 5.9(E) (allowances on account of compensation for extraordinary services ordinarily will not be allowed)].

[11] Notice of Hearing

Notice of the hearing for an allowance on compensation of the personal representative or attorney for the personal representative must be given as provided in *Prob. Code § 1220* to all of the following: (1) each person listed in *Prob. Code § 1220*; (2) each known heir whose interest in the estate would be affected by the payment of the compensation; (3) each known devisee who would be affected by the payment of the compensation; and (4) the Attorney General, at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the petition [*Prob. Code § 10830(b)* (applies to proceeding commenced on or after July 1, 1991)]. Substantially the same is true if the proceeding was commenced before July 1, 1991, in which case the provisions of former Prob. Code §§ 904(b), (c), 911(b), (c) continue to apply [*see Prob. Code § 10850*]. The former statutes provide that notice of the hearing for partial allowance of commissions or fees must be given as provided in *Prob. Code § 1220* [former Prob. Code §§ 904(b), 911(b)]. Additionally, notice of the hearing must be given as provided in *Prob. Code § 1220 to (1)* each known heir or devisee whose interest in the estate is affected by the payment of the commissions or fees, and (2) the State of California if any portion of the estate is to escheat to it and its interest in the estate is affected by the payment [former Prob. Code §§ 904(c), 911(c)].

Local courts may impose additional requirements. For example, in Los Angeles County, an application for

compensation for extraordinary fees or commissions will not be considered unless the notice contains a reference to the application for extraordinary fees [Los Angeles Co. Super. Ct. Rules, Rule 10.137, 10.141]. Local rule may also specify additional persons who must receive notice [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 10.119 (when there has been a change of personal representative or a substitution of counsel)].

[12] State Statutes

Law applicable before July 1, 1991, continues to apply to proceedings commenced before July 1, 1991. *Prob. Code § 10850*

Appealability of order directing, or refusing to direct, payment of attorney's or personal representative's compensation. *Prob. Code § 7240(l)*

Right of personal representative to compensation. *Prob. Code § 10800* (proceeding commenced on or after July 1, 1991); former Prob. Code § 900 (proceeding commenced before July 1, 1991)

Schedule of compensation allowed personal representative. *Prob. Code § 10800* (proceeding commenced on or after July 1, 1991); former Prob. Code § 901 (proceeding commenced before July 1, 1991)

Extra allowances to personal representative for extraordinary services. *Prob. Code § 10801* (proceeding commenced on or after July 1, 1991); former Prob. Code § 902 (proceeding commenced before July 1, 1991)

Contract with heir, devisee, or legatee for higher compensation is void. *Prob. Code § 10803* (proceeding commenced on or after July 1, 1991); former Prob. Code § 903 (proceeding commenced before July 1, 1991)

Attorney's fees for ordinary services; schedule of compensation allowed attorney. *Prob. Code § 10810* (proceedings commenced on or after July 1, 1991); former Prob. Code § 910 (proceeding commenced before July 1, 1991)

Additional compensation allowed attorney for extraordinary services. *Prob. Code § 10811* (proceedings commenced on or after July 1, 1991); former Prob. Code § 910 (proceeding commenced before July 1, 1991)

Agreement between personal representative and attorney for higher compensation for attorney is void. *Prob. Code § 10813* (proceedings commenced on or after July 1, 1991)

Partial allowance of executor's or administrator's compensation or commissions. *Prob. Code § 10830(a)(1)* (allowance on personal representative's compensation in proceeding commenced on or after July 1, 1991); former Prob. Code § 904 (allowance on executor's or administrator's commissions in proceeding commenced before July 1, 1991)

Partial allowance of attorney's compensation or fees. *Prob. Code § 10830(a)(2)* (allowance on attorney's compensation in proceeding commenced on or after July 1, 1991); former Prob. Code § 910 (allowance on attorney's fee in proceeding commenced before July 1, 1991)

[13] Local Court Rules

[a] Alameda County

Commissions and fees. Alameda Co. Unified Super. Ct. Rules, Rule 12.10

[b] Los Angeles County

Attorney's fees and personal representative's commissions in decedents' estates. Los Angeles Co. Super. Ct. Rules, Rule 10.131 et seq.

[c] Orange County

Accounts, compensation, and distribution. Orange Co. Super. Ct. Rules, Rule 608.01 et seq.

[d] City and County of San Francisco

Commissions and fees. San Francisco Uniform Local Ct. Rules, Rule 14.107, 14.108, 14.113, 14.115 et seq.

[e] Santa Clara County

Fees and commissions. Santa Clara Co. Super. Ct. Rules, Rule 5.9(D)

[14] Decisions

[a] Generally

Statutory commissions and fees are not gratuities, but compensation given by statute to personal representative and his or her attorney for all services performed by them from commencement of probate until estate is wound up and distributed, except for those services that are remarkable, uncommon, or rare; personal representative and attorney are entitled to statutory fees (former Prob. Code §§ 901, 910 (proceeding commenced before July 1, 1991); *Prob. Code §§ 10800, 10810* (proceeding commenced on or after July 1, 1991) as matter of right, and fact that estate is simple and fees larger than would be adequate compensation for work involved does not affect right to full statutory compensation. *Estate of Getty (1983) 143 Cal. App. 3d 455, 465-466, 191 Cal. Rptr. 897* ; *Estate of Buchman (1955) 138 Cal. App. 2d 228, 235, 291 P.2d 547*

Executor's or administrator's commissions and equivalent attorney's fees ais based on values set forth in inventory compiled as of date of decedent's death. *Estate of Downing (1982) 134 Cal. App. 3d 256, 264-265, 184 Cal. Rptr. 511* (citing *Prob. Code §§ 600,* 901; *now see Prob. Code § 10800* (proceeding commenced on or after July 1, 1991); former Prob. Code § 901 (proceeding commenced before July 1, 1991); *Prob. Code §§ 8800, 8802*)

Order granting executor's petition for distribution of attorney's fees for probate services is appealable under former Prob. Code § 1240 (*now see Prob. Code § 7240*), even though allowance of attorney's fees is preliminary in nature. *Estate of Effron (1981) 117 Cal. App. 3d 915, 921 n.3, 173 Cal. Rptr. 93 , appeal dismissed, 454 U.S. 1070, 102 S. Ct. 622, 70 L. Ed. 2d 606*

Right of executor, administrator, or attorney to ordinary compensation is absolute, but does not accrue until order for payment is made; same as true of compensation for extraordinary services. *Hatch v. Bush (1963) 215 Cal. App. 2d 692, 705, 30 Cal. Rptr. 397*

[b] Attorney's Fees

Petition for partial allowance of fees to administrator's attorney provided for by former Prob. Code § 911 (applicable to proceedings commenced before July 1, 1991; *see Prob. Code § 10830(a)(1)* for proceedings commenced on or after

July 1, 1991) is permissive only and not exclusive means by which court may authorize allowance for fees; statute is inapplicable when administrator is seeking authority to compromise wrongful death claim under Federal Tort Claims Act in accordance with applicable federal statutes (*28 U.S.C. §§ 2677, 2678*), including appropriate allowance for attorney's fees as part of terms of that settlement. Estate of Ledbetter *(1958) 50 Cal. 2d 283, 287, 324 P.2d 884*

Attorney's fees in probate proceedings are strictly statutory and as not arising from contract. *Estate of Lee (1981) 124 Cal. App. 3d 687, 693, 177 Cal. Rptr. 229*

Under former Prob. Code §§ 910 and 911 (applicable to proceedings commenced before July 1, 1991; *see Prob. Code §§ 10810, 10830(a)(1)* for proceedings commenced on or after July 1, 1991), attorney's fees are required to be paid "out of the estate" and, hence, attorney's only right to recover fees for services is against estate, and not against executor or administrator personally. *Estate of Lee (1981) 124 Cal. App. 3d 687, 693, 177 Cal. Rptr. 229*

Liability for attorney's fees as expense of administration. *Hutchinson v. Gertsch (1979) 97 Cal. App. 3d 605, 613, 159 Cal. Rptr. 40*

On attorney's petition for allowance of fees on account for services rendered up to certain time, trial court did not abuse its discretion in deferring immediate award until filing of accounting or petition for final distribution when, although administratrix had discharged attorney and substituted other counsel after a number of legal services had been performed, no inventory or appraisal had yet been filed and newly appointed counsel was unable to give opinion as to value of estate. *Estate of McManus (1963) 214 Cal. App. 2d 390, 396-397, 29 Cal. Rptr. 543*

[c] Constitutionality of Statutes

Statutory attorney's fees are valid and fall within state action exemption to Sherman Antitrust Act (*15 U.S.C.S § 1 et seq.*) enunciated in *Parker v. Brown (1943) 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307* ; and statutory schedules providing for compensation to lawyers and executors does not violate due process of law. *Estate of Effron (1981) 117 Cal. App. 3d 915, 920, 927, 173 Cal. Rptr. 93* , *appeal dismissed, 454 U.S. 1070, 102 S. Ct. 622, 70 L. Ed. 2d 606* (tracing legislative history of California statutes specifying compensation of personal representatives of estates and attorneys for representatives)

[d] Extraordinary Services

Petition for extraordinary fees is filed to recover fees out of estate for extraordinary services rendered to estate. *Estate of Linnick (1985) 171 Cal. App. 3d 752, 760 n.8, 217 Cal. Rptr. 552*

Statute authorizing allowance for attorney fees for extraordinary services that did not cover services involved at time they were rendered but that was amended to include those services while probate proceeding was still pending applied to those services; probate proceeding is still pending for this purpose when appeal is pending, even though only issue on appeal is right to attorney's fee for those services. *Estate of Schuster (1984) 163 Cal. App. 3d 337, 341, 209 Cal. Rptr. 289*

Probate court has discretion under former Prob. Code §§ 902, 910 (applicable to proceedings commenced before July 1, 1991; *see Prob. Code §§ 10801, 10811* for proceedings commenced on or after July 1, 1991) to award fees out of estate being probated for successful preprobate defense of will contest, even though "success" consisted of settlement of case before trial. *Estate of Schuster (1984) 163 Cal. App. 3d 337, 341-342, 209 Cal. Rptr. 289*

Award of commissions to executor or administrator and of attorney's fees for extraordinary services is within trial court's discretion. *Estate of Downing (1982) 134 Cal. App. 3d 256, 267, 184 Cal. Rptr. 511*

Language of former Prob. Code § 902 (applicable to proceedings commenced before July 1, 1991: *see Prob. Code § 10801* for proceedings commenced on or after July 1, 1991) makes clear that allowance of fees for extraordinary services rendered in probate proceedings by executors or administrators and their attorneys is discretionary with probate court. *Estate of Downing (1982) 134 Cal. App. 3d 256, 267, 184 Cal. Rptr. 511* ; *Estate of Walker (1963) 221 Cal. App. 2d 792, 795, 34 Cal. Rptr. 832*

Probate court is proper forum for determining validity and reasonableness of extraordinary compensation sought from estate by executor or his or her legal representative; such determinations are made by court and issues arising over such fees is not triable by jury. *Hutchinson v. Gertsch (1979) 97 Cal. App. 3d 605, 613, 159 Cal. Rptr. 40*

In making allowance, or disallowing claim, for extraordinary services, court is permitted to take into consideration all matters relating to administration of particular estate, such as value of estate, kind and character of assets, effort involved in care and preservation of estate property, and such other facts as bear on labor and effort of executor or administrator and of attorney in routine administration of estate; amount of ordinary fees to which persons are entitled under former Prob. Code §§ 901 and 910 (applicable to proceedings commenced before July 1, 1991; *see Prob. Code §§ 10800, 10810* for proceedings commenced on or after July 1, 1991) is permitted to be considered and, if, under all facts and circumstances bearing on administration of estate, sum allowed by law as ordinary compensation appears to be adequate, just, and reasonable compensation for all services rendered, even though some extraordinary services may have in fact been performed, probate court is permitted, in exercise of discretion conferred on it by statute, to disallow all claims for extraordinary compensation. *Estate of Walker (1963) 221 Cal. App. 2d 792, 795, 34 Cal. Rptr. 832*

Former Prob. Code §§ 902 and 910 (applicable to proceedings commenced before July 1, 1991; *see Prob. Code §§ 10801, 10811* for proceedings commenced on or after July 1, 1991) authorize court to allow such amounts as it may deem just and reasonable for extraordinary services rendered by executor and his or her attorney. *Estate of Herbst (1938) 26 Cal. App. 2d 249, 251, 79 P.2d 139*

[e] Final Account

Court is required on final account to deduct from total commissions and fees due amounts paid on account to executor or administrator or attorney and allow balance under rates prescribed in former Prob. Code § 901 (applicable to proceedings commenced before July 1, 1991; *see Prob. Code § 10800* for proceedings commenced on or after July 1, 1991), as it reads at time final account is approved. *Estate of Heck (1958) 160 Cal. App. 2d 162, 165-166, 324 P.2d 733*

[f] Nature of Allowance on Account

Executor's commissions and attorney's fees are allowed in accordance with statute in effect at time of approval of final account and entry of final decree of distribution; any compensation granted before final accounting is merely an advance allowance or "on account of" full commission or fee allowable, which can be determined only on final account. *Estate of Heck (1958) 160 Cal. App. 2d 162, 165-166, 324 P.2d 733*

[g] Personal Representative's Commissions

Court is empowered by former Prob. Code § 904 (applicable to proceedings commenced before July 1, 1991; *see Prob. Code § 10830(a)(1)* for proceedings commenced on or after July 1, 1991) to allow portion of commissions it deems proper for services rendered up to time of hearing; statute as not requiring court to fix this compensation on basis of provisions of former Prob. Code § 901 (schedule of commissions allowed). *Estate of Heck (1958) 160 Cal. App. 2d*

162, 165, 324 P.2d 733

[15] Cross References

For a related form, see *§ 458C.60*.

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Volume 39: Probate: Claims Against the Estate thru Probate: Discharge-Chs. 454-459
Chapter 458C PROBATE: PRELIMINARY DISTRIBUTION AND PARTIAL ALLOWANCE OF COMPENSATION
PART IV. FORMS

39-458C California Forms of Pleading and Practice--Annotated § 458C.63

§ 458C.63 Order for Partial Allowance of Compensation for Ordinary and Extraordinary Services [Prob. Code §§ 10801, 10811, 10830(a)(1), (2) (Proceeding Commenced on or After July 1, 1991); Former Prob. Code §§ 901, 902, 904, 910, 911 (Proceeding Commenced Before July 1, 1991)]

[1] FORM Order for Partial Allowance of Compensation for Ordinary and Extraordinary Services [Prob. Code §§ 10801, 10811, 10830(a)(1), (2) (Proceeding Commenced on or After July 1, 1991); Former Prob. Code §§ 901, 902, 904, 910, 911 (Proceeding Commenced Before July 1, 1991)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	ORDER FOR PARTIAL ALLOWANCE OF COM-
Deceased.	)	PENSATION FOR ORDINARY [AND EX-
		TRAORDINARY] SERVICES

_____

The petition of _____ [*name*] for a partial allowance on the statutory compensation to which the petitioner is entitled for ordinary services as the [attorney for the] _____ [Executor *or* Administrator] of the above entitled estate [and for compensation for extraordinary services] came on regularly for hearing [in Department _____ (*number*)] of the above-entitled Court, on _____ [this date *or specify date*], the Honorable _____ [*name*] presiding. Petitioner appeared _____ [in person and/*or* by his/her attorney, _____ (*name*)]. _____ [There was no opposition to the petition *or* _____ (*name*) appeared _____ (in person and/*or* by his/her attorney, _____ (*name*)), in opposition to the petition].

On evidence given to the satisfaction of the court, THE COURT FINDS that

1. Notice of the time and place of the hearing was _____[given as required by _____ (*Prob. Code Section 10830(b) if proceeding was commenced on or after July 1, 1991, or* former Prob. Code Section(s) 904(c) *and/or* 911(c) *if proceeding was commenced before July 1, 1991*)) *or* waived by the person(s) entitled to it]. [Special notice, was _____ (given to _____ (*name(s)*), as requested *or* requested and waived by _____ (*name(s)*)).]

2. The allegations of the petition are true.

IT IS ORDERED that

1. _____ [*Name*], as [attorney for] the _____ [Executor *or* Administrator] of [the estate of] _____ [*name*], is allowed $_____ as a partial allowance on account of the statutory _____ [compensation *if action was filed on or after July 1, 1991, or, if action was filed before July 1, 1991,* commissions *or* fees], and _____ [he/she is authorized to withdraw that sum from the funds of the estate and to pay it to himself/herself *or* _____ (*name*), as the _____ (Executor *or* Administrator), is directed to withdraw that sum from the funds of the estate and to pay it to _____ (*name of attorney*)].

[*ADD, if compensation for extraordinary services is ordered*]

2. _____ [*Name*], as [attorney for] the personal representative of the estate, is allowed $_____ as compensation for the following extraordinary services rendered by him/her: _____ [*specify services compensated, as alleged in petition*]; and _____ [he/she is authorized to withdraw that sum from the funds of the estate and to pay it to himself/herself *or* _____ (*name*), as the _____ (Executor *or* Administrator), is directed to withdraw that sum from the funds of the estate and to pay it to _____ (*name of attorney*).]

[*CONTINUE*]

Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form is an order for use when the court grants a petition for an allowance on statutory compensation in a proceeding commenced on or after July 1, 1991 [*see Prob. Code § 10830(a), (c)*] or, in a proceeding commenced before July 1, 1991, on statutory commissions (former Prob. Code § 904) or fees (former Prob. Code § 911). In some counties, the clerk will prepare the order [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 10.39(a)]. A form of the order printed in blank may be available in some counties from the court clerk, and, if available, should be used.

In a proceeding commenced before July 1, 1991 [*see Prob. Code § 10850*], on hearing the petition, the court is required to make an order allowing such portion of the commissions or fees, for services rendered up to that time, as the court shall deem proper, and the portion of commissions so allowed may be thereupon charged against the estate [former Prob. Code § 904(a)], or make an order requiring the executor or administrator to pay the attorney out of the estate such compensation on account of services rendered up to that time as the court shall deem proper, and payment of the fees allowed must be made forthwith [former Prob. Code § 911(a)].

In a proceeding commenced on or after July 1, 1991, on the hearing of the petition, the court may make an order allowing the portion of the compensation of the personal representative or the attorney for the personal representative, as the case may be, on account of services rendered up to that time that the court determines is proper, and the court must authorize the personal representative to charge against the estate the amount allowed [*Prob. Code § 10830(c)*].

[3] Cross References

For related forms, see *§§ 458C.61* and *458C.62*.

California Forms of Pleading and Practice--Annotated

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Volume 39: Probate: Claims Against the Estate thru Probate: Discharge-Chs. 454-459
Chapter 458D PROBATE: ACCOUNTS, FINAL DISTRIBUTION, AND COMPENSATION

39-458D California Forms of Pleading and Practice--Annotated 458D.syn

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[a] Allegation in Petition Regarding Claims

[b] Amount Requested as Extraordinary Fees Must Be Specified

[c] Caption and Prayer of Petition Must Contain Reference to Application for Extraordinary Fees

[d] Character of Property Must Be Alleged in Petition

[e] Distribution to Minors

[f] Form of Account

[g] Form of Calculation of Statutory Compensation

[h] Petition Must List and Describe in Detail All Property to Be Distributed

[i] Proposed Distribution Must Be Alleged in Petition

[j] Title of Petition Must Reflect All Relief Asked for in Prayer

[21] Decisions

§ 458D.191 Allegation--Death of Beneficiary Before Distribution [Prob. Code §§ 11801, 11802]--General Form

[1] FORM

[2] Use of Form

[3] Death of Beneficiary Before Distribution

[4] Effect of Advancement

[5] State Statutes

[6] Decisions

[7] Cross References

§ 458D.192 Allegation--Death of Beneficiary Before Distribution [Prob. Code §§ 11801, 11802]--Beneficiary Was Unemancipated Minor Issue of Decedent and Died Intestate

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 458D.193 Allegation--Receipt by Heir of Advancement [Prob. Code § 6409]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 458D.194 Allegation--Ademption by Satisfaction of Devise by Gift Before Death [Prob. Code § 21135]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 458D.195 Allegation--Whereabouts of Distributee Is Unknown [Prob. Code § 11603(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 458D.196 Allegation--Amount of Contribution for Abatement Required of Each Distributee Because of Payment of Expenses, Debts, etc. [Prob. Code § 21401]

[1] FORM

[2] Use of Form

[3] Governing Law

[4] State Statutes

§ 458D.197 Allegation--When Devisee Is Subscribing Witness to Will [Prob. Code § 6112]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

§ 458D.198 Allegation--Omission to Provide in Testamentary Instrument for Surviving Spouse or Registered Domestic Partner by Later Marriage [Prob. Code §§ 26110-21612]

[1] FORM

[2] Use of Form

[3] When Omitted Spouse or Registered Domestic Partner Is Not Entitled to Share

[4] State Statutes

[5] Decisions

§ 458D.199 Allegation--Failure to Provide for Child Who Was Subsequently Born or Adopted, or Who Was Believed Dead, or of Whose Birth Testator Was Unaware [former Prob. Code §§ 90, 91; Prob. Code §§ 6570-6573, 6580]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

§ 458D.200 Allegation--Predeceased Devisee [former Prob. Code § 92; Prob. Code §§ 21109(a), 21110, 21111(a)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

§ 458D.201 Allegation--Property Is Unclaimed, Whereabouts of Distributee Is Unknown, or Distributee Refuses Property [Prob. Code § 11850(a), (b)]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 458D.202 Allegation--No Fiduciary Appointed for Minor or Incompetent Distributee and No Person Authorized to Give Receipt for Property [Prob. Code § 11850(c)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 458D.203 Allegation--Minor Distributee of Personal Property Not Exceeding $5,000 in Value [Prob. Code §§ 3400, 3401]

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

§ 458D.204 Written Assurance Under Oath of Parent Entitled to Custody re Value of Minor's Estate [Prob. Code § 3401]

[1] FORM

[2] Use of Form

[3] Cross References

§ 458D.205 Petition for Order Relating to Money to Be Distributed to Minor [Prob. Code §§ 3411, 3413]

[1] FORM

[2] Use of Form

[3] Terminology

[4] Notice of Hearing

[5] Signature and Verification

[6] Cross References

[7] State Statutes

[8] Local Rules of Court--Petition Requirements

§ 458D.206 Order on Ex Parte Application That Money to Be Distributed to Minor Be Deposited in Blocked Account [Prob. Code § 3413(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 458D.207 Notice of Hearing of Final Account and Petition for Final Distribution [and for Allowance of Compensation for Extraordinary Services] [Prob. Code §§ 1220, 10831(a), 11000, 11601]

[1] FORM

[2] Use of Form

[3] 1990 Legislation

[4] Persons Who Must Be Given Notice

[5] Contents of Notice

[6] State Statutes

[7] Local Rules of Court

§ 458D.208 Supplemental Account of Subsequently Acquired or Discovered Property [Prob. Code § 11642(a)]

[1] FORM

[2] Use of Form

[3] Distribution of After Acquired or Discovered Property

[4] Verification

[5] State Statutes

§ 458D.209 Contest of Account [Prob. Code § 11001]

[1] FORM

[2] Use of Form

[3] Title of Pleading

[4] Capacity of Contestant

[5] Account

[6] Matters Subject to Contest

[7] Specification of Matters

[8] Appointment of Referees

[9] Prayer

[10] Verification

[11] State Statutes

§ 458D.210 Petition to Inquire Into Circumstances Surrounding Execution of, and Consideration for, Transfer of All or Portion of Distributive Share [Prob. Code § 11604]--By Transferor

[1] FORM

[2] Use of Form

[3] Petition vs. Motion

[4] Petitioner

[5] Notice of Hearing

[6] Scope of Inquiry

[7] Court Order

[8] Verification

[9] State Statutes

[10] Local Rules of Court

[11] Decisions

§ 458D.211 Order Settling Final Account [Prob. Code § 7250(a)], Directing Final Distribution [Prob. Code §§ 11605, 11640], and Allowing Compensation for Extraordinary Services [Former Prob. Code §§ 902, 910 (Administration of Estate Proceeding Commenced Before July 1, 1991)] or Fixing and Allowing Compensation [Prob. Code §§ 10800, 10810 (Administration of Estate Proceeding Commenced on or After July 1, 1991)]

[1] FORM

[2] Use of Form

[3] Findings

[a] In General

[b] Notice Duly Given

[c] Creditor's Claims

[4] Allowance of Compensation for Extraordinary Services

[5] Ademptions and Advancements

[6] Names of Distributees and Shares; Conditions

[7] Whereabouts of Distributee Unknown

[8] Distribution of Unknown Property

[9] State Statutes

[a] Allowances

[b] Appeal

[c] Compensation

[d] Distribution of Estate

[e] Effect of Finality of Order

[f] Findings

[g] Judgment

[h] Judgment Roll

[10] Orders

[a] In General

[b] For Distribution

§ 458D.212 Provision in Order--Distribution of Minor's Property Less Than $5,000 in Value to Custodial Parent [Prob. Code §§ 3400-3402]

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

§ 458D.213 Provision in Order--Money Distributable to Minor to Be Deposited in Blocked Account Until Majority [Prob. Code § 3413(a)]

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

§ 458D.214 Provision in Order--Distribution to Trustee

[1] FORM

[2] Use of Form

[3] Distribution to Trustee as Validation of Trust

§ 458D.215 Waiver of Account [Prob. Code § 10954]

[1] FORM

[2] Use of Form

[3] When Account Is Not Required

[4] Execution of Waiver or Acknowledgment

[5] Conditional Waiver

[6] State Statutes

[7] Decisions

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§ 458D.01 Scope of Chapter

This chapter discusses and includes forms relating to accounts of the personal representative, final distribution of the estate, and compensation of the personal representative and his or her attorney. The chapter starts with several provisions that apply generally [*see § 458D.10* et seq.]. The chapter then discusses accounts [*see § 458D.30* et seq.], distribution [*see § 458D.70* et seq.], and compensation [*see § 458D.120* et seq.].

The forms in this chapter include:

- A final account and petition for final distribution, which may or may not include a request for compensation for extraordinary services [*see § 458D.190*].

- Particular allegations that may be included in the petition for final distribution [*see §§ 458D.191 -458D.203*].

- Written assurance by a custodial parent to secure distribution under *Prob. Code § 3401* of money or property to the parent of a minor distributee who has no guardian of the estate and whose total estate does not exceed $5,000 [*see § 458D.204*].

- A petition and order for distribution under *Prob. Code §§ 3410-3413* of money belonging to a minor [§§ 458D.205, 458D.206].

- A notice of hearing on the final account and petition for final distribution [*see § 458D.207*].

- A supplemental account [*see § 458D.208*].

- A contest of an account [*see § 458D.209*].

- A petition to inquire into the circumstances surrounding the execution of, and the consideration for, the transfer of an heir's or devisee's interest in an estate to another [*see § 458D.210*].

- An order settling the account, for final distribution, and allowing compensation for extraordinary services [*see § 458D.211*] and provisions for use in the order when property is to be distributed under *Prob. Code §§ 3400-3402* [*see § 458D.212*], under *Prob. Code §§ 3410-3412* [*see § 458D.213*], or to a trustee [*see § 458D.214*].

- A waiver of the personal representative's account [*see § 458D.215*].

For the distribution of property in California in an ancillary proceeding to the sister-state personal representative of a nondomiciliary decedent [*Prob. Code §§ 12540-12542*], see Ch. 458C, *Probate: Preliminary Distribution and Partial Allowance of Compensation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesCompensation

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39-458D California Forms of Pleading and Practice--Annotated § 458D.02

§ 458D.02 Cross References

For discussion and forms relating to claim and delivery and the recovery of personal property in connection with an action to recover a distributee's share of the estate, see Ch. 119, *Claim and Delivery*

For discussion and forms relating to ejectment in connection with an action to recover a distributee's share of the estate consisting of real property, see Ch. 241, *Ejectment*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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[Reserved]

§§ 458D.03[Reserved]

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§ 458D.10 Governing Law

Accounts by the personal representative are governed principally by *Prob. Code §§ 1060-1064*. Final distribution of estates is governed principally by *Prob. Code §§ 11600-11605*, *11640-11642*, and *11750-12252*. Compensation for the personal representative and his or her attorney in proceedings for administration of a decedent's estate commenced before July 1, 1991, is governed by former *Prob. Code §§ 900-911* [*see Prob. Code § 10850(b)*]. Compensation for the personal representative and his or her attorney in proceedings for administration of a decedent's estate commenced on or after July 1, 1991, is governed by *Prob. Code §§ 10830-10832* [*Prob. Code § 10850(a)*; *see also* discussion in *§ 458D.11*].

Cal. Rules of Ct., Rules 7.250 and *7.403* govern the listings needed in a petition for final distribution when the petitioner is acting under the Independent Administration of Estates Act.

Cal. Rules of Ct., Rule 7.650 governs a decree of distribution establishing a testamentary trust.

Cal. Rules of Ct., Rule 7.801, governs the failure to file and serve an objection or response when the court has continued a matter to allow for a written objection or response to be made.

Many courts have adopted local rules also governing probate proceedings, which must be complied with and should be checked if counsel is unfamiliar with them. Some of these rules, insofar as they relate to accounts, distribution, or compensation, are cited in the Research Guide in this part.

Some statutes discussed in this chapter use the term "personal representative," whereas others refer to the "executor or administrator." These terms are used interchangeably in the following discussion unless a distinction is noted [*see Prob. Code § 58* and discussion in *§ 458D.12*].

Legal Topics:

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

Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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§ 458D.11 Applicability of Former Law

If a petition, account, report, inventory, appraisal, or other document or paper is filed before July 1, 1991, its contents, execution, and notice are governed by the prior law. Any subsequent proceedings taken after July 1, 1991, concerning the petition, account, report, inventory, appraisal, or other document or paper, including an objection or response, a hearing, an order, or other matter relating thereto, is governed by current law rather than former law [*Prob. Code § 3(d)*].

In addition, former *Prob. Code §§ 900-911* (repealed by Stats. 1990, ch. 79, operative July 1, 1991), as those sections existed on June 30, 1991, continue to apply in any proceeding for the administration of a decedent's estate commenced before July 1, 1991. *Prob. Code §§ 10800-10850* (compensation of the personal representative and his or her attorney; operative July 1, 1991) do not apply in any proceeding for administration of a decedent's estate commenced before July 1, 1991 [*Prob. Code § 10850(a)*]. Among the changes effected by *Prob. Code §§ 10800-10850*, the word "compensation" was substituted for the words "commission," "fee," and "fees" in the former statutes.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.12 Definitions

The term "interested person" includes the following [*Prob. Code § 48(a)*]:

- An heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent that may be affected by the proceeding;
- Any person having priority for appointment as personal representative; and
- A fiduciary representing an interested person.

However, the meaning of "interested person" as it applies to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, the proceeding [*Prob. Code § 48(b)*].

The term "personal representative" means executor, administrator, administrator with the will annexed, special administrator, successor personal representative, public administrator acting under *Prob. Code § 7660*, or a person who performs substantially the same function under the law of another jurisdiction governing the person's status [*Prob. Code § 58(a)*]. "General personal representative" excludes a special administrator unless the special administrator has the powers, duties, and obligations of a general personal representative under *Prob. Code § 8545* [*Prob. Code § 58(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesAppointmentEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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§ 458D.13 "In Chambers" Powers

A judge of the court, in chambers, may grant all orders that are usually granted in the first instance on an ex parte application, hear and dispose of those orders, appoint referees, require and receive accounts to be filed, order notice of settlement of supplemental accounts, suspend the powers of personal representatives, and direct the issuance of all writs and process necessary in the exercise of the judge's powers in matters of probate [*Code Civ. Proc. § 166(a)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesAppointmentsEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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[Reserved]

§§ 458D.14[Reserved]

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§ 458D.30 When Account Is Allowed or Required

The court on its own motion or on petition of an interested person may order an account at any time [*Prob. Code § 10950(a)*]. The court is required to order an account on petition of an interested person if it has been more than a year since the last account was filed or, if no previous account has been filed, if it has been more than a year since letters were issued to the personal representative [*Prob. Code § 10950(b)*]. When the court orders an account, it must specify the time within which the personal representative must file the account [*Prob. Code § 10950(c)*].

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§ 458D.31 Duty to Render Account

[1] By Personal Representative

The personal representative must file a final account and petition for an order for final distribution of the estate when the estate is in a condition to be closed [*Prob. Code § 10951*].

[2] By Resigned or Removed Personal Representative

A personal representative who resigns or is removed from office or whose authority is otherwise terminated must, file an account not later than 60 days after termination of authority, unless the court extends the time. Should the personal representative fail to do so, the court may compel an account under *Prob. Code §§ 11050-11052* (discussed in *§ 458D.32*) [*Prob. Code § 10952*].

[3] On Death, Incapacity, or Abscondence of Personal Representative

If a personal representative dies or becomes incapacitated and a legal representative is appointed, the legal representative, not later than 60 days after his or her appointment, unless the court extends the time, must file an account of the administration of the deceased or incapacitated personal representative [*Prob. Code § 10953(b)*]. A "legal representative" is the personal representative of a deceased personal representative or the conservator of the estate of an incapacitated personal representative [*Prob. Code § 10953(a)(2)*]. "Incapacitated" means lack of capacity to serve as personal representative [*Prob. Code § 10953(a)(1)*].

If no legal representative is appointed, or if the personal representative absconds, the court may compel the attorney for the deceased, incapacitated, or absconding personal representative or the attorney of record in the estate proceeding to file an account of the administration of the deceased, incapacitated, or absconding personal representative [*Prob. Code § 10953(c)*].

The legal representative or attorney must exercise reasonable diligence in preparing the account, which must be settled by the court as in other cases [*Prob. Code § 10953(d)*]. The court must allow reasonable compensation to the legal

representative or attorney for preparing the account, and the amount allowed is a charge against the estate that was being administered by the deceased, incapacitated, or absconding personal representative [*Prob. Code § 10953(d)*]. Legal services for which a fee will be allowed to the attorney under *Prob. Code § 10953(d)* include those services rendered by any paralegal performing the services under the direction and supervision of an attorney, but the petition or application must set forth the hours spent and services performed by the paralegal [*Prob. Code § 10953(d)*; *see also* discussion in *§ 458D.120* et seq].

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-458D California Forms of Pleading and Practice--Annotated § 458D.32

§ 458D.32 Compelling Account

If the personal representative does not file a required account, the court must compel the account by punishment for contempt [*Prob. Code § 11050*]. A citation must be issued, served, and returned, requiring the personal representative to appear and show cause why he or she should not be punished for contempt [*Prob. Code § 11051(a)*]. A personal representative who does not appear and file the required account after having been duly cited may be punished for contempt or removed from office, or both, in the discretion of the court [*Prob. Code § 11052*; *see also Prob. Code § 8505(a)* (removal of personal representative found in contempt)].

A personal representative who purposefully evades personal service of the citation must be removed from office [*Prob. Code § 11051(b)*].

Prob. Code §§ 11050-11052 may also be used to compel an account by a personal representative who has resigned or been removed from office or whose authority has otherwise terminated [*Prob. Code § 10952* (discussed in *§ 458D.31[2]*)].

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39-458D California Forms of Pleading and Practice--Annotated § 458D.33

§ 458D.33 Form and Format of Account

All accounts filed under the Probate Code are subject to the requirements of *Prob. Code §§ 1060-1064* [*Prob. Code § 1060.5*]. Every account filed under the code must include a financial statement and a report of administration as provided in those sections *Prob. Code § 10900(a). Prob. Code §§ 1060-1064*. Every account must also state the period that it covers, and contain a summary showing matters specified in *Prob. Code § 1061(a).*

All accounts must be verified [*Prob. Code § 1021(a)(1)*]. An account must be verified by the person who has the duty to make it or, if there are two or more parties with that duty, by any of them [*Prob. Code § 1021(b)(2)*]. When an account is filed by the legal representative or attorney of a deceased, incapacitated, or absconding personal representative (discussed in *§ 458D.31[3]*), it maybe verified on information and belief [*Prob. Code § 10953(d)*].

The filing of an account is deemed to include a petition requesting its approval [*Prob. Code § 1064(b)*].

The final account or report filed in every decedent's estate proceeding commenced on or after August 18, 2003, must include a separate schedule containing specified information that the court may use to determine whether any adjustment in the fee paid for filing the petition is warranted [*see Cal. Rules of Ct., Rule 7.552*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-458D California Forms of Pleading and Practice--Annotated § 458D.34

§ 458D.34 Supporting Documents

On court order, or on request by an interested person (*defined in § 458D.12*) filed with the clerk and a copy served on the personal representative, the personal representative must produce for inspection and audit by the court or interested person the documents specified in the order or request that support the account [*Prob. Code § 10901*; *see also* discussion in *§ 458D.40*].

Prob. Code § 10901 supersedes former Prob. Code § 925, extending the voucher procedure to supporting documents generally [Cal. L. Revision Comm'n Comment to *Prob. Code § 10901*].

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39-458D California Forms of Pleading and Practice--Annotated § 458D.35

§ 458D.35 Setting Account for Hearing

When an account is filed, the court clerk sets the matter for hearing, for which notice is required [*Prob. Code §§ 1041, 1042*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-458D California Forms of Pleading and Practice--Annotated § 458D.36

§ 458D.36 Notice of Hearing on Settlement

[1] To Whom Given, Manner of Giving, and Proof of Notice

At least 15 days before the hearing on the account, notice of the time and place of the hearing must be given to the following persons [*Prob. Code § 11000(a)*; *see Prob. Code § 1220(a)(2)*]:

- Any nonpetitioning personal representative.

- All persons who have requested special notice in the estate proceeding pursuant to *Prob. Code § 1250*.

- All known heirs (defined in *Prob. Code § 44*) and devisees (defined in *Prob. Code § 34*) whose interests in the estate would be affected by the account.

- The Attorney General, if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the account.

- If the estate is insolvent, each creditor who has filed a claim that is allowed or approved but is unpaid in whole or in part.

In the case of persons requesting special notice, the notice must be mailed to the address set forth in the request [*Prob. Code § 1252(a)*]. In the case of the Attorney General, notice is to be given at the office of the Attorney General in Sacramento [*Prob. Code § 11000(a)(4)*]. In the case of others entitled to notice, the notice must be mailed to the person's business or residence address, if known; if not known, the court may order that the notice be given in a manner reasonably calculated to give actual notice to that person [*Prob. Code §§ 1212, 1220(a)(3)*; *see Code Civ. Proc. § 413.30*]. If any person entitled to notice is represented by an attorney of record, the notice must also be given to that attorney [*Prob. Code § 1214*].

Personal delivery of the notice is the equivalent of notice by mail [*Prob. Code § 1215(a), 1216*].

The court may, for good cause, dispense with the notice required to be given to a person [*Prob. Code §§ 1220(c), 1252(a)*].

Proof of giving notice of the hearing must be made to the satisfaction of the court at or before the hearing, in the manner provided in *Prob. Code §§ 1260-1265* [*see Prob. Code § 1260(a)*].

Waiver of notice is governed by *Prob. Code §§ 1204, 1210*.

For discussion and forms for giving notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

[2] Form and Contents of Notice

The general form and contents of a notice are set forth in *Prob. Code § 1211*. However, if the petition for approval of the account requests allowance of all or a portion of the compensation of the personal representative or his or her attorney, the notice of hearing must so state [*Prob. Code § 11000(b)*; for proceedings commenced before July 1, 1991, *see* former *Prob. Code § 11000(c)*]. If the account is a final account and is filed together with a petition for an order for final distribution of the estate, the notice of hearing must also so state [*Prob. Code § 11000(c)*; for proceedings commenced before July 1, 1991, *see* former *Prob. Code 11000(d)*].

For a form for a notice of hearing on a final account and petition for final distribution, *see § 458D.207*. For further discussion and forms for notice, including a Judicial Council form for notice of hearing for optional use, see Ch. 447, *Probate: Statutory Notice Requirements* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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§ 458D.37 Effect of Stipulation

The court has authority to settle the accounts of a personal representative, freefrom the control of any parties. Although it may, if it chooses, settle an account in accordance with a stipulation, the court is not bound to do so [*Estate of Richards (1941) 17 Cal. 2d 259, 269, 109 P.2d 923* (decided under former Prob. Code §§ 920-932 (repealed by Stats. 1988, ch. 1199, operative July 1, 1989; *now see Prob. Code §§ 10900-11052*))].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.38 Hearing on Account; Citing Personal Representative to Appear; Appointment of Referees

The court may conduct any hearing that may be necessary to settle the account, and may cite the personal representative to appear before it for examination [*Prob. Code § 11002(a)*]. It may also appoint one or more referees to examine the account and make a report on it, subject to confirmation by the court, and may allow a reasonable compensation to the referee(s) to be paid out of the estate [*Prob. Code § 11002(b)*]. The court may make any order it deems necessary to effectuate the foregoing provisions [*Prob. Code § 11002(c)*]. For discussion, forms, and procedural guides relating to referees generally, see Ch. 38, *Reference* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersRefereesAppointmentsEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-458D California Forms of Pleading and Practice--Annotated § 458D.39

§ 458D.39 Duty and Discretion of Court

It is the court's duty to scrutinize the final account of the personal representative and to disallow any item that is not a proper and legal charge against the estate, whether or not any person contests the account (*see* discussion in *§ 458D.45*) [*Estate of Bennett (1939) 13 Cal. 2d 354, 368, 90 P.2d 84]* . In ruling on a petition for final distribution and settlement of an account, the court is vested with broad discretion that will not be disturbed on appeal except when abused [*see Estate of Lock (1981) 122 Cal. App. 3d 892, 902, 176 Cal. Rptr. 358]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.40 Supporting Evidence

The evidence that the court may require the personal representative to produce in support of the correctness of any account is largely a matter within the court's discretion. When there is no contest of the account, it is the duty of the court to satisfy itself that the account is correct, and, within reason, it may require the personal representative to produce such evidence as will satisfy it in this respect [*Estate of Barreiro (1932) 125 Cal. App. 752, 773-774, 14 P2d 786* ; *see also Prob. Code § 10901*, discussed in *§ 458D.34*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-458D California Forms of Pleading and Practice--Annotated § 458D.41

§ 458D.41 Scope of Inquiry

[1] Property Received

By virtue of a court's power to settle the final account of a personal representative and to determine what remains to be distributed, the court is authorized to determine the amount of money or property of the estate that has come into the hands of the personal representative and to charge him or her accordingly, adversely to his or her individual claim or right against the estate if that be the case [*see Estate of Chamberlain (1941) 44 Cal. App. 2d 193, 204, 112 P2d 53]* .

[2] Advances to Distributees

In the settlement of the final account, the court has no authority to allow the personal representative credit for money advanced to distributees without a court order. However, the court may properly consider and allow such credits in the hearing on the petition for final distribution [*Estate of Bennett (1939) 13 Cal. 2d 354, 362, 90 P.2d 84* ; *see also Estate of Guglielmi (1934) 138 Cal. App. 80, 91, 31 P.2d 1078* (issue can be determined only on hearing for preliminary or final distribution of estate)].

[3] Settlement of Claim Not Properly Filed

If a debt has been paid within the time prescribed in *Prob. Code § 9154* but without a claim having been filed and established in the manner prescribed by statute, the court, in settling the account, must allow the amount paid if it is proved that the debt was justly due and paid in good faith, the amount paid did not exceed the amount reasonably necessary to satisfy the indebtedness, and the estate is solvent [*Prob. Code § 11005*].

[4] Title to Property

In a probate proceeding, the court has no authority to determine title to property when the dispute is between the estate or heirs or devisees on the one hand and a stranger to the estate on the other. However, as an incidental procedure to the settlement of a final account, the court may determine title to property claimed by the personal representative adversely to the estate [*see Waterland v. Superior Court (1940) 15 Cal. 2d 34, 38-39, 98 P.2d 211]* .

[5] Liability of Personal Representative

A personal representative has the duty to preserve the estate's property by paying taxes legally imposed when there is sufficient money on hand for that purpose, and when it is proper to surcharge a negligent executor for losses suffered by an estate due to penalties or interest paid on delinquent taxes, or to deny settlement of an executor's account or final distribution in the absence of such surcharge [*Estate of Lock (1981) 122 Cal. App. 3d 892, 903, 176 Cal. Rptr. 358* ; *see Prob. Code § 9601(a)* (personal representative's liability for breach of fiduciary duty)].

Whether or not the personal representative unreasonably delayed the payment of monetary devises, and whether or not he or she ought to be charged with interest because of the delay, are issues that should be determined on thesettlement of the final account [*Estate of Reed (1935) 9 Cal. App. 2d 94, 96, 48 P.2d 177* (decided under former law); *see Prob. Code § 9600* (personal representative's duty to exercise ordinary care and diligence)].

For further discussion regarding the liability of a personal representative, see Ch. 456, *Probate: Management of Estate Assets* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.42 Reservation of Ruling on Particular Items

The court has authority to reserve its ruling on any portion of the account as to which the court deems the evidence of propriety and reasonableness to be unsatisfactory or incomplete [*Estate of Barreiro (1932) 125 Cal. App. 153, 184, 13 P.2d 1017]* . The court should not reserve its ruling in any case in which such reservation threatens to cause an indefinite postponement of distribution and possibly the complete divestiture of a devisee's claim under the decedent's will [*Estate of Shannon (1941) 43 Cal. App. 2d 425, 428-429, 110 P.2d 1017]* .

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39-458D California Forms of Pleading and Practice--Annotated § 458D.43

§ 458D.43 Certificate of Franchise Tax Board That Taxes Have Been Paid on Certain Distributions to Nonresidents

The court may not approve a final account in an estate that has a total appraised value or more than $1,000,000, when more than $250,000 of the estate has been distributed or is distributable to beneficiaries who are not California residents, until the executor or administrator has filed the Franchise Tax Board's state income tax certificate showing that all state personal income taxes, additions to tax, penalties, and interest imposed on the estate or the decedent have been paid or that payment has been secured [*Rev. & Tax. Code § 19513*; *Cal. Rules of Ct., Rule 7.551(a)*; *see 18 Cal. Code Reg. § 19513(b)*]. If a final account is waived under *Prob. Code § 10954* in such an estate, the court may not approve the final report required by *Prob. Code § 10954(c)(1)* until the state income tax certificate is filed [*Cal. Rules of Ct., Rule 7.551(b)*]. When the Franchise Tax Board issues the certificate on the condition that the court must approve the final account or report before a date specified in the certificate, the court may not approve the final account or report after that date unless the executor or administrator first files a new or revised certificate [*Cal. Rules of Ct., Rule 7.551(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-458D California Forms of Pleading and Practice--Annotated § 458D.44

§ 458D.44 Allowance of Expenses of Administration

The personal representative shall be allowed all necessary expenses in the administration of the estate, including, but not limited to, necessary expenses in the care, management, preservation, and settlement of the estate [*Prob. Code § 11004*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.45 Contest of Account

[1] Matters That May Be Contested

Under *Prob. Code § 11001*, all matters relating to an account may be contested for cause shown, including but not limited to the following:

- The validity of an allowed or approved claim not reported in a previous account and not established by judgment [*Prob. Code § 11001(a)*].

- The value of property for purposes of distribution [*Prob. Code § 11001(b)*; *see* Cal. L. Revision Comm'n Comments to *Prob. Code § 11001* (*Prob. Code § 11001(b)* permits a contest of the value of property for purposes of distribution only; objections to the inventory and appraisal are provided for separately under *Prob. Code § 8906*)].

- Actions taken by the personal representative not previously authorized or approved by the court, subject to *Prob. Code § 10590* (relating to Independent Administration of Estates Act) [*Prob. Code § 11001(c)*; *see § 458D.209*; *see also* Cal. L. Revision Comm'n Comments to *Prob. Code § 11001* (*Prob. Code § 11001(c)* makes clear an interested person's right to obtain court review of the personal representative's actions through a contest of an account)].

[2] When Contest May Be Made

The validity of an allowed or approved claim (*see Prob. Code §§ 9250, 9251*) may be contested by any interested person (*defined in § 458D.12*,) at any time before settlement of the report or account of the personal representative in which it is first reported as an allowed or approved claim [*see Prob. Code § 9254(a)* (also providing for burden of proof); *see also Prob. Code § 9254(b)* (*Prob. Code § 9254(a)* does not apply to a claim established by a judgment)].

For further discussion and forms relating to claims against the estate, see Ch. 454, *Probate: Claims Against the Estate* .

Failure of an interested person to object specifically in written exceptions to the account constitutes a waiver of the objections not so alleged [*Estate of Kirkpatrick (1952) 109 Cal. App. 2d 709, 713, 241 P.2d 555* (decided under former law)].

The court may continue a matter to allow a written objection or response to be made. If the court does so, however, and the responding or objecting party fails to serve and file a timely objection or response, the court may deem the objections or responses waived [*Cal. Rules of Ct., Rule 7.801*].

[3] Who May Contest

Neither *Prob. Code § 11001* (discussed in *§ 458D.45[1]*) nor Prob. Code§ 11003 (discussed in *§ 458D.45[6]*) specifies who may contest an account. It appears, however, that a contest may be filed only by an interested person (*defined in § 458D.12*). *Prob. Code § 1043*, applicable generally to court hearings under the Probate Code, provides that an interested person may make a response or objection to an account [*Prob. Code § 1043(a), (b)*; *see Prob. Code §§ 1040, 1041*; *see also Prob. Code § 1021(a)(2)*]. Also, *Prob. Code § 9254(a)*, discussed in *§ 458D.45[2]*, provides that the validity of an allowed or approved claim may be contested by any interested person [*see* also *Prob. Code § 8906(a)*]. Finally, the Law Revision Commission's Comment to *Prob. Code § 11001* notes that *Prob. Code § 11001* restates portions of former Prob. Code § 927 (repealed by Stats. 1988, ch. 1199, operative July 1, 1989), which provided in pertinent part that "[a]ny person interested in the estate may appear and file written exceptions to the account, and contest the account, including objecting to the value of assets shown on the inventories and appraisements filed in the proceedings."

A person who is entitled to contest the account and does not do so has no standing to appeal from the order settling the account [*Estate of Vizelich (1932) 123 Cal. App. 651, 653, 11 P.2d 870* (decided under former law)]. If there is any doubt as to whether a person has an interest sufficient to entitle him or her to contest the personal representative's account, the doubt should be resolved in favor of the person claiming the interest [*see Estate of Reinicke (1941) 44 Cal. App. 2d 271, 273-274, 112 P.2d 311]* .

The following persons were specifically held to have standing to object to the personal representative's account under former law; they still appear to be within the current definition of interested person (*defined in § 458D.12*):

- A coexecutor or coadministrator, when there are two or more personal representatives serving simultaneously, whether or not the objecting personal representative participated in the conduct that is the basis for the attack on the account [*see Estate of Auslender (1960) 53 Cal. 2d 615, 627-628, 2 Cal. Rptr. 769, 349 P.2d 537* (participation in fraud held no bar)].

- A person named as a beneficiary in the decedent's will, whether the person has a vested interest or merely a contingent future interest [*Estate of Brown (1938) 24 Cal. App. 2d 573, 574-575, 75 P.2d 658]* .

- The heir of a predeceased beneficiary named in the decedent's will [*Estate of Cummings (1961) 189 Cal. App. 2d 801, 803, 11 Cal. Rptr. 465]* .

- The residuary legatee, even though there would be no residue if the objections are sustained [*Estate of Harrison (1951) 103 Cal. App. 2d 12, 15-16, 228 P.2d 881]* .

- The attorney for the personal representative, because he or she is entitled to a statutory allowance out of the estate [*Estate of McMillin (1956) 46 Cal. 2d 121, 127, 292 P.2d 881]* .

- A tax expert employed by the personal representative and paid from the funds of the estate for the services [*Estate of McMillin (1956) 46 Cal. 2d 121, 127, 292 P.2d 881]* .

- A creditor of the decedent's estate, as distinguished from a creditor of the personal representative, whether or not he or she was a creditor of the decedent during the decedent's life [*Estate of McMillin (1956) 46 Cal. 2d 121, 127, 292 P.2d 881]* .

- A creditor whose claim was rejected and who then filed a civil action to collect it [*Estate of Mailhebuau (1933) 218 Cal. 202, 204, 22 P.2d 514]* .

- The judgment creditor of a sole beneficiary under a decedent's will, whose judgment exceeded the total value of the estate and who had levied execution against the beneficiary's interest [*Estate of Reinicke (1941) 44 Cal. App. 2d 271, 273-274, 112 P.2d 311]* .

In other cases, it has been held that the assignee or grantee of an heir, the judgment creditor of a devisee who had acquired title under execution, and the judgment creditor of a legatee who had levied execution on the legatee's interest were interested persons entitled to contest the account [*see* *Estate of Reinicke (1941) 44 Cal. App. 2d 271, 273, 112 P.2d 311* and cases cited therein].

[4] Manner of Contesting

An account may be contested by appearing and filing a written contest [*Prob. Code §§ 11001, 11003*; *see § 458D.209*], or objections in writing at or before the hearing or orally at the hearing [*see Prob. Code § 1043(a), (b)*]. Failure of the heirs or devisees to appear and contest the account will be considered a consent that the account may be settled as filed [*see* *Estate of Kent (1936) 6 Cal. 2d 154, 164, 57 P.2d 901* (construing former law)].

Written objections to, or a written contest of, the account appear to be the only responsive pleading that is expressly authorized or required to be filed in a proceeding for settlement of an account [*see Prob. Code § 1043(a)*; *see also Estate of Smith (1937) 23 Cal. App. 2d 383, 388, 73 P.2d 239* (affirming order striking cross complaint)].

[5] Effect of Failure to Cross Examine Personal Representative

If the personal representative testifies that the account is true and correct and that all debts paid were justly due, and if the objector does not cross examine on this testimony, the objector will be precluded from questioning the account on appeal [*Estate of Rindge (1934) 136 Cal. App. 263, 267, 28 P.2d 705]* .

[6] Award of Costs and Fees on Determination of Contest

If the court determines that the contest was without reasonable cause and in bad faith, it may award against the contestant the compensation and costs of the personal representative and other expenses and costs of litigation, including attorney's fees, incurred to defend the account. The amount awarded is a charge against any interest of the contestant in the estate and the contestant is personally liable for any amount that remains unsatisfied [*Prob. Code § 11003(a)*].

If the court determines that the opposition to the contest was without reasonable cause and in bad faith, it may award the contestant the contestant's costs and other expenses and costs of litigation, including attorney's fees, incurred to contest the account. The amount awarded is a charge against the compensation or other interest of the personal representative in the estate, and the personal representative is liable personally and on the bond, if any, for any amount that remains unsatisfied [*Prob. Code § 11003(b)*].

Legal Topics:

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

Administrative LawJudicial ReviewReviewabilityStandingEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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§ 458D.46 Effect of Order Settling Account

When an order settling an interim or final account of the personal representative becomes final, it releases the personal representative and any sureties on the personal representative's bond from any claims of heirs, devisees, or other affected persons based on any act or omission directly authorized, approved, or confirmed in the order [*Prob. Code § 7250(a)*]. However, an order settling an account will not release the personal representative or the sureties from claims if it was obtained by fraud or conspiracy, or by misrepresentation of any material fact in the petition or account. Failure to disclose a material fact also constitutes misrepresentation for this purpose [*Prob. Code § 7250(c)*].

Cause for reopening an account cannot be shown if the only objection is that the account reflects a distribution made earlier pursuant to a valid order that has become final and, therefore, conclusive [*Gladding v Superior Court (1936) 7 Cal. 2d 408, 418, 60 P.2d 857* (construing former Code Civ. Proc. § 1637 and former Prob. Code § 931 (conclusiveness of order settling account))].

When final distribution has been made and the order has become final, the order settling the final account is conclusive against all persons interested in the estate, including minors or other persons who might have been entitled before distribution to move for reopening the account under former Prob. Code § 931 (conclusiveness of order settling account) [*Carr v. Bank of America etc. Assn. (1938) 11 Cal. 2d 366, 371-372, 79 P.2d 1096]* .

A probate court's approval of the final accounting, that survives on appeal, is conclusive as to the personal representative's veracity and exercise of due care [*Estate of Regli (2004) 121 Cal. App. 4th 878, 881, 17 Cal. Rptr. 3d 514* (because former administrator of decedent's estate would have been adversely affected by remaining potential beneficiaries' motion seeking stipulated partial reversal of several probate court orders, motion could not be granted)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.47 Setting Aside Order for Extrinsic Fraud

When the order settling the account has been obtained through extrinsic fraud, it may be set aside, even though long since final, by an independent suit in equity. Extrinsic fraud is fraud in the obtaining of the order [*see Lazzarone v. Bank of America (1986) 181 Cal. App. 3d 581, 595-597, 226 Cal. Rptr 855* (finding no extrinsic fraud); *Bank of America v. Superior Court (1986) 181 Cal. App. 3d 705, 711, 713-717, 226 Cal. Rptr. 685* (finding no extrinsic fraud in obtaining order under *Prob. Code § 2103* settling guardianship account); *see also* Cal. L. Revision Comm'n Comment to former *Prob. Code § 9612*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-458D California Forms of Pleading and Practice--Annotated § 458D.48

§ 458D.48 Setting Aside Order to Correct Clerical Mistake

Even though an order settling and allowing an account has become final, it may be set aside in a proceeding under *Code Civ. Proc. § 473(d)*, for the purpose of correcting a clerical mistake [*Estate of Soboslay (1935) 4 Cal. 2d 177, 180, 47 P.2d 714* ; *see also Prob. Code § 1000* (application of general rules of civil practice in probate proceedings); for further discussion of *Code Civ. Proc. § 473*, *see* Ch. 489, *Relief From Judgments and Orders*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-458D California Forms of Pleading and Practice--Annotated § 458D.49

§ 458D.49 Final Account When Payment of Debts Exhausts Estate

On the settlement of any account of the personal representative after the expiration of four months after the date letters are first issued to a general personal representative, the court must order payment of debts as the circumstances of the estate permit. If property in the estate is insufficient to pay all the debts, the order must specify the amount to be paid to each creditor [*Prob. Code § 11422(b)*]. If the estate will be exhausted by the payment ordered, the account of the personal representative constitutes a final account, and notice of hearing must be the notice given for the hearing of a final account. The personal representative is entitled to a discharge when he or she has complied with the terms of the order [*Prob. Code § 11422(c)*; for further discussion, *see* Ch. 458E, *Probate: Discharge*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-458D California Forms of Pleading and Practice--Annotated § 458D.50

§ 458D.50 When Account Is Not Required

[1] Waiver, Acknowledgment, or Adequate Provision Made

Under *Prob. Code § 10954(a)*, the personal representative is not required to file an account if any of the following conditions is satisfied as to each person entitled to distribution from the estate:

- The person has executed and filed a written waiver of account or a writtenacknowledgment that the person's interest has been satisfied [*Prob. Code § 10954(a)(1)*].

- Adequate provision has been made for satisfaction in full of the person's interest. However, this does not apply to a residuary devisee or to a devisee whose interest in the estate is subject to abatement, payment of expenses, or accrual of interest or income [*Prob. Code § 10954(a)(2)*; *see Prob. Code § 34* (defining "devisee")].

For a form for a waiver, and discussion of the manner in which a waiver of the account or acknowledgment must be executed, *see § 458D.215*.

[2] Report of Administration

Even though an account is not required under *Prob. Code § 10954(a)*, the personal representative must file a final report of administration at the time the final account would otherwise have been required, and the final report must include the amount of compensation paid or payable to the personal representative and to the attorney for the personal representative and must set forth the basis for determining the amount [*Prob. Code § 10954(c)(1)*; *Cal. Rules of Ct., Rules 7.550(a), 7.705*]. Although the details of receipts and disbursements need not be listed, the report must list the information required by law, including information as to creditors' claims, sales, purchases or exchanges of assets, changes in the form of assets, assets on hand, whether the estate is solvent, detailed schedules of receipts and gains or losses on sale (if an amount other than the amount of the inventory and appraisal is used as a basis for calculating fees or commissions), costs of administration (if reimbursement of these costs is requested), the amount of any fees or commissions paid or to be paid, the calculation of these fees or commissions, and (for decedent's estate proceedings

commenced on or after August 18, 2003) the information required by *Cal. Rules of Ct., Rule 7.552(a)* and *(b)* (relating to graduated filing fee adjustments) [*see* discussion in *Ch. 442, Probate: Initiating Probate Administration, § 442.14[4]*] for making any adjustment to the filing fee [*Cal. Rules of Ct., Rule 7.550(b)*].

[3] Exception for Unsatisfied Creditor

A creditor whose interest has not been satisfied may, notwithstanding *Prob. Code § 10954(a)*, petition for an account under *Prob. Code § 10950* (discussed in *§ 458D.30*) [*Prob. Code § 10954(c)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.51 Objections When Account Waived

If an account is waived, the remedy of a disaffected person interested in the estate is to object to distribution on the ground that the account has not been settled [*see Estate of Moore (1967) 253 Cal. App. 2d 945, 951, 61 Cal. Rptr. 722* (decided prior to 1984 enactment of Prob. Code § 933, the predecessor to *Prob. Code § 10954*)].

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[Reserved]

§§ 458D.52[Reserved]

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39-458D California Forms of Pleading and Practice--Annotated § 458D.70

§ 458D.70 Petition for Final Distribution or Status Report

[1] Time Limit on Filing

The personal representative must petition for an order for final distribution of the estate or make a status of administration report either [*Prob. Code § 12200*]:

- Within one year after the date letters were issued in an estate for which a federal estate tax return is not required, or

- Within 18 months after letters were issued in an estate for which a federal estate tax return is required.

[2] Independent Administration of Estates Act Distribution

In a final report or a petition for final distribution under the Independent Administration of Estates Act, the personal representative is required to list each claim presented, as well as the claimant's name, the date of filing of the claim, the nature of the claim, the amount claimed, the disposition of the claim, and if the claim was rejected, the date of service of the rejection and whether or not a lawsuit was filed [*Cal. Rules of Ct., Rule 7.403*].

In the petition for final distribution, the petitioner is also required to list and describe all actions taken without prior court approval if notice of the proposed action was required [*Cal. Rules of Ct., Rule 7.250(a)*]. The description of the action is required to include the following [*Cal. Rules of Ct., Rule 7.250(a)*]:

- The nature of the action.

- When the action was taken.

- A statement of when and to whom notice was given.

- Whether notice was waived, and if so, by whom.
- Whether any objections were received.

An action taken under the Independent Administration of Estates Act that was properly listed and described in a prior accounting, report, or petition for distribution, and that was approved by the court, need not be listed and described in a subsequent account, report, or petition for distribution [*Cal. Rules of Ct., Rule 7.250(b)*].

[3] Status of Administration Report

[a] Contents and Filing

If a status report is filed, it must show the condition of the estate, the reasonswhy the estate cannot be distributed and closed, and an estimate of the time needed to close administration of the estate [*Prob. Code § 12201(a)*].

The report must be filed with the court [*Prob. Code § 12201(b)*].

[b] Notice of Hearing

Notice of hearing of the report must be given as provided in *Prob. Code § 1220* to persons then interested in the estate, and must include a statement in not less than 10-point boldface type, or a reasonable equivalent if printed, or in all capital letters if not printed, in substantially the following words: "YOU HAVE THE RIGHT TO PETITION FOR AN ACCOUNT UNDER SECTION 10950 OF THE CALIFORNIA PROBATE CODE" [*Prob. Code § 12201(b)*].

[c] Hearing and Orders

On the hearing of the report, the court, if it determines that continuation of administration is in the best interests of the estate or of interested persons, may order that administration of the estate continue for the time and on the terms and conditions that appear reasonable, including an account under *Prob. Code § 10950* (discussed in *§ 458D.30*), or it may order the personal representative to petition for final distribution [*Prob. Code § 12201(c)*].

[4] Failure to File Petition or Report

If the personal representative does not petition for final distribution or make a report within the prescribed time, he or she may be cited to appear before the court. On its own motion, or on petition of any interested person, the court may, for good cause shown on the record, cite the personal representative to appear before the court and show the condition of the estate and the reasons why it cannot be distributed and closed [*Prob. Code § 12202(a)*].

On the hearing of the citation, the court may either order the administration of the estate to continue or order the personal representative to petition for final distribution, as provided in *Prob. Code § 12201* (discussed in *§ 458D.70[3][c]*) [*Prob. Code § 12202(b)*].

[5] Continuation of Administration to Pay Family Allowance

For the purposes of *Prob. Code §§ 12200-12206*, continuation of the administration of the estate in order to pay a family allowance (discussed in Ch. 448, *Probate: Family Allowance*) is not in the best interests of the estate or interested persons unless the court determines both that (1) the family allowance is needed by the recipient to pay for necessaries of life, including education so long as pursued to advantage, and (2) the needs of the recipient for continued family allowance outweigh the needs of the decedent's beneficiaries whose interests would be adversely affected by continuing the administration of the estate for this purpose [*Prob. Code § 12203(a)*].

However, nothing in *Prob. Code § 12203* is to be construed either to authorize continuation of a family allowance beyond the time prescribed in *Prob. Code § 6543* or to limit the power of the court to order a preliminary distribution of the estate [*Prob. Code § 12203(b), (c)* (discussed in Ch. 458C, *Probate: Preliminary Distribution and Partial Allowance of Compensation*)].

[6] Failure to Comply

Failure of the personal representative to comply with an order made under *Prob. Code §§ 12200-12206* is grounds for removal from office [*Prob. Code § 12204*]. Moreover, the personal representative or attorney may suffer a reduction in compensation [*Prob. Code § 12205*; *see also* discussion in § 458.120 et seq.].

[7] Continuation of Administration Beyond Limitation in Will

A limitation in a will of the time for administration of an estate is directory only and does not limit the power of the personal representative or the court to continue administration of the estate beyond the time limitation in the will if the continuation is necessary [*Prob. Code § 12206*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.71 Petition for Final Distribution of Estate

[1] Who May File

Either the personal representative or an interested person may petition the court for an order for final distribution [*Prob. Code § 11600*; *see also* discussion in *§ 458D.12*].

[2] When Petition Must Be Filed

When all debts have been paid or adequately provided for, or if the estate is insolvent, and the estate is in a condition to be closed, the personal representative must file for, and the court must make, an order for final distribution of the estate [*Prob. Code § 11640(a)*]. "Debt" means (1) *Prob. Code §§ 9000-9399* or that is otherwise payable in the course of administration; (2) an expense of administration; and (3) a charge against the estate including, but not limited to, taxes, expenses of last illness, and family allowance [*Prob. Code § 11401*].

[3] Description of Property in Petition

The petition must list and describe in detail the property to be distributed, either in the body of the petition or in an attachment incorporated in the petition by reference. When an account is filed with the petition, the description must be included in a schedule in the account [*Cal. Rules of Ct., Rule 7.651(a)*]. The description must do all of the following [*Cal. Rules of Ct., Rule 7.651(b)*]:

- Include the amount of cash on hand.

- Indicate whether promissory notes are secured or unsecured, and describein detail the security interest of any secured notes.

- Include a complete legal description, street address (if any), and assessor's parcel number (if any) of real property.

- Include the complete description of each individual security held in "street name" in security brokers' accounts.

If the character of property to be distributed may affect the distribution, the petition must allege both of the following [*Cal. Rules of Ct., Rule 7.652(a)*]:

- The character of the property, whether separate, community, or quasi-community.

- That the community or quasi-community property to be distributed is either the decedent's one-half interest only, or the entire interest of the decedent and the decedent's spouse.

If any property is to be distributed to the surviving spouse outright, the spouse must file a written election, complying with *Prob. Code § 1513.2*, and the petition must show the date the election was filed [*Cal. Rules of Ct., Rule 7.652(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-458D California Forms of Pleading and Practice--Annotated § 458D.72

§ 458D.72 Notice of Hearing on Petition--To Whom Given, Manner of Giving, and Proof of Notice

At least 15 days before the hearing on the petition, notice of the time and place of the hearing must be given to the following persons [*Prob. Code § 11601(a)*; *see Prob. Code § 1220(a)(2)*]:

- Any nonpetitioning personal representative.

- All persons who have requested special notice in the estate proceeding pursuant to *Prob. Code § 1250*.

- All known heirs (defined in *Prob. Code § 44*) and devisees (defined in *Prob. Code § 34*) whose interests in the estate would be affected by the petition.

- The Attorney General, if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the petition.

In the case of persons requesting special notice, the notice must be mailed to the address set forth in the request [*Prob. Code § 1252(a)*]. In the case of the Attorney General, notice is to be given at the office of the Attorney General in Sacramento [*Prob. Code § 11601(d)*]. In the case of others entitled to notice, the notice must be mailed to the person's business or residence address, if known; if not known, the court may order that the notice be given in a manner reasonably calculated to give actual notice to that person [*Prob. Code §§ 1212, 1220(a)(3)*; *see Code Civ. Proc. § 413.30*]. If any person entitled to notice is represented by an attorney of record, the notice must also be given to that attorney [*Prob. Code § 1214*].

Personal delivery of the notice is the equivalent of notice by mail [*Prob. Code §§ 1215(a), 1216*].

Proof of giving notice of the hearing must be made to the satisfaction of the court at or before the hearing, in the manner provided in *Prob. Code §§ 1260-1265* [*see Prob. Code § 1260(a)*].

The court, for good cause, may dispense with the notice required to be given to a person [*Prob. Code §§ 1220(c), 1252(a)*]. Waiver of notice is governed by *Prob. Code §§ 1204, 1210*.

For further discussion and forms for notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.73 Who May Oppose Petition for Final Distribution

The personal representative or any interested person may oppose the petition [*Prob. Code § 11602*; *see also* discussion in *§ 458D.12*)]. When there are two or more personal representatives, any of them may oppose a petition made by one or more of the other personal representatives or by any other person [*Prob. Code § 9630(d)(1)*]. For further discussion regarding objections to petition, see Ch. 458C, *Probate: Preliminary Distribution and Partial Allowance of Compensation* .

When the interest of an heir or devisee who is a judgment debtor becomes subjected to levy of execution, and the property that he or she would have been entitled to receive is sold by the sheriff, the heir or devisee loses his or her interest in the estate [*Estate of Pierce (1938) 28 Cal. App. 2d 8, 13, 81 P.2d 1037]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.74 Hearing

The court must hear and determine and resolve in the order all questions arising under *Prob. Code § 21135* (discussed in *§ 458D.82[4]*) or *Prob. Code § 6409* (discussed in *§ 458D.78[8]*) [*Prob. Code § 11640(b)*].

If debts remain unpaid or not adequately provided for or if, for other reasons, the estate is not in a condition to be closed, the administration may continue for a reasonable time, subject to *Prob. Code §§ 12200-12206* (discussed in *§ 458D.70*) [*Prob. Code § 11640(c)*].

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39-458D California Forms of Pleading and Practice--Annotated § 458D.75

§ 458D.75 Inquiry by Court When Beneficiary's Interest Has Been Transferred

When distribution is to be made to the transferee of a beneficiary or any person other than a beneficiary under an agreement, a request, or the instructions of abeneficiary or the attorney in fact of a beneficiary [*Prob. Code § 11604(a)*], the court on its own motion, or on motion of the personal representative or other interested person or of the public administrator, may inquire into the circumstances surrounding the execution of, and the consideration for, the transfer, agreement, request, or instructions, and the amount of any fees, charges, or consideration paid or agreed to be paid by the beneficiary [*Prob. Code § 11604(b)*; *see § 458D.210*]. The court may refuse to order distribution, or may order distribution on any terms that the court deems just and equitable, if it finds either (1) the fees, charges, or consideration paid or agreed to be paid by a beneficiary are grossly unreasonable, or (2) the transfer, agreement, request, or instructions were obtained by duress, fraud, or undue influence [*Prob. Code § 11604(c)*]. Notice of hearing on the motion must be served on the beneficiary and on the persons described in *Prob. Code § 11604(a)* at least 15 days before the hearing in the manner provided in *Code Civ. Proc. § 415.10* or *415.30*, as the court may direct [*Prob. Code § 11604(d)*; for further discussion relating to *Code Civ. Proc. §§ 415.10* and *415.30*, *see* Ch. 518, *Service of Summons and Papers*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-458D California Forms of Pleading and Practice--Annotated § 458D.76

§ 458D.76 Order for Distribution

If the court determines that the requirements for distribution are satisfied, it must order distribution of the decedent's estate to the persons entitled to it [*Prob. Code § 11603(a)*].

The order must (1) name the distributees and the share to which each is entitled; and (2) provide that property distributed subject to a limitation or condition, including, but not limited to, an option granted under *Prob. Code §§ 9960-9966*, is distributed to the distributees subject to the terms of the limitation or condition [*Prob. Code § 11603(b)*].

If the whereabouts of a distributee named in the order is unknown, the order must provide for alternate distributees and the share to which each is entitled. The alternate distributees are the persons, to the extent known or reasonably ascertainable, who would be entitled under the decedent's will or under the laws of intestate succession if the distributee named in the order had predeceased the decedent, or in the case of a devise for a charitable purpose, under the cy pres doctrine. A distributee named in the order who does not claim the share to which he or she is entitled within five years after the date of the order is deemed to have predeceased the decedent for the purpose of the order, and the alternate distributees are entitled to the share as provided in the order [*Prob. Code § 11603(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-458D California Forms of Pleading and Practice--Annotated § 458D.77

§ 458D.77 Effect of Final Order

[1] As to Rights of Interested Persons

An order for distribution binds and is conclusive as to the rights of all interested persons [*Prob. Code § 11605*].

[2] As Construction of Will

Prob. Code § 11603 (discussed in *§ 458D.152[4][l]*) requires the court to order distribution of the estate to the persons entitled to it and to "name the distributees and the share to which each is entitled" [*Prob. Code § 11603(b)(1)*]. The order for distribution is the instrument that determines and concludes the rights of the devisees, and resort may be had to the will only when by apt language the will is incorporated into the order for distribution. In other words, the will is only evidence on which the court passes in rendering its judgment embodied in the order for distribution [*Estate of Den (1935) 3 Cal. 2d 638, 640, 45 P.2d 963* (involving predecessor statutes); *see In re Estate of Lockhart (1937) 21 Cal. App. 2d 574, 578-579, 69 P.2d 1001* (same; disapproved on another point in *Estate of Platt (1942) 21 Cal. 2d 343, 349, 131 P.2d 825*)].

Thus, an order of distribution is a judicial construction of the will arrived at by the court ascertaining the intent of the testator. Once final, the order supersedes the will and becomes the conclusive determination of the validity, meaning, and effect of the will, the trusts created in it, and the rights of all parties under it [*Estate of Callnon (1969) 70 Cal. 2d 150, 156, 74 Cal. Rptr. 250, 449 P.2d 186* ; *see also Estate of McCallen (1975) 53 Cal. App. 3d 142, 148, 125 Cal. Rptr. 645* (decree of final distribution constitutes a conclusive construction of the will as against all interested parties, including beneficiaries of a testamentary trust)]. If the order erroneously interprets the intention of the testator, it must be attacked, if at all, by appeal and not collaterally. If not corrected by appeal, an erroneous order is as conclusive as an order that contains no error. When the order of distribution is contrary to the provisions in the will, the order controls and prevails over the terms of the will with respect to the distribution of the property. If the language of the order is uncertain, vague, or ambiguous may resort be had to the will to interpret, not to contradict, the order; if the distributive portions of the order are free of ambiguity, resort may not be had to the provisions of a will in order to create an ambiguity [*Estate of Callnon (1969) 70 Cal. 2d 150, 157, 74 Cal. Rptr. 250, 449 P.2d 186* (involving predecessor statutes)]. Additionally, if the will is incorporated by reference into the order for distribution, resort to the will may be

had to ascertain the intent of the testator [*see Estate of Heil (1989) 210 Cal. App. 3d 1503, 1508, 259 Cal. Rptr. 28]* .

However, where the construction of a will has been litigated and determined in a proceeding for preliminary distribution (discussed in Ch. 458C, *Probate: Preliminary Distribution and Partial Allowance of Compensation*), the determination is res judicata and controls the final order of distribution [*Estate of McCallen (1975) 53 Cal. App. 3d 142, 148, 125 Cal. Rptr. 645]* .

[3] On Title to Property

A proceeding for distribution is a proper one to determine questions of title to properties in which the decedent had an interest and that are claimed by the personal representative, adversely to the estate, as his or her own [*Estate of Basso (1945) 68 Cal. App. 2d 294, 299, 156 P.2d 476]* . Moreover, in the distribution of a decedent's estate, the court, acting in its probate capacity, may pass on equitable interests in the property being distributed, such as a contingent remainder after termination of a life estate in trust [*Estate of White (1945) 69 Cal. App. 2d 749, 758, 160 P.2d 204]* .

However, the probate court has no jurisdiction to determine adverse claims to the properties of an estate in course of administration when asserted by a stranger to the estate or to try the question of title to property as between a representative of the estate and strangers to the estate [*Estate of Dabney (1951) 37 Cal. 2d 672, 676, 234 P.2d 962]* . Nor does an order for distribution determine the title between a devisee whose right has vested and his or her grantee. It is conclusive only as to the claims and rights of heirs and devisees on whom the estate devolved at the time of death. The court has jurisdiction to determine who are the heirs of a deceased person who died intestate, and who are the devisees of one who died testate; but its determination of such matters, rather than creating any new title, merely declares the title that accrued under the law of descent or under the provisions of the will. The order for distribution has nothing to do with contracts or conveyances that may have been made by heirs or devisees respecting their shares of the estate, whether among themselves or with others [*Kingsbury v. Ross (1933) 217 Cal. 484, 486, 19 P.2d 784]* .

Moreover, an order for distribution does not determine that the decedent had any title to the property distributed, nor does it bind third persons who claim an interest adverse to that of the decedent. It merely determines the succession or testamentary disposition of such title as the decedent may have had [*Romagnolo v. Romagnolo (1964) 230 Cal. App. 2d 315, 319, 40 Cal. Rptr. 807* (holding probate court had no jurisdiction either to determine title to partnership property or to administer assets of partnership on death of one of the partners)].

[4] Exceptions to Conclusiveness

Although an order for distribution is normally final and conclusive as to the rights of all heirs and devisees, it is not conclusive against a distributee who procures it by means of extrinsic fraud [*Platnauer v. Forni (1933) 131 Cal. App. 393, 399, 21 P.2d 638* (decided under former *Prob. Code § 1021*, predecessor to *Prob. Code § 11605*)]. Thus, the fact that an order for distribution has become final and conclusive does not divest a court of equitable jurisdiction to afford a remedy for an erroneous distribution of property or to construe a declaration of trust when it appears that the order for distribution was procured by fraud or mistake; nor does it divest the court of jurisdiction when it is sought to modify the order by consent of all the interested parties [*Security First Nat. Bank v. Easter (1934) 136 Cal. App. 691, 694-695, 29 P.2d 422* (decided under former *Prob. Code § 1021*, predecessor to *Prob. Code § 11605*)].

In addition, just as the probate court has no jurisdiction to determine adverse claims to the properties of an estate in the course of administration when asserted by a stranger to the estate, the court's order of distribution is not binding on one who is claiming adversely to an estate properties that have been included in the estate [*Estate of Dabney (1951) 37 Cal. 2d 672, 676-677, 234 P.2d 962]* .

It has also been held that in a proper case an order for distribution may be set aside under *Code Civ. Proc. § 473* [*see Estate of Ampusait (1933) 131 Cal. App. 533, 537-538, 21 P.2d 691* (order vacating judgment affirmed)]. Although the

court in *Ampusait* did not specify which of the several provisions in *Code Civ. Proc. § 473* it was applying and the case was decided before the 1933 amendment of that section, it would appear the court was relying on what is now *Code Civ. Proc. § 473(b)* (relief from order, judgment, or other proceeding taken through mistake, inadvertence, surprise, or excusable neglect), rather than the provision authorizing a defendant who was not personally served one year after rendition of the judgment in which to answer to the merits (*now Code Civ. Proc. § 473.5*) or the provision authorizing a court to set aside any void judgment or order (*now Code Civ. Proc. § 473(d)*). Correction of clerical errors in an order or judgment is, on the other hand, expressly authorized by *Code Civ. Proc. § 473(d)* [*Estate of Goldberg (1938) 10 Cal. 2d 709, 713-714, 76 P.2d 508* (affirming order correcting judgment to include name inadvertently omitted); *see also Prob. Code § 1000* (application of general rules of civil practice in probate proceedings)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 39: Probate: Claims Against the Estate thru Probate: Discharge-Chs. 454-459
Chapter 458D PROBATE: ACCOUNTS, FINAL DISTRIBUTION, AND COMPENSATION
PART II. LEGAL BACKGROUND
C. Distribution

39-458D California Forms of Pleading and Practice--Annotated § 458D.78

§ 458D.78 Distribution Under Laws of Intestate Succession

[1] Governing Law

When a decedent dies intestate (that is, without a will), or when any property is not effectively disposed of by the will of a testate decedent, the property not disposed of by will is distributed to the decedent's heirs according to the laws of intestate succession [*see Prob. Code § 6400*]. These laws are set out in *Prob. Code §§ 6400-6455*. Except as discussed in *§ 458D.78[6]*. *Prob. Code §§ 6400-6455* apply only when the decedent died on or after January 1, 1985 [*Prob. Code § 6414(a)*]. The intestate succession of a decedent who died before January 1, 1985, is governed by former *Prob. Code §§ 200-258* (repealed by Stats. 1983, ch. 842, operative January 1, 1985) [*Prob. Code § 6414(a)*; *see also Prob. Code §§ 3, 6414(c)*].

The right to succession is defined by statute [*Estate of Griswold (2001) 25 Cal. 4th 904, 907, 108 Cal. Rptr. 2d 165, 24 P.3d 1191]* . Courts have no authority to change the statutory rules governing the law of succession [*Estate of McCrary (1997) 54 Cal. App. 4th 100, 102, 62 Cal. Rptr. 2d 504]* .

[2] Definition of Terms Used in Intestate Succession Statutes

[a] "Heirs"

"Heirs," as used in the Probate Code, means the persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent [*Prob. Code § 44*].

[b] "Child," "Parent," and "Issue"

As used in the Probate Code, "child" means any individual entitled to take as a child by intestate succession from the parent whose relationship is involved [*Prob. Code § 26*].

"Parent" means any individual entitled to take as a parent by intestate succession from the child whose relationship is involved [*Prob. Code § 54*].

"Issue" of a person means all his or her lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent [*Prob. Code § 50*].

[c] "Predeceased Spouse" and "Surviving Spouse"

"Predeceased spouse" means a person who died before the decedent while married to the decedent, but the term does not include the following [*Prob. Code § 59*]:

- A person who obtains or consents to a final decree or judgment of dissolution of marriage from the decedent or a final decree or judgment of annulment of their marriage, which decree or judgment is not recognized as valid in California, unless they (1) subsequently participate in a marriage ceremony purporting to marry each to the other, or (2) subsequently live together as husband and wife.

- A person who, following a decree or judgment of dissolution or annulment of marriage obtained by the decedent, participates in a marriage ceremony to a third person.

- A person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

"Surviving spouse" does not include any of the following [*Prob. Code § 78*]:

- A person whose marriage to the decedent has been dissolved or annulled, unless, by virtue of a subsequent marriage, the person is married to the decedent at the time of death.

- A person who obtains or consents to a final decree or judgment of dissolution of marriage from the decedent or a final decree or judgment of annulment of their marriage, which decree or judgment is not recognized as valid in California, unless they (1) subsequently participate in a marriage ceremony purporting to marry each to the other, or (2) subsequently live together as husband and wife.

- A person who, following a decree or judgment of dissolution or annulment of marriage obtained by the decedent, participates in a marriage ceremony with a third person.

- A person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights. Under this provision, a spouse who obtains a judgment of legal separation that resolves the parties' marital property rights does not qualify as a "surviving spouse" on the subsequent death of the other spouse for purposes of intestate succession [*Estate of McDaniel (2008) 161 Cal. App. 4th 458, 463, 73 Cal. Rptr. 3d 907]* .

In addition, the following individuals do not qualify as a "surviving spouse" for purposes of intestate succession:

- A spouse who has waived his or her rights to take from the decedent's estate by entering into a written property settlement agreement [*see Prob. Code §§ 140-147*; *Estate of Lahey (1999) 76 Cal. App. 4th 1056, 1058 fn. 2, 91 Cal. Rptr. 2d 30]* .

- An undivorced bigamous spouse with respect to the estate of his or her legally recognized first spouse [*Estate of Anderson (1997) 60 Cal. App. 4th 436, 441-444, 70 Cal. Rptr. 2d 266* (inheritance is precluded by doctrine of judicial estoppel when claimant states in application for marriage license to second spouse that he or she has never been married)].

- An individual who married the decedent in a purported marriage ceremony that did not result in a valid marriage, because the parties had not obtained a marriage license [*see Estate of DePasse (2002) 97 Cal. App. 4th 92, 107, 118 Cal. Rptr. 2d 143* (when day before decedent's death from terminal illness, hospital chaplain performed marriage ceremony for petitioner and decedent, but they had not obtained marriage license because of imminence of her death, there was no valid marriage and petitioner could not qualify as surviving spouse)].

[d] "Surviving Domestic Partner"

A "domestic partner" is one of two persons who have filed a Declaration of Domestic Partnership with the Secretary of State under *Fam. Code § 297 et seq.*, provided that the domestic partnership has not been terminated under *Fam. Code § 299* [*Prob. Code § 37(a)*]. Notwithstanding *Fam. Code § 299*, if a domestic partnership is terminated by the death of one of the partners and neither partner filed a Notice of Termination before the date of the decedent's death, the domestic partner who survives the deceased is a surviving domestic partner and is entitled to the rights of a surviving domestic partner as provided in the Probate Code [*Prob. Code § 37(b)*]. This includes the right to an intestate share of the deceased partner's separate property [*Prob. Code § 6401(c)* (effective July 1, 2003); *see* discussion in *§ 458D.78[11]*].

[3] Inheritance by Relatives of the Halfblood, Afterborn Relatives, and Aliens

Relatives of the halfblood generally inherit the same share they would inherit if they were of the whole blood [*Prob. Code § 6406*], and relatives of the decedent conceived before the decedent's death and born thereafter inherit as if they had been born in the decedent's lifetime [*Prob. Code § 6407*]. No person is disqualified to take as an heir because that person, or persons through whom he or she claims, is or has been an alien [*Prob. Code § 6411*].

[4] Establishing Parent-Child Relationship for Purpose of Intestate Succession

[a] Natural Parent

The relationship of parent and child exists, for the purpose of intestate succession, between a person and the person's natural parents, regardless of the parents' marital status [*Prob. Code § 6450(a)*]. In determining whether a parent is a "natural parent," the following rules apply:

- A natural parent and child relationship is established if that relationship is presumed and not rebutted under the Uniform Parentage Act (*Fam. Code § 7600 et seq.*) [*Prob. Code § 6453(a)*]. For example:

  - A man is presumed to be the natural father of a child if he receives the child into his home and openly holds the child out as his natural child [*Fam. Code § 7611(d)*].

  - A woman may also be a presumed mother of a child of her lesbian partner if they agree to raise the child together, she receives the child into her home, and she holds the child out as her natural child [*see Elisa B. v. Superior Court (2005) 37 Cal. 4th 108, 125, 33 Cal. Rptr. 3d 46, 117 P.3d 660* (both of child's parents can be women, and woman with no biological connection to child can be child's presumed mother under *Fam. Code § 7611(d)*); *see also* K.M. v. E.G. *(2005) 37 Cal. 4th 130, 142-143, 33 Cal. Rptr. 3d 61, 117 P.3d 673* (when woman provides ova to her lesbian partner so that partner can bear child who will be raised in their joint home, both women are child's parents); *Kristine H. v. Lisa R. (2005) 37 Cal. 4th 156, 166, 33 Cal. Rptr. 3d 81, 117 P.3d 690* (lesbian mother of child was estopped from challenging validity of stipulated judgment declaring that she and her lesbian partner were child's parents)].

- A man who acknowledges a child conceived during marriage is entitled to inherit as a natural parent, regardless of the man's alleged failure to pay child support or the lack of a meaningful parent-child relationship [*see Estate of Shellenbarger (2008) 169 Cal. App. 4th 894, 896, 86 Cal. Rptr. 3d 862* (court cannot disinherit a natural parent who abandoned a child who later died intestate, when the deceased child was conceived during the parents' marriage and the father acknowledged paternity)].

- A natural parent and child relationship may be established under any provision of the Uniform Parentage Act, except that the relationship may not be established by an action under *Fam. Code § 7630(c)*, governing actions to determine the existence of a father-child relationship when the child has no presumed father or whose presumed father is deceased, unless one of the following conditions exists [*Prob. Code § 6453(b)*]:

  - A court order was entered during the father's lifetime declaring paternity [*see Estate of Griswold (2001) 25 Cal. 4th 904, 921-924, 108 Cal. Rptr. 2d 165, 24 P.3d 1191* (judgment in bastardy proceeding, in which decedent's biological father confessed paternity, established father as decedent's natural parent for purposes of intestate succession)]. A finding in a proceeding for dissolution of marriage between the decedent and his or her spouse that the claimant is their child establishes, for the purpose of intestate succession, that the claimant is the decedent's issue [*Weir v. Ferreira (1997) 59 Cal. App. 4th 1509, 1518-1522, 70 Cal. Rptr. 2d 33]* .

  - Paternity is established by clear and convincing evidence that the father has openly held out the child as his own [*see Estate of Burden (2007) 146 Cal. App. 4th 1021, 1030* ; *53 Cal. Rptr. 3d 390* (decedent's acknowledgements during his lifetime of son born out of wedlock, which included (1) decedent's written acknowledgement that he was a party to conception; (2) that he had asked the child's mother to marry him; and (3) his admissions to his own mother, brother, and sister, as well as to the child himself and his mother, that the child was the decedent's son, were sufficient to meet the evidentiary burden of *Prob. Code § 6453(b)(2)*)].

  - It was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence. This alternative does not require proof of any specified conduct by the father, but merely proof that he is (or was) the child's biological father [*Cheyanna M. v. A.C. Nielsen Co. (1998) 66 Cal. App. 4th 855, 867, 78 Cal. Rptr. 2d 335* (statute does not limit type or source of permissible evidence)]. It governs a situation in which the father dies before the child is born [*Cheyanna M. v. A.C. Nielsen Co. (1998) 66 Cal. App. 4th 855, 870, 78 Cal. Rptr. 2d 335]* .

- A natural parent and child relationship may be established for a posthumously conceived child under *Prob. Code § 249.5* [*Prob. Code § 6453(c)*; *see § 458D.78[5]*].

If a child is born out of wedlock, neither a natural parent nor a relative of that parent inherits from or through the child on the basis of the parent and child relationship between that parent and the child, unless the parent or a relative of the parent acknowledged the child and contributed to the support or care of the child [*Prob. Code§ 6452*]. For example, when the natural father of a decedent who wasborn out of wedlock acknowledged the decedent as his child by confessing to paternity in court and contributed to his support, the decedent's half siblings were entitled to inherit from the decedent's estate through their father who was also deceased [*see Estate of Griswold (2001) 25 Cal. 4th 904, 910-920, 924, 108 Cal. Rptr. 2d 165, 24 P.3d 1191* (no requirement that father receive child into his or her home or have personal contact with child)].

[b] Adoptive Parent

The relationship of parent and child exists, for the purpose of intestate succession, between an adopted person and his or her adopting parent or parents [*Prob. Code § 6450(b)*].

An adoption severs the relationship of parent and child between an adopted person and a natural parent of the adopted person, unless the natural parent and the adopted person lived together at any time as parent and child (or the natural parent was married to or cohabiting with the other natural parent at the time the person was conceived and died before the person's birth), and the adoption was by the spouse of either of the natural parents or after the death of either of the natural parents [*Prob. Code § 6451(a)*]. Neither a natural parent nor a relative of a natural parent, except for a wholeblood sibling of the adopted person or the issue of that sibling, inherits from or through the adopted person on the basis of a parent and child relationship between the adopted person and that natural parent, unless the adoption is by the spouse or surviving spouse of that parent [*Prob. Code § 6451(b)*]. A prior adoptive parent and child relationship is treated as a natural parent and child relationship [*Prob. Code § 6451(c)*].

[c] Foster or Stepparent

The relationship of parent and child exists, for the purpose of intestate succession, between a person and the person's foster parent or stepparent if (1) the relationship began during the person's minority and continued throughout the joint lifetimes of the person and the person's foster parent or stepparent, and (2) it is established by clear and convincing evidence that the foster parent or stepparent would have adopted the person but for a legal barrier [*Prob. Code § 6454*; *Estate of Furia (2002) 103 Cal. App. 4th 1, 4, 126 Cal. Rptr. 2d 384* (*Prob. Code § 6454* governs intestate succession by and through stepparent)]. The barrier to adoption must have begun during the child's minority and have continued throughout the joint lifetimes of the child and the decedent [*Estate of Joseph (1998) 17 Cal. 4th 203, 211-212, 216-217, 70 Cal. Rptr. 2d 619, 949 P.2d 472* (not sufficient that barrier only existed at time when adoption was contemplated or attempted; legal barrier must have continued until decedent's death or at least until such point in time before death as to amount to a factual barrier to adoption in the period remaining); *Estate of Furia (2002) 103 Cal. App. 4th 1, 4-5, 126 Cal. Rptr. 2d 384* (biological father's refusal to consent to adoption was not legal barrier when child reached age of majority more than 20 years before decedent's death)]. The benefits of *Prob. Code § 6454* are not limited to minors, but also apply to adult foster children or stepchildren [*Estate of Joseph (1998) 17 Cal. 4th 203, 214, 70 Cal. Rptr. 2d 619, 949 P.2d 472]* .

[d] Equitable Adoption

These statutes do not affect or limit application of the judicial doctrine of equitable adoption for the benefit of the child or the child's issue [*Prob. Code § 6455*; *see Estate of Furia (2002) 103 Cal. App. 4th 1, 5-7, 126 Cal. Rptr. 2d 384* ; *In re Marriage of Lewis & Goetz (1988) 203 Cal. App. 3d 514, 250 Cal. Rptr. 30* (applying doctrine)]. This doctrine allows a person who was accepted and treated as a natural or adopted child, and as to whom adoption was promised or contemplated but never performed, to share in inheriting the property of the equitable "parent" [*Estate of Ford (2004) 32 Cal. 4th 160, 165, 8 Cal. Rptr. 3d 541, 82 P.3d 747]* . Under the doctrine, an equitable adoption may be found to exist based on an express contract to adopt [*see Estate of Cleveland (1993) 17 Cal. App. 4th 1700, 1713 fn.15, 22 Cal. Rptr. 2d 590]* . The doctrine also applies to individuals who have filled the place of a natural born child, but through inadvertence or fault have not been legally adopted, as long as there is evidence of an intent to adopt [*Estate of Furia (2002) 103 Cal. App. 4th 1, 5, 126 Cal. Rptr. 2d 384]* .

Although California decisions have explained equitable adoption as the specific enforcement of a contract to adopt, the doctrine rests less on ordinary rules of contract law than on considerations of fairness and intent [*Estate of Ford (2004) 32 Cal. 4th 160, 169, 8 Cal. Rptr. 3d 541, 82 P.3d 747]* . However, the California law of equitable adoption does not recognize an estoppel arising merely from the existence of a family relationship between the decedent and the claimant. While a person with whom the decedent had a close, caring, and enduring relationship may be seen as more

deserving of inheritance than the decedent's heirs whose personal relationships with the decedent may have been more attenuated, the doctrine of equitable adoption is not a means of compensating the child for services rendered to the parent or a device for avoiding the unjust enrichment of other more distant relatives who will succeed to the estate under the intestacy statutes. Absent proof of an intent to adopt, a court must follow the statutory law of intestate succession [*Estate of Ford (2004) 32 Cal. 4th 160, 170, 8 Cal. Rptr. 3d 541, 82 P.3d 747]* . There is, however, no legal barrier requirement under the doctrine of equitable adoption as there is for a stepparent adoption under *Prob. Code § 6454* [*Estate of Furia (2002) 103 Cal. App. 4th 1, 5, 126 Cal. Rptr. 2d 384]* .

Although an equitable adoption claimant need not prove all the elements of an enforceable contract to adopt, the claimant must demonstrate the existence of a direct expression by the decedent of an intent to adopt the claimant. This intentmay be shown by proof of an unperformed express agreement or promise to adopt. It may also be shown by proof of other acts or statements directly showing that the decedent intended the claimant to be, or to be treated as, a legally adopted child, such as an invalid or unconsummated attempt to adopt, the decedent's statement of his or her intent to adopt, or the decedent's representation to the claimant or to the community at large that the claimant was the decedent's natural or legally adopted child [*Estate of Ford (2004) 32 Cal. 4th 160, 171, 8 Cal. Rptr. 3d 541, 82 P.3d 747]* . In addition to a statement or act by the decedent that unequivocally shows the decedent's intent to adopt, the claimant must show that the decedent acted consistently with that intent by forming with the claimant a close and enduring family relationship that must persist up to, or at least not be repudiated by the decedent before, the decedent's death [*Estate of Ford (2004) 32 Cal. 4th 160, 171 n6, 8 Cal. Rptr. 3d 541, 82 P.3d 747]* . These elements of an equitable adoption must be shown by clear and convincing evidence [*Estate of Ford (2004) 32 Cal. 4th 160, 173, 8 Cal. Rptr. 3d 541, 82 P.3d 747]* .

The doctrine applies principally when the equitable "parent" dies intestate, but may also be applied when the parent dies with a will [*Estate of Furia (2002) 103 Cal. App. 4th 1, 5-7, 126 Cal. Rptr. 2d 384]* . However, an equitably adopted child does not have a right to inherit the property of a testate "grandparent," whose will directs that her property is to go to the "surviving issue" of her children; an equitable child only has a contractual right to a portion of the parent's estate, and has no right to inherit *through* the parent [*Estate of Furia (2002) 103 Cal. App. 4th 1, 6-7, 126 Cal. Rptr. 2d 384]* .

[5] Posthumously Conceived Children

[a] Burden of Proof

For purposes of determining rights to property to be distributed on a decedent's death, a child of the decedent who was conceived after the decedent's death is deemed to have been born in the decedent's lifetime, and after the execution of all of the decedent's testamentary instruments, if the child or the child's representative proves, by clear and convincing evidence, that all of the following conditions are satisfied [*Prob. Code § 249.5*]:

- The decedent specified in writing that his or her genetic material could be used for the posthumous conception of a child of the decedent. This writing must be signed by the decedent, and dated [*Prob. Code § 249.5(a)(1)*].

- The person the decedent designated to control the use of the genetic material has given written notice by certified mail, return receipt requested, that the decedent's genetic material was available for posthumous conception. The notice must have been given to a person who has the power to control the distribution of the decedent's property or death benefits payable by reason of the decedent's death, within four months of the date of issuance of a certificate of the decedent's death or entry of a judgment determining the fact of the decedent's death, whichever event occurs first [*Prob. Code § 249.5(b)*].

- The child was in utero using the decedent's genetic material within two years of the date of issuance

of a certificate of the decedent's death or entry of a judgment determining the fact of the decedent's death, whichever occurs first. This provision does not apply to a child who shares all of his or her nuclear genes with the person donating the implanted nucleus as a result of the application of somatic nuclear transfer technology commonly known as human cloning [*Prob. Code § 249.5(c)*].

[b] Delayed Distribution

The person with the power to control the distribution of the decedent's property or death benefits payable by reason of the decedent's death may not make a distribution of property or pay death benefits before two years following the date of issuance of a certificate of the decedent's death or entry of a judgment determining the fact of the decedent's death, whichever occurs first, if the person receives timely notice under *Prob. Code § 249.5(b)*, or has actual knowledge, of the availability of the decedent's genetic material for posthumous conception [*Prob. Code § 249.6(a)*]. This provision does not apply to, and the distribution of property or the payment of death benefits may proceed in a timely manner as provided by law with respect to, any property if the birth of the posthumously conceived child or children will not affect the proposed distribution of the decedent's property, the payment of death benefits payable by reason of the decedent's death, the determination of rights to property to be distributed on the decedent's death, or the right of any person to claim a probate homestead or probate family allowance [*Prob. Code § 249.6(b)*]. The provision for delayed distribution also does not apply if the person the decedent designated to control the use of the genetic material sends written notice by certified mail, return receipt requested, that he or she does not intend to use the genetic material for the posthumous conception of a child of the decedent. The notice must be signed by the person and at least one competent witness, and dated [*Prob. Code § 249.6(c)*].

The person with the power to control the distribution of the decedent's property or death benefits payable by reason of the decedent's death is not liable for making a distribution of property or paying death benefits before receiving notice or acquiring actual knowledge of the existence of genetic material available for posthumous conception purposes [*Prob. Code § 249.6(d)*]. Each person to whom payment, delivery, or transfer of the decedent's property is made is personally liable to a person who, under *Prob. Code § 249.5*, has a superior right to the property. A person's aggregate personal liability cannot exceed the fair market value, valued as of the time of the transfer, of the property paid, delivered, ortransferred to the person, less the amount of any liens and encumbrances on the property at that time [*Prob. Code § 249.6(e)*]. In addition, any person who fraudulently secures the payment, delivery, or transfer of the decedent's property is liable to the person having a superior right for three times the fair market value of the property [*Prob. Code § 249.6(f)*]. Any action to impose liability must be filed within three years after the distribution to the holder of the decedent's property, or three years after the discovery of the fraud, whichever is later. This three-year period may not be tolled for any reason [*Prob. Code § 249.6(g)*].

If the notice required by *Prob. Code § 249.5(b)* is not given in a timely manner, the person with the power to control the distribution of the decedent's property or death benefits payable by reason of the decedent's death may make the distribution in the manner provided by law as if any child of the decedent conceived after his or her death had predeceased the decedent without heirs. A posthumously conceived child, or that child's representative, is barred from making a claim for wrongful distribution against either the person making the distribution or the recipient of the distribution, when timely notice was not given [*Prob. Code § 249.7*].

Any interested person may file a petition under *Prob. Code §§ 248* or *17200* requesting distribution of the decedent's property or death benefits payable by reason of the decedent's death that are subject to the delayed distribution provisions of *Prob. Code § 249.6* [*Prob. Code § 249.8*]. At the hearing, if it appears that distribution can be made without any loss to any interested person, including any loss (either actual or contingent) to the decedent's posthumously conceived child, the court may order distribution of all, or a portion, of the property or death benefits. The order is stayed until any bond required by the court is filed [*Prob. Code § 249.8*].

[6] Dower and Curtesy

Except to the extent provided in *Prob. Code § 120*, the estates of dower and curtesy are not recognized [*Prob. Code § 6412*; *see In re Marriage of Dajani (1988) 204 Cal. App. 3d 1387, 1388 n.2, 251 Cal. Rptr. 871* (distinguishing "dower" and "dowry")]. This is true whether the decedent died before, on, or after January 1, 1985 [*Prob. Code § 6414(b)*].

Under *Prob. Code § 120*, the surviving spouse of a decedent who died not domiciled in California but who left a valid will disposing of real property in California that is not the community property of the decedent and the surviving spouse has the same right to elect to take a portion of or interest in the property against the decedent's will as though the property were situated in the decedent's domicile state at death.

[7] Failure to Survive Decedent

A person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for the purpose of intestate succession, and the heirs are determined accordingly. If it cannot be established by clear and convincing evidence that a person who would otherwise be an heir has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period. The requirement that a person who survives the decedent must survive by 120 hours does not apply if the application of the 120-hour survival requirement would result in the escheat of property to the state [*Prob. Code § 6403(a)* (applicable if all persons on whom disposition of the property depends died on or after January 1, 1990)].

[8] Advancements by Decedent

If a person dies intestate as to all or part of his or her estate after January 1, 1985, property the decedent gave during his or her lifetime to an heir is treated as an advancement against that heir's share of the intestate estate if (1) the decedent declares in a contemporaneous writing that the gift is an advancement against the heir's share of the estate, or that its value is to be deducted from the value of the heir's share of the estate, or (2) the heir acknowledges in writing that the gift is to be so deducted or is an advancement or that its value is to be deducted from the value of the heir's share of the estate [*Prob. Code § 6409(a)*].

The property advanced is to be valued as of the time the heir came into possession or enjoyment of it or as of the time of the decedent's death, whichever occurs first [*Prob. Code § 6409(b)*]. However, if the value of the property advanced is expressed in the decedent's contemporaneous writing, or in the heir's acknowledgment made contemporaneously with the advancement, that value is conclusive in the division and distribution of the intestate estate [*Prob. Code § 6409(c)*].

If the recipient of the property advanced fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient's issue unless the declaration or acknowledgment provides otherwise [*Prob. Code § 6409(d)*].

[9] Debts Owed to Decedent

A debt owed to the decedent is not charged against the intestate share of any person except the debtor [*Prob. Code § 6410(a)*] and, if the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's issue [*Prob. Code § 6410(b)*].

[10] Distribution to Surviving Spouse

The surviving spouse's intestate share of community property (defined in *Prob. Code § 28*) and quasi-community property (defined in *Prob. Code § 66*) is the one half of the community property and of the quasi-community property thatbelongs to the decedent under *Prob. Code §§ 100* and *101*, respectively [*Prob. Code § 6401(a), (b)*]. With respect to the decedent's separate property, the intestate share of the surviving spouse is as follows [*Prob. Code § 6401(c)*]:

- The entire intestate estate if the decedent did not leave any surviving issue, parent, brother, sister, or issue of a deceased brother or sister.

- One half of the intestate estate if the decedent leaves (1) only one child or the issue of one deceased child, or (2) no issue but leaves a parent or parents or their issue or the issue of either of them.

- One third of the intestate estate if the decedent leaves (1) more than one child, or (2) one child and the issue of one or more deceased children, or (3) the issue of two or more deceased children.

[11] Distribution to Surviving Domestic Partner

A surviving domestic partner [*see Prob. Code § 37(b)* (definition), § 458D.78[3][d]] is entitled to the same intestate share of the decedent's separate property to which a surviving spouse would be entitled [*Prob. Code § 6401(c)*; *see* discussion in *§ 458D.78[1]*]].

Beginning January 1, 2005, a surviving registered domestic partner, following the other partner's death, has the same rights, protections, and benefits, and is subject to the same responsibilities, obligations, and duties under law that are granted to and imposed on a surviving spouse [*Fam. Code § 297.5(c)*; *see Fam. Code § 297.5*(j) (when necessary to implement statutory rights of domestic partners, gender-specific terms referring to spouses must be construed to include domestic partners); *see also Knight v. Superior Court (2005) 128 Cal. App. 4th 14, 22-31, 26 Cal. Rptr. 3d 687* (enactment of *Fam. Code § 297.5* is not an improper legislative amendment of Proposition 22, codified in *Fam Code § 308.5*, which states that only marriage between a man and a woman is valid or recognized in *California); Bouley v. Long Beach Memorial Medical Center (2005) 127 Cal. App. 4th 601, 606, 25 Cal. Rptr. 3d 813* (domestic partner has right under *Code Civ. Proc. § 377.60* to bring wrongful death action for death of his or her partner); *Armijo v. Miles (2005) 26 Cal. Rptr. 3d 623* (giving domestic partner right to bring wrongful death action for death of his or her partner does not violate Proposition 22, codified in *Fam. Code § 308.5*].

The legislature has made clear its intention in the domestic partnership law to substantially equalize the status of registered domestic partners and spouses [*Koebke v. Bernardo Heights Country Club (2005) 36 Cal. 4th 824, 839, 31 Cal. Rptr. 3d 565, 115 P.3d 1212]* . To couples who meet the requirements of establishing a domestic partnership under the domestic partnership law and who have registered under that law, the legislature has granted legal recognition comparable to marriage, both procedurally and in terms of the substantive rights and obligations granted to and imposed on the partners, which are supported by policy considerations similar to those favoring marriage. These rights and responsibilities are not shared by couples who cohabit or who have not registered as domestic partners [*Koebke v. Bernardo Heights Country Club (2005) 36 Cal. 4th 824, 845-846, 31 Cal. Rptr. 3d 565, 115 P.3d 1212* (finding that in light of domestic partnership law, Unruh Act requires businesses to treat registered domestic partners same as spouses)].

[12] Distribution to Other Heirs

Except as provided in *Prob. Code § 6402.5* (decedent who had a predeceased spouse but no surviving spouse or issue, discussed in *§ 458D.78[13],*), or to a surviving domestic partner under *Prob. Code § 6401(c)* (discussed in *§ 458D.78[11]*) the part of the intestate estate not passing to the surviving spouse or surviving domestic partner under *Prob. Code § 6401* (discussed in *§ 458D.78[10]*), or the entire intestate estate if there is no surviving spouse or surviving domestic partner, passes as follows [*Prob. Code § 6402*]:

- To the decedent's issue. If they are all of the same degree of kinship to the decedent they take equally, but, if of unequal degree, those of more remote degree take in the manner provided in *Prob. Code § 240* (discussed in *§ 458D.78[14]*).

- If there is no surviving issue, to the decedent's parent or parents equally.

- If there is no surviving issue or parent, to the issue of the parents or either of them. The issue take equally if they are all of the same degree of kinship to the decedent, but, if of unequal degree, those of more remote degree take in the manner provided in *Prob. Code § 240* (discussed in *§ 458D.78[14]*).

- If there is no surviving issue, parent, or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, to the grandparent or grandparents equally, or if there is no surviving grandparent, to their issue. The issue take equally if they are all of the same degree of kinship to the decedent, but, if of unequal degree, those of more remote degree take in the manner provided in *Prob. Code § 240* (discussed in *§ 458D.78[14]*).

- If there is no surviving issue, parent or issue of a parent, grandparent or issue of a grandparent, but the decedent is survived by the issue of a predeceased spouse, to such issue. The issue take equally if they are all of the same degree of kinship to the predeceased spouse, but, if of unequal degree, those of more remote degree take in the manner provided in *Prob. Code § 240* (discussed in *§ 458D.78[14]*).

- If there is no surviving issue, parent or issue of a parent, grandparent or issue of a grandparent, or issue of a predeceased spouse, but the decedent is survived by next of kin, to the next of kin in equal degree; however, if there are two or more collateral kindred in equal degree claiming through different ancestors, those who claim through the nearest ancestor will be preferred to those claiming through an ancestor more remote.

- If there is no surviving next of kin of the decedent and no surviving issue of a predeceased spouse of the decedent, but the decedent is survived by the parents of a predeceased spouse or the issue of those parents, to the parent or parents equally, or to the issue of the parents if both are deceased. The issue take equally if they are all of the same degree of kinship to the predeceased spouse, but if of unequal degree, those of more remote degree take in the manner provided in *Prob. Code § 240* (discussed in *§ 458D.78[14]*).

A person who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship that would entitle the person to the larger share [*Prob. Code § 6413*].

[13] Distribution of Estate Attributable to Decedent's Predeceased Spouse

[a] Real Property

For the purposes of distributing real property, if the decedent left no surviving spouse or issue but had a predeceased spouse who died not more than 15 years before the decedent, the "portion of the decedent's estate attributable to the decedent's predeceased spouse" (*defined in § 458D.78[13][c]*) passes as follows [*Prob. Code § 6402.5(a)*]:

- If the decedent is survived by issue of the predeceased spouse, to the surviving issue. If they are all of the same degree of kinship to the predeceased spouse they take equally, but if of unequal degree, those of more remote degree take in the manner provided in *Prob. Code § 240* (discussed in *§ 458D.78[14]*).

- If there is no surviving issue of the predeceased spouse but the decedent is survived by a parent or parents of the predeceased spouse, to the surviving parent or parents equally.

- If there is no surviving issue or parent of the predeceased spouse but the decedent is survived by issue of a parent of the predeceased spouse, to the surviving issue of the parents or either of them. The

issue take equally if they are all of the same degree of kinship to the predeceased spouse, but if of unequal degree, those of more remote degree take in the manner provided in *Prob. Code § 240* (discussed in *§ 458D.78[14]*).

- If the decedent is not survived by issue, parent, or issue of a parent of the predeceased spouse, to the decedent's next of kin in the manner provided in *Prob. Code § 6402* (*see Prob. Code § 6402(f)*, discussed in *§ 458D.78[12]*).

- If the portion of the decedent's estate attributable to the decedent's predeceased spouse would otherwise escheat to the state because there is no kin of the decedent to take under *Prob. Code § 6402*, the portion of the decedent's estate attributable to the predeceased spouse passes to the predeceased spouse's next of kin, who will take in the same manner as the next of kin of the decedent under *Prob. Code § 6402*.

[b] Personal Property

For the purposes of distributing personal property, if the decedent left no surviving spouse or issue but had a predeceased spouse who died not more than five years before the decedent, the "portion of the decedent's estate attributable to the predeceased spouse" (*defined in § 458D.78[13][c]*) passes as follows [*Prob. Code § 6402.5(b)*]:

- If the decedent is survived by issue of the predeceased spouse, to the predeceased spouse's surviving issue. If they are all of the same degree of kinship to the predeceased spouse, they take equally, but if of unequal degree, those of more remote degree take in the manner provided in *Prob. Code § 240* (discussed in *§ 458D.78[14]*).

- If there is no surviving issue of the predeceased spouse but the decedent is survived by a parent or parents of the predeceased spouse, to the predeceased spouse's surviving parent or parents equally.

- If there is no surviving issue or parent of the predeceased spouse but the decedent is survived by issue of a parent of the predeceased spouse, to the surviving issue of the parents or either of them. They take equally if they are all of the same degree of kinship to the predeceased spouse, but if of unequal degree, those of more remote degree take in the manner provided in *Prob. Code § 240* (discussed in *§ 458D.78[14]*).

- If the decedent is not survived by issue, parent, or issue of a parent of the predeceased spouse, to the decedent's next of kin in the manner provided in *Prob. Code § 6402* (*see Prob. Code § 6402(f)*, discussed in *§ 458D.78[12]*).

- If the portion of the decedent's estate attributable to the decedent's predeceased spouse would otherwise escheat to the state because there is no kin of the decedent to take under *Prob. Code § 6402*, the portion of the decedent's estate attributable to the predeceased spouse passes to thepredeceased spouse's next of kin, who will take in the same manner as the next of kin of the decedent under *Prob. Code § 6402*.

Under *Prob. Code § 6402.5(b)*, the claimant heir bears the burden of proof to show the exact personal property to be disposed of to the heir [*Prob. Code § 6402.5(c)*].

The term "personal property," as used in *Prob. Code § 6402.5(b)*, means the personal property in which there is a written record of title or ownership and the aggregate value of which is $10,000 or more [*Prob. Code § 6402.5(e)*].

[c] Portion of Estate Attributable to Predeceased Spouse

For the purpose of distributing that portion of the decedent's estate that is attributable to his or her predeceased spouse, the term "portion of the decedent's estate attributable to the decedent's predeceased spouse" means all of the following property in the decedent's estate [*Prob. Code § 6402.5(f)*]:

- One half of the community property in existence at the time of the predeceased spouse's death.

- One half of any community property, in existence at the time of the predeceased spouse's death, that was given to the decedent by the predeceased spouse by way of gift, descent, or devise.

- That portion of any community property in which the predeceased spouse had any incident of ownership and that vested in the decedent on the death of the predeceased spouse by right of survivorship.

- Any separate property of the predeceased spouse that came to the decedent by gift, descent, or devise of the predeceased spouse, or that vested in the decedent on the predeceased spouse's death by right of survivorship.

[d] Quasi-Community Property

For the purposes of *Prob. Code § 6402.5*, quasi-community property (defined in *Prob. Code § 66*) is treated in the same manner as community property (defined in *Prob. Code § 28*) [*Prob. Code § 6402.5(g)*].

[e] Inheritance by Afterborn Relatives of Predeceased Spouse

Relatives of the predeceased spouse conceived before the decedent's death but born thereafter inherit as if they had been born in decedent's lifetime [*Prob. Code § 6402.5(h)(1)*].

[f] Inheritance by Person Related Through Two Lines of Relationship

A person who is related to the predeceased spouse through two lines of relationship is entitled to only a single share based on the relationship that would entitle the person to the larger share [*Prob. Code § 6402.5(h)(2)*].

[14] Distribution to Issue of Unequal Degree

When a statute calls for property to be distributed or taken in the manner provided in *Prob. Code § 240*, the property must be divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living, each living member of the nearest generation of issue then living receiving one share and the share of each deceased member of that generation who leaves issue then living being divided in the same manner among his or her then living issue [*Prob. Code § 240*]. Distribution of an intestate decedent's estate cannot be limited to surviving first cousins and the children of predeceased first cousins while excluding grandchildren of predeceased first cousins because the statutes do not limit the surviving issue of a predeceased heir entitled to inherit to the first generation. Rather, the surviving issue includes all lineal descendents of all generations [*Estate of Beckel (2009) 174 Cal. App. 4th 34, 38, 93 Cal. Rptr. 3d 890]* .

For example, in distributing the estate of a decedent who died intestate and who was not survived by any children, parents, siblings, grandparents, aunts, or uncles, but who was survived by four material first cousins and the issue of 14 predeceased paternal first cousins, the court properly divided the decedent's estate into 18 shares and distributed 4/18ths of the estate to the first cousins and 14/18ths of the estate to the decedent's relatives who were the issue of the 14 deceased paternal first cousins. The paternal first cousins were not of a different generation of issue by reason of being

descendants of a different grandparent; the degree of the grandparents' issue is measured by their degree of kinship to the decedent, not their degree of kinship to the grandparents [*see Estate of McCrary (1997) 54 Cal. App. 4th 100, 102-105, 62 Cal. Rptr. 2d 504* (rejecting contention of maternal first cousins that they were entitled to entire estate, and that nothing should have been awarded to more remote relatives, because first cousins were nearest generation of issue then living from any of decedent's grandparents)].

Prob. Code § 240 applies to decedents who die on or after January 1, 1985; if the decedent died before that date, prior law continues to apply [*Prob. Code § 241*].

[15] Escheat in Absence of Heirs

If there is no taker of the intestate estate under the provisions of *Prob. Code §§ 6400-6455*, the property escheats to the estate as provided in *Prob. Code §§ 6800-6806* [*Prob. Code § 6404*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewReal Property LawOwnership & TransferDeath & IncapacityIntestate Succession

California Forms of Pleading and Practice--Annotated

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Volume 39: Probate: Claims Against the Estate thru Probate: Discharge-Chs. 454-459
Chapter 458D PROBATE: ACCOUNTS, FINAL DISTRIBUTION, AND COMPENSATION
PART II. LEGAL BACKGROUND
C. Distribution

39-458D California Forms of Pleading and Practice--Annotated § 458D.79

§ 458D.79 Disclaimer of Interest in Estate

A beneficiary may disclaim any interest in an estate, in whole or in part, by filing a disclaimer as provided in *Prob. Code §§ 260-295* [*Prob. Code § 275*]. A spendthrift provision or similar restriction has no effect on a beneficiary's right to disclaim [*Prob. Code § 286*]. A disclaimer on behalf of a conservatee is made by the conservator of the estate [*Prob. Code § 276*]. A disclaimer on behalf of a minor is made by the guardian of the minor's estate, or, if none, a guardian ad litem of the minor [*Prob. Code § 277(a)*]. A disclaimer on behalf of a decedent ismade by the decedent's personal representative [*Prob. Code § 277(b)*]. A disclaimer on behalf of a minor or decedent is not effective unless made pursuant to a court order obtained under *Prob. Code § 277(c)-(f)* [*Prob. Code § 277(a), (b)*].

The disclaimer must be in writing and signed by the disclaimant, identify the creator of the interest, describe the interest to be disclaimed, and state the disclaimer and the extent of it [*Prob. Code § 278*]. The disclaimer must be filed within a reasonable time after the person able to disclaim acquires knowledge of the interest [*Prob. Code § 279(a)*]. The disclaimer of an interest created under a will or by intestate succession is conclusively presumed to have been filed within a reasonable time if it is filed within nine months after the death of the creator of the interest or within nine months after the interest becomes indefeasibly vested, whichever occurs later [*Prob. Code § 279(b)(1), (2)*].

Unless the creator of the interest provides for a specific disposition in the event of a disclaimer, the interest disclaimed shall descend, go, be distributed, or continue to be held (1) as to a present interest, as if the disclaimant had predeceased the creator of the interest; or (2) as to a future interest, as if the disclaimant had died before the event determining that the taker of the interest had become finally ascertained and the taker's interest indefeasibly vested. A disclaimer relates back for all purposes to the date of the death of the creator of the disclaimed interest or the determinative event, as the case may be [*Prob. Code § 282(a)*; for when the beneficiary is not treated as having predeceased the decedent, *see Prob. Code § 282(b)*].

A disclaimer, when effective, is irrevocable and binding on the beneficiary and all persons claiming by, through, or under the beneficiary, including the beneficiary's creditors [*Prob. Code § 281*].

A beneficiary who has accepted an interest cannot thereafter disclaim it [*Prob. Code § 285(a)*; *see Prob. Code § 285(b)*

(acts constituting acceptance)].

A person who could file a disclaimer may instead file a written waiver as set forth in *Prob. Code § 284*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWillsBeneficiariesDisclaimers & Renunciations

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39-458D California Forms of Pleading and Practice--Annotated § 458D.80

§ 458D.80 Rules of Construction of Will

[1] Generally

The Probate Code sets forth general rules for the construction of instruments [*see Prob. Code § 21101 et seq.*]. These rules apply broadly to wills, trusts, deeds, and other instruments [*Prob. Code § 21101*].

The first and most important rule for the construction of a will is that the intention of the testator as expressed in the will controls the legal effect of the dispositions made in the will [*Prob. Code § 21102(a)*]. Accordingly, the other rules apply only when the intention of the testator is not otherwise indicated by the will [*Prob. Code § 21102(b)*]. These statutory provisions do not, however, limit the use of extrinsic evidence, to the extent otherwise authorized by law, to determine the transferor's intent [*Prob. Code § 21102(c)*].

Under the Probate Code, all parts of a will are to be construed in relation to each other and so as, if possible, to form a consistent whole. If the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference to or recital of that part in another part of the instrument [*Prob. Code § 21121*]. The words of a will must be interpreted in such a way as to give some effect to every expression in the instrument, and not so that any of the expressions will become inoperative. Preference must be given to an interpretation that will prevent intestacy or failure of a transfer, rather than one that will result in an intestacy or failure of a transfer [*Prob. Code § 21120*].

The words of a will are to be given their ordinary and grammatical meaning, unless the intention to use them in another sense is clear and their intended meaning can be ascertained. Technical words are not necessary to give effect to a disposition in a will. However, technical words are to be considered as having been used in their technical sense unless the context clearly indicates a contrary intention or it satisfactorily appears that the will was drawn solely by the testator and the testator was unacquainted with the technical sense [*Prob. Code § 21122*].

Words used in a will are ordinarily given the same effect as by statute or case law, in the absence of a showing of contrary intent [*Estate of Furia (2002) 103 Cal. App. 4th 1, 3, 126 Cal. Rptr. 2d 384]* . For example, when there is no evidence that the testator used the word "issue" in the will with the intention of including or excluding any particular

persons, the court will give the term its statutory meaning [*Estate of Furia (2002) 103 Cal. App. 4th 1, 3, 126 Cal. Rptr. 2d 384]* .

As an illustration of application of the foregoing rules, the statutory rules of construction were applied in one case to determine what the phrase "my money" meant in the dispositive provisions of a holographic will. The court concluded that it meant all of the testator's financial assets (including treasury bills, money market accounts, and savings bonds), and not merely his bank accounts, when this construction would avoid intestacy, was in accord with the general scheme of the will to benefit the two beneficiaries named in the will, and was also in accord with the testator's lack of legal sophistication, as shown in other parts of the will, supporting the conclusion that the testator used the term "my money" in its most flexible sense to include all of his financial assets [*Estate of Goyette (2004) 123 Cal. App. 4th 67, 71-72, 19 Cal. Rptr. 3d 760]* .

[2] Devises Classified

The Probate Code recognizes six classifications of devises (referred to in the code as "at-death transfers") [*Prob. Code § 21117*; *see Prob. Code § 21101* (ruleapplicable to transfers under wills, trusts, deed, and other instruments)]:

- A specific devise is a transfer of specifically identifiable property [*Prob. Code § 21117(a)*].

- A general devise is a transfer from the general assets of the decedent's estate that does not give specific property [*Prob. Code § 21117(b)*].

- A demonstrative devise is a general devise that specifies the fund or property from which the transfer is primarily to be made [*Prob. Code § 21117(c)*].

- A general pecuniary devise is a devise that is expressly stated as a fixed dollar amount or is a dollar amount determinable by the provisions of the will [*Prob. Code §§ 21117(d), 21118(b)*].

- An annuity is a general pecuniary devise that is payable periodically [*Prob. Code § 21117(e)*].

- A residuary devise is a transfer of property that remains after all specific and general devises have been satisfied [*Prob. Code § 21117(f)*].

[3] Law Governing Meaning and Legal Effect of Disposition

The meaning and legal effect of a disposition in a will is determined by the local law of a particular state selected by the testator in the will, unless the application of that law would be contrary to the rights of the surviving spouse to community and quasi-community property, to the family protection provisions of the Probate Code [*Prob. Code § 21103*; *see Prob. Code § 6500 et seq.* (family protection)], or to any other public policy of California applicable to the disposition [*Prob. Code § 21103*].

[4] Property Passing by Will

For most purposes, a will is effective to pass all property the testator owns at death, including property acquired after execution of the will [*Prob. Code § 21105*].

This rule, however, is subject to the following exceptions:

- A general residuary clause in a will, or a will making a general disposition of all of the testator's property, is not effective to exercise a power of appointment held by the testator unless specific reference

is made to the power or there is some other indication of intent to exercise the power [*Prob. Code §§ 641(a), 21105*; *see Prob. Code § 641(b)*].

- If a power of appointment existing at the donee's death but created after the execution of the donee's will is exercised by the will, the appointment is not effective if the creating instrument manifests an intent that the power may not be exercised by a will previously executed, or if the will manifests an intent not to exercise a power subsequently acquired [*Prob. Code §§ 642, 21105*].

[5] Direction to Convert Real Property to Money

Absent a contrary intention indicated by the will, if the will directs the conversion of real property into money at the testator's death, the real property and its proceeds are deemed to be personal property from the time of the testator's death [*Prob. Code § 21107*; *see Prob. Code § 21102* (testator's intent controlling)].

[6] Common Law Rule of Worthier Title

The common law doctrine of worthier title, under which a testator cannot devise an interest to the testator's own heirs, has been abolished in California, as has the presumption (or rule of interpretation) that a transferor does not intend, by a transfer to the transferor's own heirs or next of kin, to transfer an interest to those heirs [*Prob. Code § 21108*]. Rather, the Probate Code provides that the meaning of a transfer of a legal or equitable interest to a transferor's own heirs or next of kin must be determined by the general rules applicable to the interpretation of instruments [*Prob. Code § 21108* (rule applicable to all cases in which final judgment has not been entered as of September 18, 1959)].

[7] Death of Devisee

A devisee who does not survive the testator, or who does not survive until a future time required by the will, does not take under the will [*Prob. Code § 21109(a)*; *see Prob. Code § 21101* (rules applicable to wills, trusts, deeds, and other instruments)]. Unless the will provides otherwise, a devisee will be presumed not to have survived until a future time required by the will unless there is clear and convincing evidence that he or she did in fact survive until that time [*Prob. Code § 21109(b)*].

Under the so-called "anti-lapse statute" [*see Prob. Code § 21110*], if a devise is made to "kindred" of the testator (or to "kindred" of a surviving, deceased, or former spouse of the testator), and if the "kindred" devisee is dead when the will is executed, is treated as if he or she predeceased the testator, fails to survive the testator, or fails to survive until a future time required by the will, the issue of the deceased devisee take in his or her place in the manner provided in *Prob. Code § 240* [*Prob. Code § 21110(a), (c)*; *see Prob. Code § 21101* (rules applicable to wills, trusts, deeds, and other instruments); *see also Estate of Mooney (2008) 169 Cal. App. 4th 654, 663, 87 Cal. Rptr. 3d 115* (antilapse statute provides that when a bequest to a protected transferee would otherwise lapse due to the transferee's death, that bequest passes by right of representation to his or her descendants)]. However, the issue of the deceased devisee do not take if the will expresses a contrary intention or makes a substitute disposition [*Prob. Code § 21110(b), (c)*]. For this purpose, a requirement that the initial devisee survive the testator or survive for a specified period of time after the testator's death, or until a future time that is related to the probate of the will orthe administration of the testator's estate, constitutes a contrary intention [*Prob. Code § 21110(b)*; *Burkett v. Capovilla (2003) 112 Cal. App. 4th 1444, 1451, 5 Cal. Rptr. 3d 817]* .

If a transfer (other than a residuary gift or a transfer of a future interest) fails for any reason, the property is transferred as follows [*Prob. Code § 21111(a)*; *see Prob. Code § 21101* (rule applicable to wills, trusts, deeds, and other instruments)]:

(1) If the transferring instrument provides for an alternative disposition in the event the transfer fails, the

property is transferred according to the terms of the instrument.

(2) If the transferring instrument does not provide for an alternative disposition but does provide for the transfer of a residue, the property becomes a part of the residue.

(3) If the transferring instrument does not provide for an alternative disposition and does not provide for the transfer of a residue, or if the transfer is itself a residuary gift, the property is transferred to the decedent's estate.

If a residuary gift or a future interest is transferred to two or more persons and the share of a transferee fails for any reason, and no alternative disposition is provided, the share passes to the other transferees in proportion to their other interest in the residuary gift or the future interest [*Prob. Code § 21111(b)*].

Both provisions of *Prob. Code § 21111* are expressly subject to *Prob. Code § 21110*. A transfer of "all my estate,"or words of similar import, is a residuary gift for purposes of *Prob. Code § 21111* [*Prob. Code § 21111(c)*]. If failure of a future interest results in intestacy, the property passes to the transferor's heirs determined under *Prob. Code § 21114*, discussed in *§ 458D.80[9]* [*Prob. Code § 21111(d)*].

For distribution of property when the distributee has died before distribution, see *Prob. Code §§ 11801* and *11802*, discussed in *§ 458D.95*.

[8] Condition of Death With or Without Issue

Unless the will provides otherwise, a condition in a transfer of a present or future interest that refers to a person's death "with" or "without" issue, or to a person's "having" or "leaving" issue or no issue, or a condition based on words of similar import, is construed to refer to that person's being dead at the time the transfer takes effect in enjoyment and to his or her either having or not having, as the case may be, issue who are alive at the time of enjoyment [*Prob. Code § 21112*; *see Prob. Code § 21102* (testator's intent controlling)].

[9] Devise to Class

If a statute or a will provides for transfer of a present or future interest to, or creates a present or future interest in, a designated person's heirs, heirs at law, next of kin, relatives, family, or words of similar import, the transfer is to the persons, including the state under *Prob. Code § 6800*, and in the shares that would succeed to the designated person's intestate estate under the intestate succession law of the transferor's domicile, if the designated person died when the transfer is to take effect in enjoyment [*Prob. Code § 21114(a)*]. If the designated person's surviving spouse is living but is remarried at the time the transfer is to take effect in enjoyment, the surviving spouse is not an heir of the designated person for this purpose [*Prob. Code § 21114(a)*]. The term "designated person" includes the transferor [*Prob. Code § 21114(b)*].

A devise of an interest to "children" or "issue" must be interpreted in the light of the statutory definitions of those terms in effect *at the time the will is executed*. Unless a contrary intention is expressed in the will, if the will makes a devise to "children" or "issue," the testator is presumed to be aware of the public policy reflected in the statutory definitions and to intend that those definitions be followed in the construction of the will. If the statutory definitions are later changed, the will must still be interpreted in light of the statutory definitions in effect at the time the will is executed [*Newman v. Wells Fargo Bank (1996) 14 Cal. 4th 126, 136, 59 Cal. Rptr. 2d 2, 926 P. 2d 969* (statutory definition of child adopted out of natural parent's family in former *Prob. Code § 257*, repealed 1985, modified after execution of will but before distribution of devise); *now see Prob. Code § 6451*].

Unless otherwise provided in the will, the following rules apply [*Prob. Code § 21115*; *see Prob. Code § 21102*

(testator's intent controlling)]:

- Except as provided below, half-bloods, adopted persons, persons born out of wedlock, stepchildren, foster children, and the issue of all such persons when appropriate to the class, are included in terms of class gift or relationship in accordance with the rules for determining relationship and inheritance rights for purposes of intestate succession.

- In construing a devise by a testator who is not the natural parent, a person born to the natural parent will not be considered the child of that parent unless the person lived while a minor as a regular member of the household of the natural parent or of that parent's parent, brother, sister, spouse, or surviving spouse. In construing a devise by the testator who is not the adoptive parent, a person adopted by the adoptive parent will not be considered the child of that parent unless the person lived while a minor (either before or after the adoption) as a regular member of the household of the adopting parent or of that parent's parent, brother, sister, or surviving spouse [*see In re Estate of DeLoreto (2004) 118 Cal. App. 4th 1048-1053, 118 Cal. App. 4th 1048, 1053, 13 Cal. Rptr. 3d 513* (adopted adult children of beneficiary of father's trust were not members of class of settlor's grandchildren whowere trust beneficiaries); *see also Ehrenclou v. MacDonald (2004) 117 Cal. App. 4th 364, 373, 12 Cal. Rptr. 3d 411* (person adopted by adoptive parent in another state was entitled to inherit parent's distributive share of decedent's estate as parent's "living lawful issue" only if out-of-state adoption decree created parent-child relationship between them)].

- The preceding two requirments also apply in determining (1) persons who would be kindred of the testator or kindred of a surviving, deceased, or former spouse of the testator under *Prob. Code § 21110* (discussed in *§ 458D.80[7]*); (2) persons to be included as issue of a deceased devisee under *Prob. Code § 21110*; or *(3)* persons who would be the testator's or other designated person's heirs in *Prob. Code § 21114*, discussed *above*.

The rules for determining intestate succession under these provisions are those in effect at the time the transfer is to take effect in enjoyment [*Prob. Code § 21115(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawWillsInterpretationGeneral OverviewEstate, Gift & Trust LawWillsInterpretationRules of ConstructionGeneral OverviewEstate, Gift & Trust LawWillsInterpretationRules of ConstructionConstruction Favoring TestacyEstate, Gift & Trust LawWillsInterpretationRules of ConstructionStatutory RulesEstate, Gift & Trust LawWillsInterpretationTestator's IntentGeneral OverviewEstate, Gift & Trust LawWillsInterpretationTestator's IntentExtrinsic Evidence

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39-458D California Forms of Pleading and Practice--Annotated § 458D.81

§ 458D.81 Rules for Distribution Under Will or Trust

If a will, trust, or other instrument calls for property to be distributed or taken "in the manner provided in *Section 240 of the Probate Code*," or if a will, trust, or other instrument that expresses no contrary intention provides for issue or descendants to take without specifying the manner, the property to be distributed must be distributed in the manner provided in *Prob. Code § 240* (discussed in *§ 458D.78[14]*) [*Prob. Code § 245(a)*]. Use of the words "per capita," when living members of the designated class are not all of the same generation, or contradictory wording such as "per capita and per stirpes" or "equally and by right of representation," standing alone, is not an expression of contrary intention [*Prob. Code § 245(b)*].

If a will, trust, or other instrument calls for property to be distributed or taken "in the manner provided in *Section 246 of the Probate Code*," the property to be distributed is divided into as many equal shares as there are living children of the designated ancestor, if any, and deceased children who leave issue then living. Each living child of the designated ancestor is allocated one share, and the share of each deceased child who leaves issue then living is divided in the same manner [*Prob. Code § 246(a)*]. Unless the will, trust, or other instrument expressly provides otherwise, if a will, trust, or other instrument executed on or after January 1, 1986, calls for property to be distributed or taken "per stirpes," "by representation," or "by right of representation," the property must be distributed in the manner provided in *Prob. Code § 246(a)* [*Prob. Code § 246(b)*]. Additionally, if a will, trust, or other instrument executed before January 1, 1986, calls for property to be distributed or taken "per stirpes," "by representation," or "by right of representation," the property must be distributed in the manner provided in *Prob. Code § 246(a)*, absent a contrary intent of the testator or trustor [*Prob. Code § 246(c)*].

If a will, trust, or other instrument calls for property to be distributed or taken "in the manner provided in *Section 247 of the Probate Code*," the property to be distributed is divided into as many equal shares as there are living members of the nearest generation of issue then living and deceased members of that generation who leave issue then living. Each living member of the nearest generation of issue then living is allocated one share, and the remaining shares, if any, are combined and then divided and allocated in the same manner among the remaining issue as if the issue already allocated a share and their descendants were then deceased [*Prob. Code § 247(a)*]. Unless the will, trust, or other instrument expressly provides otherwise, if a will, trust, or other instrument executed on or after January 1, 1986, calls for property

to be distributed or taken "per capita at each generation," the property must be distributed in the manner provided in *Prob. Code § 247(a)* [*Prob. Code § 247(b)*]. Additionally, if a will, trust, or other instrument executed before January 1, 1986, calls for property to be distributed or taken "per capita at each generation," the property must be distributed in the manner provided in *Prob. Code § 247(a)*, absent a contrary intent of the transferor [*Prob. Code § 247(c)*].

On distribution involving a testamentary trust, the court is required to do all of the following [*Cal. Rules of Ct., Rule 7.650(a)*]:

- Determine whether or not a valid trust has been created by the will.
- Determine the terms of the trust.
- Order distribution of the trust property to the trustee.

The order for distribution is required to incorporate the terms of the trust, to give effect to the conditions existing at the time distribution is ordered [*Cal. Rules of Ct., Rule 7.650(b)*]. The pertinent provisions are to be stated in the present tense and in the third person, instead of quoting the will verbatim [*Cal. Rules of Ct., Rule 7.650(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsTestamentary Trusts

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39-458D California Forms of Pleading and Practice--Annotated § 458D.82

§ 458D.82 Exoneration and Ademption

[1] Governing Law

Exoneration and ademption are governed by *Prob. Code §§ 21131-21139*, which apply when the testator's intention is not otherwise indicated by the will [*see Prob. Code §§ 21101, 21102*].

The provisions governing ademption, *Prob. Code §§ 21133-21135*, are not exhaustive, and nothing in those sections is intended to increase the incidence of ademption under California law [*Prob. Code § 21139*; *see* Estate of Worthy *(1988) 205 Cal. App. 3d 760, 765, 252 Cal. Rptr. 462]* .

[2] No Exoneration

A specific devise passes the property transferred subject to any mortgage, deed of trust, or other lien existing at the date of the testator's death, without right of exoneration, even when there is a general directive in the will to pay the testator's debts [*Prob. Code § 21131*; *see Prob. Code § 21101* (rule applicable to wills, trusts, deeds, and other instruments); *see also Estate of Worthy (1988) 205 Cal. App. 3d 760, 767, 252 Cal. Rptr. 462]* .

[3] Ademption by Partial or Total Extinction

[a] Change in Form of Securities Specifically Devised

If the testator executes a will that makes an at-death transfer of securities and the testator then owned securities meeting the description in the will, the devise includes additional securities the testator owned at death to the extent the testator acquired them after executing the will as a result of his or her ownership of the described securities [*Prob. Code § 21132(a)*]. The securities must be:

- Securities of the same organization acquired by reason of action initiated by the organization or any successor, related, or acquiring organization, excluding any acquired by exercise of purchase options [*Prob. Code § 21132(a)(1)*].

- Securities of another organization acquired as a result of a merger, consolidation, reorganization, or other distribution by the organization or any successor, related, or acquiring organization [*Prob. Code § 21132(a)(2)*].

- Securities of the same organization acquired as a result of a reinvestment plan [*Prob. Code § 21132(a)(3)*].

Cash distributions before death with respect to a described security are not part of the devise [*Prob. Code § 21132(b)*].

[b] By Sale or Taking by Eminent Domain of Specifically Devised Property, or Obtaining Property as Result of Foreclosure of Security for Specifically Devised Obligation

A recipient of an at-death transfer of a specific gift has a right to the specifically given property, to the extent the transferor owned the property at the time the gift takes effect in possession or enjoyment, and all of the following:

- Any balance of the purchase price (together with any security agreement) owing from a purchaser to the transferor at the time the gift takes effect by reason of a sale of the property [*Prob. Code § 21133(a)*].

- Any amount of an eminent domain award for the taking of property unpaid at the time the gift takes effect [*Prob. Code § 21133(b)*].

- Any proceeds unpaid at the time the gift takes effect on fire or casualty insurance on or other recovery for injury to the property [*Prob. Code § 21133(c)*].

- Property owned by the transferor at the time the gift takes effect and acquired as a result of foreclosure, or obtained in place of foreclosure, of the security interest for a specifically given obligation [*Prob. Code § 21133(d)*].

If, after the execution of the instrument of gift, specifically given property is sold or mortgaged by a conservator or an agent acting within the authority of a durable power of attorney for an incapacitated principal, the transferee of the specific gift has the right to a general pecuniary gift equal to the net sale price of, or the amount of the unpaid loan on, the property [*Prob. Code § 21134(a)*]. If an eminent domain award for the taking of specifically given property is paid to a conservator or agent acting within the authority of a durable power of attorney for an incapacitated principal, or if the proceeds on fire or casualty insurance on, or recovery for injury to, specifically given property are paid to a conservator or agent acting within the authority of a durable power of attorney for an incapacitated principal, the recipient of the specific gift has the right to a general pecuniary gift equal to the eminent domain award or the insurance proceeds or recovery [*Prob. Code § 21134(b)*]. These provisions do not apply with respect to a conservator if, after the sale, mortgage, condemnation, fire, casualty, or recovery, the conservatorship is terminated and the transferor survives the termination by one year [*Prob. Code § 21134(c)*]. For purposes of these provisions, the term "incapacitated principal" means a principal who is an incapacitated person, no adjudication of incapacity before death is necessary, and the acts of an agent within the authority of a durable power of attorney are presumed to be for an incapacitated principal [*Prob. Code § 21134(d)*]. The right of the transferee of a specific gift under these provisions must be reduced by any right the transferee has under *Prob. Code § 21133* [*Prob. Code § 21134(e)*].

[4] Ademption by Satisfaction

Property given by a transferor during his or her lifetime to a person is treated as a satisfaction of an at-death transfer to that person, in whole or in part, only if one of the following conditions is satisfied:

- The instrument provides for deduction of the lifetime gift from the at-death transfer [*Prob. Code § 21135(a)(1)*].

- The transferor declares in a contemporaneous writing that the gift is in satisfaction of the at-death transfer or that its value is to be deducted fromthe value of that transfer [*Prob. Code § 21135(a)(2)*].

- The transferee acknowledges in writing that the gift is in satisfaction of the at-death transfer or that its value is to be deducted from the value of that transfer [*Prob. Code § 21135(a)(3)*].

- The property given is the same property that is the subject of a specific gift to that person [*Prob. Code § 21135(a)(4)*].

For the purpose of partial satisfaction, property given during the testator's lifetime is valued as of the time the devisee came into possession or enjoyment of the property or as of the time of death of the testator, whichever occurs first [*Prob. Code § 21135(b)*; *see Prob. Code § 21101* (rule applicable to wills, trusts, deeds, and other instruments)]. However, if the value of the gift was expressed in the contemporaneous writing of the testator, or in an acknowledgment of the devisee made contemporaneously with the gift, that value is conclusive in the division and distribution of the estate [*Prob. Code § 21135(c)*; *see Prob. Code § 21101* (rule applicable to wills, trusts, deeds, and other instruments)].

If the transferee fails to survive the transferor, the gift is treated as a full or partial satisfaction of the gift in applying *Prob. Code §§ 21110* and *21111* [see discussion in *§ 458D.80[7]*], unless the transferor's contemporaneous writing provides otherwise [*Prob. Code § 21135(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-458D California Forms of Pleading and Practice--Annotated § 458D.83

§ 458D.83 Abatement

[1] Generally

Except as provided in *Probate Code §§ 20100-20255* (proration of taxes) and 21600-21630 (inheritance rights of omitted spouses and children), shares of beneficiaries abate as provided in *Prob. Code §§ 21400-21406* for all purposes, including payment of the debts, expenses, and charges specified in *Prob. Code § 11420*, satisfaction of gifts, and payment of expenses on specifically devised property pursuant to *Prob. Code § 12002*, and without any priority as between real and personal property [*Prob. Code § 21401*].

However, notwithstanding any other provision of *Prob. Code §§ 21400-21406*, if the instrument provides for abatement, or if the transferor's plan or the purpose of the transfer would be defeated by abatement, the shares of the beneficiaries abate as is necessary to effectuate the instrument, plan, or purpose [*Prob. Code § 21400*].

Prob. Code §§ 21401-21406 apply to a gift made on or after July 1, 1989. Gifts made before that date are governed by the law that would have applied had *Prob. Code §§ 21401-21406* not been enacted [*Prob. Code § 21406(a)*]. For this purpose, a gift by will is made on the date of the decedent's death [*Prob. Code § 21406(b)*].

[2] Order of Abatement

Shares of beneficiaries abate in the following order [*Prob. Code § 21402(a)*]:

(1) Property not disposed of by the instrument.

(2) Residuary gifts.

(3) General gifts to persons other than the transferor's relatives.

(4) General gifts to the transferor's relatives.

(5) Specific gifts to persons other than the transferor's relatives.

(6) Specific gifts to the transferor's relatives.

As used in above, a "relative" of the transferor is a person to whom property would pass from the transferor under *Prob. Code § 6401* or *6402* (intestate succession) if the transferor died intestate and there were no other persons having priority [*Prob. Code § 21402(b)*].

General statements in a will that the executor must pay expenses out of the testator's estate are not sufficiently specific to override the abatement order established by *Prob. Code § 21402* [*Burkett v. Capovilla (2003) 112 Cal. App. 4th 1444, 1452, 5 Cal. Rptr. 3d 817]* .

[3] Abatement Within Classes

Shares of beneficiaries abate pro rata within each class specified in *Prob. Code § 21402*, discussed in *§ 458D.83[2]*. [*Prob. Code § 21403(a)*]. However, gifts of annuities and demonstrative gifts are treated as specific gifts to the extent that they are satisfied out of the fund or property specified in the gift and as general gifts to the extent that they are satisfied out of property other than the fund or property specified in the gift [*Prob. Code § 21403(b)*].

[4] Exoneration of Specific Gift From Mortgage, Deed of Trust, or Lien

If an instrument requires property that is the subject of a specific gift to be exonerated from a mortgage, deed of trust, or other lien, a specific gift of other property does not abate for the purpose of exonerating the encumbered property [*Prob. Code § 21404*].

[5] Contribution in Case of Abatement

In any case in which there is abatement when a distribution is made during estate administration, the court must fix the amount each distributee must contribute for abatement. The personal representative must reduce the distributee's share by that amount [*Prob. Code § 21405*].

If a specific gift must be abated, the beneficiary of the specific gift may satisfythe contribution for abatement out of the beneficiary's property other than the property that is the subject of the specific gift [*Prob. Code § 21405(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-458D California Forms of Pleading and Practice--Annotated § 458D.84

§ 458D.84 Gift in Will to Witness

[1] In General

Unless there are at least two other subscribing witnesses who are disinterested witnesses, a devise to a subscribing witness creates a presumption that the witness procured the devise by duress, menace, fraud, or undue influence. This presumption is one affecting the burden of proof [*Prob. Code § 6112(c)*]. The presumption does not apply, however, when the witness is a person to whom the devise is made solely in a fiduciary capacity [*Prob. Code § 6112(c)*; *see Estate of Tkachuk (1977) 73 Cal. App. 3d 14, 19-20, 139 Cal. Rptr. 55* (decided under former *Prob. Code § 51*)]. Even though fraud or undue influence is not presumed in the latter case, it may still be proven as a question of fact [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 6112*; *see also Prob. Code § 6112(d)*].

If a devise made by the will to an interested witness fails because the presumption established by *Prob. Code § 6112(c)* applies to the devise and the witness fails to rebut the presumption, the interested witness takes the proportion of the devise made to the witness in the will that does not exceed the share of the estate that would have been distributed to the witness if the will had not been established. However, nothing in *Prob. Code § 6112(d)* affects the law that applies when it is established that the witness procured a devise by duress, menace, fraud, or undue influence [*Prob. Code § 6112(d)*].

[2] Effect of No Contest Clause in Will

The purpose of a no contest clause is to discourage will contests by imposing a penalty of forfeiture against any beneficiary who challenges the will [Estate of Gonzalez (2002) *102 Cal. App. 4th, 1296, 1302, 126 Cal. Rptr. 2d 332]* . A no contest clause also is known as an "in terrorem" clause.

A no contest clause in a will creates a condition on the gifts and dispositions provided for in the instrument [*Burch v. George (1994) 7 Cal. 4th 246, 254, 27 Cal. Rptr. 2d 165, 866 P.2d 92* ; *Estate of Lindstrom (1987) 191 Cal. App. 3d 375, 381, 236 Cal. Rptr. 376]* . In essence, a no contest clause in a will conditions the rights of the devisees named in the will to take the devises provided for in the will on their acquiescence in its terms. To the extent that a particular devisee acquiesces in those terms, the devisee is entitled to take the devise; to the extent that the devisee does not

acquiesce, the devisee cannot take [*see Burch v. George (1994) 7 Cal. 4th 246, 254, 27 Cal. Rptr. 2d 165, 866 P.2d 92]* .

No contest clauses are valid and enforceable in California [*Burch v. George (1994) 7 Cal. 4th 246, 254, 27 Cal. Rptr. 2d 165, 866 P.2d 92]* . The rules governing no contest clauses were significantly revised effective January 1, 2010 [*Prob. Code § 21315*; *see Prob. Code §§ 21310-21315*]. The revised statute governs the enforcement of no contest clauses in "protected instruments" [*see Prob. Code § 21310(e)* (definition)] that are filed on or after January 1, 2010, whenever executed, provided that the protected instrument became irrevocable on or after January 1, 2001 [*Prob. Code § 21315*]. Common law continues to govern no contest clauses in all other instruments [*Prob. Code § 21315*].

Under the revised rules, a no contest clause is only enforceable in three specific circumstances [*Prob. Code § 21311(a)*]:

- A direct contest brought without probable cause.
- A challenge to the transfer of property (provided the no contest clause provides).
- The filing of a creditor's claim (provided the no contest clause provides).

The provisions of *Prob. Code §§ 21310-21315* apply notwithstanding any contrary provisions in an instrument [*Prob. Code § 21314*].

For further discussion of the enforceability of no contest clauses, see Ch. 444, *Probate: Will Contests* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-458D California Forms of Pleading and Practice--Annotated § 458D.85

§ 458D.85 Omitted Spouse

[1] Statutory Share of Decedent's Estate

If a decedent fails to provide in a testamentary instrument for a spouse who married the decedent *after* the execution of all of the decedent's testamentary instruments, the omitted spouse generally will be entitled to receive a share of the decedent's estate prescribed by statute [*Prob. Code § 21610*; *but see Prob. Code § 21611* (no share if spouse intentionally omitted or otherwise provided for) and discussion *below*]. The share consists of all of the following [*Prob. Code § 21610*]:

- The one half of the community property that belongs to the decedent under *Prob. Code § 100(a)* (unless the spouses agreed to a non pro rata division of their community property [*see Prob. Code § 100(b)*]).

- The one half of the quasi-community property that belongs to the decedent under *Prob. Code § 101(a)* (unless the spouses agreed to a non pro rata division of their quasi-community property [*see Prob. Code § 101(b)*]).

- A share of the decedent's separate property equal in value to the share the spouse would have received if the decedent had died without having executed a testamentary instrument, but in no event is the share to be more than one half of the value of the separate property in the estate.

For purposes of this rule, a "testamentary instrument" is either a will or a trust instrument that was executed by the decedent and that became irrevocable on the decedent's death [*Prob. Code § 21601(a)*] and "estate" is the decedent's probate estate and all property held in any revocable trust executed by the decedent that became irrevocable on the decedent's death [*Prob. Code § 21601(b)*].

[2] Exceptions; When Spouse *Not* Entitled to Share of Estate

Notwithstanding the general rule discussed in *§ 458D.85[1]*, the spouse is *not* entitled to receive a share of the estate if

any of the following is established [*Prob. Code § 21611*]:

- The decedent's failure to provide for the spouse in the decedent's testamentary instruments was intentional and that intention appears from the testamentary instruments.

- The decedent provided for the spouse by transfer outside of the estate passing by the decedent's testamentary instruments and the intention that the transfer be in lieu of a provision in those instruments is shown by statements of the decedent or from the amount of the transfer or by other evidence.

- The spouse made a valid agreement waiving the right to share in the decedent's estate [*see Estate of Butler (1988) 205 Cal. App. 3d 311, 315-317, 252 Cal. Rptr. 210]* .

[3] Satisfaction of Spouse's Share

In satisfying the omitted spouse's share, the share must be taken first from any part of the decedent's estate that is not disposed of by will or trust [*Prob. Code § 21612(a)(1)*; *but see Prob. Code § 21612(b)* (exception to rule) and discussion *below*]. If that is not sufficient, as much as may be necessary to satisfy the share must be taken from all beneficiaries of the decedent's testamentary instruments in proportion to the value they may respectively receive [*Prob. Code § 21612(a)(2)*; *but see Prob. Code § 21612(b)* (exception to rule) and discussion *below*]. This value must be determined as of the date of the decedent's death [*Prob. Code § 21612(a)(2)*]. However, if the obvious intention of the decedent in relation to some specific gift or devise or other provision of a testamentary instrument would be defeated by satisfying the omitted spouse's share in this way, the specific devise or gift or provision may be exempted from the apportionment and a different apportionment, consistent with the decedent's intention, may be adopted [*Prob. Code § 21612(b)*].

[4] Application of Rules; Prior Law

The foregoing rules apply only if the decedent died on or after January 1, 1998 [*Prob. Code § 21630*]. If the decedent died before January 1, 1998, but on or after January 1, 1985, former *Prob. Code §§ 6560-6562* (repealed effective January 1, 1998 by Stats. 1997, ch. 724, § 34) govern the rights of omitted spouses.

Although these rules were substantially similar to the post-1998 rules described above, they applied only when the decedent failed to provide for a spouse married after the execution of a *will* that did not provide for the spouse [*see* former *Prob. Code § 6560*]. The rules applicable on and after January 1, 1998, differ from the former rules in that they apply not just when the decedent failed to provide for the spouse in a will, but also when the decedent failed to provide for the spouse in a *trust instrument* that becomes irrevocable on the decedent's death [*see Prob. Code § 21610*]. Conversely, an intention not to provide for the surviving spouse, under the rules applicable on and after January 1, 1998, may shown not just by the decedent's will, but also by a trust instrument executed by the decedent that becomes irrevocable on the decedent's death [*see Prob. Code § 21610*]. If the decedent died before January 1, 1985, former *Prob. Code § 70* (repealed effective January 1, 1985) governs the rights of omitted spouses [*see* former *Prob. Code § 6580* (repealed effective January 1, 1998)].

[5] Public Policy

The rules protecting the inheritance rights of omitted spouses are declarative of public policy in California [*Estate of Butler (1988) 205 Cal. App. 3d 311, 315, 252 Cal. Rptr. 210]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-458D California Forms of Pleading and Practice--Annotated § 458D.86

§ 458D.86 Effect of 1981-1984 Property Settlement Renouncing Right to Inherit

Former *Prob. Code § 80(a)* provided that if, after executing a will or codicil, the testator's marriage is dissolved or declared a nullity by a final judgment of a court of competent jurisdiction, and if the testator and his or her former spouse have executed a property settlement agreement waiving and renouncing all rights to inherit the estate of the other at the other's death, or to receive any property of the other under a will executed prior to the agreement, the former spouse of the testator and the lineal descendants of the former spouse of the testator are deemed to have predeceased the testator for purposes of the will or codicil, unless the will or codicil expressly provides otherwise. For purposes of the above provision, lineal descendants include all lineal descendants of the former spouse of the testator who are not also lineal descendants of the testator [former *Prob. Code § 80(a)*].

Former *Prob. Code § 80(a)* apply only to wills or codicils executed on or after January 1, 1981, and do not apply if the testator's death occurs during a remarriage to the former spouse [former *Prob. Code § 80(b), (c)*]. Wills or codicils executed on or after January 1, 1985, must comply with the requirements of *Prob. Code §§ 140-147* [*see Prob. Code §§ 147(a)*; *see also* discussion in *§ 458D.87*]. However, nothing in *Prob. Code §§ 140-147* affects the validity or effect of any waiver, agreement, or property settlement made before January 1, 1985, and the validity and effect of such a waiver, agreement, or property settlement will continue to be determined by the law applicable to the waiver, agreement, or property settlement before that date [*Prob. Code § 147(b)*]. Thus, if a decedent executed a property settlement agreement during the period 1981-1984, the provisions of former *Prob. Code § 80(a)* continue to apply to that agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 458D PROBATE: ACCOUNTS, FINAL DISTRIBUTION, AND COMPENSATION
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39-458D California Forms of Pleading and Practice--Annotated § 458D.87

§ 458D.87 Surviving Spouse's Waiver of Rights at Death of Spouse

[1] Applicability of Statutory Provisions

Except as provided in *Prob. Code § 147(c)* and *(d)*, discussed *below*, a waiver, agreement, or property settlement made after December 31, 1984, is invalid insofar as it affects the rights listed in *Prob. Code § 141(a)* unless it satisfies the requirements of *Prob. Code §§ 140-147* [*Prob. Code § 147(a)*].

Prob. Code § 147(c) provides that nothing in *Prob. Code §§ 140-147* affects the validity or effect of any premarital property settlement, whether made before, on, or after January 1, 1985, insofar as the premarital property settlement affectsthe rights listed in *Prob. Code § 141(a)*, and the validity and effect of such a premarital property agreement are determined by the law otherwise applicable to the premarital property agreement [*Prob. Code § 147(c)*]. Nothing in *Prob. Code § 147(c)* limits the enforceability under *Prob. Code §§ 140-147* of a waiver, made under *Prob. Code §§ 140-147* by a person intending to marry, which is otherwise enforceable under *Prob. Code §§ 140-147* [*Prob. Code § 147(c)*].

Prob. Code § 147(d) provides that nothing in *Prob. Code §§ 140-147* limits any right one spouse has to revoke a consent or election to disposition of his or her half of the community or quasi-community property under the will of the other spouse [*Prob. Code § 147(d)*].

Nothing in *Prob. Code §§ 140-147* affects the validity or effect of any waiver, agreement, or property settlement made before January 1, 1985, and the validity and effect of such a waiver, agreement, or property settlement will continue to be determined by the law applicable to the waiver, agreement, or property settlement before January 1, 1985 [*Prob. Code § 147(b)*].

[2] Waiver Defined

As used in *Prob. Code §§ 140-147*, "waiver" means a waiver by the surviving spouse of any of the rights listed in *Prob. Code § 141(a)* (discussed in *§ 458D.87[3]*, whether signed before or during marriage [*Prob. Code § 140*].

[3] Rights That May Be Waived

The right of a surviving spouse to any of the following may be waived in whole or in part by a waiver under *Prob. Code §§ 140-147* [*Prob. Code § 141(a)*]:

- Property that would pass from the decedent by intestate succession.
- Property that would pass from the decedent by testamentary disposition in a will executed before the waiver.
- A probate homestead.
- The right to have exempt property set aside.
- Family allowance.
- The right to have an estate set aside under *Prob. Code §§ 6600-6615* (relating to small estates).
- The right to elect to take community or quasi-community property against the decedent's will.
- The right to take the statutory share of an omitted spouse under *Prob. Code §§ 21610-21612*.
- The right to be appointed as the personal representative of the decedent's estate.
- An interest in property that is the subject of a nonprobate transfer on death under *Prob. Code §§ 5000-5032*.

Nothing in *Prob. Code §§ 140-147* affects or limits the waiver or manner of waiver of rights other than those referred to in *Prob. Code § 141(a)*, including, but not limited to the right to property that would pass from the decedent to the surviving spouse by nonprobate transfer on the death of the decedent, such as the survivorship interest under a joint tenancy, a Totten trust account, or a pay-on-death account [*Prob. Code § 141(b)*].

[4] Effect of Language Waiving All Rights

Unless the waiver or property settlement provides to the contrary, a waiver under *Prob. Code §§ 140-147* of "all rights" (or equivalent language) in the property or estate of a present or prospective spouse, or a complete property settlement entered into after or in anticipation of separation or dissolution or annulment of marriage, is a waiver by the spouse of the rights described in *Prob. Code § 141(a)* [*Prob. Code § 145*].

[5] Formal Requirements for Waiver

A waiver under *Prob. Code §§ 140-147* must be in writing and must be signed by the surviving spouse [*Prob. Code § 142(a)*]. Enforcement of the waiver against the surviving spouse is subject to the same defenses as enforcement of a contract, except that [*Prob. Code § 142(c)*]:

- Lack of consideration is not a defense to enforcement of the waiver.
- A minor intending to marry may make a waiver under *Prob. Code §§ 140-147* as if married, but the waiver becomes effective only on the marriage.

Except as provided in *Prob. Code § 142(c)*, a waiver under *Prob. Code §§ 140-147* is enforceable only if it satisfies the requirements of *Prob. Code § 142(a)* and is enforceable under either *Prob. Code § 143* or *Prob. Code § 144* (discussed in *§ 458D.87[6]* and *[7]* [*Prob. Code § 142(b)*]).

[6] Prerequisites to Enforcement

Except as provided in *Prob. Code § 144(b)*, discussed in *§ 458D.87[8]*, and subject to *Prob. Code § 142*, discussed in *§ 458D.87[5]*, a waiver is enforceable if the court determines either of the following [*Prob. Code § 144(a)*]:

- The waiver at the time of signing made a fair and reasonable disposition of the rights of the surviving spouse.

- The surviving spouse had, or reasonably should have had, an adequateknowledge of the property and financial obligations of the decedent and the decedent did not violate the duty imposed by *Fam. Code § 721(b)* (husband and wife in confidential relationship).

Except as provided in Prob. Code § 144(a)(2), Fam. Code § 721(b) does not apply if the waiver is enforceable under *Prob. Code § 144* [*Prob. Code § 144(c)*]. When a waiver complies with the requirements of *Prob. Code § 144*, it is enforceable regardless of whether the document containing the waiver is enforceable [Estate of Will *(*2009) *170 Cal. App. 4th 902, 908, 88 Cal. Rptr. 3d 502* (waiver was enforceable regardless of whether document containing the waiver was enforceable as a prenuptial agreement under *Fam. Code § 1615*)].

[7] Defenses to Enforcement

Subject to *Prob. Code § 142*, a waiver is enforceable under *Prob. Code § 143* unless the surviving spouse proves either of the following [*Prob. Code § 143(a)*]:

- A fair and reasonable disclosure of the property or financial obligations of the decedent was not provided to the surviving spouse before the signing of the waiver unless the surviving spouse waived such a fair and reasonable disclosure after advice from independent legal counsel.

- The surviving spouse was not represented by independent legal counsel at the time of signing the waiver.

Fam. Code § 721(b) (husband and wife in confidential relationship) does not apply if the waiver is enforceable under *Prob. Code § 143* [*Prob. Code § 143(b)*].

[8] Power of Court

If, after considering all relevant facts and circumstances, the court finds that enforcement of a waiver under *Prob. Code § 144(a)* would be unconscionable under the circumstances existing at the time enforcement is sought, the court may refuse to enforce the waiver, enforce the remainder of the waiver without the unconscionable provisions, or limit the application of the unconscionable provisions to avoid an unconscionable result [*Prob. Code § 144(b)*].

[9] Agreement Altering, Amending, or Revoking Waiver

Except as provided in *Prob. Code § 147(c)* and *(d)* (discussed in *§ 458D.87[1]*), unless the waiver specifically otherwise provides, a waiver under *Prob. Code §§ 140-147* may not be altered, amended, or revoked except by a subsequent written agreement signed by each spouse or prospective spouse [*Prob. Code § 146(b)*].

The enforcement of an agreement altering, amending, or revoking a waiver under *Prob. Code § 146* essentially depends

on the same factors used to determine the enforceability of the original waiver. Thus, except for lack of consideration and the minority of a contracting party, enforcement is subject to the same defenses as any other contract [*compare Prob. Code § 146(d)* with *Prob. Code § 142(c)* (discussed in *§ 458D.87[5]*)]. An agreement altering, amending, or revoking a waiver under *Prob. Code § 146* is enforceable unless the party against whom the agreement is sought to be enforced proves either lack of disclosure or lack of representation by independent counsel [*compare Prob. Code § 146(e) with Prob. Code § 143(a)*, discussed in *§ 458D.87[7]*]. The court must determine that the agreement made a fair and reasonable disposition of the rights of the spouses [*compare Prob. Code § 146(f)* with *Prob. Code § 144(a)(1)*, discussed in *§ 458D.87[6]*]. The court also has the power not to enforce an unconscionable agreement, or to limit its enforcement if necessary [*compare Prob. Code § 146(g) with Prob. Code § 144(b)*, discussed in *§ 458D.87[8]*].

Fam. Code § 721(b) (husband and wife in confidential relationship) does not apply if the agreement altering, amending, or revoking a waiver is enforceable under *Prob. Code § 146* [*Prob. Code § 146(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesSpousesEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPremarital AgreementsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsPremarital AgreementsEnforcement

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§ 458D.88 Setting Aside Nonprobate Transfer of Community Property

On the death of a married person, one-half of the community property belongs to the decedent and the other half belongs to the surviving spouse [*Prob. Code § 100(a)*]. Each spouse has the right of testamentary disposition over that spouse's half of the community property [*Estate of Miramontes-Najera (2004) 118 Cal. App. 4th 750, 756, 13 Cal. Rptr. 3d 240]* .

Although the phrase "one-half of the community property," as used in *Prob. Code § 100(a)*, on its face, could mean either one-half of the total value of all community property or one-half of each item of community property, the courts have concluded that the statute means a decedent has a right to dispose of only one-half of *each* community property asset to someone other than a spouse [*Estate of Wilson (1986) 183 Cal. App. 3d 67, 70, 227 Cal. Rptr. 794]* . This rule is based on the nature of community property. Each spouse has a vested, undivided one-half interest in the community property. A spouse's death only dissolves the community. It does not affect the character of the property acquired or rights vested before the spouse's death. Because each asset is only half of his or hers to give, a spouse cannot make a testamentary disposition to a third party of any specific item of community property except by a "forced election" requiring the surviving spouse to elect to take under the testamentary scheme or to take his or her community property share [*Estate of Wilson (1986) 183 Cal. App. 3d 67, 72, 227 Cal. Rptr. 794]* . For example, a spouse cannot devise the family residence to a third party, even if there are sufficient other community assets to counterbalance the value of the gift, because each spouse only owns an undivided one-half interest in the residence [*Estate of Wilson (1986) 183 Cal. App. 3d 67, 73, 227 Cal. Rptr. 794]* .

Although this rule makes less practical sense with respect to fungible assets such as money, it applies nevertheless [*Estate of Wilson (1986) 183 Cal. App. 3d 67, 73, 227 Cal. Rptr. 794]* . Thus, for example, when a spouse has transferred community property into pay-on-death accounts for third persons without the surviving spouse's consent, the surviving spouse may enforce his or hercommunity property interest in each account on an asset-by-asset basis, even if the surviving spouse is already receiving more than one-half of the total community property [*Estate of Miramontes-Najera (2004) 118 Cal. App. 4th 750, 753, 756-760, 13 Cal. Rptr. 3d 240* ; *see Prob. Code § 5020* (provision for nonprobate transfer of community property on death executed by married person without spouse's written consent is not effective as to nonconsenting spouse's interest in property)]. Only one-half of the community property

funds in the account belong to the third person. The other one-half, which is the surviving spouse's share of the community property, belongs to that spouse [*Estate of Wilson (1986) 183 Cal. App. 3d 67, 68-69, 227 Cal. Rptr. 794]* .

In a proceeding to set aside a nonprobate transfer of community property on death made pursuant to a provision for transfer of the property executed by a married person without his or her spouse's written consent, the court must set aside the transfer as to the nonconsenting spouse's interest in the property, subject to terms and conditions or other remedies that appear equitable under the circumstances, taking into account the rights of all interested persons [*Prob. Code § 5021(a)*; *see Estate of Miramontes-Najera (2004) 118 Cal. App. 4th 750, 753, 756-760, 13 Cal. Rptr. 3d 240* (*Prob. Code § 5021(a)* codifies rule of *Estate of Wilson (1986) 183 Cal. App. 3d 67, 227 Cal. Rptr. 794*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawCommunity PropertyGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawNonprobate TransfersGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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§ 458D.89 Omitted (Pretermitted) Child

[1] Statutory Share of Decedent's Estate

If a decedent fails to provide in a testamentary instrument for a child born or adopted after the execution of all of the decedent's testamentary instruments, the omitted child generally will be entitled to receive a share of the decedent's estate prescribed by statute [*Prob. Code § 21620*; *but see Prob. Code § 21621* (no share if child intentionally omitted or otherwise provided for) and discussion in *§ 458D.89[2]*; *see also Estate of Mowry (2003) 107 Cal. App. 4th 338, 344, 131 Cal. Rptr. 2d 855* (daughter adopted *before* decedent executed holographic will, and who failed to prove mistaken omission, was not omitted heir)]. The share will be equal in value to the share the child would have received if the decedent had died without executing any testamentary instrument [*Prob. Code § 21620*]. For purposes of this rule, a "testamentary instrument" is either a will or a trust instrument that was executed by the decedent and that became irrevocable on the decedent's death [*Prob. Code § 21601(a)*], and "estate" is the decedent's probate estate and all property held in any revocable trust executed by the decedent that became irrevocable on the decedent's death [*Prob. Code § 21601(b)*].

[2] Exceptions; When Omitted Child *Not* Entitled to Share of Estate

Notwithstanding the general rule stated above, an omitted child is *not* entitled to receive a share of the estate if any of the following is established [*Prob. Code § 21611*]:

- The decedent's failure to provide for the child in the decedent's testamentary instruments was intentional and that intention appears from the testamentary instruments.

- The decedent had one or more children and devised or otherwise directed the disposition of substantially all the estate to the other parent of the omitted child.

- The decedent provided for the child by transfer outside of the estate passing by the decedent's testamentary instruments and the intention that the transfer be in lieu of a provision in those instruments is shown by statements of the decedent or from the amount of the transfer or by other evidence.

If, at the time of the execution of all of the decedent's testamentary instruments effective at the time of the decedent's death, the decedent failed to provide for a living child solely because the decedent believed the child to be dead or was unaware of the birth of the child, the child must receive a share in the estate equal in value to the share the child would have received if the decedent had died without having executed any testamentary instruments [*Prob. Code § 21622*].

[3] Satisfaction of Omitted Child's Share

In satisfying an omitted child's share, the share must be taken first from any part of the decedent's estate that is not disposed of by will or trust [*Prob. Code § 21623(a)(1)*; *but see Prob. Code § 21623(b)* (exception to rule) and discussion *below*]. If that is not sufficient, as much as may be necessary to satisfy the share must be taken from all beneficiaries of the decedent's testamentary instruments in proportion to the value they may respectively receive [*Prob. Code § 21623(a)(2)*; *but see Prob. Code § 21623(b)* (exception to rule) and discussion *below*]. This value must be determined as of the date of the decedent's death [*Prob. Code § 21623(a)(2)*]. However, if the obvious intention of the decedent in relation to some specific gift or devise or other provision of a testamentary instrument would be defeated by satisfying the omitted child's share in this way, the specific devise or gift or provision may be exempted from the apportionment and a different apportionment, consistent with the decedent's intention, may be adopted [*Prob. Code § 21623(b)*].

[4] Application of Omitted-Child Rules; Prior Law

The preceding rules apply only if the decedent died on or after January 1, 1998 [*Prob. Code § 21630*]. If the decedent died before January 1, 1998, but on or after January 1, 1985, former *Prob. Code §§ 6560-6562* (repealed effective January 1,1998 by Stats. 1997, ch. 724, § 34) govern the rights of omitted spouses [*Prob. Code § 21630*].

Although pre-1998 rules were substantially similar to the rules described above, they applied only when the decedent failed to provide for a child born or adopted after the execution of a *will* that did not provide for the child [*see* former *Prob. Code § 6570*]. The rules applicable on and after January 1, 1998, differ from the former rules in that they apply not just when the decedent failed to provide for the child in a will, but also when the decedent failed to provide for the child in a *trust instrument* that becomes irrevocable on the decedent's death [*see Prob. Code § 21620*]. Conversely, an intention not to provide for the child, under the rules applicable on and after January 1, 1998, may be shown not just by the decedent's will, but also by a trust instrument executed by the decedent that becomes irrevocable on the decedent's death [*see Prob. Code § 21620*].

If the decedent died before January 1, 1985, former *Prob. Code §§ 71*, 90, and 91 (repealed effective January 1, 1985) govern the rights of omitted children [*see* former *Prob. Code § 6580* (repealed effective January 1, 1998)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawWillsPretermitted HeirsGeneral OverviewEstate, Gift & Trust LawWillsPretermitted HeirsAdopted ChildrenEstate, Gift & Trust LawWillsPretermitted HeirsIntent to OmitEstate, Gift & Trust LawWillsPretermitted HeirsStatutesFamily LawAdoptionChild RightsInheritance Rights

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§ 458D.90 Partition or Allotment of Property Before Distribution

If two or more beneficiaries are entitled to the distribution of undivided interests in property and have not agreed among themselves to a partition, allotment, or other division of the property, any of them, or the personal representative at the request of any of them, may petition the court to make a partition, allotment, or other division that will be equitable and will avoid the distribution of undivided interests [*Prob. Code § 11950(a)*; *see also Prob. Code §§ 11950(b)-11956* (procedure)]. For further discussion, see Ch. 456, *Probate: Management of Estate Assets* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.91 Distribution of Property

[1] On Finality of Order

The personal representative is responsible for distribution of the property in the estate in compliance with the terms of the court order for distribution [*Prob. Code § 11750*]. When an order settling a final account and for final distribution is entered, the personal representative may, without further notice or proceedings, immediately distribute the property in the estate to the persons entitled to it [*Prob. Code § 11641*].

[2] Receipt for Property or Recordation of Court Order or Deed

The personal representative must obtain the receipt of the distributee for property in the estate distributed by the personal representative. In the case of real property, the personal representative must record the court order for distribution or the personal representative's deed or both in the county in which the real property is located. Recordation of the order or deed is deemed to be a receipt of the distributee for the property [*Prob. Code § 11751*].

[3] Inventory by Life Tenant

If personal property in the possession of a distributee is subject to possession by the distributee for life only, the personal representative must demand an inventory of the property from the distributee. On receipt, the personal representative must file the inventory with the court and deliver a copy to the distributee of the remainder [*Prob. Code § 11752*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.92 After Acquired or Discovered Property

Any property acquired or discovered after the court order for final distribution is made must be distributed as follows [*Prob. Code § 11642*]:

- If the order disposes of the property, distribution shall be made in the manner provided in the order. The court may, in an appropriate case, require a supplemental account and make further instructions relating to the property.

- If the order does not dispose of the property, distribution must be made either (1) in the manner ordered by the court on a petition for instructions; or (2) under *Prob. Code § 12252* (administration after discharge), if the personal representative has been discharged.

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§ 458D.93 Valuation of Assets Distributed to Satisfy Pecuniary Devise

If the will authorizes the personal representative to satisfy a pecuniary gift wholly or partly by distribution of property other than money, the assets selected for that purpose are required, unless the will otherwise expressly provides, to be valued at their respective fair market values on the date or dates of distribution [*Prob. Code § 21118(a)*; *see Prob. Code § 21101* (rule applicable to wills, trusts, and other instruments); *see also Estate of Simoncini (1991) 229 Cal. App. 3d 881, 890-891, 280 Cal. Rptr. 393* (enforcing will provision valuing real property at amount less than market value)].

If the will permits the personal representative to value the property selected for distribution as of a date other than the date of distribution, the property selected for that purpose must fairly reflect, unless the will expressly provides otherwise, net appreciation and depreciation (occurring between the valuation date and the date of distribution) in all of the assets from which the distribution could have been made [*Prob. Code § 21118(a)*; *see Prob. Code § 21101* (rule applicable to wills, trusts, and other instruments)].

As used in *Prob. Code § 21118*, the term "pecuniary gift" means a transfer ofproperty made in an instrument that either is expressly stated as a fixed dollar amount or is a dollar amount determinable by the provisions of the instrument [*Prob. Code § 21118(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.94 Interest, Income, and Expenses Accruing During Administration

[1] Applicability of Statutes

If the intention of the testator is not otherwise indicated by the will, the interest, income, and expenses accruing during administration are governed by *Prob. Code §§ 12000-12007* [*Prob. Code § 12000*; *see also Prob. Code § 16320 et seq.* (Uniform Principal and Income Act)].

[2] Rate of Interest

The rate of interest payable under *Prob. Code §§ 12000-12007* is three percentage points less than the legal rate on judgments in effect one year after the date of the testator's death. The rate may not be recomputed if the applicable rate changes [*Prob. Code § 12001*].

[3] Income and Expenses of Specific Devises and Interest

A specific devise carries with it income on the devised property from the date of death, less expenses attributable to the devised property during administration of the estate. Expenses attributable to the property are those expenses that result directly from the use or ownership of the property, including property tax and tax on the income from the property, but excluding estate tax and generation-skipping transfer taxes [*Prob. Code § 12002(b)*].

If the income of specifically devised property is not sufficient to pay the expenses attributable to the property, the deficiency must be paid out of the estate until the property is distributed to the devisee or until the devisee takes possession of or occupies the property, whichever occurs first. To the extent that a deficiency paid out of the estate is attributable to the period that commences one year after the testator's death, whether paid during or after expiration of the one-year period following the date of death, the amount paid is a charge against the share of the devisee, and the personal representative has an equitable lien on the specifically devised property as against the devisee in the amount paid [*Prob. Code § 12002(c)*].

If specifically devised property is sold during administration of the estate, the devisee is entitled to the net income from

the property until the date of sale, and to interest on the net sale proceeds thereafter, but no interest accrues during the first year after the testator's death [*Prob. Code § 12002(d)*]. Otherwise, a specific devise does not bear interest [*Prob. Code § 12002(a)*].

[4] Interest on General Pecuniary Devise

If a general pecuniary devise, including such a devise in trust, is not distributed within one year after the testator's death, the devise bears interest thereafter [*Prob. Code § 12003*].

[5] Interest on Annuity

An annuity commences at the testator's death and must be paid at the end of the annual, monthly, or other specified period [*Prob. Code § 12004(a)*]. If it is not paid at the end of the specified period, it bears interest thereafter, but no interest accrues during the first year after the testator's death [*Prob. Code § 12004(b)*].

[6] Interest on Devise for Maintenance

A devisee of a devise for maintenance is entitled to interest on the amount of any unpaid accumulations of the payments held by the personal representative on each anniversary of the testator's death, computed from the date of the anniversary [*Prob. Code § 12005*].

[7] Remaining Income to Residuary or Intestate Distributees

Net income received during administration not paid under the provisions of *Prob. Code §§ 12000-12007* and not otherwise devised, must be distributed pro rata as income among all distributees who receive either residuary or intestate property. If a distributee takes for life or for a term of years, the pro rata share of income belongs to the tenant for life or for the term of years [*Prob. Code § 12006*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.95 Distribution When Distributee Is Deceased

Except as provided in *Prob. Code § 11801(b)*, the share in a decedent's estate of a beneficiary who survives the decedent but who dies before distribution is distributed under *Prob. Code §§ 11801* and *11802* with the same effect as though the distribution were made to the beneficiary while living [*Prob. Code § 11801(a)*; *see Estate of Stoddart (2004) 115 Cal. App. 4th 1118, 1132-1133, 9 Cal. Rptr. 3d 770* (when will plainly stated husband's intent to pass residue of his estate to wife if trust they established was inoperative or invalid and wife survived husband, wife, who did survive husband, was not required under will or *Prob. Code § 11801(a)* to survive distribution of husband's estate to receive residue)]. Subject to *Prob. Code § 21525* (relating to conditions on marital deduction gifts), distribution may not be made under *Prob. Code §§ 11801* and *11802* if the decedent's will provides that the beneficiary is entitled to take under the will only if the beneficiary survives the date of distribution or other period stated in the will and the beneficiary fails to survive the date of distribution or other period [*Prob. Code § 11801(b)*; *see also Prob. Code §§ 21109-21111*, discussed in *§ 458D.80[7]*].

If the beneficiary satisfies the requirement of *Prob. Code § 11801*, his or her share in the decedent's estate must be distributed as follows [*Prob. Code § 11802*]:

- Except as provided below, distribution must be made to the personal representative of the beneficiary's estate for the purpose of administration in the beneficiary's estate [*see § 458D.191*].

- If the beneficiary was issue of the decedent and died intestate while under the age of majority and not having been emancipated, distribution must be made directly to the beneficiary's heirs without administration in the beneficiary's estate [*see § 458D.192*].

- If a person entitled to the beneficiary's share proceeds makes application under *Prob. Code § 13000 et seq.* (Disposition of Estate Without Administration), distribution shall be made under those statutes.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawWillsBeneficiariesGeneral Overview

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39-458D California Forms of Pleading and Practice--Annotated § 458D.96

§ 458D.96 Distribution of Money or Property to Minor

[1] In General

Money or other property not exceeding $5000 and belonging to a minor not having a guardian of the estate may be paid or delivered to a parent of the minor entitled to the minor's custody to be held in trust for the minor until he or she reaches majority [*see Prob. Code § 3401*]. If the minor has no guardian of the estate and there is money belonging to the minor, the court may order that a guardian be appointed, or may order one or more of the arrangements set forth in *Prob. Code § 3413* relating to deposit of the money [*see Prob. Code § 3413*]. For discussion of the requirements and procedure for distribution of money and property to minors without guardians, see Ch. 364, *Minors: Claims and Property of Minors* .

If the minor has a guardian of the estate, and the sole asset of the guardianship estate is money, the court may order that the guardianship be terminated and may also order any one of the dispositions set forth in *Prob. Code 3412* [*see Prob. Code § 3412*]. For discussion of the requirements and procedure for distribution of money and property to minors with guardians, see Ch. 290, *Guardianships and Conservatorships: Maintenance of Ward or Conservatee* .

[2] Power of Personal Representative

A personal representative may make an irrevocable transfer to another adult or trust company as custodian for the benefit of a minor pursuant to *Prob. Code § 3909*, in the absence of a will or under a will that does not contain an authorization to do so [*Prob. Code § 3906(a)*]. However, such a transfer may be made only if all the following requirements are satisfied [*Prob. Code § 3906(c)*]:

- The personal representative considers the transfer to be in the best interest of the minor.

- The transfer is not prohibited by or inconsistent with provisions of the applicable will or other governing instrument. For this purpose, a spendthrift provision [*see Prob. Code § 15300*] will not prohibit or be inconsistent with the transfer.

- The transfer is authorized by the court if it exceeds $10,000 in value. However, court authorization is not required when the transfer is to a custodian who is a trust company or an individual designated as a trustee by the terms of a trust instrument that does not require a bond.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewFamily LawGuardiansAppointment

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39-458D California Forms of Pleading and Practice--Annotated § 458D.97

§ 458D.97 Deposit With County Treasurer When Distribution Cannot Be Made

[1] When Authorized

Subject to *Prob. Code § 11851* (discussed in *§ 458D.97[2]*), the personal representative may deposit property to be distributed with the county treasurer of the county in which the proceedings are pending in the name of the distributee in any of the following cases [*Prob. Code § 11850*]:

- The property remains in the possession of the personal representative unclaimed or the whereabouts of the distributee is unknown.

- The distributee refuses to give a receipt for the property.

- The distributee is a minor or incompetent person who has no guardian, conservator, or other fiduciary to receive the property or person authorized to give a receipt for the property.

- For any other reason the property cannot be distributed, and the personal representative desires discharge. However, notwithstanding *Prob. Code § 11851*, deposit may not be made under this provision except on court order.

[2] Deposit of Money or Other Personal Property

If the property to be deposited consists of money, the personal representative may deposit the money [*Prob. Code § 11851(a)*]. Money deposited with the county treasurer, however, does not bear interest for the benefit of the distributee [*see Gov. Code § 53844* (interest on funds deposited with county treasurer as credited to county's general fund)].

If the property consists of personal property other than money, the personal representative may not deposit it except on court order [*Prob. Code § 11851(b)*]. If it appears to the court that the sale is for the benefit of interested persons, thecourt must order the personal property sold, and the proceeds of sale, less the expenses of sale allowed by the court, must be deposited in the county treasury [*Prob. Code § 11851(b)*]. If it appears to the court that sale is not for the

benefit of interested persons, the court must order the personal property deposited with the Controller, to be held subject to *Prob. Code §§ 11900-11904* (discussed in *§ 458D.98*) [*Prob. Code § 11851(b)*].

[3] Delivery of Certified Copy of Order of Distribution for Money Deposit

If money is deposited or is already on deposit with the county treasurer, the personal representative must deliver to the county treasurer a certified copy of the order for distribution [*Prob. Code § 11853*].

[4] Receipt for Deposit and Treasurer's Liability

The county treasurer must give a receipt for the deposit and is liable on his or her official bond for the money deposited. The receipt has the same effect as if executed by the distributee [*Prob. Code § 11852*].

[5] Procedure to Claim Property

A person may claim money on deposit in the county treasury by filing a petition with the court that made the order for distribution. The petition must show the person's claim or right to the property [*Prob. Code § 11854(a)*]. Unless the petition is filed by the person named in the decree for distribution of the decedent's estate, or the legal representative of that person or the person's estate, the petition must state the facts required to be stated in a petition for escheated property filed under *Code Civ. Proc. § 1355* [*Prob. Code § 11854(a)*]. On the filing of the petition, the same proceedings must be had as are required by *Code Civ. Proc. § 1355*, except that the hearing must be ex parte unless the court orders otherwise [*Prob. Code 11854(a)*].

If the court so orders, a copy of the petition must be served on the Attorney General, who may answer the petition at his or her discretion [*Prob. Code § 11854(b)*]. If the court is satisfied that the claimant has a right to the property claimed, the court must make an order establishing the right. On presentation of a certified copy of the order, the county auditor must draw a warrant on the county treasurer for the amount of money covered by the order [*Prob. Code § 11854(c)*].

A claim for money distributed in the estate of a deceased person made after the deposit of the property in the State Treasury is governed by the provisions of *Code Civ. Proc. §§ 1335-1355* (relating to escheat) [*Prob. Code § 11854(d)*]. For a discussion of escheat and forms that may be adapted for use, see Ch. 252, *Escheat (Unclaimed Property)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDeposits in CourtEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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§ 458D.98 Distribution to the State of California

[1] In General

The court must order property that is not ordered distributed to known beneficiaries to be distributed to the State of California, and, insofar as practicable, any real property or tangible personal property must be converted to money before distribution to the state [*Prob. Code § 11900*].

[2] Distribution in Trust for Class

If the court's order of distribution of property in the decedent's estate to the state includes words that otherwise create a trust in favor of unknown or unidentified persons as a class, the distribution vests both legal and equitable title to the property in the state [*Prob. Code § 11901*].

[3] Duties of Personal Representative

If the court orders distribution to the state, the personal representative must promptly do the following [*Prob. Code § 11902(a)*]:

- Deliver any money to the State Treasurer;
- Deliver any personal property other than money to the Controller for deposit in the State Treasury;
- Cause a certified copy of the order to be recorded in the office of the county recorder of each county in which any real property is located.

At the time of making a delivery of property or recordation, the personal representative must deliver to the Controller a certified copy of the order for distribution, together with a statement of the date and place of each recording and other appropriate recording information [*Prob. Code § 11902(b)*].

[4] No Deposit in County Treasury

If any property in the estate is to be or has been distributed to the state, the personal representative must make no deposit of other property in an estate in the county treasury. Rather, the property that would otherwise be deposited in the county treasury must be transmitted promptly to the State Treasurer or Controller, as the case may be [*Prob. Code § 11904*].

[5] Claims to Property Distributed to State

The state Treasurer must hold the property for a period of five years from the date of the order for distribution, and at any time within this period any person may claim the property in the manner provided by *Code Civ. Proc. § 1300 et seq.* (relating to unclaimed property) [*Prob. Code § 11903(a)*; for discussion and forms, see Ch. 252, *Escheat (Unclaimed Property)*].

A person who fails to claim the property within the five-year period is forever barred, and the property vests absolutely in the state, subject to the provisions of *Code Civ. Proc. § 1300 et seq.* [*Prob. Code § 11903(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.99 Right of Distributee to Recover Share of Estate

A distributee may demand, sue for, and recover from the personal representative or from any person in possession, property to which he or she is entitled [*Prob. Code § 11750(b)*].

For a general form for a complaint to recover personal property or its value and for damages for wrongful detention, see Ch. 119, *Claim and Delivery* . For a general form for a complaint to recover possession of real property and damages for wrongful detention, see Ch. 241, *Ejectment* .

A beneficiary of a testamentary trust is apparently entitled to take advantage of the provisions of *Prob. Code § 11750(b)* [*see Estate of Loring (1946) 29 Cal. 2d 423, 430-431, 175 P.2d 524* (involving predecessor statutes)]. The period of limitation for an action under *Prob. Code § 11750(b)* is 10 years, under *Code Civ. Proc. § 337.5* (action on judgment or decree) [*Gay v. Straube (1966) 245 Cal. App. 2d 683, 684, 54 Cal. Rptr. 293* (involving predecessor statute)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.100 Effect of Distribution on Good Faith Purchaser

A distribution of property made in compliance with the terms of the court order for distribution is valid as to a person acting in good faith and for a valuable consideration [*Prob. Code § 11750(c)*].

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§ 458D.101 Discharge of Personal Representative

Distribution in compliance with the court order entitles the personal representative to a full discharge with respect to property included in the order [*Prob. Code § 11753(a)*]. For a discussion of discharge and appropriate forms and procedures, see Ch. 458E, *Probate: Discharge* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-458D California Forms of Pleading and Practice--Annotated § 458D.102

§ 458D.102 Continuing Jurisdiction Until Discharge

Jurisdiction of the court sitting in probate continues until the final discharge of the person whom the court directs to make its order effective, and until that person is discharged, the court retains jurisdiction for the purpose of compelling execution of its order [*Estate of Evans (1944) 62 Cal. App. 2d 249, 256, 144 P.2d 625]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbatePersonal RepresentativesRemoval & TerminationGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateJurisdiction & VenueGeneral Overview

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39-458D California Forms of Pleading and Practice--Annotated § 458D.103

§ 458D.103 Administration After Final Settlement

If, after the personal representative has been discharged, subsequent administration of an estate is necessary because other property is discovered, or because it becomes necessary or proper for any cause, the court must appoint as personal representative the person entitled to appointment in the same order as is directed in relation to an original appointment, except that the person who served as personal representative at the time of the order of discharge has priority [*Prob. Code § 12252(a)*].

Notice of hearing of the appointment must be given as provided in *Prob. Code § 1220* to the person who served as personal representative at the time of the order of discharge and other interested persons. If property has been distributed to the State of California, a copy of any petition for subsequent appointment of a personal representative and the notice of hearing must be given as provided in *Prob. Code § 1220* to the Controller [*Prob. Code § 12252(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.104 Liability of Personal Representative for Wrongful Concealment of Estate Property

A personal representative who wrongfully conceals estate property may be held liable to the beneficiaries long after the estate is closed and the personal representative is discharged.

In *Strasberg v. Odyssey Group, Inc.* [*Strasberg v. Odyssey Group, Inc. (1996) 51 Cal. App. 4th 906, 917, 59 Cal. Rptr. 2d 474]* , the special administrator of the estate of Marilyn Monroe prepared an inventory and stored and inventoried Monroe's personal effects and clothing, all of which Monroe had willed to her close personal friend Lee Strasberg. Monroe died in 1962. The special administrator's distribution of the estate was approved and the special administrator was discharged in 1963. Strasberg died in 1982, devising all of Monroe's personal effects and property to Strasberg's widow. The special administrator died in 1985. In 1994, Strasberg's widow learned that the son of the special administrator's sister-in-law was advertising the auction of a large sale of Marilyn Monroe's personal property. The widow immediately filed suit against the son and the auction house, alleging that the property had been converted by the special administrator and fraudulently concealed from Lee Strasberg, and seeking to subject it to a constructive trust. The son and the auction house argued that the action was barred by the three-year statute of limitations for taking, detaining, or injuring goods or chattels set forth in *Code Civ. Proc. § 338(c)*. Both the trial court and the Court of Appeal ruled that the action was not barred by the statute, holding that in an action against a fiduciary for conversion of trust property the statute of limitations is tolled until the beneficiary discovers or should have discovered the conversion [*Strasberg v. Odyssey Group, Inc. (1996) 51 Cal. App. 4th 906, 917, 59 Cal. Rptr. 2d 474]* .

Since a fiduciary has a duty to make full disclosure of all facts that materially affect the rights of the beneficiaries, any act by the fiduciary amounting to aconversion of trust property is akin to fraudulent concealment. The general rule is that the statute of limitations does not begin to run against an action for breach of trust until there has been a repudiation of the trust which is brought home to the beneficiary [*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 561, 305 P.2d 20* ; *Strasberg v. Odyssey Group, Inc. (1996) 51 Cal. App. 4th 906, 917, 59 Cal. Rptr. 2d 474]* . The cause of action did not accrue when the personal representative filed reports failing to disclose the existence of the concealed property, because repudiation of a trust is not effective and does not trigger the running of the statute of limitations unless and until the fact is "brought home to the beneficiary" [*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 561, 305 P.2d 20* ; *Strasberg v. Odyssey Group, Inc. (1996) 51 Cal. App. 4th 906, 917, 59 Cal. Rptr. 2d 474]* . The death of the special

administrator and transfer of the property to the administrator's successor also does not cause the statute to begin to run. Because the original conversion was still concealed, the beneficiary had no reason to discover it just because the special representative died and the special representative's successors in interest acquired the converted property [*Strasberg v. Odyssey Group, Inc. (1996) 51 Cal. App. 4th 906, 918-919, 59 Cal. Rptr. 2d 474]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesClaims By & AgainstEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewTortsIntentional TortsConversionGeneral Overview

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§ 458D.105 Unpaid Creditors

When the accounts of the personal representative have been settled and an order made for the payment of debts and distribution of the estate, a creditor who is not paid, whether or not included in the order for payment, has no right to require contribution from creditors who are paid or from distributees, except to the extent provided in *Prob. Code § 9392* [*Prob. Code § 11429(a)*]. However, nothing in the foregoing precludes recovery against the personal representative personally or on the bond, if any, by a creditor who is not paid subject to *Prob. Code § 9053* [*Prob. Code § 11429(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-458D California Forms of Pleading and Practice--Annotated § 458D.106

§ 458D.106 Distribution of Property in Ancillary Administration Proceeding

If a person dies while domiciled in a sister state, the court in an ancillary administration proceeding may make an order for preliminary or final distribution of all or part of the decedent's personal property in California to the sister-state personal representative if distribution is in the best interest of the estate or interested persons [*Prob. Code § 12540(a)*]. The court order must be made in the manner and pursuant to the procedure provided in, and is subject to the provisions of, *Prob. Code §§ 11600-11642* (order for distribution) [*Prob. Code § 12540(b)*].

If necessary to make distribution, real property in the nondomiciliary decedent's estate may be sold and the court may order the proceeds to be distributed to the sister-state personal representative. The sale must be made in the same manner as other sales of real property of a decedent [*Prob. Code § 12541*].

If the nondomiciliary decedent's estate in the sister state where the decedent was domiciled is insolvent, distribution may be made only to the sister-state personal representative, and not to the beneficiaries [*Prob. Code § 12542*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbateAncillary ProceedingsEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-458D California Forms of Pleading and Practice--Annotated § 458D.107

§ 458D.107 Assignment of Interest in Estate for Cash Advance or Other Consideration

[1] Assignment of Beneficiary's Interest to Transferee for Value

When a beneficiary has assigned all or part of his or her interest in a decedent's estate to a "transferee for value" in exchange for a cash advance or other consideration, specified requirements must be met. For purposes of these provisions, a "transferee for value" is a person who purchases the interest from a beneficiary for consideration pursuant to a written agreement, and who, directly or indirectly, regularly engaged in the purchase of beneficial interests in estates for consideration [*Prob. Code § 11604.5(b)*]. These provisions do not apply to a transferee who is a beneficiary of the estate or a person who has a claim to distribution from the estate under another instrument or by intestate succession, to a transferee who is either the registered domestic partner of the beneficiary or is related by blood, marriage, or adoption to the beneficiary of the decedent, a transaction made in conformity with the California Finance Lenders Law [Fin. Code § 2200 et seq.], or to a transferee who is engaged in the business of locating missing or unknown heirs and who acquires an interest from a beneficiary solely in exchange for providing information or services associated with locating the heir or beneficiary [*Prob. Code § 11604.5(c)*].

[2] Assignment and Affidavit Must Be Filed With Court

The agreement assigning the interest must be filed with the court within 30 days after it is executed or, if administration of the decedent's estate has not commenced, within 30 days after issuance of the letters of administration or letters testamentary, but in no event later than 15 days before the hearing on the petition for final distribution [*Prob. Code § 11604.5(d)(1)*]. Within these time limits the transferee must file with the court a declaration or affidavit attesting that the requirements of *Prob. Code § 11604.5* have been met, and must serve the personal representative (or the attorney of record for the personal representative) with notice of the assignment [*Prob. Code § 11604.5(d)(4), (5)*].

[3] Contents of Assignment Agreement

[a] Required Terms

The assignment agreement (and any other documents signed by or provided to the beneficiary) must be printed in at

least 10 point type [*Prob. Code § 11604.5(d)(3)*]. The assignment must contain the following terms, in addition to any other terms [*Prob. Code § 11604.5(e)*]:

- The amount of consideration paid to the beneficiary.
- A description of the transferred interest.
- If the written agreement so provides, the amount by which the transferee for value would have its distribution reduced if the beneficial interest assigned is distributed prior to a specified date.
- A statement of the total of all costs or fees charged to the beneficiary resulting from the transfer for value, including, but not limited to the following:
    - Transaction or processing fees.
    - Credit report costs.
    - Title search costs.
    - Due diligence fees.
    - Filing fees.
    - Bank or electronic transfer costs.
    - Any other fees or costs.

If all the costs and fees are paid by the transferee for value and are included in the amount of the transferred interest, then the statement of costs need not itemize any costs or fees. These requirements are inapplicable to costs, fees, or damages arising out of a material breach of the agreement or fraud by or on the part of the beneficiary [*Prob. Code § 11604.5(e)*].

[b] Prohibited Terms

The assignment agreement may not contain provisions doing any of the following [*Prob. Code § 11604.5(f)*]:

- Holding harmless the transferee for value, other than for liability arising out of fraud by the beneficiary.
- Granting to the transferee for value agency powers to represent the beneficiary's interest in the decedent's estate beyond the interest transferred.
- Requiring payment by the beneficiary to the transferee for value for services not related to the written agreement or services other than the transfer of interest under the written agreement.
- Permitting the transferee for value to have recourse against the beneficiary if the distribution from the estate in satisfaction of the beneficial interest is less than the beneficial interest assigned to the transferee for value, other than recourse for any expense or damage arising out of the material breach of the agreement or fraud by the beneficiary.

If any such provision is included, that provision is void [*Prob. Code § 11604.5(f)*].

[c] Translation Requirement

If the negotiation or discussion between the beneficiary and the transferee for value leading to the execution of the written agreement by the beneficiary was conducted in a language other than English, the beneficiary must receive the written agreement in English, together with a copy of the agreement translated into the language in which it was negotiated or discussed [*Prob. Code § 11604.5(d)(2)*].

[4] Powers of Court

The court, on its own motion, or on the motion of the personal representative or other interested person, may inquire into the circumstances surrounding the execution of, and the consideration for, the assignment agreement, to determine that the requirements of *Prob. Code § 11604.5* have been met [*Prob. Code § 11604.5(g)*]. The court may refuse to order distribution under the agreement, or may order distribution on any terms it considers equitable, if it finds that the transferee did not substantially comply with the statutory requirements, or if it finds that the fees, charges, or consideration paid or agreed to be paid by the beneficiary were grossly unreasonable or that the transfer of the beneficial interest was obtained by duress, fraud, or undue influence [*Prob. Code § 11604.5(h)*]. The court may require the transferee to pay to the beneficiary up to twice the value paid for the assignment if the court finds that the transferee willfully violated the statutory requirements in bad faith [*Prob. Code § 11604.5(i)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesDuress & Undue InfluenceGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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[Reserved]

§§ 458D.108[Reserved]

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39-458D California Forms of Pleading and Practice--Annotated § 458D.120

§ 458D.120 Reimbursement for Expenses

[1] In General

The personal representative must be allowed all necessary expenses in the administration of the estate, including, but not limited to, necessary expenses in the care, management, preservation, and settlement of the estate [*Prob. Code § 11004*]. This means that a personal representative who personally incurs a liability on account of necessary matters related to the estate may be reimbursed out of the assets of the estate [*Harm v. Frasher (1960) 181 Cal. App. 2d 405, 421, 5 Cal. Rptr. 367]* .

[2] Expenses Before Issuance of Letters

The personal representative is not allowed expenses incurred in proceedings unrelated and prior to his or her petition for appointment and issuance of letters [*Estate of Tubbs (1947) 82 Cal. App. 2d 305, 308, 186 P.2d 7]* .

[3] Travel Expenses

If proper administration of the estate requires the personal representative or his or her attorney or agent to travel, the travel expenses thus incurred may be allowed as a necessary expense in the management of the estate [*Estate of Turner (1942) 50 Cal. App. 2d 332, 335, 123 P.2d 66]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesTravel ExpensesEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesCompensationEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-458D California Forms of Pleading and Practice--Annotated § 458D.121

§ 458D.121 Personal Representative's Commission or Compensation

[1] Applicability of Former Law

The entire Probate Code was repealed and a new code enacted by 1990 legislation (Stats. 1990, ch. 79), operative July 1, 1991. Former *Prob. Code §§ 900-904* as they existed on June 30, 1991, continue to apply in those administration of estate proceedings commenced before July 1, 1991 [*see Prob. Code § 10850(b)*]. Although many of the statutes in the former code were carried over intact into the current code, or with minor changes and with the same code number, the compensation of personal representatives and their attorneys in the current code is governed by *Prob. Code §§ 10800-10850*. These latter provisions do not apply in any administration of estate proceeding commenced before July 1, 1991 [*Prob. Code § 10850(a)*]. The word "commission" used in former *Prob. Code §§ 900-904* was changed to "compensation" in the current statutes.

For proceedings commenced after June 30, 1991, the law in effect on the date of the court's order awarding statutory compensation determines the amount of that compensation [*Cal. Rules of Ct., Rule 7.707*].

[2] Special Administrator

Subject to the limitations imposed by *Prob. Code § 8547*, the court fixes the compensation of a special administrator [*Prob. Code § 8547(a)*]. Compensation will not be allowed until the close of administration, unless the general personal representative joins in the petition for allowance of the special administrator's compensation or the court in its discretion so allows [*Prob. Code § 8547(b)*]. If the same person does not act as both special administrator and general personal representative, the compensation (*see* discussion in *§ 458D.127[1]*) must be divided in such proportions as the court deems just or as may be agreed to by the special administrator and general personal representative [*Prob. Code § 8547(b)*].

[3] Public Administrator

A public administrator is entitled to receive the same compensation granted to a personal representative generally, provided, however, that the compensation may not be less than the compensation in effect at the time of the public

administrator's appointment or $1,000 (the minimum amount provided in *Prob. Code § 7666(b)*), whichever is greater [*Prob. Code § 7622(b)*]. The compensation of a public administrator under *Prob. Code § 7660 et seq.* (summary disposition of small estates) is set forth in *Prob. Code § 7666*. Recovery by a public administrator of the reasonable costs incurred for the preservation of the estate, together with a reasonable compensation for services, when another person is subsequently appointed personal representative is provided for in *Prob. Code § 7604*.

[4] Statutory Commission or Compensation

[a] Calculation

The statutory commission or compensation of the personal representative is calculated on the value of the estate accounted for [former Prob. Code § 901; *Prob. Code § 10800(a)*].

The calculation of the personal representative's commission in administration of estate proceedings commenced before July 1, 1991, is governed by former Prob. Code § 901 [*see Prob. Code § 10850(b)*]; in a proceeding commenced on or after July 1, 1991, the personal representative's compensation is governed by *Prob. Code § 10800* [*see Prob. Code § 10850(a)*].

Effective October 11, 2001, the following compensation schedule applies [*Prob. Code § 10800(a)*]:

4 percent on the first $100,000 ($4,000) = $4,000

plus 3 percent on the next $100,000 ($3,000) = $7,000

plus 2 percent on the next $800,000 ($16,000) = $23,000

plus 1 percent on the next $9 million dollars ($90,000) = $113,000

plus 1/2 of 1 percent on the next $15 million dollars ($75,000) = $188,000

plus a reasonable amount to be determined by the court for any remainder over $25 million.

Before October 11, 2001, the compensation schedule (which was the same under both former Prob. Code § 901 and *Prob. Code § 10800* as then in effect) was as follows:

4 percent of first $15,000 ($600) if estate accounted for is valued at $15,000 or more = $600

plus 3 percent of next $85,000 ($2,550) = $3,150

plus 2 percent of next $900,000 ($18,000) = $21,150

plus 1 percent of the next $9 million ($90,000) = $111,150

plus 1/2 of 1 percent of the next $15 million ($75,000) = $186,150

plus a reasonable amount to be determined by the court for any remainder over $25 million.

[b] Basis of Calculation

A petition for statutory commissions or attorney's fees must state the amount of statutory compensation that is payable, and set forth the estate accounted for and the calculation of statutory compensation [*Cal. Rules of Ct., Rule 7.705(a)*]. If an account has been waived, the final report of administration must list the information required by law, including information as to creditors' claims, sales, purchases or exchanges of assets, changes in the form of assets, assets on

hand, whether the estate is solvent, detailed schedules of receipts and gains or losses on sale (if an amount other than the amount of the inventory and appraisal is used as a basis for calculating fees or commissions), costs of administration (if reimbursement of these costs is requested), the amount of any fees or commissions paid or to be paid, and the calculation of these fees or commissions [*Cal. Rules of Ct., Rules 7.705(b), 7.550*]. If the report is accompanied by a request for statutory commissions or fees, the basis for their computation must be included in the petition [*Cal. Rules of Ct., Rule 7.705(b)*].

The basis for calculation of the personal representative's commission or compensation is the same regardless of whether the administration proceedings were commenced before or after July 1, 1991. It is the total amount of the appraisal value of property in the inventory, plus gains over the appraisal value on sales, plus receipts, less losses from the appraisal value on sales, without reference to encumbrances or other obligations on estate property [*see* former Prob. Code § 901 (applicable to proceedings commenced before July 1, 1991), *Prob. Code § 10801(b)* (applicable to proceedings commenced on or after July 1, 1991); *see also Recommendation Proposing New Probate Code, 20* Cal. Law Revision Com'n Reports 1763-1764 (1990); *Recommendations Relating to Probate Law: Hiring and Paying Attorneys, Advisors, and Others*]. Once this basis is properly calculated, the correct commission can easily be determined [*Estate of Lampman (1940) 15 Cal. 2d 212, 215, 100 P.2d 488* ; *Estate of Getty (1983) 143 Cal. App. 3d 455, 466-468, 191 Cal. Rptr. 897* (rejecting contention that statute allowed employment of alternative method of computing commission's fees)].

When the estate includes a business that is operated by the personal representative, the phrase "plus receipts" means the net profits of the business, not its gross receipts [*Estate of Sanchez (1995) 33 Cal. App. 4th 239, 243-244, 39 Cal. Rptr. 2d 141]* . The result is the same when the estate holds an apartment house that is operated as a business by the personal representative. In such a case, the net and not the gross income of the apartment house is the proper basis for calculating the statutory commissions or compensation [*Estate of Reinhertz (1947) 82 Cal. App. 2d 156, 163-164, 185 P.2d 858]* .

[c] Inclusion of Property When Personal Representative Denies Title of Estate

Property accounted for by the personal representative pursuant to the court's order to do so may be included in the amount of the estate accounted for, for the purpose of calculating the commission and attorney's fee, even though the personal representative erroneously objected, in good faith, that the property did not belong in the estate [*Estate of Raphael (1954) 128 Cal. App. 2d 92, 95, 274 P.2d 880]* .

[d] Allowance on Account of Statutory Compensation

The court may authorize an allowance of statutory fees or commissions on account before approval of the final account and decree of final distribution [*Cal. Rules of Ct., Rule 7.701*]. Any allowance before settlement of the final account must be low enough to avoid the possibility of overpayment and must be (1) based on the estimated amount of statutory compensation payable on the estate determined as of the date of the petition for allowance, (2) in proportion to the work actually performed, and (3) based on a detailed description of the ordinary services performed and remaining to be performed [*Cal. Rules of Ct., Rule 7.701*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.122 Effect of Negligent Administration

A personal representative does not lose the right to the statutory compensation because he or she is guilty of mismanagement of the estate. A personal representative should be charged with losses resulting from his or her default or neglect, but should be allowed the compensation [*Estate of Roberts (1945) 27 Cal. 2d 70, 76, 162 P.2d 461* ; *Estate of Carver (1898) 123 Cal. 102, 105, 55 P. 770]* . The amount of compensation due the personal representative may be set off against the loss incurred by the estate as a result of the personal representative's default or neglect [*see Estate of Roberts (1945) 27 Cal. 2d 70, 76, 162 P.2d 461* ; *Estate of Smith (1954) 123 Cal. App. 2d 844, 849-850, 268 P.2d 53]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.123 Reduction of Compensation on Failure to Close Estate in Timely Manner

The court may reduce the compensation of the personal representative or the attorney for the personal representative by an amount the court determines to be appropriate if the court makes all of the following determinations [*Prob. Code § 12205(a)*]:

- The time taken for administration of the estate exceeds the time required by *Prob. Code §§ 12200-12206* (that is, one year from the date letterswere issued in estates not required to file a federal estate tax return, or 18 months from that date in estates required to file such a return [*Prob. Code § 12200* (discussed in *§ 458D.70[1]*)]) or prescribed by the court;

- The time taken was within the control of the personal representative or attorney whose compensation is being reduced; and

- The delay was not in the best interest of the estate or interested persons.

The order reducing compensation may be made regardless of whether the compensation otherwise allowable under *Prob. Code §§ 10800-10850* would be reasonable compensation for the services rendered by the personal representative or attorney [*Prob. Code § 12205(b)*]. The order may be made at either the hearing for final distribution or the hearing for an allowance on the compensation of the personal representative or attorney [*Prob. Code § 12205(c)*]. In making its determination the court must take into account any action taken under *Prob. Code § 12202* (discussed in *§ 458D.70[4]*) as a result of a previous delay [*Prob. Code § 12205(d)*]. Reducing compensation under *Prob. Code § 12205* is within the trial court's discretion, and the court's determinations will be upheld in the absence of manifest abuse of discretion [*Estate of Heller (1992) 7 Cal. App. 4th 862, 864, 9 Cal. Rptr. 2d 274]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral

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39-458D California Forms of Pleading and Practice--Annotated § 458D.124

§ 458D.124 Two or More Personal Representatives

There is only one statutory commission for ordinary services by the personal representative of the estate, regardless of the number of personal representatives performing the services [*Cal. Rules of Ct., Rule 7.704(a)*]. If there are two or more personal representative (whether successive or concurrent), the court must apportion the statutory commission among them based on their agreement or, if there is no agreement, according to the services actually rendered by each of them [*Prob. Code § 10850*; *Cal. Rules of Ct., Rule 7.704(a)*].

If there has been a change of personal representative, notice of hearing of any interim or final petition seeking or waiving an award of statutory compensation must be given to all prior personal representatives unless: (1) a waiver of notice executed by all prior personal representatives is on file or is filed with the petition; (2) a written, signed agreement on the allocation of statutory commissions between the present personal representative and all prior personal representatives is on file or is included in or filed with the petition; or (3) the court's file and the petition demonstrate that the commissions of the prior personal representatives have been previously provided for and allowed by the court [*Cal. Rules of Ct., Rule 7.704(b)*].

If there is disagreement, each coexecutor or coadministrator should present his or her own argument for apportionment at the hearing on settlement of the final account. The order settling the final account is the means by which the compensation and extraordinary compensation are allowed, and when it becomes final, it will be held conclusive against all coexecutors or coadministrators [*see Dobbins v. Title Guar. & Trust Co. (1943) 22 Cal. 2d 64, 69-70, 136 P.2d 572]* .

Furthermore, each coexecutor or coadministrator should take care to ensure that the order allowing compensation or a commission specifically states how it is to be apportioned. When a stated sum is allowed for two personal representatives, but the order does not determine apportionment between them, the question of apportionment remains open and may be determined in a civil action between the two personal representatives. Language in the order that the stated sum "is hereby ordered to be paid to said executors," or words to that effect, will not be taken as allowing half of the stated sum to each, since each is entitled to share in the compensation according to the time spent, the responsibility assumed, and the services rendered [*see Kelly v. Conroy (1928) 91 Cal. App. 350, 354-355, 266 P. 1022* (construing

former Code Civ. Proc. § 1618, substantially the same as former Prob. Code § 901 and present *Prob. Code § 10805* regarding apportionment)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesCompensationEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-458D California Forms of Pleading and Practice--Annotated § 458D.125

§ 458D.125 Successive Personal Representatives

When there are two or more personal representatives in succession rather than simultaneously, the court is authorized to apportion the statutory compensation between or among them, according to the services rendered by each [*see Estate of Gonzales (1949) 93 Cal. App. 2d 440, 442-443, 209 P.2d 21* (60 percent of commission allowed to public administrator, 40 percent allowed to executor named in will found after public administrator had been appointed)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesCompensationEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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§ 458D.126 Contract With Beneficiary

All contracts between a personal representative and an heir, devisee, or legatee, for a higher compensation than that provided for in former Prob. Code § 901 or present *Prob. Code § 10800* are void [*Prob. Code § 10803*; former Prob. Code § 903; *see Prob. Code § 10850*].

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39-458D California Forms of Pleading and Practice--Annotated § 458D.127

§ 458D.127 Extraordinary Services and Expenses

[1] Allowances of Additional Compensation

Former *Prob. Code §§ 900-904* apply to the "commissions" of a personal representative in all administration of estate proceedings commenced before July 1, 1991. Present *Prob. Code §§ 10800-10850* govern the "compensation" of a personal representative in proceedings commenced on or after July 1, 1991 [*see Prob. Code § 10850*]. *Prob. Code §§ 7623* (public administrators) and 8547 (special administrators) apply to all proceedings.

If the personal representative has performed extraordinary services, he or shemay claim a further compensation, and the court may allow such further compensation for extraordinary services as the court deems just and reasonable [*Prob. Code § 10801*; former Prob. Code § 902]. The court may allow compensation to the personal representative for extraordinary services before final distribution if (a) it appears likely that the administration of the estate will continue, because of litigation or otherwise, for an unusually long time, (b) present payment will benefit the estate or the beneficiaries of the estate, or (c) other good cause is shown [*Prob. Code § 10832* (applicable in administration of estate proceedings commenced on or after July 1, 1991); *see Prob. Code § 10850(a)*].

A petition for extraordinary compensation must include, or be accompanied by, a statement of the facts on which the petition is based, which must: (1) show the nature and difficulty of the tasks performed; (2) show the results achieved; (3) show the benefit of the services to the estate; (4) specify the amount requested for each category of service performed; (5) state the hourly rate of each person who performed services and the hours spent by each of them; (6) describe the services rendered in sufficient detail to demonstrate the productivity of the time spent; and (7) state the estimated amount of statutory compensation to be paid by the estate, if the petition is not part of a final account or report [*Cal. Rules of Ct., Rule 7.702*].

An order allowing compensation for extraordinary services is appealable [*Prob. Code § 7240(l)*]. After the time for appeal has expired, however, the court cannot reduce the allowance. By allowing extraordinary compensation, the court necessarily finds that the compensation was justified, and if the same parties are involved in a later request to reduce the earlier allowance the court is collaterally estopped from determining that it was not justified [*Estate of Hilton (1996)*

44 Cal. App. 4th 890, 910, 52 Cal. Rptr. 2d 491] .

Extra allowances of a special administrator may be allowed on settlement of the final account of the special administrator. However, the total compensation paid and extra allowances made to the special administrator and general personal representative must not, together, exceed the sums provided for compensation and extra allowances for the services of a personal representative [*Prob. Code § 8547(b)*].

An award of additional compensation to a public administrator is authorized by *Prob. Code § 7623*.

[2] Considerations Regarding Allowance

In determining whether to allow compensation for extraordinary services, the court may consider all matters relating to the administration of the estate, including the value of the estate, the time spent in rendering the services, the skill exercised, and the results obtained [*Estate of Beach (1975) 15 Cal. 3d 623, 645, 125 Cal. Rptr. 570, 542 P.2d 994 , cert. denied, 434 U.S. 1046, 98 S. Ct. 891, 54 L. Ed. 2d 797 (1978)]* .

The court may also consider the amount of the statutory compensation for ordinary services [*Cal. Rules of Ct., Rule 7.703(a)*]. If the court reasonably concludes that the amount of the statutory compensation is adequate to fully compensate the personal representative or attorney for all services rendered in the estate, including extraordinary services, it may deny a request for extraordinary compensation [*Estate of Walker (1963) 221 Cal. App. 2d 792, 795* , Cal. Rptr. 832]. The court has discretion to deny extraordinary compensation when the statutory compensation reasonably compensates the representative or attorney for both the ordinary and the extraordinary services actually rendered [*Estate of Hilton (1996) 44 Cal. App. 4th 890, 914, 52 Cal. Rptr. 2d 491]* . When there are successive petitions for extraordinary compensation, each request requires the probate court to determine whether the compensation already awarded compensates the representative or the attorney not only for the services for which compensation was previously awarded, but also for services for which compensation is currently sought [*Estate of Hilton (1996) 44 Cal. App. 4th 890, 917, 52 Cal. Rptr. 2d 491]* .

The award of extraordinary compensation rests in the sound discretion of the court. When a representative or attorney requests extraordinary compensation, the court must consider the value of the estate, both the ordinary and the extraordinary services rendered, and the amount of the ordinary compensation allowed by law. If the ordinary compensation appears to be reasonable compensation for all the services rendered, the court has discretion to deny extraordinary compensation even when it is not disputed that extraordinary services have been rendered [*Estate of Hilton (1996) 44 Cal. App. 4th 890, 918-919, 52 Cal. Rptr. 2d 491]* .

When the personal representative or the attorney have rendered extraordinary services and it is not expected that the estate will be closed in the near future, a request for extraordinary compensation should be made at an early date. It is unwise to wait until long after extraordinary services have been rendered, or until it is time for the estate to be closed, to request compensation for the services; the representative or attorney may then be unpleasantly surprised to find that the court does not agree that extraordinary compensation has been earned or is due [*see Estate of Hilton (1996) 44 Cal. App. 4th 890, 923, 52 Cal. Rptr. 2d 491]* .

[3] Examples of Extraordinary Services

[a] In General

The following is a nonexclusive list of activities for which the personal representative may be awarded extraordinary compensation [*Cal. Rules of Ct., Rule 7.703(b)*]:

- Selling, leasing, exchanging, financing, or foreclosing real or personalproperty.

- Carrying on the decedent's business if necessary to preserve the estate or under court order.
- Preparing tax returns.
- Handling audits or litigation connected with tax liabilities of the decedent of the estate.

[b] Sale Directed in Will

The fact that the decedent's will directs the executor to sell estate property does not make the selling of the property an ordinary service and is not a basis for denying the executor additional compensation for extraordinary services [*see Estate of Neff (1943) 56 Cal. App. 2d 728, 730-732, 133 P.2d 413]* .

[c] Continuing Decedent's Business

The amount of further compensation due to a personal representative on account of continuing the decedent's business (*see Prob. Code § 9760*) should be calculated according to the extra work involved for the personal representative, regardless of whether the business turns out to be successful or the estate becomes insolvent through the personal representative's management of the business [*In re Estate of Allen (1941) 42 Cal. App. 2d 346, 353, 108 P.2d 973]* .

It should be noted that former Prob. Code § 902 contains the qualification that carrying on the decedent's business is a compensable extraordinary service if done "pursuant to an order of the court." The personal representative has no duty to carry on the decedent's business and, except as provided in *Prob. Code § 9760* (discussed *below*), will be held to have done so at his or her own risk if he or she undertakes the task without having been ordered by the court to do so [*Estate of Burke (1926) 198 Cal. 163, 166, 244 P. 340]* .

However, in at least one case, the personal representative was allowed expenses incurred in carrying on the decedent's business (an extraordinary service [*see* former Prob. Code § 902]), even though the personal representative had not obtained an order from the court directing him to carry on the business [*see* former Prob. Code § 902], but the expenses were characterized as necessary for preservation of the asset, all known heirs had consented, and the personal representative was experienced enough that his carrying on the business was actually a benefit to the estate [*see In re Estate of Messena (1933) 129 Cal. App. 255, 258-261, 18 P.2d 779]* .

Notwithstanding the foregoing, if it is to the advantage of the estate and in the best interest of the interested persons, the personal representative, with or without court authorization, may continue the operation of decedent's business, but may not do so for a period of more than six months after the date letters were first issued to the personal representative unless a court order is obtained [*Prob. Code § 9760(b)*]. As used in *Prob. Code § 9760*, "decedent's business" means an unincorporated business or venture in which the decedent was engaged or that was wholly or partly owned by the decedent at the time of his or her death, but does not include a business operated by a partnership in which the decedent was a partner [*Prob. Code § 9760(a)*]. With respect to partnerships, the personal representative may, after authorization by order of court on a showing that it would be to the advantage of the estate and in the best interest of the interested persons, continue as a general or a limited partner in any partnership in which the decedent was a general partner at the time of death [*Prob. Code § 9762(a)*]. For further discussion, see Ch. 456, *Probate: Management of Estate Assets* .

[d] Services Regarding Nonestate Property of Which Personal Representative Mistakenly Takes Possession

A personal representative who takes possession of real or personal property in the good faith belief that it is property of the estate, and makes reasonable efforts to determine its true nature and title is not criminally liable or civilly liable to any person for so doing [*Prob. Code § 9651(a), (b)*]. Although this is not one of the extraordinary services enumerated in former Prob. Code § 902 for which compensation may be allowed, the personal representative may be awarded

reasonable compensation for services rendered in connection with the duties specified in *Prob. Code § 9651* if the property is later determined not to be property of the estate, and the court finds either that (1) the services were of benefit to the estate, or (2) the services were essential to the preservation, protection, and maintenance of the property [*Prob. Code § 9651(d)*].

If the court finds that the services were of benefit to the estate, the compensation and the expenses and costs of litigation, including attorney's fees of the attorney hired by the personal representative to handle the matter, are a proper expense of administration [*Prob. Code § 9651(d)(1)*]. If the court finds that the services were essential to preserve, protect, and maintain the property, the court must award compensation and the expenses and costs of litigation, including attorney's fees of the attorney hired by the personal representative to handle the matter, as an expense deductible from the rents, issues, and profits received by the personal representative to be turned over to the true owner or, if these are insufficient, as a lien against the property [*Prob. Code § 9651(c), (d)(2)*].

[e] Preparing Account When Personal Representative Dies or Becomes Incapacitated

If a "legal representative" is appointed and obliged to render an account because the personal representative has died or become incapacitated (*see Prob. Code § 10953*, discussed in *§ 458D.31[3]*), the court is required to allow thelegal representative compensation for preparing the account [*Prob. Code § 10953(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.128 Locating Estate Assets as Nonextraordinary Service

Locating assets of the estate is an ordinary service of the personal representative and is compensated for by the statutory compensation [*see Estate of Tubbs (1947) 82 Cal. App. 2d 305, 309, 186 P.2d 7]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.129 Employment of Tax Auditors, Accountants, or Other Tax Experts

The personal representative may employ or retain tax counsel, tax auditors, accountants, or other tax experts for the performance of any action that such persons, respectively, may lawfully perform in the computation, reporting, or making of tax returns, or in negotiations or litigation that may be necessary for the final determination and payment of taxes, and may pay from the funds of the estate for such services [*Prob. Code § 10801(b)* (proceedings commenced on or after July 1, 1991); former Prob. Code § 902 (proceedings commenced before July 1, 1991); *see also Estate of McMillin (1956) 46 Cal. 2d 121, 127, 292 P.2d 881* (payment of tax expert retained pursuant to former Prob. Code § 902 constitutes expense of administration entitled to priority under former Prob. Code § 950 (*now see Prob. Code § 11420(a)(1)*)]. If, however, the personal representative hires a professional to perform "ordinary duties of being a personal representative," the professional's fee will be charged to the personal representative, or deducted from his or her compensation [*see Estate of Brignole (1901) 133 Cal. 162, 164, 65 P. 294* (executor not permitted to pay his personal attorney for services classified as executor's work); *Estate of Billings (1991) 228 Cal. App. 3d 426, 431-432, 278 Cal. Rptr. 439* (court deducted from personal representative's compensation that portion of accountant's fee attributable to "general probate accounting" as opposed to tax return preparation)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.130 Attorney's Fee or Compensation

[1] Ordinary Services

Former Prob. Code §§ 910 and 911 as they existed on June 30, 1991, continue to apply in those administration of estate proceedings commenced before July 1, 1991 [*see Prob. Code § 10850(b)*]. Although many of the statutes in the former Probate Code were carried over intact into the current code (Stats. 1990, ch. 79), or with minor changes and with the same code number, the compensation of personal representatives and their attorneys in the current code is governed by *Prob. Code §§ 10800-10850*. These latter provisions do not apply in any administration of estate proceeding commenced before July 1, 1991 [*Prob. Code § 10850(a)*]. The words "fee" or "fees" used in former Prob. Code §§ 910 and 911 were changed to "compensation" in the current statutes.

For ordinary services, attorneys for personal representatives receive compensation based on the value of the estate, calculated using the same statutory formula as that used for calculating compensation of personal representatives [*see Prob. Code § 10810* (proceeding commenced on or after July 1, 1991); former Prob. Code § 910 (proceeding commenced before July 1, 1991); *see also Prob. Code § 10800* (compensation of personal representative for ordinary services; proceeding commenced on or after July 1, 1991); former Prob. Code § 901 (compensation of personal representative for ordinary services; proceeding commenced before July 1, 1991)]. For a general discussion of statutory compensation, see *§ 458D.121[4]*.

With respect to estates in which administration commenced on or after July 1, 1991, any agreement between the personal representative and the attorney for compensation greater than that provided by the Probate Code is void [*see Prob. Code § 10813*].

For discussion of when the attorney's compensation may be reduced because of unreasonable delay in the distribution and closing of the estate, see the discussion relating to personal representatives in § 458D.123.

[2] Attorney for Special Administrator

Subject to the limitations imposed by *Prob. Code § 8547*, the fees or compensation of a special administrator's attorney

are fixed by the court [*Prob. Code § 8547(a)*]. The total fees or compensation paid to the attorneys both of the special administrator and of the general personal representative must not, together, exceed the sums provided as compensation for the ordinary and extraordinary services (discussed in *§ 458D.132[1]*) of attorneys for personal representatives. When the same attorney does not act for both the special administrator and general personal representative, the fees or compensation must be divided between the attorneys in such proportions as the court determines to be just or as agreed to by the attorneys [*Prob. Code § 8547(c)*].

[3] Attorney for Public Administrator

The attorney for the public administrator is entitled to receive the same compensation as *Prob. Code § 7000 et seq.* grants to an attorney for a personal representative generally. However, the compensation of the public administrator's attorney may not be less than the compensation in effect at the time of the public administrator's appointment or $1,000 (the minimum amount provided in *Prob. Code § 7666(b)*), whichever is greater [*Prob. Code § 7622(b)*]. The compensation of a public administrator's attorney under *Prob. Code §§ 7660-7666* (summary disposition of small estates) is set forth in *Prob. Code § 7666*.

[4] Two or More Attorneys

There is only one statutory attorney fee for ordinary legal services to the personal representative, regardless of the number of attorneys performing the services [*Cal. Rules of Ct., Rule 7.704(a)*]. If there are two or more attorneys for the personal representative (whether successive or concurrent), the court must apportion the statutory attorney fee among them based on the attorneys' agreement or, if there is no agreement, according to the services actually rendered by each attorney [*Prob. Code § 10814*; *Cal. Rules of Ct., Rule 7.704(a)*].

If there has been a substitution of attorneys for the personal representative, notice of hearing of any interim or final petition seeking or waiving an award of statutory compensation must be given to all prior attorneys unless one of the following applies [*Cal. Rules of Ct., Rule 7.704(b)*]:

- A waiver of notice executed by all prior attorneys is on file or is filed with the petition.

- A written, signed agreement on the allocation of statutory fees between the present attorney and all prior attorneys is on file or is included in or filed with the petition.

- The court's file and the petition demonstrate that the fees of the prior attorneys have been previously provided for and allowed by the court.

[5] Payable by Estate

The personal representative is not liable for payment of the fee or compensation to the attorney hired to represent him or her in the administration proceedings; rather, the attorney must look to the estate for the fee or compensation [*Houghton v. Coberly (1962) 201 Cal. App. 2d 820, 823-824, 20 Cal. Rptr. 489]* .

[6] Standing to Sue

The attorney for the personal representative has standing to sue for his or her fee and to appeal from an order denying the fee in whole or in part [*Estate of Merrill (1946) 29 Cal. 2d 520, 523, 175 P.2d 819* ; *Estate of Lagersen (1962) 210 Cal. App. 2d 788, 791, 26 Cal. Rptr. 783* ; *see also Prob. Code § 7240(l)* (appeal from making or refusing to make order directing or allowing payment of attorney's fee)].

[7] Fee Agreement for Services Under Prob. Code §§ 13650-13660

The attorney's fees for services performed in connection with the filing of a petition and obtaining a court order under *Prob. Code §§ 13650-13660* (petition that administration is not necessary for parts of the estate passing to the surviving spouse) are determined by private agreement between the attorney and the client, and are not subject to approval by the court [*Prob. Code § 13660* (operative July 1, 1987)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.131 Personal Representative Acting as Attorney

[1] In General

A personal representative who is also an attorney may receive the personal representative's compensation but may not receive compensation for acting as the attorney for the personal representative unless the court specifically approves the right to the compensation in advance and finds that the arrangement is to the advantage, benefit, and best interests of the estate [*Prob. Code § 10804*; *Cal. Rules of Ct., Rule 7.706(a)*].

Before January 1, 1994, an attorney could properly receive compensation both as personal representative and as attorney for the personal representative if the decedent left a will nominating the attorney as executor and the will expressly authorized such dual compensation [*Estate of Thompson (1958) 50 Cal.2d 613, 616-617, 328 P.2d 1* ; *Estate of Crouch (1966) 240 Cal. App. 2d 801, 802, 49 Cal. Rptr. 926]* . Under the amendment of *Prob. Code § 10804* that became operative on that date, however [*see* discussion in *§ 458D.131[1]*], the rule barring an attorney from receiving dual compensation unless the arrangement is approved in advance by the court governs, even when the will contains a contrary provision [*Prob. Code § 10804*].

A law firm in which the personal representative is a partner or shareholder may request compensation for legal services in addition to the personal representative's compensation if a written agreement not to participate in each other's compensation, signed by the personal representative and by authorized representatives of the firm, has been filed in the estate proceeding [*Cal. Rules of Ct., Rule 7.706(b)*].

[2] Effect of Waiving Claim to Personal Representative's Commission

An attorney who elects to render services not only as personal representative but also as attorney for the personal representative cannot waive his or her compensation as executor and thereafter claim attorneys' fees. This is because the rule prohibiting an attorney-personal representative from receiving attorneys' fees [*see Prob. Code § 10804* and discussion in *§ 458D.131[1]*] is based on public policy, and private waivers are ineffective to controvert public policy [*Estate of Hart (1962) 204 Cal. App. 2d 634, 639, 22 Cal. Rptr. 495]* .

[3] When Personal Representative and Attorney Are Law Partners

Before January 1, 1994, it was possible for an attorney to receive compensation as personal representative and for the attorney's law firm to receive compensation as attorneys for the personal representative if the attorney and the firm agreed that the attorney would not receive any part of the attorney's fees [*Estate of Parker (1926) 200 Cal. 132, 137, 251 P. 907]* . The amendment of *Prob. Code § 10804* that became operative on that date [for discussion, *see § 458D.131[1]*] does notdirectly address this question. It can be logically argued that, when the attorney and the law firm agree not to share the attorney's fees, the attorney is not "receiving" any part of those fees and the statute is not violated. Whether the courts will find this argument persuasive remains to be seen. If an agreement of this kind is made, however, it should be in writing and filed with the court, since in the absence of proof to the contrary the court may presume that the fees will be shared [*Estate of Parker (1926) 200 Cal. 132, 138, 251 P. 907]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.132 Extraordinary Services by Attorney

[1] In General

Attorneys for personal representatives are allowed out of the estate, in addition to the fee for ordinary services, such further amount as the court may deem just and reasonable for extraordinary services [*Prob. Code § 10811(a)*; former Prob. Code § 910; *see also Prob. Code § 9651*, discussed in *§ 458D.127[3][d]*]. These services include extraordinary services rendered by a paralegal under the direction and supervision of an attorney, in which event the petition or application for compensation must set forth the hours spent and services performed by the paralegal [*see Prob. Code § 10811(b)*; former Prob. Code § 910].

If the attorney is obliged to render an account because the personal representative has died, become incapacitated, or absconded (*see Prob. Code § 10953*, discussed in *§ 458D.31[3]*), the court is required to allow the attorney added compensation for this "extraordinary service" [*Prob. Code § 10953(d)*]. Furthermore, this extraordinary service includes services rendered by a paralegal under the direction and supervision of the attorney [*see Prob. Code § 10953(d)*].

Extraordinary services for which the attorney may apply to the court for compensation include those services rendered by any paralegal performing the extraordinary services under the direction and supervision of the attorney, but the petition or application for compensation must set forth the hours spent and services performed by the paralegal [*Prob. Code § 10811(b)*]. Fees of an attorney for extraordinary services to a special administrator may be awarded in the same manner and subject to the same standards as extraordinary services to a general personal representative, except that the award of fees to the attorney may be made on settlement of the final account of the special administrator [*Prob. Code § 8547(d)*].

[2] Services Rendered on Contingent Fee Basis

An attorney for a personal representative may agree to perform extraordinary services on a contingent fee basis [*Prob. Code § 10811(c)*; *Cal. Rules of Ct., Rule 7.703(d)*]. Any contingent fee agreement must be in writing and comply with all of the requirements of *Bus. & Prof. Code § 6147* [*Prob. Code § 10811(c)(1)*; *Cal. Rules of Ct., Rule 7.703(d)(1)*; for discussion of contingent fee agreement requirements, see Ch. 72, *Attorney Practice and Ethics*].

Any contingent fee agreement signed with the attorney for the personal representative must be approved by the court after notice has been given to all of the persons entitled to notice in the proceedings [*Prob. Code § 10811(c)(2)*; *see Prob. Code §§ 1220, 10812*]. The court must determine that the compensation provided in the agreement is just and reasonable and that the agreement is to the advantage of the estate and in the best interests of the persons who are interested in the estate [*Prob. Code § 10811(c)(3)*]; *Cal. Rules of Ct., Rule 7.703(d)(2)*]. Absent an emergency or other unusual circumstances, the personal representative must obtain the court's approval of the agreement before services are performed under it [*Cal. Rules of Ct., Rule 7.703(d)(3)*].

[3] Considerations Regarding Allowance of Extraordinary Compensation

The matters considered by the court in making an allowance of extraordinary compensation with respect to the personal representative's right to claim extraordinary compensation have already been discussed [§ 458D.127[3]]. The same considerations apply in the case of extraordinary compensation for the personal representative's attorney [*see Estate of Walker (1963) 221 Cal. App. 2d 792, 795, 34 Cal. Rptr. 832* ; *see also Prob. Code § 10810*; former Prob. Code § 910].

The following is a nonexclusive list of activities for which the attorney may be awarded extraordinary compensation [*Cal. Rules of Ct., Rule 7.703(c)*]:

- Legal services in connection with the sale of property held in the estate.
- Services to secure a loan to pay estate debts.
- Litigation undertaken to benefit the estate or protect its interests.
- Defense of the personal representative's account or defense of a will that is contested after its admission to probate.
- Successful defense of a will that is contested before its admission to probate or successful defense of a personal representative in a removal proceeding.
- Extraordinary efforts to locate estate assets.
- Litigation in support of the attorney's request for extraordinary compensation when prior compensation awards are not adequate compensation under all of the circumstances.
- Coordination of ancillary administration.
- Accounting for a deceased, incapacitated, or absconded personal representative under *Prob. Code § 10953*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.133 Extraordinary Services Distinguished From Ordinary

Statutory commissions and fees are not gratuities, but are the compensation given by former *Prob. Code §§ 900* and 910 (repealed by Stats. 1990, ch. 79, but continuing to apply to administration of estate proceedings commenced before July 1, 1991; *now see Prob. Code §§ 10800, 10802, 10810* (applicable in proceedings commenced on or after July 1, 1991, and using term "compensation" instead of "commissions" and "fees")) to the personal representative and the attorney for all services performed by them in their respective capacities from the commencement of probate proceedings until the estate is wound up and distributed, except those that are extraordinary in their nature, that is, services that are remarkable, uncommon, or rare [*Estate of Getty (1983) 143 Cal. App. 3d 455, 465-466, 191 Cal. Rptr. 897* ; *Estate of Buchman (1955) 138 Cal. App. 2d 228, 235, 291 P.2d 547]* . The personal representative and the attorney are entitled to statutory fees as a matter of right, and the fact that the estate is a simple one and the fees larger than would be adequate compensation for the work involved does not affect the right to the full statutory compensation [*Estate of Getty (1983) 143 Cal. App. 3d 455, 466, 191 Cal. Rptr. 897* (involving largest estate ever probated in California at the time, $1,357,877,342, consisting of an essentially liquid, one-asset estate (stock), in which commissions and fees totaled *$27,179,846); Estate of Buchman (1955) 138 Cal. App. 2d 228, 235, 291 P.2d 547]* . Conversely, if the estate is more complicated and requires more work, effort, and skill than is required in the simple estate, the nature of the services does not change from ordinary to extraordinary [*Estate of Getty (1983) 143 Cal. App. 3d 455, 466, 191 Cal. Rptr. 897* ; *Estate of Buchman (1955) 138 Cal. App. 2d 228, 235, 291 P.2d 547]* .

Fees in excess of the statutory fees are not a matter of right, but the court may and should, in determining whether or not to award them and their amount, take into consideration several factors, including whether or not the statutory fee constitutes adequate compensation not only for the ordinary services, but for the extraordinary services rendered; whether or not the service rendered was beneficial to the estate, and whether it was necessary; and the character of the service rendered--that is, was it performed in carrying out the ordinary duties of the personal representative, or was it in fact extraordinary [*Estate of Buchman (1955) 138 Cal. App. 2d 228, 235, 291 P.2d 547]* .

The services rendered in reducing the estate to possession of the personal representative, the payment of claims, and the collection of debts are not extraordinary services, but are ordinarily performed by personal representatives and their counsel in the handling of the estate, unless the claims are contested in good faith or the debtor resists payment and

litigation results [*Estate of Buchman (1955) 138 Cal. App. 2d 228, 235, 291 P.2d 547]* .

Former Prob. Code § 902 covers the matter of extraordinary services of personal representatives. The section does not restrict the court in the allowance of extraordinary services to the matters expressly referred to in the section, but it does restrict the services for which extraordinary compensation may be awarded to matters of a similar kind to those enumerated in the statute; in other words, the section is descriptive of the general nature of the services for which extra compensation may be awarded [*Estate of Buchman (1955) 138 Cal. App. 2d 228, 236, 291 P.2d 547* (analyzing and categorizing as ordinary or extraordinary many items in an account)]. The examples of extraordinary services listed in former Prob. Code § 902 were not carried over into the successor statute (*Prob. Code § 10801*) in the new code.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.134 Use of Paralegals in Performance of Extraordinary Services

Extraordinary legal services may include the services of a paralegal acting under an attorney's direction and supervision [*Cal. Rules of Ct., Rule 7.703(e)*]. A request for extraordinary legal fees for a paralegal's services must: (1) describe the paralegal's qualifications (including education, certification, continuing education, and experience); (2) state the hours the paralegal spent and the hourly rate requested for the paralegal's services; (3) described the services the paralegal performed; (4) state why it was appropriate to use the paralegal's services in the particular case; and (5) demonstrate that the total amount requested for the attorney's and paralegal's extraordinary services does not exceed the amount appropriate if the attorney had performed the services without the paralegal's assistance [*Cal. Rules of Ct., Rule 7.703(e)*].

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§ 458D.135 No Advance Compensation

The personal representation may not pay or receive, and the attorney for the personal representative may not receive, statutory commissions or fees, or fees for extraordinary services in advance of a court order authorizing their payment [*Cal. Rules of Ct., Rule 7.700(a)*]. In addition to removing the personal representative and imposing any other sanctions authorized by law against the personal representative or the attorney, the court may surcharge the personal representative for payment or receipt of statutory commissions or fees, or fees for extraordinary services, in advance of a court order authorizing their payment [*Cal. Rules of Ct., Rule 7.700(b)*]. This surcharge may include interest at the legal rate from the date of payment [*Cal. Rules of Ct., Rule 7.700(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.136 Compensation Based on Provision in Will

If administration of estate proceedings commenced before July 1, 1991, and the decedent, in his or her will, made provisions for compensating the personal representative that differ from the statutory provisions, the compensation provided for by the decedent will be deemed full compensation to the personal representative, unless, by a written instrument filed in court, he or she renounces all claims for compensation provided for in the will [former *Prob. Code § 900*; *see Prob. Code § 10850(b)*].

With respect to estates in which administration is commenced on or after July 1, 1991 [*see Prob. Code § 10850(b)*], if the decedent's will makes provision for compensation of the personal representative or the personal representative's attorney, the compensation provided in the will is the full and only compensation for the personal representative or attorney, except as otherwise provided in *Prob. Code §§ 10802, 10812* [*Prob. Code §§ 10802, 10812*]. Those sections allow either the personal representative or the attorney to petition the court to be relieved of the will provision [*Prob. Code §§ 10802(b)* (personal representative), 10812(b) (attorney)], specify the notice of the hearing on the petition [*Prob. Code §§ 10802(c), 10812(c)*], and authorize the court to allow a greater amount than that provided in the will if the court determines that it is to the advantage of the estate and in the best interests of the persons interested in the estate to do so [*Prob. Code §§ 10802(d), 10812(d)*]. For a more detailed discussion of compensation based on a will provision, see *California Probate Practice, ch. 26, § 26.05A* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.137 Petition to Fix and Allow Compensation for All Services Rendered on Filing of Final Account and Petition for Final Distribution

At the time the final account and petition for final distribution are filed, the personal representative may petition the court for an order fixing and allowing his or her compensation for all services rendered in the estate proceeding [*Prob. Code § 10831(a)(1)*]. Either the personal representative or his or her attorney may also petition the court for an order fixing and allowing the compensation of the attorney for all services rendered in the estate proceeding [*Prob. Code § 10831(a)(2)*]. The request for compensation may be included in the final account or the petition for distribution or may be made in a separate petition [*Prob. Code § 10831(b)*]. Notice must be given as provided in *Prob. Code § 1220* to the persons listed in *Prob. Code § 10831(c)* [*Prob. Code § 10831(c)*]. On the hearing, the court must make an order fixing and allowing the compensation for all services rendered in the estate proceeding [*Prob. Code § 10831(d)*].

In the case of an allowance to the personal representative, the order must authorize the personal representative to charge against the estate the amount allowed, less any amount previously charged against the estate pursuant to *Prob. Code § 10830* (allowance of compensation before final distribution) [*Prob. Code § 10831(d)*].

In the case of the attorney's compensation, the order must require the personal representative to pay the attorney out of the estate the amount allowed, less any amount paid to the attorney out of the estate pursuant to *Prob. Code § 10830* [*Prob. Code § 10831(d)*].

Prob. Code § 10831 applies only in administration of estate proceedings commenced on or after July 1, 1991 [*see Prob. Code § 10850(a)*]. The fixing and allowing of compensation of the personal representative and his or her attorney in proceedings commenced before July 1, 1991, are governed by former *Prob. Code §§ 900-910* [*see Prob. Code § 10850(b)*].

Legal Topics:

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

§§ 458D.138[Reserved]

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39-458D California Forms of Pleading and Practice--Annotated § 458D.150

§ 458D.150 Federal Statutes

Imposition and collection of federal estate tax. *I.R.C. § 2001* et seq.

California Forms of Pleading and Practice--Annotated

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39-458D California Forms of Pleading and Practice--Annotated § 458D.151

§ 458D.151 Federal Administrative Regulations

Imposition and collection of federal estate tax. *Treas. Reg. §§ 20.0-1*-20.7101-1

Temporary estate tax regulations. *Treas. Reg. §§ 22.0*-24.1

Generation-skipping transfer tax. *Treas. Reg. § 26.2601-1*

Temporary generation-skipping transfer tax. Treas. Reg. § 26a.2621-1

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesCompensationEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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39-458D California Forms of Pleading and Practice--Annotated § 458D.152

§ 458D.152 State Statutes

[1] Accounts

Report or account as required to be in writing, signed by person making it, and filed. *Prob. Code § 1020*

Report, plan, or account and objections to it as required to be verified by person filing report, plan, account, or objections; exception. *Prob. Code §§ 1021, 1023*

Contents, schedules, format. *Prob. Code §§ 1060-1064*

Issuance, contents, and service of citation. *Prob. Code §§ 1240-1242*

Validity of allowed or approved claim as subject to contest by interested person before settlement of report or account in which claim is first reported, unless claim is established by a judgment; burden of proof. *Prob. Code § 9254*

Production by personal representative of supporting documents for inspection and audit. *Prob. Code § 10901*

Court-ordered account. *Prob. Code § 10950*

Personal representative as required to file final account and petition for final distribution of estate when estate is in condition to be closed. *Prob. Code § 10951*

Account after authority terminated. *Prob. Code § 10952*

Rendering and settlement of account when personal representative dies, absconds, or becomes incapacitated. *Prob. Code § 10953*

When account is not required. *Prob. Code § 10954*

Personal representative as required to give notice of hearing on account as provided in *Prob. Code § 1220*. *Prob. Code § 11000(a)*

Additional persons to whom notice must be given. *Prob. Code § 11000(a)*

If petition for approval of account requests fees, notice as required to so state. *Prob. Code § 11000(b)*

If final account is filed together with petition for order for final distribution, notice as required to so state. *Prob. Code § 11000(c)*

Contest of account. *Prob. Code § 11001*

Hearing on account. *Prob. Code § 11002*

Litigation expenses on contest of account. *Prob. Code § 11003*

In settling account, personal representative as allowed all necessary expenses in administration of estate. *Prob. Code § 11004*

Settlement of claim not properly filed. *Prob. Code § 11005*

Court or judge as required to compel account by punishment for contempt if personal representative fails to file required account. *Prob. Code § 11050*

Removal from office of personal representative who purposefully evades personal service of citation re contempt. *Prob. Code § 11051*

Removal from office, punishment for contempt, or both in discretion of court if personal representative does not appear and file required account after having been duly cited. *Prob. Code § 11052*

[2] Application of "New Law" and "Old Law"

"New law," "old law," and "operative date" defined. *Prob. Code § 3(a)*

Determining which law applies. *Prob. Code § 3(b)-(h)*

[3] Compensation

Compensation of public administrator and his or her attorney. *Prob. Code §§ 7622(b), 7623, 7666*

Compensation of special administrator and his or her attorney. *Prob. Code § 8547*

Services of representative and attorney in taking possession of property in good faith that is later determined not to be property of estate as compensable in specified circumstances. *Prob. Code § 9651*

Calculation of statutory compensation of personal representative. *Prob. Code § 10800* (administration of estate proceedings commenced on or after July 1, 1991); former Prob. Code § 901 (proceedings commenced before July 1, 1991); *see Prob. Code § 10850*

Personal representative as entitled to additional compensation for extraordinary services. *Prob. Code § 10801(a)* (administration of estate proceedings commenced on or after July 1, 1991); former Prob. Code § 902 (proceedings commenced before July 1, 1991); *see Prob. Code § 10850*

Retention and payment of tax experts. *Prob. Code § 10801(b)* (proceedings commenced on or after July 1, 1991); former Prob. Code § 902 (proceedings commenced before July 1, 1991)

Provision for compensation stated in will as providing full compensation for personal representative unless claim for compensation under will is renounced in writing. *Prob. Code § 10802* (administration of estate proceedings commenced on or afterJuly 1, 1991); former *Prob. Code § 900* (proceedings commenced before July 1, 1991); *see Prob. Code § 10850*

Contract between personal representative and heir, devisee, or legatee for higher compensation than provided in statute as void. *Prob. Code § 10803* (administration of estate proceedings commenced on or after July 1, 1991); former Prob. Code § 903 (proceedings commenced before July 1, 1991); *see Prob. Code § 10850*

Attorney's fees for ordinary services; schedule of compensation allowed attorney. *Prob. Code § 10810* (proceedings commenced on or after July 1, 1991); former Prob. Code § 910 (proceeding commenced before July 1, 1991)

Additional compensation allowed attorney for extraordinary services, including services performed by paralegal under direction of attorney. *Prob. Code § 10811* (proceedings commenced on or after July 1, 1991); former Prob. Code § 910 (proceeding commenced before July 1, 1991)

Agreement between personal representative and attorney for higher compensation for attorney is void. *Prob. Code § 10813* (proceedings commenced on or after July 1, 1991)

Partial allowance of compensation prior to distribution. *Prob. Code § 10830* (administration of estate proceedings commenced on or after July 1, 1991); former Prob. Code §§ 904, 911 (proceedings commenced before July 1, 1991); *see Prob. Code § 10850*

Court on petition as fixing and allowing compensation for all services rendered on filing of final account and petition for final distribution. *Prob. Code § 10831*

Allowance before final distribution to personal representative of compensation for extraordinary services when any of specified requirements are met. *Prob. Code § 10832*

Legal representative or attorney is entitled to compensation for preparing account of absconding, deceased, or incapacitated personal representative. *Prob. Code § 10953(d)*

Attorney's fees for services performed in connection with filing of petition and obtaining court order under *Prob. Code §§ 13650-13660* (property passing to surviving spouse) are determined by private agreement between attorney and client, and are not subject to approval by court. *Prob. Code § 13660*

Personal representative as entitled to statutory compensation and allowance for necessary expenses. Former *Prob. Code § 900* (administration of estate proceedings commenced before July 1, 1991); *see Prob. Code § 10850*

[4] Final Distribution

[a] In General

Attachment of debtor's interest in personal property in decedent's estate as heir or devisee. *Code Civ. Proc. § 488.485*

Surviving spouse's waiver of rights to take. *Prob. Code §§ 140-147*

Rules for distribution under will or trust to members of different generations. *Prob. Code §§ 245-247*

Delayed distribution if there is posthumously conceived child of decedent. *Prob. Code §§ 249.5-249.9*

Prohibition against right to take of person who feloniously and intentionally killed decedent. *Prob. Code §§ 250-257*

Disclaimer of testamentary and other interests by or on behalf of beneficiary. *Prob. Code §§ 260-295*

Petition, report, or objection must be in writing, signed by all persons making it, and filed. *Prob. Code § 1020*

Verification of petition, report, and objection; exception. *Prob. Code §§ 1021, 1023*

Jurisdictional recitals in orders are not required except as otherwise provided in Probate Code. *Prob. Code § 1047*

Gift to subscribing witness to will is presumed to have been procured by duress, menace, fraud, or undue influence and, if presumption is not rebutted, witness takes only such proportion of devise as does not exceed share of estate that would have been distributed to witness had will not been established. *Prob. Code § 6112*

Provisions and dispositions in will revoked by subsequent dissolution or annulment of marriage unless will expressly provides otherwise. *Prob. Code § 6122*; *see also Prob. Code § 6123*

Except as otherwise provided in *Prob. Code §§ 641* and *642* (relating to powers of appointment), unless contrary intention is indicated by will, will passes all property owned by testator at death including property acquired after execution of will. *Prob. Code § 21105*

Effect of testator's subsequent marriage on will executed before marriage. *Prob. Code §§ 6560-6562*

Omitted (pretermitted) children. *Prob. Code §§ 6570-6573*

Distribution of property in compliance with order for distribution is valid as to person acting in good faith and for valuable consideration. *Prob. Code § 11750(c)*

Interest and income accruing during administration. *Prob. Code §§ 12000-12006*

Discharge of personal representative. *Prob. Code §§ 12250, 12251*

Administration after final settlement. *Prob. Code § 12252*

Abatement of shares of gifts to beneficiaries. *Prob. Code §§ 21400-21406*

Transfer of decedent's motor vehicle without probate. *Veh. Code § 5910*

[b] Ademptions and Advancements

When property given during lifetime of person who dies intestate as to all or part of his or her estate is treated as advancement against that heir's share of intestate estate. *Prob. Code § 6409*

Change in form of securities. *Prob. Code § 21132*.

Unpaid proceeds of sale, condemnation, or insurance; property obtained as result of foreclosure. *Prob. Code § 21133*.

Ademption by satisfaction. *Prob. Code § 21135*.

Rules in *Prob. Code §§ 21133-21135* not exhaustive. *Prob. Code § 21139*.

[c] Appeal

Appealable orders. *Prob. Code § 7240*

[d] California Personal Income Tax

Certificate of Franchise Tax Board is required if value of assets of estate at death of decedent and distributable to one or more nonresidents exceed amounts prescribed by board regulations. *Rev. & Tax. Code § 19513*

[e] Definitions

"Beneficiary" defined. *Prob. Code § 24*

"Community property" defined. *Prob. Code § 28*

"Devise" and "devisee" defined. *Prob. Code §§ 32, 34*

"Family allowance" defined. *Prob. Code § 38*

"Fiduciary" defined. *Prob. Code § 39*

"Heirs" defined. *Prob. Code § 44*

"Interested person" defined. *Prob. Code § 48*

"Issue" defined. *Prob. Code § 50*

"Personal representative" defined. *Prob. Code § 58*

"Predeceased spouse" defined. *Prob. Code § 59*

"Quasi-community property" defined. *Prob. Code § 66*

"Real property" defined. *Prob. Code § 68*

"Surviving spouse" defined. *Prob. Code § 78*

[f] Devises

Devises to minors subject to California Uniform Transfers to Minors Act (*Prob. Code § 3900 et seq.*). Prob. Code §§ 6340-6349

Probate Code rules for interpretation of instruments as applicable to wills, trusts, deeds, and other instruments. *Prob. Code § 21101*

[g] Interpretation of Instruments

Prob. Code §§ 21101 et seq. applicable to wills, trusts, deeds, and other instruments. *Prob. Code § 21101*

Intention of transferor controlling. *Prob. Code § 21102*

Choice of law. *Prob. Code § 21103*

"At-death transfer" is transfer that is revocable during transferor's lifetime, but does not include joint tenancy or joint account with right of survivorship. *Prob. Code § 21104*

Will passes all property testator owns at death. *Prob. Code § 21105*

Lapsed transfers. *Prob. Code §§ 21109-21111*

Transfers to "heirs," "heirs at law," "next of kin," "relatives," or "family," under intestate succession law. *Prob. Code § 21114*

Transfers to halfbloods, adopted persons, persons born out of wedlock, stepchildren, foster children, and the issue of these persons. *Prob. Code § 21115*

Classifications of at death transfers. *Prob. Code § 21117*

Valuation of property transferred in lieu of money at fair market value. *Prob. Code § 21118*

Preference for interpretation that will give effect to every expression in instrument; preference to testacy over intestacy. *Prob. Code § 21120*

All parts of instrument are to be construed in relation to each other. *Prob. Code § 21121*

Words in instrument must be given ordinary and grammatical meaning. *Prob. Code § 21122*

Exoneration and ademption of transfers. *Prob. Code § 21131 et seq.*

[h] Intestate Succession

Survivor's right to one half of community property, distribution of other half to survivor in case of intestacy. *Prob. Code §§ 100(a), 6401(a)*

Survivor's right to "quasi community" property. *Prob. Code §§ 101(a), 6401(b)*

Surviving spouse's right to restoration to decedent's estate of property, in which surviving spouse had expectancy under *Prob. Code § 101*, transferred without adequate consideration. *Prob. Code § 102*

Intestate distribution by representation based on nearest generation with living members. *Prob. Code §§ 240, 241*

Surviving spouse's intestate share of deceased spouse's separate property. *Prob. Code § 6401(c)*

Surviving domestic partner's intestate share of deceased partner's separate property. *Prob. Code § 6401(c)*

Surviving registered domestic partner has same rights, responsibilities, protections, and benefits as surviving spouse. *Fam. Code § 297.5(c)*

Descent of separate property to heirs other than surviving spouse or surviving domestic partner. *Prob. Code § 6402*

Distribution of portion of decedent's estate attributable to decedent's predeceased spouse. *Prob. Code § 6402.5*

Requirement that heir survive decedent. *Prob. Code § 6403*

Prob. Code §§ 6800-6806 (escheat) apply if there is no taker of intestate estate under *Prob. Code §§ 6400-6414*. *Prob. Code § 6404*

Inheritance rights of relatives of the half blood. *Prob. Code § 6406*

Inheritance by afterborn heirs. *Prob. Code § 6407*

Inheritance by alien. *Prob. Code § 6411*

Person related to decedent through two lines of relationship as entitled to only single share based on relationship that would entitle person to larger share. *Prob. Code § 6413*

Applicability, with respect to when decedent died, of *Prob. Code § 6400 et seq.*. *Prob. Code § 6414*

Right to intestate succession based on relationships between natural parent and natural child and adopted parent and adopted child. *Prob. Code § 6450*

Effect of adoption on right to intestate succession based on relationship between natural child and natural parent. *Prob. Code § 6451*

Right of parent and parent's relatives to intestate succession when natural child born out of wedlock. *Prob. Code § 6452*

Rules for determining whether person is natural parent for purposes of intestate succession. *Prob. Code § 6453*

Right to intestate succession based on relationship between stepparent and stepchild and foster parent and foster child. *Prob. Code § 6454*

Statutory recognition of judicial doctrine of equitable adoption. *Prob. Code § 6455*

Survivor's right to elect against will. Former Prob. Code § 201.7 (repealed operative January 1, 1985, but still applicable if decedent died before that date)

[i] Limitation on Time to Close Estate

Personal representative required to either petition for order for final distribution or to make report of status of administration within one year after letters issued if no federal tax return is required or within 18 months if federal tax return is required. *Prob. Code § 12200*

Content and filing of status of administration report. *Prob. Code § 12201*

Procedure when personal representative fails to petition for final distribution or make report as required by *Prob. Code §§ 1200, 12201*; effect of failure to comply with court order. *Prob. Code §§ 12202, 12204*

Continuation of administration to pay family allowance. *Prob. Code § 12203*

Sanction for failure to close estate in timely manner. *Prob. Code § 12205*

Limitation in will of time for administration of estate as directory only. *Prob. Code § 12206*

[j] Minors Generally

Distribution of $5,000 or less without court order to parent entitled to custody of minor when total estate of minor, including money or other property to be paid or delivered, does not exceed $5,000. *Prob. Code §§ 3400-3402*

Distribution on court order when minor has guardian of estate and sole asset of guardianship estate is money or when minor has no guardian of estate and there is money belonging to minor; procedure. *Prob. Code § 3410-3412*

California Uniform Transfers to Minors Act. *Prob. Code § 3900 et seq.*

[k] Nonresidents

Distribution of estates of nondomiciliary decedents. *Prob. Code §§ 12500-12591*

[l] Order for Distribution

Order for distribution is required to be entered at length in judgment book or other permanent record of court. *Prob. Code § 1048(b)*

Form and contents of order for distribution. *Prob. Code § 11603*

Order for distribution when final as conclusive as to rights of all interested persons. *Prob. Code § 11605*

Personal representative is required to file peition for, and court is required to make, order for final distribution if all debts have been paid or adequately provided for, or if estate is insolvent, and estate is in condition to be closed; otherwise, administration of estate may continue for reasonable time, subject to *Prob. Code §§ 12200-12206* (limitation on time to close estate). *Prob. Code § 11640*

Personal representative must deliver to county treasurer certified copy of order for distribution if money is deposited or is already on deposit with county treasurer. *Prob. Code § 11853*

[m] Partition Before Distribution

Petition for partition of property before distribution. *Prob. Code § 11950*

Procedure for obtaining partition before distribution. *Prob. Code §§ 11951-11955*

[n] Procedure for Distribution

When petition, report, account, or other matter that requires hearing is filed, clerk must set matter for hearing. *Prob. Code § 1041*

Personal representative must file final account and petition for final distribution of estate when estate is in condition to be closed. *Prob. Code § 10951*

Either personal representative or interested person may petition court for order for final distribution of decedent's estate. *Prob. Code § 11600*

Notice of hearing on petition. *Prob. Code § 11601*

Personal representative or any interested person may oppose petition. *Prob. Code § 11602*; *see also Prob. Code §§ 1020-1023, 1043* (objections to petition), 9630(d)(1) (opposition by one of two or more personal representatives)

When distribution is to be made to beneficiary's transferee or person other than beneficiary, under agreement, request, or instructions of beneficiary or beneficiary's attorney in fact, court is authorized to inquire into circumstances surrounding execution of, and consideration for, transfer, agreement, request, or instructions, and amount of any fees, charges, or consideration paid or agreed to be paid by beneficiary, and to refuse to order distribution, or to order distribution on terms it deems just and equitable, on finding that fees, etc., are grossly unreasonable, or transfer, agreement, request, or instructions, was obtained by duress, fraud, or undue influence. *Prob. Code § 11604*

Personal representative is authorized to immediately distribute property when order settling final account and for final distribution becomes final. *Prob. Code § 11641*

Distribution of property acquired or discovered after order for final distribution is made. *Prob. Code § 11642*

Personal representative is responsible for distribution of property in compliance with order for distribution. *Prob. Code § 11750(a)*

Distribution when beneficiary dies during administration. *Prob. Code §§ 11801, 11802*

[o] Property That Cannot be Distributed

Deposit with county treasurer of property that is unclaimed or when (1) whereabouts of distributee is unknown; (2) distributee refuses to accept or give receipt for property; (3) distributee is minor or incompetent person without guardian, conservator, or other fiduciary to receive property or person authorized to give receipt for property; or (4) for any other reason property cannot be distributed and personal representative desires discharge; procedure for making deposit and procedure for claiming money on deposit with county treasury. *Prob. Code § 11850*

Procedure for depositing property with county treasurer and procedure for claiming it. *Prob. Code §§ 11851-11854*

Distribution to State of California of property not ordered by court distributed to known beneficiaries and procedure for claiming it from state. *Prob. Code §§ 11900-11903*

Prohibition against depositing property in county treasury when any other property in estate has been or is to be distributed to State of California under *Prob. Code §§ 1900-1904*. *Prob. Code § 11904*

[p] Real Property

Personal representative must record in office of county recorder in which any portion of real property is situated certified copy of order distributing real property, or determining any other matter affecting title to real property in estate. *Prob. Code § 7263*

In case of real property, personal representative must record court order for distribution or personal representative's deed, or both, in county in which property is situated. *Prob. Code § 11751*

Certified copy of order for final distribution of real property to State of California must be recorded. *Prob. Code § 11902(a)(3)*

[q] Receipts for Property and Inventory of Life Tenant

Personal representative must obtain receipt for property from distributee. *Prob. Code § 11751*

Requirement that personal representative receive from distributee in possession of personal property for life only inventory of property and that, on receipt, inventory be filed with court and copy delivered to distributee of remainder. *Prob. Code § 11752*

Filing receipts and discharge of personal representative. *Prob. Code § 11753*

[r] Right of Distributee

Distributee is entitled to demand, sue for, and recover distributive share. *Prob. Code § 11750(b)*

[5] Notices Generally

General notice provisions. *Prob. Code §§ 1200-1209*

Statutory form of notice. *Prob. Code § 1211*

Mailing notices in general. *Prob. Code §§ 1215-1217*

Mode of mailing notice of hearing. *Prob. Code § 1220*

Requests for special notice. *Prob. Code §§ 1250-1252*

Proof of giving notice. *Prob. Code §§ 1260-1265*

[6] Taxes

[a] When Decedent Died Before January 1, 1987

Federal or California estate tax to be prorated among beneficiaries. Former Prob. Code § 970

Court to make proration of federal estate tax. Former Prob. Code § 971

In prorating federal or California estate tax, court to make allowance for exempt property. Former Prob. Code § 972

Proration of federal or California estate tax when trust created. Former Prob. Code § 973

Federal estate tax must be paid, or agreement for payment must be filed, before court makes distribution. Former Prob. Code § 974

Duty of personal representative to recover tax when property is not in his or herpossession is included in gross estate for purpose of calculating federal estate tax. Former Prob. Code § 975

Court to order personal representative to charge beneficiaries with prorated portions of federal estate tax. Former Prob. Code § 976

Definitions of "person interested in the estate" and "gross estate" as used in former Prob. Code §§ 970-976. Former Prob. Code § 977

Release of personal property tax. Former Prob. Code § 1024

[b] When Decedent Died on or After January 1, 1987

Definitions relating to proration of estate taxes. *Prob. Code § 20100*

Federal and state estate taxes are prorated among persons interested in estate. *Prob. Code § 20110*

Manner of proration. *Prob. Code § 20111*

In making proration of federal and state estate taxes, allowances must be made for enumerated credits, exemptions, and deductions. *Prob. Code § 20112*

If trust is created, or other provision made whereby person is given temporary interest, in any property, estate tax on both temporary interest and remainder is charged against corpus of property without apportionment. *Prob. Code § 20113*

Proration of additional tax on certain qualified real property. *Prob. Code § 20114*

Proration of additional tax on excess retirement accumulations. *Prob. Code § 20114.5*

Proration of extended estate tax. *Prob. Code § 20115*

Personal representative not in possession of all property must recover proportionate amount of estate tax from persons interested in estate. *Prob. Code § 20116*

Right of reimbursement of person charged with or required to pay estate tax greater than amount prorated to that person because another person does not pay. *Prob. Code § 20117*

Judicial proceeding to determine proration. *Prob. Code §§ 20120-20125*

Court is to direct personal representative in possession of any property or interests of persons against whom estate tax has been prorated to charge prorated amounts against those persons, and to summarily direct all other persons to make payment of prorated amounts to personal representative. *Prob. Code § 20123*

Proration of taxes on generation-skipping transfer. *Prob. Code §§ 20200-20225*

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§ 458D.153 California Rules of Court

Listings required for petition for final distribution when acting under Independent Administration of Estates Act. *Cal. Rules of Ct., Rules 7.250, 7.403*

Effect of waiver of account. *Cal. Rules of Ct., Rule 7.550*

Decree of distribution of testamentary trust. *Cal. Rules of Ct., Rule 7.650*

No advance compensation. *Cal. Rules of Ct., Rule 7.700*

Allowance on account of statutory compensation. *Cal. Rules of Ct., Rule 7.701*

Petition for extraordinary compensation. *Cal. Rules of Ct., Rule 7.702*

Examples of extraordinary services by personal representative. *Cal. Rules of Ct., Rule 7.703(b)*

Examples of extraordinary services by attorney. *Cal. Rules of Ct., Rule 7.703(c)*

Contingency fee agreement for extraordinary legal services. *Cal. Rules of Ct., Rule 7.703(d)*

Use of paralegals in performance of extraordinary services. *Cal. Rules of Ct., Rule 7.703(e)*

Apportionment of statutory compensation between two or more personal representatives or between two or more attorneys. *Cal. Rules of Ct., Rule 7.704*

Calculation of statutory compensation. *Cal. Rules of Ct., Rule 7.705*

Compensation when personal representative is an attorney. *Cal. Rules of Ct., Rule 7.706*

Application of compensation provisions. *Cal. Rules of Ct., Rule 7.707*

Objections or responses waived if not timely filed after matter continued to allow for their filing. *Cal. Rules of Ct., Rule 7.801*

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§ 458D.154 Local Rules of Court

[1] Administration Costs to Be Paid.

Los Angeles Co. Super. Ct. Rules, Rule 10.108

Orange Co. Super. Ct. Rules, Rule 608.09

[2] Allegations in Petition for Final Distribution Relating to Independent Acts

San Francisco Uniform Local Ct. Rules, Rule 14.95(B)

[3] Allegations re Claims

Alameda Co. Unified Super. Ct. Rules, Rule 12.11.17

Contra Costa Co. Prob. Pol. Man., § 610

Los Angeles Co. Super. Ct. Rules, Rule 10.107

Marin Co. Rule, Probate 5.49

Orange Co. Super. Ct. Rules, Rule 608.08

San Bernardino Co. Prob. Pol. Mem., §§ 701, 907

San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.98

San Francisco Uniform Local Ct. Rules, Rule 14.95(A)

[4] Assignment by Heir, Devisee, or Legatee, and Agreements for Distribution

Alameda Co. Unified Super. Ct. Rules, Rule 12.11.10

Marin Co. Rule, Probate 5.50

Orange Co. Super. Ct. Rules, Rule 608.16

Sacramento Co. Local Ct. Rules, Rule 15.70

San Francisco Uniform Local Ct. Rules, Rule 14.87, 14.88

[5] Attorney's Fees to Be Fixed by Court

Alameda Co. Unified Super. Ct. Rules, Rule 12.10.1

San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.112

[6] Basis for Compensation When Account Waived

Alameda Co. Unified Super. Ct. Rules, Rule 12.10.4

[7] Caption of Petitions to Be All-Inclusive as to Relief Sought

Los Angeles Co. Super. Ct. Rules, Rule 10.9

Orange Co. Super. Ct. Rules, Rule 601.05

[8] Character of Property to Be Distributed Must Be Listed

Los Angeles Co. Super. Ct. Rules, Rule 10.114

Marin Co. Rule, Probate 5.49

Orange Co. Super. Ct. Rules, Rule 608.12

Sacramento Co. Local Ct. Rules, Rule 15.68

San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.102

San Francisco Uniform Local Ct. Rules, Rule 14.86

[9] Claims and Debts to Be Itemized in Petitions for Final Distribution

San Francisco Uniform Local Ct. Rules, Rule 14.95(a)

Santa Clara Co. Super. Ct. Rules, Rule 5.9

[10] Community Property as Factor in Calculation of Compensation

Alameda Co. Unified Super. Ct. Rules, Rule 12.10.10

[11] Computation of Statutory Compensation

Los Angeles Co. Super. Ct. Rules, Rule 10.142

Marin Co. Rule, Probate 5.84

Orange Co. Super. Ct. Rules, Rule 608.03

Sacramento Co. Local Ct. Rules, Rule 15.63

San Bernardino Co. Prob. Pol. Mem., § 906

[12] Debts Paid Without Verified Claims

Alameda Co. Unified Super. Ct. Rules, Rule 12.7.10

Los Angeles Co. Super. Ct. Rules, Rule 10.86, 10.112

Orange Co. Super. Ct. Rules, Rule 608.08

San Bernardino Co. Prob. Pol. Mem., § 907

[13] Description of Heirs in Case of Intestacy

Alameda Co. Unified Super. Ct. Rules, Rule 12.11.4

Marin Co. Rule, Probate 5.55

San Francisco Uniform Local Ct. Rules, Rule 14.93

[14] Determination of Statutory Fees

Contra Costa Co. Prob. Pol. Man., § 605

Los Angeles Co. Super. Ct. Rules, Rule 10.142

Sacramento Co. Local Ct. Rules, Rule 15.66

San Bernardino Co. Prob. Pol. Mem., § 906

San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.114

[15] Distributees to Be Named

Alameda Co. Unified Super. Ct. Rules, Rule 12.11.2.1

San Francisco Uniform Local Ct. Rules, Rule 14.85

[16] Distribution in Case of Minor, Deceased Distributee, or Missing Heir

Alameda Co. Unified Super. Ct. Rules, Rule 12.11.11-12.11.13

Marin Co. Rule, Probate 5.52, 5.54, 5.56

Sacramento Co. Local Ct. Rules, Rule 15.71

San Francisco Uniform Local Ct. Rules, Rule 14.90, 14.92

[17] Distribution in Case of Civil Suit Pending Against Estate

Alameda Co. Unified Super. Ct. Rules, Rule 12.11.14

[18] Distribution to Persons Under Conservatorship or Guardianship

San Francisco Uniform Local Ct. Rules, Rule 14.89

[19] Distribution Under Prob. Code § 6402.5

Alameda Co. Unified Super. Ct. Rules, Rule 12.11.5

[20] Extraordinary Fees

Alameda Co. Unified Super. Ct. Rules, Rule 12.10.6

Marin Co. Rule, Probate 5.86

Orange Co. Super. Ct. Rules, Rule 608.03-608.05

Sacramento Co. Local Ct. Rules, Rule 15.65

San Bernardino Co. Prob. Pol. Mem., § 906

San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.115

San Francisco Uniform Local Ct. Rules, Rule 14.108

[21] Federal Estate Tax to Be Paid Before Distribution

Alameda Co. Unified Super. Ct. Rules, Rule 12.11.15

Marin Co. Rule, Probate 5.49

[22] Fees to Be Stated Even Though Account Waived

Alameda Unified Co. Super. Ct. Rules, Rule 12.10.2

Contra Costa Co. Prob. Pol. Man., § 605

Los Angeles Co. Super. Ct. Rules, Rule 10.110, 10.135

Marin Co. Rule Probate 5.48, 5.86

Orange Co. Super. Ct. Rules, Rule 608.03

Sacramento Co. Local Ct. Rules, Rule 15.63

San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.100

San Francisco Uniform Local Ct. Rules, Rule 14.107

[23] Form of Order for Final Distribution

Alameda Co. Unified Super. Ct. Rules, Rule 12.11.7

Santa Clara Co. Super. Ct. Rules, Rule 5.9(I)

[24] Franchise Tax Board Certificate Under Rev. & Tax. Code § 19513 Required When Appropriate

Alameda Co. Unified Super. Ct. Rules, Rule 12.11.16

Los Angeles Co. Super. Ct. Rules, Rule 10.126(a)

Santa Clara Co. Super. Ct. Rules, Rule 5.9(C)

[25] Interest on General Pecuniary Legacies

San Francisco Uniform Local Ct. Rules, Rule 14.94

[26] Payment of Interest on Funeral Claims

Alameda Co. Unified Super. Ct. Rules, Rule 12.7.7

Los Angeles Co. Super. Ct. Rules, Rule 10.84

San Bernardino Co. Prob. Pol. Mem., § 706

San Francisco Uniform Local Ct. Rules, Rule 14.61

[27] Pleadings to Be Signed by Personal Representative

Contra Costa Co. Prob. Pol. Man., § 104

Los Angeles Co. Super. Ct. Rules, Rule 10.12

San Bernardino Co. Prob. Pol. Mem., § 903

San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.10

San Francisco Uniform Local Ct. Rules, Rule 14.25

[28] Property to Be Distributed to Be Listed

Alameda Co. Unified Super. Ct. Rules, Rule 12.11.1

Contra Costa Co. Prob. Pol. Man., § 602

Los Angeles Co. Super. Ct. Rules, Rule 10.111

Marin Co. Rule, Probate 5.48

Orange Co. Super. Ct. Rules, Rule 608.20

Sacramento Co. Local Ct. Rules, Rule 15.68

San Bernardino Co. Prob. Pol. Mem., § 908

San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.101

San Francisco Uniform Local Ct. Rules, Rule 14.85

[29] Proposed Distribution to Be Indicated

Marin Co. Rule, Probate 5.48

San Francisco Uniform Local Ct. Rules, Rule 14.85

[30] Provision of Order in Case of Distribution to Trustee

Alameda Co. Unified Super. Ct. Rules, Rule 12.11.8, 12.11.9

Marin Co. Rule, Probate 5.53

[31] Reporting Income and Principal

San Francisco Uniform Local Ct. Rules, Rule 14.77

[32] Required Form of Accounts

Alameda Co. Unified Super. Ct. Rules, Rule 12.9.1-12.9.5

Contra Costa Co. Prob. Pol. Man., § 603

Los Angeles Co. Super. Ct. Rules, Rule 10.106

Marin Co. Rule, Probate 5.42

Orange Co. Super. Ct. Rules, Rule 608.01, 608.20

Sacramento Co. Local Ct. Rules, Rule 15.60

San Bernardino Co. Prob. Pol. Mem., § 901

San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.95

San Francisco Uniform Local Ct. Rules, Rule 14.74 et seq.

[33] Required Use of Judicial Council or Local Forms

Orange Co. Super. Ct. Rules, Rule 601.02

[34] Waiver of Account

Alameda Co. Unified Super. Ct. Rules, Rule 12.9.5

Marin Co. Rule, Probate 5.45

Orange Co. Super. Ct. Rules, Rule 608.02

Sacramento Co. Local Ct. Rules, Rule 15.62

San Francisco Uniform Local Ct. Rules, Rule 14.81

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Forms of Pleading and Practice--Annotated

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Chapter 458D PROBATE: ACCOUNTS, FINAL DISTRIBUTION, AND COMPENSATION
PART III. RESEARCH GUIDE

39-458D California Forms of Pleading and Practice--Annotated § 458D.155

§ 458D.155 Decisions

[1] Accounts

[a] In General

Matters stated in account need not be stated with nicety, precision, and detail required in pleadings in civil actions; claims to be set out with sufficient certainty to identify them accurately so as to pass on their validity. *Estate of McKenzie (1962) 199 Cal. App. 2d 393, 398, 18 Cal. Rptr. 680*

Court as authorized in appropriate case to require personal representative to account for property in foreign jurisdiction of which personal representative took control, and to account for transactions relating to such property. *Estate of Barreiro (1932) 125 Cal. App. 752, 767, 14 P.2d 786* (personal representative held accountable for property of foreign corporation wholly owned by decedent)

[b] Contesting Account

[i] In General

Doubts regarding whether person has sufficient interest within meaning of former Prob. Code § 927 (repealed by Stats. 1988, ch. 1199; *now see Prob. Code §§ 48, 1041, 1043, 11001*) to object to executor's account as required to be resolved in favor of party claiming interest in estate. *Estate of McMillin (1956) 46 Cal. 2d 121, 127, 292 P.2d 881* ; *Estate of Reinicke (1941) 44 Cal. App. 2d 271, 273-274, 112 P.2d 311*

[ii] Persons Who May Object

Administrator of estate as entitled to file written objections to account rendered by coadministrator on ground of fraudulent administration, regardless of fact that objecting administrator participated in fraud. *Estate of Auslender (1960) 53 Cal. 2d 615, 627-628, 2 Cal. Rptr. 769, 349 P.2d 537*

Creditor of decedent as interested person within meaning of former Prob. Code § 927 (repealed by Stats. 1988, ch. 1199; *now see Prob. Code §§ 48(a)(1)* (defining "interested person" as including creditor), 1041, 1043 ("interested person" as authorized to appear and make response or objection to account), and 11001 (contest of account)) entitled to except to administrator's account, and such person as not required to be creditor of decedent by virtue of contractual relationship created by decedent during his or her lifetime; pivotal question as being whether he or she is creditor of estate as distinguished from creditor of personal representative. *Estate of McMillin (1956) 46 Cal. 2d 121, 127, 292 P.2d 881*

Attorney for personal representative, being entitled to statutory allowance "out of the estate" [Prob. Code § 910 (repealed by Stats. 1990, ch. 79, but continuing to apply in administration of estate proceedings commenced before July 1, 1991 [*see Prob. Code § 900(a)*]); *now see Prob. Code § 10830(a)(2)* (applying in proceedings commenced on or after July 1, 1991)], as person "interested in the estate" under former Prob. Code § 927 (repealed by Stats. 1988, ch. 1199; *now see Prob. Code §§ 48, 1041, 1043, 11001*) entitled to file written exceptions to personal representative's account. *Estate of McMillin (1956) 46 Cal. 2d 121, 127, 292 P.2d 881*

Because Prob. Code § 902 (repealed by Stats. 1990, ch. 79, but continuing to apply in administration of estate proceeding commenced before July 1, 1991 [*see Prob. Code § 900(a)*]) authorizes personal representative to employ tax experts to do tax work and to pay experts from funds of estate for such services, tax expert so employed as having demand against estate, as contemplated by former Prob. Code § 950 (order of payment of claims) (repealed by Stats. 1987, ch. 923, operative July 1, 1988; *now see Prob. Code § 11420* (priority for payment)), entitling him or her to object to administrator's final account that fails to provide for payment for his or her services. *Estate of McMillin (1956) 46 Cal. 2d 121, 126-128, 292 P.2d 881*

"Interested person" within meaning of former Prob. Code § 927 (who may contest account) (repealed by Stats. 1988, ch. 1199; *now see Prob. Code §§ 48, 1041, 1043, 11001*) as including creditor whose claim was rejected and whose civil action to collect it is pending; obtaining final judgment on rejected claim as not necessary in order to contest account. *Estate of Mailhebuau (1933) 218 Cal. 202, 204, 22 P.2d 514*

Assignee or grantee of property of an estate as having same right to object toadministrator's account that assignor or grantor would have had as heir. *Estate of Ross (1918) 179 Cal. 358, 359, 182 P. 303*

Heirs at law of beneficiary named in decedent's will as persons "interested in the estate" under former Prob. Code § 927 (repealed by Stats. 1988, ch. 1199; *now see Prob. Code §§ 48, 1041, 1043, 11001*) entitling them to file written objections to personal representative's account when beneficiary predeceased decedent whose will gave portion of decedent's estate to beneficiary or his heirs. *Estate of Cummings (1961) 189 Cal. App. 2d 801, 803, 11 Cal. Rptr. 465* (nevertheless affirming judgment overruling objections on ground objectors were not aggrieved by matters objected to)

Residuary legatee of estate in which there is no residue as "interested person" entitled to file written exceptions to personal representative's account. *Estate of Harrison (1951) 103 Cal. App. 2d 12, 15-16, 228 P.2d 881*

Judgment creditor of sole beneficiary under will whose judgment exceeds total value of estate and who has levied execution on beneficiary's interest, as "an interested person" within meaning of former Prob. Code § 927 (repealed by Stats. 1988, ch. 1199; *now see Prob. Code §§ 48, 1041, 1043, 11001*) who may file objections to administrator's account. *Estate of Reinicke (1941) 44 Cal. App. 2d 271, 272-274, 112 P.2d 311* ; *see also Estate of Lind (1934) 1 Cal. 2d 291, 293, 34 P.2d 486*

"Interested person" under former Prob. Code § 927 (who may contest account) (repealed by Stats. 1988, ch. 1199; *now see Prob. Code §§ 48, 1041, 1043, 11001*) as any person named as beneficiary in decedent's will, including person having contingent future interest as well as person having vested interest. *Estate of Brown (1938) 24 Cal. App. 2d 573,*

574-575, 75 P.2d 658

[iii] Persons Who May Not Object

Fact that person asserting adverse interest to estate is claiming more than total assets of estate as not making person "a person interested in the estate" within meaning of former Prob. Code § 927 (who may contest account) (repealed by Stats. 1988, ch. 1199; *now see Prob. Code §§ 48, 1041, 1043, 11001*) so as to be entitled to be heard in opposition to administrator's account; lack of necessary interest as arising from nature of claim, not its extent. *Estate of Hart (1959) 51 Cal. 2d 819, 824-825, 337 P.2d 73*

Person claiming adversely to estate as not person "interested in the estate" under former Prob. Code § 927 (who may contest account) (repealed by Stats. 1988, ch. 1199; *now see Prob. Code §§ 48, 1041, 1043, 11001*) and as not entitled to file written exceptions to personal representative's account. *Estate of Hart (1959) 51 Cal. 2d 819, 824, 337 P.2d 73*

Executor of predeceased husband's estate as not a person interested in estate of wife so as to be entitled to file written exceptions to account on ground that property claimed to belong in wife's estate was in fact property of predeceased husband. *Estate of Zavadil (1962) 200 Cal. App. 2d 32, 36, 19 Cal. Rptr. 132*

[iv] Pleading

Term "written exceptions," as used in former Prob. Code § 927 (who may contest account) (repealed by Stats. 1988, ch. 1199; *now see Prob. Code §§ 48, 1041, 1043, 11001*) as to be given broad scope, in absence of statutory limitations; thus, written exceptions as properly including exceptions not only to what is affirmatively stated in account, but also to what is omitted therefrom, and as properly praying that account be surcharged with what is omitted. *Estate of McMillin (1956) 46 Cal. 2d 121, 128, 292 P.2d 881*

Contestant's pleading as properly called either "objections" or "exceptions" to account. *Estate of McMillin (1956) 46 Cal. 2d 121, 127, 292 P.2d 881* (decided under former law); *Estate of Pardue (1943) 57 Cal. App. 2d 918, 920, 135 P.2d 394* (same, pointing out that two words are equivalent terms)

Probate Code contains no provision for filing any pleading in proceeding for settlement of account other than written exceptions to account. *Estate of Smith (1937) 23 Cal. App. 2d 383, 388, 73 P.2d 239* (applying former Prob. Code § 927 (who may contest account) (repealed by Stats. 1988, ch. 1199; *now see Prob. Code §§ 48, 1041, 1043, 11001*) and affirming order striking cross complaint)

[v] Procedure

Heirs and legatees who fail to appear on settlement of account are considered to consent that account may be settled. *Estate of Kent (1936) 6 Cal. 2d 154, 164, 57 P.2d 901*

Failure of contestant in written exceptions to specifically allege objections constituting new and affirmative matter in opposition to account as waiver of objections not so alleged. *Estate of Kirkpatrick (1952) 109 Cal. App. 2d 709, 713, 241 P.2d 555*

Contestants are limited by exceptions presented, and evidence is limited accordingly; while it is duty of court to scrutinize account and correct all errors in it, it is only when independent investigation is set on foot by court that rule limiting evidence is inapplicable. *Estate of Roberts (1942) 49 Cal. App. 2d 71, 81, 120 P.2d 933* , quoting from *Estate of Mallory (1929) 99 Cal. App. 96, 102, 278 P. 488*

Contestant who does not cross examine personal representative on testimony that account is true and correct and that all debts paid were justly due is precluded from questioning account for first time on appeal. *Estate of Rindge (1934) 136 Cal. App. 263, 267, 28 P.2d 705*

Person who does not appear and contest account is not entitled to appeal from order settling account. *Estate of Vizelich (1932) 123 Cal. App. 651, 653, 11 P.2d 870*

[c] Hearing on Settlement of Account

[i] Issues

Issues at hearing on settlement of account, in absence of independent inquiry by court, is limited by account and report on the one hand and written exceptions on the other. *Estate of Fraysher (1956) 47 Cal. 2d 131, 139, 301 P.2d 848*

Court sitting in probate is without authority to determine title to property in dispute between heirs, devisees, or estate on the one hand and stranger to estate on the other, but is authorized in settling final account to determine title claimed bypersonal representative adversely to estate. *Waterland v. Superior Court of Sacramento County (1940) 15 Cal. 2d 34, 38-39, 98 P.2d 211*

Court is without authority, in hearing on settlement of final account, to allow credit for money advanced to distributees without court order, but is authorized to consider and allow such a credit in hearing on petition for final distribution. *Estate of Benett (1939) 13 Cal. 2d 354, 362, 90 P.2d 84*

If, after conducting evidentiary hearing, probate court concludes any one of petitioners' grounds for invalidating a settlement and assignment has merit, court has discretion to either modify parties' agreement or rescind it. *Estate of Bennett (2008) 163 Cal. App. 4th 1303, 1311, 78 Cal. Rptr. 3d 435*

Function of court in settling account is to determine what property is in hands of personal representative. *Estate of Chamberlain (1941) 44 Cal. App. 2d 193, 204, 112 P.2d 53*

Court settling account is authorized to determine amount of money or property of estate coming into hands of personal representative and to charge personal representative therewith adversely to his or her individual claim or right against estate if that is the case. *Estate of Chamberlain (1941) 44 Cal. App. 2d 193, 204, 112 P.2d 53*

Whether personal representative unreasonably delayed payment of legacies and should be charged with interest because of delay are issues to be determined in settlement of final account. *Estate of Reed (1935) 9 Cal. App. 2d 94, 96, 48 P.2d 177*

Propriety of personal representative having made advances on distributive shares of estate in absence of any prior order for partial distribution is not an issue to be determined on settlement of account; rather, issue is to be determined in hearing on distribution, either preliminary or final. *Estate of Guglielmi (1934) 138 Cal. App. 80, 91, 31 P.2d 1078*

[ii] Parties

Probate administrator's surety permitted to participate as interested person under *Prob. Code § 48*, without intervening under procedures set forth in *Code Civ. Proc. § 387*, in probate hearing on final account and petition for final distribution in which creditor requested that special administrator be personally surcharged for estate's insolvency. *Estate of Davis (1990) 219 Cal. App. 3d 663, 667-668, 268 Cal. Rptr. 384* .

[iii] Procedure

Court is entitled but not required to settle account in accordance with stipulation respecting it; stipulation respecting account is not binding on court, which by statute has authority to settle accounts of personal representatives, free from control of any parties. *Estate of Richards (1941) 17 Cal. 2d 259, 269, 109 P.2d 923* (applying former Prob. Code §§ 920-932 (repealed by Stats. 1988, ch. 1199, operative July 1, 1989; *now see Prob. Code §§ 10900 et seq.*))

Court has duty, when sitting in probate, to scrutinize final account and to disallow any item not a proper and legal charge against estate, whether or not any person contests account. *Estate of Bennett (1939) 13 Cal. 2d 354, 368, 90 P.2d 84*

Reservation of ruling not recommended when it threatens to cause indefinite postponement of distribution and possibly complete divestiture of devisee's claim under decedent's will. *Estate of Shannon (1941) 43 Cal. App. 2d 425, 428-429, 110 P.2d 1017*

Court is required, even when account is not contested, to satisfy itself that account is correct, and is authorized to require personal representative to produce such evidence, within reason, as will satisfy court in this respect. *In re Estate of Barreiro (1932) 125 Cal. App. 752, 773-774*

Court authorized to reserve ruling on any portion of account as to which court deems evidence of propriety and reasonableness to be unsatisfactory or incomplete. *In re Estate of Barreiro (1932) 125 Cal. App. 752, 774, 14 P.2d 786*

[d] Order Settling Account

After probate court has issued judgment approving administrator's final account at hearing of which legatees had notice and at which they appeared and objected, and from which approval they failed to appeal, and has discharged administrator, legatees are collaterally estopped from seeking damages from administrator for imprudently negotiating settlement and reimbursement agreements on behalf of estate when those claims were settled and resolved by judgment of probate court approving account; legatees further prohibited from claiming damages against administrator, because administrator owed no duty to legatees and could not be held liable to them in negligence. *Goldberg v. Frye (1990) 217 Cal. App. 3d 1258, 1263-1264, 266 Cal. Rptr. 483* .

Order settling final account is conclusive against all persons interested in estate, including minors or other persons who might have moved before distribution for reopening account, when distribution has been made and judgment has become final. *Carr v. Bank of America etc. Assn. (1938) 11 Cal. 2d 366, 371, 79 P.2d 1096* (decided under former Prob. Code § 931; *see Prob. Code § 7250*)

Order settling and allowing account is subject to being set aside in proceeding under *Code Civ. Proc. § 473* for purpose of correcting clerical mistake, even though it has become final. *Estate of Soboslay (1935) 4 Cal. 2d 177, 179, 47 P.2d 714*

Probate court's approval of final accounting, that survives on appeal, is conclusive as to personal representative's veracity and exercise of due care. *Estate of Regli (2004) 121 Cal. App. 4th 878, 881, 17 Cal. Rptr. 3d 514*

Order settling one account, which has become final, does not conclude objections to later account covering payments after the earlier account had been settled, even though objections are identical to those overruled in order settling earlier account. *Estate of Mailhebuau (1933) 218 Cal. 202, 205, 22 P.2d 514*

Minute order, even though there is no direction in it for preparation of written order, is not the appealable order under former Rules on Appeal, Rule 2(b)(2) (*now Cal. Rules of Ct., Rule 8.104*) if it omits any essential portion of a valid order, such as findings when necessary; thus, minute order settling account and allowing fees for extraordinary services is not appealable when it omits essential finding that required notice of hearing was given. *Estate of Mills (1952) 111 Cal. App. 2d 83, 83-84, 243 P.2d 889* (applying former *Prob. Code § 1200* (repealed by Stats. 1987, ch. 923, operative July 1, 1988; *now see Prob. Code §§ 1260, 11000-11005*))

Court not required to adopt formal findings on settlement of personal representatives' accounts. *Estate of Bell (1943) 58 Cal. App. 2d 333, 339, 136 P.2d 804* , citing *Estate of Machado (1921) 186 Cal. 246, 248, 251, 199 P. 505*

Finding in judgment settling final account that notice was given as required by law is correct for purpose of appeal, unless contrary evidence appears in record. *Estate of Bell (1943) 58 Cal. App. 2d 333, 338, 136 P.2d 804*

[e] Reopening Account

Cause for reopening account by minor grandchildren under former Code Civ. Proc. § 1637 (repealed; *now see* Prob. Code § 11006) not shown when only objection to account was that it reflected earlier distribution made pursuant to valid order that had be come final and, therefore, conclusive. *Gladding v. Superior Court (1936) 7 Cal. 2d 408, 418, 60 P.2d 857*

[f] Waiver of Account

Waiver of account properly conditioned on court's approval of plan of distribution requested in petition for final distribution. *Estate of Simmons (1966) 64 Cal. 2d 217, 223, 49 Cal. Rptr. 369, 411 P.2d 97*

Waiver of account is not of statutory origin but is permitted by case law; remedy of person interested in estate disaffected by waiver as objection to distribution under former *Prob. Code § 1000* (repealed by Stats. 1988, ch. 1199, operative July 1, 1989; *now see Prob. Code §§ 11600-11624*), on ground account has not been settled. *Estate of Moore (1967) 253 Cal. App. 2d 945, 951, 61 Cal. Rptr. 722* (decided prior to enactment of former Prob. Code § 933 by Stats. 1984, ch. 451 (repealed operative July 1, 1989; *now see Prob. Code § 10954*; *see also Prob. Code § 900(b), (c)*, as to version of *Prob. Code § 10954* applicable in administration of estate proceedings), setting forth circumstances in which account is not required, including waiver)

[2] Compensation

[a] In General

1987 modification of statutory fee schedule for personal representatives and attorneys, lowering statutory fees computed on value of estate between $10 million and $25 million to one-half of one percent and changing statutory fee on value of estate over $25 million from one percent to reasonable amount to be determined by court, not retroactively applicable to impair integrity of previous partial statutory fee orders. *Estate of Hilton (1996) 44 Cal. App. 4th 890, 907-908, 52 Cal. Rptr. 2d 491*

Delay in settling estate is not ground for denying compensation to personal representative or attorney if otherwise justified by services rendered. *Estate of Taylor (1967) 66 Cal. 2d 855, 860, 59 Cal. Rptr. 437, 428 P.2d 301* (now see *Prob. Code § 12205* for sanctions that may be imposed for failure to timely close estate)

Right of personal representative and attorney to commission and fee is absolute but as not accruing until order for payment is made. *Estate of Johnston (1956) 47 Cal. 2d 265, 272, 303 P.2d 1*

Commission of personal representative and fee of attorney as not founded on contract but arises from statute. *Estate of Johnston (1956) 47 Cal. 2d 265, 272, 303 P.2d 1*

Allowance of compensation as made in and by settlement of final account. *Dobbins v. Title Guar. & Trust Co. (1943) 22 Cal. 2d 64, 69-70, 136 P.2d 572*

Court has no power to depart from statutory scheme for commissions and fees and has no authority to impose standard of reasonableness in such matters, although estate was largest estate probated in California to date and consisted primarily of stock in a single corporation. *Estate of Getty (1983) 143 Cal. App. 3d 455, 465-466, 191 Cal. Rptr. 897*

Statutory compensation provisions [Prob. Code §§ 901, 910] are exempt from Sherman Anti-Trust Law because set fee program derives its authority and efficacy from legislative command of state. *Estate of Effron (1981) 117 Cal. App. 3d 915, 922-927, 173 Cal. Rptr. 93 , appeal dismissed, 454 U.S. 1070, 102 S. Ct. 622, 70 L. Ed. 2d 606 (1981)*

Nature of statutory compensation analyzed and explained. *Estate of Buchman (1955) 138 Cal. App. 2d 228, 235-236, 291 P.2d 547* (analyzing and categorizing as ordinary or extraordinary many items in an account)

Order describing amount of extraordinary compensation allowed in terms of percentage rather than dollar amount is void. *Estate of Rowe (1944) 66 Cal. App. 2d 594, 603-606, 152 P.2d 765* (disapproved on another point by *Pacific Mut. Life Ins. Co. v. McConnell (1955) 44 Cal. 2d 715, 726, 285 P.2d 636*)

[b] Apportionment

Order settling final account and allowing entire amount of additional compensation for extraordinary services to one of two coexecutors having become final, as res judicata on issue of apportionment and binding on other coexecutor. *Dobbins v. Title Guar. & Trust Co. (1943) 22 Cal. 2d 64, 69-70, 136 P.2d 572*

Probate court authorized under various circumstances to determine validity and effect of contracts when ancillary to proper judgment by it; thus, as necessary incident of its general power to apportion compensation on basis of services performed, probate court was obligated also to determine validity and effect of any agreement between coexecutors affecting apportionment. *Dobbins v. Title Guar. & Trust Co. (1943) 22 Cal. 2d 64, 67-69, 136 P.2d 572* (overruling *In re Estate of Carter (1901) 132 Cal. 113, 64 P. 123* , and disapproving *Kelly v. Conroy (1928) 91 Cal. App. 350, 266 P. 1022*)

Requirement of former Prob. Code § 901 (repealed by Stats. 1990, ch. 79, but continuing to apply in administration proceedings commenced before July 1, 1991; *see Prob. Code § 10805*, applicable in proceedings commenced on or after July 1, 1991) that commission be apportioned when there are two or more personal representatives is applicable to compensation for extraordinary services as well as to statutory commission. *Dobbins v. Title Guar. & Trust Co. (1943) 22 Cal. 2d 64, 66-67, 136 P.2d 572*

[c] Attorney of Personal Representative

Rules governing compensation of attorney for personal representative arise not from contract but are founded on statutory enactment; attorney who has rendered services to personal representative is permitted to petition court for order requiring representative to pay attorney out of estate; because attorney is person interestedin estate, petition is not required to be presented by representative but directly by attorney, who may appeal from adverse ruling; because

attorney's right to compensation is statutory, court is not bound by compensation specified in employment contract between personal representative and attorney. *Estate of Trynin (1989) 49 Cal. 3d 868, 873, 264 Cal. Rptr. 93, 782 P.2d 232*

Compensation of attorney for extraordinary services includes work reasonably performed to establish and defend claim for compensation. *Estate of Trynin (1989) 49 Cal. 3d 868, 880, 264 Cal. Rptr. 93, 782 P.2d 232*

Final probate judgment finding that disputed fees were not expenses of estate did not bar law firm from making quantum meruit claim to recover fees for services rendered to client personally, and not as executor of estate; firm's evidence was sufficient to raise factual question as to whether firm reasonably expected to be paid by client personally. *Miller v. Campbell (2008) 162 Cal. App. 4th 1331, 1340, 76 Cal. Rptr. 3d 649*

Court's discretion to deny attorney's request for extraordinary compensation when ordinary fees reasonably compensate attorney for both ordinary and extraordinary services actually rendered. *Estate of Hilton (1996) 44 Cal. App. 4th 890, 910, 52 Cal. Rptr. 2d 491*

Double compensation to attorney who serves as personal representative and represents himself in that capacity as allowable where decedent's will expressly provides that double compensation may be paid. *Estate of Thompson (1958) 50 Cal. 2d 613, 615-617, 328 P.2d 1* (allowing double compensation); *see also Estate of Scherer (1943) 58 Cal. App. 2d 133, 139, 136 P.2d 103*

Refusal to make order directing or allowing attorney's fee in administration proceeding is appealable under former *Prob. Code § 1240* (repealed by Stats. 1987, ch. 923, operative July 1, 1988; *now see Prob. Code § 7240(l)*). *Estate of Merrill (1946) 29 Cal. 2d 520, 523, 175 P.2d 819*

Attorney for personal representative has standing to sue for fee and to appeal from order denying fee in whole or in part. *Estate of Merrill (1946) 29 Cal. 2d 520, 523, 175 P.2d 819* ; *Estate of Lagersen (1962) 210 Cal. App. 2d 788, 791, 26 Cal. Rptr. 783*

Rule that executor, being attorney, who acts as own attorney may not have allowance for professional services is rule of equity, not of law. *Estate of Lankershim (1936) 6 Cal. 2d 568, 572, 58 P.2d 1282* (parties in interest estopped to deny administrator compensation for services as attorney, when administrator waived compensation for administration services and those parties allowed him to proceed)

Personal representative entitled to credit for fees paid to law firm of which he is a member and that served as attorney for him, if he and his partners agreed he would not share in money received by firm for such services. *Estate of Parker (1926) 200 Cal. 132, 137, 251 P. 907*

Attorney's fees paid by executor from estate for purpose of defending challenge to codicils are necessary expenses [former Prob. Code §§ 902, 910, repealed by Stats. 1990, ch. 79, but continuing to apply in administration proceedings commenced before July 1, 1991; *see Prob. Code §§ 10800, 10801*, applicable in proceedings commenced on or after July 1, 1991] given executor's duty to defend testamentary instrument that has been admitted to probate. *Estate of Stokley (1980) 108 Cal. App. 3d 461, 474, 166 Cal. Rptr. 587*

Personal representative acting as own attorney is not entitled to compensation for professional services, ordinary or extraordinary, even though waiving right to personal representative's commission. *Estate of Hart (1962) 204 Cal. App. 2d 634, 639-640, 22 Cal. Rptr. 495*

Personal representative is not personally liable for payment of fee to attorney hired to represent him in administration proceedings. *Houghton v. Coberly (1962) 201 Cal. App. 2d 820, 823-824, 20 Cal. Rptr. 489*

Personal representative is not entitled to compensation for services as such plus for services of himself or firm of which he is partner as attorneys for personal representative, in absence of agreement not to share in fee of partnership. *Estate of Anderson (1958) 166 Cal. App. 2d 39, 43, 332 P.2d 785*

Attorney who rendered services to personal representative and then was replaced by substitution of another attorney as entitled to apply under former Prob. Code § 911 (repealed by Stats. 1990, ch. 79, but continuing to apply in administration proceedings commenced before July 1, 1991; *see Prob. Code § 10830(a)(2), (c)*, applicable in proceedings commenced on or after July 1, 1991) for pro rata share of statutory attorney's fee, and court is authorized on such an application to order payment forthwith of appropriate amount out of estate. *Estate of Algee (1958) 158 Cal. App. 2d 691, 692-696, 323 P.2d 221*

Attorney representing personal representative in both individual and representative capacity is entitled to fee from estate for services rendered to personal representative in representative capacity. *Estate of Raphael (1954) 128 Cal. App. 2d 92, 97-98, 274 P.2d 880* (personal representative as defendant, both individually and in representative capacity)

Attorney for legatee or claimant is required to look to client for fee, not to estate. *Estate of Feldman (1947) 78 Cal. App. 2d 778, 795, 178 P.2d 498*

Provisions of *Cal. Rules of Court, Rule 3.1702*, providing that in civil cases a notice of motion for attorney's fees must be filed and served within 60 days of entry of judgment, do not apply to probate court proceedings. *Hollaway v. Edwards (1998) 68 Cal. App. 4th 94, 80 Cal. Rptr. 2d 166*

[d] Calculation

Property in personal representative's possession is property includable in "estate accounted for" for purpose of calculating commission. *Estate of Lampman (1940) 15 Cal. 2d 212, 216-217, 100 P.2d 488* (construing former Prob. Code § 901 before addition of second paragraph in 1965; *see Prob. Code § 10800*, applicable in proceedings commenced on or after July 1, 1991)

Amount of estate accounted for as basis for calculating personal representative's commission. *Estate of Lampman (1940) 15 Cal. 2d 212, 215, 100 P.2d 488* (construing former Prob. Code § 901 before addition of second paragraph in 1965; *see Prob. Code § 10800*, applicable in proceedings commenced on or after July 1, 1991)

Statutory compensation of administrator based on 1948 appraised values of estate's real property rather than 1978 values, when testator died in 1948 and executor died in 1978, was proper because former *Prob. Code § 600* (repealed by Stats. 1988, ch. 1199, operative July 1, 1989; *now see Prob. Code § 8802*), providing that inventory must be appraised as of time of decedent's death, and former Prob. Code § 901 (*now see Prob. Code § 10800*), providing that compensation must be based on total amount of inventory, must be read together and are mandatory. *Estate of Downing (1982) 134 Cal. App. 3d 256, 264-266, 184 Cal. Rptr. 511*

Commission and attorney's fee was properly based in part on value of property that personal representative was ordered by court to account for, over personal representative's good faith objection that estate did not own property. *Estate of Raphael (1954) 128 Cal. App. 2d 92, 95, 274 P.2d 880*

Because it is subject to administration, share of community property belonging to surviving spouse was properly included in estate accounted for by personal representative, for purpose of calculating commission and attorney's fee. *Estate of Phillips (1954) 123 Cal. App. 2d 570, 573-574, 266 P.2d 954*

Property held by decedent in joint tenancy was not includable in estate for purpose of calculating commission and fee. *Estate of Fritz (1934) 140 Cal. App. 487, 488, 35 P.2d 643* (joint tenancy bank account passing to executor by right of survivorship was not includable in estate for purpose of calculation of commission)

[e] Extraordinary Services

Compensation of attorney for extraordinary services includes work reasonably performed to establish and defend claim for compensation. *Estate of Trynin (1989) 49 Cal.3d 868, 880, 264 Cal. Rptr. 93, 782 P.2d 232*

In making partial allowance to attorney for personal representative on account of compensation for ordinary services [*see Prob. Code § 10803*], court is not required to fix precise value of ordinary services performed to date, but simply to estimate total ordinary services that will be required and endeavor to make certain that services performed to date are large enough proportion of total to justify partial award. *Estate of Hilton (1996) 44 Cal. App. 4th 890, 914, 52 Cal. Rptr. 2d 491*

After time for appeal has expired, award of extraordinary compensation to attorney is protected from reduction by court; award of extraordinary fees includes implied finding that fees were justified; in later proceeding between same parties, court is collaterally estopped from determining that fees were not justified. *Estate of Hilton (1996) 44 Cal. App. 4th 890, 910, 52 Cal. Rptr. 2d 491*

Court's discretion to deny attorney's request for extraordinary compensation when ordinary fees reasonably compensate attorney for both ordinary and extraordinary services actually rendered. *Estate of Hilton (1996) 44 Cal. App. 4th 890, 910, 52 Cal. Rptr. 2d 491*

Court is authorized to allow extraordinary compensation for purpose of remedying injustice resulting if estate on which commission and fee are allowed is small and extraordinary services particularly burdensome. *Estate of Lampman (1940) 15 Cal. 2d 212, 219, 100 P.2d 488*

Personal representative has no duty to carry on decedent's business without order of court and does so at own risk if not so ordered. *Estate of Burke (1926) 198 Cal. 163, 166, 244 P. 340*

Because former Prob. Code § 910 (repealed by Stats. 1990, ch. 79, but continuing to apply in administration proceedings commenced before July 1, 1991; *see Prob. Code § 10810*, applicable in proceedings commenced on or after July 1, 1991) provided that attorneys rendering extraordinary services will be allowed out of estate such amount "as the court may deem just and reasonable," any settlement agreement between estate's personal representative and third party with regard to attorney's fees necessarily reserves to court power to allow "just and reasonable" amount. *Estate of Baum (1989) 209 Cal. App. 3d 744, 750, 257 Cal. Rptr. 566*

Code Civ. Proc. § 1036, relating to award of attorney's fees to plaintiff in inverse condemnation proceedings, does not prevail over former Prob. Code § 910 (repealed by Stats. 1990, ch. 79, but continuing to apply in administration proceedings commenced before July 1, 1991; *see Prob. Code § 10810*, applicable in proceedings commenced on or after July 1, 1991), which gave probate court large and very wide discretion in awarding reasonable fee to attorney for extraordinary services; hence, probate court as not bound under *Code Civ. Proc. § 1036* to award as fee figure used by attorney and defendant public entity in negotiating settlement of inverse condemnation proceeding by estate against public entity. *Estate of Baum (1989) 209 Cal. App. 3d 744, 751-754, 257 Cal. Rptr. 566*

Attorney is entitled to extraordinary fees under Prob. Code § 902, as amended January 1, 1984, when contest was brought before probate was successfully settled and probate proceedings were still pending on January 1, 1984. *Estate of Schuster (1984) 163 Cal. App. 3d 337, 341-345, 209 Cal. Rptr. 289*

Trial court did not abuse its discretion by awarding extraordinary fees to administrator and counsel but denying their requests for additional extraordinary compensation pursuant to former Prob. Code § 902 (repealed by Stats. 1990, ch. 79, but continuing to apply in administration of estate proceedings commenced before July 1, 1991; *see Prob. Code § 10810*, applicable in proceedings commenced on or after July 1, 1991), when court made express finding that services performed were ordinary as opposed to extraordinary and did not result in any unusual benefit to estate. *Estate of Downing (1982) 134 Cal. App. 3d 256, 266-268, 184 Cal. Rptr. 511*

Court has jurisdiction to vacate portion of order for final distribution directing payment of attorney's fees for extraordinary services if services were rendered in connection with property owned by executor as individual. *Estate of Lee (1981) 124 Cal. App. 3d 687, 692-693, 177 Cal. Rptr. 229*

Former Prob. Code § 902 (repealed by Stats. 1990, ch. 79, but continuing to apply in administration proceedings commenced before July 1, 1991; *see Prob. Code § 10801*, applicable in proceedings commenced on or after July 1, 1991) authorizes executors to be reimbursed for account services that they provide, even though executor hires own firm to do account. *Estate of Haviside (1980) 102 Cal. App. 3d 365, 369-370, 162 Cal. Rptr. 393*

Phrases describing extraordinary services in petition for extraordinary compensation held insufficient because they were too general and not informative of time consumed in performing each item of extraordinary service. *Estate of Fulcher (1965) 234 Cal. App. 2d 710, 717, 44 Cal. Rptr. 861*

Considerations of court in making allowance of extraordinary compensation to personal representative or attorney. *Estate of Walker (1963) 221 Cal. App. 2d 792, 795, 34 Cal. Rptr. 832*

Locating assets of estate is ordinary service and compensable by statutory commission. *Estate of Tubbs (1947) 82 Cal. App. 2d 305, 309, 186 P.2d 7*

Fact that will directs executor to sell estate property is no basis for denying compensation for extraordinary services in selling property. *Estate of Neff (1943) 56 Cal. App. 2d 728, 729, 731-732, 133 P.2d 413* (affirming allowance of additional compensation for extraordinary service in selling bonds which will directed executor to sell)

Extraordinary commission for running decedent's business was properly based on amount of extra work involved for personal representative, not on whether business was successful or estate eventually became insolvent under personal representative's management. *Estate of Allen (1941) 42 Cal. App. 2d 346, 353, 108 P.2d 973*

Court not bound by unrefuted expert testimony on value of extraordinary services, but as authorized to exercise independent judgment on basis of evidence of value of services. *Estate of Pomin (1939) 33 Cal. App. 2d 544, 546-549, 92 P.2d 479*

Application for extraordinary compensation not required to state facts with precision and detail of allegations of complaint; sufficiency of application as not to be tested by rules applicable to pleadings; applicant as required to state claim particularly so nature, necessity, and value of extraordinary services can be determined. *Estate of Herbst(1938) 26 Cal. App. 2d 249, 251, 79 P.2d 139*

[f] Personal Representative

Personal representative who mismanaged estate is nevertheless entitled to statutory commission but is chargeable with losses resulting from such mismanagement. *Estate of Roberts (1945) 27 Cal. 2d 70, 76, 162 P.2d 461*

Amount of commission due personal representative was properly set off against losses incurred by estate as result of personal representative's default or neglect. *Estate of Roberts (1945) 27 Cal. 2d 70, 76, 162 P.2d 461* ; *Estate of Smith (1954) 123 Cal. App. 2d 844, 849-850, 268 P.2d 53*

Personal representative whose appointment is attacked by appeal is entitled to commission for services rendered up to time of filing of notice of appeal, at which time personal representative's authority was suspended. *Estate of Schwartz (1948) 87 Cal. App. 2d 569, 573, 197 P.2d 223* (steps taken by personal representative after notice of appeal from order of appointment was filed were void)

Personal representative whose appointment was voidable, rather than void, and who acted as executor in good faith until appointment was revoked, and attorney for that personal representative, were entitled to commission and fee for services rendered. *Estate of Clark (1939) 33 Cal. App. 2d 523, 525-527, 92 P.2d 505*

Executor who, on own initiative without order of court, withdrew funds of estate to pay himself commission in addition to that allowed by statute was chargeable with amount withdrawn including interest from date of withdrawal. *Estate of Guglielmi (1934) 138 Cal. App. 80, 90, 31 P.2d 1078*

Provision in will that executor should serve without compensation was ineffectual to deny executor compensation if it is claimed. *Estate of Fritz (1933) 130 Cal. App. 725, 731-732, 20 P.2d 361*

[g] Reimbursement of Expenses

Expense of defending on appeal items of account, challenged by creditor who appealed from order settling account, is chargeable against estate, even though executor thereby defends items that deprive estate of property. *Ludwig v. Superior Court (1933) 217 Cal. 499, 500, 19 P.2d 984*

Personal representative is entitled to reimbursement out of estate assets for liability incurred on account of necessary matters related to estate. *Harm v. Frasher (1960) 181 Cal. App. 2d 405, 421, 5 Cal. Rptr. 367*

Expenses incurred by successful applicant for letters of administration is not allowable under former *Prob. Code § 900* (repealed by Stats. 1990, ch. 79, but continuing to apply in administration proceedings commenced before July 1, 1991; *see Prob. Code § 10850,* applicable in proceedings commenced on or after July 1, 1991). *Estate of Tubbs (1947) 82 Cal. App. 2d 305, 308, 186 P.2d 7*

Travel expenses of personal representative and attorney or agent are allowable, if necessary for proper administration of estate. *Estate of Turner (1942) 50 Cal. App. 2d 332, 335, 123 P.2d 66*

Personal representative is entitled to allowance for expenses incurred in carrying on decedent's business even though without court order to do so when items allowed were intended and necessary for preservation of property belonging to estate and administrator was experienced in business concerned and had consent of all known heirs at time expenses were incurred. *In re Estate of Messena (1933) 129 Cal. App. 255, 258-261, 18 P.2d 779*

[3] Effect of Order for Preliminary Distribution on Order for Final Distribution

Decree rendered in proceeding for preliminary distribution is not controlling on issue of heirship at time of final distribution as against those heirs who were unaware of proceeding on partial distribution, were not parties to it, and whose existence was not known to court at time proceeding for preliminary distribution was heard and determined, and consequently whose claims were never before court to be considered or passed on. *Estate of McCallen (1975) 53 Cal. App. 3d 142, 149, 125 Cal. Rptr. 645* ; *In re Estate of Ampusait (1933) 131 Cal. App. 533, 538, 21 P.2d 691*

Order for preliminary distribution is conclusive only as to rights of all persons claiming interest in property distributed under it, while decree of final distribution as constituting conclusive construction of will as against all interested parties, including beneficiaries of a testamentary trust. *Estate of McCallen (1975) 53 Cal. App. 3d 142, 148, 125 Cal. Rptr. 645*

When construction of will has been litigated and determined in proceeding for preliminary distribution, that determination is res judicata and controlling on final decree of distribution. *Estate of McCallen (1975) 53 Cal. App. 3d 142, 148, 125 Cal. Rptr. 645*

[4] Final Distribution

[a] In General

Persons who have no interest in estate has no standing to question manner of its distribution, and how it is distributed as no concern of theirs. *In re Estate of Spreckels (1913) 165 Cal. 597, 604, 133 P. 289*

Distribution to trustee under will as adjudication of validity of trust. *Estate of White (1945) 69 Cal. App. 2d 749, 755, 160 P.2d 204*

Court continues to have jurisdiction until final discharge of person whom court directs to make order effective, and retains jurisdiction until discharge, for purpose of compelling execution of order. *Estate of Evans (1944) 62 Cal. App. 2d 249, 256, 144 P.2d 625*

Judicial sale of legatee's interest in estate divests legatee of any interest. *Estate of Pierce (1938) 28 Cal. App. 2d 8, 13, 81 P.2d 1037*

[b] Action to Recover Distributive Share

Beneficiary under testamentary trust as heir, legatee, or devisee within meaning of former *Prob. Code § 1021*, requiring that order for distribution name persons and proportions or parts to which each is entitled, and providing that such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession, and that order or decree, when it becomes final, is conclusive as to right of heirs, devisees, and legatees (repealed by Stats. 1988, ch. 1199, operative July 1, 1989; *now see Prob. Code §§ 24(c), 48(a)(1), 11603(b), 11605, 11750(b)*). *Estate of Loring (1946) 29 Cal. 2d 423, 430-431, 175 P.2d 524*

Limitation period for action to recover share of estate under former *Prob. Code § 1021* (repealed by Stats. 1988, ch. 1199, operative July 1, 1989; *now see Prob. Code §§ 24(c), 48(a)(1), 11603(b), 11605, 11750(b)*) as 10 years under *Code Civ. Proc. § 337.5(3)* (action on judgment or decree). *Gay v. Straube (1966) 245 Cal. App. 2d 683, 684, 54 Cal. Rptr. 293*

[c] Failure to Provide in Will for Surviving Spouse by Later Marriage

Language in codicil, facially made in contemplation of testator's subsequent marriage to his surviving widow, stating that codicil (and will republished in it) "shall not berevoked by the marriage" expressly declared testator's intention, within meaning of former *Prob. Code § 70* (repealed by Stats. 1983, ch. 842, operative January 1, 1985; *now see Prob. Code § 6560*), that his impending marriage to surviving widow should not revoke bequests he had made to his children and grandchildren in will. *Estate of Cooper (1983) 142 Cal. App. 3d 118, 119-121, 190 Cal. Rptr. 826*

Revocation of will in favor of intestate succession by surviving spouse who has been omitted was presumed under former *Prob. Code § 70* (repealed by Stats. 1983, ch. 842, operative January 1, 1985; *now see Prob. Code § 6560*) unless will manifests intention to disinherit future spouse. *Estate of Green (1981) 120 Cal. App. 3d 589, 593, 174 Cal. Rptr. 654*

[d] Inquiry Into Validity of Assignment of Beneficiary's Interest in Estate

Clear implication of former Prob. Code § 1020.1 (giving probate court power to inquire into consideration for assignment of or agreement for interest in an estate (repealed by Stats. 1988, ch. 1199, operative July 1, 1989; *now see Prob. Code § 11604*)) is that court may determine validity of agreement that property is to be distributed in certain manner, and, under it, court is empowered to look to value of consideration in determining whether agreement or assignment is grossly unreasonable and to set aside that portion of it found to be grossly unreasonable; probate court has jurisdiction to determine rights under contracts ancillary to exercise of its probate jurisdiction, and order under former Prob. Code § 1020.1 when final is binding on parties in all further actions. *Burchell v. Strube (1955) 43 Cal. 2d 828, 834-836, 279 P.2d 1*

Distribution of $122,000 to heir hunter was not grossly unreasonable even though probate court had authorized a $5,000 fee to an heir hunter employed by estate, because heir hunter who actually located heir spent approximately 150 hours searching data bases and interviewing leads and had spent two days searching; heir's assignment of her interest in estate also was not obtained by duress, fraud or undue influence when heir hunter gave heir time to consider matter and gave her his cell phone number. *Estate of Wright (2001) 90 Cal. App. 4th 228, 239, 108 Cal. Rptr. 2d 572*

Application of former Prob. Code § 1020.1 (inquiry into consideration for assignment (repealed by Stats. 1988, ch. 1199, operative July 1, 1989; *now see Prob. Code § 11604*)) is not limited to heir hunters, the original object of the enactment, but includes any assignee or transferee; terms of section are general. *Estate of Peterson (1968) 259 Cal. App. 2d 492, 506, 66 Cal. Rptr. 629* ; *see also Burchell v. Strube (1955) 43 Cal. 2d 828, 836, 279 P.2d 1* (former Prob. Code § 1020.1 as statute of general applicability and, if consideration is grossly unreasonable, burden is on heir hunter or other assignee to prove their real value)

Party has no right to trial by jury of petition for inquiry under former Prob. Code § 1020.1 (repealed by Stats. 1988, ch. 1199, operative July 1, 1989; *now see Prob. Code § 11604*). *Estate of Cazaurang (1946) 75 Cal. App. 2d 217, 225, 226, 170 P.2d 694*

[e] Intestate Succession

Trimble v. Gordon (1977) 430 U.S. 762, 97 S. Ct. 1459, 52 L. Ed. 2d 31 , *below*, decided April 26, 1977, applies to estate of decedent who died before that date so as to allow inheritance by illegitimate child who did not file claim in estate proceeding until after that date. *Reed v. Campbell (1986) 476 U.S. 852, 852-854, 106 S. Ct. 2234, 90 L. Ed. 2d 858*

Intestate succession statute prohibiting inheritance by illegitimate child is unconstitutional violation of *equal protection clause of Fourteenth Amendment*. *Trimble v. Gordon (1977) 430 U.S. 762, 776, 97 S. Ct. 1459, 52 L. Ed. 2d 31* (*see Prob. Code § 6450(a)*, providing that relationship of parent and child exists between person and person's natural parents for purposes of determining intestate succession by, through, or from that person, regardless of marital status of natural parents)

Distribution of intestate decedent's estate could not be limited to surviving first cousins and children of predeceased first cousins while excluding grandchildren of predeceased first cousins because governing statutes (*Prob. Code §§ 50,*

240, 6402(d)) do not limit surviving issue of a predeceased heir entitled to inherit to the first generation; rather, surviving issue includes all lineal descendents of all generations. *Estate of Beckel (2009) 174 Cal. App. 4th 34, 38, 93 Cal. Rptr. 3d 890*

Right to succession is defined by statute. *Estate of Griswold (2001) 25 Cal. 4th 904, 907, 108 Cal. Rptr. 2d 165, 24 P.3d 1191*

Judgment in bastardy proceeding, in which decedent's biological father confessed paternity, established father as decedent's natural parent for purposes of intestate succession. *Estate of Griswold (2001) 25 Cal. 4th 904, 921-924, 108 Cal. Rptr. 2d 165, 24 P.3d 1191*

Decedent's widow was not entitled to a statutory share of the decedent's trust or estate, when waiver of the widow's inheritance rights was in writing, signed by the widow, and complied with the requirements of *Prob. Code § 144*; waiver was enforceable regardless of whether the document containing the waiver was enforceable as a prenuptial agreement under *Fam. Code § 1615*. Estate of Will *(*2009) *170 Cal. App. 4th 902, 908, 88 Cal. Rptr. 3d 502*

Court cannot disinherit a natural parent who abandoned a child who later died intestate, when the deceased child was conceived during the parents' marriage and the father acknowledged paternity; father's alleged failure to pay child support or the lack of a meaningful parent-child relationship does not affect father's right as an intestate heir. *Estate of Shellenbarger (2008) 169 Cal. App. 4th 894, 896, 86 Cal. Rptr. 3d 862*

California's antilapse statute provides that when a bequest is to a protected transferee would otherwise lapse due to the transferee's death, the bequest passes by right of representation to her descendants. *Estate of Mooney (2008) 169 Cal. App. 4th 654, 663, 87 Cal. Rptr. 3d 115*

Decedent's former wife was not entitled to inherit from decedent's estate because she was a party to a valid dissolution proceeding which concluded in an order terminating all marital property rights; therefore, she was not a surviving spouse under *Prob. Code § 78(d)* at time of decedent's death. *Estate of McDaniel (2008) 161 Cal. App. 4th 458, 463, 73 Cal. Rptr. 3d 907*

Individual who married decedent in purported marriage ceremony that did not result in valid marriage was not "surviving spouse." *Estate of DePasse (2002) 97 Cal. App. 4th 92, 107, 118 Cal. Rptr. 2d 143*

Spouse who obtains judgment of legal separation that resolves parties' marital property rights does not qualify as "surviving spouse" on subsequent death of other spouse for purposes of intestate succession. *Estate of Lahey (1999) 76 Cal. App. 4th 1056, 1059-1060, 91 Cal. Rptr. 2d 30*

Courts have no authority to change statutory rules governing law of succession. *Estate of McCrary (1997) 54 Cal. App. 4th 100, 102, 62 Cal. Rptr. 2d 504*

When decedent's estate is to be distributed to issue of decedent's grandparents (decedent's cousins) because there is no surviving issue, parent, issue of a parent, or grandparents, grandparents' issue are entitled to take equally if they are all of the same degree, and in the manner provided in *Prob. Code § 240* if they are not of the same degree; one cousin or group of cousins is not entitled to take to exclusion of another cousin or group of cousins merely because first cousin or group of cousins is nearer in degree to grandparents. *Estate of McCrary (1997) 54 Cal. App. 4th 100, 104-105, 62 Cal. Rptr. 2d 504*

If one group of cousins are all children of grandparents (and thus first cousins of decedent), while another group are grandchildren of grandparents (and thus first cousins onceremoved), they are all equally entitled to distribution, but shares to which they are entitled are determined under *Prob. Code § 240*. *Estate of McCrary (1997) 54 Cal. App. 4th*

100, 104-105, 62 Cal. Rptr. 2d 504

When neither decedent nor predeceased husband left issue, fact that predeceased husband and sister of predeceased husband had been alienated for 28 years preceding his death does not prevent application of former Prob. Code § 229 (which created rights of succession in favor of designated relatives of predeceased spouse, regardless of whether predeceased spouse had issue (repealed by Stats. 1983, ch. 842, operative Jan 1, 1985; *now see Prob. Code § 6402.5*)); principles of equity are unavailable to avoid mandate of statute; moreover, evidence presented fell far short of establishing that under equitable principles sister would be estopped from claiming her statutory share of estate. *Estate of McInnis (1986) 182 Cal. App. 3d 949, 956-959, 227 Cal. Rptr. 604* (tracing legislative history of former Prob. Code § 229)

Unadopted stepchildren not entitled to share in estate when intestate dies leaving issue. *Estate of Davis (1980) 107 Cal. App. 3d 93, 95, 165 Cal. Rptr. 543* (*see Prob. Code § 6454* for rules governing intestate succession from or through stepparent)

[f] Issues at Hearing

Court authorized at hearing on petition for final distribution to credit personal representative with preliminary distribution made without court order. *Estate of Bennett (1939) 13 Cal. 2d 354, 358, 362, 90 P.2d 84*

Court in its probate capacity is authorized, when distributing property from a decedent's estate, to pass on equitable interests in property. *Estate of White (1945) 69 Cal. App. 2d 749, 758, 160 P.2d 204*

Proceeding for distribution is proper one for determining title to properties in which decedent had an interest and that are claimed by personal representative adversely to estate. *Estate of Basso (1945) 68 Cal. App. 2d 294, 299, 156 P.2d 476*

Court is required at hearing on petition for final distribution to determine whether debts have been paid and, if they have not, is authorized on proper showing by creditor whose contingent or not yet due debt is unpaid, to make provision for that debt under former Prob. Code § 953 (repealed by Stats. 1987, ch. 923, operative July 1, 1988; *now see Prob. Code § 11463*) and then proceed with distribution. *Dabney v. Dabney (1942) 54 Cal. App. 2d 695, 700, 129 P.2d 470* (suggesting that petitioner for distribution has duty to ask for such provision when creditor does not appear in response to petition for distribution to raise question)

[g] Judgment

Rule that order for final distribution controls over terms of will with respect to distribution of property when order is contrary to will's provisions is subject to exceptions when will is incorporated by reference into decree, or decree is uncertain or ambiguous; resort to will to ascertain testator's intent is permissible when exception applies. *Estate of Heil (1989) 210 Cal. App.3d 1503, 1508, 259 Cal. Rptr. 28*

Court has equitable jurisdiction to set aside judgment of distribution obtained by extrinsic and collateral fraud; executor as fiduciary; extrinsic fraud found in concealment by executor, who was also primary beneficiary, of fact that decedent had made second will revoking major bequest to other beneficiaries and statements of executor that he was looking after other beneficiaries' interests, and that they need not appear. *Estate of Sanders (1985) 40 Cal. 3d 607, 613-619, 221 Cal. Rptr. 432, 710 P.2d 232*

Trial court's finding that property is either separate or community is binding if supported by sufficient evidence. *Estate of Leslie (1984) 37 Cal. 3d 186, 197, 201, 207 Cal. Rptr. 561, 689 P.2d 133*

Scope and effect of judgment of final distribution. *Estate of Callnon (1969) 70 Cal. 2d 150, 156-157, 74 Cal. Rptr. 250, 449 P.2d 186* ; *Kingsbury v. Ross (1933) 217 Cal. 484, 486, 19 P.2d 784*

Person claiming, adversely to estate, property included in judgment for distribution is not bound by judgment. *Estate of Dabney (1951) 37 Cal. 2d 672, 677, 234 P.2d 962*

Notice requirements in motion under *Code Civ. Proc. § 473* to have judgment for distribution set aside. *Lilienkamp v. Superior Court (1939) 14 Cal. 2d 293, 297-304, 93 P.2d 1008*

Clerical errors in judgment for distribution are subject to being corrected pursuant to *Code Civ. Proc. § 473*. *Estate of Goldberg (1938) 10 Cal. 2d 709, 716-717, 76 P.2d 508* (affirming order correcting judgment so as to include name of distributee inadvertently omitted)

Judgment for distribution determines and settles rights of legatees and devisees; will is only evidence on which judgment is based. *Estate of Den (1935) 3 Cal. 2d 638, 640, 45 P.2d 963* ; *In re Estate of Lockhart (1937) 21 Cal. App. 2d 574, 578-579, 69 P.2d 1001* (disapproved on another point in *Estate of Platt (1942) 21 Cal. 2d 343, 349, 131 P.2d 825*)

Judgment of distribution does not determine that decedent had title to property distributed and is not binding on third persons claiming interest adverse to decedent's, but merely determines succession or testamentary disposition of such title as decedent had. *Romagnolo v. Romagnolo (1964) 230 Cal. App. 2d 315, 319, 40 Cal. Rptr. 807*

Purpose and effect of omnibus clause in judgment for distribution. *Estate of Heigho (1960) 186 Cal. App. 2d 360, 368, 9 Cal. Rptr. 196*

Finding that due notice of petition for settlement of final account and final distribution was given ordinarily is essential to show jurisdiction of record, but requirement is waived by parties who appeared at hearing and proceeded on basis that hearing was on final account and on petition for distribution. *Estate of Toler (1959) 174 Cal. App. 2d 764, 770, 345 P.2d 152*

Distribution of "all other property belonging to said estate whether described herein or not" vests title in distributees. *Howe v. Brock (1948) 86 Cal. App. 2d 271, 275, 194 P.2d 762*

Conclusiveness of judgment for distribution does not divest court of equitable jurisdiction to remedy erroneous distribution, to construe declaration of trust when judgment procured by fraud or mistake, or to modify judgment with consent of all interested parties. *Security-First Nat. Bank v. Easter (1934) 136 Cal. App. 691, 694-695, 29 P.2d 422*

Judgment for distribution is subject to being set aside under *Code Civ. Proc. § 473*. *Estate of Ampusait (1933) 131 Cal. App. 533, 537-538, 21 P.2d 691*

Judgment for distribution is not conclusive against distributee who procured it by means of extrinsic fraud. *Platnauer v. Forni (1933) 131 Cal. App. 393, 399, 21 P.2d 638*

[h] Omitted (Pretermitted) Heirs

When will intentionally disinherited decedent's child but was silent regarding children of that child, presumption of former Prob. Code § 90 (repealed by Stats. 1983, ch. 842, operative January 1, 1985; *now see Prob. Code §§ 6570-6573*) is prevailing to allow grandchildren to share in estate; extrinsic evidence, such as deposition of attorney

whodrafted will, is admissible to resolve ambiguities or to support presumption of unintentional omission but is inadmissible to prove omission was intentional. *Smith v. Crook (1984) 160 Cal. App. 3d 245, 248-249, 206 Cal. Rptr. 524*

No-contest clause (provision denying person who challenges will anything more than nominal sum) that also precludes heirs as class from participating (disinheritance provision) is valid against contention that it lacked sufficient specificity to prevent operation of omitted heir statute (former Prob. Code § 90; repealed by Stats. 1983, ch. 842, operative January 1, 1985; *now see Prob. Code §§ 6570-6573*); however, claimant is still permitted to show absence of decedent's intention to disinherit children or grandchildren. *Estate of Leonetti (1981) 115 Cal. App. 3d 378, 383, 171 Cal. Rptr. 303*

Alleged grandchild of decedent is not omitted heir when will shows that person's omission was intentional (former Prob. Code § 90; repealed by Stats. 1983, ch. 842, operative January 1, 1985; *now see Prob. Code §§ 6570-6573*), even though different article of will stated that decedent's only child had predeceased decedent leaving no issue. *Estate of Hirschi (1980) 113 Cal. App. 3d 681, 684, 685, 170 Cal. Rptr. 186*

[i] Putative Spouse

Putative spouse (*see Fam. Code § 2251*) is entitled to intestate share of decedent's separate property (decided under former *Prob. Code § 221* (repealed by Stats. 1983, ch. 842, operative January 1, 1985; *now see Prob. Code § 6401(c)*)). *Estate of Leslie (1984) 37 Cal. 3d 186, 197, 204, 207 Cal. Rptr. 561, 689 P.2d 133*

[j] Ademption

Prob. Code § 21134(a) and case law prohibit ademption of specific gifts of corporate stock contained in living trust due to liquidation and dissolution of the corporation, when settlor's conservator, acting as trustee of the revocable trust, participates in the sale of the corporations assets. *Brown v. Labow (2008) 157 Cal. App. 4th 795, 816, 69 Cal. Rptr. 3d 417*

[5] Interest on Monetary Devises

Award of interest to beneficiary of trust created in 1948 was proper, despite fact that former Prob. Code § 162 (authorizing interest) (repealed by Stats. 1983, ch. 842, operative January 1, 1985) was expressly inapplicable to estates of persons dying prior to 1959 (Stats. 1959, ch. 1882, § 3), because law regarding payment of interest on general pecuniary legacies in trust was unclear in 1948 and trial court did not base its interest award solely on former *Civ. Code § 162*, but expressly found interest was also authorized by former *Civ. Code § 2262* (requiring trustee who failed to in vest trust moneys to pay simple interest on it if omission was negligent merely and compound interest if it was willful) (repealed by Stats. 1986, ch. 820, operative July 1, 1987). *Estate of Downing (1982) 134 Cal. App. 3d 256, 271-272, 184 Cal. Rptr. 511* (devises that may carry interest and distribution of income accruing during administration are now covered in *Prob. Code §§ 12000-12007*; measure of liability of trustee for breach of trust is covered in *Prob. Code §§ 16440, 16441*)

[6] Will Construction

Rules that apply to construing wills. *Estate of Edwards (1988) 203 Cal. App. 3d 1366, 1371-1375, 250 Cal. Rptr. 779*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesClaims By & AgainstEstate, Gift & Trust LawProbatePersonal RepresentativesCompensationEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateJudicial Review

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[Reserved]

§§ 485D.156[Reserved]

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[Reserved]

§ 485D.170[Reserved]

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39-458D California Forms of Pleading and Practice--Annotated § 458D.171

§ 458D.171 Preliminary Determinations

In consultation with personal representative, determine whether estate is in a condition to be closed.

1. Reread will to make sure that all provisions have been, or will be, complied with and determine if any provisions of a trust created by the will need to be clarified by court order.

2. Check probate court file for any liens, attachments, assignments, and unpaid claims of which personal representative may have no record.

3. Review any interim accounts filed and any orders of partial distribution, stipulations, agreements, assignments, or court orders affecting the estate to be sure they have been, or will be, complied with.

NOTE:
With respect to any preliminary distribution, check with the personal representative to be sure that proper receipts have been received from the distributees and, in the case of personal property in possession of a life tenant, a proper inventory [*see* *Prob. Code §§ 11751, 11752*]. With respect to a transfer or assignment by a beneficiary of his or her right to estate property, see *Prob. Code § 11604*, authorizing the court to inquire into the circumstances surrounding the execution of, and the consideration for, the transfer, agreement, request, or instructions, and the amount of any fees, charges, or consideration paid or agreed to be paid by the beneficiary, and to refuse distribution or order it on terms, and setting forth the procedure to be followed [***see*** discussion in *§ 458D.75* and *§ 458D.210*].

4. Determine what, if any, provision should be made for any contingent tax liabilities.

5. Determine which expenses of administration (*see* former Prob. Code § 902 (applies in administration of estate proceedings commenced before July 1, 1991 [*see Prob. Code § 10850*]); *Prob. Code §§ 10801* (applicable in proceedings commenced on or after July 1, 1991, but does not carry over list of

extraordinary services and expenses set forth in former statute), 11004, 11420(a)(1), 11421) have or have not been paid.

6. Determine that all debts have been paid or adequately provided for (*see Prob. Code § 11420 et seq.*).

NOTE:

"Debt" means (1) a claim established under Prob. Code §§ 9000-9399 or that is otherwise payable in the course of administration; (2) an expense of administration; and (3) a charge against the estate including, without limitation, taxes, expenses of last illness, and family allowance [*Prob. Code § 11401*].

7. Ascertain whether any debt was paid by personal representative without a claim having been filed and established in the manner prescribed by statute and, if so, the amount.

NOTE:

Except for funeral expenses, expenses of last illness, family allowance, and wage claims (*see* *Prob. Code § 11421*), the personal representative is not required to pay a debt until payment has been ordered by the court [*Prob. Code § 11422(a)*]. However, if the personal representative paid a debt within the time prescribed inProb. Code § 9154 without a claim having been filed and established in the manner prescribed by statute, the court must, in settling the account, allow the amount paid if it is proven that the debt was justly due and paid in good faith, that the amount paid did not exceed the amount reasonably necessary to satisfy the indebtedness, and that the estate is solvent [*Prob. Code § 11005*; ***see also*** *Prob. Code § 11422(d)*].

8. If all debts have not been fully paid, ascertain which debts are contingent or not due, or are disputed, and which debts cannot be paid because the creditor cannot be found.

NOTE:

If a debt is contingent or not due, the court may provide for the debt in various ways. It may (1) approve an agreement of interested persons as to the manner of providing for the debt [*Prob. Code § 11462*], (2) order funds deposited in a blocked account [*Prob. Code § 11463*], (3) order that property be distributed subject to an assumption of liability [*Prob. Code § 11464*], (4) appoint a trustee to receive payment [*Prob. Code § 11465*], (5) order that property be distributed subject to a bond [*Prob. Code § 11466*], or (6) continue administration of the estate [*Prob. Code § 11467*]. For discussion, *see § 458D.190, Comments in § 458D.211[3][c]*.

9. Determine whether any devisees have died since the decedent's death and, if so, how their share or shares are to be distributed.

NOTE:

The share in a decedent's estate of a beneficiary who survives the decedent but who dies before distribution is distributed as provided in *Prob. Code §§ 11801, 11802*.

10. Determine whether whereabouts of any distributee are unknown and, if so, who alternate distributees are.

NOTE:

If the whereabouts of a distributee is unknown, the order must provide for alternate distributees and the share to which each is entitled [*Prob. Code § 11603(c)*].

11. Review estate assets to determine whether any problems exist relating to distribution.

NOTE:
The order for distribution must provide that property distributed subject to a limitation or condition, including, but not limited to, an option granted under *Prob. Code §§ 9960-9966* (option to purchase), is distributed to the distributees subject to the terms of the limitation or condition [*Prob. Code § 11603(b)(2)*].

12. Determine whether any proration of estate tax is required.

NOTE:
The proration of estate taxes is covered in *Prob. Code §§ 20100-20125*, which are discussed in Ch. 452*, Probate: Proration of Estate and Generation-Skipping Transfer Taxes* .

13. Prepare a schedule of final distribution, taking into account will provisions and whether specific devisees are entitled to income accruing during administration or to payment of interest, and compute probate income or interest, if any.

NOTE:
The order for distribution must name the distributees and the share to which each is entitled [*Prob. Code § 11603(b)*]. Interest and income accruing during administration, unless the testator otherwise indicates in the will, are governed by *Prob. Code §§ 12000-12007*.

14. If estate is not in a condition to be closed, and time limit for petitioning for final distribution is approaching, prepare Report of Status of Administration showing the matters specified in *Prob. Code § 12201* and file it with court.

NOTE:
The personal representative must either petition for an order for final distribution of the estate or make a report of the status of the administration within one year after the date letters were issued if no federal estate tax is required and within 18 months after letters were issued if a federal estate tax is required [*Prob. Code § 12200*].

15. If the estate is in a condition to be closed, prepare the Account and Petition for Final Distribution and the petition for an order fixing and allowing personal representative's and/or the attorney's compensation for all services rendered in the estate proceeding, if any [*see Prob. Code § 10831(a)*].

NOTE:
The request for compensation may be included in the final account or the petition for final distribution, or may be made in a separate petition [*Prob. Code § 10831(b)*; *see § 458D.190*]. If the petition for approval of the account requests allowance of all or a portion of the compensation of the personal representative or of his or her attorney, the notice of hearing must so state [*Prob. Code § 11000(b)*].

Legal Topics:

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

Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawEstate AdministrationAllowancesGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesCompensationEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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§ 458D.172 Account

NOTE:

Except when an account is not required (*see* *Prob. Code § 10954*), the personal representative, must, whether or not an interim account has been filed, file a final account when the estate is in a condition to be closed [*Prob. Code § 10951*; *see § 458D.190*]. The court may, however, on its own motion or on the petition of an "interested person" (defined in *Prob. Code § 48*),order an account at any time [*Prob. Code § 10950(a)*], and must order an account on petition of an interested person made more than one year after the last account was filed or, if no previous account has been filed, made more than one year after issuance of letters to the personal representative [*Prob. Code § 10950(b)*]. In either case, the order must specify the time within which the personal representative must file the account [*Prob. Code § 10950(c)*]. The filing of an account is deemed to include a petition requesting its approval [*Prob. Code § 1064(b)*].

1. Prepare account with original and a copy for personal representative, an office copy, and additional copies for any persons who must be served with one.

NOTE:

The account must be in writing [*Prob. Code § 1020*]. For persons who must be served with a copy of the account, see Paragraph D(1), *below.*

2. Have the personal representative sign the account.

NOTE:

The account must be signed by all of the persons making it [*Prob. Code § 1020*].

3. Have the account verified by the personal representative.

NOTE:

The account must be verified [*Prob. Code §§ 1021(a)(1)*] by the person who has the duty to make it or, if there are two or more of them, by any of them [*Prob. Code §*

***1021(b)(2)*]**.

4. Obtain all documents necessary to support the account.

NOTE:
On either the order of the court or the request, of an interested person, filed with the clerk and a copy served on the personal representative, the personal representative must produce for inspection and audit by the court or interested person the documents specified in the order or request that support an account [*Prob. Code § 10901*].

5. Present the original of the account (together with the Petition for Final Distribution and the petition, if any, for an order fixing and allowing the personal representative's and attorney's compensation for all services rendered in the estate proceeding [*see Prob. Code § 10831(a), (b)*]) at the court clerk's office for filing.

NOTE:
The account must be filed with the court [*Prob. Code § 1020*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesCompensationEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 458D.173 Petition for Final Distribution

NOTE:
When all debts have been paid or adequately provided for, or if the estate is insolvent, and the estate is in a condition to be closed, a petition must be filed for final distribution of the estate [*Prob. Code § 11640(a)*; *see § 458D.190*]. Normally, a petition for distribution may be filed by either the personal representative or an interested person [*Prob. Code § 11600*]. However, if the estate is in a condition to be closed, the personal representative, on filing a final account, must also file a petition for an order for final distribution of the estate [*see* *Prob. Code § 10951*; *see § 458D.190*].

1. Prepare the petition for final distribution [*Prob. Code § 11600*] in an original, one copy for the personal representative, an office copy, and sufficient copies to give one to each person on whom a copy must be served.

NOTE:
The petition must be in writing [*Prob. Code § 1020*]. For persons who must be served with a copy of the petition, see *§ 458D.174*.

2. Have the personal representative sign the petition.

NOTE:
The petition must be signed by all of the petitioners [*Prob. Code § 1020*].

3. Have the petition verified by the personal representative.

NOTE:
The petition must be verified [*Prob. Code § 1021(a)(1)*] by the petitioner or, if there are two or more parties joining in the petition, by any of them [*Prob. Code § 1021(b)(1)*].

4. Present the original of the petition for final distribution, together with the Final Account, at the court clerk's office for filing.

NOTE:
The petition must be filed with the court [*Prob. Code § 1020*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 458D.174 Notice of Hearing

NOTE:

The clerk of the court is required to set the account and the petition for final distribution for hearing [*see* *Prob. Code § 1041*].

1. Prepare the notice of hearing in a sufficient number of copies to serve one copy on each person to be given notice [*see Prob. Code § 1211*; Form No. 649] and an office copy.

NOTE:

The notice of hearing on the account and the petition for final distribution, as well as notice of hearing on the petition, if any, to fix and allow compensation for all services rendered in the estate proceeding by the personal representative and his or her attorney, must be given as provided in *Prob. Code § 1220* to all of the following persons: (1) each person listed in *Prob. Code § 1220*; (2) each known heir whose interest in the estate would be affected by the account; (3) each known devisee whose interest in the estate would be affected by the account; and (4) the Attorney General, at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest would be affected by the account [*Prob. Code §§ 10831(c)* (petition for compensation in administration of estate proceedings commenced on or after July 1, 1991), 11000(a)(1)-(4) (account), 11601(a)-(d) (petition for distribution)]. If the estate is insolvent, notice of the hearing on the account must also be given to each creditor who has filed a claim that is allowed or approved but is unpaid in whole or in part [*Prob. Code § 11000(a)(5)*]. Notice of the hearing on the petition for final distribution must also be given to the Controller if property is to be distributed to the state because there is no known beneficiary or if property is to be distributed to a beneficiary whose whereabouts is unknown. A copy of the latest accountfiled with the court must be served on the Controller with the notice [*Prob. Code § 11601(e)*]. *Prob. Code § 1220* requires that the notice be given to the personal representative [*Prob. Code § 1220(a)(2)(A)*] if he or she is not the petitioner [*see* *Prob.*

Code § 1201], and to all persons who have requested special notice in the estate proceeding pursuant to *Prob. Code § 1250* [*Prob. Code § 1220(a)(1)(B)*].

2. Prepare a proof of mailing for each person to whom a copy of the notice will be mailed in at least three copies (original for filing, one unsigned copy for inclusion with the copy of the notice served (*see Code Civ. Proc. § 1013(b)*; *Prob. Code § 1000*), and one office copy).

NOTE:

If a copy of the account or a copy of the petition for final distribution is mailed with the notice of hearing, that fact should be set forth in the proof of mailing [*see* *Code Civ. Proc. § 1013a*; for a form of proof of service by mail under *Code Civ. Proc. § 1013a*, ***see*** Ch. 518, ***Service of Summons and Papers***].

3. At least 15 days before the date set for hearing, mail the notice of hearing, together with a copy of the account and of the petition for final distribution when required, and an unsigned copy of the proof of mailing, to the person to be served or, if the person appeared by attorney, to the person's attorney; if the notice is to be mailed to a person's attorney, the better, if not required, practice is to enclose two copies of each paper, one for the attorney and one for his or her client.

NOTE:

Prob. Code § 1220* requires that notice be given at least 15 days before the time set for hearing [*Prob. Code § 1220(a)(1)*]. In the case of persons requesting special notice, the notice must be mailed to the address set forth in the request [*Prob. Code § 1252(a)*]. In the case of others entitled to notice, the notice must be mailed to the person's business or residence address, if known; if not known, the court may order that the notice be given in a manner reasonably calculated to give actual notice to that person [*Prob. Code §§ 1212, 1215(d), 1220(a)(3)*; *see *Code Civ. Proc. § 413.30*]. If any person entitled to notice is represented by an attorney of record, the notice must also be given to that attorney [*Prob. Code § 1214*].

Notwithstanding the above, if the court determines that the notice in the particular circumstances is insufficient, it may require that further or additional notice, including a longer period of notice, be given [*Prob. Code § 1202*]. Orders shortening the time of notice are authorized by *Prob. Code § 1203*, waiver of notice by *Prob. Code § 1204*, and orders dispensing with notice by *Prob. Code § 1220(c)*.

4. Present the originals of the proofs of mailing at the court clerk's office for filing.

NOTE:

Proof of giving notice of the hearing must be made to the satisfaction of the court at or before the hearing [*Prob. Code § 1260(a)*]. A filed proof of mailing (which is part of the judgment roll [*see* *Prob. Code § 1050(a)(3)*]) made in the manner prescribed in *Code Civ. Proc. § 1013a* is sufficient to establish the fact of mailing [***see*** *Prob. Code § 1261*]. Nevertheless, proof of notice, however given, may be made by evidence presented at the hearing [*Prob. Code § 1265*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessMethodsMailCivil ProceduresPleading & PracticeService of ProcessProofGeneral OverviewEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust

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§ 458D.175 Contest of Account and Opposition to Petition for Distribution

NOTE:
All matters relating to an account may be contested for cause shown [*Prob. Code § 11001*], and any interested person may oppose the petition for distribution [*Prob. Code § 11602*]. The petitioner, or other party affirming, is the plaintiff and the party objecting or responding is the defendant [*Prob. Code § 1044*].

1. If the account or any part of it is contested [*see § 458D.209*], marshal any evidence, including the testimony of witnesses, that may be available to oppose the contest.

NOTE:
If the court determines that the opposition was without reasonable cause and in bad faith, it may award the contestant the contestant's costs and other expenses, and costs of litigation, including attorney's fees, incurred to contest the account. The amount awarded is a charge against the compensation or other interest of the personal representative in the estate, and the personal representative is liable personally and on the bond, if any, for any amount that remains unsatisfied [*Prob. Code § 11003(b)*]. For the award of fees, commissions, and costs if the court determines the contest was without reasonable cause and in bad faith, see *Prob. Code § 11003(a)* and the Comments to § 458D.209.

2. If the petition for final distribution is opposed, obtain any evidence to present that will support the distribution proposed in the petition for distribution.

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-458D California Forms of Pleading and Practice--Annotated § 458D.176

§ 458D.176 Hearing and Order

NOTE:

The court must hear and determine any matter at issue and any response or objection presented, consider the evidence presented, and make appropriate orders [*Prob. Code § 1046*]. The personal representative must be allowed all the necessary expenses in the administration of the estate [*Prob. Code § 11004*]. Moreover, when a petition for final distribution is filed, the court must order final distribution of the estate if it determines that the requirements for distribution are satisfied [*Prob. Code § 11603*], that is, that all debts have been paid or adequately provided for, or that the estate is insolvent, and that the estate is in a condition to be closed [*Prob. Code § 11640*]. The court must hear and determine and resolve in the order all questions arising under *Prob. Code § 21135* (ademption by satisfaction) or *Prob. Code § 6409* (advancements) [*Prob. Code § 11640(b)*]. If debts remain unpaid or not adequately provided for, or if, for other reasons, the estate is not in a condition to be closed, the administration may continue for a reasonable time, subject to *Prob. Code §§ 12200-12206* (specifying the time for closing an estate) [*Prob. Code § 11640(c)*].

The court may continue or postpone any hearing, from time to time, in the interest of justice [*Prob. Code § 1045*]. If a hearing is continued or postponed,no further notice of the continued or postponed hearing is required unless the court so orders [*Prob. Code § 1205*].

1. Have the personal representative attend the hearing, if required by the court to do so, and take the witness stand to identify the account as his or hers and to testify that the contents of the account are true.

NOTE:

An affidavit or verified petition must be received as evidence when offered in an uncontested proceeding [*Prob. Code § 1022*]. Hence, some courts, by local court rule, do not require an appearance when the account is verified and there is nothing unusual about the distribution or the commissions or fees requested. The court may, however, order the personal representative to produce specified documents that support the account [*Prob. Code § 10901*], and may conduct any hearing that may be

necessary to settle the account [*Prob. Code § 11002*]. The court may also appoint one or more referees to examine the account and make a report on it, subject to confirmation by the court [*Prob. Code § 11002(b)*], and the court may make any orders it deems necessary to effectuate the provisions of *Prob. Code § 11002* [*Prob. Code § 11002(c)*].

2. If a debt was paid by the personal representative within the time prescribed by *Prob. Code § 9154* but without a claim having been filed and established in the manner prescribed by statute, be ready to prove that the debt was justly due and paid in good faith, that the amount paid did not exceed the amount reasonably necessary to satisfy the indebtedness, and that the estate is solvent.

NOTE:

If the foregoing facts are proved, the court must, in settling the account, allow the amount paid [*Prob. Code § 11005*; *see also* *Prob. Code § 11422(d)*].

3. If the court makes an order settling the account and ordering final distribution, draft the order, if this has not already been done, and present it to the judge's courtroom clerk for signature by the judge. At the same time, deliver to the clerk any copies of the order that counsel wishes to have conformed [*see* Paragraph 4, *below*].

NOTE:

When an order settling an interim or final account of the personal representative becomes final, it releases the personal representative and the sureties from all claims of the heirs or devisees and of any persons affected thereby based on any act or omission directly authorized, approved, or confirmed in the order [*see* *Prob. Code § 9612*]. The required contents of an order for distribution are set forth in *Prob. Code §§ 11603, 11640(b)* [*see §§ 458D.211 -458D.214*]. An order for distribution, on becoming final, binds and is conclusive as to the rights of all interested persons [*Prob. Code § 11605*].

4. Prepare a notice of the court's order settling the account and ordering final distribution in a sufficient number of copies to give a copy to each person to whom a copy of the notice of hearing was mailed, attach to each a conformed copy of the court's order if desired, prepare a proof of mailing in the same number of copies as the notice, cause the notice (and attached order) with an unsigned copy of the proof of mailing to be mailed to each person affected by the court's order, and file the original of the notice and the proofs of mailing with the court.

NOTE:

***Code Civ. Proc. § 1019.5* provides that when a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order must be given by the prevailing party to all other parties or their attorneys in the manner provided in *Code Civ. Proc. §§ 1010-1020* (*see* Ch. 518, *Service of Summons and Papers*),** unless notice is waived by all parties in open court and is entered in the minutes. Although a motion is defined by *Code Civ. Proc. § 1003* as an application for an order for the purposes of Part Two of the Code of Civil Procedure, governing civil actions, and *Prob. Code § 1000* provides that, except to the extent that the Probate Code provides applicable rules, the rules of practice applicable to civil actions apply to, and constitute the rules of practice in, proceedings under the Probate Code, it is not altogether clear whether *Code Civ. Proc. § 1019.5* applies to a petition to settle an account or for final distribution of an estate. Nevertheless, in the absence of any express authority to the contrary, it would

appear that the safer practice would be to comply with it and to mail a notice of the court's ruling, to which a conformed copy of the order may be attached, to the persons to whom the notice of the hearing were mailed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureJudicial OfficersRefereesAppointmentsEstate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesCompensationEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 39: Probate: Claims Against the Estate thru Probate: Discharge-Chs. 454-459
Chapter 458D PROBATE: ACCOUNTS, FINAL DISTRIBUTION, AND COMPENSATION
PART IV. PROCEDURAL CHECKLIST

39-458D California Forms of Pleading and Practice--Annotated § 458D.177

§ 458D.177 Posthearing Proceedings

1. After the order settling the account, ordering the payment of compensation and fees, and ordering final distribution has been signed and filed, obtain from the court clerk's office certified copies as required.

2. Have the personal representative prepare the necessary receipts for signature by the distributees of the estate [*see Ch. 458E, Probate: Discharge, § 458E.50*].

3. When the order is entered, have the personal representative pay or deliver to the respective distributees the estate property to which each is entitled, and have each distributee sign the prepared receipt.

NOTE:
When an order settling a final account and for final distribution is entered, the personal representative may immediately distribute the property to the persons entitled to distribution, without further notice or proceedings [*Prob. Code § 11641*]. The personal representative must obtain the receipt of the distributee for property in the estate distributed by the personal representative [*Prob. Code § 11751*].

4. Have the personal representative obtain from the distributee of personal property subject to possession by the distributee for life only an inventory of the property, file the inventory with the court, and deliver a copy of it to any distributee of the remainder [*see Prob. Code § 11752*].

5. Have the personal representative make any necessary transfers of securities.

6. Have a certified copy of the order for distribution of real property recorded in the counties in which a certified copy is required to be recorded.

NOTE:
***Prob. Code § 7263* provides that if real property is being distributed, a certified copy of the order must be recorded in the county in which the property is located. *Prob. Code § 11751*, however, provides that in the case of real property, the personal**

representative shall record the court order for distribution or the personal representative's deed or both in the county in which the real property is located, and that recordation of the order or deed is deemed to be a receipt of the distributee for the property.

7. Deposit with the county treasurer any property ordered deposited with the treasurer, as well as a certified copy of the order for distribution, and obtain from the treasurer a receipt for the property [*see Prob. Code §§ 11850-11853*].

8. If personal property other than money is ordered deposited with the Controller pursuant to *Prob. Code § 11850* (*see Prob. Code § 11851(b)*), or if personal property other than money is ordered distributed to the state, have the personal representative deliver the property to the Controller, together with a certified copy of the order for distribution [*Prob. Code § 11902(a)(2), (b)*], and obtain a receipt for it [*Prob. Code § 11751*].

NOTE:
Insofar as practicable, any tangible personal property must be converted to money before distribution to the State of California [*Prob. Code § 11900(b)*].

9. If money is to be distributed to the state, have the personal representative deliver it to the State Treasurer [*Prob. Code § 11902(a)(1)*], and obtain a receipt for it [*Prob. Code § 11751*], and deliver to the Controller a certified copy of the order for distribution [*see Prob. Code § 11902(b)*].

10. If real property is to be distributed to the state, have the personal representative cause a certified copy of the court's order to be recorded in the office of the county recorder of each county in which any of the real property is situated [*Prob. Code § 11902(a)(3)*], and at the same time deliver to the Controller a certified copy of the order for distribution, together with a statement of the date and place or location of each recording and other appropriate recording information [*Prob. Code § 11902(b)*].

NOTE:
Recordation of the order is deemed to be a receipt of the distributee for the property [*Prob. Code § 11751*]. However, insofar as practicable, any real property must be converted to money before distribution to the state [*Prob. Code § 11900(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesCompensationEstate, Gift & Trust LawProbatePersonal RepresentativesDuties & PowersDistributionEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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Chapter 458D PROBATE: ACCOUNTS, FINAL DISTRIBUTION, AND COMPENSATION
PART IV. PROCEDURAL CHECKLIST

39-458D California Forms of Pleading and Practice--Annotated §§ 458D.178-458D.189

[Reserved]

§§ 458D.178[Reserved]

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Volume 39: Probate: Claims Against the Estate thru Probate: Discharge-Chs. 454-459
Chapter 458D PROBATE: ACCOUNTS, FINAL DISTRIBUTION, AND COMPENSATION
PART V. FORMS

39-458D California Forms of Pleading and Practice--Annotated § 458D.190

§ 458D.190 Final Account [Prob. Code §§ 10900, 10951] and Petition for Settlement of Final Account, Final Distribution [Prob. Code § 11640], and for Allowance of Compensation for Ordinary Services [Prob. Code §§ 10800, 10810, 10831(a) (Administration of Estate Proceeding Commenced on or After July 1, 1991); former Prob. Code §§ 901, 910 (Administration of Estate Proceeding Commenced Before July 1, 1991)] and Extraordinary Services [Prob. Code §§ 10801, 10811, 10831(a) (Administration of Estate Proceeding Commenced on or After July 1, 1991); former Prob. Code §§ 902, 910 (Administration of Estate Proceeding Commenced Before July 1, 1991)]

[1] FORM Final Account [Prob. Code §§ 10900, 10951] and Petition for Settlement of Final Account, Final Distribution [Prob. Code § 11640], and for Allowance of Compensation for Ordinary Services [Prob. Code §§ 10800, 10810, 10831(a) (Administration of Estate Proceeding Commenced on or After July 1, 1991); former Prob. Code §§ 901, 910 (Administration of Estate Proceeding Commenced Before July 1, 1991)] and Extraordinary Services [Prob. Code §§ 10801, 10811, 10831(a) (Administration of Estate Proceeding Commenced on or After July 1, 1991); former Prob. Code §§ 902, 910 (Administration of Estate Proceeding Commenced Before July 1, 1991)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	_____ [PETITION FOR SETTLE-
Estate of_____ [*name*],	)	MENT OF *Number, e.g.,* FIRST] AND FINAL AC-
Deceased.	)	COUNT AND FINAL DISTRIBUTION [AND FOR
	)	_____ (ALLOWANCE OF COM-
	)	PENSATION FOR EXTRAORDINARY
		SERVICES *or* ORDER FIXING AND ALLOWING
		COMPENSATION FOR ALL SERVICES
		RENDERED)]

_____

Petitioner, _____ [*name*], respectfully represents:

1. Petitioner _____ [*name*] is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], decedent.

2. Decedent died on _____ [*date*], in _____ [*specify place of death*], and was on the date of death a resident of _____ [*name of county and state or foreign country*].

[*EITHER*]

3. Decedent's will, dated _____, was duly admitted to probate on _____ [*date*].

[*OR*]

3. Decedent died intestate.

[*CONTINUE*]

4. Letters _____ [testamentary *or* of administration *or* of administration with the will annexed *or* of special administration] (hereinafter "letters") were issued to petitioner on _____ [*date*], and are in full force and effect. [The special administrator was granted the same powers, duties, and obligations as a general personal representative.]

[*ADD, if estate is administered under Independent Administration of Estates Act*]

5. The petitioner was granted _____ [full *or* limited] authority under the Independent Administration of Estates Act to administer decedent's estate without court supervision.

[*CONTINUE*]

6. Notice to creditors was published in the manner prescribed by *Probate Code Section 9001*.

[*EITHER, if notice to known creditors was not required*]

7. No notice of administration was required under *Probate Code Sections 9050 through 9052*.

[*OR, if notice was mailed to known creditors*]

7. The notice of administration prescribed by *Probate Code Sections 9050 through 9052* was duly mailed to all known and reasonably ascertainable creditors of the estate, other than those described in *Probate Code Section 9054*, and more than 30 days have elapsed since the date notice was given. _____ [That notice was *or* Those notices were] filed with the court on _____ [*date*].

[*EITHER, if no notice to public entity is required*]

8. Petitioner knows of no public entity to which notice is required under *Probate Code Section 9201(a)*, and no notice is required under *Probate Code Section 9202*, since the decedent received no Medi-Cal benefits during his/her lifetime and was not the surviving spouse of a person who received Medi-Cal benefits.

[*OR, if notice to public entity was given*]

8. On _____ [*date*], notice of the decedent's death and of theseproceedings was given to [*for those estates in which letters were first issued on or after July 1, 2008:* the Franchise Tax Board and] _____ [*name of public entity or officer, e.g.,* the State Director of Health Services in the manner prescribed by _____ (law *or Probate Code Sections 215, 1215,* and *9202*)] because _____ [*specify, e.g.,* petitioner believed that the decedent had received health care from the state *or* petitioner believed that decedent was the surviving spouse of a person who had received health care from the state], _____ [but no claim has been filed and the time in which to file a claim has expired *or* and a claim was filed, the status of which is set forth under Paragraph 10, below].

[*CONTINUE*]

9. The time for filing claims against the estate expired on _____ [*date*].

[*EITHER, if no claims were filed*]

10. No claims against the estate have been filed.

[*OR, if claims were filed in a case not under the Independent Administration of Estates Act*]

10. The claims filed against the estate, including the name of the claimant, the amount of the claim, the date the claim was filed, and the action taken on the claim, are as follows [*set forth each claim filed and its disposition in a separately lettered subparagraph, e.g.*]:

a. BROWN & SMITH MORTUARY, claim for $3,895.00, filed on _____, for funeral services, _____ [allowed *or* approved] and paid on _____ [*date*].

b. PEACEFUL VALLEY CEMETERY, claim for $2,105.00, filed on _____, for grave site and interment of decedent's remains, _____ [allowed *or* approved] and paid _____ [*date*].

c. PEACEFUL VALLEY CEMETERY, claim for $1,020.00, filed on _____, for marker for decedent's grave, _____ [allowed *or* approved] and paid _____ [*date*].

d. PETER JONES, M.D., claim for 3,500.00, filed on _____, for expenses of decedent's last illness, _____ [allowed *or* approved] and paid _____ [*date*].

e. All Right Pharmacy, claim for $499.00, filed on _____, for prescriptions filled for decedent,

_____ [allowed *or* approved] and paid _____ [*date*].

f. RICHARD C. BUTLER, wage claim for $1,500.00, filed on _____, for services rendered as domestic servant during decedent's life, rejected on the grounds the claim was not substantiated and, if it was valid, was barred by the statute of limitations. Written notice of rejection was served on _____ [*date*], no action on the claim has been brought against the estate, and the time for bringing an action has expired.

[*Set forth in subsequently lettered subparagraphs similar information for each claim filed.*]

[OR, if claims were filed in a case under the Independent Administration of Estates Act]

10. The claims presented, including the claimant's name, the date of filing of the claim, the nature of the claim, the amount claimed, the disposition of the claim, and if the claim was rejected, the date of service of the rejection and whether or not a lawsuit was filed, are as follows:

_____ [set forth each claim filed and the stated items of information about each, in a separately lettered subparagraph]

(a) _____.

(b) _____.

(c) _____.

[*CONTINUE*]

[*If all creditor claims have been satisfied*]

11. There are no creditor claims that have not been paid, satisfied, or adequately provided for.

[*OR, for each claim that is not paid, satisfied, or adequately provided for, and for which distributee will post a bond*]

11. The claim of _____ [*name*] has not been paid or satisfied, because it is a _____ [contingent *or* disputed] debt. This claim is _____ [not due *or* became due on _____ (*date*) *or* will become due on _____ (*date*)]. _____ [No action has been brought on the claim *or* Action was filed on the claim on _____ (*date*) in _____ (*name of court and action number*)]. The claim is _____ [unsecured *or* secured by _____ (*describe mortgage, deed of trust, lien, or other encumbrance*) on _____ (*describe real or personal property in estate*), which has a fair market value of $_____]. Before distribution, _____ [*name of distributee*] will post a bond pursuant to *Probate Code Section 11466* conditioned on payment of the claim should it become _____ [absolute *or* established]. The amount of the claim is $_____ and its present value is $_____. The fair market value of the property to be distributed, less the amount of liens and encumbrances on the property is $_____.

[*OR, for each claim that is not paid, satisfied, or adequately provided for, and for which the parties have agreed on a method for satisfying the claim*]

11. The claim of _____ [*name*] has not been paid or satisfied, becauseit is a _____ [contingent *or* disputed] debt. This claim is _____ [not due *or* became due on _____ (*date*) *or* will become due on _____ (*date*)]. _____ [No action has been brought on the claim *or* Action was filed on the claim on _____ (*date*) in _____ (*name of court and action number*).] The claim is _____ [unsecured *or* secured by _____ (*describe mortgage, deed of trust, lien, or other encumbrance*) on _____ (*describe real or personal property in estate*), which has a fair market value of $_____]. All persons interested in the estate have agreed on a method to provide for payment of the claim. The terms of the agreement are _____ [as follows: _____ (*describe terms*) *or* set forth in Exhibit _____ attached to this petition and made a part hereof]. This agreement reasonably protects all interested persons and will not extend administration of the estate unreasonably. [*Add, if appropriate:* Petitioner is informed and believes and thereon represents that this agreement will, in fact, accelerate administration of the estate, because _____ (*explain facts*)].

[*OR, for each claim that is not paid, satisfied, or adequately provided for, and for which a court order requiring deposit of funds as security for the claim is sought*]

11. The claim of _____ [*name*] has not been paid or satisfied, because it is a _____ [contingent *or* disputed] debt. This claim is _____ [not due *or* became due on _____ (*date*) *or* will become due on _____ (*date*)]. _____ [No action has been brought on the claim *or* Action was filed on the claim on _____ (*date*) in _____ (*name of court and action number*).] The claim is _____ [unsecured *or* secured by _____ (*describe mortgage, deed of trust, lien, or other encumbrance) on* _____ *(describe real or personal property in estate*), which has a fair market value of $_____]. Petitioner hereby petitions for an order that $_____ in funds belonging to the estate be deposited in _____ [*name and address of financial institution in California*]. Petitioner further petitions that _____ [*describe assets, e.g.,* the funds] be subject to withdrawal only on authorization of this court, either to be paid to _____ [*name of creditor*] when this claim becomes _____ [absolute *or* established *or* due], or to be distributed _____ [*specify distribution pursuant to Prob. Code § 11642, e.g., as follows:* _____ (*describe distribution*)] if the claim does not become _____ [absolute *or* established *or* due].

[*OR, for each claim that is not paid, satisfied, or adequately provided for, and for which a court order appointing a trustee to invest estate funds for the creditor's benefit is sought*]

11. The claim of _____ [*name*] has not been paid or satisfied, because it is a _____ [contingent *or* disputed] debt. This claim is _____ [not due *or* became due on _____ (*date*) *or* will become due on _____ (*date*)]. _____ [No action has been brought on the claim *or* Action was filed on the claim on _____ (*date*) in _____ (*name of court and action number*).] The claim is _____ [unsecured *or* secured by _____ (*describe mortgage, deed of trust, lien, or other encumbrance*) on _____ (*describe real or personal property in estate*), which has a fair market value of $_____]. Petitioner hereby petitions the court for an order appointing _____ [*name*] as trustee to receive payment from funds in the estate in the amount of $_____, to invest that amount and, from that investment, to pay _____ [*name of creditor*] the full amount of this claim. In paying this amount to the trustee, petitioner requests the court to compute the present value of

the claim, which is $_____ giving consideration to a reasonable return on the amount to be invested. Petitioner further petitions the court to order the trustee to invest the payment in investments that would be proper for a personal representative. Petitioner further petitions the court for an order that the trustee pay the claim _____ [*specify, e.g.*, in monthly installments of $_____ each, beginning on _____ (*date*) and continuing on the _____ (*specify, e.g.*, first) day of each and every month thereafter until the claim is paid in full] and that, when the claim is fully paid, any excess in the trustee's possession be distributed _____ [*specify distribution pursuant to Prob. Code § 11642, e.g., as follows:* _____ (*describe distribution*)].

[*CONTINUE*]

12. During the period embraced in the account, there were no sales, purchases, changes in the form of assets, or other transactions that are not otherwise readily understandable from the account and schedules.

[*OR*]

12. During the period embraced in the account, the following securities were sold or redeemed: _____ [*specify*].

[OR, if claim is under Independent Administration of Estates Act]

12. Petitioner has taken certain actions without prior court approval, under the Independent Administration of Estates Act, for which notice of the proposed action was required. These actions are as follows: [describe each action not yet listed in a prior accounting, report, or petition for preliminary distribution that was approved by the court; list each action separately, including the nature of the action, when the action was taken, a statement of when and to whom notice was given, whether notice was waived and if so, by whom, and whether any objections were received].

[*CONTINUE*]

[*INCLUDE, If appropriate*]

13. During the period embraced in the account, the following securities werepurchased or subscribed for:_____ [*specify, setting forth authority under which seller acted*].

[*INCLUDE, If appropriate*]

14. During the period embraced in the account, the following securities were received as a result of stock dividends or stock splits: _____ [*specify*].

[*INCLUDE, If appropriate*]

15. During the period embraced in the account, the following other assets of the estate were sold: _____ [*specify*].

[*INCLUDE, if appropriate, when including any of optional Paragraphs 12-15*]

16. _____ [Petitioner *or* The decedent's personal representative] acted as set forth in Paragraphs 12-15, without court supervision after having served, when necessary, notice of proposed action on or obtained a written waiver of notice of proposed action from all persons entitled.

[*INCLUDE, if appropriate*]

17. Apart from the actions set forth in Paragraphs 12-15, during the period embraced by the account, _____ [petitioner *or* the decedent's personal representative] took the following actions without court approval after serving notice of proposed action on or obtaining a written waiver from all persons entitled: _____ [*specify*].

[*CONTINUE*]

18. During the period covered by this account, the personal representative has kept all cash in his/her possession invested in _____ [interest-bearing accounts *or* investments as authorized by law *or* investments authorized by the will *or* interest bearing accounts and other investments authorized by law], except such amounts of cash as were reasonably necessary for the orderly administration of this estate.

19. During the account period, petitioner has not hired any person who has a family or affiliate relationship with the petitioner.

[*OR*]

19. During the account period, petitioner hired _____ [*name*], who is _____ [*describe family or affiliate relationship to petitioner, e.g.,* the son of the petitioner *or* the Black Corporation, a California corporation of which petitioner is currently the president and chief executive officer] _____ [*describe capacity in which hired or duties performed, e.g.,* to act as a bookkeeper for the estate *or* to act as a real estate broker for the purpose of selling real estate belonging to the estate].

[*CONTINUE*]

20. [On or about _____ (*date*), an inventory and appraisal was filed showing the value of this estate to be $_____.] This inventory lists all the assets of the decedent's estate that have come into petitioner's possession [or under his/her control]. A complete, true, and correct account of decedent's estate for the period from _____ [*date*] to _____ [*date*], inclusive, is filed herewith. [*Add, if appropriate:* Petitioner has heretofore filed, and the court has settled and allowed, a _____ (*number, e.g.,* First) Account for the period from _____ (*date*), to _____ (*date*), inclusive.]

[*EITHER*]

21. No personal property taxes are due or payable by the estate.

[*OR*]

21. All personal property taxes due and payable by the estate have been paid.

[*EITHER*]

22. No real property taxes are due or payable by the estate.

[*OR*]

22. All real property taxes due and payable by the estate have been paid.

[*EITHER*]

23. No _____ [California *or* federal *or* California or federal] income tax(es) is/are due or payable.

[*OR*]

23. All _____ [California *and/or* federal] income tax(es) due and payable have been paid.

[*ADD. if income tax applies, EITHER, if certificate of Franchise Tax Board is not required*]

24. There is/are _____ [no nonresident devisee(s) of the estate *or* (a) nonresident devisee(s), but the value of the state is less than $400,000 *or* (a) nonresident devisee(s), but the total value of the assets distributable to the nonresident devisee(s) is less than $100,000].

[*OR, if certificate of Franchise Tax Board is required*]

24. The fair market value of the assets in the estate at the time of decedent's death exceeded $1,000,000, and the value of the assets distributable to one or more nonresident beneficiaries exceeded $250,000. Therefore, the certificate of the Franchise Tax Board prescribed by *Section 19513 of the Revenue andTaxation Code* has been filed with the court.

[*EITHER*]

25. The estate is of insufficient value to require the filing of a federal or California estate tax return and therefore, no federal or California estate tax return has been or will be filed for the estate.

[*OR*]

25. A federal estate tax return has been filed for the estate showing a total tax liability of $_____, which has been

paid. The return _____ [has *or* has not] been audited.

[*OR*]

25. A federal estate tax return has been filed for the estate showing a total tax liability of $_____. The tax has not been paid, but evidence of a written agreement for the payment of the tax, executed between the Internal Revenue Service and _____ [the personal representative *or* certain persons interested in the estate, to wit: _____ (*names*), who are _____ (*specify basis for interest, e.g.,* heirs)], has been filed with the court.

[*ADD, if California estate tax applies*]

26. A California estate tax return has been filed for the estate showing a total tax liability of $_____, which has been paid.

[*EITHER*]

27. Petitioner has performed all the duties required of him/her as _____ [*specify, e.g.,* the Executor of decedent's will]. The estate is insolvent and is in condition to be closed.

[*OR*]

27. Petitioner has performed all the duties required of him/her as _____ [*specify, e.g.,* the Executor of decedent's will]; all costs of administration, except _____ [*specify unpaid costs, e.g.,* petitioner's compensation, and the compensation of his/her attorney, for services rendered to the estate], and all debts have been paid [or adequately provided for], and the estate is in condition to be closed.

[*CONTINUE*]

28. _____ [*Specify character of estate property, e.g.,* (Except as otherwise herein expressly stated,) (T)he whole of the estate is decedent's separate property].

29. The name, age, relationship to the decedent, and address of each _____ [heir *or* devisee (who has not already received his or her devise in full pursuant to court order)] is as follows:

Name and Relationship	Age	Address
_____	_____	_____ _____
_____	_____	_____ _____
_____	_____	_____ _____

[*ADD, if federal estate tax has been paid*]

30. The federal estate tax paid should be prorated as follows among the following persons:

Beneficiary	Proration

[*List persons interested in the estate or benefited by the payment of the estate tax, who should bear prorated shares of the tax pursuant to former Prob. Code § 970 (if decedent died before January 1, 1987), or Prob. Code § 20110* (if decedent died on or after January 1, 1987), and calculate the proration that each should bear. For a discussion of the proration of estate taxes, see Ch. 452, *Probate: Proration of Estate and Generation-Skipping Transfer Taxes* .]

[*CONTINUE*]

[*INCLUDE if decedent's will contains a condition precedent to a disposition*]

[31. The will expresses the condition precedent that disposition of _____ (*specify property or interest affected*) to _____ (*name*) shall not take effect unless and until _____ (*state condition*); this expression appears _____ (*specify location in will, e.g.,* on page 2, lines 20 through 21, and on page 3, lines 1 and 2). As far as is known to petitioner, that condition _____ (has *or* has not) been fulfilled in that _____ (*state facts known to petitioner relevant to whether the condition has or has not been fulfilled*).]

[*INCLUDE if a testamentary disposition is subject to a condition subsequent that has been fulfilled before distribution*]

32. Decedent's will gives _____ [*specify property or interest given*] to _____ [*name*] subject to a condition subsequent expressed in the following language, to wit: _____ [*quote language*]; this language appears _____ [*specify location in will, e.g.,* on page 2, lines 3 through 10]. That condition has been fulfilled during the period of administration in that_____[*state facts showing fulfillment of condition*].

[*INCLUDE if income, including net income from property sold during the period, has been received during the period of administration from real or personal property not otherwise devised*]

33. During the period of administration, petitioner received net income in the amount of $_____ from the following described _____ [real *or* personal *or* real and personal] property not otherwise devised, _____ [*add, if property yielding income was sold during period,* including net income from such of the property as was sold during the period,] which property does not include a general pecuniary devise in trust: _____ [*describe property, indicating which items, if any, were sold during administration*]. The following persons are entitled to receive the following shares of the _____ [residuary *or* intestate] property and should receive prorated shares of such income:

Distributee	Distributive Share
_____	_____
_____	_____

_____ _____

[*INCLUDE if decedent's will gives property to a minor subject to the California Uniform Transfers to Minors Act (Prob. Code § 3900 et seq.)*]

34. In _____ [*location in will, e.g.,* Paragraph IV, on page 2, lines 6 through 10,] decedent's will provides that _____ [*specify property*] is given to _____ [*name*] as custodian for _____ (*name of minor*) under the California Uniform Transfers to Minors Act, in the following words, to wit: _____ [*quote provision*].

[*INCLUDE if a beneficiary has filed a written disclaimer of his/her interest in the estate, in compliance with Prob. Code §§ 260-295*]

35. On _____ [*date*][, and within nine (9) months after the death of decedent], _____ [*name*] filed a written disclaimer of any interest to which _____ [he *or* she *or name of beneficiary*] would otherwise have succeeded as a beneficiary. [*If disclaimer made on minor's behalf by guardian of minor's estate or guardian ad litem, or made by a personal representative on behalf of a decedent, add*: The disclaimer was filed pursuant to a court order obtained under *Probate Code Section 277(c)-(f)*.] Had the disclaimer not been filed, _____ [*name*] would have been entitled to take _____ [*specify interest or property*]. Decedent has _____ [*either* specified _____ (*indicate manner of specification, e.g.,* in his/her will) that in the event of a disclaimer by _____ (*name*), his/her interest shall be distributed *or* not specified how the interest of _____ (*name*) should be distributed in the event of his/her disclaimer, and the interest, which is a _____ (present interest, should be distributed as if he/she had predeceased decedent *or* future interest, should be distributed as if he/she had died before the event determining that his/her interest had become finally ascertained and his/her interest indefeasibly vested], as follows:

Distributee	Distributive Share
_____	_____
_____	_____
_____	_____

[*INCLUDE if a preliminary distribution has been made to any beneficiary of all or a portion of his or her share of the estate property*]

36. Pursuant to the order of this court, a preliminary distribution of property has been made to beneficiaries as set forth in Paragraph 12, Schedule G, *above.*

[*EITHER, if decedent died testate*]

37. By the terms of decedent's will, the [remaining] property in the estate should be distributed to the following persons:

[*List the names of the persons who are to receive property, the capacity, if appropriate, in which he or she is to receive the property, the property that each is to receive, the paragraph or other part of the will under which the distribution is*

to be made, and the inventory item number of the property unless it is cash. The devises may be listed as set forth in Prob. Code § 21117 (cf. Prob. Code § 21402 (order of abatement)), that is, beginning with specific devises, and continuing in order with general devises, if any, demonstrative devises, general pecuniary devises, annuities, and residuary devises, or they may be grouped under the devisee's name, when a devisee is to receive more than one item or group of items of the estate property; for example:]

a. [*Specific devise of real property (see Prob. Code § 21117(a)):*] To _____ [*name*], absolutely, pursuant to _____ [*e.g.,* Paragraph VII] of decedent's will, Inventory Item No. _____, _____ [*e.g.,* decedent's farm commonly known as Blackacre, located in Sonoma County, California].

b. [*Specific devise of personal property (see Prob. Code § 21117(a)):*] To _____ [*name*][, as custodian for _____ [*name*] under the California Uniform Transfers to Minors Act], pursuant to _____ [*e.g.,* Paragraph VIII, lines three through six, on page two] of decedent's will, InventoryItem No. _____, _____ [*e.g.,* decedent's 57 shares of Class A preferred stock of the First National Bank and Trust Company of Citytown, California].

c. [*Demonstrative devise (see Prob. Code § 21117(c)):*] To _____ [*name*][, as trustee for _____ (*name*)], pursuant to _____ [*e.g.,* Subparagraphs A through F of Paragraph XI] of decedent's will, the sum of $_____, to be taken from the proceeds of sale of Inventory Item No. _____, to wit: _____ [*e.g.,* 100 shares of the common stock of the Hupmobile Automobile Corporation].

d. [*General pecuniary devise (see Prob. Code §§ 21117(d), 21118):*] To _____ [*name*], pursuant to _____ [*e.g.,* Paragraph X] of decedent's will, the sum of $_____.

e. [*Annuity (see Prob. Code § 21117(e)):*] To _____ [*name*], pursuant to _____ [*e.g.,* Paragraph XI] of decedent's will, an annuity of $_____ [*e.g.,* per year, payable every three months, for life].

f. [*Residuary devise (see Prob. Code § 21117(f)):*] To _____ [*name*], pursuant to _____ [*e.g.,* Paragraph XX] of decedent's will, all the remaining property in the estate not disposed of by the will.

[*OR, if decedent died intestate*]

37. Under the law of intestacy, the property in decedent's estate should be distributed to the following persons:

[*List the persons who are to receive property and the property or interest that each is to receive, beginning with the spouse, if any, and continuing with the heirs in order from nearest to farthest degree of kinship (see Prob. Code § 6400 et seq.), and the inventory item number of the property unless it is cash, as in the following examples.*]

a. To _____ [*name*], decedent's surviving spouse, decedent's half of all community property, plus one _____ [half *or* third] of decedent's separate property, as follows:

(i) Inventory Item No. _____, _____ [*e.g.,* real property commonly known as 123 Main Street, Citytown, California (community property)].

(ii) Inventory Item No. _____, _____ [*e.g.,* the sum of $_____, being _____ [one half *or* one third] of the balance at the date of decedent's death in Savings Account No. 12345 at the First National Bank

and Trust Company of Citytown, California (separate property)].

b. To _____ [*name*], decedent's _____ [*e.g.*, only surviving son], _____ [one half *or* one third] of decedent's separate property, namely, _____ [one half *or* one third] of the balance in Savings Account No. 12345 at the First National Bank and Trust Company of Citytown, California, Inventory Item No. _____.

[c. To _____ (*name*), the son of decedent's deceased daughter, one third of decedent's separate property, namely, one third of the balance in Savings Account No. 12345 at the First National Bank and Trust Company of Citytown, California, Inventory Item No. _____.]

[*CONTINUE*]

38. Petitioner is entitled to a total statutory compensation of $_____. [*If court has made a partial allowance, add:* As set out in Schedule _____ to the _____ (*specify, e.g.,* first and final) account of decedent's estate, filed herewith, petitioner has pursuant to court order received a partial allowance on his/her compensation in the sum of $_____, leaving a balance due of $_____.] _____ [*If petitioner has not received any other compensation from the assets subject to the account:* Petitioner has not received any other compensation from the assets subject to the account *or, if other compensation has been paid:* As set out in Schedule _____ to the _____ (*specify, e.g.,* first and final) account of decedent's estate, filed herewith, petitioner has received a payment _____ (of *or* on account of his/her) compensation in the sum of $_____, without prior court order, leaving a balance due of $_____].

39. Petitioner's attorney, _____ [*name*], is entitled to a total statutory compensation of $_____. [*If court has made a partial allowance, add:* As set out in Schedule _____ to the _____ (*specify, e.g.,* first and final) account of decedent's estate, filed herewith, petitioner's attorney has pursuant to court order received a partial allowance on his/ her compensation in the sum of $_____, leaving a balance due of $_____.] _____ [*If no other compensation has been paid to petitioner's attorney from the assets subject to the account:* Petitioner's attorney has not received any other compensation from the assets subject to the account *or, if other compensation has been paid:* As set out in Schedule _____ to the _____ (*specify, e.g.,* first and final) account of decedent's estate, filed herewith, petitioner's attorney has received a payment _____ (of *or* on account of his/her) compensation in the sum of $_____, without prior court order, leaving a balance due of $_____].

[*Add, if compensation for extraordinary services is sought by petitioner*]

40. Petitioner has, for the benefit of the estate, performed the extraordinary services set out in Exhibit B, which is attached hereto and made a part hereof, for which he/she is entitled to a reasonable compensation in addition to his/her statutory compensation. A reasonable compensation for these services is $_____.]

[*Add, if compensation for extraordinary services is sought by petitioner's attorney*]

41. _____ [*Name*], attorney for petitioner, has, for the benefit of the estate, performed the extraordinary services set out in Exhibit B, which is attached hereto and made a part hereof, for which he/she is entitled to a reasonable compensation in addition to his/her statutory compensation. A reasonable compensation for these services is $_____. [The extraordinary services for which compensation should be allowed include services rendered by _____ (*name*), a paralegal who _____ (*specify qualifications and experience*).

The paralegal's services, performed under the petitioner's direction and supervision, were as follows: _____ (*specify the hours spent and services performed by the paralegal)*.]

[*EITHER*]

42. Petitioner requests authorization to withhold $_____ for closing expenses and as a reserve for any liabilities that may hereafter be determined to be due from the decedent or the estate, including any estate or income tax deficiencies, penalties, and interest, and to pay any additional attorneys' fees relative to communication with beneficiaries, work with regard to estate tax or fiduciary income tax, and preparation of income tax returns. Any unexpended portion of the reserve will be distributed to _____ [*specify, e.g.,* _____ (*name*), the residuary beneficiary under the decedent's will,] without further order of this court.

[*OR*]

42. No reserve is needed to cover closing costs or future unanticipated expenses, such as possible costs associated with any estate or income tax deficiencies, penalties, interest, tax audits, or disputes of the estate, or to pay any additional attorneys' fees relative to communication with beneficiaries or work with regard to estate tax or fiduciary income tax, and preparation of income tax returns.

WHEREFORE, petitioner prays for an order that:

1. The administration of this estate be closed.

2. Petitioner's _____ [*number, e.g.,* First] and final account as filed herewith be settled, allowed, and approved.

3. The property in the estate be distributed as set forth herein.

[*ADD if distribution is conditioned on posting of bond to provide for contingent or disputed debt EITHER*]

4. The bond of _____ [*name*] as distributee to secure payment of the claim of _____ [*name of creditor*] be set in the amount of $_____.

[*OR*]

4. The agreements of _____ [*names of all distributees*], set forth in Exhibit "_____" to this petition, assuming liability with regard to the _____ [contingent *or* disputed] debt of _____ [*name of creditor*] be approved.

[*OR*]

4. The agreement between all persons interested in the estate, set forth in Exhibit "_____" to this petition, regarding a method to provide for the debt to _____ [*name of creditor*], which is _____ [contingent *or* disputed *or* not due] be approved.

[*OR*]

4. Funds belonging to the estate in the amount of $_____ be deposited in _____ [*name and address of financial institution in California*], subject to withdrawal only on authorization of this court, either to be paid to _____ [*name of creditor*] when his/her claim becomes _____ [absolute *or* established *or* due], or to be distributed _____ [*specify distribution pursuant to Probate Code Section 11642, e.g.,* as follows: _____ (*describe distribution*)] if the claim does not become _____ [absolute *or* established *or* due].

[*OR*]

4. _____ [*Name*] be appointed as trustee to receive payment from funds in the estate in the amount of $_____, to invest in _____ [*specify, e.g.,* investments that would be proper for a personal representative], and from such investments, to pay _____ [*name of creditor*] the full amount of his/her claim _____ [*specify payment manner of payment, e.g.,* monthly until _____ (*date*), when the claim shall be deemed paid in full], and that, on completion of payment, any excess in the trustee's possession be distributed _____ [*specify distribution pursuant to Probate Code Section 11642, e.g.,* as follows: _____ (*describe distribution*)].

[*CONTINUE*]

[5. *If petitioner has made an agreement with the Internal Revenue Service for payment of the estate tax:* The agreement between the Internal Revenue Service and petitioner, referred to in Paragraph 24, for payment of the federal estate tax be approved and ratified, and that petitioner be authorized to withhold from each distributee a prorated portion of his or her distributive share, for the payment of the tax.]

[6. *If an estate tax has been paid:* The estate tax paid by petitioner be prorated among the persons named in Paragraph 29 of this petition.]

7. All acts, transactions, sales, and investments of the personal representative be ratified, approved, and confirmed.

[8. Petitioner be allowed the sum of $_____ out of the estate as (the unpaid balance due on) the statutory compensation to which petitioner is entitled.]

[9. Petitioner be allowed the additional sum of $_____ as reasonable compensation for extraordinary services rendered for the benefit of the estate.]

[10. _____ (*Name*), attorney for petitioner, be allowed the sum of $_____ out of the estate as (the unpaid balance due on) the statutory compensation to which he/she is entitled.]

[11. _____ (*Name*), attorney for petitioner, be allowed the additional sum of $_____ as reasonable compensation for extraordinary services rendered for the benefit of the estate.]

[12. Petitioner be authorized to withhold $_____ for closing expenses and as a reserve for liabilities of the estate.]

13. For such other and further orders as the court may deem proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

EXHIBIT A

STATEMENT OF COMPENSATION

Commission or Fee Base

Inventory and Appraisal	$_____
Receipts, excluding Principal.....	$_____
Gains On Sales.....	$_____
Losses on Sales.....	$_____
Total Commission or Fee Base.....	$_____

Commission or Fee Computation

4% on first $100,000.00	($_____)	$_____
3% on next $100,000.00.....	($_____)	$_____
2% on next $800,000.00.....	($_____)	$_____
1% on next $9,000,000.00.....	($_____)	$_____
1/2% on next $15,000,000.00	($_____)	$_____
Amount requested from the court for estates above $25,000,000	($_____)	$_____

Total Commission or Fee

EXHIBIT B
SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

	)	
	)	NO. _____
Estate of_____ [*name*],	)	_____ [DECLARATION OF
Deceased.	)	_____ (*NAME*) IN SUPPORT OF
	)	REQUEST FOR COMPENSATION
	)	FOR _____
	)	(PARALEGAL SERVICES
	)	*or* EXTRAORDINARY
		SERVICES)]

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California *or other statement as appropriate*].

[*Set forth in detail the services rendered by the personal representative, attorney or paralegal, including the amount of time spent (see Prob. Code §§ 10801, 10810, 10850(a); former Prob. Code §§ 900(a), 902; see also Prob. Code § 10850(b)).*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

	)	
Estate of_____ [*name*],	)	NO. _____
Deceased.	)	_____ [*number, e.g.,* FIRST] AND
	)	FINAL ACCOUNT OF PERSONAL REPRESENT-
	)	ATIVE OF THE ESTATE OF
		_____

[*name of decedent*]

_____

SUMMARY OF ACCOUNT
(From _____ [*date*], to _____ [*date*])

CHARGES

Property on hand at beginning of account period.....	$_____
Additional property received (or supplemental inventor-ies).....	$_____
Income receipts during account period (Schedule A)	$_____
Principal receipts during account period (Schedule B).....	$_____
Net income from trade or business (Schedule E).....	$_____
Gains on sales or other dispositions (Schedule F).....	$_____
TOTAL CHARGES	$_____

CREDITS

Income disbursements during account period (Schedule C).....	$_____
Principal disbursements during account period (Schedule D).....	$_____
Net loss from trade or business (Schedule E).....	$_____
Losses on sales or other dispositions (Schedule G).....	$_____
Distributions to beneficiaries (Schedule H).....	$_____
Property on hand at end of account period (carry value) (Schedule I).....	$_____
TOTAL CREDITS	$_____

VERIFICATION

I, _____ [*name*], am the personal representative in the above-entitled proceeding. I have read the foregoing account and the schedules attached hereto, and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

SCHEDULE A: INCOME RECEIPTS DURINGACCOUNT PERIOD[Unless otherwise required by

local court rule or practice, income receipts may be listed by category, rather than in chronological order, e.g.:]

	Amount	Total
Dividends		
Widget Company, 100 shares, common Period 1/1/95-12/1/95.....	$ 75.00	
Gadget Co., 100 shares, common		
Period 1/1/95-9/1/95.....	25.00	$100.00
Period 1/1/95-12/31/95.....	$ 94.91	
City Savings, Money Market		
Account Period 6/19/95-5/5/96	443.47	
$50,000 in U.S. Treasury Notes,		
due June 1, 1996.....	4,110.00	$4,648.38
TOTAL INCOME RECEIPTS.....		$4,748.38

SCHEDULE B: PRINCIPAL RECEIPTS DURINGACCOUNT PERIOD[Unless a chronological list is required by local court rule or practice, list and total cash and noncash assets separately e.g.:]

	Amount	Total
Cash		
National Insurance Co., payment on claim under Policy		
No. 10092.....	$20,000.00	$20,000.00
Other		
Antique sideboard, purchased by decedent prior to death, pursuant to contract with Watson & Co., Ltd. dated 9/27/96		
Value.....	1,200.00	$1,200.00
TOTAL PRINCIPAL RECEIPTS.....		$21,200.00

SCHEDULE C: INCOME DISBURSEMENTS DURING ACCOUNT PERIOD[Unless otherwise required by local court rule, income disbursements, like receipts, may be listed according to category, rather than in chronological order, e.g.:]

Expenses Related to Income Producing Property		Totals
1/25/96 Jobee Roofing Company --repair roof of rental unit, 3158 Ritchie Lane, #2 Nicetown, CA.....	$ 525.00	$ 525.00
Income Taxes		
4/15/96 I.R.S.		

--Fiduciary Income Tax	$ 3,000.00	$ 3,000.00
TOTAL INCOME DISBURSEMENTS.....		$ 3,525.00

SCHEDULE D: PRINCIPAL DISBURSEMENTS DURING ACCOUNT PERIOD[Unless otherwise required by local court rule, principal disbursements, like receipts, may be listed according to category, rather than in chronological order, e.g.:]

Debts of Decedent		Totals
2/02/96 Peter Jones, M.D.		
--last illness expenses.....	$ 3,500.00	
2/02/96 All Right Pharmacy --prescriptions.....	499.00	$ 3,999.00
Funeral Expenses		
1/19/96 Brown & Smith Funeral Home --funeral expenses.....	$ 3,895.00	
1/19/96 Peaceful Valley Cemetery --grave site and interment.....	2,105.00	
1/19/96 Peaceful Valley Cemetery --grave marker.....	1,020.00	$ 7,020.00
Administration Expenses		
12/5/95 Clerk of Court --filing fees.....	$ 97.00	
1/14/96 Worldwide Bonding --premium on executor's bond.....	300.00	
1/15/96 Nicetown City Tribune --publication of notice.....	250.00	
2/15/96 Jack Jones, Jeweler --appraisal of jewelry.....	200.00	
2/28/96 Jack L. Green, Probate Referee --appraisal of balance of estate property.....	400.00	$ 1,247.00
Federal and State Taxes		
8/20/96 I.R.S.		
--federal estate tax.....	$10,249.00	$ 10,249.00
Compensation		
3/15/96 Partial Allowance on Personal Representative's Compensation per Court Order.....	$ 500.00	
3/15/96 Partial Allowance on Attorney's Compensation per Court Order		
--to _____ [*name of attorney*	$ 500.00	$ 1,000.00

].....

TOTAL PRINCIPAL DISBURSE-MENTS..... $ 23,515.00

SCHEDULE E: NET INCOME OR LOSS FROM TRADE OR BUSINESS

Income Received During Account Period from

_____

[*name of business*]

_____ [*describe item*]..... $_____

_____ [*describe item*]..... $_____

_____ [*describe item*]..... $_____

_____ [*describe item*]..... $_____

Expenses During Account Period from

_____

[*name of business*]

_____ [*describe item*]..... $_____

_____ [*describe item*]..... $_____

_____ [*describe item*]..... $_____

_____ [*describe item*]..... $_____

NET INCOME (OR LOSS)..... $_____

SCHEDULE F: GAINS ON SALES OR OTHER DISPOSITIONS

Inventory Item No.

_____,

_____ [*describe*]

Appraised at ..... $_____

Sold for ..... $_____

Gain ..... $_____

[*Describe other items as necessary*]

TOTAL ..... $_____

SCHEDULE G: LOSSES ON SALES OR OTHER DISPOSITIONS

Inventory Item No.

_____,

_____ [*describe*]

Appraised at ..... $_____

Sold for ..... $_____

Loss ..... $_____

[*Describe other items as necessary*]

TOTAL ..... $_____

SCHEDULE H: DISTRIBUTIONS TO BENEFICIARIES[List property included in the inventory or the schedules of thelast account that is no longer in the personal representative'spossession and is not otherwise accounted for, e.g.:]

To decedent's widow, Joanne Appleby, pursuant to court order in partial satisfaction of the devise under Paragraph 11 of decedent's will:

4/14/96	Cash	$ 50,000.00	$ 50,000.00

To decedent's sister, Mary Appleby, pursuant to court order in satisfaction of the devise under Paragraph 14 of decedent's will:

4/14/96	(Inventory item no. _____) 201 piece sterling silver flatware set.....	$ 12,500.00	
4/14/96	(Inventory item no. _____) 18" ruby/sapphire necklace.....	29,000.00	
4/14/96	(Inventory item no. _____) Family photo album.....	0.00	
4/14/96	Cash	10,000.00	$ 51,500.00

To decedent's brother, Tony Appleby, pursuant to court order and in satisfaction of the devise under Paragraph 15 of decedent's will:

4/15/96	(Inventory item no. _____) 1-carat white diamond ring set in platinum	$ 12,500.00	
4/15/96	Cash	15,000.00	$ 27,500.00

SCHEDULE I: PROPERTY ON HAND AT END OF ACCOUNT PERIOD(CARRY VALUE)

[*List all property on hand at end of account period, setting forth value at which property is carried on books:*]

Cash on hand.....	$_____
Inventory Item No. _____, 40 acres of unimproved real property situated in San Cristobal, California	$_____
Inventory Item No. _____, U.S. stamp collection	$_____

[*List additional items as necessary*]

TOTAL

SCHEDULE J: PROPERTY ON HAND AT END OF ACCOUNT PERIOD(ESTIMATED MARKET VALUE)

[*List all property on hand at end of account period, setting forth estimated market value of each item*]

Cash on hand..... $_____

Inventory Item No. _____, $_____
40 acres of unimproved real property
situated in San Cristobal, California .....

Inventory Item No. _____, $_____
U.S. stamp collection .....

[*List additional items as necessary*]

TOTAL

SCHEDULE K: PROPERTY ON HAND AT BEGINNING OF ACCOUNT PERIOD(ESTIMATED MARKET VALUE)

[*In this account, which is required only if the account is not an initial account, list all property on hand at beginning of account period, setting forth estimated market value of each item:*]

Cash on hand ..... $_____

Inventory Item No. _____, $_____
House and lot at 4111 Navidad Lane,
San Cristobal, California .....

Inventory Item No. _____, $_____
Original oil painting by Jasper Johns .....

[*List additional items as necessary*]

TOTAL

SCHEDULE L: PURCHASES OR OTHER CHANGES IN FORM OF ASSETS DURING ACCOUNT PERIOD

[*Set forth any purchases or other changes in forms of assets, such as by sale, exchange, or otherwise, during account period:*]

Inventory Item No. _____, $_____
Steinway Grand Piano, Model D,
sold on July 1, 1998, for cash in the amount of.....

Inventory Item No. _____, $_____
real property improved by warehouse building located at 6630 Cabrillo Boulevard, San Cristobal, California,
exchanged on August 31, 1998, for 40 acres of unimproved real property at 2000 Vizcaino Road, San Cristobal, California,
with a fair market value of .....

[*List additional items as necessary*]

TOTAL

SCHEDULE M: PROPOSED DISTRIBUTION, INCLUDING DISTRIBUTION OF NET INCOME

Petitioner proposes to distribute assets of the estate as follows:

To _____ [*name*]

1. Inventory Item No. _____, $_____
original oil painting
by Winslow Homer.....

2. Inventory Item No. _____, $_____
40 acres of unimproved real property
at 2000 Vizcaino Road, San Cristobal, California,.....

3. Net income received during account period from Item No. 2 $_____
above .....

Total distributions to
_____ [*name*]

To _____ [*name*]

1. Inventory Item No. _____, $_____
1997 Buick Le Sabre,.....

2. Inventory Item No. _____, $_____
2,000 shares of the Class B stock,
Micro Force Corporation,.....

3. Inventory Item No. _____, $_____
Net income received during account period from Item No. 2
above .....

4. Inventory Item No. _____, $_____
house and lot located at
2000 Shady Lane, San Cristobal, California,.....

5. Inventory Item No. _____, $_____
household furniture and furnishings located at
2000 Portola Lane, San Cristobal, California,.....

Total distributions to
_____ [*name*]

[*Set forth additional items of distribution as needed*]

TOTAL DISTRIBUTIONS

SCHEDULE N: ALLOCATION OF RECEIPTS AND DISBURSEMENTS BETWEEN PRINCIPAL AND INCOME

RECEIPTS ALLOCATED TO PRINCIPAL

World Concepts, Inc., $_____
100 shares, common stock,
dividend for period 1/1/98-12/31/99 .....

Travelwide Company, $_____
500 shares, common stock,
dividend for period 1/1/98-12/31/99 .....

[*Add additional items as necessary*]

TOTAL RECEIPTS ALLOCATED TO PRINCIPAL $_____

SCHEDULE N: ALLOCATION OF RECEIPTS AND DISBURSEMENTS BETWEEN PRINCIPAL AND INCOME

RECEIPTS ALLOCATED TO INCOME

First Trust Co., savings account, interest for period 1/1/98-12/31/98 ..... $_____

City Savings, money market account, dividend for period 1/1/98-12/31/98 ..... $_____

$50,000 face value, U. S. Treasury notes, interest paid June 1, 1998 ..... $_____

TOTAL RECEIPTS ALLOCATED TO PRINCIPAL $_____

SCHEDULE O: INCOME, DISBURSEMENTS, AND PROCEEDS OF SALE ATTRIBUTABLE TO SPECIFICALLY DEVISED PROPERTY

INCOME ATTRIBUTABLE TO SPECIFICALLY DEVISED PROPERTY

To Inventory Item No. _____, real property improved with warehouse building located at 6630 Cabrillo Boulevard, San Cristobal, California, net rents received during account period from same ..... $_____

To Inventory Item No. _____, 2,000 shares of the Class B stock, Micro Force Corporation, dividends received during account period from same ..... $_____

[*Add additional items as needed*]

SCHEDULE P: CALCULATION OF INTEREST TO BE PAID TO [GENERAL PECUNIARY DEVISES or ANNUITIES or DEVISES FOR MAINTENANCE]

INTEREST TO BE PAID TO GENERAL DEVISE OF $2,000 TO _____ [*name*]

Interest at the rate of _____percent per annum computed from _____ [*date*] to _____ [*date*]..... $_____

[*Add additional items as necessary*]

SCHEDULE Q: LIABILITIES OF ESTATE[List all liabilities of estate, including liabilities which are a lien on estate assets, taxes due but unpaid as shown on filed returns or assessments received after filing returns, all notes payable, any judgments for which estate is liable, and any other material liability:]

Unsecured liability owing to Down Home Loan Company, for money lent to decedent on or about _____ [*date*], principal plus interest accrued to _____ [*date*]..... $_____

Judgment in favor of Bulldog Creditors, Inc., entered on _____ in the Superior Court of the State of California for the County of Imperial, principal plus interest accrued to _____ [*date* $_____

].....

[*Add additional items as needed*]

CAUTION:

The account must be verified by the personal representative or any of them if there is more than one [*Prob. Code § 1021(a)(1), (b)(2)*]. A petition must be verified by the petitioner or any of them if there is more than one [*Prob. Code § 1021(a)(1), (b)(1)*], or, if the petitioner is absent from the county or for some other cause is unable to verify the petition, it may be verified by the petitioner's attorney, provided that the petitioner is not a fiduciary [*Prob. Code § 1023*]. An affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) or verified petition must be received as evidence when offered in an uncontested proceeding [*Prob. Code § 1022*].

This form includes the allegations required by the California Rules of Court when the estate has been administered under the Independent Administration of Estates Act [*Prob. Code § 10400 et seq.*; (*see* Ch. 442, *Probate: Initiating Probate Administration*)]. However, some local court rules may require additional allegations [*see, e.g.,* discussion in *§ 458D.190[12], [13]*].

[2] Use of Form

This form may be used by the "personal representative" [defined in *Prob. Code § 58*; *see also Prob. Code § 8546(c)* (verified account of special administrator on termination of powers)] for any combination of the following: to render to the court his or her final account for settlement [*Prob. Code § 10951*]; to petition the court for an order for final distribution of the estate [*Prob. Code §§ 10951, 11600, 11640*]; and, if administration of the estate proceeding was commenced before July 1, 1991, to petition the court for an order for compensation for extraordinary services rendered by the personal representative or by the attorney [*see* former Prob. Code §§ 902, 910; *Prob. Code § 10850(b)*)]; or, if the estate proceeding was commenced on or after July 1, 1991, to petition the court for an order fixing and allowing the amount of compensation of the personal representative and of the attorney for all services rendered by each in the estate proceeding [*Prob. Code § 10831(a)*; *see Prob. Code § 10850(a)*]. The request for compensation may be included in the final account or the petition for final distribution, as is done in the foregoing form, or it may be made in a separate petition [*Prob. Code § 10831(b)*].

The filing of an account is deemed to include a petition requesting its approval [*Prob. Code § 1064(b)*].

This form may also be adapted for use by an "interested person" (defined in *Prob. Code § 48*) to petition for an order for final distribution when the personal representative fails to do so [*see Prob. Code § 11600*].

Portions of the foregoing form were adapted from California Probate Practice (Matthew Bender).

[3] Local Rules

Many superior courts by local rule impose precise and detailed requirements on accounts, petitions for distribution, petitions for allowance of compensation for extraordinary services, and the documents that must be on file before making an order for distribution, and those rules must be complied with. Hence, before drafting this form, counsel should carefully review any rules of the court in which the proceeding is pending to be sure that he or she complies with them.

[4] When Account and Petition Must Be Filed

Unless the account has been waived [*see Prob. Code § 10954* and *see § 458D.215*], the personal representative must, when the estate is in a condition to be closed, file a final account and petition for an order for final distribution of the

estate [*Prob. Code § 10951*; *see* discussion in *§ 458D.30* et seq.].

[5] Effect of Waiver of Account

The account may be waived [*see Prob. Code § 10954(a)*] as provided in *Prob. Code § 10954(b)* [*see § 458D.215*]. But even if it is waived, the personal representative must file a final report of administration at the time the final account would otherwise have been required, and the final report must include the amount of compensation paid or payable to the personal representative and to the attorney and set forth the basis for determining the amount [*Prob. Code § 10954(c)(1)*].

Moreover, even if an account is waived by the beneficiaries, a creditor whose interest has not been satisfied may petition under *Prob. Code § 10950* for an account [*Prob. Code § 10954(c)(2)*].

[6] Use of Form When Account Waived

With appropriate modifications, the foregoing form may also be used when the account is waived [*see Prob. Code § 10954*]. If the account is waived, only the petition should be filed, modified to omit all reference to the account [*see e.g.*, Paragraph 19].

Although the account is waived, the personal representative must file a final report of administration at the time the final account would otherwise have been required, and the final report must include the amount of compensation paid or payable to the personal representative and to his or her attorney, and it must set forth the basis for determining the amounts [*Prob. Code § 10954(c)(1)*].

If the account is waived and this petition is to be used, the following paragraph should be included:

No account is required because _____ [*specify legal reason (see Prob. Code § 10954), e.g.*, as shown by the records and file herein, each of the personsentitled to distribution from the estate has executed and filed herein a written waiver of account or acknowledgment that the person's interest has been satisfied].

[7] Joinder by Attorney

The attorney for the personal representative may petition for an order for fees for extraordinary services [former Prob. Code §§ 902, 910 (applicable in administration of estate proceedings commenced before July 1, 1991); *see Prob. Code § 10850(b)*], and for this purpose may join in the petition filed by the personal representative, as in the foregoing form. In administration of estate proceedings commenced on or after July 1, 1991 [*see Prob. Code § 10850(a)*], either the personal representative or the attorney may, at the time the final account and petition for final distribution are filed, petition the court for an order fixing and allowing the attorney's compensation for all services rendered by him or her in the estate proceeding [*Prob. Code § 10831(a)(2)*]. The request for compensation may be included in the final account or the petition for final distribution, or it may be made in a separate petition [*Prob. Code § 10831(a)(2)*].

[8] Form and Format

Both the account and the petition must be in writing [*Prob. Code § 1020*]. The account must be signed by all persons making it (for example, where there are two or more joint personal representatives [*see Prob. Code §§ 9630, 9631*], by each of them) [*Prob. Code § 1020*]. Joint personal representatives may consist of coexecutors appointed by the court when so provided in the will [*see Prob. Code § 8422*] or, in the case of intestacy, of coadministrators appointed by the court [*Prob. Code § 8460(b)*]. In addition, the petition must be signed by all petitioners, but an exception exists when the petitioner is absent from the county or for some other cause is unable to sign the petition; in this event, the petition may be signed by the petitioner's attorney if the petitioner is not a fiduciary [*Prob. Code §§ 1020, 1023*]. Because the personal representative is a fiduciary [*see Prob. Code § 39*], the exception would not apply when a petition for final

distribution is filed by the personal representative, but would apply when it is filed by some other "interested person" (defined in *Prob. Code § 48*) under *Prob. Code § 11600*.

The format for the petition is not prescribed by statute. However, certain matters that must be set forth in the petition are mandated by statute [*see, e.g., Prob. Code §§ 1064, 10900, 10954(c)*]. The format and contents of all accounts filed under the Probate Code are governed by *Prob. Code §§ 1060-1064*, which became operative on July 1, 1997 [*Prob. Code § 1060.5*]. For a discussion of *Prob. Code §§ 1060-1064*, see *§ 458D.190[16]*

Many courts have local rules relating to accounts and petitions that must be complied with; hence, counsel should, if unfamiliar with them, check them before the account and petition are drafted.

[9] Contents of Petition

[a] Report of Administration

The report of administration required when an account is filed [*see Prob. Code § 10900(b)*] is generally combined with the petition for approval of the account.

The petition for approval must include all of the following [*Prob. Code § 1064(a)*; *see Prob. Code § 39* ("fiduciary" means personal representative)]:

- A description of all sales, purchases, changes in the form of assets, or other transactions occurring during the period of the account that are not otherwise readily understandable from the schedule (Paragraphs 12-15).

- An explanation of any unusual items appearing in the account;

- A statement of all compensation paid from the assets subject to the account to the personal representative or the attorneys for the personal representative other than pursuant to a prior court order (Paragraphs 38-39).

- A statement disclosing any family or affiliate relationship between the personal representative and any agent hired by the personal representative during the accounting period (Paragraph 19). For this purpose, "family" means a relationship created by blood or marriage, and "affiliate" means an entity that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with, the trustee [*Prob. Code § 1064(c)*].

- An allegation disclosing whether all of the cash has been invested and maintained in interest bearing accounts or in investments authorized by law or the governing instrument, except for an amount of cash that is reasonably necessary for the orderly administration of the estate (Paragraph 18).

The report of administration must include a statement of liabilities that includes all of the following information [*Prob. Code § 10900(b)*]:

- Whether notice to creditors was given under *Prob. Code § 9050* (Paragraph 7);

- Creditor claims filed, including the date of filing each claim, the name of the claimant, the amount of the claim, and the action taken on the claim (Paragraph 10);

- Creditor claims not paid, satisfied, or adequately provided for (Paragraph11). As to each such claim,

the statement must indicate whether the claim is due and the date due, the date any notice of rejection was given, and whether the creditor has brought an action on the claim. The statement must also identify any real or personal property that is security for the claim, whether by mortgage, deed of trust, lien, or other encumbrance.

[b] Compensation of Personal Representative and Attorney

The final report of administration required to be filed when an account is waived must include the amount of compensation paid or payable to the personal representative and to the attorney, as well as the basis for determining the amount [*see Prob. Code § 10954(c)* (when account is not required)]. Therefore, a fortiori, it would appear that this information must be contained in the report of administration when an account is not waived [*see* Cal. L. Revision Comm'n Comments to *Prob. Code § 10900*], and this is expressly required by *Cal. Rules of Ct., Rule 7.705*. Further, a petition for approval of an account must include a statement of all compensation paid to the attorney for the personal representative from the assets subject to the account other than pursuant to a prior court order (Paragraph 39) [*Prob. Code § 1064(a)(3)*; *see Prob. Code § 39* ("fiduciary" means personal representative)]. A separate statement of compensation should be attached to the petition as an exhibit, demonstrating to the court the computation used to arrive at the amount of compensation requested [*see Cal. Rules of Ct., Rule 7.705* and Exhibit A]. The amounts claimed to be owing should also be set forth in the body of the petition [*see* Paragraphs 37-40].

The compensation of the executor or personal representative and his or her attorney for both ordinary and extraordinary services are governed by *Prob. Code §§ 10800, 10801, 10810, 10811* (applying in administration of estate proceedings commenced on or after July 1, 1991) or by former Prob. Code §§ 901, 902, 910 (applying in proceedings commenced before July 1, 1991; *see Prob. Code § 10850(a)*) [*see § 458D.121, § 458D.127*, and *§ 458D.130*]. The compensation of a special administrator and the fees of his or her attorney are fixed by the court and normally allowed only on settlement of the special administrator's final account [*see Prob. Code § 8547*].

Because compensation of the personal representative and his or her attorney is based on percentages of the value of the amount of the estate accounted for [*see Prob. Code §§ 10800, 10810* (applying in administration of estate proceedings commenced on or after July 1, 1991); former Prob. Code §§ 901, 910 (applying in proceedings commenced before July 1, 1991; *see Prob. Code § 10850(a)*)]; *Cal. Rules of Ct., Rule 7.707* (for proceedings commenced after June 30, 1991, law in effect on date of court's order awarding statutory compensation determines amount of that compensation), any petition for compensation must set forth sufficient facts for the court to determine the amounts to be allowed [*see Prob. Code § 10954(c)* (requiring that the report of administration to be filed when an account is waived include the amount of compensation paid or payable and the basis for determining the amount)]; *Cal. Rules of Ct. 7.705* (calculation of statutory compensation when account has been filed and when account has been waived)].

There is only one statutory commission for ordinary services by the personal representative of the estate, regardless of the number of personal representatives performing the services [*Cal. Rules of Ct., Rule 7.704(a)*]. If there are two or more personal representative (whether successive or concurrent), the court must apportion the statutory commission among them based on their agreement or, if there is no agreement, according to the services actually rendered by each of them [*Prob. Code § 10850*; *Cal. Rules of Ct., Rule 7.704(a)*].

If there has been a change of personal representative, notice of hearing of any interim or final petition seeking or waiving an award of statutory compensation must be given to all prior personal representatives unless: (1) a waiver of notice executed by all prior personal representatives is on file or is filed with the petition; (2) a written, signed agreement on the allocation of statutory commissions between the present personal representative and all prior personal representatives is on file or is included in or filed with the petition; or (3) the court's file and the petition demonstrate that the commissions of the prior personal representatives have been previously provided for and allowed by the court [*Cal. Rules of Ct., Rule 7.704(b)*].

When compensation for extraordinary services is sought, any request for compensation should set forth the amount requested and the method of calculation, including a detailed description of the services rendered and the number of hours expended. Each extraordinary service for which fees are claimed should be separately stated, as is frequently required by local rule [*see, e.g.*, Riverside Co. Consol. Ct. Rules, Rule 6.1004(B); Santa Clara Co. Super. Ct. Rules, Rule 5.9(E)]. See also discussions in *§§ 458D.190[10][y]*, and *§ 458D.190[15]*. Exhibit B to the petition is a declaration supporting a request for compensation for extraordinary services [*see also* Paragraphs 39, 40].

[c] Final Distribution

A petition for final distribution must show that all debts have been paid or adequately provided for, or that the estate is insolvent, and, in either event, that it is in a condition to be closed [*see Prob. Code § 11640(a)*]. Local court rules may amplify this requirement. For example, in the Santa Clara County Superior Court, the allegations regarding disposition of all claims must appear in the petition for final distribution even though they may have appeared in whole or in part in prior petitions [Santa Clara Co. Super. Ct. Rules, Rule 5.9]. Because this form is a combined form of account and petition and the disposition of claims is set forth in the report of administration portion of the form as required by Prob. Code§ 10900(b), it would appear to be unnecessary to repeat them in the part of the form dealing with final distribution.

The petition must also name the distributees and the share to which each is entitled and advise the court of any property that is to be distributed subject to a limitation or condition [*see Prob. Code § 11603* (contents of order)]. Again, precise requirements may be imposed by local court rule.

[10] Allegations

[a] Petitioner's Capacity [Paragraph 1]

Paragraph 1 alleges the petitioner's capacity and standing [*see Prob. Code §§ 10951* (final account and petition for final distribution must be filed by personal representative), 11600 (personal representative of interested person may petition for preliminary or final distribution)].

[b] Residence and Date of Death [Paragraph 1]

An allegation of decedent's date of death and residence at that time is not expressly required by statute because these facts are matters of record appearing in the petition for letters; nevertheless, the allegation is customary. The decedent's residence will not necessarily have been the county in which the probate proceeding is pending; but if it was, the name of the county may be replaced with "this county."

[c] Whether Decedent Died Intestate, Admission of Will and Issuance of Letters [Paragraphs 2, 3, 4]

Whether decedent died intestate, the admission of decedent's will to probate, and the fact and date of the issuance of letters are also facts appearing of record, but they are frequently included to establish the personal representative's standing to render the final account and petition for final distribution [*see Prob. Code §§ 10951, 11600*].

[d] Independently Administered Estate [Paragraph 5]

If the estate was administered under the Independent Administration of Estates Act (*Prob. Code § 10400 et seq.*), that fact should be alleged, since local court rules may impose additional requirements on the contents of the petition for final distribution in such a case [*see, e.g.*, discussion in *§ 458D.190[13]*]. Even if the personal representative has authority for independent administration of the estate, court supervision is required for the allowance of compensation, settlement of accounts, and preliminary and final distributions and discharge [*Prob. Code § 10501(a)(1)-(4)*]. For further discussion, see Ch. 445, *Probate: Independent Administration of Estates* .

[e] Notice to Creditors [Paragraphs 6, 7]

The report of administration must state whether notice to creditors was given under *Prob. Code § 9050* [*Prob. Code § 10900(b)(1)*], and Paragraphs 6 and 7 do so. Because the first notice to creditors is included in the notice of petition to administer estate that must be served, as provided in *Prob. Code §§ 8110-8113*, and published as provided in *Prob. Code §§ 8120-8125*, an allegation of compliance is included in these paragraphs.

[f] Notice to Public Entities [Paragraph 8]

Except as otherwise provided in *Prob. Code §§ 9200-9205*, a claim of a public entity must be filed within the time otherwise provided by law and is normally barred if it is not [*Prob. Code § 9200(a)*]. However, certain claims are barred only after a written notice or request is given to the public entity and the period provided in the applicable code section has expired [*see Prob. Code §§ 9201, 9202*]. Paragraph 8 alleges compliance with these provisions.

The inclusion of this, or a similar, allegation may be expressly required by local court rule. For example, in the Los Angeles Superior Court, before the court will authorize distribution, there must be a showing of compliance with *Prob. Code § 9202* or a showing that the notice thereunder is not required because the decedent did not receive Medi-Cal (or was not the surviving spouse of a recipient), or that no claim can be made by the Department of Health Services because decedent died before June 28, 1981, was under age 65, or was survived by a spouse, minor child, or disabled child [Los Angeles Co. Super. Ct. Rules, Rule 10.79(b), (c); *see Prob. Code §§ 215, 1215, 9202*]. If the proceeding is pending in another county, counsel should check with the local court rules in that county to ascertain if a similar rule is in effect. For discussion of the right of the Department of Health Services to claim against the estate of a deceased Medi-Cal recipient an amount equal to payments for health care services received, see *Welf. & Inst. Code § 14009.5* and *Kizer v. Hanna (1989) 48 Cal. 3d 1, 4-13, 255 Cal. Rptr. 412, 767 P.2d 679* (in effect disapproving *Estate of Messner (1987) 190 Cal. App. 3d 818, 235 Cal. Rptr. 495* , to the extent it held the department could not, under *Welf. & Inst. Code § 14009.5*, recover Medi-Cal payments made prior to the effective date of the statute to a recipient who died after that date but could, subject to the limitations imposed by the statute, recover only those amounts paid after the statute's effective date).

[g] Creditors' Claims [Paragraphs 9-11]

These paragraphs are required by *Prob. Code § 10900(b)*. For a discussion of the requirements of *Prob. Code § 10900(b)*, see *§ 458D.50[2]*, For discussion of what constitutes a claim, see *Prob. Code § 9000* and *Kizer v. Hanna (1989) 48 Cal. 3d 1, 12, 255 Cal. Rptr. 412, 767 P.2d 679* . Paragraph 9 sets forth the date on which the time for filing claims against the estate expired. Alternative Paragraphs10 state either that no claims have been filed, or detail any claims that have been filed.

In a final report or a petition for final distribution under the Independent Administration of Estates Act, the personal representative is required to list each claim presented, as well as the claimant's name, the date of filing of the claim, the nature of the claim, the amount claimed, the disposition of the claim, and if the claim was rejected, the date of service of the rejection and whether or not a lawsuit was filed [*Cal. Rules of Ct., Rule 7.403*].

In the hearing on a petition for final distribution the court must determine whether all debts have been paid. With respect to debts that are contingent, disputed, or not due, the court may, in its discretion, make an order or combination of orders pursuant to *Prob. Code § 11460 et seq.* [*see Prob. Code § 11461*; for discussion *see* Ch. 454, *Probate: Claims Against the Estate ; see also Prob. Code § 11460* (definitions of "contingent," "disputed," and "not due")]. The court may approve an agreement of interested persons as to the manner of providing for the debt [*see Prob. Code § 11462*], may order an amount deposited in a blocked account [*see Prob. Code § 11463*], may order property distributed subject to assumption of liability [*see Prob. Code § 11464*], may appoint a trustee to receive payment [*see Prob. Code § 11465*], may order distribution subject to a bond [*see Prob. Code § 11466*], or may continue administration of the estate

[*see Prob. Code § 11467*]. Alternative Paragraphs 11 are for use when provision is being made for any remaining debts against the estate that are contingent, disputed, or not yet due.

If an estate is in all other respects ready to be closed, and it appears to the satisfaction of the court, on affidavit [or declaration under penalty of perjury (*Code Civ. Proc. § 2015.5*)] or from evidence taken in open court, that a debt has not been and cannot be paid because the creditor cannot be found, the court or judge is required to make an order fixing the amount of the payment and directing the personal representative to deposit the payment with the county treasurer of the county in which the proceeding is pending [*Prob. Code § 11428*].

[h] Actions Taken by Petitioner [Paragraphs 12-17]

Paragraphs 12-17 set forth actions taken by the petitioner or decedent's personal representative such as the purchase of securities and the sale of securities and other estate assets, and set forth the authority for those actions.

In the petition for final distribution, the petitioner is also required to list and describe all actions taken without prior court approval if notice of the proposed action was required [*Cal. Rules of Ct., Rule 7.250(a)*]. The description of the action is required to include the following [*Cal. Rules of Ct., Rule 7.250(a)*]:

- The nature of the action.
- When the action was taken.
- A statement of when and to whom notice was given.
- Whether notice was waived, and if so, by whom.
- Whether any objections were received.

An action taken under the Independent Administration of Estates Act that was properly listed and described in a prior accounting, report, or petition for distribution, and that was approved by the court, need not be listed and described in a subsequent account, report, or petition for distribution [*Cal. Rules of Ct., Rule 7.250(b)*].

[i] Investment of Cash [Paragraph 18]

Unless the will has provided otherwise, the personal representative is required to keep all cash invested in interest-bearing accounts or other authorized investments, except for amounts reasonably necessary for the orderly administration of the estate [*see Prob. Code § 9652*; *see also Prob. Code §§ 9730 et. seq., 10533*]. Paragraph 19 alleges compliance with this requirement. Any interest received on such accounts must, of course, be listed in the account in the schedule of income receipts, that is, in Schedule A. For further discussion of the personal representative's duties and responsibilities regarding estate property, see Ch. 456, *Probate: Management of Estate Assets* . For the power of the personal representative to deposit or invest money belonging to an estate administered under the Independent Administration of Estates Act (*Prob. Code § 10400 et seq.*), see *Prob. Code § 10533*.

[j] Inventory and Appraisal; Account [Paragraph 20]

This paragraph alleges that an inventory and appraisal of estate property was filed and that it includes all property that has come into the personal administrator's possession or control. Paragraph 19 also includes reference to the account that, unless it has been waived [*see Prob. Code § 10954*], is filed with the petition.

[k] Taxes [Paragraphs 21-26]

A petition for final distribution may be filed only when all "debts" have been paid or adequately provided for (or when the estate is insolvent), and the estate is in a condition to be closed [*Prob. Code § 11640(a)*]. The word "debt" is defined as including, inter alia, a charge against the estate, including taxes [*Prob. Code § 11401(c)*]. Hence, the petition should allege that tax liabilities have been paid or adequately provided for [*see Prob. Code § 11640(a)*].

Some courts by local rule expressly require that a petition for final distribution of a decedent's estate must contain an allegation that all personal property and income taxes that are due and payable have been paid, and, in addition, mustdisclose whether a federal or California estate (and generation-skipping transfer) tax return is required, and whether there is a need for an order or orders prorating the tax or taxes under *Prob. Code § 20100 et seq.* [*see, e.g.,* Orange Co. Super. Ct. Rules, Div. VI, Rule 608.10].

If the assets of an estate are distributable to one or more nonresident beneficiaries, final distribution will not be allowed unless the personal representative obtains from the Franchise Tax Board and files with the court a certificate to the effect that all income taxes on the decedent or the estate that have become payable have been paid, and that all taxes that may become due are secured by bond, deposit, or otherwise [*Rev. & Tax. Code § 19513(a)*]. This provision applies, however, only if the value of the assets exceeds amounts prescribed by Franchise Tax Board regulations [*Rev. & Tax. Code § 19513(b)*; *see 18 Cal. Code Reg. § 19513(b)(b)* (certificate required if fair market value of estate exceeds $1,000,000 and more than $250,000 is distributable to one or more nonresidents)]. For additional discussion, see *§ 458D.43*.

[l] Condition of Estate [Paragraph 27]

This paragraph alleges that the petitioner has performed all the duties required of him or her, that the estate is insolvent or all debts have been paid or adequately provided for, and that the estate is in a condition to be closed, which triggers the requirement for the filing of a final account and of a petition for final distribution [*see Prob. Code §§ 10951, 11640, 12200*].

[m] Character of Decedent's Property [Paragraph 28]

The nature of the decedent's property, whether community, quasi-community, separate, or a mixture of these should be alleged if the character of the property will affect distribution [*see, e.g.,* Orange Co. Super. Ct. Rules, Div. VI, Rule 608.12]. If community, the petition must state whether decedent's half-interest or both spouses' interests are described.

[n] Devisees and Heirs [Paragraph 29]

The name, relationship to the decedent, age, and address of each devisee and heir are matters of record appearing in the petition for letters. Nevertheless, the order for distribution must name the distributees [*Prob. Code § 11603(b)(1)*], and hence they should be named in the petition.

The relationship to the decedent should be specified when the decedent died intestate, because the relationship governs the order of distribution [*see Prob. Code §§ 6401-6402.5*]. It should be included even when the decedent died testate if, for example, there is any question as to abatement [*see Prob. Code § 21402*].

The age of the distributee (or at least the statement that the devisee or heir is over 18 years of age) should be set forth; some local court rules specifically cover distributions to minors [*see, e.g.,* Alameda Co. Super. Ct. Rules, Rule 12.11.11], and hence any minor distributee should be so identified in the petition, at least in those counties in which such rules exist. In addition to identifying the distributee as a minor, the minor's birthdate should be added.

The addresses of the distributees should be included, as the value of the assets of the estate at the death of the decedent and the value of the assets distributable to one or more nonresidents may exceed amounts prescribed by regulations

promulgated by the Franchise Tax Board [*see 18 Cal. Code Reg. § 19513(b)*]. Such a distribution is subject to the requirement of *Rev. & Tax. Code § 19513* that a certificate from the Franchise Tax Board showing that the income tax liability of the estate and the decedent has been satisfied or secured be filed.

[o] Proration of Federal Estate Tax [Paragraph 30]

Any estate tax must be equitably prorated among the persons interested in the estate, in the manner prescribed in *Prob. Code §§ 20110-20117* [*Prob. Code § 20110(a)*], and Paragraph 15 alleges the distributees among whom the tax must be prorated and the amount of the proration.

However, federal law may provide for a different proration, and when it does, *Prob. Code § 20110(a)* does not apply. In fact, if federal law directs the manner of proration of the federal estate tax, the California estate tax must be prorated in the same manner [*see Prob. Code § 20110(b)(2)*; for further discussion, *see* Ch.452, *Probate: Proration of Estate and Generation-Skipping Transfer Taxes*].

[p] Condition Precedent [Paragraph 31]

Until January 1, 1985, the effect of a condition precedent in a will was governed by former *Prob. Code § 142* (repealed by Stats. 1983, ch. 842, operative January 1, 1985). That statute provided that a condition precedent in a will is one that is required to be fulfilled before a particular disposition takes effect. It is to be deemed performed when the testator's intention has been substantially, though not literally, complied with. Nothing vests until such condition is fulfilled, except where fulfillment is impossible, in which case the disposition vests, unless the condition was the sole motive thereof and the impossibility was unknown to the testator or arose from an unavoidable event subsequent to the execution of the will.

After the repeal of former *Prob. Code § 142*, the interpretation of conditions precedent will presumably be left to judicial interpretation.

[q] Condition Subsequent [Paragraph 32]

Until January 1, 1985, the effect of a condition subsequent in a will was governed by former *Prob. Code § 143* (repealed by Stats. 1983, ch. 842, operative January 1, 1985). That statute provided that a condition subsequent is if an estateor interest is so given as to vest immediately, subject only to being divested by some subsequent act or event. A testamentary disposition, when vested, cannot be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose.

After the repeal of former *Prob. Code § 143*, the interpretation of conditions subsequent will presumably be left to judicial interpretation.

[r] Income Received During Administration [Paragraph 33]

Unless otherwise indicated by decedent's will [*Prob. Code § 12000*], a specific devise [*see Prob. Code § 21117(a)*] carries with it income on the devised property from the date of death, less expenses attributable to the devised property during administration of the estate [*Prob. Code § 12002(b)*; *see Prob. Code § 12002(c)* (result when the income is insufficient to pay the expenses attributable to the property)]. If specifically devised property is sold during administration of the estate, the devisee is entitled to the net income from the property until the date of sale, and to interest on the net sale proceeds thereafter [*Prob. Code § 12002(d)*]. Net income received during administration, not paid under other provisions of *Prob. Code §§ 12000-12007*, and not otherwise devised must be distributed pro rata as income among all distributees who receive either residuary or intestate property. If a distributee takes for life or for a term of years, the pro rata share of income belongs to the tenant for life or for the term of years [*Prob. Code § 12006*].

[s] Devise to Minor Subject to California Uniform Transfers to Minors Act [Paragraph 34]

A testator may devise securities, money, real property, and other forms of property to a minor pursuant to the California Uniform Transfers to Minors Act (*Prob. Code § 3900 et seq.*). By so doing, the testator incorporates all the provisions of the Act into the disposition [*Prob. Code § 6341(a)*; *see also Prob. Code § 3911(b)*]. Under the Act, devises to minors are given to the care of a "custodian," who, like a trustee, manages the property [*see Prob. Code § 3912*], makes certain distributions to or for the benefit of the minor [*see Prob. Code § 3914*], and ultimately distributes the remainder of the custodial property to the minor, usually when the minor becomes 18 years of age [*Prob. Code § 3920*]. The Act contains a comprehensive set of rules that govern such matters as the rights, duties, and powers of the custodian [*see Prob. Code §§ 3912-3915*] and termination of the custodianship [*see Prob. Code §§ 3918*].

The testator may nominate a custodian in his or her will by naming the custodian followed in substance by words such as "as custodian for (Name of Minor) under the California Uniform Transfers to Minors Act" [*Prob. Code § 3903*]. In addition, the will may name substitute custodians [*Prob. Code §§ 3903, 6345*]. The custodian must be a person to whom a transfer of property of that kind is permissible under *Prob. Code § 3909(a)* [*Prob. Code § 3903(b)*]. For example, if the property is a security, the custodian must be either an adult or a trust company [*Prob. Code § 3909(a)(1)*]. In the alternative, the testator may provide that property is to be delivered, paid, or transferred to a custodian for the benefit of a minor without naming the custodian [*see Prob. Code §§ 6341, 3905*]. If the testator does not nominate a custodian, or if those nominated are dead or otherwise unable to serve, the personal representative chooses the custodian [*Prob. Code § 3905(c)*; *see Prob. Code § 6341(d)*].

Unless the will clearly requires otherwise, if the person named as the beneficiary for whose benefit the custodial property is to be held attains the age at which the custodianship was to terminate prior to the order of distribution, the devise shall be deemed to be a direct devise to the beneficiary [*Prob. Code § 6341(b)*].

Other forms of devises to minors or for the benefit of minors are valid alternatives to a devise under the Act [*Prob. Code § 6349*].

[t] Disclaimer of Interest [Paragraph 35]

If a beneficiary has disclaimed his or her interest in the estate in whole or in part, that fact should be alleged. For discussion, see *§ 458D.79*. Some courts by local rule require that any disclaimer must be on file prior to the hearing of any petition for distribution of any affected asset [*see, e.g.,* Orange Co. Super. Ct. Rules, Div. VI, Rule 608.14].

[u] Preliminary Distribution [Paragraph 36]

If any property has already been distributed under the court's order for a preliminary distribution [*see Prob. Code §§ 11600, 11621*], that fact should be alleged, and the persons who received property, and the property received, should be identified. Inasmuch as the foregoing form combines the account and petition for final distribution and the account contains a schedule setting forth this information, the allegation may simply refer to it, as is done in Paragraph 35.

If the personal representative has distributed any property to a beneficiary without a court order for preliminary distribution, the distribution, the property distributed, and the recipient should be alleged. The court has authority, in hearing the petition for final distribution, to credit the personal representative for such distribution [*Estate of Bennett (1939) 13 Cal. 2d 354, 358, 362, 90 P.2d 84]* .

[v] Names of Distributees and Shares to Which Each Is Entitled [Paragraph 37]

Distribution of the property in an estate is discussed in *§ 458D.70* et seq. Inasmuch as the court's order for final distribution must name the distributees and the share to which each is entitled [*Prob. Code § 11603(b)(1)*], the petition

shouldset forth exactly how the property should be distributed, in detail, and this is frequently expressly required by local court rule. Any general allegation such as "distribution according to the terms of decedent's will" is not sufficient [*see, e.g.,* Alameda Co. Super. Ct. Rules, Rule 12.11.2; Marin Co. Rule, Probate 5.48].

[w] Statutory Compensation [Paragraphs 38, 39]

The total statutory compensation, which is the same for both the personal representative and the attorney [*see* discussion in *§ 458D.120* et seq.], should be set forth in the petition. The calculation is governed by *Prob. Code §§ 10800, 10810* (*see* former Prob. Code § 901 if proceedings commenced before July 1, 1991). A separate statement of compensation should be attached to the petition as an exhibit, demonstrating to the court the computation used to arrive at the amount of compensation requested [*see* Exhibit A]. When compensation is requested in the petition for settlement of the account, the notice of hearing must so state [*Prob. Code § 11000(b)*]. In many cases, the personal representative will waive the statutory compensation to which he or she is entitled. In such a case, the fact of waiver should be alleged.

[x] Allowances or Previous Payments of Compensation [Paragraphs 38, 39]

If any allowances or payments of compensation have been made to the personal representative or the attorney for the personal representative, they must be disclosed. Any payments will usually have been made pursuant to prior court orders. However, if there have been payments from the assets subject to the account without prior court order, the petition must disclose the fact and the amount of the payments [*Prob. Code § 1064(a)(3)*]. In either case, the payments must be deducted from the total compensation to which the personal representative or the attorney is entitled, and the balance due should be alleged.

[y] Compensation for Extraordinary Services [Paragraphs 40, 41]

If extraordinary services were performed for which compensation is sought, the services must be alleged in detail [*see, e.g.,* Orange Co. Super. Ct. Rules, Div. VI, Rules 608.03-608.05]. For the contents of such an exhibit or allegation, see the discussion in *§ 458D.155[2][e]*. When compensation for extraordinary services is sought, courts may require by local rule that the caption, prayer, and notice of hearing contain a reference to the application [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 10.137].

[z] Reserve [Paragraph 42]

Ordinarily, there are closing expenses; often a reserve for payment of taxes must be created. Paragraph 41 addresses the issue of future expenses of the estate, and either requests authorization to withhold a reserve, or states that a reserve will not be needed.

[11] Prayer

The prayer should in every case request both a settlement of the final account [*see Prob. Code § 11000-11005*], unless the account has been waived [*see Prob. Code § 10954*], and distribution of the estate [*see Prob. Code § 11640*]. Other matters that usually will be included in the prayer are requests for statutory compensation and compensation for extraordinary services [*see* former Prob. Code §§ 901, 910 (if proceedings commenced before July 1, 1991)], or for an order fixing and allowing compensation to the personal representative and to his or her attorney for all services rendered in the estate proceeding [*see Prob. Code § 10831(a)* (if proceedings commenced on or after July 1, 1991)]. The foregoing petition contains a prayer requesting other items of relief appropriate to the allegations of the petition. Each case will present different facts. The prayer should specify all relief that petitioner is entitled to request according to the facts alleged in the petition.

[12] Los Angeles County Allegations and Statements

In Los Angeles County, certain allegations and statements must be included in any petition for distribution when the estate has been administered under the Independent Administration of Estates Act [Los Angeles Co. Super. Ct. Rules, Rule 10.69]:

- In any petition for distribution, a schedule of claims must be included as a part of the petition showing the name of the claimant, amount claimed, date presented, date allowed, amount allowed, and, if paid, the date of payment. As to any claims rejected, the date of rejection must be set forth, and the original of the Notice of Rejection with affidavit of mailing to the creditor must be filed [Los Angeles Co. Super. Ct. Rules, Rule 10.69(a)].

- In any petition for distribution, all independent acts taken without prior court approval must be set forth and described and an allegation made that the 15-day notice of proposed action was duly served and that no objections were received. The original of the action notice with attached affidavit of mailing must be filed with the court. If certain acts have been properly reported in a prior distribution, they need not be repeated [Los Angeles Co. Super. Ct. Rules, Rule 10.69(c)].

[13] San Francisco Allegations and Statements

In the San Francisco Superior Court, a petition for final distribution (whether or not an account is waived and whether or not the personal representative is acting under the Independent Administration of Estates Act) must list all creditors' claims presented and indicate the disposition of each claim. If any claim has been rejected, the date of service of notice of rejection must be stated, as well as its disposition, whether by suit or otherwise. This information must be set forth in thepetition for final distribution even though it may have been presented to the court in whole or in part in prior accounts or petitions for distribution [San Francisco Uniform Local Ct. Rules, Rule 14.95(A)]. The petition for final distribution must list and describe all independent acts taken without prior court approval and must contain an allegation that the 15-day notice of proposed action was waived or duly served when required and that no objections were received. The originals of the advice of proposed action with attached declarations of mailing must be available but need not be filed with the court. If certain acts have been properly reported in a prior petition for distribution, they need not be repeated [San Francisco Uniform Local Ct. Rules, Rule 14.95(B)].

The petition for final distribution must address the question of the source of the payment of the federal estate tax and California estate tax, if any. If the will has a clause directing the payment of the taxes out of the residue of the estate, this should be so alleged. If, on the other hand, there is no tax clause or there is a tax clause that does not direct the source of payment, the amounts required to be prorated or charged must be stated [San Francisco Uniform Local Ct. Rules, Rule 14.95(C)].

Whether the decedent died testate or intestate, the petition for distribution must contain an allegation as to the separate or community character of the property in all cases in which the character of the property may affect distribution [San Francisco Uniform Local Ct. Rules, Rule 14.86]. The relationship of heirs who take by intestacy should be sufficiently described to permit the court to determine whether the laws of intestate succession have been properly applied. If an heir takes by right of representation, the petition must indicate parentage and the approximate date of the parent's death [San Francisco Uniform Local Ct. Rules, Rule 14.93].

[14] Statement of Compensation [Exhibit A]

Exhibit A is a statement of compensation to be attached to the petition, setting forth the computation used to arrive at the amount of compensation requested. Calculation of compensation is governed by *Prob. Code §§ 10800, 10810* (*see* former *Prob. Code §§ 900*, 910 if proceedings commenced before July 1, 1991) [*see Prob. Code § 10850* (applicability of law)]. In some counties, the form in which the calculation should be set out is prescribed or suggested by local rule [*see e.g.*, Alameda Co. Super. Ct. Rules, Rules 12.10.2.3, 12.18.1; Orange Co. Super. Ct. Rules, Div. VI, Rule 608.03].

[15] Extraordinary Services [Exhibit B]

Normally, an application for extraordinary compensation by the personal representative [*see Prob. Code § 10801*; former Prob. Code § 902 (if proceedings commenced before July 1, 1991)] or by the attorney [*see Prob. Code § 10811*; formerProb. Code § 910 (if proceedings commenced before July 1, 1991)] need not contain a statement of supporting facts as precise and detailed as the allegations of a complaint. Rather, the applicant should state his or her claim with enough particularity that the court and the persons interested in the estate who have standing to object may be fully informed about the nature of the extraordinary services rendered, the necessity for those services, and their reasonable value, to the end that properly chargeable items may be distinguished from those that are not properly and justly chargeable [*Estate of Herbst (1938) 26 Cal. App. 2d 249, 251, 79 P.2d 139]* . Nevertheless, many courts, by local rule, specify matters that must be set forth when compensation for extraordinary services is sought, and those rules must be complied with [*see, e.g.,* Orange Co. Super. Ct. Rules, Div. VI, Rules 608.03-608.05].

If the attorney for the personal representative provided services under a contingent fee agreement [*Prob. Code § 10811(c)*], the court order approving it should be referenced in the exhibit for the court's information [*see Prob. Code § 10811(c)(3)*; for discussion of contingent fee contracts, *see § 458D.132[2]*].

Only those extraordinary services that were for the benefit of the estate rather than for the benefit of some of the beneficiaries, including the administrator or executor of an estate who is a beneficiary, are allowed as compensation under *Prob. Code §§ 10801, 10811, 10850(a)* (applicable in administration of estate proceedings commenced on or after July 1, 1991; *see* former Prob. Code §§ 902, 910 if proceedings commenced before July 1, 1991) [*see Estate of Bloom (1980) 107 Cal. App. 3d 195, 200-201, 165 Cal. Rptr. 591* ; *Hutchinson v. Gertsch (1979) 97 Cal. App. 3d 605, 616, 159 Cal. Rptr. 40* ; *Estate of Pryor (1942) 51 Cal. App. 2d 735, 738-739, 125 P.2d 511]* .

Phrases such as "court appearances," "initial investigation, study, and preparation," "determination of complex issues," "sales of property," "services in connection with the collection of notes and accounts," "services in negotiating and completing the settlement of the issues presented by ... and subsequent services in effectuating," "extensive preparation in advance of the hearing," "extensive office consultation, research, interviewing of witnesses, collection of evidence," "preparation and filing of ... tax returns ... including numerous conferences" lend little toward informing the court and interested parties of the extent of the extraordinary services performed, without the taking of evidence to substantiate with particularity the actual services, item by item, for which compensation is sought [*Estate of Fulcher (1965) 234 Cal. App. 2d 710, 717, 44 Cal. Rptr. 861]* . The request for extraordinary compensation should be based on a factual statement of the time consumed in performing each individual item of extraordinary service. If the attorney requests compensation for extraordinary services performed by a paralegal under the direction and supervision of the attorney, the petition must set forth the hours spent and services performed by the paralegal [*Prob. Code §§ 10811(b), 10850(a)* (applicable in administration of estateproceedings commenced on or after July 1, 1991); former Prob. Code § 910 (applicable in proceedings commenced before July 1, 1991; *see Prob. Code § 10850*)].

[16] Contents of Account

[a] Probate Code Rules

The account must include both a financial statement and a report of administration as provided in *Prob. Code §§ 1060-1064. Prob. Code §§ 1060-1064*, which became operative on July 1, 1997 [*Prob. Code § 1060.5*], prescribe rules that must be met whenever an account is filed in any proceeding subject to the Probate Code.

[b] Summary

Every account must state the period that it covers and contain a summary showing all of the following, to the extent applicable [*Prob. Code § 1061(a)*]:

- The property on hand at the beginning of the account period. If the account is the first account, this will be the value of the property initially received by the personal representative. If it is a subsequent account, it will be the property on hand at the end of the prior account [*Prob. Code § 1061(a)(1)*].

- The value of any assets received during the account period that are not assets on hand as of the commencement of the administration of the estate.

- The amount of any receipts of income or principal, excluding items listed under the first two categories, above (Schedules A and B), or receipts from a trade or business.

- Net income from a trade or business (Schedule D).

- Gains on sales (Schedule F).

- The amount of disbursements, excluding disbursements for a trade or business or distributions (Schedules C and D).

- Loss on sales (Schedule G).

- Net loss from trade or business (Schedule E).

- Distributions to beneficiaries (Schedule H).

- Property on hand at the end of the account period, stated at its carry value (Schedule I).

[c] Statutory Format

Prob. Code § 1061(b) specifies a statutory format for the account summary. Certain categories of items must be included in the summary unless they are inapplicable [*Prob. Code § 1061(b)*]. The categories are as follows [*Prob. Code § 1061(b)*]:

```
CHARGES:
Property on hand at beginning of account (or Invent-
ories)
Additional property received (or supplemental in-
ventories)
Receipts
Gains on Sale or Other Disposition
Net income from trade or business
Total Charges
CREDITS:
Disbursements
Losses on Sale or Other Disposition
Net loss from trade or business
Distributions
Property on hand at close of account
Total Credits
```

Amounts must be shown for each of the categories in dollars. Total charges must equal total credits [*Prob. Code §*

1061(b)].

[d] Standard Schedules

The summary of account [*see Prob. Code § 1061* and discussion in *§§ 458D.190[9][b]* and *[c]*] must be supported by detailed schedules showing the following [*Prob. Code § 1062*]:

- Receipts, showing the nature or purpose of each item, the source of the receipt, and the date thereof (Schedules A and B).

- Disbursements, including the nature or purpose of each item, the name of the payee, and the date thereof (Schedules C and D).

- Net income or loss from a trade or business, which will be sufficient if it provides the information disclosed on Schedule C or Schedule F of the federal income tax return (Schedule E).

- Calculation of gains or losses on sales or other dispositions (Schedules F and G).

- Distributions of cash or property to beneficiaries, showing the date and amount of each distribution, with the distribution of property shown at its carry value (Schedule H).

- An itemized list of property on hand, describing each item at its carry value (Schedule I).

[e] Additional Schedules

In all accounts, there must be an additional schedule showing the estimated market value of the assets on hand as of the end of the account period (Schedule J) [*Prob. Code § 1063(a)*]. If the account is not the first account, there must also be a schedule of the estimated market value of the assets on hand as of the beginning of the accounting period (Schedule K) [*Prob. Code § 1063(a)*]. The requirement of an estimated value of real estate, a closely held business, or other assets without a ready market may be satisfied by a good faith estimate by the personal representative [*Prob. Code § 1063(a)*].

There must also be a schedule of purchases or other changes in the form of assets occurring during the account period (Schedule L). However, no reporting is required for transfers between cash or accounts in a financial institution or money market mutual funds as defined in *Prob. Code § 8901(d)* [*Prob. Code § 1063(b)*].

If an estate of a decedent or a trust is to be distributed to an income beneficiary, there must also be an allocation of receipts and disbursements between principal and income (Schedule N) [*Prob. Code § 1063(c)*].

If there is specifically devised property, there must be a separate schedule accounting for income, disbursements, and proceeds of sale attributable to that property pursuant to *Prob. Code § 12002* (Schedule O) [*Prob. Code § 1063(d)*]. *Prob. Code § 12002* prescribes rules for allocating income and expense to specific devises and is discussed in *§ 458D.94[3]*.

If any interest is to be paid to general pecuniary devises, annuities, or devises for maintenance, there must be a separate schedule showing the calculation of the interest (Schedule P) [*Prob. Code § 1063(e)*; *see Prob. Code §§ 12003* (interest on general pecuniary devise), 12004 (interest on annuity), 12005 (interest on devise for maintenance)].

If the account contemplates a proposed distribution, there must be a schedule to set forth the proposed distribution, including the distribution of net income under *Prob. Code § 12006* (Schedule M) [*Prob. Code § 1063(f)*]. *Prob. Code § 12006* prescribes rules for distribution of net income received during administration and not otherwise devised and is

discussed in *§ 458D.94[7]*. If the distribution requires an allocation between trusts, the allocation must be set forth on the schedule, unless the allocation is to be made by a trustee after receipt of the assets. If the distribution requires valuation of assets as of the date of distribution, the schedule must set forth the fair market value of those assets [*Prob. Code § 1063(f)*].

If the estate has any liabilities, there must be a schedule showing the following (Schedule Q) [*Prob. Code § 1063(g)*]:

- All liabilities which are a lien on estate assets.
- Taxes due but unpaid as shown on filed returns or assessments received after the filing of returns.
- All notes payable.
- Any judgments for which the estate is liable.
- Any other material liability.

Monthly payments, including rent, utilities, salaries, or other recurring expenses need not be separately scheduled [*Prob. Code § 1063(g)*].

If the guardian or conservator has knowledge of any real property of the conservatee or ward located in a foreign jurisdiction, the guardian or conservator must include an additional schedule that identifies the real property, provides a good faith estimate of the fair market value of the real property, and states what action, if any, will or has been taken to preserve and protect the real property, including a recommendation whether an ancillary proceeding is necessary to preserve and protect the real property [*Prob. Code § 1063(h)*].

[f] Personal Representative Entitled to Rely on Account of Conservator or Guardian

When a personal representative receives assets from the conservator of a deceased conservatee or the guardian of a deceased ward, the personal representative may incorporate by reference any accounting provided by the conservator or guardian for the decedent for the period subsequent to the date of death [*Prob. Code § 10902*]. The personal representative is entitled to rely on such an accounting and has no duty to independently investigate or verify the transactions report in it [*Prob. Code § 10902*].

[g] No Requirement for Other Information

Before the operative date of *Prob. Code §§ 1060-1064*, local court rules required that some information in addition to that required by statute be included in accounts filed in decedents' estates. For example, some local court rules required that a separate cash recapitulation be included with the summary of account [*see, e.g.,* Alameda Co. Super. Ct. Rules, Rule 12.9.2.1]. However, *Prob. Code § 1060* explicitly states that *Prob. Code §§ 1060-1064* govern all accounts to be filed with the court under the Probate Code and that, except as specifically provided elsewhere in the Code, or unless good cause is shown therefore, no information in addition to that required in *Prob. Code §§ 1060-1064* need be in an account.

The law does not require that matters contained in an account be stated with "as much nicety or precision or as great detail as is required in pleadings in civil actions." The settlement of an account should be considered as an adjudication of the validity of each claim exhibited therein with sufficient certainty to identify it accurately [*see Estate of McKenzie (1962) 199 Cal. App. 2d 393, 398, 18 Cal. Rptr. 680]* .

[17] State Statutes

[a] Accounts

Accounts filed under Probate Code. *Prob. Code §§ 1060-1064*

Statutes govern all accounts under Probate Code. *Prob. Code § 1060*

July 1, 1997, operative date. *Prob. Code § 1060.5*

Summary of account. *Prob. Code § 1061*

Detailed schedules supporting summary. *Prob. Code §§ 1062*

Additional schedules. *Prob. Code § 1063*

Petition for approval or accompanying report. *Prob. Code § 1064*

Accounts to include financial statement and report of administration as provided in *Prob. Code §§ 1060-1064* and *Prob. Code § 10900*. *Prob. Code § 10900*

Supporting documents subject to inspection and audit. *Prob. Code § 10901*

Personal representative is entitled to rely on accounting by conservator or guardian of deceased person. *Prob. Code § 10902*

Settlement of account, including contest of account. *Prob. Code § 11000 et seq.*

Compelling account. *Prob. Code §§ 11050-11052*

[b] Compensation of Personal Representative and Attorney

Compensation of public administrators and their attorneys. *Prob. Code § 7622*

Compensation of special administrators and their attorneys. *Prob. Code § 8547*

Compensation of personal representative and his or her attorney. *Prob. Code § 10800 et seq.* (applicable in proceedings commenced on or after July 1, 1991); *see Prob. Code § 10850(a)*

Commissions and fees of executors or administrators and their attorneys. Former *Prob. Code §§ 900-911* (applicable in administration of estate proceedings commenced before July 1, 1991); *see Prob. Code § 10850(a)*

[c] Declaration Under Penalty of Perjury

Use of, in lieu of affidavit. *Code Civ. Proc. § 2015.5*

[d] Definitions

"Beneficiary." *Prob. Code § 24*

"Community property." *Prob. Code § 28*

"Devise." *Prob. Code § 32*

"Devisee." *Prob. Code § 34*

"Fiduciary." *Prob. Code § 39*

"Heir." *Prob. Code § 44*

"Interested person." *Prob. Code § 48*

"Issue." *Prob. Code § 50*

"Letters" as it relates to a personal representative. *Prob. Code § 52(a)*

"Personal representative." *Prob. Code § 58*

"Predeceased spouse." *Prob. Code § 59*

"Property." *Prob. Code § 62*

"Quasi-community property." *Prob. Code § 66*

"Real property." *Prob. Code § 68*

"Will." *Prob. Code § 88*

[e] Devises

Classification of at death transfers. *Prob. Code § 21117*

[f] Disclaimer of Interest

Disclaimer of interest in estate. *Prob. Code §§ 260-295*

[g] Final Distribution

Petition and order for final distribution. *Prob. Code §§ 10951, 11600-11605, 11640, 11641*

Distribution of property acquired or discovered after order of final distribution. *Prob. Code § 11642*

[h] Income and Interest

Payment of income accruing during administration and payment of interest. *Prob. Code §§ 12000-12007*

[i] Independent Administration

Independent administration of estates. *Prob. Code § 10400 et seq.*

[j] Taxes

Certificate of Franchise Tax Board is required when value of assets of estate at decedent's death and value of assets distributable to one or more nonresidents exceeds amounts prescribed by regulations promulgated by Franchise Tax Board (*see 18 Cal. Code Reg. § 19513*). *Rev. & Tax. Code § 19513*

[18] California Code of Regulations

Estates exceeding $1,000,000 and more than $250,000 is distributable to nonresident beneficiaries. *18 Cal. Code Reg. § 19513*

[19] California Rules of Court

Listings required for petition for final distribution when acting under Independent Administration of Estates Act. *Cal. Rules of Ct., Rules 7.250, 7.403*

[20] Local Rules of Court

[a] Allegation in Petition Regarding Claims

Los Angeles Co. Super. Ct. Rules, Rule 10.107

[b] Amount Requested as Extraordinary Fees Must Be Specified

Alameda Co. Super. Ct. Rules, Rule 12.10.6

San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.115

San Francisco Uniform Local Ct. Rules, Rule 14.108

[c] Caption and Prayer of Petition Must Contain Reference to Application for Extraordinary Fees

Alameda Co. Super. Ct. Rules, Rule 12.10.6.1

Los Angeles Co. Super. Ct. Rules, Rule 10.137

[d] Character of Property Must Be Alleged in Petition

Alameda Co. Super. Ct. Rules, Rule 12.11.1.2

Los Angeles Co. Super. Ct. Rules, Rule 10.114

Orange Co. Super. Ct. Rules, Rule 608.12

San Francisco Uniform Local Ct. Rules, Rule 14.86

[e] Distribution to Minors

Alameda Co. Super. Ct. Rules, Rule 12.11.11

[f] Form of Account

Los Angeles Co. Super. Ct. Rules, Rule 10.106

Orange Co. Super. Ct. Rules, Rules 608.01, 608.20

[g] Form of Calculation of Statutory Compensation

Alameda Co. Super. Ct. Rules, Rule 12.10.4

Orange Co. Super. Ct. Rules, Rule 608.03

[h] Petition Must List and Describe in Detail All Property to Be Distributed

Los Angeles Co. Super. Ct. Rules, Rule 10.111

Orange Co. Super. Ct. Rules, Rule 608.20

[i] Proposed Distribution Must Be Alleged in Petition

Alameda Co. Super. Ct. Rules, Rule 12.11.2

[j] Title of Petition Must Reflect All Relief Asked for in Prayer

Los Angeles Co. Super. Ct. Rules, Rule 10.9

Orange Co. Super. Ct. Rules, Rule 601.05

[21] Decisions

Court has authority in hearing on petition for final distribution to credit personal representative for preliminary distribution without court order. *Estate of Bennett (1939) 13 Cal. 2d 354, 358, 362, 90 P.2d 84*

Descriptions that are not acceptable in application for compensation for extraordinary services. *Estate of Fulcher (1965) 234 Cal. App. 2d 710, 717, 44 Cal. Rptr. 861*

Application for compensation for extraordinary services must specify nature of extraordinary services rendered, necessity for those services, and reasonable value of them. *Estate of Herbst (1938) 26 Cal. App. 2d 249, 251, 79 P.2d 139*

California Forms of Pleading and Practice--Annotated

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Volume 39: Probate: Claims Against the Estate thru Probate: Discharge-Chs. 454-459
Chapter 458D PROBATE: ACCOUNTS, FINAL DISTRIBUTION, AND COMPENSATION
PART V. FORMS

39-458D California Forms of Pleading and Practice--Annotated § 458D.191

§ 458D.191 Allegation--Death of Beneficiary Before Distribution [Prob. Code §§ 11801, 11802]--General Form

[1] FORM Allegation--Death of Beneficiary Before Distribution [Prob. Code §§ 11801, 11802]--General Form

_____ [*Name*], was a beneficiary of the decedent, namely, _____ [an heir of the decedent who died intestate *or* a devisee under the decedent's will], and survived the decedent, but died on _____ [*date*], before distribution to him/her of his/her share of the decedent's estate. He/She was _____ [unrelated to the decedent *or specify relationship, e.g.,* the decedent's son]. [*If issue of decedent add:* On the date of death, he/she was _____ (over the age of majority *or* an emancipated minor *or* a minor who died testate)]. _____ [No personal representative of his/her estate has yet been appointed *or* The name and address of his/her personal representative are as follows: _____ (*specify*)].

[2] Use of Form

This allegation should be included in the petition for final distribution when a beneficiary, other than an unemancipated, intestate minor issue of the decedent, died before distribution of the decedent's estate and, if decedent left a will, there was no condition in the will that the beneficiary survive the date of distribution or some other period that the beneficiary failed to survive [*see Prob. Code §§ 11801, 11802(a)*]. If the beneficiary was an unemancipated minor issue of the decedent and died intestate, § 458D.192, should be used.

[3] Death of Beneficiary Before Distribution

The share of a beneficiary who survives the decedent and dies before distribution is distributed with the same effect as though distribution were made to the beneficiary while living, but, subject to *Prob. Code § 21525* (relating to marital deduction gifts), this does not apply in the case of a testate decedent if the decedent's will provides that the beneficiary is entitled to take only if he or she survives the date of distribution or other period stated in the will and the beneficiary fails to do so [*Prob. Code § 11801*].

If the beneficiary meets the foregoing requirements for distribution, the beneficiary's share is distributed to his or her personal representative for administration in the beneficiary's estate [*Prob. Code § 11802(a)*]. For further discussion, see *§ 458D.95*.

[4] Effect of Advancement

If the decedent died intestate as to all or part of his or her estate, property the decedent gave during his or her lifetime to an heir is treated as an advancement against that heir's share of the intestate estate if either the decedent declared in a contemporaneous writing that the gift was an advancement against, or its value is to be deducted from the value of, the heir's share of the estate, or the heir acknowledged in writing that the gift was to be so deducted or was an advancement or that its value is to be deducted from the value of the heir's share of the estate [*Prob. Code § 6409(a)*; *see § 458D.193*].

[5] State Statutes

"Minor" defined. *Fam. Code § 6500*

"Age of majority" and similar references construed. *Fam. Code § 6502*

When minor is emancipated. *Fam. Code § 7002*

"Beneficiary" defined. *Prob. Code § 24*

"Devisee" defined. *Prob. Code § 34*

"Heirs" defined. *Prob. Code § 44*

"Issue" defined. *Prob. Code § 50*

"Personal representative" defined. *Prob. Code § 58*

Distribution when beneficiary dies before distribution of his or her share of estate. *Prob. Code §§ 11801, 11802*

[6] Decisions

Provision in will requiring survival to date of distribution as satisfied by survival to date distribution could and should have occurred. *Estate of Taylor (1967) 66 Cal. 2d 855, 857-858, 59 Cal. Rptr. 437, 428 P.2d 301*

[7] Cross References

For a related form, *see § 458D.190*.

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39-458D California Forms of Pleading and Practice--Annotated § 458D.192

§ 458D.192 Allegation--Death of Beneficiary Before Distribution [Prob. Code §§ 11801, 11802]--Beneficiary Was Unemancipated Minor Issue of Decedent and Died Intestate

[1] FORM Allegation--Death of Beneficiary Before Distribution [Prob. Code §§ 11801, 11802]--Beneficiary Was Unemancipated Minor Issue of Decedent and Died Intestate

_____ [*Name*], was _____ [the *or* a(n)] _____ [*specify relationship showing that person was decedent's issue, e.g.,* son] and [a] beneficiary of the decedent, namely, _____ [one of his/her heirs under the laws of intestate succession *or* his/her heir under the laws of intestate succession *or* _____ (a *or* the) devisee under the decedent's will]. He/she survived the decedent, but died on _____ [*date*], before distribution to him/her of his/her share of the decedent's estate. At the time of death, he/she was an unemancipated minor of the age of _____ years and died intestate. As far as they are known to petitioner, the heirs of _____ [*name of deceased minor*] are as follows:

Name & Relationship	Age	Address

[*List name and relationship of each known heir of deceased minor and, if known, his or her address and age (whether 18 or over or under 18). Give birthdates of minors, if known.*]

[2] Use of Form

This allegation should be included in the petition for final distribution (1) when the beneficiary survived the decedent, was an unemancipated minor issue of the decedent, and died intestate before distribution of the decedent's estate; and (2) if decedent left a will, there was no condition in the will that the beneficiary survive the date of distribution or some other period which the beneficiary did not do [*see Prob. Code § 11801, 11802(b)*]. If the deceased beneficiary was any other person, § 458D.191 should be used.

If the deceased minor met the foregoing conditions, distribution is made directly to the minor's heirs without administration in the minor's estate [*Prob. Code § 11802(b)*].

[3] State Statutes

Distribution when beneficiary is unemancipated, minor issue of decedent and died before distribution. *Prob. Code § 11802(b)*

[4] Cross References

For a related form, *see § 458D.191*.

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39-458D California Forms of Pleading and Practice--Annotated § 458D.193

§ 458D.193 Allegation--Receipt by Heir of Advancement [Prob. Code § 6409]

[1] FORM Allegation--Receipt by Heir of Advancement [Prob. Code § 6409]

1. _____ [*Name*], who is an heir of the decedent [and a devisee under the decedent's will], received from the decedent during the decedent's lifetime, on or about _____ [*date*], as an advancement toward his/her share of the decedent's estate, _____ [*specify, e.g.,* 50 shares of Widget common stock].

2. The character of the gift as an advancement is established by the following: _____ [*specify, e.g.,* the decedent declared in a contemporaneous writing, a copy of which is attached hereto as Exhibit "C" and made a part hereof, that the gift is _____ (to be deducted from _____'s (*name of heir*) share of the estate *or* an advancement against _____'s (*name of heir*) share of the estate) *or* _____ (*name of heir*) acknowledged in writing, a copy of which is attached hereto as Exhibit "C" and made a part hereof, that the gift is _____ (to be deducted from his/her share of the estate *or* an advancement)].

[*EITHER*]

3. The value of the property constituting the advancement is expressed in the _____ [writing of the decedent made contemporaneously with the gift *or* acknowledgment of _____ (*name of heir* made contemporaneously with the advancement)] (Exhibit "C") to be $_____.

[*OR*]

3. The value of the property constituting the advancement is not expressed in either _____ [the writing of the decedent or an acknowledgement by _____ (*name of heir*) *or* the acknowledgment by _____ (*name of heir*) or a writing of the decedent] made contemporaneously with the advancement. Petitioner estimates that the value of the property on the date _____, [_____ (*name of heir*) came into possession or enjoyment of it *or* of decedent's death *whichever occurred first*] was $_____. This

estimate is based on _____ [*specify, e.g.,* the closing price per share of the stock as traded on the New York Stock Exchange on _____ (*date listed in previous sentence*), multiplied by the number of shares advanced by decedent].

[2] Use of Form

This allegation should be included in the petition for final distribution if an heir received an advancement from a person who died intestate as to all or part of his or her estate after January 1, 1985 [*see Prob. Code § 6409(a)*]. Property the decedent gave during his or her lifetime to an heir is treated as an advancementagainst the heir's share of the intestate estate only if (1) the decedent declares in a contemporaneous writing that the gift is an advancement against the heir's share or its value is to be deducted from the value of the heir's share, or (2) the heir acknowledges in writing that the gift is to be so deducted or is an advancement or its value is to be deducted from the value of the heir's share [*Prob. Code § 6409(a)*]. Therefore, a writing that establishes the gift as an advancement should be alleged and a copy of it attached to the petition as an exhibit.

The property advanced must be valued as of the time the heir came into possession or enjoyment of it or as of the time of death of the decedent, whichever occurs first [*Prob. Code § 6409(b)*]. However, if the value is expressed in the decedent's contemporaneous writing or in an acknowledgment of the heir made contemporaneously with the advancement, that value is conclusive in the division and distribution of the intestate estate [*Prob. Code § 6409(c)*]. If an estimate of the value of the property must be made, petitioner should state the estimated amount in the petition and the basis for the estimate.

For further discussion, see *§ 458D.78[8]*.

[3] State Statutes

When lifetime gift to heir is treated as advancement. *Prob. Code § 6409(a)*

Valuation of property given as advancement. *Prob. Code § 6409(b), (c)*

Effect on distribution of advance made by decedent to recipient who failed to survive decedent. *Prob. Code § 6409(d)*

Requirement that court on petition for final distribution hear and determine and resolve in its order all questions arising under *Prob. Code § 6409*, relating to advancements. *Prob. Code § 11640(b)*

[4] Cross References

For a related form, *see § 458D.190* and Comments to § 458D.191

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39-458D California Forms of Pleading and Practice--Annotated § 458D.194

§ 458D.194 Allegation--Ademption by Satisfaction of Devise by Gift Before Death [Prob. Code § 21135]

[1] FORM Allegation--Ademption by Satisfaction of Devise by Gift Before Death [Prob. Code § 21135]

1. _____ [*Name*], who is a devisee under decedent's will of _____ [*specify, e.g.,* the sum of $25,000], received from decedent during decedent's lifetime, on or about _____ [*date*], _____ [*specify, e.g.,* $1,000 in cash and a 1986 BMW motorcycle].

2. The receipt of this property should be treated as a _____ [complete *or* partial] satisfaction of the devise for the following reason(s): _____ [*specify, e.g.,* the will provides for the deduction of the lifetime gift *or* the decedent declared in a contemporaneous writing, a copy of which is attached hereto as Exhibit "C," that the gift is _____ (to be deducted from _____ the devise *or* is in satisfaction of the devise) *or* _____ [*name of devisee*] has acknowledged in writing, a copy of which is attached hereto as Exhibit "C," that the gift is in satisfaction].

[*If a partial satisfaction, CONTINUE*]

[*EITHER*]

3. The value of the gift is _____ [expressed in the contemporaneous writing of the decedent *or* expressed in an acknowledgment of _____ (*name of devisee*) that was made contemporaneously with the gift] to be $_____.

[*OR*]

3. The value of the gift is neither expressed in a contemporaneous writing of the decedent, nor in an acknowledgement by _____ [*name of devisee*]. Petitioner estimates that the value of the property on the date

_____ [_____ (*name of devisee*) came into possession or enjoyment of it *or* of decedent's death] was $_____. The basis of this estimate is the following: _____ [*specify, e.g.,* the fair market value of the vehicle as reflected in Kelley's "Blue Book" on _____ [*date listed in previous sentence*], plus the $1,000 in cash received by the devisee].

[2] Use of Form

These allegations should be included in the petition for final distribution if a devise was satisfied in whole or in part by a gift to the devisee during the lifetime of a decedent [*see Prob. Code § 21135(a)*]. Property given by a testator during his or her lifetime to a person is treated as a satisfaction of a devise to that person in whole or in part only if (1) the will provides for deduction of the lifetime gift, (2) the decedent declared in a contemporaneous writing that the gift is to be deductedfrom the devise or is in satisfaction of the devise, (3) the heir acknowledges in writing that the gift is in satisfaction, or (4) the property given is the same property that is the subject of the specific gift [*Prob. Code § 21135(a)*]. Therefore, a writing that satisfies one of these requirements should be alleged and a copy attached to the petition as an exhibit.

For the purpose of partial satisfaction, the property given during lifetime is valued as of the time the devisee came into possession or enjoyment of it or as of the time of death of the decedent, whichever occurs first [*Prob. Code § 21135(b)*]. However, if the value of the gift is expressed in the contemporaneous writing of the testator or in an acknowledgement of the devisee made contemporaneously with the gift, that value is conclusive in the division and distribution of the estate [*Prob. Code § 21135(c)*]. If an estimate of the value of the property must be made, petitioner should allege the estimate in the petition and the basis for the estimate.

For further discussion, see *§ 458D.82*.

[3] State Statutes

Ademption by satisfaction in whole or in part of devise by gift during testator's lifetime. *Prob. Code § 21135(a)*

Valuation of lifetime gift for purpose of partial satisfaction. *Prob. Code § 21135(b), (c)*

Requirement that on petition for final distribution court hear and determine and resolve in its order all questions arising under *Prob. Code § 21135* relating to ademption by satisfaction. *Prob. Code § 11640(b)*

[4] Cross References

For related forms, *see §§ 458D.190, 458D.193*.

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39-458D California Forms of Pleading and Practice--Annotated § 458D.195

§ 458D.195 Allegation--Whereabouts of Distributee Is Unknown [Prob. Code § 11603(c)]

[1] FORM Allegation--Whereabouts of Distributee Is Unknown [Prob. Code § 11603(c)]

_____ [*Name*] was a beneficiary of the decedent, namely, a devisee under the decedent's will, but his/her/its whereabouts is unknown. The following are the alternate distributees, namely, the persons who would be entitled to the property _____ [under the decedent's will *or* under the doctrine of cy pres], and the share to which each is entitled:

Name and Relationship	Age	Address	Share to Which Entitled
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

[*OR, if decedent died intestate*]

_____ [*Name*] was a beneficiary of the decedent, namely, an heir of the decedent who died intestate, but his/her/its whereabouts is unknown. The following are the alternate distributees, namely, the persons who would be entitled to the property under the laws of intestate succession if the above-named distributee had predeceased the decedent, and the share to which each is entitled:

Name and Relationship	Age	Address	Share to Which Entitled

_____

_____ _____ _____ _____
_____ _____

_____ _____ _____ _____
_____ _____

_____ _____ _____ _____
_____ _____

CAUTION:

If this allegation is included in the petition, local rules should be checked as they may require that notice be mailed to persons other than those specified in *Prob. Code § 11601*.

[2] Use of Form

This allegation should be included in the petition for final distribution [*see § 458D.190*] if the whereabouts of a distributee is unknown. In that case, the order must provide for alternate distributees and the share to which each is entitled [*Prob. Code § 11603(c)*]. Thus, the petition for final distribution should alsoinclude that information. The alternate distributees are the persons, to the extent known or reasonably ascertainable, who would be entitled under the decedent's will or under the laws of intestate succession if the distributee named in the order had predeceased the decedent, or in the case of a devise for a charitable purpose, under the cy pres doctrine. A distributee named in the order who does not claim the share to which he or she is entitled within five years after the date of the order is deemed to have predeceased the decedent for the purpose of the order, and the alternate distributees are entitled to the share as provided in the order [*Prob. Code § 11603(c)*].

[3] State Statutes

Procedure if whereabouts of beneficiary named in order is unknown. *Prob. Code § 11603(c)*

Deposit with county treasurer of property to be distributed when property remains unclaimed in personal representative's possession or whereabouts of distributee is unknown. *Prob. Code § 11850(a)*

[4] Cross References

For an allegation under *Prob. Code § 11850* stating that unclaimed property exists and cannot be distributed because the whereabouts of a distributee is unknown or a distributee refuses the property, see *§ 458D.201*.

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39-458D California Forms of Pleading and Practice--Annotated § 458D.196

§ 458D.196 Allegation--Amount of Contribution for Abatement Required of Each Distributee Because of Payment of Expenses, Debts, etc. [Prob. Code § 21401]

[1] FORM Allegation--Amount of Contribution for Abatement Required of Each Distributee Because of Payment of Expenses, Debts, etc. [Prob. Code § 21401]

[*EITHER*]

1. On _____ [*date*], petitioner sold _____ [*specify property, e.g.,* 100 of decedent's shares in the XYZ Corporation], which property is given by decedent's will to _____ [*name*], for the sum of $_____ in order to pay _____ [*specify, e.g.,* expenses and debts].

[*OR*]

1. Petitioner has had to withdraw various sums from funds on hand in order to pay _____ [*specify, e.g.,* expenses and debts], leaving the total value of the estate at a figure less than that of the total of the devises made.

[*CONTINUE*]

2. The respective interests of the [other] devisees and the amounts that each should contribute [to _____ (*name*)] on account of the _____ [sale of the property *or* shortfall] are as follows:

_____ [*List each devisee, the value of his or her share under the will, and the proportionate amount that he or she should contribute to the devisee whose interest was sold or the shortfall, so that all devisees within a class will share proportionately in the payment of the debts, expenses, etc., funded by the sale or withdrawal of funds.*]

[2] Use of Form

This allegation should be included in the petition for final distribution when property given by the will to a designated beneficiary was sold to pay expenses, debts, etc., or when funds on hand were withdrawn for such purposes, leaving a shortfall in the total amount devised. Although the court must fix the amount each distributee of the estate property must contribute for abatement [*see Prob. Code § 21405(a)*], it is helpful to allege those amounts in the petition as an aid to the court.

[3] Governing Law

Abatement is governed by *Prob. Code §§ 21400-21406*, which, however, apply only to gifts made on or after July 1, 1989; in the case of a gift made before July 1, 1989, the law that would have applied had *Prob. Code §§ 21401-21406* not been enacted will apply [*Prob. Code § 21406(a)*]. A gift by will is made on the date of the decedent's death [*Prob. Code § 21406(b)*]. For discussion of these provisions, see *§ 458D.83*.

[4] State Statutes

Abatement of shares of beneficiaries for all purposes including payment of debts, expenses, etc. *Prob. Code § 21401*

Order in which shares of beneficiaries abate. *Prob. Code § 21402*

Abatement within classes of beneficiaries. *Prob. Code § 21403*

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39-458D California Forms of Pleading and Practice--Annotated § 458D.197

§ 458D.197 Allegation--When Devisee Is Subscribing Witness to Will [Prob. Code § 6112]

[1] FORM Allegation--When Devisee Is Subscribing Witness to Will [Prob. Code § 6112]

_____ [*Name*], to whom decedent's will gives _____ [*specify property given*], of a value of $_____, as a _____ [general *or* specific] devise, is one of the subscribing witnesses to decedent's will. There _____ [is only one other *or* are two other] disinterested subscribing _____ [witness *or* witnesses]. [*If only one other disinterested subscribing witness, add:* _____ (*Name*) _____ (is *or* is not) an heir of decedent _____ (*add, if an heir* : to wit, _____ [*specify relationship creating status as heir, e.g.*, decedent's son], and his/her share of the estate, if the will had not been established, would have been _____ [*specify, e.g.*, an undivided one third (1/3)] of a value of $_____).]

CAUTION:

If this allegation is included in the petition, local rules may require that notice be mailed to persons other than those specified in *Prob. Code § 11601* and should be checked.

[2] Use of Form

This subscribing allegation may be included in the petition for final distribution when a devisee was one of two witnesses to the will [*see Prob. Code § 6112*]. If the decedent died before January 1, 1985, an interested witness can take only his or her intestate share in the testator's estate [*see* former *Prob. Code § 51*]. If the decedent died on or after that date, the fact that the witness was interested in the will merely creates a presumption affecting the burden of proof that the witness procured the devise by duress, menace, fraud, or undue influence. The presumption does not apply when the witness is a person to whom the devise is made solely in a fiduciary capacity [*Prob. Code § 6112(c)*]. If a devise fails because the presumption established by *Prob. Code § 6112(c)* applies and is not rebutted, the interested witness shall take that proportion of the devise that does not exceed the share of the estate that would have been distributed to the witness had the will not been established [*Prob. Code § 6112(d)*]. If the limitation on the amount the witness may take applies, the court must decide what share of the estate would have gone to the person had the will not been established, but it is helpful to allege this, as an aid to the court. For further discussion, see *§ 458D.84[1]*.

[3] State Statutes

Effective date of new provisions; continued effect of former law. *Prob. Code § 6103*

Devisee who is witness to will as presumed to have procured devise through duress, menace, fraud, or undue influence unless there are two other subscribing witnesseswho are disinterested witnesses; effect of failure to rebut presumption. *Prob. Code § 6112*

[4] Decisions

Disclaimer by witness who is also beneficiary as not making that witness disinterested for purpose of proving will. *Estate of Parsons (1980) 103 Cal. App. 3d 384, 386, 163 Cal. Rptr. 70* (interpreting former *Prob. Code § 51*, the predecessor to *Prob. Code § 6112*)

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39-458D California Forms of Pleading and Practice--Annotated § 458D.198

§ 458D.198 Allegation--Omission to Provide in Testamentary Instrument for Surviving Spouse or Registered Domestic Partner by Later Marriage [Prob. Code §§ 26110-21612]

[1] FORM Allegation--Omission to Provide in Testamentary Instrument for Surviving Spouse or Registered Domestic Partner by Later Marriage [Prob. Code §§ 26110-21612]

Decedent's will was executed before decedent _____ [married *or* formed a registered domestic partnership with] _____ [*name of spouse or registered domestic partner*], who is decedent's surviving _____ [spouse *or* registered domestic partner]. _____ [*Name of surviving spouse or registered domestic partner*] is not provided for in the will or in any other testamentary instrument executed by decedent. It does not appear from any testamentary instrument executed by decedent that decedent's failure to provide for _____ [*name of surviving spouse or registered domestic partner*] was intentional. Decedent did not provide for _____ [*name of surviving spouse or registered domestic partner*] by any transfer or transfers outside of the estate passing by the decedent's _____ [will *or if decedent also executed a trust that became irrevocable on decedent's death* testamentary instruments], and _____ [*name of surviving spouse or registered domestic partner*] has not agreed in writing to waive his/her right to share in the decedent's estate. _____ [*Name of surviving spouse or registered domestic partner*] is therefore entitled to the following property in the estate: _____ [*specify, e.g.,* the one half of the community property that belongs to the decedent under *Probate Code Section 100 and/or* the one half of the quasi-community property that belongs to the decedent under *Probate Code Section 101 and/or* a share in the separate property of the decedent equal in value to that which he/she would have received if the decedent had died without having executed a testamentary instrument, up to one half of the value of the separate property in the estate].

CAUTION:

If this allegation is included in the petition, local rules may require that notice be mailed to persons other than those specified in *Prob. Code § 11601* and should be checked.

[2] Use of Form

This allegation may be included in the petition when the estate is being administered under a will made before the decedent married or entered into a registered domestic partnership and the decedent failed to provide for the surviving

spouse or registered domestic partner either in the will or in a trust instrument that became irrevocable on the decedent's death. Under these circumstances, the spouse or registered domestic partner will qualify as an "omitted spouse" and be entitled to receive a share of the estate as specified by statute [*see Prob. Code § 21610*]. As used in this form, "testamentary instrument"means the decedent's will or a trust instrument executed by the decedent creating a revocable trust that became irrevocable only on the decedent's death [*Prob. Code §§ 21600, 21601(a)*].

As of January 1, 2005, a surviving registered domestic partner has the same rights, responsibilities, protections, and benefits as a surviving spouse [*Fam. Code § 297.5(c)*].

For a more detailed discussion of the statutory rules governing omitted spouses, see *§ 458D.85[1]*.

[3] When Omitted Spouse or Registered Domestic Partner Is Not Entitled to Share

An omitted spouse is *not* entitled to receive a share of the estate in the following situations:

- The decedent's failure to provide for the spouse or registered domestic partner in the decedent's testamentary instruments was intentional and that intention appears from the testamentary instruments [*Prob. Code § 21611(a)*];

- The decedent provided for the spouse or registered domestic partner by transfer outside of the estate passing by the decedent's testamentary instruments and the intention that the transfer be in lieu of a provision in those instruments is shown by statements of the decedent or from the amount of the transfer or by other evidence [*Prob. Code § 21611(b)*]; or

- The spouse or registered domestic partner made a valid agreement waiving the right to share in the decedent's estate [*Prob. Code § 21611(c)*; *see Estate of Butler (1988) 205 Cal. App. 3d 311, 315-317, 252 Cal. Rptr. 210]* .

[4] State Statutes

Except as provided in *Prob. Code § 21611*, surviving spouse who married decedent after execution of all testamentary instruments entitled to share in estate. *Prob. Code § 21610*

Conditions preventing spouse from receiving share of estate under *Prob. Code § 21610*. *Prob. Code § 21611*

Manner of satisfying surviving spouse's interest in estate. *Prob. Code § 21612*

[5] Decisions

Putative spouse is omitted spouse within meaning of former *Prob. Code § 6560* [*now see Prob. Code § 21610*]. *Estate of Sax (1989) 214 Cal. App. 3d 1300, 1303, 263 Cal. Rptr. 190*

Surviving spouse's share was determined by former *Prob. Code § 221* rather than by former *Prob. Code § 224* because entire estate consisted of decedent's separate property and will that left everything to single charity and intentionally disinherited only child was revoked under former *Prob. Code § 70*; thus, surviving spouse and charity were each entitled to one half of estate. *Estate of Smith (1985) 167 Cal. App. 3d 208, 212, 212 Cal. Rptr. 923*

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39-458D California Forms of Pleading and Practice--Annotated § 458D.199

§ 458D.199 Allegation--Failure to Provide for Child Who Was Subsequently Born or Adopted, or Who Was Believed Dead, or of Whose Birth Testator Was Unaware [former Prob. Code §§ 90, 91; Prob. Code §§ 6570-6573, 6580]

[1] FORM Allegation--Failure to Provide for Child Who Was Subsequently Born or Adopted, or Who Was Believed Dead, or of Whose Birth Testator Was Unaware [former Prob. Code §§ 90, 91; Prob. Code §§ 6570-6573, 6580]

[*EITHER, if decedent died on or after January 1, 1985, but before January 1, 1998*]

_____ [*Name of omitted child*] is _____ [a *or* an *or* the] [adopted] child of decedent, who died on _____ [*date*]. _____ [*Name of omitted child*] was _____ [born *or* adopted] after the execution of the decedent's will and is not provided for in decedent's will; it does not appear from the will that the omission was intentional; [the will was executed at a time when decedent had _____ (one child *or* _____ [*number*] children) and decedent did not devise substantially all of the estate to the other parent of _____ (*name of omitted child*)]; and the decedent did not provide for _____ [*name of omitted child*] by any transfer outside the will [with the intention that the transfer be in lieu of a testamentary provision]. The share of the estate to which _____ [*name of omitted child*] would have succeeded had decedent died intestate is _____ [*state percentage or dollar amount*], on the basis that _____ [*specify, e.g.*, _____ (*name of omitted child*) was one of three children of decedent, and decedent was not survived by a spouse].

[*OR, if decedent died on or after January 1, 1985, but before January 1, 1998, and failed to provide for a living child because of the belief that child was dead or of whose birth he or she was unaware*]

_____ [*Name*], who was living at the time the will was executed, is _____ [a *or* the] surviving child of the decedent. Decedent failed to provide in his/her will for _____ [*name of child*] solely because at the time the will was executed, decedent _____ [*either* believed that

_____ (*name of surviving child*) was dead *or* was unaware of the birth of _____ (*name of surviving child*)]. _____'s [*name of child*] share of the estate, had the decedent died intestate, would have been _____ [*specify, e.g.,* an undivided one third] of a value of $_____).]

[*OR, if decedent died on or after January 1, 1998, and failed to provide in any testamentary instrument for child born or adopted after all of decedent's testamentary instruments*]

_____ [*Name of child*] is a child of decedent and was _____ [born *or* adopted by decedent] on _____ [*date*], after the execution of all of decedent's testamentary instruments. _____ [*Name of child*] is not provided for in the will or in any other testamentary instrument executed by decedent. Decedent did not devise or otherwise direct the disposition of substantially all the estate to the other parent of _____ [*name of child*]. Decedent _____ [did not provide *or* provided] for _____ [*name of child*] by transfer outside of the estate passing by decedent's testamentary instruments [*if decedent provided for child, add:*, but it does not appear from any statements of decedent, from the amount of the transfer, or by other evidence that that provision was intended to be in lieu of a provision in the will]. _____ [*Name of child*] is therefore entitled to receive a share in the estate equal in value to that which _____ [he *or* she] would have received if the decedent had died without having executed any testamentary instrument.

CAUTION:

If this allegation is included in the petition, local rules may require that notice be mailed to persons other than those specified in *Prob. Code § 11601* and should be checked.

[2] Use of Form

This allegation may be included in the petition if the decedent failed to make provision in his or her will for a child.

The first alternative is for use when the decedent died on or after January 1, 1985, but before January 1, 1998, and failed to provide in the will for a child born or adopted after the will was executed, and when none of the conditions set forth in former Prob. Code § 7671 is established [former *Prob. Code § 6570*].

The second alternative is for use when the decedent died on or after January 1, 1985, but before January 1, 1998, and when the child was living at the time the will was executed but was not provided for solely because the testator believed the child was dead or was unaware of the child's birth [former *Prob. Code § 6572*].

The third alternative is for use when the decedent died on or after January 1, 1998, when the child was born or adopted after the execution of all of the decedent's testamentary instruments, and when the decedent failed to provide in any of those instruments for the child [*Prob. Code § 21620*]. As used in this alternative, "testamentary instrument" means the decedent's will or a trust instrument executed by the decedent creating a revocable trust that became irrevocable only on the decedent's death [*Prob. Code §§ 21600, 21601(a)*].

For discussion of the inheritance rights of omitted children, see *§ 458D.89[1]*, et seq.

[3] State Statutes

Inheritance rights of omitted children when decedent died on or after January 1, 1998. *Prob. Code §§ 21620-21623*

Prob. Code §§ 21620-21623 inapplicable if decedent died before January 1, 1998. *Prob. Code § 21630*

Inheritance rights of omitted children when decedent died before January 1, 1985. Former Prob. Code §§ 90, 91

Inheritance rights of omitted children when decedent died on or after January 1, 1985, but before January 1, 1998. Former *Prob. Code §§ 6570-6573*

[4] Decisions

Niece of testator adopted after execution of will is omitted heir. *Estate of Turkington (1983) 147 Cal. App. 3d 590, 592-594, 195 Cal. Rptr. 178* (involving former Prob. Code § 90; *now see Prob. Code § 21620*)

No-contest clause specifically disinheriting contesting heirs as class from participating in estate was sufficient disinheritance provision to prevent operation of pretermission statute (former Prob. Code § 90; *now see Prob. Code § 21620*). *Estate of Leonetti (1981) 115 Cal. App. 3d 378, 383, 171 Cal. Rptr. 303* (holding, however, that testators did not intend to disinherit grandchildren)

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39-458D California Forms of Pleading and Practice--Annotated § 458D.200

§ 458D.200 Allegation--Predeceased Devisee [former Prob. Code § 92; Prob. Code §§ 21109(a), 21110, 21111(a)]

[1] FORM Allegation--Predeceased Devisee [former Prob. Code § 92; Prob. Code §§ 21109(a), 21110, 21111(a)]

_____ [*Name*], whom the will names as _____ [devisee *or* legatee] of _____ [*specify devise or legacy*], died before decedent, on _____ [*date*]. The will _____ [expresses *or* does not express] an intention to substitute another person _____ [*if appropriate, add:*, to wit, _____ (*name of other person*),] in place of _____ [*name of predeceased devisee or legatee*]. [*If no substitution, add*: _____ (*Name of predeceased devisee or legatee*) _____ (was *or* was not) kindred of decedent _____ (*if related, add:*, to wit, _____ (*relationship*), and left _____ (no *or* the following) lineal descendants surviving decedent _____ (*if any such survivors, add:*, to wit: _____ (*names, relationships to decedent, ages, and addresses*)).]

CAUTION:

If this allegation is included in the petition, local rules may require that notice be mailed to persons other than those specified in *Prob. Code § 11601* and should be checked.

[2] Use of Form

This allegation may be included in the petition if a devisee named in the will failed to survive the decedent [*see Prob. Code §§ 21109(a), 21110, 21111(a)*].

[3] State Statutes

Transferee who fails to survive transferor does not take under instrument. *Prob. Code § 21109*

Issue of transferee who fails to survive transferor takes in place of transferee. *Prob. Code § 21110*

Transfer of property subject to failed transfer. *Prob. Code § 21111*

[4] Decisions

California's antilapse statute provides that when a bequest is to a protected transferee would otherwise lapse due to the transferee's death, the bequest passes by right of representation to the transferee's descendants. *Estate of Mooney (2008) 169 Cal. App. 4th 654, 663, 87 Cal. Rptr. 3d 115*

Former Prob. Code § 92 (lapsed devises and legacies; *now see Prob. Code §§ 21109-21111*) is not avoided by presence of residual clause unless proof exists of testator's clearly expressed intent to avoid its operation. *Estate of Casey (1982) 128 Cal. App. 3d 867, 874, 180 Cal. Rptr. 582*

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39-458D California Forms of Pleading and Practice--Annotated § 458D.201

§ 458D.201 Allegation--Property Is Unclaimed, Whereabouts of Distributee Is Unknown, or Distributee Refuses Property [Prob. Code § 11850(a), (b)]

[1] FORM Allegation--Property Is Unclaimed, Whereabouts of Distributee Is Unknown, or Distributee Refuses Property [Prob. Code § 11850(a), (b)]

[*EITHER*]

The following described property remains in petitioner's possession unclaimed: _____ [*describe*]. [*If the property is other than money, add:* Petitioner requests an order that the property be deposited with the treasurer of this county].

[*OR*]

The whereabouts of _____ [*name of distributee*] is unknown, and petitioner is, therefore, unable to distribute the property devised to him/her. [*If the property is other than money, add:* Petitioner requests an order that the property to be distributed to _____ (*name of distributee*) be deposited with the treasurer of this county.]

[*OR*]

_____ [*Name of distributee*] has refused to give a receipt for the following property that was devised to him/her: _____ [*describe*]. [*If the property is other than money, add:* Petitioner requests an order that the property to be distributed to _____ (*name of distributee*) be deposited with the treasurer of this county.]

[2] Use of Form

This allegation may be included in the petition when the personal representative has already deposited money to be distributed with the county treasurer (*see Prob. Code §§ 11851(a), 11853*); or, if a court order is required before the property may be deposited with the county treasurer [*see Prob. Code § 11851(b)* (property other than money)], the allegation may be included in a petition for the order to deposit, which may be requested in the petition for final distribution; otherwise, the allegation should be included in the petition for discharge [*see* Ch. 458E, *Probate: Discharge*].

Prob. Code § 11850, unlike its predecessor (former *Prob. Code §§ 1060* and *1062*), omits reference to a distributee who resides out of California. Distribution should be made to the named distributee or any known assignee of the named distributee, regardless of the place of residence of the distributee [*see* Law Revision Comm'n Comment to *Prob. Code § 11850*].

Distribution to the county treasurer under *Prob. Code § 11850* is permissive, and the personal representative may make distribution in any other manner that is appropriate [*see* Law Revision Comm'n Comment to *Prob. Code § 11850*].

For further discussion, see *§ 458D.97*

[3] State Statutes

Deposit with county treasurer of property to be distributed when property remains unclaimed in personal representative's possession or whereabouts of distributee is unknown. *Prob. Code § 11850(a)*

Deposit with county treasurer of property to be distributed when distributee refuses to give receipt for property. *Prob. Code § 11850(b)*

When court order for deposit with county treasurer is required. *Prob. Code § 11851(b)*

Requirement that county treasurer give receipt for deposit. *Prob. Code § 11852*

Requirement that personal representative deliver to county treasurer certified copy of order for distribution when money is deposited or is already on deposit with county treasurer. *Prob. Code § 11853*

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39-458D California Forms of Pleading and Practice--Annotated § 458D.202

§ 458D.202 Allegation--No Fiduciary Appointed for Minor or Incompetent Distributee and No Person Authorized to Give Receipt for Property [Prob. Code § 11850(c)]

[1] FORM Allegation--No Fiduciary Appointed for Minor or Incompetent Distributee and No Person Authorized to Give Receipt for Property [Prob. Code § 11850(c)]

_____ [*Name*], who is entitled to receive out of the estate _____ [*specify personal property*], as _____ [an heir *or* a devisee], is _____ [a minor *or* an incompetent person] who has no legally qualified guardian or conservator or other fiduciary to receive the property or person authorized to give a receipt for the property. [*If the property is other than money, add:* Petitioner requests an order that _____ (the property to be distributed to _____ (*name of distributee*) be deposited with the treasurer of this county *or* the property be sold and the proceeds of the sale, less expenses of sale allowed by the court, be deposited with the county treasurer, which sale would be for the benefit of _____ (*name of minor or incompetent person*) for the reason(s) that _____ (*specify*)).]

[2] Use of Form

The foregoing allegation is for use when a distributee of personal property is a minor or an incompetent person having no legally qualified guardian or conservator or other fiduciary to receive the property or person authorized to give a receipt for it [*see Prob. Code § 11850(c)*]. The allegation may be included in the petition for final distribution when the personal representative has already deposited money to be distributed with the county treasurer (*see Prob. Code §§ 11851(a), 11853*). If a court order is required before the property may be deposited with the county treasurer [*see Prob. Code § 11851(b)* (property other than money)], the allegation may be included in a petition for the order to deposit, which may be requested in the petition for final distribution. Otherwise, the allegation should be included in the petition for discharge [*see* Ch. 458E, *Probate: Discharge*].

Distribution to the county treasurer under *Prob. Code § 11850* is permissive, and the personal representative may make distribution in any other manner that is appropriate. For example, distribution to a minor for whom no guardian has been appointed might be made under the California Uniform Transfers to Minors Act (*see Prob. Code §§ 3905, 3906*) or under another appropriate statute. If the distributee is a nonresident minor or incompetent person who has a guardian or other fiduciary of the estate legally appointed under the law of another jurisdiction, the distribution of the person's

share should be made to the fiduciary [*see* Law Revision Comm'n Comment to *Prob. Code § 11850*].

For further discussion, see *§ 458D.97*.

[3] State Statutes

Deposit with county treasurer of property to be distributed to minor or incompetent person having no guardian, conservator, or other fiduciary to receive property or person authorized to give receipt for it. *Prob. Code § 11850(c)*

[4] Cross References

For related forms, *see §§ 458D.190* and *458D.201*.

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39-458D California Forms of Pleading and Practice--Annotated § 458D.203

§ 458D.203 Allegation--Minor Distributee of Personal Property Not Exceeding $5,000 in Value [Prob. Code §§ 3400, 3401]

[1] FORM Allegation--Minor Distributee of Personal Property Not Exceeding $5,000 in Value [Prob. Code §§ 3400, 3401]

_____ [*Name*] is a minor whose distributive share of this estate consists of personal property not exceeding $5,000 in value. _____ [Petitioner has received the written assurance, under oath, of _____ [*name*](, a copy of which is attached hereto as Exhibit C,) *or* _____ [*name*] will, before the hearing on this petition, file with the court a written assurance] that he/she is the parent having custody of the minor, that there is no guardianship of the estate of the minor, that the total estate of the minor does not exceed $5,000, [excluding custodial property held pursuant to the California Uniform Transfers to Minors Act *and/or* any money or property held subject to court order pursuant to *Probate Code Section 3602(c)*, but] including the _____ [money *and/or* property] to be _____ [paid *and/or* delivered] from this estate to the parent to be held in trust for the minor until he/she reaches the age of majority.

[2] Use of Form

The foregoing allegation is for use in a petition for final distribution when property having a value that does not exceed $5,000 is to be distributed to a minor who has no guardian of his or her estate. The property may be paid or delivered to a parent of the minor entitled to custody to be held in trust for the minor until he or she reaches the age of majority, provided that the parent gives the person making the payment or delivery written assurance, verified by the oath of the parent [*see § 458D.204*], that the "total estate of the minor" (defined in *Prob. Code § 3400(a)*), including the money or other property to be paid or delivered to the parent, does not exceed $5,000 [*Prob. Code § 3401(a)-(c)*].

Some courts may require that the affidavit or declaration be filed before the date of hearing of a petition for distribution [*see, e.g.*, Los Angeles Co. Super. Ct. Rules, Rule 10.120] or before an order for distribution will be made [*see*, e.g., Orange County Sup. Ct. Rules, Rule 608.21].

In computing the total estate of a minor, custodial property held pursuant to the California Uniform Transfers to Minors Act (*Prob. Code §§ 3900-3925*) and any money or property subject to court order pursuant to *Prob. Code § 3602(c)* or

Prob. Code §§ 3610-3612 are excluded [*Prob. Code § 3400(b)*].

If the assets to be distributed to the minor exceed $5,000 in value, a guardianship may be necessary unless the property is all cash [*see Prob. Code §§ 3410(a)(2), 3413*], in which event the court may make any of the orders authorized by *Prob. Code § 3413* [*see §§ 458D.205, 458D.206, 458D.213*].

[3] Cross References

For a related form, *see § 458D.191*.

For forms of petition for appointment of guardian of minor, see generally Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians*

[4] State Statutes

Distribution of property not exceeding $5,000 in value to parent of minor distributee. *Prob. Code §§ 3400-3402*

Right of parent or guardian to compromise claim in favor of minor. *Prob. Code §§ 3500, 3600-3612*

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39-458D California Forms of Pleading and Practice--Annotated § 458D.204

§ 458D.204 Written Assurance Under Oath of Parent Entitled to Custody re Value of Minor's Estate [Prob. Code § 3401]

[1] FORM Written Assurance Under Oath of Parent Entitled to Custody re Value of Minor's Estate [Prob. Code § 3401]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ Estate of	)	NO. _____
_____ [*name*],	)	WRITTEN ASSURANCE OF PARENT ENTITLED
Deceased.	)	TO CUSTODY
	)	[*Prob. Code § 3401(c)(2)*]

_____

I, _____ [*name*], hereby assure that:

I am the _____ [father *or* mother] and _____ [a *or* the] parent entitled to custody of _____ [*name*], a minor, who is a distributee of _____ [this estate *or* the estate of _____ (*name*), deceased]. _____ [*Name of minor*] has no guardianship of the estate, and his/her total estate, including his/her distributive share of the estate, does not exceed $5,000 in value. [In computing this value, I have deducted _____ (custodial property held pursuant to the California Uniform Transfers to Minors Act *and/or* _____ (money *and/or* property) subject to court order pursuant to *Section 3602(c) of the Probate Code*).]

I request that the _____ [money *and/or* property] to be distributed to _____ [*name of minor*] be _____ [paid *and/or* delivered] to me at _____ [*street address, city, and state*], to be held in trust for _____ [*name of minor*] until he/she reaches the age of majority.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

Parent

[2] Use of Form

The foregoing declaration under penalty of perjury is for use by a parent entitled to custody of a minor distributee of an estate when the property distributable to the minor does not exceed $5,000 in value, the minor has no guardian of the estate, and the total value of the minor's estate, including the property to be distributed, does not exceed $5,000 [*see Prob. Code § 3401*]. By giving a written assurance, under oath, that the minor's total estate, including the distributive interests, does not exceed $5,000, a parent of the minor entitled to custody may have the property paid or delivered to him or her in trust for the minor until the minor reaches majority [*Prob. Code § 3401(a), (c)*]. In computing the total estate of the minor, custodial property held pursuant to the California Uniform Transfers to Minors Act (*Prob. Code §§ 3900-3925*) and any money or property subject to court order pursuant to *Prob. Code § 3602(c)* or *Prob. Code §§ 3610-3612* is to be deducted [*Prob. Code § 3400(b)*].

[3] Cross References

For related forms, *see §§ 458D.190, 458D.203*.

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39-458D California Forms of Pleading and Practice--Annotated § 458D.205

§ 458D.205 Petition for Order Relating to Money to Be Distributed to Minor [Prob. Code §§ 3411, 3413]

[1] FORM Petition for Order Relating to Money to Be Distributed to Minor [Prob. Code §§ 3411, 3413]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
In the Matter of	)	PETITION FOR ORDER RELATING TO MONEY
_____ [*name*],	)	TO BE DISTRIBUTED TO
a minor.	)	MINOR
	)	[*Prob. Code §§ 3411, 3413*]

_____

Petitioner, _____ [*name*], respectfully represents:

1. Petitioner is the _____ [_____ (father *or* mother) and (a) parent entitled to custody of _____ (*name*), a minor *or* the duly appointed and acting _____ (*specify, e.g.,* executor of the will of _____ (*name*), deceased), in a proceeding now pending administration in _____ (this court, No. _____, *or* the Superior Court of California, County of _____), entitled Estate of _____ (*name*), deceased, No. _____ (hereinafter, "the probate proceeding"), of which this court is requested to take judicial notice].

2. Under the _____ [will of _____ (*name of decedent*) *or* laws of intestate succession], _____ [*name of minor*] (hereinafter "the minor") is entitled to receive the sum of $_____ as his/her share of the decedent's estate in _____ [the probate proceeding *or* a proceeding now pending in the Superior Court of California, County of _____, entitled Estate of _____ (*name*), deceased, No. _____ (hereinafter, "the probate proceeding"), of which this court is requested to take judicial notice].

3. The minor is a resident of this county.

4. The minor has no guardian of the estate.

5. [Because _____ (*specify, e.g.,* the total estate of the minor, including the sum to be distributed in the probate proceeding, exceeds $5,000 in value, the sum to be distributed *or* the sum to be distributed exceeds $5,000, it) cannot be paid to _____ (petitioner *or* a custodial parent of the minor) as provided in *Probate Code Section 3401*.]

6. To avoid the expenses of a guardianship, it would be in the best interests of the minor if the court would order the sum to be distributed to be deposited in _____ [*specify, e.g.,* an insured account in a financial institution in California *or specify type of account and name, branch, and address of financial institution in California*], subject to withdrawal only on the authorization of this court.

WHEREFORE, petitioner prays that this court order that the sum of $_____ to be distributed to the minor in the probate proceeding be _____ [*specify, e.g.,* deposited in an interest bearing account in the (_____ branch of the) _____ Bank, located at _____ (*street address and city*), California], to be withdrawn only on the order of this court, and for such further or other orders as the court deems proper.
Dated: _____.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

CAUTION:
The foregoing petition must be verified [*Prob. Code § 1021(a)(1)*; *see also Prob. Code §§ 1020, 1021(b)(1), 1023*].

[2] Use of Form

The foregoing form is for use by either a parent having custody of a minor who is to receive a sum of money as her or her share of an estate being probated or by the personal representative of the decedent's estate to petition the court for an order that the money be deposited, invested, held on conditions, or paid as provided in *Prob. Code § 3413(a)-(d)* (discussed briefly in § 458D.96[1]. For further discussion of *Prob. Code § 3413*, see Ch. 364, *Minors: Claims and Property of Minors* . For a corresponding provision in the order for final distribution, *see § 458D.213*. Note that some courts provide forms for mandatoryuse in petitioning the court for an order under *Prob. Code § 3413(a)* [*see, e.g.,* Orange Co. Super. Ct. Rules, Rule 613.01(6)].

The petition must be filed in the superior court of the county in which the minor resides [*see Prob. Code § 3411(b)(1)*], and may be filed by a parent entitled to the minor's custody or by the person holding the money belonging to the minor [*Prob. Code § 3411(a)*], that is, by the personal representative.

If the minor is a resident of the same county in which the estate proceeding is pending, it would appear that the petition by the personal representative could be made in conjunction with the petition for distribution. Nevertheless, some courts require that an order made under *Prob. Code § 3413* be filed before the date of the hearing on the petition for distribution [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 10.120(a)]. Other courts, by local rule, require a separate petition and order under the minor's name with a different case number when distribution is to be made for the benefit of a minor under *Prob. Code §§ 3410-3412*, and that a copy of the order must be filed in the decedent's estate proceeding [*see, e.g.,* Orange Co. Super. Ct. Rules, Rule 608.21(3)]. Local court or department rules and practice should be consulted.

[3] Terminology

Accounts from which funds may be withdrawn only on court order (*Prob. Code § 3413(a)*) are referred to as "blocked accounts" [*see, e.g.,* Orange Co. Super. Ct. Rules, Rule 613.01 et seq.], and local court rule may specify the particular blocked accounts into which funds will be ordered deposited [*see, e.g.,* Orange Co. Super. Ct. Rules, Rule 613.02(D)].

[4] Notice of Hearing

There is no notice of hearing required by *Prob. Code §§ 3410-3413*, and the order may, therefore, be obtained ex parte. However, some courts require a hearing and notice if the petition does more than seek the deposit of funds or the deposit of funds subject to reimbursement for the costs of filing the petition [*see, e.g.,* Orange Co. Super. Ct. Rules, Rule 613.02(A)]. Local rules and practice should be consulted.

[5] Signature and Verification

The petition must be signed by all of the petitioners, although, unless expressly provided to the contrary, verification of a document constitutes signature of that document [*Prob. Code § 1020*]. It must also be verified [*Prob. Code § 1021(a)(1)*] by the petitioner or by any one of them if there are two or more [*Prob. Code § 1021(b)(1)*]. However, if the petitioner is absent from the county or for some other cause is unable to sign or verify it, and the petitioner is not the personal representative or other fiduciary (*see Prob. Code § 39*), it may be signed and verified by the petitioner's attorney [*Prob. Code § 1023*].

[6] Cross References

For a related form, *see § 458D.204*.

For forms of petition for guardianship of estate of minor, see Ch. 280, *Guardianship and Conservatorship:*

Appointment of Guardians

For discussion and forms relating to disposition of of property and money to a minor, see Ch. 364, *Minors: Claims and Property of Minors*

[7] State Statutes

Minors as being all persons under 18 years of age. *Fam. Code § 6500*

"Age of majority" defined. *Fam. Code § 6502*

Verification of petition required. *Prob. Code §§ 1021(a)(1), (b)(1), 1023*

Court in which petition is to be filed. *Prob. Code § 3411*

Disposition by court order of money held for minor by deposit in specified accounts subject to withdrawal only on court order, transfer to custodian for benefit of minor under California Uniform Transfers to Minors Act (*Prob. Code §§ 3900-3925*), held subject to conditions if sum does not exceed $20,000, or paid to parent of minor if sum does not exceed $5,000. *Prob. Code § 3413*

[8] Local Rules of Court--Petition Requirements

Orange Co. Super. Ct. Rules, Rule 613.02

San Francisco Uniform Local Ct. Rules, Rule 14.90

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39-458D California Forms of Pleading and Practice--Annotated § 458D.206

§ 458D.206 Order on Ex Parte Application That Money to Be Distributed to Minor Be Deposited in Blocked Account [Prob. Code § 3413(a)]

[1] FORM Order on Ex Parte Application That Money to Be Distributed to Minor Be Deposited in Blocked Account [Prob. Code § 3413(a)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
In the Matter of	)	ORDER ON EX PARTE APPLICATION TO DE-
_____ [*name*],	)	POSIT MONEY OF MINOR TO BE
a minor.	)	WITHDRAWN ON COURT ORDER ONLY
	)	[*Prob. Code § 3413(a)*]

_____

[*EITHER*]

On the verified petition of _____ [*name*], the _____ [father *or* mother], and a/the parent entitled to custody of _____ [*name*], a minor,

[*OR*]

On the verified petition of _____ [*name*], the duly appointed and acting _____ [*title of personal representative, e.g.*, Executor of the will] of _____ [*name*], in _____ [the above-entitled proceeding *or* that certain proceeding now pending in the Superior Court of California, County of _____, entitled Estate of _____ (*name*), deceased, No. _____

(hereinafter, "the probate proceeding")], who holds the sum of $_____ to be distributed in those proceedings to _____ [*name*], a minor, as his/her share of the decedent's estate,

[*CONTINUE*]

for an order that the minor's share in the estate of _____ [*name*], deceased, be _____ [deposited in an account in *or* invested in a single-premium deferred annuity given by *or* deposited with] _____ [*name*], _____ [a financial institution in this state *or* the treasurer of _____ County], subject to withdrawal only on the court's authorization, and it appearing to the satisfaction of the court that the minor has no guardian of the estate,

IT IS ORDERED that:

1. The sum of $_____, representing the share of _____ [*name*], a minor, in the decedent's estate in _____ [the probate proceeding *or* that certain proceeding now pending in the Superior Court of California, County of _____, entitled "Estate of _____ [*name*], deceased," No. _____,] be deposited in the name of the minor _____ [in an insured account in a financial institution in California *or specify type of account and name, branch, and address of financial institution in California or* in a single-premium deferred annuity (issued by _____ (*name and address of insurance company or other company selling single-premium deferred annuities*)) *or* with _____ (*name*), the treasurer of _____ County].

2. Neither all nor any part of the money so deposited shall be withdrawn except on order of this court until the minor reaches the age of majority on _____ [*date*]. On or after that date all money in the _____ [account *or* shares *or* annuity] shall be paid _____ [to or on the order of the minor *or, in the case of an annuity,* according to its terms] without further order of this court.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The foregoing form of order is for use with the petition for the order set out in *see § 458D.205*. The wording of the form is intended to permit the funds to be released to the minor when he or she reaches the age of 18 without any further order of the court. If for any reason the money is not to be released to the minor on his or her 18th birthday (for example, the mental or physical incapacity of the minor that may persist beyond the time he or she reaches the age of majority), the provision for automatic release may be deleted from the foregoing order.

Some courts provide their own form of order, and where they do, the form must be used [*see, e.g.,* Orange Co. Super. Ct. Rules, Rule 613.01].

[3] Cross References

For a related form, *see § 458D.205*.

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Volume 39: Probate: Claims Against the Estate thru Probate: Discharge-Chs. 454-459
Chapter 458D PROBATE: ACCOUNTS, FINAL DISTRIBUTION, AND COMPENSATION
PART V. FORMS

39-458D California Forms of Pleading and Practice--Annotated § 458D.207

§ 458D.207 Notice of Hearing of Final Account and Petition for Final Distribution [and for Allowance of Compensation for Extraordinary Services] [Prob. Code §§ 1220, 10831(a), 11000, 11601]

[1] FORM Notice of Hearing of Final Account and Petition for Final Distribution [and for Allowance of Compensation for Extraordinary Services] [Prob. Code §§ 1220, 10831(a), 11000, 11601]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Estate of_____ [*name*], Deceased.	))))))	NO. _____ NOTICE OF HEARING OF FINAL ACCOUNT AND PETITION FOR FINAL DISTRIBUTION [AND FOR ALLOWANCE OF COMPENSATION FOR EXTRAORDINARY SERVICES] [*Prob. Code §§ 1220, 10831(a), 11000, 11601*]

_____

To all interested persons in the above estate:

NOTICE IS HEREBY GIVEN that _____ [*name*], as _____ [*personal representative, e.g.,* Executor of the will of _____ (*name*) in the above-entitled proceeding], has filed herein a final account and petition for final distribution [*add, if appropriate, if estate proceedings commenced on or after July 1, 1991,* _____ (with a request *or* and a petition) for an order fixing and allowing the personal representative's and attorney's compensation for all services rendered in the estate proceeding *or add, if appropriate, if estate proceedings commenced before July 1, 1991:* for the petitioner's statutory commission and attorney's fee, and for an allowance of additional compensation to the petitioner and attorney for extraordinary services], reference to which is made for further particulars. The time and place for settling the account and hearing of the petition have been set for _____ [*date*], at _____ [*time*], in the courtroom [of Department No. _____] of the above-entitled court at _____ [the _____ courthouse

or specify other building], located at _____ [*street address*], _____ [*city*], California. Dated: _____.

_____ [*signature*]

Attorney of Petitioner

[2] Use of Form

This form of notice may be used to give notice in the manner prescribed by *Prob. Code § 1220* of a hearing on a final account and petition for final distribution, as required by *Prob. Code §§ 11000* and *11601*. This form complies with the requirements of *Prob. Code § 1211* (statutory form of notice). For a further discussion of the statutory form of notice, as well as the Judicial Council form of notice for optional use, see Ch. 447, *Probate: Statutory Notice Requirements* .

[3] 1990 Legislation

In 1990, the Probate Code was repealed and a new Probate Code was enacted operative July 1, 1991 [Stats. 1990, ch. 79]. Although some of the former statutes were not continued in the new code, most were. Some of the statutes were carried over without change or with minor changes, whereas others were substantially changed or replaced. In this latter case, some of the repealed statutes continue to apply in specified proceedings.

Former *Prob. Code §§ 900-910* (personal representative's commission and attorney's fees), as they existed on June 30, 1991, continue to apply in administration of estate proceedings commenced before July 1, 1991 [*Prob. Code § 10850(b)*]. In proceedings commenced on or after July 1, 1991, the compensation of the personal representative and his or her attorney are governed by *Prob. Code §§ 10800-10850* [*see Prob. Code § 10850(a)*]. Under the new code, the personal representative, at the time of the filing of the final account and petition for final distribution, may petition the court for an order fixing and allowing his or her compensation for all services rendered in the estate proceeding, and, at that time, either the personal representative or the personal representative's attorney may petition the court for an order fixing and allowing the attorney's compensation for all services rendered in the estate proceeding [*Prob. Code § 10831(a)*]. The request may be included in the final account or the petition for final distribution or may be made in a separate petition [*Prob. Code § 10831(b)*].

In addition, *Prob. Code § 11000* (notice of hearing on the account, as enacted by Stats. 1990, ch. 79) does not apply in any administration of estate proceeding commenced before July 1, 1991 [*Prob. Code § 900(b)*]; rather, in any proceeding commenced before July 1, 1991, former *Prob. Code § 11000*, as it existed on June 30, 1991, continues to apply [*Prob. Code § 900(c)*].

[4] Persons Who Must Be Given Notice

In administration of estate proceedings commenced before July 1, 1991, a copy of the notice must be mailed at least 15 days before the time set for the hearing to (1) all persons who have given notice of appearance in the estate proceeding or who have requested special notice pursuant to *Prob. Code § 1250*, *(2)* each known heir or devisee whose interest in the estate is affected by the account or petition, and (3) the State of California if any portion of the estate is to escheat to it and its interest is affected by the account or petition [*see Prob. Code §§ 1220, 11601(a)-(d)*; former *Prob. Code § 11000(b)(1)-(3)*].

In administration of estate proceedings commenced on or after July 1, 1991, notice of the time and place of the hearing must be given at least 15 days before the hearing to the following persons [*Prob. Code §§ 10831(c), 11000(a), 11601*; *see Prob. Code § 1220(a)(2)*]:

- All persons who have requested special notice in the estate proceeding pursuant to *Prob. Code §*

1250.

- All known heirs and devisees whose interests in the estate would be affected by the account.

- The Attorney General, at the office of the Attorney General in Sacramento, if any portion of the estate is to escheat to the state and its interest in the estate would be affected by the account.

- Each creditor who has filed a claim that is allowed or approved but is unpaid in whole or in part, if the estate is insolvent.

- The California Controller, if property is to be distributed to the state because there is no known beneficiary, or if property is to be distributed to a beneficiary whose whereabouts are unknown.

The court may for good cause dispense with notice to persons entitled to notice under Section 1220 or special notice under Section 1252 [*see Prob. Code § 1220(c), 1252(a)*].

[5] Contents of Notice

In addition to the matters required by the statutory form of notice [*Prob. Code § 1211*], when the petition for approval of the account requests compensation or when a final account is filed with a petition for an order for final distribution of the estate, the notice of hearing must so state [*Prob. Code § 11000(b), (c)*].

For further discussion, see *§§ 458D.36, 458D.72*.For additional discussion, see Ch. 447, *Probate: Statutory Notice Requirements* .

[6] State Statutes

General notice provisions. *Prob. Code §§ 1200-1210*

Statutory form of notice. *Prob. Code § 1211*

Mailing notice in general. *Prob. Code §§ 1215-1217*

Mode of mailing notice of hearing. *Prob. Code § 1220*

Requests for special notice. *Prob. Code §§ 1250-1252*

Proof of giving notice. *Prob. Code §§ 1260-1265*

Notice when account is rendered for settlement as required to be given in accordance with *Prob. Code § 1220*. *Prob. Code § 11000(a)*

Additional persons required to be given notice when account is rendered for settlement. *Prob. Code § 11000(a)*

Notice of hearing on petition for final distribution required to be given in accordance with *Prob. Code § 1220*. *Prob. Code § 11601(a)*

Additional persons required to be given notice of petition for final distribution. *Prob. Code § 11601(a)*

[7] Local Rules of Court

Department number and date of hearing as required to be placed immediately below case number on first page of document filed. Los Angeles Co. Super. Ct. Rules, Rule 10.10

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39-458D California Forms of Pleading and Practice--Annotated § 458D.208

§ 458D.208 Supplemental Account of Subsequently Acquired or Discovered Property [Prob. Code § 11642(a)]

[1] FORM Supplemental Account of Subsequently Acquired or Discovered Property [Prob. Code § 11642(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Estate of_____ [*name*],	)	
Deceased.	)	NO. _____
	)	SUPPLEMENTAL ACCOUNT
	)	

_____

Since the filing of his/her final account, _____ [*name*], as _____ [*personal representative, e.g.,* Executor of the will of _____ (*name*), deceased] of the estate of _____ [*name of decedent*], deceased, has _____ [received *or* disbursed *or* received and disbursed] property belonging in the estate, and pursuant to the order of this court herewith renders his/her supplemental account. The following is a true and correct account of all such _____ [receipts *or* disbursements *or* receipts and disbursements], covering the period from _____ [*date*], to _____ [*date*], inclusive.

RECEIPTS

Date ..... Item ..... Amount

[*List receipts, in order by date from earliest to latest, briefly describing each item received. If there were no receipts, then state* "None" *in the column headed* "Item."]

DISBURSEMENTS

Date ..... Item ..... Amount

[*Account for disbursements as for receipts. If there were no disbursements, then state* "None" *in the column headed* "Item."]

VERIFICATION

I, _____ [*name*], am the person making the supplemental account in the above-entitled proceeding. I have read the foregoing account and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

Personal Representative

[2] Use of Form

The form is a supplemental account that may be used when any property is acquired or discovered after the court has ordered final distribution, the court orders the filing of a supplemental account [*see Prob. Code § 11642(a)*], and the court in which the proceeding is pending does not provide its own form. Even if the local superior court does not provide its own standard form, its local rules should be checked if counsel is unfamiliar with them to ascertain any requirements that may be imposed on the form or content of the supplemental account.

[3] Distribution of After Acquired or Discovered Property

Any property acquired or discovered after the court order for final distribution is made must be distributed in the following manner [*Prob. Code § 11642*]:

- If the order disposes of the property, distribution is made in the manner provided in the order. In an appropriate case, the court may require a supplemental account and make further instructions relating to the property.

- If the order does not dispose of the property, distribution is made either (1) in the manner ordered by the court on a petition for instructions; or (2) under *Prob. Code § 12252* (administration after discharge), if the personal representative has been discharged.

Under *Prob. Code § 12252*, if, after the personal representative has been discharged, subsequent administration of an estate is necessary because other property is discovered, or because it becomes necessary or proper for any cause, the court must appoint as personal representative the person entitled to appointment in the same order as is directed in relation to an original appointment, except that the person who served as personal representative at the time of the order of discharge has priority [*Prob. Code § 12252(a)*]. Notice of hearing of the appointment must be given as provided in *Prob. Code § 1220* to the person who served as personal representative at the time of the order of discharge and to other interested persons. If property has been distributed to the State of California, a copy of any petition for subsequent appointment of a personal representative and the notice of hearing must be given as provided in *Prob. Code § 1220* to

the Controller [*Prob. Code § 12252(b)*].

[4] Verification

The supplemental account must be verified by the person with the duty to make it [*see Prob. Code § 1021(a)(1), (b)(2)*].

[5] State Statutes

Authority of court to order account at any time. *Prob. Code § 10950(a)*

Supplemental account. *Prob. Code § 11642*

Subsequent administration after discharge of personal representative. *Prob. Code § 12252*

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39-458D California Forms of Pleading and Practice--Annotated § 458D.209

§ 458D.209 Contest of Account [Prob. Code § 11001]

[1] FORM Contest of Account [Prob. Code § 11001]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Estate of_____ [*name*],	)	
Deceased.	)	NO. _____
	)	CONTEST OF ACCOUNT
	)	

_____

_____ [*Name*] is _____ [*specify interest in estate, e.g.,* a devisee under decedent's will] and contests the _____'s [*personal representative, e.g.,* Executor] [final] account covering the period of _____ [*date*], to _____ [*date*], and herein filed on _____ [*date*], as follows:

1. [*In separate numbered paragraphs, set out objections to account.*]

2. [*If the facts warrant the appointment of one or more referees to examine and report on the account, allege those facts, e.g.:* As appears from the foregoing, it is not clear from the account what property the personal representative has taken into his/her possession or disposed of, what sums of money he/she has received and disbursed, for what purposes he/she has made disbursements, and in what condition the estate now stands. The account is long and complicated and on its face appears to be incomplete.]

WHEREFORE, contestant prays for an order as follows:

1. That the objections herein alleged be sustained.

2. That the account not be settled and allowed as filed.

3. That the _____ [*personal representative, e.g.,* Executor] be ordered forthwith to render a true, correct and legally sufficient verified account.

4. [That one or more referees, be appointed to examine the account (and all former accounts) and to report thereon, subject to confirmation by the court.]

5. For all other orders that the court deems proper.

_____ [*signature*]

Contestant

_____ [*signature*]

Attorney for Contestant

VERIFICATION

I, _____ [*name*], am the contestant in the above-entitled proceeding. Ihave read the foregoing contest and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

Contestant

[2] Use of Form

The foregoing form is included as a guide for the contestant of an account, as a recommended format for the presentation of the contest. Examples of matters contested have not been given because they will depend on the facts of the case and the astuteness of counsel in discovering legal defects or factual discrepancies. For matters that may be contested, see *§ 458D.209[6]*. For the penalty imposed for filing a contest without reasonable cause and in bad faith, see *Prob. Code § 11003(a)* (discussed in *§ 458D.45[6]*).

[3] Title of Pleading

The former statute governing contests of accounts (former Prob. Code § 927 [repealed by Stats. 1988, ch. 1199, operative July 1, 1989]) in part provided that any person interested in the estate may appear and file *written exceptions* to the account, and *contest the account*, including *objecting* to the value of assets. Under the former statute, it had been held that the contestant's pleading might be entitled either "objections" or "exceptions" to the account [*Estate of McMillin (1956) 46 Cal. 2d 121, 128, 292 P.2d 881* (upholding filing of "Objections to Final Account and Petition That Allowance Be Made to Objector")], because the words "objections" and "exceptions" are equivalent terms [*Estate of Pardue (1943) 57 Cal. App. 2d 918, 920, 135 P.2d 394]* .

Although it would appear that either word would still be proper under current law to identify the pleading, it should be noted that (*Prob. Code §§ 11001-11003*) use neither the word "objection" nor "exception" or any variant of those words. On the other hand, the general procedural provisions in the Probate Code (*Prob. Code §§ 1000-1050*) governing, among other things, papers and pleadings filed with the court (*Prob. Code §§ 1020, 1021, 1043*) all use the word "objectors" or "objection," and do not use the word "contest," although, for the purposes of those provisions, it would appear that the contest would be treated as objections and the person filing it as an objector [*see Prob. Code §§ 1021(a)(2), 1041, 1043(a)* (objection to account); *cf. Prob. Code § 8906(a)* (objection to appraisal)]. Nevertheless, in deference to *Prob. Code §§ 11001-11003*, the foregoing form is entitled "Contest of Account" [*see Prob. Code §§ 11001, 11003*] and the person contesting it referred to as the "contestant" [*see Prob. Code § 11003*; *see also Prob. Code § 9254(a)* (contest of validity of allowed or approved claim)].

[4] Capacity of Contestant

Under former law, an account could be contested only by a "person interested in the estate" [former Prob. Code § 927 (repealed by Stats. 1988, ch. 1199, operative July 1, 1989)]. *Prob. Code §§ 11001-11003* impose no such express limitation, although it would appear the limitation would be implied [*cf. Prob. Code §§ 1041, 1043(a)* (objection by interested person to petition, report, account, or other matter requiring a hearing), 8906(a) (written objection by any interested person to appraisal), 9254(a) (contest by any interested person of validity of allowed or approved claim); *see Prob. Code § 48* (defining "interested person") and discussion in *§ 458D.12*]. For further discussion, see *§ 458D.45[3]*

[5] Account

The account contested should be identified, by stating the accounting period it covers and the date it was filed.

[6] Matters Subject to Contest

All matters relating to an account may be contested for cause shown, including, but not limited to [*Prob. Code § 11001*]:

(1) The validity of an allowed or approved claim not reported in a previous account and not established by judgment [*see also Prob. Code § 9254*].

(2) The value of property for purposes of distribution.

(3) Actions taken by personal representatives not previously authorized or approved by the court, subject to *Prob. Code § 10590* (Independent Administration of Estates Act).

[7] Specification of Matters

Although the form and content of the contest are not specified in *Prob. Code § 11001* or *11003*, it has been held under the former law authorizing a contest by the filing of "written exceptions" [former Prob. Code § 927 (repealed by Stats. 1988, ch. 1199, operative July 1, 1989)] that the term "written exceptions" was to be given a broad scope, that written exceptions might include exceptions not only to what was affirmatively stated in an account but also to what was omitted, and that they might properly contain a request that the account be surcharged with what was omitted [*Estate of McMillin (1956) 46 Cal. 2d 121, 128, 292 P.2d 881]* .

It was also held that, as a general rule, in the absence of an independent inquiry undertaken by the court, the issues in a hearing on settlement were limited by the account on the one hand and the written exceptions on the other [*see* Estate of *Fraysher (1956) 47 Cal. 2d 131, 139, 301 P.2d 848]* , and that the evidence that might be produced in opposition to settlement and approval was accordingly limited [*see Estate of Roberts (1942) 49 Cal. App. 2d 71, 81, 120 P.2d 933]* .

It would appear that these rules would continue to apply.

[8] Appointment of Referees

The court may appoint one or more referees to examine the account and make a report on it, subject to confirmation by the court, and it may allow a reasonable compensation to the referee(s) to be paid out of the estate [*Prob. Code § 11002(b)*]. The court also has authority under *Code Civ. Proc. § 639* to appoint a referee without the consent of the parties when it is necessary for the information of the court in a special proceeding [*Code Civ. Proc. § 639(a)(4)*]. A probate proceeding is, of course, a special proceeding and not a civil action [*see Code Civ. Proc. §§ 20-25*].

For further discussion, forms, and procedural guides for use in matters referred to a referee, see Ch. 38, *Reference* .

[9] Prayer

Although the Probate Code does not expressly require that the contest contain a prayer, the normal practice is to include a request for the relief the contestant seeks in lieu of the order settling and allowing the account. The court has the authority to order the filing of an account at any time on the motion or petition of an interested person [*Prob. Code § 10950(a)*], and the contestant may wish to request that the court make such an order. Serious consequences could follow should the personal representative fail to comply with the order [*see Prob. Code §§ 11050-11052* (compelling account)].

If the facts alleged would support the ordering of a reference, the prayer should include a request for the appointment of one or more referees to examine and report on the account [*see Prob. Code § 11002(b)*].

[10] Verification

An objection to an account must be verified by the objector [*see Prob. Code § 1021(a)(2), (b)(3)*].

[11] State Statutes

Objection is required to be in writing, signed by all objectors, and filed. *Prob. Code § 1020*

Objection to account is required to be verified. *Prob. Code § 1021(a)(2), (b)(3)*

Interested person is authorized to make objection in writing at or before hearing on account. *Prob. Code §§ 1041, 1043(a)*

Interested person is permitted to appear and make objection orally at hearing. *Prob. Code § 1043(b)*

Objection to appraisal on petition of personal representative or interested person at any time before hearing on petition for final distribution of estate; procedure. *Prob. Code § 8906*

Contest by any interested person of validity of allowed or approved claim at any time before settlement of account in which it is first reported as allowed or approved claim; burden of proof. *Prob. Code § 9254*

Power of court on its own motion or on petition of interested person to order account. *Prob. Code § 10950(a)*

Contest of account. *Prob. Code § 11001*

Penalty for contest without reasonable cause and in bad faith or for opposing contest without reasonable cause and in bad faith. Former *Prob. Code § 11003* (administration of estate proceeding commenced before July 1, 1991); *Prob. Code § 11003* (administration of estate proceeding commenced on or after July 1, 1991) (*see Prob. Code § 900(b), (c)*)

Compelling account. *Prob. Code §§ 11050-11052*

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39-458D California Forms of Pleading and Practice--Annotated § 458D.210

§ 458D.210 Petition to Inquire Into Circumstances Surrounding Execution of, and Consideration for, Transfer of All or Portion of Distributive Share [Prob. Code § 11604]--By Transferor

[1] FORM Petition to Inquire Into Circumstances Surrounding Execution of, and Consideration for, Transfer of All or Portion of Distributive Share [Prob. Code § 11604]--By Transferor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

Estate of_____ [*name*], Deceased.	)))))	NO. _____ PETITION TO INQUIRE INTO CIRCUMSTANCES SURROUNDING AND CONSIDERATION FOR TRANSFER OF INTEREST [*Prob. Code § 11604*]

_____

_____ [*name*] respectfully represents:

1. Petitioner _____ [*name*] is _____ [the *or* a(n)] _____ [heir *or* devisee] entitled, in the absence of _____ [*specify manner in which interest was transferred, e.g.,* an assignment], to receive in the distribution of the estate of _____ [*name of decedent*], deceased, _____ [*describe property or share to be received, e.g.,* the sum of $50,000 as a demonstrative devise *or, e.g.,* an undivided one-third 1/3) interest, as tenant in common, in the real property known as 123 Main Street, Citytown, California *or, e.g.,* one half of the residue].

[*EITHER*]

2. By an instrument dated _____ [*date*], and signed by petitioner as _____ [*e.g.,*

assignor], a copy of which is attached hereto as Exhibit "A" and made a part hereof, petitioner _____ [*e.g.*, assigned] _____ [all *or a fraction, e.g.*, one half (1/2)] of petitioner's _____ [inheritance *or* devise] to _____ [*name*]. As consideration for the _____ [*e.g.*, assignment], petitioner received _____ [*specify amount of money received or other consideration received*], which is grossly unreasonable because _____ [*specify why consideration is unreasonable*]. At the time of executing the _____ [*e.g.*, assignment], petitioner did not know and had no reason to know that the consideration was grossly unreasonable.

[*OR*]

2. By an instrument dated _____ [*date*], and signed by petitioner as _____ [*e.g.*, assignor], a copy of which is attached hereto as Exhibit "A" and made a part hereof, petitioner purportedly _____ [*e.g.*, assigned] _____ [all *or a fraction, e.g.*, one half (1/2)] of petitioner's _____ [inheritance *or* devise] to _____ [*name*]. Execution of the purported _____ [*e.g.*, assignment] by petitioner was obtained by _____ [fraud *or* duress *or* undue influence] as follows: _____ [*specifically describe how petitioner was subjected to fraud, duress, or undue influence*].

[*CONTINUE*]

WHEREFORE, petitioner prays that the court inquire into the circumstances surrounding the execution of, and the consideration for, the [purported] _____ [*e.g.*, assignment] and make an order as follows:

[*EITHER, if consideration was grossly unreasonable*]

1. That the consideration received by petitioner was grossly unreasonable.

2. That a reasonable consideration is _____ [*specify dollar amount or other consideration*].

3. That no property should be distributed from the estate pursuant to the _____ [*e.g.*, assignment] except on the following terms, to wit: _____ [*specify desired terms*].

4. For all other orders the court deems proper.

[*OR, if transfer of interest was obtained by duress, fraud, or undue influence*]

1. That the purported _____ [*e.g.*, assignment] is not a valid _____ [*e.g.*, assignment].

2. That no property should be distributed from the estate pursuant to the purported _____ [*e.g.*, assignment].

3. For all other orders the court deems proper.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

Petitioner

[2] Use of Form

The foregoing petition may be used to obtain a hearing by the court to inquire into the circumstances surrounding the execution of, and the consideration for, a transfer, agreement, request, or instructions of a beneficiary or a beneficiary's attorney in fact, by the terms of which distribution of all or a part of the property to be distributed to the beneficiary is to be distributed to any other person [*see Prob. Code § 11604*].

[3] Petition vs. Motion

Prob. Code § 11604(b) authorizes the inquiry by "the court on its own motion, or on motion of the personal representative or other interested person or of the public administrator." By definition, applications for orders are motions [*see Code Civ. Proc. § 1003*], which, depending on the nature of the order sought, may be made orally or in writing. A petition, other than one used to initiate a special proceeding (such as a petition for probate), is merely a written motion as opposed to an oral motion, is made ex parte, and, depending on the order sought, may be decided without a hearing or after a hearing, notice of which is served after the petition is filed. Procedurally, there is no difference between a written motion and a petition; both are filed and, if a hearing is required, a hearing date is secured at or after the time of filing and a notice of hearing is then served on the other party together with a copy of the petition, and a proof of service of the notice is filed. Noticed motions, on the other hand, are oral motions that historically had to be made at the hearing (this requirement was dispensed with by the 1953 enactment of *Code Civ. Proc. § 1005.5*), and they do differ procedurally from written motions and petitions in that a notice of motion specifies the time and place of the hearing and is served and then filed, normally with a proof of service. For further discussion of written versus oral motions, see Ch. 372, *Motions and Orders* .

Since the notice of hearing (discussed *below*) is apparently served after the "motion" is filed and a hearing date obtained, it would appear that the motion referred to in *Prob. Code § 11604* is a written motion and not procedurally different from all the other written motions authorized in the Probate Code that are referred to as petitions. Thus, it appears that the Legislature used the word "motion" in *Prob. Code § 11604*, as opposed to petition, only to make clear that the court could inquire into the matter without any formal application for an order that it do so, rather than to

require use by parties of the motion terminology. Because of that and the fact that the Probate Code almost uniformly uses the term "petition" to describe the numerous written motions for orders in probate proceedings, that term is used in the foregoing form. Nevertheless, before using this terminology, local rules and practice should be checked and complied with.

[4] Petitioner

In the foregoing form, the petitioner is an heir or devisee of the decedent; however, the petition may be filed by the personal representative or other "interested person" (defined in *Prob. Code § 48*) or by the public administrator [*Prob. Code § 11604(b)*]. With appropriate modifications, the form may be used when the petition is filed by an authorized person other than an heir or devisee.

[5] Notice of Hearing

Notice of the hearing must be served on the beneficiary (if not the petitioner) and on the persons described in *Prob. Code § 11604(a)* (discussed in [2], *above*) at least 15 days before the hearing in the manner provided in *Code Civ. Proc. § 415.10* (personal service) or 415.30 (service by mail) [*Prob. Code § 11604(d)*]. For a form of notice of hearing that may be modified for use in this situation, see *§ 458D.207* and Ch. 447, *Probate: Statutory Notice Requirements* . If a form of notice is provided by the court in which the proceeding is pending, that form must be used if so required by the court.

[6] Scope of Inquiry

The court may inquire into the circumstances surrounding the execution of, and the consideration for, the transfer, agreement, request, or instructions, and the amount of any fees, charges, or consideration paid or agreed to be paid by the beneficiary [*Prob. Code § 11604(b)*].

An assignment is the most commonly used means of transferring the interest in question. It has been pointed out that the assignee is in many cases an "heir hunter," and that former Prob. Code § 1020.1, the predecessor to *Prob. Code § 11604*, was enacted to curb abuses by such persons [*see Estate of Lund (1944) 65 Cal. App. 2d 151, 153, 150 P.2d 211* (analyzing former Prob. Code § 1020.1, finding it "anomalous")].

[7] Court Order

If the court finds that either (1) the fees, charges, or consideration paid or agreed to be paid by a beneficiary are grossly unreasonable; or (2) the transfer, agreement, request, or instructions were obtained by duress, fraud, or undue influence, it may refuse to order distribution, or may order distribution on any terms it deems just and equitable [*Prob. Code § 11604(c)*]. For example, the appellate court let stand a $122,000 assignment to an heir hunter. The distribution was not grossly unreasonable even though the probate court had authorized a $5,000 fee to an heir hunter employed by the estate, because heir hunter who actually located heir spent approximately 150 hours searching data bases and interviewing leads and had spent two days searching for the heir. Further, theheir's assignment of her interest in estate was not obtained by duress, fraud or undue influence where the heir hunter gave heir time to consider the matter and gave her his cell phone number [*Estate of Wright (2001) 90 Cal. App. 4th 228, 239, 108 Cal. Rptr. 2d 572]* .

If the execution of the assignment was obtained by fraud, duress, or undue influence, there is no assignment at all, as there is no consent [*see Civ. Code § 1567*]; in such case, it would appear that the appropriate relief is distribution to the beneficiary without reference to the purported assignment. However, if the consideration is grossly unreasonable, the relief would be distribution according to reasonable terms that the court reads into the assignment [*see Prob. Code § 11604(c)*; *Burchell v. Strube (1955) 43 Cal. 2d 828, 836, 279 P.2d 1]* .

[8] Verification

The petition must be verified by the petitioner or by any of them if there are two or more [*see Prob. Code § 1021(a)(1), (b)(1)*] or by the petitioner's attorney if the petitioner is absent from the county or for some other cause is unable to verify it [*Prob. Code § 1023*].

Like the petition, a written motion would also have to set forth the evidentiary facts within the signatory's personal knowledge that would support the order sought and would therefore have to be supported by oath, that is, by affidavit [*see Code Civ. Proc. §§ 2002(1), 2003, 2009*; *Evid. Code §§ 702, 710*] or by declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5*].

[9] State Statutes

"Beneficiary" defined. *Prob. Code § 24*

"Fiduciary" defined. *Prob. Code § 39*

Petition as required to be signed by all petitioners or, if petitioner is absent from county or for some other cause is unable to sign it, by petitioner's attorney, provided petitioner is not a fiduciary appointed in the proceeding. *Prob. Code §§ 1020, 1023*

Petition as required to be verified by petitioner or any one of two or more petitioners or, if petitioner is absent from county or for some other cause is unable to verify it, by petitioner's attorney, provided petitioner is not a fiduciary appointed in the proceeding. *Prob. Code § 1021(a)(1), (b)(1), 1023*

Inquiry by court into consideration for or validity of assignment of interest by beneficiary. *Prob. Code § 11604*

[10] Local Rules of Court

Petitions required to be set for hearing as required to have self-addressed, stamped envelope attached. Los Angeles Co. Super. Ct. Rules, Rule 10.31(a) (or attach fax cover sheet; *see* Los Angeles Co. Super. Ct. Rules, Rule 10.31(b))

[11] Decisions

Valuation date in assessing consideration paid for assignment of real property under former Prob. Code § 1020.1 (repealed; *now see Prob. Code § 11604*) as date of assignment. *Estate of Boyd (1979) 98 Cal. App. 3d 125, 136, 159 Cal. Rptr. 298*

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Volume 39: Probate: Claims Against the Estate thru Probate: Discharge-Chs. 454-459
Chapter 458D PROBATE: ACCOUNTS, FINAL DISTRIBUTION, AND COMPENSATION
PART V. FORMS

39-458D California Forms of Pleading and Practice--Annotated § 458D.211

§ 458D.211 Order Settling Final Account [Prob. Code § 7250(a)], Directing Final Distribution [Prob. Code §§ 11605, 11640], and Allowing Compensation for Extraordinary Services [Former Prob. Code §§ 902, 910 (Administration of Estate Proceeding Commenced Before July 1, 1991)] or Fixing and Allowing Compensation [Prob. Code §§ 10800, 10810 (Administration of Estate Proceeding Commenced on or After July 1, 1991)]

[1] FORM Order Settling Final Account [Prob. Code § 7250(a)], Directing Final Distribution [Prob. Code §§ 11605, 11640], and Allowing Compensation for Extraordinary Services [Former Prob. Code §§ 902, 910 (Administration of Estate Proceeding Commenced Before July 1, 1991)] or Fixing and Allowing Compensation [Prob. Code §§ 10800, 10810 (Administration of Estate Proceeding Commenced on or After July 1, 1991)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of_____ [*name*],	)	ORDER SETTLING FINAL ACCOUNT, DIRECT-
Deceased.	)	ING FINAL DISTRIBUTION,
	)	AND _____
	)	[ALLOWING COMPENSATION FOR EX-
	)	TRAORDINARY SERVICES *or* FIXING
		AND ALLOWING COMPENSATION]

_____

The final account and petition for final distribution [and (petition) for allowance of compensation for extraordinary services] of _____ [*name of personal representative*] came on regularly for settlement of the account and hearing of the petition(s) by the court on this date. Petitioner appeared by _____ [*name*], counsel. [_____ (*Name*) appeared _____ (without counsel *or* by _____ (*name*), counsel,) _____ (to contest the account *and/or, if the administration of estate proceeding was commenced before July 1, 1991,* to object to the application for compensation for extraordinary services *and/or, if the administration proceeding was commenced on or after July 1, 1991,* to object to the fixing and allowing of

compensation as requested).]

On evidence given to the satisfaction of the court, the court makes the following findings:

1. Notice of the time and place of the hearing was given as required by _____ [*if the administration of estate proceeding was commenced before July 1, 1991, Probate Code Sections 1220, 11000* (as it existed on June 30, 1991), and 11601 *or, if the administration proceeding was commenced on or after July 1, 1991, Probate Code Sections 1200, 10831(c), 11000(a), 11601*]. [Special notice was _____ (given to _____ (*name(s)*), as requested and required by *Probate Code Section 1252(a) or* requested and waived by _____ (*names(s)*).]

2. The account and report cover the period from _____ [*date*] to _____ [*date*], inclusive. [Former accounts have covered the period from _____, to _____ (*dates*). The account and report are full, verified, true, and correct.]

[3. *Other findings regarding account that may be required by local court rule.*]

4. Notice to creditors has been given as required by *Probate Code Sections 8120* and *9050-9054*.

5. More than four months have elapsed since the date letters were first issued to the personal representative, and more than 30 days have elapsed since the date notice of administration was given to creditors pursuant to *Probate Code Section 9051* _____ [(b) *and/or* (c)].

6. All claims filed against the estate have been allowed, approved, and paid [except the claims of the following creditors, which have been rejected: _____ (*names of creditors whose claims were rejected*)][, and except for the claims set forth in Paragraph 8, which are either contingent or not yet due].

[7. *If any claim was rejected:* With respect to the claims that were rejected, notice of rejection has been duly given as required by *Probate Code Section 9250*. As to each rejected claim that was due at the time the notice of rejection was given, at least three months have elapsed since notice of rejection was given.]

[8. *If any claim was contingent or premature:* The claim of _____ (*name of creditor*) is in the amount of $_____ and is _____ (contingent on _____ [*describe contingency*] *or* the subject of litigation *or* not currently due in full). Payment of this debt on becoming _____ (absolute *or* established *or* due) after final distribution has been provided for by _____ (*describe manner in which claim is being provided for under Prob. Code § 11460 et seq., e.g.*, each of the distributees signing acknowledged agreements assuming liability pursuant to *Probate Code Section 11464*). (*Repeat for each creditor whose claim has been provided for in the same fashion*).]

9. _____ [The federal estate tax payable by the estate has been paid *or* The federal estate tax payable by the estate has not been entirely paid, but evidence of a written agreement between the Internal Revenue Service and _____ (*name*) for the payment of the tax remaining due has been filed as permitted by law *or* No federal estate tax is due.]

[10. *If the federal estate tax has been paid:* The amount of federal estate tax paid is $_____, and that sum should be prorated as follows among the following persons, as required by law:]

Beneficiary	Proration

[*List persons interested in the estate or benefited by the payment of the estate tax, who should bear prorated shares of the tax pursuant to former Prob. Code § 970 (if decedent died before January 1, 1987), or Prob. Code § 20110 (if decedent died on or after January 1, 1987), and calculate the proration that each should bear* .]

11. _____ [All personal property taxes due and payable in the estate have been paid *or* No personal property taxes are due in the estate].

[12. *Include, if appropriate:* The fair market value of the assets in the estate at the time of decedent's death exceeded $1,000,000, and assets having a value of $250,000 or more are distributable to one or more nonresident beneficiaries. The certificate of the Franchise Tax Board prescribed by *Revenue and Taxation Code Section 19513* has been filed.]

13. The estate is in a condition to be closed. All debts and all expenses of administration except closing expenses and statutory compensation to the personal representative and his/her attorney have been paid. The sum reasonably necessary to pay closing expenses is $_____, being the sum of the following: _____ [*specify closing expenses, giving the amount of each*].

[14. *Other specific findings according to allegations in petition or as required by local court rule.*]

15. The personal representative is entitled to a total statutory _____ [commission *or* compensation] for ordinary services of $_____. [The personal representative has already received a partial allowance of the statutory _____ (commission *or* compensation), in the amount of $_____.] _____ [The personal representative should be allowed $_____ in payment of the (unpaid balance due on the) statutory _____ (commission *or* compensation) to which he/she is entitled *or* The personal representative has waived his/her right to receive an allowance for the statutory _____ (commission *or* compensation) to which he/she is entitled (other than such allowance as he/she has already received).]

16. _____ [*Name*], as attorney for the personal representative, is entitled to a total statutory _____ [fee *or* compensation] for ordinary services of $_____. [He/She has already received a partial allowance of the statutory _____ (fee *or* compensation), in the amount of $_____.] He/She should be allowed $_____ in payment of the [unpaid balance due on the] statutory _____ [fee *or* compensation] to which he/she is entitled.

[17. *If personal representative entitled to compensation for extraordinary services:* The personal representative has performed extraordinary services for the benefit of the estate and should be allowed an additional compensation of $_____for such extraordinary services.]

[18. *If attorney for personal representative entitled to compensation for extraordinary services:* _____ (*Name*), as attorney for the personal representative, has performed extraordinary services for the benefit of the estate and should be allowed an additional compensation of $_____ for such extraordinary services.]

19. The property in the estate should be distributed as hereinafter ordered.

20. All allegations of the petition not specifically included in the foregoing findings are true.

IT IS ORDERED that:

1. The report of _____ [*name*], as personal representative of the estate of _____ [*name of decedent*], deceased, is approved and all acts and transactions of the personal representative relating to the matters in the report are ratified and confirmed, and the final account covering the period from _____ [*date*], to _____ [*date*], inclusive, is settled and allowed as filed.

[*If personal representative has not waived statutory commission:*]

2. _____ [*Name*], as personal representative of the estate, is allowed $_____ as the statutory _____ [commission *or* compensation] for ordinary services, and he/she is authorized to withdraw that sum from the funds of the estate and to pay it to himself/herself.

3. _____ [*Name*], as attorney for the personal representative of the estate, is allowed $_____ as the statutory _____ [fee *or* compensation] for ordinary services, and _____ [*name*], as the personal representative, is ordered to withdraw that sum from the funds of the estate and to pay it to _____ [*name of attorney*].

[*If compensation for extraordinary services is allowed to personal representative:*]

4. _____ [*Name*], as personal representative of the estate, is allowed additionally $_____ as compensation for extraordinary services, and he/she is authorized to withdraw that sum from the funds of the estate and to pay it to himself/herself.

[*If compensation for extraordinary services allowed to attorney for personal representative:*]

5. _____ [*Name*], as attorney for the personal representative of theestate, is allowed additionally $_____ as compensation for extraordinary services, and _____ [*name*], as the personal representative, is ordered to withdraw that sum from the funds of the estate and to pay it to _____ [*name of attorney*].

6. The personal representative is authorized to withhold $_____ for the purpose of paying closing expenses. Any portion of that sum not so used shall be distributed to _____ [*name*].

[*If personal representative remains obligated by agreement with Internal Revenue Service to pay estate tax:*]

7. Before distributing any property to the following distributees, the personal representative shall deduct from each share the following amounts, or shall require and receive from each distributee an equivalent sum of money, which the personal representative shall hold for the payment of the estate tax according to the agreement therefor between the personal representative and Internal Revenue Service:

Distributee	Amount

[*Names of distributees and proportionate amounts to be withheld for estate tax.*]

[*If order is to be made to provide for contingent, disputed, and/or not yet due claim:*]

8. _____ [*Set out order regarding provision for debt, e.g.,* The agreement of all interested persons to provide for the _____ (contingent *or* disputed *or* not due) debt of _____ (*name of creditor*) is approved (and _____ (*specify actions that parties must take to perform agreement*)]. [*Add, if order is for deposit of property under Probate Code § 11463 or for payment to trustee under Probate Code § 11465:* Any balance of funds remaining after the claim becomes _____ (absolute *or* established *or* due) shall be distributed to _____ (*name or specify names and distributive shares*).]

[*OR, if order to provide for contingent or disputed debt, or debt not yet due by deposit in financial institution under Probate Code § 11463 or payment to trustee under Probate Code § 11465 was made on a separate petition:*]

8. With respect to all funds that _____ [have been *or* are to be] _____ [deposited in _____ (*name of financial institution*) *and/or* paid to _____ (*name*) as trustee] to provide for payment of the contingent or disputed debts of the estate or debts of the estate not presently due, the balance thereof remaining after all such claims have been paid, defeated, or rendered unenforceable, shall be distributed to _____ [*name or specify names and distributive shares*].

[*If whereabouts of a distributee is unknown:*]

9. _____ [*Name*], was a beneficiary of the decedent, namely, _____ [a devisee under the decedent's will *or, if decedent died intestate,* an heir of the decedent who died intestate], but his/her/its whereabouts is unknown. The property to be distributed to the above-named primary beneficiary is as follows: _____.

The following are the alternate distributees, namely, the persons who would be entitled to the property _____ [under the decedent's will *or, if decedent died intestate,* under the laws of intestate succession, *or, in the case of a devise for a charitable purpose,* under the doctrine of cy pres], and the share to which each is entitled:

Name and Relationship	Age	Address	Share to Which Entitled
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

If the above-named primary beneficiary whose whereabouts is unknown does not claim the share to which he/she/it is entitled within five years after the date of this order is deemed to have predeceased the decedent for the purpose of this order, and the above-named alternate distributees are entitled to the share as provided above.

[10. *Other specific provisions according to requests in prayer in petition or as required by local court rule.*]

11. [Subject to the provisions set out above respecting withholdings by the personal representative on account of tax liabilities not yet satisfied, and subject also to the provision set out above regarding the unknown whereabouts of a beneficiary,] [T]he personal representative shall distribute the following described property in the estate to the following named persons:

[*Set out plan of distribution as alleged in petition. See § 458D.190, Paragraph 37.*]

Property	Name, Age [, Relationship]
_____	_____
_____	_____

All other property of decedent not distributed hereinabove, whether described herein or not, is distributed to _____ [*name or names*] _____ [*ifmore than one person, indicate apportionment and how title will be held, e.g.,* in equal shares, as tenants in common].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This order is for use to settle the final account and to order final distribution and payment of compensation, in counties in which the order is not prepared by the court clerk. Local court rules should be checked to determine whether counsel must prepare the order and, if so, any requirements as to its contents. If any property is to be distributed to a trustee, the order should include the provision set out in *see § 458D.214*.

[3] Findings

[a] In General

Except as otherwise provided by law, the court need not adopt formal findings on settling the accounts of personal representatives [*see Estate of Bell (1943) 58 Cal. App. 2d 333, 339, 136 P.2d 804]* .

[b] Notice Duly Given

If it appears to the court's satisfaction that notice has been regularly given or that the party entitled to notice has waived it, the court must so find in its order [*Prob. Code § 1260(b)*], and, when the order becomes final, the finding is conclusive on all persons [*Prob. Code § 1260(c)*]. If the order finds that notice was given as required by law, the appellate court will assume, in the absence of contrary evidence in the record, that notice was duly proved and that the finding is correct [*Estate of Bell (1943) 58 Cal. App. 2d 333, 338, 136 P.2d 804]* .

[c] Creditor's Claims

A finding that the time has expired for bringing an action on a rejected claim, or for referring the matter to a referee or to arbitration, should be made [*see Prob. Code § 9253*; *see also Prob. Code § 11429* (except to extent provided in *Prob. Code § 9392*, unpaid creditor has no right to contribution from other creditors or distributees after accounts settled)].

[4] Allowance of Compensation for Extraordinary Services

The allowance of compensation for extraordinary services should be in the form of a stated dollar amount allowed. A description of the amount allowed as a percentage of the estate makes the allowance void [*see Estate of Rowe (1944) 66 Cal. App. 2d 594, 603-606, 152 P.2d 765* , disapproved on another point in *Pacific Mut. Life Ins. Co. v. McConnell (1955) 44 Cal. 2d 715, 726, 285 P.2d 636]* .

[5] Ademptions and Advancements

On a petition for final distribution, the court must resolve in its order all questions arising under *Prob. Code § 21135* (ademption by satisfaction) or 6409 (advancements) [*Prob. Code § 11640(b)*].

[6] Names of Distributees and Shares; Conditions

The order for distribution must (1) name the distributees and the share to which each is entitled; and (2) provide that property distributed subject to a limitation or condition, including, but not limited to, an option granted under *Prob. Code §§ 9960-9966* (option to purchase, discussed in Ch. 456, *Probate: Management of Estate Assets*), is distributed to the distributees subject to the terms of the limitation or condition [*Prob. Code § 11603(b)*].

[7] Whereabouts of Distributee Unknown

If the whereabouts of a distributee named in the order is unknown, the order must provide for alternate distributees and the share to which each is entitled [*Prob. Code § 11603(c)*]. The alternate distributees are the persons, to the extent known or reasonably ascertainable, who would be entitled under the decedent's will or under the laws of intestate succession if the distributee named in the order had predeceased the decedent, or in the case of a devise for a charitable purpose, under the cy pres doctrine. A distributee named in the order who does not claim the share to which he or she is entitled within five years after the date of the order is deemed to have predeceased the decedent for the purpose of the order, and the alternate distributees are entitled to the share as provided in the order [*Prob. Code § 11603(c)*].

[8] Distribution of Unknown Property

The order may properly distribute all other property of the decedent, whether described in the order or not, as a means of distributing unknown property [*see Howe v. Brock (1948) 86 Cal. App. 2d 271, 275, 194 P.2d 762* (distribution of "all other property belonging to said estate whether described herein or not" held to vest decedent's title in distributees)]. In the case of a will, the distributees would be the residuary devisees, since unknown property would form part of the residue of the estate. In some cases, the provision might need to be expanded to delineate the rights of different distributees to real or personal, community, or separate property. Inclusion of such a general provision is a safeguard against incomplete distribution of the estate [*see Estate of Heigho (1960) 186 Cal. App. 2d 360, 368, 9 Cal. Rptr. 196* (explaining purpose and effect of omnibus clause in judgment)].

[9] State Statutes

[a] Allowances

Personal representative is to be allowed all necessary expenses in administration of estate, including, but not limited to, necessary expenses in care, management, preservation, and settlement of estate. *Prob. Code § 11004*

[b] Appeal

Order or refusal of order settling account. *Prob. Code § 7240(j)*

Order or refusal of order directing or allowing payment of devise or attorney's fee or personal representative's compensation. *Prob. Code § 7240*(*l*)

Order or refusal of order determining heirship or persons to whom distribution should be made. *Prob. Code § 7240(m)*

Order or refusal of order distributing property. *Prob. Code § 7240(n)*

[c] Compensation

Compensation for extraordinary services. *Prob. Code §§ 10801, 10811* (administration of estate proceedings

commenced on or after July 1, 1991); former Prob. Code § 902 (administration of estate proceedings commenced before July 1, 1991); *see Prob. Code § 10850*

[d] Distribution of Estate

When order settling final account and for final distribution is entered, personal representative is permitted to immediately distribute property in estate to persons entitled to distribution without further notice or proceedings. *Prob. Code § 11641*

[e] Effect of Finality of Order

Extent to which order settling account releases personal representative and sureties from liability. *Prob. Code § 7250*

Order for distribution, on becoming final, is binding and conclusive as to rights of all interested persons. *Prob. Code § 11605*

[f] Findings

Finding of giving or waiver of notice is required, and conclusive when order becomes final. *Prob. Code § 1260(b), (c).*

[g] Judgment

Mailing and filing of notice of entry of judgment. *Code Civ. Proc. § 664.5*

[h] Judgment Roll

Papers constituting judgment roll. *Prob. Code § 1050*

[10] Orders

[a] In General

Except as otherwise provided in Probate Code, order made in proceeding under Probate Code is not required to recite existence of facts, or performance of acts, on which jurisdiction depends, but is required to contain only matters ordered. *Prob. Code § 1047*

Entry of orders. *Prob. Code § 1048*

Enforcement of orders. *Prob. Code § 1049*

[b] For Distribution

Distribution of property subject to limitation or condition, including, but not limited, to option. *Prob. Code §§ 9960-9966, 11603(b)(2)*

Contents of order for distribution. *Prob. Code § 11603*

If whereabouts of distributee named in order is unknown, order must provide for alternate distributees and share to which each is entitled. *Prob. Code § 11603(c)*

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39-458D California Forms of Pleading and Practice--Annotated § 458D.212

§ 458D.212 Provision in Order--Distribution of Minor's Property Less Than $5,000 in Value to Custodial Parent [Prob. Code §§ 3400-3402]

[1] FORM Provision in Order--Distribution of Minor's Property Less Than $5,000 in Value to Custodial Parent [Prob. Code §§ 3400-3402]

[*Add to findings*]

_____ [*Number of finding*]. _____ [*Name*] is a minor who has no guardianship of his/her estate and who is entitled to distribution from this estate of _____ [the sum of $_____ (*not exceeding $5,000*) *and/or* property, the (total) value of which does not exceed $5,000]. _____ [*Name*] is the _____ [father *or* mother] and the/a parent entitled to the custody of the minor and has filed with this court a written assurance verified under oath that the total value of this minor's estate, including the distributive share from this estate, does not exceed $5,000 in value [deducting the custodial property held pursuant to the California Uniform Transfers to Minors Act and any money or property subject to court order pursuant to *Section 3602(c) of the Probate Code*].

[*Add to order*]

_____ [*Paragraph number*]. The _____ [money *and/or* property] of _____ [*name*], a minor, is to be _____ [paid *and/or* delivered] to _____ [*name*], minor's parent, to be held in trust for the minor until his/her majority; written receipt from minor's parent shall be an acquittance of the personal representative for the _____ [money paid *and/or* property delivered].

[2] Use of Form

These provisions are for inclusion in the order of final distribution [*see § 458D.211*] when money or property of a minor distributee is to be paid or delivered to the minor's custodial parent to hold in trust for the minor until his or her majority [*see Prob. Code §§ 3400-3402*]. This provision includes the finding that the minor has no guardianship of his or her estate, that a written assurance verified under oath has been filed by a parent of the minor entitled to custody that the

total estate of the minor, including the value of the distributive interest, does not exceed $5,000 in value, and that the value of the money or property to be distributed does not exceed $5,000. Each of these facts is a prerequisite for distribution pursuant to *Prob. Code §§ 3400-3402* [*see Prob. Code § 3401*; for a form of written assurance, *see § 458D.204*].

[3] Cross References

For a related form, *see § 458D.204*.

For forms of petition for guardianship of the estate of a minor, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians*

[4] State Statutes

Distribution to parent of money or property of minor that does not exceed $5,000. *Prob. Code §§ 3400-3402*

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39-458D California Forms of Pleading and Practice--Annotated § 458D.213

§ 458D.213 Provision in Order--Money Distributable to Minor to Be Deposited in Blocked Account Until Majority [Prob. Code § 3413(a)]

[1] FORM Provision in Order--Money Distributable to Minor to Be Deposited in Blocked Account Until Majority [Prob. Code § 3413(a)]

[*Add to findings*]

_____ [*Number of finding*]. _____ [*Name*] is a minor and is entitled to distribution from this estate of the sum of $_____. _____ [*Name*], who is the _____ [_____ (father *or* mother) and the/a parent entitled to custody of the minor *or* personal representative of this estate] filed in _____ [this court *or* the Superior Court of California, County of _____,] a verified petition entitled In the Matter of _____ [*name*], a minor, No. _____, requesting the court to order that the sum to be distributed to the minor be _____ [*specify, e.g.,* deposited in an insured account in a financial institution in California *or specify type of account and name, branch, and address of financial institution in California*], subject to withdrawal only on the authorization of the court. The petition was granted, and by order dated _____ [, a certified copy of which is on file herein], the court so ordered.

[*Add to order*]

_____ [*Paragraph number*]. Pursuant to the order of _____ [this court *or* the Superior Court of California, County of _____, a certified copy of which is on file herein], in In the Matter of _____ [*name*], a minor, No. _____, the personal representative _____ [*specify, e.g.,* deposit in an insured account in a financial institution in California *or specify type of account and name, branch, and address of financial institution in California*] the sum of $_____, which shall be subject to withdrawal only on the authorization of _____ [this court *or* the Superior Court of California, County of _____]. A receipt from an authorized officer of that institution for the specified sum shall be an acquittance of the personal representative of the money so _____ [*specify, e.g.,* deposited].

[2] Use of Form

The foregoing provisions are for use in the order of final distribution [*see § 458D.211*] when money only is distributable to a minor and the superior court of the county in which the minor resides has ordered that the money be deposited or invested as provided in *Prob. Code § 3413(a)*. The provision to be included in the findings has alternatives. If the minor resides in a county other than that county in which the estate is being administered, disposition of the minor's money is under the jurisdiction of the superior court of that county. If the minor resides in the same county of administration, then the superior court having jurisdiction over the estate also has jurisdiction over the disposition of the minor's money [*see Prob. Code §§ 3410-3413*; for a form of petition, *see § 458D.205*].

[3] Cross References

For related forms, see *§§ 458D.205, 458D.206*.

For forms of petition for guardianship of the estate of a minor, see Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians*

[4] State Statutes

Deposit of money belonging to minor in blocked account by order of superior court of county in which minor resides on verified petition of parent or personal representative. *Prob. Code §§ 3410, 3411, 3413(a)*

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39-458D California Forms of Pleading and Practice--Annotated § 458D.214

§ 458D.214 Provision in Order--Distribution to Trustee

[1] FORM Provision in Order--Distribution to Trustee

_____ [*Paragraph number*]. The court has determined that there has been a valid trust created by the will, under which the certain property is to be distributed to _____ [name], as trustee, to be held, administered, and distributed by the trustee, and by any successor trustee or trustees, on the following terms and conditions of trust:

[*Trust provisions are to be set forth in the present tense and the third person, and not quoted verbatim. The decree should also give effect to the condition that existed at the time of death. The following provisions are set forth to illustrate how such changes in wording are made. It is illustrative only.*]

A. PAYMENT AND DISTRIBUTION OF INCOME AND PRINCIPAL

1. The entire trust estate shall be administered as one trust until ("my" *deleted*) decedent's youngest child then living reaches the age of (24) years. Until that time the Trustee shall apply the net income and principal of the trust estate as follows:

(a) The Trustee shall pay to or apply for the benefit of each of ("my" *deleted*) decedent's then living children who are under the age of (24) years, in monthly or in other convenient installments but in no event less often than annually, so much of the net income and so much of the principal of the trust estate, up to the whole thereof, as the Trustee in his/her discretion deems necessary for the proper care, support, and education of each of them. No child who has attained the age of (24) years shall receive any of these payments from the trust estate.

(b) The Trustee may pay more to or apply more for some beneficiaries than others and may omit some beneficiaries entirely.

(c) The Trustee, in exercising his/her discretionary authority with respect to the payment of income or principal of the

trust estate to any beneficiary, shall take into consideration any income or other resources available to such beneficiary from sources outside of this trust that may be known to the Trustee. The Trustee may accept as final and conclusive the written statement of the beneficiary receiving payment as to other available income or resources. The determination of the Trustee with respect to the necessity of making payments out of income or principal to any beneficiary shall be conclusive on all persons howsoever interested in the trust.

(d) The Trustee shall accumulate and add to principal any net income of the trust not paid out in accordance with the discretion hereinabove conferred on the Trustee.

2. When ("my" *deleted*) decedent's youngest child then living reaches the age of (24) years, the trust shall terminate and the Trustee shall immediately distribute the balance of the trust estate in equal shares to ("my" *deleted*) decedent's children then living. However, if any child of ("my" *deleted*) decedent not then living leaves issue then surviving, an equal share of the trust estate shall be distributed to the then surviving issue of each such child on the principle of representation.

3. Definitions:

(a) The term "children," as used ("in this Will" *deleted*) herein, includes adopted children and any who may hereafter be born.

(b) The term "issue," as used ("in this Will" *deleted*) herein, means lawful issue and includes legally adopted children.

(c) The term "education," as used ("in this Will" *deleted*) herein, includes both college and postgraduate study at any accredited institution of the beneficiary's choice for any period of time that, in the judgment of the Trustee, is advantageous to the beneficiary concerned; the Trustee shall provide adequate amounts for all related living and travel expenses of the beneficiary within reasonable limits.

4. No beneficiary or remainderman of this trust shall have any right to alienate, encumber, or hypothecate his or her interest in the principal or income of the trust in any manner, nor shall any interest of any beneficiary or remainderman be subject to claims of his or her creditors or liable to attachment, execution, or other process of law.

B. GENERAL ADMINISTRATIVE POWERS OF TRUSTEE

In order to carry out the purposes of ("any" *deleted*) the trust, ("established by this Will," *deleted*) the Trustee, in addition to all other powers granted ("by this Will" *deleted*) herein or by law, shall have the following powers over the trust estate, subject to any limitations specified elsewhere ("in this Will" *deleted*) herein.

Retention of Assets

1. To retain any property received by the trust estate for as long as the Trustee considers advisable.

Investments

2. To invest and reinvest in every kind of property and investment that men and women of prudence, discretion, and intelligence acquire for their own accounts.

Management

3. To manage, control, repair, and improve all trust property.

Sales

4. To sell, for cash or on terms, and to exchange any trust property.

Adjustment of Claims

5. To adjust or compromise any claims for or against the trust.

Leasing and Mineral Rights

6. To lease any property for terms within or beyond the duration of the trust for any purpose, including the exploration and removal of oil, gas, and other minerals, and to enter into community leases and pooling and unitization agreements.

Borrowing

7. To borrow money and to encumber or hypothecate any trust property.

Division and Distribution

8. On any division or distribution of the trust estate, in the discretion of the Trustee to divide and distribute property of the trust estate in cash or in kind, including undivided interests, or partly in cash and partly in kind, including undivided interests.

C. OPERATIONAL PROVISIONS

1. The Trustee shall determine what is income and what is principal of each trust ("established under this Will," *deleted*) and what expenses, costs, taxes, and charges of all kinds shall be charged against income and what shall be charged against principal in accordance with the applicable statutes of the State of California from time to time existing.

2. If _____ [*name of original trustee*] is unable or unwilling to act or to continue to act as the Trustee, then ("I appoint" *deleted*) _____ [*name*], _____ [*address*], shall be eligible for appointment as the Trustee with the same powers, rights, discretions, obligations, and immunities. If the aforesaid _____ [*name of original trustee*] and _____ [*name of alternate*] are each unable or unwilling to act as the Trustee, then ("I appoint" *deleted*) _____ [*name*], _____ [*address*], shall be eligible for appointment as the Trustee with the same powers, rights, discretions, obligations, and immunities.

3. The Trustee shall receive a reasonable compensation for his/her services as determined by ("the" *deleted*) this court.

4. No Trustee ("appointed in this Will" *deleted*) named herein shall at any time be held liable for any action or default of _____ [himself *or* herself *or* him or herself] or of any other person in connection with the administration of the trust estate, unless caused by _____ [his *or* her *or* his or her] own gross negligence or by a willful commission by _____ [him *or* her *or* him or her] of an act in breach of the trust.

On distribution of a testamentary trust, the court is required to do all of the following [*Cal. Rules of Ct., Rule 7.650(a)*]:

- Determine whether or not a valid trust has been created by the will.
- Determine the terms of the trust.
- Order distribution of the trust property to the trustee.

The order for distribution is required to incorporate the terms of the trust, to give effect to the conditions existing at the time distribution is ordered [*Cal. Rules of Ct., Rule 7.650(b)*]. The pertinent provisions are to be stated in the present tense and in the third person, instead of quoting the will verbatim [*Cal. Rules of Ct., Rule 7.650(b)*].

[2] Use of Form

The form of order, above, is used for distribution to a trustee. For discussion, see *§ 458D.81*.

[3] Distribution to Trustee as Validation of Trust

When a decedent's estate is distributed to trustees under a will, the judgment of distribution is an adjudication of the validity of the trust [*Estate of White (1945) 69 Cal. App. 2d 749, 755, 160 P.2d 204]* .

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Chapter 458D PROBATE: ACCOUNTS, FINAL DISTRIBUTION, AND COMPENSATION
PART V. FORMS

39-458D California Forms of Pleading and Practice--Annotated § 458D.215

§ 458D.215 Waiver of Account [Prob. Code § 10954]

[1] FORM Waiver of Account [Prob. Code § 10954]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
Estate of_____ [*name*],	)	NO. _____
Deceased.	)	WAIVER OF ACCOUNT
	)	[*Prob. Code § 10954*]
	)	

_____

Contemplating and expecting that the estate of _____ [*name of decedent*], deceased, will be distributed as requested in the petition for final distribution filed _____ [herewith *or* on _____ (*date*),] by _____ [*name*], as personal representative of the estate, and solely in the event that it will be so distributed, _____ [I *or* we], _____ [*name or names*], being _____ [the sole distributee of *or* all of the persons entitled to distribution of] the estate, do hereby waive an account by the personal representative. All the beneficiaries of the estate are ascertained. _____ [I *or* We] reserve the right to rescind this waiver and require an account instead, if the estate is not distributed to the persons and in the manner requested in the petition for final distribution referred to hereinabove.
Dated: _____.

_____ [*signature*]

[_____ (*signature*)]

[_____ (*signature*)]

[*etc.*]

[2] Use of Form

The foregoing form is for use by a competent adult distributee of an estate to waive an account by the personal representative [*see Prob. Code § 10954(a)(1), (b)(1)*]. With appropriate modifications, it may be used when the person entitled to distribution is a minor, conservatee, trustee, or an estate, or when the person entitled to distribution is incapacitated, unborn, unascertained, or a person whose identity or address is unknown, or is a designated class of persons who are not ascertained or are not in being, and a guardian ad litem has been appointed [*see* discussion in *§ 458D.215[4]*].

[3] When Account Is Not Required

The personal representative is not required to file an account if (1) each person entitled to distribution from the estate has executed and filed a written waiver of account or a written acknowledgment that the person's interest has been satisfied, or (2) adequate provision has been made for satisfaction in full of the interest of each person entitled to distribution from the estate, but this does not apply to a residuary devisee or a devisee whose interest in the estate is subject to abatement, payment of expenses, or accrual of interest or income [*Prob. Code § 10954(a)*].

For the Report of Administration that must be filed, even if an account is waived, and for when an account may be required on petition of a creditor, see *Prob. Code § 10954(c)* (discussed in *§ 458D.50[2], [3]*).

[4] Execution of Waiver or Acknowledgment

A waiver or acknowledgment under *Prob. Code § 10954(a), above,* must be executed as follows [*Prob. Code § 10954(b)*]:

(1) If the person entitled to distribution is an adult and competent, by that person.

(2) If the person entitled to distribution is a minor, by a person authorized to receive money or property belonging to the minor. If the waiver or acknowledgment is executed by a guardian of the minor's estate, it may be executed without the need to obtain approval of the court in which the guardianship proceeding is pending.

(3) If the person entitled to distribution is a conservatee, by the conservator of the estate of the conservatee, and it may be executed without the need to obtain approval of the court in which the conservatorship proceeding is pending.

(4) If the person entitled to distribution is a trust, by the trustee, but only if the named trustee's written acceptance of the trust is filed with the court. In the case of a trust that is subject to the continuing jurisdiction of the court pursuant to *Prob. Code §§ 17300-17354*, the waiver or acknowledgment may be executed without the need to obtain approval of the court.

(5) If the person entitled to distribution is an estate, by the personal representative of the estate, and it may be executed without the need to obtain approval of the court in which the estate is being administered.

(6) If the person entitled to distribution is incapacitated, unborn, unascertained, or is a person whose identity or address is unknown, or is a designated class of persons who are not ascertained or are not in being, and there is a guardian ad litem appointed to represent the person entitled to distribution, by the

guardian ad litem.

(7) If the person entitled to distribution has designated an attorney in fact who has the power under the power of attorney to execute the waiver oracknowledgment, by either the person entitled to distribution if an adult and competent or the attorney in fact [*Prob. Code § 10954(b)(7)*]. This provision applies, however, only in administration of estate proceedings commenced on or after July 1, 1991 [*Prob. Code § 900(b), (c)*].

[5] Conditional Waiver

It is proper to condition the waiver of an account on the court's ordering distribution as requested in a petition for final distribution, reserving the right to have an account in the event that the court does not distribute the estate in the manner contemplated [*Estate of Simmons (1966) 64 Cal. 2d 217, 223, 49 Cal. Rptr. 369, 411 P.2d 97* (decided prior to the enactment of Prob. Code § 933)].

[6] State Statutes

Waiver of account and exceptions. *Prob. Code § 10954*

[7] Decisions

Waiver of account by sole distributee or all interested persons. *Estate of Moore (1967) 253 Cal. App. 2d 945, 951, 61 Cal. Rptr. 722* ; *Middlecoff v. Superior Court (1906) 149 Cal. 94, 97, 84 P. 764* (decided prior to enactment of Prob. Code § 933, the predecessor to *Prob. Code § 10954*)

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Chapter 458E PROBATE: DISCHARGE

39-458E California Forms of Pleading and Practice--Annotated 458E.syn

§ 458E.syn Synopsis to Chapter 458E: PROBATE: DISCHARGE

§ 458E.01 Scope of Chapter

§§ 458E.02-458E.09 [Reserved]

§ 458E.10 Governing Law

§ 458E.11 Order of Discharge

§ 458E.12 Discharge Without Administration When No Property Appears to Be in Estate

§ 458E.13 Administration After Discharge

§§ 458E.14-458E.29 [Reserved]

§ 458E.30 State Statutes

§ 458E.31 Local Rules of Court

§ 458E.32 Decisions

[1] Discharge of Personal Representative for Lack of Estate Property

[2] Final Discharge of Personal Representative

[3] Issuance of Letters Subsequent to Final Settlement of Estate

§ 458E.33 Text References

§§ 458E.34-458E.49 [Reserved]

§ 458E.50 Receipt From Distributee for Property Received Pursuant to Decree of Distribution [Prob. Code § 12250]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Local Rules of Court

§ 458E.51 Ex Parte Petition for Final Discharge and Order [Prob. Code § 12250]--Judicial Council Form DE-295

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Local Rules of Court

§ 458E.52 [Reserved]

§ 458E.53 Proceedings for Termination of Proceedings and Discharge for Want of Assets Subject to Administration [Prob. Code § 12251]--Petition

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Local Rules of Court

[5] Cross References

§ 458E.54 Proceedings for Termination of Proceedings and Discharge for Want of Assets Subject to Administration [Prob. Code § 12251]--Order

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Local Rules of Court

[5] Cross References

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Chapter 458E PROBATE: DISCHARGE
PART I. SCOPE

39-458E California Forms of Pleading and Practice--Annotated § 458E.01

§ 458E.01 Scope of Chapter

This chapter discusses and contains forms for use in obtaining a final discharge of the personal representative. It contains a form for a receipt [*see § 458E.50*], a form for an ex parte petition and order for discharge of the personal representative [*see § 458E.51*], a form for a petition for termination of proceedings and discharge in the absence of assets subject to probate [*see § 458E.53*], and an order terminating probate proceedings [*see § 458E.54*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral Overview

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[Reserved]

§§ 458E.02[Reserved]

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39-458E California Forms of Pleading and Practice--Annotated § 458E.10

§ 458E.10 Governing Law

Discharge of personal representatives is generally governed by *Prob. Code §§ 12250-12252*. In addition, there are a wide variety of local court rules governing probate practice. To ensure complete compliance, the attorney should consult the applicable rules.

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-458E California Forms of Pleading and Practice--Annotated § 458E.11

§ 458E.11 Order of Discharge

When the personal representative has complied with the terms of the order for final distribution and has filed the appropriate receipts (or the court has excused the filing of a receipt as provided in *Prob. Code § 11753*) the court must, on ex parte petition, make an order discharging the personal representative from all liability incurred thereafter [*Prob. Code § 12250(a)*; *see § 458E.51*]. Nothing in *Prob. Code § 12250*, however, precludes discharge of the personal representative for distribution made without prior court order, so long as the terms of the order for final distribution are satisfied [*Prob. Code § 12250(b)*].

A representative who has been discharged after distribution of the estate is no longer subject to suit in his or her representative capacity, even if the suit was filed before discharge [*Katleman v. First Nat. Bank of Nevada (1963) 212 Cal. App. 2d 520, 524, 28 Cal. Rptr. 135* ; *Independent Bankers Trust Co. v. Superior Court (1982) 138 Cal. App. 3d 238, 241, 188 Cal. Rptr. 14]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-458E California Forms of Pleading and Practice--Annotated § 458E.12

§ 458E.12 Discharge Without Administration When No Property Appears to Be in Estate

At any time after appointment of a personal representative and whether or not letters have been issued, if it appears that there is no property of any kind belonging to the estate and subject to administration, the personal representative may petition for the termination of further proceedings and discharge of the personal representative [*Prob. Code § 12251(a), see §§ 458E.53* (petition), 458E.54 (order granting petition)].

Notice of hearing on the petition must be given as provided in *Prob. Code § 1220* to persons then interested in the estate [*Prob. Code § 12251(b)*]. If it appears to the satisfaction of the court on the hearing that the facts stated in the petition are true, the court must make an order terminating the proceeding and discharging the personal representative [*Prob. Code § 12251(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-458E California Forms of Pleading and Practice--Annotated § 458E.13

§ 458E.13 Administration After Discharge

If subsequent administration of an estate is necessary after the personal representative has been discharged because other property is discovered, or because it becomes necessary or proper for any cause, the court must appoint as personal representative the person entitled to appointment in the same order as is directed in relation to an original appointment [*Prob. Code § 12252(a)*; *see also Prob. Code §§ 8400-8577* (appointment of personal representatives)]. However, the person who served as personal representative at the time of the order of discharge has priority [*Prob. Code § 12252(a)*].

Notice of hearing of the appointment must be given as provided in *Prob. Code § 1220* to the person who served as personal representative at the time of the order of discharge and to other interested persons [*Prob. Code § 12252(b)*; *see Prob. Code § 48* (defining "interested person")]. If property has been distributed to the State of California, a copy of any petition for subsequent appointment of a personal representative and the notice of hearing must be given as provided in *Prob. Code § 1220* to the Controller [*Prob. Code § 12252(b)*].

For discussion of distribution of property acquired or discovered after the court order for final distribution is made, see *Ch. 458D, Probate: Accounts, Final Distribution, and Compensation, § 458D.70* et seq.

Legal Topics:

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

§§ 458E.14[Reserved]

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39-458E California Forms of Pleading and Practice--Annotated § 458E.30

§ 458E.30 State Statutes

Order of discharge. *Prob. Code § 12250*

Discharge without administration. *Prob. Code § 12251*

Administration after discharge. *Prob. Code § 12252*

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39-458E California Forms of Pleading and Practice--Annotated § 458E.31

§ 458E.31 Local Rules of Court

Petition to terminate proceedings must allege that all costs of administration including charges for legal advertising have been paid. Los Angeles Super. Ct. Rules, Rule 10.108

Discharge. Orange Co. Super. Ct. Rules, Rule 608.22; San Francisco Uniform Local Ct. Rules, Rule 14.102

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39-458E California Forms of Pleading and Practice--Annotated § 458E.32

§ 458E.32 Decisions

[1] Discharge of Personal Representative for Lack of Estate Property

What constitutes application for termination of further proceedings and discharge under former Prob. Code § 1068 (now see *Prob. Code § 12251*). *Estate of Robinson (1942) 19 Cal. 2d 534, 540, 121 P.2d 734*

[2] Final Discharge of Personal Representative

Effect of decree of final discharge. *Johnston v. Long (1947) 30 Cal. 2d 54, 64-65, 181 P.2d 645*

Probate court, on making decree of distribution, loses jurisdiction of property distributed even though time for appeal has not passed. *Estate of Baird (1919) 181 Cal. 742, 744-745, 186 P. 351*

Personal representative is entitled to discharge on showing that he or she has paid or delivered property to parties entitled thereto. *McAdoo v. Sayre (1904) 145 Cal. 344, 349, 78 P. 874*

Administration of estate is still pending until entry of a decree discharging personal representative. *Dohs v. Dohs (1882) 60 Cal. 255, 260*

Probate court is vested with power to determine who are entitled to estate, and personal representative is discharged after having delivered up all property of estate to parties entitled. *In re Estate of Dobbins (1940) 36 Cal. App. 2d 536, 538-539, 97 P.2d 1051*

Order discharging personal representative is not appealable. *Estate of Mitchell (1931) 115 Cal. App. 348, 352, 1 P.2d 536*

[3] Issuance of Letters Subsequent to Final Settlement of Estate

Order for further administration is conclusive on issue of necessity if issued on grounds of necessity and permitted to become final. *Estate of Den (1935) 3 Cal. 2d 638, 640-641, 45 P.2d 963*

After final settlement of estate and distribution, further letters of administration may not be issued unless there remains property not disposed of, or some act to be done that only a personal representative can do. *Estate of Yorba (1917) 176 Cal. 166, 168, 167 P. 854*

Newly discovered property is requirement for applicability of former Prob. Code § 1067 (now see *Prob. Code § 12252*). *Estate of St. John (1971) 19 Cal. App. 3d 1008, 1011, 97 Cal. Rptr. 291* ; *Estate of Heigho (1960) 186 Cal. App. 2d 360, 368, 9 Cal. Rptr. 196*

Property transferred by decedent in lifetime is not property within meaning of former Prob. Code § 1067 (now see *Prob. Code § 12252*); property transferable by will as within meaning of former Prob. Code § 1067. *Estate of Heigho (1960) 186 Cal. App. 2d 360, 364-365, 9 Cal. Rptr. 196*

Legal Topics:

For related research and practice materials, see the following legal topics:
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39-458E California Forms of Pleading and Practice--Annotated § 458E.33

§ 458E.33 Text References

Witkin, Summary of California Law, vol. 14, *Wills and Probate*, §§ 742, 744 (10th ed. 2005)

Legal Topics:

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[Reserved]

§§ 458E.34[Reserved]

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39-458E California Forms of Pleading and Practice--Annotated § 458E.50

§ 458E.50 Receipt From Distributee for Property Received Pursuant to Decree of Distribution [Prob. Code § 12250]

[1] FORM Receipt From Distributee for Property Received Pursuant to Decree of Distribution [Prob. Code § 12250]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
Estate of _____ [*name*],	)	RECEIPT
Deceased.	)	

_____

I, _____ [*name*], say:

I acknowledge receipt from _____ [*name*], the personal representative of the estate of _____ [*name*], deceased, of all of the property distributed to me in accordance with the decree of distribution in the above-entitled proceeding on _____ [*date*].

The property so distributed to and received by me is described as follows: _____ [*set out description, e.g.*, money in the sum of $_____].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

Distributee

[2] Use of Form

The personal representative should require a receipt substantially in this form from each distributee under the order for final distribution prior to his or her application for final discharge [*see Prob. Code § 12250*]. When the property cannot actually be delivered to the distributee, procedures outlined under *Prob. Code §§ 11850-11854* (deposit with county treasurer) should be followed. For discussion and forms relating to that procedure, see Ch. 458D, *Probate: Accounts, Final Distribution, and Compensation* .

[3] State Statutes

Necessity that personal representative file appropriate receipts prior to obtaining order of discharge. *Prob. Code § 12250*

[4] Local Rules of Court

Receipt for property received by distributee to be signed by distributee personally. Los Angeles Co. Super. Ct. Rules, Rule 10.124

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Volume 39: Probate: Claims Against the Estate thru Probate: Discharge-Chs. 454-459
Chapter 458E PROBATE: DISCHARGE
PART IV. FORMS

39-458E California Forms of Pleading and Practice--Annotated § 458E.51

§ 458E.51 Ex Parte Petition for Final Discharge and Order [Prob. Code § 12250]--Judicial Council Form DE-295

[1] FORM Ex Parte Petition for Final Discharge and Order [Prob. Code § 12250]--Judicial Council Form DE-295

Click here to view image.

[2] Use of Form

This form is an illustration of the Judicial Council Form DE-295, Ex Parte Petition for final discharge and order. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form is for use by a personal representative of a decedent to apply for a discharge. It may be filed ex parte after the personal representative has complied with the terms of the order for final discharge and has filed the appropriate receipts from the distributees of the decedent's estate [*Prob. Code § 12250(a)*]. Receipts need not be filed if the court excuses the filing of receipts [*Prob. Code § 12250(a)*]. Nothing in *Prob. Code § 12250* precludes discharge of the personal representative for distribution made without prior court order, so long as the terms of the order for final distribution are satisfied [*Prob. Code § 12250(b)*].

The petition must be verified by the personal representative [*Prob. Code §§ 1021(a)(1), 1023*].

Use of the Judicial Council form is mandatory [*see Cal. Rules of Ct., Rules 1.31, 7.101*].

[3] State Statutes

Verification of petition. *Prob. Code §§ 1021, 1023*

Petition for discharge of personal representative. *Prob. Code § 12250(a)*

[4] Local Rules of Court

Final discharge. Orange Co. Super. Ct. Rules, Rule 608.22; San Francisco Uniform Local Ct. Rules, Rule 14.102

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39-458E California Forms of Pleading and Practice--Annotated § 458E.52

[Reserved]

§ 458E.52[Reserved]

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PART IV. FORMS

39-458E California Forms of Pleading and Practice--Annotated § 458E.53

§ 458E.53 Proceedings for Termination of Proceedings and Discharge for Want of Assets Subject to Administration [Prob. Code § 12251]--Petition

[1] FORM Proceedings for Termination of Proceedings and Discharge for Want of Assets Subject to Administration [Prob. Code § 12251]--Petition

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION FOR TERMINATION OF
	)	FURTHER PROCEEDINGS AND DISCHARGE
Estate of _____ [*name*],	)	OF
Deceased.	)	PERSONAL
	)	REPRESENTATIVE
	)	_____

_____

Petitioner _____ [*name*] respectfully represents:

1. Petitioner is the duly appointed, qualified, and acting personal representative of the above entitled estate.

2. In the petition for probate filed on _____ [*date*], petitioner alleged that the value of the assets of decedent subject to probate administration was $_____. This allegation was based on the fact that _____ [*specify*, *e.g.*, prior to the issuance of letters and the subsequent opening of decedent's safe deposit box, petitioner concluded from the best evidence available that decedent died possessed of property consisting of _____ (*describe*), which was the separate property of decedent and subject to administration].

3. It appears now that the property described in Paragraph 2, above, is not property that is subject to administration

because _____ [*specify, e.g.,* on _____ (*date*), after letters were issued, petitioner opened decedent's safe deposit box in the presence of _____ (*names and titles*). As shown in the Inventory of Safe Deposit Box, which is attached to this petition as Exhibit "A" and incorporated by reference, each _____ (*specify, e.g.,* stock certificate and deed) found in the box was held by decedent in joint tenancy with the person indicated in Exhibit "A"].

4. Petitioner has diligently searched for all assets of decedent but has failed to discover any property of any kind belonging to the estate that is subject to administration.

5. All costs, expenses, and premiums on surety bonds, incurred in the administration of the estate, have been paid.

6. A request for special notice has _____ [not been filed herein *or* been filed herein by _____ (*name*) and notice of the time and place of hearing on this petition has been given as required by law *or* been filed herein and waived].

WHEREFORE, petitioner prays:

1. For an order terminating further proceedings for the administration of the estate.

2. For an order discharging petitioner as the personal representative of the estate.

3. For such other orders as the court may deem proper.
Dated: _____.

_____ [*signature*]

Petitioner

_____ [*signature*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form is for use by a personal representative to apply for a termination of proceedings and for a discharge when it appears that there is no property of any kind belonging to the estate and subject to administration [*see Prob. Code § 12251*]. The form may be filed any time after the personal representative's appointment, whether or not letters have been

issued [*Prob. Code § 12251(a)*].

A petition for termination and discharge under *Prob. Code § 12251* is required to contain a statement attesting to the apparent lack of "property of any kind belonging to the estate and subject to administration" (Paragraph 4) [*see Prob. Code § 12251(a)*].

The petition must be in writing and verified by the personal representative [*Prob. Code §§ 1020, 1021(a)(1), 1023(b)*].

Fifteen days notice of the hearing on the petition must be given as provided in *Prob. Code § 1220* to all interested persons [*Prob. Code §§ 1220, 12251(b)*; *see also Prob. Code § 48* ("interested person" defined)]. If special notice has been requested, it must be given or waived [*see Prob. Code §§ 1204, 1252*]. For general discussion of notice requirements, see Ch. 447, *Probate: Statutory Notice Requirements* .

[3] State Statutes

Mailing notice of hearing. *Prob. Code § 1220*

Discharge without administration. *Prob. Code § 12251*

[4] Local Rules of Court

Petitions required to be set for hearing must have self-addressed, stamped envelope attached. Los Angeles Co. Super. Ct. Rules, Rules 10.31(a) (or attach fax cover sheet; see Los Angeles Co. Super. Ct. Rules, Rule 10.31(b))

[5] Cross References

For a related form, *see § 458E.51*

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39-458E California Forms of Pleading and Practice--Annotated § 458E.54

§ 458E.54 Proceedings for Termination of Proceedings and Discharge for Want of Assets Subject to Administration [Prob. Code § 12251]--Order

[1] FORM Proceedings for Termination of Proceedings and Discharge for Want of Assets Subject to Administration [Prob. Code § 12251]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER TERMINATING PROCEEDINGS AND
Estate of _____ [*name*],	)	DISCHARGING
Deceased.	)	PERSONAL
	)	REPRESENTATIVE IN ABSENCE OF ASSETS
		SUBJECT TO PROBATE

_____

The petition of _____ [*name*], personal representative of the estate of _____ [*name*], deceased, to terminate further proceedings in the administration of the estate and to discharge _____ [*name*] as personal representative of the estate came on regularly for hearing on _____ [*date*], in [Department _____ (*number*) of] the above-entitled court, the Honorable _____ [*name*], Judge, presiding. Petitioner appeared by counsel _____ [*name*].

The court, after examining the petition and hearing the evidence, and finding no property belonging to the estate and subject to administration [, that notice of the time and place of the hearing was given as required by _____ (*specify*, *e.g.*, order of this court) (and that special notice was _____ (given to _____ (*name(s)*), as requested *or* requested and waived by _____ (*names(s)*)),] and that the facts alleged in the petition are true, grants this petition as follows:

IT IS ORDERED AND ADJUDGED that proceedings in the estate are terminated and that _____ [*name*] is discharged from further duties and responsibilities as personal representative [and his/her bond is exonerated].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This order is for use to grant a petition for termination of proceedings and discharge of the personal representative when it appears that there is no property of any kind belonging to the estate and subject to administration [*see Prob. Code § 12251*].

[3] State Statutes

Probate orders generally. *Prob. Code §§ 1046-1049*

Finding of giving or waiver of notice. *Prob. Code § 1260(b)*

[4] Local Rules of Court

Orders to be complete in themselves and set forth all matters actually passed on by court, date of hearing, relief granted, and names of persons and descriptions of property or amounts of money affected. Los Angeles Co. Super. Ct. Rules, Rule 10.42; San Francisco Uniform Local Ct. Rules, Rule 14.27

Orders to be submitted to Probate Courtroom at least two weeks in advance of scheduled hearing date, and required to note hearing date on face sheet. San Francisco Uniform Local Ct. Rules, Rule 14.6

[5] Cross References

For a related form, see *§ 458E.53*

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Volume 40: Products Liability thru Public Entities and Officers-Chs. 460-469
Chapter 460 PRODUCTS LIABILITY

40-460 California Forms of Pleading and Practice--Annotated 460.syn

§ 460.syn Synopsis to Chapter 460: PRODUCTS LIABILITY

§ 460.01 Scope of Chapter

§ 460.02 Cross References

§§ 460.03-460.09 [Reserved]

§ 460.10 Origins of Governing Law

[1] Historical Origin

[2] Fraud Exception

[3] Negligence Exceptions in Case of Inherent or Imminent Danger

[4] Negligence Exception in Case of Safety Order Violation

[5] Implied Warranty Exceptions

§ 460.11 Doctrine of Strict Liability in Tort

[1] General Rule

[a] Rule Announced in Greenman

[b] Rationale for Rule

[2] "Products"

[a] "Products" Defined

[b] Stream of Commerce Requirement

[c] Requirement That Product Be in Use

[3] Property and Persons Protected

[4] Economic Loss Not Protected

[5] Persons Liable

[6] Persons Not Liable

[a] Occasional Seller

[b] Manufacturer or Supplier of Nondefective Component

[c] Magazine Publisher of Advertisement

[d] Seller of Services

[e] Furnishing of Blood and Human Tissue

[f] Pharmacy and Pharmacist

[g] Exceptions Regarding Real Property

[h] Landlord and Hotel Proprietor

[i] Party With No Connection to Design, Manufacture, or Marketing of Defective Product

[j] Finance Lessor

[k] Seller of Used Goods

[7] Market-Share Theory of Liability

[a] Required Joinder of Manufacturers Sharing Market

[b] Shifting of Burden of Proof

[c] Apportionment of Damages

[d] Statute of Limitations

[e] Limitations on Theory

[7a] Concert of Action

[8] Inherently and Unavoidably Unsafe Products

[a] Civ. Code § 1714.45 Provides Immunity for Certain Common Consumer Products

[b] Tobacco Products

[c] Drugs and Vaccines Are "Unavoidably Unsafe Products" Under Comment k

[d] Implanted Medical Devices

[e] Applicability of Comment k to Other Products

[9] Defect

[a] Defect in Manufacture

[b] Defect in Design

[i] Alternative Test

[ii] Consumer Expectation Test

[iii] Risk-Benefit Test

[iv] Causation

[A] Substantial Factor Test

[B] Proving Exposure to Defendant's Product

[C] Proving Causation in Food Cases

[v] Firearms and Ammunition

[10] Failure to Warn or Instruct

[a] Duty to Warn

[i] General Rule

[ii] Actual or Constructive Knowledge

[iii] Manufacturers

[iv] Allergies

[b] Limitations on Duty to Warn

[i] Compliance With Regulations

[ii] Warning Seller or Supplier Rather Than Ultimate Consumer

[iii] Effect of Government Warning During Emergency

[iv] Sufficiency of Warning

[v] Rare, Idiosyncratic, or Unusual Reactions

[vi] Commonly Known or Obvious Dangers

[vii] Sophisticated User Defense

[viii] Dangers of Other Manufacturers' Products

[11] Elimination of "Unreasonably Dangerous" Limitation

[a] Rejection of Restatement Component

[b] Effect on Instructions Regarding Definition of Defect

[12] Disclaimer of Liability Does Not Preclude Liability

[13] Express Assumption of Risk Does Not Preclude Liability

[14] Causation in Warning Cases

§ 460.12 Relation of Strict Liability Doctrine to Negligence Concepts

[1] Relief of Evidentiary Burdens

[2] Aspects of Negligence Adopted in Strict Liability

§ 460.13 Strict Liability and Warranties Distinguished

§ 460.14 Liability of Successor Manufacturer

[1] Traditional Exceptions to General Rule of Successor Nonliability

[2] Product Line Theory

§ 460.15 Development of AIDS Vaccine

[1] Establishment of Victims' Compensation Fund

[2] Compensation From Fund for Damages to Injured Person

[3] Procedures and Review

[4] Fund's Right to Subrogation or Lien

[5] Notice of Action to Board or Attorney General

§ 460.16 Insurance Coverage

[1] Availability of Coverage

[2] Coverage Precluded

§§ 460.17-460.29 [Reserved]

§ 460.30 Elements of Action

§ 460.31 Statute of Limitations

[1] Applicable Limitations Periods

[2] Accrual of Cause of Action

[a] When Act Committed

[b] Exceptions

[i] Injury Causing Subsidence of Land

[ii] Discovery Rule

[A] Postponing Accrual of a Cause of Action

[B] Statutory Discovery Rule for Hazardous Substances

[C] Applying Discovery Rule to Separate and Distinct Acts

[D] Applying the Discovery Rule in Tobacco Litigation

[iii] Fraudulent Concealment

[iv] Filing of Class Action

[v] Equitable Tolling

[c] Pleading

[3] Limitation Derived From Other Jurisdiction's Statute of Repose

§ 460.32 Alternative Theories of Recovery

[1] Pleading Alternative Theories

[2] Alternative Theories Against Retailer, Wholesaler, Distributor, Manufacturer, and Supplier

[3] Pleading Theories of Strict Liability and Negligence

[4] Res Ipsa Loquitur

§ 460.33 Damages

[1] Effect of Alternative Theories of Recovery

[2] Punitive Damages

[a] Civ. Code § 3294 Provides Statutory Authority

[b] Grimshaw Court Adopted Broad View of Punitive Damages

[c] U.S. Supreme Court Cases Addressing Constitutionality of Punitive Damages

[d] California Appellate Review of Punitive Damages Awards

§ 460.34 Burden of Proof

[1] Plaintiff

[2] Market-Share Theory Actions

[3] Jury Instructions

§§ 460.35-460.49 [Reserved]

§ 460.50 Answer

§ 460.51 Pleading and Proof Responses to Strict Liability Action

§ 460.52 Affirmative Defenses

[1] General Rule

[2] Federal Preemption

[a] Overview

[b] Medical Devices

[i] Class III Devices Present Preemption Issue

[ii] Medtronic, Inc. v. Lohr: No Preemption of "Substantially Equivalent" Devices

[iii] Riegel v. Metronic, Inc.: Preemption of Claims Alleging Defective PMA-Approved Devices

[iv] Preemption and PMA-Approved Devices in Ninth Circuit Pre-Riegel

[v] California Judiciary's Approach to Preemption of MDA-Approved Devices

[vi] Preemption of Claims Involving Class II Devices

[vii] Buckman v. Plaintiffs' Legal Comm.: Fraud-on-the-FDA Claims Are Preempted

[c] Drugs

[i] Prescription Drugs

[ii] Over-the-Counter Drugs

[d] Air Bags and Other Automotive Components

[e] General Aviation Aircraft

[f] Locomotives and Other Railroad Appliances

[g] Pesticides

[h] Boats

[i] Tobacco

§ 460.53 Comparative Fault and Assumption of Risk

§ 460.54 Burden of Proof

§§ 460.55-460.69 [Reserved]

§ 460.70 Right to Indemnity

[1] Express and Implied Indemnity

[2] Good Faith Settlement Bar

[3] Proposition 51: Fair Responsibility Act of 1986

[a] Statute Eliminated Joint Liability for Non-Economic Damages

[b] Joint Liability When Injuries Are Caused Solely by Defective Product

[c] Special Issues Relating to Allocation of Damages in Settlements

[d] Proposition 51 and the Fault of Immune Nonparties

§ 460.71 Cross Complaint

[1] Setting Forth Cause of Action

[2] Declaratory Relief

[3] Separate Document Requirement

[4] Time to File

[5] Service

§ 460.72 Special Answer

§§ 460.73-460.79 [Reserved]

§ 460.80 Right of Contribution

§ 460.81 Apportionment of Loss

§ 460.82 Determination of Pro Rata Share

§ 460.83 Indemnity Distinguished

§ 460.84 Procedure

§§ 460.85-460.99 [Reserved]

§ 460.100 Related Matthew Bender Publications

§ 460.101 State Constitution

§ 460.102 State Statutes

[1] Adulterated Candy

[2] Affirmative Defenses

[3] Answers

[4] Borrowing Statute

[5] Bunk Bed Safety

[6] Cigarette Fire Safety

[7] Construction Defects

[8] Contribution

[a] General Rule

[b] Judgment

[9] Cosmetics Safety

[10] Cross Complaints

[11] Damages

[12] Declarations

[13] Demurrers

[14] Design Defect--Firearms and Ammunition

[15] Duty Not to Injure

[16] Employment Safety Laws

[17] Evidence and Proof

[18] Failure to Warn

[19] Fraud

[20] Indemnity

[21] Joinder

[22] Liability

[23] Motions

[24] Statute of Limitations

[25] Summary Judgment

[26] Transplants

[27] Unsafe Products

[28] Vaccines

[29] Warranty

§ 460.103 California Rules of Court

§ 460.104 Decisions

[1] Accrual of Cause of Action

[2] Agency

[3] Alteration in Product After Sale

[4] Alternative Theories of Recovery

[5] Appeal

[6] Applicability of Strict Liability Doctrine

[a] Against Bailors and Lessor of Personal Property

[b] Against Employer

[b.1] Against Hotel Proprietors

[c] Against Lessors of Real Property

[d] Against Licensors of Chattels

[e] Against Manufacturers

[i] Manufacturers of Lots

[ii] Manufacturers of Products and Component Parts

[iii] Manufacturers of Components Installed in Mass-Produced Home

[f] Against Manufacturer-Repairer of Product

[g] Against Occasional Seller

[h] Against Publishers

[i] Against Real Estate Developers and Builders

[j] Against Retailers, Wholesalers, and Distributors of Products

[k] Against Successor to Product Manufacturer

[l] Against Used Products Dealer

[m] In Favor of Nonpurchasers

[n] Maritime Law

[o] Nature of Injury--Economic Losses

[p] Against Tobacco Industry

[q] Against Suppliers of Raw Materials

[r] Against Trademark Licensors

[7] Assumption of the Risk

[8] Automobiles

[8a] Borrowing Statute

[9] Burden of Proof

[10] Causation

[11] Class Action Allegations

[12] Comparative Fault

[12a] Concert of Action

[13] Conflict of Laws

[14] Contribution

[15] Damages

[a] Compensatory

[b] Punitive

[16] Defective Product

[a] Defect Generally

[b] Design Defect

[c] Failure to Warn

[d] Manufacturing Defect

[17] Defendants

[18] Definitions

[19] Delegation of Duty by Manufacturer

[20] Elements of Cause of Action

[21] Evidence

[a] Circumstantial

[a.1] Compliance With Industry Standards

[b] Expert Witnesses

[c] Other Accidents

[d] Res Ipsa Loquitur

[e] Safety Orders

[f] Subsequent Remedial Measures

[22] Forum Non Conveniens

[22a] Fraud

[a] Fraudulent Concealment

[b] Intent

[c] Reliance

[22b] General Aviation Aircraft; GARA

[23] Government Contract Immunity

[24] Inapplicability of Doctrine

[a] Bargained-for Transactions

[b] Blood, Blood Products, and Human Tissue

[c] Endorser of Product

[c.1] Finance Lessor

[d] Hospitals

[e] Occasional Builder

[f] Occasional Seller

[g] Partial Successor of Product Manufacturer

[h] Physicians

[i] Private Subdivider of Work Accepted as Public Improvement

[i.1] Product Not in Use

[j] Public Utility Facilities

[k] Purchaser or User

[l] Secondhand Goods Dealer

[m] Sellers of Services

[n] Supplier of Nondefective Component

[o] Supplier Outside Chain of Commerce

[p] Transactions Between "Merchants"

[25] Indemnity

[a] Comparative Equitable Indemnity

[b] Decline to Determine Indemnity

[c] Express Indemnity

[d] Implied Indemnity

[e] Participation in Tort

[f] Reversible Judgment

[g] Warranty

[26] Insurance

[27] Issues

[28] Judgment on the Pleadings

[29] Jury Instructions

[a] Aggravation of Injuries

[b] Burden of Proof

[c] Causation

[d] Contributory Negligence

[e] Drugs and Medical Devices

[f] Material Fact Issues

[g] Proffered Instructions

[h] Res Ipsa Loquitur

[i] Strict Liability and Negligence

[j] Strict Liability in Tort

[k] Vehicles

[30] Landlord-Tenant

[31] Limitations on Liability Imposed by Contract

[32] Market-Share Theory of Strict Liability in Tort

[33] Misuse of Product

[a] Defense of Misuse

[b] Foreseeable Misuse as No Defense

[c] Jury Instructions

[d] Misuse Contrary to Warning

[e] Questions of Fact

[f] Test for Determining Intended Use

[34] Nonpurchaser-Nonuser of Defective Product

[35] Nonpurchaser-User of Defective Product

[36] Nonsuit

[37] Notice

[38] Pleading

[39] Preemption by Federal Law

[40] Prescription Drugs and Medical Devices

[41] Privity of Contract

[42] "Product" Defined

[42a] Proposition 51

[43] Public Policy

[44] Statute of Limitations

[45] Summary Judgment

[46] Superseding Cause

[47] Warranties

[a] Advertising

[b] Basis of Bargain

[c] Class Actions

[d] Construction

[e] Disclaimers

[ee] Express Warranty

[f] Economic Losses

[g] Implied Warranty

[h] Limitations in Warranties

[i] Notice of Breach

[j] Privity

[k] Purpose of Strict Liability

[l] Statute of Limitations

[48] Witnesses

[49] Workers' Compensation

§ 460.105 Law Reviews

§ 460.106 Text References

§§ 460.107-460.119 [Reserved]

Scope

§ 460.120 Product Defect

§ 460.121 Theories of Liability, Parties, Damages

[1] No Injury to Person or to Property

[2] Injury to Person or Property or Both

§ 460.122 Analysis of Actions

[1] By Purchaser

[2] By Nonpurchaser User

[3] By Nonpurchaser, Nonuser Bystander

[4] By Spouse of Injured Person

[5] By Persons Entitled to Bring Wrongful Death Action, or by Personal Representative on Their Behalf

§ 460.123 Defenses

[1] Strict Liability in Tort

[2] Negligence

[3] Breach of Warranty

§ 460.124 Indemnity

§§ 460.125-460.139 [Reserved]

§ 460.140 Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12(a); Cal. Rules of Ct., Rule 1.45(a)]--Complaint for Damages [Civ. Code § 3333] for Personal Injury, Property Damage, Wrongful Death With Products Liability and Exemplary Damages Attachments [Cal. Judicial Council PLD-PI-100, PLD-PI-001(5), PLD-PI-001(6)]

[1] FORM

[2] Use of Form

[3] Allegations

[a] Complaint Form

[i] General Information

[ii] Heading

[iii] Number of Pages

[iv] Damages

[v] Prayer

[b] Products Liability Attachment to Complaint Form

[i] Plaintiff's Name

[ii] Date of Injury and Product Causing Injury (Paragraph Prod.L.-1.)

[iii] Defect and Use of Product (Paragraph Prod.L.-2.)

[iv] Status of Plaintiff (Paragraph Prod.L.-3.)

[v] Strict Liability (Paragraph Prod.L.-4.)

[vi] Negligence (Paragraph Prod.L.-5.)

[vii] Breach of Warranty (Paragraph Prod.L.-6.)

[viii] Other Liability (Paragraph Prod.L.-7.)

[c] Exemplary Damages (Attachment)

[i] Malice, Fraud, or Oppression (Paragraph EX-1.)

[ii] Facts Supporting Claim (Paragraph EX-2.)

[iii] Amount of Damages (Paragraph EX-3.)

[4] Cross References

§ 460.141 Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--For Injury to Person and Property--By Purchaser--User Against Manufacturer

[1] FORM

[2] Use of Form

[3] Allegations

[a] General Allegations

[b] Alleging Amount of Damages

[4] Verification

[5] Copies to Prepare

[6] Cross References

§ 460.142 Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--For Injury to Person and Property--By Purchaser-User Against Multiple Defendants (Manufacturer, Supplier of Component Parts, Retailer, and Fictitious Named Defendants)

[1] FORM

[2] Use of Form

[3] Cross Action by Defendants

[4] Cross References

§ 460.143 Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--For Injury to Person--By Lessee Against Lessor of Product

[1] FORM

[2] Use of Form

[3] Cross Action by Defendant

[4] Cross References

§ 460.144 Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--For Injury to Person--By Licensee Against Licensor of Personal Property (Launderette Owner)

[1] FORM

[2] Use of Form

[3] Cross Action by Defendant

[4] Cross References

§ 460.145 Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--For Injury to Person and Property--By Purchaser Against Manufacturer of Residential Lot

[1] FORM

[2] Use of Form

[3] Cross Action by Defendant

[4] Cross References

§ 460.146 Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--For Injury to Property--By Purchaser of House Against Mass Producer of Houses

[1] FORM

[2] Use of Form

[3] Cross Action by Defendant

[4] Cross References

§ 460.147 Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--For Injury to Person--By Purchaser-User Against Manufacturer's Successor in Interest

[1] FORM

[2] Use of Form

[3] Liability of Successor Business on Predecessor's Obligations

[4] Successors' Liability for Punitive Damages

[5] Cross References

§§ 460.148-460.159 [Reserved]

§ 460.160 Allegation--Plaintiff Was Nonpurchaser-User of Defective Product

[1] FORM

[2] Use of Form

§ 460.161 Allegation--Plaintiff Was Nonpurchaser Nonuser of Defective Product

[1] FORM

[2] Use of Form

[3] Negligence Liability

[4] Cross References

§ 460.162 Allegation--Defect in Design, Manufacture, and Assembly

[1] FORM

[2] Use of Form

[3] Cross References

§ 460.163 Allegation--Defect in Metal Hasp Holding Trays in Truck

[1] FORM

[2] Use of Form

[3] Source of Form

[4] Cross References

§ 460.164 Allegation--Product Defective as Result of Failure to Warn of Danger in Use

[1] FORM

[2] Use of Form

[3] Failure to Warn

§ 460.165 Allegation--Product Defective Because of Failure to Warn of Ingredient to Which Substantial Number of Population Is Allergic

[1] FORM

[2] Use of Form

[3] Duty to Warn of Allergic Properties

[4] Cross References

§ 460.166 Allegation--Drug Manufacturer Strictly Liable for Injuries Caused by Unavoidably Unsafe Prescription Drug Because of Failure to Prepare Drug Properly or Failure to Warn of Its Known or Knowable Dangers

[1] FORM

[2] Use of Form

[3] Liability of Manufacturer of Prescription Drugs

[4] Cross References

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[1] FORM

[2] Use of Form

[3] Inadequate Instructions

[4] Cross References

§ 460.168 Allegation--Exemplary Damages [Civ. Code § 3294]

[1] FORM

[2] Use of Form

[3] Exemplary Damages

[a] General Rule

[b] Award

[c] Pleading

§ 460.169 Allegation--Manufacturers of Substantial Share of Market--Particular Manufacturer Unidentifiable

[1] FORM

[2] Use of Form

[3] Doe Defendants

[4] Theory of Substantial Share of Market

[5] Burden of Proof and Apportionment of Damages

[6] Cross References

§§ 460.170-460.179 [Reserved]

§ 460.180 Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12(a); Cal. Rules of Ct., Rule 1.45(a)]--Answer [Code Civ. Proc. § 431.30] in Action for Personal Injury, Property Damage, Wrongful Death [Cal. Judicial Council PLD-PI-003]

[1] FORM

[2] Use of Form

[3] General Denial

[4] Allegations

[a] Number of Pages (Paragraph 1.)

[b] General Denial (Paragraph 2.)

[c] Other Denials and Admissions (Paragraph 3.)

[d] Affirmative Defenses

[i] Comparative Fault (Paragraph 4.)

[ii] Statute of Limitations (Paragraph 5.)

[iii] Other Defenses (Paragraph 6.)

[e] Prayer (Paragraph 7.)

[f] Signature

[g] Verification

§ 460.181 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action for Personal Injuries Barred by Statute of Limitations [Code Civ. Proc. § 340(3)]

[1] FORM

[2] Use of Form

[3] Alternative Procedures

[4] Pleading Statute of Limitations

[a] In Answer

[b] By Demurrer

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[1] FORM

[2] Use of Form

[3] Alternative Procedures

[4] Comparative Fault

§ 460.183 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Misuse of Product Causing Injuries

[1] FORM

[2] Use of Form

[3] Alternative Procedures

[4] Use of Product

§ 460.184 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Alteration in Product After Sale

[1] FORM

[2] Use of Form

[3] Alternative Procedures

§ 460.185 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Manufacturer Not Liable to Consumer Because of Failure to Warn When Adequate Warnings Given to Distributor With Control Over Packaging, Labeling, and Marketing

[1] FORM

[2] Use of Form

[3] Duty to Warn Regarding Safe Use of Product

[4] Alternative Procedures

§ 460.186 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Manufacturer Not Liable to Consumer Because of Failure to Warn in Language Other Than English of Danger Posed by Nonprescription Drug When Warning in

English Met Legal Requirements

[1] FORM

[2] Use of Form

[3] Statutes Governing Warnings to Accompany Nonprescription Drugs Establish Duty of Care

§ 460.187 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Government Contractor Immunity

[1] FORM

[2] Use of Form

[3] Government Contractor Immunity

[4] Alternative Procedures

§ 460.188 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Cause of Action Preempted by Federal Law

[1] FORM

[2] Use of Form

§§ 460.189-460.199 [Reserved]

§ 460.200 Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12; Cal. Rules of Ct., Rule 1.45(a)]--Cross Complaint [Code Civ. Proc. § 428.10] in Action for Personal Injury, Property Damage, Wrongful Death [Cal. Judicial Council Form PLD-PI-002]

[1] FORM

[2] Use of Form

[3] Allegations

[a] General Allegations

[b] Causes of Action (Paragraphs 7.-10.)

§ 460.201 Cross Complaint [Code Civ. Proc. § 428.10] for Declaratory Relief as to Right to Indemnity [Code Civ. Proc. §§ 86(a)(7)(A), 1060]--By Defendant Retailer Against Manufacturer of Defective Product

[1] FORM

[2] Use of Form

[3] Copies to Prepare

[4] Cross References

§ 460.202 Cross Complaint [Code Civ. Proc. § 428.10] for Declaratory Relief as to Right to Indemnity [Code Civ. Proc. §§ 86(a)(7), 1060]--By Defendant Manufacturer Against Independent Contractor--Breach of Warrant

[1] FORM

[2] Use of Form

[3] Cross References

§§ 460.203-460.209 [Reserved]

§ 460.210 Notice of Motion to Compel Codefendant to Contribute Pro Rata Share of Judgment [Code Civ. Proc. § 878]

[1] FORM

[2] Use of Form

[3] Caption

[4] Contents of Notice

[5] Accompanying Papers

[6] Service of Notice

[7] Judgment Required

§ 460.211 Declaration in Support of Motion to Compel Codefendant to Contribute Pro Rata Share of Judgment [Code Civ. Proc. § 878]

[1] FORM

[2] Use of Form

[3] Contents of Form

[4] Cross References

§ 460.212 Judgment [Code Civ. Proc. § 578] for Contribution Against Codefendant [Code Civ. Proc. § 878]

[1] FORM

[2] Use of Form

[3] Cross References

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PART I. SCOPE

40-460 California Forms of Pleading and Practice--Annotated § 460.01

§ 460.01 Scope of Chapter

This chapter discusses that aspect of products liability known as strict liability in tort. The legal background discussion is subdivided into five parts, for a general discussion and discussion of complaints, answers, cross complaints, and contribution.

The chapter contains the following forms:

- Forms of complaints illustrating the various relationships between the parties and the contents of the pleading with respect to specific kinds of defective products [*see §§ 460.141 -460.147*].

- Forms of alternative and additional allegations for use in these complaints [*see §§ 460.160 -460.169*].

- Judicial Council forms of complaint, answer, and cross complaint [*see §§ 460.140, 460.141, 460.180, 460.200*].

- Forms of affirmative defenses [*see §§ 460.181 -460.188*].

- Other forms of cross complaint [*see §§ 460.201 -460.202*].

- Forms for obtaining contribution [*see §§ 460.210 -460.212*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsCross-ComplaintsTortsProcedureMultiple DefendantsContributionGeneral OverviewTortsProducts LiabilityStrict Liability

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§ 460.02 Cross References

For discussion and forms of affidavits, certificates, and declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

For discussion and forms relating to answers, see Ch. 26, *Answers*

For discussion and forms relating to the strict liability of automobile manufacturers, see Ch. 91, *Automobiles: Actions Involving Defects and Repairs*

For discussion and forms relating to actions against manufacturers, wholesalers, and retailers of cosmetic products, see Ch. 97, *Barbering and Cosmetology*

For discussion and forms relating to complaints and cross complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to declaratory relief, see Ch. 182, *Declaratory Relief*

For discussion and forms relating to motions attacking the sufficiency of pleadings or proof, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , Ch. 345, *Limitation of Actions* , and Ch. 537, *Summary Judgment* , and Ch. 389, *Nonsuit and Motions for Judgment*

For discussion relating to the strict liability of drug manufacturers, see Ch. 214, *Drugs and Pharmacists*

For discussion relating to the strict liability of elevator and escalator manufacturers, see Ch. 244, *Elevators and Escalators*

For discussion and forms relating to strict liability for defective food products, see Ch. 268, *Food*

For discussion and forms relating to fraud and deceit, see Ch. 269, *Fraud and Deceit*

For discussion and forms relating to the strict liability of a commercial supplier of electricity, see Ch. 277, *Gas and Electricity*

For discussion relating to the inapplicability of the strict liability doctrine to hospitals furnishing defective equipment and supplies, see Ch. 295, *Hospitals*

For discussion and forms relating to indemnity and contribution, see Ch. 300, *Indemnity and Contribution*

For discussion and forms relating to negligence, see Ch. 380, *Negligence*

For discussion and forms relating to sales and secured transactions, and relating to actions arising out of breach of warranties in sales contracts, see Ch. 500, *Sales and Secured Transactions*

For discussion and forms relating to warranties, see Ch. 502, *Sales and Warranties*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionBreach of WarrantyContracts LawSales of GoodsDamages & RemediesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesElevators & EscalatorsTortsProcedureMultiple DefendantsContributionParticular ActionsTortsTransportation TortsGeneral OverviewTortsTransportation TortsMotor VehiclesPersonal Vehicles

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[Reserved]

§§ 460.03[Reserved]

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§ 460.10 Origins of Governing Law

[1] Historical Origin

The doctrine of strict liability in tort can be best understood in its historical context. In 1842, Winterbottom v. Wright (Ex. Ch. 1842) 10 M. & W. 109, 152 Eng. Rep. 402, an English case, was decided. That case was generally interpreted as standing for the proposition that the seller of a product is not liable to the consumer, even when the seller was negligent, unless privity of contract existed between them. The doctrine of strict liability in tort evolved from the development of exceptions to this rule.

[2] Fraud Exception

In 1896, the California Supreme Court recognized an exception to the rule of no liability without privity of contract where the manufacturer of a product knew that the product was dangerous, concealed this fact, and represented to the purchaser that the product was safe [*Lewis v. Terry (1896) 111 Cal. 39, 44-45, 43 P. 398* (defective folding bed which injured plaintiff who was purchaser's tenant)]. Liability was based on fraud and hence privity of contract was held not to be required.

[3] Negligence Exceptions in Case of Inherent or Imminent Danger

In 1916, a California court of appeal recognized another exception to the privity-of-contract requirement in the case of mislabeling of dangerous substances [*Catlin v. Union Oil Co. (1916) 31 Cal. App. 597, 605, 161 P. 29]* . There, the court said: "The mislabeling of poisons, inflammable oils, explosives, and like dangerous substances is so fraught with possibilities of danger to purchasers as to charge the first vender with a responsibility for damages, even though the mismarked substance has passed through the hands of a number of intermediate venders." *Catlin* was a wrongful death action against both the retailer and the manufacturer of gas and oil. There, the oil company had misdelivered to the retailer a mixture of coal oil and gasoline for coal oil, a portion of which the retailer then sold to plaintiff's decedent who was killed in a subsequent explosion while filling a coal-oil lamp with it. The jury found the retailer not liable and returned a verdict against the oil company. The court of appeal, while recognizing the above rule nevertheless reversed the judgment on the ground that the act of the retailer in selling the mixture after he knew of the oil company's mistake

and had notified it of the error and the oil company had agreed to take back the mixture was an independent negligent act not reasonablyforseeable by the oil company and, hence, a superseding cause to the oil company's liability.

In *Kalash v. Los Angeles Ladder Co. (1934) 1 Cal. 2d 229, 231-233, 34 P.2d 481* , an action based on negligence for personal injuries sustained by plaintiff in a fall from a ladder when a defective rung broke where the court reversed judgment for plaintiff on the ground of faulty jury instructions, the California Supreme Court advanced development of the inherent-danger exception by making it applicable to things that were not inherently dangerous but which, from their nature, were such that they were reasonably certain to place life and limb in danger if negligently made.

[4] Negligence Exception in Case of Safety Order Violation

Another exception to the privity-of-contract requirement evolved where a safety order was violated. Violation of a safety order imposing requirements for a piece of equipment and adopted for the protection of the class of which plaintiff is a member was held to give rise to liability notwithstanding the absence of privity of contract [*see, e.g., Di Muro v. Masterson Trusafe Steel Scaffold Co. (1961) 193 Cal. App. 2d 784, 790-791, 14 Cal. Rptr. 551* (injured employee fell from scaffold which failed to have guardrails as required by safety order)].

[5] Implied Warranty Exceptions

California courts first developed liability without fraud or negligence and without privity in food products cases. In *Klein v. Duchess Sandwich Co., Ltd. (1939) 14 Cal. 2d 272, 276-284, 93 P.2d 799* (maggots in a ham and cheese sandwich), the Supreme Court of California adopted the doctrine of implied warranty of fitness of foodstuffs intended for human consumption and held that the warranty was intended not only for the benefit of the immediate buyer but also for the benefit of the ultimate consumer and, hence, privity of contract was not required.

But in Burr v. Sherwin Williams Co. (1954) 42 Cal. 2d 682, 695-696, 268 P.2d 1041 , the California Supreme Court refused to extend the implied-warranty exception in the absence of privity to other than foodstuffs.

However, in *Gottsdanker v. Cutter Labs. (1960) 182 Cal. App. 2d 602, 606-607, 6 Cal. Rptr. 320* , an action for damages against the manufacturer of a poliomyelitis vaccine which caused plaintiffs to become infected with the disease it was supposed to prevent, the court of appeal affirmed judgment for plaintiffs and extended the nonprivity-of-contract exception in foodstuffs to drugs [*see also Grinnell v. Charles Pfizer & Co. (1969) 274 Cal. App. 2d 424, 433-434, 79 Cal. Rptr. 369* ; 460.164-460.165].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsImplied WarrantiesGeneral OverviewTortsProducts LiabilityGeneral OverviewTortsProducts LiabilityStrict LiabilityTortsStrict LiabilityGeneral Overview

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§ 460.11 Doctrine of Strict Liability in Tort

[1] General Rule

[a] Rule Announced in *Greenman*

In *Greenman v. Yuba Power Products,* the California Supreme Court brushed aside the need for a person injured by a defective product to resort to theories of fraud, negligence, or implied warranty to recover damages and promulgated the following rule: "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." At page 63 the court said: "The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves" [*Greenman v. Yuba Power Prods., Inc. (1963) 59 Cal. 2d 57, 62, 63, 27 Cal. Rptr. 697, 377 P.2d 897* ; *see also § 460.11[1][b]*].

[b] Rationale for Rule

The purpose of imposing strict liability in tort is to ensure that the costs of injuries resulting from defective products are borne by the manufacturers that put the products on the market rather than by the injured persons who are powerless to protect themselves [*Greenman v. Yuba Power Prods., Inc. (1963) 59 Cal. 2d 57, 63, 27 Cal. Rptr. 697, 377 P.2d 897* ; *Ontiveros v. 24 Hour Fitness USA, Inc. (2008) 169 Cal. App. 4th 424, 430, 86 Cal. Rptr. 3d 767* ; *Arriaga v. Citicapital Commercial Corp. (2008) 167 Cal. App. 4th 1527, 1534, 85 Cal. Rptr. 3d 143* ; *Bostick v. Flex Equip. (2007) 147 Cal. App. 4th 80, 88, 54 Cal. Rptr. 3d 28, 35* ; *Cadlo v. Owens-Ill., Inc. (2004) 125 Cal. App. 4th 513, 524, 23 Cal. Rptr. 3d 1* , *modified, 2004 Cal. App. LEXIS 2260]* . Public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market, and it is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot [*Escola v. Coca Cola Bottling Co. (1944) 24 Cal. 2d 453, 462, 150 P.2d 436* (concurring opinion); *see Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 129, 104 Cal. Rptr. 433, 501 P.2d 1153* ; *Young v. Aro Corp. (1973) 36 Cal. App. 3d 240, 246, 111 Cal. Rptr. 535]* . Other purposes behind the creation of strict liability were to provide a "short cut" to liability in cases in which proving negligence may be difficult, to provide manufacturers with an

economic incentive to improve product safety, to induce the allocation of resources toward safer products, and to spread the risk of loss [*Nelson v. Superior Court (2006) 144 Cal. App. 4th 689, 696, 50 Cal. Rptr. 3d 684* ; *Bostick v. Flex Equip. (2007) 147 Cal. App. 4th 80, 88, 54 Cal. Rptr. 3d 28, 35* ; *Barrett v. Superior Court (1990) 222 Cal. App. 3d 1176, 1186, 272 Cal. Rptr. 304]* . Moreover, by extending strict liability to entities further down the stream of commerce than the manufacturer, the policy of compensating injured plaintiffs is preserved, and retailers and distributors remain free to seek indemnity from the manufacturer [*Edwards v. A.L. Lease & Co. (1996) 46 Cal. App. 4th 1029, 1033, 54 Cal. Rptr. 2d 259]* .

Thus, the paramount policy to be promoted by the rule of strict liability in tort essentially is the protection of otherwise defenseless victims of manufacturing defects and the spreading throughout society of the cost of compensating them [*Price v. Shell Oil Co. (1970) 2 Cal. 3d 245, 251, 85 Cal. Rptr. 178, 466 P.2d 722* ; *Young v. Aro Corp. (1973) 36 Cal. App. 3d 240, 246-247, 111 Cal. Rptr. 535* ; *see Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 30-31, 136 Cal. Rptr. 574, 560 P.2d 3* ; *see Altman v. Ho Sports Co. (E.D. Cal. Aug. 20, 2009) 2009 U.S. Dist. LEXIS 80662, at *9* (policies did not support application of strict liability to manufacturer's sales representative)].

The accepted rationale of strict liability in California is that the responsibility for the consequences of defective products should rest on those who, as a class, are in the best position to make sure that the products never reach the consumer in the first place, but who can distribute the loss among the public as a cost of doing business if they do [*Young v. Aro Corp. (1973) 36 Cal. App. 3d 240, 247, 111 Cal. Rptr. 535]* .

The doctrine does not, however, place on the producer absolute liability for all injuries that result from the use of its product [*Baker v. Chrysler Corp. (1976) 55 Cal. App. 3d 710, 716, 127 Cal. Rptr. 745]* . That is, the producer is not an insurer of the safety of the product [*see, e.g., Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 994, 281 Cal. Rptr. 528, 810 P.2d 549]* .

[2] "Products"

[a] "Products" Defined

Generally speaking, "products" subject to the application of the doctrine of strict products liability are manufactured goods as opposed to services [*see Haynes v. AMTRAK (C.D. Cal. 2006) 423 F. Supp. 2d 1073, 1085* (Amtrak provided transportation services, not a product); *Cryolife, Inc. v. Superior Court (2003) 110 Cal. App. 4th 1145, 1153-1155, 2 Cal. Rptr. 3d 396* (provision of human tissue is service); *Shepard v. Alexian Bros. Hosp. (1973) 33 Cal. App. 3d 606, 613-614, 109 Cal. Rptr. 132* (blood transfusion as service)]. There are, however, some gray areas. Books and magazines are normally outside the application of the doctrine of strict products liability [*see Herceg v. Hustler Magazine, Inc. (S.D. Tex. 1983) 565 F. Supp. 802, 803]* . On the other hand, some published material is considered a product for which the manufacturer may be held strictly liable. For example, a mass-produced navigational chart is a product for the purposes of applying the doctrine of strict liability in tort [*Fluor Corp. v. Jeppesen & Co. (1985) 170 Cal. App. 3d 468, 475, 216 Cal. Rptr. 68]* .

In determining whether or not a specific item is a "product," counsel should consider the policy reasons underlying strict liability, rather than merely focusing on the dictionary definition of the word [*Fluor Corp. v. Jeppesen & Co. (1985) 170 Cal. App. 3d 468, 475, 216 Cal. Rptr. 68]* .

Whether or not a specific item is a "product" is a question of law for the trial court, unlike whether a product is defective, which is a factual issue to be determined by the trier of fact [*Brooks v. Eugene Burger Mgmt. Corp. (1989) 215 Cal. App. 3d 1611, 1626, 264 Cal. Rptr. 756]* .

[b] Stream of Commerce Requirement

A cause of action for strict product liability will not lie unless the defective product has been placed in the stream of commerce by the defendant [*Taylor v. Elliott Turbomachinery Co. (2009) 171 Cal. App. 4th 564, 576-577, 90 Cal. Rptr. 3d 414* ; *Thibos v. Pacific Gas & Elec. Co. (1986) 187 Cal. App. 3d 337, 339-341, 232 Cal. Rptr. 11* (streetlight installed and maintained by electric utility not placed in stream of commerce, and strict liability not applicable to action for damages allegedly caused by failure)].

Under the "stream of commerce" approach to strict liability in tort, liability extends to all those who are in the "overall producing and marketing enterprise" [*Edwards v. A.L. Lease & Co. (1996) 46 Cal. App. 4th 1029, 1033-1034, 54 Cal. Rptr. 2d 259* ; *Fortman v. Hemco, Inc. (1989) 211 Cal. App. 3d 241, 251, 259 Cal. Rptr. 311* ; *but see In re Deep Vein Thrombosis (N.D. Cal. 2005) 356 F. Supp. 2d 1055, 1066* (rejecting contention that aircraft manufacturer was liable for configuration of seats it did not manufacture because it was "integral part" of "overall producing and marketing enterprise" of commercial airline economic market)]. Liability falls in some proportion "on all parties who have mutually participated, in a dependent, interrelated way, in designing, assembling, and marketing the offending product" [*Gehl Bros. Mfg. Co. v. Superior Court (1986) 183 Cal. App. 3d 178, 186, 228 Cal. Rptr. 19]* .

Entities outside the chain of distribution of the defective product will *not* be held strictly liable [*see § 460.11[6][i], below*].

A sale of the product is not a prerequisite to the imposition of strict products liability [*Nelson v. Superior Court (2006) 144 Cal. App. 4th 689, 695, 50 Cal. Rptr. 3d 684 (MTBE)* ; *Stein v. Southern Cal. Edison Co. (1992) 7 Cal. App. 4th 565, 570-571, 8 Cal. Rptr. 2d 907* (electricity)]. This significant deviation from § 402A of the *Restatement (Second) of Torts* distinguishes California products liability law from that of other jurisdictions [*Nelson v. Superior Court (2006) 144 Cal. App. 4th 689, 695, 50 Cal. Rptr. 3d 684* ; *Stein v. Southern Cal. Edison Co. (1992) 7 Cal. App. 4th 565, 570, 8 Cal. Rptr. 2d 907]* .

[c] Requirement That Product Be in Use

There is some debate over whether a product must be in use at the time of the incident to be subject to strict products liability [*see, e.g., Torres v. City of Madera (In re Torres) (E.D. Cal. July 11, 2005) 2005 U.S. Dist. LEXIS 34672, at *27-*30 , aff'd sub nom. Torres v. Taser Int'l, Inc., 277 Fed. Appx. 684, 2008 U.S. App. LEXIS 10169 (9th Cir.)* (not appropriate for publication) (under risk/benefit test, plaintiff must show that product was actually used)]. In *Souza v. Squaw Valley Ski Corp. [(2006) 138 Cal. App. 4th 262, 271, 41 Cal. Rptr. 3d 389]* , an appellate court rejected the strict products liability claim of a skier who collided with a snow making hydrant on the ground that the equipment was not being used as a product at time of the accident. The court relied on language from the seminal case *Greenman v. Yuba Power Products., Inc. [(1963) 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 377 P.2d 897]* stating that a "manufacturer is strictly liable in tort when an article he or she places on the market, knowing that *it is to be used* without inspection..." Fatal to the *Souza* plaintiff's cause of action was the fact that she neither used the hydrant or nozzle nor was a bystander to its use. That same court later clarified this ruling in *Nelson v. Superior Court [(2006) 144 Cal. App. 4th 689, 695-696]* , stating that strict liability does not require use of a product by an ultimate consumer, and may include foreseeable uses of a product while it is still on the market.

[3] Property and Persons Protected

The rule of strict liability in tort, at first applicable to cover injury to person, has been extended to cover injury to property as well [*see Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 19, 45 Cal. Rptr. 17, 403 P.2d 145* ; *Collins Dev. Co. v. D. J. Plastering, Inc. (2000) 81 Cal. App. 4th 771, 778-779, 97 Cal. Rptr. 2d 83* ; *Stearman v. Centex Homes (2000) 78 Cal. App. 4th 611, 623, 92 Cal. Rptr. 2d 761* ; *Gherna v. Ford Motor Co. (1966) 246 Cal. App. 2d 639, 649, 55 Cal. Rptr. 94* ; *see also Southern Cal. Edison Co. v. Harnischfeger Corp. (1981) 120 Cal. App. 3d 842, 846, 852, 175 Cal. Rptr. 67]* and applies in favor of bystanders as well as in favor of the purchaser or user of the product [*Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 587, 75 Cal. Rptr. 652, 451 P.2d 84]* . That is, privity of

contract is not required as a condition to liability [*see* *Williams v. Volkswagenwerk Aktiengesellschaft (1986) 180 Cal. App. 3d 1244, 1266-1267, 226 Cal. Rptr. 306]* .

A cause of action based on the strict products liability doctrine may also be stated by persons entitled under *Code Civ. Proc. § 377.60* to bring a wrongful death action for the death of a decedent killed by a defective product [*Barrett v. Superior Court (1990) 222 Cal. App. 3d 1176, 1183-1196, 272 Cal. Rptr. 304]* . For discussion and forms regarding death actions generally, see Ch. 181, *Death and Survival Actions* .

Strict products liability is available in an action for personal injuries by a bystander against the manufacturer or seller [*Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 587, 75 Cal. Rptr. 652, 451 P.2d 84]* . The public policy that enforces strict liability for manufacturing and design defects in favor of consumers and users also applies to bystanders [*Baker v. Chrysler Corp. (1976) 55 Cal. App. 3d 710, 715, 127 Cal. Rptr. 745]* . Because bystanders have no opportunity to inspect products for defects and limit their purchases to articles manufactured and sold by reputable manufacturers and retailers, they should be entitled to at least as much protection that is accorded consumers or users when the injury from a defect is reasonably foreseeable [*Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 586, 75 Cal. Rptr. 652, 451 P.2d 84]* . One court took the broad protection afforded to bystanders one step further, and held that strict liability may apply to products that have left the control of the manufacturer and are still on the market. The court based its conclusion in part on the fact that bystanders to uses of a product while it is still on the market are in the same position vis-a-vis the manufacturer as bystanders to uses of the product by the ultimate consumer: both are powerless to protect themselves [*Nelson v. Superior Court (2006) 144 Cal. App. 4th 689, 693-696, 50 Cal. Rptr. 3d 684* (MTBE contamination)].

The firefighters' rule, which originated at common law, precludes firefighters from suing those whose negligence caused or contributed to a fire that, in turn, caused the firefighter's injury or death [*Neighbarger v. Irwin Indus., Inc. (1994) 8 Cal. 4th 532, 34 Cal. Rptr. 2d 630, 632, 882 P.2d 347]* . The rule extends to police officers as well. The rationale of the firefighter's rule is assumption of risk [*Calatayud v. State (1998) 18 Cal. 4th 1057, 1061, 77 Cal. Rptr. 2d 202, 959 P.2d 360]* . However, the firefighters' rule contains a number of exceptions and does not necessarily preclude firefighters or police officers injured by defective products in the course of performing their duties from recovery. For example, under the "independent cause" exception, the firefighters' rule does not shield a defendant from liability for actions of misconduct which are independent from those which necessitated the summoning of the officer [*Seibert Sec. Servs., Inc. v. Superior Court (1993) 18 Cal. App. 4th 394, 22 Cal. Rptr. 2d 514, 519* ; *Donohue v. San Francisco Hous. Auth. (1993) 16 Cal. App.4th 658, 20 Cal. Rptr. 2d 148* ; *Vasquez v. North County Transit Dist. (9th Cir. 2002) 292 F.3d 1049, 1060* , applying California law (where railroad crossing gate broke and struck police officer who had been dispatched to crossing because crossing gate arms were stuck in "down" position, and officer alleged that problem that necessitated his presence at scene was not same as allegedly negligent act that caused gate arm to fall sideways and strike him, issue of fact existed as to whether independent cause exception applied); *Stapper v. GMI Holdings, Inc. (1999) 73 Cal. App. 4th 787, 86 Cal. Rptr. 2d 688, 690* (firefighters' rule did not bar claims alleging that garage door opener was defective, because plaintiff alleged that door's malfunction was independent of fire and not caused by fire)].

[4] Economic Loss Not Protected

California follows the economic loss doctrine under which strict liability may not be asserted if the only damages are economic in nature [*see* *Zamora v. Shell Oil Co. (1997) 55 Cal. App. 4th 204, 208-211, 63 Cal. Rptr. 2d 762* (homeowners could not recover in negligence or strict liability for cost of replacing water pipes known to be defective, but which had not yet leaked); *Fieldstone v. Briggs Plumbing Prods., Inc. (1997) 54 Cal. App. 4th 357, 363-367, 62 Cal. Rptr. 2d 701* (in strict liability case, general contractor could not recover cost of replacing installed sinks which rusted and chipped prematurely because no other property had been damaged); *Anthony v. Kelsey-Hayes Co. (1972) 25 Cal. App. 3d 442, 447, 102 Cal. Rptr. 113* (no recovery in strict liability for general depreciation of trucks in absence of allegations of physical damage to persons or property)]. Nonrecoverable economic damages include damages for

inadequate value, costs of repair and replacement of the defective product or consequent loss of profits [*Jimenez v. Superior Court (2002), 29 Cal. 4th 473, 482, 127 Cal. Rptr. 2d 614, 58 P.3d 450* ; *see Stearns v. Select Comfort Retail Corp. (N.D. Cal. June 5, 2009) 2009 U.S. Dist. LEXIS 48367, at *10-*12* (mold-tainted beds)], and damages to the product itself [*Fieldstone Co. v. Briggs Plumbing Prods., Inc. (1997) 54 Cal. App. 4th 357, 371, 62 Cal. Rptr. 2d 701* (plaintiff could not recover damages for sinks that rusted and chipped a few years after installation when only sinks themselves were damaged)].

Thus, the economic loss rule bars recovery in tort for economic damages caused by a defective product, unless those losses are accompanied by some form of personal injury or damage to property other than the product itself [*KB Home v. Superior Court (2003) 112 Cal. App. 4th 1076, 1085, 5 Cal. Rptr. 3d 587]* . In *County of Santa Clara v. Atlantic Richfield Co. [(2006) 137 Cal. App. 4th 292, 320, 40 Cal. Rptr. 3d 313* ; *see also* Cal. Dep't of Toxic Substances Control v. Payless Cleaners (E.D. Cal. Aug. 16, 2007) 2007 U.S. Dist. LEXIS 60703, at *20-*22], municipalities seeking to recoup the costs of abatement of lead-based paint in their buildings alleged only that lead paint is harmful to human beings, and did not allege any physical injury to their buildings. The deterioration of lead paint did not constitute a physical injury to their buildings sufficient to support a negligence or strict liability cause of action.

The economic rule is not a *defense* to a cause of action. Rather, the existence of damages other than purely economic loss is an *element* of a common law cause of action [*Greystone Homes, Inc. v. Midtec, Inc. (2008) 168 Cal. App. 4th 1194, 1215, 86 Cal. Rptr. 3d 196*].

A plaintiff could not recover under a strict products liability theory the costs of repairing or replacing defective windows he had purchased and incorporated into his residence. The only evidence of actual property damage to property other than the windows was several hundred dollars worth of damage to sheet rock and wallpaper, and the persons who purchased his house had paid the costs of repairing this damage [*Carrau v. Marvin Lumber & Cedar Co. (2001) 93 Cal. App. 4th 281, 112 Cal. Rptr. 2d 869, 877-878]* . However, the economic loss rule does not bar recovery in tort in construction cases if the plaintiff produces evidence of damage to other property, which may include other portions of the structure [*Jimenez v. Superior Court (2002) 29 Cal. 4th 473, 481-484, 127 Cal. Rptr. 2d 614, 58 P.3d 450]* . The manufacturer of a defective window installed in a mass-produced home may thus be held strictly liable in tort for damage that the window's defect causes to other parts of the home in which it is installed. In so holding, the California Supreme Court explicitly rejected the defense contention that the "product" was the entire house, and that damage caused to other parts of the house was damage to the product itself [*Jimenez v. Superior Court (2002) 29 Cal. 4th 473, 481-484, 127 Cal. Rptr. 2d 614, 58 P.3d 450* ; *see Crawford v. Weather Shield Mfg., Inc. (2006) 136 Cal. App. 4th 304, 324, 38 Cal. Rptr. 3d 787, 800* , *review granted and depublished, (2006) 44 Cal. Rptr. 3d 632, 136 P.3d 168* , *review dismissed in part (2007) 67 Cal. Rptr. 3d 753, 170 P.3d 129* (*Jimenez* applies retroactively); *see also Mitchell v. Skyline Homes (E.D. Cal. Nov. 25, 2009) 2009 U.S. Dist. LEXIS 116066, at *5]* .

The *Jimenez* court did not provide any direct guidance as to how to make the crucial evaluation as to exactly what is the product at issue. One appellate court concluded that distinguishing between "other property" and the defective product itself in a case involving component-to-component damage requires a determination whether the defective part is a sufficiently discrete element of the larger product that it is not reasonable to expect its failure invariably to damage other portions of the finished product. Factors that may be properly considered in determining what the product at issue is under that test include 1) whether the defective component performs an integral function in the operation of the larger product; 2) whether the component has any independent use to the consumer; 3) how related the property damage is to the inherent nature of the defect in the component; and 4) whether the component itself or the larger product was placed into the stream of commerce. The court further held that determining the nature of the product at issue and whether the injury is to the product itself or to other property is generally the province of the trier of fact [*KB Home v. Superior Court (2003) 112 Cal. App. 4th 1076, 1086-1087, 5 Cal. Rptr. 3d 587* (court's ruling that furnace was single, integrated product deprived plaintiff of right to have material issues of fact submitted to jury); *see also Waste Mgmt., Inc. v. Ishikawajima-Harima Heavy Indus., Co. (E.D. Cal. Aug. 29, 2006) 2006 U.S. Dist. LEXIS 64038, at *11-*14* (*KB Homes* factors suggested that blade retainers were intrinsic, not discrete, elements of the turbine); Croman Corp. v. GE

(E.D. Cal. Sept. 12, 2005) 2005 U.S. Dist. LEXIS 39408, at *4-*5 (plaintiff alleged that component parts were defective and contributed to loss of its helicopter); McDowell Valley Vineyards, Inc. v. Sabate USA Inc. (N.D. Cal. Aug. 6, 2004) 2004 U.S. Dist. LEXIS 15797, at *9-*12 (whether "product" was entire bottle for which closures were used, or whether closure was separate product which caused physical damage to other property, i.e., wine, could not be determined on motion to dismiss)].

In a previous construction defect case in which it held that damages in tort are not available if the defective product has not caused personal injury or property damage, the California Supreme Court rejected a life-safety exception to the economic loss rule. The court reasoned that whether the economic loss rule applies depends on whether property damage has occurred rather than on the possible gravity of damages that have not yet occurred [*Aas v. Superior Court (2000) 24 Cal. 4th 627, 650, 101 Cal. Rptr. 2d 718, 12 P.3d 1125* ; *KB Home v. Superior Court (2003) 112 Cal. App. 4th 1076, 1087-1088, 5 Cal. Rptr. 3d 587]* .

However, effective January 1, 2003, there is a limited cause of action for certain specified housing defects [*Civ. Code § 895 et seq.*]. The Right to Repair Act (the Act) established building standards pertaining to new residential construction and provides homeowners with a cause of action against builders and individual product manufacturers for violation of those standards [*Civ. Code §§ 896, 936*; *Greystone Homes, Inc. v. Midtec, Inc. (2008) 168 Cal. App. 4th 1194, 1202, 86 Cal. Rptr. 3d 196*]. The Act abrogated the economic loss rule, thereby legislatively superseding *Aas v. Superior Court, above* [*Kingsbury v. U.S. Greenfiber, LLC (C.D. Cal. Sept. 14, 2009) 2009 U.S. Dist. LEXIS 92014, at *19* ; *Greystone Homes, Inc. v. Midtec, Inc. (2008) 168 Cal. App. 4th 1194, 1202, 86 Cal. Rptr. 3d 196*]. In *Greystone Homes, Inc. v. Midtec, Inc. (2008) 168 Cal. App. 4th 1194, 1203, 86 Cal. Rptr. 3d 196* , the court held that a builder may recover from a product manufacturer for economic losses caused by the manufacturer's violations of the standards set forth in the Act through an equitable indemnity action. However, a builder may *not* recover for economic losses through a direct negligence claim based on the manufacturer's violations of the standards.

Diminution in value also constitutes economic loss not recoverable in strict liability [*San Francisco Unified Sch. Dist. v. W.R. Grace & Co. (1995) 37 Cal. App. 4th 1318, 1327-1328, 44 Cal. Rptr. 2d 305* (reduction of fair market value of buildings found to contain asbestos building materials may constitute economic loss that cannot be recovered in strict liability or negligence); *Anthony v. Kelsey-Hayes Co. (1972) 25 Cal. App. 3d 442, 446, 102 Cal. Rptr. 113* (denying plaintiff, suing on products liability theory, any depreciation in value to its truck caused by defective wheels supplied by manufacturer)].

The California Supreme Court has held that the economic loss rule did not bar a fraud and intentional misrepresentation claim with respect to an aircraft part manufacturer's provision of false FAA certificates. The defendant's issuance of the false certificates of conformance unquestionably constituted affirmative misrepresentations that plaintiff justifiably relied on to its detriment--that is, the elements of fraud. Accordingly, the defendant's tortious conduct was separate from the breach itself (the provision of the nonconforming clutches). The defendant's provision of faulty clutches also exposed plaintiff to liability for personal damages and to disciplinary action by the FAA. The economic loss rule did not bar the plaintiff's fraud and intentional misrepresentation claims because they were independent of the defendant's breach of contract [*Robinson Helicopter Co. v. Dana Corp. (2004) 34 Cal. 4th 979, 990-991, 22 Cal. Rptr. 3d 352, 102 P.3d 268]* . An appellate court interpreted *Robinson* as precluding application of the economic loss rule to *any* intentional affirmative fraud action where the plaintiff can establish that the fraud exposed the plaintiff to liability, as opposed to only fraud actions that *also* accompany, but are independent of, breach of contract causes of action. In *County of Santa Clara v. Atlantic Richfield Co. [(2006) 137 Cal. App. 4th 292, 328-329, 40 Cal. Rptr. 3d 313]* , municipalities alleged that lead paint and pigment manufacturers made affirmative representations about the dangers of exposure to low levels of lead, causing them to delay making timely efforts to prevent and treat low-level lead exposure. The economic loss doctrine did not apply to plaintiffs' fraud cause of action.

[5] Persons Liable

Originally, the rule of strict liability in tort was stated in terms of holding the manufacturer strictly liable in tort for any defect in a product manufactured by it which caused injury to any person [*Greenman v. Yuba Power Prods., Inc. (1963) 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 377 P.2d 897]* . Since *Greenman,* the rule has been made applicable to any person who is in the business of placing the defective product in, or moving it along, the stream of commerce.

Therefore, the doctrine has been applied in the following situations:

- Component part manufacturers when the component part was defective at the time it left the component part manufacturer's factory [*Yu-Santos v. Ford Motor Co. (E.D. Cal. May 13, 2009) 2009 U.S. Dist. LEXIS 41001, at *49* ; *Gonzalez v. Autoliv ASP, Inc. (2007) 154 Cal. App. 4th 780, 788, 64 Cal. Rptr. 3d 908*].

- Retailers [*see* *Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 587, 75 Cal. Rptr. 652, 451 P.2d 84* ; *Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 263, 37 Cal. Rptr. 896, 391 P.2d 168* ; *Ontiveros v. 24 Hour Fitness USA, Inc. (2008) 169 Cal. App. 4th 424, 431, 86 Cal. Rptr. 3d 767* ; *Arriaga v. Citicapital Commercial Corp. (2008) 167 Cal. App. 4th 1527, 1534, 85 Cal. Rptr. 3d 143* ; *see also* *Livingston v. Marie Callenders, Inc. (1999) 72 Cal.App. 4th 830, 839, 85 Cal. Rptr. 2d 528* (restaurant failed to warn about food additive); §§ 460.141-460.142].

- Wholesalers and distributors [*see* *Lyles v. Zimmer, Inc. (E.D. Cal. May 29, 2009) 2009 U.S. Dist. LEXIS 50483, at *11-*13* (implanted medical device); *Hinds v. Zimmer, Inc. (E.D. Cal. May 29, 2009) 2009 U.S. Dist. LEXIS 48565, at *11-*13* (same); *Moorhouse v. Bayer Healthcare Pharms. (N.D. Cal. June 17, 2008) 2008 U.S. Dist. LEXIS 48833, at *11-*14* ; *Maher v. Novartis Pharms. Corp. (S.D. Cal. Aug. 10, 2007) 2007 U.S. Dist. LEXIS 58984, at *8-*9* ; *Johnson v. Standard Brands Paint Co. (1969) 274 Cal. App. 2d 331, 337, 79 Cal. Rptr. 194* ; *Barth v. B.F. Goodrich Tire Co. (1968) 265 Cal. App. 2d 228, 252-253, 71 Cal. Rptr. 306]* .

- Bailors [*McClaflin v. Bayshore Equip. Rental Co. (1969) 274 Cal. App. 2d 446, 452, 79 Cal. Rptr. 337* (defective stepladder); *see § 460.143*].

- Manufacturer-repairers of products when the defect results from the repair [*see* *Young v. Aro Corp. (1973) 36 Cal. App. 3d 240, 246, 111 Cal. Rptr. 535]* .

- Licensors of personal property [*Garcia v. Halsett (1970) 3 Cal. App. 3d 319, 324-326, 82 Cal. Rptr. 420* (defective washing machine in launderette); *see also* *Thomas v. General Motors Corp. (1970) 13 Cal. App. 3d 81, 89, 91 Cal. Rptr. 301* (same); *see generally § 460.144*].

- Lessors of personal property [*Westlye v. Look Sports, Inc. (1993) 17 Cal. App. 4th 1715, 1741-1742, 22 Cal. Rptr. 2d 781* ; *Price v. Shell Oil Co. (1970) 2 Cal. 3d 245, 253, 85 Cal. Rptr. 178, 466 P.2d 722* ; *see § 460.143*].

- Manufacturers of building lots (manufactured by cutting, filling, grading, compacting, and the like) [*GEM Developers v. Hallcraft Homes of San Diego, Inc. (1989) 213 Cal. App. 3d 419, 431, 261 Cal. Rptr. 626* (regarding cross-complaint by contractor for comparative indemnity); *Avner v. Longridge Estates (1969) 272 Cal. App. 2d 607, 609-615, 77 Cal. Rptr. 633* (improper drainage, improper compaction of fill, and organic matter left beneath fill); *see § 460.145*].

- Sellers of mass-produced homes [*Kriegler v. Eichler Homes, Inc. (1969) 269 Cal. App. 2d 224, 227-229, 74 Cal. Rptr. 749* (defective heating system); *Mills v. Forestex Co. (2003) 108 Cal. App. 4th 625, 636, 134 Cal. Rptr. 2d 273* (plaintiffs' house, siding of which warped, was not mass-produced

house); *see § 460.146*].

- Real estate developers [*Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 810-811, 110 Cal. Rptr. 543* (installation of defective water distribution system); *see also Casey v. Overhead Door Corp. (1999) 74 Cal. App. 4th 112, 120, 87 Cal. Rptr. 2d 603* (defective construction, leaking windows)].

- Developers of multiple-unit, residential, planned development complex [*Del Mar Beach Club Owners Assn. v. Imperial Contracting Co. (1981) 123 Cal. App. 3d 898, 911, 913, 176 Cal. Rptr. 886* (defective design and construction of project on unstable bluff)].

- Employers, when an employee's injury or death is proximately caused by a defective product manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and that product is thereafter provided for the employee's use by a third person [*Lab. Code § 3602(b)(3)*; *see* Ch. 360, *Master and Servant* , regarding anemployer's liability under the dual capacity doctrine].

- Commercial suppliers of electricity, when personal injuries are caused by delivery of electricity at dangerously high voltage because of defective equipment and when the electricity is actually in the stream of commerce and expected to be at a marketable voltage [*Stein v. Southern Cal. Edison Co. (1992) 7 Cal. App. 4th 565, 8 Cal. Rptr. 2d 907* ; *Pierce v. Pacific Gas & Elec. Co. (1985) 166 Cal. App. 3d 68, 83-84, 212 Cal. Rptr. 283]* . However, strict liability does not apply when the electricity is not in the stream of commerce and in marketable form; for example, the supplier is not strictly liable when the electricity is being transmitted in power lines owned by the supplier of electricity [*see United Pac. Ins. Co. v. Southern Cal. Edison Co. (1985) 163 Cal. App. 3d 700, 707-708, 209 Cal. Rptr. 819* ; *see also Pierce v. Pacific Gas & Elec. Co. (1985) 166 Cal. App. 3d 68, 84, 212 Cal. Rptr. 283* (dictum); *see generally* Ch. 277, *Gas and Electricity*]. For example, if evidence shows that the voltage of the lines was normal, there is no defective product, and strict liability in tort will not lie for defective electric transmission lines or defects anywhere along the distribution lines [*Fong v. Pacific Gas & Elec. Co. (1988) 199 Cal. App. 3d 30, 36, 245 Cal. Rptr. 436* (judgment in favor of electric utility customer on strict liability in tort theory reversed)].

- A business entity that is the successor in interest to a manufacturer or distributor. In addition to the four traditional exceptions to the general rule of successor nonliability [*see § 460.14*], a successor may be liable under the product line theory. A successor may be liable in product liability actions to the same extent that the predecessor entity would have been liable had it remained a going concern [*Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 30-34, 136 Cal. Rptr. 574, 560 P.2d 3* (successor to manufacturer); *Kaminski v. Western MacArthur Co. (1985) 175 Cal. App. 3d 445, 454-459, 220 Cal. Rptr. 895* (successor to distributor)]. Successor liability is imposed under the product line theory when:

  - The destruction of plaintiff's remedies against the predecessor was caused by the successor's acquisition of the business.

  - The successor has the ability to assume the predecessor's risk-spreading role.

  - It is fair to require the successor to assume liability in light of the successor's continued operation of the business and use of the predecessor's good will [*Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 31, 136 Cal. Rptr. 574, 560 P.2d 3* ; *Monarch Bay II v. Professional Serv. Indus., Inc. (1999) 75 Cal. App. 4th 1213, 1216-1217, 89 Cal. Rptr. 2d 778* ; *Kaminski v. Western MacArthur Co. (1985) 175 Cal. App. 3d 445, 454, 220 Cal.*

Rptr. 895] . The mere fact that the successor utilizes the name of the original manufacturer is not sufficient to impose liability [*Lundell v. Sidney Mach. Tool Co. (1986) 190 Cal. App. 3d 1546, 1557, 236 Cal. Rptr. 70]* . Liability may be imposed on a successor only if all three prongs of the test set forth in *Ray v. Alad* are satisfied [*Lundell v. Sidney Mach. Tool Co. (1986) 190 Cal. App. 3d 1546, 1550-1557, 236 Cal. Rptr. 70* ; *see* *Stewart v. Telex Communications, Inc. (1991) 1 Cal. App. 4th 190, 200, 1 Cal. Rptr. 2d 669* (successor liability inappropriate when defendant did not cause bankruptcy of predecessor)]. For a form of complaint alleging that a successor in interest to a manufacturer should be held strictly liable, see *§ 460.147*.

- A restaurant may be strictly liable for failing to warn customers in the context of allergies [*Livingston v. Marie Callenders, Inc. (1999) 72 Cal. App. 4th 830, 839, 85 Cal. Rptr. 2d 528* (a customer ate soup that contained an allergy producing food additive)].

- A supplier of raw asbestos is subject to strict products liability [*Garza v. Asbestos Corp. (2008) 161 Cal. App. 4th 651, 658-659, 74 Cal. Rptr. 3d 359* ; *Arena v. Owens-Corning Fiberglas Corp. (1998) 63 Cal. App. 4th 1178, 1181, 74 Cal. Rptr. 2d 580]* .

- A manufacturer of windows installed in a mass-produced home can be strictly liable for harm resulting from defects in those windows [*Jimenez v. Superior Court (2002) 29 Cal. 4th 473, 481, 127 Cal. Rptr. 2d 614, 58 P.3d 450]* .

- Trade mark licensors that are a link in the marketing enterprise which placed the defective product in the stream of commerce [*Kasel v. Remington Arms Co. (1972) 24 Cal. App. 3d 711, 725, 101 Cal. Rptr. 314]* .

- Companies involved in the "overall producing and marketing enterprise," [*Arriaga v. Citicapital Commercial Corp. (2008) 167 Cal. App. 4th 1527, 1534, 85 Cal. Rptr. 3d 143* ; *Bay Summit Community Assn v. Shell Oil Co. (1996) 51 Cal. App. 4th 762, 773, 59 Cal. Rptr. 2d 322* ; *see* *Vu v. Ortho-McNeil Pharm., Inc. (N.D. Cal. 2009) 602 F. Supp. 2d 1151, 1155*] such as a company that manufactured a fiberglass mold used to cast an after-market jeep-top [*Fortman v. Hemco, Inc. (1989) 211 Cal. App. 3d 241, 251, 259 Cal. Rptr. 311]* .

[6] Persons Not Liable

[a] Occasional Seller

The doctrine of strict liability in tort applies only to persons engaged in the business of placing products on the market [*Price v. Shell Oil Co. (1970) 2 Cal. 3d 245, 253-254, 85 Cal. Rptr. 178, 466 P.2d 722]* . The doctrine does not apply to the occasional seller (or lessor or licensor) of a product who is not engaged in the business of selling (or otherwise placing the product into, or moving it along, the stream of commerce) [*see* *Barth v. B.F. Goodrich Tire Co. (1968) 265 Cal. App. 2d 228, 251, 71 Cal. Rptr. 306* ; *see also* *Ortiz v. HPM Corp. (1991) 234 Cal. App. 3d 178, 285 Cal. Rptr. 728* (owner sold machine in one-time transaction on liquidation of his own business); *Balido v. Improved Mach., Inc. (1972) 29 Cal. App. 3d 633, 640, 105 Cal. Rptr. 890* , *criticized on another point,* *Foglio v. Western Auto Supply (1976) 56 Cal. App. 3d 470, 476, 128 Cal. Rptr. 545* (manufacturer that sells second-hand piece of equipment it had used in its business but that it was not in business of selling as in position of occasional seller with respect to that piece of equipment))]. Nor does the doctrine apply to a landowner who leases a dwelling as an isolated act, for example, to the owner of a house who leases his own residence temporarily [*Vaerst v. Tanzman (1990) 222 Cal. App. 3d 1535, 1539-1541, 272 Cal. Rptr. 503]* .

[b] Manufacturer or Supplier of Nondefective Component

A component part manufacturer who had no role in designing the finished product and who supplied a nondefective component cannot be held liable for the defective product [*Merrill v. Leslie Controls, Inc. (2009) 179 Cal. App. 4th 262, 271, 101 Cal. Rptr. 3d 614* ; *Taylor v. Elliott Turbomachinery Co. (2009) 171 Cal. App. 4th 564, 584, 90 Cal. Rptr. 3d 414* ; *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co. (2004) 129 Cal. App. 4th 577, 581, 28 Cal. Rptr. 3d 744* ; *Lee v. Electric Motor Div. (1985) 169 Cal. App. 3d 375, 385-387, 215 Cal. Rptr. 195*]. A component seller who simply designs a component to the buyer's specifications, and does not substantially participate in the integration of the component into the design of the product, is not liable [*Taylor v. Elliott Turbomachinery Co. (2009) 171 Cal. App. 4th 564, 584-585, 90 Cal. Rptr. 3d 414* ; *Artiglio v. General Elec. Co. (1998) 61 Cal. App. 4th 830, 841, 71 Cal. Rptr. 2d 817* ; *Wiler v. Firestone Tire & Rubber Co. (1979) 95 Cal. App. 3d 621, 629, 157 Cal. Rptr. 248* ; *Walker v. Stauffer Chem. Corp. (1971) 19 Cal. App. 3d 669, 673, 96 Cal. Rptr. 803*]. The alleged foreseeability of the risk of the finished product is irrelevant to the issue of the component part manufacturers' liability [*Merrill v. Leslie Controls, Inc. (2009) 179 Cal. App. 4th 262, 278, 101 Cal. Rptr. 3d 614* ; *Taylor v. Elliott Turbomachinery Co. (2009) 171 Cal. App. 4th 564, 585-586, 90 Cal. Rptr. 3d 414]* .

Only defendants who supply "generic" or "off-the-shelf" components, as to those which are really a separate product with a specific purpose and use, are protected from liability under the component part doctrine [*Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co. (2004) 129 Cal. App. 4th 577, 581, 28 Cal. Rptr. 3d 744* ; *Gonzalez v. Autoliv ASP, Inc. (2007) 154 Cal. App. 4th 780, 788, 64 Cal. Rptr. 3d 908, 915* ; *Springmeyer v. Ford Motor Co. (1998) 60 Cal. App. 4th 1541, 1554, 71 Cal. Rptr. 2d 190, 196*]. The fact that a defendant manufactured its equipment pursuant to government or military specifications will not deprive it of the component parts defense [*Taylor v. Elliott Turbomachinery Co. (2009) 171 Cal. App. 4th 564, 584-585, 90 Cal. Rptr. 3d 414]* .

[c] Magazine Publisher of Advertisement

Strict products liability (or any other products-liability theory) is inapplicable to a magazine publisher that advertised a product, but in no way sponsored or endorsed the product for its own economic gain [*see* Walters v. Seventeen *Magazine (1987) 195 Cal. App. 3d 1119, 1121-1122, 241 Cal. Rptr. 101* (advertisement of tampons, use of which caused toxic-shock syndrome in plaintiff)]. The advertisement of a product does not constitute a warranty of the product, or create a duty to investigate them, unless the publisher endorses a product for economic gain and for the purpose of inducing the public to buy it. Mere advertisement is also a protected activity under the *First Amendment* [*Walters v. Seventeen Magazine (1987) 195 Cal. App. 3d 1119, 1121-1122, 241 Cal. Rptr. 101* ; *cf. Hanberry v. Hearst Corp. (1969) 276 Cal. App. 2d 680, 81 Cal. Rptr. 519* (product endorsed by Good Housekeeping magazine)].

[d] Seller of Services

The sellers of services, as opposed to products, are not subject to strict liability in tort [*Haynes v. AMTRAK (C.D. Cal. 2006) 423 F. Supp. 2d 1073, 1085* (Amtrak provided services, not a product); Torres v. City of Madera (In re Torres) (E.D. Cal. July 11, 2005) 2005 U.S. Dist. LEXIS 34672, at *46 (training in taser use); *Gagne v. Bertran (1954) 43 Cal. 2d 481, 487, 275 P.2d 15* (test-hole digger); *Ontiveros v. 24 Hour Fitness USA, Inc. (2008) 169 Cal. App. 4th 424, 434-435, 86 Cal. Rptr. 3d 767* ; *Hector v. Cedars-Sinai Med. Ctr. (1985) 180 Cal. App. 3d 493, 501-508, 225 Cal. Rptr. 595* (hospital); *Del Mar Beach Club Owners Assn. v. Imperial Contracting Co. (1981) 123 Cal. App. 3d 898, 914, 176 Cal. Rptr. 886* (soil engineers, structural engineers, and architects of defective development complex); *Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 811, 110 Cal. Rptr. 543* (engineers who designed defective water distribution system); *Shepard v. Alexian Bros. Hosp. (1973) 33 Cal. App. 3d 606, 609-610, 109 Cal. Rptr. 132* (hospital); *Allied Properties v. John A. Blume & Associates (1972) 25 Cal. App. 3d 848, 855-856, 102 Cal. Rptr. 259* (engineering firm which designed allegedly defective pier); *Silverhart v. Mount Zion Hosp. (1971) 20 Cal. App. 3d 1022, 1028, 98 Cal. Rptr. 187* (hospital); *Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 978, 95 Cal. Rptr. 381* (doctor)]. In transactions involving both products and services, liability often depends on the defendant's role [*Ferrari*

v. Grand Canyon Dories (1995) 32 Cal. App. 4th 248, 258, 38 Cal. Rptr. 2d 65 (defendant provided recreational raft transportation service, not a raft); *Pierce v. Pacific Gas & Elec. Co. (1985) 166 Cal. App. 3d 68, 83-84, 212 Cal. Rptr. 283*]. The determinative issue in mixed purpose transactions is whether the dominant role in supplying the product should be characterized as the performance of a service or the provision of a product [*Ontiveros v. 24 Hour Fitness USA, Inc. (2008) 169 Cal. App. 4th 424, 434-435* (dominant purpose of membership agreement was to provide fitness services); *Murphy v. E.R. Squibb & Sons, Inc. (1985) 40 Cal. 3d 672, 677, 221 Cal. Rptr. 447, 710 P.2d 247* (pharmacist not strictly liable for providing prescription drug)]. This reasoning has been used to deny application of the strict-liability doctrine to a hospital for injuries arising from latent defects in hospital premises. In doing so, the court refused to expand the rule under which a landlord is strictly liable for injuries resulting from a latent defect in leased premises, if the defect existed at the time the premises were leased. Although a landlord is an integral part of the business of producing and marketing rental housing, a hospital primarily provides professional medical services rather than products [*Pierson v. Sharp Mem'l Hosp., Inc. (1989) 216 Cal. App. 3d 340, 343-347, 264 Cal. Rptr. 673]* . Persons selling services are liable in tort only for negligence or intentional misconduct [*Gagne v. Bertran (1954) 43 Cal. 2d 481, 487, 275 P.2d 15* ; *Del Mar Beach Club Owners Assn. v. Imperial Contracting Co. (1981) 123 Cal. App. 3d 898, 914, 176 Cal. Rptr. 886* ; *Allied Properties v. John A. Blume & Associates (1972) 25 Cal. App. 3d 848, 855-856, 102 Cal. Rptr. 259*].

[e] Furnishing of Blood and Human Tissue

The doctrine of strict liability in tort is also inapplicable to the furnishing of blood that by statute [*Health & Safety Code §§ 1600.4, 1606*] is regarded as a service and not a sale [*Osborn v. Irwin Mem. Blood Bank (1992) 5 Cal. App. 4th 234, 272, 7 Cal. Rptr. 2d 101* ; *Shepard v. Alexian Bros. Hosp. (1973) 33 Cal. App. 3d 606, 609-610, 109 Cal. Rptr. 132* ; *accord McDonald v. Sacramento Med. Found. Blood Bank (1976) 62 Cal. App. 3d 866, 869-874, 133 Cal. Rptr. 444* ; *Klaus v. Alameda-Contra Costa Medical Assn. Blood Bank, Inc. (1976) 62 Cal. App. 3d 417, 418, 133 Cal. Rptr. 92* ; *see also Hyland Therapeutics v. Superior Court (1985) 175 Cal. App. 3d 509, 514-516, 220 Cal. Rptr. 590* (*Health & Safety Code § 1606* as constitutional); *Fogo v. Cutter Labs., Inc. (1977) 68 Cal. App. 3d 744, 752, 137 Cal. Rptr. 417* (extending nonliability rule to manufacturer of "Factor IX Konyne," a blood plasma product obtainable only on prescription)].

In a case of first impression, one court of appeal concluded that *Health & Safety Code § 1635.2* provides statutory immunity from strict liability to human tissue banks subject to regulation under the Health & Safety Code. The court specifically rejected the plaintiff's argument that the omission in § 1635.2 of language indicating that a tissue bank shall be deemed to provide a service "for all purposes," combined with the reference to the Commercial Code, indicated that the legislature did not intend to immunize tissue banks from strict products liability [*Cryolife, Inc. v. Superior Court (2003) 110 Cal. App. 4th 1145, 1153-1155, 2 Cal. Rptr. 3d 396* (defendant provided infected patellar tendon from human cadaver)].

[f] Pharmacy and Pharmacist

The strict liability doctrine does not impose strict liability on a pharmacy and its pharmacists for injury caused by defective prescription drugs [*see Murphy v. E.R. Squibb & Sons, Inc. (1985) 40 Cal. 3d 672, 679-688, 221 Cal. Rptr. 447, 710 P.2d 247* (plurality opinion)].

[g] Exceptions Regarding Real Property

The application of the strict liability doctrine to real property developers does not extend to subcontractors who are in the typical general contractor-subcontractor relationship, although developers are subject to strict liability for defects caused by the negligence of their subcontractors [*La Jolla Village Homeowners' Assn. v. Superior Court (1989) 212 Cal. App. 3d 1131, 1144-1149, 261 Cal. Rptr. 146]* .

The *La Jolla* court thus held that a subcontractor hired by a developer cannot be strictly liable for defects in mass-produced homes, unless it also owns or controls the housing development. *La Jolla* also suggested a broader subcontractor exception, under which strict products liability did not apply to subcontractors in the typical real estate construction project regardless of whether they provided services or a product. In *Jimenez v. Superior Court (2002) 29 Cal. 4th 473, 481, 127 Cal. Rptr. 2d 614, 621, 58 P.3d 450* , the California Supreme Court disapproved *La Jolla* to the extent it is inconsistent with the views expressed in that case.

Engineers and architects working on housing are not held strictly liable for the rendering of professional services [*see, e.g., Del Mar Beach Club Owners Assn. v. Imperial Contracting Co. (1981) 123 Cal. App. 3d 898, 176 Cal. Rptr. 886, 894* ; *Swett v. Gribaldo, Jones & Assocs. (1974) 40 Cal. App. 3d 573, 115 Cal. Rptr. 99, 100-101* (purchaser of home which was rendered uninhabitable could not assert strict liability claim against soils engineer); *Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 110 Cal. Rptr. 543, 549]* .

[h] Landlord and Hotel Proprietor

Neither landlords nor hotel proprietors are subject to strict products liability for injuries to tenants or guests caused by a defect in the premises [*Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1200, 43 Cal. Rptr. 2d 836, 899 P.2d 905 , overruling Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 213 Cal. Rptr. 213, 698 P.2d 116]* . The rationales for imposing strict products liability on manufacturers or retailers do not apply to a hotel owner because the owner was not part of the "chain of distribution" of the injury-causing product [*Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1199, 43 Cal. Rptr. 2d 836, 899 P.2d 905* (bathtub)]. Unlike retailers, landlords and hotel owners often are unable to exert pressure on manufacturers to make their products safer and cannot share the costs of insuring the tenants' or guests' safety with the manufacturer. Also, unlike manufacturers and retailers, landlords and hotel owners cannot necessarily be expected to possess expert knowledge concerning the components that comprise leased dwellings. The Court did not decide whether it would apply different considerations in its analysis in the event that the landlord or hotel owner had participated in the construction of the building [*Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1189-1209, 43 Cal. Rptr. 2d 836, 899 P.2d 905 , overruling Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 213 Cal. Rptr. 213, 698 P.2d 116]* .

[i] Party With No Connection to Design, Manufacture, or Marketing of Defective Product

A defendant that played no role in the design, manufacture, distribution, or marketing of an injury-causing product is not subject to strict products liability [*Cadlo v. Owens-Ill., Inc. (2004) 125 Cal. App. 4th 513, 516, 23 Cal. Rptr. 3d 1 , modified, 2004 Cal. App. LEXIS 2260* (distinguishing *Fortman v. Hemco, Inc. (1989) 211 Cal. App. 3d 241, 259 Cal. Rptr. 311*); *see Altman v. Ho Sports Co. (E.D. Cal. Aug. 20, 2009) 2009 U.S. Dist. LEXIS 80662, at *9* (salesperson)]. For example, the court of appeal refused to impose liability on the developer of the asbestos-containing product Kaylo. The defendant had sold its Kaylo-producing division in 1958 and did not manufacture any of the Kaylo to which the plaintiff was exposed beginning in 1965. The court concluded that the defendant's "historic role in the design, manufacture and marketing of Kaylo" did not support the plaintiff's claims against it, absent any evidence that the defendant had actual connection with the design, manufacture, or distribution of the asbestos to which the plaintiff was exposed. Imposition of strict liability requires a continuous course of business, and the defendant had no business association with, direct or indirect financial interest in, or control over Kaylo for the seven years preceding the plaintiff's exposure [*Cadlo v. Owens-Ill., Inc. (2004) 125 Cal. App. 4th 513, 523-525, 23 Cal. Rptr. 3d 1 , modified, 2004 Cal. App. LEXIS 2260* (distinguishing *Fortman v. Hemco, Inc. (1989) 211 Cal. App. 3d 241, 259 Cal. Rptr. 311*)].

Entities outside the chain of distribution of the defective product will not be held strictly liable [*Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1201-1202, 43 Cal. Rptr. 2d 836, 899 P.2d 905* (bathtub); *Merrill v. Leslie Controls, Inc. (2009) 179 Cal. App. 4th 262, 270-271, 101 Cal. Rptr. 3d 614* ; *Taylor v. Elliott Turbomachinery Co. (2009) 171 Cal. App. 4th 564, 577, 90 Cal. Rptr. 3d 414]* . The plaintiff bears the burden of linking the injury-causing product with a particular entity by evidence establishing that:

- The defendant received a direct financial benefit from the sale of the product;

- The defendant's role was integral to the business enterprise to the degree that its conduct was required to bring the product to the initial consumer market; and

- The defendant had control over, or a substantial ability to influence, the manufacturing or distribution process [*Merrill v. Leslie Controls, Inc. (2009) 179 Cal. App. 4th 262, 271-272, 101 Cal. Rptr. 3d 614* ; *Taylor v. Elliott Turbomachinery Co. (2009) 171 Cal. App. 4th 564, 576, 90 Cal. Rptr. 3d 414]* . Manufacturers of engine components were not part of the chain of distribution of asbestos-containing material used with their products [*Merrill v. Leslie Controls, Inc. (2009) 179 Cal. App. 4th 262, 270-271, 101 Cal. Rptr. 3d 614* ; *Taylor v. Elliott Turbomachinery Co. (2009) 171 Cal. App. 4th 564, 579, 90 Cal. Rptr. 3d 414]* .

Applying the "universal" principles of product liability law, a federal district court ruled that an aircraft manufacturer was not liable in multidistrict litigation alleging that seating on its aircraft was defective because it created the risk of deep vein thrombosis in passengers. In each case, the aircraft manufacturer had either delivered the aircraft with no installed seating or installed seating manufactured by another party. The aircraft manufacturer did not deliver the aircraft to the airlines for them to complete its manufacturing process. Instead, the aircraft manufacturer sold the aircraft to the airlines, which were free to do whatever they desired with their purchased aircraft. Moreover, neither the airlines nor the seat manufacturers selected by the airlines were authorized dealers or agents of the aircraft manufacturer [*In re Deep Vein Thrombosis (N.D. Cal. 2005) 356 F. Supp. 2d 1055, 1063* , applying California law].

[j] Finance Lessor

Finance lessors are not subject to strict products liability. Because it did not select the specific product involved in the litigation, a finance lessor does not maintain an ongoing relationship with a particular manufacturer. Unlike a retailer or a commercial lessor, it is not in a position to exert pressure on the manufacturer to improve the product's safety. Moreover, a finance lessor does not play an integral role in the "producing and marketing enterprise" of a product [*see § 460.11[5], above*], and is not strictly liable under a marketing or distribution theory [*Arriaga v. Citicapital Commercial Corp. (2008) 167 Cal. App. 4th 1527, 1537-1538, 85 Cal. Rptr. 3d 143* (glue spreading machine)]. Imposing strict products liability on a finance lessor would not further the policy considerations underlying the strict products liability doctrine [*Arriaga v. Citicapital Commercial Corp. (2008) 167 Cal. App. 4th 1527, 1539, 85 Cal. Rptr. 3d 143*].

[k] Seller of Used Goods

A seller of used or secondhand products cannot be held in strict liability in tort, unless the seller rebuilds or reconditions the product [*Arriaga v. Citicapital Commercial Corp. (2008) 167 Cal. App. 4th 1527, 1540, 85 Cal. Rptr. 3d 143* (glue spreading machine)]. The rationale is that a commercial dealer in used goods has no continuing business relationship with the manufacturer through which the dealer can adjust the cost of protection from strict liability [*Tauber-Arons Auctioneers Co. v. Superior Court (1980) 101 Cal. App. 3d 268, 283, 161 Cal. Rptr. 789*]. Unlike retailers, sellers of used products are not in a position to exert pressure on manufacturers to ensure that the products are safe. The used product dealer is normally outside the original chain of distribution of the product [*La Rosa v. Superior Court (1981) 122 Cal. App. 3d 741, 752-753, 176 Cal. Rptr. 224* (punch press)]. Imposing strict products liability on secondhand products dealers would in effect require them to routinely take apart, inspect, and repair the goods, thereby changing the essence of the used product market [*Arriaga v. Citicapital Commercial Corp. (2008) 167 Cal. App. 4th 1527, 1540, 85 Cal. Rptr. 3d 143* ; *Wilkinson v. Hicks (1981) 126 Cal. App. 3d 515, 521, 179 Cal. Rptr. 5*].

The used products seller's exemption from strict applies to subsequent defects as well [*Arriaga v. Citicapital*

Commercial Corp. (2008) 167 Cal. App. 4th 1527, 1540, 85 Cal. Rptr. 3d 143 ; *La Rosa v. Superior Court (1981) 122 Cal. App. 3d 741, 752-753, 176 Cal. Rptr. 224*].

[7] Market-Share Theory of Liability

[a] Required Joinder of Manufacturers Sharing Market

In *Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924* , the plaintiff was allegedly injured as a result of administration of a drug (diethylstibestrol, or DES) to her mother during pregnancy. Plaintiff, however, could not identify the manufacturer of the precise product prescribed to her mother. The court held that it was reasonable, in the context of the facts before it, to measure the likelihood that any of the defendants supplied the product that allegedly injured plaintiff by the percentage that the DES sold by each of them for the purpose of preventing miscarriage bears to the entire production of the drug sold by all manufacturers for that purpose. The court held that the plaintiff was required to join in the action the manufacturers of a substantial share of the appropriate market of the DES that plaintiff's mother might have taken [*Sindell v. Abbott Laboratories (1980) 26 Cal. 3d 588, 611, 612, 163 Cal. Rptr. 132* P.2d 924; *see Miles Laboratories, Inc. v. Superior Court (1982) 133 Cal. App. 3d 587, 595-596, 184 Cal. Rptr. 98* (defendant's motion for summary judgment as properly denied when plaintiff alleged under *Sindell* that defendant gained a market share by acquiescing in generic drug's use for an unintended purpose); *see also Wheeler v. Raybestos-Manhattan (1992) 8 Cal. App. 4th 1152, 11 Cal. Rptr. 2d 109* (offer of proof that used asbestos brake pads were fungible goods, and thus untraceable, was sufficient to avoid nonsuit)].

[b] Shifting of Burden of Proof

The market-share theory affects the burden of proof, in that each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product that caused plaintiff's injuries [*Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 612, 163 Cal. Rptr. 132, 607 P.2d 924]* . Once plaintiff has met the burden of joining the required defendants, the defendants in turn may cross complain against other manufacturers, not joined in the action, that they can allege might have supplied the injury-causing product [*Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 612, 163 Cal. Rptr. 132, 607 P.2d 924]* . Thus, *Sindell* is more than a mere burden-shifting case. It went beyond the burden-shifting precedent of *Summers v. Tice (1943) 33 Cal. 2d 80, 199 P.2d 1* , and held that between an innocent plaintiff and a group of allegedly negligent defendants, one of whom probably caused the injury, the latter should bear the costs of the harm. Therefore, the Court in *Sindell* imposed liability on defendants even though there was a significant possibility that the manufacturer of the particular pills ingested by a plaintiff's mother was not a party to the suit [*Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1114-1115, 245 Cal. Rptr. 658, 751 P.2d 923]* . For discussion of *SummersTice*, see Ch. 380, *Negligence* .

[c] Apportionment of Damages

Under *Sindell*, each manufacturer's liability would approximate its responsibility for the injuries caused by its own products. Some discrepancy in the correlation between market share and liability is inevitable yet justified [*Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 612, 163 Cal. Rptr. 132, 607 P.2d 924]* . In interpreting this language of *Sindell, the California Supreme Court, in Brown v. Superior Court (1988) 44 Cal. 3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470* , rejected the contention that defendants joined under a market-share theory should be jointly liable for the judgment rendered against them, or that *Sindell* held or implied that finding [*Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1074-1075, 245 Cal. Rptr. 412, 751 P.2d 470]* .

The Court in *Brown* held that imposition of joint liability would be inconsistent with the rationale of *Sindell* because a jointly liable defendant could be held responsible for the entire judgment even though its market sharemay have been comparatively insignificant. Liability would therefore be determined by the financial ability of a defendant to undertake payment, rather than by its proportional share of the market. For example, defendants who were solvent would bear the loss if other culpable manufacturers were either not amenable to suit, or judgment proof. The imposition of joint

liability would therefore frustrate *Sindell*'s goal of achieving a balance between the interests of DES plaintiffs and manufacturers of the drug. Accordingly, each defendant is liable only for the proportion of the judgment represented by its market share [*Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1074-1075, 245 Cal. Rptr. 412, 751 P.2d 470]* .

[d] Statute of Limitations

The California Supreme Court, in Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1115, 245 Cal. Rptr. 658, 751 P.2d 923 , emphasized that *Sindell* did not create an entirely new tort or identify a new "product" with an independent starting date for the purposes of the statute of limitations. The Court in *Jolly* rejected a DES plaintiff's contention that the statute of limitations on her claim did not run until the filing of the opinion in *Sindell* because, although she had knowledge of facts regarding her injury and causation prior to *Sindell*, that case created a new tort with an independent starting date for purposes of the statute of limitations. The plaintiff had contended that *Sindell* identified DES as a generic drug, as opposed to the various manufactured brand name products, from which she had previously been unable to isolate the one that caused her injuries.

The Court in *Jolly* stated that the applicable limitations period for plaintiff's cause of action was one year, pursuant to former *Code Civ. Proc. § 340(3)*, and that it had started to run when she suspected that the defendants' conduct was wrongful, which was prior to the *Sindell* and well over a year before she filed suit [*Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1112-1113, 245 Cal. Rptr. 658, 751 P.2d 923* (finding plaintiff's claim barred by statute of limitations)]. The effect of *Sindell* on the claim of the plaintiff in *Jolly* was merely to demonstrate the legal significance of facts already known to her [*Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1115, 245 Cal. Rptr. 658, 751 P.2d 923]* . Under the general rule, it is the discovery of facts, not their legal significance, that starts the limitations period [*Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1113, 245 Cal. Rptr. 658, 751 P.2d 923]* . The fact that the plaintiff in *Jolly* could not identify the manufacturer, and therefore, prior to *Sindell*, could not have stated a cause of action without naming a particular manufacturer, was not significant, because a change in the law, either by statute or by case law, does not revive claims otherwise barred by the statute of limitations [*Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1115-1116, 245 Cal. Rptr. 658, 751 P.2d 923]* .

Moreover, plaintiff could not claim that, as a putative class member of *Sindell*, the statute of limitations was tolled on the filing of that action until the class was denied certification, pursuant to the holding of *American Pipe & Construction Co. v. Utah (1974) 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713* [*Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1118-1125, 245 Cal. Rptr. 658, 751 P.2d 923]* . The tolling of the limitations period under *American Pipe* is applicable only under limited circumstances, and does not apply to the members of *Sindell*'s purported class because, among other reasons, the *Sindell* class suit, which did not regard personal injury claims, could not have apprised defendants of plaintiff's substantive claims [*Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1123, 245 Cal. Rptr. 658, 751 P.2d 923]* .

[e] Limitations on Theory

The theory of market-share liability set forth in *Sindell* only applies when the product in general is inherently defective for the purpose for which it is marketed, and not when one of the product units was defectively manufactured [*see* Sheffield v. *Eli Lilly & Co. (1983) 144 Cal. App. 3d 583, 593, 192 Cal. Rptr. 870* (polio vaccine)]. The market-share liability theory also cannot be used to impose punitive damages when the plaintiff cannot identify the defendant who supplied the product [*see Magallanes v. Superior Court (1985) 167 Cal. App. 3d 878, 890, 213 Cal. Rptr. 547]* . For an allegation based on *Sindell*, see *§ 460.169*.

Market share liability is inapplicable when the plaintiff is able to identify the manufacturer of the defective product, but not its wholesaler, because the plaintiff is not otherwise without a remedy [*Edwards v. A.L. Lease & Co. (1996) 46 Cal. App. 4th 1029, 54 Cal. Rptr. 2d 259* (defective drain pipe)].

Courts also do not impose market share liability for nonfungible products, such as asbestos [*Mullen v. Armstrong World Indus., Inc. (1988) 200 Cal. App. 3d 250, 246 Cal. Rptr. 32]* .

In *Wheeler v. Raybestos-Manhattan (1992) 8 Cal. App. 4th 1152, 11 Cal. Rptr. 2d 109* , an appellate court held that a plaintiff could proceed on a market share theory against manufacturers of asbestos-containing brake pads, which, although not identical, were fungible because they contained a percentage of asbestos within the restricted range of between 40 percent and 60 percent and posed nearly equivalent risks of harm. It is unclear whether *Wheeler's* "fungibility" exception remains viable in the 21st century, in light of *Rutherford v. Owens-Ill., Inc. (1997) 16 Cal. 4th 953, 67 Cal. Rptr. 2d 16, 941 P.2d 1203* [*see § 460.11[9][b][iv]*], in which the Supreme Court rejected an alternative-liability burden shifting instruction in asbestos cases. When presented with the issue, one appellate court did not decide the validity of *Wheeler* because it determined that *Wheeler* had no application to the facts of the case [*Ferris v. Gatke Corp. (2003) 107 Cal. App. 4th 1211, 132 Cal. Rptr. 2d 819, 827-829* (decedent had been exposed to asbestosnot only from friction brake products but also while working in shipyards and as upholsterer, and plaintiff was able to identify two manufacturers to whose friction products the decedent had been exposed)].

[7a] Concert of Action

Concert of action is another theory of group liability. The theory traces its origins to *Summers v. Tice,* in which the California Supreme Court held that a plaintiff, struck by birdshot when two hunters each fired their guns in his direction, could recover from both hunters [*Summers v. Tice (1948) 33 Cal. 2d 80, 86,199 P.2d 1]* . Concert of action requires a common design by two or more tortfeasors to commit a tortious act. This theory may be used to impose liability on a person who did not personally cause harm to the plaintiff, but whose advice or encouragement to act operated as moral support to a tortfeasor. If the act encouraged is known to be tortious, it has the same effect on the liability of the adviser as participation or physical assistance. If the encouragement or assistance is a substantial factor in causing the resulting tort, the one provided it is also a tortfeasor and is responsible for the consequences of the other tortfeasor's act. The classic example of concert of action involves the liability imposed on drag race participants who injure a bystander [*see, e,g.,* *Agovino v. Kunze (1960) 181 Cal. App. 2d 591, 598, 5 Cal. Rptr. 534]* . The elements of the theory are set forth in Restatement (Second) of Torts § 876.

Although courts have applied the concert of action theory in drag racing cases [*see, e.g.,* *Agovino v. Kunze (1960) 181 Cal. App. 2d 591, 598, 5 Cal. Rptr. 534]* , they have so far declined to apply it in products liability cases. The California Supreme Court specifically rejected application of concert of action liability in a DES case, holding that allegations that the defendants failed to adequately test the drug or to give sufficient warning of its dangers and that they relied on the tests performed by one another and took advantage of each others' promotional techniques were insufficient to satisfy the requirements of the theory. According to the court, this sort of conduct is common practice in industry, and application of the concert of action concept to this situation would render virtually any manufacturer liable for the defective products of an entire industry. The court noted that cases supporting application of concert of action usually involved conduct by a small number of individuals whose actions resulted in a tort against a single plaintiff, usually over a short span of time [*Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 605-606, 163 Cal. Rptr. 132, 607 P.2d 924]* .

A few court of appeal opinions have discussed concert of action in asbestos cases, but none have applied the theory. In one case, for example, a mechanic who contracted mesothelioma was unable to prove that he had ever worked with brake shoes manufactured by the defendant. Nevertheless, he contended that the defendant was liable under the concert of action theory, because in the 1930s it had contributed to financing a private research laboratory to study the health effects of asbestos. The laboratory eventually reported the hazards of asbestos to the manufacturers, but the information was not made public for many years. The court held that, as a matter of law, the trial court did not err in refusing to instruct on the concert of action theory. The court expressed constitutional concerns over application of the theory, pointing out that requiring a manufacturer to stand trial predicated solely on its exercise of its *First Amendment* rights could have a chilling effect on participation in trade group activity [*Chavers v. Gatke Corp. (2003) 107 Cal. App. 4th*

606, 615-619, 132 Cal. Rptr. 2d 198] . In another case, the plaintiff alleged concert of action liability based on allegations that the successor to the defendant's asbestos product line, with defendant's approval and assistance, marketed the product by falsely representing its safe use and concealing its hazards. The court held that the allegations did not support a concert of action cause of action, because the plaintiff's injuries were not caused by any asbestos-containing material manufactured by the defendant, and the plaintiff did not allege that the defendant continued to encourage its successor to make false representations about the product [*Cadlo v. Owens-Ill., Inc. (2004) 125 Cal. App. 4th 513, 522* , *23 Cal. Rptr. 3d 1* , *modified, 2004 Cal. App. LEXIS 2260]* .

[8] Inherently and Unavoidably Unsafe Products

[a] Civ. Code § 1714.45 Provides Immunity for Certain Common Consumer Products

Civ. Code § 1714.45 provides that in a products liability action, a manufacturer or seller is not liable if the product is inherently unsafe, if the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community, and if the product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, and butter, as identified in Restatement (Second) of Torts § 402A, comment i [*Civ. Code § 1714.45(a)*]. *Civ. Code § 1714.45* does not exempt the manufacture or sale of tobacco products by tobacco manufacturers and their successors from liability [*Civ. Code § 1714.45(b)*; *see § 460.11[8][b]*].

One court of appeal has held that manufacturers of the products enumerated in *Civ. Code § 1714.45* are immune from suit without a showing that the product is inherently unsafe and is known to be unsafe by the ordinary consumers [*American Tobacco Co. v. Superior Court (1989) 208 Cal. App. 3d 480, 485-490, 255 Cal. Rptr. 280* (noting ambiguity in *Civ. Code § 1714.45* regarding effect of enumeration of products, but concluding that scant legislative history available, as well as the intent behind comment i, compelled finding of complete immunity)]. Comment i serves only to illuminate when a manufacturer or seller is not liable for products liability under *Civ. Code § 1714.5*; it is not part of California law. The California Supreme Court has concluded that to the extent *Civ. Code § 1714.45* affords manufacturers or sellers immunity from liability in direct actions against them, it also precludes indirect assignment of comparative fault for purposes of Proposition 51 (*Civ. Code § 1431 et seq.*) [*Richards v. Owens-Ill., Inc. (1997) 14 Cal. 4th 985, 1003 n.8, 60 Cal. Rptr. 2d 103, 928 P.2d 1181* (interpreting former *Civ. Code § 1714.45* in suit against tobacco manufacturer)].

Civ. Code § 1714.45 does not apply to actions based on manufacturing defects or breach of express warranty [*Civ. Code § 1714.45(c)*]. *Civ. Code § 1714.45* states that it is intended to be declarative of existing law [*Civ. Code § 1714.45(d)* (citing *Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153* , as existing law not intended to be overruled)].

[b] Tobacco Products

Civ. Code § 1714.45 does not exempt tobacco manufacturers and their successors from liability for the manufacture and sale of tobacco products [*Civ. Code § 1714.45(b)*]. Tobacco research organizations also are not entitled to statutory immunity [*Civ. Code § 1714.45(g)*]. Thus, there exists no statutory bar to tobacco-related personal injury, wrongful death, or other tort claims against tobacco research organizations, or tobacco manufacturers and their successors-in-interest by California smokers or others (such as individuals exposed to second-hand smoke) who have suffered or incurred injuries, damages, or costs arising from the promotion, marketing, sale, or consumption of tobacco products [*see Civ. Code § 1714.45(f)*]. *Civ. Code § 1714.45*, however, continues to exempt other persons and entities, such as retailers and distributors, from tobacco products liability [*see* Jacobs v. Philip Morris, Inc. (C.D. Cal. Sept. 4, 2003) 2003 U.S. Dist. LEXIS 25016, at *12 (plaintiff could not plead around safe harbor provided by *Civ. Code § 1714.45* by recasting cause of action against retailer for tobacco-related injuries as claims for violation of unfair competition law); Harshbarger v. Philip Morris, Inc. (N.D. Cal. April 1, 2003) 2003 U.S. Dist. LEXIS 25023, at *9-*13 (immunity statute barred unfair competition and false advertising claims against retailers brought under *Cal. Bus. &*

Prof. Code §§ 17200, 17500, despite fact that claims were not labeled as "product liability")].

Civ. Code § 1714.45 also does not apply to actions brought against tobacco companies by public entities to recover the value of benefits provided to individuals suffering tobacco-related illnesses. The fact that an injured individual's claim may have been barred by a prior version of *Civ. Code § 1714.45* is not a valid defense [*Civ. Code § 1714.45(e)*].

Prior to its amendment in 1997, § 1714.45 provided tobacco manufacturers immunity from almost all product liability suits alleging injuries from cigarettes. Effective January 1, 1998, the California legislature amended § 1714.45 to read, "(b) This section does not exempt the manufacture or sale of tobacco products by tobacco manufacturers and their successors in interest from product liability actions ... ." Courts were almost immediately faced with questions as to the applicability of the amended statute, known as the "repeal statute," particularly in cases involving conduct occurring before the statute's effective date. The Ninth Circuit Court of Appeals certified to the California Supreme Court a question of law concerning the proper interpretation of the amendments to *Cal. Civ. Code § 1714.45* [*Myers v. Phillip Morris Cos. (9th Cir. 2001) 239 F.3d 1029* (the court stayed the proceedings since the answer to the question is determinative to the appeal)]. The question was whether the amendments to § 1714.45 that became effective on January 1, 1998, apply to a claim that accrued after January 1, 1998 based on conduct that occurred prior to January 1, 1998.

Applying the presumption against retroactive application of a statute, the California Supreme Court, in *Myers v. Philip Morris Co. (2002) 28 Cal. 4th 828, 759-763* , concluded that the repeal statute is perspective only, and that the immunity statute continuesto shield tobacco companies in product liability actions for conduct they engaged in during the ten-year period ending Jan. 1, *1998 [Myers v. Philip Morris Co. (2002) 28 Cal. 4th 828, 123 Cal. Rptr. 2d 40, 50 P.3d 751, 759-763* (neither language of § 1714.45(f) nor legislative history constituted "clear indication" that repeal statute was to apply retroactively, and constitutional considerations also reinforced court's construction of statute as prospective only)]. As for the tobacco companies' conduct *before* the immunity period, however, liability is determined by applying general tort principles. Although the repeal statute has no retroactive effect, it nonetheless removed the protection that the immunity statute conferred on tobacco companies for their conduct occurring before the immunity statute's effective date [*Myers v. Philip Morris Co. (2002) 28 Cal. 4th 828, 123 Cal. Rptr. 2d 40* (retroactive effect is one that impairs rights party possessed when he or she acted, and repeal statute did not impair any rights that tobacco companies possessed before immunity period; on contrary, by abrogating immunity statute, repeal statute restored law governing product liability for tobacco products to what it had been before Jan. 1, 1988)].

In *Myers'* companion case, *Naegele v. R.J. Reynolds Tobacco Co. (2002) 28 Cal. 4th 856, 862-867, 123 Cal. Rptr. 2d 61, 50 P.3d 769* , the court addressed what forms of conduct during the 10-year immunity period fall within the protection conferred by the immunity statute. The court concluded that the statute's protection does not extend to allegations that the tobacco companies used additives that exposed smokers to dangers beyond those commonly known to be associated with cigarette smoking. Looking to the history and purpose of the immunity statute, the court found that it was intended to protect tobacco companies from liability for products containing pure and unadulterated tobacco, when the claim seeks damages for injuries or deaths resulting from risks that are commonly known to be inherent in tobacco products. Thus, the immunity statute did not bar claims that the defendants manipulated the addictive properties of cigarettes via additives and controlled nicotine delivery through adding ammonia. However, allegations that the defendants increased the nicotine content of their cigarettes through blended or high-nicotine tobacco, and lied about the addictive nature of smoking, fell squarely within the reach of the immunity statute.

California courts have subsequently applied the principles set forth in *Myers/Naegele* without difficulty [*Boeken v. Philip Morris, Inc. (2005) 127 Cal. App. 4th 1640, 1670-1674, 26 Cal. Rptr. 3d 638* (except for 10-year period, defendant was not entitled to jury instruction (*BAJI No. 9.00.6*) derived from former *Civ. Code § 1714.45*); *Whiteley v. Philip Morris, Inc. (2004) 117 Cal. App. 4th 635, 651-665, 11 Cal. Rptr. 3d 807* (court committed prejudicial error in refusing to instruct jury regarding 10-year statutory immunity); *Souders v. Philip Morris Inc. (2002) 104 Cal. App. 4th 15, 127 Cal. Rptr. 2d 748, 755-756]* .

[c] Drugs and Vaccines Are "Unavoidably Unsafe Products" Under Comment k

The California Supreme Court, in Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1061, 245 Cal. Rptr. 412, 751 P.2d 470 , has adopted the approach of Restatement (Second) of Torts § 402A, comment k, with regard to certain drugs classified as "unavoidably unsafe products," holding that a drug manufacturer's liability for a defectively designed drug of that nature should not be measured by the standards of strict liability if the drug is properly prepared and contains proper warnings [*Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1061, 245 Cal. Rptr. 412, 751 P.2d 470* ; *see Johnson v. Honeywell Int'l Inc. (2009) 179 Cal. App. 4th 549, 562, 101 Cal. Rptr. 3d 726]* . However, strict liability may apply to a drug manufacturer who fails to warn of a drug's dangerous propensities [*Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1110, 56 Cal. Rptr. 2d 162, 920 P.2d 1347* ; *Gilbert v. Watson Labs., Inc. (S.D. Cal. Oct. 9, 2008) 2008 U.S. Dist. LEXIS 79539, at *7 (Prednisone)* ; *see § 460.11[10][a]*].

Restatement (Second) of Torts § 402A, comment k states that there are some products that, in the present state of human knowledge, are incapable of being made safe for their intended and ordinary use, which commonly include drugs. For example, with respect to a vaccine for a serious disease, both the marketing and use of the product are fully justified, notwithstanding the unavoidable high degree of risk involved. That product, properly prepared, and accompanied by proper directions and warning, is neither defective nor *unreasonably* dangerous. Moreover, many new or experimental drugs, which lack assurances of safety due to urgency of need, are justifiably marketed and used, notwithstanding a medically recognizable risk. If a drug of this type is properly prepared and marketed, and includes a proper warning, the seller is not held to strict liability for unfortunate consequences attending its use merely because the seller has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk [Restatement (Second) of Torts § 402A, cmt. k; *Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1058-1059, 245 Cal. Rptr. 412, 751 P.2d 470]* .

In adopting comment k, the Court in *Brown* rejected the contrary view that a drug manufacturer should be strictly liable for a defective product due to defective design as defined in *Barker v. Lull*, that is, a product that is either "perfectly" manufactured but lacking a safety device, or lacking adequate warnings or instructions [*see § 460.11[9]*]. The Court also rejected the contention that liability could be based on failure to warn of the drug's dangerous propensities even when the dangers were neither known nor scientifically knowable at the time of distribution [*Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1057, 1060, 245 Cal. Rptr. 412, 751 P.2d 470]* . The Court also expressly disapproved the holding of *Kearl v. Lederle Laboratories (1985) 172 Cal. App. 3d 812, 829-830, 218 Cal. Rptr. 453* , which stated that strict liability for design defects should apply to prescription drugs unless the particular drug that caused the injury is found to be "unavoidably dangerous," pursuant to a preliminary "mini trial" by the trial judge, weighing the benefit and risk of that particular product [*Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1061, 1066-1067, 245 Cal. Rptr. 412, 751 P.2d 470]* . The Court rejected the holding in *Kearl* on the grounds that it does not allow the manufacturer to predictthe test by which its product will be ultimately evaluated, that it fosters different conclusions at the trial level for the same drug, and that the judge and jury in the same case may render inconsistent findings [*Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1067-1068, 245 Cal. Rptr. 412, 751 P.2d 470]* .

The Court in *Brown* concluded that a manufacturer is not strictly liable for injuries caused by a prescription drug so long as the drug was properly prepared and accompanied by warnings of its dangerous propensities that were either known or reasonably scientifically knowable at the time of distribution, because of the public interest in the development, availability, and reasonable price of drugs [*Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1058-1061, 1069, 245 Cal. Rptr. 412, 751 P.2d 470* ; *see § 460.166*].

[d] Implanted Medical Devices

Implanted medical devices may also be classified as unavoidably unsafe products. The manufacturer is not strictly liable for injuries caused by an implanted prescription medical product that has been properly made, and distributed with information regarding risks and dangers of which the manufacturer knew or should have known at the time [*see*

Notmeyer v. Stryker Corp. (N.D. Cal. 2007) 502 F. Supp. 2d 1051, 1058-1059 (hip replacement system); *Artiglio v. Superior Court (1994) 22 Cal. App. 4th 1388, 1394-1396, 27 Cal. Rptr. 2d 589* (breast implants); *Plenger v. Alza Corp. (1992) 11 Cal. App. 4th 349, 359-361, 13 Cal. Rptr. 2d 811* (intrauterine devices); *Hufft v. Horowitz (1992) 4 Cal. App. 4th 8, 11, 5 Cal. Rptr. 2d 377* (penile prostheses)].

[e] Applicability of Comment k to Other Products

Courts have thus far declined to expand the scope of comment k's "unavoidably unsafe" defense beyond products such as prescription drugs, vaccines, and medical devices [*Wilkinson v. Bay Shore Lumber Co. (1986) 182 Cal. App. 3d 594, 602, 227 Cal. Rptr. 327* (lumber)]. In *Johnson v. Honeywell Int'l Inc.* [*Johnson v. Honeywell Int'l Inc. (2009) 179 Cal. App. 4th 549, 562, 101 Cal. Rptr. 3d 726]* , defendants urged the court to apply the defense to air conditioning refrigerants. The court declined to decide the issue in light of the scant evidentiary record and the fact that it was raised for the first time on appeal.

[9] Defect

[a] Defect in Manufacture

A manufacturing defect exists when a product unit deviates from the manufacturer's intended result or from other ostensibly identical units of the same product line [*Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 429, 143 Cal. Rptr. 225, 573 P.2d 443]* . For example, a product that comes off an assembly line in substandard condition has a manufacturing defect [*Notmeyer v. Stryker Corp. (N.D. Cal. 2007) 502 F. Supp. 2d 1051, 1059* ; *Gonzalez v. Autoliv ASP, Inc. (2007) 154 Cal. App. 4th 780, 791, 64 Cal. Rptr. 3d 908, 918* ; *McCabe v. American Honda Motor. Co. (2002) 100 Cal. App. 4th 1111, 1120, 123 Cal. Rptr. 2d 303* ; *Montez v. Ford Motor Co. (1980) 101 Cal. App. 3d 315, 321, 161 Cal. Rptr. 578]* . As another example, a manufacturer's failure to comply with its own design specifications regarding the assembly of a crane that injured plaintiff was held to be the basis of a manufacturing defect [*Lewis v. American Hoist & Derrick Co. (1971) 20 Cal. App. 3d 570, 580, 97 Cal. Rptr. 798]* .

In one case, a plaintiff claimed that defective natural rubber latex (NRL) gloves caused her to develop a life-threatening allergy to all forms of NRL by allowing excessive levels of latex proteins to remain present on the surface of the gloves during manufacture. It was undisputed that the allergic agents could be reduced or eliminated through washing and chlorinating procedures in the design and manufacture of the gloves. Plaintiff contendedthat the defendant "took too long" to make that its standard practice, in light of its knowledge and research. The appellate court concluded that the plaintiff failed to show that the latex gloves--which were manufactured precisely as intended, complied with government standards, and fulfilled their primary barrier function--nevertheless had manufacturing defects due to the existence of evidence of the manufacturer's improvement efforts, targets, and goals, at different times and locations, reflective of the available state of scientific knowledge regarding latex protein levels of exposure [*In re Coordinated Latex Glove Litig. (2002) 99 Cal. App. 4th 594, 121 Cal. Rptr. 2d 301, 315-316]* .

If a plaintiff alleges that a product is defective, proof that the product has malfunctioned is essential to establish the element of causation. For example, in the case of a heart valve that is recalled because of a defect that has caused malfunctioning in some cases, the manufacturer of the valve is not subject to a cause of action in product liability brought by a person in whom the valve was implanted if that particular valve has not yet malfunctioned [*Khan v. Shiley Inc. (1990) 217 Cal. App. 3d 848, 855, 266 Cal. Rptr. 106]* . In such a case, a plaintiff also cannot state causes of action in negligence for failure to warn or for breach of warranty, based on the risk that the product may malfunction in the future [*Khan v. Shiley Inc. (1990) 217 Cal. App. 3d 848, 857, 266 Cal. Rptr. 106]* .

[b] Defect in Design

[i] Alternative Test

Strict liability in tort can be based on a product's defective design if the defect causes injury while the product is being used in a reasonably foreseeable way [*Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 560, 34 Cal. Rptr. 2d 607, 882 P.2d 298* ; *Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 126-130, 104 Cal. Rptr. 433, 501 P.2d 1153]* . A product is defective in design if either [*Barker v. Lull Engineering Co. (1978) 20 Cal. 3d 413, 417, 418, 435, 143 Cal. Rptr. 225, 573 P.2d 443]* :

- The plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner [*Johnson v. Honeywell Int'l Inc. (2009) 179 Cal. App. 4th 549, 558, 101 Cal. Rptr. 3d 726* ; *Bullock v. Philip Morris USA, Inc. (2008) 159 Cal. App. 4th 655, 674, 71 Cal. Rptr. 3d 775* ; *Gonzalez v. Autoliv ASP, Inc. (2007) 154 Cal. App. 4th 780, 786, 64 Cal. Rptr. 3d 908* ; *Karlsson v. Ford Motor Co. (2006) 140 Cal. App. 4th 1202, 1208, 45 Cal. Rptr. 3d 265* ; *Boeken v. Philip Morris Inc. (2005) 127 Cal. App. 4th 1640, 1668, 26 Cal. Rptr. 3d 638* ("light" cigarettes)].

- The plaintiff proves that the product's design proximately caused his or her injury, and the defendant fails to prove that on balance the benefits of the design outweigh its inherent risk of danger. [*Johnson v. Honeywell Int'l Inc. (2009) 179 Cal. App. 4th 549, 558, 101 Cal. Rptr. 3d 726* ; *Bullock v. Philip Morris USA, Inc. (2008) 159 Cal. App. 4th 655, 674, 71 Cal. Rptr. 3d 775* ; *Gonzalez v. Autoliv ASP, Inc. (2007) 154 Cal. App. 4th 780, 786, 64 Cal. Rptr. 3d 908* ; *Karlsson v. Ford Motor Co. (2006) 140 Cal. App. 4th 1202, 1208, 45 Cal. Rptr. 3d 265* ; Ford v. Polaris Indus., Inc. *(2006) 139 Cal. App. 4th 755, 775-776, 43 Cal. Rptr. 3d 215]* .

[ii] Consumer Expectation Test

Although the test is alternative, the "consumer expectation" test is reserved for cases in which the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions, and is thus defective regardless of expert opinion about themerits of the design [*Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 567, 34 Cal. Rptr. 2d 607, 882 P.2d 298* ; *Stephen v. Ford Motor Co. (2005) 134 Cal. App. 4th 1363, 1370, n.6, 37 Cal. Rptr. 3d 9* (tire and vehicle); *Jones v. John Crane, Inc. (2005) 132 Cal. App. 4th 990, 1001-1004, 35 Cal. Rptr. 3d 144* (asbestos); *Morson v. Superior Court of San Diego Co. (2001) 90 Cal. App. 4th 775, 791-794, 109 Cal. Rptr. 2d 343* (in latex glove case, court properly restricted plaintiffs from seeking jury instructions pursuant to consumer expectations test)]. A complex product, even when used as intended, may cause injury in a way that does not engage its ordinary consumers' reasonable minimum assumptions about safe performance. The Supreme Court set forth this rule in holding that the consumer expectation test was improperly submitted to the jury in a case involving the crashworthiness of an automobile, on the ground that the ordinary consumer of an automobile has no idea how it should perform in all foreseeable situations, or how safe it should be made against all foreseeable hazards [*Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 566-567, 570, 34 Cal. Rptr. 2d 607, 882 P.2d 298]* .

However, whether a product is susceptible to the consumer expectation analysis cannot be determined by looking at the product in isolation, but must be considered in the context of the facts surrounding the its failure [*McCabe v. American Honda Motor Co. (2002) 100 Cal. App. 4th 1111, 1122, 123 Cal. Rptr. 2d 303]* . As the Supreme Court made clear, the critical question is whether the circumstances of the product's failure permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers [*Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 568-569, 34 Cal. Rptr. 2d 607, 882 P.2d 298]* . In one case, the plaintiff was injured when the air bag deployed in a frontal collision with an on-coming car. The Second Appellate District, Division Six, affirmed the refusal to instruct the jury on the consumer expectations test, holding that the deployment of an air bag is not part of the consuming public's everyday experience [*Pruitt v. General Motors Corp. (1999) 72 Cal. App. 4th 1480, 1483, 86 Cal. Rptr. 2d 4]* . In another case, the plaintiff was injured when the air bag deployed in a low-speed, rear-end collision. The Second Appellate District, Division Two, reversed the refusal to instruct the jury on the consumer expectations test, holding that an ordinary consumer is equipped to form expectations

of the safety of a car with an air bag in a minor collision [*Bresnahan v. Chrysler Corp. (1995) 32 Cal. App. 4th 1559, 1568, 38 Cal. Rptr. 2d 446]* . This apparent inconsistency was explained by the Second Appellate District, Division Seven in a case arising when a driver's side air bag failed to deploy in a frontal collision. In holding that triable issues of fact precluded a finding that the consumer expectations test was inapplicable as a matter of law, the court explained that the three cases involved three factually distinct scenarios. Deciding whether the functioning of an air bag lends itself, in every circumstances, to the consumer expectation test would improperly focus on the nature of the product without regard to the circumstances of its purported failure. Issues of material fact existed as to the circumstances of the accident, i.e., the speed and collision range, and the plaintiff provided sufficient evidence for the jury to infer that nondeployment of the air bag, in the context of a high-speed, head-on collision, violated the minimum safety expectations of the ordinary consumer [*McCabe v. American Honda Motor Co. (2002) 100 Cal. App. 4th 1111, 1122, 123 Cal. Rptr. 2d 303]* .

Courts have consistently approved the use of the consumer expectations test in asbestos litigation [*see, e.g.,* *Jones v. John Crane, Inc. (2005) 132 Cal. App. 4th 990, 1001-1004, 35 Cal. Rptr. 3d 144* ; *Sparks v. Owens-Ill., Inc. (1995) 32 Cal. App. 4th 461, 474, 38 Cal. Rptr. 2d 739]* . The consumer expectations test does not require inquiry into how exposure to a particular level of asbestos may lead to the development of cancer. Instead, it merely asks whether the circumstances permit an inference that the product's design performed below the commonly accepted minimum safety assumptions of its ordinary consumer [*Jones v. John Crane, Inc. (2005) 132 Cal. App. 4th 990, 1003, 35 Cal. Rptr. 3d 144]* . At least one court has found that the consumer expectations test applies to *raw* asbestos as well [*Garza v. Asbestos Corp. (2008) 161 Cal. App. 4th 651, 659-660, 74 Cal. Rptr. 3d 359 (2008)*]. The consumer expectations test has been applied to torts involving many other products, including home pesticides [*Arnold v. Dow Chem. Co. (2001) 91 Cal. App. 4th 698, 726, 110 Cal. Rptr. 2d 722]* , cigarettes [*Bullock v. Philip Morris USA, Inc. (2008) 159 Cal. App. 4th 655, 674, 71 Cal. Rptr. 3d 775*], and lawnmowers [*Jordan v. Deere & Co. (E.D. Cal. July 5, 2006) 2006 U.S. Dist. LEXIS 47904, at *10]* .

The fact that the plaintiff must present expert testimony to establish causation between a product defect and his or her injury does not preclude use of the consumer expectations test [*Jones v. John Crane, Inc. (2005) 132 Cal. App. 4th 990, 1001-1002, 35 Cal. Rptr. 3d 144]* .

Instructions based on the consumer expectations test are not appropriate if, as a matter of law, the evidence would not support a jury verdict on that theory. In such a case, the jury must be instructed solely on the alternative, risk-benefit theory of design defect [*Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 568, 34 Cal. Rptr. 2d 607, 882 P.2d 298]* .

[iii] Risk-Benefit Test

Under the risk-benefit test, once the injured party has shown that the design feature proximately caused his or her injury, the burden shifts to the manufacturer to prove that the product is not defective [*Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 431, 143 Cal. Rptr. 225, 237, 573 P.2d 443* ; *Johnson v. Honeywell Int'l Inc. (2009) 179 Cal. App. 4th 549, 560, 101 Cal. Rptr. 3d 726* ; *Gonzalez v. Autoliv ASP, Inc. (2007) 154 Cal. App. 4th 780, 786, 64 Cal. Rptr. 3d 908* ; *McCabe v. American Honda Motor Co. (2002) 100 Cal. App. 4th 1111, 1121, 123 Cal. Rptr. 2d 303*]. The manufacturer must go forward with evidence of the benefits of the design feature that caused the injury. In so doing, the manufacturer may introduce evidence of aesthetic, economic, or engineering reasons for the design [*Pietrone v. American Honda Motor Co. (1986) 189 Cal. App. 3d 1057, 1062, 235 Cal. Rptr. 137]* . Factors the jury may consider in determining the adequacy of a product's design under the risk-benefit test include the gravity of the danger posed by the design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and the consumer that would result from an alternative design [*Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 418, 143 Cal. Rptr. 225, 573 P.2d 443* ; *Gonzalez v. Autoliv ASP, Inc. (2007) 154 Cal. App. 4th 780, 786, 64 Cal. Rptr. 3d 908*].

A few early cases indicated that, under the risk-benefit test, the plaintiff has the burden of proving the existence of a feasible alternative design [*see Garcia v. Joseph Vince Co. (1978) 84 Cal. App. 3d 868, 879 n.3, 148 Cal. Rptr. 843* ; *see also Baker v. Chrysler Corp. (1976) 55 Cal. App. 3d 710, 716, 127 Cal. Rptr. 745* (decided prior to *Barker v. Lull*)]. Then, in *Bernal v. Richard Wolf Medical Instruments Corp. [(1990) 221 Cal. App. 3d 1326, 1332-1333, 272 Cal. Rptr. 41 , overruled in part on other grounds in Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 34 Cal. Rptr. 2d 607, 882 P.2d 298*], the court of appeal explained that the burden of proving a feasible alternative design did not survive *Barker v. Lull Engineering Co. [(1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443*]. Courts apparently no longer require the plaintiff to prove the existence of a feasible alternative design in strict liability design defect cases [*see Yu-Santos v. Ford Motor Co. (E.D. Cal. May 13, 2009) 2009 U.S. Dist. LEXIS 41001, at *49* ; *Gonzalez v. Autoliv ASP, Inc. (2007) 154 Cal. App. 4th 780, 791, 64 Cal. Rptr. 3d 908*]. One appellate court refused to address a manufacturer's argument that the plaintiff did not provide adequate evidence of a safer alternative design, where the jury had not been instructed that proof of a safer alternative design was required [*Bullock v. Philip Morris USA, Inc. (2008) 159 Cal. App. 4th 655, 674, 71 Cal. Rptr. 3d 775*].

In proving that a product was defectively designed, evidence showing that subsequent safety improvements have been instituted regarding the defective product or other similar products may be of relevance in showing that safer alternatives were feasible [*see Aguayo v. Crompton & Knowles Corp. (1986) 183 Cal. App. 3d 1032, 1038-1040, 228 Cal. Rptr. 768]* .

The dual tests for design defect are not inconsistent, and it is often the case that a plaintiff is able to allege that a product was defective on bothgrounds [*see Williams v. Beechnut Nutrition Corp. (1986) 185 Cal. App. 3d 135, 141, 229 Cal. Rptr. 605* (glass food container designed to be given to young children)].

[iv] Causation

[A] Substantial Factor Test

A manufacturer is liable only if a defect in its product was a legal cause of injury [*Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 572, 34 Cal. Rptr. 2d 607, 882 P.2d 298* ; *Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 133-134, 104 Cal. Rptr. 433, 501 P.2d 1153]* . A tort is a legal cause of injury only if it is a substantial factor in producing the injury [*Sanders v. City of Fresno (E.D. Cal. July 3, 2006) 2006 U.S. Dist. LEXIS 48582, at *47-*56* (taser); *Mitchell v. Gonzales (1991) 54 Cal. 3d 1041, 1048-1054, 1 Cal. Rptr. 2d 913, 819 P.2d 872* ; *Sarti v. Salt Creek Ltd. (2008) 167 Cal. App. 4th 1187, 1210, 85 Cal. Rptr. 3d 506* ; *Whiteley v. Philip Morris, Inc. (2004) 117 Cal. App. 4th 635, 696, 11 Cal. Rptr. 3d 807]* , and not interrupted by a superseding cause [*Torres v. Xomox Corp. (1996) 49 Cal. App. 4th 1, 18* ; Cal. Rptr. 2d 455 (third-party negligence as possible superseding cause)].

The substantial factor standard is a relatively broad one, requiring only that the defendant's contribution be more than negligible or theoretical [*Bockrath v. Aldrich Chem. Co. (1999) 21 Cal. 4th 71, 79, 86 Cal. Rptr. 2d 846, 980 P.2d 398* ; *Bunch v. Hoffinger Indus., Inc. (2004) 123 Cal. App. 4th 1278, 1303-1304, 20 Cal. Rptr. 3d 780* ; *see McIntyre v. Warren Pumps LLC (N.D. Cal. April 30, 2007) 2007 U.S. Dist. LEXIS 35954, at *12]* . A plaintiff need not establish that the defendant's product was the sole proximate cause of his or her injury, but only that the defendant's conduct substantially contributed to the injury and the circumstances make it just to hold the defendant responsible for the consequences of the injury [*Bates v. John Deere Co. (1983) 148 Cal. App. 3d 40, 50, 195 Cal. Rptr. 637]* .

Under this definition, an abstract defect in a vehicle's collision safety cannot be considered a substantial factor in causing injuries if the external force of the vehicle accident was so severe that it would have caused identical injuries notwithstanding the alleged defect [*Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 572, 34 Cal. Rptr. 2d 607, 882 P.2d 298]* .

Reasonable medical probability is enough to establish proximate cause. Scientific certainty is not required. For example,

although it has not been ascertained how the inhalation of asbestos fibers leads to lung cancer, a plaintiff may prove causation by showing that exposure to an asbestos-containing product, in reasonable medical probability, was a substantial factor in contributing to the risk of developing asbestos-related cancer [*Rutherford v. Owens-Ill., Inc. (1997) 16 Cal. 4th 953, 974-976, 67 Cal. Rptr. 2d 16, 941 P.2d 1203]* . Factors relevant to assessing whether such a medical probability exists include the frequency of exposure, regularity of exposure, and proximity of the asbestos product to the plaintiff [*Weber v. John Crane, Inc. (2006) 143 Cal. App. 4th 1433, 1438, 50 Cal. Rptr. 3d 71* ; *Lineaweaver v. Plant Insulation Co. (1995) 31 Cal. App. 4th 1409, 1416, 37 Cal. Rptr. 2d 902]* . A plaintiff thus cannot prevail without evidence that he or she was exposed to asbestos-containing materials manufactured or furnished by the defendant with enough frequency and regularity as to show a reasonable medical probability that this exposure was a factor in causing plaintiff's injuries [*Weber v. John Crane, Inc. (2006) 143 Cal. App. 4th 1433, 1438, 50 Cal. Rptr. 3d 71* ; *McGonnell v. Kaiser Gypsum Co. (2002) 98 Cal. App. 4th 1098, 1103, 120 Cal. Rptr. 2d 23]* .

[B] Proving Exposure to Defendant's Product

The plaintiff must prove exposure to defendant's product to prove causation. This is a threshold issue in asbestos and other toxic tort litigation [*see Kennedy v. Southern Cal. Edison Co. (9th Cir. 2001) 268 F.3d 763, 769-771* (no reasonable juror could have found that radiation played more than "infinitesimal" or "theoretical" part in bringing about plaintiff's disease); *Rutherford v. Owens-Ill., Inc. (1997) 16 Cal. 4th 953, 975-976, 67 Cal. Rptr. 2d 16, 941 P.2d 1203* ; *Jones v. John Crane, Inc. (2005) 132 Cal. App. 4th 990, 999, 35 Cal. Rptr. 3d 144* ; *McGonnell v. Kaiser Gypsum Co. (2002) 98 Cal. App. 4th 1098, 1103, 120 Cal. Rptr. 2d 23* (plaintiff showed only, at best, that decedent might have cut into wall that might have contained defendant's joint compound that might have contained asbestos)].

In *Weber v. John Crane, Inc. [(2006) 143 Cal. App. 4th 1433, 1439, 50 Cal. Rptr. 3d 71]* , the court clarified that a defendant does not shift the burden of production to the plaintiff by showing that the plaintiff has no personal recall of the defendant's product. Rather, the defendant must make an affirmative showing that the plaintiff will be unable to prove his or her case by any means [*citing Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 107 Cal. Rptr. 2d 841, 850-851, 24 P.3d 493]* . The fact that the plaintiff was unable to recall whether he had worked around defendant's product over 40 years earlier did not mean that he would be unable to recognize defendant's product if shown its packaging or logo. Defendant's evidence did not support an inference that the plaintiff did not possess and could not reasonably obtain the requisite evidence. Thus, the burden did not shift to plaintiff to make a prima facie showing of a triable issue of material fact regarding his exposure to defendant's product [*Weber v. John Crane, Inc. (2006) 143 Cal. App. 4th 1433, 1439-1443, 50 Cal. Rptr. 3d 71* ; *see also Scheiding v. Dinwiddie Constr. Co. (1999) 69 Cal. App. 4th 64, 81 Cal. Rptr. 2d 360]* .

A different result was reached in *Andrews v. Foster Wheeler LLC [(2006) 138 Cal. App. 4th 96, 109, 41 Cal. Rptr. 3d 229]* . The plaintiff in *Andrews* was a sailor who admitted in deposition that he did not know if he had ever been present when anyone was working with defendant's asbestos products. Unlike the defendant in *Weber, above,* the defendant in *Andrews* submitted plaintiffs' nonresponsive answers to special interrogatories designed to elicit information about the plaintiff's exposure to defendant's product. Specifically, the plaintiff submitted the names of coworkers and supervisors and provided a list of depositions, but did not disclose any facts known by those persons or contained in the documents. In light of the interrogatory questions, plaintiff's failure to provide any information admitted that he had no further information. The defendant thus met its initial burden of making a prima facie showing that a triable issue of fact did not exist regarding causation. Expert declarations submitted in response to defendant's summary judgment motion, suggesting that plaintiff could have been exposed to asbestos fibers released into the air from condensers many years before he became aboard, amounted to little more than speculation [*Andrews v. Foster Wheeler LLC (2006) 138 Cal. App. 4th 96, 108, 41 Cal. Rptr. 3d 229* ; *see McIntyre v. Warren Pumps LLC (N.D. Cal. April 30, 2007) 2007 U.S. Dist. LEXIS 35954, at *14* (distinguishing *Andrews*)]. The court affirmed the summary judgment granted in favor of the defendant.

[C] Proving Causation in Food Cases

Food poisoning cases are governed by the same rules as those that control other personal injury actions. A plaintiff must prove that the food product was unwholesome and caused his or her illness. A prima facie case is not made merely by showing that the plaintiff became sick after eating food produced, supplied, or served by the defendant [*Minder v. Cielito Lindo Restaurant (1977) 67 Cal. App. 3d 1003, 1008, 136 Cal. Rptr. 915*]. Reasonable inferences are available to show causation [*Sarti v. Salt Creek Ltd. (2008) 167 Cal. App. 4th 1187, 1191, 85 Cal. Rptr. 3d 506* (expert testimony linked particular type of food poisoning involved to particular unsanitary conditions at restaurant)]. In *Sarti v. Salt Creek Ltd. [(2008) 167 Cal. App. 4th 1187, 1201-1202, 85 Cal. Rptr. 3d 506]* , the Fourth Appellate District, Division Three, declined to follow *Minder v. Cielito Lindo Restaurant [(1977) 67 Cal. App. 3d 1003, 136 Cal. Rptr. 915]* , to the extent that it requires a plaintiff in food poisoning cases to exclude other possible causes of his or her illness. California applies the substantial factor test for causation [*see* [A], *above*], and there is no heightened standard of causation in food cases [*Sarti v. Salt Creek Ltd. (2008) 167 Cal. App. 4th 1187, 1210-1211, 85 Cal. Rptr. 3d 506*].

[v] Firearms and Ammunition

In 1983, the California legislature enacted former *Cal. Civ. Code § 1714.4*. The statute provided that in a product liability action, no firearm or ammunition could be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged [former *Cal. Civ. Code § 1714.4(a)*]. The statute thus foreclosed use of any type of risk-benefit analysis when evaluating the design of firearms or ammunition [*Moore v. R.G. Indus., Inc. (9th Cir. 1986) 789 F.2d 1326, 1327-1328]* . Former § 1714.4(c) provided an exception to the general exemption of product liability for a "products liability cause of action based upon the improper selection of design alternatives."

Former *Cal. Civ. Code § 1714.4* was repealed in 2002 [Stats. 2002, ch. 906, § 2 (AB 496), ch. 913, § 2 (SB 682)]. While the statute was in effect, however, it effectively immunized the firearm industry from claims by victims of violence. For example, plaintiffs brought negligence claims in an effort to circumvent the statute and hold manufacturers of properly functioning weapons accountable. In 2001, in *Merrill v. Navegar, Inc. (2001) 26 Cal. 4th 465, 110 Cal. Rptr. 2d 370* , *28 P.3d 116* , the California Supreme Court put an end to these efforts, holding that former § 1714.4(a) precluded recovery in common law negligence against the manufacturer for the deaths of persons killed by TEC-9/DC9s.

Merrill arose when an assailant entered a law firm and killed eight persons, wounded six others, and then killed himself with the TEC-9/DC9's and another pistol. Plaintiffs' ordinary negligence claim was based on the manufacturer's decision to make available for sale to the general public guns which have no legitimate sporting or self-defense purpose and which are particularly well adopted to a military-style assault on large numbers of people. Plaintiffs thus alleged that the manufacturer "acted negligently by manufacturing, marketing, and making available for sale to the general public" the TEC-9/DC9. Plaintiffs' argument that former § 1714.4 was inapplicable to their action because it was not a products liability action, i.e., they sought to hold Navegar liable for its negligent conduct, not for making a defective product, was without merit. Moreover, their allegations that Navegar was liable because it designed and widely distributed a weaponuniquely suited for mass killing and lacking legitimate civilian uses squarely fit within risk/utility test. Plaintiffs could not avoid the legislative policy § 1714.4 reflects simply by declining to use the word "defect" or "defective," or by reformulating their claim as one for negligent distribution to the general public [*Merrill v. Navegar, Inc. (2001) 26 Cal. 4th 465, 480-485, 110 Cal. Rptr. 2d 370, 28 P.3d 116, 125-129]* .

The *Merrill* decision most likely prompted the legislature to repeal former *Cal. Civ. Code § 1714.4* in 2002 [*see* Emily Kromke, Note, *California's Legislative Response to Merrill v. Navegar: An Analysis, 24 Whittier L. Rev. 833, 834 (2003)*]. That same year, the California legislature amended *Cal. Civ. Code § 1714(a)* to add that "[t]he design, distribution, or marketing of firearms and ammunition is not exempt from the duty to use ordinary care and skill that is required by this section." The repeal of § 1714.4 was not intended to create new causes of action against firearm manufacturers, but to preserve all actions against them including products liability, nuisance, and statutorily-based

actions [*In re Firearm Cases (2005) 126 Cal. App. 4th 959, 973, n.12, 24 Cal. Rptr. 3d 659 (2005)]* .

Plaintiffs subsequently restructured their negligent marketing claims to avoid falling within the scope of *Merrill*. One case appeared to be initially successful. A federal court had dismissed a complaint arising out of the shooting of several persons in a Jewish Community Center. On appeal, the court found that *Merrill* was distinguishable. In *Merrill*, the references to distribution were to distribution of a defective product. Here, plaintiffs did not allege that Glock was negligent in distributing its defective firearms to the general public. Rather, they contended that Glock's distribution scheme specifically targets criminal users. The *Merrill* plaintiffs alleged that the gun manufacturers' actions in distributing the guns to the general public were negligent due to the guns' alleged defective design features. The plaintiffs here focused on the negligent distribution of a non-defective product. The focus was on the defendants' affirmative actions in distributing their products to create an illegal secondary market for guns that targeted illegal purchasers. As a result, this action alleged negligence and public nuisance claims; it did not allege that the guns in question were defectively designed or manufactured or that there were inadequate warnings [*Ileto v. Glock, Inc. (9th Cir. 2003) 349 F.3d 1191, 1201* , applying California law]. The wording of former § 1714.4 is carefully limited to products liability actions and has never acted to bar a negligence case or nuisance case. Thus, even though § 1714.4 was in force at the time of the shootings and when the complaint was filed, it did not affect the action [*Ileto v. Glock, Inc. (9th Cir. 2003) 349 F.3d 1191, 1202* , applying California law]. The plaintiffs alleged sufficient facts for a reasonable jury to conclude that through their distribution practices, defendants created an illegal secondary market targeting prohibited purchasers that placed plaintiffs in a situation in which they were exposed to an unreasonable risk of harm through the reasonably foreseeable conduct of a prohibited purchaser [*Ileto v. Glock, Inc. (9th Cir. 2003) 349 F.3d 1191, 1203* , applying California law]. The court reversed the dismissal of the negligence, nuisance, survival, and wrongful death claims, and remanded the case for further action [*Ileto v. Glock Inc. (9th Cir. 2003) 349 F.3d 1191, 1217* , applying California law].

The *Ileto* plaintiffs' apparent victory was short-lived. On October 26, 2005, President Bush approved the Protection of Lawful Commerce in Arms Act (PLCAA) [Pub. L. No. 109-92, 119 Stat. 2095, *15 U.S.C.S. § 7901 et seq.*]. The PLCAA, effective immediately, requires that a "qualified civil liability" action pending on the date of enactment be immediately dismissed. The Act defines a "qualified civil liability action" as an action against a manufacturer or seller of a qualified product, or a trade association for any type of damages or equitable relief resulting from the criminal misuse of a firearm [*15 U.S.C.S. § 7903(5)(A)*]. It provides for six exceptions to this definition [*15 U.S.C.S. § 7903(5)(A)(i)-(iv)*]. Under the "predicate exception," firearms manufacturers and dealers are still liable if they "knowingly violated a State or Federal statute applicable to the sale or marketing" of a firearm, and the violation proximately caused the harm for which relief is sought [*15 U.S.C.S. § 7903(5)(A)(iii)*]. The federal court determined that the *Ileto* plaintiffs' cause of action did not fall within the predicate exception [*Ileto v. Glock, Inc. (C.D. Cal. 2006) 421 F. Supp. 2d 1274, 1297-1298]* . The court also held that the PLCAA--including its retroactive provision--is constitutional [*Ileto v. Glock, Inc. (C.D. Cal. 2006) 421 F. Supp. 2d 1274, 1299-1304]* . The Act resulted in the dismissal with prejudice of *Ileto v. Glock*.

[10] Failure to Warn or Instruct

[a] Duty to Warn

[i] General Rule

A product that is not defective in either manufacture or design, that is, a product that is faultlessly made, may nevertheless be rendered defective within the meaning of the strict-liability doctrine because of a failure to give adequate directions or warning of a potential danger in its use [*see, e.g.,* *Haynes v. AMTRAK (C.D. Cal. 2006) 423 F. Supp. 2d 1073, 1079-1084* ; *Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56, 64, 74 Cal. Rptr. 3d 108, 179 P.3d 905* ; *Merrill v. Leslie Controls, Inc. (2009) 179 Cal. App. 4th 262, 271, 101 Cal. Rptr. 3d 614* ; *Oxford v. Foster Wheeler LLC (2009) 177 Cal. App. 4th 700, 717, 99 Cal. Rptr. 3d 418* ; *Gonzalez v. Autoliv ASP, Inc. (2007)*

154 Cal. App. 4th 780, 793, 64 Cal. Rptr. 3d 908 ; *Valentine v. Baxter Healthcare Corp. (1999) 68 Cal. App. 4th 1467, 1483, 81 Cal. Rptr. 2d 252* (manufacturer's strict liability duty to warn is greater than its duty under negligence); *Wright v. Stang Mfg. Co. (1997) 54 Cal. App. 4th 1218, 1229, 63 Cal. Rptr. 2d 422* (deck gun); *Schwoerer v. Union Oil Co. (1993) 14 Cal. App. 4th 103, 111-112, 17 Cal. Rptr. 2d 227* (solvent); *Cavers v. Cushman Motor Sales, Inc. (1979) 95 Cal. App. 3d 338, 343-350, 157 Cal. Rptr. 142]* . The failure to issue an adequate warning may subject manufacturers and distributors to strict liability if they knew or should have known of the danger and the necessity of warnings to ensure safe use [*Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56, 64, 74 Cal. Rptr. 3d 108, 179 P.3d 905* ; *Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1110, 56 Cal. Rptr. 2d 162, 920 P.2d 1347* ; *Gonzalez v. Autoliv ASP, Inc. (2007) 154 Cal. App. 4th 780, 793, 64 Cal. Rptr. 3d 908* ; *Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 996, 281 Cal. Rptr. 528, 810 P.2d 549* ; *Rosburg v. Minnesota Mining & Mfg. Co. (1986) 181 Cal. App. 3d 726, 734, 226 Cal. Rptr. 299* ; *Blackwell v. Phelps Dodge Corp. (1984) 157 Cal. App. 3d 372, 377, 203 Cal. Rptr. 706* ; *see §§ 460.164 -460.167*].

Whether the absence of a warning makes a product defective involves consideration of several factors, including a consumer's normal expectations of how the product will perform, the degree of simplicity or complexity in the product's operation or use, the nature and magnitude of the danger to which its user is exposed, the likelihood of injury, and the feasibility and beneficial effect of including a warning [*Oxford v. Foster Wheeler LLC (2009) 177 Cal. App. 4th 700, 717, 99 Cal. Rptr. 3d 418* ; *Jackson v. Deft, Inc. (1990) 223 Cal. App. 3d 1305, 1320, 273 Cal. Rptr. 214]* .

A manufacturer is not required to warn against every conceivable health problem associated with use of a product. However, the more severe the consequences from unprotected exposure to the product, the greater is the need to warn of significant health risks. The court must weigh the degree of danger involved in determining whether a warning defect exists [*Wright v. Stang Mfg. Co. (1997) 54 Cal. App. 4th 1218, 1229, 63 Cal. Rptr. 2d 422* ; *Schwoerer v. Union Oil Co. (1993) 14 Cal. App. 4th 103, 111, 17 Cal. Rptr. 2d 227* (solvent)].

[ii] Actual or Constructive Knowledge

Actual or constructive knowledge of the danger is a requisite for strict liability for failure to warn [*Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1113 n.3, 56 Cal. Rptr. 2d 162, 920 P.2d 1347* (adopting standard of Restatement (Second) of Torts § 402A, cmt. j); *Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 1000, 281 Cal. Rptr. 528*]. The California Supreme Court has stated that to hold otherwise would make the manufacturer or distributor of the product the insurer of the product's safe use, imposing absolute liability in contravention of the purpose of the doctrine of strict products liability [*Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 1003-1004, 281 Cal. Rptr. 528, 810 P.2d 549]* . Therefore, a defendant in a failure-to-warn action may present evidence of state of the art, that is, evidence that the particular risk was neither known nor knowable by the application of scientific knowledge available at the time of manufacture or distribution, or both [*Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 1004, 281 Cal. Rptr. 528, 810 P.2d 549* (adopting requirement of Restatement (Second) of Torts § 402A, cmt. j); *Vermeulen v. Superior Court (1988) 204 Cal. App. 3d 1192, 1202, 1205-1206, 251 Cal. Rptr. 805]* . A plaintiff can rebut a defendant's claim that it had no knowledge to suspect any danger associated with its product by offering into evidence scientific, medical, and historical articles, as well as published standards referring to the connection between the defendant's product and injury [*Jones v. John Crane, Inc. (2005) 132 Cal. App. 4th 990, 1004-1005, 35 Cal. Rptr. 3d 144* (encyclopedia and medical articles, together with published standards for airborne asbestos dust, supported finding that risks associated with defendant's products could reasonably have been ascertained)].

The California Supreme Court has acknowledged that the "warning defect" theory is rooted in negligence to a greater extent than are the manufacturing--or design--defect theories, in that the "warning defect" relates to a failure extraneous to the product itself. Therefore, although a manufacturing or design defect can be evaluated without reference to the conduct of the manufacturer, the giving of a warning cannot; hence the requirement that the risk be known or knowable [*see* *Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 1002, 281 Cal. Rptr. 528, 810 P.2d 549]* .

Despite its roots in negligence, the Supreme Court stated, failure to warn in strict liability differs markedly from failure to warn in the negligence context. Negligence law requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons that fell below the acceptable standard of care, that is, what a reasonably prudent manufacturer would have known and warned about. Strict liability is not concerned with the standard of due care or the reasonableness of a manufacturer's conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture or distribution. Therefore, in strict liability, as opposed to negligence, the reasonableness of the defendant's failure to warn is immaterial [*Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 1002-1003, 281 Cal. Rptr. 528, 810 P.2d 549]* .

Although negligence and strict products liability are not identical, and a plaintiff is entitled to instructions on both theories if both are supported by the evidence, a finding of liability on a failure-to-warn claim under one theory but not the other raises questions of irreconcilability [*see, e.g.,* *Valentine v. Baxter Healthcare Corp. (1999) 68 Cal. App. 4th 1467, 1482, 81 Cal. Rptr. 2d 252]* . Whether such verdicts can be reconciled depends on the evidence presented and the precise instructions given [*Oxford v. Foster Wheeler LLC (2009) 177 Cal. App. 4th 700, 718, 99 Cal. Rptr. 3d 418]* . At least one court has specifically concluded that a finding of negligent failure to warn is "logically and legally inconsistent" with a jury's finding that the product is not defective with respect to its warnings [*Oxford v. Foster Wheeler LLC [(2009) 177 Cal. App. 4th 700, 720, 99 Cal. Rptr. 3d 418* (boilers)].

[iii] Manufacturers

Strict liability for failure to warn imposes more expansive liability on manufacturers than does a negligence theory of liability. A reasonably prudent manufacturer that reasonably decides that the risk of harm is such as not to require a warning (for example, based on the manufacturer's own testing showing results contrary to that of others in the scientific community), although possibly escaping liability under negligence principles, would be subject to strict products liability if it failed to give warning of dangers that were known or reasonably knowable to the scientific community at the time it manufactured or distributed the product [*Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1110, 56 Cal. Rptr. 2d 162, 920 P.2d 1347]* .

Under strict liability, whatever may be reasonable from the point of view of the manufacturer, the user of the product must be given the option either to refrain from using the product at all or to use it in such a way as to minimize the degree of danger [*see* *Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 1003, 281 Cal. Rptr. 528, 810 P.2d 549]* .

Strict liability for failure to warn applies to prescription drug manufacturers to the same extent as other manufacturers. Manufacturers of prescription drugs are strictly liable for injuries caused by their failure to give warning of risks that were known, or reasonably scientifically knowable, at the time they manufactured and distributed the drug [*Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1110, 56 Cal. Rptr. 2d 162, 920 P.2d 1347]* .

The duty to warn does not always run to the ultimate consumer. For example, in the case of prescription drugs, the manufacturer must warn the medical community of dangers so that physicians can warn patients for whom a drug is prescribed [*Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1116, 56 Cal. Rptr. 2d 162, 920 P.2d 1347* ; *see § 460.11[10][b][ii]*].

Also, a name-brand drug manufacturer's duty to use due care when providing product warnings extends not only to consumers of its own product, but also to consumers whose physicians foreseeably rely on its product information when prescribing a medication, even if the prescription is filled with a generic equivalent [*Conte v. Wyeth, Inc. (2008) 168 Cal. App. 4th 89, 94, 85 Cal. Rptr. 3d 299*]. Importantly, plaintiff in this case did not allege a strict products liability failure-to-warn cause of action, but rather, asserted a negligent misrepresentation claim, alleging that the manufacturer

failed to use due care when disseminating its product information [*Conte v. Wyeth, Inc. (2008) 168 Cal. App. 4th 89, 101, 85 Cal. Rptr. 3d 299*].

[iv] Allergies

Strict liability for failure to warn also applies in the context of allergies. A restaurant may be strictly liable for failing to warn customers about additives in the food served. A defendant may be liable if its product contained an ingredient to which a substantial number of the population is allergic, the ingredient is one whose danger is not generally known, or if known is not one which the customer would reasonably expect to find in the product, and the defendant knew or should have known that the ingredient was present and was dangerous [*Livingston v. Marie Callenders, Inc. (1999) 72 Cal. App. 4th 830, 839, 85 Cal. Rptr. 2d 528]* .

[b] Limitations on Duty to Warn

[i] Compliance With Regulations

The nature and scope of the duty to warn of known or knowable dangers may be limited under some circumstances. For example, a manufacturer of nonprescription drugs (aspirin) had no duty to provide warnings in Spanish, given the existence of extensive regulation under state and federal law governing the contents of warnings that did not require warnings in languages other than English [*Ramirez v. Plough, Inc. (1993) 6 Cal. 4th 539, 553-555, 25 Cal. Rptr. 2d 97, 863 P.2d 167]* . In this specific situation, the Court held that the duty to warn is no broader than that currently required by the applicable statutes and regulations [*Ramirez v. Plough, Inc. (1993) 6 Cal. 4th 539, 545 n.3, 555, 25 Cal. Rptr. 2d 97, 863 P.2d 167* (noting that opinion did not consider issue of foreign-language warnings for products other than nonprescription drugs); *see also O'Neill v. Novartis Consumer Health, Inc. (2007) 147 Cal. App. 4th 1388, 1395-1396* (court did not err in giving instruction that FDA action or inaction, though not dispositive, may be considered to show whether a product is safe or not safe)].

Federal Food and Drug Administration (FDA) regulations do not expressly preempt common law tort remedies for failure to warn. Evidence of FDA action or inaction is admissible in a failure-to-warn action to show whether a risk was known or reasonably knowable. A prescription drug manufacturer is not strictly liable for failing to give warnings expressly precluded by the federal Food and Drug Administration [*Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1113-1115, 56 Cal. Rptr. 2d 162, 920 P.2d 1347]* .

[ii] Warning Seller or Supplier Rather Than Ultimate Consumer

A manufacturer may have a duty to warn only the seller or supplier of the product, rather than the ultimate consumer, depending on the nature of the product and the sophistication required to understand and heed the warning. If a direct warning to the consumer would be ineffective, and the manufacturer fulfills its duty to warn by informing the seller or supplier (who then has an independent duty to warn the consumer), the manufacturer is not liable to the consumer for failing to warn the consumer directly [*see Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1062 n.9, 245 Cal. Rptr. 412, 751 P.2d 470* (manufacturer of prescription drug has no duty to warn consumer; adequate warning to physician is sufficient); *Persons v. Salomon North America, Inc. (1990) 217 Cal. App. 3d 168, 178, 265 Cal. Rptr. 773* (manufacturer of ski bindings had no duty to warn users directly, because of technical and qualified nature of warning); *Groll v. Shell Oil Co. (1983) 148 Cal. App. 3d 444, 448-450, 196 Cal. Rptr. 52* (manufacturer of bulk product, who has no control over subsequent packaging, has no duty to warn consumer; warning to distributor is sufficient); *Stevens v. Cessna Aircraft Co. (1981) 115 Cal. App. 3d 431, 433-434, 170 Cal. Rptr. 925* (manufacturer of airplane has no duty to warn passengers of plane's load capacity, given technical nature of the determination)].

In the context of prescription drugs and medical devices [*Notmeyer v. Stryker Corp. (N.D. Cal. 2007) 502 F. Supp. 2d 1051, 1060* ; *Hufft v. Horowitz (1992) 4 Cal. App. 4th 8, 21, 5 Cal.Rptr. 2d 377*], manufacturers have a duty to warn the physician, not the patient, of a drug's dangerous propensities [*Wendell v. Johnson & Johnson (N.D. Cal. Jan. 20,*

*2010) 2010 U.S. Dist. LEXIS 4188, at *9* ; *Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1116, 56 Cal. Rptr. 2d 162, 920 P.2d 1347* ; *Brown v. Superior Court, (1988) 44 Cal. 3d 1049, 1061-1062, 245 Cal. Rptr. 412, 751 P.2d 470* ; *Conte v. Wyeth, Inc. (2008) 168 Cal. App. 4th 89, 98 n.4, 85 Cal. Rptr. 3d 299* ; *Valentine v. Baxter Healthcare Corp. (1999) 68 Cal. App. 4th 1467, 1483, 81 Cal. Rptr. 2d 252]* . The rationale is that physicians have a duty to warn patients of the potential dangers of drugs and medical devices prescribed by them [*Stevens v. Parke, Davis & Co. (1973) 9 Cal. 3d 51, 65, 107 Cal. Rptr. 45, 507 P.2d 653]* . Thus, the duty to warn does not require the manufacturer to warn physicians of dangers already known to the medical community because physicians presumably are already aware of these dangers [*Plenger v. Alza Corp. (1992) 11 Cal. App. 4th 349, 362, 13 Cal. Rptr. 2d 811]* . On the other hand, in the case of a drug administered through a mass immunization program, the manufacturer's duty runs to the patient because the physician is not acting as an intermediary under these circumstances [*Davis v. Wyeth Laboratories, Inc. (9th Cir. 1968) 399 F.2d 121, 129-130]* .

[iii] Effect of Government Warning During Emergency

A manufacturer does not have a duty to warn once the government has issued public health warnings relating to the use of the manufacturer's product during a public emergency. Moreover, no duty arises even if the manufacturer is aware that the governmental warning may be inadequate. The imposition of a private tort duty to warn could severely compromise the state's centralized and well coordinated response to a public emergency [*Macias v. State of California (1995) 10 Cal. 4th 844, 853-860, 42 Cal. Rptr. 2d 592, 897 P.2d 530* (manufacturers of Malathion used by state under Emergency Services Act have no duty to warn even though they became aware of inadequacy of state's warnings)].

[iv] Sufficiency of Warning

A warning is not sufficient to preclude an action in strict products liability if it fails to perform its intended purpose of attracting the attention of the user [*see generally* Frumer and Friedman, Products Liability, Ch. 12 (Matthew Bender) (adequacy depends on conspicuousness of warning)]. Nor is liability precluded because an unclear warning is understood by some users; because it is foreseeable that those who do understand the warning may negligently fail to explain the danger to others, it is a triable issue of fact whether the warning actually given was adequate to preclude liability [*Huynh v. Ingersoll-Rand (1993) 16 Cal. App. 4th 825, 833-835, 20 Cal. Rptr. 2d 296]* . Whether a warning is adequate depends on several factors, including the normal expectations of the consumer, the degrees of simplicity or complication in the product's operation or use, the nature and magnitude of the danger to which the user is exposed, the likelihood of injury, and the feasibility and beneficial effect of including a warning [*Oxford v. Foster Wheeler LLC (2009) 177 Cal. App. 4th 700, 717, 99 Cal. Rptr. 3d 418* ; *Jackson v. Deft, Inc. (1990) 223 Cal. App. 3d 1305, 1320, 273 Cal. Rptr. 214]* . In addition, if the defendant has warned of less than all known or knowable dangers, and plaintiff suffers an injury that was not the subject of a warning, plaintiff may be able to recover even if heeding the warning given could have prevented the injury. Thus, a warning that use of a solvent without protective gloves could cause dermatitis, but that did not warn of the danger of liver damage that plaintiff suffered, could not preclude liability on the ground that the warning was adequate as a matter of law [*Schwoerer v. Union Oil Co. (1993) 14 Cal. App. 4th 103, 111-112, 17 Cal. Rptr. 2d 227* (reversing summary judgment for defendant)].

[v] Rare, Idiosyncratic, or Unusual Reactions

There is no duty to warn of the possibility of rare, idiosyncratic, or unusual reactions to an otherwise useful product [*Friedman v. Merck & Co. (2003) 107 Cal. App. 4th 454, 131 Cal. Rptr. 2d 885* (distributor's failure to warn that TB test contained animal products was not sufficiently likely to result in serious harm to significant segment of population so as to impose a duty to so advise as matter of law); *Briggs v. National Indus., Inc. (1949) 92 Cal. App. 2d 542, 545-546, 207 P.2d 110]* . Comment j to § 402A of the Restatement (Second) of Torts, in discussing strict liability failure to warn, makes it clear that a duty to warn arises only where a substantial number of the population are affected.

[vi] Commonly Known or Obvious Dangers

A seller need not give a warning to consumers when the dangers or potential of danger is generally known and recognized [*Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56, 67, 74 Cal. Rptr. 3d 108, 179 P.3d 905* ; *Holmes v. J.C. Penney Co. (1982) 133 Cal. App. 3d 216, 220, 183 Cal. Rptr. 777* (potentiality of harm incident to firing pellet gun was obvious); *Bojorquez v. House of Toys, Inc. (1976) 62 Cal. App. 3d 930* (no need to include warning of potential dangers of slingshot because they were generally known and recognized)].Moreover, strict liability for failure to warn does not attach if the danger is obvious or known to the injured person at the time of the product's use [Salyards v. Metso Minerals Tampere Oy (E.D. Cal. Nov. 10, 2005) 2005 U.S. Dist. LEXIS 29360, at *18 (rock-crushing machine); Torres v. City of Madera (In re Torres) (E.D. Cal. July 11, 2005) 2005 U.S. Dist. LEXIS 34672, at *40 (potential for "weapon confusion"); *Gonzales v. Carmenita Ford Truck Sales, Inc. (1987) 192 Cal. App. 3d 1143, 1151-1152, 238 Cal. Rptr. 18]* . The obvious danger rule is an objective test, and courts do not inquire into the user's subjective knowledge of the product's danger [*Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56, 71, 74 Cal. Rptr. 3d 108, 179 P.3d 905*].

In one case, the defendant failed to establish that the potential dangers of operating a deck gun were generally known or actually known by the plaintiff [*Wright v. Stang Mfg. Co. (1997) 54 Cal. App. 4th 1218, 1231, 63 Cal. Rptr. 2d 422]* . In another case, the danger of diving into a shallow above-ground pool was not open and obvious to an 11-year-old as a matter of law [*Bunch v. Hoffinger Indus., Inc. (2004) 123 Cal. App. 4th 1278, 1299-1300, 20 Cal. Rptr. 3d 780]* .

[vii] Sophisticated User Defense

The Supreme Court of California expressly adopted the sophisticated user defense [*Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56, 70, 74 Cal. Rptr. 3d 108, 179 P.3d 905*]. The defense relieves manufacturers of the duty to provide warnings about their products' potential hazards of which users are or should be already aware [*In re Asbestos Cases (N.D. Cal. 1982) 543 F. Supp. 1142, 1151* ; *Fierro v. International Harvester Co. (1982) 127 Cal. App. 3d 862, 866, 179 Cal. Rptr. 923* (dictum)]. The sophisticated user defense evolved out of both § 388 of the Restatement (Second) of Torts and the obvious danger rule [*see § 460.11[10][b][vi], above*]. The defense applies to both strict liability and negligent failure to warn cases [*Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56, 65, 74 Cal. Rptr. 3d 108, 179 P.3d 905* ; *Johnson v. Honeywell Int'l Inc. (2009) 179 Cal. App. 4th 549, 554, 101 Cal. Rptr. 3d 726*].

The duty to warn is measured by the actual or constructive knowledge of the class of sophisticated users, rather than by the individual plaintiff's subjective knowledge [*Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56, 65-66, 74 Cal. Rptr. 3d 108, 179 P.3d 905*]. The "should have known" standard is employed because of the impossibility of a manufacturer's determining whether a given member of the sophisticated group actually has knowledge of the danger [*Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56, 71, 74 Cal. Rptr. 3d 108, 179 P.3d 905*]. The time for determining user sophistication for purposes of the defense is the time of injury [*Johnson v. American Standard, Inc.(2008) 43 Cal. 4th 56, 73, 74 Cal. Rptr. 3d 108, 179 P.3d 905* ; *see Herrera v. Louisville Ladder Group, LLC (C.D. Cal. Nov. 16, 2009) 2009 U.S. Dist. LEXIS 107384, at *7* ; *Castellanos v. Louisville Ladder, Inc. (N.D. Cal. May 11, 2009) 2009 U.S. Dist. LEXIS 40547, at *3*].

The sophisticated user defense applies to a negligent failure-to-warn cause of action on a negligence per se theory [*Johnson v. Honeywell Int'l Inc. (2009) 179 Cal. App. 4th 549, 556, 101 Cal. Rptr. 3d 726]* , but not to a strict liability design defect cause of action [*Johnson v. Honeywell Int'l Inc. (2009) 179 Cal. App. 4th 549, 558-559, 101 Cal. Rptr. 3d 726]* .

[viii] Dangers of Other Manufacturers' Products

A manufacturer's duty to warn is limited to its own products [*Merrill v. Leslie Controls, Inc. (2009) 179 Cal. App. 4th 262, 273, 101 Cal. Rptr. 3d 614]* . There is no duty to warn about a defect in another manufacturer's product that is used

in conjunction with one's own product. Although a manufacturer may owe a duty to warn when the use of its product in combination with another party's product creates a hazard, that duty arises only when the manufacturer's own product creates the risk of harm [*Merrill v. Leslie Controls, Inc. (2009) 179 Cal. App. 4th 262, 273, 101 Cal. Rptr. 3d 614* ; *Taylor v. Elliott Turbomachinery Co. (2009) 171 Cal. App. 4th 564, 580-583, 90 Cal. Rptr. 3d 414* ; *Powell v. Standard Brands Paint Co. (1985) 166 Cal. App. 3d 357, 364, 212 Cal. Rptr. 395* ; *Blackwell v. Phelps Dodge Corp. (1984) 157 Cal. App. 3d 372, 375-376, 203 Cal. Rptr. 706]* . Accordingly, suppliers of engine components had no duty to warn of the dangers of asbestos-containing components supplied by other parties [*Merrill v. Leslie Controls, Inc. (2009) 179 Cal. App. 4th 262, 273, 101 Cal. Rptr. 3d 614* ; *Taylor v. Elliott Turbomachinery Co. (2009) 171 Cal. App. 4th 564, 580-583, 90 Cal. Rptr. 3d 414]* , a stove manufacturer had no duty to warn that a properly operating stove might ignite propane gas leaking from a tank [*Garman v. Magic Chef, Inc. (1981) 117 Cal. App. 3d 634, 638-639* ; *173 Cal. Rptr. 20]* , and the seller of sulfuric acid had no duty to warn of the possible accumulation of pressure in the tank car in which it was shipped [*Blackwell v. Phelps Dodge Corp. (1984) 157 Cal. App. 3d 372, 375-376, 203 Cal. Rptr. 706]* .

[11] Elimination of "Unreasonably Dangerous" Limitation

[a] Rejection of Restatement Component

The California Supreme Court has rejected the concept, embodied in Restatement (Second) of Torts § 402A, that the application of the strict products liability doctrine requires not only proof that the product was defective, but also that the defect made the product "unreasonably dangerous" [*Cronin v. J. B. E. Olson Corp. (1972) 8 Cal. 3d 121, 134-135, 104 Cal. Rptr. 433, 501 P.2d 1153* ; *see* Restatement (Second) of Torts § 402A (liability based on sale of product in "defective condition unreasonably dangerous")]. The Court rejected the "unreasonably dangerous" component on the ground that it would require an injured plaintiff to prove not only that the product contained a defect, but also that the defect made the product unreasonably dangerous to the user or consumer, which would place a considerably greater burden on the plaintiff than that articulated in *Greenman v. Yuba Power Prods., Inc. (1963) 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 377 P.2d 897* , under which a plaintiff alleging a defect in manufacture or design satisfies his or her burden of proof by proving the existence of a "defect," and that the defect was the proximate cause of the injuries [*see* *Cronin v. J. B. E. Olson Corp. (1972) 8 Cal. 3d 121, 133-135, 104 Cal. Rptr. 433, 501 P.2d 1153* (also noting difficulties inherent in "giving content to the defectiveness standard"); *see also* *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 427, 143 Cal. Rptr. 225, 573 P.2d 443* (reiterating holding in *Cronin*)]. The Supreme Court observed that the requirement that the defect made the product unreasonably dangerous "crept into our jurisprudence without fanfare" after its inclusion in the Restatement (Second) of Torts in 1965 (after the decision in *Greenman*), and that subsequent decisions often referred to the Restatement and *Greenman* in tandem, without specifically determining whether the jury must decide that the injuries were caused by a "defective" product or by a product in a "defective condition unreasonably dangerous" [*Cronin v. J. B. E. Olson Corp. (1972) 8 Cal. 3d 121, 129-131, 104 Cal. Rptr. 433, 501 P.2d 1153]* . The Court also noted disapprovingly that the "unreasonably dangerous" limitation burdened the injured plaintiff with proof of an element that "rings of negligence" [*Cronin v. J. B. E. Olson Corp. (1972) 8 Cal. 3d 121, 132, 104 Cal. Rptr. 433, 501 P.2d 1153]* . However, the argument that a concept "rings of negligence" does not necessarily preclude its incorporation into the strict products liability doctrine [*see* *Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 1000, 281 Cal. Rptr. 528, 810 P.2d 549* ; *see also § 460.12*].

[b] Effect on Instructions Regarding Definition of Defect

Although the California Supreme Court has rejected the position of Restatement (Second) of Torts § 402A that a defective product must also be "unreasonably dangerous" for recovery in strict liability [*Cronin v. J. B. E. Olson Corp. (1972) 8 Cal. 3d 121, 134-135, 104 Cal. Rptr. 433, 501 P.2d 1153* ; *see § 460.11[11][a]*], that decision did not dictate that the term "defect" be left undefined in jury instructions given in all product liability cases [*Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 417, 143 Cal. Rptr. 225, 573 P.2d 443]* . The Court acknowledged that although in many instances involving a defect in manufacturing, "defect" requires little or no elaboration, in other instances, such as

cases involving defective design or inadequate warning, the contours of the defect concept may not be self-evident. In such a case, a trial judge may find it necessary to explain more fully to the jury the legal meaning of "defect" [*Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 417, 143 Cal. Rptr. 225, 573 P.2d 443]* . For discussion of the consequent formulation in *Barker v. Lull Engineering* of the definition of design defect, see *§ 460.11[9][b]*.

In *Cavers v. Cushman Motor Sales, Inc. (1979) 95 Cal. App. 3d 338, 157 Cal. Rptr. 142* , the court addressed the application of *Cronin* to warning-defect cases, and the jury instructions concerning the definition of "defect" that are proper in those cases. The court in *Cavers* stated that *Cronin*, although abolishing the "unreasonably dangerous" requirement in manufacturing- and design-defect situations, did not overrule or disapprove of any prior cases that defined "defect," and therefore did not alter, forexample, the prior holding that a product otherwise free of defects in manufacture and design may become defective if it is "unreasonably dangerous to place it in the hands of the user without a suitable warning" [*Cavers v. Cushman Motor Sales, Inc. (1979) 95 Cal. App. 3d 338, 344, 157 Cal. Rptr. 142* ; *see Canifax v. Hercules Powder Co. (1965) 237 Cal. App. 2d 44, 53, 46 Cal. Rptr. 552]* . *Cavers* applied the principles of *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* , and concluded that the classification drawn between manufacturing defects on the one hand, and defects caused by poor design or failure to warn on the other, is significant, because the concept of defect raises considerably more difficulties in the design context than in manufacturing or production context, and becomes all the more elusive when applied to failure-to-warn cases [*Cavers v. Cushman Motor Sales, Inc. (1979) 95 Cal. App. 3d 338, 346-347, 157 Cal. Rptr. 142]* .

Consequently, in a warning-defect case, a jury instruction that predicates liability on a finding of "danger" must include consideration of the degree of danger, among other relevant factors. The court in *Cavers* therefore approved a jury instruction stating that an otherwise faultlessly made article may be deemed defective if the manufacturer/lessor fails to warn of dangerous propensities that in the absence of an adequate warning render the article substantially dangerous to the user [*Cavers v. Cushman Motor Sales, Inc. (1979) 95 Cal. App. 3d 338, 349-350, 157 Cal. Rptr. 142]* . It also noted that the trial court "wisely chose to omit the word 'unreasonably' from the formulation," in light of *Cronin*, to avoid diverting the jury's attention from the condition of the product to the conduct of the seller; and further defined "substantial danger" in order properly to focus the jury's attention on the relevant factors regarding the sufficiency of the magnitude of danger [*Cavers v. Cushman Motor Sales, Inc. (1979) 95 Cal. App. 3d 338, 349-350, 157 Cal. Rptr. 142]* . Subsequently, the California Supreme Court cited *Cavers* with approval, noting that the court of appeal rejected the argument that requiring plaintiff to prove that the manufacturer's failure to warn rendered the product "substantially dangerous" to the user impermissibly increased the plaintiff's burden to prove the product defective in the manner that the phrase "unreasonably dangerous" was held in *Cronin* to do [*Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 1001, 281 Cal. Rptr. 528, 810 P.2d 549]* .

The issue of the permissible scope of dangerousness inherent in the definition of "defect" in a warning-defect case has not been decided squarely, nor determined definitively [*see, e.g., Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 995-996, 1001, 281 Cal. Rptr. 528, 810 P.2d 549* (discussing issue obliquely in context of evolution of warning-defect theory and application of negligence concepts, but deciding case on knowability requirement); *compare, e.g., Groll v. Shell Oil Co. (1983) 148 Cal. App. 3d 444, 448, 196 Cal. Rptr. 52* ("unreasonably dangerous"); *Fierro v. International Harvester Co. (1982) 127 Cal. App. 3d 862* (absence of warning did not "substantially or unreasonably" increase any danger); *Foster v. Gillette Co. (1979) 100 Cal. App. 3d 569* (trial court's addition of "unreasonably" was necessary to correctly state law); *Canifax v. Hercules Powder Co. (1965) 237 Cal. App. 2d 44, 53, 46 Cal. Rptr. 552* (not specifically disapproved on "unreasonably dangerous" point in *Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 995-996, 281 Cal. Rptr. 528, 810 P.2d 549*) *with, e.g., Rodriguez v. Superior Court (1990) 221 Cal. App. 3d 1371, 1374, 1375, 271 Cal. Rptr. 114* ("substantial, foreseeable danger"; product possesses "such risks" that it becomes defective; citing *Cavers); West v. Johnson & Johnson Prods., Inc. (1985) 174 Cal. App. 3d 831, 853* , *220 Cal. Rptr. 437* (instruction, withdrawn because plaintiff proceeded on design-defect theory, stated "substantial danger"); *see also BAJI 9.00.7* (7th ed.) (product is defective if reasonably foreseeable use involves "substantial danger" not readily recognized in absence of adequate warning)]. In light of the relevant case law taken as a whole, it appears that the holding of *Cronin* does not prohibit the trial court, in a case involving alleged warning defect, from defining

"defect" in jury instructions, and stating the threshold degree of dangerousness that would render the product defective in the absence of an adequate warning. That threshold may be described as "substantially dangerous," but describing it as "unreasonably dangerous" would impermissibly increase the plaintiff's burden to prove the product defective within the scope of *Greenman* [*see Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 1001, 281 Cal. Rptr. 528, 810 P.2d 549]* .

[12] Disclaimer of Liability Does Not Preclude Liability

Liability under the doctrine of strict liability in tort may not be disclaimed by the person otherwise liable, because one of the purposes of strict liability in tort is to prevent a manufacturer from defining the scope of its responsibility for harm caused by the manufacturer's products [*Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 17, 45 Cal. Rptr. 17, 403 P.2d 145* ; *Westlye v. Look Sports, Inc. (1993) 17 Cal. App. 4th 1715, 1743-1746, 22 Cal. Rptr. 2d 781* ; *cf. Dorman v. International Harvester Co. (1975) 46 Cal. App. 3d 11, 14-20, 120 Cal. Rptr. 516* (on requirements of disclaimers of implied warranties of merchantability and fitness for particular use under Commercial Code)].

[13] Express Assumption of Risk Does Not Preclude Liability

As a matter of public policy, product suppliers cannot insulate themselves from strict liability in tort for injuries caused by defects in products they place on the market by obtaining a consumer's signature on an express assumption of risk [*Westlye v. Look Sports, Inc. (1993) 17 Cal. App. 4th 1715, 1747, 22 Cal. Rptr. 2d 781* (noting public policy protecting consumers, as well as policy against allowing suppliers to disclaim liability)].

[14] Causation in Warning Cases

A plaintiff bringing a failure to warn cause of action must prove not only that no warning was provided or that the given warning was inadequate, but also that the inadequacy or absence of warning caused the plaintiff's injury [*Motus v. Pfizer Inc. (C.D. Cal. 2001) 196 F. Supp. 2d 984, 991*]--that is, was a substantial factor in bringing about the injury [*Rutherford v. Owens-Ill., Inc. (1997) 16 Cal. 4th 953, 968, 67 Cal. Rptr. 2d 16, 941 P.2d 1203* ; *Conte v. Wyeth, Inc. (2008) 168 Cal. App. 4th 89, 112, 85 Cal. Rptr. 3d 299* ; *Whiteley v. Philip Morris, Inc. (2004) 117 Cal. App. 4th 635, 696, 11 Cal. Rptr. 3d 807* ; *see* Salyards v. Metso Minerals Tampere Oy (E.D. Cal. Nov. 10, 2005) 2005 U.S. Dist. LEXIS 29360, at *22-*23].

The substantial factor standard is a relatively broad one, requiring only that the defendant's contribution be more than negligible or theoretical [*Bockrath v. Aldrich Chem. Co. (1999) 21 Cal. 4th 71, 79, 86 Cal. Rptr. 2d 846, 980 P.2d 398* ; *Bunch v. Hoffinger Indus., Inc. (2004) 123 Cal. App. 4th 1278, 1303-1304, 20 Cal. Rptr. 3d 780* (lack of label adequately warning of dangers of diving into aboveground pool was substantial factor in causing plaintiff's injuries)].

The California Supreme Court has not adopted the rebuttable presumption adopted by many other states that had an adequate warning been given, the plaintiff would have heeded it [*Motus v. Pfizer Inc. (C.D. Cal. 2001) 196 F. Supp. 2d 984, 994-995* , applying California law)]. It has, however, cited comment j to § 402A of the Restatement (Second) of Torts to support the conclusion that a *defendant* may assume that an adequate warning provided to the plaintiff may assume it will be read and heeded [*Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56, 65, 74 Cal. Rptr. 3d 108, 179 P.3d 905* ; *see also Motus v. Pfizer, Inc. (C.D. Cal. 2001) 196 F. Supp. 2d 984, 992*].

In the context of drugs and medical devices, a defendant may prevail in a summary judgment on a warning claim if the plaintiff produces no evidence that the prescribing physician would have acted differently had an adequate warning been given [*Motus v. Pfizer Inc. (C.D. Cal. 2001) 196 F. Supp. 2d 984, 995-997*)]. Evidence which may help establish that the physician would have acted differently had he or she received an adequate warning may include evidence the plaintiff was not a good candidate for the drug, that the plaintiff's symptoms worsened over a period of time, that the non-disclosed risk was sufficiently high, and that the physician actually relied on the manufacturer's statements [*Motus*

v. Pfizer Inc. (C.D. Cal. 2001) 196 F. Supp. 2d 984, 995-997]. There is no proximate causation when the prescribing physician did not read or rely upon the warning in the drug's package insert or in the Physician's Desk Reference when determining the proper treatment for the plaintiff [*Conte v. Wyeth, Inc. (2008) 168 Cal. App. 4th 89, 111-112, 85 Cal. Rptr. 3d 299*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 460.12 Relation of Strict Liability Doctrine to Negligence Concepts

[1] Relief of Evidentiary Burdens

One of the guiding principles of the strict liability doctrine is to relieve plaintiffs of the evidentiary burdens inherent in negligence causes of action [*see Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 1000, 281 Cal. Rptr. 528, 810 P.2d 549]* .

To that end, for example, the California Supreme Court has refused to incorporate the "unreasonably dangerous" element of Restatement (Second) of Torts § 402A into the plaintiff's burden of proof [*see Cronin v. J.B.E.Olson Corp. (1972) 8 Cal. 3d 121, 132-133, 104 Cal. Rptr. 433, 501 P.2d 1153* ; *see also § 460.11[11]*]. The Supreme Court has also refused to reject the incorporation of a component into the doctrine simply because the component "rings of" or "sounds in" negligence [*see Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 1000, 281 Cal. Rptr. 528, 810 P.2d 549]* .

[2] Aspects of Negligence Adopted in Strict Liability

There is a functional similarity between strict products liability and negligence [*Merrill v. Navegar, Inc. (2001) 26 Cal. 4th 465, 480, 110 Cal. Rptr. 2d 370* P.3d 116 (incorporation of several negligence principles into strict liability doctrine); *Milwaukee Elec. Tool Corp. v. Superior Court (1993) 15 Cal. App. 4th 547, 559, 19 Cal. Rptr. 2d 24* (functional similarity insofar as duty and breach are concerned)]. Aspects of negligence law that have been adopted in the strict products liability context include:

- The doctrine of plaintiff's negligence as a defense when it consists of assumption of the risk [*see Luque v. McLean (1972) 8 Cal. 3d 136, 145, 104 Cal. Rptr. 443, 501 P.2d 1163* ; *see also* Restatement (Second) of Torts § 402A, comment b].

- Plaintiff's burden to prove that the manufacturer's failure to warn rendered a product "substantially dangerous" to the user [*see Cavers v. Cushman Motor Sales, Inc. (1979) 95 Cal. App. 3d 338, 348-349, 157 Cal. Rptr. 142* ; *see also § 460.11[11]*].

- Principles of comparative negligence [*see* *Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 734, 144 Cal. Rptr. 380, 575 P.2d 1162* (blending twin principles of strict products liability and traditional negligence while recognizing their theoretical and semantic distinctions)].

- The risk-benefit test under *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 434, 143 Cal. Rptr. 225, 573 P.2d 443* , requiring the balancing of a number of factors for the jury to evaluate [*see* *Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 1001, 281 Cal. Rptr. 528, 810 P.2d 549]* .

Nevertheless, despite the functional overlap between strict products liability and negligence, there remain significant differences between the two doctrines in elements, focus, and proof [*Crawford v. Weather Shield Mfg., Inc. (2006) 136 Cal. App. 4th 304, 320, 38 Cal. Rptr. 3d 787* , *review granted and depublished,* *(2006) 44 Cal. Rptr. 3d 632, 136 P.3d 168* , *review dismissed in part* (2007) *67 Cal. Rptr. 3d 753* (in light of differences between two doctrines, court did not abuse its discretion in determining that absence of a strict products liability instruction was prejudicial)]. The focus of negligence is on the conduct of the tortfeasor, while strict liability focuses on the product itself [*Edwards v. A.L. Lease & Co. (1996) 46 Cal. App. 4th 1029, 1034, 54 Cal. Rptr. 2d 259]* .

For a comparison between strict liability and negligence actions based on failure-to-warn, see *§ 460.11[10]*. For discussion of negligence principles generally, see Ch. 380, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceGeneral OverviewTortsProducts LiabilityGeneral OverviewTortsProducts LiabilityDuty to WarnTortsProducts LiabilityStrict LiabilityTortsStrict LiabilityGeneral Overview

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§ 460.13 Strict Liability and Warranties Distinguished

The law of strict liability in tort was developed to govern the problem of physical injuries to person and property and not to undermine the warranty provisions of the Commercial Code [*Com. Code §§ 2312-2317*], which continue to control commercial aspects of commercial transactions [*Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 15, 45 Cal. Rptr. 17, 403 P.2d 145]* .

Justice Peters in a vigorous concurring and dissenting opinion in *Seely* was of the view that the doctrine of strict liability in tort should apply to economic losses as well as to injury to person or property provided that such losses resulted from a defect in the product. However, this view hasnot been accepted as the law in California. No recovery for purely economic loss is allowed in a strict liability action [*see § 460.11[4]*]. Instead, a warranty claim should be made for recovery of economic losses [*see Anthony v. General Motors Corp. (1973) 33 Cal. App. 3d 699* (express warranty class action for replacement of defective wheels); *Dorman v. International Harvester Co. (1975) 46 Cal. App. 3d 11* (implied warranties under Commercial Code)].

In addition, strict liability in tort does not apply between parties who [*Kaiser Steel Corp. v. Westinghouse Elec. Corp. (1976) 55 Cal. App. 3d 737, 748, 127 Cal. Rptr. 838]* :

- Deal in a commercial setting.
- Deal from positions of relatively equal economic strength.
- Bargain the specifications of the product.
- Negotiate concerning the risk of loss from defects in it.

In summary, insofar as injury to person or property is concerned, the doctrine of strict liability in tort has substantially replaced the doctrine of implied warranty [*see Shepard v. Alexian Bros. Hosp. (1973) 33 Cal. App. 3d 606, 614, 109 Cal. Rptr. 132]* . Insofar as the commercial aspects of commercial transactions are concerned, the warranty provisions

of the Commercial Code [*Com. Code §§ 2312-2317*] and of the Song-Beverly Consumer Warranty Act [*Civ. Code §§ 1790-1795.7*] and the statutory provisions governing mobilehome warranties [*Civ. Code § 1797 et seq.*] control. and while privity appears to remain a requirement for actions based on implied warranties, it is not required for an action based on express warranty [*Hauter v. Zogarts (1975) 14 Cal. 3d 104, 114 n.8, 120 Cal. Rptr. 681, 534 P.2d 377* ; *see also Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 14, 45 Cal. Rptr. 17, 403 P.2d 145]* . With respect to express warranty, the seller's statements, whether of fact or opinion, must, however, under *Com. Code § 2313*, become part of the "basis of the bargain" if their breach is to give rise to a cause of action. The basis-of-the-bargain requirement represents a significant change in the former law of warranties. Prior to the adoption of the Commercial Code, plaintiff had to prove reliance on specific promises by the seller [former *Civ. Code § 1732*], but the Commercial Code requires no such proof [*Hauter v. Zogarts (1975) 14 Cal. 3d 104, 115, 120 Cal. Rptr. 681, 534 P.2d 377]* .

For further discussion, see Ch. 500, *Sales and Secured Transactions* ; Cotchett & Cartwright, California Products Liability Actions, Chs. 1, 2 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProducts LiabilityGeneral OverviewTortsProducts LiabilityStrict LiabilityTortsStrict LiabilityGeneral Overview

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40-460 California Forms of Pleading and Practice--Annotated § 460.14

§ 460.14 Liability of Successor Manufacturer

[1] Traditional Exceptions to General Rule of Successor Nonliability

Under the general rule of successor liability, a corporation purchasing the principal assets of another corporation does not assume the predecessor corporation's liabilities, except when any of the following exists [*Fisher v. Allis-Chalmers Corp. Prod. Liab. Trust (2002) 95 Cal. App. 4th 1182, 1188, 116 Cal. Rptr. 2d 310* ; *Franklin v. USX Corp. (2001) 87 Cal. App. 4th 615, 105 Cal. Rptr. 2d 11* ; *Maloney v. American Pharm. Co. (1988) 207 Cal. App. 3d 282, 287, 255 Cal. Rptr. 1* ; *see Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 28, 136 Cal. Rptr. 574, 560 P.2d 3]* :

- There is an express or implied agreement of assumption.
- The transaction amounts to a consolidation or merger of the two corporations.
- The purchasing corporation is a mere continuation of the seller.
- The transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts.

Before one corporation can be said to be a mere continuation or reincarnation of another, there must be insufficient consideration running from the new company to the old [*Franklin v. USX Corp. (2001) 87 Cal. App. 4th 615, 105 Cal. Rptr. 2d 11* ; *Maloney v. American Pharm. Co. (1988) 207 Cal. App. 3d 282, 287, 255 Cal. Rptr. 1]* . Mere continuation exists when one corporation takes all of another's assets without providing any consideration that could be made available to meet claims of the other's creditors, or when the consideration consists wholly of shares of the purchaser's stock that are promptly distributed to the seller's shareholders in conjunction with the seller's liquidation [*Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 28, 136 Cal. Rptr. 574, 560 P.2d 3]* .

Other characteristics typical of mere continuation are the continuity of personnel and the direct sale from the seller to the buyer (rather than, for example, sale by a creditor of the predecessor to the buyer) [*Maloney v. American Pharm.*

Co. (1988) 207 Cal. App. 3d 282, 288, 255 Cal. Rptr. 1] .

[2] Product Line Theory

In addition to the four traditional exceptions to the general rule of successor nonliability [*see § 460.14[1]*], the state's highest court created a fifth exception, which is now known as the product line exception [*Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 136 Cal. Rptr. 574, 560 P.2d 3]* . The court presented a three-part rationale for imposing strict liability on a successor corporation [*Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 31, 136 Cal. Rptr. 574, 560 P.2d 3* ; *Rosales v. Thermex-Thermatron, Inc. (1998) 67 Cal. App. 4th 187, 194, 78 Cal. Rptr. 2d 861* ; *see also Monarch Bay II v. Professional Serv. Indus., Inc. (1999) 75 Cal. App. 4th 1213, 1216-1217, 89 Cal. Rptr. 2d 778]* :

- The virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business.

- The successor's ability to assume the original manufacturer's risk-spreading role.

- The fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in the continued operation of the business.

Legal Topics:

For related research and practice materials, see the following legal topics:
Mergers & Acquisitions LawLiabilities & Rights of SuccessorsGeneral OverviewTortsProducts LiabilityGeneral OverviewTortsProducts LiabilityStrict LiabilityTortsStrict LiabilityGeneral OverviewTortsVicarious LiabilityCorporationsPredecessor & Successor Corporations

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40-460 California Forms of Pleading and Practice--Annotated § 460.15

§ 460.15 Development of AIDS Vaccine

[1] Establishment of Victims' Compensation Fund

To promote the development of an AIDS (acquired immune deficiency syndrome) vaccine, the legislature enacted *Health & Safety Code §§ 121250-121275*, which provide financial incentives to manufacturers to develop and market that vaccine. In the event the vaccine is manufactured, the AIDS Vaccine Victims Compensation Fund, financed by a surcharge on the sale of an approved vaccine will be used to compensate a person injured by the vaccine [*see Health & Safety Code § 121270(c), (o)*]. Nevertheless, no immunity from liability or limitation on damages in actions against the manufacturers is provided by this legislation [*see Health & Safety Code § 121270(c)(2)* (fund will not compensate for damages against manufacturer in lawsuit), (m) (concurrent actions against manufacturer and fund allowed)]. For discussion of confidentiality and disclosure of records relating to AIDS testing and research, see Ch. 429, *Privacy* .

[2] Compensation From Fund for Damages to Injured Person

The State Board of Control is authorized to pay from the fund damages for personal injuries caused by an AIDS vaccine that is sold in or delivered in California and administered or dispersed in California to the injured person. Payment is contingent on the availability of money in the fund [*Health & Safety Code § 199.50(c), (p)*].

The fund, however, will not compensate for the following [*Health & Safety Code § 121270(c)*]:

- Damages for personal injuries caused by the vaccine to the extent that they are attributable to the comparative negligence of the person making the claim.

- Damages for personal injuries in any instance in which the manufacturer has been found to be liable for those injuries in a court of law.

- Damages for personal injuries due to a vaccination administered during a clinical trial.

The term "damages for personal injuries" means the direct medical costs for the care and treatment of injuries to any

person, including a person entitled to recover damages under *Code Civ. Proc. § 377.60* (regarding wrongful death actions), proximately caused by an AIDS vaccine, the loss of earnings caused by the injuries, and the amount necessary, but not to exceed $550,000, to compensate for noneconomic losses, including pain and suffering caused by the injuries [*Health & Safety Code § 121270(b)(3)*]. For discussion and forms relating to death actions, see Ch. 181, *Death and Survival Actions* . For discussion and forms relating to personal injury damages, see Ch. 177, *Damages* .

[3] Procedures and Review

Procedures for applying for compensation and for conduct of the hearing on the application are governed by *Health & Safety Code § 121270(d)-(h)*. Application shall be made on a form prescribed by the board [*Health & Safety Code § 121270(d)*]. The board may adopt rules and regulations to implement these procedures [*Health & Safety Code § 121270(j)*]. Review of the board's decision by a writ of administrative mandate is governed by *Health & Safety Code § 121270(i)*.

[4] Fund's Right to Subrogation or Lien

The fund is subrogated to any right or claim that any injured person who receives compensation from the fund may have, or any right or claim that such person's personal representative, legal guardian, estate, or survivor may have against any third party who is liable for the personal injuries caused by the AIDS vaccine, and the fund is entitled to indemnity from that third party. The fund is also entitled to a lien on the judgment, award, or settlement in the amount of any payments made to the injured person [*Health & Safety Code § 121270(k)*].

Nothing in *Health & Safety Code § 199.50* affects the right of any individual to pursue claims against the fund and lawsuits against manufacturers concurrently. The fund is entitled, however, to a lien on the judgment award, or settlement, in the amount of any payments made to the injured party by the fund [*Health & Safety Code § 121270(m)*].

[5] Notice of Action to Board or Attorney General

In the event that the injured person, or his or her guardian, personal representative, estate, or survivors, or any of them, brings an action for damages against the person or persons liable for the injury or death giving rise to an award by the board, notice of institution of legal proceedings and notice of any settlement must be given to the board in Sacramento, except in cases when the board specifies that notice must be given to the Attorney General. All notices must be given by the attorney employed to bring the action for damages or by the injured person or his or her guardian,personal representative, estate, or survivors if no attorney is employed [*Health & Safety Code § 121270(l)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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40-460 California Forms of Pleading and Practice--Annotated § 460.16

§ 460.16 Insurance Coverage

[1] Availability of Coverage

Liability insurance [*see Ins. Code §§ 100(8), 108*] is available to those who produce and market goods to cover liability arising from injuries proximately caused by defects in the goods [*see Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 32, 136 Cal. Rptr. 574, 560 P.2d 3* ("products liability insurance is usually limited to accidents or occurrences taking place while the policy is in effect"); *see also* Flintkote Co. v. Gen. Accident Assur. Co. of Can. (N.D. Cal. Jan. 3, 2006) 2006 U.S. Dist. LEXIS 11, at *2-*3 (asbestos); *Oliver Mach. Co. v. United States Fid. & Guar. Co. (1986) 187 Cal. App. 3d 1510, 232 Cal. Rptr. 691* (products sold by predecessor not covered under policy obtained by successor manufacturer); *see generally* Long, Law of Liability Insurance, Ch. 11 (Matthew Bender)]. Coverage may be provided by a comprehensive liability policy or by a policy with more limited coverage, such as a products liability policy. A comprehensive liability policy might, however, expressly exclude products liability or hazards [*see, e.g., Cravens, Dargan & Co. v. Pacific Indem. Co. (1972) 29 Cal. App. 3d 594, 596, 600, 105 Cal. Rptr. 607]* , and even a policy providing coverage might limit coverage to products the possession of that has been relinquished by the insured and which are away from the insured's premises.

Other kinds of policies may, however, provide coverage if possession of the product has not been relinquished or if the product is not away from the insured's premises. Examples are a premises liability policy, a manufacturers and contractors liability policy, an owners, landlords, or tenants policy, and so forth [*see* Long, Law of Liability Insurance, Ch. 11 (Matthew Bender)]. In preparing to prosecute or defend a strict-liability-in-tort action, counsel for each party should examine any relevant policies of his or her client and make sure that the provisions of any policy providing coverage are complied with by the client. Plaintiff's counsel may, by written interrogatories or other discovery procedures, ascertain whether defendant is insured and, if so, the limits of liability [*see generally Code Civ. Proc. §§ 2016-2036*; and Ch. 190-200: *Discovery*].

[2] Coverage Precluded

A party may not, however, insure against liability for punitive damages in a strict products liability action because that insurance would violate public policy [*Ford Motor Co. v. Home Ins. Co. (1981) 116 Cal. App. 3d 374*]. For further

discussion of liability insurance, see Ch. 308, *Insurance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawGeneral Liability InsuranceCoverageGeneral OverviewTortsProducts LiabilityGeneral OverviewTortsProducts LiabilityStrict LiabilityTortsStrict LiabilityGeneral Overview

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[Reserved]

§§ 460.17[Reserved]

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40-460 California Forms of Pleading and Practice--Annotated § 460.30

§ 460.30 Elements of Action

To state a cause of action based on strict liability in tort against the manufacturer or supplier of a defective product, the complaint must allege facts showing that:

- Defendant placed the product on the market in the ordinary course of business (as opposed to an occasional sale or an isolated transaction).
- Defendant knew the product was to be used without inspection for defects.
- The particular product or article involved was defective.
- An accident occurred as a proximate result of the defect.
- As a proximate result of the defect and accident plaintiff sustained personal injuries or injury to property.
- The injuries sustained are compensable in money.

That is, the complaint must allege duty, breach of duty, proximate cause, injury or detriment, and damages [*see Nelson v. Superior Court (2006) 144 Cal. App. 4th 689, 695, 50 Cal. Rptr. 3d 684* ; *County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal. App. 4th 292, 335, 40 Cal. Rptr. 3d 313* ; *Civ. Code § 3281*]. Injury and damages are frequently combined in the same allegation.

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40-460 California Forms of Pleading and Practice--Annotated § 460.31

§ 460.31 Statute of Limitations

[1] Applicable Limitations Periods

An action for damages for personal injury based on products liability is governed by the two-year period of limitation prescribed by *Code Civ. Proc. § 335.1*. Former *Code Civ. Proc. § 340(3)* provided for a one-year period [*Rose v. Fife (1989) 207 Cal. App. 3d 760, 770-771, 255 Cal. Rptr. 440* ; *Becker v. Volkswagen of Am., Inc. (1975) 52 Cal. App. 3d 794, 802, 125 Cal. Rptr. 326* ; *G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 25, 122 Cal. Rptr. 218]* . An action for injury to real or personal property must be commenced within three years [*Code Civ. Proc. § 338(b),(c)*; *see also* Cal. Dep't of Toxic Substances Control v. Payless Cleaners (E.D. Cal. Aug. 16, 2007) 2007 U.S. Dist. LEXIS 60703, at *16, n.3); Universal Paragon Corp. v. Ingersoll-Rand Co. (N.D. Cal. Feb. 13, 2007) 2007 U.S. Dist. LEXIS14530, at *25; *County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal. App. 4th 292, 318, 40 Cal. Rptr. 3d 313* (lead paint); *Fireman's Fund Ins. Co. v. Sparks Constr., Inc. (2004) 114 Cal. App. 4th 1135, 1150-1151, 8 Cal. Rptr. 3d 446* (allegation that defective toilet ballcock caused damage to home and contents); *Mills v. Forestex Co. (2003) 108 Cal. App. 4th 625, 647, 134 Cal. Rptr. 2d 273* (action against siding manufacturer); *Avner v. Longridge Estates (1969) 272 Cal. App. 2d 607, 615, 77 Cal. Rptr. 633* (injury to real property)]. Personal injury and death actions based on exposure to asbestos are governed by *Code Civ. Proc. § 340.2*, which requires the actions to be brought the later of 1) one year after the plaintiff first suffered disability; or 2) one year after the plaintiff knew or should have known that the disability was caused or contributed to by asbestos exposure [*Hamilton v. Asbestos Corp., Ltd. (2000) 22 Cal. 4th 1127, 1138, 95 Cal. Rptr. 2d 701, 998 P.2d 403, 409]* .

The four-year limitation period of *Code Civ. Proc. § 337.1*, which applies to patent defects in real property development and construction, applies to an action based on strict product liability [*Mills v. Forestex Co. (2003) 108 Cal. App. 4th 625, 643, 134 Cal. Rptr. 2d 273* (neither *Code Civ. Proc. § 337.1* nor § 337.15 applied to siding manufacturer); *Stoneson Dev. Corp. v. Superior Court (1987) 197 Cal. App. 3d 178, 181, 242 Cal. Rptr. 721* , citing *Mattingly v. Anthony Indus., Inc. (1980) 109 Cal. App. 3d 506, 167 Cal. Rptr. 292]* . However, the limitation period of *Code Civ. Proc. § 337.1* does not apply to manufacturers and sellers of products used to improve real property, unless the seller or manufacturer has also installed the product [*see* *Mills v. Forestex Co. (2003) 108 Cal. App. 4th 625, 643, 134 Cal. Rptr. 2d 273* (neither *Code Civ. Proc. § 337.1* nor § 337.15 applied to siding manufacturer); *Nichols v. Swimquip*

(1985) 171 Cal. App. 3d 216, 220-222, 217 Cal. Rptr. 272] .

The 10-year limitation period of *Code Civ. Proc. § 337.15*, which applies to latent defects in real property development and construction, also applies to a cause of action based on strict products liability concerning real property [*Stoneson Dev. Corp. v. Superior Court (1987) 197 Cal. App. 3d 178, 179-181, 242 Cal. Rptr. 721]* . Nothing in the language of the statute suggests that product liability actions are exempt from its scope [*Stoneson Devel. Corp. v. Superior Court (1987) 197 Cal. App. 3d 178, 180, 242 Cal. Rptr. 721]* . Therefore, *Code Civ. Proc. § 337.15* applies to a cause of action against a contractor whose improper repair of real property caused the property to be damaged again in a subsequent mudslide [*Stoneson Dev. Corp. v. Superior Court (1987) 197 Cal. App. 3d 178, 179-181, 242 Cal. Rptr. 721* (judgment on pleadings for defendant improperly denied on cause of action for strict products liability)].

Code Civ. Proc. § 337.15 continues to apply to many construction projects, including all nonresidential projects, but certain categories of nonresidential construction, including common interest developments and residential units first sold after Jan. 1, 2003, are subject to more recent legislation affecting the limitations periods for actions involving latent defects [*Code Civ. Proc. §§ 855 et seq.*, *941*, and *1375*].

The four-year maximum period of limitation found in *Code Civ. Proc. § 337.1*, which applies to improvers of real property, does not apply to manufacturers and sellers of products used to improve real property unless the seller or manufacturer has also installed the product [*see* *Nichols v. Swimquip (1985) 171 Cal. App. 3d 216, 220-222, 217 Cal. Rptr. 272]* .

[2] Accrual of Cause of Action

[a] When Act Committed

In tort actions, the statute of limitations generally commences when the last element essential to a cause of action occurs [Cal. Dep't of Toxic Substances Control v. Payless Cleaners (E.D. Cal. Aug. 16, 2007) 2007 U.S. Dist. LEXIS 60703, at *16 ; Universal Paragon Corp. v. Ingersoll-Rand Co. (N.D. Cal. Feb. 13, 2007) 2007 U.S. Dist. LEXIS14530, at *27; *Grisham v. Philip Morris U.S.A., Inc. (2007) 40 Cal. 4th 623, 634, 54 Cal. Rptr. 3d 735, 151 P.3d 1151, 1156* ; *San Francisco Unified Sch. Dist. v. W.R. Grace & Co. (1995) 37 Cal. App. 4th 1318, 1326, 44 Cal. Rptr. 2d 305* ; *City of San Diego v. U.S. Gypsum Co. (1994) 30 Cal. App. 4th 575, 582, 35 Cal. Rptr. 2d 876]* . If the last element of the cause of action to occur is damage, the statute of limitations begins to run on the occurrence of "appreciable and actual harm, however uncertain in amount," that consists of more than nominal damages [*Davies v. Krasna (1975) 14 Cal. 3d 502, 513-514, 121 Cal. Rptr. 705, 535 P.2d 1161* ; *City of San Diego v. U.S. Gypsum Co. (1994) 30 Cal. App. 4th 575, 582-583, 35 Cal. Rptr. 2d 876]* . Once a plaintiff has suffered actual and appreciable harm, neither the speculative nor uncertain character of damages nor the difficulty of proof will toll the period of limitation [*Davies v. Krasna (1975) 14 Cal. 3d 502, 514, 121 Cal. Rptr. 705, 535 P.2d 1161* ; *City of San Diego v. U.S. Gypsum Co. (1994) 30 Cal. App. 4th 575, 583, 35 Cal. Rptr. 2d 876]* . The common law rule that a cause of action accrued on the date of injury has been modified by the discovery rule [*see § 460.31[2][b]*].

One court held that physical injury resulting from asbestos contamination, not the mere presence of asbestos, must have occurred before a cause of action for strict liability or negligence can accrue in asbestos-in-building cases and the limitations period commence [*San Francisco Unified School Dist. v. W.R. Grace & Co. (1995) 37 Cal. App. 4th 1318, 1330, 44 Cal. Rptr. 2d 305* (disagreeing with *City of San Diego v. U.S. Gypsum Co. (1994) 30 Cal. App. 4th 575, 35 Cal. Rptr. 2d 876*); *see also* Cal. Dep't of Toxic Substances Control v. Payless Cleaners (E.D. Cal. Aug. 16, 2007) 2007 U.S. Dist. LEXIS 60703, at *15 (dry cleaning solvents); *County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal. App. 4th 292, 318, 40 Cal. Rptr. 3d 313* (lead paint)].

The fact that an injured plaintiff could not have stated a cause of action when first apprised of the injury and the causation does not alter the general rule, because a subsequent change in the law, either by statute or by case law, does

not revive claims otherwise barred by the statute of limitations [*Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1115-1116, 245 Cal. Rptr. 658, 751 P.2d 923 (DES case)]* .

[b] Exceptions

[i] Injury Causing Subsidence of Land

There are exceptions to the rule discussed in *§ 460.31[2][a]*. For example, in case of injury to real property where the wrong proximately results in the subsidence of land, a new and separate cause of action, and hence a new and separate period of limitation, arises with each new subsidence [*Avner v. Longridge Estates (1969) 272 Cal. App. 2d 607, 616-617, 77 Cal. Rptr. 633]* .

[ii] Discovery Rule

[A] Postponing Accrual of a Cause of Action

The most important exception to the general rule for defining the accrual of a cause of action is the discovery rule, which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action, i.e., until he or she at least suspects or has reason to suspect a factual basis for its elements [*Grisham v. Philip Morris U.S.A., Inc. (2007) 40 Cal. 4th 623, 634, 54 Cal. Rptr. 3d 735, 151 P.3d 1151* ; *Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1109, 245 Cal. Rptr. 658, 751 P.2d 923* ; *Clark v. Baxter Healthcare Corp. (2000) 83 Cal. App. 4th 1048* ; *Rivas v. Safety-Kleen Corp. (2001) 98 Cal. App. 4th 218, 119 Cal. Rptr. 2d 503, 510-511]* . Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that his or her injury was caused by wrongdoing, i.e., that someone has done something wrong to him or her [*Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1110-1111, 245 Cal. Rptr. 658, 751 P.2d 923* ; *see* Universal Paragon Corp. v. Ingersoll-Rand Co., 2007 U.S. Dist. LEXIS 14530 , at *27].

A plaintiff's duty to investigate does not begin until the plaintiff actually has a reason to investigate [*Nelson v. Indevus Pharms., Inc. (2006) 142 Cal. App. 4th 1202, 1206, 48 Cal. Rptr. 3d 668 (Redux)]* . In other words, the suspicion necessary to trigger the statute of limitations may not be imputed to a plaintiff. Information given to the general public through media coverage about the dangers of a product does not trigger the statute of limitations. A plaintiff had no duty to read newspapers and watch television news and otherwise seek out news of a product's dangers [*Nelson v. Indevus Pharms., Inc. (2006) 142 Cal. App. 4th 1202, 1206-1208, 48 Cal. Rptr. 3d 668]* .

[B] Statutory Discovery Rule for Hazardous Substances

In 2003, the California legislature enacted a statutory discovery rule for actions based on injury, illness, or death resulting from exposure to hazardous material or toxic substances. Under the statute, personal injury actions must be commenced no later than either (1) two years after the date of injury or (2) two years after the date that the plaintiff became or reasonably should have become aware of the injury, the physical cause of the injury, and sufficient facts to put a reasonable person on inquiry notice that the injury was caused by the wrongful act of another, whichever occurs later [*Code Civ. Proc. § 340.8(a)*; *see Bonds v. Nicoletti Oil, Inc. (E.D. Cal. May 28, 2008), 2008 U.S. Dist. LEXIS 47054, at *33]* . Wrongful death actions must be commenced no later than either (1) two years after the date of death, or (2) two years after the date that the plaintiff was or reasonably should have become aware of the physical cause of death and sufficient facts to put a reasonable person on inquiry notice that the death was caused by the wrongful act of another, whichever occurs later [*Code Civ. Proc. § 340.8(b)*]. The statute specifically provides that media reports regarding the hazardous material or toxic substance contamination do not, in and of themselves, constitute sufficient facts to put a reasonable person on inquiry notice that the injury or death was caused by the wrongful act of another [*Code Civ. Proc. § 340.8(c)(2)*]. By enacting the statute, the legislature intended to codify the rulings in *Norgart v. Upjohn Co.* [*Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 87 Cal. Rptr. 2d 453, 981 P.2d 79]* , *Jolly v. Eli Lilly & Co.* [*Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 245 Cal. Rptr. 658, 751 P.2d 923]* , and *Clark v. Baxter*

Healthcare Corp. [*Clark v. Baxter Healthcare Corp. (2000) 83 Cal. App. 4th 1048]* . *Code Civ. Proc. § 340.8* is not limited to environmental hazards, but also applies to cases alleging personal injury caused by harmful chemicals [*Nelson v. Indevus Pharms., Inc. (2006) 142 Cal. App. 4th 1202, 1209, 48 Cal. Rptr. 3d 668]* .

[C] Applying Discovery Rule to Separate and Distinct Acts

Application of the discovery rule is particularly thorny when the case involves two or more defendants alleged of committing separate and distinct wrongful acts. This scenario may arise following an unsuccessful surgery, when the plaintiff may at first suspect only the surgeon of malpractice, and only after the statute of limitations has run, learned that the medical device may have been defective.

The California Supreme Court has explored the contours of its discovery rule in a series of products liability cases in which the plaintiffs also suspected the negligence or other wrongful acts of parties other than the products liability defendants. A reading of the cases makes it clear that the court distinguishes between a plaintiff's ignorance of the identity of a particular defendant and the plaintiff's ignorance that a product was the cause of the injury.

In *Jolly v. Eli Lilly & Co.*, the Court held that the discovery rule postpones the accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. A plaintiff discovers a cause of action when the plaintiff at least suspects a factual basis, as opposed to a legal theory, for the elements of that cause of action--that is, the plaintiff at least suspects that someone has done something wrong to him or her [*Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 245 Cal. Rptr. 658, 751 P.2d 923]* .

In *Norgart v. Upjohn Co.*, the Court elaborated on the principles it set forth in *Jolly* to conclude that a drug products liability claim was time-barred. Key to the court's holding was the principle that the discovery rule allows accrual of a cause of action even if the plaintiff does not have reason to suspect the defendant's identity. This is because the identity of the defendant is not an element of a cause of action [*Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 981 P.2d 79]* .

In *Norgart*, the plaintiffs sued the Upjohn Company after their daughter died from an overdose of prescription drugs, including Halcion. Plaintiffs admitted that they suspected something was wrong after her death and investigated causes of he death, including the fact that she had taken Halcion. Within a year after her death, her father suspected that an "individual or individuals" had done something wrong to his daughter that had caused her to take her own life. These individuals included herhusband, who he suspected of physical abuse, and her psychiatrist, whom he suspected of professional negligence. The plaintiffs brought the action exactly six years after their daughter's death. The trial court granted summary judgment in favor of the manufacturer on the ground of the one-year statute of limitations for wrongful death. The First District reversed, holding that when separate and distinct acts or omissions concur in causing an injury, a cause of action does not accrue, and the statute of limitations does not commence with respect to a potential defendant, until the plaintiff suspects or should suspect that the injury was caused by the specific wrongdoing for which that party was liable. California's highest court reversed, holding that the manufacturer was entitled to judgment as a matter of law based on the statute of limitations. The court noted that under the discovery rule, the plaintiffs' wrongful death cause of action accrued when they came to suspect, or had reason to suspect, a factual basis for the cause of action. A plaintiff has reason to suspect when he or she had notice or information of circumstances to put a reasonable person on inquiry. This would have occurred as early as their daughter's death, or shortly after, based on their investigation. The plaintiffs were four or five years late under this exception [*Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 405, 981 P.2d 79]* .

In *Fox v. Ethicon Endo-Surgery, Inc.*, the California Supreme Court was presented with the issue of whether a plaintiff could avail herself of the discovery rule in her medical products liability action even though she had already filed a medical malpractice claim against her surgeon. Distinguishing both *Jolly* and *Norgart*, the court concluded that her claim was not necessarily time-barred. It held that under the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless

the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action. In that situation, the statute of limitations for that cause of action would be tolled until such time as a reasonable investigation would have revealed its factual basis [*Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal. 4th 797, 802-803, 27 Cal. Rptr. 3d 661, 110 P.3d 914]* .

In *Fox,* the plaintiff filed a medical malpractice complaint after her intestine was perforated during surgery. During his deposition the following year, the surgeon first raised the possibility that the perforation was caused by a malfunctioning stapler. The plaintiff then filed a first amended complaint adding the manufacturer of the stapler as a named defendant. The superior court sustained the manufacturer's demurrer to the products liability complaint, concluding that the statute of limitations barred the claim. The court of appeal reversed and remanded with directions to grant the plaintiff leave to amend to allege facts explaining why she did not have reason to discover earlier the factual basis of her products liability claim [*Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal. 4th 797, 802-803, 27 Cal. Rptr. 3d 661, 110 P.3d 914]* .

The Supreme Court affirmed, explaining that to rely on the discovery rule, a potential plaintiff must specifically plead facts to show both (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence. To adequately allege facts supporting a theory of delayed discovery, the plaintiff must plead that despite diligent investigation of the circumstances of the injury, he or she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitation period [*Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal. 4th 797, 807-809, 27 Cal. Rptr. 3d 661, 110 P.3d 914]* . The plaintiff in *Fox* only partially met this requirement by alleging that there was no way "through which her reasonable diligence would have revealed, or through which she would have suspected" the stapler as a cause of her injury until August 13, 2001, the date of the surgeon's deposition. She needed to allege specific facts supporting her allegations. She could have cured this defect by adding to her complaint the allegation that she did not suspect or have reason to discover facts supporting a products liability action against the manufacturer until after deposing her physician [*Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal. 4th 797, 807-809, 27 Cal. Rptr. 3d 661, 110 P.3d 914]* .

In *Fox,* the Court specifically rejected the bright-line test of *Bristol-Myers Squibb v. Superior Court,* which provides that when a plaintiff has cause to sue based on knowledge or suspicion of negligence, the statute of limitations starts to run as to all potential defendants [*Bristol-Myers Squibb Co. v. Superior Court (1995) 32 Cal. App. 4th 959, 966, 38 Cal. Rptr. 2d 298]* . The Court noted that in *Bristol-Myers Squibb,* the court of appeal had failed to make the distinction between a plaintiff's ignorance of the identity of a particular defendant and ignorance that a product was the cause of the plaintiff's injury. The Court reiterated that although ignorance of the identity of the manufacturer is not an essential element of a products liability cause of action and therefore will not delay the running of the statute of limitations, a plaintiff's ignorance of wrongdoing involving a product's defect will usually delay accrual because that wrongdoing is essential to the cause of action [*Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal. 4th 797, 812-814, 27 Cal. Rptr. 3d 661, 110 P.3d 914]* . A diligent plaintiff's investigation may only disclose an action for one type of tort (for example, medical malpractice), and facts supporting an entirely different type of tort action (for example, products liability) may, through no fault of the plaintiff, only come to light at a later date. Therefore, the *Bristol-Myers Squibb* rule that all claims arising from any injury accrue simultaneously, even if based on distinct types of wrongdoing, is inconsistent with the generic elements approach set forth in *Norgart* [*Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal. 4th 797, 814-815, 27 Cal. Rptr. 3d 661, 110 P.3d 914]* .

A few years later, in *Grisham v. Philip Morris U.S.A., Inc.* *[(2007) 40 Cal. 4th 623, 646, 54 Cal. Rptr. 3d 735, 151 P.3d 1151*], the California Supreme Court held that the basic rationale of *Fox*--that the discovery of one cause of action does not necessary mean that plaintiff should have discovered the factual basis for a qualitatively different type of action--was fully applicable in a case where a smoker first claimed economic injury from addiction and later claimed physical injuries. The court clarified that the fact that *Fox*--unlike *Grisham*--involved misconduct by two different defendants was not a basis for its ruling. *Grisham* is discussed in *§ 460.31[2][b][D], below.*

[D] Applying the Discovery Rule in Tobacco Litigation

Tobacco litigation poses particularly complex statute of limitations problems because of the issues of addiction and the substantial public information available regarding the harmful effects of smoking. In *Soliman v. Philip Morris Inc. [(9th Cir. 2002) 311 F.3d 966, 972*], the Ninth Circuit held that a plaintiff who alleged addiction as a distinct injury had constructive knowledge that smoking was addictive and could not invoke the discovery rule. Federal courts in the Ninth Circuit routinely relied on *Soliman* to dismiss tobacco lawsuits, proceeding under the rule that a plaintiff is presumed to be aware that smoking causes addiction and other health problems [*see Grisham v. Philip Morris U.S.A. (9th Cir. 2005) 403 F.3d 631, 637*]. Subsequent California case law addressing fraud in the context of tobacco litigation did not support the reasoning of *Soliman*, and the Ninth Circuit decided to revisit the issue. It certified two questions. The first asked whether for statute of limitations purposes, persons are presumed to have been aware by 1988 that smoking causes addiction and other health problems, and if so, under what circumstances is it rebuttable. The second question asked whether, if a plaintiff seeks damages for addiction, the personal injury action accrues when the plaintiff recognizes that he or she is addicted to tobacco, if the plaintiff has not yet been diagnosed with a tobacco-related injury [*Grisham v. Philip Morris U.S.A. (9th Cir. 2005) 403 F.3d 631, 633*].

The Supreme Court of California answered the question in *Grisham v. Philip Morris U.S.A., Inc. [(2007) 40 Cal. 4th 623, 54 Cal. Rptr. 3d 735, 151 P.3d 1151*]. The court found no basis for a conclusive presumption that a particular smoker was or should have been aware in 1988 that cigarettes were addictive or dangerous [*Grisham v. Philip Morris U.S.A., Inc. (2007) 40 Cal. 4th 623, 636-637, 54 Cal. Rptr. 3d 735, 151 P.3d 1151*]. Because of the tobacco companies' widespread misrepresentations, the court also rejected a special presumption based on common knowledge that plaintiffs are aware that smoking is addictive or harmful. The court did acknowledge a general, rebuttable presumption that plaintiffs have knowledge of the wrongful cause of their injuries. The court specifically rejected *Soliman* to the extent that it held that there is a special presumption based on common knowledge that a plaintiff is aware that smoking is addictive or harmful *[(2007) 40 Cal. 4th 623, 638, 54 Cal. Rptr. 3d 735, 151 P.3d 1151*]. In so doing, the court almost certainly revived tobacco litigation in California.

The court also made it clear that the fact that an unfair competition claim based on *economic* injury from addiction might be time-barred did not mean that plaintiff's other claims based on *physical* injury were also barred In so holding, the court distinguished the statute of limitations from rule against splitting a cause of action, which "is in part a rule of *abatement* and in part a rule of *res judicata*" [*Grisham v. Philip Morris U.S.A., Inc. (2007) 40 Cal. 4th 623, 640-646, 54 Cal. Rptr. 3d 735, 151 P.3d 1151*]. The court did not address whether two different physical injuries arising out of the same wrongdoing can give rise to two separate lawsuits.

Litigants and courts alike continue to wrestle with application of California's discovery rule. In *Pooshs v. Phillip Morris USA, Inc.* [*Pooshs v. Phillip Morris USA, Inc. (9th Cir. 2009) 561 F.3d 964, 967-968]* , the Ninth Circuit certified two questions asking whether (1) two separate physical injuries arising out of the same wrongdoing may be conceived of as invading two different primary rights, and (2) whether two separate physical injuries--both caused by a plaintiff's use of tobacco--may be considered "qualitatively different" for purpose of determining when the statute of limitations begins to run.

[iii] Fraudulent Concealment

The statute of limitations is also tolled by the defendant's fraud in concealing the cause of action so long as the plaintiff has not discovered the claim or, with the exercise of reasonable diligence, should have discovered it [*Braxton-Secret v. A.H. Robins Co. (9th Cir. 1985) 769 F.2d 528, 531-532* ; *Grisham v. Philip Morris U.S.A., Inc. (2007) 40 Cal. 4th 623, 638, 54 Cal. Rptr. 3d 735, 151 P.3d 1151* ; *Bernson v. Browning-Ferris Indus. (1994) 7 Cal. 4th 926, 931, 30 Cal. Rptr. 2d 440, 873 P.2d 613]* . A defendant's fraudulent concealment tolls the statute of limitations only when, as a result of that concealment, the plaintiff fails to discovery some critical fact [*Goldrich v. Natural Y Surgical Specialties (1994) 25 Cal. App. 4th 772, 784, 31 Cal. Rptr. 2d 162* (breast implant)].

[iv] Filing of Class Action

The United States Supreme Court has held that the filing of a class action tolls the applicable statute of limitations [*American Pipe & Constr. Co. v. Utah (1974) 414 U.S. 538, 552-556, 94 S. Ct. 756, 38 L. Ed. 2d 713, 725-728]* . The California Supreme Court declined to "extend" those cases to a mass-tort class action situation presented by a prescription drug litigation case [*Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1122-1124, 245 Cal. Rptr. 658, 751 P.2d 923]* . The court pointed out the two policy considerations underlying the tolling rule: protection of the efficiency and economy of the litigation and protection of defendants from unfair claims. Neither consideration was present in the prescription drug class action complaint [*Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1122-1124, 245 Cal. Rptr. 658, 751 P.2d 923]* . However, the court did not establish a blanket rule against tolling. In a mass construction defect case, the appellate court held that tolling was proper [*Becker v. McMillin Constr. Co. (1991) 226 Cal. App. 3d 1493, 1502, 277 Cal. Rptr. 491]* . The court of appeal subsequently held in a property damage asbestos case that the statute of limitations was tolled until from the commencement of an class action filed in federal court until decertification [*San Francisco Unified School Dist. v. W.R. Grace & Co. (1995) 37 Cal. App. 4th 1318, 1337, 44 Cal. Rptr. 2d 305* (because U.S. Supreme Court is ultimate authority on FRCP, Supreme Court's decisions on class action tolling have force of law if class action was filed in federal court)]. The court also held that a plaintiff who opts out of federal class action is entitled to have the limitations period tolled during the time it was a member of the class [*San Francisco Unified School Dist. v. W.R. Grace & Co. (1995) 37 Cal. App. 4th 1318, 1340, 44 Cal. Rptr. 2d 305]* .

[v] Equitable Tolling

The doctrine of equitable tolling is a rule of procedure adopted by the courts. It operates independently of the Code of Civil Procedure [*Addison v. State (1978) 21 Cal. 3d 313, 318-319, 146 Cal. Rptr. 224, 578 P.2d 941]* . The doctrine of equitable tolling may relieve a plaintiff from the bar of the statute of limitations when, possessing several legal remedies, he or she reasonably and in good faith pursues one designed to lessen the extent of the injuries or damage. Application of the doctrine requires timely notice and lack of prejudice to the defendant, and reasonable and good faith conduct on the part of the plaintiff [*Addison v. State (1978) 21 Cal. 3d 313, 317-319, 146 Cal. Rptr. 224, 578 P.2d 941]* . In *Addison v. State [(1978) 21 Cal. 3d 313, 317-319, 146 Cal. Rptr. 224, 578 P.2d 941]* , the court held that the period for filing a state court suit was tolled while the plaintiff pursued a federal court suit on the same claims against the same defendants. Because the federal action was timely filed, defendants were notified of the action and had the opportunity to begin gathering their evidence and preparing their defense [*Addison v. State (1978) 21 Cal. 3d 313, 319, 146 Cal. Rptr. 224, 578 P.2d 941]* .

Equitable tolling is not available to a plaintiff whose conduct evidences an intent to delay disposition of the case without good cause, or who engages in the procedural tactic of moving the case from one forum to another in the hopes of obtaining more favorable rulings [*Mitchell v. Frank R. Howard Mem'l Hosp. (1992) 6 Cal. App. 4th 1396, 1407-1408, 8 Cal. Rptr. 2d 521*)].

In one case, plaintiffs contended that the doctrine of equitable tolling applied to their action against a manufacturer of hardboard siding because they had previously made a warranty claim to the company and subsequently engaged in continuous negotiations. However, no evidence supported their contention [*Mills v. Forestex Co. (2003) 108 Cal. App. 4th 625, 650-651, 134 Cal. Rptr. 2d 273]* .

In *Lantzy v. Centex Homes (2003) 31 Cal. 4th 363, 383, 2 Cal. Rptr. 3d 655, 73 P.3d 517* , the California Supreme Court concluded that the 10-year period set forth in *Code Civ. Proc. § 337.15* [*see § 460.31[1]*] is not subject to equitable tolling while a potential defendant's promises or attempts to repair the defects are pending. The court held that a broad tolling-for-repairs rule would have contravened the legislature's clear intent to ensure a generous but firm cutoff date for latent-defects suits. The court also held that the homeowners failed to plead facts that would equitably estop the defendant from asserting the limitations period.

[c] Pleading

A plaintiff who commences an action after the period specified by the applicable statute of limitations and who relies on the delayed accrual of the cause of action as noted above must plead facts justifying the delayed accrual. For example, in the case of personal injury discussed above, the complaint must allege both [*G. D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 26, 122 Cal. Rptr. 218]* :

- The time and manner of discovery.
- The circumstances excusing delayed discovery.

[3] Limitation Derived From Other Jurisdiction's Statute of Repose

Another jurisdiction's statute of repose can stop a plaintiff from bringing a products liability action against a manufacturer. For example, a federal statute of repose, the General Aviation Revitalization Act of 1994 (GARA) [*49 U.S.C.S. § 40101*], precludes any civil action against a manufacturer of general aviation aircraft if the part that allegedly caused the accident is more than 18 years old [*see § 460.52[2][e]*].

Statutes of repose of other states may apply to a case because of choice of law rules [*see § 460.104[13]*] or because of California's borrowing statute [*see § 460.104[8a]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProcedureStatutes of LimitationsAccrual of ActionsGeneral OverviewTortsProcedureStatutes of LimitationsAccrual of ActionsDiscovery RuleTortsProcedureStatutes of ReposeProducts LiabilityTortsProducts LiabilityGeneral OverviewTortsProducts LiabilityStrict LiabilityTortsStrict LiabilityGeneral Overview

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Volume 40: Products Liability thru Public Entities and Officers-Chs. 460-469
Chapter 460 PRODUCTS LIABILITY
PART II. LEGAL BACKGROUND
B. Complaints

40-460 California Forms of Pleading and Practice--Annotated § 460.32

§ 460.32 Alternative Theories of Recovery

[1] Pleading Alternative Theories

It is good practice for a plaintiff to plead any and all causes of action against any and all potential defendants who may be liable to plaintiff for plaintiff's injuries. This will avoid the running of the statute of limitations on any such action (as opposed to a count, or alternative theory of recovery) and provide plaintiff with a wider selection of defendants with whom a satisfactory settlement may be negotiated. Such actions or parties may, of course, be dismissed prior to trial.

[2] Alternative Theories Against Retailer, Wholesaler, Distributor, Manufacturer, and Supplier

Potential parties against whom strict liability may be asserted include the retailer, the wholesaler or distributor, and the manufacturer of the defective product, as well as any supplier of the specific defective component part of the product. Alternative theories of liability against these parties which may be pleaded in the complaint as additional causes of action or alternative counts include actions based on negligence, breach of express or implied warranty [*but see Balido v. Improved Mach., Inc. (1972) 29 Cal. App. 3d 633, 640-641, 105 Cal. Rptr. 890 , criticized on another point,* Foglio v. Western Auto Supply (1976) 56 App. 3d 470, 476, *128 Cal. Rptr. 545* (in personal injury actions not involving commerical relationship between manufacturer and injured person, warranty count in action against manufacturer adds nothing to strict liability and negligence counts)], or based on intentional tort, such as fraud [*Henley v. Philip Morris Inc. (2004) 114 Cal. App. 4th 1429, 1467, 9 Cal. Rptr. 3d 29]* . Fraud must be pleaded with specificity, and to withstand a demurrer, the facts constituting every element of fraud must be alleged with particularity [*Cadlo v. Owens-Ill., Inc. (2004) 125 Cal. App. 4th 513, 519, 23 Cal. Rptr. 3d 1 , modified, 2004 Cal. App. LEXIS 2260* ; *Goldrich v. Natural Y Surgical Specialties (1994) 25 Cal. App. 4th 772, 782, 31 Cal. Rptr. 2d 162* (breast implant)].

[3] Pleading Theories of Strict Liability and Negligence

It is not uncommon for a plaintiff in a products liability case to seek recovery from the same person on the theories of both strict liability in tort and negligence and a plaintiff who does so is not required to elect whether to proceed on one theory or the other but may proceed on both [*Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 387, 93 Cal. Rptr. 769, 482 P.2d 681* ; *see Valentine v. Baxter Healthcare Corp. (1999) 68 Cal. App. 4th 1467, 1479, 81 Cal. Rptr.*

2d 252 (negligence was separate and severable from independent causes of action for strict liability and fraud)]. The disadvantage of going to trial on both theories would be to open the door to defendant to introduce extensive evidence relevant to the due care issue of the negligence count showing the great pains taken to design, test, produce, and inspect the product. This evidence might have a negative effect on the trier of fact so far as the plaintiff is concerned. On the other hand, in such case plaintiff would be entitled to a res ipsa loquitur instruction on the negligence count [*see § 460.32[4]*].

Although under *Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 387, 93 Cal. Rptr. 769, 482 P.2d 681* , a plaintiff in a products liability action is not required to elect whether to proceed on a theory of strictliability in tort or on a theory of negligence when the instructions on the two theories will not be confusing to the jury, in a non res ipsa loquitur case when recovery under either theory is dependent on the existence of a manufacturing defect, the court may properly refuse to instruct on negligence and instruct solely on the strict liability theory [*Montez v. Ford Motor Co. (1980) 101 Cal. App. 3d 315, 318-320, 161 Cal. Rptr. 578]* .

In addition to those persons involved in placing the product in or moving it along the stream of commerce, whose liability is based on strict liability in tort, other persons may be liable to plaintiff based on a theory other than strict liability in tort, for example, based solely on negligence theory [*see §§ 460.143, 460.161*].

[4] Res Ipsa Loquitur

If an action is based solely on strict liability in tort, the plaintiff is not entitled to have the jury given a res ipsa loquitur instruction [*see, e.g.,* *Lewis v. American Hoist & Derrick Co. (1971) 20 Cal. App. 3d 570, 579, 97 Cal. Rptr. 798* ; *Tresham v. Ford Motor Co. (1969) 275 Cal. App. 2d 403, 407-408, 79 Cal. Rptr. 883* ; *McCurter v. Norton Co. (1968) 263 Cal. App. 2d 402, 408, 69 Cal. Rptr. 493]* . But, if the case is based on both strict liability and negligence, the plaintiff may be entitled to the instruction on the negligence count [*see* *Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 383-386, 93 Cal. Rptr. 769, 482 P.2d 681* ; *cf.* *Romig v. Goodyear Tire & Rubber Co. (1969) 271 Cal. App. 2d 420, 422, 76 Cal. Rptr. 479* (refusal of instruction not reversible error)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProducts LiabilityGeneral OverviewTortsProducts LiabilityBreach of WarrantyTortsProducts LiabilityManufacturing DefectsTortsProducts LiabilityStrict LiabilityTortsStrict LiabilityGeneral Overview

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§ 460.33 Damages

[1] Effect of Alternative Theories of Recovery

Strict products liability permits recovery of compensatory damages for many forms of personal injury and property damage [*see, e.g., McKinney v. California Portland Cement Co. (2002) 96 Cal. App. 4th 1214, 1227-1229, 117 Cal. Rptr. 2d 849, 858-860* (loss of household services)]. These include damages for physical harm to the plaintiff's property [*Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 19, 45 Cal. Rptr. 17, 403 P.2d 145* ; *Gherna v. Ford Motor Co. (1966) 246 Cal. App. 2d 639, 649, 55 Cal. Rptr. 94]* . In construction defect cases for physical injury to property, cost of repair is the proper measure of damages. Relevant expert fees incurred to formulate a repair plan are recoverable as cost of repair damages [*Stearman v. Centex Homes (2000) 78 Cal. App. 4th 611, 624-625, 92 Cal. Rptr. 2d 761]* . They also include damages for the emotional shock of viewing the injuries caused by the defendant's defective product while being used by plaintiff [*Kately v. Wilkinson (1983) 148 Cal. App. 3d 576, 587, 195 Cal. Rptr. 902* ; *Shepard v. Superior Ct. (1977) 76 Cal. App. 3d 16, 20-21, 142 Cal. Rptr. 612]* . Plaintiffs may also recover damages for medical monitoring expenses [*In re Mattel, Inc. Toy Lead Paint Prods. Liab. Litig. (C.D. Cal. Nov. 24, 2008) 2008 U.S. Dist. LEXIS 104241, at *20* ; *Miranda v. Shell Oil Co. (1993) 17 Cal. App. 4th 1651, 1655-1660, 12 Cal. App. 4th 28, 15 Cal. Rptr. 2d 569, 26 Cal. Rptr. 2d 655]* . The U.S. Supreme Court ruled that a jury hearing a FELA case must be instructed on the standard for fear-of cancer damages [*CSX Transp., Inc. v. Hensley (2009) -- U.S. --, 129 S. Ct. 2139, 2141-2142, 173 L. Ed. 2d 1184]* .

Generally, no recovery is allowed under strict liability for purely economic losses such as lost property, loss of use, or loss of bargain [*see § 460.11[4]*]. Those losses are usually compensable only under a warranty theory [*Rodrigues v. Campbell Indus. (1978) 87 Cal. App. 3d 494, 151 Cal. Rptr. 90* ; *Anthony v. Kelsey-Hayes Co. (1972) 25 Cal. App. 3d 442, 102 Cal. Rptr. 113]* . Economic losses not recoverable in strict liability can include repair cost, replacement cost, loss of profits or diminution of value, if the loss is solely economic, and not due to physical harm to the property [*Collins Dev. Co. v. D. J. Plastering, Inc. (2000) 81 Cal. App. 4th 771, 779, 97 Cal. Rptr. 2d 83]* . For discussion of damages available for breach of warranty, see Ch. 500, *Sales and Secured Transactions* . Recovery of economic losses may also be possible in an action based on negligence if certain requirements regarding the foreseeability of the damages are met [*see Pisano v. Am. Leasing (1983) 146 Cal. App. 3d 194, 197, 194 Cal. Rptr. 77]* . For discussion of

the damages recoverable in a negligence action, see Ch. 380, *Negligence* .

The collateral source rule operates to prevent a defendant from reducing a plaintiff's damages with evidence that the plaintiff received compensation from a source independent of the defendant [*Pacific Gas & Elec. v. Superior Court (1994) 28 Cal. App. 4th 174, 176, 33 Cal. Rptr. 2d 522* ; *McKinney v. California Portland Cement Co. (2002) 96 Cal. App. 4th 1214, 1224-1227, 117 Cal. Rptr. 2d 849, 855-858* (declining defendant's invitation to reconstruct collateral source rule "in reverse" to reduce plaintiff's damages in asbestos case)]. Examples of collateral sources that may not be used to decrease a plaintiff's recovery include medical insurance, pension and disability benefits, and continued wages paid by an employer [*Helfend v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 1, 13-14, 84 Cal. Rptr. 173, 465 P.2d 61]* . The rule is subject to certain exceptions [*see, e.g.,* *Stathos v. Lemich (1963) 213 Cal. App. 2d 52, 56-57, 28 Cal. Rptr. 462]* .

[2] Punitive Damages

[a] Civ. Code § 3294 Provides Statutory Authority

Punitive damages may be awarded in a strict products liability action if the plaintiff can establish the "oppression, fraud, or malice" required under *Civ. Code § 3294*, and that personal injury (or some equivalent egregious injury) occurred [*Gawara v. United States Brass Corp. (1998) 63 Cal. App. 4th 1341, 1360-1363, 74 Cal. Rptr. 2d 663* (award of punitive damages reversed because plaintiffs did not suffer personal injury or any other egregious injury)]. Punitive damages may be awarded in a products liability action if the plaintiff shows that the defendant placed the product on the market in conscious disregard of the safety of consumers and others [*Bethel v. Home Depot U.S.A., Inc. (S.D. Cal. Dec. 4, 2008) 2008 U.S. Dist. LEXIS 98161, at *7* ; *Ehrhardt v. Brunswick, Inc. (1986) 186 Cal. App. 3d 734, 741, 231 Cal. Rptr. 60*]. To establish conscious disregard, the plaintiff must show that the defendant was aware of the probable dangerous consequences of its conduct, and that it willfully and deliberately failed to avoid those consequences [*Bethel v. Home Depot U.S.A., Inc. (S.D. Cal. Dec. 4, 2008) 2008 U.S. Dist. LEXIS 98161, at *7* ; *Hoch v. Allied-Signal (1994) 24 Cal. App. 4th 48, 61, 29 Cal. Rptr. 2d 615*]. Courts generally impose a heightened pleading standard for the recovery of punitive damages under Code Civ. Proc. § 3294 [*see* *Lear v. Louisville Ladder, Inc. (S.D. Cal. Oct. 9, 2007) 2007 U.S. Dist. LEXIS 75007, at *3* ; *Smith v. Superior Court (1992) 10 Cal. App. 4th 1033, 1041-1042, 13 Cal. Rptr. 2d 133*]. Appellate courts conduct de novo review of the amount of a punitive damages award [*Boeken v. Philip Morris Inc. (2005) 127 Cal. App. 4th 1640, 1690, 26 Cal. Rptr. 3d 638]* . For discussion of punitive damages generally, see Ch. 177, *Damages* .

[b] *Grimshaw* Court Adopted Broad View of Punitive Damages

California's view of punitive damages in products liability was set forth in *Grimshaw v. Ford Motor Co.* *[(1981) 119 Cal. App. 3d 757, 174 Cal. Rptr. 348*], a case arising when a Ford Pinto burst into flames when rear-ended by another vehicle. The *Grimshaw* court reasoned that government safety standards and criminal law failed to provide adequate protection against the manufacture and distribution of defective products, leaving punitive damages as the most effective remedy against mass produced articles. The *Grimshaw* court adopted a broad view not only of the *goal* of punitive damages, but also of the *measure* of punitive damages. It noted that an award that is so small that it can be simply written off as a part of the cost of doing business would have no deterrent effect. In subsequent products liability cases, the essential question for the jury, the trial court, and the appellate courts was whether the amount of the award substantially served the public interest in punishment and deterrence. The courts used three criteria for making that determination: (1) the reprehensibility of the defendant's misdeeds; (2) the amount of compensatory damages; and (3) the defendant's financial condition [*Stevens v. Owens-Corning Fiberglas Corp. (1996) 49 Cal. App. 4th 1645, 57 Cal. Rptr. 2d 525* ; *Vossler v. Richards Mfg. Co. (1983) 143 Cal. App. 3d 952, 968-969, 192 Cal. Rptr. 219 , overruled in part,* *Adams v. Murakami (1991) 54 Cal. 3d 105, 115-116, 284 Cal. Rptr. 318*].

[c] U.S. Supreme Court Cases Addressing Constitutionality of Punitive Damages

The U.S. Supreme Court had issued a series of decisions discussing the constitutionality of punitive damages [*Philip Morris USA Inc. v. Williams (2007) 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed.2d 940 , cert. dismissed, 2009 U.S. LEXIS 2493* (vacating and remanding Oregon Supreme Court's affirmance of a $79.5 million punitive damages award, which was approximately 100 times the compensatory damages award, on grounds that the court erred in permitting the jury to consider harm defendant's product caused to non-parties as a factor in their punitive damages calculations; doing so violated *14th Amendment Due Process Clause*); *State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585* (applying *Gore* factors to reverse $145 million punitive damages award in insurance bad faith case arising out of fatal motor vehicle accident); *Cooper v. Leatherman (2001) 532 U.S. 424, 434-436, 121 S. Ct. 1678, 149 L. Ed.2d 674* (courts of appeals should apply de novo standard of review, when passing on courts' determination of whether punitive damages awards are grossly excessive); *BMW of N. Am., Inc. v. Gore (1996) 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809* (setting forth "guideposts" for lower courts to consider when weighing constitutionality of punitive damages award); *Honda Motor Co. v. Oberg (1994) 512 U.S. 415, 114 S. Ct. 2331, 129 L. Ed. 2d 336* (denial of review of punitive damages award violates *Due Process Clause); TXO Prod. Corp. v. Alliance Res. Corp. (1993) 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366]* ($10 million punitive damages award was not so grossly excessive as to violate *Due Process); Pacific Mut. Life Ins. Co. v. Haslip (1991) 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1* (declining to draw mathematical bright line between constitutionally acceptable and unacceptable).

Also, a divided U.S. Supreme Court dealt a blow to punitive damages in its 2008 decision, *Exxon Shipping Co. v. Baker* [*Exxon Shipping Co. v. Baker (2008) -- U.S. --, 128 S. Ct. 2605, 171 L. Ed. 2d 570*]. Unlike the series of cases mentioned in the paragraph above, the Court did not decide *Baker* on constitutional grounds. Instead, it exercised its "federal maritime common law authority" to devise a one-to-one maximum ratio between compensatory and punitive damages. The *Baker* ruling is binding only in maritime cases, but will no doubt be cited in federal and state courts alike by those seeking to impose quantitative limits on punitive damages.

[d] California Appellate Review of Punitive Damages Awards

Soon after the U.S. Supreme Court's series of punitive damages decisions, California appellate courts began grappling with the constitutionality of punitive damages awards. In 2005, the California Supreme Court shed some light on the issue in two cases, neither of which involved products liability. In the first of these cases, *Johnson v. Ford Motor Co.,* the Supreme Court of California addressed the due process considerations of punitive damages awards. The plaintiffs in that case alleged that the defendant concealed an automobile's history of transmission work when reselling the automobile. The jury awarded the plaintiffs $17,811 in compensatory damages and $10 million in punitive damages. The court of appeal held that the defendant could constitutionally be punished only for its fraud on the plaintiffs and not for its overall course of conduct. It reduced the punitive damages award to $53,435, approximately three times the compensatory damages. The Supreme Court reversed, holding that the court of appeal failed to adequately consider that the defendant's conduct was more reprehensible because it was part of a repeated corporate practice, rather than an solated incident. After reviewing the U.S. Supreme Court's analyses in *Gore* and *State Farm,* the Court found that due process does not prohibit state courts, in awarding or reviewing punitive damages, from considering the defendant's wrongful conduct towards others that was similar to the tortious conduct that injured the plaintiff. It accordingly found that a civil defendant's recidivism remains pertinent to an assessment of culpability [*Johnson v. Ford Motor Co. (2005) 35 Cal. 4th 1191, 1196-1204, 29 Cal. Rptr. 3d 401, 113 P.3d 82]* . The Court criticized the approach to punitive damages taken by the court of appeal in *Romo v. Ford Motor Co.,* discussed *below,* as incorrectly suggesting that appellate review must be "blind to the state's interest in punishing and deterring a wrongful corporate practice." The Court found that California's policy of using punitive damages to deter continuation or imitation of a corporation's course of wrongful conduct in fact survived the U.S. Supreme Court cases already discussed. However, the Court disapproved of the plaintiffs' "aggregate disgorgement" theory of punitive damages [*Johnson v. Ford Motor Co. (2005) 35 Cal. 4th 1191, 1206, 29 Cal. Rptr. 3d 401, 113 P.3d 82]* .

In *Johnson's* companion case, *Simon v. San Paolo U.S. Holding Co.,* another non-products liability case, the California Supreme Court pointed out that a court reviewing a punitive damages award for constitutionality must make an

independent assessment of the relationship between the award and the factual circumstances of the case [*Simon v. San Paolo U.S. Holding Co. Inc. (2005) 35 Cal. 4th 1159, 29 Cal. Rptr. 3d 379, 113 P.3d 63]* .

The Fifth Appellate District responded dramatically to the *State Farm* decision, reducing the largest punitive damages judgment ever upheld by California appellate court from $290 million to $23.7 million. In *Romo v. Ford Motor Co. (2003) 113 Cal. App. 4th 738, 6 Cal. Rptr. 3d 793* , plaintiffswere injured and their parents and brother died when the steel and fiberglass portions of their 1978 Ford Bronco's roof collapsed in a rollover. The appellate court initially found that plaintiffs met their burden of establishing that Ford consciously decided not to provide adequate crush protection to properly belted passengers, and that the $290 million punitive damages award was not excessive. Following *State Farm,* the U.S. Supreme Court granted certiorari, vacated the judgment, and remanded the case for reconsideration. The California court interpreted *State Farm* as impliedly disapproving of its broad view of the goal and measure of punitive damages. It explained that the result of *State Farm's* constitutional due process limitation is a punitive damages analysis that focuses primarily on what the defendant did to the present plaintiff, rather than the defendant's wealth or general incorrigibility [*Romo v. Ford Motor Co. (2003) 113 Cal. App. 4th 738, 749, 6 Cal. Rptr. 3d 793]* . As the court read *State Farm,* the legitimate state goal that punitive damages may seek is to condemn conduct that resulted in "outrage and humiliation" to the plaintiffs before the court, not to punish the defendant for everything else it may have done wrong. However, as already discussed, the California Supreme Court has criticized this analysis [*Johnson v. Ford Motor Co. (2005) 35 Cal. 4th 1191, 1206, 29 Cal. Rptr. 3d 401, 113 P.3d 82]* .

The court then explained that under its previous broad view of punitive damages, the $290 million punitive damage award against Ford was justified, but only as a means to actually punish and deter an entire course of conduct that harmed not only the plaintiffs, but potentially thousands of others. But *State Farm* made it clear that the permissible punishment is for the harm inflicted on the present plaintiffs.

After discussing *State Farm's* amplification of the three *Gore* factors, the court applied the opinion as part of its review of the punitive damages award. It concluded that the jury was incorrectly instructed that it could consider the amount of punitive damages which would have a deterrent effect on the defendant in light of defendant's financial condition. The court emphasized that the instructions must not invite the jury to impose damages sufficient to punish and deter all conduct of the type directed towards these plaintiffs. Although evidence concerning a defendant's financial condition is not inappropriate under *State Farm,* it must be used only to determine the appropriate punishment for the present malicious conduct.

The court next turned to the issue of constitutional excessiveness in light of *State Farm.* The reprehensibility factor weighed heavily in favor of substantial punitive damages. As for the "reasonable relationship" factor, the court noted that there was no award whatsoever reflecting the "outrage" to the deceased family members themselves. The court concluded that the third *Gore* factor--comparable civil and criminal punishments--required neither a higher nor lower ratio between the compensatory and punitive damages.

In conclusion, the court concluded that the extreme reprehensibility of defendant's actions and the under-compensation of plaintiff's individual losses outweighed the punitive element already contained to some extent in the individual compensatory damages award. As a result, the court determined that a punitive damages award of triple the compensatory award to the individual plaintiffs of $4,574,429--or $13,723,287--would be constitutionally reasonable. A punitive damages award to the estate of each deceased parent of $5,000,000 was constitutionally reasonable. The overall punitive damages award--$23,723,287--was about five times the total compensatory damages award.

Several months before the California Supreme Court issued its opinion in *Johnson v. Ford Motor Co.,* the Second Appellate District also issued an opinion on punitive damages. In that case, the jury awarded a smoker $5,539,127 in compensatory damages and $3 billion in punitive damages. The trial court reduced the punitive damages award to $100 million. The court of appeal initially reduced that award to $50 million. On rehearing, after extensive evaluation of the federal and state standards for review of punitive damages, the court affirmed the $50 million award. In making its

determination, the court pointed out that the plaintiff's injuries were physical, as opposed to merely economic, that he was physically and psychologically vulnerable, that the defendant knew it was manufacturing a dangerous product, and in fact added chemicals to it to make it more addictive. Moreover, the defendant continued its conduct for nearly half a century with indifference to the safety of others [*Boeken v. Philip Morris Inc. (2005) 127 Cal. App. 4th 1640, 1692, 26 Cal. Rptr. 3d 638]* .

As for the ratio of compensatory to punitive damages, the court interpreted *State Farm* as being instructive, not binding [*Boeken v. Philip Morris Inc. (2005) 127 Cal. App. 4th 1640, 1695-1696, 26 Cal. Rptr. 3d 638]* . The court next examined the defendant's wealth and accepted the trial court's finding of the defendant's value as between $30 and $35 million [*Boeken v. Philip Morris Inc. (2005) 127 Cal. App. 4th 1640, 1697, 26 Cal. Rptr. 3d 638]* . The court then found no analogous civil or criminal penalties against which to measure the award of punitive damages. Applying the law to the facts, the court found that the defendant's 40 years' of fraud and continuing conscious disregard for the safety of consumers to be "exceptionally extreme." At the same time, it acknowledged that the compensatory damages award of over $5 million was significant. The court took into consideration previous punitive damages awards imposed against the defendant, as well as the possibility of future awards in cases with identical issues. The court concluded that more than a single digit multiplier was not justified, but that the extreme reprehensibility of defendant's conduct justified a ratio of at least 9 to 1 [*Boeken v. Philip Morris Inc. (2005) 127 Cal. App. 4th 1640*]. The Supreme Court of California denied the parties' petition for review [*Boeken v. Philip Morris (Cal. Aug. 10, 2005) 2005 Cal. LEXIS 8780]* . The U.S. Supreme Court also denied the petition for writ of certiorari [*Boeken v. Philip Morris (2006) 547 U.S. 1018, 126 S. Ct. 1567, 164 L. Ed. 2d 297]* . Philip Morris then paid $82 million including interest to the plaintiff [TobaccoDocuments.org, Tobacco Documents Online, http://tobaccodocuments.org/profiles/litigation/boeken.html]. The smoker's widow and son subsequently filed a wrongful death suit against Philip Morris.

The constitutional concerns addressed in the U.S. Supreme Court cases continue to shape California punitive damages law. In *Ford Motor Co. v. Buell-Wilson* [*Ford Motor Co. v. Buell-Wilson (2007) 127 S. Ct. 2250, 167 L. Ed. 2d 1087*], a Ford Explorer rollover case, the U.S. Supreme Court vacated a judgment of the Fourth Appellate District, Division One, which had reduced a remitted $75 million punitive damages award to $55 million, a two-to-one ratio to the compensatory damages award. The court remanded the case for further consideration in light of *Philip Morris USA v. Williams* [*Philip Morris USA v. Williams (2007) 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940 , cert. denied, 2009 U.S. LEXIS 2493*]. On remand, the California appellate court concluded that *Williams* did not require it to reverse or further reduce the punitive damages award. The court concluded that the manufacturer forfeited its right to argue that there was a significant risk the punitive damages verdict was based on improper evidence and arguments concerning third-party harm. The court also concluded that its original decision reduced the punitive damages award to a constitutionally permissible amount [*Buell-Wilson v. Ford Motor Co. (2008) 160 Cal. App. 4th 1107, 1119-1120, 73 Cal. Rptr. 3d 277 , review granted and depublished, 80 Cal. Rptr. 3d 27, 187 P.3d 887*]. The Supreme Court initially granted review and depublished the case, but ultimately dismissed review and remanded the case back to the court of appeal after the U.S. Supreme Court dismissed the writ of certiorari in the *Williams* case [*Buell-Wilson (Benetta) v. Ford Motor Co. (2009) 93 Cal. Rptr. 3d 536, 207 P.3d 1]* . The U.S. Supreme Court then denied the auto manufacturer's petition for review [*Ford Motor Co. v. Buell-Wilson (2009) -- U.S. --, 175 L. Ed. 2d 515]* . However, the court of appeal decision upholding the constitutionality of the $55 million punitive damages award remains unpublished. In *Bullock v. Philip Morris USA, Inc., [(2006) 48 Cal. Rptr. 3d 365, 141 P.3d 718]* , another cigarette case, the supreme court depublished and granted review of decision affirming a $28 million punitive damages award, an amount 33 times greater than the compensatory damages award. The court agreed to defer further action pending the U.S. Supreme Court's decision in *Philip Morris USA v. Williams* (2006) - U.S. -, *126 S. Ct. 2329, 164 L. Ed. 2d 838]* . The court ultimately transferred the case back to the court of appeal with directions to vacate its decision and reconsider the matter in light of *Williams* [*Bullock v. Philip Morris USA, Inc. (2007) 59 Cal. Rptr. 3d 441, 159 P.3d 33*]. On remand, the appellate court concluded that the refusal to give the cigarette manufacturer's proposed instruction not to impose punishment for harm caused to nonparties to the litigation constituted prejudicial error. The court ordered a new trial to determine the amount of punitive damages [*Bullock v. Philip Morris USA, Inc. (2008) 159 Cal. App. 4th 655, 693-694, 71 Cal. Rptr. 3d 775*].

Under *Civ. Code § 3294.5*, effective August 16, 2004 [Stats 2004, ch. 227 § 8.5], 75 percent of any punitive damages awarded by final judgment must be deposited in a state fund, to be appropriated for public purposes. However, the statute was repealed on July 1, 2006, due to a sunset provision that the statute contained. The California Supreme Court has noted that the enactment appears to confirm that punitive damages are imposed to address a public, not merely a private, wrong [*Johnson v. Ford Motor Co. (2005) 35 Cal. 4th 1191, 29 Cal. Rptr. 3d 401, 113 P.3d 82]* . However, the legislature declared in the text of the statute itself that *Civ. Code § 3294.5* "shall not be construed or interpreted in any way to establish any policy ... regarding the award of punitive damages" [*Civ. Code § 3294.5(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesGeneral OverviewTortsDamagesPunitive DamagesGeneral OverviewTortsProducts LiabilityGeneral OverviewTortsProducts LiabilityStrict LiabilityTortsStrict LiabilityGeneral Overview

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40-460 California Forms of Pleading and Practice--Annotated § 460.34

§ 460.34 Burden of Proof

[1] Plaintiff

Under *Evid. Code § 500*, "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief ... that he is asserting." Hence, plaintiff, in an action based on strict liability in tort, has the burden of presenting evidence that will establish the essential elements of the cause of action. That is, plaintiff has the burden of proving that defendant sold or was somehow responsible for the product's being in the commercial stream by which it reached public use, that defendant knew or intended that the product would be used without inspection for defects, that, at the time it left defendant's hands, it contained a defect in manufacture or design that rendered it unsafe for its intended purpose (or required special instructions or warning as to its use because of a known or knowable danger [*see §§ 460.164* -469.168] and that the instructions or warning were not given or if given were inadequate), and that plaintiff or plaintiff's property was injured as a proximate result of the defect while the product was being used in a way it was intended to be used [*see Miller v. Los Angeles County Flood Control Dist. (1973) 8 Cal. 3d 689, 704, 106 Cal. Rptr. 1, 505 P.2d 193* ; *Foglio v. Western Auto Supply (1976) 56 Cal. App. 3d 470, 474, 128 Cal. Rptr. 545]* . Plaintiff also has the burden of establishing damages, that is, the amount of money necessary to compensate plaintiff for his, her, or its injuries [*see Civ. Code §§ 3281-3283*].

Proof beyond a reasonable doubt is not required. Rather, plaintiff need only introduce evidence that affords a reasonable basis for the conclusion that it is more likely that plaintiff's injury was caused by defendant than that it was not [*Grinnell v. Charles Pfizer & Co. (1969) 274 Cal. App. 2d 424, 435, 79 Cal. Rptr. 369]* .

For further discussion of the elements of a cause of action and proof requirements, see *§ 460.11*.

[2] Market-Share Theory Actions

In an action brought under the market-share theory of liability (in which all the manufacturers of a substantial portion of the appropriate markethave been joined as defendants), each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product that caused plaintiff's injuries [*Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 612, 163 Cal. Rptr. 132, 607 P.2d 924]* .

Once plaintiff has met the burden of joining the required defendants, the defendants in turn may cross complain against other manufacturers not joined in the action that they can allege might have supplied the injury-causing product [*Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 612, 163 Cal. Rptr. 132, 607 P.2d 924]* . The market-share theory is discussed in more detail in the General Introduction under § 460.11[7].

[3] Jury Instructions

The court must instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact or that the party establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt [*Evid. Code § 502*].

Effective September 1, 2003, the official instructions for use in California are contained in the Judicial Council of California Civil Jury Instructions (LexisNexis/Matthew Bender, Official Publisher), commonly referred to as CACI. The California Rules of Court strongly encourage use of the Judicial Council instructions and recommend that a judge use an applicable Judicial Council instruction unless he or she finds that a different instruction would more accurately state the law and be understood by jurors [*Cal. Rules of Ct., Rule 2.1050*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofAllocationTortsProducts LiabilityGeneral OverviewTortsProducts LiabilityStrict LiabilityTortsStrict LiabilityGeneral Overview

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[Reserved]

§§ 460.35[Reserved]

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40-460 California Forms of Pleading and Practice--Annotated § 460.50

§ 460.50 Answer

When the complaint is not verified, and in limited civil cases whether or not the complaint is verified, the defendant may file an answer denying generally all the allegations of the complaint [*see Code Civ. Proc. § 431.30(d)* (subject to exception for limited civil cases when action is claim assigned to a third party for collection and complaint is verified, in which case answer must be verified)]. When, however, the complaint is verified, the denial of allegations must be made positively or according to the information and belief of the defendant [*see Code Civ. Proc. §§ 431.20(a), 590(1)*].

For example, a defendant foreign corporation will usually admit, by failure to deny [*see Code Civ. Proc. § 431.20(a)*], its corporate status, that it is qualified to do business in California, and that its principal place of business in this state is in a particular county [*see Code Civ. Proc. § 395.5*; *Corp. Code § 2105*]. It will usually admit, again by failure to deny, that it manufactured the product in question and that the product was intended to be used by members of the general public. A defendant manufacturer, whether or not a corporation, that did not directly sell or lease the product to the purchaser or lessee might deny on lack of information and belief[*see Code Civ. Proc. § 431.30(e)*] that a particular party bought or leased the product or was using the product in contemplation of purchasing it or otherwise. When the product has not been actually sold or leased to someone, the defendant manufacturer might deny that it has placed that particular product on the market for sale or lease to members of the general public. The defendant manufacturer will usually deny [*see Code Civ. Proc. § 431.30(b)(1), (f)*] that the particular product contained a defect and that the defect was the proximate cause of plaintiff's injuries. It will probably deny on lack of information and belief allegations of general or special damages suffered by the plaintiff.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewTortsProducts LiabilityGeneral OverviewTortsProducts LiabilityStrict LiabilityTortsStrict LiabilityGeneral Overview

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40-460 California Forms of Pleading and Practice--Annotated § 460.51

§ 460.51 Pleading and Proof Responses to Strict Liability Action

If the complaint states a cause of action and is not barred by the statute of limitations, counsel for the defendant will usually defend a strict liability action on one or more of the following grounds:

- The product was not being used in the way it was intended to be used at the time of the accident.
- The product was altered after it left defendant's hands and the defect was a result of the alteration.
- Plaintiff was aware of the defect and the danger of using the product in its defective condition and hence assumed the risk of injury.
- The cause of action is federally preempted.
- Plaintiff has not met his, her, or its burden of proof on the essential ultimate facts necessary to prove a strict liability action.
- Plaintiff has not proved the injuries or damages allegedly suffered.

The first four grounds would be put in issue by affirmative defenses in the answer [*see § 460.52*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewTortsProducts LiabilityGeneral OverviewTortsProducts LiabilityStrict LiabilityTortsStrict LiabilityGeneral Overview

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40-460 California Forms of Pleading and Practice--Annotated § 460.52

§ 460.52 Affirmative Defenses

[1] General Rule

The answer, in addition to admissions and denials [*see* the discussion in *§ 460.50*], may set forth one or more affirmative defenses to the complaint [*see Code Civ. Proc. §§ 431.20(b), 431.30(b)(2)*] which, if established, will bar recovery by the plaintiff notwithstanding the fact that the allegations of the complaint may be true. Common affirmative defenses include the following:

- The action is barred by the statute of limitations [*see §§ 460.31, 460.181*] or another jurisdiction's statute of repose [*see § 460.31[3]*].

- The cause of action is federally preempted [*see § 460.52[2]*].

- Plaintiff's comparative fault [*see § 460.182*].

- The proximate cause of plaintiff's injuries was the misuse of the product [*see § 460.183*].

- The defect resulted from an alteration in the product by the purchaser or other person after it left defendant's hands [*see § 460.184*].

- That a manufacturer of a product distributed in bulk is not liable to a consumer based on inadequate warning regarding the safe use of the product if the manufacturer adequately warned the distributor [*see § 460.185*].

A defendant may also raise as an affirmative defense the claim that it is immune from liability as a government contractor supplying military equipment [*see § 460.187*].

The uniqueness of a purchaser's order of a product is not a defense to a products liability action [*Wright v. Stang Mfg.*

Co. (1997) 54 Cal. App. 4th 1218, 1229, 63 Cal. Rptr. 2d 422 (issues of fact existed on whether or not deck gun was defectively designed)].

Each affirmative defense alleged in an answer must refer to the specific cause of action or count it is intended to answer if the complaint alleges more than one cause of action or count, and if the answer contains more than one such affirmative defense, each must be separately stated [*Code Civ. Proc. § 431.30(g)*] and numbered [*Cal. Rules of Ct., Rule 2.112* (unlimited civil case)].

[2] Federal Preemption

[a] Overview

Federal preemption is a defense to a state products liability action grounded in the Supremacy Clause of the United States Constitution, which requires dismissal of a state claim when it has been "preempted" by federal law [*O'Neal v. Smithkline Beecham Corp. (E.D. Cal. 2008) 551 F. Supp. 2d 993, 1002* ; *Williamson v. Mazda Motor of Am., Inc. (2008) 167 Cal. App. 4th 905, 910, 84 Cal. Rptr. 3d 545 , modified and reh'g denied, 2008 Cal. App. LEXIS 2269* ; *McKenney v. Purepac Pharm. Co. (2008) 167 Cal. App. 4th 72, 79, 83 Cal. Rptr. 3d 810 , review denied, 2009 Cal. LEXIS 679 (Jan. 14, 2009)* ; *Blanco v. Baxter Healthcare Corp. (2008) 158 Cal. App. 4th 1039, 2008 Cal. App. LEXIS 34, at *12* ; *Steele v. Collagen Corp (1997) 54 Cal. App. 4th 1474, 1478, 63 Cal. Rptr. 2d 879* ; *citing Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407]* .

Federal preemption can arise in three different contexts: (1) express preemption, i.e., where Congress explicitly defined the extent to which its enactments preempt state law; (2) field preemption, i.e., where state law attempts to regulate conduct in a field that Congress intended the federal law to occupy exclusively; and (3) conflict preemption, i.e., where it is impossible to comply with both federal and state requirements, or where state law poses an obstacle to the execution of the full objectives of Congress [Industrial Truck Ass'n v. Henry (9th Cir. 1997) *125 F.3d 1305, 1309 (OSHA)* ; *Gaeta v. Perrigo Pharms. Co. (N.D. Cal. 2008) 562 F. Supp. 2d 1091, 1095* ; *In re Mattel, Inc. Toy Lead Paint Prods. Liab. Litig. (C.D. Cal. Nov. 24, 2008) 2008 U.S. Dist. LEXIS 104241, at *16* ; O'Neal v. Smithkline Beecham Corp. (E.D. Cal. 2008) *551 F. Supp. 2d 993, 1002 (Paxil)* ; *Jasso v. Citizens Telcoms. Co. of Cal., Inc. (E.D. Cal. July 30, 2007) 2007 U.S. Dist. LEXIS 54866, at *13-*14* (FCC's RF radiation regulatory scheme); *Williamson v. Mazda Motor of Am., Inc. (2008) 167 Cal. App. 4th 905, 910, 84 Cal. Rptr. 3d 545 , modified and reh'g denied, 2008 Cal. App. LEXIS 2269* ; *McKenney v. Purepac Pharm. Co. (2008) 167 Cal. App. 4th 72, 79-80, 83 Cal. Rptr. 3d 810 , review denied, 2009 Cal. LEXIS 679 (Jan. 14, 2009)* ; *In re Tobacco Cases II (2007) 41 Cal. 4th 1257, 1265, 63 Cal. Rptr. 3d 418, 163 P.3d 106* ; *Frastaci v. Vapor Corp. (Dec. 21, 2007) 2007 Cal. App. LEXIS 2147, at *4-*5* (locomotives); *Jessen v. Mentor Corp. (Jan. 16, 2008) 2008 Cal. App. LEXIS 61, at *10, n.5* (testicular prosthesis)]. Regulations promulgated pursuant to federal statutory authority have the same preemptive effect as federal statutes [*Fidelity Fed. Savings & Loan Ass'n v. de la Cuesta (1982) 458 U.S. 141, 153, 102 S. Ct. 3014, 73 L. Ed. 2d 664* ; O'Neal v. Smithkline Beecham Corp. (E.D. Cal. 2008) *551 F. Supp. 2d 993 (Paxil)* ; *Williamson v. Mazda Motor of Am., Inc. (2008) 167 Cal. App. 4th 905, 910, 84 Cal. Rptr. 3d 545 , modified and reh'g denied, 2008 Cal. App. LEXIS 2269* ; *McKenney v. Purepac Pharm. Co. (2008) 167 Cal. App. 4th 72, 80, 83 Cal. Rptr. 3d 810 , review denied, 2009 Cal. LEXIS 679 (Jan. 14, 2009)*].

To prevail on the federal preemption defense, the defendant must overcome the presumption that federal statutes do not supersede the historic police powers of the states unless Congress has the "clear and manifest" intent to do so [*Medtronic, Inc. v. Lohr (1996) 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700* ; *Williamson v. Mazda Motor of Am., Inc. (2008) 167 Cal. App. 4th 905, 910, 84 Cal. Rptr. 3d 545 , modified and reh'g denied, 2008 Cal. App. LEXIS 2269]* . This presumption supports a narrow interpretation of the preemption defense [*McKenney v. Purepac Pharm. Co. (2008) 167 Cal. App. 4th 72, 80, 83 Cal. Rptr. 3d 810 , review denied, 2009 Cal. LEXIS 679 (Jan. 14, 2009)* ; Ketchum v. Hyundai Motor Co. *(1996) 49 Cal. App. 4th 1672, 1678, 57 Cal. Rptr. 2d 595]* . Congressional intent is discerned from the the language, structure and purpose of the federal statute at issue, revealed not only in its text, but

also through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to operate [*Medtronic, Inc. v. Lohr (1996) 518 U.S. 470, 485-486, 116 S. Ct. 2240, 135 L. Ed. 2d 700* ; *see also Ketchum v. Hyundai Motor Co. (1996) 49 Cal. App. 4th 1672, 1676, 57 Cal. Rptr. 2d 595* (design defect based on seat belt design in compliance with federal standards was not preempted by the National Traffic and Motor Vehicle Safety Act); *see also Carrillo v. ACF Industries, Inc. (1999) 20 Cal. 4th 1158, 980 P.2d 386* (Federal Safety Appliance Act reflected congressional intentto regulate railroad safety appliances, thus precluding state law tort claims based on design defects)]. If Congress intends to occupy an entire field of regulation, such as locomotive equipment, then the federal standards must displace all state requirements, notwithstanding a lack of conflict between that standard and state law [*Scheiding v. General Motors Corp. (2000) 22 Cal. 4th 471, 475, 93 Cal. Rptr. 2d 342, 993 P.2d 996]* .

Moreover, when Congress includes an express preemption provision in a statute, a court may not look beyond it to consider implied preemption [Blanco v. Baxter Healthcare Corp . *(2008) 158 Cal. App. 4th 1039, 2008 Cal. App. LEXIS 34, at *12-*13*].

The affirmative defense of federal preemption, or "ordinary preemption," is distinct from the issue of "complete preemption." Complete preemption involves the issue of determining whether a case should be removed from state court. Complete preemption permits removal of state claims when "a federal statute *wholly displaces the state-law cause of action.*" The defense of federal preemption, in contrast, results in dismissal of state claims on the merits [*Jasso v. Citizens Telcoms. Co. of Cal., Inc. (E.D. Cal. Jan. 9, 2007) 2007 U.S. Dist. LEXIS 4771, at *30-*31)*].

[b] Medical Devices

[i] Class III Devices Present Preemption Issue

A brief overview of the Medical Device Amendments (MDA) to the Food, Drug and Cosmetic Act is required to understand federal preemption of medical devices.

The MDA categorizes devices into three separate classes. Class I devices are those which present no unreasonable risk of illness or injury and are subject only to regulation by "general controls" [*21 U.S.C.S. § 360c(a)(1)(A)*]. Class II devices are potentially more harmful than class I devices, but may be marked without advance approval by the FDA if they comply with federal performance regulations called "special controls" [*21 U.S.C.S. 360c(a)(1)(B)*]. Class III devices are those which "present a potential unreasonable risk of illness or injury," or which are "purported or represented to be for use in supporting or sustaining human life or for a use which is of substantial importance in preventing impairment of human health" [*21 U.S.C.S. § 360c(a)(1)(C)*].

Class III devices pose a special problem. To market a device, the manufacturer must give the FDA "reasonable assurance" that the device is both safe and effective [*21 U.S.C.S. § 360e(d)(2)*]. This procedure is called "premarket approval" (PMA) and is a "rigorous" process. Many Class III devices on the market, however, have not received PMA approval because of three exceptions to the PMA process. The first exception is a "grandfathering" provision for pre-1976 devices which remain on the market until the FDA completes the premarket approval process [*21 U.S.C.S. § 360e(b)(1)(A)*]. The second exception is a provision allowing Class III devices which are "substantially equivalent" to preexisting devices, grandfathered or otherwise, to avoid MPA until such time as the FDA completes the premarket approval process [*21 U.S.C.S. § 360e(b)(1)(B)*]. The final exception is the investigational device exemption (IDE), under which a device may be tested on humans without premarket approval [*21 U.S.C.S. § 360e(a)*].

[ii] *Medtronic, Inc. v. Lohr*: No Preemption of "Substantially Equivalent" Devices

In *Medtronics, Inc. v. Lohr*, the United States Supreme Court held that claims alleging the negligent design of a pacemaker (a regulated medical device) were not preempted under the MDA because the pacemaker fell under the

"substantially equivalent" exception described in the paragraph above [*Medtronic, Inc. v. Lohr (1996) 518 U.S. 470, 492-494, 116 S. Ct. 2240, 135 L. Ed. 2d 700]* . Negligent-manufacture and failure-to-warn claims also were not preempted [*Medtronic, Inc. v. Lohr (1996) 518 U.S.470, 494-502, 116 S. Ct. 2240, 135 L. Ed. 2d 700]* . *Medtronics* does not resolve all preemption questions because the pacemaker had only proceeded through FDCA's § 510(k) "substantially equivalency" process. *Medtronics* left open the question of whether the more specific requirements imposed by more demanding procedures--such as the PMA process--will insulate medical devices from common law claims.

[iii] *Riegel v. Metronic, Inc.*: Preemption of Claims Alleging Defective PMA-Approved Devices

As a result of the Supreme Court's fractured decision in *Medtronics*, there developed a substantial split in authority regarding whether the MDA preempts state products liability lawsuits over medical devices which have received PMA approval. The majority of federal circuits to have addressed the issue held that the PMA process results in preemption [*see* L. Frumer & M. Friedman, Products Liability, Ch. 24 (Matthew Bender)]. In 2008, in *Riegel v. Medtronic, Inc.[(Feb. 20, 2008) 2008 U.S. LEXIS 2013, at *17-*29]* , the U.S. Supreme Court resolved the issue, holding that the MDA's preemption clause bars common law claims challenging the safety or effectiveness of a medical device given FDA premarket approval. The case involved a balloon catheter that burst after being inserted in the decedent. The plaintiffs brought a products liability action, raising several common law claims under New York law. In ruling that the claims were preempted, the Court first set out to determine whether the federal government established requirements applicable to the catheter, because the MDA expressly preempts only state requirements "different from, or in addition to, any requirement applicable ... to the device" under federal law [*21 U.S.C.S. § 360k(a)*]. The Court found that unlike the § 510(k) process analyzed in *Lohr*, premarket approval does impose "requirements" under the MDA. The Court then addressed whether the plaintiffs' common law claims relied upon "any requirement" of New York law applicable to the catheter that was "different from, or in addition to" federal requirements and that related "to the safety or effectiveness of the device included in a requirement applicable to the device" [*21 U.S.C.S. § 360k(a)*]. Again, the Court answered in the affirmative. It adhered to its view set forth in previous preemption cases that common-law causes of action for negligence and strict liability *do* impose "requirements."

The *Riegel* Court left open the possibility that certain state-law claims will not be preempted, pointing out that "§ 360k does not prevent a State from providing a damages remedy for claims premised on a violation of FDA regulations; the state duties in such a case 'parallel,' rather than add to, federal requirements" [*Riegel v. Medtronic, Inc. (2008) 552 U.S. 312, 128 S. Ct. 999, 169 L. Ed. 2d 892]* . The *Riegel* Court did not further discuss the term "parallel," and courts across the country, predictably, have not been consistent in interpreting the term. As of 2010, one court within the federal Court of Appeals for the Ninth Circuit has taken on the issue [*Prudhel v. Endologix, Inc. (E.D. Cal. July 9, 2009) 2009 U.S. Dist. LEXIS 64402]* . The district court first addressed the scope of the MDA's preemption provision. It determined that an express warranty claim was preempted to the extent that the manufacturer represented that the device was safe within the meaning of the MDA but that the plaintiffs sought to impose liability on the ground that it was unsafe under California law [*Prudhel v. Endologix, Inc. (E.D. Cal. July 9, 2009) 2009 U.S. Dist. LEXIS 64402, at *11-*17]* . The court next addressed what constitutes a parallel claim under *Riegel*. Declining to follow the restrictive approach followed by other courts, it held that a state-law claim that requires more than mere compliance with federal requirements (e.g., that the violation of federal requirements was reckless or unreasonable) may constitute a permissible parallel claim [*Prudhel v. Endologix, Inc. (E.D. Cal. July 9, 2009) 2009 U.S. Dist. LEXIS 64402, at *17-*24]* . Only the plaintiff's strict liability manufacturing defect claim survived the court's preemption analysis.

[iv] Preemption and PMA-Approved Devices in Ninth Circuit Pre-*Riegel*

Pre-*Riegel*, federal courts within the Ninth Circuit adopted the majority approach to preemption [*Carson v. Depuy Spine, Inc. (C.D. Cal. 2007) 2007 U.S. Dist. LEXIS 48378, at *18-*19* (MDA preempted claims based on negligent design and warning, warranty, and strict liability, but not claim that disc replacement had manufacturing defect); *Morton v. Centerpulse Orthopedics, Inc. (E.D. Cal. 2005) 2005 U.S. Dist. LEXIS 45329* ; *Gilleon v. Medtronic USA,*

*Inc. (N.D. Cal. 2002) 2002 U.S. Dist. LEXIS 20154, at *4-*5*].

One federal court concluded that the Product Development Protocol P) approval process is as rigorous as the PMA process, and preempted common law tort claims that imposed a different standard from those imposed by the FDA requirements [*Clement v. Kaiser Found. Health Plan, Inc. (Dec. 17, 2004) 2004 U.S. Dist. LEXIS 26414, at *13-*17* (MDA preempted claims relating to design, manufacture, labeling, and warnings regarding pacemakers and leads, but not intentional tort claims or claims alleging negligence for failing to following FDA regulations)]. Note that one pre-*Riegel* court had concluded that the PMA process does not constitute or create specific FDA requirements applicable to a particular device and thus cannot be used to preempt state law causes of action [*Notmeyer v. Stryker Corp. (N.D. Cal. 2007) 502 F. Supp. 2d 1051, 1057*]. This holding does not survive *Riegel, above.*

[v] California Judiciary's Approach to Preemption of MDA-Approved Devices

California courts of appeal have also addressed whether the MDA preempts state law causes of action involving Class III medical devices. A few months after the U.S. Supreme Court issued *Medtronic,* Division One of the Second Appellate District ruled against preemption. In *Armstrong v. Optical Radiation Corp.* [*Armstrong v. Optical Radiation Corp. (1996) 50 Cal. App. 4th 580, 57 Cal. Rptr. 2d 763*], a case involving intraocular fluid, the court determined that the state law requirements imposed by the negligence claim were "requirements of general applicability ... that escapepreemption." This holding does not survive *Riegel, above*.

The Third Appellate District then expounded on the concept of federal preemption in *Steel v. Collagen Corp.* [*Steele v. Collagen Corp. (1997) 54 Cal. App. 4th 1474, 63 Cal. Rptr. 2d 879*]. The court took issue with the *Armstrong* court's holding that a state common law tort cause of action does not seek to impose state requirements specific to the product. The *Steel* court specifically stated that common law standards of care and behavior impose state requirements that may be preempted if they are different to or in addition to the specific federal requirements arising from the PMA process. The court was unable to determine on the facts before it whether the medical produce Zyderm was designed, manufactured, and labeled according to the FDA-approved specifications.

Division Three of the Fourth Appellate Department then followed suit and determined in *Blanco v. Baxter Healthcare Corp. [(2008) 158 Cal. App. 4th 1039, 2008 Cal. App. LEXIS 34, at *25-*27*] that PMA approval for a heart valve was a device-specific federal requirement that could preempt any conflicting state requirement. The court then set out to determine whether there were any state requirements that conflicted with the device-specific federal requirements. Examining the allegations made under each of plaintiff's causes of action as well as his statement of facts and supporting evidence, the court determined that his negligence and strict liability claims were preempted.

Division Seven of the Second Appellate District was the next to take on the issue. In *Jessen v. Mentor Corp. [(Jan. 16, 2008) 2008 Cal. App. LEXIS 61, at *17-*23)*], the court agreed with the *Steel* court that state common law tort actions relating to the safety or effectiveness of PMA-approved devices are preempted. It determined that the manufacturer met its burden of proving that its testicular implant was designed, manufactured, and labeled according to FDA specifications. The plaintiff' claims alleging that the prosthesis was defective because it lacked a warning on the outer packaging that the device had to be filled with saline prior to implantation were thus preempted.

[vi] Preemption of Claims Involving Class II Devices

Tampons are Class II devices. The Ninth Circuit has held that device- and disease-specific FDA regulations preempted failure-to-warn claims when the defendant's warning labels tracked the language of the federal regulation almost verbatim [*Papike v. Tambrands Inc. (9th Cir. 1997) 107 F.3d 737, 743* (case involved tampons and toxic shock syndrome)].

[vii] *Buckman v. Plaintiffs' Legal Comm.*: Fraud-on-the-FDA Claims Are Preempted

In the late 1990's, thousands of plaintiffs across the country brought fraud-on-the-FDA cases against bone screw device manufacturers, claiming that the FDA would not have approved the screws had defendants not made fraudulent representations regarding their intended use. Appellate courts issued conflicting opinions as to the preemptive effect of the FDCA on these claims. In 2001, in *Buckman v. Plaintiffs' Legal Comm. (2001) 531 U.S. 341, 121 S. Ct. 1012, 148 L. Ed. 2d 854, 862-864* , the U.S. Supreme Court held that plaintiffs' state law fraud-on-the-FDA claims conflicted with, and were therefore impliedly preempted by, the FDCA as amended by the MDA.

[c] Drugs

[i] Prescription Drugs

Federal preemption--in particular preemption of claims involving prescription drugs--has been a hot topic in the new millennium. On March 4, 2009, the U.S. Supreme Court issued *Wyeth v. Levine* [*Wyeth v. Levine (2009) -- U.S. --, 129 S. Ct. 1187, 173 L. Ed. 2d 51]* , its highly awaited opinion addressing federal preemption in the context of prescription drugs. The majority held in its 6-3 opinion that FDA approval of a drug's label does not provide a complete defense to failure-to-warn claims. There are three key elements to the ruling:

- It was not impossible for the drug manufacturer to comply with both its state and federal law obligations regarding drug labeling.

- Plaintiff's state-law failure-to warn claims did not stand as an obstacle to the accomplishment of Congress' purpose in the FDCA.

- The FDA's Preemption Preamble to its 2006 Final Rule was not entitled to deference [*Wyeth v. Levine (2009) -- U.S. --, 129 S. Ct. 1187, 173 L. Ed. 2d 51]* .

Levine began when the plaintiff received an injection of the anti-nausea drug Phenergan as part of her migraine treatment. The drug was injected directly into her vein through the "IV-push" method. It entered her artery, causing gangrene and resulting in the amputation her entire forearm. She brought a claim against the manufacturer, alleging that the label was defective because it did not instruct practitioners to use the IV-drip method of intravenous administration rather than the higher risk IV-push method. The Phenergan label did warn of the danger of gangrene and amputation following inadvertent intra-arterial injection.

The jury found in favor of the plaintiff and awarded her more than $7 million in damages. The trial court denied Wyeth's motion for judgment n.o.v., rejecting the manufacturer's preemption arguments. The Vermont Supreme Court affirmed. The state court ruled that federal labeling requirements created a floor, not a ceiling, for state regulation, and that conflict preemption did not bar the plaintiff's claims. The U.S. Supreme Court granted Wyeth's petition for certiorari [*Wyeth v. Levine (2008) 552 U.S. 1161, 128 S. Ct. 1118, 169 L. Ed. 2d 845]* .

Justice Stevens delivered the opinion of the Court, which Justices Kennedy, Souter, Ginsburg, and Breyer joined. Before beginning its analysis, the Court identified two legal principles that guided its analysis: the "purpose of Congress" as the ultimate touchstone in every preemption case, and its recognition of the presumption against preemption.

The Court then turned to Wyeth's first argument: that it would have been impossible to comply with the state-law duty to modify labeling without violating federal law. This argument failed, because FDA's "change being effected" (CBE) regulation *does* permit a manufacturer to make certain changes to its label before receiving FDA approval of its supplemental application [*21 C.F.R. § 314.70*(c)(6)(iii)(A), (C)]. The manufacturer's contention that the CBE regulation was not implicated because a 2008 amendment allows the manufacturer only to change its label "to reflect newly

acquired information" [*73 Fed. Reg. 49603, 49609]* was also unsuccessful. Wyeth could have revised the Phenergan label even under the amended regulation, because "newly acquired information" includes "new analyses of previously submitted data" [*73 Fed. Reg. 49604]* . Wyeth could have analyzed the accumulating data from the 20-plus incidents of amputation resulting from Phenergan over the years, and added a stronger warning about IV-push administration of the drug.

The Court rejected the manufacturer's argument that unilaterally adding a stronger warning about IV-push administration would have subjected it to liability for unauthorized distribution. The Court identified a fundamental misunderstanding at the core of Wyeth's argument: that the FDA bears the primary responsibility for the content of a drug's label at all times. To the contrary, numerous amendments to the FDCA and FDA regulations make it clear that ultimate responsibility for a drug's labeling rests with the manufacturer. When the risk of gangrene from IV-push injection became apparent, Wyeth had a duty to adequately warn of that risk, and the CBE regulation permitted it to provide that warning before receiving FDA's approval. In short, absent clear evidence that FDA would not have approved such a change--and Wyeth did not offer any--it was not impossible for the drug manufacturer to comply with both federal and state requirements [*Wyeth v. Levine (2009) -- U.S. --, 129 S. Ct. 1187, 1196-1199, 173 L. Ed. 2d 51]* .

The Court next rejected Wyeth's "purposes and objectives" preemption argument: that requiring it to comply with a state-law duty to provide a stronger warning would interfere with Congress' purpose to entrust FDA to make drug labeling decision. The Court construed the evidence of "Congress' purposes" as actually supporting the opposite point of view: that FDCA establishes only a floor for drug regulation. Had Congress believed that state-law suits posed an obstacle to its objectives, it would have enacted an express preemption provision at some point in the statute's 70-year history. The majority viewed Congress' "silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation," as strong evidence that the legislature did *not* intend FDA oversight to be the exclusive means of ensuring drug safety [*Wyeth v. Levine (2009) -- U.S. --, 129 S. Ct. 1187, 1199-1200, 173 L. Ed. 2d 51]* .

The Court put to rest the contention that the Preemption Preamble to a 2006 FDA regulation [*71 Fed. Reg. 3922]*-- in which the agency declared that its approval of labeling preempts conflicting state law--is entitled to deference. The majority clarified that agencies have no inherent authority to pronounce on preemption. The weight accorded to an agency's view on the issue depends on "its thoroughness, consistency, and persuasiveness." Under this standard, the 2006 Preemption Preamble did not merit deference. The Court criticized the agency's failure to comply with notice-and-comment requirements when it finalized its rule in 2006. Moreover, the FDA's position in 2006 contradicted evidence of Congress' purpose, and reversed the agency's own long-standing position regarding state tort law as a complementary form of drug regulation [*Wyeth v. Levine (2009) -- U.S. --, 129 S. Ct. 1187, 1200-1203, 173 L. Ed. 2d 51]* .

Finally, the Court distinguished the regulatory scheme regarding passive restraint devices in its "no-airbag" case, *Geier v. American Honda Motor Co.* [*Geier v. American Honda Motor Co. (2000) 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914]* . While acknowledging that some state-law claims might frustrate the achievement of Congress's purposes in the FDCA, the one at issue in this case was not one of them. In the end, the Court concluded that the plaintiff's state-law failure-to-warn claim was not preempted.

Justice Breyer wrote a one-paragraph concurring opinion. He pointed out that certain specific FDA regulations could have a preemptive effect, for example, one describing when labeling requirements serve as a ceiling as well as a floor [*Wyeth v. Levine (2009) -- U.S. --, 129 S. Ct. 1187, 1204, 173 L. Ed. 2d 51]* . Justice Thomas penned a lengthy, separate opinion, concurring only in the majority's judgment [*Wyeth v. Levine (2009) -- U.S. -- 129 S. Ct. 1187, 1204-1217, 173 L. Ed. 2d 51]* . Justice Alito wrote the dissenting opinion, joined by Chief Justice Roberts and Justice Scalia [*Wyeth v. Levine, (2009) -- U.S. -- 129 S. Ct. 1187, 1217-1231, 173 L. Ed. 2d 51]* .

The *Levine* decision signals that state court lawsuits against the pharmaceutical industry will continue, despite the Bush administration's efforts to shut them down. Particularly telling was the majority's criticism of the FDA for abandoning

its long-held view that state law provides an additional and important complementary form of drug regulation.

Even before the *Levine* decision, California courts had held that FDA regulations as to design and warning standards are minimum standards which do not preempt state law defective design and failure to warn claims with respect to prescription drugs [*Carlin v. Superior Court (1996)13 Cal. 4th 1104, 1113, 920 P.2d 1347 (Halcion)]* . Compliance with an FDA regulation may establish that the manufacturer met the appropriate minimum standards of due care, but does not necessarily absolve the manufacturers of all liability [*Motus v. Pfizer, Inc. (C.D. Cal. 2000) 127 F. Supp. 2d 1085, 1096-1100]* .

A handful of courts from other states found support for preemption of common law claims in a document published by the FDA on January 24, 2006 [Requirements on Content and Format of Labeling for Human Prescription Drugs and Biological Products], known as the Preemption Preamble to the Final Rule. California courts were not swayed by this logic. In *McKenney v. Purepac Pharm. Co.* [*McKenney v. Purepac Pharm. Co. (2008) 167 Cal. App. 4th 72, 82-84, 83 Cal. Rptr. 3d 810* , *review denied, 2009 Cal. LEXIS 679 (Jan. 14, 2009)]* , the court rejected a generic drug manufacturer's argument that the plaintiff's failure-to-warn claim was barred by conflict preemption. The court concluded that the federal requirement that a generic drug have the same labeling as a listed drug *[57 Fed. Reg. 17950, 17961 (Apr. 28, 1992)]* does not necessarily result in federal preemption of state failure-to-warn claim against generic manufacturers. The court pointed out that the FDA mechanism for compelling labeling revisions applies to both new and generic drugs, and saw no reason to distinguish between the two types of drugs for preemption purposes. The court found that nothing in the post-*Carlin* (see paragraph above) environment mandates the conclusion that generic drug manufacturers are exempt from strict products liability because they must obtain FDA approval before making label changes. Nor did the FDA's January 24, 2006, statements convince the court that preemption was warranted (as discussed above, the U.S. Supreme Court itself held that the 2006 Preemption Preamble was not entitled to deference [*Wyeth v. Levine (2009) -- U.S. -- 129 S. Ct. 1187, 1200-1203, 173 L. Ed. 2d 51]*).

In *O'Neal v. Smithkline Beecham Corp. (E.D. Cal. 2008) 551 F. Supp. 2d 993, 1003-1009* , the federal court from the Eastern District of California found that conflict preemption barred claims that Paxil should have included a warning of suicidality in pediatric patients. The court found that a direct conflict of law existed because the manufacturer could not have been in compliance with federal law at the time the decedent attempted suicide and have included the suicidality warning insisted on by the plaintiffs. The court explicitly stated that in reaching its decision, it did *not* rely on the *FDA's Preemption Preamble [(E.D. Cal. 2008) 551 F. Supp. 2d 993, 1004]* . This decision should not be cited as authority in light of the Supreme Court's no-preemption case, *Wyeth v. Levine*, discussed above.

On March 3, 2008, in a 4-4 split, the U.S. Supreme Court affirmed a Second Circuit ruling that federal law did not preempt common law claims brought under the fraud exception to Michigan's drug immunity statute [Mich. Comp. Laws § 600.2946(5)]. The case, *Warner-Lambert Co. v. Kent* [*Warner-Lambert Co. v. Kent (2008) 552 U.S. 440, 128 S. Ct. 1168, 170 L. Ed. 2d 51*], consisted of a one-sentence ruling. The Second Circuit had distinguished *Buckman Co. v. Plaintiffs' Legal Comm. (2001) 531 U.S. 341, 348, 121 S. Ct. 1012, 148 L. Ed. 2d 854* , in which the U.S. high Court had found that federal law impliedly preempted "fraud on the FDA" claims against a medical device manufacturer. The Second Circuit had identified three critical differences between the claims in *Buckman* and the claims in *Kent* that warranted a separate preemption analysis [*Desiano v. Warner-Lambert & Co. (2d Cir. 2006) 467 F.3d 85, 93-97*].

While clearly a victory for the plaintiffs involved, *Kent* is of minimal precedential value because it involves Michigan's unique drug immunity statute.

[ii] Over-the-Counter Drugs

Common law claims regarding over-the-counter drugs, in contrast, are generally preempted by the FDCA [*see, e.g., Gaeta v. Perrigo Pharms. Co. (N.D. Cal. 2008) 562 F. Supp. 2d 1091, 1097* (generic OTC ibuprofen drug); *Kanter v.*

Warner-Lambert Co. (2002) 99 Cal. App. 4th 780, 790-795, 122 Cal. Rptr. 2d 72 (*21 U.S.C.S. § 379r(a)* preempted claims alleging that labels to over-the-counter drugs for treatment of head lice contained false and misleading statements about effectiveness of drugs)]. In 1997, Congress passed the National Uniformity for Non-prescription Drugs and Preemption for Labeling or Packaging of Cosmetics [*21 U.S.C.S. § 379r(a)(2)*], which contains an express preemption provision. The statute states that except as otherwise provided, no state or its subdivision may establish or continue in effect any requirement that relates to regulation of a drug that is "different from or in addition to, or that is otherwise not identical with, a requirement under the FDA." The statute contains a savings clause, providing that nothing in the section shall be construed as modifying or otherwise affecting any action or the liability of any person under the product liability law of any state [*21 U.S.C.S. § 379r(e)*].

This savings clause was designed specifically to preserve California's Proposition 65. The California Supreme Court has ruled that the savings clause does not entirely exclude conflict preemption, and that notwithstanding language in the savings clause for Proposition 65 in the preemption clause for over-the-counter drugs, the federal requirement prevails when the warning mandated by California law directly conflicts with the one required by the FDA. In *Dowhal*, the plaintiff filed a suit against distributors of a nicotine replacement therapy (NRT) product alleging violation of Proposition 65 [*Health & Safety Code § 25249.6*], requiring warnings that chemicals cause reproductive toxicity. The FDA refused to allow the defendant to use Proposition 65's warning, and instead mandated less broad language. The FDA had sent plaintiff a letter rejecting his proposed "can harm your baby" warning and proposed that all nicotine replacement products bear uniform warnings advising pregnant women to consult their health care provider and try to stop smoking without using a NRT product. The court explained that the FDA ruling reflected its concern that the Proposition 65 warning might discourage pregnant women from stopping smoking. It concluded that the letter established a federal policy prohibiting defendants from giving consumers any warning other than the one approved by the FDA, and that use of a Proposition 65 warning would conflict with that policy. Even though it is probably true that nicotine in defendant's products can cause reproductive harm, the FDA has authority to prohibit truthful statements on a product label if they are misleading [*Dowhal v. SmithKline Beecham Consumer Healthcare (2004) 32 Cal. 4th 910, 920-921, 12 Cal. Rptr. 3d 262, 88 P.3d 1]* .

As discussed in *§ 460.52[2][c][i], above*, the U.S. Supreme Court ruled in *Wyeth v. Levine [(2009) -- U.S. --, 129 S. Ct. 1187, 173 L. Ed. 2d 51]* that federal law does not preempt failure-to-warn claims involving preemption drugs. A few months before the *Levine* decision was issued, the federal district court for the Northern District of California had concluded that failure-to-warn claims involving an over-the-counter generic drug were preempted [*Gaeta v. Perrigo Pharms. Co. (N.D. Cal. 2008) 562 F. Supp. 2d 1091, 1097]* . The court subsequently denied the plaintiffs' motion for reconsideration in light of *Wyeth v. Levine*. *Levine* did not require the court to reverse its earlier ruling because the U.S. Supreme Court's decision did not address whether a *generic* manufacturer may use the FDA's "changes being effected" (CBE) process to unilaterally change its warning label [*Gaeta v. Perrigo Pharms. Co. (N.D. Cal. Nov. 24, 2009) 2009 U.S. Dist. LEXIS 115752]* .

[d] Air Bags and Other Automotive Components

The federal preemption of passive restraint and air bag claims under the National Traffic and Motor Vehicle Safety Act of 1966 [*15 U.S.C.S. § 1381 et seq.* ("the Safety Act")] has been an unsettled area of the law. In a case involving another aspect of the Safety Act, the United States Supreme Court held that federal regulations do not expressly preempt state tort claims concerning defective tractor trailers and anti-lock brakes [*Freightliner Corp. v. Myrick (1995) 514 U.S. 280, 286-287, 115 S. Ct. 1483, 131 L. Ed. 2d 385]* . An air bag case held, however, that federal vehicle standards did preempt state common law tort actions against an automobile manufacturer alleging design defects based on a failure to install air bags [*see* *Nissan Motor Corp. v. Superior Court (1989) 212 Cal. App. 3d 980, 982-983, 261 Cal. Rptr. 80]* . On the other hand, a subsequent case, relying on *Medtronic*, held that federal law did not preempt a cause of action against an automobile manufacturer alleging a design defect based on seat belt design that complied with federal standards [*Ketchum v. Hyundai Motor Co. (1996) 49 Cal. App. 4th 1672, 57 Cal. Rptr. 2d 595]* . The federal statute at issue provided that "compliance with any federal motor vehicle safety standard issued under this subchapter does not

exempt any person from any liability under common law" [*Ketchum v. Hyundai Motor Co. (1996) 49 Cal. App. 4th 1672, 1679, 57 Cal. Rptr. 2d 595 , abrogated in part as stated in Williamson v. Mazda Motor of Am., Inc. (2008) 167 Cal. App. 4th 905, 913-914, 84 Cal. Rptr. 3d 545* citing *15 U.S.C.S. § 1397(k)* (holding that federal statute only specified minimum standards)].

However, in 2000, the issue of federal preemption in relation to air bags appears to have been settled. Affirming the decision of the D.C. Court of Appeals, the United States Supreme Court held that a personal injury action alleging that a manufacturer was negligent in failing to equip a 1987 automobile with driver's side air bag was preempted [*Geier v. American Honda Motor Co. (2000) 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914]* .

Courts have subsequently interpreted *Geier* in considering the preemptive effect of the Safety Act on common law claims involving other automotive components [*see, e.g., Kent v. Daimlerchrysler Corp. (N.D. Cal. 2002) 200 F. Supp. 2d 1208, 1214-1216* (allegation that 1995-1999 Jeep Grand Cherokees sometimes self-shift from park to reverse was not preempted by Safety Act); *Williamson v. Mazda Motor of Am., Inc. (2008) 167 Cal. App. 4th 905, 912-919, 84 Cal. Rptr. 3d 545 , modified and reh'g denied, 2008 Cal. App. LEXIS 2269* (claim that 1993 Mazda MPV minivan was defective because middle row inboard seat only had a lap belt was preempted)].

[e] General Aviation Aircraft

The General Aviation Revitalization Act of 1994 (GARA) [*49 U.S.C.S. § 40101*] contains a statute of repose precluding any civil action against a manufacturer of general aviation aircraft if the part that allegedly caused the accident is more than 18 years old [GARA §§ 2(a), 3(3)]. The federal statute defines "general aviation aircraft" as any aircraft for which an airworthiness certificate has been issued, which has a maximum capacity of fewer than 20 passengers, and which is not, at the time of the accident,engaged in scheduled passenger-carrying operations [GARA § 2(c)]. GARA expressly preempts state law [GARA § 2(d)].

In *Burroughs v. Precision Airmotive Corp. (2000) 78 Cal. App. 4th 681, 699* , the plaintiff claimed that an aircraft's carburetor, which was manufactured 27 years before the crash, was defective. GARA's statute of repose barred his products liability claims against the successor to the carburetor manufacturer.

GARA contains a "rolling" feature, which extends the limitation period with respect to any new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft, and which is alleged to have caused death, injury, or damage [GARA § 2(a)(2); *see Lyon v. Agusta S.P.A. (9th Cir. 2001) 252 F.3d 1078, 1088* (plaintiff's argument that failure to warn about newly perceived problem amounted to "replacement of component part" within meaning of GARA § 2(a)(2) was without merit); *Caldwell v. Enstrom Helicopter Corp. (9th Cir. 2000) 230 F.3d 1155, 1156-1157* (revised flight manual is new "system ... . or other part" of helicopter within meaning of GARA)]. One appellate court held that the new 18-year limitation period begins to run only with respect to a new specific part shown to be a cause of the accident, and that plaintiff thus had to prove that a cause of the crash was a defect in one of the pieces in the retrofit kit to the helicopter's fuel transfer system. Because the item causing the damage must be a *replacement* item, replacement of a few parts of a larger system does not start the rolling limitation period anew for all parts in the larger system [*Hiser v. Bell Helicopter Textron Inc. (2003) 111 Cal. App. 4th 640, 648-650, 4 Cal. Rptr. 3d 249]* .

The Ninth Circuit concluded that GARA applies to all actions that had not already been commenced on its effective date of August 17, 1994 [*Lyon v. Agusta S.P.A. (9th Cir. 2001) 252 F.3d 1078, 1085*].

GARA contains an exception if the claimant proves that the manufacturer knowingly misrepresented to the FAA or concealed or withheld from the FAA "required information" material to the maintenance or operation of the aircraft or part that is causally related to the harm [GARA § 2(b)(1)]. One appellate court concluded that the exception applied in a case where there was evidence that the helicopter manufacturer, within the period of repose, withheld information from

the FAA about five military aircraft accidents caused by failure of tail rotor yokes. The court explicitly found that the manufacturer had an affirmative duty to report the failures pursuant to FAA regulations [*Butler v. Bell Helicopter Textron, Inc. (2003) 109 Cal. App. 4th 1073, 135 Cal. Rptr. 2d 762, 770]* .

[f] Locomotives and Other Railroad Appliances

Federal railroad regulations, on the other hand, have been held to preempt state products liability actions. The Locomotive Boiler Inspection Act [*49 U.S.C.S. § 20701*] (BIA) imposes an absolute duty on railroad carriers to ensure that their locomotives are properly maintained and safe to operate [*Frastaci v. Vapor Corp. (Dec. 21, 2007) 2007 Cal. App. LEXIS 2147, at *7*]. The U.S. Supreme Court concluded early on that BIA occupies the field of locomotive equipment, precluding all state claims within that field [*Napier v. Atlantic Coast Line R.R. Co. (1926) 272 U.S. 605, 606-607, 47 S. Ct. 207, 71 L. Ed. 432*]. BIA does not contain a preemption clause. Nevertheless, in *Law v. General Motors Corp. [(9th Cir. 1997) 114 F.3d 908, 910-912*], the Ninth Circuit concluded that BIA preempted state law claims against railroad manufacturers alleging that locomotive brakes and engines were defectively designed in that they subjected workers to excessive noise. The court rejected the plaintiffs' contention that the claims were not preempted because BIA refers only to "railroad carriers" and not "manufacturers." Nor did preemption leave the plaintiffs without a remedy, because they could recover for their occupational injuries from their employer under the Federal Employers' Liability Act [*45 U.S.C.S. § 51 et seq.*]

The California Supreme Court endorsed the 9th Circuit's approach to federal preemption in railroad litigation. In *Scheiding v. General Motors Corp. (2000) 22 Cal. 4th 471, 483, 93 Cal. Rptr. 2d 343, 993 P.2d 996* , it held that a products liability claim brought by former railroad employees against General Motors, the manufacturer, for asbestos related injuries was preempted under the Locomotive Boiler Inspection Act (BIA) *49 U.S.C.S. § 20701 et seq.* [*Scheiding v. General Motors Corp. (2000) 22 Cal. 4th 471, 475, 93 Cal. Rptr. 2d 342, 993 P.2d 996]* . The Court held that because the BIA extends to the design, the construction and the material of every part of the locomotive and all its appurtenances, Congress intended the BIA to occupy this field. It would be contrary to Congress' purpose of uniform national regulation to allow the states to reoccupy fields from which they had previously been displaced. The Court affirmed the appellate court's dismissal of the plaintiffs' claims [*Scheiding v. General Motors Corp. (2000) 22 Cal. 4th 471, 473, 93 Cal. Rptr. 2d 342, 993 P.2d 996]* . The court reasoned that BIA cannot remove the design, construction, and material of every part of the locomotive from the purview of state regulation without also precluding tort actions premised on a defect in the design, construction, or material. Moreover, to leave regulation in the hands of juries would undermine the uniformity that Congress sought to establish through BIA. The Supreme Court also rejected the contention that BIA does not apply to locomotive manufacturers [*Scheiding v. General Motors Corp. (2000) 22 Cal. 4th 471, 483, 93 Cal. Rptr. 2d 342, 993 P.2d 996*].

In *Frastaci v. Vapor Corp. [(Dec. 21, 2007) 2007 Cal. App. LEXIS 2147, at *16*] the court held that *Scheiding* forecloses design defect claims against locomotive manufacturers, regardless of whether the locomotive was "in use" or off line in roundhouses and repair shops when the injury occurred. The case involved a locomotive repairman who died of mesothelioma from asbestos exposure. The fact that the Federal Employers' Liability Act [*45 U.S.C.S. § 51 et seq.*] requires a locomotive to be "in use" at the time of injury before BIA applies did not change the court's analysis. Nor was it persuaded that the presumption against preemption should apply. Citing the principles set forth in *Napier, above,* the court was unwilling to "second-guess Congress's decision to require national uniformity in the field of railroad safety" [*Frastaci v. Vapor Corp. [(Dec. 21, 2007) 2007 Cal. App. LEXIS 2147, at *26*].

The Federal Safety Appliance Act (SAA) [*49 U.S.C.S. § 20301 et seq.*] does not have an explicit preemption provision, but courts have found that the statute occupies the field of legislation related to rail cars with safety appliances to such a degree that field preemption applies [*Southern Ry. Co. v. R.R. Comm., Ind. (1915) 236 U.S. 439, 447, 35 S. Ct. 304, 59 L. Ed. 661* ; *Miller v. S. Pac. R.R. (E.D. Cal. Sept. 7, 2007) 2007 U.S. Dist. LEXIS 66314, at *14*]. In *Carrillo v. ACF Industries, Inc. (1999) 20 Cal. 4th 1158, 1168-1169, 980 P.2d 386* , the California Supreme Court held that the SAA preempted a strict liability design claim against a railcar manufacturer alleging that walkways on a hopper car's

roof hatches were unsafe. The court found that the SAA and its regulations specifying safety equipment on railroad freight cars reflect the congressional intent to occupy the field regulating safety appliances.

The Federal Railroad Safety Act (FRSA) contains an express preemption provision relating to railroad safety and security [*49 U.S.C.S. § 20106*]. This provision contains a savings clause recognizing that state regulation is permitted 1) in areas not already covered by federal regulations, and 2) when state laws are required to address local safety hazards, are compatible with federal law, and do not burden state commerce [*49 U.S.C.S. § 20106*].

In Miller v. S. Pac. R.R. *[(E.D. Cal. Sept. 7, 2007) 2007 U.S. Dist. LEXIS 66314, at *14-*17*], the FRSA and SAA preempted a negligence claim alleging design defects of a railroad car's operating platform. The high level of federal regulation of the platforms' walking surface leaves no room for state common law theories to regulate the subject.

In Haynes v. AMTRAK *(C.D. Cal. 2006) 423 F. Supp. 2d 1073, 1079-1081* , a federal court concluded that there are no federal safety regulations subsuming California tort actions regarding the potential of deep vein thrombosis (DVT) from poorly designed seats or seating configurations. Nor are there any regulations regarding the duty to warn passengers about DVT. Despite the absence of preemption under the FRSA, the court nevertheless found that state laws regarding seats and seating configurations were unduly burdensome on interstate commerce and the passenger train industry and were preempted by the *Commerce Clause*. The duty to warn passengers of the dangers of DVT, in contrast, was not unduly burdensome on commerce and not preempted [Haynes v. AMTRAK [*Haynes v. AMTRAK (C.D. Cal. 2006) 423 F. Supp. 2d 1073, 1083-1084*]. The court also concluded that the federal Amtrak Act [*49 U.S.C.S. § 24301 et seq.*] did not preempt the California common law claims alleging dangerous seating configurations and failure to warn passengers about DVT. The Amtrak Act's express preemption clause relates to state laws "related to rates, routes, or services" [*49 U.S.C.S. § 24301(g)*]. Federal case law has made it clear that a state law does not relate to prices unless it "acts immediately and exclusively upon price," or unless the existence of a price is essential to the law's operation. Although plaintiffs' claims, if successful, could result in higher costs leading to higher rates, they did not work to regulate Amtrak's rates directly. A provision of the Act requiring Amtrak to maintain a minimum amount of liability insurance to handle passengers' claims [*49 U.S.C.S. § 28103(c)*] was further evidence that Congress did not intend to preempt all state tort law claims against Amtrak [*Haynes v. AMTRAK (C.D. Cal. 2006) 423 F. Supp. 2d 1073, 1079-1081*].

[g] Pesticides

Provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), *7 U.S.C.S. § 136v(b)*, expressly prohibit states from imposing "any requirements for labeling or packaging in addition to or different from those required under" the Act. In 2005, the U.S. Supreme Court at long last addressing the scope of FIFRA preemption of state law claims regarding pesticides in *Bates v. Dow Agrosciences LLC* [*Bates v. Dow Agrosciences L.L.C. (2005) 544 U.S. 431, 125 S. Ct. 1788, 161 L. Ed. 2d 687]* . *Bates* was the latest in the Court's string of decisions addressing federal preemption of common law claims, beginning with its 1992 decision in *Cipollone v. Liggett Group, Inc.* [*Cipollone v. Liggett Group, Inc.(1992) 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407* ; *see § 460.52[2][i]*]. State and federal courts have been wrestling with the issue of preemption of pesticide-related claims since *Cipollone*, and whether the *Bates* decision clarifies the issue or raises more questions remains to be seen.

In a nutshell, *Bates* held that for a particular state rule to be preempted by FIFRA's preemption clause, it must first satisfy two conditions. First, it must be a requirement for labeling or packaging. Second, it must impose a labeling or packaging requirement that is in addition to or different from those required under FIFRA. A state-law labeling requirement is not preempted by § 136v(b) if it is equivalent to, and fully consistent with, FIFRA's misbranding provisions [*Bates v. Dow Agrosciences L.L.C. (2005) 544 U.S. 431, 125 S. Ct. 1788, 161 L. Ed. 2d 687, 703]* . As discussed below, the *Bates* decision definitely limits the preemptive reach of FIFRA.

Bates was initiated by 29 Texas peanut farmers who alleged that the defendant's pesticide "Strongarm" severely

damaged their crops. Strongarm's label stated, "Use of Strongarm is recommended in all areas where peanuts are grown." When the farmers applied Strongarm on soils with pH levels of 7.2 or higher, as is typical in western Texas, the pesticide severely damaged their peanut crops. The farmers gave the defendant notice of their intent to bring suit, alleging that the defendant knew or should have known that Strongarm would stunt the growth of peanuts in soils with pH levels of 7.0 or greater. The defendant filed a declaratory judgment action contending that FIFRA expressly or impliedly preempted the claims. The plaintiffs counterclaimed, asserting several state law claims. The federal district court granted the defendant's motion for summary judgment, rejecting one claim on state law grounds and dismissing the remainder as expressly preempted by *7 U.S.C.S. § 136v(b)*, and the Fifth Circuit affirmed. It read § 136v(b) as preempting any state law claim in which "a judgment against [the defendant] would induce it to alter its product label." This decision was consistent with a majority of the federal courts of appeals, but conflicted with the decisions of other courts and with the views of the EPA. The U.S. Supreme Court granted certiorari to resolve the conflict [*Bates v. Dow Agrosciences L.L.C. (2005) 544 U.S. 431, 125 S. Ct. 1788, 161 L. Ed. 2d 687, 698-699]* .

In a 7-2 majority opinion written by Justice Stevens, the U.S. Supreme Court vacated the decision and remanded. The opinion began by providing the history of regulatory control over the distribution of poisonous substances, noting that prior to 1910, the states provided the primary and possibly exclusive source of regulatory control. In 1970, the EPA assumed responsibility for the pesticide registration process. In 1972, Congress adopted the extensive amendments transforming FIFRA from a labeling law into a comprehensive regulatory statute. The 1972 amendments also imposed a new criterion for registration--environmental safety [*Bates v. Dow Agrosciences, L.L.C. (2005) 544 U.S. 431, 125 S. Ct. 1788, 1794-1795, 161 L. Ed. 2d 687, 699]* . The Court then reviewed the obligations of manufacturers relating to registration and labeling under FIFRA as it currently stands. It pointed out that a pesticide is misbranded if its label does not contain adequate instruction for use or omits necessary warnings or cautionary statements [*7 U.S.C.S. §§ 136(q)(1)(A), 136(q)(1)(F),(G)*]. Because it is unlawful under the statute to sell a pesticide that is registered but nevertheless misbranded, manufacturers have a continuing obligation to adhere to FIFRA's labeling requirements [*Bates v. Dow Agrosciences, L.L.C. (2005) 544 U.S. 431, 125 S. Ct. 1788, 1795-1796, 161 L. Ed. 2d 687, 699-701]* .

The Court pointed out that tort litigation against pesticide manufacturers had begun well before the passage of FIFRA in 1947 and continued to be a common feature at the time of the 1972 amendments. The Court noted that it was only after it issued its decision in *Cipollone v. Liggett Group, Inc.* [*Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407]* that the groundswell of federal and state decisions emerged holding that § 136v(b) preempted claims like those advanced in *Bates*.

The Court rejected the plaintiffs' argument that FIFRA's express preemption does not apply to tort actions--that is, that the term "requirements" as used in § 136v(b) does not encompass tort actions. Although pointing out that the Fifth Circuit was "quite wrong" when it assumed that any event, such as a jury verdict, that might "induce" a pesticide manufacturer to change its label should be viewed as a requirement, the Court agreed that the term "requirements" in § 136v(b) reaches beyond positive enactments, such as statutes and regulations, to embrace common law duties [*Bates v. Dow Agrosciences, L.L.C. (2005) 544 U.S. 431, 125 S. Ct. 1788, 1798, 161 L. Ed. 2d 687, 703]* .

The Court then set forth its two-part test for determining whether a particular state rule is preempted by FIFRA. First, the rule must be a requirement "for labeling or packaging." For example, rules governing the design of a product are not preempted. Second, the rule must impose a labeling or packaging requirement that is "in addition to or different from those required under [FIFRA]." For example, a state regulation requiring the word "poison" to appear in red letters would not be preempted if an EPA regulation imposed the same requirement [*Bates v. Dow Agrosciences, L.L.C. (2005) 544 U.S. 431, 125 S. Ct. 1788, 1798, 161 L. Ed. 2d 687, 703]* .

The Court then pointed out that common law rules requiring manufacturers to design reasonably safe products, to use due care in testing their products, to market products free from defects, and to honor their express warranties, clearly did not satisfy the first condition of the test (they were not requirements "for labeling or packaging"). Therefore, FIFRA did not preempt the plaintiffs' claims for defective design, defective manufacture, negligent testing, and breach of express

warranty. The Court also noted that the plaintiffs' off-label claims--their warranty and fraud claims based on oral representations made by the defendant's agents--fell outside the text of § 136v(b) for another reason: FIFRA defines labeling by reference to "written, printed, or graphic matter" and not to oral representations. The Court expressly disapproved of the "effects-based" test used by many federal and state courts to determine whether a non-warning claim was preempted: whether a judgment against a manufacturer would cause it to alter the pesticide label. This test was unsupported in the text of § 136v(b), which refers only to "requirements," and was overbroad because it would allow preemption of many "genuine" design defect claims [*Bates v. Dow Agrosciences, L.L.C. (2005) 544 U.S. 431, 125 S. Ct. 1788, 1799, 161 L. Ed. 2d 687, 704]* .

The Court next turned to the plaintiffs' claims of fraud and negligent failure to warn--claims that virtually all prior federal and state courts had found preempted. Although agreeing that these claims were premised on common law rules that qualify as "requirements for labeling or packaging," thereby meeting the first part of its test, the Court noted that some courts had "too quickly" concluded that failure-to-warn claims were preempted under FIFRA without weighing the obvious textual differences between the preemption clauses in FIFRA and the Smoking Act provisions at issue in *Cipollone*. Specifically, unlike the Smoking Act, § 136v(b) prohibits only statelaw labeling and packaging requirements that are "in addition to or different from" the labeling and packaging requirements under FIFRA. Consequently, a state law labeling requirement is not preempted by § 136v(b) if it is equivalent to, and fully consistent with, FIFRA's misbranding provisions. The Court held that state law need not explicitly incorporate FIFRA's standards as an element of a cause of action to survive preemption, but left it to the Fifth Circuit to decide whether the particular common law duties were equivalent to FIFRA's misbranding standards [*Bates v. Dow Agrosciences, L.L.C. (2005) 544 U.S. 431, 125 S. Ct. 1788, 1800, 161 L. Ed. 2d 687, 705]* .

The Court went on to explain that the "parallel requirements" reading of § 136v(b) that it adopted found strong support in an earlier decision, *Medtronic, Inc. v. Lohr* [*Medtronic, Inc. v. Lohr (1996) 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700]* , in which the Court held that nothing in the preemption provision of the statute regulating medical devices denied the state of Florida the right to provide a traditional damages remedy for violations of common law duties that parallel federal requirements. The Court then rejected the defendant's argument that such a reading of parallel state requirements would establish a "crazy-quilt" of anti-misbranding requirements different from the requirement defined by FIFRA. Moreover, even if the defendant had offered a plausible reading of § 136v(b), the Court would still have had a duty to accept the reading that disfavored preemption. The Court also found the policy objections raised by the defendant against its reading of § 136v(b) to be unpersuasive [*Bates v. Dow Agrosciences, L.L.C. (2005) 544 U.S. 431, 125 S. Ct. 1788, 1801-1803, 161 L. Ed. 2d 687, 706-708]* .

The Court concluded that § 136v(b) retains a narrow, but still important role. It preempts competing state labeling standards that would create significant inefficiencies for manufacturers as well as any statutory or common law rule that would impose a labeling requirement that diverges from those set out in FIFRA. It does not, however, preempt any state rules that are fully consistent with federal requirements [*Bates v. Dow Agrosciences, L.L.C. (2005) 544 U.S. 431, 125 S. Ct. 1788, 1801-1803, 161 L. Ed. 2d 687, 706-708]* .

Although the Court enunciated its interpretation of § 136v(b), whether that provision preempted the plaintiffs' fraud and failure-to-warn claims remained undecided. Because the Court had not received sufficient briefing on this issue, it remanded it to the Fifth Circuit. The Court specifically emphasized that a state law labeling requirement must in fact be equivalent to a requirement under FIFRA to survive preemption. It cautioned that a state law requirement need not be phrased in language identical to FIFRA; general equivalence is sufficient [*Bates v. Dow Agrosciences, L.L.C. (2005) 544 U.S. 431, 125 S. Ct. 1788, 1804, 161 L. Ed. 2d 687, 709]* .

In a pre-*Bates* case, the California Supreme Court found preemption of a common law claim involving a pesticide [*Etcheverry v. Tri-Ag Serv., Inc. (2000) 22 Cal. 4th 316, 320, 93 Cal. Rptr. 2d 36, 993 P.2d 366] , overruled in part, Bates v. Dow Agrosciences L.L.C., 544 U.S. 431, (2005)* . The plaintiffs here operated a walnut orchard and arranged for an application of chemicals, Guthion and Morestan, to kill moths and other insects. The spraying resulted in

approximately $150,000 in damages to the crop. The court held that when a claim boils downs to an assertion that a pesticide's label failed to warn of the damage that the plaintiff allegedly suffered, the claim is preempted by FIFRA [*Etcheverry v. Tri-Ag Service, Inc. (2000) 22 Cal. 4th 316, 335-336, 93 Cal. Rptr. 2d 36, 993 P.2d 366] , overruled in part, Bates v. Dow Agrosciences L.L.C., 544 U.S. 431, 447-452 (2005)* . To maintain uniformity, FIFRA expressly prohibits states from imposing "any requirements for labeling or packaging in addition to or different from those required under" the statute [*7 U.S.C.S. § 136v(b)*]. Under the supremacy clause of the U.S. Constitution, any state law or claim that requires a pesticide manufacturer to conform to a state law standard of care in its labeling and packaging practices is preempted [*Taylor Ag Indus. v. Pure-Gro (9th Cir. 1995) 54 F.3d 555, 561]* .

In addition to warning claims, FIFRA also preempts claims based on breach of an express warranty required and approved by the EPA [*Etcheverry v. Tri-Ag Serv., Inc. (2002) 22 Cal. 4th 316, 93 Cal. Rptr. 2d 36, 993 P.2d 366] , overruled in part, Bates v. Dow Agrosciences L.L.C., 544 U.S. 431, 447-452 (2005)* . One court of appeal held, before the U.S. Supreme Court's decsion in *Bates*, that FIFRA also preempts claims based on off-label statements which merely repeat information in the label itself [*Sun Valley Packing v. Consep, Inc. (2001) 94 Cal. App. 4th 315, 322, 114 Cal. Rptr. 2d 237* (certified for partial publication)]. These decisions will certainly be reevaluated in the case law that emerges after *Bates*.

In *Arnold v. Dow Chem. Co. (2001) 91 Cal. App. 4th 698, 110 Cal. Rptr. 2d 722* , the plaintiffs claimed that their daughter suffered an intrauterine stroke, which resulted in hemiparesis (paralysis affecting one side of the body), hemianopsia (blindness affecting half of the field of vision) and disability as a result of pesticides sprayed in and scattered around her home when she was in utero. Plaintiffs also claimed that their other daughter suffered pancreatitis and hepatitis as a result of exposure to the same pesticides. The Ninth Circuit held that FIFRA preempts the family's state law claim challenging the labeling of pesticide sprays used around their home, but did not preempt its state common law design defect claim [*Arnold v. Dow Chem. Co. (2001) 91 Cal. App. 4th 698, 110 Cal. Rptr. 2d 722]* .

Also, FIFRA does not preempt claims arising when a manufacturer or retailer voluntarily warrants a pesticide's fitness for a particular purpose [*Etcheverry v. Tri-Ag Serv., Inc. (2002) 22 Cal. 4th 316, 337, 93 Cal. Rptr. 2d 36, 993 P.2d 366 , overruled in part, Bates v. Dow Agrosciences L.L.C., 544 U.S. 431, 447-452 (2005)* ; *Sun Valley Packing v. Consep, Inc. (2001) 94 Cal. App. 4th 315, 322-323, 114 Cal. Rptr. 2d 237* (certified for partial publication) (FIFRA did not preempt claims based not on general warranty of fitness, but on manufacturer's express oral guarantee that mating disruption product would control twig borers when applied for first time mid season)].

FIFRA preemption rules do not require a court to enforce a damage limitation provision clause which it finds unconscionable in an EPA-approved pesticide label [*Etcheverry v. Tri-Ag Serv., Inc. (2002) 22 Cal. 4th 316, 335, 93 Cal. Rptr. 2d 36, 993 P.2d 366 , overruled in part, Bates v. Dow Agrosciences L.L.C., 544 U.S. 431, 447-452 (2005)* ; *Sun Valley Packing v. Consep, Inc. (2001) 94 Cal. App. 4th 315, 324, 114 Cal. Rptr. 2d 237* (certified for partial publication)].

[h] Boats

Federal law preempts claims for certain injuries sustained in connection with boats. In *Sprietsma v. Mercury Marine (2002) 537 U.S. 51, 54-70, 123 S. Ct. 518, 154 L. Ed. 2d 466* , the U.S. Supreme Court resolved a split of both federal and state authority and held that the FBSA does not preempt common law "no propeller guard" claims.

Before the *Sprietsma* decision, the majority of courts considering the issue, including the Eastern District of California [*Moss v. Outboard Marine Corp. (E.D. Cal. 1996) 915 F. Supp. 183, 185-186]* , had found express preemption of the claims. A few courts had found implied preemption of "no propeller guard" claims. Only a few courts had found no preemption of the claims [*see* L. Frumer & M. Friedman, Products Liability, Ch. 24, *Federal Preemption* (Matthew Bender)].

A bit of background is required to explain the *Sprietsma* decision. The Federal Boating Safety Act of 1971 (FBSA), which deals with recreational boats and their use, contains both a preemption provision and a savingsclause. The preemption provision prohibits States from establishing, continuing in effect, or enforcing a regulation establishing a performance or safety standard that is not identical to a regulation prescribed under the Act [*46 U.S.C.S. § 4306*]. The savings clause provides that compliance with standards or regulations prescribed under the FBSA does not relieve a person from common law liability [*46 U.S.C.S. § 4311(g)*].

The FBSA authorizes the Secretary of Transportation to issue regulations establishing minimal safety standards for recreational vessels and associated equipment [*46 U.S.C.S. § 4302*]. The Secretary delegated this authority to the Coast Guard [*49 C.F.R. § 1.46(n)(1)*]. In 1990, the Coast Guard adopted the recommendation of its subcommittee and decided to take no regulatory action to require propeller guards on recreational boats. In 2001, the Advisory Counsel recommended that the Coast Guard develop four specific regulations with respect to propeller guards [*66 Fed. Reg. 63645, 63647]* . However, the Coast Guard has not yet issued any regulation requiring or prohibiting the propeller guards.

In *Sprietsma v. Mercury Marine (2002) 537 U.S. 51, 63-70, 123 S. Ct. 518, 154 L. Ed. 2d 466* , the Court concluded that a state common law tort action seeking damages from the manufacturer of an outboard motor is not pre-empted either by the enactment of the FBSA or by the Coast Guard decisions not to promulgate a regulation requiring propeller guards.

Sprietsma arose when the decedent fell overboard and was struck by the propeller of a ski boat. The Court first disposed of the manufacturer's express preemption argument. Focusing on the plain wording of the express preemption clause, the Court concluded that it applies to state or local law or regulation, and not to common law claims. The Court relied on two reasons. First, the article "a" before the phrase "law or regulation" implies a discreteness--which is embodied in statutes and regulations--that is not present in common law. Secondly, if the terms "law" were read broadly so as to include the common law, it might also be interpreted to regulations, which would render the express reference to "regulation" in the preemption clause superfluous. The Court also found that the savings clause indicates that the preemption provision was drafted to preempt performance standards and equipment requirements imposed by statute or regulation [*Sprietsma v. Mercury Marine (2002) 537 U.S. 51, 63-64, 123 S. Ct. 518, 526-528, 154 L. Ed. 2d 466]* .

Next, the Court rejected the manufacturer's implied preemption arguments. The Court found it "quite wrong" to view the Coast Guard's decision not to adopt a regulation requiring propeller guards on motorboats as the functional equivalent of a regulation prohibiting all States from adopting such a regulation. The 1990 decision to accept the recommendation to take no regulatory action left the law exactly the same as it had been before the subcommittee began its investigation. Nothing in the Coast Guard's official explanation would be inconsistent with a tort verdict premised ona jury's finding that some type of propeller guard should have been installed on a particular kind of boat. The decision not to require propeller guards did not convey an "authoritative" message of a federal policy against propeller guards. Morever, nothing in the Coast Guard's 2001 regulatory activities altered the Court's conclusion [*Sprietsma v. Mercury Marine (2002) 537 U.S. 51, 64-70, 123 S. Ct. 518, 528-529, 154 L. Ed. 2d 466]* .

Finally, the Court disposed of the manufacturer's alternative implied preemption argument, i.e., that the potential conflict with the federal scheme impliedly preempted plaintiff's "no propeller guard" claims. The Court concluded that the FBSA did not so completely occupy the field of safety regulation of recreational boats as to foreclose state common law remedies. The FBSA, unlike other federal statutes such as Title II of the Ports and Waterways Safety Act of 1972, does not *require* the Coast Guard to promulgate comprehensive regulations covering every aspect of recreational boat safety and design. Nor must the Coast Guard certify the acceptability of every recreational boat subject to its jurisdiction. In short, the FBSA's structure and framework does not convey a "clear and manifest intent" to pre-empt all state common law relating to boat manufacture. The Court concluded that concern with uniformity in manufacturing regulations does not justify the displacement of state common law remedies that compensate accident victims and serve the FBSA's more prominent objective of promoting boating safety [*Sprietsma v. Mercury Marine (2002) 537 U.S. 51,*

64-70, 123 S. Ct. 518, 529-530, 154 L. Ed. 2d 466] .

The *Sprietsma* holding is limited to "no propeller guard" claims. There is authority holding that claims relating to aspects of boats that have not even by considered by the Coast Guard as a subject of regulation are not preempted by FBSA. One California appellate court held that the FBSA neither expressly nor impliedly preempted claims alleging inadequate handhold areas in a boat's tow area. The plaintiff had been thrown from a boat and then struck by it. In finding no express preemption, the court stated that the FBSA's preemption provision [*46 U.S.C.S. § 4306*] only expressly precludes a state from enforcing a law or regulation that is not identical to a regulation *prescribed* by the Coast Guard. It does not prohibit the establishment or enforcement by state laws or regulations for which no Coast Guard regulations have been promulgated. Moreover, the preemption provision must be read in conjunction with the savings clause [*LaPlante v. Wellcraft Marine Corp. (2001) 94 Cal. App. 4th 282, 291, 114 Cal. Rptr. 2d 196, 202]* .

The court also found that *United States v. Locke (2000) 529 U.S. 89, 120 S. Ct. 1135, 146 L. Ed. 2d 69* , did not establish field preemption through the FBSA, as that case involved commercial oil tankers, not recreational vessels [*Laplante v. Wellcraft Marine Corp. (2001) 94 Cal. App. 4th 282, 291-294, 114 Cal. Rptr. 2d 196, 203-204]* . Finally, the court found that plaintiff's common law claims were not subject to conflict preemption because the Coast Guard has not adopted any regulations dealing withhandrails or handgrips [*Laplante v. Wellcraft Marine Corp. (2001) 94 Cal. App. 4th 282, 294-295, 114 Cal. Rptr. 2d 196, 205-206]* .

[i] Tobacco

Tobacco was the first product subject to the U.S. Supreme Court's preemption analysis. Federal preemption of cigarettes stems from the Federal Cigarette Labeling and Advertising Act of 1969 [*15 U.S.C.S. §§ 1331-1340*]. The preemption section of the 1969 Act provides that "[n]o requirement of prohibition based on smoking and health shall be imposed under State law with respect to advertising or promotion or any cigarettes the packages of which are labeled in conformity with the provisions of this chapter" [Pub. L. No. 91-222, § 2 (Apr. 1, 1970) 84 Stat. 87].

In *Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504, 518, 112 S. Ct. 2608, 120 L. Ed. 2d 407* , the U.S. Supreme Court construed the language of both the 1969 Act, and its predecessor the 1965 Act. The Court determined that the plain language of the 1965 Act did not have the effect of preempting any state law products liability claims. The broader language of the 1969 Act, however, expressly preempted those claims that relied on a state law requirement or prohibition with respect to promotion or advertising. The preempted claims in *Cipollone* were based upon the alleged failure to adequately warn of the dangers of cigarette smoking in post-1969 advertisements, and alleged fraudulent misrepresentation that was predicated on a state law prohibition against advertising and promotional statements that tended to minimize the health hazards associated with smoking.

The other claims, however, which did not relate to advertising were not preempted by the 1969 Act. These included plaintiff's additional failure to warn claim insofar as it relied solely upon the defendant's testing or research practices or other actions unrelated to advertising [*Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504, 524, 112 S. Ct. 2608, 120 L. Ed. 2d 407]* . The claim alleging intentional fraud in misrepresenting and concealing a material fact, to the extent that it related to the duty to disclose material facts, was also not preempted [*Cipollone v. Liggett Group (1992) 505 U.S. 504, 528-529, 112 S. Ct. 2608, 120 L. Ed. 2d 407]* . The claim alleging a conspiracy to misrepresent or conceal material facts concerning the hazards of smoking was not the subject of preemption [*Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504, 527, 112 S. Ct. 2608, 120 L. Ed. 2d 407]* .

Finally, the claim alleging breach of express warranty was not preempted because liability for such a breach derived from the terms of the warranty and did not relate to requirements imposed by state law [*Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504, 525-526, 112 S. Ct. 2608, 120 L. Ed. 2d 407]* .

The Ninth Circuit has narrowly interpreted the phrase "advertising and promotion" as used in the 1969 Act. The court

held that by alleging that Philip Morris breached its duty to warn about the addictive nature of nicotine, the manipulation of nicotine levels, and the carcinogenic effect of smoking, a plaintiff was not challenging the warnings the defendant actually gave pursuant to the Act. Rather, his claim addressed smoking harms outside the Act's reach--about which the defendant gave no warnings at all, but could have, through means other than advertising and promotion. The plaintiff's warning claim was based on the defendant's failure to employ non-promotional communications, such as public service announcements. The claim was not preempted as long as it did not challenge a substantive warning issued pursuant to the Act, and was not based on the defendant's packaging, advertising, or promotional materials. The plaintiff's fraudulent concealment claim survived preemption for similar reasons [*Rivera v. Philip Morris, Inc. (9th Cir. 2005) 395 F.3d 1142, 1147-1150]* .

In *Whiteley v. Philip Morris, Inc. (2004) 117 Cal. App. 4th 635, 666-677, 11 Cal. Rptr. 3d 807* the appellate court applied the principles of *Cipollone* to conclude that certain fraudulent misrepresentation claims brought by a smoker and her husband were not preempted. As stated above, the U.S. Supreme Court in *Cipollone* distinguished between two fraudulent misrepresentation theories. It found that the claim that defendants "neutralized" the effect of federally mandated warning labels through their advertising was inextricably related to the failure-to-warn theory and was preempted. However, it also found that the fraudulent misrepresentation claims predicated on the duty not to deceive were not preempted [*Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504, 527-529, 112 S Ct. 2608, 120 L. Ed. 2d 407]* . In *Whitely,* the California appellate court likewise found that the defendants' false assurances that they would keep the public informed of their findings regarding smoking and health, and the manufacturing of a false controversy regarding the health effects of smoking, were affirmative misrepresentations outside the preemptive reach of the cigarette labeling statute. The court also found that misrepresentation by "half-truths" is a species of affirmative misrepresentation and fraud falling on the non-preempted prong of *Cipollone* [*Whiteley v. Philip Morris, Inc. (2004) 117 Cal. App. 4th 635, 666-677, 11 Cal. Rptr. 3d 807]* .

In *Boeken v. Philip Morris Inc.,* the court of appeal squarely rejected the suggestion that the consumer expectations test is essentially a failure-to-warn claim and hence preempted by the 1969 Smoking Act. The court also held that the trial court did not erroneously refuse the defendant's proffered instructions relating to federally preempted advertising [*Boeken v. Philip Morris Inc. (2005) 127 Cal. App. 4th 1640, 1676-1679, 26 Cal. Rptr. 3d 638]* .

In 2001, the U.S. Supreme Court once again addressed the preemptive effect of the Cigarette Labeling Act, this time in the context of outdoor advertising. At issue in the case were regulations banning outdoor cigarette advertising within 1,000 feet of any school, park, or playground. The regulations had been issued by the Massachusetts Attorney General pursuant to the state deceptive trade practices act. In *Lorillard Tobacco Co. v. Reilly, [(2001) 533 U.S. 525, 547-552, 121 S. Ct. 2404, 150 L. Ed. 2d 532*], the high Court held that the Labeling Act preempted the state regulations. The majority opinion, written by Justice O'Connor, rejected the Massachusetts Attorney General's contention that the statute regulations were not based on smoking and health because they did not involve health-related conduct, but instead targeted youth exposed to cigarette advertising. The Court observed that one of the purposes of the Labeling Act was to "protect the public, including youth, from being inundated with images of cigarette smoking in advertising." It found that the Attorney General's attempt "to address the incidence of underage cigarette smoking by regulating advertising" was similar to the Labeling Act's "ban on cigarette smoking in electronic media." Finding that the concern about youth exposure to cigarette advertising was intertwined with the concern about cigarette smoking and health, the Court accordingly rejected the state's attempt to distinguish one concern from the other. It also rejected the contention that federal preemption was limited to cigarette advertising's content, not its location.

In *In re Tobacco Cases II [(2007) 41 Cal. 4th 1257, 1272, 63 Cal. Rptr. 3d 418, 163 P.3d 106*], the Supreme Court of California was presented with the issue of federal preemption of minors' unfair competition claims against the tobacco companies. The court ruled that the U.S. Supreme Court's decision in *Lorillard Tobacco Co. v. Reilly* was inconsistent with and impliedly disapproved the California court's previous decision [*Mangini v. R.J. Reynolds Tobacco Co. (1994) 7 Cal. 4th 1057, 31 Cal. Rptr. 2d 358, 875 P.2d 73*] holding that the Labeling Act did not preempt a similar claim. The court acknowledged that California's unfair competition law--a law of general application--was not

preempted on its face by the Labeling Act. However, the plaintiffs' claim was also based on the penal law section prohibiting sales of tobacco products to minors, i.e., a statute based largely on health concerns. Their unfair competition claim sought to impose on the tobacco companies a duty not to advertise in a way that could encourage minors to smoke--a duty which the *Lorillard* Court determined was subjection to preemption. Moreover, plaintiffs' cause of action did not fall within the exception allowing states to prohibit activity that constitutes an inchoate crime.

Although courts have implemented the *Cipollone* decision with relatively little difficulty over the years, there was one exception. Courts had reached mixed results regarding whether the Federal Cigarette Labeling & Advertising Act (Labeling Act) preempted claims alleging that tobacco manufacturers violated state unfair trade practices acts or consumer protection acts by advertising that "light" cigarettes delivered less tar and nicotine than regular brands. The controversy stemmed from statements issued by the FTC in 1966 that it would not challenge factual statements about cigarettes' tar and nicotine content based on the "Cambridge Filter Method" test. The Cambridge test was supposed to produce uniform data regarding tar and nicotine content. The industry then began promoting cigarettes with lower tar and nicotine as "light" cigarettes. On December 15, 2008, the U.S. Supreme Court ended the controversy by holding in a 5-4 ruling that neither the Labeling Act's preemption provision nor the FTC's actions in the field preempted state-law claims predicated on the duty not to deceive [*Altria Group, Inc. v. Good (2008) -- U.S. --, 129 S. Ct. 538, 172 L. Ed. 2d 398*].

The case, *Altria Group, Inc. v. Good [(2008) -- U.S. --, 129 S. Ct. 538, 172 L. Ed. 2d 398*], was brought by a group of Maine smokers of "light" cigarettes. They alleged that the manufacturers deliberately deceived them about the true nature of those cigarettes in violation of the Maine Unfair Trade Practices Act (MUTPA) [Me. Rev. Stat. Ann. Tit. 5, § 207]. They claimed that the manufacturers knew that smokers of "light" cigarettes actually inhale as much tar and nicotine as do smokers of regular cigarettes because of their tendency to engage in "compensatory" smoking. The district court ruled that the MUTPA claim was preempted. The First Circuit Court of Appeals reversed, holding that the smokers' claim was not a warning neutralization claim, but rather, a fraud claim. The U.S. Supreme Court granted the manufacturers' petition for certiorari [*Altria Group, Inc. v. Good (2008) 128 S. Ct. 1119, 169 L. Ed. 2d 846, 2008 U.S. LEXIS 1099*].

At issue in the case was one of the Labeling Act's two express preemption provisions, § 5(b). That section provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter" [*15 U.S.C. § 1334(b)*].

Justice Stevens delivered the opinion of the Court, in which Justices Kennedy, Souter, Ginsburg, and Breyer joined.

The Court began its express preemption analysis by announcing its adherence to the presumption against preemption [*Altria Group, Inc. v. Good (2008) -- U.S. --, 129 S. Ct. 538, 543, 172 L. Ed. 2d 398*]. Next, it briefly reviewed the plurality's opinion in *Cipollone*. To determine whether a particular common law claim was preempted, the *Cipollone* plurality had inquired "whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health ... with respect to ... advertising or promotion,' giving that clause a fair but narrow reading." Applying that standard, the *Cipollone* plurality had concluded that fraudulent misrepresentation and concealment claims were not preempted [*Cipollone v. Liggett Group (1992) 505 U.S. 504, 528-529, 112 S. Ct. 2608, 120 L. Ed. 2d 407*]. The *Good* Court stated that the duty not to deceive, as codified in the MUTPA, is likewise unrelated to smoking and health [*Altria Group, Inc. v. Good (2008) -- U.S. --, 129 S. Ct. 538, 545-546, 172 L. Ed. 2d 398, 408*].

The Court then rejected the tobacco companies' argument that the smokers' claim was analogous to the "warning neutralization" claim found to be preempted in *Cipollone* because it was based on statements that "might create a false impression" rather than statements that are "inherently false." After eliminating that argument, it was clear to the majority that *Cipollone's* holding that the common-law fraud claim survived preemption directly applied to the *Good*

smokers' MUTPA claim [*Altria Group, Inc. v. Good (2008) -- U.S. --, 129 S. Ct. 538, 546, 172 L. Ed. 2d 398*]. Moreover, the Court found no inconsistency between its analysis in *Cipollone* and its subsequent decision, *Lorillard Tobacco Co. v. Reilly [(2001) 533 U.S. 525, 121 S. Ct. 2404, 150 L. Ed. 2d 532*] (discussed *above*). The Court declined to reject the express preemption framework established by the *Cipollone* plurality, despite its possible lack of "theoretical elegance" [*Altria Group, Inc. v. Good (2008) -- U.S. --, 129 S. Ct. 538, 547, 172 L. Ed. 2d 398*]. The Court also distinguished *Riegel v. Medtronic, Inc. [(2008) 552 U.S. 312, 128 S. Ct. 999, 169 L. Ed. 2d 892]* (discussed in *§ 460.52[2][b][f], above*) in which it had found that the Medical Device Amendments of 1976 expressly preempted state law claims [*Altria Group, Inc. v. Good (2008) -- U.S. --, 129 S. Ct. 538, 548-549, 172 L. Ed. 2d 398*]. In sum, the Court concluded that the phrase "based on smoking and health," narrowly construed, does not encompass the general duty not to make fraudulent statements.

Next, the Court rejected the petitioners' alternative argument that the smokers' claim was impliedly preempted because it presented an obstacle to longstanding FTC policy. A review of FTC regulatory actions revealed that there never was in fact any government policy authorizing the use of the "light" and "low tar" descriptors based on Cambridge Filter Method test results [*Altria Group, Inc. v. Good (2008) -- U.S. --, 129 S. Ct. 538, 550, 172 L. Ed. 2d 398*]. Significantly, the Agency rescinded its 1966 guidance concerning the Cambridge Filter Method in 2008, referring to it as "sufficiently flawed" [*73 Fed. Reg. 74500]* .

Justice Thomas wrote a dissenting opinion, joined by Chief Justice Roberts and Justices Scalia and Alito. Justice Thomas criticized the majority for adopting the *Cipollone* plurality as governing law while ignoring the other *Cipollone* opinions as well as recent Supreme Court opinions finding federal preemption of state law claims. The dissent took issue with the majority's emphasis on the presumption against preemption.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewTortsProcedurePreemptionGeneral OverviewTortsProcedureStatutes of LimitationsGeneral OverviewTortsProcedureStatutes of ReposeGeneral OverviewTortsProcedureStatutes of ReposeProducts LiabilityTortsProducts LiabilityGeneral OverviewTortsProducts LiabilityStrict LiabilityTortsStrict LiabilityGeneral OverviewTortsTransportation TortsGeneral Overview

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§ 460.53 Comparative Fault and Assumption of Risk

In *Li v. Yellow Cab Co. [(1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226*], the California Supreme Court abolished the "all-or-nothing" rule of contributory negligence in cases based on negligence and replaced it with the doctrine of comparative negligence. The system of comparative fault announced in *Li* also applies to actions based on strict products liability and to actions based on negligence [*Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 730, 742, 144 Cal. Rptr. 380, 575 P.2d 1162]* . Under the principles of comparative fault, a plaintiff's recovery will be reduced in proportion to the amount of fault attributable to him or her [*Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 738, 144 Cal. Rptr. 380, 575 P.2d 1162* ; *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 829, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

The doctrine of assumption of risk is divided into two categories: (1) primary assumption of risk (those instances in which the assumption of risk doctrine embodies a legal conclusion that there is "no duty" on the part of the defendant to protect the plaintiff from a particular risk; and (2) secondary assumption of risk (those instances in which the defendant does owe a duty of care to the plaintiff, but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty). A plaintiff's recovery is completely barred in primary assumption of risk cases, but comparative fault principles apply in secondary assumption of risk cases [*Knight v. Jewett (1992) 3 Cal. 4th 296, 308, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *Wright v. Stang Mfg. Co. (1997) 54 Cal. App. 4th 1218, 1232-1233, 63 Cal. Rptr. 2d 422* (defendants failed to establish primary assumption of risk as bar to strict products liability cause of action)].

The existence and scope of a defendant's duty of care in the context of primary assumption of risk is a legal question for the court [*Knight v. Jewett (1992) 3 Cal. 4th 296, 313, 11 Cal. Rptr. 2d 2, 834 P.2d 696* ; *Ford v. Polaris Indus., Inc. (2006) 139 Cal. App. 4th 755, 766, 43 Cal. Rptr. 3d 215]* .

Since the *Knight v. Jewett* decision, appellate courts have wrestled with the issue of whether primary assumption of risk applies in products liability cases. The first to address the issue was the Fourth Appellate District, Division One. In *Milwaukee Elec. Tool Corp. v. Superior Court (1993) 15 Cal. App. 4th 547, 550, 19 Cal. Rptr. 2d 24* , a drill manufacturer contended that the plaintiff's claim against it was barred by primary assumption of risk. The court disagreed. It pointed out that pursuant to *Knight v. Jewett*, primary assumption of risk embodies a legal conclusion that

there is no duty on the part of a defendant to protect the plaintiff from a particular risk. Under products liability, in contrast, a manufacturer *does* owe a duty to produce detect-free products. Moreover, in using a defective product, the user does not intend to confront a risk that is inherent in its use. To the extent that the user does elect to use the product with knowledge of the danger posed by the defect, the user's actions are subsumed by comparative negligence. The manufacturer is not relieved of its duty to make a defect-free product. This makes the primary assumption of risk doctrine inapplicable [*Milwaukee Elec. Tool Corp. v. Superior Court (1993) 15 Cal. App. 4th 547, 551, 19 Cal. Rptr. 2d 24]* .

The Third Appellate District adopted the reasoning of *Milwaukee Elec. Tool Corp.* and concluded that assumption of risk does not insulate equipment suppliers from liability for providing defective equipment. The court held that primary assumption of risk did not bar a products liability claim by an 11-year-old child who dived into an aboveground swimming pool [*Bunch v. Hoffinger Indus., Inc. (2004) 123 Cal. App. 4th 1278, 1300-1301, 20 Cal. Rptr. 3d 780* ; *see also Souza v. Squaw Valley Ski Corp. (2006) 138 Cal. App. 4th 262, 271, 41 Cal. Rptr. 3d 389]* .

In *Ford v. Polaris Indus., Inc. [(2006) 139 Cal. App. 4th 755, 766, 43 Cal. Rptr. 3d 215]* , the First Appellate District analyzed the doctrine of primary assumption of risk in the context of a recreational equipment design defect case. The plaintiff in *Ford* sustained severe orifice injuries after falling off the rear of a personal watercraft. Finding the reasoning of *Milwaukee Tool* "instructive," the court found that primary assumption of risk did not foreclose plaintiff's strict products liability claim. The court acknowledged that the general risk of falling and coming into contact with water is inherent in jet skiing. However, it declined to find that the specific risks of sustaining orifice injuries are inherent in the sport. Orifice injuries and the conduct that causes them do not belong to the "fundamental nature or habit" of the sport. The court was unconvinced by defendant's argument that the nature of the sport and its inherent risks is defined by the industry standard. Cases cited by defendant did not support its proposition that primary assumption of risk will preclude a strict products liability design defect claim against a recreational equipment manufacturer simply because its equipment is "essentially the same" in design as that of other manufacturers [*Ford v. Polaris Indus., Inc. (2006) 139 Cal. App. 4th 755, 772-773, 43 Cal. Rptr. 3d 215]* . The defendant neglected to take into consideration a key principle of *Knight:* that the examination of duty under a primary assumption of risk inquiry takes into account a defendant's role in, or relationship to, the sport in question. Comparing the duty of sports venue proprietors and operators, where the asserted design defect is the failure to incorporate protection against a serious injury into recreational equipment, the court rephrased the manufacturer's duty to design nondefective products as a duty to take reasonable steps to minimize without altering the nature of the sport, at least under circumstances where the risk poses the gravest danger [*Ford v. Polaris Indus., Inc. (2006) 139 Cal. App. 4th 755, 772-773, 43 Cal. Rptr. 3d 215]* .

However, in *Sanchez v. Hillerich & Bradsby Co. (2002) 104 Cal. App. 4th 703, 715, 128 Cal. Rptr. 2d 529* , the Second Appellate District, Division Four, found that a triable issue of fact existed as to whether primary assumption of risk applied to the case against an aluminum baseball batmanufacturer. The court found that the plaintiff presented sufficient evidence to establish that use of the aluminum bat significantly increased the inherent risk that a pitcher would be hit by a line drive. The court also held that if it is ultimately determined that primary assumption of risk does not apply, the issue then becomes one of secondary assumption of risk. The court did not discuss the interplay between products liability and assumption of risk.

For complete discussion of assumption of the risk generally, see Ch. 380, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesAssumption of RiskGeneral OverviewTortsNegligenceDefensesComparative NegligenceCommon Law ConceptsGeneral OverviewTortsNegligenceDefensesComparative NegligenceCommon Law ConceptsAssumption of RiskTortsNegligenceDefensesContributory NegligenceGeneral OverviewTortsProducts LiabilityGeneral OverviewTortsProducts LiabilityStrict Liability

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§ 460.54 Burden of Proof

Evid. Code § 500 states that, except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the defense that he or she is asserting.

Evid. Code § 502 provides that the court on all proper occasions must instruct the jury as to which party bears the burden of proof on each issue and as to whether that burden requires that a party raise a reasonable doubt concerning the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.

Under these sections, defendant has the burden of proving by a preponderance of the evidence any affirmative defense alleged in the answer.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofAllocationTortsProducts LiabilityGeneral OverviewTortsProducts LiabilityStrict LiabilityTortsStrict LiabilityGeneral Overview

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40-460 California Forms of Pleading and Practice--Annotated §§ 460.55-460.69

[Reserved]

§§ 460.55[Reserved]

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California Forms of Pleading and Practice--Annotated

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Volume 40: Products Liability thru Public Entities and Officers-Chs. 460-469
Chapter 460 PRODUCTS LIABILITY
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40-460 California Forms of Pleading and Practice--Annotated § 460.70

§ 460.70 Right to Indemnity

[1] Express and Implied Indemnity

Indemnity is an obligation resting on one party (the indemnitor) to make good a loss or damage that another party (the indemnitee) has incurred [*Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal. 3d 622, 628, 119 Cal. Rptr. 449, 532 P.2d 97* ; *see Civ. Code § 2772*]. A right to indemnity may be expressly provided for by contract [*see, e.g., Crawford v. Weather Shield Mfg., Inc. (2006) 136 Cal. App. 4th 304, 330* (express contractual indemnity is defined in *Civil Code § 2772*); *Jimenez v. Pacific W. Constr. Co. (1986) 185 Cal. App. 3d 102, 229 Cal. Rptr. 575]* ; it may be implied from a contract not specifically mentioning indemnity [*see, e.g., Cahill Bros. Inc. v. Clementina Co. (1962) 208 Cal. App. 2d 367, 375-379, 25 Cal. Rptr. 301]* ; or, it may arise from the equities of particular circumstances [*see, e.g., Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 251 Cal. Rptr. 202, 760 P.2d 399]* .

Express contractual indemnity operates to effect a complete shift of the loss from the indemnitee to the indemnitor [*see Rodriguez v. McDonnellDouglas Corp. (1978) 87 Cal. App. 3d 626, 676, 151 Cal. Rptr. 399]* . By contrast, implied equitable indemnity is based on principles of comparative fault. A concurrent tortfeasor is entitled to obtain partial indemnity from other concurrent tortfeasors for that part of a settlement or judgment paid to a tort plaintiff that exceeds the indemnitee's comparative share of liability to the plaintiff [*American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 598, 146 Cal. Rptr. 182, 578 P.2d 899]* .

A defendant-indemnitee in an action for indemnity may seek apportionment of the loss on any theory that was available to the plaintiff on which the plaintiff would have been successful [*Greystone Homes, Inc. v. Midtec, Inc. (2008) 168 Cal. App. 4th 1194, 1208-1209, 86 Cal. Rptr. 3d 196* ; *GEM Developers v. Hallcraft Homes of San Diego, Inc. (1989) 213 Cal. App. 3d 419, 430, 261 Cal. Rptr. 626]* . Consequently, under principles of comparative equitable indemnity, the trier of fact may apportion liability not only among negligent parties, but also among tortfeasors, some of whose liability rests on California's strict liability products doctrine, and others whose liability rests in negligence [*Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 325, 146 Cal. Rptr. 550, 579 P.2d 441]* . Moreover, multiple tortfeasors who are subject to strict liability with respect to a consumer may seek comparative indemnity among themselves, according to the principles set forth in *American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20*

Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 . It is irrelevant that a tortfeasor from whom indemnity is sought is not actually joined in the underlying complaint as a co-defendant of the party seeking indemnity. The term "joint tortfeasor" as used in the comparative equitable indemnity context does not mean the defendants were "joined" as tortfeasors by the plaintiff; it is a broad term that includes joint, concurrent, and successive tortfeasors [*GEM Developers v. Hallcraft Homes of San Diego, Inc. (1989) 213 Cal. App. 3d 419, 431, 261 Cal. Rptr. 626]* .

[2] Good Faith Settlement Bar

A claimant for indemnification may not avoid the bar to a claim pursuant to *Code Civ. Proc. § 877.6(c)* (good faith settlement bars joint tortfeasor from further claims against settling tortfeasor for comparative indemnity), by asserting that the claim is for "total indemnity," rather than partial indemnity on a comparative fault basis; there is no separate doctrine of "total indemnification" [*Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 808-815, 815*]. Rather, under California law there is a single "comparative indemnity" doctrine that permits partial indemnification on a comparative fault basis in appropriate cases, including the situation in which one party is 100 percent responsible and another 0 percent responsible [*Far W. Fin. Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 808, 251 Cal. Rptr. 202, 760 P.2d 399]* .

[3] Proposition 51: Fair Responsibility Act of 1986

[a] Statute Eliminated Joint Liability for Non-Economic Damages

The Fair Responsibility Act of 1986, often referred to as Proposition 51 [*Civ. Code § 1431.2 et seq.*], places restrictions on the joint and severalliability of tort defendants that are applicable in products liability actions for personal injury, property damage, or wrongful death based on comparative fault [*Garcia v. Duro Dyne Corp. (2007) 156 Cal. App. 4th 92, 103, 67 Cal. Rptr. 3d 100* ; *Bostick v. Flex Equip. (2007) 147 Cal. App. 4th 80, 89, 54 Cal. Rptr. 3d 28* ; *Wilson v. John Crane, Inc. (2000) 81 Cal. App. 4th 847, 851-852, 97 Cal. Rptr. 2d 240* ; *see also Hackett v. John Crane, Inc. (2002) 98 Cal. App. 4th 1233, 120 Cal. Rptr. 2d 662, 670* (when jury awards economic damages to injured plaintiff as well as loss of consortium damages to his or her spouse, and there are pre-verdict settlements embracing such damages, court must apply ratios established by verdict to apportion settlement amounts between economic and noneconomic damages)]. Proposition 51 applies prospectively to causes of actions that accrue after its effective date of June 4, 1986 [*Evangelatos v. Superior Court (1988) 44 Cal. 3d 1188*]. For this purpose, latent asbsestos-related diseases, such as mesothelioma, accrue when the plaintiff was diagnosed with the disease for which damages are being sought, or has otherwise discovered the asbestos-related illness [*Buttram v. Owens-Corning Fiberglas Corp. (1997) 16 Cal. 4th 520, 540]* . Under Proposition 51, tort defendants are jointly liable only for a plaintiff's "economic" damages, and are only severally liable for "noneconomic" damages [*Civ. Code § 1431.2(a), see Civ. Code § 1431.2(b)* (definitions of "economic" and "noneconomic" damages); *Wilson v. John Crane, Inc. (2000) 81 Cal. App. 4th 847, 851-852, 97 Cal. Rptr. 2d 240]* .

[b] Joint Liability When Injuries Are Caused Solely by Defective Product

Some courts have applied Proposition 51 to strict liability asbestos exposure cases where multiple products cause the plaintiff's injuries and the evidence provides a basis to allocate liability for noneconomic damages between defective products [*Arena v. Owens-Corning Fiberglas Corp. (1998) 63 Cal. App. 4th 1178, 1198, 74 Cal. Rptr. 2d 580* ; *Wilson v. John Crane, Inc. (2000) 81 Cal. App. 4th 847, 852, 97 Cal. Rptr. 2d 240* ; *see Garcia v. Duro Dyne Corp. (2007) 156 Cal. App. 4th 92, 103, 67 Cal. Rptr. 3d 100* (*Arena* did not apply because evidence did not show the percentage of harm caused by any specific product manufactured by defendant)].

At least two courts of appeal, however, have held that this does not mean that Proposition 51 applies to all strict liability causes of action. In the first case, *Wimberly v. Derby Cycle Corp.* [*Wimberly v. Derby Cycle Corp. (1997) 56 Cal. App. 4th 618, 65 Cal. Rptr. 2d 532*], the plaintiff was injured when the fork assembly of his bicycle broke. He brought a strict products liability action against several entities, including the designer, manufacturer, and seller of the fork

assembly. He settled with several of the defendants and proceeded to trial against the distributor only. The jury returned a verdict in favor of the plaintiff. On appeal, the defendant contended that the court erred in refusing to apply Proposition 51 to require the jury the apportion fault among it and the other defendants in the chain of distribution.

The appellate court rejected this contention, ruling that Proposition 51 did not modify the common law rule that defendants in an action for strict products liability who are in the chain of distribution of the same defective product are jointly and severally liable for all of plaintiff's economic and noneconomic damages. In reaching its conclusion the court relied on prior case law holding that Proposition 51 does not relieve defendants whose liability was solely vicarious for all liability for noneconomic damages. Strict products liability is similar to vicarious liability, and to limit a defendant's responsibility in strict products liability cases for noneconomic damages to a proportionate share based on fault would defeat the policy reasons for adoption of the doctrine.

Ten years later, another court explicitly agreed with *Wimberly*. In *Bostick v. Flex Equipment Co.* [*Bostick v. Flex Equipment Co. (2007) 147 Cal. App. 4th 80, 54 Cal. Rptr. 3d 28*], the plaintiff was injured while working out on weight-lifting equipment at a gym. He entered into a settlement with the gym for $7.3 million. In his product liability action against the equipment manufacturer, the jury awarded him $3.3 million in economic damages and $13 million in noneconomic damages. It apportioned 90 percent of the fault to the manufacturer, 10 percent to plaintiff, and zero percent to "other entities." The trial court concluded that the claimed liability common to the gym and the manufacturer was fully joint and several, and thus reduced plaintiff's award against the manufacturer by the full amount of his settlement with the gym. It entered judgment in favor of the gym on its cross-complaint against the manufacturer for equitable indemnity in the full amount of the settlement.

On appeal, the plaintiff contended that Proposition 51 applied, and the manufacturer was only severally liable for his noneconomic damages. He also contended that the court erred in setting off the full amount of his $7.3 million settlement with the gym, because the setoff should have been limited to that portion of the settlement attributable to economic damages only.

The appellate court held that the court did not err in reducing plaintiff's award by the full amount of his settlement with the gym. The plaintiff's injuries were caused by a single defective product, and the manufacturer was found liable under strict products liability. Thus, under *Wimberly*, Proposition 51 was not triggered by the facts of the case. To apportion noneconomic damages under Proposition 51 would be to reduce or potentially eliminate a plaintiff's recovery for noneconomic damages, thereby reallocating the risks and losses associated with the use of defective products and defeating the social justifications for strict products liability. Proposition 51 is not triggered in a strict products liability case where there is one defective product and all of the defendants are in the same chain of distribution. This is because Proposition 51 was intended to apply only when defendants' fault is comparable, and in a strict products liability case, there is no fault to compare [*Bostick v. Flex Equip. (2007) 147 Cal. App. 4th 80, 93, 95, 54 Cal. Rptr. 3d 28*].

[c] Special Issues Relating to Allocation of Damages in Settlements

The enactment of Proposition 51 resulted in considerable litigation with respect to settlement credits. If a plaintiff has entered into pre-trial settlements with other parties, the defendant is entitled under *Code Civ. Proc. 877* to a credit for amounts previously recovered from other parties for economic damages--for which it remains jointly liable--but not for noneconomic damages. To determine the setoff, the court must determine the amount of the settlement attributable to economic damages [*Espinoza v. Machonga (1992) 9 Cal. App. 4th 268, 276-277, 11 Cal. Rptr. 2d 498* ; *see Pierson v. Ford Motor Co. (N.D. Cal. Aug. 18, 2009) 2009 U.S. Dist. LEXIS 79758, at *6-*7]* . Courts have found that allocation of settlement proceeds according to the proportions set forth in a pretrial settlement is inherently suspect, reflecting a bias against economic damages that is prejudicial to the nonsettling defendant. In other words, the plaintiff has an interest in allocating as little as possible of the settlement to economic damages, because the smaller the allocation to economic damages, the less the nonsettling defendant will be able to claim as a credit. The settling defendants have no incentive to oppose the plaintiff's allocation because they are entirely unaffected by it [*Greathouse*

v. Amcord, Inc. (1995) 35 Cal. App. 4th 831, 840-841, 41 Cal. Rptr. 2d 561] . Therefore, if the court finds an absence of good faith, it may adjust the allocation set forth in a prior settlement to mirror the jury's apportionment of economic and noneconomic damages [*Jones v. John Crane, Inc. (2005) 132 Cal. App. 4th 990, 1008-1011, 35 Cal. Rptr. 3d 144]* .

In one case, the court of appeal made it clear that a trial court is not bound by allocations made in settlement agreements that have not received prior judicial approval. Instead, it is the court's task to determine whether there was a reasonable basis on which to justify those allocations, and the plaintiff bears the burden of presenting evidence that will enable the court to perform that task. Moreover, any allocation of settlement proceeds that will affect the ultimate credit that a nonsettling defendant will receive against any future judgment will not be given any presumptive effect unless it was the product of adverse negotiation [*Jones v. John Crane, Inc. (2005) 132 Cal. App. 4th 990, 1008-1011, 35 Cal. Rptr. 3d 144]* . In this particular case, the trial court did not allocate any portion of a prior settlement to potential wrongful death claims, despite a provision in the settlement agreement allocating 20 percent of the settlement proceeds to the release of such claims. It also allocated a lesser percentage of the proceeds to loss of consortium than that specified in the agreement. The court of appeal affirmed, holding that the court properly used the jury's verdict to allocate damage components as to which the jury made findings--that is, the loss of consortium claim. Nor did the trial court abuse its discretion in refusing to allocate any portion of the prior settlement proceeds to the potential wrongful death claims, because the record contained no basis for making such an allocation [*Jones v. John Crane, Inc. (2005) 132 Cal. App. 4th 990, 1008-1011, 35 Cal. Rptr. 3d 144]* .

[d] Proposition 51 and the Fault of Immune Nonparties

Proposition 51 applies to limit a defendant's liability for noneconomic damages by the comparative fault of all those responsible for the plaintiff's injuries, not merely the fault of the defendants who are parties to the action. Thus, an award of noneconomic damages against a manufacturer was properly reduced by the amount attributable to the fault of plaintiff's employer, which was immune from liability under the workers' compensation system [*DaFonte v. Up-Right, Inc. (1992) 2 Cal. 4th 593, 600, 7 Cal. Rptr. 2d 238, 828 P.2d 140]* . A court properly allowed the fault of the Navy to be taken into account in allocating responsibility for plaintiff's injuries in an action against an asbestos manufacturer, even if the Navy was immune under the *Feres/Stencel* rule [*Taylor v. John Crane Inc. (2003) 113 Cal. App. 4th 1063, 1068, 6 Cal. Rptr. 3d 695]* . However, the statute that previously immunized cigarette manufacturers from liability [*Civ. Code § 1714.45*, since amended] did not permit apportioning liability under Proposition 51 to cigarette manufacturers. This is because the tobacco immunity statute did not merely confer immunity from liability for tortious conduct; it constituted a legislative determination that a company supplying tobacco did not engage in tortious conduct [*Richards v. Owens-Ill., Inc. (1997) 14 Cal. 4th 985, 60 Cal. Rptr. 2d 103, 928 P.2d 1181]* . When the operator of the jet ski on which plaintiff was injured prevailed on summary judgment based on primary assumption of risk, the manufacturer was not entitled to a verdict form that would have permitted the jury to allocate some fault to her under *Civ. Code § 1431.2(a)*. The case was controlled by *Richards v. Owens-Illinois, Inc.*, not *DaFonte*. Because the operator breached no duty and committed no tort, there was no legal fault to apportion to her [Ford v. Polaris Indus., Inc. *[(2006) 139 Cal. App. 4th 755, 777-778, 43 Cal. Rptr. 3d 215]* .

For further discussion of indemnity, including Proposition 51, see Chapter 300, *Indemnity and Contribution* , and Levy, Golden & Sacks, California Torts, Ch. 74 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 460.71 Cross Complaint

[1] Setting Forth Cause of Action

A party against whom a cause of action has been asserted in a complaint or cross complaint may file a cross complaint setting forth any cause of action he, she, or it has against a person alleged to be liable thereon, whether or not such person is already a party to the action, if the cause of action asserted in the cross complaint arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause brought against the cross complainant [*Code Civ. Proc. § 428.10(b)*]. In such a case, the cross complainant may join any person as a cross complainant or cross defendant, whether or not such person is already a party to the action, if, had the cross complaint been filed as an independent action, the joinder of that party would have been permitted by the statutes governing joinder of parties [*Code Civ. Proc. § 428.20*; on joinder of parties, *see Code Civ. Proc. §§ 378, 379, 389*], and the cross complainant may unite with the cause of action asserted in the cross complaint any other causes of action he, she, or it has against any of the cross defendants, whether or not such cross defendant is already a party to the action [*Code Civ. Proc. § 428.30*].

For forms and discussion of cross complaints, see Ch. 395, *Complaints and Cross Complaints* .

[2] Declaratory Relief

A cross complaint for declaratory relief in a pending action is expressly authorized by statute [*Code Civ. Proc. §§ 86(a)(7)(A), 1060*]. A cross complaint alleging a direct right to indemnity rather than for a declaration of that right would be improper since the defendant-cross complainant has sustained no damages, an essential element of the cause of action for indemnity [*see Civ. Code § 2778*], until a judgment in favor of plaintiff has been entered against him, her, or it.

[3] Separate Document Requirement

The cross complaint must be a separate document [*Code Civ. Proc. § 428.40*]. That is, it may not be set forth as part of the answer or in the same document as another pleading.

[4] Time to File

A party "shall" file a cross complaint against any of the parties who filed the complaint or cross complaint against him or her before or at the same time as the answer to the complaint or cross complaint [*Code Civ. Proc. § 428.50(a)*]. Any other cross complaint may be filed at any time before the court has set a date for trial [*Code Civ. Proc. § 428.50(b)*]. A party must obtain leave of court to file any cross complaint except one filed within the time specified in *Code Civ. Proc. § 428.50(a)* or *(b)*, and leave may be granted in the interest of justice at any time during the course of the action [*Code Civ. Proc. § 428.50(c)*]. Leave of court is obtained by noticed motion.For the requirements concerning and a discussion of noticed motion proceedings, see *Code Civ. Proc. §§ 1003-1011, 1013-1016* and Ch. 372, *Motions and Orders*.

[5] Service

If the cross complaint is against a party who has not appeared in the action [*see Code Civ. Proc. § 1014* and Ch. 323, *Jurisdiction: Personal*, regarding what constitutes an appearance], a summons on the cross complaint must be issued and served on the cross defendant in the same manner as on commencement of an original action [*Code Civ. Proc. § 428.60(1)*; *see Code Civ. Proc. § 410.10 et seq.*; and Ch. 518, *Service of Summons and Papers*, regarding issuance and service of summons]. In addition to a summons [*see Code Civ. Proc. § 428.60(1)*], a cross complainant must serve a copy of the most recently amended complaint and any answers on cross defendants who have not previously appeared [*Cal. Rules of Ct., Rule 3.222*].

If the cross complaint is against a party who has appeared in the action, the cross complaint must be served on that party's attorney, or on the party, if a natural person, who has appeared in the action without an attorney, either in the manner provided for service of summons or in the manner provided in *Code Civ. Proc. § 1010 et seq.*, relating to service of notices [*Code Civ. Proc. § 428.60(2)*; *see also Code Civ. Proc. § 465*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 460.72 Special Answer

The cross defendant, at the time he, she, or it files an answer to the cross complaint, may file as a separate document a special answer alleging against the person asserting the claim against the cross complainant (i.e., the plaintiff or another cross complainant) any defenses the cross complainant may have on the cause of action for which indemnity is sought. The special answer must be served on both the cross complainant and such other person [*Code Civ. Proc. § 428.70*; for the requirements concerning the manner of serving the answer, *see Code Civ. Proc. §§ 465, 1011, 1013-1015*].

For forms and discussion of answers, see Ch. 26, *Answers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 460.80 Right of Contribution

A right of contribution exists among two or more defendants in a tort action where a money judgment is rendered jointly against them [*Code Civ. Proc. § 875(a)*]. The right is administered in accordance with equitableprinciples [*Code Civ. Proc. § 875(b)*] but can be enforced only after one tortfeasor has, by payment, discharged the joint judgment or paid more than his, her, or its pro rata share. Contribution is limited to the excess paid over the pro rata share of the person paying, and in no event may a tortfeasor be compelled to make contribution beyond his, her, or its pro rata share of the entire judgment [*Code Civ. Proc. § 875(c)*]. A tortfeasor who intentionally injured the injured person, however, has no right to contribution [*Code Civ. Proc. § 875(d)*].

A liability insurer which by payment has discharged the liability of a tortfeasor judgment debtor is subrogated to that judgment debtor's right of contribution [*Code Civ. Proc. § 875(e)*].

Nothing in the law governing contribution [*Code Civ. Proc. §§ 875-880*] impairs any right of indemnity under existing law [for a discussion of indemnity, see *§ 460.70*], and where one tortfeasor judgment debtor is entitled to indemnity from another there is no right of contribution between them [*Code Civ. Proc. § 875(f)*; *see also § 460.210*]. Nor does the law of contribution impair the plaintiff's right to satisfy a judgment in full as against any of the tortfeasor judgment debtors [*Code Civ. Proc. § 875(g)*].

For a discussion of the effect on the liability of joint tortfeasors of a release, dismissal, or covenant not to sue given to one or more of them before verdict or judgment, see *Code Civ. Proc. § 877*. For a discussion of the effect of a covenant not to sue given after judgment, see *Thomas v. General Motors Corp. (1970) 13 Cal. App. 3d 81, 85-86, 91 Cal. Rptr. 301* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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40-460 California Forms of Pleading and Practice--Annotated § 460.81

§ 460.81 Apportionment of Loss

Where two or more persons are held strictly liable in tort to a plaintiff, the question arises as to how the loss is to be apportioned. If a right to indemnity exists and the party entitled to be indemnified has filed a cross complaint for a declaration of that right, the court may proceed to adjudicate that issue [*see § 460.70*]. If the right to indemnity does not exist, however, the rule of contribution obtains among parties held jointly and severally liable and the loss is distributed equally between or among them [*Pearson Ford Co. v. Ford Motor Co. (1969) 273 Cal. App. 2d 269, 271, 78 Cal. Rptr. 279]* .

Legal Topics:

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§ 460.82 Determination of Pro Rata Share

The pro rata share of each tortfeasor judgment debtor is determined by dividing the entire judgment equally among all of the judgment debtors [*Code Civ. Proc. § 876(a)*]. But where a person is held liable solely for the tort of another of the judgment debtors, as in the case of the liability of an employer for the tort of an employee, the two are required to contribute only a single pro rata share, as to which there may be indemnity between them [*see Code Civ. Proc. § 876(b)*].

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§ 460.83 Indemnity Distinguished

By indemnity one seeks to transfer the entire loss imposed on him, her, or it to another who in justice and equity should bear it, whereas by contribution the loss is distributed equally among all those held liable, each bearing his, her, or its pro rata share [*see Herrero v. Atkinson (1964) 227 Cal. App. 2d 69, 73, 38 Cal. Rptr. 490* ; *see also* Ch. 300, *Indemnity and Contribution*].

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§ 460.84 Procedure

A judgment for contribution [*see § 460.212*] is obtained by noticed motion. The notice of motion [*see § 460.210*] must be given to all parties to the action, including the plaintiff(s), at least 10 days before the hearing on the motion and must be accompanied by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see § 460.211*], setting forth any information the moving party may have as to the assets of defendants available for satisfaction of the judgment or claim for contribution [*Code Civ. Proc. § 878*].

For further discussion and alternative forms, see Ch. 300, *Indemnity and Contribution* .

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§ 460.100 Related Matthew Bender Publications

For discussion and forms relating to demurrers and motions for judgment on the pleadings, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*

For discussion and forms relating to indemnity and contribution, see California Points and Authorities, Ch. 115, *Indemnity and Contribution*

For discussion and forms relating to the statute of limitations, see California Points and Authorities, Ch. 143, *Limitation of Actions*

For discussion and forms relating to products liability, see California Points and Authorities, Ch. 190, *Products Liability*

For discussion and forms relating to sureties, see California Points and Authorities, Ch. 222, *Suretyship*

Cotchett and Cartwright, California Products Liability Actions

Frumer and Friedman, Products Liability

Vargo, Products Liability Practice Guide

Long, Law of Liability Insurance, Ch. 11

Personal Injury: Actions, Defenses, Damages, Vol. 23, *Products Liability*

Legal Topics:

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§ 460.101 State Constitution

Legal rate of interest as seven percent. *Cal. Const. art. XX, § 22*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsJudgment on the PleadingsGovernmentsLegislationStatutes of LimitationsGeneral OverviewTortsProcedureMultiple DefendantsContributionGeneral OverviewTortsProcedureSettlementsMultipartiesContributionTortsProducts LiabilityGeneral OverviewTortsProducts LiabilityStrict LiabilityTortsStrict LiabilityGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 40: Products Liability thru Public Entities and Officers-Chs. 460-469
Chapter 460 PRODUCTS LIABILITY
PART III. RESEARCH GUIDE

40-460 California Forms of Pleading and Practice--Annotated § 460.102

§ 460.102 State Statutes

[1] Adulterated Candy

Regulation of candy to ensure that it is not adulterated (does not contain lead in excess of the naturally occurring levels). *Health & Safety Code § 110552*

[2] Affirmative Defenses

Affirmative defenses as deemed denied by plaintiff without replication. *Code Civ. Proc. § 431.20(b)*

Affirmative defenses generally. *Code Civ. Proc. § 431.30(b)(2)*

Affirmative defenses as required to be separately stated and to refer to cause of action they are intended to answer. *Code Civ. Proc. § 431.30(g)*

[3] Answers

Answers. *Code Civ. Proc. §§ 422.10, 422.30, 422.40, 431.20, 431.30*

[4] Borrowing Statute

Limitation laws of other states, effect of. *Code Civ. Proc. § 361*

[5] Bunk Bed Safety

Commercial users prohibited from manufacturing, retrofitting, selling, contracting to sell or resell, leasing, subletting,

or otherwise placing in stream of commerce any bunk bed that is unsafe for any child user.

[6] Cigarette Fire Safety

Prohibition of sale of cigarettes unless manufacturer certifies that they have been tested in accordance with standards, and imposition of liability on manufacturers, distributors, wholesalers, retailers, and others who knowingly sell cigarettes in violation of statutory provisions. *Health & Safety Code 14950* (effective January 1, 2007)

[7] Construction Defects

Requirements for actions for construction defects in real or immovable property. *Civ. Code § 895 et seq.*

[8] Contribution

[a] General Rule

Contribution among joint tortfeasors. *Code Civ. Proc. §§ 875-880*

Contribution, right of and enforceability of only after one tortfeasor has, by payment, discharged joint judgment or has paid more than his, her, or its pro rata share of it and as limited to excess so paid over pro rata share of person so paying. *Code Civ. Proc. § 875*

Determination of pro rata share. *Code Civ. Proc. § 876*

Effect of release, dismissal, or covenant not to sue. *Code Civ. Proc. § 877*

Notice of motion for judgment for contribution; affidavit setting forth any information moving party may have as to assets of defendant available for satisfaction of judgment or claim for contribution as required to accompany notice of motion for entry of judgment for contribution. *Code Civ. Proc. § 878*

[b] Judgment

Costs after judgment. *Code Civ. Proc. § 685.010 et seq.*

Entry of judgment for contribution on motion. *Code Civ. Proc. § 878*

Interest. *Civ. Code § 3287*

Judgment as ineffectual until entered. *Code Civ. Proc. § 664*

Judgment defined. *Code Civ. Proc. §§ 577, 578*

[9] Cosmetics Safety

Manufacturers must provide list of its FDA-regulated cosmetics that contain any chemical identified as causing cancer or reproductive toxicity. *Health & Safety Code § 111791* (effective January 1, 2007)

[10] Cross Complaints

Cross complaint for declaratory relief. *Code Civ. Proc. §§ 86(a)(7)(A), 1060*

Cross complaint as a pleading. *Code Civ. Proc. § 422.10*

Format for cross complaints. *Code Civ. Proc. §§ 422.20, 422.30*

Compulsory cross complaints. *Code Civ. Proc. §§ 426.10-426.70*

Permissive cross complaints. *Code Civ. Proc. §§ 428.10-428.80*

[11] Damages

Damages are measure of detriment or injury in terms of money. *Civ. Code §§ 3281, 3282*

Exemplary or punitive damages. *Civ. Code § 3294*

75 percent of any punitive damages awarded by final judgment must be deposited in state fund, to be appropriated for public purposes. *Civ. Code § 3294*.5 (effective August 16, 2004, and only in effect until July 1, 2006, unless extended by subsequent legislation)

Damages for breach of obligation not arising from contract. *Civ. Code § 3333*

Party who has, by own statement or conduct, intentionally and deliberately led another to believe particular thing to be true and to act on such belief is not allowed in any litigation arising out of such statement or conduct to contradict it. *Evid. Code § 623*

[12] Declarations

Declaration under penalty of perjury. *Code Civ. Proc. § 2015.5*

[13] Demurrers

Demurrer to complaint. *Code Civ. Proc. §§ 430.10, 430.30-430.80*

Demurrer to answer. *Code Civ. Proc. §§ 430.20-430.70*

[14] Design Defect--Firearms and Ammunition

Design, distribution, or marketing of firearms and ammunition is not exempt from duty to use ordinary care and skill. *Cal. Civ. Code § 1714(a)*

[15] Duty Not to Injure

Duty of every person to abstain from injuring person or property of another or infringing on any of his or her rights.

Civ. Code § 1708

[16] Employment Safety Laws

California employment safety laws pursuant to *Lab. Code § 6300 et seq.*, or orders promulgated under those laws, as inapplicable in any fashion to, as not to be considered in, and as not admissible into evidence in, any personal injury or death action except between employee and his or her employer. *Lab. Code §§ 6304, 6304.5*

[17] Evidence and Proof

Burden of proof. *Evid. Code §§ 500, 502*

Party claiming that person did not exercise requisite degree of care as having burden of proof on that issue. *Evid. Code § 521*

Evidence by party contradicting his or her own statement or conduct that intentionally and deliberately misled another as not permitted. *Evid. Code § 623*

Presumptions and inferences. *Evid. Code §§ 600-669*

[18] Failure to Warn

Criminal liability of corporations, limited liability companies, and certain corporate managers for failure to report and failure to warn of serious concealed dangers of products or business practices. *Penal Code § 387*

[19] Fraud

Elements of actionable fraud. *Civ. Code § 1710*

Fraud on public or class as fraud on individual. *Civ. Code § 1711*

[20] Indemnity

Indemnity contracts generally. *Civ. Code §§ 2772-2784.5*

Indemnity contracts for design defects. *Civ. Code §§ 2782-2784*

Jurisdiction of actions for declaratory relief as to right to indemnity asserted by cross complaint. *Code Civ. Proc. §§ 86(a)(7)(A), 1060*

[21] Joinder

Joinder of parties. *Code Civ. Proc. §§ 378, 379, 382, 389*

Joinder of actions. *Code Civ. Proc. § 427.10*

[22] Liability

Proposition 51: Joint and several liability. *Civ. Code § 1431.2*

Liability for negligence or tort. *Civ. Code § 1714*

[23] Motions

Motions and orders. *Code Civ. Proc. §§ 1003-1008*

Motion as deemed made on serving and filing notice. *Code Civ. Proc. § 1005.5*

Notices of motion. *Code Civ. Proc. §§ 1010-1011, 1013-1020*

[24] Statute of Limitations

Action to recover damages for injury to real property as required to be commenced within three years. *Code Civ. Proc. §§ 337.1, 337.15, 338(b)*

Action to recover damages for injury to personal property as required to be commenced within three years. *Code Civ. Proc. § 338(c)*

Action to recover damages for personal injury or wrongful death as required to be commenced within two years. *Code Civ. Proc. §§ 335.1*; *see* former *Code Civ. Proc. § 340(3)* (one-year period)

Actions for injury or illness caused by exposure to asbestos as required to be commenced within one year from date of disability or date plaintiff knew or should have known that disability was caused by exposure to asbestos, whichever is later. *Code Civ. Proc. § 340.2*

Statute of limitations for action by minor for injury suffered prior to birth or at birth. *Code Civ. Proc. § 340.4*; *see also Code Civ. Proc. § 340.5* (time limits for medical malpractice actions brought on behalf of minors)

Statute of limitations for professional negligence of health care provider. *Code Civ. Proc. § 340.5*

Discovery rule for wrongful death actions based on exposure to hazardous materials or toxic substances. *Code Civ. Proc. § 340.8*

Pleading statute of limitations in bar. *Code Civ. Proc. § 458*

Separate trial of defense of statute of limitations. *Code Civ. Proc. § 597*

[25] Summary Judgment

Summary judgment. *Code Civ. Proc. § 437c*

In personal injury or property damage case, defendants as precluded from referring at trial to fault, absence from action, or involvement of defendant whose motion for summary judgment has been granted on ground that defendant was

without fault. *Code Civ. Proc. § 437c(k)*

[26] Transplants

Collection, processing, storage, or distribution of tissue for purpose of transplantation as service, and therefore as not subject to *Com. Code § 2101* (regarding sales). *Health & Safety Code § 1635.2*

[27] Unsafe Products

Inherently unsafe products. *Civ. Code § 1714.45*

[28] Vaccines

Development of AIDS vaccine. *Health & Safety Code §§ 121250-121275*

Compensation by victims' fund to person injured by AIDS vaccine; procedures for application and review. *Health & Safety Code § 121270*

[29] Warranty

Construction of warranties. *Com. Code § 2317*

Express warranties. *Com. Code § 2313*

Implied warranties. *Com. Code §§ 2314, 2315*

Modification or exclusion of warranties. *Com. Code § 2316*

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§ 460.103 California Rules of Court

Form and format of papers presented for filing in the trial courts. *Cal. Rules of Ct., Rules 2.100*-2.119 (reorganized and effective Jan. 1, 2007).

Standards for judicial management of complex litigation. *Cal. Rules of Ct., Rule 3.400 et. seq.* (reorganized and effective Jan. 1, 2007)

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40-460 California Forms of Pleading and Practice--Annotated § 460.104

§ 460.104 Decisions

[1] Accrual of Cause of Action

Court certified questions asking whether (1) two separate physical injuries arising out of the same wrongdoing may be conceived of as invading two different primary rights, and (2) whether two separate physical injuries--both caused by a plaintiff's use of tobacco--may be considered "qualitatively different" for purpose of determining when the statute of limitations begins to run. *Pooshs v. Phillip Morris USA, Inc. (9th Cir. 2009) 561 F.3d 964, 967-968*

Claims were not time-barred under the discovery rule in absence of any suggestion when plaintiff should have suspected that his use of Prednisone caused his hip injury. *Gilbert v. Watson Labs., Inc. (S.D. Cal. Oct. 9, 2008) 2008 U.S. Dist. LEXIS 79539, at *5*

Claims of injury or damage caused by addiction were time-barred under *Grisham v. Philip Morris, Inc. (2007) 40 Cal. 4th 623, 54 Cal. Rptr. 3d 735, 151 P.3d 1151* , even though plaintiff, who was diagnosed with COPD in 1989, did not specifically claim addiction as injury. "First-injury" rule barred her physical injury claims. *Pooshs v. Phillip Morris USA, Inc. (N.D. Cal. May 27, 2008), 2008 U.S. Dist. LEXIS 43620, at *42*

Discovery rule only delayed accrual of cause of action until prisoner suspected that someone had done something wrong to him, not until he suspected that Paxil was a "direct cause" of his violent behavior. *Howard v. Glaxosmithkline (E.D. Cal. Dec. 16, 2005) 2005 U.S. Dist. LEXIS 33317, at *6*

The court found no basis for a conclusive presumption that a particular smoker was or should have been aware in 1988 that cigarettes were addictive. The court also rejected a special presumption based on common knowledge that plaintiffs are aware that smoking is addictive or harmful. The court did acknowledge a general, rebuttable presumption that plaintiffs have knowledge of the wrongful cause of their injuries. The court specifically rejected *Soliman v. Philip Morris Inc. (9th Cir. 2002) 311 F.3d 966* to the extent that it held that such a special presumption exists. *Grisham v. Philip Morris U.S.A., Inc. (2007) 40 Cal. 4th 623, 640-646, 54 Cal. Rptr. 3d 735, 151 P.3d 1151*

Under delayed discovery rule, cause of action accrues and statute of limitations begins to run when plaintiff has reason

to suspect injury and some wrongful cause, unless plaintiff pleads and proves that reasonable investigation at that time would not have revealed factual basis for that particular cause of action, in which case, statute of limitations is tolled until reasonable investigation would have revealed its factual basis; to rely on rule, plaintiff must specifically plead facts to show time and manner of discovery and inability to have made earlier discovery despite reasonable diligence. *Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal. 4th 797, 814-815, 27 Cal. Rptr. 3d 661, 110 P.3d 914*

Limitations period commences when plaintiff has "reason to suspect" a factual basis for a cause of action. A plaintiff has reason to suspect when he or she has notice or information of circumstances to put a reasonable person on inquiry; plaintiffs suspected, for more than a year before they filed complaint, wrongdoing by someone and that someone was to blame for their daughter's death, putting them on notice of a potential claim; because plaintiffs delayed in filing their claim, drug manufacturer was entitled to summary judgment. *Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 398, 87 Cal. Rptr. 2d 453, 981 P.2d 79*

One-year statute of limitations for market-share theory action (*Code Civ. Proc. § 340(3)*) as starting to run when injured party suspected that defendants' conduct was wrongful, and not after filing of decision of California Supreme Court case allowing previously impermissible cause of action; change in law, either by statute or by case law, as not reviving claims otherwise barred by statute of limitations. *Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1112-1116, 245 Cal. Rptr. 658, 751 P.2d 923*

Plaintiff's duty to investigate does not begin until plaintiff actually has reason to investigate. Suspicion necessary to trigger statute of limitations may not be imputed to a plaintiff. Information given to general public through media coverage about dangers of Redux did not trigger statute of limitations. Plaintiff had no duty to read newspapers and watch television news and otherwise seek out news of drug's dangerous side effects. *Nelson v. Indevus Pharms., Inc. (2006) 142 Cal. App. 4th 1202, 1211, 48 Cal. Rptr. 3d 668*

Economic loss alone, without physical injury, does not constitute the type of "damage" that will cause a negligence or strict liability cause of action to accrue. Municipalities' allegations that deteriorating lead paint contaminated their property did not include any allegations of physical injury. Their causes of action thus never accrued. *County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal. App. 4th 292, 318, 40 Cal. Rptr. 3d 313 , review denied, 2006 Cal. LEXIS 7622*

Defendant was properly granted summary judgment on statute of limitations grounds. Plaintiff's being informed by physicians that he was suffering from serious condition and being asked to provide list of all chemicals he came into contact with and to stay away from solvent was sufficient to arouse suspicion and lead to further investigation. Moreover, fact that plaintiff filed workers' compensation claim based on exposure to toxic chemicals was definitive proof that he had suspicion that "someone had some something wrong to [him]." *Rivas v. Safety-Kleen Corp. (2002) 98 Cal. App. 4th 218, 119 Cal. Rptr. 2d 503, 511*

If there exists some triable issue of fact about when plaintiff was placed on notice, then, as a matter of law, it cannot be determined when statute of limitations begins to run and summary judgment for defendant is improper. *Clark v. Baxter Healthcare Corp. (2000) 83 Cal. App. 4th 1048, 1060, 100 Cal. Rptr. 2d 223*

In tort actions, statute of limitations generally commences when last element essential to cause of action occurs. Physical injury resulting from asbestos contamination, not mere presence of asbestos, must have occurred before cause of action for strict liability or negligence can accrue in asbestos-in-building cases and limitations period commence. *San Francisco Unified Sch. Dist. v. W.R. Grace & Co. (1995) 37 Cal. App. 4th 1318, 1330, 44 Cal. Rptr. 2d 305* (disagreeing with *City of San Diego v. U.S. Gypsum Co. (1994) 30 Cal. App. 4th 575, 590, 35 Cal. Rptr. 2d 876*)

Cause of action accrues for statute of limitations purposes when plaintiff had notice or information of circumstances that would put reasonable person on inquiry. *Goldrich v. Natural Y Surgical Specialties, Inc. (1994) 25 Cal. App. 4th*

772, 779, 31 Cal. Rptr. 2d 162

Court applied the discovery rule to medical malpractice cause of action and products liability cause of action using what later courts called "Basic Approach." As a matter of law, plaintiff should have suspected that manufacturer of her IUD wronged her by supplying defective product, and her doctor wronged her by prescribing it. *Rose v. Fife (1989) 207 Cal. App. 3d 760, 771, 255 Cal. Rptr. 440*

In drug product liability action, when manifestation of injury, cause of injury, and person's knowledge of wrongdoing by manufacturer occur at differenttimes, statute of limitations as beginning to run when person discovers, or with reasonable diligence should have discovered, wrongful conduct of manufacturer; whether plaintiff was reasonably diligent in discovering wrongful conduct of drug manufacturer as question of fact. *Kensinger v. Abbott Labs. (1985) 171 Cal. App. 3d 376, 385-386, 217 Cal. Rptr. 313*

Statute of limitations for action based on injury from asbestos exposure (*Code Civ. Proc. § 340.2*) as not beginning to run until disability under *Code Civ. Proc. § 340.2(b)* exists, even when plaintiff knows of injury caused by asbestos exposure. *Blakey v. Superior Court (1984) 153 Cal. App. 3d 101, 106-107, 200 Cal. Rptr. 52*

First prerequisite for running of statute of limitations as existence of cause of action, and trial court as improperly granting summary judgment when record did not show without substantial conflict that plaintiff would have had case had he sued two decades previously on minor possible side effects of drug; miscarriage of justice as existing if trial court did not allow plaintiff to proceed on theory that his cataracts were caused by drug even if action was filed years after he knew or should known that he had suffered some injuries from drug. *Martinez-Ferrer v. Richardson-Merrell, Inc. (1980) 105 Cal. App. 3d 316, 321-322, 327, 164 Cal. Rptr. 591*

In negligence or strict liability action, in case of latent or progressive disorder, discovery as appropriate test for determining accrual of cause of action; diagnosis that is meant to be essence of discovery as required to be "informed diagnosis," requiring brief explanation of findings and prognosis by examining physician; when physical manifestations have not occurred, discovery as required to mean reasonable knowledge that they are likely to occur. *Velasquez v. Fibreboard Prod. Corp. (1979) 97 Cal. App. 3d 881, 887, 888-889, 159 Cal. Rptr. 113* (plaintiff learned of asbestosis disease before knowingly suffering its severe effects; *see Code Civ. Proc. § 340.2*)

To prove tolling of statute of limitations due to defendant's fraudulent misrepresentations and concealment of material facts of defect in design, plaintiff as required to plead and prove (1) when fraud was discovered; (2) circumstances under which fraud was discovered; and (3) that plaintiffs were not at fault for failure to discover fraudulent concealment, and did not have actual or presumptive knowledge of facts sufficient to put them on inquiry. *Baker v. Beech Aircraft Corp. (1979) 96 Cal. App. 3d 321, 327, 157 Cal. Rptr. 779*

Generally, personal-injury claim as accruing and period of limitation as commencing when wrongful act takes place; exception as presented when pathological effect occurs without perceptible trauma and victim is "blamelessly ignorant" of cause of injury; in that case, statute of limitations as not beginning to run until person knows or, by exercise of reasonable diligence, should have discovered cause of injury. *G. D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 25, 122 Cal. Rptr. 218* ; *see Pereira v. Dow Chem. Co. (1982) 129 Cal. App. 3d 865, 873-875, 181 Cal. Rptr. 364* (record did not justify, as a matter of law, conclusion that plaintiffs acted unreasonably or without due diligence in pursuit of their claims)

Cause of action as generally arising when wrongful act is committed and not at time of discovery; statute of limitations as commencing to run eventhough plaintiff is ignorant of having cause of action; exceptions. *Avner v. Longridge Estates (1969) 272 Cal. App. 2d 607, 616, 77 Cal. Rptr. 633*

[2] Agency

Question of agency as inconsequential under rule of strict liability in tort but as still crucial as to cause of action for breach of express warranty. *Grinnell v. Charles Pfizer & Co. (1969) 274 Cal. App. 2d 424, 439 n. 12, 79 Cal. Rptr. 369*

[3] Alteration in Product After Sale

Jury's finding for manufacturer of product as proper where evidence showed that product was altered by plaintiff's employer, that alteration was not sanctioned by manufacturer, and that alteration could have caused breakdown in product resulting in plaintiff's injury. *Martinez v. Nichols Conveyor & Eng'g Co., Inc. (1966) 243 Cal. App. 2d 795, 799, 52 Cal. Rptr. 842* (paper baler altered to utilize upstroke of piston to unload completed bale from machine and bale ejector could have caused fracturing of bolt which allowed 800 pound platen on baler to fall on pla plaintiff's arm resulting in serious injuries; case criticized on another point in *Warner Constr. Corp. v. Los Angeles (1970) 2 Cal. 3d 285, 298-299 n.15, 85 Cal. Rptr. 444, 466 P.2d 996*)

For doctrine of strict liability to apply, Restatement (Second) of Torts § 402A as requiring that product be one which "is expected to and does reach user or consumer without substantial change in the condition in which it is sold," which requirement is explanatory of requirement of *Greenman* rule that product be one which seller knows "is to be used without inspection for defects." *Putensen v. Clay Adams, Inc. (1970) 12 Cal. App. 3d 1062, 1073, 91 Cal. Rptr. 319* (applicability of doctrine against manufacturer of allegedly defective surgical tubing as not established where tubing after purchase had been stretched, soaked, and drawn over another tubing by doctor or under his direction in preparing it for heart catheterization procedure and evidence adduced by plaintiff did not afford reasonable basis for conclusion that it is more probable that "kinking" in tubing was caused by manufacturer than that it was not)

Liability of manufacturer where purchaser's change in design of product, which change cause injury, was foreseeable. *Thomas v. General Motors Corp. (1970) 13 Cal. App. 3d 81, 89, 91 Cal. Rptr. 301* (washing machine from which bead holding glass in place in lid had been removed after sale to laundromat owner)

[4] Alternative Theories of Recovery

Finding of negligent failure to warn was "logically and legally inconsistent" with jury's finding that boilers were not defective with respect to their warnings. *Oxford v. Foster Wheeler LLC (2009) 177 Cal. App. 4th 700, 720, 99 Cal. Rptr. 3d 418*

Finding by one jury that defendant's product was not defective because of failure to warn precluded second jury from finding that defendant was negligent for failure to warn of risks of its product. *Valentine v. Baxter Healthcare Corp. (1999) 68 Cal. App. 4th 1467, 1482, 81 Cal. Rptr. 2d 252*

In personal injury action alleging in one cause of action, negligent design and construction of swimming pool as proximate causes of injuries sustained by plaintiff when he dove into pool and struck his head on bottom, and, in second cause of action mixed theory of breach of warranty and liability predicated on strict liability in tort, plaintiff as having burden of proving defendant's negligence on first cause of action and existence of defect on second cause of action. *Barnes v. Blue Haven Pools (1969) 1 Cal. App. 3d 123, 127, 81 Cal. Rptr. 444 , superseded by statute on other grounds as stated in Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573*

[5] Appeal

Execution (by guardian ad litem on behalf of minor plaintiff with court approval) after judgment of covenant not to sue

one defendant (laundromat owner) against whom judgment in strict-liability action (for defectively designed washing machine) was entered and another defendant (washing-machine dealer) in favor of whom judgment was entered against plaintiff as not estopping plaintiff from prosecuting appeal from judgment in favor of other two defendants (washing-machine manufacturer and company formed for purpose of selling manufacturer's washers); covenant not to sue one of several joint tortfeasors (as distinguished from release) as not operating as release of others; covenant not to sue after judgment as governed by law apart from *Code Civ. Proc. § 877*, which applies only to releases, covenants not to sue, and dismissals executed or entered before verdict or judgment. *Thomas v. General Motors Corp. (1970) 13 Cal. App. 3d 81, 85-86, 91 Cal. Rptr. 301*

Claim that doctrine of strict liability should have been applied against defendant furniture retailer in personal injury action, resulting from collapse of chair on sales floor of defendant's store when plaintiff sat on it, pleaded and tried on negligence theory as not subject to being considered on appeal if doctrine was not raised in trial court. *Andrews v. Barker Bros. Corp. (1968) 267 Cal. App. 2d 530, 539, 73 Cal. Rptr. 284*

[6] Applicability of Strict Liability Doctrine

[a] Against Bailors and Lessor of Personal Property

Doctrine of strict liability in tort as applicable to bailors and lessors of personal property in business of letting such property as well as to manufacturers. *Price v. Shell Oil Co. (1970) 2 Cal. 3d 245, 253, 85 Cal. Rptr. 178, 466 P.2d 722* ; *McClaflin v. Bayshore Equip. Rental Co. (1969) 274 Cal. App. 2d 446, 452, 79 Cal. Rptr. 337*

[b] Against Employer

Although workers' compensation law bars employee's action at law for injury arising out of and in course of employment when conditions of workers' compensation exist, and even though *Lab. Code § 4553* was designed to penalize intentional misconduct of employer, cause of action as permitted for aggravation of disease because of employer's fraudulent concealment of condition and its cause. *Johns-Manville Prods. Corp. v. Superior Court (1980) 27 Cal. 3d 465* (plaintiff developed asbestos-related diseases as result of exposure while working for defendant)

Dual capacity doctrine, by which employer may be liable for worker's compensation benefits and strict products liability damages, as not applying to employer who merely makes design changes in standard product used inemployer's business and not sold to public by employer. *Bonus-Bilt v. United Grocers, Ltd. (1982) 136 Cal. App. 3d 429, 440, 186 Cal. Rptr. 357*

[b.1] Against Hotel Proprietors

Neither landlords nor hotel proprietors are subject to strict products liability for injuries to tenants and guests caused by defect in premises; unlike retailers, landlords and hotel owners often are unable to exert pressure on manufacturers to make products safer and cannot share costs of insuring tenants' or guests' safety with manufacturer; landlords and hotel owners cannot be expected to possess expert knowledge concerning components that comprise leased dwellings. *Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1189-1209, 43 Cal. Rptr. 2d 836, 899 P.2d 905 , overruling Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 213 Cal. Rptr. 213, 698 P.2d 116*

[c] Against Lessors of Real Property

Peterson, holding that landlord is not strictly liable for injuries to tenant caused by latent defects, is retroactively applicable. *McCarthy v. Martinson (1997) 51 Cal. App. 4th 632, 639-640, 59 Cal. Rptr. 2d 149* ; *see* *Peterson v.*

Superior Court (1995) 10 Cal. 4th 1185, 43 Cal. Rptr. 2d 836

Doctrine of strict liability in tort does not apply to lessor of real property. *Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1204, 43 Cal. Rptr. 2d 836, 899 P.2d 905 overruling Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 213 Cal. Rptr. 213, 698 P.2d 116*

[d] Against Licensors of Chattels

Doctrine of strict liability in tort as applicable to licensors of chattels; hence, licensor (owner of launderette) as strictly liable in tort to licensee (minor) using chattel (washing machine) on premises in manner in which it was intended to be used (to wash clothes), who was injured as proximate result of defect in chattel (lack of safety device). *Garcia v. Halsett (1970) 3 Cal. App. 3d 319, 324-326, 82 Cal. Rptr. 420* ; *see also Thomas v. General Motors Corp. (1970) 13 Cal. App. 3d 81, 89, 91 Cal. Rptr. 301*

[e] Against Manufacturers

[i] Manufacturers of Lots

Doctrine of strict liability in tort as applicable to manufacturer of a lot (by cutting, filling, grading, compacting, and the like of the lot) for damages suffered by owner as proximate result of defects in manufacturing process. *Avner v. Longridge Estates (1969) 272 Cal. App. 2d 607, 615, 77 Cal. Rptr. 633*

[ii] Manufacturers of Products and Component Parts

See also § 460.104[24][n], below, "Supplier of Nondefective Component."

Doctrine of strict liability in tort as applicable to manufacturer of defective product. *Greenman v. Yuba Power Prods., Inc. (1963) 59 Cal. 2d 57, 62, 27 Cal. Rptr. 697, 377 P.2d 897*

Plaintiff could not establish that a defect in component parts caused injury in absence of evidence that defendant supplied the asbestos-containing gaskets used in its valves. Fact that use of asbestos-containing material with the valves was foreseeable was irrelevant. *Merrill v. Leslie Controls, Inc. (2009) 179 Cal. App. 4th 262, 277-278, 101 Cal. Rptr. 3d 614*

Fact that defendants manufactured their equipment pursuant to Navy specifications did not deprive them of the component parts defense. Moreover, the alleged foreseeability of risk of finished product was irrelevant to issue of component part manufacturers' liability. *Taylor v. Elliott Turbomachinery Co. (2009) 171 Cal. App. 4th 564, 584-586, 90 Cal. Rptr. 3d 414*

Because the defendant did not show that its component part (airbag module) did not contain a defect, it was subject to strict liability under the risk-benefit test. *Gonzalez v. Autoliv ASP, Inc. (2007) 154 Cal. App. 4th 780, 790, 64 Cal. Rptr. 3d 908, 914-917*

Component parts doctrine did not apply to grinders, sanders, and saws specifically designed to be used with abrasive wheels. *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co. (2004) 129 Cal. App. 4th 577, 581, 28 Cal. Rptr. 3d 744*

Manufacturers and successor manufacturers of general aviation aircraft parts in relation to duty to warn and federal

preemption. *Burroughs v. Precision Airmotive Corp. (2000) 78 Cal. App. 4th 681, 702*

Component part manufacturer who participates in and is responsible for testing durability of component part after installation in finished product as liable for design defect. *Springmeyer v. Ford Motor Co. (1998) 60 Cal. App. 4th 1541, 1552-1553, 71 Cal. Rptr. 2d 190*

Doctrine of strict liability as not applying to defendant manufacturer sued only for economic losses, defined as damages for loss based on inadequate value, costs of repair, and replacement of defective product or consequent loss of profits without any claim of personal injury or damage to other property. *Fieldstone Co. v. Briggs Plumbing Prods., Inc. (1997) 54 Cal. App. 4th 357, 364-366, 62 Cal. Rptr. 2d 701*

Manufacturer of fiberglass mold, used to produce jeep top that was sold as after-market product, as subject to strict liability for injuries caused by defect in top, by virtue of defendant's participation in overall production enterprise. *Fortman v. Hemco, Inc. (1989) 211 Cal. App. 3d 241, 251-255, 259 Cal. Rptr. 311*

Statutory scheme requiring immunization for all school-age children against communicable childhood diseases (*Health & Safety Code §§ 3380-3390*) as not extending grant of immunity from liability for negligence or strict liability in tort to manufacturers of vaccine. *Flood v. Wyeth Labs., Inc. (1986) 183 Cal. App. 3d 1272, 1275-1277, 228 Cal. Rptr. 700*

Health & Safety Code § 429.36, providing that no person shall be liable for injury caused by act or omission in administration of vaccine or other immunizing agent to a minor, including residual effects of vaccine or immunizing agent, if such immunization is required by state law and act or omission does not constitute willful misconduct or gross negligence, as not including manufacturers of vaccines within its grant of immunity or granting them exemption from products liability. *Flood v. Wyeth Labs., Inc. (1986) 183 Cal. App. 3d 1272, 1277-1280, 228 Cal. Rptr. 700*

Doctrine of strict liability in tort as applying to manufacturer of blasting material which caused actual manufacturer of fuses to place allegedly defective dynamite fuse into stream of commerce. *Canifax v. Hercules Powder Co. (1965) 237 Cal. App. 2d 44, 47-52, 46 Cal. Rptr. 552* (action arose out of dynamite explosion caused by short-burning fuse allegedly defective in that no warning was given; defendant was manufacturer of dynamite and took order for dynamite and fuses from jobber who actually supplied products to customer; defendant ordered fuses from another company which sent them directly to jobber)

Doctrine of strict liability in tort as applicable to manufacturer of vaccine administered to plaintiff and causing very disease it was designed to prevent. *Grinnell v. Charles Pfizer & Co. (1969) 274 Cal. App. 2d 424, 432-434, 79 Cal. Rptr. 369* (involving Sabin polio vaccine); *see also Gottsdanker v. Cutter Labs. (1960) 182 Cal. App. 2d 602, 607, 6 Cal. Rptr. 320* (action based on implied warranty against manufacturer of Salk polio vaccine by plaintiff who became infected with that disease after vaccination)

One who puts out as his own product chattel manufactured by another as subject to same liability as though he were its manufacturer. *Cravens, Dargan & Co. v. Pacific Indem. Co. (1972) 29 Cal. App. 3d 594, 599, 105 Cal. Rptr. 607*

Applicability of doctrine of strict liability in tort to corporation organized under laws of sister state for defective product manufactured and sold by its foreign affiliate in foreign country where plaintiff, a California resident, sustained personal injuries as result of defect. *Kasel v. Remington Arms Co. (1972) 24 Cal. App. 3d 711, 717-727, 739-740, 101 Cal. Rptr. 314* (defendant was Delaware corporation with home office in Connecticut doing multinational business and advertising its products (firearms and shells) in national magazines; it organized and financed affiliate in Mexico to manufacture shells and market them under defendant's trademark which was registered in manycountries; the two companies had interlocking or common directors and officers and defendant owned 40 percent of stock of its affiliate; plaintiff, a California resident, while hunting in Mexico, was injured by allegedly defective shotgun shell which he purchased in Mexico and which had been manufactured by defendant's Mexican affiliate; California law on strict

liability was applied since Mexico had no comparable law and did not allow recovery for pain and suffering)

[iii] Manufacturers of Components Installed in Mass-Produced Home

Manufacturer of windows installed in mass-produced home during its construction can be strictly liable in tort for harm resulting from defects in those windows. Policies underlying doctrine of strict liability are equally applicable to component manufacturers and suppliers. Component manufacturers are integral part of overall producing and marketing enterprise, may be only member of that enterprise reasonably available to injured plaintiff, and may be in best position to ensure product safety. Moreover, component part manufacturers can adjust costs of liability in course of their continuing business relationship with other participants in overall manufacture and marketing enterprise. Court rejected manufacturers' argument that subjecting them to strict liability would be improper because they had no physical control over windows at time of alleged harm. Also, fact that windows were assembled and installed by other parties did not change court's analysis, because mere assembly of a product that is sold in parts is not "substantial change" in product within meaning of § 402(1)(b) of Restatement (Second) of Torts. Finally, holding window manufacturers subject to strict liability would not "open the litigation floodgates." *Jimenez v. Superior Court (2002) 29 Cal. 4th 473, 480-481, 127 Cal. Rptr. 2d 614, 58 P.3d 450*

[f] Against Manufacturer-Repairer of Product

Doctrine of strict liability in tort as extending in some situations to repairer of product who was also its manufacturer. *Young v. Aro Corp. (1973) 36 Cal. App. 3d 240, 246, 111 Cal. Rptr. 535* (grinder returned to manufacturer with instructions to reduce speed; manufacturer was given carte blanche as to how to accomplish this; manufacturer exchanged springs, necessary to reduce speed, but failed to replace governor which was so worn that it failed to control speed and after repair grinder wheel disintegrated killing plaintiff's decedent)

[g] Against Occasional Seller

Doctrine of strict liability in tort as applicable to manufacturer, wholesaler, retail dealer, or distributor; only group of persons exempt from liability as occasional seller not engaged in that activity as part of his business. *Barth v. B.F. Goodrich Tire Co. (1968) 265 Cal. App. 2d 228, 251-253, 71 Cal. Rptr. 306*

[h] Against Publishers

Erroneous approach chart for airport as defective product under California's strict liability law; publisher as strictly liable for accident resulting from reliance on chart. *Brocklesby v. United States (9th Cir. 1985) 753 F.2d 794, 800*

Absent endorsement or sponsorship for economic gain, publisher of advertisement as having no duty to investigate safety of advertised product and no liability for injuries sustained from use of product. *Walters v. Seventeen Magazine (1987) 195 Cal. App. 3d 1119, 1121-1122, 241 Cal. Rptr. 101*

[i] Against Real Estate Developers and Builders

California Supreme Court disapproved *Casey*,, to extent it is inconsistent with views expressed in case holding that manufacturer of defective windows installed in mass produced home can be strictly liable for harm resulting from defects. *Jimenez v. Superior Court (2002) 29 Cal. 4th 473, 481, 127 Cal. Rptr. 2d 614, 621, 58 P.3d 450*

Doctrine of strict liability in tort as inapplicable in action against developer's subcontractor, whose predecessor

installed faulty windows; subcontractor could not be held strictly liable because subcontractor's agreement with developer showed that subcontractor was only providing materials, labor and equipment, and had no financial stake or control of project. *Casey v. Overhead Door Corp. (1999) 74 Cal. App. 4th 112, 119, 87 Cal. Rptr. 2d 603*

Doctrine of strict liability in tort as inappcliable in action against manufacturer sued by developer who installed manufacturer's sinks in housing developments when action was solely for repair and replacement costs of sinks, which are economic losses; strict liability not applicable unless there is personal injury or damage to property other than allegedly defective product. *Fieldstone Co. v. Briggs Plumbing Prods., Inc. (1997) 54 Cal. App. 4th 357, 364-366, 62 Cal. Rptr. 2d 701*

Doctrine of strict liability in tort as applying to builders engaged in mass production and sales of homes. *Collins Dev. Co. v. D. J. Plastering, Inc. (2000) 81 Cal. App. 4th 771, 778-779, 97 Cal. Rptr. 2d 83* ; *Stearman v. Centex Homes (2000) 78 Cal. App. 4th 611, 623, 92 Cal. Rptr. 2d 761* ; *Orndorff v. Christiana Cmty. Builders (1990) 217 Cal. App. 3d 683, 689, 266 Cal. Rptr. 193* ; *Kriegler v. Eichler Homes, Inc. (1969) 269 Cal. App. 2d 224, 227-229, 74 Cal. Rptr. 749* (defective heating system)

Doctrine of strict products liability as not applicable to action alleging that seller of house participated in construction of defective improvement to house before sale. *Siders v. Schloo (1987) 188 Cal. App. 3d 1217, 1223, 233 Cal. Rptr. 906*

Lending institution as unable to state cause of action for strict liability against builder of defective condominiums when property was purchased by lending institution at foreclosure sale after builder defaulted. *Sumitomo Bank v. Taurus Developers, Inc. (1986) 185 Cal. App. 3d 211, 226-227, 229 Cal. Rptr. 719*

Doctrine of strict liability in tort as applicable to developers of multiple-unit, residential, planned development complex. *Del Mar Beach Club Owners Assn. v. Imperial Contracting Co. (1981) 123 Cal. App. 3d 898, 911, 913, 176 Cal. Rptr. 886*

Doctrine of strict liability in tort as applicable to producer-seller of tract houses, whether termed developer, subdivider, or builder. *Swett v. Gribaldo, Jones & Assocs. (1974) 40 Cal. App. 3d 573, 575, 115 Cal. Rptr. 99*

Although mass producer-seller of homes or residential lots who has no reasonable expectation that purchasers will make thorough inspection for defects is strictly liable in tort to purchaser for physical damage resulting from defect in design or construction of such homes or lots, lender of money for development as not permitted to recover on strict liability theory because lender is link in marketing chain; however, lender not precluded from recovering damages from developer, engineer, and contractor that manufactured lots based on negligence in impairing security of loan. *U. S. Fin. v. Sullivan (1974) 37 Cal. App. 3d 5, 17, 112 Cal. Rptr. 18*

Doctrine of strict liability in tort as applicable to defectively designed home where, as proximate result of defect, injury results to a human being. *Hyman v. Gordon (1973) 35 Cal. App. 3d 769, 772-773, 111 Cal. Rptr. 262* (water heater installed on floor of garage instead of being elevated and fire erupted when spilled gasoline spread across floor and reached flame of heater, seriously injuring plaintiff, a minor)

Doctrine of strict liability in tort as applicable to developer of real property for installation of defective water distribution system. *Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 810-811*

Doctrine of strict liability in tort as applicable to manufacturer of building lot (by cutting, filling, grading, compacting, etc.) for damages suffered by owner as proximate result of defects in manufacturing process. *Avner v. Longridge Estates (1969) 272 Cal. App. 2d 607, 615, 77 Cal. Rptr. 633*

[j] Against Retailers, Wholesalers, and Distributors of Products

Doctrine of strict liability in tort as applicable to retailer as well as to manufacturer of defective product. *Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 260-261, 37 Cal. Rptr. 896, 391 P.2d 168* ; *see also Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 587, 75 Cal. Rptr. 652, 451 P.2d 84* ; *Westlye v. Look Sports, Inc. (1993) 17 Cal. App. 4th 1715, 1741-1742, 22 Cal. Rptr. 2d 781* ; *Midgley v. S.S. Kresge Co. (1976) 55 Cal. App. 3d 67, 71, 127 Cal. Rptr. 217* ; *McClaflin v. Bayshore Equip. Rental Co. (1969) 274 Cal. App. 2d 446, 452, 79 Cal. Rptr. 337* ; *Johnson v. Standard Brands Paint Co. (1969) 274 Cal. App. 2d 331, 337, 79 Cal. Rptr. 194* ; *Slayton v. Wright (1969) 271 Cal. App. 2d 219, 237, 76 Cal. Rptr. 494* ; *Read v. Safeway Stores, Inc. (1968) 264 Cal. App. 2d 404, 407, 70 Cal. Rptr. 454* ; *Canifax v. Hercules Powder Co. (1965) 237 Cal. App. 2d 44, 51, 46 Cal. Rptr. 552*

Service provider that facilitated delivery of the Durom Hip Resurfacing System to physician was subject to liability as a distributor. There is no exception to strict liability for distributors of implanted medical devices. *Lyles v. Zimmer, Inc. (E.D. Cal. May 29, 2009) 2009 U.S. Dist. LEXIS 50483, at *11-*13*

Distributors who allegedly failed to warn of risks of gadolinium contrast dye were not fraudulently joined. *Moorhouse v. Bayer Healthcare Pharms. (N.D. Cal. June 17, 2008) 2008 U.S. Dist. LEXIS 48833, at *11-*14*

For purposes of determining fraudulent joinder, the general rule that distributors are strictly liable for defective products applied to the distributor of the prescription drug *Tegretol. Maher v. Novartis Pharms. Corp. (S.D. Cal. Aug. 10, 2007) 2007 U.S. Dist. LEXIS 58984, at *8-*9*

Restaurant as strictly liable for failing to warn customers in the context of allergies, such as when a customer eats soup that contains an allergy producing food additive. *Livingston v. Marie Callenders, Inc. (1999) 72 Cal. App. 4th 830, 839, 85 Cal. Rptr. 2d 528*

Doctrine of strict liability in tort as not applicable to person who sells new or used vehicle to dealer under *Veh. Code § 24007*. *Fruehauf Corp. v. Lakeside Chevrolet Co. (1981) 117 Cal. App. 3d 783, 789, 173 Cal. Rptr. 55*

Defendant wholesale distributor as properly contending that bases of liability of wholesale distributor and retail seller of defectively manufactured product are identical and based on same facts--manufacturing defect in product that was proximate cause of plaintiff's injury; therefore, jury verdict exonerating retailer while finding against wholesaler as fatally inconsistent. *Cavallaro v. Michelin Tire Corp. (1979) 96 Cal. App. 3d 95, 100, 157 Cal. Rptr. 602*

Neither transfer of title to goods nor sale as required for application of doctrine of strict liability in tort. *Barth v. B.F. Goodrich Tire Co. (1968) 265 Cal. App. 2d 228, 251-252, 71 Cal. Rptr. 306*

Doctrine of strict liability in tort as applicable to wholesale-retail distributor of product as well as to manufacturer. *Barth v. B.F. Goodrich Tire Co. (1968) 265 Cal. App. 2d 228, 252-253, 71 Cal. Rptr. 306* (wholesale-retail distributor of tires from stock on order of manufacturer)

[k] Against Successor to Product Manufacturer

Phrases "any and all" and "of any kind or nature" in transfer agreement did not exclude plaintiff's theory of product liability and under literal reading, defendant agreed to assume liability represented by lawsuit. *Fisher v. Allis-Chalmers Corp. Prod. Liab. Trust (2002) 95 Cal. App. 4th 1182, 116 Cal. Rptr. 2d 310, 315-316* (certified for partial publication)

Successor liability as appropriate when successor purchased stock of asbestos product supplier and took over its business. *Petrini v. Mohasco Corp. (1998) 61 Cal. App. 4th 1091, 1096, 71 Cal. Rptr. 2d 910*

Successor liability as inappropriate when successor purchased assets of predecessor at bankruptcy sale, but did not cause predecessor to go bankrupt. *Stewart v. Telex Communications, Inc. (1991) 1 Cal. App. 4th 190, 200, 1 Cal. Rptr. 2d 669*

One of three elements necessary to establish strict liability of successor to manufacturer of defective product, that destruction of plaintiff's remedies was caused by successor's acquisition of business, as not satisfied in DES action when predecessor company continued successfully in another business for 10 years following acquisition of drug production by successor company, and there was no causal connection between that acquisition and predecessor's ultimate dissolution. *Phillips v. Cooper Labs. (1989) 215 Cal. App. 3d 1648, 1659, 264 Cal. Rptr. 311*

Under traditional theories of corporate successor liability, successor corporation as not liable for injuries incurred by use of predecessor's product, when plaintiff established neither merger of corporations nor successor's express assumption of predecessor's liabilities. *Phillips v. Cooper Labs. (1989) 215 Cal. App. 3d 1648, 1660-1661, 264 Cal. Rptr. 311*

General rule imposing liability for injuries, caused by products manufactured by predecessor, on successor corporation that purchased assets in arms-length transaction if predecessor has liquidated itself after sale of assets, as requiring that sale contribute to liquidation; rule as not applicable, andsuccessor as not liable, when predecessor operated for 20 years after sale and then filed for reorganization in bankruptcy. *Kline v. Johns-Manville (9th Cir. 1984) 745 F.2d 1217, 1219-1221*

Acquisition of all outstanding stock of corporation, without acquisition of assets or facilities, as insufficient to impose liability on acquiring corporation even though acquired corporation was later dissolved; continuation of business as necessary to impose successor liability. *Potlatch Corp. v. Superior Court (1984) 154 Cal. App. 3d 1144, 1150-1151, 201 Cal. Rptr. 750*

Doctrine of strict liability in tort as applying to successor corporation for injuries sustained after purchase of predecessor manufacturing corporation as proximate result of defect in product manufactured and sold by predecessor if successor acquired by purchase for adequate consideration all assets of predecessor and on acquisition of predecessor's plant, equipment, inventory, trade name, goodwill, and customer lists continued to manufacture same line of products under predecessor's name, using same equipment, designs, and personnel, and soliciting predecessor's customers through same sales representatives with no outward indication of any change in ownership of business or notice to customers of that change. *Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 24-25, 30-34, 136 Cal. Rptr. 574, 560 P.2d 3*

One of three elements necessary to establish strict liability of successor to manufacturer of defective product, that destruction of plaintiff's remedies was caused by successor's acquisition of business, as not satisfied in DES action when predecessor company continued successfully in another business for 10 years following acquisition of drug production by successor company, and no causal connection existed between that acquisition and predecessor's ultimate dissolution. *Phillips v. Cooper Labs. (1989) 215 Cal. App. 3d 1648*

Under traditional theories of corporate successor liability, successor corporation as not liable for injuries incurred by use of predecessor's product, when plaintiff established neither merger of corporations nor successor's express assumption of predecessor's liabilities. *Phillips v. Cooper Labs. (1989) 215 Cal. App. 3d 1648, 1660-1661, 264 Cal. Rptr. 311*

Decision in Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 24-25, 30-34, 136 Cal. Rptr. 574, 560 P.2d 3 , as not requiring insurer to defend distributor of product in action regarding predecessor manufacturer's product when policy covered

only named insured's products and distributor could have negotiated for coverage of predecessor's products. *Oliver Machinery Co. v. United States Fid. & Guar. Co. (1986) 187 Cal. App. 3d 1510, 1517-1518, 232 Cal. Rptr. 691*

Exception set out in *Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 24-25, 34-35, 136 Cal. Rptr. 574, 560 P.2d 3* , as not to be construed so narrowly as to create exception to general rule for successor nonliability only in case of "Alad clone." *Rawlings v. D. M. Oliver, Inc. (1979) 97 Cal. App. 3d 890, 900-902, 159 Cal. Rptr. 119*

Defendant that had merged with manufacturer of product causing death of plaintiff's decedent held liable under successor theory; evidence supported California jurisdiction, and evidence that three of four conditions listed as typically supporting liability by Court in *Ray v. Alad Corp. (1977) 19 Cal.3d 22, 136 Cal. Rptr. 574, 560 P.2d 3* , were present in instant case as sufficient. *Sanders v. CEG Corp. (1979) 95 Cal. App. 3d 779, 157 Cal. Rptr. 252*

Corporation which acquires by purchase substantial portion of assets of manufacturing corporation, together with right to use latter's name, and leases latter's plant facilities for period of years, but where latter corporation continues to exist for some two years afterwards as not strictly liable in tort for injuries sustained almost three years before purchasing corporation purchased assets as proximate result of defect in product manufactured and sold by manufacturing corporation some 11 years prior to purchase of assets where purchasing corporation did not expressly or impliedly assume strict liability of manufacturer for defective products. *Schwartz v. McGraw-Edison Co. (1971) 14 Cal. App. 3d 767, 778-781, 92 Cal. Rptr. 776* (disapproved on another point in *Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 34, 136 Cal. Rptr. 574, 560 P.2d 3*)

[l] Against Used Products Dealer

Seller of used crane that made extensive modifications before sale as strictly liable as manufacturer for injuries caused by defects in crane. *Green v. Los Angeles (1974) 40 Cal. App. 3d 819, 838, 115 Cal. Rptr. 685*

[m] In Favor of Nonpurchasers

Manufacturer putting defective product on market as strictly liable to any person injured. *Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 407, 185 Cal. Rptr. 654, 650 P.2d 1171*

Strict liability may apply to products that have left the control of manufacturer and are still on market. Property owner was not precluded from recovering for MTBE contamination under strict products liability, even though injury had occurred while product was still possessed and stored by participants in stream of commerce, i.e., gas stations. *Nelson v. Superior Court (2006) 144 Cal. App. 4th 689, 693-696, 50 Cal. Rptr. 3d 684*

Doctrine of strict liability in tort as available to "bystander" injured by defective product. *Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 587, 75 Cal. Rptr. 652, 451 P.2d 84* ; *Baker v. Chrysler Corp. (1976) 55 Cal. App. 3d 710, 715, 127 Cal. Rptr. 745* ; *Preissman v. Ford Motor Co. (1969) 1 Cal. App. 3d 841, 850, 82 Cal. Rptr. 108* ; *Johnson v. Standard Brands Paint Co. (1969) 274 Cal. App. 2d 331, 337, 79 Cal. Rptr. 194*

Strict liability in tort as extending not only to actual consumers or users of defective product but to any human being to whom an injury from defect is reasonably foreseeable. *Putensen v. Clay Adams, Inc. (1970) 12 Cal. App. 3d 1062, 1072, 91 Cal. Rptr. 319*

Liability under doctrine of strict liability in tort as extending to protect employees of ultimate consumer of defective product. *Canifax v. Hercules Powder Co. (1965) 237 Cal. App. 2d 44, 54, 46 Cal. Rptr. 552*

[n] Maritime Law

Restatement (Second) of Torts § 402A as applicable law of strict products liability in admiralty cases in *Ninth Circuit. Matthews v. Hyster Co., Inc. (9th Cir. 1988) 854 F.2d 1166, 1168*

[o] Nature of Injury--Economic Losses

Economic loss rule did not bar action because plaintiff alleged damage to portions of home other than exterior wall. *Mitchell v. Skyline Homes (E.D. Cal. Nov. 25, 2009) 2009 U.S. Dist. LEXIS 116066, at *5*

Court granted leave to amend tort claims to more specifically allege harm caused by purchase of mold-tainted beds. *Stearns v. Select Comfort Retail Corp. (N.D. Cal. June 5, 2009) 2009 U.S. Dist. LEXIS 48367, at *10-*12*

Lost profits, diminution in property value, and costs of removing contaminants were not compensable under a negligence or strict liability theory. *California Dep't of Toxic Substances Control v. Payless Cleaners (E.D. Cal. Aug. 16, 2007) 2007 U.S. Dist. LEXIS 60703, at *20-*22*

Factors set forth in *KB Homes, below*, suggested that blade retainers were intrinsic, not discrete, elements of the turbine. *Waste Mgmt., Inc. v. Ishikawajima-Harima Heavy Indus., Co. (E.D. Cal. Aug. 29, 2006) 2006 U.S. Dist. LEXIS 64038, at *11-*14*

Strict products liability and negligence claims survived motion to dismiss because plaintiff alleged that component parts were defective and contributed to loss of its helicopter. Croman Corp. v. Gen. Elec. Co. (E.D. Cal. Sept. 13, 2005) 2005 U.S. Dist. LEXIS 39408, at *4-*5

Whether "product" was entire bottle for which closures were used, or whether closure was separate product that caused physical damage to otherproperty, i.e., plaintiff's wine, could not be determined on motion to dismiss. *McDowell Valley Vineyards, Inc. v. Sabate USA Inc. (N.D. Cal. Aug. 6, 2004) 2004 U.S. Dist. LEXIS 15797, at *9-*12*

Economic loss rule did not bar fraud and intentional misrepresentation claims with respect to aircraft part manufacturer's provision of false FAA certificates, because claims were independent of defendant's breach of contract. *Robinson Helicopter Co. v. Dana Corp. (2004) 34 Cal. 4th 979, 990-991, 22 Cal. Rptr. 3d 352, 102 P.3d 268*

Economic loss rule does not bar recovery in tort in construction cases if plaintiff produces evidence of damage to other property, which may include other portions of structure; Manufacturer of defective window installed in mass-produced home may be held strictly liable in tort for damage that window's defect causes to other parts of home in which it is installed. *Jimenez v. Superior Court (2002) 29 Cal. 4th 473, 481-484, 127 Cal. Rptr. 2d 614, 58 P.3d 450*

Right to Repair Act, *Civ. Code §§ 896, 936*, established building standards pertaining to new residential construction and provides homeowners with a cause of action against builders and individual product manufacturers for violation of those standards. The Act abrogated economic loss rule, thereby legislatively superseding *Aas v. Superior Court (2000) 24 Cal. 4th 627, 101 Cal. Rptr. 2d 718, 12 P.3d 1125* . *Greystone Homes, Inc. v. Midtec, Inc. (2008) 168 Cal. App. 4th 1194, 1202, 86 Cal. Rptr. 3d 196*

Court rejected municipalities' contention that deterioration of lead paint constituted physical injury to their buildings sufficient to support negligence or strict liability cause of action. *County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal. App. 4th 292, 320, 40 Cal. Rptr. 3d 313 , review denied, 2006 Cal. LEXIS 7622*

Municipalities alleged that lead paint and pigment manufacturers made affirmative representations about the dangers of exposure to low levels of lead, causing them to delay making timely efforts to prevent and treat low-level lead exposure.

Economic loss doctrine did not apply to plaintiffs' fraud cause of action. *County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal. App. 4th 292, 328-329, 40 Cal. Rptr. 3d 313 , review denied, 2006 Cal. LEXIS 7622*

Doctrine of strict liability in tort as applying to physical injury to property as well as to personal injury. *Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 19, 45 Cal. Rptr. 17, 403 P.2d 145* ; *Collins Dev. Co. v. D. J. Plastering, Inc. (2000) 81 Cal. App. 4th 771, 778-779, 97 Cal. Rptr. 2d 83* ; *Stearman v. Centex Homes (2000) 78 Cal. App. 4th 611, 623, 92 Cal. Rptr. 2d 761* ; *Gherna v. Ford Motor Co. (1966) 246 Cal. App. 2d 639, 649 , 55 Cal. Rptr. 94*

Economic loss rule bars recovery in tort for economic damages caused by defective product, unless those losses are accompanied by some form of personal injury or damage to property other than product itself. *KB Home v. Superior Court (2003) 112 Cal. App. 4th 1076, 1085, 5 Cal. Rptr. 3d 587*

Plaintiff could not recover under strict products liability theory costs of repairing or replacing defective windows he had purchased and incorporated into his residence; only evidence of actual property damage to property other than windows was damage to sheet rock and wallpaper, and persons who purchased his house had paid costs of repairing this damage. *Carrau v. Marvin Lumber & Cedar Co. (2001) 93 Cal. App. 4th 281, 112 Cal. Rptr. 2d 869, 877-878*

Homeowners could not recover in negligence or strict liability for cost of replacing water pipes known to be defective, but which had not yet leaked. *Zamora v. Shell Oil Co. (1997) 55 Cal. App. 4th 204, 208-211, 63 Cal. Rptr. 2d 762*

In strict liability case, general contractor could not recover cost of replacing installed sinks which rusted and chipped prematurely because no other property had been damaged. *Fieldstone v. Briggs Plumbing Prods., Inc. (1997) 54 Cal. App. 4th 357, 363-367, 62 Ca. Rptr. 2d 701*

Reduction of fair market value of buildings found to contain asbestos building materials may constitute economic loss that cannot be recovered in strict liability or negligence. *San Francisco Unified Sch. Dist. v. W.R. Grace & Co. (1995) 37 Cal. App. 4th 1318, 1327-1328*

Plaintiff, suing on products liability theory, could not recover depreciation in value to truck caused by defective wheels supplied by manufacturer. *Anthony v. Kelsey-Hayes Co. (1972) 25 Cal. App. 3d 442, 446, 102 Cal. Rptr. 113*

[p] Against Tobacco Industry

Code Civ. Proc. § 1714.45, which repealed statute granting tobacco companies complete immunity in certain products liability lawsuits, is perspective only. Immunity statute continues to shield tobacco companies in product liability actions for conduct they engaged in during ten-year period ending Jan. 1, 1998. As for tobacco companies' conduct *before* immunity period, however, liability is determined by applying general tort principles. *Myers v. Philip Morris Co. (2002), 28 Cal. 4th 828, 123 Cal. Rptr. 2d 40, 50 P.3d 751, 759-763*

As for conduct occurring during 10-year immunity (Jan. 1, 1988-Dec. 31, 1997), former Code Civ. Proc. § 1714.45's protection does not extend to allegations that tobacco companies used additives that exposed smokers to dangers beyond those commonly known to be associated with cigarette smoking. Immunity statute thus did not bar claims that defendants manipulated addictive properties of cigarettes via additives and controlled nicotine delivery through adding ammonia. However, allegations that defendants increased nicotine content of their cigarettes through blended or high-nicotine tobacco and lied about addictive nature of smoking fell squarely within reach of immunity statute. *Naegele v. R.J. Reynolds Tobacco Co. (2002) 28 Cal. 4th 856, 861-867, 123 Cal. Rptr. 2d 61, 50 P.3d 769*

Except for 10-year period, defendant was not entitled to have jury instructed with *BAJI No. 9.00.6*, which was derived from former *Civ. Code § 1714.45*. *Boeken v. Philip Morris Inc. (2005) 127 Cal. App. 4th 1640, 1670-1674, 26 Cal.*

Rptr. 3d 638

Under *Myers* and *Naegele,* trial court committed prejudicial error in refusing to instruct jury regarding 10-year statutory immunity created by former Code Civ. Proc. § 1714.45. *Whiteley v. Philip Morris, Inc. (2004) 117 Cal. App. 4th 635, 651-665, 11 Cal. Rptr. 3d 807*

Immunity statute barred allegations that defendant misrepresented addictive nature of nicotine and developed high-nicotine tobacco, but not allegations that defendant added ammonia, altered PH of tobacco, or enhanced delivery of nicotine. *Souders v. Philip Morris Inc. (2002) 104 Cal. App. 4th 15, 127 Cal. Rptr. 2d 748, 755-756*

[q] Against Suppliers of Raw Materials

Court declined to find that *Arena, below,* which held that strict liability can apply to suppliers of defective raw materials, was wrongly decided. *Garza v. Asbestos Corp. (2008) 161 Cal. App. 4th 651, 658-659, 74 Cal. Rptr. 3d 359*

Supplier of raw asbestos is subject to strict products liability. Restatement (Third) of Torts: Products Liability § 5, cmt. c, stating that raw material sellers are not subject to liability for harm caused by defective design of end-product, was inapplicable because it was possible that injury was caused by defect in raw asbestos and because asbestos is not component material that is usually innocuous. *Arena v. Owens-Corning Fiberglas Corp. (1998) 63 Cal. App. 4th 1178, 1191, 74 Cal. Rptr. 2d 580, 589*

[r] Against Trademark Licensors

As long as licensor is link in marketing enterprise which placed defective product, here, shotgun ammunition, in stream of commerce, there is no reason to refuse to apply strict liability in tort to such entity. *Kasel v. Remington Arms Co. (1972) 24 Cal. App. 3d 711, 725, 101 Cal. Rptr. 314*

[7] Assumption of the Risk

Assumption of risk as embodying two separate defenses: primary assumption of risk, completely barring action when defendant owed no duty to prevent plaintiff's injury, and secondary assumption of risk, making comparative fault apportionment proper if defendant owed duty to plaintiff, but plaintiff knowingly encountered risk of injury caused by defendant's breach of duty. *Knight v. Jewett (1992) 3 Cal. 4th 296, 308, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

Primary assumption of risk did not foreclose strict products liability claim of plaintiff who fell off personal watercraft and sustained severe orifice injuries. Court acknowledged that general risk of falling and coming into contact with water is inherent in jet skiing, but declined to find that specific risks of sustaining orifice injuries are inherent in the sport. *Ford v. Polaris Indus., Inc. (2006) 139 Cal. App. 4th 755, 772-773, 43 Cal. Rptr. 3d 215* .

Assumption of risk does not insulate equipment suppliers from liability for providing defective equipment; primary assumption of risk did not bar products liability claim by 11-year-old child who dived into aboveground swimming pool and was paralyzed. *Bunch v. Hoffinger Indus., Inc. (2004) 123 Cal. App. 4th 1278, 1300-1301, 20 Cal. Rptr. 3d 780*

Defendant owes no duty of care to protect plaintiff against risks inherent in particular sport voluntarily played by plaintiff, but defendant owes duty to participants not to increase risk of harm over and above that inherent in sport; risk is inherent in sport if its elimination would: (1) chill vigorous participation in sport, and (2) alter fundamental nature of activity; pitcher created triable issue of material fact regarding whether design and use of hollow aluminum alloy bat significantly increased inherent risk of being hit by line drive, where bat had pressurized air bladder which increased

speed at which ball left its surface. Sanchez v. Hillerich & *Bradsby Co. (2002) 104 Cal. App. 4th 703, 713-715, 128 Cal. Rptr. 2d 529*

Manufacturer of defective product as having duty to users of product for purposes of analyzing assumption of risk; products liability actions as generally subject to apportionment of damages under secondary assumption of risk principles, but not barred by primary assumption of risk doctrine. *Milwaukee Elec. Tool Corp. v. Superior Court (1993) 15 Cal. App. 4th 547, 560-565, 19 Cal. Rptr. 2d 24*

[8] Automobiles

Application of doctrine of strict liability in tort in favor of passenger in defective automobile driven by purchaser. *Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 258, 261, 37 Cal. Rptr. 896, 391 P.2d 168*

Plaintiff, injured in a rollover, chose not to pursue his roof defect claim and proceeded only with his vehicle stability claim. After a mistrial, he designated expert witnesses to testify in support of his roof defect claim. The court committed reversible error in striking portions of his expert witness disclosure statement related to roof defects. *Gordon v. Nissan Motor Co. (2009) 170 Cal. App. 4th 1103, 1111, 88 Cal. Rptr. 3d 778*

Punitive damages award as upheld in favor of automobile passenger. *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 810, 819-820, 174 Cal. Rptr. 348*

[8a] Borrowing Statute

The court rejected plaintiff's contention that borrowing statute, *Code Civ. Proc. § 361*, is not applicable to indivisible injuries caused by multiple exposures to asbestos. The single injury--mesothelioma--had been caused by multiple exposures to asbestos products in Indiana and California, and plaintiffs argued that trial court erroneously split cause of action into California and Indiana components, contrary to statements made in *Rutherford v. Owens-Ill., Inc. (1997) 16 Cal. 4th 953, 67 Cal. Rptr. 2d 16, 941 P.2d 1203* . The court rejected this contention, explaining that *Rutherford* concerned a different subject, which was the inapplicability of a burden-shifting instruction in asbestos cases. The court also rejected the plaintiff's contention that he was excepted from reach of borrowing statute if he was citizen of California at any time in past. A plaintiff must have been citizen of California at the time his or her claim accrued to fall within statute's exception. *Cossman v. Daimlerchrysler Corp. (2003) 108 Cal. App. 4th 370, 376-377, 133 Cal. Rptr. 2d 376*

Court rejected contention that borrowing statute, *Code Civ. Proc. § 361*, applies only in cases in which plaintiffs have sued in California for sole purpose of avoiding limitations period which lapsed in another state. Although overriding purpose of borrowing statutes is to curtail forum shopping, statute does not inquire into plaintiff's subjective intentions in suing in California. *Geist v. Sequoia Ventures, Inc. (2000) 83 Cal. App. 4th 300*

[9] Burden of Proof

Quantum of proof necessary to establish prima facie case of design defect, on basis that product failed to perform as safely as ordinary consumer would expect when used in reasonably foreseeable manner, as including evidence of (1) plaintiff's use of product; (2) circumstances surrounding injury; and (3) objective features of product relevant to evaluation of its safety. *Campbell v. General Motors Corp. (1982) 32 Cal. 3d 112, 127, 184 Cal. Rptr. 891, 649 P.2d 224*

Burden as on plaintiff to establish defective condition of product and that defect proximately caused plaintiff's injuries.

Miller v. Los Angeles County Flood Control Dist. (1973) 8 Cal. 3d 689, 704, 106 Cal. Rptr. 1, 505 P.2d 193

Distinction between manufacture and design defects requiring different burden of proof from plaintiff as not tenable; although condemnation of entire line of product as defectively designed may damage manufacturer more than finding that single product was defectively manufactured, potential economic loss to manufacturer as not to be reflected in different standard of proof for injured consumer. *Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 134, 104 Cal. Rptr. 433, 501 P.2d 1153* ; *Foglio v. Western Auto Supply (1976) 56 Cal. App. 3d 470, 475, 128 Cal. Rptr. 545*

[10] Causation

There was no evidence that the porosity of a pneumatic air impact wrench caused it to burst. *Doetsch v. American Household Inc. (S.D. Cal. Aug. 3, 2007) 2007 U.S. Dist. LEXIS 56773, at *10*

Plaintiff established a prima facie case of exposure to defendant's asbestos-containing product. *McIntyre v. Warren Pumps LLC (N.D. Cal. April 30, 2007) 2007 U.S. Dist. LEXIS 35954, at *12-*15*

Taser was substantial factor in causing death. *Sanders v. City of Fresno (E.D. Cal. July 3, 2006) 2006 U.S. Dist. LEXIS 48582, at *47-*56*

Plaintiff did not prove that warning defect was substantial factor in causing accident, because machine's pinch-point was open and obvious hazard, andadditional warnings or instructions would not have changed operators' behavior; manufacturing defect not substantial factor in causing plaintiff's harm. *Andrade v. Pangborn Corp. (N.D. Cal. Oct. 22, 2004) 2004 U.S. Dist. LEXIS 22704, at *55-*60*

Plaintiff offered no evidence that prescribing physician would have acted differently had manufacturer provided adequate warning about alleged risk that drug Zoloft causes persons who ingest it to commit suicide; because she was unable to create genuine issue of fact as to whether manufacturer's alleged failure to provide adequate warning caused her husband's death, manufacturer was entitled to summary judgment. *Motus v. Pfizer Inc. (C.D. Cal. 2001) 196 F. Supp. 2d 984, 991* , applying California law

In complaint alleging long-term exposure to multiple toxins, plaintiff must plead specific facts explaining how conduct caused or contributed to injury; substantial factor standard of causation is relatively broad, requiring only that defendant's contribution be more than negligible or theoretical. *Bockrath v. Aldrich Chem. Co. (1999) 21 Cal. 4th 71, 79, 86 Cal. Rptr. 2d 846, 980 P.2d 398*

Plaintiff could not establish proximate cause in failure-to-warn case when prescribing physician did not read package insert in making his decision to prescribe generic form of *Reglan. Conte v. Wyeth, Inc. (2008) 168 Cal. App. 4th 89, 111-112, 85 Cal. Rptr. 3d 299*

Reasonable inferences are available to show causation, and expert testimony linked particular type of food poisoning involved to particular unsanitary conditions at defendant's restaurant. Court declined to follow *Minder v. Cielito Lindo Rest. (1977) 67 Cal. App. 3d 1003, 136 Cal. Rptr. 915* , to extent that it requires plaintiff in food poisoning cases to exclude other possible causes of his or her illness. *Sarti v. Salt Creek Ltd. (2008) 167 Cal. App. 4th 1187, 1210-1211, 85 Cal. Rptr. 3d 506*

A defendant does not shift the burden of production by showing that plaintiff has no personal recall of defendant's product. Rather, defendant must make an affirmative showing that plaintiff will be unable to prove his or her case by any means. The fact that plaintiff was unable to recall whether he had worked around defendant's product over 40 years earlier did not mean that he would be unable to recognize defendant's product if shown its packaging or logo. *Weber*

v. John Crane, Inc. (2006) 143 Cal. App. 4th 1433, 1439-1443, 50 Cal. Rptr. 3d 71

Plaintiff admitted that he did not know if he had ever been present when anyone was working with defendant's asbestos products. Defendant submitted plaintiffs' nonresponsive answers to special interrogatories designed to elicit information about the plaintiff's exposure to defendant's product. Defendant thus met its initial burden of making a prima facie showing that a triable issue of fact did not exist regarding causation. *Andrews v. Foster Wheeler LLC (2006) 138 Cal. App. 4th 96, 108, 41 Cal. Rptr. 3d 229*

In cases of asbestos-related cancer, jury instruction shifting burden of proof to asbestos defendants on element of causation is generally unnecessary and incorrect. Plaintiffs must prove only that exposure to defendant's asbestos product was, in reasonable medical probability, a substantial factor in causing or contributing to their risk of developing cancer. In particular, they need not prove with medical exactitude that fibers from particular defendant's asbestos-containing product were those, or among those, that actually began cellular process of malignancy. *Rutherford v. Owens-Ill., Inc. (1997) 16 Cal. 4th 953, 975-976, 67 Cal. Rptr. 2d 16, 941 P.2d 1203*

Expert testimony supported jury's finding that plaintiff's exposure to defendant's asbestos-containing products was substantial factor contributing to risk of developing lung cancer--that is, lung cancer was caused by cumulative exposure, with each of many separate exposures having constituted substantial factors; despite defendant's assertion that plaintiff's total exposure to asbestos from its products was significantly less than lifetime of exposure to ambient asbestos, *Rutherford* does not require that each exposure be sufficient to independently cause lung cancer. *Jones v. John Crane, Inc. (2005) 132 Cal. App. 4th 990, 999, 35 Cal. Rptr. 3d 144*

Plaintiff successfully established that lack of label adequately warning of dangers of diving into aboveground pool was substantial factor in causing her injuries; plaintiff offered own testimony that she thought that homeowner was "just being a mom" when she told her not to dive, and that sticker on pool meant only "not to do a pike dive"; plaintiff testified that label warning of crippling dangers would have prevented her from diving on day of incident; plaintiff also presented expert testimony that young divers cannot necessarily appreciate depth of aboveground pools. *Bunch v. Hoffinger Indus., Inc. (2004) 123 Cal. App. 4th 1278, 1303-1304, 20 Cal. Rptr. 3d 780*

Defendant was properly granted summary judgment, where plaintiff showed only, at best, that decedent might have cut into wall that might have contained defendant's joint compound that might have contained asbestos. *McGonnell v. Kaiser Gypsum Co. (2002) 98 Cal. App. 4th 1098, 1103, 120 Cal. Rptr. 2d 23*

In asbestos products liability action, no triable issue of fact as to causation as existing when plaintiff's deposition testimony only demonstrated that defendant was potentially present at job site. *Hunter v. Pacific Mech. Corp. (1995) 37 Cal. App. 4th 1282, 1289*

In asbestos products liability action, absence of causation as matter of law when evidence of exposure is inadequate; evidence as not showing that asbestos products of type supplied by defendants was on ship while plaintiff was aboard. *Dumin v. Owens-Corning Fiberglas Corp (1994) 28 Cal. App. 4th 650, 658, 33 Cal. Rptr. 2d 702* ; *Lineaweaver v. Plant Insulation Co. (1995) 31 Cal. App. 4th 1409, 1421*

Absence of causation as properly found as matter of law when evidence showed that alleged inaccessibility of parking brake had no causal relationship to victim's death because truck owner had failed to maintain brake in operable condition and truck driver admitted that he never used it. *Visueta v. General Motors Corp. (1991) 234 Cal. App. 3d 1609, 1616-1617, 286 Cal. Rptr. 402*

In products liability action alleging that use of drug caused cancer, causation as required to be proved within reasonable medical probability based on competent expert testimony; evidence that probability of causation was "less than 50-50" as insufficient to establish prima facie case. *Jones v. Ortho Pharm. Corp. (1985) 163 Cal. App. 3d 396, 402-405, 209*

Cal. Rptr. 456

Evidence that plaintiff could have avoided injury had product been equipped with cutoff switch as sufficient to support finding that lack of switch proximately caused injury to plaintiff; to establish proximate cause, plaintiff as required to show only that defendant's conduct in some way substantially contributed to injury, and that circumstances justify holding defendant responsible for consequences of accident. *Bates v. John Deere Co. (1983) 148 Cal. App. 3d 40, 50, 195 Cal. Rptr. 637*

Doctrine of concurrent causation as applicable in strict liability in tort as well as in negligence cases. *Thompson v. Package Machinery Co. (1971) 22 Cal. App. 3d 188, 193-195, 99 Cal. Rptr. 281* ; *Southern Cal. Edison Co. v. Harnischfeger Corp. (1981) 120 Cal. App. 3d 842, 854, 175 Cal. Rptr. 67*

Plaintiff in products liability case involving long passage of time between manufacture and injury as required to produce evidence that product was not changed by purposeful alteration or abuse; showing that product was in poor condition at time of accident after having been subjected to prolonged and rough use as strong evidence that defect was not cause of injury; if product has been altered or otherwise misused, alleged defect as not cause of injury. *Knudsen v. Peoples Lumber Co. (1977) 68 Cal. App. 3d 167, 179, 137 Cal. Rptr. 110*

In order to sustain their burden of proof in a products liability action, plaintiffs need to prove by a preponderance of the evidence that the contamination attributed to defendants was a "substantial factor" in causing the decedent's demise. This standard minimally requires that the contribution of the individual cause be more than negligible or theoretical. *Kennedy v. S. Cal. Edison Co. (9th Cir. 2001) 268 F.3d 763, 770* ; *see* *Rutherford v. Owens-Ill., Inc. (1997) 16 Cal. 4th 953, 67 Cal. Rptr. 2d 16, 941 P.2d 1203*

[11] Class Action Allegations

Plaintiff did not establish that CAFA's "Home-State" Controversy exception, *28 U.S.C. § 1332(d)(4)(B)*, applied in an action seeking medical monitoring in connection with lead-tainted toys. *Harrington v. Mattel, Inc. (N.D. Cal. Dec. 20, 2007) 2007 U.S. Dist. LEXIS 95401, at *14-*17*

Court reversed decertification order and remanded action brought under unfair competition law to determine whether named representatives could establish standing. *In re Tobacco II Cases (2009) 46 Cal. 4th 298, 93 Cal. Rptr. 3d 559, 207 P.3d 20*

Court affirmed denial of certification of proposed class of homeowners in which allegedly defective shower pans were installed. Sole common issue (i.e., whether pan was defectively or negligently designed) did not predominate over individualized questions of damages. *Evans v. Lasco Bathware, Inc. (2009) 178 Cal. App. 4th 1417, 1427, 101 Cal. Rptr. 3d 354*

There is no per se or categorical bar to finding that medical monitoring claims are appropriate for class treatment, but plaintiffs failed to establish that common issues predominated in class of 50,000-100,000 residents exposed to at least 12 different toxic substances discharged into their drinking water. The proposed class consisted of all persons exposed to specified dose of one of at least 12 different toxic substances on various locations on 400-acre-plus property for period of over 40 years. Determining each defendant's liability to the class and whether each class member required additional monitoring due to exposure would require staggering number of complex individual issues. *Lockheed Martin Corp. v. Superior Court (2003) 29 Cal. 4th 1096, 1103-1114, 131 Cal. Rptr. 2d 1, 63 P.3d 913*

In action for damages for personal injuries allegedly caused by defective manufacture of cardiac pacemaker, factual questions and legal issues raised in pleadings on behalf of 4,000 potential claimants as preponderantly diverse rather

than common; trial court's dismissal of class action allegations as proper. *Rose v. Medtronics, Inc. (1980) 107 Cal. App. 3d 150, 166 Cal. Rptr. 16*

[12] Comparative Fault

Assumption of risk as embodying two separate defenses: primary assumption of risk, completely barring action when defendant owed no duty to prevent plaintiff's injury, and secondary assumption of risk, making comparative fault apportionment proper if defendant owed duty to plaintiff, but plaintiff knowingly encountered risk of injury caused by defendant's breach of duty. *Knight v. Jewett (1992) 3 Cal. 4th 296, 308, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696*

Comparative fault as applicable to strict products liability actions. *Daly v. General Motors (1978) 20 Cal. 3d 725, 742, 144 Cal. Rptr. 380, 575 P.2d 1162* ; *see also* *Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal. 3d 322, 328-332, 146 Cal. Rptr. 550, 579 P.2d 441*

[12a] Concert of Action

Concert of action did not apply in a DES case. Allegations that defendants failed to adequately test the drug or to give sufficient warning of its dangers and that they relied upon the tests performed by one another and took advantage of each others' promotional techniques were insufficient to satisfy the requirements of the theory. This sort of conduct is common practice in industry, and application of the concert of action concept to this situation would render virtually any manufacturer liable for the defective products of an entire industry. *Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 605, 163 Cal. Rptr. 132, 607 P.2d 924*

Court did not err in refusing to instruct on concert of action theory in asbestos action by mechanic who contended that defendant was liable because it had contributed in 1930s to financing private research laboratory to study health effects of asbestos; court expressed constitutional concerns over application of theory, pointing out that requiring manufacturer to stand trial predicated solely on its exercise of its *First Amendment* rights could have chilling effect on participation in trade group activity. *Chavers v. Gatke Corp. (2003) 107 Cal. App. 4th 606, 615-616, 132 Cal. Rptr. 2d 198*

Plaintiff's allegations did not support concert of action cause of action, because his injuries were not caused by any asbestos-containing material manufactured by defendant, and he did not allege that defendant continued to encourage its successor to make false representations about product; plaintiff had alleged that successor to defendant's asbestos product line, with defendant's approval and assistance, marketed product by falsely representing its safe use and concealing its hazards. *Cadlo v. Owens-Ill., Inc. (2004) 125 Cal. App. 4th 513, 522, 23 Cal. Rptr. 3d 1 , modified, 2004 Cal. App. LEXIS 2260*

[13] Conflict of Laws

Court as applying California strict-liability-in-tort law in action in California by California resident against Delaware corporation, home office of which was in Connecticut, doing multinational business, and amenable to jurisdiction of California courts, for damages for personal injuries sustained in Mexico by explosion of defective shotgun shell purchased in Mexico and manufactured in Mexico by defendant's affiliate when law of Mexico did not recognize strict liability in tort and allowed no recovery for pain and suffering. *Kasel v. Remington Arms Co. (1972) 24 Cal. App. 3d 711, 727-739, 101 Cal. Rptr. 314*

In tort case involving choice of law problem, law of place of wrong as not necessarily applicable law for all tort actions brought in courts of this state; forum court as required to search to find proper law to apply based on interests of litigants and of involved state and thus determine law that most appropriately applies to issue involved. *Ryan v. Clark*

Equip. Co. (1969) 268 Cal. App. 2d 679, 682, 74 Cal. Rptr. 329 , disapproved on other grounds, *Hurtado v. Superior Court (1974) 11 Cal. 3d 574, 585-586, 114 Cal. Rptr. 106, 522 P.2d 666* (wrongful-death action, court applying law of state where injury and death occurred and where plaintiff and decedent resided and plaintiff still resides, rather than law of state where defective product was manufactured)

[14] Contribution

Judgment against two or more defendants as first required in order to entitle one defendant to contribution from the other. *Barth v. B.F. Goodrich Tire Co. (1971) 15 Cal. App. 3d 137, 141, 92 Cal. Rptr. 809*

Manufacturer of defective product as having right of contribution [*Code Civ. Proc. § 875*] against codefendant distributor where distributor also violates duty to warn public and has no right of indemnity against manufacturer. *Barth v. B.F. Goodrich Tire Co. (1971) 15 Cal. App. 3d 137, 144, 92 Cal. Rptr. 809*

[15] Damages

[a] Compensatory

Jury hearing FELA case must be instructed on the standard for fear-of cancer damages. The case was brought by an electrician who alleged that railroad negligently caused him to contract asbestosis. Proper instructions are particularly important in FELA context because nature of such claims enhances danger that jury, if not properly instructed, will award damages for emotional distress based on slight evidence. *CSX Transp., Inc. v. Hensley (2009) -- U.S.--, 129 S. Ct. 2139, 2141-2142, 173 L. Ed. 2d 1184*

Mental anguish damages resulting from fear of developing cancer may be recovered under FELA by railroad workers suffering asbestosis caused by work-related exposure to asbestos. Also, plaintiff who has asbestosis can recover damages for fear of cancer without proof of physical manifestations of claimed emotional distress, but claimant must prove that his or her alleged fear is "genuine and serious." *Norfolk & W. Ry. Co. v. Ayers (2003) 538 U.S. 135, 145-159, 123 S. Ct. 1210, 155 L. Ed. 2d 261*

Disease-and-symptom free plaintiff could not recover for negligent inflection of emotional distress under FELA. Mere exposure to substance, in this case asbestos, is insufficient, even if it involves extensive, physical contact. The holding is limited to FELA actions. *Metro-N. Commuter R.R. Co. v. Buckley (1997) 521 U.S. 424, 117 S. Ct. 2113, 138 L. Ed. 2d 560*

In this construction defect case, court held that damages in tort are not available if the defective product has not caused personal injury or property damage. *Aas v. Superior Court (2000) 24 Cal. 4th 627, 650, 101 Cal. Rptr. 2d 718, 12 P.3d 1125*

Recovery of fear of cancer damages in actions for intentional infliction of emotional distress does not depend on showing of medically corroborated belief that it is more likely than not that plaintiff will develop feared cancer as result of toxic exposure. *Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal. 4th 965, 1003, 863 P.2d 795, 820-821*

Economic damages alone as not available in products liability action based in negligence unless parties have special relationship. *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 804, 157 Cal. Rptr. 407, 598 P.2d 60* ; *Ott v. Alfa-Laval Agri, Inc. (1995) 31 Cal. App. 4th 1439, 1449-1456*

Remitted noneconomic damage award of $70 million to woman rendered a paraplegic was excessive, and further reduction to $18 million was appropriate. However, the remitted award of $5 million for loss of consortium was

appropriate. *Buell-Wilson v. Ford Motor Co. (2006) 141 Cal. App. 4th 525, 554, 46 Cal. Rptr. 3d 147*

Distinguishing between "other property" and defective product itself in case involving component-to-component damage requires determination whether defective part is sufficiently discrete element of larger product that it is not reasonable to expect its failure invariably to damage other portions of finished product. Determining nature of product at issue and whether injury is to product itself or to other property is generally province of trier of fact. The court's ruling that furnace was single, integrated product deprived plaintiff of right to have material issues of fact submitted to jury. *KB Home v. Superior Court (2003) 112 Cal. App. 4th 1076, 1086-1087, 5 Cal. Rptr. 3d 587*

Economic damages as not available in products liability action based on strict liability for presence of asbestos in school buildings; physical injury (i.e., contamination) as required to be alleged. *San Francisco Unified Sch. Dist. v. W.R. Grace & Co. (1995) 37 Cal. App. 4th 1318, 1327-1328, 44 Cal. Rptr. 2d 305*

In action based on strict liability in tort to recover damages for aggravation of injuries caused by defect in design or manufacture, jury, after finding plaintiff suffered aggravated injuries, as under duty to fix amount of damages from evidence available; one whose wrongful conduct has rendered determination of damages uncertain as not relieved of liability. *Horn v. General Motors Corp. (1976) 17 Cal. 3d 359, 369 , 131 Cal. Rptr. 78, 551 P.2d 398*

Award of damages based on strict liability in tort as permitted to include compensation for past loss of time and earnings due to injury, for loss of future earning capacity, and for increased living expenses caused by injury. *Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 22, 45 Cal. Rptr. 17, 403 P.2d 145* (concurring and dissenting opinion of Peters, J.)

Manufacturer owed no duty to plaintiff that would allow her to recover for emotional distress on theory that she, as owner of vehicle that caused fatal injury to her close family member, was direct victim of the manufacturer's alleged negligence. *Gu v. BMW of N. Am., LLC (2005) 132 Cal. App. 4th 195, 206, 33 Cal. Rptr. 3d 617*

Loss of household services are not akin to generalized, noneconomic damages such as loss of companionship, and where there was evidence that decedent performed household services that had particular economic value, jury could consider costs of obtaining substitute domestic services as economic damages. *McKinney v. California Portland Cement Co. (2002) 96 Cal. App. 4th 1214, 1227-1229, 117 Cal. Rptr. 2d 849, 858-860*

Recovery on theory of strict products liability as precluded when damage consists solely of economic losses; expenses of repair of defect as purely economic damages. *Sacramento Reg'l Transit Dist. v. Grumman Flxible (1984) 158 Cal. App. 3d 289, 294-295, 204 Cal. Rptr. 736*

In actions for negligence, a manufacturer's liability is limited to damages for physical injuries; no recovery is allowed for economic loss alone. A plaintiff is not able to recover under products liability or negligence for the costs of repairing and replacing a defective product; recovery for those costs is available only through contract or breach of warranty law. *Carrau v. Marvin Lumber & Cedar Co. (2001) 93 Cal. App. 4th 281, 112 Cal. Rptr. 2d 869* ; *see Aas v. Superior Court (2001) 24 Cal. 4th 627, 101 Cal. Rptr. 2d 718, 12 P.3d 1125*

User of defective product that injures another, causing user to suffer emotional distress, as entitled to recover damages for emotional distress; no showing of familial relationship as required. *Kately v. Wilkinson (1983) 148 Cal. App. 3d 576, 587-588, 195 Cal. Rptr. 902*

Plaintiff as not entitled to recover for lost profits and loss of business opportunities under product liability cause of action; damages limited to physical damage to property and personal injury. *Pisano v. American Leasing (1983) 146 Cal. App. 3d 194, 197, 194 Cal. Rptr. 77*

Loss of use of vehicle resulting from defect as item of incidental damage and as characterized according to nature of damage; unless incidental to physical property damage, loss as properly classified as type of economic loss. *Anthony v. Kelsey-Hayes Co. (1972) 25 Cal. App. 3d 442, 446, 102 Cal. Rptr. 113*

Damages resulting from depreciation in value of vehicle caused by defect in manufacture as falling within category of "loss of bargain." *Anthony v. Kelsey- Hayes Co. (1972) 25 Cal. App. 3d 442, 446, 102 Cal. Rptr. 113*

Remarriage of surviving spouse as not admissible on issue of damages in wrongful death case. *Barth v. B.F. Goodrich Tire Co. (1968) 265 Cal. App. 2d 228, 241, 71 Cal. Rptr. 306*

[b] Punitive

NOTE:

Civ. Code § 3294, the statute regulating punitive damages, was amended in 1987 regarding the applicable standard of proof and the definitions of malice and oppression. Counsel should use cases before that date with care, and only to the extent that the principles expressed in those earlier cases are consistent with the statute as amended.

In action seeking recovery for economic losses resulting from 1989 *Exxon Valdez* oil spill, Court exercised its "federal maritime common law authority" to devise a one-to-one maximum ratio between compensatory and punitive damages. Unlike the cases mentioned below, Court did not decide *Baker* on constitutional grounds. *Exxon Shipping Co. v. Baker (2008) -- U.S. --, 128 S. Ct. 2605, 171 L. Ed. 2d 570*

Court granted Philip Morris' petition for certiorari after Oregon Supreme Court reinstated a $79.5 million punitive damages award. Limiting its review to a procedural question, Court declined to consider second question of whether punitive damages award that is 97 times the compensatory damages may be upheld. *Philip Morris USA Inc. v. Williams (2008) -- U.S. --, 128 S. Ct. 2904, 171 L. Ed. 2d 840*

In a Ford Explorer rollover case, the Court vacated a judgment that had reduced a punitive damages award to $18 million, a two-to-one ratio to the compensatory damages award. The court remanded the case to the Court of Appeal for further consideration in light of *Philip Morris USA v. Williams. Ford Motor Co. v. Buell-Wilson [(2007) 550 U.S. 931, 127 S. Ct. 2250, 167 L. Ed. 2d 1087*

The Court struck down a $79.5 million punitive damage against a cigarette manufacturer, holding that an award based in part upon the jury's desire to punish the defendant for harming persons not before the court would amount to a taking of (property) without due process. *Philip Morris USA v. Williams (2007) 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940 , cert. dismissed, 2009 U.S. LEXIS 2493*

Court applied *Gore* factors to reverse $145 million punitive damages award in insurance bad faith case arising out of fatal motor vehicle accident. While again declining to impose bright-line ratio which punitive damages award cannot exceed, Court pointed out that in practice, *few awards exceeding a single-digit ratio between punitive and compensatory damages* will satisfy due process. *State Farm Mut. Auto. Ins. Co. v. Campbell (2003) 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585*

Courts of appeals should apply de novo standard of review, when passing on lower courts' determination of whether punitive damages awards are grossly excessive. *Cooper v. Leatherman (2001) 532 U.S. 424, 434-436, 121 S. Ct. 1678, 149 L. Ed. 2d 674*

Court set forth "guideposts" for lower courts to consider when weighing constitutionality of punitive damages award.

BMW of N. Am., Inc. v. Gore (1996) 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809

Denial of review of punitive damages award violates *Due Process Clause. Honda Motor Co. v. Oberg (1994) 512 U.S. 415, 114 S. Ct. 2331, 129 L. Ed. 2d 336*

$10 million punitive damages award was not so grossly excessive as to violate *Due Process. TXO Prod. Corp. v. Alliance Res. Corp. (1993) 509 U.S. 443, 113 S. Ct. 2711, 125 L. Ed. 2d 366*

The court of appeal had affirmed a $28 million punitive damages award, an amount 33 times greater than the compensatory damages award. The court transferred the case back to the court of appeal with directions to vacate its decision and reconsider the matter in light of *Philip Morris USA v. Williams, above. Bullock v. Philip Morris USA, Inc. (2007) 59 Cal. Rptr. 3d 441, 159 P.3d 33*

Court declined to draw mathematical bright line between constitutionally acceptable and unacceptable. *Pacific Mut. Life Ins. Co. v. Haslip (1991) 499 U.S. 1, 111 S. Ct. 1032, 113 L. Ed. 2d 1*

Question of fact as to whether manufacturer's conduct regarding ladder's false latching condition warranted punitive damages award. However, retailer was entitled to summary judgment on punitive damages claim. *Bethel v. Home Depot U.S.A., Inc. (S.D. Cal. Dec. 4, 2008) 2008 U.S. Dist. LEXIS 98161, at *12-*15*

Due process does not prohibit state courts, in awarding or reviewing punitive damages, from considering defendant's wrongful conduct towards others that was similar to tortious conduct that injured plaintiff; civil defendant's recidivism remains pertinent to assessment of culpability, and California's policy of using punitive damages to deter continuation or imitation of corporation's course of wrongful conduct survived U.S. Supreme Court cases limiting punitive damages. *Johnson v. Ford Motor Co. (2005) 35 Cal. 4th 1191, 1196-1204, 29 Cal. Rptr. 3d 401*

Court reviewing punitive damages award for constitutionality must make independent assessment of relationship between award and factual circumstances of case. *Simon v. San Paolo U.S. Holding Co. (2005) 35 Cal. 4th 1159, 29 Cal. Rptr. 3d 379*

Evidence as sufficient to support award of punitive damages when former high-level employee of automobile manufacturer testified that defendant (1) deliberately failed to warn dealers or owners of remedial steps to avoid brake failure, (2) deliberately failed to run adequate tests to define nature of brake loss problem, and (3) deliberately failed to install part that would have alleviated problem. *Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 402-403, 185 Cal. Rptr. 654, 650 P.2d 1171*

Trial court's refusal to give cigarette manufacturer's proposed punitive damages instruction not to impose punishment for harm caused to nonparties to the litigation was error. Court ordered new trial to determine amount of punitive damages. *Bullock v. Philip Morris USA, Inc. (2008) 159 Cal. App. 4th 655, 693-694, 71 Cal. Rptr. 3d 775*

Smoker awarded $5,539,127 in compensatory damages was entitled to punitive damages award of $50 million because *State Farm's* language was instructive, not binding; defendant's 40 years' of fraud and continuing conscious disregard for safety of consumers was "exceptionally extreme"; taking into consideration previous punitive damages awards imposed against defendant, as well as possibility of future awards in cases with identical issues. more than single digit multiplier was not justified, but extreme reprehensibility of defendant's conduct justified ratio of at least 9 to 1. *Boeken v. Philip Morris Inc. (2005) 127 Cal. App. 4th 1640, 1700-1703, 26 Cal. Rptr. 3d 638*

Court reduced largest punitive damages judgment ever upheld by California appellate court from $290 million to $23.7 million in action arising when portions of 1978 Ford Bronco's roof collapsed in rollover. Court interpreted *State Farm* as impliedly disapproving of its broad view of the goal andmeasure of punitive damages. Result of *State Farm's*

constitutional due process limitation is punitive damages analysis that focuses primarily on what defendant did to the present plaintiff, rather than the defendant's wealth or general incorrigibility. *Romo v. Ford Motor Co. (2003) 113 Cal. App. 4th 738, 749, 6 Cal. Rptr. 3d 793* ; *but see Johnson v. Ford Motor Co. (2005) 35 Cal. 4th 1191, 1196-1204, 29 Cal. Rptr. 3d 401* (criticizing reasoning in *Romo*)

Punitive damages as available in products liability actions if defendant placed product on market in conscious disregard of safety of consumers and others; plaintiff must establish that defendant was aware of probable dangerous consequences of its conduct and that it willfully and deliberately failed to avoid those consequences. *Ehrhardt v. Brunswick, Inc. (1986) 186 Cal. App. 3d 734, 741-742, 231 Cal. Rptr. 60*

Evidence as sufficient to support award of punitive damages when (1) defendant had reports from its employees of infections resulting from design of intrauterine device, but continued to market device without change; (2) defendant knew that intrauterine device had been implicated in serious injuries and other severe complications, but did not warn patients or doctors of the risk; and (3) defendant knew that its devices often did not show up on x-rays, but did nothing to increase the devices' opaqueness or to train x-ray technicians in techniques for finding the devices. *Hilliard v. A.H. Robins Co. (1983) 148 Cal. App. 3d 374, 397-398, 196 Cal. Rptr. 117*

Public policy in favor of product development as not violated by award of punitive damages in case in which well-designed product was defectively manufactured and defect was concealed by manufacturer for sake of profits and at expense of health and safety of ultimate users. *Vossler v. Richards Mfg. Co. (1983) 143 Cal. App. 3d 952, 968, 192 Cal. Rptr. 219 , overruled in part, Adams v. Murakami (1991) 54 Cal. 3d 105, 284 Cal. Rptr. 318, 813 P.2d 1348*

Ratio of 20:1 punitive to compensatory damages as not excessive in products liability action in which actual damages were limited and defendant's conduct egregious, so that lesser ratio would have insufficient punitive and deterrent effect. *Vossler v. Richards MFg. Co. (1983) 143 Cal. App. 3d 952, 969, 192 Cal. Rptr. 219 , overruled in part, Adams v. Murakami (1991) 54 Cal. 3d 105, 284 Cal. Rptr. 318, 813 P.2d 1348*

Punitive damages as most effective remedy for consumer protection against defectively designed, mass-produced articles because governmental safety standards and criminal law provide inadequate protection. *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 810, 174 Cal. Rptr. 348*

Punitive damages as properly awarded in case of automobile's design defects when substantial evidence existed to show manufacturer knew of defects, knew that they would expose consumers to serious injury or death in 20 to 30 mile-per-hour collisions, and could have corrected defects at minimal cost, but by cost-benefit analysis, made conscious decision to defer corrections. *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 813, 174 Cal. Rptr. 348*

Products liability action generated by adverse physical effects of pharmaceuticals as furnishing occasion for award of exemplary damages, provided supplier's conduct satisfies exemplary damage criterion of *Civ. Code § 3294*. *G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 26, 122 Cal. Rptr. 218*

Corporation as subject to liability for punitive damages for acts of its agents and employees when act is done in ill will, or is motivated by actual malice, or done under circumstances amounting to fraud or oppression, providingact is done with knowledge or under direction of corporate officials having power to bind corporation. *Toole v. Richardson-Merrell, Inc. (1967) 251 Cal. App. 2d 689, 711, 60 Cal. Rptr. 398* (action for damages for personal injuries sustained in use of drug manufactured by defendant and prescribed for plaintiff's use by his physician based on negligence, fraud, breach of express and implied warranties, and strict liability in tort)

To justify award of exemplary damages in personal injury action, defendant as required to have acted with intent to vex, injure, or annoy, or with conscious disregard of safety of others. *G.D. Searle & Co. v. Superior Court (1975) 122 Cal. Rptr. 218*

When malice is ground relied on to support award of punitive damages, malice in fact as required to be established by evidence; malice in fact, sufficient to support award of punitive damages on basis of malice as that term is used in *Civ. Code § 3294*, as established by showing that defendant's wrongful conduct was willful, intentional, and done in reckless disregard of its possible results. *Toole v. Richardson-Merrell, Inc. (1967) 251 Cal. App. 2d 689, 713, 60 Cal. Rptr. 398*

Amendment of complaint to allege punitive damages after defense testimony revealed that manufacturer knew of defect at time of sale and deliberately neglected for business reasons to caution customers and unknowing public as proper; conduct as clearly justifying punitive damage charge based on grounds of fraud, malice, and oppression; amendment as required to be limited to nonwrongful death causes of action. *Barth v. B.F. Goodrich Tire Co. (1968) 265 Cal. App. 2d 228, 240-241, 71 Cal. Rptr. 306* (defective tire blew out causing car to crash, killing driver and injuring other passengers)

[16] Defective Product

[a] Defect Generally

Claims as dismissed for lack of plaintiff proof or expert testimony that design defect caused plaintiff to be blinded after having eye surgery. *Chandler v. Chiron Corp. (9th Cir. 1999) 1999 U.S. App. LEXIS 5860* (unpublished; citation restricted)

Evidence of functioning of substantially similar related products as sufficient to prove heating unit in coffee maker was defective. *Aetna Cas. & Sur. Co. v. Farmers Bros. Co. (1998) 65 Cal. App. 4th 574, 579-580, 76 Cal. Rptr. 2d 587*

Proposition 51 (*Civ. Code § 1431 et seq.*) as inapplicable in strict products liability case in which plaintiff's injuries were caused solely by defective product. *Wimberly v. Derby Cycle Corp. (1997) 56 Cal. App. 4th 618, 633, 65 Cal. Rptr. 2d 532*

No authority for defendant's implied proposition that deck gun that caused injuries was not defective merely because product itself remained intact or was not damaged in accident. *Wright v. Stang Mfg. Co. (1997) 54 Cal. App. 4th 1218, 1229, 63 Cal. Rptr. 2d 422*

Term "defect" as variously defined, with no definition yet formulated that would resolve all cases and that is universally agreed on. *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 427-428, 143 Cal. Rptr. 225, 573 P.2d 443* ; *Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 383, 93 Cal. Rptr. 769, 482 P.2d 681*

California law of strict products liability as not imposing requirement, embodied in Restatement (Second) of Torts § 402A, that product be in "defective condition unreasonably dangerous." *Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 131-135, 104 Cal. Rptr. 433, 501 P.2d 1153*

Plaintiff as not establishing defect by merely proving some subsequent accident or shattering of product. *McCurter v. Norton Co. (1968) 263 Cal. App. 2d 402, 407, 69 Cal. Rptr. 493*

[b] Design Defect

Plaintiffs failed to establish essential element of their product liability claim--that patient-controlled anesthesia pump was defective or failed to perform as expected because it administered extra, unrecorded morphine. Miller v. Baxter Healthcare Corp. (9th Cir. Jan. 12, 2006) 2006 U.S. App. LEXIS 2356, at *4-*9 (not appropriate for publication)

Plaintiff merely tracked elements of a design defect claim without pleading facts identifying what aspect of ski bindings made their design defective. He should have described how bindings failed to meet minimum safety expectations of ordinary consumers. Regarding risk-benefit test, plaintiff needed to allege how bindings' design was a substantial factor in causing his injuries. *Altman v. Ho Sports Co. (E.D. Cal. Nov. 19, 2009) 2009 U.S. Dist. LEXIS 108971, at *23-*24*

Plaintiff need not prove existence of feasible alternative design to prevail in design defect claim. *Yu-Santos v. Ford Motor Co. (E.D. Cal. May 13, 2009) 2009 U.S. Dist. LEXIS 41001, at *49*

Under the consumer expectations test, the relevant inquiry is whether the ordinary consumer *of the defendant's product* would have minimum safety assumptions about the products that were not met. *Vanier v. Battery Handling Sys. (E.D. Cal. Sept. 12, 2007) 2007 U.S. Dist. LEXIS 71091, at *17-*23*

Whether plaintiff's crush injury resulting when hand he used to guide control cable out of way became caught between upper and lower portion of handle was within ordinary consumer expectations was for jury. *Jordan v. Deere & Co. (E.D. Cal. July 5, 2006) 2006 U.S. Dist. LEXIS 47904, at *10*

It was not necessary to show that taser was inherently dangerous to bring strict liability design defect claim against its manufacturer. *Rosa v. City of Seaside (N.D. Cal. March 7, 2006) 2006 U.S. Dist. LEXIS 12530, at *9-*10* (not for publication)

It was a question of fact whether toaster was defectively designed either because it lacked sufficient insulation or because thermoplastic knob was not adequately secured. Charter Oak Fire Ins. Co. v. Sodexho Marriot (N.D. Cal. Feb. 27, 2006) 2006 U.S. Dist. LEXIS 9567, at *14-*15 (not designated for publication)

Aircraft manufacturer has no legal duty to require airlines to configure seats to maximize passenger safety because duty would lead to untenable result of manufacturer becoming liable for any purchaser's use or misuse of product. *In re Deep Vein Thrombosis (N.D. Cal. 2005) 356 F. Supp. 2d 1055, 1066*

Under risk/benefit design defect theory, plaintiff must show that product was actually "used." Torres v. City of Madera (In re Torres) (E.D. Cal. July 11, 2005) 2005 U.S. Dist. LEXIS 34672, at *27 , applying California law

Consumer expectations test applies to *raw* asbestos as well as to finished asbestos products. Court distinguished *Walker v. Stauffer Chem. Corp. (1971) 19 Cal. App. 3d 669, 96 Cal. Rptr. 803 (1971) . Garza v. Asbestos Corp. (2008) 161 Cal. App. 4th 651, 659-660, 74 Cal. Rptr. 3d 359*

Manufacturer's argument that plaintiff failed to establish existence of safer alternative designed failed, where court did not instruct jury that such proof was essential. *Bullock v. Philip Morris USA, Inc. (2008) 159 Cal. App. 4th 655, 674-675, 71 Cal. Rptr. 3d 775*

Liability under consumer expectations test could stand in light of evidence of manufacturer's efforts to mislead smokers about dangers of cigarettes and about smokers' vulnerability to such manipulation. *Bullock v. Philip Morris USA, Inc. (2008) 159 Cal. App. 4th 655, 675, 71 Cal. Rptr. 3d 775*

Plaintiff was not entitled to prove her design defect claims relating to tire failure under consumer expectations test. *Stephen v. Ford Motor Co. (2005) 134 Cal. App. 4th 1363, 1370, n.6, 37 Cal. Rptr. 3d 9*

Although the defendant's expert testified that the airbag performed in accordance with its intended design, it offered no evidence that the benefits of the design outweighed its inherent risks. *Gonzalez v. Autoliv ASP, Inc. (2007) 154 Cal.*

App. 4th 780, 788, 64 Cal. Rptr. 3d 908

Consumer expectations test applied to plaintiff's asbestos claim; test does not require inquiry into how exposure to particular level of asbestos may lead to development of cancer but merely asks whether circumstances permit inference that product's design performed below commonly accepted minimum safety assumptions of its ordinary consumer. *Jones v. John Crane, Inc. (2005) 132 Cal. App. 4th 990, 1001-1002, 35 Cal. Rptr. 3d 144*

Evidence supported jury's finding that "light" cigarettes were defective product under consumer expectations test. *Boeken v. Philip Morris Inc. (2005) 127 Cal. App. 4th 1640, 1668, 26 Cal. Rptr. 3d 638*

Issues of fact precluded finding that consumer expectations test was inapplicable as matter of law. Issues of material fact existed as to circumstances of accident, i.e., speed and collision range, and plaintiff provided sufficient evidence for jury to infer that nondeployment of air bag, in context of high-speed, head-on collision, violated minimum safety expectations of ordinary consumer. *McCabe v. American Honda Motor Co. (2002) 100 Cal. App. 4th 1111, 1122, 123 Cal. Rptr. 2d 303*

Court properly restricted plaintiffs from seeking jury instructions pursuant to consumer expectations test. Particular circumstances of latex gloves' failure could not be fairly evaluated according to common reason, experience, and understanding of ordinary consumer, regarding whether design performed below legitimate, commonly accepted minimum safety assumptions of such consumers. *Morson v. Superior Court (2001) 90 Cal. App. 4th 775, 791-794, 109 Cal. Rptr. 2d 343*

In case in which car air bag deployed and injured plaintiff, consumer expectations test as not applying because deployment of air bag was not within everyday experience of consuming public. *Pruitt v. General Motors Corp. (1999) 72 Cal. App. 4th 1480, 1483, 86 Cal. Rptr. 2d 4*

Evidence of package warnings as admissible in design defect case to prove that product's design embodies excessive preventable danger. *Hansen v. Sunnyside Products, Inc. (1997) 55 Cal. App. 4th 1497, 1512, 65 Cal. Rptr. 2d 266*

Uniqueness of purchaser's order did not alter manufacturer's responsibilities and was no defense; triable issues of fact existed on issue of whether or not deck gun was defectively designed in that it was not manufactured with flange mounting system or capability to have such system attached. *Wright v. Stang Mfg. Co. (1997) 54 Cal. App. 4th 1218, 1229, 63 Cal. Rptr. 2d 422*

Consumer expectation test as applying in asbestos products liability action. *Arena v. Owens-Corning Fiberglas Corp. (1998) 63 Cal. App. 4th 1178, 74 Cal. Rptr. 2d 580* ; *Morton v. Owens-Corning Fiberglas Corp. (1995) 33 Cal. App. 4th 1529, 1534-1536, 40 Cal. Rptr. 2d 22* ; *Sparks v. Owens-Ill., Inc. (1995) 32 Cal. App. 4th 461, 475-476, 38 Cal. Rptr. 2d 739*

Consumer expectation test applied in case against manufacturers of allegedly defective automobile air bags in which "crashworthiness" was at issue. *Bresnahan v. Chrysler Corp. (1998) 65 Cal. App. 4th 1149, 1155, 76 Cal. Rptr. 2d 804* ; *Bresnahan v. Chrysler Corp. (1995) 32 Cal. App. 4th 1559, 1567-1569, 38 Cal Rptr. 2d 446*

Evidence of product's safety history as admissible to prove design defect. *Benson v. Honda Motor Co. (1994) 26 Cal. App. 4th 1337, 1344, 32 Cal. Rptr. 2d 322*

Absence of pole or bar in front of seat on bus, that passenger could hold on sharp turns or sudden shifts, as establishing prima facie case of design defect. *Campbell v. General Motors Corp. (1982) 32 Cal. 3d 112, 119-122, 127, 184 Cal. Rptr. 891, 649 P.2d 224*

Product as defective in design if either (1) product failed to perform safely as ordinary consumer would expect when used in intended or reasonably foreseeable manner, or (2) benefits of challenged design are outweighed by its inherent risk of danger. *Barker v. Lull Eng'g Co. (1978) 20 Cal. 3d 413, 432, 143 Cal. Rptr. 225, 573 P.2d 443*

Product as not required to be found defective simply because accident has occurred. *Henderson v. Harnischfeger Corp. (1974) 12 Cal. 3d 663, 676, 117 Cal. Rptr. 1, 527 P.2d 353* (crane); *Baker v. Chrysler Corp. (1976) 55 Cal. App. 3d 710, 716, 127 Cal. Rptr. 745* (automobile)

Doctrine of strict liability in tort as applicable to defect in design as well as to defect in manufacture. *Pike v. Frank G. Hough Co. (1970) 2 Cal. 3d 465, 475-477, 85 Cal. Rptr. 629, 467 P.2d 229* (earth-moving equipment); *Smith v. Dhy-Dynamic Co. (1973) 31 Cal. App. 3d 852, 858-859, 107 Cal. Rptr. 907* (earth-moving equipment)

Failure to include instruction regarding manufacturing defect as proper when testimony of witnesses and argument of counsel related exclusively to asserted defect in design. *Dierks v. Mitsubishi Motors Corp. (1989) 208 Cal. App. 3d 352, 355-357, 256 Cal. Rptr. 230*

Evidence that product was designed in accordance with current state of art as admissible to determine whether product defective under risk-benefit analysis. *Rosburg v. Minnesota Mining & Mfg. Co. (1986) 181 Cal. App. 3d 726, 735, 226 Cal. Rptr. 299*

Consumer expectation instruction under *Barker v. Lull Engineering* as not appropriate when no expert testimony was introduced regarding reasonable expectations of users of specialized machinery claimed to be defective because of lack of warning. *Lunghi v. Clark Equip. Co. (1984) 153 Cal. App. 3d 485, 496, 200 Cal. Rptr. 387*

Piece of machinery otherwise not defective as potentially defective if installed near other equipment and combined with other equipment to create danger to foreseeable users; whether or not manufacturer of machinery had duty to anticipate dangers posed by other equipment near machinery and to protect forseeable users from those dangers as question of fact. *De Leon v. Commercial Mfg. & Supply Co. (1983) 148 Cal. App. 3d 336, 344-347, 195 Cal. Rptr. 867*

Jury's special verdict finding product defective based only on second alternative under *Barker v. Lull Engineering* (risk-benefit test) as not erroneous merely because jury also finds that benefits of design outweigh risks, because instruction on consumer exception prong of *Barker* affords basis for finding defendant strictly liable. *Curtis v. State of California (1982) 128 Cal. App. 3d 668, 690-691, 180 Cal. Rptr. 843*

Two-pronged definition of design defect under *Barker v. Lull Engineering*, consisting of "consumer expectation" standard, and "risk-benefit" test, asalternative tests, and jury instruction referring to only one as sufficient. *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 802, 174 Cal. Rptr. 348*

Jury instruction on risk-benefit test for design defect as required to include element of manufacturer's burden of proof. *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 803, 174 Cal. Rptr. 348*

Comparison of product's design to others in industry as inappropriate consideration in jury instruction regarding determination of existence of design defect. *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 803, 174 Cal. Rptr. 348*

Requiring injured plaintiff who seeks damages against manufacturer on basis of strict liability in tort for defective design to show that alternative designs for product could reasonably have been developed as not enlarging plaintiff's burden of proof; injured plaintiff as always having had burden to prove existence of defect; reasonableness of alternative designs where design defect is claimed as part of that burden. *Garcia v. Joseph Vince Co. (1978) 84 Cal.*

App. 3d 868, 879, 148 Cal. Rptr. 843 ; *contra Bernal v. Richard Wolf Med. Instruments Corp. (1990) 221 Cal. App. 3d 1326, 1333, 272 Cal. Rptr. 41* ; *overruled in part on other grounds in Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 34 Cal. Rptr. 2d 607, 882 P.2d 298*

Doctrine of strict liability as applicable to defectively placed water heater in home, because design of residential building resulted in injury. *Hyman v. Gordon (1973) 35 Cal. App. 3d 769, 772, 111 Cal. Rptr. 262*

Product as defective if it lacks safety devices necessary to its reasonable safety. *Garcia v. Halsett (1970) 3 Cal. App. 3d 319, 323, 82 Cal. Rptr. 420* (commercial washing machine)

Plaintiffs may not hold a gun manufacturer liable on a common law negligence theory because the legislature has declared as a matter of public policy that a gun manufacturer may not be held liable in a products liability action on the basis that the benefits of its product do not outweigh the risk of injury posed by the product's potential to cause serious injury, damage, or death when discharged. *Cal. Civ. Code § 1714.4(a)*; *Merrill v. Navegar, Inc. (2001) 26 Cal. 4th 465, 110 Cal. Rptr. 2d 370, 28 P.3d 116*

[c] Failure to Warn

Plaintiff was not sophisticated user of ladder. The manufacturer could not avoid liability by merely including a warning in lettering that was only 1/16" high, because a question of fact existed as to whether it could reasonably anticipate that user would not heed warning. *Herrera v. Louisville Ladder Group, LLC (C.D. Cal. Nov. 16, 2009) 2009 U.S. Dist. LEXIS 107384, at *7-9*

Plaintiff failed to state defective warning claim because he did not identify how warning was inadequate, i.e., complaint did not identify the specific danger that required a warning. *Altman v. Ho Sports Co. (E.D. Cal. Nov. 19, 2009) 2009 U.S. Dist. LEXIS 108971, at *25*

Plaintiff failed to establish that risk of metabolic acidosis from Tasers was known or knowable. *Rosa v. City of Seaside (N.D. Cal. Nov. 20, 2009) 2009 U.S. Dist. LEXIS 108602, at *16-*23* (not designated for publication)

Genuine issue of material fact existed as to whether plaintiff was sophisticated user of ladder at time of his injury. *Castellanos v. Louisville Ladder, Inc. (N.D. Cal. May 11, 2009) 2009 U.S. Dist. LEXIS 40547, at *3*

Manufacturer provided no evidence that labelling to its hip replacement system included FDA-approved warnings, and was not entitled to summary judgment on plaintiff's failure to warn claim. *Notmeyer v. Stryker Corp. (N.D. Cal. 2007) 502 F. Supp. 2d 1051, 1060*

It was a question of fact as to whether user's guide adequately warned against danger of electric shock from prescribed use of toaster. Charter Oak Fire Ins. Co. v. Sodexho Marriot (N.D. Cal. Feb. 27, 2006) 2006 U.S. Dist. LEXIS 9567, at *16 (not designated for publication)

Despite defendants' argument that any potential hazards associated with jaw die change-out were obvious or known to plaintiff, genuine issue of fact existed as to whether defendants should have warned users of rock-crushing machine's dangers. Salyards v. Metso Minerals Tampere Oy (E.D. Cal. Nov. 10, 2005) 2005 U.S. Dist. LEXIS 29360, at *18-*22

There is no duty to warn about dangers that plaintiff knew about at time plaintiff used product; plaintiff knew about potential for "weapon confusion." Torres v. City of Madera (E.D. Cal. July 11, 2005) 2005 U.S. Dist. LEXIS 34672, at *40 , applying California law

Court expressly adopted sophisticated user defense, which relieves manufacturers of duty to provide warnings about product's potential hazards of which users are or should be already aware. Defense applies to both strict liability and negligent failure to warn cases. Moreover, duty to warn is measured by actual or constructive knowledge of class of sophisticated users, rather than by individual plaintiff's subjective knowledge. Time for determining user sophistication for purposes of defense is time of injury. *Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56, 65-73, 74 Cal. Rptr. 3d 108, 179 P.3d 905*

Prescription drug manufacturer is strictly liable for failure to warn of dangers that were known, or reasonably scientifically knowable at the time drug was manufactured and distributed. *Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1110, 56 Cal. Rptr. 2d 162, 920 P.2d 1347*

Manufacturers of Malathion used by the State under Emergency Services Act as not responsible for disseminating public health warnings to supplement governmental health warnings which differed markedly from manufacturers' Environmental Protection Agency (EPA) approved label. *Macias v. State of California (1995) 10 Cal. 4th 844, 853-860, 42 Cal. Rptr. 2d 592, 897 P.2d 530*

Prescription drug manufacturer's compliance with statutes and regulations governing warnings required to accompany product as constituting defense to action alleging that failure to warn in Spanish was basis for defendant's liability. *Ramirez v. Plough, Inc. (1993) 6 Cal. 4th 539, 549-553, 25 Cal. Rptr. 2d 97, 863 P.2d 167*

Sophisticated user defense applies to negligent failure-to-warn cause of action on negligence per se theory, but not to strict liability design defect cause of action. *Johnson v. Honeywell Int'l Inc. (2009) 179 Cal. App. 4th 549, 554, 101 Cal. Rptr. 3d 726*

Defendant was not liable for failure to warn because it did not supply the asbestos-containing gaskets used in its valves. *Merrill v. Leslie Controls, Inc. (2009) 179 Cal. App. 4th 262, 101 Cal. Rptr. 3d 614*

Suppliers of components to a propulsion system had no duty to warn of dangers of asbestos-containing components supplied by other parties. *Taylor v. Elliott Turbomachinery Co. (2009) 171 Cal. App. 4th 564, 580-583, 90 Cal. Rptr. 3d 414*

Plaintiff did not identify any particular risk known to the airbag module manufacturer for which it should have provided a warning. *Gonzalez v. Autoliv ASP, Inc. (2007) 154 Cal. App. 4th 780, 793, 64 Cal. Rptr. 3d 908*

Encyclopedia and medical articles, together with published standards for airborne asbestos dust, supported jury's finding that risks associated with defendant's products could reasonably have been ascertained. *Jones v. John Crane, Inc. (2005) 132 Cal. App. 4th 990, 1004-1005, 35 Cal. Rptr. 3d 144*

Danger of diving into shallow aboveground pool was not open and obvious to 11-year-old as matter of law. *Bunch v. Hoffinger Indus., Inc. (2004) 123 Cal. App. 4th 1278, 1299-1300, 20 Cal. Rptr. 3d 780*

Defendant failed to establish that potential dangers of operating deck gun were generally known or actually known by plaintiff. *Wright v. Stang Mfg. Co. (1997) 54 Cal. App. 4th 1218, 1231, 63 Cal. Rptr. 2d 422*

Defendant's actual or constructive knowledge of danger as requisite for strict liability for failure to warn. *Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 1000, 281 Cal. Rptr. 528, 810 P.2d 549*

Prescription drug manufacturer as not strictly liable for injuries caused by unavoidably unsafe drug so long as drug was properly prepared and accompanied by warnings of dangerous propensities that were either known or reasonably scientifically knowable at the time of distribution. *Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1069, 245 Cal.*

Rptr. 412, 751 P.2d 470 (adopting Restatement (Second) of Torts § 402A, comment k)

There is no duty to warn of possibility of rare, idiosyncratic, or unusual reactions to otherwise useful product, and distributor's failure to warn that TB test contained animal products was not sufficiently likely to result in serious harm to significant segment of population so as to impose duty to so advise as matter of law. *Friedman v. Merck & Co. (2003) 107 Cal. App. 4th 454, 131 Cal. Rptr. 2d 885*

Manufacturers and successor manufacturers of general aviation aircraft parts in relation to duty to warn and federal preemption. *Burroughs v. Precision Airmotive Corp. (2000) 78 Cal. App. 4th 681, 702*

Restaurant as strictly liable for failing to warn customers in context of food allergies, even though product itself was not defective. *Livingston v. Marie Callenders, Inc. (1999) 72 Cal. App. 4th 830, 839, 85 Cal. Rptr. 2d 528*

Strict liability for failure to warn as applicable in context of allergies; restaurant may be strictly liable for failing to warn customers about additives in food served; defendant may be liable if its product contained ingredient to which substantial number of the population is allergic, ingredient is one whose danger is not generally known, or if known is not one which customer would reasonably expect to find in product, and defendant knew or should have known that ingredient was present and was dangerous. *Livingston v. Marie Callenders, Inc. (1999) 72 Cal. App. 4th 830, 839, 85 Cal. Rptr. 2d 528*

Finding by one jury that defendant's product was not defective because of failure to warn precluded second jury from finding that defendant was negligent for failing to warn of risks of product. *Valentine v. Baxter Healthcare Corp. (1999) 68 Cal. App. 4th 1467, 1481-1482, 81 Cal. Rptr. 2d 252*

Negligence liability based on failure to warn as not precluded by jury determination that product was not defective. *Hernandez v. Badger Constr. (1994) 28 Cal. App. 4th 1791, 1827-1828, 34 Cal. Rptr. 2d 732*

Fact that some intended recipients of warning understood content of warning as not precluding liability if warning was not adequate to warn injured user; negligence in explaining (or failing to explain) unclear warning to those who did not understand it as foreseeable. *Huynh v. Ingersoll-Rand (1993) 16 Cal. App. 4th 825, 833-835, 20 Cal. Rptr. 2d 296*

Whether warning is adequate is usually question of fact; although MSDS pointed out certain hazards associated with unprotected use of solvent, including dermatitis, liver damage is far more likely to have devastating effect than dermatitis, and therefore defendants failed to show that warnings provided were adequate as matter of law. *Schwoerer v. Union Oil Co. (1993) 14 Cal. App. 4th 103, 111-112, 17 Cal. Rptr. 2d 227*

Proof of defendant's actual or constructive knowledge as not required for imposing strict liability when defendant admitted knowledge of danger, and failed to place warning on product. *McKinney v. Revlon, Inc. (1992) 2 Cal. App. 4th 602, 606-608, 3 Cal. Rptr. 2d 72*

Whether warning is adequate depends on several factors, including normal expectations of consumer, degrees of simplicity or complication in product's operation or use, nature and magnitude of danger to which user is exposed, likelihood of injury, and feasibility and beneficial effect of including warning; defendants failed to establish that labels on their paint products were adequate as matter of law. *Jackson v. Deft, Inc. (1990) 223 Cal. App. 3d 1305, 1320, 273 Cal. Rptr. 214*

In cause of action brought by commercial user of chemicals against chemical companies, alleging strict products liability based on failure to warn of dangers of improper disposal of inherently dangerous and ultrahazardous chemicals, plaintiffs as required to allege that: (1) plaintiffs were foreseeable users, using chemicals in foreseeable manner; (2) chemicals were dangerous to environment if deposited directly in ground; (3) plaintiffs did not know of dangers of

improper disposal; (4) defendants failed to warn plaintiffs of dangers; and (5) ignorant of dangers, plaintiffs failed to guard against ground contamination. *Selma Pressure Treating Co. v. Osmose Wood Preserving, Inc. (1990) 221 Cal. App. 3d 1601, 1621, 271 Cal. Rptr. 596 , distinguished, Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56, 70, 74 Cal. Rptr. 3d 108, 179 P.2d 905*

Cause of action for strict products liability under *Brown v. Superior Court (1988) 44 Cal. 3d 1049, 245 Cal. Rptr. 412, 751 P.2d 470* , as sufficiently stated against manufacturer of baby aspirin for purposes of withstanding motion for judgment on pleadings, based on allegations that: (1) use of aspirin was reasonably foreseeable by defendant, (2) use involved substantial, foreseeable danger, and (3) adequate warnings were not given; distinction between prescription and nonprescription drugs as irrelevant at pleading stage. *Rodriguez v. Superior Court (1990) 221 Cal. App. 3d 1371, 1374, 271 Cal. Rptr. 114*

Requirement of giving warnings as not limited to unavoidably dangerous or unsafe products. *Gonzales v. Carmenita Ford Truck Sales, Inc. (1987) 192 Cal. App. 3d 1143, 238 Cal. Rptr. 18*

One manufacturer's failure to warn as not proximate cause of injury resulting from explosion of another manufacturer's product absent allegations that (1) product of manufacturer allegedly liable for failure to warn, which had been previously used by injured person, and product causing injury were subject to same generic description; (2) products were generally used for same purposes by consumers; (3) product warnings regarding both products were inadequate; and (4) both products had identical risks of use. *Powell v. Standard Brands Paint Co. (1985) 166 Cal. App. 3d 357, 365, 212 Cal. Rptr. 395*

Seller of acid was not liable for failure to warn of danger from formation of pressure caused by defective design of a tank car. *Blackwell v. Phelps Dodge Corp. (1984) 157 Cal. App. 3d 372, 375, 203 Cal. Rptr. 706*

Failure to give adequate warnings as potential basis for strict liability of manufacturer or distributor that knew or should have known of the danger and necessity of warnings to ensure safe use; trial court's refusal to instruct jury that failure to warn may constitute defect as reversible error despite special verdict of no defect. *Lunghi v. Clark Equipment Co. (1984) 153 Cal. App. 3d 485, 493-494, 200 Cal. Rptr. 387* (front-end loader); *DeLeon v. Commercial Manufacturing & Supply Co. (1983) 148 Cal. App. 3d 336, 343, 195 Cal. Rptr. 867* (cannery bin)

In action alleging strict liability (inter alia), arising from death of hot-air balloon owner, resulting from failure of Velcro fastener used in construction of balloon without Velcro manufacturer's knowledge and despite its attempts to have Federal Aviation Administration issue warnings regarding danger inherent in product's use in that manner, Velcro manufacturer's warning to that effect, mailed to all registered balloon owners, as adequate as matter of law. *Temple v. Velcro USA, Inc. (1983) 148 Cal. App. 3d 1090, 1094-1095, 196 Cal. Rptr. 531*

Manufacturer as not liable for inadequate warnings regarding safe use of product when product sold in bulk, with adequate warnings, to distributor who packages, labels, and markets product. *Groll v. Shell Oil Co. (1983) 148 Cal. App. 3d 444, 449-450, 196 Cal. Rptr. 52*

CO[2] cartridges as not defective for failure to bear warning that others could be harmed if cartridges are used to power pellet guns; seller need not add warning when the danger or potentiality of danger is generally known and recognized. *Holmes v. J. C. Penney Co. (1982) 133 Cal. App. 3d 216, 220, 183 Cal. Rptr. 777*

Instructions for use of stove as not inadequate by virtue of manufacturer's failure to warn of danger of lighting stove without first checking for gas leak, in action based on explosion caused by defect in copper tubing and joints between propane gas tank and hot water heater. *Garman v. Magic Chef, Inc. (1981) 117 Cal. App. 3d 634, 637-638, 173 Cal. Rptr. 20*

Distributor not required to include warning of potential dangers of slingshot because they were generally known and recognized. *Bojorquez v. House of Toys, Inc. (1976) 62 Cal. App. 3d 930, 933, 133 Cal. Rptr. 483*

Product requiring assembly and use in conformity with supplier's directions as defective if supplier fails to warn adequately of circumstances created by assembly or use that would render product dangerous to user. *Midgley v. S.S. Kresge Co. (1976) 55 Cal. App. 3d 67, 74, 127 Cal. Rptr. 217* (telescope)

No warning as required regarding use that is not reasonably foreseeable. *Dosier v. Wilcox-Crittendon Co. (1975) 45 Cal. App. 3d 74, 81, 119 Cal. Rptr. 135*

In action based on strict products liability, to recover damages from manufacturers and distributor of weed-killing chemical products that allegedly caused severe systemic skin condition for failure to warn of danger, plaintiff as having burden of proving that seller knew, or by application of reasonable, developed human skill and foresight should have known, of presence of ingredient in product to which substantial number of population is allergic and danger created by ingredient. *Oakes v. E.I. Du Pont de Nemours & Co., Inc. (1969) 272 Cal. App. 2d 645, 649-651, 77 Cal. Rptr. 709*

In a survival action against a drug manufacturer for damages sustained while using their drug, partial summary judgment was denied to the defendant for their failure to establish that the FDA's approval of manufacturer's proposed warnings preempted plaintiff from asserting state law tort claims based on failure to warn of a suicide risk. *Motus v. Pfizer, Inc. (C.D. Cal. 2000) 127 F. Supp. 2d 1085, 1100-1101*

[d] Manufacturing Defect

Circumstantial evidence created a triable issue of fact as to whether femoral head to hip replacement contained a manufacturing defect. *Notmeyer v. Stryker Corp. (N.D. Cal. 2007) 502 F. Supp. 2d 1051, 1059-1060*

Plaintiff presented no evidence that the airbag module performed differently from other identical units and failed to establish a manufacturing defect. *Gonzalez v. Autoliv ASP, Inc. (2007) 154 Cal. App. 4th 780, 791, 64 Cal. Rptr. 3d 908*

Plaintiff failed to show that latex gloves--which were manufactured precisely as intended, complied with government standards, and fulfilled their primary barrier function--nevertheless had manufacturing defects due to existence of evidence of manufacturer's improvement efforts, targets, and goals, at different times and locations, reflective of available state of scientific knowledge regarding latex protein levels of exposure. *In re Coordinated Latex Glove Litig. (2002) 99 Cal. App. 4th 594, 121 Cal. Rptr. 2d 301, 315-316*

Speculative harm as insufficient basis for negligence cause of action in manufacturing defect case. *Zamora v. Shell Oil Co. (1997) 55 Cal. App. 4th 204, 210-211, 63 Cal. Rptr. 2d 762*

Manufacturing defect as existing when product unit deviates from manufacturer's intended result or from other ostensibly identical units of same product line. *Barker v. Lull Engineering Co. (1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443*

Plaintiff whose case was limited to manufacturing defect, and who did not rely on defect in design or failure to warn, as entitled to have court give *BAJI No. 9.00.3* (definition of manufacturing defect) instead of *BAJI No. 9.00* (general instruction re liability for defect) as jury would not have been misled or confused as result of instruction; however, error as not prejudicial, since factual record showed that jury was capable of determining existence of defect due to instruction given and obvious nature of alleged defect. *Montez v. Ford Motor Co. (1980) 101 Cal. App. 3d 315, 321-322, 161 Cal. Rptr. 578* (automobile steering assembly)

In strict products liability action arising out of car collision in which tie rod broke when brakes were applied, mere proof that tie rod broke as not establishing that it was defective at time of delivery of car to plaintiff some 33 months before accident. *Moerer v. Ford Motor Co. (1976) 57 Cal. App. 3d 114, 116, 129 Cal. Rptr. 112*

Although product may be nondefective in design, failure of manufacturer to comply with its own design requirements as resulting in defect of assembly or manufacture. *Lewis v. American Hoist & Derrick Co. (1971) 20 Cal. App. 3d 570, 580, 97 Cal. Rptr. 798* (crane)

[17] Defendants

In diversity action alleging design and manufacturing defects against manufacturer of allegedly defective surgical implant device, failure to join doctor and hospital (against whom plaintiff filed administrative proceeding and state-court action) as not requiring dismissal of complaint under *Fed. R. Civ. P., Rule 19(b)* (regarding indispensable parties) because tortfeasor with usual joint-and-several liability is merely permissive party to action against another with like liability. *Temple v. Synthes Corporation, Ltd. (1990) 498 U.S. 5, 111 S. Ct. 315, 112 L. Ed. 2d 263, 267-268*

Sales representative for company that manufactured wakeboard boots was not subject to products liability. *Altman v. Ho Sports Co. (E.D. Cal. Aug. 20, 2009) 2009 U.S. Dist. LEXIS 80662, at *9*

Aircraft manufacturer was not liable in multidistrict litigation alleging that seating on its aircraft was defective because it created risk of deep vein thrombosis in passengers; manufacturer did not deliver aircraft to airlines for them to complete manufacturing process, but sold aircraft to airlines, which were free to do whatever they desired with purchased aircraft; manufacturer was not liable as integral part of overall producing and marketing enterprise of commercial airline economic market. *In re Deep Vein Thrombosis (N.D. Cal. 2005) 356 F. Supp. 2d 1055, 1063*

Neither landlords nor hotel proprietors are subject to strict products liability for injuries to tenants and guests caused by defect in premises; unlike retailers, landlords and hotel owners often are unable to exert pressure on manufacturers to make products safer and cannot share with manufacturer costs of insuring tenants' or guests' safety; landlords and hotel owners cannot necessarily be expected to possess expert knowledge concerning components that comprise leased dwellings. *Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1189-1209, 43 Cal. Rptr. 2d 836, 899 P.2d 905 , overruling Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 213 Cal. Rptr. 213, 698 P.2d 116*

Defendant who played no role indesign, manufacture, distribution, or marketing of injury-causing product is not subject to strict products liability; court refused to impose liability on developer of asbestos-containing product, because its historic role in the design, manufacture, and marketing of product did not support plaintiff's claims. *Cadlo v. Owens-Ill., Inc. (2004) 125 Cal. App. 4th 513, 516, 23 Cal. Rptr. 3d 1 , modified, 2004 Cal. App. LEXIS 2260*

Under "stream of commerce" approach to strict liability in tort, liability extends to all those who are in "overall producing and marketing enterprise." *Fortman v. Hemco, Inc. (1989) 211 Cal. App. 3d 241, 259 Cal. Rptr. 311*

Liability falls in some proportion on all parties that have mutually participated in, in dependent, interrelated way, in designing, assembling, and marketing defective product. *Gehl Bros. Mfg. Co. v. Superior Court (1986) 183 Cal. App. 3d 178, 186, 228 Cal. Rptr. 19*

[18] Definitions

In literature of law, "fault" as synonymous with "negligence." *Cahill Bros., Inc. v. Clementina Co. (1970) 208 Cal. App. 2d 367, 380, 25 Cal. Rptr. 301*

[19] Delegation of Duty by Manufacturer

Rules relating to strict liability in tort as focusing responsibility for defects, whether negligently or nonnegligently caused, on manufacturer of completed product and as applying regardless of what part of manufacturing process manufacturer chooses to delegate to third parties. *Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 261, 37 Cal. Rptr. 896, 391 P.2d 168*

Automobile manufacturer that delivers to its dealers cars that are not ready to be driven away by ultimate purchasers but relies on its dealers to make final inspections, corrections, and adjustments necessary to make cars ready for use as not able to delegate its duty to have cars delivered to ultimate purchaser free from dangerous defects and, hence, as not able to escape liability on ground defect in particular car may have been caused by something one of its authorized dealers did or failed to do. *Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 261, 37 Cal. Rptr. 896, 391 P.2d 168*

[20] Elements of Cause of Action

Plaintiff failed to establish a triable question of fact with respect to the elements of a strict liability, negligence, or warranty cause of action. *McGrath v. Cirrus Design Corp. (N.D. Cal. Dec. 12, 2007) 2007 U.S. Dist. LEXIS 91318, at *7*

Allegation that defendant-manufacturer actually manufactured defective product as ordinarily prerequisite to imposition of liability; exceptions and limitations to requirement. *Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 597-598, 610-613, 163 Cal. Rptr. 132, 607 P.2d 924*

Manufacturers and designers of products as strictly liable in tort for injuries caused by their products when following four elements are present: (1) product is placed on market; (2) there is knowledge it will be used without inspection for defects; (3) product proves to have a defect; and (4) defect causes injury to human being. *Baker v. Chrysler Corp. (1976) 55 Cal. App. 3d 710, 715, 127 Cal. Rptr. 745*

[21] Evidence

[a] Circumstantial

Plaintiff as permitted to prove strict liability case by circumstantial evidence. *Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 583-584, 75 Cal. Rptr. 652, 451 P.2d 84* ; *Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 260, 37 Cal. Rptr. 896, 391 P.2d 168* ; *Hughes Tool Co. v. Max Hinrichs Seed Co. (1980) 112 Cal. App. 3d 194, 169 Cal. Rptr. 160* ; *Johnson v. Standard Brands Paint Co. (1969) 274 Cal. App. 2d 331, 338* , 79 Rptr. 194; *Van Zee v. Bayview Hardware Store (1968) 268 Cal. App. 2d 351, 361, 74 Cal. Rptr. 21*

Circumstantial evidence created a triable issue of fact as to whether the femoral head to hip replacement contained a manufacturing defect. *Notmeyer v. Stryker Corp. (N.D. Cal. 2007) 502 F. Supp. 2d 1051, 1059-1060*

Design defect as capable of proof by circumstantial evidence even if product itself has been destroyed. *Hughes Tool Co. v. Max Hinrichs Seed Co. (1980) 112 Cal. App. 3d 194, 201, 169 Cal. Rptr. 160*

[a.1] Compliance With Industry Standards

Trial court refused to give an instruction that compliance with government standards cannot be considered as a basis for assessing the safety of a product in a design defect claim. Instead, it instructed the jury that evidence of FDA action or inaction, although not dispositive, may be considered to show whether a drug is safe or not safe. The appellate court found no error. *O'Neill v. Novartis Consumer Health, Inc. (2007) 147 Cal. App. 4th 1388, 1395-1396*

Manufacturer cannot defend product liability action with evidence that it met its industry's customs or standards on safety. *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 803, 174 Cal. Rptr. 348*

[b] Expert Witnesses

In case involving collagen implants, court improperly applied *Daubert* test because it failed to consider relevant scientific evidence relied on by plaintiff's expert to support his conclusion *Kennedy v. Collagen Corp. (9th Cir. 1998) 161 F.3d 1226, 1227*

Court properly concluded that testimony based on "whole person aggravation" theory of causation did not meet *Daubert's* standard. *Schudel v. General Electric Co. (9th Cir. 1997) 120 F.3d 991, 995-996*

Occupant restraint systems expert with master's degree in mechanical engineering was qualified to testify regarding seat belt defects. His testimony that front seat belt broke either because the webbing separated or because the retractor allowed excessive spooling satisfied *Daubert. Yu-Santos v. Ford Motor Co. (E.D. Cal. May 13, 2009) 2009 U.S. Dist. LEXIS 41001, at *19-*21*

Whether expert failed to comply with NFPA 921 by not considering other possible ignition sources went to weight, not admissibility, of his testimony. *Wawanesa Gen. Ins. Co. v. Applica Consumer Prods., Inc. (S.D. Cal. Oct. 23, 2008) 2008 U.S. Dist. LEXIS 86938, at *11*

Cardiologist's opinion that 200 mg dose of Celebrex can increase risk of heart attacks was not "good science" because witness first identified his conclusion and then "cherry-picked" observational studies that supported it. However, plaintiffs' general causation testimony regarding Celebrex 400 mg/d was supported by clinical study and was admissible. *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig. (N.D. Cal. 2007) 524 F. Supp. 2d 1166, 1176-1181*

Court granted in part and denied in part defendant's motion to exclude expert testimony that polyurethane foam-coated breast implants causeddecedent's breast cancer. *In re Silicone Gel Breasts Implants Prods. Liab. Litig. (Cagle v. Cooper Cos.) (C.D. Cal. 2004) 318 F. Supp. 2d 879, 887*

California Supreme Court granted review of question of whether the *Kelly/Frye* standard for admitting results of new scientific techniques should be modified. Court answered in negative, concluding that the *Kelly/Frye* formulation should remain prerequisite to admission of expert testimony regarding new scientific methodology. *People v. Leahy (1994) 8 Cal. 4th 587, 882 P.2d 321, 325*

Nonsuit as properly granted in action based on strict liability for damages for personal injuries and wrongful death resulting from flood that swept away house with its occupants, when jury was incapable of determining without expert testimony that house was defective and plaintiffs presented no expert testimony regarding existence of defect in house. *Miller v. Los Angeles County Flood Control Dist. (1973) 8 Cal. 3d 689, 704, 106 Cal. Rptr. 1, 505 P.2d 193*

Kelly standard for admission of novel scientific methodology did not apply to testimony that some cases in a study regarding the association between PPA and stroke were misclassified. *O'Neill v. Novartis Consumer Health, Inc. (2007) 147 Cal. App. 4th 1388, 1397*

Experts generally conduct visual and tactile examinations of failed tires to rule out other possible causes, but this expert relied exclusively on supposedly similar tire failures and amateur photographs to support conclusion that tire was defective; expert's opinions were thus mere speculation. *Stephen v. Ford Motor Co. (2005) 134 Cal. App. 4th 1363, 1372-1373*

Plaintiffs' expert based general causation opinion on study that analyzed prior epidemiological studies of painters' exposure to dozens of chemicals; study concluded that painters experienced 40 percent greater incidence of lung cancer and 20 percent greater incidence of various other types of cancer than did general population; trial court properly excluded testimony; matter that provides reasonable basis for one opinion does not necessarily provide reasonable basis for another opinion; court construed *Evid. Code § 801(b)* to mean that matter relied on must provide reasonable basis for particular opinion offered, and that expert opinion based on speculation or conjecture is inadmissible. *Lockheed Litigation Cases (2004) 115 Cal. App. 4th 558, 563-565, 10 Cal. Rptr. 3d 34*

When product fails to extent that examination can furnish no clue regarding specific part that failed, (1) facts indicating that accident occurred shortly after sale of product, (2) facts indicating that plaintiff did nothing to bring about accident, and (3) expert testimony suggesting defect was responsible for the accident as sufficient to allow jury to decide whether or not defendants are strictly liable for plaintiff's injuries. *Hinckley v. La Mesa R.V. Center, Inc. (1984) 158 Cal. App. 3d 630, 642-643, 205 Cal. Rptr. 22*

In case of defectively designed car, court as properly permitting plaintiffs to directly examine defendant's former engineering executive regarding his forced early retirement due to his views on safety when such testimony established witness's professional experience, and was relevant to issue of malice on claim for punitive damages. *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 786, 174 Cal. Rptr. 348*

Circumstantial evidence as proper basis for expert witness opinion. *Cravens, Dargan & Co. v. Pacific Indem. Co. (1972) 29 Cal. App. 3d 594, 598-599, 105 Cal. Rptr. 607*

Court as not abusing its discretion under *Evid. Code § 352* (excluding probative evidence outweighed by prejudicial effect) in refusing to exclude expert testimony of medical doctor on effects of toluene poisoning, in action based on strict liabiltiy and negligence for personal injuries caused by use of adhesive containing toluene in course of employment, when doctor qualified as expert on effects on children of glue-sniffing. *Ruiz v. Minnesota Ming & Mfg. Co. (1971) 15 Cal. App. 3d 462, 468, 93 Cal. Rptr. 270*

[c] Other Accidents

Knowledge of prior similar accidents is particularly important in actions alleging failure to warn of an alleged defect. *Benson v. Honda Motor Co. (1994) 26 Cal. App. 4th 1337, 1345, 32 Cal. Rptr. 2d 322*

Evidence of prior accidents is admissible to prove defective condition, knowledge, or cause of accident, provided that circumstances of other accidents are similar and not too remote. *Elsworth v. Beech Aircraft Corp. (1984) 37 Cal. 3d 540, 555, 208 Cal. Rptr. 874, 691 P.2d 630*

Evidence of previous automobile accidents offered to show that defendant manufacturer had notice of dangerous condition of automobile as admissible if they occurred under circumstances substantially similar to those of case at hand, and jury as justifiably inferring that earlier incidents were result of same defect as complained of in instant case. *Hasson v. Ford Motor Co. (1982) 32 Cal. 3d 388, 404, 185 Cal. Rptr. 654, 650 P.2d 1171*

In products liability actions, evidence of *subsequent* accident may be as relevant as prior accident to show existence of

defect or causation. *Simmons v. Southern Pac. Transp. Co. (1976) 62 Cal. App. 3d 341, 365, 133 Cal. Rptr. 42*

Evidence of other accidents as admissible to prove defective condition, knowledge, or cause of accident, provided circumstances of other accidents are similar and not overly remote. *Ault v. International Harvester Co. (1974) 13 Cal. 3d 113, 121-122, 117 Cal. Rptr. 812, 528 P.2d 1148*

[d] Res Ipsa Loquitur

Res ipsa loquitur as having no application to strict products liability. *Lewis v. American Hoist & Derrick Co. (1971) 20 Cal. App. 3d 570, 579, 97 Cal. Rptr. 798*

Doctrine of res ipsa loquitur as relating to cases involving negligence, and as not applicable in cases based on strict products liability or breach of warranty. *Tresham v. Ford Motor Co. (1969) 275 Cal. App. 2d 403, 407, 79 Cal. Rptr. 883*

[e] Safety Orders

Cal-OSHA regulations inadmissible under *Lab. Code § 6304.5* in action by employee against manufacturer of equipment that caused injury. *Widson v. International Harvester Co. (1984) 153 Cal. App. 3d 45, 51-52, 200 Cal. Rptr. 136*

[f] Subsequent Remedial Measures

Evidence of subsequent remedial measures taken by a third party is admissible. *Scherer v. Home Depot U.S.A., Inc. (E.D. Cal. Oct. 23, 2006) 2006 U.S. Dist. LEXIS 79126, at *6* (ladder)

Evid. Code § 1151 (evidence of subsequent remedial or precautionary measure inadmissible to prove negligence or culpable misconduct) as inapplicable to action based on strict products liability. *Schelbauer v. Butler Manufacturing Co. (1984) 35 Cal. 3d 442, 450-452, 198 Cal. Rptr. 155, 673 P.2d 743* ; *Ault v. International Harvester Co. (1974) 13 Cal. 3d 113, 117-121, 117 Cal. Rptr. 812, 528 P.2d 1148*

In action against elevator manufacturer alleging design defect, *Evid. Code § 1151* (limiting use at trial of evidence of remedial measures) as precluding evidence of subsequent remedial measures taken by nonparty employer of plaintiff, when liability of employer, if any, would be based on negligence; inclusion of strict-liability theory in complaint against defendant manufacturer as not controlling. *Santilli v. Otis Elevator Co. (1989) 215 Cal. App. 3d 210, 213, 263 Cal. Rptr. 496*

Plaintiff in strict products liability action as permitted to introduce evidence of subsequent repairs made to product to cure defect; *Evid. Code § 1151* (limiting use of proof of subsequent repairs) as not applicable to strict products liability actions. *Magnante v. Pettibone-Wood Manufacturing Co. (1986) 183 Cal. App. 3d 764, 766-767, 228 Cal. Rptr. 420*

[22] Forum Non Conveniens

District court did not abuse discretion in dismissing strict liability action arising out of air crash in Scotland on forum non conveniens grounds; possibility of unfavorable change in law does not bar dismissal on ground of forum non conveniens; district court properly decided that presumption in favor of plaintiffs' forum choice applied with less force because real parties in interest were foreign. *Piper Aircraft Co. v. Reyno (1981) 454 U.S. 235, 256, 102 S. Ct. 252, 70*

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Singapore was available forum for claims by citizens of Netherlands arising out of crash in Taiwan, and public and private interest factors favored dismissal on forum non conveniens grounds. *Schijndel v. Boeing Co. 434 F. Supp. 2d 766, 779 (C.D. Cal. 2006)*

Court granted motion to dismiss on forum non conveniens grounds, subject to defendant submitting to jurisdiction of Mexican court and making all of its witnesses and evidence available for Mexican proceedings. Mexico provided adequate forum even though strict liability theory was unavailable. *De Lourdes Ruelas Aldaba v. Michelin N. Am., Inc. (N.D. Cal. Dec. 22, 2005) 2005 U.S. Dist. LEXIS 37934, at *14-*18*

Court granted motion to dismiss action arising out of air crash in Taiwan on forum non conveniens grounds, if defendants complied with seven conditions, including not contesting liability for compensatory damages, submitting to service of process, waiving any statute of limitations defense, and providing plaintiffs with access to evidence and witnesses under their control. In re Air Crash over Taiwan Strait on May 25, 2002 *(C.D. Cal. 2004) 331 F. Supp. 2d 1176, 1184-1185*

Court granted motion to dismiss product liability case arising out of air crash in Taiwan on forum non conveniens grounds. In re Air Crash at Taipei, Taiwan, (C.D. Cal. Feb. 6, 2004) 2004 U.S. Dist. LEXIS 10539, at *13-*14

Court did not abuse its discretion by finding that California was a seriously inconvenient forum, where decedent's former employers, as well as majority of witnesses concerning his work history and medical care, resided in *Texas. Morris v. AGFA Corp. (2006) 144 Cal. App. 4th 1452, 1466, 51 Cal. Rptr. 3d 301*

Where Swiss resident was injured in Switzerland on bicycle he had purchased on visit to California, trial court did not abuse its discretion in denying motions for dismissal on foreign non conveniens grounds. Although Switzerland was suitable alternative forum, balance of private and public interest factors favored trial in *California. Roulier v. Cannondale (2002) 101 Cal. App. 4th 1180, 124 Cal. Rptr. 2d 877, 879*

Decedents and most of potential witnesses were from Montana, and none of decedents' asbestos exposure took place in California. Montana was the appropriate forum. *Hansen v. Owens-Corning Fiberglas Corp. (1996) 51 Cal. App. 4th 753, 59 Cal. Rptr. 2d 229*

Products liability action arising from out-of-state accident that was filed by two Nevada residents against two Japanese corporations and twowholly-owned California subsidiaries as properly dismissed on forum non conveniens grounds. *Rinauro v. Honda Motor Co. (1995) 31 Cal. App. 4th 506, 509-510, 37 Cal. Rptr. 2d 181*

[22a] Fraud

[a] Fraudulent Concealment

Alleged misrepresentations refuting and concealing evidence that low levels of lead exposure could be hazardous were sufficient to support fraud cause of action. *County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal. App. 4th 292, 330-331, 40 Cal. Rptr. 3d 313*

In drug and medical device product liability cases, defendant's duty to disclose may run to plaintiff's physician, rather than to plaintiff; plaintiff alleged that manufacturer's failure to give adequate warnings regarding flammability of its cautery resulted in ignition during cosmetic eye surgery; plaintiff stated claim for fraudulent concealment. Butler v. Aaron Med. Indus., Inc. (N.D. Cal. Oct. 6, 2004) 2004 U.S. Dist. LEXIS 20581, at *7-*14 (not for citation)

[b] Intent

Fraudulent intent ordinarily proved by inference rather than direct evidence; plaintiff created genuine issue of material fact as to whether manufacturer acted with fraudulent intent by failing to disclose revised warning regarding risk of fire associated with use of cautery device. Butler v. Aaron Med. Indus., Inc. (N.D. Cal. Oct. 6, 2004) 2004 U.S. Dist. LEXIS 20581, at *13-*14 (not for citation)

[c] Reliance

Defendant could be liable for representations made to plaintiffs' mother regarding safety of its product. Even though plaintiffs did not actually rely on representations, their mother relied on them in exposing her family to defendant's products in her home. *Dillard v. Victoria M. Morton Enters. (E.D. Cal. Oct. 7, 2008) 2008 U.S. Dist. LEXIS 79588, at *21-*23*

Factual dispute existed regarding whether physician relied on warnings to Reglan when he planned plaintiff's treatment. *Conte v. Wyeth, Inc. (2008) 168 Cal. App. 4th 89, 98-100, 85 Cal. Rptr. 3d 299*

Intentional misrepresentation and false promise verdicts could stand because plaintiff did not need to show that she directly heard and relied on specific representation made by manufacturer. *Bullock v. Philip Morris USA, Inc. (2008) 159 Cal. App. 4th 655, 675-676, 71 Cal. Rptr. 3d 775*

Municipalities could not have justifiably relied on any representations made after 1978 that lead paint was safe because it was generally recognized by that time that lead paint was hazardous. *County of Santa Clara v. Atlantic Richfield Co. (2006) 137 Cal. App. 4th 292, 331, 40 Cal. Rptr. 3d 313 , review denied, 2006 Cal. LEXIS 7622*

Direct evidence is not required to show reliance on false representations; pursuant to Restatement (Second) of Torts § 533, maker of fraudulent misrepresentation made to third person may be liable to person who acts in justifiable reliance on it; plaintiff established that he actually relied on cigarette manufacturer's "campaign of doubt," despite fact that he could not recall particular advertisement that made him decide to smoke. *Boeken v. Philip Morris Inc. (2005) 127 Cal. App. 4th 1640, 1659-1667, 26 Cal. Rptr. 3d 638*

Actual reliance occurs when if defendant's misrepresentation is immediate cause of plaintiff's conduct, altering his or her relations, and if, absent that representation, plaintiff would not, in all reasonable probability, have entered into transactions in question; plaintiff did not allege that he was actually aware of or was reassured by and relied on defendant's misrepresentation that its asbestos product was safe. *Cadlo v. Owens-Ill., Inc. (2004) 125 Cal. App. 4th 513, 519-520, 23 Cal. Rptr. 3d 1 , modified, 2004 Cal. App. LEXIS 2260*

Plaintiff's reliance on defendants' misrepresentations was reasonable, in light of her lack of sophistication, her addiction to cigarettes, the fact that no one had ever told her that smoking could lead to cancer, and her understanding that defendants had said that smoking was "safe"; fraud verdicts supported by substantial evidence and not preempted by federal law. *Whiteley v. Philip Morris, Inc. (2004) 117 Cal. App. 4th 635, 679-692, 11 Cal. Rptr. 3d 807*

[22b] General Aviation Aircraft; GARA

GARA contains "rolling" feature, which extends limitation period with respect to any new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, aircraft, and which is alleged to have caused death, injury, or damage. Plaintiff's argument that failure to warn about newly perceived problem amounted to "replacement of component part" within meaning of GARA

§ 2(a)(2) was without merit. *Lyon v. Agusta S.P.A. (9th Cir. 2001) 252 F.3d 1078, 1088*

GARA applies to all actions that had not already been commenced on its effective date of August 17, 1994. *Lyon v. Agusta S.P.A. (9th Cir. 2001) 252 F.3d 1078, 1085*

Revised flight manual is new "system ... . or other part" of helicopter within meaning of *GARA. Caldwell v. Enstrom Helicopter Corp. (9th Cir. 2000) 230 F.3d 1155, 1156-1157*

Helicopter qualified as "general aviation aircraft" within meaning of GARA 2(c). Croman Corp. v. GE (E.D. Cal. Nov. 2, 2006) 2006 U.S. Dist. LEXIS 82391, at *7-*16

Presumption against extraterritoriality did not apply where eight Macedonian residents were killed inplane crash in Bosnia because conduct GARA regulates is inherently domestic. *Blazevska v. Raytheon Aircraft Co. (N.D. Cal. May 12, 2006) 2006 U.S. Dist. LEXIS 32170, at *18*

Plaintiff claimed that aircraft's carburetor, which was manufactured 27 years before crash, was defective. GARA's statute of repose, *49 U.S.C.S. § 40101* barred his products liability claims against successor to carburetor manufacturer. *Burroughs v. Precision Airmotive Corp. (2000) 78 Cal. App. 4th 681, 699*

New 18-year limitation period of GARA § 2(a)(2) begins to run only with respect to new specific part shown to be cause of accident. Plaintiff thus had to prove that cause of crash was defect in one of pieces in retrofit kit to helicopter's fuel transfer system. Because item causing damage must be replacement item, replacement of few parts of larger system does not start rolling limitation period anew for all parts in the larger system. *Hiser v. Bell Helicopter Textron Inc. (2003) 111 Cal. App. 4th 640, 648-650, 4 Cal. Rptr. 3d 249*

GARA contains exception to repose period if claimant proves that manufacturer knowingly misrepresented to FAA or concealed from FAA "required information" material to maintenance or operation of aircraft or part that is causally related to the harm (GARA § 2(b)(1)). Exception applied in case where there was evidence that helicopter manufacturer, within period ofrepose, withheld information from FAA about five military aircraft accidents caused by failure of tail rotor yokes. *Butler v. Bell Helicopter Textron, Inc. (2003) 109 Cal. App. 4th 1073, 135 Cal. Rptr. 2d 762, 770*

[23] Government Contract Immunity

Supplier of military equipment as immune from strict liability for defective design when United States immune from liability; supplier shows that United States established or approved reasonably precise design specifications for allegedly defective equipment; equipment conformed to those specifications; and supplier warned United States about patent errors in government's specifications or about dangers involved in use of equipment known to supplier but not to United States. *Boyle v. United Technologies Corp. (1988) 487 U.S. 500, 512-513, 108 S. Ct. 2510, 101 L. Ed. 2d 442* ; *McLaughlin v. Sikorsky Aircraft (1983) 148 Cal. App. 3d 203, 210-211, 195 Cal. Rptr. 764* ; *see also McKay v. Rockwell Intern. Corp. (9th Cir. 1983) 704 F.2d 444, 448-451*

State law that holds Government contractors liable for design defects in military equipment as presenting "significant conflict" with federal policy in some circumstances, requiring displacement by federal law. *Boyle v. United Technologies Corp. (1988) 487 U.S. 500, 512-513, 108 S. Ct. 2510, 101 L. Ed. 2d 442* (regarding Virginia tort law) *28 U.S.C.S. § 2680(a)* (Federal Tort Claims Act), excepting from liability any claim regarding discretionary function, as precluding claim based on government's selection of appropriate design for military equipment used by armed forces, and as providing guidelines for establishing "significant conflict" that supports preemption of state law. *Boyle v. United Technologies Corp. (1988) 487 U.S. 500, 511-512, 108 S. Ct. 2510, 101 L. Ed. 2d 442*

Military contractor defense applies to manufacturing defect claims in which there are reasonably precise, government-approved manufacturing specifications. Defense might also be supported by evidence that contractor, in selecting particular component or employing particular process, was following specific directions of government officer reflecting latter's exercise of judgment. *Snell v. Bell Helicopter Textron, Inc. (9th Cir. 1997) 107 F.3d 744, 749*

Government contractor defense is inapplicable to failure to warn claim in absence of evidence that in making its decision whether to provide warning defendant was "acting in compliance with 'reasonably precise specifications' imposed on [i]t by the United States." *Butler v. Ingalls Shipbuilding, Inc. (9th Cir. 1996) 89 F.3d 582, 586* ; *see also In re Fed. Asbestos Cases (9th Cir. 1992) 960 F.2d 806, 813*

Asbestos insulation supplied to Navy did not constitute military equipment entitling its manufacturers to government contractor defense. *In re Hawaii Federal Asbestos Cases (9th Cir. 1991) 960 F.2d 806, 811-812*

Issues of fact existed regarding government contractor defense, because defendant did not show that the Navy made a judgment in creating reasonably precise specifications that mandated use of asbestos, or that Navy's knowledge of risk was superior to its own. *McIntyre v. Warren Pumps LLC (N.D. Cal. April 30, 2007) 2007 U.S. Dist. LEXIS 35954, at *6-*12*

Court dismissed complaints of families of marines killed in combat when vehicle was struck by missile erroneously fired from Air Force plane. *Bentzlin v. Hughes Aircraft Co. (C.D. Cal. 1993) 833 F. Supp. 1486, 1489*

Government contractor defense applied to boilers that required the use of asbestos. However, jury's positive finding on the defense did not entitle defendant to judgment because court did not give an instruction on defense tailored to failure-to-warn context. *Oxford v. Foster Wheeler LLC (2009) 177 Cal. App. 4th 700, 709-711, 99 Cal. Rptr. 3d 418*

In action by civilian painter employed by United States Navy against paint suppliers (that manufactured product specifically for military, but also sold product commercially) seeking damages arising from exposure to particular substance in paint (toluene diisocyanate), and alleging inadequate warning labels among other theories of liability, defendant as failing to show asmatter of law necessary significant conflict between federal contracting requirement and state law; evidence showing that certain warnings were required by military specifications as not establishing that specifications placed any limitation on additional information from manufacturers to users of products. *Jackson v. Deft (1990) 223 Cal. App. 3d 1305, 1317, 273 Cal. Rptr. 214*

[24] Inapplicability of Doctrine

[a] Bargained-for Transactions

Strict-liability cause of action as unavailable in lawsuit over defective product that arose in commercial setting and involved only business loss; liability for defects as subject to disclaimer in commercial setting, pursuant to *Com. Code § 2316* and contractual disclaimer provisions. Appalachian Ins. Co. v. McDonnell Douglas Corp. *(1989) 214 Cal. App. 3d 1, 33, 262 Cal. Rptr. 716*

In cross complaint by housing contractor against developer that graded land, regarding homeowner association's action in strict liability, cause of action based on strict liability as inapplicable; however, cause of action for comparative indemnity applicable to apportion loss between two tortfeasors strictly liable to consumer. *Gentry Construction Co. v. Superior Court (1989) 212 Cal. App. 3d 177, 180-184, 260 Cal. Rptr. 421*

If factual question exists regarding whether or not commercial plaintiff bargained for product specifications, *Kaiser Steel Corp. v. Westinghouse Elec. Corp. (1976) 55 Cal. App. 3d 737, 127 Cal. Rptr. 838* , as not precluding plaintiff's

cause of action for strict products liability. *Southern Cal. Edison Co. v. Harnischfeger Corp. (1981) 120 Cal. App. 3d 842, 855, 175 Cal. Rptr. 67*

Doctrine of strict liability in tort as not applying in action between parties who (1) deal in a commercial setting; (2) deal from positions of relatively equal economic strength; (3) bargain the specifications of the product; and (4) negotiate concerning risk of loss from defects in it. *International Knights of Wine, Inc.Nave Pierson Winery, Inc. (1980) 110 Cal. App. 3d 1001, 1005, 168 Cal. Rptr. 301* ; *Kaiser Steel Corp. v. Westinghouse Elec. Corp. (1976) 55 Cal. App. 3d 737, 748, 127 Cal. Rptr. 838* ; *see Aris Helicopters, Ltd. v. Allison Gas Turbine (9th Cir. 1991) 932 F.2d 825, 827* (citing *Scandinavian Airline System v. United Aircraft Corp. (9th Cir. 1979) 601 F.2d 425, 429)*

[b] Blood, Blood Products, and Human Tissue

Health & Safety Code § 1635.2 provides statutory immunity from strict liability to human tissue banks. Court rejected plaintiff's argument that omission in § 1635.2 of language indicating that tissue bank shall be deemed to provide service "for all purposes," combined with reference to Commercial Code, indicated that legislature did not intend to immunize tissue banks from strict products liability. *Cryolife, Inc. v. Superior Court (2003) 110 Cal. App. 4th 1145, 1153-1155, 2 Cal. Rptr. 3d 396*)

Because blood transfusion must, by statute [*Health & Safety Code §§ 1600.4, 1606*], be regarded as a service and not as a sale, doctrine of strict liability in tort as inapplicable as matter of law in action by patient who became infected with serum hepatitis as result of blood transfusion. *Shepard v. Alexian Bros. Hosp. (1973) 33 Cal. App. 3d 606, 609-610, 109 Cal. Rptr. 132* ; *accord, McDonald v. Sacramento Medical Foundation Blood Bank (1976) 62 Cal. App. 3d 866, 869-874, 133 Cal. Rptr. 444* (upholding constitutionality of *Health & Safety Code § 1606* against argument that it denies equal protection of law); *Klaus v. Alameda-Contra Costa Medical Assn. Blood Bank, Inc. (1976) 62 Cal. App. 3d 417, 418, 133 Cal. Rptr. 92* (extending immunity against strict liability for blood infected with serum hepatitis to nonprofit blood bank)

[c] Endorser of Product

Doctrine of strict liability in tort as not applying to "Good Housekeeping" seal (shoes endorsed by Good Housekeeping Magazine), where endorser makes no representation it has examined or tested each item marketed, because endorser is not directly involved in manufacturing and supplying process. *Hanberry v. Hearst Corp. (1969) 276 Cal. App. 2d 680, 687-688, 81 Cal. Rptr. 519* (nevertheless, holding complaint stated cause of action for negligent misrepresentation and that defendant's liability for damages was not limited to mere purchase price of defective product as stated in its endorsement); *see also Walters v. Seventeen Magazine (1987) 195 Cal. App. 3d 1119, 1121, 241 Cal. Rptr. 101* (magazine that did not endorse product in any way as not liable under any of several product-liability theories); *but see Kasel v. Remington Arms Co. (1972) 24 Cal. App. 3d 711, 726-727, 101 Cal. Rptr. 314* (if defendant by its avowed testing was responsible inducement for plaintiff's purchase, no reason to hold that defendant was not necessary instrument in stream of commerce)

[c.1] Finance Lessor

Finance lessor was not subject to strict products liability. It was not in position to exert pressure on manufacturer to improve product's safety. Imposing strict products liability on finance lessor would not further policy considerations underlying doctrine. *Arriaga v. Citicapital Commercial Corp. (2008) 167 Cal. App. 4th 1527, 1537-1539, 85 Cal. Rptr. 3d 143*

[d] Hospitals

Hospitals as providers of medical services as not subject to strict tort liability. *San Diego Hospital Assn. v. Superior Court (1994) 30 Cal. App. 4th 8, 15-16, 35 Cal. Rptr. 2d 489* (physician was injured by laser while performing surgery)

Doctrine of strict liability in tort as not applying to hospital as user of defective product in course of its primary function of providing medical services; liability, if any, as depending on whether hospital was negligent or guilty of intentional misconduct. *Silverhart v. Mount Zion Hosp. (1971) 20 Cal. App. 3d 1022, 1028, 98 Cal. Rptr. 187* (surgical needle broke during course of routine surgery and became imbedded in patient's lower pelvic area where it remained)

[e] Occasional Builder

Strict liability as inapplicable regarding deficiencies in residence that was not mass-produced, but that was constructed and sold by contractor engagedonly in occasional or isolated construction and sale of residence. *Oliver v. Superior Court (1989) 211 Cal. App. 3d 86, 89, 259 Cal. Rptr. 160*

[f] Occasional Seller

Company that purchased plastic injection molding machine from manufacturer, used it for several years in its own operation, and sold it after closing down facility, as intermediate seller, or occasional seller, as not subject to strict products liability for injuries arising from its subsequent use; modifications to safety devices made during period of ownership as not extensive enough to constitute remanufacture for purposes of applying strict products liability doctrine. *Ortiz v. HPM Corp. (1991) 234 Cal. App. 3d 178, 188-189, 285 Cal. Rptr. 728*

Occasional seller not engaged in that activity as part of his business as exempt from rule of strict liability in tort. *Barth v. B.F. Goodrich Tire Co. (1968) 265 Cal. App. 2d 228, 251, 71 Cal. Rptr. 306* ; *see also Hyman v. Gordon (1973) 35 Cal. App. 3d 769, 773-774, 111 Cal. Rptr. 262* ; *Balido v. Improved Mach., Inc. (1972) 29 Cal. App. 3d 633, 639-640, 105 Cal. Rptr. 890* (criticized on another point in *Foglio v. Western Auto Supply (1976) 56 Cal. App. 3d 470, 476, 128 Cal. Rptr. 545*)

[g] Partial Successor of Product Manufacturer

Corporation which acquires by purchase substantial portion of assets of manufacturing corporation, together with right to use latter's name, and leases latter's plant facilities for term of years, but where latter corporation continues to exist for some two years afterwards as not strictly liable in tort for injuries sustained almost three years before purchase of assets as proximate result of defect in product manufactured and sold by manufacturing corporation some 11 years prior to the purchase of the assets where purchasing corporation did not contractually assume strict liability of manufacturer for defective products. *Schwartz v. McGraw-Edison Co. (1971) 14 Cal. App. 3d 767, 778-781, 92 Cal. Rptr. 776* (disapproved on another ground in *Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 34, 136 Cal. Rptr. 574, 560 P.2d 3*)

[h] Physicians

Doctrine of strict liability in tort as not applying to doctor who prescribed drug which produced untoward results in patient; physician who prescribes ethical (prescription) drug to achieve cure as selling or furnishing his services as healer of illnesses rather than as seller of product or insurance. *Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 979, 95 Cal. Rptr. 381*

[i] Private Subdivider of Work Accepted as Public Improvement

Rule that where public entity approves and accepts as public improvement private construction by subdivider public entity and not subdivider is liable in an inverse condemnation suit for damages to property as applying to insulate developer from liability for injuries caused by construction of project, and interposition of public entity between developer and user of realproperty as providing basis for continuation of rule. *Blau v. Los Angeles (1973) 32 Cal. App. 3d 77, 90, 107 Cal. Rptr. 727*

[i.1] Product Not in Use

A skier who collided with snow-making hydrant could not recover under strict products liability where equipment was not being used as a product at time of accident. *Souza v. Squaw Valley Ski Corp. (2006) 138 Cal. App. 4th 262, 271, 41 Cal. Rptr. 3d 389*

[j] Public Utility Facilities

Doctrine of strict liability in tort for defective products as inapplicable to facilities used by public utility for transmission of electric energy. *United Pacific Ins. Co. v. Southern Cal. Edison Co. (1985) 163 Cal. App. 3d 700, 708-709, 209 Cal. Rptr. 819*

[k] Purchaser or User

Strict liability in tort as applying only to participants in the marketing of the defective product and not to user or consumer, such as purchasing employer whose employee is injured by defective product. *Ruiz v. Minnesota Mining & Mfg. Co. (1971) 15 Cal. App. 3d 462, 470, 93 Cal. Rptr. 270*

[l] Secondhand Goods Dealer

Seller of used or secondhand products cannot be held strict liability in tort, unless seller rebuilds or reconditions the product. *Arriaga v. Citicapital Commercial Corp. (2008) 167 Cal. App. 4th 1527, 1540, 85 Cal. Rptr. 3d 143*

Used-products dealers as not subject to strict products liability doctrine unless they are responsible for modification, dilapidation, or misuse that renders product unreasonably unsafe for its intended use. *Barrett v. Superior Court (1990) 222 Cal. App. 3d 1176, 1196-1197, 272 Cal. Rptr. 304* ; *but see* *Cronin v. J. B. E. Olson Corp. (1972) 8 Cal. 3d 121, 134-135, 104 Cal. Rptr. 433, 501 P.2d 1153* (rejecting "unreasonably dangerous" component in strict products liability law)

Auctioneer of used machinery that did not take title to machinery and that sold machinery "as is, where is" without modification or inspection, as not liable for injury caused by machine when no evidence indicated that auctioneer had responsibility for condition of machine. *Brejcha v. Wilson Mach., Inc. (1984) 160 Cal. App. 3d 630, 639-641, 206 Cal. Rptr. 688*

Fact that seller of used goods had facilities to perform repairs as argument supporting negligence, but as not sufficient reason to hold used machinery dealer strictly liable for defects in punch press. *Wilkinson v. Hicks (1981) 126 Cal. App. 3d 515, 521, 179 Cal. Rptr. 5*

Commercial dealer in used goods as not strictly liable, independently of initial marketing and distribution enterprise, for injury caused by defect in used punch press that he or she sold in regular course of business, absent showing that he

or she caused or created defect. *La Rosa v. Superior Court (1981) 122 Cal. App. 3d 741, 753, 761, 176 Cal. Rptr. 224* ; *see Wilkinson v. Hicks (1981) 126 Cal. App. 3d 515, 521, 522, 179 Cal. Rptr. 5*

Dealer in used machinery as not strictly liable for injuries resulting from defects in punch press that are attributable to design or fabrication of press by original manufacturer. *La Rosa v. Superior Court (1981) 122 Cal. App. 3d 741, 749, 176 Cal. Rptr. 224* ; *see Wilkinson v. Hicks (1981) 126 Cal. App. 3d 515, 521, 522, 179 Cal. Rptr. 5*

Defendant who conducted auction sales of used machinery as not strictly liable for defects in original manufacture or design of used planer, when defendant made no recommendation or representation of merit of products it sold, held no special relationship to manufacturer, and had not modified or rebuiltmachine. *Tauber-Arons Auctioneers Co. v. Superior Court (1980) 101 Cal. App. 3d 268, 274-284, 161 Cal. Rptr. 789*

[m] Sellers of Services

Amtrak was not subject to strict products liability because it provided transportation services, not a product, and use of seats was merely incidental to those services. *Haynes v. AMTRAK (C.D. Cal. 2006) 423 F. Supp. 2d 1073, 1085*

Training in taser use was service and not subject to strict products liability. Torres v. City of Madera (In re Torres) (E.D. Cal. July 11, 2005) 2005 U.S. Dist. LEXIS 34672, at *46 , applying California law

Dominant purpose of membership agreement was to provide fitness services, and health club was not strictly liable for injuries sustained on stairstep machine. *Ontiveros v. 24 Hour Fitness USA, Inc. (2008) 169 Cal. App. 4th 424, 434-435, 86 Cal. Rptr. 3d 767*

Doctrine of strict liability as not applying to raft transportation company primarily providing recreational service. *Ferrari v. Grand Canyon Dories (1995) 32 Cal. App. 4th 248, 258-259, 38 Cal. Rptr. 2d 65*

Doctrine of strict liability in tort as not applying to soil engineers, structural engineers, and architects of multiple-unit, residential, planned development complex because those who sell their services for guidance of others in their economic, financial, and personal affairs are not liable in the absence of negligence or intentional misconduct. *Del Mar Beach Club Owners Assn. v. Imperial Contracting Co. (1981) 123 Cal. App. 3d 898, 914, 176 Cal. Rptr. 886*

Acts of travel agencies in selecting and coordinating transportation, accommodation, and meals for prospective travelers, as clearly performance of service, whether or not these arrangements were presented in form of "package tour"; travel agencies as therefore not strictly liable for traveler's injury suffered on tour when bus traveler was riding overturned. *Pena v. Sita World Travel, Inc. (1979) 88 Cal. App. 3d 642, 644-645, 152 Cal. Rptr. 17*

Former strict implied-warranty liability as not applying to sellers of services for guidance of others in their economic, financial, and personal affairs; such persons as liable only for negligence or intentional misconduct. *Gagne v. Bertran (1954) 43 Cal. 2d 481, 487 , 275 P.2d 15* (involving test-hole digger)

Doctrine of strict liability in tort as not applying to sellers of services for guidance of others in their economic, financial, and personal affairs; such persons as liable only for negligence or intentional misconduct. *McDonald v. Sacramento Medical Foundation Blood Bank (1976) 62 Cal. App. 3d 866, 871, 133 Cal. Rptr. 444* ; *Swett v. Gribaldo, Jones & Associates (1974) 40 Cal. App. 3d 573, 575-576, 115 Cal. Rptr. 99* ; *Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 978, 95 Cal. Rptr. 381*

Doctrines of implied warranty and strict liability as not applying to professionals where primary objective of transaction is to obtain services. *Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 811, 110 Cal. Rptr.*

543 ; *Allied Properties v. John A. Blume & Associates (1972) 25 Cal. App. 3d 848, 855-856, 102 Cal. Rptr. 259* (liability, if any, is for negligence)

Doctrine of strict liability in tort as not applicable to engineers who designed defective water distribution system since engineers render professional services and are not analogous to manufacturers who place products on market and are in best position to spread cost of injuries resulting from defective products. *Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 811, 110 Cal. Rptr. 543* ; *see also Allied Properties v. John A. Blume & Associates (1972) 25 Cal. App. 3d 848, 855-856, 102 Cal. Rptr. 259* (doctrine of implied warranty as not applying to engineering firm which designed pier)

Doctrine of strict liability in tort as not applicable to soils engineer for defectively constructed subdivision lots. *Swett v. Gribaldo, Jones & Associates (1974) 40 Cal. App. 3d 573, 575-576, 115 Cal. Rptr. 99* ; *see also Monarch Bay II v. Professional Service Industries, Inc. (1999) 75 Cal. App. 4th 1213, 1215-1217, 89 Cal. Rptr. 2d 778*

Parties (developer, engineer, and contractor) which did grading, engineering, soil testing, construction, and other work in development of residential subdivision as not strictly liable in tort to beneficiary, which loaned money for development of subdivision, of trust deeds secured by the lots in the subdivision, in action by beneficiary for damages resulting from differential settlement in filled earth in subdivision, since lender-beneficiary is itself link in marketing chain of such mass-produced homes and residential lots, although such parties may be liable to lender-beneficiary for negligence in impairing beneficiary's security. *U. S. Financial v. Sullivan (1974) 37 Cal. App. 3d 5, 12-19, 112 Cal. Rptr. 18* (issuing writ of mandate commanding superior court to vacate its judgment of dismissal of certain causes of action after sustaining demurrer without leave to amend and directing it to enter order overruling demurrers to causes of action based on negligence for impairment of security and sustaining demurrers to causes of action based on strict liability in tort)

[n] Supplier of Nondefective Component

Supplier of raw materials (silicone) as not liable for injuries caused by breast implants because silicone is not inherently dangerous and implant manufacturer was sophisticated buyer with duty to investigate hazards of its own product. *Artiglio v. General Electric Co. (1998) 61 Cal. App. 4th 830, 841, 71 Cal. Rptr. 2d 817*

Manufacturer of component part (electric motor for meat grinder) as not liable for injury caused by finished product absent defect in component or participation in design process. *Lee v. Electric Motor Division (1985) 169 Cal. App. 3d 375, 385, 215 Cal. Rptr. 195*

Testimony by employee of finished product's manufacturer who purchased component part, to effect that he decided which part to order without advice from manufacturer of component, as precluding liability of nondefective component's manufacturer as matter of law. *Lee v. Electric Motor Division (1985) 169 Cal. App. 3d 375, 385, 215 Cal. Rptr. 195*

When evidence showed no defect in component part (an automobile tire) manufacturer of tire as not to be held responsible for death of driver of automobile; since tire manufacturer could reasonably have believed automobile manufacturer would take appropriate measures to insure proper design and installation of tire valve stem, responsibility for valve rested with automobile manufacturer. *Wiler v. Firestone Tire & Rubber Co. (1979) 95 Cal. App. 3d 621, 629-630, 157 Cal. Rptr. 248*

Doctrine of strict liability in tort of manufacturer (seller) as not extending to supplier of nondefective substance to be used by manufacturer in compounding or formulating product which eventually causes injury to ultimate consumer. *Walker v. Stauffer Chem. Corp. (1971) 19 Cal. App. 3d 669, 673, 96 Cal. Rptr. 803*

[o] Supplier Outside Chain of Commerce

Housing-developer tile subcontractor as outside chain of commerce for purpose of imposing strict products liability in action arising from injuriesincurred by homeowner caused by defective soap dish purchased by tile subcontractor from building-material supplier as "generic" soap dish and identified among other materials sold at same time but not itemized separately. *Monte Vista Development Corp. v. Superior Court (1991) 226 Cal. App. 3d 1681, 1684-1687, 277 Cal. Rptr. 608*

[p] Transactions Between "Merchants"

Plaintiff within statutory definition of "merchant" [*Com. Code § 2104(1)*] as not stating tort cause of action based on strict liability or negligence against manufacturer of product purchased by plaintiff when cost of repairing product's defect is only damage alleged. *Sacramento Regional Transit Dist. v. Grumman Flxible (1984) 158 Cal. App. 3d 289, 291, 204 Cal. Rptr. 736*

[25] Indemnity

[a] Comparative Equitable Indemnity

Comparative equitable indemnity includes entire range of apportionments, from no right to indemnity to right to total indemnity; good faith settlement (under *Code Civ. Proc. § 877.6(c)*) as absolving settling party from all equitable indemnity claims, including claims seeking "total equitable indemnity." *Far West Financial Corp. v. D & S Co. (1988) 46 Cal. 3d 796, 808, 817, 251 Cal. Rptr. 202, 760 P.2d 399*

[b] Decline to Determine Indemnity

Fact that jury in action by lessee for damages based on strict liability in tort and negligence returns verdict in favor of lessee against lessor-purchaser but against lessee and in favor of maker-seller of defective product as not exonerating trial court from declining to determine lessor's right to indemnity by seller on merits on lessor's cross complaint where reasons exist for jury's verdict other that that maker-seller was not negligent or that some supervening act of lessor had insulated maker-seller from strict liability in tort. *Fakhoury v. Magner (1972) 25 Cal. App. 3d 58, 66-67, 101 Cal. Rptr. 473* (criticized on another point in *Brennan v. Cockrell Inv., Inc. (1973) 35 Cal. App. 3d 796, 801, 111 Cal. Rptr. 122*)

[c] Express Indemnity

Extent of any duty of lessee of personal property to indemnify lessor held strictly liable in tort to lessee's employee as to be determined from contract between parties and not from independent doctrine of equitable indemnity where parties expressly contracted with respect to that duty. *Price v. Shell Oil Co. (1970) 2 Cal. 3d 245, 256, 85 Cal. Rptr. 178, 466 P.2d 722* (holding at page 258 that lease contained no language indicating that lessee is to be held responsible for negligent acts of the lessor, much less for the strict liability in tort imposed upon the lessor for placing on the market a defective article)

[d] Implied Indemnity

Comparative equitable indemnity as including entire range of apportionments, from no right to indemnity to right to

total indemnity; good faith settlement (under *Code Civ. Proc. § 877.6(c)*) as absolving settling party from all equitable indemnity claims, including claims seeking total equitable indemnity. *Far West Financial Corp.D & S Co. (1988) 46 Cal. 3d 796, 808, 817, 251 Cal. Rptr. 202, 760 P.2d 399*

Neither the tort doctrine of comparative negligence nor the last clear chance doctrine as applying to right of implied indemnity. *Barth v. B.F. Goodrich Tire Co. (1971) 15 Cal. App. 3d 137, 145, 92 Cal. Rptr. 809*

Whether implied indemnity should be allowed or denied as generally a question of fact for jury determination; but where claimant's active participation in wrong appears clearly and indisputably in evidence, claimant as precluded from indemnification as matter of law. *Barth v. B.F. Goodrich Tire Co. (1971) 15 Cal. App. 3d 137, 145, 92 Cal. Rptr. 809*

Determination of whether or not implied indemnity should be allowed as, of necessity, depending on facts of each case. *Barth v. B.F. Goodrich Tire Co. (1971) 15 Cal. App. 3d 137, 145, 92 Cal. Rptr. 809* ; *Pearson Ford Co.Ford Motor Co. (1969) 273 Cal. App. 2d 269, 272, 78 Cal. Rptr. 279*

Fact that retailer failed to discover defect in manufacture, in absence of independent duty to inspect or facts to put him on notice, as not precluding retailer's right against manufacturer to implied indemnity. *Barth v. B.F. Goodrich Tire Co. (1971) 15 Cal. App. 3d 137, 144, 92 Cal. Rptr. 809* ; *Pearson Ford Co.Ford Motor Co. (1969) 273 Cal. App. 2d 269, 273-274, 78 Cal. Rptr. 279*

When right to implied indemnity arises. *Pearson Ford Co.Ford Motor Co. (1969) 273 Cal. App. 2d 269, 271-273, 78 Cal. Rptr. 279*

Contractual and noncontractual implied indemnity distinguished. *Cahill Bros., Inc.Clementina Co. (1962) 208 Cal. App. 2d 367, 376-380, 25 Cal. Rptr. 301* (stating at pages 379-380 that the right of implied indemnity in contractual cases is based upon a breach of contract by the person against whom indemnity is sought, while in the area of noncontractual indemnity the right rests upon the fault of another which has been imputed to or constructively fastened upon him who seeks indemnity)

[e] Participation in Tort

If person seeking indemnity personally participates in an affirmative act of negligence, or is physically connected with an act or omission by knowledge or acquiescence in it on his part, or fails to perform some duty in connection with omission which he or she may have undertaken by virtue of his or her agreement, right of implied indemnity as denied. *Pearson Ford Co.Ford Motor Co. (1969) 273 Cal. App. 2d 269, 276, 78 Cal. Rptr. 279*

Once party seeking implied indemnity steps outside his or her nonactor capacity, or acquires sufficient knowledge of circumstances prior to resulting injury, relief by indemnity as generally not granted. *Barth v. B.F. Goodrich Tire Co. (1971) 15 Cal. App. 3d 137, 145, 92 Cal. Rptr. 809*

Acting solely as retailer of automobile, dealer's negligence, if any, in failing to discover brake defect in car which caused it to crash as "passive negligence" and, as such, as not defeating dealer's right to indemnity against car manufacturer for judgment entered against both in action based on strict liability in tort for personal injuries sustained in crash; but when dealer goes beyond duty imposed by law, as retailer of car, and undertakes to repair part of car closely associated with and inextricably related to brake defect, its failure to discover defect as "active negligence" if, under all the circumstances and in exercise of ordinary care it should have made that discovery; active negligence on part of person seeking indemnity contributing to injury or wrong as barring recovery. *Pearson Ford Co.Ford Motor Co. (1969) 273 Cal. App. 2d 269, 276, 78 Cal. Rptr. 279*

[f] Reversible Judgment

Judgment on cross complaint for indemnity in favor of defendant-cross defendant maker-seller of couch having latent defect and against defendant-cross complainant lessor of furnished apartment, against whom judgment was entered in favor of injured plaintiff-tenant, as reversed when trial court's denial of indemnity was without any independent weighing of evidence and was based on jury's verdict in favor of maker-seller against tenant when there were possible reasons for jury's verdict other than decision that maker-seller was without fault. *Fakhoury v. Magner (1972) 25 Cal. App. 3d 58, 66-67, 101 Cal. Rptr. 473*

[g] Warranty

Where homeowners recovered damages from builder-seller of mass produced homes based on strict liability in tort for injuries resulting from defective radiant heating systems installed in homes, builder-seller as entitled to indemnification from contractor which installed systems, and contractor as entitled to indemnification from manufacturers of tubing used in system, based on breach of express and implied warranties under former *Civ. Code §§ 1732, 1735* [*now see Com. Code §§ 2313-2315, 2317*]. *Eichler Homes, Inc.Anderson (1970) 9 Cal. App. 3d 224, 229-233, 87 Cal. Rptr. 893*

[26] Insurance

Comprehensive liability insurance policy excluding coverage of "products hazard," which is defined in policy in part as meaning goods or products manufactured, sold, handled, or distributed by named insured if accident or occurrence occurs after possession of such goods or products has been relinquished to others if such action or occurrence occurs away from premises owned, rented, or controlled by named insured, as not covering insured's liability arising from loss of tomato crop destroyed by insecticide sold by insured where insured selected product to be used, took on itself role of manufacturer, and then sold insecticide, such acts as being all part of excluded process of manufacture, handling, and sale. *Cravens, Dargan & Co. v. Pacific Indem. Co. (1972) 29 Cal. App. 3d 594, 600-601, 105 Cal. Rptr. 607*

In an action for damages suffered as a result of the driver's seat collapsing, the Supreme Court held that a products liability claim against an automobile manufacturer falls outside the scope of *Cal. Civ. Code § 3333.4*, which bars the recovery of punitive and compensatory damages to uninsured drivers. *Hodges v. Superior Court (2001) 21 Cal. 4th 109, 86 Cal. Rptr. 2d 884, 980 P.2d 433*

[27] Issues

In products liability cases, issues of superseding or intervening cause, doctrine of concurrent causation, and extent to which defendant is required to anticipate safety neglect by plaintiff or others as questions of fact in both negligence and strict liability causes of action. *Southern Cal. Edison Co. v. Harnischfeger Corp. (1981) 120 Cal. App. 3d 842, 852-854, 175 Cal. Rptr. 67*

Factors considered in risk-benefit analysis for determining either design defect or liability for failure to warn as questions of fact for jury. *Southern Cal. Edison Co. v. Harnischfeger Corp. (1981) 120 Cal. App. 3d 842, 854-855, 175 Cal. Rptr. 67*

Issue of intervening causation as jury question, and manufacturer's foreseeability of user's intervening act in altering design of product as key element. *Thomas v. General Motors Corp. (1970) 13 Cal. App. 3d 81, 89, 91 Cal. Rptr. 301*

[28] Judgment on the Pleadings

Judgment on the pleadings in favor of defendant in strict liability cause of action as denied when pleadings show only that parties transacted in commercial setting, and do not show parties' relative economic strength or ability to negotiate risk of loss of defective product. *International Knights of Wine, Inc.Nave Pierson Winery, Inc. (1980) 110 Cal. App. 3d 1001, 1007, 168 Cal. Rptr. 301*

[29] Jury Instructions

[a] Aggravation of Injuries

Jury instruction in action based on strict liability in tort, arising out of single-car collision to recover damages for aggravation of injuries caused when horn cap in center of steering wheel flew off exposing three sharp prongs sticking up and against which plaintiff hit her face, to the effect that if vehicle was defectively designed or manufactured in such a manner that horn assembly caused plaintiff to sustain greater injuries in collision than she would have otherwise sustained absent the defect, then manufacturer and distributor of vehicle would be liable to extent of such aggravation of her injuries as proper. *Horn v. General Motors Corp. (1976) 17 Cal. 3d 359, 366, 131 Cal. Rptr. 78, 551 P.2d 398*

[b] Burden of Proof

Correct instruction of jury on burden of proof for design defect as sufficient guide for logical evaluation of issues; special verdict form as not required to repeat instruction. *Neal v. Montgomery Elevator Co. (1992) 7 Cal. App. 4th 1194, 9 Cal. Rptr. 2d 497*

Failure to instruct jury to shift burden of proof to manufacturer based on manufacturer's violation of federal air regulations as reversible error. *McGee v. Cessna Aircraft Co. (1983) 139 Cal. App. 3d 179, 185-187, 188 Cal. Rptr. 542*

[c] Causation

Manufacturer is liable only if defect in its product was legal cause of injury, and defect is legal cause of injury if it is substantial factor in producing injury; substantial factor in causing harm is factor that a reasonable person would consider to have contributed to harm and need not be only cause of harm. Torres v. City of Madera (In re Torres) (E.D. Cal. July 11, 2005) 2005 U.S. Dist. LEXIS 34672, at *22 , applying California law

In cases of asbestos-related cancer, jury instruction shifting burden of proof to asbestos defendants on element of causation is generally unnecessary and incorrect. Instructions on limits of plaintiff's burden of proof of causation, together with standardized instructions defining cause-in-fact causation under substantial factor test (*BAJI No. 3.76*) and doctrine of concurrent proximate legal causation (*BAJI No 3.77*), will adequately apprise jury of elements required to establish causation. No burden-shifting instructions is necessary on matter of proof of causation, and in absence of such necessity, there is no justification or basis for shifting part of plaintiff's burden of proof to defendant to prove that it was not a legal cause of plaintiff's asbestos-related disease or injuries. *Rutherford v. Owens-Ill., Inc. (1997) 16 Cal. 4th 953, 975-976, 67 Cal. Rptr. 2d 16, 941 P.2d 1203*

"But-for" causation jury instruction (BAJI No. 3.75) as disapproved; "substantial factor" instruction (*BAJI No. 3.76*) as properly instructing jury on cause-in-fact issues. *Mitchell v. Gonzales (1991) 54 Cal. 3d 1041, 1052-1054, 1 Cal. Rptr. 2d 913, 819 P.2d 872*

In action for strict products liability arising from plaintiff's injuries caused by both plaintiff's negligence and failure of car roof to withstand crash, instruction as properly stating that, if jury found that car was defectively manufactured, but that same or similar deformation of roof would have occurred even if vehicle was not defective, then defective vehicle was not legal cause of plaintiff's injuries; concurrent cause instruction as not impugning substantial factor test of legal cause, in that it instructs jury that there may be more than one legal cause, which is important for apportionment of fault. *DoupnikGeneral Motors Corp. (1990) 225 Cal. App. 3d 849, 860-867, 275 Cal. Rptr. 715*

Offered instructions that attempted to impose duty to foresee the very accident that occurred, ignored the weighing concept of *Barker v. Lull Engineering Co. (1978) 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443* , failed totally to deal with the role of a commercial user that installed additional components in the chain of production, and in effect attempted to fix liability totally on manufacturer-supplier of truck engine, cab, and chassis as properly rejected. *Fierro v. International Harvester Co. (1982) 127 Cal. App. 3d 862, 869-870, 179 Cal. Rptr. 923*

Court as properly submitting its own instruction on superseding cause when defendant car manufacturer's proposed instruction was erroneous in stating that only one defect in car should be considered to determine whether accident would have occurred anyway when other defects had also been at issue. *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 804-805, 174 Cal. Rptr. 348*

In action based on strict liability in tort against third-party tortfeasor (manufacturer of defectively designed machine) by employee of machine'spurchaser, jury instruction that there may be more than one legal cause of an injury, that when conduct of two or more persons contribute concurrently as legal cause of injury conduct of each of said persons or corporations is a legal cause of injury regardless of extent to which each contributes to injury, that a cause is concurrent if it was operative at moment of injury and acted with another cause to produce injury, and that it is no defense that conduct of a person not joined as party was also legal cause of injury as proper. *Thompson v. Package Machinery Co. (1971) 22 Cal. App. 3d 188, 193-194, 99 Cal. Rptr. 281* (prejudicial error for trial court to have refused to give foregoing instruction and to have given other erroneous instructions)

[d] Contributory Negligence

Trial judge as improperly granting judgment notwithstanding the verdict when conflicting evidence on comparative fault raised jury question. *Hansen v. Sunnyside Products, Inc. (1997) 55 Cal. App. 4th 1497, 1519-1521, 65 Cal. Rptr. 2d 266*

Principles of comparative fault as applicable to actions involving strict products liability; trier of fact as permitted to apportion fault between party found strictly liable and party found negligent. *See Safeway Stores, Inc.Nest-Kart (1978) 21 Cal. 3d 322, 328-332, 146 Cal. Rptr. 550, 579 P.2d 441* (apportionment in indemnity action between co-tortfeasors); *Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 742, 144 Cal. Rptr. 380, 575 P.2d 1162* (apportionment between plaintiff and defendant)

Trial court's refusal to instruct jury that contributory negligence is no defense to strict products liability action as correct because neither side had mentioned negligence at trial; instruction on contributory negligence, when it has not been issue at trial, as confusing to jury. *Foster v. Gillette (1979) 100 Cal. App. 3d 569, 575, 161 Cal. Rptr. 134*

[e] Drugs and Medical Devices

Instructions of law on how to determine whether prescription drug is defective or unusually dangerous so as to render it defective product within meaning of Restatement (Second) of Torts § 402A and comments, relating to strict liability in tort. *Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 986-987, 95 Cal. Rptr. 381*

Trial court did not err in issuing a general order restricting plaintiffs from seeking jury instructions pursuant to the consumer expectation test of design defect. The alleged creation or exacerbation of allergies by the gloves were not subjects of commonly accepted minimum safety assumptions of an ordinary consumer. *Morson v. Superior Court (2001) 90 Cal. App. 4th 775, 109 Cal. Rptr. 2d 343*

[f] Material Fact Issues

Party as entitled to proper jury instructions on every material issue of fact on which he relies when there is substantial evidence to support its theory of case. *Slayton v. Wright (1969) 271 Cal. App. 2d 219, 237, 76 Cal. Rptr. 494*

[g] Proffered Instructions

Trial court did not err in refusing to give cigarette manufacturer's proffered instruction on federal preemption, because it was unnecessary, unduly repeated and emphasized a defense, and was verbose and confusing. *Bullock v. Philip Morris USA, Inc. (2008) 159 Cal. App. 4th 655, 683-686, 71 Cal. Rptr. 3d 775*

Trial court as under no obligation in civil cases to modify or recast proffered instructions to make them applicable, and as permitted to reject them if portions thereof that correctly state applicable law are covered by other instructions given. *FogoCutter Laboratories, Inc. (1977) 68 Cal. App. 3d 744, 761-762, 137 Cal. Rptr. 417*

[h] Res Ipsa Loquitur

Res ipsa loquitur instruction in action based on negligence and strict liability in tort for damages for personal injuries. *Preissman v. Ford Motor Co. (1969) 1 Cal. App. 3d 841, 852-855, 82 Cal. Rptr. 108* ; *see also* *Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 383-387, 93 Cal. Rptr. 769, 482 P.2d 681*

[i] Strict Liability and Negligence

CACI No. 1204 incorporates risk-benefit test and confirms that "use" of product is required element under risk/utility theory; police officer who mistakenly used her service revolver instead of Taser supplied by defendant did not "use" *Taser. Torres v. City of Madera (In re Torres) (E.D. Cal. July 11, 2005) 2005 U.S. Dist. LEXIS 34672, at *27* , applying California law

In light of differences between strict products liability and negligence, court did not abuse its discretion in determining that absence of a strict products liability instruction was prejudicial. *Crawford v. Weather Shield Mfg., Inc. (2006) 136 Cal. App. 4th 304, 320-323, 38 Cal. Rptr. 3d 787 , review granted and depublished, (2006) 44 Cal. Rptr. 3d 632, 136 P.3d 168 , review dismissed in part (2007) 67 Cal. Rptr. 3d 753, 170 P.3d 129*

Court did not err in refusing to instruct jury that in addition to proving a defective design that harmed her, plaintiff also had to prove that defect increased risk of harm beyond those risks that are a normal part of sport of jet skiing. Requested instructions would have been redundant and confusing. *Ford v. Polaris Indus., Inc. (2006) 139 Cal. App. 4th 755, 776, 43 Cal. Rptr. 3d 215*

Although under *Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 387, 93 Cal. Rptr. 769, 482 P.2d 681* , plaintiff in action for personal injuries is not required to elect whether to proceed on theory of strict liability in tort or on theory of negligence when instructions on two theories will not be confusing to jury, in non res ipsa loquitur case

involving manufacturing defect only, instruction on both theories, although not confusing, as unnecessary. *Montez v. Ford Motor Co. (1980) 101 Cal. App. 3d 315, 316-317, 320, 161 Cal. Rptr. 578*

[j] Strict Liability in Tort

In strict liability action premised on marketing enterprise theory, defendant as entitled to jury instruction that plaintiff must establish (1) the defendant received direct financial benefit from sale of product; (2) the defendant's role was a necessary factor in bringing the product to market; and (3) the defendant had control over, or a substantial ability to influence, the manufacturing or distribution process. *Bay Summit Community Association v. Shell Oil Company (1996) 51 Cal. App. 4th 762, 778, 59 Cal. Rptr. 2d 322*

Plaintiff as entitled to strict-liability instruction in wrongful-death action caused by defective grinder when employer returned grinder to manufacturer with directions to reduce speed and gave manufacturer carte blanche on how to accomplish that objective, manufacturer substituted one spring for another (necessary to reduce speed) but failed to replace governor on grinder that was so worn that speed was not controlled after repair, and grinder wheel overspeeded and disintegrated, killing plaintiff's decedent who was operating grinder. *Young v. Aro Corp. (1973) 36 Cal. App. 3d 240, 246, 111 Cal. Rptr. 535*

Trial court's instructions on strict liability in tort stating that manufacturer and retailer of product that place it on market for use under circumstances under which they know that product will be used without inspection for defects are liable for injuries proximately caused by defects in manufacture or design of product of which user was not aware, and that if evidence is equally balanced on issue of whether there was a defect in manufacture ordesign, jury must find against party (plaintiff) making charge on that issue, as proper. *Preissman v. Ford Motor Co. (1969) 1 Cal. App. 3d 841, 851-852, 82 Cal. Rptr. 108*

[k] Vehicles

Former *8 Cal. Code Reg. § 1591(c)(1)*, requiring that all haulage vehicles (defined in *8 Cal. Code Reg. § 1504*) be equipped with brakes adequate to stop and hold vehicle stationary on any grade that vehicle can climb under its own power within limit of traction of braked wheels and that braking devices must be in compliance with Vehicle Code as not making *Veh. Code § 26311* (providing generally that all motor vehicles be equipped with service brakes on all wheels) applicable to haulage vehicles; reference to Vehicle Code as meaning that compliance with industrial safety order does not excuse compliance with any Vehicle Code requirement that may be applicable when haulage vehicle is driven on public highway; hence, in personal-injury action against manufacturer of earth-moving machine allegedly defective in failing to have brakes on its front wheels, trial court as not erring in failing to instruct jury on requirements of *Veh. Code § 26311*. *Smith v. Dhy-Dynamic Co. (1973) 31 Cal. App. 3d 852, 861-863, 107 Cal. Rptr. 907*

[30] Landlord-Tenant

Neither landlords nor hotel proprietors are subject to strict products liability for injuries to respective tenants and guests caused by defect in the premises; unlike retailers, landlords and hotel owners often are unable to exert pressure on manufacturers to make products safer and cannot share with manufacturer costs of insuring tenants' or guests' safety; landlords and hotel owners cannot necessarily be expected to possess expert knowledge concerning components that comprise leased dwellings; court did not decide different considerations applied if landlord or hotel owner had participated in construction of building. *Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1189-1209, 43 Cal. Rptr. 2d 836, 899 P.2d 905 , overruling Becker v. IRM Corp. (1985) 38 Cal. 3d 454, 213 Cal. Rptr. 213, 698 P.2d 116*

[31] Limitations on Liability Imposed by Contract

Commercial entities as entitled to contract to limit liability between themselves or otherwise allocate risk of doing business; requirements of agreement exculpating one party from liability to another for negligence or indemnity. *Philippine Airlines, Inc. v. McDonnell Douglas Corp. (1987) 189 Cal. App. 3d 234, 236-243, 234 Cal. Rptr. 423*

[32] Market-Share Theory of Strict Liability in Tort

Court did not decide validity of *Wheeler's* fungibility exception, because *Wheeler* had no application to facts of case. Decedent had been exposed to asbestos not only from friction brake products but also while working in shipyards and as upholsterer, and plaintiff was able to identify two manufacturers to whose friction products decedent had been exposed. *Ferris v. Gatke Corp. (2003) 107 Cal. App. 4th 1211, 132 Cal. Rptr. 2d 819, 827-829*

Market share liability was inapplicable when plaintiff was able to identify manufacturer of defective product--a drain pipe--but not its wholesaler, because plaintiff was not otherwise without remedy. *Edwards v. A.L. Lease & Co. (1996) 46 Cal. App. 4th 1029, 54 Cal. Rptr. 2d 259*

Market-share theory as not applicable against manufacturers of paints, solvents, strippers, and glue products because plaintiff failed to identify common toxic chemical ingredient or other "fungible" agent common to all the products. *Setliff v. E.I. Du Pont de Nemours & Co. (1995) 32 Cal. App. 4th 1525, 1537, 38 Cal. Rptr. 2d 763*

Asbestos brake-lining pads as fungible for purposes of market-share theory given evidence that asbestos exposure came from used pads that were not identifiable; nonsuit in favor of manufacturer reversed. *Wheeler v. Raybestos-Manhattan (1992) 8 Cal. App. 4th 1152, 1157-1158, 11 Cal. Rptr. 2d 109* ; *see also Richie v. Bridgestone/Firestone, Inc. (1994) 22 Cal. App. 4th 335, 338-339, 27 Cal. Rptr. 2d 418* (rule applicable retroactively)

Limitations period for action brought against DES manufacturers on market-share theory as one year, pursuant to *Code Civ. Proc. § 340(3)*; *Sindell* as not creating new tort or new product (i.e., generic drug DES as opposed to unidentifiable brand names), and as not reviving claim otherwise barred by statute of limitations, or as creating new limitations period. *Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1109-1118, 245 Cal. Rptr. 658, 751 P.2d 923* (plaintiff aware of injury and causation more than one year prior to filing of action, although she could not identify manufacturer of particular product and therefore could not have stated cause of action prior to *Sindell*)

Under market-share theory, each defendant against which judgment is rendered as liable for damages according to its proportionate share of market; joint liability as inapplicable to market-share actions. *Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1074-1075, 245 Cal. Rptr. 412, 751 P.2d 470*

Courts did not impose market share liability for asbestos products used in residential housing construction, because asbestos is generic name for family of minerals with myriad of uses, and prerequisite of fungibility was not demonstrated. *Mullen v. Armstrong World Indus., Inc. (1988) 200 Cal. App. 3d 250, 246 Cal. Rptr. 32*

When product is inherently defective for purpose for which it is marketed, and plaintiff cannot identify manufacturer of precise product that caused injury, plaintiff as required to join manufacturers of substantial share of appropriate market as defendants; once plaintiff has satisfied burden of joining defendants, each defendant as liable according its share of market unless it can prove that it could not have made product that caused plaintiff'sinjuries. *Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 612, 163 Cal. Rptr. 132, 607 P.2d 924*

In market-share theory action against manufacturers, once plaintiff has met burden of joining required defendants, defendants in turn as able to cross complain against other manufacturers, not joined in action, that they can allege might have supplied injury-causing product. *Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 612, 163 Cal. Rptr. 132, 607*

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[33] Misuse of Product

[a] Defense of Misuse

Misuse of product as defense to action based on strict liability in tort. *McCurter v. Norton Co. (1968) 263 Cal. App. 2d 402, 407, 69 Cal. Rptr. 493* ; *see also Oakes v. E.I. Du Pont de Nemours & Co., Inc. (1969) 272 Cal. App. 2d 645, 649, 77 Cal. Rptr. 709*

[b] Foreseeable Misuse as No Defense

Manufacturer or supplier of product as strictly liable for injuries resulting from misuse of product by customer which misuse was reasonably foreseeable. *Thomas v. General Motors Corp. (1970) 13 Cal. App. 3d 81, 91, 91 Cal. Rptr. 301* (removal of bead holding glass window in place in washing machine in laundromat; glass gave way when plaintiff leaned on it, plunging her arm into machine)

Driving automobile without using seat belt as entirely foreseeable use of vehicle. *Horn v. General Motors Corp. (1976) 17 Cal. 3d 359, 371, 131 Cal. Rptr. 78, 551 P.2d 398*

Vehicle manufacturers, in designing and manufacturing cars, as required to take accidents into consideration as reasonably foreseeable occurrences involving their products. *Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 126-127, 104 Cal. Rptr. 433, 501 P.2d 1153*

In deciding whether or not product is being used in way manufacturer intended it to be used, market for which it is produced as a most important consideration; such fact as bearing directly on issue of foreseeability. *Dosier v. Wilcox-Crittendon Co. (1975) 45 Cal. App. 3d 74, 78, 119 Cal. Rptr. 135*

[c] Jury Instructions

Jury instruction that in determining purposes for which article was designed and intended to be used, jury may consider those uses of article which would be foreseeable by manufacturer at time article was placed on market. *Preston v. Up-Right, Inc. (1966) 243 Cal. App. 2d 636, 643, 52 Cal. Rptr. 679*

Jury instruction in strict tort liability case that jury cannot find defendant liable if it finds cause of accident and injury were due to alteration in machine as it was manufactured or designed or any of its components as error; whether alteration in or misuse of product is a defense to strict liability case as depending on whether alteration or misuse was reasonably foreseeable to manufacturer. *Thompson v. Package Machinery Co. (1971) 22 Cal. App. 3d 188, 195-196, 99 Cal. Rptr. 281* ; *see also Thomas v. General Motors Corp. (1970) 13 Cal. App. 3d 81, 88, 91 Cal. Rptr. 301*

[d] Misuse Contrary to Warning

Adequate warning as sufficient defense to strict liability action; adequacy of warning as question of law when written warning not dependent on extrinsic evidence. *Templev. Velcro USA, Inc. (1983) 148 Cal. App. 3d 1090, 1094-1095, 196 Cal. Rptr. 531*

Manufacturer of fuel as not liable for injury caused by use of fuel on open flame despite warning against such use. *Groll v. Shell Oil Co. (1983) 148 Cal. App. 3d 444, 448, 196 Cal. Rptr. 52*

[e] Questions of Fact

It was question of fact as to whether commercial use of toaster labeled "household use only" was foreseeable. Charter Oak Fire Ins. Co. v. Sodexho Marriot (N.D. Cal. Feb. 27, 2006) 2006 U.S. Dist. LEXIS 9567, at *11-*12 (not designated for publication)

Defendant's failure to produce evidence that plaintiff's alleged misuse of product was cause of injury as precluding summary judgment in defendant's favor; whether different ratings for grinder and attached disc was misuse that caused injury as triable issue of fact. *Huynh v. Ingersoll-Rand (1993) 16 Cal. App. 4th 825, 831-832, 20 Cal. Rptr. 2d 296*

Whether product was designed with reasonable care to protect persons using product in way it was intended to be used against foreseeable danger and whether misuse of product by user was foreseeable to manufacturer as questions for the trier of facts. *Thompson v. Package Mach. Co. (1971) 22 Cal. App. 3d 188, 196, 99 Cal. Rptr. 281* ; *see also Dosier v. Wilcox-Crittendon Co. (1975) 45 Cal. App. 3d 74, 78, 119 Cal. Rptr. 135* (stating that it has been repeatedly held that the foreseeability of the misuse of a product is a question for the trier of fact)

[f] Test for Determining Intended Use

Ultimate test in determining whether product was being used in way it was intended to be used as being whether article was being used in way which seller should have reasonably anticipated. *Johnson v. Standard Brands Paint Co. (1969) 274 Cal. App. 2d 331, 340, 79 Cal. Rptr. 194* ; *see also Dosier v. Wilcox-Crittendon Co. (1975) 45 Cal. App. 3d 74, 78, 119 Cal. Rptr. 135*

In action against seller of defective product based on strict liability in tort, intended use of product which should be foreseen by seller, as well as that foreseeable by manufacturer, as material; ultimate test as being whether article was being used in way which seller should have reasonably anticipated. *Lewis v. American Hoist & Derrick Co. (1971) 20 Cal. App. 3d 570, 586, 97 Cal. Rptr. 798*

[34] Nonpurchaser-Nonuser of Defective Product

Where railroad crossing gate broke and struck police officer who had been dispatched to crossing because crossing gate arms were stuck in "down" position, and officer alleged that problem that necessitated his presence at scene was not same as allegedly negligent act that caused gate arm to fallsideways and strike him, issue of fact existed as to whether independent cause exception to firefighters' rule applied. *Vasquez v. North County Transit Dist. (9th Cir. 2002) 292 F.3d 1049, 1060* , applying California law

Doctrine of strict liability in tort as available to bystander injured by defective product. *Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 587, 75 Cal. Rptr. 652, 451 P.2d 84* ; *Baker v. Chrysler Corp. (1976) 55 Cal. App. 3d 710, 715, 127 Cal. Rptr. 745* ; *Preissman v. Ford Motor Co. (1969) 1 Cal. App. 3d 841, 850, 82 Cal. Rptr. 108* ; *Johnson v. Standard Brands Paint Co. (1969) 274 Cal. App. 2d 331, 337, 79 Cal. Rptr. 194*

Firefighters' rule did not bar claims alleging that garage door opener was defective because plaintiff alleged that door's malfunction was independent of fire and not caused by fire. *Stapper v. GMI Holdings, Inc. (1999) 73 Cal. App. 4th 787, 86 Cal. Rptr. 2d 688, 690*

Code Civ. Proc. § 340.2 as applicable when disability caused or contributed to exposure to asbestos; statute as not requiring either expressly or impliedly that diagnosis and disability be contemporaneous. *Uram v. Abex Corp. (1990) 217 Cal. App. 3d 1425, 1432, 266 Cal. Rptr. 695*

Code Civ. Proc. § 340.2 as codifying discovery rule regarding asbestos exposure cases with exception that statute never commences to run until plaintiff suffers disability. *Duty v. Abex Corp. (1989) 214 Cal. App. 3d 742, 748, 263 Cal. Rptr. 13*

Strict liability in tort as extending not only to actual consumers or users of defective product but to any human being to whom an injury from defect is reasonably foreseeable. *Putensen v. Clay Adams, Inc. (1970) 12 Cal. App. 3d 1062, 1072, 91 Cal. Rptr. 319*

[35] Nonpurchaser-User of Defective Product

Application of doctrine of strict liability in tort in favor of passenger in defective automobile driven by purchaser. *Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 258, 261, 37 Cal. Rptr. 896, 391 P.2d 168*

Punitive damages award as upheld in favor of automobile passenger. *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 810, 819-820, 174 Cal. Rptr. 348*

Neither transfer of title to goods nor sale as required for application of doctrine of strict liability in tort. *Barth v. B.F. Goodrich Tire Co. (1968) 265 Cal. App. 2d 228, 251-252, 71 Cal. Rptr. 306*

Liability under doctrine of strict liability in tort as extending to protect employees of ultimate consumer of defective product. *Canifax v. Hercules Powder Co. (1965) 237 Cal. App. 2d 44, 54, 46 Cal. Rptr. 552*

[36] Nonsuit

Granting motion for nonsuit in strict products liability case as improper when plaintiff establishes prima facie showing that injury was proximately caused by product's design; whether or not design actually defective as question of fact for jury to decide. *Campbell v. General Motors Corp. (1982) 32 Cal. 3d 112, 120-122, 184 Cal. Rptr. 891, 649 P.2d 224*

Nonsuit in favor of manufacturer of defectively designed plastic-injection molding press in action by worker for personal injuries as not justified by lengthy interval between design and injury (15 years), by manufacturer's offer to plaintiff's employer to conform equipment to state safety standards conditioned on payment of cost of necessary parts, by manufacturer's warning plaintiff's employer about safety deficiency. *Balido v. Improved Mach., Inc. (1972) 29 Cal. App. 3d 633, 641-654, 105 Cal. Rptr. 890* (criticized on another point in *Foglio v. Western Auto Supply (1976) 56 Cal. App. 3d 470, 476, 128 Cal. Rptr. 545*)

[37] Notice

Requirement of timely notice of breach of warranty as not applicable to strict-tort liability of automobile retailer which sold defective car. *Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 263, 37 Cal. Rptr. 896, 391 P.2d 168*

[38] Pleading

In complaint alleging long-term exposure to multiple toxins (that is, if pleaded facts do not naturally give rise to inference of causation), plaintiff must plead specific facts explaining how conduct caused or contributed to injury by: (1) alleging exposure to each toxic material claimed to have caused specific illness; (2) identifying each product that allegedly caused injury; (3) alleging that toxins entered body; (4) alleging that plaintiff suffers from specific illness; and

(except in market share liability case) (5) alleging that each toxin was manufactured or supplied by specific defendant. *Bockrath v. Aldrich Chem. Co. (1999) 21 Cal. 4th 71, 79, 86 Cal. Rptr. 2d 846, 980 P.2d 398*

If complaint states cause of action in strict liability, trial court as abusing its discretion by precluding plaintiff from amending complaint to include issues raised by facts stated in pleadings in order to ensure trial on merits; whether or not accident resulted from improper handling or use of product as matter of proof rather than pleading. *Read v. Safeway Stores, Inc. (1968) 264 Cal. App. 2d 404, 408-409, 70 Cal. Rptr. 454*

Complaint to recover damages sustained when bottle of collins mix exploded as sufficient where it alleges that defendant store is in business of selling collins mix; that bottle of collins mix reached plaintiff without change in condition in which it was received by store from manufacturer; and that it exploded almost immediately after plaintiff removed it from refrigeration compartment; plaintiff as required at trial within reasonable limits to eliminate evidence that explosion was caused by improper handling, but such requirement as matter of proof rather than pleading. *Read v. Safeway Stores, Inc. (1968) 264 Cal. App. 2d 404, 408, 70 Cal. Rptr. 454*

Merger of negligence and strict liability claims; in personal injury actions not involving commercial relationship between manufacturer and injured person, warranty count as adding nothing to strict liability and negligence counts. *Balido v. Improved Mach., Inc. (1972) 29 Cal. App. 3d 633, 640-641, 105 Cal. Rptr. 890* (criticized on another point in *Foglio v. Western Auto Supply (1976) 56 Cal. App. 3d 470, 476, 128 Cal. Rptr. 545*)

[39] Preemption by Federal Law

FDA approval of drug's label does not provide a complete defense to failure-to-warn claims. It was not impossible for the manufacturer of Phenergan to comply with both its state and federal law obligations regarding drug labeling. Plaintiff's state-law failure-to warn claims did not stand as an obstacle to accomplishment of Congress' purpose in FDCA. FDA's Preemption Preamble to its 2006 Final Rule was not entitled to deference. *Wyeth v. Levine (2009) -- U.S. --, 129 S. Ct. 1187, 173 L. Ed. 2d 51*

Court resolved controversy of whether federal cigarette Labeling Act preempted claims alleging that tobacco manufacturers violated state unfair trade practices acts by advertising that "light" cigarettes delivered less tar and nicotine than regular brands. It held that neither Labeling Act's preemption provision nor Federal Trade Commission's actions in field preempted state-law claims predicated on duty not to deceive. *Altria Group, Inc. v. Good (2008) -- U.S. --, 129 S. Ct. 538, 172 L. Ed. 2d 398*

21 U.S.C.S. § 360k(a), MDA's express preemption clause, bars common law claims challenging safety or effectiveness of medical device given FDA premarket approval. *Riegel v. Medtronic, Inc. (2008) 552 U.S. 312 128 S. Ct. 999, 169 L. Ed. 2d 892*

State rule not preempted by *7 U.S.C.S. § 136v(b)* (FIFRA) unless it (1) is requirement for labeling or packaging and (2) imposes labeling or packaging requirement that is in addition to or different from those required under FIFRA; state law labeling requirement is not preempted by § 136v(b) if it is equivalent to, and fully consistent with, FIFRA's misbranding provisions. *Bates v. Dow Agrosciences L.L.C. (2005) 544 U.S. 431, 125 S. Ct. 1788, 161 L. Ed. 2d 687, 703*

"No propeller guard" state common law tort action against manufacturer of outboard motor is not pre-empted either by enactment of FBSA or by Coast Guard decisions not to promulgate regulation requiring propeller guards. *Sprietsma v. Mercury Marine (2002) 537 U.S. 51, 63-70, 123 S. Ct. 518, 154 L. Ed. 2d 466*

Plaintiffs' state law fraud-on-the-FDA claims conflicted with, and were therefore impliedly preempted by, FDCA as amended by *MDA. Buckman v. Plaintiffs' Legal Comm. (2001) 531 U.S. 341, 121 S. Ct. 1012, 148 L. Ed. 2d 854,*

862-864

A personal injury action alleging that a manufacturer was negligent in failing to equip a 1987 automobile with driver's side air bag was preempted by the federal regulations under the *National Highway and Motor Safety Act. Geier v. American Honda Motor Co. (2000) 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914*

State common law negligence claim involving allegedly defective pacemaker as not preempted by Medical Device Amendments of 1976 (MDA) to federal Food Drug and Cosmetic Act. *Medtronics, Inc. v. Lohr, (1996) 518 U.S. 470*

Federal regulations under National Highway and Motor Safety Act as not preempting state tort claims concerning defective tractor trailers and anti-lock brakes. *Freightliner Corp. v. Myrick (1995) 514 U.S. 280, 286-287, 115 S. Ct. 1483, 131 L. Ed. 2d 385*

1969 cigarette labeling act preempted claims based on failure to warn of dangers of smoking in post-1969 advertisements and alleged fraudulent misrepresentation predicated on state law prohibition against promotional statements that tended to minimize health hazards associated with smoking; non-preempted claims included failure to warn claim insofar as it relied solely upon defendant's testing or research practices, claim alleging intentional fraud in misrepresenting and concealing material fact to extent that it related to duty to disclose material facts, claim alleging conspiracy to misrepresent or conceal material facts concerning the hazards of smoking, and claim alleging breach of express warranty. *Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504, 525-527, 112 S. Ct. 2608, 2622-2624, 120 L. Ed. 2d 407*

State-law claims were preempted because in case of non-commercial helicopter accident, DOHSA becomes applicable three nautical miles from shore. *Helman v. Alcoa Global Fasteners Inc. (C.D. Cal. June 16, 2009) 2009 U.S. Dist. LEXIS 64720, at *3*

Wyeth v. Levine did not require court to reverse its earlier ruling because U.S. Supreme Court's decision did not address whether a *generic* manufacturer may use FDA's "changes being effected" (CBE) process to unilaterally change its warning label. *Gaeta v. Perrigo Pharms. Co. (N.D. Cal. Nov. 24, 2009) 2009 U.S. Dist. LEXIS 115752*

Express warranty claim was preempted to extent that manufacturer represented that stent was safe within meaning of MDA but that plaintiffs sought to impose liability on ground that it was unsafe under California law. Moreover, state law claim that requires more than mere compliance with federal requirements may constitute a permissible parallel claim. Only the strict liability manufacturing defect claim survived court's preemption analysis. *Prudhel v. Endologix, Inc. (E.D. Cal. July 9, 2009) 2009 U.S. Dist. LEXIS 64402, at *11-*24*

State-law claims against manufacturer of generic OTC ibuprofen drug were preempted, where FDA had once rejected a warning regarding the risks of liver injury associated with the drug. 1997 Modernization Act's savings clause, *21 U.S.C. § 379r(e)*, did not preclude court's conflict preemption analysis. *Gaeta v. Perrigo Pharms. Co. (N.D. Cal. 2008) 562 F. Supp. 2d 1091, 1097*

Claims that Paxil should have included warning of risk of suicidal impulses in pediatric patients were preempted. *O'Neal v. Smithkline Beecham Corp. (E.D. Cal. 2008) 551 F. Supp. 2d 993, 1003-1009*

Premarket approval (PMA) does not constitute specific FDA requirements applicable to a particular device and cannot be used to preempt state law causes of action. State law claims regarding hip replacement were thus not subject to 360k preemption. *Notmeyer v. Stryker Corp. (N.D. Cal. 2007) 502 F. Supp. 2d 1051, 1057*

FRSA and SAA preempted a negligence claim alleging design defects of a railroad car's operating platform. *Miller v. S. Pac. R.R. (E.D. Cal. Sept. 7, 2007) 2007 U.S. Dist. LEXIS 66314, at *14-*17*

Federal Communications Act did not completely preempt state law claims alleging injury from radiation emitted from cellular equipment. *Jasso v. Citizens Telcoms. Co. of Cal., Inc. (E.D. Cal. Jan. 9, 2007) 2007 U.S. Dist. LEXIS 4771, at *26-*32*

State laws regarding seats and seating configurations were unduly burdensome on interstate commerce and passenger train industry and were preempted by the *Commerce Clause*. Duty to warn passengers of dangers of deep vein thrombosis, in contrast, was not unduly burdensome on commerce and not preempted. Federal Amtrak Act, *49 U.S.C.S. § 24301 et seq.* , did not preempt the common law claims. *Haynes v. AMTRAK (C.D. Cal. 2006) 423 F. Supp. 2d 1073, 1079-1081*

Product Development Protocol P) approval process is as rigorous as PMA process and preempted common law tort claims that imposed different standard from those imposed by FDA. Thus, MDA preempted claims relating to design, manufacture, labeling, and warnings regarding pacemakers and leads. Clement v. Kaiser Found. Health Plan, Inc. (Dec. 17, 2004) 2004 U.S. Dist. LEXIS 26414, at *13-*17

Claims that Pfizer negligently failed to adequately warn of dangers of suicide in connection with drug Zoloft were not preempted by federal law. *Motus v. Pfizer, Inc. (C.D. Cal. 2000) 127 F. Supp. 2d 1085, 1096-1100*

FBSA expressly preempted common law design defect and failure to warn action based on manufacturer's failure to install propeller guard or to provide adequate warning regarding unprotected propellers. *Moss v. Outboard Marine Corp. (E.D. Cal. 1996) 915 F. Supp. 183*

Labeling Act preempted minors' unfair competition claims against tobacco companies. The U.S. Supreme Court's decision in *Lorillard Tobacco Co. v. Reilly (2001) 533 U.S. 525, 121 S. Ct. 2404, 150 L. Ed. 2d 532* was inconsistent with and impliedly disapproved *Mangini v. R.J. Reynolds Tobacco Co. (1994) 7 Cal. 4th 1057, 31 Cal. Rptr. 2d 358, 875 P.2d 73* , which had held that the Labeling Act did not preempt a similar claim. *In re Tobacco Cases II (2007) 41 Cal. 4th 1257, 1272, 63 Cal. Rptr. 3d 418, 163 P.3d 106*

Savings clause in Food & Drug Modernization Act of 1997, *21 U.S.C.S. § 379r(d)(2)*, which was designed specifically to preserve Proposition 65, does not entirely exclude conflict preemption; federal requirement prevails if warning mandated by California law directly conflicts with one required by FDA; FDA's refusal to allow defendant to use Proposition 65's warning on nicotine replacement therapy product established federal policy prohibiting defendant from giving consumers any warning other than warning approved by FDA; use of Proposition 65 warning would conflict with that policy. *Dowhal v. SmithKline Beecham Consumer Healthcare (2004) 32 Cal. 4th 910, 920-921, 12 Cal. Rptr. 3d 262*

Products liability claim, alleging defective design, brought by former railroad employees for asbestos related injuries was preempted under the Locomotive Boiler Inspection Act (BIA) *49 U.S.C.S. § 20701 et seq.* *Scheiding v. General Motors Corp. (2000) 22 Cal. 4th 471, 473, 93 Cal. Rptr. 2d 342, 993 P.2d 996*

State law claims for failure to warn of pesticide risks are preempted by federal regulations under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) *7 U.S.C.S. § 136 et seq.* *Etcheverry v. Tri-Ag Serv., Inc. (2000) 22 Cal. 4th 316, 335-336, 93 Cal. Rptr. 2d 36, 993 P.2d 366 , overruled in part, Bates v. Dow Agrosciences L.L.C., 544 U.S. 431, 447-452 (2005)*

Federal Motor Vehicle Safety Standard 208 preempted claim that 1993 Mazda MPV minivan was defective because middle row inboard seat had lap-only belt. *Williamson v. Mazda Motor of Am., Inc. (2008) 167 Cal. App. 4th 905, 912-919, 84 Cal. Rptr. 3d 545 , modified and reh'g denied, 2008 Cal. App. LEXIS 2269*

Locomotive Boiler Inspection Act, *49 U.S.C.S. § 20701 et seq.*, preempts design defect claims against locomotive manufacturers, regardless of whether the locomotive was "in use" or off line in a repair shop when the injury occurred. The case involved a locomotive repairman who died of mesothelioma from asbestos exposure. *Frastaci v. Vapor Corp. (Dec. 21, 2007) 2007 Cal. App. LEXIS 2147, at *26*

Manufacturer met its burden of proving that its testicular implant was designed, manufactured, and labeled according to FDA specifications. Claims alleging that prosthesis was defective because it lacked an adequate warning were preempted. *Jessen v. Mentor Corp. (Jan. 16, 2008) 2008 Cal. App. LEXIS 61, at *17-*23*

PMA approval for a heart valve was a device-specific federal requirement that could preempt any conflicting state requirement. Negligence and strict liability claims were preempted. *Blanco v. Baxter Healthcare Corp. (2008) 158 Cal. App. 4th 1039, 2008 Cal. App. LEXIS 34, at *25-*27*

1969 Smoking Act did not preempt claim under consumer expectations test, because products liability under failure-to-warn theory is distinct cause of action from one under consumer expectations test. *Boeken v. Philip Morris Inc. (2005) 127 Cal. App. 4th 1640, 1676-1679, 26 Cal. Rptr. 3d 638*

Defendants' false assurances that they would keep public informed of their findings regarding smoking and health, manufacturing of false controversy regarding health effects of smoking, and misrepresentation by "half-truths," were affirmative misrepresentations outside preemptive reach of 1969 cigarette labeling statute. *Whiteley v. Philip Morris, Inc. (2004) 117 Cal. App. 4th 635, 666-677, 11 Cal. Rptr. 3d 807*

21 U.S.C.S. § 379r(a) preempted claims alleging that labels to over-the-counter drugs for treatment of head lice contained false and misleading statements about the effectiveness of the drugs. Savings clause did not apply, because plaintiffs had suffered no injury to person or property, and their claims were thus not "products liability claims" under California law. *Kanter v. Warner-Lambert Co. (2002) 99 Cal. App. 4th 780, 790-795, 122 Cal. Rptr. 2d 72*

FIFRA did not preempt claims arising when manufacturer or retailer *voluntarily* warranted pesticide's fitness for a particular purpose. Nor do FIFRA preemption rules require court to enforce damage limitation provision clause which it finds unconscionable in EPA-approved pesticide label. *Sun Valley Packing v. Consep, Inc. (2001) 94 Cal. App. 4th 315, 324, 114 Cal. Rptr. 2d 237* (certified for partial publication)

FBSA neither expressly nor impliedly preempted claims alleging inadequate handhold areas in boat's tow area. *LaPlante v. Wellcraft Marine Corp. (2001) 94 Cal. App. 4th 282, 291, 114 Cal. Rptr. 2d 196, 202*

Manufacturers and successor manufacturers of general aviation aircraft parts in relation to duty to warn and federal preemption. *Burroughs v. Precision Airmotive Corp. (2000) 78 Cal. App. 4th 681, 702*

Negligence, strict liability, and breach of warranty claims involving optical surgical aid as not preempted by *MDA. Armstrong v. Optical Radiation Corp. (1996) 50 Cal. App. 4th 580, 57 Cal. Rptr. 2d 763*

Defendant's burden of proof on preemption as including evidence that its product was designed, manufactured, and labeled according to thespecifications approved by the *FDA. Steele v. Collagen Corp. (1997) 54 Cal. App. 4th 1474, 63 Cal. Rptr. 2d 879*

Common law claim of negligence involving allegedly defective seat beat was not preempted by the *National Traffic and Motor Vehicle Safety Act. Ketchum v. Hyundai Motor Co. (1996) 49 Cal. App. 4th 1672, 1678-1679, 57 Cal. Rptr. 2d 595*

Intraocular lens as medical device under Food Drug and Cosmetic Act (FDCA); express preemption clause (*21 U.S.C §*

360k) as preempting state-law products liability action. *Evraets v. Intermedics Intraocular (1994) 29 Cal. App. 4th 779, 785-787, 34 Cal. Rptr. 2d 852*

Automobile manufacturer's compliance with federal statute and regulations regarding restraint system in automobile as preempting state-law products liability action alleging that failure to supply air bags made automobile defective. *Nissan Motor Corp. v. Superior Court (1989) 212 Cal. App. 3d 980, 982, 261 Cal. Rptr. 80*

[40] Prescription Drugs and Medical Devices

FDA approval of drug's label does not provide a complete defense to failure-to-warn claims. It was not impossible for the manufacturer of Phenergan to comply with both its state and federal law obligations regarding drug labeling. Plaintiff's state-law failure-to warn claims did not stand as an obstacle to the accomplishment of Congress' purpose in the FDCA. The FDA's Preemption Preamble to its 2006 Final Rule was not entitled to deference. *Wyeth v. Levine (2009) -- U.S. --, 129 S. Ct. 1187, 173 L. Ed. 2d 51*

Plaintiffs alleged that defendants failed to adequately warn of risks of lymphoma associated with off-label use of Humira. Court granted motion to dismiss claims but allowed plaintiffs 21 days to file amended complaint. *Wendell v. Johnson & Johnson (N.D. Cal. Jan. 20, 2010) 2010 U.S. Dist. LEXIS 4188, at *8-*15*

Court dismissed complaint because plaintiff could not establish that defendant manufactured anesthetic delivered to plaintiff via pain pump. *Combs v. Stryker Corp. (E.D. Cal. Dec. 14, 2009) 2009 U.S. Dist. LEXIS 115920, at *6-*7*

Service provider that facilitated delivery of Durom Hip Resurfacing System to physician was subject to liability as a distributor. There is no exception to strict liability for distributors of implanted medical devices. *Lyles v. Zimmer, Inc. (E.D. Cal. May 29, 2009) 2009 U.S. Dist. LEXIS 50483, at *11-*13*

Complaint alleging that Prednisone was not properly prepared and not accompanied by warnings regarding avascular necrosis stated strict products liability claim. *Gilbert v. Watson Labs., Inc. (S.D. Cal. Oct. 9, 2008) 2008 U.S. Dist. LEXIS 79539, at *7*

Manufacturer as not strictly liable for injuries caused by prescription drug so long as drug was properly prepared and accompanied by warnings of its dangerous propensities that were either known or reasonably scientifically knowable at time of distribution. *Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1069, 245 Cal. Rptr. 412, 751 P.2d 470* (consolidating numerous DES cases; adopting Restatement (Second) of Torts § 402A, cmt. k)

Manufacturer of hip replacement system could not be held strictly liable for design defect under *Hufft v. Horowitz, below. Notmeyer v. Stryker Corp. (N.D. Cal. 2007) 502 F. Supp. 2d 1051, 1058-1059*

Manufacturer of implanted prescription medical product cannot be held strictly liable for a design defect. *Hufft v. Horowitz (1992) 4 Cal. App. 4th 8, 17, 5 Cal. Rptr. 2d 377*

Whether vendor of prescription drug is to be exempt from strict liability as depending on facts surrounding manufacture and sale of product; vendor who has properly prepared product and accompanied its sale with proper directions and warnings as not held to strict products liability for unforeseen results, but as subject to strict liability for resulting injuries when facts disclose that drug has not been properly prepared or has been placed on market and sold without adequate and proper warnings. *Carmichael v. Reitz (1971) 17 Cal. App. 3d 958, 988-989, 95 Cal. Rptr. 381* (prescription drug for pregnancy problems that caused heart disease); *Toole v. Richardson-Merrell, Inc. (1967) 251 Cal. App. 2d 689, 710-711, 60 Cal. Rptr. 398* (prescription drug MER/29 (triparanol) for arteriosclerosis condition that caused eye cataracts and skin and hair damage)

Drug manufacturer as having no duty to warn users of possible harmful side effects of drug unless it has knowledge, or by application or reasonable, developed human skill and foresight, should have knowledge, of danger. *Christofferson v. Kaiser Found. Hosps. (1971) 15 Cal. App. 3d 75, 79, 92 Cal. Rptr. 825* (prescription drug for skin ailment that caused permanent vision impairment)

[41] Privity of Contract

Strict-tort liability as not restricted on theory of privity of contract or on theory that no representation of safety is made to bystander injured by defective product. *Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 586, 75 Cal. Rptr. 652, 451 P.2d 84*

[42] "Product" Defined

Apartment complex as not "product" within meaning of strict-liability doctrine; cause of action in strict liability, alleging that design defect in apartment complex (i.e., lack of fence enclosure) caused injury to child who walked into street and was hit by vehicle, as subject to summary judgment in favor of defendant. *Brooks v. Eugene Burger Mgmt. Corp. (1989) 215 Cal. App. 3d 1611, 1626-1627, 264 Cal. Rptr. 756*

[42a] Proposition 51

Ford was entitled to setoff of $3,595,500 million in economic damages under *Cal. Code Civ. Proc. § 977* and Proposition 51. *Pierson v. Ford Motor Co. (N.D. Cal. Aug. 18, 2009) 2009 U.S. Dist. LEXIS 79758, at *6-*7*

Statute that previously immunized cigarette manufacturers from liability, former *Civ. Code § 1714.45*, did not permit apportioning liability under Proposition 51 to cigarette manufacturers, because former tobacco immunity statute did not merely confer immunity from liability for tortious conduct; it constituted legislative determination that company supplying tobacco did not engage in tortious conduct. *Richards v. Owens-Ill., Inc. (1997) 14 Cal. 4th 985, 997, 60 Cal. Rptr. 2d 103, 928 P.2d 1181*

Arena v. Owens-Corning Fiberglas Corp., below, did not apply because evidence did not show percentage of harm caused by any specific product manufactured by defendant. *Garcia v. Duro Dyne Corp. (2007) 156 Cal. App. 4th 92, 103, 67 Cal. Rptr. 3d 100*

Court did not err in reducing award against weight-lifting equipment manufacturer by full amount of plaintiff's settlement with gym. His injuries were caused by a single defective product. Under *Wimberly, below*, Proposition 51 was not triggered. *Bostick v. Flex Equip. (2007) 147 Cal. App. 4th 80, 93, 95, 54 Cal. Rptr. 3d 28*

When operator of jet ski on which plaintiff was injured prevailed on summary judgment based on primary assumption of risk, manufacturer was not entitled to verdict form that would have permitted jury to allocate some fault to her under *Civ. Code § 1431.2(a)*. Because operator breached no duty and committed no tort, there was no legal fault to apportion to her. *Ford v. Polaris Indus., Inc. (2006) 139 Cal. App. 4th 755, 777-778, 43 Cal. Rptr. 3d 215*

Proposition 51 applies to limit defendant's liability for noneconomic damages by comparative fault of all those responsible for plaintiff's injuries, not merely fault of defendants who are parties to action; award of noneconomic damages against manufacturer was properly reduced by amount attributable to fault of plaintiff's employer, which was immune from liability under workers' compensation system.

DaFonte v. Up-Right, Inc. (1992) 2 Cal. 4th 593, 600, 7 Cal. Rptr. 2d 238, 828 P.2d 140

Trial court is not bound by allocations made in settlement agreements that have not received prior judicial approval; court must determine whether there was reasonable basis on which to justify those allocations, and plaintiff bears burden of presenting evidence that will enable court to perform its responsibility; any allocation of settlement proceeds that will affect ultimate credit that nonsettling defendant will receive against any future judgment will not be given any presumptive effect unless it was product of adverse negotiation; trial court did not err in refusing to allocate any portion of prior settlement to potential wrongful death claims, despite provision in settlement agreement allocating 20 percent of settlement proceeds to release of those claims, or in allocating lesser percentage of proceeds to loss of consortium than that specified in agreement. *Jones v. John Crane, Inc. (2005) 132 Cal. App. 4th 990, 1008-1011, 35 Cal. Rptr. 3d 144*

Under Proposition 51, Court properly allowed fault of Navy to be taken into account in allocating responsibility for plaintiff's injuries in action against asbestos manufacturer, even if Navy was immune under *Feres/Stencel* rule. *Taylor v. John Crane Inc. (2003) 113 Cal. App. 4th 1063, 1068, 6 Cal. Rptr. 3d 695*

Proposition 51 applies to all strict liability cases. *Wilson v. John Crane, Inc. (2000) 81 Cal. App. 4th 847, 852, 97 Cal. Rptr. 2d 240*

Proposition 51 applies to strict liability asbestos exposure cases where multiple products cause plaintiff's injuries and evidence provides a basis to allocate liability for noneconomic damages between defective products. *Arena v. Owens-Corning Fiberglas Corp. (1998) 63 Cal. App. 4th 1178, 1198, 74 Cal. Rptr. 2d 580*

Proposition 51 did not modify the common law rule that defendants in an action for strict products liability who are in the chain of distribution of the same defective product are jointly and severally liable for all of plaintiff's economic and noneconomic damages. Wimberly v. Derby Cycle Corp . *(1997) 56 Cal. App. 4th 618, 65 Cal. Rptr. 2d 532*

Allocation of settlement proceeds according to proportions set forth in pretrial settlement is inherently suspect, reflecting bias against economic damages that is prejudicial to nonsettling defendant; if court finds absence of good faith, it may adjust allocation set forth in prior settlement to mirror jury's apportionment of economic and noneconomic damages. *Greathouse v. Amcord, Inc. (1995) 35 Cal. App. 4th 831, 840-841, 41 Cal. Rptr. 2d 561*

[43] Public Policy

Purpose of imposing strict liability in tort as to insure that costs of injuries resulting from defective products are borne by manufacturers that put such products on market rather than by injured persons who are powerless to protect themselves. *Greenman v. Yuba Power Prods., Inc. (1963) 59 Cal. 2d 57, 63, 27 Cal. Rptr. 697, 377 P.2d 897* ; *Canifax v. Hercules Powder Co. (1965) 237 Cal. App. 2d 44, 51, 46 Cal. Rptr. 552* ; *see also* *Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 585-586, 75 Cal. Rptr. 652, 451 P.2d 84* ; *Baker v. Chrysler Corp. (1976) 55 Cal. App. 3d 710, 716, 127 Cal. Rptr. 745*

Purpose of rule of strict-tort liability as being to insure that costs of injuries resulting from defective products are borne by manufacturers that put suchproducts on market rather than by injured persons who are powerless to protect themselves; rule as not resting on analysis of financial strength or bargaining power of parties to particular action but on proposition that cost of an injury and loss of time or health may be an overwhelming misfortune to person injured and a needless one, for risk of injury can be insured by manufacturer and distributed among public as cost of doing business; thus, paramount policy to be promoted by rule as being protection of otherwise defenseless victims of manufacturing defects and spreading throughout society cost of compensating them. *Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 30-31, 136 Cal. Rptr. 574, 560 P.2d 3*

Public policy as demanding that responsibility be fixed wherever it will most effectively reduce hazards to life and health inherent in defective products that reach market. *Escola v. Coca Cola Bottling Co. (1944) 24 Cal. 2d 453, 462, 150 P.2d 436* (concurring opinion); *see also* *Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 129, 104 Cal. Rptr. 433, 501 P.2d 1153* ; *Young v. Aro Corp. (1973) 36 Cal. App. 3d 240, 246, 111 Cal. Rptr. 535*

Paramount policy to be promoted by rule of strict liability as being protection of otherwise defenseless victims of manufacturing defects and spreading throughout society cost of compensating them. *Price v. Shell Oil Co. (1970) 2 Cal. 3d 245, 251, 85 Cal. Rptr. 178, 466 P.2d 722* ; *Young v. Aro Corp. (1973) 36 Cal. App. 3d 240, 247, 111 Cal. Rptr. 535*

Accepted rationale of strict liability as being that responsibility for consequences of defective products should rest on those who, as a class, are in best position to make sure such products never reach consumer but who can distribute loss among public as cost of doing business if these products do. *Young v. Aro Corp. (1973) 36 Cal. App. 3d 240, 247, 111 Cal. Rptr. 535*

Strict liability as generally justified on four main policy grounds: (1) as a shortcut to liability where negligence is present but difficult to prove; (2) as an economic incentive to improved product safety; (3) to induce reallocation of resources toward safer products; and (4) to spread risk of loss among all who use product. *McDonald v. Sacramento Medical Foundation Blood Bank (1976) 62 Cal. App. 3d 866, 874, 133 Cal. Rptr. 444*

Rule of products liability as rationalized as inducement to manufacturers to design and produce safe products and as means to avoid artificial conditions to recovery in warranty created by rules of privity. *Kaiser Steel Corp. v. Westinghouse Elec. Corp. (1976) 55 Cal. App. 3d 737, 747* , 127 Cal. Rtpr 838

[44] Statute of Limitations

Allegations that defendants represented that their products posed no health risks were sufficient to indicate that statute of limitations was tolled for products liability and negligence claims. *Dillard v. Victoria M. Morton Enters. (E.D. Cal. Oct. 7, 2008) 2008 U.S. Dist. LEXIS 79588, at *12*

Claims of injury or damage caused by addiction were time-barred under *Grisham v. Philip Morris, Inc. (2007) 40 Cal. 4th 623, 54 Cal. Rptr. 3d 735, 151 P.3d 1151* , even though plaintiff, who was diagnosed with COPD in 1989, did not specifically claim addiction as injury. "First-injury" rule barred her physical injury claims. *Pooshs v. Phillip Morris USA, Inc. (N.D. Cal. May 27, 2008), 2008 U.S. Dist. LEXIS 43620, at *42*

Because plaintiff cannot discover that disability was caused by asbestos exposure before he or she suffers that disability, disability must in all cases either precede or accompany its discovery. *Code Civ. Proc. § 340.2* may be read as providing in effect that action for injury or illness arising from asbestos exposure must be filed within one year after date plaintiff first suffered disability and either knew or should have known disability was caused or contributed to by that exposure. *Hamilton v. Asbestos Corp., Ltd. (2000) 22 Cal. 4th 1127, 1138, 95 Cal. Rptr. 2d 701, 998 P.2d 403, 409*

Plaintiffs suspected, for more than a year before they filed complaint, wrongdoing by someone and that someone was to blame for their daughter's death,putting them on notice of a potential claim; because plaintiffs delayed in filing claim, drug manufacturer was entitled to summary judgment. *Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 398, 87 Cal. Rptr. 2d 453, 981 P.2d 79*

Period of *Code Civ. Proc. § 340(3)* (one year for personal injury or wrongful death), subject to discovery rule, as

applying to loss-of-consortium claim based on injury to spouse caused by exposure to asbestos; *Code Civ. Proc. § 340.2* (exposure to asbestos) as not applying because spouse does not suffer "disability" within meaning of that statute. *Uram v. Abex Corp. (1990) 217 Cal. App. 3d 1425, 1436, 266 Cal. Rptr. 695*

Code Civ. Proc. § 340.2 (limitation period for claims arising from exposure to asbestos) as not requiring that asbestos be sole cause of disability; statute as speaking in terms of disability "caused or contributed to by such exposure" or "as a result of such exposure." *Uram v. Abex Corp. (1990) 217 Cal. App. 3d 1425, 1432-1433, 266 Cal. Rptr. 695*

Code Civ. Proc. § 340.2 (limitation period for asbestos-related injuries) as applicable if timeliness of claim was not adjudicated prior to effective date of *Code Civ. Proc. § 340.2* (January 1, 1980); action as not barred if brought within period allowed by *Code Civ. Proc. § 340.2*, even though limitation period under prior law had expired on plaintiff's claim prior to January 1, 1980. *Nelson v. Flintkote Co. (1985) 172 Cal. App. 3d 727, 730, 218 Cal. Rptr. 562*

Retroactive application of special statute of limitations for asbestosis claims (*Code Civ. Proc. § 340.2*) as justified by legislative intent and remedial nature of statute. *Puckett v. Johns-Manville Corp. (1985) 169 Cal. App. 3d 1010, 1015-1017, 215 Cal. Rptr. 726*

Manufacturers and suppliers of heating-cooling systems used in constructing a building as not permitted to raise defense of statute of limitations under *Code Civ. Proc. §§ 337.1* and *337.15* because these provisions provide limitations on actions for design or construction defects in improvements to real property only; manufacturing of a unit to heat or cool as considered to be the provision of a product. *Baker v. Walker & Walker (1982) 133 Cal. App. 3d 746, 756-758, 184 Cal. Rptr. 245*

Action for damages for personal injuries couched in terms of breach of warranty but which is, in fact, consumer's action in strict liability in tort as governed by one-year limitation period provided by *Code Civ. Proc. § 340(3)* for personal injury actions and not by four-year limitation period of *Com. Code § 2725* for actions for breach of contract of sale. *Becker v. Volkswagen of Am., Inc. (1975) 52 Cal. App. 3d 794, 802, 125 Cal. Rptr. 326*

Personal injury actions based on products liability as governed by one-year period of limitation prescribed by *Code Civ. Proc. § 340(3).* *G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 25, 122 Cal. Rptr. 218*

Action based on strict liability in tort against manufacturer of residential lot for subsurface defect causing soil subsidence as governed by former *Code Civ. Proc. § 338(2)* (now *Code Civ. Proc. § 338(b)*), limiting commencement of action for injury to real property to three years; when cause of action accrues. *Avner v. Longridge Estates (1969) 272 Cal. App. 2d 607, 615-617, 77 Cal. Rptr. 633*

Statute of limitations as applicable to actions for injury to real property; when cause of action accrues; exceptions. *Avner v. Longridge Estates (1969) 272 Cal. App. 2d 607, 615-618, 77 Cal. Rptr. 633*

Manner of pleading statute of limitations in answer. *Brown v. World Church (1969) 272 Cal. App. 2d 684, 691, 77 Cal. Rptr. 669*

Manner of pleading statute of limitations in demurrer. *Bainbridge v. Stoner (1940) 16 Cal. 2d 423, 431, 106 P.2d 423* ; *Spreckels v. Spreckels (1916) 172 Cal. 775, 783, 158 P. 537* ; *Lewis v. Security-First Nat'l Bank (1943) 58 Cal. App. 2d 827, 828* fn, *137 P.2d 864*

[45] Summary Judgment

If there exists some triable issue of fact about when plaintiff was placed on notice, then, as a matter of law, it cannot be

determined when statute of limitations begins to run and summary judgment for defendant is improper. *Clark v. Baxter Healthcare Corp. (2000) 83 Cal. App. 4th 1048, 1060, 100 Cal. Rptr. 2d 223*

Summary judgment as properly granted to defendant in action based on negligence when plaintiff sued gas company for injuries caused by fire ignited by pilot light of unelevated water heater because defendant owed plaintiff no duty. *Salazar v. Southern Cal. Gas Co. (1997) 54 Cal. App. 4th 1370, 1385, 63 Cal. Rptr. 2d 522*

Summary judgment as improperly granted to defendants in action based on strict liability when questions of fact remained as to whether deck gun had design or warning defect. *Wright v. Stang Mfg. Co. (1997) 54 Cal. App. 4th 1218, 1229, 1236, 63 Cal. Rptr. 2d 422*

Summary judgment as improperly granted to defendant in action based on strict liability when plaintiff sued collagen manufacturer for personal injury and collagen manufacturer failed to prove preemption defense. *Steele v. Collagen Corp. (1997) 54 Cal. App. 4th 1474, 1480, 63 Cal. Rptr. 2d 879*

Summary judgment as improperly granted to defendants in action based on strict liability in tort, negligence, and implied warranty when plaintiff alleged kidney damage from a chemical spill and the cumulative effect of exposure to vapors of chemical products manufactured or distributed by several defendants and used during plaintiff's employment; defendants as required to prove that vapors from their chemicals did not cause or contribute to plaintiff's chronic renal failure. *Pereira v. Dow Chem. Co. (1982) 129 Cal. App. 3d 865, 872, 873, 181 Cal. Rptr. 364*

Summary judgment as improperly granted to defendant on causes of action for strict liability and negligence when commercial plaintiff sued manufacturer and seller of crane for property damage and economic loss and questions of fact remained as to proximate cause and existence of defect. *Southern Cal. Edison Co. v. Harnischfeger Corp. (1981) 120 Cal. App. 3d 842, 852, 855, 175 Cal. Rptr. 67*

Summary judgment as properly granted to defendant on action for breach of implied warranty when defendant and commercial plaintiff had relatively equal bargaining positions and their contract for sale of product contained disclaimer by defendant. *Southern Cal. Edison Co. v. Harnischfeger Corp. (1981) 120 Cal. App. 3d 842, 855-856, 175 Cal. Rptr. 67*

Summary judgment as improperly granted to defendant in action based on negligence and strict liability in tort resulting from one-car collision after tire came off wheel where supporting declarations negated defect in manufacture but not defect in design of tire and contained only opinions and conclusions of declarants, as opposed to evidentiary facts. *Fuller v. Goodyear Tire & Rubber Co. (1970) 7 Cal. App. 3d 690, 692-694, 86 Cal. Rptr. 705*

Summary judgment as properly granted in favor of manufacturer of product (nondefective bulk sulphuric acid) sold to another manufacturer for use in producing a drain-cleaning product ("Clear-All"), which caused plaintiff's injuries, where second manufacturer substantially altered first manufacturer's product before it reached ultimate user or consumer. *Walker v. Stauffer Chem. Corp. (1971) 19 Cal. App. 3d 669, 672-675, 96 Cal. Rptr. 803*

[46] Superseding Cause

Summary judgment on superseding cause was inappropriate because a triable issue of fact existed as to whether damage caused by toaster was foreseeable. Charter Oak Fire Ins. Co. v. Sodexho Marriot (N.D. Cal. Feb. 27, 2006) 2006 U.S. Dist. LEXIS 9567, at *17 (not designated for publication)

When neglect of third party constitutes superseding cause to strict liability in tort. *Balido v. Improved Mach., Inc. (1972) 29 Cal. App. 3d 633, 644-649, 105 Cal. Rptr. 890*

Effect on proximate cause of lapse of time between sale of product and subsequent injury from defect as question of fact. *Balido v. Improved Mach., Inc. (1972) 29 Cal. App. 3d 633, 642-644 , 105 Cal. Rptr. 890* ; *see also Knudsen v. Peoples Lumber Co. (1977) 68 Cal. App. 3d 167, 179, 137 Cal. Rptr. 110*

[47] Warranties

[a] Advertising

Affirmations in newspaper advertising as capable of giving rise to express-warranty liability. *Grinnell v. Charles Pfizer & Co. (1969) 274 Cal. App. 2d 424, 439 n. 13, 79 Cal. Rptr. 369*

[b] Basis of Bargain

To recover for breach of express warranty under *Com. Code § 2313*, seller's statements, whether of fact or opinion, as required to be part of basis of bargain; basis-of-bargain requirement as representing significant change in law of warranties. *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 115, 120 Cal. Rptr. 681, 534 P.2d 377*

[c] Class Actions

Class action based on breach of express warranty against truck manufacturer to compel manufacturer to recall and replace at its expense defective wheelsinstalled on certain of its trucks. *Anthony v. General Motors Corp. (1973) 33 Cal. App. 3d 699, 704-709, 109 Cal. Rptr. 254*

[d] Construction

Statement of fact on shipping-carton label and cover of instruction booklet to "Golfing Gizmo," to wit, "Completely Safe Ball Will Not Hit Player," as subject to construction as an express warranty; but even statements of opinion as becoming warranties under *Com. Code § 2313* if they become part of basis of bargain; thus, California's Commercial Code as expanding sellers' liability beyond former Uniform Sales Act (former *Civ. Code §§ 1732-1736*) and as providing greater coverage than Restatement (Second) of Torts § 402. *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 115 n. 10, 120 Cal. Rptr. 681, 534 P.2d 377*

[e] Disclaimers

Purpose underlying *Com. Code § 2316* suggests that disclaimers must be included in contract with end user. Salyards v. Metso Minerals Tampere Oy (E.D. Cal. Nov. 10, 2005) 2005 U.S. Dist. LEXIS 29360, at *27-*29

Disclaimer of implied warranties as precluding cause of action for breach of warranty when parties had reasonably equal bargaining power. *Southern Cal. Edison Co. v. Harnischfeger Corp. (1981) 120 Cal. App. 3d 842, 855-856, 175 Cal. Rptr. 67*

Contractual disclaimers to implied warranties as question of fact for jury, not properly raised for first time on appeal. *Hughes Tool Co. v. Max Hinrichs Seed Co. (1980) 112 Cal. App. 3d 194, 201-202, 169 Cal. Rptr. 160*

Manner of disclaiming or modifying, and construction of, express and implied warranties. *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 114-120, 120 Cal. Rptr. 681, 534 P.2d 377*

Insufficiently conspicuous disclaimer provisions of contract as not negating implied warranties. *Dorman v. International Harvester Co. (1975) 46 Cal. App. 3d 11, 18, 120 Cal. Rptr. 516*

[ee] Express Warranty

No evidence that breach of express warranty was substantial factor in causing accident involving industrial machine. Andrade v. Pangborn Corp. (N.D. Cal. Oct. 22, 2004) 2004 U.S. Dist. LEXIS 22704, at *61-*62

[f] Economic Losses

Economic losses not recoverable in strict liability can include repair cost, replacement cost, loss of profits or diminution of value, if loss is solely economic, and not due to physical harm to the property. *Collins Dev. Co. v. D. J. Plastering, Inc. (2000) 81 Cal. App. 4th 771, 779, 97 Cal. Rptr. 2d 83*

Strict liability as inapplicable to defendant manufacturer sued solely for economic losses, defined as damages for loss based on inadequate value, costs of repair, and replacement of defective product or consequent loss of profits without any claim of personal injury or damage to other property. *Fieldstone Co. v. Briggs Plumbing Prods., Inc. (1997) 54 Cal. App. 4th 357, 365-366, 62 Cal. Rptr. 2d 701*

In breach of warranty action, order for new trial on issue of damages as proper when plaintiff offered expert testimony based on national averages of profitsfor similar businesses, which was entirely speculative as to lost profits for plaintiff's particular business. *Berge v. International Harvester Co. (1983) 142 Cal. App. 3d 152, 190 Cal. Rptr. 815*

Defects in quality of goods (loss of bargain) and economic loss (loss of use of truck resulting in business loss) as not recoverable from manufacturer under theory of strict liability, but as relegated to law of contracts (sales) governing commercial transactions, that is, to express and implied warranties. *Anthony v. Kelsey-Hayes Co. (1972) 25 Cal. App. 3d 442, 447, 102 Cal. Rptr. 113*

[g] Implied Warranty

No evidence that breach of implied warranty of merchantability or implied warranty of fitness for particular purpose was substantial factor in causing accident involving industrial machine. Andrade v. Pangborn Corp. (N.D. Cal. Oct. 22, 2004) 2004 U.S. Dist. LEXIS 22704, at *63-*65

Theory of strict liability in tort as having virtually superseded concept of implied warranties in cases involving personal injuries resulting from defective products. *Grinnell v. Charles Pfizer & Co. (1969) 274 Cal. App. 2d 424, 433, 79 Cal. Rptr. 369* ; *see also Christofferson v. Kaiser Found. Hosps. (1971) 15 Cal. App. 3d 75, 80, 92 Cal. Rptr. 825*

[h] Limitations in Warranties

In action against automobile retailer for injuries sustained in accident allegedly caused by sudden failure of car's braking system, fact that defendant restricted its contractual liability to purchaser of car as immaterial, since it was strictly liable in tort. *Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 263, 37 Cal. Rptr. 896, 391 P.2d 168*

[i] Notice of Breach

Builders and sellers of new construction (apartment buildings) as held to implied representation that completed structure was designed and constructed in reasonably workmanlike manner; buyer as required to give timely notice of breach of warranty. *Pollard v. Saxe & Yolles Dev. Co. (1974) 12 Cal. 3d 374, 380, 115 Cal. Rptr. 648, 525 P.2d 88* (judgment for defendants affirmed on ground plaintiffs failed to give timely notice of breach)

[j] Privity

Plaintiff stated claim for breach of warranties because nothing in his complaint affirmatively showed that he did *not* receive Prednisone directly from defendants. *Gilbert v. Watson Labs., Inc. (S.D. Cal. Oct. 9, 2008) 2008 U.S. Dist. LEXIS 79539, at *6*

Courts have not extended privity exception to products beyond medicine, pesticides, and foodstuffs, and there was no privity between decedent and manufacturer of *Taser. Sanders v. City of Fresno (E.D. Cal. July 3, 2006) 2006 U.S. Dist. LEXIS 48582, at *66-*69*

Because plaintiffs failed to establish privity between themselves and defendant, defendant entitled to summary judgmenton express and implied warranty claims. Torres v. City of Madera (In re Torres) (E.D. Cal. July 11, 2005) 2005 U.S. Dist. LEXIS 34672, at *56-*68 , applying California law

Lack of privity precluded breach of implied warranty claim because there was no evidence that decedent relied on manufacturer's judgment that its heart valve was appropriate for her. *Blanco v. Baxter Healthcare Corp.(2008) 158 Cal. App. 4th 1039, 2008 Cal. App. LEXIS 34, at *40-*41*

To prevail on breach of implied warranty of merchantability claim, plaintiff must stand in "vertical privity" with defendants (they must occupy adjoining links in distribution chain; plaintiffs did not allege that they purchased latex gloves directly from defendants. *Kennedy v. Baxter Healthcare Corp. (1996) 43 Cal. App. 4th 799, 810-811 50 Cal. Rptr. 2d 736*

Under Commercial Code [*Com. Code §§ 2313, 2314, 2316*], privity as not required for action based on express warranty although it "appears" to remain a requirement for actions based on implied warranty of merchantability. *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 114 n. 8, 120 Cal. Rptr. 681, 534 P.2d 377*

[k] Purpose of Strict Liability

Law of strict liability in tort as developed to govern problem of physical injuries and not to undermine warranty provisions of former sales act or of *Commercial Code. Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 15, 45 Cal. Rptr. 17, 403 P.2d 145*

[l] Statute of Limitations

Under *Comm. Code § 2725*, cause of action for breach of warranty for future performance, such as manufacturer's 25-year warranty on siding, accrues upon discovery of breach. Thus, subject to tolling or estoppel, plaintiffs were required to bring warranty claims within four years from date they discovered or should have discovered that siding was not performing properly. *Mills v. Forestex Co. (2003) 108 Cal. App. 4th 625, 642, 134 Cal. Rptr. 2d 273*

Statute of limitations in action for breach of warranty by purchaser of industrial electric motor as beginning to run from date of motor failure where purchaser did not and could not reasonably discover defect until such failure (principles of prospective warranties applied). *Kaiser Cement & Gypsum Corp. v. Allis-Chalmers Mfg. Co. (1973) 35 Cal. App. 3d*

948, 960-961, 111 Cal. Rptr. 210

[48] Witnesses

In action based on strict liability in tort to recover damages for personal injury sustained as result of defectively placed water heater in garage of residential home (can containing gasoline knocked over causing gasoline to spread across floor to heater where it ignited on reaching flame of heater seriously injuring plaintiff, a minor, in resulting fire), trial court as committing reversible error in disallowing testimony of plaintiff's qualified expert as to fire hazard created by placement of heater. *Hyman v. Gordon (1973) 35 Cal. App. 3d 769, 774, 111 Cal. Rptr. 262* (expert was well qualified to offer what information expert possessed concerning fire hazards and properties of gasoline in relation to allegedly defective house design, subjects beyond common knowledge of most jurors)

[49] Workers' Compensation

Court rejected contention that decedent's cause of action accrued at time of his original exposure to asbestos between 1964-1966, and that the dual capacity exception in effect prior to 1982 amendment was applicable. Only if decedent had first learned he was suffering from asbestos-related illness prior to 1982 could plaintiffs have based their claim on former dual capacity doctrine. *Ashdown v. Ameron Int'l Corp. (2000) 83 Cal. App. 4th 868, 100 Cal. Rptr. 2d 20, 27*

In action by employer injured on job while operating press brake, cause of action for strict products liability as preempted by workers' compensation law and as not excepted from exclusive remedy rule by virtue of *Lab. Code § 4558(b)*, establishing higher burden of proof by plaintiff for that type of injury. *Award Metals, Inc. v. Superior Court (1991) 228 Cal. App. 3d 1128, 1133-1135, 279 Cal. Rptr. 459*

Employer liable under comparative negligence theory to employee injured by defective product as not entitled to credit for paying workers' compensation benefits. *Anderson-Cottonwood Disposal Serv. v. Workers' Comp. Appeals Bd. (1982) 135 Cal. App. 3d 326, 333, 185 Cal. Rptr. 336*

Where claimed negligence of purchaser of defective product, unreasonably dangerous to user, is not of such nature as would bar recovery in strict liability by purchaser from manufacturer of product, strict liability of manufacturer as not shared with workers' compensation insurer of purchaser whose employees were injured by defective product and which paid workers' compensation benefits. *Ruiz v. Minnesota Mining & Mfg. Co. (1971) 15 Cal. App. 3d 462, 465, 93 Cal. Rptr. 270* (affirming judgment for plaintiff employees and for plaintiff in intervention, the State Compensation Insurance Fund); *see also Shamblin v. Polich (1973) 32 Cal. App. 3d 756, 763, 108 Cal. Rptr. 410* ; *Lewis v. American Hoist & Derrick Co. (1971) 20 Cal. App. 3d 570, 585, 97 Cal. Rptr. 798* ; *cf. Levels v. Growers Ammonia Supply Co. (1975) 48 Cal. App. 3d 443, 453, 121 Cal. Rptr. 779* (employer assumed risk of conditions that gave rise to supplier's strict liability and was therefore joint tortfeasor, barring its insurance carrier's recovery of workers' compensation benefits paid)

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Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProcedureSettlementsMultipartiesContributionTortsProducts LiabilityGeneral OverviewTortsProducts LiabilityStrict LiabilityTortsStrict LiabilityGeneral OverviewTortsStrict LiabilityAbnormally Dangerous ActivitiesGeneral Overview

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§ 460.106 Text References

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Standard of care required of manufacturers. Restatement (Second) of Torts § 395

Care required of manufacturer in design of product. Restatement (Second) of Torts § 398

Standard for strict liability applicable to sellers of products. Restatement (Second) of Torts § 402A

When placing of dangerous product in hands of user without warning gives rise to strict tort liability. Restatement (Second) of Torts § 402A

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsJudgment on the PleadingsGovernmentsLegislationStatutes of LimitationsGeneral OverviewTortsProcedureMultiple DefendantsContributionGeneral OverviewTortsProcedureSettlementsMultipartiesContributionTortsProducts LiabilityGeneral OverviewTortsProducts LiabilityStrict LiabilityTortsStrict LiabilityGeneral Overview

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[Reserved]

§§ 460.107[Reserved]

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40-IV California Forms of Pleading and Practice--Annotated Scope

Scope

NOTE: This checklist is designed as a reminder to counsel only of the usual classes of defects, parties, and theories of liability in a products liability case. In any given fact situation nonlisted defects and additional potential parties and theories of liability may emerge. Hence, this checklist should be treated as an illustrative guide rather than as a definitive listing of all possible defects, parties, and theories of liability.

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40-460 California Forms of Pleading and Practice--Annotated § 460.120

§ 460.120 Product Defect

☐ Product defective because it was incapable of doing job for which it was intended and warranted.

☐ Defect in manufacture (e.g., something was not done that should have been done, or vice versa, in course of manufacture).

☐ Product defective because of improper assembly or service by one other than manufacturer (e.g., an automobile dealer who or which, pursuant to contract with manufacturer, makes certain adjustments or assembly before selling car).

☐ Product defective because it incorporates component part manufactured by another which contains defect in manufacture or design.

☐ Product defective because it incorporates component part manufactured by another which was not defective in manufacture or design but which was incapable of doing the job for which it was intended (e.g., component part was of improper size or made of materials inadequate for the specific purpose for which it was to be used).

☐ Defect in design (which would have been reasonably inexpensive to correct).

☐ Product defective because it lacked safety device required by law or otherwise necessary for safe use of product.

☐ Product, although nondefective in manufacture, assembly, or design, was rendered defective because of failure to give warning or instructions as to danger inherent in its use.

☐ Product, although nondefective in manufacture, assembly, or design, but requiring warning or instructions as to use was rendered defective because warning or instructions given were inadequate to avoid injury to person or to property from danger inherent in use of product.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProcedureSettlementsMultipartiesContributionTortsProducts LiabilityGeneral OverviewTortsProducts LiabilityDuty to WarnTortsProducts LiabilityManufacturing DefectsTortsProducts LiabilityStrict LiabilityTortsStrict LiabilityGeneral Overview

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40-460 California Forms of Pleading and Practice--Annotated § 460.121

§ 460.121 Theories of Liability, Parties, Damages

[1] No Injury to Person or to Property

- ☐ Theories of liability.
  - ☐ Breach of express warranty [*see Com. Code §§ 2313, 2317*].
  - ☐ Breach of implied warranty [*see Com. Code §§ 2314, 2315, 2317*].
- ☐ Potential plaintiff.
  - ☐ Purchaser of product.
  - ☐ Lessee of product.
  - ☐ Bailee of product.
- ☐ Potential defendant.
  - ☐ Retailer (lessor, bailor) of product.
  - ☐ Manufacturer of product.
- ☐ Damages recoverable: economic loss.

[2] Injury to Person or Property or Both

☐ Theories of liability.

☐ Strict liability in tort.

☐ Negligence.

☐ Breach of express warranty.

☐ Potential plaintiff.

☐ Purchaser of product.

☐ Lessee of product.

☐ Bailee of product.

☐ Licensee of product.

☐ Employee of purchaser, lessee, bailee, or licensee (against third party in which case employer's compensation carrier may be lien claimant or intervene to recover out of judgment any worker's compensation benefits paid).

NOTE:
Covered employee would also be entitled to proceed against employer under Worker's Compensation Law [*see generally* Ch. 577, *Workers' Compensation*].

☐ User of product other than the above.

☐ Nonuser of product other than the above.

☐ Spouse of person injured by defective product (loss of consortium).

☐ Personal representative or persons entitled to bring wrongful death action for death of person killed by defective product (wrongful death action [*Code Civ. Proc. § 377.60*]).

☐ Personal representative of person injured by defective product who dies before judgment (survival action [*Prob. Code § 573*]).

☐ Potential defendants.

☐ Retailer (lessor, bailor, licensor) of defective product.

☐ Wholesaler or distributor of defective product.

☐ Manufacturer of defective product.

☐ Manufacturer of defective component part in product.

☐ Installer, the negligence of whom or which created defect.

☐ Repairer, the negligence of whom or which created defect or failed to discover defect.

☐ Servicer, other than installer or repairer, the negligence of whom or which caused or contributed to existence of defect.

☐ In case of action by nonuser, user of product who or which knew of defect and was negligent in using defective product.

☐ In case of action by nonuser, nonpurchaser, purchaser of product who or which knew of defect and was negligent in allowing defective product to be used.

☐ Third person, other than the above, the negligence of whom or which contributed to plaintiff's injuries (e.g., a public entity for maintenance of a dangerous road condition, in which case a claim must be timely filed and rejected by the public entity before an action may be filed against it and these facts must be alleged in the complaint).

☐ Damages recoverable.

☐ Actual damages [*Civ. Code §§ 3300, 3333*].

☐ Exemplary or punitive damages [*Civ. Code § 3294*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProducts LiabilityGeneral OverviewTortsProducts LiabilityBreach of WarrantyTortsProducts LiabilityStrict LiabilityTortsPublic Entity LiabilityLiabilityGeneral OverviewTortsStrict LiabilityGeneral Overview

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40-460 California Forms of Pleading and Practice--Annotated § 460.122

§ 460.122 Analysis of Actions

[1] By Purchaser

☐ Strict liability in tort.

☐ Potential defendants.

☐ Retailer or other seller (including lessor, bailor, licensor) of defective product.

☐ Wholesaler or distributor of defective product.

☐ Manufacturer of defective product.

☐ Manufacturer of defective component part in product.

☐ Damages recoverable.

☐ Damages for injury to person from any of above-listed potential defendants.

☐ Damages for injury to property from any of above-listed potential defendants.

☐ Exemplary or punitive damages from potential defendant responsible for, and having knowledge of, defect who or which with conscious disregard of safety of public placed defective product into stream of commerce.

☐ Exemplary or punitive damages from any of above-listed potential defendants other than one responsible for defect who or which with knowledge of defect moved product along stream of commerce with conscious disregard of safety of public.

☐ Damages for emotional distress suffered by user of product when defective product severely injures another.

☐ Negligence.

☐ Potential defendants.

☐ Retailer or other seller (including lessor, bailor, licensor) of defective product who or which having a duty to do so was negligent in failing to discover and correct defect or negligence of whom or which caused or contributed to existence of defect.

☐ Wholesaler or distributor of defective product who or which having a duty to do so was negligent in failing to discover and correct defect or negligence of whom or which caused or contributed to existence of defect.

☐ Manufacturer of defective product who or which created or contributed to creation of defect or having a duty to do so was negligent in failing to discover and correct defect in defective component part manufactured by another.

☐ Manufacturer of defective component part.

☐ Designer of defective product (design defect).

☐ Installer of product where defect wholly or partially resulted from negligent installation.

☐ Repairer of product where defect wholly or partially resulted from negligent repair of product or who or which having a duty to do so was negligent in failing to discover defect and repair it.

☐ Other servicer of product where defect wholly or partially resulted from negligent servicing.

☐ User of defective product who had knowledge of defect and was negligent in using it.

☐ Third person, the negligence of whom or which apart from the defect in the product contributed to plaintiff's injuries.

☐ Damages recoverable.

☐ Damages for injury to person from any of the above potential defendants.

☐ Damages for injury to property from any of the above potential defendants.

☐ Breach of express warranty.

☐ Potential defendant.

☐ Person or entity who or which warranted product.

☐ Damages.

☐ Recovery of damages for injury to person.

☐ Recovery of damages for injury to property.

☐ Recovery of other economic loss proximately caused by breach of warranty.

[2] By Nonpurchaser User

☐ Strict liability in tort.

☐ Potential defendants and damages. See *§ 460.122[1]*.

☐ Negligence.

☐ Potential defendants and damages. See *§ 460.122[1]*.

☐ Breach of express warranty.

☐ Potential defendants and damages. See *§ 460.122[1]*.

[3] By Nonpurchaser, Nonuser Bystander

☐ Strict liability in tort.

☐ Potential defendants and damages. See *§ 460.122[1]*.

☐ Negligence.

☐ Potential defendants and damages. See *§ 460.122[1]*.

[4] By Spouse of Injured Person

☐ Plaintiff as spouse of injured party.

☐ Cause of action against the wrongdoer to recover damages for loss of consortium.

[5] By Persons Entitled to Bring Wrongful Death Action, or by Personal Representative on Their Behalf

☐ Plaintiff as personal representative or heir on behalf of injured party who was killed as result of injuries.

☐ Action for damages for wrongful death [*Code Civ. Proc. § 377.60*].

☐ Survival action, if injured party survived long enough that cause of action accrued [*Code Civ. Proc. § 377.20 et seq.*]. For discussion and forms regarding these actions, see Ch. 181, *Death and Survival Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProducts LiabilityBreach of WarrantyTortsProducts LiabilityDesign DefectsTortsProducts LiabilityManufacturing DefectsTortsProducts LiabilityStrict LiabilityTortsStrict LiabilityGeneral Overview

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40-460 California Forms of Pleading and Practice--Annotated § 460.123

§ 460.123 Defenses

[1] Strict Liability in Tort

☐ Product was not defective (put in issue by defendant's denial in answer of plaintiff's allegation of defect).

☐ Defect was caused by alteration in product after its purchase by consumer (put in issue by affirmative defense in answer).

☐ Defect resulted from misuse of product (put in issue by affirmative defense in answer).

☐ Defect did not proximately cause accident (put in issue by defendant's denial in answer of plaintiff's allegation of proximate cause).

☐ Plaintiff sustained no injury to person or property and hence no damages as proximate result of alleged defect (put in issue by defendant's denial for lack of sufficient information and belief of plaintiff's allegations of injuries and damages).

☐ Action is barred by statute of limitations (put in issue by affirmative defense in answer).

☐ Plaintiff was aware of defect and voluntarily assumed risk of very accident which occurred (put in issue by affirmative defense in answer).

☐ Plaintiff's negligence was a factor that will diminish amount of plaintiff's recovery under comparative fault principles (put in issue by affirmative defense in answer).

☐ Defendant is immune from liability under doctrine of government contract liability (put in issue by affirmative defense in answer).

☐ Federal statute preempted state law cause of action.

[2] Negligence

☐ Defendant was not negligent (put in issue by defendant's denial in answer of plaintiff's allegation of negligence).

☐ Plaintiff sustained no injury to person or property and hence no damages as proximate result of defendant's alleged negligence (put in issue by defendant's denial for lack of sufficient information and belief of plaintiff's allegations of injuries and damages).

☐ Action is barred by statute of limitations (put in issue by affirmative defense in answer).

☐ Plaintiff was aware of defendant's alleged negligence and voluntarily assumed risk of very accident which occurred (put in issue by affirmative defense in answer).

☐ Plaintiff was also negligent (put in issue by affirmative defense in answer thereby invoking doctrine of comparative negligence).

☐ Federal statute preempted state law cause of action.

[3] Breach of Warranty

☐ See *460.123*[1].

☐ Defendant did not warrant the product (put in issue by defendant's denial in answer of plaintiff's allegation of warranty).

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsProceduresPreemptionGeneral OverviewTortsProcedureStatutes of LimitationsAccrual of ActionsDiscovery RuleTortsProducts LiabilityBreach of WarrantyTortsProducts LiabilityNegligenceTortsProducts LiabilityStrict LiabilityTortsStrict LiabilityGeneral Overview

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40-460 California Forms of Pleading and Practice--Annotated § 460.124

§ 460.124 Indemnity

☐ Express indemnity.

☐ Implied indemnity.

☐ Contractual.

☐ Noncontractual.

☐ Right to file cross complaint against the person claimed to have the duty of indemnifying the cross complainant for a declaration of that duty.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsCross-ComplaintsTortsProcedureSettlementsMultipartiesIndemnityTortsProducts LiabilityStrict LiabilityTortsStrict LiabilityGeneral Overview

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40-460 California Forms of Pleading and Practice--Annotated §§ 460.125-460.139

[Reserved]

§§ 460.125[Reserved]

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PART V. FORMS
A. Complaints

40-460 California Forms of Pleading and Practice--Annotated § 460.140

§ 460.140 Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12(a); Cal. Rules of Ct., Rule 1.45(a)]--Complaint for Damages [Civ. Code § 3333] for Personal Injury, Property Damage, Wrongful Death With Products Liability and Exemplary Damages Attachments [Cal. Judicial Council PLD-PI-100, PLD-PI-001(5), PLD-PI-001(6)]

[1] FORM Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12(a); Cal. Rules of Ct., Rule 1.45(a)]--Complaint for Damages [Civ. Code § 3333] for Personal Injury, Property Damage, Wrongful Death With Products Liability and Exemplary Damages Attachments [Cal. Judicial Council PLD-PI-100, PLD-PI-001(5), PLD-PI-001(6)]

Click here to view image.

[2] Use of Form

This form is a complaint, consisting of the Judicial Council approved general complaint form, for use in any action based on personal injury, property damage, or wrongful death including the products liability and exemplary damages attachments [Cal. Judicial Council Forms PLD-PI-100, PLD-PI-001(5), PLD-PI-001(6)]. Use of these forms is optional [*see Code Civ. Proc. § 425.12*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. For general information relating to the use of Judicial Council complaint forms, see Ch. 123, *Complaints and Cross Complaints* .

[3] Allegations

[a] Complaint Form

[i] General Information

General information relating to filling out the Judicial Council form of complaint for personal injury, property damage, and wrongful death is set out in the comments to that form in Ch. 380, *Negligence* . Information particularly applicable to filling out the complaint form in products liability actions is set out below.

For general information for filling out this complaint in a wrongful death action, see the comments to the complaint form in Ch. 181, *Death and Survival Actions* . For further discussion of filling in the exemplary damages attachment, see the comments to that attachment in Ch. 177, *Damages*.

[ii] Heading

The heading is located in the box titled "COMPLAINT," just above **Paragraph 1**. on page 1 of the general complaint form. Because the complaint is not one for a motor vehicle action, the box labeled "OTHER" must be checked and "Products Liability" specified. Although a products liability action may involve an automobile as the allegedly defective product, as in the sample form presented here, it is not a motor vehicle action as provided for in the Judicial Council motor vehicle attachment. A motor vehicle action is brought against the party or parties to an automobile accident, whereas a products liability action is brought against the party or parties involved in producing or marketing an allegedly defective automobile or other defective product. Each box corresponding to a type of damages that is being sought must also be checked.

If the complaint is an amendment, the "AMENDED" box should be checked, and the original case number should be entered.

In the "Jurisdiction" section of the heading, the appropriate box must be checked to show that the case is either a limited or unlimited civil case. If it is a limited civil case, the appropriate box must be checked to show whether or not the amount in controversy exceeds $10,000 [*see Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111.(9)*]. Also, if a case is reclassified by the filing of an amended complaint [*see Code Civ. Proc. § 403.020*], the "ACTION IS RECLASSIFIED" box must be checked and the reclassification described by checking one of the boxes below that line.

[iii] Number of Pages

The total number of pages in the complaint should be indicated in **Paragraph 2**. Each products liability complaint will have a minimum of four pages: three pages constituting the general complaint form and one or more pages as attachments, since at least one attachment alleging a cause of action must be included, and additional pages would be included as exhibits, if appropriate. In a products liability action, the Products Liability Attachment should be used, and, depending on the facts to be alleged, other attachments, such as the Exemplary Damages Attachment may be needed. In addition, counsel might prepare other attachments as continuations of allegations on the complaint form. On the Products Liability Attachment, for example, alleging a theory of recovery that is not otherwise provided on the form may be accomplished by a separate attachment prepared by counsel.

[iv] Damages

It is recommended that the words "and/or will suffer" be added after the material following **11.**, to include all of plaintiff's damages. If there is more than one plaintiff, it is recommended that the name(s) of the plaintiff(s) who suffered a particular type of damage be typed to the right of that checked damage item. For instance, if only plaintiff Jones suffered property damage, counsel should check the box for this type of damage and add "(Plaintiff Jones)" following the words "property damage." However, counsel may wish to avoid unnecessarily narrowing the damages sought at the pleading stage of the action. If all damages checked apply to all plaintiffs, the wording following **11.** may be modified. For instance, in an action with two plaintiffs, counsel might insert "Plaintiffs Smith and Jones have suffered and/or will suffer."

Damages that may be recoverable in a products liability action include each type of damages represented by the boxes in **Paragraph 11.** [*see Civ. Code § 3333*]. To allege a type of damage not provided for in the form, the box labeled "other damage" should be checked. If the "other damage" box is checked the appropriate specification must be made in the corresponding space, particularly in the case of special damages, which must bespecifically set forth in a complaint [*see Shook v. Pearson (1950) 99 Cal. App. 2d 348, 351, 221 P.2d 757]* .

For a discussion relating to pleading general and special damages, see Ch. 177, *Damages* .

[v] Prayer

If plaintiff is seeking compensatory damages for personal injury or wrongful death in superior court, the first boxes in **Paragraph 14(a).** and **Paragraph 14(b).** should be checked [*see Code Civ. Proc. § 425.10(b)*; Comments to Judicial Council form of complaint in Ch. 380, *Negligence*]. If the plaintiff is seeking punitive damages, the second box in **Paragraph 14(a).** should also be checked. The words "Exemplary Damages (see Exemplary Damages attachment, p. _____)" should be added to **Paragraph 15.** For a discussion of filling in the prayer if property damages are sought, see the Comments following the Judicial Council form of complaint in Ch. 380, *Negligence*.

[b] Products Liability Attachment to Complaint Form

[i] Plaintiff's Name

The attachment states "Use a separate cause of action form for each cause of action." If there is more than one plaintiff in the action, each one has a separate cause of action. If this direction is strictly adhered to, a separate products liability attachment for each plaintiff would have to be attached to the complaint. It is not clear if this is what is intended by the direction at the top of the attachment, since the complaint form while referring to "plaintiff" (singular) in the caption, seems intended for use by more than one plaintiff due to the wording of **Paragraph 2.** of the General Complaint Form.

[ii] Date of Injury and Product Causing Injury (Paragraph Prod.L.-1.)

In filling in the date on which the injury occurred, counsel should review the applicable statute of limitations. The statute of limitations for personal injury or death in a products liability action is two years [*Code Civ. Proc. § 335.1* [Added Stats. 2002, ch. 48, § 2 (SB 688)]; *Becker v. Volkswagen of Am., Inc. (1975) 52 Cal. App. 3d 794, 802, 125 Cal. Rptr. 326* ; *G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 25, 122 Cal. Rptr. 218]* . Former *Code Civ. Proc. § 340(3)* provided for a one-year period. Personal injury and death actions based on exposure to asbestos are governed by *Code Civ. Proc. § 340.2*, which requires the actions to be brought the later of 1) one year after the plaintiff first suffered disability; or 2) one year after the plaintiff knew or should have known that the disability was caused or contributed to by asbestos exposure [*Hamilton v. Asbestos Corp. (2000) 22 Cal. 4th 1127, 1138, 95 Cal. Rptr. 2d 701, 998 P.2d 403, 409]* . The statute of limitations for injury to real or personal property is three years [*Code Civ. Proc. § 338(b), (c)*].

When the victim of a products liability action has been blamelessly ignorant of an injury, the discovery rule postpones the accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action [*Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 397, 87 Cal. Rptr. 2d 453, 981 P.2d 79]* . A reason to discover the cause of action exists when the plaintiff has reason to at least suspect a factual basis for its elements [*Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 397, 87 Cal. Rptr. 2d 453, 981 P.2d 79]* . A reason to suspect a factual basis for the elements of a cause of action exists when the plaintiff has notice or information of circumstances to put a reasonable person on inquiry [*Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1110, 245 Cal. Rptr. 658, 751 P.2d 923]* .

Under the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable

investigation at that time would not have revealed a factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action will be tolled until such time as a reasonable investigation would have revealed its factual basis [*Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal. 4th 797, 803, 27 Cal. Rptr. 3d 661, 110 P.3d 914* ; *Nelson v. Indevus Pharms., Inc. (2006) 142 Cal. App. 4th 1202, 1211, 48 Cal. Rptr. 3d 668.]* . To rely on the discovery rule, a plaintiff must specifically plead facts to show both (1) the time and manner of discovery, and (2) the inability to have made earlier discovery despite reasonable diligence. [*Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal. 4th 797, 808, 27 Cal. Rptr. 3d 661, 110 P.3d 914]* .

In the form, this information could be filled in the space following **Prod.L.-1.**, just under the date of injury. In the alternative, counsel could prepare an attachment alleging the information, and cross refer to the attachment after filling in the date of injury. For discussion relating to statute of limitations as an affirmative defense, see *§ 460.181*. For detailed discussion of the discovery rule, see *§ 460.31[2][b][ii]*.

In 2003, the California legislature enacted a statutory discovery rule for actions based on injury, illness, or death resulting from exposure to hazardous material or toxic substances. Under the statute, personal injury actions must be commenced no later than two years after the date of injury, or two years after the plaintiff became or reasonably should have been aware of the injury, the physical cause of the injury, and sufficient facts to put a reasonable person on inquiry notice that the injury was caused by the wrongful act of another, whichever occurs later [*Code Civ. Proc. § 340.8(a)*]. Wrongful death actions must be commenced no later than either two years after the date of death, or two years after the date that the plaintiff was or reasonably should have become aware of the physical cause of death and sufficient facts to put a reasonable person on inquiry notice that the death was caused by the wrongful act of another, whichever occurs later [*Code Civ. Proc. § 340.8(b)*]. *Code Civ. Proc. 340.8* is not limited to environmental hazards, but also applies to cases alleging personal injury caused by harmful chemicals [*Nelson v. Indevus Pharms., Inc. (2006) 142 Cal. App. 4th 1202, 1209, 48 Cal. Rptr. 3d 668]* .

Specify the defective product in the space provided. It appears that counsel is not required to describe the product's defect.

[iii] Defect and Use of Product (Paragraph Prod.L.-2.)

Even in a strict products liability case, a plaintiff must establish that the product was used in an intended or reasonably foreseeable manner [*Garcia v. Joseph Vince Co. (1978) 84 Cal. App. 3d 868, 877-879, 148 Cal. Rptr. 843* ; *see also Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 733, 144 Cal. Rptr. 380, 575 P.2d 1162]* . Therefore, either or both of the boxes in **Paragraph Prod.L.-2.** should be checked, depending on the facts of the case.

[iv] Status of Plaintiff (Paragraph Prod.L.-3.)

One or more of the boxes in **Paragraph Prod.L.-3.** will be checked, according to the facts of the case. A plaintiff may be the purchaser and user of a product, for example. If a plaintiff is neither a purchaser, user, nor bystander, the "other" box should be checked, and the appropriate information specified in the space provided. For example, a plaintiff mightbe the creditor of the purchaser, in a case in which the plaintiff's security interest in the product was impaired by the defendant's negligence [*U.S. Financial v. Sullivan (1974) 37 Cal. App. 3d 5, 12-14, 112 Cal. Rptr. 18]* .

[v] Strict Liability (Paragraph Prod.L.-4.)

Paragraph Prod.L.-4. provides boxes for alleging strict products liability and spaces for identifying each defendant alleged to be so liable. **Prod.L.-4.a.** refers to the manufacturer or assembler of the product. It does not refer to the designer of the whole product, however, so that checking the box for **Prod.L.-4.a.** will only allege a manufacturing defect. If counsel wishes to allege strict liability against the product manufacturer for a design defect, he or she would check box **Prod.L.-7.**, as has been done on the sample form and add the appropriate allegations [*see §*

460.140[3][b][viii]; *see also § 460.11[9]*].

Paragraph Prod.L.-4.b. refers to both the designer and manufacturer of component parts of the product. Therefore, with regard to those defendants, counsel may allege both a design defect and a manufacturing defect, by checking the box following **Prod.L.-4.b.**

In the case of a manufacturing defect, in addition to the manufacturer of the product and the supplier of component parts, the retailer of the product may be strictly liable [*Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 263, 37 Cal. Rptr. 896, 391 P.2d 168]* . In such a case the box following **Prod.L.-4.c.** should be checked, and the name of the retailer should be indicated in the space provided.

[vi] Negligence (Paragraph Prod.L.-5.)

Prod.L.-5. provides for allegations of negligence by defendant(s). Negligence and strict products liability may both be pleaded, and the plaintiff is not required to elect one theory or another [*Jiminez v. Sears, Roebuck & Co. (1971) 4 Cal. 3d 379, 387, 93 Cal. Rptr. 769, 482 P.2d 681]* . Note that in the sample form provided here, negligence and strict liability for design and manufacturing defects are both pleaded.

[vii] Breach of Warranty (Paragraph Prod.L.-6.)

Breach of warranty by defendant(s) may be pleaded in addition to other theories of recovery [*see, e.g.,* *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 108, 120 Cal. Rptr. 681, 534 P.2d 377]* . Liability under a breach of express or implied warranty theory permits the recovery of economic or commercial losses which would not be recoverable otherwise [*Com. Code §§ 2714, 2715*; *see* *Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 18, 45 Cal. Rptr. 17, 403 P.2d 145]* .

[viii] Other Liability (Paragraph Prod.L.-7.)

If other theories of liability are to be alleged, for example agency and employment, the box following **Prod.L.-7.** and one of the two boxes under it should be checked. The sample form presented here contains an allegation of strict liability for a defectively designed product as an example of a theory of liability that would be alleged in **Paragraph Prod.L.-7.** Such an allegation would not be made under **Prod.L.-4.** because a manufacturing defect, as provided by **Prod.L.-4.a.**, is separate and distinct from a design defect [*see* *Barker v. Lull Engineering Co. (1978) 20 Cal. 3d 413, 429-430, 143 Cal. Rptr. 225, 573 P.2d 443]* . Depending on the amount of space required, the information alleged in **Prod.L.-7.** may be filled in at the bottom of the page, after checking the right-hand box, or may be presented in an attachment prepared by counsel, after checking the left-hand box.

[c] Exemplary Damages (Attachment)

[i] Malice, Fraud, or Oppression (Paragraph EX-1.)

Civ. Code § 3294(a) requires that the defendant be proven guilty by clear and convincing evidence of either oppression, fraud, or malice, in order for the plaintiff to obtain an award of punitive or exemplary damages [*Romo v. Ford Motor Co. (2003) 113 Cal. App. 4th 738, 749, 6 Cal. Rptr. 3d 793]* . Therefore, only one of the three boxes in **Paragraph EX-1.** is required to be checked, although more than one may be checked if appropriate. For general information relating to filling out this form, see the Comments to this form of attachment in Ch. 177, *Damages*.

[ii] Facts Supporting Claim (Paragraph EX-2.)

The facts alleged in the sample form presented here are based on the facts of *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 174 Cal. Rptr. 348* . To allege malice, the complaint must allege either conduct by the defendant that was intended to injure the plaintiff, or despicable conduct carried on by the defendant with willful and conscious

disregard of the rights and safety of others [*Civ. Code § 3294(c)(1)*; *Romo v. Ford Motor Co. (2003) 113 Cal. App. 4th 738, 749, 6 Cal. Rptr. 3d 793* ; *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 808, 174 Cal. Rptr. 348* (decided before 1987 amendment to *Civ. Code § 3294*)]. The allegations required to show fraud or oppression are set forth in *Civ. Code § 3294(c)(2), (3)*. If more space is necessary to fill out **Paragraph EX-2.**, counsel should remember to cross refer to the attachment in the space provided, to label the attachment EX-2. Attachment, and to follow the form requirements of *Cal. Rules of Ct., Rule 2.100 et seq.*

For a discussion relating to punitive damages generally, and for further comments on the Judicial Council Exemplary Damages attachment, see Ch. 177, *Damages* . For developments in appellate review of punitive damages awards, see *§ 460.33[2]*.

[iii] Amount of Damages (Paragraph EX-3.)

Box **a.** in **Paragraph EX-3.** should be checked if punitive damages are claimed. If the action is brought in superior court, the phrase "and *Civil Code § 3295(e)*" should be added at the end of the line, as illustrated, unless the action is a limited civil case. If the action is a limited civil case brought in superior or municipal court, the reference to *Code of Civil Procedure section 425.10* should be lined out and "*Civil Code § 3295(e)*" should be added at the end of the line.

Box **b.** should never be checked. The Judicial Council has not revised this form since the 1987 enactment of *Civ. Code § 3295(e)* prohibited all claims for exemplary or punitive damages from stating an amount or amounts.

[4] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to Fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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Volume 40: Products Liability thru Public Entities and Officers-Chs. 460-469
Chapter 460 PRODUCTS LIABILITY
PART V. FORMS
A. Complaints

40-460 California Forms of Pleading and Practice--Annotated § 460.141

§ 460.141 Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--For Injury to Person and Property--By Purchaser--User Against Manufacturer

[1] FORM Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--For Injury to Person and Property--By Purchaser--User Against Manufacturer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
	)	(Strict Liability in Tort)
_____ [*name*],	)	[Amount demanded _____ (exceeds
Defendant.	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, a resident of _____[*specify county and state; or allege capacity of plaintiff if a legal entity or suing in a representative capacity*].

2. Defendant is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of _____ [California *or other*] [and qualified to do business in California] with its principal place of business in this state situated in the [City and] County of _____.

3. Defendant is, and at all times herein mentioned was, engaged in the business of _____ [*specify, e.g.*, designing, manufacturing, and assembling] _____[*name or description of products*] for sale to and use by members of the general public, and as a part of his/her/its business defendant _____ [*specify, e.g.*, designed, manufactured, and assembled] the specific _____[*defective product*] hereinafter referred to.

[4. _____ (*Name of retailer*) is, and at all times herein mentioned was, engaged in the business of selling at retail to members of the general public in _____ (*specify city or county and state*) the hereinabove described _____ (*name or description of products*) _____ (*specify, e.g.*, manufactured, designed, and assembled) by defendant.]

[5. Defendant intended that the _____ (*name or description of products*) _____ (*specify, e.g.*, manufactured, designed, and assembled) by him/her/it be used _____ (*specify intended use*).]

6. At all times herein mentioned, defendant knew [and intended] that his/her/its _____[*name or description of products*] would bepurchased by members of the public and used by the purchasers [and others] without inspection for defects.

7. On or about _____[*date*], plaintiff purchased the _____[*defective product*] referred to in Paragraph 3 above and hereinafter referred to as "the _____" [*generic term, e.g.*, car *or trademark, e.g.*, Go-Go Bat] from _____ [defendant *or name of retailer*] at his/her/its place of business hereinabove alleged.

8. The _____[*defective product*] was, at the time plaintiff purchased it as herein alleged, defective and unsafe for its intended purpose[s] in that _____[*specify defect in manufacture or design*].

9. On or about _____[*date*], plaintiff was using the _____[*defective product*] at _____[*location*] for the purpose of _____[*specify*]. During the course of this use and as a proximate result of the defect hereinabove described, _____ [*specify accident, e.g.*, the right front wheel of the car fell off causing the car to go out of control and crash].

10. As a proximate result of the defect and _____ [*specify accident, e.g.*, crash] as herein alleged, plaintiff sustained _____ [*describe personal injuries, e.g.*, serious and permanent injuries to his/her health, strength, and activity, severe shock to his/her nervous system, broken bones, and multiple contusions and abrasions on and about his/her head and body and was caused to suffer extreme physical and mental pain], all to his/her general damage [*if action is filed in municipal court, add* in the sum of $_____].

11. As a further proximate result of the defect, _____ [*specify accident, e.g.*, crash], and injuries sustained by plaintiff as herein alleged, plaintiff was required to and did employ physicians, surgeons, and other medical personnel and incurred expenses therefor, and incurred additional medical expense for hospital bills and other incidental medical expenses, all to his/her further damage [*if action is filed in municipal court, add* in the sum of $_____ *or* in an amount that has not yet been fully ascertained, and plaintiff will seek leave to amend this complaint to insert the true amount thereof when ascertained)]. [Plaintiff is informed and believes and thereon alleges that as a proximate result of the defect, _____ (*specify accident, e.g.*, crash), and injuries sustained by plaintiff, as herein alleged, plaintiff will be required to incur additional medical expense all to his/her further damage (*if action is filed in municipal court, add* in an amount not yet ascertained. Plaintiff will seek leave of court to amend this complaint to insert the true amount thereof when ascertained).]

12. As a further proximate result of the defect, _____ [*specify accident, e.g.*, crash], and injuries sustained by plaintiff as herein alleged, plaintiff was prevented from attending to his/her usual _____

[occupation *or* profession] as a _____[*specify*] from _____[*date*] to _____ [the present *or insert date*], and thereby lost earnings all to his/her further damage [*if action is filed in municipal court, add* in the sum of $_____]. Plaintiff is informed and believes and thereon alleges that he/she will thereby be further prevented from attending to his/her usual _____ [occupation *or* profession] in the future and will thereby sustain future loss of earnings all to his/her further damage [*if action is filed in municipal court, add* in the sum of $_____ *or* in an amount not yet ascertained. Plaintiff will seek leave of court to amend this complaint to insert the true amount thereof when ascertained].

13. As a further proximate result of the defect and _____ [*specify accident, e.g.*, crash] herein alleged, the _____[*defective product*] was _____ [damaged *or* destroyed] to plaintiff's further damage in the sum of $_____.

14. _____[*Set forth in separately numbered paragraphs injury, if any, to other of plaintiff's personal property, such as clothing, jewelry, or other personal effects, and the amount of plaintiff's resulting damage; if plaintiff sustained injury to real property, so allege in a separately numbered paragraph and specify the amount of that damage*].

[15. As a further proximate result of the defect and the _____ (*specify accident, e.g.*, crash), _____ (*name of third person*) was injured while the plaintiff was _____ (using *or* operating) the defective _____ (*product*).]

[16. As a further proximate of the defect and the _____ (*specify accident, e.g.*, crash), plaintiff suffered severe emotional distress (and physical injury resulting therefrom) when he/she saw _____ (*name of third person injured in accident*) severely injured by the defective _____ (*product*) while the plaintiff was _____ (using *or* operating) the defective _____ (*product*).]

[17. Plaintiff is informed and believes and thereon alleges that defendant knew that the _____ (*name or description of products*) _____ (*specify, e.g.*, manufactured, designed, and assembled) by him/her/it were defective and dangerous in the manner alleged in Paragraph 8 above; that defendant knew that because of the defect(s), the _____ (*name or description of products*) could not safely be used for the purpose(s) for which they were intended; that defendant, knowing that the _____ (*name or description of products*) were defective and dangerous, despicable and in willful and conscious disregard of the safety of the public placed them on the market (without warning customers or the unknowing public of the defect), and knew when he/she/it did so that they would be sold to and used by the general public without inspection for defects; that defendant, by placing the defective _____ (*name or description of products*) on the market, impliedly represented that they were safe for the purpose for which they were intended; _____ (*specify any additional representations express or implied*); and that defendant, by placing them on the market and otherwise representing them as able to perform safely, intended that customers and the unknowing public should rely on his/her/its representations. Plaintiff, in purchasing and using the defective _____ (*nameor description of product*) as herein alleged, did rely on defendant's above representations, all to his/her damage as hereinabove alleged. In doing the things aforementioned, defendant was guilty of malice, oppression, and fraud, and plaintiff is, therefore, entitled to recover exemplary or punitive damages.]

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages [in the sum of $_____];

2. For special damages for medical and incidental expenses [in the sum of $_____ *or* according to proof];

3. For loss of earnings [in the sum of $_____ *or* according to proof];

4. For damages to personal property in the sum of $_____;

[5. For damages to real property in the sum of $_____;]

[6. For punitive damages;]

7. For costs of suit herein incurred; and

8. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____[*name*], declare:

I am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*].

_____ [*signature*]

[2] Use of Form

This form is a complaint for use by a purchaser-user of a product against the product's manufacturer to recover damages based on strict liability in tort for injuries sustained as a result of a defect in the product. With appropriate modifications, it may also be used by a nonpurchaser-user or by a nonuser of the product injured as a proximate result of the defect.

The retailer also is strictly liable in tort for injuries caused by the defect [*see, e.g., Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 263, 37 Cal. Rptr. 896* ; *Ontiveros v. 24 Hour Fitness USA, Inc. (2008) 169 Cal. App. 4th 424, 431, 86 Cal. Rptr. 3d 767* ; *Arriaga v. Citicapital Commercial Corp. (2008) 167 Cal. App. 4th 1527, 1534, 85 Cal. Rptr. 3d 143* ; *Midgley v. S.S. Kresge Co. (1976) 55 Cal. App. 3d 67, 71, 127 Cal. Rptr. 217* ; *Read v. Safeway Stores, Inc. (1968) 264 Cal. App. 2d 404, 407, 70 Cal. Rptr. 454* ; *see also Livingston v. Marie Callenders, Inc. (1999) 72 Cal. App. 4th 830, 839, 85 Cal. Rptr. 2d 528* (restaurant)] and would normally be joined as a defendant with the manufacturer or sued in lieu of the manufacturer [*see § 460.142*]. This complaint with appropriate modifications may, of course, be used in such a case. The retailer would not be sued where plaintiff has executed a release or covenant not to sue in exchange for the retailer's settlement of plaintiff's claim against him, her, or it [*see Code Civ. Proc. § 877*; *see also Thomas v. General Motors Corp. (1970) 13 Cal. App. 3d 81, 85-86, 91 Cal. Rptr. 301* (involving settlement after

judgment)]. Another situation might be where the defective product was sold and delivered to plaintiff outside California by a retailer who has insufficient minimal contacts with this state to allow the court's assumption of jurisdiction over him, her, or it [*see Code Civ. Proc. § 410.10*; *see generally* Ch. 323, *Jurisdiction: Personal* , and Ch. 518, *Service of Summons and Papers*].

For a discussion of alternative theories of recovery, see *§§ 460.32* and *460.33*.

[3] Allegations

[a] General Allegations

Paragraph 1 of the complaint alleges plaintiff's capacity (an individual) and residence. This allegation is not, however, required and is normally omitted unless plaintiff is a legal entity, is doing business under a fictitious business name, or is suing in a representative capacity, in which case an appropriate allegation of capacity will be substituted for it. For forms of allegations where the party is a legal entity, see Paragraph 2 of the complaint and the *form in § 460.142*; for a form of allegation where the plaintiff is doing business under a fictitious business name alleging compliance with the fictitious business name statutes, see Paragraph 1 of the *form in § 460.201*. For forms of allegations where the plaintiff is suing in a representative capacity, see generally Ch. 20, *Allegations Commonly Used* , and specific chapters in this publication dealing with such representatives.

Paragraph 2 of the complaint alleges defendant's capacity and principal place of business. The allegation as to the county of defendant's principal place of business lays venue, although venue may be laid based on other factors [*see Code Civ. Proc. § 395.5* and Ch. 571, *Venue*]. For example, the action may be brought in the county where the accident occurred as alleged in Paragraph 9. If defendant is other than a corporation, the allegation will be revised accordingly [*see § 460.142* and Ch. 20, *Allegations Commonly Used ; see also Code Civ. Proc. § 395* and Ch. 571, *Venue*].

Paragraph 3 alleges that defendant is the manufacturer of products which it places into the stream of commerce and that it manufactured the specific product or article which is the subject of the action. It is the first of three paragraphs alleging defendant's duty. In most cases, plaintiff must establish that defendant actually manufactured the defective product [*see Cadlo v. Owens-Ill., Inc. (2004) 125 Cal. App. 4th 513, 516, 23 Cal. Rptr. 3d 1 , modified, 2004 Cal. App. LEXIS 2260* ; *McCreery v. Eli Lilly & Co. (1978) 87 Cal. App. 3d 77, 83, 150 Cal. Rptr. 730]* . However, there are situations in which the burden of proof will be shifted to the defendant, requiring the defendant to prove that it did not manufacture the defective product [*Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 610-613, 163 Cal. Rptr. 132, 607 P.2d 924]* . For an alternative allegation for use when the manufacturer is not known, see *§ 460.169*.

Paragraph 4 will be included without the outside brackets only where the product was purchased from a retailer other than the manufacturer.

Paragraph 5 will be included without the outside brackets only where the intended use of the product is not obvious or where the pleader wishes to focus attention on the particular use to which the product was being put when the accident occurred.

Paragraph 6 is the second of the three duty allegations, and Paragraph 7 is the third. These three paragraphs (3, 6, 7) establish a duty on the part of defendant not to sell a defective product, or cause it to be sold, to plaintiff. Paragraph 6 might be omitted where, from the very nature of the product, it was obvious that the product was not one which would normally be inspected for defects by a purchaser [on judicial notice, *see Evid. Code §§ 451(f), 452(g), (h)*].

Paragraph 8 alleges breach of duty, that is, that the product or article was defective at the time plaintiff purchased it. No case has been found that holds the defect may be pleaded generally, that is, merely by alleging that the product was defective and unsafe for its intended purposes, as is allowed in pleading negligence, but an examination of complaints

filed in northern California courts shows that this, nevertheless, is done [*see also* the discussion in *§ 460.32*]. To avoid a special demurrer for uncertainty [*Code Civ. Proc. § 430.10(f)*], it would seem that the safer practice would be to allege the manner in which the product was defective, although the specificity of such allegation must depend on the evidence available. At the same time, counsel does not want to be so specific in this allegation as to prevent proof of another defect if evidence is later discovered which might establish it. If the complaint is specific as to the defect, however, and evidence of another defect is admitted at the trial with *Code Civ. Proc. § 469*]. But it is more likely, when such evidence is sought to be introduced, that defendant will object to its introduction on the ground that it is not in issue, that is, that such evidence is irrelevant to the issues [*see Evid. Code §§ 210, 350*].

Paragraph 9 alleges proximate cause which may be alleged generally as is done [*see, e.g., Rannard v. Lockheed Aircraft Corp. (1945) 26 Cal. 2d 149, 156, 157 P.2d 1* , involving negligence].

Paragraphs 10-14 allege injury or detriment and damages.

Paragraphs 15 and 16 will be used without the outside brackets when plaintiff suffered emotional distress because the product that he or she was using or operating injured a third person [*see Kately v. Wilkinson (1983) 148 Cal. App. 3d 576, 587-588, 195 Cal. Rptr. 902]* .

Paragraph 17 will be used without the outside brackets where defendant in placing the defective products on the market was guilty of fraud, oppression, or malice, and exemplary or punitive damages are sought. For an alternative form of allegation and discussion, see *§ 460.168*.

[b] Alleging Amount of Damages

In any civil action brought to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages must be alleged [*Code Civ. Proc. § 425.10(a)(2)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment. The defendant may at any time request a statement setting forth the nature and amount of damages being sought [*Code Civ. Proc. § 425.11(b)*].

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

The complaint in this form sets forth two causes of action, although they are not (and need not be) separately stated. One is for injuries to person in which action the amount sought will be included only if the complaint is to be filed in a municipal court. The second cause of action seeks recovery of damages for injury to personal property. The amount sought on this cause must be stated in the complaint regardless of the court in which the action is commenced. This is also true if the complaint should seek to recover damages for injury to real property in lieu of or in addition to the other recoveries sought. An action to recover damages for injury to real property would be a separate cause of action but it need not be separately stated.

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case in the superior court [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Copies to Prepare

- Original for filing in court clerk's office.
- One conformed endorsed-filed copy for the defendant if defendant is to be served in person pursuant to *Code Civ. Proc. § 415.10* or by mail pursuant to *Code Civ. Proc. § 415.30* or *415.40*, or two copies if defendant is to be served in the manner provided in *Code Civ. Proc. § 415.20*.
- One conformed endorsed-filed copy for client, if desired.
- One copy to be retained in office file until endorsed-filed copies are returned from court clerk.
- One endorsed-filed copy for office file.
- Additional copies as desired.

[6] Cross References

For discussion relating to the general requirements for a complaint, see *§§ 460.30 -460.34*

For alternative forms of captions, see Ch. 108, *Captions and Introductions*

For alternative allegations as to capacities of parties, and fictitiously named defendant allegations, see Ch. 20, *Allegations Commonly Used*

For alternative allegations as to damages, see Ch. 177, *Damages*

For alternative forms of verifications, see Ch. 572, *Verification*

For forms of complaints for use in negligence actions and actions for breach of warranty, see Ch. 380, *Negligence* , and Ch. 500, *Sales and Secured Transactions*

For forms of complaints alleging fraud and deceit, see Ch. 269, *Fraud and Deceit*

For memoranda of points and authorities in support of and in opposition to a general demurrer to a complaint for damages based on strict liability in tort, see California Points and Authorities, Ch. 190, *Products Liability*

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40-460 California Forms of Pleading and Practice--Annotated § 460.142

§ 460.142 Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--For Injury to Person and Property--By Purchaser-User Against Multiple Defendants (Manufacturer, Supplier of Component Parts, Retailer, and Fictitious Named Defendants)

[1] FORM Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--For Injury to Person and Property--By Purchaser-User Against Multiple Defendants (Manufacturer, Supplier of Component Parts, Retailer, and Fictitious Named Defendants)

[*Caption, introduction. See § 460.141[1].*]

1. Plaintiff is, and at all times herein mentioned was, a resident of _____[*specify county and state; or allege capacity of plaintiff if a legal entity or suing in a representative capacity*].

2. Defendant _____[*name of manufacturer*], hereinafter referred to as "defendant manufacturer," is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of _____ [California *or other*] [and qualified to do business in California] with its principal place of business in this state situated in the [City and] County of _____.

3. Defendant manufacturer is, and at all times herein mentioned was, engaged in the business of _____ [*specify, e.g.*, designing, manufacturing, and assembling] _____ [*name or description of products, e.g.*, _____ (*make*) automobiles] for sale to and use by members of the general public, and as a part of his/her/its business, defendant manufacturer [in _____ (*year*)] _____ [*specify, e.g.*, designed, manufactured, and assembled] a line of _____ [*specify, e.g.*, cars described as _____ (*make*) _____ (*model*), _____ (*size, e.g.*, four door sedans)] including the specific _____ [*defective product, e.g.*, _____ (*year and make*) _____ (*model*), _____ (*size, e.g.*, four door sedan) automobile] referred to in this complaint.

4. Defendant _____[*name of supplier of defective component part*], hereinafter referred to as "defendant supplier," is, and at all times herein mentioned was, _____ [*specify capacity, e.g.*, an individual doing business as a sole proprietor under the fictitious firm name and style of _____ (*specify*) in the (City and) County of _____, California].

5. Defendant supplier is, and at all times herein mentioned was, engaged in the business of _____ [*specify, e.g.*, designing, fabricating, manufacturing, and assembling] certain component parts, to wit, _____ [*describe, e.g.*, tires], and supplying them to defendant manufacturer, and as a part of his/her/its business defendant supplier _____ [*specify, e.g.*, designed, fabricated, manufactured, assembled,] and supplied to defendant manufacturer the specific _____ [*defective product, e.g.*, _____ (*size*) tires] referred to in this complaint.

6. Defendant _____[*name of retailer*], hereinafter referred to as "defendant retailer," is, and at all times herein mentioned was, a _____ [*specify capacity, e.g.*, partnership formed and existing under the laws of the State of California with its principal place of business in this state situated in the (City and) County of _____ and is sued herein in the name it has assumed and by which it is known)].

7. Defendant retailer is, and at all times herein mentioned was, engaged in the business of [_____ (assembling *or* inspecting *or other*) and] selling at retail to members of the general public at his/her/its principal place of business in the [City and] County of _____, California, the _____ [*specify products, e.g.*, _____ (*make*) _____ (*model*), _____ (*size, e.g.*, four door sedan) automobiles] described above, including the specific _____ [*defective product, e.g.*, _____ (*year and make*), _____ (*model*), _____ (*size, e.g.*, four door sedan) automobile [hereinafter referred to which was _____ [*specify, e.g.*, designed

[8. Defendants _____ (*names*) are, and at all times herein mentioned were, partners and members of defendant retailer and are sued herein individually and are joined as parties defendant in this action against defendant retailer.]

[9. Plaintiff is ignorant of the true names of defendants sued herein as DOES 1-_____ inclusive, and, therefore, sues these defendants by such fictitious names. Plaintiff will amend this complaint to insert their true names when ascertained. Each of these defendants is, and at all times herein mentioned was, a partner and member of defendant retailer and is sued herein individually and is joined as a party defendant in this action against defendant retailer.]

10. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and, therefore, sues these defendants by such fictitious names. Plaintiff will amend this complaint to insert their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants is, and at all times herein mentioned was, in the business of manufacturing, fabricating, assembling, inspecting, and selling the _____ (*name or description of products, e.g.*, _____ (*make*), _____ (*model*) automobiles), or parts of them, manufactured by defendant manufacturer, that each such defendant is responsible in some manner for placing the particular _____ (*defective product, e.g.*, _____ (*year and make*), _____ (*model*), _____ (*size, e.g.*, four door sedan) automobile) hereinafter referred to, or causing it to be placed, into the stream of commerce, and that plaintiff's injuries as hereinafter alleged were proximately caused by the acts of such defendants, and each of them.]

11. Defendant manufacturer intended that the _____ [*name or description of products, e.g.*, _____ (*year and make*), _____ (*model*), _____ (*size, e.g.*, four door sedan) automobiles], including the specific _____ [*defective product, e.g.*, _____ (

year and make), _____ (*model*), _____ (*size, e.g.*, four door sedan) automobile] hereinafter referred to, _____ [*specify, e.g.*, designed, manufactured, and assembled] by him/her/it as hereinabove alleged were to be used for the purpose(s) of _____ [*specify, e.g.*, carrying a maximum load of eight persons and a total of 2000 pounds] and that defendant supplier knew and intended that the _____ [*component parts, e.g.*, _____ (*size*) tires] _____ [*specify, e.g.*, designed, fabricated, manufactured, assembled,] and supplied by him/her/it to defendant manufacturer were to be installed and incorporated by the latter into his/her/its _____ [*specify, e.g.*, _____ (*year and make*), _____ (*model*), _____ (*size, e.g.*, four door sedan) automobiles].

12. Defendants and each of them at all times herein mentioned knew [and intended] that the _____ [*name or description of products, e.g.*, _____ (*name*) automobiles] _____ (*specify, e.g.*, designed, manufactured, and assembled] by defendant manufacturer would be purchased from defendant retailer and used by the purchaser or user without inspection for defects therein or in any of its component parts.

13. On or about _____[*date*], plaintiff purchased the _____ [*specify, e.g.*, _____ (*year and make*), _____ (*model*), _____ (*size, e.g.*, four-door sedan) automobile] referred to in Paragraphs 3 and 7, above, and hereinafter referred to as "the _____" [*specify, e.g.*, car] from defendant retailer at his/her/its principal place of business in the [City and] County of _____, California. At that time and at all other subsequent times herein mentioned, the _____ [*specify, e.g.*, car] was _____ [*specify, e.g.*, equipped with] the _____ [*component part(s), e.g.*, _____ (*size*) tires], hereinafter referred to as "the _____" [*specify, e.g.*, tires], which had been _____ [*specify, e.g.*, designed, fabricated, manufactured, and assembled] by defendant supplier and supplied by him/her/it to defendant manufacturer as alleged in Paragraphs 5 and 11, above.

14. The _____ [*specify*, e.g., car] was, at the time plaintiff purchased it as herein alleged, defective and unsafe for its intended purpose(s) in that _____ [*specify, e.g.*, the tires were too small for their intended use on automobiles of the year, make, model, and size purchased by plaintiff, as hereinabove alleged, which resulted in their continually being overloaded by the normal and intended use of the car].

15. On or about _____[*date*], plaintiff was _____ [*specify, e.g.*, driving] the _____ [*specify, e.g.*, car] at _____[*location*] for the purpose of _____ [*specify, e.g.*, transporting himself and three coworkers to their place of employment at _____ (*address*)]. During the course of this use and as a proximate result of the defect hereinabove described, the _____ [*describe accident, e.g.*, left front tire blew out causing the car to go out of control and crash].

[16-19. *Injuries and damages allegations. See Paragraphs 10-14 in § 460.141[1].*]

[20. *Punitive damages allegation, if appropriate. See Paragraph 15 in § 460.141[1].*]

[*Prayer. See § 460.141[1].*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 460.141[1].*]

[2] Use of Form

This form is a complaint for use by a purchaser-user of a product against the product's manufacturer, the supplier of the defective part, the retailer, and DOES to recover damages based on strict liability in tort for injuries sustained as a result of a defect in the product. With appropriate modifications, the complaint may also be used by a nonpurchaser-user or nonuser of the product injured as a proximate result of the defect.

For an analysis of the complaint, the number of copies to prepare, and a discussion of the applicable statute of limitations, see *§ 460.141*. For a discussion of alternative theories of recovery, see *§§ 460.32, 460.33*.

[3] Cross Action by Defendants

In the fact situation illustrated in this form, one or more of the defendants may serve and file a cross complaint on one or more of his, her, or its codefendants for a declaration as to the defendant-cross complainant's right, if any, to be indemnified by the cross defendant(s) for any judgment that may be recovered in the action by the plaintiff against that defendant-cross complainant or against him, her, or it by another defendant-cross complainant in the action [*see Code Civ. Proc. §§ 86(a)(7), 428.70, 1060*; *see also § 460.201*].

For example, the defendant retailer might file a cross complaint against the defendant manufacturer of the product and the defendant supplier of the defective component part, or either of them, as well as against any wholesaler or distributor who sold the product to the retailer, for a declaration of his, her, or its right to be indemnified by the cross defendants for any judgment recovered in the action by the plaintiff against the defendant-cross complainant retailer. If named as a cross defendant in the retailer's cross complaint, the wholesaler or distributor might file a cross complaint against the defendant manufacturer and the defendant supplier of the defective component part, or either of them, for a declaration as to the right of the wholesaler or retailer to be indemnified by either the manufacturer or supplier or both of them for any judgment that might be recovered in the action by the plaintiff against the cross complaining wholesaler or distributor. The defendant manufacturer in turn might file a cross complaint against the defendant supplier of the defective component part for a declaration as to his, her, or its right to be indemnified by the defendant-cross defendant supplier for any judgment recovered in the action by the plaintiff against the defendant manufacturer and for any liability to the defendant-cross complainant retailer or the wholesaler or distributor, if any, which may be imposed on the defendant manufacturer by a judgment in favor of the retailer or the wholesaler or distributor on their cross complaints naming defendant manufacturer as a cross defendant. A cross complaint by the defendant supplier against any of the above-listed defendants would, of course, not be proper under the facts assumed, although the defendant supplier may be entitled to indemnity from some other person who caused the defect to exist and may file a cross complaint against such other person for a declaration as to the supplier's right to be indemnified. The court may order severance and separate trial of any of the actions alleged in these separate pleadings [*see Code Civ. Proc. § 1046(b)*].

[4] Cross References

For discussion relating to the general requirements for a complaint, see *§§ 460.30 -460.34* and *§ 460.141*

For forms of amendments to complaints substituting the correct name of a defendant for an incorrect name and defendant's true name for a fictitious name, *see* Ch. 21, *Amended and Supplemental Pleadings*

For forms of papers for use in securing joinder of an omitted party, see Ch. 395, *Parties*

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40-460 California Forms of Pleading and Practice--Annotated § 460.143

§ 460.143 Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--For Injury to Person--By Lessee Against Lessor of Product

[1] FORM Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--For Injury to Person--By Lessee Against Lessor of Product

[*Caption, introduction. See § 460.141[1].*]

[1. Plaintiff is, and at all times herein mentioned was, _____ (*specify relationship of plaintiff user of defective product to lessee, e.g.*, employed in _____[*city*], _____ County, California as a _____[*classification*] by _____[*business name of lessee*], hereinafter referred to as "plaintiff's employer").]

2. Defendant is, and at all times herein mentioned was, a _____ [*specify capacity, e.g.*, sole proprietor doing business under the fictitious firm name and style of _____ (*specify*)] [with his/her/its principal place of business situated] in the [City and] County of _____, California, and engaged in the business of [manufacturing and] leasing _____ [*specify products, e.g.*, construction equipment *or* motor vehicles] to _____ [*specify e.g.*, building contractors *or* the public at large].

3. At all times herein mentioned defendant knew that his/her/its _____ [*specify, e.g.*, equipment *or* motor vehicles] would be leased by _____ [*specify, e.g.*, building contractors *or* members of the public] and used _____ [*specify, e.g.*, by them, their employees, and others] without inspection for defects.

4. On or about _____[*date*], _____ [plaintiff *or* plaintiff's employer *or other*] leased from defendant at his/her/its place of business hereinabove referred to a certain _____ [*specify product, e.g.*, ladder *or* _____ (*make, model, year, and size*) car, California license number _____], hereinafter referred to as "the _____" [*specify product, e.g.*, ladder *or* car],

which defendant knew and intended was to be used by _____ [plaintiff *or* the lessee's employees *or other*] to _____[*specify intended use*].

5. The _____ [*specify, e.g.*, ladder *or* car], at the time it was leased by defendant to _____ [plaintiff *or* plaintiff's employer *or other*] as herein alleged, was defective and unsafe for its intended purpose in that _____[*specify defect*].

6. On or about _____[*date*], plaintiff was using the _____ [*specify, e.g.*, ladder *or* car] for the purpose of _____[*specify*] and in the course of that use as a proximate result of the defect hereinabove described, _____[*specify accident*].

7-10. [*Injuries and damages allegations. See Paragraphs 10-13 in § 460.141[1].*]

[11. *Punitive damages allegation, if appropriate. See Paragraph 15 in § 460.141[1].*]

[*Prayer. See § 460.141[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 460.141[1].*]

[2] Use of Form

This form is a complaint for use by a lessee-user, or user if other than the lessee, injured as a proximate result of a defect in the leased or bailed product to recover damages based on strict liability in tort from the lessor who may or may not also be the manufacturer of the product. With appropriate modifications, the complaint may also be used by a nonlessee nonuser injured as a proximate result of the defect. By the inclusion of appropriate allegations [*see § 460.141*], the complaint may also be used to recover damages for injury to property as well as injury to person. For an analysis of the complaint, the number of copies to prepare, and a discussion of the applicable statute of limitations, see *§ 460.141*. For a discussion of alternative theories of recovery, see *§§ 460.32*, *460.33*.

The manufacturer if other than the lessor, the wholesaler, distributor, or retailer of the defective leased product, or the supplier of any defective component part of the product, or any combination of these persons may be joined as a defendant [*see § 460.142*], if the defect existed at the time the supplier delivered the defective component part to the manufacturer or if it existed at the time the manufacturer or other person joined as a defendant placed the product in or moved it along the stream of commerce.

If the defect was one that should have been discovered and repaired by some third person who negligently failed to do so or the defect resulted from or was contributed to by the faulty installation, repair, or other service of or to the leased product by a third person, plaintiff might join that third person as a defendant in addition to the lessor and other parties in the marketing chain and set forth in the complaint a separate cause of action against that person based on negligence rather than on strict liability in tort. For forms of negligence complaints which may be adapted for use in drafting the second cause of action for insertion in the foregoing complaint, see generally Ch. 380, *Negligence* .

[3] Cross Action by Defendant

Whether or not the plaintiff joins the manufacturer, wholesaler, distributor, or retailer of the defective product, or the supplier of the defective component part, as a defendant in the action, the defendant lessor may file and serve or serve and file (depending on whether such other person has been joined as a defendant and served with summons in the action [*see Code Civ. Proc. § 428.60*]) a cross complaint against any one or more of these persons for a declaration as to the lessor's right to be indemnified by such cross defendant(s) for any judgment that may be recovered in the action by the plaintiff against the defendant lessor [*see §§ 460.201 -460.202*].

If the defect resulted from the negligence of a third person in installing, repairing, or otherwise servicing the leased product, the defendant lessor may file a cross complaint against that person for a declaration as to the lessor's right to be indemnified by that person for any judgment that may be rendered in the action in favor of plaintiff against the defendant lessor.

[4] Cross References

For discussion relating to the general requirements for a complaint, see *§§ 460.30 -460.34* and *§§ 460.141 -460.142*

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40-460 California Forms of Pleading and Practice--Annotated § 460.144

§ 460.144 Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--For Injury to Person--By Licensee Against Licensor of Personal Property (Launderette Owner)

[1] FORM Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--For Injury to Person--By Licensee Against Licensor of Personal Property (Launderette Owner)

[*Caption, introduction. See § 460.141[1].*]

1. Defendant is, and at all times herein mentioned was, a _____ [*specify capacity, e.g.*, sole proprietor doing business under the fictitious firm name and style of _____ (*specify*)] in the [City and] County of _____, California, and engaged in the business of owning and operating a coin launderette for public use.

2. In the course of his/her/its business as the owner and operator of a launderette, defendant maintained at its above-stated business location a number of _____ [*specify, e.g.*, coin operated front loading commercial washing machines, including the one hereinafter referred to, and driers for use by the general public. Plaintiff is informed and believes and thereon alleges that these machines have a washing cycle, three rinse cycles, two spin cycles, and a final long extraction cycle lasting four and one half to five minutes during which the tub of the machine obtains a velocity of 370 revolutions per minute, and that the entire washing procedure lasts 30 minutes. The machines were designed automatically to start when the door was closed and the proper coin inserted and automatically to stop on completion of the extraction cycle referred to above].

3. At all times herein mentioned defendant knew that his/her/its washing machines and driers would be used by members of the general public without inspection for defects.

4. On or about _____[*date*], plaintiff was using one of the _____ [*specify, e.g.*, washers,] hereinafter referred to as "the _____" [*specify, e.g.*, washer], in defendant's business establishment hereinabove referred to for the purpose of _____ [*specify, e.g.*, washing a load of

clothes].

5. The _____ [*specify, e.g.*, washer] was at the time of plaintiff's use of it as hereinabove alleged defective and unsafe for its intended purpose in that _____ [*specify, e.g.*, it would prematurely stop during its fast spin or extraction cycle giving the appearance of having completed the final cycle and would, some seconds after the door was opened, suddenly, without warning, start up again in the fast spin cycle].

6. During the course of plaintiff's use of the _____ [*specify, e.g.*, washer] as hereinabove alleged, the _____ [*specify, e.g.*, machine stopped after what appeared to be completion of the extraction or fast spin cycle and plaintiff opened the door and commenced removing the clothes from the tub]. As plaintiff was _____ [*specify, e.g.*, removing the clothes from the tub] and as a proximate result of the defect hereinabove described, the _____ [*specify, e.g.*, washer] _____ [*specify, e.g.*, without warning abruptly started spinning in the fast cycle, entangling plaintiff's hand and arm in the spinning clothes].

7. As a proximate result of the defect and the _____ [*specify, e.g.*, sudden starting of the washer with plaintiff's hand and arm inserted in the tub] as hereinabove alleged, plaintiff sustained _____ [*describe personal injuries, e.g.*, serious and permanent injuries to his/her health, strength, and activity, severe shock to his/her nervous system, dislocated bones, strained and sprained muscles and ligaments, and abrasions, and was caused to suffer extreme physical and mental pain], all to his/her general damage [*if the action is filed as a limited civil case in superior or municipal court add* in the amount of $_____].

8-9. [*Special damages allegations. See Paragraphs 11, 12 in § 460.141[1].*]

[10. *Punitive damages allegation, if appropriate. See Paragraph 15 in § 460.141[1].*]

[*Prayer. See § 460.141[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 460.141[1].*]

[2] Use of Form

This form is a complaint for use by a licensee of a defective product to recover damages based on strict liability in tort from the licensor, who may also be the manufacturer, for injuries proximately caused by the defect. The product illustrated is a coin operated washing machine in a launderette. With appropriate modifications, the complaint may also be used by a nonlicensee nonuser injured as a proximate result of the defect. By the inclusion of appropriate allegations [*see § 460.141*], the complaint may also be used to recover damages for injury to property as well as injury to person. For an analysis of the complaint, the number of copies to prepare, and a discussion of the applicable statute of limitations, see *§ 460.141*. For a discussion of alternative theories of recovery, see *§§ 460.32, 460.33*.

The manufacturer if other than the licensor, the wholesaler, distributor, or retailer of the defective licensed product, or the supplier of any defective component part of the product, or any combination of these persons may be joined as a defendant [*see § 460.142*], if the defect existed at the time the supplier delivered the defective component part to the manufacturer or if it existed at the time the manufacturer or other person joined as a defendant placed the product in or moved it along the stream of commerce.

If the defect was one that should have been discovered and repaired by some third person who negligently failed to do so or resulted from or was contributed to by the faulty installation, repair, or other service of or to the product by a third person, plaintiff might join that third person as a defendant in the action in addition to the licensor and other parties in the marketing chain and set forth in the complaint a separate cause of action against that person based on negligence rather than on strict liability in tort. For forms of negligence complaints which may be adapted for use in drafting the second cause of action for insertion in the foregoing complaint, see generally Ch. 380, *Negligence* .

[3] Cross Action by Defendant

Whether or not the plaintiff in the foregoing complaint joins the manufacturer, wholesaler, distributor, or retailer of the defective product, or the supplier of the defective component part, as a defendant in the action, the defendant licensor may file and serve or serve and file (depending on whether such other person has been joined as a defendant and served with summons in the action [*see Code Civ. Proc. § 428.60*]) a cross complaint against any one or more of these persons for a declaration as to the licensor's right to be indemnified by such cross defendant(s) for any judgment that may be recovered in the action by the plaintiff against the defendant licensor [*see §§ 460.201 -460.202*].

If the defect resulted from the negligence of a third person in installing, repairing, or otherwise servicing the product, the defendant licensor may file a cross complaint against that person for a declaration as to the licensor's right to be indemnified by that person for any judgment that may be rendered in the action in favor of plaintiff against the defendant licensor.

In addition to a summons [*see Code Civ. Proc. § 428.60(1)*], a cross complainant must serve a copy of the most recently amended complaint and any answers on cross defendants who have not previously appeared [*Cal. Rules of Ct., Rule 3.222*].

[4] Cross References

For discussion relating to the general requirements for a complaint, see *§§ 460.30 -460.34* and *§§ 460.141 -460.142*

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40-460 California Forms of Pleading and Practice--Annotated § 460.145

§ 460.145 Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--For Injury to Person and Property--By Purchaser Against Manufacturer of Residential Lot

[1] FORM Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--For Injury to Person and Property--By Purchaser Against Manufacturer of Residential Lot

[*Caption, introduction, See § 460.141[1].*]

1. Defendant is, and at all times herein mentioned was, _____ [*specify capacity, e.g.,* a corporation organized and existing under the laws of the State of California with its principal place of business in this state situated in the (City and) County of _____].

2. Defendant is, and at all times herein mentioned was, engaged in the business of manufacturing residential lots and selling the lots to the public.

3. In or about _____[*date*], defendant _____ [purchased *or* became the owner of] a parcel of real property situated in _____ [*location, e.g.,* the Santa Monica Mountains] in _____ County, California, and manufactured it into a tract, hereinafter referred to as "the tract," of residential lots, including lot number _____, hereinafter referred to as "the lot," by cutting, grading, filling, and compacting the soil for the purpose of selling the lots to the public for the purpose of having houses constructed on them.

4. At all times herein mentioned defendant knew and intended that the lots in the tract would be purchased by members of the public who would have houses constructed on them without inspection for defects and knew that if the work done by defendant was defective it would cause damage to any improvements, including houses, placed on the property.

5. On or about _____[*date*], plaintiff purchased the lot from defendant and immediately had a house, hereinafter referred to as "the house," constructed on it. Construction of the house was completed on or about

_____[*date*].

6. At the time of plaintiff's purchase as hereinabove alleged, the lot was defective and unsafe for its intended purpose in that _____ [*specify, e.g.*, inadequate provision had been made in the manufacturing process for drainage, there was organic matter beneath the fill, and the fill had been insufficiently compacted at the time of the lot preparation].

7. As a proximate result of the defect(s) in the lot as herein alleged, _____ [*specify, e.g.*, water accumulated between the fill and the bedrock of the lot and the organic matter beneath the fill decomposed].

8. As a further proximate result of the defect(s) in the lot and the _____ [*specify, e.g.*, accumulation of water between the fill and the bedrock of the lot] as herein alleged, the _____ [*specify, e.g.*, rear portion of the lot failed and on or about _____[*date*] fell away onto the roadway below].

9. As a further proximate result of the defect(s) in the lot, the _____ [*specify, e.g.*, decomposition of the organic matter beneath the fill, and the improper compaction of the soil], as herein alleged, the _____ [*specify, e.g.*, lot pad settled, commencing on or about _____ (*date*) and continuing to on or about _____ (*date*)].

10. As a further proximate result of the defect(s) in the lot, the _____ [*specify, e.g.*, decomposition of the organic matter beneath the fill, and the settling of the lot pad], as herein alleged, the house, commencing on or about _____[*date*] and continuing until on or about _____[*date*], _____ [collapsed *or* was caused to sag, its floors, walls, and ceilings cracked and in some places split open, various of its beams were dislocated and broken, many of its window frames were twisted and their windows broken] and the house was thereby rendered uninhabitable from on or about _____[*date*] to on or about _____[*date*].

[11. *Personal injury allegations, if appropriate. See Paragraphs 10-12 in § 460.141[1].*]

[*EITHER*]

[*If house and lot have been rendered valueless or repairs have not and will not be undertaken or costs of repairs exceed value of property in nondefective condition immediately before loss, add following Paragraphs 12 and 13 and, if appropriate, Paragraphs 14 and 15*]

12. The value of the house and lot in a nondefective condition immediately before the _____ [*e.g.*, failure of a portion of the rear slope of the lot, the settling of the lot pad, and the _____ (destruction of *or* injury to) the house] as herein alleged was $_____.

13. As a further proximate result of the defects in the lot, the _____ [*e.g.*, failure of a portion of the rear slope of the lot, the settling of the lot pad, and the _____ (destruction of *or* injury to) the house], as herein alleged, the _____ [value of the property has been diminished from $_____ (*sum specified in Paragraph 12*) to $_____, and plaintiff has thereby been damaged in the sum of $_____ (*difference between foregoing two sums*) *or* the property has been rendered valueless, to plaintiff's damage in the sum of $_____ (*sum specified in Paragraph 12*)].

14. As a further proximate result of the defects in the lot and the destruction of the house as herein alleged, plaintiff was required to and did employ contractors to demolish the house and remove it from the lot and in so doing incurred an expense therefor in the sum of $_____, all to plaintiff's further damage in that sum.

15. As a further proximate result of the defects in the lot and the destruction of the house as herein alleged, plaintiff was required to and did find new living quarters for himself/herself [and his/her family] and in so doing and in moving to them incurred additional expenses in the sum of $_____, to plaintiff's further damage in that sum.

[*OR*]

[*If repairs have been or will be undertaken and their costs will not exceed the value of the property in a nondefective condition immediately before the loss, add*:]

12. As a further proximate result of the defects in the lot, the _____ [*specify, e.g.*, failure of a portion of the rear slope of the lot, and the settling of the lot pad], all as herein alleged, plaintiff was required to and did employ professional soil engineers to determine the causes of the _____ [*specify, e.g.*, soil failure and settling of the lot pad] and to make recommendations in respect thereto, and incurred expenses therefor in the sum of $_____, all to plaintiff's damage in that sum.

13. As a further proximate result of the defects in the lot, the _____ [*specify, e.g.*, failure of a portion of the rear slope of the lot, and the settling of the lot pad], all as herein alleged, plaintiff was required to and did employ contractors to _____ [*e.g.*, stabilize the lot, including the construction of a retaining wall and the refilling and recompacting of the soil], and incurred expenses therefor in the sum of $_____, all to plaintiff's further damage in that sum.

14. As a further proximate result of the defects in the lot and the injury to the house as herein alleged, plaintiff was required to and did employ contractors to restore the house to the condition it was in immediately prior to the _____ [*specify, e.g.*, settling of the lot pad] and in so doing incurred expenses therefor in the sum of $_____, all to plaintiff's further damage in that sum.

15. As a further proximate result of the defects in the lot and the injury to the house as herein alleged, the house was rendered uninhabitable from _____[*date*] to _____[*date*]; _____ [*specify loss, e.g.*, plaintiff thereby lost rentals for that period in the sum of $_____, to plaintiff's further damage in that sum *or if house was inhabited by plaintiff at time of loss allege additional living expenses incurred as proximate result of house's being rendered uninhabitable during period required for repair*].

[*In either case continue:*]

16. _____[*In separately numbered paragraphs allege any damages for injury to or loss of personal property or injury to person and damages proximately resulting from the defective condition of the lot and the subsequent failure*].

[17. *Punitive damages allegation, if appropriate. See Paragraph 15 in § 460.141[1].*]

WHEREFORE, plaintiff prays judgment as follows:

1. _____ [*General and special damages for personal injuries if any* (*see Prayer in § 460.141[1]*)].

[*If property has been rendered valueless or will not be restored:*]

2. For diminution in the value of the house and lot in the sum of $_____.

3. For costs incurred by plaintiff in having the house demolished and removed from the lot in the sum of $_____.

4. For costs incurred by plaintiff in finding new residential quarters and moving himself/herself [and his/her family] to them in the sum of $_____.

[*If property has been or will be restored:*]

2. For professional expenses and costs incurred by plaintiff in having the soil restored to the condition it was in immediately prior to the soil failure and settling of lot pad but without the defect in the sum of $_____.

3. For costs incurred by plaintiff in having the house restored to the condition it was in immediately prior to the collapse of the soil pad in the sum of $_____.

4. For _____ [lost rental *or* additional living expenses incurred] during the period required for restoration of the house and lot, to wit, from _____[*date*], to _____[*date*], in the sum of $_____.

[*In either case continue:*]

[5. For injury to personal property in the sum of $_____]

[6. For costs incurred in repairing personal property in the sum of $_____.]

[7. For exemplary and punitive damages in the sum of $_____.]

8. For costs of suit herein incurred.

9. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 460.141[1].*]

[2] Use of Form

This form is a complaint for use by a purchaser of a building lot against the manufacturer-seller of the lot to recover damages based on strict liability in tort for injuries to the lot and to the house plaintiff had constructed on it proximately caused by a defect in the manufacturing process of the lot which rendered the lot unsafe for its intended purpose as a residential lot [*see Avner v. Longridge Estates (1969) 272 Cal. App.2d 607, 615, 77 Cal. Rptr. 633]* . For an analysis of the complaint, the number of copies to prepare, and a discussion of the applicable statute of limitations, see *§ 460.141*.

For a discussion of the alternative theories of recovery, see *§§ 460.32*, *460.33*.

If the defect in the lot resulted from the negligence of a third person, such as a contractor or engineering firm, employed by the defendant manufacturer to test or prepare the soil, plaintiff might join that person as a defendant in addition to the manufacturer and set forth a separate cause of action in the complaint against the third person based on negligence rather than on strict liability in tort. For forms of negligence complaints which may be adapted for use in drafting the second cause of action for insertion in the foregoing form of complaint, see Ch. 380, *Negligence* .

[3] Cross Action by Defendant

If the defect in the lot resulted from the negligence of a third person, such as a contractor or engineering firm, employed by the defendant manufacturer to test or prepare the soil, the defendant manufacturer may file a cross complaint against that person for a declaration as to the manufacturer's right to be indemnified by that person for any judgment that may be rendered in the action in favor of plaintiff against the defendant manufacturer [*see § 460.202*].

[4] Cross References

For discussion relating to the general requirements for a complaint, see *§§ 460.30 -460.34* and *§§ 460.141 -460.142*

See generally Ch. 177, *Damages*

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40-460 California Forms of Pleading and Practice--Annotated § 460.146

§ 460.146 Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--For Injury to Property--By Purchaser of House Against Mass Producer of Houses

[1] FORM Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--For Injury to Property--By Purchaser of House Against Mass Producer of Houses

[*Caption, introduction. See § 460.141[1].*]

1. Defendant is, and at all times herein mentioned was, a _____ [*specify capacity, e.g.*, a corporation organized and existing under the laws of the State of California with its principal place of business in this state situated in the (City and) County of _____].

2. Defendant is, and at all times herein mentioned was, in the business of mass producing homes in the Counties of _____, California and selling them to members of the public.

3. In or about _____[*date*], defendant _____ [purchased *or* became the owner of] a tract of residential lots in _____[*city*], _____ County, California, on each lot of which he/she/it constructed a residence, including the residence located at _____[*street address*], hereinafter referred to as "the residence."

4. At all times herein mentioned defendant knew and intended that the residences constructed by him/her/it as alleged in Paragraph 3 would be purchased by members of the public and used by them without inspection for defects.

5. On or about _____[*date*], plaintiff purchased the residence and on or about _____[*date*] moved into it [with his/her family].

6. At the time of plaintiff's purchase, the residence was defective and unsafe for its intended purpose in that _____ [*specify, e.g.*, the radiant heating system was improperly installed in the residence, and was

subject to premature corrosion and hence to failure].

7. On or about _____[*date*], as a proximate result of the defect in the residence as herein alleged, the _____ [*specify, e.g.*, radiant heating system became corroded throughout and failed].

8. The value of the residence without the defect immediately before the _____ [*specify e.g.*, failure of the radiant heating system] as herein alleged was $_____.

9. As a further proximate result of the defect in the residence and the _____ [*specify*, e.g., failure of the radiant heating system] as herein alleged, the value of the residence has been diminished from $_____[*sum alleged in Paragraph 9*] to $_____, and plaintiff has thereby been damaged in the sum of $_____[*difference between foregoing two sums*].

[10. As a further proximate result of the defect in the residence and the _____ (*specify, e.g.*, failure of the radiant heating system) as herein alleged, plaintiff was required to and did acquire other temporary shelter for himself/herself [and his/her family] during the period of time it took to repair _____ (*specify, e.g.*, the radiant heating system), to wit, from _____ (*date*) to _____ (*date*), and incurred expenses therefor in the sum of $_____, all to plaintiff's further damage in that sum.]

[11. As a further proximate result of the defect in the residence and the _____ (*specify, e.g.*, failure of the radiant heating system) as herein alleged, plaintiff was required to and did remove and store his/her furniture during the period of time it took to repair _____ (*specify, e.g.*, the radiant heating system), to wit, from _____ (*date*) to _____ (*date*), and incurred expenses therefor in the sum of $_____, all to plaintiff's further damage in that sum.]

[12. *Punitive damages allegation, if appropriate. See Paragraph 15 in § 460.141[1].*]

[*Prayer. See § 460.141[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 460.141[1].*]

[2] Use of Form

This form is a complaint for use by the purchaser of a home from the mass producer builder-seller of homes to recover damages based on strict liability in tort for injury to the residence proximately caused by a defect in the manufacture of the residence which existed at the time defendant sold the home and which rendered the home unsafe for its intended purpose as a residence [*see Kriegler v. Eichler Homes, Inc. (1969) 269 Cal. App. 2d 224, 228-229, 74 Cal. Rptr. 749* ; *see Mills v. Forestex Co. (2003) 108 Cal. App. 4th 625, 636, 134 Cal. Rptr. 2d 273* (plaintiffs' house, siding of which warped, was not mass-produced house)]. With appropriate modifications it may also be used where the defect was in design rather than in manufacture [*see Hyman v. Gordon (1973) 111 Cal. Rptr. 262* (home defectively designed in placement of water heater on floor of garage; fire erupted when spilled gasoline spread across garage floor and reached flame of heater)] and to recover damages for personal injuries or wrongful death [*see § 460.141*] as well as damages for injury to property. For an analysis of the complaint, the number of copies to prepare, and a discussion of the applicable statute of limitations, see *§ 460.141*. For a discussion of the alternative theories of recovery, see *§§ 460.32, 460.33*.

[3] Cross Action by Defendant

If the defect in the house resulted from the negligence of a third person, such as a contractor or subcontractor employed to build the house or parts of it or to install various fixtures or appliances, the defendant manufacturer may file a cross complaint against that person for a declaration as to the manufacturer's right to be indemnified by that person for any judgment that may be rendered in the action in favor of plaintiff against the defendant manufacturer [*see § 460.202*].

[4] Cross References

For discussion relating to the general requirements for a complaint, see *§§ 460.30 -460.34* and *§§ 460.141 -460.142*

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40-460 California Forms of Pleading and Practice--Annotated § 460.147

§ 460.147 Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--For Injury to Person--By Purchaser-User Against Manufacturer's Successor in Interest

[1] FORM Complaint for Damages [Civ. Code § 3333] Based on Strict Liability in Tort--For Injury to Person--By Purchaser-User Against Manufacturer's Successor in Interest

[*Caption, introduction. See § 460.141[1].*]

1. Defendant is, and _____ [at all times herein mentioned was *or* since _____ (*date*) has been], a _____ [*specify capacity, e.g.*, corporation organized and existing under the laws of the State of California with its principal place of business in this state situated in the (City and) County of _____].

2. _____[*Name of manufacturer*], hereinafter referred to as "the manufacturer," at all times herein mentioned prior to _____[*date manufacturer sold his/her/its manufacturing business*], was a _____ [*specify capacity, e.g.*, corporation organized and existing under the laws of the State of California with its principal place of business in this state situated in the (City and) County of _____], and was engaged in the business of manufacturing [, among other products,] _____ [*specify products, e.g.*, specialty ladders], including the particular _____ [*specify defective product, e.g.*, 22 foot heavy duty ladder] hereinafter referred to [for sale to _____ (*specify, e.g.*, building, painting, and other contractors, as well as to the general public)].

[3. The manufacturer intended that the _____ (*specify products, e.g.*, specialty ladders) manufactured by him/her/it be used by _____ (*specify, e.g.*, building, painting, and other contractors) and put to _____ (*specify, e.g.*, heavy industrial use).]

4. At all times herein mentioned prior to _____[*date manufacturer sold its/his/her manufacturing business*], the manufacturer knew [and intended] that his/her/its _____ [*specify products, e.g.*,

specialty ladders] would be purchased by _____ [*specify, e.g.*, building contractors and other] members of the general public and used by them, their employees, and others without inspection for defects.

5. On or about _____[*date*], _____ [plaintiff *or* plaintiff's employer, a _____ (*specify, e.g.*, general building contractor)], purchased from the manufacturer at his/her/its place of business hereinabove described the _____ [*specify defective product, e.g.*, 22 foot heavy duty ladder] referred to in paragraph 2 above and herein

6. On or about _____[*date*], defendant purchased all the manufacturer's assets and thereby acquired the manufacturer's plant, equipment, fixtures, inventory, trade name, goodwill, and customer lists and since that date has continued to manufacture and sell to _____ [*specify class if any, e.g.*, building, painting, and other contractors and to] the general public the same line of _____ [*specify, e.g.*, specialty ladders] under the manufacturer's name, using the same equipment, designs, and personnel, and soliciting the manufacturer's customers through the same sales representatives with no outward indication of any change in the ownership of the business and without any notification to customers of the change of ownership.

[7. On or about _____ (*date*), the manufacturer filed with the California Secretary of State a certificate of winding up and dissolution of _____ (*name of manufacturer*) in which it declared that the corporation "has been completely wound up," that its "known debts and liabilities have been actually paid," and that its "known assets have been distributed to the shareholders."]

[8. On or about _____ (*date*), defendant _____, (filed and published the statement required by *Sections 17915* and *17917 of the Business and Professions Code* showing that he/she/it was transacting business under the fictitious name of _____ (*name of manufacturer*) *or* filed with the California Secretary of State an amendment to its articles of incorporation changing its name from _____ (*specify*) to _____ (*specify*), the name of the now defunct manufacturer).]

9. The _____ [*specify, e.g.*, ladder], at the time _____ [plaintiff purchased it *or* it was purchased by plaintiff's employer] as hereinabove alleged, was defective and unsafe for its intended purpose in that _____[*specify defect in manufacture or design of product*].

10. On or about _____[*date*], plaintiff was using the _____ [*specify, e.g.*, ladder] at _____[*address or location*] for the purpose of _____[*specify*]. During the course of this use and as a proximate result of the defect hereinabove described, _____ [*specify accident, e.g.*, the third rung from the top of the ladder on which plaintiff was standing broke causing plaintiff to fall some 20 feet to the concrete floor below].

11-13. [*Personal injuries and damages allegations. See Paragraphs 10-12 in § 460.141[1].*]

[*Prayer. See § 460.141[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 460.141[1].*]

[2] Use of Form

This form is a complaint for use by the user of a defective product to recover damages based on strict liability in tort from the manufacturer's business successor for injuries proximately caused by the defect. For an analysis of the complaint, the number of copies to prepare, and a discussion of the applicable statute of limitations, see *§ 460.141*. For a discussion of alternative theories of recovery, see *§§ 460.32, 460.33*.

[3] Liability of Successor Business on Predecessor's Obligations

Ordinarily when one corporation purchases the principal assets of another corporation the former does not assume the latter's liabilities unless either [*Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 28, 136 Cal. Rptr. 574, 560 P.2d 3]* :

- There is an express or implied agreement of assumption.
- The transaction amounts to a consolidation or merger of the two corporations.
- The purchasing corporation is a mere continuation of the seller.
- The transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller's debts.

There is, however, an exception to the foregoing rule where the liability is based on strict liability in tort for damages for injuries sustained after the transfer of the business as a proximate result of a defect in a product manufactured by the predecessor business. In that case, the policies underlying strict liability in tort for defective products require that the successor business be liable for injuries resulting from a defective product manufactured by its predecessor where the successor, through the purchase of the manufacturer's assets, acquires the manufacturer's plant, equipment, inventory, trade name, goodwill, and customer lists and continues to manufacture the same line of products under the same name as the manufacturer, using the same equipment, designs, and personnel, and soliciting the manufacturer's customers through the same sales representatives with no outward indication of any change in the ownership of the business or notice to customers of that change. Justification for imposing strict liability in such case on the successor to the manufacturer rests on [*Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 30-34, 136 Cal. Rptr. 574, 560 P.2d 3]* :

- The virtual destruction of the injured person's remedies against the original manufacturer caused by the successor's acquisition of the business.
- The successor's ability to assume the original manufacturer's risk-spreading role.
- The fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's goodwill being enjoyed by the successor in the continued operation of the business.

In *Ray* the Supreme Court held: "[A] party which acquires a manufacturing business and continues the output of its line of products under the circumstances here presented assumes strict tort liability for defects in units of the same product line previously manufactured and distributed by the entity from which the business was acquired" [*Ray v. Alad Corp. (1977) 19 Cal. 3d 22, 34, 136 Cal. Rptr. 574, 560 P.2d 3* (disapproving anything to the contrary in *Ortiz v. South Bend Lathe (1975) 46 Cal. App. 3d 842, 120 Cal. Rptr. 556* and in *Schwartz v. McGraw-Edison Co. (1971) 14 Cal. App. 3d 767, 92 Cal. Rptr. 776*)].

For further discussion, see *§ 460.14*.

[4] Successors' Liability for Punitive Damages

If the original manufacturer of a defective product committed acts sufficient to support an award of punitive damages, a successor to the manufacturer may be required to pay such damages if the successor acquired the manufacturer's interest either by statutory merger or by a de facto merger [*Marks v. Minnesota Mining & Mfg. Co. (1986) 187 Cal. App. 3d 1429, 1434-1437, 232 Cal. Rptr. 594* ; *see Corp. Code § 1107*].

[5] Cross References

For discussion relating to the general requirements for a complaint, see *§§ 460.30 -460.34* and *§§ 460.141 -460.146*

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[Reserved]

§§ 460.148[Reserved]

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40-460 California Forms of Pleading and Practice--Annotated § 460.160

§ 460.160 Allegation--Plaintiff Was Nonpurchaser-User of Defective Product

[1] FORM Allegation--Plaintiff Was Nonpurchaser-User of Defective Product

Plaintiff is informed and believes and thereon alleges that on or about _____[*date*], _____[*name*] purchased the _____[*defective product*], referred to in Paragraph _____ hereof and hereinafter referred to as "the _____" [*descriptive word or phrase*] from _____[*name of retailer or other*] at his/her/its place of business hereinabove described.

[2] Use of Form

This form is an allegation for use in the *form in § 460.141[1]* in place of Paragraph 7 (in which case Paragraph 8 in that form will require appropriate changes and Paragraph 13 will be deleted) and in the *form in § 460.142[1]* in place of the first sentence of Paragraph 13 (in which case Paragraph 14 in that form will also require appropriate changes). The allegation, with appropriate modifications, may also be used in the *forms in §§ 460.143* and *460.147*.

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40-460 California Forms of Pleading and Practice--Annotated § 460.161

§ 460.161 Allegation--Plaintiff Was Nonpurchaser Nonuser of Defective Product

[1] FORM Allegation--Plaintiff Was Nonpurchaser Nonuser of Defective Product

On or about _____[*date*], [through _____ (*date*),] plaintiff _____ [*specify way in which plaintiff came into contact with the product, e.g.,* was exposed to] the _____ [*describe product, e.g.,* asbestos insulation] at _____[*describe location*] when _____ [*specify, e.g.,* he was performing his employment duties as an electrician while construction workers in the immediate area removed and repaired the insulation]. As a proximate result of the product's defective condition described above, plaintiff sustained injuries consisting of _____ [*describe, e.g.,* respiratory illnesses caused by prolonged inhalation of asbestos particles]. Although plaintiff neither purchased nor used the product, the injury subsequently incurred by him/her was reasonably foreseeable by virtue of the product's defective condition in that _____ [*specify, e.g.,* the removal and repair of the installed asbestos products on the premises of plaintiff's employer was foreseeable, and in light of defective nature of the product, that is, the manufacturer's failure to warn of the dangers of overexposure, injury to persons employed on the premises who took no precautions against inhalation of asbestos particles was also reasonably foreseeable].

[2] Use of Form

This form is an allegation for use to allege that plaintiff incurred reasonably foreseeable injuries caused by a defective product although plaintiff was neither a purchaser nor a user of the product [*see Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 75 Cal. Rptr. 652, 451 P.2d 84* (doctrine of strict liability in tort available to bystander injured by defective product)]. It may be used to allege that plaintiff was a bystander, and incurred injuries in an accident caused by the defect in the product while the product was being used in a reasonably foreseeable manner by another [*see Elmore v. American Motors Corp. (1969) 70 Cal. 2d 578, 75 Cal. Rptr. 652, 451 P.2d 84* (driver of nearby car injured when defective automobile car caused accident); *Nelson v. Superior Court (2006) 144 Cal. App. 4th 689, 693-696, 50 Cal. Rptr. 3d 684* (bystanders to uses of product while it is still on market are in same position vis-a-vis manufacturer as bystanders to uses of product by ultimate consumer)]. It may also be used to allege that plaintiff was injured by repeated exposure to a defective product over a period of time, which has often arisen in the context of an employee's exposure to some substance or chemical at his or her work premises [*see, e.g., Anderson v.*

Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 281 Cal. Rptr. 528, 810 P.2d 549 (exposure to asbestos products used in building); *Ruiz v. Minnesota Mining & Mfg. Co. (1971) 15 Cal. App. 3d 462, 93 Cal. Rptr. 270* (inhalation of glue used in furniture manufacturing)].

This allegation may be inserted in the *form in § 460.141[1]* in lieu of Paragraph 9, in which case Paragraphs 7 and 13 of that form should be omitted. If the purchaser of the product is known, for example, when plaintiff is a bystander in an accident in which the purchaser is using the product, the allegation in § 460.160[1] should also be substituted for Paragraph 7 of the *form in § 460.141[1]*. In addition, Paragraph 8 should be modified to delete the reference to plaintiff as purchaser.

This allegation may also be inserted in the *form in § 460.142[1]*, in lieu of Paragraph 15, in which case Paragraphs 13 and 14 should be modified to delete the reference to plaintiff as purchaser. If the purchaser of the product is known, § 460.160[1] should also be incorporated into Paragraph 13 of § 460.142.

[3] Negligence Liability

A plaintiff who is a third-party bystander injured by the use of a defective product may also have a cause of action against the user or owner of the product if the use was with knowledge of the defect and was negligent. In this case, the complaint will set forth a second cause of action against the user, owner, or both, based on negligence rather than on strict liability in tort. For forms of negligence complaints that may be adapted for use in drafting the second cause of action for insertion in the complaint, see Ch. 380, *Negligence* .

[4] Cross References

For further discussion in general, see *§ 460.143*.

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40-460 California Forms of Pleading and Practice--Annotated § 460.162

§ 460.162 Allegation--Defect in Design, Manufacture, and Assembly

[1] FORM Allegation--Defect in Design, Manufacture, and Assembly

The _____[*product*] was unsafe for its intended use by reason of a defect in its design, manufacture, and assembly which allowed it to malfunction and _____ [*allege accident, e.g.,* catch on fire].

[2] Use of Form

This form is an allegation for use in lieu of Paragraph 8 of the *form in § 460.141[1]* and Paragraph 14 of § 460.142[1] [*see Golden v. Conway (1976) 55 Cal. App. 3d 948, 952, 128 Cal. Rptr. 69* (involving defective heater in rented premises)].

[3] Cross References

For further discussion in general, see *§ 460.141*.

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40-460 California Forms of Pleading and Practice--Annotated § 460.163

§ 460.163 Allegation--Defect in Metal Hasp Holding Trays in Truck

[1] FORM Allegation--Defect in Metal Hasp Holding Trays in Truck

1. At all times herein mentioned, defendants _____[*names*] and DOES 1-_____, inclusive, were and are _____ [*specify capacities, e.g.,* corporations doing business under the laws of the State of California and engaged in the business of sales agent for assembled vehicles, the chassis, body, and racks of which are manufactured by subcontractors].

2. At all times herein mentioned, defendants _____[*names*] and DOES 1-_____, inclusive, were and are _____ [*specify capacities, e.g.,* corporations organized and existing under the laws of the State of California, and engaged in the business of distributing, buying, and selling vehicles to the general public].

3. Defendants _____[*names*] and DOES 1-_____, inclusive, manufactured, designed, and assembled a certain _____[*model year*] _____ [*describe vehicle, e.g.,* one ton step van] hereinafter referred to as "the vehicle," especially equipped with racks and safety locking devices for _____ [*product, e.g.,* bread] delivery, which was intended by said defendants to be used as follows: to be operated on the public highways in delivering _____ [*product, e.g.,* loaves of bread] to retail outlets, said safety locking devices to prevent the loaded racks from passing beyond the safety locks into the driver's compartment on sudden stops or impacts.

4. Prior to _____[*date of collision*], defendants _____[*names*] and DOES 1-_____, inclusive, sold, supplied, and delivered the vehicle equipped with the racks and locking device, which was intended by the defendants to be used as follows: _____ [*specify, e.g.,* to be driven on the public highways and used to deliver _____ (*describe product, e.g.,* bread) to retail outlets, the safety locking devices to be used to prevent racks from passing into the driver's compartment on a sudden stop of the vehicle or a sudden impact between the vehicle and another object].

5. Defendants, and each of them, knew that the vehicle would be purchased and used by the purchaser and its employees without inspection for defects.

6. The vehicle was unsafe for its intended use by reason of the following defects in manufacture: _____ [*specify, e.g.,* the metal hasp on the locking device through which the locking pin was inserted, after the hinge locking the edge of the trays was folded over the metal hasp, was exceedingly porous and contained innumerable spherical holes, contained a large and irregularly shaped cavity, distinct pits in the surface of the metal hasp corresponding to voids within the metal underneath, was of a soft aluminum metal, and was of an insufficient tensile strength to withstand the impact of the racks striking the locking device and hasp].

7. On or about _____[*date*], plaintiff was operating the vehicle on the public highways to deliver _____ [*describe, e.g.,* bread] to various retail outlets and at that time the safety locking devices were in a locked position. During the course of this use and while plaintiff was operating the vehicle, the vehicle was forced off the highway and collided with an embankment. As a proximate result of this collision and of the defect hereinabove described, the hasp on the locking device fractured and broke thereby releasing the trays from the loading portion of the vehicle and causing them to enter the driver's compartment and strike plaintiff with great force and violence.

[2] Use of Form

This form contains allegations illustrating a specific fact situation, which may be used in a complaint for damages based on strict liability in tort [*see* the *forms in §§ 460.141 -460.142*]. They identify the defendants, describe the product, its use, and its defect, and the manner in which the accident occurred.

[3] Source of Form

The allegations in [1], *above*, are adapted from the complaint filed in *Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153* . In *Cronin*, plaintiff voluntarily dismissed the action against the manufacturer of the chassis prior to trial. The jury returned a verdict in favor of plaintiff against the sales agent for the assembled vehicle but in favor of the seller against plaintiff. The sales agent appealed and the judgment was affirmed.

[4] Cross References

For a related form, see *§ 460.164*

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40-460 California Forms of Pleading and Practice--Annotated § 460.164

§ 460.164 Allegation--Product Defective as Result of Failure to Warn of Danger in Use

[1] FORM Allegation--Product Defective as Result of Failure to Warn of Danger in Use

1. At all relevant times, the _____ [*describe product, e.g.,* asbestos insulation] manufactured by defendant was defective as a result of the defendant's failure to give _____[adequate] warning that the particular risk of _____ [*describe risk, e.g.,* respiratory injuries incurred because of continual exposure to removal and installation of the product] rendered the product unsafe for its intended or reasonably foreseeable use.

2. [Plaintiff is informed and believes, and thereon alleges, that] [A]t all relevant times, _____ [defendant had specific knowledge of the risk *or* defendant could have known of the risk by the application of scientific knowledge available at the time of manufacture].

[2] Use of Form

This form is an allegation for insertion in lieu of Paragraph 8 of the *form in § 460.141[1]* if the product was defective because of a failure to warn rather than because of a defect in manufacture or design. For alternative allegations, see the *forms in §§ 460.165 -460.167*.

[3] Failure to Warn

The failure to issue an adequate warning may subject manufacturers and distributors to strict liability if they knew or should have known of the danger and the necessity to warn [*Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1110, 56 Cal. Rptr. 2d 162, 920 P.2d 1347* ; *Valentine v. Baxter Healthcare Corp. (1999) 68 Cal. App. 4th 1467, 1483, 81 Cal. Rptr. 2d 252* ; *Schwoerer v. Union Oil Co. (1993) 14 Cal. App. 4th 103, 111-112, 17 Cal. Rptr. 2d 227* ; *Rosburg v. Minnesota Mining & Mfg. Co. (1986) 181 Cal. App. 3d 726, 734, 226 Cal. Rptr. 299* ; *Blackwell v. Phelps Dodge Corp. (1984) 157 Cal. App. 3d 372, 377, 203 Cal. Rptr. 706]* . Actual or constructive knowledge of the danger is a requisite for strict liability based on the failure to provide adequate warning [*Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal. 3d 987, 1000, 281 Cal. Rptr. 528, 810 P.2d 549* ; *Jones v. John Crane, Inc. (2005) 132 Cal. App. 4th 990, 1004-1005, 35 Cal. Rptr. 3d 144]* .

For further discussion, see *§ 460.11[10]*.

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40-460 California Forms of Pleading and Practice--Annotated § 460.165

§ 460.165 Allegation--Product Defective Because of Failure to Warn of Ingredient to Which Substantial Number of Population Is Allergic

[1] FORM Allegation--Product Defective Because of Failure to Warn of Ingredient to Which Substantial Number of Population Is Allergic

1. At all times herein mentioned defendant _____ [knew *or* by the application of reasonably developed human skill and foresight should have known] that the _____[*product*] contained the ingredient _____[*specify*], that a substantial number of the population is allergic to this ingredient, the _____ [breathing *or* exposure to the skin *or other*] of which causes _____[*specify affliction from which plaintiff suffers*], and that the ingredient is one _____ [the danger of which is not generally known *or* which a purchaser or user would reasonably not expect to find in the _____ (*product*)].

2. The _____[*product*] purchased by plaintiff from defendant as herein alleged was at the time of purchase defective and unsafe for its intended use in that it contained the ingredient _____[*specify*] and defendant failed to give plaintiff any notice thereof or to warn plaintiff of the danger of _____ [breathing *or* exposure to *or other*] that ingredient.

[2] Use of Form

This form contains allegations for insertion and renumbering in lieu of Paragraph 8 in the *form in § 460.141[1]* if the product was defective not in manufacture or design, but because of a failure to warn of an ingredient in the product to which a substantial number of the population is allergic, and the ingredient is one the danger of which is not generally known or, if known, is one that the purchaser or user would reasonably not expect to find in the product. If the allegations in this form are used, Paragraph 6 of the *form in § 460.141[1]* will allege defendant's intended use of the product and Paragraph 9 (renumbered 10) will allege plaintiff's use showing that the use was within the ambit of Paragraph 6. For alternative allegations, see the *forms in §§ 460.164* and *460.167*. For an allegation regarding a manufacturer of an unavoidably unsafe prescription drug, see *§ 460.166*.

[3] Duty to Warn of Allergic Properties

When a product contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known or, if known, is one that the consumer would reasonably not expect to find in the product, the seller is required to give warning against it if the seller has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger [Restatement (Second) of Torts § 402A, cmt. j]. This has been termed a neg ligence standard [*Kearl v. Lederle Laboratories (1985) 172 Cal. App. 3d 812, 831-832, 218 Cal. Rptr. 453* (disapproved for its holding regarding strict liability standards for drug manufacturers in *Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1061-1069, 245 Cal. Rptr. 412, 751 P.2d 470*); *see § 460.166*].

[4] Cross References

For a related form, see *§ 460.164*

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40-460 California Forms of Pleading and Practice--Annotated § 460.166

§ 460.166 Allegation--Drug Manufacturer Strictly Liable for Injuries Caused by Unavoidably Unsafe Prescription Drug Because of Failure to Prepare Drug Properly or Failure to Warn of Its Known or Knowable Dangers

[1] FORM Allegation--Drug Manufacturer Strictly Liable for Injuries Caused by Unavoidably Unsafe Prescription Drug Because of Failure to Prepare Drug Properly or Failure to Warn of Its Known or Knowable Dangers

1. At all times herein mentioned, defendant knew and intended that its drug _____ [*name of drug or vaccine, e.g.,* diethylstilbestrol (hereinafter DES)] would be purchased by health-care patients by prescription from their physicians, and that those patients would rely on their physicians to transmit any relevant warnings about the drug.

2. The prescription drug _____ [*name of drug, e.g.,* DES], intended for the purpose of _____ [*specify, e.g.,* preventing miscarriage], is unavoidably unsafe in that its use can cause _____ [*specify danger, e.g.,* cancerous vaginal and cervical growths, or adenocarcinoma, in daughters exposed to it before birth], and that dangerous propensity was _____ [known to defendant *or* reasonably knowable scientifically] at the time that the drug was distributed.

3. At all times herein mentioned, defendant failed properly to _____ [prepare *and/or* warn physicians of the dangerous propensities of] the drug.

4. On or about _____[*specify date or range of dates*], _____ [*specify person who used drug, e.g.,* plaintiff *or* plaintiff's mother] obtained a prescription for _____ [*specify drug, e.g.,* DES] from his/her physician _____[*name*], and ingested that drug on or about _____[*specify date or period of time, if drug taken regularly*].

5. On or about _____[*date*], as a proximate result of the use of _____ [*specify drug, e.g.,* DES] described in Paragraph 4, plaintiff suffered physical injuries in that _____ [*describe injuries, e.g.,* she contracted adenocarcinoma].

[2] Use of Form

This form contains allegations for insertion and renumbering in the *form in § 460.141[1]*, in lieu of Paragraphs 6 through 9, if the defendant is the manufacturer of an unavoidably unsafe prescription drug, if the drug was distributed without proper preparation and warning of its dangerous propensities, and if the plaintiff ingested the drug after purchasing it by prescription and suffered injuries caused by the drug's known or knowable dangerous qualities [*see Carlin v. Superior Court (1996) 13 Cal.4th 1104, 1110, 56 Cal. Rptr. 2d 162, 920 P.2d 1347* ; *Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1061-1069, 245 Cal. Rptr. 412, 751 P.2d 470]* . If these allegations are used, defendant should be identified in Paragraph 3 of the *form in § 460.141[1]* as a prescription-drug manufacturer. If the plaintiff cannot identify the manufacturer of the precise product that caused the injury because several manufacturers shared the market for that drug, the foregoing allegations should be combined with § 460.169 to join the manufacturers of a substantial share of the market in the action [*see § 460.11[7]*].

[3] Liability of Manufacturer of Prescription Drugs

Prescription drug manufacturers are strictly liable for injuries caused by failure to warn of dangers that were known, or reasonably scientifically knowable at the time a drug was manufactured and distributed [*Carlin v. Superior Court (1996) 13 Cal. 4th 1104, 1110, 56 Cal. Rptr. 2d 162, 920 P.2d 1347]* .

A manufacturer is not strictly liable for injuries caused by a prescription drug so long as the drug was properly prepared and accompanied by warnings of its dangerous propensities that were either known or reasonably scientifically knowable at the time of distribution [*Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1069, 245 Cal. Rptr. 412, 751 P.2d 470* (adopting Restatement (Second) of Torts § 402A, cmt. k].

[4] Cross References

For related forms, see *§§ 460.141, 460.169*

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40-460 California Forms of Pleading and Practice--Annotated § 460.167

§ 460.167 Allegation--Product Defective in That Instructions on Assembly or Use Were Inadequate to Avoid Danger of Injury

[1] FORM Allegation--Product Defective in That Instructions on Assembly or Use Were Inadequate to Avoid Danger of Injury

The _____[*products*] [manufactured and] sold by defendant are technically complex products that were marketed by defendant and intended for use by technically unsophisticated consumers to be assembled and used by them in accordance with written instructions composed and furnished by defendant. The _____[*product*] herein involved was defective at the time plaintiff purchased it in that defendant failed to warn plaintiff of conditions and circumstances created by the assembly or use which would render the _____[*product*] dangerous to him/her and the instructions for assembly and use composed and furnished with the _____[*product*] by defendant were inadequate to avoid the danger of injury to plaintiff in that they failed to _____[*specify*].

[2] Use of Form

This form is an allegation for use in lieu of Paragraph 8 of the *form in § 460.141[1]*, if the defect consists of a failure to provide adequate instructions regarding assembly or use of a product necessary to avoid the danger of injury that would result from improper assembly or use.

[3] Inadequate Instructions

A product requiring assembly and use in conformity with the supplier's directions is defective if the supplier fails to warn adequately of conditions and circumstances created by such assembly or use that would render the product dangerous to the user. Therefore, the supplier is strictly liable for injury proximately resulting from composing and furnishing a set of instructions for assembly and use that does not adequately avoid the danger of injury [*Midgley v. S.S. Kresge Co. (1976) 55 Cal. App. 3d 67, 74, 127 Cal. Rptr. 217* (inadequate instructions on assembly of telescope; plaintiff, a minor, followed instructions in assembling telescope and sustained severe eye injury when viewing sun through improperly installed filter)].

[4] Cross References

For a related form, see *§ 460.164*

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40-460 California Forms of Pleading and Practice--Annotated § 460.168

§ 460.168 Allegation--Exemplary Damages [Civ. Code § 3294]

[1] FORM Allegation--Exemplary Damages

At all times herein mentioned defendant knew that _____ [*specify, e.g.,* the tires] herein described manufactured and sold by it were defective in the manner herein alleged, that _____ [*specify, e.g.,* in all likelihood the tires would fail while in normal use, and that if they failed the failure would in all likelihood cause an accident] which in turn would cause _____[serious] personal injury and property damage to users[, passengers,] and bystanders, and yet, notwithstanding this knowledge, defendant despicably, and in willful and conscious disregard of the safety of such persons and of the plaintiff herein, without giving any notice of the defect to the purchasers, placed and persisted in placing its herein described defective _____ [*product, e.g.,* tires] into the stream of commerce, causing them to be _____ [*specify, e.g.,* installed on cars, including the car sold to plaintiff as herein alleged]. Plaintiff is therefore entitled to an award of exemplary or punitive damages.

[2] Use of Form

This form is an allegation, appropriately numbered, for insertion in a complaint seeking recovery of damages for personal injuries or property damage or both in an action based on strict liability in tort where defendant was guilty of malice. For an alternative form of allegation, see Paragraph 15 of the *form in § 460.141[1]*. When the punitive damage allegation is used, the prayer of the complaint will include a request for an award of punitive, or exemplary, damages [*see § 460.141[1]*]. However, no claim for exemplary or punitive damages may state an amount or amounts [*Civ. Code § 3295(e)*].

[3] Exemplary Damages

[a] General Rule

In an action for the breach of an obligation not arising from contract, when it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant [*Civ. Code § 3294(a)*].

Exemplary or punitive damages under *Civ. Code § 3294* may, in a proper case, be recovered in an action based on strict liability in tort [*see Boeken v. Philip Morris Inc. (2005) 127 Cal. App. 4th 1640, 1700-1703, 26 Cal. Rptr. 3d 638* ; *Romo v. Ford Motor Co. (2003) 113 Cal. App. 4th 738, 749, 6 Cal. Rptr. 3d 793* ; *G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 26, 122 Cal. Rptr. 218* ; *Barth v. B.F. Goodrich Tire Co. (1968) 265 Cal. App. 2d 228, 240-241, 71 Cal. Rptr. 306* ; *Toole v. Richardson-Merrell, Inc. (1967) 251 Cal. App. 2d 689, 711, 713, 60 Cal. Rptr. 398* ; *see also Hasson v. Ford Motor Co. (1981) 32 Cal. 3d 388* ; *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 810, 174 Cal. Rptr. 348* (decided before 1987 amendment to *Civ. Code § 3294*)]. However, to recover punitive damages, the plaintiff must show that personal injury (or some equivalent egregious injury) occurred in addition to establishing the "oppression, fraud, or malice" required under *Civ. Code § 3294* [*Romo v. Ford Motor Co. (2002) 99 Cal. App. 4th 1115, 1138-1150, 122 Cal. Rptr. 2d 139 , overruled on other grounds, Romo v. Ford Motor Co. (2003) 113 Cal. App. 4th 738, 749, 6 Cal. Rptr. 3d 793* ; *Gawara v. United States Brass Corp. (1998) 63 Cal. App. 4th 1341, 1360-1363, 74 Cal. Rptr. 2d 663]* .

For developments in appellate review of punitive damages awards, see *§ 460.33[2]*.

[b] Award

To justify an award of exemplary or punitive damages, the defendant must have been proved guilty, by clear and convincing evidence, of oppression, fraud, or malice [*Civ. Code § 3294(a)*]. "Malice," for the purpose of *Civ. Code § 3294(a)*, is defined as conduct that is intended to cause injury to plaintiff, or despicable conduct that is carried on by the defendant with conscious disregard of the rights or safety of others [*Civ. Code § 3294(c)(1)*]. "Oppression," as used in *Civ. Code § 3294(a)*, is despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights [*Civ. Code § 3294(c)(2)*]; and fraud, as used in *Civ. Code § 3294(a)*, is an intentional misrepresentation, deceit, or a concealment of a material fact known to the defendant with the intention on the part of the defendant to thereby deprive a person of legal rights or property, or to otherwise cause injury [*Civ. Code § 3294(c)(3)*].

[c] Pleading

A complaint seeking exemplary or punitive damages must contain appropriate allegations showing that an award of such damages is justified. For example, where malice is relied on in a complaint alleging an intentional wrong, a prayer for exemplary damages may be supported by pleading that the wrong was committed willfully and with a design to injure; but when nondeliberate injury is charged, allegations that the defendant's conduct was wrongful, willful, wanton, reckless, or unlawful will not support a claim for exemplary damages because they do not charge malice. But an allegation that defendant in doing the things alleged acted despicably and in willful and conscious disregard of the safety of others properly describes the animus malus that may justify an exemplary damage award when nondeliberate injury is alleged [*see Civ. Code § 3294(c)(1)*; *see also G.D. Searle & Co. v. Superior Court (1975) 49 Cal. App. 3d 22, 29-32 , 122 Cal. Rptr. 218* (decided before 1987 amendment to *Civ. Code § 3294*)].

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40-460 California Forms of Pleading and Practice--Annotated § 460.169

§ 460.169 Allegation--Manufacturers of Substantial Share of Market--Particular Manufacturer Unidentifiable

[1] FORM Allegation--Manufacturers of Substantial Share of Market--Particular Manufacturer Unidentifiable

Defendants _____[*name of manufacturer*], and _____[*name of manufacturer, repeating for as many as necessary*][, and DOES _____ (*numbers*)] produced a substantial share of the market for _____ [*describe product and use if there was more than one use, e.g.,* diethylstibestrol, hereinafter DES, used to prevent miscarriages], which product was defective as alleged herein, during the time in question. Defendants, and each of them _____ [*state reason defendants share the liabiity, e.g.,* produced DES from identical formulas], and the producers of the _____ [*specify, e.g.,* DES] that caused plaintiff's injuries cannot be identified through no fault of plaintiff.

[2] Use of Form

This form is an allegation for use in a complaint for personal injuries by a plaintiff who knows the type of product that caused the injury, but who, through no fault of plaintiff, cannot identify the manufacturer of the precise product that caused the injury. It is for use if plaintiff can name the manufacturers who supplied an amount of the product that comprises a substantial share of the market for the particular defective product that caused the injury. The allegation is based on *Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 163 Cal. Rptr. 132, 607 P.2d 924* [*see § 460.11[7]*].

[3] Doe Defendants

Sindell requires the plaintiff to join in the action a significant share of the market for the product that might have caused the injuries. It is not clear whether DOE defendants may be included in this allegation. However, the court in *Sindell* stated that the problems of defining the market and determining market share are largely matters of proof that cannot properly be determined at the pleading stage of these proceedings [*Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 613, 163 Cal. Rptr. 132, 607 P.2d 924]* . Therefore, plaintiff could argue that whether or not the named defendants supplied a significant share of the market without the DOE defendants may not be determined on demurrer. Plaintiff could then name any DOE defendants that he or she later discovers are needed to comprise a significant share of the market.

[4] Theory of Substantial Share of Market

The court in *Sindell, above*, declined to require the particular share of the market suggested by a law review article (75 to 80 percent), and stated that it was holding only that a substantial percentage is required. It is clear, however, that a small percentage of the market (10 percent) does not constitute a substantial share of the market for purposes of imposing liability under the *Sindell* market-share theory [*Murphy v. E.R. Squibb & Sons, Inc. (1985) 40 Cal. 3d 672, 682-687, 221 Cal. Rptr. 447, 710 P.2d 247]* . The court stated that each defendant would be held liable for the proportion of the judgment represented by its share of that market unless it demonstrated that it could not have made the product that caused the plaintiff's injuries. Once plaintiff met her burden of joining the required defendants, the defendants could cross complain against other DES manufacturers, not joined in the action, that might have supplied the injury-causing product. As mentioned above, the problems of defining the market and determining the market share are matters of proof that cannot properly be determined at the pleading stage of the proceedings [*Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 611-613, 163 Cal. Rptr. 132, 607 P.2d 924* ; *see Miles Labs., Inc. v. Superior Court (1982) 133 Cal. App. 3d 587, 595-596, 184 Cal. Rptr. 98* (defendant's motion for summary judgment as properly denied when plaintiff alleged under *Sindell* that defendant gained a substantial market share by acquiescing in generic drug's use for an unintended purpose)]. Counsel should note, however, that the market-share liability theory cannot be used to impose punitive damages when the plaintiff cannot identify the defendant who supplied the product [*see Magallanes v. Superior Court (1985) 167 Cal. App. 3d 878, 890, 213 Cal. Rptr. 547]* .

[5] Burden of Proof and Apportionment of Damages

Under the market-share theory, each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product that caused plaintiff's injuries [*Sindell v. Abbott Labs. (1980) 26 Cal. 3d 588, 612, 163 Cal. Rptr. 132, 607 P.2d 924]* . Therefore, each defendant is liable for the proportion of the judgment represented by its market share, and joint liability is inapplicable [*Brown v. Superior Court (1988) 44 Cal. 3d 1049, 1074-1075, 245 Cal. Rptr. 412, 751 P.2d 470]* . For further discussion, see *§ 460.11[7]*.

[6] Cross References

For further discussion in general, see *§ 460.166*.

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[Reserved]

§§ 460.170[Reserved]

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40-460 California Forms of Pleading and Practice--Annotated § 460.180

§ 460.180 Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12(a); Cal. Rules of Ct., Rule 1.45(a)]--Answer [Code Civ. Proc. § 431.30] in Action for Personal Injury, Property Damage, Wrongful Death [Cal. Judicial Council PLD-PI-003]

[1] FORM Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12(a); Cal. Rules of Ct., Rule 1.45(a)]--Answer [Code Civ. Proc. § 431.30] in Action for Personal Injury, Property Damage, Wrongful Death [Cal. Judicial Council PLD-PI-003]

Click here to view image.

[2] Use of Form

This form is the Judicial Council approved general answer form for use in any action based on personal injury, property damage, or wrongful death [*see Code Civ. Proc. § 425.12*; Cal. Judicial Council Form PLD-PI-003]. The complaint which it answers is *set out in § 460.140*. Use of the forms is optional [*see Code Civ. Proc. § 425.12*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. For general information relating to the use of Judicial Council answer forms, see Ch. 26, *Answers* .

[3] General Denial

If the complaint is not verified, if the complaint is subject to *Code Civ. Proc. §§ 90-100* (relating to pleadings in municipal courts, but excepting claims assigned to a third party for collection when the complaint is verified), or if the demand or the value of the property in controversy does not exceed $1,000, the defendant may make a general denial [*Code Civ. Proc. §§ 431.30(d), 431.40(a)*]. A form of general denial has been adopted by the Judicial Council for this purpose [*Code Civ. Proc. § 431.40(c)*; Cal. Judicial Council Form PLD-050]. Use of this general denial form is mandatory, pursuant to Cal. Rules of Ct., Rule 201.1(b). Therefore, in a products liability action brought on a Judicial Council complaint form that is unverified, it is unclear whether the answering attorney would use the mandatory general

denial form, or the form presented here, which is a more specifically applicable answer form for a personal injury, property damage, or wrongful death complaint, and which the Judicial Council has approved for optional use for this purpose [*see* Cal. Judicial Council Form PLD-PI-003]. Counsel should review local court practice to determine whether or not the court will require the general denial form. A copy of the general denial form suitable for reproduction is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[4] Allegations

[a] Number of Pages (Paragraph 1.)

The total number of pages submitted is to be indicated in **Paragraph 1.** For a discussion of attachments to this form, see the Comments to the Judicial Council answer form in Ch. 380, *Negligence* .

[b] General Denial (Paragraph 2.)

Counsel for the defendant should check either the box in **Paragraph 2.** or one or more of the boxes in **Paragraph 3.** Box **2.** may be checked if the complaint is unverified. As a general denial, checking box **2.** will put in issue the material allegations of the complaint [*Code Civ. Proc. § 431.30(d)*]. Therefore, if the complaint is verified, or the defendant wishes to put in issue allegations other than the material allegations of the complaint, one or more of the boxes in **Paragraph 3.** should be checked instead. For a discussion of using this form for a general denial, rather than the general Judicial Council general denial form, see [3], *above.*

[c] Other Denials and Admissions (Paragraph 3.)

For a discussion of filling in **Paragraph 3.** see the Comments to the Judicial Council Form of answer in Ch. 380, *Negligence*.

[d] Affirmative Defenses

[i] Comparative Fault (Paragraph 4.)

The defense of comparative fault may be asserted in an action for negligence or strict products liability to reduce the plaintiff's recovery to the extent that his or her own lack of reasonable care contributed to the injury [*Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 737, 738, 144 Cal. Rptr. 380, 575 P.2d 1162]* . If the box following **4.** is to be checked, counsel should fill in the name or names of the plaintiff or plaintiffs against whom comparative fault is alleged. Counsel should also allege plaintiff's negligence as proximately contributing to plaintiff's alleged injuries. For specific allegations of comparative fault as an affirmative defense, see Forms 21 and 22. If comparative fault is asserted against more than one plaintiff, counsel should, within **Paragraph 4.**, number and state separately each allegation of comparative fault against each particular plaintiff [*see Code Civ. Proc. § 431.30(g)*; *Cal. Rules of Ct., Rule 2.112*].

[ii] Statute of Limitations (Paragraph 5.)

If a statute of limitations is to be asserted as a defense, the box following **5.** should be checked. The Code of Civil Procedure provides that it is not necessary to state the facts showing the defense, but that it may be stated generally that the cause of action is barred by a particular code section, which is pleaded by number, and subsection number if applicable [*Code Civ. Proc. § 458*]. For a form of allegations of the statute of limitations as an affirmative defense, see *§ 460.181*

[iii] Other Defenses (Paragraph 6.)

An answer may set forth as many defenses as a defendant has [*Code Civ. Proc. § 431.30(b)(2)*]. Thus **Paragraph 6.** may be used to allege affirmative defenses not provided for in **Paragraphs 4.** and **5.** One example of an affirmative defense that may apply to a products liability action is alteration in the product after sale [*see § 460.184*]. In addition, special defenses, such as plaintiff's lack of capacity to sue, or the court's lack of subject matter jurisdiction may be asserted as affirmative defenses in an action, if the grounds for the defense do not appear on the face of the complaint [*Code Civ. Proc. §§ 430.10, 430.30(b)*].

If more than one defense is alleged in **Paragraph 6.**, each defense must be separately stated, and must refer to the causes of action in the complaint to which they apply [*Code Civ. Proc. § 431.30(g)*]. Each defense must also be separately numbered [*Cal. Rules of Ct., Rule 2.112*].

[e] Prayer (Paragraph 7.)

Affirmative relief may not be claimed in the answer [*Code Civ. Proc. § 431.30(c)*]. Therefore, the prayer will probably be limited to requesting the costs of suit, requesting that the plaintiff take nothing, and requesting such other and further relief as the court may deem proper. If the defendant is seeking affirmative relief, a cross complaint must be filed [*Code Civ. Proc. §§ 426.30, 428.10*; *see § 460.200* for Judicial Council cross complaint form].

[f] Signature

The answer must be signed by the defendant or the defendant's attorney [*Code Civ. Proc. § 446*].

[g] Verification

If the complaint is verified the answer must also be verified, unless the defendant is the state, a county, city, school district, public agency, public corporation, or the officer of any of such entities in his or her official capacity [*Code Civ. Proc. § 446*]. When a corporation is the defendant, the verification may be made by any officer of the corporation [*Code Civ. Proc. § 446*]. If the answer is to be verified, counsel should prepare a verification attachment to the form. If a verification attachment is prepared, counsel must follow the form required by *Cal. Rules of Ct., Rule 2.100 et seq.*

For further discussion and forms of verification, see Ch. 26, *Answers* , and Ch. 573, *Verification* .

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40-460 California Forms of Pleading and Practice--Annotated § 460.181

§ 460.181 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action for Personal Injuries Barred by Statute of Limitations [Code Civ. Proc. § 340(3)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action for Personal Injuries Barred by Statute of Limitations [Code Civ. Proc. § 340(3)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that: the action sued on is barred by the provisions of *Section 335.1 of the Code of Civil Procedure.*

[2] Use of Form

This form is an affirmative defense for insertion in an answer to a complaint seeking damages based on strict liability in tort for personal injury or death where the complaint was not filed within two years from the date the cause of action accrued [*see Code Civ. Proc. § 335.1*; for a discussion of when an action accrues, *see § 460.31[2]*; for the requirements concerning computation of time, *see Code Civ. Proc. §§ 12, 12a*]. Former *Code Civ. Proc. § 340(3)* provided for a one-year period. Personal injury and death actions based on exposure to asbestos are governed by *Code Civ. Proc. § 340.2*, which requires the actions to be brought the later of 1) one year after the plaintiff first suffered disability; or 2) one year after the plaintiff knew or should have known that the disability was caused or contributed to by asbestos exposure [*Hamilton v. Asbestos Corp., Ltd. (2000) 22 Cal. 4th 1127, 1138, 95 Cal. Rptr. 2d 701, 998 P.2d 403, 409]* . With substitution of appropriate code sections, the form may also be used when the complaint seeks recovery of damages for injury to property and was not filed within the period prescribed by the appropriate statute of limitations [*see Code Civ. Proc. § 338(b), (c)*].

If more than one affirmative defense is set forth in the answer, each defense must be separately stated [*Code Civ. Proc. § 431.30(g)*] and numbered [*Cal. Rules of Ct., Rule 2.112*]. If the complaint sets forth more than one cause of action, the affirmative defense must refer to the cause of action it is intended to answer [*Code Civ. Proc. § 431.30(g)*].

[3] Alternative Procedures

If the fact that the action is barred by the statute of limitations appears on the face of the complaint or from matter of which the court must or may take judicial notice [*see Evid. Code §§ 451, 452*], the objection may be raised by demurrer [*Code Civ. Proc. § 430.30(a)*; *see § 460.181[4][b]*]. Whether or not the fact so appears, if the defense can be indisputably established by affidavits, declarations, admissions, answers to interrogatories, or depositions, defendant may move for summary judgment on that ground [*see Code Civ. Proc. § 437c*; and Ch. 537, *Summary Judgment*]. Where the fact does not so appear and cannot be indisputably established on a motion for summary judgment, that is, the defense can be established but fact issues must be determined, defendant may allege the bar of the statute as an affirmative defense in his, her, or its answer to the complaint and then move for a separate trial of that issue [*see Code Civ. Proc. § 597*].

[4] Pleading Statute of Limitations

[a] In Answer

A defendant asserting that the action is barred by the statute of limitations may, in his, her, or its answer to the complaint, plead the bar of the statute in one of two ways:

- By alleging all of the facts showing that the action is barred and indicating that the lateness of the commencement of the action is being urged as a defense [*Brown v. World Church (1969) 272 Cal. App. 2d 684, 691, 77 Cal. Rptr. 669]* .

- By stating generally that the cause of action is barred by a specified section of the Code of Civil Procedure or, if the section is subdivided, by a specified section and the subdivision [*Code Civ. Proc. § 458*].

If the second method is used and defendant fails to specify the code section relied on or if the section is subdivided, the code section and the subdivision relied on, the plea is insufficient [*Brown v. World Church (1969) 272 Cal. App. 2d 684, 691, 77 Cal. Rptr. 669]* and would be subject to a demurrer on the ground that it does not state facts sufficient to constitute a defense [*see Code Civ. Proc. §§ 430.20(a), 430.50(b)*].

Code Civ. Proc. § 458 further provides that if the allegation that the action is barred is controverted, the party pleading the defense must establish, on the trial, the facts showing the cause of action is barred. The plaintiff does not, however, file a replication to the answer. Rather, statute provides that the statement of any new matter in the answer, in avoidance or constituting a defense, must, on the trial, be deemed controverted by the opposite party [*Code Civ. Proc. § 431.20(b)*]. Since the affirmative defense is deemed controverted by operation of law, defendant has the burden on trial of establishing it.

[b] By Demurrer

A complaint that shows on its face, or from any matter properly brought to the court's attention of which the court must or may take judicial notice [*see Evid. Code §§ 451-456*], that the cause of action sued on is barred by the statute of limitations is subject to a demurrer on the ground that it fails to state a cause of action [*see Code Civ. Proc. §§ 430.10(e), 430.50(a)*; *California Safe Deposit & Trust Co. v. Sierra Valleys Ry. Co. (1910) 158 Cal. 690, 698, 112 P. 274* (construing predecessor statute)]. In such case, however, it is necessary that the demurrer specify the reason the complaint fails to state a cause of action, to wit, that the action is barred by the statute of limitations. Thus, the complete body of the demurrer would read: "Defendant demurs to the complaint herein on the ground that it fails to state facts sufficient to constitute a cause of action in that it shows on its face that the action is barred by the statute of limitations" [*see* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 345, *Limitation of Actions*].

Instead of the whole complaint, the demurrer may be directed to a single cause of action or count in a complaint setting forth two or more causes of action or counts in which case a proper identifying phrase, e.g., "to the first cause of action alleged in the complaint herein," would be substituted for "complaint herein" in the above demurrer; too, if the defect appears from judicially noticed matter, a proper identifying phrase or clause would be used in lieu of the clause "it shows on its face ... "

It is not necessary in pleading the bar of the statute of limitations in a demurrer to specify the code section or code section and subdivision relied on as is required by *Code Civ. Proc. § 458* when pleading the bar of the statute in an answer [*see § 460.181[4][a]*]. *Code Civ. Proc. § 458* specifies a substitute for pleading the facts showing the defense, and facts have no place in a demurrer. Hence, the requirement of *Code Civ. Proc. § 458* that the code section or, where the section is subdivided, the code section and subdivision be specified does not apply to demurrers [*Bainbridge v. Stoner (1940) 16 Cal. 2d 423, 431, 106 P.2d 423* ; *Spreckels v. Spreckels (1916) 172 Cal. 775, 783, 158 P. 537* ; *Lewis v. Security-First Nat'l Bank (1943) 58 Cal. App. 2d 827, 828, 137 P.2d 864]* .

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40-460 California Forms of Pleading and Practice--Annotated § 460.182

§ 460.182 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Comparative Fault

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Comparative Fault

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

[1. The defect in the _____ (*product*) _____ (manufactured *or* sold) by defendant as alleged in the complaint herein, if it existed at all, was patent and the danger of _____ (using the _____(*product*) *or* being in the area of its use) in the allegedly defective condition was obvious.]

2. Plaintiff at all times _____ [from and after _____ (*date plaintiff became aware of defect*), *or* mentioned in the complaint herein] knew that the _____[*product*] was defective in that _____[*specify particulars in which product was defective*] and that _____ [to use the _____ (*product*) in that condition *or* to be in the area of its use] would expose him/her to the risk of the very injuries of which he/she complains, to wit, _____[*specify*].

3. Notwithstanding that plaintiff knew of the defect in the _____[*product*] and of the danger involved in _____ [using it *or* being in the area of its use] in the defective condition alleged, plaintiff _____ [used the _____ (*product*) *or* _____ (entered *or* remained) in the area of its use] and, by so doing, plaintiff _____ [was negligent, and that negligence was a cause of any injuries he/she suffered *and/or* assumed the risk of injury by knowingly encountering the risk of injury caused by the use of the defective product].

[2] Use of Form

This form contains affirmative defenses for insertion in an answer to a complaint seeking damages for injuries based on strict liability in tort where plaintiff was aware of the defect in the product prior to the accident sued on and of the danger of using the defective product in its defective condition or being in the zone of danger created by the use of the

product by another but nevertheless proceeded to make use of the product or to enter or remain in the zone of danger and thereby sustained the injuries complained of.

[3] Alternative Procedures

Should the fact that plaintiff voluntarily encountered the risk, or otherwise acted in the manner indicating comparative fault, appear on the face of the complaint or from matter of which the court must or may take judicial notice [*see Evid. Code §§ 451, 452*], the objection may be raised by demurrer [*Code Civ. Proc. § 430.30(a)*] on the ground that the complaint fails to state a cause of action [*see Code Civ. Proc. § 430.10(e)*; for forms of demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*]. Whether or not the fact so appears, if the defense can be indisputably established by affidavits, declarations, admissions, answers to interrogatories, or depositions, defendant may move for summary judgment on that ground [*see Code Civ. Proc. § 437c*; and Ch. 537, *Summary Judgment*].

[4] Comparative Fault

The principles of comparative fault announced in *Li v. Yellow Cab (1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226* , apply to actions founded on strict products liability as well as those based on negligence [*Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 730, 742, 144 Cal. Rptr. 380, 575 P.2d 1162]* . Under the principles of comparative fault, a plaintiff's recovery will be reduced in proportion to the amount of fault attributable to him or her [*Daly v. General Motors Corp. (1978) 20 Cal. 3d 725, 738, 144 Cal. Rptr. 380, 575 P.2d 1162* ; *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 824-825, 829, 119 Cal. Rptr. 858, 532 P.2d 1226]* .

Comparative fault principles also apply to cases in which "secondary assumption of risk" is established: that is, cases in which the defendant owes a duty of care to the plaintiff, but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty [*Knight v. Jewett (1992) 3 Cal. 4th 296, 308, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . In the products liability context, it has been held that a manufacturer does have a duty to users of the product; therefore, the manufacturer of a defective product had not established the complete bar to liability that results from "primary assumption of risk," under which the assumption of the risk doctrine embodies a legal conclusion that the defendant owed no duty to protect the plaintiff from a particular risk [*Milwaukee Electric Tool Corp. v. Superior Court (1993) 15 Cal. App. 4th 547, 560-565, 19 Cal. Rptr. 2d 24* ; *see Knight v. Jewett (1992) 3 Cal. 4th 296, 314-315, 11 Cal. Rptr. 2d 2, 834 P.2d 696]* . The court broadly stated that the purposes of the strict products liability doctrine are served by the finding that, absent some extraordinary circumstance, the primary assumption of risk doctrine does not apply because of the duty a manufacturer owes to the users of its product [*Milwaukee Electric Tool Corp. v. Superior Court (1993) 15 Cal. App. 4th 547, 565, 19 Cal. Rptr. 2d 24]* .

Although a defendant owes no duty of care to protect a plaintiff against risks inherent in a particular sport voluntarily played by the plaintiff, the defendant owes a duty to participants not to increase the risk of harm over and above that inherent in the sport [*American Golf Corp. v. Superior Court (2000) 79 Cal. App. 4th 30, 35, 93 Cal. Rptr. 2d 683* ; *Sanchez v. Hillerich & Bradsby Co. (2002) 104 Cal. App. 4th 703, 713-715, 128 Cal. Rptr. 2d 529* (triable issue of material fact whether design and use of hollow aluminum alloy bat significantly increased inherent risk that pitcher would be hit by line drive)].

For further discussion, see *§ 460.53*.

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40-460 California Forms of Pleading and Practice--Annotated § 460.183

§ 460.183 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Misuse of Product Causing Injuries

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Misuse of Product Causing Injuries

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. The _____[*product*] described in the complaint herein was designed and intended to be used _____[*specify normal use of product*].

2. As shown by Paragraph _____, Page _____ of the complaint herein, at the time of the alleged accident sued on, the _____[*product*] was being used by _____[*name*] to _____[*specify misuse*]. This use was without defendant's knowledge, approval, or consent [and was contrary to the printed instructions that were delivered to plaintiff with the _____ (*product*)]. The use of the _____[*product*] as alleged in the complaint was not reasonably foreseeable to defendant either at or before the time of sale, or at any time prior to the time defendant received notice of the accident described in the complaint.

3. Defendant is informed and believes and thereon alleges that the accident for which plaintiff herein seeks recovery of damages was solely and proximately caused by such misuse of the _____[*product*].

[2] Use of Form

This form is an affirmative defense for insertion in an answer to a complaint for damages based on strict liability in tort where the accident sued on resulted from a misuse of the product which was not reasonably foreseeable by the defendant.

[3] Alternative Procedures

Should the fact that the accident sued on resulted from a misuse of the product not reasonably foreseeable by the defendant appear on the face of the complaint or from matter of which the court must or may take judicial notice [*see Evid. Code §§ 451, 452*], the objection may be raised by demurrer [*Code Civ. Proc. § 430.30(a)*] on the ground that the complaint fails to state a cause of action [*see Code Civ. Proc. § 430.10(e)*; for forms of demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*]. Whether or not the fact so appears, if the defense can be indisputably established by affidavits, declarations, admissions, answers to interrogatories, or depositions, defendant may move for summary judgment on that ground [*see Code Civ. Proc. § 437c*; and Ch. 537, *Summary Judgment*].

[4] Use of Product

To invoke the doctrine of strict liability in tort, plaintiff must prove that at the time of the injury, the product was being used in a way the manufacturer intended it to be used [*Dosier v. Wilcox-Crittendon Co. (1975) 45 Cal. App. 3d 74, 78, 119 Cal. Rptr. 135]* . The ultimate test in determining whether the product was being used in the way it was intended to be used, however, is whether the article was being used in a way which the seller should have reasonably anticipated [*Johnson v. Standard Brands Paint Co. (1968) 274 Cal. App. 2d 331, 340, 79 Cal. Rptr. 194* ; *see also Horn v. General Motors Corp. (1976) 17 Cal. 3d 359, 371, 131 Cal. Rptr. 78, 551 P.2d 398* ; *Cronin v. J.B.E. Olson Corp. (1972) 8 Cal. 3d 121, 126, 104 Cal. Rptr. 433, 501 P.2d 1153* ; *Thomas v. General Motors Corp. (1970) 13 Cal. App. 3d 81, 91, 91 Cal. Rptr. 301]* . Even an unusual use which the manufacturer is required to anticipate will not relieve the manufacturer of liability in the absence of warnings against such use. Just what a manufacturer is required to anticipate in connection with the use of a product is a question of reasonable foreseeability [*Dosier v. Wilcox-Crittendon Co. (1975) 45 Cal. App. 3d 74, 78, 119 Cal. Rptr. 135]* .

The foreseeability of the misuse of a product is ordinarily a question for the trier of fact [*Dosier v. Wilcox-Crittendon Co. (1975) 45 Cal. App. 3d 74, 78, 119 Cal. Rptr. 135* ; *Thompson v. Package Mach. Co. (1971) 22 Cal. App. 3d 188, 196, 99 Cal. Rptr. 281]* .

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40-460 California Forms of Pleading and Practice--Annotated § 460.184

§ 460.184 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Alteration in Product After Sale

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Alteration in Product After Sale

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. The _____[*product*] described in the complaint herein was a _____[*fully describe*], manufactured and sold by defendant to _____ [*specify, e.g.,* plaintiff] on _____[*date*].

2. Thereafter, to wit, on or about _____[*date*], without defendant's knowledge or approval, _____ [*specify, e.g.,* plaintiff] _____ [redesigned *or* modified *or* altered the _____ (*product*) by *or* subjected the _____ (*product*) to] the following treatment which substantially changed its character: _____[*specify; or allege other change*].

3. The defect in the _____[*product*], as alleged in the complaint, consisted of _____[*describe*]. This defect resulted solely from the _____ [redesign *or* modification *or* alteration *or* treatment *or other change*] of the _____[*product*] as above-described and not from any act or omission of defendant or its suppliers.

4. Defendant is informed and believes and thereon alleges that the above-described defect, created by _____ [*specify, e.g.,* plaintiff himself], was the sole and proximate cause of plaintiff's injuries, if any, as alleged in the complaint herein.

[2] Use of Form

The foregoing form is for insertion in an answer to a complaint seeking damages based on strict liability in tort where the alleged defect resulted from some change in the product effected after the consumer's purchase of it.

[3] Alternative Procedures

Should the fact that the alleged defect resulted solely from an alteration or modification of the product by the purchaser and not by any act or omission of the manufacturer or other person in the marketing chain appear on the face of the complaint or from matter of which the court must or may take judicial notice [*see Evid. Code §§ 451, 452*], the objection may be raised by demurrer [*Code Civ. Proc. § 430.30(a)*] on the ground that the complaint fails to state a cause of action [*see Code Civ. Proc. § 430.10(e)*; for forms of demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*]. Whether or not the fact so appears, if the defense can be indisputably established by affidavits, declarations, admissions, answers to interrogatories, or depositions, defendant may move for summary judgment on that ground [*see Code Civ. Proc. § 437c*; and Ch. 537, *Summary Judgment*].

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40-460 California Forms of Pleading and Practice--Annotated § 460.185

§ 460.185 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Manufacturer Not Liable to Consumer Because of Failure to Warn When Adequate Warnings Given to Distributor With Control Over Packaging, Labeling, and Marketing

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Manufacturer Not Liable to Consumer Because of Failure to Warn When Adequate Warnings Given to Distributor With Control Over Packaging, Labeling, and Marketing

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. The defect in the _____ [*specify product, e.g.,* lantern fuel], as alleged in the complaint, consisted solely of an inadequate warning regarding the safe use of the _____[*product*].

2. Defendant manufactured the _____[*product*] and distributed it in bulk to _____[*name of distributor*].

3. Defendant provided adequate warning regarding the proper use of the _____[*product*] to _____[*name of distributor*].

4. _____[*Name of distributor*] packaged, labeled, and marketed the _____[*product*].

[2] Use of Form

This form is an affirmative defense for insertion into an answer to a complaint seeking damages based on strict liability in tort when the alleged defect resulted from inadequate warnings regarding the safe use of the product, the defendant manufacturer produced the product in bulk, and the manufacturer provided adequate warnings to the distributor who packaged, labeled, and marketed the product.

[3] Duty to Warn Regarding Safe Use of Product

A product, though faultlessly made, may nevertheless be found defective within the general strict liability rule if it is unreasonably dangerous to place the product in the hands of the user without adequate warnings [*Artiglio v. General Elec. Co. (1998) 61 Cal. App. 4th 830, 837, 71 Cal. Rptr. 2d 817* (applying test based on combined factors from "raw material supplier defense" and "bulk sales/sophisticated purchaser rule" to determine the liability of component part manufacturers); *Groll v. Shell Oil Co. (1983) 148 Cal. App. 3d 444, 448, 196 Cal. Rptr. 52* ; *Cavers v. Cushman Motor Sales, Inc. (1979) 95 Cal. App. 3d 338, 349, 157 Cal. Rptr. 142]* . However, when a manufacturer distributes a product in bulk to a distributor who subsequently packages, labels, and markets the product, the manufacturer's responsibility to warn is satisfied when it provides adequate warnings to the distributor [*Groll v. Shell Oil Co. (1983) 148 Cal. App. 3d 444, 449-450, 196 Cal. Rptr. 52]* . In this circumstance, the manufacturer need not warn the consumer or ensure that the distributor provides adequate warnings to the consumer [*Groll v. Shell Oil Co. (1983) 148 Cal. App. 3d 444, 449, 196 Cal. Rptr. 52]* .

[4] Alternative Procedures

If the facts that defendant produced the product in bulk and provided adequate warnings to the distributor who packaged, labelled, and marketed the product appear on the face of the complaint or from matter of which the court must or may take judicial notice [*see Evid. Code §§ 451*, *452*], the objection may be raised by demurrer [*Code Civ. Proc. § 430.30(a)*] on the ground that the complaint fails to state a cause of action [*see Code Civ. Proc. § 430.10(e)*; for forms of demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*]. Whether or not the fact so appears, if the defense can be indisputably established by affidavits, declarations, admissions, answers to interrogatories, or depositions, defendant may move for summary judgment on that ground [*see Code Civ. Proc. § 437c*; *see also* Ch. 537, *Summary Judgment*].

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40-460 California Forms of Pleading and Practice--Annotated § 460.186

§ 460.186 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Manufacturer Not Liable to Consumer Because of Failure to Warn in Language Other Than English of Danger Posed by Nonprescription Drug When Warning in English Met Legal Requirements

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Manufacturer Not Liable to Consumer Because of Failure to Warn in Language Other Than English of Danger Posed by Nonprescription Drug When Warning in English Met Legal Requirements

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. The product described in the complaint herein, _____[*specify product, including brand and type of nonprescription drug*], is a nonprescription drug subject to the labeling requirements of Section 502 of the Food, Drug, and Cosmetic Act (Title *21, United States Code Section 352*) and regulations implementing the statute.

2. The warnings that accompanied the _____[*specify product*], which are alleged in the complaint to have been inadequate because they were in English and not in _____ [*specify language other than English that complaint alleges warning should have been included in, e.g.,* Spanish], met all legal requirements, and therefore fulfilled defendant's duty to care to warn.

[2] Use of Form

This form is an affirmative defense for insertion into an answer to a complaint seeking damages based on strict liability in tort, if the alleged defect resulted from inadequate warnings regarding the safe use of the product, the alleged inadequacy is the defendant's failure to include warnings in a language other than English, the product is a nonprescription drug, and the warning or warnings accompanying the product met the standards established by federal law [*see 21 U.S.C.S. § 352*; *21 C.F.R. § 201.1 et seq.*].

[3] Statutes Governing Warnings to Accompany Nonprescription Drugs Establish Duty of Care

Although the use of statutes to establish a standard of care typically establish the minimum standard required, there are situations in which compliance with statutes can establish a defense to a tort cause of action [*Ramirez v. Plough, Inc. (1993) 6 Cal. 4th 539, 548, 25 Cal. Rptr. 2d 97, 863 P.2d 167* ; *see also O'Neill v. Novartis Consumer Health, Inc. (2007) 147 Cal. App. 4th 1388, 1395-1396]* . One such situation involves the warnings that must accompany nonprescription drugs, which are comprehensively regulated under federal law. The extensiveness of these regulations, and the fact that the regulations do not require warnings in languages other than English, persuaded the California Supreme Court to adopt for tort purposes the existing legislative and administrative standard of care, which does not require warnings in other languages [*Ramirez v. Plough, Inc. (1993) 6 Cal. 4th 539, 553, 25 Cal. Rptr. 2d 97, 863 P.2d 167* (failure to warn in Spanish of danger of Reye's syndrome that could result from administering aspirin to children could not be basis for tort liability)].

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40-460 California Forms of Pleading and Practice--Annotated § 460.187

§ 460.187 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Government Contractor Immunity

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Government Contractor Immunity

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. The _____[*product*] described in the complaint herein was a _____[*fully describe*], military equipment manufactured and sold by defendant to _____ [*specify branch of service that purchased equipment, e.g.,* the United States Army] on _____[*date*].

2. The United States is immune from liability for any damages caused by the allegedly defective military equipment.

3. The United States _____ [established *or* approved] reasonably precise specifications for the allegedly defective military equipment.

4. The equipment conformed to the specifications mentioned in Paragraph 3, above.

5. Defendant warned the United States about _____ [patent errors in the government's specifications *and/or* dangers involved in the use of the equipment that were known to defendant but not known to the United States.

[2] Use of Form

This form is an affirmative defense for insertion in an answer to a complaint seeking damages based on strict liability in tort when the alleged defect was in a piece of military equipment supplied in compliance with specifications provided by or approved by the United States.

[3] Government Contractor Immunity

As set forth by the U.S. Supreme Court, liability for design defects in military equipment cannot be imposed pursuant to state law when 1) the United States approved reasonably precise specifications; 2) the equipment conformed to those specifications; and 3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States [*Boyle v. United Techs. Corp. (1988) 487 U.S. 500, 512, 108 S. Ct. 2510, 2518, 101 L. Ed. 2d 442, 458]* .

In its formulation of the government contractor defense, the Ninth Circuit had included a requirement that the United States be immune from liability under the *Feres/Stencel* doctrine [*McKay v. Rockwell Int'l Corp. (9th Cir. 1983) 704 F.2d 444, 449-450]* . The Supreme Court eliminated this element. Also, the Ninth Circuit had invited application of the defense in cases in which the contractor exercised some influence of over the product's design by stating that the United States must have *established* or approved reasonably precise specifications [*McKay v. Rockwell Int'l Corp. (9th Cir. 1983) 704 F.2d 444, 449-450]* . The Supreme Court eliminated this possibility in *Boyle* by eliminating the word "established" in the second required element [*see* Frumer & Friedman, Products Liability, Ch. 31, *The Government Contract Defense* (Matthew Bender)].

Showing government approval of reasonably precise specifications requires more than a "rubber stamp" or mere signature of a government employee [*Snell v. Bell Helicopter Textron (9th Cir. 1997) 107 F.3d 744, 748* ; *McIntyre v. Warren Pumps LLC (N.D. Cal. April 30, 2007) 2007 U.S. Dist. LEXIS 35954, at *6* (asbestos insulation)].

"Military equipment" within the meaning of the government contractor defense is not necessarily limited to products typically associated with the military [*McKay v. Rockwell Int'l Corp. (9th Cir. 1983) 704 F.2d 444, 451]* . It can also include products sold commercially, such as a paint product designed to weatherproof military aircraft, if the product is produced according to military specifications and used by the military because of particular qualities that serve a military purpose. In that case, the product could be considered military equipment even though it is incidentally sold commercially as well law [*Jackson v. Deft (1990) 223 Cal. App. 3d 1305, 1318-1319, 273 Cal. Rptr. 214* (dictum)]. The government contractor defense may also apply to boilers that had been designed pursuant to detailed military specifications [*Oxford v. Foster Wheeler LLC (2009) 177 Cal. App. 4th 700, 709-710, 99 Cal. Rptr. 3d 418]* . The focus is not whether a product is made exclusively for the military, but rather, whether the area involves "uniquely federal interests," and if so, whether application of state law conflicts with federal policy [*Oxford v. Foster Wheeler LLC (2009) 177 Cal. App. 4th 700, 709-710, 99 Cal. Rptr. 3d 418]* .

Although courts around the country are split on the issue [*see* Frumer & Friedman, Products Liability, Ch. 31, *The Government Contract Defense* (Matthew Bender)], the Ninth Circuit held that the military contractor defense as set forth in *Boyle* applies to manufacturing defect claims in which there are reasonably precise, government-approved manufacturing specifications [*Snell v. Bell Helicopter Textron, Inc. (9th Cir. 1997) 107 F.3d 744, 749* (noting that defense might also be supported by evidence that contractor, in selecting particular component or employing particular process, was following specific directions of government officer reflecting latter's exercise of judgment); *Bentzlin v. Hughes Aircraft Co. (C.D. Cal. 1993) 833 F. Supp. 1486, 1489* (dismissing complaints of families of marines killed in combat when vehicle was struck by missile erroneously fired from Air Force plane)]. The court has also held that the government contractor defense is inapplicable to a failure to warn claim in the absence of evidence that in making its decision whether to provide a warning the defendant was "acting in compliance with 'reasonably precise specifications' imposed on [i]t by the United States" [*Butler v. Ingalls Shipbuilding, Inc. (9th Cir. 1996) 89 F.3d 582, 586* (accommodation ladder on ship broke); *In re Fed. Asbestos Cases (9th Cir. 1992) 960 F.2d 806, 813]* .

In state court, the government contractor defense does not bar warning claims if the government's specifications regarding warning labels does not preclude the supplier's additional warnings required to comply with state law, i.e., if there is no significant conflict between federal contracting requirements and state tort law [*Oxford v. Foster Wheeler LLC (2009) 177 Cal. App. 4th 700, 711-712, 99 Cal. Rptr. 3d 418* ; *Jackson v. Deft (1990) 223 Cal. App. 3d 1305, 1313-1318, 273 Cal. Rptr. 214* (reversing summary judgment for defendants in action based on inadequate warnings on paint product supplied to military)].

[4] Alternative Procedures

If the fact that defendant is immune from liability under the doctrine of government contractor immunity appears on the face of the complaint or from matter of which the court must or may take judicial notice [*see Evid. Code §§ 451, 452*], the objection may be raised by demurrer [*Code Civ. Proc. § 430.30(a)*] on the ground that the complaint fails to state a cause of action [*see Code Civ. Proc. § 430.10(e)*; for forms of demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*]. Whether or not the fact so appears, if the defense can be indisputably established by affidavits, declarations, admissions, answers to interrogatories, or depositions, defendant may move for summary judgment on that ground [*see Code Civ. Proc. § 437c*; *see also* Ch. 537, *Summary Judgment*].

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40-460 California Forms of Pleading and Practice--Annotated § 460.188

§ 460.188 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Cause of Action Preempted by Federal Law

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Cause of Action Preempted by Federal Law

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. The complaint's allegation that the _____ [*specify product, e.g.,* automobile] _____ [*specify defendant's role in the manufacture and/or distribution of the product, e.g.,* manufactured] by defendant was defective, set forth in Paragraph _____ of the [_____ (*specify number, e.g.,* first) amended] complaint, is preempted by _____ [*specify provision of federal law relied on to preempt cause of action, e.g., 15 United States Code Section 1392(b)*]. The cause of action is preempted because the allegedly defective condition relied on by plaintiff was in fact in full compliance with the standards imposed by federal law.

[2] Use of Form

This form is an affirmative defense for insertion into an answer to a complaint seeking damages on a products liability theory, when the alleged basis for liability is a defective condition that is in fact in compliance with a federal law governing the specific condition. With modifications, the form can also be used in an answer to a complaint alleging that defendant's failure to warn constituted the defect on which liability can be imposed, if defendant provided warnings expressly sanctioned by federal law [*see, e.g., Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504, 524-525, 550, 112 S. Ct. 2608, 120 L. Ed. 2d 407* (actions based on allegedly inadequate warnings regarding cigarettes preempted by federal laws that sanctioned warnings given by manufacturer)].

For further discussion of the use of the federal preemption defense in product liability actions, see *§ 460.52[2]*.

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[Reserved]

§§ 460.189[Reserved]

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40-460 California Forms of Pleading and Practice--Annotated § 460.200

§ 460.200 Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12; Cal. Rules of Ct., Rule 1.45(a)]--Cross Complaint [Code Civ. Proc. § 428.10] in Action for Personal Injury, Property Damage, Wrongful Death [Cal. Judicial Council Form PLD-PI-002]

[1] FORM Judicial Council Trial Court Pleading Form [Code Civ. Proc. § 425.12; Cal. Rules of Ct., Rule 1.45(a)]--Cross Complaint [Code Civ. Proc. § 428.10] in Action for Personal Injury, Property Damage, Wrongful Death [Cal. Judicial Council Form PLD-PI-002]

Click here to view image.

[2] Use of Form

This form is the Judicial Council approved cross complaint form for use in any action based on personal injury, property damage, or wrongful death [Cal. Judicial Council Form PLD-PI-002]. Use of the forms is optional [*see Code Civ. Proc. § 425.12*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. For general information relating to the use of Judicial Council complaint and cross complaint forms, see Ch. 123, *Complaints and Cross Complaints* .

[3] Allegations

[a] General Allegations

For discussion and general instructions relating to filling out the cross complaint form, see the Comments to the Judicial Council form of cross complaint in Ch. 380, *Negligence*.

[b] Causes of Action (Paragraphs 7.-10.)

The causes of action must be numbered in the blank immediately to the right of the box corresponding to the paragraph number. Each paragraph should also refer to the names of each of the cross defendants against whom that particular cause of action is alleged, if it is not alleged against all cross defendants.

Paragraph 7. in the cross complaint form alleges that the cross complainant is entitled to complete implied equitable indemnity from the cross defendant. **Paragraph 8.** alleges that the cross complainant is entitled to partial equitable indemnity from the cross defendant based on an apportionment of fault [*see American Motorcycle Assn. v. Superior Court of Los Angeles County (1978) 20 Cal. 3d 578, 598, 146 Cal. Rptr. 182, 578 P.2d 899]* . For further discussion, see the comments to the Judicial Council form of cross complaint in Ch. 380, *Negligence*, and Ch. 300, *Indemnity and Contribution*. **Paragraphs 7.** and **8.** may be checked and incorporated by reference into **Paragraph 9.**

Counsel should note, however, that a cause of action for implied indemnity (**Paragraph 6.**) or partial equitable indemnity (**Paragraph 7.**), does not accrue until the cross complainant has incurred an actual loss through payment [*E.L. White, Inc. v. Huntington Beach (1978) 21 Cal. 3d 497, 506, 146 Cal. Rptr. 614, 579 P.2d 505* ; *People ex rel. Dep't of Transp. v. Superior Court (1980) 26 Cal. 3d 744, 757, 759, 163 Cal. Rptr. 585, 608 P.2d 673* (discussing accrual of cause of action for purposes of statute of limitations)]. Cases indicate that the proper form of action for indemnity before the cross complainant has incurred a loss is a declaratory relief action seeking a declaration that the cross complainant is entitled to be indemnified for any judgment rendered against the cross complainant in favor of the plaintiff [*see Roylance v. Doelger (1962) 57 Cal. 2d 255, 258-262, 19 Cal. Rptr. 7, 368 P.2d 535* ; *Dreybus v. Bayless Rents (1963) 213 Cal. App. 2d 506, 508, 28 Cal. Rptr. 825]* . Therefore, when the cross complainant is seeking indemnity, counsel should use **Paragraph 9.**, alleging a cause of action for declaratory relief. However, since **Paragraphs 7.** and **8.** are provided in this form, counsel may wish to check them and incorporate them into **Paragraph 9.**

In addition to alleging a cause of action for declaratory relief regarding the cross complainant's right to implied equitable indemnity or partial equitable indemnity, **Paragraph 9.** might be used if the cross complainant seeks a determination of the cross defendant's duty to indemnify the cross complainant on a theory of implied contractual indemnity, or on a theory of contractual indemnity, pursuant to a written agreement between the cross complainant and cross defendant [*see Code Civ. Proc. § 1060*].

Any additional, miscellaneous, causes of action may be entered at **Paragraph 10.**

For discussions relating to grounds for indemnity, see Ch. 300, *Indemnity and Contribution* . For a discussion relating to the requirements for bringing an action for declaratory relief, see Ch. 182, *Declaratory Relief* .

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40-460 California Forms of Pleading and Practice--Annotated § 460.201

§ 460.201 Cross Complaint [Code Civ. Proc. § 428.10] for Declaratory Relief as to Right to Indemnity [Code Civ. Proc. §§ 86(a)(7)(A), 1060]--By Defendant Retailer Against Manufacturer of Defective Product

[1] FORM Cross Complaint [Code Civ. Proc. § 428.10] for Declaratory Relief as to Right to Indemnity [Code Civ. Proc. §§ 86(a)(7)(A), 1060]--By Defendant Retailer Against Manufacturer of Defective Product

[*EITHER*]

[*If cross defendant is not a defendant*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	CROSS COMPLAINT FOR
Defendant and Cross Complainant,	)	DECLARATORY RELIEF
vs.	)	[Amount demanded _____ (exceeds
_____ [*name*],	)	*or* does not exceed) $10,000]
Cross Defendant.	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

[*OR*]

[*If cross defendant is also a defendant*]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	
_____ [*name*],	)	NO. _____
Defendants.	)	CROSS COMPLAINT FOR
_____	)	DECLARATORY RELIEF
_____ [*name*],	)	[Amount demanded _____ (exceeds
Defendant and Cross Complainant,	)	*or* does not exceed) $10,000]
vs.	)	[LIMITED CIVIL CASE]
_____ [*name*],	)	
Defendant and Cross Defendant.	)	
	)	
	)	

[*In either case continue*]

Cross complainant alleges:

1. Cross complainant is, and at all times herein mentioned was, _____ [*specify capacity, e.g.*, an individual doing business under the firm name and style of _____ (*specify*) in the (City and) County of _____, California and has filed and published the statement required by *Sections 17915* and *17917 of the Business and Professions Code*].

2. Cross complainant is, and at all times herein mentioned was, engaged in the business of selling at retail to members of the general public at its place of business hereinabove mentioned _____ [*e.g.*, various products], including certain _____[*name or description of products*] [_____ (designed *or* assembled *or* designed, assembled, *or other*) and] manufactured by cross defendant.

3. Cross defendant is, and at all times herein mentioned was, _____ [*specify capacity, e.g.*, a corporation organized and existing under the laws of the State of _____ (California *or other*) (and qualified to do business in California) with its principal place of business in this state situated in the (City and) County

of _____].

4. Cross defendant is, and at all times herein mentioned was, engaged in the business of [_____ (designing *or* assembling *or* designing, assembling *or other*) and] manufacturing _____[*name or description of products*], including the specific _____[*product*] hereinafter referred to, for sale to and use by members of the general public [, both directly and] through retailers.

[*EITHER*]

5. On or about _____[*date*], cross complainant and cross defendant entered into _____ [a written *or* an oral] agreement, hereinafter referred to as "the agreement," by the terms of which cross defendant agreed to sell at wholesale to cross complainant and cross complainant agreed to purchase from cross defendant at wholesale for retail sale to and use by members of the general public _____[*specify products*]. [A copy of the agreement is attached hereto as Exhibit A and made a part hereof.]

[*OR*]

5. On or about _____[*date*], cross complainant _____ [purchased *or* ordered] at wholesale _____[*units*] of _____[*specify product*] from cross defendant for resale by cross complainant to members of the general public.

6. Pursuant to the terms of the _____ [agreement *or* purchase *or* order], _____[commencing] on or about _____[*date*], [and continuing to _____ (the present *or insert date*)] cross defendant [sold and] delivered to cross complainant _____ [*units ordered or* various quantities of] _____[*name or description of products*], including the specific _____[*product*] hereinafter referred to, which were [_____ (designed *or* assembled *or* de signed, assembled, *or other*) and] manufactured by cross defendant.

7. On or about _____[*date*], cross complainant sold the specific _____[*product*] referred to in paragraphs 4 and 6 hereof to _____ [plaintiff in the above-entitled action *or name of purchaser*].

8. On or about _____[*date*], plaintiff in the within action filed in the above-entitled court his/her/its complaint against cross complainant for damages for _____ [injury to property *or* personal injuries *or* wrongful death *or combination of these*] in which it is alleged that at the time _____ [plaintiff *or name of purchaser*] purchased the _____[*product*] from cross complainant (as alleged in Paragraph _____ above), the _____[*product*] was defective in that _____[*specify defect*]; that on or about _____[*date*], the _____[*product*] was being _____ [used *or* operated] by _____ [*specify, e.g.*, plaintiff] to _____[*specify use*]; and during the course of that _____ [use *or* operation] and as a proximate result of the defect in the _____[*product*] as therein and herein described, the _____[*specify accident*], as a proximate result of which _____[*specify injuries*]. [The complaint seeks recovery from cross complainant of damages in the sum of $_____.]

9. On or about _____[*date*], cross complainant was served with a copy of the summons and of the complaint in the above-entitled action by plaintiff.

10. As a result of the filing of the action by plaintiff, cross complainant has been required to retain and has retained legal counsel to defend him/her/it against plaintiff's claim and has incurred, and will continue to incur, expenses for investigation, legal costs, and legal fees in connection with the defense of the action, the full amount of which has not yet been ascertained. Cross complainant will seek leave to amend this cross complaint to insert the amount thereof when ascertained.

11. A dispute has arisen and an actual controversy exists between cross complainant and cross defendant in that cross complainant contends and cross defendant denies as follows:

(a) Cross defendant at all times herein mentioned knew and intended that the _____ [*name or description of products*], including the specific _____ [*product*] hereinabove referred to, [(designed *or* assembled *or* designed, assembled, *or other*) and] manufactured by him/her/it were to be purchased by cross complainant and sold by cross complainant to members of the general public without inspection for defects.

(b) The specific _____ [*product*] which was sold by cross complainant to _____ [plaintiff *or name of purchaser*] as alleged in Paragraph _____ hereof and which was [_____ (designed *or* assembled *or* designed, assembled, *or other*) and] manufactured by cross defendant was in the same condition at the time it was sold to _____ [plaintiff *or name of purchaser*] as it was in at the time cross defendant sold and delivered it to cross complainant and, therefore, if there was any defect in the _____ [*product*] at the time cross complainant sold it, that defect existed in the _____ [*product*] at the time cross defendant sold and delivered it to cross complainant.

(c) If the _____ [*product*] referred to in subparagraph (b), above, was defective as herein alleged and as alleged by plaintiff, and the defect proximately caused plaintiff's damages as alleged in the complaint herein, cross defendant is obligated to indemnify cross complainant for any judgment that may be awarded plaintiff against cross complainant in the above-entitled action and further that cross defendant is obligated to reimburse cross complainant for all costs, attorneys' fees, and other expenses incurred and to be incurred by cross complainant in investigating plaintiff's claim and in preparing to defend and defending against that action.

12. A declaration as to the rights and duties of the parties in the premises is necessary and proper at this time to avoid a multiplicity of lawsuits.

WHEREFORE, cross complainant prays judgment against cross defendant as follows:

1. For a declaration:

(a) That cross defendant is obligated to pay any judgment awarded plaintiff against cross complainant herein or to reim burse cross complainant in the amount of such judgment if cross complainant pays it;

(b) That cross defendant is obligated to reimburse cross complainant for attorneys' fees, costs, and all other expenses incurred and to be incurred by cross complainant in investigating plaintiff's claim and in preparing to defend and defending against plaintiff's above-entitled action against cross complainant; and

(c) Otherwise in accordance with the contentions of cross complainant as alleged in Paragraph 11 hereof.

2. For costs of suit incurred in the prosecution of this cross complaint.

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant and Cross Complainant _____ [*name*]

[*Verification, if desired. See § 460.141[1].*]

[2] Use of Form

This form is a cross complaint for use by a defendant retailer sued for damages based on strict liability in tort resulting from a defect in a product to shift any liability in the action to the manufacturer where the defendant was merely a conduit through whom or which the defective product passed on its way to the ultimate consumer and was in no way responsible for the existence of the defect. The pleading may be filed by any person in the marketing chain sought to be held liable by plaintiff against any one or more persons higher up in that chain through whom or which the defective product passed or against the party actually responsible for the defect.

For a form of cross complaint by the manufacturer of a finished product against the installer of a component part for indemnity based on breach of warranty, see *§ 460.202*.

For a discussion of the essential allegations of a complaint or cross complaint for declaratory relief, see Ch. 182, *Declaratory Relief* . For alternative forms of cross complaints for declaratory relief as to the right to indemnity, see Ch. 300, *Indemnity and Contribution* .

[3] Copies to Prepare

- Original for filing in court clerk's office (together with original of proof of service [*see Code Civ. Proc. § 1013a*] if cross defendant is already a party to action and has appeared).

- If cross defendant has appeared in action, one conformed copy to be served on his, her, or its attorney, if any, and, if none, on cross defendant.

- If cross defendant is not yet a party to action or has not yet appeared, one conformed endorsed-filed copy to be served (with copy of summons) on cross defendant if service is to be made in person, pursuant to *Code Civ. Proc. § 415.10* or by mail pursuant to *Code Civ. Proc. § 415.30* or *415.40*, or two copies if cross defendant will be served in the manner provided in *Code Civ. Proc. § 415.20*.

- One conformed endorsed-filed copy for client, if desired.

- One copy to be retained in office file until endorsed-filed copies are returned from court clerk.

- One endorsed-filed copy for office file.

- Additional copies as desired.

[4] Cross References

For related forms, see *§§ 460.142* and *460.145*

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40-460 California Forms of Pleading and Practice--Annotated § 460.202

§ 460.202 Cross Complaint [Code Civ. Proc. § 428.10] for Declaratory Relief as to Right to Indemnity [Code Civ. Proc. §§ 86(a)(7), 1060]--By Defendant Manufacturer Against Independent Contractor--Breach of Warrant

[1] FORM Cross Complaint [Code Civ. Proc. § 428.10] for Declaratory Relief as to Right to Indemnity [Code Civ. Proc. §§ 86(a)(7), 1060]--By Defendant Manufacturer Against Independent Contractor--Breach of Warrant

[*Caption, introduction. See § 460.201[1].*]

1. Cross complainant is, and at all times herein mentioned was, _____ [*specify capacity, e.g.*, a partnership formed and existing under the laws of the State of _____ (California *or other*) (with its principal place of business in this state situated in the (City and) County of _____. Plaintiff has filed and published the statement required by *Sections 17915* and *17917 of the Business and Professions Code* and brings this action in the name _____ (which it has assumed *or* by which it is known)].

2. Cross complainant is, and at all times herein mentioned was, engaged in the business of _____ [*specify, e.g.*, building houses], including the specific _____ [*specify, e.g.*, house] hereinafter referred to, and _____ [*specify, e.g.*, selling] them to members of the general public, and in the course of that business from time to time entered into contracts with contractors for _____ [*specify, e.g.*, performance of various parts of the work].

3. Cross defendant is, and at all times herein mentioned was, _____ [*specify capacity, e.g.*, a corporation organized and existing under the laws of the State of _____ (California *or other*) (and qualified to do business in California) with its principal place of business in this state situated in the (City and) County of _____.

4. Cross defendant is, and at all times herein mentioned was, a _____[licensed] contractor engaged in the business of _____[*specify*].

5. On or about _____[*date*], cross complainant and cross defendant entered into a written contract, hereinafter referred to as "the contract," a copy of which is attached hereto as Exhibit A and made a part hereof, by the terms of which cross defendant promised and agreed to _____ [*specify, e.g.*, install all plumbing in the houses, including the specific house referred to in paragraph 2, being constructed by cross complainant at _____ (*location*)].

6. By the terms of the contract, cross defendant _____ [expressly *or* impliedly] warranted that the _____ [*specify, e.g.*, products and materials used by him/her/it in the plumbing systems would be of merchantable quality and reasonably fit for their intended purpose and that the work in installing the plumbing systems would be done in a careful and workmanlike manner].

7. On or about _____[*date*], cross defendant _____ [*specify, e.g.*, completed installation of the plumbing system in the house referred to in Paragraphs 2 and 5, above, located at _____ (*address*)], and hereinafter referred to as "the _____" [*specify, e.g.*, house].

8. On or about _____[*date*], cross complainant, in its ordinary course of business, sold the _____ [*specify, e.g.*, house] to _____ [plaintiff in the above-entitled action *or name of purchaser*].

9. On or about _____[*date*], plaintiff in the within action filed in the above-entitled court his/her/its complaint against cross complainant for damages for _____ [injury to property *or* personal injuries *or* wrongful death *or combination of these*] in which it is alleged that at the time _____ [plaintiff *or name of purchaser*] purchased the _____ [*specify, e.g.*, house] from cross complainant (as alleged in Paragraph 8 above), the _____ [*specify, e.g.*, house] was defective in that _____[*specify defect, e.g., the plumbing system was unfit for its intended use*]; that on or about _____[*date*], as a proximate result of that defect, _____[*specify accident*], as a proximate result of which _____[*specify injuries to property, person, or both*]. The complaint seeks recovery from cross complainant of damages for injury to property in the sum of $_____ [as well as damages for _____ (personal injury *or* wrongful death *or both*) (for the sum of $_____)].

10. On or about _____[*date*], cross complainant was served with a copy of the summons and of the complaint in the above-entitled action by plaintiff and immediately in writing notified cross defendant of the filing of the action, the defect alleged, and the amount of damages sought.

11. As a result of the filing of the action by plaintiff, cross complainant has been required to retain and has retained legal counsel to defend him/her/it against plaintiff's claim and has incurred and will continue to incur expenses for investigation, legal costs, and legal fees in connection with the defense of the action, the full amount of which has not yet been ascertained. Cross complainant will seek leave to amend this cross complaint to insert the amount thereof when ascertained.

12. A dispute has arisen and an actual controversy exists between cross complainant and cross defendant in that cross complainant contends and cross defendant denies as follows:

(a) If the _____ [*specify, e.g.*, plumbing system installed by cross defendant in the house as herein alleged] was defective as alleged by plaintiff, the defect _____ [*specify e.g.*, _____ (was caused by *or* resulted from) cross defendant's use of _____ (faulty *or* inferior *or* faulty and inferior *or other*) _____ (products *or* materials *or* products and materials *or other*)], and existed at the time cross defendant _____ [*specify, e.g.*, com pleted installation of the system] as alleged in Paragraph 7 above].

(b) Cross defendant _____ [*specify warranty, e.g.*, impliedly warranted that the _____ (materials *or* products *or other*) were of merchantable quality and reasonably fit for their intended use and expressly warranted that they were suitable for use in plaintiff's house].

(c) If the _____ [*specify, e.g.*, plumbing system installed by cross defendant in the house as herein alleged] was defective as alleged by plaintiff, cross defendant breached his/her/its _____ [implied and express warranties *or* _____ (implied *or* express) warranty] to cross complainant as alleged in subparagraph (b), above.

(d) If the _____ [*specify, e.g.*, plumbing system installed by cross defendant in the house as herein alleged] was defective as alleged by plaintiff, and the defect proximately caused plaintiff's damages as alleged in the complaint herein, cross defendant is obligated by the _____ [express *or* implied] terms of the contract to indemnify cross complainant for any judgment that may be awarded plaintiff against cross complainant in the above-entitled action and further that cross defendant is obligated to reimburse cross complainant for all costs, attorneys' fees, and other expenses incurred and to be incurred by cross complainant in investigating plaintiff's claim and in preparing to defend and defending against that action.

[13. Cross defendant further contends and cross complainant denies that any liability of the cross defendant to cross complainant, if it exists at all, is limited to the costs of repairing the defective _____ (*specify, e.g.*, plumbing system in plaintiff's house).]

14. A declaration as to the rights and duties of the parties in the premises is necessary and proper at this time to avoid a multiplicity of lawsuits.

[*Prayer, see § 460.201[1].]*

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 460.141[1].*]

[2] Use of Form

This form is a cross complaint for use by a manufacturer against a contractor, subcontractor, or supplier of a product or material incorporated in the finished product sold by cross complainant, which product or material was itself defective or was unsuitable for incorporation in the completed product and rendered the completed product defective. The theory of liability giving rise to indemnity is breach of warranty [*see Eichler Homes, Inc. v. Anderson (1970) 9 Cal. App. 3d 224, 229, 87 Cal. Rptr. 893]* .

[3] Cross References

For a related form, see *§ 460.201*.

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40-460 California Forms of Pleading and Practice--Annotated §§ 460.203-460.209

[Reserved]

§§ 460.203[Reserved]

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D. Contribution

40-460 California Forms of Pleading and Practice--Annotated § 460.210

§ 460.210 Notice of Motion to Compel Codefendant to Contribute Pro Rata Share of Judgment [Code Civ. Proc. § 878]

[1] FORM Notice of Motion to Compel Codefendant to Contribute Pro Rata Share of Judgment [Code Civ. Proc. § 878]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR JUDGMENT FOR CONTRIBUTION [, SUPPORTING DECLARATION OF _____ _____ (*name*), AND MEMORANDUM]
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To each _____ _____ plaintiff and defendant named above, and to the attorney of record for each such party:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ _____ [*street address*], _____ _____ [*city*], defendant] _____ _____ [*name*] will, and hereby does, move pursuant to *Code of Civil Procedure section 878* for a judgment for contribution in his/her/its favor and against defendant(s) _____ _____[*name(s)*] in the amount of $_____, with interest thereon at the legal rate from and after _____[*date*], until paid. The motion will be made on the grounds that a money judgment has been rendered in the above-captioned action jointly against the moving party and defendant(s) _____ _____[*name(s)*] and that the moving party has paid _____ _____ [the entire *or* more than his/her/its pro rata share of the] judgment and defendant(s) _____ _____[*name(s)*] has/have paid _____ _____ [neither all nor part *or* less than his/her/its/their pro rata share] of the judgment.

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ _____ [*name(s*)] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion. Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

This form is a notice of motion for use by one tortfeasor judgment debtor against his, her, or its joint tortfeasor judgment debtor to secure a judgment for contribution where the former has paid more than his, her, or its pro rata share of the money judgment entered against them. With appropriate modifications, it may also be used where the judgment entered was against three or more defendants and contribution is sought by one against one or more of them [*see Code Civ. Proc. § 878*].

The motion is deemed made and pending on the due service and filing of the notice of motion [*Code Civ. Proc. § 1005.5*] and, consequently, it is not necessary to make the motion orally at the hearing as was the case prior to the 1953 adoption of *Code Civ. Proc. § 1005.5*.

[3] Caption

The caption on the notice of motion identifies the court and parties, sets forth the number of the case, specifies the nature of the paper, and itemizes information about the timing and location of the hearing [*see Cal. Rules of Ct., Rule 2.111*].

[4] Contents of Notice

The notice of motion must be in writing, identify the motion, state when and the grounds on which the motion will be made, and identify the papers on which the motion will be based [*Code Civ. Proc. § 1010*]. Although not expressly required by *Code Civ. Proc. § 1010*, the notice also states where the motion will be made, that is, the department or division number of the court and the court's address. This information, must at any rate be included in the caption below the case number [*Cal. Rules of Ct., Rule 3.1110*].

Code Civ. Proc. § 1010 requires that if any paper on which the motion will be based has not previously been served on

the party to be notified and was not filed by him, her, or it, a copy of the paper must accompany the notice. The form complies with this requirement. The two papers specified, neither of which was previously served on the party to be notified nor filed by that party, are the declaration and the memorandum of points and authorities. A copy of each must, therefore, be served and filed with the notice of motion. The "records and files" referred to are, of course, the court's records, such as the register of actions, the minute book, and the judgment book, and the court's file of the action, that is, the manilla folder in which the various pleadings and papers in the case are filed.

[5] Accompanying Papers

The notice of motion must be accompanied by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) setting forth any information the moving party may have as to the assets of defendants available for satisfaction of the judgment or claim for contribution [*Code Civ. Proc. §§ 878, 1010*; *see § 460.211*].

An affidavit (or declaration under *Code Civ. Proc. § 2015.5*) setting forth the particulars of payment by the moving defendant of more than his, her, or its pro rata share will also be necessary if the fact of that payment does not already appear in the court's file in the action [*see Code Civ. Proc. §§ 875(c), 1010, 2009*]. A single affidavit (declaration) may, of course, be used where all the facts are within the knowledge of the declarant.

A memorandum must be served and filed with the notice of motion [*Code Civ. Proc. § 1010*; *Cal. Rules of Ct., Rules 3.1103, 3.1113, 3.1114*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[6] Service of Notice

The notice of motion must be served on all parties in the action, including the plaintiff or plaintiffs, at least 10 days before the hearing [*see Code Civ. Proc. § 878*]. For the requirements concerning and discussion of the service and proving service of notices of motion, see *Code Civ. Proc. § 1011, 1013-1013a, 1015* and Ch. 518, *Service of Summons and Papers*.

[7] Judgment Required

In order to be entitled to contribution, it is, of course, necessary that a judgment exist which has been rendered against two or more defendants [*Code Civ. Proc. § 875(a)*; *Barth v. B.F. Goodrich Tire Co. (1971) 15 Cal. App. 3d 137, 141, 92 Cal. Rptr. 809]* .

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40-460 California Forms of Pleading and Practice--Annotated § 460.211

§ 460.211 Declaration in Support of Motion to Compel Codefendant to Contribute Pro Rata Share of Judgment [Code Civ. Proc. § 878]

[1] FORM Declaration in Support of Motion to Compel Codefendant to Contribute Pro Rata Share of Judgment [Code Civ. Proc. § 878]

[*Caption. See § 460.210[1].*]

I, _____[*name*], declare:

I am _____ [one of the defendants in the above-entitled action *or* _____ (a general partner *or* _____ (*title*)) of defendant _____ (*name of defendant partnership or corporation*) *or state other relationship to moving party if declarant is a nonparty*].

On _____[*date*], judgment in the sum of $_____ was entered in this action against defendants jointly. On _____[*date*], _____ [I *or name of moving party*] paid plaintiff _____ [the entire *or* the sum of $_____ (*amount greater than pro rata share*) on the] judgment by _____ [*specify manner of payment, e.g.*, certified check] as evidenced by the _____ [satisfaction of judgment filed herein *or* my canceled check, a copy of which is attached hereto and made a part hereof *or other*].

_____ [Neither all nor any part of the judgment herein was paid by defendant _____ (*name*) *or* I am informed and believe and thereon state that defendant _____ (*name*) paid plaintiff the sum of $_____ (*amount less than pro rata share*), and no more, on the judgment in this action].

I have the following information as to the assets of defendant _____[*name*] and the availability of those assets for the satisfaction of [the judgment and] this claim for contribution:_____[*specify*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

[2] Use of Form

This form is a declaration is for use in support of a motion by a defendant who or which has paid more than its pro rata share of a money judgment to compel contribution from his, her, or its codefendant who or which has paid less than its pro rata share, or nothing at all, on the judgment [*see Code Civ. Proc. § 878*].

[3] Contents of Form

The first two paragraphs identify the declarant and show that he or she would be competent if called as a witness to testify to the remaining facts set forth in the declaration.

The third paragraph avers the entry of judgment against defendants jointly and the moving party's payment of more than his, her, or its pro rata share of the judgment [*see Code Civ. Proc. § 875*].

The fourth paragraph alleges the codefendant's nonpayment of his, her, or its pro rata share [*see Code Civ. Proc. § 875*].

The fifth paragraph identifies the assets of the codefendant available to satisfy the judgment or the claim for contribution according to the declarant's information [*see Code Civ. Proc. § 878*].

The form of the declaration itself is based on *Code Civ. Proc. § 2015.5*].

[4] Cross References

For a related form, see *§ 460.210*

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40-460 California Forms of Pleading and Practice--Annotated § 460.212

§ 460.212 Judgment [Code Civ. Proc. § 578] for Contribution Against Codefendant [Code Civ. Proc. § 878]

[1] FORM Judgment [Code Civ. Proc. § 578] for Contribution Against Codefendant [Code Civ. Proc. § 878]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	JUDGMENT
Defendant.	)	
	)	
	)	

_____

The motion of defendant _____[*name*] for judgment for contribution against defendant _____[*name*] came on regularly for hearing before _____ [the above-entitled court, the Honorable _____ (*name*) presiding *or* the undersigned] on _____[*date*]. _____[*Name*] appeared as attorney for defendant _____[*name of moving party*] and _____[*name*] appeared as attorney for defendant _____[*name*]. The court considered the papers submitted in support of and in opposition to the motion, the oral and documentary evidence produced, the records and files herein, and the arguments of counsel, [and it appearing to the satisfaction of the court that a joint judgment in the sum of $_____ was entered in the above-entitled action against the above-named defendants on _____ (*date*), that on _____ (*date*), defendant _____ (*name of moving party*) paid plaintiff _____ (the entire *or* the sum of $_____ (*amount greater than pro rata share* on the) judgment, and that defendant _____ (*name*) has paid _____ (neither all nor any part of *or* the sum of

$_____ (*amount less than pro rata share*) only on) the judgment] and good cause appearing therefor;

IT IS ORDERED AND ADJUDGED that the motion for contribution be and it hereby is granted and that defendant _____[*name of moving party*] have and recover from defendant _____[*name*] the sum of $_____, together with interest thereon at the rate of seven percent per annum from and after _____[*date of payment of more than pro rata share*] until paid.
Dated: _____.

_____ [*signature*]
Judge of the Court

[2] Use of Form

This form is a judgment for use when the court grants the motion of one tortfeasor judgment debtor for contribution against his, her, or its codefendant judgment debtor [*see Code Civ. Proc. § 878*].

[3] Cross References

For a related form, see *§ 460.210*

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40-462 California Forms of Pleading and Practice--Annotated 462.syn

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§ 462.01 Scope of Chapter

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§ 462.11 Appointment of Administrative Committees

§ 462.12 Permit to Practice Public Accountancy

[1] California Certified Public Accountants

[2] Certified Public Accountants of Other States or Countries

§ 462.13 Enjoining Certain Acts or Practices

§ 462.14 Discipline by State Board of Accountancy

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§ 462.20 Ownership of Papers

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§ 462.22 Right to Practice Accountancy

§ 462.23 Duties to Clients

§ 462.24 Liability to Person Not in Privity

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§ 462.26 Confidential Relationship Between Client and Accountant

[1] General Rule

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§ 462.27 Conflict of Interest

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§ 462.30 Accountancy Corporation

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§§ 462.32through 462.39 [Reserved]

§ 462.40 Related Matthew Bender Publications

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[1] Accountancy Corporations

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[a] Certified Public Accountants

[b] Discipline

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§ 462.42 Administrative Regulations

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[1] Duties and Liability of Professionals

[a] In General

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[2] Regulation of Practice of Public Accountancy

[3] Rights of Public Accountants

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§ 462.44 Attorney General Opinions

§ 462.45 Law Reviews

§ 462.46 Text References

§§ 462.47through 462.49 [Reserved]

§ 462.50 Complaint by Public Accountant for Compensation for Services Rendered [Civ. Code § 3302]--With Common Counts on Account Stated and for Work and Labor

[1] FORM

[2] Use of Form

[3] Contents

[4] Venue

[5] Jurisdiction

[6] Verification

[7] Cross References

§ 462.51 Complaint for Damages [Civ. Code § 3333]--By Client Against Public Accountant for Negligence

[1] FORM

[2] Use of Form

[3] Contents

[4] Venue

[5] Negligence Per Se

[6] When Action Accrues

[7] Cross References

§ 462.52 Complaint for Damages [Civ. Code § 3333]--By Third Party Against Public Accountant for Intentional or Negligent Misrepresentation

[1] FORM

[2] Use of Form

[3] Contents

[4] Cross References

§ 462.53 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Accountant and Plaintiff Not in Privity of Contract

[1] FORM

[2] Use of Form

[3] Cross References

§ 462.54 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Compel State Board of Accountancy to Admit Petitioner Either to Accountant's Examination or to Practice as Accountant

[1] FORM

[2] Use of Form

[3] Contents

[4] Verification

[5] Proof of Service

[6] Attaching Points and Authorities

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40-462 California Forms of Pleading and Practice--Annotated § 462.01

§ 462.01 Scope of Chapter

This chapter discusses, among other things, the regulation of public accountants, public accountants' duties to their clients, and the confidential relationship between public accountants and their clients. It includes forms of complaints for use in actions by accountants for compensation for services rendered [§ 462.50], as well as for use in actions by clients against public. accountants for negligence [§ 462.51], and by third parties against public accountants for intentional or negligent misrepresentation [§ 462.52]. A form of affirmative defense is included for use by an accountant not in privity with the plaintiff [§ 462.53]. The chapter also includes a form of petition for writ of mandate to compel the State Board of Accountancy to admit the petitioner to the accountant's examination or to the practice of public accountancy [462.54].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsState & Territorial GovernmentsLicensesTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationGeneral OverviewTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationDefenses

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§ 462.02 Cross References

For forms for use in actions for compensation for services, see *Ch. 72, Attorney Practice and Ethics, § 72.350* et seq.

For forms alleging entitlement to treble damages when defendant is not licensed see *Ch. 174, Damages, § 177.40* et seq.

For forms relating to writs of mandate to review administrative decisions, see Ch. 209, *Dentists* , and Ch. 415, *Physicians: Medical Malpractice* , respectively

For discussion of injunctions, see Ch. 303, *Injunctions*

For forms relating to mandate, see Ch. 358, *Mandate and Prohibition*

For discussion of licensing and for writs of mandate directing issuance of licenses, see Ch. 471B, *Licensing by Public Agencies*

For discussion of administrative adjudication and judicial review, see Ch. 473, *Public Agency Adjudication* , et seq., and Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

For discussion of trade secrets and confidential information, see Ch. 565, *Unfair Competition*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesGeneral OverviewAdministrative LawJudicial ReviewRemediesInjunctive ReliefCivil ProcedureRemediesWritsCommon Law WritsMandamusHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansHealthcare LawBusiness Administration & OrganizationLicensesRequirements

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§ 462.03 Governing Law

The practice of public accountancy is regulated by *Bus. & Prof. Code §§ 5000-5173* and by *16 Cal. Code Reg §§ 1-99.2*. The regulatory authority is the State Board of Accountancy ("Board") [*Bus. & Prof. Code § 5000* (operative until July 1, 2011, and repealed January 1, 2012, unless the Legislature changes those dates)]. The Board may receive and investigate complaints and conduct investigations or hearings with or without filing a complaint, and obtain evidence relating to and involving the conduct of licensees or any violation or alleged violation of *Bus. & Prof. Code § 5000* et seq. [*Bus. & Prof. Code § 5103*]. The Board may issue subpoenas in connection with an investigation or action authorized by *Bus. & Prof. Code § 5000 et seq.* [*Bus. & Prof. Code § 5108*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGeneral OverviewAdministrative LawAgency InvestigationsScopeSubpoenasGovernmentsState & Territorial GovernmentsLicenses

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§ 462.04 Definitions

A public accountant is any person who has registered with the Board as a public accountant and who holds a valid permit for the practice of public accountancy [*Bus. & Prof. Code § 5034*]. A certified public accountant is any person who has received from the Board a certificate of certified public accountant and who holds a valid permit to practice [*Bus. & Prof. Code § 5033*]. A certified public accountant may use the abbreviation "C.P.A." [*Bus. & Prof. Code § 5055*].

An unlicensed person offering certain permitted accounting services may use the terms "accountant," "accounting," or "accounting services," if the use of those terms is further qualified by an explanation, disclaimer, or warning stating that the advertiser is not licensed by the state or that the services being offered do not require a state license, thereby eliminating any potential or likelihood of confusion regarding those terms [*Moore v. California State Bd. of Accountancy (1992) 2 Cal. 4th 999, 1023, 9 Cal. Rptr. 2d 358, 831 P.2d 798]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGeneral OverviewAdministrative LawAgency InvestigationsScopeSubpoenasGovernmentsState & Territorial GovernmentsLicenses

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[Reserved]

§§ 462.05[Reserved]

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A. Regulation of Accountants

40-462 California Forms of Pleading and Practice--Annotated § 462.10

§ 462.10 Rules of Professional Conduct

The Board may, by regulation, prescribe, amend or repeal rules of professional conduct appropriate to the establishment and maintenance of a high standard of integrity and dignity in the profession [*Bus. & Prof. Code § 5018*]. The rules of professional conduct applicable to public accountants are found in *16 Cal. Code Reg. § 53 et seq.* [*see 35 Ops. Cal. Att'y Gen. 120, 122 (1960)* (all Board licensees, whether privately employed or engaged in public accountancy, are subject to Board's rules of professional conduct)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGeneral OverviewAdministrative LawAgency InvestigationsScopeSubpoenasGovernmentsState & Territorial GovernmentsLicenses

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§ 462.11 Appointment of Administrative Committees

For the purpose of obtaining technical expertise, the Board may appoint an administrative committee to provide assistance related to the functions specified in *Bus. & Prof. Code § 5103, i.e.,* to inquire into alleged violations of *Bus. & Prof. Code § 5000 et seq.* or any other state or federal law, regulation, or rule relevant to the practice of accountancy [*Bus. & Prof. Code § 5020*].

The committee acts only in an advisory capacity, has no authority to initiate a disciplinary action against a licensee, and is only authorized to report its findings from an investigation or hearing to the Board, or at the Board's direction, to the executive officer [*Bus. & Prof. Code § 5020*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGeneral OverviewAdministrative LawAgency InvestigationsScopeSubpoenasGovernmentsState & Territorial GovernmentsLicenses

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§ 462.12 Permit to Practice Public Accountancy

[1] California Certified Public Accountants

Except as otherwise provided, no person may engage in the practice of public accountancy in California unless the person is the holder of a valid permit to practice public accountancy issued by the Board, or a holder of a practice privilege [*Bus. & Prof. Code § 5050(a)*; *see Bus. & Prof. Code §§ 5050(b)* (certified public accountants of other states), 5050(c) (public accountant of foreign country); 5054(a) (preparation of tax returns by individuals and firms licensed outside state); 5096 et seq. (practice privilege)].

[2] Certified Public Accountants of Other States or Countries

The Board may, when specified conditions are met, waive the examination requirements in *Bus. & Prof. Code § 5082* and issue a license as a certified public accountant to any applicant who is the holder of a valid and unrevoked license as a certified public accountant issued under the laws of another state [*Bus. & Prof. Code § 5087(a)*; *see also Bus. & Prof. Code § 5087(b)*]. Nothing in the laws governing public accountants [*Bus. & Prof. Code § 5000 et seq.*] prohibits a certified public accountant, a public accountant, or a public accounting firm lawfully practicing in another state from temporarily practicing in California incident to practice in another state. However, neither an individual nor a firm providing these temporary services may do any of the following [*Bus. & Prof. Code § 5050(b)*, operative until January 1, 2011]:

- Solicit California clients.
- Assert or imply that the individual or firm is licensed to practice public accountancy in California.
- Engage in the development, implementation, or marketing to California consumers of any abusive tax avoidance transaction, as defined in *Rev. & Tax. Code § 19753(c)*.

Nothing in the laws governing public accountants [*Bus. & Prof. Code § 5000 et seq.*] prohibits a person who holds a valid and current license, registration, certificate, permit, or other authority to practice public accountancy from a

foreign country, and lawfully practicing there, from temporarily engaging in the practice of public accountancy California incident to an engagement in that country, provided that both of the following are true [*Bus. & Prof. Code § 5050(c)*]:

- The temporary practice is regulated by the foreign country and is performed under accounting or auditing standards of that country.

- The person does not hold himself or herself out as being the holder of a valid California permit to practice public accountancy or the holder of a practice privilege [*see Bus. & Prof. Code § 5096 et seq.*].

Any person engaging in any act that is the practice of public accountancy in California consents to the personal, subject matter, and disciplinary jurisdiction of the Board [*Bus. & Prof. Code § 5050.1(a)*], and is deemed to have appointed the regulatory authority of the state or foreign jurisdiction that issued the person's permit, certificate, license, or other authorization to practice as the person's agent on whom notice, subpoenas, or other process may be served in any action or proceeding by or before the Board against or involving that person [*Bus. & Prof. Code § 5050.1(b)*].

An individual who holds a current and valid license as a certified public accountant issued under the laws of any state and who applies to the board for a license as a certified public accountant under the provisions of *Bus. & Prof. § 5087* may, until the time the application for a license is granted or denied, practice public accountancy in California only under a practice privilege pursuant to *Bus. & Prof. Code § 5096 et seq.*, except that, for these purposes, the individual is not disqualified from a practice privilege during the period the application is pending by virtue of maintaining an office or principal place of business, or both, in this state. The Board may by regulation provide for exemption, credit, or proration of fees to avoid duplication of fees [*Bus. & Prof. Code § 5088*].

Operative until January 1, 2011 [*Bus. & Prof. Code § 5096.11*], an individual whose principal place of business is not in California and who has a valid and current license, certificate or permit to practice public accountancy from another state may, subject to the conditions and limitations in *Bus. & Prof. Code § 5096 et seq.*, engage in the practice of public accountancy in California under a practice privilege without obtaining a certificate or license under *Bus. & Prof. Code § 5000 et seq.* if the individual satisfies specified statutory requirements or substantial equivalents [*see Bus. & Prof. Code § 5096(a), (b)*, operative until January 1, 2011; *but see Bus. & Prof. Code § 5096.10* (provisions relating to practice privileges will only be operative if commencing July 1, 2005, and continuing until January 1, 2011, there is appropriation from Accountancy Fund in the annual Budget Act to fund activities in *Bus. & Prof. Code § 5096 et seq.* and sufficient hiring authority is granted pursuant to budget change proposal to Board to provide staffing to implement *Bus. & Prof. Code § 5096 et seq.*)]. To obtain a practice privilege, an individual who meets the requirements follow a specified procedure, which includes notifying the Board of the individual's intent to practice and paying a fee [*Bus. & Prof. Code § 5096(c)*, operative until January 1, 2011; for required contents of notification, *see Bus. & Prof. Code § 5096.13*], Except as otherwise provided, the practice privilege commences when the individual notifies the board, provided the fee is received by the Board within a specified period, and the Board must permit the notification to be provided electronically [*Bus. & Prof. Code § 5096(d)*, operative until January 1, 2011].

A certified public accounting firm authorized to practice in another state, which does not have an office in California, may engage in the practice of public accountancy in California through the holder of a practice privilege provided that both of the following are true [*Bus. & Prof. Code § 5096.12(a)*, operative until January 1, 2011]:

- The practice of public accountancy by the firm is limited to authorized practice by the holder of the practice privilege.

- A firm that engages in practice is deemed to consent to the personal, subject matter, and disciplinary jurisdiction of the Board with respect.

The board may revoke, suspend, issue a fine, or otherwise restrict or discipline the firm for any act that would be grounds for discipline against a holder of a practice privilege through which the firm practices [*Bus. & Prof. Code § 5096.12(b)*, operative until January 1, 2011; *see Bus. & Prof. Code § 5116* (fines)].

An individual who holds a practice privilege has the following rights and duties [*Bus. & Prof. Code § 5096(e)*, operative January 1, 2006, until January 1, 2011]:

> (1) Is subject to the personal and subject matter jurisdiction and disciplinary authority of the Board and the courts of California.
>
> (2) Must comply with the provisions of *Bus. & Prof. Code § 5000 et seq.*, board regulations, and other laws, regulations, and professional standards applicable to the practice of public accountancy by the licensees of California and any other laws and regulations applicable to individuals practicing under practice privileges in California, except the individual is deemed, solely for the purpose of this article, to have met California's continuing education requirements and ethics examination requirements when the individual has met the examination and continuing education requirements of the state in which the individual holds the valid license, certificate, or permit on which the substantial equivalency is based.
>
> (3) May not provide public accountancy services in California from any office located in California except as an employee of a firm registered in this state. This does not apply to public accountancy services provided to a client at the client's place of business or residence.
>
> (4) Is deemed to have appointed the regulatory agency of the state that issued the individual's certificate, license, or permit on which substantial equivalency is based as the individual's agent on whom notices, subpoenas or other process may be served in any action or proceeding by the Board against the individual.
>
> (5) Must cooperate with any board investigation or inquiry and timely respond to a Board investigation, inquiry, request, notice, demand or subpoena for information or documents and timely provide to the Board the identified information and documents.

An individual may not sign any attest report pursuant to a practice privilege unless the individual meets the experience requirements of *Bus. & Prof. Code § 5095* and completes any continuing education or other conditions required by Board regulations [*Bus. & Prof. Code § 5096.5*, operative January 1, 2006, until January 1, 2011].

A practice privilege expires one year from the date of the notice, unless a shorter period is set by board regulation [*Bus. & Prof. Code § 5096(f)*, operative January 1, 2006, until January 1, 2011].

No individual may practice under a practice privilege without prior approval of the Board if the individual has, or acquires at any time during the term of the practice privilege, any disqualifying condition, which include the following [*Bus. & Prof. Code § 5096(g)(1), (2)*, operative January 1, 2006, until January 1, 2011; *see also Bus. & Prof. Code § 5096(g)(3)*, operative January 1, 2006, until January 1, 2011 (Board may adopt regulations exempting specified minor occurrences of listed conditions involving action against license, permit, registration, certificate, or other authority to practice any profession from being disqualifying conditions)]:

> (1) Conviction of any crime other than a minor traffic violation.
>
> (2) Revocation, suspension, denial, surrender or other discipline or sanctions involving any license, permit, registration, certificate or other authority to practice any profession in California or any other state or foreign country or to practice before any state, federal, or local court or agency, or the Public

Company Accounting Oversight Board.

(3) Pendency of any investigation, inquiry, or proceeding by or before any state, federal, or local court or agency, including, but not limited to, the Public Company Accounting Oversight Board, involving the individual's professional conduct.

(4) Any judgment or arbitration award against the individual involving the individual's professional conduct in a specified amount.

(5) Any other conditions as specified by the board in regulation.

Engaging in the practice of public accountancy in California without giving notice of intent to practice under practice privileges and paying the required fee by a person who has a license, certificate, or other authority to engage in the practice of public accountancy in any other state, regardless of whether active, inactive, suspended, or subject to renewal on payment of a fee or completion of an educational or ethics requirement, is [*Bus. & Prof. Code § 5096.1(a)* operative January 1, 2006, until January 1, 2011]:

(1) Deemed to be practicing public accountancy unlawfully in California.

(2) Subject to the personal and subject matter jurisdiction and disciplinary authority of the Board and the courts of California to the same extent as a holder of a valid practice privilege.

(3) Deemed to have appointed the regulatory agency of the state that issued the individual's certificate or license as the individual' s agent on whom notice, subpoenas, or other process may be served in any action or proceeding by the Board against the individual.

The Board may prospectively deny a practice privilege for any of the following reasons:

- An individual violated *Bus. & Prof. Code § 5096.1* or implementing regulations or committed any act which would be grounds for discipline against the holder of a practice privilege [*Bus. & Prof. Code § 5096.1(b)*, operative January 1, 2006, until January 1, 2011].

- Failure to qualify under or comply with the provisions of *Bus. & Prof. Code § 5096 et seq.* governing practice privileges or implementing regulations [*Bus. & Prof. Code § 5096.2(a)*, operative January 1, 2006, until January 1, 2011].

- Any act that if committed by an applicant for licensure would be grounds for denial of a license under *Bus. & Prof. Code § 480* or if committed by a licensee would be grounds for discipline under *Bus. & Prof. Code § 5100* [*Bus. & Prof. Code § 5096.2(a)*, operative January 1, 2006, until January 1, 2011].

- For any act committed outside of California that would be a violation if committed within California [*Bus. & Prof. Code § 5096.2(a)*, operative January 1, 2006, until January 1, 2011].

The procedures for denying practice privileges are specified by statute [*see Bus. & Prof. Code § 5096.2(b)*, operative January 1, 2006, until January 1, 2011]. The provisions of the Administrative Procedure Act apply [*Bus. & Prof. Code § 5096.3(e)*, operative January 1, 2006, until January 1, 2011].

Practice privileges are subject to revocation, suspension, fines or other disciplinary sanctions for any conduct that would be grounds for discipline against a licensee of the Board or for any conduct in violation of *Bus. & Prof. Code § 5096 et seq.* or implementing regulations [*Bus. & Prof. Code § 5096.3(a)*, operative January 1, 2006, until January 1, 2011].

Practice privileges are subject to discipline during any time period in which they are valid, under administrative suspension, or expired [*Bus. & Prof. Code § 5096.3(b)*, operative January 1, 2006, until January 1, 2011]. An individual whose practice privilege has been revoked may apply for a new practice privilege not less than one year after the effective date of the Board's decision revoking the individual's practice privilege unless a longer time period, not to exceed three years, is specified in the board's decision revoking the practice privilege [*Bus. & Prof. Code § 5096.3(d)*, operative January 1, 2006, until January 1, 2011]. The right of an individual to practice under a practice privilege may be administratively suspended [*see Bus. & Prof. Code § 5096.4(a)*, operative January 1, 2006, until January 1, 2011].

The Board may revoke, suspend, issue a fine, otherwise restrict or discipline, or administratively suspend for any act that would be grounds for administrative suspension under *Bus. & Prof. Code § 5096.4*, the authorization to practice in California of the holder of an authorization to practice as licensed in another state or country, as preparing tax returns when licensed outside California, or as an out-of-state practicing under a practice privilege for any act that would be a violation of the and Professions Code or grounds for discipline against a licensee or holder of a practice privilege, or ground for denial of a license or practice privilege under the and Professions Code. The provisions of the Administrative Procedure Act, including, but not limited to, the commencement of a disciplinary proceeding by the filing of an accusation by the Board apply. Any person so authorized to practice whose authorization to practice has been revoked may apply for reinstatement of the authorization to practice not less than one year after the effective date of the Board's decision revoking the authorization to practice, unless a longer time, not to exceed three years, is specified in the Board's decision revoking the authorization to practice [*Bus. & Prof. Code § 5050.2*; *see Bus. & Prof. Code §§ 5054* (preparation of tax returns by individuals and firms licensed outside state); 5096.12 (practice privilege for firm licensed outside state); 5116 (fines)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGeneral OverviewAdministrative LawAgency InvestigationsScopeSubpoenasGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsState & Territorial GovernmentsLicenses

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40-462 California Forms of Pleading and Practice--Annotated § 462.13

§ 462.13 Enjoining Certain Acts or Practices

Whenever in the judgment of the Board, or with its approval the administrative committee, any person who has engaged, or is about to engage, in any acts or practices that constitute, or will constitute, an offense against *Bus. & Prof. Code § 5000 et seq.* (provisions regulating practice of public accountancy), the Board may apply to the appropriate court for an order enjoining those acts or practices. On a showing by the Board that a person has engaged, or is about to engage, in any act or practice that constitutes an offense under *Bus. & Prof. Code § 5000 et seq.*, the court must grant an injunction, restraining order, or other order that may be appropriate [*Bus. & Prof. Code § 5122*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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40-462 California Forms of Pleading and Practice--Annotated § 462.14

§ 462.14 Discipline by State Board of Accountancy

After notice and hearing, the Board may revoke, suspend, or refuse to renew any permit or certificate, or censure the permit or certificate holder, for unprofessional conduct that includes, but is not limited to, the following [*Bus. & Prof. Code § 5100*]:

- Conviction of any crime substantially related to the qualifications, functions, and duties of a certified public accountant or a public accountant;

- A violation of *Bus. & Prof. Code §§ 478, 498, 499* dealing with false statements or omissions in the application for a license or in obtaining a certificate as a certified public accountant, registration under *Bus. & Prof. Code § 5000 et seq.*, or a permit to practice public accountancy under *Bus. & Prof. Code § 5000 et seq.*;

- Dishonesty, fraud, gross negligence or repeated negligent acts committed in the same or different engagements, for the same or different clients, or any combination of engagements or clients, each resulting in a violation of applicable professional standards indicating a lack of competency in the practice of public accountancy or in the performance of the bookkeeping operations described in *Bus. & Prof. Code § 5052*;

- Cancellation, revocation, or suspension of a certificate, other authority to practice or refusal to renew the certificate or other authority to practice as a certified public accountant or a public accountant, or any other discipline by any other state or foreign country;

- Violation of *Bus. & Prof. Code § 5097*, relating to auditing documentation;

- Violation of *Bus. & Prof. Code § 5120*, relating to unauthorized practice of public accountancy;

- Willful violation of *Bus. & Prof. Code § 5000 et seq.* or any rule or regulation promulgated by the

Board under the authority granted under *Bus. & Prof. Code § 5000 et seq.*;

- Suspension or revocation of the right to practice before any governmental body or agency [*see Clare v. State Bd. of Accountancy (1992) 10 Cal. App. 4th 294, 302, 12 Cal. Rptr. 2d 481* (requiring substantial relationship between suspension or revocation and accountant's qualifications, functions, or duties)];

- Fiscal dishonesty or breach of fiduciary responsibility of any kind;

- Knowing preparation, publication, or dissemination of false, fraudulent, or materially misleading financial statements, reports, or information;

- Embezzlement, theft, misappropriation of funds or property, or obtaining money, property, or other valuable consideration by fraudulent means or false pretenses;

- The imposition of any discipline, penalty, or sanction on a registered public accounting firm or associated person of the firm, or both, or on any other holder of a permit, certificate, license, or other authority to practice in California, by the Public Company Accounting Oversight Board or the United States Securities and Exchange Commission, or their designees under the Sarbanes-Oxley Act of 2002 or other federal legislation; and

- Unlawfully engaging in the practice of public accountancy in another state.

Accepted accounting principles require that public accountants conducting an audit evaluate compliance with investment-related laws, and accountants can be disciplined for a failure to do so [*McBride v. California Bd. of Accountancy (2005) 130 Cal. App. 4th 518, 528-529, 30 Cal. Rptr. 3d 287]* .

Revocation of an accountancy license is not penal. The only purpose of such an action is to protect the public from incompetence and lack of integrity [*Murrill v. Board (1950) 97 Cal. App. 2d 709, 712, 218 P.2d 569]* . However, the Board, after appropriate notice and an opportunity for hearing, may order any licensee or applicant for licensure or examination to pay an administrative penalty as part of any disciplinary proceeding or other proceeding provided for in *Bus. & Prof. Code § 5000 et seq.* [*see Bus. & Prof. Code § 5116 et seq.*].

Cause for discipline by the Board does not void or render nonexistent agreements made in contravention of the rules. For example, when an accounting firm was engaged in the practice of accountancy, and had as a partner a woman who was not a licensee in good standing in California, thereby contravening the provisions of *Bus. & Prof. Code § 5072*, the Board could discipline her and her partners in the firm or revoke the firm's registration and permit to practice. However, the fact that the firm was in violation of the rules of professional conduct did not void or render nonexistent any agreement the firm had with her or with its insurance carrier [*Montgomery v. Cal. Accountants Mutual Ins. Co. (1998) 61 Cal. App. 4th 854, 859-860, 72 Cal. Rptr. 2d 39]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationDecisionsGeneral OverviewGovernmentsFiduciary ResponsibilitiesGovernmentsState & Territorial GovernmentsLicensesTortsIntentional TortsBreach of Fiduciary DutyGeneral Overview

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[Reserved]

§§ 462.15[Reserved]

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40-462 California Forms of Pleading and Practice--Annotated § 462.20

§ 462.20 Ownership of Papers

All statements, records, schedules, working papers, and memoranda made by a licensee or a partner, shareholder, officer, director, or employee of a licensed public accountant, incident to, or in the course of, rendering services to a client in the practice of public accountancy are and remain the property of the licensee in the absence of an express agreement between the licensee and the client to the contrary, except [*Bus. & Prof. Code § 5037(a)*]:

- The reports submitted by that licensee to the client; and
- Records which are part of the client's records.

None of these statements, records, schedules, working papers, or memoranda may be sold, transferred, or bequeathed, without the consent of the client or his or her personal representative or assignee, to anyone other than one or more surviving partners or stockholders or new partners or stockholders of the licensee, or any combined or merged firm successor in interest to the licensee [*Bus. & Prof. Code § 5037(a)*].

The licensed public accountant is required to furnish to his or her client or former client, on request and reasonable notice [*Bus. & Prof. Code § 5037(b)*]:

- A copy of the licensee's working papers, to the extent that those working papers include records that would ordinarily constitute part of the client's records and are not otherwise available to the client; and
- Any accounting or other records belonging to, or obtained from or on behalf of, the client which the licensee removed from the client's premises or received for the client's account.

The licensee may make and retain copies of documents of the client when they form the basis for work done by him or her [*Bus. & Prof. Code § 5037(b)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 462.21 Appeal Available if Applicant Aggrieved in Registration as Certified Public Accountant

Any applicant for registration as a certified public accountant who is aggrieved by any action taken by the committee with respect to his or her qualifications may appeal to the Board in accordance with rules or regulations prescribed by the Board. The Board on appeal may give an oral or written examination as an aid in determining whether the applicant is qualified [*Bus. & Prof. Code § 5022*]. An appeal must be filed within 24 months after (1) the action appealed or (2) the mailing of written notice from the Board officially advising the applicant of the action being taken by an administrative committee, whichever is later [*16 Cal. Code Reg. § 49(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewReviewabilityStandingGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsState & Territorial GovernmentsLicensesTortsMalpractice & Professional LiabilityProfessional Services

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40-462 California Forms of Pleading and Practice--Annotated § 462.22

§ 462.22 Right to Practice Accountancy

An accountant does not acquire a vested right to practice accountancy by reason of his or her registration certificate. The general right to engage in a trade, profession, or business is subject to the power inherent in the state to make necessary rules and regulations respecting the use and enjoyment of property necessary for the preservation of the public health,morals, comfort, order, and safety; such regulations do not deprive owners of property without due process of law. No person can acquire a vested right to continue, when once licensed, in a business, trade, or occupation which is subject to legislative control under the police powers [*Murrill v. Board (1950) 97 Cal. App. 2d 709, 711-712, 218 P.2d 569]* .

Legal Topics:

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§ 462.23 Duties to Clients

Accountants have been recognized as a skilled professional class subject generally to the same rules of liability for negligence in the practice of their profession as are members of other skilled professions [*see, e.g.,* *Mattco Forge, Inc. v. Arthur Young & Co. (1997) 52 Cal. App. 4th 820, 831-833, 60 Cal. Rptr. 2d 780* (action for accounting malpractice based on allegedly negligent trial assistance)]. As members of a skilled profession they are experts [*Lindner v. Barlow, Davis & Wood (1962) 210 Cal. App. 2d 660, 665, 27 Cal. Rptr. 101]* . The services of experts are sought because of their special skill. They have a duty to exercise the ordinary skill and competence of members of their profession, and a failure to discharge that duty will subject them to liability for negligence. Those who hire them, however, are not justified in expecting infallibility; they can expect only reasonable care and competence [*Gagne v. Bertran (1954) 43 Cal. 2d 481, 489, 275 P.2d 15* (involving action by purchaser of land against defendant hired to make fill test); *Lindner v. Barlow, Davis & Wood (1962) 210 Cal. App. 2d 660, 665, 27 Cal. Rptr. 101]* .

The elements of a cause of action in tort for accounting malpractice based on negligence are [*Mattco Forge, Inc. v. Arthur Young & Co. (1997) 52 Cal. App. 4th 820, 833, 60 Cal. Rptr. 2d 780* (applying trial--within--trial standard to accounting malpractice action based on allegedly negligent litigation support)]:

- The duty of the accountant to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise;
- Breach of the duty;
- Proximate causal connection between the negligent conduct and the resulting injury; and
- Actual loss or damage resulting from the accountant's negligence.

An action against an accountant for failure to perform his or her obligation to the person employing him or her may be based on breach of a contract. If an accountant contracts to do a specific thing, his or her obligation is not limited to the exercise of ordinary care but is a positive, specific duty [*L. B. Laboratories, Inc. v. Mitchell (1952) 39 Cal. 2d 56, 63,*

244 P.2d 385] .

However, when the accountant is retained to conduct an independent audit report, the accountant's responsibility to the intended beneficiaries of that report [*see § 462.24*] may influence the accountant's relationship to his or her client. Indeed, the importance of the independent audit report and the credence with which it is viewed by third parties are reflected in the standard to which the profession is held. The public reliance on the objectivity and integrity of certified public accountants to maintain the orderly function of commerce imposes a public interest responsibility on them [*National Medical Transportation Network v. Deloitte & Touche(1998) 62 Cal. App. 4th 412, 428, 72 Cal. Rptr. 2d 720]* . By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a public responsibility transcending any employment relationship with the client. Thus, an accounting firm may resign as independent auditor of a company without issuing an opinion. In a suit by the company for professional negligence, breach of contract, and negligent interference with economic advantage after a resignation, the firm is entitled to a jury instruction that professional standards permit or compel an auditor to resign if good cause exists, regardless of the adverse effects on the client's interest [*National Medical Transportation Network v. Deloitte & Touche (1998) 62 Cal. App. 4th 412, 428-432, 72 Cal. Rptr. 2d 720* (firm presented evidence that resignation was justified by lack of cooperation from client's management, firm's loss of faith in client's integrity, and threats from client's chief executive officer compromising firm's independence as support for good cause)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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40-462 California Forms of Pleading and Practice--Annotated § 462.24

§ 462.24 Liability to Person Not in Privity

In general, an accountant has no liability to third parties not in privity. The California Supreme Court has rejected the prior rule that accountants owe a duty of care to all persons who reasonably and foreseeably rely on the accountant's professional opinions [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 405-406 n.15, 416, 11 Cal. Rptr. 2d 51, 834 P.2d 745* (overruling *International Mortgage Co. v. John P. Butler Accountancy Corp. (1986) 177 Cal. App. 3d 806, 223 Cal. Rptr. 218*)]. There is now a strict privity rule, under which an auditor's liability for general negligence in the conduct of an audit of its client's financial statements is confined to the client, that is, the person who contracts for or engages the audit services. Other persons may not recover on a pure negligence theory [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 406, 11 Cal. Rptr. 2d 51, 834 P.2d 745]* . *Bily* has been held to be retroactive in application [*Industrial Indemnity Co. v. Touche Ross & Co. (1993) 13 Cal. App. 4th 1086, 17 Cal. Rptr. 2d 29]* .

Although parties who are not in a contractual relationship with an accountant may not sue for general negligence, intended beneficiaries of audit reports who are known to the auditor and for whose benefit the auditor renders the report may recover on a theory of negligent misrepresentation [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 406-407, 11 Cal. Rptr. 2d 51, 834 P.2d 745* ; *see Civ. Code § 1710(2)*]. This is because nonclients of the auditor are connected with the audit through receipt of and express reliance on the audit report. Therefore, the report, not the audit itself, is the foundation of the third person's claim [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 412-413, 11 Cal. Rptr. 2d 51, 834 P.2d 745]* .

In addition to negligent misrepresentation, an auditor may be liable to third parties for intentional fraud in the preparation of an audit report. In such a suit, it must be shown that the auditor had no belief in the truth of the statements made and that the auditor made them recklessly, even though the auditor may not have had actual knowledge of the false or baseless character of its opinion [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 414-415, 11 Cal. Rptr. 2d 51, 834 P.2d 745]* .

Legal Topics:

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

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40-462 California Forms of Pleading and Practice--Annotated § 462.25

§ 462.25 Statute of Limitations in Actions Against Accountants

The *Code Civ. Proc. § 339(1)* two-year limitation period governs actions against accountants for professional negligence [*see International Engine Parts, Inc. v. Feddersen & Co. (1995) 9 Cal. 4th 606, 608, 38 Cal. Rptr. 2d 150, 888 P.2d 1279* ; *Slavin v. Trout (1993) 18 Cal. App. 4th 1536, 1539, 23 Cal. Rptr. 2d 219]* .

In a malpractice action against an accountant, the statute of limitations does not run until the negligent act is discovered or, with reasonable diligence, could have been discovered [*Electronic Equipment Express, Inc. v. Donald H. Seiler & Co. (1981) 122 Cal. App. 3d 834, 848, 176 Cal. Rptr. 239* ; *Moonie v. Lynch (1967) 256 Cal. App. 2d 361, 365-366, 64 Cal. Rptr. 55]* . Fraudulent concealment of the facts on which a cause of action and right of recovery are based tolls the statute of limitations until the plaintiff discovers or, in the exercise of reasonable diligence, should have discovered the facts on which the cause of action is based; at that time, the applicable statute starts to run [*L. B. Laboratories, Inc. v. Mitchell (1952) 39 Cal. 2d 56, 64-65, 244 P.2d 385* ; *Sears, Roebuck & Co. v. Blade (1956) 139 Cal. App. 2d 580, 587, 294 P.2d 140]* .

In addition to the discovery of the negligent act, an actual injury must be incurred by the plaintiff before the statute of limitations will begin to run. For example, in *International Engine Parts, Inc. v. Feddersen & Co. (1995) 9 Cal. 4th 606, 38 Cal. Rptr. 2d 150, 888 P.2d 1279* , in which an accountant's alleged negligence caused the Internal Revenue Service to assess a tax deficiency, the California Supreme Court held that the statute did not begin to run until the IRS actually assessed the deficiency, rather than at the time the IRS auditor issued a preliminary audit report finding that an assessment may be imposed [*International Engine Parts, Inc. v. Feddersen & Co. (1995) 9 Cal. 4th 606, 608-609, 620, 38 Cal. Rptr. 2d 150, 888 P.2d 1279]* . The Court held that the preliminary report did not impose anything more than a tentative assessment of potential liability, insufficient to amount to actual harm for statute of limitations purposes [*International Engine Parts, Inc. v. Feddersen & Co. (1995) 9 Cal. 4th 606, 620, 38 Cal. Rptr. 2d 150, 888 P.2d 1279]* .

Subsequent to its decision in *International Engine Parts*, the Supreme Court, in dealing with an attorney malpractice case, warned that several of its recent decisions, including *International Engine Parts*, should not be taken as establishing rules for when actionable harm occurs under all circumstances. Rather, as with other causes of action, the

determination of when actionable harm occurs is generally a question of fact [*Adams v. Paul (1995) 11 Cal. 4th 583, 588, 46 Cal. Rptr. 2d 594, 904 P.2d 1205* (construing *Code Civ. Proc. § 340.6* regarding attorney malpractice)]. However, when only one legitimate inference can be drawn from uncontradicted evidence, summary judgment is proper [*Van Dyke v. Dunker & Aced (1996) 46 Cal. App. 4th 446, 451, 455, 53 Cal. Rptr. 2d 862* (plaintiffs suffered actual injury upon unconditional conveyance of property to charitable donee rather than years later when full extent of harm was known)]. Actionable harm does not consist of nominal damages. Once actionable harm is sustained, neither difficulty in proving damages nor uncertainty as to their amount tolls the limitations period [*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison (1998) 18 Cal. 4th 739, 752, 76 Cal. Rptr. 2d 749, 958 P.2d 1062* (construing *Code Civ. Proc. § 340.6* regarding attorney malpractice)].

A plaintiff who has suffered actual or appreciable harm due to an accountant's professional negligence cannot claim that the statute of limitations is tolled during the period in which he or she may remedy the injury by the administrative or appellate process [*see Schrader v. Scott (1992) 8 Cal. App. 4th 1679, 1684-1687, 11 Cal. Rptr. 2d 433* ; *see also Laird v. Blacker (1992) 2 Cal. 4th 606, 615-617, 7 Cal. Rptr. 2d 550, 828 P.2d 691* (attorney malpractice case rejecting prior appellate authority that had held that commencement of statute of limitations is tolled until attorney's error could no longer be remedied)]. For example, if an accountant gives a client negligent tax advice that results in adverse tax assessments by the Internal Revenue Service and Franchise Tax Board, the statute of limitations on the client's accountant malpractice action is not tolled while the client pursues administrative remedies challenging the assessments [*see Schrader v. Scott (1992) 8 Cal. App. 4th 1679, 1684-1687, 11 Cal. Rptr. 2d 433* ; *cf. International Engine Parts, Inc. v. Feddersen & Co. (1995) 9 Cal. 4th 606, 616-617, 620, 38 Cal. Rptr. 2d 150, 888 P.2d 1279* (noting that *Schrader* dealt with rejection of "irremediable damage" rule, not with actual injury determination)]. The statute of limitations is not tolled if plaintiff discovers the accountant's negligent act before there is a final determination of the extent of the harm caused by the negligence [*Van Dyke v. Dunker & Aced (1996) 46 Cal. App. 4th 446, 451-452, 53 Cal. Rptr. 2d 862* (plaintiffs who unconditionally conveyed real property to charity upon negligent accountant's advice learned of harm when they paid taxes that same year, not later when full damage was known)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityProfessional ServicesTortsProcedureStatutes of LimitationsGeneral OverviewTortsProcedureStatutes of LimitationsAccrual of ActionsDiscovery Rule

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§ 462.26 Confidential Relationship Between Client and Accountant

[1] General Rule

No confidential information obtained by a certified public accountant in his or her professional capacity concerning a client or a prospective client may be disclosed by the accountant without the written permission of the client or prospective client, except the following [*Bus. & Prof. Code § 5063.3(a)*]:

(1) Disclosures in compliance with a subpoena or a summons enforceable by order of a court.

(2) Disclosures regarding a client or prospective client to the extent the accountant reasonably believes it is necessary to maintain or defend himself or herself in a legal proceeding initiated by the client or prospective client.

(3) Disclosures in response to an official inquiry from a federal or state government regulatory agency.

(4) Disclosures by an accountant or the accountant's duly authorized representative to another accountant in connection with a proposed sale or merger of the accountant's professional practice.

(5) Disclosures to either of the following:

(A) Another accountant to the extent necessary for purposes of professional consultation.

(B) Organizations providing professional standards review and ethics or quality control peer review.

(6) Disclosures specifically required by law.

(7) Disclosures specified by the Board in regulation.

In the event the accountant may disclose confidential client information to persons or entities outside the United States of America in connection with the services provided, the accountant must inform the client in writing and obtain the client's written permission for the disclosure [*Bus. & Prof. Code § 5063.3(b)*].

[2] Injunction to Prevent Disclosure of Confidential Information

Any unwarranted disclosure of confidential information constitutes a breach of trust, and equity will restrain any threatened disclosure or use of the information by an employee or former employee to the detriment of the employer. The character of the information, if peculiar and important to the business, is not material. Logic and a consideration of general principles of equity dictate that even though an accountant's client list would not necessarily be secret, an accountant's method or the details of practice in handling a client's business would or could reasonably be so considered. If a client relies on and has confidence in the manner in which his or her or its accounts are handled by an accounting firm, it certainly lies beyond the fair and ethical scope of an employee of the firm, after discharge or severance of employment with the firm, to attempt to discredit his or her employer and destroy the client's confidence in the proper handling of its accounts [*Ernst & Ernst v. Carlson (1966) 247 Cal. App. 2d 125, 128-129, 55 Cal. Rptr. 626]* . For discussion of, procedural checklist, and forms involving injunctions, see Ch. 303, *Injunctions* . For discussion of and forms related to trade secrets and confidential information, see Ch. 565, *Unfair Competition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesAccountant-Client PrivilegeGeneral OverviewEvidencePrivilegesAccountant-Client PrivilegeElementsEvidencePrivilegesAccountant-Client PrivilegeExceptionsEvidencePrivilegesAccountant-Client PrivilegeScope

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§ 462.27 Conflict of Interest

A licensee who is engaged in the practice of public accounting may not concurrently engage in any business or occupation which impairs his or her objectivity or creates a conflict of interest in rendering professional services [*16 Cal. Code Reg. § 57*]. In addition, a licensee or a firm of which the licensee is a partner or shareholder may not express an opinion on financial statements of an enterprise unless the licensee and his or her firm are independent with respect to that enterprise. Independence must be determined by assessing the accountant's financial, promotional, managerial, and other relationships with the enterprise to determine whether, in the circumstances, his or her opinion would be considered independent, objective, and unbiased by one who had knowledge of all the facts [*16 Cal. Code Reg. § 65*].

A licensee may not accept employment with a publicly traded corporation or its affiliate within 12 months of the issuance of a financial statement report if both of the following are true [*Bus. & Prof. Code § 5062.2*]:

- The licensee has participated in an audit engagement for the corporation and held responsibility, with respect to the audit engagement, requiring the licensee to exercise significant judgment in the audit process. Responsibilities meeting these requirements include, but are not limited to, positions, however titled, in which the licensee was the person in charge of the fieldwork, up through positions in which the licensee was a partner on the engagement.

- The employment would permit the licensee to exercise significant authority over accounting or financial reporting, including authority over the controls related to those functions.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 462.28 Unauthorized Practice of Law

No person may practice law in California unless he or she is an active member of the State Bar [*Bus. & Prof. Code § 6125*]. Anyone advertising himself or herself as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, or otherwise authorized pursuant to statute or court rule to practice law in California at the time of doing so, is guilty of a misdemeanor [*Bus. & Prof. Code § 6126(a)*]. In addition, an accountant who has engaged in the illegal practice of law has no cause of action for fees for services rendered in violation of *Bus. & Prof. Code § 6126* [*see Agran v. Shapiro (1954) 127 Cal. App. 2d Supp. 807, 826, 273 P.2d 619 , 127 Cal. App. 2d Supp. 807, 273 P.2d 619]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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40-462 California Forms of Pleading and Practice--Annotated § 462.29

§ 462.29 Audit Documentation

Audit documentation is an accountant's records of the procedures applied, tests performed, information obtained and pertinent conclusions reached in an audit engagement. Audit document must include, but is not limited to, the following [*Bus. & Prof. Code § 5097(a)*]:

- Programs
- Analyses
- Memoranda
- Letters of confirmation and representation
- Copies or abstracts of company documents
- Schedules or commentaries prepared or obtained by the accountant.

Audit documentation must contain sufficient documentation to enable a reviewer with relevant knowledge and experience, but no previous connection to the audit engagement, to understand the nature, timing extent, and results of the auditing or other procedures performed, evidence obtained, and conclusions reached, and to determine the identity of the persons who performed and reviewed the work [*Bus. & Prof. Code § 5097(b)*]. Failure of the documentation to document procedures applied, tests performed, evidence obtained, and relevant conclusions reached raises a rebuttable presumption that the procedures were not applied, tests were not performed, information was not obtained, and relevant conclusions were not reached, which affects the burden of proof relative to the portions of the audit not documented, which can be met by a preponderance of the evidence [*Bus. & Prof. Code § 5097(c)*].

Audit documentation must be maintained for the longer of a minimum period of seven years, which will be extended during any investigation, disciplinary action or legal action involving the accountant or the accountant's firm, or a

period sufficient to satisfy professional standards and to comply with applicable laws and regulations [*Bus. & Prof. Code § 5097(d), (e)*]. Accountants must maintain a written documentation retention and destruction policy setting for the accountant's practices and procedures complying with the documentation requirements [*Bus. & Prof. Code § 5097(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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40-462 California Forms of Pleading and Practice--Annotated § 462.30

§ 462.30 Accountancy Corporation

An accountancy corporation is a corporation that is registered with the Board and has a currently effective certificate of registration from the Board. Subject to all applicable statutes, rules, and regulations, an accountancy corporation is entitled to practice accountancy [*Bus. & Prof. Code § 5150*; *16 Cal. Code Reg. § 75.5*]. An accountancy corporation may not do or fail to do any act the doing or not doing of which would constitute unprofessional conduct under any statute, rule, or regulation. In the conduct of its practice, the corporation must observe and be bound by those statutes, rules, and regulations to the same extent as a person [*Bus. & Prof. Code § 5156*]. Each office of an accountancy corporation engaged in the practice of public accountancy in California must be managed by a certified public accountant or public accountant [*Bus. & Prof. Code § 5158*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 462.31 Limited Liability Partnership for Public Accountants

Legislation enacted and effective October 1995 enables public accountants and attorneys to form limited liability partnerships. For discussion of this legislation and its impact on public accountancy, see Ch. 400, *Partnerships: Governing Statutes* .

Legal Topics:

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

§§ 462.32[Reserved]

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§ 462.40 Related Matthew Bender Publications

For discussion and forms relating to accountancy services, see California Legal Forms, Ch. 86, *Agreements for Professional Services*, Pt. C (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 462.41 State Statutes

[1] Accountancy Corporations

Registration of partnerships of public accountants. *Bus. & Prof. Code §§ 5072-5073*

Accountancy corporation is capable of practicing accountancy and is required to comply with rules of professional conduct. *Bus. & Prof. Code §§ 5150, 5156*

Management requirement for accountancy corporation offices practicing public accountancy in *California. Bus. & Prof. Code § 5158*

[2] Definitions

Definition of certified public accountant. *Bus. & Prof. Code § 5033*

Definition of public accountant. *Bus. & Prof. Code § 5034*

Definition of client. *Bus. & Prof. Code § 5035.2*

Meaning of certified public accountant when contained in statute governing preparation of state documents. *Bus. & Prof. Code § 5036*

Public accountancy defined. *Bus. & Prof. Code § 5051*

[3] Regulation of Public Accountants

[a] Certified Public Accountants

Requirements for becoming certified public accountant. *Bus. & Prof. Code §§ 5080-5090*

Accountant certified in another state who applies for certificate is deemed to be practicing temporarily in California as provided pending determination of application. *Bus. & Prof. Code § 5088*

[b] Discipline

Disciplinary proceedings by Board involving revocation, suspension, or refusal to renew license. *Bus. & Prof. Code § 5100 et seq.*

Payment of costs of investigation and prosecution, including attorney's fees, by public accountant following professional disciplinary proceeding. *Bus. & Prof. Code § 5107*

Imposition of administrative penalty as part of disciplinary proceeding or other proceeding provided for in Bus. & Prof. Code *§ 5000 et seq. Bus. & Prof. Code* § 5116 et seq.

Violations of *Bus. & Prof. Code §§ 5050-5058.1* (regulations concerning practice of accountancy) are misdemeanors. *Bus. & Prof. Code § 5120*

Board is capable of applying for injunction against acts or practices constituting offenses. *Bus. & Prof. Code § 5122*

[c] Licensure Requirement

Noncompliance with child or family support order is ground for nonissuance or nonrenewal of professional license. *Bus. & Prof. Code §§ 31, 6143.5*

Continuing education requirements are prerequisite to renewal of public accountancy license. *Bus. & Prof. Code §§ 5026-5029*

Person is required to have permit to practice public accountancy; public accountant from another state or foreign country is capable of temporarily practicing public accountancy in *California. Bus. & Prof. Code § 5050*

Application for permit and expiration of permit to practice public accountancy. *Bus. & Prof. Code §§ 5070-5070.8*

Recovery of treble damages, and costs and attorney's fees, from unlicensed person. *Code Civ. Proc. § 1029.8*

[d] State Board of Accountancy

[i] Appeal to Board

Appeal to Board by applicant aggrieved by action of administrative committee with respect to qualifications. *Bus. & Prof. Code § 5022*

[ii] Powers

Board is part of Department of Consumer Affairs. *Bus. & Prof. Code § 101*

Rules governing Board. *Bus. & Prof. Code §§ 5000-5025*

Board is capable of prescribing, amending, or repealing rules of professional conduct. *Bus. & Prof. Code § 5018*

Board is capable of appointing administrative committee. *Bus. & Prof. Code § 5020*

Any person engaging in any act that is practice of public accountancy in California consents to personal, subject matter, and disciplinary jurisdiction of Board. *Bus. & Prof. Code § 5050.1*

[iii] Judicial Review

Judicial review of administrative decisions. *Gov. Code § 11523*

[4] Rights and Duties of Public Accountants

Proof of Department of Consumer Affairs licensure in actions to recover compensation for professional services. *Bus. & Prof. Code § 143*

Public accountant's ownership and furnishing of papers prepared incidental to or in course of professional service to clients. *Bus. & Prof. Code § 5037*

Use of abbreviation "C.P.A." *Bus. & Prof. Code § 5055*

Audit documentation. *Bus. & Prof. Code § 5097 et seq.*

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§ 462.42 Administrative Regulations

Rules governing State Board of Accountancy. *16 Cal. Code Reg. § 1 et seq.*

Requirements for becoming certified public accountant. *16 Cal. Code Reg. §§ 6-36*

Appeal to Board by applicant aggrieved by action of administrative committee with respect to qualifications. *16 Cal. Code Reg. § 49*

Accounting licensee or registrant as prohibited from engaging in discriminatory acts or practices. *16 Cal. Code Reg. § 53*

Confidential relationship between accountant and client. *16 Cal. Code Reg. § 54*

Conflict of interest. *16 Cal. Code Reg. §§ 57, 65*

Continuing education requirements as prerequisite to renewal of public accountancy license. *16 Cal. Code Reg. §§ 85-94*

Denial, suspension, and revocation of public accountant's certificate, permit, or license. *16 Cal. Code Reg. §§ 99, 99.1, 99.2*

Legal Topics:

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

[1] Duties and Liability of Professionals

[a] In General

No civil RICO cause of action under 18 U.S.C. § 1982(c) was stated against accounting firm that conducted audits and prepared financial statements for now-bankrupt farming cooperative because these activities did not constitute participation in operation or management of cooperative for purpose of statutory requirement of conduct or participation, directly or indirectly, in conduct of the enterprise's affairs. *Reves et al. v. Ernst & Young (1993) 507 U.S. 170, 113 S. Ct. 1163, 122 L. Ed. 2d 525, 541*

Accountant was liable in third-party contribution action filed by insurer seeking subrogation, even though accountant not named in original complaint, because accountant would have been liable for damages if named in original action. *Employers Ins. v. Musick, Peeler & Garrett (9th Cir. 1992) 954 F.2d 575, 579-580*

Cause of action for aider and abettor liability was stated against accounting firm who knew that memoranda it aided in preparing were false and did not disclose that fact, and when plaintiffs alleged they relied on accounting firm's reputation in deciding to invest and would not have invested if accounting firm had disclosed fraud. *Roberts v. Peat, Marwick, Mitchell & Co. (9th Cir. 1988) 857 F.2d 646, 652-653 , cert. denied, 493 U.S. 1002, 110 S. Ct. 561, 107 L. Ed. 2d 556 (1989)*

No civil RICO cause of action was stated against failed savings and loan's accountants or accounting firm when all actions taken by accountants and information learned by them were in furtherance of single audit, which thus constituted only one predicate act. *Blake v. Dierdorff (9th Cir. 1988) 856 F.2d 1365, 1371*

Incorrect advice regarding reporting for securities transaction, even though it influenced purchaser's decision to purchase security, was not sufficiently connected with sale of security to render purchaser's accountants liable for misrepresentation under federal securities law. *In re Financial Corp. of America Shareholder Lit. (9th Cir. 1986) 796 F.2d 1126, 1129-1131*

Auditor, when auditing insurance company, owes duty of due care not to make negligent misrepresentations to Insurance Commissioner in latter's capacity as representative of policyholders and creditors. *Arthur Andersen v. Superior Court (1998) 67 Cal. App. 4th 1481, 1507, 79 Cal. Rptr. 2d 879* (on receiving audit report filed pursuant to Ins. Code *§ 900.2, Insurance* Commissioner comes within universe of foreseeable plaintiffs; if Commissioner relies on negligent misrepresentations in audit report, and if insurance company's claims-paying ability damaged as consequence, award of damages may be made against auditor in favor of policyholders and other creditors)

Elements of accounting malpractice based on negligence are: (1) Duty of accountant to use skill, prudence and diligence as other members of accounting profession commonly possess and exercise; (2) Breach of duty; (3) Proximate causal connection between negligent conduct and resulting injury; and (4) Actual loss or damage resulting from accountant's negligence. Further, in action for accounting malpractice based on allegedly negligent trial litigation support, trial--within--trial standard, under which plaintiff is required to prove that in underlying trial, plaintiff would have prevailed, applies. *Mattco Forge, Inc. v. Arthur Young & Co. (1997) 52 Cal. App. 4th 820, 831-837, 60 Cal. Rptr. 2d 780*

Accounting firm was not liable under *Corp. Code § 25503* (sale of unregistered securities) or 25504 (liability of controlling person for sale of unregistered securities) when it had no other connection to transaction than as accountant for both entities involved. *Sherman v. Lloyd (1986) 181 Cal. App. 3d 693, 703, 226 Cal. Rptr. 495*

Person uttering misrepresentation was liable only to those in whom intended to induce reliance and who do so rely and not to third parties. *Cohen v. Citizens Nat'l Trust & Sav. Bank (1956) 143 Cal. App. 2d 480, 484, 300 P.2d 14*

[b] Public Accountants

Accountant has positive, specific duty if he or she contracts to do specific thing. *L. B. Laboratories, Inc. v. Mitchell (1952) 39 Cal. 2d 56, 63, 244 P.2d 385*

Contractual negligence gives rise to action against accountant either in tort or on contract. *Eads v. Marks (1952) 39 Cal. 2d 807, 810-811, 249 P.2d 257*

Unwarranted disclosure of confidential information by accountant formerly employed by firm of certified public accountants was breach of trust and capable of being restrained by injunction. *Ernst & Ernst v. Carlson (1966) 247 Cal. App. 2d 125, 128-129, 55 Cal. Rptr. 626*

Report made for plaintiffs by accountant from defendant's records during plaintiffs' preparation for trial was confidential. *Oppenheimer v. Minks (1956) 141 Cal. App. 2d 485, 493, 297 P.2d 67*

[2] Regulation of Practice of Public Accountancy

Hearsay was not competent evidence to support revocation of license. *Walker v. City of San Gabriel (1942) 20 Cal. 2d 879, 881, 129 P.2d 349*

Public accountants were properly disciplined for failure to test county's compliance with investment-related laws, where accounting firm's audit plan stated that U.S. Auditor General required auditors to report on compliance with laws and regulations, and, among other things, firm would 'identify any material instance of noncompliance with applicable state laws; firm identified compliance with investment laws as an important audit objective in earlier general audit plans; county asserted in its financial statements that it did not violate laws dealing with deposits, investments, or reverse purchase agreements; various written professional standards required audits for compliance with

investment-related laws; and there was expert testimony that auditors engaged to audit public agency had duty to test and report on compliance with investment-related laws and regulations. *McBride v. California Bd. of Accountancy (2005) 130 Cal. App. 4th 518, 528-529, 30 Cal. Rptr. 3d 287*

Fact that differing standards of proof and practice may be used in suspension or revocation proceeding conducted by governmental body or agency did not make former *Bus. & Prof. Code § 5100(g)* [*now see Bus. & Prof. Code § 5100(h)*] invalid; statute's reliance on licensee's failure to conform to professional conduct regulations imposed by, and voluntarily assumed in other jurisdiction, was not unreasonable. *Clare v. State Bd. of Accountancy (1992) 10 Cal. App. 4th 294, 304-305, 12 Cal. Rptr. 2d 481*

Determination of what constitutes practice of public accountancy. *State Bd. of Accountancy v. Lender's Serv. Corp. (1960) 179 Cal. App. 2d 150, 162-163, 3 Cal. Rptr. 656*

Accounting was not subject to provisions of and Professions Code when referee was appointed by trial court pursuant to its general authority to refer accounting matters to a referee. *Huntoon v. Hurley (1955) 137 Cal. App. 2d 33, 38, 290 P.2d 14*

Services of accountant with respect to income tax returns constituted practice of law. *Agran v. Shapiro (1954) 127 Cal. App. 2d Supp. 807, 812-820, 273 P.2d 619* , *127 Cal. App. 2d Supp. 807, 273 P.2d 619*

[3] Rights of Public Accountants

Proceeding in mandamus to annul State Board of Accountancy's decision to revoke certificate and permit to practice accountancy. *Kramer v. State Board of Accountancy (1962) 200 Cal. App. 2d 163, 166, 19 Cal. Rptr. 226*

In action by accountant for payment for services rendered, defense alleging services constituted practice of law is generally valid but if services do not constitute practice of law was invalid. *Zelkin v. Caruso Discount Corp. (1960) 186 Cal. App. 2d 802, 806, 9 Cal. Rptr. 220*

Writ of mandate to review proceedings of State Board of Accountancy revoking accountant's license to practice accountancy dismissed on ground of lack of prosecution. *Wisler v. California State Bd. of Accountancy (1955) 136 Cal. App. 2d 79, 81, 288 P.2d 322*

Action by accountant for account stated, oral agreement for professional services and indebtedness; statute of limitations raised too late in proceedings to be timely. *Horwath v. Roosevelt Hotel Co. (1953) 118 Cal. App. 2d 1, 8, 257 P.2d 56*

Action by accountant against employer for balance of compensation due for services rendered. *Breslauer v. McCormick-Saeltzer Co. (1916) 31 Cal. App. 284, 285, 160 P. 251*

[4] Statute of Limitations

Claim for accounting malpractice action is governed by two-year statute of limitations contained in *Code Civ. Proc. § 339(1). International Engine Parts, Inc. v. Feddersen & Co. (1995) 9 Cal. 4th 606, 608, 38 Cal. Rptr 2d. 150, 888 P.2d 1279*

Fraudulent concealment of facts tolled statute of limitations. *L. B. Laboratories, Inc. v. Mitchell (1952) 39 Cal. 2d 56, 64-65, 244 P.2d 385* ; *Sears, Roebuck & Co. v. Blade (1956) 139 Cal. App. 2d 580, 587, 294 P.2d 140*

In malpractice action by school district against accounting firm and accountant, trial court properly sustained defendants' demurrer without leave to amend based on running of statute of limitations [*Code Civ. Proc. § 339(a)*], where statute began to run when district learned of improper payments to state for charter school not entitled to funds, based on claimed misrepresentations in audit report which allegedly induced district to provide funds, and when district incurred expenses in effort to assess and limit its exposure, notwithstanding fact it had not been determined that district was legally responsible for reimbursing state for funds, and where district did not file suit until more than two years later. *Apple Valley Unified School District v. Vavrinek, Trine, Day & Co. (2002) 98 Cal. App. 4th 934, 120 Cal. Rptr. 2d 629*

For purposes of accounting malpractice action based on improperly prepared tax return, actual injury occurs so as to commence running of statute of limitations when Internal Revenue Service assesses tax deficiency. *Curtis v. Kellogg & Andelson (1999) 73 Cal. App. 4th 492, 500-503, 86 Cal. Rptr. 2d 536*

Statute of limitations for accounting malpractice action begins to run when plaintiff sustains actual or appreciable harm as result of accountant's negligence. *Schrader v. Scott (1992) 8 Cal. App. 4th 1679, 1684-1687, 11 Cal. Rptr. 2d 433*

Statute of limitations for accounting malpractice action starts to run when plaintiff both sustains actual harm and discovers, or with reasonable diligence should have discovered, wrongful acts. *Electronic Equipment Express, Inc. v. Donald H. Seiler & Co. (1981) 122 Cal. App. 3d 834, 848, 176 Cal. Rptr. 239*

Statute of limitations for fraud and professional negligence runs from time wrongful acts discovered or with reasonable diligence could have been discovered. *Bedolla v. Logan & Frazer (1975) 52 Cal. App. 3d 118, 130-131, 125 Cal. Rptr. 59*

Criminal statute of limitations does not applying to proceedings for suspension or revocation of private investigator's license. *Wayne v. Bureau of Private Investigators & Adjusters (1962) 201 Cal. App. 2d 427, 439, 20 Cal. Rptr. 194*

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesAccountant-Client PrivilegeGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationGeneral OverviewTortsMalpractice & Professional LiabilityProfessional ServicesTortsProcedureStatutes of LimitationsAccrual of ActionsDiscovery Rule

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40-462 California Forms of Pleading and Practice--Annotated § 462.44

§ 462.44 Attorney General Opinions

State Board of Accountancy's administrative rules and regulations provide adequate interpretation as to character of government experience required to qualify as certified public accountant. *70 Ops. Cal. Att'y Gen. 292 (1987)*

Regulation of experience requirements of CPA applicants. *60 Ops. Cal. Att'y Gen. 1 (1977)*

Public accountant not able to obtain new permit after permit to practice canceled by failure to renew for five years. *42 Ops. Cal. Att'y Gen. 43, 44 (1963)*

Lack of good moral character not covered by *Bus. & Prof. Code § 5100* not ground for discipline of certified public accountant. *36 Ops. Cal. Att'y Gen. 169, 174 (1960)*

Accountants, whether privately employed or engaged in practice of public accountancy, subject to rules of professional conduct promulgated by State Board of Accountancy. 35 Ops. Cal. Att'y Gen. 120, 122 (1960)

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGeneral OverviewAdministrative LawAgency InvestigationsScopeSubpoenasGovernmentsState & Territorial GovernmentsLicenses

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40-462 California Forms of Pleading and Practice--Annotated § 462.45

§ 462.45 Law Reviews

Lowenfels & Bromberg, *Liabilities of Lawyers and Accountants Under Rule 10b-5, 53 Bus. Law. 1157 (1998)*

Comment, *Bily v. Arthur Young & Co: An Inequitable Approach to Defining Accountant Liability to Third Parties, 28 U.S.F. L. Rev. 239 (1993)*

Comment, *Professional-Client Sex: Is Criminal Liability an Appropriate Means of Enforcing Professional Responsibility, 40 UCLA L. Rev. 1275 (1993)*

Note, *Accountants' Liability after Bily v. Arthur Young & Co.: A More Equitable Proposal for Third Party Recovery, 45 Hastings L.J. 147 (1993)*

Note, *Bily v. Arthur Young & Co.: Is Limiting Auditor Liability to Third Parties Favoritism or Fair Play? 26 Loy. L.A. L. Rev. 1335 (1993)*

Gruenbaum and Steinberg, *Accountants' Liability and Responsibility: Securities, Criminal and Common Law, 13 Loy. L.A. L. Rev. 247 (1980)*

Adams, *Lessening the Legal Liability of Auditors, 32 Bus. Law. 1037 (1977)*

Deer, Fiflis, Gonson, Henry, Hill & Scott, *Responsibilities and Liabilities of Auditors and Accountants*, 30 Bus. Law., Special Issue 169 (1975)

Note, *Newly Registered Securities and Accountants' Liability to Third Party Investors Under the Federal Securities Law, 5 Golden Gate U.L. Rev. 305 (1975)*

Note, *Certified Public Accountants' Liability for Unaudited Financial Statements, 8 Cal. W.L. Rev. 368 (1972)*

Murphy, *Torts: Accountant's Common Law Liability to Third Persons for Misrepresentation--Rusch Factors, Inc. v. Levin (D.R.I. 1968), 57 Calif. L. Rev. 281 (1969)*

Neider and Tims, *CPA Incorporation--Why Not? 10 Santa Clara Law. 64 (1969)*

Levitin, *Accountants' Scope of Liability for Defective Financial Reports, 15 Hastings L.J. 436 (1964)*

Comment, *Accountants, Income Tax and the Unauthorized Practice of Law, 15 Hastings L.J. 321 (1964)*

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesAccountant-Client PrivilegeGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesLegal EthicsUnauthorized Practice of LawTortsMalpractice & Professional LiabilityProfessional Services

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§ 462.46 Text References

Witkin, California Procedure, vol. 3, *Actions*, § 742 (4th ed. 1996)

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

Legal Topics:

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

§§ 462.47[Reserved]

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40-462 California Forms of Pleading and Practice--Annotated § 462.50

§ 462.50 Complaint by Public Accountant for Compensation for Services Rendered [Civ. Code § 3302]--With Common Counts on Account Stated and for Work and Labor

[1] FORM Complaint by Public Accountant for Compensation for Services Rendered [Civ. Code § 3302]--With Common Counts on Account Stated and for Work and Labor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONEY
_____ [*name*], [and DOES I	)	[LIMITED CIVIL CASE]
through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	

Plaintiff alleges:

FIRST COUNT

(Breach of Contract)

1. Plaintiff is, and at all times herein mentioned was, a [certified] public accountant, duly licensed by the California State Board of Accountancy to practice accountancy in California.

2. Defendant is, and at all times mentioned herein was, _____ [a corporation, organized and existing under the laws of California with its principal place of business in _____ County, California *or allege other capacity and residence of defendant*].

[3. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is indebted to plaintiff as hereinafter alleged, and that plaintiff's rights against such fictitiously named defendants arise from such indebtedness.)]

[4. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned each of the defendants, including all defendants sued under fictitious names, was the agent and employee of each of the remaining defendants, and in doing the things herein alleged, was acting within the scope of his/her agency and employment.]

5. On or about _____ [*date*], plaintiff and defendant entered into a/an _____ [written *or* oral] agreement whereby plaintiff agreed to _____ [*specify agreed services*] and defendant agreed to pay the sum of $_____ as plaintiff's fee for such services to be paid _____ [*specify manner of payment*]. [A copy of the agreement is attached hereto as Exhibit A and made a part hereof.]

6. Plaintiff has fully performed all acts, services, and conditions required by such agreement to be performed on his/her part [*or allege any excuse for nonperformance*].

7. Plaintiff has made demand on defendant for payment of such compensation and for reimbursement of costs and expenses of the total sum of $_____, but neither the whole nor any part of such sum has been paid, [except the sum of $_____,] and there is now due and unpaid from defendant to plaintiff the sum of $_____.

SECOND COUNT
(Common Count)

8. Plaintiff refers to and incorporates, as though fully set forth herein, Paragraphs 1-4, inclusive, and Paragraph 7 of the First Count.

9. On or about _____ [*date*], at _____ [*address*], California, defendant became indebted to plaintiff in the sum of $_____ for accounting services rendered by plaintiff to defendant at the special instance and request of defendant.

THIRD COUNT
(Account Stated)

10. Plaintiff refers to and incorporates, as though fully set forth herein, Paragraphs 1-4, inclusive, of the First Count.

11. Between _____ [*date*], and _____ [*date*], plaintiff performed accounting services for defendant at defendant's request.

12. On or about _____ [*date*], at _____ [*address*], California, an account was stated [in writing] between plaintiff and defendant and on the basis of such account there was found due from defendant to plaintiff the sum of $_____, which defendant agreed to pay.

13. Neither the whole nor any part of such sum has been paid[, except the sum of $_____,] even though plaintiff has demanded payment, and there is now due, owing, and unpaid from defendant to plaintiff the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____ with interest thereon at the legal rate from and after _____ [*date*];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a certified public accountant or public accountant in an action to recover fees for services rendered where the fees are fixed by agreement of the parties [*see Civ. Code § 3302* (detriment caused by breach of obligation to pay money only as deemed to be amount due by terms of obligation, with interest on that amount)]. The agreement may be oral [*see Horwath v. Roosevelt Hotel Co. (1953) 118 Cal. App. 2d 1, 7-8, 257 P.2d 56* (action by accountant based on oral agreement for professional services barred by statute of limitations)].

[3] Contents

The complaint in [1], *above*, sets forth three counts as a basis for recovery of compensation for accountancy services. The First Count specifically alleges:

- That plaintiff is a (certified) public accountant (Paragraph 2);
- The oral or written agreement for services providing for a fixed fee (Paragraph 5);
- That plaintiff performed in accordance with the agreement (Paragraph 6); and
- That the fees and costs were demanded and are due, owing, and unpaid (Paragraph 7).

For allegations necessary to state cause of action for fixed fees, see *Hardy v. San Fernando Valley C. of C. (1950) 99 Cal. App. 2d 572, 576-577, 222 P.2d 314* .

The Second Count alleges a common count for indebtedness for services rendered [*see generally* Ch. 121, *Common Counts ; see also*, *Breslauer v. McCormick-Saeltzer Co. (1916) 31 Cal. App. 284, 285, 160 P. 251* (action by accountant against employer for balance of compensation due him for services rendered)]. The Third Count alleges an account stated for legal services [*see generally* Ch. 8, *Accounts Stated and Open Accounts*].

The prayer for the award of costs includes the award of attorney fees to the prevailing party, if the agreement between the parties that serves as the basis for the action so provides [*see Code Civ. Proc. § 1032(a)(4), (b)*]. For items allowable as costs generally, see *Code Civ. Proc. § 1033.5*.

[4] Venue

When a defendant has contracted to perform an obligation in a particular county, any of the following is a proper county for the trial of the action [*Code Civ. Proc. § 395*]:

- Where the obligation is to be performed;
- Where the contract in fact was entered into; or
- Where the defendant or any defendant resides at the commencement of the action.

The county in which the obligation is incurred is deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary [*Code Civ. Proc. § 395*].

A corporation or association may be sued in the county where [*Code Civ. Proc. § 395.5*]:

- The contract is made or is to be performed;
- The obligation or liability arises or the breach occurs; or
- The principal place of business of such corporation is situated.

If an unincorporated association has filed a statement with the Secretary of State pursuant to *Corp. Code § 24003* listing its principal office in California, the proper county for the trial of an action against an unincorporated association is the same as it would be if the unincorporated association were a corporation. For the purpose of determining the county, the

principal place of business of the unincorporated association is deemed to be the principal office in California listed in the statement [*Code Civ. Proc. § 395.2*].

[5] Jurisdiction

The superior court has jurisdiction of an action for accountant's fees as an unlimited civil case or as a limited civil case (amount in controversy, exclusive of interest, is $25,000 or less) [*see Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases the caption must state whether the demand exceeds or does not exceed $10,000. When a limited civil case is brought in a unified court, the caption must also identify the case as a limited civil case[*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (9)*].

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[7] Cross References

For complaints and forms relating to actions on an account stated, see Ch. 8, *Accounts Stated and Open Accounts*

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For complaints and forms relating to contract actions and actions on common counts, see Ch. 140, *Contracts* , and Ch. 121, *Common Counts* , respectively

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, § 177.140* et seq.

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 321, *Jurisdiction, Inconvenient Forum, and Appearances*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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40-462 California Forms of Pleading and Practice--Annotated § 462.51

§ 462.51 Complaint for Damages [Civ. Code § 3333]--By Client Against Public Accountant for Negligence

[1] FORM Complaint for Damages [Civ. Code § 3333]--By Client Against Public Accountant for Negligence

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Negligence)
through _____,]	)	
Defendant(s).	)	
	)	

Plaintiff alleges:

[*Allege venue, EITHER*]

1. _____ [*If defendant is an individual, allege defendant's residence, e.g.,* Defendant _____ (*name*) resides in _____ County, California.]

[*AND/OR*]

1. _____ [*If defendant is a partnership, allege capacity and principal place of business (or other venue), e.g.,* Defendants _____ (*name*) and _____ (*name*) are, and at all times herein mentioned were, partners engaged in the practice of accountancy under the common name of _____ (*name of partnership*) (hereinafter called "Firm") having their principal place of business at _____ (*address*), _____ (*city*), California, and are sued herein individually and by such common name.]

[*AND/OR*]

1. _____ [*If defendant is an accountancy corporation, allege capacity and principal place of business (or other venue), e.g.,* Defendant _____ (*name*) (hereinafter referred to as "Firm") is, and at all times herein mentioned was, a professional corporation organized and existing under the laws of California, duly registered with the State Board of Accountancy as an accountancy corporation, with its principal place of business at _____ (*address*), _____ (*city*), California.)]

[*CONTINUE*]

[2. *Fictitious name allegation, if appropriate. See § 462.50[1], Paragraph 3.*]

[3. *Agency allegation, if appropriate. See § 462.50[1], Paragraph 4.*]

4. At all times herein mentioned, defendant was, and now is a [certified] public accountant, duly licensed by the California State Board of Accountancy to practice his/her profession in California, and practicing the same in _____, California.

5. On or about _____ [*date*], plaintiff and defendant entered into an agreement at _____ [*address*], _____ [*city*], California, that defendant would _____ [*describe services*]. Plaintiff and defendant further agreed that plaintiff should pay defendant a _____ [reasonable sum *or* sum of $_____] for all the services performed by him/her/it.

6. At all times during the existence of that agreement, plaintiff relied completely on defendant to perform the agreement, as well as on defendant's skill and ability as an accountant.

7. Defendant negligently, carelessly, and recklessly rendered services as an accountant in that he/she/it _____ [*state negligent act(s) or omission(s)*]. Defendant thus failed to render the skill required of and commonly exercised by [certified] public accountants.

8. As a direct and proximate result of defendant's negligence, carelessness, and recklessness, plaintiff was _____ [*state damage caused*], all to his/her/its damage in an amount according to proof.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For damages in an amount according to proof;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 462.50[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action against a certified public accountant or a public accountant for professional negligence. Accountants have the duty to exercise the ordinary skill and competence of members of their profession; failure to discharge that duty subjects them to liability for negligence [*Lindner v. Barlow, Davis & Wood (1962) 210 Cal. App. 2d 660, 665, 27 Cal. Rptr. 101* ; *see, e.g., Smolen v. Deloitte, Haskins & Sells (9th Cir. 1990) 921 F.2d 959, 965* (reliance by plaintiff on professional accounting firm's misrepresentations as element of professional negligence claim); *L. B. Laboratories, Inc. v. Mitchell (1952) 39 Cal. 2d 56, 60, 244 P.2d 385* (action by client against accountant for negligence and breach of contract for failure to file plaintiff's tax returns by date defendant agreed to do so)]. Contractual negligence gives rise to an action either in tort or on the contract [*Eads v. Marks (1952) 39 Cal. 2d 807, 811, 249 P.2d 257]* .

[3] Contents

The complaint in [1] *above*, alleges:

- Duty to plaintiff (Paragraphs 5, 6);
- Breach of duty (Paragraph 7);
- Proximate cause (Paragraph 8); and
- Loss suffered by plaintiff (Paragraph 8).

For discussion of the principles of negligence, see Ch. 380, *Negligence* .

If the negligent accountant's partners or accountancy corporation is sued on the principle of respondeat superior, allegations of such partnership or corporate capacity are included (Alternative Paragraph 1), together with an agency allegation (Optional Paragraph 3). For a comprehensive discussion of these principles and related forms, see Ch. 160, *Corporations: Capacity* , Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties* , and Ch. 427, *Principal and Agent* .

[4] Venue

The county in which the defendants or some of them reside at the commencement of the action is the proper county for the trial of the action [*Code Civ. Proc. § 395(a)*]. A corporation has a residence where its principal office or place of business is established [*Code Civ. Proc. § 395.5*].

[5] Negligence Per Se

Violation of a regulation is, in some cases, negligence per se. Thus, if a possible violation of a regulation is involved one count of the complaint might allege negligence per se [*see Evid. Code § 669*].

[6] When Action Accrues

The statute of limitations for accounting malpractice action begins to run when plaintiff sustains actual or appreciable harm as a result of the accountant's negligence [*Schrader v. Scott (1992) 8 Cal. App. 4th 1679,1684-1687, 11 Cal. Rptr. 2d 433* ; *see also*, *Bedolla v. Logan & Frazer (1975) 52 Cal. App. 3d 118, 130-131, 125 Cal. Rptr. 59* (statute of limitations for fraud and professional negligence runs from time wrongful acts discovered or with reasonable diligence could have been discovered); *Moonie v. Lynch (1967) 256 Cal. App. 2d 361, 365-366, 64 Cal. Rptr. 55* (statute of limitations in malpractice action against accountant runs from time negligent act discovered or with reasonable diligence could have been discovered)].

[7] Cross References

For allegations of damages generally, see *Ch. 177, Damages, § 177.40* et seq.

For complaints for use in negligence actions generally, see Ch. 380, *Negligence*

For additional discussion and references relating to complaints generally, see notes and references in § 462.50[2]-[6]

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40-462 California Forms of Pleading and Practice--Annotated § 462.52

§ 462.52 Complaint for Damages [Civ. Code § 3333]--By Third Party Against Public Accountant for Intentional or Negligent Misrepresentation

[1] FORM Complaint for Damages [Civ. Code § 3333]--By Third Party Against Public Accountant for Intentional or Negligent Misrepresentation

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Deceit)
through _____,]	)	
Defendant(s).	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of defendant(s). See § 462.50[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 462.50[1], Paragraph 3.*]

[3. *Agency allegation, if appropriate. See § 462.50[1], Paragraph 4.*]

4. On or about _____ [*date*], defendant and _____ [*name of defendant's client*] entered into an agreement at _____ [*address*], _____ [*city*], California, that defendant would _____ [*describe services, e.g.,* perform an audit of the financial statements of _____ (*name of defendant's client*)].

5. On or about _____ [*date*], defendant made following false representations: _____ [*allege in exact language or as close to exact language as possible the statements of material fact claimed by plaintiff to be false, e.g.,* stated in its audit report that the 1991 financial statements of _____ (*name of defendant's client*) revealed a net operating profit of $75,000 on sales of $70,000,000].

6. The representations made by defendant were in fact false. The true facts were as follows: _____ [*specify, e.g.,* In 1991, _____ (*name of defendant's client*) actually suffered a net operating loss of $5,000,000].

[*EITHER, if intentional misrepresentation is alleged*]

7. When defendant made these representations, he/she _____ [knew them to be false *or* had no belief in their truth and made them recklessly], and he/she made them with the intent to defraud and deceive plaintiff, or a particular class of persons to which plaintiff belongs, whom defendant intended or reasonably should have foreseen would rely on the representations. Defendant made these representations with the intent to induce plaintiff to act in the manner herein alleged.

[*OR, if negligent misrepresentation is alleged*]

7. Defendant made these representations with no reasonable ground for believing them to be true, in that _____ [*allege facts showing lack of reasonable grounds for believing the representations, e.g.,* defendant, before issuing its unqualified audit opinion, had discovered deviations in its own accounting procedures and systems from those set forth in the "Generally Accepted Accounting Principles," promulgated by the American Institute of Certified Public Accountants, thereby rendering inaccurate the representations herein alleged].

8. Defendant made these representations with the intent to induce plaintiff, or a particular class of persons to which plaintiff belongs, to act in reliance on the representations and to be influenced in the specific [type of] transaction herein alleged, which defendant intended to influence, in that defendant knew with substantial certainty that plaintiff, or the particular class of persons to which plaintiff belongs, would rely on the representations in the course of the transaction.

[*CONTINUE*]

9. Plaintiff, at the time these representations were made by defendant, and at the time plaintiff took the actions herein alleged, was ignorant of the falsity of the defendant's representations and believed them to be true. In reliance on these representations, plaintiff was induced to and did _____ [*specify actions taken by plaintiff, e.g.,* invest in _____ (*name of defendant's client*) by purchasing 40,000 shares of stock]. Plaintiff's reliance on defendant's representations was justified because _____ [*specify, e.g.* defendant, a prestigious

accounting firm, stated in its unqualified audit opinion that it had performed an examination of its client's 1991 financial statements in accordance with the accounting profession's "Generally Accepted Auditing Standards" and "Generally Accepted Accounting Principles"].

10. As a proximate result of defendant's fraud and deceit and the facts herein alleged, plaintiff was _____ [*allege facts showing allowable damages, e.g.,* induced to expend $_____ to purchase the 40,000 shares of the stock].

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For damages in the sum of $_____;

2. For costs of suit herein incurred;

[3. For punitive damages;] and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 462.50[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use in an action by a third party against a certified public accountant or a public accountant for intentional or negligent misrepresentation. Auditors are liable to third parties for intentional misrepresentation [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 415, 11 Cal. Rptr. 2d 51, 834 P.2d 745* ; *see, e.g., Mariani v. Price Waterhouse (1999) 70 Cal. App. 4th 685, 695, 696, 708, 82 Cal. Rptr. 2d 671* ; *Anderson v. Deloitte & Touche (1997) 56 Cal. App. 4th 1468, 1476-1479, 66 Cal. Rptr. 2d 512* (reversing summary judgment for defendant)].

[3] Contents

The complaint in [1], *above*, alleges [*see, e.g., Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 414, 11 Cal. Rptr. 2d 51, 834 P.2d 745* (negligent misrepresentation claim has as elements reliance by third-party plaintiff on professional accounting firm's misrepresentations and that accounting firm knew or should have known that plaintiff would rely on misrepresentations)]:

- The exact false representations made by the accountant (Paragraph 5);
- The falsity of these representations and the true facts (Paragraph 6);
- That the accountant either knew the representations were false, made them recklessly, or had no

reasonable ground for believing them to be true (Paragraph 7);

- That plaintiff belongs to the class of persons to whom or for whom the representations were made (Paragraphs 7 and 8);

- Plaintiff's actual and justifiable reliance on the representations (Paragraph 9); and

- Resulting damages (Paragraph 10).

For a comprehensive discussion of negligent and intentional misrepresentation and related forms, see Ch. 269, *Fraud and Deceit* .

[4] Cross References

For discussion and references relating to complaints generally, see notes and references in § 462.51[2]-[6].

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Chapter 462 PUBLIC ACCOUNTANT S
PART IV. FORMS

40-462 California Forms of Pleading and Practice--Annotated § 462.53

§ 462.53 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Accountant and Plaintiff Not in Privity of Contract

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Accountant and Plaintiff Not in Privity of Contract

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that he/she/it is not liable to plaintiff for damages caused by defendant's alleged negligence because defendant did not enter into a contractual relationship with plaintiff to render accounting services to plaintiff.

[2] Use of Form

The form in [1], *above*, is for use as an affirmative defense in an answer to a complaint for damages in an action against a certified public accountant or a public accountant for professional negligence when the plaintiff and the accountant were not in a contractual relationship. Third-party negligence claims are barred, irrespective of the foreseeability of a third party's reliance on audit [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 405-406, 11 Cal. Rptr. 2d 51, 834 P.2d 745* ; *see also Mariani v. Price Waterhouse (1999) 70 Cal. App. 4th 685, 701, 82 Cal. Rptr. 2d 671* (there are no express third-party beneficiaries of ordinary white bread audit engagement contract, only incidental beneficiaries who have no legal rights arising from contract)]. This form may be inserted into a general form of answer, to be found in Ch. 26, *Answers* .

[3] Cross References

For discussion and references relating to complaints involving certified public accountants or public accountants generally, see notes and references in § 462.51[2]-[6].

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40-462 California Forms of Pleading and Practice--Annotated § 462.54

§ 462.54 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Compel State Board of Accountancy to Admit Petitioner Either to Accountant's Examination or to Practice as Accountant

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Compel State Board of Accountancy to Admit Petitioner Either to Accountant's Examination or to Practice as Accountant

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION FOR WRIT OF
_____ [*name(s)*],	)	MANDATE
Respondent(s).	)	
	)	
	)	

Petitioner alleges:

1. Petitioner is a resident of _____ County, California.

2. Respondent State Board of Accountancy was, and now is, an agency of the State of California, organized and existing under the laws thereof, with authority to regulate the practice of public accountancy in California and, in particular, to license persons to practice public accountancy in California. [_____ (*State also capacity of any individual respondents, e.g., members or secretary of State Board of Accountancy.*)]

3. On or about _____ [*date*], petitioner filed an application with respondent State Board of Accountancy _____ [to take the examination for certified public accountant *or* for a permit to practice public accountancy], pursuant to the provisions of Section _____ of the and Professions Code of California. The application was in proper form and contained a full and correct statement of all matters required to be contained therein.

4. At all times herein mentioned, petitioner was fully qualified to _____ [take that examination *or* be admitted to practice as a certified public accountant] in California, inasmuch as he/she _____ [*state education and all other qualifications required, including payment of any fee required as condition to admission*].

5. By reason thereof, petitioner is entitled to be admitted to the _____ [examination *or* practice of public accountancy as a certified public accountant], and respondent's refusal to so admit petitioner constitutes an arbitrary and wrongful violation of its duties, in that petitioner has fully complied with all requirements for such admission and is, therefore, entitled under Section _____ of the and Professions Code of the State of California to be so admitted.

6. Petitioner has performed all conditions precedent to the filing of this petition by _____ [*describe performance of conditions such as exhausting administrative remedies*].

7. Petitioner has duly demanded of respondents that he/she be so admitted to _____ [the examination *or* practice], but his/her demand has been refused and respondents do now refuse to so admit petitioner.

8. At all times herein mentioned, respondent has been able to admit petitioner to _____ [the examination *or* practice]. Notwithstanding such ability and despite petitioner's demand that he/she be admitted, respondent continues to refuse to so admit him/her.

9. Petitioner has no plain, speedy, or adequate remedy in the ordinary course of law, other than the relief sought in this petition, in that this is the only proceeding in which petitioner may obtain the rights demanded herein.

WHEREFORE, petitioner prays:

1. That this court issue an alternative writ of mandate commanding respondents to admit petitioner _____ [to the next regularly scheduled examination for certified public accountants *or* forthwith to practice in the State of California as a certified public accountant], or to show cause before this court at a time specified by court order why it has not done so and why a peremptory writ should not issue;

2. That on the return of the alternative writ and the hearing of this petition, this court issue its peremptory writ of mandate commanding respondents to do the things prayed for above; and

3. For costs of this proceeding; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form is a petition for a writ of mandate in superior court to compel the State Board of Accountancy to admit the petitioner to the accountant's examination or to practice as an accountant. For mandate generally, see *Code Civ. Proc. §§ 1084-1097*; for damages in mandate proceedings, see *Code Civ. Proc. §§ 1090, 1095*; for administrative mandate, see *Code Civ. Proc. § 1094.5*; for requirements for petitions for writ of mandate filed in reviewing courts, see *Cal. Rules of Ct., Rule 8.486*, all of which are discussed in Ch. 358, *Mandate and Prohibition* .

[3] Contents

This form alleges:

- The existence of respondent's duty (Paragraph 5) [*see Code Civ. Proc. § 1085*].
- Petitioner's right (Paragraph 5) [*see Code Civ. Proc. § 1085*].
- The performance of all conditions precedent (Paragraph 6).
- The making of a demand on respondent (Paragraph 7).
- The ability of respondent to perform the duty or exercise the discretion (Paragraph 8).
- The lack of an adequate legal remedy (Paragraph 9).

[4] Verification

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*]. The verification may be by declaration

under penalty of perjury [*Code Civ. Proc. § 2015.5*] or by affidavit [*Code Civ. Proc. § 2009*].

[5] Proof of Service

Proof of service of a copy of a petition for writ of mandate on each respondent and real party in interest must accompany the petition when it is offered for filing (except when, in its discretion and for good cause, the court has granted the application for the writ ex parte or in a trial court, when the petition does not seek an alternative writ) [*Code Civ. Proc. § 1107*; for discussion of method of serving petition, *see* Ch. 358, *Mandate and Prohibition*].

[6] Attaching Points and Authorities

Cal. Rules of Ct., Rule 8.486 requires that a supporting memorandum accompany a petition filed in a court of appeal or the Supreme Court. Memoranda are also required to accompany a petition filed in a superior court [*Cal. Rules of Ct., Rules 3.1103(a)(2), 3.1113(a)*; for discussion and forms, *see* Ch. 417, *Points and Authorities*].

[7] Attaching Complete Record

The petitioner should attach as exhibits all pleadings, affidavits, declarations, stipulations, minutes, orders, rulings, transcripts, or other documents comprising the record of any proceedings before the State Board of Accountancy. Whether the court is persuaded to issue an alternative writ might depend on how thorough a record is attached to the petition.

[8] Time for Filing

The petition for writ of mandate must be filed within 30 days after the last day on which reconsideration can be ordered [*Gov. Code § 11523*].

[9] Jurisdiction

The Supreme Court, the courts of appeal, and the superior courts have jurisdiction in proceedings for extraordinary relief in nature of mandate [*Cal. Const., art VI, § 10*].

[10] Cross References

For forms for writs of mandate to compel the issuance of licenses, see Ch. 471B, *Licensing by Public Agencies*

For forms for writ of mandate ordering petitioner to be permitted to take an examination, see Ch. 415, *Physicians: Medical Malpractice*

For memoranda for use in mandate proceedings, see California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender)

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Volume 40: Products Liability thru Public Entities and Officers-Chs. 460-469
Chapter 464 PUBLIC ENTITIES AND OFFICERS: CALIFORNIA TORT CLAIMS ACT

40-464 California Forms of Pleading and Practice--Annotated 464.syn

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[1] FORM

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[1] FORM

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[1] FORM

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Cross References

§ 464.188 General Demurrer--Failure of Plaintiff Suing Public Entity to Allege Filing of Claim [Gov. Code §§ 905, 911.2, 945.4]--And Notice of Hearing [Cal. Rules of Ct., Rules 3.1103(c), 3.1113(a), 3.1320(c)]

[1] FORM

[2] Use of Form

[3] Accompanying Papers

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§ 464.189 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Action Against Public Entity Barred by Statute of Limitations [Gov. Code § 945.6]

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[2] Use of Form

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§ 464.190 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity Not Liable for Punitive Damages [Gov. Code § 818]

[1] FORM

[2] Use of Form

§ 464.191 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity Not Liable for Adoption of Ordinance [Gov. Code § 818.2]

[1] FORM

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§ 464.192 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity Not Liable for Injury Caused by Revocation or Issuance of License [Gov. Code § 818.4]

[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

§ 464.194 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity Not Liable for Misrepresentation by Employee [Gov. Code § 818.8]

[1] FORM

[2] Use of Form

[3] Cross References

§ 464.195 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity Not Liable if Public Employee Is Immune [Gov. Code § 815.2(b)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 464.196 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Employee Not Liable for Discretionary Acts [Gov. Code § 820.2]

[1] FORM

[2] Use of Form

[3] Cross References

§ 464.197 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Employee Not Liable for Acts or Omissions of Others [Gov. Code § 820.8]

[1] FORM

[2] Use of Form

§ 464.198 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Employee Not Liable for Malicious Prosecution [Gov. Code § 821.6]

[1] FORM

[2] Use of Form

[3] Cross References

§ 464.199 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Mayor or Member of Locally Elected or Appointed Governing Body, Board, Commission, or Advisory Body Not Vicariously Liable for Injuries Caused by Acts or Omissions of Public Entity [Gov. Code § 820.9]

[1] FORM

[2] Use of Form

[3] Cross References

§§ 464.200-464.209 [Reserved]

§ 464.210 Complaint for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity and Public Employee Based on Dangerous Condition Caused by Negligence of Employee [Gov. Code §§ 835(a), 840.2]

[1] FORM

[2] Use of Form

[3] Venue

[4] Jurisdiction

[5] Verification

[6] Specification of Damages

[7] Cross References

§ 464.211 Complaint for Damages [Civ. Code § 3333] for Wrongful Death [Code Civ. Proc. §§ 377.60, 377.61]--Against Public Entity and Public Employee Based on Dangerous Condition of Which Entity and Employee Had Notice [Gov. Code §§ 835(b), 840.2]

[1] FORM

[2] Use of Form

[3] Guardian ad Litem

[4] Wrongful Death Actions

[5] Cross References

§ 464.212 Complaint for Damages [Civ. Code § 3333] to Property--Against Public Entity Based on Dangerous

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[1] FORM

[2] Use of Form

[3] Inverse Condemnation

[4] Venue

[5] Cross References

§ 464.213 Complaint for Damages [Civ. Code § 3333] to Property--Against Public Entity Based on Dangerous Condition of Which Entity Had Notice [Gov. Code § 835(b)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 464.214 Complaint for Damages [Civ. Code § 3333] for Personal Injury--Against Public Entity Based on Dangerous Condition Caused by Failure to Protect and/or Warn Plaintiff Against Third-Party Criminal Conduct [Gov. Code § 835]--By Plaintiff in Special Relationship With Public Entity

[1] FORM

[2] Use of Form

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[4] Special Relationship

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§ 464.215 Allegation--Constructive Notice of Condition [Gov. Code §§ 835(b), 840.4(b)]

[1] FORM

[2] Use of Form

§ 464.216 Allegation--Dangerous Condition of Public Property [Gov. Code § 835]--Condition on Adjacent Property Made Public Property Dangerous

[1] FORM

[2] Use of Form

§ 464.217 Allegation--Dangerous Condition of Public Property [Gov. Code § 835]--Failure to Post Sign in Situation Constituting Trap for Motorist [Gov. Code § 830.8]

[1] FORM

[2] Use of Form

§ 464.218 Allegation--Dangerous Condition of Public Property [Gov. Code § 835]--Dangerous Condition of Public Sidewalk

[1] FORM

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§ 464.219 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity Based on Dangerous Condition of Reservoir or Canal [Gov. Code § 831.8(c)]

[1] FORM

[2] Use of Form

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§ 464.220 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity as Immune From Liability for Injury Caused by Approved Design [Gov. Code § 830.6]

[1] FORM

[2] Use of Form

[3] Cross References

§ 464.221 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity Not Liable for Injury Caused by Natural Condition of Unimproved Public Property [Gov. Code § 831.2]

[1] FORM

[2] Use of Form

[3] Cross References

§ 464.222 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity and Public Employee Not Liable if Action Reasonable [Gov. Code §§ 835.4, 840.6]

[1] FORM

[2] Use of Form

[3] Cross References

§ 464.223 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity and Public Employee Not Liable for Injury Resulting From Work on Nondedicated Road Performed With Reasonable Care [Gov. Code § 831.3]

[1] FORM

[2] Use of Form

§§ 464.224-464.239 [Reserved]

§ 464.240 Complaint for Damages [Civ. Code § 3333] for Failure to Summon Medical Aid for Prisoner [Gov. Code § 845.6]--Against Public Entity and Public Employee

[1] FORM

[2] Use of Form

[3] Jurisdiction

[4] Venue

[5] Verification

[6] Specification of Damages

[7] Cross References

§ 464.241 Complaint for Damages [Civ. Code § 3333] for Injuries to Prisoner [Gov. Code § 844.6] or Patient at Mental Institution [Gov. Code § 854.8] Caused by Negligence of Public Employee

[1] FORM

[2] Use of Form

[3] Cross References

§ 464.242 Complaint for Damages [Civ. Code § 3333] for Injuries Caused by Failure of Public Entity Operating Medical Facility to Provide Adequate Equipment or Facilities [Gov. Code § 855(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 464.243 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity and Public Employee Not Liable for Failure to Provide Police Protection [Gov. Code § 845]

[1] FORM

[2] Use of Form

[3] Cross References

§ 464.244 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity and Public Employee Not Liable for Injury Caused by Release of Prisoner or by Escaping Prisoner [Gov. Code § 845.8]

[1] FORM

[2] Use of Form

§ 464.245 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity and Public Employee Not Liable for Determination to Confine, for Terms and Conditions of Confinement, or for Determination to Release Mental Patient [Gov. Code § 856]

[1] FORM

[2] Use of Form

§ 464.246 General Demurrer [Code Civ. Proc. § 430.30(a)] for Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Public Entity and Public Employee Not Liable for Injury Caused in Fighting Fire [Gov. Code § 850.4]--And Notice of Hearing [Cal. Rules of Ct., Rule 1320(c)]

[1] FORM

[2] Use of Form

[3] Accompanying Papers

[4] Cross References

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Chapter 464 PUBLIC ENTITIES AND OFFICERS: CALIFORNIA TORT CLAIMS ACT
PART I. SCOPE

40-464 California Forms of Pleading and Practice--Annotated § 464.01

§ 464.01 Scope of Chapter

This chapter discusses and contains forms for claims and actions against public entities and public employees based on the California Tort Claims Act (*Gov. Code § 810 et seq.*).

Subpart A of Part II, Legal Background, discusses the procedures for making claims against public entities [*see § 464.20* et seq.], as well as the procedures for filing actions against public entities and employees [*see § 464.40* et seq.]. The chapter also contains a procedural checklist for use by a claimant [*see § 464.140*] and a procedural checklist for filing actions against public entities and employees [*see § 464.161*].

Subpart B of Part II, Legal Background, discusses the substantive rules governing the liability of public entities and public employees. Subdivision 1 of Subpart B discusses general principles of liability and immunity [*see § 464.60* et seq.]; Subdivision 2 discusses the liability of a public entity for dangerous conditions of public property [*see § 464.80* et seq.]; and Subdivision 3 discusses other specific statutory liabilities and immunities [*see § 464.100* et seq.].

The chapter contains the following forms:

- Forms for filing claims against public entities [*see § 464.160* et seq.].

- Forms for use in filing complaints against public entities and employees based on general principles of liability, and forms for defending against such claims [*see § 464.180* et seq.].

- Forms for use in filing complaints against public entities and employees based on dangerous conditions of public property, and forms for defending against such claims [*see § 464.210* et seq.].

- Forms for use in filing complaints against public entities and employees based on other specific statutory liabilities, and forms for asserting specific statutory defenses against such claims [*see § 464.240* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview

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§ 464.02 Cross References

- For forms of acknowledgments by public entities, see Ch. 9, *Acknowledgments*
- For forms of complaints against airports, see Ch. 16, *Airplanes and Airports*
- For forms alleging the capacity of public entities, see Ch. 20, *Allegations Commonly Used*
- For forms of complaints for use in actions involving assault and battery, see Ch. 58, *Assault and Battery*
- For discussion and forms of complaints against public entities involving the right to assemble, see Ch. 59, *Assemblies, Meetings, and Demonstrations*
- For forms of complaints against public entities involving bridges, see Ch. 102, *Bridges*
- For discussion and forms of complaints against public entities involving building contracts, see Ch. 104, *Building Contracts*
- For forms of complaints against public entities involving buses and streetcars, see Ch. 106, *Buses and Streetcars*
- For descriptions of public entity parties for use in captions, see Ch. 108, *Captions and Introductions*
- For forms of complaints for use in actions involving conversion, see Ch. 150, *Conversion*
- For discussion of recovery of defense costs after summary judgment, directed verdict, judgment on motion, or nonsuit for the defendant in a civil proceeding under the Tort Claims Act brought in bad faith and without reasonable cause, see *Ch. 174, Costs and Attorney's Fees, § 174.10* et seq.

- For discussion and forms of complaints for declaratory relief against public entities, see Ch. 182, *Declaratory Relief*

- For forms of complaints for use in actions against public entities involving emergency vehicles, see Ch. 246, *Emergency Vehicles*

- For a complaint against a public entity involving fireworks, see Ch. 256, *Explosives*

- For forms of complaints against public entities and public employees for false imprisonment, see Ch. 257, *False Imprisonment*

- For forms of complaints for use in actions involving fraud and deceit, see Ch. 269, *Fraud and Deceit*

- For discussion and forms for use in actions involving hospitals, see Ch. 295, *Hospitals*

- For discussion of and forms for actions against public officials for libel and slander, see Ch. 340, *Libel and Slander*

- For forms of complaints and affirmative defenses for use in actions for malicious prosecution against public entities and public employees, see Ch. 357, *Malicious Prosecution and Abuse of Process*

- For forms of complaints for use in actions involving mental suffering and emotional distress, see Ch.362, *Mental Suffering and Emotional Distress*

- For forms of complaints in actions involving negligence, see Ch. 380, *Negligence*

- For forms of complaints in actions involving nuisances, see Ch. 391, *Nuisance*

- For discussion and forms for use in actions involving physicians, see Ch. 415, *Physicians: Medical Malpractice*

- For discussion of and a form of complaint against a public entity involving pollution, see Ch. 418, *Pollution and Environmental Matters*

- For a form of affirmative defense allegation for use in an action for damages brought by or on behalf of a person injured or killed while committing specified crimes, see Ch. 421, *Premises Liability*

- For discussion and forms of complaints for use in actions involving sanitation districts, see Ch. 511, *Sanitation and Sewerage Districts*

- For discussion and forms for use in actions involving public schools, see Ch. 513, *Schools: Student Rights and Responsibilities*

- For discussion of a subrogee's right of action against a public entity, see Ch. 536, *Subrogation*

- For forms of complaints for use in actions involving trespasses, see Ch. 550, *Trespass*

Legal Topics:

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

Contracts LawDefensesFraud & MisrepresentationGeneral OverviewEnvironmental LawLitigation & Administrative ProceedingsNuisances, Trespasses & Strict LiabilityHealthcare LawActions Against Healthcare WorkersDoctors & PhysiciansTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsTransportation TortsGeneral Overview

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[Reserved]

§§ 464.03[Reserved]

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Chapter 464 PUBLIC ENTITIES AND OFFICERS: CALIFORNIA TORT CLAIMS ACT
PART II. LEGAL BACKGROUND
A. Procedures for Seeking Relief From Public Entities and Employees
1. Claims Against Public Entities

40-464 California Forms of Pleading and Practice--Annotated § 464.20

§ 464.20 Governing Law

[1] California Tort Claims Act

The California Tort Claims Act is set forth in *Gov. Code § 810 et seq.* General provisions governing claims are set forth in *Gov. Code § 900 et seq.* The presentation and consideration of claims against public entities and public employees are governed by *Gov. Code § 910 et seq.* In 2007, the California Supreme Court stated that because of the broad scope of the claim requirements which may involve claims based on contract, a number of Courts of Appeal have followed the suggestion that "Government Claims Act" is a more appropriate short title than the traditional "Tort Claims Act," and the Supreme Court has adopted the newer term [*City of Stockton v. Superior Court (2007) 42 Cal. 4th 730, 741, 68 Cal. Rptr. 3d 295, 171 P. 2d 20* ("We agree that this practice is a useful way to reduce confusion over the application of the claim requirements. Henceforth, we will refer to title 1, division 3.6, parts 1 through 7 of the Government Code (§ 810 et seq.) as the Government Claims Act ... Government Claims Act is an appropriately inclusive term and an apt short version of the comprehensive title bestowed by the 1963 Legislature: 'Claims and Actions Against Public Entities and Public Employees' "]. For purposes of this publication, either term is used to describe the provisions of *Gov. Code § 810 et seq.*

[2] Special Emergency Procedures

In response to the earthquake that struck northern California on October 17, 1989, the legislature enacted *Gov. Code § 997 et seq.*, which deal with claims procedures for compensation of victims of the collapse of the San Francisco-Oakland Bay Bridge and the I-880 Cypress structure. Although the deadline for filing applications for compensation has passed [*see Gov. Code § 997.1(a)*; *see also Gov. Code § 911.4* (application for leave to present late claim must be filed within one year after accrual of cause of action)], litigation arising out of some of those claims may still be ongoing [*see Gov. Code § 997.1(e)*].

In the event of another major catastrophe, it is probable that the legislature will enact a similar relief plan with streamlined procedures to ensure the fair and prompt payment of all valid claims. To the extent such a plan differs from provisions of the Tort Claims Act, the provisions of the emergency relief plan would control.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityLiabilityClaim PresentationTime LimitationsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural Requirements

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1. Claims Against Public Entities

40-464 California Forms of Pleading and Practice--Annotated § 464.21

§ 464.21 Framework of Tort Claims Act

[1] Enactment of Statute

The California legislature enacted *Gov. Code § 810 et seq.*, commonly known as the California Tort Claims Act, in 1963 [*see* Stats. 1963, chs. 1681-1684, 1715, 1805]. Although there is no statutory authority for this title, it is frequently used by courts [*see, e.g.,* *Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 715, 117 Cal. Rptr. 241, 527 P.2d 865* ; *Elson v. Public Utilities Commission (1975) 51 Cal. App. 3d 577, 582, 124 Cal. Rptr. 305*]. In 2007, the California Supreme Court stated that because of the broad scope of the claim requirements which may involve claims based on contract, a number of Courts of Appeal have followed the suggestion that "Government Claims Act" ' is a more appropriate short title than the traditional "Tort Claims Act," and the Supreme Court has adopted the newer term [*City of Stockton v. Superior Court (2007) 42 Cal. 4th 730, 68 Cal. Rptr. 3d 295, 171 P. 2d 20* ("We agree that this practice is a useful way to reduce confusion over the application of the claim requirements. Henceforth, we will refer to title 1, division 3.6, parts 1 through 7 of the Government Code (§ 810 et seq.) as the Government Claims Act ... Government Claims Act is an appropriately inclusive term and an apt short version of the comprehensive title bestowed by the 1963 Legislature: 'Claims and Actions Against Public Entities and Public Employees' "]. For purposes of this publication, either term is used to describe the provisions of *Gov. Code § 810 et seq.* The Tort Claims Act, which now comprehensively covers the area of governmental tort liability in California, was enacted in response to the California Supreme Court's abrogation of the doctrine of governmental tort immunity [*see* *Muskopf v. Corning Hosp. Dist. (1961) 55 Cal. 2d 211, 218-221* ; *Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal. 2d 224, 229-232, 11 Cal. Rptr. 97, 359 P.2d 465]* .

[2] Definitions

The term "local public entity" includes a county, city, district, public authority, public agency, and any other political subdivision or public corporation in California, but does not include the state [*Gov. Code § 900.4*].

The term "state" means the State of California and any office, officer, department, division, bureau, board, commission, or agency of the state, claims against which are paid by warrants drawn by the Controller [*Gov. Code § 900.6*]. The Tort

Claims Act does not, however, apply to claims against the Regents of the University of California [*Gov. Code § 905.6*].

In the case of a local public entity, the term "board" refers to the governing body of that public entity [*Gov. Code § 900.2(a)*]; the term "public entity" is frequently used in this chapter for purposes of clarity. In the case of the state, the term "board" refers to the California Victim Compensation and Government Claims Board [*Gov. Code § 900.2(b)*]. Wherever the term "board" is used in this chapter, it refers to the California Victim Compensation and Government Claims Board, unless otherwise noted.

[3] Statutory Basis for Liability Required

Except as otherwise provided by statute, a public entity is not liable for an injury, whether the injury arises out of an act or omission of the public entity, a public employee, or any other person [*Gov. Code § 815(a)*]. Moreover, the public entity liability established by *Gov. Code § 814 et seq.* (liability of public entities and public employees) is subject to any public entity immunity provided by statute, and is also subject to any defenses that would be available to the public entity if it were a private person [*Gov. Code § 815(b)*; *see § 464.60* et seq.].

Although a public entity may be sued, nothing in the Tort Claims Act imposes liability on a public entity unless that liability otherwise exists [*Gov. Code §§ 944, 945*]. However, nothing in the Tort Claims Act can be construed to deprive a claimant of the right to resort to a writ of mandate or other proceeding against the public entity, or the board or any employee of the public entity, to compel payment of a claim if and to the extent that it has been allowed and is required by the Tort Claims Act to be paid [*Gov. Code § 942*].

[4] Claim as Condition Precedent to Action

The tort liability of a public entity is conditioned on the timely filing of a written claim in proper form [*see Gov. Code §§ 905, 905.2*; § 464.12]. Except as provided in *Gov. Code §§ 946.4* and *946.6*, no suit for money or damages may be brought against a public entity on a cause of action for which the Tort Claims Act requires that a claim be presented, until a written claim has been presented to the public entity and has either been acted on by the board or been deemed to have been rejected by the board [*Gov. Code § 945.4*; for discussion of *Gov. Code § 946.6, see § 464.25[3]*]. Compliance with the claim requirement of *Gov. Code § 945.4* is, therefore, a condition precedent to an action against the public entity [*Williams v. Horvath (1976) 16 Cal. 3d 834, 838, 129 Cal. Rptr. 453, 548 P.2d 1125* ; *Ridley v. City & County of San Francisco (1969) 272 Cal. App. 2d 290, 292, 293, 77 Cal. Rptr. 199]* .

For discussion of the procedures governing the filing of actions against public entities, see *§ 464.40* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsClaims By & AgainstTortsPublic Entity LiabilityLiabilityClaim PresentationGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsConstruction & InterpretationTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEntities Covered

California Forms of Pleading and Practice--Annotated

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PART II. LEGAL BACKGROUND
A. Procedures for Seeking Relief From Public Entities and Employees
1. Claims Against Public Entities

40-464 California Forms of Pleading and Practice--Annotated § 464.22

§ 464.22 Scope of Claim Presentation Requirement

[1] Types of Claims

Except for those nontort claims listed in *Gov. Code § 905*, and other specified exceptions, all claims for money or damages against local public entities must be presented in accordance with the requirements of *Gov. Code §§ 900-915.4* [*Gov. Code § 905*].

In addition, all of the following claims for money or damages against the state must be presented in accordance with the requirements of *Gov. Code §§ 900-915.4* [*Gov. Code § 905.2(b)*; *but see Gov. Code § 905.6* (Tort Claims Act inapplicable to Regents of the University of California)]:

- Claims for which no appropriation has been made or for which no fund is available, but the settlement of which has been provided for by statute or constitutional provision;
- Claims for which the appropriation made or fund designated is exhausted;
- Claims for money or damages on express contract or for an injury for which the state is liable; and
- Claims for which settlement is not otherwise provided for by statute or constitutional provision.

In addition to the statutory provision that an action on an express contract brought against the state is subject to the claims filing requirements, an action on a contract brought against other public entities, such as a claim for failure to pay for goods or services rendered, is an action for money or damages that is subject to the claims filing requirements [*City of Stockton v. Superior Court (2007) 42 Cal. 4th 730, 738, 68 Cal. Rptr. 3d 295, 171 P.3d 20* ; *see, e.g., Baines Pickwick Ltd. v. City of Los Angeles (1999) 72 Cal. App. 4th 298, 310, 85 Cal. Rptr. 2d 74* ; *Alliance Fin. v. City & County of San Francisco (1998) 64 Cal. App. 4th 635, 641-642, 75 Cal. Rptr. 2d 341]* .

Claims against a judicial branch entity for money or damages based on an express contract or for an injury for which the judicial branch entity is liable are also subject to the claims filing requirement [*Gov. Code § 905.7*].

[2] Purpose of Claim Requirement

The claim presentation requirement of the Tort Claims Act serves several purposes [*Phillips v. Desert Hosp. Dist. (1989) 49 Cal. 3d 699, 705, 263 Cal. Rptr. 119, 780 P.2d 349* ; *Bettencourt v. Los Rios Cmty. Coll. Dist. (1986) 42 Cal. 3d 270, 279, 228 Cal. Rptr. 190, 721 P.2d 71]* :

- It gives the public entity prompt notice of a claim so that it can investigate the strengths and weaknesses of the claim while the evidence is still fresh and the witnesses are available.

- It affords opportunity for amicable adjustment, thereby avoiding expenditure of public funds in needless litigation.

- It informs the public entity of potential liability so that it can better prepare for the upcoming fiscal year.

- It provides the public entity with an opportunity to quickly rectify a dangerous condition [*Johnson v. San Diego Unified Sch. Dist. (1990) 217 Cal. App. 3d 692, 696-697, 266 Cal. Rptr. 187]* .

However, in keeping with its general purposes, the claim presentation requirement cannot be used as a trap for the unwary if its underlying purposes have been satisfied [*Johnson v. San Diego Unified Sch. Dist. (1990) 217 Cal. App. 3d 692, 697, 266 Cal. Rptr. 187* ; *Krainock v. Superior Court (1990) 216 Cal. App. 3d 1473, 1477, 265 Cal. Rptr. 715]* . Consequently, in determining whether a plaintiff has met the claim filing and presentation requirements of the Tort Claims Act, the courts employ a test of substantial, rather than strict, compliance [*Johnson v. San Diego Unified Sch. Dist. (1990) 217 Cal. App. 3d 692, 697, 266 Cal. Rptr. 187* ; for discussion of the doctrine of substantial compliance, *see § 464.23[3][e]*].

[3] Statutory Exceptions to Requirement

The following specific types of claims against local public entities are not subject to the claim-filing requirement of the Tort Claims Act [*Gov. Code § 905*]:

- Claims under the Revenue and Taxation Code or any other statute prescribing procedures for the refund, rebate, exemption, cancellation, amendment, modification, or adjustment of any tax, assessment, fee, or charge, or any portion thereof, or any penalties, costs, or related charges;

- Claims in connection with which the filing of a notice of lien, statement of claim, or stop notice is required under any provision of law relating to mechanics', laborers', or materialmen's liens;

- Claims by public employees for fees, salaries, wages, mileage, or other expenses and allowances;

- Claims for which the workers' compensation authorized by *Lab. Code § 3200 et seq.* is the exclusive remedy;

- Applications or claims for any form of public assistance under the Welfare and Institutions Code or other provisions of law relating to public assistance programs, and claims for goods, services, provisions, or other assistance rendered for or on behalf of any recipient of any form of public assistance;

- Applications or claims for money or benefits under any public retirement or pension system [*see Blue v. Los Angeles Unified Sch. Dist. (1994) 26 Cal. App. 4th Supp. 12, 14 , 31 Cal. Rptr. 2d 923* (plaintiff's request for life insurance benefits on death of public employee spouse falls within exception from claim filing requirements under *Gov. Code § 905* for application for benefits under public retirement or pension system; denial of benefits did not transform claim into one for breach of contract, for which filing of claim is necessary)];

- Claims for principal or interest on any bonds, notes, warrants, or other evidences of indebtedness;

- Claims that relate to a special assessment constituting a specific lien against the property assessed and that are payable from the proceeds of that assessment, by offset of a claim for damages against it, or by delivery of any warrant or bonds representing it;

- Claims by the state or by a state department or agency or by another local public entity or by a judicial branch entity;

- Claims arising under any provision of the Unemployment Insurance Code, including but not limited to claims for money or benefits, or for refunds or credits of employer or worker contributions, penalties, or interest, or for refunds to workers of deductions from wages in excess of the amount prescribed;

- Claims for the recovery of penalties or forfeitures made pursuant to *Lab. Code § 1720 et seq.* relating to public works; and

- Claims governed by *Sts. & Hy. Code § 11000 et seq.* (the Pedestrian Mall Law).

- Claims to recover damages for childhood sexual abuse brought pursuant to *Code of Civil Procedure Section 340.1*, if arising from conduct occurring on or after January 1, 2009.

Although actions against local public entities that have not filed an information statement with the California Secretary of State's Roster of Public Agencies in conformance with *Gov. Code § 53051* are not specifically excepted from the claim presentation requirement, the plaintiff's failure to present a claim does not constitute a bar or defense to such an action [*see Gov. Code § 946.4*; *see also* § 464.38].

No claim is required to be filed to maintain an action against a public entity for the taking of, or damage to, private property pursuant to *Cal. Const. art. I, § 19*. If, however, a claim is filed against a public entity for the taking of, or damage to, private property pursuant to Cal. Const. art. I, § 19, that public entity must process the claim in accordance with the Tort Claims Act [*Gov. Code § 905.1*]. For discussion and forms relating to takings of private property and claims of inverse condemnation, see Ch. 247, *Eminent Domain* .

A local public entity, or a state agency, may include in any written agreement to which the public entity is a party provisions governing the presentation, by or on behalf of any party, of any or all claims arising out of or related to the agreement and the consideration and payment of such claims [*Gov. Code §§ 930, 930.2*]. Such claims procedures established in the agreement govern the claims to which the agreement relates, although the statutory procedures for relief from late claims apply if the agreement requires a claim to be presented less than one year from accrual [*Gov. Code § 930.4*], and the limitations of *Gov. Code §§ 945.6* and *946* apply if the contractual provisions require presentation of a claim prior to suit [*Gov. Code § 930.6*]. However, other than the required application of those statutory procedures, a claim subject to contractual claims procedures written into a public contract is not subject to the statutory claims presentation requirements of *Gov. Code §§ 905* and *910 et seq.*, unless such a requirement is written into the agreement [*Arntz Builders v. City of Berkeley (2008) 166 Cal. App. 4th 276, 288-291, 82 Cal. Rptr. 3d 605*].

[4] Other Exceptions

Despite the requirement in *Gov. Code § 905* that a claim based on a contract must be presented to the state, if the state has filed an action as the plaintiff based on a contract, the defendant need not present a claim to cross complain based on the same contract [*People ex rel. Dept. of Parks & Recreation v. West-A-Rama, Inc. (1973) 35 Cal. App. 3d 786, 793-795, 111 Cal. Rptr. 197*].

Similarly, compliance with the claim filing requirement may not be necessary before a defendant in a tort action may file a cross complaint against a public entity that has initiated an action against that defendant [*Krainock v. Superior Court (1990) 216 Cal. App. 3d 1473, 1478-1479, 265 Cal. Rptr. 715* (personal injury action against individual and public school district in which school district cross complained against individual defendant for indemnity, apportionment, and declaratory relief, to which individual cross complained for same relief against school district)]. In general, there are three rules for determining whether a defensive cross complaint is exempt from the claim filing requirement. First, the inapplicability of the claim filing requirement is limited to cases initiated by the public entity; claims are still required in actions initiated by a third party in which a defendant seeks to cross complain against a public entity not previously a party to the action. Second, to be exempt from the claim requirement the defensive pleading must arise out of the same transaction or event forming the basis of the plaintiff's claim, and it may not introduce an unrelated claim. Third, the cross complaint may assert only defensive matter; that is, a cross complaint may be filed without a claim only if it is limited to claims that, if successful, would destroy or diminish the plaintiff's recovery, but would not be the basis for affirmative relief [*Krainock v. Superior Court (1990) 216 Cal. App. 3d 1473, 1478, 265 Cal. Rptr. 715* (facts did not squarely fit rules, but were sufficiently analogous)].

Gov. Code § 905 requires presentation of a claim only if the claimant is seeking money or damages. Although the phrase "claims for money or damages" is not defined in the Tort Claims Act, there is case authority indicating that if an action is not primarily based on a claim for money or damages, the presentation of a claim is not required. For example, a claim for the recovery of specific property converted by a public entity is not a claim for money or damages and thus is not subject to the claims procedure of the Tort Claims Act, even if the claim is for the conversion of a specific sum of money [*Minsky v. City of Los Angeles (1974) 11 Cal. 3d 113, 121-123, 113 Cal. Rptr. 102, 520 P.2d 726* ; *Hibbard v. City of Anaheim (1984) 162 Cal. App. 3d 270, 276-277, 208 Cal. Rptr. 733]* . This exception for the recovery of specific property applies even if loss of some of the property while in government custody due to the government's own negligence necessitates that the plaintiff also seek monetary damages in lieu of return of the lost property [*Long v. City of Los Angeles (1998) 68 Cal. App. 4th 782, 786-787* , *80 Cal. Rptr. 2d 583* (relying on *MinskyMinsky and Holt v. Kelly (1978) 20 Cal. 3d 560, 565, 143 Cal. Rptr. 625*)].

Similarly, actions seeking specific relief other than money or damages, such as injunctive or declaratory relief and certain actions in mandamus and in which money is an incident thereto, are exempt from the Tort Claims Act [*see, e.g., Eureka Teacher's Assn. v. Board of Education (1988) 202 Cal. App. 3d 469, 474-476, 247 Cal. Rptr. 790* (mandamus to compel school district to re-employ petitioner as teacher; claims for back pay and fringe benefits were incidental to mandamus action); *Harris v. State Personnel Bd. (1985) 170 Cal. App. 3d 639, 643, 216 Cal. Rptr. 274* (mandamus to compel State Personnel Board to reinstate petitioner to state employment; back salary recovery sought was incidental to mandamus action)].

The claim filing requirements of the Tort Claims Act were also inapplicable to an arbitration proceeding challenging a public school district's decision not to re-employ a probationary teacher for the succeeding school year. Therefore, the teacher's failure to file a claim with the school district did not bar the arbitrator's monetary award in favor of the teacher. The court of appeal reasoned that such an arbitration proceeding did not involve a claim for money or damages within the meaning of the Tort Claims Act because no judicial adjudication was involved [*Paramount Unified School Dist. v. Teachers Assn. of Paramount (1994) 26 Cal. App. 4th 1371, 1386-1388, 32 Cal. Rptr. 2d 311*].

Additional exceptions to the claim presentation requirement are based on the nature of the action being brought against

the public entity. Therefore, an action brought under *42 U.S.C.S. § 1983* alleging deprivation of rights under color of state law need not be preceded by compliance with the state claim requirement [*Williams v. Horvath (1976) 16 Cal. 3d 834, 837-842, 129 Cal. Rptr. 453, 548 P.2d 1125* ; for discussion and a form for use in a *42 U.S.C.S. § 1983* action, see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*]. Furthermore, actions seeking redress for employment discrimination under the Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*) are not subject to the claim presentation requirement of the Tort Claims Act [*Garcia v. Los Angeles Unified Sch. Dist. (1985) 173 Cal. App. 3d 701, 710-711, 219 Cal. Rptr. 544* ; *Snipes v. City of Bakersfield (1983) 145 Cal. App. 3d 861, 865-869, 193 Cal. Rptr. 760* ; *but see Caldwell v. Montoya (1995) 10 Cal. 4th 972, 976-979, 984-985, 42 Cal. Rptr. 2d 842, 897 P.2d 1320* (applying Tort Claims Act immunities to claim brought under FEHA); for discussion of employment discrimination, see Ch. 115, *Civil Rights: Employment Discrimination*].

Claims against charter schools run by nonprofit corporations that are legal entities independent from the chartering school districts are not subject to the claims filing requirement, as a charter school is not considered to be a public entity [*Knapp v. Palisades Charter High Sch. (2007) 146 Cal. App. 4th 708, 717, 53 Cal. Rptr. 3d 182]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural Requirements

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§ 464.23 Claim Filing Procedures

[1] Rules Applicable to Claims Against Local Public Entities

Claims against a local public entity for money or damages that are excepted from the general claim requirements by *Gov. Code § 905*, and that are not governed by any other statutes or regulations expressly relating thereto, are governed by the procedure prescribed in any charter, ordinance, or regulation adopted by the local public agency [*Gov. Code § 935(a)*; for discussion of claims excepted by *Gov. Code § 905, see § 464.22[3]*].

The procedure prescribed by the local public entity may include a requirement that a claim be presented and acted on as a prerequisite to suit. If such a requirement is included, any action brought against the public entity on the claim is subject to the provisions of *Gov. Code §§ 945.6* (statute of limitations) and 946 (no action if claim is allowed) [*Gov. Code § 935(b)*; *see § 464.41*]. This prerequisite applies to claims against a local public entity by the state [*City of Ontario v. Superior Court (1993) 12 Cal. App. 4th 894, 903, 16 Cal. Rptr. 2d 32* (precluding action by state against city for indemnification on ground that state failed to present claim pursuant to city ordinance)]. Furthermore, any such procedure may not require a shorter time for presentation of a claim than the time provided in *Gov. Code § 911.2* [*Gov. Code § 935(c)*], and it may not provide a longer time for the public entity to take action on any claim than the time provided in *Gov. Code § 912.4* [*Gov. Code § 935(d)*].

If local procedure requires a claim to be presented within one year after the accrual of the cause of action and a claim is not timely presented, an application may be made to that public entity for leave to present the claim. *Gov. Code §§ 911.4(b), 911.6-912.2* (late claims), 946.4 (statement with Roster of Public Agencies), and 946.6 (relief from claim filing requirement) are applicable to all such claims, and the time specified in the charter, ordinance, or regulation is the "time specified in *Gov. Code § 911.2*" within the meaning of *Gov. Code §§ 911.6* and *946.6* [*Gov. Code § 935(e)*; for discussion of *Gov. Code § 946.6, see § 464.25*].

[2] Rules Applicable to Claims Against State

Any person having a claim against the state for which appropriations have been made or for which state funds are

available may present it to the State Controller in the form and manner prescribed by the general rules and regulations adopted by the board for the presentation and audit of claims [*Gov. Code § 925.4*]. If the Controller approves the claim, a warrant for the amount approved will be drawn in favor of the claimant [*Gov. Code § 925.8*]. If the claim is disapproved, the claim and a statement of disapproval, with supporting reasons, will be filed with the board by the Controller [*Gov. Code § 926*].

Although the Controller will not typically entertain a previously rejected claim a second time [*see Gov. Code § 926.2*], anyone who is aggrieved by the Controller's disapproval of a claim may appeal to the board. If the board finds that the facts justify such action, the Controller will reconsider the rejection of the claim [*Gov. Code § 926.4*]. After final rejection of a claim by the Controller following reconsideration, any interested person may appeal to the legislature [*see Gov. Code § 926.6*].

[3] Form and Contents of Claim

[a] Statutorily Required Information

The claim must be presented by the claimant or by a person acting on the claimant's behalf and must show all of the following [*Gov. Code § 910*]:

- The claimant's name and post office address;
- The post office address to which the person presenting the claim desires notices to be sent;
- The date, place, and other circumstances of the occurrence or transaction giving rise to the claim asserted;
- A general description of the indebtedness, obligation, injury, damage, or loss incurred so far as it may be known at the time of presentation of the claim;
- The names of any public employees causing the injury, damage, or loss, if known; and
- The amount claimed if it totals less than $10,000 as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed (if the amount claimed exceeds $10,000, no dollar amount should be included in the claim, but the claim must indicate whether the claim would be a limited civil case (amount in controversy, exclusive of interest, is $25,000 or less)).

The claim must be signed by the claimant or by a person acting on the claimant's behalf. However, claims against local public entities for supplies, materials, equipment, or services need not be signed if presented on a bill or invoice regularly used in the conduct of the claimant's business [*Gov. Code § 910.2*].

The claim must fairly describe what the public entity is alleged to have done. It need not conform to pleading standards, but the causes of action pleaded in any complaint subsequently filed must substantially correspond with the circumstances that the claim describes [*Shoemaker v. Myers (1992) 2 Cal. App. 4th 1407, 1426, 4 Cal. Rptr. 2d 203* ; *see § 464.41[3]*].

For a general claim form, reproductions of the claim forms for use with the board, and a form of class action claim, see *§§ 464.160* -464.162.

[b] Forms Provided by Public Entities

The public entity may provide forms specifying the information to be contained in claims against that public entity. If the public entity does provide a form, the person presenting a claim need not use that form if he or she presents the claim in conformity with *Gov. Code §§ 910* and *910.2*. A claim presented on a form provided by the state is deemed to be in conformity with *Gov. Code §§ 910* and *910.2* if the claim complies substantially with the requirements of the form or with the requirements of *Gov. Code §§ 910* and *910.2* [*Gov. Code § 910.4*]. Therefore, a claim submitted on a public entity's form that includes all of the information required by *Gov. Code § 910* need not answer additional questions [*see Blair v. Superior Court (1990) 218 Cal. App. 3d 221, 225, 267 Cal. Rptr. 13* (claim submitted on form provided by State Board of Control was in compliance even though it did not specifically state the "act or omission on the part of state officers" that caused injury; Board could not expand requirements of *Gov. Code § 910*)].

[c] Other Documents Disclosing Claim

[i] Treated as Claim

A document that discloses the existence of a claim that will result in litigation if not paid or otherwise resolved must be treated as a claim [*Phillips v. Desert Hosp. Dist. (1989) 49 Cal. 3d 699, 707-710, 263 Cal. Rptr. 119, 780 P.2d 349* ; *Wilson v. Tri-City Hosp. Dist. (1990) 221 Cal. App. 3d 441, 449, 270 Cal. Rptr. 436]* . Although the California Supreme Court adopted this theory in a case in which the document was a notice of intention to commence a medical malpractice action [*see Phillips v. Desert Hosp. Dist. (1989) 49 Cal. 3d 699, 263 Cal. Rptr. 119, 780 P.2d 349]* , theory is not limited to that type of document, and has also been applied to letters written by tort plaintiffs' attorneys [*see, e.g., Wilson v. Tri-City Hosp. Dist. (1990) 221 Cal. App. 3d 441, 270 Cal. Rptr. 436* (action for wrongful termination and breach of covenant); *Foster v. McFadden (1973) 30 Cal. App. 3d 943, 106 Cal. Rptr. 685* (personal injury action)].

[ii] Letter From Attorney

Although a letter from an attorney to the public entity can constitute sufficient notice of a claim to trigger a duty on the part of the public entity to notify the plaintiff of claim deficiencies [*see Green v. State Ctr. Cmty. Coll. Dist. (1995) 34 Cal. App. 4th 1348, 1357-1358, 41 Cal. Rptr. 2d 140]* , the public entity must be able to discern from the letter that a claim is being made that will result in litigation if not otherwise satisfied [*Green v. State Ctr. Cmty. Coll. Dist. (1995) 34 Cal. App. 4th 1348, 1358, 41 Cal. Rptr. 2d 140]* . Therefore, a letter from an attorney that merely notifies the public entity that the attorney has been hired to represent an individual concerning an accident occurring on a particular date, but at an unspecified location, and to direct all inquiries to the attorney, did not constitute notice of a claim [*Green v. State Ctr. Cmty. Coll. Dist. (1995) 34 Cal. App. 4th 1348, 1351, 1359, 41 Cal. Rptr. 2d 140]* .

However, a communication to a public entity that a claim has accrued and that the claimant intends to enforce it through litigation, if needed, suffices as notice of a claim, even though the communication fails to notify the public entity that a lawsuit is imminent [*Alliance Fin. v. City & County of San Francisco (1998) 64 Cal. App. 4th 635, 647, 75 Cal. Rptr. 2d 341]* . A letter from an attorney that discusses an ongoing monetary dispute between the client and the public entity does not constitute notice of a claim if it does not threaten litigation if the matter is not resolved and is not treated by the parties at the time as a claim under the statute [*Schaefer Dixon Assocs. v. Santa Ana Watershed Project Auth. (1996) 48 Cal. App. 4th 524, 533-534, 55 Cal. Rptr. 2d 698]* . Moreover, such a letter is not a claim notice for statutory purposes even if litigation is threatened, if the letter demands a response within a period of time that is shorter than the 45-day time period for responding that is granted by statute [*Schaefer Dixon Assocs. v. Santa Ana Watershed Project Auth. (1996) 48 Cal. App. 4th 524, 534, 55 Cal. Rptr. 2d 698]* .

[iii] Notice of Intent to Commence Medical Malpractice Action

If the public entity is a health care provider, the notice of intention to commence a medical malpractice action required by *Code Civ. Proc. § 364(a)* may be treated as a claim [*see, e.g., Mandjik v. Eden Township Hosp. Dist. (1992) 4 Cal.*

App. 4th 1488, 1495, 1503-1504, 6 Cal. Rptr. 2d 582 ; for discussion of *Code Civ. Proc. § 364(a)*, see Ch. 295, *Hospitals*]. A document that discloses the existence of a claim that will result in litigation if not paid or otherwise resolved must be treated as a claim, although the document must definitely disclose the existence of a claim for monetary damages. Such a document satisfies the main purpose of the Tort Claims Act, which is to facilitate investigation of disputes and their settlement without trial if appropriate. If the document does not meet all the claims requirements, it must be treated as a defective claim [*Phillips v. Desert Hosp. Dist. (1989) 49 Cal. 3d 699, 707-710, 263 Cal. Rptr. 119, 780 P.2d 349]* .

If the document is a defective claim because of a perceived deficiency, the public entity must provide notice of that deficiency to the claimant or that deficiency is waived as a defense [*Wilson v. Tri-City Hosp. Dist. (1990) 221 Cal. App. 3d 441, 449-450, 270 Cal. Rptr. 436* ; *see Gov. Code §§ 910.8, 911*; *see also § 464.24[1][c]*].

Additionally, if the document is not a timely filed claim, the public entity must provide notice of the lateness of the claim or lateness is waived as a defense [*Wilson v. Tri-City Hosp. Dist. (1990) 221 Cal. App. 3d 441, 449-450, 270 Cal. Rptr. 436* ; *see Gov. Code § 911.3*; *see also § 464.24[1][d]*].

A Patient Problem/Complaint Form submitted to a hospital quality assurance department complaining about the quality of medical care, together with a Supplemental Note dated a few days later, were insufficient to trigger an obligation on the entity's part to give a claimant a written notice of insufficiency under *Gov. Code § 910.8* or waive any defense under *Gov. Code § 911* based on that insufficiency [*Wood v. Riverside Gen. Hosp. (1994) 25 Cal. App. 4th 1113, 1118-1119, 31 Cal. Rptr. 2d 8]* . The documents were not delivered or mailed to the clerk, secretary, or auditor of the local public entity as required under *Gov. Code § 915*, nor was there any indication that the correspondence was intended as a claim for money damages. These documents were not sufficient to make the recipient realize that a claim was being asserted and, in the normal course of business, forward that claim to the persons responsible for investigating and settling claims [*Wood v. Riverside Gen. Hosp. (1994) 25 Cal. App. 4th 1113, 1118-1119, 31 Cal. Rptr. 2d 8]* .

[d] Amendments to Claim

A claim may be amended at any time before the later of either the expiration of the period for filing of claims designated by *Gov. Code § 911.2* or the board's taking final action on the original claim, if the claim as amended relates to the same transaction or occurrence that gave rise to the original claim. The amendment is considered a part of the original claim for all purposes [*Gov. Code § 910.6(a)*]. For a form of amendment to a claim, *see § 464.163*.

A failure or refusal to amend a claim, whether or not notice of insufficiency is given under *Gov. Code § 910.8*, does not constitute a defense to any action brought on the cause of action for which the claim was presented, if the court finds that the claim as presented complied substantially with *Gov. Code §§ 910* and *910.2* or a form provided by the entity [*Gov. Code § 910.6(b)*].

[e] Substantial Compliance Sufficient

Generally, compliance with the claims statute is mandatory, and failure to file a claim is fatal to the cause of action [*City of San Jose v. Superior Court (1974) 12 Cal. 3d 447, 454, 115 Cal. Rptr. 797, 525 P.2d 701]* . However, if the claimant has attempted to comply with the claim filing requirements, but the compliance is defective, the test of substantial compliance controls, and substantial compliance with the statutory requirements will be considered sufficient [*Pacific Tel. & Tel. Co. v. County of Riverside (1980) 106 Cal. App. 3d 183, 188, 165 Cal. Rptr. 29]* . Under this test, the court must determine whether or not sufficient information is disclosed on the face of the filed claim to reasonably enable the public entity to make an adequate investigation of the merits of the claim and to settle it without the expense of a lawsuit [*White v. Moreno Valley Unified Sch. Dist. (1986) 181 Cal. App. 3d 1024, 1031, 226 Cal. Rptr. 742]* . Additionally, the claim must be readily identifiable as such. A letter merely providing information, but not advising of imminent litigation, is insufficient to constitute a claim [*Schaefer Dixon Assocs. v. Santa Ana Watershed*

Project Auth. (1996) 48 Cal. App. 4th 524, 533, 55 Cal. Rptr. 2d 698] .

Substantial compliance, however, cannot be based on a total failure to comply with a particular statutory requirement, and compliance with the filing requirements may not be excused simply because the public entity had full knowledge of the facts constituting the basis of the claim [*City of San Jose v. Superior Court (1974) 12 Cal. 3d 447, 455-456, 115 Cal. Rptr. 797, 525 P.2d 701* ; *Loehr v. Ventura County Cmty. Coll. Dist. (1983) 147 Cal. App. 3d 1071, 1083-1084, 195 Cal. Rptr. 576]* . Therefore, to determine the sufficiency of a particular claim, the courts will first determine whether there is some compliance with all the statutory requirements and, if so, whether that compliance is sufficient to constitute substantial compliance [*City of San Jose v. Superior Court (1974) 12 Cal. 3d 447, 456-457, 115 Cal. Rptr. 797, 525 P.2d 701]* . Accordingly, in a case in which the plaintiff stated a mistaken location of the occurrence of the injury, the otherwise valid claim substantially complied with the claim requirements [*Rowan v. City & County of San Francisco (1966) 244 Cal. App. 2d 308, 312-313, 53 Cal. Rptr. 88]* .

In contrast, in an action for personal injury damages, there was no substantial compliance because the claim was based on property damages only [*State of California ex rel. Dep't of Transportation v. Superior Court (1984) 159 Cal. App. 3d 331, 336, 205 Cal. Rptr. 518]* . Moreover, a claim that is addressed to the wrong entity is not in substantial compliance [*Life v. County of Los Angeles (1991) 227 Cal. App. 3d 894, 900-901, 278 Cal. Rptr. 196* (claim presented to "legal department" of county-owned and operated medical center that should have been presented to county board of supervisors)]. In another case, a complaint form and supplemental note submitted to a hospital quality assurance department complaining about the quality of medical care did not substantially comply with the claims statute because there was a total failure to meet at least two of the statutory requirements: (1) failure to transmit the document to the statutorily designated agent under *Gov. Code § 915*; and *(2)* failure to indicate that a monetary claim was being asserted by not complying with *Gov. Code § 910(f)* [*Wood v. Riverside Gen. Hosp. (1994) 25 Cal. App. 4th 1113, 1116-1119, 31 Cal. Rptr. 2d 8]* .

Even if the claim fails to specify the nature of personal injuries claimed or the amount of damages, the claim may be in substantial compliance if it gives sufficient information to put the public entity on notice that a personal injury is claimed, how it was sustained, and that the claimant is seeking compensation for that injury [*Connelly v. County of Fresno (2006) 146 Cal. App. 4th 29, 42, 52 Cal. Rptr. 3d 720]* . In one case, for example, a claimant described the general facts surrounding a car accident allegedly caused when a county employee ran a stop sign and stated that she sought "unspecified medical, lost income, future medical." The court of appeal concluded that this met the substantial compliance test, as it put the county on notice of personal injuries suffered by the claimant in the accident and that the claimant did not at that time know the extent of the injuries or the associated costs [*Connelly v. County of Fresno (2006) 146 Cal. App. 4th 29, 39-41, 52 Cal. Rptr. 3d 720]* .

A major purpose of the Tort Claims Act is to give the public entity an opportunity to investigate and evaluate its potential liability, and the substantial compliance exception does not apply to a cause of action for which the entity had no notice. Therefore, if all the causes of action raised by the plaintiff's complaint were not reflected in the plaintiff's claim, the causes of action not reflected in the claim must be disallowed for noncompliance with filing prerequisites [*Fall River Joint Unified Sch. Dist. v. Superior Court (1988) 206 Cal. App. 3d 431, 434-436, 253 Cal. Rptr. 587* (claim alleging dangerous condition of public property and negligent maintenance of school property did not support action for negligent supervision); *see also* *Watson v. State of California (1993) 21 Cal. App. 4th 836, 844-845, 26 Cal. Rptr. 2d 262* (variance between first amended complaint, alleging that employees failed to provide plaintiff with appropriate and adequate medical treatment, and claim, which was based on theory that state refused to provide medical care and no care was provided, was fatal; doctrine of substantial compliance does not apply if claim fails to set forth factual basis for recovery); *Donohue v. State of California (1986) 178 Cal. App. 3d 795, 805, 224 Cal. Rptr. 57* (claim that did not set forth grounds for relief later set forth in complaint could not be basis for waiver of defense that claim was insufficient; no notice of insufficiency of claim could be given by entity until complaint was filed)].

[4] Period for Filing Claim

[a] Period Based on Claim Type

[i] Tort Claims

A claim relating to a cause of action for death or for injury to person or to personal property or growing crops must be presented not later than six months after the accrual of the cause of action [*Gov. Code § 911.2(a)*]. The six-month time provision applies to actions based on breaches of noncontractual duties and therefore covers tort claims only [*see Voth v. Wasco Pub. Util. Dist. (1976) 56 Cal. App. 3d 353, 356, 128 Cal. Rptr. 608]* . For example, claims for damages based on false arrest and false imprisonment [*Ridley v. City & County of San Francisco (1969) 272 Cal. App. 2d 290, 292, 77 Cal. Rptr. 199]* , on malicious prosecution and tortious interference with contract [*Meester v. Davies (1970) 11 Cal. App. 3d 342, 345-348, 89 Cal. Rptr. 711]* , on defamation [*Miller v. Hoagland (1966) 247 Cal. App. 2d 57, 61, 55 Cal. Rptr. 311]* , and on a breach of warranty or strict liability theory for personal injury or property damages [*Voth v. Wasco Pub. Util. Dist. (1976) 56 Cal. App. 3d 353, 359, 128 Cal. Rptr. 608* (dictum)] are all claims that must be presented to the public entity within the presentation period specified in *Gov. Code § 911.2* as a condition precedent to filing an action.

Prior to 1988, *Gov. Code § 911.2* required a claim to be presented not later than 100 days after the accrual of the cause of action. Many of the cases discussed in this chapter were decided prior to that time and refer to the 100-day limitation period. They are cited for their general principles, which were not affected by the amendment to *Gov. Code § 911.2*.

For purposes of determining whether a claim was presented within the required six-month period, the presentation date is: (1) the date the claim is submitted with the filing fee; (2) if a fee waiver is granted, the date the claim was submitted with an affidavit requesting the fee waiver; or (3) if a fee waiver is denied, the date the claim was submitted with an affidavit requesting the fee waiver, so long as the filing fee is paid within 10 calendar days after the mailing of the notice of denial of the fee waiver [*Gov. Code § 911.2(b)*].

[ii] Contract and Real Property Claims

A claim relating to any cause of action other than for death or for injury to person or to personal property or growing crops must be presented no later than one year after the accrual of the cause of action [*Gov. Code § 911.2(a)*]. This provision was intended to cover claims arising out of contract and claims for injuries to real property [*Voth v. Wasco Pub. Util. Dist. (1976) 56 Cal. App. 3d 353, 356, 128 Cal. Rptr. 608]* . For example, a claim for damages to growing crops based on the breach of a promise of fitness of water implied from a written lease is a claim that must be filed within one year as provided by *Gov. Code § 911.2* [*Voth v. Wasco Pub. Util. Dist. (1976) 56 Cal. App. 3d 353, 356-360, 128 Cal. Rptr. 608]* .

For purposes of determining whether a claim was presented within the required one-year period, the rule of *Gov. Code § 911.2(b)* applies [*see § 464.23[4][a][i]*].

[iii] Distinguishing Claim Types

Whether an action on which claim based is a contract or tort action depends on the nature of the right sued on and not on the form of pleading or relief demanded. If an action is based on the breach of a promise, it is a contract action; if it is based on the breach of a noncontractual duty, it is a tort action [*Voth v. Wasco Pub. Util. Dist. (1976) 56 Cal. App. 3d 353, 356, 128 Cal. Rptr. 608]* . If the breach sued on is both contractual and tortious, it must be ascertained what type of duty (tort or contract) is the quintessence of the action. If this is unclear, courts generally consider the action to be in contract rather than in tort. If, however, the action is predicated on a duty independent of the contract, it is generally deemed to be in tort regardless of the contractual relation of the parties [*Voth v. Wasco Pub. Util. Dist. (1976) 56 Cal. App. 3d 353, 356-357, 128 Cal. Rptr. 608]* .

[b] Accrual of Claim

[i] Date of Accrual

For the purpose of computing the time limits prescribed by the Tort Claims Act for filing of claims, the date of the accrual of a cause of action to which a claim relates is the date on which the cause of action would be deemed to accrue within the meaning of the applicable statute of limitations if there were no claim presentation requirement [Gov. Code § 901; *see Gov. Code §§ 911.2* (time for presenting claim), 911.4 (application to present late claim)].

The date on which a cause of action for equitable indemnity or partial equitable indemnity accrues, however, is the date on which a defendant is served with the complaint giving rise to the defendant's claim for equitable indemnity or partial equitable indemnity against the public entity [*Gov. Code § 901*].

A minor's medical malpractice cause of action against a government defendant accrues when the minor's parent or guardian knew, or should have known through the exercise of reasonable diligence, that a negligent wrongful act of medical care caused the child's injuries [*Torres v. County of Los Angeles (1989) 209 Cal. App. 3d 325, 335, 257 Cal. Rptr. 211* (*Code Civ. Proc. § 340.5* is unconstitutional violation of equal protection to extent that it distinguishes between accrual of minors' and adults' actions regarding discovery of injury as point of accrual); for discussion of medical malpractice actions, *see* Ch. 415, *Physicians: Medical Malpractice*].

A cause of action against a public entity for false imprisonment accrues on termination of the imprisonment, rather than at the beginning of the incarceration [*Collins v. County of Los Angeles (1966) 241 Cal. App. 2d 451, 455-456, 50 Cal. Rptr. 586]* . This is also the time of accrual even if criminal proceedings against a claimant are not dismissed until some time after the claimant is released [*Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 606-607, 199 Cal. Rptr. 644]* .

A cause of action for injury caused by a public employee's intentional interference with the right of a prisoner or inmate of a medical facility to obtain judicial review of the legality of his or her confinement does not accrue until it has been determined that the confinement was illegal [*Gov. Code §§ 845.4* (prisoners), 855.2 (medical facility inmates)].

If the relevant facts are in dispute and the issue is raised in connection with a tort claim, the date of accrual for a cause of action under *Gov. Code § 901* is subject to a jury determination [*Jefferson v. County of Kern (2002) 98 Cal. App. 4th 606, 610-611, 120 Cal. Rptr. 2d 1]* .

[ii] Belated Discovery

Under the belated discovery rule, a cause of action does not accrue from the occurrence of the last essential fact or from discovery of the damage, but rather from the time the plaintiff became aware, or could have become aware, of the defendant's negligence as a cause [*Bastian v. County of San Luis Obispo (1988) 199 Cal. App. 3d 520, 527, 245 Cal. Rptr. 78]* . The belated discovery rule protects the plaintiff whose cause of action is preserved if, despite diligent investigation, the plaintiff is blamelessly ignorant of the cause of his or her injuries, as well as the defendant, who is spared precipitous litigation. It is applicable to actions against public entities under the Tort Claims Act [*Bastian v. County of San Luis Obispo (1988) 199 Cal. App. 3d 520, 529, 245 Cal. Rptr. 78]* .

To raise the issue of belated discovery, the plaintiff must state when the discovery was made and the circumstances behind the discovery, and must plead facts showing that the failure to discover was reasonable, justifiable, and not the result of a failure to investigate or act. Once belated discovery is pleaded, the issue of whether the plaintiff exercised reasonable diligence in discovering the negligent cause of the injury is a question of fact [*Bastian v. County of San Luis Obispo (1988) 199 Cal. App. 3d 520, 527, 245 Cal. Rptr. 78]* .

The test for belated discovery is whether the plaintiff had information of circumstances sufficient to put a reasonable person on inquiry, or had the opportunity to obtain knowledge from sources open to the plaintiff's investigation. If the

plaintiff believed, because of injuries that he or she suffered, that someone had done something wrong, that fact is sufficient to alert the plaintiff to the necessity for investigation and the pursuit of his or her remedies [*Bastian v. County of San Luis Obispo (1988) 199 Cal. App. 3d 520, 527, 245 Cal. Rptr. 78]* . The test for diligence is not whether the plaintiff was successful in his or her timely investigation of the cause of injury, but whether the plaintiff's efforts were reasonable [*Bastian v. County of San Luis Obispo (1988) 199 Cal. App. 3d 520, 528, 245 Cal. Rptr. 78]* .

[c] Tolling of Claim Filing Period

If a claimant has several legal remedies, the requirement to file a claim may be tolled while the claimant is pursuing an alternative remedy, such as the administrative remedies available to an employee after dismissal and any subsequent judicial review [*Baillargeon v. Department of Water & Power (1977) 69 Cal. App. 3d 670, 683-684, 138 Cal. Rptr. 338* ; *Myers v. County of Orange (1970) 6 Cal. App. 3d 626, 634-637, 86 Cal. Rptr. 198]* .

The time period for filing a claim is also tolled during the time the claimant is in military service [*Syzemore v. County of Sacramento (1976) 55 Cal. App. 3d 517, 521-524, 127 Cal. Rptr. 741]* .

If a public entity or its insurer makes an advance or partial payment under a liability insurance policy as an accommodation to a deceased or injured person, or on his or her behalf to others, without providing written notice of the applicable time period within which a claim must be brought against that public entity, the time period for filing any such claim is tolled until that notice is given. Notification is not required, however, if the recipient of the payment is represented by an attorney [*see Ins. Code § 11583*].

Accrual of a cause of action against a public entity is not tolled based on an attorney's discouraging advice to the plaintiff. A limitation period dependent on discovery of the cause of action begins to run no later than the time the plaintiff learns, or should have learned, the facts essential to his or her claim. The plaintiff's ignorance of his or her legal remedy or the underlying legal theories is irrelevant; if the plaintiff has suffered appreciable harm and knows or suspects the cause, that is sufficient to commence the running of the limitation period [*Reyes v. County of Los Angeles (1988) 197 Cal. App. 3d 584, 591-592, 243 Cal. Rptr. 35]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityLiabilityClaim PresentationContent & FormTortsPublic Entity LiabilityLiabilityClaim PresentationTime LimitationsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsConstruction & InterpretationTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural Requirements

California Forms of Pleading and Practice--Annotated

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Volume 40: Products Liability thru Public Entities and Officers-Chs. 460-469
Chapter 464 PUBLIC ENTITIES AND OFFICERS: CALIFORNIA TORT CLAIMS ACT
PART II. LEGAL BACKGROUND
A. Procedures for Seeking Relief From Public Entities and Employees
1. Claims Against Public Entities

40-464 California Forms of Pleading and Practice--Annotated § 464.24

§ 464.24 Response to Claim by Public Entity

[1] Time Requirements for Response

[a] 45-Day Period

A public entity must act on a claim within 45 days after the claim has been presented [*Gov. Code § 912.4(a)*]. If a claim is amended, the public entity must act on the amended claim within 45 days after the amended claim is presented [*Gov. Code § 912.4(a)*]. No suit for money or damages may be brought against the public entity until the claim has been acted on or deemed to have been rejected [*Gov. Code § 945.4*]. For discussion of the commencement of the period of limitation in an action against a public entity after a claim has been rejected, see *§ 464.42[1][a]*.

If the public entity fails or refuses to act on a claim within 45 days, that claim is deemed to have been rejected by the public entity on the last day of the period within which the public entity was required to act on the claim [*Gov. Code § 912.4(c)*]. The 45-day period is not jurisdictional, however, and an act by the public entity on a claim after the 45-day period is valid and not outside of the authority of that public entity [*Kane v. County of San Diego (1969) 2 Cal. App. 3d 550, 554, 83 Cal. Rptr. 19* (county may reject claim after expiration of 45 days)]. Negotiations between the public entity and the claimant do not constitute action by the public entity, and the claim is still deemed denied on the expiration of the 45-day period [*Potstada v. City of Oakland (1973) 30 Cal. App. 3d 1022, 1027, 106 Cal. Rptr. 705]* .

[b] Extension by Agreement

The claimant and the public entity may extend the period within which the public entity is required to act on the claim by written agreement made before the expiration of that period or after the expiration of that period, if an action based on the claim has not been commenced and is not yet barred by the period of limitation provided in *Gov. Code § 945.6* [*Gov. Code § 912.4(b)*].

If the period within which the public entity is required to act has been extended by agreement, whether made before or after the expiration of that period, the last day of the period within which the public entity is required to act is the last

day of the period specified in the agreement [*Gov. Code § 912.4(c)*].

[c] Claims Deemed Insufficient by Public Entity

[i] Notice of Insufficiency

If in the opinion of the public entity, a claim as presented fails to comply substantially with the requirements of *Gov. Code §§ 910* and *910.2* or with the requirements of a form provided by that public entity, the public entity may, at any time within 20 days after the claim is presented, give written notice of the claim's insufficiency, stating with particularity the claim's defects or omissions. The notice must be given in the manner prescribed by *Gov. Code § 915.4* [*Gov. Code § 910.8*; *see § 464.24[3][b]*]. The public entity may not take action on the claim for a period of 15 days after that notice is given [*Gov. Code § 910.8*].

[ii] Effect of Failure to Give Notice

Failure by a public entity to give notice of insufficiency of the claim, as required by *Gov. Code § 910.8*, waives any defense regarding the sufficiency of the claim based on a defect or omission in the claim as presented. However, no notice need be given and no waiver results if the claim as presented fails to state either an address to which the person presenting the claim desires notices to be sent or the claimant's address [*Gov. Code § 911*].

No notice of insufficiency is required and no waiver occurs if the insufficiency of the claim lies in its failure to set forth the factual basis for recovery that is later alleged in the complaint. In that case, the public entity could not have discovered the defect until after the filing of the complaint [*Donohue v. State of California (1986) 178 Cal. App. 3d 795, 805, 224 Cal. Rptr. 57* (judgment on pleadings affirmed because complaint based on negligently failing to control and supervise driver during driving examination, but claim based on negligently allowing uninsured driver to take driving test on public streets)]. For discussion of the requirement that the allegations in a complaint must comply with the allegations in the claim, see *§ 464.41[3]*.

[d] Late Claims

[i] Notice of Lateness

If a claim that is required by *Gov. Code § 911.2* to be filed within six months after accrual of the cause of action (a tort claim) is filed after that time, without an application to present a late claim, the public entity may, within 45 days after the claim is presented, give written notice to the claimant that the claim was not timely filed and that it is being returned without further action [*Gov. Code § 911.3(a)*]. The notice must be substantially in the following form [*Gov. Code § 911.3(a)*]:

"The claim you presented to the (insert title of board or officer) on (indicate date) is being returned because it was not presented within six months after the event or occurrence as required by law. See *Sections 901* and *911.2 of the Government Code*. Because the claim was not presented within the time allowed by law, no action was taken on the claim."

"Your only recourse at this time is to apply without delay to (name of public entity) for leave to present a late claim. See Sections 911.4 to 912.2, inclusive, and *Section 946.6 of the Government Code*. Under some circumstances, leave to present a late claim will be granted. See *Section 911.6 of the Government Code*."

"You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately."

[ii] Effect of Failure to Give Notice

Failure to notify the claimant, as provided for in *Gov. Code § 911.3(a)*, within 45 days after the claim is presented waives any defense regarding the time limit for claim presentation. However, no notice need be given and no waiver results if the claim as presented fails to state either an address to which the person presenting the claim desired notices to be sent or the claimant's address [*Gov. Code § 911.3(b)*; *see, e.g., Mandjik v. Eden Township Hosp. Dist. (1992) 4 Cal. App. 4th 1488, 1503-1504, 6 Cal. Rptr. 2d 582]* .

Gov. Code § 911.3 concerns waiver of only the defense of the untimeliness of the claim. A failure by a public entity to give the required notice does not constitute a waiver by the public entity of the defense that the action is barred by the two-year statute of limitations set forth in *Gov. Code § 945.6(a)(2)* [*County of Alameda v. Superior Court (1987) 195 Cal. App. 3d 1283, 1287, 241 Cal. Rptr. 312* ; *see § 464.42[1][a]*].

[2] Substantive Response to Claims

[a] Claims Against Local Public Entity

[i] Response Options

In the case of a claim against a local public entity, the board may act on a claim in one of the following ways [*Gov. Code § 912.6(a)*]:

- If the board finds the claim is not a proper charge against the public entity, it must reject the claim;

- If the board finds that the claim is a proper charge against the public entity and is for an amount justly due, it must allow the claim;

- If the board finds that the claim is a proper charge against the public entity, but is for an amount greater than is justly due, it must either reject the claim or allow it in the amount justly due and reject it as to the balance; or

- If the legal liability of the public entity or the amount justly due is disputed, the board may reject the claim or may compromise it.

[ii] Settlement or Compromise of Claim

If the board allows the claim in whole or in part or compromises the claim, it may require the claimant, if the claimant accepts the amount allowed or offered to settle the claim, to accept it in settlement of the entire claim [*Gov. Code § 912.6(b)*].

Subject to *Gov. Code § 912.6(b)*, the local public entity must pay the amount allowed on the claim or in compromise of the claim in the same manner as if the claimant had obtained a final judgment against the local public entity for that amount. Nevertheless, the claim may be paid in not more than 10 equal annual installments as provided in *Gov. Code § 970.6* only if the claimant agrees in writing to that method of payment. In that case, no court order authorizing installment payments is required. If an agreement for payment of the claim in installments is made, the local public entity, in its discretion, may prepay any one or more installments or any part of an installment [*Gov. Code § 912.6(c)*].

For discussion of *Gov. Code § 970 et seq.*, which govern the payment and enforcement of claims against local public entities, see Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities* .

[b] Claims Against State

In the case of claims against the state, the board must act on claims in accordance with any rules it may prescribe. It may hear evidence for and against claims and, with the approval of the Governor, report to the legislature those facts and recommendations concerning claims as it deems proper. In making recommendations, the board may state and use any official or personal knowledge that any member may have regarding any claim [*Gov. Code § 912.8*].

If the board approves or recommends a claim, and no sufficient appropriation for payment is available, the board, with the approval of the Governor, reports to the legislature such facts and recommendations concerning the claim as it deems proper [*2 Cal. Code Reg. § 632.9(d)*].

On allowance by the board of all or part of a claim for which a sufficient appropriation exists, and on execution and presentation of those documents that the board may require that discharge the state and its officers, agents, servants, and employees of all liability under the claim, the board designates the fund from which the claim is to be paid and the state agency concerned pays the claim from that fund [*2 Cal. Code Reg. § 632.9(e)*].

If the claim is not covered by insurance, the Attorney General on behalf of all state agencies except the Department of Transportation, and the Director of the Department of Transportation on behalf of that agency, are authorized, subject to any instructions that may be issued by the board from time to time, to investigate and recommend to the board the disposition of all claims involving personal injury, wrongful death, and property damage. The Attorney General and the Director of the Department of Transportation are also authorized to adjust and pay all such claims if the settlement does not exceed $1,000 and if a sufficient appropriation exists, providing the board is presented with a statement of the basis of the claim, the amount of the settlement, and the claimant's agreement with the settlement, and the board approves that settlement [*2 Cal. Code Reg. § 632.11*].

As a practical matter, the board is essentially charged with certain fiscal control functions and is neither staffed nor budgeted for lengthy hearings on disputed issues of fact or law. Therefore, the board generally denies claims arising out of the operation of state-owned vehicles by employees or agents of the state, because the state carries insurance covering negligent operation of state-owned motor vehicles. It also generally denies a claim if the claimant and the state agency concerned disagree over the facts or law material to the claim and if the claimant has a remedy at law. Finally, the board typically denies all claims for paint-spray damage to motor vehicles unless the state agency concerned has been given an opportunity to inspect the damage and to remove the paint spray.

For discussion of *Gov. Code § 965 et seq.*, which govern the payment and enforcement of claims against the state and its agencies, see Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities* .

[3] Notice to Claimant of Action on Claim

[a] General Requirements

Written notice of the action taken by the public entity under *Gov. Code § 912.6* or *912.8*, or the inaction that is deemed rejection under Gov. Code § 914.2, must be given by the public entity in the manner prescribed in *Gov. Code § 915.4* [*Gov. Code § 913(a)*]. The public entity need not give notice if the claim fails to state either the claimant's address or an address to which the claimant desires notices to be sent [*Gov. Code §§ 913(a), 915.4(b)*].

Gov. Code § 913(a) provides a form of notice, use of which is optional [*see Chalmers v. County of Los Angeles (1985) 175 Cal. App. 3d 461, 464-466, 221 Cal. Rptr. 19]* . If a claim is rejected in whole or in part, the notice must include a warning in substantially the form set forth in *Gov. Code § 913(b)*, stating that the claimant has six months from the date of the notice to file a court action on the claim [*see Chalmers v. County of Los Angeles (1985) 175 Cal. App. 3d 461, 464-466, 221 Cal. Rptr. 19* (dates of filing and rejection of claim need not be included in notice)]. If the proper notice is not given, the statute of limitations to file an action on the claim is extended to two years from the accrual of the cause of action [*Gov. Code § 945.6(a)(2)*; *Reyes v. County of Los Angeles (1988) 197 Cal. App. 3d 584,*

595-596, 243 Cal. Rptr. 35] . Notice of rejection, however, is not ineffective because it does not indicate the date or manner of service and is not accompanied by proof of service [*Dowell v. County of Contra Costa (1985) 173 Cal. App. 3d 896, 899-902, 219 Cal. Rptr. 341]* .

If the public entity never formally rejects a claim, as might occur if it merely finds a claim was not timely filed, it may not be required to present the notice of rejection pursuant to *Gov. Code § 913*. In some circumstances, however, the public entity's determination of untimeliness may be construed to be a rejection of the claim, and the failure to give proper notice of the rejection similarly extends the statute of limitations to two years [*see Rason v. Santa Barbara City Hous. Auth. (1988) 201 Cal. App. 3d 817, 829, 247 Cal. Rptr. 492]* .

For discussion of the commencement of suit against the public entity after a claim has been rejected, see *§ 464.42*.

[b] Methods of Delivering Notice

The notices provided for in *Gov. Code §§ 910.8* (insufficient claim), 911.8 (board action), and 913 (rejection of claim) must be given by either of the following methods [*Gov. Code § 915.4(a)*]:

- Personally delivering the notice to the person presenting the claim or making the application; or

- Mailing the notice to the address, if any, stated in the claim or application as the address to which the person presenting the claim or making the application desires the notices to be sent or, if no such address is stated in the claim or application, by mailing the notice to the address, if any, of the claimant as stated in the claim or application.

[4] Reexamination of Rejected Claim

The public entity may in its discretion, but within the time prescribed by *Gov. Code § 945.6* for commencement of an action on the claim, reexamine a previously rejected claim to consider a settlement of the claim [*Gov. Code § 913.2*; *see Kane v. County of San Diego (1969) 2 Cal. App. 3d 550, 554, 83 Cal. Rptr. 19* (county considered claim after it had been rejected by operation of law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsClaims By & AgainstTortsPublic Entity LiabilityLiabilityClaim PresentationContent & FormTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsConstruction & InterpretationTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural Requirements

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Volume 40: Products Liability thru Public Entities and Officers-Chs. 460-469
Chapter 464 PUBLIC ENTITIES AND OFFICERS: CALIFORNIA TORT CLAIMS ACT
PART II. LEGAL BACKGROUND
A. Procedures for Seeking Relief From Public Entities and Employees
1. Claims Against Public Entities

40-464 California Forms of Pleading and Practice--Annotated § 464.25

§ 464.25 Presentation of Late Tort Claims

[1] Application to Public Entity

If a claim that is required by *Gov. Code § 911.2* to be presented not later than six months after the accrual of the cause of action is not presented within that time, a written application may be made to the public entity for leave to present the claim [*Gov. Code § 911.4(a)*; for a form of application, *see § 464.164*]. The application must be presented to the public entity as provided in *Gov. Code §§ 915-915.4*. The application must state the reason for the delay in presenting the claim and must have attached to it the proposed claim [*Gov. Code § 911.4(b)*].

The application must be presented within a reasonable time not to exceed one year after the accrual of the cause of action [*Gov. Code § 911.4(b)*]. If the application is not filed within one year after accrual of the cause of action, the public entity has no authority to grant relief [*Hom v. Chico Unified Sch. Dist. (1967) 254 Cal. App. 2d 335, 339, 61 Cal. Rptr. 920]* . In computing the one-year period, time during which the person who sustained the alleged injury, damage, or loss is a minor must be counted. On the other hand, any time during which the claimant is mentally incapacitated and does not have a guardian or conservator of the person must not be counted [*Gov. Code § 911.4(c)(1)*]. A mentally incapacitated minor who has parents capable of acting on his or her behalf is not entitled to invoke the tolling provision of *Gov. Code § 911.4(c)* [*Hernandez v. County of Los Angeles (1986) 42 Cal. 3d 1020, 1024-1027, 232 Cal. Rptr. 519, 728 P.2d 1154]* .

Despite the general rule against tolling if a mentally incapacitated person has a conservator, a mentally incapacitated person may invoke the tolling provision even if a parent or other person is acting as conservator, if the conservator did not and could not reasonably have known about the claim [*Favorite v. County of Los Angeles (1998) 68 Cal. App. 4th 835, 837, 839, 80 Cal. Rptr. 2d 656* (error not to consider tolling for sexual assault claim brought by person who at time of alleged assault was heavily medicated and mentally incapacitated)]. Moreover, the time period for filing an application for leave to file a late claim is tolled for any period during which a mentally incapacitated plaintiff's interests are represented only by a guardian or conservator of the person with no authority to prosecute the claim, such as a public conservator [*see Kagy v. Napa State Hosp. (1994) 28 Cal. App. 4th 1, 6-7, 33 Cal. Rptr. 2d 741]* . Similarly, if a

minor has no parent, legal guardian, or conservator to protect the minor's interests, the appointment under *Welf. & Inst. Code § 317* of an independent counsel empowered to prosecute any legal claims on the minor's behalf does not preclude the minor from relying on the tolling provision of *Gov. Code § 911.4(c)* [*County of Los Angeles v. Superior Court (2001) 91 Cal. App. 4th 1303, 1310-1313, 111 Cal. Rptr. 2d 471]* .

In addition, the claim period is tolled during any period in which the person is detained or adjudged to be a dependent child of the juvenile court under the Arnold-Kennick Juvenile Court Law, if both of the following conditions exist [*Gov. Code § 911.4(c)(2)*]:

- The person is in the custody and control of an agency of the public entity to which a claim is to be presented; and

- The public entity or its agency having custody and control of the person is required by statute or other law to make a report of injury, abuse, or neglect to either the juvenile court or the person's attorney, and that entity or its agency fails to make this report within the time required by the statute or other enactment, with this time period to commence on the date on which the public entity or its agency becomes aware of the injury, neglect, or abuse. If the public entity or its agency makes a late report, the claim period is tolled for the period of the delay caused by the failure to make a timely report.

Beginning in 2004, the time during which a minor is adjudged to be a dependent child of the juvenile court under the Arnold-Kennick Juvenile Court Law is also not counted if the minor is without a guardian ad litem or conservator for purposes of filing civil actions [*Gov. Code § 911.4(c)(3)*].

If there is little or no delay by a claimant in applying for leave to present a late claim after discovering his or her default, the application is considered to be made within a reasonable time [*Viles v. State of California (1967) 66 Cal. 2d 24, 31-32, 56 Cal. Rptr. 666, 423 P.2d 818* (delay of 14 days was reasonable); *Bertorelli v. City of Tulare (1986) 180 Cal. App. 3d 432, 437, 442, 225 Cal. Rptr. 582* (claim filed 43 days after attorney was contacted was reasonable because attorney continued to negotiate with adjuster and inquired into necessity for filing late claim)]. If there is a substantial or unexplained delay before presenting a late claim application, however, the application is not considered timely and will be denied [*see, e.g.,* *Drummond v. County of Fresno (1987) 193 Cal. App. 3d 1406, 1410-1412, 238 Cal. Rptr. 613* (three-month delay after hospital discharge not explained by claimant's quadriplegia); *Roberts v. State of California (1974) 39 Cal. App. 3d 844, 847, 114 Cal. Rptr. 518* (delay of seven months)].

[2] Response by Public Entity

[a] Substance and Timing of Response

The board must grant or deny the application to file a late claim within 45 days after it is presented to the board. However, before the expiration of that period, the claimant and the board may, by written agreement, extend that period [*Gov. Code § 911.6(a)*]. If the board fails or refuses to act on the application within the prescribed period, it is deemed denied on the 45th day or, if the period was extended by agreement, on the last day of the period specified in the agreement [*Gov. Code § 911.6(c)*]. If an application is granted, the claim is deemed to have been presented to the board on the day that leave to present the late claim is granted [*Gov. Code § 912.2*].

The board must grant an application to file a late claim if one or more of the grounds set forth in *Gov. Code § 911.6(b)* is applicable. These grounds for relief are the same as the grounds for judicial relief from claim requirements [*see Gov. Code § 946.6(c)*] and are discussed in *§ 464.25[4]*.

An application to file a late claim also must be granted if it can be shown that the claimant acted with reasonable diligence in pursuing the claim and reasonably believed that the responsible entity was not a public agency by reason of

its representations [*Gov. Code § 7530*]. All public agencies, public entities, districts, cities, counties, and cities and counties, when identifying themselves as such for any purpose, must be identified as a public agency, public entity, district, city, county, or city and county, whichever is appropriate. This requirement is satisfied by an appropriate designation on letterhead stationery [*Gov. Code § 7530*; *cf. Rojes v. Riverside Gen. Hosp. (1988) 203 Cal. App. 3d 1151, 1165-1166, 250 Cal. Rptr. 435* (public hospital not required to identify itself as such on claimant's medical records, which are not "letterhead stationery" under meaning of statute)].

[b] Notice of Action to Claimant

Written notice of the board's action on the application to file a late claim must be given in the manner prescribed in *Gov. Code § 915.4* [*Gov. Code § 911.8(a)*; for discussion of *Gov. Code § 915.4, see § 464.24[3]*]. If the application is denied, the notice must contain a warning in substantially the following form [*Gov. Code § 911.8(b)*]:

"WARNING"

> "If you wish to file a court action on this matter, you must first petition the appropriate court for an order relieving you from the provisions of *Government Code section 945.4* (claim presentation requirement). See *Government Code section 946.6*. Such petition must be filed with the court within six (6) months from the date your application for leave to present a late claim was denied."
>
> "You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately."

If the application is denied, the public entity must make it clear that the claim is rejected because it was untimely filed, rather than on its merits. If the notification fails to do so, the public entity may be estopped to rely on the failure of the claimant to comply with the requirement of presenting an application to file a late claim [*Dujardin v. Ventura County Gen. Hosp. (1977) 69 Cal. App. 3d 350, 360, 138 Cal. Rptr. 20* ; *McLaughlin v. Superior Court (1972) 29 Cal. App. 3d 35, 39-40, 105 Cal. Rptr. 384* (notice indicating that board had rejected claim rather than application to present late claim was misleading)].

[3] Judicial Relief From Claim Filing Requirement

[a] Petition Required Prior to Bringing Action

If an application for leave to present a claim is denied or deemed denied pursuant to *Gov. Code § 911.6*, a petition may be made to the court for an order relieving the petitioner from the requirement under *Gov. Code § 945.4* of presenting a claim before the board before bringing an action against the public entity [*Gov. Code § 946.6(a)*; for discussion of *Gov. Code § 911.6, see § 464.25[1]*]. A petition for relief from the claim filing requirement is a mandatory prerequisite to bringing an action against a public entity if the public entity has denied a claimant's application for leave to present a late claim [*see Gov. Code § 945.4*; *Kendrick v. City of La Mirada (1969) 272 Cal. App. 2d 325, 327-330, 77 Cal. Rptr. 444]* , unless the applicant is excused from petitioning for relief on the basis of equitable estoppel [*McLaughlin v. Superior Court (1972) 29 Cal. App. 3d 35, 38, 105 Cal. Rptr. 384* ; *see § 464.47*].

[b] Contents of Petition

The petition for relief from the claim filing requirement must show: (1) that an application for leave to present a late claim was made to the board under *Gov. Code § 911.4* and was denied or deemed denied; (2) the reason for failure to present the claim within the six month time limit specified in *Gov. Code § 911.2*; and *(3)* the information required by *Gov. Code § 910* (contents of claim) [*Gov. Code § 946.6(b)*; *City of Los Angeles v. Superior Court (1993) 14 Cal. App. 4th 621, 626-628, 17 Cal. Rptr. 2d 703]* . For a form of petition and a form of order granting the relief requested, see *§§ 464.165* and *464.166*.

[c] Time for Filing Petition

The petition must be filed within six months after the application to the board is denied or deemed to be denied pursuant to *Gov. Code § 911.6*[*Gov. Code § 946.6(b)*]. This six-month time requirement is a mandatory statute of limitations [*Paramount Unified School Dist. v. Teachers Assn. of Paramount (1994) 26 Cal. App. 4th 1371*

The six-month period for filing the petition begins to run on the date that the application for relief from the claim filing requirement is denied, even though the notice of the denial is mailed or delivered at a later date [*Rason v. Santa Barbara City Hous. Auth. (1988) 201 Cal. App. 3d 817, 824, 247 Cal. Rptr. 492]* . However, if the public entity delays notice of denial of the application by a considerable period of time, due process considerations may estop the public entity from asserting that the six-month period ran from the date of denial. For example, if notice of a denial is given 5 months and 28 days later, absent unusual circumstances, the public entity would be estopped to block a claim because of the running of the six-month period. The claimant would be granted a reasonable period of time in which to file a petition [*Rason v. Santa Barbara City Hous. Auth. (1988) 201 Cal. App. 3d 817, 824-825, 247 Cal. Rptr. 492* (notice sent within 45-day period in which public entity could act, but mailed 33 days after denial of application, was not prejudicial)].

The limitation period contained in *Gov. Code § 946.6(b)* is subject to the provisions of *Code Civ. Proc. § 352* (tolling limitation periods for commencement of actions). Therefore, it may be tolled during the period of the petitioner's minority or insanity as specified in *Code Civ. Proc. § 352(a)* [*see Code Civ. Proc. § 352(a)*; *Los Angeles City Sch. Dist. v. Superior Court (1970) 9 Cal. App. 3d 459, 463-467, 88 Cal. Rptr. 286* (minor permitted to petition for relief three years after denial of leave to present late tort claim); *see also Code Civ. Proc. § 352.1(a)* (tolling statute of limitations for period, not to exceed two years, during which plaintiff is imprisoned or in execution under criminal sentence for term less than life)]. By contrast, the tolling provisions of *Code Civ. Proc. §§ 352* and *352.1* do not apply to the limitation period for filing an action against the public entity after a claim is denied [*see Code Civ. Proc. §§ 352(b), 352.1(b)*].

[d] Determination by Trial Court

[i] Basis

The court must make an independent determination on the petition for an order for relief from the claim requirements [*Gov. Code § 946.6(e)*]. If the court finds that (1) the application to the board for leave to present a late claim under *Gov. Code § 911.4* was timely, and (2) that at least one of the four grounds listed in *Gov. Code § 946.6(c)(1)-(4)* exists, it must grant the petition [*Gov. Code § 946.6(c)*; for discussion of the time in which to file an application for leave to present a late claim, *see § 464.25[1]*]. The four grounds listed in *Gov. Code § 946.6(c)* as prerequisites to relief are discussed in *§ 464.25[4][b]*.

The court's determination must be made on the basis of the petition, any supporting or opposing affidavits, and any additional evidence received at the hearing on the petition [*Gov. Code § 946.6(e)*]. The court may make its decision based on the petition and any supporting or opposing declarations if no testimonial evidence is offered [*County of Santa Clara v. Superior Court (1971) 4 Cal. 3d 545, 553-554, 94 Cal. Rptr. 158, 483 P.2d 774]* . There is no right to a trial by jury on the petition [*County of Sacramento v. Superior Court (1974) 42 Cal. App. 3d 135, 138-141, 116 Cal. Rptr. 602]* .

The purpose of the petition procedure is to determine whether or not the petitioner should be excused from the claim requirement and be permitted to file an action without filing any claim. If the court is unable to determine that relief from the claim requirement is appropriate, it may not order partial relief by permitting the petitioner to file a late claim [*see Tuolumne Air Serv., Inc. v. Turlock Irrigation Dist. (1978) 87 Cal. App. 3d 248, 251, 150 Cal. Rptr. 809]* .

[ii] Trial Court's Jurisdiction to Decide Timeliness of Claim

Authority diverges on whether, in a claim relief proceeding, the trial court has the power to determine the issue of the timeliness of a claim. One line of cases holds that the trial court lacks power to determine an issue of timely filing (or the related issue of substantial compliance) because the claim relief proceeding, by definition, assumes that a claim was not timely filed [*see, e.g.,* *Ngo v. County of Los Angeles (1989) 207 Cal. App. 3d 946, 950, 255 Cal. Rptr. 140* (characterizing proceedings under *Gov. Code § 946.6* as redundant if claim is assertedly timely); *Toscano v. County of Los Angeles (1979) 92 Cal. App. 3d 775, 783, 155 Cal. Rptr. 146]* . These cases suggest that the procedures for relief from the timely claim requirement should not be used if the plaintiff argues that the claim was timely filed. Instead, if there is a dispute concerning the timeliness of the claim filed, the claimant should proceed to file a complaint in tort in the appropriate court. Based on its assertion that a timely claim was not filed, the public entity will file a demurrer to the complaint or a motion for summary judgment or other similar motion. In response to that demurrer or motion, the claimant will raise the arguments in support of his or her compliance with the claims filing statutes [*Ngo v. County of Los Angeles (1989) 207 Cal. App. 3d 946, 950, 255 Cal. Rptr. 140* ; *Toscano v. County of Los Angeles (1979) 92 Cal. App. 3d 775, 783, 155 Cal. Rptr. 146]* .

This reasoning was criticized by a later case in which the claimant, who was appealing the order denying her petition for relief from the claim requirement, argued that she had timely complied with the claim presentation requirement. In this later case, the court of appeal held that the trial court may, but is not required to, make factual determinations relating either to the timeliness of the claim or to substantial compliance with the claim presentation requirement [*Santee v. Santa Clara County Office of Educ. (1990) 220 Cal. App. 3d 702, 711-712, 269 Cal. Rptr. 605]* .

These cases often differ factually and procedurally, so counsel is advised to be cautious and to consult the cases to determine which one most closely parallels his or her case, in deciding how best to proceed [*see* generally *Santee v. Santa Clara County Office of Educ. (1990) 220 Cal. App. 3d 702, 711-712, 269 Cal. Rptr. 605* (cited with approval in *Reyes v. County of Los Angeles (1988) 197 Cal. App. 3d 584, 593-594, 243 Cal. Rptr. 35* , and *County of Los Angeles v. Superior Court (1985) 169 Cal. App. 3d 1095, 1100-1101, 215 Cal. Rptr. 699* , regarding issue of trial court's jurisdiction of timely filing of claim, but disagreeing with suggestion in *Reyes* regarding election of remedies)]. A cautious claimant who has received notice that his or her claim was untimely and who wishes to preserve both issues of timeliness and of excusable lateness may wish to file a complaint in court and an application for leave to present a late claim [*Mandjik v. Eden Township Hosp. Dist. (1992) 4 Cal. App. 4th 1488, 1499, 6 Cal. Rptr. 2d 582* ; *Rason v. Santa Barbara City Hous. Auth. (1988) 201 Cal. App. 3d 817, 828, 247 Cal. Rptr. 492]* .

[e] Review of Trial Court Determination

[i] Review of Order Granting Petition

If the trial court issues an order granting relief from the claim requirement, the petitioner must file an action on the claim in the same court within 30 days [*see Gov. Code § 946.6(f)*; *see also § 464.42[1][b]*]. As such, that order is not appealable because it is an interlocutory order that is nothing more than a prelude to further proceedings [*Church v. County of Humboldt (1967) 248 Cal. App. 2d 855, 857-859, 57 Cal. Rptr. 79]* . Moreover, an order granting relief is not reviewable by a writ of prohibition because it is within the trial court's jurisdiction [*County of Santa Clara v. Superior Court (1971) 4 Cal. 3d 545, 549-551, 94 Cal. Rptr. 158, 483 P.2d 774* ; *but see* *County of Alameda v. Superior Court (1987) 196 Cal. App. 3d 619, 622-623, 242 Cal. Rptr. 215* (considered petition for writ of mandate on grounds that alternative writ had been issued and case had been fully briefed)].

[ii] Review of Order Denying Petition

An order denying a petition for relief from the claim requirement is a final, appealable order [*Cabamongan v. City of Long Beach (1989) 208 Cal. App. 3d 946, 947* & n.1, *256 Cal. Rptr. 621]* .

Courts differ on whether or not an order denying relief has a collateral estoppel effect [*compare Ngo v. County of Los Angeles (1989) 207 Cal. App. 3d 946, 951, 255 Cal. Rptr. 140* (no collateral estoppel effect); *with Gurrola v. County of Los Angeles (1984) 153 Cal. App. 3d 145, 150, 200 Cal. Rptr. 157* (collateral estoppel effect)]. If the order is deemed to have a collateral estoppel effect, any further action by the claimant is barred unless the order is successfully attacked, directly or collaterally [*Gurrola v. County of Los Angeles (1984) 153 Cal. App. 3d 145, 152, 200 Cal. Rptr. 157]* . In contrast, the finding that an order does not have a collateral estoppel effect recognizes that a *Gov. Code § 946.6* proceeding is not a trial of the action itself and that the court does not have the power to grant what amounts to a summary judgment so long as there are triable issues of fact concerning whether or not there was compliance with the claims statutes. The proceeding serves as an avenue of relief similar to relief from a default [*see Code Civ. Proc. § 473*], and it is not designed to resolve the issue of actual compliance with the claim filing requirements [*Ngo v. County of Los Angeles (1989) 207 Cal. App. 3d 946, 951, 255 Cal. Rptr. 140]* . Therefore, seeking relief from the claim filing requirement is not an election of remedies that, if unsuccessful, subjects the plaintiff to a claim of collateral estoppel regarding factual findings. The granting of relief is not a determination of compliance, but an excusing of compliance. Similarly, a denial of relief is not a determination of lack of compliance but only that compliance will not be excused [*Ngo v. County of Los Angeles (1989) 207 Cal. App. 3d 946, 951, 255 Cal. Rptr. 140]* .

If the trial court improperly considers irrelevant factors in denying the petition for relief, its order must be reversed and sent back for reconsideration if appropriate [*see Cabamongan v. City of Long Beach (1989) 208 Cal. App. 3d 946, 952, 256 Cal. Rptr. 621]* . For example, in a case in which the trial court improperly considered the amount of time that the petitioner took to file the petition for relief, the court of appeal reversed the denial and directed the trial court to hold a new hearing on the petition without considering that period of time [*Cabamongan v. City of Long Beach (1989) 208 Cal. App. 3d 946, 951-952, 256 Cal. Rptr. 621* (if petition is filed within time provided by statute, whether or not petitioner was reasonable in waiting to file petition is irrelevant)].

[iii] Standard of Review

The decision of whether or not a petitioner should be relieved from the claim requirement lies within the discretion of the trial court, and appellate courts will not interfere except for an abuse of discretion [*Ebersol v. Cowan (1983) 35 Cal. 3d 427, 435, 197 Cal. Rptr. 601, 673 P.2d 271* ; *County of Santa Clara v. Superior Court (1971) 4 Cal. 3d 545, 552, 94 Cal. Rptr. 158, 483 P.2d 774]* . Therefore, so long as the trial court is acting within its discretion, the order generally will be affirmed even if there is substantial evidence to support a conclusion opposite to that reached by the trial court [*see Bennett v. City of Los Angeles (1970) 12 Cal. App. 3d 116, 120, 90 Cal. Rptr. 479]* .

Nevertheless, *Gov. Code § 946.6* is a remedial statute that must be liberally construed, and denials of relief under its provisions are reviewed more carefully than decisions granting relief [*County of Santa Clara v. Superior Court (1971) 4 Cal. 3d 545, 552, 94 Cal. Rptr. 158, 483 P.2d 774]* . Any doubts must be resolved in favor of granting relief [*Bettencourt v. Los Rios Cmty. Coll. Dist. (1986) 42 Cal. 3d 270, 276, 228 Cal. Rptr. 190, 721 P.2d 71* ; *Viles v. State of California (1967) 66 Cal. 2d 24, 28-29, 56 Cal. Rptr. 666, 423 P.2d 818]* . Accordingly, an appellate court is not precluded from reversing an order denying relief if adequate cause for that relief is shown by uncontradicted evidence or the petitioner's affidavits [*Bettencourt v. Los Rios Cmty. Coll. Dist. (1986) 42 Cal. 3d 270, 275-276, 228 Cal. Rptr. 190, 721 P.2d 71* ; *Viles v. State of California (1967) 66 Cal. 2d 24, 28-29, 56 Cal. Rptr. 666, 423 P.2d 818]* .

[4] Grounds for Relief From Claim Requirement

[a] General Requirements

The grounds for granting an application to present a late claim are set forth in *Gov. Code § 911.6(b)*. The grounds for granting a petition relieving the claimant from complying with the claim requirement are set forth in *Gov. Code § 946.6(c)*. These grounds are the same, and the following discussion applies to both procedures.

The board must grant an application to file a late claim, or a court must relieve a plaintiff from compliance with the claim procedure prior to instigating a lawsuit, if one or more of the following conditions applies [*Gov. Code §§ 911.6(b), 946.6(c)*]:

- The failure to present the claim was through mistake, inadvertence, surprise, or excusable neglect, and the public entity was not be prejudiced in its defense of the claim by the failure to present the claim within the time specified for presentation of the claim;

- The person who sustained the alleged injury, damage, or loss was a minor during the entire time specified for presentation of the claim;

- The person who sustained the alleged injury, damage, or loss was physically or mentally incapacitated during the entire time specified for presentation of the claim and by reason of that disability failed to present a claim during that time; or

- The person who sustained the alleged injury, damage, or loss died before the expiration of the time specified for presentation of the claim.

[b] Mistake, Inadvertence, Surprise, or Excusable Neglect

[i] Applicable Standard

The showing required of a petitioner seeking relief because of mistake, inadvertence, surprise, or excusable neglect is the same as that generally required under *Code Civ. Proc. § 473* for relieving a party from a dismissal or default judgment [*Viles v. State of California (1967) 66 Cal. 2d 24, 29, 56 Cal. Rptr. 666, 423 P.2d 818* ; *Bertorelli v. City of Tulare (1986) 180 Cal. App. 3d 432, 438, 225 Cal. Rptr. 582]* . However, the provision of *Code Civ. Proc. § 473*, stating that relief from a default, default judgment, or dismissal must be granted on a timely application supported by an attorney affidavit of fault even if the neglect was not excusable, does not apply to relief from the claim requirement under *Gov. Code § 946.6*, which still requires the neglect to be excusable [*Tackett v. City of Huntington Beach (1994) 22 Cal. App. 4th 60, 64-65, 27 Cal. Rptr. 2d 133]* . Furthermore, although the statutes attach the qualifier "excusable" to neglect only, courts have uniformly held that for relief on any or all of the stated grounds, the petitioner must show that his or her misconception was reasonable or that it might have been the conduct of a reasonably prudent person under similar circumstances [*Black v. County of Los Angeles (1970) 12 Cal. App. 3d 670, 675, 91 Cal. Rptr. 104* ; *Shaddox v. Melcher (1969) 270 Cal. App. 2d 598, 601, 76 Cal. Rptr. 80]* .

Although the claims relief provisions are liberally construed and relief is granted unless absolutely forbidden by statute [*Viles v. State of California (1967) 66 Cal. 2d 24, 32-33, 56 Cal. Rptr. 666, 423 P.2d 818* ; *Kaslavage v. West Kern County Water Dist. (1978) 84 Cal. App. 3d 529, 538, 148 Cal. Rptr. 729]* , a claimant who intentionally or deliberately fails to comply with the claims requirements is not entitled to relief [*Rivera v. City of Carson (1981) 117 Cal. App. 3d 718, 724-725, 173 Cal. Rptr. 4* ; *County of Sacramento v. Superior Court (1980) 105 Cal. App. 3d 898, 902, 164 Cal. Rptr. 724]* .

If a timely claim was not filed because of a mistake in understanding when the claim-filing period expired, that mistake may be excusable under the appropriate circumstances. Calendar errors by an attorney or a member of the attorney's staff are generally excusable [*see Nilsson v. City of Los Angeles (1967) 249 Cal. App. 2d 976, 980-981, 58 Cal. Rptr. 20]* . For example, in one case in which a firm of attorneys failed to open a file that would have reminded them of the deadline, that mistake was excusable [*see Flores v. Board of Supervisors (1970) 13 Cal. App. 3d 480, 483, 91 Cal. Rptr. 717]* . In another case, in which an attorney made an error in calculating the commencement of the period, the mistake also was excusable [*see Segal v. Southern Cal. Rapid Transit Dist. (1970) 12 Cal. App. 3d 509, 512, 90 Cal.*

Rptr. 720] .

[ii] Mistake of Law

A mistake of law occurs if a person knows the facts as they really are, but has a mistaken belief regarding the legal consequences of those facts. A mistake of law may serve as an excuse for failing to file a claim [*see Moore v. State of California (1984) 157 Cal. App. 3d 715, 723, 203 Cal. Rptr. 847]* , but only if the petitioner makes a substantial showing that the true facts could not have been ascertained through the exercise of reasonable diligence and that the mistake was the actual cause of the failure to comply with the claim requirement [*see Black v. County of Los Angeles (1970) 12 Cal. App. 3d 670, 676, 91 Cal. Rptr. 104]* . Not every mistake of law, however, requires relief as a matter of law. The issue of which mistakes of law constitute excusable neglect presents a fact question, and the determining factors are the reasonableness of the misconception and the justifiability of the lack of determination of the correct law [*Tammen v. County of San Diego (1967) 66 Cal. 2d 468, 478, 58 Cal. Rptr. 249, 426 P.2d 753]* . An honest mistake is excusable if it is a reasonable misconception [*Viles v. State of California (1967) 66 Cal. 2d 24, 29, 56 Cal. Rptr. 666, 423 P.2d 818]* .

Ignorance of the law, if coupled with negligence in failing to look it up, does not justify the granting of relief [*Tammen v. County of San Diego (1967) 66 Cal. 2d 468, 478, 58 Cal. Rptr. 249, 426 P.2d 753]* . The difference between a mistake of law and ignorance of the law is tenuous, the difference being only a matter of degree [*Tammen v. County of San Diego (1967) 66 Cal. 2d 468, 476, 58 Cal. Rptr. 249, 426 P.2d 753]* .

The circumstances taken into consideration in determining whether a mistake of law constitutes excusable neglect include whether the mistake was that of a lay person or an attorney. A given mistake of law may be excusable if made by a lay person, but not if made by an attorney [*see Powell v. City of Long Beach (1985) 172 Cal. App. 3d 105, 109, 218 Cal. Rptr. 97]* .

A mistake by an attorney regarding a well-settled issue of law is inexcusable [*Tammen v. County of San Diego (1967) 66 Cal. 2d 468, 479, 58 Cal. Rptr. 249, 426 P.2d 753]* . If, however, the legal issue is debatable and without a clear answer, a mistake of law by an attorney may constitute a mistake warranting relief [*Moore v. State of California (1984) 157 Cal. App. 3d 715, 723-725, 203 Cal. Rptr. 847]* . For example, an attorney's failure to file a timely claim was an excusable mistake of law because the claim he had timely filed was held invalid by the trial court for failure to sufficiently support or coincide with the cause of action pleaded. The mistake was characterized by the court as an excusable mistake of law because the attorney did not fail to invoke the claims procedure at all, but instead failed to anticipate the trial court's holding that a claim presented by the plaintiff and acted on by the state was not drafted with sufficient specificity to support or embrace the plaintiff's cause of action [*Moore v. State of California (1984) 157 Cal. App. 3d 715, 723-725, 203 Cal. Rptr. 847]* .

The claimant's mere ignorance of the claim requirements and the time limitation does not excuse the failure to file a timely claim [*Tsingaris v. State of California (1979) 91 Cal. App. 3d 312, 314, 154 Cal. Rptr. 135* ; *but see Syzemore v. County of Sacramento (1976) 55 Cal. App. 3d 517, 524, 127 Cal. Rptr. 741]* . Nevertheless, a claimant's ignorance of the existence of a possible cause of action against a public entity, coupled with the claimant's consistent but unsuccessful efforts to retain legal representation, may constitute mistake or excusable neglect that warrants granting relief from the claim requirements [*Ebersol v. Cowan (1983) 35 Cal. 3d 427, 435, 197 Cal. Rptr. 601, 673 P.2d 271]* . Additionally, a claimant's failure to file a timely claim based on assurances by insurance company representatives that he had one year to file an action for wrongful death was an excusable mistake [*Viles v. State of California (1967) 66 Cal. 2d 24, 29-31, 56 Cal. Rptr. 666, 423 P.2d 818]* .

[iii] Excusable Neglect

Not every act of neglect will excuse compliance with the filing requirements [*Shank v. County of Los Angeles (1983)*

139 Cal. App. 3d 152, 157, 188 Cal. Rptr. 644] . Excusable neglect is neglect that might have been the act or omission of a reasonably prudent person under the same or similar circumstances [*Ebersol v. Cowan (1983) 35 Cal. 3d 427, 435, 197 Cal. Rptr. 601, 673 P.2d 271* ; *Tammen v. County of San Diego (1967) 66 Cal. 2d 468, 478, 58 Cal. Rptr. 249, 426 P.2d 753]* . The courts tend to grant the requested relief and permit a trial on the merits unless inexcusable neglect is clear [*see* *Bettencourt v. Los Rios Cmty. Coll. Dist. (1986) 42 Cal. 3d 270, 276-281, 228 Cal. Rptr. 190, 721 P.2d 71]* .

Absent peculiar circumstances, a claimant's unexplained delay in failing to consult counsel after realizing that he or she has a claim against a public entity normally does not constitute excusable neglect entitling the claimant to relief from the claim requirement [*Bennett v. City of Los Angeles (1970) 12 Cal. App. 3d 116, 121-122, 90 Cal. Rptr. 479* ; *see Garcia v. Los Angeles Unified Sch. Dist. (1985) 173 Cal. App. 3d 701, 708-709, 219 Cal. Rptr. 544]* .

An attorney's neglect is generally imputed to his or her client. Therefore, neglect by the claimant's attorney will not justify relief to the claimant unless the attorney's neglect was excusable [*Clark v. City of Compton (1971) 22 Cal. App. 3d 522, 528-529, 99 Cal. Rptr. 613* ; *see* *Torbitt v. State of California (1984) 161 Cal. App. 3d 860, 866-867, 208 Cal. Rptr. 1* (client injured by attorney's neglect may bring malpractice action); for discussion of attorney malpractice, see Ch. 76, *Attorney Professional Liability*]. However, if the attorney's neglect is of such an extreme degree that it amounts to positive misconduct and the client is relatively free from negligence, the existence of the attorney-client relationship is considered terminated. In this situation, the attorney's neglect will not be imputed to the client [*see* *Clark v. City of Compton (1971) 22 Cal. App. 3d 522, 528-529, 99 Cal. Rptr. 613* (attorney's failure to present claim for months was not positive misconduct)].

An attorney's failure to file a claim based on a reasoned decision that the attorney's client has no cause of action against the public entity constitutes neither excusable neglect nor positive misconduct, and a client who relies on the attorney's decision by not filing a timely claim cannot later obtain relief from claim presentation requirements on those grounds [*Mitchell v. Department of Transp. (1985) 163 Cal. App. 3d 1016, 1022-1024, 210 Cal. Rptr. 266]* . The failure of a claimant's attorney to obtain information that normally would be available through the exercise of reasonable diligence and that would lead the attorney to realize that the claimant has a claim against a public entity does not constitute excusable neglect [*Tammen v. County of San Diego (1967) 66 Cal. 2d 468, 478-479, 58 Cal. Rptr. 249, 426 P.2d 753* ; *Shaddox v. Melcher (1969) 270 Cal. App. 2d 598, 601-602, 76 Cal. Rptr. 80]* .

To show that the neglect was excusable, a claimant or the claimant's attorney must show not only that he or she did not discover a fact until too late, but also that he or she failed to discover it in the use of reasonable diligence [*Spencer v. Merced County Office of Education (1997) 59 Cal. App. 4th 1429, 1440* (attorney who failed to consult roster of public agencies, investigate case, hire an investigator, request information about accident involving plaintiff, or read police report and letter in file indicating proper public entity, was not reasonably diligent in determining proper public entity to serve); *Greene v. State of California (1990) 222 Cal. App. 3d 117, 120-123, 272 Cal. Rptr. 52* (plaintiff was not reasonably diligent in determining state ownership of accident site because police report clearly showed accident occurred on state highway); *Black v. County of Los Angeles (1970) 12 Cal. App. 3d 670, 677, 91 Cal. Rptr. 104]* .

If a diligent and substantial investigation is made that fails to reveal the existence of a claim against a public entity, the failure to file a timely claim may be excusable [*Kaslavage v. West Kern County Water Dist. (1978) 84 Cal. App. 3d 529, 536-538, 148 Cal. Rptr. 729]* . However, a claimant cannot normally demonstrate reasonable diligence if the claimant does nothing within the six-month period [*People ex rel. Dept. of Transportation v. Superior Court (2003) 105 Cal. App. 4th 39, 44-45, 129 Cal. Rptr. 2d 60* .

Excusable neglect may also be based on errors committed by members of an attorney's staff. For example, an attorney acts reasonably in relying on staff members to calendar deadlines correctly, and a failure to file a timely claim due to a reasonable calendaring error may be excused [*see, e.g.,* *Renteria v. Juvenile Justice, Department of Corrections and Rehabilitation (2006) 135 Cal. App. 4th 903, 911-912, 37 Cal. Rptr. 3d 777]* .

A finding of excusable neglect may be grounded on the physical and mental condition of the claimant. In one case, for example, a claimant's leg had been crushed as he worked repairing slide damage on a road, and he was placed on medication that prevented him from thinking clearly. His failure to file a timely claim was excusable [*County of Alameda v. Superior Court (1987) 196 Cal. App. 3d 619, 623-625, 242 Cal. Rptr. 215]* . Depending on the circumstances, a claimant suffering from the emotional trauma resulting from the wrongful death of a loved one, which is the basis of the claim, may be excused for neglecting to file a timely claim [*compare* *County of Santa Clara v. Superior Court (1971) 4 Cal. 3d 545, 551-554, 94 Cal. Rptr. 158, 483 P.2d 774* (emotional trauma excused neglect); *with* *People ex rel. Dept. of Transportation v. Superior Court (2003) 105 Cal. App. 4th 39, 46, 129 Cal. Rptr. 2d 60* (17-day stay in hospital and bare allegation of post-accident depression did not excuse late filing)].

A claimant's excusable neglect may be based on the actions of the public entity. For example, if a government agency with which a claimant has filed a claim promptly acknowledges receipt of the claim, but does not inform the claimant that a different agency had jurisdiction until the time period in which to file the claim with the proper agency has lapsed, the claimant's neglect to file may be excusable [*Lawrence v. State of California (1985) 171 Cal. App. 3d 242, 245-246, 217 Cal. Rptr. 200]* . Similarly, if the public entity promises the claimant an investigation, tells the claimant to forgo any other action pending the investigative report, and supplies the claimant with inaccurate information regarding its ownership of property, the claimant's failure to file a timely claim is excusable [*Boas v. County of San Diego (1980) 113 Cal. App. 3d 355, 358, 169 Cal. Rptr. 828]* . For discussion of estoppel based on misrepresentation by a public entity, see *§ 464.47*.

[iv] Surprise

A claimant is entitled to relief from the claim requirement on the ground of surprise if the claimant is unexpectedly placed to his or her injury in some condition or situation, without any fault on the claimant's part, under circumstances that the claimant was not reasonably called on to anticipate and that ordinary foresight could not have guarded against [*see* *Tammen v. County of San Diego (1967) 66 Cal. 2d 468, 478, 58 Cal. Rptr.249, 426 P.2d 753]* . For example, an attorney's discovery, after the time for filing the claim had passed, that a county was in some way responsible for a dangerous and defective condition of the state highway was not the type of surprise that justified relief from the claim requirement [*Tammen v. County of San Diego (1967) 66 Cal. 2d 468, 478, 58 Cal. Rptr. 249, 426 P.2d 753]* .

[v] Prejudice

If the claimant is seeking relief based on mistake, inadvertence, surprise, or excusable neglect, relief cannot be granted unless it can be shown that the public entity will not be prejudiced in its defense of the claim [*Gov. Code §§ 911.6(b)(1), 946.6(c)(1)*]. Unlike *Gov. Code § 946.6(c)(1),* which places the burden of proving this directly on the public entity, *Gov. Code § 911.6(b)(1)* does not indicate whether the claimant must prove the public entity will not be prejudiced or whether the public entity must show that it will be prejudiced. Because the two statutes are parallel in almost every other way, it has been suggested that *Gov. Code § 911.6(b)(1)* should be interpreted to require the public entity to sustain the burden of showing prejudice [*see* California Government Tort Liability Practice, Ch. 6 (Cal. C.E.B. 3d ed. 1992)].

Prejudice must be established by a preponderance of the evidence. Prejudice to the public entity is established only if there is a factual basis for concluding that the claimant's delay has substantially impaired the entity's ability to present a full and fair defense on the merits [*Ramariz v. County of Merced (1987) 194 Cal. App. 3d 684, 689, 239 Cal. Rptr. 774]* .

Prejudice need not be shown until after the claimant establishes that the failure to timely file the claim was through mistake, inadvertence, surprise, or excusable neglect [*see* *Tammen v. County of San Diego (1967) 66 Cal. 2d 468, 478, 58 Cal. Rptr. 249, 426 P.2d 753* ; *Hasty v. County of Los Angeles (1976) 61 Cal. App. 3d 623, 627, 131 Cal. Rptr.*

347] . If the claimant establishes grounds for relief and the public entity makes no effort to assert or establish prejudice, some appellate courts have reversed outright a trial court decision denying relief to the claimant [*see, e.g.,* *Moore v. State of California (1984) 157 Cal. App. 3d 715, 727-728, 203 Cal. Rptr. 847* (public entity should not be given "second shot" on remand to establish prejudice); *but see* *Ebersol v. Cowan (1983) 35 Cal. 3d 427, 430, 197 Cal. Rptr. 601, 673 P.2d 271* (reversed and remanded for determination of prejudice)].

[c] Minority

The minority of the claimant during the entire period for filing a claim is an independent ground for an order for relief from the claim presentation requirement. If a claimant meets the time limitations for application to file a late claim, the board of the public entity or the court must grant relief if it finds that the claimant was a minor [*Gov. Code §§ 911.6(b)(2), 946.6(c)(2)*]. It is immaterial whether or not the public entity will be prejudiced by the late filing. The only determination for the board or the court is whether the minor acted diligently in seeking relief from the claim requirements [*Tammen v. County of San Diego (1967) 66 Cal. 2d 468, 479-480, 58 Cal. Rptr. 249, 426 P.2d 753]* . In making this determination, the neglect or ignorance of the minor's parents or attorney is not attributed to the minor [*Hernandez v. County of Los Angeles (1986) 42 Cal. 3d 1020, 1029-1031, 232 Cal. Rptr. 519, 728 P.2d 1154]* .

Although late claim relief under these circumstances is a matter of right and must be granted to a minor who applies, the minor must actually file the proper application to obtain relief [*Ridley v. City & County of San Francisco (1969) 272 Cal. App. 2d 290, 292-293, 77 Cal. Rptr. 199]* .

[d] Physical or Mental Incapacity

A claimant is entitled to relief from the claims requirement if he or she was physically or mentally incapacitated, during the entire period for filing a claim, and by reason of that disability failed to present a claim during that time [*Gov. Code §§ 911.6(b)(3), 946.6(c)(3)*]. For example, a mentally ill claimant who was involuntarily confined as gravely disabled and was unable to communicate effectively with his attorney during the entire claim filing period was entitled to relief for failure to file a timely claim [*Baber v. Napa State Hosp. (1984) 154 Cal. App. 3d 514, 517-518, 201 Cal. Rptr. 432]* . The claimant's disability need not be the sole reason for the delay in presenting a claim, so long as it provides a substantial reason [*Baber v. Napa State Hosp. (1984) 154 Cal. App. 3d 514, 519, 201 Cal. Rptr. 432]* .

The claimant has the burden of showing physical or mental incapacity of a degree that prevents him or her from consulting with an attorney [*see* *Martin v. County of Madera (1968) 265 Cal. App. 2d 76, 80, 70 Cal. Rptr. 908* ; *but see* *Draper v. City of Los Angeles (1990) 52 Cal. 3d 502, 507-508, 276 Cal. Rptr. 864, 802 P.2d 367* (in light of plaintiff's serious and prolonged incapacity, Court supported liberal construction of statute; concurrence in judgment only)]. The claimant's status as a conservatee does not, in and of itself, establish the requisite incompetence [*Board of Regents v. Davis (1975) 14 Cal. 3d 33, 43, 120 Cal. Rptr. 407, 533 P.2d 1047* (conservatee retained capacity to contract)].

Once a claimant is aware that he or she has a claim against a public entity, the issue in determining whether or not the claimant was mentally incapacitated is not whether the claimant could look after his or her affairs as the claimant normally would, but whether the claimant was able to undertake the extraordinary steps such circumstances would require [*see* *Bennett v. City of Los Angeles (1970) 12 Cal. App. 3d 116, 121, 90 Cal. Rptr. 479* (emotional incapacity discussed in context of excusable neglect in failing to file claim)]. Even if a claimant's emotional trauma is not sufficient to establish physical or mental incapacity under *Gov. Code § 946.6(c)(3)*, it may nevertheless be grounds for granting relief based on excusable neglect under *Gov. Code § 946.6(c)(1)* [*see* *County of Santa Clara v. Superior Court (1971) 4 Cal. 3d 545, 552-554, 94 Cal. Rptr. 158, 483 P.2d 774* ; *see also 464.25[4][b][iii]*].

[e] Death

Late claim relief is available if the person who sustained the alleged injury, damage, or loss died before the expiration of the time in which to file a claim [*Gov. Code §§ 911.6(b)(4), 946.6(c)(4)*].

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[Reserved]

§§ 464.26[Reserved]

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§ 464.40 Governing Law

The law governing actions against public entities and public employees is set forth in *Gov. Code § 940 et seq.* Collateral source payments relating to personal injury and wrongful death actions are governed by *Gov. Code § 985*.

Legal Topics:

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§ 464.41 General Requirements for Filing Action Against Public Entity

[1] Claim as Condition Precedent

Except as provided in *Gov. Code §§ 946.4* and *946.6*, no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented under the Tort Claims Act until a written claim has been presented to the public entity and has been either acted on by the board or deemed to have been rejected by the board [*Gov. Code § 945.4*]. Thus, compliance with the claim requirement of *Gov. Code § 945.4* is a condition precedent to an action against the public entity [*Williams v. Horvath (1976) 16 Cal. 3d 834, 838, 129 Cal. Rptr. 453, 548 P.2d 1125* ; *Ridley v. City & County of San Francisco (1969) 272 Cal. App. 2d 290, 292, 293, 77 Cal. Rptr. 199]* . The claim requirement is discussed in detail in *§ 464.20* et seq.

[2] Action Barred if Claim Allowed

If a claim that is required to be presented to a public entity is presented and the board acts on it, the following rules apply [*Gov. Code § 946*]:

- If the claim is allowed in full and the claimant accepts the amount allowed, no suit may be maintained on any part of the cause of action to which the claim relates.

- If the claim is allowed in part and the claimant accepts the amount allowed, no suit may be maintained on the part of the cause of action that is represented by the allowed portion of the claim.

- If the claim is allowed in part, no suit may be maintained on any portion of the cause of action if, pursuant to a requirement of the board to that effect, the claimant has accepted the amount allowed in settlement of the entire claim.

[3] Allegations Must Conform to Claim

Actions alleging matters not set forth in the claim filed with the public entity are barred [*see, e.g.,* *Watson v. State of California (1993) 21 Cal. App. 4th 836, 844-845, 26 Cal. Rptr. 2d 262* (claim against state, based on theory that state refused to provide prisoner with medical care, could not support claim alleged in first amended complaint against state employees for medical malpractice); *Turner v. State of California (1991) 232 Cal. App. 3d 883, 888-891, 284 Cal. Rptr. 349* (claim alleging failure to warn or take adequate precautions against anticipated gang-related violence and reckless conduct of security guards could not support action alleging inadequate lighting); *Crow v. State of California (1990) 222 Cal. App. 3d 192, 201-202, 271 Cal. Rptr. 349* (claim describing assault could not support action based on contractual relationship); *Fall River Joint Unified Sch. Dist. v. Superior Court (1988) 206 Cal. App. 3d 431, 434-436, 253 Cal. Rptr. 587* (claim alleging dangerous condition of public property and negligent maintenance of school property did not support action for negligent supervision); *Donohue v. State of California (1986) 178 Cal. App. 3d 795, 804, 224 Cal. Rptr. 57* (claim alleging negligence in permitting uninsured motorist to take driving test cannot support action alleging negligence in failing to direct or control motorist during driving test); *State of California ex rel. Dep't of Transp. v. Superior Court (1984) 159 Cal. App. 3d 331, 335-337, 205 Cal. Rptr. 518* (allegation of property damage in claim could not support cause of action for personal injuries); *Nelson v. State of California (1982) 139 Cal. App. 3d 72, 80-81, 188 Cal. Rptr. 479* (claim alleging malpractice cannot be basis of action for failure to summon medical care)].

Furthermore, if a plaintiff relies on more than one theory of recovery against the governmental entity, each cause of action must have been reflected in the claim. The factual circumstances set forth in the claim also must correspond with the facts alleged in the complaint; if the complaint alleges a factual basis for recovery that is not fairly reflected in the claim, it is subject to demurrer [*Fall River Joint Unified Sch. Dist. v. Superior Court (1988) 206 Cal. App. 3d 431, 434, 253 Cal. Rptr. 587* ; *see* *Watson v. State of California (1993) 21 Cal. App. 4th 836, 844-845, 26 Cal. Rptr. 2d 262]* . For example, in a case in which the plaintiff presented a claim alleging a dangerous condition of public property and negligent maintenance of school property, a third cause of action alleging that the school district had negligently supervised students who were engaged in dangerous horseplay was not allowed. The negligent supervision theory was premised on an entirely different factual basis than that set forth in the tort claim [*Fall River Joint Unified Sch. Dist. v. Superior Court (1988) 206 Cal. App. 3d 431, 434-436, 253 Cal. Rptr. 587]* .

Although the allegations of the complaint must conform with the claim, an extremely narrow and limited construction of the language of the claim is not warranted in view of the policies served by the claims statute. Therefore, although the plaintiff may not completely shift the nature of the allegations in an effort to premise liability on acts or omissions committed at different times or by different persons than those described in the claim, the plaintiff may elaborate or add further detail to a claim, so long as the complaint is based on the same fundamental facts that were set forth in the claim [*White v. Superior Court (1990) 225 Cal. App. 3d 1505, 1511, 275 Cal. Rptr. 706* ; *Blair v. Superior Court (1990) 218 Cal. App. 3d 221, 226, 267 Cal. Rptr. 13* ; *see* *Stevenson v. San Francisco Hous. Auth. (1994) 24 Cal. App. 4th 269, 275-278, 29 Cal. Rptr. 2d 398]* .

For example, after denial of a bus driver's claim against a city alleging that a city police officer falsely arrested and imprisoned her, brutally beat her, and denied her medical attention, the driver sued the city on a variety of causes of action, including negligent hiring, training, and retention, and intentional failure to train, supervise, and discipline. The city objected to these two causes of action, arguing that the claim did not mention any alleged problems with the city's training, supervision, and discipline of its employees. The court of appeal held that the complaint and the claim were predicated on the same fundamental facts--the officer's alleged mistreatment of the bus driver. The two causes of action at issue were not shifts in the allegations, but sought to show the direct responsibility of the city for the officer's conduct [*White v. Superior Court (1990) 225 Cal. App. 3d 1505, 1511, 275 Cal. Rptr. 706* (distinguishing *Fall River,* which also sought to add allegations of negligent supervision, observing that claim in *Fall River* only alleged injuries were caused by defective door, without mentioning poor student supervision, whereas claim and suit in this case identified police officer as principal actor); *see also* *Stevenson v. San Francisco Hous. Auth. (1994) 24 Cal. App. 4th 269, 275-278, 29 Cal. Rptr. 2d 398* (although legal theories in complaint more detailed, written claim referred to decedent's fall in apartment and negligent maintenance of premises; additional details were elaborations of facts stated in claim].

If a party files an amended complaint in an attempt to avoid the defects of the original complaint by adding facts inconsistent with those of previous pleadings, the court may take judicial notice of prior pleadings and may disregard any inconsistent allegations [*Colapinto v. County of Riverside (1991) 230 Cal. App. 3d 147, 151, 281 Cal. Rptr. 191]* . In one case, for example, the court sustained a city's demurrer to a complaint based on its absolute immunity for injuries caused by firefighting activities and the condition of fire protection equipment. The plaintiffs filed an amended complaint alleging liability under *Veh. Code § 17001* (damage to property proximately caused by public employee's negligent act in operation of motor vehicle), based on the fire department's use of a forklift while fighting the fire. The court of appeal held that the amended complaint was subject to dismissal because its facts and theories were different from those alleged in the original claim [*Colapinto v. County of Riverside (1991) 230 Cal. App. 3d 147, 151-152, 152 n.1, 281 Cal. Rptr. 191]* .

[4] Prematurely Filed Complaints

If a complaint has been filed prematurely, before a claim has been acted on or rejected or before relief has been granted under *Gov. Code § 946.6*, the prematurely filed complaint substantially complies with the provisions of the Tort Claims Act and is not subject to dismissal [*Bahten v. County of Merced (1976) 59 Cal. App. 3d 101, 107, 130 Cal. Rptr. 539* ; *Cory v. City of Huntington Beach (1974) 43 Cal. App. 3d 131, 135-136, 117 Cal. Rptr. 475]* . Although a complaint that is filed before relief is granted under *Gov. Code § 946.6* technically does not meet the requirement of *Gov. Code § 945.4* that the claim be filed before suit is brought, in keeping with the liberal attitude that technical procedural requirements must be interpreted in a way that will not deprive a litigant of a day in court, courts have been very accommodating to plaintiffs [*see, e.g.,* *Bell v. Tri-City Hosp. Dist. (1987) 196 Cal. App. 3d 438, 444-445, 449, 241 Cal. Rptr. 796* ; *Savage v. State of California (1970) 4 Cal. App. 3d 793, 796, 84 Cal. Rptr. 650]* .

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§ 464.42 Time Periods for Filing Actions

[1] Determining Applicable Limitations Period

[a] Time Period Following Rejection of Claim

Except as provided in *Gov. Code §§ 946.4* and *946.6*, and subject to *Gov. Code § 945.6(b)* [*see § 464.42[2][b]*], any suit brought against a public entity on a cause of action for which a claim is required to be presented must be commenced within one of the following time periods [*Gov. Code § 945.6(a)*]:

- If written notice of rejection is given in accordance with *Gov. Code § 913*, not later than six months after the date that notice is personally delivered or deposited in the mail; or

- If written notice of rejection is not given in accordance with *Gov. Code § 913*, within two years after the accrual of the cause of action. If the period within which the public entity is required to act is extended by agreement under *Gov. Code § 912.4*, the period of such extension is not part of the time limit for the commencement of the action.

The two-year period applies if a public entity rejects an application to present a late claim without specifically rejecting the substance of the claim [*Paniagua v. Orange County Fire Authority (2007) 149 Cal. App. 4th 83, 88, 56 Cal. Rptr. 3d 746]* .

Gov. Code § 946.4, one of the exceptions specified by *Gov. Code § 945.6(a)*, provides generally that the failure to present a claim does not bar the maintenance of an action against a public agency that has failed to file a statement with the Roster of Public Agencies [*see § 464.48*]. *Gov. Code § 946.6*, the other exception specified by *Gov. Code § 945.6(a)*, pertains to relief from the claim requirement [*see § 464.42[1][b]*].

"Six months," as used in *Gov. Code § 945.6*, means the longer of either six calendar months or 182 days [*Gonzales v. County of Los Angeles (1988) 199 Cal. App. 3d 601, 604, 245 Cal. Rptr. 112]* .

If an amended claim is timely filed that relates to the same transaction or occurrence that gave rise to the original claim, the six-month period for filing suit generally runs from the time that the first claim is rejected [*Sofranek v. County of Merced (2007) 146 Cal. App. 4th 1238, 1248, 53 Cal. Rptr. 3d 426]* . However, a narrow exception to this rule has been recognized when a wrongful death claim is submitted without including all the necessary heirs. Because a wrongful death action that does not include all heirs is not authorized under the wrongful death statute, the six-month period for filing suit begins to run upon rejection of an amended claim, assuming it is timely filed, when the amendment is made to include all heirs [*Norwood v. S. Cal. Rapid Transit Dist. (1985) 164 Cal. App. 3d 741, 743-744, 211 Cal. Rptr. 6]* . In addition, if a government entity sends notice upon rejection of an amended claim that the claimant has six-months from rejection of the claim to file suit, the entity may be estopped from relying on rejection of the original claim for purposes of calculating the six-month period for filing suit [*Sofranek v. County of Merced (2007) 146 Cal. App. 4th 1238, 1251-1252, 53 Cal. Rptr. 3d 426]* . Estoppel is discussed in *§ 464.47*.

This six-month limitation period is mandatory, and the claimant must strictly comply with it [*Childs v. State of California (1983) 144 Cal. App. 3d 155, 159-160, 192 Cal. Rptr. 526]* . Other statutes of limitations that do not expressly extend the six-month period do not do so by implication. For example, a plaintiff who files a medical malpractice claim against a county hospital and who receives notice of rejection of that claim pursuant to *Gov. Code § 913* must file an action within six months or the action will be barred, even if the action is filed within the one-year limitation period of *Code Civ. Proc. § 340.5* applicable to malpractice actions [*Anson v. County of Merced (1988) 202 Cal. App. 3d 1195, 1199, 1202, 249 Cal. Rptr. 457]* . Moreover, the six-month period for filing an action applies even if the plaintiff is a minor and even if contrary to the provisions of *Code Civ. Proc. § 340.5*, which, for example, would otherwise permit a minor to bring an action against a health care provider at any time prior to his or her eighth birthday [*Martell v. Antelope Valley Hosp. Med. Ctr. (1998) 67 Cal. App. 4th 978, 981-983, 79 Cal. Rptr. 2d 329]* .

The tolling provisions of *Code Civ. Proc. § 352(a)* due to the plaintiff's minority or insanity, and the tolling provisions of *Code Civ. Proc. § 352.1(a)* pertaining to the plaintiff's imprisonment on a criminal charge or sentence, do not apply to an action against a public entity or public employee on a cause of action for which a claim must be presented [*Code Civ. Proc. §§ 352(b), 352.1(b)*]. For discussion of tolling provisions that do apply, see *§ 464.42[4]*.

In a personal injury action not involving negligence of a health-care provider, compliance with the provisions of the Tort Claims Act exempts a claimant from the provisions of *Code Civ. Proc. § 335.1*, which require that suit be filed within two years after the injury (one year after the injury under former *Code Civ. Proc. § 340(3)*, applicable before 2003) [*Schmidt v. Southern Cal. Rapid Transit Dist. (1993) 14 Cal. App. 4th 23, 30, 17 Cal. Rptr. 2d 340]* . However, a plaintiff suing a public entity hospital or employee for medical malpractice must meet the three-year limitations period of *Code Civ. Proc. § 340.5*, and failure to do so will provide a limitations defense for the defendant even if the plaintiff's action is otherwise timely under the Government Claims Act [*Roberts v. County of Los Angeles (2009) 175 Cal. App. 4th 474, 481, 96 Cal. Rptr. 3d 60]* .

The filing of a petition to perpetuate testimony or preserve evidence made under *Code Civ. Proc. § 2035.010 et seq.* does not constitute the filing of a suit for purposes of the six-month limitations period [*Orr v. City of Stockton (2007) 150 Cal. App. 4th 622, 629, 58 Cal. Rptr. 3d 662]* .

[b] Time Period if Plaintiff Granted Relief From Claim Requirement

Gov. Code § 946.6(f) provides a special period of limitation on actions that can be commenced only after relief from the claims presentation requirement is granted pursuant to *Gov. Code § 946.6* [*Brown v. Huntington Beach Union High Sch. Dist. (1971) 15 Cal. App. 3d 640, 646, 93 Cal. Rptr. 417]* . If the court issues an order relieving the claimant from the provisions of the claim requirement of *Gov. Code § 945.4*, suit on the cause of action to which the claim relates must be filed with the court within 30 days [*Gov. Code § 946.6(f)*].

The 30-day period is a statute of limitations that is strictly construed. The court, in granting the petition from relief, has no power to extend that period [*Rivera v. City of Carson (1981) 117 Cal. App. 3d 718, 726-727, 173 Cal. Rptr. 4* ; *see Tuolumne Air Serv., Inc. v. Turlock Irrigation Dist. (1978) 87 Cal. App. 3d 248, 251-252, 150 Cal. Rptr. 809]* . Usually, the 30-day period commences with the entry of the minute order granting relief, rather than with the later filing of a formal order [*Mandjik v. Eden Township Hosp. Dist. (1992) 4 Cal. App. 4th 1488, 1496-1497, 6 Cal. Rptr. 2d 582* ; *McHale v. State of California (1981) 125 Cal. App. 3d 396, 399, 178 Cal. Rptr. 83]* or with the receipt of the clerk's notification of the order [*Fritts v. County of Kern (1982) 135 Cal. App. 3d 303, 306-307, 185 Cal. Rptr. 212]* . However, if the court in the minute order directs the subsequent preparation and filing of a formal order, the 30-day period commences with the entry of the formal order [*County of Nevada v. Superior Court (1986) 183 Cal. App. 3d 806, 808-809, 228 Cal. Rptr. 447* (if local rule requires preparation and filing of formal order, court entering minute order deemed to have directed preparation of formal order)].

If a successful claimant files a complaint against the public entity within 30 days after the court has granted the petition for relief, the complaint is timely filed, even though it would otherwise be barred by the provisions of *Code Civ. Proc. § 335.1* because it is filed more than two years (before 2003, one year, under former *Code Civ. Proc. § 340(3)*) after the accrual of the cause of action [*Brown v. Huntington Beach Union High Sch. Dist. (1971) 15 Cal. App. 3d 640, 642-647, 93 Cal. Rptr. 417]* . If a complaint is already on file when the order granting such relief is made, the complaint, although prematurely filed, satisfies the provisions of *Gov. Code § 946.6(f)*, and the filing of an amended pleading alleging compliance with that statute is unnecessary [*Bahten v. County of Merced (1976) 59 Cal. App. 3d 101, 106-107, 130 Cal. Rptr. 539* ; *see also Bell v. Tri-City Hosp. Dist. (1987) 196 Cal. App. 3d 438, 444-445, 241 Cal. Rptr. 796* (premature complaint was effective, even though government entity was named in body of complaint but not in caption)].

If, however, the original complaint does not state a cause of action against the public entity and is not amended to state such a cause of action within the 30-day period set forth in *Gov. Code § 946.6(f)*, the plaintiff is foreclosed thereafter from maintaining an action to which the claim relates against the public entity [*Wilson v. People ex rel. Dep't of Pub. Works (1969) 271 Cal. App. 2d 665, 667-669, 76 Cal. Rptr. 906* ; *see also Ard v. County of Contra Costa (2001) 93 Cal. App. 4th 339, 346, 112 Cal. Rptr. 2d 886* ; *but see Bell v. Tri-City Hosp. (1987) 196 Cal. App. 3d 438, 443-444, 241 Cal. Rptr. 796]* . An exception to this rule has been recognized if the plaintiff can demonstrate that the public entity should be equitably estopped from relying on the limitations bar--for example, because the public entity took some action to deceive the plaintiff into missing the 30-day deadline [*see Ard v. County of Contra Costa (2001) 93 Cal. App. 4th 339, 346-348, 112 Cal. Rptr. 2d 886* (dismissal reversed to allow plaintiff to amend complaint to attempt to allege facts justifying estoppel)].

[c] Time Period if No Claim Required

Unless a different statute of limitations is specifically applicable to the public entity and except as provided in *Gov. Code §§ 930.6* (claims procedures established by agreement) and 935 (claims procedures established by public entity), any action against a public entity on a cause of action for which a claim is not required to be presented to the public entity must be commenced within the time prescribed by the statute of limitations that would be applicable if the action were brought against a defendant other than a public entity [*Gov. Code § 945.8*].

[2] Extension of Period

[a] Applicability of General Statutory Extensions

Code Civ. Proc. § 1013(a), which extends by five days any prescribed period for acting after service of a document by mail, does not apply to the six-month limitation period under *Gov. Code § 945.6*; the limitation period begins to run on the date the notice of rejection is deposited in the mail [*Cole v. Los Angeles Unified Sch. Dist. (1986) 177 Cal. App. 3d 1, 4-5, 222 Cal. Rptr. 426* ; *Smith v. City & County of San Francisco (1977) 68 Cal. App. 3d 227, 230-232, 137 Cal.*

Rptr. 146] . Nevertheless, the provisions of *Code Civ. Proc. § 12a*, extending the statute of limitations if the last day to file an action is a holiday, do apply to the *Gov. Code § 945.6(a)(1)* six-month period of limitation [*DeLeon v. Bay Area Rapid Transit Dist. (1983) 33 Cal. 3d 456, 457-461, 189 Cal. Rptr. 181, 658 P.2d 108]* .

[b] Extension for Imprisonment

If a person is unable to commence a suit on a cause of action on which a claim must be filed within the time prescribed by *Gov. Code § 945.6(a)* because he or she has been sentenced to imprisonment in a state prison, the time limit for the commencement of the suit is extended to six months after the date that the civil right to commence the action is restored to that person. The time is not extended, however, if the public entity establishes that the person failed to make a reasonable effort to commence the suit, or to obtain a restoration of the civil right to do so, before the expiration of the time prescribed by *Gov. Code § 945.6(a)* [*Gov. Code § 945.6(b)*]. A person sentenced to imprisonment in a state prison may not commence a suit on the cause of action unless he or she has complied with the claim presentation requirement [*Gov. Code § 945.6(c)*].

Also, under both state and federal law, a prisoner must exhaust administrative remedies before filing suit, and substantial compliance with this requirement is insufficient [*Wright v. State of California (2004) 122 Cal. App. 4th 659, 664-667, 19 Cal. Rptr. 3d 92* ; *see 42 U.S.C.S. § 1997e(a)* (federal requirement), 15 Cal. Code Reg. § 3804.1 et seq. (state administrative review procedures)]. This requirement applies even if the prisoner seeks only monetary damages that are unavailable through the administrative review process [*Wright v. State of California (2004) 122 Cal. App. 4th 659, 668, 19 Cal. Rptr. 3d 92]* .

If a prisoner files a civil action pro se against a government entity while the prisoner is still incarcerated, the complaint is deemed filed when the complaint is delivered to prison authorities for forwarding to the superior court [*Moore v. Twomey (2004) 120 Cal. App. 4th 910, 918, 16 Cal. Rptr. 3d 163]* .

[c] Extension in Medical Malpractice Actions

If a medical malpractice action is brought against a public entity and the notice of intention to commence a medical malpractice action filed pursuant to *Code Civ. Proc. § 364* is filed within 90 days after the expiration of the statutory period of limitation, the time for commencement of that action will be extended by 90 days [*see Code Civ. Proc. § 364(d)*; for discussion of *Code Civ. Proc. § 364*, see Ch. 295, *Hospitals*]. Accordingly, in some situations, an action for medical malpractice against a health care provider that is a public entity may be timely if filed six months plus 90 days after notice of rejection [*see Anson v. County of Merced (1988) 202 Cal. App. 3d 1195, 1204-1205, 249 Cal. Rptr. 457]* . Under some circumstances, the notice of intention to commence a medical malpractice action against a public entity may be treated as a claim under the Tort Claims Act [*see Phillips v. Desert Hosp. Dist. (1989) 49 Cal. 3d 699, 707-710, 263 Cal. Rptr. 119, 780 P.2d 349* ; *see also § 464.23[3][c][iii]*].

[3] Effect of Substitution for Fictitious "Doe" Defendants

Courts have disagreed on whether the Tort Claims Act's timeliness requirements are satisfied by filing a complaint with "Doe" defendants [*see Code Civ. Proc. § 474*] and substituting in a public entity after the expressed statutory time period has expired. One court held that although the general rule is that a defendant sued by a fictitious name and later brought into the case by an amendment substituting the true name is considered a party to the action from its commencement for purposes of the statute of limitations, this rule does not apply to the Tort Claims Act [*Chase v. State of California (1977) 67 Cal. App. 3d 808, 813-814, 136 Cal. Rptr. 833]* . In that case, the plaintiff intentionally failed to name as a defendant a known public entity against which the plaintiff had earlier presented a claim for personal injuries [*see Chase v. State of California (1977) 67 Cal. App. 3d 808, 813-814, 136 Cal. Rptr. 833]* . Another court accepted that holding, but carved an exception for actions against public employees [*Olden v. Hatchell (1984) 154 Cal. App. 3d 1032, 1036-1037, 201 Cal. Rptr. 715]* .

A third court distinguished a case in which the plaintiff was, in good faith, ignorant of the true identity of the defendant, but had substantially complied with the claims presentation requirements by fortuitously filing a claim with one public entity, filing a complaint naming that public entity and Doe defendants, and after the applicable two-year period had expired, substituting an additional public entity on learning of that public entity's jurisdiction. In this case, the substitution of a public entity for a Doe defendant related back to the filing of the original complaint and was, therefore, timely [*Carlino v. Los Angeles County Flood Control Dist. (1992) 10 Cal. App. 4th 1526, 1535-1536, 13 Cal. Rptr. 2d 437* (original complaint named county board of supervisors, who were directors of the flood county district; amendment substituted county flood control district for Doe defendant)].

For further discussion of the amendment of pleadings for substitution of a fictitiously named defendant, see Ch. 21, *Amended and Supplemental Pleadings* .

[4] Tolling of Limitations Period

[a] Criminal Charges Pending Against Plaintiff

No person charged by indictment, information, complaint, or other accusatory pleading charging a criminal offense may bring a civil action for money or damages against a law enforcement officer or the public entity employing a law enforcement officer based on conduct of the law enforcement officer relating to the offense for which the person is charged, including an act or omission in investigating or reporting the offense or in arresting or detaining the person, while the charges against the person are pending before a superior court [*Gov. Code § 945.3*]. Any applicable statute of limitations for filing and prosecuting these actions is tolled during the period that those charges are pending [*Gov. Code § 945.3*].

For purposes of *Gov. Code § 945.3*, a notice to appear served on the plaintiff constitutes an "accusatory pleading," regardless of whether that notice was ever filed with a court [*Schmidlin v. City of Palo Alto (2007) 157 Cal. App. 4th 728, 756, 69 Cal. Rptr. 3d 365*]. In addition, "charges pending before a court" includes any charges embodied in a notice to appear, as long as the charges have not yet been disposed of or defeated through prosecutorial inaction [*Schmidlin v. City of Palo Alto (2007) 157 Cal. App. 4th 728, 760, 69 Cal. Rptr. 3d 365*]. Criminal charges are "pending" until the date of judgment and sentence, not the date of conviction [*McAlpine v. Superior Court (1989) 209 Cal. App. 3d 1, 8, 257 Cal. Rptr. 32]* . Appeals or criminal proceedings diverted pursuant to *Penal Code §§ 1000 et seq., 1000.6 et seq., 1001 et seq., 1001.20 et seq.,* or *1001.50 et seq.* are not within the charges encompassed by *Gov. Code § 945.3* [*Gov. Code § 945.3*].

The purpose of *Gov. Code § 945.3* is to eliminate the use of civil damage complaints as plea bargaining levers, and possibly to prevent use of civil false arrest suits as a device to inquire into prosecutorial material and investigative information while the criminal charge is pending [*Damjanovic v. Ambrose (1992) 3 Cal. App. 4th 503, 508, 4 Cal. Rptr. 2d 560* (quoting from *McMartin v. County of Los Angeles (1988) 202 Cal. App. 3d 848, 855, 249 Cal. Rptr. 53*)]. The statute does not affect actions against civilian defendants, nor does it apply to causes of actions brought by a plaintiff who has not been charged with a criminal offense [*Damjanovic v. Ambrose (1992) 3 Cal. App. 4th 503, 510-511, 4 Cal. Rptr. 2d 560* (*Gov. Code § 945.3* did not toll running of time within which service of summons and complaint must be made under *Code Civ. Proc. § 583.210*; late service justified dismissal of action against civilian defendants)].

Gov. Code § 945.3 neither prohibits the filing of a claim nor extends the time within which a claim must be presented pursuant to *Gov. Code § 911.2* [*Gov. Code § 945.3*; *see § 464.23[4]*].

[b] Equitable Tolling

Although strict compliance with the prescribed statute of limitations for commencement of actions against a public entity is mandatory, the Tort Claims Act does not preclude application of the equitable tolling doctrine, the purpose of which is to soften the harsh impact of technical rules that might otherwise prevent a good faith litigant from having a day in court [*see, e.g.,* *Addison v. State of California (1978) 21 Cal. 3d 313, 316, 146 Cal. Rptr. 224, 578 P.2d 941* ; *Loehr v. Ventura County Cmty. Coll. Dist. (1983) 147 Cal. App. 3d 1071, 1084, 195 Cal. Rptr. 576]* . Equitable tolling is based on the rationale that a plaintiff should not be barred by a statute of limitations unless the defendant would be unfairly prejudiced [*Collier v. City of Pasadena (1983) 142 Cal. App. 3d 917, 923, 191 Cal. Rptr. 681]* . Generally, it applies if a claimant has several legal remedies available and, reasonably and in good faith, pursues one designed to lessen the extent of the injury or damages [*Addison v. State of California (1978) 21 Cal. 3d 313, 317-321, 146 Cal. Rptr. 224, 578 P.2d 941* (period tolled during plaintiff's tort action in federal court); *McAlpine v. Superior Court (1989) 209 Cal. App. 3d 1, 5-6, 257 Cal. Rptr. 32* (period tolled during plaintiff's tort action in federal court); *Collier v. City of Pasadena (1983) 142 Cal. App. 3d 917, 923-926, 191 Cal. Rptr. 681* (period tolled pending disability claim)].

The three factors necessary to invoke the doctrine of equitable tolling are: (1) timely notice to the defendant in pursuing the first remedy; (2) lack of prejudice to the defendant in gathering evidence to defend against the second action (the tort action--usually, the defendant is the same in both instances); and (3) good faith and reasonable conduct by the plaintiff in filing the second action [*Addison v. State of California (1978) 21 Cal. 3d 313, 319, 146 Cal. Rptr. 224, 578 P.2d 941* ; *Loehr v. Ventura County Cmty. Coll. Dist. (1983) 147 Cal. App. 3d 1071, 1085, 195 Cal. Rptr. 576* ; *Collier v. City of Pasadena (1983) 142 Cal. App. 3d 917, 924, 191 Cal. Rptr. 681]* .

A claimant's failure to comply with the six-month period because of his or her pursuit of a federal civil rights action under *42 U.S.C.S. § 1983* does not invoke the doctrine of equitable tolling [*Loehr v. Ventura County Cmty. Coll. Dist. (1983) 147 Cal. App. 3d 1071, 1085-1086, 195 Cal. Rptr. 576* ; for discussion of *42 U.S.C.S. § 1983* actions, see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGovernmental EntitiesTortsProcedureStatutes of LimitationsAccrual of ActionsDiscovery RuleTortsProcedureStatutes of LimitationsTollingGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationTime LimitationsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural Requirements

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§ 464.43 Pleading Requirements

Because recovery against a public entity is based on statute, the complaint must set forth facts sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied. General allegations are inadequate [*Mittenhuber v. City of Redondo Beach (1983) 142 Cal. App. 3d 1, 5, 190 Cal. Rptr. 694]* . For example, a complaint against a public entity based on a dangerous condition of public property must satisfy *Gov. Code § 835*, the basis for public entity liability for dangerous conditions of public property [*Mittenhuber v. City of Redondo Beach (1983) 142 Cal. App. 3d 1, 4-5, 190 Cal. Rptr. 694* ; for discussion of dangerous conditions of public property, *see § 464.80* et seq.].

A complaint that is insufficiently specific in its factual allegations not only prevents the public entity from determining the theory under which the plaintiff is seeking relief, but also prevents the public entity from determining whether the complaint varies from the plaintiff's claim [*People ex rel. Dep't of Transp. v. Superior Court (1992) 5 Cal. App. 4th 1480, 1484-1486, 7 Cal. Rptr. 2d 498* (merely placing "X" in box on Judicial Council form of complaint for personal injury may not be sufficient)].

Facts supporting separate theories of liability must be stated separately [*Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 939, 101 Cal. Rptr. 568, 496 P.2d 480]* . The plaintiff must also plead facts sufficient to show that the cause of action lies outside the scope of any applicable statutory immunity [*Giannuzzi v. State of California (1993) 17 Cal. App. 4th 462, 467, 21 Cal. Rptr. 2d 335* ; *Keyes v. Santa Clara Valley Water Dist. (1982) 128 Cal. App. 3d 882, 886, 180 Cal. Rptr. 586]* .

Because submission of a claim to a public entity is a condition precedent to filing suit against that entity [*see Gov. Code § 945.4*], the California Supreme Court has held that a plaintiff must either allege in the complaint facts demonstrating that the plaintiff has complied with the claim presentation requirement or allege in the complaint facts excusing such compliance [*State of California v. Superior Court (2004) 32 Cal. 4th 1234, 1239-1243, 13 Cal. Rptr. 3d 534, 90 P.3d 116]* . The plaintiff's failure to do so subjects the complaint to a general demurrer for failure to state facts sufficient to constitute a cause of action [*State of California v. Superior Court (2004) 32 Cal. 4th 1234, 1243, 13 Cal. Rptr. 3d*

534, 90 P.3d 116] .

If a complaint shows on its face that the cause of action is apparently barred by the statute of limitations, the plaintiff must plead facts showing a ground for suspension, delayed accrual, or application of another theory for avoidance of the statute [*County of Alameda v. Superior Court (1987)195 Cal. App. 3d 1283, 1286-1287, 241 Cal. Rptr. 312* (failure to do so subjects complaint to general demurrer)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationContent & FormTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural Requirements

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§ 464.44 Venue

[1] Actions Against State

The proper court for trial of actions against the state for the taking or damaging of private property for public use is a court of competent jurisdiction in the county in which the property is situated. Except as provided in *Gov. Code §§ 955.2* (venue in actions for death or injury to persons or personal property) and 955.3 (venue in actions by local agencies against the state), on written demand of the Attorney General made on or before answering, the place of trial in all other actions must be changed to Sacramento County [*Gov. Code § 955*].

Notwithstanding any other provision of law, if the state is named as a defendant in any action or proceeding for death or injury to person or personal property and the injury or the injury causing death occurred within California, the proper court for the trial of the action is a court of competent jurisdiction in the county where the injury occurred or where the injury causing death occurred. The court may, on motion, change the place of the trial in the same manner and under the same circumstances as in an action between private parties [*Gov. Code § 955.2*; for discussion of the transfer of actions for trial, *see* Ch. 571, *Venue*]. The state is entitled to have the action transferred to the county where the injury occurred even though other defendants are residents of the county where the action was filed [*State v. Superior Court of Los Angeles County (1967) 252 Cal. App. 2d 637, 640-644, 60 Cal. Rptr. 653]* .

[2] Actions Against Local Public Entity

An action against a county, city and county, city, or local agency may be tried in that county or the county in which that city or local agency is situated. If an action is brought in any other county, the public entity has the right, on its motion, to have trial transferred to a county in which no plaintiff resides, is doing business, or is situated, except that trial cannot be transferred to the county in which the public entity is situated. However, if the action against a public entity is based on injury to person, property, or both, occurring within the public entity or within the county in which the public entity is situated, and resulting from the negligence or alleged negligence of the public entity or its agents or employees, the action must be tried in that county or the county in which the public entity is situated. In any of these actions, the parties may, by stipulation made in writing or in open court, and entered into the minutes, agree on any county for the place of

the trial [*see Code Civ. Proc. § 394(a)*].

For purposes of *Code Civ. Proc. § 394*, the term "local agency" means any governmental district, board, or agency, or any other local governmental body or corporation, but does not include the State of California or any of its agencies, departments, commissions, or boards [*Code Civ. Proc. § 394(c)*; *see Golden Gate Bridge, Highway & Transp. Dist. v. Superior Court (2004) 125 Cal. App. 4th 177, 184, 22 Cal. Rptr. 3d 558* (bridge district was local agency entitled to transfer of venue to neutral county)].

Although court of appeal opinions are split on the issue, the more recent majority view holds that *Code Civ. Proc. § 394(a)* applies to a cross-complaint just as it does to a complaint [*compare Kennedy/Jenks Consultants, Inc. v. Superior Court (2000) 80 Cal. App. 4th 948, 954-957, 95 Cal. Rptr. 2d 817 , and Ohio Cas. Ins. Group v. Superior Court (1994) 30 Cal. App. 4th 444, 448-449, 35 Cal. Rptr. 2d 771 , with City of Chico v. Superior Court (1979) 89 Cal. App. 3d 187, 188-192, 152 Cal. Rptr. 380]* . This majority view has been applied even when the cross-complaint is filed only against the original plaintiff in the action, rather than against a third-party, and the cross-complaint was compulsory, although in that particular case the plaintiff had no choice as to venue when filing the original complaint [*Metropolitan Transit System v. Superior Court (2007) 153 Cal. App. 4th 293, 302, 62 Cal. Rptr. 3d 517]* .

The venue provisions of *Code Civ. Proc. § 394* are not jurisdictional [*Newman v. County of Sonoma (1961) 56 Cal. 2d 625, 627-628, 15 Cal. Rptr. 914, 364 P.2d 850]* . Moreover, an action against a county and an individual brought in the county of the individual defendant's residence cannot be transferred to the defendant county because the plaintiff is entitled, under *Code Civ. Proc. § 395*, to sue in the residence of any defendant [*Channell v. Superior Court (1964) 226 Cal. App. 2d 246, 250-253, 38 Cal. Rptr. 13]* .

Although venue in a certain county is mandated by *Code Civ. Proc. § 394*, a party is not prevented from seeking a change of venue pursuant to *Code Civ. Proc. § 397(b)* if it appears that an impartial trial cannot be had in that county [*see Paesano v. Superior Court (1988) 204 Cal. App. 3d 17, 19-20, 250 Cal. Rptr. 842* (mandatory removal language of *Code Civ. Proc. § 394* does not take precedence over and prohibit discretionary removal pursuant to *Code Civ. Proc. § 397*)]. For discussion of a change of venue motion on these grounds, see Ch. 571, *Venue* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewTortsProcedureCommencement & ProsecutionVenueTortsPublic Entity LiabilityLiabilityState Tort Claims ActsJurisdictionTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural RequirementsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsVenue

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§ 464.45 Service of Summons

[1] Actions Against State

Except as provided in *Gov. Code §§ 955.6* and *955.8*, service of summons in all actions on claims against the state must be made on the Attorney General [*Gov. Code § 955.4(a)*]. In actions for the taking or damaging of private property for public use within the meaning of *Cal. Const. art. I, § 19*, on claims arising out of work done by the Department of Transportation, service of summons must be made on the Attorney General or the Director of Transportation [*Gov. Code § 955.6(a)*]. In actions for the taking or damaging of private property for public use within the meaning of *Cal. Const. art. I, § 19*, on claims arising out of work done by the Department of Water Resources, service of summons must be made on the Attorney General or the Director of Water Resources [*Gov. Code § 955.8* (erroneously refers to former *Cal. Const., art. I § 14*, which was repealed)].

[2] Actions Against Other Public Entity

[a] Proper Recipient

A summons may be served on a public entity by delivering a copy of the summons and of the complaint to the clerk, secretary, president, presiding officer, or other head of its governing body [*Code Civ. Proc. § 416.50(a)*]. As used in *Code Civ. Proc. § 416.50*, the term "public entity" includes the state; any office, department, division, bureau, board, commission, or agency of the state; the Regents of the University of California; a county, city, district, public authority, or public agency; and any other political subdivision or public corporation in the state [*Code Civ. Proc. § 416.50(b)*]. For discussion of general service requirements and procedures, see Ch. 518, *Service of Summons and Papers* .

[b] Service in Conformity With Statement

Service of process in an action against a public agency may be made in conformity with the information contained in the statement in the Roster of Public Agencies pertaining to that public agency that is on file at the time of that service. Service in this manner, if otherwise made in compliance with law, constitutes personal service on the public agency [

Gov. Code § 960.8]. "Statement in the Roster of Public Agencies" means the statement or amended statement in the Roster of Public Agencies in the office of the Secretary of State or in the office of the county clerk of any county in which that statement or amended statement is on file [*Gov. Code § 960.8*; *see § 464.48*].

As used in *Gov. Code §§ 960.2*, *960.3*, and *960.8*, the term "public agency" means a district, public authority, public agency, and any other political subdivision or public corporation in the state, but does not include the state or a county, city and county, or city [*Gov. Code §§ 960, 53050*].

[c] Service if No Accurate Statement on File

Notwithstanding any provision of law to the contrary, service of process in an action against a public agency may be made in the manner provided in *Gov. Code § 960.3* if, during the 10 days immediately following the commencement of the action, one of the following situations exists [*Gov. Code § 960.2*]:

- No statement pertaining to the public agency is on file or is placed on file in the Roster of Public Agencies in the office of the Secretary of State and of the county clerk of each county in which the public agency then maintains an office, as required by *Gov. Code § 53051*;

- A statement or amended statement pertaining to the public agency is on file, or is placed on file, in the Roster of Public Agencies in the office of the Secretary of State and of the county clerk of each county in which the public agency then maintains an office, but the information contained in the statement is so inaccurate or incomplete that it does not substantially conform to the requirements of *Gov. Code § 53051*; or

- A statement or amended statement pertaining to the public agency is on file, or is placed on file, in the Roster of Public Agencies in the office of the Secretary of State and of the county clerk of each county in which the public agency then maintains an office, but neither the governing body nor any officer or agent of the public agency on whom personal service of process constitutes service on the public agency can thereafter, with due diligence, be personally served at the address or addresses set forth in the statement.

If it is shown by affidavit to the satisfaction of the court that the circumstances required by *Gov. Code § 960.2* exist, the court or judge may make an order that service of process be made on the public agency as provided in *Gov. Code § 960.3* [*Gov. Code § 960.3(a)*]. Service of process must be made by one of the following methods [*Gov. Code § 960.3(b)*]:

- Leaving two copies of the process for each public agency to be served, together with two copies of the order authorizing the service, in the hands of the Secretary of State or in his or her office at Sacramento; or

- Mailing two copies of the process for each public agency to be served, together with two copies of the order authorizing the service to the office of the Secretary of State in Sacramento by certified or registered mail, addressee only, return receipt requested. Service is effective as of the day the return receipt is received from the office of the Secretary of State.

Service as provided in *Gov. Code § 960.3* constitutes personal service on the public agency [*Gov. Code § 960.3(c)*]. Service in this manner requires the plaintiff to pay a fee of $50 to the Secretary of State for each public agency so served [*Gov. Code § 960.3(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessMethodsService Upon AgentsTortsPublic Entity LiabilityLiabilityClaim PresentationContent & FormTortsPublic Entity LiabilityLiabilityState Tort Claims ActsJurisdictionTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural Requirements

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§ 464.46 Filing Action Against Public Employee

[1] Claim Against Public Entity as Condition Precedent

[a] General Rule

Except as provided in *Gov. Code § 950.4*, a cause of action against a public employee or former public employee for injury resulting from an act or omission in the scope of his or her employment as a public employee is barred if an action against the employing public entity is barred under *Gov. Code § 900 et. seq.* (claims against public entities) or under *Gov. Code § 945 et seq.* (actions against public entities) [*Gov. Code § 950.2*]. Therefore, under *Gov. Code § 950.2*, a claim must be filed against the employing public entity as a condition precedent to an action against the public employee [*Williams v. Horvath (1976) 16 Cal. 3d 834, 838, 129 Cal. Rptr. 453, 548 P.2d 1125* ; *Mazzola v. Feinstein (1984) 154 Cal. App. 3d 305, 310, 201 Cal. Rptr. 148* ; *see also § 464.46[2]*].

Under *Gov. Code § 950.2*, an action against a public employee or former employee is barred if an action against the entity is barred not only by the plaintiff's failure to present any claim at all, but also by presenting a claim that is insufficient, too late, or for other reasons is inadequate to support an action against the employing public entity [7 Cal. L. Rev. Comm. Reports 401 (1965)]. Similarly, if a suit against a public entity is barred by the applicable statute of limitations or by any other provision of *Gov. Code § 945 et seq.* dealing with actions against public entities, an action against the public employee or former employee is also barred [7 Cal. L. Rev. Comm. Reports 401 (1965)]. The requirements of *Gov. Code § 950.2* are applicable even though the public entity itself is immune from liability for the injury [*Gov. Code § 950.2*].

If a written claim for money or damages for injury has been presented to the employing public entity, a cause of action for that injury may not be maintained against the public employee or former public employee whose act or omission caused that injury, until the claim has been rejected or deemed to have been rejected in whole or in part by the public entity [*Gov. Code § 950.6(a)*].

[b] Exception for Lack of Knowledge of Involvement of Public Entity or Employee

A cause of action against a public employee or former public employee is not barred by *Gov. Code § 950.2* if the plaintiff pleads and proves that he or she did not know or have reason to know, within the period for the presentation of a claim to the employing public entity as prescribed by *Gov. Code § 911.2* or by such other claims procedure as may be applicable, that the injury was caused by an act or omission of the public entity or by an act or omission of an employee of the public entity in the scope of his or her employment as a public employee [*Gov. Code § 950.4*]. In other words, a claimant who does not file a timely claim with the public entity is not barred from proceeding against a public employee if the claimant can prove that during the initial period for presentation of a claim based on accrual of the claimant's cause of action, the claimant was ignorant of the involvement of a public entity or public employee. However, this exception applies only to claims against public employees and not to claims against public entities [*Moore v. Morhar (1977) 65 Cal. App. 3d 896, 901-902, 135 Cal. Rptr. 626]* .

[c] Determining Scope of Employment

For purposes of *Gov. Code § 950.2*, a public employee is acting in the course and scope of employment if that employee is engaged in work that he or she was employed to perform or if the act is an incident of his or her duty and was performed for the benefit of the employer and not to serve the employee's own purposes or conveniences [*Neal v. Gatlin (1973) 35 Cal. App. 3d 871, 875, 111 Cal. Rptr. 117* ; for further discussion of scope of employment, *see* Ch. 248, *Employer's Liability for Employee Torts*].

[2] Claim Against Public Employee Not Required

A plaintiff does not need to file a claim against the individual public employee as a condition precedent to an action against him or her for injury resulting from an act or omission in the scope of his or her employment as a public employee [*see Gov. Code § 950*; 4 Cal. L. Rev. Comm. Reports 1001 (1963)]. Furthermore, any provision of a charter, ordinance, or regulation adopted by a local public entity that requires the presentation of a claim as a prerequisite to the maintenance of an action against a public employee to enforce his or her personal liability is invalid [*Gov. Code § 950.8*].

[3] Limitations Period

If a written claim for money or damages for injury has been presented to the employing public entity, a suit against the public employee or former public employee for that injury must be commenced within the time prescribed by *Gov. Code § 945.6* for bringing an action against the public entity [*Gov. Code § 950.6(b)*; for discussion of *Gov. Code § 945.6, see § 464.42[1][a]*].

If a person is unable to commence the suit within the time prescribed by *Gov. Code § 945.6* because he or she has been sentenced to imprisonment in a state prison, the time limit for the commencement of that suit is extended to six months after the date that the civil right to commence that action is restored to that person, except that the time is not extended if the public employee or former public employee establishes that the plaintiff failed to make reasonable effort to commence the suit, or to obtain a restoration of the civil right to do so, before the expiration of the prescribed time [*Gov. Code § 950.6(c)*].

[4] Venue

The county in which the cause, or some part of the cause, arose is the proper county for trial of an action against a public officer or person specially appointed to execute his or her duties, for an act done by him or her in the course of employment. This county is also the proper venue for an action against a person who, by command of a public officer or in his or her aid, does anything touching the duties of that officer [*Code Civ. Proc. § 393(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGovernmental EntitiesGovernmentsLocal GovernmentsClaims By & AgainstTortsPublic Entity LiabilityLiabilityClaim PresentationGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationContent & FormTortsPublic Entity LiabilityLiabilityClaim PresentationTime LimitationsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsJurisdictionTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural Requirements

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§ 464.47 Estoppel

[1] Estoppel as Relief From Failure to File Claim or Meet Limitations Period

Under certain circumstances, a public entity may be estopped to rely on the plaintiff's noncompliance with the claim requirements or the plaintiff's failure to meet the applicable statute of limitations as a defense to an action brought against it. For example, if the claimant was misled by government agents regarding the procedural and time requirements of the claims statutes or if the public entity has acted in an unconscionable manner, estoppel may apply [*Fredrichsen v. City of Lakewood (1971) 6 Cal. 3d 353, 357, 359, 99 Cal. Rptr. 13, 491 P.2d 805]* . Estoppel may also apply if acts of violence or intimidation were committed with the intention of preventing the filing of a claim [*John R. v. Oakland Unified Sch. Dist. (1989) 48 Cal. 3d 438, 445, 256 Cal. Rptr. 766, 769 P.2d 948* ; *see, e.g., Ortega v. Pajaro Valley Unified Sch. Dist. (1998) 64 Cal. App. 4th 1023, 1050-1056, 75 Cal. Rptr. 2d 777]* .

Estoppel on this basis may even be based on the unauthorized actions of one the entity's employees. For example, in a case alleging the sexual molestation of a 14-year-old boy by his teacher in an officially sanctioned, extracurricular program, alleged threats by the teacher of retaliation against the student if he reported the incidents were sufficient to require the trial court to render a factual determination on the applicability of estoppel [*John R. v. Oakland Unified Sch. Dist. (1989) 48 Cal. 3d 438, 444-446, 256 Cal. Rptr. 766, 769 P.2d 948* (for purposes of equitable estoppel, court concluded that time for filing claim against district was tolled during period that teacher's threats prevented plaintiff from pursuing claim; case remanded for trial court to determine if teacher in fact made any threats, when effect of threats ceased, and whether plaintiffs acted within reasonable time after coercive effect of threats ended)].

Similarly, in a case alleging sexual molestation of an 11-year-old child by his teacher during a school field trip, a court of appeal held that a teacher's directive to the child not to tell anyone about it was a sufficient inducement of delay to invoke an estoppel [*Christopher P. v. Mojave Unified Sch. Dist. (1993) 19 Cal. App. 4th 165, 170-173, 23 Cal. Rptr. 2d 353* (appeal from trial court's denial of petition under *Gov. Code § 946.6*; case remanded for trial court to determine: (1) if directive or admonition not to tell was made in conjunction with alleged molestation; (2) when effect of admonition coupled with molestation ceased; and (3) whether claimant acted within reasonable time, not to exceed one

year, after delay-inducing effect of molestation and directive ended)].

In another case in which the court of appeal held that equitable estoppel was appropriate, a school guidance counselor sexually molested a boy beginning in junior high school and continuing until after the boy was out of high school. The counselor continually threatened to humiliate the boy publicly, and because the threats actually deterred the boy from reporting the abuse even after he graduated from school, application of the estoppel doctrine extended until the abuse was exposed publicly, the boy was enrolled in a witness protection program, and the boy began to receive counseling from a psychotherapist [*Doe v. Bakersfield City School Dist. (2006) 136 Cal. App. 4th 556, 571-573, 39 Cal. Rptr. 3d 79]* .

The court of appeal has also held that courts may equitably grant additional time for the accrual of molestation claims by minors who, because of their young age, inexperience, ignorance, or other vulnerabilities, were unable at the time of the assault to comprehend the wrongfulness of the conduct [*Curtis T. v. County of Los Angeles (2004) 123 Cal. App. 4th 1405, 1421, 21 Cal. Rptr. 3d 208]* . In that particular case, the court also noted that the plaintiff, who was between the ages of five and eight when the molestation occurred, alleged that his foster parent saw the molestation and took no action to prevent it, which could reinforce in the mind of a young child that the conduct was not wrongful [*Curtis T. v. County of Los Angeles (2004) 123 Cal. App. 4th 1405, 1422, 21 Cal. Rptr. 3d 208]* .

Although the existence of estoppel is generally a question of fact, if the evidence is not in conflict and is susceptible of only one reasonable inference, the existence of an estoppel against the public entity is a question of law [*Johnson v. San Diego Unified Sch. Dist. (1990) 217 Cal. App. 3d 692, 701, 266 Cal. Rptr. 187]* .

[2] Elements of Estoppel

A plaintiff in an action against a public entity must prove four elements to assert successfully that the public entity is estopped to claim the plaintiff's noncompliance with the claims statutes as a defense [*Elmore v. Oak Valley Hosp. Dist. (1988) 204 Cal. App. 3d 716, 724, 251 Cal. Rptr. 405]* :

- The public entity was apprised of the facts;

- The public entity intended that its conduct be acted on, or acted in such a way that the plaintiff had a right to believe it was so intended;

- The plaintiff was ignorant of the true facts [*see* *Cole v. City of Los Angeles (1986) 187 Cal. App. 3d 1369, 1374-1375, 232 Cal. Rptr. 624* (element of ignorance of true state of facts not satisfied unless party claiming estoppel did not have notice of facts sufficient to put reasonably prudent person on notice that inquiry should be made that would have cured ignorance)]; and

- The plaintiff relied on the public entity's conduct to his or her injury.

Estoppel usually requires some affirmative representation or act by the public entity inducing reliance by the claimant [*see* Tammen v. County of San Diego *Tammen v. County of San Diego (1967) 66 Cal. 2d 468, 480, 58 Cal. Rptr. 249, 426 P.2d 753* ; *see also* *John R. v. Oakland Unified Sch. Dist (1989) 48 Cal. 3d 438, 445, 256 Cal. Rptr. 766, 769 P.2d 948* (estoppel most common as result of misleading statements about need for or advisability of claim)]. The reliance must be reasonable [*see* *Life v. County of Los Angeles (1991) 227 Cal. App. 3d 894, 902, 278 Cal. Rptr. 196* (attorney's reliance on advice of medical records clerk was not sufficiently reasonable to estop county from relying on noncompliance with claims statutes)]. Estoppel usually cannot be established if there are no such misrepresentations or promises [*see* *Tubbs v. Southern Cal. Rapid Transit Dist. (1967) 67 Cal. 2d 671, 678-679, 63 Cal. Rptr. 377, 433 P.2d 169]* . Furthermore, the doctrine of estoppel cannot be applied to one public entity based on the actions of another public entity if there is no agency relationship between the entities in the context of civil liability [*Johnson v. San*

Diego Unified Sch. Dist. (1990) 217 Cal. App. 3d 692, 700-701, 266 Cal. Rptr. 187] .

[3] Factors Considered by Court

Courts consider the following factors to determine whether or not the actions of a public entity are sufficiently culpable to warrant estoppel [*Fredrichsen v. City of Lakewood (1971) 6 Cal. 3d 353, 358, 99 Cal. Rptr. 13, 491 P.2d 805]* :

- Whether the inaccurate advice or information is negligently asserted;
- Whether or to what extent the public entity is certain of the information it dispenses;
- Whether the entity purports to advise and direct or merely to inform and respond to inquiries;
- Whether the entity acts in bad faith;
- Whether the claimant is one who purports to have no knowledge or training that would aid the claimant in determining his or her rights and the entity purports to be informed and knowledgeable; [*see, e.g.,* *Jordan v. City of Sacramento (2007) 148 Cal. App. 4th 1487, 1499, 56 Cal. Rptr. 3d 641* (estoppel inappropriate when claimant had already hired attorney, who was allegedly misled when public entity claimed it was not legally responsible for site of accident)]
- Whether the right of which the claimant is being deprived is significant; and
- Whether a confidential relationship exists between the claimant and the public entity.

A plaintiff may not assert estoppel as an excuse for the failure to present a late claim if the basis for the estoppel is predicated on facts that would constitute a ground for granting a petition for relief under *Gov. Code § 946.6(c)(1)-(4)* [*see* *Kendrick v. City of La Mirada (1969) 272 Cal. App. 2d 325, 329-330, 77 Cal. Rptr. 444* ; for discussion of *Gov. Code § 946.6(c)(1)-(4), see § 464.25[4]*].

[4] Misleading Acts of Public Entity

Whether the actions of the public entity were misleading to the plaintiff is determined by the facts of the case. In one case, for example, the board of a public entity, in denying an application for leave to present a late claim, warned the plaintiff that he had six months to file an action on the rejected claim. The board misled the plaintiff into believing that the board had rejected his claim, rather than his application for leave to present a late claim. Accordingly, the public entity was estopped to rely on the plaintiff's failure to file a petition under *Gov. Code § 946.6* for relief from the claim-filing requirements [*McLaughlin v. Superior Court (1972) 29 Cal. App. 3d 35, 40, 105 Cal. Rptr. 384* ; for discussion of a petition under *Gov. Code § 946.6, see § 464.25[3]*]. Moreover, a public entity is required to identify itself as such, including identification as a public entity on all letterhead stationery. However, unless it misleads the plaintiff, the plaintiff has the burden of ascertaining its status as a public entity. A public entity has no duty to inform potential claimants of the necessity of filing a timely claim [*Shank v. County of Los Angeles (1983) 139 Cal. App. 3d 152, 156-157, 188 Cal. Rptr. 644* ; *see Gov. Code § 7530* (identification as public entity)].

A public entity is estopped to raise the statute of limitations if its conduct induces the plaintiff not to file the complaint on time by leading the plaintiff to believe that his or her complaint was being reconsidered and that if it was rejected, that a written rejection would be given [*Potstada v. City of Oakland (1973) 30 Cal. App. 3d 1022, 1028, 1029, 106 Cal. Rptr. 705]* , or by requesting that the plaintiff's attorney not file a complaint until a medical report is received, which report was not received until after the statute had run [*Sumrall v. City of Cypress (1968) 258 Cal. App. 2d 565, 569-571, 65 Cal. Rptr. 755]* . A plaintiff cannot establish estoppel, however, if his or her attorney filed the complaint

late because of a mistake regarding the applicable statute of limitations rather than in reliance on action of the public entity [*Isaacson v. City of Oakland (1968) 263 Cal. App. 2d 414, 419, 69 Cal. Rptr. 379]* .

If an amended claim is timely filed that relates to the same transaction or occurrence that gave rise to the original claim, the six-month period for filing suit generally runs from the time that the first claim is rejected [*Sofranek v. County of Merced (2007) 146 Cal. App. 4th 1238, 1248, 53 Cal. Rptr. 3d 426]* . However, if a government entity sends notice upon rejection of an amended claim that the claimant has six months from rejection of the claim to file suit, the entity may be estopped from relying on rejection of the original claim for purposes of calculating the six-month period for filing suit [*Sofranek v. County of Merced (2007) 146 Cal. App. 4th 1238, 1251-1252, 53 Cal. Rptr. 3d 426]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsEquitable EstoppelTortsPublic Entity LiabilityLiabilityClaim PresentationGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationContent & FormTortsPublic Entity LiabilityLiabilityClaim PresentationTime LimitationsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural Requirements

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§ 464.48 Effect of Insufficient Statement of Public Agency on Plaintiff's Right to Sue

If provision is made by or pursuant to law that no suit may be brought against a public agency unless and until a claim is presented to the agency, the failure topresent a claim does not constitute a bar or defense to the maintenance of a suit against that public agency if, during the 70 days immediately following the accrual of the cause of action, either of the following is true [*Gov. Code § 946.4(a)*]:

- No statement pertaining to the public agency is on file, or is placed on file, in the Roster of Public Agencies in the office of the Secretary of State and of the county clerk of each county in which the public agency then maintains an office, as required by *Gov. Code § 53051*; or

- A statement or amended statement pertaining to the public agency is on file, or is placed on file, in the Roster of Public Agencies in the office of the Secretary of State and of the county clerk of each county in which the public agency then maintains an office, but the information contained in it is so inaccurate or incomplete that the statement does not substantially conform to the requirements of *Gov. Code § 53051*.

On any question of fact arising within the scope of *Gov. Code § 946.4(a)*, the burden of proof is on the public agency [*Gov. Code § 946.4(b)*]. In this context, the term "public agency" means a district, public authority, public agency, and any other political subdivision or public corporation in the state, but does not include the state, a county, city and county, or city [*Gov. Code § 946.4(a)*; *see Gov. Code § 53050*; *see also Lundeen Coatings Corp. v. Department of Water & Power (1991) 232 Cal. App. 3d 816, 830 n.8, 283 Cal. Rptr. 551* (city department is within definition of "city")].

A claimant who has actually presented a claim with the proper public agency may not raise the failure of that public agency to file the required statement to extend the statute of limitations [*Tubbs v. Southern Cal. Rapid Transit Dist. (1967) 67 Cal. 2d 671, 676, 63 Cal. Rptr. 377, 433 P.2d 169]* .

Unless otherwise specified, *Gov. Code § 946.4* does not apply to claims that are required pursuant to a claims procedure established by agreement pursuant to *Gov. Code § 930.2* [*Gov. Code § 946.4(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsGovernmental EntitiesTortsPublic Entity LiabilityLiabilityClaim PresentationGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationContent & FormTortsPublic Entity LiabilityLiabilityState Tort Claims ActsJurisdictionTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural Requirements

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§ 464.49 Collateral Source Payments

[1] Inadmissible in Action

Any collateral source payment paid or owed to or on behalf of a plaintiff is inadmissible in any action for personal injuries or wrongful death based on acts or omissions occurring after 1987, in which a public entity is a defendant [*Gov. Code § 985(b)*; Stats. 1987, ch. 1208, § 11; *see Gov. Code § 985(j)* (jury instructions to disregard possible collateral sources)].

For discussion of post-trial hearings regarding collateral payments, see Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities* .

[2] Definitions

As used in *Gov. Code § 985*, "collateral source payment" includes either of the following [*Gov. Code § 985(a)(1)*]:

- The direct provision of services prior to the commencement of trial to the plaintiff for the same injury or death by prepaid health maintenance organizations providing services to their members or by nonfederal publicly funded health service providers; and

- Monetary payments paid or obligated to be paid for services or benefits that were provided prior to the commencement of trial to or on behalf of the plaintiff for the same injury or death from a provider of collateral source payments described in *Gov. Code § 985(f)(1), (2)*.

"Plaintiff" includes, but is not limited to, a person or entity that is entitled to make a claim under *Prob. Code § 6400 et seq.* (intestate succession) for the collateral source benefits against the tortfeasor or alleged tortfeasor, and, in the case of a minor, the minor and the minor's parent, legal guardian, or guardian ad litem [*Gov. Code § 985(a)(2)*].

"Commencement of trial" occurs at the beginning of the opening statement or argument of any party or counsel or, if

there is no opening statement, at the time of the administering of the oath or affirmation to the first witness or the introduction of any evidence [*Gov. Code § 985(a)(3)*; *see Code Civ. Proc. § 581(a)(6)*].

[3] Discovery of Payment

A public entity may, by interrogatory or in writing at the trial-setting conference, request from the plaintiff a list of the names and addresses of any provider of a collateral source payment affected by *Gov. Code § 985* that has provided collateral source payments directly to or on behalf of the plaintiff and the amount provided to the plaintiff from each collateral source [*Gov. Code § 985(c)*]. The plaintiff must produce the requested list within 30 days after the request. The plaintiff has a continuing duty to disclose to the public entity the name and address of any provider of a collateral source payment affected by *Gov. Code § 985*, but not disclosed in the plaintiff's response, if that provider pays or owes collateral source payments to or on behalf of the plaintiff between the time of the plaintiff's response and the commencement of trial [*Gov. Code § 985(c)*].

[4] Failure to Comply With Disclosure Requirements

If the plaintiff fails or refuses to supply to the public entity information regarding the identity of a provider of a collateral source payment, as required by *Gov. Code § 985*, the public entity may, on discovery of the identity of the provider of a collateral source payment, within five years after the date of entry of judgment, request a reduction of the judgment for payment made or for services provided by that source prior to the commencement of trial. Failure of the plaintiff to provide the names of collateral source providers affected by *Gov. Code § 985* and known to the plaintiff subjects the plaintiff or his or her attorney to sanctions pursuant to *Code Civ. Proc. § 128.5* (frivolous actions and delaying tactics) [*Gov. Code § 985(d)*].

Code Civ. Proc. § 128.5, referred to in *Gov. Code § 985(d)*, specifically applies only to actions filed or proceedings initiated before 1995. A significantly different statute, *Code Civ. Proc. § 128.7*, governs sanctions for frivolous and delaying tactics in actions filed after 1994. *Gov. Code § 985(d)* was not amended to refer to *Code Civ. Proc. § 128.7*, nor does *Code Civ. Proc. § 128.7* specifically refer to *Gov. Code § 985(d)*. Generally, *Code Civ. Proc. § 128.7* provides sanctions for filing a pleading, petition, written notice of motion, or other similar paper that does not meet certain requirements; it is not clear whether that section may be construed to also permit sanctions for failure to supply information.

For discussion of sanctions under *Code Civ. Proc. §§ 128.5* and *128.7*, see Ch. 510, *Sanctions* .

[5] Collateral Source Provider's Participation in Pretrial Conference

The public entity must provide written notice to each provider of a collateral source payment listed by the plaintiff or identified by the defendant of the date set for any pretrial settlement conference. The provider of a collateral source is not required to attend a settlement conference unless requested to do so by the court. The court may request a provider of a collateral source to attend a settlement conference or to provide written information, to be available by telephone, or otherwise to participate in the conference. A provider of a collateral source waives its rights to reimbursement unless it attends or otherwise complies with the request [*Gov. Code § 985(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCollateral Source RuleGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural Requirements

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Chapter 464 PUBLIC ENTITIES AND OFFICERS: CALIFORNIA TORT CLAIMS ACT
PART II. LEGAL BACKGROUND
A. Procedures for Seeking Relief From Public Entities and Employees
2. Actions Against Public Entities and Employees

40-464 California Forms of Pleading and Practice--Annotated §§ 464.50-464.59

[Reserved]

§§ 464.50[Reserved]

California Forms of Pleading and Practice--Annotated

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B. Grounds for Seeking Relief From Public Entities and Employees
1. General Principles of Liability and Immunity

40-464 California Forms of Pleading and Practice--Annotated § 464.60

§ 464.60 Governing Law

The law governing the general liability and immunity of public entities is set forth in *Gov. Code §§ 815-818.8*. The law governing the general liability and immunity of public employees is set forth in *Gov. Code §§ 820-822.2*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityLiabilityClaim PresentationContent & FormTortsPublic Entity LiabilityLiabilityClaim PresentationTime LimitationsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsConstruction & InterpretationTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural Requirements

California Forms of Pleading and Practice--Annotated

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1. General Principles of Liability and Immunity

40-464 California Forms of Pleading and Practice--Annotated § 464.61

§ 464.61 General Principles of Public Entity Liability

[1] Statutory Basis for Liability Required

Except as otherwise provided by statute, a public entity is not liable for an injury, whether that injury arises out of an act or omission of the public entity or a public employee or any person, and the liability of a public entity as set forth by statute is subject to any immunity of the public entity provided by statute and is subject to any defenses that would be available to the public entity if it were a private person [*Gov. Code § 815*]. This provision is applicable to all types of public entities because the term "public entity" as used in *Gov. Code § 815* is defined as including the state, the Regents of the University of California, a county, city, district, public agency, and any other political subdivision or public corporation in California [*Gov. Code § 811.2*]. It is also applicable to all types of torts because the term "injury" is defined as death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his or her person, reputation, character, feelings, or estate, of such nature that it would be actionable if inflicted by a private person [*Gov. Code § 810.8*]. Injury to property includes loss of profits, good will, equipment, customers, and similar damages [*O'Hagan v. Board of Zoning Adjustment (1974) 38 Cal. App. 3d 722, 727-728, 113 Cal. Rptr. 501]* .

The immunity granted public entities is not, however, as all-encompassing as it first appears. The Legislative Committee Comment to *Gov. Code § 815* clarified the effect of that section by pointing out that there are a few provisions in other codes providing for the liability of governmental entities and that the statutes imposing liability generally are cumulative in nature--that is, if liability cannot be established under the requirements of one section, liability will nevertheless exist if liability can be established under the provisions of another section [*Gibson v. Pasadena (1978) 83 Cal. App. 3d 651, 655-656, 148 Cal. Rptr. 68]* .

The term "statute" as used in *Gov. Code § 815* is defined as an act adopted by the state legislature, Congress, or a statewide initiative [*Gov. Code § 811.8*]. Therefore, *Gov. Code § 815* does not encompass local ordinances or charters. It does, however, encompass constitutions, so that a public entity can be liable if the state or federal constitution requires liability [*Fenton v. Groveland Cmty. Servs. Dist (1982) 135 Cal. App. 3d 797, 803, 185 Cal. Rptr. 758* (damage action based on violation of self-executing right-to-vote provision of California Constitution)].

The effect of *Gov. Code § 815* is that a plaintiff seeking to establish the liability of any public entity for any tort must establish that there is a statutory basis for that liability. Even if there is a statutory basis for liability, the liability is subject to statutory immunities and ordinary defenses [*see Rodriguez v. Inglewood Unified Sch. Dist. (1986) 186 Cal. App. 3d 707, 716, 230 Cal. Rptr. 823]* . The bases for liability set forth in the statutes are generally cumulative--if liability is not established under one section, it may be established under another section. However, if there is a statutory immunity, it will generally prevail over all statutory liabilities [Legislative Comm. Comment to *Gov. Code § 815*].

The statutory rules regarding public entity tort liability do not affect liability based on contract or the right to obtain relief other than money or damages against a public entity or public employee [*Gov. Code § 814*]. Similarly, the immunity provisions of the Tort Claims Act only apply if the action seeks damages for an injury that meets the statutory definition of an "injury" [*City of Dinuba v. County of Tulare (2007) 41 Cal. 4th 859, 867, 62 Cal. Rptr. 3d 614, 161 P.3d 1168* ; *see Gov. Code § 810.8*]. However, if the remedy sought is something other than money or damages, the remedy cannot circumvent the underlying policies behind a particular tort immunity. For example, injunctive relief must be denied if granting such a remedy would require the public entity to spend money to correct a condition for which it has been granted tort immunity [*Schooler v. State of California (2000) 85 Cal. App. 4th 1004, 1014, 102 Cal. Rptr. 2d 343* (injunction forcing state to correct erosion on bluff adjacent to plaintiff's property is improper because Tort Claims Act immunizes state from liability for damage caused by erosion)].

In addition, the tort liability rules cannot be construed to impliedly repeal any worker's compensation law [*Gov. Code § 814.2*; *see Lab. Code § 3200 et seq.* (worker's compensation laws)]. Similarly, liability in inverse condemnation, which is constitutional in basis, is not affected by these statutory rules [Legislative Comm. Comment to *Gov. Code § 815*].

There is one major exception to the rule that a public entity may only be liable as provided by statute. Public entities may, through the conduct of employees, be subject to the same liability for negligence as any private person or organization under common law principles of duty and breach. If a public entity, through its agents, voluntarily assumes a protective duty toward a certain member of the public and undertakes action on behalf of that member, thereby inducing reliance, it is held to the same standard of care as a private person or organization [*Williams v. State of California (1983) 34 Cal. 3d 18, 24-25, 192 Cal. Rptr. 233, 664 P.2d 137]* . This area of liability is discussed in *§ 464.61[6]*.

However, a public entity is not otherwise directly liable in the absence of a specific statute that provides that the entity may be liable [*Munoz v. City of Union City (2004) 120 Cal. App. 4th 1077, 1111-1113, 16 Cal. Rptr. 3d 521]* . Thus, for example, a public entity cannot be held liable under general tort principles for alleged negligence in hiring and supervising its employees, as there is no statutory basis for imposing such liability [*de Villers v. County of San Diego (2007) 156 Cal. App. 4th 238, 252-253, 67 Cal. Rptr. 3d 253]* . By contrast, the Fair Employment and Housing Act applies to public entity employers, making such employers susceptible to direct liability for discrimination prohibited by the Act [*DeJung v. Superior Court (2008) 169 Cal. App. 4th 533, 545-547, 87 Cal. Rptr. 3d 99* ; *see Gov. Code § 12926(d)*].

[2] Liability for Acts of Employee

[a] General Rule of Respondeat Superior

A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his or her employment if the act or omission would, apart from the statute, have given rise to a cause of action against that employee or his or her personal representative [*Gov. Code § 815.2(a)*]. An "employee" is defined as including an officer, judicial officer as defined in *Elec. Code § 327*, employee, or servant, whether or not compensated, but does not include an independent contractor [*Gov. Code § 810.2*].

Although the definition of employee may include an employee or servant who is not receiving compensation, unpaid volunteers of public agencies are excluded from the definition of "employee" for workers' compensation purposes. Because of this exclusion, a city was not liable under the doctrine of respondeat superior for the alleged tort of an unpaid volunteer [*Munoz v. City of Palmdale (1999) 75 Cal. App. 4th 367, 368-369, 89 Cal. Rptr. 2d 229* (alleged tortfeasor was volunteer at city's senior center); *see Lab. Code § 3352(i)*].

[b] Effect of Employee Immunity

Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity if the employee is immune from liability [*Gov. Code § 815.2(b)*; *see, e.g.,* *Chester v. State of California (1994) 21 Cal. App. 4th 1002, 1004-1008, 26 Cal. Rptr. 2d 575* (under *Mil. & Vet. Code § 392,* members of militia in active service of state not liable for any act or acts done by them in performance of their duty; therefore, immunity of *Gov. Code § 815.2* and *Mil. & Vet. Code § 392* barred liability in wrongful death action against state brought by family of county deputy sheriff killed in crash of helicopter flown by National Guard officer while engaged in drug interdiction operation in which National Guard provided air support to law enforcement officials)]. Nor is a public entity liable for negligent or intentional misrepresentations of its employees, because the absolute immunity of public entities under *Gov. Code § 818.8* [*see § 464.62[5]*] prevails over the general statement of liability in *Gov. Code § 815.2*, precluding public entity liability for acts of an employee of the entity even if the employee may be personally liable under *Gov. Code § 822.2* [*Chu v. County of San Mateo (1983) 144 Cal. App. 3d 65, 68-69, 192 Cal. Rptr. 476* ; *but see* *Michael J. v. Los Angeles County Dept. of Adoptions (1988) 201 Cal. App. 3d 859, 872-875, 247 Cal. Rptr. 504* (county adoption agency subject to liability for intentional misrepresentation or fraudulent concealment in adoption process)].

However, these rules apparently only shield the entity from vicarious liability for the employee's wrongful conduct. The California Supreme Court has suggested in dicta that even if the employee cannot be personally liable, the public entity may still be directly liable if statutory authority exists for imposing direct liability [*see* *Caldwell v. Montoya (1995) 10 Cal. 4th 972, 989 n.9, 42 Cal. Rptr. 2d 842, 897 P.2d 1320]* . It is also possible that school districts may be directly liable for negligence in hiring and supervising teachers [*see* *Virginia G. v. ABC Unified Sch. Dist. (1993) 15 Cal. App. 4th 1848, 1854-1855, 19 Cal. Rptr. 2d 671* (if school district employees responsible for hiring and supervising teachers knew or should have known of teacher's prior sexual misconduct toward students, and that there was reasonably foreseeable risk of harm to students supervised by that teacher, that knowledge can be basis for legal duty); *but see* *Van Ort v. Estate of Stanewich (9th Cir. 1996) 92 F.3d 831* (distinguishing *Virginia G.* and finding county and sheriff's department not liable for assault and attempted robbery committed by undercover officer outside scope of his employment)].

[c] "Scope of Employment" Defined

A public employee is acting in the course and scope of his or her employment if he or she is engaged in the work he or she was employed to perform or if the act in question is an incident to his or her duty and was performed for the benefit of his or her employer and not to serve his or her own purposes or conveniences. The phrase "scope of employment" has been equated with the express or implied power of the public employee to act in a particular instance, and in evaluating his or her conduct to determine whether it is within the ambit of his or her authority, the court must look not to the nature of the act itself, but to the purpose or result intended. If the object or end to be accomplished is within the employee's express or implied authority, his or her act is deemed to be within the scope of his or her employment, irrespective of its wrongful nature [*Sanborn v. Chronicle Publishing Co. (1976) 18 Cal. 3d 406, 411, 134 Cal. Rptr. 402, 556 P.2d 764* ; *Neal v. Gatlin (1973) 35 Cal. App. 3d 871, 875, 111 Cal. Rptr. 117]* .

Based on this rule, a county clerk's act of explaining his release of county funds in an interview in a newspaper, which interview libeled the plaintiff, was within the scope of his employment because the act served a public purpose and was thus within the ambit of his employment [*Sanborn v. Chronicle Publishing Co. (1976) 18 Cal. 3d 406, 412, 134 Cal.*

Rptr. 402, 556 P.2d 764 . Similarly, an on-duty police officer who falsely imprisoned and assaulted a motorist he ordered to stop was acting within the scope of his employment [*White v. County of Orange (1985) 166 Cal. App. 3d 566, 571-572, 212 Cal. Rptr. 493* ; *but see Alma W. v. Oakland Unified Sch. Dist. (1981) 123 Cal. App. 3d 133, 139-140, 176 Cal. Rptr. 287* (school district not vicariously liable for janitor's rape of student because connection between janitor's duties and rape too attenuated to impose employer liability)]. Additionally, an on-duty police officer who raped a woman after detaining her for erratic driving was acting within the scope of his employment based on the fact that he was on duty, in uniform, and armed, and because he accomplished the detention by activating the red lights on his patrol car and overcame the victim's resistance by threatening to take her to jail [*Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 213-221, 285 Cal. Rptr. 99, 814 P.2d 1341]* .

Whether an individual was acting within the scope of employment may depend on whether that individual's acts flowed from the exercise of authority conferred on that individual by the employing public entity. Therefore, a police officer who falsely imprisoned and assaulted a motorist he ordered to stop was acting within the scope of his employment because his wrongful acts flowed from the exercise of authority conferred on him by the county that employed him [*White v. County of Orange (1985) 166 Cal. App. 3d 566, 571-572, 212 Cal. Rptr. 493]* . However, an employee may not always be acting within the scope of his or her employment even when acting pursuant to the official authority conferred on him or her by the public employer [*see John R. v. Oakland Unified Sch. Dist. (1989) 48 Cal. 3d 438, 449-450, 256 Cal. Rptr. 766, 769 P.2d 948]* . The determinative factor appears to be the degree and kind of authority [*see John R. v. Oakland Unified Sch. Dist. (1989) 48 Cal. 3d 438, 449-450, 452, 256 Cal. Rptr. 766, 769 P.2d 948]* .

For example, a teacher accused of sexually molesting one of his students while the student was at his apartment participating in an officially sanctioned, extracurricular program was not acting within the scope of his employment. The California Supreme Court acknowledged the extensive control teachers have been given over their students and their all-encompassing authority in the eyes of children, but distinguished that authority from the authority of a police officer [*John R. v. Oakland UnifiedSch. Dist. (1989) 48 Cal. 3d 438, 448-450, 256 Cal. Rptr. 766, 769 P.2d 948]* . The Court found that the authority of a police officer--bolstered most immediately by his or her uniform, badge, and firearm, and only slightly less so by the prospect of criminal sanction for disobedience--plainly surpassed that of a teacher over a student [*see John R. v. Oakland Unified Sch. Dist. (1989) 48 Cal. 3d 438, 452, 256 Cal. Rptr. 766, 769 P.2d 948]* .

In a subsequent case that actually involved the rape of a woman by an on-duty police officer, the California Supreme Court held that if on-duty police officers misuse the formidable power and authority given to them by the state to commit sexual assaults, the public employer must be held accountable for their actions. The Court concluded that it is neither startling nor unexpected that, on occasion, an officer will misuse that authority by engaging in assaultive conduct, including sexual assault. Nevertheless, the Court cautioned that its holding did not mean that as a matter of law, a public employer is vicariously liable in every case in which an on-duty officer commits a sexual assault. Instead, it is a question of fact for the jury [*Mary M. v. City of Los Angeles (1991) 54 Cal. 3d 202, 217-221, 285 Cal. Rptr. 99, 814 P.2d 1341* ; *cf. M.P. v. City of Sacramento (2009) 177 Cal. App. 4th 121, 130-133, 98 Cal. Rptr. 3d 812* (rejecting attempt to extend *Mary M.* holding to sexual assault committed by firefighters, noting that firefighters had no coercive authority over victim and did not purport to detain her in course of investigation or even while performing any official duties)].

In a later case, the court of appeal analyzed the policy factors set forth in *Mary M.* and concluded that an off-duty police officer who was socializing with other off-duty police officers and whose service gun discharged while he was moving it from his waistband, thereby wounding one of the other officers in front of that officer's home, was not acting in the scope of employment at the time of the injury. Drawing an analogy to decisions that construed the scope of employment in automobile accident cases, the court held that if weapons are used for law employment purposes, liability for resulting harm would probably extend to the employer. However, the mere presence of a weapon, without more, is not sufficient to impose employer liability for all of the employee's actions regarding the use of that weapon [*Henriksen v. City of Rialto (1993) 20 Cal. App. 4th 1612, 1617-1622, 25 Cal. Rptr. 2d 308]* .

For general discussion of an employer's liability for the torts of employees, see Ch. 248, *Employer's Liability for Employee's Torts* .

[d] Intentional Torts of Elected Officials

Notwithstanding any other provision in *Gov. Code § 814 et seq.*, if a plaintiff seeks to hold a public entity liable for an act or omission of an elected official employed by or otherwise representing the public entity that constitutes an intentional tort as specified in *Gov. Code § 815.3*, the plaintiff must name the elected official and the public entity as codefendants in the same action. If the plaintiff does not do so, the public entity is not liable to the plaintiff [*Gov. Code § 815.3(a)*].

Acts or omissions that constitute intentional torts within the meaning of *Gov. Code § 815.3* include, but are not limited to, harassment, sexual battery, and intentional infliction of emotional distress. For purposes of *Gov. Code § 815.3*, harassment in violation of state or federal law constitutes an intentional tort to the extent permitted by federal law. *Gov. Code § 815.3* does not, however, apply to defamation [*Gov. Code § 815.3(a)*].

For discussion of special provisions regarding liability and indemnification of elected officials under *Gov. Code § 815.3*, see *§ 464.63[2][c][ii]*.

[e] Motor Vehicle Accidents

A public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his or her employment [*Veh. Code § 17001*; *City of San Jose v. Superior Court (1985) 166 Cal. App. 3d 695, 698, 701, 212 Cal. Rptr. 661]* . The term "employee" as used in *Veh. Code § 17001* includes an officer, employee, or servant, whether or not compensated, but does not include an independent contractor [*Veh. Code § 17000(a)*]; the term "employment" includes office or employment [*Veh. Code § 17000(b)*]; and the term "public entity" includes the state, the Regents of the University of California, a county, city, district public authority, public agency, or any other political subdivision or public corporation in the state [*Veh. Code § 17000(c)*].

The specific provision for public entity liability in *Veh. Code § 17001* overrides the general derivative immunity provided by *Gov. Code § 815.2(b)* [*Brummett v. County of Sacramento (1978) 21 Cal. 3d 880, 883, 885, 148 Cal. Rptr. 361, 582 P.2d 952* ; *City of Sacramento v. Superior Court (1982) 131 Cal. App. 3d 395, 400, 182 Cal. Rptr. 443]* . For example, *Veh. Code § 17004* immunizes a public employee operating an authorized emergency vehicle as specified in that section. Although that immunity would otherwise extend to the public entity employing that employee under *Gov. Code § 815.2(b)* [*see § 464.61[b]*], *Veh. Code § 17001* provides a statutory exception to public entity immunity under *Gov. Code § 815.2(b)*, and therefore the public entity that employs the driver of an emergency vehicle can be liable for the driver's negligence, even if the driver himself or herself is immune under *Veh. Code § 17004* [*Brummett v. County of Sacramento (1978) 21 Cal. 3d 880, 885, 148 Cal. Rptr. 361, 582 P.2d 952]* .

Subject to *Gov. Code §§ 825-825.6* with regard to indemnification of public employees, a public entity is liable for death or injury to person or property to the same extent as a private person under the provisions of *Veh. Code §§ 17150-17159* [*Veh. Code § 17002*].

A public agency that adopts and promulgates a written policy on vehicular pursuits that meets specified criteria [*see Veh. Code § 17004.7(c)*], and provides regular and periodic training on vehicular pursuits on an annual basis, is immune from liability for civil damages for personal injury, death, or property damage resulting from the collision of a vehicle being operated by an actual or suspected violator of the law who is being, has been, or believes he or she is being or has been, pursued in a motor vehicle by a peace officer employed by the public agency [*Veh. Code § 17004.7(b)(1)*]. This

immunity is discussed in more detail in *§ 464.102[3]*.

[3] Liability for Acts of Independent Contractors

A public entity is liable for injury proximately caused by a tortious act or omission of an independent contractor to the same extent that the public entity would be subject to such liability if it were a private person [*Gov. Code § 815.4*]. For example, a public entity is liable for the negligent failure of its independent contractor to construct or maintain public buildings in a reasonably safe condition [*O'Gan v. King City Joint Union High Sch. Dist. (1970) 3 Cal. App. 3d 641, 646-647, 83 Cal. Rptr. 795]* , but is not liable to an employee of an independent contractor for a dangerous defect in the equipment of the independent contractor, unless the entity has actual knowledge of the defect and the right to order the equipment removed from the job [*Holman v. California (1975) 53 Cal. App. 3d 317, 328-335, 124 Cal. Rptr. 773]* . In addition, a public entity is not liable for the torts of the independent contractor of a third party merely because the entity has issued a permit allowing the work to be done [*Stanford v. City of Ontario (1972) 6 Cal. 3d 870, 878-879, 101 Cal. Rptr. 97, 495 P.2d 425]* .

The public entity is not subject to liability for the act or omission of an independent contractor if the public entity would not have been liable for the injury had the act or omission been that of an employee of the public entity [*Gov. Code § 815.4*]. Therefore, the public entity has the benefit of the public employee immunities, which are discussed in *§ 464.64*, with respect to acts or omissions of independent contractors.

[4] Liability for Failure to Discharge Mandatory Duty

If a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty, unless the public entity establishes that it exercised reasonable diligence to discharge the duty [*Gov. Code § 815.6*]. To serve as the basis for liability under *Gov. Code § 815.6*, the enactment must create an affirmative duty on the part of a government agency to perform some act; a mandatory duty does not exist if the enactment simply sets forth a prohibition or a right [*Clausing v. San Francisco Unified Sch. Dist. (1990) 221 Cal. App. 3d 1224, 1239, 271 Cal. Rptr. 72* (no liability under *Gov. Code § 815.6* based on *Educ. Code §§ 49000* and *49001* prohibitions against corporal punishment, because they do not require school district to act affirmatively to prevent its occurrence)]. The enactment must do more than merely recite legislative goals and policies that must be implemented through a public agency's exercise of judgment [*Wilson v. County of San Diego (2001) 91 Cal. App. 4th 974, 980, 111 Cal. Rptr. 2d 173* ; *see, e.g.,* *de Villers v. County of San Diego (2007) 156 Cal. App. 4th 238, 260-261, 67 Cal. Rptr. 3d 253* (regulatory language requiring lab to "guard against" theft of drugs with "effective controls and procedures" did not impose mandatory duty to take any particular steps)]. The statute or regulation must explicitly mandate that the government entity take the particular action the plaintiff alleges was not taken [*Guzman v. County of Monterey (2009) 46 Cal. 4th 887, 894, 95 Cal. Rptr. 3d 183, 209 P.3d 89* (county did not have implied mandatory duty to ensure water system operator notified tenants of water contamination); *see also* *Guzman v. County of Monterey (2009) 178 Cal. App. 4th 983, 992-993, 100 Cal. Rptr. 3d 793* (on remand, county had mandatory duty under *22 C.C.R. § 64256(e)* to read water quality reports submitted by water system operators)].

Moreover, a mandatory duty to investigate does not necessarily impose a mandatory duty to take action [*MacDonald v. State of California (1991) 230 Cal. App. 3d 319, 328-333, 281 Cal. Rptr. 317* (state's duty to license and inspect day care facilities under California Child Day Care Facilities Act (*Health & Safety Code § 1596.70 et seq.*) does not include duty to discover and prevent harmful conduct that might injure children served by those facilities)].

The term "enactment" as used in *Gov. Code § 815.6* is defined as a constitutional provision, statute, charter provision, ordinance, or regulation [*Gov. Code § 810.6*]. The term "regulation" is defined in this context as a rule, regulation, order or standard, having the force of law and adopted by an employee or agency of the United States pursuant to the federal Administrative Procedure Act [*Gov. Code § 811.6*]. Therefore, Small Business Administration Operating Procedures

not promulgated pursuant to the Administrative Procedure Act do not qualify as regulations for the purposes of California's government liability statute [*Concrete Tie of San Diego v. Liberty Constr. (9th Cir. 1997) 107 F.3d 1368, 1371 , overruled in part, United States v. Olson, 546 U.S. 43*]. Similarly, an employee manual that relates to the internal management of an agency is not an administrative regulation within the meaning of *Gov. Code § 815.6* and cannot impose a mandatory duty for these purposes [*Wilson v. County of San Diego (2001) 91 Cal. App. 4th 974, 982, 111 Cal. Rptr. 2d 173]* .

Gov. Code § 815.6 provides a three-prong test for determining whether liability may be imposed on a public entity. Liability will be imposed only if: (1) the enactment imposes a mandatory, and not discretionary, duty; (2) the enactment is designed to guard against the type of injury suffered by the plaintiff; and (3) the breach of the mandatory duty proximately caused the injury [*Braman v. State of California (1994) 28 Cal. App. 4th 344, 349, 33 Cal. Rptr. 2d 608* ; *Gray v. State of California (1989) 207 Cal. App. 3d 151, 154-155, 254 Cal. Rptr. 581* . For example, a public entity was liable for failure to discharge its mandatory duty to require all persons to whom building permits are issued to have worker's compensation insurance in a case in which the plaintiff was injured while working for a person to whom a building permit was issued, but who did not maintain such insurance [*Morris v. County of Marin (1977) 18 Cal. 3d 901, 905-911, 136 Cal. Rptr. 251, 559 P.2d 606]* . On the other hand, a public entity was not liable for failure to perform its mandatory duty to issue a final decision as to the plaintiff's right to welfare within a certain time because the duty was not clearly designed to protect against the injury suffered by the plaintiff, which was the failure to receive benefits [*Williams v. State of California (1976) 62 Cal. App. 3d 960, 966-971, 133 Cal. Rptr. 539]* .

If an enactment creates a mandatory governmental duty that is violated, and if the three-pronged test described above is satisfied, liability under *Gov. Code § 815.6* does not require that the enactment itself manifest an intent to create a private right of action. *Gov. Code § 815.6*, rather than the underlying enactment, creates the private right of action [*Haggis v. City of Los Angeles (2000) 22 Cal. 4th 490, 499-500* & n.2, *Haggis v. City of Los Angeles (2000) 93 Cal. Rptr. 2d 327, 993 P.2d 983* (disapproving analysis used in *Zolin v. Superior Court (1993) 19 Cal. App. 4th 1157, 23 Cal. Rptr. 2d 871* , and *State of California v. Superior Court (1992) 8 Cal. App. 4th 954, 10 Cal. Rptr. 2d 527*)].

The fact that a statute contains "shall" language is not necessarily controlling on the issue of whether it creates a mandatory duty within the meaning of *Gov. Code § 815.6*. Even though the language of the enactment appears mandatory, if significant discretion is required to carry out the duty imposed, that duty is not mandatory for purposes of *Gov. Code § 815.6*, and a breach will not support liability in tort [*Sutherland v. City of Fort Bragg (2000) 86 Cal. App. 4th 13, 20, 102 Cal. Rptr. 2d 736]* .

For example, although *Health & Safety Code § 17980*, governing the abatement of private nuisances by a public entity, contains some "shall" language, it does not create a mandatory duty within the meaning of *Gov. Code § 815.6* [*Fox v. County of Fresno (1985) 170 Cal. App. 3d 1238, 1242-1244, 216 Cal. Rptr. 879* ; *but see Braman v. State of California (1994) 28 Cal. App. 4th 344, 351, 33 Cal. Rptr. 2d 608* (use of term "shall" in *Penal Code § 12076(c)* means that Department of Justice has mandatory duty to investigate prospective handgun purchasers as described in that section)]. Similarly, despite some mandatory statutory language in the Hereditary Disorders Act [*see Health & Safety Code § 124975 et seq.*], which governs the development of testing and reporting standards for mass neonatal screening by the director of the state Department of Health Services, the allegedly negligent exercise of discretion in selecting the appropriate testing and reporting standards does not constitute violation of a mandatory duty under *Gov. Code § 815.6* [*Creason v. Department of Health Servs. (1998) 18 Cal. 4th 623, 631-635, 76 Cal. Rptr. 2d 489, 957 P.2d 1323]* .

The mandatory duty liability prevails over the licensing immunity [*see § 464.62[3]*] and the immunity for failure to enforce laws [*see § 464.62[2]*], because those immunities only protect the public entity from discretionary licensing decisions or law enforcement decisions [*Morris v. County of Marin (1977) 18 Cal. 3d 901, 905-911, 136 Cal. Rptr. 251, 559 P.2d 606* ; *Corona v. State of California (2009) 178 Cal. App. 4th 723, 733, 100 Cal. Rptr. 3d 591* (licensing immunity did not protect State for failing to exercise mandatory duty to deny boxing license for failure to submit negative HIV blood test)]. Because employee immunity is not set forth as a defense in *Gov. Code § 815.6*, the immunity

of the employee is not a defense to liability, and the entity is liable even though the employee might be immune [*Bradford v. State of California (1973) 36 Cal. App. 3d 16, 19-20, 111 Cal. Rptr. 852* ; *see Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 716, 117 Cal. Rptr. 241, 527 P.2d 865* ; *Roe v. State of California (2001) 94 Cal. App. 4th 64, 75, 113 Cal. Rptr. 2d 900]* .

[5] Liability for Nuisance

A public entity is liable for maintaining a nuisance based on *Civ. Code § 3479*, which provides the necessary statutory basis for liability [*see Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 931-938, 101 Cal. Rptr. 568, 496 P.2d 480* (airport noise); *Vedder v. Imperial County (1974) 36 Cal. App. 3d 654, 661, 111 Cal. Rptr. 728* (maintaining fire hazard)].

However, if recognition of a nuisance cause of action would conflict with the terms or purposes of other specific provisions of the Tort Claims Act, the nuisance claim is precluded. In one case, for example, the court of appeal held that because the purpose of *Gov. Code § 831.25* is to relieve the state from liability for injuries on adjacent property caused by the natural conditions of its unimproved land, a landowner whose property was adjacent to a state-owned bluff could not pursue a cause of action for nuisance against the state for damage to the lateral support of the landowner's own property caused by erosion to the bluff [*Schooler v. State of California (2000) 85 Cal. App. 4th 1004, 1012-1013, 102 Cal. Rptr. 2d 343]* .

[6] Liability for Voluntarily Undertaken Protective Duty

If a public entity, through its agents, voluntarily assumes a protective duty toward a certain member of the public and undertakes action on behalf of that member, thereby inducing reliance, the public entity is held to the same standard of care as a private person or organization. Justifiable reliance giving rise to the duty of care may be based either on a promise, express or implied, to provide a service, or on the conduct of the public employee in a situation of dependency [*Williams v. State of California (1983) 34 Cal. 3d 18, 24-25, 192 Cal. Rptr. 233, 664 P.2d 137]* . Under these principles, a public entity may be liable for an omission or failure to act after inducing reliance in the plaintiff [*see Bock v. County of Los Angeles (1983) 150 Cal. App. 3d 65, 72, 197 Cal. Rptr. 470* ; *cf. Arroyo v. State of California (1995) 34 Cal. App. 4th 755, 760, 762-764, 40 Cal. Rptr. 2d 627* (even though brochures, verbal information, and signs warned visitors of "various dangers" in largely unimproved state park, state had not assumed a duty to warn of all dangers presented by natural conditions, including mountain lions, on unimproved property)].

Also known as the "Good Samaritan" rule, this theory of liability generally may not be used to extend liability to a public entity on the basis of the past gratuitous "Good Samaritan" acts of one of its employees. For example, a county was not liable for the failure of its sheriff's department to notify a city regarding streetlight outages, even though a few deputies had so notified the city in the past. The court of appeal provided the following three grounds for its refusal to find the county sheriff department liable as a "Good Samaritan" [*City of Santee v. County of San Diego (1989) 211 Cal. App. 3d 1006, 1012, 1018-1019, 259 Cal. Rptr. 757]* :

- A "Good Samaritan" who has performed a series of voluntary acts in the past is not thereafter required indefinitely to continue performing such acts into the future;

- Any duty imposed on the "Good Samaritan" is limited to the individuals who originally performed the voluntary act (the voluntary act of one deputy could not draft the entire sheriff's department into an army of "Good Samaritans"); and

- There are significant policy reasons for declining to impose such a continuing duty on law enforcement officers, in that public entities would be placed in the position of discouraging the officers from providing assistance in discretionary situations to avoid the creation of a mandatory duty to offer

such assistance in the future.

Furthermore, a duty imposed by the "Good Samaritan" doctrine does not extend indefinitely into the future. This limitation applies even if promises of future action have been implied, so long as there have been no express promises of open-ended duration [*Weissich v. County of Marin (1990) 224 Cal. App. 3d 1069, 274 Cal. Rptr. 34* (police not required to warn threatened district attorney of criminal activities of convicted arsonist, who issued threats over course of 10 years after release from prison)].

A public entity may also be liable for an affirmative act that places a person in peril or contributes to, increases, or changes the risk of harm that would otherwise exist [*see* *McCorkle v. City of Los Angeles (1969) 70 Cal. 2d 252, 261, 74 Cal. Rptr. 389, 449 P.2d 453]* .

A "special relationship" between a public employee and a specific private citizen may give rise to liability of both a public employee and his or her employer. This type of relationship exists, however, only if the injured person demonstrates that the public officer or employee assumed a duty toward him or her greater than the duty owed to members of the public generally [*Walker v. County of Los Angeles (1987) 192 Cal. App. 3d 1393, 1398, 238 Cal. Rptr. 146* ; *see also* *Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal. 3d 780, 785-790, 221 Cal. Rptr. 840, 710 P.2d 907* (special relationship between a common carrier and its passengers created by *Civ. Code § 2100* applies to public as well as private carriers)]. California courts have found special relationships in cases in which public employees [*Walker v. County of Los Angeles (1987) 192 Cal. App. 3d 1393, 1399, 238 Cal. Rptr. 146]* :

- Create a foreseeable peril not readily discoverable by endangered persons;

- Make a promise, express or implied, that they will undertake a special duty toward the plaintiff; and

- Cause an injured person to rely on them to his or her detriment in a situation in which the person is dependent on the employees.

By asking a citizen to perform a public function that is for the benefit of the general public and that involves a foreseeable risk of injury, a public employee creates a "special relationship" with the citizen to whom he or she owes a duty of due care, and both the employee, and through him or her the public entity, are liable to the private citizen for injuries caused by the employee's negligence [*Carpenter v. City of Los Angeles (1991) 230 Cal. App. 3d 923, 931-934, 281 Cal. Rptr. 500* (special relationship between police and plaintiff existed because police asked plaintiff to testify in robbery prosecution, assured him that defendant in that case posed no danger to him, and then failed to warn him or provide him with protection after they received reliable information that his life was in danger); *Walker v. County of Los Angeles (1987) 192 Cal. App. 3d 1393, 1395, 1397, 1402-1405, 238 Cal. Rptr. 146* (plaintiff's thumb was bitten off by stray dog that he was attempting to capture at request of county's animal control officer, who failed to give him proper equipment and support and otherwise to exercise due care)].

Establishment of a special relationship and duty to act prudently does not create an exception to any statutory immunity provided to public entities and employees. The question of the applicability of a statutory immunity does not even arise, however, until it is determined that a defendant otherwise owes a duty of care and thus would be liable in the absence of such immunity [*Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal. 3d 780, 785, 221 Cal. Rptr. 840, 710 P.2d 907* ; *Williams v. State of California (1983) 34 Cal. 3d 18, 24, 192 Cal. Rptr. 233, 664 P.2d 137* ; *see* *Rodriguez v. Inglewood Unified Sch. Dist. (1986) 186 Cal. App. 3d 707, 723, 230 Cal. Rptr. 823* (school district owed duty to students by virtue of special relationship); *Whitcombe v. County of Yolo (1977) 73 Cal. App. 3d 698, 704, 141 Cal. Rptr. 189]* .

[7] Failure to Investigate Harm Already Incurred

In *Williams v. State of California*, the California Supreme Court refused to extend liability to situations involving a public employee's failure to investigate the cause and source of an accident after simply stopping to assist the victim [*see Williams v. State of California (1983) 34 Cal. 3d 18, 24, 27-28, 192 Cal. Rptr. 233, 664 P.2d 137]* . The Court disapproved an earlier court of appeal case [*Clemente v. State of California (1980) 101 Cal. App. 3d 374, 161 Cal. Rptr. 799* ("Clemente i")], to the extent that this case imposed liability for such an omission. However, the *Williams* court did imply that liability might be imposed if the public entity voluntarily assumes responsibility to protect a person's prospects for recovery by civil litigation and thereby causes that person not to undertake an independent investigation [*see Williams v. State of California (1983) 34 Cal. 3d 18, 24, 27-28, 192 Cal. Rptr. 233, 664 P.2d 137]* .

Subsequent to the decision in *Williams*, the *Clemente* case reached the Supreme Court [*Clemente v. State of California (1985) 40 Cal. 3d 202, 219 Cal. Rptr. 445, 707 P.2d 818* ("Clemente II")]. In that case, the Supreme Court affirmed a judgment for the plaintiff, and reconciled its holding with the holding of the *Williams* case by characterizing the *Williams* holding as recognizing that the conduct of a patrol officer in a situation of dependency resulting in detrimental reliance may give rise to a duty of care and that there may be a duty to refrain from conduct that prevents others from giving assistance [*Clemente v. State of California (1985) 40 Cal. 3d 202, 212-213, 219 Cal. Rptr. 445, 707 P.2d 818]* .

[8] Liability of Specific Entities

[a] Liability of School Districts for Inadequate Supervision of Students

A school district is liable for injuries caused by inadequate supervision of students on school grounds [*Dailey v. Los Angeles Unified Sch. Dist. (1970) 2 Cal. 3d 741, 747-751, 87 Cal. Rptr. 376, 470 P.2d 360* ; *Biggers v. Sacramento City Unified Sch. Dist. (1972) 25 Cal. App. 3d 269, 273-275, 101 Cal. Rptr. 706]* . However, the liability of school districts for injuries to students occurring off-campus is limited by statute [*see Educ. Code §§ 35330, 44808, 87706*]. For full discussion of the liability of public school districts for injuries to students, see Ch. 514, *Schools: Injuries to Students* .

[b] Liability of Department of Motor Vehicles

The Department of Motor Vehicles is liable for any injury to a lienholder or good faith purchaser of a vehicle proximately caused by the department's negligent omission of the lienholder's name from an ownership certificate issued by the department [*Gov. Code § 818.5*]. The liability of the department under this provision cannot exceed the actual cash value of the vehicle [*Gov. Code § 818.5*]. In enacting this provision, the legislature did not intend to establish any precedent for creating state liability in any other situation or circumstance [*see* Stats. 1985, ch. 437, § 1].

However, the Department of Motor Vehicles was not liable to a party injured by a 96-year-old licensed driver because the department had determined that the driver was able to drive a motor vehicle safely on a highway. *Vehicle Code § 12805*, which provides that the department must not issue or renew a driver's license to any person if that person is unable to operate a motor vehicle safely on a highway, did not impose a mandatory duty on the department that it failed to discharge. Not only was there no determination that the applicant was unable to operate a motor vehicle safely, but a license examiner specifically made the determination that he was able to operate a motor vehicle safely. Because there was no disputed material fact that the department had determined that he was able to drive safely, and because the department in its discretion issued him a license, the decision was cloaked in immunity [*Waschek v. Department of Motor Vehicles (1997) 59 Cal. App. 4th 640, 647, 69 Cal. Rptr. 2d 296]* .

[c] Liability of State Compensation Insurance Fund

Under *Ins. Code § 11873*, the liabilities and immunities of the California Tort Claims Act do not apply to the State Compensation Insurance Fund [*see Maxon Indus. v. State Comp. Ins. Fund (1993) 16 Cal. App. 4th 1387, 1390-1391, 20 Cal. Rptr. 2d 730* (statutory immunities under tort claims act do not apply to fund); *Courtesy Ambulance Service v.*

Superior Court (1992) 8 Cal. App. 4th 1504, 1514, 11 Cal. Rptr. 2d 161 (statutory immunity from awards of punitive damages under tort claims act does not apply to fund)].

[9] Liability Under Public Entity Agreements

[a] Nature of Agreements

Public entities may enter into a joint powers agreement to create a new public entity [*see Gov. Code § 6500 et seq.*] or an agreement to transfer functions of one public entity or employee to another public entity [*see Gov. Code § 51300 et seq.*]. Public entities may enter into other agreements under which a public entity undertakes to perform any function, service, or act with or for any other public entity (or an employee of that public entity) with its consent, whether the agreement is expressed by resolution, contract, ordinance, or in any other manner provided by law [*Gov. Code § 895*].

The phrase "any other manner provided by law" refers only to law regarding the manner in which a public entity may express its agreement and generally requires some positive act by that public entity, such as a city charter provision, an ordinance, or a state statute. Common law principles of joint enterprise liability are not sufficient "law" to bind a public entity to an agreement to which that entity did not expressly agree [*see Authority for Cal. Cities Excess Liab. v. City of Los Altos (2006) 136 Cal. App. 4th 1207, 1214-1215, 39 Cal. Rptr. 3d 571* (agreement reached by city police chief was not agreement binding on city because no law authorized police chief to reach agreements on behalf of city)].

The term "agreement" does not include an agreement between public entities that is designed to implement the disbursement or subvention of public funds from one of the public entities to the other, whether or not it provides standards or controls governing the expenditure of those funds [*Gov. Code § 895*].

[b] Joint and Several Liability

Whenever public entities enter into an agreement, as *defined in § 464.61[9][b]*, they are jointly and severally liable to a party injured by any negligent or wrongful act or omission occurring in the performance of the agreement for which any one of the entities, or an entity created by the agreement, is otherwise liable [*see Gov. Code § 895.2*].

As part of any agreement, the public entities may provide for contribution or indemnification by any or all of the public entities that are parties to the agreement on any liability arising out of the performance of the agreement [*Gov. Code § 895.4*]. If an agreement is silent in this respect, a public entity that pays more than its pro rata share of liability, determined by dividing the total amount of the judgment by the number of public entities that are parties to the agreement, is entitled to contribution from other parties to the agreement [*see Gov. Code § 895.6*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsConstruction & InterpretationTortsPublic Entity LiabilityLiabilityState Tort Claims ActsScope of EmploymentTortsPublic Entity LiabilityLiabilityVicarious Liability

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§ 464.62 General Immunities of Public Entities

[1] Immunity From Punitive Damages

Notwithstanding any other provision of law, a public entity is not liable for punitive damages awarded under *Civ. Code § 3294* or other damages imposed primarily for the sake of example and by way of punishing the defendant [*Gov. Code § 818*]. However, punitive damages may be awarded against individual public employees [*Runyon v. Superior Court (1986) 187 Cal. App. 3d 878, 881-882, 232 Cal. Rptr. 101]* . The authority of the governing body of a public entity, other than the State of California, to pay the punitive damages portion of a judgment against a public employee is discussed in *§ 464.63[2][b]*.

Statutory damages for spilling oil or discharging raw sewage are not solely punitive and, therefore, a public entity can be held liable for those damages [*People ex rel. Younger v. Superior Court (1976) 16 Cal. 3d 30, 42, 127 Cal. Rptr. 122, 544 P.2d 1322* ; *San Francisco Civil Serv. Ass'n v. Superior Court (1976) 16 Cal. 3d 46, 48-50, 127 Cal. Rptr. 131, 544 P.2d 1331]* . Civil penalties assessed for noncompliance with regulations governing patient care in long-term health care facilities are not punitive damages, and a public entity may be liable for those penalties [*Kizer v. County of San Mateo (1991) 53 Cal. 3d 139, 145-150, 279 Cal. Rptr. 318, 806 P.2d 1353]* . Similarly, the civil penalty provided by *Civ. Code § 52(b)(2)* for victims of hate crimes may be imposed against a public entity, because this civil penalty is designed to provide an economic incentive for victims to bring suit and is not primarily punitive in nature [*Los Angeles County Metro. Transp. Auth. v. Superior Court (2004) 123 Cal. App. 4th 261, 270-271, 20 Cal. Rptr. 3d 92]* .

[2] Immunity for Legislative Action or Failure to Enforce Law

A public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law [*Gov. Code § 818.2*]. The term "enactment" as used in *Gov. Code § 818.2* is defined as a constitutional provision, statute, charter provision, or regulation [*Gov. Code § 810.6*]. This immunity precludes an award of damages in a mandate proceeding to overturn adoption of a zoning ordinance [*HFH, Ltd. v. Superior Court (1975) 15 Cal. 3d 508, 518-520, 125 Cal. Rptr. 365, 542 P.2d 237]* .

The immunity for failure to enforce a law does not protect a public entity from liability if the public entity has a mandatory duty to enforce the law. For example, a public entity was liable for failure to enforce a law requiring all persons who are issued building permits to have worker's compensation insurance, because the duty to enforce the law was mandatory [*Morris v. County of Marin (1977) 18 Cal. 3d 901, 916-917, 136 Cal. Rptr. 251, 559 P.2d 606]* . Also, a complaint based on a county's failure to enforce and comply with certain regulations regarding placement of dependent children in foster homes, which resulted in injuries to a minor, was not barred by the immunity provided in *Gov. Code § 818.2* [*Elton v. County of Orange (1970) 3 Cal. App. 3d 1053, 1059, 84 Cal. Rptr. 27]* . That immunity also did not protect an agency that failed to enforce the law by not suspending a license for failure to maintain insurance, because the suspension requirement was mandatory with the agency [*Elson v. Public Utilities Commission (1975) 51 Cal. App. 3d 577, 589, 124 Cal. Rptr. 305*]. The immunity appears to apply to a public entity that fails to enforce laws against third persons, if enforcement is discretionary, but not to apply if the public entity itself fails to obey a mandatory requirement of the law [*see Morris v. County of Marin (1977) 18 Cal. 3d 901, 916-917, 136 Cal. Rptr. 251, 559 P.2d 606]* .

[3] Immunity for Licensing Activities

A public entity is not liable for an injury caused by the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization, if the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended, or revoked [*Gov. Code § 818.4*; *see also Waschek v. Department of Motor Vehicles (1997) 59 Cal. App. 4th 640, 647, 69 Cal. Rptr. 2d 296* (DMV not liable to party injured by 96-year-old licensed driver because DMV had used its discretion and determined driver was able to drive safely)]. However, if the entity's issuance of a permit created a dangerous condition on its own property as defined in *Gov. Code § 830(c)*, the legislature did not intend that the permit immunity of *Gov. Code § 818.4* defeat government liability under *Gov. Code § 835* for injury caused by the dangerous condition [Hill v. People (1979) *91 Cal. App. 3d, 426, 431* , *154 Cal. Rptr. 142]* . If the denial of a license or permit is challenged by an application for a writ of mandate, the licensing immunity precludes the award of damages in the mandate proceeding, even if the writ is granted [*State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 245-247, 115 Cal. Rptr. 497, 524 P.2d 1281]* .

The licensing immunity does not prevail over the liability of a public entity for failure to perform a mandatory duty, because the licensing immunity only applies if the public entity is authorized to exercise discretion [*see Corona v. State of California (2009) 178 Cal. App. 4th 723, 733, 100 Cal. Rptr. 3d 591* (licensing immunity did not protect State for failing to exercise mandatory duty to deny boxing license for failure to submit negative HIV blood test); *Cancun Homeowners Assn. v. City of San Juan Capistrano (1989) 215 Cal. App. 3d 1352, 1356-1361* . *264 Cal. Rptr. 288* (immunity applied because city building inspector had discretion to decide whether to issue permit)]. For example, a public entity was liable for its issuance of a building permit without fulfilling its mandatory duty to require the applicant to establish that it had worker's compensation insurance, in a case in which the plaintiff was injured while working for a permittee who had no worker's compensation insurance [*Morris v. County of Marin (1977) 18 Cal. 3d 901, 911-916, 136 Cal. Rptr. 251, 559 P.2d 606]* . Likewise, the Public Utilities Commission was liable for failure to perform its mandatory duty to suspend the license of a common carrier that did not maintain its liability insurance in a case in which the plaintiff was injured by the carrier, but could not recover for his injuries because the carrier had no assets [*Elson v. Public Utils. Comm'n (1975) 51 Cal. App. 3d 577, 587-589, 124 Cal. Rptr. 305]* .

Although the decision whether or not to issue a building permit is the sort of discretionary decision normally covered by the immunities of *Gov. Code §§ 818.4* and *821.2*, a building official had no further discretion, under a city ordinance adopting Section 307 of the Uniform Building Code, to withhold a certificate of occupancy once the official had approved an owner's building by a "Final Inspection Okay." Therefore, even though a building official may be immune for a discretionary act in determining whether or not to issue a certificate of occupancy--for example, determining whether a building complies with the permit conditions and applicable code and other requirements--the immunities of *Gov. Code §§ 818.4* and *821.2* did not bar liability under a complaint that alleged failure to discharge a mandatory

ministerial duty to issue a certificate of occupancy after the final inspection approval had been issued [*Thompson v. City of Lake Elsinore (1993) 18 Cal. App. 4th 49, 55-58, 22 Cal. Rptr. 2d 344]* .

[4] Immunity Based on Inspections

A public entity is not liable for injury caused by its failure to make an inspection, or by its making an inadequate or negligent inspection of any property, other than its own property, for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety [*Gov. Code § 818.6*; *see Gov. Code § 830(c)* (definition of agency's property); *see also Harshbarger v. City of Colton (1988) 197 Cal. App. 3d 1335, 1344-1348, 243 Cal. Rptr. 463* ; *Cochran v. Herzog Engraving Co. (1984) 155 Cal. App. 3d 405, 205 Cal. Rptr. 1]* .

In addition, the immunity provided by *Gov. Code § 818.6* has been applied to protect a city from liability for failing, after performing an inspection, to take the additional step of recording with the county recorder information about substandard conditions discovered by the inspection, despite the fact that a local ordinance required recording the information [*Haggis v. City of Los Angeles (2000) 22 Cal. 4th 490, 503-504, 93 Cal. Rptr. 2d 327, 993 P.2d 983* .

[5] Immunity for Misrepresentation

A public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether the misrepresentation is negligent or intentional [*Gov. Code § 818.8*; *see Tallmadge v. County of Los Angeles (1987) 191 Cal. App. 3d 251, 253-254, 236 Cal. Rptr. 338* (misrepresentation of deputy district attorney to owners of confiscated firearms that firearms would be returned without need for plaintiffs to institute legal action; instead, firearms were subsequently destroyed by county without notice to owners)]. The immunity also applies to the concealment or suppression of fact [*see Chevlin v. Los Angeles Cmty. Coll. Dist. (1989) 212 Cal. App. 3d 382, 390, 260 Cal. Rptr. 628]* .

The Supreme Court has interpreted the term "misrepresentation" to mean interferences in the nature of the common law action for deceit with financial or commercial interests and not any conduct that literally could be called a misrepresentation, such as a misleading turn signal by a driver or the failure of state authorities to disclose the criminal and violent tendencies of a juvenile parolee being placed in a foster home [*Johnson v. State of California (1968) 69 Cal. 2d 782, 799-800, 73 Cal. Rptr. 240, 447 P.2d 352* ; *see Los Angeles Equestrian Ctr., Inc. v. City of Los Angeles (1993) 17 Cal. App. 4th 432, 449, 21 Cal. Rptr. 2d 313]* . The Court has stated that the immunity from liability for misrepresentations does not apply to misrepresentations involving a risk of physical harm [*Garcia v. Superior Court (1990) 50 Cal. 3d 728, 738 n.8, 268 Cal. Rptr. 779, 789 P.2d 960* (case remanded to permit plaintiff leave to amend complaint to state cause of action for negligent misrepresentation involving risk of physical harm based on parole officer's misrepresentations regarding dangerousness of parolee); *see also Weissich v. County of Marin (1990) 224 Cal. App. 3d 1069, 1081, 274 Cal. Rptr. 342* (complaint did not allege facts sufficient to state cause of action under *Garcia*; court did not discuss immunity of *Gov. Code §§ 818.8, 822.2*)]. For example, government entities are not immune for injuries due to the intentional concealment of health and safety information [*Adkins v. State of California (1996) 50 Cal. App. 4th 1802, 1811, 59 Cal. Rptr. 2d 59]* .

The court of appeal has held that the immunity did not apply to a negligent misrepresentation about the maximum height a river would rise because the loss did not result from a commercial transaction with the state or from the state's interference with the plaintiff's commercial activities [*Connelly v. State of California (1970) 3 Cal. App. 3d 744, 752, 84 Cal. Rptr. 257 but see Tokeshi v. State of California (1990) 217 Cal. App. 3d 999, 1007-1008, 266 Cal. Rptr. 255* (criticizing *Connelly* to extent it focused on negligence underlying misrepresentation, rather than on commercial nature of damages)]. It is clear that immunity is provided for a negligent misrepresentation that the public entity would waive the terms of a construction contract requiring approval before changes were made [Cal. L. Revision Comm'n Comment to *Gov. Code § 818.8*; *Johnson v. Stateof California (1968) 69 Cal. 2d 782, 800, 73 Cal. Rptr. 240, 447 P.2d 352]* .

However, the immunity does not bar an action in contract based on a misrepresentation [*Gov. Code § 814*; *Warner Constr. Corp. v. City of Los Angeles (1970) 2 Cal. 3d 285, 293-294, 85 Cal. Rptr. 444, 466 P.2d 996]* . Furthermore, the immunity does not bar an action for intentional misrepresentation or fraudulent concealment in the adoption process, because such a proceeding is not a commercial transaction [*Michael J. v. Los Angeles County Dept. of Adoptions (1988) 201 Cal. App. 3d 859, 872, 875, 247 Cal. Rptr. 504* .

The absolute immunity provided by *Gov. Code § 818.8* prevails over the general statement of *Gov. Code § 815.2* establishing vicarious liability for a public employee's acts and precludes a public entity from being vicariously liable for an employee's fraudulent concealment, even if the employee may be liable under *Gov. Code § 822.2* for actual fraud [*see Harshbarger v. City of Colton (1988) 197 Cal. App. 3d 1335, 1340-1341, 243 Cal. Rptr. 463* ; *but see Michael J. v. Los Angeles County Dept. of Adoptions (1988) 201 Cal. App. 3d 859, 872, 875, 247 Cal. Rptr. 504* (county adoption agency subject to liability for intentional misrepresentation or fraudulent concealment in adoption process; adoption is not commercial transaction)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityImmunityAbsolute ImmunityTortsPublic Entity LiabilityImmunityQualified ImmunityTortsPublic Entity LiabilityLiabilityGeneral Overview

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§ 464.63 General Principles of Liability for Public Employees

[1] General Rule of Liability

Except as otherwise provided by statute, a public employee is liable for injury caused by his or her act or omission to the same extent as a private person. This liability of a public employee is subject to any defenses that would be available to the public employee if he or she were a private person [*Gov. Code § 820*]. A public employee includes an officer, judicial officer as defined in *Elec. Code § 327*, employee or servant, whether or not compensated, but does not include an independent contractor [*Gov. Code § 810.2*]. Therefore, a public employee is responsible for his or her torts in the same manner as a private citizen with the very important exception that a public employee is immune from liability for certain acts [*see § 464.64*]. If no immunity is available, the public employee may be liable for punitive as well as compensatory damages [*Runyon v. Superior Court (1986) 187 Cal. App. 3d 878, 881-882, 232 Cal. Rptr. 101]* .

[2] Defense and Indemnification of Public Employees

[a] Public Entity's Duty to Defend and Indemnify

Under most circumstances, public entities are required to provide a defense for public employees in any action brought against the public employees for an act or omission in the scope of their employment [*see Gov. Code § 995*; *but see City of Huntington Beach v. Petersen Law Firm (2002) 95 Cal. App. 4th 562, 567-568, 115 Cal. Rptr. 2d 568* (if public entity is also sued, public entity offering joint representation not required to provide employee with separate counsel even if potential conflict of interest exists)]. Under most circumstances, if the public entity defends the employee, it must also pay any judgment against the employee [*see Gov. Code § 825(a)*]. However, certain exceptions to these general rules are discussed in *§ 464.63[2][b], [c]*.

[b] Payment of Punitive Damages

[i] Discretion to Pay

Notwithstanding *Gov. Code § 825(a)* or any other provision of law, a public entity, other than the state as defined in *Gov. Code § 900.6*, is authorized to pay that part of a judgment that is for punitive or exemplary damages, if the governing body of the public entity, acting in its sole discretion, finds all of the following [*Gov. Code § 825(b)*]:

- The judgment is based on an act or omission of an employee or former employee acting within the course and scope of his or her employment as an employee of the public entity;

- At the time of the act giving rise to the liability, the employee or former employee acted, or failed to act, in good faith, without actual malice, and in the apparent best interests of the public entity; and

- Payment of the claim or judgment would be in the best interests of the public entity.

[ii] Restrictions on Evidence at Trial

The discovery of, or the introduction of evidence of, the assets of a public entity is not permitted in an action in which it is alleged that a public employee is liable for punitive or exemplary damages. Additionally, the possibility that a public entity may pay the punitive damages portion of a judgment must not be disclosed at trial if it is alleged that a public employee is liable for punitive or exemplary damages. Disclosure of this possibility is grounds for a mistrial [*Gov. Code § 825(b)*].

[iii] Effect of Public Entity's Immunity From Punitive Damages

Nothing in *Gov. Code § 825(b)* affects *Gov. Code § 818*, prohibiting the award of punitive damages against a public entity. Furthermore, *Gov. Code § 825(b)* cannot be construed as a waiver of a public entity's immunity from liability for punitive damages under *42 U.S.C.S. §§ 1981, 1983*, or *1985* [*Gov. Code § 825(e)*; *see § 464.62[1]*].

[c] Elected Officials

[i] Tortious Intervention in Judicial Proceeding

Except as discussed below, a public entity is precluded from paying a judgment, compromise, or settlement that arises from a claim or action against an elected official, if the claim or action is based on conduct by the elected public official that consists of tortiously intervening or attempting to intervene in, or of tortiously influencing or attempting to influence the outcome of, any judicial action or proceeding for a particular party's benefit by contacting the trial judge or any commissioner, court-appointed arbitrator, court-appointed mediator, or court-appointed special referee assigned to the matter, or the court clerk, bailiff, or marshal after an action has been filed, unless the elected official was counsel of record acting lawfully within the scope of his or her employment on that party's behalf [*Gov. Code § 825(f)(1)*]. Notwithstanding *Gov. Code § 825.6* (generally governing public entity's payment of claims or judgments against employees), if a public entity conducts the defense of an elected official against a claim or action involving alleged tortious interference with or attempt to influence a judicial proceeding, the court must order the elected official to pay to the public entity the cost of the defense if the trier of fact finds the elected official liable [*Gov. Code § 825(f)(1)*].

If an elected official is held liable for monetary damages in an action alleging tortious intervention in or interference with a judicial action, as described above, the plaintiff must first seek recovery of the judgment against the elected official's assets [*Gov. Code § 825(f)(2)*]. If the elected official's assets are insufficient to satisfy the total judgment, as determined by the court, the public entity may pay the deficiency if the public entity is authorized by law to pay that judgment [*Gov. Code § 825(f)(2)*]. To the extent that the public entity pays any portion of the judgment or is entitled under *Gov. Code § 825(f)(1)* to reimbursement of defense costs, the public entity must pursue all available creditor remedies against the elected official, including garnishment, until the elected official has fully reimbursed the public entity [*Gov. Code § 825(f)(3)*].

The provisions of *Gov. Code § 825(f)* do not apply to any criminal or civil enforcement action brought by an elected district attorney, city attorney, or attorney general in the name of the people of the State of California [*Gov. Code § 825(f)(4)*].

[ii] Intentional Torts Not Directly Related to Official Duties

Gov. Code § 815.3 limits a public entity's liability for intentional torts committed by an elected public official and requires the official to indemnify the public entity for judgments and claims paid and to reimburse the entity for defense costs in specified circumstances. For purposes of *Gov. Code § 815.3*, an intentional tort includes, but is not limited to, harassment, sexual battery, and intentional infliction of emotional distress. Harassment in violation of state or federal law constitutes an intentional tort to the extent permitted by federal law. *Gov. Code § 815.3* does not, however, apply to defamation [*Gov. Code § 815.3(a)*].

If an elected official employed by, or otherwise representing, a public entity is liable for an intentional tort other than defamation, the trier of fact must determine if the act or omission constituting the intentional tort arose from and was directly related to the elected official's performance of his or her official duties. If the trier of fact determines that the act or omission arose from and was directly related to the elected official's performance of his or her official duties, the public entity is liable for the judgment as provided by law [*Gov. Code § 815.3(b)*]. For the purposes of this provision, employee managerial functions are deemed to arise from, and to directly relate to, the elected official's official duties. Acts or omissions constituting sexual harassment, however, are not deemed to arise from, or to directly relate to, the elected official's official duties [*Gov. Code § 815.3(b)*].

If the trier of fact determines that the elected official's act or omission did not arise from and was not directly related to the elected official's performance of his or her official duties, on a final judgment, including any appeal, the plaintiff is required to first seek recovery of the judgment against the elected official's assets [*Gov. Code § 815.3(c)*]. If the court determines that the elected official's assets are insufficient to satisfy the total judgment, including plaintiff's costs as provided by law, the court must determine the amount of the deficiency, and the plaintiff may seek to collect that remainder of the judgment from the public entity. The public entity may pay that deficiency if it is otherwise authorized by law to pay that judgment [*Gov. Code § 815.3(c)*].

To the extent that the public entity pays any portion of the judgment against the elected official pursuant to *Gov. Code § 815.3(c)*, or has expended defense costs in an action in which the trier of fact determines that the elected official's action did not arise from and did not directly relate to the elected official's performance of official duties, the public entity must pursue all available creditor's remedies against the elected official in indemnification, including garnishment, until the elected official has fully reimbursed the public entity [*Gov. Code § 815.3(d)*].

If the public entity appeals the judgment in an action brought pursuant to *Gov. Code § 815.3*, the entity must continue to provide a defense until the case is finally adjudicated, as provided by law [*Gov. Code § 815.3(e)*].

The legislature's intent in enacting *Gov. Code § 815.3* was to have elected officials assume full fiscal responsibility for conduct that constitutes an intentional tort not directly related to their official duties, for which the public entity they represent may also be liable, while maintaining fair compensation for those persons injured by such conduct [*Gov. Code § 815.3(f)*]. *Gov. Code § 815.3* does not apply to a criminal or civil enforcement action brought by an elected district attorney, city attorney, or Attorney General, on behalf of the state [*Gov. Code § 815.3(g)*].

For discussion of the requirement that both the elected official and the public entity be named as codefendants in the same action for the public entity to be liable to the plaintiff under *Gov. Code § 815.3(a)*, see *§ 464.61[2][d]*.

[iii] Elected Official Convicted of Certain Felonies

If an elected official or former elected official of a public entity is convicted of a felony for violation of *Gov. Code § 1195* or for violation of *Penal Code §§ 68, 93, 165, 504,* or *518* (criminal offenses involving bribery, embezzlement, or extortion by specified public officials) for an act or omission of that official while in office, the official forfeits any right to defense or indemnification under *Gov. Code § 825* with respect to a claim for damages for an injury arising from that act or omission [*Gov. Code § 825.6(b)(1)*].

If a public entity pays all or any portion of a claim or judgment, either against itself or against an elected official or former elected official of the public entity, for an injury arising out of an act or omission of the official that constituted a felony violation of *Gov. Code § 1195* or of *Penal Code §§ 68, 93, 165, 504,* or *518*, the public entity must recover from the elected official or former elected official the amount of that payment on the official's felony conviction for that act or omission. The public entity must also recover from the convicted official the costs of any defense to a civil action filed against the elected official for that act or omission [*Gov. Code § 825.6(b)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsClaims By & AgainstTortsDamagesPunitive DamagesAvailabilityGovernmental EntitiesTortsPublic Entity LiabilityGeneral OverviewTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral Overview

California Forms of Pleading and Practice--Annotated

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1. General Principles of Liability and Immunity

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§ 464.64 General Immunities of Public Employees

[1] Immunity for Discretionary Acts

[a] Policy Behind Immunity

Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his or her act or omission, if the act or omission was the result of the exercise of the discretion vested in the public employee, whether or not such discretion was abused [*Gov. Code § 820.2*].

The personal immunity granted by *Gov. Code § 820.2* generally applies to protect against common law causes of action, as well as against statutory causes of action that are based on prohibitory state statutes of general application [*Caldwell v. Montoya (1995) 10 Cal. 4th 972, 984, 989, 42 Cal. Rptr. 2d 842, 897 P.2d 1320* (discretionary immunity applied to claims under FEHA)]. However, immunity is not provided under Section 820.2 in actions brought under a state statute for which the legislature has clearly indicated an intent that immunity be withdrawn under the circumstances present in the case [*cf. Caldwell v. Montoya (1995) 10 Cal. 4th 972, 989, 42 Cal. Rptr. 2d 842, 897 P.2d 1320* (no legislative intent found to withdraw discretionary immunity protection from actions brought under FEHA for allegedly wrongful personnel decisions)].

The scope of this immunity, which makes the public entity immune if the employee is immune [*see Gov. Code § 815.2(b)*], was delineated by the Supreme Court in *Johnson v. State of California* [*Johnson v. State of California (1968) 69 Cal. 2d 782, 73 Cal. Rptr. 240, 447 P.2d 352]* . *Johnson* involved an action against the state by a woman who was assaulted by a juvenile placed in her foster home by the California Youth Authority. She alleged that the state official responsible for the placement knew that the juvenile had homicidal tendencies, but negligently failed to warn her of those tendencies prior to the placement. The principal issue in the case was whether the discretionary immunity applied to the state official's failure to warn.

The Supreme Court began its analysis by rejecting a semantic inquiry into the meaning of the term discretionary as a basis for its decision. The Court pointed out that almost any act involves some element of discretion and stated that the

immunity must be analyzed in terms of policy considerations relevant to the claim of immunity [*Johnson v. State of California (1968) 69 Cal. 2d 782, 787-790, 73 Cal. Rptr. 240, 447 P.2d 352]* .

In analyzing these policy considerations, the Court rejected the traditional policy basis for the immunity: that public officials would be insufficiently zealous in their duties if they were in fear of personal liability for their discretionary acts. The Court pointed out that in California, public officials are provided with a defense in actions brought against them arising out of an action in the scope of their employment [*see Gov. Code § 825(a)*], that judgments against them are usually paid by the public entity [*see Gov. Code § 825(a)*], and that there is only a very limited right of indemnification by the public entity against the public employee for judgments against the entity based on the employee's acts or omissions [*see Gov. Code §§ 815.3, 825.4, 825.6*]. Therefore, public officials in California were not deterred from zealous performance of their duties by fear of personal liability [*Johnson v. State of California (1968) 69 Cal. 2d 782, 790-793, 73 Cal. Rptr. 240, 447 P.2d 352]* .

The Court concluded that the basic policy behind the discretionary immunity is judicial abstention in areas in which the responsibility for basic policy decisions has been committed to the legislative or executive branches of government. Based on this policy, the Court described the distinction between discretionary and ministerial acts as the distinction between planning and operational levels of decision-making [*Johnson v. State of California (1968) 69 Cal. 2d 782, 793-794, 73 Cal. Rptr. 240, 447 P.2d 352* ; *see also Caldwell v. Montoya (1995) 10 Cal. 4th 972, 981, 42 Cal. Rptr. 2d 842, 897 P.2d 1320]* .

The Court then applied this analysis to the facts at issue. It held that the decision of the California Youth Authority to parole the juvenile was discretionary because it was a basic policy decision, but that subsequent ministerial actions in the implementation of that decision, such as the decision not to warn the foster parent of the youth's dangerous tendencies, presented no policy reasons for immunity from liability. Therefore, the discretionary immunity did not apply to the ministerial implementation of the basic decision, and the public entity and officials could be liable if the public officials had acted negligently [*Johnson v. State of California (1968) 69 Cal. 2d 782, 795-798, 73 Cal. Rptr. 240, 447 P.2d 352* ; *cf. Thompson v. County of Alameda (1980) 27 Cal. 3d 741, 747, 167 Cal. Rptr. 70, 614 P.2d 728* (county's decision to release juvenile, who was allegedly danger to community and eventually murdered plaintiffs' son, was immune from tort liability under *Gov. Code § 820.2*); *Jacqueline T. v. Alameda County Child Protective Services (2007) 155 Cal. App. 4th 456, 468, 66 Cal. Rptr. 3d 157* (decisions made during investigation of child abuse allegations, including decision that charges were unsubstantiated, were protected under Gov. Code §§ 2009; *820.2*)].

[b] Requirement That Discretion Be Exercised

Gov. Code § 820.2 only provides immunity if the act or omission was the result of an actual exercise of discretion. Therefore, even if the decision is discretionary, the defendant must establish that a policy decision, consciously balancing the risks and advantages, took place. If it did not, the immunity is not available because discretion was not exercised [*Johnson v. State of California (1968) 69 Cal. 2d 782, 794-795, 73 Cal. Rptr. 240, 447 P.2d 352]* .

In an opinion subsequent to *Johnson*, the Supreme Court clarified that consciously balancing the risks and advantages of a basic policy decision does not require a "strictly careful, thorough, formal, or correct evaluation." Instead, the test is met if the public officials involved make an "actual, conscious, and considered ... policy decision," purposefully employing the standards deemed relevant by the officials [*Caldwell v. Montoya (1995) 10 Cal. 4th 972, 976, 983-984, 42 Cal. Rptr. 2d 842, 897 P.2d 1320* (despite allegations that individual school board members used impermissible criteria such as age and race in voting against rehiring of superintendent, collective board decision not to rehire was discretionary decision for which personal immunity for board members was proper), *disapproving Mouchette v. Board of Educ. (1990) 217 Cal. App. 3d 303, 312-313, 266 Cal. Rptr. 1* (school board member who had no specific knowledge of employee's duties, and who had not studied impact of eliminating employee's position on school district, had not rendered decision based on balancing of risks and advantages)].

For a form of affirmative defense asserting this immunity, *see § 464.196*.

[c] Discretionary Acts

Based on the analysis in *Johnson v. State of California* [*Johnson v. State of California (1968) 69 Cal. 2d 782, 793-794, 73 Cal. Rptr. 240, 447 P.2d 352]* , the following were all discretionary acts entitled to immunity: a police decision to pursue a vehicle that resulted in a collision with plaintiff's vehicle [*Bratt v. City & County of San Francisco (1975) 50 Cal. App. 3d 550, 553-554, 123 Cal. Rptr. 774]* ; the failure of the highway patrol to undertake a search for the victim of an accident [*McCarthy v. Frost (1973) 33 Cal. App. 3d 872, 875-876, 109 Cal. Rptr. 470]* ; and the decision to award a contract to a party other than the lowest bidder [*Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Ctr. Auth. (1974) 40 Cal. App. 3d 98, 101-103, 114 Cal. Rptr. 834]* .

The selection by juvenile authorities of custodians for potentially dangerous minors and the determination of the requisite level of governmental supervision of those custodians was also an entirely discretionary decision. The determination involved a careful consideration and balancing of such factors as the protection of the public, the physical and psychological needs of the minor, the relative suitability of the home environment, the availability of other resources, such as halfway houses and community centers, and the need to reintegrate the minor into the community. The decision thus required comparisons, choices, judgments, and evaluations, the very essence of the exercise of discretion [*Thompson v. County of Alameda (1980) 27 Cal. 3d 741, 748-749, 167 Cal. Rptr. 70, 614 P.2d 728]* .

Similarly, a county social worker's decision to place a child in a particular foster home, after consideration of the factors requiring consideration by statute, was a discretionary decision immune from liability under *Gov. Code § 820.2* [*Becerra v. County of Santa Cruz (1998) 68 Cal. App. 4th 1450, 1464, 81 Cal. Rptr. 2d 165]* . The court that reached this conclusion distinguished an earlier court of appeal opinion, *Elton v. County of Orange*, which had arguably reached a different result [*see* *Elton v. County of Orange (1970) 3 Cal. App. 3d 1053, 84 Cal. Rptr. 27* (decision by county probation department to place dependent child in particular home is not basic policy decision protected by discretionary immunity)]. However, unlike *Becerra, Elton* was decided at the demurrer stage, when facts supporting the discretionary decision were not before the court. Moreover, *Elton* was decided in 1970, years before the adoption of current statutes requiring that social workers engage in a discretionary analysis of the needs and interests of a dependent child prior to placement, statutes that had not been violated in *Becerra v. County of Santa Cruz* [*Becerra v. County of Santa Cruz (1998) 68 Cal. App. 4th 1450, 1460, 1464, 81 Cal. Rptr. 2d 165* ; *see, e.g., Welf. & Inst. Code § 16501.1*]. The court in *Becerra* also held that the decision whether to intervene and discontinue a child's placement, no less than the initial placement decision, is a discretionary decision [*Becerra v. County of Santa Cruz (1998) 68 Cal. App. 4th 1450, 1460, 1466, 81 Cal. Rptr. 2d 165* ; *see also* *Alicia T. v. County of Los Angeles (1990) 222 Cal. App. 3d 869, 882-883, 271 Cal. Rptr. 513* , *superseded by statute on other grounds as stated in* Clarke v. Upton, 2008 U.S. Dist. LEXIS 38206 (social worker's investigation of child abuse is discretionary function)].

The decision by a department head as to whether to initiate disciplinary proceedings against a subordinate employee, and what discipline to impose, is a discretionary act entitled to immunity. Such a decision is entirely within that department head's discretion and involves an exercise of analysis and judgment concerning what is just and proper under the circumstances [*Kemmerer v. County of Fresno (1988) 200 Cal. App. 3d 1426, 1437-1439, 246 Cal. Rptr. 609]* . The related decision to terminate the employment of a subordinate employee is also a discretionary act [*Summers v. City of Cathedral City (1990) 225 Cal. App. 3d 1047, 1064-1065, 275 Cal. Rptr. 594]* .

[d] Ministerial Acts

Based on the analysis in *Johnson v. State of California* [*Johnson v. State of California (1968) 69 Cal. 2d 782, 793-794, 73 Cal. Rptr. 240, 447 P.2d 352]* , all of the following were ministerial acts not giving rise to immunity: a therapists' failure to warn a person that the therapist's patient had threatened to kill the person [*Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 444-447, 131 Cal. Rptr. 14, 551 P.2d 334* ; a social worker's application of standards for

eligibility for welfare that were radically different than the standards mandated by statute and regulation [*Ramos v. County of Madera (1971) 4 Cal. 3d 685, 692-694, 94 Cal. Rptr. 421, 484 P.2d 93]* ; a policeman's leading the plaintiff to a place in the street to investigate an accident where the plaintiff was struck by another car [*McCorkle v. City of Los Angeles (1969) 70 Cal. 2d 252, 260-262, 74 Cal. Rptr. 389, 449 P.2d 453]* ; and a bus driver's failure of to stop a fight on a government-run bus [*Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal. 3d 780, 790, 221 Cal. Rptr. 840, 710 P.2d 907]* .

Action by public officials pursuant to a statute that uses the word "may" may be ministerial in nature. If the type of discretion permitted by the statute is necessary to implement a broader policy, the decision is ministerial rather than discretionary, and the immunity will not apply [*Sandrini Bros. v. Voss (1992) 7 Cal. App. 4th 1398, 1407-1408, 9 Cal. Rptr. 2d 763* (seizure of crops under *Food & Agric. Code § 12648*)].

[e] Conduct Both Discretionary and Ministerial

As indicated in *Johnson v. State of California* [*Johnson v. State of California (1968) 69 Cal. 2d 782, 793-794, 73 Cal. Rptr. 240, 447 P.2d 352]* , the basic decision may be discretionary, but its implementation may be ministerial. For instance, the decision to issue a press release was discretionary, but its contents, timing, and manner of release were ministerial, subjecting the public entity and official to liability if the ministerial acts were tortious [*Toney v. State of California (1976) 54 Cal. App. 3d 779, 789-793, 126 Cal. Rptr. 869* ; *Ogborn v. City of Lancaster (2002) 101 Cal. App. 4th 448, 461, 124 Cal. Rptr. 2d 238* (declaration of property as nuisance was discretionary, but actions implementing nuisance abatement on property were ministerial)]. Similarly, the decision to issue flood forecasts was discretionary, but the allegedly negligent implementation of that decision was ministerial and not immune [*Connelly v. State of California (1970) 3 Cal. App. 3d 744, 749-751, 84 Cal. Rptr. 257]* .

The California Supreme Court has held that a deputy public defender is not immune from liability for acts or omissions made in the course of providing legal representation to a criminal defendant. Once the decision to provide legal services to a defendant is made, which may itself be a policy decision entitled to immunity, acts or omissions made in the course of the representation, which are subject to the same standard of due care as arethose made by a private attorney, are operational decisions that are incident to the normal functioning of the office of the public defender, and they are not the type of discretionary policy decisions that are immunized from liability [*Barner v. Leeds (2000) 24 Cal. 4th 676, 679-680, 689-690, 102 Cal. Rptr. 2d 97, 13 P.3d 704]* .

[2] Immunity for Execution and Enforcement of Laws

A public employee is not liable for his or her act or omission, exercising due care, in the execution or enforcement of any law. This immunity does not, however, exonerate a public employee from liability for false arrest or false imprisonment [*Gov. Code § 820.4*]. Therefore, a sheriff is liable for false imprisonment if he or she knew or should have known that a person's incarceration is unlawful because all charges against that person have been dismissed [*Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 719, 117 Cal. Rptr. 241, 527 P.2d 865]* .

[3] Immunity for Acting Under Unconstitutional Enactment

If a public employee acts in good faith, without malice, and under the apparent authority of an enactment that is unconstitutional, invalid, or inapplicable, he or she is not liable for an injury caused thereby, except to the extent that he or she would have been liable if the enactment had been constitutional, valid, and applicable [*Gov. Code § 820.6*; *see, e.g.,* *O'Toole v. Superior Court (2006) 140 Cal. App. 4th 488, 504-509, 44 Cal. Rptr. 3d 531* (police officers immune from liability for enforcing college's requirement that nonstudents get permit before distributing anti-abortion information on campus)]. This immunity applies even though the employee may have been negligent in his or her good faith belief that the enactment was constitutional [Legislative Comm. Comment to *Gov. Code § 820.6*].

[4] Immunity for Acts or Omissions of Others

Except as otherwise provided by statute, a public employee is not liable for an injury caused by the act or omission of another person. Nothing in this immunity exonerates a public employee from liability for injury proximately caused by his or her own negligent or wrongful act or omission [*Gov. Code § 820.8*]. There can therefore be no vicarious liability of public employees for the torts of their subordinates [Calif. L. Rev. Comm'n Comment to *Gov. Code § 820.8*]. However, a public employee may still be liable for his or her own negligent failure to discharge an employee who is known to be incompetent or otherwise unfit [*see Fernelius v. Pierce (1943) 22 Cal. 2d 226, 239-241, 138 P.2d 12]* . For a form of affirmative defense asserting this immunity, *see § 464.197*.

[5] Immunity for Members of Local Governing Bodies

Members of city councils, mayors, members of boards of supervisors or school boards, members of governing boards of other local public entities, members of locally appointed boards and commissions, and members of locally appointed or elected advisory boards are not vicariously liable for injuries caused by the acts or omissions of the public entity or advisory body. This immunity does not exonerate an official from liability for injuries caused by that individual's own wrongful conduct. Nor does it affect the immunity of any other public official [*Gov. Code § 820.9*]. For a form of affirmative defense asserting this immunity, *see § 464.199*.

[6] Immunity for Legislative Action or Failure to Enforce Enactment

A public employee is not liable for an injury caused by his or her adoption of or failure to adopt an enactment or by his or her failure to enforce an enactment [*Gov. Code § 821*]. The term "enactment" is defined as a constitutional provision, statute, charter provision, ordinance, or regulation [*Gov. Code § 810.6*]. This immunity is intended to apply to law enforcement officers [*Michenfelder v. City of Torrance (1972) 28 Cal. App. 3d 202, 206, 104 Cal. Rptr. 501]* .

This immunity is similar to the immunity of public entities for legislative action and failure to enforce an enactment, which is discussed in *§ 464.62[2]*.

[7] Immunity for Malicious Prosecution

[a] When Applicable

A public employee is not liable for injury caused by his or her instituting or prosecuting any judicial or administrative proceeding within the scope of his or her employment, even if he or she acts maliciously or without probable cause [*Gov. Code § 821.6*]. *Gov. Code § 822.2*, which immunizes public entities and public employees from liability for misrepresentations unless the employees are guilty of actual fraud, corruption, or malice does not create an exception to a public employee's *Gov. Code § 821.6* immunity from liability for malicious prosecution [*Tur v. City of Los Angeles (1996) 51 Cal. App. 4th 897, 902-903, 59 Cal. Rptr. 2d 470* (public employee firefighters immune under *Gov. Code § 821.6* for subjecting reporter to criminal proceedings)].

Gov. Code § 821.6 is not limited to suits for damages for malicious prosecution, even though that is its principal use [*Gillan v. City of San Marino (2007) 147 Cal. App. 4th 1033, 1048-1050, 55 Cal. Rptr. 3d 158* (defamation and intentional infliction of emotional distress); *Kemmerer v. County of Fresno (1988) 200 Cal. App. 3d 1426, 1436, 246 Cal. Rptr. 609* (intentional infliction of emotional distress); *see also County of Los Angeles v. Superior Court (2009) 181 Cal. App. 4th 218, 231, 104 Cal. Rptr. 3d 230* (immunity applied to civil rights cause of action asserted under *Civ. Code § 52.1*); *Javor v. Taggart (2002) 98 Cal. App. 4th 795, 808-810, 120 Cal. Rptr. 2d 174* (slander and clouding of title, intentional infliction of emotional distress, and negligence)]. This immunity protects a police officer from negligent conduct in arresting a person [*Johnson v. City of Pacifica (1970) 4 Cal. App. 3d 82, 84-88, 84 Cal. Rptr. 246]* , protects a district attorney's office for conduct in investigating criminal charges, including alleged misconduct in obtaining or executing a search warrant or damaging property seized in that execution [*County of Los Angeles v. Superior Court (2009) 181 Cal. App. 4th 218, 230, 104 Cal. Rptr. 3d 230]* , and protects a coroner from liability based

on allegations that a negligent autopsy caused the plaintiff's prosecution [*Stearns v. County of Los Angeles (1969) 275 Cal. App. 2d 134, 136-138, 79 Cal. Rptr. 757]* .

Persons appointed as deputy district attorneys are protected by prosecutorial immunity under *Gov. Code § 821.6*, even if there is a ministerial defect in the appointment process, so long as the deputy district attorney acts under color of authority and is performing the proper function of a deputy district attorney at the time [*Miller v. Filter (2007) 150 Cal. App. 4th 652, 666-669, 58 Cal. Rptr. 3d 671* (deputy district attorneys protected by *Gov. Code § 821.6* despite district attorney's failure to file written appointments for deputies with county clerk)]. Prosecutorial immunity protects an appointed deputy district attorney even though the deputy receives no salary from the public entity [*Miller v. Filter (2007) 150 Cal. App. 4th 652, 669-670, 58 Cal. Rptr. 3d 671]* . The immunity applies to a deputy attorney general assigned to assist a county grand jury in its investigation of alleged misconduct in the county sheriff's office [*Harmston v. Kirk (1989) 216 Cal. App. 3d 1410, 1413-1414, 265 Cal. Rptr. 548]* , and it protects prosecutors and police officers from claims that they negligently suppressed exculpatory evidence [*Randle v. City & County of San Francisco (1986) 186 Cal. App. 3d 449, 456, 230 Cal. Rptr. 901]* . It also protects a social worker who investigated reported child abuse from charges of negligence in the investigation based on an alleged failure to consider all of the evidence and misrepresentation of information to the juvenile court, even though, as a result of the investigation, the child had been temporarily removed from his mother's custody [*Jenkins v. County of Orange (1989) 212 Cal. App. 3d 278, 283-284, 260 Cal. Rptr. 645* , *distinguished,* Clarke v. Upton, 2008 U.S. Dist. LEXIS 38206 ; *see Jacqueline T. v. Alameda County Child Protective Services (2007) 155 Cal. App. 4th 456, 468, 66 Cal. Rptr. 3d 157* ; *Alicia T. v. County of Los Angeles (1990) 222 Cal. App. 3d 869, 883, 271 Cal. Rptr. 513* , *distinguished,* Clarke v. Upton, 2008 U.S. Dist. LEXIS 38206 ; *but see Scott v. County of Los Angeles (1994) 27 Cal. App. 4th 125, 143-144, 32 Cal. Rptr. 2d 643* (distinguishing *Jenkins* and *Alicia T.*; county social worker is not immune under *Gov. Code § 821.6* from liability for negligent supervision of foster care of children who are subject of dependency proceedings)].

In addition, the prosecution immunity barred a physician's claim against the Board of Medical Quality Assurance and its officers for publication of disciplinary action taken against the physician. The court stated that the publication was part of the statutory scheme of enforcement [*Kayfetz v. State of California (1984) 156 Cal. App. 3d 491, 496-499, 203 Cal. Rptr. 33]* . Similarly, the immunity protects a director of county social services who initiated formal disciplinary proceedings against an employee, based on the assistant director's investigation and recommendation of dismissal, even though the discipline was later reduced to the placement of a letter of reprimand in the employee's personnel file [*Kemmerer v. County of Fresno (1988) 200 Cal. App. 3d 1426, 1436-1437, 246 Cal. Rptr. 609]* . Furthermore, the immunity protects state employers from an action by a discharged employee claiming wrongful termination in violation of public policy [*Ross v. San Francisco Bay Area Rapid Transit Dist. (2007) 146 Cal. App. 4th 1507, 1514-1516, 53 Cal. Rptr. 3d 715* ; *Shoemaker v. Myers (1992) 2 Cal. App. 4th 1407, 1425, 4 Cal. Rptr. 2d 203*]. Finally, this immunity protected state bar personnel from allegations of negligence and negligent and intentional infliction of emotional distress in connection with the disbarment of an attorney [*Rosenthal v. Vogt (1991) 229 Cal. App. 3d 69, 75, 280 Cal. Rptr. 1]* .

[b] When Not Applicable

The immunity for malicious prosecution is based on prosecution types of activity. It does not extend to activity that constitutes false imprisonment. Therefore, the immunity did not protect a sheriff from liability for falseimprisonment for keeping a prisoner in jail after the sheriff knew or should have known that the prisoner should be discharged. Retaining a person in jail when no criminal proceedings are pending against that person is not instituting a proceeding against that person, and is thus not an action that is immune [*Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 719-722, 117 Cal. Rptr. 241, 527 P.2d 865]* .

False imprisonment or false arrest is detention without legal authority, whereas malicious prosecution involves proper use of legal process, but with improper motives. Therefore, if the arrest is based on a valid warrant, no cause of action can be stated for false arrest or imprisonment, and the cause of action for malicious prosecution is subject to the

immunity of *Gov. Code § 821.6* [*Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 123 Cal. Rptr. 525]* . However, an arrest made without probable cause is not protected by the immunity of *Gov. Code § 821.6* [*Gillan v. City of San Marino (2007) 147 Cal. App. 4th 1033, 1050, 55 Cal. Rptr. 3d 158]* .

If a person is arrested without a warrant and is later prosecuted (and eventually exonerated), he or she can only recover damages for false imprisonment from the time of the warrantless arrest until the commencement of legal proceedings, because the malicious prosecution immunity applies thereafter [*Jackson v. City of San Diego (1981) 121 Cal. App. 3d 579, 583-589, 175 Cal. Rptr. 395]* . The immunity from liability for injury caused by malicious prosecution, provided to public employees by *Gov. Code § 821.6*, precludes a plaintiff in a false arrest action from recovering damages that are attributable to the period of the plaintiff's incarceration that follows his or her arraignments [*Asgari v. City of Los Angeles (1997) 15 Cal. 4th 744, 748, 758 n.10, 63 Cal. Rptr. 2d 842, 937 P.2d 273* (disapproving *Jackson* to extent it holds that recovery of damages for post-arraignment confinement is permitted)]. However, this rule does not prevent a plaintiff from seeking damages for injuries suffered after the arraignment that were caused by false arrest and imprisonment that preceded the arraignment [*County of Los Angeles v. Superior Court (2000) 78 Cal. App. 4th 212, 222-224, 92 Cal. Rptr. 2d 668]* .

Malicious prosecution and false arrest, although distinct causes of action, are not necessarily mutually exclusive. A cause of action for false arrest or false imprisonment may lie in a case in which the same facts also support a cause of action for malicious prosecution. Under the facts of a given case, the distinction between malicious prosecution and false arrest--and, with it, the existence of statutory immunity--may depend on whether or not the defendant charged with maliciously instituting the prosecution also made the arrest [*Harden v. San Francisco Bay Area Rapid Transit Dist. (1989) 215 Cal. App. 3d 7, 16-17, 263 Cal. Rptr. 549* (public employee who did not directly participate in actual arrest, detention, or imprisonment, but knowingly gave false and materially incomplete information of character that could be expected to stimulate arrest, may be joint tortfeasor in action for false arrest)].

The malicious prosecution immunity does not, however, protect the public entity from liability for failure to discharge a mandatory duty; that basis for liability is not subject to the immunities of the public employee [*Bradford v. State of California (1973) 36 Cal. App. 3d 16, 19-21, 111 Cal. Rptr. 852]* . Nor does the immunity apply to acts that violate the whistle-blower statute, which applies if any state employee directly or indirectly uses or threatens to use any official authority or influence in any manner whatsoever that tends to discourage, restrain, interfere with, coerce, or discriminate against any other state employee because the latter has reported information relating to an actual or suspected violation of law [*Shoemaker v. Myers (1992) 2 Cal. App. 4th 1407, 1423-1425, 4 Cal. Rptr. 2d 203* ; *see Gov. Code § 19683* (whistle-blower statute, discussed in Ch. 118, *Civil Service*)]. The whistle-blower statute and prosecution immunity overlap if public employees are accused of using official authority to discourage, restrain, interfere with, coerce, or discriminate against another public employee by means of a judicial or administrative proceeding [*Shoemaker v. Myers (1992) 2 Cal. App. 4th 1407, 1423, 4 Cal. Rptr. 2d 203]* . If the two statutes conflict, the whistle-blower statute prevails; otherwise, the Section 821.6 immunity will protect conduct, taken to discourage whistle-blowing, that is more egregious than other conduct that would be unprotected by the immunity [*see Shoemaker v. Myers (1992) 2 Cal. App. 4th 1407, 1423, 4 Cal. Rptr. 2d 203]* .

A county social worker's function in supervising the foster care of children who are the subject of juvenile dependency proceedings was separate and distinct from the social worker's prosecutorial function in initiating such proceedings. Therefore, although a social worker may be entitled to immunity under *Gov. Code § 821.6* for his or her conduct in the initiation and prosecution of dependency proceedings, he or she is not immune under that section from liability for negligent supervision of the foster care of children who are the subject of those proceedings [*Scott v. County of Los Angeles (1994) 27 Cal. App. 4th 125, 143-144, 32 Cal. Rptr. 2d 643]* .

[c] Causal Connection Required

The test of the prosecution immunity is causal connection, not time of occurrence. So long as an injury is caused by

behavior involved in the initiation or prosecution of a proceeding, it is within the scope of the immunity. Even conduct occurring after termination of the prosecution is included within the immunity. Therefore, the immunity applied in an action for libel and slander brought by fish purchasers against a state official who, after trial, announced that the fish purchasers had been found guilty of underweighing fish by amounts far greater than the actual violations [*Cappuccio, Inc. v. Harmon (1989) 208 Cal. App. 3d 1496, 1498, 257 Cal. Rptr. 4]* .

Moreover, the term "administrative proceeding" is broadly construed. In an employee disciplinary action, it encompassed the investigation, preliminary notice, and proceedings before the Civil Service Commission [*Kemmerer v. County of Fresno (1988) 200 Cal. App. 3d 1426, 1436-1437, 246 Cal. Rptr. 609]* .

[8] Immunity for Licensing

A public employee is not liable for an injury caused by his or her issuance, denial, suspension, or revocation of, or by his or her failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval order, or similar authorization, if he or she is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended, or revoked [*Gov. Code § 821.2*; *see, e.g.,* *Rosenthal v. Vogt (1991) 229 Cal. App. 3d 69, 75, 280 Cal. Rptr. 1* (disbarment proceedings); *Land Waste Mgmt. v. Contra Costa County Bd. of Supervisors (1990) 222 Cal. App. 3d 950, 962-963, 271 Cal. Rptr. 909* (failure to approve sanitary landfill project); *see also* *Thompson v. City of Lake Elsinore (1993) 18 Cal. App. 4th 49, 55-58, 22 Cal. Rptr. 2d 344* (under city ordinance adopting Uniform Building Code § 307, building official who gave "Final Inspection Okay" had no discretion to withhold certificate of occupancy, and thus *Gov. Code § 821.2* was no bar to liability under complaint that alleged breach of mandatory ministerial duty to issue certificate of occupancy)].

This immunity is similar to the licensing immunity for public entities, which is discussed in *§ 464.62[3]*.

[9] Immunity for Inspections

A public employee is not liable for injury caused by his or her failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, other than the property of the public entity employing the public employee, for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety [Gov. Code § 821.43; *see Gov. Code § 830(c)* (definition of public entity's property)].

This immunity is similar to the inspection immunity for public entities, which is discussed in *§ 464.62[4]*.

[10] Immunity for Entry on Property

A public employee is not liable for an injury arising out of his or her entry on any property if that entry is expressly or impliedly authorized by law. Nothing in this immunity exonerates a public employee from liability for an injury proximately caused by his or her own negligent or wrongful act or omission [*Gov. Code § 821.8*].

[11] Immunity for Money Stolen From Custody

A public employee is not liable for money stolen from his or her official custody. Nothing in this immunity exonerates a public employee from liability if the loss was sustained as a result of his or her own negligent or wrongful act or omission [*Gov. Code § 822*].

[12] Immunity for Misrepresentations

A public employee acting in the scope of his or her employment is not liable for an injury caused by his or her misrepresentation, whether or not such misrepresentation is negligent or intentional, unless he or she is guilty of actual

fraud, corruption, or actual malice [*Gov. Code § 822.2*]. This immunity applies unless, in addition to the essentials of common law deceit, a public employee is motivated by corruption or actual malice, such as a conscious intent to deceive, vex, annoy, or harm the injured party in that party's business [*Schonfeld v. City of Vallejo (1974) 50 Cal. App. 3d 401, 409-411, 123 Cal. Rptr. 669* ; *see Golden W. Baseball Co. v. Talley (1991) 232 Cal. App. 3d 1294, 1304-1306, 284 Cal. Rptr. 53* (defendant entitled to summary judgment based on his uncontroverted declaration regarding his lack of malice)].

The California Supreme Court has held that misrepresentation as used in the similar immunity for public entities [*see Gov. Code § 818.8*, which is discussed in *§ 464.62[5]*] means only an interference with a financial or commercial interest [*Johnson v. State of California (1968) 69 Cal. 2d 782, 799-800, 73 Cal. Rptr. 240, 447 P.2d 352* ; *see Michael J. v. Los Angeles County Dept. of Adoptions (1988) 201 Cal. App. 3d 859, 872, 875, 247 Cal. Rptr. 504* (county adoption agency subject to liability for intentional misrepresentation or fraudulent concealment in adoption process)]. It seems evident that this definition is also applicable to the public employee misrepresentation immunity under *Gov. Code § 822.2* [*see Bastian v. County of San Luis Obispo (1988) 199 Cal. App. 3d 520, 533, 245 Cal. Rptr. 78]* .

Gov. Code § 822.2, which immunizes public entities and public employees from liability for misrepresentations, unless the employees are guilty of actual fraud, corruption, or malice, does not create an exception to a public employee's *Gov. Code § 821.6* immunity from liability for malicious prosecution [*Tur v. City of Los Angeles (1996) 51 Cal. App. 4th 897, 902-903, 59 Cal. Rptr. 2d 470* (public employee firefighters immune under *Gov. Code § 821.6* for subjecting reporter to criminal proceedings)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityImmunityAbsolute ImmunityTortsPublic Entity LiabilityImmunityJudicial ImmunityTortsPublic Entity LiabilityImmunityQualified Immunity

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1. General Principles of Liability and Immunity

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[Reserved]

§§ 464.65[Reserved]

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§ 464.80 Governing Law

The law governing liability for dangerous conditions of public property is set forth in *Gov. Code § 835*. That statute is the sole avenue for imposing liability on a public entity for a dangerous condition on public property. A plaintiff may not rely on the general negligence principles of *Civ. Code § 1714* to impose liability on a public entity landowner (as the plaintiff could in an action against a private property owner) [Zelig v. County of Los Angeles (2002) 27 Cal. 4th 1112, 1132, 119 Cal. Rptr. 2d 709, 43 P.3d 1171.]

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsConstruction & InterpretationTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEntities Covered

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§ 464.81 Liability of Public Entity for Dangerous Condition of Public Property

[1] General Rule of Liability

A public entity may be liable for injury on its property if [*Gov. Code § 835*]:

- Its property was in a dangerous condition at the time of the injury;
- The injury was proximately caused by the dangerous condition; and
- The dangerous condition created a reasonably foreseeable risk of the kind of injury that occurred.

Once these elements are shown, there are two alternate bases for liability [*see Gov. Code § 835*]:

- A negligent or wrongful act or omission of an employee of the public entity within the scope of his or her employment created the dangerous condition; or
- The public entity had actual or constructive notice of the dangerous condition a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

It is not enough that a plaintiff plead and prove merely that a dangerous condition of public property existed and that it caused injury to plaintiff. Under the plain language of the statute, the plaintiff must also plead and prove that the dangerous condition was created through the negligent or wrongful act or omission of an employee of the public entity, or that the public entity had notice of the dangerous condition a sufficient time prior to the injury to take remedial steps [*Metcalf v. County of San Joaquin (2008) 42 Cal. 4th 1121, 1131, 72 Cal. Rptr. 3d 382, 176 P.3d 654*]. It is not necessary that the plaintiff prove both a negligent act and notice to the public agency, however, as either alone will suffice to establish liability [*Curtis v. State of California ex rel. Dept. of Transportation (1982) 128 Cal. App. 3d 668, 693, 180 Cal. Rptr. 843*].

[2] Requirement of Ownership or Control of Property

To be liable for a dangerous condition of public property, a public entity must be the owner or in control of the property at the time of the injury [*Tolan v. State of Califronia ex rel. Dept. of Transportation (1979) 100 Cal. App. 3d 980, 984, 161 Cal. Rptr. 307* ; *see also Bethman v. City of Ukiah (1989) 216 Cal. App. 3d 1395, 1398, 1408-1409, 265 Cal. Rptr. 539* (claim against city as owner of municipal airport was preempted by Federal Aviation Act because airport navigation facilities, as matter of law, are regulated, approved, and controlled pursuant to federal law)]. If the public entity clearly owns the property at issue, further evidence that the entity controlled the property is not required [*see Huffman v. City of Poway (2000) 84 Cal. App. 4th 975, 989-990, 101 Cal. Rptr. 2d 325* (although public entity control was present, court suggested that issue of control is irrelevant if public entity clearly owns property)].

When a public entity does not own the property upon which the dangerous condition exists and otherwise holds no interest in it, the mere fact that the public entity has regulatory authority over aspects of the property does not equate with control over the property for purposes of imposing liability for failing to correct a dangerous condition [*see, e.g., Public Utilities Com. v. Superior Court (2010) 181 Cal. App. 4th 364, 375-376, 105 Cal. Rptr. 3d 234* (regulatory authority of Public Utilities Commission did not generate sufficient control over railroad crossing to warrant holding PUC liable for dangerous condition of crossing)].

The public entity that owns or controls that location must be properly identified. For example, a city is not responsible for the condition of a state highway located within its boundaries [*Ramsey v. City of Lake Elsinore (1990) 220 Cal. App. 3d 1530, 1537-1540, 270 Cal. Rptr. 198* ; *see Sts. & Hy. Code § 1806*].

[3] Requirement That Property Was Dangerous if Used With Due Care

The plaintiff is not required to establish that the public property was being used with due care when the injury occurred, but must establish that the property was dangerous if used with due care [*Murrell v. State of California ex rel. Dept. Pub. Wks. (1975) 47 Cal. App. 3d 264, 267, 120 Cal. Rptr. 812* ; *see Lompoc Unified Sch. Dist. v. Superior Court (1993) 20 Cal. App. 4th 1688, 1698, 26 Cal. Rptr. 2d 122]* . For instance, the negligence of the driver of the car in which the plaintiff was injured did not preclude an action if the condition of the road was dangerous if used with due care [*Callahan v. City & County of San Francisco (1967) 249 Cal. App. 2d 696, 702-704, 57 Cal. Rptr. 639]* . However, the public entity is not liable if the public property is dangerous only if used without due care [*Schonfeldt v. State of California (1998) 61 Cal. App. 4th 1462, 1468, 72 Cal. Rptr. 2d 464* ; *Rombalski v. City of Laguna Beach (1989) 213 Cal. App. 3d 842, 849-850, 261 Cal. Rptr. 820* ; *Fredette v. City of Long Beach (1986) 187 Cal. App. 3d 122, 130-132, 231 Cal. Rptr. 598]* .

[4] Negligent or Wrongful Act or Omission

[a] Requirement for Liability

Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that a negligent or wrongful act or omission of an employee of the public entity within the scope of his or her employment created the dangerous condition [*Gov. Code § 835(a)*].

The fact that a dangerous condition was created by a public entity employee, even created deliberately, may be used to support a finding that the dangerous condition was created negligently, but such facts do not *necessitate* a factual finding that the dangerous condition was created negligently or wrongfully [*Metcalf v. County of San Joaquin (2008) 42 Cal. 4th 1121, 1135-136, 72 Cal. Rptr. 3d 382, 176 P.3d 654*]. The negligence standard applicable to a finding of liability under this statute is the common-law ordinary negligence standard, which measures the reasonableness of a

defendant's conduct in light of the foreseeable risk of harm [*Metcalf v. County of San Joaquin (2008) 42 Cal. 4th 1121, 1136, 1139, 72 Cal. Rptr. 3d 382, 176 P.3d 654*].

Even if a plaintiff establishes a basis for imposing liability by pleading and proving that the dangerous condition was created through the negligence of a public employee acting within the scope of employment, a public entity may avoid liability by showing that it did not act unreasonably, in light of the practicality and cost of pursuing the alternative courses of action available to it, when it created or failed to remedy a dangerous condition [*Gov. Code § 835.4*; *Metcalf v. County of San Joaquin (2008) 42 Cal. 4th 1121, 1137-1138, 72 Cal. Rptr. 3d 382, 176 P.3d 654*]. This "reasonability" defense employs a different standard of reasonableness than the ordinary standard used to establish liability under *Gov. Code § 835* and under ordinary tort principles. Reasonability under ordinary tort principles does not depend on the existence of other, conflicting claims on a defendant's resources or on the political barriers to acting in a reasonable manner, although such considerations may provide a defense for a public entity [*Metcalf v. County of San Joaquin (2008) 42 Cal. 4th 1121, 1138, 72 Cal. Rptr. 3d 382, 176 P.3d 654*]. This affirmative defense is discussed in more detail in *§ 464.86*.

[b] Res Ipsa Loquitur Presumption Inapplicable

Gov. Code § 835(a) requires the plaintiff to show that an employee of the public entity created the dangerous condition [*Brown v. Poway Unified Sch. Dist. (1993) 4 Cal. 4th 820, 836, 15 Cal. Rptr. 2d 679, 843 P.2d 624]* . The term "created" means the sort of involvement by an employee that would justify a presumption of notice on the entity's part [*Brown v. Poway Unified Sch. Dist. (1993) 4 Cal. 4th 820, 836-838, 15 Cal. Rptr. 2d 679, 843 P.2d 624]* . Accordingly, the presumption of negligence created by application of the res ipsa loquitur doctrine does not satisfy the requirements for holding a public entity liable under *Gov. Code § 835(a)* [*Brown v. Poway Unified Sch. Dist. (1993) 4 Cal. 4th 820, 836, 15 Cal. Rptr. 2d 679, 843 P.2d 624]* .

Res ipsa loquitur requires the plaintiff to show only that (1) the accident was of a kind ordinarily not occurring in the absence of negligence, (2) the instrumentality of harm was within the defendant's exclusive control, and (3) the plaintiff did not voluntarily contribute to the injuries [*Brown v. Poway Unified Sch. Dist. (1993) 4 Cal. 4th 820, 836, 15 Cal. Rptr. 2d 679, 843 P.2d 624]* . To permit the res ipsa loquitur presumption alone to establish a prima facie case would permit a jury to find a public entity liable even though there was no evidence that an employee of that entity was involved in creating the allegedly dangerous condition [*Brown v. Poway Unified Sch. Dist. (1993) 4 Cal. 4th 820, 836-838, 15 Cal. Rptr. 2d 679, 843 P.2d 624]* .

For general discussion of the doctrine of res ipsa loquitur, see Ch. 380, *Negligence* .

[5] Failure to Take Protective Measures After Notice

[a] Requirement for Liability

Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that the public entity had actual or constructive notice of the dangerous condition a sufficient time prior to the injury to have taken measures to protect against the dangerous condition [*Gov. Code § 835(b)*].

[b] Actual Notice

A public entity has actual notice of a dangerous condition if it has actual knowledge of the existence of the condition and knows or should know of its dangerous character [*Gov. Code § 835.2(a)*].

[c] Constructive Notice

A public entity has constructive notice of a dangerous condition only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character [*Gov. Code § 835.2(b)*].

On the issue of due care, admissible evidence includes but is not limited to evidence of the following [*Gov. Code § 835.2(b)*]:

- The existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (considering the practicability and cost of the inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property.

- The public entity maintained and operated such an inspection system with due care and did not discover the condition.

A public entity is not on notice of a dangerous condition if it is not obvious and there is no evidence that it has existed at any particular time before the accident [*State v. Superior Court of San Mateo County (1968) 263 Cal. App. 2d 396, 399-401, 69 Cal. Rptr. 683* (remains of fire covered with sand on state beach)]. However, a public entity does have constructive notice of danger if the dangerousness is apparent to anyone who attempts to use the property for the purpose for which it is intended [*see Anderson v. City of Thousand Oaks (1976) 65 Cal. App. 3d 82, 91-92, 135 Cal. Rptr. 127* (danger in road curve obvious to drivers who attempt to negotiate it at posted speed limit)]. For example, a public entity had constructive notice of the dangerousness of an excavation on its property because the entity issued a permit for the excavation, the entity knew when and where the excavation would take place, and a cursory inspection would have disclosed the danger [*Stanford v. City of Ontario (1972) 6 Cal. 3d 870, 882-884, 101 Cal. Rptr. 97, 495 P.2d 425]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsClaims By & AgainstTortsNegligenceProofRes Ipsa LoquiturGeneral OverviewTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsGeneral OverviewTortsPublic Entity LiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEntities Covered

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§ 464.82 Liability of Public Employee for Dangerous Condition of Public Property

[1] General Rule of Liability

Except as provided in *Gov. Code §§ 840-840.6*, a public employee is not liable for injury caused by a condition of public property if that condition exists because of any act or omission of that employee within the scope of his or her employment [*Gov. Code § 840*].

An employee of a public entity is liable for injury caused by a dangerous condition of public property if the plaintiff establishes that: the property of the public entity was in a dangerous condition at the time of the injury; the injury was proximately caused by the dangerous condition; the dangerous condition created a reasonably foreseeable risk of the kind of injury that was incurred; and either [*Gov. Code § 840.2*]:

- The dangerous condition was directly attributable wholly or in substantial part to a negligent or wrongful act of the employee, and the employee had the authority and the funds and other means immediately available to take alternative action that would not have created the dangerous condition; or

- The employee had the authority, it was the employee's responsibility to take adequate measures to protect against the dangerous condition at the expense of the public entity, the funds and other means for doing so were immediately available to the employee, and the employee had actual or constructive notice of the dangerous condition under *Gov. Code § 840.4* a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Liability of a public employee for a dangerous condition of public property is subject to any immunity of the public employee provided by the State of California, and is subject to any defenses that would be available to the public employee if he or she were a private person [*Gov. Code § 840*].

[2] Actual Notice of Danger

A public employee has actual notice of a dangerous condition if he or she had actual personal knowledge of the existence of the condition and knew or should have known of its dangerous character [*Gov. Code § 840.4(a)*].

[3] Constructive Notice of Danger

A public employee has constructive notice of a dangerous condition only if the plaintiff establishes that: the public employee had the authority and it was his or her responsibility as a public employee to inspect the property of the public entity or to see that inspections were made to determine whether dangerous conditions existed in the public property; the funds and other means for making such inspections or for seeing that such inspections were made were immediately available to the public employee; and the dangerous condition had existed for such a period of time and was of such an obvious nature that the public employee, in the exercise of his or her authority and responsibility with due care, should have discovered the condition and its dangerous character [*Gov. Code § 840.4(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsConstruction & InterpretationTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEntities Covered

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2. Liability for Dangerous Conditions of Public Property

40-464 California Forms of Pleading and Practice--Annotated § 464.83

§ 464.83 Dangerous Condition

[1] Statutory Definition

A "dangerous condition" means a condition of property that creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury if that property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used [*Gov. Code § 830(a)*].

A condition is not dangerous unless it creates a hazard to those who foreseeably will use the property or adjacent property with due care. Therefore, even though it is foreseeable that persons may use public property without due care, a public entity may not be liable for failing to take precautions to protect those persons. The definition does, however, take into consideration the standard of care that would be applicable to foreseeable users of the property. If it is reasonably foreseeable that persons to whom a lower standard of care is applicable, such as children, may be exposed to a substantial risk of injury from the property, the public entity should be required to take reasonable precautions to protect those persons from that risk. For example, a public entity may be expected to fence a swimming pool or to fence or lock up a dangerous instrumentality if it is reasonably foreseeable that small children may be injured if those precautions are not taken [Cal. L. Revision Comm'n Comment to *Gov. Code § 830*; *see Mathews v. City of Cerritos (1992) 2 Cal. App. 4th 1380, 1384, 4 Cal. Rptr. 2d 16]* .

[2] Third Party Conduct Insufficient

Third party conduct by itself, unrelated to the condition of the property, does not constitute a dangerous condition for which a public entity may be liable. A defect in the property is necessary to state a cause of action based on the wrongful conduct of third parties [*Zelig v. County of Los Angeles (2002) 27 Cal. 4th 1112, 1134* ; *Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 810-811, 205 Cal. Rptr. 842, 685 P.2d 1193* ; *see, e.g., Crow v. State of California (1990) 222 Cal. App. 3d 192, 204-206, 271 Cal. Rptr. 349]* . Public entities were not liable for personal injury and death resulting from criminal conduct on public property either because the plaintiffs could not show that defects in the property itself contributed to the criminal conduct or because both public awareness of the prevalence of crime and policy factors militated against imposing a government duty to warn of the possibility of

criminal acts [*see Hayes v. State of California (1974) 11 Cal. 3d 469, 472-473, 113 Cal. Rptr. 599, 521 P.2d 855* ; *Turner v. State of California (1991) 232 Cal. App. 3d 883, 891-892, 284 Cal. Rptr. 349]* .

In one case, for example, the California Supreme Court held that a county was not liable for failing to prevent an ex-husband from shooting his former spouse in a county courthouse, because the plaintiffs could not show that any physical condition of the courthouse increased the risk of the shooting or otherwise had a causal connection to the shooting [*Zelig v. County of Los Angeles (2002) 27 Cal. 4th 1112, 1136*]. In another case, in which two people were killed when their car was struck by another vehicle engaged in a race, the court of appeal held that the flat, straight city street was not physically defective because of inadequate lighting, but that even if it were, there was no evidence that the lack of adequate lighting influenced the racers to race [*City of San Diego v. Superior Court (2006) 137 Cal. App. 4th 21, 31, 40 Cal. Rptr. 3d 26]* .

A public entity may be liable if a combination of both a dangerous condition of the property itself and also acts of third parties creates an unreasonable risk of harm [*see Hayes v. State (1974) 11 Cal. 3d 469, 472* (dictum)]. Nothing in *Gov. Code § 835* specifically precludes a finding that a public entity may have a duty, given special circumstances, to protect against harmful criminal conduct on its property [*Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 811, 205 Cal. Rptr. 842, 685 P.2d 1193]* . For example, a community college had a duty to take reasonable measures to protect or to warn its students against criminal assault if its failure to do so created a reasonably foreseeable risk of injury, given the college's awareness of property conditions favorable to assaults and the incidence of prior assaults. The duty arose out of the special relationship between college and student, the property conditions known to the college that tended to increase the risk of crime, as well as the absence of policy factors militating against a government duty to warn [*see Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 812-814, 205 Cal. Rptr. 842, 685 P.2d 1193]* .

The duty extends only to a plaintiff's use of the property in a manner in which it is reasonably foreseeable that the plaintiff will, in fact, use the property. If the plaintiff's use of the property is not in such a manner, there is no dangerous condition that is a prerequisite to liability [*Branch v. State of California ex rel. Dep't of Transp. (1984) 159 Cal. App. 3d 340, 344-345, 205 Cal. Rptr. 482* (plaintiff abducted by third parties and taken to entity's property was not "using" property in foreseeable manner, and therefore no dangerous condition liability existed)].

[3] Minor Risk of Danger

A condition is not a dangerous condition if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial, or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury if that property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used [*Gov. Code § 830.2*].

Although technically this provision is unnecessary because it merely declares the rule that would ordinarily be applied when a court rules on the sufficiency of the evidence, it serves to emphasize that the court must determine that there is evidence from which a reasonable person could conclude that a substantial, as opposed to a possible, risk is involved before it permits the jury to find that a condition is dangerous [*Antenor v. City of Los Angeles (1985) 174 Cal. App. 3d 477, 481, 220 Cal. Rptr. 181*]. A court may not determine that a defect is trivial as a matter of law, however, if competing and conflicting evidence of the size, nature, and quality of the defect, or the circumstances surrounding the plaintiff's injury, raise triable factual issues as to whether the defect or condition of the property presented a danger to persons exercising ordinary care [*Stathoulis v. City of Montebello (2008) 164 Cal. App. 4th 559, 569, 78 Cal. Rptr. 3d 910* (triable issue existed as to whether series of gouge marks in roadway created dangerous condition for pedestrians such as plaintiff)].

The court should not rely solely on the size of a particular defect in determining whether it is trivial. The court should

also consider the circumstances surrounding the accident that might have made the defect more dangerous than its size would indicate. These circumstances include whether the accident occurred in an area where the view of the defect is obstructed, the shape and configuration of the defect, whether it occurred at night in an unlighted area, and any other conditions surrounding the defect [*Dolquist v. City of Bellflower (1987) 196 Cal. App. 3d 261, 267-271, 241 Cal. Rptr. 706]* .

[4] Failure to Provide Traffic Signals

A condition is not a dangerous condition merely because of the failure to provide regulatory traffic control signals, stop signs, yield right of way signs, or speed restriction signs, as described by the Vehicle Code, or distinctive roadway markings described in *Veh. Code § 21460* (double lines) [*Gov. Code § 830.4*; *see, e.g.,* *Frazier v. County of Sonoma (1990) 218 Cal. App. 3d 454, 459-461, 267 Cal. Rptr. 39]* . The lack of a traffic signal or crossing guard at a crosswalk near which a school has opened does not constitute a dangerous condition of public property [*Cerna v. City of Oakland (2008) 161 Cal. App. 4th 1340, 1351-1352, 75 Cal. Rptr. 3d 168*].

If a traffic situation is dangerous for reasons other than the failure to provide regulatory signals or street markings, the definitional exemption of *Gov. Code § 830.4* does not apply. A public entity is protected from liability by *Gov. Code § 830.4* only if the dangerous condition exists solely as a result of the entity's failure to provide a regulatory traffic device or street marking [*Washington v. City & County of San Francisco (1990) 219 Cal. App. 3d 1531, 1534-1535, 269 Cal. Rptr. 58* (dangerous condition of vision limitations caused by metal pillars in middle of street and shadow caused by elevated freeway was not solely result of failure to provide signals)].

Gov. Code § 830.8 grants immunity to public entities and their employees for the failure to provide other types of traffic signals [*see § 464.85[3]*].

[5] Circumstances Deemed Insufficient to Establish Dangerous Condition

Unless the doctrine of res ipsa loquitur is applicable, the happening of the accident that results in the injury is not in and of itself evidence that public property was in a dangerous condition [*Gov. Code § 830.5(a)*]. *Gov. Code § 830.5(a)* was expressly intended to abrogate a rule to the effect that the happening of the accident is evidence that public property was in a dangerous condition. It does not act to extend the liability of public entities to cases in which there was no involvement by a public employee and thus no basis for presuming that the entity had notice of the dangerous condition [*Brown v. Poway Unified Sch. Dist. (1993) 4 Cal. 4th 820, 830-833, 15 Cal. Rptr. 2d 679, 843 P.2d 624]* .

The fact that action was taken after an injury occurred to protect against a condition of public property is not evidence that the public property was in a dangerous condition [*Gov. Code § 830.5(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDutyAffirmative Duty to ActSpecial RelationshipsGovernment OfficialsTortsNegligenceStandards of CareAppropriate StandardObjectivityTortsPublic Entity LiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral Overview

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40-464 California Forms of Pleading and Practice--Annotated § 464.84

§ 464.84 Public Property

[1] Statutory Definition

The terms "property of a public entity" and "public property" mean real or personal property owned or controlled by the public entity, but do not include easements, encroachments, and other property that are located on the property of the public entity, but are not owned or controlled by the public entity [*Gov. Code § 830(c)*].

For purposes of determining liability for dangerous conditions of public property, seismic safety improvements or fire sprinkler improvements that are owned, built, controlled, operated, and maintained by the private owner of the building in which they are installed are not public property or property of a public entity solely because they were financed by means of the formation of a special assessment district [*Gov. Code § 830.1*].

[2] Danger Affecting Adjacent Property

A public entity is liable only for dangerous conditions of its own property, but its own property may be considered dangerous if it creates a substantial risk of injury to adjacent property or to persons on adjacent property [Cal. L. Revision Comm'n Comment to *Gov. Code § 830*]. Property belonging to a public entity may also be considered dangerous if a condition on the adjacent property exposes persons using the public property to a substantial risk of injury [Cal. L. Revision Comm'n Comment to *Gov. Code § 830*; *Jordan v. City of Long Beach (1971) 17 Cal. App. 3d 878, 882-883, 95 Cal. Rptr. 246]* .

In one case, the California Supreme Court held that the location of a bus stop may constitute a dangerous condition of public property if bus patrons must cross a dangerous crosswalk on adjacent property to reach the bus stop, assuming that the other elements for imposing liability under *Gov. Code § 835* have been met [*Bonanno v. Central Contra Costa Transit Auth. (2003) 30 Cal. 4th 139, 144, 132 Cal. Rptr. 2d 341, 65 P.3d 807* ; *see also Joyce v. Simi Valley Unified Sch. Dist. (2003) 110 Cal. App. 4th 292, 298-300, 1 Cal. Rptr. 3d 712* (school district liable to student struck by car in dangerous crosswalk, based on district's placement of entrance gate adjacent to crosswalk)]. In that case, the defendant, a transit authority, had no control over the adjacent county street, which was a busy thoroughfare with an

uncontrolled intersection, nor could the defendant control the actions of third-party drivers such as the driver who caused the plaintiff's injuries [*Bonanno v. Central Contra Costa Transit Auth. (2003) 30 Cal. 4th 139, 151-152, 132 Cal. Rptr. 2d 341, 65 P.3d 807]* . However, the defendant was on notice of the dangers involved in reaching the bus stop, and although installing a new stop at another location would have required the county's approval, the transit authority had sole control over whether to remove a bus stop if its location was unnecessarily dangerous [*Bonanno v. Central Contra Costa Transit Auth. (2003) 30 Cal. 4th 139, 144-147* & n.2, *132 Cal. Rptr. 2d 341, 65 P.3d 807]* . Under those circumstances, the Court found no reason to reverse the jury's determination that the location of the bus stop constituted a dangerous condition of public property [*Bonanno v. Central Contra Costa Transit Auth. (2003) 30 Cal. 4th 139, 156, 132 Cal. Rptr. 2d 341, 65 P.3d 807]* .

A public entity that allows a sporting event to take place on its property has no legal duty to provide a distraction barrier to prevent a passing motorist on an adjacent public street from seeing or hearing the event. For example, a public entity was not liable for injuries caused by an inattentive motorist who became involved in a traffic accident with a bicyclist using the street. The fact that an event may be in progress poses no risk of harm (let alone a substantial risk) to pedestrians, bicyclists, or motorists on the adjacent public road if a motorist exercises due care while passing the property on which the event is taking place. It is the motorist who at all times has the duty to exercise reasonable care to be alert to potential dangers and not let his or her attention be distracted by an interesting sight so as to interfere with the safe operation of a motor vehicle [*Lompoc Unified Sch. Dist. v. Superior Court (1993) 20 Cal. App. 4th 1688, 1691, 1694-1698, 26 Cal. Rptr. 2d 122]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsGeneral OverviewTortsPublic Entity LiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEntities Covered

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§ 464.85 Immunities

[1] Availability of Immunity

In addition to specific immunities and defenses to dangerous-condition liability, public entities may use any defenses that would be available if the public entity were a private person [*Gov. Code § 815(b)*; Senate Legis. Comm. Comment to *Gov. Code § 835*]. This type of liability, however, is not subject to the immunity that public entities derive from *Gov. Code § 815.2* for acts or omissions for which an employee is immune, such as immunity for discretionary acts under *Gov. Code § 820.2*, because *Gov. Code §§ 830-840.6* declare the limits of a public entity's discretion in dealing with dangerous conditions of its property [*see* Senate Legis. Comm. Comment to *Gov. Code § 835*].

Similarly, the liability of public employees for dangerous conditions of public property is subject to any immunity of the public employee provided by statute and is subject to any defenses that would be available to the public employee if he or she were a private person [*Gov. Code § 840*].

Because *Gov. Code § 835* qualifies liability for a dangerous condition of public property by stating that the liability applies "except as provided by statute," some immunity statutes, in addition to those statutes that specifically provide defenses to dangerous condition liability, may be applicable. For example, immunity under *Gov. Code § 855.4* for the failure to prevent the communication of a disease has been applied to a claim of dangerous condition of public property [*Wright v. City of Los Angeles (2001) 93 Cal. App. 4th 683, 688-689, 113 Cal. Rptr. 2d 352* ; *see § 464.105[1][b]*].

[2] Approved Plan or Design

[a] Rule of Immunity

Neither a public entity nor a public employee is liable for an injury from a dangerous condition caused by the plan or design of a construction of, or an improvement to, public property if that plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give the approval or if the plan or design is prepared in conformity with standards

previously so approved, if the trial or appellate court determines that there is any substantial evidence on the basis of which: (1) a reasonable public employee could have adopted the plan, design, or standards; or (2) a reasonable legislative body or other body or employee could have approved the plan, design, or standards [*Gov. Code § 830.6*].

A public entity claiming design immunity must show the existence of three elements: (1) a causal relationship between the plan and the accident; (2) discretionary approval of the plan prior to construction; and (3) substantial evidence supporting the reasonableness of the design [*Grenier v. City of Irwindale (1997) 57 Cal. App. 4th 931, 939, 67 Cal. Rptr. 2d 454* ; *see Higgins v. State of California (1997) 54 Cal. App. 4th 177, 185, 62 Cal. Rptr. 2d 459]* .

The first element requires proof that the alleged design defect was responsible for the accident, as opposed to some other cause [*Grenier v. City of Irwindale (1997) 57 Cal. App. 4th 931, 940, 67 Cal. Rptr. 2d 454* (allegation that street flooding was caused by inadequate drainage sufficient to establish causation); *see Mozzetti v. City of Brisbane (1977) 67 Cal. App. 3d 565, 570, 136 Cal. Rptr. 751]* .

The second element requires approval in advance of construction by the legislative body or officer exercising discretionary authority. A detailed plan, drawn up by a competent engineering firm, and approved by a city engineer in the exercise of his or her discretionary authority, is persuasive evidence of the element of prior approval [*Grenier v. City of Irwindale (1997) 57 Cal. App. 4th 931, 940, 67 Cal. Rptr. 2d 454* (cross slopes, longitudinal slopes and runoff inlets relied on by plaintiff's expert to establish design defect were features of plan approved by city engineer); *see Ramirez v. City of Redondo Beach (1987) 192 Cal. App. 3d 515, 526, 237 Cal. Rptr. 505]* .

The third element requires only substantial evidence--that is, evidence of solid value that reasonably inspires confidence. If there is substantial evidence of reasonableness, the public entity is entitled to design immunity even if the evidence is conflicting [*Grenier v. City of Irwindale (1997) 57 Cal. App. 4th 931, 940, 67 Cal. Rptr. 2d 454* ; *see Ramirez v. City of Redondo Beach (1987) 192 Cal. App. 3d 515, 526, 237 Cal. Rptr. 505* ; *see also Gov. Code § 830.6*]. Generally, a civil engineer's opinion regarding reasonableness is sufficient to satisfy this element [*Grenier v. City of Irwindale (1997) 57 Cal. App. 4th 931, 941, 67 Cal. Rptr. 2d 454* ; *see Hefner v. County of Sacramento (1988) 197 Cal. App. 3d 1007, 1015, 243 Cal. Rptr. 291]* . Approval of the plan by competent professionals can, in and of itself, constitute substantial evidence of reasonableness [*Grenier v. City of Irwindale (1997) 57 Cal. App. 4th 931, 941, 67 Cal. Rptr. 2d 454* (approval of civil engineer's design plan by city engineer satisfied element of substantial evidence of reasonableness of design); *see Higgins v. State of California (1997) 54 Cal. App. 4th 177, 187, 62 Cal. Rptr. 2d 459]* .

However, if expert opinion of reasonableness is merely conclusory, and there is no foundation for the opinion in the evidence, the approved design defense may be rejected [*Arreola v. County of Monterey (2002) 99 Cal. App. 4th 722, 758-759, 122 Cal. Rptr. 2d 38* (defense rejected despite expert testimony of reasonableness because state's own evidence indicated that approved highway design was based on presumption, outdated when design was adopted, that projects added by other parties would alleviate flooding concerns)]. In order for design immunity to be available, however, it is not necessary that the decision-maker who approved the design be informed before the approval was made of every negative comment or concern expressed by every consultant or expert who reviewed the proposed plan, so long as evidence supports the reasonableness of the plan or design [*Alvis v. County of Ventura (2009) 178 Cal. App. 4th 536, 553, 100 Cal. Rptr. 3d 494]* .

Although a finding of substantial evidence supporting the reasonableness of a design is a determination reserved by statute for the court [*see Gov. Code § 830.6*], the issues of whether there is a causal connection between the project design and the accident and whether there was actually discretionary approval of the design prior to construction require a case-specific, factual determination that must be left for the jury if there is conflicting evidence [*Hernandez v. Dep't of Transp. (2003) 114 Cal. App. 4th 376, 387-388, 7 Cal. Rptr. 3d 536]* .

If the design immunity is applicable, a public entity may still be liable for failure to warn of a dangerous condition caused by the design [*Cameron v. State of California (1972) 7 Cal. 3d 318, 327-329, 102 Cal. Rptr. 305, 497 P.2d*

777 ; *Grenier v. City of Irwindale (1997) 57 Cal. App. 4th 931, 945* (evidence that city placed eight signs warning that street flooded during storms constituted sufficient warning of flooded condition)]. Design immunity is not applicable if the approved design did not include the feature that created the dangerous condition [*Cameron v. State of California (1972) 7 Cal. 3d 318, 323-326, 102 Cal. Rptr. 305, 497 P.2d 777]* or if the design is not related to the dangerous condition [*Flournoy v. State of California (1969) 275 Cal. App. 2d 806, 813-814, 80 Cal. Rptr. 485]* . Moreover, although the absence of a warning sign may be a part of the approved design and, therefore, covered by design immunity, it may serve as the independent basis of liability for failure to warn of a dangerous condition [*Anderson v. City of Thousand Oaks (1976) 65 Cal. App. 3d 82, 90-92, 135 Cal. Rptr. 127]* , but the absence of a warning sign cannot be the basis for liability unless there is a hidden dangerous condition [*Weinstein v. Department of Transp. (2006) 139 Cal. App. 4th 52, 61, 42 Cal. Rptr. 3d 417]* .

A plaintiff cannot defeat a defense of design immunity by arguing that the public entity was negligent in its maintenance of a public project if the "maintenance" proposed by the plaintiff is actually a change in the original design of the project [*Alvis v. County of Ventura (2009) 178 Cal. App. 4th 536, 550-551, 100 Cal. Rptr. 3d 494* (immunity applied to claim that landslide retaining wall was poorly maintained because it did not drain adequately, as plaintiff really was suggesting that design should have included better drainage features)].

Design immunity does not apply unless the actual construction or improvement conforms to the plan or design as approved, although substantial conformity is sufficient in cases in which there is a slight deviation from the approved design [*see* *Wyckoff v. State of California (2001) 90 Cal. App. 4th 45, 52-55, 108 Cal. Rptr. 2d 198* (highway median width that averaged 45 feet 5 inches at site of accident did not materially depart from plans that called for median of 46 feet)].

Design immunity applies to a cause of action against a public entity based on nuisance under *Civ. Code § 3479*, as well as to actions based on negligence [*Mikkelsen v. State of California (1976) 59 Cal. App. 3d 621, 628-631, 130 Cal. Rptr. 780]* . For discussion of *Civ. Code § 3479*, see Ch. 391, *Nuisance* .

On review of a trial court determination denying immunity under *Gov. Code § 830.6*, it is improper for the appellate court merely to inquire whether substantial evidence supports the trial court's decision. Instead, the appellate court must determine whether there is any substantial evidence to support a finding that the decision by the public entity was reasonable. If there is substantial evidence to support the public entity's decision, the trial court's denial of immunity must be reversed [*Ramirez v. City of Redondo Beach (1987) 192 Cal. App. 3d 515, 526-527, 237 Cal. Rptr. 505]* .

While the public entity bears the burden of pleading and proving application of reasonable design immunity, evidence submitted by the plaintiff in opposition to a motion for summary judgment may be used in support of the public entity's defense if the evidence supports defendant's position [*Laabs v. City of Victorville (2008) 163 Cal. App. 4th 1242, 1267, 78 Cal. Rptr. 3d 372*].

[b] Exception for Changed Conditions

A public entity is liable for injury proximately caused by a dangerous condition of its property if the dangerous condition created a reasonably foreseeable risk of the kind of injury sustained, and the public entity had actual or constructive notice of the condition a sufficient time before the injury to have taken preventive measures (*Gov. Code § 835, subd (b)*).

A change in physical conditions is a prerequisite to the loss of design immunity [*Grenier v. City of Irwindale (1997) 57 Cal. App. 4th 931, 945, 67 Cal. Rptr. 2d 454* (city's knowledge of fact that street flooded during storms not sufficient change in conditions)]. However, a change in physical conditions, by itself, is insufficient to deprive the public entity of design immunity; there must be evidence that the change has produced a dangerous condition of which the public entity is aware [*Alvarez v. State of California (1999) 79 Cal. App. 4th 720, 737, 95 Cal. Rptr. 2d 719* (increase in traffic

triggering state's eventual decision to install highway median barrier was not, by itself, dangerous condition)]. Changes in a state's design manual, which seek to improve design standards for new construction, do not support the conclusion or constitute an admission that the superseded design standards are defective. Therefore, such changes were insufficient to prove a change in physical conditions necessary to defeat a claim of design immunity [*Dole Citrus v. State of California (1997) 60 Cal. App. 4th 486, 493, 70 Cal. Rptr. 2d 348* (no evidence of changed physical condition of freeway over-crossing that would make earlier guard-rail design obsolete and no showing of accident history at over-crossing resulting from dropped or thrown objects)].

If the public entity has notice that constructed or improved public property may no longer be in conformity with a plan or design or a standard that reasonably could be approved, its immunity continues for a reasonable period of time sufficient to permit it to obtain funds for and carry out necessary remedial work. If the entity is unable to remedy the property because of practical impossibility or lack of sufficient funds, its immunity remains so long as it attempts to provide adequate warnings of the existence of the nonconforming condition [*Gov. Code § 830.6*]. Exactly what constitutes a "reasonable period of time" sufficient to permit the public entity to act has not been defined and will presumably depend on the specific facts of each case [*see Bane v. State of California (1989) 208 Cal. App. 3d 860, 875, 256 Cal. Rptr. 468* (suggesting that state should have acted within two to three days after receiving notice that directional sign was confusing to motorists), *disapproved on other grounds, Grenier v. City of Irwindale (1997) 57 Cal. App. 4th 931, 945, 67 Cal. Rptr. 2d 454]* .

To defeat design immunity, a claimed change of physical conditions cannot be based on the same technical data or policy decisions that went into the original plan or design. Instead, immunity is preserved if a public entity approves a design that contemplated and made allowances for the possibility of the specific change of condition argued by the plaintiff [*Alvis v. County of Ventura (2009) 178 Cal. App. 4th 536, 539, 555, 100 Cal. Rptr. 3d 494* (when county's approval of landslide retaining wall considered and made allowances for drainage through wall, change of condition argument failed when based on alleged inadequate drainage)].

Unlike the determination of whether substantial evidence supports the reasonableness of the adoption of the original plan or design, which is reserved by statute for determination by the court [*see Gov. Code § 830.6*], a plaintiff has a right to have a jury decide whether design immunity has been lost because triable issues of material fact have been presented [*Cornette v. Dep't of Transp. (2001) 26 Cal. 4th 63, 67, 109 Cal. Rptr. 2d 1, 26 P.3d 332]* . However, a plaintiff cannot create a triable issue of material fact with generalities suggesting the dangerous nature of a large area of public property, if the public entity provides details showing the lack of a dangerous condition at the specific place where the injury occurred [*see Mirzada v. Dep't of Transp. (2003) 111 Cal. App. 4th 802, 808-810, 4 Cal. Rptr. 3d 205* (evidence of number of vehicle accidents in "vicinity" of plaintiff's accident site did not create triable issue because CalTrans showed that no accidents occurred within previous Five years at more specific 2.8-mile stretch of highway)].

[3] Traffic Signal Immunities

[a] Failure to Provide Signals

Neither a public entity nor a public employee is liable for an injury from a dangerous condition caused by the failure to provide traffic or warning signals, signs, markings, or devices described in the Vehicle Code. However, a public entity or public employee is not exonerated from liability for injury proximately caused by such failure if a signal, sign, marking, or device (other than one described in *Gov. Code § 830.4*) was necessary to warn of a dangerous condition that endangered the safe movement of traffic and that would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care [*Gov. Code § 830.8*; *Kessler v. State of California (1988) 206 Cal. App. 3d 317, 321-322, 253 Cal. Rptr. 537* ; for discussion of *Gov. Code § 830.4, see § 464.83[4]*].

Therefore, a public entity is liable if failure to post signs constitutes a trap to the motorist [*Anderson v. City of Thousand Oaks (1976) 65 Cal. App. 3d 82, 93, 135 Cal. Rptr. 127]* . Moreover, although a public entity is not liable for

failure to install traffic signs or signals, if it undertakes to do so and invites public reliance on them, it may be liable for creating a dangerous condition in so doing [*De La Rosa v. City of San Bernardino (1971) 16 Cal. App. 3d 739, 746, 94 Cal. Rptr. 175]* .

However, *Gov. Code § 830.8* provides immunity to a public entity for failing to repaint a marked crosswalk after preexisting markings are removed for construction, at least in the absence of any hazardous condition that would not be apparent to pedestrians or motorists using the intersection with due care [*Sun v. City of Oakland (2008) 166 Cal. App. 4th 1177, 1193, 83 Cal. Rptr. 3d 372* (installation of "bulb out" sidewalk extensions did not make intersection dangerous condition, even when crosswalk markings were removed in process)]. Moreover, a city's failure to comply with the public notice requirements of *Veh. Code § 21950.5* prior to removing crosswalk markings does not render the city liable for injury to a pedestrian caused by a motorist who fails to yield the right of way [*Sun v. City of Oakland (2008) 166 Cal. App. 4th 1177, 1191-1192, 83 Cal. Rptr. 3d 372*].

[b] Signals Controlled by Emergency Vehicles

Neither a public entity nor a public employee is liable for an injury caused by the operation or nonoperation of official traffic control signals that are controlled by an emergency vehicle in accordance with the provisions of *Veh. Code § 25258(a)* [*Gov. Code § 830.9*; *see* generally Ch. 246, *Emergency Vehicles*].

[4] Condition of Streets Caused by Weather

Neither a public entity nor a public employee is liable for an injury caused by the effect of weather conditions on the use of streets and highways. However, a public entity or employee is not exonerated from liability for injury proximately caused by this effect if it would not be reasonably apparent to, and would not be anticipated by, a person exercising due care. The effect of weather conditions on the use of streets and highways includes the effect of fog, wind, rain, flood, ice, or snow, but does not include physical damage to or deterioration of streets and highways resulting from weather conditions [*Gov. Code § 831*].

A cause of action can be stated against a public entity for failure to warn of the hidden effect of weather conditions, such as ice on the road [*Flournoy v. State of California (1969) 275 Cal. App. 2d 806, 814, 80 Cal. Rptr. 485]* . Conversely, the presence of two to three inches of snow on a highway would be reasonably apparent to a person exercising due care [*see Allyson v. Department of Transp. (1997) 53 Cal. App. 4th 1304, 62 Cal. Rptr. 2d 490* (defendant entitled to summary judgment because plaintiff admitted presence of snow and offered no evidence to suggest that this condition would not be apparent)].

[5] Work on Nondedicated Roads

Neither a public entity nor a public employee is liable for any injury occurring on account of the grading or the performance of other maintenance or repair on, reconstruction or replacement of, any road that has not officially been accepted as a part of the road system under the jurisdiction of the public entity, provided that the grading, maintenance, repair, reconstruction, or replacement is performed with reasonable care and leaves the road in no more dangerous or unsafe condition than it was before the work commenced [*Gov. Code § 831.3*; *Matthews v. County of San Bernardino (1991) 233 Cal. App. 3d 1623, 1634-1635, 285 Cal. Rptr. 422]* . No such act of grading, maintenance, or repair creates any duty of the public entity to continue the work on any road not a part of the road system under that entity's jurisdiction [*Gov. Code § 831.3*].

No county is liable for failure to maintain any road unless and until it has been accepted into the county road system by action of the board of supervisors or its designee [*see Sts. & Hy. Code § 941(b)*]. No city is liable for failure to maintain any road until it has been accepted into the city system by resolution of the governing body [*see Sts. & Hy. Code § 1806*]. For discussion of dedication of land to public use, see Ch. 183, *Dedication* .

Although *Gov. Code § 831.3* and *Sts. & Hy. Code §§ 941* and *1806* address similar topics, they are distinct without being inconsistent. *Gov. Code § 831.3* addresses a public entity's misfeasance in its action of maintaining, grading, or repairing an unaccepted road. *Sts. & Hy. Code §§ 941* and *1806* immunize a county or a city from any claimed nonfeasance regarding its nonmaintenance of unaccepted roads. *Gov. Code § 831.3* and *Sts. & Hy. Code §§ 941* and *1806* address different circumstances regarding the liability of a county or a city if it maintains or does not maintain unaccepted roads. Moreover, *Gov. Code § 831.3* includes all public entities described in *Gov. Code § 811.2*, but *Sts. & Hy. Code §§ 941* and *1806* are limited to counties and cities, respectively [*Matthews v. County of San Bernardino (1991) 233 Cal. App. 3d 1623, 1633, 1633 n.6, 285 Cal. Rptr. 422* (no city was involved, so court was not required to interpret *Sts. & Hy. Code § 1806*)].

[6] Unimproved Public Property

[a] Natural Condition Immunity

Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river, or beach [*Gov. Code § 831.2*; *see Gov. Code § 831.5* (providing same immunity to public land trust meeting specified requirements)].

Conditions caused by human alteration, especially those that have existed for some years, that merely duplicate models common to nature are still "natural conditions" as a matter of law for purposes of *Gov. Code § 831.2* [*Knight v. City of Capitola (1992) 4 Cal. App. 4th 918, 928-929, 6 Cal. Rptr. 2d 874* (immunity applied to beach that was altered to prevent its destruction by erosion because resulting beach was not materially different from beach as it existed before onset of erosion)]. For example, an artificial ("man-made") lake is unimproved public property [*Osgood v. County of Shasta (1975) 50 Cal. App. 3d 586, 588-590, 123 Cal. Rptr. 442]* . Also, the attachment of a rope by an unknown third party to a tree on undeveloped land does not change the natural condition of the land so as to abrogate the immunity [*Kuykendall v. State of California (1986) 178 Cal. App. 3d 563, 566, 223 Cal. Rptr. 763]* . This immunity does not apply, however, to injuries caused to adjacent property or to persons on adjacent property who are not users of the public property [*Milligan v. City of Laguna Beach (1983) 34 Cal. 3d 829, 834, 835, 196 Cal. Rptr. 38, 670 P.2d 1121* (trees falling on adjacent residence)].

A "natural condition" under *Gov. Code § 831.2* is not limited to physical conditions of the land. Therefore, a claim based on an injury caused by a wild animal is subject to immunity under this provision [*Arroyo v. State of California (1995) 34 Cal. App. 4th 755, 762, 40 Cal. Rptr. 2d 627* (mountain lion)]. Furthermore, imposing a moratorium on hunting an animal to increase that particular animal population, even though the moratorium has the potential to increase the risks of injury caused by the animal, does not create an artificial condition sufficient to remove the injury from a claim of immunity under § 831.2 [*Arroyo v. State of California (1995) 34 Cal. App. 4th 755, 764-765, 40 Cal. Rptr. 2d 627]* .

For an entity to lose this immunity it must make an improvement, and that improvement must be of the type to induce reliance on the part of the public [*see Rombalski v. City of Laguna Beach (1989) 213 Cal. App. 3d 842, 853, 261 Cal. Rptr. 820* (addition of stairway leading to beach in location of lifeguard station did not induce reliance on safety of rock from which boy jumped)]. The fact that certain parts of a park are improved does not make a public entity liable for injuries in unimproved parts of the park [*Rendak v. State of California (1971) 18 Cal. App. 3d 286, 288-289, 95 Cal. Rptr. 665* ; *see also Bartlett v. State of California (1988) 199 Cal. App. 3d 392, 397, 245 Cal. Rptr. 32]* .

The immunity applies to injuries on unimproved public property in urban as well as rural areas [*Winterburn v. City of Pomona (1986) 186 Cal. App. 3d 878, 881, 231 Cal. Rptr. 105* (cave located in a city-owned urban greenbelt)]. A designation of particular land as nonrecreational does not negate the land's character as public property to which the immunity applies [*Winterburn v. City of Pomona (1986) 186 Cal. App. 3d 878, 881, 231 Cal. Rptr. 105]* .

There is no duty to warn of a latent condition on public property that represents a hidden danger as long as the condition is purely natural [*Mercer v. State of California (1987) 197 Cal. App. 3d 158, 166 n.4, 242 Cal. Rptr. 701* ; *McCauley v. City of San Diego (1987) 190 Cal. App. 3d 981, 991-993, 235 Cal. Rptr. 732]* . Moreover, if a public entity chooses to warn of the potential hazards of some natural conditions, it does not thereby incur a duty to warn of all potential dangers that may be present [*Arroyo v. State of California (1995) 34 Cal. App. 4th 755, 764, 40 Cal. Rptr. 2d 627* (warning about snakes and ticks did not create duty to warn about mountain lions)]. However, there is some authority holding that a duty to warn arises if the public entity by its own conduct is partially responsible for inducing a person to be victimized by a dangerous natural condition that constitutes a hidden trap [*Gonzales v. City of San Diego (1982) 130 Cal. App. 3d 882, 885-887, 182 Cal. Rptr. 73* (provision of lifeguard services on public beach creates hybrid natural and improved condition and triggers duty to warn of dangerous currents); *see* McCauley v. City ofSan *Diego (1987) 190 Cal. App. 3d 981, 989, 235 Cal. Rptr. 732* ; *but see Geffen v. County of Los Angeles (1987) 197 Cal. App. 3d 188, 192-194, 242 Cal. Rptr. 492]* . However, any application of this rule to public beaches has been abrogated by the enactment of *Gov. Code § 831.21*. Public beaches are deemed to be in a natural condition and unimproved, notwithstanding the provision or absence of public safety services, such as lifeguards or law enforcement patrols, medical services, fire protection services, beach cleanup services, or signs [*Gov. Code § 831.21*].

[b] Immunity for Land Failure

No public entity or employee is liable for damage or injury to property or for emotional distress unless the plaintiff has suffered substantial physical injury, off the public entity's property, caused by land failure of any unimproved public property that in turn was caused by a natural condition of the unimproved public property [*Gov. Code § 831.25(a)*; *see Gov. Code § 831.5(b)* (providing same immunity to public land trust meeting specified requirements)]. "Land failure" means any movement of land, including a landslide, mudslide, creep, subsidence, and any other gradual or rapid movement of land [*Gov. Code § 831.25(c)*].

For these purposes, a natural condition exists, and property is deemed to be unimproved, regardless of any minor improvements made for the preservation or prudent management of the property in its unimproved state that did not contribute to the land failure [*Gov. Code § 831.25(b)*]. Similarly, conditions that occur in nature, but happen to be produced by a combination of human and natural forces, are natural conditions as a matter of law [*Schooler v. State of California (2000) 85 Cal. App. 4th 1004, 1009, 102 Cal. Rptr. 2d 343]* . In one case, for example, the fact that pedestrian traffic may have added to the corrosive effect of wind, water, and wave action along a bluff adjacent to a state-owned beach did not alter the fact that bluff erosion was a natural condition. Therefore, the adjacent landowner was precluded from successfully prosecuting a tort suit against the state for damage to the lateral support of that adjacent property caused by the erosion [*Schooler v. State of California (2000) 85 Cal. App. 4th 1004, 1010, 102 Cal. Rptr. 2d 343]* .

This immunity does not inure to the benefit of any public entity or employee who had actual notice of probable damage that was likely to occur outside of the public property because of land failure and who failed to give a reasonable warning of the danger to the affected property owners. However, if a public entity or a public employee does provide a warning, neither is liable for any damage or injury arising from the giving of that warning [*Gov. Code § 831.25(d)*].

Gov. Code § 831.2 neither limits the immunity provided by *Gov. Code § 831.2* nor creates any duty of care or basis of liability for damage or injury to property or for emotional distress [*Gov. Code § 831.25(e), (f)*].

[c] Immunity Applicable to Specified State Lands

Neither the state nor any employee of the state is liable for any injury caused by a dangerous condition of the unimproved and unoccupied portions of the following [*Gov. Code § 831.6*]:

- The ungranted tidelands and submerged lands and the beds of navigable rivers, streams, lakes, bays, estuaries, inlets, and straits owned by the state; or

- The unsold portions of the sixteenth and thirty-sixth sections of school lands, the unsold portions of the 500,000 acres granted to the state for school purposes, and the unsold portions of the listed lands selected of the United States in lieu of the sixteenth and thirty-sixth sections and losses to the school grant.

[7] Conditions on Trails and Unpaved Access Roads

A public entity, public employee, or a grantor of a public easement to a public entity for any of the following purposes, is not liable for an injury caused by a condition of any unpaved road that provides access to fishing, hunting, camping, hiking, riding (including animal and all types of vehicular riding), water sports, recreational, or scenic areas so long as that road is not one of the following [*Gov. Code § 831.4(a)*]:

- A city street or highway;

- A county, state, or federal highway; or

- A public street or highway of a joint highway district, boulevard district, bridge and highway district, or similar district formed for the improvement or building of public streets or highways.

There is also no liability for any trail used for the above purposes [*Gov. Code § 831.4(b)*; *Carroll v. County of Los Angeles (1997) 60 Cal. App. 4th 606, 609, 70 Cal. Rptr. 2d 504* ("trail" applies to paved bicycle path); *but see Treweek v. City of Napa (2000) 85 Cal. App. 4th 221, 232, 101 Cal. Rptr. 2d 883* (boat ramp, standing alone and not as integral part of trail, was not itself "trail"); *see Gov. Code § 831.5* (providing same immunity to public land trust meeting specified requirements)].

The "above purposes" language contained in *Gov. Code § 831.4(b)* has been construed to refer to the recreational activities specified in *Gov. Code § 831.4(a)*. Thus, a trail that is intended for hiking (or one of the other specified activities) need not provide access to anything for the immunity of *Gov. Code § 831.4(b)* to attach. The immunity of *Gov. Code § 831.4(b)* precludes liability for injuries caused by the conditions of trails that are used for the activities specified in *Gov. Code § 831.4(a)* [*Giannuzzi v. State of California (1993) 17 Cal. App. 4th 462, 466-467, 21 Cal. Rptr. 2d 335* (immunity of *Gov. Code § 831.4(b)* barred liability for injuries suffered by plaintiff while riding motorcycle on dirt trail in state park)]. Immunity may also extend under *Gov. Code § 831.4(b)* if the trail is used only for access to a listed form of recreational activity and is not used for the actual activity itself [*see Treweek v. City of Napa (2000) 85 Cal. App. 4th 221, 229, 101 Cal. Rptr. 2d 883]* .

The immunity provided by *Gov. Code § 831.4(b)* applies regardless of whether the trail is paved or not [*Farnham v. City of Los Angeles (1998) 68 Cal. App. 4th 1097, 1101-1103, 80 Cal. Rptr. 2d 720* (immunity applied to injury suffered on paved biking trail); *accord Armenio v. County of San Mateo (1994) 28 Cal. App. 4th 413, 417-418, 33 Cal. Rptr. 2d 631* (riding bicycle on paved trail on public land); *Carroll v. County of Los Angeles (1997) 60 Cal. App. 4th 606, 610, 70 Cal. Rptr. 2d 504* (rollerblading on paved bicycle path)]. Trail immunity is available even when the claim alleges defects in the design or maintenance of the trail [*Amberger-Warren v. City of Piedmont (2006) 143 Cal. App. 4th 1074, 1084-1085, 49 Cal. Rptr. 3d 631* (immunity applied when injury was sustained on paved pathway through public dog park, despite allegations that handrails should have been installed); *see also Prokop v. City of Los Angeles (2007) 150 Cal. App. 4th 1332, 1341-1342, 59 Cal. Rptr. 3d 355* (injury allegedly caused by design of access gate to bikeway was covered by trail immunity)].

Additionally, there is no liability for injuries caused by a condition of any paved trail or walkway, path, or sidewalk on

an easement of way that has been granted to the public entity, if that easement provides access to any unimproved property, so long as the entity reasonably attempts to provide adequate warnings of the existence of any condition of the paved trail, walkway, path, or sidewalk that constitutes a hazard to health or safety [*Gov. Code § 831.4(c)*]. Such warnings are only required if the pathways are paved, and the requirement of such a warning cannot be construed as a standard of care for any unpaved pathways or roads [*Gov. Code § 831.4(c)*; *see Astenius v. State of California (2005) 126 Cal. App. 4th 472, 476, 23 Cal. Rptr. 3d 877* (state was immune from liability for death sustained on unpaved trail despite failure to post warnings and regardless of whether state made other improvements to area)].

[8] Hazardous Recreational Activity

Neither a public entity nor a public employee is liable to any person who participates or who assists a participant in a hazardous recreational activity, or to any spectator who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk or had the ability to leave but failed to do so, for any damage or injury to property or persons arising out of the hazardous recreational activity [*Gov. Code § 831.7(a)*].

However, a school district is not immune from liability under *Gov. Code § 831.7* for injury to a student engaged in a school-sponsored athletic practice under the negligent supervision of school personnel [*Acosta v. Los Angeles Unified Sch. Dist. (1995) 31 Cal. App. 4th 471, 477-479, 37 Cal. Rptr. 2d 171* (established duty of reasonable supervision extends to school-sponsored extracurricular sports programs); *see also Iverson v. Muroc Unified School Dist. (1995) 32 Cal. App. 4th 218, 225-227* (school not immune because injury occurred during physical education class)].

"Hazardous recreational activity" means a recreational activity conducted on property of a public entity that creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury to a participant or a spectator [*Gov. Code § 831.7(b)*]. It also means any of the following [*Gov. Code § 831.7(b)*]:

- Water contact activities, except diving, in places where or when lifeguards are not provided, if reasonable warning of no lifeguards has been given or the injured party should reasonably have known that there was no lifeguard provided at that time;

- Any form of diving into water from other than a diving board or diving platform or at any place or from any structure where diving is prohibited, if reasonable warning not to dive has been given; and

- Animal riding (including equestrian competition), archery, bicycle racing or jumping, mountain bicycling, boating, cross-country and downhill skiing, hang gliding, kayaking, motorized vehicle racing, off-road motorcycling or four-wheel driving of any kind, orienteering, pistol and rifle shooting, rock climbing, rocketeering, rodeo, spelunking, sky diving, sport parachuting, paragliding, body contact sports (sports in which it is reasonably foreseeable that there will be rough bodily contact with one or more participants), surfing, trampolining, tree climbing, tree-rope swinging, water skiing, white-water rafting, and wind surfing. "Mountain bicycling" as used in *Gov. Code § 831.7* does not include riding a bicycle on pathways, roadways or sidewalks.

Immunity is available under *Gov. Code § 831.7* only if the injury-producing activity was both "hazardous" and "recreational" [*Acosta v. Los Angeles Unified Sch. Dist. (1995) 31 Cal. App. 4th 471, 476, 37 Cal. Rptr. 2d 171, 174]* . For example, school districts, including colleges, have been denied immunity from liability under *Gov. Code § 831.7* for injuries to students engaged in school-sponsored athletic practices under the negligent supervision of school personnel, based on the conclusion that such activities are part of the educational mission of the school and therefore not considered "recreational" [*Avila v. Citrus Cmty. Coll. Dist. (2006) 38 Cal. 4th 148, 159-160, 41 Cal. Rptr. 3d 299, 131 P.3d 383* (community college was not immune under statute for injury to intercollegiate baseball player sustained during game); *Iverson v. Muroc Unified Sch. Dist. (1995) 32 Cal. App. 4th 218, 227* (body contact sport performed in

physical education class during school hours and required by school is not "recreational" under *Gov. Code § 831.7*); *Acosta v. Los Angeles Unified Sch. Dist. (1995) 31 Cal. App. 4th 471, 477-478, 37 Cal. Rptr. 2d 171* (school district has duty of reasonable supervision).

For purposes of *Gov. Code § 831.7*, "diving platform" refers to an artificial structure designed for the purpose of diving [*Berry v. State of California (1992) 2 Cal. App. 4th 688, 691-692, 3 Cal. Rptr. 2d 382]* .

This immunity does not limit liability that would otherwise exist for any of the following [*Gov. Code § 831.7(c)*]:

- Failure of the public entity or public employee to guard or warn of a known dangerous condition or of another hazardous recreational activity known to the public entity or employee that is not reasonably assumed by the participant as inherently a part of the hazardous recreational activity out of which the damage or injury arose;

- Damage or injury suffered in any case in which permission to participate in the hazardous recreational activity was granted for a specific fee, as defined below;

- Injury suffered to the extent proximately caused by the negligent failure of the public entity or public employee to properly construct or maintain in good repair any structure, recreational equipment or machinery, or substantial work of improvement used in the hazardous recreational activity out of which the damage or injury arose;

- Damage or injury suffered in any case in which the public entity or public employee recklessly or with gross negligence promoted the participation in or observance of a hazardous recreational activity; and

- An act of gross negligence by a public entity or a public employee that is the proximate cause of the injury.

A "specific fee," for purposes of the second paragraph above, does not include a fee or consideration charged for a general purpose, such as a general park admission charge, a vehicle entry or parking fee, or an administrative or group use application or permit fee, as distinguished from a specific fee charged for participation in the specific hazardous recreational activity out of which the damage or injury arose [*Gov. Code § 831.7(c)*; *see also Perry v. East Bay Reg'l Park Dist. (2006) 141 Cal. App. 4th 1, 13, 45 Cal. Rptr. 3d 477* (because park charged fee specifically for swimming only if lifeguards were on duty, specific fee exception to immunity did not apply in case involving swimmer who drowned after lifeguards had gone off duty)].

Promotional literature or a public announcement or advertisement that merely describes the available facilities and services on the property does not in itself constitute a reckless or grossly negligent promotion for purposes of the fifth paragraph above [*Gov. Code § 831.7(c)*].

Nothing in *Gov. Code § 831.7(c)* creates a duty of care or basis of liability for personal injury or for damage to personal property [*Gov. Code § 831.7(c)*]. Additionally, nothing in *Gov. Code § 831.7* limits the liability of an independent concessionaire or any person or organization other than the public entity, whether or not the person or organization has a contractual relationship with the public entity to use the public property, for injuries or damages suffered in any case as a result of the operation of a hazardous recreational activity on public property by the concessionaire, person, or organization [*Gov. Code § 831.7(d)*].

Civ. Code § 846, which provides immunity to owners of property from liability to persons using their land for a variety of recreational purposes, does not apply to public entities [*Delta Farms Reclamation Dist. v. Superior Court (1983)*

33 Cal. 3d 699, 710, 190 Cal. Rptr. 494, 660 P.2d 1168] . For discussion of that statute, see Ch. 421, *Premises Liability* .

[9] Condition of Reservoirs and Canals

Subject to the exceptions set forth in *Gov. Code § 831.8(c), (d)*, neither a public entity nor a public employee is liable for an injury caused by the dangerous condition of a reservoir if, at the time of the injury, the injured person was using the property for any purpose other than that for which the public entity intended or permitted the property to be used [*Gov. Code § 831.8(a)*].

Subject to the same exceptions, neither an irrigation district or its employee nor the state or its employee is liable for an injury caused by the dangerous condition of canals, conduits, or drains used for the distribution of water if, at the time of the injury, the injured person was using the property for any purpose other than that for which the district or the state intended it to be used [*Gov. Code § 831.8(b)*].

Nothing in *Gov. Code § 831.8* exonerates a public entity or a public employee from liability for injury proximately caused by a dangerous condition of property if all of the following conditions are met [*Gov. Code § 831.8(d)*]:

- The injured person was not guilty of a criminal offense under *Penal Code § 552 et seq.* in entering or using the property;

- The condition created a substantial and unreasonable risk of death or serious bodily harm if the property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used;

- The dangerous character of the condition was not reasonably apparent to, and would not have been anticipated by, a mature, reasonable person using the property with due care; and

- The public entity or the public employee had actual knowledge of the condition and knew or should have known of its dangerous character a sufficient time prior to the injury to have taken measures to protect against the condition.

Additionally, nothing in *Gov. Code § 831.8* exonerates a public entity or a public employee from liability for injury proximately caused by a dangerous condition of property if all the following conditions are present [*Gov. Code § 831.8(d)*]:

- The person injured was less than 12 years of age;

- The dangerous condition created a substantial and unreasonable risk of death or serious bodily harm to children under 12 years of age using the property or adjacent property with due care in a manner in which it was reasonably foreseeable that it would be used;

- The person injured, because of his or her immaturity, did not discover the condition or did not appreciate its dangerous character; and

- The public entity or the public employee had actual knowledge of the condition and knew or should have known of its dangerous character a sufficient time prior to the injury to have taken measures to protect against the condition.

An analogous exception to immunity applies to Los Angeles County flood control agencies and water conservation

facilities and their employees, although that exception extends to children 16 years old or younger [*Gov. Code § 831.8(f)*]. The qualified immunity for those agencies, facilities, and employees generally extends to injuries caused by the condition or use of unlined flood control channels or adjacent groundwater recharge spreading grounds if, at the time of injury, the person injured was using the property for any purpose other than that for which the public entity intended it to be used [*Gov. Code § 831.8(c)*].

The existence of an unfenced canal in a residential area does not create a substantial and unreasonable risk to children as a matter of law [*Cardenas v. Turlock Irrigation Dist. (1968) 267 Cal. App. 2d 352, 359, 73 Cal. Rptr. 69]* .

[10] Asbestos in Schools

A school district and its officers, directors, or employees have no civil liability in any civil action for injury, disease, death, or economic loss arising out of exposure, after 1988, to asbestos contained in buildings owned, leased, or otherwise used by a school district, except on proof that the injury, disease, death, or economic loss was caused by the negligence of the school district or its officers, directors, or employees [*Gov. Code § 905.5*]. Notwithstanding *Gov. Code § 815.6* (public entity's liability on failure to discharge mandatory duty) and *Evid. Code § 669* (presumption of failure to exercise due care on basis of statutory violation), no presumption of negligence applies to any action under *Gov. Code § 905.5* [*Gov. Code § 905.5*].

Gov. Code § 905.5 applies only to actions against school districts. It does not apply to any other action, including, but not limited to, actions against a manufacturer, contractor, or any person who makes, sells, distributes, furnishes, or installs asbestos-containing materials. *Gov. Code § 905.5* does not affect, alter, or otherwise modify the law pertaining to workers' compensation claims. Nor does it affect the right of a school district or its officers, directors, or employees to seek indemnification [*Gov. Code § 905.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawImmunitiesSchool District ImmunityReal Property LawTortsNuisanceDefensesImmunityTortsPublic Entity LiabilityGeneral OverviewTortsPublic Entity LiabilityImmunityGeneral Overview

California Forms of Pleading and Practice--Annotated

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§ 464.86 Reasonableness Defense

[1] Public Entities

A public entity is not liable under *Gov. Code § 835(a)* for injury caused by a condition of its property if that entity establishes that the act or omission that created the condition was reasonable. The reasonableness of the act or omission that created the condition is determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or protecting against the risk of injury [*Gov. Code § 835.4(a)*].

A public entity is not liable under *Gov. Code § 835(b)* for injury caused by a dangerous condition of its property if that entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable. The reasonableness of the action or inaction of the public entity is determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury against the practicability and cost of protecting against the risk of that injury [*Gov. Code § 835.4(b)*].

[2] Public Employees

A public employee is not liable under *Gov. Code § 840.2(a)* for his or her negligent act for injury caused by a dangerous condition of public property if he or she establishes that the act or omission that created the condition was reasonable. The reasonableness of the act or omission that created the condition is determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury [*Gov. Code § 840.6(a)*].

A public employee is not liable under *Gov. Code § 840.2(b)* for injury caused by a dangerous condition of public property if he or she establishes that the action taken to protect against the risk of injury created by the condition or the failure to take that action was reasonable. The reasonableness of the inaction or action is determined by taking into consideration the time and opportunity the public employee had to take action and by weighing the probability and

gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of that injury [*Gov. Code § 840.6(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployeesTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From Liability

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[Reserved]

§§ 464.87[Reserved]

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40-464 California Forms of Pleading and Practice--Annotated § 464.100

§ 464.100 Governing Law

The law governing police and correctional activities, liabilities, and immunities is set forth in *Gov. Code §§ 844-846*. The law governing fire protection liabilities and immunities is set forth in *Gov. Code §§ 850-850.8*. The law governing medical, hospital, and public health liabilities and immunities is set forth in *Gov. Code §§ 854-856.4*, and the law governing administration of tax laws immunities is set forth in *Gov. Code §§ 860-860.4*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityGeneral OverviewTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityImmunityJudicial ImmunityTortsPublic Entity LiabilityImmunityQualified ImmunityTortsPublic Entity LiabilityImmunitySovereign Immunity

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§ 464.101 Common Law Judicial and Legislative Immunity

Judges and legislators are immune under the common law from tort liability for their official acts [*Paddleford v. Biscay (1971) 22 Cal. App. 3d 139, 143, 99 Cal. Rptr. 220* (judges); *City of Santa Clara v. County of Santa Clara (1969) 1 Cal. App. 3d 493, 498, 81 Cal. Rptr. 643* (judges); *Frazier v. Moffatt (1951) 108 Cal. App. 2d 379, 384, 239 P.2d 123* (justices of peace); *see Lake Country Estates v. Tahoe Planning Agency (1979) 440 U.S. 391, 405, 99 S. Ct. 1171, 59 L. Ed. 2d 401* (federal, state, and regional legislators); *Tenney v. Brandhove (1950) 341 U.S. 367, 372, 71 S. Ct. 783, 95 L. Ed. 1019* (legislators)]. The courts have also extended the judicial immunity doctrine to persons who are not technically judges, but who act in a judicial or quasi-judicial capacity [*Taylor v. Mitzel (1978) 82 Cal. App. 3d 665, 670-671, 147 Cal. Rptr. 323]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsJudicial ImmunityTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityImmunityJudicial ImmunityTortsPublic Entity LiabilityImmunityJudicial Immunity

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40-464 California Forms of Pleading and Practice--Annotated § 464.102

§ 464.102 Law Enforcement Activities

[1] Liability of Law Enforcement Officer for Negligence

[a] General Rule of Liability

A law enforcement officer is liable, to the same extent as a private individual, for his or her lack of due care that results in injury, unless he or she is protected by a statutory immunity [*Gov. Code § 820(a)*; *see Munoz v. Olin (1979) 24 Cal. 3d 629, 634, 156 Cal. Rptr. 727, 596 P.2d 1143* . The officer's conduct must be gauged in relation to all the other material circumstances surrounding it, and if such other circumstances admit of a reasonable doubt as to whether the questioned conduct falls within or without the bounds of ordinary care, then such doubt must be resolved as a matter of fact rather than law [*Grudt v. Los Angeles (1970) 2 Cal. 3d 575, 587, 86 Cal. Rptr. 465* . For example, police officers and a public entity were liable because there was substantial evidence supporting a finding of lack of due care resulting in an intentional shooting death by the officers. From the evidence, the jury could have found that the officers were negligent in mistaking the decedent for a suspect, in failing to adequately warn the decedent of their intentions, and in use of their weapons, which was not necessarily required by the circumstances [*Munoz v. Olin (1979) 24 Cal. 3d 629, 634, 156 Cal. Rptr. 727, 596 P.2d 1143* ; *see Grudt v. Los Angeles (1970) 2 Cal. 3d 575, 586-588, 86 Cal. Rptr. 465, 468 P.2d 825* (issue of officer's negligence for jury)].

Similarly, a plaintiff stated a cause of action for negligence against police officers based on allegations that the officers failed to inform a person that they were police officers when they approached him with guns, which caused the person to flee in an automobile. The officers chased the automobile, and it crashed into the plaintiff's automobile [*Sparks v. Compton (1976) 64 Cal. App. 3d 592, 597-602, 134 Cal. Rptr. 684]* . Failure to provide police protection also may be the basis of a negligence action if an officer acts as a "good Samaritan" by voluntarily undertaking to provide protection, and then fails to exercise due care [*Baker v. City of Los Angeles (1986) 188 Cal. App. 3d 902, 907, 233 Cal. Rptr. 760* (no duty as matter of law because once voluntary act performed, police officer not required to continue providing protection indefinitely)].

[b] Plaintiff Injured During Commission of Felony

Under Proposition 213, adopted by the voters in 1996 and applicable to all actions in which the initial trial begins after 1996 [*see* Note following *Civ. Code § 3333.3*], a plaintiff seeking damages for negligence does not have the right to recover any damages if the plaintiff's injuries were in any way proximately caused by the plaintiff's commission of a felony or were caused by the plaintiff's immediate flight from the commission of a felony, so long as the plaintiff has been convicted of that felony [*Civ. Code § 3333.3*]. However, this limitation on liability for damages applies only to conduct that is negligent. It does not apply to shield law enforcement personnel from potential liability for intentional torts based on the nonnegligent use of excessive force [*Jenkins v. County of Los Angeles (1999) 74 Cal. App. 4th 524, 534, 88 Cal. Rptr. 2d 149]* . For further discussion of Proposition 213, see Ch. 82A, *Automobiles: Damages* .

[2] Liability of Police Officer for Failure to Investigate Child Abuse

Penal Code § 11166(a) imposes a mandatory duty on a police officer to investigate child abuse allegations that the officer receives and, if a reasonable person would have suspected child abuse, to report to the appropriate child protective agency [*Alejo v. City of Alhambra (1999) 75 Cal. App. 4th 1180, 1186, 89 Cal. Rptr. 2d 768]* . The failure to perform these mandatory statutory duties may support a tort action for negligence per se against the officer and the employing entity, if the child is subsequently injured through further abuse [*Alejo v. City of Alhambra (1999) 75 Cal. App. 4th 1180, 1184-1190, 89 Cal. Rptr. 2d 768]* .

[3] Immunity for Injury Caused by Police Pursuit Vehicles

Effective July 1, 2007, a public agency that adopts and promulgates a written policy on vehicular pursuits that meets the criteria specified in *Veh. Code § 17004.7(c)*, and provides regular and periodic training on vehicular pursuits on an annual basis, is immune from liability for civil damages for personal injury, death, or property damage resulting from the collision of a vehicle being operated by an actual or suspected violator of the law who is being, has been, or believes he or she is being or has been, pursued in a motor vehicle by a peace officer employed by the public agency [*Veh. Code § 17004.7(b)(1)*]. Similar statutory immunity was provided prior to July 1, 2007, although the earlier version of the statute did not impose either a promulgation or training requirement on the public agency, and it imposed less detailed substantive criteria on the adopted policy [*see* former *Veh. Code § 17004.7(b), (c)*].

"Promulgation" of a written policy under the 2007 provisions includes, but is not limited to, a requirement that all peace officers employed by the public agency certify in writing that they have received, read, and understand the policy [*Veh. Code § 17004.7(b)(2)*]. The failure of an individual officer to sign a certification, however, may not be used to impose liability on an individual officer or a public entity [*Veh. Code § 17004.7(b)(2)*]. "Regular and periodic training" means annual training that includes, at a minimum, coverage of each of the subjects and policy elements set forth below, and that complies, at a minimum, with the training guidelines established pursuant to *Pen. Code § 13519.8* [*Veh. Code § 17004.7(d)*].

The immunity provision of *Veh. Code § 17004.7* has been upheld against challenges that it denies equal protection to accident victims injured by vehicles driven by pursued suspects [*see* *Billester v. City of Corona (1994) 26 Cal. App. 4th 1107, 1121-1125, 32 Cal. Rptr. 2d 121]* , as well as against constitutional challenges based on the due process clauses of the state and federal constitutions [*Ketchum v. State of California (1998) 62 Cal. App. 4th 957, 962-964, 73 Cal. Rptr. 2d 152]* .

The immunity is not limited to situations in which the pursued suspect is driving his or her own vehicle. It also applies to situations in which the pursued suspect is operating a stolen police vehicle [*Bryant v. County of Los Angeles (1994) 26 Cal. App. 4th 919, 923-924, 32 Cal. Rptr. 2d 285]* . Nor is immunity limited to situations in which the police officer chases a suspect in a car. Immunity also applies to police officers who use motorcycles rather than cars in police chases, despite statutory language protecting police officers who chase suspects "in" rather than "on" motor vehicles [*McGee v. City of Laguna Beach (1997) 56 Cal. App. 4th 537, 543, 65 Cal. Rptr. 2d 506]* .

Immunity under *Veh. Code § 17004.7* applied to a chase in which a suspect's motorcycle crashed to the ground while fleeing from police, resulting in the death of a passenger on the motorcycle, who either jumped or was thrown off the crashing motorcycle and was immediately struck by the pursuing police vehicle. Under these circumstances, the passenger's act of jumping or falling off the crashing motorcycle resulted from the collision of the motorcycle with the ground, as did the passenger's immediate impact with the pursuing police vehicle [*Lewis v. County of Sacramento (2001) 93 Cal. App. 4th 107, 120-121, 113 Cal. Rptr. 2d 90]* . Immunity also was granted under the statute in a case in which a vehicle being pursued struck a trash dumpster, which in turn struck a bystander, causing serious injury and eventually death [*Nguyen v. City of Westminster (2002) 103 Cal. App. 4th 1161, 1168, 127 Cal. Rptr. 2d 388]* .

This immunity applies once the public entity has adopted the requisite pursuit policy. The public entity need not prove that during a particular chase, the policy on safe pursuits was actually practiced by the pursuing officers [*Nguyen v. City of Westminster (2002) 103 Cal. App. 4th 1161, 1167, 127 Cal. Rptr. 2d 388* ; *Weiner v. City of San Diego (1991) 229 Cal. App. 3d 1203, 1210, 280 Cal. Rptr. 818* ; *Kishida v. State of California (1991) 229 Cal. App. 3d 329, 335, 280 Cal. Rptr. 62* ; *see Brumer v. City of Los Angeles (1994) 24 Cal. App. 4th 983, 987, 29 Cal. Rptr. 2d 515]* .

Immunity under *Veh. Code § 17004.7* did not apply in a case in which a city's vehicular pursuit policy did not provide sufficient specific guidelines for determining when to initiate or terminate a pursuit [*see Berman v. City of Daly City (1993) 21 Cal. App. 4th 276, 280-285, 26 Cal. Rptr. 2d 493*]. The policy must do more than advise officers to exercise their discretion and use their best judgment. Instead, the policy must control and channel the officer's discretion by providing objective standards by which to evaluate whether the pursuit should be initiated or terminated [*Ketchum v. State of California (1998) 62 Cal. App. 4th 957, 966-970, 73 Cal. Rptr. 2d 152* (policy adopted by CHP provided adequate guidelines for justification, initiation, and termination of pursuit under former version of *Veh. Code § 17004.7*)].

A police pursuit policy that otherwise meets the statutory guidelines is not inadequate because it fails to cover all possible contingencies [*Bryant v. County of Los Angeles (1994) 26 Cal. App. 4th 919, 922, 32 Cal. Rptr. 2d 285*]. For example, a police pursuit policy is not inadequate merely because it provides no guidelines covering the situation of a pursued suspect's driving a stolen police vehicle [*see Bryant v. County of Los Angeles (1994) 26 Cal. App. 4th 919, 922-923, 32 Cal. Rptr. 2d 285* (decided under former version of *Veh. Code § 17004.7*)].

The statute uses the terms "public entity" and "public agency" interchangeably and both terms include a city [*Alcala v. City of Corcoran (2007) 147 Cal. App. 4th 666, 671, 53 Cal. Rptr. 3d 908]* . A pursuit policy promulgated by a city's chief of police can qualify for immunity under *Veh. Code § 17004.7* [*Brumer v. City of Los Angeles (1994) 24 Cal. App. 4th 983, 987, 29 Cal. Rptr. 2d 515; see also Alcala v. City of Corcoran (2007) 147 Cal. App. 4th 666, 674, 53 Cal. Rptr. 3d 908 (police chief's conduct was sufficient to establish that policy was formally adopted)*].

[4] Immunity for Failure to Provide Police Protection

Neither a public entity nor a public employee is liable for failure to establish a police department or otherwise provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service [*Gov. Code § 845*; *see, e.g., Zelig v. County of Los Angeles (2002) 27 Cal. 4th 1112, 1144-1147, 119 Cal. Rptr. 2d 709, 45 P.3d 1171* (county not liable for failing to prevent shooting in public courthouse)].

This immunity for failure to provide police protection service is absolute whether the police action is discretionary or ministerial [*Hartzler v. City of San Jose (1975) 46 Cal. App. 3d 6, 8-9, 120 Cal. Rptr. 5]* , and a public entity is immune from liability for failure to respond promptly to a burglar alarm that signals the police station [*Antique Arts Corp. v. Torrance (1974) 39 Cal. App. 3d 588, 591-593, 114 Cal. Rptr. 332]* , even though the police department is required to respond to the call [*see Gov. Code § 845* (cannot fail to respond to alarm solely because city permit not obtained)].

Additionally, a public entity is immune to liability for the failure to provide adequate police protection during a riot, notwithstanding allegations that senior police officials had discriminatory motives when allocating police resources during the riot [*Gates v. Superior Court (Hirata) (1995) 32 Cal. App. 4th 481, 508, 510* , n.511, *38 Cal. Rptr. 2d 489, 502* (government tort immunities apply to intentional torts)]. Application of *Gov. Code § 845* immunity in light of allegations of unlawfully discriminatory deployment of police officers has also withstood equal protection challenge [*Gates v. Superior Court (1995) 32 Cal. App. 4th 481, 513-525, 38 Cal. Rptr. 2d 489, 502*], as well as arguments that immunity under such circumstances is precluded by *Civ. Code §§ 51.7* and *52*, which generally grant the right to be free from violence directed against a person because of membership in a protected classification [*Gates v. Superior Court (Hirata) (1995) 32 Cal. App. 4th 481, 510-525, 38 Cal. Rptr. 2d 489* ; *see Civ. Code §§ 51.7, 52*]. This immunity applies only to actions for monetary damages, however, and does not extend to actions seeking equitable relief [*Gates v. Superior Court (Hirata) (1995) 32 Cal. App. 4th 481, 494-508, 38 Cal. Rptr. 2d 489]* .

Immunity for failure to provide police protection does not apply to situations in which the government entity failed to take other reasonable action, in lieu of providing police protection, to minimize the chances of harm to plaintiff [*Lopez v. Southern Cal. Rapid Transit Dist. (1985) 40 Cal. 3d 780, 785, 791, 221 Cal. Rptr. 840, 710 P.2d 907]* . The immunity also does not apply if the police had a special relationship with the victim and failed to warn him or her of a known danger [*Wallace v. City of Los Angeles (1993) 12 Cal. App. 4th 1385, 1402-1403, 16 Cal. Rptr. 2d 113* (witness whose cooperation police officer sought in connection with murder trial was murdered after threats from suspect and assurances by officer that she was in no danger; officer had duty to warn); *Carpenter v. City of Los Angeles (1991) 230 Cal. App. 3d 923, 934-935, 281 Cal. Rptr. 500* (victim was witness in criminal case, and police had reliable information that his life was in danger); *but see Hernandez v. City of Pomona (1996) 49 Cal. App. 4th 1492, 1504, 57 Cal. Rptr. 2d 406* (police officers owed no duty to protect plaintiff's deceased son from retaliation by fellow gang members against whom son provided incriminating evidence despite assurances to son that no harm would come to him)]. Apart from the defense of statutory immunity, a police officer or entity is not liable for failure to provide police protection unless it can be established that the plaintiff was owed a duty of care [*Baker v. City of Los Angeles (1986) 188 Cal. App. 3d 902, 909, 233 Cal. Rptr. 760* ; *see § 464.102[1]*].

[5] Immunity for Failure to Make Arrest

Neither a public entity nor a public employee is liable for injury caused by the failure to make an arrest or by the failure to retain an arrested person in custody [*Gov. Code § 846*]. Moreover, a police officer is under no mandatory duty, for the purpose of imposing liability under *Gov. Code § 815.6*, to prevent an obviously intoxicated person from operating a motor vehicle [*Lehto v. City of Oxnard (1985) 171 Cal. App. 3d 285, 288-296, 217 Cal. Rptr. 450]* .

[6] Liability and Immunity for Torts of Law Enforcement Officer Employed as Private Security Guard

Penal Code § 70(d) provides that a public entity may be liable for the actions of off-duty law enforcement officers who are engaged in casual or part-time employment as security guards for private employers, but only under limited circumstances. A public entity is not liable for an off-duty officer's tortious conduct while engaged in secondary employment unless all of the following conditions are met:

- The law enforcement officer was wearing his or her uniform;
- The secondary employment was approved by the county board of supervisors or city council of the principal employer, or their designees;
- The wearing of uniforms and equipment was approved by the principal employer; and
- The law enforcement officer was subject to reasonable rules and regulations of the principal

employer [*Penal Code § 70(d)(1)*; *Melendez v. City of Los Angeles (1998) 63 Cal. App. 4th 1, 6-7, 12, 73 Cal. Rptr. 2d 469* (city not liable because all conditions of statute were not met)].

However, beginning in 1997, the principal public employer was required to obtain an indemnity agreement from the secondary private employer as a condition of approving the casual or part-time employment [*Penal Code § 70(d)(2)*].

[7] Immunity From Suit by Plaintiff Charged With Criminal Conduct

No person charged by indictment, information, complaint, or other accusatory pleading charging a criminal offense may bring a civil action for money or damages against a law enforcement officer or against the public entity employing a law enforcement officer based on conduct of the law enforcement officer relating to the offense for which the accused is charged, including an act or omission in investigating or reporting the offense or arresting or detaining the accused, while the charges against the accused are pending before a superior court. Any applicable statute of limitations for filing and prosecuting these claims is tolled during the period that the charges are pending before a superior court [*Gov. Code § 945.3*; *see McMartin v. County of Los Angeles (1988) 202 Cal. App. 3d 848, 854-860, 249 Cal. Rptr. 53* (upholding constitutionality of *Gov. Code § 945.3*)].

The charges pending do not include appeals or criminal proceedings diverted pursuant to *Penal Code §§ 1000-1000.5, 1000.6-1000.11, 1001-1001.11, 1001.20-1001.35, 1001.50*, or *1001.51*. Nothing in *Gov. Code § 945.3*, however, prohibits the filing of a claim with the board of a public entity or extends the time within which a claim is required to be presented pursuant to *Gov. Code § 911.2* [*Gov. Code § 945.3*]. Therefore, the person so charged must file a claim with the proper government entity within six months after the arrest, or be barred thereafter from filing a subsequent court action [*see Gov. Code § 911.2*].

[8] Recovery of Attorney's Fees by Police Officer Sued in Bad Faith

In any action for damages arising out of the performance of a law enforcement officer's duties (including an action for libel or slander under *Civ. Code § 45* or *46*) brought against a law enforcement officer (as defined in *Penal Code § 830 et seq.*) or against a public entity employing a law enforcement officer, the court may, in its discretion, award reasonable attorney's fees to the defendant as part of the costs, on a finding by the court that the action was not filed or maintained in good faith and with reasonable cause [*Code Civ. Proc. § 1021.7*; *see Planned Protective Servs., Inc. v. Gorton (1988) 200 Cal. App. 3d 1, 15, 245 Cal. Rptr. 790* ; *see also Martin v. Szeto (2004) 32 Cal. 4th 445, 451-452* & n.7, *9 Cal. Rptr. 3d 687, 84 P.3d 374* (although statute only applies to actions involving law enforcement officer conduct, statute applies reciprocally to allow for award of attorneys' fees to private citizens who must defend against baseless complaints for libel or slander stemming from citizen's complaint about manner in which law enforcement officer has performed duties)]. Counsel should add a request in the prayer to the answer for such reasonable attorney's fees.

For a discussion of the procedures necessary for recovering attorney's fees, see Ch. 174, *Costs and Attorney's Fees* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsClaims By & AgainstGovernmentsLocal GovernmentsPolice PowerTortsPublic Entity LiabilityExcessive ForceTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral Overview

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§ 464.103 Injuries by and to Prisoners

[1] General Rules of Liability and Immunity

Notwithstanding any other provisions of *Gov. Code §§ 814-895.8* (liability of public entities and public employees), except as provided in *Gov. Code § 844.6(b)-(d)* and in *Gov. Code §§ 814* (contract liability), 814.2 (workers' compensation liability), 845.4 (interference with prisoners' rights), and 845.6 (failure to furnish or obtain medical care for prisoner), a public entity is not liable for an injury proximately caused by any prisoner or an injury to any prisoner [*Gov. Code § 844.6(a)*]. This provision does not affect the liability of a public entity under *Veh. Code §§ 17000-17004.5* with regard to liability for motor vehicles [*Gov. Code § 844.6(b)*]. Except for an injury to a prisoner, nothing in *Gov. Code § 844.6* prevents recovery from the public entity for an injury resulting from the dangerous condition of public property as described in *Gov. Code §§ 830-840.6* [*Gov. Code § 844.6(c)*]. However, if the cause of action does arise from injuries to a prisoner, the immunity applies. Therefore, that statutory immunity bars a claim for loss of consortium made by the wife of a prisoner, based on injuries sustained by her husband [*Badiggo v. County of Ventura (1989) 207 Cal. App. 3d 357, 361-362, 254 Cal. Rptr. 771]* .

Nothing in *Gov. Code § 844.6* exonerate a public employee from liability for injury proximately caused by his or her negligent or wrongful act or omission. The public entity may, but is not required to, pay any judgment, compromise, or settlement, or may, but is not required to, indemnify any public employee, in any case where the public entity is immune from liability under these provisions. However, the public entity must pay, as provided in *Gov. Code §§ 825-825.6*, any judgment based on a claim against a public employee who is lawfully engaged in the practice of one of the healing arts under any law of California for malpractice arising from an act or omission in the scope of his or her employment and must pay any compromise or settlement of a claim or action, based on such malpractice, to which the public entity has agreed [*Gov. Code § 844.6(d)*].

The public employee immunity provision of *Gov. Code § 844.6* does not prevent a lawsuit by a prison inmate against a correctional officer and a prison doctor in their personal, as opposed to their official, capacities. In a case before the Ninth Circuit, in which the defendants argued that because California would indemnify the defendants if they were

required to pay damages to the plaintiff, California was the real party in interest, the court concluded that California's indemnification of defendants did not render California the real party in interest [*Ashker v. California Dep't of Corr. (9th Cir. 1997) 112 F.3d 392, 395* (inmate's suit alleging *42 U.S.C.S. § 1983* claim as well as pendent state claims for assault and battery and medical malpractice not barred by *Eleventh Amendment* immunity)].

The court of appeal has held that there is no private right of action for violation of the prohibition against cruel and unusual punishment contained in *Article I, Section 17 of the California Constitution*. Recognizing the importance of the rights protected by the provision, the court nonetheless found nothing in the constitutional provision or its history suggesting that the enactors intended to create a private right of action. The court also noted adequate alternate remedies existed, including the right to proceed under federal law for a violation of the same protection afforded by the U.S. Constitution [*Giraldo v. Department of Corrections & Rehabilitation (2008) 168 Cal. App. 4th 231, 254-256, 85 Cal. Rptr. 3d 371*].

[2] Definition of "Prisoner"

The term "prisoner" as used in *Gov. Code § 844.6* includes an inmate of a prison, jail, or penal or correctional facility. A lawfully arrested person brought into a law enforcement facility for the purpose of being booked becomes a prisoner as a matter of law on entry into a prison, jail, or penal or correctional facility pursuant to penal process [*Gov. Code § 844*]. A person in the custody of a law enforcement officer, but undergoing medical treatment in a county hospital, is considered a prisoner. Work camps for prisoners are considered penal or correctional facilities. Although a prisoner or ward of the juvenile court engaged in fire suppression is considered a prisoner, a person on parole is not considered a prisoner [*Fearon v. Department of Corr. (1984) 162 Cal. App. 3d 1254, 1256, 209 Cal. Rptr. 309* ; *Zeilman v. County of Kern (1985) 168 Cal. App. 3d 1174, 1179, 214 Cal. Rptr. 746]* . The ward of a juvenile court committed to the custody of his or her parent is also not a prisoner [*Patricia J. v. Rio Linda Union Sch. Dist. (1976) 61 Cal. App. 3d 278, 282-288, 132 Cal. Rptr. 211]* .

The term "prisoner" means a person in jail or prison and does not include a person detained by police, but not yet arrested [*Larson v. Oakland (1971) 17 Cal. App. 3d 91, 94-98, 94 Cal. Rptr. 466]* , or a person who has been arrested and held in a police car, but not yet incarcerated [*Griffith v. City of Monrovia (1982) 134 Cal. App. 3d Supp. 6, 8-10 , 184 Cal. Rptr. 709]* . However, a person who has been arrested, booked, and is being held in the receiving section of the jail is a prisoner [*Datil v. Los Angeles (1968) 263 Cal. App. 2d 655, 658-659, 69 Cal. Rptr. 788]* . A ward of the juvenile court committed to a foster home is also a prisoner [*Jiminez v. Santa Cruz County (1974) 42 Cal. App. 3d 407, 410-413, 116 Cal. Rptr. 878]* . Similarly, a person who has been arrested and is turned over to the custody of the sheriff's department on completion of the initial booking in the reception area of the county jail is a prisoner [*Terzian v. County of Ventura (1994) 24 Cal. App. 4th 78, 83-87, 28 Cal. Rptr. 2d 809]* . Furthermore, a person who is not actually within a cell but is within the confines of a jail facility awaiting incarceration is a prisoner [*Peterson v. County of Los Angeles (1986) 185 Cal. App. 3d 705, 709, 230 Cal. Rptr. 80]* .

A person who has been falsely imprisoned by the failure to release him or her at the proper time is not a prisoner for the purposes of a subsequent action for false imprisonment, and the public entity is not immune from liability for false imprisonment [*Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 716-717, 117 Cal. Rptr. 241, 527 P.2d 865]* .

The decisive element in defining "prisoner" has been confinement due to court commitment or legal process. Although a work furlough program differs from a jail or prison in many respects, an individual's restraint within such a program satisfies this element of confinement, and a program participant is a prisoner [*Badiggo v. County of Ventura (1989) 207 Cal. App. 3d 357, 360-361, 254 Cal. Rptr. 771* ; *see Penal Code § 1208* (work furlough programs)].

A person confined in a correctional facility or institution pursuant to *Pen. Code § 647,* which permits a law enforcement officer to place a person under the influence of intoxicating liquor into civil protective custody, is a prisoner for these

purposes [*Teter v. City of Newport Beach (2003) 30 Cal. 4th 446, 451-453, 133 Cal. Rptr. 2d 139, 66 P.3d 1225]* . In addition, if a person taken into custody pursuant to a valid arrest under *Pen. Code § 647* is subsequently released without charges being filed, and a certificate is issued under *Pen. Code § 851.6* that describes the earlier period of custody as a "detention," that person is still considered a prisoner during the time of detention for purposes of applying the immunity of *Gov. Code § 844.6* [*Teter v. City of Newport Beach (2003) 30 Cal. 4th 446, 454, 133 Cal. Rptr. 2d 139, 66 P.3d 1225]* .

A child residing with his or her incarcerated mother under the Pregnant and Parenting Women's Alternative Sentencing Program Act [*see Pen. Code § 1174 et seq.*] is not a "prisoner" for purposes of these provisions of the Tort Claims Act, as such a child resides in the facility because the mother is housed there and not because the child is the subject of any legal restraint [*Lawson v. Superior Court (2010) 180 Cal. App. 4th 1372, 1387, 103 Cal. Rptr. 3d 834]* .

An inmate performing assigned work while incarcerated in a prison facility may be considered an "employee" within the meaning of the Workers' Compensation Act. In that case, the exclusive workers' compensation remedy applies, and the civil courts have no jurisdiction over the matter [*see Rowland v. County of Sonoma (1990) 220 Cal. App. 3d 331, 333-334, 269 Cal. Rptr. 426*]. If the inmate is in a state facility, he or she will usually be considered an employee [*see Lab. Code § 3351* (definition of employee for purpose of Workers' Compensation Act)]. However, if the inmate is in a county facility, the determination of whether he or she is an employee is made on a case-by-case basis using the general definition of an employee, and considering the following factors: whether the work was required as a condition of incarceration; whether the inmate volunteered for the assignment; and what considerations, such as monetary compensation, work-time credits, and freedom from incarceration, were received by the inmate [*see Rowland v. County of Sonoma (1990) 220 Cal. App. 3d 331, 334, 269 Cal. Rptr. 426*].

[3] Interference With Prisoner's Right to Judicial Determination

Neither a public entity nor a public employee acting within the scope of his or her employment is liable for interfering with the right of a prisoner to obtain a judicial determination or review of the legality of his or her confinement. However, a public employee and the public entity for which the employee is acting within the scope of his or her employment are liable for injury proximately caused by the employee's intentional and unjustifiable interference with that right, but no cause of action for that injury is deemed to have accrued until it has first been determined that the confinement was illegal [*Gov. Code § 845.4*].

[4] Immunity for Failure to Provide Prison Facilities

Except as provided in *Gov. Code §§ 830-840.6* involving the dangerous conditions of public property, neither a public entity nor a public employee is liable for failure to provide a prison, jail, or penal or correctional facility or, if such facility is provided, for failure to provide sufficient equipment, personnel, or facilities there [*Gov. Code § 845.2*].

The immunity provided by *Gov. Code § 845.2*, like that provided by *Gov. Code § 845*, is designed to prevent political decisions of government policy-making officials from being second-guessed by judges and juries in personal injury litigation [*Taylor v. Buff (1985) 172 Cal. App. 3d 384, 390, 218 Cal. Rptr. 249]* . Therefore, for example, essentially budgetary decisions of these officials are not subject to judicial review in tort litigation [*Taylor v. Buff (1985) 172 Cal. App. 3d 384, 390, 218 Cal. Rptr. 249]* .

Despite protection from actions under state law, however, public entities and officials, including prisons and prison officials, may be liable under federal civil rights statutes. For further discussion, see Ch. 112, *Civil Rights: Government-Funded Programs and Activities* , as well as Levy, Golden & Sacks, *California Torts, Ch. 66, § 61.66* (Matthew Bender), and Cook & Sobieski, Civil Rights Actions (Matthew Bender).

[5] Failure to Furnish Medical Care to Prisoner

Neither a public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner. However, except as otherwise provided in *Gov. Code §§ 855.8* and *856* regarding mental illness, a public employee and the public entity for which the employee is acting within the scope of his or her employment are liable if the employee knows or has reason to know that the prisoner is in need of immediate medical care and he or she fails to take reasonable action to summon such medical care. Nothing stated above exonerates a public employee, who is lawfully engaged in the practice of one of the healing arts under any law of California, from liability for injury proximately caused by malpractice or exonerates the public entity from its obligation to pay any judgment, compromise, or settlement that it is required to pay under *Gov. Code § 844.6(d)* [*Gov. Code § 845.6*]. Therefore, a public entity under *Gov. Code § 845.6* is immune from suit for the medical malpractice of its employees, although it is required to pay a judgment against its employees for medical malpractice committed against a prisoner [*see Watson v. State of California (1993) 21 Cal. App. 4th 836, 842, 26 Cal. Rptr. 2d 262]* .

[6] Immunity for Release or Escape of Prisoners

Neither a public entity nor a public employee is liable for any injury resulting from determining whether to parole or release a prisoner, from determining the terms and conditions of his or her parole or release, or from determining whether to revoke his or her parole or release [*Gov. Code § 845.8(a)*]. Therefore, a public entity is immune from liability for the actions of prisoners released into the community for rehabilitative purposes [*California v. Superior Court (1974) 37 Cal. App. 3d 1023, 1025-1028, 112 Cal. Rptr. 706]* . A public entity or public employee is also immune from liability for injury resulting from the negligent failure to supervise a person's parole [*Gov. Code § 845.8(a)*; *Duffy v. City of Oceanside (1986) 179 Cal. App. 3d 666, 673, 224 Cal. Rptr. 879* ; *Martinez v. State of California (1978) 85 Cal. App. 3d 430, 436, 149 Cal. Rptr. 519]* . Finally, the members of the Board of Prison Terms are immune from suit for making the discretionary decision that an incarcerated plaintiff is not suitable for parole [*Leyva v. Nielsen (2000) 83 Cal. App. 4th 1061, 1066-1067, 100 Cal. Rptr. 2d 231*].

Ministerial acts undertaken in the performance of correctional policy decisions are not covered by the immunity of *Gov. Code § 845.8(a)*, however [*Perez-Torres v. State of California (2007) 42 Cal. 4th 136, 144-145, 64 Cal. Rptr. 3d 155, 164 P.3d 583* (overruling *Swift v. Department of Corrections (2004) 116 Cal. App. 4th 1365, 11 Cal. Rptr. 3d 406*)]. Thus, for example, while the State's decision to revoke a prisoner's parole, even if based on erroneous information about the person's identity, is a policy decision covered by immunity [*Perez-Torres v. State of California (2007) 42 Cal. 4th 136, 141-142, 64 Cal. Rptr. 3d 155, 164 P.3d 583]* , the failure of State personnel to release the prisoner after they knew or should have known that they were detaining the wrong person is a ministerial act not protected by immunity under *Gov. Code § 845.8(a)* [*Perez-Torres v. State of California (2007) 42 Cal. 4th 136, 145, 64 Cal. Rptr. 3d 155, 164 P.3d 583]* .

Neither a public entity nor a public employee is liable for any injury caused by an escaping or escaped prisoner, an escaping or escaped arrested person, or a person resisting arrest [*Gov. Code § 845.8(b)*]. This immunity from liability for injuries caused by an escaping prisoner is absolute whether the acts of the public employee that allowed the escape were discretionary or ministerial [*Sacramento County v. Superior Court (1972) 8 Cal. 3d 479, 481-486, 105 Cal. Rptr. 374, 503 P.2d 1382]* . The immunity provided in *Gov. Code § 845.8(b)* also applies if persons whom police did not attempt to arrest, but merely attempted to stop for questioning and citation for traffic violations, cause injury in fleeing from the police [*Kisbey v. State of California (1984) 36 Cal. 3d 415, 419, 204 Cal. Rptr. 428, 682 P.2d 1093]* .

However, the immunity of *Gov. Code § 845.8* does not preclude public entity liability under *Veh. Code § 17001* for negligent operation of motor vehicles by public employees during the course of their employment in situations in which the police have not yet detained the suspect [*Stark v. City of Los Angeles (1985) 168 Cal. App. 3d 276, 283-284, 214 Cal. Rptr. 216* (failure of police to sound siren during chase may provide basis for liability even though suspect's car collided with plaintiff); *see also Thomas v. City of Richmond (1995) 9 Cal. 4th 1154, 1164, 40 Cal. Rptr. 2d 442, 892*

P.2d 1185 ; *but see Veh. Code § 17004.7* (immunizing public entity that has enacted specified guidelines from liability resulting from police pursuit)].

The immunity provided in *Gov. Code § 845.8(a)* applies if the questioned act involves policy decisions made prior to or as an integral part of the decision to release [*Thompson v. County of Alameda (1980) 27 Cal. 3d 741, 747-748, 749, 167 Cal. Rptr. 70, 614 P.2d 728* (release of juvenile into mother's custody on temporary leave)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsPolice PowerTortsIntentional TortsFalse ImprisonmentDefensesImmunityTortsPublic Entity LiabilityExcessive ForceTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral Overview

California Forms of Pleading and Practice--Annotated

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§ 464.104 Emergency Services

[1] Fire Protection Activities

[a] Immunity for Failure to Provide Fire Protection

Neither a public entity nor a public employee is liable for failure to establish a fire department or otherwise to provide fire protection service [*Gov. Code § 850*].

[b] Immunity for Failure to Provide Sufficient Fire Protection Facilities

Neither a public entity that has undertaken to provide fire protection service nor an employee of such public entity is liable for any injury resulting from the failure to provide or maintain sufficient personnel, equipment, or other fire protection facilities [*Gov. Code § 850.2*]. For example, a public entity was not liable for shutting off a water valve that supplied fire hydrants and not notifying the fire department or turning the valve back on [*Heieck & Moran v. City of Modesto (1966) 64 Cal. 2d 229, 233, 49 Cal. Rptr. 377, 411 P.2d 105]* .

[c] Immunity for Condition of Equipment and for Injuries Caused in Fighting Fires

Neither a public entity nor a public employee acting in the scope of his or her employment is liable for any injury resulting from the condition of fire protection or fire fighting equipment or facilities or, except as provided in *Veh. Code §§ 17000-17004.5* with regard to liability for motor vehicles, for any injury caused in fighting fires [*Gov. Code § 850.4*]. For example, a public entity was immune from liability for injuries incurred by a person who was being rescued from a fire [*Heimberger v. City of Fairfield (1975) 44 Cal. App. 3d 711, 714-716, 117 Cal. Rptr. 482* , as well as for damages incurred when cattle escaped through a hole in a fence cut by firefighters to fight a fire and not repaired [*Bettencourt v. California (1975) 51 Cal. App. 3d 892, 894-896, 124 Cal. Rptr. 542]* . This immunity extends to the failure of firefighters to get to a fire quickly, even if the failure was caused by willful, wanton, and reckless conduct [*City & County of San Francisco v. Superior Court (1984) 160 Cal. App. 3d 837, 841-842, 207 Cal. Rptr. 6* (delay due to firefighters' unauthorized social gathering away from fire house)].

The immunity provided in *Gov. Code § 850.4* for injuries caused in fighting fires does not extend to situations that do not involve fighting fires [*Lewis v. Mendocino Fire Prot. Dist. (1983) 142 Cal. App. 3d 345, 346-347, 190 Cal. Rptr. 883* (no immunity for further injuring person in course of removing fallen tree from him); *but see Health & Safety Code § 1769*, providing immunity for emergency rescue, discussed in *§ 464.104[2]*]. Additionally, if an action for inverse condemnation otherwise exists, the statutory immunity for injuries resulting from the condition of firefighting equipment does not provide a defense, because the constitutional provisions requiring compensation for property taken or damaged by a public use override the Tort Claims Act and its immunities [*Pacific Bell v. City of San Diego (2000) 81 Cal. App. 4th 596, 602-603, 96 Cal. Rptr. 2d 897]* . In one case, for example, a city had no preventive maintenance plan to inspect or monitor the effect of corrosion on old cast iron pipes, and the plaintiff's business was flooded after a corroded cast iron water pipe servicing a fire hydrant burst. The city was not immune from liability for inverse condemnation under *Gov. Code § 850.4* [*Pacific Bell v. City of San Diego (2000) 81 Cal. App. 4th 596, 602-606, 96 Cal. Rptr. 2d 897]* . For a discussion of inverse condemnation generally, see Ch. 247, *Eminent Domain* .

The immunity granted by *Gov. Code § 850.4* has been extended to a city and a municipal utility district charged with negligent installation and maintenance of a fire hydrant, which vandals opened, resulting in water damage to the plaintiff's house [*Razeto v. Oakland (1979) 88 Cal. App. 3d 349, 351-353, 151 Cal. Rptr. 791]* .

The immunity provided by *Gov. Code § 850.4* also applies to injuries suffered by a firefighter who is not an employee of a government entity, but who is injured while engaged in firefighting activities [*State of California v. Superior Court (2001) 87 Cal. App. 4th 1409, 1413-1414, 105 Cal. Rptr. 2d 499* (immunity applied to suit against state for death of privately-employed pilot killed while attempting to drop fire retardant materials on forest or brush fire)].

The immunity provided by *Gov. Code § 850.4* is an affirmative defense and must be pled and proved, or it is deemed waived [*McMahan's of SantaMonica v. City of Santa Monica (1983) 146 Cal. App. 3d 683, 689, 194 Cal. Rptr. 582]* .

In a case in which a fire department used a forklift to open a large service entry door to a building in fighting the fire that ultimately destroyed that building, the owner argued that the fire department was liable under *Veh. Code § 17001* (damage to property proximately caused by a negligent act by a public employee in the operation of a motor vehicle). In dicta, the court of appeal said that analyzing both *Gov. Code § 850.4*, which applies whenever firefighters are engaged in firefighting activities, and *Veh. Code § 17001*, which is designed to deal with the hazard created by the operation of automobiles on streets and highways, leads to the conclusion that *Veh. Code § 17001* does not apply if the motor vehicle is used as a method to fight a fire and not in a negligent manner on the streets and highways [*Colapinto v. County of Riverside (1991) 230 Cal. App. 3d 147, 150, 152-153, 281 Cal. Rptr. 191]* .

[d] Liability and Immunity for Firefighting Outside Regular Area

Whenever a public entity provides fire protection or firefighting service outside of the area regularly served and protected by the public entity providing that service, the public entity providing that service is liable for any injury for which liability is imposed by statute caused by its act or omission or the act or omission of its employee occurring in the performance of that fire protection or fire fighting service.

Notwithstanding any other law, the public entity receiving that fire protection or firefighting service is not liable for any act or omission of the public entity providing the service or for any act or omission of an employee of the public entity providing the service. However, the public entity providing that service and the public entity receiving that service may by agreement determine the extent, if any, to which the public entity receiving that service is required to indemnify the public entity providing the service. Notwithstanding any other provision set forth above, any claims against the state must be presented to the board in accordance with *Gov. Code §§ 940-965.4* [*Gov. Code § 850.6*].

[e] Immunity for Transportation of Persons Injured by Fires

Any member of an organized fire department, fire protection district, or other firefighting unit of either the State of California or any political subdivision, any employee of the Department of Forestry, or any other public employee acting in the scope of his or her employment may transport, or arrange for the transportation of, any person injured by a fire, or by a fire protection operation, to a physician and surgeon or hospital if the injured person does not object to that transportation [*Gov. Code § 850.8*].

Neither a public entity nor a public employee is liable for any injury sustained by the injured person as a result of, or in connection with, that transportation or for any medical, ambulance, or hospital bills incurred by, or in behalf of, the injured person or for any other damages, but a public employee is liable for injury proximately caused by his or her willful misconduct in transporting the injured person or arranging for that transportation [*Gov. Code § 850.8*].

[2] Immunity for Providing Emergency Rescue Services

Neither a public entity nor emergency rescue personnel are liable for any injury caused by an action taken by emergency rescue personnel acting within the scope of their employment to provide emergency services, unless the action taken was performed in bad faith or in a grossly negligent manner. although they can still be liable under *Veh. Code §§ 17001-17004.5* [*Health & Safety Code § 1799.107(b)*]. For this purpose, it is presumed that the action taken when providing emergency services was performed in good faith and without gross negligence. This presumption affects the burden of proof [*Health & Safety Code § 1799.107(c)*].

"Emergency rescue personnel" means any person who is an officer, employee, or member of a fire department or fire protection or firefighting agency of the federal government, the State of California, a city, county, city and county, district, or other public or municipal corporation or political subdivision of California, or of a private fire department, whether the person is a volunteer, partly paid, or fully paid, while that person is actually engaged in providing emergency services [*Health & Safety Code § 1799.107(d)*]. "Emergency services" includes, but is not limited to, first aid and medical services, rescue procedures and transportation, or other related activities necessary to insure the health or safety of a person in imminent peril [*Health & Safety Code § 1799.107(e)*]. The qualified immunity of *Health & Safety Code § 1799.107* extends to protect public entities for the allegedly negligent conduct of 911 emergency dispatchers [*Eastburn v. Regional Fire Prot. Auth. (2003) 31 Cal. 4th 1175, 1184-1185, 7 Cal. Rptr. 3d 552, 80 P.3d 656]* .

In addition, neither the state nor its political subdivisions are liable for any claim based on the exercise or performance of, or the failure to exercise or perform, a discretionary function or duty on the part of a state or local agency or any employee of the state or its political subdivisions in carrying out the emergency services provisions [*Gov. Code § 8655*]. However, the state is not immune from liability under the Emergency Services Act for the intentional concealment of known dangers that cause personal injuries [*Adkins v. State of California (1996) 50 Cal. App. 4th 1802, 1811, 59 Cal. Rptr. 2d 59* (injuries to plaintiffs hired by state to hang Mediterranean fruit fly traps)].

[3] Immunity for Operation of Emergency Vehicles

A public employee is not liable for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle while responding to an emergency call or when in immediate pursuit of an actual or suspected violator of the law or when responding to, but not on returning from, a fire alarm or other emergency call [*Veh. Code § 17004*].

A public agency is not liable for damages resulting from the collision of a vehicle being pursued by police, as long as the public agency adopted a written policy on vehicular pursuits complying with certain minimum standards [*Veh. Code § 17004.7(b)*; *see § 464.102[3]*].

For complete discussion of the liability of a public entity and its employees for the operation of an emergency vehicle, see Ch. 246, *Emergency Vehicles* .

[4] Liability and Immunity for Rescue of Vessels

A public entity engaged in the rescue of a vessel involved in a collision, accident, or other casualty is liable in civil damages if its individual employee has failed to act as a reasonably prudent person would have acted under the same or similar circumstances [*Harb. & Nav. Code § 656(c)(2)*].

If a public entity has given a reasonable printed, electronic, or verbal warning of the danger causing the distress that created the necessity for the rescue, and there has been a reasonable opportunity for the party in distress to receive the warning, the public entity is liable only for the grossly negligent acts or omissions of its employee [*Harb. & Nav. Code § 656(c)(3)*].

An individual employee of a public entity engaged in the rescue of a vessel involved in a collision, accident, or other casualty is not a proper party defendant and must be dismissed on motion, unless the employee has violated a statute other than one creating a general obligation to rescue, or unless the employee is guilty of oppression, fraud, malice, or the conscious disregard of the safety of others [*Harb. & Nav. Code § 656(c)(1)*].

[5] Immunity for Actions Taken Under California Emergency Services Act

Neither the state nor its political subdivisions are liable for any claim based on the exercise or performance, or the failure to exercise or perform, a discretionary function or duty on the part of a state or local agency or any employee of the state or its political subdivisions in carrying out the provisions of the California Emergency Services Act [*Gov. Code § 8655*]. This immunity is not limited to emergency situations and can apply to training exercises conducted under the act [*Soto v. State of California (1997) 56 Cal. App. 4th 196, 201-202, 65 Cal. Rptr. 2d 11]* .

Section 8655 is a broad immunity provision that covers not only the exercise of discretion, but also the performance, or the failure to perform, a discretionary function in carrying out the provisions of the California Emergency Services Act. Section 8655 provides immunity even for negligently designed and performed disaster training exercises [*Soto v. State of California (1997) 56 Cal. App. 4th 196, 201, 65 Cal. Rptr. 2d 11]* . This immunity is broader than that provided by the general immunity statute, *Gov. Code § 820.2*, which is discussed in *§ 464.64[1]* [*Soto v. State of California (1997) 56 Cal. App. 4th 196, 201, 65 Cal. Rptr. 2d 11]* .

Immunity under *Gov. Code § 8655* has been applied to emergency actions to fight flooding that were taken without a preexisting flood control plan, even though some of those actions were taken outside of the defendant's geographical jurisdiction [Thousand Trails, Inc. v. California Reclamation Dist. No. 17 *(2004) 124 Cal. App. 4th 450, 458-459, 21 Cal. Rptr. 3d 196]* .

[6] Immunity for Earthquake and Volcanic Warnings

[a] Legislative Intent

The science of earthquake prediction is developing rapidly and, although still largely in a research stage, such predictions are now being initiated and are certain to continue into the future. Administrative procedures exist within the Office of Emergency Services to advise the Governor on the validity of earthquake predictions. Numerous important actions can be taken by state and local governments and special districts to protect life and property in response to earthquake predictions and associated warnings. The legislature has expressed its intent to insure that appropriate actions are taken in the public interest by government agencies acting in a reasonable manner without fear of consequent financial liabilities [*Gov. Code § 955.1(a)*].

[b] General Rule of Immunity

The Governor may, at his or her discretion, issue a warning as to the existence of an earthquake or volcanic prediction determined to have scientific validity. The state and its agencies and employees are not liable for any injury resulting from the issuance or nonissuance of such a warning or for any acts or omissions in fact-gathering evaluation, or other activities leading up to the issuance or nonissuance of a warning [*Gov. Code § 955.1(b)*]. In addition, public entities and public employees may, on the basis of a warning issued pursuant to the preceding paragraph take, or fail or refuse to take, any action; they may execute, or fail or refuse to execute any earthquake or volcanic prediction response plan with relation to the warning issued that is otherwise authorized by law. In taking, or failing or refusing to take such action, public entities and public employees are not liable for any injuries caused thereby or from any injuries resulting from the preparation of, or failure or refusal to prepare, any earthquake hazard or damage prediction maps, plans for evacuation of endangered areas, or other plan elements [*Gov. Code § 955.1(c)*].

The Governor's issuance of an earthquake or volcanic warning under *Gov. Code § 955.1(b)* is a sufficient basis for a declaration of a state of emergency or local emergency as defined by *Gov. Code § 8558*. Public entities and public employees are immune from liability in accordance with all immunity provisions that apply during such state of emergency or local emergency [*Gov. Code § 955.1(d)*].

[c] Additional Local Immunity

No city, city and county, or county, nor any employee of any such entity, is liable for damages for injury to persons or property, resulting from an earthquake or otherwise, on the basis of any assessment or evaluation performed, any ordinance adopted, or any other action taken pursuant to *Health & Safety Code §§ 19160-19169*, irrespective of whether that action complies with these sections, or on the basis of failure to take any action that these sections authorize. The immunity from liability provided by this statute is an addition to all other immunities of the city, city and county, or county provided by law [*Health & Safety Code § 19167*].

[7] Immunity for Activities to Abate Gradual Earth Movements

Subject to the provisions of *Gov. Code § 866(b), (c)*, in the event of public necessity and to avoid impending peril to persons or property as a result of gradual earth movement, a local public entity is not liable for damages for injury to persons or property resulting from that peril or from any action taken to abate the peril, providing the legislative body of the local public entity has, on the basis of expert opinion or other reasonable basis, done all of the following: (1) on the basis of adequate evidence, such as expert opinion or otherwise, found the existence of the impending peril; (2) determined appropriate remedial action to halt, stabilize, or abate the impending peril; and (3) undertaken to implement that remedial action [*Gov. Code § 866(a)*].

"Gradual earth movements" include, but are not limited to, perceptible changes in the earth either in a subterranean area or at the surface, or both, which if not arrested or contained will, over a gradual period of time, result in damage to or destruction of underground or aboveground property or harm to person. However, the term does not include movement that is caused by activity undertaken by the local public entity for purposes other than the abatement of peril caused by gradual earth movement. "Local public entity" has the meaning set forth in *Gov. Code § 900.4* [*Gov. Code § 866(a)*].

If the public entity is unable to complete the three steps described above because (1) the hazard has ceased, (2) such actions cannot be completed before the occurrence of the hazard sought to be avoided, or (3) the legislative body of the entity reasonably determines that remedial action will not abate the danger, the immunity nevertheless applies to the actions of the local public entity [*Gov. Code § 866(b)*].

This immunity is in addition to any other immunity of the local public entity provided by law or statute. Any claim of liability based on the impending peril or any action of the entity is subject to such immunities and any defenses that

would be available to the entity if it were a private person [*Gov. Code § 866(c)*]. The immunity provided by *Gov. Code § 866* overrides the provisions providing for government liability for dangerous conditions on public property [*City of Pomona v. Superior Court (1986) 182 Cal. App. 3d 1093, 1099, 227 Cal. Rptr. 714]* .

In addition to the immunity of the entity, an employee of the entity is not liable for damage for injury to persons or property resulting from an impending peril or from any action to abate the peril pursuant to *Gov. Code § 866* [*Gov. Code § 867*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityImmunityQualified ImmunityTortsPublic Entity LiabilityImmunitySovereign ImmunityTortsPublic Entity LiabilityLiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployeesTortsPublic Entity LiabilityLiabilityState Tort Claims ActsScope of Employment

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§ 464.105 Medical and Health Services

[1] General Liabilities and Immunities

[a] Liability for Failure to Provide Adequate Public or Mental Health Equipment or Facilities

A public entity that operates or maintains any medical facility that is subject to regulation by the State Department of Public Health or the State Department of Mental Hygiene is liable for injury proximately caused by the failure of the public entity to provide adequate or sufficient equipment, personnel, or facilities required by any statute or any regulation of the State Department of Public Health or the State Department of Mental Hygiene prescribing minimum standards for equipment, personnel, or facilities, unless the public entity establishes that it exercised reasonable diligence to comply with the applicable statute or regulation [*Gov. Code § 855(a)*].

A public entity that operates or maintains any medical facility that is not subject to regulation by the State Department of Public Health or the State Department of Mental Hygiene is liable for injury proximately caused by the failure of the public entity to provide adequate or sufficient equipment, personnel, or facilities substantially equivalent to those required by any statute or any regulation of the State Department of Public Health or the State Department of Mental Hygiene prescribing minimum standards for equipment, personnel, or facilities applicable to a public medical facility of the same character and class, unless the public entity establishes that it exercised reasonable diligence to conform with such minimum standards [*Gov. Code § 855*].

The term "medical facility" as used in *Gov. Code § 855* is defined as including a hospital, infirmary, clinic, dispensary, mental institution, or similar facility [*Gov. Code § 854*].

If a plaintiff seeks to impose liability under *Gov. Code § 855* for violation of a regulation, that regulation must have been promulgated by one of the four state departments specified by the statute [*Lockhart v. County of Los Angeles (2007) 155 Cal. App. 4th 289, 305-306, 66 Cal. Rptr. 3d 62]* . In addition, regardless of whether liability is predicated on a statute or regulation, the relevant statute or regulation must prescribe a specific minimum standard that has been violated. Provisions that merely provide general guidelines, such as those requiring "sufficient" personnel or the like,

cannot be a basis for imposing liability under the statute [*Lockhart v. County of Los Angeles (2007) 155 Cal. App. 4th 289, 307-309, 66 Cal. Rptr. 3d 62]* .

[b] Immunity for Acts Promoting Public Health

Neither a public entity nor a public employee is liable for an injury resulting from the decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease within the community, if the decision as to whether the act was or was not to be performed was the result of the exercise of discretion vested in the public entity or the public employee, whether or not such discretion was abused. Nor is a public entity or a public employee liable for an injury caused by an act or omission in carrying out such a decision with due care [*Gov. Code § 855.4*].

The court of appeal has suggested that this immunity may apply to immunize a public entity from liability for failing to keep a building on public property free from a disease-causing virus [*Wright v. City of Los Angeles (2001) 93 Cal. App. 4th 683, 689-690, 113 Cal. Rptr. 2d 352* (rejecting liability for dangerous condition of public property)].

[c] Immunity for Administration of 1976 Flu Program

A public entity, public employee, or volunteer participating in the National Influenza Program of 1976 is not liable for an injury caused by an act or omission in the promotion of a community program or the administration of vaccine in a community program, including the residual effects of the vaccine, unless the act or omission constituted willful misconduct [*Gov. Code § 856.6(a)*].

[2] Liabilities and Immunities for Treatment Decisions

[a] Immunity for Failure to Make Physical or Mental Examination

Except for an examination or diagnosis for the purpose of treatment, neither a public entity nor a public employee acting within the scope of his or her employment is liable for injury caused by the failure to make a physical or mental examination or to make an adequate physical or mental examination of any person for the purpose of determining whether that person has a disease or physical or mental condition that would constitute a hazard to the health or safety of himself or herself or of others [*Gov. Code § 855.6*].

In determining whether the immunity under *Gov. Code § 855.6* applies, the source of the material examined is not determinative. Instead, the question is whether the public employee's actions were taken to facilitate the delivery of medical diagnosis or care to the individual who was injured by the employee's actions [*Smith v. County of Kern (1993) 20 Cal. App. 4th 1826, 1835, 25 Cal. Rptr. 2d 716]* . In one case, for example, the plaintiff was a police officer who became covered with another person's blood while rendering assistance. The plaintiff alleged damages caused by a county hospital's negligent failure adequately to test this other person for HIV, the virus that causes AIDS. The court noted that the statute would clearly not provide immunity if the hospital's laboratory had undertaken to test the plaintiff's blood for the AIDS virus in order to assist in the diagnosis of whether the officer had contracted the disease [*Smith v. County of Kern (1993) 20 Cal. App. 4th 1826, 1834, 25 Cal. Rptr. 2d 716]* . The court concluded that the facts in the plaintiff's amended complaint permitted a reasonable inference that the hospital's laboratory undertook to perform a test on the other person's blood for the purpose of assisting the plaintiff's physician in examining or diagnosing the plaintiff's exposure to HIV and that the county was therefore not immune from liability [*Smith v. County of Kern (1993) 20 Cal. App. 4th 1826, 1834-1835, 25 Cal. Rptr. 2d 716]* .

The "purpose of treatment" exception is apparently intended to apply to examinations made in doctors' offices and public hospitals for the purpose of treatment, but not to public health examinations [*see Creason v. Department of Health Services (1998) 18 Cal. 4th 623, 636-637, 76 Cal. Rptr. 2d 489, 957 P.2d 1323]* . The exception does not apply to the development of testing and reporting standards for mass neonatal screening under the Hereditary Disorders Act,

because the development of such standards cannot reasonably be deemed "an examination or diagnosis" [*Creason v. Department of Health Servs. (1998) 18 Cal. 4th 623, 635-638, 76 Cal. Rptr. 2d 489, 957 P.2d 1323* ; *see Health & Safety Code § 124975 et seq.*].

[b] Immunity for Failure to Admit Person to Medical Facility

Except as provided in *Gov. Code § 815.6* regarding mandatory duties of public entities, neither a public entity nor a public employee acting in the scope of his or her employment is liable for an injury resulting from the failure to admit a person to a public medical facility [*Gov. Code § 856.4*].

[c] Liability and Immunity for Diagnosing Mental Illness or Addiction

Neither a public entity nor a public employee acting within the scope of his or her employment is liable for injury resulting from diagnosing or failing to diagnose that a person is afflicted with mental illness or addiction or from failing to prescribe for mental illness or addiction [*Gov. Code § 855.8(a)*]. A public employee acting within the scope of his or her employment is not liable for administering the treatment prescribed for mental illness or addiction with due care [*Gov. Code § 855.8(b)*].

Nothing in *Gov. Code § 855.8* exonerates a public employee who has undertaken to prescribe for mental illness or addiction from liability for injury proximately caused by his or her negligence or wrongful act in so prescribing [*Gov. Code § 855.8(c)*]. Nothing in *Gov. Code § 855.8* exonerates a public employee from liability for injury proximately caused by his or her negligent or wrongful act or omission in administering any treatment prescribed for mental illness or addiction [*Gov. Code § 855.8(d)*]. The term "mental illness or addiction" as used in *Gov. Code § 855.8* is defined as any condition for which a person may be detained, cared for, or treated in a mental institution, in a facility designated by a county pursuant to *Welf. & Inst. Code §§ 5150-5344*, or in a similar facility [*Gov. Code § 854.4*].

[3] Liabilities and Immunities Relating to Confinement of Patients

[a] Injuries by and to Mental Patients

Notwithstanding any other provisions of *Gov. Code §§ 814-895.8* (liability of public entities and public employees), except as provided in *Gov. Code § 854.8* and in *Gov. Code §§ 814* (contract liability), 814.2 (workers' compensation liability), 855 (failure to operate or maintain adequate medical facility), and 855.2 (interference with inmates' rights), a public entity is not liable for an injury proximately caused by a patient of a mental institution or an injury to an inpatient of a mental institution [*Gov. Code § 854.8(b)*]. This provision does not affect the liability of a public entity under *Veh. Code §§ 17000-17004.5*, with regard to liability for motor vehicles [*Gov. Code § 854.8(b)*].

As used in *Gov. Code § 854.8*, the term "mental institution" is defined as any state hospital for the care and treatment of the mentally disordered or the mentally retarded, the California Rehabilitation Center referred to in *Welf. & Inst. Code § 3300*, or any county hospital, ward, or facility provided by a county pursuant to *Welf. & Inst. Code § 7100* [*Gov. Code §§ 854.2, 854.3*].

Except for an injury to an inpatient of a mental institution, nothing in *Gov. Code § 854.8* prevents recovery from the public entity for an injury resulting from the dangerous condition of public property under *Gov. Code §§ 830-840.6* [*Gov. Code § 854.8(c)*]. Nor does anything in *Gov. Code § 854.8* exonerate a public employee from liability for injury proximately caused by his or her negligent or wrongful act or omission. The public entity may, but is not required to, pay any judgment, compromise, or settlement or may, but is not required to, indemnify any public employee, in any case in which the public entity is immune from liability under these provisions. However, the public entity must pay as provided in *Gov. Code §§ 825-825.6* any judgment based on a claim against a public employee who is lawfully engaged in the practice of one of the healing arts under any California law for malpractice arising from an act or omission in the scope of his or her employment and must pay any compromise or settlement of a claim or action based on that

malpractice, to which the public entity has agreed [*Gov. Code § 854.8(d)*].

The fact that a person is confined outside the area used to confine mental patients does not preclude the application of the immunity [*see Guzman v. County of Los Angeles (1991) 234 Cal. App. 3d 1343, 1346-1350* (individual involuntarily confined for mental evaluation under *Welf. & Inst. Code § 5150*, who was kept in regular medical ward of county hospital because there were no beds in psychiatric ward of that facility, was mental hospital patient for immunity purposes)]. The immunity provided to public entities under *Gov. Code § 854.8* is jurisdictional in nature and may be raised at any time in the proceedings [*Hata v. Los Angeles County Harbor (1995) 31 Cal. App. 4th 1791, 1803, 37 Cal. Rptr. 2d 630* (although not required to plead immunity as affirmative defense, county hospital specifically pleaded immunity by mentioning statutory section in answer and pleading facts indicating applicability)].

Notwithstanding the general immunity of Gov. Code § 854.8, Health & Safety Code § 1444.6 may create an area of potential tort liability for public entities with regard to injury to ambulance personnel by mental health patients [*Health & Safety Code § 1444.6*]. If a county hospital requests an ambulance to transfer a mental health patient to another facility and if that patient is unstable and has a history of being assaultive, the hospital has a duty to inform the ambulance personnel of the instability and potential assaultiveness of the patient [*Health & Safety Code § 1444.6*]. However, the courts must decide whether failure to warn under Health & Safety Code § 1114.6 is grounds for imposing tort liability on the county.

[b] Interference With Right of Facility Inmate to Judicial Determination

Neither a public entity nor a public employee acting within the scope of his or her employment is liable for interfering with the right of an inmate of a medical facility operated or maintained by a public entity to obtain a judicial determination or review of the legality of his or her confinement. However, a public employee and the public entity for which the employee is acting within the scope of his or her employment is liable for injury proximately caused by the employee's intentional and unjustifiable interference with such right, but no cause of action for that injury may be deemed to accrue until it has first been determined that the confinement was illegal [*Gov. Code § 855.2*].

[c] Determining Confinement of Persons Afflicted With Mental Illness or Addiction

Neither a public entity nor a public employee acting within the scope of his or her employment is liable for any injury resulting from determining in accordance with any applicable enactment any of the following [*Gov. Code § 856(a)*]:

- Whether to confine a person for mental illness or addiction;
- The terms and conditions of confinement for mental illness or addiction; or
- Whether to parole, grant a leave of absence to, or release a person confined for mental illness or addiction.

A public employee is not liable for making any of these determinations with due care [*Gov. Code § 856(b)*].

Nothing in *Gov. Code § 856* exonerates a public employee from liability for injury proximately caused by his or her negligent or wrongful act or omission in carrying out or failing to carry out any of the following [*Gov. Code § 856(c)*]:

- A determination to confine or not to confine a person for mental illness or addiction;
- The terms or conditions of confinement of a person for mental illness or addiction; or
- A determination to parole, grant a leave of absence to, or release a person confined for mental illness

or addiction.

The term "confined" as used in *Gov. Code § 856* includes the verbs admit, commit, place, detain, or hold in custody [*Gov. Code § 854.5*].

Under *Gov. Code § 856*, a public entity is immune from liability for injuries caused by a person released from a mental hospital [*Hernandez v. State of California (1970) 11 Cal. App. 3d 895, 899-901, 90 Cal. Rptr. 205* ; *Kravitz v. California (1970) 8 Cal. App. 3d 301, 306-307, 87 Cal. Rptr. 352]* . A publicly employed therapist is not liable for failure to have a patient confined who threatened the life of a person and later killed her [*Tarasoff v. Regents of University of Cal. (1976) 17 Cal. 3d 425, 447-449, 131 Cal. Rptr. 14, 551 P.2d 334* .

The immunity granted by *Gov. Code § 856* has been extended to a county and county hospital employees charged with the wrongful death of the plaintiff's decedent, who was shot and killed by a mentally disordered person two days after attending personnel at the hospital had diagnosed the person as mentally disordered (dangerous to others) and sent the person, for psychiatric treatment, to a private hospital by taxicab (from which the person alighted en route and fled) because the private hospital refused to dispatch an ambulance. The court held there was immunity under *Gov. Code § 856(a)* respecting the decision not to confine the person in question at the county hospital, and no lifting of the immunity under *Gov. Code § 856(c)* because, as a matter of law, sending the person away in a taxicab (without a custodian or any restraint) was not negligence in the carrying out of the decision against confinement [*McDowell v. County of Alameda (1979) 88 Cal. App. 3d 321, 325-328, 151 Cal. Rptr.779]* .

[d] Immunity for Escape of Committed Person

Neither a public entity nor a public employee is liable for an injury caused by an escaping or escaped person who has been confined for mental illness or addiction or an injury to, or the wrongful death of, an escaping or escaped person who has been confined for mental illness or addiction [*Gov. Code § 856.2(a)*]. A public employee can nevertheless be liable if he or she acted or failed to act because of actual fraud, corruption, or actual malice or for injuries inflicted, as a result of his or her own negligence or wrongful act or omission, on an escaping or escaped mental patient in the process of recapturing the patient [*Gov. Code § 856.2(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstHealthcare LawActions Against FacilitiesGovernmental & Nonprofit LiabilityState, County & Municipal LiabilityTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsEmployees

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3. Specific Liabilities and Immunities

40-464 California Forms of Pleading and Practice--Annotated § 464.106

§ 464.106 Control Over Hazardous Substances

[1] Liability for Use of Pesticides

A public entity is liable for injuries caused by its use of a pesticide to the same extent as a private person, except that no presumption of negligence arises from the failure of the public entity or a public employee to comply with a provision of a statute or regulation relating to the use of a pesticide, if the statute or regulation by its terms is made inapplicable to the public entity or the public employee [*Gov. Code § 862(b)*]. In addition, states must adhere to statutory notification requirements. For example, as part of a Mediterranean fruit fly eradication program, the state is obligated by *Food & Agric. Code §§ 5029, 5771 et seq.* to comply with strict notification requirements expressly designed for such programs [*Adkins v. State of California (1996) 50 Cal. App. 4th 1802, 1811, 59 Cal. Rptr. 2d 59]* .

The term "pesticide" as used in *Gov. Code § 862(b)* means: an economic poison as defined in *Food & Agric. Code § 12753*; an injurious material, the use of which is regulated or prohibited under *Food & Agric. Code § 14001 et seq.*; or any material used for the same purpose as these materials [*Gov. Code § 862(a)*].

Food & Agric. Code § 11761 et seq., relating to reports of loss or damages from the use of pesticides, apply in an action against a public entity under *Gov. Code § 862* [*Gov. Code § 862(c)*].

[2] Immunity for Abatement of Hazardous Substances

A public entity, a county public health director, a public safety employee, a member of a radiation emergency screening team formed pursuant to *Health & Safety Code § 25575(c)(7)*, a person authorized by a public entity, or a registered sanitarian employee is not liable for any injury or property damage caused by an act or omission taken by a county public health director, a public safety employee, a member of a radiation emergency screening team formed pursuant to *Health & Safety Code § 25574*, a person authorized by a public entity, or a registered sanitarian employee acting within the scope of employment to abate or attempt to abate hazards reasonably believed to be an imminent peril to public health and safety caused by the discharge, spill, or presence of a hazardous substance [*Health & Safety Code § 25400(b)*]. This immunity does not extend to acts taken or omissions performed in bad faith or in a grossly negligent

manner. This immunity also does not apply to the specific liability of public entities with regard to motor vehicles set forth in *Veh. Code § 17000 et seq.* [*Health & Safety Code § 25400(b)*; for discussion of public entity liability for motor vehicle accidents, *see § 464.61[2][e]*].

For the purposes of this immunity, it is presumed that the act or omission was performed in good faith and without gross negligence. This presumption is one affecting the burden of proof [*Health & Safety Code § 25400(c)*].

For purposes of *Health & Safety Code § 25400*, "hazardous substance" means a substance that presents a threat to the public because of its toxicity, radioactivity, flammability, or other characteristic dangerous to the public health or to the environment [*Health & Safety Code § 25400(d)(1)*]. "Imminent peril" includes peril that, if not mitigated, threatens the public health or welfare or the environment [*Health & Safety Code § 25400(d)(2)*]. "Person authorized by a public agency" includes a person from whom services are contracted by a public agency [*Health & Safety Code § 25400(d)(3)*]. "Public agency" includes, but is not limited to, the federal government or any department or agency of the federal government to the extent permitted by law [*Health & Safety Code § 25400(d)(4)*]. "Public safety employee" means any person who is a public entity employee and whose principal duties include law enforcement, fire protection, fire prevention, or the enforcement of regulations relating to facilities or sites where hazardous substances are stored or handled [*Health & Safety Code § 25400(d)(5)*]. "Registered sanitarian employee" means a person who is registered pursuant to *Health & Safety Code § 520* and who is a paid employee of a state or local public entity [*Health & Safety Code § 25400(d)(6)*].

This immunity is not intended to impair any cause of action against the person, firm, or entity creating the spill, discharge, or presence of the hazardous material giving rise to the response by the immunized public entity or person [*Health & Safety Code § 25400(e)*].

The immunity for county public health directors or registered sanitarian employees applies only if the person, at the request of a public entity or public safety employee in charge of scene management, provides emergency assistance or advice at the scene of the peril in mitigating or attempting to mitigate the effects of an actual or threatened discharge, spill, or presence of a hazardous substance on private or public property. The request issued by the scene manager must be confirmed by that person in a written report of the incident [*Health & Safety Code § 25400(f)*].

[3] Immunity for Failure to Restrict Travel of Flammable Tank Vehicles Through Tunnels

Neither a public entity nor a public employee acting within the scope of his or her employment is liable for failing to prohibit cargo tank vehicles required to display flammable liquid placards from traveling through a tunnel or for failing to restrict the time during which they may do so [*Gov. Code § 821.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsClaims By & AgainstTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral OverviewTransportation LawCarrier Duties & LiabilitiesHazardous Materials

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§ 464.107 Immunity for Administration of Tax Laws

Neither a public entity nor a public employee is liable for an injury caused by instituting any judicial or administrative proceeding or action for, or incidental to, the assessment or collection of a tax or an act or omission in the interpretation or application of any law relating to a tax [*Gov. Code § 860.2*; *see Mitchell v. Franchise Tax Bd. (1986) 183 Cal. App. 3d 1133, 1136-1137, 228 Cal. Rptr. 750]* . The term "tax" as used in *Gov. Code 860.2* is defined to include a tax, assessment, fee, or charge [*Gov. Code § 860*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From Liability

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[Reserved]

§§ 464.108[Reserved]

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§ 464.120 Related LexisNexis/Matthew Bender Publications

For points and authorities relating to actions against public entities, see California Points and Authorities, Ch. 196, *Public Entities*

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§ 464.121 State Statutes

[1] Claims Against Public Entities

[a] Claim Presentation

Contents of claim. *Gov. Code § 910*

Signature on claim. *Gov. Code § 910.2*

Forms provided by state. *Gov. Code § 910.4*

Amendment of claim. *Gov. Code § 910.6*

Time for presentation of claim. *Gov. Code § 911.2*

Presentation of claim. *Gov. Code § 915*

Mailing of claim. *Gov. Code § 915.2*

[b] Claim Requirement

Claims for money or damages against local public entities. *Gov. Code § 905*

Claim as unnecessary in inverse condemnation action. *Gov. Code § 905.1*

Claims for money or damages against state. *Gov. Code § 905.2*

Claims procedures are inapplicable to claims against Regents of University of *California. Gov. Code § 905.6*

Claim requirement does not impose liability. *Gov. Code § 905.8*

[c] Definitions

"Board" defined. *Gov. Code § 900.2*

"Local public entity" defined. *Gov. Code § 900.4*

"State" defined. *Gov. Code § 900.6*

Date of accrual of cause of action. *Gov. Code § 901*

[d] Late Claims Procedure

Application to present late claim. *Gov. Code § 911.4*

Grant or denial of application to file late claim. *Gov. Code § 911.6*

Notice of action on application to file late claim. *Gov. Code § 911.8*

Effect of grant of application to file late claim. *Gov. Code § 912.2*

[e] Other Claims Procedures

Proceedings to determine constitutionality of claims against state. *Gov. Code § 920 et seq.*

Claims procedures established by agreement. *Gov. Code § 930 et seq.*

Claims procedures established by public entities. *Gov. Code § 935 et seq.*

[f] Payment and Compromise of Claim

Amount allowed on claim. *Gov. Code § 906(a)*

Interest on claim. *Gov. Code § 906(b), (c), (e)*

Conditional allowance of claim or offer to settle or compromise claim. *Gov. Code § 906(d)*

[g] Public Entity's Response to Claim

Notice of insufficiency of claim. *Gov. Code § 910.8*

Effect of failure to give notice of insufficiency. *Gov. Code § 911*

Notice of lateness of claim. *Gov. Code § 911.3*

Time for action on claim. *Gov. Code § 912.4*

Action on claim by local public entity. *Gov. Code § 912.6*

Action on claim by state. *Gov. Code § 912.8*

Notice of rejection of claim. *Gov. Code § 913*

Reexamination of rejected claim. *Gov. Code § 913.2*

Manner of giving notice of insufficiency of claim, rejection of claim, or action on application to file late claim. *Gov. Code § 915.4*

[h] Relief From Claim Requirement

Judicial relief from claims requirement. *Gov. Code § 946.6*

[2] Actions Against Public Entities and Employees

[a] Action Against Public Entity

Public entity may be sued. *Gov. Code § 945*

[b] Claim Requirement

Claim procedures do not impose liability on public entity unless liability otherwise exists. *Gov. Code § 944*

Claim is prerequisite to action against public entity. *Gov. Code § 945.4*

Action not permitted if claim has been allowed. *Gov. Code § 946*

Failure to file claim does not bar action if statement of public agency is not on file. *Gov. Code § 946.4*

Claim against individual public employee is not prerequisite to maintaining action against him or her. *Gov. Code § 950*

[c] Collateral Source Payments

Definitions. *Gov. Code § 985(a)*

Inadmissibility of payments. *Gov. Code § 985(b)*

Discovery. *Gov. Code § 985(b)-(d)*

Collateral source provider's participation in pretrial conference. *Gov. Code § 985(c)*

[d] Definitions and Rules of Practice

Definitions. *Gov. Code § 940.2 et seq.*

Rules of civil practice are applicable. *Gov. Code § 945.2*

[e] Enforcement

Writ of mandate or other proceeding is available to compel payment of claim. *Gov. Code § 942*

[f] Insurance

Authority of local public entities to insure themselves against liability and expenses. *Gov. Code § 989 et seq.*

[g] Joinder of State

Joinder of state in action for declaratory relief involving real property in which state has remainder or undivided interest. *Gov. Code § 956*

[h] Payment and Compromise

Writ of mandate or other proceeding is available to compel payment of claim. *Gov. Code § 942*

Compromise of action by head of state agency. *Gov. Code § 948*

Compromise of action by local public agency. *Gov. Code § 949*

Payment of claims and judgments against state. *Gov. Code § 965 et seq.*

Payment of judgments against local public entities. *Gov. Code § 970 et seq.*

[i] Public Employees

Action against public employee barred if action against public entity barred. *Gov. Code § 950.2*

Action against public employee not barred if plaintiff ignorant of status as public employee. *Gov. Code § 950.4*

Statute of limitations for actions against public employee. *Gov. Code § 950.6*

Invalidity of local ordinance that requires presentation of claim against public employee. *Gov. Code § 950.8*

Defense of public employees. *Gov. Code § 995 et seq.*

[j] Service of Process

Service on public entities. *Code Civ. Proc. § 416.50*

Service on Attorney General. *Gov. Code § 955.4*

Service in actions against Department of Transportation for inverse condemnation. *Gov. Code § 955.6*

Service in actions against Department of Water Resources in actions for inverse condemnation. *Gov. Code § 955.8*

Service on local public entity if no statement is on file. *Gov. Code § 960 et seq.*

[k] Statute of Limitations

Statute of limitations when claims requirements applicable. *Gov. Code § 945.6*

Statute of limitations when claim is not required. *Gov. Code § 945.8*

Statute of limitations when relief from claim requirement was granted. *Gov. Code § 946.6*

Statute of limitations for actions against public employee. *Gov. Code § 950.6*

[l] Venue

Venue in actions against local public entities. *Code Civ. Proc. § 394*

Venue in actions against state for taking or damaging property or public use. *Gov. Code § 955*

Venue in actions against state for death or personal injury. *Gov. Code § 955.2*

[3] General Principles of Liability and Immunity

[a] Application of Tort Claims Act

Tort Claims Act does not affect liability based on contract or right to obtain relief other than money. *Gov. Code § 814*

Tort Claims Act does not affect Worker's Compensation Law. *Gov. Code § 814.2*

[b] Defense and Indemnification of Public Employees

Public entity entitled to indemnification from elected official for payment of judgment or defense costs arising from intentional tort not directly related to elected official's performance of official duties. *Gov. Code § 815.3(d)*

Indemnification of public employees. *Gov. Code § 825 et seq.*

Indemnification of punitive damages judgments against public employees. *Gov. Code § 825(b)*

Defense of public employees. *Gov. Code § 995 et seq.*

[c] Definitions

Definition of "employee." *Gov. Code § 810.2*

Definition of "employment." *Gov. Code § 810.4*

Definition of "enactment." *Gov. Code § 810.6*

Definition of "injury." *Gov. Code § 810.8*

Definition of "law." *Gov. Code § 811*

Definition of "public entity." *Gov. Code § 811.2*

Definition of "public employee." *Gov. Code § 811.4*

Definition of "regulation." *Gov. Code § 811.6*

Definition of "statute." *Gov. Code § 811.8*

[d] Immunities of Public Employees

Immunity for discretionary acts. *Gov. Code § 820.2*

Decision of law enforcement officer to render assistance to motorist, not involved in accident, or to leave scene after rendering assistance on instructions of supervisor or learning of reasonably apparent emergency elsewhere is exercise of discretion unless occurring pursuant to performance of ministerial duty. *Gov. Code § 820.25*

Immunity for execution or enforcement of law. *Gov. Code § 820.4*

Immunity for acting in good faith under unconstitutional, invalid, or inapplicable enactment. *Gov. Code § 820.6*

Immunity for acts of others. *Gov. Code § 820.8*

Immunity for adoption or failure to adopt enactment or failure to enforce enactment. *Gov. Code § 821*

Immunity for licensing. *Gov. Code § 821.2*

Immunity for inspections. *Gov. Code § 821.4*

Immunity for malicious prosecution. *Gov. Code § 821.6*

Immunity for authorized entry on property. *Gov. Code § 821.8*

Immunity for money stolen from official custody. *Gov. Code § 822*

Immunity for misrepresentations. *Gov. Code § 822.2*

[e] Immunities of Public Entities

Field trip immunity. *Educ. Code § 35330*

Immunity for injuries to students not on school property. *Educ. Code §§ 44808, 87706*

Public entity not liable for injury resulting from act or omission for which public employee is immune, unless otherwise provided by statute. *Gov. Code § 815.2(b)*

Immunity from liability for injury arising out of any activity conducted by member of California National Guard pursuant to *32 U.S.C.S. §§ 316, 502, 503, 504,* or *505* and compensated pursuant to Federal Tort Claims Act. *Gov. Code § 816*

Immunity from liability for punitive damages. *Gov. Code § 818*

Immunity from liability for adoption or failure to adopt enactment or failure to enforce law. *Gov. Code § 818.2*

Licensing immunity. *Gov. Code § 818.4*

Immunity for failure to inspect or negligent inspection of property other than public entity's property. *Gov. Code § 818.6*

Controlled substance conviction records immunity. *Gov. Code § 818.7*

Misrepresentation immunity. *Gov. Code § 818.8*

Earthquake and volcano warning immunity. *Gov. Code § 955.1*

[f] Liability of Public Employees

Bases of liability of public employees. *Gov. Code § 820*

[g] Liability of Public Entities

Construction contract provisions to relieve public agency from liability for its active negligence are void and unenforceable. *Civ. Code § 2782*

Agreement to indemnify engineer or geologist from liability in providing hazardous materials identification is inapplicable to public entities. *Civ. Code § 2782.6*

Public entity liable only as provided by statute. *Gov. Code § 815*

Liability of public entity for injuries caused by employees acting within scope of employment. *Gov. Code § 815.2(a)*

Liability of public entity for injuries caused by intentional torts of elected officials. *Gov. Code § 815.3*

Liability of public entity for injuries caused by independent contractors. *Gov. Code § 815.4*

Liability of public entity for failure to discharge mandatory duty. *Gov. Code § 815.6*

Department of Motor Vehicles (DMV) is liable, in amount not to exceed actual cash value of vehicle, for any injury to lienholder or good faith purchaser of vehicle proximately caused by DMV's negligent omission of lienholder's name from ownership certificate issued by department. *Gov. Code § 818.5*

Liability of public entity for motor vehicle accidents. *Veh. Code §§ 17000, 17001, 17002, 17004.7*

[4] Liability for Dangerous Conditions of Public Property

[a] Definitions

Definition of "dangerous condition." *Gov. Code § 830(a)*

Definition of "protect against." *Gov. Code § 830(b)*

Definitions of "property of public entity" and "public property." *Gov. Code § 830(c)*

Seismic safety improvements and fire sprinkler improvements are not public property due to financing by means of formation of special assessment district. *Gov. Code § 830.1*

[b] Immunities

No liability for minor, trivial, or insignificant risk. *Gov. Code § 830.2*

Immunity for failure to provide traffic control signals. *Gov. Code §§ 830.4, 830.8*

Design immunity. *Gov. Code § 830.6*

Immunity for condition of streets caused by weather. *Gov. Code § 831*

Immunity for natural conditions of public property. *Gov. Code § 831.2*

Public beaches are in natural condition, regardless of provision of public safety services. *Gov. Code § 831.21*

Immunity for injury to property, or for emotional distress without substantial physical injury, off public property caused by land failure of unimproved public property. *Gov. Code § 831.25*

Immunity for work on or failure to maintain nondedicated roads. *Gov. Code § 831.3*; *Sts. & Hy. Code §§ 941, 1806*

Immunity for condition of unpaved access roads to recreational areas. *Gov. Code § 831.4(a)*

Immunity for injuries caused by conditions of trails used for purposes specified in *Gov. Code § 831.4(a). Gov. Code § 831.4(b)*

Immunity for injuries on paved trails and paths located on property to which public entity has been given an easement, if specified warning is given. *Gov. Code § 831.4(c)*

Immunity for condition of specified state lands. *Gov. Code § 831.6*

Immunity for hazardous recreational activity. *Gov. Code § 831.7*

Immunity for reservoirs and canals. *Gov. Code § 831.8*

Public entity defense of reasonableness. *Gov. Code § 835.4*

Public employee defense of reasonableness. *Gov. Code § 840.6*

Public entity not liable for injury or death of person committing specified crimes on its property. *Civ. Code § 847(a)*

School district immunity for asbestos-related injuries. *Gov. Code § 905.5*

[c] Liabilities

Liability of public entities for dangerous conditions. *Gov. Code § 835*

Liability of public employees for dangerous conditions. *Gov. Code § 840.2*

[d] Notice

Actual and constructive notice of public entities. *Gov. Code § 835.2*

Actual and constructive notice of public employees. *Gov. Code § 840.4*

[5] Specific Liabilities and Immunities

[a] Emergency Services

Immunity for failing to prohibit or restrict time that cargo tank vehicles requiring flammable liquid placards travel through tunnel. *Gov. Code § 821.5*

Immunity and liability for rescue of vessels involved in collision, accident, or other casualty. *Harb. & Nav. Code § 656(c)*

Qualified immunity for emergency medical services. *Health & Safety Code § 1799.106*

Immunity for emergency rescue personnel performing emergency services. *Health & Safety Code § 1799.107*

Immunity for operation of emergency vehicles. *Veh. Code § 17004*

[b] Firefighting Activities

Immunity for failure to provide fire protection service. *Gov. Code § 850*

Immunity for failure to provide or maintain sufficient fire protection facilities. *Gov. Code § 850.2*

Immunity for condition of firefighting equipment or for injury caused in fighting fires. *Gov. Code § 850.4*

Liability for firefighting service outside regular area. *Gov. Code § 850.6*

Immunity and liability for transportation of person injured in fire. *Gov. Code § 850.8*

[c] Hazardous Substances

Qualified immunity for abatement of hazardous substances by specified public entities and public safety employee. *Health & Safety Code § 25400*

[d] Medical and Mental Health Activities

[i] Definitions

"Medical facility" defined. *Gov. Code § 854*

"Mental institution" defined. *Gov. Code § 854.2*

"Mental illness or addiction" defined. *Gov. Code § 854.4*

"Confined" defined. *Gov. Code § 854.5*

[ii] Emergency Medical Care Programs

Immunity for any civil damages alleged to result from training of laypersons in emergency medical services. *Health & Safety Code § 1799.100*

Immunity of physician, nurse, emergency medical technician, or mobile intensive care paramedic in delivering emergency care. *Health & Safety Code § 1799.104*

[iii] Mental Patients

Immunities and liabilities for injuries caused by or to mental patients. *Gov. Code § 854.8*

Immunities and liabilities for interference with right of mental patients to judicial determination of legality of confinement. *Gov. Code § 855.2*

Immunities and liabilities for diagnosing or failing to diagnose mental illness or addiction. *Gov. Code § 855.8(a)*

Immunity for administering prescribed treatment for mental illness with due care. *Gov. Code § 855.8(b)*

Immunities and liabilities for determining whether to confine or release mental patient. *Gov. Code § 856*

Immunity for injuries caused by or to escaping mental patients. *Gov. Code § 856.2*

Duty of county hospital to warn ambulance personnel of mental patient's instability and potential to assault others. *Health & Safety Code § 1444.6*

Mental hospitals and treating health professionals as immune from civil liability for filing authorized reports relating to mental patients and firearms. *Welf. & Inst. Code § 8108*

[iv] Public Health

Immunity for decision to act or not to act to promote the public health of the community. *Gov. Code § 855.4*

Immunity for failure to make physical examination or making inadequate physical examination for purpose of determining whether person has disease or condition. *Gov. Code § 855.6*

Immunity for failure to admit person to public medical facility. *Gov. Code § 856.4*

Immunity for flu program. *Gov. Code § 856.6*

[v] Public Medical Facilities

Liability of public medical facility for failure to provide required equipment, personnel, or supplies. *Gov. Code § 855*

Immunity for removal of corneal tissue by or at direction of coroner or medical examiner. *Gov. Code § 27491.47*

[e] Pesticides

Liability for use of pesticides. *Gov. Code § 862*

[f] Police and Correctional Activities

[i] Definitions

Definition of "prisoner." *Gov. Code § 844*

[ii] Immunities and Liabilities

Immunities and liabilities for injuries to prisoners. *Gov. Code § 844.6*

Immunity for failure to provide police protection. *Gov. Code § 845*

Immunity for failure to provide prison or jail facilities. *Gov. Code § 845.2*

Immunity and liability for interference with right of prisoner to judicial determination of legality of confinement. *Gov. Code § 845.4*

Immunity and liability for failure to furnish prisoner with medical care. *Gov. Code § 845.6*

Immunity for determination to release or parole prisoner. *Gov. Code § 845.8(a)*

Immunity for injury caused by escaping prisoner or person resisting arrest. *Gov. Code § 845.8(b)*

Immunity for failure to make arrest or failure to retain arrested person in custody. *Gov. Code § 846*

Immunity of law enforcement officer for making arrest. *Penal Code § 847*

[g] Tax Laws

Immunity for administration of tax laws. *Gov. Code §§ 860-860.4*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstTortsDamagesPunitive DamagesAvailabilityGovernmental EntitiesTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityImmunityQualified ImmunityTortsPublic Entity LiabilityLiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationTime LimitationsTortsPublic Entity LiabilityLiabilityFederal Tort Claims ActGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From Liability

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PART III. RESEARCH GUIDE

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§ 464.122 Administrative Regulations

Claims against state. *2 Cal. Code Reg. § 601 et seq.*

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§ 464.123 Decisions

[1] Claims Against Public Entities

[a] Accrual of Cause of Action

[i] Equitable Indemnity

Limitation period on actions for equitable indemnity against public entity begins on date on which defendant is served, and as not subject to late discovery rule. *Greyhound Lines, Inc. v. County of Santa Clara (1986) 187 Cal. App. 3d 480, 484-488, 231 Cal. Rptr. 702*

[ii] Tort Claims

Nonsuit for public entity on basis that claim was not timely filed was improper because evidence showed that mother of child did not and should not have discovered negligence of public entity in treatment of child until shortly before claim was filed. *Whitfield v. Roth (1974) 10 Cal. 3d 874, 883-889, 112 Cal. Rptr. 540, 519 P.2d 588*

To raise issue of belated discovery properly, plaintiff is required to state in complaint when discovery was made, circumstances surrounding discovery, and facts that show that failure to make earlier discovery was reasonable, justifiable, and not result of plaintiff's failure to investigate or to act. *Rodriguez v. County of Los Angeles (1985) 171 Cal. App. 3d 171, 178, 217 Cal. Rptr. 69*

Insurance company's cause of action based on subrogation in its insured's rights accrued only when insurance company paid insured and thus commenced period for filing claim at that time, not at time of original accident. *Allstate Ins. Co. v. County of Alameda (1973) 33 Cal. App. 3d 418, 420-423, 109 Cal. Rptr. 53*

[b] Application of Claims Requirement

State claim requirements inapplicable to federal civil rights action against police officers. *Williams v. Horvath (1976) 16 Cal. 3d 834, 837-842, 129 Cal. Rptr. 453, 548 P.2d 1125*

Claim for recovery of specific property converted by public entity, including specific sum of money, is not subject to claims statutes. *Minsky v. City of Los Angeles (1974) 11 Cal. 3d 113, 121-123, 113 Cal. Rptr. 102, 520 P.2d 726* ; *Hibbard v. City of Anaheim (1984) 162 Cal. App. 3d 270, 276-277, 208 Cal. Rptr. 733*

Public employee who files writ seeking reimbursement from public entity for costs incurred in providing his or her own defense to action filed against employee for conduct taken in scope of employment must first file claim for that reimbursement with public entity under *Government Claims Act. Sparks v. Kern County Bd. of Supervisors (2009) 173 Cal. App. 4th 794, 798-799, 93 Cal. Rptr. 3d 173*

Class action seeking return of money paid to city as compensation demanded for emergency response services provided by city was claim for "money or damages" requiring compliance with claims presentation requirement. *City of Los Angeles v. Superior Court (2008) 168 Cal. App. 4th 422, 430, 85 Cal. Rptr. 3d 560*

Claim for actual damages and civil penalties under Public Safety Officers Procedural *Bill of Rights* Act, *Gov. Code § 3300 et seq.*, was subject to claim presentation requirement of Government Claims Act; claims were more than incidental to extraordinary relief sought under statute. *Lozada v. City and County of San Francisco (2006) 145 Cal. App. 4th 1139, 1146-1147, 52 Cal. Rptr. 3d 209*

Recovery of money damages from public entity, even if "incidental" to request for equitable relief, is not permitted absent compliance with claims presentation requirement. *TrafficSchoolOnline, Inc. v. Clarke (2003) 112 Cal. App. 4th 736, 741-742, 5 Cal. Rptr. 3d 408*

Letter from attorney to public entity is sufficient notice of claim to trigger duty on part of public entity to notify plaintiff of claim deficiencies, if public entity can discern from letter that claim is being made that will result in litigation if not otherwise satisfied; letter from attorney that merely notifies public entity that attorney has been hired is not notice of claim. *Green v. State Center Cmty. Coll. Dist. (1995) 34 Cal. App. 4th 1348, 1357-1359, 41 Cal. Rptr. 2d 140*

Injured employee's compliance with claim requirement against port district alleged to be third-party tortfeasor satisfied employer's compensation carrier's claim filing requirement for purposes of intervening in employee's action. *San Diego Unified Port Dist. v. Superior Court (1988) 197 Cal. App. 3d 843, 846-848, 243 Cal. Rptr. 163*

Claim requirement against state applies to actions for damages for breach of contract; claim requirement not excused merely because claim is brought as class action. *White v. State of California (1987) 195 Cal. App. 3d 452, 477, 240 Cal. Rptr. 732*

Action for breach of contract requesting monetary damages for lost salary and retirement benefits does not fall within requirements for exemptions to claims presentation. *Dilts v. Cantua Elementary Sch. Dist. (1987) 189 Cal. App. 3d 27, 32, 234 Cal. Rptr. 612*

Claim requirement against public entity not applicable if writ of mandate compelling county to act is sought. *Madera Cmty. Hosp. v. County of Madera (1984) 155 Cal. App. 3d 136, 148, 201 Cal. Rptr. 768*

[c] Class Claims

If class claim was made on behalf of claimants, those residing with claimants, and those affected by airport noise, that

claim was sufficient to protect interests of claimants' children even after class action was decertified. *Dhuyvetter v. City of Fresno (1980) 110 Cal. App. 3d 659, 662-665, 168 Cal. Rptr. 61*

Class claim as required to contain sufficient information to enable public entity to reasonably determine circumstances giving rise to alleged liability. *Eaton v. Ventura Port Dist. (1975) 45 Cal. App. 3d 862, 868, 119 Cal. Rptr. 746*

Class claim not allowed if members of class unascertainable. *Bozaich v. State of California (1973) 32 Cal. App. 3d 688, 694-699, 108 Cal. Rptr. 392*

[d] Judicial Relief From Claim Requirement

[i] Burden of Proof

Public entity not required to prove that it would be prejudiced by late filing until petitioner has satisfied court that failure was due to mistake, inadvertence, surprise, or excusable neglect and that claim was filed within reasonable time not to exceed one year after accrual of cause of action. *Shank v. County of Los Angeles (1983) 139 Cal. App. 3d 152, 158-159, 188 Cal. Rptr. 644* ; *Hasty v. County of Los Angeles (1976) 61 Cal. App. 3d 623, 627, 131 Cal. Rptr. 347*

Hearing on petition for relief from claim requirement is triable by court and not by jury. *County of Sacramento v. Superior Court (1974) 42 Cal. App. 3d 135, 138-141, 116 Cal. Rptr. 602*

Burden of showing mistake, inadvertence, surprise, or excusable neglect is on petitioner, who must meet this burden by preponderance of evidence. *Shaddox v. Melcher (1969) 270 Cal. App. 2d 598, 600-601, 76 Cal. Rptr. 80*

[ii] Denial of Relief

In medical malpractice action against county, plaintiff's abandonment of appeal of denial of petition for relief from claims requirement as waiver of her right to challenge ruling; order denying relief as collaterally estopping assertion in complaint that claim had been timely filed, thereby rendering complaint fatally defective. *County of Los Angeles v. Superior Court (1985) 169 Cal. App. 3d 1095, 1101, 215 Cal. Rptr. 699*

Determination of claimant's right to sue public entity by court's denial of relief from claim requirement did not collaterally estop claimant from maintaining tort action because issue of whether defendants were public agencies or employees of public agency was not litigated in claim relief procedures. *Harman v. Mono Gen. Hosp. (1982) 131 Cal. App. 3d 607, 614-617, 182 Cal. Rptr. 570*

Deliberate decision not to timely file claim, in effort to influence pending criminal charges, was not basis for relief from claim requirements. *Rivera v. City of Carson (1981) 117 Cal. App. 3d 718, 724-725, 173 Cal. Rptr. 4*

Failure to petition court for relief if application for leave to present late claim is denied as precluding applicant's right to bring cause of action against public entity, unless entity is estopped to rely on failure to petition for relief. *Kendrick v. City of La Mirada (1969) 272 Cal. App. 2d 325, 327-330, 77 Cal. Rptr. 444*

[iii] Excusable Neglect

After failing to file timely claim with city, claimant's neglect not excusable because claimant and counsel had either actual possession or ready access to police report and other information suggesting possible liability of city's Department of Water and Power for automobile accident injuries. *Department of Water & Power v. Superior Court*

(2000) 82 Cal. App. 4th 1288, 1296, 99 Cal. Rptr. 2d 173

Counsel's assumption that claim for spoliation of evidence accrued only when counsel abandoned attempts to locate evidence, an impounded automobile that had been sold to satisfy storage lien, rather than having accrued when automobile was sold, was unreasonable and did not constitute excusable mistake of law. *Hernandez v. Garcetti (1998) 68 Cal. App. 4th 675, 683-684, 80 Cal. Rptr. 2d 443*

Failure to file timely claim is excused if claimant had been involved in ongoing settlement discussions with adjuster for public entity during claim-filing period and adjuster had not advised claimant of claim requirements. *Bertorelli v. City of Tulare (1986) 180 Cal. App. 3d 432, 440-441, 225 Cal. Rptr. 582*

[iv] Minority

If plaintiff is minor, knowledge or lack thereof of minor's parents, not knowledge or lack thereof of minor, determines time of accrual of cause of action; mental incapacity of minor does not excuse requirement of filing claim. *Reyes v. County of Los Angeles (1988) 197 Cal. App. 3d 584, 592-593, 243 Cal. Rptr. 35*

Court did not properly consider dilatory actions of minor's guardian and attorney in determining whether minor was entitled to late claim relief. *Rousseau v. City of San Carlos (1987) 192 Cal. App. 3d 498, 501-503, 236 Cal. Rptr. 299*

[v] Physical or Mental Incapacity

Disability not required to be sole reason for submitting late claim, but required to be substantial reason. *Thompson v. County of Fresno (1963) 59 Cal. 2d 686, 31 Cal. Rptr. 44, 381 P.2d 924* ; *Baber v. Napa State Hosp. (1984) 154 Cal. App. 3d 514, 519, 201 Cal. Rptr. 432*

Psychiatrist's statement that plaintiff was totally incapacitated during filing period was insufficient to justify relief if other evidence was contradictory. *Garcia v. Los Angeles Unified Sch. Dist. (1985) 173 Cal. App. 3d 701, 707-708, 219 Cal. Rptr. 544*

[vi] Time Considerations

Court without jurisdiction to grant relief if underlying application to file late claim is filed more than one year after accrual of cause of action. *Greyhound Lines, Inc. v. County of Santa Clara (1986) 187 Cal. App. 3d 480, 488, 231 Cal. Rptr. 702*

If local rule requires preparation and filing of formal order, 30-day period of limitation begins when formal order is made and filed, not from date of minute order, regardless of whether minute order calls for preparation of formal order. *County of Nevada v. Superior Court (1986) 183 Cal. App. 3d 806, 808-809, 228 Cal. Rptr. 447*

Reasonable time in submitting late claim is defined by specific facts of case, policies of law regarding personal injury claims against state, and discretion of court. *Baber v. Napa State Hosp. (1984) 154 Cal. App. 3d 514, 518, 201 Cal. Rptr. 432*

Thirty-day limitation period for filing suit after granting of petition for relief from claim requirement begins with making of order and not with receipt of notification by clerk. *Fritts v. County of Kern (1982) 135 Cal. App. 3d 303, 306-307, 185 Cal. Rptr. 212*

Thirty-day period is not extended by court order authorizing claimant to file late claim because order is beyond court's power. *Tuolumne Air Serv., Inc. v. Turlock Irrigation Dist. (1978) 87 Cal. App. 3d 248, 251-252, 150 Cal. Rptr. 809*

If complaint is filed before relief from claim requirement is granted and is not amended to reflect that relief until more than 30 days from order granting relief, complaint is not barred by 30-day limitation period, because amendment related back to original complaint. *Bahten v. County of Merced (1976)59 Cal. App. 3d 101, 107-116, 130 Cal. Rptr. 539* ; *Black v. County of Los Angeles (1976) 55 Cal. App. 3d 920, 930-931, 127 Cal. Rptr. 916*

Action is subject to dismissal for untimeliness if complaint was amended to include cause of action against public entity more than 30 days after relief was granted. *Wilson v. People ex rel. Dep't of Pub. Works (1969) 271 Cal. App. 2d 665, 667-669, 76 Cal. Rptr. 906* ; *but see Bell v. Tri-City Hosp. (1987) 196 Cal. App. 3d 438, 443-444, 241 Cal. Rptr. 796*

[e] Late Claims

Failure to serve public entity within reasonable time after entity denies petitioner's request for permission to file late claim results in presumption that entity would be prejudiced by granting of petitioner's request; two-and-one-half-year delay is not reasonable. *Han v. City of Pomona (1995) 37 Cal. App. 4th 552, 560, 43 Cal. Rptr. 2d 616*

Parents of child who filed tort claim based on medical malpractice are required to file claim separate from that of child because injuries suffered by parents are separate and distinct. *Nguyen v. Los Angeles County Harbor/UCLA Med. Ctr. (1992) 8 Cal. App. 4th 729, 732-734, 10 Cal. Rptr. 2d 709*

Leave to file late claim is two-prong test, requiring showing of mistake, inadvertence, surprise, or excusable neglect and that application for leave to file late claim was presented within reasonable time not to exceed one year after accrual of cause of action. *DeYoung v. Del Mar Thoroughbred Club (1984) 159 Cal. App. 3d 858, 864, 206 Cal. Rptr. 28*

[f] Pleading

If plaintiff relies on more than one theory of recovery against public entity, each cause of action is required to have been reflected in timely claim; factual circumstances set forth in claim are required to correspond with facts alleged in complaint. *Fall River Joint Unified Sch. Dist. v. Superior Court (1988) 206 Cal. App. 3d 431, 434-436, 253 Cal. Rptr. 587*

Compliance with claims statute is mandatory; fact that public entity has full knowledge of claim and related circumstances is not sufficient to excuse noncompliance. *McMartin v. County of Los Angeles (1988) 202 Cal. App. 3d 848, 858, 249 Cal. Rptr. 53*

Causes of action based on facts not mentioned in claim is barred. *Connelly v. State of California (1970) 3 Cal. App. 3d 744, 753, 84 Cal. Rptr. 257*

[g] Presentation of Claim

Claim filed with state agency instead of Board of Control is properly filed because state agency had duty to forward claim to *Board of Control. Jamison v. State of California (1973) 31 Cal. App. 3d 513, 518, 107 Cal. Rptr. 496*

Presentation of claim to city is not sufficient to fulfill claim requirement with regard to school board. *Jackson v. Board of Educ. (1967) 250 Cal. App. 2d 856, 859-860, 58 Cal. Rptr. 763*

[h] Public Entity's Rules

Public entity's claims rules are authorized by statute and bar cause of action on which claim not filed. *Ruggiero v. Los Angeles City Unified Sch. Dist. (1973) 33 Cal. App. 3d 970, 975-976, 109 Cal. Rptr. 417*

[i] Substantial Compliance

Notice required by *Code Civ. Proc. § 364(a)* of intention to commence action based on professional negligence by health care provider is treated as valid claim if it discloses existence of claim that, if not paid or otherwise resolved, will result in litigation, and if it definitely discloses existence of claim for monetary damages. *Phillips v. Desert Hosp. Dist. (1989) 49 Cal. 3d 699, 707-710, 263 Cal. Rptr. 119, 780 P.2d 349*

Test to gauge adequacy of claim is whether there is some compliance with all of statutory requirements and whether there is substantial compliance with claim requirement. *City of San Jose v. Superior Court (1974) 12 Cal. 3d 447, 456-457, 115 Cal. Rptr. 797, 525 P.2d 701* ; *McMartin v. County of Los Angeles (1988) 202 Cal. App. 3d 848, 858-859, 249 Cal. Rptr. 53*

Letter sent by plaintiff's attorney to individual city employee involved in auto accident with plaintiff did not substantially comply with claim filing requirements for suing city, because letter failed to provide sufficient information about identity of claimant or nature of accident, failed to indicate what injury was suffered or what damages were sought, and merely requested information rather than threatened formal proceedings. *Del Real v. City of Riverside (2002) 95 Cal. App. 4th 761, 769-771, 115 Cal. Rptr. 2d 705*

Submitting Patient Problem/Complaint Form to hospital quality assurance department together with Supplemental Note dated a few days thereafter, both complaining about the quality of medical care, was not substantial compliance with claims statute, given total failure to comply with at least two statutory requirements: (1) failing to transmit document to statutorily designated agent under *Gov. Code § 915*, and *(2)* failing to indicate that monetary claim being asserted by not complying with *Gov. Code § 910(f)*. *Wood v. Riverside Gen. Hosp. (1994) 25 Cal. App. 4th 1113, 1116-1119, 31 Cal. Rptr. 2d 8*

Variance between claim against state, based on theory that state refused to provide prisoner with medical care, and first amended complaint, alleging cause of action for medical malpractice against state employees, was fatal to recovery against employees because of failure to comply with claim presentation requirements; doctrine of substantial compliance not applicable if claim fails to set forth factual basis for recovery. *Watson v. State of California (1993) 21 Cal. App. 4th 836, 844-845, 26 Cal. Rptr. 2d 262*

Substantial compliance not applicable if factual basis for cause of action is wholly absent from claim. *Crow v. State of California (1990) 222 Cal. App. 3d 192, 202, 271 Cal. Rptr. 349*

Claim that alleged violation by permanently terminating employee, without specifically asserting denial of that employee's reemployment rights, was claim in substantial compliance. *Mouchette v. Board of Educ. (1990) 217 Cal. App. 3d 303, 311-312, 266 Cal. Rptr. 1*

Claim substantially complies with tort claim requirement if it discloses sufficient information on its face to reasonably enable public entity to make adequate investigation of merits of claim and to settle it without lawsuit; facts constituting cause of action pleaded in any subsequent complaint are required to correspond substantially with circumstances described in claim as basis of plaintiff's injury. *Smith v. County of Los Angeles (1989) 214 Cal. App. 3d 266, 277, 262 Cal. Rptr. 754*

Purpose of Tort Claims Act is giving public entity opportunity to investigate and evaluate its potential liability; "substantial compliance" exception to strict claims requirement not applicable if this purpose would be subverted, which would result if plaintiff were permitted to impose obligation on public entity to defend lawsuit based on set of facts entirely different from those first noticed in claim. *Fall River Joint Unified Sch. Dist. v. Superior Court (1988) 206 Cal. App. 3d 431, 435-436, 253 Cal. Rptr. 587*

Series of letters between attorneys for plaintiff and district attorney did not constitute claim; therefore, doctrine of substantial compliance cannot be applied. *Dilts v. Cantua Elementary Sch. Dist. (1987) 189 Cal. App. 3d 27, 34-36, 234 Cal. Rptr. 612*

Doctrine of substantial compliance is controlling if party attempts to comply with statutes, but compliance is defective; doctrine does not cure total omission of essential element from claim or remedy plaintiff's failure to comply meaningfully with statutes. *State of California ex rel. Dep't of Transp. v. Superior Court (1984) 159 Cal. App. 3d 331, 335, 205 Cal. Rptr. 518*

Compliance with claims statute by widow who intervened in action by husband's employer against county (to recover workers' compensation benefits paid to widow) was mandatory, even though employer previously had timely filed its claim; substantial compliance with claims statute is not permitted to be accomplished by intervention if claim of intervenor differs from that of original plaintiff. *Pacific Tel. & Tel. Co. v. County of Riverside (1980) 106 Cal. App. 3d 183, 190-192, 165 Cal. Rptr. 29*

Claim made by husband was sufficient to be claim also on wife's behalf because claim described occurrence and specified wife's claim for damages. *Lacy v. City of Monrovia (1974) 44 Cal. App. 3d 152, 155-157, 118 Cal. Rptr. 277*

[j] Time for Filing Claims

[i] Amendment of Cause of Action

If amended claim relates back to original claim that has already been rejected by public entity as untimely, amended claim is nullity to which public entity need not respond with notice of untimeliness. *Dixon v. City of Turlock (1990) 219 Cal. App. 3d 907, 912-913, 268 Cal. Rptr. 510*

Plaintiff was permitted to file amended complaint in proceeding alleging facts and circumstances preventing her from filing timely amendment to proposed claim, if she had not filed claim but had unsuccessfully applied for leave to present late claim, and proposed claim had not been amended. *Williams v. Braslow (1986) 179 Cal. App. 3d 762, 774, 224 Cal. Rptr. 895*

If cause of action on which claim was filed is amended after claim period to allege different basis of liability, dismissal of public entity is proper because of failure to file timely claim on new basis of liability. *Lopez v. Southern Cal. Permanente Med. Group (1981) 115 Cal. App. 3d 673, 677, 171 Cal. Rptr. 527*

[ii] Contract and Real Property Claims

One-year time provision of *Gov. Code § 911.2* is intended to cover claims arising out of contract and claims for injuries to real property. *Voth v. Wasco Pub. Util. Dist. (1976) 56 Cal. App. 3d 353, 356, 128 Cal. Rptr. 608*

Claim for damages to growing crops based on a promise of fitness of water implied from written lease is one-year claim under *Gov. Code § 911.2*. *Voth v. Wasco Pub. Util. Dist. (1976) 56 Cal. App. 3d 353, 356-360, 128 Cal. Rptr.*

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[iii] Strict Compliance

Prescribed statutes of limitations for commencement of actions against public entities require strict compliance. *State of California ex rel. Dep't of Transp. v. Superior Court (1984) 159 Cal. App. 3d 331, 335, 205 Cal. Rptr. 518*

[2] Actions Against Public Entities and Employees

[a] Actions After Grant of Relief From Claim Requirement

Time spent complying with claims procedure or relief from those procedures was not exempted from five-year requirement of *Code Civ. Proc. § 583.310 et seq.*, even if complaint was filed prematurely. *Davalos v. County of Los Angeles (1983) 142 Cal. App. 3d 57, 62-63, 190 Cal. Rptr. 711* (decided under former *Code Civ. Proc. § 583(b)*)

If original complaint alleged cause of action against public entity but was filed before relief from claim requirement was granted, plaintiffs were not subject to dismissal for failure to file amended complaint within 30 days after relief was granted. *Black v. County of Los Angeles (1976) 55 Cal. App. 3d 920, 930-931, 127 Cal. Rptr. 916*

[b] Actions Against Public Employees

Salaried full-time public defender engaged in representing assigned clients is public employee, and claim against employing public entity is prerequisite to malpractice complaint against public defender. *Briggs v. Lawrence (1991) 230 Cal. App. 3d 605, 612-618, 281 Cal. Rptr. 578*

Denial of relief from filing late claim against public employees is proper even though claimant, a minor, met requirements for relief, because claim was substantively identical to earlier claim that had been timely filed against public entity, but as to which no action had been commenced within statutory period. *Julian v. City of San Diego (1986) 183 Cal. App. 3d 169, 173-175, 229 Cal. Rptr. 664*

Allegedly slanderous statements made by city supervisor serving on fact-finding committee were made within scope of employment as matter of law, and plaintiff's failure to file claim against county was fatal to his action against supervisor. *Mazzola v. Feinstein (1984) 154 Cal. App. 3d 305, 310, 201 Cal. Rptr. 148*

Plaintiff was on notice that defendant might be public employee because complaint was based on defective public property, even though plaintiff was unaware of which public entity had control over property. *Moore v. Morhar (1977) 65 Cal. App. 3d 896, 902, 135 Cal. Rptr. 626*

Plaintiff was not excused from requirement of filing claim against public entity as prerequisite to action against its employee because plaintiff and attorney knew that cause of action accrued at county hospital and failed to inquire regarding status of public employee anesthesiologist. *Leake v. Wu (1976) 64 Cal. App. 3d 668, 673-674, 134 Cal. Rptr. 616*

Public employees were acting within scope of their employment when they wrote letters for plaintiff's personnel file and commented on his performance to prospective employers; claim against public entity was prerequisite to suit. *Neal v. Gatlin (1973) 35 Cal. App. 3d 871, 875-878, 111 Cal. Rptr. 117*

Actions of mayor and police officers based on alleged conspiracy to have plaintiff dismissed as police chief were

within scope of their employment and subject to *Tort Claims Act. Meester v. Davies (1970) 11 Cal. App. 3d 342, 346-347, 89 Cal. Rptr. 711*

[c] Collateral Estoppel

Action against public employees was barred by collateral estoppel because it had been determined in prior action that claim against public entity was not timely filed. *Black v. County of Los Angeles (1976) 55 Cal. App. 3d 920, 928-929, 127 Cal. Rptr. 916*

[d] Estoppel

In case alleging sexual molestation of 11-year-old child by his teacher during school field trip, teacher's directive to child not to tell anyone about incident was sufficient to raise estoppel. *Christopher P. v. Mojave Unified Sch. Dist. (1993) 19 Cal. App. 4th 165, 170-173, 23 Cal. Rptr. 2d 353*

Estoppel of public entity to raise defense based on claims statute was sufficiently pleaded because plaintiff alleged that (1) public entity did business under different name than that appearing on certificate filed with Secretary of State; (2) plaintiffs were informed by Secretary of State that name under which public entity did business was not listed on roster; (3) in reliance on that information, plaintiffs' attorney did not present claim; and (4) entity misled plaintiffs by filing certificate under different name. *Elmore v. Oak Valley Hosp. Dist. (1988) 204 Cal. App. 3d 716, 723-724, 251 Cal. Rptr. 405*

Public entity is not estopped to assert insufficiency of claim if insufficiency lies in failure of claim to set forth factual basis for recovery alleged in complaint, because public entity could not discover defect until after complaint was filed. *Donohue v. State of California (1986) 178 Cal. App. 3d 795, 805, 224 Cal. Rptr. 57*

Estoppel of public entity to assert noncompliance with claims statute was not established because petitioners provided contradictory evidence regarding their states of mind preceding claim filing deadline; trial court did not abuse its discretion in choosing to interpret events as being result of petitioners' conscious decision not to pursue any action against entity and concluding that decision was not induced by conduct or representations of entity's deputies. *Toscano v. County of Los Angeles (1979) 92 Cal. App. 3d 775, 785-786, 155 Cal. Rptr. 146*

Public entity was estopped to assert noncompliance with claims statute because notice denying application to file late claim was ambiguous and made it appear that claim rather than application was denied. *McLaughlin v. Superior Court (1972) 29 Cal. App. 3d 35, 38-40, 105 Cal. Rptr. 384*

[e] Expenses of Public Employment

City had no duty to pay for defense of public employee who willfully obstructed city authority by failure to make disbursements, as was her clear duty under city charter. *City of Redondo Beach v. DeLong (1981) 123 Cal. App. 3d 1035, 1043, 177 Cal. Rptr. 77*

Public entity had no authority to reimburse public employee for defense expenses because employee charged with criminal offenses not related to duties. *Holtzendorff v. Housing Auth. (1967) 250 Cal. App. 2d 596, 632-634, 58 Cal. Rptr. 886*

[f] Interest

Plaintiff entitled to recover postjudgment interest against state on tort claim. *Harland v. State of California (1979) 99 Cal. App. 3d 839, 842-848, 160 Cal. Rptr. 613*

[g] Intervention

Employee, who had filed timely claim against transit district for injuries sustained in accident with bus, was entitled to intervene, pursuant to *Lab. Code § 3853*, in action brought by his employer's workers' compensation insurer against transit district, even though employee had not timely filed his own action after his claim was rejected. *Home Ins. Co. v. Southern Cal. Rapid Transit Dist. (1987) 196 Cal. App. 3d 522, 526-527, 241 Cal. Rptr. 858*

[h] Parties

Demurrer to complaint against city was properly sustained without leave to amend with respect to causes of action based on contract breach, because contract was between plaintiff and redevelopment agency within that city. *Pacific States Enters., Inc. v. City of Coachella (1993) 13 Cal. App. 4th 1414, 1422, 17 Cal. Rptr. 2d 68*

[i] Payment by State

If no appropriation exists, state officials are not subject to being compelled to pay judgment against state. *Westinghouse Elec. Co. v. Chambers (1915)169 Cal. 131, 135-136, 145 P. 1025* ; *Veterans of Foreign Wars v. State of California (1974) 36 Cal. App. 3d 688, 697, 111 Cal. Rptr. 750*

[j] Service of Summons

If service was improperly made on Board of Control rather than on Attorney General, state not estopped to deny proper service because facts showed Board did not have ostensible authority and plaintiff did not reasonably rely on alleged misrepresentation. *House v. State of California (1981) 119 Cal. App. 3d 861, 873-879, 174 Cal. Rptr. 279*

[k] Statute of Limitations

[i] Application

Six-month statute of limitations in *Gov. Code § 945.6* is applicable to action for refund of taxes if basis for action is in city charter. *Volkswagen Pac., Inc. v. City of Los Angeles (1972) 7 Cal. 3d 48, 60-63, 101 Cal. Rptr. 869, 496 P.2d 1237*

In determining timeliness of lawsuit, plaintiff's contention that attorney never received notice of rejected claim was insufficient to create triable issue on nonreceipt because city provided proofs of service by mail. *Him v. City & County of San Francisco (2005) 133 Cal. App. 4th 437, 446, 34 Cal. Rptr. 3d 838*

Action based on real property loss because of sewage backup was untimely filed because written rejection contained explicit warning (*Gov. Code § 913(b)*) with regard to six-month limitation period under *Gov. Code § 945.6(a)(1)*, and suit was filed more than six months after date of written denial of claim. *City of Los Angeles v. Superior Court (1993) 14 Cal. App. 4th 621, 629, 17 Cal. Rptr. 2d 703*

Medical malpractice action against public entity brought after claim rejected under *Gov. Code § 913* must be filed

within six-month limitation period of *Gov. Code § 945.6*, even though action is filed within one-year limitation period of *Code Civ. Proc. § 340.5* for medical malpractice actions. *Anson v. County of Merced (1988) 202 Cal. App. 3d 1195, 1199, 1202, 249 Cal. Rptr. 457*

Six-month period of limitation in *Gov. Code § 945.6* is longer of either six calendar months or 182 days. *Gonzales v. County of Los Angeles (1988) 199 Cal. App. 3d 601, 604, 245 Cal. Rptr. 112*

Two-year limitation period of *Gov. Code § 945.6(a)(2)* was applicable because plaintiff had submitted timely claim together with unnecessary application to file late claim, and public entity denied unnecessary application but did not specifically reject claim; six-month limitation of *Gov. Code § 945.6(a)(1)* not applicable unless public entity gives specific written notice of rejection of claim. *Jenkins v. County of Contra Costa (1985) 167 Cal. App. 3d 152, 155-157, 213 Cal. Rptr. 126*

Because separate claims were filed by one heir and by all heirs, and both were rejected, limitation of *Gov. Code § 945.6(a)(1)* for wrongful death action ran from denial of claim by all heirs. *Norwood v. Southern Cal. Rapid Transit Dist. (1985) 164 Cal. App. 3d 741, 744, 211 Cal. Rptr. 6*

If rejection sent by certified mail, statute of limitations runs from date of deposit in mail, not from date of delivery to claimant. *Edgington v. County of San Diego (1981) 118 Cal. App. 3d 39, 43-47, 173 Cal. Rptr. 225*

Limitation periods in Tort Claims Act not applicable to action under *42 U.S.C.S. § 1983* for violation of civil rights under color of state law. *Rossiter v. Benoit (1979) 88 Cal. App. 3d 706, 713-714, 152 Cal. Rptr. 65*

Filing of amended claim is ineffective to extend statute of limitations because amended claim was not timely filed. *Rogers v. Board of Educ. (1968) 261 Cal. App. 2d 355, 358, 67 Cal. Rptr. 905*

[ii] Tolling

Code Civ. Proc. § 356 provision tolling statute of limitations during period in which commencement of action is statutorily barred was not applicable to period spent seeking relief from claim requirement because public entity's failure to comply with information-filing statute lifted statutory bar to lawsuit. *Banfield v. Sierra View Local Dist. Hosp. (1981) 124 Cal. App. 3d 444, 456-457, 177 Cal. Rptr. 290 , disapproved on other grounds, Woods v. Young (1991) 53 Cal. 3d 315, 328 n.4, 279 Cal. Rptr. 613, 807 P.2d 455*

Statute of limitations in action against public entity was tolled during pendency of interrelated administrative proceedings. *Olson v. County of Sacramento (1974) 38 Cal. App. 3d 958, 961-965, 113 Cal. Rptr. 664*

[l] Venue

Gov. Code § 955 (change of venue to Sacramento County in action against state) applies only to cases involving claims for money or damages for which filing of claim is statutory prerequisite or to actions on claims for money or damages that are specifically exempted from filing requirements. *Tharp v. Superior Court (1982) 32 Cal. 3d 496, 500-501, 186 Cal. Rptr. 335, 651 P.2d 1141*

Code Civ. Proc. § 394(a), relating to venue of actions brought by or against local public entity, applies to cross-complaint even when cross-complaint is filed only against original plaintiff in action, rather than against third-party, and cross-complaint was compulsory. *Metropolitan Transit System v. Superior Court (2007) 153 Cal. App. 4th 293, 302, 62 Cal. Rptr. 3d 517*

Change of venue to county of school district, only remaining defendant, was mandatory under *Code Civ. Proc. § 394* because district sought change within 30 days after dismissal of only other defendant. *Ventura Unified Sch. Dist. v. Superior Court (2001) 92 Cal. App. 4th 811, 815-816, 112 Cal. Rptr. 2d 260*

Code Civ. Proc. § 394(a), relating to venue of negligence actions brought against or by local government entity, applies to cross-complaint just as it does to complaint. *Kennedy/Jenks Consultants, Inc. v. Superior Court (2000) 80 Cal. App. 4th 948, 954-957, 95 Cal. Rptr. 2d 817* ; *see also Ohio Cas. Ins. Group v. Superior Court (1994) 30 Cal. App. 4th 444, 448-449, 35 Cal. Rptr. 2d 771* ; *but see City of Chico v. Superior Court (1979) 89 Cal. App. 3d 187, 188-192, 152 Cal. Rptr. 380*

[3] General Principles of Liability and Immunity

[a] Actionable Injury Defined

Public entities and public employees are liable only for injuries to types of interests that have been protected by courts in actions between private persons; public entity's failure to fulfill its duty under public works law to ensure that workers are paid prevailing wages on public works was not actionable under *Aubry v. Tri-City Hospital Dist (1992) 2 Cal. 4th 962, 967-968, 9 Cal. Rptr. 2d 92, 831 P.2d 317*

Because private parties have analogous protection afforded by mechanic's lien, subcontractor's injury sustained after county failed to require posting of payment bond by general contractor who filed for bankruptcy was injury actionable under *Tort Claims Act. N.V. Heathorn, Inc. v. County of San Mateo (2005) 126 Cal. App. 4th 1526, 1535-1537, 25 Cal. Rptr. 3d 400*

Because public entity liability may only be imposed for injuries that would be actionable if inflicted by private person, elimination of spoliation of evidence cause of action against private persons effectively shields public entity from liability for failure to maintain court records necessary to prosecute appeal. *Forbes v. County of San Bernardino (2002) 101 Cal. App. 4th 48, 57, 123 Cal. Rptr. 2d 721*

[b] Constitutional Claims

Gov. Code § 815 does not provide immunity from constitutionally created claims. *Young v. County of Marin (1987) 195 Cal. App. 3d 863, 869, 241 Cal. Rptr. 169* (*First Amendment* claim)

[c] Defense and Indemnification of Public Employees

Municipality's policy of indemnifying police officers against punitive damages liability in excessive force cases, pursuant to *Gov. Code § 825(b)* does not amount to deprivation of civil rights under *42 U.S.C.S. § 1983*. *Trevino v. Gates (9th Cir. 1996) 99 F.3d 911, 926*

Indemnification provisions of *Gov. Code § 825.2*, which govern if employer declines to defend employee, apply even if employee has entered into stipulated judgment with plaintiff in underlying action. *Johnson v. County of Fresno (2003) 111 Cal. App. 4th 1087, 1093-1094, 4 Cal. Rptr. 3d 475*

Public university did not abuse discretion in refusing to defend physician being sued for conspiracy to misappropriate and misuse eggs obtained through employment in fertility clinic at university, because alleged conduct was outside scope of physician's employment. *Stone v. Regents of Univ. of Cal. (1999) 77 Cal. App. 4th 736, 746-749, 92 Cal. Rptr. 2d 94*

State was not obligated to defend employee in suit in which alleged misconduct related only to employee's duties as union representative, even though employee was performing employment duties at time. *Zamudio v. State of California (1998) 62 Cal. App. 4th 673, 677-680, 73 Cal. Rptr. 2d 79*

Public entity not required under *Gov. Code § 995.8* to provide defense to criminal prosecution against employee arising out of conduct within course and scope of employment; indemnification of employee's criminal defense costs is within discretion of public entity. *Los Angeles Police Protective League v. City of Los Angeles (1994) 27 Cal. App. 4th 168, 182, 32 Cal. Rptr. 2d 574*

Gov. Code § 825 does not compel public entity to pay judgment entered against its employee unless public entity provided employee's defense; *Gov. Code § 825.2* provides for indemnity of public employee only if employee acted within course and scope of employment when incident occurred. *Rivas v. City of Kerman (1992) 10 Cal. 4th 1110, 1118-1119, 1123-1124, 13 Cal. Rptr. 2d 142*

Public employees' indemnity claim against codefendant public entity, based on *Gov. Code § 825*, survived good faith settlement between public entity and personal injury plaintiff. *Kantor v. Housing Auth. (1992) 8 Cal. App. 4th 424, 429-430, 10 Cal. Rptr. 2d 695*

Statutory scheme governing defense and indemnification of public employees so adequately protected their rights to defense and indemnification that there was no room and no need for judicially declared right to independent counsel such as is required of insurance companies under some circumstances. *Laws v. County of San Diego (1990) 219 Cal. App. 3d 189, 192, 267 Cal. Rptr. 921*

Neither public entity nor its insurers was able to benefit from its employee's insurance, pursuant to *Gov. Code § 825*; consequently, neither public entity nor its liability carriers was able to seek to recover from liability carrier of public entity's employee. *Fireman's Fund Ins. Co. v. City of Turlock (1985) 170 Cal. App. 3d 988, 1004, 216 Cal. Rptr. 796*

[d] Employee Defined

In action against state college basketball player, college's athletic director, coach, and state, for injuries player inflicted on plaintiff during game, trial court was correct in ruling that player was not state employee, and therefore plaintiff could not recover from other defendants under doctrine of respondeat superior. *Townsend v. State of California (1987) 191 Cal. App. 3d 1530, 1536, 237 Cal. Rptr. 146*

[e] Federal Civil Rights Actions

California government immunity statutes are not applicable against claim brought under federal Civil Rights Act (*42 U.S.C.S. §§ 1981-2000h-6*). *Martinez v. California (1980) 444 U.S. 277, 284, 100 S. Ct. 553, 62 L. Ed. 2d 481* ; *Fenton v. Groveland Cmty. Servs. Dist (1982) 135 Cal. App. 3d 797, 808, 185 Cal. Rptr. 758*

Public entity was not liable under federal civil rights act for actions of its employees in depriving persons of their civil rights. *Moor v. Alameda County (1973) 411 U.S. 693, 698-710, 93 S. Ct. 1785, 36 L. Ed. 2d 596*

State indemnification provisions applicable to public employee defendants in action based on federal civil rights action. *Williams v. Horvath (1976) 16 Cal. 3d 834, 842-848, 129 Cal. Rptr. 453, 548 P.2d 1125*

Immunities available to public entity under Tort Claims Act do not shield entity from liability under *42 U.S.C.S. § 1983*. *Buenavista v. City & County of San Francisco (1989) 207 Cal. App. 3d 1168, 1174, 255 Cal. Rptr. 329*

[f] Immunities of Public Employees

[i] Discretionary Immunity

[A] Combination Acts

Immunity for investigating child abuse in emergency situations, accorded county welfare officials by *Welf. & Inst. Code § 16513* and *Gov. Code § 820.4*, encompasses actions necessary to make meaningful investigation, but does not encompass any tortious conduct in making investigation. *Newton v. County of Napa (1990) 217 Cal. App. 3d 1551, 1559-1561, 266 Cal. Rptr. 682*

Action of police officers in stopping drunk driver was discretionary, but decision to leave drunk passengers in car with keys was ministerial. *Green v. City of Livermore (1981) 117 Cal. App. 3d 82, 88-89, 172 Cal. Rptr. 461*

Decision to issue press release was discretionary but contents, timing, and manner of release were ministerial, subjecting public entity to liability if ministerial acts were tortious. *Toney v. State of California (1976) 54 Cal. App. 3d 779, 789-793, 126 Cal. Rptr. 869*

Decision to issue flood forecasts was discretionary, but implementation of that decision was ministerial, subjecting public entity to liability if done negligently. *Connelly v. State of California (1970) 3 Cal. App. 3d 744, 749-751, 84 Cal. Rptr. 257*

Decision to declare child dependent child was discretionary, but implementation of decision by placing child in foster home was ministerial and subjected entity to liability if done negligently. *Elton v. County of Orange (1970) 3 Cal. App. 3d 1053, 1056-1058, 84 Cal. Rptr. 27* ; *but see Becerra v. County of Santa Cruz (1998) 68 Cal. App. 4th 1450, 1464, 81 Cal. Rptr. 2d 165* (county social worker's decision to place child in particular foster home is discretionary; distinguishing *Elton* in part on grounds that it was decided years before adoption of current statutes governing out-of-home placement of dependent children)

Discretionary act immunity not applicable to use of unreasonable force in making arrest although original decision to make arrest was discretionary. *Scruggs v. Haynes (1967) 252 Cal. App. 2d 256, 265-268, 60 Cal. Rptr. 355*

Decision by state botanist to analyze substance was discretionary, but negligent analysis subsequently was ministerial and not immune. *Sava v. Fuller (1967) 249 Cal. App. 2d 281, 285-292, 57 Cal. Rptr. 312*

[B] Discretionary Acts

Only basic policy decisions, not subsequent ministerial actions in implementation of policy, are immune as discretionary acts. *Johnson v. State of California (1968) 69 Cal. 2d 782, 793-797, 73 Cal. Rptr 240, 447 P.2d 352* ; *Taylor v. Buff (1985) 172 Cal. App. 3d 384, 390, 218 Cal. Rptr. 249*

Decisions made during investigation into propriety of returning minor to father's custody following temporary county custody under *Welf. & Inst. Code § 309* were discretionary decisions subject to immunity under *Gov. Code § 820.2*, even if steps taken during investigation to compile relevant information before deciding to release were admittedly inadequate. *Ortega v. Sacramento County Dept. of Health & Human Services (2008) 161 Cal. App. 4th 713, 732-733, 74 Cal. Rptr. 3d 390*

Statutes and regulations giving preferential consideration to family members as foster caretakers and promoting sibling placement in same foster home did not create mandatory duties and were not designed to prevent sexual abuse; in case

in which no family members were available to serve as foster caretakers, county was not liable for placing plaintiff, but not siblings, in foster care of family friend, who allegedly sexually abused plaintiff. *County of Los Angeles v. Superior Court (2002) 102 Cal. App. 4th 627, 640-643, 125 Cal. Rptr. 2d 637*

County social worker's decision to place child in particular foster home, after consideration of factors required by statute, is discretionary decision immune from liability under *Gov. Code § 820.2*. *Becerra v. County of Santa Cruz (1998) 68 Cal. App. 4th 1450, 1464, 81 Cal. Rptr. 2d 165*

State immune from liability under *Gov. Code § 818.4* if existence of mandatory duty by state to revoke driver's license under *Veh. Code § 12805(c)* not established; evidence insufficient to establish that Department of Motor Vehicles or any other state agent or agency made determination under *Veh. Code §§ 12805(c)* and *12806(c)* that diabetic driver was unable to safely operate a motor vehicle so as to mandate termination of driving privilege. People v. Superior Court (1993) *(Wilson) 18 Cal. App. 4th 31, 35-39, 22 Cal. Rptr. 2d 110*

Immunity granted to state under *Gov. Code § 8655* is significantly broader than that provided in *Gov. Code § 820.2*; former statute encompasses performance of or failure to perform discretionary act, while latter statute immunizes exercise of discretion itself. *LaBadie v. State of California (1989) 208 Cal. App. 3d 1366, 1368-1369, 256 Cal. Rptr. 604* (malathion spraying)

In action by rape victim for negligent infliction of emotional distress arising from police dispatcher's telephone call to victim during attack in which dispatcher badgered and berated victim while rapist stood armed at her side, police dispatcher's decision to place call was discretionary and thus cloaked with immunity under *Gov. Code § 820.2*. *Sullivan v. City of Sacramento (1987) 190 Cal. App. 3d 1070, 1081, 235 Cal. Rptr. 844*

State was immune under *Gov. Code §§ 818.2, 820.2*, and *820.4* from liability for damage to crops resulting from decision to quarantine or fumigate crops to eradicate pests under Medfly program. *Teresi v. State of California (1986) 180 Cal. App. 3d 239, 244, 225 Cal. Rptr. 517*

To be entitled to immunity for discretionary acts, entity or officer required to show that basic policy decision, involving conscious balancing of risks and advantages, took place. *Taylor v. Buff (1985) 172 Cal. App. 3d 384, 390, 218 Cal. Rptr. 249*

Government decision involving essentially political considerations, including questions of (1) budgetary and fiscal policy, (2) personnel administration standards, (3) allocation of available resources according to variable priorities of need, and (4) choices between competing plans for accomplishing approved objectives, was discretionary and thus immune from liability under *Gov. Code § 820.2*. *Taylor v. Buff (1985) 172 Cal. App. 3d 384, 390, 218 Cal. Rptr. 249*

Coastal Commission was immune under *Gov. Code § 818.4* from action for damages allegedly incurred because Commission decision affected plaintiff's contract with third party. *Walter H. Leimert Co. v. California Coastal Comm'n (1983) 149 Cal. App. 3d 222, 234, 196 Cal. Rptr. 739*

Failure to warn family of pending release of prisoner with known suicidal tendencies, when danger to prisoner was clearly foreseeable, did not rise to level of discretionary governmental decision calling for immunity; public agency required to show conscious exercise of discretion to invoke discretionary acts immunity. *Johnson v. County of Los Angeles (1983) 143 Cal. App. 3d 298, 313, 191 Cal. Rptr. 704*

Decision whether to remove motor home parked at side of highway was discretionary action of Highway Patrol officer within *Gov. Code § 820.2* governmental immunity in action by motorist whose vehicle collided with motor home. *David Smith Bonds v. State of California ex rel. Cal. Highway Patrol (1982) 138 Cal. App. 3d 314, 320-321, 187 Cal. Rptr. 792*

Police officer's decision to order plaintiff to leave certain real property or be arrested was discretionary act. *Watts v. County of Sacramento (1982) 136 Cal. App. 3d 232, 234-235, 186 Cal. Rptr. 154*

City manager's decision to terminate water service was not discretionary act because it was at operational, not planning, level. *H & M Assocs. v. City of El Centro (1980) 109 Cal. App. 3d 399, 406-407, 167 Cal. Rptr. 392*

Department of Motor Vehicles (DMV) was not liable for wrongful death of automobile accident victim, although DMV failed to revoke license of other driver, who had six citations in 18 months, because decision not to revoke was discretionary under *Veh. Code § 13950*; DMV was immune from liability under *Gov. Code § 818.4*, granting immunity for discretionary licensing activities. *Department of Motor Vehicles v. Superior Court (1980) 105 Cal. App. 3d 537, 541, 164 Cal. Rptr. 379*

Decision not to award contract to lowest bidder was based on state employees' exercise of discretion so that plaintiff's cause of action for damages for negligent rejection of bids without ascertaining whether sufficient funding existed was barred by governmental immunity (*Gov. Code §§ 815.2, 820.2*). *Pacific Architects Collaborative v. State of California (1979) 100 Cal. App. 3d 110, 121-122, 166 Cal. Rptr. 184*

Decision to pursue vehicle that resulted in vehicle colliding with plaintiff's car was discretionary. *Bratt v. City & County of San Francisco (1975) 50 Cal. App. 3d 550, 553-554, 123 Cal. Rptr. 774*

Failure to require posting of bond on transfer of automobile registration under statute that stated that Department of Motor Vehicles may require that bond was discretionary. *Hirsch v. Department of Motor Vehicles (1974) 42 Cal. App. 3d 252, 258-259, 115 Cal. Rptr. 452*

Award of contract to party other than lowest responsible bidder was discretionary. *Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Ctr. Auth. (1974) 40 Cal. App. 3d 98, 101-103, 114 Cal. Rptr. 834* ; *Rubino v. Lolli (1970) 10 Cal. App. 3d 1059, 89 Cal. Rptr. 320*

Failure of highway patrol to undertake search for victim of accident was discretionary. *McCarthy v. Frost (1973) 33 Cal. App. 3d 872, 875-876, 109 Cal. Rptr. 470*

Failure of police to take appropriate action to protect property of plaintiffs that was subject of self-help by third party of which police were aware was discretionary. *Michenfelder v. City of Torrance (1972) 28 Cal. App. 3d 202, 206-207, 104 Cal. Rptr. 501*

Recommendation that person committed to mental health facility be released, which person after release murdered plaintiff's daughter, was discretionary act. *Kravitz v. California (1970) 8 Cal. App. 3d 301, 307, 87 Cal. Rptr. 352*

Decision of public administrator not to make payments on property of decedent, which caused its loss by foreclosure, was discretionary act. *Saltares v. Kristovich (1970) 6 Cal. App. 3d 504, 519, 85 Cal. Rptr. 866*

Advice by one agency to another not to perform unenforceable oral contract, which was incident of transaction in which advising agency had interest, was discretionary act. *Osborne v. Huntington Beach Union High Sch. Dist. (1970) 5 Cal. App. 3d 510, 514-515, 85 Cal. Rptr. 793*

Decision, and execution of that decision, to advise bidders at probate sale that property being sold was going to be condemned was discretionary act. *Bank of America v. Los Angeles County (1969) 270 Cal. App. 2d 165, 173-175, 75 Cal. Rptr. 444*

[C] Ministerial Acts

Therapists who failed to warn person that patient intended to kill her were not immune from liability for that failure under discretionary act immunity. *Tarasoff v. Regents of University of Cal. (1976) 17 Cal. 3d 425, 444-447, 131 Cal. Rptr. 14, 551 P.2d 334*

Social worker was not exercising discretion so as to be entitled to immunity when applying radically different standards for eligibility for welfare than allowed by statute and regulation. *Ramos v. Merced County (1971) 4 Cal. 3d 685, 692-694, 94 Cal. Rptr. 421, 484 P.2d 93*

Discretionary act immunity was not applicable to police officer's negligence in leading plaintiff to place in street to investigate accident. *McCorkle v. City of Los Angeles (1969) 70 Cal. 2d 252, 260-262, 74 Cal. Rptr. 389, 449 P.2d 453*

Public official's decision to make statement to press with regard to his or her release of funds from official custody was not discretionary act. *Sanborn v. Chronicle Publishing Co. (1976) 18 Cal. 3d 406, 414-416, 134 Cal. Rptr. 402, 556 P.2d 764*

Social worker was not immune from liability under discretionary acts immunity for alleged negligent supervision of foster care placement; social worker's failure to comply with regulations regarding supervision of foster care was "ministerial" and not discretionary because regulations afforded social worker no discretion to visit foster child less frequently than monthly to determine adequacy of placement. *Scott v. County of Los Angeles (1994) 27 Cal. App. 4th 125, 141-142, 32 Cal. Rptr. 2d 643*

County clerk and elections board's act of determining if potential voters meet residency requirements is ministerial task. *Fenton v. Groveland Cmty. Servs. Dist. (1982) 135 Cal. App. 3d 797, 806-807, 185 Cal. Rptr. 758*

[ii] Failure to Enforce Law Immunity

Failure to enforce law immunity is applicable to law enforcement officers. *Michenfelder v. City of Torrance (1972) 28 Cal. App. 3d 202, 206, 104 Cal. Rptr. 501*

[iii] Judicial Immunity

Unless specifically provided otherwise by Tort Claims Act, common law immunities, such as judicial immunity, are not affected by *Act. Fisher v. Pickens (1990) 225 Cal. App. 3d 708, 715-718, 275 Cal. Rptr. 487*

[iv] Malicious Prosecution Immunity

County employee acting within scope of employment was immune from claim of malicious prosecution under *Gov. Code § 821.6* for initiating criminal prosecution against plaintiff who had prior grant of immunity from prosecution. *Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 604, 199 Cal. Rptr. 644*

Retaining person in jail when no proceedings pending against him or her was not malicious prosecution, and sheriff was not immune. *Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 719-722, 117 Cal. Rptr. 241, 527 P.2d 865*

Immunity applicable to protect state bar personnel from liability for negligence and negligent and intentional infliction of emotional distress in connection with disbarment proceedings. *Rosenthal v. Vogt (1991) 229 Cal. App. 3d 69, 75, 280 Cal. Rptr. 1*

Immunity inapplicable to exonerate public employee from liability for false arrest or imprisonment; if facts support causes of action for malicious prosecution and false arrest, immunity applicable only to malicious prosecution cause of action. *Harden v. San Francisco Bay Area Rapid Transit Dist. (1989) 215 Cal. App. 3d 7, 14-17, 263 Cal. Rptr. 549*

Gov. Code § 821.6 immunity not limited to suits for damages for malicious prosecution. *Kemmerer v. County of Fresno (1988) 200 Cal. App. 3d 1426, 1436, 246 Cal. Rptr. 609* (wrongful discharge, intentional infliction of emotional distress)

Malicious prosecution immunity is constitutional. *Blackburn v. Los Angeles County (1974) 42 Cal. App. 3d 175, 177-178, 116 Cal. Rptr. 622*

Malicious prosecution immunity does not protect public entity from liability for failure to discharge mandatory duty. *Bradford v. State of California (1973) 36 Cal. App. 3d 16, 19-21, 111 Cal. Rptr. 852*

Malicious prosecution immunity available to protect police officer if acts that resulted in malicious prosecution were negligent. *Johnson v. City of Pacifica (1969) 4 Cal. App. 3d 82, 84-88, 84 Cal. Rptr. 246*

Malicious prosecution immunity available to protect coroner from claim that negligent autopsy caused prosecution of claimant. *Stearns v. County of Los Angeles (1969) 275 Cal. App. 2d 134, 137-138, 79 Cal. Rptr. 757*

Public entity and employee immune from liability for malicious prosecution. *Vivell v. Belmont (1969) 274 Cal. App. 2d 38, 40-41, 78 Cal. Rptr. 841*

[v] Misrepresentation Immunity

Gov. Code §§ 818.8, 822.2 protects school district and employee from liability for allegedly misrepresenting to high school student that completion of particular science class would allow student to meet requirements for playing NCAA sports. *Brown v. Compton Unified Sch. Dist. (1998) 68 Cal. App. 4th 114, 117-118, 80 Cal. Rptr. 2d 171*

Gov. Code §§ 818.8, 822.2 does not preclude action against county adoption agency for intentional misrepresentation or fraudulent concealment of adoptee's medical condition as part of adoption process. *Michael J. v. Los Angeles County Dept. of Adoptions (1988) 201 Cal. App. 3d 859, 872, 875, 247 Cal. Rptr. 504*

Gov. Code § 822.2 does not abrogate common law regarding judicial immunity; thus, even though judge is public employee and public employees are immune only if they are not guilty of actual fraud, corruption, or actual malice, judge is immune from civil suit in exercise of judicial function even if acting maliciously and corruptly. *Frost v. Geernaert (1988) 200 Cal. App. 3d 1104, 1107-1109, 246 Cal. Rptr. 440*

Tort actions for misrepresentation made by state employees were barred by Tort Claims Act (*Gov. Code § 818.8*). *Seymour v. State of California (1984) 156 Cal. App. 3d 200, 205, 201 Cal. Rptr. 15*

Misrepresentation immunity does not apply to allegations for fraud in contract action. *Arthur L. Sachs, Inc. v. City of Oceanside (1984) 151 Cal. App. 3d 315, 320-321, 198 Cal. Rptr. 483*

Cause of action was stated against building inspectors for actual fraud in approving building that they allegedly knew

did not conform to applicable building codes. *Cooper v. Jevne (1976) 56 Cal. App. 3d 860, 874-875, 128 Cal. Rptr. 724*

Misrepresentation immunity not applicable if public employee is motivated by corruption or actual malice, such as a conscious intent to deceive, vex, annoy, or harm injured party in his or her business. *Schonfeld v. City of Vallejo (1974) 50 Cal. App. 3d 401, 409-411, 123 Cal. Rptr. 669*

[g] Immunities of Public Entities

[i] Employee Immunity

County was immune from liability based on social worker's alleged negligence in investigating report of child abuse, because social worker was immune under *Gov. Code § 821.6*. *Jenkins v. County of Orange (1989) 212 Cal. App. 3d 278, 284, 260 Cal. Rptr. 645 , distinguished,* Clarke v. Upton, 2008 U.S. Dist. LEXIS 38206

State officials were immune from liability for publicizing results of investigation of plaintiffs' activities and conduct as collection agencies; thus, state was exempt from any liability for actions of officials. *Citizens Capital Corp. v. Spohn (1982) 133 Cal. App. 3d 887, 888-889, 184 Cal. Rptr. 269*

[ii] Failure to Adopt or Enforce Laws

Duty of public entity to promulgate regulations under former *Bus. & Prof. Code § 7514.1* was discretionary, not mandatory within meaning of *Gov. Code § 815.6*; immunity for failure to adopt or enforce laws under *Gov. Code §§ 818.2* and *821* was therefore applicable, precluding any liability for alleged negligent delay in promulgating regulations. *Nunn v. State of California (1984) 35 Cal. 3d 616, 621-626, 200 Cal. Rptr. 440, 677 P.2d 846*

Federal decisions construing immunity afforded discretionary acts under Federal Tort Claims Act (*28 U.S.C.S. § 2680(a)*) were useful precedent to determine whether public entity is immune from liability under *Gov. Code § 818.2* for alleged negligent delay in promulgating regulations under former *Bus. & Prof. Code § 7514.1*. *Nunn v. State of California (1984) 35 Cal. 3d 616, 623 n.5, 200 Cal. Rptr. 440, 677 P.2d 846*

Failure to enforce law immunity not applicable if duty to enforce law is mandatory with public entity because immunity only applicable to discretionary law enforcement. *Morris v. County of Marin (1977) 18 Cal. 3d 901, 916-917, 136 Cal. Rptr. 251, 559 P.2d 606*

Immunity for adopting or failing to adopt a statute precluded award of damages in mandate action to overturn zoning ordinance. *HFH, Ltd. v. Superior Court (1975) 15 Cal. 3d 508, 518-520, 125 Cal. Rptr. 365, 542 P.2d 237*

Immunity of public employee under *Gov. Code § 821* for injury caused by employee's adoption of or failure to adopt enactment, or by employee's failure to enforce enactment, was applicable to regulations relating to detention and penal facilities. *Taylor v. Buff (1985) 172 Cal. App. 3d 384, 389, 218 Cal. Rptr. 249*

State not liable for effect of legislation enacted under police power. *Dana Corp. v. State of California (1980) 103 Cal. App. 3d 424, 426, 162 Cal. Rptr. 875*

Failure to enforce law immunity not applicable to action for damages for agency's failure to suspend license of bus company that failed to maintain insurance. *Elson v. Public Utilities Commission (1975) 51 Cal. App. 3d 577, 589, 124 Cal. Rptr. 305*

Failure to enforce law immunity not applicable to complaint for damages for failure to enforce regulations regarding placement of dependent children in foster homes. *Elton v. County of Orange (1970) 3 Cal. App. 3d 1053, 1059, 84 Cal. Rptr. 27*

[iii] Inspections

Public entity's immunity from tort liability for negligent inspections under *Gov. Code § 818.6* was not preempted by provisions of federal law that govern Section 8 housing (*42 U.S.C.S. § 1437f et seq.*; 24 C.F.R. § 882.109). *Stevenson v. San Francisco Hous. Auth. (1994) 24 Cal. App. 4th 269, 279-283, 29 Cal. Rptr. 2d 398*

Immunity protects Department of Social Services from liability based on failure to conduct mandatory inspection of day-care facility before renewing license of operator, who made false declarations in her renewal application. *Powell v. State of California (1991) 234 Cal. App. 3d 910, 914-916, 286 Cal. Rptr. 8*

Public entity immune from liability for negligent inspection whether duty to inspect is mandatory or discretionary. *Cochran v. Herzog Engraving Co. (1984) 155 Cal. App. 3d 405, 205 Cal. Rptr. 1*

Public entity not liable for failure to inspect private property, and mandatory duty liability was not applicable did not override immunity. *Clayton v. Sunnyvale (1943) 62 Cal. App. 3d 666, 686-671, 133 Cal. Rptr. 306*

[iv] Licensing

In action for alleged negligent provision of training course for license under former *Bus. & Prof. Code § 7514.1*, public school district had no actionable duty to offer such course and also had licensing immunity from liability under *Gov. Code § 818.4*. *Nunn v. State of California (1984) 35 Cal. 3d 616, 626-628, 200 Cal. Rptr. 440, 677 P.2d 846*

Licensing immunity not applicable if public entity has mandatory duty not to issue license unless applicant establishes that it has worker's compensation insurance. *Morris v. County of Marin (1977) 18 Cal. 3d 901, 911-916, 136 Cal. Rptr. 251, 559 P.2d 606*

Licensing immunity precludes award of damages in mandamus proceeding to challenge denial of license even if the writ is granted. *State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 245-247, 115 Cal. Rptr. 497, 524 P.2d 1281*

Public entity immune from liability for denial of building permit. *Selby Realty Co. v. San Buenaventura (1973) 10 Cal. 3d 110, 127, 109 Cal. Rptr. 799, 514 P.2d 111*

Issuance of certificate stating that particular grapevine was diseased, pursuant to state inspection program for grapevines, was discretionary act for which immunity was provided under *Gov. Code §§ 818.4, 821.2*. *Sonoma Ag Art, LLC v. Department of Food & Agric. (2004) 125 Cal. App. 4th 122, 127-129, 22 Cal. Rptr. 3d 468*

Decision of public entity health maintenance organization to issue credentials to physician to receive Medi-Cal reimbursements was discretionary decision protected by immunity of *Gov. Code § 818.4*. *Inland Empire Health Plan v. Superior Court (2003) 108 Cal. App. 4th 588, 592-594, 133 Cal. Rptr. 2d 735*

Licensing and discretionary acts immunity of *Gov. Code §§ 818.4* and *821.2* was not applicable in case in which building official approved owner's building by giving "Final Inspection Okay," thereby precluding official from further discretion to withhold certificate of occupancy; official was under mandatory duty to issue certificate of occupancy. *Thompson v. City of Lake Elsinore (1993) 18 Cal. App. 4th 49, 55-58, 22 Cal. Rptr. 2d 344*

State immune from liability under *Gov. Code § 818.4* because plaintiff failed to establish existence of mandatory duty on state to revoke driver's license under *Veh. Code § 12805(c)*; evidence was insufficient to establish that Department of Motor Vehicles or any other state agent or agency made determination under *Veh. Code §§ 12805(c)* and *12806(c)* that diabetic driver was unable to operate a motor vehicle safely so as to mandate termination of driving privilege. People v. Superior Court (1993) *(Wilson) 18 Cal. App. 4th 31, 34-39, 22 Cal. Rptr. 2d 110*

Licensing immunity applied to protect city from liability for damage caused by soil subsidence after its building inspector had issued permits, despite knowledge that all soil was not compacted to optimum level set forth by ordinance; issuance of permit was discretionary. *Cancun Homeowners Assn. v. City of San Juan Capistrano (1989) 215 Cal. App. 3d 1352, 1356-1361, 264 Cal. Rptr. 288*

Licensing of home improvement contractor under *Bus. & Prof. Code § 7153.1* was discretionary; state board therefore immune under *Gov. Code § 818.4* from liability for negligent licensing procedures. *West v. State of California (1986) 181 Cal. App. 3d 753, 760-763, 227 Cal. Rptr. 16*

Public entity not liable for issuing driver's license to allegedly senile person. *Papelian v. California ex rel. Dep't of Motor Vehicles (1976) 65 Cal. App. 3d 958, 961-963, 135 Cal. Rptr. 665*

Licensing immunity not applicable because public entity had mandatory duty to suspend license of bus company for failure to maintain insurance. *Elson v. Public Utilities Commission (1975) 51 Cal. App. 3d 577, 587-589, 124 Cal. Rptr. 305*

Public entity immune from liability for issuance of automobile registration. *Hirsch v. Department of Motor Vehicles (1974) 42 Cal. App. 3d 252, 254-257, 115 Cal. Rptr. 452*

Public entity immune from liability for revoking use permit. *O'Hagan v. Board of Zoning Adjustment (1974) 38 Cal. App. 3d 722, 726-727, 113 Cal. Rptr. 501*

City immune for refusal to issue building permit. *Burns v. City Council (1973) 31 Cal. App. 3d 999, 1003-1005, 107 Cal. Rptr. 787*

[v] Misrepresentations

Erroneous advice by fiscal intermediary not following correct administrative practice was not sufficient misrepresentation to estop government from recovering funds to which nonprofit corporation was not entitled. *Heckler v. Community Health Servs. (1984) 467 U.S. 51, 61-63, 104 S. Ct. 2218, 81 L. Ed. 2d 42*

Misrepresentation immunity did not bar contract action based on misrepresentation. *Warner Constr. Corp. v. City of Los Angeles (1970) 2 Cal. 3d 285, 293-294, 85 Cal. Rptr. 444, 466 P.2d 996* ; *Arthur L. Sachs, Inc. v. City of Oceanside (1984) 151 Cal. App. 3d 315, 320-321, 198 Cal. Rptr. 483*

Misrepresentation for purpose of misrepresentation immunity means interferences with financial or commercial interests in nature of common law action for deceit. *Johnson v. State of California (1968) 69 Cal. 2d 782, 799-800, 73 Cal. Rptr. 240, 447 P.2d 352*

Immunity for negligent misrepresentation under *Gov. Code § 818.8* applied to air management district that, because of miscalculation, notified ranch that it had earned 470 tons of marketable pollution credits more than ranch actually had earned, forcing ranch to reduce sale price of credits by over $831,000 when notified of error while sale was pending.

Jopson v. Feather River Air Quality Mgmt. Dist. (2003) 108 Cal. App. 4th 492, 499, 133 Cal. Rptr. 2d 506

Gov. Code § 818.8 immunized county for allegedly misrepresenting conditions of plaintiff's employment with office of county counsel and thus inducing plaintiff to relocate to accept position even though plaintiff was terminated shortly after being hired. *Burden v. County of Santa Clara (2000) 81 Cal. App. 4th 244, 250-252, 96 Cal. Rptr. 2d 587*

Immunity was applicable to bar recovery by farmers who had applied pesticides under direction of county employee and who thereafter were prohibited by county officials from harvesting or selling their raspberry crop due to excess pesticide residues. *Tokeshi v. State of California (1990) 217 Cal. App. 3d 999, 1004-1008, 266 Cal. Rptr. 255*

Immunity was applicable to county and state for alleged misrepresentations made in conjunction with tax sale of real property; although immunity was not applicable to contractual liabilities of public entities, ordinary contract law not applicable to determine rights of purchaser against seller in sale of tax-delinquent property. *Craland, Inc. v. State of California (1989) 214 Cal. App. 3d 1400, 1405, 263 Cal. Rptr. 255*

Gov. Code §§ 818.8, 822.2 did not preclude action against county adoption agency for intentional misrepresentation or fraudulent concealment of adoptee's medical condition as part of adoption process. *Michael J. v. Los Angeles County Dept. of Adoptions (1988) 201 Cal. App. 3d 859, 872, 875, 247 Cal. Rptr. 504*

Public entity was not liable for alleged misrepresentation by police officer that undercover informant would be treated as police officer if killed as result of undercover work. *Page v. Montebello (1980) 112 Cal. App. 3d 658, 670-671, 169 Cal. Rptr. 447*

Governmental entity was immune from liability for its misrepresentation relating to units; immunity under *Gov. Code § 818.8* (providing immunity for injury caused by misrepresentation) is commonly applied to deny relief for injury to financial or commercial interests. *Grenell v. Hermosa Beach (1980) 103 Cal. App. 3d 864, 873-875, 163 Cal. Rptr. 315*

Public entity immune from liability based on misrepresentations, including those based on fraud, corruption, or malice. *Universal By-Prods., Inc. v. City of Modesto (1974) 43 Cal. App. 3d 145, 154, 117 Cal. Rptr. 525*

Misrepresentation immunity not applicable to negligent misrepresentation about maximum height that river would rise. *Connelly v. State of California (1970) 3 Cal. App. 3d 744, 752, 84 Cal. Rptr. 257*

Misrepresentation immunity applied to misrepresentation by public employee that activities violated zoning ordinance. *Brown v. Los Angeles (1968) 267 Cal. App. 2d 849, 850-851, 73 Cal. Rptr. 364*

[vi] Punitive Damages

Civil penalties assessed for noncompliance with regulations governing patient care in long-term health care facilities are different from punitive damages, and public entity is potentially liable for such penalties. *Kizer v. County of San Mateo (1991) 53 Cal. 3d 139, 145-150, 279 Cal. Rptr. 318, 806 P.2d 1353*

Statutory damages for spilling oil or discharging raw sewage are not solely punitive, and therefore public entity is liable for such damages. *People ex rel. Younger v. Superior Court (1976) 16 Cal. 3d 30, 42, 127 Cal. Rptr. 122, 544 P.2d 1322* ; *San Francisco Civil Serv. Ass'n v. Superior Court (1976) 16 Cal. 3d 46, 48-50, 127 Cal. Rptr. 131, 544 P.2d 1331*

State Compensation Insurance Fund (SCIF) subject to liability for punitive damages if sued in tort; *Ins. Code § 11873,*

which excepts SCIF from Government Code provisions applicable to other state agencies, removes SCIF from scope of *Gov. Code § 818*. *Courtesy Ambulance Serv. v. Superior Court (1992) 8 Cal. App. 4th 1504, 1519, 11 Cal. Rptr. 2d 161*

Recovery of punitive damages by or against public entities is not authorized. *City of Los Angeles v. Shpegel-Dimsey, Inc. (1988) 198 Cal. App. 3d 1009, 1023-1026, 244 Cal. Rptr. 507*

Proscription of *Gov. Code § 818* against imposition of punitive damages is not violative of equal protection if plaintiff only alleges ad hoc acts of misbehavior by employees of public entity. *McAllister v. South Coast Air Quality Mgmt. Dist. (1986) 183 Cal. App. 3d 653, 661, 228 Cal. Rptr. 351*

[vii] Malicious Prosecution Immunity

Malicious prosecution immunity not applicable to action for false imprisonment alleging that sheriff kept prisoner in jail after prisoner should have been released. *Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 719-722, 117 Cal. Rptr. 241, 527 P.2d 865*

County immune from claim of malicious prosecution under *Gov. Code §§ 821.6* and *815.2(b)* for employee's initiation of criminal prosecution against plaintiff, who had prior grant of immunity from prosecution. *Scannell v. County of Riverside (1984) 152 Cal. App. 3d 596, 604-605, 199 Cal. Rptr. 644*

Malicious prosecution immunity does not protect entity and employee if it is alleged that public employee falsely obtained warrant and arrested plaintiff under warrant, because there is no immunity for false imprisonment. *McKay v. County of San Diego (1980) 111 Cal. App. 3d 251, 254-257, 168 Cal. Rptr. 442*

Arrest based on valid warrant is not false imprisonment, and cause of action for malicious prosecution is subject to immunity. *Collins v. City & County of San Francisco (1975) 50 Cal. App. 3d 671, 676-679, 123 Cal. Rptr. 525*

[viii] State Militia Immunity

State immune from liability under *Gov. Code § 815.2* and *Mil. & Vet. Code § 392* in wrongful death action brought by family of county deputy sheriff killed during drug interdiction operation in crash of helicopter being flown by officer of California National Guard, which provided air support to state and federal law enforcement officials in operation. *Chester v. State of California (1994) 21 Cal. App. 4th 1002, 1004-1008, 26 Cal. Rptr. 2d 575*

[h] Liabilities of Public Employee

Highway patrolman's act of stopping and aiding motorist did not create special relationship that would impose affirmative duty to secure information or preserve evidence for civil litigation between motorist and third parties. *Williams v. State of California (1983) 34 Cal. 3d 18, 22-23, 192 Cal. Rptr. 233, 664 P.2d 137*

Before issue of immunity can be reached, threshold question of whether there was duty of care owed to plaintiff must be answered. *Williams v. State of California (1983) 34 Cal. 3d 18, 22-23, 192 Cal. Rptr. 233, 664 P.2d 137* ; *Harris v. Smith (1984) 157 Cal. App. 3d 100, 104-105, 203 Cal. Rptr. 541*

Sheriff liable for false imprisonment if sheriff knew or should have known that incarceration was unlawful. *Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 719, 117 Cal. Rptr. 241, 527 P.2d 865*

Public employee liable for negligent failure to discharge employee who is known to be incompetent or unfit. *Fernelius v. Pierce (1943) 22 Cal. 2d 226, 239-241, 138 P.2d 12*

Public employees are potentially liable for punitive damages. *Runyon v. Superior Court (1986) 187 Cal. App. 3d 878, 881-882, 232 Cal. Rptr. 101*

Duty of care owed by state as result of affirmative act that placed person in peril or increased risk of harm, omission, or failure to act after promise was made, or special relationship in which person relied to his or her detriment on official conduct in situation of dependency; highway patrol officer's act in stopping driver, administering sobriety tests, and releasing driver after driver passed tests did not create affirmative duty to motorist, even if motorist was reasonably foreseeable victim. *Harris v. Smith (1984) 157 Cal. App. 3d 100, 104-106, 203 Cal. Rptr. 541*

County sheriffs not liable for failure to render emergency aid to plaintiff found injured at scene of investigation, or for failure to secure evidence found at scene, absent special relationship giving rise to affirmative duty; special relationship existed only if sheriffs' actions increased risk of harm to plaintiff or led to detrimental reliance on part of plaintiff. *Rose v. County of Plumas (1984) 152 Cal. App. 3d 999, 1003-1007, 199 Cal. Rptr. 842*

[i] Liabilities of Public Entities

[i] Actions of Independent Contractors

Public entity not liable for negligence of independent contractor hired by third party who is issued permit by public entity. *Stanford v. City of Ontario (1972) 6 Cal. 3d 870, 878-879, 101 Cal. Rptr. 97, 495 P.2d 425*

Indigent criminal defendant unable to bring legal malpractice action against county, based on dissatisfaction with free counsel hired as independent contractor and employed by private law firm under contract with county to provide public defender services, because counsel was not alleged to lack required expertise; government owes no duty to criminal defendant to control performance of publicly provided lawyer who was not employee of government entity responsible for legal representation. *Foster v. County of San Luis Obispo (1991) 14 Cal. App. 4th 668, 674-675, 17 Cal. Rptr. 2d 730*

General allegations insufficient to support cause of action for government liability; issuance of authorization, without alleging supervision or control by public entity, was insufficient to infer employment or independent contractor relationship. *Shields v. County of San Diego (1984) 155 Cal. App. 3d 103, 113, 202 Cal. Rptr. 30*

Public entity not liable to employee of independent contractor for dangerous defect in equipment of independent contractor unless entity has actual knowledge of defect and right to order equipment removed from job. *Holman v. California (1975) 53 Cal. App. 3d 317, 328-335, 124 Cal. Rptr. 773*

Public entity liable for negligent failure of its independent contractor to construct or maintain buildings in reasonably safe condition. *O'Gan v. King City Joint Union High Sch. Dist. (1970) 3 Cal. App. 3d 641, 646-647, 83 Cal. Rptr. 795*

[ii] Conversion

County liable to owners for conversion of firearms confiscated for use as exhibits in criminal prosecution and subsequently destroyed by county pursuant to court order without notice to owners as required by former *Penal Code § 1418* (*now see Penal Code §§ 1417-1417.7*). *Tallmadge v. County of Los Angeles (1987) 191 Cal. App. 3d 251, 254, 236 Cal. Rptr. 338*

[iii] Discrimination

Gov. Code § 815 immunity does not enable public entity or its employees to act with impunity in manner for which private persons would be liable; acts of supervisory employees motivated by and resulting in discrimination based on race and age was not immunized. *Watson v. Department of Rehab. (1989) 212 Cal. App. 3d 1271, 1285, 261 Cal. Rptr. 204*

[iv] Failure to Discharge Mandatory Duty

Mandatory requirement that city record notice of substandard conditions of property with county recorder, although having incidental effect of notifying potential purchasers of property about those substandard conditions, was intended as leverage to induce correction of substandard conditions and was not intended to protect future purchasers or lenders from economic damages subsequently caused because substandard conditions were not corrected; subsequent purchaser had no cause of action for failure to perform mandatory duty. *Haggis v. City of Los Angeles (2000) 22 Cal. 4th 490, 503, 93 Cal. Rptr. 2d 327, 993 P.2d 983*

Whether particular statute imposes mandatory duty within meaning of *Gov. Code § 815.6* is question of interpretation for courts. *Nunn v. State of California (1984) 35 Cal. 3d 616, 624, 200 Cal. Rptr. 440, 677 P.2d 846*

Public entity liable for failure to perform mandatory duty of requiring all persons to whom building permit is issued to have workers' compensation insurance. *Morris v. County of Marin (1977) 18 Cal. 3d 901, 905-911, 136 Cal. Rptr. 251, 559 P.2d 606*

Public entity liable for failure to discharge mandatory duty for failure to release prisoner against whom charges had been dismissed. *Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 715-717, 117 Cal. Rptr. 241, 527 P.2d 865*

Public entity liable for failure to discharge mandatory duty in coercing welfare recipients to violate state laws, which resulted in their injury. *Ramos v. County of Madera (1971) 4 Cal. 3d 685, 695-696, 94 Cal. Rptr. 421, 484 P.2d 93*

Corp. Code § 25612, which requires Commissioner of Corporations to make certain findings before rescinding desist and refrain order relating to securities regulation, does not create mandatory duty that may be used to support action by security investors against Department of Corporations when Commissioner does not make explicit findings before rescinding order that had been imposed against broker. *Department of Corporations v. Superior Court (2007) 153 Cal. App. 4th 916, 931-934, 63 Cal. Rptr. 3d 624*

Plaintiffs failed to plead that reclamation district had mandatory duty to avoid leakage or similar failure of levees under their maintenance; Army Corps of Engineers' regulations were not mandatory and dealt with construction, not subsequent maintenance. *Tilton v. Reclamation Dist. No. 800 (2006) 142 Cal. App. 4th 848, 861-863, 48 Cal. Rptr. 3d 366*

County had mandatory duty under *Civ. Code §§ 3247* and *3251* to require posting of payment bond as condition to awarding public construction contract. *N.V. Heathorn, Inc. v. County of San Mateo (2005) 126 Cal. App. 4th 1526, 1532, 25 Cal. Rptr. 3d 400*

Public entity awarding public contract has mandatory duty under Bond and Undertaking Law to take reasonable steps to ensure financial solvency of sureties provided by its contractors by ensuring that proposed surety is admitted surety insurer or requiring two or more sufficient personal sureties or combination of sufficient personal sureties or admitted surety insurers, and by conducting proper investigation into status of alleged admitted surety by requiring surety to

submit county clerk's certificate showing that surety is admitted. *Walt Rankin & Assocs., Inc. v. City of Murrieta (2000) 84 Cal. App. 4th 605, 622, 624, 101 Cal. Rptr. 2d 48* ; *see Code Civ. Proc. §§ 995.310, 995.660(a)(3)*

City ordinance governing site and architectural review of applications for building permits was not mandatory duty for purposes of *Gov. Code § 815.6* due to level of discretion accompanying application of ordinance; ordinance was also intended primarily to protect scenic and aesthetic interests and not intended to protect light and air access or fire escape access for neighboring landowner's building. *Sutherland v. City of Fort Bragg (2000) 86 Cal. App. 4th 13, 20-23, 102 Cal. Rptr. 2d 736*

Coroner was liable for failure to perform mandatory duty to act with reasonable diligence in attempting to identify body placed in coroner's custody and then to attempt with reasonable diligence to locate decedent's family. *Davila v. County of Los Angeles (1996) 50 Cal. App. 4th 137, 143, 57 Cal. Rptr. 2d 651*

Dangerous Weapons' Control Law (*Penal Code § 12076*) imposed mandatory duty on State Department of Justice to examine its own records and those that it may obtain from State Department of Mental Health for purpose of determining whether prospective handgun purchaser is prohibited from purchasing firearms under specified code sections; plaintiff stated cause of action against Department for wrongful death of decedent who committed suicide through use of handgun obtained as result of Department's alleged failure to discharge mandatory duty to investigate for purpose of determining whether decedent was person who had received treatment at Lanterman-Petris-Short Act facility because he was danger to himself. *Braman v. State of California (1994) 28 Cal. App. 4th 344, 351-357, 33 Cal. Rptr. 2d 608*

Mandatory duty to investigate does not constituting mandatory duty to take action. *MacDonald v. State of California (1991) 230 Cal. App. 3d 319, 328-333, 281 Cal. Rptr. 317*

Health & Safety Code § 1799.107 (limitation of public entity's liability exposure for providing emergency services to public) does not impose mandatory duty on emergency rescue team that would support liability under *Gov. Code § 815.6*. *Zepeda v. City of Los Angeles (1990) 223 Cal. App. 3d 232, 236-237, 272 Cal. Rptr. 635*

Mandatory statutory duty to investigate did not impose mandatory duty to take action; breach of duty to investigate was not proximate cause of injuries flowing from failure to prevent certain conduct by object of investigation. *Brenneman v. State of California (1989) 208 Cal. App. 3d 812, 818, 256 Cal. Rptr. 363*

State not liable under *Gov. Code § 815.6* for negligent approval of community college district's construction project that failed to generate sufficient funds to fulfill plaintiffs' contract because applicable statute (*Educ. Code § 81836*) only obligates state chancellor to determine whether construction plans conform to established standards and is not intended to protect against college district's default on financing agreement. *First Interstate Bank v. State of California (1987) 197 Cal. App. 3d 627, 636-637, 243 Cal. Rptr. 8*

Department of Motor Vehicles (DMV) has mandatory duty to refuse to issue or renew driver's license if it has determined that person is unable to operate motor vehicle safely on highway; if DMV has already exercised discretion of *Veh. Code § 12806* and in so doing has decided that person is unable to operate motor vehicle safely on highway, DMV has mandatory duty not to issue or renew person's driver's license. *Johnson v. Mead (1987) 191 Cal. App. 3d 156, 160, 236 Cal. Rptr. 277*

Litigant seeking to plead breach of mandatory duty is required to allege violation of specifically identified provision or regulation; violation of police department's training, practices, and procedures is not sufficient. *Sullivan v. City of Sacramento (1987) 190 Cal. App. 3d 1070, 1080, 235 Cal. Rptr. 844*

Compulsory attendance laws (*Educ. Code §§ 48200-48324*), on which special relationship between school district and

students giving rise to initial duty to protect students is partly based, was not within contemplation of *Gov. Code § 815.6* because those laws are not designed to protect students against risk of any particular injury. *Rodriguez v. Inglewood Unified Sch. Dist. (1986) 186 Cal. App. 3d 707, 721, 230 Cal. Rptr. 823*

Liability under *Gov. Code § 815.6* is proper only if all three requisite elements are met: (1) enactment imposes mandatory, not discretionary, duty; (2) enactment intends to protect against kind of risk of injury suffered by individual asserting liability; and (3) breach of mandatory duty is proximate cause of injury suffered. *Posey v. State of California (1986) 180 Cal. App. 3d 836, 848, 225 Cal. Rptr. 830*

County's duty under *Penal Code § 13518*, to insure training of law enforcement officers in first aid, did not give rise to mandatory duty on officers' part to use such training and render emergency first aid to plaintiff found injured at scene of investigation. *Rose v. County of Plumas (1984) 152 Cal. App. 3d 999, 1007, 199 Cal. Rptr. 842*

Public entity's failure to comply with mandatory duty imposes liability only if injury suffered is type of injury protected against and failure is proximate cause of that injury. *State of California v. Superior Court (1984) 150 Cal. App. 3d 848, 854, 197 Cal. Rptr. 914*

Police officers did not have mandatory duty under *Penal Code § 647(f)* to take public inebriate into custody; therefore, police officer and city were not liable for injuries incurred after plaintiff was stopped by officer while in inebriated state, but not incarcerated. *Stout v. City of Porterville (1983) 148 Cal. App. 3d 937, 945-947, 196 Cal. Rptr. 301*

City's adoption of Uniform Fire Code did not create mandatory duty to comply with code, given specific section precluding code from creating public entity liability. *New Hampshire Ins. Co. v. City of Madera (1983) 144 Cal. App. 3d 298, 306-307, 192 Cal. Rptr. 548*

Parents of homicide victim claiming damages as result of delay in ascertaining identity of victim had no cause of action under *Gov. Code § 815.6* for failure of city officials to obtain and forward victim's dental records pursuant to former *Penal Code § 11114*, because Penal Code statute was enacted to assist coroner in identifying bodies rather than to benefit relatives of victims, no particular person or entity was charged with duty, and statute presented no clear or ascertainable standard for assessing breach of duty. *Shelton v. City of Westminster (1982) 138 Cal. App. 3d 610, 615-617, 188 Cal. Rptr. 205*

Statutory responsibility of Department of Rehabilitation to educate public officials concerning handicap accessibility requirements did not impose mandatory duty on department to inform city officials of requirements; public entities are presumed to have knowledge of legislative enactments. *State of California ex rel. Dep't of Rehab. v. Superior Court (1982) 137 Cal. App. 3d 282, 285-286, 187 Cal. Rptr. 1*

Public entity not liable for monetary damages for loss of custody and companionship of children even if it failed to perform mandatory duty of giving notice to parent of juvenile court proceedings. *Novoa v. County of Ventura (1982) 133 Cal. App. 3d 137, 145-146, 183 Cal. Rptr. 736*

State not liable for failure to review activities of local Levee Maintenance District because legislature did not intend State Reclamation Board to review all existing local district plans. *Galli v. State of California (1979) 98 Cal. App. 3d 662, 684-686, 159 Cal. Rptr. 721*

City liable under *Gov. Code § 815.6*, imposing liability on public entity for injury proximately resulting from its failure to discharge mandatory duty imposed by enactment designed to protect against risk of that particular kind of injury, for damages resulting from city's failure, in issuing building permit, to perform mandatory duty imposed on it by *Bus. & Prof. Code § 7031.5*, requiring county or city, as condition precedent to issuance of permit, to require that applicant file statement showing that applicant is licensed under *General Contractor Licensing Law. Young v. Inglewood (1979) 92*

Cal. App. 3d 437, 439-440, 154 Cal. Rptr. 724 ; *see also Health & Safety Code §§ 19825, 19826, 19827* (conditions precedent to issuance of building permits)

Failure of state official to perform mandatory duty to issue final decision as to plaintiff's right to welfare within certain time did not make state liable for damages because duty was not clearly designed to protect against type of injury suffered. *Williams v. State of California (1976) 62 Cal. App. 3d 960, 966-971, 133 Cal. Rptr. 539*

Public entity liable for failure to discharge mandatory duty in failing to suspend operating authority of bus company that was operating without insurance. *Elson v. Public Utilities Commission (1975) 51 Cal. App. 3d 577, 582-588, 124 Cal. Rptr. 305*

Public entity liable for failure to discharge mandatory duty for failing to make required entry of dismissal, which resulted in wrongful arrest; malicious prosecution immunity under *Gov. Code § 821.6* does not protect public entity from liability for failure to perform mandatory duty. *Bradford v. State of California (1973) 36 Cal. App. 3d 16, 19-20, 111 Cal. Rptr. 852*

Immunity of public employee is not defense to public entity's liability for failure to discharge mandatory duty. *Bradford v. State of California (1973) 36 Cal. App. 3d 16, 19-20, 111 Cal. Rptr. 852*

Public entity liable for failure to discharge mandatory duty in failing to enforce and comply with regulations governing foster homes, which allowed a minor to be injured by foster parents. *Elton v. County of Orange (1970) 3 Cal. App. 3d 1053, 1060, 84 Cal. Rptr. 27*

[v] Failure to Investigate Harm Already Incurred

Whether highway patrol officer's conduct, in stopping at scene of accident, but leaving before local police arrived and not obtaining identification of witness or person inflicting injury, was violation of officer's manual, and whether that violation was legal cause of injury for purposes of establishing presumption of negligence under *Evid. Code § 669*, was question for jury because plaintiff was dependent on officer, plaintiff detrimentally relied on officer, and officer's conduct prevented others from providing assistance to plaintiff. *Clemente v. State of California (1985) 40 Cal. 3d 202, 212-213, 219 Cal. Rptr. 445, 707 P.2d 818*

If public employee has undertaken to protect person from future physical harm, extension of that assumed duty to encompass investigation of cause and source of harm already incurred was unwarranted. *Williams v. State of California (1983) 34 Cal. 3d 18, 26, 192 Cal. Rptr. 233, 664 P.2d 137*

Failure of city police officers to secure identification of driver who caused accident, after they stopped to investigate and aid victims of accident, was not actionable because detriment suffered by victim occurred before officers arrived; no special relationship existed to give rise to duty to protect victim from effects of prior events. *Winkelman v. City of Sunnyvale (1976) 59 Cal. App. 3d 509, 512, 130 Cal. Rptr. 690*

[vi] Motor Vehicle Accidents

City subject to liability under *Veh. Code § 17001* for injuries to third persons arising out of vehicle collision between third persons' vehicle and vehicle being pursued by police officers for traffic violations; city not immune from liability under *Gov. Code § 845.8*. *City of San Jose v. Superior Court (1985) 166 Cal. App. 3d 695, 698, 701, 212 Cal. Rptr. 661*

Public entity immune from liability under *Gov. Code § 845.8* for police officer's conduct in leaving arrested drunk

driver unattended in police car while motor was running, resulting in injuries to bystander caused by arrestee escaping in unattended police car. *Duarte v. City of San Jose (1980) 100 Cal. App. 3d 648, 654, 657, 161 Cal. Rptr. 140* ; *but see Ladd v. County of San Mateo (1996) 12 Cal. 4th 913, 925-926, 50 Cal. Rptr. 2d 309, 911 P.2d 496* (disapproving conclusion in *Duarte* that officer's conduct created cause of action against city under *Veh. Code § 17001*)

[vii] Negligence Based on Common Law Principles

Conduct of patrol officer in situation of dependency resulting in detrimental reliance can give rise to duty of care; officer may also have duty to refrain from conduct that prevents others from giving assistance. *Clemente v. State of California (1985) 40 Cal. 3d 202, 212-213, 219 Cal. Rptr. 445, 707 P.2d 818*

Public entity held to same standard of care as private person or organization if, through its agents, it voluntarily assumes protective duty toward certain member of public and undertakes action on behalf of that member, thereby inducing reliance. *Williams v. State of California (1983) 34 Cal. 3d 18, 24, 192 Cal. Rptr. 233, 664 P.2d 137* ; *City of Santee v. County of San Diego (1989) 211 Cal. App. 3d 1006, 1016, 259 Cal. Rptr. 757* ; *Mann v. State of California (1977) 70 Cal. App. 3d 773, 778, 139 Cal. Rptr. 82*

City and its police officers were not liable for injuries to plaintiff from assault in laundromat that police had under surveillance, because plaintiff was unaware of officers' presence and did not rely on their protection, and officers' conduct did not alter risk that would have existed in their absence. *Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 206-209, 185 Cal. Rptr. 252, 649 P.2d 894*

Public entity liable for negligence because police officer investigating accident directed plaintiff to follow him into middle of intersection where plaintiff was hit by other car. *McCorkle v. City of Los Angeles (1969) 70 Cal. 2d 252, 261, 74 Cal. Rptr. 389, 449 P.2d 453*

State's duty to enforce regulations designed to promote safety does not transform state into insurer of safety; state, as licenser of day care facilities, did not have special relationship to children served by those facilities. *MacDonald v. State of California (1991) 230 Cal. App. 3d 319, 333-334, 281 Cal. Rptr. 317*

Complaint by citizens seeking to develop their property, alleging breach of special relationship by local land use regulators, was subject to demurrer because complaint failed to allege actions taken by city demonstrating that it had assumed protective duty toward plaintiffs that would have created special relationship imposing tort duty on city, and offered no authority for existence of special relationship between local land use regulators and citizens. *Smith v. City & County of San Francisco (1990) 225 Cal. App. 3d 38, 50-52, 275 Cal. Rptr. 17*

Law enforcement officer's duty to protect citizenry is general duty owed to public as whole, and officer does not assume any greater obligation to others individually; absent special relationship creating special duty, victim of crime that police might have prevented was unable to recover; officers responding to burglar alarm at business premises and proceeding to investigate did not create requisite special relationship. *Von Batsch v. American Dist. Tel. Co. (1985) 175 Cal. App. 3d 1111, 1121-1125, 222 Cal. Rptr. 239*

City was collaterally estopped from relitigating issue of whether or not police officer, its former employee, had raped plaintiff because officer's criminal trial, involving serious felony, provided him with every motive to make as vigorous and effective defense as possible, and city was in privity with people as prosecutors. *Miller v. Superior Court (1985) 168 Cal. App. 3d 376, 382-384, 214 Cal. Rptr. 125*

Although county coroner ordinarily has no duty to notify decedent's next of kin, failure to so notify possibly gives rise to cause of action for negligent infliction of emotional distress if county voluntarily assumes duty to assist in locating

victim and then fails to act in careful and reasonably diligent manner in carrying out assumed duty. *Bock v. County of Los Angeles (1983) 150 Cal. App. 3d 65, 72-73, 197 Cal. Rptr. 470*

Allegation that police had responded numerous times to victim's requests for assistance and had previously arrested victim's husband did not indicate that special relationship existed between victim and police so as to give rise to police liability for failure to respond to victim's request for assistance on night she was murdered. *Hartzler v. City of San Jose (1975) 46 Cal. App. 3d 6, 10, 120 Cal. Rptr. 5*

County liable for deputy sheriff's failure to warn victim that prisoner, who had threatened victim's life, had been released, because sheriff had promised to give warning. *Morgan v. County of Yuba (1964) 230 Cal. App. 2d 938, 944-945, 41 Cal. Rptr. 508*

[viii] Nuisance

Public entity liable for maintaining nuisance as defined in *Civ. Code § 3479*. *Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 931-938, 101 Cal. Rptr. 568, 496 P.2d 480*

Public entity liable for maintaining fire hazard that was nuisance. *Vedder v. Imperial County (1974) 36 Cal. App. 3d 654, 661, 111 Cal. Rptr. 728*

[ix] Promise Involved

Liability of public entity for failure to inform threatened victim of release from jail by person who threatened her after promise to do so. *Morgan v. County of Yuba (1964) 230 Cal. App. 2d 938, 942-945, 41 Cal. Rptr. 508*

[x] Respondeat Superior

City and shipowner were jointly and severally liable to third party for negligence of pilot who was furnished by city at shipowner's request under doctrine of respondeat superior. Societa per *Azioni de Navigazione Italia v. City of Los Angeles (1982) 31 Cal. 3d 446, 461-462, 183 Cal. Rptr. 51, 645 P.2d 102*

City's port tariff-ordinance allowing city to escape respondeat superior liability for negligence of harbor pilots and to secure full indemnification from shipowners was void because in conflict with Tort Claims Act (*Gov. Code § 810 et seq.*). Societa per *Azioni de Navigazione Italia v. City of Los Angeles (1982) 31 Cal. 3d 446, 462-465, 183 Cal. Rptr. 51, 645 P.2d 102*

Public employee was acting within scope of employment so as to make public entity liable when issuing statement explaining why employee released funds from employee's official custody. *Sanborn v. Chronicle Publishing Co. (1976) 18 Cal. 3d 406, 411-412, 134 Cal. Rptr. 402, 556 P.2d 764*

Off-duty police officer who was socializing with other off-duty police officers and whose service gun discharged when he was moving it from his waistband, wounding one of other officers in front of that officer's home, was not acting in scope of employment at time of injury to other officer, precluding city's liability. *Henriksen v. City of Rialto (1993) 20 Cal. App. 4th 1612, 1617-1622, 25 Cal. Rptr. 2d 308*

Public entity (county) as subject to civil liability under *Gov. Code § 815.2(a)* for wrongful acts committed by deputy sheriff while on duty; because employee's wrongful use of police authority was incidental and integral to his official duties, actions were within scope of employment, although illegal and unauthorized by employer. *White v. County of*

Orange (1985) 166 Cal. App. 3d 566, 571-572, 212 Cal. Rptr. 493

Rape committed by janitor as too far out of ambit of janitor's duties to extend liability to school employing janitor, although act was committed on premises and janitor was engaged in normal duties immediately prior and subsequent to act. *Alma W. v. Oakland Unified Sch. Dist. (1981) 123 Cal. App. 3d 133, 176 Cal. Rptr. 287*

[xi] School District

School district was liable for negligent supervision of pupils. *Dailey v. Los Angeles Unified Sch. Dist. (1970) 2 Cal. 3d 741, 747-751, 87 Cal. Rptr. 376, 470 P.2d 360* ; *Biggers v. Sacramento City Unified Sch. Dist. (1972) 25 Cal. App. 3d 269, 273-275, 101 Cal. Rptr. 706*

State not liable for acts or omissions of community college district, although created by statute to discharge state's constitutional duty to provide public education, unless statute authorizes district to act on behalf of state, or unless state and district have entered into joint powers agreement. *First Interstate Bank v. State of California (1987) 197 Cal. App. 3d 627, 243 Cal. Rptr. 8* (state and state community college board not liable for district's default on financing agreement)

School district was not immune from liability under "field trip immunity" because student required to attend activity away from school. *Castro v. Los Angeles Bd. of Educ. (1976) 54 Cal. App. 3d 232, 235-237, 126 Cal. Rptr. 537*

[4] Liability for Dangerous Conditions of Public Property

[a] Conditions Creating Liability

[i] Adjacent Property

Location of bus stop may constitute dangerous condition of public property if bus patrons must cross dangerous crosswalk on adjacent property to reach bus stop, assuming other elements for imposing liability under *Gov. Code § 835* have been met. *Bonanno v. Central Contra Costa Transit Auth. (2003) 30 Cal. 4th 139, 144, 132 Cal. Rptr. 2d 341, 65 P.3d 807*

Public entity liable for dangerous condition of its property even if public property is only dangerous because of condition on adjacent private property. *Carson v. Facilities Dev. Co. (1984) 36 Cal. 3d 830, 841, 206 Cal. Rptr. 136, 686 P.2d 656*

Natural condition immunity of *Gov. Code § 831.2* is not applicable to injury to adjacent property or to persons on adjacent property. *Milligan v. City of Laguna Beach (1983) 34 Cal. 3d 829, 834, 835, 196 Cal. Rptr. 38, 670 P.2d 1121*

Public entity that allows sporting event to take place on its property has no legal duty to provide distraction barrier to prevent passing motorist on adjacent public street from seeing or hearing and is not liable for injuries caused by inattentive motorist who becomes involved in traffic accident with bicyclist using street. *Lompoc Unified Sch. Dist. v. Superior Court (1993) 20 Cal. App. 4th 1688, 1691, 1694-1698, 26 Cal. Rptr. 2d 122*

Public entity was not liable for dangerous cliff because it did not own cliff and its property was not adjacent to cliff. *Blakley v. State of California (1980) 108 Cal. App. 3d 971, 167 Cal. Rptr. 1*

State was not liable for motorist's injuries sustained when car went off road into ravine owned by state, on theory that

adjacent county-owned road was public property of state, because state only had easement on road and therefore had no control over placement of barrier to prevent such mishaps. *Mamola v. State of California ex rel. Dept. of Transportation (1979) 94 Cal. App. 3d 781, 787-789, 156 Cal. Rptr. 614*

Question of fact whether state owed duty to users of county-owned road to barricade adjacent state-owned ravine or otherwise protect against risk of car going off road into ravine. *Mamola v. State of California ex rel. Dept. of Transportation (1979) 94 Cal. App. 3d 781, 789-792, 156 Cal. Rptr. 614*

Public entity liable for dangerous condition of its property even if public property is only dangerous because of condition on adjacent private property. *Jordan v. City of Long Beach (1971) 17 Cal. App. 3d 878, 881-883, 95 Cal. Rptr. 246*

Cause of action stated against public entity for dangerous condition of public property caused by conditions of adjacent property because accident happened on adjacent property. *Holmes v. City of Oakland (1968) 260 Cal. App. 2d 378, 389-391, 67 Cal. Rptr. 197*

[ii] Streets, Highways, and Sidewalks

Proof of visual obstruction at publicly owned intersection that rendered intersection dangerous does not require expert testimony. *Carson v. Facilities Dev. Co. (1984) 36 Cal. 3d 830, 845, 206 Cal. Rptr. 136, 686 P.2d 656*

Public entity potentially subject to liability under *Gov. Code § 835* for failure to erect median highway barrier to protect against cross-median accidents. *Ducey v. Argo Sales Co. (1979) 25 Cal. 3d 707, 715-718, 159 Cal. Rptr. 835, 602 P.2d 755*

Cause of action stated against public entity based on allegations that arrangement of signals at intersection was such that pedestrian would be misled into thinking it was safe to cross. *Teall v. Cudahy (1963) 60 Cal. 2d 431, 433-435, 34 Cal. Rptr. 869, 386 P.2d 493*

Ridge between slabs of sidewalk no more than 1/2 inch high was minor or trivial and thus not dangerous as matter of law. *Barrett v. Claremont (1953) 41 Cal. 2d 70, 72-75, 256 P.2d 977*

Defect in sidewalk that was concealed hole about two feet deep into which plaintiff fell was dangerous condition of public property. *Fackrell v. San Diego (1945) 26 Cal. 2d 196, 206-208, 157 P.2d 625*

Nonsuit appropriate if roadway marking whose absence allegedly caused accident was type of roadway marking referred to in *Gov. Code § 830.4*, indicating its absence was not dangerous condition; case governed by *Gov. Code § 830.4* rather than *Gov. Code § 830.8*. *Frazier v. County of Sonoma (1990) 218 Cal. App. 3d 454, 459-461, 267 Cal. Rptr. 39*

Gov. Code § 830.8 is applicable to all warning signs and devices conforming to uniform standards promulgated by Department of Transportation, not merely to specific signs explicitly "described in ... *Vehicle Code." Kessler v. State of California (1988) 206 Cal. App. 3d 317, 321-323, 253 Cal. Rptr. 537*

Quarter-inch length of steel reinforcement rod protruding from concrete parking abutment, viewed in context of other factors such as visibility, did not constitute trivial defect as matter of law. *Dolquist v. City of Bellflower (1987) 196 Cal. App. 3d 261, 266-271, 241 Cal. Rptr. 706*

Improper channelization of freeway and lack of devices to properly warn driver around abutment in middle of freeway,

together with blinding sun at top of incline as driver approached abutment, was dangerous condition for which public entity was liable. *Erfurt v. State of California (1983) 141 Cal. App. 3d 837, 843, 190 Cal. Rptr. 569*

Irregular break in sidewalk that created difference in elevation of about one inch was not minor or trivial as matter of law. *Barone v. San Jose (1978) 79 Cal. App. 3d 284, 291, 144 Cal. Rptr. 836*

Depression in sidewalk, which had maximum depth of 3/4 inch, was minor or trivial and thus not dangerous condition as matter of law. *Fielder v. Glendale (1977) 71 Cal. App. 3d 719, 732-733, 139 Cal. Rptr. 876*

Public entity liable if it fails to post signs in circumstances constituting trap to motorist. *Anderson v. Thousand Oaks (1976) 65 Cal. App. 3d 82, 93, 135 Cal. Rptr. 127*

Evidence was sufficient to support finding that bodysurfing area was dangerous condition and no warning was given by signs. *Buchanan v. City of Newport Beach (1975) 50 Cal. App. 3d 221, 227-228, 123 Cal. Rptr. 338*

Public entity was liable for injuries incurred in accident caused by obscuring of stop sign by shrubbery on private property, which created dangerous condition. *De La Rosa v. City of San Bernardino (1971) 16 Cal. App. 3d 739, 745-746, 94 Cal. Rptr. 175*

Public entity liable for inadequate warning of slide on road because signs were not in conformity with standards for such signs. *Briggs v. California (1971) 14 Cal. App. 3d 489, 497-498, 92 Cal. Rptr. 433*

Evidence was sufficient to support finding that intersection was dangerous condition because trees obscured view at intersection and stop sign was placed in unanticipated position. *Bakity v. Riverside County (1970) 12 Cal. App. 3d 24, 29-31, 90 Cal. Rptr. 541*

Cause of action for maintaining public property in dangerous condition was stated because plaintiff alleged that public entity allowed and encouraged driving of golf carts on sidewalks in violation of state statute and that plaintiff was injured by cart negligently driven on sidewalk. *Quelvog v. City of Long Beach (970) 6 Cal. App. 3d 584, 589-592, 86 Cal. Rptr. 127*

Public entity liable for injuries caused by explosion if it controlled sidewalk over dangerous gas tank. *Hoover v. City of Fresno (1969) 272 Cal. App. 2d 7, 13-15, 77 Cal. Rptr. 146*

Public entity liable for failure to provide adequate sign or signal to warn of dangerous condition of streets. *Hilts v. County of Solano (1968) 71 Cal. Rptr. 275*

Public entity liable for injuries to pedestrian if low curb on steep hill where parking was at right angles created dangerous condition. *Curreri v. City & County of San Francisco (1968) 262 Cal. App. 2d 603, 611-614, 69 Cal. Rptr. 20*

Cause of action stated against public entity for dangerous condition of railroad right of way near school. *Holmes v. City of Oakland (1968) 260 Cal. App. 2d 378, 383-389, 67 Cal. Rptr. 197*

Public entity liable for dangerous condition of intersection because promontory of land obscured view of vehicles coming from other direction. *Feingold v. County of Los Angeles (1967) 254 Cal. App. 2d 622, 625-626, 62 Cal. Rptr. 396*

Public entity liable for dangerous condition of public property because dangerous condition of pedestrian subway caused pedestrians to use street where pedestrians and drivers both thought they had right of way. *Gardner v. San Jose*

(1967) 248 Cal. App. 2d 798, 801-805, 57 Cal. Rptr. 176

Irrigation district liable for condition of unpaved road unless it is used for access to recreational areas. *Hernandez v. Imperial Irrigation Dist. (1967) 248 Cal. App. 2d 625, 626-627, 56 Cal. Rptr. 811*

Cause of action stated against public entity based on allegations that combination of factors (including too narrow lanes, inadequate dividers, inadequate banking, and too high speed limit) made bridge dangerous. *Dahlquist v. California (1966) 243 Cal. App. 2d 208, 210-214, 52 Cal. Rptr. 324*

Misaligned slabs of sidewalk creating 1/2 to one inch difference in height was not minor or trivial as matter of law and thus was issue for jury. *Rodriguez v. Los Angeles (1963) 215 Cal. App. 2d 463, 467-470, 30 Cal. Rptr. 180*

Height differential of 1/2 to 5/8 inch was not minor or trivial as matter of law because of other factors present, including careful plaintiff and dusk conditions. *Johnson v. Palo Alto (1962) 199 Cal. App. 2d 148, 18 Cal. Rptr. 48*

Clump of ice plant five inches high and prongs protruding from adjacent fence were not minor or trivial defect as matter of law. *Rodriguez v. Los Angeles (1959) 171 Cal. App. 2d 761, 771, 341 P.2d 410*

Broken piece of sidewalk that caused elevation differential of one or two inches was not minor or trivial as matter of law. *Gentekos v. City & County of San Francisco (1958) 163 Cal. App. 2d 691, 697, 329 P.2d 943*

[iii] Third-Party Conduct

Cause of action stated against public entity based on dangerous condition of public property because complaint alleged community college district maintained property in manner that increased risk of criminal activity, and failed to warn student of known danger posed by criminal assaults on campus. *Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 815, 205 Cal. Rptr. 842, 685 P.2d 1193*

Community college district had duty to exercise due care to protect, including duty to warn, its students against reasonably foreseeable assaults on campus. *Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 804, 205 Cal. Rptr. 842, 685 P.2d 1193*

Whether or not given set of facts and circumstances creates dangerous condition is question of fact and may be resolved as question of law only if reasonable minds can come to but one conclusion. *Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 810, 205 Cal. Rptr. 842, 685 P.2d 1193*

Gov. Code § 835 is not statutory basis for liability if allegations relate only to conditions of persons on property and do not include physical defects or conditions of property that increase risk of crime. *Rodriguez v. Inglewood Unified Sch. Dist. (1986) 186 Cal. App. 3d 707, 718-720, 230 Cal. Rptr. 823*

Public entity permitted to assert plaintiff's negligence as defense, but that negligence was not determinative of existence of dangerous condition; "used with due care" in *Gov. Code § 830(a)* doe not necessarily include obeying traffic laws. *Alexander v. State of California ex rel. Dep't of Transp. (1984) 159 Cal. App. 3d 890, 205 Cal. Rptr. 758* (fact that plaintiff was speeding at time of accident did not preclude dangerous condition liability)

Cause of action was not stated against public entity under *Gov. Code § 835* for injuries caused by criminal assault because no special relationship between plaintiff and defendant was alleged, and plaintiff was found not to be using property either voluntarily or in manner in which it was reasonably foreseeable that plaintiff would use it. *Branch v. State of California ex rel. Dep't of Transp. (1984) 159 Cal. App. 3d 340, 345, 205 Cal. Rptr. 482*

Mere disrepair of median barrier on high speed, heavily traveled freeway, function of which barrier was to protect motorists on freeway from intrusion into their lanes of vehicles crossing median out of control, whether by reason of mechanical or tire failures or other causes unrelated to negligence or by reason of negligence of their drivers and owners, was dangerous condition of public property; condition of property is dangerous if it creates substantial risk of harm when used with due care by public generally, as distinguished from particular person charged as concurrent tortfeasor. *Morris v. State of California (1979) 89 Cal. App. 3d 962, 965-966, 153 Cal. Rptr. 117*

Cause of action stated against public entity for dangerous condition for failure to adequately light parking lot to prevent criminal conduct because entity was on notice of past criminal conduct. *Slapin v. Los Angeles Int'l Airport (1976) 65 Cal. App. 3d 484, 488-491, 135 Cal. Rptr. 296*

Plaintiff not required to establish that public property was being used with due care when accident occurred, only that property was dangerous when being used with due care. *Murrell v. State of California ex rel. Dep't of Pub. Works (1975) 47 Cal. App. 3d 264, 267, 120 Cal. Rptr. 812*

Intervening or concurrent negligence of third party does not preclude liability of public entity for dangerous condition. *Bakity v. County of Riverside (1970) 12 Cal. App. 3d 24, 32, 90 Cal. Rptr. 541*

Public entity's liability for dangerous condition is not affected by negligence of third party if such negligence was reasonably foreseeable. *Kechter v. Downey (1968) 265 Cal. App. 2d 877, 880, 71 Cal. Rptr. 844*

Plaintiff not required to establish that driver with whom plaintiff was riding was not negligent if plaintiff can establish dangerous condition to persons using due care. *Callahan v. City & County of San Francisco (1967) 249 Cal. App. 2d 696, 702-704, 57 Cal. Rptr. 639*

[iv] Voluntary Assumption of Duty

City not immune for creation of dangerous condition if city voluntarily assumed duty to provide lifeguard services at unimproved beach and then provided inadequate service and failed to warn of riptide condition. *Gonzales v. City of San Diego (1982) 130 Cal. App. 3d 882, 889, 182 Cal. Rptr. 73*

[b] Conditions Not Creating Liability

Public entity not liable for failure to warn of possibility of criminal conduct on public property. *Hayes v. State of California (1974) 11 Cal. 3d 469, 471-473, 113 Cal. Rptr. 599, 521 P.2d 855* ; *but see Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 815, 205 Cal. Rptr. 842, 685 P.2d 1193*

Condition of street was not dangerous because no reasonable person could believe that lines on street were pedestrian crosswalk. *Pfeifer v. County of San Joaquin (1967) 67 Cal. 2d 177, 182-184, 60 Cal. Rptr. 493, 430 P.2d 51*

Chain link fence around public school perimeter was not dangerous condition rendering school district liable for injury sustained when 9-year-old boy propped his bicycle handlebar through fence, stood on top of bicycle in order to reach oranges growing on tree on adjacent property, and injured his arm on metal tines at top of fence when he fell; danger of using bicycle as ladder to reach over spiked fence was reasonably obvious even to child of plaintiff's age, and plaintiff was not using fence in manner in which it was reasonably foreseeable that it would be used. *Biscotti v. Yuba City Unified School Dist. (2007) 158 Cal. App. 4th 554, 560-561, 69 Cal. Rptr. 3d 825*

Bridge district could not, as matter of law, be liable for suicide of decedent, who climbed over three-and-a-half foot

railing and jumped off Golden Gate Bridge, because persons using bridge to kill themselves were not, by definition, using bridge with due care. *Milligan v. Golden Gate Bridge Highway & Transp. Dist. (2004) 120 Cal. App. 4th 1, 7, 15 Cal. Rptr. 3d 25*

Neither increase in volume or speed of traffic after street was widened, nor location of facilities such as bus stop, park, or school near busy intersection, rendered street dangerous condition of public property, at least in absence of other allegations concerning physical condition of street that made it unsafe to cross when motorists and pedestrians were exercising due care. *Brenner v. City of El Cajon (2003) 113 Cal. App. 4th 434, 440-441, 6 Cal. Rptr. 3d 316*

City was not liable for injury at crosswalk even though streetlight was inoperative, because city had no duty to provide any lighting, and plaintiff knew light was inoperative. *Plattner v. City of Riverside (1999) 69 Cal. App. 4th 1441, 1446, 82 Cal. Rptr. 2d 211*

City was immune from liability under *Gov. Code § 830.4* for injuries sustained when two vehicles collided at intersection after an earlier accident knocked down stop sign at intersection, at least if alleged dangerous condition was merely absence of stop sign. *City of South Lake Tahoe v. Superior Court (1998) 62 Cal. App. 4th 971, 978-980, 73 Cal. Rptr. 2d 146*

Public entity was not liable for actions of other party because relationship between that party and public entity was lessor-lessee and not employer-independent contractor. *Bostrom v. County of San Bernardino (1995) 35 Cal. App. 4th 1654, 1665-1671, 42 Cal. Rptr. 2d 669*

Canal separated from neighboring residential community by eight-foot-high sound wall of stonemasonry construction was not condition creating liability in that it was not reasonably foreseeable that children playing in area would be able to scale wall. *Dominguez v. Solano Irrigation Dist. (1991) 228 Cal. App. 3d 1098, 1103-1105, 279 Cal. Rptr. 470*

Public entity not liable because undisputed facts showed that alleged improper lighting, patrolling, maintenance, and insufficient visibility at state-owned rest stop was not proximate cause of plaintiff's assault. *Constance B. v. State of California (1986) 178 Cal. App. 3d 200, 211, 223 Cal. Rptr. 645*

Public entity not liable unless some physical condition of public property is contributing cause of plaintiff's injury; criminal acts of third party are insufficient to state cause of action under *Gov. Code § 835* (dangerous condition of public property). *Gonzales v. City of San Diego (1984) 156 Cal. App. 3d 256, 258-259, 202 Cal. Rptr. 634*

Neither blind nature of intersection, amount of traffic on street, nor downhill grade of through street was dangerous condition. *Mittenhuber v. City of Redondo Beach (1983) 142 Cal. App. 3d 1, 5-7, 190 Cal. Rptr. 694*

Placement of stop signs on one street at intersection was not dangerous condition due to speed of traffic on other street increasing as result of stop signs. *Mittenhuber v. City of Redondo Beach (1983) 142 Cal. App. 3d 1, 8-11, 190 Cal. Rptr. 694*

Public entity not liable if property is dangerous only when used without due care. *Gray v. America W. Airlines, Inc. (1989) 209 Cal. App. 3d 76, 85, 256 Cal. Rptr. 877* ; *Fredette v. City of Long Beach (1986) 187 Cal. App. 3d 122, 130-132, 231 Cal. Rptr. 598* ; *Fuller v. State of California (1975) 51 Cal. App. 3d 926, 939-940, 125 Cal. Rptr. 586*

City not liable for flood damage to property because flood control system, whether or not inadequate, reduced natural flooding of plaintiff's property and therefore any negligence by city in maintaining drain and ditch did not cause plaintiff's damages. *Tri-Chem, Inc. v. Los Angeles County Flood Control Dist. (1976) 60 Cal. App. 3d 306, 315, 132 Cal. Rptr. 142*

Public property was not in dangerous condition because parking lot was unlighted and third party assaulted plaintiff in lot. *Sykes v. County of Marin (1974) 43 Cal. App. 3d 158, 160-164, 117 Cal. Rptr. 466*

Dangerous condition not established if all reasonable precautions were taken to secure work bench and public entity had no notice that bench was placed on end in dangerous position. *Van Kempen v. Hayward Area Park, Recreation & Park Dist. (1972) 23 Cal. App. 3d 822, 826-827, 100 Cal. Rptr. 498*

Dangerous condition not established with regard to design of intersection if no similar accident had ever taken place and accident was caused by excessive speed. *Callahan v. City & County of San Francisco (1971) 15 Cal. App. 3d 374, 379-380, 93 Cal. Rptr. 122*

Public entity not liable for dangerous condition if crosswalk was properly marked and injury was caused by driver's violation of law. *Moritz v. City of Santa Cruz (1970) 8 Cal. App. 3d 573, 575-577, 87 Cal. Rptr. 675*

Public entity not liable for icy condition of bridge because bridge had never been icy before and public entity was not on notice of condition. *Clarke v. Michals (1970) 4 Cal. App. 3d 364, 372, 84 Cal. Rptr. 507*

[c] Constructive Notice

Constructive notice imputable to public entity if obvious danger existed for adequate period of time before accident to have permitted entity in exercise of due care to have discovered and remedied situation; whether there was adequate time to remedy situation is fact question. *Carson v. Facilities Dev. Co. (1984) 36 Cal. 3d 830, 842-843, 206 Cal. Rptr. 136, 686 P.2d 656*

Public entity had constructive notice of dangerous condition of public property because inspection would have disclosed defect and public entity knew where and when excavation would take place and that it would be unsafe if done improperly. *Stanford v. City of Ontario (1972) 6 Cal. 3d 870, 882-884, 101 Cal. Rptr. 97, 495 P.2d 425*

In action against driver of car and city, arising from traffic accident, expert testimony that city traffic engineer should have known intersection in question was dangerous was relevant to issue of constructive notice under *Gov. Code § 835*.(b); trial court committed reversible error by excluding evidence, which resulted in nonsuit for defendant. *Martinez v. City of Poway (1993) 12 Cal. App. 4th 425, 433-434, 15 Cal. Rptr. 2d 644*

In action against state by pedestrian struck by motorist in allegedly hazardous intersection, nearby resident, who had notified state of his concern about safety of intersection, was properly permitted to testify regarding previous instances of "burning rubber," "fender-benders," "near misses," and "screeching tires" at intersection; testimony was admissible only to show that state had notice of condition of intersection. *Genrich v. State of California (1988) 202 Cal. App. 3d 221, 231-233, 248 Cal. Rptr. 303*

In action against state by pedestrian struck by motorist in allegedly hazardous intersection, fact that numerous accidents had occurred near intersection was insufficient to show state had notice of hazardous condition. *Genrich v. State of California (1988) 202 Cal. App. 3d 221, 228, 248 Cal. Rptr. 303*

Constructive notice was shown by long continued existence of dangerous or defective condition; whether condition existed for sufficient time to give public agency constructive notice was question of fact for jury. *Erfurt v. State of California (1983) 141 Cal. App. 3d 837, 845, 190 Cal. Rptr. 569*

Finding of constructive notice of dangerous condition was proper; although condition existed for only 20 days of each year due to location of sun, condition had been in existence for over 10 years. *Erfurt v. State of California (1983) 141*

Cal. App. 3d 837, 846, 190 Cal. Rptr. 569

Evidence was sufficient to show that state had constructive notice of dangerous condition (improper construction of state fence so that cows could enter on freeway) and should have discovered and repaired condition because condition existed for long period and was of such an obvious nature that state should have discovered it in exercise of due care. *Curtis v. State of California (1982) 128 Cal. App. 3d 668, 693-694, 180 Cal. Rptr. 843*

Evidence was sufficient to show state had constructive notice of dangerous condition (icy highway), failed to make required inspections, and failed to take requisite precautionary measures. *Straughter v. State of California (1979) 89 Cal. App. 3d 102, 110-112, 152 Cal. Rptr. 147*

If unsafeness of curve was apparent to anybody who attempted to negotiate it at speed limit, public entity had constructive notice of defect. *Anderson v. City of Thousand Oaks (1976) 65 Cal. App. 3d 82, 91-92, 135 Cal. Rptr. 127*

Evidence was sufficient to support finding that public entity had constructive notice of dangerous slide on highway; slides had been occurring for two weeks, and public entity had posted signs. *Briggs v. State of California (1971) 14 Cal. App. 3d 489, 494-498, 92 Cal. Rptr. 433*

Public entity was not liable for dangerous condition because dangerous condition was not obvious and there was no evidence that it had existed any particular time before accident. *State v. Superior Court of San Mateo County (1968) 263 Cal. App. 2d 396, 399-401, 69 Cal. Rptr. 683*

Public entity was not liable for condition in road because it had inspected road several hours earlier and determined that condition was not dangerous. *Drummond v. City of Redondo Beach (1967) 255 Cal. App. 2d 715, 719-720, 63 Cal. Rptr. 497*

Plaintiff's evidence was not sufficient to establish that public entity had constructive knowledge of defect because no evidence as to how long defect had existed before injury. *Strongman v. County of Kern (1967) 255 Cal. App. 2d 308, 314-316, 62 Cal. Rptr. 908*

[d] Control or Ownership

District was not controlling culvert carrying creek water beneath residential home for purposes of liability under *Gov. Code § 835*; although district assumed maintenance responsibility in connection with its channel-clearing program for portion of creek running through culvert, that portion did not include culvert at issue; control was not established by district's inspections to implement flood control objectives, or its requirement of preapproving all work done on the culvert. *Chatman v. Alameda County Flood Control & Water Conservation Dist. (1986) 183 Cal. App. 3d 424, 430-431, 228 Cal. Rptr. 257*

[e] Defenses

[i] Design Immunity

If design immunity is applicable, public entity is still liable for failure to warn of dangerous condition. *Cameron v. State of California (1972) 7 Cal. 3d 318, 327-329, 102 Cal. Rptr. 305, 497 P.2d 777*

Design immunity not applicable if approved design did not include superelevation that made curve dangerous. *Cameron v. State (1972) 7 Cal. 3d 318, 323-326, 102 Cal. Rptr. 305, 323-326, 497 P.2d 777*

Increase in traffic volume, increase in posted speed limit, and nine cross-median accidents along 24-mile freeway over 21 months did not constitute changed conditions sufficient to require median barrier and overcome design immunity. *Wyckoff v. State of California (2001) 90 Cal. App. 4th 45, 58-62, 108 Cal. Rptr. 2d 198*

State may assert design immunity if suit alleges that injury was caused by setting roadway speed limit too high, so long as speed limit is set in accordance with some plan and adopted as matter of discretion by employee with authority to do so. *Fuller v. Department of Transp. (2001) 89 Cal. App. 4th 1109, 1115, 107 Cal. Rptr. 2d 823*

Substantial evidence supported Bridge District's decision not to include median barrier as part of project to replace deteriorating roadway on bridge. *Sutton v. Golden Gate Bridge, Highway & Transp. Dist. (1998) 68 Cal. App. 4th 1149, 1159-1162, 81 Cal. Rptr. 2d 155*

Changed physical conditions necessary for loss of design immunity. *Sutton v. Golden Gate Bridge, Highway & Transp. Dist. (1998) 68 Cal. App. 4th 1149, 1163-1164, 81 Cal. Rptr. 2d 155*

In personal injury action against state arising from automobile collision into DMV building, evidence of vehicle collisions with other DMV buildings was relevant to issue of immunity under *Gov. Code § 830.6* with respect to state's knowledge of unusual risk associated with DMV parking lots vis-a-vis danger to adjacent buildings; trial court's denial of plaintiff's request for discovery order on that point was reversible error. *Morfin v. State of California (1993) 12 Cal. App. 4th 812, 816-817, 15 Cal. Rptr. 2d 861*

Employee who prepares plan or design was able to approve design; assigned signal operator has discretionary authority to approve timing sequence of traffic lights at intersection when preliminary plans are formulated in accordance with basic guidelines. *Uyeno v. State of California (1991) 234 Cal. App. 3d 1371, 1378-1380, 286 Cal. Rptr. 328*

County was immune from liability for placing limit line where visibility of cross traffic at intersection was totally obscured, because substantial evidence showed that national, state, and county standards do not require any sight distance from limit line; "trap" exception to immunity if entity negligently fails to warn of dangerous condition was inapplicable absent claim that warning signs at intersection were inadequate. *Hefner v. County of Sacramento (1988) 197 Cal. App. 3d 1007, 1014-1017, 1018-1019, 243 Cal. Rptr. 291*

Design immunity is applicable even if evidence is conflicting, so long as evidence is substantial (that is, evidence that reasonably inspires confidence or is of solid value). *Ramirez v. City of Redondo Beach (1987) 192 Cal. App. 3d 515, 526, 237 Cal. Rptr. 505* ; *Muffett v. Royster (1983) 147 Cal. App. 3d 289, 306-307, 195 Cal. Rptr. 73*

Elements of design immunity defense are: (1) causal relationship between design and accident; (2) approval of design in advance of construction by officer exercising discretionary authority; and (3) substantial evidence of reasonableness of design. *Levin v. State of California (1983) 146 Cal. App. 3d 410, 415, 194 Cal. Rptr. 223*

Artificial ("man-made") condition for flow of water that is not permanent but permits continued control over the flow of water was not natural condition. *Buchanan v. Los Angeles County Flood Control Dist. (1976) 56 Cal. App. 3d 757, 767, 128 Cal. Rptr. 770*

Absence of warning signs on curve was part of approved design. *Anderson v. Thousand Oaks (1976) 65 Cal. App. 3d 82, 89-90, 135 Cal. Rptr. 127*

Shop drawing executed by private contractor was sufficient design for proper person to approve to establish design immunity. *Thomson v. Glendale (1976) 61 Cal. App. 3d 378, 384-385, 132 Cal. Rptr. 52*

Design immunity was applicable to claim against public entity based on nuisance. *Mikkelsen v. State of California (1976) 59 Cal. App. 3d 621, 628-631, 130 Cal. Rptr. 780*

Design immunity not established if there was no substantial evidence presented that design of lake with steep hole in middle was reasonable. *Davis v. Cordova Recreation & Park Dist. (1972) 24 Cal. App. 3d 789, 794-800, 101 Cal. Rptr. 358*

Design immunity was not applicable because public entity did not establish that installation of stop sign that was alleged to be dangerous condition was approved by legislative body or officer. *De La Rosa v. San Bernardino (1971) 16 Cal. App. 3d 739, 747-748, 94 Cal. Rptr. 175*

Design immunity not available if design of bridge was not related to dangerous icing condition. *Flournoy v. State 91969) 275 Cal. App. 2d 806, 813-814, 80 Cal. Rptr. 485*

Design immunity not established if approving officer did not approve design, but was ordered to build it anyway to save money. *Johnston v. County of Yolo (1969) 274 Cal. App. 2d 46, 51-55, 79 Cal. Rptr. 33*

[ii] Hazardous Recreational Activity Immunity

For purposes of recreational activities immunity of *Gov. Code § 831.7(b)(3)*, "boating" includes fishing from canoe tethered near shore of waterway also being used by powerboats; public entity had no duty to warn of dangerous conditions that are so obvious or inherent as to be reasonably assumed, such as risk of collision between boats in area in which powerboats were commonly used. *Wood v. County of San Joaquin (2003) 111 Cal. App. 4th 960, 970-971, 4 Cal. Rptr. 3d 340*

Objective standard applicable in determining whether dangerous condition is reasonably assumed by participant as inherently part of hazardous recreational activity within meaning of *Gov. Code § 831.7(c)(1)*, providing exception to public entity immunity from liability for injuries to participants in hazardous recreational activities for failure to warn or guard against known dangers not reasonably assumed by participants; minor plaintiff's alleged lack of knowledge of risks of activity because of age was not relevant to existence of immunity. *Perez v. City of Los Angeles (1994) 27 Cal. App. 4th 1380, 1385-1388, 33 Cal. Rptr. 2d 55*

Public entity was immune as matter of law under *Gov. Code § 831.7* from liability for injury suffered by child swinging from rope attached to tree in public park; risk of falling from great height during "tree-swinging" as obvious, even to children, and inherent in activity; public entity therefore not liable for failure to warn or guard against that risk. *Perez v. City of Los Angeles (1994) 27 Cal. App. 4th 1380, 1388, 33 Cal. Rptr. 2d 55*

Full-court game of basketball includes rough body contact and risk of substantial injury that is not confined to boundaries of court; activity was therefore "recreational hazardous activity" under *Gov. Code § 831.7(b)(3)*. *Yarber v. Oakland Unified Sch. Dist. (1992) 4 Cal. App. 4th 1516, 1519-1520, 6 Cal. Rptr. 2d 437*

Diving from sand near shore's edge was hazardous recreational activity under *Gov. Code § 831.7(b)(2)*. *Tessier v. City of Newport Beach (1990) 219 Cal. App. 3d 310, 316, 268 Cal. Rptr. 233* ; *Morin v. County of Los Angeles (1989) 215 Cal. App. 3d 184, 195, 263 Cal. Rptr. 479*

Diving from rock on public beach was hazardous recreational activity under *Gov. Code § 831.7(b)(2)* as matter of law. *Valenzuela v. City of San Diego (1991) 234 Cal. App. 3d 258, 262-264, 286 Cal. Rptr. 1* ; *Rombalski v. City of Laguna Beach (1989) 213 Cal. App. 3d 842, 850-851, 261 Cal. Rptr. 820*

To avoid finding of gross negligence under *Gov. Code § 831.7(c)(5)*, public entity not required to pursue all possible options in its rescue efforts, but required only to exercise some care, and to pursue course of conduct that is not extreme departure from ordinary standard of conduct. *Decker v. City of Imperial Beach (1989) 209 Cal. App. 3d 349, 359-361, 257 Cal. Rptr. 356*

Gov. Code § 831.7(c)(1) denies immunity for injuries caused by hazardous recreational activities if public entity fails to guard or warn of known dangerous condition that is not reasonably assumed by participant as inherent part of hazardous recreational activity out of which damage or injury arose. *De Vito v. State of California (1988) 202 Cal. App. 3d 264, 271-272, 248 Cal. Rptr. 330*

Person who swings on hose hanging from tree limb over steep slope is required to reasonably assume that inherent part of activity is possibility of fall down slope from height greater than person's starting point on ledge. *De Vito v. State of California (1988) 202 Cal. App. 3d 264, 271-272, 248 Cal. Rptr. 330*

[iii] Lack of Control

Public entity not liable because it did not control dangerous condition and did not cause dangerous condition to occur. *Mark v. Pacific Gas & Elec. Co. (1972) 7 Cal. 3d 170, 179, 101 Cal. Rptr. 908, 496 P.2d 1276*

School district did not control property near school merely because it had right to institute traffic control measures on property. *Searcy v. Hemet Unified Sch. Dist. (1986) 177 Cal. App. 3d 792, 798-800, 223 Cal. Rptr. 206*

Evidence sufficient to support conclusion that public entity controlled beach because it stationed lifeguards on beach, placed signs on beach, and had considered closing beach to swimming. *Buchanan v. Newport Beach (1975) 50 Cal. App. 3d 221, 225, 123 Cal. Rptr. 338*

City not in control of private walkway and therefore not liable for injury there. *Ackley v. City & County of San Francisco (1970) 11 Cal. App. 3d 108, 113-114, 89 Cal. Rptr. 480*

County liable for dangerous condition of parking strip because it had control of parking strip as abutting owner even though city had easement in strip. *Low v. Sacramento (1970) 7 Cal. App. 3d 826, 832-835, 87 Cal. Rptr. 173*

Public entity not liable for dangerous condition of property that it does not possess or control. *Petersen v. Vallejo (1968) 259 Cal. App. 2d 757, 773-776, 66 Cal. Rptr. 776*

Public entities not liable for alleged dangerous condition of state highway over which entities had no ownership or control. *Avey v. Santa Clara County (1968) 257 Cal. App. 2d 708, 712, 65 Cal. Rptr. 181*

[iv] Natural Condition Immunity

Natural condition immunity of *Gov. Code § 831.2* is not applicable if allegedly dangerous condition injures adjacent property or persons on adjacent property. *Milligan v. City of Laguna Beach (1983) 34 Cal. 3d 829, 834, 835, 196 Cal. Rptr. 38, 670 P.2d 1121*

Human-altered conditions that merely duplicate natural conditions do not negate immunity; immunity applied to beach that was artificially rebuilt and sheltered by artificially created rock groin 17 years before occurrence of accident. *Knight v. City of Capitola (1992) 4 Cal. App. 4th 918, 928-929, 6 Cal. Rptr. 2d 874*

Human-altered conditions that have existed for some years that merely duplicate models common to nature are natural

conditions; city's activities in dredging, constructing jetties, and diverting river flow to make nearby harbor navigable, which may have increased size of sand bar on beach, did not change natural condition of beach, because many factors influence size of sand bar and city's activities took place 35 years in past. *Tessier v. City of Newport Beach (1990) 219 Cal. App. 3d 310, 313-315, 268 Cal. Rptr. 233*

Gov. Code § 831.2 immunity, applicable to any body of water, was applicable if public entity's nearby improvements together with natural forces added to buildup of sand on public beach. *Morin v. County of Los Angeles (1989) 215 Cal. App. 3d 184, 188, 263 Cal. Rptr. 479*

Whether immunity for injuries caused by natural conditions applied to case was not determinable on demurrer. *De Vito v. State of California (1988) 202 Cal. App. 3d 264, 269, 248 Cal. Rptr. 330*

Fact that area in which injury occurred was previously adjudicated to be in natural condition of public property four years before injury was not determinative of state of property at time of injury. *De Vito v. State of California (1988) 202 Cal. App. 3d 264, 269, 248 Cal. Rptr. 330*

Legislative policy underlying *Gov. Code § 831.2* was permitting public use of government property without making cost prohibitive, by precluding liability for unimproved natural conditions unless public entity engaged in conduct that actively increased degree of dangerousness of natural condition. *City of Santa Cruz v. Superior Court (1988) 198 Cal. App. 3d 999, 1004, 1006-1007, 244 Cal. Rptr. 105*

Gov. Code § 831.2 immunized county from liability for injury caused to swimmer because county had done nothing to increase degree of dangerousness of natural condition of beach. *Geffen v. County of Los Angeles (1987) 197 Cal. App. 3d 188, 191-195, 242 Cal. Rptr. 492*

Gov. Code § 831.2 grants absolute immunity, which forecloses any duty to warn of dangerous condition on unimproved public lands that constitutes hidden trap to users of land. *Mercer v. State of California (1987) 197 Cal. App. 3d 158, 166 n.4, 242 Cal. Rptr. 701*

City was shielded by immunity of *Gov. Code § 831.2* in personal injury action arising out of plaintiff's fall from cliffs overhanging city beach because city program of posting warning signs constituted neither improvement nor voluntary assumption of protective services. *McCauley v. City of San Diego (1987) 190 Cal. App. 3d 981, 988-991, 235 Cal. Rptr. 732*

Immunity of *Gov. Code § 831.2* precludes imposition on public entity of independent duty to warn of dangerous natural conditions on unimproved property required under *Gov. Code § 835*. *McCauley v. City of San Diego (1987) 190 Cal. App. 3d 981, 991-993, 235 Cal. Rptr. 732*

City was not liable for injury caused by natural condition in unimproved area of city-owned greenbelt, notwithstanding greenbelt's location in urban area. *Winterburn v. City of Pomona (1986) 186 Cal. App. 3d 878, 881, 231 Cal. Rptr. 105*

Unknown third party's attachment of rope to tree on undeveloped land did not change natural condition of land; state was therefore immune from liability under Gov. Code § 832.1 for plaintiff's injuries suffered after swinging and falling from rope. *Kuykendall v. State of California (1986) 178 Cal. App. 3d 563, 566, 223 Cal. Rptr. 763*

City was not immune under *Gov. Code § 831.2*, regarding injuries caused by natural conditions in unimproved property, because dangerous riptide combined with conduct of city in voluntarily providing lifeguard service at beach without warning of riptide and because lifeguard service inadequate. *Gonzales v. City of San Diego (1982) 130 Cal. App. 3d 882, 885-886, 182 Cal. Rptr. 73* (decided before enactment of *Gov. Code § 831.21*); *but see Geffen v. County*

of Los Angeles (1987) 197 Cal. App. 3d 188, 192-194, 242 Cal. Rptr. 492 (decided before effective date of *Gov. Code § 831.21*, and rejecting holding in *Gonzales*)

Statutory immunity conferred on public entities under *Gov. Code § 831.2* extends to any natural condition of any natural or artificial lake, so that plaintiff injured by submerged object while swimming in artificial lake must allege facts from which it can be reasonably inferred that dangerous condition was artificial in character. *Keyes v. Santa Clara Valley Water Dist. (1982) 128 Cal. App. 3d 882, 889-889, 180 Cal. Rptr. 586*

County not liable for accident resulting from combination of flow of water in river and snag of trees washed out of upstream shoreline by water and lodged downstream by streambed's own obstruction, which collectively constitute natural condition. *Sacramento County v. Superior Court (1979) 89 Cal. App. 3d 215, 218, 152 Cal. Rptr. 391*

Cliffs, ocean, and beach are natural condition of property despite fact that some distance away, activities had been undertaken that, when combined with natural forces, resulted in increased sand and lower water level. *Fuller v. California (1975) 51 Cal. App. 3d 926, 936-939, 125 Cal. Rptr. 586*

Artificial lake was unimproved public property. *Osgood v. Shasta County (1975) 50 Cal. App. 3d 586, 588-590, 123 Cal. Rptr. 442*

Evidence was sufficient to support conclusion that beach was not in natural condition because of deposit of sand on beach and building of jetty adjacent to beach. *Buchanan v. City of Newport Beach (1975) 50 Cal. App. 3d 221, 226-227, 123 Cal. Rptr. 338*

Public entity not liable for injury occurring in unimproved area of park in its natural condition even though other parts of park are improved. *Rendak v. State of California (1971) 18 Cal. App. 3d 286, 288-289, 95 Cal. Rptr. 665*

[v] Nondedicated Roads Immunity

City not shielded from liability by unaccepted street immunity under *Sts. & Hy. Code § 1806* if there was substantial evidence that relevant portion of street was accepted by city resolution into its system of streets. *Copeland v. City of Oakland (1993) 19 Cal. App. 4th 717, 720-723, 23 Cal. Rptr. 2d 719*

[vi] Preemption

If facilities on publicly owned property operated by local public entity are controlled by federal law, federal law preempts state Tort Claims Act; federal law preempted state tort claim alleging dangerous condition on public property based on airport navigation facilities that, as matter of law, are regulated, approved, and controlled pursuant to Federal Aviation Act (former 49 U.S.C.S. § 1301 et seq.). *Bethman v. City of Ukiah (1989) 216 Cal. App. 3d 1395, 1398, 1407-1409, 265 Cal. Rptr. 539*

[vii] Reasonableness

In negligence action arising from traffic accident allegedly caused by dangerous highway condition, public entity was precluded from asserting defense of reasonableness under *Gov. Code § 835.4(b)* because of discovery sanctions awarded against it for failure to produce requested information concerning speed studies, guard rail design, and "ball bank" studies. *Kuhns v. State of California (1992) 8 Cal. App. 4th 982, 990-991, 10 Cal. Rptr. 2d 773*

No liability for drowning of children because failure to fence canal in residential area was reasonable. *Cardenas v.*

Hock Irrigation Dist. (1968) 267 Cal. App. 2d 352, 358-360, 73 Cal. Rptr. 69

[viii] Trivial Risk

City was not liable for injuries sustained by two-year-old child (supervised by other family members) who wandered into fire ring at city beach park, because rings were not dangerous condition when used with due care by members of public, but posed only minor, insignificant, or trivial risk of injury. *Sambrano v. City of San Diego (2001) 94 Cal. App. 4th 225, 240-241, 114 Cal. Rptr. 2d 151*

Iceplant growing on sidewalk and sharp prong sticking out from fence were not trivial defective condition, and public entity was liable for an injury caused by that condition. *Rodriguez v. Los Angeles (1959) 171 Cal. App. 2d 761, 771-772, 341 P.2d 410*

[ix] Weather Immunity

Gov. Code § 831 immunity for injuries caused by effect of weather conditions on streets and highways did not apply because blinding sun at top of incline could not have been anticipated by or was not reasonably apparent to driver. *Erfurt v. State of California (1983) 141 Cal. App. 3d 837, 845, 190 Cal. Rptr. 569*

Gov. Code § 831 immunity for injuries caused by effect of weather conditions on streets and highways did not apply because dangerous condition was combination of weather condition and layout of highway. *Erfurt v. State of California (1983) 141 Cal. App. 3d 837, 846, 190 Cal. Rptr. 569*

Purpose of *Gov. Code § 831* was to immunize against effect of weather conditions that no amount of human care can fully protect against and does not apply if weather condition is sun rising, which is predictable. *Erfurt v. State of California (1983) 141 Cal. App. 3d 837, 846, 190 Cal. Rptr. 569*

[f] Failure to Warn

Highway patrol car parked on shoulder with lights activated was adequate warning as matter of law because motorist approaching smoke-obscured section of highway was fully aware of dangerous condition on highway, received warning from officer to proceed with caution, understood warning to be related to dangerous condition, and could not have reasonably interpreted warning to mean it was safe to drive into smoke at high speeds. *Foremost Dairies, Inc. v. State of California (1986) 190 Cal. App. 3d 361, 367-368*

Public entity was liable for failure to warn of dangerous condition of steep crest of hill because warning sign was too far away to be clearly applicable to dangerous condition. *Bunker v. City of Glendale (1980) 111 Cal. App. 3d 325, 328, 168 Cal. Rptr. 565*

Evidence was sufficient to show state had duty to warn, but failed to warn, of dangerous condition (icy highway). *Straughter v. State of California (1979) 89 Cal. App. 3d 102, 112, 152 Cal. Rptr. 147*

Public entity liable if it fails to post signs in circumstances constituting trap to motorist. *Anderson v. Thousand Oaks (1976) 65 Cal. App. 3d 82, 93, 135 Cal. Rptr. 127*

Evidence was sufficient to support finding that bodysurfing area was dangerous condition and that no warning was given by signs. *Buchanan v. City of Newport Beach (1975) 50 Cal. App. 3d 221, 227-228, 123 Cal. Rptr. 338*

Public entity liable for inadequate warning of slide on road because signs were not in conformity with standards for such signs. *Briggs v. California (1971) 14 Cal. App. 3d 489, 497-498, 92 Cal. Rptr. 433*

Public entity liable for failure to provide adequate sign or signal to warn of dangerous condition of streets. *Hilts v. County of Solano (1968) 265 Cal. App. 2d 161, 174-175, 71 Cal. Rptr. 275*

[5] Specific Liabilities and Immunities

[a] Correctional Activities

[i] Constitutionality

Immunity of public entities for injuries to prisoners is not violation of *equal protection clause* and therefore is constitutional. *Hughes v. San Diego County (1973) 35 Cal. App. 3d 349, 352-353, 110 Cal. Rptr. 754*

Public entity immunity for injuries to prisoners is constitutional. *Reed v. City & County of San Francisco (1965) 237 Cal. App. 2d 23, 24-25, 46 Cal. Rptr. 543*

[ii] Definition of Prisoner

Person who has been arrested and turned over to custody of sheriff's department on completion of initial booking in reception area of county jail is prisoner. *Terzian v. County of Ventura (1994) 24 Cal. App. 4th 78, 83-87, 28 Cal. Rptr. 2d 809*

Participant in work furlough program is prisoner. *Badiggo v. County of Ventura (1989) 207 Cal. App. 3d 357, 360-361, 254 Cal. Rptr. 771*

Person sitting in county jail facility awaiting incarceration, although not within a cell, is "prisoner" within definition of *Gov. Code §§ 844* and *844.6*. *Peterson v. County of Los Angeles (1986) 185 Cal. App. 3d 705, 709, 230 Cal. Rptr. 80*

Plaintiff's status as prisoner was triable issue of fact, precluding summary judgment for defendant based on immunity of *Gov. Code § 844*. *Zeilman v. County of Kern (1985) 168 Cal. App. 3d 1174, 1178-1183, 214 Cal. Rptr. 746*

Determination of whether action may be brought was governed by status of plaintiff at time injury took place; parolee on way out of prison was not prisoner within definition of *Gov. Code § 844.6*. *Fearon v. Department of Corr. (1984) 162 Cal. App. 3d 1254, 1256-1257, 209 Cal. Rptr. 309*

Action alleging negligent loss of plaintiff's property while he was in state prison system barred under *Gov. Code § 844.6* because loss took place while plaintiff was prisoner; action alleging conversion by willful failure to return property on date of plaintiff's parole when he had right to immediate possession of property was not barred by *Gov. Code § 844.6*. *Fearon v. Department of Corr. (1984) 162 Cal. App. 3d 1254, 1256-1257, 209 Cal. Rptr. 309*

Person under arrest but not yet incarcerated in penal facility was not "prisoner" within meaning of *Gov. Code §§ 844* and *844.6*, and therefore city not immune from tort liability for battery by police officer. *Griffith v. City of Monrovia (1982) 134 Cal. App. 3d Supp. 6, 8-10 , 184 Cal. Rptr. 709*

Ward of juvenile court committed to custody of parent was not prisoner. *Patricia J. v. Rio Linda Union Sch. Dist. (1976) 61 Cal. App. 3d 278, 282-288, 132 Cal. Rptr. 211*

Ward of juvenile court committed to foster home was prisoner for purposes of public entity's immunity for injuries to prisoners. *Jiminez v. Santa Cruz County (1974) 42 Cal. App. 3d 407, 410-413, 116 Cal. Rptr. 878*

Term "prisoner" as used in *Gov. Code § 844* means person who is in jail or in prison and does not include person detained by police but not yet arrested. *Larson v. Oakland (1971) 17 Cal. App. 3d 91, 94-98, 94 Cal. Rptr. 466*

Persons who were arrested, booked, and in receiving section of the jail were prisoners for purposes of prisoner immunities. *Datil v. Los Angeles (1968) 263 Cal. App. 2d 655, 658-659, 69 Cal. Rptr. 788*

[iii] False Imprisonment

False imprisonment was not injury to prisoner and therefore public entity was not immune to action for false imprisonment. *Sullivan v. County of Los Angeles (1974) 12 Cal. 3d 710, 716-717, 117 Cal. Rptr. 241, 527 P.2d 865*

[iv] Immunity for Escaping Prisoner

Immunity from liability for injuries caused by escaping prisoner is absolute and precludes liability for both discretionary and ministerial acts. *Sacramento County v. Superior Court (1972) 8 Cal. 3d 479, 481-486, 105 Cal. Rptr. 374, 503 P.2d 1382*

City subject to liability under *Veh. Code § 17001* for injuries to third persons arising out of vehicle collision between third persons' vehicle and vehicle being pursued by police officers for traffic violations, and city not immune from liability under *Gov. Code § 845.8*. *City of San Jose v. Superior Court (1985) 166 Cal. App. 3d 695, 698, 701, 212 Cal. Rptr. 661*

Public entity immune for liability under *Gov. Code § 845.8* for injuries to bystander caused by arrestee escaping in unattended police car. *Duarte v. City of San Jose (1980) 100 Cal. App. 3d 648, 654, 657, 161 Cal. Rptr. 140* ; *but see Ladd v. County of San Mateo (1996) 12 Cal. 4th 913, 925-926, 50 Cal. Rptr. 2d 309, 911 P.2d 496* (disapproving holding in *Duarte* that officer's conduct created cause of action against city under *Veh. Code § 17001*)

Public entity and public employee were not liable for injuries caused by escaping prisoner. *Ne Casek v. Los Angeles (1965) 233 Cal. App. 2d 131, 138-142, 43 Cal. Rptr. 294*

[v] Immunity for Failure to Provide Prison Facilities

In action for damages by county jail inmates for personal injuries inflicted by other inmates, chairperson of county board of supervisors was immune under *Gov. Code § 845.2* from liability for board's failure to allocate funds for repair of county jail security systems, which failure resulted in lack of properly functioning electronic locks on cell doors, thus allowing inmates to roam freely throughout cellblock. *Taylor v. Buff (1985) 172 Cal. App. 3d 384, 390, 218 Cal. Rptr. 249*

Immunity granted in *Gov. Code § 845.2*, for failure to provide prison or jail facilities or if provided, to maintain them, was designed to prevent political decisions of government policy-making officials from being second-guessed by judges and juries in personal injury litigation; thus, essentially budgetary decisions of these officials are not subject to judicial review in tort litigation. *Taylor v. Buff (1985) 172 Cal. App. 3d 384, 390, 218 Cal. Rptr. 249*

[vi] Immunity for Injuries by Prisoner

Public entity absolutely immune from liability for assault by prisoner under *Gov. Code § 844.6(a)(1)*, despite gross negligence of entity. *Savitt v. Jordon (1983) 142 Cal. App. 3d 820, 822, 191 Cal. Rptr. 290*

[vii] Immunity for Injuries to Prisoners

In defamation action based on parole officer's discretionary decisions and actions leading to revocation of parole, parole officer was immune under *Gov. Code § 845.8*. *Kim v. Walker (1989) 208 Cal. App. 3d 375, 381-382, 256 Cal. Rptr. 223*

Public entities immune from any liability for wrongful death of prisoner regardless of theory of action. *May v. County of Monterey (1983) 139 Cal. App. 3d 717, 720-721, 189 Cal. Rptr. 63*

Gov. Code § 844.6(a)(2) barred wrongful death action against public entity brought by wife of prisoner who died while hospitalized at county medical facility. *Lowman v. County of Los Angeles (1982) 127 Cal. App. 3d 613, 616, 179 Cal. Rptr. 709*

[viii] Immunity for Release of Prisoner

Police officers immune from liability for releasing from custody person who threatened life of another person and later killed her. *Tarasoff v. Regents of University of Cal. (1976) 17 Cal. 3d 425, 449-450, 131 Cal. Rptr. 14, 551 P.2d 334*

Public entity or employee immune under *Gov. Code § 845.8* from liability for injury resulting from determination regarding parole or release of prisoner, including negligent failure to supervise parole. *Brenneman v. State of California (1989) 208 Cal. App. 3d 812, 820-821, 256 Cal. Rptr. 363* ; *Duffy v. City of Oceanside (1986) 179 Cal. App. 3d 666, 673, 224 Cal. Rptr. 879*

State immune under *Gov. Code § 845.8* from suit seeking damages for wrongful death of woman murdered by paroled mentally disordered sex offender. *Martinez v. State of California (1978) 85 Cal. App. 3d 430, 434, 149 Cal. Rptr. 519*

Decision to release prisoner, including ministerial act of applying established rules and regulations to particular case, was covered by governmental immunity under *Gov. Code § 845.8*. *Martinez v. State of California (1978) 85 Cal. App. 3d 430, 435, 149 Cal. Rptr. 519*

Public entity immune from liability for actions of prisoners released into community for rehabilitative purposes. *State of California v. Superior Court (1974) 37 Cal. App. 3d 1023, 1025-1028, 112 Cal. Rptr. 706*

Public entity immune from liability for murder by person who was allegedly negligently released from jail. *Santa Barbara County v. Superior Court (1971) 15 Cal. App. 3d 751, 755-758, 93 Cal. Rptr. 406*

[ix] Liability for Failure to Summon Medical Assistance

Public entity immune under *Gov. Code § 845.6* because it provided prompt medical care and had no actual or constructive notice that prisoner's Achilles tendon was ruptured and required surgery; public entity immune from direct suit for medical malpractice committed by its employees against prisoner although it is required to pay judgment against employees for medical malpractice; liability under *Gov. Code § 845.6* for failure to take reasonable action to summon medical care is limited to serious and obvious medical conditions if the public entity intentionally or unjustifiably fails to furnish immediate medical care. *Watson v. State of California (1993) 21 Cal. App. 4th 836, 841-843, 26 Cal. Rptr.*

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Gov. Code §§ 855.8 and *856* immunity for failure to diagnose, prescribe, or confine for mental illness does not preclude liability under *Gov. Code § 845.6* for failure to summon medical assistance for mentally disturbed prisoner. *Johnson v. County of Los Angeles (1983) 143 Cal. App. 3d 298, 317, 191 Cal. Rptr. 704*

Any failure to summon medical assistance is irrelevant if decedent could not be found in reservoir until well after death. *May v. County of Monterey (1983) 139 Cal. App. 3d 717, 722, 189 Cal. Rptr. 63*

Trial court's sustaining state's demurrer was proper even though plaintiff stated cause of action under *Gov. Code § 845.6* for failure to summon medical assistance because amended complaint failed to reflect contents of plaintiff's written claim filed with state. *Nelson v. State of California (1982) 139 Cal. App. 3d 72, 78-80, 188 Cal. Rptr. 479*

Public entity was not liable for its failure to summon medical assistance for prisoner who thereafter committed suicide because prisoner did not need medical assistance. *Lucas v. Long Beach (1976) 60 Cal. App. 3d 341, 349-350, 131 Cal. Rptr. 470*

Public entity not immune from action for damages based on failure to summon medical help for prisoner because public employee had knowledge of need for such care. *Hart v. Orange County (1967) 254 Cal. App. 2d 302, 304-307, 62 Cal. Rptr. 73* ; *Sanders v. County Yuba (1967) 247 Cal. App. 2d 748, 752-754, 55 Cal. Rptr. 852*

[b] Emergency Response Activities

[i] Firefighting Activities

Public entity not liable for shutting off water valve that supplied fire hydrants or for not notifying fire department or turning valve back on. *Heieck & Moran v. City of Modesto (1966) 64 Cal. 2d 229, 233, 49 Cal. Rptr. 377, 411 P.2d 105*

City not liable under *Veh. Code § 17001* (damage to property proximately caused by negligent act by public employee in operation of motor vehicle) for fire department's use of forklift to open door to building while combating fire. *Colapinto v. County of Riverside (1991) 230 Cal. App. 3d 147, 150, 152-153, 281 Cal. Rptr. 191*

Immunities of *Gov. Code §§ 850, 850.4* extended to failure of firefighters to arrive quickly at fire because of willful misconduct in participating in unauthorized social gathering away from firehouse. *City & County of San Francisco v. Superior Court (1984) 160 Cal. App. 3d 837, 841-842, 207 Cal. Rptr. 6*

Public entity immune under *Gov. Code §§ 850.2* and *850.4* from liability for fire damage caused by closed water valve, because water system part of firefighting facilities. *New Hampshire Ins. Co. v. City of Madera (1983) 144 Cal. App. 3d 298, 304-305, 192 Cal. Rptr. 548*

Failure of public employees to discover closed water valve, leading to destruction of building by fire, was within immunity of *Gov. Code § 815*. *New Hampshire Ins. Co. v. City of Madera (1983) 144 Cal. App. 3d 298, 305-306, 192 Cal. Rptr. 548*

Public entity not immune from liability for injuries caused by negligence of firefighters in rescuing person during incident not involving firefighting. *Lewis v. Mendocino Fire Protection Dist. (1983) 142 Cal. App. 3d 345, 346-347, 190 Cal. Rptr. 883*

Immunity for injury caused in fighting fires was not applicable to plaintiff, who broke gas line with his machine and was instructed by fire chief to move machine, which started fire that injured plaintiff, because fire had not yet started when alleged negligence of fire chief occurred. *Potter v. City of Oceanside (1981) 114 Cal. App. 3d 564, 566, 170 Cal. Rptr. 753*

Public entity protected from liability by firefighting immunity for cutting fence to fight fire and neglecting to repair fence, which allowed plaintiff's cattle to escape. *Bettencourt v. California (1975) 51 Cal. App. 3d 892, 894-896, 124 Cal. Rptr. 542*

Public entity immune from liability for injuries sustained by plaintiff as he was being rescued by firefighters from fire. *Heimberger v. City of Fairfield (1975) 44 Cal. App. 3d 711, 714-716, 117 Cal. Rptr. 482*

[ii] Immunities for Activities to Abate Gradual Earth Movements

Immunity provided by *Gov. Code § 866* was available in action against public entity for dangerous conditions on public property. *City of Pomona v. Superior Court (1986) 182 Cal. App. 3d 1093, 1099, 227 Cal. Rptr. 714*

[c] Failure to Make Physical or Mental Examination

Immunity of *Gov. Code § 855.6* was not applicable to county medical laboratory that was requested by police officer and his physician to perform test for AIDS virus, but mistakenly performed hepatitis test on person suffering self-inflicted stab wounds who had stated that he had AIDS and with whose blood officer had become covered while rendering assistance. *Smith v. County of Kern (1993) 20 Cal. App. 4th 1826, 1830-1835, 25 Cal. Rptr. 2d 716*

[d] Mental Patients

[i] Immunities for Detention and Failure to Confine

Therapists was immune from liability for failure to have patient confined who threatened life of another person and later killed her. *Tarasoff v. Regents of University of Cal. (1976) 17 Cal. 3d 425, 447-449, 131 Cal. Rptr. 14, 551 P.2d 334*

Gov. Code §§ 855.8 and *856* immunities extend to all those authorized to request or recommend confinement, and to all determinations involved in process of treatment or commitment; sheriff's decisions regarding mentally disturbed prisoner were immune as part of process of determining treatment. *Johnson v. County of Los Angeles (1983) 143 Cal. App. 3d 298, 315-316, 191 Cal. Rptr. 704*

[ii] Escape Immunity

Mental patient's failure to return from short leave to unlocked board and care facility was "escape" within meaning of *Gov. Code § 856.2*, rendering public entity immune from suit arising from patient's personal injuries incurred in traffic accident while away from facility. *Brookhouser v. State of California (1992) 10 Cal. App. 4th 1665, 1686, 13 Cal. Rptr. 2d 658*

Person detained on 72-hour hold under *Welf. & Inst. Code § 5150* was confined within meaning of *Gov. Code § 856.2*; *Gov. Code § 856.2* immunity applies to public entity confining person who escapes and sustains injury while on 72-hour hold. *Buenavista v. City & County of San Francisco (1989) 207 Cal. App. 3d 1168, 1173, 255 Cal. Rptr. 329* ; *Los Angeles County-U.S.C. Med. Ctr. v. Superior Court (1984) 155 Cal. App. 3d 454, 460-463, 202 Cal. Rptr. 222*

Public entity not liable for injuries suffered by escaped mental patient, whether confinement was voluntary or involuntary and despite alleged negligence in failing to try to recapture patient. *Forde v. County of Los Angeles (1976) 64 Cal. App. 3d 477, 479-481, 134 Cal. Rptr. 549*

Public entity immune from liability for preliminary diagnosis that person should be detained for observation of his mental condition. *Fish v. Regents of University of Cal. (1966) 246 Cal. App. 2d 327, 333-334, 54 Cal. Rptr. 656*

[iii] Immunity for Injuries to Mental Patient

Public entity not directly liable for injuries suffered in mental hospital and only liable to pay malpractice judgment against public employee. *County of Los Angeles v. Superior Court (1965) 62 Cal. 2d 839, 844, 44 Cal. Rptr. 796, 402 P.2d 868*

Gov. Code § 854.8 immunity is broadly construed and encompasses injuries to individual involuntarily confined for mental evaluation under *Welf. & Inst. Code § 5150* who was kept in regular medical ward of county hospital due to shortage of beds in psychiatric ward of that facility. *Guzman v. County of Los Angeles (1991) 234 Cal. App. 3d 1343, 1346-1350, 286 Cal. Rptr. 317*

In action by mental patient for injuries caused by other mental patients, nonsuit for failure to state prima facie exception under *Gov. Code § 855(a)* to *Gov. Code § 854.8* (immunity for injuries by and to mental patients) was improper because it involved questions of fact not resolvable on motion for nonsuit. *Baber v. Napa State Hosp. (1989) 209 Cal. App. 3d 213, 216-221, 257 Cal. Rptr. 55*

Public guardian was immune under *Gov. Code § 854.8* from liability for alleged negligent supervision of incompetent female patient resulting in pregnancy and childbirth. *Foy v. Greenblott (1983) 141 Cal. App. 3d 1, 6, 190 Cal. Rptr. 84*

[iv] Leave of Absence Immunity

Gov. Code § 854.8 (providing for government immunity for injuries caused by patients of mental institutions) is applicable to injuries caused by patients who are on leave of absence. *Buford v. State of California (1980) 104 Cal. App. 3d 811, 829, 164 Cal. Rptr. 264* (state was immune, even though immunity provisions of *Gov. Code § 856* were not applicable, because complaint alleged negligence in ministerial actions following discretionary leave determination)

[v] Release Immunity

Public entity immune from liability for injuries suffered by person who was released from mental hospital and immediately attempted suicide. *Goff v. County of Los Angeles (1967) 254 Cal. App. 2d 45, 49-50, 61 Cal. Rptr. 840*

Public entity not liable for injuries caused by released mental patient, who was released based on allegedly incorrect medical opinion as to his sanity. *Kravitz v. California (1970) 8 Cal. App. 3d 301, 306-307, 87 Cal. Rptr. 352*

Public entity immune from liability for death of person at hands of person released from mental hospital allegedly as result of negligent maintenance of records. *Hernandez v. State of California (1970) 11 Cal. App. 3d 895, 899-901, 90 Cal. Rptr. 205*

[e] Police Activities

[i] Citizen's Arrest

Public entity not liable for act of police officer in accepting delivery of person on whom citizen's arrest had been made and transporting her to jail. *Kinney v. County of Contra Costa (1970) 8 Cal. App. 3d 761, 766-769, 87 Cal. Rptr. 638*

[ii] Immunity for Failure to Make Arrest

Police officers not liable for failure to detain and conduct sobriety test of intoxicated motorcyclist stopped for speeding, who shortly thereafter ran off road and injured himself. *Hucko v. City of San Diego (1986) 179 Cal. App. 3d 520, 522, 224 Cal. Rptr. 552*

Demurrer to cause of action against law enforcement officers by drunk driver, based on defendants' failure to arrest and detain plaintiff, was properly sustained pursuant to *Gov. Code § 846*; plaintiff, released by tow truck driver at intersection and struck by oncoming vehicles, caused own injuries by voluntary drunkenness. *Truong v. James (1985) 168 Cal. App. 3d 833, 835-836, 215 Cal. Rptr. 33*

[iii] Immunity for Failure to Provide Police Protection

Community college district was immune from liability for failure to provide adequate police protection to student victim of criminal assault on campus. *Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 815, 205 Cal. Rptr. 842, 685 P.2d 1193*

Negligence action brought against city and police officers for injuries plaintiff sustained when stabbed in laundromat that was under police surveillance was properly dismissed because no relationship existed sufficient to impose duty of care based on special relationship between officers and assailant or officers and victim; police were in no way responsible for presence in laundromat of either assailant or victim, victim was unaware of officers' presence and did not rely on them for protection, and officers' alleged conduct did not change risk that would have existed in their absence. *Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 206-209, 185 Cal. Rptr. 252, 649 P.2d 894*

Immunity for failure to provide police protection is not available if special relationship existed between police and victim and police failed to warn victim of known danger. *Carpenter v. City of Los Angeles (1991) 230 Cal. App. 3d 923, 934-935, 281 Cal. Rptr. 500*

Sheriff's department not liable for murder victim's death because sheriff who responded to victim's telephone reports of death threats did not create or assume special relationship with victim. *Lowe v. County of San Diego (1986) 183 Cal. App. 3d 515, 531, 228 Cal. Rptr. 139*

Immunity from liability for failure to provide police protection is applicable to any public entity in absence of special relationship with plaintiff. *Hernandez v. Southern Cal. Rapid Transit Dist. (1983) 142 Cal. App. 3d 1063, 1067, 191 Cal. Rptr. 436* ; *but see Lopez v. Southern Cal. Rapid Transit Dist. (1985)40 Cal. 3d 780, 790, 221 Cal. Rptr. 840, 710 P.2d 907*) (disapproving *Hernandez* to extent it holds no special relationship between public carrier and passengers giving rise to duty on part of carrier to protect passengers from assaults by fellow passengers)

Immunity for failure to provide police protection is applicable to proprietary functions such as operating parking lot. *Slapin v. Los Angeles Int'l Airport (1976) 65 Cal. App. 3d 484, 487, 135 Cal. Rptr. 296*

Immunity for failure to provide police protection is absolute, whether police action is discretionary or ministerial. *Hartzler v. City of San Jose (1975) 46 Cal. App. 3d 6, 8-9, 120 Cal. Rptr. 5*

Failure to provide adequate police protection or to respond promptly to alarm was not basis for liability of public entity. *Antique Arts Corp. v. Torrance (1974) 39 Cal. App. 3d 588, 591-593, 114 Cal. Rptr. 332*

Public entity not liable for acts of police officers, who failed to arrest or take other action against persons who were using self-help to obtain possession of plaintiff's property. *Michenfelder v. City of Torrance (1972) 28 Cal. App. 3d 202, 206-208, 104 Cal. Rptr. 501*

Public entity not liable for inciting riot or failing to protect plaintiff's property from damage from riot. *Susman v. City of Los Angeles (1969) 269 Cal. App. 2d 803, 810-822, 75 Cal. Rptr. 240*

[iv] Immunity for Injuries During Police Pursuit

If valid police pursuit policy has been adopted, immunity of *Veh. Code § 17004.7* applies even though injury was sustained because pursuing officer deliberately rammed officer's car into pursued vehicle in attempt to disable it. *Weaver v. State of California (1998) 63 Cal. App. 4th 188, 200, 73 Cal. Rptr. 2d 571*

Immunity under *Veh. Code § 17004.7* requires that adopted police pursuit policy control and channel officer's discretion by providing objective standards by which to evaluate whether pursuit should be initiated or terminated; policy adopted by Highway Patrol provided adequate guidelines for justification, initiation, and termination of pursuit under former version of *Veh. Code § 17004.7*. *Ketchum v. State of California (1998) 62 Cal. App. 4th 957, 966-970, 73 Cal. Rptr. 2d 152*

Immunity under *Veh. Code § 17004.7* is not limited to situations in which pursued suspect is driving his or her own vehicle; immunity also applies to situations in which pursued suspect is operating stolen police vehicle. *Bryant v. County of Los Angeles (1994) 26 Cal. App. 4th 919, 923-924, 32 Cal. Rptr. 2d 285*

In action for wrongful death arising from fatal crash by fleeing robber being pursued by police, immunity of former version of *Veh. Code § 17004.7* was applicable because pursuit policy contained sufficient guidelines to satisfy requirements of former *Veh. Code § 17004.7(c)(4)*, although manifest perils not specified in format of list; extent to which pursuit policy implemented in general and followed in particular pursuit is irrelevant if pursuit policy adopted by agency meets statutory requirements of *Veh. Code § 17004.7*; pursuit policy qualifies under *Veh. Code § 17004.7* if promulgated by city's chief of police. *Brumer v. City of Los Angeles (1994) 24 Cal. App. 4th 983, 987-988, 29 Cal. Rptr. 2d 515*

In personal injury action arising when car of fleeing criminal suspect being pursued by police officer struck plaintiff's car, immunity of former version of *Veh. Code § 17004.7* was inapplicable because city's vehicular pursuit policy did not provide sufficiently specific guidelines for determining when to initiate or terminate pursuit so as to comply with former *Veh. Code § 17004.7(c)(4)*. *Berman v. City of Daly City (1993) 21 Cal. App. 4th 276, 280-285, 26 Cal. Rptr. 2d 493*

In action for wrongful death arising from police vehicular pursuit of criminal suspect, immunity under *Veh. Code § 17004.7* was unavailable because written police policy guidelines failed to delineate any specific factors supporting decision to initiate or terminate pursuit. *Payne v. City of Perris (1993) 12 Cal. App. 4th 1738, 1751, 16 Cal. Rptr. 2d 143*

In action for wrongful death arising from traffic accident involving police pursuit of traffic offender, city not immune under *Veh. Code § 17004.7* because of inadequacy of its written policy, which lacked specificity regarding officers' exercise of discretion, guidelines for initiating and discontinuing vehicular pursuits, and guidelines for designation of primary pursuit vehicle. *Colvin v. City of Gardena (1992) 11 Cal. App. 4th 1270, 1281-1287, 15 Cal. Rptr. 2d 234*

Public entity was not liable for injuries caused by vehicle being pursued by police car merely on ground that decision to pursue was negligent. *Bratt v. City & County of San Francisco (1975) 50 Cal. App. 3d 550, 552-555, 123 Cal. Rptr. 774*

[v] Liability in Other Situations

Police officer had duty to exercise reasonable care for safety of persons officer stopped for speeding; issue of fact existed as to whether officer breached duty by directing persons to stop on center median of highway. *Lugtu v. California Highway Patrol (2001) 26 Cal. 4th 703, 718, 724, 110 Cal. Rptr. 2d 528, 28 P.3d 249*

Dismissal of negligence action against city and police officers for injuries plaintiff sustained when assaulted in laundromat that was under police surveillance was proper because no relationship existed sufficient to impose duty of care based on special relationship; police were not responsible in any way for presence of assailant or victim in laundromat, victim was unaware of officers' presence and did not rely on their protection, and officers' alleged conduct did not change risk that would have existed in their absence. *Davidson v. City of Westminster (1982) 32 Cal. 3d 197, 206-209, 185 Cal. Rptr. 252, 649 P.2d 894*

Public entity was liable in negligence for actions of law enforcement officers in shooting suspect. *Munoz v. Olin (1979) 24 Cal. 3d 629, 634, 156 Cal. Rptr. 727, 596 P.2d 1143*

Police had no duty to provide transportation to minor who was in vehicle when driver was cited for excessive speed and lack of license, and who was evicted from vehicle with other occupants, in wrongful death action arising from minor's death in traffic accident two hours later while being driven home by friend. *Hernandez v. City of San Jose (1993) 14 Cal. App. 4th 129, 135, 17 Cal. Rptr. 2d 589*

Special relationship between police and individual depends on representations or conduct by police that cause detrimental reliance by victim that increases risk of harm from police negligence. *Denton v. City of Fullerton (1991) 233 Cal. App. 3d 1636, 1640-1645, 285 Cal. Rptr. 297* ; *M. B. v. City of San Diego (1991) 233 Cal. App. 3d 699, 704-708, 284 Cal. Rptr. 555*

No detrimental reliance existed to support claim of special relationship between highway patrol and motorist because officer's warning could not, as matter of law, be reasonably interpreted to mean smoke-obscured highway ahead was suitable for travel at high speeds. *Foremost Dairies, Inc. v. State of California (1986) 190 Cal. App. 3d 361, 366*

Negligence verdict was unfounded in case in which police, who confiscated gun from plaintiff's intoxicated husband for plaintiff's protection and then arrested him on related charge, returned gun to husband on completion of his jail term, having failed to ascertain whether possession of firearm violated his probation, and husband subsequently shot plaintiff; officer who returned gun was under no duty to protect plaintiff absent special relationship with her; officer who confiscated gun was voluntarily assuming duty only for limited purpose of protecting plaintiff from momentary threat; officer made no express or implied promise to render additional aid. *Baker v. City of Los Angeles (1986) 188 Cal. App. 3d 902, 907-908, 233 Cal. Rptr. 760*

County sheriffs not liable for failure to render emergency aid to plaintiff found injured at scene of investigation, or for failure to secure evidence found at scene, absent special relationship giving rise to affirmative duty; special relationship existed only if sheriffs' actions increased risk of harm to plaintiff or led to detrimental reliance on part of plaintiff. *Rose v. County of Plumas (1984) 152 Cal. App. 3d 999, 1003-1007, 199 Cal. Rptr. 842*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawImmunitiesSchool District ImmunityTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From LiabilityTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural RequirementsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsScope of Employment

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§ 464.124 Attorney General Opinions

County would not subject itself to greater risk of liability under Tort Claims Act by having its officers exercise their discretion in requiring an industrial facility to use an inherently safer system or take a specific action. *83 Ops. Cal. Att'y Gen. 195 (2000)*

If California Highway Patrol (CHP) officer at scale facility prevents overweight vehicle from being driven on highway, and facility lacks unloading equipment, CHP is not liable for any injuries sustained by operator of vehicle in attempting to reduce weight without proper equipment. *82 Ops. Cal. Att'y Gen. 196 (1999)*

Public entity immunity from liability for skateboarding on public property. *81 Ops. Cal. Att'y Gen. 331 (1998)*

Person appointed as referee to hear and determine discovery motions and paid by the parties was not statutorily entitled to defense and indemnification by county against claims or actions seeking monetary damages in connection with performance of duties as referee. *72 Ops. Cal. Att'y Gen. 94 (1989)*

Claim filed against public agency under California Tort Claims Act was not exempt from disclosure under *Gov. Code § 6254(b)* (71 Cal. Op. Att'y Gen. 235

Arresting officer has authority to release person arrested for driving under influence of alcohol on issuance of notice and arrestee's promise to appear; arresting officer not liable for injury caused by arrestee after release. *71 Ops. Cal. Att'y Gen. 46 (1988)*

Lawyer-client privilege and work-product rule, when relied on by public officer, do not automatically terminate with settlement or adjudication of underlying claim. *71 Ops. Cal. Att'y Gen. 5 (1988)*

Public officer entitled to claim lawyer-client privilege and rely on work-product rule to prevent disclosure of requested information in grand jury proceeding. *70 Ops. Cal. Att'y Gen. 28 (1987)*

Retired judge sitting by assignment is entitled to defense provided by public entity under provisions of *Gov. Code §§ 995-996.6*, may be represented under provisions of *Gov. Code § 27647* if he or she is sitting as judge, is entitled to indemnification under provisions of *Gov. Code §§ 825-825.6* for plaintiff's attorney's fees and costs awarded in action under federal Civil Rights Act, and is provided defense and indemnification by state or county. *68 Ops. Cal. Att'y Gen. 127 (1985)*

Publicly owned health facilities are subject to civil penalty provisions of former *Health & Safety Code § 442.3*. *68 Ops. Cal. Att'y Gen. 55 (1985)*

Ins. Code § 11580.26 requires that uninsured motorist property damage coverage be offered on publicly owned school buses and fire trucks. *68 Ops. Cal. Att'y Gen. 51 (1985)*

Law enforcement officers and judges are not under duty to report knowledge they might have about persons who entered United States by violating *8 U.S.C.S. § 1325*. *67 Ops. Cal. Att'y Gen. 331 (1984)*

Pro tempore workers' compensation referees appointed under *Lab. Code § 123.7* are immune from liability for their discretionary acts within scope of employment to same extent as permanent referees of Workers' Compensation Appeals Board. 66 Cal. Ops. Att'y Gen. 69, 73 (1983)

California Coastal Commission is not liable for accident or injury resulting from hazardous condition on road or highway, even though commission denied permit application for project designed to eliminate that condition. *62 Ops. Cal. Att'y Gen. 527 (1979)*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsClaims By & AgainstTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From LiabilityTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural RequirementsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsScope of Employment

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40-464 California Forms of Pleading and Practice--Annotated § 464.125

§ 464.125 Law Reviews

Comment, *California Sidewalks: A Comprehensive Scheme for Determining Municipal and Abutter Liabilities, 31 Santa Clara L. Rev. 463 (1991)*

Comment, *Government Estoppel: The Search for Constitutional Limits, 25 Loy. L.A. L. Rev. 229 (1991)*

Zaitzeff and Kunz, *The Act of State Doctrine and the Allied Bank Case, 40 Bus. Law. 449 (1985)*

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Note, *Defining the "State as State": Is a Nonprofit Corporation Under Contract With a State to Perform an Integral Government Function Entitled to Immunity From the Fair Labor Standards Act Under National League of Cities?, 10 Hastings Const. L.Q. 877 (1983)*

Note, *Police Liability for Negligent Failure to Prevent Crime, 94 Harv. L. Rev. 821 (1981)*

Comment, *Thompson v. County of Alameda: The Demise of the Special Relationship Doctrine in California, 15 U.S.F. L. Rev. 563 (1981)*

Comment, *Discretionary Immunity in California in the Aftermath of Johnson v. State, 15 Santa Clara Lawyer 454*

(1975)

Nelson and Avnaim, *Claims Against a California Governmental Entity or Employee,* 6 Sw. U.L. (L.A.) Rev. 550 (1974)

Morgan, Bertram and Johnson, *Cameron v. State: Widening the Breach in Governmental Immunity, 9 Lincoln L. Rev. 107 (1974)*

Note, *Torts: Effect of Changed Conditions or a Nonapproved Design on Statutory Immunity, 61 Cal. L. Rev. 627 (1973)*

Note, *Nestle v. City of Santa Monica: A Test Case for a General Immunity Statute, 5 Sw. U. L. Rev. 197 (1973)*

Note, *Torts: Liability of Public Entity for Nuisance, 61 Cal. L. Rev. 648 (1973)*

Berger, *The California Supreme Court--A Shield Against Governmental Overreaching: Nestle v. City of Santa Monica, 9 Cal. W. L. Rev. 199 (1973)*

Comment, *Governmental Nuisance Liability: An Inadequate Remedy for Aircraft Noise, 9 Cal. W. L. Rev. 310 (1973)*

Comment, *Sovereign Immunity--An Anathema to the "Constitutional Tort," 12 Santa Clara Lawyer 543 (1972)*

Comment, *Liability for Dangerous Conditions of Public Property: California's Design Immunity Statute--A Need for Legislative Clarification, 3 Pac. L.J. 687 (1972)*

Comment, *Tort Liability of a Peace Officer for Injuring a Bystander During Suppression of Civil Disturbance, 4 U.S.F. L. Rev. 452 (1970)*

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Fizzolio, *Piercing the Protective Shield of Immunity Given Public Employees of the State of California and its Political Subdivisions Against Tort Claims,* 44 L.A. Bar B. 343 (1969)

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Comment, *Never Trust a Bureaucrat: Estoppel Against the Government,* 42 S. Cal. L. Rev. 391 (1969)

O'Brien, *Claims Against California Public Entities and Public Employees,* 43 Cal. St. B.J. 693 (1968)

Comment, *The California Tort Claims Act: Discretionary Immunity, 39 S. Cal. L. Rev. 470 (1966)*

Comment, *Governmental Liability for Torts of Employees--The End of Sovereign Immunity in California, 5 Santa Clara Lawyer 81 (1964)*

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Legal Topics:

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

Civil ProcedureFederal & State InterrelationshipsSovereign ImmunityState ImmunityGovernmentsLocal GovernmentsClaims By & AgainstTortsPublic Entity LiabilityGeneral OverviewTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From Liability

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§ 464.126 Text References

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Witkin, California Procedure, Vol. 3, *Actions*, §§ 223 et seq., 628-631, 779-790, 973-976 (4th ed. 1996)

Witkin, Summary of California Law, Vol. 5, *Torts*, §§ 214 et seq., 249 et seq., 290-338, 361-365 (10th ed. 2005)

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§§ 464.127[Reserved]

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PART IV. PROCEDURAL CHECKLISTS

40-464 California Forms of Pleading and Practice--Annotated § 464.140

§ 464.140 Claimant's Checklist for Filing Claims Against Public Entities

[1] Obtain Facts and Documents

[a] Relating to Potential Cause of Action

1. The time, place, and circumstances of the occurrence leading to the plaintiff's injuries or damages.

2. The type and extent of the plaintiff's injuries or damages.

3. The names, addresses, and telephone numbers of any witnesses to the occurrence.

4. The names, addresses, and telephone numbers of physicians and medical specialists involved in treating plaintiff's injuries.

5. The names, addresses, and telephone numbers of potential expert witnesses on the cause of the occurrence and on the nature and extent of the plaintiff's injuries or damages.

[b] Relating to Potential Defendants

1. Public entity(ies):

a. Complete name(s).

b. Address(es) of principal office(s).

NOTE:
Information about the full name of any public agency, its address, the names and addresses of the members of its governing board, and the names and addresses of its presiding officer and clerk or secretary can be obtained by examining the Roster of Public Agencies available at the Secretary of State's office and the county clerk's

office in any county where the agency has an office [*Gov. Code § 53051*; *see also* State of California Telephone Directory (available through Documents Sections of Department of General Services)].

2. Public employee(s):

a. Complete name(s).

b. Address(es).

c. Name(s) of employing public agency(ies).

3. Independent contractors of public agency(ies):

a. Complete name(s) and status(es).

b. Address(es).

c. Name(s) of employing public agency(ies).

d. Terms of contract with public agency(ies).

4. Other persons or entities:

a. Complete name(s) and status(es).

b. Address(es).

[c] Relevant to Occurrence and Injuries or Damage

[2] Prepare and Present Claim

NOTE:

Most claims for money or damages against public entities must be presented in accordance with the claims statutes as a prerequisite to any action on the claims, although there are certain specified statutory exceptions [*see* *Gov. Code §§ 905, 905.2*]. Additionally, an action against a public employee or former public employee for injury resulting from an act or omission by the employee within the scope of that employment is barred if a proper claim was not filed against the public entity [*Gov. Code § 950.2*], unless the plaintiff establishes that the plaintiff did not know or have reason to know that the defendant was a public employee [***see*** *Gov. Code § 950.4*].

[a] Time Limits

1. Six months from accrual of cause of action [*Gov. Code § 911.2*]:

a. Death actions.

b. Injury to persons.

c. Injury to personal property.

2. All other claims: one year from accrual of cause of action [*Gov. Code § 911.2*].

[b] Prepare Claim

1. Draft the claim [*see §§ 464.160, 464.162*]. If the public entity has a printed claim form, that form should be used [*see §§ 464.161*].

2. Have the claim signed by the claimant or by someone on the claimant's behalf [*Gov. Code § 910.2*].

[c] Present Claim

1. Against the state, accompanied by $25 filing fee [*Gov. Code § 915(b)*]:

a. Deliver to the Victim Compensation and Government Claims Board, 630 K Street, Sacramento, CA 95814; or

b. Mail to Victim Compensation and Government Claims Board, Government Claims Program, P.O. Box 3035, Sacramento, CA 95812-3035. The claim must be deposited in the United States post office, or in a mail box, subpost office, substation, mail chute, or other similar facility regularly maintained by the government of the United States, in a sealed envelope, properly addressed, with postage paid. The claim, amendment, application, or notice is deemed to have been presented and received at the time of deposit. Proof of mailing must be made in the manner set forth in *Code Civ. Proc. § 1013a* [*Gov. Code § 915.2*; for discussion and forms relating to proof of service, *see* Ch. 518, *Service of Summons and Papers*].

2. Against a local public entity [*Gov. Code § 915(a)*]:

a. Deliver to the clerk, secretary, or auditor of the local public entity; or

a. Mail to the clerk, secretary, or auditor of the local public entity, using the same method of mailing described above for claims against the state [*Gov. Code § 915.2*].

[d] Wait for Action on Claim by Board

1. The governing board must act on a claim within 45 days or it is deemed denied unless that time is extended by written agreement [*Gov. Code § 912.4*].

2. The board may take any of the following actions:

a. Serve notice of insufficiency of claim [*Gov. Code § 910.8*].

b. Allow the claim [*Gov. Code § 912.6(a)(2)*].

c. Reject the claim [*Gov. Code § 912.6(a)(1)*].

d. Reject part of the claim [*Gov. Code § 912.6(a)(3)*].

e. Compromise the claim [*Gov. Code § 912.6(a)(4)*].

NOTE:
The board must notify the claimant of the action taken [*Gov. Code § 911.8(a)*].

[e] Amend Claim

1. The time limit for an amendment related to the original claim is later of [*Gov. Code § 910.6(a)*]:

a. Within the time allowed for filing the original claim; or

b. Before the final action taken by the board.

2. Prepare the amendment [*see § 464.163*].

3. Present the amendment in the same manner as the original claim [*Gov. Code § 915.2*; *see § 464.140[2][c]*].

[3] Apply to Present Late Claim

NOTE:
A written application to present a late claim may be presented if a claim that should have been filed within six months was not filed [*Gov. Code § 911.4(a)*].

1. The application must be based on one of following grounds [*Gov. Code § 911.6(b)*]:

a. Mistake, inadvertence, surprise, or excusable neglect, and the public entity was not prejudiced in its defense.

b. Minority.

c. Physical or mental incapacitation.

d. Death.

2. The application must be filed within a reasonable time not to exceed one year from the accrual of the cause of action [*Gov. Code § 911.4(b)*].

3. Prepare the application [*see § 464.164*].

4. Present the application in the same manner as an original claim [*Gov. Code § 915.2*; *see § 464.140[2]*].

5. Wait for action on the application by the board, which is required to act on the application within 45 days, unless the period is extended by written agreement. If the board fails to act, the application is deemed denied on the 45th day, or the last day of the extended period [*Gov. Code § 911.6(a), (c)*]. The board may grant or deny the application [*Gov. Code § 911.6(a)*].

NOTE:
The board must notify the applicant of the action taken [*Gov. Code § 915.4*].

[4] Petition Court for Relief From Claim Requirement

NOTE:
A petition for relief from claim requirements may be filed after the application to present a late claim is denied or deemed denied [*Gov. Code § 946.6(a)*].

1. Base the petition on the following grounds [*Gov. Code § 946.6(c)*]:

a. The application to present a late claim was made within a reasonable time not exceeding one year from accrual of the cause of action; and

b. One of the following is applicable:
(1) Mistake, inadvertence, surprise, or excusable neglect, unless the public entity establishes that it would be prejudiced in its defense.

(2) Minority.

(3) Physical or mental incapacitation.

(4) Death.

2. File the petition within six months after denial of the application to file a late claim [*Gov. Code § 946.6(b)*].

3. Prepare the petition and supporting declarations [*see § 464.165*].

4. File the petition in a superior court that would be a proper court for the trial of an action on the cause of action to which the claim relates [*Gov. Code § 946.6(a)*].

5. Prepare the order [*see § 464.166*].

6. Serve a copy of the petition and a written notice of the time and place of hearing before the hearing as prescribed by *Code Civ. Proc. § 1005(b)*[*Gov. Code §§ 946(d), 946.6(d)*; *see also Code Civ. Proc. § 1005(a)(9)*; *see generally* Ch. 372, *Motions and Orders*]:

a. On a local public agency by serving its clerk, secretary, or board.

b. On the state:

(1) By serving the Attorney General at any of the Attorney General's offices in Los Angeles, Sacramento, San Diego, or San Francisco.

(2) If the petition involves a claim arising out of alleged actions or inactions of the Department of Transportation, by serving either the Attorney General at any of the Attorney General's offices in Los Angeles, Sacramento, San Diego, or San Francisco, or the Director of Transportation only at the Department of Transportation's headquarters office in Sacramento.

NOTE:
All moving and supporting papers must be served and filed at least 16 court days before the hearing [***Code Civ. Proc. § 1005(b)*** ; ***see also*** **Cal. Rules of Ct., Rule 3.1300(a)**]. **If, however, the notice is served by mail, the required 16-day period of**

notice before the time appointed for the hearing must be increased by five calendar days if the place of mailing and the place of address are within the State of California, by 10 calendar days if the place of mailing is outside the State of California but within the United States, and by 20 calendar days if the place of mailing is outside the United States [***Code Civ. Proc. § 1005(b)*** **;** ***see also*** *Cal. Rules of Ct., Rule 3.1300(c)* **(proof of service of moving papers)]. The 16-day period is increased by two days if service is by fax, Express Mail, or other overnight delivery method** [***Code Civ. Proc. § 1005(b)***]. **An extension of two court days may apply in case of electronic service pursuant to a local rule adopted under** ***Code Civ. Proc. § 1010.6*** [***Code Civ. Proc. § 1010.6(a)(6)*** ; **for discussion,** ***see*** Ch. 518, ***Service of Summons and Papers***].

7. Attend the hearing.

8. Have the judge sign the order.

NOTE:
If the order is granted, suit must be filed within 30 days after the order [*Gov. Code § 946.6(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From LiabilityTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural RequirementsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsScope of Employment

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§ 464.141 Plaintiff's Checklist for Filing Actions Against Public Entities and Employees

NOTE:

Actions against public entities and employees are governed by the same rules as other civil actions [*Gov. Code § 945.2*]. This checklist addresses only areas in which the procedures are different. For a procedural guide for use by plaintiffs in civil actions, see Ch. 2, *Procedural Guide for Civil Actions*.

[1] Statute of Limitations

1. File action against public entity within one of the following limitations periods:

a. Six months after proper notice of rejection of the claim is personally delivered to the claimant or deposited in the mail [*Gov. Code § 945.6(a)(1)*].

b. If notice of rejection of the claim is not given, two years after accrual of the cause of action [*Gov. Code § 945.6(a)(2)*].

c. If the petition for relief from claim requirements is granted, 30 days after the granting of that order [*Gov. Code § 946.6(f)*].

d. If no claim is required to be filed, the limitations period applicable to defendants who are not public entities [*Gov. Code § 945.8*].

2. If a claim has been filed against a public entity for injury, file the action against a public entity employee within the same periodsof limitation prescribed by *Gov. Code § 945.6* for public entities [*Gov. Code § 950.6(b)*].

[2] Prepare Papers

1. Complaint [*see §§ 464.180 -464.187, 464.210 -464.219, 464.240 -464.242*].

2. Proof of service [*see 464.141[4]*].

[3] Venue

1. In actions against the state, file the complaint in the appropriate county, as follows:

a. For death or injury to persons or personal property, the county where the injury or the injury causing death occurred [*Gov. Code § 955.2*].

b. In actions for the taking or damaging of private property for public use, the county in which the property is situated [*Gov. Code § 955*].

c. In all other actions, the state may have the action transferred to Sacramento County [*Gov. Code § 955*].

2. In actions against local public entities, file the complaint in the appropriate county, as follows: [*Code Civ. Proc. § 394(a)*].

a. In the county in which the local public entity is situated.

b. If an action is brought against a local public entity in a county other than the one in which it is situated, the entity may have the action transferred to a neutral county where none of the plaintiffs reside or do business and where the local public entity is not situated.

[4] Service of Summons

1. In actions against the state, serve the summons as follows:

a. On the Attorney General [*Gov. Code § 955.4*].

b. In actions for taking or damaging public property arising out of work done by the Department of Transportation, either on the Attorney General or on the Director of Transportation [*Gov. Code § 955.6(a)*].

c. In actions for taking or damaging public property arising out of work done by Department of Water Resources, either on the Attorney General or on the Director of Water Resources [*Gov. Code § 955.8*].

2. In actions against a local public entity, serve the summons as follows:

a. On the clerk, secretary, president, presiding officer, or other head of the governing body [*Code Civ. Proc. § 416.50(a)*; *see also Gov. Code § 960.8*; *see generally § 464.45[2][b]*].

b. If the public agency has no statement or if a defective statement is on file in the Roster of Public Agencies, obtain a court order for service on the Secretary of State and serve the Secretary of State [*see Gov. Code §§ 960.2*, *960.3*; *see* discussion in *§ 464.45[2][c]*].

[5] Collection of Judgment

NOTE:
For detailed discussion of the procedures applicable to enforcing claims and judgments against the state and local public entities, see Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities* .

1. For judgments against the state, the Controller must draw a warrant for the payment of any final judgment or settlement against the state whenever the Director of Finance certifies that a sufficient appropriation for payment exists. Claims on these judgments and settlements are exempt from the *Gov. Code § 925.6* requirement that the claim be audited before the Controller draws a warrant for it. Claims arising out of the activities of the State Department of Transportation may be paid if either the Director of Transportation or the Director of Finance certifies that a sufficient appropriation for payment of the claim exists [*Gov. Code § 965.2*].

NOTE:
If no appropriation exists, the Controller cannot be compelled to pay a judgment by a writ of mandate [*Westinghouse Elec. Co. v. Chambers (1915) 169 Cal. 131, 135-136, 145 P. 1025* ; *Veterans of Foreign Wars v. State of California (1974) 36 Cal. App. 3d 688, 697, 111 Cal. Rptr. 750]* .

2. A local public entity must pay any tort judgment in one of the manners set forth in *Gov. Code § 970 et seq.* [*Gov. Code § 970.2*].

NOTE:
A writ of mandate is an appropriate remedy to compel payment [*Gov. Code § 970.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityLiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationTime LimitationsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsJurisdictionTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural RequirementsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsScope of EmploymentTortsPublic Entity LiabilityLiabilityState Tort Claims ActsVenue

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A. Claims Against Public Entities and Employees

40-464 California Forms of Pleading and Practice--Annotated § 464.160

§ 464.160 Claim Against Public Entity [Gov. Code §§ 905, 905.2, 910, 910.2]--General Form

[1] FORM Claim Against Public Entity [Gov. Code §§ 905, 905.2, 910, 910.2]--General Form

TO _____ [*name of public entity*]:

_____ [*Name of claimant*] hereby makes claim against _____ [*name of public entity*] [*specify sum only if the amount claimed is less than $10,000, e.g.,* for the sum of $_____] and makes the following statements in support of the claim:

1. Claimant's post office address is _____ [*address*], _____ [*city*], California.

2. Notices concerning the claim should be sent to _____ [*address*], _____ [*city*], California.

3. The date and place of the _____ [occurrence *or* transaction] giving rise to this claim are _____ [*specify*].

4. The circumstances giving rise to this claim are as follows: _____ [*specify, e.g.,* at the above time and place, claimant was walking on the sidewalk, which was in a dangerous condition due to repair work being done by _____ (*name of public entity*), and, because of the dangerous condition, plaintiff slipped and fell into an excavation, causing _____ [him *or* her] serious injuries].

5. Claimant's injuries are _____ [*specify*].

6. The names of the public employees causing the claimant's injuries are _____ [*specify or unknown]*.

[*EITHER, if amount claimed is less than $10,000*]

7. My claim as of the date of this claim is $_____. This figure is based on the following: _____ [*specify, e.g.:*

Medical Expenses Incurred to Date:	$_____
Estimated Future Medical Expenses:	$_____
Loss of Wages:	$_____
General Damages:	$_____
TOTAL	$_____].

[*OR, if amount claimed is greater than $10,000*]

7. My claim as of the date of this claim is in an amount that would place it within the jurisdiction of the superior court. The claim is based on _____ [*specify, e.g.,* injury, damage, and/or loss] in an amount to be proved later.
Dated: _____.

_____ [*signature*]
[Claimant *or* On Behalf of Claimant]

[2] Use of Form

This form is a general form of claim that can be used for any claim against any public entity [*see Gov. Code §§ 905, 905.2*]. Many public entities, however, have their own forms of claims and the better practice is to use those forms, although their use is not required [*see Gov. Code § 910.4*]. For an official form provided by the state for use in filing claims against the state, see *§ 464.161*.

Although compliance with the claims statute is mandatory and failure to file a claim is fatal to a cause of action, if there has been an attempt to comply with the claim filing requirements but the compliance is defective, the claim may be deemed adequate under the doctrine of substantial compliance [*see City of San Jose v. Superior Court (1974) 12 Cal. 3d 447, 454-458, 115 Cal. Rptr. 797, 525 P.2d 701* ; *Pacific Tel. & Tel. Co. v. County of Riverside (1980) 106 Cal. App. 3d 183, 188, 165 Cal. Rptr. 29]* . For further discussion of the substantial compliance doctrine, see *§ 464.23[3][e]*.

[3] Contents of Claim

The claim must be presented by the claimant or by a person acting on the claimant's behalf and must show all of the following [*Gov. Code § 910*]:

- The name and post office address of the claimant;
- The post office address to which the person presenting the claim desires notices to be sent;
- The date, place, and other circumstances of the occurrence or transaction that gave rise to the claim

asserted;

- The name or names of the public employee or employees causing the injury, damage, or loss, if known;

- A general description of the indebtedness, obligation, injury, damage, or loss incurred so far as it may be known at the time of presentation of the claim; and

- The amount claimed if it totals less than $10,000 as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed. If the amount claimed exceeds $10,000, the claim must not state any dollar amount. The claim, however, must indicate whether the claim would be a limited civil case (amount in controversy, exclusive of interest, is $25,000 or less) [*see Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86* (limited civil case); *see generally* Ch. 324, *Jurisdiction: Subject Matter*].

The claim must be signed by the claimant or by some person on the claimant's behalf. Claims against local public entities for supplies, materials, equipment, or services need not be signed by the claimant or on the claimants behalf if presented on a bill or invoice regularly used in the conduct of the claimant's business [*Gov. Code § 910.2*].

[4] Time for Presentation of Claim

A claim relating to a cause of action for death or for injury to a person or to personal property or growing crops must be presented not later than six months after the accrual of the cause of action. A claim relating to any other cause of action must be presented not later than one year after the accrual of the cause of action [*Gov. Code § 911.2*].

[5] Presentation of Claim

A claim must be presented to a local public entity by either delivering it or mailing it to the clerk, secretary, or auditor thereof [*Gov. Code § 915(a)*]. A claim must be presented to the state by delivering it to an office of the Victim Compensation and Government Claims Board or by mailing it to the board at its principal office [*Gov. Code § 915(b)*; *see* § 464.110[2] (board address)].

A claim is deemed to have been presented in compliance with these requirements even though it is not delivered or mailed as provided above if it is actually received by the clerk, secretary, auditor, or board of the local public entity or is actually received at an office of the Victim Compensation and Government Claims Board within the time prescribed for presentation [*Gov. Code § 915(d)*]. However, presentation of a claim to the State Board of Control (now the Victim Compensation and Government Claims Board) did not constitute receipt by the proper local public entity ultimately responsible [*Johnson v. San Diego Unified Sch. Dist. (1990) 217 Cal. App. 3d 692, 699-700, 266 Cal. Rptr. 187* (school district is local public entity)].

A claim is deemed to have been presented to a public agency in compliance with these requirements if it is delivered or mailed within the time prescribed for presentation in conformity with the information contained in the statement in the Roster of Public Agencies pertaining to that public agency that is on file at the time the claim is delivered or mailed [*Gov. Code § 915(e)*; *see Gov. Code § 53050* (definition of public agency); for discussion of the statement in the Roster of Public Agencies, *see § 464.48*].

A claim must be accompanied by a $25 filing fee, unless the claimant has applied for and been granted a waiver based on indigency, as defined by statute [*Gov. Code § 905.2(c)(1), (2)* (persons receiving benefits under SSI or SSP programs, CalWORKS program, food stamp program, or under *Welf. & Inst. Code § 1700*, persons with monthly

income 125 percent or less of current state monthly poverty line, or persons in prison, jail, or other state institution who have balance of $100 or less credited to resident's trust account within 90 days prior to filing claim)]. To request a fee waiver, the claimant must attach to the claim a signed affidavit requesting the waiver and a verification of benefits or income and any other required financial information in support of the request for the waiver [*Gov. Code § 905.2(c)(2)*]. If the board approves the claim, any filing fee paid will be refunded to the claimant by the state entity against which the approved claim was filed [*Gov. Code § 905.2(e)*]. The time for the board to determine the sufficiency, timeliness, or any other aspect of the claim begins when the claim is submitted with the filing fee, when a fee waiver is granted, or when the filing fee is paid to the board after a fee waiver is denied, so long as payment is received within 10 calendar days after the mailing of the notice of denial [*Gov. Code § 905.2(d)*].

[6] Manner of Mailing

If a claim is presented or sent by mail, the claim must be mailed in the manner prescribed by *Gov. Code § 915.2*. The claim must be deposited in the United States post office or in a mailbox, subpost office, substation, mail chute, or other similar facility regularly maintained by the government of the United States, in a sealed envelope, properly addressed with postage paid. The claim is deemed to have been presented and received at the time of the deposit. Proof of mailing may be made in the manner prescribed by *Code Civ. Proc. § 1013a* [*Gov. Code § 915.2*].

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40-464 California Forms of Pleading and Practice--Annotated § 464.161

§ 464.161 Tort Claim Against State [Gov. Code §§ 905.2, 910.2]--General Form

[1] FORM Tort Claim Against State [Gov. Code §§ 905.2, 910.2]--General Form

Click here to view image.

[2] Use of Form

This form is for use by a person to claim compensation for damages or injuries resulting from a tort for which the state is responsible. Although use of the form is not mandatory, the better practice is to use it [*Gov. Code § 910.4*].

A copy of this form is available on-line at http://www.boc.ca.gov/PubsGC/Forms/GCClaimForm.pdf.

The questions on this form request the information required by *Gov. Code § 910*, which sets forth the contents of a claim [*see § 464.160[3]*]. When responding to the questions on the form, as long as the required elements are present, it is not necessary that the claim comply with formal pleading standards. The purpose of the claim is to present sufficient detail to reasonably enable the public entity to make an adequate investigation of the merits of the claim and to settle it without the expense of a lawsuit. Compliance with *Gov. Code § 910* should suffice [*see Blair v. Superior Court (1990) 218 Cal. App. 3d 221, 225, 267 Cal. Rptr. 13]* .

[3] Filing

Completed claims and related documentation must be filed in triplicate with the Victim Compensation and Government Claims Board, Government Claims Program, P.O. Box 3035, Sacramento, CA 95812-3035. The claim may also be delivered to the board at 630 K Street in Sacramento.

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40-464 California Forms of Pleading and Practice--Annotated § 464.162

§ 464.162 Claim Against Public Entity [Gov. Code §§ 905, 905.2, 910, 910.2]--On Behalf of Class

[1] FORM Claim Against Public Entity [Gov. Code §§ 905, 905.2, 910, 910.2]--On Behalf of Class

TO _____ [*name of public entity*]:

_____ [*Name of claimant*] on _____ [his *or* her *or* its] own behalf and on behalf of others similarly situated hereby makes claim against _____ [*name of public entity*] [*specify sum only if the amount claimed is less than $10,000, e.g.,* for the sum of $_____] and makes the following statements in support of the claim:

1-3. [*Addresses and date and place of allegations. See § 464.160[1], Paragraphs 1-3*].

4. The circumstances giving rise to this claim are as follows: _____ [*specify, including class claims*].

5. Claimant's individual damages are _____ [*specify type of damages, e.g.,* medical expenses] and the class damages are _____ [*specify type of damages, e.g.,* medical expenses].

6. The names of the public employees causing the claimant's injuries are _____ [*specify or* unknown].

[*EITHER, if amount claimed is less than $10,000*]

7. Claimant's individual claim as of the date of this claim is $_____; the class claim as of the date of this claim is $_____. These figures are based on the following: _____ [*specify, e.g.:*

Medical Expenses Incurred to Date:	$_____
Estimated Future Medical Expenses:	$_____

Loss of Wages:	$_____
General Damages:	$_____
TOTAL	$_____].

[*OR, if amount claimed is greater than $10,000*]

7. Claimant's individual claim and the class claim as of the date of this claim are in amounts that would place them within the jurisdiction of the superior court. These claims are based on _____ [*specify, e.g.,* injury, damage, and/or loss] in an amount to be proved later.

[*CONTINUE*]

8. The class on whose behalf this claim is made can be identified and ascertained by _____ [*specify*].
Dated: _____.

_____ [*signature*]
Claimant, Individually and on Behalf of the Above-Described Class

[2] Use of Form

This form of claim is for use in making a class claim against a public entity. For a description of the requirements for claims generally, *see § 464.160*.

[3] Allegations

A class claim must provide sufficient information to identify and make ascertainable the class itself [*City of San Jose v. Superior Court (1974) 12 Cal. 3d 447, 456-457, 115 Cal. Rptr. 797, 525 P.2d 701]* .

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40-464 California Forms of Pleading and Practice--Annotated § 464.163

§ 464.163 Amendment of Claim [Gov. Code § 910.6]

[1] FORM Amendment of Claim [Gov. Code § 910.6]

TO _____ [*name of public entity*]:

_____ [*Name of claimant*] hereby amends his/her claim against _____ [*name of public entity*] presented to you on _____ [*date*], as follows: _____ [*specify amendments and additions*].
Dated: _____.

_____ [*signature*]
[Claimant *or* On Behalf of Claimant]

[2] Use of Form

This form is for use in amending a claim against a public entity. If the changes are substantial, the better practice is to file an entirely new claim entitled "Amended Claim." An amendment is presented in the same manner as the original claim [*see Gov. Code § 915*], which is described in § 464.160.

[3] Time and Effect of Amendment

A claim may be amended at any time before the later of either the expiration of the period designated in *Gov. Code § 911.2* or the time that the board takes final action on the claim, if the claim as amended relates to the same transaction or occurrence that gave rise to the original claim. The amendment is considered a part of the original claim for all purposes [*Gov. Code § 910.6(a)*].

[4] Effect of Failure or Refusal to Amend

A failure or refusal to amend a claim, whether or not notice of insufficiency is given under *Gov. Code § 910.8*, does not

constitute a defense to any action brought on the cause of action for which the claim was presented, if the court finds that the claim as presented complied substantially with *Gov. Code §§ 910* and *910.2* or a form provided by the entity [*Gov. Code § 910.6(b)*].

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40-464 California Forms of Pleading and Practice--Annotated § 464.164

§ 464.164 Application to Public Entity for Leave to Present Late Tort Claim [Gov. Code §§ 911.4, 911.6]

[1] FORM Application to Public Entity for Leave to Present Late Tort Claim [Gov. Code §§ 911.4, 911.6]

In the Matter of the Claim of _____ [*name*] against _____ [*name of public entity*]	))))))	APPLICATION FOR LEAVE TO PRESENT LATE CLAIM [*Gov. Code § 911.4*]

_____

TO _____ [*name of public entity*]:

1. Application is hereby made for leave to present a late claim under *Section 911.4 of the Government Code*. The claim is founded on a cause of action for _____ [*specify, e.g.,* wrongful death], which accrued on _____ [*date*], and for which a claim was not timely presented. For additional circumstances relating to the cause of action, reference is made to the proposed claim attached hereto as Exhibit _____ and made a part hereof.

[*EITHER*]

2. The reason for the delay in presenting this claim is the _____ [mistake *and/or* inadvertence *and/or* surprise *and/or* excusable neglect] of the claimant [and _____ (*name of attorney*)], as is more particularly shown in the declaration of _____ [*name*] attached hereto as Exhibit _____. _____ [*Name of public entity*] was not prejudiced in the defense of the claim by the failure to file the claim in a timely manner, as shown by the declaration of _____ [*name*] attached hereto as Exhibit _____ and made a part hereof.

[*OR*]

2. The reason for the delay in presenting this claim is that the claimant was a minor during all of the period when the claim should have been presented, as shown by the declaration of _____ [*name*] attached hereto as Exhibit _____ and made a part hereof.

[*OR*]

2. The reason for the delay in presenting this claim is that the claimant was _____ [physically *or* mentally *or* physically and mentally] incapacitated during all of the period when the claim should have been presented and, by reason of this disability, failed to present the claim in a timely manner, as shown by the declaration of _____ [*name*] attached hereto as Exhibit _____ and made a part hereof.

[*OR*]

2. The reason for delay in presenting this claim is that the claimant was a dependent child of the juvenile court under the Arnold-Kennick Juvenile Court Law and was in the custody and control of _____ [*name of public entity*], the public entity to which the claim is to be presented, and this public entity was required by law to make a report of injury, abuse, or neglect to either the juvenile court or the claimant's attorney, but this public entity failed to make the report within the time required, as shown by the declaration of _____ [*name*], attached hereto as Exhibit _____ and made a part hereof.

[*OR*]

2. The reason for the delay in presenting this claim is that the person who sustained the injury described in the claim attached hereto died during the period the claim should have been presented, as shown by the declaration of _____ [*name*] attached hereto as Exhibit _____ and made a part hereof.

[*CONTINUE*]

3. This application is presented within a reasonable time after the accrual of the cause of action, as shown by the declaration of _____ [*name*] attached hereto as Exhibit _____ and made a part hereof.

WHEREFORE, it is respectfully requested that this application be granted and that the attached claim be received and acted on in accordance with *Sections 912.4-912.8 of the Government Code*.
Dated: _____.

_____ [*signature*]
[Claimant *or* On Behalf of Claimant]

[2] Use of Form

The application form above is for use by a claimant to apply to a public entity for leave to file a late tort claim. The proposed claim [*see §§ 464.160* and *464.161*] must be attached to the application [*Gov. Code § 911.4(b)*], along with

supporting declarations. The application should be presented in the same manner as a claim [*Gov. Code § 911.4*; *see Gov. Code § 915*], which is described in § 464.160.

The alternatives in Paragraph 2 are based on each of the grounds for granting the application specified in *Gov. Code § 911.6(b)*. For discussion of these grounds, see *§ 464.25[4]*.

[3] Time for Presentation of Application

The application must be presented to the public entity within a reasonable time not to exceed one year after the accrual of the cause of action. In computing the one-year period, time during which the person who sustained the alleged injury, damage, or loss was a minor must be counted, but time during which he or she was mentally incapacitated and did not have a guardian or conservator of the person is not counted [*Gov. Code § 911.4(c)(1)*]. Time during which a minor is adjudged to be a dependent child of the juvenile court under the Arnold-Kennick Juvenile Court Law is also not counted under the appropriate circumstances [*see Gov. Code § 911.4(c)(2), (3)*; *see § 464.25[1]*].

[4] Action on Application

The board must grant or deny the application within 45 days after it is presented to the board. However, before the expiration of that period, the claimant and the board may, by written agreement, extend that period [*Gov. Code § 911.6(a)*]. If the board fails or refuses to act on the application within the prescribed period, it is deemed denied on the 45th day or, if the period was extended by agreement, on the last day of the period specified in the agreement [*Gov. Code § 911.6(c)*]. If an application is granted, the claim will be deemed to have been presented to the board on the day that leave to present the late claim is granted [*Gov. Code § 912.2*].

An application to file a late claim must be granted if it can be shown that the claimant acted with reasonable diligence in pursuing the claim and reasonably believed that the responsible entity was not a public agency because of its representations [*Gov. Code § 7530*; *see § 464.25[2]*].

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40-464 California Forms of Pleading and Practice--Annotated § 464.165

§ 464.165 Notice of Hearing and Petition for Relief From Claim Requirement After Late Tort Claim Denied by Board [Gov. Code § 946.6]

[1] FORM Notice of Hearing and Petition for Relief From Claim Requirement After Late Tort Claim Denied by Board [Gov. Code § 946.6]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Petitioner,	)	
vs.	)	NO. _____
_____ [*name*], Respondent.	)	NOTICE OF HEARING AND PETITION FOR RE-
	)	LIEF FROM CLAIM REQUIREMENT
	)	[*Gov. Code § 946.6*]

_____

TO _____ [*name of public entity*]:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], California, petitioner will petition for an order under *Section 946.6 of the Government Code* relieving petitioner of the requirement of presenting a claim. Petitioner _____ [*name*] respectfully represents:

1. _____ [*Allege identity and capacity of petitioner, e.g.,* Petitioner _____ (*name*) is a resident of _____ (*city*), _____ (*county*), California.]

2. _____ [*Allege identity and capacity of respondent, e.g.,* Respondent _____ (*name*) is _____ (*specify, e.g.,* an incorporated city)], and is a public entity within the meaning of *Government*

Code Section 810 et seq.

3. On _____ [*date*], petitioner presented to _____ [*name of public entity*] a written application for leave to present a late tort claim pursuant to *Section 911.4 of the Government Code*, which included a proposed claim, a copy of which is attached hereto as Exhibit _____ and made a part hereof. The application was [deemed] denied on _____ [*date*].

4. Petitioner's claim is based on a cause of action that accrued on _____ [*date*], the details of which are set forth in the application for leave to present a late tort claim attached hereto as part of Exhibit _____. A claim was not timely filed on this cause of action against _____ [*name of public entity*].

[*EITHER*]

5. The reason for the delay in presenting the claim was _____ [mistake *and/or* inadvertence *and/or* surprise *and/or* excusable neglect] of the claimant [and _____ (*name of attorney*)], as is more particularly shown in the declaration of _____ [*name*] attached hereto as Exhibit _____ and made a part hereof.

[*OR*]

5. The reason for the delay in presenting the claim was that the claimant was a minor during all of the period when the claim should have been presented, as shown by the declaration of _____ [*name*] attached hereto as Exhibit _____ and made a part hereof.

[*OR*]

5. The reason for delay in presenting this claim is that the claimant was a dependent child of the juvenile court under the Arnold-Kennick Juvenile Court Law and was in the custody and control of _____ [*name of public entity*], the public entity to which the claim is to be presented, and this public entity was required by law to make a report of injury, abuse, or neglect to either the juvenile court or the claimant's attorney, but this public entity failed to make the report within the time required, as shown by the declaration of _____ [*name*], attached hereto as Exhibit _____ and made a part hereof.

[*OR*]

5. The reason for the delay in presenting the claim was that the claimant was _____ [physically *or* mentally *or* physically and mentally] incapacitated during all of the period when the claim should have been presented and, by reason of that disability, failed to present the claim in a timely manner, as shown by the declaration of _____ [*name*] attached hereto as Exhibit _____ and made a part hereof.

[*OR*]

5. The reason for the delay in presenting the claim was that the person who sustained the injury described in the claim attached hereto died during the period the claim should have been presented, as shown by the declaration of _____ [*name*] attached hereto as Exhibit _____ and made a part hereof.

[*CONTINUE*]

6. The application for leave to file a late claim was presented within a reasonable time after the accrual of the cause of action, as shown by the declaration of _____ [*name*] attached hereto as Exhibit _____ and made a part hereof.

WHEREFORE, petitioner prays that the court grant this petition and issue an order relieving petitioner from complying with the provisions of *Government Code Section 945.4* and grant such further orders as the court deems proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Use of Form

This form of petition is for use by a claimant in petitioning the court for relief from *Gov. Code § 945.4*, which requires that a claim be presented to the public entity and rejected before an action may be brought in court against the public entity. *Gov. Code § 946.6(a)* permits this relief if the board has denied or is deemed to have denied the petitioner's previous application for leave to present a late tort claim under *Gov. Code § 911.4*. For a form for use in applying to a public entity for leave to present a late claim, see *§ 464.164*.

The court must grant the relief requested if it finds that the application for leave to present a late claim was made within a reasonable time not to exceed one year and was denied or deemed denied, and that one or more of the grounds specified in *Gov. Code § 946.6(c)(1)-(4)* exist [*see Gov. Code § 946.6(c)*; for discussion of these grounds, *see § 464.25[4]*].

[3] Contents of Petition

This petition alleges:

- The petitioner's identity and capacity (Paragraph 1).
- The respondent's identity and capacity (Paragraph 2).
- That an application for leave to present a late claim was made to the board and was denied or deemed denied (Paragraph 3) [*Gov. Code § 946.6(b)(1)*].
- The information required to be included within the claim (Paragraph 4) [*Gov. Code § 946.6(b)(3)*].
- The reason for the failure to present a timely claim (Alternative Paragraphs 5) [*Gov. Code § 946.6(b)(2)*].
- That the application for leave to present a late claim was presented within a reasonable time (Paragraph 6) [*see Gov. Code § 946.6(c)*].

[4] Time to File Petition

This petition must be filed within six months after the application to the board is denied or deemed to be denied [*Gov.*

Code § 946.6(b)]. This limitation period is, however, subject to the provisions of *Code Civ. Proc. § 352* (tolling limitations periods for actions), and may thus be tolled during the period of the petitioner's minority or insanity as specified in *Code Civ. Proc. § 352(a)* [*see Code Civ. Proc. § 352(a)*; *Los Angeles City Sch. Dist. v. Superior Court (1970) 9 Cal. App. 3d 459, 463-464, 88 Cal. Rptr. 286* ; *see also Code Civ. Proc. § 352.1(a)* (tolling statute of limitations for period, not to exceed two years, during which plaintiff is imprisoned or in execution under criminal sentence for term less than life)]. For further discussion, see *§ 464.25[3][c]*.

[5] Venue

The proper court for filing the petition is a superior court that would be a proper court for the trial of an action on the cause of action to which the claim relates. If the petition is filed in a court that is not a proper court for the determination of the matter, the court, on motion of any party, must transfer the proceeding to a proper court [*Gov. Code § 946.6(a)*].

[6] Service of Petition

[a] On Whom Service Must be Made

If the respondent is a local public entity, a copy of the petition and a written notice of the time and place of hearing on the petition must be served before the hearing on the clerk, secretary, or board of that local public entity [*Gov. Code § 946.6(d)(1)*].

If the respondent is the state, a copy of the petition and a written notice of the time and place of hearing on the petition must be served before the hearing on the Attorney General. If, however, the petition involves a claim arising out of alleged actions or inactions of the Department of Transportation, service must be made on the Attorney General or on the Director of Transportation [*Gov. Code § 946.6(d)(2)*].

Service on the Attorney General may be accomplished at any of the Attorney General's offices in Los Angeles, Sacramento, San Diego, or San Francisco. Service on the Director of Transportation may be accomplished only at the Department of Transportation's headquarters in Sacramento [*Gov. Code § 946.6(d)(2)*].

[b] Manner of Service

Service must be made in the manner prescribed by *Code Civ. Proc. § 1005(b)* [*Gov. Code § 946.6(d)*; *see also Code Civ. Proc. § 1005(a)(9)*]. *Code Civ. Proc. § 1005(b)* provides generally that all moving and supporting papers must be served and filed at least 16 court days before the time appointed for the hearing [*Code Civ. Proc. § 1005(b)*; *see also Cal. Rules of Ct., Rule 3.1300(a)*]. If, however, the notice is served by mail, the required 16-day period of notice before the time appointed for the hearing must be increased by five calendar days if the place of mailing and the place of address are within the State of California, by 10 calendar days if the place of mailing is outside the State of California but within the United States, and by 20 calendar days if the place of mailing is outside the United States; the 16-day period is increased by two calendar days if service is by fax, Express Mail, or other overnight delivery method [*Code Civ. Proc. § 1005(b)*; *see Cal. Rules of Ct., Rule 3.1300(c)* (proof of service of movingpapers); *see also* Ch. 372, *Motions and Orders*]. An extension of two court days may apply in case of electronic service pursuant to a local rule adopted under *Code Civ. Proc. § 1010.6* [*Code Civ. Proc. § 1010.6(a)(6)*; for discussion, *see* Ch. 518, *Service of Summons and Papers*].

Because the petition for relief involves an attempt to obtain preliminary judicial assistance in preparation for later litigation, service of the petition must be effected in the same manner as service of summons in order to give the court jurisdiction to enter an order against the public entity [*Thierfeldt v. Marin Hosp. Dist. (1973) 35 Cal. App. 3d 186, 198-200, 110 Cal. Rptr. 791* (service by mail is insufficient in absence of acknowledgment of service as provided in *Code Civ. Proc. § 415.30*)]. Although any order entered on a petition served in an improper manner may be set aside,

when the court enters an order granting relief to the petitioner, if the petitioner can show that the clerk, secretary, or board of the local public entity had actual notice of the hearing on the petition not less than 10 days before the hearing, it may be inequitable to set aside the order unconditionally [*see Thierfeldt v. Marin Hosp. Dist. (1973) 35 Cal. App. 3d 186, 200-201, 110 Cal. Rptr. 791* (public entity was entitled to set aside order, however, because improper notice was given)].

[7] Cross References

For memoranda of points and authorities supporting and opposing a petition for relief from claim filing requirements, see California Points and Authorities, Ch. 196, *Public Entities*

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40-464 California Forms of Pleading and Practice--Annotated § 464.166

§ 464.166 Order Granting Petition for Relief From Claim Requirement [Gov. Code § 946.6]

[1] FORM Order Granting Petition for Relief From Claim Requirement [Gov. Code § 946.6]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER GRANTING RELIEF FROM CLAIM RE-
Respondent.	)	QUIREMENT
	)	
	)	

The petition of _____ [*name*] for an order of the court relieving _____ [him *or* her *or* it] from the requirements of *Section 945.4 of the Government Code* that a written claim be presented and be rejected, or be deemed rejected, by the public entity prior to the commencement of an action against a public entity came on regularly for hearing this day. Petitioner appeared by counsel _____ [*name*]; respondent appeared by counsel _____ [*name*].

The court finds from proof made to satisfaction of the court and good cause appearing therefor:

IT IS ORDERED that petitioner _____ [*name*] is relieved from the provisions of *Section 945.4 of the Government Code* requiring that a written claim be filed as a prerequisite to a suit against a public entity on the cause of action set forth in the petition herein.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use if the claimant's petition for relief from the claim filing requirement of *Gov. Code § 945.4* is granted [*see Gov. Code § 946.6*; for form of petition, *see § 464.165*]. It is presented to the judge for signature after the matter has been heard and ruled on favorably.

[3] Time for Filing Suit

If the court makes an order relieving the petitioner from the claim requirements, suit on the cause of action to which the claim relates must then be filed in that court within 30 days [*Gov. Code § 946.6(f)*].

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40-464 California Forms of Pleading and Practice--Annotated §§ 464.167-464.179

[Reserved]

§§ 464.167[Reserved]

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40-464 California Forms of Pleading and Practice--Annotated § 464.180

§ 464.180 Complaint for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity and Employee Based on Tortious Act of Employee Within Scope of Employment [Gov. Code § 815.2]--General Form

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity and Employee Based on Tortious Act of Employee Within Scope of Employment [Gov. Code § 815.2]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	[Amount demanded _____ (exceeds
Defendants.	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

[*EITHER*]

1. Defendant City of _____ is, and at all times mentioned herein was, a municipal corporation, duly organized and existing under the laws of the State of California and situated in the County of _____.

[*OR*]

1. Defendant City of _____ is, and at all times mentioned herein was, a chartered city, duly organized and existing under the laws of the State of California and situated in the County of _____.

[*OR*]

1. Defendant County of _____ is, and at all times mentioned herein was, a county duly organized and existing under the laws of the State of California.

[*OR*]

1. Defendant _____ [*name*] is, and at all times mentioned herein was, a _____ [*specify*] district, duly organized and existing under the laws of the State of California.

[*OR*]

1. Defendant State of California is, and at all times mentioned herein was, a sovereign state of the United States of America.

[*OR*]

1. Defendant _____ [*name*] is, and at all times mentioned herein was, a _____ [*specify, e.g.*, housing] authority of the State of California, duly organized and existing under the laws of the State of California.

2. At all times mentioned herein, defendant _____ [*name*] was an employee of defendant _____ [*name of public entity*] and in doing the acts hereinafter described, acted within the course and scope of _____ [his *or* her] employment.

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by that negligence.)]

[*EITHER*]

[4. (Plaintiff is informed and believes and thereon alleges that) at all times herein mentioned each of the defendants sued herein as DOES 1-_____, inclusive, was the agent and employee of each of the remaining defendants and was at all times acting within the purpose and scope of such agency and employment.]

[*OR*]

[4. At all times herein mentioned, defendants DOES 1-_____, inclusive, were the agents, servants, and employees of

their codefendants, and in doing the things hereinafter alleged were acting in the scope of their authority as such agents, servants, and employees, and with the permission and consent of their codefendants.]

5. On or about _____ [*date*], plaintiff _____ [*allege where plaintiff was and what plaintiff was doing at time of injury*].

6. At such time and place, defendant _____ [*name of public employee*] _____ [*specify tortious act of public employee, e.g.,* negligently and carelessly _____ (*specify negligent act or omission*)]. _____ [*If the complaint seeks damages against a publicly elected or appointed state or local officer, in the officer's individual capacity, and the alleged injury is proximately caused by the officer acting under color of law, allege with particularity the material facts sufficient to establish the individual liability of the officer, and the plaintiff's right to recover from the officer*].

7. As a proximate result of the _____ [*specify, e.g.,* negligence and carelessness] of defendant _____ [*name*], _____ [*describe how plaintiff was injured from act or omission*], causing plaintiff the injuries described hereinafter.

8. As a proximate result of the _____ [*specify, e.g.,* negligence and carelessness] of defendant[s, and each of them], plaintiff was hurt and injured in _____ [his *or* her] health, strength, and activity, sustaining injury to _____ [his *or* her] body and shock and injury to _____ [his *or* her] nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to _____ [him *or* her.] As a result of such injuries, plaintiff has suffered general damages.

[*EITHER*]

9. As a [further] proximate result of defendant's _____ [*specify, e.g.,* negligence and carelessness] herein alleged, plaintiff has been required to expend money and incur obligations, and will continue to expend money and incur obligations, for medical services, X-rays, drugs, and sundries reasonably required in the treatment and relief of the injuries herein alleged, and plaintiff has been damaged thereby.

[*OR*]

9. As a further proximate result of the _____ [*specify, e.g.,* negligence and carelessness] of defendant [s, and each of them], plaintiff has incurred, and will continue to incur, medical and related expenses.

[*EITHER*]

10. As a further proximate result of the _____ [*specify, e.g.,* negligence and carelessness] of defendant[s, and each of them], plaintiff was prevented from attending to _____ [his *or* her] usual occupation as a _____ [*state occupation*] for a period _____ [of _____ (*specify) or* to the date of the filing of this complaint] and thereby lost earnings.

[*OR*]

10. As a further proximate result of the _____ [*specify, e.g.*, negligence and carelessness] of defendant [s, and each of them], plaintiff's earning capacity has been greatly impaired, both in the past and at present.

11. On or about _____ [*date*], plaintiff presented to _____ [*name of public entity*] by _____ [delivering *or* mailing] a claim to the _____ [clerk *or* secretary *or* auditor] for the injuries, disability, losses, and damages suffered and incurred by _____ [him *or* her] by reason of the above-described occurrence, all in compliance with the requirements of *Government Code Section 905*. A copy of the claim is attached hereto as Exhibit A and made a part hereof.

12. On or about _____ [*date*], _____ [*name of public entity*] _____ [rejected the claim in its entirety *or* allowed the claim in the amount of $_____ and rejected it as to the remainder *or* failed to act on the claim within the period of 45 days after its presentation, and the claim was thus deemed rejected, under the provisions of *Government Code Section 912.4*, at the expiration of the 45-day period, to wit, on _____ (*date*)].

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This complaint is a general form for use in an action against a public entity and employee for personal injuries caused by the act or omission of the employee in the scope of his or her employment.

[3] Allegations

This form includes the following allegations:

- An allegation concerning the status of any defendant that is a public entity (Paragraph 1);
- An allegation concerning any public employees being sued in their individual capacities (Paragraph 2);
- An optional fictitious name allegation (Paragraph 3);
- Alternative agency allegations (Paragraph 4);
- Allegations concerning the plaintiff's injury (Paragraph 5);
- Allegations concerning the defendants' conduct that caused the injury, including an optional allegation setting forth specific facts regarding an individual's liability that is required if the complaint alleges that a publicly elected or appointed state or local officer caused injury while acting under color of law [*Gov. Code § 951*] (Paragraph 6);
- Allegation of damages suffered by the plaintiff as a result of the defendant's conduct (Paragraphs 7-10); and
- Allegation of the plaintiff's compliance with the applicable claims procedure under the Tort Claims Act [*Gov. Code § 810 et seq.*] (Paragraph 11).

For complete discussion of the tort liability of public entities and employees under general principles of tort law, see *§ 464.60* et seq.

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[5] Venue

In an action against the state for personal injuries, the proper court is a court in the county where the injury occurred [*Gov. Code § 955.2*]. In an action against a local public entity for personal injuries, the proper court is the county in which the local public entity is situated [*Code Civ. Proc. § 394(a)*].

[6] Verification

A public entity need not verify its answer even though the complaint is verified [*see Code Civ. Proc. § 446*]. Verification of a complaint against a public entity does, however, preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case if the action is a claim assigned to a third party for

collection [*Code Civ. Proc. § 431.30(d)*].

[7] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included--for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought if they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[8] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For forms of complaints for use in assault and battery actions, see Ch. 58, *Assault and Battery*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For forms of complaints for use in conversion actions, see Ch. 150, *Conversion*

For forms of complaints for use in false imprisonment and false arrest actions, see Ch. 257, *False Imprisonment*

For forms of complaints for use in actions involving fraud and deceit, see Ch. 269, *Fraud and Deceit*

For forms of complaints for use in actions involving libel and slander, see Ch. 340, *Libel and Slander*

For forms of complaints for use in actions involving malicious prosecution and abuse of process, see Ch. 357, *Malicious Prosecution and Abuse of Process*

For forms of complaints for use in actions involving mental suffering and emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress*

For forms of complaints for use in negligence actions, see Ch. 380, *Negligence*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively

For forms of complaints for use in actions involving trespasses, see Ch. 550, *Trespass*

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40-464 California Forms of Pleading and Practice--Annotated § 464.181

§ 464.181 Allegation--Negligent Operation of Motor Vehicle for Which Public Entity Is Responsible [Gov. Code § 815.2(a); Veh. Code §§ 17001, 17150]--General Form

[1] FORM Allegation--Negligent Operation of Motor Vehicle for Which Public Entity Is Responsible [Gov. Code § 815.2(a); Veh. Code §§ 17001, 17150]--General Form

On or about _____ [*date*], at _____ [*specify place of accident*], the defendant _____ [*name of public employee*] was operating a _____ [*describe motor vehicle*] in the course and scope of _____ [his *or* her] employment as an employee of the defendant _____ [*name of public entity*]. At the above-described time and place, the defendant _____ [*name of public employee*] negligently and carelessly operated the vehicle so as to _____ [*describe actions of public employee that caused accident, e.g.,* cause the vehicle to run through a red light and collide with the plaintiff's vehicle].

[2] Use of Form

The allegations above may be used to replace Paragraphs 6 and 7 of the *form in § 464.180* if damages were caused by the employee's operation of a motor vehicle.

[3] Cross References

For discussion of and forms for use in actions against public entities based on the negligence of emergency vehicle drivers, see Ch. 246, *Emergency Vehicles*

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40-464 California Forms of Pleading and Practice--Annotated § 464.182

§ 464.182 Allegation--Transportation of Plaintiff as Prisoner in Bus and Negligent Operation of Bus [Gov. Code §§ 815.2(a), 844.6(b); Veh. Code § 17001]

[1] FORM Allegation--Transportation of Plaintiff as Prisoner in Bus and Negligent Operation of Bus [Gov. Code §§ 815.2(a), 844.6(b); Veh. Code § 17001]

On _____ [*date*], the plaintiff was being held as a prisoner by the defendant _____ [*name of public entity*] and was, at the direction and under the control of the police of _____ [*name of public entity*], being transported as a prisoner to the _____ [*specify*] on a public street of the city in a bus owned by _____ [*name of public entity*] and driven by the defendant _____ [*name*], in the course of _____ [his *or* her] employment with the defendant _____ [*name of public entity*].

At that time and place, the defendant _____ [*name*] negligently and carelessly drove and operated said bus, so as to cause it to _____ [*allege nature of accident*].

[2] Use of Form

The allegation above may be used to replace Paragraphs 6 and 7 of the *form in § 464.180* in an action against a public entity and public employee for injuries suffered by a prisoner being transported in a bus.

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40-464 California Forms of Pleading and Practice--Annotated § 464.183

§ 464.183 Allegation--Plaintiff's Ignorance of Defendant's Status as Public Employee [Gov. Code § 950.4]

[1] FORM Allegation--Plaintiff's Ignorance of Defendant's Status as Public Employee [Gov. Code § 950.4]

From the accrual of the cause of action herein on _____ [*date*], until _____ [*date*], the last day for presenting a claim against _____ [*name of public entity*] on the cause of action, the plaintiff did not know and did not have reason to know that the defendant _____ [*name of public employee defendant*] caused the injuries to the plaintiff described hereinafter in the scope of _____ [his *or* her] employment as a public employee.

[2] Use of Form

The allegation above is for use in a complaint against a public entity and public employee if the plaintiff failed to file a timely claim against the public entity and is pleading that he or she is excused from the claim requirement by ignorance of the fact that the injury was caused by a public employee acting in the scope of his or her employment.

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40-464 California Forms of Pleading and Practice--Annotated § 464.184

§ 464.184 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714]--Against Public Entity and Independent Contractor Based on Negligence of Independent Contractor [Gov. Code § 815.4]

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714]--Against Public Entity and Independent Contractor Based on Negligence of Independent Contractor [Gov. Code § 815.4]

[*Caption. See § 464.180[1].*]

Plaintiff alleges:

1. [*Capacity of defendant public entity. See § 464.180[1], Paragraph 1.*]

2. The defendant _____ [*name of public entity*] employed _____ [*name of independent contractor] as an independent contractor to* _____ [*specify purposes for which independent contractor employed*].

3-4. [*Fictitious name allegations, if appropriate. See § 464.180[1], Paragraphs 3 and 4.*]

5. [*Allege basis on which public entity is liable for torts of independent contractor, e.g.,* On or about _____ (*date*), _____ (*name of independent contractor*) constructed a public building owned by _____ (*name of public entity*) at _____ (*street address and city*), California in such a negligent and careless manner so that it was not in a reasonably safe condition in that the handrail on the stairs therein was improperly attached to the wall].

6. [*Allege circumstances under which the plaintiff was injured, e.g.,* On _____ (*date*), the plaintiff

was descending the above-described staircase and leaning on the handrail when the handrail came loose, which caused the plaintiff to fall down the stairs, causing the injuries described hereinafter.]

7-9. [*Damages allegations. See § 464.180[1], Paragraphs 8-10.*]

10-11. [*Filing and rejection of claim. See § 464.180[1], Paragraphs 11-12.*]

[*Prayer. See § 464.180[1].*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 464.180[1].*]

[2] Use of Form

The complaint above is for use in an action against a public entity based on the negligence of its independent contractor. It might also be made a cause of action within a complaint based on the dangerous condition of the public building. It can be added to the form of complaint provided in § 464.180.

[3] Cross References

Witkin, Summary of California Law, Vol. 5, *Torts*, § 244 (10th ed. 2005)

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40-464 California Forms of Pleading and Practice--Annotated § 464.185

§ 464.185 Complaint for Damages [Civ. Code § 3333] Based on Failure to Discharge Mandatory Duty [Gov. Code § 815.6]

[1] FORM Complaint for Damages [Civ. Code § 3333] Based on Failure to Discharge Mandatory Duty [Gov. Code § 815.6]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*], Defendants.	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. [*Capacity of defendant public entity. See § 464.180[1], Paragraph 1.*]

2. At all times mentioned herein, the defendants _____ [*name*] and _____ [*name*] were employees of the defendant _____ [*name of public entity*] and in doing the acts hereinafter described, acted within the course and scope of their employment.

3-4. [*Fictitious name allegations, if appropriate. See § 464.180[1], Paragraphs 3 and 4.*]

5. [*Allege defendants' failure to discharge mandatory statutory duty, e.g.,* On or about _____ (*date*),

the defendants were informed that _____ (*name of bus company*) was operating a passenger stage business without maintaining the required insurance. Under Public Utilities Commission's Order, General Order No. 101-C, the defendants had a mandatory duty to revoke _____ (*name*)'s operating permit but failed to take any steps to revoke the operating permit and allowed _____ (*name*) to operate without carrying the required insurance.]

6. [*Allege how defendants' failure to discharge mandatory duty injured plaintiff, e.g.,* On _____ (*date*), the plaintiff was injured in an accident caused by the negligence of _____ (*name of bus company*). The plaintiff recovered a judgment for $_____ from _____ (*name of bus company*) but was unable to collect the judgment because _____ (*name of bus company*) was insolvent. If _____ (*name of bus company*) had carried the required liability insurance, it would have paid the plaintiff's judgment.]

7-8. [*Filing and rejection of claim. See § 464.180[1], Paragraphs 11 and 12*.]

[*Prayer. See § 464.180[1]* .]

[*Verification, if desired. See § 464.180[1]* .]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

The complaint above is for use in an action to recover damages against a public entity and its employees for their failure to discharge a mandatory duty, which failure injured the plaintiff. For a description and discussion of the general allegations that should be included in a complaint against a public entity, *see § 464.180*.

As a general rule, a complaint that alleges government liability based on the violation of a mandatory duty imposed by statute or regulation must specifically identify the statute or regulation in the complaint [*see Searcy v. Hemet Unified Sch. Dist. (1986) 177 Cal. App. 3d 792, 802, 223 Cal. Rptr. 206]* . However, it is unclear whether a party may allege violation of a regulation imposing a mandatory duty without specifically naming the regulation if the regulations are not available to the general public [*compare Green v. City of Livermore (1981) 117 Cal. App. 3d 82, 90, 172 Cal. Rptr. 461* (upholding cause of action although complaint did not specifically identify regulation); *with Searcy v. Hemet Unified Sch. Dist. (1986) 177 Cal. App. 3d 792, 802, 223 Cal. Rptr. 206* (rejecting cause of action alleging on information and belief that mandatory duty was imposed by regulation, but noting that case did not involve situation like that in *Green*, in which regulation was not available to public)].

[3] Cross References

Witkin, Summary of California Law, Vol. 5, *Torts*, §§ 245-248 (10th ed. 2005)

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40-464 California Forms of Pleading and Practice--Annotated § 464.186

§ 464.186 Complaint for Damages [Civ. Code § 3333] for Nuisance [Civ. Code § 3479] Against Public Entity

[1] FORM Complaint for Damages [Civ. Code § 3333] for Nuisance [Civ. Code § 3479] Against Public Entity
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

	)	
	)	NO. _____
_____ [*name*], Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Nuisance)
_____ [*name(s)*], Defendant(s).	)	[LIMITED CIVIL CASE]
	)	DAMAGES
	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]

_____

The plaintiff alleges:

1. [*Capacity of defendant public entity. See § 464.180[1], Paragraph 1*.]

2-3. [*Fictitious name allegations, if appropriate. See § 464.180[1], Paragraphs 3 and 4*.]

4. The plaintiff is, and at all times mentioned herein was, the owner and in possession of, the property commonly known as _____ [*address*], _____ [*city*], California. The legal description of the property is _____ [*specify legal description*].

5. The defendant is, and at all times mentioned herein was, the owner, and in possession of, property commonly known

as _____ [*address*], _____ [*city*], California. The legal description of the property is _____ [*specify*].

6. The above-described property of the plaintiff and the above-described property of the defendant are adjacent to each other and share a common property line of approximately _____ feet.

7. Since before _____ [*date*], the defendant has occupied and used the above-described property in such a manner as to constitute a continuing nuisance in that it has _____ [*describe nuisance, e.g.,* constructed and maintained a sewage treatment plant thereon which emits noxious and foul odors that are blown onto the plaintiff's property].

8. This use of the defendant's property constitutes a private nuisance in that _____ [*describe effect of nuisance, e.g.,* the odors are injurious to the health of the plaintiff and _____ (his *or* her) family and visitors and interfere with the comfortable enjoyment of the property by the plaintiff and _____ (his *or* her) family and visitors].

9. As a result of the above-described nuisance, the value of the plaintiff's property has been diminished by $_____.

10-11. [*Filing and rejection of claim. See § 464.180[1], Paragraphs 11 and 12.*]

WHEREFORE, plaintiff prays for judgment against defendant[s, and each of them], as follows:

1. For general damages in the sum of $_____;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 464.180* .]

[2] Use of Form

The complaint above is for use in an action against a public entity based on nuisance. Counsel also may desire to seek injunctive relief. For a description and discussion of the general allegations that should be included in a complaint against a public entity, *see § 464.180*.

[3] Pleading Alternate Theories of Recovery

If the plaintiff can establish that his or her property is burdened in a direct, peculiar, and substantial way as a result of the nuisance, a cause of action or inverse condemnation may provide an alternative basis of relief [*see Varjabedian v. City of Madera (1977) 20 Cal. 3d 285, 298, 299, 142 Cal. Rptr. 429, 572 P.2d 43* ; *see also* Ch. 247, *Eminent Domain*].

If applicable, the plaintiff may also proceed on the theories of liability for dangerous conditions of public property [*Gov. Code §§ 830-840.6*; *see §§ 464.80 -464.86*], liability for failure to discharge a mandatory duty [*Gov. Code § 815.6*; *see*

§ 464.61[4]], and vicarious liability [*Gov. Code § 815.2*; *see § 464.61[2]*]. Facts supporting these various theories of liability must be stated separately from the cause of action for nuisance [*see Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 939, 101 Cal. Rptr. 568, 496 P.2d 480]* . However, if nuisance and negligence are alleged merely as different theories of recovery under the same facts, only one cause of action is stated, even though it is alleged in two counts [*Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 372, 82 Cal. Rptr. 689]* .

A cause of action for nuisance under *Civ. Code § 3479* may be stated against a public entity even though the same facts would also support a cause of action based on dangerous condition liability under *Gov. Code § 835* [*see Pfleger v. Superior Court (1985) 172 Cal. App. 3d 421, 431-432, 218 Cal. Rptr. 371* (defendants based their demurrers not on any immunity under Tort Claims Act, but only on proposition that nuisance claim could not be stated on facts that come within dangerous condition liability)]. The courts have rejected the contention, raised by defendants, that to allow a cause of action for nuisance against a public entity, based on a dangerous condition of property, would allow a plaintiff to circumvent *Gov. Code § 835*, which, the defendants argued, requires a more stringent showing to impose liability for a dangerous condition of property on a public entity than does a nuisance statute such as *Civ. Code § 3479* [*Pfleger v. Superior Court (1985) 172 Cal. App. 3d 421, 425, 432, 218 Cal. Rptr. 371]* . The court reasoned that if, as case law has established, no government immunity against a cause of action for nuisance can be found or implied in *Gov. Code § 815* (providing generally for liability, and immunity from liability, of public entities), the provision of the Tort Claims Act in which it would most likely be placed, then it would be too great an exercise of judicial imagination to find it by implication in *Gov. Code § 835*. *Gov. Code § 835* defines a form of government liability, rather than an immunity, and does not purport to prescribe an exclusive remedy [*Pfleger v. Superior Court (1985) 172 Cal. App. 3d 421, 432, 218 Cal. Rptr. 371* ; *see also Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 937, 101 Cal. Rptr. 568, 496 P.2d 480]* .

[4] Cross References

For discussion, procedural checklist, and forms for use in obtaining injunctive relief, see Ch. 303, *Injunctions*

For further forms for nuisance actions, see Ch. 391, *Nuisance*

For memoranda of points and authorities relating to nuisance actions, see California Points and Authorities, Ch. 167, *Nuisance* (Matthew Bender)

For memoranda of points and authorities relating to nuisance actions against public entities, see California Points and Authorities, Ch. 196, *Public Entities* (Matthew Bender)

For discussion of the tort of nuisance as applied to public entities, see N. Levy, M. Golden & L. Sacks, eds., California Torts, Ch. 17 (Matthew Bender)

Witkin, Summary of California Law, Vol. 5, *Torts*, § 339 (10th ed. 2005)

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40-464 California Forms of Pleading and Practice--Annotated § 464.187

§ 464.187 Allegation--Plaintiff Relieved From Claim Requirement [Gov. Code § 946.6]

[1] FORM Allegation--Plaintiff Relieved From Claim Requirement [Gov. Code § 946.6]

On _____ [*date*], this court granted the plaintiff's petition and relieved the plaintiff from the provisions of *Section 945.4 of the Government Code* requiring that a written claim be filed as a prerequisite to a suit against the defendant on the cause of action alleged herein.

[2] Use of Form

This allegation is for use in any complaint in this subpart to replace the filing and rejection of claim allegations if the court has relieved the plaintiff from the claim requirements under *Gov. Code § 946.6*.

[3] Cross References

For a Notice of Hearing, Petition for Relief, and Order Granting Relief from the claims filing requirement, *see §§ 464.165* and *464.166*

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40-464 California Forms of Pleading and Practice--Annotated § 464.188

§ 464.188 General Demurrer--Failure of Plaintiff Suing Public Entity to Allege Filing of Claim [Gov. Code §§ 905, 911.2, 945.4]--And Notice of Hearing [Cal. Rules of Ct., Rules 3.1103(c), 3.1113(a), 3.1320(c)]

[1] FORM General Demurrer--Failure of Plaintiff Suing Public Entity to Allege Filing of Claim [Gov. Code §§ 905, 911.2, 945.4]--And Notice of Hearing [Cal. Rules of Ct., Rules 3.1103(c), 3.1113(a), 3.1320(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DEMURRER TO COMPLAINT AND NOTICE OF
Defendant.	)	HEARING
	)	
	)	

The defendant demurs to the complaint herein on the following ground:

The complaint does not state facts sufficient to constitute a cause of action in that it discloses on its face that the defendant is a public entity, but does not allege that the plaintiff filed a claim against the defendant as required by *Sections 905* and *945.4 of the Government Code*. Moreover, the complaint alleges that the cause of action accrued on _____ [*date*], which is more than _____ [six months *or* one year] before the filing of the complaint herein and, therefore, the time allowed for filing of the claim has lapsed. Thus, the complaint fails to state a cause of action.

_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

NOTICE IS HEREBY GIVEN that this demurrer has been set for hearing on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] the above-entitled court, located at _____ [*name of building or street address or both*], in _____ [*city*], _____ County, California.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

This form is for objecting, by general demurrer, to a complaint on the ground that the pleading does not state facts sufficient to constitute a cause of action because the plaintiff is suing a public entity without first having filed a claim with that entity.

[3] Accompanying Papers

A party filing a demurrer must serve and file with the demurrer a notice of hearing and a memorandum of points and authorities in support of each ground asserted [*Cal. Rules of Ct., Rules 3.1103(c), 3.1113(a), 3.1320(c)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[4] Cross References

For a memorandum of points and authorities supporting this demurrer, see California Points and Authorities, Ch. 196, *Public Entities*

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40-464 California Forms of Pleading and Practice--Annotated § 464.189

§ 464.189 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Action Against Public Entity Barred by Statute of Limitations [Gov. Code § 945.6]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Action Against Public Entity Barred by Statute of Limitations [Gov. Code § 945.6]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], the defendant alleges that the plaintiff filed a claim for the damages claimed herein with the defendant on _____ [*date*], which claim was rejected by a notice mailed to the plaintiff on _____ [*date*]. This action was commenced on _____ [*date*], and is therefore barred by the six-month statute of limitations set forth in *Section 945.6 of the Government Code*.

[2] Use of Form

This affirmative defense is for use in an answer to a complaint against a public entity to raise the defense that the action is barred by the statute of limitations [*see Gov. Code § 945.6*].

[3] Cross References

For memoranda of points and authorities supporting and opposing a demurrer based on the statute of limitations, see California Points and Authorities, Ch. 196, *Public Entities*

Witkin, California Procedure, Vol. 3, *Actions*, §§ 628-632 (4th ed. 1996)

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40-464 California Forms of Pleading and Practice--Annotated § 464.190

§ 464.190 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity Not Liable for Punitive Damages [Gov. Code § 818]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity Not Liable for Punitive Damages [Gov. Code § 818]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], the defendant alleges:

A public entity is not liable for damages awarded under *Section 3294 of the Civil Code* or other damages imposed primarily for the sake of example and by way of punishing the defendant.

[2] Use of Form

The affirmative defense provided above is for use by a public entity in an answer if the plaintiff has sought punitive damages against a public entity [*see Gov. Code § 818*].

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40-464 California Forms of Pleading and Practice--Annotated § 464.191

§ 464.191 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity Not Liable for Adoption of Ordinance [Gov. Code § 818.2]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity Not Liable for Adoption of Ordinance [Gov. Code § 818.2]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], the defendant alleges:

A public entity is not liable for an injury caused by the adoption of an ordinance.

[2] Use of Form

The affirmative defense provided above is for use by a public entity in an answer if the basis of the plaintiff's claim for damages is the adoption of an ordinance by a public entity [*see Gov. Code § 818.2*].

[3] Cross References

California Government Tort Liability Practice, Ch. 10, §§ 10.50-10.52 (Cal. CEB 4th ed. 1999)

Witkin, Summary of California Law, Vol. 5, *Torts*, §§ 230, 286 (10th ed. 2005)

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40-464 California Forms of Pleading and Practice--Annotated § 464.192

§ 464.192 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity Not Liable for Injury Caused by Revocation or Issuance of License [Gov. Code § 818.4]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity Not Liable for Injury Caused by Revocation or Issuance of License [Gov. Code § 818.4]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], the defendant alleges:

The defendant was authorized by law to _____ [revoke *or* issue] the _____ license, the _____ [issuance *or* revocation] of which is the basis of the complaint. Therefore, the defendant as a public entity is not liable for an injury caused by its revocation.

[2] Use of Form

The affirmative defense provided above is for use by a public entity in an answer if the basis of the plaintiff's claim is the issuance or revocation of a license [*see Gov. Code § 818.4*].

[3] Cross References

California Government Tort Liability Practice, Ch. 10, § 10.63 et seq. (Cal. CEB 4th ed. 1999)

Witkin, Summary of California Law, Vol. 5, *Torts*, §§ 248, 287 (10th ed. 2005)

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40-464 California Forms of Pleading and Practice--Annotated § 464.193

§ 464.193 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity Not Liable for Injuries Caused by Failure to Inspect Property [Gov. Code § 818.6]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity Not Liable for Injuries Caused by Failure to Inspect Property [Gov. Code § 818.6]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], the defendant alleges:

A public entity is not liable for its failure to inspect property, other than its own property, for the purpose of determining whether the property complies with or violates any enactment or constitutes a hazard to health or safety.

[2] Use of Form

The affirmative defense provided above is for use by a public entity in an answer if the basis of the plaintiff's claim is that the public entity failed to inspect property, other than its own property, to determine whether it complied with the law or was a health hazard [*see Gov. Code § 818.6*].

[3] Cross References

Witkin, Summary of California Law, Vol. 5, *Torts*, § 288 (10th ed. 2005)

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40-464 California Forms of Pleading and Practice--Annotated § 464.194

§ 464.194 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity Not Liable for Misrepresentation by Employee [Gov. Code § 818.8]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity Not Liable for Misrepresentation by Employee [Gov. Code § 818.8]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], the defendant alleges:

A public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether negligent or intentional.

[2] Use of Form

The form of affirmative defense provided above is for use in an answer if the basis of the plaintiff's claim is a misrepresentation by a public employee [*see Gov. Code § 818.8*].

[3] Cross References

California Government Tort Liability (Cal. CEB 4th ed. 1999), Ch. 5

Witkin, Summary of California Law, Vol. 5, *Torts*, §§ 348, 354, 355, 358 (10th ed. 2005)

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40-464 California Forms of Pleading and Practice--Annotated § 464.195

§ 464.195 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity Not Liable if Public Employee Is Immune [Gov. Code § 815.2(b)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity Not Liable if Public Employee Is Immune [Gov. Code § 815.2(b)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], the defendant alleges:

_____ [*Name of public employee*] is immune from liability for _____ [his *or* her] actions alleged in the complaint herein. A public entity is not liable for the act or injury of an employee if the employee is immune from liability.

[2] Use of Form

The affirmative defense provided above is for use by a public entity in an answer if the public employee alleged to have caused the injury or damages is immune from liability [*see Gov. Code § 815.2(b)*].

[3] Cross References

California Government Tort Liability Practice, Ch. 10, § 10.38 et seq. (Cal. CEB 4th ed. 1999)

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40-464 California Forms of Pleading and Practice--Annotated § 464.196

§ 464.196 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Employee Not Liable for Discretionary Acts [Gov. Code § 820.2]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Employee Not Liable for Discretionary Acts [Gov. Code § 820.2]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], the defendant alleges:

At all times mentioned in the complaint, the defendant _____ [*name*] was a public employee of _____ [*name of public entity*] and, if _____ [he *or* she] performed any of the acts or omissions alleged as the basis of the complaint, the acts or omissions were the result of the exercise of the discretion vested in _____ [him *or* her]. The defendant _____ [*name*] is therefore immune from liability.

[2] Use of Form

The affirmative defense provided above is for use by a public employee in an answer if the complaint is based on acts that resulted from the defendant's exercise of the discretion vested in him or her as a public employee [*see Gov. Code § 820.2*].

[3] Cross References

California Government Tort Liability Practice, Ch. 10, § 10.6 et seq. (Cal. CEB 1999)

Witkin, Summary of California Law, Vol. 5, *Torts*, §§ 351-358, 368 (10th ed. 2005)

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40-464 California Forms of Pleading and Practice--Annotated § 464.197

§ 464.197 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Employee Not Liable for Acts or Omissions of Others [Gov. Code § 820.8]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Employee Not Liable for Acts or Omissions of Others [Gov. Code § 820.8]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], the defendant alleges:

At all times mentioned in the complaint, the defendant _____ [*name*] was a public employee of _____ [*name of public entity*] and, as such, is not liable for any of the acts or omissions alleged in the complaint because the complaint only alleges that the defendant _____ [*name*] is liable based on the acts or omissions of others.

[2] Use of Form

The affirmative defense provided above is for use by a public employee in an answer if the complaint is based on acts performed by others and only alleges that the defendant is vicariously liable [*see Gov. Code § 820.8*].

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40-464 California Forms of Pleading and Practice--Annotated § 464.198

§ 464.198 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Employee Not Liable for Malicious Prosecution [Gov. Code § 821.6]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Employee Not Liable for Malicious Prosecution [Gov. Code § 821.6]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], the defendant alleges:

At all times mentioned in the complaint, the defendant _____ [*name*] was a public employee of _____ [*name of public entity*] and, if _____ [he *or* she] performed any of the acts alleged as the basis of the complaint, _____ [he *or* she] acted only in instituting or prosecuting a judicial proceeding within the scope of _____ [his *or* her] employment. The defendant _____ [*name*] is therefore immune from liability for the alleged acts.

[2] Use of Form

The affirmative defense provided above is for use by a public employee in an answer if the complaint is based on the institution or prosecution of a judicial or administrative proceeding [*Gov. Code § 821.6*].

[3] Cross References

California Government Tort Liability Practice, Ch. 10, § 10.43 et seq. (Cal. CEB 4th ed. 1999)

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40-464 California Forms of Pleading and Practice--Annotated § 464.199

§ 464.199 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Mayor or Member of Locally Elected or Appointed Governing Body, Board, Commission, or Advisory Body Not Vicariously Liable for Injuries Caused by Acts or Omissions of Public Entity [Gov. Code § 820.9]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Mayor or Member of Locally Elected or Appointed Governing Body, Board, Commission, or Advisory Body Not Vicariously Liable for Injuries Caused by Acts or Omissions of Public Entity [Gov. Code § 820.9]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], the defendant alleges:

At all times mentioned in the complaint the defendant _____ [*name*] was a _____ [*specify protected status under Gov. Code § 820.9, e.g.,* member of the board of supervisors] of _____ [*name of public entity*] and, as such, is not liable for any of the injuries caused by the acts or omissions alleged in the complaint, because the complaint only alleges that the defendant _____ [*name*] is vicariously liable based on the acts or omissions of _____ [*name of public entity*].

[2] Use of Form

The affirmative defense provided above is for use by a mayor, a member of a city council, board of supervisors, school board, or governing board of another local public entity, a member of a locally appointed board or commission, or a member of a locally appointed or elected advisory body in an answer to a complaint that seeks to impose vicarious liability against that person for injuries caused by the acts or omissions of the local public entity [*see Gov. Code § 820.9*].

[3] Cross References

For discussion of immunities and defenses of public entities, see Levy, Golden, and Sacks, California Torts, Ch. 60 (Matthew Bender)

California Government Tort Liability Practice, Ch. 10, § 10.36 et seq. (Cal. CEB 4th ed. 1999)

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B. Actions Against Public Entities and Employees
1. General Principles of Liability and Immunity

40-464 California Forms of Pleading and Practice--Annotated §§ 464.200-464.209

[Reserved]

§§ 464.200[Reserved]

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Volume 40: Products Liability thru Public Entities and Officers-Chs. 460-469
Chapter 464 PUBLIC ENTITIES AND OFFICERS: CALIFORNIA TORT CLAIMS ACT
PART V. FORMS
B. Actions Against Public Entities and Employees
2. Liability for Dangerous Conditions of Public Property

40-464 California Forms of Pleading and Practice--Annotated § 464.210

§ 464.210 Complaint for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity and Public Employee Based on Dangerous Condition Caused by Negligence of Employee [Gov. Code §§ 835(a), 840.2]

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity and Public Employee Based on Dangerous Condition Caused by Negligence of Employee [Gov. Code §§ 835(a), 840.2]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*], Defendants.	)	(Dangerous Condition)
	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]

_____

The plaintiff alleges:

[*EITHER*]

1. The defendant City of _____ is, and at all times mentioned herein was, a municipal corporation, duly organized and existing under the laws of the State of California and situated in the County of _____.

[*OR*]

1. The defendant City of _____ is, and at all times mentioned herein was, a chartered city, duly organized and existing under the laws of the State of California and situated in the County of _____.

[*OR*]

1. The defendant County of _____ is, and at all times mentioned herein was, a county duly organized and existing under the laws of the State of California.

[*OR*]

1. The defendant _____ [*name*] is, and at all times mentioned herein was, a _____ [*specify*] district, duly organized and existing under the laws of the State of California.

[*OR*]

1. The defendant State of California is, and at all times mentioned herein was, a sovereign state of the United States of America.

[*OR*]

1. The defendant _____ [*name*] is, and at all times mentioned herein was, a _____ [*specify, e.g.,* housing] authority of the State of California, duly organized and existing under the laws of the State of California.

[*CONTINUE*]

2. At all times mentioned herein, the defendant _____ [*name*] was an employee of the defendant _____ [*name of public entity*] and in doing the acts hereinafter described, acted within the course and scope of _____ [his *or* her] employment.

3. [The plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____ inclusive, and therefore sues these defendants by such fictitious names. The plaintiff will amend this complaint to allege their true names and capacities when ascertained. (The plaintiff is informed and believes and thereon alleges that each of said fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that the plaintiff's injuries as herein alleged were proximately caused by their acts.)]

[*EITHER*]

4. [The plaintiff is informed and believes and thereon alleges that at all times mentioned herein each of the defendants sued herein as DOES 1-_____ inclusive, was the agent and employee of each of the remaining defendants and was at all times acting within the purpose and scope of such agency and employment.]

[*OR*]

[4. At all times herein mentioned the defendants DOES 1-_____ inclusive, were the agents, servants, and employees of their codefendants, and in doing the things hereinafter alleged were acting in the scope of their authority as such agents, servants, and employees, and with the permission and consent of their codefendants.]

[*CONTINUE*]

5. On or about _____ [*date*], the defendant _____ [*name of public employee*], within the scope of _____ [his *or* her] employment with the defendant _____ [*name of public entity*], negligently and carelessly _____ [*specify, e.g.*, spilled water on the floor of the property of _____ (*name of public entity*) at _____ (*address*), _____ (*city*), and failed to clean it up or post a warning], which negligence caused a dangerous condition that created a substantial risk of the type of injury hereinafter alleged when the property was used with due care in a manner in which it was reasonably foreseeable that it would be used.

6. On or about _____ [*date*], the plaintiff was lawfully on the above-described premises, and as a proximate result of the dangerous condition _____[*describe accident, e.g.*, slipped and fell on the wet floor] causing the plaintiff the injuries hereinafter alleged.

7. As a proximate result of the dangerous condition on the defendant's property, the plaintiff was hurt and injured in _____ [his *or* her] health, strength, and activity, sustaining injury to _____ [his *or* her] body and shock and injury to _____ [his *or* her] nervous system and person, all of which injuries have caused, and continue to cause, the plaintiff great mental, physical, and nervous pain and suffering. [The plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to _____ [him *or* her].] As a result of such injuries, the plaintiff has suffered general damages.

[*EITHER*]

8. As a [further] proximate result of the dangerous condition on the defendant's property herein alleged, the plaintiff has been required to expend money and incur obligations, and will continue to expend money and incur obligations, for medical services, X-rays, drugs, and sundries reasonably required in the treatment and relief of the injuries herein alleged, and the plaintiff has been damaged thereby.

[*OR*]

8. As a further proximate result of the dangerous condition on the defendant's property, the plaintiff has incurred, and will continue to incur, medical and related expenses.

[*EITHER*]

9. As a further proximate result of the dangerous condition on the defendant's property, the plaintiff was prevented from attending to _____ [his *or* her] usual occupation as a _____ [*state occupation*] for a period _____ [of _____ (*specify*) *or* to the date of the filing of this complaint] and thereby lost earnings.

[*OR*]

9. As a further proximate result of the dangerous condition on the defendant's property, the plaintiff's earning capacity has been greatly impaired, both in the past and at present.

[*CONTINUE*]

10. On or about _____ [*date*], the plaintiff presented to_____ [*name of public entity*] by _____ [delivering *or* mailing] a claim to the _____ [clerk *or* secretary *or* auditor] for the injuries, disability, losses, and damages suffered and incurred by _____ [him *or* her] by reason of the above-described occurrence, all in compliance with the requirements of *Section 905 of the Government Code*. A copy of the claim is attached hereto as Exhibit A and made a part hereof.

11. On or about _____ [*date*], _____ [*name of public entity*] _____ [rejected the claim in its entirety *or* allowed the claim in the amount of $_____ and rejected it as to the remainder *or* failed to act on the claim within the period of 45 days after its presentation, and the claim was thus deemed rejected, under the provisions of *Section 912.4 of the Government Code*, at the expiration of the 45-day period, to wit, on _____ (*date*)].

WHEREFORE, the plaintiff prays judgment [against defendants, and each of them,] as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION [*Code Civ. Proc. §§ 446, 2015.5*]

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form of complaint above is for use in bringing an action against a public entity and a public employee for injuries resulting from a dangerous condition caused by the negligence of the employee.

[3] Venue

In an action for personal injuries against the state, the proper court is a court in the county where the injury occurred [*Gov. Code § 955.2*]. In an action against a local public entity for personal injuries, the proper court is the county in which the local public entity is situated [*Code Civ. Proc. § 394*].

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[5] Verification

A public entity need not verify its answer even though the complaint is verified [*see Code Civ. Proc. § 446*]. Verification of a complaint against a public entity does, however, preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*].

[6] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included--for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought if they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification*

For complaints for use in premises liability actions generally, see Ch. 421, *Premises Liability*

California Government Tort Liability Practice, Ch. 6 (Cal. C.E.B. 4th ed. 1999)

Witkin, Summary of California Law, Vol. 5, *Torts*, §§ 250-271 (10th ed. 2005)

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40-464 California Forms of Pleading and Practice--Annotated § 464.211

§ 464.211 Complaint for Damages [Civ. Code § 3333] for Wrongful Death [Code Civ. Proc. §§ 377.60, 377.61]--Against Public Entity and Public Employee Based on Dangerous Condition of Which Entity and Employee Had Notice [Gov. Code §§ 835(b), 840.2]

[1] FORM Complaint for Damages [Civ. Code § 3333] for Wrongful Death [Code Civ. Proc. §§ 377.60, 377.61]--Against Public Entity and Public Employee Based on Dangerous Condition of Which Entity and Employee Had Notice [Gov. Code §§ 835(b), 840.2]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*], Plaintiff(s),	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*], Defendant.	)	(Wrongful Death)
	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]

_____

The plaintiff(s) alleges/allege:

1. The plaintiff(s) is/are the [personal representative of the estate of _____ (*name of decedent*), deceased, and bring(s) this action on behalf of] _____ [*describe status entitling plaintiff(s) to bring wrongful death cause of action under Code Civ. Proc. § 377.60, e.g.,* surviving spouse and children] of _____ [*name of decedent*], deceased (hereinafter referred to as "decedent"). _____ [His *or* Her *or* Their] relationship(s) to decedent is/are as follows:

Name	Relationship

_____ _____
_____ _____
_____ _____

2. [*Capacity of defendant public entity. See § 464.210[1], Paragraph 1.*]

3-4. [*Fictitious name allegations, if appropriate. See § 464.210[1], Paragraphs 3 and 4.*]

5. The defendant _____ [*name of public employee*] is, and at all times herein mentioned was, a public employee of _____ [*name of public entity*].

6. On _____ [*date*], and prior thereto, the defendant _____ [*name of public entity*] owned, maintained, and controlled _____ [*describe public property on which dangerous condition occurred, e.g.,* _____ (*name of street*) and _____ (*name of street*) at their intersection in the City of _____].

7. On _____ [*date*], and prior thereto, the above-described public property was in a dangerous condition that created a substantial risk of the type of injury hereinafter alleged when the property was used with due care in a manner that it was reasonably foreseeable that it would be used in that _____ [*specify, e.g.,* shrubbery and vegetation on the property of the defendant _____ (*name of public entity*) obscured the stop signs at the above-described intersection and the view of drivers of the intersecting street so that drivers coming from all directions could reasonably believe that they had the right of way and could not see automobiles coming from different directions].

8. The defendants had actual knowledge of the existence of the condition and knew or should have known of its dangerous character a sufficient time prior to _____ [*date*], to have taken measures to protect against the dangerous condition. _____ [*Name of public employee*] had the authority and it was _____ [his *or* her] responsibility to take adequate measures to protect against the dangerous condition at the expense of the public entity and the funds or other means were immediately available to _____ [him *or* her].

9. On _____ [*date*], the decedent _____ [*describe how decedent was killed as a result of the dangerous condition, e.g.,* was driving on _____ (*name of street*) approaching its intersection with _____ (*name of street*). As a proximate result of the dangerous condition of the intersection, when the decedent entered the intersection, the decedent was struck by an automobile driven by _____ (*name*), who could not see the decedent because of the shrubbery and vegetation and did not stop because the stop sign was similarly obscured], causing the death of the decedent. [10. Prior to the death of the decedent, the plaintiffs lived with _____ [him *or* her] and were totally dependent on _____ [him *or* her] for their support and maintenance, and the decedent was a faithful and dutiful _____ (*specify, e.g.,* husband and father *or* wife and mother) to the plaintiffs.]

11. As a proximate result of the dangerous condition on the defendant's property, and the death of the decedent, the plaintiff(s) has/have sustained pecuniary loss resulting from the loss of the society, comfort, attention, services, and support of the decedent.

12. As a further proximate result of the dangerous condition of the defendant's property, and the death of the decedent, the plaintiff(s) has/have incurred funeral and burial expenses.

[13. *Filing and rejection of claim. See § 464.210[1], Paragraphs 10 and 11*.]

WHEREFORE, plaintiff(s) prays/pray judgment against the defendants, and each of them, as follows:

1. For general damages according to proof;

2. For funeral and burial expenses according to proof;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 464.210[1]* .]

[2] Use of Form

The complaint above is for use in an action by the heirs of a decedent who was killed as a result of a dangerous condition of public property of which the public entity and its employee had actual notice. For a form of complaint for personal injuries that do not result in death, see *§ 464.210*.

[3] Guardian ad Litem

If an heir of the deceased is a minor, a guardian ad litem must be appointed for the purposes of the action, unless the minor already has a guardian. See generally Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , through Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Conservatorships* , and Ch. 291, *Guardians ad Litem* .

[4] Wrongful Death Actions

An action for wrongful death may also be brought by the personal representative, rather than the heirs [*Code Civ. Proc. §§ 377.60, 377.61*]. Further, if the decedent incurred medical expenses before his or her death, these expenses are not recoverable in a wrongful death action [*Follansbee v. Benzenberg (1954) 122 Cal. App. 2d 466, 473-474, 265 P.2d 183]* . Those expenses should instead be sought by the personal representative in a survival action under *Code Civ. Proc. §§ 377.30-377.35*. Counsel may wish to combine the survival action with the wrongful death action because both arise out of the same occurrence [*see Code Civ. Proc. § 377.62* (joinder of plaintiffs)].

For a general form of complaint for a wrongful death action and allegations setting forth the plaintiffs' entitlement to bring a wrongful death action, see Ch. 181, *Death and Survival Actions* .

[5] Cross References

For forms for use in wrongful death actions generally, see Ch. 181, *Death and Survival Actions*

For forms for use in appointing a guardian or guardian ad litem, see Ch. 291, *Guardians ad Litem*

California Government Tort Liability, Ch. 6 (Cal. C.E.B. 1999)

Witkin, Summary of California Law, Vol. 5, *Torts*, § 271 (10th ed. 2005)

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40-464 California Forms of Pleading and Practice--Annotated § 464.212

§ 464.212 Complaint for Damages [Civ. Code § 3333] to Property--Against Public Entity Based on Dangerous Condition Caused by Negligence of Public Employee [Gov. Code § 835(a)]

[1] FORM Complaint for Damages [Civ. Code § 3333] to Property--Against Public Entity Based on Dangerous Condition Caused by Negligence of Public Employee [Gov. Code § 835(a)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*], Plaintiff,	)	COMPLAIN FOR DAMAGES
vs.	)	(Dangerous Condition)
_____ [*name*], Defendant.	)	[*Gov. Code § 835(a)*]
	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]

_____

The plaintiff alleges:

1. [*Capacity of defendant public entity. See § 464.210[1], Paragraph 1.*]

2. [*Fictitious name allegations, if appropriate. See § 464.210[1], Paragraphs 3 and 4.*]

3. Since _____ [*date*], the plaintiff has been the _____ [owner *or* tenant *or* lessee] of real property situated in the County of _____, California, and described as follows: _____ [*set forth legal description*]. Since _____ [*date*], the plaintiff has occupied

_____ [*specify, e.g.,* a dwelling] on such property.

4. On or about _____ [*date*], _____ [*name of public employee(s)*], acting within the course and scope of _____ [his *or* her *or* their] employment with the defendant _____ [*name of public entity*], negligently and carelessly _____ [*specify act or omission causing dangerous condition, e.g.,* filled the natural channel of _____ Creek along the _____ (*specify, e.g.,* southern) boundary of the plaintiff's property, constructed in its place a concrete storm sewer that diverted the normal drainage of floodwaters from the natural channel of _____ Creek onto the plaintiff's property, and failed to properly maintain the storm sewer]. This negligence caused a dangerous condition that created a substantial risk of the type of injury hereinafter alleged when adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used.

5. On or about _____ [*date*], as a proximate result of the dangerous condition described above, _____ [*describe how damage occurred as a result of the dangerous condition, e.g.,* floodwaters that normally would not have reached the plaintiff's premises were diverted on to the plaintiff's property, flooding it to a depth of _____ feet for a period of _____ hours].

6. As a proximate result of the dangerous condition _____ [*specify, e.g.,* of the storm sewer], the plaintiff's property, _____ [*specify, e.g.,* dwelling], and articles therein were damaged in that _____ [*specify damage sustained, e.g.,* the floodwater warped floors and doors, ruined carpeting, drapes, and furniture, and ruined certain personal property in the plaintiff's dwelling]. As a result of such injuries to the plaintiff's property, the plaintiff has suffered damages in the sum of $_____.

7. [*Filing and rejection of claim. See § 464.210[1], Paragraphs 10 and 11*.]

WHEREFORE, the plaintiff prays judgment as follows:

1. For damages in the sum of $_____.

2. For costs of suit herein incurred.

3. For such other further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 464.210[1]* .]

[2] Use of Form

The complaint above is for use in an action against a public entity to recover damages for injury to property that occurred as a result of a dangerous condition of public property caused by the negligence of a public employee. For a form of complaint for personal injuries, see *§ 464.210*.

[3] Inverse Condemnation

If the construction or maintenance of a public project is designed to serve the interests of the community as a whole, any property damage caused by the project or by its operations as deliberately conceived is for a public use and is

constitutionally compensable [*see Cal. Const. art. I, § 14*]. The constitutional remedy often overlaps normal tort remedies and provides an alternative basis of relief. However, government tort liability and liability in inverse condemnation may be distinguished in that the latter does not involve ordinary acts of carelessness in the carrying out of the public entity's program. Therefore, damage resulting from negligence in the routine operation having no relation to the function of the project as conceived is not within the purview of *Cal. Const. art. I, § 14* [*Sheffet v. County of Los Angeles (1970) 3 Cal. App. 3d 720, 733-734, 84 Cal. Rptr. 11]* .

The alternate remedy of inverse condemnation should be considered particularly in cases in which design immunity [*Gov. Code § 830.6*] may preclude government tort liability, because design immunity does not apply to liability in inverse condemnation [*see Baldwin v. State of California (1972) 6 Cal. 3d 424, 438, 99 Cal. Rptr. 145, 491 P.2d 1121]* .

For further discussion and forms for use in inverse condemnation actions, see Ch. 247, *Eminent Domain* .

[4] Venue

An action against the state for injury to personal property is properly brought in a court in the county in which the injury occurred [*Gov. Code § 955.2*]. In an action against a local public entity, the proper court is in the county in which the entity is situated [*Code Civ. Proc. § 394*].

[5] Cross References

For alternate allegations of damages, see Ch. 177, *Damages*

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40-464 California Forms of Pleading and Practice--Annotated § 464.213

§ 464.213 Complaint for Damages [Civ. Code § 3333] to Property--Against Public Entity Based on Dangerous Condition of Which Entity Had Notice [Gov. Code § 835(b)]

[1] FORM Complaint for Damages [Civ. Code § 3333] to Property--Against Public Entity Based on Dangerous Condition of Which Entity Had Notice [Gov. Code § 835(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

	)	
_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], Defendant.	)	(Dangerous Condition)
	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]

_____

The plaintiff alleges:

1. [*Capacity of defendant public entity. See § 464.210[1], Paragraph 1*.]

2. [*Fictitious name allegation, if appropriate. See § 464.210[1], Paragraph 3*.]

3. On _____ [*date*], and at all times mentioned herein, the plaintiff _____ [owned *or* rented *or* leased] and occupied the premises commonly known as _____ [*specify address and describe premises, if relevant, e.g.,* consisting of a storeroom on the main floor and a basement used as a warehouse for merchandise used in conducting plaintiff's clothing business].

4. On _____ [*date*], and prior thereto, the defendant owned, maintained, and controlled _____ [*describe public property on which dangerous condition occurred, e.g.,* the sewage system, consisting of a network of various sewer pipes and outlets, below the surface of _____ Street in front of the plaintiff's premises].

5. On _____ [*date*], and prior thereto, the above-described _____ [*specify, e.g.,* sewage system in front of the plaintiff's premises] was in a dangerous condition that created a substantial risk of the type of injury hereinafter alleged when adjacent property was used with due care in a manner that it was reasonably foreseeable that it would be used in that _____ [*specify dangerous condition, e.g.,* the sewage system had not been maintained for _____ years and the sewer pipes therein were defective, cracked, and broken, allowing water to seep from the pipes to the adjacent property].

6. The defendant had actual knowledge of the existence of the condition and knew or should have known of its dangerous character a sufficient time prior to _____ [*date*] to have taken measures to protect against the dangerous condition.

7. On _____ [*date*], _____ [*describe how damage occurred as a result of the dangerous condition, e.g.,* water from the sewer system in front of the plaintiff's premises flooded the area in front of the plaintiff's premises and below the surface of the street, causing the plaintiff the injuries hereinafter alleged].

8. As a proximate result of the dangerous condition _____ [*specify, e.g.,* of the sewer system], the plaintiff's premises and articles therein were damaged in that _____ [*specify damage sustained, e.g.,* the merchandise stored in the basement was ruined]. As a result of such injuries to the plaintiff's property, the plaintiff has suffered damages in the sum of $_____.

9. [*Filing and rejection of claim. See § 464.210[1], Paragraphs 10 and 11*.]

[*Prayer. See § 464.212[1]* .]

[*Verification, if desired. See § 464.210[1]* .]

[2] Use of Form

The complaint above is for use in an action by the owner, tenant, or lessee of premises damaged as a result of a dangerous condition of public property of which the public entity had actual notice.

[3] Cross References

For a form of complaint against a public entity for damage to property based on a dangerous condition created by the negligence of a public employee, *see § 464.212*

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40-464 California Forms of Pleading and Practice--Annotated § 464.214

§ 464.214 Complaint for Damages [Civ. Code § 3333] for Personal Injury--Against Public Entity Based on Dangerous Condition Caused by Failure to Protect and/or Warn Plaintiff Against Third-Party Criminal Conduct [Gov. Code § 835]--By Plaintiff in Special Relationship With Public Entity

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injury--Against Public Entity Based on Dangerous Condition Caused by Failure to Protect and/or Warn Plaintiff Against Third-Party Criminal Conduct [Gov. Code § 835]--By Plaintiff in Special Relationship With Public Entity

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*], Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Dangerous Condition)
_____ [*name*], [and DOES 1	)	[*Gov. Code § 835*]
through _____], Defendants.	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]

_____

The plaintiff alleges:

1. [*Capacity of defendant public entity. See § 464.210[1], Paragraph 1*.]

2. [*Capacity of defendant public employee(s). See § 464.210[1], Paragraph 2*.]

3. [*Fictitious name allegations, if appropriate. See § 464.210[1], Paragraphs 3 and 4*.]

4. The plaintiff _____ [*name*] is _____ [*specify the plaintiff's special relationship to the defendant, e.g.,* a student at the defendant _____ (*name of institution*)].

5. On or about _____ [*date*], the defendants _____ [*name of public entity, employees, and agents*] owned, maintained, and controlled _____ [*describe public property on which dangerous condition occurred, e.g.,* the campus of the _____ (*name of institution*)].

6. On or about _____ [*date*], the plaintiff _____ [*describe how the plaintiff was injured as a result of the dangerous condition while using the property in a reasonably foreseeable manner, e.g.,* parked her car in the school parking lot and was ascending the stairway in the parking lot on her way to class, when an unidentified male jumped from behind unreasonably thick and untrimmed foliage and trees adjoining the stairway, and attempted to rape her].

7. _____ [*Allege facts showing special relationship between the plaintiff and the defendant giving rise to a duty owed to the plaintiff, e.g.,* Having invited the plaintiff onto the campus property, having enrolled her as a student, having issued her a permit to park and use the parking lot and stairway in question in exchange for payment of a fee, having undertaken to patrol the parking lot and stairway in question in light of prior incidents of violence in the area, and having induced the plaintiff to rely and depend on this protection], the defendants had a special relationship with the plaintiff pursuant to which the defendants were obliged to take reasonable protective measures to ensure the plaintiff's safety against violent attacks and otherwise protect the plaintiff from foreseeable criminal conduct and/or to warn the plaintiff as to the location of prior _____ [*specify crime, e.g.,* violent assaults] in the vicinity of the _____ [*specify location of dangerous condition, e.g.,* subject parking lot and stairway].

8. On or about _____ [*date*], the defendants breached their duty of care to the plaintiff by carelessly, negligently, and improperly owning, operating, managing, maintaining, supervising, controlling, [lighting,] and securing the property so as to maintain a dangerous condition thereon, creating a reasonably foreseeable risk of the type of injury hereinabove alleged when the plaintiff used the property with due care, as hereinabove alleged, in a manner in which it was reasonably foreseeable that it would be used, in that _____ [*specify dangerous condition, e.g.,* the stairway in the parking lot was surrounded by unreasonably thick and untrimmed foliage and trees, permitting the assailant to hide therein and jump from that hiding place to assault the plaintiff].

9. The defendants further breached their duty of care owed to the plaintiff in that the defendants had actual knowledge of the existence of the condition and knew or should have known of its dangerous character a sufficient time prior to _____ [*date of assault*] to have taken measures to protect against the dangerous condition in that _____ [*allege facts showing knowledge of dangerous condition, e.g.,* the defendants knew of the occurrence of previous, similar attacks on the same stairway, the assailant used a modus operandi similar to that used in previous attacks on the same stairway, and the defendants knew of and permitted the existence of unreasonably thick and untrimmed foliage and trees around the parking lot and stairway and failed to take reasonably protective measures, such as trimming the foliage].

10. [*Allegation of general damages (e.g., mental, physical, and emotional injuries) proximately caused by dangerous condition of the defendants' property. See § 464.210[1], Paragraph 7*.]

11. [*Allegation of special damages (e.g., medical expenses) proximately caused by dangerous condition of the defendants' property. See § 464.210[1], Paragraph 8*.]

12. [*Allegation of special damages (e.g., economic loss) proximately caused by dangerous condition of the defendants' property. See § 464.210[1], Paragraph 9*.]

13. [*Filing of claim by the plaintiff. See § 464.210[1], Paragraph 10*.]

14. [*Rejection of claim by the public entity. See § 464.210[1], Paragraph 11*.]

WHEREFORE, the plaintiff prays judgment [against the defendants, and each of them,] as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 464.210[1]* .]

[2] Use of Form

The complaint above is for use in an action by a plaintiff against a public entity, its agents, and its employees for personal injury caused by a criminal assault occurring on the public entity's property if the plaintiff is in a special relationship with the public entity and if the entity has allowed a dangerous condition to exist that increases the risk of criminal activity on the property [*Gov. Code § 835*].

This form is adapted from the facts in *Peterson v. San Francisco Community College District* [*Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 205 Cal. Rptr. 842, 685 P.2d 1193]* .

[3] Allegations

This complaint alleges the plaintiff's special relationship with the defendants (Paragraphs 4 and 7), the defendants' maintenance of public property in a dangerous condition (Paragraph 5), the foreseeability of the plaintiff's use of the property and the nature and foreseeability of the plaintiff's injury (Paragraph 6), the defendants' duty toward the plaintiff (Paragraph 7), the defendants' breach of duty (Paragraphs 8 and 9), proximate causation and damages (Paragraphs 10-12) [*see Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 815, 205 Cal. Rptr. 842, 685 P.2d 1193]* , and the plaintiff's filing and rejection of a claim against the defendants (Paragraphs 13 and 14) [*Gov. Code §§ 835, 905, 905.2*].

[4] Special Relationship

As a general rule, one has no duty to control the conduct of another or warn those who may be endangered by that conduct [*Peterson v. SanFrancisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 806, 205 Cal. Rptr. 842, 685 P.2d 1193]* . However, such a duty may arise if a special relationship exists between an actor and another that gives the other a right to protection [*Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 806, 205 Cal. Rptr. 842, 685 P.2d 1193]* . Among commonly recognized special relationships are those between a common carrier and its passengers, an

innkeeper and its guests, and a possessor of land and members of the public who enter in response to the owner's invitation [*Peterson v. San Francisco Cmty. Coll. Dist. (1984) 36 Cal. 3d 799, 806, 205 Cal. Rptr. 842, 685 P.2d 1193]* .

[5] Foreseeable Use of Property by Plaintiff

To sustain a cause of action for injuries caused by a dangerous condition of property of a public entity, a the plaintiff must have been using the property in a manner in which it is reasonably foreseeable that it would have been used by that the plaintiff [*Branch v. State of California ex rel. Dep't of Transp. (1984) 159 Cal. App. 3d 340, 344, 205 Cal. Rptr. 482]* .

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40-464 California Forms of Pleading and Practice--Annotated § 464.215

§ 464.215 Allegation--Constructive Notice of Condition [Gov. Code §§ 835(b), 840.4(b)]

[1] FORM Allegation--Constructive Notice of Condition [Gov. Code §§ 835(b), 840.4(b)]

The defendant _____ [*name of public entity*] had constructive notice of the dangerous condition because the condition had existed for a sufficient period of time, at least _____ [*specify period of time*], and was of such an obvious nature that the defendant, in the exercise of due care, should have discovered the condition and its dangerous character.

[2] Use of Form

The allegation of constructive notice provided above can be used to replace Paragraph 8 of the *form in § 464.211* if the defendant public entity had only constructive notice of the dangerous condition.

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40-464 California Forms of Pleading and Practice--Annotated § 464.216

§ 464.216 Allegation--Dangerous Condition of Public Property [Gov. Code § 835]--Condition on Adjacent Property Made Public Property Dangerous

[1] FORM Allegation--Dangerous Condition of Public Property [Gov. Code § 835]--Condition on Adjacent Property Made Public Property Dangerous

On _____ [*date*], and prior thereto, the _____ [*describe public property, e.g.,* street] was in a dangerous condition that created a substantial risk of the type of injury hereinafter alleged when the property was used with due care in a manner that it was reasonably foreseeable that it would be used, in that _____ [*specify dangerous condition caused by condition on adjacent property, e.g.,* trees on property adjacent to the street had overhanging and cracked branches that created a substantial risk that they would fall and injure persons using the street].

[2] Use of Form

The allegation provided in [1], above, can be used to replace Paragraph 7 of the *form in § 464.211* if the complaint is based on a dangerous condition of property caused by condition of adjacent property.

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40-464 California Forms of Pleading and Practice--Annotated § 464.217

§ 464.217 Allegation--Dangerous Condition of Public Property [Gov. Code § 835]--Failure to Post Sign in Situation Constituting Trap for Motorist [Gov. Code § 830.8]

[1] FORM Allegation--Dangerous Condition of Public Property [Gov. Code § 835]--Failure to Post Sign in Situation Constituting Trap for Motorist [Gov. Code § 830.8]

On _____ [*date*], and prior thereto, the highway was in a dangerous condition that created a substantial risk of the type of injury hereinafter alleged when the property was used in a manner that was reasonably foreseeable in that _____ [*describe dangerous condition, e.g.,* the curve was unsafe if taken at the speed limit], but there was no warning sign of that fact, and that danger would not be reasonably apparent to, and would not have been anticipated by, a person using due care.

[2] Use of Form

The allegation provided above can be used to replace Paragraph 7 of the *form in § 464.211* if the complaint is based on a dangerous condition in a highway due to failure to post a sign warning of a dangerous condition.

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40-464 California Forms of Pleading and Practice--Annotated § 464.218

§ 464.218 Allegation--Dangerous Condition of Public Property [Gov. Code § 835]--Dangerous Condition of Public Sidewalk

[1] FORM Allegation--Dangerous Condition of Public Property [Gov. Code § 835]--Dangerous Condition of Public Sidewalk

On _____ [*date*], and prior thereto, the sidewalk was in a dangerous condition that created a substantial risk of the type of injury hereinafter alleged when the property was used in a manner that was reasonably forseeable in that _____ [*describe dangerous condition, e.g.,* the sidewalk contained a jagged break, one side of which was significantly higher than the other, creating a substantial risk that persons walking down the sidewalk would trip on the break and fall and injure themselves].

[2] Use of Form

The allegation provided above can be used to replace Paragraph 7 of the *form in § 464.211* if the complaint is based on a dangerous condition of a public sidewalk. In sidewalk cases, the minor or trivial exemption from liability is often raised as a defense [*Gov. Code § 830.2*; *see § 464.83[3]*].

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40-464 California Forms of Pleading and Practice--Annotated § 464.219

§ 464.219 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity Based on Dangerous Condition of Reservoir or Canal [Gov. Code § 831.8(c)]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries--Against Public Entity Based on Dangerous Condition of Reservoir or Canal [Gov. Code § 831.8(c)]

[*Caption. See § 464.210[1]* .]

The plaintiff alleges:

1. [*Capacity of the defendant public entity. See § 464.210[1], Paragraph 1*.]

2-3. [*Fictitious name allegations, if appropriate. See § 464.210[1], Paragraphs 3 and 4*.]

4. On _____ [*date*], and prior thereto, the defendant was the owner and operator of _____ [*specify, e.g.,* a canal known as _____ (*name*) located in _____ County, California].

5. On _____ [*date*], and prior thereto, the _____ [*specify, e.g.,* canal] was in a dangerous condition that created a substantial and unreasonable risk of death or serious bodily harm when used with due care in a manner in which it was reasonably foreseeable that it would be used in that it _____ [*specify, e.g.,* contained alligators] and the condition was not reasonably apparent to, and would not be anticipated by, a mature, reasonable person using the property with due care.

6. The defendant had actual knowledge of the existence of the condition and knew, or should have known, of its dangerous character a sufficient period of time prior to the injury to have taken measures to protect against the dangerous condition.

7. On or about _____ [*date*], the plaintiff was lawfully on the above-described property and, as a proximate result of the dangerous condition of the property, was _____ [*specify how injuries occurred, e.g.,* bitten by an alligator], causing the plaintiff the injuries hereinafter alleged.

8-10. [*Damages allegations. See § 464.210[1], Paragraphs 7-9.*]

11-12. [*Filing and rejection of claim. See § 464.210[1], Paragraphs 10 and 11.*]

[*Prayer. See § 464.210[1]* .]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 464.210[1]* .]

[2] Use of Form

The form of complaint above is for use in bringing an action against a public entity for injuries sustained resulting from the dangerous condition of a canal or reservoir.

[3] Liability to Children

If the plaintiff is less than 12 years of age, the public entity is also liable if the dangerous condition created a substantial and unreasonable risk of death or serious bodily harm to children under 12 years of age using the property or adjacent property with due care in a manner in which it was reasonably foreseeable that it would be used, and if the person injured, because of his or her immaturity, did not discover the condition or did not appreciate its dangerous character [*Gov. Code § 831.8(d)*]. An analogous exception to immunity applies to Los Angeles County flood control agencies and water conservation facilities and their employees, although that exception extends to children 16 years old or younger [*Gov. Code § 831.8(f)*].

[4] Cross References

For a general form of complaint against a public entity for personal injuries caused by a dangerous condition of public property, *see § 464.210*

California Government Tort Liability Practice, Ch. 12, § 12.93 et seq. (Cal. CEB 4th ed. 1999)

Witkin, Summary of California Law, Vol. 5, *Torts*, § 273 et seq. (10th ed. 2005)

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40-464 California Forms of Pleading and Practice--Annotated § 464.220

§ 464.220 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity as Immune From Liability for Injury Caused by Approved Design [Gov. Code § 830.6]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity as Immune From Liability for Injury Caused by Approved Design [Gov. Code § 830.6]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], the defendant alleges:

The defendant _____ [*name*] is not liable for the injury alleged in the complaint because if it was caused by a dangerous condition of public property, the condition was created by the design of an improvement of public property, which plan had been approved in advance of the improvement by _____ [*name of legislative body or employee*] exercising discretionary authority to give such approval, and a reasonable legislative _____ [body *or* employee] would have approved the design.

[2] Use of Form

The affirmative defense provided above is for use by a public entity or public employee in an answer if the complaint is based on a condition that was created by an approved design.

[3] Cross References

California Government Tort Liability Practice, Ch. 12, § 12.66 et seq. (Cal. CEB 4th ed. 1999)

Witkin, Summary of California Law, Vol. 5, *Torts*, § 273 et seq. (10th ed. 2005)

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40-464 California Forms of Pleading and Practice--Annotated § 464.221

§ 464.221 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity Not Liable for Injury Caused by Natural Condition of Unimproved Public Property [Gov. Code § 831.2]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity Not Liable for Injury Caused by Natural Condition of Unimproved Public Property [Gov. Code § 831.2]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], the defendant alleges:

The defendant _____ [*name*] is not liable for the injury alleged in the complaint because it was caused by a natural condition of unimproved public property.

[2] Use of Form

The affirmative defense provided above is for use by a public entity or public employee in an answer if the complaint is based on an injury caused by a natural condition of unimproved public property.

[3] Cross References

California Government Tort Liability, Ch. 6 (Cal. CEB 4th ed. 1999)

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40-464 California Forms of Pleading and Practice--Annotated § 464.222

§ 464.222 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity and Public Employee Not Liable if Action Reasonable [Gov. Code §§ 835.4, 840.6]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity and Public Employee Not Liable if Action Reasonable [Gov. Code §§ 835.4, 840.6]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], the defendant alleges:

[*EITHER*]

The defendant _____ [*name*] is not liable for the injury alleged in the complaint because the act alleged as the basis for liability was reasonable when the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury was weighed against the practicability and cost of taking alternative action that would not create the risk of injury and protecting against the risk of injury.

[*OR*]

The defendant _____ [*name*] is not liable for the injury alleged in the complaint because the action taken to protect against the risk of injury created by the condition or the failure to take such action was reasonable, considering the time and opportunity available for taking action and when the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury was weighed against the practicability and cost of protecting against the risk of such injury.

[2] Use of Form

The alternative affirmative defenses provided above are for use by a public entity or public employee in an answer if the public entity or employee acted reasonably. The first alternative is for use if a negligent act or omission is the basis of the complaint; the second is for use if the complaint alleges that the public entity or employee was aware of a dangerous condition.

[3] Cross References

California Government Tort Liability Practice, Ch. 12, §§ 12.61 et seq., 12.116 et seq. (Cal. CEB 4th ed. 1999)

Witkin, Summary of California Law, Vol. 5, *Torts*, § 272 (10th ed. 2005)

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40-464 California Forms of Pleading and Practice--Annotated § 464.223

§ 464.223 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity and Public Employee Not Liable for Injury Resulting From Work on Nondedicated Road Performed With Reasonable Care [Gov. Code § 831.3]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity and Public Employee Not Liable for Injury Resulting From Work on Nondedicated Road Performed With Reasonable Care [Gov. Code § 831.3]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], the defendant alleges:

The defendant _____ [*name*] is not liable for the injury alleged in the complaint because it occurred on account of the _____ [grading *or* specify other maintenance or repair] of a road that has not officially been accepted as a part of the road system under _____ [the defendant public entity's jurisdiction *or* the jurisdiction of _____ (*name of public entity*)] and the _____ [grading *or* specify other maintenance or repair] was performed with reasonable care and left the road in no more dangerous or unsafe condition than it was before the work began.

[2] Use of Form

The affirmative defense provided above is for use by a public entity or public employee in an answer if the complaint is based on an injury that occurred because of the public entity's performance of maintenance or repair on, or reconstruction or replacement of, a nondedicated road, and the work was performed with reasonable care and left the road in no more dangerous or unsafe condition than it was before the work began. For purposes of *Gov. Code § 831.3*, "reconstruction or replacement" means reconstruction or replacement performed pursuant to *Sts. & Hy. Code §§ 1160-1197* (formation of permanent road divisions) [*Gov. Code § 831.3*].

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40-464 California Forms of Pleading and Practice--Annotated §§ 464.224-464.239

[Reserved]

§§ 464.224[Reserved]

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40-464 California Forms of Pleading and Practice--Annotated § 464.240

§ 464.240 Complaint for Damages [Civ. Code § 3333] for Failure to Summon Medical Aid for Prisoner [Gov. Code § 845.6]--Against Public Entity and Public Employee

[1] FORM Complaint for Damages [Civ. Code § 3333] for Failure to Summon Medical Aid for Prisoner [Gov. Code § 845.6]--Against Public Entity and Public Employee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

	)	
_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*], Defendants.	)	(Failure to Summon Medical Aid)
	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]

_____

The plaintiff alleges:

1. The defendant County of _____ is, and at all times mentioned herein was, a county organized and existing under the laws of the State of California.

2. At all times mentioned herein, the defendant _____ [*name*] was an employee of the defendant _____ [*name of public entity*] and in doing the acts hereinafter described, acted within the course and scope of _____ [his *or* her] employment.

3. [The plaintiff is ignorant of the true names and capacities of the defendants sued herein as DOES 1-_____, inclusive,

and therefore sues these defendants by such fictitious names. The plaintiff will amend this complaint to allege their true names and capacities when ascertained. (The plaintiff is informed and believes and thereon alleges that each of said fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that the plaintiff's injuries as herein alleged were proximately caused by their acts.)]

[*EITHER*]

[4. (The plaintiff is informed and believes and thereon alleges that) (A)t all times mentioned herein each of the defendants sued herein as DOES 1-_____, inclusive, was the agent and employee of each of the remaining defendants and was at all times acting within the purpose and scope of such agency and employment.]

[*OR*]

[4. At all times mentioned herein the defendants DOES 1-_____, inclusive, were the agents, servants, and employees of their codefendants, and in doing the things hereinafter alleged were acting in the scope of their authority as such agents, servants, and employees, and with the permission and consent of their codefendants.]

[*CONTINUE*]

5. On _____ [*date*], the plaintiff was a prisoner in the county jail at _____ [*specify*]. On that day, the plaintiff was in need of immediate medical care by reason of _____ [*specify, e.g.,* having suffered an epileptic seizure].

6. The defendant _____ [*name of public employee*] observed the plaintiff in the above-described condition and had reason to know and knew that the plaintiff was in need of immediate medical care. Despite such knowledge, the defendant _____ [*name of public employee*] intentionally failed to take reasonable action to summon medical aid for the plaintiff with the result that the plaintiff did not receive any medical aid for _____ [*specify hours*] after the plaintiff needed such aid.

7. As a proximate result of the above-described acts of the defendant[s, and each of them], the plaintiff was hurt and injured in _____ [his *or* her] health, strength, and activity, sustaining injury to _____ [his *or* her] body and shock and injury to _____ [his *or* her] nervous system and person, all of which injuries have caused, and continue to cause, the plaintiff great mental, physical, and nervous pain and suffering. [The plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to _____ [him *or* her].] As a result of such injuries, the plaintiff has suffered general damages.

[*EITHER*]

8. As a [further] proximate result of the defendant's above-described acts herein alleged, the plaintiff has been required to expend money and incur obligations, and will continue to expend money and incur obligations, for medical services, X-rays, drugs, and sundries reasonably required in the treatment and relief of the injuries herein alleged, the plaintiff has been damaged thereby.

[*OR*]

8. As a further proximate result of the above-described acts of the defendant[s, and each of them], the plaintiff has incurred, and will continue to incur, medical and related expenses.

[*CONTINUE*]

9. On or about _____ [*date*], the plaintiff presented to_____ [*name of public entity*] by _____ [delivering *or* mailing] a claim to the _____ [clerk *or* secretary *or* auditor] for the injuries, disability, losses, and damages suffered and incurred by _____ [him *or* her] by reason of the above-described occurrence, all in compliance with the requirements of *Section 905 of the Government Code*. A copy of the claim is attached hereto as Exhibit A and made a part hereof.

10. On or about _____ [*date*], _____ [*name of public entity*] _____ [rejected the claim in its entirety *or* allowed the claim in the amount of $_____ and rejected it as to the remainder *or* failed to act on the claim within the period of 45 days after its presentation, and the claim was, thus, deemed rejected under the provisions of *Section 912.4 of the Government Code* at the expiration of the 45-day period, to wit, on _____ (*date*)].

WHEREFORE, the plaintiff prays judgment against the defendants, and each of them, as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION [*Code Civ. Proc. §§ 446, 2015.5*]

I, _____ [*name*], am the plaintiff in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own personal knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of complaint is for use in an action against a public entity and public employee for failure to summon medical aid for a prisoner.

[3] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[4] Venue

In an action against the state for personal injuries, the proper court is a court in the county where the injury occurred [*Gov. Code § 955.2*]. In an action against a local public entity for personal injuries, the proper court is the county in which the local public entity is situated [*Code Civ. Proc. § 394*].

[5] Verification

A public entity need not verify its answer even though the complaint is verified [*see Code Civ. Proc. § 446*]. Verification of a complaint against a public entity does, however, preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*].

[6] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included--for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought if they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification*

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B. Actions Against Public Entities and Employees
3. Specific Liabilities and Immunities

40-464 California Forms of Pleading and Practice--Annotated § 464.241

§ 464.241 Complaint for Damages [Civ. Code § 3333] for Injuries to Prisoner [Gov. Code § 844.6] or Patient at Mental Institution [Gov. Code § 854.8] Caused by Negligence of Public Employee

[1] FORM Complaint for Damages [Civ. Code § 3333] for Injuries to Prisoner [Gov. Code § 844.6] or Patient at Mental Institution [Gov. Code § 854.8] Caused by Negligence of Public Employee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAIN FOR DAMAGES
_____ [*names*], Defendants.	)	(Negligence of Public Employee)
	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]

_____

The plaintiff alleges:

1. At all times mentioned herein, the defendant _____ [*name*] was an employee of _____ [*name of public entity*] and was _____ [*describe the defendant's duties, e.g.,* a guard at _____ (*name of facility*)].

[2-3. *Fictitious name allegations, if appropriate. See § 464.240[1], Paragraphs 3 and 4.*]

4. On _____ [*date*], the plaintiff was _____ [a prisoner at _____ (*specify*) *or* a mental patient at _____ (*name of state mental institution*)].

5. On _____ [*date*], the defendant negligently and carelessly _____ [*describe act that injured the plaintiff, e.g.,* attempted to restrain the plaintiff with a strait jacket] causing the plaintiff the injuries hereinafter described.

[6-7. *Damages allegations. See § 464.240[1], Paragraphs 7 and 8*.]

[8-9. *Filing and rejection of claim. See § 464.240[1], Paragraphs 9 and 10*.]

[*Prayer. See § 464.240[1]* .]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 464.240[1]* .]

[2] Use of Form

The form of complaint above is for use in an action against a public employee for a negligent act that injured a prisoner or mental patient.

[3] Cross References

For discussion of venue, jurisdiction, specification of damages, and verification of complaint, see *§ 464.240*

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40-464 California Forms of Pleading and Practice--Annotated § 464.242

§ 464.242 Complaint for Damages [Civ. Code § 3333] for Injuries Caused by Failure of Public Entity Operating Medical Facility to Provide Adequate Equipment or Facilities [Gov. Code § 855(a)]

[1] FORM Complaint for Damages [Civ. Code § 3333] for Injuries Caused by Failure of Public Entity Operating Medical Facility to Provide Adequate Equipment or Facilities [Gov. Code § 855(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*], Defendants.	)	(Failure to Provide Adequate Equipment or Facilities)
	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]

_____

The plaintiff alleges:

[1. *Status of the defendant public entity. See § 464.240[1], Paragraph 1*.]

[2-3. *Fictitious name allegations, if appropriate. See § 464.240[1], Paragraphs 2 and 3*.]

4. On _____ [*date*], the plaintiff was a patient in _____ [*name of public medical facility*], at _____ [*specify*], receiving treatment for _____ [*specify*].

5. On that date, the defendant failed to provide adequate and sufficient _____ [equipment *or* facilities

or personnel] as required by _____ [*specify statute or regulation the requirements of which were not met*] in that _____ [*describe inadequacy*], which failure proximately caused the injuries to the plaintiff hereinafter described.

[6-7. *Damages allegations. See § 464.240[1], Paragraphs 7 and 8*.]

[*Filing and rejection of claim. See § 464.240[1], Paragraphs 9 and 10*.]

[*Prayer. See § 464.240[1]* .]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 464.240[1]* .]

[2] Use of Form

The form of complaint above is for use in an action against a public entity maintaining a medical facility for failure to provide required equipment, personnel, or facilities.

[3] Cross References

For discussion of venue, jurisdiction, specification of damages, and verification of complaint, see *§ 464.240*

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40-464 California Forms of Pleading and Practice--Annotated § 464.243

§ 464.243 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity and Public Employee Not Liable for Failure to Provide Police Protection [Gov. Code § 845]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity and Public Employee Not Liable for Failure to Provide Police Protection [Gov. Code § 845]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify e.g.,* SECOND) CAUSE OF ACTION], the defendant alleges that:

[*EITHER*]

At all times mentioned in the complaint, the defendant _____ [*name of public employee*] was a public employee of _____ [*name of public entity*] and _____ [he *or* she] is, therefore, not liable for failure to provide [adequate] police protection.

[*OR*]

A public entity is not liable for failure to provide [adequate] police protection.

[2] Use of Form

The forms of affirmative defense provided above are for use by a public entity or a public employee if the complaint is based on failure to provide police protection.

[3] Cross References

California Government Tort Liability Practice, Ch. 4 (Cal. C.E.B. 1980)

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40-464 California Forms of Pleading and Practice--Annotated § 464.244

§ 464.244 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity and Public Employee Not Liable for Injury Caused by Release of Prisoner or by Escaping Prisoner [Gov. Code § 845.8]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity and Public Employee Not Liable for Injury Caused by Release of Prisoner or by Escaping Prisoner [Gov. Code § 845.8]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], the defendant alleges that:

[*EITHER*]

At all times mentioned in the complaint, the defendant _____ [*name of public employee*] was a public employee of _____ [*name of public entity*] and _____ [he *or* she], therefore, is not liable for an injury caused by _____ [the decision to release a prisoner *or* an escaping prisoner].

[*OR*]

A public entity is not liable for an injury caused by _____ [the decision to release a prisoner *or* an escaping prisoner].

[2] Use of Form

The forms of affirmative defense provided above are for use by a public employee or a public entity if the basis of the complaint is an injury caused by the decision to release a prisoner or by an escaping prisoner.

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40-464 California Forms of Pleading and Practice--Annotated § 464.245

§ 464.245 Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity and Public Employee Not Liable for Determination to Confine, for Terms and Conditions of Confinement, or for Determination to Release Mental Patient [Gov. Code § 856]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)]--Public Entity and Public Employee Not Liable for Determination to Confine, for Terms and Conditions of Confinement, or for Determination to Release Mental Patient [Gov. Code § 856]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], the defendant alleges that:

[*EITHER*]

At all times mentioned in the complaint, the defendant _____ [*name of public employee*] was a public employee of _____ [*name of public entity*] acting within the scope of _____ [his *or* her] employment in determining, in accordance with the applicable _____ [statute *or* regulation *or* ordinance], _____ [to confine _____ (*name*) *or* concerning the terms and conditions of the confinement of _____ (*name*) *or* to release _____ (*name*) from confinement], for mental illness or addiction and _____ [he *or* she] is, therefore, not liable for any injury resulting from such determination.

[*OR*]

A public entity is not liable for any injury resulting from its determination, in accordance with the applicable _____ [statute *or* regulation *or* ordinance] _____ [to confine _____

(*name*) *or* concerning the terms and conditions of the confinement of _____ (*name*) *or* to release _____ (*name*) from confinement] for mental illness or addiction.

[2] Use of Form

This form of affirmative defense is for use by a public employee or a public entity in an answer if the complaint is based on an injury caused by a determination to confine a mental patient, by a determination concerning the terms and conditions of confinement of the patient, or by a determination to release the patient.

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40-464 California Forms of Pleading and Practice--Annotated § 464.246

§ 464.246 General Demurrer [Code Civ. Proc. § 430.30(a)] for Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Public Entity and Public Employee Not Liable for Injury Caused in Fighting Fire [Gov. Code § 850.4]--And Notice of Hearing [Cal. Rules of Ct., Rule 1320(c)]

[1] FORM General Demurrer [Code Civ. Proc. § 430.30(a)] for Failure to State Cause of Action [Code Civ. Proc. § 430.10(e)]--Public Entity and Public Employee Not Liable for Injury Caused in Fighting Fire [Gov. Code § 850.4]--And Notice of Hearing [Cal. Rules of Ct., Rule 1320(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	DEMURRER TO COMPLAINT AND NOTICE OF
_____ [*name*],	)	HEARING
Defendant.	)	[LIMITED CIVIL CASE]
	)	
	)	

The defendant demurs to the complaint herein on the following ground:

The complaint fails to state a cause of action because the defendant as a _____ [public entity *or* public employee acting in the scope of _____ (his *or* her) employment] is not liable for any injury caused in fighting a fire.

NOTICE IS HEREBY GIVEN that this demurrer has been set for hearing on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____

(Department *or* Division) _____ of] the above-entitled court, located at _____ [*name of building or street address or both*], in _____ [*city*], _____ County, California.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[2] Use of Form

This form of demurrer is for use if it appears on the face of the complaint against a public entity or public employee that it is based on an injury caused in fighting a fire.

[3] Accompanying Papers

A party filing a demurrer must serve and file with the demurrer a notice of hearing and a memorandum of points and authorities in support of each ground asserted [*Cal. Rules of Ct., Rules 3.1103(c), 3.1113(a), 3.1320(c)*].

[4] Cross References

California Government Tort Liability Practice, Ch. 4, § 4.31 (Cal. C.E.B. 1980)

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40-465 California Forms of Pleading and Practice--Annotated 465.syn

§ 465.syn Synopsis to Chapter 465: PUBLIC ENTITIES AND OFFICERS: CIVIL CLAIMS ARISING FROM CRIMINAL ACTS

§ 465.01 Scope of Chapter

§ 465.02 Victim Compensation and Government Claims Board

§§ 465.03-465.19 [Reserved]

§ 465.20 Governing Law

§ 465.21 Victim and Witness Assistance Centers

§ 465.22 Restitution Obligation in Criminal or Juvenile Wardship Proceedings

§ 465.23 Assistance for Crime Victims and Derivative Victims From State Restitution Fund

[1] Availability of Assistance

[2] Eligibility for Assistance

[a] General Requirements

[b] Effect of Victim's Conduct

[i] Victim's Contributory Behavior

[ii] Victim's Failure to Cooperate

[c] Certain Crimes Involving Vehicles Excluded

[d] Domestic Violence Cases

[3] Types of Assistance Available

[a] Mental Health Counseling Expenses

[b] Lost Wages

[c] Rehabilitation Services

[d] Loss of Support

[e] Reimbursement for Medical, Burial, or Cleanup Expenses

[4] Independent Evaluation May Be Required

[5] Payment

[a] Lump Sum or Periodic Payments

[b] Maximum Amount of Payment

[c] Maximum Rates for Medical Services Reimbursement

[6] Attorney's Fees

§ 465.24 Procedures for Processing Claims

[1] Form for Application

[2] Limitations Period

[3] Board's Response to Claim

[a] Period for Processing Claim

[b] Verification of Application

[c] Right to Hearing

§ 465.25 Reimbursement of Assistance

§ 465.26 Emergency Awards

[1] Availability

[2] Amount of Award

[3] Reimbursement of Award

[4] Procedures

[a] Form of Application

[b] Processing Application

[c] No Right to Hearing

§ 465.27 Review of Board's Decision on Application for Assistance

[1] Reconsideration by Board

[2] Judicial Review

[a] Filing Writ of Mandate

[b] Attorney's Fees and Costs

§§ 465.28-465.39 [Reserved]

§ 465.40 Governing Law

§ 465.41 Eligibility for Indemnification

[1] Eligibility of Private Citizens ("Good Samaritans")

[2] Ineligibility of Crime Victims Receiving State Assistance

§ 465.42 Scope of Indemnification

§ 465.43 Hearing on Claim

[1] Hearing Required

[2] Evidence Considered

[3] Standard of Proof

§ 465.44 Award and Fees

[1] Amount of Award

[2] Attorney's Fees

§§ 465.45-465.59 [Reserved]

§ 465.60 Governing Law

§ 465.61 Eligibility for Indemnification

§ 465.62 Filing of Claim

[1] Supporting Documents

[2] Time for Filing Claim

§ 465.63 Hearing on Claim

[1] Setting of Time and Notice

[2] Evidence Supporting Claim

[a] Facts in Statement of Claim

[b] Independent Evidence of Innocence Required

[c] Admissibility of Evidence

§ 465.64 Post-Hearing Procedures

[1] Legislative Funding of Award

[2] Judicial Review

§§ 465.65-465.79 [Reserved]

§ 465.80 Governing Law

§ 465.81 Scope of Protection

[1] Persons Protected

[2] Types of Searches Covered

§ 465.82 Requirements for Searches

[1] Visual and Strip Searches

[a] Reasonable Suspicion Required

[b] Authorization Required

[c] Restrictions on Search

[2] Physical Cavity Searches

[a] Search Warrant Required

[b] Conditions of and Persons Conducting Search

[3] Requirements Applicable to All Searches

[a] Record of Authorizing Document

[b] Sex of Searching Persons

[c] Privacy During Search

§ 465.83 Judicial Remedies

§§ 465.84-465.99 [Reserved]

§ 465.100 State Statutes

[1] Body Cavity and Strip Searches

[a] Provisions Applicable to All Types of Searches

[b] Definitions

[c] Physical Body Cavity Searches

[d] Visual Body Cavity and Strip Searches

[e] Remedies

[2] Crime Victims' Assistance

[a] Claim Procedure

[i] Application

[ii] Hearing

[b] Court-Ordered Restitution

[c] Definitions

[d] Eligibility

[e] Emergency Award

[f] Reconsideration and Review

[g] Scope of Recovery

[h] Victim Centers

[3] Indemnification of "Good Samaritans"

[a] Award

[b] Claim

[c] Eligibility

[d] Hearing

[4] Indemnification of Persons Erroneously Imprisoned

[a] Claim

[b] Hearing

§ 465.101 Administrative Regulations

[1] Assistance for Crime Victims

[2] Indemnification of "Good Samaritans"

[3] Indemnification of Persons Erroneously Imprisoned

§ 465.102 Decisions

[1] Assistance for Crime Victims

[2] Indemnification of "Good Samaritans"

[3] Indemnification of Persons Erroneously Imprisoned

§ 465.103 Attorney General Opinions

§ 465.104 Law Reviews

§§ 465.105-465.119 [Reserved]

§ 465.120 Application for Assistance by Crime Victim [Gov. Code § 13950 et seq.]

[1] FORM

[2] Use of Form

[3] Time for Filing

[4] Return of Incomplete Application

[5] Verification

§ 465.121 Claim for Indemnification of Damages by Private Citizen Who Apprehended Criminal, Prevented Crime, or Rescued Person [Gov. Code §§ 13970-13974]

[1] FORM

[2] Use of Form

[3] Time for Filing

[4] Corroboration

§ 465.122 Claim for Indemnification by Person Erroneously Imprisoned [Penal Code §§ 4900-4906]

[1] FORM

[2] Use of Form

[3] Time for Filing

[4] Verification

§ 465.123 Complaint for Damages Resulting From Improper Strip Search or Body Cavity Search [Penal Code § 4030]--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Requirement of Damages or Harm

[5] Amount of Damages

[6] Attorney's Fees

§ 465.124 Class Action Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527], and Permanent Injunction [Code Civ. Proc. § 526]--Improper Strip Search or Body Cavity Search [Penal Code § 4030]--General Form

[1] FORM

[2] Use of Form

[3] Allegations

§ 465.125 Allegation--Strip Search or Visual Body Cavity Search Conducted Without Reasonable Suspicion [Penal Code § 4030(f)]

[1] FORM

[2] Use of Form

§ 465.126 Allegation--Strip Search or Visual Body Cavity Search Conducted Without Authorization of Supervising Officer [Penal Code § 4030(f)]

[1] FORM

[2] Use of Form

§ 465.127 Allegation--Strip Search or Visual Body Cavity Search Improperly Conducted [Penal Code § 4030(j), (l), (m)]

[1] FORM

[2] Use of Form

§ 465.128 Allegation--Warrantless Physical Body Cavity Search Conducted [Penal Code § 4030(h)]

[1] FORM

[2] Use of Form

§ 465.129 Allegation--Physical Body Cavity Search Improperly Conducted [Penal Code § 4030(k)-(m)]

[1] FORM

[2] Use of Form

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PART I. SCOPE

40-465 California Forms of Pleading and Practice--Annotated § 465.01

§ 465.01 Scope of Chapter

This chapter discusses a variety of civil claims arising from criminal acts.

The chapter includes discussion of claims for restitution by crime victims [*see § 465.20* et seq.] and includes forms for use by a crime victim to claim general and emergency assistance [*see §§ 465.120*].

The chapter includes discussion of claims for indemnification of so-called "good samaritans" [*see § 465.40* et seq.] and includes a form for a claim for indemnification for use by a person who sustained injury as a result of preventing a crime, apprehending a criminal, or rescuing another [*see § 465.122*].

The chapter includes discussion of claims for indemnification of persons erroneously imprisoned [*see § 465.60* et seq.] and includes a form for use by a person erroneously convicted of a felony [*see § 465.123*].

The chapter includes discussion of actions by persons wrongfully subjected to a body cavity or strip search [*see § 465.80* et seq.] and includes forms of complaint for use after a person detained for a minor offense was subjected to an improper strip or body cavity search [*see §§ 465.124 -465.129*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsEmployees & OfficialsTortsPublic Entity LiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral Overview

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40-465 California Forms of Pleading and Practice--Annotated § 465.02

§ 465.02 Victim Compensation and Government Claims Board

The Victim Compensation and Government Claims Board receives claims for assistance or restitution from all of the following: crime victims; persons who aided in the prevention of a crime, apprehension of a criminal, or rescue of another; and persons claiming to have been erroneously imprisoned for a felony [*Gov. Code § 13951(a)*]. Wherever the term "board" is used in this chapter, it refers to the California Victim Compensation and Government Claims Board unless otherwise noted.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsEmployees & OfficialsTortsPublic Entity LiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral Overview

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[Reserved]

§§ 465.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Restitution for Crime Victims

40-465 California Forms of Pleading and Practice--Annotated § 465.20

§ 465.20 Governing Law

A crime victim's right to restitution or state assistance is governed by Gov. Code § 13950 et seq., Penal Code §§ 679.02, 1202.4, and *Welf. & Inst. Code § 730.6*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsEmployees & OfficialsTortsPublic Entity LiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral Overview

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PART II. LEGAL BACKGROUND
A. Restitution for Crime Victims

40-465 California Forms of Pleading and Practice--Annotated § 465.21

§ 465.21 Victim and Witness Assistance Centers

Penal Code § 13835.2 provides for state funding to selected nonprofit agencies that provide comprehensive services to crime victims and witnesses. The agency receiving this funding must not restrict its services to victims of particular crimes or to victims of crimes in which there is a suspect in the case [*see Penal Code § 13835.2(a)(1)*]. Agencies that provide these services and that are eligible for funding are designated as victim and witness assistance centers [*see Penal Code § 13835.2(b)*]. *Penal Code §§ 13835-13835.10* generally govern the establishment of, and services provided by, victim and witness assistance centers. The services that these centers must render include assistance in the preparation, verification, and presentation of claims for crime victim assistance [*Gov. Code § 13950 et seq.*], and cooperation with the Board in verifying the information pertaining to these claims [*see Penal Code § 13835.2(a)(4), (5)*; *Penal Code § 13835.5(a)(5)*; *see also Gov. Code § 13962(e)*].

Penal Code §§ 13897-13897.3 provide for state funding to a selected nonprofit agency to provide a legal resource center, statewide in scope, where crime victims, their families, and providers of services to crime victims can receive information, assistance, and referral relating to the rights and needs of the victims [*see Penal Code § 13897*]. In addition to other services, the center must provide information about victims' legal rights to compensation under the Victims of Crimes Act [*see Gov. Code § 13959 et seq.*] and, if appropriate, provide victims with guidance in exercising these rights [*Penal Code § 13897.2(b)(1)*]. The center must also distribute to local law enforcement agencies and local victims' programs certain information and educational materials, prepared pursuant to *Penal Code § 13897.1*, that set forth the statutory rights of the victim, including the victim's statutory right to be provided with information concerning the opportunity to be compensated under *Gov. Code § 13959 et seq.* [*Penal Code § 679.02(a)(8), (b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 40: Products Liability thru Public Entities and Officers-Chs. 460-469
Chapter 465 PUBLIC ENTITIES AND OFFICERS: CIVIL CLAIMS ARISING FROM CRIMINAL ACTS
PART II. LEGAL BACKGROUND
A. Restitution for Crime Victims

40-465 California Forms of Pleading and Practice--Annotated § 465.22

§ 465.22 Restitution Obligation in Criminal or Juvenile Wardship Proceedings

When a person is convicted of a crime in California, the court is generally required to order the criminal defendant to make restitution to the victim of the crime, if any, for economic loss incurred as a result of the defendant's criminal conduct [*see Penal Code § 1202.4(a)(3)(B), (f)-(j)*]. Under specified conditions, the court must also order the defendant to pay a restitution fine, to be deposited in the Restitution Fund in the state treasury [*see Penal Code § 1202.4(a)(3)(A), (b)-(g)*]. A similar restitution provision applies to juvenile offenders [*see Welf. & Inst. Code §§ 729.6, 730.6*].

To the extent that the victim has received assistance from the state under *Gov. Code § 13950 et seq.* [*see § 465.23*], the criminal defendant must make the restitution payment to the Restitution Fund [*see Penal Code § 1202.4(f)(2)*].

For full discussion of restitution provisions in criminal and juvenile wardship proceedings, *see* Erwin, Millman, Monroe, Sevilla & Tarlow, California Criminal Defense Practice, Chs. 90, 91, and 124 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 465.23 Assistance for Crime Victims and Derivative Victims From State Restitution Fund

[1] Availability of Assistance

Eligible crime victims or "derivative victims" [*see Gov. Code § 13951* (definitions); *see also § 465.23[2][a]*] may apply to the board for specified types of assistance from the Restitution Fund in the state treasury [*see Gov. Code §§ 13950, 13952*]. Assistance granted under *Gov. Code § 13950 et seq.* does not disqualify an otherwise eligible victim or derivative victim from participating in any other public assistance program [*Gov. Code § 13957.7(f)*].

The types of assistance that may be obtained from the Restitution Fund are discussed in *§ 465.23[3]*. The procedure for applying for assistance is discussed in *§ 465.24*.

[2] Eligibility for Assistance

[a] General Requirements

To qualify for assistance under *Gov. Code § 13950 et seq.*, one must be the victim of a crime or a "derivative victim," as defined [*see Gov. Code §§ 13951, 13957, 13957.5*]. For these purposes, a "victim" is a person who sustains an injury or death as a direct result of a crime [*Gov. Code § 13951(g)*]. A "derivative victim" is an individual who sustains pecuniary loss as a result of injury or death to a crime victim [*Gov. Code § 13951(c)*]. A "pecuniary loss" is an economic loss or expense that has not been and will not be reimbursed from any other source [*Gov. Code § 13951(e)*].

The term "crime" for these purposes means a crime or public offense that would constitute a misdemeanor or a felony if committed in California by a competent adult. A crime includes an act of terrorism, as defined in *18 U.S.C.S. § 2331*, that is committed against a resident of California, whether or not the act occurs within California [*Gov. Code § 13951(b)*]. In addition to falling within these general definitions, a person must meet other requirements to be eligible for assistance. For example, the crime victim must be or have been a California resident, a member of the military stationed in California, or a family member living with a member of the military stationed in California [*Gov. Code § 13955(b)(2)*]. However, if the board determines that federal funds are currently available to California for the compensation of crime victims, it is sufficient that the crime occurred within California, whether or not the victim is a

resident of California [*Gov. Code § 13955(b)(1)*].

If compensation is being sought for a derivative victim, the derivative victim must be a resident of California or another state and be one of the following [*Gov. Code § 13955(c)*]:

- The parent, grandparent, sibling, spouse, child, or grandchild of the victim at the time of the crime;
- Living in the household of the victim at the time of the crime;
- A person who had previously lived in the household of the victim for a period of not less than two years in a relationship substantially similar to that of a parent, grandparent, sibling, spouse, child, or grandchild;
- Another family member of the victim, including the victim's fianc' or fianc'e, who witnessed the crime; or
- The primary caretaker of a minor victim, but not the primary caretaker at the time of the crime.

Compensable injuries include physical injury, or emotional injury combined with the threat of physical injury [*Gov. Code § 13955(f)(1), (2)*]. The board may presume that a child who witnessed a crime of domestic violence has sustained physical injury. The board may also presume that a child who resides in a home where a crime of domestic violence has occurred has sustained physical injury, regardless of whether the child has witnessed the crime [*Gov. Code § 13955(f)(1)*].

Other emotional injuries may be compensable, if the crime was a violation of one of the following provisions [*Gov. Code § 13955(f)(3)*]:

- *Penal Code §§ 261, 262, 271, 273a, 273d, 285, 286, 288, 288a, 288.5, 289,* or *311.4(b)* or *(c)*;
- *Penal Code § 270*, if the emotional injury was a result of conduct other than a failure to pay child support and if criminal charges were filed;
- *Penal Code § 261.5*, if criminal charges were filed; or
- *Penal Code §§ 278* or *278.5*, if the deprivation of custody described in those sections endured for at least 30 days (for these purposes, the child, rather than a nonoffending parent or caretaker, is considered the victim).

A county that operates a public hospital does not have standing to sue the board to assert claims for the cost of medical services provided to indigent victims by the public hospital or to seek payment for those services from the Restitution Fund, because third-party health care providers are not victims entitled to file claims with the board. The hospital does not have a cognizable claim for restitution and, in any event, the indigent crime victims would be indispensable parties [*County of Alameda v. State Bd. of Control (1993) 14 Cal. App. 4th 1096, 1104-1106, 18 Cal. Rptr. 2d 487]* .

Notwithstanding the United States residency requirement of *Gov. Code § 13955*, a nonresident of the United States who meets the other requirements of that statute is considered a derivative victim and may be reimbursed for outpatient mental health counseling, if mental health counseling is necessary as a direct result of a crime [*Gov. Code § 13955.5* (effective until January 1, 2007)].

In addition to compensation for crime victims and derivative victims, person who incur funeral or burial expenses

caused by the death of a crime victim, or who incur cleanup costs for a crime scene, may also be eligible for reimbursement of some or all of these costs [*see § 465.23[3][e]*].

[b] Effect of Victim's Conduct

[i] Victim's Contributory Behavior

The board may deny an application for assistance, in whole or in part, if the board finds that denial is appropriate because of the victim's or other applicant's involvement in the events leading up to the crime or the involvement of the persons whose injury or death is the basis of the application [*Gov. Code § 13956(c)*]. In the case of a minor, the board must consider the minor's age, physical condition, and psychological state, as well as any compelling health and safety concerns, in determining whether to deny the minor's application [*Gov. Code § 13956(c)*].

Furthermore, a victim is ineligible for assistance if the board finds that the victim knowingly and willingly participated in the crime [*Gov. Code § 13956(a)*], and a derivative victim is ineligible for assistance if the board finds that either the victim or the derivative victim knowingly and willingly participated in the commission of the crime [*Gov. Code § 13956(a)*].

[ii] Victim's Failure to Cooperate

A victim is ineligible for assistance if the victim failed to cooperate reasonably with a law enforcement agency in the apprehension and conviction of a person who committed the crime [*Gov. Code § 13956(b)(1)*]. A derivative victim is ineligible for assistance if the board finds that either the victim or the derivative victim failed to cooperate with a law enforcement agency in the apprehension and conviction of a person who committed the crime [*Gov. Code § 13956(b)(1)*].

However, in determining whether cooperation has been reasonable, the board must consider the victim's or derivative victim's age, physical condition, and psychological state, cultural or linguistic barriers, any compelling health and safety concerns, including, but not limited to, a reasonable fear of retaliation or harm that would jeopardize the well-being of the victim or the victim's family or the derivative victim or the derivative victim's family, and the board must give due consideration to the degree of cooperation that the victim or derivative victim is capable of in light of any of these factors [*Gov. Code § 13956(b)(1)*].

[c] Certain Crimes Involving Vehicles Excluded

No act involving the operation of a motor vehicle, aircraft, or water vehicle that results in injury or death constitutes a crime for purposes of assistance to crime victims, except for any of the following [*Gov. Code § 13955(e)(2)*]:

- Injury or death, intentionally inflicted through the use of a motor vehicle, aircraft, or water vehicle;

- Injury or death caused by hit and run driving, or by driving while under influence of alcohol or drugs [*see Veh. Code §§ 20001, 23152, 23153*];

- Injury or death caused by the driver of a motor vehicle in the immediate act of fleeing the scene of a crime in which he or she knowingly and willingly participated;

- Injury or death caused by a person in violation of *Penal Code §§ 191.5(b), 192(c), 192.5* (vehicular manslaughter); or

- Injury or death caused by any party if a peace officer is operating a motor vehicle in an effort to apprehend a suspect, and the suspect is evading, fleeing, or otherwise attempting to elude the police

officer.

[d] Domestic Violence Cases

An application for a claim based on domestic violence may not be denied solely because the victim did not make a police report. The board must adopt guidelines that allow it to consider and approve applications for assistance based on domestic violence that rely on evidence other than a police report to establish that a domestic violence crime has occurred. Evidence that a domestic violence crime has occurred may include, but is not limited to, medical records documenting injuries consistent with allegations of domestic violence, mental health records, or the fact that the victim has obtained a temporary or permanent restraining order [*Gov. Code § 13956(b)(2)*].

The application of a derivative victim of domestic violence under the age of 18 years cannot be considered ineligible on the basis of the ineligibility of the victim's application for assistance [*Gov. Code § 13956(c)*].

[3] Types of Assistance Available

[a] Mental Health Counseling Expenses

If the application for assistance is approved, the board may reimburse any of the following persons (in the following amounts) for the expense of their outpatient mental health counseling, if that counseling is necessary as a direct result of the crime [*Gov. Code § 13957(a)(2)(A), (B)*]:

- A victim [*see § 465.23[2][a]*], $10,000 or less;

- A derivative victim [*see § 465.23[2][a]*] who is the surviving parent, sibling, child, spouse, fiance, or fiancee of a victim of a crime that directly resulted in the death of the victim, $10,000 or less;

- A derivative victim who is the primary caretaker of a minor victim of sexual or physical abuse whose claim is not denied or reduced under *Gov. Code § 13956* [*see § 465.23[2][b]*], $10,000 or less for not more than two derivative victims;

- A derivative victim who is not eligible for reimbursement under the second or third paragraphs above, $5,000 or less;

- A victim of the crime of unlawful sexual intercourse with a minor, committed in violation of *Penal Code § 261.5(d)* (statutory rape), $5,000 or less; and

- A minor who suffers emotional injury as a direct result of witnessing (in close proximity to the victim) a violent crime and who is not otherwise eligible for reimbursement of outpatient mental health counseling costs, $5,000 or less.

The board may reimburse a victim or derivative victim for outpatient mental health counseling in excess of these authorized amounts, or for inpatient psychiatric, psychological, or other mental health counseling, if the claim is based on dire or exceptional circumstances that require more extensive treatment, as approved by the board [*Gov. Code § 13957(a)(2)(C)*].

Expenses for psychiatric, psychological, or other mental health counseling related expenses may only be reimbursed if provided by one of the following individuals [*Gov. Code § 13957(a)(2)(D)*]:

- A licensed physician certified in psychiatry;

- A licensed psychologist;
- A licensed clinical social worker or marriage, family, and child counselor;
- A registered psychological assistant who is under the supervision of a licensed psychologist or board certified psychiatrist;
- A person registered with the Board of Psychology who is providing nonprofit community service;
- A registered marriage, family, and child counselor intern who is under the supervision of a licensed counselor, a licensed clinical social worker, licensed psychologist, or board certified psychiatrist;
- A registered associate clinical social worker who is under the supervision of a licensed clinical social worker, a licensed psychologist, or a board certified psychiatrist; or
- A psychology intern who is under the supervision of a licensed mental health professional (psychiatrist, psychologist, or social worker) in a university hospital or university medical school clinic or a person who is pursuing a postdoctoral and training in a university or university medical school clinic under the supervision of a licensed mental health professional (psychiatrist, psychologist, or social worker) for the purpose of achieving higher clinical competency.

Reimbursement on the initial claim for any psychological, psychiatric, or mental health counseling services, including peer counseling services provided by a rape crisis center, must, if the application has been approved, be paid by the board within 90 days after receipt of the claim for payment, with subsequent payments to be made to the provider within one month after the receipt of a claim for payment [*Gov. Code § 13957.7(c)(2)*].

If a public agency (including a court, district attorney, police agency county child protective services, or other state or local governmental agency) refers a crime victim to a private nonprofit agency for treatment for that victim, the private nonprofit agency must be reimbursed for those services at the level of the normal and customary fee charged by the private nonprofit agency to clients with adequate means of payment for its services, except that the reimbursement may not exceed the maximum reimbursement rates set by the board and may be made only to the extent that the victim otherwise qualifies for services under the victims of crime program and that other reimbursement or direct subsidies are not available to serve the victim [*Gov. Code § 13957.7(h)*; *see Gov. Code § 13957.2* (board's authority to set maximum rates for reimbursement for medical and medical-related expenses, including counseling expenses)].

Payments authorized for peer counseling services by a rape counseling center are limited to $15 per hour. Covered services are limited to individual, in-person counseling on a face-to-face basis for a period not to exceed 10 weeks, plus one series of facilitated support group counseling sessions [*Gov. Code § 13957.7(d)*].

The Victims of Crime Act does not authorize an award for the value of reasonably anticipated future medical expenses, but only for expenses actually incurred [*Webster v. State Bd. of Control (1987) 197 Cal. App. 3d 29, 39, 242 Cal. Rptr. 685]* . In addition, a claimant under both the Victims of Crime Act and the Good Samaritan Act [*see Gov. Code § 13970 et seq.*, discussed in *§ 465.40* et seq.] is not entitled to recovery under both Acts for the same injuries [*see Webster v. State Bd. of Control (1987) 197 Cal. App. 3d 29, 34, 242 Cal. Rptr. 685]* .

Reimbursement for any medical or medical-related services must, if the victim's application has been approved, be paid by the board within an average of 90 days after receipt of the claim for payment. Payments to a medical or mental health provider may not be discontinued prior to completion of any reevaluation. Whether or not a reevaluation is obtained, if the board determines that payments to a provider will be discontinued, the board must notify the provider of their

discontinuance within 30 days after its determination [*Gov. Code § 13957.2*; *see § 465.23[4]*].

If the victim requests that the board give priority to reimbursement of lost wages, the board may not pay medical expenses or mental health counseling expenses except on the request of the victim or after determining that payment of these expenses will not decrease the funds available to the victim for payment for lost wages [*Gov. Code § 13957(a)(4)*]. The board may authorize a direct cash payment to a provider of reimbursable services; however, the board may not, without good cause, authorize a direct cash payment to a provider over the objection of the victim or the applicant [*Gov. Code § 13957.7(c)(1)*].

[b] Lost Wages

If the application for assistance is approved, the board may authorize a cash payment to the victim equal to the pecuniary loss resulting from loss of wages that directly resulted from the injury [*Gov. Code § 13957.5(a)(1)*]. Loss of wages may not be paid by the board for more than five years following the crime, unless the victim is disabled [*Gov. Code § 13957.5(a)(1)*].

A derivative victim--that is, the parent or legal guardian of a victim who at the time of the crime was under the age of 18 years and is hospitalized or dead as a direct result of the crime--can receive reimbursement for a loss of income for not more than thirty days [*Gov. Code § 13957.5(a)(2), (3)*].

[c] Rehabilitation Services

If the application for assistance is approved, the board may authorize cash payments to or on behalf of the victim for job retraining or similar employment-oriented rehabilitation services [*Gov. Code § 13957(a)(5)*].

[d] Loss of Support

If the application for assistance is approved, the board may authorize a cash payment to a derivative victim who was legally dependent on the victim at the time of the crime for the loss of support incurred by that derivative victim as a direct result of the crime [*Gov. Code § 13957.5(a)(4)*]. Loss of support may not be paid by the board for income lost by an adult for a period of more than five years following the date of the crime [*Gov. Code § 13957.5(a)(4)(A)*]. Loss of support may not be paid by the board on behalf of a minor for any period after the child attains the age of 18 years [*Gov. Code § 13957.5(a)(4)(B)*]. The total amount payable to all derivative victims for loss of support under *Gov. Code § 13957.5* may not exceed $70,000 [*Gov. Code § 13957.5(b)*].

[e] Reimbursement for Medical, Burial, or Cleanup Expenses

If a victim dies as a direct result of a crime, the board may reimburse any individual who voluntarily, and without anticipation of personal gain, pays or assumes the obligation to pay the medical or burial expenses incurred as a direct result of the crime for the amount of those expenses, up to the maximum rates or limitations established by the board [*Gov. Code § 13957(a)(9)(A), (B)*].

If the crime occurs in a residence, the board may also reimburse the reasonable costs to clean the scene of the crime, in an amount not to exceed $1,000 [*Gov. Code § 13957(a)(10)*].

A person is eligible for funeral, burial, or crime scene cleanup expenses regardless of any felon status of the victim [*Gov. Code § 13955(a)(3)(B)*].

[4] Independent Evaluation May Be Required

If the application for restitution is approved, the board may obtain an independent examination and report from any

provider of psychological or psychiatric treatment, mental health counseling services, or medical services, if it believes there is a reasonable basis for requesting an additional evaluation. If the crime involved sexual assault, the provider must have expertise in the needs of sexual assault victims. If the crime involved child abuse or molestation, the provider must have expertise in the needs of victims of child abuse or molestation, as appropriate. If a reevaluation is obtained, payments cannot be discontinued prior to completion of the reevaluation [*Gov. Code § 13957.2(b)*].

Whenever a victim's application for assistance has been approved, and the board determines that an independent evaluation is appropriate, the victim must be notified of the name of the provider who is to perform the evaluation within 30 days after that determination [*Gov. Code § 13957.2(b)*].

[5] Payment

[a] Lump Sum or Periodic Payments

Cash payments made as assistance to crime victims may be made as a one time (lump sum) payment or on a periodic basis. If periodic, the board may increase, reduce, or terminate the amount of assistance according to the victim's or the derivative victim's need, subject to the maximum limits provided in *Gov. Code § 13957.2* [*Gov. Code § 13957.7(b)*; *see § 465.23[5][b]*].

[b] Maximum Amount of Payment

The total award to or on behalf of a victim or a derivative victim may not exceed $35,000, and it may be increased only in accordance with *Gov. Code § 13957* [*Gov. Code § 13957(b)*]. The maximum cash payments authorized in *Gov. Code § 13957(b)* are increased to $70,000 if federal funds for those increases are available [*Gov. Code § 13957(b)*].

[c] Maximum Rates for Medical Services Reimbursement

The board may establish maximum rates and service limitations for reimbursement of medical and medical-related expenses, including counseling expenses [*Gov. Code § 13957.2(a)*].

The adoption, amendment, and repeal of these maximum rates are not subject to the rulemaking provision of the Administrative Procedure Act [*see Gov. Code § 11340 et seq.*]. An informational copy of the maximum rates is required to be filed with the Secretary of State on adoption by the board. A provider who accepts payment from the program for a service is required to accept the program's rates as payment in full, and cannot accept any payment on account of the service from any other source if the total of payments would exceed the maximum rate set by the board for that service [*Gov. Code § 13957.2(a)*].

To assure service limitations that are uniform and appropriate to the levels of mental health treatment required by a victim or derivative victim, the board may review all claims for these services as necessary to ensure their medical necessity [*Gov. Code § 13957.2(a)*].

[6] Attorney's Fees

The board must pay attorney's fees representing the reasonable value of legal services rendered to the applicant, in an amount equal to the lesser of either 10 percent of the amount of the award or $500, for each victim and each derivative victim. An attorney receiving fees from another source may waive the right to receive fees under *Gov. Code § 13957.7* [*Gov. Code § 13957.7(g)*].

Payments under *Gov. Code § 13957.7* are in addition to any amount authorized or ordered under *Gov. Code § 13960(b)* (attorney's fees for prevailing applicant in mandate proceeding to review board's decision) [*Gov. Code § 13957.7(g)*].

No attorney may charge, demand, receive, or collect any amount for services rendered in connection with any proceedings to obtain assistance for crime victims under *Gov. Code § 13950 et seq.*, except as awarded under those provisions [*Gov. Code § 13957.7(g)*].

Legal Topics:

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40-465 California Forms of Pleading and Practice--Annotated § 465.24

§ 465.24 Procedures for Processing Claims

[1] Form for Application

A crime victim or derivative victim may file an application for assistance with the board [*Gov. Code § 13952(a)*]. The application for assistance must be verified [*see Gov. Code § 13952(b)(1)*]. There is an application form available for this purpose [*see Gov. Code § 13952(a)*; *see § 465.120*].

[2] Limitations Period

The application for assistance must be filed within one year after the latest of the following: the date of the crime, the date that the victim attains the age of 18 years, or the time that the victim or derivative victim knew or in the exercise of ordinary diligence could have discovered that an injury or death had been sustained as a direct result of the crime [*Gov. Code § 13953(a)*]. However, an application for compensation based on a crime involving sex with a minor eligible for prosecution under *Pen. Code § 801.1* may be filed any time prior to the victim's 28th birthday [*Gov. Code § 13953(a)*].

The board may for good cause grant an extension of this time period [*Gov. Code § 13953(b)*]. In making this determination, the board may consider any relevant factors, including but not limited to the following [*Gov. Code § 13953(b)(1)-(3)*]:

- A recommendation from the prosecuting attorney regarding the victim's or derivative victim's cooperation with law enforcement in the apprehension and prosecution of the person charged with the crime.

- Whether particular events occurring during the prosecution or punishment of the person convicted of the crime resulted in additional pecuniary loss to the applicant.

- Whether the nature of the crime is such that delayed reporting of the crime is reasonably excusable.

This current version of the limitations period, enacted in 2002, does not contain a three-year maximum for an extension

of time as was contained under earlier law, but the law in effect at the time of the application governs any extension [*Moore v. State Bd. of Control (2003) 112 Cal. App. 4th 371, 376, 5 Cal. Rptr. 3d 116]* .

The period prescribed for filing an application by or on behalf of a derivative victim is tolled when the board accepts the application filed by a victim of the same qualifying crime [*Gov. Code § 13953(c)*].

If the application for assistance is not complete, the board staff must return it to the applicant, noting the additional information required. The applicant has 30 days after receipt of the returned application to either supply the additional information or appeal this action to the board, which will review the application to determine whether or not it is complete [*Gov. Code § 13952(c)(2)*].

[3] Board's Response to Claim

[a] Period for Processing Claim

The board must approve or deny applications accepted in accordance with *Gov. Code § 13958* within an average of 90 calendar days. Each individual claim must be approved or denied within 180 calendar days [*Gov. Code § 13958*]. If the board does not meet this 90-day average standard, the board must thereafter report to the legislature, on a quarterly basis, its progress and its current average time of processing applications. These quarterly reports must continue until the board meets the 90-day average standard for two consecutive quarters [*Gov. Code § 13958(a)*].

If the board fails to approve or deny an individual claim within 180 days after the date that the claim was accepted, the board must advise the applicant and his or her representative, in writing, of the reason for the failure to approve or deny the claim [*Gov. Code § 13958(b)*].

[b] Verification of Application

The board must verify, with hospitals, physicians, law enforcement officials, or other interested parties, the treatment of the victim or derivative victim, the circumstances of the crime, the amounts paid or received by or for the victim or derivative victim, and any other pertinent information that the board deems necessary. Verification information must be returned to the board within 10 business days after the board requests it. Verification information must be provided at no cost to the applicant, the board, or victim centers. When requesting verification information, the board must certify that a signed authorization by the applicant is retained in the applicant's file and that this certification constitutes actual authorization for the release of information, notwithstanding any other provision of law. If requested by a physician or mental health provider, the board must provide a copy of the signed authorization for the release of information [*Gov. Code § 13954(a)*]. The board may contract with local victim centers to provide verification of claims processed by the centers pursuant to the conditions described above [*Gov. Code § 13954(c)*].

If the victim (and the applicant, if other than the victim) does not cooperate with the staff of the board or the local victim center in the verification process, the board, in its discretion, may reject the application on this ground alone [*Gov. Code § 13954(b)*].

Although the board has a duty to investigate all facts presented by an applicant, the board does not have a burden to produce the evidence necessary to prove entitlement [*Blazevich v. State Bd. of Control (1987) 191 Cal. App. 3d 1121, 1127, 237 Cal. Rptr. 35]* .

The board may, in its discretion, make payments directly to providers before verification [*Gov. Code § 13957.7(c)(1)*].

[c] Right to Hearing

If the board's staff has recommended denial of compensation in whole or in part to an applicant who believes that he or

she is entitled to compensation, the board must grant the applicant a hearing to contest the staff's recommendation [*Gov. Code § 13959(a)*]. Hearings are held in various locations with the frequency necessary to provide for the speedy adjudication of the applications. If the applicant must be present at the hearing, the board must schedule the applicant's hearing in as convenient a location as possible [*Gov. Code § 13959(f)*]. The board must notify the applicant not less than ten days prior to the date of the hearing [*Gov. Code § 13959(b)*]. If necessary, the board will delegate the hearing to a hearing officer [*Gov. Code § 13959(g)*]. The board may exclude the public from the hearing if the application it is considering is the result of either a crime against a minor or a crime of sexual assault or domestic violence [*see Gov. Code § 13959(b)*].

At the hearing, the person seeking compensation has the burden of establishing, by a preponderance of the evidence, the elements of eligibility under *Gov. Code § 13955* [*Gov. Code § 13959(c)*].

The board's decision must be in writing. Copies of the decisions must be delivered to the applicant or to his or her representative either personally or by mail [*Gov. Code § 13959(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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40-465 California Forms of Pleading and Practice--Annotated § 465.25

§ 465.25 Reimbursement of Assistance

If a crime victim has received assistance from the state and also obtains a judgment against the perpetrator of the crime or any person liable for the pecuniary loss, the state has a right to be reimbursed for all or part of the award out of the recovery that the victim obtains. In essence, the state is substituted for the victim as holder of the victim's rights against the perpetrator of the crime or any person liable for the victim's pecuniary loss, to the extent of the cash payment of assistance that has been granted to the victim [*see Gov. Code § 13963(a)*]. For general discussion of the substitution of one person for another as holder of rights against a third person, *see* Ch. 536, *Subrogation* .

If a judgment, award, or settlement is actually obtained by the victim or on behalf of the victim, the state is entitled to a lien on it, in the amount of any assistance payments made [*see Gov. Code § 13963(b)*]. To recover on the lien, the state may intervene in any action by the victim against the perpetrator or may initiate a separate action [*Gov. Code § 13963(b)*]. However, if a claim is filed within one year after the date of the recovery and the total amount of the lien is recovered, the state must pay 25 percent of the amount of the recovery that is covered by the lien to the victim that was responsible for the recovery [*see Gov. Code § 13963(b)*].

To allow the board an opportunity to assert its lien, a victim who has received assistance under *Gov. Code § 13950 et seq.*, or his or her representative, is required to give statutorily specified notice to the board of the institution of any damages action against the person responsible for the death or injury, any settlement of that action, and any satisfaction of a judgment, award, or settlement arising out of that action [*see Gov. Code § 13963(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsState & Territorial GovernmentsClaims By & AgainstTortsPublic Entity LiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationGeneral Overview

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40-465 California Forms of Pleading and Practice--Annotated § 465.26

§ 465.26 Emergency Awards

[1] Availability

An emergency award is available to a person eligible for compensation if the board determines that such an award is necessary to avoid or mitigate substantial hardship that may result from delaying compensation until complete and final consideration of an application [*Gov. Code 13952.5(a)*].

The board may refuse to grant an emergency award if it has reason to believe that the applicant will not qualify for an award for assistance [*Gov. Code § 13952.5(c)(1)*]. If an application for an emergency award is denied, the board must notify the applicant in writing of the reason for the denial [*Gov. Code § 13952.5(e)(1)*].

[2] Amount of Award

The amount of an emergency award depends on the immediate needs of the victim or derivative victim, subject to rates and limitations established by the board [*Gov. Code 13952.5(g)*; *see § 465.23[5][b]*].

[3] Reimbursement of Award

If, on final disposition of the applicant's regular application for assistance [*see Gov. Code § 13952.5(f)*] or verification of the emergency award, the board finds that the applicant is not eligible for assistance, the applicant must reimburse the board for the emergency award under an agreed repayment schedule. If, on final disposition of the application, the board grants assistance to the applicant, the amount of the emergency award will be deducted from the final award of compensation granted to the applicant. If the amount of the final award is less than the amount of the emergency award, the excess amount shall be repaid by the applicant [*Gov. Code § 13952.5(f)(2)*]. The term "final disposition" means a final decision of the board with respect to the victim's or derivative victim's application for assistance, before any appellate action is initiated [*Gov. Code § 13952.5(f)(3)*].

[4] Procedures

[a] Form of Application

The board has provided a form for filing an application for an emergency award [*see Gov. Code § 13952.5(b)*; *see § 465.120*].

[b] Processing Application

The board may grant an emergency award based solely on the victim's or derivative victim's application. The board may also delegate authority to designated staff persons or other agencies that use established guidelines to determine whether or not to grant applications for emergency awards [*Gov. Code § 13952.5(c)(3)*].

Disbursement of emergency awards must be made within 30 days after application [*Gov. Code § 13952.5(d)*]. By mutual agreement between the staff of the board and the applicant or the applicant's representative, the staff of the board may take additional 10-day periods to verify the emergency award claim and make payment [*Gov. Code § 13952.5(c)(2)*].

[c] No Right to Hearing

An applicant is not entitled to a hearing before the board to contest a denial of an emergency award. However, the applicant may submit an application for a regular award, and is entitled to a hearing under *Gov. Code § 13959* if that application is recommended for denial [*Gov. Code § 13952.5(e)(2)*; *see § 465.24[3][c]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsEmployees & OfficialsTortsPublic Entity LiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral Overview

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40-465 California Forms of Pleading and Practice--Annotated § 465.27

§ 465.27 Review of Board's Decision on Application for Assistance

[1] Reconsideration by Board

The board may reconsider all or part of an application for assistance on its own motion or on written request of the applicant or his or her representative. The board may not grant more than one of these requests for an application. The board will not consider a request filed with the board more than 30 days after the personal delivery or 60 days after the mailing of the original decision [*Gov. Code § 13959(i)*]. The board may order reconsideration of all or part of a decision on its own motion, at its discretion, at any time [*Gov. Code § 13959(j)*].

[2] Judicial Review

[a] Filing Writ of Mandate

Judicial review of a final decision on an application may be had by filing a petition for a writ of administrative mandate [*Gov. Code § 13960(a)*; *Code Civ. Proc. § 1094.5*]. The right to petition will not be affected by the failure to seek reconsideration before the board [*Gov. Code § 13960(a)*; *see § 465.27[1], above*].

A petition for writ of mandate to review a final decision on an application for assistance must be filed as follows [*Gov. Code § 13960(a)*]:

- If no request for reconsideration is filed, within 30 days after personal delivery or within 60 days after the mailing of the board's decision on the application for assistance;

- If a timely request for reconsideration is filed and rejected by the board, within 30 days after personal delivery or within 60 days after the mailing of the notice of rejection; or

- If a timely request for reconsideration is filed and granted by the board, or if reconsideration is ordered by the board, within 30 days after personal delivery or within 60 days after the mailing of the final decision on the reconsideration application.

[b] Attorney's Fees and Costs

In an action resulting in the issuance of a writ of mandate pursuant to *Gov. Code § 13960*, the court may order the board to pay to the applicant's attorney the lesser of either reasonable attorney's fees or the sum of $1,000. If the board takes action in favor of the applicant in response to the filing of the petition, but prior to a judicial determination, the board must pay the applicant's costs of filing the petition [*Gov. Code § 13960(b)(1)*].

If the board appeals a decision on the petition for writ of mandate that results in a decision in favor of the applicant, the court may order the board to pay the applicant's reasonable attorney's fees [*Gov. Code § 13960(b)(2)*].

Nothing in *Gov. Code § 13960* can be construed to prohibit or limit an award of attorney's fees pursuant to *Code Civ. Proc. § 1021.5* (award in action to enforce important public right) [*Gov. Code § 13960(b)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewGovernmentsState & Territorial GovernmentsClaims By & AgainstTortsPublic Entity LiabilityLiabilityGeneral Overview

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[Reserved]

§§ 465.28[Reserved]

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40-465 California Forms of Pleading and Practice--Annotated § 465.40

§ 465.40 Governing Law

The indemnification of a person who aids in the prevention of a crime, apprehension of a criminal, or rescue of another is governed by *Gov. Code §§ 13970-13974* (the so-called "Good Samaritan Act").

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstHealthcare LawGood Samaritan LawsTortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsPublic Entity LiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From Liability

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40-465 California Forms of Pleading and Practice--Annotated § 465.41

§ 465.41 Eligibility for Indemnification

[1] Eligibility of Private Citizens ("Good Samaritans")

If private citizens prevent the commission of crime against the person or property of others, apprehend criminals, or rescue persons in immediate danger of injury or death as a result of fire, drowning, or other catastrophe, their actions benefit the public. Recognizing that public benefit, the state may in appropriate cases indemnify these citizens, as well as their surviving spouses, children, and other dependents for any injury, death, or damage sustained by them as a direct consequence of those meritorious acts [*Gov. Code § 13970*].

For purposes of the indemnification of so-called "Good Samaritans," the term "private citizen" means any natural person other than a peace officer, firefighter, lifeguard, or person whose employment includes the duty to protect the public safety and who was acting within the course and scope of this employment [*Gov. Code § 13971*].

[2] Ineligibility of Crime Victims Receiving State Assistance

A claim for indemnification under the so-called "Good Samaritan Act" must be denied if the claimant has received an award for the same injury under the Victims of Crimes Act (discussed in *§ 465.20* et seq.) [*Gov. Code § 13970*; *Webster v. State Bd. of Control (1987) 197 Cal. App. 3d 29, 34-35, 242 Cal. Rptr. 685* (upholding denial of recovery by claimant who received award as victim of crime)]. Moreover, a claim for indemnification is not allowed if the crime prevented, or the crime committed, was against the person or property of the person who prevented the crime, apprehended the criminal, or substantially and materially assisted a peace officer for this purpose [*2 Cal. Code Reg. § 648.4*]. Therefore, it appears that a person who is a crime victim may recover only under the Victims of Crimes Act, even if he or she has also acted as a so-called "Good Samaritan."

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstHealthcare LawGood Samaritan LawsTortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsPublic Entity LiabilityGeneral

OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From Liability

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§ 465.42 Scope of Indemnification

The injury, death, or damage can be indemnified to the extent that it is not compensated from any other source. A claim must be denied if restitution has been given [*Gov. Code § 13970*; *see Gov. Code § 13950 et seq.*; *see also § 465.20* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstHealthcare LawGood Samaritan LawsTortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsPublic Entity LiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From Liability

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40-465 California Forms of Pleading and Practice--Annotated § 465.43

§ 465.43 Hearing on Claim

[1] Hearing Required

On presentation of any claim for indemnification [*see § 465.122*], the board must fix a time and place for hearing the claim, and it must mail notices of the hearing to interested persons or agencies [*Gov. Code § 13973*].

[2] Evidence Considered

At the hearing, the board will receive recommendations from public safety or law enforcement agencies and evidence showing the following [*Gov. Code § 13973*]:

- The nature of the crime committed by the apprehended criminal or prevented by the action of the private citizen, or the nature of the action of the private citizen in rescuing a person in immediate danger of injury or death as a result of fire, drowning, or other catastrophe, and the circumstances involved;

- That the actions of the private citizen substantially and materially contributed to the apprehension of a criminal, the prevention of a crime, or the rescuing of a person in immediate danger or injury or death as a result of fire, drowning, or other catastrophe;

- That as a direct consequence of the private citizen's act, the private citizen incurred personal injury or damage to property or died;

- The extent of the injury or damage for which the claimant is not compensated from any other source; and

- Any other evidence that the board may require.

[3] Standard of Proof

If the board determines, on the basis of a preponderance of the evidence, that the state should indemnify the claimant for the injury, death, or damage sustained, it must approve the claim for payment [*Gov. Code § 13973*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewGovernmentsState & Territorial GovernmentsClaims By & AgainstTortsPublic Entity LiabilityGeneral Overview

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40-465 California Forms of Pleading and Practice--Annotated § 465.44

§ 465.44 Award and Fees

[1] Amount of Award

The board may not approve any claim in any case in excess of $10,000 [*Gov. Code § 13973*].

[2] Attorney's Fees

In addition to any award made to a so-called "Good Samaritan," the board may award, as attorney's fees, an amount representing the reasonable value of legal services rendered to a claimant. The award of attorney's fees may not exceed 10 percent of the amount of the award on the claim [*Gov. Code § 13973*].

An attorney cannot charge, demand, receive, or collect for services rendered in connection with any proceedings to claim indemnification for so-called "Good Samaritans" for any amount other than that awarded as attorney's fees pursuant to statute [*Gov. Code § 13973*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstHealthcare LawGood Samaritan LawsTortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsPublic Entity LiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsExclusions From Liability

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[Reserved]

§§ 465.45[Reserved]

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40-465 California Forms of Pleading and Practice--Annotated § 465.60

§ 465.60 Governing Law

The indemnification of a person erroneously imprisoned for a felony is governed by *Penal Code §§ 4900-4906*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstTortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsPublic Entity LiabilityGeneral Overview

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40-465 California Forms of Pleading and Practice--Annotated § 465.61

§ 465.61 Eligibility for Indemnification

Any person may present a claim against the state for the pecuniary injury that person sustained as a result of a conviction and term of imprisonment, if the person meets all of the following conditions [*Penal Code § 4900*]:

- Was convicted of and imprisoned for the commission of any California felony;
- Was thereafter pardoned or determined to be innocent of the offense, either because the crime was not committed at all or the crime was not committed by that person; and
- Served all or part of a term of imprisonment for this offense.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstTortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsPublic Entity LiabilityGeneral Overview

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40-465 California Forms of Pleading and Practice--Annotated § 465.62

§ 465.62 Filing of Claim

[1] Supporting Documents

A claim filed under *Penal Code § 4900* must be accompanied by a statement of the facts constituting the claim and must be verified in the manner provided for verification of complaints [*Penal Code § 4901*; *see § 465.123*].

[2] Time for Filing Claim

A claim filed by an erroneously convicted felon must be presented by the claimant to the board within two years after judgment of acquittal or discharge given, pardon granted, or release from imprisonment. Untimely claims will not be considered by the board [*Penal Code § 4901*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstTortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsIntentional TortsMalicious ProsecutionGeneral OverviewTortsPublic Entity LiabilityGeneral Overview

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40-465 California Forms of Pleading and Practice--Annotated § 465.63

§ 465.63 Hearing on Claim

[1] Setting of Time and Notice

On presentation of any claim under *Penal Code § 4900*, the board must fix a time and place for the hearing of the claim, and must mail notice of the time and place of the hearing to the claimant and the California Attorney General at least 15 days before the time fixed for the hearing [*Penal Code § 4902*].

[2] Evidence Supporting Claim

[a] Facts in Statement of Claim

At the hearing, the claimant must introduce evidence in support of the claim, and the Attorney General may introduce opposing evidence. The claimant must prove the facts set out in the statement constituting the claim, including the following [*Penal Code § 4903*]:

- The crime with which the claimant was charged was either not committed at all, or if committed, was not committed by the claimant;

- The claimant did not, by act or omission, intentionally contribute to the bringing about of the claimant's arrest or conviction for the crime with which the claimants was charged; and

- The claimant sustained pecuniary injury as a result of the erroneous conviction and imprisonment.

When determining whether the claimant intentionally contributed to the bringing about of his or her arrest or conviction, the factfinder is not to consider statements obtained from an involuntary false confession or involuntary plea. The claimant bears the burden of proving by a preponderance of the evidence that the statements were obtained from an involuntary false confession or involuntary plea [*Pen. Code § 4903*].

[b] Independent Evidence of Innocence Required

The board may consider the claimant's denial of commission of the crime for which he or she was convicted, reversal of the judgment of conviction on appeal, acquittal of the claimant on retrial, or failure of the prosecuting authority to retry the claimant for the crime, but this evidence alone is not sufficient to warrant the board's recommendation that the claimant be indemnified. The claimant must present substantial independent corroborating evidence that he or she is innocent of the charged crime [*2 Cal. Code Reg. § 641*].

A stipulated finding of innocence in an earlier proceeding under *Penal Code § 851.8* does not have collateral estoppel effect in a subsequent proceeding under *Penal Code § 4900* [*Tennison v. California Victim Comp. & Government Claims Bd. (2007) 152 Cal. App. 4th 1164, 1177-1180, 62 Cal. Rptr. 3d 88]* .

[c] Admissibility of Evidence

Evidence is admissible at the hearing if the claimant had an opportunity to cross-examine the witness whose testimony is being proffered or to object to the evidence that is being proffered, and if the testimony or evidence was admitted in earlier proceedings arising out of the criminal offense. The board may also consider any other evidence it deems relevant [*2 Cal. Code Reg. § 641*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewGovernmentsState & Territorial GovernmentsClaims By & AgainstTortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsPublic Entity LiabilityGeneral Overview

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40-465 California Forms of Pleading and Practice--Annotated § 465.64

§ 465.64 Post-Hearing Procedures

[1] Legislative Funding of Award

If the claimant carries his or her burden of proof [*see § 465.63[2]*], the board must report the facts of the case and its conclusions to the California legislature, with a recommendation that an appropriation be made for the purpose of indemnifying the claimant for his or her pecuniary injury. The amount of the appropriation recommended is a sum equivalent to $100 per day of incarceration served subsequent to the claimant's conviction. This amount is not considered gross income for state tax purposes [*Penal Code § 4904*].

[2] Judicial Review

A board decision not to recommend an appropriation for the purpose of indemnifying the claimant is subject to administrative mandamus review under *Code Civ. Proc. § 1094.5* [*Diola v. State Bd. of Control (1982) 135 Cal. App. 3d 580, 585, 185 Cal. Rptr. 511* ; *see* Ch. 474, *Availability of Judicial Review of Agency Decisions*]. The reviewing court should affirm the Board's decision if if is supported by substantial evidence [*Tennison v. California Victim Comp. & Government Claims Bd. (2007) 152 Cal. App. 4th 1164, 1182, 62 Cal. Rptr. 3d 88]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewRemediesMandamusGovernmentsState & Territorial GovernmentsClaims By & AgainstTortsPublic Entity LiabilityGeneral Overview

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[Reserved]

§§ 465.65[Reserved]

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40-465 California Forms of Pleading and Practice--Annotated § 465.80

§ 465.80 Governing Law

The proper conduct of strip searches and body cavity searches is set forth in *Penal Code § 4030*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureSearch & SeizureGeneral OverviewGovernmentsState & Territorial GovernmentsClaims By & AgainstTortsPublic Entity LiabilityGeneral Overview

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40-465 California Forms of Pleading and Practice--Annotated § 465.81

§ 465.81 Scope of Protection

[1] Persons Protected

Penal Code § 4030, which restricts and regulates strip searches and body cavity searches of criminal detainees, applies only to prearraignment detainees arrested for infraction or misdemeanor offenses and to any juvenile offender detained before a detention hearing and alleged to have committed a misdemeanor or infraction offense [*Penal Code § 4030(b)*; *see* Ch. 329, *Juvenile Courts: Delinquency Proceedings*]. This statute does not apply to any person in the custody of the Department of Corrections or the California Youth Authority [*Penal Code § 4030(b)*].

[2] Types of Searches Covered

Penal Code § 4030 restricts and regulates strip searches, visual body cavity searches, and physical body cavity searches. A strip search is a search that requires a person to remove or arrange some or all of his or her clothing so as to permit a visual inspection of the underclothing, breasts, buttocks, or genitalia [*Penal Code § 4030(c)*]. A visual body cavity search is a visual inspection of the stomach, rectal cavity, or vagina [*Penal Code § 4030(d)(1), (2)*]. A physical body cavity search is a physical intrusion into the stomach, rectal cavity, or vagina to discover an object concealed in the body cavity [*Penal Code § 4030(d)(3)*].

When a person is arrested and taken into custody, however, that person may be subjected to patdown searches, metal detector searches, and thorough clothing searches to discover and retrieve concealed weapons and contraband before being booked [*Penal Code § 4030(e)*; *see* Erwin, Millman, Monroe, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 22 (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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40-465 California Forms of Pleading and Practice--Annotated § 465.82

§ 465.82 Requirements for Searches

[1] Visual and Strip Searches

[a] Reasonable Suspicion Required

Criminal detainees covered by *Penal Code § 4030* [*see § 465.81*] may not be subjected to a strip search or visual body cavity search before placement in the general jail population unless a law enforcement officer has determined that there is reasonable suspicion, based on specific and articulable facts, to believe that the detainee is concealing a weapon or contraband, and that a strip search will result in the discovery of the weapon or contraband [*Penal Code § 4030(f)*]. Although the statute does not expressly require that the officer must determine that the search will result in the discovery of a weapon or contraband in the case of a visual body cavity search, this appears to be a drafting error.

The detainee may not be confined in the general jail population unless he or she is not (1) cited and released, (2) released on his or her own recognizance, and (3) able to post bail within a reasonable time less than three hours, or unless a documented emergency exists [*see Penal Code § 4030(g)*].

[b] Authorization Required

No strip search or visual body cavity search may be conducted without prior written authorization by the supervising officer on duty. The authorization must include the specific and articulable facts and circumstances on which the supervisor made the reasonable suspicion determination [*Penal Code § 4030(f)*].

[c] Restrictions on Search

If a strip search or visual body cavity search is permitted, persons conducting the search are prohibited from touching the breasts, buttocks, or genitalia of the person being searched [*Penal Code § 4030(j)*].

[2] Physical Cavity Searches

[a] Search Warrant Required

No person arrested on a misdemeanor or infraction offense, and no minor described in *Penal Code § 4030(b)* [*see § 465.81*], shall be subjected to a physical body cavity search except pursuant to a search warrant issued by a magistrate specifically authorizing the physical body cavity search [*Penal Code § 4030(h)*].

[b] Conditions of and Persons Conducting Search

A physical body cavity search must be conducted under sanitary conditions. Only a physician, nurse practitioner, registered nurse, licensed vocational nurse, or emergency medical technician level II licensed to practice in California may conduct the search. Any physician engaged in providing health care to detainees and inmates of the facility may conduct physical body cavity searches [*Penal Code § 4030(k)*].

[3] Requirements Applicable to All Searches

[a] Record of Authorizing Document

A copy of the prior written authorization [*Penal Code § 4030(f)*; *see § 465.82[1][b]*] or the search warrant [*Penal Code § 4030(h)*; *see § 465.82[2][a]*] must be placed in the agency's records and made available, on request, to the person searched or his or her authorized representative. The time, date, and place of the search, the name and sex of the personconducting the search, and a statement of the results of the search, including a list of any items removed from the person searched, must be included in the agency's records and made available, on request, to the person searched or his or her authorized representative [*Penal Code § 4030(i)*].

[b] Sex of Searching Persons

All persons conducting or otherwise present during a body cavity search or a strip search must be of the same sex as the person being searched, except for physicians and licensed medical personnel [*Penal Code § 4030(l)*].

[c] Privacy During Search

All strip searches and body cavity searches must be conducted in an area of privacy so that the search cannot be observed by persons not participating in the search. Persons are considered to be participating in the search if their official search duties require them to be present during the search [*Penal Code § 4030(m)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPrisoner RightsSearch & SeizureCriminal Law & ProcedureSearch & SeizureGeneral OverviewCriminal Law & ProcedureSearch & SeizureWarrantless SearchesAdministrative SearchesGovernmentsState & Territorial GovernmentsClaims By & AgainstTortsPublic Entity LiabilityGeneral Overview

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D. Actions by Persons Wrongfully Subjected to Body Cavity or Strip Search

40-465 California Forms of Pleading and Practice--Annotated § 465.83

§ 465.83 Judicial Remedies

Any person who suffers damage or harm as a result of a strip search or body cavity search may bring a civil action to recover the greater of either actual damages or $1,000. In addition, the court may, in its discretion, award punitive damages, equitable relief as it deems necessary and proper, and costs, including reasonable attorney's fees [*Penal Code § 4030(p)*; *see §§ 465.124 -465.129*]. Nothing in *Penal Code § 4030* may be construed to limit any common law action for damages or injunctive relief, or to preclude the prosecution under another provision of law of any law enforcement officer or other person who has violated *Penal Code § 4030* [*Penal Code § 4030(o)*].

Anyone who knowingly and willfully authorizes or conducts a strip search or body cavity search in violation of *Penal Code § 4030* is guilty of a misdemeanor [*Penal Code § 4030(n)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesPunitive DamagesCriminal Law & ProcedureSearch & SeizureGeneral OverviewGovernmentsState & Territorial GovernmentsClaims By & AgainstTortsPublic Entity LiabilityGeneral Overview

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[Reserved]

§§ 465.84[Reserved]

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40-465 California Forms of Pleading and Practice--Annotated § 465.100

§ 465.100 State Statutes

[1] Body Cavity and Strip Searches

[a] Provisions Applicable to All Types of Searches

Protection limited to detainees for minor offenses. *Penal Code § 4030(b)*

Standard booking searches are permissible. *Penal Code § 4030(e)*

Restrictions on placement of detainees in main population. *Penal Code § 4030(g)*

Record of document authorizing search. *Penal Code § 4030(i)*

Touching of private parts during permissible strip search or visual body cavity search prohibited. *Penal Code § 4030(j)*

Sex of persons conducting search. *Penal Code § 4030(l)*

Privacy during search. *Penal Code § 4030(m)*

[b] Definitions

Strip search. *Penal Code § 4030(c)*

Visual body cavity search. *Penal Code § 4030(d)(1), (2)*

Physical body cavity search. *Penal Code § 4030(d)(3)*

[c] Physical Body Cavity Searches

Search warrant requirement. *Penal Code § 4030(h)*

Other requirements. *Penal Code § 4030(k)*

[d] Visual Body Cavity and Strip Searches

Prohibited without reasonable suspicion. *Penal Code § 4030(f)*

Authorization of supervisor required. *Penal Code § 4030(f)*

[e] Remedies

Unlawful search is misdemeanor. *Penal Code § 4030(n)*

Searched person retains common law right to sue. *Penal Code § 4030(o)*

Civil action. *Penal Code § 4030(p)*

[2] Crime Victims' Assistance

[a] Claim Procedure

[i] Application

Application form. *Gov. Code § 13952(a)*

Verification required. *Gov. Code § 13952(b)(1)*

Incomplete applications. *Gov. Code § 13952(c)(2)*

Statute of limitations. *Gov. Code § 13953(a), (c)*

Board verification of application. *Gov. Code § 13954(a)*

[ii] Hearing

Applicant's right to hearing. *Gov. Code § 13959(a)*

Exclusion of public from hearing if application being considered is result of either crime against minor or crime of sexual assault or domestic violence. *Gov. Code § 13959(b)*

Standard of proof. *Gov. Code § 13959(c)*

Delegation of duty to hold hearing. *Gov. Code § 13959(g)*

Written decision after hearing. *Gov. Code § 13959(h)*

[b] Court-Ordered Restitution

Restitution requirements for criminal defendant convicted of crime. *Penal Code § 1202.4*

Restitution requirement for minor adjudged ward of state based on commission of crime. *Welf. & Inst. Code § 730.6*

[c] Definitions

Crime. *Gov. Code § 13951(b)*

Derivative victim. *Gov. Code § 13951(c)*

Pecuniary loss. *Gov. Code § 13951(e)*

Peer counseling. *Gov. Code § 13951(f)*

Victim. *Gov. Code § 13951(g)*

Victim center. *Gov. Code § 13951(h)*

[d] Eligibility

Basis of eligibility. *Gov. Code § 13955*

Factors defeating eligibility. *Gov. Code § 13956*

Applications based on domestic violence. *Gov. Code § 13956(b)(2)*

[e] Emergency Award

Availability. *Gov. Code § 13952.5(a)*

Disposition of application. *Gov. Code § 13952.5(c), (d)*

No appeal of denial of award. *Gov. Code § 13952.5(e)(2)*

Reimbursement of award by applicant. *Gov. Code § 13952.5(f)*

Amount of award. *Gov. Code § 13952.5(g)*

[f] Reconsideration and Review

Court review. *Code Civ. Proc. § 1094.5*; *Gov. Code § 13960(a)*

Board reconsideration. *Gov. Code § 13959(i)*

Attorney's fees. *Gov. Code § 13960(b)*

[g] Scope of Recovery

Mental health counseling expenses. *Gov. Code § 13957(a)(2)*

Job training or rehabilitative services. *Gov. Code § 13957(a)(5)*

Reimbursement to person who voluntarily pays or assumes obligation to pay deceased victim's medical or burial expenses. *Gov. Code § 13957(a)(9)(A), (B)*

Maximum amount of award. *Gov. Code § 13957(b)*

Maximum rates and service limitations established by board. *Gov. Code § 13957.2(a)*

Independent medical and mental health examinations and reports. *Gov. Code § 13957.2(b)*

Loss of wages. *Gov. Code § 13957.5(a)(1)*

Loss of support. *Gov. Code § 13957.5(a)(4)*

Board's discretion to make payments directly to providers before verification. *Gov. Code § 13957.7(c)(1)*

Attorney's fees. *Gov. Code § 13957.7(g)*

Time limit for board action on application. *Gov. Code § 13958*

[h] Victim Centers

Statutory right of victims to be provided with information concerning Restitution Fund; information to be distributed by Victims' Legal Resource Center to local law enforcement agencies and local victims' programs. *Penal Code § 679.02(a)(8), (b)*

Required services. *Penal Code §§ 13835-13835.7*

Establishment and funding. *Penal Code § 13835.2*

Training for victim service providers. *Penal Code § 13835.10*

Victims' Legal Resource Center. *Penal Code § 13897 et seq.*

[3] Indemnification of "Good Samaritans"

[a] Award

Maximum amount. *Gov. Code § 13973*

Attorney's fees. *Gov. Code § 13973*

[b] Claim

Right to file claim. *Gov. Code § 13972*

Required information. *Gov. Code § 13972*

[c] Eligibility

Generally. *Gov. Code § 13970*

Private citizen entitled to claim indemnification. *Gov. Code § 13971*

[d] Hearing

Evidence. *Gov. Code § 13973*

Standard of proof. *Gov. Code § 13973*

[4] Indemnification of Persons Erroneously Imprisoned

[a] Claim

Eligibility. *Penal Code § 4900*

Statement of facts and verification required. *Penal Code § 4901*

Time to file claim. *Penal Code § 4901*

Indemnification at discretion of legislature. *Penal Code § 4904*

[b] Hearing

Setting and notice of hearing. *Penal Code § 4902*

Evidence. *Penal Code § 4903*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPrisoner RightsSearch & SeizureCriminal Law & ProcedureSearch & SeizureGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutory Remedies & RightsGovernmentsLocal GovernmentsAdministrative Boards

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40-465 California Forms of Pleading and Practice--Annotated § 465.101

§ 465.101 Administrative Regulations

[1] Assistance for Crime Victims

Good cause for filing late claim. *2 Cal. Code Reg. § 649.15*

Third-party applications not permitted. *2 Cal. Code Reg. § 649.12*

Amount. *2 Cal. Code Reg. § 649.24*

[2] Indemnification of "Good Samaritans"

Time for presentation of claims. *2 Cal. Code Reg § 648.1*

Contents of claims. *2 Cal. Code Reg § 648.2*

Claims form. *2 Cal. Code Reg § 648.3*

Special grounds for disallowing claims. *2 Cal. Code Reg § 648.4*

Amount of indemnification. *2 Cal. Code Reg § 648.5*

[3] Indemnification of Persons Erroneously Imprisoned

Presentation and contents of claim. *2 Cal. Code Reg § 640*

Burden of proof. *2 Cal. Code Reg § 641*

Legal Topics:

For related research and practice materials, see the following legal topics:
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40-465 California Forms of Pleading and Practice--Annotated § 465.102

§ 465.102 Decisions

[1] Assistance for Crime Victims

Claimant under both Victims of Violent Crime Act (*Gov. Code § 13959 et seq.*) and "Good Samaritan Act" (*Gov. Code § 13970 et seq.*) is not entitled to double recovery for same injuries. *Webster v. State Bd. of Control (1987) 197 Cal. App. 3d 29, 34, 242 Cal. Rptr. 685* .

Child of murdered mother foreclosed from collecting payments under Victims of Violent Crime Act for loss of future support claim because child failed to present evidence of measurable loss of support. *Blazevich v. State Bd. of Control (1987) 191 Cal. App. 3d 1121, 1126-1127, 237 Cal. Rptr. 35*

Victims of Violent Crime Act provides recovery only for out-of-pocket losses. *Blazevich v. State Bd. of Control (1987) 191 Cal. App. 3d 1121, 1126, 237 Cal. Rptr. 35*

Children of murdered father foreclosed from collecting payments under Victims of Violent Crime Act for lost support claims because they were compensated for loss of support by Social Security benefits. *Fierro v. State Bd. of Control (1987) 191 Cal. App. 3d 735, 738-740, 236 Cal. Rptr. 516*

"Collateral source" exception inapplicable to reimbursement aspects of *Victims of Violent Crime Act. Fierro v. State Bd. of Control (1987) 191 Cal. App. 3d 735, 740-741, 236 Cal. Rptr. 516*

Under *Lab. Code § 4903,* Workers' Compensation Appeals Board authorized to allow as lien against workers' compensation amount of any indemnification granted victim pursuant to Victims of Violent Crime Act; amount of indemnification crime victim receives under victims of violent crime program allowed as lien against both temporary and permanent disability awards. *Burnsed v. State Bd. of Control (1987) 189 Cal. App. 3d 213, 218, 234 Cal. Rptr. 316*

Phrase "any other source," as used in *Gov. Code § 13960(d),* defining pecuniary loss to mean specified expenses for which victim "has not and will not be reimbursed from any other source," means "every other source." *Burnsed v. State*

Bd. of Control (1987) 189 Cal. App. 3d 213, 217, 234 Cal. Rptr. 316 ; *see* *Webster v. State Bd. of Control (1987) 197 Cal. App. 3d 29, 38, 242 Cal. Rptr. 685*

In proceeding under Victims of Violent Crime Act by worker, who had been assaulted and battered on job by unknown assailants and awarded temporary disability benefits and advance on permanent disability benefits, for restitution of unreimbursed portion of income lost as result of injuries sustained, California State Board of Control properly offset amount of lost wages by amount of permanent disability payments victim received under *Workers' Compensation Act. Burnsed v. State Bd. of Control (1987) 189 Cal. App. 3d 213, 215, 234 Cal. Rptr. 316* ; *see* *Webster v. State Bd. of Control (1987) 197 Cal. App. 3d 29, 38, 242 Cal. Rptr. 685*

Unlawful resident alien eligible for crime victim restitution. *Cabral v. State Bd. of Control (1980) 112 Cal. App. 3d 1012, 1016-1017, 169 Cal. Rptr. 604* (lawful presence requirement of former *2 Cal. Code Reg § 649.12* beyond scope of enabling statute)

California Victims of Crimes Act (*Gov. Code § 13959 et seq.*) is constitutional although it does not provide compensation for nonresident victims of crimes. *Ostrager v. State Bd. of Control (1979) 99 Cal. App. 3d 1, 6-8, 160 Cal. Rptr. 317*

[2] Indemnification of "Good Samaritans"

"Good Samaritan Act" (*Gov. Code § 13970 et seq.*) allows recovery only for loss of support to surviving spouse or child; no recovery for loss of support if "Good Samaritan" does not die. *Webster v. State Bd. of Control (1987) 197 Cal. App. 3d 29, 40, 242 Cal. Rptr. 685*

Unlike Victims of Violent Crime Act (*Gov. Code § 13959 et seq.*), "Good Samaritan Act" is not expressly limited to pecuniary loss; nevertheless, "Good Samaritan Act" does not allow recovery for nonpecuniary injuries such as pain and suffering. *Webster v. State Bd. of Control (1987) 197 Cal. App. 3d 29, 35-38, 242 Cal. Rptr. 685*

Claimant under both Victims of Violent Crime Act (*Gov. Code § 13959 et seq.*) and Good Samaritan Act is not entitled to double recovery for same injuries. *Webster v. State Bd. of Control (1987) 197 Cal. App. 3d 29, 34, 242 Cal. Rptr. 685*

[3] Indemnification of Persons Erroneously Imprisoned

Person who has been found not guilty by reason of insanity is not entitled to indemnity under *Penal Code § 4900 et seq.*. *Ebberts v. State Bd. of Control (1978) 84 Cal. App. 3d 329, 331-336, 148 Cal. Rptr. 543*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPrisoner RightsSearch & SeizureGovernmentsState & Territorial GovernmentsClaims By & AgainstTortsPublic Entity LiabilityGeneral Overview

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40-465 California Forms of Pleading and Practice--Annotated § 465.103

§ 465.103 Attorney General Opinions

Victim who is active litigant responsible for state's recovery of money on lien on award against perpetrator is not entitled to proportionate share of attorney's fees from state under common fund doctrine. *64 Ops. Cal. Atty. Gen. 540 (1981)*

Sexual assault victim's specification of public or private hospital to which he or she will be taken for evidentiary examination does not affect state's liability to pay for treatment of sexual assault victim, regardless of whether victim contacted local law enforcement agency before going to hospital, if hospital is reasonably acceptable to appropriate local agency. *60 Ops. Cal. Atty. Gen. 390 (1977)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPrisoner RightsSearch & SeizureGovernmentsState & Territorial GovernmentsClaims By & AgainstHealthcare LawGood Samaritan LawsTortsPublic Entity LiabilityGeneral Overview

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40-465 California Forms of Pleading and Practice--Annotated § 465.104

§ 465.104 Law Reviews

Edwards, *Contributory Negligence in Compensation Claims by Victims of Sexual Assault, 132 New L.J. 1140 (1982)*

Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts, 30 UCLA L. Rev. 52 (1982)*

Heinz, *Victim and Witness Protection Act of 1982, 29 Prac. Law. 13 (1983)*

Scutt, *Victims, Offenders and Restitution: Real Alternative or Panacea?*, 56 A.L.J. 156 (1982)

Survey, *Women and California Law: Part II. C. Sex Offenses, 16 Golden Gate U.L. Rev. 555 (1986)*

Comment, *Restitution for Crime Victims: The California Legislature Responds to Proposition 8, 14 Sw. U.L. Rev. 745 (1984)*

Comment, *Rehabilitation of the Victims of Crime: An Overview, 21 UCLA L. Rev. 317 (1973)*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstHealthcare LawGood Samaritan LawsTortsNegligenceDefensesContributory NegligenceGeneral OverviewTortsNegligenceDefensesContributory NegligenceLimits on ApplicationIntentional TortsTortsPublic Entity LiabilityGeneral Overview

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[Reserved]

§§ 465.105[Reserved]

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40-465 California Forms of Pleading and Practice--Annotated § 465.120

§ 465.120 Application for Assistance by Crime Victim [Gov. Code § 13950 et seq.]

[1] FORM Application for Assistance by Crime Victim [Gov. Code § 13950 et seq.]

Click here to view image.

[2] Use of Form

The application form above is for use by a crime victim or derivative victim to apply for assistance (including an emergency award)from the state [*Gov. Code §§ 13952, 13952.5*].

[3] Time for Filing

The application for assistance must be filed within the latest of (1) one year after the date of the crime, (2) one year after the victim attains the age of 18 years, or (3) one year after the victim or derivative victim knew (or in the exercise of ordinary diligence could have discovered) that an injury or death had directly resulted from the crime. Additionally, an application for compensation based on a crime involving sex with a minor eligible for prosecution under *Pen. Code § 801.1* may be filed any time prior to the victim's 28th birthday [*Gov. Code § 13953(a)*]. The board may for good cause grant an extension of this time period [*Gov. Code § 13953(a), (b)*].

[4] Return of Incomplete Application

If an application is not complete, it will be returned to the applicant with a brief statement of the additional information required. The victim, within 30 days after receipt of the returned application, may supply the additional information or appeal the staff's action to the board [*Gov. Code § 13952(c)(2)*].

[5] Verification

The form above must be verified under penalty of perjury, and it includes a form of verification above the signature block [*Gov. Code § 13952(b)(1)*; *see Code Civ. Proc. § 2015.5*].

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40-465 California Forms of Pleading and Practice--Annotated § 465.121

§ 465.121 Claim for Indemnification of Damages by Private Citizen Who Apprehended Criminal, Prevented Crime, or Rescued Person [Gov. Code §§ 13970-13974]

[1] FORM Claim for Indemnification of Damages by Private Citizen Who Apprehended Criminal, Prevented Crime, or Rescued Person [Gov. Code §§ 13970-13974]

BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Claim of _____ [*name*]

_____[*name of claimant*] hereby claims indemnification in the sum of $_____ and in support of the claim represents as follows:

1. The occurrence that gave rise to the claim took place on _____[*date*], at _____[*location*]. The circumstances surrounding the occurrence are as follows: _____[*describe circumstances surrounding crime against person or property of another, or apprehension of criminal by law enforcement officer, or immediate danger to another from fire, drowning, or other catastrophe*].

2. With regard to the above stated occurrence, _____ [the claimant *or* _____ (*name of person who performed the actions*)] performed the following actions _____[*describe actions on which claim is based*]. These actions contributed materially to _____ [prevention of the above stated crime *or* apprehension of _____ (*name of criminal*) or the rescue of _____ (*name of person rescued*)].

[3. The claimant is the surviving _____ (spouse *or* child) of the person who performed the aforementioned actions.]

[4. The claimant was dependent on the person who performed the aforementioned actions for his/her principal income or support.]

5. The amount of damages sustained as a direct result of the aforementioned actions, insofar as it is now known is $_____.

6. The above amount was calculated as follows: _____[*specify injuries and damages suffered by persons to be indemnified, dollar amount assigned to each injury or item of damage, and calculation used to arrive at total amount*].

[*EITHER*]

7. _____[*Name of claimant*] has not actually received compensation for the above-described injuries and damages and does not have the right to receive such compensation from any other source.

[*OR*]

7. The following amounts have been received in compensation or reimbursement for the above-described injuries and damages: _____[*specify amounts and sources*]. These amounts of compensation leave _____[*name of claimant*] without compensation for $_____ of the aforementioned injuries and damages.

8. Send notices to:

_____[*list names and addresses of interested persons and agencies*]

VERIFICATION

I,_____[*name*], am the claimant in the above-entitled claim. I have read the foregoing claim and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form above is for use by a private citizen who claims indemnification under *Gov. Code §§ 13970-13974* for injuries or damages directly resulting from the acts of a private citizen who prevented a crime against another person, aided in the apprehension of a criminal, or rescued another person from danger.

A claim may be filed by or on behalf of the private citizen who performed the acts on which the claim is based, the surviving spouse or children of this citizen, or persons who were dependent on this citizen for their income or support [

see Gov. Code § 13972].

The form may be adapted for use by a law enforcement or public service agency to claim indemnification on behalf of a person entitled to indemnification under *Gov. Code § 13972*, although law enforcement or public service officers may not recover personally.

[3] Time for Filing

A claim must be presented to the board not later than one year after the occurrence of the injury or damage. A claim filed after that period will not be considered unless the board determines that, for good and sufficient reason, the claim was not filed within the one-year period [*2 Cal. Code Reg § 648.1*].

[4] Corroboration

A claim must be accompanied by a statement from an appropriate state or local law enforcement or public safety agency, corroborating that the claimant incurred injury or damage as a direct consequence of preventing a crime, aiding in the apprehension of a criminal, or rescuing another person from danger. The statement must also contain the recommendation of the law enforcement or public safety agency on the claim [*Gov. Code § 13972*].

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40-465 California Forms of Pleading and Practice--Annotated § 465.122

§ 465.122 Claim for Indemnification by Person Erroneously Imprisoned [Penal Code §§ 4900-4906]

[1] FORM Claim for Indemnification by Person Erroneously Imprisoned [Penal Code §§ 4900-4906]

BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Claim of
_____
[*name*]
against the State of Califor-
nia

_____[*name of claimant*] makes claim against the State of California in the sum of $_____ and in support of the claim represents as follows:

1. Claimant was convicted of_____[*specify felony*] in the Superior Court of the County of _____, on_____[*date*], and was sentenced to_____[*specify term*].

2. Claimant was imprisoned at_____[*specify name and location of state correctional institution*] from_____[*date*], to_____[*date*]. [*If claimant was imprisoned at more than one institution, specify time served at each institution*.] The total amount of time for which claimant was imprisoned for the aforementioned felony was_____[*specify total time*].

3. _____ [*State facts showing that the crime with which claimant was charged was not committed at all or that claimant did not commit it, e.g.,* The eyewitnesses who identified the claimant as the criminal have all recanted and agree that _____ (*name*), who physically resembles the claimant and who has confessed to the crime, was the person they observed committing the crime]. The claimant did not by any act or omission on [his *or* her] part, intentionally contribute to the bringing about of [his *or* her] arrest or conviction for the crime with which

[he *or* she] was charged,_____[*set out supporting facts, e.g.,* but at all times before and after arrest vigorously denied [his *or* her] guilt and presented the evidence of [his *or* her] spouse that the claimant was not at the scene of the crime].

4. Claimant sustained pecuniary injury as a result of the aforementioned conviction and incarceration as follows: _____ [*specify, e.g.,* lost earnings in the amount of $_____, attorney's fees, and other expenses related to defending against the felony charge in the amount of $_____].

5. The date of claimant's_____[*insert whichever of the following was latest in time:* judgment of acquittal *or* discharge from prison *or* grant of pardon *or* release from prison] was_____[*date*].
Dated:_____[*date*]

_____ [*signature*]

Claimant
_____ [*address*]

[*Verification. See § 465.124.]*

[2] Use of Form

The form above is based on the model form set out in *2 Cal. Code Reg § 640* and is for use by a person erroneously convicted of and imprisoned for a felony in making a claim to the board under *Penal Code § 4900* for indemnification for pecuniary injury suffered as a result of the erroneous conviction and imprisonment.

[3] Time for Filing

The claim must be presented to the board within a period of two years after judgment of acquittal or discharge given, after pardon granted, or after release from imprisonment [*Penal Code 4901*].

[4] Verification

The claim must be verified in the manner required for verification of complaints [*Penal Code § 4901*; *see Code Civ. Proc. §§ 446, 2015.5*].

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40-465 California Forms of Pleading and Practice--Annotated § 465.123

§ 465.123 Complaint for Damages Resulting From Improper Strip Search or Body Cavity Search [Penal Code § 4030]--General Form

[1] FORM Complaint for Damages Resulting From Improper Strip Search or Body Cavity Search [Penal Code § 4030]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*], Defendants.	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff is and at all times herein mentioned was a resident of _____ County, California.

2. Defendant_____[*name of law enforcement agency*] is a duly constituted law enforcement agency charged with administering and maintaining_____[*name of jail facility*], which is located in _____ County, California.

[*EITHER*]

3. Defendant City of _____ is, and at all times mentioned herein was, a municipal corporation, duly organized and existing under the laws of the State of California and situated in the County of _____.

[*OR*]

3. Defendant City of _____ is, and at all times mentioned herein was, a chartered city, duly organized and existing under the laws of the State of California and situated in the County of _____.

[*OR*]

3. Defendant County of _____ is, and at all times mentioned herein was, a county duly organized and existing under the laws of the State of California.

4. Defendants_____[*names of individual defendants*] are and at all times alleged herein were employees of defendant law enforcement agency and as such were responsible for conducting the improper search of the plaintiff alleged herein, or were in some other way responsible for the damages suffered by the plaintiff as alleged herein.

5. The true name or capacities of defendants DOE 1 through DOE_____[*number*] are unknown to plaintiff, who therefore sues such defendants by such fictitious names, and will amend this complaint to show their true names and capacities when they are ascertained. Plaintiff is informed and believes and thereon alleges that each of the defendants designated as a DOE is responsible in some manner for the improper conduct herein alleged.

[*EITHER, if the plaintiff is an adult*]

6. On_____[*date*], the plaintiff was arrested and detained by defendant law enforcement agency pending arraignment on a charge of_____[*specify misdemeanor or infraction offense*]. [*If the plaintiff was subjected only to an improper strip search or visual body cavity search, add:* The offense for which the plaintiff was arrested and detained did not involve weapons, contraband, or violence.]

[*OR, if the plaintiff is a minor*]

6. On_____[*date*], the plaintiff was detained by defendant law enforcement agency before a detention hearing on the grounds that the plaintiff is a person described in Section_____[300 *or* 601 *or* 602] of the Welfare and Institutions Code. [*If the plaintiff was subjected only to an improper strip search or visual body cavity search, add:* The plaintiff was not alleged to have committed a felony or an offense involving weapons, contraband, or violence.]

7. During the above-alleged detention, and without the plaintiff being properly placed in the main population of the jail, the defendants subjected the plaintiff to a search in which the plaintiff was required to_____[remove *or* arrange] some or all of [his *or* her] clothing so as to permit a visual inspection of [his *or* her]_____[underclothing *or* breasts *or* buttocks *or* genitalia *or combination thereof*]. [*If the plaintiff was subjected to a visual body cavity search, add:* During the course of this search, the defendants visually inspected the plaintiff's _____ (rectal cavity *or* vagina)].

8. [*If the plaintiff was subjected to a physical body cavity search, add:* The search to which the plaintiff was subject included physical intrusion into the plaintiff's_____[stomach *or* rectal cavity *or* vagina] for the purpose of discovering concealed objects.]

9. [*In this and following Paragraphs, allege impropriety or improper conduct of the above alleged searches by the defendants. For specific allegations of improper strip search or body cavity search, or improper conduct of such search, see* §§ 465.182 -465.186.]

10. As a proximate result of the defendants' aforementioned improper conduct, the plaintiff_____[*specify damages suffered, e.g.,* suffered and continues to suffer great humiliation and embarrassment].

[11. As a further proximate result of the defendants' aforementioned improper conduct, the plaintiff _____ (*specify additional damages, e.g.,* has incurred bills for psychological counseling and treatment) and will continue to incur such bills.]

12. [*If plaintiff is seeking punitive damages, add:* In engaging in the above alleged conduct, the defendants, and each of them, were acting with malice, oppression, or fraud in that _____ (*specify conduct*)].

13. In prosecuting this action, the plaintiff has incurred attorney's fees in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages according to proof;

[2. For special damages according to proof];

[3. For punitive damages]; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I,_____[*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form above is for use by a person who was detained by a law enforcement agency and who seeks damages pursuant

to *Penal Code § 4030* for an improper strip search or body cavity search.

This form may be used in combination with the forms in §§ 465.182 -465.186, which set out specific allegations of impropriety under *Penal Code § 4030* regarding strip or body cavity searches of detainees for minor offenses.

[3] Allegations

This form alleges:

- The plaintiff's capacity and residence (Paragraph 1).
- The status and location of defendant law enforcement agency (Paragraph 2).
- The capacity and responsibility of the individual defendants (Paragraphs 3 and 4).
- Fictitious defendants (Paragraph 5).
- The detention or arrest of the plaintiff [*Penal Code § 4030(b), (f)*] (Paragraph 6).
- The defendants' conduct of strip search or body cavity search [*Penal Code § 4030(c)*] (Paragraph 7).
- Damages [*Penal Code § 4030(p)*] (Paragraph 10).
- Attorney's fees [*Penal Code § 4030(p)*] (Paragraph 13).

The form includes optional allegations that the defendant(s) conducted a visual body cavity search [*Penal Code § 4030(d)(1), (2)*] (Paragraph 7) or a physical body cavity search [*Penal Code § 4030(d)(1), (3)*] (Paragraph 8), or both. The form also includes optional allegations that the defendant(s) acted with oppression, fraud, or malice, for use if the plaintiff seeks punitive damages [*Civ. Code § 3294*] (Paragraph 12), and of special damages (*see* Paragraph 11).

[4] Requirement of Damages or Harm

A person must have suffered damages or harm as a result of an illegal strip search or body cavity search in order to have standing to bring a civil action under *Penal Code § 4030* [*see Penal Code § 4030(p)*]. Because this statute does not specify what constitutes damages or harm, it is not clear whether damages for injuries such as embarrassment or mental anguish are sufficient to create standing to sue under *Penal Code § 4030*.

[5] Amount of Damages

A person who has suffered damages or harm as a result of a violation of *Penal Code § 4030* may recover the greater of actual damages or $1,000, in addition to punitive damages when appropriate [*Penal Code § 4030(p)*]. If the complaint is filed for actual or punitive damages for personal injury, it must not state the amount of damages sought [*see Code Civ. Proc. § 425.10(b)*]. Furthermore, no claim for exemplary or punitive damages may state an amount or amounts [*see Civ. Code § 3295(e)*].

For discussion and forms relating to statements of damages if the complaint cannot give the amount, *see* Ch. 177, Damages.

[6] Attorney's Fees

A person who has suffered damages or harm as a result of a violation of *Penal Code § 4030* may recover reasonable

attorney's fees and costs [*see Penal Code § 4030(p)*].

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40-465 California Forms of Pleading and Practice--Annotated § 465.124

§ 465.124 Class Action Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527], and Permanent Injunction [Code Civ. Proc. § 526]--Improper Strip Search or Body Cavity Search [Penal Code § 4030]--General Form

[1] FORM Class Action Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527], and Permanent Injunction [Code Civ. Proc. § 526]--Improper Strip Search or Body Cavity Search [Penal Code § 4030]--General Form

[*Caption. See § 465.123*.]

Plaintiff alleges:

1. [*Capacity and residence of the plaintiff. See § 465.123, Paragraph 1*.]

2. [*Capacity and location of defendant law enforcement agency. See § 465.123, Paragraph 2*.]

3. [*Capacity of defendant municipality or county. See § 465.123, Paragraph 3*.]

4. The defendants_____[*names of individual defendants*] are and at all times alleged herein were employees of defendant law enforcement agency and as such were and continue to be responsible for the policies and conduct of the defendant law enforcement agency regarding_____[strip search *or* body cavity search] alleged herein.

5. [*Fictitious defendant allegations. See § 465.123, Paragraph 5*.]

6. The plaintiff brings this action on [his *or* her] own behalf and on behalf of all persons similarly situated. The class that the plaintiff represents is composed of all persons detained in_____[*name of jail facility*], but not in the main population of the jail facility, as (1) adults charged with infractions or misdemeanor offenses and (2) as minors on the ground that they are persons described in *Sections 300, 601* or *602 of the Welfare and Institutions Code*.

[7. The alleged offenses that caused these above-described class members to be detained are not felonies and do not involve weapons, contraband, or violence].

8. The persons in this class are so numerous that the joinder of all these persons is impracticable, and disposition of their claims in a class action is a benefit to the parties and to the court.

9. There is a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented in that the defendants' continuing practice of improper conduct regarding searches as hereinafter stated affects all members of the class. Proof of a common or single state of facts will establish the right of each member of the class to judgment in that *Section 4030 of the Penal Code* grants the same rights with respect to the conduct by the defendants herein complained of to all members of the above-mentioned class, and proof that the defendants' ongoing practice as stated herein violates these rights will be applicable to all members of the class. Moreover, a temporary restraining order, preliminary injunction, and permanent injunction proscribing the defendants' practice will benefit all members of the class equally.

10. It is the ongoing practice and policy of the defendants to subject the plaintiffs on detention as described in Paragraph 6, above, [*if plaintiff is seeking relief only for strip and visual body cavity searches, add:* when there has been no allegation of a felony or an offense involving weapons, contraband, or violence] to a search requiring_____[removal *or* arrangement] of clothing to permit a visual inspection of_____[underclothing *or* breasts *or* buttocks *or* genitalia *or combination thereof*] [*If the plaintiff is seeking relief for visual body cavity searches, add:* and involving a visual inspection of the (_____ rectal cavity *or* vagina)].

[11. *If plaintiff is seeking relief for physical body cavity searches, add:* It is furthermore the ongoing practice and policy of the defendants to subject the plaintiffs on detention as described in Paragraph 6, to a search involving physical intrusion into the _____ (stomach *or* rectal cavity *or* vagina) for the purpose of discovering objects concealed in this cavity.]

12. [*In this and following Paragraphs, allege impropriety or improper conduct of the above alleged searches by defendants. For specific allegations of improper strip searches or body cavity searches, or improper conduct of these searches, see §§ 465.126 -465.129*.]

[13. *If the plaintiff is seeking a temporary restraining order or preliminary injunction, add:* The defendants' wrongful conduct, unless and until enjoined and restrained by order of this court, will cause great and irreparable injury to the plaintiffs in that _____ (*specify particular facts showing that great and irreparable injury will result*).]

14. The plaintiffs have no adequate remedy at law for the injuries here complained of in that_____[*specify facts in addition to those previously alleged showing inadequacy of legal remedy, e.g.*, the defendants' practice constitutes a continuing wrong, and monetary damages would not protect the plaintiffs from suffering harm from the defendants' improper conduct in the future].

15. [*Attorney's fees. See § 465.123, Paragraph 13*.]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining the defendants and each of them, and their agents, servants, and employees, and all persons acting in concert with or for them, from conducting searches of the plaintiffs in the manner described in this complaint;

2. For reasonable attorney's fees as determined by the court;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification. See § 465.123* .]

[2] Use of Form

The form above is for use in a class action seeking injunctive relief for strip searches or body cavity searches of persons who have been detained or arrested for minor offenses, if the strip search or body cavity search itself is improper under *Penal Code § 4030* or if the search is conducted in a manner that is improper under *Penal Code § 4030*. A civil action seeking equitable relief for violations of *Penal Code § 4030* is provided for by *Penal Code § 4030(p)*.

This form should be used in combination with forms of allegations that state specific instances of impropriety under Penal Code § 4030regarding strip searches or body cavity searches [*see §§ 465.126 -465.129*]. If past misconduct has caused damage to the plaintiff, the form may also be used in combination with a form of complaint for damages for violations of *Penal Code § 4030* regarding strip searches and body cavity searches [*see § 465.123*].

[3] Allegations

This form alleges:

- The capacity and responsibility of the individual defendants (Paragraph 4);
- The existence of a class represented by the plaintiff consisting of persons covered by *Penal Code § 4030* [*Code Civ. Proc. § 382*; *Penal Code § 4030(b)*] (Paragraph 6);
- The fact that the class is too numerous to permit joinder of all members [*Code Civ. Proc. § 382*] (Paragraph 8);
- A well-defined community of interest among the members of the class [*Code Civ. Proc. § 382*] (Paragraph 9);
- The defendants' ongoing practice of subjecting the plaintiffs to strip or body cavity search [*Penal Code § 4030(c)*] (Paragraph 10);
- That the defendants' conduct will cause great and irreparable harm if not enjoined [*Code Civ. Proc. § 527*] (Paragraph 13); and
- The lack of an adequate remedy at law [*Code Civ. Proc. § 526*] (Paragraph 14).

The form includes the following optional allegations: (1) that members of the plaintiff class were not detained for

felonies or crimes involving weapons, controlled substances, or violence (for use if the plaintiff is alleging visual body cavity searches) [*Penal Code § 4030(f)*] (Paragraph 7); and (2) the defendants' conduct of physical body cavity searches [*Penal Code § 4030(d)(1)-(3)*] (Paragraph 11).

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40-465 California Forms of Pleading and Practice--Annotated § 465.125

§ 465.125 Allegation--Strip Search or Visual Body Cavity Search Conducted Without Reasonable Suspicion [Penal Code § 4030(f)]

[1] FORM Allegation--Strip Search or Visual Body Cavity Search Conducted Without Reasonable Suspicion [Penal Code § 4030(f)]

The defendants conducted the aforementioned search despite the absence of a reasonable suspicion, based on specific and articulable facts, to believe that the plaintiff was concealing a weapon or contraband, or a reasonable suspicion that the search would result in discovery of weapons or contraband.

[2] Use of Form

The allegation above states that the defendants, in violation of *Penal Code § 4030(f)*, conducted a strip search or a visual body cavity search of the plaintiff without reasonable suspicion based on articulable facts that the plaintiff was concealing weapons or contraband or a reasonable suspicion that the search would lead to discovery of these items. This allegation may be incorporated into a general form of complaint for conduct with respect to improper strip searches and visual body cavity searches under *Penal Code § 4030* [*see § 465.123*]. This allegation may also be adapted for use in a general form of class action complaint seeking injunctive relief for improper strip searches and visual body cavity searches [*see § 465.124*]. This allegation may be inserted into Paragraph 9 of the *form in § 465.123*, or it may be inserted into Paragraph 12 of the *form in § 465.124*, if it is adapted for injunctive relief.

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40-465 California Forms of Pleading and Practice--Annotated § 465.126

§ 465.126 Allegation--Strip Search or Visual Body Cavity Search Conducted Without Authorization of Supervising Officer [Penal Code § 4030(f)]

[1] FORM Allegation--Strip Search or Visual Body Cavity Search Conducted Without Authorization of Supervising Officer [Penal Code § 4030(f)]

[*EITHER*]

The defendants conducted the aforementioned search despite the absence of written authorization by the supervising officer on duty at the time that the search was conducted.

[*OR*]

The purported written authorization for the aforementioned search of the plaintiff by the supervising officer on duty at the time that the search was conducted did not include the specific and articulable facts and circumstances based on which the supervising officer on duty at the time that the search was conducted determined that reasonable suspicion existed to justify the search.

[2] Use of Form

The allegation above states that the defendants conducted a strip search or visual body cavity search of the plaintiff without the written authorization for the search required by *Penal Code § 4030*. This allegation also alleges as an alternative that an authorization for a strip search or visual body cavity search was defective for failure to state grounds for the reasonable suspicion required to conduct the search. This allegation may be incorporated into a general form of complaint for conduct with respect to improper strip searches and visual body cavity searches under *Penal Code § 4030* [*see § 465.123*]. This allegation may also be adapted for use in a general form of class action complaint seeking injunctive relief for improper strip searches and visual body cavity searches [*see § 465.124*]. This allegation may be inserted into Paragraph 9 of the *form in § 465.123*, or it may be inserted into Paragraph 12 of the *form in § 465.124*, if it is adapted for injunctive relief.

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40-465 California Forms of Pleading and Practice--Annotated § 465.127

§ 465.127 Allegation--Strip Search or Visual Body Cavity Search Improperly Conducted [Penal Code § 4030(j), (l), (m)]

[1] FORM Allegation--Strip Search or Visual Body Cavity Search Improperly Conducted [Penal Code § 4030(j), (l), (m)]

[*EITHER*]

[1. The defendants who were conducting the search touched the plaintiff's _____ (breasts *or* buttocks *or* genitalia *or any combination thereof*) while conducting the above-described search.]

[*AND/OR*]

[2. The above-described search was conducted in the presence of (a) person(s) who _____ (is *or* are) not (a) physician(s) or licensed medical personnel and who _____ (is *or* are) not of the same sex as the plaintiff.]

[*AND/OR*]

[3. The above-described search was conducted in an area from which the search could be observed by persons whose official duties relative to search procedure did not require them to be present at the time that the search was conducted.]

[2] Use of Form

The allegations above state that the defendants improperly conducted a strip or visual body cavity search. The grounds of impropriety that may be alleged are that persons touched the plaintiff's breasts, buttocks, or genitalia in violation of *Penal Code § 4030(j)*, the search was conducted by persons who were not physicians or licensed medical personnel and who were not of the same sex as the plaintiff in violation of *Penal Code § 4030(l)*, and that the search was not

conducted in an area of privacy, in violation of *Penal Code § 4030(m)*.

All or any one of these allegations may be incorporated into a general form of complaint for damages or injunctive relief for conduct with respect to strip or body cavity searches that is improper under *Penal Code § 4030* [*see § 465.123*]. These allegations may also be adapted for use in a general form of class action complaint seeking injunctive relief for improper strip searches and visual body cavity searches [*see § 465.124*]. These allegations may be inserted into Paragraph 9 of the *form in § 465.123*, or into Paragraph 12 of the *form in § 465.124*, if adapted for injunctive relief.

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40-465 California Forms of Pleading and Practice--Annotated § 465.128

§ 465.128 Allegation--Warrantless Physical Body Cavity Search Conducted [Penal Code § 4030(h)]

[1] FORM Allegation--Warrantless Physical Body Cavity Search Conducted [Penal Code § 4030(h)]

The defendants conducted the aforementioned search despite the fact that no search warrant specifically authorizing physical intrusion into a body cavity had been issued by a magistrate.

[2] Use of Form

The allegation above states that the defendants conducted a physical body cavity search of the plaintiff without a search warrant, in violation of *Penal Code § 4030(h)*. This allegation may be incorporated into a general form of complaint for conduct with respect to improper strip searches and visual body cavity searches under *Penal Code § 4030* [*see § 465.123*]. This allegation may also be adapted for use in a general form of class action complaint seeking injunctive relief for improper strip searches and visual body cavity searches [*see § 465.124*]. This allegation may be inserted into Paragraph 9 of the *form in § 465.123*, or it may be inserted into Paragraph 12 of the *form in § 465.124*, if it is adapted for injunctive relief.

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40-465 California Forms of Pleading and Practice--Annotated § 465.129

§ 465.129 Allegation--Physical Body Cavity Search Improperly Conducted [Penal Code § 4030(k)-(m)]

[1] FORM Allegation--Physical Body Cavity Search Improperly Conducted [Penal Code § 4030(k), (l), (m)]

[*EITHER*]

1. The conditions under which the defendants conducted the above-described search were not sanitary in that_____[*describe unsanitary conditions*].

[*AND/OR*]

2. The persons who conducted the above-described search included persons who were not physicians, registered nurses, licensed vocational nurses, or Level III emergency medical technicians licensed to practice in California.

[*AND/OR*]

3. [*Allegation that search was conducted by nonphysicians of opposite sex. See § 465.184, Paragraph 2*.]

[*AND/OR*]

4. [*Allegation that search was not conducted in place of privacy. See § 465.184, Paragraph 3*.]

[2] Use of Form

The allegations above state that the defendants improperly conducted a physical body cavity search of the plaintiff as defined in *Penal Code § 4030(d)(1), (3)*. The grounds of impropriety that may be alleged are that the search was conducted under unsanitary conditions, using personnel without proper medical credentials in violation of *Penal Code §*

4030(k), using nonphysician personnel of the opposite sex in violation of *Penal Code § 4030(l)*, or in an area that did not assure plaintiff's privacy in violation of *Penal Code § 4030(m)*.

All or any one of these allegations may be incorporated into a general form of complaint for damages or injunctive relief for conduct with respect to strip or body cavity searches that is improper under *Penal Code § 4030* [*see § 465.123*]. These allegations may also be adapted for use in a general form of class action complaint seeking injunctive relief for improper strip searches and visual body cavity searches [*see § 465.124*]. These allegations may be inserted into Paragraph 9 of the *form in § 465.123*, or into Paragraph 12 of the *form in § 465.124*, if adapted for injunctive relief.

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Chapter 466 PUBLIC ENTITIES AND OFFICERS: TAXPAYERS' ACTIONS

40-466 California Forms of Pleading and Practice--Annotated 466.syn

§ 466.syn Synopsis to Chapter 466: PUBLIC ENTITIES AND OFFICERS: TAXPAYERS' ACTIONS

§ 466.01 Scope of Chapter

§ 466.02 Cross References

§§ 466.03through 466.19 [Reserved]

§ 466.20 Taxpayers' Action for Injunctive Relief

[1] Statutory Authority

[a] Parties to Action

[b] Exception

[c] Scope and Purpose

[2] Standing to Sue

[3] Potential Defendants

[4] Available Remedies

[5] Precedence on Court Calendar

§ 466.21 Grounds for Seeking Injunctive Relief

[1] Illegal Expenditures

[a] Testing Legality of Expenditures

[b] Challenging Performance of Contracts

[c] Constitutional Challenge to Legislation

[d] Constitutional Challenge to Police Activities

[2] Waste

[3] Injury to City or County Property

[4] Situations in Which Injunctive Relief Denied

§ 466.22 Representative Actions

[1] Right to Maintain Action

[2] Situations in Which Action Available

[a] Limitations

[b] Fraud

[c] Ultra Vires Acts

[d] Public Entity's Failure to Perform Duty Specifically Enjoined

[e] Public Official's Failure to Exercise Due Care in Authorizing Expenditure of Public Funds

[3] Pleading Requirements

§ 466.23 Attorney's Fees

§§ 466.24through 466.39 [Reserved]

§ 466.40 State Statutes

§ 466.41 Decisions

[1] Attorney's Fees

[2] Case or Controversy Requirement

[3] Defendants

[a] Agencies and Districts

[b] State Officials

[4] Definitions

[5] Illegal Expenditure of Money as Basis for Injunction

[a] Constitutional Challenge to Legislative Enactments

[b] Constitutional Challenge to Police Activities

[c] Payment of Money

[d] Performance of Contracts

[6] Pleading Requirements

[7] Purpose of Code Civ. Proc. § 526a

[8] Representative Actions

[a] Demand

[b] Defenses

[c] Right to Maintain

[i] Types of Cases

[ii] Fraud

[iii] Public Entity's Failure to Perform

[iv] Ultra Vires Act

[9] Situations in Which Injunctive Relief Denied

[10] Standing to Bring Action

[11] Statutory Construction

[12] Waste as Basis for Injunction

§ 466.42 Law Reviews

§§ 466.43through 466.59 [Reserved]

§ 466.60 Complaint for Injunction Against Public Officer to Restrain Illegal Expenditure of Public Money [Code Civ. Proc. § 526a]

[1] FORM

[2] Use of Form

[3] Jurisdiction

[a] Subject Matter Jurisdiction

[b] Personal Jurisdiction

[4] Venue

[5] Verification

[6] Cross References

§ 466.61 Allegation of Illegal Expenditure of Public Money [Code Civ. Proc. § 526a]--Unconstitutional Statute or Ordinance

[1] FORM

[2] Use of Form

§ 466.62 Allegation of Waste of Public Estate or Funds [Code Civ. Proc. § 526a]

[1] FORM

[2] Use of Form

§ 466.63 Complaint by Taxpayer on Behalf of Public Entity to Recover Public Funds Illegally Expended

[1] FORM

[2] Use of Form

[3] Public Entity as Defendant

[4] Venue

[5] Cross References

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40-466 California Forms of Pleading and Practice--Annotated § 466.01

§ 466.01 Scope of Chapter

This chapter discusses taxpayers' actions [*see § 466.20* et seq.]. It also contains a form of complaint for injunctive relief for use in a taxpayer's action under *Code Civ. Proc. § 526a* [*see § 466.60*], and alternative allegations for use in such a complaint [*see §§ 466.61, 466.62*]. It also contains a form of complaint for use in a taxpayer's representative action to recover public funds illegally expended [*see § 466.63*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsFinanceTax LawState & Local TaxesAdministration & ProceedingsTaxpayer ProtestsTortsPublic Entity LiabilityGeneral Overview

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§ 466.02 Cross References

For discussion, procedural checklist, and forms for use in obtaining injunctive relief generally, see Ch. 303, *Injunctions*

Legal Topics:

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

§§ 466.03[Reserved]

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40-466 California Forms of Pleading and Practice--Annotated § 466.20

§ 466.20 Taxpayers' Action for Injunctive Relief

[1] Statutory Authority

[a] Parties to Action

Taxpayer's actions to restrain illegal public expenditures are governed by *Code Civ. Proc. § 526a*. Under that statute, an action to obtain a judgment, restraining, and preventing any illegal expenditure of, waste of, or injury to the estate, funds, or other property of a county, town, city, or city and county in California, may be maintained against any officer of that county, town, city, or city and county, or any agent or other person, acting in its behalf. It may be brought either by a citizen resident in that county, town, city, or city and county, or by a corporation, that is assessed for and is liable to pay, or within one year before the commencement of the action has paid, a tax in that county, town, city, or city and county [*Code Civ. Proc. § 526a*].

[b] Exception

No injunction may be granted restraining the offering for sale, the sale, or the issuance of any municipal bonds for public improvements or public utilities [*Code Civ. Proc. § 526a*].

[c] Scope and Purpose

The primary purpose of *Code Civ. Proc. § 526a* is to enable a large body of the citizenry to challenge government action that would otherwise go unchallenged in the courts because of the standing requirement [*Blair v. Pitchess (1971) 5 Cal. 3d 258, 267-268, 96 Cal. Rptr. 42, 486 P.2d 1242 , superseded by statute on other grounds, Simms v. NPCK Enterprises, Inc. (2003) 109 Cal. App. 4th 233, 134 Cal. Rptr. 2d 557]* .

Code Civ. Proc. § 526a must be liberally construed to achieve the remedial purpose of allowing challenges to government action. It is immaterial in obtaining an injunction that the amount of the illegal expenditures is small or that the illegal expenditures actually permit a saving of tax funds. Even the expenditure of time by police officers performing illegal and unauthorized acts has been enjoined. Nor is there any requirement that the illegally spent funds derive from tax revenues; they may be derived from the operation of a public utility or from gas revenues. Finally, no

showing of special damage to the particular taxpayer is necessary to obtain an injunction [*Blair v. Pitchess (1971) 5 Cal. 3d 258, 268, 96 Cal. Rptr. 42, 486 P.2d 1242 , superseded by statute on other grounds, Simms v. NPCK Enterprises, Inc. (2003) 109 Cal. App. 4th 233, 134 Cal. Rptr. 2d 557]* .

[2] Standing to Sue

Despite the language of *Code Civ. Proc. § 526a* that a taxpayer's action must be maintained by a citizen taxpayer or a corporate taxpayer, the California Supreme Court has construed *Code Civ. Proc. § 526a* to allow an action by an individual nonresident taxpayer. The court based its interpretation on the fact that an interpretation that allowed a taxpayer's suit by a nonresident corporate taxpayer but not by a nonresident individual taxpayer would violate the *equal protection clause of the Fourteenth Amendment to the United States Constitution* [*Irwin v. City of Manhattan Beach (1966) 65 Cal. 2d 13, 18-20, 51 Cal. Rptr. 881, 415 P.2d 769]* .

[3] Potential Defendants

Code Civ. Proc. § 526a by its own terms only provides for taxpayers' actions against a county, town, city, or city and county. However, because the statute did not establish the right to a taxpayer's action, but merely codified it and limited it [*Irwin v. City of Manhattan Beach (1966) 65 Cal. 2d 13, 19, 51 Cal. Rptr. 881, 415 P.2d 769]* , taxpayers' actions have been allowed, without discussion, against a school district [*Shakespear v. Smith (1888) 77 Cal. 638, 640-642, 20 P. 294* (pre-*Code Civ. Proc. § 526a* case); *see California Sch. Employment Ass'n v. Sequoia Union High Sch. Dist. (1969) 272 Cal. App. 2d 98, 105, 77 Cal. Rptr. 187* (discussion of issue without resolution)], a fire protection district [*Holman v. County of Santa Cruz (1949) 91 Cal. App. 2d 502, 514-522, 205 P.2d 767]* , a municipal utility district [*Strain v. East Bay Mun. Util. Dist. (1937) 21 Cal. App. 2d 281, 284-286, 69 P.2d 191]* , and a rapid transit district [*Mills v. San Francisco Bay Area Rapid Transit Dist. (1968) 261 Cal. App. 2d 666, 667-669, 68 Cal. Rptr. 317]* . In addition, taxpayers have standing to bring such an action to enjoin expenditures by a state official [*California State Employees' Assn. v. Williams (1970) 7 Cal. App. 3d 390, 395, 86 Cal. Rptr. 305* ; *see Blair v. Pitchess (1971) 5 Cal. 3d 258, 268, 96 Cal. Rptr. 42, 486 P.2d 1242 , superseded by statute on other grounds, Simms v. NPCK Enterprises, Inc. (2003) 109 Cal. App. 4th 233, 134 Cal. Rptr. 2d 557* (appearing to approve *Williams* holding)].

[4] Available Remedies

The language of *Code Civ. Proc. § 526a* clearly encompasses a suit for injunctive relief [*see Code Civ. Proc. § 526a*]. However, to promote the remedial purpose of the statute, California courts have also permitted taxpayer suits for declaratory relief, damages, and mandamus [*Van Atta v. Scott (1980) 27 Cal. 3d 424, 449-450, 166 Cal. Rptr. 149, 613 P.2d 210 , superseded by statute on other grounds, In re York (1995) 9 Cal. 4th 1133, 40 Cal. Rptr. 2d 308, 892 P.2d 804]* .

[5] Precedence on Court Calendar

An action brought pursuant to *Code Civ. Proc. § 526a* to enjoin a public improvement project has special precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law [*Code Civ. Proc. § 526a*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsPublic ImprovementsFinancingGovernmentsState & Territorial GovernmentsClaims By & AgainstTax LawState & Local TaxesAdministration & ProceedingsTaxpayer Protests

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40-466 California Forms of Pleading and Practice--Annotated § 466.21

§ 466.21 Grounds for Seeking Injunctive Relief

[1] Illegal Expenditures

[a] Testing Legality of Expenditures

Taxpayers' suits can be used to test the legality of the expenditure of money by a public entity, such as the appropriation of funds to purchase land for a parking garage [*Larsen v. City & County of San Francisco (1957) 152 Cal. App. 2d 355, 360-370, 313 P.2d 959]* or the payment of an appropriation to provide opera performances [*Jarvis v. Bloodgood (1972) 25 Cal. App. 3d 694, 697-700, 102 Cal. Rptr. 212]* .

[b] Challenging Performance of Contracts

Taxpayers' suits can be used to challenge the performance or execution of allegedly illegal contracts by public entities, such as the enforcement of a contract to provide public defender services [*Phillips v. Seely (1975) 43 Cal. App. 3d 104, 112-120, 117 Cal. Rptr. 863]* , the execution of a contract to convey land [*City of Los Angeles v. Superior Court (1959) 51 Cal. 2d 423, 429-438, 333 P.2d 745* ; *Ruben v. City of Los Angeles (1959) 51 Cal. 2d 857, 861-864, 337 P.2d 825]* , or the letting of contracts in violation of statute [*Advance Med. Diagnostic Labs. v. County of Los Angeles (1976) 58 Cal. App. 3d 263, 267-269, 129 Cal. Rptr. 723]* .

[c] Constitutional Challenge to Legislation

Many taxpayers' cases involve constitutional challenges to statutes or official actions that basically do not involve municipal finances. Of course, a complaint must allege the illegal expenditure of public funds, but the California Supreme Court has held that it is immaterial that the amount of the illegal expenditures is small [*Blair v. Pitchess (1971) 5 Cal. 3d 258, 268, 96 Cal. Rptr. 42, 486 P.2d 1242 , superseded by statute on other grounds, Simms v. NPCK Enterprises, Inc. (2003) 109 Cal. App. 4th 233, 134 Cal. Rptr. 2d 557* ; *Wirin v. Parker (1957) 48 Cal. 2d 890, 894, 313 P.2d 844]* . The Court has also held that the expenditure of time by county officials in carrying out the provisions of an unconstitutional ordinance may be enjoined even though the collection of fees for the services actually effects a saving of tax funds [*Blair v. Pitchess (1971) 5 Cal. 3d 258, 268-269, 96 Cal. Rptr. 42, 486 P.2d 1242 , superseded by statute on other grounds, Simms v. NPCKEnters. (2003) 109 Cal. App. 4th 233, 134 Cal. Rptr. 2d 557* ; *Wirin v.*

Horrall (1948) 85 Cal. App. 2d 497, 504-505, 193 P.2d 470] .

The validity of the following enactments has been decided on the merits in taxpayers' actions: the garageman's lien act [*Adams v. Department of Motor Vehicles (1974) 11 Cal. 3d 146, 150-158, 113 Cal. Rptr. 145, 520 P.2d 961* (partially unconstitutional)]; provisions for the enforcement of the unlawful detainer statute [*Love v. Keays (1971) 6 Cal. 3d 339, 343-345, 98 Cal. Rptr. 811, 491 P.2d 395* (constitutional)]; a local tax on liquor consumed on the premises [*Century Plaza Hotel Co. v. City of Los Angeles (1970) 7 Cal. App. 3d 616, 618-626, 87 Cal. Rptr. 166* (preempted by state law)]; the claim and delivery statute [*Blair v. Pitchess (1971) 5 Cal. 3d 258, 267-269, 96 Cal. Rptr. 42, 486 P.2d 1242 , superseded by statute on other grounds, Simms v. NPCK Enterprises, Inc. (2003) 109 Cal. App. 4th 233, 134 Cal. Rptr. 2d 557* (unconstitutional)]; certain city loitering and housing laws [*Ames v. City of Hermosa Beach (1971) 16 Cal. App. 3d 146, 150-154, 93 Cal. Rptr. 786* (loitering law unconstitutional)]; the state employee's loyalty oath [*Vogel v. County of Los Angeles (1967) 68 Cal. 2d 18, 21-26, 64 Cal. Rptr. 409, 434 P.2d 961* (unconstitutional)]; and the state property tax exemption for nonprofit private schools below collegiate grade [*Lundberg v. County of Alameda (1956) 46 Cal. 2d 644, 647-648, 298 P.2d 1* (constitutional)].

[d] Constitutional Challenge to Police Activities

The constitutionality of the following police practices has been challenged successfully in taxpayers' suits: undercover surveillance and intelligence gathering at a state university [*White v. Davis (1975) 13 Cal. 3d 757, 762-763, 120 Cal. Rptr. 94, 533 P.2d 222]* ; conducting police surveillance by means of concealed microphones [*Wirin v. Parker (1957) 48 Cal. 2d 890, 893-896, 313 P.2d 844]* ; and conducting police blockades and making searches without search warrants [*Wirin v. Horrall (1948) 85 Cal. App. 2d 497, 500-506, 193 P.2d 470]* .

[2] Waste

Code Civ. Proc. § 526a authorizes an injunction restraining and preventing any waste of the estate, funds, or other property of a city or county. As used in the statute, the term "waste" means something more than an alleged mistake by public officials in matters involving the exercise of judgment or wide discretion. To hold otherwise would invite constant harassment of city and county officers by disgruntled citizens and could seriously hamper our representative form of government at the local level. Therefore, the courts should not take judicial cognizance of disputes that are primarily political in nature, nor should they attempt to enjoin every expenditure that does not meet with a taxpayer's approval. On the other hand, a court must not close its eyes to wasteful, improvident, and completely unnecessary public spending merely because it is done in the exercise of a lawful power. For example, a taxpayer was entitled to state a cause of action to enjoin waste based on a city's intention to construct sewer lines in an unincorporated area that it might never be able to annex because of a dispute with another city [*Ceres v. City of Modesto (1969) 274 Cal. App. 2d 545, 555-557, 79 Cal. Rptr. 168]* .

In another case involving waste, the court reiterated that an action of a city council may not be voided by a court merely because some mistake of judgment may have occurred. The courts will entertain only those taxpayers' suits that seek to measure government performance against a legal standard. The courts cannot formulate decrees that involve the exercise of indefinable discretion, nor will they invalidate a transaction that is for municipal purposes even though there is incidental private benefit; but in measuring the transaction against a legal standard, the court may consider the transaction as a whole. The court held that a taxpayer's suit states a cause of action if, assuming the allegations are true, it fairly discloses waste of public funds or property or a manifest use of such funds or property chiefly for long-term commercial use with substantial benefit to a lessee, accompanied by diminution of active present use of the property for a municipal purpose [*Rathbun v. City of Salinas (1973) 30 Cal. App. 3d 199, 202-203, 106 Cal. Rptr. 154]* .

The California Supreme Court has held that a complaint to enjoin waste stated a cause of action based on allegations that the city was selling vacated streets, burdened with private easements of ingress and egress, at an arbitrary value of 50 percent of their unencumbered value. Those sales violated the city's charter duty to obtain 90 percent of market value

of public property offered for sale, because the burdening easements varied in value [*Harman v. City & County of San Francisco (1972) 7 Cal. 3d 150, 159-160, 101 Cal. Rptr. 880, 496 P.2d 1248]* .

The California Supreme Court has also upheld an injunction against an election, although courts usually do not interfere with an election held in accordance with the proper procedures. However, in this case, the proposition to be voted on would have been an unconstitutional redistricting. The Court stated that an election for such a purpose would be a useless expenditure and a waste of public funds [*Harnett v. County of Sacramento (1925) 195 Cal. 676, 682-683, 235 P. 445]* .

[3] Injury to City or County Property

The third basis for an injunction set forth in *Code Civ. Proc. § 526a* is injury to the estate, funds, or other property of the county or city. There are no reported cases based on this injury, which may often overlap with illegal expenditure or waste. Injury to property is defined in the Code of Civil Procedure as depriving the property owner of the benefit of the property by taking, withholding, deteriorating, or destroying it [*see Code Civ. Proc. § 28*].

[4] Situations in Which Injunctive Relief Denied

An injunction will not be granted if it is unnecessary or inappropriate--for example, if there is no evidence that illegal payments will continue to be made [*Mallon v. City of Long Beach (1958) 164 Cal. App. 2d 178, 190, 330 P.2d 423]* , or if proper review of the issuance of a license for allegedly illegal gambling activity was by mandate and the criminal law was available for enforcement [*Nathan H. Schur, Inc. v. City of Santa Monica (1956) 47 Cal. 2d 11, 17-19, 300 P.2d 831]* .

Execution of an allegedly illegal contract cannot be enjoined after it has been executed and partially performed [*Hodgeman v. City of San Diego (1942) 53 Cal. App. 2d 610, 614-619, 128 P.2d 412]* . Also, title to a public office cannot be tested by an action to enjoin the payment of the salary because quo warranto is the exclusive remedy for trying title to a public office [*Hallinan v. Mellon (1963) 218 Cal. App. 2d 342, 344-348, 32 Cal. Rptr. 446]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 466.22 Representative Actions

[1] Right to Maintain Action

A taxpayer can maintain a representative action on behalf of a public entity to recover damages for the public entity. Such an action is similar to a corporate shareholder's derivative action [*Osburn v. Stone (1915) 170 Cal. 480, 482-483, 150 P. 367]* .

[2] Situations in Which Action Available

[a] Limitations

A representative action may be brought only in cases involving fraud, collusion, ultra vires, or failure on the part of the government body to perform a duty specifically enjoined [*Gogerty v. Coachella Valley Junior College Dist. (1962) 57 Cal. 2d 727, 730, 21 Cal. Rptr. 806, 371 P.2d 582* ; *see 466.22[1][b] -[d]*]. Additionally, a public official may be personally liable to the state in a taxpayer's action, based on the official's failure to exercise due care in authorizing the expenditure of public funds [*Stevens v. Geduldig (1986) 42 Cal. 3d 24, 32, 227 Cal. Rptr. 405, 719 P.2d 1001* ; *Stanson v. Mott (1976) 17 Cal. 3d 206, 226-227, 130 Cal. Rptr. 697, 551 P.2d 1* ; *see 466.22[1][e]*].

By limiting representative actions to taxpayers' suits that seek to measure government performance against a legal standard, the California courts do not trespass into the domains of legislative or executive discretion. This also serves to prevent the courts from hearing complaints that seek relief that the courts cannot effectively render. The courts cannot formulate decrees that involve the exercise of indefinable discretion, and their decrees can only restrict conduct that can be tested against legal standards [*Harman v. City & County of San Francisco (1972) 7 Cal. 3d 150, 160-161, 101 Cal. Rptr. 880, 496 P.2d 1248]* .

[b] Fraud

A complaint stated a cause of action based on fraud sufficient for a representative suit because it alleged that a school board intended to acquire a school site near an airport, regardless of the contents of a required report from the State Board of Education that disapproved of the site as suitable for a school [*Gogerty v. Coachella Valley Junior Coll.*

Dist. (1962) 57 Cal. 2d 727, 730-732, 21 Cal. Rptr. 806, 371 P.2d 582 ; *see also Lusk v. Compton City Sch. Bd. of Educ. (1967) 252 Cal. App. 2d 376, 377-379, 60 Cal. Rptr. 426]* . A representative cause of action for damages based on fraud also was stated because the complaint alleged that a special attorney for a city sold tax-deeded property on behalf of the city to himself and his clients through dummies and nominees [*Schaefer v. Berinstein (1956) 140 Cal. App. 2d 278, 289-290, 295 P.2d 113* ; *see also Miller v. Martinez (1938) 28 Cal. App. 2d 364, 369-372, 82 P.2d 519* (representative action to recover price of goods purchased in a conflict of interest situation)].

[c] Ultra Vires Acts

A representative suit based on an ultra vires act stated a cause of action because the complaint alleged that the city was using land dedicated to park purposes for a road for access to other city property [*Hermosa Beach v. Superior Court (1964) 231 Cal. App. 2d 295, 300, 41 Cal. Rptr. 796* ; *see Griffith v. Department of Pub. Works (1956) 141 Cal. App. 2d 376, 379, 296 P.2d 838* (use of Griffith Park for freeway)].

[d] Public Entity's Failure to Perform Duty Specifically Enjoined

An alleged violation of charter provisions in appraisal and sale of vacated streets, by not obtaining 90 percent of the preliminary appraisal value of the lots, stated a cause of action in a representative suit based on a failure to perform a duty specifically enjoined [*Harman v. City & County of San Francisco (1972) 7 Cal. 3d 150, 160-161, 101 Cal. Rptr. 880, 496 P.2d 1248]* . Taxpayers can bring a representative action for a writ of mandamus to compel city officials to perform public duties that the law specifically enjoins [*Knoff v. City & County of San Francisco (1969) 1 Cal. App. 3d 184, 198, 81 Cal. Rptr. 683]* .

Alleged violations of competitive bidding requirements have been sufficient to state a representative cause of action for recovery of the money expended [*Miller v. McKinnon (1942) 20 Cal. 2d 83, 87-101, 124 P.2d 34* ; *Osburn v. Stone (1915) 170 Cal. 480, 482, 150 P. 367]* . These cases did not use the language of failure to perform a duty specifically enjoined, but such a failure was the basis of the actions.

[e] Public Official's Failure to Exercise Due Care in Authorizing Expenditure of Public Funds

The basis for a taxpayer's representative action to hold a public official personally liable to the state for failing to exercise due care in authorizing the expenditure of public funds is the general principle that expenditures by an administrative official are proper only insofar as they are authorized, explicitly or implicitly, by legislative enactment. Public officials are not free to spend public funds for any public purpose they may choose. They must use appropriate funds in accordance with the legislatively designated purpose. Accordingly, a public official who controls public funds may be personally liable to repay improperly expended funds if he or she has failed to exercise due care in permitting the expenditure [*Stevens v. Geduldig (1986) 42 Cal. 3d 24, 32, 227 Cal. Rptr. 405, 719 P.2d 1001]* .

For example, in a representative action against the director of a state parks and recreation department to subject the director to personal liability for the improper expenditure of public funds, the plaintiff was permitted to amend the complaint to state a cause of action against the defendant for failing to exercise due care in authorizing the expenditure of department funds to promote the passage of a bond issue [*Stanson v. Mott (1976) 17 Cal. 3d 206, 209, 226-227, 130 Cal. Rptr. 697, 551 P.2d 1]* . Similarly, a representative action was brought against a member of a tax-reduction task force, who was appointed by the governor, and the director of a state health care services department, seeking to subject these two defendants to personal liability for failing to exercise due care in authorizing the expenditure of various state departments' funds for expenses incurred by the task force. The complaint stated a cause of action for negligence [*Stevens v. Geduldig (1986) 42 Cal. 3d 24, 32-35, 227 Cal. Rptr. 405, 719 P.2d 1001]* .

Numerous considerations may be relevant to the determination of whether or not a public official has acted with due care. For example, a court may consider whether the expenditure's impropriety was obvious, whether or not the official

was alerted to the possible invalidity of the expenditure, and whether the official relied on legal advice or on the presumed validity of an existing legislative enactment or judicial decision in making the expenditure [*Stanson v. Mott (1976) 17 Cal. 3d 206, 209, 227, 130 Cal. Rptr. 697, 551 P.2d 1]* .

A public official's personal liability for failing to exercise due care is mitigated if the damages attributable to the official's negligence are eliminated by subsequent proper reimbursement of the funds from other public funds. Presumably, however, an improper reimbursement would not eliminate the damages caused by the unauthorized expenditure [*Stevens v. Geduldig (1986) 42 Cal. 3d 24, 35-36, 227 Cal. Rptr. 405, 719 P.2d 1001]* .

[3] Pleading Requirements

A representative action requires specific allegations of fraud, collusion, ultra vires, or failure to perform an action specifically enjoined [*Wine v. Los Angeles City Council (1960) 177 Cal. App. 2d 157, 164, 2 Cal. Rptr. 94 , overruled on other grounds, Pines v. City of Santa Monica (1981) 29 Cal. 3d 656, 175 Cal. Rptr. 336, 630 P.2d 521]* . Presumably, a representative action against a public official for failing to exercise due care in authorizing the expenditure of public funds, as in any negligence action, must contain an allegation of failure to exercise due care [*see Stanson v. Mott (1976) 17 Cal. 3d 206, 209, 227, 130 Cal. Rptr. 697, 551 P.2d 1* (plaintiff permitted to amend complaint to allege public official's failure to exercise due care in authorizing expenditure of public funds); *see also Stevens v. Geduldig (1986) 42 Cal. 3d 24, 35-36, 227 Cal. Rptr. 405, 719 P.2d 1001* (liability of public official for negligence under *Stanson* is based on tort)]. Bare allegations of bad faith, abuse of discretion, and action in excess of authority are not sufficient; specific allegations are necessary [*Lagiss v. County of Contra Costa (1963) 223 Cal. App. 2d 77, 92-93, 35 Cal. Rptr. 450]* . If municipal officers have no duty to bring the action and can exercise their discretion not to bring the action, the taxpayer must allege either fraud or abuse of discretion [*Whitson v. City of Long Beach (1962) 200 Cal. App. 2d 486, 506, 19 Cal. Rptr. 668]* .

Two early cases upheld demurrers to representative suits on the basis that the taxpayers had not alleged both a demand on the proper official that the action be brought by the public entity and also a refusal to bring the action [*Hansen v. Carr (1925) 73 Cal. App. 511, 514-516, 238 P. 1048* ; *Keith v. Hammel (1915) 29 Cal. App. 131, 135-136, 154 P. 871]* . One of these cases also held that an allegation that a demand would have been useless was not sufficient [*Hansen v. Carr (1925) 73 Cal. App. 511, 515-516, 238 P. 1048]* . That holding, however, is contrary to California Supreme Court holdings that if a demand by the taxpayer would be unavailing, it need not be made [*Briare v. Matthews (1927) 202 Cal. 1, 8-9, 258 P. 939* ; *Mock v. City of Santa Rosa (1899) 126 Cal. 330, 342, 58 P. 826]* , as in the situation in which the claim is against city council members and the mayor for the return of illegal expenditures [*Osburn v. Stone (1915) 170 Cal. 480, 483, 150 P. 367]* . Therefore, the plaintiff must allege either that a demand was made and the appropriate officials refused to act [*Schaefer v. Berinstein (1956) 140 Cal. App. 2d 278, 293, 295 P.2d 113]* , or that the demand would be unavailing [*Briare v. Matthews (1927) 202 Cal. 1, 8-9, 258 P. 939* ; *Citizens' Comm. for Old Age Pensions v. Los Angeles County Bd. of Supervisors (1949) 91 Cal. App. 2d 658, 660, 205 P.2d 761]* .

Legal Topics:

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§ 466.23 Attorney's Fees

If a lawyer has rendered such valuable service as to make available a fund for a class (for example, in a taxpayers' representative action), eventhough he or she appeared for only one claimant, it is equitable that his or her compensation and expenses should come from the entire fund saved for all classes concerned. This principle is derived from the equitable concept that if one of a group has borne the cost of litigation resulting in benefit to the entire group, the group should contribute to those expenses [*Stratton v. City of Long Beach (1961) 188 Cal. App. 2d 761, 768, 11 Cal. Rptr. 8]* .

The California Supreme Court has stated that the basis of the equitable rule that permits surcharging a common fund with the expenses of its protection or recovery, including counsel fees, appears to be: (1) fairness to the successful litigant, who otherwise might receive no benefit because his or her recovery might be consumed by the expenses; (2) correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; and (3) encouragement of the attorney for the successful litigation, who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if the attorney is assured that he or she will be promptly and directly compensated should his or her efforts be successful [*Gabrielson v. City of Long Beach (1961) 56 Cal. 2d 224, 229, 14 Cal. Rptr. 651, 363 P.2d 883]* .

Two reported cases have allowed attorney's fees in taxpayers' actions under *Code Civ. Proc. § 526a*. The first was a taxpayer's action for a writ of mandate seeking to order the City and County of San Francisco to investigate loss of property tax revenues due to corrupt practices in the assessor's office. The trial court awarded attorney's fees based on a percentage of any property taxes collected. The court of appeal upheld the award, despite the fact that no fund was in existence. The court relied on a court's equitable powers in mandate and on an earlier case involving a shareholder's derivative suit that extended the common fund concept to allow attorney's fees to the plaintiffs based on their having provided a "substantial benefit" to the corporation, despite the fact no fund was created [*Knoff v. San Francisco (1969) 1 Cal. App. 3d 184, 203, 81 Cal. Rptr. 683* (relying on *Fletcher v. A.J. Indus., Inc. (1968) 266 Cal. App. 2d 313, 72 Cal. Rptr. 146*); *see also* *D'Amico v. Board of Med. Examiners (1974) 11 Cal. 3d 1, 25, 112 Cal. Rptr. 786, 520 P.2d 10* (appearing to approve substantial benefit test)].

The second case allowing attorney's fees in a taxpayer's action, based on the substantial benefit test, was an action that

invalidated an amendment to a redevelopment plan, which resulted in a reduction in the amount of money spent and taxes collected [*Card v. Community Redevelopment Agency (1976) 61 Cal. App. 3d 570, 582-583, 131 Cal. Rptr. 153]* .

However, attorney's fees have been denied if the ultimate objective of the attorney and the client was not to secure or preserve a common fund, but to establish personal adverse interests in that common fund [*Gabrielson v. Long Beach (1961) 56 Cal. 2d 224, 229, 14 Cal. Rptr. 651, 363 P.2d 883* .2d 883], and if the attorney's activities were antagonistic to the establishment of the trust from which the attorney was claiming fees [*Stratton v. City of Long Beach (1961) 188 Cal. App. 2d 761, 771, 11 Cal. Rptr. 8]* .

For a discussion of the possible availability of an award of attorneys' fees under *Code Civ. Proc. § 1021.5* to a plaintiff who is not the prevailing party in a representative action against a public official for failing to exercise due care in authorizing the appropriation of public funds, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesAmerican RuleGovernmentsState & Territorial GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsFinanceTax LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTortsPublic Entity LiabilityGeneral Overview

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§§ 466.24[Reserved]

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§ 466.40 State Statutes

Taxpayers' actions authorized. *Code Civ. Proc. § 526a*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsLocal GovernmentsFinanceGovernmentsPublic ImprovementsFinancingTax LawState & Local TaxesGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsJudicial Review

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40-466 California Forms of Pleading and Practice--Annotated § 466.41

§ 466.41 Decisions

[1] Attorney's Fees

Equitable basis of rule allowing attorney's fees from fund recovered for group. *Gabrielson v. City of Long Beach (1961) 56 Cal. 2d 224, 229, 14 Cal. Rptr. 651, 363 P.2d 883*

Attorney's fees denied if ultimate objective of attorney and client was to establish adverse personal interests in common fund. *Gabrielson v. City of Long Beach (1961) 56 Cal. 2d 224, 229, 14 Cal. Rptr. 651, 363 P.2d 883*

Attorney's fees awarded in taxpayer's action successfully challenging amendment of redevelopment plan under substantial benefit test. *Card v. Community Redevelopment Agency (1976) 61 Cal. App. 3d 570, 582-583, 131 Cal. Rptr. 153*

Attorney's fees proper in taxpayer's action for writ of mandate to order city and county to investigate loss of property tax revenues due to corrupt practices in assessor's office, based on substantial benefit test. *Knoff v. San Francisco (1969) 1 Cal. App. 3d 184, 203, 81 Cal. Rptr. 683*

Recovery of attorney's fees is proper if lawyer has made fund available for class. *Stratton v. City of Long Beach (1961) 188 Cal. App. 2d 761, 768, 11 Cal. Rptr. 8*

Attorney's fees denied if attorney's activities were antagonistic to establishment of trust from which fees were claimed. *Stratton v. City of Long Beach (1961) 188 Cal. App. 2d 761, 771, 11 Cal. Rptr. 8*

[2] Case or Controversy Requirement

Action that meets requirements for *Code Civ. Proc. § 526a* taxpayer's suit presents true case or controversy, whether or not plaintiff and defendant each have special personal interest in outcome of case, because few government officers have personal interest in validity of their acts. *Arrieta v. Mahon (1982) 31 Cal. 3d 381, 387, 182 Cal. Rptr. 770, 644*

P.2d 1249 ; *Blair v. Pitchess (1971) 5 Cal. 3d 258, 269, 96 Cal. Rptr. 42, 486 P.2d 1242 , superseded by statute on other grounds, Simms v. NPCK Enterprises, Inc. (2003) 109 Cal. App. 4th 233, 134 Cal. Rptr. 2d 557*

[3] Defendants

[a] Agencies and Districts

Taxpayer's action against school district. *Shakespear v. Smith (1888) 77 Cal. 638, 640-642, 20 P. 294* ; *California Sch. Employment Ass'n v. Sequoia Union High Sch. Dist. (1969) 272 Cal. App. 2d 98, 105, 77 Cal. Rptr. 187*

Taxpayers action against rapid transit district. *Mills v. San Francisco Bay Area Rapid Transit Dist. (1968) 261 Cal. App. 2d 666, 667-669, 68 Cal. Rptr. 317*

Taxpayer's action against fire protection district. *Holman v. County of Santa Cruz (1949) 91 Cal. App. 2d 502, 514-522, 205 P.2d 767*

Taxpayer's action against municipal utility district. *Strain v. East Bay Mun. Util. Dist. (1937) 21 Cal. App. 2d 281, 284-286, 69 P.2d 191*

[b] State Officials

Taxpayer's action proper to hold member of governor's tax-reduction task force and director of state health care services department personally liable to state for failing to exercise due care in authorizing expenditure of various state departments' funds for expenses incurred by task force. *Stevens v. Geduldig (1986) 42 Cal. 3d 24, 32, 35, 227 Cal. Rptr. 405, 719 P.2d 1001*

Taxpayer's action proper to hold director of state parks and recreation department personally liable to state for failing to exercise due care in authorizing expenditure of department funds to promote passage of bond issue. *Stanson v. Mott (1976) 17 Cal. 3d 206, 209, 226-227, 130 Cal. Rptr. 697, 551 P.2d 1*

Taxpayer's action against state officials to enjoin relocation of state highway. *Holloway v. Purcell (1950) 35 Cal. 2d 220, 222-232, 217 P.2d 665*

Taxpayer's action permissible against state agency. *Duskin v. San Francisco Redevelopment Agency (1973) 31 Cal. App. 3d 769, 772-773, 107 Cal. Rptr. 667*

[4] Definitions

"Waste," as used in *Code Civ. Proc. § 526a* relating to taxpayers' actions to enjoin waste of public funds, means more than alleged mistake by public officials in matters involving exercise of judgment or discretion. *TRIM, Inc. v. County of Monterey (1978) 86 Cal. App. 3d 539, 543, 150 Cal. Rptr. 351*

[5] Illegal Expenditure of Money as Basis for Injunction

[a] Constitutional Challenge to Legislative Enactments

Taxpayer's action proper to test constitutionality of garageman's lien act. *Adams v. Department of Motor Vehicles (1974) 11 Cal. 3d 146, 150-158, 113 Cal. Rptr. 145, 520 P.2d 961*

Taxpayer's action proper to test constitutionality of provisions dealing with enforcement of unlawful detainer statute. *Love v. Keays (1971) 6 Cal. 3d 339, 343-345, 98 Cal. Rptr. 811, 491 P.2d 395*

Taxpayer's action proper even if amount of illegal expenditures is small or if collection of fees for illegal services effects savings of tax funds. *Blair v. Pitchess (1971) 5 Cal. 3d 258, 268-269, 96 Cal. Rptr. 42, 486 P.2d 1242 , superseded by statute on other grounds, Simms v. NPCK Enterprises, Inc. (2003) 109 Cal. App. 4th 233, 134 Cal. Rptr. 2d 557*

Taxpayer's action proper to test the constitutionality of claim and delivery statute. *Blair v. Pitchess (1971) 5 Cal. 3d 258, 267-269, 96 Cal. Rptr. 42, 486 P.2d 1242* P.2d 1242, *superseded by statute on other grounds, Simms v. NPCK Enterprises, Inc. (2003) 109 Cal. App. 4th 233, 134 Cal. Rptr. 2d 557*

Taxpayer's action proper to test constitutionality of state public employee's loyalty oath. *Vogel v. County of Los Angeles (1967) 68 Cal. 2d 18, 21-26, 64 Cal. Rptr. 409, 434 P.2d 961*

Taxpayer's action proper to test constitutionality of state property tax exemption for nonprofit private schools below collegiate grade. *Lundberg v. County of Alameda (1956) 46 Cal. 2d 644, 647-648, 298 P.2d 1*

Taxpayer's action proper to test constitutionality of city loitering and housing laws. *Ames v. City of Hermosa Beach (1971) 16 Cal. App. 3d 146, 150-154, 93 Cal. Rptr. 786*

Taxpayer's action proper to test constitutionality of tax on liquor consumed on premises. *Century Plaza Hotel Co. v. City of Los Angeles (1970) 7 Cal. App. 3d 616, 618-626, 87 Cal. Rptr. 166*

[b] Constitutional Challenge to Police Activities

Taxpayer's suit proper to test legality of city's undercover surveillance and intelligence gathering activities at university. *White v. Davis (1975) 13 Cal. 3d 757, 762-765, 120 Cal. Rptr. 94, 533 P.2d 222*

Taxpayer's action proper to test constitutionality of conducting police surveillance by means of concealed microphones. *Wirin v. Parker (1957) 48 Cal. 2d 890, 893-896, 313 P.2d 844*

Taxpayer's action proper to test constitutionality of police making public statements and supplying information about arrested persons. *County of Los Angeles v. Superior Court (1967) 253 Cal. App. 2d 670, 675-690, 62 Cal. Rptr. 435*

Taxpayer's action proper to challenge constitutionality of conducting police blockades and making warrantless searches. *Wirin v. Horrall (1948) 85 Cal. App. 2d 497, 500-506, 193 P.2d 470*

[c] Payment of Money

Injunction properly denied to taxpayer seeking to stop rebuilding of juvenile hall on ground that construction constituted waste of public funds, partially because stopping construction prior to completion would be more expensive than completion. *Cota v. County of Los Angeles (1980) 105 Cal. App. 3d 282, 292, 164 Cal. Rptr. 323*

Taxpayer's action proper to test validity of procedure used by county to purchase medical testing services. *Advance Med. Diagnostic Labs. v. County of Los Angeles (1976) 58 Cal. App. 3d 263, 267-269, 129 Cal. Rptr. 723*

Taxpayer's action proper to challenge legality of appropriation to provide opera performances. *Jarvis v. Bloodgood*

(1972) 25 Cal. App. 3d 694, 697-700, 102 Cal. Rptr. 212

Taxpayer's action proper to test legality of appropriation of funds to purchase land for parking garage. *Larsen v. City & County of San Francisco (1957) 152 Cal. App. 2d 355, 360-370, 313 P.2d 959*

Taxpayer's action proper to test legality of use of city's general funds for street improvement. *Klassen v. City of San Carlos (1957) 149 Cal. App. 2d 225, 226-228, 308 P.2d 413*

Taxpayer's action proper to test legality of payment of salary to allegedly illegally promoted public employee. *Brown v. Boyd (1939) 33 Cal. App. 2d 416, 420-424, 91 P.2d 926*

[d] Performance of Contracts

Taxpayer's action proper to test legality of contract to build overpass in city. *Irwin v. City of Manhattan Beach (1966) 65 Cal. 2d 13, 16-20, 51 Cal. Rptr. 881, 415 P.2d 769*

Taxpayer's action proper to challenge legality of execution of contract to convey land to baseball team on which it agreed to build stadium. *City of Los Angeles v. Superior Court (1959) 51 Cal. 2d 423, 429-438, 333 P.2d 745* ; *see also Ruben v. City of Los Angeles (1959) 51 Cal. 2d 857, 861-864, 337 P.2d 825*

Taxpayer's action proper to test payment under allegedly illegal contract. *Mahoney v. City & County of San Francisco (1927) 201 Cal. 248, 251-266, 257 P. 49*

Taxpayer's action proper to test legality of payment under contract that was allegedly made without following proper bidding procedures. *Crowe v. Boyle (1920) 184 Cal. 117, 121-122, 193 P. 111*

Taxpayer's action proper to challenge performance of allegedly illegal contract by public entity to provide for public defender services. *Phillips v. Seely (1975) 43 Cal. App. 3d 104, 112-120, 117 Cal. Rptr. 863*

Taxpayer's action as proper to test legality of payment of warrant that was allegedly for illegal payment of funds. *Chapman v. City of Fullerton (1928) 90 Cal. App. 463, 465-471, 265 P. 1035*

[6] Pleading Requirements

Action under *Code Civ. Proc. § 526a* requires actual expenditure, or at least threat of actual expenditure, of public funds, if only in small amounts. *Fiske v. Gillespie (1988) 200 Cal. App. 3d 1243, 1246, 246 Cal. Rptr. 552*

Action under *Code Civ. Proc. § 526a*, to require Attorney General and State Controller to recover money allegedly owed to state for payment of money to private party defendant for property turned over to state, is premature if taxpayers had yet to prove that private party knew it had no legal claim to property. *Orange County Found. v. Irvine Co. (1983) 139 Cal. App. 3d 195, 200, 188 Cal. Rptr. 552*

Taxpayer complaining of government waste states cause of action under *Code Civ. Proc. § 526a* by alleging that funds are being expended for project with no public benefit and no useful purpose, or for plan costing much more than any alternative plans considered, without finding of any additional public benefit. *TRIM, Inc. v. County of Monterey (1978) 86 Cal. App. 3d 539, 543, 150 Cal. Rptr. 351*

[7] Purpose of Code Civ. Proc. § 526a

Primary purpose of *Code Civ. Proc. § 526a* is to enable large body of citizenry to challenge government action that would otherwise go unchallenged incourts because of standing to sue requirement; California courts consistently construe *Code Civ. Proc. § 526a* liberally to achieve this remedial purpose. *McKinny v. Board of Trustees (1982) 31 Cal. 3d 79, 91, 181 Cal. Rptr. 549, 642 P.2d 460*

Primary purpose of *Code Civ. Proc. § 526a*, authorizing taxpayers' actions to enjoin waste of public funds, is to give large body of citizens standing to challenge government actions; provision must be liberally construed; taxpayers have standing under provision to challenge illegal expenditures of funds by county officials; provision construed to authorize taxpayer to contest legality of taxing statute. *TRIM, Inc. v. County of Monterey (1978) 86 Cal. App. 3d 539, 542, 150 Cal. Rptr. 351*

[8] Representative Actions

[a] Demand

Representative suit properly pleaded if complaint alleges that making demand for action by public entity would be useless. *Briare v. Matthews (1927) 202 Cal. 1, 8-9, 258 P. 939* ; *Citizens Comm. for Old Age Pensions v. Los Angeles County Bd. of Supervisors (1949) 91 Cal. App. 2d 658, 660, 205 P.2d 761*

[b] Defenses

Fraud be must specifically pleaded in taxpayer's action based on fraud. *Cooper v. Leslie Salt Co. (1969) 70 Cal. 2d 627, 636, 75 Cal. Rptr. 766, 451 P.2d 406*

Judgment against taxpayer in representative suit upheld because taxpayer stipulated that no fraud was involved. *Silver v. City of Los Angeles (1961) 57 Cal. 2d 39, 41-42, 17 Cal. Rptr. 379, 366 P.2d 651*

Despite liberal construction of *Code Civ. Proc. § 526a*, permitting taxpayers' challenge to illegal government activity without showing of special damage to particular taxpayer, taxpayer required to show further actual or threatened harm to himself or herself, or to show that other persons in community felt imminently threatened, before trial court in action for preliminary injunction can find irreparable injury and balance of interim harms in taxpayer's favor. *Cohen v. San Francisco City & County Bd. of Supervisors (1986) 178 Cal. App. 3d 447, 453, 455, 225 Cal. Rptr. 114*

Representative action not permitted if municipal officers have no duty to bring action and can exercise discretion not to bring action, unless taxpayer can allege fraud or abuse of discretion. *Whitson v. City of Long Beach (1962) 200 Cal. App. 2d 486, 506, 19 Cal. Rptr. 668*

Specific allegations of fraud, collusion, ultra vires, or failure to perform mandatory duty required to state representative cause of action. *Wine v. Los Angeles City Council (1960) 177 Cal. App. 2d 157, 164, 2 Cal. Rptr. 94 , overruled on other grounds, Pines v. City of Santa Monica (1981) 29 Cal. 3d 656, 175 Cal. Rptr. 336, 630 P.2d 521* ; *see also Lagiss v. County of Contra Costa (1963) 223 Cal. App. 2d 77, 92-93, 35 Cal. Rptr. 450*

[c] Right to Maintain

[i] Types of Cases

Representative suit proper only in cases involving fraud, collusion, ultra vires, or failure on part of public entity to

perform duty specifically enjoined. *Gogerty v. Coachella Valley Junior Coll. Dist. (1962) 57 Cal. 2d 727, 730, 21 Cal. Rptr. 806, 371 P.2d 582*

[ii] Fraud

Representative suit proper based on fraud in acquisition of school site, despite report that site was not suitable. *Gogerty v. Coachella Valley Junior Coll. Dist. (1962) 57 Cal. 2d 727, 730-732, 21 Cal. Rptr. 806, 371 P.2d 582*

Representative suit proper to recover illegal expenditures for public entity. *Osburn v. Stone (1915) 170 Cal. 480, 482-483, 150 P. 367*

Representative suit proper based on allegations that city attorney sold tax-deeded property to himself and clients through dummies. *Schaefer v. Berinstein (1956) 140 Cal. App. 2d 278, 289-290, 295 P.2d 113*

Taxpayer's representative action proper to recover price of goods purchased in conflict of interest situation. *Miller v. Martinez (1938) 28 Cal. App. 2d 364, 367-372, 82 P.2d 519*

[iii] Public Entity's Failure to Perform

Representative suit on behalf of city is proper if complaint alleges failure of city to perform mandatory duty in selling vacated streets. *Harman v. City & County of San Francisco (1972) 7 Cal. 3d 150, 160-161, 101 Cal. Rptr. 880, 496 P.2d 1248*

Representative action stated based on allegations of violation of competitive bidding requirements. *Miller v. McKinnon (1942) 20 Cal. 2d 83, 87-101, 124 P.2d 34* ; *Osburn v. Stone (1915) 170 Cal. 480, 482, 150 P. 367*

Representative action for writ of mandamus to compel city officials to perform public duties that law requires. *Knoff v. City & County of San Francisco (1969) 1 Cal. App. 3d 184, 198, 81 Cal. Rptr. 683*

[iv] Ultra Vires Act

Representative suit based on ultra vires was proper because complaint alleged that city was using land dedicated for parks as road. *City of Hermosa Beach v. Superior Court (1964) 231 Cal. App. 2d 295, 300, 41 Cal. Rptr. 796*

Representative suit based on ultra vires act was proper because complaint alleged that city was using land dedicated for park as freeway. *Griffith v. Department of Pub. Works (1956) 141 Cal. App. 2d 376, 379, 296 P.2d 838*

[9] Situations in Which Injunctive Relief Denied

Injunction improper if remedy was by mandamus or criminal law. *Nathan H. Schur, Inc. v. City of Santa Monica (1956) 47 Cal. 2d 11, 17-19, 300 P.2d 831*

Despite liberal construction of *Code Civ. Proc. § 526a*, permitting taxpayers' challenge to illegal government activity without showing of special damage to particular taxpayer, taxpayer required to show further actual or threatened harm to himself or herself, or to show that other persons in community felt imminently threatened, before trial court in action for preliminary injunction can find irreparable injury and balance of interim harms in taxpayer's favor. *Cohen v. San Francisco City & County Bd. of Supervisors (1986) 178 Cal. App. 3d 447, 453, 455, 225 Cal. Rptr. 114*

Taxpayer's action improper to enjoin judges from expending funds to prosecute plaintiff. *Gould v. People ex rel. Busch (1976) 56 Cal. App. 3d 909, 921-923, 128 Cal. Rptr. 743* ; *but see Van Atta v. Scott (1980) 27 Cal. 3d 424, 449, 166 Cal. Rptr. 149, 613 P.2d 210* , *superseded by statute on other grounds, In re York (1995) 9 Cal. 4th 1133, 40 Cal. Rptr. 2d 308, 892 P.2d 804* (disapproving *Gould* to extent it holds that taxpayers cannot maintain action under *Code Civ. Proc. § 526a* if persons directly affected by expenditure have standing to sue)

Injunction refused because budget's failure to contain sufficient funds to pay employees at rate set could be solved by city council. *Silver v. City of Los Angeles (1967) 257 Cal. App. 2d 557, 562-563, 65 Cal. Rptr. 227*

Injunction not proper to test title to public office. *Hallinan v. Mellon (1963) 218 Cal. App. 2d 342, 344-348, 32 Cal. Rptr. 446*

Injunction improper if unnecessary or inappropriate, such as if there is no evidence that illegal payments will continue to be made. *Mallon v. City of Long Beach (1958) 164 Cal. App. 2d 178, 190, 330 P.2d 423*

Injunction of allegedly illegal contract was improper because it had been executed and partially performed. *Hodgeman v. City of San Diego (1942) 53 Cal. App. 2d 610, 618-619, 128 P.2d 412*

[10] Standing to Bring Action

Code Civ. Proc. § 526a does not provide standing for medically indigent adults and taxpayers to bring action against state for alleged violation of *Cal. Const. art. XIII B, § 6*, based on state's shifting responsibility for funding health for poor onto county without providing necessary funding; *Gov. Code § 17500 et seq.* creates adequate administrative forum for such action. *Kinlaw v. State of California (1991) 54 Cal. 3d 326, 328, 331-334, 285 Cal. Rptr. 66, 814 P.2d 1308*

Taxpayers permitted to maintain action under *Code Civ. Proc. § 526a* to challenge illegal expenditure of funds, even though persons directly affected by expenditure also have standing to sue. *Van Atta v. Scott (1980) 27 Cal. 3d 424, 449, 166 Cal. Rptr. 149, 613 P.2d 210* , *superseded by statute on other grounds, In re York (1995) 9 Cal. 4th 1133, 40 Cal. Rptr. 2d 308, 892 P.2d 804* (disapproving *Gould v. People (1976) 56 Cal. App. 3d 909, 128 Cal. Rptr. 743* , and *Di Suvero v. Los Angeles County (1977) 73 Cal. App. 3d 718, 140 Cal. Rptr. 895* , to extent inconsistent with this rule)

Nonresident taxpayer has right to bring taxpayer's action. *Irwin v. City of Manhattan Beach (1966) 65 Cal. 2d 13, 18-20, 51 Cal. Rptr. 881, 415 P.2d 769*

Payment of sales tax insufficient for standing under *Code Civ. Proc. § 526a* to challenge proposed redevelopment project in city because tax is levied on retailer rather than consumer. *Torres v. City of Yorba Linda (1993) 13 Cal. App. 4th 1035, 1047, 17 Cal. Rptr. 2d 400*

[11] Statutory Construction

Rule that general language in statute such as "person" should not be construed to apply to government entities without explicit legislative direction was not applicable if that construction would not infringe sovereign power. *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1979) 88 Cal. App. 3d 43, 56, 152 Cal. Rptr. 153*

[12] Waste as Basis for Injunction

Taxpayer's suit proper to enjoin waste of municipal assets by selling vacated streets burdened with easements at arbitrary figure of half their unencumbered value. *Harman v. City & County of San Francisco (1972) 7 Cal. 3d 150, 159-160, 101 Cal. Rptr. 880, 496 P.2d 1248*

Injunction against municipal election based on waste was proper because proposition to be voted on would have been unconstitutional. *Harnett v. County of Sacramento (1925) 195 Cal. 676, 682-683, 235 P. 445*

Taxpayer's action stated cause of action based on waste to test legality of lease of municipal property. *Rathbun v. City of Salinas (1973) 30 Cal. App. 3d 199, 202-203, 106 Cal. Rptr. 154*

Taxpayer's action based on waste is only proper if action of public entity can be measured against legal standard. *Rathbun v. City of Salinas (1973) 30 Cal. App. 3d 199, 202-203, 106 Cal. Rptr. 154*

Taxpayer had standing for action against state official to enjoin performance of administrative tasks by private carriers. *California State Employees' Assn. v. Williams (1970) 7 Cal. App. 3d 390, 394-395, 86 Cal. Rptr. 305*

Taxpayer's action based on waste was proper because complaint alleged that city intended to construct sewer lines in area that it might never be able to annex. *Ceres v. City of Modesto (1969) 274 Cal. App. 2d 545, 555-557, 79 Cal. Rptr. 168*

Taxpayer had standing for action against state officials to restrain illegal expenditure of funds in approving contracts for purchase of textbooks. *Ahlgren v. Carr (1962) 209 Cal. App. 2d 248, 251-254, 25 Cal. Rptr. 887*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsLocal GovernmentsFinanceGovernmentsPublic ImprovementsFinancingTax LawState & Local TaxesGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsJudicial Review

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§ 466.42 Law Reviews

Note, *California Taxpayers' Suits: Suing State Officers Under Section 526a of the Code of Civil Procedure* , *28* Hastings L.J. 477 (1976)

Legal Topics:

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Civil ProcedureJusticiabilityStandingGeneral OverviewGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsLocal GovernmentsFinanceGovernmentsPublic ImprovementsFinancingTax LawState & Local TaxesGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsJudicial Review

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§ 466.60 Complaint for Injunction Against Public Officer to Restrain Illegal Expenditure of Public Money [Code Civ. Proc. § 526a]

[1] FORM Complaint for Injunction Against Public Officer to Restrain Illegal Expenditure of Public Money [Code Civ. Proc. § 526a]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*], Defendants.	)	
	)	
	)	

_____

COMPLAINT FOR INJUNCTIVE RELIEF

The plaintiff alleges:

1. The plaintiff _____[*name*] has been assessed for, and is liable to pay, a tax in _____[*name of city or county*], California. [The plaintiff is also a resident of _____ (*name of city or county*), California.]

2. The defendants _____[*names*] are public officials of the _____[*name of city or county*] who are charged with the duty of _____[*specify duties of the defendants that are related to the expenditures to be enjoined, e.g.,* disbursing its funds].

3. [The plaintiff is ignorant of the true names and capacities of the defendants sued herein as DOES 1-_____, inclusive,

and therefore sues these defendants by such fictitious names. The plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

4. The defendants _____ have expended the moneys of _____[*name of city or county*] and threaten and will continue to spend such moneys for the illegal purpose of _____ [*specify, e.g.,* purchasing advertising to attract business to _____ (*name of city or county*), which is a violation of Section _____ of the Charter of (*name of city or county*)].

WHEREFORE, the plaintiff prays judgment against the defendants, and each of them, as follows:

1. For a preliminary injunction and a permanent injunction, each enjoining the defendants, and each of them, and their agents, servants, and employees, and all persons acting under, in concert with, or for them, from _____ [*specify, e.g.,* expending money of _____ (*name of city or county*) for the purchase of advertising to attract business to _____ (*name of city or county*)];

2. For reasonable attorney's fees;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION [*Code Civ. Proc. §§ 446, 2015.5*]

I, _____[*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

[2] Use of Form

The form above is for use in a taxpayer's action against public officials to enjoin the illegal expenditure of public money.

[3] Jurisdiction

[a] Subject Matter Jurisdiction

An action seeking permanent injunctive relief is in the jurisdiction of the superior court and is not a limited civil case [

see Cal. Const. art. VI, § 10; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*].

[b] Personal Jurisdiction

The granting of either a provisional or final injunction requires personal jurisdiction over the person enjoined [*see Comfort v. Comfort (1941) 17 Cal. 2d 736, 741, 112 P.2d 259* (permanent); *Rothschild v. Erda (1968) 258 Cal. App. 2d 750, 753, 66 Cal. Rptr. 209* (preliminary)].

[4] Venue

The proper county in which to bring the action is the county where the cause of action arose [*Code Civ. Proc. § 393(b)*], which would be the county where the expenditure was made.

[5] Verification

Verification [*Code Civ. Proc. § 446*] is required if the plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle the plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* .

Otherwise, verification is not required. Generally, verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. A public entity or officer, however, need not verify an answer even though the complaint is verified [*see Code Civ. Proc. § 446*]. The verification of a complaint against a public entity or officer does, however, preclude use of a general denial [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[6] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion, procedural checklist, and forms for use in obtaining injunctive relief generally, see Ch. 303, *Injunctions*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification*

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PART IV. FORMS

40-466 California Forms of Pleading and Practice--Annotated § 466.61

§ 466.61 Allegation of Illegal Expenditure of Public Money [Code Civ. Proc. § 526a]--Unconstitutional Statute or Ordinance

[1] FORM Allegation of Illegal Expenditure of Public Money [Code Civ. Proc. § 526a]--Unconstitutional Statute or Ordinance

The defendants have expended the money of _____[*name of city or county*] and threaten and will continue to spend that money to _____ [*specify unconstitutional law or ordinance that is being challenged, e.g.,* enforce Ordinance No. _____ of the City of _____, which prohibits _____ (*specify*), by arresting and trying persons who engage in _____ (*specify*)]. Ordinance No. _____ is unconstitutional because _____ [*specify basis for claim of unconstitutionality, e.g.,* it violates Amendments _____ and _____ of the United States Constitution and Article _____, Sections _____ and _____ of the California Constitution]. Because Ordinance No. _____ is unconstitutional, money spent to enforce it is an illegal expenditure and further such expenditures should be enjoined.

[2] Use of Form

The form above is for use as Paragraph IV of the *form in § 466.60*, if the taxpayer's suit is used to challenge the constitutionality of a law or ordinance that the city or county is enforcing.

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40-466 California Forms of Pleading and Practice--Annotated § 466.62

§ 466.62 Allegation of Waste of Public Estate or Funds [Code Civ. Proc. § 526a]

[1] FORM Allegation of Waste of Public Estate or Funds [Code Civ. Proc. § 526a]

The defendants have wasted the _____[funds *or* estate] of _____[*name of city or county*] and threaten to and will continue to waste such _____[funds *or* estate] by _____ [*specify how waste is occurring, e.g.,* selling surplus property at a private sale without public notice and not at a public sale with public notice, which results in significant loss of revenue to _____ (*name of city or county*), which waste of public funds and estate should be enjoined].

[2] Use of Form

The form above is for use as Paragraph 4 of the *form in § 466.60*, if the taxpayer's suit is based on waste of public funds or estate.

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40-466 California Forms of Pleading and Practice--Annotated § 466.63

§ 466.63 Complaint by Taxpayer on Behalf of Public Entity to Recover Public Funds Illegally Expended

[1] FORM Complaint by Taxpayer on Behalf of Public Entity to Recover Public Funds Illegally Expended

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONEY
_____ [*names*], Defendants.	)	(Taxpayer's Representative Action)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

The plaintiff alleges:

1. [*The plaintiff's status. See § 466.60[1], Paragraph 1.*]

2. The defendant _____[*name of public entity*] is and at all times mentioned herein was a _____[*describe status of defendant, e.g.,* county duly organized and existing under the laws of the State of California].

3. The defendant _____[*name of public entity*] is united in interest with the plaintiff in the prosecution of this action, but its consent to be joined as a plaintiff cannot be obtained for the reason that _____ [*specify, e.g.,* after demand by the plaintiff, the County Board of Supervisors refused and failed and continues to refuse and fail to bring such action. Therefore, the plaintiff brings this action on behalf of the defendant _____ (*name of city or county*), California].

4. The defendants _____[*names*] _____ [*specify status of defendants from whom relief is sought, e.g.,* entered into a contract with the defendant _____ (*name of city or county*) on _____[*date*], to _____ (*specify*)].

5. [*Fictitious name allegations, if appropriate. See § 466.60[1], Paragraph 3*.]

6. [*Allege basis on which individual defendants are liable to public defendant, e.g.,* Under the terms of the above-described contract, the defendants were to be paid $_____. However, the defendants actually caused themselves to be paid $_____ for the work to be done under the contract by making the following false and fraudulent misrepresentations, knowing them to be untrue and intending that the defendant _____ (*name of city or county*) rely on them: _____ (*specify misrepresentations in detail*). The defendant _____ (*name of city or county*) justifiablyrelied on the fraudulent misrepresentations and was thereby damaged in the sum of $_____].

WHEREFORE the plaintiff prays judgment against the defendants, and each of them, as follows:

1. That the defendants _____[*names*] be ordered to pay to defendant _____[*name of city or county*] the sum of $_____;

2. For reasonable attorney's fees;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 466.60* .]

[2] Use of Form

The form of complaint above is for use in a representative action by a taxpayer on behalf of a city or county to recover on its behalf money that the city or county was fraudulently induced to pay on a contract.

[3] Public Entity as Defendant

If the consent of any party that should be joined as a plaintiff cannot be obtained, that unwilling party may be made a defendant, so long as a reason for doing so is provided in the complaint [*Code Civ. Proc. § 382*]. Under those circumstances, the individual plaintiff may then sue for the benefit of the common interest [*Code Civ. Proc. § 382*].

Paragraph 3 in the form above contains an allegation that the public entity is united in interest with the plaintiff, but does not consent to joining the action as a plaintiff, thus allowing the plaintiff to add the public entity as a defendant.

[4] Venue

An action against a local public entity may be tried in the county where the local public entity is located [*Code Civ.*

Proc. § 394(a)].

[5] Cross References

For discussion of verification of the complaint, see *§ 466.60[5]*

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40-467 California Forms of Pleading and Practice--Annotated 467.syn

§ 467.syn Synopsis to Chapter 467: PUBLIC ENTITIES AND OFFICERS: ENFORCEMENT OF JUDGMENTS AGAINST PUBLIC ENTITIES

§ 467.01 Scope of Chapter

§ 467.02 Cross References

§§ 467.03through 467.19 [Reserved]

§ 467.20 Governing Law

§ 467.21 Allowance of Claim by State Without Suit

[1] Sufficient Appropriation Exists

[2] Insufficient Appropriation Exists

§ 467.22 Satisfaction of Judgment

[1] Conditions and Exceptions

[2] Period of Enforcement

[3] Interest on Judgment

[4] Mandatory Settlement Conference Required for Certain Judgments

§ 467.23 Collateral Sources in Personal Injury or Wrongful Death Actions

[1] Governing Law and Definitions

[2] Motion to Reduce Judgment

[3] Notice to Collateral Source Provider Required

[4] Determination Regarding Liens and Subrogation Rights

[5] Limitations on Reduction of Verdict

[6] Percentage of Judgment Due Immediately

[7] Claims With Multiple Defendants

§ 467.24 Full Payment by Controller's Warrant

§ 467.25 Periodic Payments

[1] Governing Law and Limitations

[2] Uninsured Public Entity

[a] Election of Periodic Payments

[b] Percentage of Judgment Payable Immediately

[c] Payment of Interest

[d] Continuation of Payments

[e] Modification of Payments Caused by Joint Tortfeasor's Inability to Pay

§ 467.26 Remedies to Compel Payment or Other Action

[1] Against State or State Employee

[2] Against Director of Finance or Director of Transportation

[3] Restriction on Compelling Legislative Action

§§ 467.27through 467.39 [Reserved]

§ 467.40 Governing Law

§ 467.41 Definitions

§ 467.42 Enforceability of Judgments

[1] Governing Law

[2] Period of Enforcement

§ 467.43 Payment of Judgments

[1] Time and Source of Payments

[2] Installment Payments

[3] Funding Required

[4] Application of Tax Limitations

§ 467.44 Judgments as Legal Investments or Security

§ 467.45 Remedy for Noncompliance

§§ 467.46through 467.59 [Reserved]

§ 467.60 State Constitution

§ 467.61 State Statutes

§ 467.62 Decisions

[1] Compelling Action

[2] Interest on Judgments Against State

[3] Separation of Powers Doctrine

§ 467.63 Text References

§§ 467.64through 467.79 [Reserved]

§ 467.80 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Compel State Official or Employee to Perform Statutory Duty Regarding Payment or Offset of Claim, Settlement, Compromise, or Judgment Against State or State Agency [Gov. Code §§ 965.7(a), 965.8]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Accompanying Papers

[a] Proof of Service

[b] Points and Authorities

[6] Cross References

§ 467.81 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Compel Local Public Entity to Perform Statutory Duty Regarding Payment of Judgment [Gov. Code § 970.2]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Accompanying Papers

[a] Proof of Service

[b] Points and Authorities

[6] Cross References

§ 467.82 Proceedings to Accelerate Installment Payments on Unreasonable Delay in or Failure to Make Payments [Gov. Code § 984(e)(4)]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] Installment Payments on Judgment Against Public Entity

[4] Cross References

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40-467 California Forms of Pleading and Practice--Annotated § 467.01

§ 467.01 Scope of Chapter

This chapter discusses the enforcement of claims, settlements, and judgments against public entities. The discussion covers enforcement against the state and state agencies [*see § 467.20* et seq.] and against local entities [*see § 467.40* et seq.]. The chapter also includes forms for petition for writ of mandate to compel a state or local public entity or official to perform his or her statutory duties with respect to payment of a judgment [*see §§ 467.80, 467.81*]. The chapter also includes a form for notice of motion and supporting declaration for proceedings to accelerate installment payments following an unreasonable delay in or failure to make payments on a judgment [*see § 467.82*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsClaims By & Against

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40-467 California Forms of Pleading and Practice--Annotated § 467.02

§ 467.02 Cross References

For discussion, procedural checklist, and additional forms for use in a mandate proceeding, see Ch. 358, *Mandate and Prohibition*

For discussion of an award of attorney fees as costs in a lawsuit under the private attorney general theory and forms for use in procuring the award, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsEnforcementGeneral Overview

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[Reserved]

§§ 467.03[Reserved]

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40-467 California Forms of Pleading and Practice--Annotated § 467.20

§ 467.20 Governing Law

The payment of claims, settlements, and judgments against the state and its agencies is governed by *Gov. Code §§ 965-965.9*. These provisions do not apply, however, to claims, settlements, and judgments against the Regents of the University of California [*Gov. Code § 965.9*]. *Gov. Code § 965.9* is consistent with *Gov. Code §§ 905.6* and *943*, making inapplicable to claims or actions against the Regents of the University of California the provisions of *Gov. Code §§ 900-935.7* (claims against public entities) and *Gov. Code §§ 940-960.8* (actions against public entities and employees), respectively.

Mandatory settlement conferences regarding satisfaction of judgments in excess of $100,000 for personal injury or wrongful death are governed by *Gov. Code § 962*. Reduction of the judgment by the amount of collateral source payments in personal injury and wrongful death actions, and determination of liens, subrogation rights, and reimbursement pertaining to liens and subrogation rights, are governed by *Gov. Code § 985*. Payment of the judgment in periodic installments is governed by *Gov. Code § 984*.

The authority of the state to procure insurance against tort or inverse condemnation liability is set forth in *Gov. Code § 11007.4*.

The California Prompt Payment Act requires state agencies to pay properly submitted, undisputed invoices within 45 days after receipt, or automatically calculate and pay the appropriate late payment penalties [*Gov. Code § 927 et seq.*]. The Act applies to all state agencies, including, but not limited to, the Public Employees' Retirement System, the State Teachers' Retirement System, the Treasurer, and the Department of General Services [*Gov. Code § 927(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentAdditurs &

RemittitursRemittitursCivil ProcedureEminent Domain ProceedingsState CondemnationsGovernmentsState & Territorial GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsFinancePublic Contracts LawBusiness Aids & AssistanceFinancial Assistance to ContractorsPrompt Payment ActReal Property LawInverse CondemnationRemediesTortsDamagesCollateral Source RuleGeneral OverviewTortsWrongful Death & Survival ActionsRemediesGeneral Overview

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40-467 California Forms of Pleading and Practice--Annotated § 467.21

§ 467.21 Allowance of Claim by State Without Suit

[1] Sufficient Appropriation Exists

On the allowance by the Victim Compensation and Government Claims Board (formerly, the State Board of Control) of all or part of a claim for which the Director of Finance certifies that a sufficient appropriation for the payment of the claim exists, and the execution and presentation of such documents as the board may require that discharge the state of all liability under the claim, the board must designate the fund from which the claim is to be paid, and the state agency concerned must pay the claim from that fund. Claims arising out of the activities of the State Departmentof Transportation may be paid if either the Director of Transportation or the Director of Finance certifies that a sufficient appropriation for the payment of the claim exists [*Gov. Code § 965(a)*].

For presentation of claims to and payment by the state Controller, see *Gov. Code §§ 925-926.17*. For when interest is allowable on a claim, see *Gov. Code §§ 906* and *926.10*.

[2] Insufficient Appropriation Exists

If no sufficient appropriation for payment of a claim is available, then the Victim Compensation and Government Claims Board (formerly, the State Board of Control) must report to the Legislature in accordance with *Gov. Code § 912.8*, which requires the board to act on claims in accordance with such procedure as the board may by rule prescribe and, with the approval of the Governor, to report to the legislature such facts and recommendations concerning the claims as it deems proper [*Gov. Code § 965(a)*]. However, if the claim, settlement, or judgment against the state arises from an action in which the state is represented by the Attorney General, the Attorney General must report the claim, settlement, or judgment to the chairperson of either the Senate Committee on Appropriations or the Assembly Committee on Ways and Means, who "shall cause to be introduced" legislation appropriating funds for the payment of the claim, settlement, or judgment [*Gov. Code § 965(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsClaims By & Against

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40-467 California Forms of Pleading and Practice--Annotated § 467.22

§ 467.22 Satisfaction of Judgment

[1] Conditions and Exceptions

Notwithstanding any other provision of law, neither the state nor any of its officers or employees, can be required by any court in any proceeding to pay or offset a tort liability claim, settlement, or judgment for which the state is liable unless one of the following conditions exists [*Gov. Code § 965.6*]:

- The legislature has authorized the payment or offset of the specific tort liability claim, settlement, or judgment.

- The Director of Finance, or the Director of Transportation for claims arising out of the activities of the Department of Transportation, has certified that a sufficient appropriation for the payment of the claim, settlement, or judgment or to provide for such offset exists.

Gov. Code § 965.6 applies only to tort liability claims, settlements, and judgments and not to other kinds of liability [*see County of Sacramento v. Lackner (1979) 97 Cal. App. 3d 576, 591, 159 Cal. Rptr. 1* (former Gov. Code § 955.5, predecessor to *Gov. Code § 965.6*, inapplicable to action based on failure of state officials to carry out statutory duties regarding Medi-Cal payments, on ground that section applied only to tort liability)].

A judgment for the payment of money against the state or a state agency is enforceable under the provisions of *Gov. Code §§ 965-965.9* and is not enforceable under *Code Civ. Proc. § 680.010 et seq.*, the Enforcement of Judgments Law [*Gov. Code § 965.5(b)*]. *Gov. Code § 965.5(b)* makes clear that execution and other remedies under the Code of Civil Procedure for the enforcement of money judgments do not apply to the enforcement of a money judgment against the state or a state agency. Although it was drawn from the second sentence of former Gov. Code § 955.5, *Gov. Code § 965.5(b)* applies to all money judgments and is not limited, like its predecessor, to tort liability claims, settlements, or judgments [*see* Legislative Committee comment to *Gov. Code § 965.5(b)*].

[2] Period of Enforcement

A judgment for the payment of money against the state or a state agency is enforceable until 10 years after the time the judgment becomes final or, if the judgment is payable in installments, until 10 years after the final installment becomes due [*Gov. Code § 965.5(a)*].

[3] Interest on Judgment

The state, like all other parties to litigation, is liable under *Cal. Const. art. XV, § 1*, for interest on judgments [*see Straughter v. State of California (1980) 108 Cal. App. 3d 412, 414, 169 Cal. Rptr. 471* (state liable for payment of interest on tort judgment); *Harland v. State of California (1979) 99 Cal. App. 3d 839, 841-843, 160 Cal. Rptr. 613* (state liable for payment of interest on tort judgment)].

[4] Mandatory Settlement Conference Required for Certain Judgments

On the entry of a verdict against a public entity in excess of $100,000 in an action for personal injury or wrongful death, the public entity may, within the time set in *Code Civ. Proc. § 659* (motion for new trial), request in writing a mandatory settlement conference for the purpose of discussing available methods by which the judgment will be satisfied. The court must then set a date for the conference. The request may be noticed with any motions pursuant to *Gov. Code §§ 984* (installment payments) and 985 (collateral source payments in personal injury and wrongful death actions), or pursuant to *Code Civ. Proc. § 659* [*Gov. Code § 962*].

At the conference, the parties must negotiate in good faith and must review and consider structured payment plans presented by either party. The conference cannot occur until after determination of any motion for a new trial, motion for judgment notwithstanding the verdict, motion for remittitur, and motion for additur, but must occur before hearing on any motions pursuant to *Gov. Code §§ 984* and *985* [*Gov. Code § 962*]. Fordiscussion and forms regarding motions for judgment notwithstanding the verdict and for new trial, see Ch. 371, *Motions After Trial* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureRemediesJudgment InterestGeneral OverviewTortsDamagesCollateral Source RuleGeneral OverviewTortsDamagesInterestPostjudgment InterestTortsProcedureSettlementsGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview

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40-467 California Forms of Pleading and Practice--Annotated § 467.23

§ 467.23 Collateral Sources in Personal Injury or Wrongful Death Actions

[1] Governing Law and Definitions

Gov. Code § 985 governs collateral source payments in any action for personal injuries or wrongful death based on acts or omissions occurring after 1987, in which a public entity is a defendant [*see* Stats. 1987, ch. 1208, § 11]. However, if the defendant is also a health care provider as defined in *Civ. Code § 3333.1*, that statute controls as to that defendant [*Gov. Code § 985(l)*]. In addition, *Gov. Code § 985* does not apply to lien or subrogation rights provided in *Lab. Code §§ 3850-3864*(subrogation of employer) [*Gov. Code § 985(m)*].

For purposes of *Gov. Code § 985*, "collateral source payment" includes either of the following [*Gov. Code § 985(a)(1)*]:

- The direct provision of services prior to the commencement of trial to the plaintiff for the same injury or death by prepaid health maintenance organizations providing services to their members or by nonfederal publicly funded health service providers; or

- Monetary payments paid or obligated to be paid for services or benefits that were provided prior to the commencement of trial to or on behalf of the plaintiff for the same injury or death from a provider of collateral source payments described in *Gov. Code § 985(f)(1), (2)*.

"Plaintiff" includes, but is not limited to, a person or entity entitled to make a claim under *Prob. Code §§ 6400-6414* (intestate succession) for the collateral source benefits against the tortfeasor or alleged tortfeasor, and in the case of a minor, the minor and the minor's parent, legal guardian, or guardian ad litem [*Gov. Code § 985(a)(2)*].

For discussion of collateral source issues prior to and during trial, see Ch. 465, *Public Entities and Officers: Civil Claims Arising from Criminal Acts* .

[2] Motion to Reduce Judgment

After a verdict has been returned against a public entity that includes damages for which payment from a collateral source enumerated in *Gov. Code § 985(f)* has already been paid or is obligated to be paid for services or benefits that were provided prior to the commencement of trial, and if the total of the collateral source payments is greater than $5,000 (increased 5 percent compounded on January 1, 1989, and each January 1 thereafter), the public entity may request a post-trial hearing for a reduction of the judgment against the public entity for collateral source payments paid or obligated to be paid for services or benefits that were provided prior the commencement of trial. The motion must be noticed within the time set in *Code Civ. Proc. § 659* (motion for new trial). The hearing may be noticed with any motions pursuant to *Gov. Code §§ 962* (determination of methods to satisfy judgment) and 984 (installment payments) or pursuant to *Code Civ. Proc. § 659*. However, the hearing cannot occur until after the determination of any motions for a new trial, for judgment notwithstanding the verdict, for remittitur, for additur, and after any mandatory settlement conference pursuant to *Gov. Code § 962* [*Gov. Code § 985(b)*; *see Gov. Code § 985(k)* (Judicial Council to adopt rules regarding extension of time for filing notice of appeal to allow time for motion and hearing)].

[3] Notice to Collateral Source Provider Required

The public entity must give 20 days' notice to the provider of a collateral source payment of any post-trial settlement conference or hearing regarding collateral source payments under *Gov. Code § 985* [*Gov. Code § 985(e)*].

[4] Determination Regarding Liens and Subrogation Rights

At the hearing, the trial court must, in its discretion and on just terms, make a final determination regarding any pending lien and subrogation rights, and determine what portion of collateral source payments must be reimbursed from the judgment to the provider of a collateral source payment, must be deducted from the verdict, or must accrue to the benefit of the plaintiff [*Gov. Code § 985(f)*].

The determination is subject to *Gov. Code § 985(f)(1)* (mandatory reimbursement to Medi-Cal and other publicly funded sources with statutory lien rights) and *Gov. Code § 985(f)(2)* (discretionary reimbursement to private medical programs, health maintenance organizations, disability, unemployment insurance, private disability insurance, or other similar sources of compensation). The determination is also subject to the following adjustments [*Gov. Code § 985(f)(3)*]:

- If the plaintiff has been found partially at fault, the reimbursement or reduction is decreased by the same percentage as the entire judgment is reduced to take into account the plaintiff's comparative fault.

- The court must deduct from the reimbursement or reduction the amount of premiums the court determines were paid by or on behalf of the plaintiff to the provider of a collateral source payment.

- After making the two adjustments described in the first and second paragraphs above, the court must reduce that amount by a percentage equal to the percentage of the entire judgment that the plaintiff paid or owes for attorney's fees and costs and reasonable expenses incurred.

No provider of collateral source payments pursuant to *Gov. Code § 985* is entitled to recover any amount against the plaintiff, nor can it be subrogated to the rights of the plaintiff against a public entity defendant other than in the amount so determined by the court [*Gov. Code § 985(f)*].

[5] Limitations on Reduction of Verdict

The total dollar amount deducted from the verdict, paid to lienholders, or reimbursed to all collateral source providers, may not exceed one-half of the plaintiff's net recovery for all damages after deducting attorney's fees, medical services paid by the plaintiff, and litigation costs. However, the court may order no reimbursement or verdict reduction if either

would result in undue financial hardship on the person who suffered the injury [*Gov. Code § 985(g)*; *see, e.g., Garcia v. County of Sacramento (2002) 103 Cal. App. 4th 67, 73-74, 126 Cal. Rptr. 2d 465* (Medi-Cal lien properly denied because quadriplegic's recovery from county was insufficient to cover future medical expenses)].

[6] Percentage of Judgment Due Immediately

Fifty percent of any amount reimbursed pursuant to *Gov. Code § 985* is due immediately, unless otherwise ordered by the court. The court may order the remaining 50 percent to be paid in installments over a period of time to be determined by the court pursuant to *Gov. Code § 984*, not to exceed 10 years [*Gov. Code § 985(h)*].

[7] Claims With Multiple Defendants

In any case involving multiple defendants, a reduction pursuant to *Gov. Code § 985* must be proportional to the percentage of the judgment actually paid by the public entity, and it must satisfy the judgment with regard to the portion reduced so that no other judgment debtor is jointly liable for the portion of the judgment reduced thereby. If, after a hearing and determination pursuant to *Gov. Code § 985*, the public entity judgment debtor is required to satisfy a portion of a joint and several judgment beyond that public entity judgment debtor's several portion, due to the uncollectability of a joint tortfeasor's portion, the public entity may make a motion to reduce the additional portion in an amount proportional to the determination of the court [*Gov. Code § 985(i)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureJudgmentsRelief From JudgmentAdditurs & RemittitursRemittitursCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsEstate, Gift & Trust LawIntestacyGeneral OverviewGovernmentsState & Territorial GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsFinanceHealthcare LawActions Against FacilitiesGovernmental & Nonprofit LiabilityState, County & Municipal LiabilityHealthcare LawManaged HealthcareHealth Maintenance OrganizationsTortsDamagesCollateral Source RuleGeneral OverviewTortsDamagesCollateral Source RuleGovernment BenefitsTortsNegligenceDefensesComparative NegligenceMultiple PartiesContributionTortsPublic Entity LiabilityGeneral OverviewTortsWrongful Death & Survival ActionsGeneral Overview

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40-467 California Forms of Pleading and Practice--Annotated § 467.24

§ 467.24 Full Payment by Controller's Warrant

The State Controller must draw a warrant for the payment of any final judgment or settlement against the state whenever the Director of Finance certifies that a sufficient appropriation for the payment of that judgment or settlement exists. Claims arising out of the activities of the State Department of Transportation may be paid if either the Director of Transportation or the Director of Finance certifies that a sufficient appropriation for payment of the claim exists [*Gov. Code § 965.2*].

Claims on such judgments and settlements are exempt from the *Gov. Code § 925.6* requirement that the claim be audited in conformity with law before the Controller draws a warrant for it [*Gov. Code § 965.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsClaims By & Against

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40-467 California Forms of Pleading and Practice--Annotated § 467.25

§ 467.25 Periodic Payments

[1] Governing Law and Limitations

A judgment against a public entity may be ordered to be paid by periodic payments only pursuant to *Code Civ. Proc. § 667.7* (action against health care provider), *Gov. Code § 970.6* (installment payment of judgments against local public entities), or *Gov. Code § 984(d)* (installment payments if public entity is "not insured"), or by agreement of the parties [*Gov. Code § 984(c)*]. *Gov. Code § 984* does not apply to contribution and indemnity between tortfeasors [*Gov. Code § 984(h)*]. Nothing in *Gov. Code § 984* prevents the parties from agreeing to settle an action on any other terms [*Gov. Code § 984(f)*].

For discussion of *Code Civ. Proc. § 667.7*, see Ch. 415, *Physicians: Medical Malpractice* . For discussion of *Gov. Code § 970.6*, see *§ 467.43[2]*.

[2] Uninsured Public Entity

[a] Election of Periodic Payments

If, after making any deductions pursuant to *Gov. Code § 985* (collateral source payments), the judgment on a tort claims action based on acts or omissions occurring after 1987 against a public entity that is not insured is greater than $500,000 (increased to $550,000 on January 1, 1990, to $600,000 on January 1, 1992, to $650,000 on January 1, 1994, to $725,000 on January 1, 1996, and increased by five percent on January 1 of each year thereafter), the public entity may elect to pay the judgment in periodic payments [*Gov. Code § 984(d)*; Stats. 1987, ch. 1204, § 4; *see Gov. Code § 984(g)* (Judicial Council to adopt rules extending time for appeal notices to allow election and any hearing under *Gov. Code § 984(d)*)].

For purposes of *Gov. Code § 984*, "not insured" includes a public entity that has no liability insurance or is self-insured by itself or through an insurance pooling arrangement, a joint powers agreement, the Local Agency Self Insurance Authority, or any other similar arrangement [*Gov. Code § 984(a)*]. If a public entity has commercial insurance regarding

a portion of the judgment, *Gov. Code § 984* only applies to that portion of the judgment that is "not insured," as defined above [*Gov. Code § 984(b)*].

For discussion of installment payments regarding a local public entity, see *§ 467.43[2]*.

[b] Percentage of Judgment Payable Immediately

After any amounts reimbursed under *Gov. Code § 985*, the judgment debtor must pay 50 percent of the remainder immediately, and the remaining 50 percent over a period of time to be determined by the court, not to exceed the lesser of either 10 years or the length of the judgment creditor's remaining life expectancy at the time the judgment is entered [*Gov. Code § 984(d)*].

[c] Payment of Interest

Interest at the same rate as one-year United States Treasury bills as of January 1 each year accrues to the unpaid balance of the judgment. On each January 1 thereafter throughout the duration of the installment payments, the interest must be adjusted until the judgment is fully satisfied [*Gov. Code § 984(e)(2)*].

[d] Continuation of Payments

Throughout the term of any installment payments, until the judgment is fully satisfied, the public entity remains liable for all payments due on the judgment and interest [*Gov. Code § 984(e)(3)*]. The court retains jurisdiction to enforce, amend, modify, or approve settlement of installment payments in a just manner [*Gov. Code § 984(e)(4)*]. On motion by the judgment creditor, the court has the authority to accelerate the installment payments if it finds any unreasonable delay in, or failure to make, payments [*Gov. Code § 984(e)(4)*; *see § 467.82*].

Payments under *Gov. Code § 984* do not terminate on the judgment creditor's death [*Gov. Code § 984(e)(1)*].

[e] Modification of Payments Caused by Joint Tortfeasor's Inability to Pay

The court, on motion, may modify the installment payments consistent with *Civ. Code §§ 1431-1431.5* (several and joint liability) to account for the insolvency of, or uncollectability of amounts of the judgment owed by, joint tortfeasors. The defendant must bring a motion for that adjustment under *Code Civ. Proc. § 1010* (written notices) [*Gov. Code § 984(e)(5)*].

For discussion and forms relating to *Civ. Code §§ 1431-1431.5*, see *Ch. 300, Indemnity and Contribution, § 300.60* et seq. For discussion and forms relating to *Code Civ. Proc. § 1010*, see Ch. 372, *Motions and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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40-467 California Forms of Pleading and Practice--Annotated § 467.26

§ 467.26 Remedies to Compel Payment or Other Action

[1] Against State or State Employee

A writ of mandate is an appropriate remedy to compel the state, or an officer or employee of the state, to perform any act required by *Gov. Code § 965 et seq.* [*Gov. Code § 965.7(a)*; *see Straughter v. State of California (1980) 108 Cal. App. 3d 412, 416, 169 Cal. Rptr. 471]* . Moreover, a judgment creditor presumably may bring an action on a money judgment rendered against the state within the 10-year limitations period for enforcing such a judgment [*see Barkley v. City of Blue Lake (1993) 18 Cal. App. 4th 1745, 1750-1751, 23 Cal. Rptr. 2d 315* (trial court properly dismissed mandamus action against local public entity because 10-year period for enforcement had expired and judgment creditor failed to bring action to trial within five years after commencing action, but trial court erred in dismissing judgment creditor's action on money judgment against local public entity filed within 10 years after judgment became final)].

[2] Against Director of Finance or Director of Transportation

If any provision of *Gov. Code §§ 810-996.6* (claims and actions against public entities and public employees) requires a certificate of the Director of Finance or Director of Transportation that a sufficient appropriation exists for the payment of a claim, settlement, compromise, or judgment, or that a sufficient appropriation exists to provide an offset, a writ of mandate is an appropriate remedy to compel the Director of Finance or Director of Transportation to so certify, if a sufficient appropriation in fact exists for that purpose [*Gov. Code § 965.8*].

[3] Restriction on Compelling Legislative Action

Nothing in *Gov. Code § 810 et seq.* (claims and actions against public entities and public employees) affects the discretion of the legislature in determining whether or not to: (1) make an appropriation for the payment of, or to provide an offset for, a claim, compromise, settlement, or judgment; or (2) authorize such a payment or offset [*Gov. Code § 965.7(b)*]. This provision codified existing law and makes clear that a writ of mandate may not be used to compel the legislature to make an appropriation or to authorize a payment or offset [*see* Law Revision Commission comment to *Gov. Code § 965.7(b)*]. A court may, however, direct that invalid legislative restrictions on the expenditure

of funds appropriated by the legislature be disregarded [*see Mandel v. Myers (1981) 29 Cal. 3d 531, 539, 174 Cal. Rptr. 841, 629 P.2d 935* ; *Committee to Defend Reproductive Rights v. Cory (1982) 132 Cal. App. 3d 852, 856, 183 Cal. Rptr. 475* ; *Serrano v. Priest (1982) 131 Cal. App. 3d 188, 196, 182 Cal. Rptr. 387]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsFinanceInsurance LawBusiness InsuranceSelf-InsuranceGovernmental Agencies

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[Reserved]

§§ 467.27[Reserved]

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§ 467.40 Governing Law

The enforcement of judgments against a local public entity is governed by *Gov. Code §§ 970-971.2*, and the funding of judgments with bonds is governed by *Gov. Code §§ 975-978.8*. The authority of local public entities to procure insurance is contained in *Gov. Code §§ 989-991.2*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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40-467 California Forms of Pleading and Practice--Annotated § 467.41

§ 467.41 Definitions

"Local public entity" includes a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state, but does not include the Regents of the University of California and does not include the state or any office, officer, department, division, bureau, board, commission, or agency of the state, claims against which are paid by warrants drawn by the state Controller [*Gov. Code § 970(c)*].

"Judgment" means a final judgment for the payment of money rendered against a local public entity [*Gov. Code § 970(b)*].

"Fiscal year" means a year beginning on July 1 and ending on June 30, unless the local public entity has adopted a different fiscal year as authorized by law, in which case "fiscal year" means the fiscal year adopted by that local public entity [*Gov. Code § 970(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 467.42 Enforceability of Judgments

[1] Governing Law

A judgment, whether or not final, is not enforceable under the provisions of *Code Civ. Proc. §§ 680.010-694.090*, the Enforcement of Judgments Law, but is enforceable under *Gov. Code §§ 970-971.2* after it becomes final [*Gov. Code § 970.1(b)*].

[2] Period of Enforcement

A judgment is enforceable until 10 years after the time the judgment becomes final or, if the judgment is payable in installments, until 10 years after the final installment becomes due [*Gov. Code § 970.1(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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40-467 California Forms of Pleading and Practice--Annotated § 467.43

§ 467.43 Payment of Judgments

[1] Time and Source of Payments

Local public entities are required to pay judgments in the manner provided by *Gov. Code §§ 970-971.2* [*Gov. Code § 970.2*]. Unless the judgment is to be paid in installments [*see § 467.43[2]*], payment of a judgment with interest must be made by the local public entity's governing body, to the extent funds are available, in the fiscal year in which the judgment becomes final. Payment must be made out of any funds to the credit of the local public entity that are either: (1) unappropriated for any other purpose, unless the use of such funds is restricted by law or contract to other purposes; or (2) appropriated for the current fiscal year for the payment of judgments and not previously encumbered [*Gov. Code § 970.4*].

If the local public entity does not pay a judgment with interest during the fiscal year in which it becomes final and the judgment is not to be paid in installments, the governing body must pay the judgment with interest during the ensuing fiscal year immediately on obtaining sufficient funds for that purpose [*Gov. Code § 970.5*].

[2] Installment Payments

The court that enters the judgment must order that the governing body pay the judgment with interest in no more than 10 equal annual installments if both of the following conditions are satisfied [*Gov. Code § 970.6(a)*]:

- The governing body of the local public entity has adopted an ordinance or resolution finding that an unreasonable hardship will result unless the judgment is paid in installments; and

- The court, after hearing, has found that payment of the judgment in installments as ordered by the court is necessary to avoid an unreasonable hardship.

Each installment payment shall be of an equal amount, consisting of a portion of the principal of the judgment and the unpaid interest on the judgment to the date of the payment. The local public entity, in its discretion, may prepay any one

or more installments or any part of an installment [*Gov. Code § 970.6(b)*].

For discussion of installment payments on large tort judgments if the public entity is "not insured," see *§ 467.25[2]*.

[3] Funding Required

Each local public entity must in each fiscal year include in its budget a provision to provide funds in an amount sufficient to pay all judgments in accordance with *Gov. Code §§ 970-971.2* [*Gov. Code § 970.8(a)*].

If the revenue used for the maintenance and operation of a local public entity liable for a judgment (other than an entity created by an agreement described in *Gov. Code § 895*, relating to joint powers agreements and any other agreement under which a public entity undertakes to perform any function, service, or act with or for another public entity or its employee) is derived in whole or in part from appropriations of another local public entity, the other local public entity is required in each fiscal year toappropriate funds equal to its pro rata share of an amount sufficient to permit the local public entity liable for the judgment to pay the judgment in accordance with *Gov. Code §§ 970-971.2*. This amount must be paid to the local public entity liable for the judgment and must be used by that entity to satisfy the judgment. The pro rata share of the other local public entity for each judgment is an amount bearing the same proportion to the total amount of the judgment as the revenue derived from the other local public entity for maintenance and operation during the fiscal year in which the cause of action on the judgment accrued bears to the total revenues used for maintenance and operation during such fiscal year of the local public entity liable for the judgment. For this purpose, the other local public entity must include in its budget a provision to provide funds sufficient in amount to make the required appropriation and payment [*Gov. Code § 970.8(b)*].

[4] Application of Tax Limitations

Any limitation on the amount of (1) taxes, assessments, or rates and charges that may be levied or collected, (2) appropriations and payments that may be made, and (3) liability or indebtedness that may be incurred by a local public entity, contained in any other statute or in any charter or ordinance applies to the taxes, assessments, rates and charges, or appropriations levied, collected, or made to pay a judgment resulting from a discretionary act, but does not apply to pay a judgment resulting from a nondiscretionary act [*Gov. Code § 971(b)*]. A judgment resulting from a discretionary act is a judgment arising from a liability that the local public entity has discretion to incur or not to incur. The term includes a judgment rendered in an eminent domain proceeding and a judgment requiring specific performance of a contractual obligation or awarding damages for failure to perform a contractual obligation [*Gov. Code § 971(a)(1)*]. A judgment resulting from a nondiscretionary act is any other judgment and includes a judgment founded on tort or inverse condemnation liability [*Gov. Code § 971(a)(2)*].

Taxes levied to pay a judgment resulting from a nondiscretionary act are costs mandated by the courts for the purposes of *Rev. & Tax Code § 2271*, authorizing local agencies to levy a tax rate in addition to the maximum prescribed by *Rev. & Tax Code §§ 2201-2327* to pay certain mandated costs, including costs mandated by the courts [*Gov. Code § 971(c)*].

The limitations on a local government entity's right to tax and spend found in Cal. Const. arts. XIII A, XIII B, and XIII C, as well as the debt limitation found in *Cal. Const. art. XVI, § 18*, cannot be used to relieve a local public entity from the duty to pay a judgment, at least if the judgment is from an inverse condemnation action, the right to recover for which is also constitutionally based [*F & L Farm Co. v. City Council (1998) 65 Cal. App. 4th 1345, 1350-1355, 77 Cal. Rptr. 2d 360]* . Although in the opinion so holding, the court was faced only with the question of whether payment of a judgment based on inverse condemnation could be avoided, the court's conclusions that the constitutional provisions at issue were not intended to apply to obligations involuntarily imposed by law suggests that these constitutional provisions are insufficient grounds on which to seek to avoid the payment of tort judgments generally [*see F & L Farm Co. v. City Council (1998) 65 Cal. App. 4th 1345, 1350-1355, 77 Cal. Rptr. 2d 360]* . However, the California Supreme Court has disapproved this opinion to the extent that it holds that Cal. Const. art. XIII A does not

prohibit a county from levying property taxes in excess of 1 percent to pay a tort judgment. The Court held that the options before the court in *F&L Farm Co.* were not limited to letting the city either "walk away" from the judgment or raise extra money by levying property taxes in excess of the 1 percent limit established by Cal. Const. art. XIII A. The city had other options, such as accepting an offer to pay the judgments in installments pursuant to *Gov. Code § 970.6* or qualifying for bankruptcy protection [*Ventura Group Ventures, Inc. v. Ventura Port Dist. (2001) 24 Cal. 4th 1089, 1104, 104 Cal. Rptr. 2d 53, 16 P.3d 717]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 467.44 Judgments as Legal Investments or Security

All judgments for which a local public entity is liable are legal investments for all trust funds and for the funds of all insurance companies, banks (both commercial and savings), and trust companies, and for every other local public entity within California, to the same extent as bonds of the local public entity liable for the judgment [*Gov. Code § 971.2(a)*].

Money or funds that may by law be invested in or loaned on the security of bonds of a local public entity may be invested in or loaned on the security of a judgment for which the local public entity is liable. Whenever bonds of a local public entity may be used as security for the faithful performance or execution of any court or private trust or of any other act, a judgment for which the local public entity is liable may be so used [*Gov. Code § 971.2(b)*].

All judgments for which a local public entity is liable, to the same extent as bonds of the local public entity, are legal for use by any state or national bank in California as security for the deposit of funds of any local public entity within California [*Gov. Code § 971.2(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBonds, Guarantees & Letters of CreditGeneral OverviewCivil ProcedureJudgmentsGeneral Overview

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§ 467.45 Remedy for Noncompliance

A writ of mandate is an appropriate remedy to compel a local public entity to perform any act required by *Gov. Code §§ 970-971.2* [*Gov. Code § 970.2*]. A judgment creditor may bring an action on a judgment rendered against a local public entity within the 10-year limitations period for enforcing the judgment [*Barkley v. City of Blue Lake (1993) 18 Cal. App. 4th 1745, 1750-1751, 23 Cal. Rptr. 2d 315]* .

Legal Topics:

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

§§ 467.46[Reserved]

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Volume 40: Products Liability thru Public Entities and Officers-Chs. 460-469
Chapter 467 PUBLIC ENTITIES AND OFFICERS: ENFORCEMENT OF JUDGMENTS AGAINST PUBLIC ENTITIES
PART III. RESEARCH GUIDE

40-467 California Forms of Pleading and Practice--Annotated § 467.60

§ 467.60 State Constitution

Suits permitted to be brought against state in such manner and in such courts as directed by law. *Cal. Const. art. III, § 5*

Interest on judgments. *Cal. Const. art. XV, § 1*

Money permitted to be drawn from state treasury only through appropriation made by law and on state Controller's duly drawn warrant. *Cal. Const. art. XVI, § 7*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsClaims By & Against

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40-467 California Forms of Pleading and Practice--Annotated § 467.61

§ 467.61 State Statutes

Penalty imposed if state agency fails to pay contract claim. *Gov. Code § 927 et seq.*

Mandatory settlement conference regarding satisfaction of personal injury or wrongful death judgments in excess of $100,000. *Gov. Code § 962*

Payment of claims, settlements, and judgments against state. *Gov. Code §§ 965-965.9*

Payment of judgments against local public entities. *Gov. Code §§ 970-971.2*

Funding of judgments against local public entities with bonds. *Gov. Code §§ 975-978.8*

Installment payments if public entity is "not insured." *Gov. Code § 984*

Collateral source payments in actions for personal injury and wrongful death. *Gov. Code § 985*

Authority of local public entity to procure insurance. *Gov. Code §§ 989-991.2*

Authority of state to procure insurance against tort or inverse condemnation liability. *Gov. Code § 11007.4*

Authority of State Controller to draw warrants. *Gov. Code § 12440*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsGeneral OverviewCivil ProcedureEminent Domain ProceedingsState CondemnationsGovernmentsLocal GovernmentsFinanceGovernmentsState & Territorial GovernmentsClaims By &

AgainstGovernmentsState & Territorial GovernmentsEmployees & OfficialsInsurance LawBusiness InsuranceSelf-InsuranceGovernmental AgenciesPublic Contracts LawDispute ResolutionGeneral OverviewReal Property LawInverse CondemnationGeneral OverviewTortsDamagesCollateral Source RuleGeneral OverviewTortsProcedureSettlementsGeneral OverviewTortsWrongful Death & Survival ActionsGeneral Overview

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40-467 California Forms of Pleading and Practice--Annotated § 467.62

§ 467.62 Decisions

[1] Compelling Action

State official's determination whether necessary funds are available to pay tort judgment against state or state agency and, if so, appropriate certification to that effect are ministerial duties enforceable by mandate. *Straughter v. State of California (1980) 108 Cal. App. 3d 412, 416, 169 Cal. Rptr. 471*

Local public entity required to pay judgments in tort and inverse condemnation against it; mandate is appropriate remedy to compel it to do so. *Galli v. State of California (1979) 98 Cal. App. 3d 662, 676, 159 Cal. Rptr. 721* (construing *Gov. Code §§ 970* (prior to 1981 amendment extending coverage to any final money judgment), 970.2)

Proceeding in traditional mandamus to compel state official to perform mandatory duty is not action against state for money, even though result compels public official to release money wrongfully detained. *County of Sacramento v. Lackner (1979) 97 Cal. App. 3d 576, 587, 159 Cal. Rptr. 1*

[2] Interest on Judgments Against State

Cal. Const. art. XV, § 1, relating to interest on judgments rendered in California courts, permits recovery of interest on judgments against state and its political subdivisions. *Harland v. State of California (1979) 99 Cal. App. 3d 839, 842, 160 Cal. Rptr. 613*

Cal. Const. art. III, § 5, providing that suits may be brought against state in such manner and in such courts as shall be directed by law, does not empower legislature to immunize state, if it has been validly sued and judgment against it sustained, from general obligation for interest on judgment pursuant to *Cal. Const. art. XV, § 1*. *Harland v. State of California (1979) 99 Cal. App. 3d 839, 845, 160 Cal. Rptr. 613*

Interest on judgment not awarded as penalty for nonpayment, but because party who retains money has its use and

benefit while party entitled to money has been deprived of opportunity to use it. *Harland v. State of California (1979) 99 Cal. App. 3d 839, 847, 160 Cal. Rptr. 613*

[3] Separation of Powers Doctrine

Separation of powers doctrine (*Cal. Const. art. III, § 3*) does not preclude judiciary from decreeing that funds appropriated by legislature must be paid without regard to improper or invalid legislative restriction if, in absence of such invalid restriction, appropriated funds are reasonably available for expenditures in question. *Mandel v. Myers (1981) 29 Cal. 3d 531, 542, 174 Cal. Rptr. 841, 629 P.2d 935* (payment ordered under private attorney general theory out of funds appropriated for Department of Health Services' operating expenses and equipment); *see Serrano v. Priest (1982) 131 Cal. App. 3d 188, 201, 182 Cal. Rptr. 387* (invalidating legislative restrictions in Budget Act resting on legislative readjudication of merits of final court judgment awarding attorney fees)

Cal. Const. art. VI, § 1, assigns resolution of specific controversies to judicial branch of government and provides legislature with no authority to set itself above judiciary by discarding outcome or readjudicating merits of particular judicial proceedings; legislature lacks constitutional authority to readjudicate or set aside final court judgments on case-by-case basis. *Mandel v. Myers (1981) 29 Cal. 3d 531, 547, 174 Cal. Rptr. 841, 629 P.2d 935* ; *Serrano v. Priest (1982) 131 Cal. App. 3d 188, 201, 182 Cal. Rptr. 387*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureEminent Domain ProceedingsState CondemnationsConstitutional LawSeparation of PowersGovernmentsState & Territorial GovernmentsClaims By & AgainstReal Property LawInverse CondemnationRemediesTortsPublic Entity LiabilityLiabilityGeneral Overview

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40-467 California Forms of Pleading and Practice--Annotated § 467.63

§ 467.63 Text References

California Government Tort Liability Practice (Cal CEB 1980), § 5.80

Witkin, California Procedure (4th ed. 1996), Vol 8, *Enforcement of Judgment*, §§ 53, 400, 401

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsClaims By & Against

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40-467 California Forms of Pleading and Practice--Annotated §§ 467.64through 467.79

[Reserved]

§§ 467.64[Reserved]

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PART IV. FORMS

40-467 California Forms of Pleading and Practice--Annotated § 467.80

§ 467.80 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Compel State Official or Employee to Perform Statutory Duty Regarding Payment or Offset of Claim, Settlement, Compromise, or Judgment Against State or State Agency [Gov. Code §§ 965.7(a), 965.8]

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Compel State Official or Employee to Perform Statutory Duty Regarding Payment or Offset of Claim, Settlement, Compromise, or Judgment Against State or State Agency [Gov. Code §§ 965.7(a), 965.8]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Petitioner,	)	
vs.	)	NO. _____
_____ [*name and official title*],	)	PETITION FOR WRIT OF MANDATE TO COMPEL RESPONDENT TO _____ [*e.g.*, CERTIFY THAT SUFFICIENT APPROPRIATION EXISTS TO _____ (PAY *or* OFFSET) TORT _____ (CLAIM *or* SETTLEMENT *or* COMPROMISE *or* JUDGMENT) AGAINST _____ (STATE *or* name of state agency)]
Respondent.	)	
	)	

_____

1. Respondent _____[*name*] is _____[*specify, e.g.*, the duly appointed, qualified, and acting Director of Finance of the State of California].

2. _____ [*Specify basis of state's or state agency's liability, e.g.*, On or about _____ (*date*), petitioner recovered a judgment against the State of California in an action entitled _____ (*name of petitioner*) vs. The State of California, No. _____, in the _____ Court of

California, County of _____]. The action arose out of _____ [*specify, e.g.,* a collision between a car owned and operated by petitioner and a car, license number _____, owned by the State of California and operated by _____ (*name*), an employee of the State of California who was at the time of the collision acting in the course and scope of (his *or* her) employment]. A certified copy of the judgment is attached hereto as Exhibit A and made a part hereof.

3. _____ [*Specify satisfaction of any conditions precedent to respondent's duty to perform, e.g.,* A sufficient appropriation for the _____ (payment *or* offset) of this _____ (claim *or* settlement *or* compromise *or* judgment) exists in that in the Budget Act of _____ (*year*) the legislature expressly appropriated the sum of $ _____ for _____ (payment *or* to provide for offsets) of any and all tort _____ (claims *or* settlements *or* compromises *or* judgments) against the state and there remains in that fund the unencumbered sum of $ _____, which is more than enough to _____ (pay *or* provide for an offset of) the _____ (claim *or* settlement *or* compromise *or* judgment with interest) in full].

4. Under the provisions of Sections _____[965(a) *or* 965.6(b) *or* other section] and _____[965.7(a) *or* 965.8] of the Government Code, respondent is expressly required to _____ [*specify action to be compelled by mandate, e.g.,* certify to the _____ (State Board of Control *or* Controller of the State of California) that a sufficient appropriation exists for the _____ (payment *or* offset) of this _____ (claim *or* settlement *or* compromise *or* judgment with interest), if a sufficient appropriation does in fact exist for such purpose].

5. On or about _____[*date*], [and on numerous occasions thereafter to and including _____ (*date*)] petitioner requested respondent to _____ [*specify action to be compelled by mandate, e.g.,* certify to the _____ (State Board of Control *or* Controller of the State of California) that an appropriation having sufficient unencumbered funds for the _____ (payment *or* offset) of the _____ (claim *or* settlement *or* compromise *or* judgment with interest) exists], but respondent has failed and refused, and continues to fail and refuse, to do so.

6. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, or any remedy other than this proceeding, which is expressly authorized by the provisions of Section _____[965.7(a) *or* 965.8] of the Government Code.

WHEREFORE, petitioner prays that:

1. The court issue an alternative writ of mandate commanding respondent to _____ [*specify, e.g.,* certify to the _____ (State Board of Control *or* Controller of the State of California) the existence of an appropriation with unencumbered funds sufficient to _____ (pay *or* offset) the _____ (claim *or* settlement *or* compromise *or* judgment with interest)] or show cause before this court at a time specified by the court why [he *or*she] has not done so.

2. That on the return of the alternative writ and the hearing of this petition, the court issue its peremptory writ of mandate commanding respondent to _____ [*specify, e.g.,* certify to the _____ (State Board of Control *or* Controller of the State of California) the existence of an appropriation with unencumbered funds sufficient to _____ (pay *or* offset) the _____ (claim *or* settlement *or* compromise *or* judgment with interest)].

3. For costs of this proceeding and for such other and further relief as the court deems just and proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

VERIFICATION

I, _____[*name*], am the [*attorney for*] petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

[2] Use of Form

This form of petition for writ of mandate may be used to compel a public entity, officer, or employee to perform a statutory duty relating to the payment or offset of a claim, settlement, compromise, or judgment in favor of petitioner against the state or a state agency [*see Gov. Code §§ 965.7(a), 965.8*].

[3] Allegations

This form alleges:

- The respondent's name and, if the respondent is an officer or employee of a public entity, the respondent's official title or capacity (Paragraph 1) [*see Gov. Code §§ 965.7(a), 965.8*];

- The basis of the liability of the state or state agency (the nature of the claim, settlement, compromise, or judgment of which payment or an offset is sought) (Paragraph 2) [*see Gov. Code §§ 965(a), 965.6(b)*];

- The satisfaction of any conditions precedent to respondent's duty to perform (for example, the existence of an appropriation with sufficient unencumbered funds to pay the claim, settlement, compromise, or judgment) (Paragraph 3) [*see Gov. Code §§ 965, 965.6*];

- The existence of respondent's duty (Paragraph 4); and

- That petitioner has requested respondent to perform the duty and that respondent has failed or refused to do so (Paragraph 5) [*see Gov. Code §§ 965.7(a), 965.8*].

In addition, the petition should allege the absence of a plain, speedy, and adequate remedy in the ordinary course of law and that a writ of mandate is authorized (Paragraph 6) [*see Code Civ. Proc. § 1086*; *Gov. Code §§ 965.7(a), 965.8*].

[4] Verification

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*].

[5] Accompanying Papers

[a] Proof of Service

Proof of service on each respondent and real party in interest of a copy of a petition that seeks an alternative writ must accompany the petition when it is offered for filing, unless the court, in its discretion and for good cause, has granted the application for the writ ex parte [*Code Civ. Proc. § 1107*; for a discussion of serving the petition, *see* Ch. 358, *Mandate and Prohibition*].

If no alternative writ is sought, proof of service of a copy of the petition need not accompany the application, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

[b] Points and Authorities

This petition should be accompanied by a memorandum [*see* Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(2), 3.1113(a) (petition filed in superior court), 8.490 (petition filed as original proceeding in reviewing court)].

[6] Cross References

For alternative forms of petitions for writ of mandate, including petitions originally filed in a court of appeal or the Supreme Court, a form of alternative writ, and related forms, see Ch. 358, *Mandate and Prohibition*

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40-467 California Forms of Pleading and Practice--Annotated § 467.81

§ 467.81 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Compel Local Public Entity to Perform Statutory Duty Regarding Payment of Judgment [Gov. Code § 970.2]

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Compel Local Public Entity to Perform Statutory Duty Regarding Payment of Judgment [Gov. Code § 970.2]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name and official title*],	)	PETITION FOR WRIT OF MANDATE TO COMPEL RESPONDENT TO _____ [*specify statutory duty, e.g.,* PAY JUDGMENT AGAINST _____ (*name of local entity*)]
Respondent.	)	
	)	
	)	

_____

1. Respondent _____[*name*] is _____ [*specify, e.g.,* the duly _____ (elected *or* appointed), qualified, and acting _____ (*specify governing body of local public entity, e.g.,* Board of Supervisors of _____ County,] California.

2. _____ [*Identify judgment entered and nature of case, e.g.,* On or about _____ (*date*), petitioner recovered a judgment against the _____ (*name of local public entity*) in an action entitled _____ (*name of petitioner*) vs. _____ (*name of local public entity*), No. _____, in the _____ Court of California, County of _____. The action arose out of _____ (*specify, e.g.,* a collision between a car owned and operated by petitioner and a car, license number _____, owned by the _____[*name of local public entity*] and

operated by _____[*name*], an employee of the _____[*name of local public entity*], who was at the time of the collision acting in the course and scope of [his *or* her] employment). The judgment became final on _____ (*date*). A certified copy of the judgment is attached hereto as Exhibit A and made a part hereof].

3. _____ [*Specify satisfaction of any conditions precedent to respondent's duty to perform, e.g.,* The judgment did not provide for installment payments. At the time it became final as hereinabove alleged, there existed, and there now exist, funds to the credit of the _____ (*name of local public entity*) that are not restricted by law or contract to other purposes and that are unappropriated for any other purposes, which are more than enough to pay the judgment with interest in full].

4. Under the provisions of Section _____[*specify code section relied on, e.g., 970.4 of the Government Code*], respondent is expressly required to _____ [*specify action to be compelled by mandate, e.g.,* pay, to the extent funds are available in the fiscal year in which it becomes final any judgment, with interest thereon, out of any funds to the credit of the _____ (*name of local public entity*) that are unappropriated for any other purpose unless the use of such funds is restricted by law or contract to other purposes].

5. On or about _____[*date*] [and on numerous occasions thereafter to and including _____ (*date*)], petitioner requested respondent to _____[*specify action to be compelled by mandate, e.g.,* pay the judgment with interest], but respondent has failed and refused, and continues to fail and refuse, to do so.

6. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, or any remedy other than this proceeding, which is expressly authorized by the provisions of *Section 970.2 of the Government Code*.

WHEREFORE, petitioner prays that:

1. The court issue an alternative writ of mandate commanding respondent to _____[*specify, e.g.,* pay the judgment with interest] or show cause before this court at a time specified by the court why it has not done so.

2. On the return of the alternative writ and the hearing of this petition, the court issue its peremptory writ of mandate commanding respondent to _____ [*specify, e.g.,* pay the _____ judgment with interest].

3. For costs of this proceeding and for such other and further relief as the court deems just and proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[*Verification. See § 467.80* .]

[2] Use of Form

This form may be used to compel a local public entity to perform a statutory duty relating to the payment of a judgment with interest against it in favor of petitioner [*see Gov. Code § 970.2*].

[3] Allegations

This form of petition alleges:

- The respondent's name, showing that it is the governing body of the local public entity (Paragraph 1) [*see Gov. Code §§ 970.4, 970.5, 970.6, 970.8*];

- The basis of the local public entity's liability (the judgment requires the payment of money and the date the judgment became final) (Paragraph 2) [*see Gov. Code § 970.4*];

- The satisfaction of any conditions precedent to respondent's duty to perform (for example, the existence in the fiscal year in which the judgment became final of sufficient unappropriated funds, the use of which is not restricted by law or contract to other purposes, or funds appropriated for the current fiscal year for the payment of judgments and not previously encumbered) (Paragraph 3) [*see Gov. Code § 970.4*];

- The existence of respondent's duty (Paragraph 4); and

- That petitioner has requested respondent to perform the duty, and respondent has failed or refused to do so (Paragraph 5) [*see Gov. Code §§ 970.4-970.6, 970.8*].

In addition, the petition should allege the absence of a plain, speedy, and adequate remedy in the ordinary course of law and that a writ of mandate is authorized (Paragraph 6) [*see Code Civ. Proc. § 1086*; *Gov. Code § 970.2*].

[4] Verification

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*].

[5] Accompanying Papers

[a] Proof of Service

Proof of service on each respondent and real party in interest of a copy of a petition that seeks an alternative writ must accompany the petition if it is offered for filing, unless the court, in its discretion and for good cause, has granted the application for the writ ex parte [*Code Civ. Proc. § 1107*; for a discussion of serving the petition, *see* Ch. 358, *Mandate and Prohibition*].

If no alternative writ is sought, proof of service of a copy of the petition need not accompany the application, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

[b] Points and Authorities

This petition should be accompanied by a memorandum [*see* Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(2), 3.1113(a) (petition filed in superior court), 8.490 (petition filed as original proceeding in reviewing court)].

[6] Cross References

For a form to use to compel the state or a state agency to perform duties arising from a judgment, see *§ 467.80*

For forms of allegations as to the capacity of a municipality, see Ch. 20, *Allegations Commonly Used*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporate NamesRequirementsCivil ProcedureParties Real Parties in InterestGeneral OverviewCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusContracts LawContract Conditions & ProvisionsConditions PrecedentGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsDuties & PowersGovernmentsLocal GovernmentsFinanceTortsTransportation TortsMotor VehiclesPersonal Vehicles

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40-467 California Forms of Pleading and Practice--Annotated § 467.82

§ 467.82 Proceedings to Accelerate Installment Payments on Unreasonable Delay in or Failure to Make Payments [Gov. Code § 984(e)(4)]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Accelerate Installment Payments on Unreasonable Delay in or Failure to Make Payments [Gov. Code § 984(e)(4)]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO AC-
vs.	)	CELERATE INSTALLMENT PAYMENTS, SUP-
_____ [*name*],	)	PORTING DECLARATION OF
Defendant.	)	_____ [*name*], AND MEMOR-
	)	ANDUM OF POINTS AND AUTHORITIES
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		To defendant _____ [*name*] and to its attorney of record:

_____

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], the plaintiff will, and hereby does, move for an order to accelerate installment payments pursuant to *Government Code Section 984(e)(4)*. The

motion will be made on the ground that the defendant has _____[unreasonably delayed in making *or* failed to make] payments as ordered by this court on _____[*date*].

The motion will be based on this notice of motion, on the declaration(s) of _____[*name(s)*] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

SUPPORTING DECLARATION OF _____[*name*]

I, _____[*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for the plaintiff _____ (*name*) *or* other statement as appropriate].

2. On _____[*date*], this court ordered the defendant _____[*name*] to pay the plaintiff _____[*name*] the amount of $ _____, payable in periodic payments of $ _____ beginning on _____[*date*], and continuing _____[*specify frequency of payments, e.g.,* monthly thereafter on the first day of each month] until the entire amount is satisfied in full.

3. Since this court's order of _____[*date*], the defendant _____[*name*] has _____ [*set forth facts describing defendant's unreasonable delay in making, or failure to make, payments, e.g.,* made the first payment as ordered but has failed to pay the plaintiff _____ (*name*) any further amount whatsoever, and is now _____ (*specify number*) months in arrears in the payments].

[4. _____ (*Describe any unsuccessful attempts to obtain payment*).]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion*.]

[2] Use of Form

This notice of motion and supporting declaration is for use by a plaintiff in an action against a public entity, in which a

judgment for periodic payments was entered, to accelerate installment payments if the defendant has unreasonably delayed in making, or has failed to make, payments [*see Gov. Code § 984(e)(4)*]. The motion should be filed in the court that ordered the installment payments [*see Gov. Code § 984(e)(4)* (court retains jurisdiction to enforce, amend, modify, or approve settlement of installment payments)].

A memorandum of points and authorities is required to be served and filed with the form [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[3] Installment Payments on Judgment Against Public Entity

A judgment against a public entity may be ordered to be paid by periodic payments only if ordered under *Code Civ. Proc. § 667.7* or Gov. Code§ 970.6, if the public entity has made an election under *Gov. Code § 984(d)*, or if the parties have agreed to it [*see § 467.25*].

[4] Cross References

For general discussion of law and motion procedure and general forms of orders, see Ch. 372, *Motions and Orders*

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Chapter 468 PUBLIC ENTITIES AND OFFICERS: FALSE CLAIMS ACTIONS

40-468 California Forms of Pleading and Practice--Annotated 468.syn

§ 468.syn Synopsis to Chapter 468: PUBLIC ENTITIES AND OFFICERS: FALSE CLAIMS ACTIONS

§ 468.01 Scope of Chapter

§§ 468.02-468.19 [Reserved]

§ 468.20 Governing Law

§ 468.21 Scope of False Claims Act

[1] Purpose and Construction of Act

[2] Statutory Definitions

[3] Conduct Prohibited by False Claims Act

[4] Excluded Claims

[a] Amount in Controversy Less Than $500

[b] Claim Pursuant to California Tort Claims Act

[c] Claim Pursuant to Workers' Compensation Law

[d] Claim Pursuant to Tax Law

[e] Substance of Claim Known to Government Entity When Action Brought

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§ 468.01 Scope of Chapter

This chapter discusses civil liability under *Gov. Code §§ 12650-12656* for presenting a false claim for money, property, or services to a governmental entity or representative [*see § 468.20* et seq.]. This chapter contains a form of complaint [*see § 468.60*] for use by a private individual who seeks to prosecute a civil action on behalf of a government entity against a defendant who has made a false claim.

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[Reserved]

§§ 468.02[Reserved]

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§ 468.20 Governing Law

Damages actions for false claims made against a government entity are generally governed by *Gov. Code §§ 12650-12656*. *Gov. Code §§ 12651* and *12652* authorize treble damages actions by government entities and private parties against defendants that file false claims. These provisions are not exclusive, however, and a government entity is free to seek any other remedies provided for in any other law or available under common law [*see Gov. Code § 12655(a)*]. Furthermore, these provisions do not cover all types of false claims [*see § 468.21[4]*].

Damages actions for fraud and deceit are governed by *Civ. Code §§ 1709* and *1710*. A civil action may be brought under these provisions against the maker of a fraudulent claim against a governmental entity, in appropriate circumstances. For further discussion of the statutes and related forms, see Ch. 269, *Fraud and Deceit* .

The federal False Claims Act is contained in *31 U.S.C.S. §§ 3729-3733*, but discussion of the federal act is beyond the scope of this chapter.

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§ 468.21 Scope of False Claims Act

[1] Purpose and Construction of Act

The apparent legislative purposes of *Gov. Code §§ 12650-12656* are to discourage the filing of fraudulent claims against government entities, to promote the discovery of fraudulent claims, and to penalize persons who file fraudulent claims [*see Gov. Code §§ 12650-12656*].

The provisions in *Gov. Code § 12650-12656* must be liberally construed and applied to promote the public interest [*Gov. Code § 12655(c)*]. If any section of these provisions or the application of that section to any person or circumstance is held to be unconstitutional, the remainder of the sections and the application of those sections to other persons or circumstances are unaffected [*Gov. Code § 12655(b)*].

[2] Statutory Definitions

For purposes of the False Claims Act, a "claim" includes any request or demand, whether under a contract or otherwise, for money, property, or services, and whether or not the state or a political subdivision has title to the money, property, or services that is either of the following [*Gov. Code § 12650 (b)(1)*]:

1. Presented to an officer, employee, or agent of the state or a political subdivision; or

2. Made to a contractor, grantee, or other recipient, if the money, property, or service is to be spent or used on a state or any political subdivision program or interest, and if the state or political subdivision meets either of the following conditions:

a. Provides or has provided any portion of the money, property, or service requested or demanded; or

b. Reimburses the contractor, grantee, or other recipient for any portion of the money, property, or service that is requested or demanded.

A "claim" does not include requests or demands for money, property, or services that the state or political subdivision has paid to an individual as compensation for employment with the state or political subdivision or as an income subsidy with no restrictions on that individual's use of the money, property, or services [*Gov. Code § 12650 (b)(2)*].

Under the Act, "state funds" refers to funds that are the subject of a claim presented to an officer, employee, or agent of the state or where the state provides, has provided, or will reimburse any portion of the money, property, or service requested or demanded [*Gov. Code § 12650(b)(9)*]. However, the "state funds" necessary to state a claim under the False Claims Act include only funds that are part of the public treasury, the diminution of which would harm taxpayers. For example, funds held in trust for private parties, even if held by a government entity, do not constitute state funds for this purpose [*State v. Altus Fin. (2005) 36 Cal. 4th 1284, 1302, 32 Cal. Rptr. 3d 498, 116 P.3d 1175* (assets of insolvent insurer held by Insurance Commissioner in trust for creditors of insurer were not state funds)]. Under the Act, "political subdivision funds" means funds that are the subject of a claim presented to an officer, employee, or agent of a political subdivision or where the political subdivision provides, has provided, or will reimburse any portion of the money, property, or service requested or demanded [*Gov. Code § 12650(b)(6)*].

A showing that the defendant's fraudulent conduct was "knowing" is generally a key element of actions brought under *Gov. Code § 12652* [*see Gov. Code § 12651(a)(1), (2), (4)-(7)*]. As used in *Gov. Code §§ 12650-12656*, "knowing" and "knowingly" mean that a person, with respect to information, has actual knowledge of the information, acts in deliberate ignorance of the truth or falsity of the information, or acts in reckless disregard of the truth or falsity of the information [*Gov. Code § 12650(b)(3)*]. Specific intent to defraud is not required [*Gov. Code § 12650(b)(3)*; *County of Kern v. Sparks (2007) 149 Cal. App. 4th 11, 19, 56 Cal. Rptr. 3d 551*].

For purposes of the Act, "political subdivision" includes any city, city and county, county, tax or assessment district, or other legally authorized local government entity with jurisdictional boundaries [*Gov. Code § 12650(b)(5)*].

"Prosecuting authority" refers to the county counsel, city attorney, or other local government official charged with investigating, filing, and conducting civil legal proceedings on behalf of, or in the name of, a particular political subdivision [*Gov. Code § 12650(b)(7)*].

For purposes of the Act, "person" includes any natural person, corporation, firm, association, organization, partnership, limited liability company, business, or trust [*Gov. Code § 12650(b)(8)*].

The statutory definition of "person" does not encompass a state or local government entity [Wells v. One2One *Learning Foundation (2006) 39 Cal. 4th 1164, 1196-1197, 48 Cal. Rptr. 3d 108, 141 P.3d 225]* . Therefore, a public entity may not be sued under the Act [Wells v. One2One *Learning Foundation (2006) 39 Cal. 4th 1164, 1196-1197, 48 Cal. Rptr. 3d 108, 141 P.3d 225]* , nor may a public entity bring an action as a qui tam plaintiff on behalf of another government agency [*State ex rel. Harris v. PricewaterhouseCoopers, LLP (2006) 39 Cal. 4th 1220, 1238, 48 Cal. Rptr. 3d 144, 141 P.3d 256* ; *see § 468.22[1]*]. Similarly, because a public agency is required to defend and indemnify a public employee against claims arising out of an act or omission occurring within the scope of his or her employment [*see Gov. Code § 825*], a public employee may not be sued under the Act for conduct taken within the scope of employment, as such a suit would be the equivalent of suing the public entity itself [*State of California ex rel. Dockstader v. Hamby (2008) 162 Cal. App. 4th 480, 484, 75 Cal. Rptr. 3d 567*].

Private entities that engage in traditional public entity activities, and are perhaps subject to some public entity oversight, may be sued under the Act if they otherwise meet the statutory definition of "person" [*see* Wells v. One2One *Learning Foundation (2006) 39 Cal. 4th 1164, 1200-1201, 48 Cal. Rptr. 3d 108, 141 P.3d 225* (charter schools could be sued under Act)].

[3] Conduct Prohibited by False Claims Act

Any of the following acts may be the basis for an award of treble damages and civil penalties under *Gov. Code § 12651* [*Gov. Code § 12651(a)*; *see § 468.21[5]*]:

- Knowingly presenting or causing to be presented a false or fraudulent claim for payment or approval;

- Knowingly making, using, or causing to be made or used a false record or statement material to a false or fraudulent claim [see also *Gov. Code § 12650(b)(4)* ("material" means having natural tendency to influence, or be capable of influencing, payment or receipt or money, property, or services)];

- Conspiring to commit a violation of the False Claims Act;

- Having possession, custody, or control of public property or money used or to be used by the state or by any political subdivision and knowingly delivering or causing to be delivered less property than all of that property;

- Having authorization to make or deliver a document certifying receipt of property used or to be used by the state or by any political subdivision and knowingly making or delivering a receipt that falsely represents the property used or to be used;

- Knowingly buying, or receiving as a pledge of an obligation or debt, public property from any person who lawfully may not sell or pledge the property;

- Knowingly making, using, or causing to be made or used a false record or statement material to an obligation to pay or transmit money or property to the state or to any political subdivision, or knowingly concealing or knowingly and improperly avoiding, or decreasing an obligation to pay or transmit money or property to the state or any political subdivision [*see State ex rel. Bowen v. Bank of Am. Corp. (2005) 126 Cal. App. 4th 225, 240-241, 23 Cal. Rptr. 3d 746* (obligation to pay must be certain and liquidated at time of concealment to recover for false claim)]; and

- Being a beneficiary of an inadvertent submission of a false claim, subsequently discovering the falsity of the claim, and failing to disclose the false claim to the state or the political subdivision within a reasonable time after discovery. A beneficiary under this provision may include a third party such as a successor or parent company, and the submission may be intentional rather than merely inadvertent [*Armenta ex rel. City of Burbank v. Mueller Co. (2006) 142 Cal. App. 4th 636, 645-649, 47 Cal. Rptr. 3d 832]* .

The use of a "false record or statement" does not itself constitute the making of a false claim, and a civil penalty is available only for the making of each false claim [*Fassberg Construction Co. v. Housing Authority of Los Angeles (2007) 152 Cal. App. 4th 720, 736-737, 60 Cal. Rptr. 3d 375* ; *see* [5], *below*]. In one case, for example, while a general contractor made a "claim" each time it submitted a request for a progress payment to a housing authority with which it had a construction contract, the submission of weekly payroll reports in support of those requests for payment did not constitute individual claims [*Fassberg Construction Co. v. Housing Authority of Los Angeles (2007) 152 Cal. App. 4th 720, 739, 60 Cal. Rptr. 3d 375]* . Similarly, requests to modify the construction contract were not actionable claims, although any subsequent request for payment based on a falsely documented change request would be a false claim [*Fassberg Construction Co. v. Housing Authority of Los Angeles (2007) 152 Cal. App. 4th 720, 741-742, 60 Cal. Rptr. 3d 375]* .

A fraudulently induced contract may create liability for a false claim if the contract later results in a payment by the government, regardless of whether the payment is made to the wrongdoer or to another party [*see City of Pomona v. Superior Court (2001) 89 Cal. App. 4th 793, 803, 107 Cal. Rptr. 2d 710* ; *see also County of Kern v. Sparks (2007)*

149 Cal. App. 4th 11, 17-18, 56 Cal. Rptr. 3d 551 (sheriff authorized special employee compensation without actual authority)]. In one case, for example, a city stated a cause of action by alleging that a manufacturer of pipes used to carry drinking water provided catalogues to its distributors, knowing that the claims made in the catalogues as to the metal content and durability of its pipes were false. Although the city paid under the purchase contract to a distributor, rather than the pipe manufacturer, the manufacturer could be liable because it provided the catalogues, knowing that they would be relied on and induce contracts for the purchase of its products [*City of Pomona v. Superior Court (2001) 89 Cal. App. 4th 793, 803-805, 107 Cal. Rptr. 2d 710]* .

A request for payment made to a public entity under a contract to provide goods or services impliedly constitutes a certification that the vendor has complied with its express contractual requirements, and a request for payment made without notifying the government entity that the vendor is not in compliance with the material terms of the contract may be the basis of a claim under *Gov. Code § 12651* [*San Francisco Unified School Dist. ex rel. Contreras v. Laidlaw Transit, Inc. (2010) 182 Cal. App. 4th 438, 453, 106 Cal. Rptr. 3d 84]* . While such a claim may be defeated with evidence that the governmental entity would have paid the claim even with knowledge of the contractual noncompliance, allegations that an implied certification of compliance was false and had a natural tendency to influence the public agency's decision to pay are sufficient to survive a demurrer [*San Francisco Unified School Dist. ex rel. Contreras v. Laidlaw Transit, Inc. (2010) 182 Cal. App. 4th 438, 456-457, 106 Cal. Rptr. 3d 84]* .

[4] Excluded Claims

[a] Amount in Controversy Less Than $500

The false claims laws do not apply to any controversy involving an amount of less than $500 in value. For purposes of the rule, "controversy" means any one or more false claims submitted by the same person in violation of *Gov. Code §§ 12650-12656* [*Gov. Code § 12651(d)*].

[b] Claim Pursuant to California Tort Claims Act

The false claims laws do not apply if the defendant's fraudulent act involves a claim, record, or statement made pursuant to the California Tort Claims Act (*Gov. Code §§ 810-996.6*) [*Gov. Code § 12651(e)*; *but see* Code *Civ. Proc. § 1038* (allowing court to award defense costs for action brought in bad faith under Tort Claims Act)]. For further discussion of the act, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[c] Claim Pursuant to Workers' Compensation Law

The false claims laws do not apply if the defendant's fraudulent act involves a claim made under the law of workers' compensation and insurance (*Lab. Code § 3200 et seq.*) [*Gov. Code § 12651(e)*]. For general discussion of workers' compensation claims, see Ch. 577, *Workers' Compensation* .

[d] Claim Pursuant to Tax Law

The false claims laws do not apply if the defendant's fraudulent act involves a claim made under the Revenue and Taxation Code [*Gov. Code § 12651(f)*]. For general discussion of tax claims, see Ch. 540, *Taxes and Assessments* .

[e] Substance of Claim Known to Government Entity When Action Brought

No court has jurisdiction over an action for fraudulent claims initiated by a qui tam plaintiff [*see § 468.22[1]*] against a member of the State Senate or Assembly, a member of the state judiciary, an elected official in the executive branch of the state, or a member of the governing body of any political subdivision, if the action is based on evidence or information known to the state or political subdivision when the action was brought [*Gov. Code § 12652(d)(1)*].

[f] Allegations Subject of Pending Civil Suit

A party initiating a false claims action as a qui tam plaintiff [*see § 468.22[1]*] may not bring an action that is based on allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the state or political subdivision is already a party [*Gov. Code § 12652(d)(2)*].

[g] Action Based on Publicly Disclosed Matter

A court will not have jurisdiction over an action for fraudulent claims under *Gov. Code §§ 12650-12656* that is based on the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in an investigation, report, hearing, or audit conducted by or at the request of the Senate, Assembly, auditor, or the governing body of a political subdivision, or from the news media, unless the action is brought by the Attorney General or the prosecuting authority of a political subdivision, or if the person bringing the action is an original source of the information [*Gov. Code § 12652(d)(3)(A)*]. "Original source" means an individual who has direct and independent knowledge of the information on which the allegations are based, who voluntarily provided the information to the state or political subdivision before filing an action based on that information, and whose information provided the basis or catalyst for the investigation, hearing, audit, or report that led to the public disclosure [*Gov. Code § 12652(d)(3)(B)*].

This "public disclosure" bar is designed as a bar against parasitic or opportunistic actions by persons who are trying to take advantage of public information without contributing to or assisting in the exposure of the fraud. Therefore, the bar must be applied only as necessary to preclude these parasitic or opportunistic actions, but not so broadly as to undermine the legislature's intent to promote public assistance in the prevention, identification, investigation, and prosecution of false claims [*City of Hawthorne ex rel. Wohlner v. H & C Disposal Co. (2003) 109 Cal. App. 4th 1668, 1683, 1 Cal. Rptr. 3d 312]* . For example, if an action alleging a fraudulent claim is brought against a defendant against whom earlier claims had been asserted, but the new action alleges different instances of fraud than those on which the earlier claims were based, the new claim will not be barred because the plaintiff asserting that claim is not merely taking advantage of information that had already been publicly disclosed [*City of Hawthorne ex rel. Wohlner v. H & C Disposal Co. (2003) 109 Cal. App. 4th 1668, 1684, 1 Cal. Rptr. 3d 312]* .

If the government is already on notice of the facts that form the basis for a cause of action under the False Claims Act, the public disclosure bar applies. This jurisdictional bar is not removed merely because the qui tam plaintiff may haveused his or her expertise or training to conclude that these public facts constitute a false claim [*State of California ex rel. Grayson v. Pacific Bell Tel. Co. (2006) 142 Cal. App. 4th 741, 752, 48 Cal. Rptr. 3d 427]* .

[h] Action Based on Information Discovered by Government Employee

A private party bringing an action on behalf of a government entity as a qui tam plaintiff [*see § 468.22[1]*] may not bring an action for fraudulent claims under *Gov. Code §§ 12650-12656* that is based on information discovered by a present or former employee of the state or of a political subdivision during the course of his or her employment, unless that employee first in good faith exhausted existing internal procedures for reporting and seeking recovery of such falsely claimed sums through official channels and unless the state or political subdivision failed to act on the information provided within a reasonable period of time [*Gov. Code § 12652(d)(4)*].

[i] Claims Involving Assets Transferred to Insurance Commissioner

The false claims laws do not apply to claims, records, or statements for the assets of a person that have been transferred to the Commissioner of Insurance pursuant to *Insurance Code § 1011* [*Gov. Code § 12651(g)*].

[5] Treble Damages and Civil Penalties Available

A person who commits any of the acts prohibited by *Gov. Code § 12651(a)* [*see 468.21[3]*] is liable to the state or to the

political subdivision for three times the amount of damages that the state or the political subdivision sustains because of the act of that person. Furthermore, a person who commits any of the prohibited acts is liable to the state or to the political subdivision for the costs of a civil action brought to recover any of those penalties or damages, and is liable to the state or political subdivision for a civil penalty of not less than $5,000 and not more than $10,000 for each violation [*Gov. Code § 12651(a)*].

If certain mitigating circumstances are present, the penalties will be less severe. The court may assess not less than two times and not more than three times the amount of damages that the state or political subdivision sustains because of the defendant's fraudulent conduct, and no civil penalty if the court finds all of the following [*Gov. Code § 12651(b)*]:

- The person committing the violation furnished officials of the state or of the political subdivision responsible for investigating false claims violations with all information known to that person about the violation within 30 days after the date on which the person first obtained the information;

- The person fully cooperated with any investigation by the state or a political subdivision of the violation; and

- At the time the person furnished the state or the political subdivision with information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation.

Liability under *Gov. Code § 12651* is joint and several for any act committed by two or more persons [*Gov. Code § 12651(c)*].

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§ 468.22 Procedures for Bringing Action Under Act

[1] Parties Who May Bring Action

The procedure for bringing an action under *Gov. Code § 12652* is determined by the status of the plaintiff initiating the action and the nature of the funds that were fraudulently claimed [*see Gov. Code § 12652(a)-(c)*]. An action under *Gov. Code § 12652* for violation of *Gov. Code § 12651* may be brought by any of the following persons:

- The Attorney General [*see Gov. Code § 12652(a)(1)*];
- The prosecuting authority of a political subdivision [*see Gov. Code § 12652(b)(1)*]; or
- A person, for the person, and either for the State of California in the name of the state if any state funds are involved, or for a political subdivision if political subdivision funds are exclusively involved. The person bringing the action is referred to as the qui tam plaintiff [*see Gov. Code § 12652(c)(1)*].

Additionally, the plaintiff initiating the action may be required to give notice to other parties potentially interested in the action, who may then have a right of assuming primary responsibility for the action or of intervention [*see, e.g., Gov. Code § 12652(c)(3), (4), (6)(A), (B)*]. The rights of assuming responsibility for or intervening in an action are discussed in *468.22[3] -[5],* depending on who initiates the action.

Because the statutory definition of "person" does not encompass a state or local government entity, a public entity may not bring an action as a qui tam plaintiff on behalf of another government agency [*State ex rel. Harris v. PricewaterhouseCoopers, LLP (2006) 39 Cal. 4th 1220, 1238, 48 Cal. Rptr. 3d 144, 141 P.3d 256]* .

[2] Statute of Limitations

A civil action under *Gov. Code § 12652* may not be filed more than three years after the date of discovery by the Attorney General or prosecuting authority with jurisdiction to act under the false claims law or, in any event, no more than 10 years after the date on which the violation of *Gov. Code § 12651* is committed [*Gov. Code § 12654(a)*]. These limitations periods even apply to actions brought for activities prior to January 1, 1988 (the effective date of *Gov. Code*

§§ 12650-12656) [*see Gov. Code § 12654(b)*].

The three-year limitations period begins to run on the date that the official charged with responsibility for acting either knows of the false claim or knows of facts that would lead a reasonably prudent person to suspect it [*Debro v. Los Angeles Raiders (2001) 92 Cal. App. 4th 940, 953, 112 Cal. Rptr. 2d 329]* . It is not necessary that the official learn every factual detail or determine the particular legal theory that the plaintiff would later assert to trigger the limitations period [*Debro v. Los Angeles Raiders (2001) 92 Cal. App. 4th 940, 955, 112 Cal. Rptr. 2d 329]* . Even if suit was brought by a qui tam plaintiff [*see § 468.22[1]*], the relevant knowledge for purposes of triggering the limitations period is the knowledge of the government official, not that of the qui tam plaintiff [*see State of California ex rel. Hindin v. Hewlett-Packard Co. (2007) 153 Cal. App. 4th 307, 314-315, 62 Cal. Rptr. 3d 762* ; *Debro v. Los Angeles Raiders (2001) 92 Cal. App. 4th 940, 951, 112 Cal. Rptr. 2d 329]* .

[3] Action Initiated by Attorney General

[a] Claim Involving State Funds Only

If the Attorney General brings a civil action under *Gov. Code § 12652* on a claim exclusively involving state funds, the Attorney General has no duty to inform local prosecuting authorities of the action, because the action does not involve political subdivision funds [*see Gov. Code § 12652(a)*]. The office of the Attorney General will receive a fixed 33 percent of the proceeds of the action or settlement of the claim [*Gov. Code §§ 12652(g)(1)(A), 12652(g)(7)*].

[b] Claim Involving State and Political Subdivision Funds

If the Attorney General brings a civil action under *Gov. Code § 12652* on a claim involving political subdivision funds as well as state funds, the Attorney General must, on the same date that the complaint is filed in the action, serve by mail with "return receipt requested" a copy of the complaint on the appropriate prosecuting authority [*Gov. Code § 12652(a)(2)*]. The prosecuting authority has the right to intervene in the action within 60 days after receipt of the complaint, and the court may permit intervention thereafter on a showing that all the requirements of *Code Civ. Proc. § 387* have been met [*Gov. Code § 12652(a)(3)*].

For further discussion of these requirements, see Ch. 395, *Parties* .

If the prosecuting authority does intervene, the court may award the office of the prosecuting authority a portion of the Attorney General's fixed 33 percent of the recovery [*see Gov. Code § 12652(g)(1)(A)*], taking into account the prosecuting authority's role in investigating and conducting the action [*Gov. Code § 12652(g)(1)(C)*].

[4] Action Initiated by Prosecuting Attorney

[a] Claim Involving Political Subdivision Funds Only

If the prosecuting authority of a political subdivision brings a civil action under *Gov. Code § 12652* on a claim exclusively involving political subdivision funds, the prosecuting authority has no statutory duty to inform the Attorney General of the action, because the action does not involve state funds [*see Gov. Code § 12652(b)*]. The office of the prosecuting authority will receive a fixed 33 percent of the proceeds of the action or settlement of the claim [*Gov. Code §§ 12652(g)(1)(B), 12652(g)(7)*].

[b] Claim Involving Political Subdivision and State Funds

If the prosecuting authority brings a civil action under *Gov. Code § 12652* on a claim involving state funds as well as political subdivision funds, the prosecuting authority must, on the same date that the complaint is filed, serve a copy of the complaint on the Attorney General [*Gov. Code § 12652(b)(2)*]. Within 60 days after receiving the complaint, the

Attorney General must notify the court as to whether or not he or she intends to proceed with the action. If the Attorney General intends to proceed with the action, the Attorney General will assume primary responsibility for conducting the action and the prosecuting authority will have the right to continue as a party [*Gov. Code § 12652(b)(3)(A)*]. If the Attorney General declines to proceed with the action, he or she must so notify the court, and the prosecuting authority then has the right to conduct the action [*Gov. Code § 12652(b)(3)(B)*].

If the Attorney General does assume responsibility for the action, the office of the Attorney General will generally be entitled to 33 percent of the proceeds of the action; however, the prosecuting authority may be awarded a portion of this recovery, depending on its role in investigating and conducting the action [*Gov. Code §§ 12652(g)(1)(A), 12652(g)(1)(C)*].

[5] Action Initiated by Qui Tam Plaintiff

[a] Filing and Service of Complaint

A complaint filed by a private person as a qui tam plaintiff must be filed in superior court in camera and may remain under seal for up to 60 days. No service may be made on the defendant until after the complaint is unsealed [*Gov. Code § 12652(c)(2)*].

On the same day as the complaint is filed, the qui tam plaintiff must serve on the Attorney General, by mail with return receipt requested, a copy of the complaint and a written disclosure of substantially all material evidence and information that the person possesses [*Gov. Code § 12652(c)(3)*].

If an action is brought under the False Claims Act, the plaintiff, whether apublic prosecutor or a qui tam plaintiff, need not comply with the claims presentation requirements of the California Tort Claims Act before filing suit [Wells v. One2One *Learning Foundation (2006) 39 Cal. 4th 1164, 1214, 48 Cal.Rptr. 3d 108, 141 P.3d 225* (action against charter schools was not subject to claim presentation requirement); *see Gov. Code §§ 905, 905.2*].

[b] Determining Primary Responsibility for Bringing Action

[i] Attorney General or Local Prosecuting Authority

Once an action under *Gov. Code § 12652* is initiated by a qui tam plaintiff, the Attorney General or local prosecuting authority may, in certain circumstances, assume primary responsibility for prosecuting the action [*see Gov. Code § 12652(e)(1)*]. The determination regarding which of the two will have prosecutorial responsibility is affected by whether the defendant's claim involved state funds, political subdivision funds, or a combination of both [*see Gov. Code § 12652(c)(4)-(8)*].

[ii] Claim Involving State Funds Only

Within 60 days after receiving a complaint alleging violations that involve state funds but not political subdivision funds, the Attorney General may elect to intervene and proceed with the action [*Gov. Code § 12652(c)(4)*]. The Attorney General may move for extensions of the time during which the complaint remains under seal, on a showing of good cause. The motion may be supported by affidavits or other submissions in camera [*Gov. Code § 12652(c)(5)*]. Before the expiration of the 60-day period or any extensions obtained, the Attorney General must notify the court as to whether or not he or she intends to proceed with the action. After such notification, the seal on the complaint will be lifted [*Gov. Code § 12652(c)(6)(A)*].

If the Attorney General declines to take over the action, the qui tam plaintiff will have the right to conduct the action [*Gov. Code § 12652(c)(6)(B)*]. However, if the Attorney General states an intention to proceed with the action, the Attorney General will have primary responsibility for the action, and the qui tam plaintiff will have the right to continue

as a full party [*Gov. Code § 12652(e)(1)*].

[iii] Claim Involving Political Subdivision Funds Only

Within 15 days after receiving a complaint alleging violations that exclusively involve political subdivision funds, the Attorney General must forward copies of the complaint and written disclosure of material evidence and information to the appropriate prosecuting authority for disposition and must notify the qui tam plaintiff of the transfer [*Gov. Code § 12652(c)(7)(A)*]. Within 45 days after the Attorney General forwards the complaint and written disclosure, the prosecuting attorney may elect to intervene and proceed with the action [*Gov. Code § 12652(c)(7)(B)*]. The prosecuting authority may move for extensions of the time during which the complaint remains under seal, on a showing of good cause. The motion may be supported by affidavits or other submissions in camera [*Gov. Code § 12652(c)(7)(C)*]. Before the expiration of the 45-day period or any extensions obtained, the prosecuting authority must notify the court regarding whether or not it intends to proceed with the action [*Gov. Code § 12652(c)(7)(D)*]. After such notification, the seal will be lifted [*Gov. Code § 12652(c)(7)(D)(i)*].

If the prosecuting authority declines to take over the action, the qui tam plaintiff will have the right to conduct the action [*Gov. Code § 12652(c)(7)(D)(ii)*]. However, if the prosecuting authority states an intention to proceed with the action, the prosecuting authority will have primary responsibility for the action, and the qui tam plaintiff will have the right to continue as a full party [*Gov. Code § 12652(e)(1)*].

[iv] Claim Involving Both State and Political Subdivision Funds

Within 15 days after receiving a complaint alleging violations that involve both state and political subdivision funds, the Attorney General must forward copies of the complaint and written disclosure to the appropriate prosecuting authority, and the Attorney General must coordinate his or her review and investigation with those of the prosecuting authority [*Gov. Code § 12652(c)(8)(A)*].

Within 60 days after receiving a complaint and written disclosure of material evidence and information alleging violations that involve both state and political subdivision funds, the Attorney General or the prosecuting authority, or both, may elect to intervene and proceed with the action [*Gov. Code § 12652(c)(8)(B)*]. The Attorney General or the prosecuting authority, or both, may move for extensions of the time during which the complaint remains under seal, upon a showing of good cause. The motion may be supported by affidavits or other submissions in camera [*Gov. Code § 12652(c)(8)(C)*]. Before the expiration of the 60-day period or any extensions obtained, the Attorney General must notify the court that: (1) the Attorney General intends to proceed with the action; (2) the Attorney General declines to proceed with the action, but the prosecuting authority of the political subdivision does intend to proceed with the action; or (3) both the Attorney General and the prosecuting authority decline to proceed with the action, in which case the qui tam plaintiff may conduct the action. After such notification, the seal on the complaint is lifted [*Gov. Code § 12652(c)(8)(D)(i)-(iii)*].

If the Attorney General notifies the court that he or she intends to proceed with the action, the qui tam plaintiff may continue as a full party to the action [*Gov. Code § 12652(e)(1)*]. Furthermore, the prosecuting authority of the political subdivision may intervene in the action within 60 days after the notification. The court may then authorize intervention by the political subdivision on a showing that all the requirements of *Code Civ. Proc. § 387* have been met [*Gov. Code § 12652(c)(8)(E)*]. For general discussion of these requirements, see Ch. 395, *Parties* , Pt. II.

[c] Defendant's Time to Respond

The defendant is not required to respond to any complaint filed under *Gov. Code § 12652* until 30 days after the complaint is unsealed and served on the defendant pursuant to *Code Civ. Proc. § 583.210* [*Gov. Code § 12652(c)(9)*].

[d] Related Actions Barred

If a person brings an action as a qui tam plaintiff under *Gov. Code § 12652(c)*, no other person may bring a related action based on the facts underlying the pending action [*Gov. Code § 12652(c)(10)*]. This rule only applies if an action is actually pending and does not bar a subsequent action that is filed after an earlier action has already been dismissed [*City of Hawthorne ex rel. Wohlner v. H & C Disposal Co. (2003) 109 Cal. App. 4th 1668, 1679, 1 Cal. Rptr. 3d 312]* .

This bar on "related actions" applies only to subsequent qui tam actions filed under the False Claims Act [*Rothschild v. Tyco Int'l (US), Inc. (2000) 83 Cal. App. 4th 488, 499, 99 Cal. Rptr. 2d 721]* . For example, it does not bar a subsequent action brought under the unfair competition statute [*Rothschild v. Tyco Int'l (US), Inc. (2000) 83 Cal. App. 4th 488, 499-500, 99 Cal. Rptr. 2d 721]* . For a discussion of remedies under the unfair competition statute, see *Ch. 565, Unfair Competition, 565.10* et seq.

[e] Restrictions on Dismissal

If a qui tam plaintiff files an action under *Gov. Code § 12652*, the action may be dismissed only with the written consent of the court and the Attorney General or prosecuting authority of a political subdivision, or both, as appropriate under the allegations of the civil action, taking into account the best interests of the parties involved and the public purposes behind the false claims law [*Gov. Code § 12652(c)(1)*]. In addition, no claim for any violation of *Gov. Code § 12651* may be waived or released by any private person, except if the action is part of a court-approved settlement of a false claim civil action brought under *Gov. Code § 12652*. However, this provision is not to be construed to limit the ability of the state or political subdivision to decline to pursue any claim brought under *Gov. Code § 12652* [*Gov. Code § 12652(c)(1)*].

[f] Restrictions on Discovery

The court may stay an act of discovery of the qui tam plaintiff for a period of not more than 60 days if either the Attorney General or local prosecuting authority shows that the act of discovery would interfere with an investigation or a prosecution of a criminal or civil matter arising out of the same facts, regardless of whether the Attorney General or local prosecuting authority proceeds with the action. Such a showing must be conducted in camera. The court may extend the 60-day period on a further showing in camera that the Attorney General or local prosecuting authority has pursued the criminal or civil investigation or proceedings with reasonable diligence and that any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings [*see Gov. Code § 12652(h)*].

On a showing by the Attorney General or local prosecuting authority that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Attorney General's or local prosecuting authority's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation. The court may limit the number of witnesses the person may call, the length of the testimony of the witnesses, and the person's cross examination of witnesses, and may otherwise restrict the person's participation in the litigation [*Gov. Code § 12652(i)*].

[g] Involvement of Government Entity

[i] Request for Pleadings and Transcripts by Government Entity

If the state or a political subdivision has elected not to proceed with an action initiated by a qui tam plaintiff, the state or political subdivision may request that it be served with copies of all pleadings filed in the action and supplied with copies of all deposition transcripts. These services are provided at the requestor's expense [*Gov. Code § 12652(f)(1)*].

[ii] Intervention by Government Entity

On timely application, the court must permit the state or political subdivision to intervene in an action with which it had initially declined to proceed, if the interest of the state or political subdivision in recovery of the property or funds involved is not being adequately represented by the qui tam plaintiff [*Gov. Code § 12652(f)(2)(A)*]. If intervention is allowed by the court, the qui tam plaintiff retains principal responsibility for the action, and the recovery of the parties is determined as if the state or political subdivision had elected not to proceed [*Gov. Code § 12652(f)(2)(B)*].

[iii] Dismissal or Settlement by Government Entity

The state or political subdivision may seek to dismiss the action for good cause, notwithstanding the objections of the qui tam plaintiff, if the qui tam plaintiff has been notified by the state or political subdivision of the filing of the motion and if the court has provided the qui tam plaintiff with an opportunity to oppose the motion and present evidence at a hearing [*Gov. Code § 12652(e)(2)(A)*].

Good cause for dismissal exists if the dismissal is rationally related to a legitimate government purpose and is not arbitrary, capricious, made in bad faith, based on improper or illegal motives, founded on an inadequate investigation, or pretextual [*Laraway v. Sutro & Co. (2002) 96 Cal. App.4th 266, 275-276, 116 Cal. Rptr. 2d 823]* . The best interests of the parties and the purposes underlying the Act are appropriate considerations, although any matter that bears on whether the lawsuit should be dismissed must be considered. For example, good cause for dismissal is established if the Attorney General determines that the action has little or no merit and that continued prosecution is likely to result in a waste of government resources [*American Contract Servs. v. Allied Mold & Die, Inc. (2001) 94 Cal. App. 4th 854, 862, 114 Cal. Rptr. 2d 773]* .

Additionally, the state or political subdivision may settle the action with the defendant notwithstanding the objections of the qui tam plaintiff, if the court determines, after a hearing providing the qui tam plaintiff an opportunity to present evidence, that the proposed settlement is fair, adequate, and reasonable under all of the circumstances [*Gov. Code § 12652(e)(2)(B)*].

[6] Arbitration of Claim

In some cases, actions under the False Claims Act may be subject to a contractual arbitration provision [*County of Solano v. Lionsgate Corp. (2005) 126 Cal. App. 4th 741, 746-750, 24 Cal. Rptr. 3d 362]* . If the language of the arbitration provision in the contract encompasses claims under the Act, the fact that the Act does not specifically provide for arbitration does not preclude such arbitration [*County of Solano v. Lionsgate Corp. (2005) 126 Cal. App. 4th 741, 747, 24 Cal. Rptr. 3d 362]* . Moreover, an arbitrator has the authority to award civil penalties under the Act, even as a way of compensating a party for expenses incurred in responding to the false claim [*County of Solano v. Lionsgate Corp. (2005) 126 Cal. App. 4th 741, 748, 24 Cal. Rptr. 3d 362]* .

[7] Standard of Proof

In any action brought under *Gov. Code § 12652*, the state, the political subdivision, or the qui tam plaintiff must prove all essential elements of the cause of action, including damages, by a preponderance of the evidence [*Gov. Code § 12654(c)*].

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§ 468.23 Allocation of Proceeds From Recovery

[1] Qui Tam Plaintiff Responsible for Prosecuting Action

If the state or political subdivision does not proceed with an action initiated by a qui tam plaintiff, and the qui tam plaintiff therefore has chief responsibility for bringing the action, the qui tam plaintiff is generally entitled to receive an amount that the court decides is reasonable for collecting the civil penalty and damages on behalf of the government. The amount must be not less than 25 percent nor more than 50 percent of the proceeds of the action or settlement and must be paid out of those proceeds [*Gov. Code § 12652(g)(3)*].

If the action was based on information discovered by a present or former employee of the state or a political division during the course of his or her employment, the present or former employee of the state or political subdivision will not be entitled to any minimum guaranteed recovery from the proceeds. The court, however, may award the qui tam plaintiff those sums from the proceeds as it considers appropriate, but in no case more than 33 percent of the proceeds if the state or political subdivision goes forth with the action, or more than 50 percent if the state or political subdivision declines to go forth, taking into account the significance of the information, the role of the qui tam plaintiff in advancing the case to litigation, and the scope of, and response to, the employee's attempts to report and gain recovery of such falsely claimed funds through official channels [*see Gov. Code § 12652(g)(4)*; *see also Gov. Code § 12652(d)(4), (g)(7)*].

If the action is one that the court finds to be based primarily on information from a present or former employee who actively participated in the fraudulent activity, the employee is not entitled to any minimum guaranteed recovery from the proceeds. The court, however, may award the qui tam plaintiff such sums from the proceeds as it considers appropriate, but not more than 33 percent of the proceeds if the state or political subdivision goes forth with the action, or more than 50 percent if the state or political subdivision declines to go forth, taking into account the significance of the information, the role of the qui tam plaintiff in advancing the case to litigation, the scope of the present or past employee's involvement in the fraudulent activity, the employee's attempts to avoid or resist that activity, and all other circumstances surrounding the activity [*Gov. Code § 12652(g)(5)*].

[2] Attorney General or Local Prosecutor Responsible for Prosecuting Action

If the state or a political subdivision assumes primary responsibility for prosecuting an action that was initially brought by a qui tam plaintiff, the qui tam plaintiff generally receives at least 15 percent but not more than 33 percent of the proceeds of the action or settlement of the claim, depending on the extent to which the qui tam plaintiff substantially contributed to the prosecution of the action [*Gov. Code § 12652(g)(2)*; *see also Gov. Code § 12652(g)(7)*]. However, there is no minimum guaranteed recovery for the qui tam plaintiff if the action was based on information discovered by a present or former employee of the state or a political division during the course of his or her employment, or if the action is based primarily on information from a present or former employee who actively participated in the fraudulent activity [*Gov. Code § 12652(g)(2), (4), (5)*].

If the Attorney General or the prosecuting authority of the political subdivision conducts the action, the Attorney General's office or the prosecuting authority receives a fixed 33 percent of the proceeds of the action or settlement of the claim. If both the Attorney General and a prosecuting attorney are involved in a qui tam action, the court in its discretion may award the prosecuting authority a portion of the Attorney General's fixed 33 percent of the recovery, taking into account the prosecuting authority's contribution to investigating and conducting the action [*Gov. Code § 12652(g)(2)*].

[3] Reversion of Undistributed Funds

The portion of the recovery not distributed pursuant to *Gov. Code § 12652(g)(1)-(5)* reverts to the state or political subdivision, depending on the type of funds involved [*see Gov. Code 12652(g)(6)*].

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§ 468.24 Costs and Attorney's Fees

If the state, political subdivision, or qui tam plaintiff prevails in or settles an action initiated by the qui tam plaintiff, the qui tam plaintiff receives an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable costs and attorney's fees. All expenses, costs, and fees must be awarded against the defendant, and under no circumstances are they the responsibility of the state or political subdivision [*Gov. Code § 12652(g)(8)*].

If the state, political subdivision, or qui tam plaintiff conducts the action, the court may award to the defendant its reasonable attorney's fees and expenses if the defendant prevails in the action and if the court finds that the claim of the qui tam plaintiff was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment [*Gov. Code § 12652(g)(9)*].

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§ 468.25 Prohibition Against Retaliation by Employer

An employer may not adopt or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency or from acting in furtherance of a false claims action [*Gov. Code § 12653(a)*]. No employer may discharge, demote, suspend, threaten, harass, deny promotion to, or in any other manner discriminate against an employee in the terms and conditions of employment because of lawful acts by the employee on behalf of the employee or others in disclosing information to a government or law enforcement agency or in furthering a false claims action [*Gov. Code § 12653(b)*].

An employer who violates *Gov. Code § 12653(b)* is liable for all relief necessary to make the employee whole, including: reinstatement with the same seniority status that the employee would have had but for the discrimination; two times the amount of back pay; interest on the back pay; compensation for any special damage sustained as a result of the discrimination; and, if appropriate, punitive damages. In addition, the defendant is required to pay litigation costs and reasonable attorney's fees. An action for such relief is brought in the superior court [*Gov. Code § 12653(c)*]. However, an aggrieved employee is required to exhaust any applicable internal grievance procedures provided by the employer before bringing suit [*Campbell v. Regents of Univ. of Cal. (2005) 35 Cal. 4th 311, 317, 325-328, 25 Cal. Rptr. 3d 320* , (university employee required to exhaust university's internal grievance procedures before filing suit for retaliatory discharge under *Gov. Code § 12653(c)* and *Lab. Code § 1102.5*)].

An employee who participated in conduct that directly or indirectly resulted in a false claim being submitted to the state or a political subdivision is entitled to similar remedie-- P.3d -- Gov. Code § 12653(c) Lab. Code § 1102.5s if he or she is discharged, demoted, suspended, harassed, denied promotion, or in any other manner discriminated against in the terms and conditions of employment by his or her employer, because of that participation, but only if two conditions are met. First, the employee must have voluntarily disclosed information to a government or law enforcement agency or acted in furtherance of a false claims action. Second, the employee must have been harassed, threatened with termination or demotion, or otherwise coerced by the employer or its management into engaging in the fraudulent activity in the first place [*Gov. Code § 12653(d)*].

Only the employer is liable under these provisions for retaliating against an employee. The injured employee may not recover from other individual employees of the employer [*LeVine v. Weis (2001) 90 Cal. App. 4th 201, 212-213, 108*

Cal. Rptr. 2d 562] .

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§ 468.26 Criminal Action for False Claims

A person who presents a false claim to a government entity may be subject to criminal prosecution. Every person who, with intent to defraud, presents for allowance or payment to any state board or officer, or to any county, city, or district board or officer, authorized to allow or pay the same if genuine, any false or fraudulent claim, bill, account, voucher, or writing, is punishable either by imprisonment in the county jail for a period of not more than one year, by a fine of not exceeding $1,000, or by both imprisonment and fine, or by imprisonment in the state prison, by a fine of not exceeding $10,000, or by both imprisonment and fine [*Penal Code § 72*]. The limitations period for prosecution under *Penal Code § 72* is three years, but the period does not commence to run until discovery of the offense [*Penal Code § 803(c)(2)*; *see Penal Code § 801*].

A guilty verdict rendered in a criminal proceeding charging false statements or fraud, whether on a verdict after trial or on a plea of guilty or nolo contendere, except for a plea of nolo contendere made prior to 1988, will estop the defendant from denying the essential elements of the offense in any action that involves the same transaction as in the criminal proceeding and that is brought under *Gov. Code § 12652(a)-(c)* [*Gov. Code § 12654(d)*].

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[Reserved]

§§ 468.27[Reserved]

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§ 468.40 State Statutes

Fraud and deceit generally. *Civ. Code §§ 1709, 1710*

False claim against government entity is basis for imposition of treble damages and civil penalty of up to $10,000. *Gov. Code §§ 12650-12652*

Civil action by qui tam plaintiff under *Gov. Code § 12652*. *Gov. Code § 12652(c)*

Employer prohibited from taking action that would prevent employee from disclosing information regarding false claim submitted to government entity. *Gov. Code § 12653*

Statute of limitations on false claim action. *Gov. Code § 12654(a), (b)*

Intentional presentation of false claim to public board or officer is criminal offense. *Penal Code § 72*

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§ 468.41 Law Reviews

Thompson, *Stealth Law: Cashing in on Military Fraud,* (Oct. 1988) Cal. Law. 33

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[Reserved]

§§ 468.42[Reserved]

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§ 468.60 Complaint for Damages by Qui Tam Plaintiff Based on False or Fraudulent Claim Against Governmental Entity [Gov. Code §§ 12651, 12652(c)]

[1] FORM Complaint for Damages by Qui Tam Plaintiff Based on False or Fraudulent Claim Against Governmental Entity [Gov. Code §§ 12651, 12652(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Qui Tam Plaintiff, on behalf of [himself *or* herself]	)	NO. _____
and the	)	COMPLAINT FOR DAMAGES
_____	)	AND CIVIL PENALTY
[State of California *and/or* other political subdivi-	)	(False Claims Action)
sion] vs.	)	
_____ [*name*],	)	
Defendant.	)	

The plaintiff alleges:

1. Defendant(s)_____[*name(s)*] is/are and at all times herein mentioned was/were [a] resident(s) of _____ County, California.

2. The qui tam plaintiff is bringing this action on behalf of and in the name of_____[*specify government entity*]. [The qui tam plaintiff is a _____ (present *or* former) employee of the aforementioned government entity.]

3. _____ [*Allege fraudulent conduct by defendant(s), e.g.,* On _____ (*date*), defendant, a former employee of _____ (*specify government entity*), presented to

_____ (*specify government entity*) a written claim for $35,000 in unpaid salary. The claim was based on a falsified records of time spent on consulting services for employee efficiency programs. Such claim was paid by _____ (*specify government entity*) on _____ (*date*)].

4._____[*Allege facts showing state of mind of the defendant(s) concerning his/her/their representations to the government entity, e.g.*, The defendant(s) made the aforementioned salary claim with actual knowledge that this claim was without merit. The defendant(s) had admitted to the qui tam plaintiff that the defendant(s) knew that (he *or* she *or* they) (was *or* were) submitting false information, and that the funds requested exceeded the amount to which the defendant(s) (was *or* were) actually entitled by $20,000].

[5. *Allege government entity's date of discovery of the false claim, if discovered separately, and any actions taken by the government entity, as appropriate, in separately numbered paragraphs.]*

[*ADD, if the qui tam plaintiff is present or former employee of government entity*]

6. The qui tam plaintiff has in good faith exhausted existing internal procedures for reporting and seeking recovery of the false claim of defendant(s) through official channels by _____[*describe all steps taken by the qui tam plaintiff, including dates steps were initiated*]. _____[*Specify government entity*] has failed to act on the information provided by the qui tam plaintiff.

[*ADD, if the qui tam plaintiff was "original source" of information to government entity*]

7. The qui tam plaintiff was the "original source" of information about the false claim of the defendant(s) in that the qui tam plaintiff voluntarily provided the information to _____[*specify government entity*] before initiating this action. As a result of providing this information, _____ [*specify action, proceeding, hearing, or similar event that resulted in public disclosure, e.g.,* _____ (*specify government entity*) initiated an administrative hearing and investigation, requested an audit, and issued a report].

[*CONTINUE*]

8. As a result of the conduct of the defendant(s), _____[*specify government entity*] has been damaged in the sum of $_____. [*Specify costs of any actions, proceedings, hearings, investigations, or similar efforts undertaken by the government entity*.]

WHEREFORE, the qui tam plaintiff prays judgment as follows:

1. For the assessment of treble damages against the defendant(s) _____[*name(s)*] in the sum of $_____[*specify treble the amount of all damages sustained by the state or political subdivision because of the act of the defendant(s)*];

2. For a civil penalty of $_____[*specify amount between $5,000 and $10,000*] to be assessed against the defendant(s) in favor of _____[*specify government entity*] [for each violation].

3. For the costs of _____[*specify government entity*] brought to recover penalties and damages;

4. For the qui tam plaintiff's reasonable expenses in the sum of $_____;

5. For the qui tam plaintiff's reasonable attorney's fees in the sum of $_____;

6. For the qui tam plaintiff's reasonable costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired*.]

VERIFICATION [*Code Civ. Proc. §§ 446, 2015.5*]

I,_____[*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

[2] Use of Form

The form of complaint above may be used by a private party to obtain damages on behalf of the state or a political subdivision under *Gov. Code § 12652* if that private party contends that a person or persons have brought a false or fraudulent claim against a government entity [*see Gov. Code §§ 12650, 12651(a), 12652(c)*].

If an action is brought by a private party under *Gov. Code § 12652* on behalf of a government entity, the plaintiff is designated as the qui tam plaintiff [*Gov. Code § 12652(c)(1)*]. The plaintiff in this complaint is so designated.

[3] Allegations

The complaint above alleges:

- The plaintiff's status as the qui tam plaintiff (Paragraph 2) [*Gov. Code § 12652(c)(1)*];

- The fraudulent conduct on which the action is based (Paragraph 3) [*see Gov. Code § 12651(a)*];

- The defendant's state of mind at the time of the conduct (Paragraph 4) [*see Gov. Code §§ 12650(b), 12651(a)*], the exhaustion of internal procedures if the qui tam plaintiff is a present or former employee of the government entity (optional Paragraph 6) [*Gov. Code § 12652(d)(4)*], and the qui tam plaintiff's status as an original source, if appropriate (optional Paragraph 7) [*Gov. Code § 12652(d)(3)*]; and

- Damages (Paragraph 8) [*Gov. Code § 12651(a)*].

[4] Prayer for Relief

The prayer for relief in the complaint above seeks: (1) treble damages (Paragraph 1) [*Gov. Code § 12651(a)*; *see also § 468.21[5*] regarding reduced damages on finding of mitigating factors]; (2) a civil penalty of not less than $5,000 and not more than $10,000 for each violation (Paragraph 2) [*Gov. Code § 12651(a)*]; (3) costs of the government entity in any action to recover penalties or damages (Paragraph 3) [*Gov. Code § 12651(a)*]; and (4) the qui tam plaintiff's reasonable expenses, attorney's fees, and costs of suit (Paragraphs 4-6) [*Gov. Code § 12652(g)(8)*]. Liability is joint and several for any act committed by two or more persons [*Gov. Code § 12651(c)*].

[5] Service and Filing

The complaint above must be filed in superior court in camera and may remain under seal for up to 60 days. No service may be made on the defendant until after the complaint is unsealed [*Gov. Code § 12652(c)(2)*].

On the same day that the complaint is filed, the qui tam plaintiff must serve on the Attorney General, by mail with return receipt requested, a copy of the complaint and a written disclosure of substantially all material evidence and information the person possesses [*Gov. Code § 12652(c)(3)*].

On receipt of the complaint, the Attorney General may decide to assume primary responsibility for prosecuting the action, or allow a local prosecuting authority to assume primary responsibility [*Gov. Code § 12652(c)(4)-(8)*; *see § 468.22[5][b]*].

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[2] Use of Form

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§ 469.01 Scope of Chapter

This chapter discusses conflicts of interest as regulated by the conflict-of-interest provisions in the Political Reform Act of 1974 [*see Gov. Code § 87100 et seq.*]. Other governing laws are also discussed [*see § 469.10* et seq.].

This chapter contains a form of complaint for declaratory and injunctive relief by a taxpayer against a public officer to prevent expenditure of public funds pursuant to a contract void for illegal conflicts of interest [*see § 469.30*]. This chapter also includes a form of complaint for an injunction restraining a public official from participating in a governmental decision in which he or she has a financial interest, which is in violation of *Gov. Code § 87100 et seq.* [*see § 469.31*], and a form of complaint against a public official to recover three times the amount of any economic benefit derived by the official from a violation of a Conflict of Interest Code disqualification provision [*see § 469.32*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsEmployees & OfficialsPublic Contracts LawBids & FormationAgency & Authority of Government OfficersContracting Officers

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§ 469.02 Cross References

For discussion and forms relating to actions for declaratory and injunctive relief, *see* Ch. 182, *Declaratory Relief* , and Ch. 303, *Injunctions* .

For discussion and forms relating to the California Tort Claims Act, *see* Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

For discussion and forms relating to civil claims arising from criminal acts of public officials and officers, *see* Ch. 465, *Public Entities and Officers: Civil Claims Arising From Criminal Acts* .

For discussion and forms relating to taxpayer actions, *see* Ch. 466, *Public Entities and Officers: Taxpayer Actions* .

For discussion and forms relating to the enforcement of judgments against public entities, *see* Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities* .

For discussion and forms relating to false claims actions, *see* Ch. 468, *Public Entities and Officers: False Claims Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsClaims By & AgainstLabor & Employment LawEmployer LiabilityFalse Claims ActGeneral OverviewTortsPublic Entity LiabilityGeneral Overview

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[Reserved]

§§ 469.03[Reserved]

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§ 469.10 Governing Law

[1] Constitutional Provisions

In 1990, the state constitution was amended to include specific prohibitions against conflicts of interest applicable to legislators and certain state officers [*see Cal. Const., art. IV, §§ 4, 5, Cal. Const., art. V, § 14*]. Pursuant to that constitutional amendment, *Cal. Const., art. IV, § 5* restricts gifts and compensation received by a member of the Legislature. *Cal. Const., art. IV, § 4* prohibits a member of the Legislature from receiving earned income from a lobbyist or other specified persons. *Cal. Const., art. V, § 14* prohibits certain state officers from receiving earned income from a lobbyist or other specified persons [*see § 469.11[6] -[7]*].

[2] Statutory Prohibition Against Interest in Government Contracts

Government Code Sections 1090-1098 prohibit certain public officials from having a financial interest in government contracts or sales made by them in their official capacity or by any body or board of which they are members [*see § 469.11[3]*]. The purpose of these provisions is to insure absolute loyalty and undivided allegiance of public officials to the best interest of the government entity they serve and to remove all direct and indirect influence of an interested officer as well as to discourage deliberate dishonesty [*Fraser-Yamor Agency, Inc. v. Del Norte County (1977) 68 Cal. App. 3d 201, 215, 137 Cal. Rptr. 118* ; *see also People v. Honig (1996) 48 Cal. App. 4th 289, 313-314, 55 Cal. Rptr. 2d 555]* . As used in *Gov. Code § 1090*, the term "financially interested," is not unconstitutionally vague, and a prosecution for violation of its terms does not deny the accused due process of law [*People v. Watson (1971) 15 Cal. App. 3d 28, 33-34, 92 Cal. Rptr. 860 , cert. denied sub nom. Watson v. California (1971) 404 U.S. 850]* . For meaning of the phrase "financially interested" in *Gov. Code § 1090*, see *§ 469.11[3]*.

[3] Political Reform Act of 1974

The Political Reform Act of 1974 was an initiative measure that added Section 81000 et seq. to the Government Code. Chapter 7 of the act deals with conflicts of interest [*see Gov. Code § 87100 et seq.*]; and *Gov. Code §§ 89501-89506* deal with honoraria and travel expenses [*see also Cal. Const., art. IV, § 5* (limitations on honoraria, gifts, and compensation)]. Six purposes are specified in the act [*see Gov. Code § 81002*], including the avoidance of conflicts of interest, an objective to be achieved by public officials' disclosure of the assets and income which might be materially

affected by their official actions and, in appropriate circumstances, public officials' disqualification from acting [*Gov. Code § 81002(c)*].

[4] Conflict of Interest Codes

[a] Required of Every Agency

Every state and local agency [*see Gov. Code §§ 82041, 82049*] is required to adopt and publish a Conflict of Interest Code [*Gov. Code § 87300*]. If there is any question whether an entity is subject to the requirement concerning a Conflict of Interest Code, the question will be resolved by the "code reviewing body" that appears to be the one provided for that entity, as follows [*Gov. Code § 82011*]:

(a) The Fair Political Practices Commission [*see Gov. Code § 82012*] with respect to a state agency, other than one in the judicial branch, or any local agency with jurisdiction in more than one county;

(b) The county board of supervisors with respect to an agency wholly within the jurisdiction of the county except itself, a city agency, or any agency of the judicial branch;

(c) The city council with respect to any city agency except itself;

(d) The Attorney General with respect to the Fair Political Practices Commission;

(e) The Chief Justice of California or his or her designee with respect to the members of the Judicial Council, the Commission on Judicial Performance, or the Board of Governors of the State Bar;

(f) The Board of Governors of the State Bar with respect to the State Bar;

(g) The Chief Justice of California, the administrative presiding judges of the courts of appeal, and the presiding judges of superior courts, or their designees, with respect to an agency of the judicial branch subject to the immediate administrative supervision of that court; and

(h) The Judicial Council with respect to a state agency within the judicial branch not elsewhere included.

Each Conflict of Interest Code is a law, and a violation of such a code is subject to a judicial remedy [*Gov. Code § 87300*; *see Gov. Code §§ 91000-91014*].

[b] Procedural Aspects of Adoption

A timetable for adoption of Conflict of Interest Codes is specified; if an agency does not adopt a code by the required time, provision is made for constructive adoption through intercession of the appropriate "code reviewing body" under *Gov. Code § 82011* (*see* [a], *above*). As a last resort, the superior court may intercede [*see Gov. Code §§ 87303-87305*]. Generally, controversies respecting the adoption and amendment of a code must be taken first to a "code reviewing body" before judicial relief is sought [*see Gov. Code §§ 87302-87308*].

For state agencies other than those in the judicial branch, adoption and amendment of a code, and review by the "code reviewing body," are governed by the appropriate provisions of the Administrative Procedure Act [*Gov. Code §§ 87311, 87311.5(a)*; *see Gov. Code § 11500 et seq.* (Administrative Procedure Act)]. Review and adoption of a code by a local agency or by an agency in the judicial branch must be carried out by procedures that guarantee to officers, employees, members, and consultants of the agency, and to residents in the area over which the agency has authority, adequate notice and a fair opportunity to present their views [*Gov. Code §§ 87311, 87311.5(a)*].

A Conflict of Interest Code must [*Gov. Code § 87302(a)-(c)*]:

> (i) Specify what positions in the agency involve making, or participation in making, decisions that might foreseeably have a material effect on any financial interest;
>
> (j) It must require the annual filing of disclosure statements by the persons in those positions; and
>
> (k) It must specify the circumstances in which a person in one of those positions must disqualify himself or herself from making or participating in making a decision. The disqualification provisions may not require an official to disqualify himself or herself with respect to any matter that could not legally be acted on or decided without his or her participation.

Codes of the Judicial Council, the Commission on Judicial Performance, the State Bar Board of Governors, and designated employees of the State Bar are exempted from some of these requirements [*see Gov. Code § 87311.5(b)*].

A Conflict of Interest Code need not provide an individual a right to a hearing with respect to every item that must be reported under the code [*Metropolitan Water Dist. v. Fair Political Practices Com. (1977) 73 Cal. App. 3d 650, 656-657, 141 Cal. Rptr. 8]* . A Conflict of Interest Code may require disclosure of financial interests regardless of whether the public official's actions will have a material effect on those interests which is distinguishable from the effect on the public generally [*Metropolitan Water Dist. v. Fair Political Practices Com. (1977) 73 Cal. App. 3d 650, 658, 141 Cal. Rptr. 8]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingState ProceedingsGovernmentsLegislationEnactmentGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsLocal GovernmentsOrdinances & RegulationsGovernmentsState & Territorial GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsLegislaturesPublic Contracts LawBids & FormationAgency & Authority of Government OfficersContracting Officers

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§ 469.11 Prohibited Conflicting Interests

[1] State Agency Personnel

No state officer or employee shall engage in any employment, activity, or enterprise that is clearly inconsistent, incompatible, or in conflict with, or inimical to, his or her duties as a state officer or employee [*Gov. Code § 19990*].

Each appointing power must determine, subject to approval of the Department of Personnel Administration, those activities that, for employees under its jurisdiction, are inconsistent, incompatible, or in conflict with their duties as state officers or employees. Activities and enterprises deemed to fall in these categories include, but are not limited to, all of the following [*Gov. Code § 19990*]:

- Using the prestige or influence of the state or the appointing authority for the officer's or employee's private gain or advantage or the private gain of another.

- Using state time, facilities, equipment, or supplies for private gain or advantage.

- Using, or having access to, confidential information available by virtue of state employment for private gain or advantage or providing confidential information to persons to whom issuance of this information has not been authorized.

- Receiving or accepting money or any other consideration from anyone other than the state for the performance of his or her duties as a state officer or employee.

- Performance of an act in other than his or her capacity as a state officer or employee, knowing that the act may later be subject, directly or indirectly, to his or her control, inspection, review, audit, or enforcement.

- Receiving or accepting, directly or indirectly, any gift, including money, or any service, gratuity, favor, entertainment, hospitality, loan, or any other thing of value from anyone who is doing or is

seeking to do business of any kind with the officer's or employee's appointing authority or whose activities are regulated or controlled by the appointing authority under circumstances from which it reasonably could be substantiated that the gift was intended (1) to influence the officer or employee in his or her official duties, or (2) as a reward for any official actions performed by the officer or employee.

- Subject to any other laws, rules, or regulations as pertain thereto, not devoting his or her full time, attention, and efforts to his or her state office or employment during his or her hours of duty as a state officer or employee.

If these provisions conflict with the provisions of a memorandum of understanding reached pursuant to *Gov. Code § 3517.5* (labor agreement between Governor and public employee organization), the memorandum of understanding is controlling without further legislative action. However, if the provisions of the memorandum of understanding require the expenditure of funds, the memorandum's provisions are not effective unless approved by the Legislature in the annual Budget Act [*Gov. Code § 19990*].

Notwithstanding *Gov. Code §§ 18000* (state salary is full compensation for all services rendered in official capacity) and 19990, and subject to specified action by the Department of Personnel Administration, any state officer or employee may receive for personal use compensation from any nonprofit corporation formed exclusively to aid and assist a state museum or a district agricultural association. The compensation may be for services rendered to the nonprofit corporation and for the officer's or employee's expenses of performing those services [*Gov. Code § 18000.5*]. The state officer or employee may render those services during his or her office hours or hours of work for the state [*Gov. Code § 19990.5*]. In these cases, the board of directors of the museum or association determines whether the services rendered to the nonprofit corporation are incompatible with the state responsibilities of the officer or employee or interfere with the officer's or employee's full-time obligation to the state [*Gov. Code § 18000.5*].

[2] Local Agency Personnel

[a] Activities Incompatible With Agency Employer

Except as provided in *Gov. Code §§ 1128* and *1129* (*see* [b] *below*) certain officers and employees may not engage in any employment, activity, or enterprise for compensation that is inconsistent, incompatible, or in conflict with, or inimical to, his or her official duties or the duties, functions, or responsibilities of his or her "appointing power" or the agency by which he or she is employed [*Gov. Code § 1126(a)* (applies specifically to officers and employees of counties, cities, city and county, and all other political subdivisions, districts, and municipal corporations); *see Gov. Code § 1125* (local agency defined)]. No such officer or employee may, except pursuant to official approval, perform any work or service or render counsel for compensation outside his or her local agency employment if any part of his or her efforts will be subject to approval by any other officer, employee, board, or commission of his or her employing agency [*Gov. Code § 1126(a)*].

Each "appointing power" may determine, subject to approval by the local agency, those outside activities which, for employees under the "appointing power's" authority, are inconsistent, incompatible, or in conflict with, their duties as local agency officers and employees. An employee's outside employment, activity, or enterprise may be prohibited if it involves any of the following [*Gov. Code § 1126(b)*]:

(1) The use for private gain or advantage of his or her local agency's time, facilities, equipment, or supplies; the use of the badge, uniform, prestige, or influence of his or her local agency's office or post;

(2) The employee's receipt or acceptance of any money or other consideration from anyone other than his or her local agency for the performance of an act which he or she would be required or expected to perform in the regular course or hours of his or her local agency employment or as part of his or her

official duties;

(3) The performance of an act other than in the employee's official capacity when the act might later be subject to control, inspection, review, audit, or enforcement by any other officer or employee or the agency by which he or she is employed; or

(4) Such time demands as would render the performance of his or her official duties less efficient.

This list is not exclusive because *Gov. Code § 1126* was not intended to preempt a local agency's authority to prohibit activities not enumerated in the statute [*Long Beach Police Officers Assn. v. City of Long Beach (1988) 46 Cal. 3d 736, 741, 748, 250 Cal. Rptr. 869, 759 P.2d 504]* . However, nothing contained in *Gov. Code § 1126* is intended to abridge or otherwise restrict the rights of public employees under *Gov. Code §§ 3201-3209* [*Gov. Code § 1126(c)* (political activities of public employees)].

Nor are the prohibitions in *Gov. Code § 1126* intended to prevent the employment by private business of a public employee, such as a peace officer, firefighter, or forestry service employee (among others), who is off duty, to do work related to and compatible with the employee's regular employment or past employment, provided the employee has the approval of his or her agency supervisor and is certified as qualified by the appropriate agency [*Gov. Code § 1127*].

[b] Exceptions for Attorneys and Directors of Local Agency Self-Insurance Authorities

If an attorney employed by a local agency in a nonelective position serves on an appointed or elected governmental board, commission, committee, or other body, such service, by itself, shall not be deemed to be inconsistent, incompatible, in conflict with, or inimical to the duties of the attorney as an officer or employee of the local agency and will not result in the automatic vacation of either officer [*Gov. Code § 1128*].

Similarly, service on the board of directors of the local agency self-insurance authority by an officer or employee of a local agency as defined by *Gov. Code § 6599.02(a)*, or by a person who serves in an appointed or employed position with an agency or entity created by a joint powers agreement pursuant to *Gov. Code § 6503.5* to provide insurance pooling, shall not, by itself, be deemed to be inconsistent, incompatible, in conflict with, or inimical to, duties of the officer or employee in either capacity [*Gov. Code § 1129*].

[c] Election or Appointment to Agency Employer's Legislative Body

An employee of a local agency may not be sworn into office as an elected or appointed member of the legislative body of that local agency unless he or she resigns as an employee. If the employee does not resign, the employment must automatically terminate when the official is sworn into office [*Gov. Code § 53227(a)*; *see Gov. Code § 53227.2* ("local agency" and "legislative body" defined)]. For an individual who is an employee of a local agency and an elected or appointed member of that local agency's legislative body prior to January 1, 1996, this requirement applies when he or she is reelected or reappointed, on or after January 1, 1996, as a member of the local agency's legislative body [*Gov. Code § 53227(b)*].

Government Code Section 53277 does not apply to any volunteer firefighter who does not receive a salary, or where the salary the volunteer firefighter would otherwise receive is applied directly by the local agency toward the purchase of disability, life, health, or similar insurance coverage [Gov. Code § 53277(c)]. Moreover, Gov. Code §§ 53277-53227.2 are not to be construed to preempt *Ed. Code §§ 35107, 72103* [Gov. Code § 53277.1].

[3] Interest in Government Contracts

[a] General Scope of Prohibition

[i] Persons and Contracts Affected

Government Code Section 1090 is a general prohibition against an officeholder's financial interest in a contract, which prohibits any public officers or employees from having any financial interest, direct or indirect, in any contract made by them in their official capacity or by any board or commission of which they are a member [*Thorpe v. Long Beach Community College Dist. (2000) 83 Cal. App. 4th 655, 659, 99 Cal. Rptr. 2d 897]* . Under *Gov. Code § 1090*, no member of the Legislature, and no officer or employee of the state or a county, district, judicial district, or city may be financially interested in any contract made by any such person in his or her official capacity or by any body or board of which he or she is a member. In addition, no such person may be a buyer at any sale or a seller in any purchase made by any of such persons in his, her, or their official capacity [*Gov. Code § 1090*; *see also City of Vernon v. Central Basin Mun. Water Dist. (1999) 69 Cal. App. 4th 508, 513, 81 Cal. Rptr. 2d 650* (§ 1090 relates specifically to "contract" by board or body in which a member has financial interest, while *Gov. Code § 87100* relates to "participation" in any "governmental decision" in which official has financial interest)].

The prohibitions contained in *Gov. Code § 1090 et seq.* and in *Gov. Code § 1125 et seq.* also apply to members of governing boards of school districts and community college districts and to members of citizens' oversight committees appointed by those governing boards under provisions of *Educ. Code, § 15264 et seq.*) [*Educ. Code §§ 35233* (school districts), 72533 (community college districts)].

[ii] Attributes of Public Position or Office and Financial Interest

Whether a position or an office is a *public* office depends not on what the particular office might be called, or on what a statute might call it, but on the kind of authority given and exercised, the duties and functions performed, and other circumstances which manifest the character of the position and mark it as a public office, whatever its formal designation [*see, e.g., Kennedy v. City of Gustine (1926) 199 Cal. 251, 255-256, 248 P. 910]* . The prohibition is against an officer's or employee's being "financially" interested in a contract, but a "financial interest" is not defined, except to the extent that certain kinds of interests are stated not to be prohibited interests [*see Gov. Code §§ 1091, 1091.5*]. The failure to specify what is a "financial interest" is not a fatal defect. Before 1963 the word "financially" did not appear in the statute, but the language was found nevertheless to be sufficiently definite and certain to enable any reasonably intelligent person to understand the meaning of "interested" [*see People v. Darby (1952) 114 Cal. App. 2d 412, 427-428, 250 P.2d 743 , appeal dismissed, 345 U.S. 937, (1953)]* . The addition of the word "financially" effectively made the statutory language more precise in restricting the prohibition to financial interests and excluding other kinds of interests [*People v. Watson (1971) 15 Cal. App. 3d 28, 34, 34 n.1, 92 Cal. Rptr. 860 , cert. denied sub nom. Watson v. California (1971) 404 U.S. 850]* .

The term "financially interested" in *Gov. Code § 1090* is not interpreted in a restricted and technical manner. The law does not require that a public officer acquire a transferable interest in the forbidden contract before he or she may be amenable to the inhibition of the statute, nor does it require that the officer share directly in the profits to be realized from a contract in order to have a prohibited interest in it [*People v. Honig (1996) 48 Cal. App. 4th 289, 315, 55 Cal. Rptr. 2d 555]* . Section 1090 prohibits an official from having any financial interest in a contract, whether direct or indirect [*People v. Honig (1996) 48 Cal. App. 4th 289, 323, 55 Cal. Rptr. 2d 555]* . The statute is intended to enforce the government's right to the absolute, undivided, uncompromised allegiance of public officials by proscribing any personal interest. *Code of Civil Procedure Section 1090* does not address the actuality of significant personal influence, but rather the mere possibility of any such influence.

Accordingly, a financial interest within the meaning of *Gov. Code § 1090* may be direct or indirect and includes the contingent possibility of monetary or propriety benefits [*People v. Honig (1996) 48 Cal. App. 4th 289, 321, 323-325, 55 Cal. Rptr. 2d 555* (violations of *Gov. Code §§ 1090, 1097* established by fact of defendant's financial interest in nonprofit corporation at time he made official contracts that directly benefited the corporation and indirectly benefited himself and his wife)]. An official has a financial interest in a contract if the official might profit from it [*People v.*

Honig (1996) 48 Cal. App. 4th 289, 333, 55 Cal. Rptr. 2d 555] . To be financially interested in a contract within the meaning of *Gov. Code § 1090* does not require that the prohibited interest have a material effect on the public official's source of income. Any interest, except a remote one, which would prevent the official from exercising absolute loyalty and undivided allegiance to the best interest of the government is prohibited under the statute [*People v. Honig (1996) 48 Cal. App. 4th 289, 328, 55 Cal. Rptr. 2d 555* ; *see also BreakZone Billiards v. City of Torrance (2000) 81 Cal. App. 4th 1205, 1230, 97 Cal. Rptr. 2d 467* (no conflict of if interest is remote or speculative)]. The phrase "financially interested" in *Gov. Code § 1090* does not mean the same thing as a "financial interest" in *Gov. Code § 87103* (Political Reform Act of 1974) [*People v. Honig (1996) 48 Cal. App. 4th 289, 325-328, 55 Cal. Rptr. 2d 555* (for discussion of the meaning of the term under *Gov. Code § 87103, see § 469.11[8][b]*].

Government Code Section 1090 does not apply to any contract or grant made by a county children and families commission, created pursuant to the California Children and Families Act of 1998 [*Health and Safety Code § 130100 et seq.*], except if [*Gov. Code § 1091.3*]:

> (a) The contract or grant directly relates to services to be provided by any member of a county children and families commission or the entity the member represents or financially benefits the member or the entity he or she represents; and
>
> (b) The member fails to recuse himself or herself from making, participating in making, or in any way attempting to use his or her official position to influence a decision on the grant or grants.

Prohibited financial interests are not limited to express agreements for benefit and need not be proven by direct evidence. Rather, forbidden interests extend to expectations of benefit by express or implied agreement and may be inferred from the circumstances [*People v. Honig (1996) 48 Cal. App. 4th 289, 315, 55 Cal. Rptr. 2d 555]* .

The statutory prohibition in *Gov. Code § 1090* refers to a contract "made" by the official or employee in question, but the statutory language has been broadly interpreted to prohibit both actually personally participating in executing the contract and influencing the execution of it directly or indirectly to promote the personal interests of the official or employee [*People v. Sobel (1974) 40 Cal. App. 3d 1046, 1052, 115 Cal. Rptr. 532* ; *see Stigall v. Taft (1962) 58 Cal. 2d 565, 569-571, 25 Cal. Rptr. 441, 375 P.2d 289* ; *People v. Watson (1971) 15 Cal. App. 3d 28, 34, 37, 92 Cal. Rptr. 860* , *cert. denied sub nom. Watson v. California (1971) 404 U.S. 850* ; *Millbrae Asso. for Residential Survival v. Millbrae (1968) 262 Cal. App. 2d 222, 237, 69 Cal. Rptr. 251]* . Thus, the negotiations, discussions, reasoning, planning, and give and take which go beforehand in the making of a decision to commit oneself are all deemed to be part of the making of a contract in the broad sense [*City Council v. McKinley (1978) 80 Cal. App. 3d 204, 212, 145 Cal. Rptr. 461* ; *see People v. Honig (1996) 48 Cal. App. 4th 289, 315, 55 Cal. Rptr. 2d 555* ; *Campagna v. City of Sanger (1996) 42 Cal. App. 4th 533, 538, 49 Cal. Rptr. 2d 676]* .

When *Gov. Code § 1090* applies, it is an absolute bar to a board or commission entering into the prohibited contract. Even if the interested board or commission member abstains from any participation in the matter, *Gov. Code § 1090* applies to prevent fellow board or commission members from being influenced by their colleague [*Thorpe v. Long Beach Community College Dist. (2000) 83 Cal. App. 4th 655, 659, 99 Cal. Rptr. 2d 897]* .

[iii] Good Faith and Equitable Aspects of Contract Are Not Defenses

In determining if a conflict of interest exists, the court will "disregard the technical relationship of the parties and look behind the veil which enshrouds their activities in order to discern the vital facts. However devious and winding the trail may be which connects the officer with the forbidden contract, if it can be followed and the connection [can be] made, a conflict of interest is established" [*People v. Watson (1971) 15 Cal. App. 3d 28, 37, 92 Cal. Rptr. 860* , *cert. denied sub nom. Watson v. California (1971) 404 U.S. 850* ; *see People v. Deysher (1934) 2 Cal. 2d 141, 146, 40 P.2d 259* ; *People v. Honig (1996) 48 Cal. App. 4th 289, 315, 320, 55 Cal. Rptr. 2d 555* (court cannot focus on isolated contract

and ignore transaction as whole); *People v. Darby (1952) 114 Cal. App. 2d 412, 429, 250 P.2d 743]* .

Whether the officer or employee in question acted in good faith and whether the contract was fair, just, and equitable are immaterial questions if the issue is whether a conflict of interests exists [*People v. Vallerga (1977) 67 Cal. App. 3d 847, 865-866, 136 Cal. Rptr. 429* ; *see People v. Honig (1996) 48 Cal. App. 4th 289, 314, 55 Cal. Rptr. 2d 555]* . The statutory prohibition is founded on "the ancient and self-evident principle that no [person] can faithfully serve two masters, a principle which has always been an essential attribute of every rational system of positive law" [*People v. Watson (1971) 15 Cal. App. 3d 28, 38, 92 Cal. Rptr. 860* , *cert. denied sub nom. Watson v. California (1971) 404 U.S. 850* ; *see Stockton Plumbing & Supply Co. v. Wheeler (1924) 68 Cal. App. 592, 601, 229 P. 1020* ; *see also People v. Honig (1996) 48 Cal. App. 4th 289, 313-314, 55 Cal. Rptr. 2d 555]* . Even if no fraud or dishonesty is apparent (in addition to avoiding contracts which are actually obtained through fraud or dishonest conduct), the object of the enactments is to remove or limit the possibility of any personal influence, either directly or indirectly, which might bear on an official's decision [*Thomson v. Call (1985) 38 Cal. 3d 633, 648-649, 214 Cal. Rptr. 139, 699 P.2d 316* ; *Stigall v. Taft (1962) 58 Cal. 2d 565, 569, 25 Cal. Rptr. 441, 375 P.2d 289* ; *see People v. Honig (1996) 48 Cal. App. 4th 289, 314, 55 Cal. Rptr. 2d 555* ; *Terry v. Bender (1956) 143 Cal. App. 2d 198, 206-207, 300 P.2d 119]* .

Government Code Sections 1090 and *1097* are more specific than the conflict of interest provisions of the Political Reform Act of 1974 (*Gov. Code § 81000 et seq.*). The former specifically apply to the making of governmental contracts, whereas the latter apply to making, participation in making, or in any way attempting to use an official position to influence, any governmental decision (*Gov. Code § 87100*) [*People v. Honig (1996) 48 Cal.App. 4th 289, 329, 55 Cal. Rptr. 2d 555]* . Although the definition of making a contract is defined broadly under *Gov. Code § 1090*, it is not nearly as broad as the behavior at which the conflict of interest provisions of the Political Reform Act are aimed. Since *Gov. Code §§ 1090* and *1097* are aimed at a more specific and limited form of official behavior by public officers and employees, they must be considered the more specific--and thus the more controlling--legislation in the circumstances in which they apply [*People v. Honig (1996) 48 Cal. App. 4th 289, 329, 55 Cal. Rptr. 2d 555]* .

[b] Qualification for Remote Interests

An officer is not financially interested in a contract made by a body or board of which he or she is a member if the officer has only a remote interest in the contract, which is disclosed and noted in the official records of the body or board, and if thereafter the body or board authorizes, approves, or ratifies the contract in good faith without having to count the vote of the interested member [*Gov. Code § 1091(a)*; *see Gov. Code § 1091(b)* (remote interest defined)]. This provision does not apply if the interested member influenced or attempted to influence another member to make the contract [*Gov. Code § 1091(c)*]. A willful failure to disclose even a remote interest is an offense [*Gov. Code § 1091(d)*; *see Gov. Code § 1097* (penalty)], but a contract made while the remote interest remained undisclosed is not void unless the contracting party knew of the interest at the time of making the contract [*Gov. Code § 1091(d)*].

As used in *Gov. Code § 1091*, the term "remote interest" also includes a person who has a financial interest in a contract, if all of the following conditions are met [*Gov. Code § 1091.4(a)*]:

(a) The agency of which the person is a board member is a special district serving a population of less than 5,000 that is a landowner voter district, as defined in *Gov. Code § 56050*, that does not distribute water for any domestic use [*Gov. Code § 1091.4(a)(1)*];

(b) The contract is for either of the following:

(A) The maintenance or repair of the district's property or facilities provided that the need for maintenance or repair services has been widely advertised. The contract will result in materially less expense to the district than the expense that would have resulted under reasonably available alternatives and review of those alternatives is documented in

records available for public inspection; or

(B) The acquisition of property that the governing board of the district has determined is necessary for the district to carry out its functions at a price not exceeding the value of the property, as determined in a record available for public inspection by an appraiser who is a member of a recognized organization of appraisers [*Gov. Code § 1091.4(a)(2)*];

(c) The person did not participate in the formulation of the contract on behalf of the district [*Gov. Code § 1091.4(a)(3)*]; and

(d) At a public meeting, the governing body of the district, after review of written documentation, determines that the property acquisition or maintenance and repair services cannot otherwise be obtained at a reasonable price, that the contract is in the best interests of the district, and adopts a resolution stating why the contract is necessary and in the best interests of the district [*Gov. Code § 1091.4(a)(4)*].

[c] Qualification for Particular Interests

An officer or employee shall not be deemed to be interested in a contract if his or her interest is in any of the following [*Gov. Code § 1091.5(a)*]:

(a) The ownership of less than three percent of the shares of a corporation for profit, provided the total annual income to him or her from dividends from the corporation, including the value of stock dividends, does not exceed five percent of his or her total annual income, and any other payments made to him or her by the corporation do not exceed five percent of his or her total annual income;

(b) That of an officer in being reimbursed for his or her actual and necessary expenses incurred in the performance of official duty;

(c) That of a recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the board;

(d) That of a landlord or tenant of the contracting party if the contracting party is the federal government or any federal department or agency, this state or an adjoining state, any department or agency of this state or an adjoining state, any county or city of this state or an adjoining state, or any public corporation or special, judicial, or other public district of this state or an adjoining state unless the subject matter of the contract is the property in which the officer or employee has the interest as landlord or tenant in which event his or her interest shall be deemed a remote interest within the meaning of, and subject to, the provisions of *Gov. Code § 1091*;

(e) That of a tenant in a public housing authority created pursuant to *Health & Safety Code § 34200 et seq.* in which he or she serves as a member of the board of commissioners of the authority or of a community development commission created pursuant to *Health & Safety Code § 34100 et seq.*;

(f) That of a spouse of an officer or employee of a public agency in his or her spouse's employment or officeholding if his or her spouse's employment or officeholding has existed for at least one year prior to his or her election or appointment [*see Thorpe v. Long Beach Community College Dist. (2000) 83 Cal. App. 4th 655, 660-665, 99 Cal. Rptr. 2d 897* (term "employment" narrowly construed to mean spouse's employment in same position, grade or classification; under facts, exception in *Gov. Code § 1091.5(a)(6)* held not to apply)];

(g) That of a nonsalaried member of a nonprofit corporation, provided that such interest is disclosed to the body or board at the time of the first consideration of the contract, and provided further that such interest is noted in its official records;

(h) That of a noncompensated officer of a nonprofit, tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration, and provided further that such interest is noted in its official records. An officer is "noncompensated" even though he or she receives reimbursement from the nonprofit, tax-exempt corporation for necessary travel and other actual expenses incurred in performing duties of his or her office [*Gov. Code § 1091.5(a)*];

(i) That of a person receiving salary, per diem, or reimbursement for expenses from a government entity, unless the contract directly involves the department of the government entity that employs the officer or employee, provided that the interest is disclosed to the body or board at the time of consideration of the contract, and provided further that the interest is noted in its official record;

(j) That of an attorney of the contracting party or that of an owner, officer, employee, or agent of a firm which renders, or has rendered, service to the contracting party in the capacity of stockbroker, insurance agent, insurance broker, real estate agent, or real estate broker, if these individuals have not received and will not receive remuneration, consideration, or a commission as a result of the contract and if these individuals have an ownership interest of less than 10 percent in the law practice or firm, stock brokerage firm, insurance firm, or real estate firm;

(k) Except as provided in *Gov. Code § 1091.5(b)*, that of an officer or employee of or a person having less than a 10 percent ownership interest in a bank, bank holding company, or savings and loan association with which a party to the contract has a relationship of borrower or depositor, debtor, or creditor; or

(l) That of (1) a bona fide nonprofit, tax-exempt corporation having among its primary purposes the conservation, preservation, or restoration of park and national lands or historical resources for public benefit, which corporation enters into an agreement with a public agency to provide services related to park and natural lands or historical resources and which services are found by the public agency, before entering into an agreement or as part of the agreement, to be necessary to the public interest to plan for, acquire, protect, conserve, improve, or restore park and natural lands or historical resources for public purposes and (2) any officer, director, or employee acting under the agreement on behalf of a nonprofit corporation. For purposes of this paragraph, "agreement" includes contracts and grants, and "park," "natural lands," and "historical resources" has the meaning set forth in *Pub. Res. Code § 5902(d), (g),* and *(j)*. Services to be provided to the public agency may include those studies and related services, acquisitions of property and property interests, and any activities related to those studies and acquisitions necessary for the conservation, preservation, improvement, or restoration of park and natural lands or historical resources [*Gov. Code § 1091.5(a)*].

An officer or employee shall not be deemed to be interested in a contract made pursuant to competitive bidding under a procedure established by law if his or her sole interest is that of an officer, director, or employee of a bank or savings and loan association with which a party to the contract has the relationship of borrower or depositor, debtor or creditor [*Gov. Code § 1091.5(b)*; *see Fin. Code § 860*].

If a person is both a public officer or employee and an officer, employee, or stockholder of a bank or a holding company owning stock in a bank, and the public agency of which he or she is an officer or employee makes a contract with the bank to hold or handle the public funds controlled by the agency, that person is not "interested" in the contract to the

extent of having conflicting interests merely because of his or her position in or with respect to the bank [*see Fin. Code § 860*].

Particular officers and employees may be the beneficiaries of a special statutory exemption from the general conflicts-of-interest prohibitions. Such exemptions are a practical necessity. For example, the Insurance Commissioner and personnel in the Department of Insurance would not be guilty of a conflict of interests merely by holding policies issued by insurance companies that they regulate or by being related or married to a person interested in a regulated insurer [*Ins. Code § 12901*]. The commissioner and his or her staff may carry on the work of the department, even as to insurers in which they are thus "interested," notwithstanding such relationships [*see Caminetti v. Pacific Mut. Life Ins. Co. (1943) 22 Cal. 2d 344, 366, 139 P.2d 908]* .

[d] Contract as Void

Any contract made in violation of the prohibition against financial interest on the part of a public officer or employee "may be avoided" by any party except the interested officer or employee [*Gov. Code § 1092(a)*]. The statutory language suggests that such a contract is merely voidable, but the courts have decided that it is actually void as against public policy [*see People ex rel. Cal. v. Drinkhouse (1970) 4 Cal. App. 3d 931, 935, 84 Cal. Rptr. 773* (reporting rule); *see also Severance v. Knight-Counihan Co. (1947) 29 Cal. 2d 561, 568, 177 P.2d 4* ; *Berka v. Woodward (1899) 125 Cal. 119, 127, 57 P. 777* ; *Stockton Plumbing & Supply Co. v. Wheeler (1924) 68 Cal. App. 592, 601, 229 P. 1020]* .

An action under *Gov. Code § 1092* must be commenced within four years after the plaintiff has discovered, or in the exercise of reasonable care should have discovered, a violation described in *Gov. Code § 1092(a)* [*Gov. Code § 1092(b)*].

A person who violates *Gov. Code § 1090*, regardless of whether the violation is intentional, forfeits any rights or interests flowing from the illegal contract [*Campagna v. City of Sanger (1996) 42 Cal. App. 4th 533, 538, 540-542, 49 Cal. Rptr. 2d 676]* . Because a contract that violates *Gov. Code § 1090* is void and against public policy, there is no ground for any equitable consideration, presumption, or estoppel, and the city or agency is entitled to recover any consideration that it has paid, without restoring the benefits received under the contract [*Thomson v. Call (1985) 38 Cal. 3d 633, 646-647, 214 Cal. Rptr. 139, 699 P.2d 316* (upholding decision allowing city to retain land purchased and recover purchase price plus interest from city councilman who violated statute in land sale transaction)].

[e] Evidences of Indebtedness

There are particular provisions governing conflicts of interest with respect to warrants, scrip, orders, demands, claims, and other evidences of indebtedness [*see Gov. Code §§ 1093-1096*].

[f] Insurance

No state officer or employee, and no member of the Legislature, may accept any commission for the placement of insurance on behalf of the state [*Gov. Code § 1090.1*].

[g] Contract or Grant by Local Workforce Investment Board

Government Code Section 1090 does not apply to any contract or grant made by local workforce investment boards created under the federal Workforce Investment Act of 1998 (*29 U.S.C. § 2801 et seq.*) except when both of the following conditions are met [*Gov. Code § 1091.2*]:

> (a) The contract or grant directly relates to services to be provided by any member of a local workforce investment board or the entity the member represents or financially benefits the member or the entity he or she represents.

(b) The member fails to recuse himself or herself from making, participating in making, or in any way attempting to use his or her official position to influence a decision on the grant or grants.

[4] Honoraria and Gifts

[a] Elected Officials

Elected state officers, elected officers of local government agencies, or other individuals specified in *Gov. Code § 87200* (applicability of disclosure statutes) may not accept any honorarium [*Gov. Code § 89502(a)*]. Also, in any calendar year, these individuals may not accept gifts with a total value of more than $250 from any single source [*Gov. Code § 89503(a)*].

[b] Candidates

A candidate for elective state office, for judicial office, or for elective office in a local government agency may not accept any honorarium [*Gov. Code § 89502(b)(1)*]. Also, in any calendar year, he or she may not accept gifts with a total value of more than $250 from any single source [*Gov. Code § 89503(b)(1)*]. The limitations contained in *Gov. Code §§ 89502(b)(1), 89503(b)(1)*, however, do not apply to any person who was a candidate described in *Gov. Code §§ 89502(b)(1), 89503(b)(1)* for judicial office on or before December 31, 1996 [*Gov. Code §§ 89502(b)(2), 89503(b)(2)*].

A person is deemed a candidate for purposes of *Gov. Code §§ 89502(b)(1)* and *89503(b)(1)* when he or she has filed a statement of organization as a committee for election to a state or local office, a declaration of intent, or a declaration of candidacy, whichever occurs first. A person is not deemed a candidate for purposes of those provisions after he or she is sworn into the elective office, or, if the person lost the election after the person has terminated his or her campaign statement filing obligations for that office under *Gov. Code § 84214*, or after certification of the election results, whichever is earlier [*Gov. Code §§ 89502(b)(1), 89503(b)(1)*].

[c] Agency Officials

A member of a state board or commission or designated employee of a state or local government agency may not accept an honorarium from any source, or gifts from any single source in any calendar year with a total value of more than $250, if the member or employee would be required to report the receipt of income or gifts from that source on his or her statement of economic interest [*Gov. Code §§ 89502(c), 89503(c)*].

[d] Exceptions

[i] Judges, Judicial Candidates, and Part-Time Board Members of Higher Learning Institution

The restrictions in *Gov. Code §§ 89502* and *89503* do not apply to a person in his or her capacity as judge [*Gov. Code §§ 89502(d), 89503(d)*]. They also do not apply to a person in his or her capacity as a part-time member of the governing board of any public institution of higher education unless that position is an elective office [*Gov. Code §§ 89502(d), 89503(d)*].

[ii] Travel Payments and Gifts Exchanged Between Individuals

Government Code Section 89503, relating to gifts, does not prohibit or limit payments, advances, or reimbursements for travel and related lodging and subsistence permitted by *Gov. Code § 89506* [*Gov. Code § 89503(e)(1)*]. The section also does not prohibit or limit wedding gifts and gifts exchanged between individuals on birthdays, holidays, and other similar occasions. This exception applies provided that the gifts exchanged are not substantially disproportionate in

value [*Gov. Code § 89503(e)(2)*].

[5] Public Members of Regulatory Agencies

The membership of some regulatory agencies in the state government includes members of the public, sometimes referred to as "lay members". Members of the public are disqualified from holding membership in a regulatory agency that licenses or regulates persons with whom the lay person has had any of certain employment and contractual relationships within the preceding five years [*Bus. & Prof. Code § 450*].

No member of the public is qualified to hold membership in a regulatory agency if within the preceding five years he or she has been an employer, or an officer, a director, or a substantially full-time representative of an employer or a group of employers, of a person licensed or regulated by the agency [*see Bus. & Prof. Code § 450(a)*]. However, a lay person is not disqualified if he or she has merely maintained an infrequent employment relationship with the licensed or regulated person, or has maintained a client, patient, or customer relationship not constituting more than two percent of the practice or business of the licensed or regulated person [*see Bus. & Prof. Code § 450(a)*].

No member of the public is qualified to hold membership in a regulatory agency if within the preceding five years he or she has been an employee, or a representative of an employee, of a person licensed or regulated by the agency [*Bus. & Prof. Code § 450(c)*]. However, a lay person is not disqualified if he or she has merely maintained an infrequent employment relationship with the licensed or regulated person, or has rendered professional or related services to the licensed or regulated person not constituting more than two percent of the employment or practice of the lay person [*Bus. & Prof. Code § 450(c)*].

No member of the public is qualified to hold membership in a regulatory agency if within the preceding five years he or she has had a contractual relationship with a person licensed or regulated by the agency and the relationship constitutes more than two percent of the business or practice of the licensed or regulated person "or an officer, director, or substantially full-time representative of such person [that is, apparently, the licensed or regulated person] or group of persons" [*Bus. & Prof. Code § 450(b)*].

In order to avoid a potential for a conflict of interest, a public member of a board must not be a current or past licensee of that board, or be a close family member of a licensee of that board [*Bus. & Prof. Code § 450.2*].

No member of the public is qualified to hold membership in a regulatory agency if at the time of his or her appointment or during his or her term of office, he or she has any financial interest in any organization regulated by the agency [*Bus. & Prof. Code § 450.3*].

No member of the public or lay member is qualified to hold membership in a regulatory agency if at any time within five years immediately preceding his or her appointment, he or she was engaged in pursuits which lie within the field of the industry or profession, or provided representation to the industry or profession, regulated by the board of which he or she is a member, nor may he or she engage in those pursuits or provide that representation during his or her term of office [*Bus. & Prof. Code § 450.5*].

[6] Constitutional Prohibitions Regarding Legislators

No member of the Legislature may accept any honorarium [*Cal. Const., art. IV, § 5(b)*, enacted in *Gov. Code § 89502* (restrictions on honoraria)]. No member of the Legislature may knowingly accept any compensation for appearing, agreeing to appear, or taking any other action on behalf of another person before any state government board or agency. If a legislator does so, he or she may not, for a period of one year following the acceptance of the compensation, vote on or make, participate in making, or in any way attempt to use his or her official position to influence an action or decision before the Legislature, other than an action or decision involving a bill described in *Cal. Const., art. IV, § 12*

(regarding budget bills), which he or she knows, or has reason to know, would have a direct and significant financial impact on that person and would not impact the public generally (which includes an industry, trade, or profession) or a significant segment of the public in a similar manner.

However, a legislator may engage in activities involving a board or agency that are strictly on his or her own behalf, appear in the capacity of an attorney before any court or the Workers' Compensation Appeals Board, or act as an advocate without compensation or make an inquiry for information on behalf of a person before a board or agency. The prohibition does not extend to any action of a partnership or firm of which the legislator is a member if the legislator does not share directly or indirectly in the fee, less any expenses attributable to that fee, resulting from that action [*Cal. Const., art. IV, § 5(d)*, enacted in *Gov. Code § 87102.5*].

To eliminate any appearance of a conflict with the proper discharge of his or her duties and responsibilities, no member of the Legislature may knowingly receive any salary, wages, commissions, or other similar earned income from a lobbyist or lobbying firm, as defined by the Political Reform Act of 1974 (*Gov. Code §§ 82038.5, 82039*), or from a person who, during the previous 12 months, has been under a contract with the Legislature [*Cal. Const., art. IV, § 4(a)*, enacted in *Gov. Code § 87102.5*].

"Earned income" means income from wages, salaries, professional fees, and other amounts received or promised to be received as compensation for personal services rendered [*Gov. Code § 82030.5(a)* (enacted pursuant to requirement under *Cal. Const., art. IV, § 4(a)*)]. However, income which is not "earned" includes, but is not limited to the following sources [*Gov. Code § 82030.5(b)*]:

(1) Any income derived from stocks, bonds, property, or other investments, or from retail or wholesale sales;

(2) Any amount paid by, or on behalf of, an elected state officer to a tax-qualified pension, profit sharing, or stock bonus plan and received by the elected state officer from the plan; or

(3) The community property interest in the income of a spouse.

[7] Constitutional Prohibitions Regarding Certain State Officers

To eliminate any appearance of a conflict with the proper discharge of official duties and responsibilities, no state officer may knowingly receive any salary, wages, commission, or other similar earned income from a lobbyist or lobbying firm or from a person who, during the previous 12 months, has been under a contract with the state agency under the jurisdiction of the state officer [*Cal. Const., art. V, § 14(a)*, enacted in *Gov. Code § 87102.8*; *see Gov. Code § 82030.5(a)* ("earned income" defined), set forth *above*; *see also Gov. Code §§ 82038.5, 82039* ("lobbying firm" and "lobbyist," defined)]. A state officer for the purposes of this provision is defined as the Governor, Lieutenant Governor, Attorney General, Controller, Insurance Commissioner, Secretary of State, Superintendent of Public Instruction, Treasurer, and member of the State Board of Equalization [*Cal. Const., art. V, § 14(f)*; *Gov. Code § 87102.8(a)*].

No state officer may accept any honorarium [*Cal. Const., art. V, § 14(b)*; *see Gov. Code § 89502* (restrictions on honoraria)]. In addition, no state officer may knowingly accept any compensation for appearing, agreeing to appear, or taking any other action on behalf of another person before any state government board or agency; a state officer who does so is prohibited for one year from using his or her official position to influence an action or decision that would financially affect that person [*see Cal. Const., art. IV, § 14(d)*, enacted in *Gov. Code § 87102.8*].

[8] Political Reform Act of 1974

[a] Prohibited Conduct

The conflicts-of-interest provisions in the Political Reform Act of 1974 (*Gov. Code § 87100 et seq.*) do not apply to:

- Judges or court commissioners [*Gov. Code § 82048(b)(1)*];

- Members of the Board of Governors and designated employees of the State Bar of California [*Gov. Code § 82048(b)(2)*];

- Members of the Judicial Council [*Gov. Code § 82048(b)(3)*];

- Members of the Commission on Judicial Performance, provided that they are subject to the conflict of interest provisions *Bus. & Prof. Code §§ 6035-6037* [*Bus. & Prof. Code § 6038*; *Gov. Code § 82048(b)(4)*]; or

- Federal officers or employees serving in official federal capacities in a state or local government agency [*Gov. Code § 82048(b)(5)*].

With these exceptions, and unless a public official is required by the "rule of necessity" to participate in a governmental decision, no public official at any level of state or local government may make, participate in making, or in any way attempt to use his or her official position to influence a governmental decision [*see Gov. Code §§ 82002, 82032, 82037*] in which he or she knows, or has reason to know, he or she has a financial interest [*Gov. Code § 87100*; *see also City of Vernon v. Central Basin Mun. Water Dist. (1999) 69 Cal. App. 4th 508, 513, 81 Cal. Rptr. 2d 650* (*Gov. Code § 1090* relates to "contract" in which member has financial interest, while § 87100 relates to "participation" in any "governmental decision" in which official has financial interest)].

The contrary "rule of necessity" is that if a public official's participation is legally required for taking action or making a decision, the official may participate, notwithstanding a financial interest [*see Gov. Code § 87101*]. This happens when there exists no alternative source of decision [*2 Cal. Code Reg. § 18708(a)*; *Kunec v. Brea Redevelopment Agency (1997) 55 Cal. App. 4th 511, 520-522, 64 Cal. Rptr. 2d 143* (discussing rule of necessity, but holding that agency failed to make full public disclosure on record about members' actual or potential conflicts and absence of alternative source of decision-making authority required to properly invoke statute under former *2 Cal. Code Reg. § 18701(b)* (*now see 2 Cal. Code Reg. § 18708(b)*))].

A public official may act even when disqualified, if participation is necessary to carry out a legislative or constitutional purpose [*see, e.g., Caminetti v. Pacific Mut. Life Ins. Co. (1943) 22 Cal. 2d 344, 366-367, 139 P.2d 908 , cert. denied sub nom. Neblett v. Caminetti (1943) 320 U.S. 802]* . The fact that an official's vote is required to break a tie vote, however, does not make his or her participation legally necessary [*Gov. Code § 87101*; *see 2 Cal. Code Reg. § 18708(c)* (regulation not to be construed to permit official, otherwise disqualified under *Gov. Code § 87100*, to vote to break tie)]. Moreover, the rule of necessity does not appear to permit government officials to vote on contracts in which they may be financially interested [*Kunec v. Brea Redevelopment Agency (1997) 55 Cal. App. 4th 511, 521 n.3, 64 Cal. Rptr. 2d 143]* .

No state administrative official can make, participate in making, or use an official position to influence, any governmental decision directly relating to any contract when the official knows, or has reason to know, that any party to the contract is a person with whom the official, or any member of the official's immediate family, has engaged in any business transaction on terms not available to members of the public, regarding any investment or interest in real property, or the rendering of goods or services, having a total value of $1,000 or more within 12 months prior to the time the official action is to be performed [*Gov. Code § 87450(a)*]. "State administrative official" means a member, officer, employee, or consultant of a state administrative agency who, as part of official responsibilities, engages in any judicial, quasi-judicial, or other proceeding in other than a purely clerical, secretarial, or ministerial capacity [*Gov. Code*

§ 87450(b) (incorporating by reference definition in *Gov. Code § 87400(b)*)].

In addition, members of the Legislature are prohibited from engaging in conduct that constitutes a misuse of the official's position to influence certain governmental decisions in which he or she is financially interested, and from receiving earned income from a lobbyist [*see Cal. Const., art. IV, §§ 4, 5*; *Gov. Code § 87102.5*; for further discussion, *see § 469.11[6]*]. Similar prohibitions apply to certain elected state officers [*see Cal. Const., art. V, § 14(a)*; *Gov. Code § 87102.8*; for further discussion, *see § 469.11[7]*]. The remedies of *Gov. Code § 83100 et seq.* (enforcement by Fair Political Practices Commission) apply to these provisions, notwithstanding the general rule that those remedies do not apply to elected state officers [*see Gov. Code §§ 87102, 87102.5(a), 87102.8(d)*]. However, the remedies under *Gov. Code § 91000 et seq.* are not available for violations of these provisions [*Gov. Code § 87102*; *see also § 469.13*].

For discussion of procedure regarding the recall of an elected official, see Ch. 302, *Initiative, Referendum, and Recall* .

The Fair Political Practice Commission has adopted regulations pursuant to the Political Reform Act of 1974, relevant to the issues discussed above. These include:

- *2 Cal. Code Reg. § 18700* (overview).
- *2 Cal. Code Reg. § 18701* (determining if individual public official within act).
- *2 Cal. Code Reg. § 18702 et seq.* (determining if public official is making, participating in making, or using or attempting to use his or her official position to influence government position).
- *2 Cal. Code Reg. § 18703 et seq.* (identifying public official's economic interests).
- *2 Cal. Code Reg. § 18704 et seq.* (determining if official's economic interest directly or indirectly involved in government decision, materiality, and whether reasonably foreseeable that government decision will have material financial effect).
- *2 Cal. Code Reg. § 18707 et seq.* (determining if reasonably foreseeable financial effect distinguishable from public generally).
- *2 Cal. Code Reg. § 18708* (determining if public officials participation legally required despite conflict of interest).

[b] Financial Interest in Governmental Decision

A public official has a financial interest in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of the official's family, or on a business entity, real property, a source of income in which the official has a certain interest, a business in which the official holds any position of management, or any donor of a gift received by, or promised to, the official within the 12 months preceding the decision [*Gov. Code § 87103* (which specifies threshold monetary amounts for certain of the above categories which are discussed below)].

An effect is considered "reasonably foreseeable," in the context of *Gov. Code § 87103*, if there is a substantial likelihood that it will occur. Certainty is not required. If an effect is only a mere possibility, however, it is not reasonably foreseeable [*Smith v. Sup. Ct. (1994) 31 Cal. App. 4th 205, 212, 36 Cal. Rptr. 2d 897* (per advice letter of Fair Political Practices Commission, test is consistent with ordinary meaning of term and based on construction of conflict of interest prohibition in *United States v. Mississippi Valley Generating Co. (1961) 364 U.S. 520, 555, 560, 81 S. Ct. 294, 5 L. Ed. 2d 268*)].

Regulations of the Fair Political Practices Commission, adopted pursuant to the Political Reform Act of 1974, define the phrase "the public generally" as used in *Gov. Code § 87103* [*see 2 Cal. Code Reg. § 18707(b)*]. Generally speaking, the material financial effect of a governmental decision on a public official's economic interest is indistinguishable from its effect on the public generally if:

- It affects a "significant segment" of the public generally [*see 2 Cal. Code Reg. § 18707.1(b)(1)(A)-(E)*]; and

- It affects the official's economic interests in substantially the same manner as the affected significant segment of the public [*see 2 Cal. Code Reg. § 18707.1(b)(1), (2)*; *see Consumers Union of U.S., Inc. v. California Milk Producers Advisory Bd. (1982) 82 Cal. App. 3d 433, 448-449, 147 Cal. Rptr. 265* (upholding validity of former regulation); *see also 2 Cal. Code Reg. §§ 18707.3 et seq.* (concerning phrase "the public generally")].

Thus, a member of an industry may serve on public boards regulating that industry, and may also participate in decisions which affect their financial interests in that industry, provided that those decisions would affect all other members of the industry similarly [*see Consumers Union of U.S., Inc. v. California Milk Producers Advisory Bd. (1978) 82 Cal. App. 3d 433, 438, 147 Cal. Rptr. 265]* . In at least one instance, the Legislature has specifically determined that the representation of the interests of a given industry is tantamount to representation of the public interest. This was done by providing that, with respect to the members of the committee, the industry concerned and the public generally are the same for the purposes of *Gov. Code § 87103* [*Food & Agric. Code § 12044* (Agricultural Pest Control Advisory Committee)].

A business entity is an organization or enterprise operated for profit, without regard to its form [*see Gov. Code § 82005*]. If it appears that a governmental decision will have a material financial effect (as opposed to its effect on the public generally) on a business entity, a public official has a financial interest in the decision if the official, or an immediate family member of the official, has a direct or an indirect investment of a fair market value exceeding $2,000 in the business entity [*Gov. Code §§ 82034, 87103*] or if the official is a director, partner, trustee, or an officer or employee of the business entity or holds any position of management in it [*Gov. Code § 87103*].

An investment is "indirect" if it is owned by the official's spouse or dependent child, an agent on behalf of the official, or a business entity or trust in which the official, the official's agent, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater [*Gov. Code § 87103*]. An "investment" for the purpose of determining a conflict of interest is defined in *Gov. Code § 82034*. With respect to a state official, an investment could result in conflicting interests only if the business entity in which the official has the investment owns an interest in real property in California, or does business or plans to do business in California, or has done business in California in the two years before the official is required to file a disclosure statement [*Gov. Code §§ 82034, 82035*]. With respect to a local official the same rule applies, except that the territory in question is the geographical area over which the official or his or her agency has authority instead of the entire state [*see Gov. Code §§ 82034, 82035*].

If it appears that a governmental decision will have a material financial effect, distinguishable from its effect on the public generally, on any real property, a state official has a financial interest in the decision if the real property is located in California and the official, or anyone in the official's immediate family, has a direct or an indirect interest in it of a fair market value exceeding $2,000 [*Gov. Code §§ 82033, 82035, 87103*]. An indirect interest has the same characteristics as an indirect investment (discussed above). The rule applies to a local official if the real property is located in the geographical area over which he or she or his or her agency has authority [*see Gov. Code §§ 82033, 82035, 87103*].

"Fair market value" is the estimated fair market value of goods, services, facilities, or anything of value other than

money [*Gov. Code § 82025.5*].

What constitutes "income" is comprehensively set out in *Gov. Code § 82030*. If it appears that a governmental decision will have a material financial effect, distinguishable from its effect on the public generally, on any source of income (as the term is defined in *Gov. Code § 82030*)--except loans by a commercial lending institution made in the regular course of business on terms available to the public without regard to official status--a public official has a financial interest in the decision if within 12 months before the making of the decision, the official received or was provided or promised income from that source aggregating $500 or more in value [*Gov. Code §§ 82030, 87103*; *see also Gov. Code §§ 87103(e)* (restriction as to source of gifts aggregating $250 or more in value), 87103.5 (certain income from retail customers excluded)].

The definition of "income" in *Gov. Code § 82030* includes both directly paid or enjoyed income and income benefitting the official indirectly, such as a community property interest in the income of the official's spouse [*see Gov. Code § 82030*], but does not include the receipt of campaign contributions [*see Gov. Code § 82030(b)*; *Woodland Hills Residents Asso., Inc. v. City Council of Los Angeles (1980) 26 Cal. 3d 938, 946-947, 164 Cal. Rptr. 255, 609 P.2d 1029* (fact that persons benefited by decision of city council members, all of whom had received substantial campaign contributions from such persons, did not deprive plaintiffs of fair trial concerning approval of subdivision map in mandamus action); *but see BreakZone Billiards v. City of Torrance (2000) 81 Cal. App. 4th 1205, 1227, 1229, 97 Cal. Rptr. 2d 467* (*Gov. Code § 87103* creates statutory obligation on part of public official not to vote on matter if campaign contributions received from donor aggregating $250 or more within 12 months before time decision is made; *Gov. Code § 87103(e)* requires that contributions received within 12 months before vote be aggregated to determine if financial threshold for disqualification from participation has been reached)].

If a governmental decision would have a material financial effect on a private entity or organization that is a source of income to a public official, the official is prohibited from participating in the decision, notwithstanding the fact that the amount of such income will not be affected thereby [*see Witt v. Morrow (1977) 70 Cal. App. 3d 817, 822-823, 139 Cal. Rptr. 161]* .

The phrase "financially interested" in *Gov. Code § 1090* does not mean the same thing as a "financial interest" in *Gov. Code § 87103*, which requires a foreseeably material financial effect. The Legislature has never qualified the proscribed financial interests under *Gov. Code § 1090* with modifiers such as "material," "substantial," "significant," "direct," "certain," "probable," and the like [*People v. Honig (1996) 48 Cal. App. 4th 289, 323-328, 55 Cal. Rptr. 2d 555]* . Moreover, since *Gov. Code §§ 1090* and *1097* are aimed at a more specific and limited form of official behavior by public officers and employees, they must be considered the more specific, and thus controlling, legislation in the circumstances in which they apply [*People v. Honig (1996) 48 Cal. App. 4th 289, 329, 55 Cal. Rptr. 2d 555* ; *see § 469.11[3*] (discussion of *Gov. C. §§ 1090, 1097*)].

[c] Procedure If Financial Interest Present

A public official who holds an office specified in *Gov. Code § 87200*, other than a member of the Legislature, who has a financial interest in a decision within the meaning of *Gov. Code § 87200* must, upon identifying a conflict of interest or a potential conflict of interest and immediately prior to the consideration of the matter, do all of the following [*Gov. Code § 87105*]:

- Publicly identify the financial interest that gives rise to the conflict of interest or potential conflict of interest in detail sufficient to be understood by the public, except that disclosure of the exact street address of a residence is not required [*see § 469.12*].

- Recuse himself or herself from discussing and voting on the matter, or otherwise acting in violation of *Gov. Code § 87100*.

- Leave the room until after the discussion, vote, and any other disposition of the matter is concluded, unless the matter has been placed on the portion of the agenda reserved for uncontested matters.

- Notwithstanding the leaving the room requirement, the public official may speak on the issue during the time that the general public speaks on the issue.

In enacting these requirements, the Legislature found and declared that these provisions further the purposes of the Political Reform Act of 1974 within the meaning of *Gov. Code § 81012(a)* [2002 Stats., ch. 233, § 3].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFormationGeneral OverviewContracts LawDefensesPublic Policy ViolationsContracts LawDefensesStatutes of LimitationsCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesAbuse of Public OfficeConflicts of InterestGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesAbuse of Public OfficeIllegal GratuitiesElementsCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesAbuse of Public OfficeMisuse of Public Funds & PropertyGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGeneral OverviewGovernmentsLegislationInitiative & ReferendumGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsElectionsGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsElectionsGovernmentsState & Territorial GovernmentsEmployees & OfficialsInsurance LawBusiness InsuranceSelf-InsuranceGovernmental AgenciesPublic Contracts LawBids & FormationAgency & Authority of Government OfficersContracting OfficersPublic Contracts LawVoiding the ContractConflicts of Interest

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§ 469.12 Disclosure Requirements

Disclosure requirements designed to reveal potential conflicts of interest are set out in *Gov. Code §§ 87200-87210*. These requirements apply only to elected state officers [*see Gov. Code §§ 82020, 82021, 82024, 82048, 82053*], judges and commissioners of courts of the judicial branch, members of the Public Utilities Commission, members of the State Energy Resources Conservation and Development Commission, members of the Fair Political Practices Commission, members of the California Coastal Commission, members of planning commissions, district attorneys, county counsel, county treasurers, city treasurers, other public officials who manage public investments, members of the board of supervisors, and chief administrative officers of a county [*see Gov. Code § 82017*], mayors [*see Gov. Code § 82042*], city managers [*see Gov. Code § 82008*], city attorneys, chief administrative officers and members of the council of a city [*see Gov. Code § 82008*], and candidates for any of these offices at any election [*Gov. Code § 87200*; *see Gov. Code §§ 82007, 82022, 82023*].

The contents of a disclosure statement showing investments, interests in real property, and sources and amounts of income are prescribed in *Gov. Code §§ 87206* and *87207*. A statement must be filed on any specified occasion, such as on the assumption of office [*see Gov. Code § 87202*], and in most cases must be filed on each anniversary of assuming office [*see Gov. Code §§ 87201-87203, 87205*] and after leaving office [*see Gov. Code § 87204*].

The Supreme Court of California has held that the business income reporting scheme of *Gov. Code § 87207(b)* does not unconstitutionally intrude into the political, privacy, and associational rights of public officials and their clients and customers [*Hays v. Wood (1979) 25 Cal. 3d 772, 780-784, 160 Cal. Rptr. 102, 603 P.2d 19]* . In 1979, the Court held a former subsection that required certain disclosure only with regard to businesses that provided legal or brokerage services, *Gov. Code § 87207(b)(2)*, to be unconstitutional [*see Hays v. Wood (1979) 25 Cal. 3d 772, 786-787, 160 Cal. Rptr. 102, 603 P.2d 19]* ; it was then deleted by legislative amendment in 1984 [*see* 1984 Stats., ch. 931, § 8]. *Gov. Code § 87207(b)* now provides that when the filer's pro rata share of income to a business entity, including income to a sole proprietorship, is required to be reported, the statement must contain certain data [*Gov. Code § 87207(b)*].

Legal Topics:

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

Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesAbuse of Public OfficeConflicts of InterestElementsEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewGovernmentsCourtsJudgesGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsEmployees & Officials

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§ 469.13 Remedies

Generally, compliance with conflicts-of-interest provisions in the Political Reform Act of 1974 may be enforced by means of an action for injunctive relief [*Gov. Code § 91003(a)*]. Nevertheless, any violation of any section of the Political Reform Act, is a misdemeanor [*Gov. Code § 91000(a)*]. Undisclosed conflicts of interest may also lead to criminal or other penalties under the Act or other statutes [*see, e.g., People v. Hedgecock (1990) 51 Cal. 3d 395, 402-403, 272 Cal. Rptr. 803, 795 P.2d 1260* (former mayor charged with conflict of interest under *Gov. Code §§ 87100, 87103, 91000(a)*, and conspiracy under *Penal Code § 182* for unreported contributions)].

The remedies provided in *Gov. Code § 91000 et seq.*, as well as those provided in *Gov. Code § 83100 et seq.* (regarding enforcement by Fair Political Practices Commission), do not apply to elected state officers for violations or threatened violations of *Gov. Code § 87100 et seq.*, except as provided in *Gov. Code §§ 87102.5* and *87102.8* [*Gov. Code §§ 87102, 87102.8(d)*; *see Gov. Code §§ 87102.5(a), 87102.8(d)* (applicability of remedies under *Gov. Code § 83100 et seq.*)].

Under *Gov. Code § 91005*, any designated employee or public official specified in *Gov. Code § 87200*, except an elected state officer, who realizes an economic benefit as a result of a violation of *Gov. Code § 87100* or of a disqualification provision of a conflict of interest code is liable in a civil action brought by the civil prosecutor or by a person residing within the jurisdiction for an amount up to three times the value of the benefit [*Gov. Code § 91005(b)*]. Before an action can be brought under *Gov. Code § 91005(b)*, however, the requirements of *Gov. Code § 91007* must be complied with [*see § 469.32[4*], discussing *Gov. Code § 91007* requirements].

Similarly, under *Gov. Code § 91004*, any person who intentionally or negligently violates any of the reporting requirements of the Political Reform Act of 1974, is liable in a civil action brought by the civil prosecutor or by a person residing within the jurisdiction for an amount not more than the amount or value not properly reported [*Gov. Code § 91004* as amended by Proposition 208; *see Community Cause v. Boatwright (1987) 195 Cal. App. 3d 562, 573 n.4, 240 Cal. Rptr. 794* (per *Gov. Code § 91004*, person who violates the provisions of *Gov. Code § 81000 et seq.* only inadvertently not liable for damages in civil action)]. Before an action can be brought under *Gov. Code § 91004*, however, the requirements of *Gov. Code § 91007* must be met [*see § 469.32[4*], discussing *Gov. Code § 91007* requirements]. If two or more persons are responsible for any violation (of the Political Reform Act of 1974), they are

jointly and severally liable [*Gov. Code § 91006*].

In cases in which *Gov. Code § 91003(a)* does apply, any person residing "in the jurisdiction" may sue for injunctive relief to enjoin violations of or to compel compliance with the provisions of the Political Reform Act of 1974 [*Gov. Code § 91003(a)*]. There is no specific time reference for residency within the meaning of Gov. Code § 91103(a), i.e., there is no durational residency requirement [*Kunec v. Brea Redevelopment Agency (1997) 55 Cal. App. 4th 511, 518, 64 Cal. Rptr. 2d 143]* . The court may, however, in its discretion require any plaintiff, other than the Fair Political Practices Commission, to file a complaint with the commission prior to seeking injunctive relief. The court may award reasonable attorney's fees to the prevailing party [*Gov. Code § 91003(a)*].

Furthermore, on a preliminary showing in an action brought by a person residing "in the jurisdiction" that a violation of *Gov. Code § 87100 et seq.* (prohibiting participation in or exercise of influence over governmental decision by financially interested public official), *Gov. Code §§ 87400-87405* (restricting specified activities of former state officers and employees), or *Gov. Code § 87450* (prohibiting state administrative officials from entering into specified contracts), or a violation of a disqualification provision of a Conflict of Interest Code, has occurred, the court may restrain the execution of any official action in relation to which the violation occurred, pending final adjudication. If it is ultimately determined that a violation has occurred and that the official action might not otherwise have been taken or approved, the court may set the official action aside as void. These official actions include, but are not limited to, orders, permits, resolutions, and contracts, but do not include the enactment of any state legislation. In considering a grant of either preliminary or permanent relief of this nature, the court is required to accord due weight to any injury that may be suffered by innocent persons relying on the official action [*Gov. Code § 91003(b)*].

Relative to alleged violations by a state agency or official, "jurisdiction" means the state; relative to a local government agency, "jurisdiction" means the region, county, city, district, or other geographical area in which it has jurisdiction [*Gov. Code § 82035*].

A violation of a Conflict of Interest Code [*see § 469.10[4]*] may be remedied in any of several ways, including criminal and civil penalties as well as administrative discipline and dismissal from a position [*see Gov. Code §§ 91000-91006*].

A contract made in violation of *Gov. Code § 1090* may be "avoided at the instance of any party except the officer interested therein" [*Gov. Code § 1092(a)*]; and a violation of *Gov. Code §§ 1090-1096* may be criminally prosecuted [*see Gov. Code § 1097*; *People v. Honig (1996) 48 Cal. App. 4th 289, 329, 55 Cal. Rptr. 2d 555* (rejecting argument that it is absurd that a felony violation of *Gov. Code §§ 1090, 1097* can be committed when official has any financial interest, however small or contingent, in a contract while a misdemeanor violation of the Political Reform Act of 1974 requires a material financial interest)].

When public funds are soon to be spent as a result of government action participated in by a public officer who had a conflict of interest, a taxpayer has standing to sue for appropriate relief [*see Code Civ. Proc. § 526a*; *see also Stigall v. Taft (1962) 58 Cal. 2d 565, 571, 25 Cal. Rptr. 441, 375 P.2d 289* (suit for declaration that certain contract between city and former council member's company was void)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsContracts LawDefensesPublic Policy ViolationsCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesAbuse of Public OfficeConflicts of InterestGeneral OverviewGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsLegislaturesPublic Contracts LawVoiding the ContractConflicts of Interest

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[Reserved]

§§ 469.14[Reserved]

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§ 469.20 Related Matthew Bender Publications

For discussion and forms relating to actions for declaratory and injunctive relief, see Ch. 182, *Declaratory Relief*

For discussion and forms relating to actions for injunctive relief, see Ch. 303, *Injunctions*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 469.21 State Constitution

Prohibition against conflict of interest by member of Legislature. *Cal. Const., art. IV, §§ 4, 5*

Prohibition against conflict of interest by certain state officers. *Cal. Const., art. V, § 14*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 469.22 State Statutes

[1] Conflict of Interest Generally

Conflicts of interest are prohibited to public members of regulatory agencies. *Bus. & Prof. Code §§ 450-450.5*

Weights and measures regulation. *Bus. & Prof. Code § 12514*

Interests in government contracts are prohibited. *Fin. Code § 860*; *Gov. Code § 1090 et seq.*

Disclosure or use for pecuniary gain of confidential information acquired in course of official duties is prohibited. *Gov. Code § 1098*

Conflicts of interest are prohibited to local officers and employees. *Gov. Code § 1125 et seq.*

Conflicts of interest are prohibited to state officers and employees. *Gov. Code §§ 18000.5, 19990, 19990.5*

Political Reform Act of 1974: conflicts-of-interest provisions. *Gov. Code §§ 87100-87500*

Ethics in Government Act of 1990, regarding prohibition against receiving honoraria and gifts. *Gov. Code § 89500 et seq.*

Prohibition against payment to public officers and others regarding certain services rendered with regard to criminal extradition. *Penal Code § 1558*

[2] Particular Public Entities

Members of Legislature. *Gov. Code § 87102.5*

Alcoholic beverage control personnel. *Bus. & Prof. Code § 23060*

Appraisers and appraisal commissions. *Rev. & Tax Code §§ 672, 1717.1*

Financial Institutions Department personnel. *Fin. Code § 234*

Board of Accountancy: public members. *Bus. & Prof. Code § 5000*

California Architects Board: public members. *Bus. & Prof. Code § 5514*

Community colleges governing boards and certain citizens' oversight committees. *Educ. Code § 72533*

Contractors' State License Board: public members. *Bus. & Prof. Code §§ 7001, 7002*

Corporations Department personnel. *Corp. Code §§ 25605(b), 25607*

Corrections Department personnel. *Penal Code §§ 2540, 2541*

County sanitation district employees. *Health & Safety Code § 4768*

Board of Dental Examiners. *Bus. & Prof. Code § 1602*

Energy Resources Conservation and Development Commission. *Pub. Res. Code § 25205*

Board of Examiners of Nursing Home Administrators. *Bus. & Prof. Code § 3912*

Board of Fire Services. *Health & Safety Code § 13142.8*

Financial advisers and bond counsel. *Gov. Code §§ 53590-53594*

Board of Guide Dogs for the Blind. *Bus. & Prof. Code § 7201*

Food and Agriculture Department personnel. *Food & Agric. Code § 12783*

Health Department personnel. *Welf. & Inst. Code §§ 14475, 14480, 14481*

Horse Racing Board. *Bus. & Prof. Code §§ 19423, 19424, 19429*

Hospital advisory Boards. *Welf. & Inst. Code § 4201*

Insurance Department personnel. *Ins. Code § 12901*

Local assessment appeals boards. *Rev. & Tax Code § 1624.2*

Local community development commission personnel. *Health & Safety Code § 34144(a)*

Local hospital district personnel. *Health & Safety Code § 32110*

Local housing authority personnel. *Health & Safety Code §§ 34272, 34281, 34328.2*

Medical Board of *California. Bus. & Prof. Code § 2007*

Municipal utility district personnel. *Pub. Util. Code §§ 12392, 12722*

Board of Registered Nursing. *Bus. & Prof. Code § 2702*

Board of Optometry. *Bus. & Prof. Code § 3011*

Board of Pharmacy: public members. *Bus. & Prof. Code § 4001(b)*; *but see Bus. & Prof. Code § 4001(f)* (section repealed January 1, 2013)

Postsecondary Education Commission. *Educ. Code § 66901*

Board for Professional Engineers and Land Surveyors: public members. *Bus. & Prof. Code § 6711*

Board of Psychology: public members. *Bus. & Prof. Code § 2923*

Public Utilities Commission. *Pub. Util. Code § 303*

Real Estate Department personnel. *Bus. & Prof. Code § 10074*

Regional park district personnel. *Pub. Res. Code § 5567*

Regional water quality control boards. *Water Code §§ 13207, 13388*

School boards and certain citizens' oversight committees. *Educ. Code §§ 35230, 35233, 35240*

California Small Business Board. *Corp. Code § 14085 et seq.*

South Coast Air Quality Management District. *Health & Safety Code §§ 40426.5, 40426.7*

State Bar Board of Governors and designated employees, attorney members of Judicial Council, and non-judge members of Commission on Judicial Performance. *Bus. & Prof. Code §§ 6035-6038*

State Board of Equalization. *Gov. Code § 15626*

State University employees. *Educ. Code §§ 89006, 89906-89908*

Structural Pest Control Board: public members. *Bus. & Prof. Code § 8521*

Tahoe Regional Planning Agency. *Gov. Code § 67042.1*

Transit district personnel. *Pub. Util. Code § 25392 et seq.*

Unemployment Insurance Appeals Board administrative law judge. *Unemp. Ins. Code § 404*

Veterinary Medical Board. *Bus. & Prof. Code § 4801*

Water Commission. *Water Code § 12892*

Water Resources Control Board. *Water Code §§ 175.5, 13388*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesAbuse of Public OfficeConflicts of InterestGeneral OverviewEducation LawAdministration & OperationBoards of Elementary & Secondary SchoolsGeneral OverviewGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsLegislaturesPublic Contracts LawVoiding the ContractConflicts of Interest

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Volume 40: Products Liability thru Public Entities and Officers-Chs. 460-469
Chapter 469 PUBLIC ENTITIES AND OFFICERS: CONFLICTS OF INTEREST
PART III. RESEARCH GUIDE

40-469 California Forms of Pleading and Practice--Annotated § 469.23

§ 469.23 Decisions

Former mayor was subject to criminal charges under *Gov. Code §§ 87100* and *87103* and *Gov. Code § 91000(a)* for conflict-of-interest violations, as well as to conspiracy charges under *Penal Code § 182* and felony perjury charges under *Penal Code § 118* for unreported contributions in violation of both Political Reform Act of 1974 and local ordinances. *People v. Hedgecock (1990) 51 Cal. 3d 395, 400-403, 272 Cal. Rptr. 803, 795 P.2d 1260* (conviction on conspiracy and perjury counts; perjury conviction reversed when trial court took materiality issue from jury; conspiracy conviction remanded for evidentiary hearing regarding jury misconduct)

Gov. Code § 1126 does not restrict a local agency's authority to prohibit off-duty activities of public employees that are not enumerated in statute. *Long Beach Police Officers Assn. v. City of Long Beach (1988) 46 Cal. 3d 736, 738, 741, 748, 250 Cal. Rptr. 869, 759 P.2d 504*

While commissioners who violate *Pub. Util. Code § 303* are subject to removal under *Cal. Const. art. XII, § 1*, any Commissioner who violates *Pub. Util. Code § 303(a)* by voluntarily owning stock does not, under the terms of the statute, forfeit the commissioner's office. Although Section 303(a) did not provide a remedy if a commissioner voluntarily owned stock in a regulated company, commissioners who violated the public trust remained subject to civil and criminal penalties under the Political Reform Act of 1974, *Gov. Code § 81000*. *People ex rel. Found. for Taxpayer & Consumer Rights v. Duque (2003) 105 Cal. App. 4th 259, 264-270, 129 Cal. Rptr. 2d 298*

When a city attorney also served as attorney for the city's redevelopment agency and public financing authority (all of which agencies consisted of the same five people), he or she acted in some official capacity in each of these roles, such that he owed a duty of absolute loyalty and undivided, uncompromised allegiance to the agencies he was representing. *People v. Gnass (2002) 101 Cal. App. 4th 1271, 1291, 125 Cal. Rptr. 2d 225*

Prohibition against contract "made" by official or employee extends to influencing making of contract directly or indirectly. *Stigall v. Taft (1962) 58 Cal. 2d 565, 569-571, 25 Cal. Rptr. 441, 375 P.2d 289* ; *People v. Vallerga (1977) 67 Cal. App. 3d 847, 868, 136 Cal. Rptr. 429* ; *City Council v. McKinley (1978) 80 Cal. App. 3d 204, 212, 145 Cal. Rptr. 461* ; *People v. Sobel (1974) 40 Cal. App. 3d 1046, 1052, 1054, 115 Cal. Rptr. 532* ; *Millbrae Ass'n for*

Residential Survival v. Millbrae (1968) 262 Cal. App. 2d 222, 237, 69 Cal. Rptr. 251

Acting in good faith is immaterial if officer guilty of prohibited conflicts of interest. *Stigall v. Taft (1962) 58 Cal. 2d 565, 569, 25 Cal. Rptr. 441, 375 P.2d 289* ; *People v. Vallerga (1977) 67 Cal. App. 3d 847, 865-866, 136 Cal. Rptr. 429* ; *Terry v. Bender (1956) 143 Cal. App. 2d 198, 206-207, 300 P.2d 119* ; *Hobbs, Wall & Co. v. Moran (1930) 109 Cal. App. 316, 319, 293 P. 145* ; *Stockton Plumbing & Supply Co. v. Wheeler (1924) 68 Cal. App. 592, 603, 229 P. 1020*

Contract made in violation of prohibition against conflicts of interest is void as against public policy. *Severance v. Knight-Counihan Co. (1947) 29 Cal. 2d 561, 568, 177 P.2d 4* ; *Oakland v. California Constr. Co. (1940) 15 Cal. 2d 573, 576-577, 104 P.2d 30* ; *Berka v. Woodward (1899) 125 Cal. 119, 127, 57 P. 777* ; *People ex rel. Cal. v. Drinkhouse (1970) 4 Cal. App. 3d 931, 935, 84 Cal. Rptr. 773*

Officer is permitted to act even though disqualified if participation is necessary to enable agency to function. *Caminetti v. Pacific Mut. Life Ins. Co. (1943) 22 Cal. 2d 344, 366, 139 P.2d 908*

Existence of prohibited interest is shown by substance, not form. *People v. Deysher (1934) 2 Cal. 2d 141, 146, 40 P.2d 259*

Whether governmental functionary holds office subject to conflict-of-interest laws depends on extent of his or her authority, duties and functions performed, and other indicia of character of position. *Kennedy v. City of Gustine (1926) 199 Cal. 251, 255-256, 248 P. 910*

Employment contract between school district and school board member's spouse is subject to scrutiny of conflict of interest provisions; board member, e.g., has community property interest in spouse's contract with school district, which implicates board member's financial interests; when *Gov. Code § 1090* applies, it is absolute bar to board or commission entering into prohibited contract; even if interested board or commission member abstains from participation in matter, *Gov. Code § 1090* applies to prevent fellow board or commission members from being influenced by their colleague; *Gov. Code § 1091.5*, however, enumerates several noninterest situations that arguably could implicate prohibition against officeholder's financial interest in contract, but are deemed by Legislature not to violate § 1090; term "employment" in *Gov. Code § 1091.5(a)(6)* narrowly construed to mean spouse's employment in same position, grade or classification; intent of *Gov. Code § 1091.5(a)(6)* is to continue status quo of spouse already employed for over year, but to prohibit spouse's employment in different position that requires approval of board of trustees of which employee's spouse is member; under facts, exception in *Gov. Code § 1091.5(a)(6)* held not to apply. *Thorpe v. Long Beach Community College Dist. (2000) 83 Cal. App. 4th 655, 659-665, 99 Cal. Rptr. 2d 897*

Political Reform Act (*Gov. Code § 81000 et seq.*) creates under *Gov. Code § 87103* statutory obligation on part of public official to whom act applies not to vote on matter if he or she has received campaign contributions from donor aggregating $250 or more within 12 months before the time the decision is made; prohibition, however, does not encompass third parties who may hold same views as donor or who might benefit from action before public official; *Gov. Code § 87103(e)* requires that contributions received within 12 months before vote be aggregated to determine if financial threshold for disqualification from participation has been reached; under facts, council members not required to be recused concerning vote on conditional use permit. *BreakZone Billiards v. City of Torrance (2000) 81 Cal. App. 4th 1205, 1227* & n.18, 1128, *97 Cal. Rptr. 2d 467*

Political Reform Act (*Gov. Code § 81000 et seq.*) does not preclude application of other laws so long as those other provisions do not interfere with compliance with Political Reform Act; *Gov. Code § 1090* is law of most general application which imposes such additional requirements; *Gov. Code § 1090* codified common law prohibition of public officials having financial interest in contracts they make in their official capacities; purpose of section is to prohibit self-dealing, not representation of interests of others; later circumstances confronted appellant in that it contended that

recipients of political contributions voted interest of developer who had history of contributing to their political campaigns; under facts, that allegation, whether true or not, was not forbidden by either *Gov. Code § 1090* or § 87103; *Gov. Code § 1090* statutory prong of conflict of interest doctrine requires that official have some interest in outcome, whether direct or indirect; when interest is remote and speculative, no conflict is presented under statute; further, while interest in outcome need not be present interest, but may consist of benefit that arises after taking of governmental action, no facts were alleged invoking indirect interest rule; it is not sufficient that city council member desires to advocate position of campaign supporter; there must be some financial or pecuniary benefit to governmental official that could sway his or her judgment. *BreakZone Billiards v. City of Torrance (2000) 81 Cal. App. 4th 1205, 1229-1231, 97 Cal. Rptr. 2d 467*

Only two kinds of defendants are subject to an action under Political Reform Act: governmental agencies and individual governmental officials; *Gov. Code § 91012* precludes agency from recovering its costs and attorney fees, but there is no such express exclusion for individual officials; neither is there any provision that individual governmental officials are entitled to award of costs, including attorney fees, only when they have personally incurred such expenses; accordingly, *Gov. Code § 91012* did not prohibit individual member of school board from recovering costs, including attorney fees and thus such individual defendant was entitled to have plaintiff post security under *Gov. Code § 91012* even though agency was providing his defense. *Dunn v. Jurupa Unified School Dist. (2000) 79 Cal. App. 4th 957, 960-961, 94 Cal. Rptr. 2d 529*

Gov. Code § 1090 relates specifically to "contracts" in which member of board or body has financial interest, while *Gov. Code § 87100* relates to "participation" in any "governmental decision" in which official has financial interest; when individual defendant was elected member of plaintiff water district's board of directors and also an owner, stockholder, and salaried president of defendant private water company, section 1090 applied to whether defendant company's continuing receipt of reclaimed water was prohibited and section 87100 applied to individual defendant's participation in governmental decisions to set rates for reclaimed water and to set standby assessment; trial court correctly held, assuming continuing receipt by defendant company of reclaimed water from district constituted series of contracts, contracts were excepted from section 1090 by *Gov. Code § 1091.5(a)(3)*; district's sale of reclaimed water to 23 purveyors, including defendant company, all of whom were charged same rate, was sufficient to establish that public services were generally provided on same terms and conditions as if individual defendant were not a board member. *City of Vernon v. Central Basin Mun. Water Dist. (1999) 69 Cal. App. 4th 508, 513-518, 81 Cal. Rptr. 2d 650*

With regard to rule of necessity, agency fatally erred to make full public disclosure on record about why council members were actually or potentially conflicted, and failed to explain on same record why there was no alternative to the city council as a source of decision making authority, which was required under former *2 Cal. Code Reg. § 18701(b)* (*now see 2 Cal. Code Reg. § 18708(b)*, the regulation of the Fair Political Practices Commission interpreting *Gov. Code § 87101*). *Kunec v. Brea Redevelopment Agency (1997) 55 Cal. App. 4th 511, 520-522, 64 Cal. Rptr. 2d 143*

Common law prohibition on holding of two incompatible public offices; board of supervisors improperly consolidated probation and correction departments when it subordinated latter to former; actual conflict of interest resulting from consolidated officer's holding two positions on County board of parole rendered offices incompatible; moreover, offices incompatible insofar as consolidation imposed on chief probation officer duties that general law does not authorize probation officer to carry out; chief probation officer may not sit on County board of parole commissioners in two capacities and may not run institutions for confinement of unsentenced adults. *People ex rel. Deputy Sheriffs' Assn. v. County of Santa Clara (1996) 49 Cal. App. 4th 1471, 1486, 1491, 57 Cal. Rptr. 2d 322*

While acting in capacity of city attorney pursuant to retainer agreement providing for monthly retainer fee that excluded from its coverage litigation related services for which the city agreed to pay on a reasonable fee basis depending on the type of services rendered, attorney held to have violated Elec. Code § 1090 by entering into oral referral fee agreement with firm that attorney found and negotiated with to represent city in litigation matter and thus forfeited right to referral fee under referral fee agreement; no evidence of compliance with disclosure requirements of

former Cal. Rules of *Prof. Cond., Rule 2-108* (*now Cal. Rules of Prof. Conduct, Rule 2-200*). *Campagna v. City of Sanger (1996) 42 Cal. App. 4th 533, 538, 540-542, 49 Cal. Rptr. 2d 676*

Hospital district bylaw requiring district employee to resign employment with hospital before she could serve as elected member of district board as impermissible restriction on employee's political activities in violation of *Gov. Code § 3203*. *Eldridge v. Sierra View Local Hospital Dist. (1990) 224 Cal. App. 3d 311, 319, 325, 273 Cal. Rptr. 654*

Gov. Code § 1126 restriction on outside employment by public officer that is in conflict with official duties as inapplicable to exercise of hospital district employee's right to hold public office while retaining her job as district employee, because *Gov. Code § 1126* does not authorize placing restrictions on political rights of public employee. *Eldridge v. Sierra View Local Hospital Dist. (1990) 224 Cal. App. 3d 311, 318, 273 Cal. Rptr. 654*

"Income" as having special meaning under Political Reform Act; disclosure of income not within that definition as not required by *Gov. Code § 87200*. *Bach v. McNelis (1989) 207 Cal. App. 3d 852, 866-868, 255 Cal. Rptr. 232*

City council member as properly barred under *Gov. Code § 87100* from voting on ordinance amending redevelopment plan, and ordinance as properly invalidated under *Gov. Code § 91003* (since member's affirmative vote was essential to passage), because it was reasonably foreseeable that adoption of ordinance would have a material financial effect on member's real property and business interests. *Downey Cares v. Downey Community Development Com. (1987) 196 Cal. App. 3d 983, 991-993, 242 Cal. Rptr. 272*

When person subject to reporting requirements of Political Reform Act of 1974 purchases partnership interest in real property and knows or reasonably should have known (1) that he or she has received value in excess of consideration paid (which includes liabilities assumed), and (2) the amount of that excess value, he or she as required to report that difference, either as income or as gift. *Community Cause v. Boatwright (1987) 195 Cal. App. 3d 562, 571, 240 Cal. Rptr. 794* (decided prior to 1978 amendments to *Gov. Code §§ 82028* and *82030*, defining "gift" and "income," respectively)

Gov. Code § 87101 as including statutory analogue to common law rule of necessity, permitting mayor's participation in decision regarding rent control ordinance despite her ownership of covered rental property when mayor's participation was required by legislative process, and under city charter mayor's failure to act would constitute approval of ordinance. *Affordable Housing Alliance v. Feinstein (1986) 179 Cal. App. 3d 484, 489-491, 224 Cal. Rptr. 557*

Gov. Code § 87100 as not available to sue persons who are not public officials, and therefore city council member's husband and son as not liable for conflict of interest for participating in business venture located near redevelopment project approved by councilmember. *Citizens for Oxnard v. Maron (1983) 145 Cal. App. 3d 702, 706, 193 Cal. Rptr. 647*

Demurrer to action against city councilmember based on violation of *Gov. Code § 87103* (official's financial interest in decision affecting business entity in which official has investment) as properly sustained when "business entity" in question was nothing more than preincorporation expense agreement signed by council member's husband and son. *Citizens for Oxnard v. Maron (1983) 145 Cal. App. 3d 702, 707, 193 Cal. Rptr. 647*

Principal investigator as entitled to be present during trial when designated by district attorney bringing action on behalf of public against public official under Political Reform Act of 1974 (*Gov. Code § 81000 et seq.*), pursuant to *Evid. Code § 777(c)*, which allows the attorney of a party other than a natural person to designate an officer or employee to be present at trial. *People ex rel. Curtis v. Peters (1983) 143 Cal. App. 3d 597, 599-600, 192 Cal. Rptr. 70*

Elected official as required under *Gov. Code § 87203* to disclose purchase price of investment or interest in real property when purchase price is lower than actual value of investment or interest so as to constitute discount or gift,

which is classed as income by *Gov. Code §§ 82030(a)* and *82028*, provided that income was actually obtained within official's jurisdiction. *Community Cause v. Boatwright (1981) 124 Cal. App. 3d 888, 905-906, 177 Cal. Rptr. 657*

Fair Political Practices Commission regulation permitting industry members to serve on public boards regulating such industry and to participate in decisions which will affect all other members of industry similarly as valid. *Consumers Union of U.S., Inc. v. California Milk Producers Advisory Bd. (1978) 82 Cal. App. 3d 433, 448-449, 147 Cal. Rptr. 265*

Conflict of Interest Code as not required to provide right to hearing with respect to every item that must be reported under code. *Metropolitan Water Dist. v. Fair Political Practices Com. (1977) 73 Cal. App. 3d 650, 656-657, 141 Cal. Rptr. 8*

Conflict of Interest Code as permitted to require disclosure of financial interests of public official regardless of whether official decisions will have a material effect on such interests which is distinguishable from the effect on the public generally. *Metropolitan Water Dist. v. Fair Political Practices Com. (1977) 73 Cal. App. 3d 650, 658, 141 Cal. Rptr. 8*

Public official as prohibited from participating in governmental decision which would have material financial effect on private entity or organization which is source of income to official, notwithstanding fact that amount of such income not affected thereby. *Witt v. Morrow (1977) 70 Cal. App. 3d 817, 822-823, 139 Cal. Rptr. 161*

Failure of *Gov. Code §§ 1091, 1091.5*, to define prohibited "financial interest" as not defect rendering statutes fatally vague. *People v. Watson (1971) 15 Cal. App. 3d 28, 34, 34 n. 1, 92 Cal. Rptr. 860 , cert. denied sub nom. Watson v. California (1971) 404 U.S. 850* ; *People v. Darby (1952) 114 Cal. App. 2d 412, 427, 250 P.2d 743 , appeal dismissed sub nom. Darby v. California (1953) 345 U.S. 937 .*

Ownership of property in area to be rezoned as not creating conflict of interest on part of planning commission member. *Orinda Homeowners Committee v. Board of Supervisors (1970) 11 Cal. App. 3d 768, 776, 90 Cal. Rptr. 88*

Disclosure of conflicting interests and nonparticipation by interested employee or official in decision as ground for holding decision valid notwithstanding conflict. *Old Town Dev. Corp. v. Urban Renewal Agency (1967) 249 Cal. App. 2d 313, 328-329, 57 Cal. Rptr. 426* (decided, in part, under former Gov. Code § 33130 and prior to enactment of Political Reform Act of 1974)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesPublic Policy ViolationsEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsEmployees & OfficialsLegal EthicsClient RelationsAttorney FeesFee AgreementsPublic Contracts LawBids & FormationAgency & Authority of Government OfficersContracting OfficersPublic Contracts LawVoiding the ContractGeneral OverviewPublic Contracts LawVoiding the ContractConflicts of Interest

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§ 469.24 Attorney General Opinions

Under the "rule of necessity," a healthcare district may advertise on a radio station where (1) the radio station is the only station that accepts advertising in the district's region, (2) one of the district's directors, who assumed office in 2001, became an employee of the radio station in 1997 as an engineer and talk show host, (3) for more than five years prior to 1997, the district advertised on the radio station, (4) the station has six employees, (5) the district director's compensation from the station exceeds 50 percent of his income, and (6) the district director does not have an ownership interest in the station or hold a supervisory or managerial position at the station. -- Ops. Cal. Atty. Gen --, No. 05-210, 2005 Cal. AG LEXIS 16

The Department of Forestry and Fire Protection may award a financial grant to a timber owner for planning, reforestation, and resource management even though the timber owner is a state employee as long as his or her duties as an employee do not relate to or affect the awarding of such grants. -- Ops. Cal. Atty. Gen. --, No. 04-701, 2005 Cal. AG LEXIS 8

Gov. Code § 1090's provisions, considered in isolation, would clearly be applicable to the execution of any contract between a school district and a probationary teacher whose spouse is a member of the governing board, since the spouse would be financially interested in her contract of employment under community property laws, and he would be considered as participating in the making of the contract as a member of the board. However, § 1090's provisions do not stand alone. The Legislature has expressly defined certain financial interests as "remote interests" and "noninterests" that, if applicable, allow a contract to be executed despite section 1090's prohibition. If a "noninterest" is present, as defined in *Gov. Code § 1091.5*, the contract may be made without the officer's abstention, and generally a noninterest does not require disclosure. Under *Gov. Code § 1091.5(a)(6)*, the governing board of a school district may employ a teacher as a permanent employee if she has been a probationary teacher for more than one year before her spouse became a member of the governing board. *87 Ops. Cal. Atty. Gen. 23 (2004)*

Gov. Code § 1090 is directed at the time a contract is made. Where a lease agreement between a city and a nonprofit corporation was executed 11 years before the nonprofit corporation's executive director became a city council member, *Gov. Code § 1090* has no application now to the formation or existence of the contract. However, any attempt by the

city and the nonprofit corporation to modify the lease agreement while the executive director is on the city council would come within the broad language of Gov. Code § 1090. Further, the general terms of *Gov. Code § 1090* would apply with respect to any grants the city council might now wish to make to the nonprofit corporation. *85 Ops. Cal. Atty. Gen. 176 (2002)*

City council may not continue to execute an extension of a contract with a construction company to "noise-proof" homes near a city airport if the company's architectural subcontractor is the firm of a newly elected city council member even though the firm has been the architectural subcontractor on the project for more than five years and the architectural subcontractor for this construction company for the past three years. *85 Ops. Cal. Atty. Gen. 176 (2002)*

Where city proposes to enter into a development agreement with a developer, a senior staff member of the city may not participate in the negotiations and drafting of the agreement if her spouse is employed by a firm that will provide outreach services for the developer with respect to the project pursuant to a yearly retainer agreement, even though the spouse has no ownership interest in the firm, he will not work on the city's project, and his income will not be affected by the outcome of the development agreement or project. *85 Ops. Cal. Atty. Gen. 34 (2002)*

Director of irrigation district may not contract to obtain private construction services performed by district valued at $29,000 in exchange for terminating district's preexisting obligation to repair bridge located on director's property, even though those repair services were valued at $47,000; alternatively, irrigation district may not pay director $29,000 in consideration for terminating its preexisting and ongoing bridge maintenance obligation. *80 Ops. Cal. Atty. Gen. 335 (1997)*

Whether position of fire chief of fire protection district is public office and incompatible with offices of city council member and director of fire district as substantial questions of fact and law; leave to file action in quo warranto under *Code Civ. Proc. § 803* granted. *76 Ops. Cal. Att'y Gen. 38, 44 (1993)*

Positions of school district trustee and community services district director as improperly held by one individual, due to incompatibility of offices; leave to file action in quo warranto under *Code Civ. Proc. § 803* granted. *75 Ops. Cal. Att'y Gen. 112, 117 (1992)*

General law county as permitted to appoint as county counsel partner in private law firm and to contract for that firm to assist county counsel in performance of duties if certain limitations and qualifications are met. *74 Ops. Cal. Att'y Gen. 155 (1991)*

No conflict of interest when attorney employed full time by Franchise Tax Board gives private seminars for compensation, teaches private law school, or compiles book in same area of tax law for which he or she did research as employee as long as attorney complies with *Gov. Code § 19990(a)-(g)*. *73 Ops. Cal. Att'y Gen. 239 (1990)*

Political Reform Act as not authorizing city attorney to prosecute violations of act when city charter amended to remove authority to prosecute misdemeanor violations; city attorney may advise city council members under the attorney-client privilege whether an official action taken by such member violates the Political Reform Act. 71 Ops. Cal. Att'y Gen. 255 (1988)

When member of school board is married to tenured teacher, school board as prohibited from entering into annual collective bargaining agreement with teachers' association except under limited circumstances. *69 Ops. Cal. Att'y Gen. 103 (1986)*

Member of board of directors of community services district as prohibited from simultaneously holding position of General Manager/District Administrator of local hospital district or office of Superintendent of Schools. 68 Ops. Cal. Att'y Gen. 337 (1985)

Member of board of directors of community services district as not prohibited from serving as Fire Captain II of district to which appointed before becoming director, but as prohibited from serving if a member of board of directors at time of appointment as Fire Captain II, or thereafter during employment as Fire Captain II. 68 Ops. Cal. Att'y Gen. 337 (1985)

Common law prohibition against holding of incompatible offices as applicable to member of county committee on school district organization who is also member of school district board of trustees located within same county; *Educ. Code § 4007* as extending common law rule. *68 Ops. Cal. Att'y Gen. 240 (1985)*

Deputy sheriff as not permitted to also hold office of county supervisor of employing county; waiver of one salary as not curing legal prohibition. *68 Ops. Cal. Att'y Gen. 7, 10-11 (1985)*

California Constitution as not prohibiting member of California Legislature who is spouse of flight attendant from accepting free or discounted air travel pass when such passes are offered to all spouses of flight attendants. *67 Ops. Cal. Att'y Gen. 81, 83 (1984)*

Although under common law, offices of trustee of school district and city attorney are incompatible, *Gov. Code § 1128* as providing no forfeiture of either office ensues under any circumstances. *66 Ops. Cal. Att'y Gen. 382 (1983)*

Gov. Code § 1090 as violated when city hires city attorney, city administrator, redevelopment agency officers, compensating them with percentage of increased value of property within city's boundaries while allowing official involvement of such persons in contracts which may increase assessed values of said parcels. *66 Ops. Cal. Att'y Gen. 376 (1983)*

"Public office" and "public employment" defined and distinguished. *65 Ops. Cal. Att'y Gen. 316 (1982)*

Conflict of interest under common law rule as not existing when individual serves simultaneously as officer and employee. *65 Ops. Cal. Att'y Gen. 316 (1982)*

"Rule of necessity" as overcoming statutory conflict of interest. *65 Ops. Cal. Att'y Gen. 305 (1982)*

Part-time clinical instructors or part-time faculty, also engaged in private practice, as barred from membership on State Board of Optometry pursuant to *Bus. & Prof. Code § 3011*. *65 Ops. Cal. Att'y Gen. 242 (1982)*

No conflict of interest where county supervisor, who is also real estate broker, represents buyer or seller in land transaction which is contingent on county approval. *64 Ops. Cal. Att'y Gen. 795 (1981)*

Applicability of Hatch Act (*5 U.S.C. §§ 1501-1508*; prohibiting political activities among employees of states whose employment is made possible by use of federal funds) to those state employees whose activities are indirectly financed by federal government as to be determined on case-by-case basis by United States Civil Service Commission subject to review by federal courts. *64 Ops. Cal. Att'y Gen. 495 (1981)*

Simultaneous holding of county planning commissioner and county water district director offices by same person as not permitted. *64 Ops. Cal. Att'y Gen. 228 (1981)*

Appointment by Governor of state legislator to Board of Regents of University of California as violation of *Cal. Const., art IV, § 13* . 64 Ops. Cal. Att'y Gen. 164 (1981)

Serving simultaneously as member of board of directors of public utility district and as member of board of supervisors

of county in which district is located as incompatible and prohibited; under such circumstances, first office held as automatically vacated when duties in second office begin. *64 Ops. Cal. Att'y Gen. 137 (1981)*

Real property tax appraiser employed by county assessor as lawfully entitled to purchase property within county at tax-deeded land sale if he or she has not participated in or influenced appraisal of said parcel, does not use county time or county facilities unavailable to general public, and is not prohibited by valid local regulation from making such purchase. *63 Ops. Cal. Att'y Gen. 868 (1980)*

Financial disclosure provisions of Political Reform Act of 1974 as applicable to members of city councils and school boards. *58 Ops. Cal. Att'y Gen. 426 (1975)*

Santa Monica Municipal Airport District Commissioners as not permitted to participate in proceedings to determine charges for tie-down spaces if lessees of such spaces. *58 Ops. Cal. Att'y Gen. 345 (1975)*

County planning commissioner as not permitted to serve also on board of directors of hospital or water district. *58 Ops. Cal. Att'y Gen. 323 (1975)*

District attorney as not permitted to serve as elementary school district trustee in general-law county having county counsel. *58 Ops. Cal. Att'y Gen. 241 (1975)*

Assistant Superintendent of Public Instruction as permitted to serve on Los Angeles Community College Board of Trustees. 56 Ops. Cal. Att'y Gen. 556 (1973)

Water conservation district board of trustees member as not permitted to serve on board of directors of municipal improvement district. *55 Ops. Cal. Att'y Gen. 36 (1972)*

No conflict of interest where flood control district director votes on levee reconstruction proposal affecting his as well as others' property. *54 Ops. Cal. Att'y Gen. 154 (1971)*

No conflict of interest where Youth Authority Board member buys surplus property sold by Department of Water Resources. 53 Ops. Cal. Att'y Gen. 163 (1970)

Financial disclosure enactment of 1969 (Stats. 1969, Ch 1512) as constitutional. *53 Ops. Cal. Att'y Gen. 52 (1970)*

Deputy sheriff as permitted but not encouraged to have private employment during off-duty hours. *51 Ops. Cal. Att'y Gen. 110 (1968)*

Official uniform, badge, or insignia of sheriff as not properly used in performing private patrol services. *48 Ops. Cal. Att'y Gen. 80 (1966)*

City council contract with newspaper in which council member has financial interest as improper. *47 Ops. Cal. Att'y Gen. 122 (1966)*

Contract between sheriff and county to furnish construction equipment unrelated to sheriff's job as not conflict of interests; county garbage collection franchise to sheriff as not conflict of interest; sheriff as not permitted to present claims to county for payment under contract or franchise. *46 Ops. Cal. Att'y Gen. 112 (1965)*

Possible conflicts of interest in recommendations by financial consultants, special counsel, district and city attorneys, and district directors to municipal corporations, community services districts, water districts, and improvement districts as to issuance of bonds, and in employment of district employee as engineer of public work. *46 Ops. Cal. Att'y Gen. 74*

(1965)

Owner of private water company or local justice court judge as permitted to serve as director of local water agency. *44 Ops. Cal. Att'y Gen. 37 (1964)*

Coroner as not permitted to assign cases to his or her own mortuary. *42 Ops. Cal. Att'y Gen. 37 (1963)*

County board of education chairperson as permitted but not encouraged to sell insurance to school district in county. *40 Ops. Cal. Att'y Gen. 210 (1962)*

Council member with direct financial interest in property as not permitted to vote on zoning ordinance. *39 Ops. Cal. Att'y Gen. 165 (1962)*

Contract to operate concession in park let to member of Unemployment Insurance Appeals Board by Department of Natural Resources as not conflict of interest. *36 Ops. Cal. Att'y Gen. 241 (1960)*

Spouse of judge as not properly appointed by judge to civil service position. *36 Ops. Cal. Att'y Gen. 121 (1960)*

Deputy Real Estate Commissioner as permitted to serve as member of city council. *34 Ops. Cal. Att'y Gen. 244 (1959)*

Lease of public property to private corporation principally owned by state senator as not improper. *34 Ops. Cal. Att'y Gen. 4 (1959)*

Contract between water district and director of district as not conflict of interest. *32 Ops. Cal. Att'y Gen. 250 (1958)*

County purchase of property from county engineer as conflict of interest. *30 Ops. Cal. Att'y Gen. 323 (1957)*

County contract with brother of member of board of supervisors as not conflict of interest; county contract with tenant of member of board of supervisors as possibly conflict of interest. *28 Ops. Cal. Att'y Gen. 168 (1956)*

District or county contract with organization of which member of governing body of district or county in connected as conflict of interest. *27 Ops. Cal. Att'y Gen. 254 (1956)*

City contract with organization of which council member is executive secretary as conflict of interest. *26 Ops. Cal. Att'y Gen. 111 (1955)*

Member of board of supervisors as not permitted to participate in discussion or decision relating to location of new county road where his or her own property is under consideration as location, and as not permitted to sell his or her own property to county, although county may condemn it. *26 Ops. Cal. Att'y Gen. 5 (1955)*

District agricultural association funds as not properly deposited in bank of which district director was officer. *24 Ops. Cal. Att'y Gen. 200 (1954)*

City funds deposited in bank of which council member was director and owner of less than five percent of outstanding stock as not conflict of interest. *21 Ops. Cal. Att'y Gen. 90 (1953)*

Director of hospital district as permitted to be employed in hospital operated by district. *20 Ops. Cal. Att'y Gen. 6 (1952)*

County lease of property owned by sheriff and deputies, for training deputy sheriffs, as conflict of interest. *19 Ops.*

Cal. Att'y Gen. 72 (1952)

Contract between member of board of supervisors and local school district as not conflict of interest. *17 Ops. Cal. Att'y Gen. 44 (1951)*

Contract between State Park Commission and Chief of Division of Beaches and Parks to operate concession in state park as conflict of interest. *15 Ops. Cal. Att'y Gen. 123 (1950)*

Sale of goods to state by member of Legislature in merchandising business as not conflict of interest. *14 Ops. Cal. Att'y Gen. 78 (1949)*

Contract between public utility district and member of board of supervisors to publish district advertisements in supervisor's newspaper as not conflict of interest. *6 Ops. Cal. Att'y Gen. 206 (1945)*

Contract between school district trustees and minor child of one of them as conflict of interest. *5 Ops. Cal. Att'y Gen. 6 (1945)*

Contract between city and member of council as conflict of interest even though council member provides only available service of type involved in contract; emergency case excepted. *4 Ops. Cal. Att'y Gen. 264 (1944)*

Contract between city and member of council for member's services as city attorney as conflict of interest. *4 Ops. Cal. Att'y Gen. 261 (1944)*

Coroner's use of own undertaking facilities to bury indigent dead as conflict of interest, even if no other undertaking services are available. *3 Ops. Cal. Att'y Gen. 201 (1944)*

Contract of county to buy supplies from county employee as not conflict of interest where purchase made by purchasing agent. *3 Ops. Cal. Att'y Gen. 188 (1944)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsQuo WarrantoGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsEmployees & OfficialsPublic Contracts LawBids & FormationAgency & Authority of Government OfficersContracting OfficersPublic Contracts LawVoiding the ContractConflicts of Interest

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§ 469.25 Law Reviews

Spahn, *How to Recognize and Deal With Conflicts of Clients' Interests*, 31(8) Prac. Law. 67 (1985)

Note, *Garnishing Graft: A Strategy for Recovering the Proceeds of Bribery, 92 Yale L.J. 128 (1982)*

Pines and Smith, *California's Governmental Conflicts of Interest Act: The Public Interest vs. The Right to Privacy, 49 L.A. B. Bull. 321 (1974)*

Note, *The Government Insider and Rule 10b-5: A New Application for an Expanding Doctrine, 47 S. Cal. L. Rev. 1491 (1974)*

Review of Selected 1973 California Legislation, *5 Pac. L.J. 205, 475 (1974)*

Comment, *Financial Disclosure by Public Officials and Public Employees in Light of Carmel-by-the-Sea v. Young, 18 UCLA L. Rev. 534 (1971)*

Kaufman and Widiss, *The California Conflict of Interest Laws, 36 S. Cal. L. Rev. 186 (1963)*

Comment, *Conflict of Interest in Public Contracts in California, 44 Cal. L. Rev. 355 (1956)*

Kennedy and Beck, *Interest of Public Officers in Contracts Prohibited by Law, 28 S. Cal. L. Rev. 335 (1955)*

Article, *Temptation and Tradition in the California School Board, 5 Stan. L. Rev. 61 (1952)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGarnishmentsCivil ProcedureJudgmentsEntry

of JudgmentsEnforcement & ExecutionGarnishmentsCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesAbuse of Public OfficeIllegal GratuitiesGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesAbuse of Public OfficeIllegal GratuitiesGeneral OverviewEducation LawAdministration & OperationBoards of Elementary & Secondary SchoolsGeneral OverviewGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsEmployees & OfficialsPublic Contracts LawBids & FormationAgency & Authority of Government OfficersContracting OfficersPublic Contracts LawVoiding the ContractConflicts of Interest

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§ 469.26 Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 650-657 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewGovernmentsState & Territorial GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsLegislatures

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[Reserved]

§§ 469.27[Reserved]

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40-469 California Forms of Pleading and Practice--Annotated § 469.30

§ 469.30 Complaint for Declaratory Relief [Code Civ. Proc. § 1060] and [Temporary Restraining Order and Preliminary and] Final Injunction[s] [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527]--By Taxpayer Against Public Officer [Code Civ. Proc. § 526a]--To Prevent Expenditure of Public Funds Pursuant to Contract Void for Illegal Conflict of Interest [Gov. Code § 1090]

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. § 1060] and [Temporary Restraining Order and Preliminary and] Final Injunction[s] [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527]--By Taxpayer Against Public Officer [Code Civ. Proc. § 526a]--To Prevent Expenditure of Public Funds Pursuant to Contract Void for Illegal Conflict of Interest [Gov. Code § 1090]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DECLARATORY RELIEF
Defendant.	)	AND [TEMPORARY RESTRAINING ORDER
	)	AND PRELIMINARY AND] FINAL INJUNC-
	)	TION[S] (Waste of Public Funds)

_____

Plaintiff alleges:

1. Plaintiff is a citizen resident in the _____[*specify political unit, e.g.,* State *or* City and County *or* County *or* City *or* Town] of _____[*name of political unit*]. _____[Plaintiff is assessed for and is liable to pay *or* Within one year before the commencement of this action, plaintiff paid] a tax in this _____[*specify political unit, e.g.,* county].

2. Defendant _____[*name*] is the _____ [*specify office or position, e.g.,* Treasurer of

_____ County].

3. _____[*Identify other defendants, if any*].

4. _____[*Allege conflicting interests, e.g.*, John Doe is, and at all times herein mentioned was, the Highway Commissioner of Canyon County. He is, and at all times herein mentioned was, married to Jane Smith Doe, who owns outright and beneficially approximately 40 percent of the capital stock of Smith Brothers Construction Company, Inc. On or about February 29, 2007, acting in his official capacity on behalf of Canyon County, Doe signed a contract with the construction company for repair work on various county roads].

5. _____[*Allege basis for relief, e.g.*, On or about April 31, 2007, the construction company which completed some of the work presented a claim to defendant for partial payment under the contract. Defendant knows the facts alleged in Paragraph 4, above, but intends, those facts notwithstanding, to issue a warrant in payment of the claim].

[6. *Allege facts showing necessity, if any, for provisional injunctive relief.*]

WHEREFORE, plaintiff prays judgment as follows:

1. For a declaration that the contract hereinabove referred to is void as having been made by _____[*name of officer or employee*] in his/her official capacity contrary to the prohibition against conflicting interests set out in *Government Code Section 1090*;

[2. For a temporary restraining order and a preliminary injunction restraining and enjoining defendant from issuing any warrant in payment of any claim arising under the contract pending judgment in this action;]

3. For a permanent injunction enjoining defendant from issuing any warrant in payment of any claim arising under the contract;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____[*name*], am the plaintiff in this action, I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

[2] Use of Form

This form is a complaint for use by an "interested party" in obtaining a judgment voiding a contract made in violation of *Gov. Code § 1090*.

[3] Standing to Sue

The Government Code provides that a contract made in violation of *Gov. Code § 1090* "may be avoided at the instance of any party except the officer interested therein" [*Gov. Code § 1092(a)*]. This provision does not limit the class of potential plaintiffs to the persons who are parties to the contract, since the Supreme Court has cited it as authority for a taxpayer's suit seeking a declaration that a government contract was void because of a prohibited conflict of interest [*see Stigall v. Taft (1962) 58 Cal. 2d 565, 568, 25 Cal. Rptr. 441, 375 P.2d 289]* .

If the funds in question belong to a town, city, county, or city and county, "a citizen resident therein, or a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein" has standing to sue [*Code Civ. Proc. § 526a*].

[4] Alleging and Proving Culpable Interest

If a public officer or employee is in fact interested in a government contract and is thereby guilty of having conflicting interests, and if the prohibited connection is not an innocent mistake, the culpable officer or employee will probably have tried to obscure his or her forbidden interest. Alleging and proving the existence of such an interest, where that is the case, may be difficult. Circumstantial evidence could be sufficient, of course, and might be the only available evidence [*see, e.g., People v. Deysher (1934) 2 Cal. 2d 141, 146-149, 40 P.2d 259]* .

The defendant's conflicting interests should be described as particularly and directly as possible. The complaint may be held not to state a cause of action if it merely alleges facts from which it might be concluded that the defendant's interests were conflicting in violation of statutory prohibitions [*see Oakland v. California Constr. Co. (1940) 15 Cal. 2d 573, 577, 104 P.2d 30* (demurrer held properly sustained)]. The plaintiff should show that the defendant definitely has conflicting interests.

[5] Undertaking for Provisional Relief

A plaintiff who seeks provisional injunctive relief must be prepared to furnish an undertaking to secure the defendant against injury, if any occurs, in the event the court finally decides that the plaintiff was not entitled to provisional relief [*see Code Civ. Proc. § 529*].

[6] Verification

If provisional injunctive relief is sought, the complaint should be verified [*see Code Civ. Proc. § 527*]. Otherwise, verification of the complaint is not required, and verification of the complaint will not require a public entity or public officer sued in his or her official capacity to verify the answer [*see Code Civ. Proc. § 446*]. The verification of a complaint against a public entity or officer does, however, preclude a general denial in an unlimited civil case [*Code Civ. Proc. § 431.30(d)*].

[7] Statute of Limitations

An action under *Gov. Code § 1092* must be commenced within four years after the plaintiff has discovered, or in the exercise of reasonable care should have discovered, a violation described in *Gov. Code § 1092(a)* [*Gov. Code § 1092(b)*].

[8] Cross References

See generally Ch. 182, *Declaratory Relief* , and Ch. 303, *Injunctions*

For alternative allegations as to capacity and residence of parties, fictitious name allegations, and agency allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms for prayers and verifications, see Ch. 420, *Prayers* and Ch. 572, *Verification* , respectively

State Statutes

Taxpayer actions. *Code Civ. Proc. § 526a*

Declaratory relief. *Code Civ. Proc. § 1060 et seq.*

Injunctive relief. *Civ. Code § 3420 et seq.*; *Code Civ. Proc. § 525 et seq.*

Prohibition against conflicting interests on the part of government officials. *Gov. Code § 1090*

Decisions

Injunctive relief is available if contract violating *Gov. Code § 1090* has not been performed. *Thomson v. Call (1985) 38 Cal. 3d 633, 646 n.17, 214 Cal. Rptr. 139, 699 P.2d 316*

Taxpayer has standing to sue for declaration that government contract is void because it was made in violation of prohibition against conflicting interests set out in *Gov. Code § 1090*. *Stigall v. Taft (1962) 58 Cal. 2d 565, 568, 25 Cal. Rptr. 441, 375 P.2d 289*

Allegation of conflicting interests held insufficient; demurrer properly sustained. *Oakland v. California Constr. Co. (1940) 15 Cal. 2d 573, 577, 104 P.2d 30*

Circumstantial evidence of conflicting interests. *People v. Deysher (1934) 2 Cal. 2d 141, 146-149, 40 P.2d 259* ; *Terry v. Bender (1956) 143 Cal. App. 2d 198, 202-204, 300 P.2d 119*

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40-469 California Forms of Pleading and Practice--Annotated § 469.31

§ 469.31 Complaint for Preliminary and Permanent Injunctive Relief [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527]--By Private Plaintiff Against Public Official or Agency to Enjoin Violation of or Compel Compliance With Conflicts of Interest Provisions of Political Reform Act of 1974 [Gov. Code §§ 87100, 87103, 91003]

[1] FORM Complaint for Preliminary and Permanent Injunctive Relief [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527]--By Private Plaintiff Against Public Official or Agency to Enjoin Violation of or Compel Compliance With Conflicts of Interest Provisions of Political Reform Act of 1974 [Gov. Code §§ 87100, 87103, 91003]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], Defendant.	)	COMPLAINT FOR PRELIMINARY AND PER-
	)	MANENT INJUNCTIVE RELIEF
	)	(Violation of Political Reform Act of 1974)

_____

Plaintiff alleges:

1. Plaintiff resides in _____[*city*], _____ County, California.

2. Defendant _____[*name*] is _____[*specify official position, e.g.*, a member of the Board of Supervisors of Canyon County].

[3. *Identify other defendants, if any.*]

4. Plaintiff's residence is within the jurisdiction of _____[*specify, e.g.*, the Board of Supervisors of Canyon County].

5. On or about _____[*date*], defendant _____[*name*], acting in his/her official capacity as _____[*specify official position as in Paragraph 2 above*] _____[participated *or* failed to disqualify himself/herself from participation] in a decision by defendant _____[*specify decision-making official or agency, e.g.*, Board of Supervisors of Canyon County] _____[*set forth governmental decision*].

6. Defendant _____[*name*]'s participation is not legally required for this decision to be made.

7. Defendant _____[*name*] is disqualified from participation in the above-described governmental decision under the provisions of *Sections 87100* and *87103 of the Government Code* in that _____[*specify disqualifying financial interest*].

8. Defendant _____[*name*] knows or has reason to know that he/she has a financial interest in the above-described governmental decision.

[9. *If plaintiff seeks an order setting aside the official action as void, add*: Had defendant _____ (*name*) not participated in the above-described governmental decision, the resulting official action might not otherwise have been taken or approved in that _____ (*specify reasons why different decision might have been reached but for defendant's participation*).]

[10. *If complaint previously filed with Fair Political Practices Commission, add*: On or about _____ (*date*), plaintiff filed a complaint, a copy of which is attached hereto as Exhibit A and incorporated herein by reference, with the Fair Political Practices Commission, requesting that the commission act to restrain defendant _____ (*name*)'s participation in the above-described governmental decision. The commission has _____ (failed *or* refused) to act on the complaint attached hereto.]

11. This court is empowered under the provisions of *Section 91003 of the Government Code* to enjoin defendant _____[*name*]'s participation in the above-described governmental decision [and to set aside such decision as void].

12. Plaintiff has no adequate remedy of law for the injury threatened by defendant _____[*name*]'s above-described violations of *Sections 87100* and *87103 of the Government Code* in that _____[*specify facts showing inadequacy of the legal remedy*].

WHEREFORE, plaintiff prays judgment as follows:

1. For a preliminary injunction enjoining defendant _____[*name*] from participation in _____[*specify governmental decision*] and restraining defendant _____[*name*] from executing any official action resulting from such decision pending judgment in this action;

2. For a permanent injunction enjoining defendant _____[*name*] from participation in _____[*specify governmental decision*].

[3. For an order setting aside as void the above-described official action in which defendant _____ (*name*) unlawfully participated;]

4. For costs of suit herein incurred, including reasonable attorney's fees; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification. See § 469.30.*]

[2] Use of Form

This complaint may be submitted by a private plaintiff in an action brought under *Gov. Code § 91003* to enjoin a public official from participating in or attempting to influence a governmental decision in which the official knows or should know he or she has a financial interest, in violation of *Gov. Code §§ 87100* and *87103*. This complaint may also be used to obtain an order setting aside as void any official action resulting from the defendant's unlawful participation in a governmental decision [*see* Paragraphs 9, 10].

[3] Related Use

Injunctive relief is also available under *Gov. Code § 91003* to compel compliance with the disclosure provisions of *Gov. Code §§ 87200-87210* or to enjoin violations of a Conflict of Interest Code established pursuant to *Gov. Code §§ 87300-87313*. With appropriate modification, this complaint may be used in such an action.

[4] Standing to Sue

Any person residing within the "jurisdiction" may sue for injunctive relief to enjoin violations of or to compel compliance with the provisions of the Political Reform Act of 1974 [*Gov. Code § 81000 et seq.*], including its conflicts-of-interest provisions [*Gov. Code §§ 87100-87500*; *see Gov. Code § 91003(a)*]. If the defendant is a state agency or official, a person residing within the state is a person residing within "the jurisdiction." If the defendant is a local government agency or official, a plaintiff has standing to sue if he or she resides within the region, county, city, district, or other geographical area in which such agency or official has jurisdiction [*see Gov. Code § 82035*].

[5] Notice to Fair Political Practices Commission When Filing

Within 10 days of filing a complaint, cross complaint, or other initial pleading in an action for injunctive relief under *Gov. Code § 91003*, or in an action for damages under *Gov. Code § 91004* (violation of reporting requirements), 91005 (violation of restrictions on contributions, gifts, or expenditures, and conflict of interest violations), or 91005.5 (violations of selected provisions of the Political Reform Act of 1974 (*Gov. Code § 81000 et seq.*) for which no specific civil penalty is provided), either a copy of the initial pleading or a notice must be served on the Fair Political Practices Commission) [*Gov. Code § 91007(b)*].

The notice must contain (1) the full title and number of the case; (2) the court in which the case is pending; (3) the name and address of the attorney for the person filing the initial pleading; and (4) a statement that the case raises issues under the Political Reform Act of 1974 [*Gov. Code § 91007(b)*]. Failure to so notify the commission is not grounds for dismissal of the pleading [*Gov. Code § 91007(c)*].

[6] Limitations on Remedies

Gov. Code § 91000 et seq. provides a number of possible remedies for violations of the Political Reform Act of 1974, as does *Gov. Code § 83100* et seq. (regarding enforcement by the Fair Political Practice Commission). Except as provided in *Gov. Code §§ 87102.5, 87102.8* (making applicable the remedies provided for in *Gov. Code § 83100 et seq.* for violation of those sections), however, these remedies are not available for violations by an elected state officer of

Gov. Code, Title 9, ch. 7. art. 1 (commencing with *Gov. Code § 87100* (regarding unlawful participation by public officer in governmental decision in which officer has financial interest) [*Gov. Code §§ 87102, 87102.8(d)*]. Thus, under *Gov. Code § 87102*, an action under *Gov. Code § 91003* may not be brought against an elected state officer for violations of *Gov. Code §§ 87100-87103*. However, the limitation on remedies provided for in *Gov. Code § 87102* apparently does not apply to violations of the disclosure provisions of *Gov. Code §§ 87200-87210* or of a Conflict of Interest Code established pursuant to *Gov. Code §§ 87300-87313*.

[7] Exhaustion of Administrative Remedy

The court may in its discretion require any plaintiff (other than the Fair Political Practices Commission) to file a complaint with the Fair Political Practices Commission prior to seeking injunctive relief [*Gov. Code § 91003(a)*]. Counsel should therefore allege the filing of such a complaint in the complaint for injunctive relief if a complaint has in fact been filed with the Commission [*see* Paragraph 10].

[8] Setting Aside Official Action; Preliminary Injunctions

In addition to enjoining a public official from unlawfully participating in a governmental decision in which he or she has a financial interest, the court may also order that any official action resulting from such participation be set aside as void, if the court finds that such action might not have been taken or approved but for the defendant's unlawful participation in the decision [*see Gov. Code § 91003(b)*]. The court may set aside orders, permits, resolutions, contracts, and other official actions, but not any enactment of state legislation [*see Gov. Code § 91003(b)*]. On a preliminary showing that a violation of *Gov. Code §§ 87100* and *87103* has occurred, the court may restrain the execution of any official action in relation to which the violation occurred pending final adjudication [*Gov. Code § 91003(b)*]. For further discussion of the scope of preliminary or permanent relief under *Gov. Code § 91003(b)*, see *§ 469.13*.

[9] Attorney's Fees and Posting of Bond

The court may award costs, including reasonable attorney's fees, to the prevailing party in an action brought under *Gov. Code § 91003* [*Gov. Code § 91003(a)*; *see also Gov. Code § 91012*]. Counsel should note that *Gov. Code § 91012* which provides for an award of attorney's fees in any one of the several actions authorized by the Political Reform Act of 1974, excludes public agencies from its coverage [*see Dunn v. Jurupa Unified School Dist. (2000) 79 Cal. App. 4th 957, 960-961, 94 Cal. Rptr. 2d 529* (although agency precluded from recovering its costs and attorney fees under Gov. Code. § 91012, that section does not prohibit individual school board member from recovering costs including attorney fees even though agency provides individual's defense; thus, individual member of school board entitled to security posting under *Gov. Code § 91012* even though agency provided defense)]. By contrast, *Gov. Code § 91003(a)*, which explicitly provides for an award of attorney's fees in an action brought under that section, contains no such exclusion. It therefore appears that a public agency that prevails in an action brought under *Gov. Code § 91003* may be awarded attorney's fees.

Prevailing defendants in actions under the Political Reform Act may only be awarded attorney's fees if the suit against them was frivolous, unreasonable, or without foundation [*Community Cause v. Boatwright (1987) 195 Cal. App. 3d 562, 575-576, 240 Cal. Rptr. 794* ; *People v. Roger Hedgecock for Mayor Com. (1986) 183 Cal. App. 3d 810, 815, 228 Cal. Rptr. 424]* . For additional discussion and forms pertaining to costs and attorney's fees, see Ch. 174, *Costs and Attorney's Fees* .

A plaintiff who seeks provisional injunctive relief must be prepared to furnish an undertaking to secure the defendant against injury, if any occurs, in the event the court finally decides that the plaintiff was not entitled to provisional relief [see *Code Civ. Proc. § 529*; *Gov. Code § 91012* (bond for costs)].

[10] Verification

If provisional injunctive relief is sought, the complaint should be verified [*see Code Civ. Proc. § 527*]. Otherwise, verification of the complaint is not required, and verification of the complaint will not require a public entity or public officer sued in his or her official capacity to verify the answer [*see Code Civ. Proc. § 446*]. The verification of a complaint against a public entity or officer does, however, preclude a general denial in an unlimited civil case [*Code Civ. Proc. § 431.30(d)*].

[11] Cross References

For discussion of the procedure regarding the recall of an elected official, see Ch. 302, *Initiative, Referendum, and Recall*

For a discussion and forms relating to other aspects of the Political Reform Act of 1974, see Ch. 243, *Elections*

For a general discussion of and forms relating to injunctions generally, see Ch. 303, *Injunctions*

State Statutes

Injunctive relief. *Civ. Code §§ 3420-3423*; *Code Civ. Proc. § 525 et. seq.*

Public official as prohibited from participating in governmental decision in which he or she has financial interest. *Gov. Code § 87100*

Exception if official's participation legally necessary in making decision. *Gov. Code § 87101*

Definition of financial interest. *Gov. Code §§ 87103, 87103.5*

Actions to enjoin violations of Political Reform Act of 1974. *Gov. Code § 91003*

Costs, attorney's fees. *Gov. Code § 91003(a)*

Requirement of service of copy of initial pleading, or notice as specified, on Fair Political Practices Commission within 10 days of filing action under *Gov. Code § 91003, 91004, 91005,* or *91005.5. Gov. Code § 91007(b)*

Decisions

Precedents under *Code Civ. Proc. § 1021.5* as persuasive in aiding interpretation of *Gov. Code § 91003* in awarding attorney's fees, especially because Political Reform Act of 1974 expressly encourages enforcement by private citizen suits. *Downey Cares v. Downey Community Development Com. (1987) 196 Cal. App. 3d 983, 996, 242 Cal. Rptr. 272*

In calculation of attorney's fees awards under *Gov. Code § 91003,* California case law interpreting common law "private attorney general" doctrine and *Code Civ. Proc. § 1021.5* (attorney's fees awards in public interest cases) as mandating trial court (1) to determine "lodestar" or "touchstone" figure (product of number of hours worked by counsel and reasonable fee per hour), and (2) to exercise discretion to increase or reduce lodestar figure by applying positive or negative multiplier based on specified factors. *Downey Cares v. Downey Community Development Com. (1987) 196 Cal. App. 3d 983, 994, 242 Cal. Rptr. 272*

Plaintiff who loses action at trial for damages under *Gov. Code § 91004* because defendant's violations of Political Reform Act of 1974 were inadvertent as not permitted to argue for first time on appeal that trial court should at least have granted injunction under *Gov. Code § 91003*. *Community Cause v. Boatwright (1987) 195 Cal. App. 3d 562, 573*

n.4, 240 Cal. Rptr. 794

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California Forms of Pleading and Practice--Annotated

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Volume 40: Products Liability thru Public Entities and Officers-Chs. 460-469
Chapter 469 PUBLIC ENTITIES AND OFFICERS: CONFLICTS OF INTEREST
PART IV. FORMS

40-469 California Forms of Pleading and Practice--Annotated § 469.32

§ 469.32 Complaint by Individual Plaintiff Against Public Official for Three Times Amount of Benefit Resulting From Violation of Conflict of Interest Code Disqualification Provision [Gov. Code § 91005(b)]--General Form

[1] FORM Complaint by Individual Plaintiff Against Public Official for Three Times Amount of Benefit Resulting From Violation of Conflict of Interest Code Disqualification Provision [Gov. Code § 91005(b)]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO RECOVER PENALTY
_____ [*name*], Defendant.	)	(Violation of Conflict of Interest Code Disqualification Provision)
	)	[LIMITED CIVIL CASE]
	)	[Amount Demanded _____ (Exceeds or Does Not Exceed) $10,000]

_____

Plaintiff alleges:

1. Plaintiff resides in _____[*city*], _____ County, California.

2. Defendant _____[*name*] is _____[*specify official governmental position, e.g.,* a member of the Board of Supervisors of Canyon County].

3. Plaintiff's residence is within the jurisdiction of _____[*specify, e.g.,* the Board of Supervisors of Canyon County].

4. On or about _____[*date*], defendant _____[*name*], acting in his/her official capacity as _____[*specify official position as in Paragraph 2, above*] _____[participated *or* failed to disqualify himself/herself from participation] in a decision [by _____ (*specify government agency, if applicable, e.g.,* Board of Supervisors of Canyon County)] _____[*set forth governmental decision, e.g.,* to let a contract for the building of a county road to XX Road Building Company].

5. _____[*Cite applicable Conflict of Interest Code section, e.g.,* Canyon County Board of Supervisors Conflict of Interest Code, Section A], a provision of a Conflict of Interest Code enacted pursuant to Title 9, Chapter 7, Article 3 (commencing with *Section 87300) of the Government Code* provides that _____[*set forth applicable provisions of Conflict of Interest Code provision, e.g.,* no supervisor of this county shall participate in or attempt to influence in any way a decision by the Board of Supervisors to let a contract for the construction or operation of any county facility if that supervisor has any financial interest in any party to such contract with the county].

6. Defendant _____[*name*] is disqualified from participation in the above-described governmental decision under the provisions of _____[*cite applicable Conflict of Interest Code section as in Paragraph 5, above*] in that _____ [*specify disqualifying interest, e.g.,* defendant _____ (*name*) owns two-thirds of the outstanding shares of the above-mentioned XX Road Building Company].

7. Plaintiff is informed and believes and thereon alleges that defendant _____[*name*] has realized an economic benefit of $_____ as a direct result of the above-described _____[governmental decision *or* action].

8. On or about _____[*date*], plaintiff filed with _____[*specify the appropriate civil prosecutor under Gov. Code § 91001(b), e.g.,* the District Attorney of Canyon County] a written request that this action be commenced. A copy of that request is attached as Exhibit A, and incorporated herein by reference.
_____

9. The _____[*specify title of civil prosecutor, e.g., City Attorney*] _____ [responded on _____ (*date*), that he/she did not intend to file a civil action *or* responded on _____ (*date*), that he/she intended to file a civil action but failed to file a civil action within 120 days from receipt of plaintiff's request *or* failed to respond within 120 days from receipt of plaintiff's request *or* filed a civil action entitled _____ vs. _____ (specify title), No. _____, on _____ (*date*), in _____ (*specify court*), which was dismissed without prejudice to any other action for failure to proceed diligently and in good faith]. [A copy of the response to plaintiff's request is attached as Exhibit B and made a part hereof.]

10. Under the provisions of *Section 91005(b), of the Government Code,* defendant is liable to plaintiff for an amount up to three times the value of the economic benefit derived from his/her participation in the above-described governmental decision in violation of the provisions of _____[*specify applicable Conflict of Interest Code section as in Paragraph 5, above*].

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____, such amount being three times the value of the economic benefit derived by defendant _____[*name*] from his/her unlawful participation in the above-described governmental decision;

2. For an order that 50 percent of the above amount be paid to plaintiff pursuant to *Section 91009 of the Government*

Code, the remaining 50 percent to be deposited in the General Fund of the State of California;

3. For costs of suit herein incurred, including reasonable attorney's fees; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 469.30.*]

[2] Use of Form

This complaint may be submitted by a private plaintiff in an action brought under *Gov. Code § 91005(b)* against a public official to recover three times the amount of the economic benefit derived by the official from his or her violation of a disqualification provision of a Conflict of Interest Code.

[3] Standing to Sue

An action to recover three times the amount of the economic benefit derived by a public official from his or her violation of a Conflict of Interest Code may be brought by a person residing within "the jurisdiction" [*see Gov. Code § 91005(b)*; *see also § 469.13*]. If the defendant is a state official (except an elected state officer, *see Gov. Code § 91005(b)*), the action may be brought by a resident of the state. If the defendant is a local government official, the plaintiff must reside within the region, county, city, district or other geographical area in which such official has jurisdiction [*see Gov. Code § 82035*].

[4] Prerequisite to Private Individual Filing Civil Action

Before filing a civil action under *Gov. Code § 91005(b)*, a person must file with the appropriate civil prosecutor [*see Gov. Code § 91001(b)*] a written request for the civil prosecutor to commence the action. The request must include a statement of the grounds for believing a cause of action exists [*Gov. Code § 91007(a)*]. The civil prosecutor must respond in writing, indicating whether he or she intends to file a civil action [*Gov. Code § 91007(a)*].

If the civil prosecutor responds in the affirmative and files suit within 120 days from receipt of the written request to commence the action, no other action may be brought unless the action brought by the civil prosecutor is dismissed without prejudice [*Gov. Code § 91007(a)(1)*].

If the civil prosecutor responds in the negative or fails to respond within 120 days from receipt of the written request to commence the action, the person requesting the action may proceed to file a civil action [*Gov. Code § 91007(a)(2)*].

The time period within which a civil action must be commenced, as set forth in *Gov. Code § 91011*, is tolled from the date of receipt by the civil prosecutor of the written request to either the date the civil action is dismissed without prejudice, or the date of receipt by the person of the negative response from the civil prosecutor, but only for a civil action brought by the person who requested the civil prosecutor to commence the action [Gov. Code § 91700(a)(3)].

[5] Limitation on Number of Actions Pertaining to Single Violation

Not more than one judgment on the merits with respect to any single violation may be obtained under *Gov. Code §*

91005(b). Actions brought for the same violation have precedence for purposes of trial in order of the time filed. Such actions must be dismissed once judgment has been entered or a settlement has been approved by the court in a previously filed action. The court may dismiss a pending action without prejudice to any other action for failure of the plaintiff to proceed diligently and in good faith [*Gov. Code § 91008*].

[6] Determination and Disposition of Award

In determining the amount of liability in an action brought under *Gov. Code § 91005(b)*, the court may take into account the seriousness of the violation and the degree of culpability of the defendant [*Gov. Code § 91009*]. If judgment is entered against a defendant in such an action, the plaintiff is entitled to receive 50 percent of the amount recovered. The remaining 50 percent must be deposited in the General Fund of the state. If the plaintiff is the civil prosecutor, the entire amount recovered must be paid to the general fund or treasury of the appropriate jurisdiction [*Gov. Code § 91009*].

[7] Attorney's Fees and Posting of Bond

The court may award costs of litigation, including reasonable attorney's fees, to the prevailing party, other than a public agency, in an action brought under *Gov. Code § 91005(b)* [*see Gov. Code § 91012*]. However, prevailing defendants in actions under the Political Reform Act of 1974 [*Gov. Code § 81000 et seq.*] may be awarded attorney's fees only if the suit against them was frivolous, unreasonable, or without foundation [*Community Cause v. Boatwright (1987) 195 Cal. App. 3d 562, 575-576, 240 Cal. Rptr. 794* ; *People v. Roger Hedgecock for Mayor Com. (1986) 183 Cal. App. 3d 810, 815, 228 Cal. Rptr. 424]* .

Although *Gov. Code § 91012* precludes an agency from recovering its costs and attorney fees, there is no such express exclusion for individual officials. Neither is there any provision that individual governmental officials are entitled to an award of costs, including attorney fees, only when they have personally incurred such expenses. Accordingly, *Gov. Code § 91012* does not prohibit an individual school board member from recovering costs, including attorney fees, even though the agency is providing the individual's defense [*Dunn v. Jurupa Unified School Dist. (2000) 79 Cal. App. 4th 957, 960-961, 94 Cal. Rptr. 2d 529]* .

On motion of any party, the court must require a private plaintiff to post a bond in a reasonable amount at any stage of the litigation to guarantee payment of costs [*Gov. Code § 91012*; *see Dunn v. Jurupa Unified School Dist. (2000) 79 Cal. App. 4th 957, 960-961, 94 Cal. Rptr. 2d 529* (although provision of security for payment of costs under *Gov. Code § 91012* could not be ordered in favor of agency, individual member of school board entitled to security posting under § 91012 even though agency provided defense)]. This provision has been interpreted to require a hearing at which the trial court may make a determination of the probable merit of the lawsuit, and set the amount of the undertaking to take into account both the reasonable costs to the defendant of the lawsuit and the probability that the lawsuit will be successful [*Rhodes v. Sup. Ct. (1979) 90 Cal. App. 3d 484, 489, 153 Cal. Rptr. 495]* . Interpreted in this manner, the provision does not offend due process [*Rhodes v. Sup. Ct. (1979) 90 Cal. App. 3d 484, 489, 153 Cal. Rptr. 495]* . Moreover, nothing in *Gov. Code § 91012* requires the trial court to take the plaintiff's means into consideration in determining whether to require a bond [*Dunn v. Jurupa Unified School Dist. (2000) 79 Cal. App. 4th 957, 963, 94 Cal. Rptr. 2d 529]* .

[8] Verification

Verification of the complaint is not required, and verification of the complaint will not require a public entity or public officer sued in his or her official capacity to verify the answer. If the action is not considered to be against a public officer in his or her official capacity, verification of the complaint will require verification of the answer [*see Code Civ. Proc. § 446*]. The verification of a complaint against a public entity or officer does, however, preclude a general denial in an unlimited civil case [*Code Civ. Proc. § 431.30(d)*].

[9] Cross References

For a form of complaint against a public official to recover for violations of reporting requirements of the Political Reform Act of 1974, see Ch. 242, *Election Campaigns*

State Statutes

Conflict of Interest Codes. *Gov. Code §§ 87300-87313*

Civil action to recover three times amount of economic benefit derived by public official from violation of Conflict of Interest Code disqualification provision. *Gov. Code § 91005(b)*

Civil action for up to $5,000 as authorized for violation of any provision of Political Reform Act of 1974 (*Gov. Code § 81000 et seq.*) in which no specific penalty is provided, except for *Gov. Code §§ 84305* (mass mailings), 84307 (commingling), 89001 (mailings by incumbent); but no civil action if prosecutor is maintaining criminal action. *Gov. Code § 91005.5*

Written request to civil prosecutor to commence action as prerequisite to filing of civil action under *Gov. Code § 91005* by private plaintiff. *Gov. Code § 91007(a)*

Limitation on number and precedence of civil actions for single violation. *Gov. Code § 91008*

Determination of amount and disposition of award in action under *Gov. Code § 91005*. *Gov. Code § 91009*

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Private plaintiff required to file bond in certain instances. *Gov. Code § 91012*

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Volume 41: Overview of Public Administrative Law thru Review of Agency Rulemaking-Chs. 470-472B
Chapter 470 OVERVIEW OF PUBLIC ADMINISTRATIVE LAW

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Chapter 470 OVERVIEW OF PUBLIC ADMINISTRATIVE LAW
PART I. SCOPE

41-470 California Forms of Pleading and Practice--Annotated § 470.01

§ 470.01 Scope of Chapter

This chapter discusses the following topics as an overview of California public administrative law:

- The nature of California administrative law and basic distinctions between rulemaking and adjudication [*see §§ 470.10, 470.11*].
- The creation and powers of California administrative agencies [*see §§ 470.12, 470.13*].
- Internal administration of agencies and validating acts [*see §§ 470.14, 470.15*].
- Limits on agency powers and functioning of agencies [*see §§ 470.16, 470.17*].
- Types of agencies, agency structure, and placement of agencies within the executive branch in California state government [*see §§ 470.18 -470.20*].

The Appendix, set out in Part IV [*see § 470.50* et seq.] provides a brief summary of general information for many of the state's licensing agencies.

For the structure and scope of the remaining chapters on Public Administrative Law, Ch. 470A, *Due Process Restrictions on Agencies*, through Ch. 474C, *Procedures in Reviewing Agency Decisions*, see *§ 470.02[1]*.

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PART I. SCOPE

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§ 470.02 Cross References

[1] Public Administrative Law Generally

For detailed discussion of the limits on agency powers and functioning imposed by procedural due process requirements, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

For discussion and forms relating to the law governing access to and conduct of meetings by California public agencies, see Ch. 470B, *Public Agency Meetings* .

For detailed discussion and forms relating to the law governing disclosure of public records under the California Public Records Act [*Cal. Gov. Code §§ 6250 et seq.*], see Ch. 470C, *Public Records Act* .

For detailed discussion and forms relating generally to executive functions of California public agencies, including judicial review of these functions, see:

- Ch. 471, *Investigations by Public Agencies*.
- Ch. 471A, *Inspections by Public Agencies*.
- Ch. 471B, *Licensing by Public Agencies*.

For detailed discussion and forms relating generally to the legislative or rulemaking functions of California public agencies, including judicial review of these functions, see:

- Ch. 472, *Public Agency Rules*.
- Ch. 472A, *Agency Rulemaking Procedures*.
- Ch. 472B, *Review of Agency Rulemaking*.

For detailed discussion and forms relating generally to the judicial or adjudicatory functions of California public agencies, see:

- Ch. 473, *Public Agency Adjudication*.
- Ch. 473A, *Commencing Agency Adjudication*.
- Ch. 473B, *Discovery in Agency Adjudications*.
- Ch. 473C, *Prehearing Procedures in Agency Adjudications*.
- Ch. 473D, *Prehearing Preparations in Agency Adjudications*.
- Ch. 473E, *Public Administrative Law Judges*.
- Ch. 473F, *Agency Adjudication Hearings*.
- Ch. 473G, *Agency Adjudication Decisions*.
- Ch. 473H, *Alternative Procedures for Agency Decisions*.

Note that Ch. 471B, *Licensing by Public Agencies*, referred to above as dealing with executive functions of an agency, also covers licensing proceedings that are in essense adjudicatory functions, that is, proceedings to revoke, suspend, deny, or not renew a license.

For detailed discussion and forms relating generally to review by California courts of agency adjudications, see:

- Ch. 474, *Availability of Judicial Review of Agency Decisions*.
- Ch. 474A, *Timing of Judicial Review of Agency Decisions*.
- Ch. 474B, *Standards in Reviewing Agency Decisions*.
- Ch. 474C, *Procedures in Reviewing Agency Decisions*.

See also [5], *below*.

[2] Specific Public Agencies

For discussion and forms relating to proceedings before particular public agencies, see:

- Ch. 12, *Adoptions: Nature and Effect*, through Ch. 12E, *Adoptions: Attack on Decree* (discussion and forms relating to adoption proceedings, including proceedings before the Department of Social Services or other public or private agencies licensed by that department).
- Ch. 18, *Alcoholic Beverage Licenses* (discussion and forms relating to licensing proceedings before the department of Alcoholic Beverage Control).
- Ch. 56, *Architects* (discussion relating to licensing by State Board of Architectural Examiners).

- Ch. 70, *Attorney Admission*, and Ch. 71, *Attorney Discipline* (discussion and forms relating to licensing and discipline of attorneys and proceedings before the State Bar and the State Bar Court).

- Ch. 92, *Automobiles: Drivers' Licenses* (discussion and forms relating to drivers' licensing and proceedings before the Department of Motor Vehicles).

- Ch. 104, *Building Contracts*, § 104.70 et seq. (discussion relating to licensing and discipline of building contractors by the Contractors' State License Board).

- Ch. 118, *Civil Service* (discussion and forms relating to proceedings before the Personnel Board).

- Ch. 127, *Consumer Contracts and Loans* (discussion relating to the Department of Consumer Affairs).

- Ch. 209, *Dentists* (discussion and forms relating to licensing and discipline of dentists and proceedings before the Board of Dental Examiners).

- Ch. 214, *Drugs and Pharmacists* (discussion and forms relating to licensing and discipline of pharmacists and proceedings before the State Board of Pharmacy).

- Ch. 359, *Marriage*, § 359.40 et seq. (discussion and forms relating to marriage licensing by county clerks).

- Ch. 414, *Physicians: Licensing and Discipline* (discussion and forms relating to licensing and discipline of physicians and proceedings before the Medical Board of California).

- Ch. 418, *Pollution and Environmental Matters* (discussion relating to State Air Resources Board and local air pollution districts and State Water Resources Control Board).

- Ch. 462, *Public Accountants* (discussion relating to licensing and discipline of public accountants and proceeding before the State Board of Accountancy).

- Ch. 480, *Public Utilities* (discussion and forms relating to proceedings before the Public Utilities Commission).

- Ch. 511, *Sanitation and Sewerage Districts* (discussion and forms relating to proceedings or actions involving local sanitation and sewerage districts).

- Ch. 512, *Schools: Certification, Dismissal, and Related Employment Issues* (discussion and forms relating to teacher certification and dismissal proceedings before the State Board of Education and local boards).

- Ch. 527, *Social Services* (discussion and forms relating to proceedings before the State Department of Social Service or the State Department of Health Services).

- Ch. 564, *Unemployment and Disability Insurance*, § 564.30 et seq. and § 564.100 et seq. (discussion and forms relating to proceedings before the Unemployment Insurance Appeals Board).

- Ch. 575, *Waters*, § 575.10 et seq. and § 575.210 et seq. (discussion and forms relating to proceedings

before the State Water Resources Control Board and local water districts).

- Ch. 577, *Workers' Compensation* (discussion and forms relating to proceedings before the Division of Workers' Compensation and the Workers' Compensation Appeals Board).

- Ch. 579, *Zoning and Planning* (discussion of local zoning and planning agencies, the Office of Planning and Research, and the California Coastal Commission).

[3] Judicial Remedies, Procedures, and Review

For discussion and forms relating to general judicial remedies that may be available in administrative actions or proceedings, see:

- Ch. 40, *Appeal: An Overview*, through Ch. 54, *Appeal: California Supreme Court Review* (discussion and forms relating to civil appeals).

- Ch. 182, *Declaratory Relief* (discussion and forms relating to action for declaration of rights of respective parties in unlitigated civil controversy).

- Ch. 292, *Habeas Corpus* (discussion and forms relating to review of contempt orders and other civil proceedings by extraordinary writ of habeas corpus).

- Ch. 303, *Injunctions* (discussion and forms relating to action to obtain immediate temporary restraint or permanent injunction to prevent harmful acts).

- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to immediate judicial review of orders by extraordinary writ of mandate or prohibition).

- Ch. 492, *Review (Certiorari), Writ of* (discussion and forms relating to immediate judicial review of civil proceedings by extraordinary writ of review).

[4] Other Chapters Relating to Public Agencies

For discussion and forms relating to claims and actions under the California Tort Claims Act (*Gov. Code §§ 810-820.21*), for damages for injuries arising from the tortious conduct of public agencies or their officers and employees, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[5] Other Matthew Bender Publications

For forms for use in drafting memoranda in judicial proceedings to review a public agency decision, see California Points and Authorities, Ch. 195, *Public Administrative Law* (Matthew Bender).

See also the following:

- Hanna, California Law of Employee Injuries and Workers' Compensation (Matthew Bender), for detailed discussion and forms relating to workers' compensation proceedings in California.

- Administrative Law (Matthew Bender), for detailed discussion of federal administrative law.

- Social Security Practice Guide (Matthew Bender), for detailed discussion and law relating to Social

Security practice.

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[Reserved]

§§ 470.03[Reserved]

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41-470 California Forms of Pleading and Practice--Annotated § 470.10

§ 470.10 Governing Law

[1] Nature of Administrative Law

California administrative law concerns the functioning of California state agencies and the regulation of persons and activities by those agencies. California agencies are government bodies created by the California Constitution [*see § 470.12[3]*], the Legislature [*see § 470.12[1]*], or the voters [*see § 470.12[2]*], and are responsible for regulating the practice of various businesses and professions within the state, managing the state resources, and overseeing state institutions.

Administrative law in California is designed to assure that the state's administrative agencies serve the people of the state with fairness and efficiency. *Gov. Code § 54950* declares that "the public commissions, boards and councils and the other public agencies in this State exist to aid in the conduct of the people's business ... . The people of this State do not yield their sovereignty to the agencies which serve them" [*Gov. Code § 54950*].

Administrative law is the law governing agencies when they are carrying out executive (enforcement), legislative (rule making), or adjudicative responsibilities. Most administrative agencies are located in the Executive Branch [*see, e.g.,* the Natural Resources Agency, *Gov. Code § 12805*]. In California, the executive branch is headed by the Governor of the State of California. Administrative law is the law of decision making by government agencies that are neither courts nor legislatures [*see Gov. Code § 11340.9(a)*]. State administrative law is often more complex than federal administrative law because there are multiple layers of legal requirements that apply to state and local government agencies. These agencies are governed by federal, state, and local legislation, as well as by state and federal constitutional guarantees.

[2] Sources of Administrative Law

In California, the functioning and powers of state agencies are governed primarily by five basic sources of law, the APA, agency enabling acts, the federal and state constitutions, agency regulations, and case law. These sources will be described briefly. The California Administrative Procedure Act, or APA [*Gov. Code §§ 11340-11529*] is a major source of administrative law. The APA [in this chapter, all references to the Administrative Procedure Act, or APA, are to this California state statute] provides the required procedures for California administrative agencies when those agencies

adopt regulations [*see* Chs. 472, *Public Agency Rules* , 472 A, *Agency Rulemaking Procedures*, and 472B, *Review of Agency Rulemaking*], and when the agencies conduct adjudicative hearings [*see* Chs. 473- 473 H governing adjudication]. The APA includes four major chapters governing rule making [Ch. 3, *Gov. Code §§ 11340-11361*], the Office of Administrative Hearings [Ch. 4, *Gov. Code §§ 11370-11380*], general provisions for adjudication [Ch. 4.5, *Gov. Code §§ 11400-11475.70*], and formal hearings in adjudication [Ch. 5, *Gov. Code §§ 11500-11529*], respectively [*see Gov. Code § 11370*].

Another major source of law for agencies is statutes that are usually passed by the Legislature, but are sometimes passed by the voters, which create agencies and define the agencies duties and scope of powers. Many of these statutes are codified in the Business and Professions Code [*Bus. & Prof. Code § 1000-1* et seq. (Chiropractic Act); and *Bus. & Prof. Code § 5000 et seq.* (Accountancy Act)]. Many statutes that deal with the environment are found in the Public Resources Code [*see, e.g., Pub. Res. Code § 25200* (California Energy Commission)], and the Health & Safety Code [*Health & Safety Code §§ 39500, 39510* (California Air Resources Board)]. An agency's governing legislation provides for the agencies powers and duties, as well as codifying the law that an agency is expected to enforce. For example, California administrative agencies that enforce environmental laws look to state statutes that have created those agencies [*e.g.,* the California Coastal Act establishing the California Coastal Commission *Pub. Res. Code § 30300* and *Health & Safety Code § 39500 et seq.,* establishing the Air Resources Board]. Environmental agencies in California often have to enforce federal environmental laws, such as the California Air Resources Board's responsibility to implement provisions of the Federal Clean Air Act.

Another source of law is agency regulations. Most agency regulations are legislative in nature, and therefore prescribe additional legal requirements that must be complied with by the people and businesses regulated by that agency. However, some agency regulations codify procedures followed by the agency or contain interpretations of the governing statute. The Office of Administrative Law [*Gov. Code § 11340.1*] has primary responsibility for review of proposed regulations, and has a complete list of adopted regulations on its agency website [http://www.oal.ca.gov/]. Regulations are codified in the California Code of Regulations (CCR) [*Gov. Code § 11344* (OAL has statutory responsibility for publication and updating of CCR)], which is organized into 28 Titles, by subject not agency. For example, the Titles in the CCR that are most relevant for environmental law are: Title 13, Motor Vehicles, Title 14, Natural Resources, Title 17, Public Health, Title 20, Public Utilities and Energy, Title 23, Waters, Title 26, Toxics, and Title 27, Environmental Protection. All of the titles of the CCR except Title 24, Building Standards, can be accessed at the following web address: http://ccr.oal.ca.gov/. Also, there is a separate list of California state agencies, at the same web site, that identifies the location of regulations promulgated by that agency. For example, the Air Resources Board entry lists regulations found in Title 13, Motor Vehicles, and Title 17, Public Health. There are search engines at the web site allowing one to search the entire CCR posted on the OAL web site. See Ch. 472, *Public Agency Rules* , for more discussion of rules and rulemaking.

Another source of administrative law is the U.S. and California Constitutions. California constitutional provisions create agencies [*see, e.g., Cal. Const., art. VII, § 2* (State Personnel Board); *see also § 470.12*] or direct the Legislature to do so [*see, e.g., Cal. Const., art. IX, § 7* (state and local boards of education), art. XX, § 22 (Alcoholic Beverage Control Act), *see also* discussion in *§ 470.12[1]*]. The Due Process of Law provisions of the U.S. and California Constitutions require require agencies to provide notice and the opportunity to be heard before taking action in quasi-judicial (adjudicative) proceedings [*see* Ch. 470A, *Due Process Restrictions on Public Agencies*]. California's administrative agencies that enforce environmental laws look to the state constitution [*see Cal. Const., art. X, § 2*] regarding water resources [*see Cal. Const., art. IV, § 20*, which established the Fish and Game Commission].

A final source of administrative law is case law, consisting of appellate court decisions based on judicial review of administrative agency actions or rulings [*see, e.g., Goldberg v. Kelly (1970) 397 U.S. 254, 262, 90 S. Ct. 1011, 25 L. Ed. 2d 287* (due process requirements in welfare benefits determinations); *Newland v. Board of Governors (1977) 19 Cal. 3d 705, 711, 139 Cal. Rptr. 620, 566 P.2d 254* (unconstitutionality of applying statute requiring certificate of rehabilitation to teacher convicted of misdemeanor as condition of being granted community college teaching

credential); *Horn v. County of Ventura (1979) 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134* (property owner had due process right to notice and opportunity to be heard before county approved tentative subdivision map allowing development of land next to owner's land); *Cooper v. Swoap (1974) 11 Cal. 3d 856, 864, 115 Cal. Rptr. 1, 524 P.2d 97* , cert. denied, *419 U.S. 1022* (permissible scope of agency regulations)]. For more discussion of the role of the courts in determining the legality of agency action, see Ch. 474, *Judicial Review of Agency Decisions* .

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41-470 California Forms of Pleading and Practice--Annotated § 470.11

§ 470.11 Agency Adjudication and Rulemaking Under the California Administrative Procedure Act

[1] Attorney Representation

The practice of administrative law usually focuses on representation before internal agency tribunals and procedures, rather than representation in courts that apply the regular rules of civil (or criminal) procedure [*see Taylor v. Bureau of Private Investigators (1954) 128 Cal. App. 2d 219, 229, 275 P.2d 579* (court rules of pleading and practice not applicable to administrative proceedings)]. Of course, some administrative law attorneys specialize in appeals or proceedings brought under administrative mandamus [*Code Civ. Proc. § 1094.5*; *see* Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.]. These attorneys present their appellate cases in the civil court system. Attorneys are often involved in administrative law as advocates for persons whose professional qualifications or right to practice their profession are called into question by the agency regulating that profession. For example, an attorney may represent an applicant for licensure as a contractor whose application has been denied by the Contractors' State License Board because the applicant allegedly made false statements in his or her license application [*Bus. & Prof. Code § 480(c)*], or a physician who is facing license revocation proceedings or other disciplinary action by the Medical Board of California for alleged unprofessional conduct [*Bus. & Prof. Code § 2234*; for discussion and forms relating to licensing and discipline of physicians, see Ch. 414, *Physicians: Licensing and Discipline*].

Attorneys may also be involved in administrative law at the regulatory level for the purpose of advising an agency or other interested party concerning proposed regulations or challenging the validity of proposed or existing regulations [*see* [3], *below*].

[2] Agency Adjudication

Agency adjudicatory proceedings are civil in nature [*Molina v. Munro (1956) 145 Cal. App. 2d 601, 606, 302 P.2d 818]* , and are similar, but not identical, to civil trial procedures. Most state agencies are required to perform their judicial or adjudicatory function by conducting proceedings in accordance with the provisions of the California Administrative Procedure Act, or APA (*Gov. Code § 11340 et seq.*).

The California APA's administrative adjudication provisions were revised, operative July 1, 1997. Chapters 4.5 and 5 of the new act, titled and cited respectively as Administrative Adjudication: General Provisions (*Gov. Code § 11400 et seq.*

) and Administrative Adjudication: Formal Hearing (*Gov. Code § 11500 et seq.*), cover all aspects of formal hearings in administrative adjudication, including:

- Pleadings (in administrative proceedings known as accusations or statements of facts) [*see Gov. Code §§ 11503-11507*; *see also* Ch. 473A, *Commencing Agency Adjudication*].

- Discovery [*see Gov. Code §§ 11507.5-11507.7, 11511*; *see also* Ch. 473B, *Discovery in Agency Adjudications*].

- Hearings [*see Gov. Code §§ 11508-11509, 11512-11516*; *see also* Ch. 473F, *Agency Adjudication Hearings*].

- Judicial review of the administrative decision [*see Gov. Code § 11523*; *see also* Ch. 474, *Judicial Review of Agency Decisions* , et seq.].

Hearings are conducted before an agency tribunal, hearing officer, or an administrative law judge (ALJ) from the Office of Administrative Hearings (OAH) [*see Gov. Code §§ 11502, 11512* (procedures for California APA agencies)]. ALJ's are appointed by the director of the OAH [*Gov. Code §§ 11370.3, 11502*; *see* Ch. 473E, *Public Administrative Law Judges*].

For detailed discussion and forms relating to agency adjudicatory proceedings, see Ch. 473, *Public Agency Adjudication* , et seq.

[3] Agency Rulemaking

Most agencies perform their legislative or rulemaking function by promulgating regulations in accordance with provisions of the California APA [*Gov. Code § 11346*]. Rulemaking procedures of the APA are set out in *Gov. Code §§ 11346-11347.3*. Generally, the rulemaking provisions of the APA require agencies to give public notice of most proposed regulatory changes and to provide a forum for receiving public comments on the proposed changes [*Gov. Code §§ 11346.4(a), 11346.8*].

In addition, the APA requires that proposed regulatory changes be submitted to the Office of Administrative Law (OAL) [*Gov. Code § 11343(a)*]. The OAL reviews regulations for necessity, authority, clarity, consistency, reference, and nonduplication [*Gov. Code §§ 11340.2, 11349.1, 11349.3*; *see also Gov. Code § 11349* ("necessity," "authority," etc., defined)]. The OAL does not, however, substitute its judgment regarding the substantive content of regulations for that of the regulating agency [*Gov. Code § 11340.1*].

For a detailed discussion and forms generally to the adoption of regulations under the APA, and challenges to regulations, see Ch. 472, *Public Agency Rules* , et seq.

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41-470 California Forms of Pleading and Practice--Annotated § 470.12

§ 470.12 Creation and Powers of Agencies

[1] Statutory Agencies

[a] Legislative Authority to Create and Empower Agencies

A majority of California's administrative agencies are created by statute [*see, e.g., Bus. & Prof. Code § 100* (establishing the Department of Consumer Affairs)]. The Legislature's main function is to declare and implement, or provide for the implementation of, public policies and purposes [*Fishman v. City of Palo Alto (1978) 86 Cal. App. 3d 506, 509, 150 Cal. Rptr. 326]* . It may generally use whatever methods it chooses to fulfill this function [*Allied Architects' Asso. v. Payne (1923) 192 Cal. 431, 435, 221 P. 209]* . One of the most common methods is passing a statute to create an agency, giving it the power to regulate occupations for protection of the general public [*Whitcomb v. Emerson (1941) 46 Cal. App. 2d 263, 275, 115 P.2d 892]* .

Although the Legislature has plenary power to declare and implement laws, this power is subject to express or implied limits in the Constitution [*Dean v. Kuchel (1951) 37 Cal. 2d 97, 104, 230 P.2d 811]* . Thus, when the Legislature creates a licensing requirement for the practice of a specific profession with an agency to implement this requirement, it must balance its interest in protecting the public from incompetent or dishonest practitioners with the constitutional rights of individuals to pursue businesses and occupations [*In re Porterfield (1946) 28 Cal. 2d 91, 103, 168 P.2d 706* ; *see U.S. Const., amend. I*; *Cal. Const., art. I, §§ 1, 3* (free speech and association rights)]. Another constitutional limitation is that any licensing law that offends the equal protection guarantees of the United States or California constitutions (*U.S. Const., amend. XIV, § 1*; *Cal. Const., art. I, § 7*) is not enforceable [*Avery v. Midland County (1968) 390 U.S. 474, 479-480, 88 S. Ct. 1114, 20 L. Ed. 2d 45]* .

This legislative power is not just limited to the creation of an agency. The Legislature also may revoke powers that it has previously granted to an agency; in addition, it may terminate the existence of a legislatively created agency [*Cal. Const., art. I, § 7(b)*].

[b] Delegation of Legislative Power to Agencies

When the Legislature passes an enabling act that creates an administrative agency, the Legislature is delegating to the

agency its power to implement particular public policies. For this delegation of power to be permissible the enabling act must:

- Contain adequate standards for implementing the legislative policies and for exercising administrative decisionmaking [*CEEED v. California Coastal Zone Conservation Com. (1974) 43 Cal. App. 3d 306, 326, 118 Cal. Rptr. 315* (Legislature established conditions that must be satisfied for Commission to issue permits)]. If the act does not specify legislative standards, courts may infer them [*County of Kern v. Pacific Gas & Elec. Co. (1980) 108 Cal. App. 3d 418, 422, 166 Cal. Rptr. 506]* .

- Contain appropriate procedural safeguards for the agency's exercise of its rulemaking function [*Salmon Trollers Marketing Assn. v. Fullerton (1981) 124 Cal. App. 3d 291, 299, 177 Cal. Rptr. 362* (director of Department of Fish and Game has 180 days to adopt regulations to conform to federal fishery plan, and must immediately report to Legislature concerning regulations adopted); *see, e.g., Bus. & Prof. Code § 5010* (Accountancy Board must adopt rules and regulations according to provisions of California APA)].

- Not represent a delegation of the Legislature's responsibility to resolve fundamental issues and to make basic policy decisions [*Kugler v. Yocum (1968) 69 Cal. 2d 371, 376-377, 71 Cal. Rptr. 687, 445 P.2d 303* (legislative body, city council, responsible for adoption of wage parity policy; city manager may apply policy)].

- Not grant to the agency powers that, if exercised, would violate the Constitution [*see* *Bownds v. City of Glendale (1980) 113 Cal. App. 3d 875, 885, 170 Cal. Rptr. 342* (Department of Housing and Community Development land use guidelines unenforceable because violative of private property protections guaranteed by *Cal. Const., art. I, §§ 1, 19*)].

Administrative agencies are creatures of the legislature that have no powers beyond those delegated to the agency by the legislature [*Victor Valley Transit Authority v. WCAB (2000) 83 Cal. App. 4th 1068, 1072-1073, 100 Cal. Rptr. 2d 235]* . An agency's functions include only those specifically delegated by its enabling act. Acts of an agency and rules and regulations enacted by an agency must not exceed the scope of its enabling act [*Sierra Club v. California Coastal Com. (2005) 35 Cal. 4th 839, 843-844, 28 Cal. Rptr. 3d 316, 111 P. 3d 294* (Coastal Commission did not have statutory authority under California Coastal Act [*Pub. Res. §§ 30000 et. seq.*] to condition issuance of a coastal zone development permit based on considering impacts on coastal zone of the part of a proposed project outside the coastal zone); *First Indust. Loan Co. v. Daugherty (1945) 26 Cal. 2d 545, 550, 159 P.2d 921]* . Any agency action or regulation that exceeds the scope of power set forth in the enabling act may be challenged judicially [*B.C. Cotton Inc. v. Voss (1995) 33 Cal. App. 4th 929, 956-957, 39 Cal. Rptr. 2d 484* (agency cannot exercise licensing authority without legislative grant of authority); *see* Ch. 471, *Public Agency Investigations* , et seq. (judicial review of agency investigations, inspections, and licensing actions); Ch. 472B, *Review of Agency Rulemaking* (judicial review of rulemaking); Ch. 474, *Review of Public Agency Decisions*, et seq. (judicial review of adjudicatory decisions)].

An agency's powers, however, are not limited to those expressly conferred by statute. Administrative officials may exercise any additional powers that are necessary for the due and efficient administration of powers expressly granted by statute or that "*may fairly be implied* from the statute granting the powers" (emphasis in original) [*Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal. 3d 805, 824-825, 258 Cal. Rptr. 161, 771 P.2d 1247]* .

For further discussion of legislative powers delegated to public agencies, see [5][b] and [7], *below*.

[c] Delegation of Judicial and Executive Powers to Agencies

Although the separation of powers clause prohibits the exercise of judicial and executive (or enforcement) functions by

the Legislature (*Cal. Const., art. III, § 3*), this prohibition is not rigid, and the Legislature generally may exercise judicial and enforcement functions that are incidental to its lawmaking function [*Parker v. Riley (1941) 18 Cal. 2d 83, 89-90, 113 P.2d 873* ; *Way v. Superior Court (1977) 74 Cal. App. 3d 165, 178, 141 Cal. Rptr. 383]* .

Thus, the Legislature may empower an agency to hold hearings, examine evidence, make findings, and suspend or revoke licenses or permits issued by the agency as necessary to enforce its rules and regulations [*Dash, Inc. v. Alcoholic Beverage Control Appeals Bd. (9th Cir. 1982) 683 F.2d 1229, 1234* ; *Goldin v. Public Utilities Commission (1979) 23 Cal. 3d 638, 653, 153 Cal. Rptr. 802, 592 P.2d 289* ; *Beamon v. Dept. of Motor Vehicles (1960)180 Cal. App. 2d 200, 205, 4 Cal. Rptr. 396* ; *see also* further discussion in [5][c] and [d], *below*].

Cities must comply with applicable provisions of state law when approving housing development projects. The appellate courts determine whether or not those provisions of law are applicable to the city's approval process. The courts will interpret the language of the statute to determine the legislative intent. The statutory language is examined in the context of the overall statute, and the plain meaning of the words of the statute will be followed in most circumstances. When there is more than one reasonable interpretation of the language of the statute, the courts will also look at the purpose of the statute, legislative history, and public policy [*Coalition of Concerned Communities, Inc. v. City of Los Angeles (2004) 34 Cal. 4th 733, 21 Cal. Rptr. 3d 676, 101 P.3d 563* (Mello Act affordable housing requirements did not apply to City of Los Angeles's approval of housing development project in coastal zone because no housing was to be built within coastal zone); *Elsner v. Uveges (2004) 34 Cal. 4th 915, 929, 938, 22 Cal. Rptr. 3d 530, 102 P.3d 915* (employee of roofing subcontractor was injured on job while working on scaffolding. Employee filed third-party tort lawsuit against general contractor. Employee sought to offer evidence of Cal OSHA regulations relating to scaffolding standards to establish a negligence per se standard of care, and shift burden of proof to general contractor defendant. The California Supreme Court interpreted the statutory language and held that the statutory change in the law could not be applied retroactively to a pre-amendment accident); *City of Long Beach v. Dept. of Industrial Relations (2004) 34 Cal. 4th 942, 953, 22 Cal. Rptr. 3d 518, 102 P. 3d 904* (statutory amendments are presumed to have prospective application only unless legislation clearly provides for retroactive application)]. When looking at legislative history, the appellate courts will normally not give much weight to letters from individual legislators, however letters presented to the legislative body and included in the statutory notes are given more weight [*City of Long Beach v. Dept. of Industrial Relations (2004) 34 Cal. 4th 942, 952-953, 22 Cal. Rptr. 3d 518, 102 P. 3d 904]* . When interpreting provisions of the California Constitution, the appellate courts use the same interpretive principles as with statutes, starting with the plain language of the text, and then looking at other factors, such as legislative history when the statutory language can be reasonably interpreted in more than one way [*Independent Energy Producers Ass'n v. State Board of Equalization (2004) 125 Cal. App. 4th 425* (*Cal. Const., art. XIII, § 19* interpreted to define public utilities as within scope of provisions, and to also include independent electric generation facilities within constitutional definition of public utilities)].

The courts, however, have final review authority over agency executive and adjudicatory matters [*Code Civ. Proc. §§ 1094.5, 1094.6*; *Bodinson Mfg. Co. v. California Employment Comm'n (1941) 17 Cal. 2d 321, 325, 109 P.2d 935* ; *see § 470.16[3]*; *see also* Ch. 471, *Public Agency Investigations* , et seq. (judicial review of agency investigations, inspections, and licensing actions); Ch. 474, *Review of Public Agency Decisions*, et seq. (judicial review of adjudicatory decisions)].

The California court of appeal held that provisions of *Labor Code § 4663* and *4664*, which required apportionment of permanent disability based on causation in worker's compensation proceedings, were specifically intended to apply to worker's compensation claims that were pending at the date of the enactment of the legislation. Thus, the provisions of this legislation were retroactive in application. Normally, legislation that changes substantive rights is applied prospectively unless there is clear expression of legislative intent in the language of the statute or in extrinsic sources that the legislature intended retroactive application. If the statute is silent or ambiguous, the courts will interpret the legislation to have prospective application. Here, the legislature clearly expressed the intent to apply the legislation retroactively [*Kleemann v. Workers' Comp. Appeals Bd. (2005) 127 Cal. App. 4th 274, 284-286, 25 Cal. Rptr. 3d 448]*

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The California Supreme Court held that the WCAB improperly interpreted the provisions of *Labor Code § 5402* (90-day time period for presumption of compensability) in a WCAB decision. The statute is clear that the 90-day time period for an employer to deny liability runs from the date that the employee filed a claim form, and does not include the date that the employer received notice or knowledge of the injury [*Honeywell v. Workers' Comp. Appeals Bd. (2005) 35 Cal. 4th 24, 29, 24 Cal. Rptr. 3d 179, 105 P.3d 544]* .

[2] Initiative Agencies

[a] Nature of Initiative Power

The Legislature shares lawmaking authority with California voters, who have the right to adopt legislation or constitutional amendments by initiative [*Cal. Const., art. II, § 8(a)*].

The initiative power is specifically reserved to the people under the Constitution rather than stated as a limited delegation of power [*Cal. Const., art. IV, § 1*]. Thus, it must be liberally construed to give maximum power to the people [*Blotter v. Farrell (1954) 42 Cal. 2d 804, 812, 270 P.2d 481* (initiative power includes power to amend and repeal prior initiative acts); *Carlson v. Cory (1983) 139 Cal. App. 3d 724, 728, 189 Cal. Rptr. 185* (initiative power may be used to repeal gift and inheritance taxes)].

The initiative power does have some limits, however, as follows:

- It cannot be used to enact statutes that amend, modify, or derogate any powers, obligations, or rights bestowed by the Constitution [*Fair Political Pratices Com. v. State Personnel Bd. (1978) 77 Cal. App. 3d 52, 56, 143 Cal. Rptr. 393]* . The people may accomplish these purposes, however, by using the initiative power to change the Constitution [*Cal. Const., art. II, § 8(a)*].

- As it is limited to legislative matters, it does not include the ability to prescribe administrative or executive matters that implement previously declared legislative policies [*Wheelright v. County of Marin (1970) 2 Cal. 3d 448, 457, 85 Cal. Rptr. 809, 467 P.2d 537* (decision to permit construction of roadway was of sufficient public interest and concern to be considered legislative in nature); *Fishman v. City of Palo Alto (1978) 86 Cal. App. 3d 506, 509, 150 Cal. Rptr. 326* (zoning ordinance was legislative in nature; minor changes in development plan to carry out ordinance were administrative in nature); *Hughes v. City of Lincoln (1965) 232 Cal. App. 2d 741, 746-747, 43 Cal. Rptr. 306* (decision to fluoridate water was legislative in nature)].

The Legislature may amend or repeal an initiative measure if the measure itself so provides. In the absence of such a provision, amendment or repeal by an act of the Legislature is not effective unless approved by the electors [*see Cal. Const., art. II, § 10(c)*; *People v. Schuster (1932) 122 Cal. App. 790, 122 Cal. App. Supp. 790, 793, 10 P.2d 204* ; *see also Bartosh v. Board of Osteopathic Examiners (1947) 82 Cal. App. 2d 486, 493, 186 P.2d 984* (Osteopathic Act, Bus. & Prof. Code Appendix II, §§ 1-5, as permitting procedural amendments by Legislature)]. For further discussion of the scope of the initiative power, see Ch. 302, *Initiative, Referendum, and Recall* .

[b] Creation of Agencies by Initiative

In several instances, the voters have used the initiative power to create an administrative agency. For example, in 1922 the voters created the Board of Chiropractic Examiners (Initiative Measure, Stat. 1923, p. lxxxviii, § 1; *Bus. & Prof. Code § 1000*; *Tain v. State Bd. of Chiropractic Exam'rs (2005) 130 Cal. App. 4th 609, 614, 616-617, 30 Cal. Rptr. 3d 330* (Chiropractic Act, adopted by initiative in 1992, establishes a scope of chiropractic practice that excludes use of

drugs, surgery or obstetrics by chiropractors; initiative measures interpreted by courts using techniques similar to statutory interpretation; Court upheld those scope of practice limits and rejected a constitutional challenge to them based on equal protection of law), and the Board of Osteopathic Examiners (Initiative Measure, Stats. 1923, p. xciii, § 1; *Bus. & Prof. Code § 3600*), the latter of which is now called The Osteopathic Medical Board of California. More recently, the voters enacted the Political Reform Act of 1974 (*see Gov. Code §§ 81000-81015*), which created the Fair Political Practices Commission (FPPC) [*see Gov. Code § 83100 et seq.*]. The lawmaking authority of the people under the initiative power is generally equal to that of the Legislature [*Blotter v. Farrell (1954) 42 Cal. 2d 804, 812-813, 270 P.2d 481* ; *Carlson v. Cory (1983) 139 Cal. App. 3d 724, 728, 189 Cal. Rptr. 185* ; *see* discussion in [1][a], [b], *above*], and may be delegated to an agency to the same extent and under the same circumstances as a legislative delegation [*see* discussion in [1][c], *above*].

[c] Use of Constitutional Initiatives to Enlarge or Limit Agency Powers

In addition to creating agencies by use of the initiative power, the voters can use that power to adopt constitutional amendments imposing newduties on existing agencies or limiting the powers of all California agencies [*Cal. Const., art. II, § 8(a)*]. The Victims *Bill of Rights* Act, adopted by the voters in 1982, created a new constitutional right to safe schools [*Cal. Const., art. I, § 28(c)*], which may impose new duties on agencies such as local school boards and school districts [*see* discussion in *§ 470.18[2][c]*].

Some years earlier, in 1978, the voters adopted a constitutional amendment prohibiting administrative agencies from doing any of the following [*Cal. Const., art. III, § 3.5*]:

- Declaring a statute unenforceable or refusing to enforce a statute on the basis of its being unconstitutional, unless an appellate court has determined that the statute is unconstitutional.

- Declaring a statute unconstitutional.

- Declaring a statute unenforceable or refusing to enforce a statute on the basis that federal law or federal regulations prohibit its enforcement, unless an appellate court has determined that its enforcement is prohibited by federal law or federal regulations.

This amendment, however, does not affect the authority of an agency to interpret existing law in the course of discharging the agency's statutory duties [*Regents of University of California v. Public Employment Relations Bd. (1983) 139 Cal. App. 3d 1037, 1042, 189 Cal. Rptr. 298]* .

[3] Constitutional or "Independent" Agencies

Because a constitutional amendment is required to terminate its existence, an agency created by the California Constitution has a special status [Cal. Const., art. XVIII]. Amending the California Constitution is a cumbersome process requiring a two-thirds vote of the Legislature and majority approval of the electorate, or approval by the voters of an initiative [*Cal. Const., art. XVIII, §§ 1-4*; for further discussion of initiatives, *see* [2], *above*].

Because an agency created by provision of the California Constitution cannot be terminated by legislative action, an agency created by the California Constitution is sometimes referred to as an "independent agency."

Constitutional provisions creating an administrative agency generally set forth the criteria for agency membership and the broad powers and duties of the agency [*see, e.g., Cal. Const., art. VI, § 6* (the Judicial Council is made up of specified judges and is responsible for surveying judicial business, adopting court rules, and making recommendations to the courts, the governor, and the Legislature)]. The Legislature may from time to time adopt more specific laws governing the agency's functioning within its constitutional scope of authority [*see, e.g., Gov. Code §§ 68500-68615*

(setting forth procedures for Judicial Council meetings, judicial record keeping, and the appointment of officers and employees of the Council, and imposing additional duties on the Council)].

The following agencies have been created under the California Constitution:

- The Personnel Board, administering the civil service system for state employees [*Cal. Const., art. VII, § 2*; *California State Personnel Bd. v. California State Employees Assn., Local 1000, SEIU, AFL-CIO (2005) 36 Cal. 4th 758, 763-764, 31 Cal. Rptr. 3d 201, 115 P.3d 506* (State Personnel Board challenged seniority based "post and bid" appointment system negotiated by state government department (Department of Personnel Administration) and state public employees union (CSEA); the Supreme Court held that this system violated provisions of California Constitution (*Cal. Const., Art. VII, § 1, subd. (b)* that required use of the merit principle, including competitive examination for appointment and promotion to permanent civil service positions.); *State Pers. B'd v. Dep't of Pers. Admin. (2005) 37 Cal. 4th 512, 527, 36 Cal. Rptr. 3d 142, 123 P. 3d 169* (State Personnel Board (SPB) challenged memoranda of understanding (MOU) agreements between Department of Personnel Administration and state public employee unions that provided for a grievance/ arbitration procedure that employees could utilize to challenge disciplinary action as an alternative to the SPB review procedure provided for in *Cal. Const., Art. VII, § 3, subd (a)*, which mandates that the SPB must review disciplinary actions brought against employees of the state civil service; the Supreme Court held that this alternative system was an unconstitutional bypass of SPB discipline review procedures required by the California constitution); for discussion and forms relating to proceedings before the Personnel Board, *see* Ch. 118, *Civil Service*].

- The Public Utilities Commission (PUC), regulating transportation, communications, and energy industries classified as public utilities or related businesses [*Cal. Const., art. XII, § 1*; Pub. Util. Code §§ 200-246; *see § 470.18[2][b]*; for discussion and forms relating to proceedings before the PUC, *see* Ch. 480, *Public Utilities*].

- The Fish and Game Commission, regulating fish and game in California [*Cal. Const., art. IV, § 20*].

- The Judicial Council, for the purpose of adopting statewide rules of court and establishing rules and policies for the administration of California courts [*Cal. Const., art. VI, § 6*].

- The Commission on Judicial Appointments, approving judicial appointments to the California Supreme Court [*Cal. Const., art. VI, § 7*].

- The Commission on Judicial Performance, recommending suspension, removal, or retirement of judges for good cause [*Cal. Const., art. VI, § 8*].

- The State Bar, regulating the practice of law in California [*Cal. Const., art. VI, § 9*; for discussion and forms relating to proceedings before the State Bar and the State Bar Court, *see* Ch. 70, *Attorney Admission* , and Ch. 71, *Attorney Discipline*].

- The Regents of the University of California, managing the University and regulating the behavior of students [*Cal. Const., art. IX, § 9(f)*; *Educ. Code §§ 66300, 66301*; *Regents of the University of California v. Benford (2005) 128 Cal. App. 4th 867, 872, 27 Cal. Rptr. 3d 441* (California constitution grants broad autonomy to *Regents of University of California); Tafoya v. Hastings College (1987) 191 Cal. App. 3d 437, 442, 236 Cal. Rptr. 395* ; *Bunnett v. Regents of the University of California (1995) 35 Cal. App. 4th 843, 848, fn. 2, 41 Cal. Rptr.2d 567* ; *see* *Board of Curators, Univ. of Mo. v. Horowitz (1978) 435 U.S. 78, 85, 98 S. Ct. 948, 55 L. Ed. 2d 124* (procedural due process protections apply to students)].

The Department of Alcoholic Beverage Control and the Alcoholic Beverage Control Appeals Board [*see Bus. & Prof. Code § 23000 et seq.* (the Alcoholic Beverage Control Act); *see also* Ch. 18, *Alcoholic Beverage Licenses*], and the state and local Boards of Education [*see Educ. Code §§ 1000 et seq.* (county boards of education), 33000 et seq. (State Board of Education)], have an unusual status in that the Legislature created them pursuant to a constitutional directive [*Cal. Const., art. IX, § 7* (boards of education); *Cal. Const., art. XX, § 22* (the ABC); *see § 470.18[2][c]*]; for discussion and forms relating to licensing proceedings before the ABC, see Ch. 18, *Alcoholic Beverage Licensing* , and for discussion and forms relating to certification of teachers by the State Board of Education and their employment by local boards, see Ch. 512, *Schools: Certification, Dismissal, and Related Employment Issues*].

In creating agencies the Constitution confirms to the Legislature the power, plenary in some cases and limited in others, to prescribe the functions and duties of an agency. To the Fish and Game Commission, for example, the Legislature may delegate "such powers relating to the protection and propagation of fish and game as the Legislature sees fit" [*Cal. Const., art. IV, § 20(b)*]. The functions and duties of the Reapportionment Commission, on the other hand, are not at all subject to the Legislature's control [*see Cal. Const., art. IV, § 6*]. Some of the agencies created by the Constitution have functions and duties prescribed in part by the Constitution and in part by the Legislature. The Personnel Board [*see Cal. Const., art. VII, §§ 3, 6*], the Public Utilities Commission [*Cal. Const., art. XII, §§ 2-6*], and the Judicial Council [*Cal. Const., art. VI, § 6*] are examples. Some agencies are merely created by the Constitution without any clue, other than in their names, as to their functions and duties and without any provision for the Legislature's prescribing these duties. The Commissions on Judicial Appointments and Judicial Performance are examples of such agencies [*see Cal. Const., art. VI, §§ 6, 8*].

[4] Agency Structure

[a] Nature of Administrative Agencies

Administrative agencies are government institutions that are authorized by statute (or constitution) and are part of the executive branch of state government. Statutory definitions of administrative agencies specify which governmental institutions are subject to the requirements of that statute. For example, the rulemaking provisions of the APA [*Gov. Code §§ 11340-11361*] define agency to exclude agencies in the judicial and legislative branches of the state [*Gov. Code §§ 11340.9(a)*]. This means that only executive branch agencies must comply with the rulemaking procedures statutes. State agencies may be called an "office, officer, department, division, bureau, board [or] commission" [*Gov. Code § 11000(a)*]. State agencies may be headed by an elected official, such as the Secretary of State [*Gov. Code § 12172.5*] or the State Controller [*Westly v. Board of Administration (2003) 105 Cal. App. 4th 1095, 130 Cal. Rptr. 2d 149* (state controller had authority to sue another state agency, CALPERS Board)]. State Agencies may be Departments, such as the Department of Consumer Affairs [*Bus. & Prof. Code § 100*] or Boards, such as the State Personnel Board [*Cal. Const. art. VII, § 2*]. State agencies are separate entities for purposes for purposes of legal authority [*Bus. & Prof. Code § 108* (state licensing boards are separate entities from Department of Consumer Affairs)], final decision making authority [*Bus. & Prof. Code § 109* (state licensing boards decisions are not subject to review by Director of Department of Consumer Affairs)], and for purposes of discovery in litigation [*People v. Superior Court (Cole) (2004) 122 Cal. App. 4th 1060, 1078-1080, 19 Cal. Rptr. 3d 324* (litigant required to serve subpoenas on nonparty state agencies to obtain discovery of documents and witnesses from those agencies in civil litigation unless the agency investigated matters related to the lawsuit); *People v. Superior Court (Barrett) (2000) 80 Cal. App. 4th 1305, 1309, 96 Cal. Rptr. 2d 264* (similar rule for criminal discovery from non party state agencies)].

[b] Departments, Divisions, and Bureaus

State agencies in California have different names, but most are identified as boards (e.g., California Air Resources Board [*Health & Safety Code § 39500*]) commissions (e.g., Public Utilities Commission [*Pub. Util. Code § 301*] or departments (e.g., Department of Water Resources [*Water Code § 120*]). Many agencies are part of one of four

superagencies (e.g., California Resources Agency [*Gov. Code § 12805*]), and others are part of the California Environmental Protection Agency [*Gov. Code § 12812*]. See *§§ 470.19, 470.20* for the organization of agencies within the executive branch of California state government.

[c] Corporate and Quasi-Corporate Entities

The state government includes a number of corporate and quasi-corporate entities. They are not administrative agencies, but their governing bodies are. These entities include the following:

- California Community Colleges (Board of Governors)
- California Maritime Academy (Board of Governors)
- Hastings College of Law (Board of Trustees)
- Public Employees' Retirement System (Board of Administration)
- State Bar of California (Board of Governors)
- State Compensation Insurance Fund (Board of Directors)
- State Teachers' Retirement System (Board of Trustees)
- State University and Colleges (Board of Trustees)
- University of California (Board of Regents)

[d] Institutions

The state government operates a number of institutions apart from colleges and universities [*see* discussion in [c], *above*]. These include 11 hospitals run by administrators responsible to the Director of Health; 12 prisons run by superintendents responsible to the Director of Corrections; six schools for students with special learning needs run by superintendents responsible to the Director of Education; and the California Veterans Home run by an administrator responsible to the Director of Veterans Affairs.

[e] Advisory Boards

There are many advisory boards in the state government. They have no governing power but only advise administrative agencies on subjects of special interest. For instance, the Division of Mines and Geology in the Resource Agency organizes and monitors the strong-motion instrumentation program with the advice of the Seismic Safety Commission [*see Pub. Res. Code § 2701*]. There are over 30 agricultural advisory boards, each concerned with a particular commodity; the Beef Council and the Dairy Council are two of the better known boards. Although advisory boards have no direct governing power, they can be very influential. In effect they are state-sponsored lobbying groups for special interests, although in many cases the special interest involved is a public interest. Since many advisory boards have considerable indirect power over the functioning of the government, private efforts to influence administrative legislation (regulations) can often be most effective when directed at or through an advisory board.

[5] Administrative Powers

[a] Introduction

Administrative agencies exercise executive, legislative, and judicial powers that correspond with the traditional three branches of the federal and state government. Administrative powers are delegated to most agencies by the legislature in statutes whereas the traditional branches of government have powers conferred by the California Constitution. Thus, an administrative agency "must act within the powers conferred upon it by law and may not validly act in excess of such powers" [*Ferdig v. State Personnel Bd. (1969) 71 Cal. 2d 96, 104, 77 Cal. Rptr. 224, 453 P.2d 728]* . For example, California state environmental agencies are part of the executive branch of state government. Most of those agencies are limited to the exercise of statutory powers. Constitutional agencies are the only exception to this rule. The Constitutional separation of powers [*Cal. Const., art. III, § 3*] requirement at the state level permits only the constitutional agencies within the executive branch (e.g., the Public Utilities Commission and the Fish and Game Commission) to exercise both legislative and truly judicial (as opposed to "quasi-judicial") powers [*Consumers Lobby Against Monopolies v. PUC (1979) 25 Cal. 3d 891, 905-906, 160 Cal. Rptr. 124, 603 P.2d 41]* .

[b] Legislative Power

The people have the prerogative to make their own laws [*see Cal. Const., art. II, §§ 1, 11*; *Cal. Const., art. IV, § 1*]. In adopting the Constitution, however, the people authorized various governmental entities to exercise legislative power on their behalf. That authority is distributed as follows:

- Five agencies are authorized to make specified laws. These agencies are:
  - the Judicial Council [*Cal. Const., art. VI, §§ 6, 18(f)*],
  - the Personnel Board [*Cal. Const., art. VII, §§ 2(c), 3, 6(b), (c)*],
  - the Board of Education [*see Cal. Const., art. IX, § 7.5*],
  - the Regents of the University of California [*Cal. Const., art. IX, § 9(a)*], and
  - the Public Utilities Commission [*Cal. Const., art. XII, §§ 2, 4, 6*].
- Except to the extent that one of those agencies has primary or exclusive authority, the Legislature is authorized to make any law [*Cal. Const., art. IV, § 1*] other than a law specifically prohibited by the Constitution.
- A county or city may make laws governing persons within the county or city limits, to the extent of not contravening general laws [*Cal. Const., art. XI, § 7*], and may make laws, in the form of a charter, respecting its own government [*Cal. Const., art. XI, §§ 3-5*]. A county or city may provide, in a charter, for the election, qualifications, and terms of office of members of the county or city board of education, and a city may further provide for compensation and removal of members and may prescribe the number of members [*Cal. Const., art. IX, §§ 3.3, 16*]. A county not having a charter to cover the subject is obliged to make laws respecting the compensation of the members of the board of supervisors and may make laws respecting the number, compensation, tenure, and appointment of county employees [*Cal. Const., art. XI, § 1(b)*].

The exercise of the initiative power by a local city and county as guaranteed by the California Constitution [*Cal. Const. Art. II, § 11(a)*] was upheld as against a challenge when the voters of the City and county of San Francisco voted to substitute vouchers for services in place of cash grants under the general assistance program [*Welf. & Inst. Code § 17001*]. The court of appeal rejected a challenge to the initiative based on exclusive delegation of legislative powers to the Board of supervisors to decide questions related to a state mandated program. The court concluded that adopting aid standards was a legislative act, like adopting administrative regulations, and that this power could be exercised by both

the board of supervisors, and by the voters using the initiative power [*Pettye v. City and County of San Francisco (2004) 118 Cal. App. 4th 233, 244-245, 12 Cal. Rptr. 3d 798]* .

Thus, except to the extent of a direct constitutional grant of legislative power, an administrative agency has only such legislative power as the Legislature or a local legislative body delegates to it [*see also* discussion in [1][b], *above*, and [7], *below*].

For detailed discussion and forms relating to public agencies legislative or rulemaking function, see Ch. 472, *Public Agency Rules* , et seq.

[c] Executive Power

Administrative agencies have always been assumed to have executive power. In fact, it is clear that every organ of government has some measure of executive power. It is significant that the Constitution does not invest the Governor with the executive power of the state but instead provides, "The *supreme* executive power of this State is vested in the Governor" [*Cal. Const., art. V, § 1* (emphasis added)]. The essence of executive power in government is enforcement, that is, execution or administration of the law. Since the Governor only stands at the top of the executive pyramid and does not have *all* executive power but has only *supreme* executive power, there is no constitutional impediment to the Legislature's assigning executive functions to administrative agencies.

The only limitation on the Legislature is that it may not take away any executive power given directly to an officer or agency by the Constitution [*see State Bd. of Educ. v. Levit (1959) 52 Cal. 2d 441, 461, 463, 343 P.2d 8* ; *California Adjustment Co. v. Atchison, Topeka etc. Ry. Co. (1918) 179 Cal. 140, 152, 175 P. 682* ; *see also* discussion in [1][c], *above*].

A local executive official, the Mayor of the City and County of San Francisco, who had a ministerial duty to enforce a state statute limiting marriage to couples of the opposite sex, exceeded his authority when he decided unilaterally that the marriage statute was unconstitutional and ordered the clerk office's to start issuing marriage licenses to same sex couples. A local executive official does not possess the authority to refuse to enforce a state statute without a court first determining that the statute is unconstitutional. The California Supreme Court issued a writ of mandate ordering the Mayor and other San Francisco officials to enforce the state marriage statute and to correct the consequences of past unauthorized actions [*Lockyer v. City and County of San Francisco (2004) 33 Cal. 4th 1055, 1068-1069, 17 Cal. Rptr. 3d 225, 95 P.3d 459]* .

For detailed discussion and forms relating to agency executive functions such as investigations, inspections, and licensing actions, including judicial review of these actions, see Ch. 471, *Public Agency Investigations* , et seq.

[d] Judicial Power

The California Constitution vests judicial power in the California Supreme Court, courts of appeal, superior courts and municipal courts [*Cal. Const., art. VI, § 1*]. In addition, the California Constitution authorizes various California administrative agencies to exercise judicial powers. Some of these agencies, such as the Department of Alcoholic Beverage Control and the Public Utilities Commission, are created by the Constitution and are thereby vested with certain judicial powers [*see* Cal. Const., arts. XII, XX, *§ 22*]. Others, such as the Workers' Compensation Appeals Board, have been legislatively endowed with judicial powers pursuant to a specific constitutional authorization [*see Cal. Const., art. XIV, §§ 1, 4*].

Agencies not vested by the California Constitution with judicial powers may not exercise judicial powers. Cal. Const., art. VI, disposes of all judicial power not expressly disposed of elsewhere in the California Constitution. Although the Legislature retains the authority to grant a multitude of powers to local bodies pursuant to Cal. Const., art. XI, powers of

a judicial nature are not at its disposal [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 42, 112 Cal. Rptr. 805, 520 P.2d 29]* .

Although administrative agencies are thus generally prohibited from exercising "judicial power" in the absence of authorization from the California Constitution, agencies may perform functions that are "judicial" in nature [*see People v. Sims (1982) 32 Cal. 3d 468, 479 n.8, 186 Cal. Rptr. 77, 651 P.2d 321* ; *see also* discussion in [1][c], *above*].

The California Supreme Court, in McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 261 Cal. Rptr. 318, 777 P.2d 91 , adopted a two-part test for determining whether an agency's acts of judicial nature constitute an unconstitutional exercise of judicial powers. An administrative agency may constitutionally hold hearings, determine facts, apply the law to those facts, and order relief, including certain types of monetary relief, so long as the following conditions are met [*McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 359, 372, 374, 261 Cal. Rptr. 318, 777 P.2d 91]* :

- The activities are authorized by statute or legislation and are reasonably necessary to effectuate the administrative agency's primary, legitimate regulatory purposes; and

- The essential judicial power (that is, the power to make enforceable binding judgments) remains ultimately in the courts through review of agency determinations.

The *McHugh* Court applied the two-part test to determine the constitutionality of actions by a local rent control board pursuant to a city's rent control charter amendment. The Court found that the board did have the power to hold hearings, hear testimony, and order restitution to tenants of excess rents charged by a landlord in violation of local rent control laws [*McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 375, 261 Cal. Rptr. 318, 777 P.2d 91]* . Nevertheless, the Court found unconstitutional an order by the board that permitted one of the tenants to immediately withhold future rent payments before a court could have an opportunity to pass on whether to stay the challenged order pending review of the administrative decision by writ of mandate. The Court characterized this order as an "unwarranted intrusion into the power of courts to 'check' administrative adjudications" and held that it violated the second prong of the test [*McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 376-377, 261 Cal. Rptr. 318, 777 P.2d 91]* . The Court also found unconstitutional an assessment of treble damages against portions of the tenants' excess rents. Even though the court conceded that treble damages were authorized by the city charter, it determined that the award violated the reasonable necessity-legitimate regulatory purpose aspect of the first prong of the test, in part because there were other, less intrusive means of accomplishing the asserted regulatory goal [*McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 378-379, 261 Cal. Rptr. 318, 777 P.2d 91]* . It further noted that the power to award treble damages would pose a risk of producing arbitrary, disproportionate results that would magnify, beyond acceptable risks, the possibility or arbitrariness inherent in any scheme of administrative adjudication [*McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 378-379, 261 Cal. Rptr. 318, 777 P.2d 91]* .

These applications of the test show that *McHugh* clearly contemplated that the mere fact of legislative authorization does not shield a challenged power from scrutiny under the reasonable necessity/legitimate regulatory purpose aspect of the first prong of the test [*Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal. 3d 245, 257, 284 Cal. Rptr. 718, 814 P.2d 704]* . On this basis, apparently, subsequent case law reads *McHugh* as requiring a reviewing court to conduct a judicial powers analysis at a somewhat higher level of scrutiny than that of rational basis [*Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal. 3d 245, 256-257, 284 Cal. Rptr. 718, 814 P.2d 704]* .

McHugh indicates that an administrative agency unconstitutionally exercises "judicial power" when it (1) issues an administrative order requiring immediate payment of money or authorizing immediate withholding of money that would otherwise be owed, or (2) assesses treble damages [*McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 377 n.44, 378-379, 261 Cal. Rptr. 318, 777 P.2d 91]* . The *McHugh* court explicitly declined to address the

constitutionality of several other types of administrative actions, including the following [*McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 375 n.38, 377 n.44, 378, 261 Cal. Rptr. 318, 777 P.2d 91]* :

- An award of general compensatory damages.
- Immediately effective restitutive orders issued by professional licensing boards.
- Administrative imposition of penalties.
- Imposition of minor punitive damages under statutory schemes that expressly authorize such damages and set a cap on awards.

Subsequent case law, while not deciding the issue, indicates that a statute authorizing the administrative award of major or substantial punitive damages, with no cap on the cumulative amount, would be constitutionally suspect as violative of the judicial powers clause. A majority of the state Supreme Court has expressed the opinion that, under a *McHugh* analysis, it would have difficulty in characterizing a several thousand dollar punitive damages award as merely incidental relief, necessary to effectuate the remedial purposes of a statute [*see Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal. 3d 245, 271, 284 Cal. Rptr. 718, 814 P.2d 704]* .

In addition, one court, applying *McHugh* to the issue of an administrative award of compensatory damages, held that an award by an administrative agency of unlimited general compensatory damages for emotional distress violates the judicial powers clause of the state constitution [*Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal. 3d 245, 265, 267, 284 Cal. Rptr. 718, 814 P.2d 704* (invalidating, prior to its 1992 amendment, *Gov. Code § 12987* of the Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*) to the extent it authorizes the award of nonquantifiable general compensatory damages for emotional distress and other intangible injury)]. This court did not address the validity of legislation authorizing an administrative award of compensatory damages for emotional injuries up to a specified maximum amount [*see Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal. 3d 245, 265 n.12, 284 Cal. Rptr. 718, 814 P.2d 704* ; *see, e.g., Gov. Code § 12970* (authorizing administrative awards in employment discrimination cases of up to $50,000 for actual damages, including emotional injuries; operative January 1, 1993)].

For detailed discussion and forms relating to agency adjudicatory proceedings under the APA, and judicial review of those proceedings, see respectively Ch. 473, *Public Agency Adjudications* , et seq., Ch. 474, *Review of Public Agency Decisions* , et seq.

[e] Constitutional Limits on Administrative Power

[i] Restraints on Enforcement of Unconstitutional Law

The Constitution contains a number of provisions limiting the government's power. Many of these purport to restrain the exercise of legislative power [*see, e.g., Cal. Const., art. I, § 4* ("[t]he Legislature shall make no law respecting an establishment of religion.")], but there is no possible restraint on the exercise of that power except insofar as legislators are willing to restrain themselves. What the Constitution prohibits in effect is the enforcement of unconstitutional laws. Thus, the constitutional prohibitions directly concern administrative agencies and limit their exercise of executive and quasi-judicial powers power.

Local executive officials who are obligated to enforce state statutes cannot unilaterally decide that a particular statute, the state law limiting marriage to couples of the opposite sex, was unconstitutional and therefore refuse to enforce that statute. A local executive official does not possess the authority to refuse to enforce a state statute without a court first determining that the statute is unconstitutional [*Lockyer v. City and County of San Francisco (2004) 33 Cal. 4th*

1055, 1068-1069, 17 Cal. Rptr. 3d 225, 95 P.3d 459] .

There is some philosophical difficulty in extending the constitutional limitations on government power to a popular exercise of power. An initiative statute is only technically different from a constitutional amendment, since they are both direct expressions of the will of the people. There is no substantive difference between an initiative statute decreeing an exception to the guaranty of free speech and an amendment of U.S. *Const., art. I, § 2*, which sets out that guaranty. Thus, where an administrative agency undertakes to enforce an initiative statute, the question whether it is unconstitutional on substantive grounds should be decided in the light of federal constitutional provisions [*see, e.g., Citizens for Jobs & Energy v. Fair Political Practices Comm'n (1976) 16 Cal. 3d 671, 675, 129 Cal. Rptr. 106, 547 P.2d 1386]* . The United States Constitution is, of course, "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding" [U.S. Const., art. VI, *cl. 2*].

[ii] Restraints Based on Equal Protection and Due Process Requirements

In administering a law, an agency is obliged to avoid violating the constitutional guaranties of equal protection and due process [*see Murgia v. Municipal Court (1975) 15 Cal. 3d 286, 294-295, 124 Cal. Rptr. 204, 540 P.2d 44* (equal protection); *Walsh v. Kirby (1974) 13 Cal. 3d 95, 105-106, 118 Cal. Rptr. 1, 529 P.2d 33* (due process)]. The United States Constitution guaranties not only the enforcement of fair and reasonable laws but also the fair and reasonable enforcement of laws [*see Yick Wo v. Hopkins (1886) 118 U.S. 356, 373-374, 6 S. Ct. 1064, 30 L. Ed. 220* ("[t]hough the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution")], including an agency's own regulations [*see Wotton v. Bush (1953) 41 Cal. 2d 460, 466-467, 261 P.2d 256]* .

An important aspect of this rule is its effect on an agency's operational policy. Nearly every agency has such a policy, usually set out in a standard operating manual that in some cases is quite lengthy. While an agency may establish an operational policy, it may not adhere to that policy when to do so would deny a person a statutory or constitutional right [*see e.g., Bank of Italy v. Johnson (1926) 200 Cal. 1, 15, 251 P. 784]* .

An administrative agency may not constitutionally deprive a person of property without due process. The property in question is a vested property right, such as the owner's exclusive right to use personal property [*see, e.g., Pacific Tel. & Tel. Co. v. Eshleman (1913) 166 Cal. 640, 680, 689-690, 137 P. 1119]* . There is no protection for anything less than a vested property right [*see, e.g., Holloway v. Purcell (1950) 35 Cal. 2d 220, 230, 217 P.2d 665* (administrative decision to abandon highway as not affecting constitutionally protected property rights of abutting owners)]. Procedural due process does not require a trial before a court, and a proceeding before an administrative officer or board is normally adequate if the basic requirements of notice and opportunity for hearing are met [*Blinder, Robinson & Co. v. Tom (1986) 181 Cal. App. 3d 283, 289, 226 Cal. Rptr. 339]* .

For detailed discussion of procedural due process requirements as they apply to public agencies, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

[f] Effects of Combined Powers

Because administrative agencies have legislative, executive, and quasi-judicial powers, some unusual situations can arise. For example, legislative power might be exercised in effect without legislation, such as where an agency's long-standing enforcement practice produces the functional equivalent of a regulation [*see, e.g., California Welfare Rights Organization v. Brian (1974) 11 Cal. 3d 237, 241, 113 Cal. Rptr. 154, 520 P.2d 970* ; *Richfield Oil Corp. v. Crawford (1952) 39 Cal. 2d 729, 736-738, 249 P.2d 600]* . Similarly, an essentially executive function, such as setting

up a schedule of enforcement for a particular law, might be performed by using legislative procedures, that is, by enacting a regulation [*see, e.g., Clean Air Constituency v. California State Air Resources Bd. (1974) 11 Cal. 3d 801, 809, 815-816, 114 Cal. Rptr. 577, 523 P.2d 617]* .

It is important to note that an administrative agency's combination of powers gives it considerable flexibility in carrying out its responsibilities, and such matters as judicial review will be affected by the method the agency chooses. Form can become more important than substance. For instance, an agency might have the choice of using legislative power or quasi-judicial power to make a particular decision [*see Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal. 3d 392, 413, 413 n.11, 128 Cal. Rptr. 183, 546 P.2d 687]* . If it chooses the ad hoc approach of using quasi-judicial power to make that decision on a case-by-case basis, judicial review under *Code Civ. Proc. § 1094.5* is available [*see Sangster v. California Horse Racing Bd. (1988) 202 Cal. App. 3d 1033, 1040 n.11, 249 Cal. Rptr. 235* (fact that petitioner sought writ of administrative mandamus pursuant to *Code Civ. Proc. § 1094.5* to overturn decision of Horse Racing Board was tantamount to a concession that agency's action involved adjudicatory, not legislative or rulemaking, function)].

Alternatively, if an agency chooses instead to use legislative power in making a decision, that is, to adopt a regulation governing all future cases, *Code Civ. Proc. § 1094.5* is not available to obtain judicial review of the regulation's application in a particular case [*see Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 34 n. 2, 112 Cal. Rptr. 805, 520 P.2d 29]* . Judicial review is limited to scrutiny of the regulation in general, under *Gov. Code § 11350* (discussed in Ch. 472B, *Review of Agency Rulemaking*).

The significance of this distinction is that the judicial remedies are not the same and do not give the same relief. An agency is not obliged to choose one method over another, such as ad hoc determinations instead of a legislative approach, but may freely choose whatever method seems most suitable to it under the circumstances [*see Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal. 3d 392, 413, 128 Cal. Rptr. 183, 546 P.2d 687* ; *Housing Authority v. Dockweiler (1939) 14 Cal. 2d 437, 461, 94 P.2d 794]* .

[6] Separation of Powers Doctrine

[a] Judicial and Legislative Powers

The California Constitution provides, "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution" [*Cal. Const., art III, § 3*]. This or a substantially similar provision has always been in the state constitution: it states the separation of powers doctrine. This doctrine applies only to the state government [*see Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 36, 112 Cal. Rptr. 805, 520 P.2d 29]* ; therefore, as to local agencies, there is no question of violating the doctrine.

Before the 1966 revision of the Constitution, Article III provided that "no person charged with the exercise of powers properly belonging to one of these departments [of the state government--legislative, executive, and judicial] shall exercise any functions appertaining to either of the others, except as in this Constitution expressly directed or permitted" [Cal. Const., former art. III, § 1 (1879 Constitution)]. Since the 1966 revision made no substantive changes [*see Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 36 n.4, 112 Cal. Rptr. 805, 520 P.2d 29]* , it appears surprising that state agencies may constitutionally exercise legislative, executive, and judicial functions.

But the separation of powers doctrine does not mean quite what it seems to mean. The doctrine does not mean that legislative, executive, and judicial powers must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence the one upon the other in the slightest degree. The true meaning is, that the whole power of one of these departments shall not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution [*People*

ex rel. McCauley & Tevis v. Brooks (1860) 16 Cal. 11, 40] .

Thus, an administrative agency may exercise judicial or legislative power without violating the separation of powers doctrine when the judicial power is subject to judicial review and the legislative power is clearly defined by the legislature. Agency action may not violate the separation of powers doctrine even when it does not satisfy these requirements. For example, an agency opinion letter interpreting a statute does not violate the doctrine because it cannot be enforced by the agency either through its adjudicatory or its rulemaking power [20th *Century Ins. Co. v. Quackenbush (1998) 64 Cal. App. 4th 135, 141-142, 75 Cal. Rptr. 2d 113]* .

The separation of powers doctrine was not violated by legislation contained in *Bus. & Prof. Code § 6079.1(a)* which revised the appointment process for five judges of the state bar court hearing department to provide for appointment of one judge by the governor, one judge by the Senate Rules Committee, and one judge by the Speaker of the Assembly, nor by legislation contained in *Bus. & Prof. Code § 6086.65(a)* requiring replacement of a lay judge in the state bar court review department with a lawyer judge. The legislation does not defeat or materially impair either the authority of the Supreme Court or the Court's inherent power over attorney discipline. This is because the court has ongoing primary authority over the State Bar Court, and because there are sufficient procedural safeguards within the appointment and attorney discipline process [*Obrien v. Jones (2000) 23 Cal. 4th 40, 43-45, 96 Cal. Rptr. 2d 205, 999 P.2d 95]* .

The California legislature did not violate the separation of powers clause of the *California Constitution, art. III, § 3*, by enacting legislation, *Pub. Resources Code §§ 30301(d), (e), 30312 (a)(2), (b)(2)*, that provided for the appointment of one third of the members of the Coastal Commission by the Senate Committee on Rules, one third of the members by the Speaker of the Assembly, and one third by the governor, when the legislatively appointed members of the Coastal Commission were appointed to serve four-year terms and could not be removed from office during the term. The governor's appointees serve at the pleasure of the Governor, but the legislature changed the law governing terms for legislatively appointed members, from service at the pleasure of the appointing authority, to set four-year terms. Under these circumstances, the California Supreme Court held that legislative appointment of Commission members did not violate separation of powers under the California Constitution because the current structure of appointment and removal coupled with the California Coastal Act [*Pub. Res. §§ 30000 et. seq.*] provisions that contained statutory guidelines for Commission action provide sufficient safeguards to ensure that the legislature does not improperly interfere with the responsibilities of the executive branch to carry out its constitutional functions independently of legislative interference [*Marine Forests Society v. California Coastal Com. (2005) 36 Cal. 4th 1, 14-16, 30 Cal. Rptr. 3d 30, 113 P. 3d 1062]* .

The legislature's enactment of a later statute (*Welf. & Inst. Code § 17000.51*), that explained the legislature's intent when it amended another related statute (*Welf. & Inst. Code § 17000.5*) in a previous legislative session, does not violate separation of powers because the legislative declaration is not binding and conclusive on the courts in deciding the application of the statute to past events, but the legislative declaration is entitled to be considered by the courts [Hunt v. Superior court *(2000) 21 Cal. 4th 984, 1007-1009, 90 Cal. Rptr. 2d 236, 987 P.2d 705]* .

The legislature amended the provisions of the Fair Employment and Housing Act (FEHA) [*Gov. Code § 12940(j)(3)*] which prohibited employment discrimination, including workplace sexual harassment, to expand personal liability of non-supervisory coworkers to an employee plaintiff who claimed unlawful discrimination under that statute. The amendment was in response to a decision of the California Supreme Court [*Carrisales v. Department of Corr. (1999) 21 Cal. 4th 1132, 90 Cal. Rptr. 2d 804, 988 P.2d 1083]* that held non-supervisory co-workers were not personally liable for workplace sexual harassment of a fellow employee. The effect of this amendment was to change the law, but the legislature's amendment included language that stated that the amended provisions are "declaratory of existing law" [*Gov. Code § 12940(j)(2)*]. The California Supreme Court held that the legislature has the authority under separation of powers to enact laws, and also to change those laws after the Supreme Court has interpreted existing law in a court decision, but the interpretation of those laws is a judicial function under separation of powers, not the legislature's function. The legislature lacks the power under separation of powers to state that a change in the law is a declaration of

existing law, as that is a judicial responsibility to interpret the law [*McClung v. Employment Development Dept. (2004) 34 Cal. 4th 467, 469-470, 20 Cal. Rptr. 3d 428, 99 P.3d 1015]* . Furthermore, the Supreme Court held that the change in law imposing liability for workplace sexual harassment on non-supervisory co-workers was prospective only, and could not be applied retroactively to the conduct of a co-worker that predated the date of the change in the law. The court concluded that the presumption against statutory retroactivity that is based on fairness concerns was applicable to this case [*McClung v. Employment Development Dept. (2004) 34 Cal. 4th 467, 475-476, 20 Cal. Rptr. 3d 428, 99 P.3d 1015]* .

The California Supreme Court held that a 1999 amendment to *Labor Code Section 6304.5* (which changed the law to permit introduction of Cal-OSHA safety standards including agency regulations to establish a statutorily based standard of care for third-party tort lawsuits) could not be retroactively applied to a lawsuit. This was an improper retroactive application of the statute that had previously prohibited introduction of Cal-OSHA safety standards to establish a standard of care. Retroactive application of a statute requires specific statutory language when the past legal consequences of past conduct is sought to be changed. This statutory change satisfied that retroactivity test, but there was no specific language in the statute requiring retroactive application. Thus, the statute could not be applied to a pre-amendment accident [*Elsner v. Uveges (2004) 34 Cal. 4th 915, 938-939, 22 Cal. Rptr. 3d 530, 102 P. 3d 915* (employee of roofing subcontractor was injured on job while working on scaffolding. Employee filed third-party tort lawsuit against general contractor. Employee sought to offer evidence of Cal-OSHA regulations relating to scaffolding standards to establish a negligence per se standard of care, and shift burden of proof to general contractor defendant)]. Similarly, the California Supreme Court held that amendments to *Labor Code Section 1720(a)(1)* which changed the definition of "public works" for purposes of the prevailing wage laws applied prospectively, not retroactively [*City of Long Beach v. Dept. of Industrial Relations (2004) 34 Cal. 4th 942, 953, 22 Cal. Rptr. 3d 518, 102 P. 3d 904* (statutory amendments are presumed to have prospective application only unless legislation clearly provides for retroactive application)]. The California Court of Appeal held that initiatives that are enacted by the voters operate prospectively only unless the voters clearly intended the initiative to operate retroactively [*Save Our Sunol, Inc. v. Mission Valley Rock Company (2004) 124 Cal. App. 4th 276, 280-281, 21 Cal. Rptr. 3d 171* (local initiative enacted by voters that significantly restricted development of quarries in county had prospective application only to quarries that had not been approved by the county through the issuance of a mining permit at the time the initiative was approved)].

The legislature did not violate the separation of powers clause of the California Constitution, *Cal. Const. art. III, § 3*, by enacting *Gov. Code § 17581* (which permits the legislature to suspend the operation of regulations and withdraw funding from state mandated local programs as part of the state budget process). This statute authorized the legislature, as part of the state budget appropriations process, to suspend the operation of administrative regulations adopted by the Department of Industrial Relations by not providing funding for enforcement of, or compliance with, the regulations. Because the legislature took this action as part of the state budget process, the suspension of regulations did not unlawfully encroach on the powers of the executive branch of the government [*Carmel Valley Fire Protection Dist. v. State (2001) 25 Cal. 4th 287, 291-292, 105 Cal. Rptr. 2d 636, 20 P.3d 533]* .

Proposition 21, the Gang Violence and Juvenile Crime Prevention Initiative, was adopted by popular vote. The initiative included an amendment to *Welf. & Inst. Code § 707(d)* that allowed the district attorney to exercise discretion to charge juveniles with crimes in the criminal division of the superior court as adults without a court first deciding that the juvenile is not fit for a juvenile court proceeding (trial in the juvenile division of the superior court). The Court held that *Welf. & Inst. Code § 707(d)* did not violate the separation of powers clause of the California Constitution, *Cal. Const. art. III, § 3*. This is because the prosecutor's decision to charge is not considered to be an "exclusively judicial function" nor does that decision "usurp fundamental judicial powers" [*Manduley v. Superior Court (2002) 27 Cal. 4th 537, 557, 117 Cal. Rptr. 2d 168, 41 P.3d 3]* . The court reasoned that separation of powers is designed to prevent concentration of the fundamental powers of government in one branch of government, that separation of powers does not require each branch of government to exercise all the powers within their branch exclusively, that the branches of government are "interdependent", and that one branch may exercise powers within its authority that "duplicate" powers delegated to another branch [*Manduley v. Superior Court (2002) 27 Cal. 4th 537, 557, 117 Cal. Rptr. 2d 168, 41 P.3d 3]* . The

discretion to make charging decisions is "well within the district attorney's traditional executive authority" [*Manduley v. Superior Court (2002) 27 Cal. 4th 537, 556, 117 Cal. Rptr. 2d 168, 41 P.3d 3]* .

Based on a request by the California State Bar, the California Supreme Court adopted a rule requiring active members of the California Bar to pay a special regulatory assessment of $173.00, for exclusive use to fund attorney discipline activities of the State Bar of California. The court also ordered the appointment of a special master to exercise oversight over the money collected to ensure that the funds were used only for discipline related purposes. The Court held that the regulatory assessment did not violate the separation of powers clause of the California Constitution, *Cal. Const. art. III, § 3*. The regulatory assessment was not a tax or appropriation that is particularly within the power of the California legislature. Courts do not have authority to order the legislature to pass an appropriation. However, State Bar revenues are based on dues assessed members of the bar, not legislative appropriations. Thus, a judicial order requiring assessment of regulatory fees does not violate separation of powers principles by usurping a legislative power to make appropriations [In *Re Attorney Discipline System (1998) 19 Cal. 4th 582, 595-596, 79 Cal. Rptr. 2d 836, 967 P. 2d 49]* .

An initiative entitled Proposition 10, the California Children and Families Act of 1998 was adopted by popular vote. The initiative increased tobacco taxes to fund smoking prevention and early child development activities. The initiative also created a new statewide agency, the California Children and Families Commission (CCFC), and also created local county commissions (CC) to implement its programs. The Court of Appeals held that the Act did not did not violate the separation of powers clause of the California Constitution, *Cal. Const. art. III, § 3*. The court rejected a separation of powers challenge based on an argument that the state and local agencies exercised the power to appropriate funds, which is a legislative power that can not be exercised by executive branch administrative agencies. The court noted that the power to appropriate had been exercised by the people, in adopting the Act which increased tobacco taxes, and specified how the increased taxes were to be spent. The people acted under the initiative and referendum powers of the California Constitution, *Cal. Const. art. VI, § 1*. The act provides specific requirements for and limitations on spending by CFCC and CC so that there is not an unconstitutional delegation of legislative authority [*California Assn. of Retail Tobacconists v. State of California (2003) 109 Cal. App. 4th 792, 830-832, 135 Cal. Rptr. 2d 224]* . The court also rejected a separation of powers challenge based on legislative appointment of four members of CCFC, an executive branch agency. The court reasoned that there were numerous executive controls over the operations of the agency so that legislative appointment did not create "unchecked power" [*California Assn. of Retail Tobacconists v. State of California (2003) 109 Cal. App. 4th 792, 832-833, 135 Cal. Rptr. 2d 224]* .

The California Supreme Court rejected a challenge under the separation of powers clause of the California Constitution, *Cal. Const. art. III, § 1*, to the California Department of Social Services (CDSS) adoption of forms and procedures to "facilitate second parent adoptions." The challenge was based on the argument that CDSS, an executive branch agency, exercised legislative powers, by recognizing a type of adoption, "second parent adoption" that was not authorised by the legislature. The Court rejected this challenge and held that CDSS had reasonably interpreted a statute authorizing independent adoptions to allow the type of adoption that they provided forms and procedures [*Sharon S. v. Superior Court (2003) 31 Cal. 4th 417, 443-445, 2 Cal. Rptr. 3d 699, 73 P.3d 554]* .

The California Court of Appeal held that a Department of Motor Vehicles' order enforcing a two year suspension of a California motorists driving license, under the provisions of *Veh. Code § 13352(a)(3)*, the administrative per se statute, was valid. The court rejected a separation of powers challenge to the statute. The motorist was also criminally convicted for the same conduct (two alcohol driving related convictions) and had a criminal sentence of a one year license suspension imposed for the same conduct. The motorist argued that the DMV suspension order was inconsistent with the criminal court sentencing order, and was therefore unconstitutional. The Court of Appeal rejected his argument, and concluded that criminal convictions under California law often have collateral consequences like the DMV administrative suspension, and these consequences are substantively distinct from the criminal sentence. Therefore, separation of powers is not violated [*Brierton v. Dep't of Motor Vehicles (2006) 140 Cal. App. 4th 427, 433-435, 44 Cal. Rptr. 3d 480]* .

The First District, Division 2, California Court of Appeal held that provisions of the Marine Life Protection Act [*Fish & Game Code §§ 2853, 2855, 2856, 2857*] that authorized the Department of Fish & Game and other state agencies to enter into a memorandum of understanding (MOU) with a private foundation (the Resources Legacy Fund Foundation) to obtain private funds to cover the costs of implementing the provisions of the MLPA by the Department did not improperly delegate legislative powers to an executive branch agency in violation of the doctrine of separation of powers. This is because the statute provided adequate safeguards so that the agency was not making fundamental policy choices but was rather carrying out the legislative policy choices provided by the statute (MLPA) [*Coastside Fishing Club v. California Resources Agency (2008) 158 Cal. App. 4th 1183, 1203-1205, 1211, 71 Cal. Rptr. 3d 87*].

[b] Unconstitutional Statutes

The provisions of *California Constitution, Article. III, Section 3.5* prohibit administrative agencies from determining the constitutionality of a statute and from not enforcing a statute because of unconstitutionality until an appellate court has determined the constitutional question. The provisions of Section 3.5 state that an administrative agency has no power to do the following [*Cal. Const., art. III, § 3.5*]:

- Declare a statute unenforceable or refuse to enforce it on the basis that it is unconstitutional unless an appellate court has found the statute unconstitutional.

  - Declare a statute unenforceable or refuse to enforce it on the basis of federal preemption unless an appellate court has so held.

- Declare a statute unconstitutional.

While these provisions preclude constitutional challenges at an administrative hearing, these issues should be raised in the pleadings at the administrative level and a record should be made of the challenge. There are several reasons for doing this. First, the section by its terms does not prevent the mere hearing of a constitutional challenge, only the declaration that a statute is unconstitutional or the refusal to enforce it on this basis [*Cal. Const., art. III, § 3.5*]. These terms have led one federal court, applying California law, to hold that the failure to raise a constitutional challenge at the administrative level may limit a later court challenge [*Southern Pacific Transp. Co. v. Public Utilities Com. (9th Cir. 1983) 716 F.2d 1285, 1291* (preemption claim not raised in administrative hearing is res judicata after California Supreme Court's denial of petition for review)]. Two divisions of the California Court of Appeal (Third District, and First District, Division 3), however, have disagreed [*Cowan v. Myers (1986) 187 Cal. App. 3d 968, 975-976, 232 Cal. Rptr. 299* (requirement of exhaustion of remedies no bar when state statute challenged as violation of federal law); *Chevrolet Motor Division v. New Motor Vehicle Bd. (1983) 146 Cal. App. 3d 533, 539, 194 Cal. Rptr. 270* (failure to challenge constitutionality of statute before administrative tribunal does not waive the issue)].

It is impossible to predict the extent to which an ALJ will allow evidence on a constitutional challenge that may be irrelevant to the issues the agency can actually decide. However, counsel in an administrative hearing should use the following approach: Whenever possible, make a record at the administrative hearing by raising the constitutional issue, or the federal statutory issue, at the hearing. Counsel should acknowledge to the ALJ that the purpose of raising the issue is to preserve that issue for appeal from the agency decision. If counsel makes this type of record at the hearing, it will avoid the risk of waiver or exhaustion of administrative remedies requirements being applied to prohibit the raising of this issue before appellate courts. Counsel should acknowledge that neither the ALJ nor the agency have the authority to decide this issue. Counsel should also make a factual record at the hearing by offering evidence on the constitutional or federal statutory issue so as to provide a basis for a later unconstitutional as applied argument.

The scope of the constitutional prohibition includes challenges to statutes. However, it does not affect an agency's enforcement of its own rules or its power to examine evidence concerning them in light of constitutional standards [

Goldin v. Public Utilities Commission (1979) 23 Cal. 3d 638, 669 n.18, 153 Cal. Rptr. 802, 592 P.2d 289 (PUC properly considered evidence from affidavit used to justify search warrant issued by magistrate to search premises of telephone subscriber suspected of running a prostitution business; subscriber's telephone service was terminated for same reason, and subscriber sought interim relief from termination under provisions of PUC regulation; subscriber had due process right to challenge termination of telephone service, and PUC properly considered evidence from affidavit to determine whether subscriber was entitled to have telephone service restored)].

However, the agency can still interpret the law in discharging its duties. The agency may consult federal law, including constitutional law, to determine if the state law can be enforced without offending the federal law (or the Constitution). The preemption issue or the constitutional challenge can thus be resolved by interpreting the state law in a way that avoids the issue [*Regents of University of California v. Public Employment Relations Bd. (1983) 139 Cal. App. 3d 1037, 1042, 189 Cal. Rptr. 298* (PERB ordered university to grant labor union access to internal mail system; PERB rationale for order included conflicts between federal statutes (governing postal system) and state statute that required union to have access. PERB concluded that it lacked authority to resolve conflict between state and federal statute. The Court of Appeal vacated PERB order, and remanded to the agency to interpret the provisions of the federal statute, to decide whether state law and federal law could be harmonized)]. In addition, an agency decision on nonconstitutional issues may obviate the consideration of constitutional challenges [*Leek v. Washington Unified School Dist. (1981) 124 Cal. App. 3d 43, 53, 177 Cal. Rptr. 196* (teachers who were not members of teachers unions challenged on *first amendment* grounds school district requirement that they must pay representation fee to union. The Court of Appeal held that teachers had to exhaust administrative remedies by bringing their challenge to the Public Employees Relations Board (PERB). Court noted that PERB had authority to prohibit unfair practices by public employee unions, and that PERB could recognize their claim under its statutory authority without having to decide constitutional issues)].

Furthermore, the constitutional challenge may go to legislation already held unconstitutional in the past and that is thus now "patently unconstitutional." If a law is patently unconstitutional, *Cal. Const., art. III, § 3.5* does not bar an agency from recognizing that fact by refusing to enforce the law [Schmid v. Lovette (1984) 154 Cal. App. 3d 466, 473-474, *154 Cal. App. 3d 466, 201 Cal. Rptr. 424* (loyalty oath provisions of Education Code had been declared unconstitutional by numerous courts; it was improper for school district to enforce loyalty oath requirements for newly hired teachers)]. This exception is very narrow.

Finally, if the provisions of *California Constitution, Article III, Section 3.5* do prevent the agency from acting on the challenge, a proper record nonetheless can obviate the need for taking evidence in a later court challenge. The record will expedite the court proceedings and eliminate the issue of whether the respondent exhausted its administrative remedies. A proper record is important because it allows the challengers to show that they exhausted their administrative remedies even when alleging constitutional violations [*Leek v. Washington Unified School Dist. (1981) 124 Cal. App. 3d 43, 53, 177 Cal. Rptr. 196* (Court of appeal upheld trial court granting of a demurrer to teacher's complaint for failure to exhaust administrative remedies)].

The Court of Appeal for the Third District held that the Public Utilities Commission (PUC) was not prohibited by the provisions of *California Constitution, Article III, Section 3.5* from enforcing a state statute on grounds that it was inconsistent with another state statute that the PUC was required to enforce. The PUC did not violate separation of powers by refusing to enforce the inconsistent statute [*Burlington Northern and Santa Fe Railway Co. v. PUC (2003) 112 Cal. App. 4th 881, 887-888, 891, 5 Cal. Rptr. 3d 503]* .

[7] Delegation of Legislative Powers

[a] Delegation Authorized by the Constitution

The California Constitution authorizes the Legislature to delegate its legislative power in a few instances [*see Cal. Const., art. IV, § 20(b)* (Fish and Game Commission); *Cal. Const., art. VI, § 6* (Judicial Council); *Cal. Const., art. IX, §*

14 (governing boards of school districts); *Cal. Const., art. XII, § 5* (Public Utilities Commission); *Cal. Const., art. XIII, §§ 15, 24, 29* (counties and cities); *Cal. Const., art. XVI, § 11* (agencies concerned with administration of relief); *Cal. Const., art. VII, § 3(a)* (Personnel Board)].

[b] Discretionary Delegation of All but Fundamental Policy Decisions

In any case not covered by such a constitutional dispensation, the Legislature could not lawfully delegate any law-making task if the Supreme Court had not established the rule that "controlled delegation" is constitutionally permissible. Unless the California Constitution requires the Legislature to delegate power to an agency, a constitutional authorization for delegation confers discretion on the Legislature to delegate or not as the Legislature sees fit [*see Dean v. Kuchel (1951) 37 Cal. 2d 97, 102, 104-105, 230 P.2d 811]* .

Except to the extent the California Constitution gives a broader authority, the Legislature's authority to delegate legislative power to administrative agencies is restricted by the judicially developed principle that the Legislature should resolve truly fundamental issues. As the most representative organ of government, it should settle as much as possible controverted issues of policy and determine crucial issues whenever it has the time, information and competence to deal with them [*Clean Air Constituency v. California State Air Resources Bd. (1974) 11 Cal. 3d 801, 817, 114 Cal. Rptr. 577, 523 P.2d 617* ; *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control (1966) 65 Cal. 2d 349, 369, 55 Cal. Rptr. 23, 420 P.2d 735* ; *see Kugler v. Yocum (1968) 69 Cal. 2d 371, 376, 71 Cal. Rptr. 687, 445 P.2d 303]* .

The essentials of the Legislature's function are the determination and formulation of fundamental policy. The Legislature may, after declaring a policy and fixing a primary standard to guide the exercise of delegated legislative power, confer upon executive officers or administrative agencies the "power to fill up the details" by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect [*First Indus. Loan Co. v. Daugherty (1945) 26 Cal. 2d 545, 549, 159 P.2d 921* ; *see Kugler v. Yocum (1968) 69 Cal. 2d 371, 376, 71 Cal. Rptr. 687, 445 P.2d 303]* .

An unconstitutional delegation of power occurs only when the Legislature confers upon an administrative agency the *unrestricted* authority to make fundamental policy determinations; to avoid such unlawful delegation, the Legislature must provide an adequate yardstick for the guidance of the administrative agency empowered to implement the law [*Clean Air Constituency v. California State Air Resources Bd. (1974) 11 Cal. 3d 801, 816-817, 114 Cal. Rptr. 577, 523 P.2d 617* (emphasis added)]. Only in the event of a total abdication of legislative power, through failure either to render basic policy decisions or to assure that they are implemented as made, will a court intrude on a legislative enactment because it is an unlawful delegation, and then only to preserve the representative character of the process of reaching legislative decision [*Kugler v. Yocum (1968) 69 Cal. 2d 371, 384, 71 Cal. Rptr. 687, 445 P.2d 303* ; *see, e.g., Brock v. Superior Court (1937) 9 Cal. 2d 291, 297, 71 P.2d 209]* . Thus, for example, when the legislature has not extablished a licensing requirement an agency may not lawfully confer such licensing authority upon itself [*B.C. Cotton, Inc. v. Voss (1995) 33 Cal. App. 4th 929, 956-957, 39 Cal. Rptr. 2d 484]* .

Gov. Code §§ 19600-19607, which authorize the State Personnel Board to conduct demonstration projects to provide new ways for selecting management employees in civil service positions in state government, does not unconstitutionally delegate legislative authority to an executive branch administrative agency. The legislature made the fundamental policy choices in the statutes, and there are adequate safeguards in the statute including notice and public procedure, protection of seniority rights of civil service employees, limited duration of the project, and consistency with the merit principle [*Alexander v. State Personnel Board (2000) 80 Cal. App. 4th 526, 537-539, 95 Cal. Rptr. 2d 324]* .

Pen. Code § 1170.3, which required the Judicial Council to adopt rules governing aggravating and mitigating circumstances for sentencing purposes, did not unconstitutionally delegate legislative authority to the Judicial Council. This is because the Legislature had made the fundamental policy choice to change from indeterminate to determinate

sentencing. Also, there were specific enough standards in the statute relating to aggravating and mitigating factors to guide the Judicial council in adopting rules of court to specify what factors will be considered as aggravating or mitigating circumstances [*People v. Wright (1982) 30 Cal. 3d 705, 712-714, 180 Cal. Rptr. 196, 639 P. 2d 267]* .

Food & Agric. Code § 8401 et seq., known as the Citrus Pest District Control Law, did not unconstitutionally delegate legislative authority to citrus growers who serve on the boards of Pest Control Districts because the legislature resolved the fundamental policy issues, and it provided adequate and more specific safeguards that are necessary when private industry representatives sit on District Boards, and exercise power to make rules affecting competitors [People ex. *Rel. Lockyer v. Sun Pacific Farming Co. (2000) 77 Cal. App. 4th 619, 632-634, 92 Cal. Rptr. 2d 115]* .

Plum growers challenged a marketing order authorized by the California Marketing Act [*Cal. Food & Agric. Code § 58601*] which required growers to pay for the cost of generic advertising of plums. The California Supreme Court rejected the challenge based on an argument that there was an invalid delegation of legislative powers to private parties, agricultural producers, who were members of the California Plum Marketing Board. The court noted that delegation of authority to agricultural producers to make decisions related to regulation of marketing of agricultural products furthered an important governmental interest (stabilization of agriculture) and recognized the value of producer participation to the effective implementation of marketing programs [*Gerawan Farming Inc. v. A.G. Kawamura (2004) 33 Cal. 4th 1, 25-27, 14 Cal.Rptr. 3d 14, 90 P.3d 1179]* .

Rev. & Tax. Code § 6909(b) did not unconstitutionally delegate legislative authority when it authorized settlement of a lawsuit, payment of court costs and attorney's fees to the prevailing party, and a determination of the amount of fees to be paid by the state through binding arbitration. The Legislature made the fundamental policy decision to refund the smog impact fee and to settle the claim for attorney's fees. The statute was interpreted to limit the amount of fees that arbitrators could award to $18 million, the amount of the fee award in the existing lawsuit. The Legislature made the basic decision to appropriate funds to resolve the lawsuit, and there was no improper delegation of the authority to appropriate funds [*Jordan v. Department of Motor Vehicles (2002) 100 Cal. App. 4th 431, 455-456, 123 Cal. Rptr. 2d 122* , as mod. den. reh.].

An initiative entitled Proposition 10, the California Children and Families Act of 1998 was adopted by popular vote. The initiative increased tobacco taxes to fund smoking prevention and early child development activities. The initiative also created a new statewide agency, the California Children and Families Commission (CCFC), and also created local county commissions (CC) to implement its programs. The act provided specific requirements for and limitations on spending by CFCC and CC so that there is not an unconstitutional delegation of legislative authority [*California Assn. of Retail Tobacconists v. State of California (2003) 109 Cal. App. 4th 792, 830-832, 135 Cal. Rptr. 2d 224]* .

The California Court of Appeal rejected a non-delegation doctrine challenge to provisions of statutes authorizing impoundment of vehicles driven by motorist without valid licenses and motorist who engaged in vehicle speed contests. The court interpreted the 30 day impoundment authority narrowly to not delegate discretion to the impounding agency to decide how many days an impoundment order would be in place. The 30-day impoundment statute requires that motor vehicles be impounded for the full 30 days, unless specific provisions or other early release statutes are applicable [*Samples v. Brown (2007) 146 Cal. App. 4th 787, 809-811, 53 Cal. Rptr. 3d 216]* .

[c] Determining When Decision Involves Fundamental Policy

The only general rule, in determining whether or not is a legislative decision is fundamental and nondeligable, is that whatever the Constitution mandates the legislature to do is fundamental and cannot be delegated [*see* *Dougherty v. Austin (1892) 94 Cal. 601, 605-607, 29 P. 1092]* . The provisions of the Constitution are mandatory and prohibitory (*i.e.*, not merely directory) unless by express words they are declared to be otherwise [*Cal. Const., art. I § 26*].

The Supreme Court has not defined further what constitutes a fundamental policy decision, and its rulings do not

necessarily show a clear application of the general rule. For example, in *El Dorado Oil Works v. McColgan (1950) 34 Cal. 2d 731, 737, 215 P.2d 4* , involving a constitutional provision that "the legislature shall *define*" corporations and net income, and that it "shall *provide*" for the allocation of income, the court held that provision imposed a nondelegable duty on the Legislature to define the specified terms, but imposed a delegable duty with respect toincome allocation. By contrast, it held many years earlier that a constitutional provision that the Legislature regulate the compensation of county officials could not be delegated to county supervisors [*Dougherty v. Austin (1892) 94 Cal. 601, 604-607, 29 P. 1092* ; *see People v. Johnson (1892) 95 Cal. 471, 474-475, 31 P. 611]* .

A court of appeal has held that the critical question in determining if a decision is fundamental is whether or not the Legislature has previously made a basic policy decision that provides a standard or guide for the exercise of administrative discretion [*California Medical Assn. v. Lackner (1981) 124 Cal. App. 3d 28, 41, 177 Cal. Rptr. 188* (including dicta that importance of interests affected by decision may be determinative of whether or not decision is fundamental)].

Examples of fundamental legislative decisions include the following:

- Public Expenditures. The decision as to what expenditures should be made from public funds must be made by the legislature; and the legislature's duty extends in some cases to how much should be spent on a given item [*see Knight v. Eureka (1898) 123 Cal. 192, 195-196, 55 P. 768* (city council as unable lawfully to delegate task of fixing compensation for public employee)].

- Crimes and Punishment. Decisions as to whether a particular act should be punished and what the punishment should be must be made by the legislature [*see Ex parte Daniels (1920) 183 Cal. 636, 655, 192 P. 442* ; *Harbor Comm'rs v. Redwood Co. (1891) 88 Cal. 491, 493, 26 P. 375* ; *Ex parte Cox (1883) 63 Cal. 21]* , although it may define a crime as a violation of a regulation adopted by an agency, and thus leave to the agency the task of providing substantive meaning to the crime so defined [*Moore v. Municipal Court (1959) 170 Cal. App. 2d 548, 556, 339 P.2d 196* ; *see People ex rel. Younger v. County of El Dorado (1971) 5 Cal. 3d 480, 494-496, 96 Cal. Rptr. 553, 487 P.2d 1193* ; *see also In re Herrera (1943) 23 Cal. 2d 206, 210-211, 143 P.2d 345* (decision whether youthful offenders should be detained for indefinite periods, as long as the protection of the public requires it, must be made by legislature, but decision as to how much detention is necessary for the protection of the public may be left to an administrative agency)].

- Economic Regulation. The decision whether to regulate the marketing of a commodity must be made by the Legislature, but decisions such as where to draw the boundaries of marketing areas and what the minimum prices in a given area should be may be left to an administrative agency [*see Ray v. Parker (1940) 15 Cal. 2d 275, 284-289, 101 P.2d 665* ; *Jersey Maid Milk Products Co. v. Brock (1939) 13 Cal. 2d 620, 641-643, 91 P.2d 577]* .

- Employment Regulation. The decision whether to impose a minimum wage requirement on employers must be made by the Legislature, but the decision as to what the minimum dollar amount should be maybe left to an administrative agency [*see California Drive-In Restaurant Assn. v. Clark (1943) 22 Cal. 2d 287*].

- Highway Construction. The decision whether to construct a highway system must be made by the Legislature, but the decisions as to when and where a particular highway in the system will be built may be left to an administrative agency [*see Holloway v. Purcell (1950) 35 Cal. 2d 220, 231-232, 217 P.2d 665]* .

- Insurance Regulation. The decision whether to adopt an assigned-risk insurance plan must be made

by the Legislature, but the decision as to how bad risks should be shared among insurers may be left to an administrative agency [*see California State Auto. Ass'n Inter-Ins. Bureau v. Downey (1950) 96 Cal. App. 2d 876, 901-907, 216 P.2d 882]* .

- Licensing. The decision whether to license a particular activity must be made by the Legislature, but decisions on what qualifications should entitle an applicant to a license may be left to an administrative agency [*see Ex parte McManus (1907) 151 Cal. 331, 335-337, 90 P. 702* ; *see* Ch. 471B, *Licensing by Public Agencies* , for detailed discussion and forms relating to licensing].

- Public Housing and Redevelopment. The decision to redevelop blighted urban areas through public assistance programs must be made by the Legislature, but the decision as to whether a particular urban area should be redeveloped may be left to an administrative agency [*see Redevelopment Agency v. Hayes (1954) 122 Cal. App. 2d 777, 807, 266 P.2d 105]* .

- Public Offices. The decision whether to create a particular public office must be made by the Legislature, but the decision as to whether a particular individual should fill that office may be left to an administrative agency [*see Farrell v. Board of Trustees (1890) 85 Cal. 408, 415-417, 24 P. 868* ; *Ford v. Board of State Harbor Comm'rs (1889) 81 Cal. 19, 36-37, 22 P. 278* (concurring opinion)].

- Traffic Control. The decision whether to place traffic control signs and devices where the public safety requires them must be made by a legislative body (*e.g.*, a city council), but the decision as to what the public safety requires at a given intersection or other place may be left to an administrative agency [*see Gould v. Western Dairy Prod., Inc. (1936) 12 Cal. App. 2d 188, 191-192, 55 P.2d 274]* .

- Fisheries Management. The decision to maintain California's jurisdiction over fisheries within three miles off shore by authorizing formulation of a fisheries management plan that will avoid conflict with an overall plan formulated by federal authorities applying to fisheries beyond three miles off shore must be made by the Legislature. However, the actual formulation of the plan, in cooperation with the federal fisheries management council, may be left to an administrativeagency, provided that there are proper safeguards to assure conformity with the legislative will. The administrative plan may even include temporary suspension of statutes if such suspension has been authorized by the Legislature [*Salmon Trollers Marketing Assn. v. Fullerton (1981) 124 Cal. App. 3d 291, 300, 177 Cal. Rptr. 362]* .

[d] Standards and Safeguards for Delegated Legislative Powers

The rule is that the Legislature, after declaring a policy and *fixing a primary standard* to guide the exercise of delegated legislative power, may confer upon an administrative agency the "power to fill up the details" by prescribing administrative rules and regulations [*First Indus. Loan Co. v. Daugherty (1945) 26 Cal. 2d 545, 549, 159 P.2d 921* (emphasis added)]. A standard need be sufficiently definite only to provide directives of conduct for the administrative agency in exercising its delegated powers [*Duskin v. State Bd. of Dry Cleaners (1962) 58 Cal. 2d 155, 160, 23 Cal. Rptr. 404, 373 P.2d 468]* .

Sufficient standards for administrative action may be found by implication from the general purposes of a statute and from the reasons which must have led to its adoption [*Louis Stores, Inc. v. Department of Alcoholic Beverage Control (1962) 57 Cal. 2d 749, 760, 22 Cal. Rptr. 14, 371 P.2d 758* ; *see, e.g., In re Petersen (1958) 51 Cal. 2d 177, 184-186, 331 P.2d 24* ; *see also State Bd. of Dry Cleaners v. Thrift-D-Lux Cleaners (1953) 40 Cal. 2d 436, 448-449, 458-459, 254 P.2d 29* (finding no sufficient standard; Traynor, J., dissenting, attacking rule)].

On the other hand, safeguards inherent in a statute, which serve to protect against arbitrary exploitation of delegated legislative powers by a public agency, obviate the need for standards. The important consideration is not whether a

statute delegating power expresses *standards*, but whether the procedure established for the exercise of the power furnishes adequate *safeguards* to those who are affected by the administrative action [*Kugler v. Yocum (1968) 69 Cal. 2d 371, 381-382, 71 Cal. Rptr. 687, 445 P.2d 303]* .

The difference between standards and safeguards is only the difference between cause and effect. The purpose of requiring standards to guide administrative exercise of delegated legislative power is to assure some safeguard against the abuse of that power. Thus, a court might speak of the absence of any guiding standards and mean the absence of safeguards against abuse of power [*see, e.g.,* *Blumenthal v. Board of Medical Examiners (1962) 57 Cal. 2d 228, 235-236, 18 Cal. Rptr. 501, 368 P.2d 101]* . Safeguards need not take traditional forms (for example, hearing and appeal rights). For example, there might be certain natural forces such as business competition and relative bargaining power that tend to effect a containment of legislative power delegated to an administrative agency, and thus an adequate safeguard might exist [*see* *Wilke & Holzheiser, Inc.v. Dept. of Alcoholic Bev. Control (1966) 65 Cal. 2d 349, 367-368, 55 Cal. Rptr. 23, 420 P.2d 735]* .

[e] Discretionary Delegation of Legislative Power to Constitutional Agencies

The fact that an agency derives some of its powers directly from the State Constitution does not preclude the Legislature from delegating some of its own powers to the agency [*Sandstrom v. Cal. Horse Racing Bd. (1948) 31 Cal. 2d 401, 413, 189 P.2d 17 , cert. denied,* *335 U.S. 814, 69 S. Ct. 31, 93 L. Ed. 369* ; *Young v. Department of Fish and Game (1981) 124 Cal. App. 3d 257, 275, 177 Cal. Rptr. 247]* . With respect to the delegation of legislative power, a constitutional agency is no different from any other agency [*see* *Harris v. Alcoholic Bev. etc. Appeals Bd. (1964) 228 Cal. App. 2d 1, 6, 39 Cal. Rptr. 192]* .

However, the legislature may not take away, diminish, or restrict, either directly or indirectly, powers given to an agency by the Constitution [*see* *State Bd. of Educ. v. Levit (1959) 52 Cal. 2d 441, 461, 463, 343 P.2d 8* ; *California Adjustment Co. v. Atchison, Topeka etc. Ry. Co. (1918) 179 Cal. 140, 152, 175 P. 682]* .

[8] Establishment of New State Agencies

Any state board proposed for creation by the legislature on or after January 1, 1991, is subject to *Gov. Code § 9148 et seq.* [*Gov. Code § 9148*]. These provisions require specific evaluative steps to be taken by the Legislature prior to legislating the creation of new state boards.

For purposes of *Gov. Code § 9148 et seq.*, the term "state board" includes any administrative or regulatory board, commission, committee, council, association, or authority consisting of more than one person, whose members are appointed by the Governor, the Legislature, or both [*Gov. Code § 9148.2*]. "State board," however, does not include any commission created by the Legislature pursuant to the California Marketing Act of 1937 (*Food & Agric. Code § 58601 et seq.*) or the Agricultural Producers Marketing Law (*Food & Agric. Code § 59501 et seq.*) [*see Gov. Code § 9148.2*].

Prior to consideration by the Legislature of legislation creating a new state board, a plan for the establishment and operation of the proposed state board must be developed by the author or sponsor of the legislation [*Gov. Code §§ 9148.4, 9148.6*]. The plan must include a description of the problem creating a need for this board and must specify the reasons for choosing this method of addressing the problem [*Gov. Code § 9148.4(a), (b)*]. The plan must also identify the public benefit or harm which will result from creation of the board as well as the source of the board's funding [*Gov. Code § 9148.4(c), (d)*].

The California legislature adopted a requirement for periodic review of state boards every four years to evaluate and determine whether each has demonstrated a public need for its continued existence in accordance with enumerated factors and standards as set forth in Chapter 2 (commencing with Section 474) of Division 1.2 of the Business and Professions Code. [*Gov. Code § 9148.51(a)*]. If a state board becomes inoperative or is repealed under this section, any

provision of existing law that provides for the appointment of board members and specifies the qualifications and tenure of board members shall not be implemented and shall have no force or effect while that state board is inoperative or repealed [*Gov. Code § 9148.51(b)*]. Similarly, any provision of law authorizing the appointment of an executive officer by a state board subject to the review described in Chapter 2 (commencing with Section 474) of Division 1.2 of the Business and Professions Code, or prescribing his or her duties, shall not be implemented and shall have no force or effect while the applicable state board is inoperative or repealed [*Gov. Code § 9148.51(c)*]. Finally, the California legislature's intent is that subsequent legislation to extend or repeal the inoperative date for any state board shall be a separate bill for that purpose [*Gov. Code § 9148.51(d)*]. In at least one area of importance to environmental law, hazardous and toxic chemicals, federal legislation and regulations govern the activities of local agencies [The Emergency Planning and Community Right-to-Know Act, *42 U.S.C. § 11001 et seq.*; *40 C.F.R. § 370.1 et seq*]. Local environmental agencies are frequently created by local legislative action creating planning commissions or boards of zoning adjustment [*see, e.g., Guinnane v. San Francisco Planning Commission (1989) 209 Cal. App. 3d 732, 257 Cal. Rptr. 742]* .

[9] Local Agencies

California local agencies are different from state agencies in many ways. Local agencies include cities that can be either chartered or "general law" municipalities [*see Gov. Code §§ 34101, 34102*]. Chartered cities have a charter that provides for the cities' primary law, like a governing statute for a state agency. Chartered cities are subject to both state and federal law that preempts local law [*Harman v. City and County of San Francisco (1972) 7 Cal. 3d 150, 161, 101 Cal. Rptr. 880, 496 P.2d 1248]* . City charters are described as a type of "home rule" option for the residents of a city [*Younger v. Board of Supervisors (1979) 93 Cal. App. 3d 864, 869, 155 Cal. Rptr. 921]* . Under *Cal. Const., art. XI, § 7,* chartered municipalities are given the authority to make decisions about local affairs, including environmental regulation, within their boundaries, so long as such regulation is not in conflict with general laws [*People ex rel. Deukmejian v. County of Mendocino (1984) 36 Cal. 3d 476, 483-484, 204 Cal. Rptr. 897, 683 P.2d 1150* (upholding county initiative ordinance prohibiting aerial herbicide spraying)]. Local agencies also include counties, school districts, boards of various types, local and regional, and commissions [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 46 n.1, 112 Cal. Rptr. 805, 520 P.2d 29* (dissenting opinion of Justice Burke)]. Because local agencies are not subject to California's constitutional separation of powers requirements, they frequently exercise both quasi-legislative and quasi-judicial powers [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 36, 112 Cal. Rptr. 805, 520 P.2d 29]* . Under *Cal. Const., art. XI, § 7,* chartered municipalities are presumed to have maximum freedom to make decisions about local affairs, including environmental regulation, within their boundaries, so long as such regulation is not in conflict with general laws [*People ex rel. Deukmejian v. County of Mendocino (1984) 36 Cal. 3d 476, 483-484, 204 Cal. Rptr. 897, 683 P.2d 1150* (upholding county initiative ordinance prohibiting aerial herbicide spraying)].

Local environmental agencies may adopt portions of the Administrative Procedure Act. More often, local agencies have highly particularized administrative procedures, which may be governed by state statute, municipal charter, local ordinance, or their own rules [*see, e.g., Guinnane v. San Francisco Planning Comm'n (1989) 209 Cal. App. 3d 732, 257 Cal. Rptr. 742* (upholding and explaining "discretionary review" process under which San Francisco City Planning Commission and Board of Permit Appeals may deny building permits)]. Local environmental agencies are frequently created by local legislative action creating planning commissions or boards of zoning adjustment [*see, e.g., Guinnane v. San Francisco Planning Comm'n (1989) 209 Cal. App. 3d 732, 257 Cal. Rptr. 742]* .

[10] Administrative Procedures in General

Except to the extent that a constitutional provision or specific governing law imposes procedural requirements, an administrative agency may perform its assigned tasks by whatever procedures the agency considers suitable under the circumstances.

Gov. Code § 11340 et seq. impose procedural requirements on most state agencies for adopting regulations, as discussed in Ch. 472, *Public Agency Rules* , et seq. Similarly, *Gov. Code § 11500 et seq.* impose procedural requirements on many state agencies for conducting administrative trials, as discussed in Ch. 473, *Public Agency Adjudications* , et seq.

Charter provisions and ordinances may impose procedural requirements on local agencies for adopting regulations, and statutes governing a particular agency or situation may impose additional or different requirements on state agencies [*see § 470.02[2]* for references to discussion of specific agencies].

Meetings of multimember agencies, both state and local, are governed by statute, as discussed in Ch. 475, *Public Agency Meetings* .

Whether an agency is required to hold a hearing, what kind of hearing is required, and when the hearing must be held, all depend on the circumstances, but there are some generally applicable rules. If administrative action threatens or interferes with a person's liberty or property rights, the constitutional guaranty of due process applies [*U.S. Const., amend. XIV, § 1*; *Cal. Const., art. I, § 7(a)*]. Denial of a license application and suspension or revocation of a license, discussed in detail in Ch. 471B, *Licensing by Public Agencies* , are prominent examples of administrative actions that the type of vested property interest that is protected under the constitutional requirements of due process. Essentially due process requires reasonable notice and opportunity for hearing; for detailed discussion of procedural due process requirements, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

When due process protections do not apply, for example, when an administrative action is legislative, a hearing is not necessary unless a governing statute prescribes some type of hearing; for further discussion, see Ch. 472, *Public Agency Rules* .

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Volume 41: Overview of Public Administrative Law thru Review of Agency Rulemaking-Chs. 470-472B
Chapter 470 OVERVIEW OF PUBLIC ADMINISTRATIVE LAW
PART II. LEGAL BACKGROUND

41-470 California Forms of Pleading and Practice--Annotated § 470.13

§ 470.13 Delegation of Administrative Powers

[1] Nature of Delegation

A delegation of power is not the giving up of that power, but rather it is the conferring on another of authority to exercise that power. Delegation is not the surrendering of power but is the temporary transfer of authority to use it [*see* Black's Law Dictionary; 26A C.J.S., *Delegation*]. There are basically two levels in government at which power may be delegated. At the higher level, the Legislature and other organs of the state government may delegate certain of their functions and duties concerning administration of the government, and the principal organs of local governments may do likewise. This is accomplished through the establishment of administrative agencies to which the various duties and functions are delegated. At the lower level, administrative agencies may delegate their assigned functions and duties even further [*see* discussion in [2] et seq., *below*].

The law respecting delegation of power by administrative agencies has been developed from principles established in cases dealing with city councils, boards of supervisors, and city and county officers. This follows from the similarity between legislative and judicial functions of administrative agencies, on the one hand, and the functions of city and county governing bodies and officers, on the other. The need to rely on such principles is evident because of both that similarity and, more significantly, the fact that administrative agencies did not exist or were very uncommon until relatively recent times. The Supreme Court continues to cite cases and authorities dealing with local governmental entities, without explanation or any attempt to distinguish administrative agencies insofar as the delegation of power is concerned [*see, e.g., California School Employees Assn. v. Personnel Com. of Pajaro Valley Unified School Dist. (1970) 3 Cal. 3d 139, 144-145, 89 Cal. Rptr. 620, 474 P.2d 436]* .

[2] Discretionary or Judgmental Functions

[a] Delegation Generally Prohibited

Authority conferred on an administrative agency to do acts which involve the exercise of judgment and discretion usually may not be delegated to others. Such power is in the nature of a public trust conferred on the administrative agency for the public benefit and should not be vicariously exercised [*see California School Employees Assn. v. Personnel Com. of Pajaro Valley Unified School Dist. (1970) 3 Cal. 3d 139, 144, 89 Cal. Rptr. 620, 474 P.2d 436* ;

Knight v. Eureka (1898) 123 Cal. 192, 194, 55 P. 768 ; *Scollay v. Butte County (1885) 67 Cal. 249, 255, 7 P. 661* ; *Redwood City v. Moore (1965) 231 Cal. App. 2d 563, 576, 42 Cal. Rptr. 72]* . Where the performance of duties requiring the exercise of discretion or judgment has been delegated to an administrative agency, the delegation is purely personal to the agency and usually may not be further delegated [*see Schecter v. County of Los Angeles (1968) 258 Cal. App. 2d 391, 396, 65 Cal. Rptr. 739]* . The rule against delegation of discretionary and judgmental duties, sometimes termed either *delegatus non potest delegare* or *delegata potestas non potest delegari* ("a delegated power may not be redelegated"), is fundamental and apparently of universal application [*Chamber of Commerce v. Stephens (1931) 212 Cal. 607, 610, 299 P. 728* ; *see, e.g., Schecter v. County of Los Angeles (1968) 258 Cal. App. 2d 391, 396, 65 Cal. Rptr. 739]* .

One reason for the rule is that the effect of any such delegation by an administrative agency would by unauthorized amendment of the general law by that agency [*Thompson v. Board of Trustees (1904) 144 Cal. 281, 283, 77 P. 951]* .

[b] Exception When Delegation Authorized

The general rule against delegation of discretionary or judgmental functions does not apply whenever the delegation is expressly authorized by the Constitution or statute [*see California School Employees Assn. v. Personnel Com. of Pajaro Valley Unified School Dist. (1970) 3 Cal. 3d 139, 144, 89 Cal. Rptr. 620, 474 P.2d 436* ; *House v. Los Angeles County (1894) 104 Cal. 73, 79, 37 P. 796* ; *Schecter v. County of Los Angeles (1968) 258 Cal. App. 2d 391, 396, 65 Cal. Rptr. 739]* . An example is *Gov. Code § 66622*, providing that a member of the San Francisco Bay Conservation and Development Commission "may authorize an alternate for attendance at meetings and voting in his absence" [*Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com. (1970) 11 Cal. App. 3d 557, 568, 89 Cal. Rptr. 897* (decided under former *Gov. Code § 66622*)]. Another example is *Health & Safety Code § 120970*, authorizing the Department of Health Services to contract with an outside entity (Ramsell Corporation) to administer the AIDS Drug Assistance Program [*Savient Pharmaceuticals, Inc. v. Department of Health Services (2007) 146 Cal. App. 4th 1457, 1466-1468, 53 Cal. Rptr. 3d 689]* .

When an administrative officer is authorized to delegate some of his or her power, he or she does not necessarily carry that authorization with him or her in all of his or her functions. Legislative and judicial duties generally may not be delegated, and it would be unreasonably inconsistent for one member of the board, commission, or the like, to be able to serve through a deputy, merely because he or she happens to be an officer with general authorization to function through a deputy, whereas other members who do not happen to be officers of some agency, and who, therefore, lack general authorization to function through a deputy, would not be able to do so [*see Webster v. Board of Education (1903) 140 Cal. 331, 332, 73 P. 1070]* . However, this rule established by case appears to be relaxed under *Gov. Code § 7 et seq.*, which provides that a duty is imposed on a public officer may be performed by a deputy unless the law specifically provides otherwise.

[c] Ratification of Unauthorized Delegation

When an administrative officer or employee, or some other person purporting to act in an official capacity, did an act which he or she had no authority to do, the act may be validated by approval or ratification by the agency or officer actually authorized to do it [*see California School Employees Assn. v. Personnel Com. of Pajaro Valley Unified School Dist. (1970) 3 Cal. 3d 139, 145, 89 Cal. Rptr. 620, 474 P.2d 436]* . Validating purported delegations of power, however, is a cumbersome way to carry on administrative government because ratification must follow after each act of the delegate. The ratification affects the only the particular act done pursuant to the purported delegation, and may be accomplished only with the same formalities as the agency or officer would be required to follow in performing the delegated duty in the first place [*Mott v. Horstmann (1950) 36 Cal. 2d 388, 391, 224 P.2d 11* ; *see California School Employees Assn. v. Personnel Com. of Pajaro Valley Unified School Dist. (1970) 3 Cal. 3d 139, 145, 89 Cal. Rptr. 620, 474 P.2d 436]* .

[d] Determining Fitness of License Applicants

The determination of the qualifications of an applicant to receive a license is a duty imposed on many administrative agencies. This is a function involving the exercise of discretion [*see, e.g., McDonough v. Goodcell (1939) 13 Cal. 2d 741, 746-747, 91 P.2d 1035]* . It is the practice of many agencies to delegate, either to a single member or to a committee of members or even to persons outside the agency, the duty of preparing and grading examinations used for determining the applicant's fitness. If examination questions are approved beforehand by the licensing agency, it is immaterial who prepares and grades them, and the grades are impliedly approved when the licensing agency issues the licenses [Aylward v. State Bd. etc. *(1948) 31 Cal. 2d 833, 840-841, 192 P.2d 929]* .

[e] Public Members of Regulatory Agencies

Some regulatory agencies in the state government are comprised of both professional members and members drawn from the public at large. Certain functions of such an agency may not be delegated solely to a lay member. These include the actual preparation, administration, and grading of examinations and the inspection or investigation of licensed or regulated persons, the manner or method in which a licensed or regulated person practices or does business, or the place of the licensed or regulated person's practice or business [*Bus. & Prof. Code § 451*; *see Bus. & Prof. Code § 7309* (Bureau of Barbering and Cosmetology)]. However, a lay member may participate in certain functions connected with those duties, including (1) the formation of policy relating to examinations, inspections, and investigations, (2) approving, disapproving, or modifying action taken by individual members of the agency, and (3) serving on subcommittees appointed by the agency to perform the duties of the agency, if the subcommittee consists of more than one person [*Bus. & Prof. Code § 451*].

[3] Ministerial Functions

In the exercise of power conferred on it, an administrative agency may appoint agents to discharge ministerial duties not calling for the exercise of discretion [*see House v. Los Angeles County (1894) 104 Cal. 73, 79, 37 P. 796* ; *Schecter v. County of Los Angeles (1968) 258 Cal. App. 2d 391, 396-397, 65 Cal. Rptr. 739* ; *see also California School Employees Assn. v. Personnel Com. of Pajaro Valley Unified School Dist. (1970) 3 Cal. 3d 139, 144-145, 89 Cal. Rptr. 620, 474 P.2d 436]* . It is not necessary that the delegation of ministerial duties be expressly authorized. Authorization for such delegation may be inferred as inherent in an express grant of power to do some act to which the ministerial function in question is incidental [*see Klevesahl v. Byington (1934) 1 Cal. App. 2d 671, 676, 37 P.2d 179]* . A common example of a ministerial duty which may be delegated pursuant to implicit authorization, if express authorization does not exist, is the making of an investigation to determine relevant facts before the agency undertakes proposed discretionary or judgmental action [*see California School Employees Assn. v. Personnel Com. of Pajaro Valley Unified School Dist. (1970) 3 Cal. 3d 139, 144-145, 89 Cal. Rptr. 620, 474 P.2d 436]* .

[4] Distinguishing Ministerial and Discretionary Functions

The distinction between discretionary functions and ministerial functions is often difficult to determine, almost any official act involves some degree of discretion [*Johnson v. State of California (1968) 69 Cal. 2d 782, 788, 73 Cal. Rptr. 240, 447 P.2d 352* ; *see Ham v. Los Angeles County (1920) 46 Cal. App. 148, 162, 189 P. 462*)]. At the very least, ministerial officers must use enough discretion and judgment to determine whether facts exist which authorize them to act [*Holley v. Orange County (1895) 106 Cal. 420, 424-425, 39 P. 790]* .

Cases attempting to distinguish between ministerial functions and discretionary functions need to be read closely. Many cite a literal difference in meaning between ministerial and discretionary, but this approach has less to recommend it than analyzing the policy considerations behind making the distinction [*see Johnson v. State of California (1968) 69 Cal. 2d 782, 788-789, 73 Cal. Rptr. 240, 447 P.2d 352]* . Other cases draw the distinction variously:

- Discretionary acts are those wherein there is no hard and fast rule as to the course of conduct that one must or must not take and, if there is a clearly defined rule, such would eliminate discretion [*Elder v. Anderson (1962) 205 Cal. App. 2d 326, 331, 23 Cal. Rptr. 48* ; *see Johnson v. State of California (1968) 69 Cal. 2d 782, 788, 73 Cal. Rptr. 240, 447 P.2d 352]* .

- A discretionary act is one which requires the exercise of judgment or choice, or an equitable decision of what is just and proper under the circumstances [*Burgdorf v. Funder (1966) 246 Cal. App. 2d 443, 449, 54 Cal. Rptr. 805* ; *see Johnson v. State of California (1968) 69 Cal. 2d 782, 788, 73 Cal. Rptr. 240, 447 P.2d 352]* .

- A discretionary act is one which requires personal deliberation, decision and judgment while an act is said to be ministerial when it amounts only to the performance of a duty in which the officer is left no choice of his own [*Morgan v. County of Yuba (1964) 230 Cal. App. 2d 938, 942, 41 Cal. Rptr. 508* ; *see Johnson v. State of California (1968) 69 Cal. 2d 782, 788, 73 Cal. Rptr. 240, 447 P.2d 352]* .

[5] Validity of Purported Delegation

[a] Source of Power

It is often said that administrative agencies have only such power as the law expressly or implicitly confers on them [*see City & County of San Francisco v. Padilla (1972) 23 Cal. App. 3d 388, 400, 100 Cal. Rptr. 223]* . Duties may not be delegated, therefore, unless the delegation is expressly or implicitly authorized by law. Express authorization may be found in constitutional or charter provisions, initiative measures, statutes, and ordinances. Sometimes express authorization will be found in an administrative regulation, which may have the force and effect of law [*see, e.g., Viner v. Civil Serv. Comm'n (1943) 59 Cal. App. 2d 458, 465, 139 P.2d 88]* . Express authorization seldom creates any problems, although sometimes locating the provision giving authorization is difficult.

An agency has the authority to exercise powers authorized by statute [*Fireman's Fund Ins. Companies v. Quackenbush (1997), 52 Cal. App. 4th 599, 605, 60 Cal. Rptr. 2d 732]* , and its authority extends both to statutory powers expressly granted as well as to those powers reasonably implied from the statute [*Calfarm Ins. Co. v. Deukmejian (1989) 48 Cal. 3d 805, 824, 258 Cal. Rptr. 161, 771 P.2d 1247* ; *20th Century Ins. Co. v. Quackenbush (1998) 64 Cal. App. 4th 1352*].

Most controversies relate to whether authorization is implied in the circumstances. Since authorization to delegate duties involving discretion or judgment is exceptional and must be clearly given, implicit authorization will almost always be found to exist when a ministerial duty has been delegated, but seldom when a discretionary or judgmental duty is involved. Since the general rule is that ministerial duties may be delegated, a finding that the duty in question is ministerial will usually lead to a finding that delegation of it is lawful, even if no express provision in a statute, an ordinance, or the like, authorizes delegation [*see Klevesahl v. Byington (1934) 1 Cal. App. 2d 671, 676, 37 P.2d 179]* .

[b] Nature of Administrative Function

There might be some difference between legislative and judicial functions with respect to the delegation of power; that is, a delegation of power in connection with the exercise of a legislative function might be less objectionable than where the agency delegating the power is engaged in a judicial function. In one case, for example, it was held proper for an agency to delegate to a hearing committee the duty of taking evidence relative to whether a regulation should be amended, since the committee only received the evidence and put it into orderly form for the consideration of the agency. The committee's function was ministerial, involving no exercise of discretion, and on this basis the delegation was proper. "Moreover," the court added, "in acting upon a proposal to amend the California Code of Regulations ... the [agency] sits in its legislative capacity ... and not in its quasi-judicial character" [*Vita-Pharmacals, Inc. v. Bd. of*

Pharmacy (1952) 110 Cal. App. 2d 826, 831, 243 P.2d 890] . The clear implication is that delegation of power is less objectionable in the one case than in the other.

[c] Balancing of Interests

The courts might be reluctant to find an unlawful attempt to delegate duties where the practical effects of the act done are slight compared with the evident need to have a subordinate do it for the sake of efficient administrative government, provided the language of the governing law is sufficiently ambiguous to allow a broad interpretation to that end. For example, in a case where the general manager of a city harbor department imposed a five-day disciplinary suspension without pay on a harbor pilot for insubordination, a court of appeal upheld the suspension and rejected the pilot's argument that a charter provision authorizing the general manager to impose such suspensions without approval of the city board of harbor commissioners amounted to an unlawful attempt to delegate a discretionary duty to the general manager [*see Patton v. Board of Harbor Commissioners (1970) 13 Cal. App. 3d 536, 543, 91 Cal. Rptr. 832]* . The charter provision in question was ambiguous and covered many different kinds of duties to be performed by the general manager subject to the provisions of this charter, the rules of the harbor department and the instructions of the board of harbor commissioners. The court observed that the provision "obviously does not require that the General Manager obtain the Board's instructions on each occasion before he acts" and that "[t]here is nothing objectionable in the legislative grant of the power over short suspensions to the General Manager, subject to the Board's supervision, to enable him to better administer the [harbor] department" [*Patton v. Board of Harbor Commissioners (1970) 13 Cal. App. 3d 536, 543, 91 Cal. Rptr. 832]* . It is likely that if the pilot involved had been discharged instead of suspended, pursuant to the general manager's apparent authority to discharge employees given in the same sentence of the charter provision authorizing suspensions, the court would have taken a different view. The effect of a discharge not sligh in comparison with the need to allow the general manager some freedom in administering the department.

[d] Qualifications of Delegate

There is apparently no implicit requirement, either from necessity or on constitutional principles, that a person or an entity to whom a duty is delegated be qualified to perform it [*see, e.g., Stoetzner v. Los Angeles (1959) 170 Cal. App. 2d 394, 398, 338 P.2d 971]* . As a practical matter, however, there are no advantages and several serious disadvantages in appointing an unqualified delegate to perform administrative functions. Such a practice might result in liability for tort. The question whether a duty has been delegated would not be affected by the lack of the delegate's qualifications, unless there is a provision in the law requiring certain qualifications. Such a provision may be specific, such as *Lab. Code § 7309*, authorizing the Chief of the Division of Industrial Safety to delegate his or her duty to inspect elevators to "any qualified elevator inspector employed by an insurance company"; or it may be general, such as *Gov. Code § 1020 et seq.*, prescribing certain qualifications for public officers and employees. Those sections must be read in conjunction with any provision in other legislation giving an administrative agency authority to delegate certain duties, if no different standards governing the qualifications of a delegate are given in the other legislation [*see Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com. (1970) 11 Cal. App. 3d 557, 568, 89 Cal. Rptr. 897* (delegation of duties by members of San Francisco Bay Conservation and Development Commission pursuant to *Gov. Code § 66622*)]. The qualifications which a delegate must have seldom are given with reference to the delegate. Rather, certain qualifications will be prescribed for the office of the person making the delegation, and to the extent that these qualifications relate to performing the duty to be delegated, they will be the minimum qualifications which the delegate must have [*see, e.g., Gov. Code § 66622*; *see also Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com. (1970) 11 Cal. App. 3d 557, 568, 89 Cal. Rptr. 897* ; *Serenko v. Bright (1968) 263 Cal. App. 2d 682, 690, 70 Cal. Rptr. 1* (person appointed by Director of Motor Vehicles to conduct departmental hearings on driver's license suspensions and revocations is not required to have higher qualifications than are prescribed for office of director, for which no special qualifications are given in Vehicle Code)].

In some cases the qualifications which a delegate must have are left to the discretion of agency or officer. For example, Gov. Code § 6662 provides that each member of the San Francisco Bay Conservation and Development Commission

who serves as a representative of one of the nine counties surrounding the bay may designate as an alternate to attend and vote at meetings a public official whom the appointing power deems qualified to represent the county. It seems that this statute gives the board of supervisors discretion to prescribe qualifications in addition to those given in *Gov. Code § 1020 et seq.* (general qualifications for public officers and employees) but probably not in place of them.

[e] Delegate Outside Government

Administrative agencies do not always, and need not always, delegate duties to other agencies or officers or even to persons or entities in government service. While an agency may not delegate its duty to control public affairs, it may delegate the performance of administrative functions to persons and entities outside government if it "retains ultimate control over administration so that it may safeguard the public interest" [*Chamber of Commerce v. Stephens (1931) 212 Cal. 607, 610, 299 P. 728* ; *Los AngelesCounty v. Nesvig (1965) 231 Cal. App. 2d 603, 616-617, 41 Cal. Rptr. 918]* . In a case where a public function seems to be performed by a person or an entity outside government, if the duty to perform the function is delegable, the question is whether or not the agency that delegated it retained ultimate control over administration [*Los Angeles County v. Nesvig (1965) 231 Cal. App. 2d 603, 617, 41 Cal. Rptr. 918]* . This translates into whether control was retained in all matters involving the exercise of judgment and discretion. Usually the issue has arisen with respect to proprietary activities carried on by government [*see, e.g.,* *Egan v. San Francisco (1913) 165 Cal. 576, 584, 133 P. 294* (operating municipal opera house); *Morton Bros. v. Pacific Coast S.S. Co. (1898) 122 Cal. 352, 353-354, 55 P. 1* (leasing use of piers); *Los Angeles County v. Nesvig (1965) 231 Cal. App. 2d 603, 617, 41 Cal. Rptr. 918* (operating municipal music center)].

In one such case, the court found that ultimate control had been retained where the agency's control extended to long-term subleases, short-term subleases, admission prices, concessions, and food and refreshment prices and service charges, and the private operator's annual budget [*Los Angeles County v. Nesvig (1965) 231 Cal. App. 2d 603, 617, 41 Cal. Rptr. 918* ; *see* *Haggerty v. Oakland (1958) 161 Cal. App. 2d 407, 415-417, 326 P.2d 957* (ultimate control retained respecting private operation of municipal convention hall and banquet building)].

In some cases the delegation of a duty to a person or an entity outside government is authorized by statute. For example, the Chief of the Division of Industrial Safety is authorized by statute to delegate to qualified employees of insurance companies his or her duty to inspect elevators [*see Lab. Code § 7309*].

[f] Nature of Delegated Power

A procedure which in form looks like a delegation of power cannot accomplish a delegation unless the delegate receives some power that he or she does not already have. If the delegate already has all of the power purportedly delegated to him or her, there is obviously no delegation, even though the delegating agency or officer has attempted to transfer power [*see* *Schnider v. State of California (1952) 38 Cal. 2d 439, 443, 241 P.2d 1]* .

[g] Procedure

An apparent delegation might actually be no delegation at all if required procedures were not followed. A procedure is not always prescribed, and where this is the case, it probably is sufficient to follow any reasonable procedure. However, if a statute, an ordinance, or the like, prescribes a procedure, that procedure must be followed in order to accomplish a delegation. An example of such a statutory procedure is found in *Gov. Code § 66622* providing, "A member [of the San Francisco Bay Conservation and Development Commission], subject to confirmation by the member's appointing power, may authorize an alternate for attendance at meetings and voting in the member's absence. Each alternate shall be designated in a written instrument which shall include evidence of the confirmation by the appointing power and the alternate's name shall be kept on file with the commission." The result of failing to follow a prescribed procedure is not necessarily the voiding of the attempted delegation. It would evidently be void where no corrective measures were taken to cure a defect in the procedure, but it is apparent that a defective procedure can be corrected by ratification.

When an administrative agency has done an act that does not comport with a prescribed procedure for delegation but which could nevertheless amount to a delegation, the issue is whether or not the evidence shows that a delegation, in fact, took place, or that the agency, in fact, attempted to delegate a nondelegable duty. If the evidence shows that the agency, in fact, did not exercise or try to exercise any authority to delegate the duty in question, the ambiguous act will not constitute a delegation [*see Eggert v. Pacific States Sav. & L. Co. (1943) 57 Cal. App. 2d 239, 249, 136 P.2d 822]* .

[6] Statutory Authorization to Delegate

[a] Delegation to Deputy

Many administrative officials have authority to delegate their duties to deputies [*see Bus. & Prof. Code § 10*; *Corp. Code § 7*; *Educ. Code § 7*; *Elec. Code § 7*; *Fin. Code § 6*; *Fish & Game Code § 6*; *Food & Agric. Code § 13*; *Gov. Code § 7*; *Harb. & Nav. Code § 7*; *Health & Safety Code § 7*; *Ins. Code § 7*; *Lab. Code § 7*; *Mil. & Vet. Code § 7*; *Penal Code § 10005*; *Pub. Res. Code § 7*; *Pub. Util. Code § 7*; *Rev. & Tax Code § 7*; *Sts. & Hy. Code § 7*; *Unemp. Ins. Code § 7*; *Veh. Code § 8*; *Water Code § 7*; *Welf. & Inst. Code § 7*].

One example, *Bus. & Prof. Code § 10*, provides: "Whenever, by the provisions of this code, a power is granted to a public officer or a duty [is] imposed upon such an officer, the power may be exercised or the duty [may be] performed by a deputy of the officer or by a person authorized pursuant to law by the officer, unless it is otherwise expressly provided." The import of these statutes is expressed as a general rule in *Gov. Code § 1194*, providing that a deputy has the authority and may perform the duties of his or her principal, unless the law provides otherwise.

The California State Controller did not improperly delegate her duties as a member of the State Board of Equalization to her deputy when the deputy controller, not a member of the Board, appeared at a Board meeting on behalf of the Controller, and voted to approve the findings and decisions of the Board. The controller is not required to approve and sign the findings and decision of the Board personally [*County of Los Angeles v. State Board of Equalization (2003) 105 Cal. App. 4th 1, 20-22, 129 Cal. Rptr. 2d 209]* .

[b] Delegation to Administrative Law Judge

In any hearing governed by Chapter 5 of the APA (*Gov. Code § 11500 et seq.*), an agency may delegate to the Administrative Law Judge [*see Gov. Code § 11502(a)* (all hearings as required to be conducted by Administrative Law Judge from Office of Administrative Hearings)] any or all of its power relating to the conduct of the hearing [*Gov. Code § 11512(b)*]. The conduct of the hearing does not include making a decision, although the Administrative Law Judge will in some cases prepare a proposed decision that might be adopted by the agency as its own [*see Gov. Code § 11517(c)(1)*].

[c] Delegation by Head of Department

Gov. Code § 11182 provides that the head of a department may delegate the powers conferred on him by *Gov. Code § 11180 et seq.* to any officer of the department he authorizes. The reference here is to heads of denominated departments, not to heads of departments-in-fact. However, in most cases the agencies administering departments-in-fact are expressly given the powers of the head of a department set out in *Gov. Code § 11180 et seq.* [*see, e.g., Health & Safety Code § 39514* (Air Resources Board)].

The written delegation by the Chairman of the California Fair Political Practices Commission of the duties of the Executive Director to three employees of the commission was upheld against an attack by a campaign organization that was fined $808,000 by FPPC for violation of the campaign finance laws. One of the employees signed an accusation against the organization. Another employee presided over a probable cause hearing and made a finding against the organization. The organization challenged the authority of these employees to make these determinations on grounds of

improper delegation of authority. The court rejected the challenge, in part, based on the de facto officer doctrine which precludes a third party from challenging the actions of an officer, de facto, acting within the scope of and with apparent authority of the public office whose duties the officer, de facto, is carrying out [*Fair Political Practices Commission v. Californians Against Corruption (2003) 109 Cal. App. 4th 269, 275-277, 134 Cal. Rptr. 2d 659]* .

[7] Statutory Prohibition Against Delegation

[a] Regulatory Agencies

No board, commission, examining committee, or similarly constituted body exercising authority under the Business and Professions Code may delegate solely to a public or lay member any duty or responsibility for (1) the actual preparation, administration, and grading of examinations or (2) inspecting or investigating licensees, the manner or method in which licensees do business or practice a profession, or the places where licensees do business or practice a profession [*Bus. & Prof. Code § 451*].

This prohibition does not preclude a public or lay member, however, from participating in the formation of policy relating to those functions, or from participating in approving, disapproving, or modifying the action of the individual members of the board, commission, or the like, or from participating as a member of a subcommittee consisting of two or more members in the performance of any duty [*Bus. & Prof. Code § 451*].

[b] Medi-Cal Act Administration

The director of a county agency which administers the provisions of the Medi-Cal Act (*Welf. & Inst. Code § 14000 et seq.*) and also administers medical facilities may not delegate to an employee the duty of deciding whether to authorize aid under the act if he or she has delegated to the employee in question authority to operate or to participate in operating any such medical facility [*Welf. & Inst. Code § 14116*].

[c] Medical Board of California and Committees

The Division of Medical Quality of the Medical Board of California [*Bus. & Prof. Code §§ 2001 to 2024*] or the senior assistant attorney general of the health quality enforcement section [*Bus. & Prof. Code § 2226*] may do the following [*Bus. & Prof. Code § 2226*]:

- Inspect a licensed general or specialized hospital.
- Require certain written reports from a hospital to determine whether it is complying with the law.
- Inspect medical staff and patient hospital medical records.

This authority to inspect or to require written reports may not be delegated to any person other than a licensed physician or surgeon [*Bus. & Prof. Code § 2226*].

[d] Local Appraisal Commissions

A local appraisal commission established by the Board of Equalization may not delegate its duty of appraising property to any private interest [*Rev. & Tax Code § 1720*].

[e] Pooled Money Investment Board

It is the duty of the Pooled Money Investment Board (consisting of the Controller, the Treasurer, and the Director of Finance), and the board's only function, to determine every month what state funds are available for investment or

deposit in bank accounts [*Gov. Code §§ 16480, 16480.1*]. The concurrence of only two of the three members is sufficient for making a determination, but the members of the board are directed to perform their duties personally and are expressly prohibited from authorizing a deputy to act for them [*Gov. Code § 16480.1*].

[f] Youthful Offender Parole Board

The Youthful Offender Parole Board, which along with the Director of the Youth Authority administers the Department of the Youth Authority [*see Welf. & Inst. Code §§ 1710-1711*], may not delegate its duty to classify and segregate persons committed to the Youth Authority [*See Welf. & Inst. Code §§ 1730-1741* (commitments to Youth Authority)].

[8] Joint-Powers Agreements

Two or more public agencies may make a joint-powers agreement for the purpose of exercising jointly any authority common to them [*Gov. Code § 6502*; *see Gov. Code § 6500* (public agency defined)]. The agreement may designate any person, firm, corporation, commission, or board, or any of the parties, to administer or execute the agreement [*Gov. Code § 6506*]. The effect is, or may be, a delegation of power. Joint-powers agreements are governed by *Gov. Code §§ 6500-6515*.

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§ 470.14 Internal Administration

[1] Authority of Department Head

Subject to the approval of the Governor, each head of a department in the state government may arrange and classify the work of the department and may create, consolidate, and abolish divisions within the department [*Gov. Code § 11152*]. For the betterment of the public service, the head of each department may reassign such duties as he or she sees fit to any employee under the chief of any division [*Gov. Code § 11152*]. Except as may be otherwise provided by a specific statute, the head of a department may, with the approval of the Governor, appoint such officers and employees as are necessary and prescribe their duties [*Gov. Code § 11154*].

This includes appointment of a chief to be in charge of any division in the department [*see Gov. Code § 11153*]. The head of a department may require any officer or employee to execute an official bond, in addition to any bond required by the Director of General Services, in whatever amount the head of the department determines [*Gov. Code § 11156*]. The head of a department may adopt such rules and regulations as are necessary to govern the activities of the department and may assign to the departmental personnel whatever duties he or she sees fit to assign to them [*Gov. Code § 11152*].

[2] Appointment of Personnel

All assistants, deputies, and other subordinate officers whose appointments are not otherwise provided for are appointed by the officer or body to whom they are subordinate [*Gov. Code § 1190*]. When not otherwise provided for, the appointment of deputies and other subordinate officers must be made in writing and filed in the office of the appointing agency or official or filed with its or his or her clerk [*Gov. Code § 1191*]. When the number of deputies or other subordinate officers is not fixed by law, it is limited only by the discretion of the agency or official making appointments [*Gov. Code § 1193*]. The Governor appoints every official where the manner of appointment is not otherwise prescribed by law [*Gov. Code § 1300*]. If the term of office of an official is not fixed by law, he or she serves at the pleasure of the agency or official who appointed him or her [*Gov. Code § 1301*].

[3] Departmental Offices

The headquarters of elective constitutional officers, other than members of the legislature, are established by filing a written statement with the State Board of Control certifying that the selected headquarters is the place where the officer spends the largest protion of his or her working time [*Gov. Code § 11031*].

[4] Fees

Every administrative agency, at every level of government, is required to accept a personal check in payment of any fee if (1) the check is made payable to the order of the agency, (2) it is drawn on a banking institution in California, and (3) the person issuing the check furnishes, to the person authorized to receive payment, satisfactory proof of residence in California [*Gov. Code § 6157(a)*].

This provision does not apply to paying any bail deposit. If the check is returned to the agency without payment, for any reason, the agency may impose a reasonable charge for the returned check, not to exceed the actual costs incurred by the agency, to recover its processing and collection costs. The agency may also prescribe a different method of payment for that and future payments by the particular payor [*Gov. Code § 6157(b)*; *see Gov. Code § 6157(b), (d)* (setting forth when the returned check charge can be added to an existing obligation)].

The agency's acceptance of a personal check constitutes payment of the obligation owed, to the extent of the amount of the check, when (but not before) the check is duly paid [*Gov. Code § 6157(c)*]. Officers of the state are prohibited from performing any official services unless the fees prescribed by law have been paid, with certain exceptions stated in *Gov. Code §§ 6101-6109* [*Gov. Code § 6100*]. On payment of the prescribed fees, the officer is required to perform the appropriate services, and he or she is liable on his or her official bond for every failure or refusal to do so [*Gov. Code § 6110*].

[5] Legal Counsel

No state agency, commissioner, or officer, except those listed below, has authority to employ any legal counsel other than the Attorney General (or one of his or her assistants or deputies) in any matter in which the agency, commissioner, or officer is interested, or is a party as a result of office or official duties [*Gov. Code § 11042*] unless the Attorney General has consented in writing to the employment of counsel other than himself or herself [*Gov. Code § 11040*].

The Attorney General may assign assistants or deputies from his or her staff to serve in any agency, on such terms as the Attorney General deems necessary for conducting the legal business of the agency or rendering legal counsel to it [*Gov. Code § 11043*].

Agencies to which *Gov. Code §§ 11042* and *11043* do not apply are the following [*Gov. Code § 11041(a)*]:

- The Alcoholic Beverage Control Appeals Board (except when the board affirms the decision of the Department of Alcoholic Beverage Control).
- The Division of Labor Standards Enforcement of the Department of Industrial Relations.
- The Inheritance Tax Department.
- The Legal Division of the Department of Public Works.
- The Legislative Counsel Bureau.
- The Public Utilities Commission.

- The Regents of the University of California.
- The Secretary of State.
- The State Compensation Insurance Fund.
- The State Department of Education.
- The State Lands Commission.
- The State Treasurer (with respect to bonds).
- The Trustees of the California State University.
- The Workers' Compensation Appeals Board.
- Any other state agency that, by law enacted after Stats. 1933, ch. 213, is authorized to employ legal counsel.

Chapter 213 was approved by the Governor on May 3, 1933, and took effect on August 21, 1933. It reorganized the Attorney General's Office. The Trustees of the California State University are required to pay the cost of employing legal counsel from their existing resources [*Gov. Code § 11041(b)*].

[6] Office Hours

All offices of every state agency are required to be kept open for business from 8:00 A.M. until 5:00 P.M. Monday through Friday, except on legal holidays, unless other hours are prescribed by law for a particular agency [*Gov. Code § 11020(a)*]. Any office of a state agency may be kept open for business during other hours and on other days as well [*Gov. Code § 11020(a)*]. When a state office is open or operates on Saturday, the agency may operate with a skeleton crew from 9:00 A.M. until noon, if the total number of hours per week that its employees work is not less than the total number of hours established by *Gov. Code § 11020(a)*, that is, 45 hours (8:00 A.M. until 5:00 P.M. Monday through Friday) [*Gov. Code § 11021(a)*]. *Gov. Code §§ 11020(b)* and *11021(b)* were added to provide that the time provisions in these sections are subject to any memorandum of understanding reached between the employers and employees of an institution of higher learning [*Gov. Code §§ 11020(b)* and *11021(b)*].

[7] Performance Bonds

The form of any bond furnished by licensees and other persons (except public officers and employees) to a state agency pursuant to law is required to be approved by the Attorney General [*Gov. Code § 11110*]. The Attorney General must indicate his or her approval, as well as modifications and revocations of approval, by a regulation filed with the Secretary of State [*Gov. Code § 11112*].

[8] State Government Reorganization

The Governor is directed by statute to make periodic reviews of the organization of the state government and to recommend to the Legislature plans of reorganization [*Gov. Code §§ 12080.1, 12080.2*]. The scope of the Governor's reorganization authority and duties, and the procedure to be followed with respect to reorganization reviews and recommendations, are described in *Gov. Code §§ 12080-12080.2*. From time to time, the Legislature acts on the Governor's recommendations and reorganizes the state government by changing the names of agencies, shifting agencies from one governmental unit to another, and reassigning law enforcement responsibilities and jurisdiction. To

avoid creating ambiguities in such a process from overlooking to amend all relevant statutes in appropriate ways, the Legislature has enacted some general rules by which statutes relating to administrative agencies may be construed:

- Whenever a successor agency is created, either by complete succession (abolishing the old agency and creating a new one) or by reassignment of law enforcement responsibilities and jurisdiction (taking some responsibilities away from one agency and giving them to another), the name of the former agency appearing in any statute is to be construed to refer to the successor agency [*Gov. Code § 11159*].

- Whenever an agency or a person is charged with enforcing any law which by its terms imposes a duty or confers an authority on a different agency or person formerly so delegated or authorized, that law is to be construed as though the reference to the formerly delegated or authorized agency or person were deleted and replaced by a reference to the agency or person now delegated or authorized [*Gov. Code § 11160*].

- Civil and criminal rights and obligations, on the part of both private citizens and public employees, remain unchanged by a mere reorganizational change in a law relating to an administrative agency, such as a name change or the shifting of a department from one agency to another [*Gov. Code §§ 11161, 11162*].

The Legislature has expressed these rules of construction in statutes. The language of the statute should be consulted if any question arises because of the Legislature's evident oversight to amend a particular regulatory statute so that it conforms to reorganizational changes. The apparent intent behind the statutes referred to above [*Gov. Code §§ 11159-11162*] is that changes in form should not cause substantive changes.

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§ 470.15 Validating Acts

[1] Purpose

At more or less regular intervals the Legislature passes acts known as validating acts, for example, the First Validating Act of 1990 [Stats. 1990, ch. 87]. Usually two or three such acts are passed each session. They are seldom codified and attract little attention; yet they can be very important. The purpose of a validating act is to cure procedural defects in certain proceedings of specified state and local agencies and public bodies. Secondarily, the purpose of such an act is to establish a period of limitation, usually short, for lawsuits challenging the validity of the proceedings covered by the act.

[2] Agencies and Public Bodies Covered

The typical validating act, the First Validating Act of 1990 will be cited in this discussion as an example, begins with a list of agencies and public bodies covered by the act [*see* Stats. 1990, ch. 87, § 2(a)]. Most of them are municipal, county, and regional districts. They all have two features in common: (1) they are territorial and (2) they are empowered to issue revenue bonds.

[3] Operative Provisions

[a] Title of Act

The first operative provision of a validating act typically sets forth the act's formal title. Many validating acts are denominated by ordinal number and by year, for example, the First Validating Act of 1990 [*see* Stats. 1990, ch. 87, § 1].

[b] Validation of Organization

The second operative provision of a validating act typically validates the organization of each agency and public body covered by the act. For example: "All public bodies [referred to in Section 2] heretofore organized or existing under, or under color of, any law are hereby declared to have been legally organized and to be legally functioning as such public body" [Stats. 1990, ch. 87, § 3].

[c] Confirmation of Rights, Powers, and Duties

The third operative provision typically confirms the rights, powers, and duties of each agency and public body covered by the act. For example: "Every such public body shall have all the rights, powers, and privileges, and be subject to all the duties and obligations of such a public body regularly formed pursuant to law" [Stats. 1990, ch. 87, § 3].

[d] Establishment of Boundaries

The fourth operative provision typically establishes the territorial boundaries of each agency and public body covered by the act. For example: "The boundaries of every public body [referred to in Section 2] as heretofore established, defined, or recorded, or as heretofore actually shown on maps or plats used by the assessor, are hereby confirmed, validated, and declared legally established" [Stats. 1990, ch. 87, § 4].

[e] Validation of Proceedings for Territorial Changes

The fifth operative provision typically validates "[a]ll acts and proceedings heretofore taken by any public body or bodies [referred to in Section 2] under any law, or under color of any law, for the annexation or inclusion of territory into any such public body or for the annexation of any such public body to any other such public body or for the withdrawal or exclusion of territory from any such public body or for the consolidation, merger, or dissolution of any [such] public bodies" [Stats. 1990, ch. 87, § 5]. The acts of officials, employees, and other persons done in connection with such proceedings are also validated.

[f] Validation of Proceedings for Bond Issues

The sixth operative provision typically validates virtually all aspects of the issuance of revenue bonds by the covered agencies and public bodies [*see* Stats. 1990, ch. 87, § 6]. For good measure, the typical validating act specially defines which bonds the act validates [*see* Stats. 1990, ch. 87, § 2(b)]. The validation of bond proceedings is probably the most significant effect of a validating act. Citizens may be complacent about the formation of a special district, but they usually become aroused when district trustees begin to finance a project that the district was formed to undertake. By validating bond proceedings, the Legislature intends to foreclose any possibility that a bond issue will be held invalid because of technical procedural mistakes. Sometimes a validating act will be directed particularly at validating a specific kind of bond issue [*see, e.g.,* Stats. 1964, ch. 42, 1st Ex. Sess. (California Water District Sewer Bond Validating Act of 1964)], and occasionally it has seemed necessary to validate tax proceedings that raise the revenue used to pay off bond issues [*see, e.g.,* Stats. 1965, ch. 1130 (Tax Validation Act of 1965)]. Nonprofit corporations can also obtain validation judgments under *Code Civ. Proc. § 860* that would guarantee repayment with public funds of tax exempt revenue bonds, and challenges to the validity of the funding that was subject to the validation action can not be subsequently litigated by parties seeking to challenge the funding outside the validation proceeding [*Friedland v. City of Long Beach (1998) 62 Cal. App. 4th 835, 851, 73 Cal. Rptr. 2d 427]* .

[4] Saving Clauses

The typical validating act includes several provisions intended to save the act from being held unconstitutional or otherwise invalid. Usually there are four specific saving clauses [*see* Stats. 1990, ch. 87, § 7]:

- A statement that the act validates only those acts and proceedings which the Legislature could have supplied or provided for in the law under which such acts or proceedings were taken.

- A statement that validation under the act shall be limited "to the extent to which the same can be effectuated under the State and Federal Constitutions."

- A statement that the act does not validate "a contract between any public body and the United

States."

- Most significantly, the following statement: "This act shall not operate to confirm, validate, or legalize any act, proceeding, or other matter the legality of which is being contested or inquired into in any legal proceeding now pending and undetermined or which is pending and undetermined during the period of 30 days from and after the effective date of this act, and shall not operate to conform, validate, or legalize any act, proceeding, or other matter which has heretofore been determined in any legal proceeding to be illegal, void, or ineffective."

[5] Period of Limitation for Legal Challenges

Except for the provision validating bond proceedings, the most important provision in the typical validating act establishes a period of limitation for lawsuits challenging any of the acts or proceedings covered by the validating act [*see* Stats. 1990, ch. 87, § 8].

Such a provision requires that any such lawsuit not otherwise barred by any statute of limitations or by laches shall be commenced within a specified time after the effective date of this act; otherwise each and all of such matters covered by the validating provisions shall be held to be valid and in every respect legal and incontestable; this act shall not extend the period in which any action may be brought beyond the period in which it would be barred by any presently existing valid statute of limitations.

The limitation period may be as short as the Legislature wishes [60-day time period in *Code Civ. Proc. § 863*; *Embarcadero Mun. Improvement Dist. v. County of Santa Barbara (2001) 88 Cal. App. 4th 781, 793* (action was time barred when not brought within 60 days of annexation approval)], but always it is short, typically six months [*see, e.g., Las Tunas Beach Geological Hazard Abatement Dist. v. Superior Court (1995) 38 Cal. App. 4th 1002, 1005-1006, 45 Cal. Rptr. 2d 529* (regarding application of six-month limitation period contained in 1992 validating act)].

[6] Condition of Validation of Boundary Changes for Tax Purposes

The generalized validation of boundary changes is typically made subject to a condition applicable to boundary changes for tax or assessment purposes: "Nothing contained in this act shall be construed to render the creation of any city or district, or any change in the boundaries of any city or district, effective for purposes of assessment or taxation unless the statement, together with the map or plat, required to be filed under *Sections 54900 to 54904, inclusive, of the Government Code*, is filed within the time and substantially in the manner required by those sections" [Stats. 1990, ch. 87, § 9].

[7] Effective Date and Time References

Most validating acts are urgency measures [*see* Stats. 1990, ch. 87, § 10] and take effect immediately [*Cal. Const., art. IV, § 8(c)*], but sometimes a validating act passed near the end of a session will be allowed to take effect as ordinary legislation [*see* Stats. 1989, ch. 777 (Third Validating Act of 1989)]. The references in a validating act to "now," "heretofore," and "hereafter" relate to the effective date of the act [*see* Stats. 1990, ch. 87, § 2(c)-(e)].

California Forms of Pleading and Practice--Annotated

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Volume 41: Overview of Public Administrative Law thru Review of Agency Rulemaking-Chs. 470-472B
Chapter 470 OVERVIEW OF PUBLIC ADMINISTRATIVE LAW
PART II. LEGAL BACKGROUND

41-470 California Forms of Pleading and Practice--Annotated § 470.16

§ 470.16 Limits on Agency Power

[1] The Constitutional Supremacy Clause and Federal Preemption Doctrine

[a] Nature of the Doctrine

Federal constitutional and statutory law, as the supreme law of the land, is binding on state governments [U.S. *Const., art. VI, § 2*; *see Cal. Const., art. III, § 1* (acknowledgment of supremacy of U.S. Constitution)]. Thus, when Congress passes legislation that resolves a national problem, state legislation regulating the same subject may be preempted [*Federal Energy Regulatory Com. v. Mississippi (1982) 456 U.S. 742, 759, 102 S. Ct. 2126, 72 L. Ed. 2d 532* (provisions of *section 210 of Public Utilities* Regulatory Policies Act preempt conflicting provisions of Mississippi state law governing electric utilities; section 210 requires state to enforce regulatory standards adopted by federal energy regulatory commission)].

For example, as allowed under the U.S. Constitution, Congress has extensively regulated interstate and foreign commerce [U.S. *Const., art. I, § 8*]. Thus, legislation passed by Congress concerning interstate commerce is binding on state governments [*Garcia v. San Antonio Metropolitan Transit Authority (1985) 469 U.S. 528, 537, 105 S. Ct. 1005, 83 L. Ed. 2d 1016]* , including state administrative agencies [*Federal Energy Regulatory Com. v. Mississippi (1982) 456 U.S. 742, 746, 102 S. Ct. 2126, 72 L. Ed. 2d 532]* .

In other instances, dual regulation by federal and state agencies may be mandated. For instance, a federal statute may allow or require state agencies to regulate a business or industry also regulated by a federal agency [*see, e.g., 15 U.S.C. § 717(c)* (delegating authority to regulate intrastate use of natural gas to states)]. Some agencies are also regulated indirectly by the federal government in that they must satisfy conditions imposed by Congress or by federal agencies in order to receive federal funds [*see, e.g., 42 U.S.C. § 602* (setting forth conditions for state receipt of AFDC funds)]. For a discussion of this dual regulation, see [b], *below*.

The California Supreme Court held that a state wine labeling statute, *Bus. & Prof. Code § 25241*, which required that wine labels with the word "Napa" on them must contain 75-percent or greater Napa county grapes used to make the wine, was not preempted by federal law. The federal law at issue, *27 U.S.C. § 205(e)*, requires federal approval of wine labels for wine shipped in interstate or foreign commerce. Implementing federal regulations, *27 C.F.R. § 4.39(i)(1)*,

adopted a similar 75-percent grape content standard, but "grandfathered" wine labels in use at the time the regulation was adopted from the 75-percent content standard if the true source of the grapes is also disclosed on the label. Under federal law, Bronco Winery's labels were in compliance with labeling requirements, due to the grandfather clause, but Bronco's labels did not comply with the state wine labeling statute. The California Supreme Court held that the California labeling statute was not preempted by the federal wine labeling law [*Bronco Wine Co. v. Jolly (2004) 33 Cal. 4th 943, 953-954, 17 Cal. Rptr. 3d 180, 95 P.3d 422]* . In so holding, the Court reasoned that federal law did not expressly preempt state laws regulating the wine industry, nor did federal law impliedly preempt state law by occupying the entire field of wine labeling law. The court also reasoned that federal law was designed to supplement, not replace, state law, and the federal regulatory agency that enforced federal law assumed that states would also enforce their own tougher wine labeling regulations, which were designed to protect against misleading advertising. Finally, state law is not impliedly preempted because it does not block or hinder "the accomplishment and enforcement of the full purposes and objectives of Congress in adopting federal law" [*Bronco Wine Co. v. Jolly (2004) 33 Cal. 4th 943, 955-956, 17 Cal. Rptr. 3d 180, 95 P.3d 422]* .

The California Supreme Court held that provisions of the Federal Cigarette Labeling and Advertising Act which prohibits states from regulating the advertising and promotion of cigarettes [*15 U.S.C. § 1334(b)*] did not preempt a California statute [*Health & Safety Code § 118950*] that regulated the free distribution of cigarettes [*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co. (2005) 37 Cal. 4th 707, 719, 726, 36 Cal. Rptr. 3d 814, 124 P. 3d 408]* . The California Supreme court also held that it was improper for the trial court to have granted summary judgment on the issue of whether $14,826,200 in fines imposed against the company were excessive within the meaning of the U.S. Constitution [*U.S. Const., Amend. 8*] and the California constitution [*Cal. Const. Art. 1, § 17*]. The fines were imposed under statutory authority [*Health & Safety Code § 118950*] that authorized $200, $500, and $1000 fines for the first, second, and any additional violations of the statute at each event [*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co. (2005) 37 Cal. 4th 707, 712-713 n. 3, 36 Cal. Rptr. 3d 814, 124 P. 3d 408]* . The court remanded the lawsuit to the trial court for a hearing on defendant company's good faith belief defense (that it in good faith believed that its conduct complied with the statute), and on the issue of whether the attorney general delayed notifying the company that its conduct violated the statute for the purpose of allowing the penalties to accumulate in amount [*People ex rel. Lockyer v. R.J. Reynolds Tobacco Company (2005) 37 Cal. 4th 707, 730-732, 36 Cal. Rptr. 3d 814, 124 P. 3d 408]* .

The California Court of Appeal held that the provisions of the Federal Communications Act of 1934, as amended by the Omnibus Budget Reconciliation Act of 1993, that preempt state and local regulation of market entry and rates charged by wireless mobile telephone providers [*47 U.S.C. § 332 (c)(3)(A)*] did not preempt decisions by the California Public Utilities Commission that imposed substantial fines against wireless service providers in California for unjust and unreasonable practices, including charging customers early termination fees to cancel contracts without permitting a grace period, for failing to disclose to customers known network problems and misleading customers regarding network coverage and service [*Pacific Bell Wireless, LLC v. P.U.C. (2006) 140 Cal. App. 4th 718, 730-731, 44 Cal. Rptr. 3d 733]* . The provisions of the National Labor Relations Act [*29 U. S. C. §§ 151-160*] do not preempt decisions of the California Public Utilities Commission requiring public utilities to pay prevailing wages to workers on energy utility construction projects. The prevailing wage requirement is a substantive employment term that does not impact collective bargaining or employee organizing efforts [*Southern California Edison Co. v. Public Utilities Com. (2006) 140 Cal. App. 4th 1085, 1100-1102*].

The provisions of the National Securities Markets Improvement Act of 1996 (NSMIA) [*15 U.S.C. § 77r*] does not preempt the California Attorney General from bringing an enforcement action under *California Corporations Code §§ 25216, 25401* against an investment advisor and registered wholesale broker dealer for statutory violations; the state enforcement action is protected by the savings clause of the preemption provisions of federal law [*15 U.S. C. § 77r (c)(1)*] [*Capital Research and Management Company v. Brown (2007) 147 Cal. App. 4th 58, 66-67, 53 Cal. Rptr. 3d 770]* .

The California Supreme Court held that the provisions of the Federal Cigarette Labeling and Advertising Act (FCLAA)

[*15 U. S. C. § 1331-1335*] expressly preempts claims brought against tobacco companies under the California unfair competition law [*Bus. & Prof. Code § 17200 et. seq.*] for advertising cigarettes in a manner that encourages minors (under age 18) to start smoking because that advertising encourages violation of the provisions of *Penal Code § 653o*, prohibiting both the sale of tobacco to minors and the purchase and possession of tobacco by minors [*In re Tobacco Cases II (2007) 41 Cal. 4th 1257, 1262-1264, 63 Cal. Rptr. 3d 418, 163 P.3d 106]* . The California Supreme Court held that the provisions of the Endangered Species Act (ESA) [*16 U. S. C. §§ 1531-1544*] do not preempt claims brought against shoe manufacturers under the California Unfair Competition Law [*Bus. & Prof. Code § 17200 et. seq.*] for selling athletic shoes made from kangaroo hides in violation of the provisions of *Penal Code § 653o*, prohibiting the importation into or sale within California of products made from kangaroo [*Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc., (2007) 41 Cal. 4th 929, 934, 935*].

[b] Dual Regulation by State and Federal Agencies

[i] Federal Delegation of Jurisdiction to State

Congress uses two approaches to allow state agencies to regulate activities also regulated by federal agencies. Under the first approach, Congress delegates jurisdiction to a state agency to regulate the intrastate activities of a business or industry that is regulated on an interstate level by a federal agency [*see, e.g., 15 U.S.C. § 717(c)* (regulation of natural gas)].

State agencies have considerable discretion under this approach to regulate the subject business or industry so that the state's interests are best served [*see, e.g., Pub. Util. Code § 202* (regulatory authority of the PUC)]. State regulations cannot directly conflict, however, with those established by Congress [*FERC v. Mississippi (1985) 456 U.S. 742, 760, 102 S. Ct. 2126, 72 L. Ed. 2d 532* (federal preemption of conflicting state regulation of public utilities upheld as exercise of Congressional power over interstate commerce)]. State regulations are subordinated to federal regulations in areas in which the federal system fully occupies the regulatory field [*Northern Nat. Gas Co. v. State Corp. Com. (1963) 372 U.S. 84, 93, 83 S. Ct. 646, 9 L. Ed. 2d 601]* . For a discussion of the PUC, the major California agency that regulates the intrastate activities of businesses and industries regulated on an interstate level by Congress, see *§ 470.18[2][b]*.

[ii] Approved State Plan Approach

The second approach used by Congress to permit state regulation of activities also regulated by federal agencies is the "approved state plan" approach. Under this approach, state agencies are responsible for administering federal programs on the state level, and must obtain approval of their program administration plan from the appropriate federal agency [*see, e.g., Health & Safety Code § 39602* (Air Resources Board enforces federal Clean Air Act [*42 U.S.C §§ 7401-7410*]); *Welf. & Inst. Code § 10553(e)* (State Department of Social Services administers federal Temporary Assistance to Needy Families (TANF) program [*42 U.S.C. §§ 601-615*])]. State agencies that enforce provisions of an approved state plan are subject to greater federal supervision and have much less discretion to apply the law to local conditions and circumstances [*Alaska Dep't of Envtl. Conservation v. EPA (2004) 540 U.S. 461, 124 S. Ct. 983, 157 L. Ed. 2d 967* (EPA issued stop construction order to mine owner which invalidated Alaska state agency issued PSD permit. Permit would have allowed expansion of a mining facility consistent with BACT provisions of Clean Air Act. State agency challenged order, and Supreme court upheld order based on EPA interpretation of BACT standards in Clean Air Act. Supreme Court noted that state agency PSD permit terms were not rationally supported by the administrative record, and the state agency permit decision was inconsistent with the requirements of the CAA, as interpreted by the EPA)].

[2] Individual Constitutional Rights

[a] Privacy

The constitutional right to privacy [*U.S. Const., amends. I, IV, V*; *Cal. Const., art. I, § 1*; *see Griswold v. Connecticut (1965) 381 U.S. 479, 484, 85 S. Ct. 1678, 14 L. Ed. 2d 510* (recognizing a right to privacy within the penumbra of the *First Amendment*)] effectively limits the power of administrative agencies to acquire, use, and disclose government information such as arrest records [*Central Valley Chap. 7th Step Foundation v. Younger (1979) 95 Cal. App. 3d 212, 236-237, 157 Cal. Rptr. 117]* , medical records [*Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 679, 156 Cal. Rptr. 55]* , and attorneys' records [*Doyle v. State Bar (1982) 32 Cal. 3d 12, 20, 184 Cal. Rptr. 720, 648 P.2d 942]* .

The right to privacy does not, however, prohibit the Franchise Tax Board from collecting legitimate records or other tax information from business taxpayers [*Roberts v. Gulf Oil Corp. (1983) 147 Cal. App. 3d 770, 790-793, 195 Cal. Rptr. 393]* . For a more detailed discussion of the right to privacy, see Ch. 429, *Privacy* , and see G. Trubow, Privacy Law and Practice (Matthew Bender).

[b] Freedom of Speech and the Press

The constitutional guarantees of freedom of speech and freedom of the press [*U.S. Const., amend. I*; *Cal. Const., art. I, § 2*] limit the extent to which an administrative agency may regulate the advertising of products [*Va. Pharmacy Bd. v. Va. Consumer Council (1976) 425 U.S. 748, 770, 96 S. Ct. 1817, 48 L. Ed. 2d 346* ; *Bronco Wine Co. v. Jolly (2005) 129 Cal. App. 4th 988, 999, 29 Cal. Rptr. 3d 462* (state wine labeling statute did not violate winery's free speech rights because statute validly regulated inherently misleading commercial speech)], or advertising, solicitation, and other forms of communication by licensees of the agency [*Zauderer v. Office of Disciplinary Counsel (1985) 471 U.S. 626, 637, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315* ; *Kitsis v. State Bar (1979) 23 Cal. 3d 857, 863, 153 Cal. Rptr. 836, 592 P.2d 323* (attorneys); *People v. Superior Court (Olson) (1979) 96 Cal. App. 3d 181, 192, 157 Cal. Rptr. 628* (real estate agents); *Institute of Governmental Advocates v. Younger (1977) 70 Cal. App. 3d 878, 884, 139 Cal. Rptr. 233* (lobbyists)].

Plum growers challenged a marketing order authorized by the California Marketing Act [*Cal. Food & Agric. Code § 58601*] which required growers to pay for the cost of generic advertising of plums. The growers argued that the marketing order violated the *First Amendment* because grower's speech was compelled through the mandatory funding requirement. The growers sought to enjoin enforcement of the marketing order. The California Supreme Court held that the *First Amendment* claims had to be reviewed under the intermediate scrutiny standard of the *Central Hudson* case [*Central Hudson Gas & Elec. v. Public Serv. Comm'n (1980) 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341]* . The court also held that the compelled speech arguments, and the government's argument that this was valid governmental speech could not be resolved on the pleading, and the court ordered a remand of the case to the lower courts for further fact finding. The court also held that the marketing program itself does not violate the *First Amendment* [*Gerawan Farming Inc. v. A.G. Kawamura (2004) 33 Cal. 4th 1, 6-7, 14 Cal.Rptr. 3d 14, 90 P.3d 1179]* .

The Court of Appeal held that provisions of a rent control ordinance adopted by the City and County of San Francisco were unconstitutional and violated the *First Amendment* guarantee of freedom of speech [*Baba v. Board of Supervisors (2004) 124 Cal. App. 4th 504, 512-513, 21 Cal. Rptr. 3d 428]* . The Court noted that the ordinance criminalized conduct by a landlord that was protected by freedom of speech, the right of the landlord to seek a waiver of rights from a tenant who represented himself [*Baba v. Board of Supervisors (2004) 124 Cal. App. 4th 504, 527-528, 21 Cal. Rptr. 3d 428]* . In so holding, the court of Appeal cited and relied upon the U.S. Supreme Court decision in the case of *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y. (1980) 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341* .

The California Court of Appeal held that the assessment of a $1,000 statutory penalty pursuant to *Cal. Rev. & Tax Code § 19714* by the State Board of Equalization for a taxpayer's filing of a frivolous administrative appeal to the Board of Tax Assessment did not violate the taxpayer's free speech rights because there is no constitutional right to bring groundless administrative proceedings [*Neufeld v. State Board of Equalization (2004) 124 Cal. App. 4th 1471,*

1477-1478, 22 Cal. Rptr. 3d 423] .

The state has a legitimate interest in protecting consumers from being misled by false, deceptive, and misleading advertising, however, and may reasonably regulate commercial speech to provide this protection [*In re R.M.J. (1982) 455 U.S. 191, 200, 102 S. Ct. 929, 71 L. Ed. 2d 64]* .

For a detailed discussion of advertising law, see Ch. 14, *Advertising* , and see P. Rosden, The Law of Advertising, Chs. 5, 6, 46, and 47 (Matthew Bender). For a discussion of attorney advertising regulations, see Ch. 72, *Attorney Practice and Ethics* .

[c] Religion

Many agency decisions and regulations have been successfully challenged on the ground that they violate the constitutional guarantees of freedom of religion and separation of church and state [*U.S. Const., amend. I*; *Cal. Const., art. I, § 4*].

In one case, the Unemployment Insurance Appeals Board was prohibited from denying unemployment benefits to a teacher who would not work on religious holidays [*Jaffe v. Unemployment Ins. Appeals Bd. (1984) 156 Cal. App. 3d 719, 723, 202 Cal. Rptr. 812]* . In another case, closing state offices and giving state employees paid time off on Good Friday, a Christian holy day, was held to violate the California Constitution [*Mandel v. Hodges(1976) 54 Cal. App. 3d 596, 615, 127 Cal. Rptr. 244]* . It was held constitutionally permissible, however, to deny welfare benefits to a mother who refused to provide social security numbers for her children on religious grounds [*Mullaney v. Woods (1979) 97 Cal. App. 3d 710, 727, 158 Cal. Rptr. 902]* .

Agency regulations that require adoption agencies to match children and adoptive parents according to shared religious orientation are subject to, but do not violate, the Constitution [*Scott v. Family Ministries (1976) 65 Cal. App. 3d 492, 497, 135 Cal. Rptr. 430]* . A Department of Corrections regulation that limited Roman Catholic publicly-paid chaplaincy positions at state prisons to persons ordained, accredited by, and in good standing with the Roman Catholic church was held not to violate the religion clauses of the United States and the California constitutions [*Duffy v. California State Personnel Board (1991) 232 Cal. App. 3d 1, 17, 283 Cal. Rptr. 622, 631]* .

[d] Due Process

Constitutional due process requirements [*U.S. Const., amend. XIV, § 1*; *Cal. Const., art. I, § 7*] apply to and govern administrative agency hearing procedures. Generally, the right to proper notice and the opportunity for a hearing arises if an individual has been deprived by an agency of a job, benefit, or license in which he or she can claim a property interest [*see, e.g.,* *Board of Regents v. Roth (1972) 408 U.S. 564, 576-577, 92 S. Ct. 2701, 33 L. Ed. 2d 548* (suspension of teacher); *Goldberg v. Kelly (1970) 397 U.S. 254, 262, 90 S. Ct. 1011, 25 L. Ed. 2d 287* (welfare benefits); *Ford Dealers Ass'n v. Department of Motor Vehicles (1982) 32 Cal. 3d 347, 366 n.12, 185 Cal. Rptr. 453, 650 P.2d 328* (business license); *Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 215, 124 Cal. Rptr. 14, 539 P.2d 774* (permanent civil service job); *American Federation of Labor v. Employment Dev. Dept. (1979) 88 Cal. App. 3d 811, 819, 152 Cal. Rptr. 193* (unemployment benefits)].

For detailed discussion of due process requirements, see Ch. 470A, *Due Process Restrictions on Public Agencies* [*see also* Bird, "California and Federal Administrative Due Process: Development, Interrelation and Direction," *5 U.C.D. L. Rev. 1 (1972)*].

For detailed discussion of agency hearing procedures, see Ch. 473, *Pubic Agency Adjudication* , et seq.

[e] Equal Protection

For most purposes, the state equal protection standards that apply to California agencies [*Cal. Const., art. I, § 7*] are the same as those required under federal law; [*U.S. Const., amend. XIV, § 1*; *Reece v. Alcoholic Bev. Appeals Bd. (1976) 64 Cal. App. 3d 675, 679, 134 Cal. Rptr 698]* . However, California agencies are bound by California standards in areas in which those standards are more stringent than federal standards [*see, e.g.*, *Serrano v. Priest (1976) 18 Cal. 3d 728, 764, 135 Cal. Rptr. 345, 557 P.2d 929* (education financing that discriminates on basis of district wealth violates California *equal protection clause* even though it does not violate federal equal protection standards)].

In addition to guaranteeing equal protection under the laws, the California Constitution specifically prohibits employment discrimination on the basis of gender, race, creed, color, or national or ethnic origin [*Cal. Const., art. I, § 8*; *but see Long v. State Personnel Board (1974) 41 Cal. App. 3d 1000, 1014, 116 Cal. Rptr. 562* (excluding women from the job of prison chaplain held not to violate this prohibition)]. An agency's use of affirmative action hiring policies has been held not to violate either the *equal protection clause* or the employment discrimination clause, and did not constitute unlawful discrimination against men [*Minnick v. Department of Corrections (1979) 95 Cal. App. 3d 506, 523, 157 Cal. Rptr. 260]* .

Equal protection under the law was not denied to licensed chiropractors by the scope of practice adopted in the Chiropractic Initiative Act of 1992 [*Bus. & Prof. Code § 1000-7*] which precluded chiropractors from penetrating human tissue, including the modern use of needles as part of acupuncture. Chiropractors could not claim fundamental right nor suspect class status, and therefore equal protection analysis was based on rational basis test under which Board's regulation, *12 Cal. Code Regs. § 302*, was not unconstitutional [*Tain v. State Bd. of Chiropractic Exam'rs (2005) 130 Cal. App. 4th 609, 629-631, 30 Cal. Rptr. 3d 330* (Chiropractic Act, adopted by initiative in 1992, establishes a scope of chiropractic practice that excludes use of drugs, surgery or obstetrics by chiropractors; Court of appeal upheld those scope of practice limits and rejected a constitutional challenge to them based on equal protection of law)].

[f] Protection From Unreasonable Search and Seizure

The right of citizens to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures [*U.S. Const., amend. IV*; *Cal. Const., art. I, § 13*] applies to inspections by California agencies [*Camara v. Municipal Court (1967) 387 U.S. 523, 538, 87 S. Ct. 1727, 18 L. Ed. 2d 930* ; *see, e.g.*, *Miller v. Obledo (1978) 79 Cal. App. 3d 714, 715, 145 Cal. Rptr. 140* (inspection of optometrists' records); *Currier v. City of Pasadena (1975) 48 Cal. App. 3d 810, 815, 121 Cal. Rptr. 913* , cert. denied, *423 U.S. 1000, 96 S. Ct. 432, 46 L. Ed. 2d 375* (housing code enforcement)]. California has a statutory administrative inspection system [*see Code Civ. Proc. §§ 1822.50-1822.59*] that requires an agency to obtain a search warrant based on reasonable cause [*Code Civ. Proc. § 1822.52*] when a person or business refuses to consent to an administrative search or inspection [*Code Civ. Proc. § 1822.51*].

This "reasonable cause" standard is not the same as the traditional "probable cause" standard applicable to criminal cases. Reasonable cause to support an administrative inspection warrant is present if either (1) "reasonable legislative or administrative standards for conducting a routine or area inspection are satisfied," or (2) there is "reason to believe that a condition of nonconformity exists with respect to the particular place" to be inspected [*Code Civ. Proc. § 1822.52*; *see City and County of San Francisco v. Municipal Court (1985) 167 Cal. App. 3d 712, 719-721, 213 Cal. Rptr. 477* (reasonable legislative and administrative standards for area inspection satisfied by city's inspection to determine conformity with housing and other building codes as part of residential assistance program)].

For a more detailed discussion of administrative investigations, inspections, and searches, see Ch. 471, *Investigations by Public Agencies* , and Ch. 471A, *Inspections by Public Agencies* .

[3] Constitutional Separation of Powers Limits and the Role of the Judiciary

Because most agencies are created by the Legislature and are located within the executive branch [*see Gov. Code §§ 12800* (major executive branch agencies), 12850.4 (agency heads accountable to governor); *see § 470.19*], an exercise of legislative or executive power by an administrative agency usually does not give rise to separation of powers issues.

A separation of powers issue may arise, however, on a court's review of an agency's exercise of legislative power. In this instance, separation of powers limits the power of the court rather than the agency. The separation of powers doctrine precludes a court from ordering a legislative body to pass a particular legislative act [*Mandel v. Myers (1981) 29 Cal. 3d 531, 551 n.9, 174 Cal. Rptr. 841, 629 P.2d 935* ; *City of Coachella v. Riverside County Airport Land Use Com. (1989) 210 Cal. App. 3d 1277, 1287-1288, 258 Cal. Rptr. 795]* . Separation of powers issues in agency law generally concern the exercise of judicial functions by agencies.

If permitted by its enabling act, an agency may hold hearings, consider evidence, and suspend or revoke licenses issued by the agency without offending the separation of powers clause of the California Constitution [*Beamon v. Dept. of Motor Vehicles (1960) 180 Cal. App. 2d. 200, 205, 4 Cal. Rptr. 396]* . The separation of powers clause is set forth in *Cal. Const., art. III, § 3*. The courts have final review authority, however, over agency adjudicatory matters [*Code Civ. Proc. §§ 1094.5, 1094.6*; *Bodinson Mfg. Co. v. California E. Com. (1941) 17 Cal. 2d 321, 325, 109 P.2d 935]* .

Superior courts have appellate jurisdiction over the decisions of state and local administrative agencies [*Code Civ. Proc. §§ 1094.5, 1094.6* (administrative mandamus); *see* Ch. 474, *Judicial Review of Agency Decisions* , et seq. (for detailed discussion of judicial review of agency decisions)].

Federal and state appellate courts also engage in review of administrative agency decisions, for the following purposes:

- Interpreting constitutional provisions [*see, e.g.,* *Mathews v. Eldridge (1976) 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18* (due process); *Horn v. County of Ventura (1979) 24 Cal. 3d 605, 613, 156 Cal. Rptr. 718, 596 P.2d 1134* (due process requirements for zoning determinations)].

- Determining legislative intent and interpreting statutes [*see, e.g.,* *Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 32-33, 112 Cal. Rptr. 805, 520 P.2d 29* (administrative mandamus statute); *Brown v. State Personnel Bd. (1985) 166 Cal. App. 3d 1151, 1158-1159, 213 Cal. Rptr. 53* (statute of limitations)].

- Developing legal principles and applying them to agencies [*see, e.g.,* *Walker v. San Gabriel (1942) 20 Cal. 2d 879, 881-882, 129 P.2d 349* . 2d 349 (use of hearsay evidence); *Gates v. Department of Motor Vehicles (1979) 94 Cal. App. 3d 921, 925-926, 156 Cal. Rptr. 791* (power of trial court to dismiss administrative proceeding for unreasonable delay)].

The reviewing court may reverse an agency's grant of a remedy, but may not itself award or deny the remedy. Instead, the court must remand the case back to the agency for reconsideration based on its decision [*Lucas v. Board of Education (1975) 13 Cal. 3d 674, 682-683, 119 Cal. Rptr. 462, 532 P.2d 110]* .

Depending on the agency action involved, judicial review of administrative actions may be obtained through regular mandamus [*Code Civ. Proc. § 1085*], administrative mandamus [*Code Civ. Proc. § 1094.5*], or declaratory relief proceedings [*see Code Civ. Proc. § 1060* (declaratory relief proceedings in general); *Gov. Code § 11350(a)* (declaratory relief actions concerning validity of administrative regulations)].

For detailed discussion and forms of judicial review of adjudicative proceedings by way of administrative mandate, see Ch. 474, *Judicial Review of Agency Decisions* , et seq. For discussion and forms relating to judicial review of executive actions such as investigations, inspections, and licensing actions, see Ch. 471, *Investigations by Public Agencies* , et seq. For discussion and forms relating to judicial review of administrative rulemaking, see Ch. 472B, *Review of Agency*

Rulemaking . For discussion and forms relating to declaratory relief generally, see Ch. 182, *Declaratory Relief* .

[4] Limits Imposed by the California APA

The California APA [*see Gov. Code § 11340 et seq.*] provides uniform procedures for rulemaking and administrative adjudication by most state agencies. Chapter 5, Administrative Adjudication: Formal Hearing, of the California APA applies to any state agency that is made subject to it by the terms of its enabling act [*Gov. Code §§ 11500(a), 11501(a)*].

If an agency is not subject to the California APA, its administrative hearing procedures and the rights of the parties involved in such procedures are determined by the provisions of the agency's enabling act [*Noll v. Department of Motor Vehicles (1969) 274 Cal. App. 2d 281, 283, 79 Cal. Rptr. 236]* . Local agencies are not subject to the California APA unless the agency has expressly adopted it [*Allen v. Humboldt County Board of Supervisors (1963) 220 Cal. App. 2d 877, 883, 34 Cal. Rptr. 232]* .

For further discussion of California APA rulemaking procedures, see *§ 470.11, above*, and Ch. 472, *Public Agency Rules*, et seq. Adjudicatory actions under the California APA are discussed in *§ 470.11, above*, and Ch. 473, *Public Agency Adjudications*, et seq.

[5] Limits on Remedies Available Through Administrative Adjudication

[a] Damages

The constitutional right to a jury trial [*Cal. Const., art. I, § 16*] prevents an administrative agency from awarding damages, because it does not conduct hearings before a jury, [*see Gov. Code § 11512(a)* (adjudicatory matters heard by ALJ and/or agency for agencies subject to California APA)]. The right to a jury trial in civil matters applies to actions, like those for damages, that have been historically legal actions rather than equitable actions [*C & K Engineering Contractors v. Amber Steel Co. (1978) 23 Cal. 3d 1, 8, 151 Cal. Rptr. 323, 587 P.2d 1136]* .

In some agency matters, however, a person who is aggrieved by an agency's decision or by its failure to take administrative action may file a civil action in the superior court requesting damages or other appropriate relief from the agency [*see, e.g., Gov. Code § 12965(b)* (authorizing civil actions by persons aggrieved by Fair Employment and Housing Commission's failure to issue administrative accusation)].

Agencies and their employees are protected from liability for injuries caused by acts or omissions done in their official capacity to the extent provided by the Tort Claims Act [*Gov. Code § 815*; *Gov. Code § 810 et seq.*]. For detailed discussion of liability under the Tort Claim Act, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* ; see also Levy, Golden, and Sacks, California Torts(Matthew Bender).

[b] Injunctive Relief

An administrative agency may not issue injunctions or other equitable orders [*see Cal. Const., art. III, § 3* (separation of powers); *see* [3], *above*]. Many agencies are authorized, however, to petition the superior court for injunctions or temporary restraining orders (TROs) to prevent licensees or others from engaging in conduct that violates provisions of the agency's enabling act [*see, e.g., Bus. & Prof. Code §§ 125.5, 125.7* (applicable to agencies within the Department of Consumer Affairs)]. For a detailed discussion of injunctions, and forms relating to injunctions, see Ch. 303, *Injunctions* . See also Ch. 473D, *Prehearing Preparations in Agency Adjudications* , for discussion of prehearing injunctive relief issues.

An agency also may be authorized by its enabling act to issue cease and desist orders against unlawful practices that the agency is charged with preventing [*see, e.g., Gov. Code § 12970(a)* (Fair Employment and Housing Commission)], or to issue subpoenas or discovery orders [*see, e.g., Gov. Code §§ 12963.1* (issuance of subpoenas by Fair Employment

and Housing Commission), 12963.4 (issuance of discovery orders by Fair Employment and Housing Commission); *see also* Ch. 471, *Investigations by Public Agencies* (for a discussion of public agency subpoena power), and Ch. 473B, *Discovery in Agency Adjudications* (for discussion of discovery in public agency adjudicative proceedings)].

To enforce these orders, an agency may petition the superior court for an injunction [*see, e.g., Gov. Code § 12973(b)* (Fair Employment and Housing Commission); *see also* Ch. 473D for a discussion of prehearing injunctive relief], or contempt orders [*see, e.g., Gov. Code § 11455.20* (authorizing contempt actions under the California APA); *see also* Ch. 471, *Investigations by Public Agencies* (for a discussion of public agency contempt orders)].

[c] Criminal Enforcement

The separation of powers clause [*Cal. Const., art. III, § 1*], and the constitutional guarantee to a jury trial in criminal matters [*Cal. Const., art. I, § 16*], prevent administrative agencies from issuing criminal sanctions or using criminal enforcement procedures. However, many agency enabling acts set forth criminal penalties for certain violations [*see, e.g., Gov. Code § 12975* (willful interference with performance of duties by employees of Fair Employment and Housing Commission); *Bus. & Prof. Code §§ 1280, 1287* (falsely representing oneself as licensed clinical laboratory technician)].

The attorney general, as the chief law officer of California, enforces these criminal provisions [*Cal. Const., art. V, § 13*; *see Gov. Code § 12510 et seq.* (specific duties)]. Administrative agencies become involved in criminal enforcement proceedings after the agency receives a complaint that entails criminal violations of its enabling act [*see, e.g., Bus. & Prof. Code § 325* (duty of director of consumer affairs to receive consumer complaints)]. The agency will conduct an initial investigation of the matter [*see, e.g., Bus. & Prof. Code § 155* (employment of investigators by director of consumer affairs)], and then will refer the matter to the attorney general's office. Activities such as the suspension or revocation of a license by the issuing agency are not considered criminal prosecutions [*Campbell v. Department of Motor Vehicles (1984) 155 Cal. App. 3d 716, 718, 202 Cal. Rptr. 324]* .

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§ 470.17 Functioning of Agencies

[1] Scope of Agency Functions

Administrative agencies are commonly authorized by their enabling acts to engage in some or all of the following functions:

- Rulemaking and rate making [*see, e.g., Bus. & Prof. Code § 2018* (authorizing divisions within Board of Medical Quality Assurance to adopt regulations concerning licensing of medical professionals), and *Pub. Util. Code § 728* (authorizing PUC to determine rates charged by public utilities)]. Regulations adopted by an agency to carry out its statutory or constitutional duties are codified in the California Code of Regulations [Formerly the California Administrative Code, the California Code of Regulations is cited as Cal. Code Reg. throughout this publication]. Agencies may also adopt rules, policies, and guidelines governing internal agency matters, which can generally be obtained directly from the agency [*see, e.g.*, Disciplinary Guidelines, Board of Vocational Nurse and Psychiatric Technician Examiners, November 1987]. See generally discussion and forms in Ch. 472, *Public Agency Rules* , et seq.

- Licensing, registration, or certification of persons or business entities to engage in particular occupations or business activities [*see, e.g., Corp. Code §§ 25210-25220* (authorizing Department of Corporations to license agents and brokers)]. See generally discussion and forms in Ch. 471B, *Licensing by Public Agencies* .

- Adjudication [*see, e.g., Bus. & Prof. Code § 1646.7* (authorizing Board of Dental Examiners to conduct disciplinary hearings)], and enforcement of statutory standards and requirements under the agency's jurisdiction [*see, e.g., Bus. & Prof. Code §§ 8505.1-8505.16* (authorizing Structural Pest Control Board to enforce statutory standards for fumigation)]. See generally discussion and forms in Ch. 473, *Public Agency Adjudication* , et seq.

Agencies may not act outside their constitutional or statutory scope of authority [*First Industrial Loan Co. v. Daugherty (1945) 26 Cal. 2d 545, 550, 159 P.2d 921* ; *Davis v. State Board of Optometry (1927)*

83 Cal. App. 488, 493, 257 P. 197] . An agency is not bound by any acts of its officers or employees that exceed the actor's scope of authority ("ultra vires" acts) [*Mullan v. State (1896) 114 Cal. 578, 587, 46 P. 670]* .

Most administrative agencies perform multiple functions. For example, administrative agencies involved in environmental law perform many functions, including the familiar division between rule making (quasi-legislative action) [for discussion of rulemaking, see Ch. 472, *Public Agency Rules*] and administrative adjudication (quasi-judicial action) [for discussion of administrative adjudication, see Ch. 473, *Public Agency Adjudication*]. However, California's environmental agencies also engage in a wide variety of other more informal administrative actions, which are sometimes described as either discretionary or ministerial. Discretionary actions include many day-to-day operations, as well as investigations and information collection [*see* Ch. 471, *Investigations by Public Agencies* , and 471A, *Public Agency Inspections*]. Ministerial actions include the issuance of some permits [*Court House Plaza Co. v. City of Palo Alto (1981) 117 Cal. App. 3d 871, 883, 173 Cal. Rptr. 161]* and mandatory approvals of subdivision tract maps [*Great Western Sav. & Loan Assn. v. City of Los Angeles (1973) 31 Cal. App. 3d 403, 410, 107 Cal. Rptr. 359]* are typical ministerial actions. Operations decisions, such as Department of Public Works property leasing and maintenance decisions are also treated as ministerial actions [Hubbs v. People ex rel. Dept. Pub. Wks. (1974) 36 Cal. App. 3d1005, 1009, *36 Cal. App. 3d 1005, 112 Cal. Rptr. 172]* . This informal agency action is a major part of environmental law practice. Under California administrative law, the exclusion of such informal action from the category of quasi-adjudicatory administrative action is particularly important, both with regard to the application of procedural requirements discussed in Ch 470A, *Due Process Restrictions on Public Agencies* and with regard to judicial review discussed in Ch. 474, *Availability of Judicial Review of Agency Decisions* .

[2] Delegation of Duties by Agencies

An agency typically delegates to agency employees the various functions and duties imposed by its enabling act on the agency, its governing board, its employees, committees, or other persons. For example, the Board of Registered Nursing delegates to its executive officer, who is not a member of the Board, the responsibility for implementing Board standards and regulations and handling procedural aspects of disciplinary matters [*Bus. & Prof. Code § 2708*; *16 Cal. Code Reg. § 1405(c)-(e)*]. A common way in which many licensing boards delegate power is by relying on national testing institutes to prepare the licensing examinations that the boards use [*see, e.g., Bus. & Prof. Code § 5082*; *16 Cal. Code Reg. § 6(a)* (Uniform Certified Public Accountant Examination, prepared by the American Institute of Certified Public Accountants, used by State Board of Accountancy)].

Unless an agency's enabling act specifically provides otherwise, the agency may not delegate its discretionary duties [*Schecter v. County of Los Angeles (1968) 258 Cal. App. 2d 391, 396, 65 Cal. Rptr. 739]* . A duty is "discretionary" if there is no hard and fast rule governing its exercise. If the agency provides a clearly defined rule for the exercise of the duty, so that the person performing the duty makes no decision on how the duty is carried out, the duty is ministerial and may be delegated [*Elder v. Anderson (1962) 205 Cal. App. 2d 326, 331, 23 Cal. Rptr. 48* ; *see* discussion in *§ 470.13*]. Some agencies are prohibited by their enabling acts from delegating certain duties. For example, agencies in the Department of Consumer Affairs may not delegate the preparation, administration, or grading of examinations, or the inspection or investigation of licensees, solely to lay or public members of the agency [*Bus. & Prof. Code § 451*].

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§ 470.18 Types of Agencies

[1] Five Categories

California administrative agencies can be divided into five major categories, depending on the major purpose of the agency:

- Regulatory agencies [*see* [2], *below*].
- Rate making agencies [*see* [3], *below*].
- Licensing agencies [*see* [4], *below*].
- Social welfare and entitlement agencies [*see* [5], *below*].
- Permitting agencies [*see* [6], *below*].

Many agencies fit into only one category. For example, the Medical Board of California is primarily responsible for licensing physicians and surgeons [*see Bus. & Prof. Code §§ 2050-2076*]. Its regulatory functions [*see Bus. & Prof. Code § 2018*] involve establishing criteria for licensure [*see, e.g., 16 Cal. Code Reg. §§ 1300-1364* (regulations for physicians and surgeons)].

Other agencies, however, fit into more than one category. For example, the PUC [*see* [2][b], *below*] is both a regulatory [*see Pub. Util. Code §§ 701-880*], and a ratemaking agency [*see Pub. Util. Code §§ 451-467*].

Each kind of agency may use one or more of the functions discussed in *§ 470.17[1]*, to the extent permitted by its enabling act or constitutional grant of power, to carry out its purpose.

[2] Regulatory Agencies

[a] Nature of Regulatory Agencies

A regulatory agency is responsible for regulating a specific business or industry f or the protection of the public interest [*see, e.g., Pub. Util. Code § 701* (duties of PUC)]. California regulatory agencies supervise the operations and practices of diverse business ventures including:

- Real estate [*see Bus. & Prof. Code §§ 11000-11200* (Department of Real Estate)].
- Horse racing [*see Bus. & Prof. Code §§ 19400-19667* (California Horse Racing Board)].
- State corporate securities transactions [*see Corp. Code §§ 25000-25706* (Department of Corporations)].

Many of the agencies within the Business, Transportation, and Housing Agency [*see § 470.20[3]*] are regulatory agencies [*Gov. Code § 13975*].

[b] The Public Utilities Commission

The Public Utilities Commission (PUC), an agency created by the California Constitution [*Cal. Const., art. XII, § 1*], regulates the intrastate activities of telephone [*Pub. Util. Code §§ 233-236*], gas and electricity [*Pub. Util. Code §§ 217, 218, 221-224*], and trucking and railroad [*Pub. Util. Code §§ 211-215, 229-232*] companies, and may regulate other industries as authorized by the Legislature [*Cal. Const., art. XII, § 3*].

The PUC is also California's major ratemaking agency. For a discussion of the kinds of activities performed by ratemaking agencies, see [3], *below*. The Legislature may also specify additional powers and duties of the PUC [*Cal. Const., art. XII, § 5*]. In carrying out its regulatory and ratemaking functions, the PUC is authorized to adopt regulations [*Pub. Util. Code § 770*], issue licenses and certificates [*see, e.g., Pub. Util. Code § 1001* (railroad construction permits)], and conduct administrative hearings and decide contested cases [*Pub. Util. Code § 1701*]. The PUC will also play a lead role in the electrical restructuring program mandated by the California legislature, which will provide for competition in the supply of electrical power [*Pub. Util. Code § 330*].

An unusual characteristic of the PUC is that the Legislature may determine the scope and authority for judicial review of PUC matters [*Cal. Const., art. XII, § 5*]. This authority includes both the capacity to restrict judicial review of PUC decisions by eliminating the jurisdiction of courts other than the California Supreme Court to hear PUC cases, and the capacity to expand the Supreme Court's review beyond the limits of Article VI of the California Constitution [*County of Sonoma v. State Energy Resources Conservation etc. Com. (1985) 40 Cal. 3d 361, 367-368, 220 Cal. Rptr. 114, 708 P.2d 693]* . The PUC has constitutional authority to adopt its own rulemaking and adjudicatory procedures, and is not required to follow the California APA [*Cal. Const., art. XII, § 2*; *Pub. Util. Code § 1701*]. The five members of the PUC are appointed by the governor for six-year terms. The appointments are approved by the Senate [*Cal. Const., art. XII, § 1*].

For further discussion and forms relating specifically to proceedings before the PUC, see Ch. 480, *Public Utilities* .

[c] The State Board of Education

The State Board of Education, an independent agency created by the California Constitution and located in the executive branch [*Cal. Const., art. IX, § 7*; *see § 470.12*], is a policymaking body that establishes rules and standards of governance for local school districts [*Educ. Code § 33031*]. The superintendent of public instruction, an elected official [*Cal. Const., art. IX, § 2*], serves as the secretary and executive officer of the Board [*Educ. Code § 33004*]. The Board has the authority to do the following:

- Waive provisions of the Education Code on request by local school districts [*Educ. Code §§ 33050-33053*].

- Manage the State Department of Education [*Educ. Code § 33302*]. The State Department of Education is responsible for the financial affairs of the public school system and for Indian education and the California Maritime Academy [*Educ. Code §§ 33316*, 33370].

For discussion and forms relating to the State Board of Education regarding the certification of teachers, see Ch. 512, *Schools: Certification, Dismissal, and Related Employment Issues* .

[d] Regulatory Agencies Within Business, Transportation, and Housing Agency

The 13 departments within the Business, Transportation, and Housing Agency [*see § 470.20[3]*] regulate major industries within California [*Gov. Code § 13975*]. The departments serve and protect the public by licensing members of specified industries, adopting regulatory standards, enforcing those standards, and periodically auditing industry members. For example, the Commissioner of Financial Institutions is responsible for certifying banking corporations [*Fin. Code § 350*], promulgating banking regulations [*Fin. Code § 215*], initiating appropriate actions for penalties or forfeiture against banks that violate banking laws [*Fin. Code § 1917*], and examining banks and other institutions to ensure their compliance with banking laws [*Fin. Code § 1900*].

The secretary of the Business, Transportation, and Housing Agency is empowered to supervise the operations of each department within the Agency, and to exercise any power or assume any responsibility to carry out the purposes of any department [*Gov. Code § 13978*]. However, the heads of the various departments and subagencies generally assume supervisory functions for their departments or subagencies [*see, e.g., Fin. Code § 215* (general authority of superintendent of banking over State Banking Department)].

[3] Rate Making Agencies

A rate making agency sets prices for goods or services provided by a business or industry that is a monopoly or common carrier [*see, e.g., Pub. Util. Code § 728* (authorizing PUC to set rates for public utilities; *see Cal. Const., art. XII, § 3*; *Pub. Util. Code § 216(a)* ("public utilities" defined)]. The principal ratemaking agency in California is the PUC [*see* [2][b], *above*]. The PUC has authority to establish rates to be charged by the following public utilities [*see Cal. Const., art. XII, § 3*; *Pub. Util. Code § 216(a)* ("public utility" defined)]:

- Intrastate water carriers [*Pub. Util. Code § 227*].

- Telephone companies [*Pub. Util. Code § 728*].

- Natural gas and electrical utilities [*Pub. Util. Code § 739* (baseline rates for residential service].

- Railroads and other transportation companies [*Pub. Util. Code § 728.5*].

- Common carriers [*Pub. Util. Code § 730*].

The PUC will grant a rate change for a utility only on a showing that the utility's existing rates are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential [*Pub. Util. Code § 728*; *see* Ch. 480, *Public Utilities* ; California Legal Forms, Ch. 54, *Shipment and Storage of Commercial Property* (Matthew Bender)]. The PUC will also play a lead role in the electrical restructuring program mandated by the California legislature, which will provide for competition in the supply of electrical power [*Pub. Util. Code § 330*].

When this change is fully implemented, the electrical power industry will no longer provide electrical power to consumers at regulated rates, the current system, with anticipated rate reductions of 20% by April 1, 2002, and a transition to a competitive power supply [*Pub. Util. Code § 330(a), (d)*] with rates that are not set by the PUC.

[4] Licensing Agencies

[a] Nature of Licensing Agencies

A licensing agency is responsible for setting and maintaining standards for entry into a business or occupation. In California, licensing standards have been established by administrative agencies for such diverse businesses and occupations as the furniture and bedding industry [*see Bus. & Prof. Code § 19000 et seq.* (Bureau of Home Furnishings)], structural pest control operators [*see Bus. & Prof. Code § 8500 et seq.* (Structural Pest Control Board)], and various medical professionals [*see Bus. & Prof. Code § 2000 et seq.* (Medical Board of California)].

Licensing and regulatory agencies [*see* [2], *above*] often have overlapping functions. For example, the agencies within the Department of Consumer Affairs [*see* [b], *below*] that are responsible for licensing various medical professionals are also responsible for enforcing professional standards and adjudicating disciplinary matters involving licensees [*see, e.g., Bus. & Prof. Code § 2004* (Medical Board of California responsible for enforcing professional standards for physicians and surgeons through disciplinary hearing procedure)].

Licensing agencies also engage in rulemaking functions [*see, e.g., Bus. & Prof. Code § 2018* (authorizing divisions within Board of Medical Quality Assurance to adopt regulations concerning licensing of medical professionals)], but do not ordinarily engage in rate making. See Ch. 471B, *Licensing by Public Agencies* , for a detailed discussion of licensing and licensing agencies.

[b] The Department of Consumer Affairs

The Department of Consumer Affairs is a licensing and regulatory agency within the State and Consumer Services Agency [*Bus. & Prof. Code § 100*; *see §§ 470.19[4][a], 470.20[2]*] that is responsible for regulating private businesses and various professions and occupations to protect the public health and safety [*Bus. & Prof. Code § 101.6*].

The Department consists of over 30 subagencies that establish licensing qualifications and competency standards, redress grievances against licensees, discipline licensees, and conduct investigations to ensure compliance with licensing standards [*Bus. & Prof. Code § 101.6*].

The director of consumer affairs is the chief executive officer of the Department [*Bus. & Prof. Code § 150*]. The director, who is appointed by the governor and holds office at the governor's pleasure [*Bus. & Prof. Code § 151*], is responsible for the following:

- Organizing the work of the Department [*Bus. & Prof. Code § 152*].
- Investigating the work of the subagencies within the Department [*Bus. & Prof. Code § 153*].
- Representing and protecting the interests of consumers [*Bus. & Prof. Code § 310*].
- Reporting to the governor and the Legislature on the affairs of the Department [*Bus. & Prof. Code § 312*].

The subagencies within the Department of Consumer Affairs function autonomously in setting standards, holding meetings, preparing and conducting licensing examinations, investigating improper conduct by licensees, conducting

disciplinary hearings, and imposing penalties following such hearings [*Bus. & Prof. Code § 108*]. The decisions of the subagencies are not subject to review by the director [*Bus. & Prof. Code § 109*].

The Director of the Department of Consumer Affairs must be provided the opportunity to review regulations proposed or promulgated by agencies within the Department before these regulations can take effect. The only exceptions to this requirement are regulations concerning examinations and qualifications for licensure. The agencies must notify the Director, and give the Director the opportunity to specifically review, consistent with APA rulemaking procedure, agency-prepared notices of proposed action, including modifications, supplements, and the text of the proposed regulations, notices of changes to regulations, including the text of proposed regulations showing modifications to the text, and final rulemaking records [*Bus. & Prof. Code § 313.1(b)(1)-(3)*].

The Director's review must be completed before that agency can file the regulation with the Office of Administrative Law [*Bus. & Prof. Code § 313.1(c)*]. The Director is required to adopt regulations to implement, interpret, and make specific the provisions of the Americans with Disabilities Act [*42 U.S.C. 12101 et. seq.*, Pub. L. No. 101-336] as they relate to the examination process for professional licensing and certification programs under the Department [*Bus. & Prof. Code § 313.2*].

[5] Social Welfare and Entitlement Agencies

Social welfare and entitlement agencies provide food, shelter, medical benefits, and income to citizens through public assistance or public benefit programs. For example, the Department of Social Services, an agency within the Health and Welfare Agency [*Welf. & Inst. Code § 10550*], administers the aid for dependent children (AFDC) program [*see Welf. & Inst. Code §§ 11200-11492.1* (AFDC program)]. California social welfare and entitlement agencies include:

- The Employment Development Department (the EDD), which administers the unemployment benefits program [*see Unemp. Ins. Code § 301 et seq.*].

- The Workers' Compensation Appeals Board (the WCAB), which resolves disputes concerning entitlement to compensation benefits for employment related injuries [*Cal. Const., art. XIV, § 4*; *see Lab. Code § 5300 et seq.*; *see also* Hanna, California Law of Employee Injuries and Workers' Compensation(Matthew Bender)].

- The State Department of Social Services, which administers the AFDC program [*see Welf. & Inst. Code §§ 11200-11492.1*].

Social welfare and entitlement agencies frequently engage in rulemaking, adjudication, and enforcement functions. For example, the Department of Social Services [*Welf. & Inst. Code § 10550*] adopts regulations [*Welf. & Inst. Code § 10554*], investigates and supervises county agencies that administer social welfare programs [*Welf. & Inst. Code §§ 10602, 10603*], and conducts administrative hearings in contested cases [*Welf. & Inst. Code §§ 10950-10967*]. These agencies do not engage in ratemaking functions, and normally do not perform licensing functions under their entitlement programs.

Adjudication involving social welfare and entitlement agencies often centers on due process rights [*U.S. Const., amend. XIV, § 1*; *Cal. Const., art. I, § 7*; *see § 470.16[2][d]*, and Ch. 470A, *Due Process Restrictions on Public Agencies*].

Two of the most important cases that discuss these issues are *Goldberg v. Kelly* [*Goldberg v. Kelly (1970) 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287]* , and *Matthews v. Eldridge* [*Mathews v. Eldridge (1976) 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18]* . Because most public assistance programs are federally funded, they must comply with federal eligibility and administrative standards [*see, e.g., Welf. & Inst. Code § 11003*; *see § 470.16[1]*].

[6] Permitting Agencies

A permitting agency allocates scarce resources and regulates a business or industry to preserve the quality of the environment [*see, e.g., Health & Safety Code §§ 39500-39811* (Air Resources Board's responsibility to enforce environmental quality laws)]. These agencies often operate by setting minimum standards for construction projects, waste disposal plans, or other projects affecting the environment, and granting permits for such projects only if they meet the applicable standards [*see, e.g., Pub. Util. Code § 216.6* (Energy Commission's minimum standards for thermal energy production)]. Many permitting agencies are responsible for preparing environmental impact reports (EIRs) as required under the California Environmental Quality Act [*see Pub. Res. Code §§ 21000-21170*; *see Environmental Planning & Information Council v. County of El Dorado (1982) 131 Cal. App. 3d 350, 352, 182 Cal. Rptr. 317]* . The purposes and functions of permitting agencies are similar to those of regulatory agencies [*see* [2], *above*], and many permitting agencies are also regulatory agencies. For example, the California Coastal Commission, an agency within the Resources Agency [*Pub. Res. Code § 30300*; *see § 470.20[5]*], regulates the use of coastal lands to ensure compliance with the federal Coastal Zone Management Act [*see 16 U.S.C. §§ 1451-1464*], and issues certificates of compliance with federal standards to agencies seeking federal funds [*Pub. Res. Code §§ 30300, 30330*].

The planning commissions of the various cities and counties within California [*see Gov. Code § 65100 et seq.*] are local permitting agencies. The functions of these agencies include adopting a general plan and local zoning ordinances [*Gov. Code §§ 65103(a), 65850*], and issuing permits for variances from the ordinance [*Gov. Code § 65901*].

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§ 470.19 Agency Structure Within Executive Branch

[1] Purpose and Function of Executive Branch Agencies

The legislative branch enacts laws [*Cal. Const., art. IV, § 1*], and the executive branch executes and enforces those laws [*Cal. Const., art. V, § 1*]. Although most California administrative agencies are created by the Legislature [*see § 470.12[1]*], the agencies are actually located in the executive branch of California government [*cf. Gov. Code §§ 12850.4* (heads of agencies exercise power delegated from governor)]. The placement of administrative agencies in the executive branch is significant for two reasons. First, it establishes law enforcement as the main function of the agencies [*Cal. Const., art. V, § 1*]. Second, it places the agencies under the direct control and influence of the governor [*see Gov. Code §§ 12011, 12080.1* (governor's supervisory power over agencies)]. Thus, administrative agencies assist the governor [*see* [2], *below*] in administering the state government and implementing state laws [*see, e.g., Bus. & Prof. Code § 101.6* (duties of subagencies of the Department of Consumer Affairs)]. This authority of the executive branch may not be usurped by the Legislature [*Cal. Const., art. III, § 3*; *Way v. Superior Court (1977) 74 Cal. App.3d 165, 178, 141 Cal. Rptr. 383]* or the courts [*Cal. Const., art. III, § 3*; *People v. Superior Court (Greer) (1977) 19 Cal. 3d 255, 262, 137 Cal. Rptr. 476, 561 P.2d 1164]* .

[2] The Governor's Role

[a] Duties

The executive branch is headed by the governor [*Gov. Code § 12010*], who has the responsibility for seeing that state laws are faithfully executed [*Cal. Const., art. V, § 1*]. The governor has the following duties regarding state agencies:

- Supervising the agencies and their officers [*Gov. Code §§ 12011, 12080.1*].

- Appointing heads of the five major executive branch agencies [*Gov. Code § 12801*; *see* [4], *below*], and appointing a majority of the members of other agencies [*Gov. Code §§ 1300, 1772*; *see, e.g., Bus. & Prof. Code § 2001* (appointments to Medical Board of California)].

- Examining the organization of agencies and, as necessary for the public interest, preparing

reorganization plans [*Gov. Code §§ 12080.1, 12080.2*; *see Gov. Code § 12080.5*; reorganization plans must be approved by the Senate and the Assembly].

- Preparing an annual state budget that, among other things, allocates funding to agencies [Gov. Code § *13337*].

[b] Significance of Governor's Appointment Powers

The governor exerts a great deal of control over the activities of administrative agencies through the appointment power. This power includes the ability to do the following:

- Remove without cause the secretary of any of the major executive branch agencies [*Gov. Code § 12801*; *see* [4][a], *below*, for listing of agencies].

- Choose individuals to lead an agency, which can affect the policies, focus, and priorities of the agency, as well as its effectiveness [*see, e.g., Bus. & Prof. Code §§ 2001* (Medical Board of California), 7003 (Contractors' State License Board)].

- Provide or withhold funding through budget recommendations, which can increase or decrease the ability of an agency to carry out its duties [*see Gov. Code § 12016* (governor's duty to submit budget to Legislature)].

[3] Other Executive Officers

The attorney general is the state's chief law officer, and it is his or her duty to see that state laws are uniformly and adequately enforced [Cal. *Const., art. V, § 13*; *see Gov. Code § 12510 et seq.* (specific duties)]. The attorney general heads the Department of Justice [*Gov. Code § 12510*], which represents the state and most state agencies and other state entities in litigation matters [*Gov. Code § 12512*].

The lieutenant governor's role in state government is similar to that of the vice president at the federal level. The lieutenant governor presides over the Senate, may vote in Senate matters in order to break a tie vote [*Cal. Const., art. V, § 9*], and acts in the governor's place if the governor is incapacitated or out of the state [*Cal. Const., art. V, § 10*].

The secretary of state keeps the official records of the Legislature [*Gov. Code § 12159*; *see Gov. Code §§ 12150-12241*(full list of duties)]. The state treasurer receives and deposits state funds [*Gov. Code § 12320*; *see Gov. Code §§ 12320-12332* (full list of duties)], and the state controller administers state expenditures and audits claims against the state and payments made by state agencies [*Gov. Code § 12410*; *see Gov. Code §§ 12410-12430* (full list of duties)].

[4] Major Agencies Within the Executive Branch

[a] The Seven Major Agencies

Seven major agencies have been created in the executive branch of California government [*Gov. Code § 12800*]:

- The State and Consumer Services Agency.

- The Business, Transportation, and Housing Agency.

- California Environmental Protection.

- The California Health and Human Services Agency.
- The Natural Resources Agency.
- Labor and Workforce Development Agency.
- The Youth and Adult Correction Agency.

Each agency is headed by an executive officer, known as a secretary, who is appointed by the governor and confirmed by the Senate [*Gov. Code § 12801*]. The secretary is responsible for the following activities:

- Supervising the operations of departments and subagencies within the agency [*Gov. Code § 12850*].
- Managing the agency's fiscal affairs [*Gov. Code § 12850.6*].
- Preparing long-range plans for the agency [*Gov. Code § 12851*].
- Advising the governor on the operations of the agency [*Gov. Code §§ 12850, 12850.2, 12851*].
- Acting as a communications link between the governor and the departments and subagencies within the agency [*Gov. Code § 12850.2*].

Agency secretaries serve at the pleasure of the governor [*Gov. Code § 12801*]. Thus, they are unlikely to take independent stands on issues concerning the agency, or to oppose the governor on policy issues.

[b] Divisions of the Major Agencies

Each major agency is divided into various departments, boards, commissions, and other kinds of subagencies. For example, the State and Consumer Services Agency includes at least nine departments or subagencies [*Gov. Code § 12804*; *see also Gov. Code §§ 12803(a)* (California Health and Human Services Agency), 12805 (Resources Agency), 13975 (Business, Transportation, and Housing Agency)]:

Many of the departments are further divided into subagencies. For example, the Department of Consumer Affairs includes over 20 subagencies, including many individual licensing boards for the various medical and mental health professions [*Bus. & Prof. Code § 101*] that are responsible for setting licensing standards, issuing or denying licenses, investigating consumer complaints and other allegations of wrongdoing by licensees, and disciplining licensees [*see, e.g., Bus. & Prof. Code §§ 2004* (Medical Board of California)]. In administrative law matters, attorneys deal most often with these subagencies. For a list explaining the placement of the various agencies within the executive branch, see *§ 470.20*.

[c] Control of the Divisions

The departments and subagencies within each major agency are controlled by individuals or boards [*see, e.g., Bus. & Prof. Code §§ 150* (director of consumer affairs heads Department of Consumer Affairs), 2701 (Board of Registered Nursing regulates licensing of registered nurses)]. These boards and department heads are under the control of the governor to varying degrees, but generally have more independence than agency secretaries because the governor's ability to appoint or remove them from office is limited. For example, although the governor appoints a majority of the members of the Medical Board of California, they may be removed only for cause [*Bus. & Prof. Code §§ 2001, 2011*]. Similarly, the governor appoints several members of the Teachers' Retirement Board, but for four-year terms [*Educ. Code § 22200(a)(6)*]. The Legislature has reserved to itself the power to appoint some agency officials [*see, e.g., Gov.*

Code § 8501 (four public members of Milton Marks Little Hoover Commission on California State Government Organization and Economy appointed by Legislature)], and has reserved confirmation authority over the governor's choices in other cases [*see, e.g., Health & Safety Code § 13101* (governor's appointment of state fire marshal subject to confirmation by the Senate)].

[5] Independent Agencies Within Executive Branch

Not all agencies within the executive branch are connected to one of the seven major agencies [*see* [4][a], *above*]. For example, the state and local boards of education and other state education agencies were created by the Legislature pursuant to a directive in the California Constitution [Cal. *Const., art. IX, § 7*], and exist as independent agencies accountable to the governor but not to any of the five major agencies [*see Educ. Code §§ 33000* (State Board of Education), 33300 (Department of Education), 66600 (Trustees of California State University and Colleges); *see also* discussion in *§ 470.18[2][c]*]. Most other constitutional agencies (*see § 470.12[3]*) are also independent agencies not located within any of the major agencies, except the Fish and Game Commission, however, which is a subagency of the Resources Agency [*Fish & Game Code § 101*]. For a listing of agencies not located within the major executive branch agencies, see *§ 470.20*.

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§ 470.20 Placement of Administrative Agencies Within California Executive Branch

[1] Listing of Most Agencies

See [2]-[6], *below*, for listings of the more significant subagencies within five of the seven major agencies in the executive branch. The two remaining major subagencies not listed are [*see § 470.19[4][a]*]:

- California Environmental Protection.
- Trade and Commerce.

Another major state agency is the California Environmental Protection Agency (Cal/EPA). The California Environmental Protection Agency consists of the State Air Resources Board, the Office of Environmental Health Hazard Assessment, the California Integrated Waste Management Board, the State Water Resources Control Board, and each California regional water quality control board, and the following departments: Pesticide Regulation and Toxic Substances Control [*Gov. Code § 12812*]. Cal/EPA was formed as part of the Governors' Reorganization Plan in 1991 [Gov. Reorg. Plan No. 1 of 1991, § 80, eff. July 17, 1991]. Cal/EPA is headed by an Agency Secretary (currently Alan C. Lloyd) who is a gubernatorial appointee. Cal/EPA has a web site address: http://www.calepa.ca.gov/ which provides links to the web sites of the Departments, and Boards and Commissions that are part of the agency. The web site also contains press releases, and meeting notices. Cal/EPA contains within its structure those agencies that enforce primary environmental laws that regulate air quality, water quality, solid waste, and other subjects.

See [7], *below*, for the more significant independent agencies organized within the executive branch of California government.

For a brief summary of general information relating to many of the state's licensing agencies, see Part IV (§ 470.50 et seq.).

[2] State and Consumer Services Agency

The State and Consumer Services Agency is established as one of the major executive branch agencies [*Gov. Code §*

12804]. The major subagencies within this agency are organized as follows:

- Department of Consumer Affairs [*Bus. & Prof. Code § 100*].
  - Medical Board of California [*Bus. & Prof. Code § 2001*; *see also § 470.68*].
  - Speech-Language Pathology and Audiology Board [*Bus. & Prof. Code § 2531*; *see also § 470.74*].
  - Physical Therapy Examining Committee [*Bus. & Prof. Code § 2602*; *see also § 470.72*].
  - Board of Psychology [*Bus. & Prof. Code § 2920*; *see also § 470.54*].
  - Hearing Aid Dispensers Examining Committee [*Bus. & Prof. Code § 3320*].
  - Physician Assistant Committee [*Bus. & Prof. Code § 3504*; *see also § 470.73*].
  - Respiratory Care Board [*Bus. & Prof. Code § 3710*].
  - Acupuncture Committee [*Bus. & Prof. Code § 4928*].
  - California Board of Podiatric Medicine [*Bus. & Prof. Code § 2460*].
  - Osteopathic Medical Board of California [*Bus. & Prof. Code § 3600-1*; *see also § 470.71*].
- Board of Registered Nursing [*Bus. & Prof. Code § 2701*; *see also § 470.55*].
- State Board of Optometry [*Bus. & Prof. Code § 3010*].
- Dental Board of California [*Bus. & Prof. Code § 1601*; *see also § 470.53*].
- California Board of Pharmacy [*Bus. & Prof. Code § 4000*; *see also § 470.62*].
- Board of Vocational Nursing and Psychiatric Technicians [*Bus. & Prof. Code § 2841*; *see also § 470.56*].
- Veterinary Medical Board [*Bus. & Prof. Code § 4800*; *see also § 470.80*].
- Board of Chiropractic Examiners [*Bus. & Prof. Code § 1000-1*; *see also § 470.52*].
- California Board of Accountancy [*Bus. & Prof. Code § 5000*; *see also § 470.76*].
- California Architects Board [*Bus. & Prof. Code § 5510*; *see also § 470.51*].
- Board for Geologists and Geophysicists [*Bus. & Prof. Code § 7810.1*; *see also § 470.77*].
- State Board of Registration for Professional Engineers and Land Surveyors [*Bus. & Prof. Code § 6710*; *see also § 470.78*].

- Contractors' State License Board [*Bus. & Prof. Code § 7000.5*; *see also § 470.64*].
- Structural Pest Control Board [*Bus. & Prof. Code § 8520*; *see also § 470.79*].
- Board of Behavioral Sciences [*Bus. & Prof. Code § 4990*].

- Department of General Services [*Gov. Code § 14601*].
  - Office of Administrative Hearings (OAH) [*Gov. Code § 11370.2*].
- Department of Fair Employment and Housing [*Gov. Code § 12901*].
- Franchise Tax Board [*Gov. Code § 15700*].
- Public Employees' Retirement System [*Gov. Code § 20002*].
- State Building and Standards Commission [*Gov. Code § 12804*].
- State Teachers' Retirement System [*Educ. Code § 22001*].
- California Museum of Science and Industry [*Food & Agric. Code § 4101*].
- California Victim Compensation and Government Claims Board [*Gov. Code § 13901(a)*].

[3] Business, Transportation, and Housing Agency

The Business, Transportation, and Housing is established as one of the major executive branch agencies [*Gov. Code § 13975*]. Included within this agency are the following:

- Department of Alcoholic Beverage Control [*Gov. Code § 13975*].
- Department of Managed Care [*Gov. Code § 13975*].
- Department of Financial Institutions [*Gov. Code § 13975*].
- Department of the California Highway Patrol [*Gov. Code § 13975*].
- Department of Corporations [*Corp. Code § 25600*].
- Department of Housing and Community Development [*Health & Safety Code § 50400*].
- Department of Motor Vehicles [*Veh. Code § 1500*; *see also § 470.66*].
  - New Motor Vehicle Board [*Veh. Code § 3000*; *see also § 470.69*].
- Department of Real Estate [*Bus. & Prof. Code § 10004*; *see also § 470.67*].
- Department of Transportation [*Gov. Code § 14001*].
- Stephen P. Teale Consolidated Data Center [*Gov. Code § 13975*].

- California Housing Finance Agency [*Health & Safety Code § 50054*].

[4] California Health and Human Services Agency

The California Health and Human Services Agency is established as one of the major executive branch agencies [*Gov. Code § 12803(a)*]. Included within this agency are the following:

- Department of Child Support Services [*Gov. Code § 12803*].
- Department of Health Services [*Health & Safety Code § 100100*].
- Department of Mental Health [*Welf. & Inst. Code § 4000*].
- Department of Developmental Services [*Welf. & Inst. Code § 4400*].
- Department of Social Services [*Welf. & Inst. Code § 10550*].
- Department of Alcohol and Drug Programs [*Health & Safety Code § 11750*].
- Department of Aging [*Welf. & Inst. Code § 9300*].
- Department of Employment Development [*Unemp. Ins. Code § 301*].
- Department of Rehabilitation [*Welf. & Inst. Code § 19001*].
- State Council on Developmental Disabilities [*Welf. & Inst. Code § 4520*].

[5] Resources Agency

The Resources Agency is established as one of the major executive branch agencies [*Gov. Code § 12805*]. The Resources Agency is headed by an Agency secretary (currently Mike Chrisman) who is a gubernatorial appointee. The Resources Agency has a web site address, http://resources.ca.gov/, which provides links to the web sites of the Departments, and Boards and Commissions that are part of the agency. The web site also contains press releases, and meeting notices. It includes the following:

- State Air Resources Board [*Health & Safety Code § 39510(a)*]. (The State Air Resources Board is part of the California Environmental Protection Agency.)
- Colorado River Board [*Water Code § 12510*].
- State Energy Resources Conservation and Development Commission [*Pub. Res. Code § 25200*].
- State Water Resources Control Board [*Water Code § 120*].
    - Regional Water Quality Control Boards [*Water Code § 13200*].
- State Lands Commission [*Pub. Res. Code § 6101*].
- Division of State Lands [*Pub. Res. Code § 6103*].

- Department of Conservation [*Pub. Res. Code § 600*].
- Fish and Game Commission [*Cal. Const. art. IV, § 20*; *Fish and Game Code § 101*].
- Department of Forestry and Fire Protection [*Pub. Res. Code § 701.5*].
- Department of Navigation and Ocean Development [*Harb. & Nav. Code § 50*].
- Parks and Recreation Department [*Pub. Res. Code § 501*].
- Department of Water Resources [*Water Code § 120*].
- Fish and Game Commission [*Fish & Game Code § 101*].

[6] Youth and Adult Correction Agency

The Youth and Adult Correction Agency is established as one of the major executive branch agencies [*Gov. Code § 12811.2*]. It includes the following:

- Department of Corrections [*Penal Code § 5000*].
- Department of Youth Authority [*Welf. & Inst. Code § 1710*].
- Board of Prison Terms [*Penal Code § 5075*].
- Youthful Offender Parole Board [*Welf. & Inst. Code § 1716*].
- Board of Corrections [*Penal Code § 6024*].
- Narcotic Addict Evaluation Authority [*Welf. & Inst. Code § 3150*].

[7] Independent Agencies

- Department of Alcoholic Beverage Control [*Cal. Const., art. XX, § 22. Bus. & Prof. Code § 23050*; *see also § 470.65*].
- Judicial Council [*Cal. Const., art. VI, § 6*].
- Personnel Board [*Cal. Const., art. VII, § 2*].
- Public Utilities Commission [*Cal. Const., art. XII, § 1. Pub. Util. Code § 301*; *see § 470.18[2][b]*].
- Commission on Judicial Appointments [*Cal. Const., art. VI, § 7*].
- Commission on Judicial Performance [*Cal. Const., art. VI, § 8*].
- State Bar of California [*Cal. Const., art. VI, § 9*; *see also § 470.75*].
- Horse Racing Board [*Bus. & Prof. Code §§ 19420, 19421*; *see also § 470.61*].

- Regents of the University of California [*Cal. Const., art. IX, §§ 7, 9(f). Educ. Code §§ 66300, 66301*].
- State Board of Education [*Cal. Const., art. IX, § 7. Educ. Code § 33000*; *see § 470.18[2][c]*].
- Commission on Teacher Credentialing [*Educ. Code § 44210*; *see also § 470.63*].
- Department of Education [*Educ. Code § 33300*].
    - Local school districts [*Educ. Code §§ 33050-33053*].
- Trustees of the California State University and Colleges [*Educ. Code § 66600*].
- Board of Governors of California Community Colleges [*Educ. Code § 71000*].

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[Reserved]

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§ 470.30 Federal Constitution

Supremacy clause. U.S. Const., art. VI

Due process guaranty. *U.S. Const., amend. XIV, § 1*

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§ 470.31 State Constitution

[1] Agencies Created by Constitutional Provision

Fish and Game Commission. *Cal. Const., art. IV, § 20(b)*

Personnel Board. *Cal. Const., art. VII, § 2*

[2] Agencies Having Legislative Power Granted Directly by Constitutional Provision

Judicial Council. *Cal. Const., art. VI, §§ 6, 18*

Personnel Board. *Cal. Const., art. VII, §§ 2(c), 3, 6(b), (c)*

Board of Education. *Cal. Const., art. IX, § 7.5*

Public Utilities Commission. *Cal. Const., art. XII, §§ 2, 4, 6*

[3] Agencies Mandated by Constitutional Provision

Commission on the Governorship. *Cal. Const., art. V, § 10*

Workmen's Compensation Appeals Board. *Cal. Const., art. XIV, § 4*

[4] Agencies Recognized by Constitutional Provision

Judicial Council. *Cal. Const., art. VI, § 6*

Commission on Judicial Appointments. *Cal. Const., art. VI, § 7*

Commission on Judicial Performance. *Cal. Const., art. VI, § 8*

Board of Governors of the State Bar. *Cal. Const., art. VI, § 9*

Board of Education. *Cal. Const., art. IX, §§ 2.1, 7.5*

County superintendents of schools. *Cal. Const., art. IX, § 3*

Board of Regents of University of California. *Cal. Const., art. IX, § 9*

Public Utilities Commission. *Cal. Const., art. XII, § 1*

County boards of equalization. *Cal. Const., art. XIII, § 16*

Board of Equalization. *Cal. Const., art. XIII, § 17*

Allocation Board. *Cal. Const., art. XVI, § 3*

Director of Alcoholic Beverage Control. *Cal. Const., art. XX, § 22*

Alcoholic Beverage Control Appeals Board. *Cal. Const., art. XX, § 22*

[5] Agencies to Which Legislature May Delegate Legislative Power

Fish and Game Commission. *Cal. Const., art. IV, § 20(b)*

Judicial Council. *Cal. Const., art. VI, § 6*

Personnel Board. *Cal. Const., art. VII, § 3(a)*

Governing boards of school districts. *Cal. Const., art. IX, § 14*

Public Utilities Commission. *Cal. Const., art. XII, § 5*

Counties and cities. *Cal. Const., art. XIII, §§ 15, 24, 29*

Commission to oversee general welfare of employees (Industrial Welfare Commission). *Cal. Const., art. XIV § 1*

Agencies concerned with administration of relief. *Cal. Const., art. XVI, § 11*

[6] Agencies Having Limited Judicial Power Directly Granted by Constitutional Provision

Public Utilities Commission. *Cal. Const., art. XII, §§ 4, 6*

Department of Alcoholic Beverage Control. *Cal. Const., art. XX, § 22* (5th paragraph)

Alcoholic Beverage Control Appeals Board. *Cal. Const., art. XX, § 22* (7th paragraph)

Personnel Board. *Cal. Const., art. VII, § 3(a)*

County assessment appeals boards. *Cal. Const., art. XIII, § 16*

[7] Agencies in Which Legislature May Vest Limited Judicial Power

Public Utilities Commission. *Cal. Const., art. XII, § 5*

Commission to oversee general welfare of employees (Industrial Welfare Commission). *Cal. Const., art. XIV, § 1*

Workmen's Compensation Appeals Board. *Cal. Const., art. XX, § 21* (2nd paragraph)

[8] Departments Recognized by Constitutional Provision

Department of Social Welfare (now Department of Benefit Payments). *Cal. Const., art. XVI, § 3*

Department of Mental Hygiene (now part of Department of Health). *Cal. Const., art. XVI, § 3*

[9] General Provisions

Judicial power of state government as vested in courts. *Cal. Const., art. VI, § 1*

Legislative power of state government as vested in Legislature. *Cal. Const., art. IV, § 1*

Legislative power of local governments. *Cal. Const., art. IX, §§ 3.3, 16*; *art. XI, §§ 1*(b), 3-5, 7

Supreme executive power of state government as vested in Governor. *Cal. Const., art. V, § 1*

Legislature precluded from amending or repealing initiative measure without approval by electors unless measure itself allows Legislature to amend or repeal it. *Cal. Const., art. II, § 10(c)*

Right of the people to make their own laws. *Cal. Const., art. II, §§ 1, 11*; *art. IV, § 1*

Separation of powers doctrine. *Cal. Const., art. III, § 3*

Due process guaranty. *Cal. Const., art. I, § 7(a)*

Appellate jurisdiction of courts. *Cal. Const., art. VI, § 11*

Jurisdiction to issue extraordinary writs. *Cal. Const., art. VI, § 10*

Power of Legislature to prescribe jurisdiction of lower courts. *Cal. Const., art. VI, §§ 5(a), 10*

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§ 470.32 State Statutes

[1] General Provisions

Departments are categories into which administration of state government is divided for convenience. *Gov. Code § 11150*

Procedural requirements for adopting regulations. *Gov. Code § 11340 et seq.*

Administrative adjudicative procedure. *Gov. Code §§ 11500-11528*

Judicial review of administrative regulation. *Gov. Code § 11350*

Judicial review of administrative adjudicative decision. *Code Civ. Proc. § 1094.5*

Review of decision by State Bar Board of Governors. *Bus. & Prof. Code § 6082*

Commission on the Governorship. *Gov. Code §§ 12070-12076*

Fair Political Practices Commission. *Gov. Code § 83100 et seq.*

Industrial Welfare Commission. *Lab. Code § 70*

Coastal Zone Conservation Commission (now defunct [*see Pub. Res. Code § 27650*]). *Pub. Res. Code §§ 27200-27243*

Review of administrative decision by original proceeding in appellate court. *Bus. & Prof. Code § 23090* (Alcoholic Beverage Control Appeals Board decision); *Lab. Code § 5950* (Workmen's Compensation Appeals Board decision); *Pub. Util. Code §§ 1756, 1759* (Public Utilities Commission decision)

Review of decision by State Energy Resources Conservation and Development Commission. *Pub. Res. Code §§ 25531,*

25901

Legislative oversight of state board formation and licensed professional practice. *Gov. Code § 9148 et seq.*

Appointment of receiver in action by Attorney General in name of people of state of *California. Gov. Code § 12527*

[2] Delegation of Powers

[a] Delegation by Head of Department

Delegation by head of department. *Gov. Code § 11182*

[b] Delegation by Particular Agencies and Officers

Air Resources Board. *Health & Safety Code § 39023*

Medical Board of California. *Bus. & Prof. Code § 2226*

Community development commission. *Health & Safety Code § 34152*

Corporations Commissioner. *Corp. Code § 25531(c)* (under Corporate Securities Law of 1968); *Fin. Code § 17612* (under Escrow law)

County administrator for Medi-Cal Act provisions. *Welf. & Inst. Code § 14116*

County board of supervisors. Educ. Code §§ 658, 671 (supervising county education system); *Pub. Res. Code § 5136* (managing local museum or art gallery); *Sts. & Hy. Code § 942.6* (controlling use of county roads)

County treasurer. *Sts. & Hy. Code § 6460.5* (under Improvement Act of 1911)

City council. *Pub. Res. Code § 5136* (managing local museum or art gallery)

City treasurer. *Sts. & Hy. Code § 6460.1* (under Improvement Act of 1911)

Department of Health. *Health & Safety Code §§ 1213, 1421*

Department of Transportation. *Sts. & Hy. Code §§ 116, 676*

Director of Parks and Recreation. *Pub. Res. Code § 546*

Fair Political Practices Commission. *Gov. Code § 83108*

Local agency. *Gov. Code § 53607* (investment of funds)

Local appraisal commission. *Rev. & Tax Code § 1720*

Local housing authority. *Health & Safety Code § 34280*

Pooled Money Investment Board. *Gov. Code § 16480.1*

Public Utilities Commission. *Pub. Util. Code § 310*

Redevelopment agency. *Health & Safety Code §§ 33205, 33210*

Resource Conservation Commission. *Pub. Res. Code § 9805*

San Francisco Bay Area Rapid Transit (BART) District Board of Directors. *Pub. Util. Code § 28773*

School district governing board. Educ. Code §§ 933-935, 944, 1031, 15961, 15962, 15962.5, *16051.5*, 16061.5

State Bar Board of Governors. *Bus. & Prof. Code § 6040*

State Compensation Insurance Fund Board of Directors. *Ins. Code § 11787*

State Employees' Retirement System Board of Administration. *Gov. Code § 22503*

Unemployment Insurance Appeals Board. *Unemp. Ins. Code § 1959*

Workmen's Compensation Appeals Board. *Lab. Code § 121*

Youth Authority [*Welf. & Inst. §§ 1737, 1830*]

[c] Other Delegations

Delegation to deputy. *Bus. & Prof. Code § 10*; *Corp. Code § 7*; *Educ. Code § 7*; *Elec. Code § 7*; *Fin. Code § 6*; *Fish & Game Code § 6*; *Food & Agric. Code § 13*; *Gov. Code § 7*; *Harb. & Nav. Code § 7*; *Health & Safety Code § 7*; *Ins. Code § 7*; *Lab. Code § 7*; *Mil. & Vet. Code § 7*; *Penal Code § 10005*; *Pub. Res. Code § 7*; *Pub. Util. Code § 7*; *Rev. & Tax Code § 7*; *Sts. & Hy. Code § 7*; *Unemp. Ins. Code § 7*; *Veh. Code § 8*; *Water Code § 7*; *Welf. & Inst. Code § 7*

Delegation to Administrative Law Judge under Administrative Procedure Act. *Gov. Code § 11512(b)*

Delegation to public member of regulatory agency. *Bus. & Prof. Code § 451*

Deputy as having principal's powers. *Gov. Code § 1194*

Deputy as serving at agency meetings in place of principal. *Gov. Code §§ 7.5, 7.6*

Joint powers agreements. *Gov. Code §§ 6500-6515*

Qualifications for public officers and employees. *Gov. Code § 1020 et seq.*

[3] Internal Administration

Authority of department head. *Gov. Code §§ 11152-11156*

Appointment of personnel. *Gov. Code §§ 1190, 1191, 1193, 1300, 1301*

Departmental offices and seals. *Gov. Code §§ 11031, 11151*

Documents as required to be written in plain, straightforward language. *Gov. Code § 6219*

Fees. *Gov. Code §§ 6100, 6110, 6157*

Legal counsel. *Gov. Code §§ 11040-11043*

Office hours. *Gov. Code §§ 11020, 11021*

Performance bonds. Gov. Code §§ 1110, 1112

State government reorganization. *Gov. Code §§ 11159-11162, 12080-12080.2*

[4] Initiative Measures Creating Agencies

Board of Chiropractic Examiners. Stats.. 1923, p. xx; Deering's Business and Professions Code, Appendix I; West's *Business and Professions Code, §§ 1000-1*-1000-19

Board of Osteopathic Examiners. Stats.. 1923, p. xxv; Deering's Business and Professions Code, Appendix II; West's *Business and Professions Code, §§ 3600-1*-3600-5

Fair Political Practices Commission. *Gov. Code §§ 83100-83122* (part of Political Reform Act of 1974)

Coastal Zone Conservation Commission (now defunct [*see Pub. Res. Code § 27650*]). *Pub. Res. Code §§ 30000-30012* (part of California Coastal Zone Conservation Act of 1972)

[5] Restrictions on Post Government Employment Representation

Restrictions on representation by former agency official of post-government-employment client in judicial, quasi-judicial, or other proceeding in which state is party or has direct and substantial interest and in which former agency official had participated. *Gov. Code § 87400 et seq.*

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41-470 California Forms of Pleading and Practice--Annotated § 470.33

§ 470.33 Decisions

[1] Generally

Establishment provisions of statute establishing and empowering agency remain effective, if severable, even though enabling provisions are determined to be unconstitutional. *Wheatley v. Superior Court of Napa County (1929) 207 Cal. 722* ; *Doyle v. Jordan (1926) 200 Cal. 170, 190-191, 252 P. 577*

Local governments are empowered to establish agencies by ordinance or charter provision. *Gaylord v. Pasadena (1917) 175 Cal. 433, 434-437, 166 P. 348*

Under *Cal. Const., art. I, § 9*, University of California constitutes public trust, possessing full powers of organization and government and all powers necessary or convenient for effective administration of its trust. Regents have general rule-making or policy-making power in regard to university and are fully empowered with respect to organization and government of university. Consequently, policies established by Regents as matters of internal regulation enjoy status equivalent to that of state statutes. Constitutional grant of power to university includes grant of quasi-judicial powers. *Apte v. Regents of University of California (1988) 198 Cal. App. 3d 1084, 1090-1091, 244 Cal. Rptr. 312*

Agency is without power to review judicial decision. *De Rasmo v. Smith (1971) 15 Cal. App. 3d 601, 609, 93 Cal. Rptr. 289*

Osteopathic Act [Stats. 1923, p. xxv] permits procedural amendments by *Legislature. Bartosh v. Board of Osteopathic Examiners (1947) 82 Cal. App. 2d 486, 493, 186 P.2d 984*

Legislature is precluded from amending or repealing initiative measure without approval of electors unless measure itself allows Legislature to amend or repeal it. *People v. Schuster (1932) 122 Cal. App. 790, 122 Cal. App. Supp. 790, 793, 10 P.2d 204*

[2] Administrative Powers

[a] Limits on Agency Action

Agency award of unlimited general compensatory damages for emotional distress violates *Cal. Const., art. VI, § 1* (judicial powers clause). *Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal. 3d 245, 265, 267, 284 Cal. Rptr. 718, 814 P.2d 704*

When enabling statute is essentially remedial, and does not carry penal program declaring certain practices to be crimes or provide penalties or fines in vindication of public rights, agency does not have discretion to devise punitive measures such as prescription of penalties or fines. *Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal. 3d 245, 271, 284 Cal. Rptr. 718, 814 P.2d 704* (statute authorizing award of limited punitive damages for race-based housing discrimination is remedial); *Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal. 3d 1379, 1388, 241 Cal. Rptr. 67, 743 P.2d 1323* (statutory power to command affirmative action is remedial)

Administrative application of equitable estoppel does not constitute prohibited exercise of "judicial power" within meaning of *Cal. Const., art. VI, § 1*, or *Cal. Const., art. III, § 3*. *Lentz v. McMahon (1989) 49 Cal. 3d 393, 406, 261 Cal. Rptr. 310, 777 P.2d 83*

Award of treble damages by administrative agency violates judicial powers clause of California constitution (*Cal. Const., art. VI, § 1*). *McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 378-379, 386, 261 Cal. Rptr. 318, 777 P.2d 91*

Administrative order requiring immediate payment of money or authorizing immediate withholding of money that would otherwise be owed violates judicial powers clause of California constitution (*Cal. Const., art. VI, § 1*) if order takes effect before court has opportunity to pass on whether to stay order pending review of administrative decision by writ of mandate. *McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 376-377, 386, 261 Cal. Rptr. 318, 777 P.2d 91*

Exercise of act of judicial nature by administrative agency is constitutionally proper when act is authorized by statute or legislation, is reasonably necessary to effectuate agency's primary, legitimate regulatory purposes, and when act does not usurp power of courts to make enforceable, binding judgments. *McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 359, 372, 374, 261 Cal. Rptr. 318, 777 P.2d 91*

Administrative agency is required to act within powers conferred on it by law. Act in excess of such powers is invalid. *Ferdig v. State Personnel Bd. (1969) 71 Cal. 2d 96, 104, 77 Cal. Rptr. 224, 453 P.2d 728*

[b] Agency Interpretation of Statute

Contemporaneous construction of new statute by administrative agency charged with its enforcement is entitled to great weight, although not controlling. *Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal. 3d 1379, 1388, 241 Cal. Rptr. 67, 743 P.2d 1323*

Construction of statute by officials charged with its administration, including their interpretation of authority invested in them to implement and carry out its provisions, is entitled to great weight; regardless of force of administrative construction. However, final responsibility for interpretation of law rests with courts. *Association for Retarded Citizens v. Department of Developmental Services (1985) 38 Cal. 3d 384, 391, 211 Cal. Rptr. 758* .2d 150; *Norman v. McMahon (1990) 225 Cal. App. 3d 1450, 1453-1454, 275 Cal. Rptr. 698*

Administrative agency's interpretation of statute it is charged with implementing is entitled to great weight unless

shown to be clearly erroneous. Ultimate interpretation of statute, however, is left to courts. *Union Oil Co. v. State Bd. of Equalization (1990) 224 Cal. App. 3d 665, 670, 274 Cal. Rptr. 76*

In action alleging that service fees assessed against licensed auto dealers and dismantlers in certain cases without advance notice or hearing violates due process of law, due process of law does not require preassessment hearing given great interest of state and burden on state of applying additional procedural requirement, when compared with minimal private interest directly involved and low probability of error in assessment. *Escondido Imports Inc. v. Department of Motor Vehicles (1983) 145 Cal. App. 3d 834, 840, 193 Cal. Rptr. 772*

Legislature is without power to take away executive powers given directly to agency or officer by *Constitution. State Bd. of Educ. v. Levit (1959) 52 Cal. 2d 441, 461, 463, 343 P.2d 8* ; *California Adjustment Co. v. Atchison, Topeka etc. Ry. Co. (1918) 179 Cal. 140, 152, 175 P. 682*

[c] Judicial Powers

Personnel Board is empowered by *Cal. Const., art. VII, § 3(b)*to exercise limited judicial power. *Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 217 n. 31, 124 Cal. Rptr. 14, 539 P.2d 774*

Legislature is without power to confer judicial power on administrative agency. *Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 42-43, 112 Cal. Rptr. 805, 520 P.2d 29*

Judicial power is power to declare law, define rights of persons under it, and determine and adjudge rights of parties in litigation. *Marin Water & Power Co. v. Railroad Comm'n of Cal. (1916) 171 Cal. 706, 711-712, 154 P. 864*

Judicial power is power to make binding orders and judgments, and to make final decision of controversy [*People v. Bird (1931) 212 Cal. 632, 641, 300 P. 23*

Administrative agencies have quasi-judicial power. *Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 42 n. 14, 112 Cal. Rptr. 805, 520 P.2d 29*

Courts have final determination as to meaning and effect of law. *Bodinson Mfg. Co. v. California Employment Comm'n (1941) 17 Cal. 2d 321, 326, 109 P.2d 935*

[d] Constitutional Limits

Constitutional guaranties of due process and equal protection limit exercise of administrative powers. *Murgia v. Municipal Court (1975) 15 Cal. 3d 286, 294-295, 124 Cal. Rptr. 204, 540 P.2d 44* (equal protection); *Walsh v. Kirby (1974) 13 Cal. 3d 95, 105-106, 118 Cal. Rptr. 1, 529 P.2d 33* (due process)

Constitution guarantees both enforcement of fair and reasonable laws and fair and reasonable enforcement of laws. *Yick Wo v. Hopkins (1886) 118 U.S. 356, 373-374, 6 S. Ct. 1064, 30 L. Ed. 220*

Guaranties of due process and equal protection apply both to enforcement of statutes and to enforcement of regulations. *Wotton v. Bush (1953) 41 Cal. 2d 460, 466-467, 261 P.2d 256*

Agency is not permitted to follow established policy if result is denial of statutory or constitutional right. *Bank of Italy v. Johnson (1926) 200 Cal. 1, 15, 251 P. 784*

Protection against deprivation of property without due process extends only to vested property right, not to anything

less. *Holloway v. Purcell (1950) 35 Cal. 2d 220, 230, 217 P.2d 665* ; *Pacific Tel. & Tel. Co. v. Eshleman (1913) 166 Cal. 640, 680, 689-690, 137 P. 1119*

[e] Conflicts

In cases of possible overlapping jurisdiction between two state agencies, extensive consultation between agencies is not required when new orders cover areas previously subject to one agency's regulation. *California Mfr. Ass'n v. Industrial Welfare Comm'n (1980) 109 Cal. App. 3d 95, 122, 167 Cal. Rptr. 203*

[f] Effect of Combined Powers

Combination of powers enables agency to choose which power to use for particular function, in absence of contrary statute. *Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal. 3d 392, 413, 413 n.11, 128 Cal. Rptr. 183, 546 P.2d 687* ; *Housing Authority v. Dockweiler (1939) 14 Cal. 2d 437, 461, 94 P.2d 794*

Judicial review under *Code Civ. Proc. § 1094.5* (administrative mandate) is unavailable where agency exercises legislative rather than quasi-judicial power. *Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 34 n. 2, 112 Cal. Rptr. 805, 520 P.2d 29*

[g] Separation of Powers Doctrine

Trial court order directing State Controller to pay attorney's fees in amount exceeding that appropriated by Legislature violates separation of powers doctrine. *Estate of Cirone (1987) 189 Cal. App. 3d 1280, 1292, 234 Cal. Rptr. 749*

Separation of powers doctrine [*Cal. Const., art. III, § 3*] is applicable to state government only, not to local governments. *Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 36, 112 Cal. Rptr. 805, 520 P.2d 29*

Separation of powers doctrine requires only that whole power of one branch not be exercised by persons having whole power of another. *People ex rel. McCauley & Tevis v. Brooks (1860) 16 Cal. 11, 40*

[3] Administrative Regulations

Administrative regulations that alter or amend statute or enlarge or impair its scope are void, and courts are not only permitted, but required, to strike down such regulations. *Bilyeu v. Unemployment Ins. Appeals Bd. (1982) 130 Cal. App. 3d 657, 664, 181 Cal. Rptr. 837*

[4] Delegation of Administrative Powers

[a] Limits on Powers

Trial court's invalidation of salary ordinance adopted by county board does not constitute improper interference with legislative process when evidence in action was completely one-sided, and county made no effort to comply with applicable charter provision. County's action was clearly unlawful, arbitrary, capricious, and abuse of discretion. *Santa Clara County Environmental Health Assn. v. County of Santa Clara (1985) 173 Cal. App. 3d 74, 81-82, 218 Cal. Rptr. 678*

[b] Delegation of Discretionary Powers

Discretionary power is in nature of public trust conferred on agency for public benefit and not properly delegable. *California School Employees Assn. v. Personnel Com. of Pajaro Valley Unified School Dist. (1970) 3 Cal. 3d 139, 144, 89 Cal. Rptr. 620, 474 P.2d 436* ; *Knight v. Eureka (1898) 123 Cal. 192, 194, 55 P. 768* ; *Scollay v. Butte County (1885) 67 Cal. 249, 255, 7 P. 661* ; *Redwood City v. Moore (1965) 231 Cal. App. 2d 563, 576, 42 Cal. Rptr. 72*

Rule against delegation of discretionary power is fundamental and apparently of universal application. *Chamber of Commerce v. Stephens (1931) 212 Cal. 607, 610, 299 P. 728*

Delegation of discretionary power in absence of statutory authority amounts to pro tanto amendment or repeal of enabling law by agency. *Thompson v. Board of Trustees (1904) 144 Cal. 281, 283, 77 P. 951*

Delegation of discretionary power is permitted where statute or other governing law authorizes it. *California School Employees Assn. v. Personnel Com. of Pajaro Valley Unified School Dist. (1970) 3 Cal. 3d 139, 144, 89 Cal. Rptr. 620, 474 P.2d 436* ; *House v. Los Angeles County (1894) 104 Cal. 73, 79, 37 P. 796* ; *Schecter v. County of Los Angeles (1968) 258 Cal. App. 2d 391, 396, 65 Cal. Rptr. 739*

Officer having power to delegate to deputy does not necessarily carry that power with him in all functions, such as service as member of board having judgmental functions. *Webster v. Board of Education (1903) 140 Cal. 331, 332, 73 P. 1070*

Improper delegation is subject to validation through ratification. *California School Employees Assn. v. Personnel Com. of Pajaro Valley Unified School Dist. (1970) 3 Cal. 3d 139, 145, 89 Cal. Rptr. 620, 474 P.2d 436* ; *Mott v. Horstmann (1950) 36 Cal. 2d 388, 391, 224 P.2d 11*

Determining fitness of license applicants is discretionary function. *McDonough v. Goodcell (1939) 13 Cal. 2d 741, 746-747, 91 P.2d 1035*

Delegation of task of preparing and grading examinations given to license applicants is not improper where agency retains power to exercise discretion whether to issue license. Aylward v. State Bd. etc. *(1948) 31 Cal. 2d 833, 840-841, 192 P.2d 929*

Power delegated to agency for exercise of judgment or discretion is purely personal to agency and not subject to further delegation. *Schecter v. County of Los Angeles (1968) 258 Cal. App. 2d 391, 396, 65 Cal. Rptr. 739*

[c] Ministerial and Discretionary Functions

Delegation of ministerial functions is permissible. *California School Employees Assn. v. Personnel Com. of Pajaro Valley Unified School Dist. (1970) 3 Cal. 3d 139, 144-145, 89 Cal. Rptr. 620, 474 P.2d 436* ; *House v. Los Angeles County (1894) 104 Cal. 73, 79, 37 P. 796* ; *Schecter v. Los Angeles County (1968) 258 Cal. App. 2d 391, 396-397, 65 Cal. Rptr. 739*

All official acts are discretionary to some extent. *Johnson v. State of California (1968) 69 Cal. 2d 782, 788, 73 Cal. Rptr. 240, 447 P.2d 352* ; *Holley v. Orange County (1895) 106 Cal. 420, 424-425, 39 P. 790* ; *Ham v. Los Angeles County (1920) 46 Cal. App. 148, 162, 189 P. 462*

Nature of function as ministerial or discretionary depends more on policy reasons for making distinction than on literal

differences in definitions. *Johnson v. State of California (1968) 69 Cal. 2d 782, 788, 73 Cal. Rptr. 240, 447 P.2d 352*

Definitional differences between ministerial and discretionary functions. *Burgdorf v. Funder (1966) 246 Cal. App. 2d 443, 449, 54 Cal. Rptr. 805* ; *Morgan v. County of Yuba (1964) 230 Cal. App. 2d 938, 942, 41 Cal. Rptr. 508* ; *Elder v. Anderson (1962) 205 Cal. App. 2d 326, 331, 23 Cal. Rptr. 48*

Authorization to delegate ministerial function is inferrable from express grant of power to perform function. *Klevesahl v. Byington (1934) 1 Cal. App. 2d 671, 676, 37 P.2d 179*

[d] Qualifications of Delegate

Agency is permitted to appoint delegate outside government or unconnected with agency as long as agency retains ultimate control so as to safeguard public interest. *Chamber of Commerce v. Stephens (1931) 212 Cal. 607, 610, 299 P. 728* ; *Egan v. San Francisco (1913) 165 Cal. 576, 584, 133 P. 294* ; *Morton Bros. v. Pacific Coast S.S. Co. (1898) 122 Cal. 352, 353-354, 55 P. 1* ; *Los Angeles County v. Nesvig (1965) 231 Cal. App. 2d 603, 616-617, 41 Cal. Rptr. 918* ; *Haggerty v. Oakland (1958) 161 Cal. App. 2d 407, 415-417, 326 P.2d 957*

Delegate is not required to have more qualifications than person appointing him, in absence of contrary statute. *Serenko v. Bright (1968) 263 Cal. App. 2d 682, 690, 70 Cal. Rptr. 1*

Delegate is not constitutionally required to be qualified to perform delegated task. *Stoetzner v. Los Angeles (1959) 170 Cal. App. 2d 394, 398, 338 P.2d 971*

[e] Validity of Purported Delegation

Agency's subsequent approval or ratification of act designated to subordinate is validating act, which becomes act of agency itself. *Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist. (1989) 49 Cal. 3d 408, 428, 261 Cal. Rptr. 384, 777 P.2d 157*

Agency is not permitted to enlarge or modify scope of power delegated to it by *Legislature. Ralphs Grocery Co. v. Reimel (1968) 69 Cal. 2d 172, 176 n. 3, 70 Cal. Rptr. 407, 444 P.2d 79*

Validity of purported delegation depends in part on balancing of interests for and against delegation. *Patton v. Board of Harbor Commissioners (1970) 13 Cal. App. 3d 536, 543, 91 Cal. Rptr. 832*

Attempted delegation to person already having all power purportedly delegated is no delegation at all. *Schnider v. State of California (1952) 38 Cal. 2d 439, 443, 241 P.2d 1*

Administrative agency has only such power as law expressly or implicitly gives it. *City & County of San Francisco v. Padilla (1972) 23 Cal. App. 3d 388, 400, 100 Cal. Rptr. 223*

Delegate of agency is not permitted to enlarge or modify scope of delegated power. *Starsky v. Board of Trustees (1973) 34 Cal. App. 3d 310, 315, 109 Cal. Rptr. 822*

Validity of purported delegation depends in part on whether agency delegates power in connection with exercising legislative or quasi-judicial power. *Vita-Pharmacals, Inc. v. Bd. of Pharmacy (1952) 110 Cal. App. 2d 826, 831, 243 P.2d 890*

Administrative regulations have force and effect of law. *Viner v. Civil Serv. Comm'n (1943) 59 Cal. App. 2d 458,*

465, 139 P.2d 88

Ambiguous act not conforming to prescribed procedure for delegation but apparently amounting to delegation is valid delegation if in fact appointing power tried to exercise authority to delegate. *Eggert v. Pacific States Sav. & L. Co. (1943) 57 Cal. App. 2d 239, 249, 136 P.2d 822*

[5] Delegation of Legislative Power

Congress is permitted to delegate power "to fill up the details" in general legislation. *Wayman v. Southard (1825) 23 U.S. 1, 43, 6 L. Ed. 253*

Legislature is required to settle controverted issues of policy whenever it has the time, information, and competence to deal with them. *Clean Air Constituency v. California State Air Resources Bd. (1974) 11 Cal. 3d 801, 817, 114 Cal. Rptr. 577, 523 P.2d 617*

Legislature is required to resolve truly fundamental issues. *Kugler v. Yocum (1968) 69 Cal. 2d 371, 376, 71 Cal. Rptr. 687, 445 P.2d 303* ; *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control (1966) 65 Cal. 2d 349, 369, 55 Cal. Rptr. 23, 420 P.2d 735*

Important consideration is not whether standards are given but whether adequate safeguards exist against abuse of delegated power. *Kugler v. Yocum (1968) 69 Cal. 2d 371, 381-382, 71 Cal. Rptr. 687, 445 P.2d 303*

Standard to guide exercise of delegated legislative power is not required to be more definite than necessary to provide directives of conduct for agency. *Duskin v. State Bd. of Dry Cleaners (1962) 58 Cal. 2d 155, 160, 23 Cal. Rptr. 404, 373 P.2d 468*

Court is permitted to find sufficient standard by inference from general purpose of statute and reasons for enactment. *Louis Stores, Inc. v. Department of Alcoholic Beverage Control (1962) 57 Cal. 2d 749, 760, 22 Cal. Rptr. 14, 371 P.2d 758* ; *In re Petersen (1958) 51 Cal. 2d 177, 184-186, 331 P.2d 24*

Legislature is not empowered to take away, diminish or restrict agency's power given by *Constitution. State Bd. of Educ. v. Levit (1959) 52 Cal. 2d 441, 461, 463, 343 P.2d 8* ; *California Adjustment Co. v. Atchison, Topeka etc. Ry. Co. (1918) 179 Cal. 140, 152, 175 P. 682*

Legislature is free to choose whether to delegate legislative power unless Constitution requires delegation. *Dean v. Kuchel (1951) 37 Cal. 2d 97, 102, 104-105, 230 P.2d 811*

Constitutional directive for Legislature to provide for something is authorization to delegate legislative power. *El Dorado Oil Works v. McColgan (1950) 34 Cal. 2d 731, 737, 215 P.2d 4*

Legislature is permitted to delegate legislative power to constitutional agencies. *Sandstrom v. Cal. Horse Racing Bd. (1948) 31 Cal. 2d 401, 413, 189 P.2d 17 , cert. denied, 335 U.S. 814, 69 S. Ct. 31, 93 L. Ed. 369* ; *Harris v. Alcoholic Bev. etc. Appeals Bd. (1964) 228 Cal. App. 2d 1, 6, 39 Cal. Rptr. 192* , 39 Rptr 192

Legislature is permitted to delegate "power to fill up the details" in general legislation if it fixes primary standard to guide exercise of delegated power. *First Indus. Loan Co. v. Daugherty (1945) 26 Cal. 2d 545, 549, 159 P.2d 921*

Legislature's attempt to make future regulations of another jurisdiction part of California law is unlawful delegation. *Brock v. Superior Court (1937) 9 Cal. 2d 291, 297, 71 P.2d 209*

Delegation of legislative power to administrative agencies is necessary to transaction of public business. *Gaylord v. Pasadena (1917) 175 Cal. 433, 436, 166 P. 348*

Constitutional directive for Legislature to regulate compensation of county officials requires that Legislature do so itself and precludes delegation of task to county supervisors. *People v. Johnson (1892) 95 Cal. 471, 474-475, 31 P. 611* ; *Dougherty v. Austin (1892) 94 Cal. 601, 604-607, 29 P. 1092*

Delegation of power to determine circumstances under which individual would be criminally prosecuted does not constitute unconstitutional delegation of legislative power when legislature, not agency, originally created underlying criminal sanction and fixed penalties. *People v. Martin (1989) 211 Cal. App. 3d 699, 710, 259 Cal. Rptr. 770* (administrative agency authorized to prepare list of hazardous wastes, improper disposal of which would be punishable under environmental quality statutes)

Whether or not legislature has previously made basic policy decision that provides standard or guide for exercise of administrative discretion is critical question in determining if decision is fundamental so as to be reserved for Legislature alone. *California Medical Assn. v. Lackner (1981) 124 Cal. App. 3d 28, 41, 177 Cal. Rptr. 188*

Unqualified grant of power to administrative agency grants all power held by Legislature itself, since Legislature must be presumed to know extent of its power. *Young v. Department of Fish and Game (1981) 124 Cal. App. 3d 257, 277, 177 Cal. Rptr. 247* (dictum)

Legislature is able to delegate authority to administrative agency to temporarily render its own acts inoperative so long as usual conditions of valid delegation (such as retention of control over fundamental policy decisions and appropriate standards and safeguards for exercise of delegated power) are met. *Salmon Trollers Marketing Assn. v. Fullerton (1981) 124 Cal. App. 3d 291, 301-302, 177 Cal. Rptr. 362*

[6] Delegation of Judicial Powers

Personnel Board is empowered *Cal. Const., art. VII, § 3(b)* to exercise limited judicial power. *Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 217 n. 31, 124 Cal. Rptr. 14, 539 P.2d 774*

Legislature is without power to confer judicial power on administrative agency. *Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 42-43, 112 Cal. Rptr. 805, 520 P.2d 29*

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§ 470.34 Attorney General Opinions

Director of Public Works (now Transportation) is not authorized to delegate surveying, planning, and contract responsibilities concerning municipal public works. *1 Ops. Cal. Att'y Gen. 628 (1943)*

State Planning Board is not authorized to delegate duties to committee. *1 Ops. Cal. Att'y Gen. 442 (1943)*

Director of Motor Vehicles is authorized to delegate certain duties. *1 Ops. Cal. Att'y Gen. 78 (1943)*

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§ 470.35 Law Reviews

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Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies, 42 U.C.L.A. L. Rev. 1157 (1995).*

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§ 470.36 Text References

Davis, Administrative Law Treatise

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§ 470.37 Internet References

California Home Page. This site includes links to other sites maintained by numerous state agencies. http://www.ca.gov

Department of Consumer Affairs. This site includes links to sites maintained by many state agencies that are under this department, as well as links to agency sites. http://www.dca.ca.gov

Office of Administrative Hearings. This site includes: information and location concerning specific OAH offices; an OAH hearing guide; information concerning Administrative Procedure Act statutes, regulations, and proposed regulations; OAH forms; information concerning alternative dispute resolution procedures; and declaratory decisions. http://www.dgs.ca.gov/oah

Office of Administrative Law. This site includes: OAL publications; links to OAL statutes and regulations relating to rulemaking; regulations submitted to the OAL for review, and information for contacting or provding input to the OAL regarding rulemaking. http://www.oal.ca.gov

California Code of Regulations. Pursuant to *Gov. Code §§ 11340.1(b), 11344*, requiring the OAL to make the California Code of Regulations available on the Internet free of charge, this site includes the full text of the CCR. http://ccr.oal.ca.gov

California Courts. This site includes: general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most Court of Appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes: text of constitution, codes, and statutes (including complete text

of APA); and information concerning pending legislation. http://www.leginfo.ca.gov

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[Reserved]

§§ 470.38[Reserved]

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§ 470.50 Scope of Appendix

This appendix provides a brief summary of general information relating to selected licensing agencies. Not all state agencies are included in this appendix. For a more complete listing of all agencies, see *§ 470.20*. Information relating to other agencies may be obtained through a state agency index linked to the Internet site maintained by the state of California [*see* http://www.ca.gov ("California Homepage"); *see also* http://www.dca.ca.gov (Internet site of the Dept. of Consumer Affairs, which oversees many licensing agencies)].

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§ 470.51 California Architects Board

The California Architects Board is an agency within the Department of Consumer Affairs [*see Bus. & Prof. Code § 5510*]. The Board is the licensing and disciplinary agency that governs professional architects [*see Bus. & Prof. Code § 475 et seq.* (denial, suspension, and revocation of licenses generally), 5500 et seq. (Architect Practices Act); *see also Gov. Code § 11340 et seq.* (APA); *16 Cal. Code Reg. §§ 100-153*].

For discussion and forms relating to actions against architects, including some discussion of licensing requirements, see Ch. 56, *Architects* .

- **Address:** 400 R Street, Suite 4000, Sacramento, CA 95814
- **Telephone:** (916) 445-3393; FAX (916) 445-8524
- **Internet Site:** http://www.cbae.cahwnet.gov

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§ 470.52 Board of Chiropractic Examiners

The Board of Chiropractic Examiners is an independent agency within the Department of Consumer Affairs. The Board is the licensing and disciplinary agency that governs professional chiropractic [*see Bus. & Prof. Code § 1000-1* et seq. (Chiropractic Act, adopted by initiative measure in 1922 and appearing as an appendix to the Bus. and Prof. Code in Deering's California Code Annotated); *see also Bus. & Prof. Code §§ 1000* (designation of Act), 1001, 1050 et seq. (chiropractic corporations); *16 Cal. Code Reg. § 301 et seq.*].

The Board's licensing and disciplinary duties include publication of an annual directory listing licensed chiropractors and stating legal developments relating to chiropractors, as well as cooperating with attorneys and law enforcement personnel in the enforcement of the Act [*see Bus. & Prof. Code § 1001*; *Bus. & Prof. Code § 1000-17*].

- **Address:** 2710 North Gateway Oaks, Suite 100, Sacramento, CA 95833-3505
- **Telephone:** (916) 263-5355; FAX (916) 263-5369
- **Internet Site:** http://www.dca.ca.gov/r_r/chiropra.htm

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§ 470.53 Dental Board of California

The Dental Board of California is a statutory agency within the Department of Consumer Affairs [*Bus. & Prof. Code §§ 101(a), 1601*], governed by the Dental Practice Act [*Bus. & Prof. Code § 1600 et seq.*; *see also Gov. Code § 11340 et seq.* (APA); *16 Cal. Code Reg. §§ 1000-1089*].

The Dental Board of California is responsible for enforcing the Dental Practice Act [*Bus. & Prof. Code § 1600 et seq.*]. It is the licensing and disciplinary agency for dentists and six classes of dental support practitioners, known collectively as "dental auxiliaries" [*Bus. & Prof. Code §§ 1611, 1741(e)*; *see also Bus. & Prof. Code §§ 1634, 1670, 1742, 1747*]. The Board functions through an Examining Committee (dentists) and a Committee on Dental Auxiliaries [*see Bus. & Prof. Code §§ 1601, 1621.2, 1743*].

For further discussion and forms relating to the licensing and discipline of dentists, see Ch. 209, *Dentists* .

- **Address:** 1432 Howe Ave., Suite. 85-B, Sacramento, CA 95825
- **Telephone:** (916) 263-2300 (dentists), (916) 263-2595 (dental auxiliaries)
- **Internet Site:** http://www.dca.ca.gov/r_r/dentalbd.htm

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§ 470.54 Board of Podiatric Medicine

The California Board of Podiatric Medicine is a statutory agency within the Medical Board of California, Department of Consumer Affairs [*Bus. & Prof. Code §§ 101(aa), 2460*], and is governed by *Bus. & Prof. Code §§ 2460 et seq.* [*see also Gov. Code § 11340 et seq.* (APA); *16 Cal. Code Reg. §§ 1399.650-1399.697*]. The Board functions as the licensing and disciplinary agency for doctors of podiatric medicine.

For coverage and forms relating to physicians generally, see Ch. 414, *Physicians: Licensing and Discipline* .

- **Address:** 1420 Howe Avenue, Suite 8, Sacramento, CA 95825-3229
- **Telephone:** (916) 263-2647; FAX 263-2651
- **Internet Site:** http://www.dca.ca.gov/bpm/

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§ 470.55 Boards of Psychology

The Board of Psychology is under the Medical Board of California, Department of Consumer Affairs [*Bus. & Prof. Code §§ 101(b), 2920*], and is governed by the Psychology Licensing Law [*Bus. & Prof. Code § 2900 et seq.*; *see also Gov. Code § 11340 et seq.* (APA); *16 Cal. Code Reg. §§ 1380-1397.40*]. The Board functions as the licensing and disciplinary agency for practicing psychologists [*see Bus. & Prof. Code § 2900*].

- **Address:** 1422 Howe Ave., Suite 22, Sacramento, CA 95825-3200
- **Telephone:** (916) 263-2699
- **Internet Site:** http://www.dca.ca.gov/psych

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§ 470.56 Board of Registered Nursing

The Board of Registered Nursing is a statutory agency within the Department of Consumer Affairs [*Bus. & Prof. Code § 2701*], and is governed by the Nursing Practice Act [*Bus. & Prof. Code § 2700 et seq.*; *see also Gov. Code § 11340 et seq.* (APA); *16 Cal. Code Reg. §§ 1402-1485*]. The Board, functioning through an executive officer who is a currently registered nurse, is the licensing and disciplinary agency for registered nurses [*see Bus. & Prof. Code § 2708*; *16 Cal. Code Reg. § 1403*].

- **Address:** 400 R St., Suite 4030, Sacramento, CA 95814
- **Telephone:** (916) 322-3350
- **Internet Site:** http://www.dca.ca.gov/r_r/regnurs1.htm

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§ 470.57 Board of Vocational Nursing and Psychiatric Technicians

The Board of Vocational Nursing and Psychiatric Technicians is a statutory agency under the Department of Consumer Affairs [*Bus. & Prof. Code § 2841*], and is governed by the Vocational Nursing Practice Act and the Psychiatric Technicians Law [*Bus. & Prof. Code §§ 2840 et seq., 4500* et seq.; *see also Gov. Code § 11340 et seq.* (APA); *16 Cal. Code Reg. §§ 2500-2547.5, 2562-2590*]. The Board is the licensing and disciplinary agency for licensed vocational nurses and psychiatric technicians; its disciplinary functions are handled through an executive officer [*see Bus. & Prof. Code §§ 2847*; *16 Cal. Code Reg. §§ 2503, 2563*].

- **Address:** 2535 Capitol Oaks Dr., Suite 205, Sacramento, CA 95833
- **Telephone:** (916) 263-7800; FAX (916) 263-7859
- **Internet Site:** http://www.bvnpt.ca.gov

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§ 470.58 Bureau of Automotive Repair

The Bureau of Automotive Repair is a statutory agency within the Department of Consumer Affairs [*Bus. & Prof. Code § 9882*; *16 Cal. Code Reg. § 3303(b)*], and is governed by the Automotive Repair Act [*Bus. & Prof. Code § 9880 et seq.*; *see also Bus. & Prof. Code §§ 472-472.5*; *Health & Safety Code § 44000 et seq.*; *Veh. Code §§ 12000-12003*; *Gov. Code § 11340 et seq.* (APA); *16 Cal. Code Reg. §§ 3300-3397.43*]. The Bureau regulates the California automotive repair industry [*see Bus. & Prof. Code § 101.6*], by enforcing the Automotive Repair Act and its regulations, and by enforcing the additional statutes such as the following:

- Automotive repair dealers [*see Bus. & Prof. Code § 9880 et seq.*].
- Licensed official stations, adjusters, and installers [*see Bus. & Prof. Code §§ 9887.1-9889.19*].
- The smog check program [*see Health & Safety Code §§ 44000-44071*].
- Fleet facility licenses [*see* Bus. & Prof. Code § 9888; *16 Cal. Code Reg. §§ 3340.1-3340.50.5*].
- Third-party dispute resolution processes for disputes between new car owners and the manufacturers [*see Civ. Code § 1793.22*; *Bus. & Prof. Code §§ 472-472.5*].
- Invoice requirements for car parts [*see Veh. Code §§ 12000-12003*].

- **Address:** 10240 Systems Parkway, Suite D, Sacramento, CA 95827
- **Telephone:** (916) 255-4300
- **Internet Site:** http://www.smogcheck.ca.gov

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§ 470.59 Bureau of Electronic and Appliance Repair, Home Furnishings, and Thermal Insulation

The Bureau of Electronic and Appliance Repair, Home Furnishings, and Thermal Insulation is a statutory agency within the Department of Consumer Affairs [*Bus. & Prof. Code § 9810*]. The Bureau is governed by the Electronic and Appliance Repair Dealer Registration Law [*Bus. & Prof. Code § 9800 et seq.*; *see also Gov. Code § 11340 et seq.* (APA); *16 Cal. Code Reg. §§ 2700-2770*]. The Electronic and Appliance Repair Dealer Registration Law (*Bus. & Prof. Code § 9800 et seq.*) concerns consumer products; the repair of electronic devices and appliances used commercially service is virtually exempt from regulation under this law [*see Bus. & Prof. Code § 9802(b), (c)*]. The Bureau functions as a registration or licensing and disciplinary agency for "service dealers" who repair electronic devices and appliances [*see Bus. & Prof. Code § 9801(f)*; *Bus. & Prof. Code §§ 9812, 9840, 9841, 9850, 9860*]. The chief of the Bureau of Electronic and Appliance Repair functions as the executive officer and administers the Repair Dealer Registration Law subject to supervision by the director of the Department of Consumer Affairs [*Bus. & Prof. Code § 9810*].

- **Address:** 400 R Street, Sacramento, CA 95814 (Dept. of Consumer Affairs generally)
- **Telephone:** (800) 952-5210; (916) 445-1254 (Dept. of Consumer Affairs generally)
- **Internet Site:** http://www.dca.ca.gov/r_r/electron.htm

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§ 470.60 Bureau of Security and Investigative Services

The Bureau of Security and Investigative Services is a statutory agency within the Department of Consumer Affairs [*see Bus. & Prof. Code 7500*], which is governed by *Bus. & Prof. Code 7500 et seq.* [*see also Gov. Code § 11340 et seq.* (APA); *16 Cal. Code Reg. §§ 600-699.1*]. The Bureau functions through a chief of security and investigative services, who serves under the direction and supervision of the director of consumer affairs [*Bus. & Prof. Code §§ 7501.1, 7512.5*]. It has licensing and regulatory authority over the following industries and professions:

- Private investigators [*Bus. & Prof. Code §§ 7540-7542.1*].
- Private patrol operators [*Bus. & Prof. Code §§ 7583-7583.42*].
- Firearms and baton training facilities [*Bus. & Prof. Code §§ 7585-7585.20*].
- Locksmiths [*Bus. & Prof. Code §§ 6980-6980.84*].
- Repossessors [*Bus. & Prof. Code §§ 7500-7511* (Repossessors Act)].
- Alarm companies [*Bus. & Prof. Code §§ 7590-7599.75* (Alarm Company Act)].

- **Address:** 400 R Street, Suite 3040, Sacramento, CA 95814
- **Telephone:** (916) 322-4000; FAX (916) 323-1182
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§ 470.61 California Horse Racing Board

The California Horse Racing Board is a constitutional agency [*Cal. Const. art. IV, § 19(b)*], governed by the Horse Racing Law [*Bus. & Prof. Code § 19400 et seq.*; *see also 4 Cal. Code Reg. §§ 1400-2061*; *Epstein v. California Horse Racing Board (1963) 222 Cal. App. 2d 831, 836, 35 Cal. Rptr. 642]* . The Horse Racing Law was enacted pursuant to *Cal. Const., art IV, § 19(b)*, as a comprehensive regulation of almost every aspect of legalized horse racing and wagering on horse racing [*see Flores v. Los Angeles Turf Club (1961) 55 Cal. 2d 736, 745-746, 13 Cal. Rptr. 201, 361 P.2d 921]* . The Board has supervision and jurisdiction under the Horse Racing Law over meetings in California where horse races with wagering on their results are held, and over all persons and things having to do with the operation of these meetings [*see Bus. & Prof. Code §§ 19401, 19420*]. The Board's powers include the following [*Bus. & Prof. Code § 19440(a)*]:

- Adopting, administering, and enforcing rules and regulations affecting horse racing and pari-mutuel wagering.

- Adjudicating controversies arising from the enforcement of those laws and regulations dealing with horse racing and pari-mutuel wagering.

- Licensing each racing association and all persons, other than the public at large, who participate in a horse race meeting with pari-mutuel wagering.

- Allocating racing dates to qualified associations in the best interests of the people of California in accord with the intent of the Horse Racing Law.

Under the Horse Racing Law, the goals of protecting the integrity of the gaming operations and insuring a rational allocation of time periods during which racing events will be held are achieved through licensing. In particular, racing associations, wagering facility operators, virtually all competitors (both human and equine), persons attendant on the horses, pari-mutuel employees, and other employees connected with the horse racing program are required to be licensed by the Board [*see Bus. & Prof. Code §§ 19480, 19510*; *4 Cal. Code Reg. §§ 1430-1510*]. Patrons attending a race meeting are also bound by certain standards of conduct, and may be removed, excluded, or ejected from the horse

racing inclosure for misconduct or prior criminal acts relating to illegal wagering or other specifically proscribed activities [*see Bus. & Prof. Code § 19572*; *4 Cal. Code Reg. §§ 1980, 1981, 1989, 1990*]. The Board functions primarily through a director or executive officer [*see Bus. & Prof. Code §§ 19428*].

For discussion and forms relating to gambling generally, see Ch. 272, *Gambling* . For discussion and forms relating to actions for injuries sustained at a sporting event, see Ch. 273, *Games, Sports, and Athletics* .

- **Address:** 1010 Hurley Way Suite 300, Sacramento, CA 95825
- **Telephone:** (916) 263-6000; FAX (916) 263-6042
- **Internet Site:** http://www.chrb.ca.gov

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§ 470.62 California State Board of Pharmacy

The California State Board of Pharmacy is a statutory agency within the Department of Consumer Affairs [*Bus. & Prof. Code § 4001*], and is governed by the Pharmacy Law [*Bus. & Prof. Code § 4000 et seq.*; *see also Gov. Code § 11340 et seq.* (APA); *16 Cal. Code Reg. §§ 1700-1792*]. The Board, functioning primarily through an executive officer, operates as the licensing and disciplinary agency for pharmacists and the regulatory agency for pharmacies [*see Bus. & Prof. Code §§ 4003(d), 4004.5, 4005*; *16 Cal. Code Reg. § 1703*].

For further discussion of the licensing and regulation of pharmacists, see Ch. 214, *Drugs and Pharmacists* .

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§ 470.63 Commission on Teacher Credentialing

The Commission is a statutory agency [*Educ. Code §§ 44200, 44210*], and is governed by *Educ. Code §§ 44200 et seq.* [*see also Gov. Code § 11340 et seq.* (APA); *5 Cal. Code Reg. § 80001 et seq.*]. It operates as the agency that oversees the standards and procedures for certifying educational personnel as qualified for a license to practice in the public schools of California [*see Educ. Code § 44225*].

For detailed discussion and forms relating to proceedings to issue, suspend, or revoke a certificate issued by the Commission, and otherwise relating to certificated employees of California pubic schools, see Ch. 512, *Schools: Certification, Dismissal, and Related Employment Issues* .

- **Address:** 1812 9th Street, Sacramento, CA 95814
- **Telephone:** (916) 445-7254
- **Internet Site:** http://www.ctc.ca.gov

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§ 470.64 Contractor's State License Board

The Contractors' State License Board is a statutory agency within the Department of Consumer Affairs [*Bus. & Prof. Code § 7000.5*], and is governed by the Contractors' State License Law [*Bus. & Prof. Code § 7000 et seq.*; *see also Gov. Code § 11340 et seq.* (APA); *16 Cal. Code Reg. §§ 810-887*]. The Board's main functions are licensing [*Bus. & Prof. Code § 7065*] and categorizing [*Bus. & Prof. Code § 7059(a)*] contractors and enforcing competency standards within the industry [*Bus. & Prof. Code § 7090*].

For detailed discussion and forms relating to contractor licensing and discipline, see *Ch. 104, Building Contracts, § 104.70* et seq.

- **Address:** 9835 Goethe Road, Sacramento, CA 95826
- **Telephone:** (916) 255-3900
- **Internet Site:** http://www.cslb.ca.gov

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§ 470.65 Department of Alcoholic Beverage Control and Alcoholic Beverage Control Appeals Board

The Department of Alcoholic Beverage Control (ABC) is a constitutional agency, within the Business, Transportation and Housing Agency [*see Cal. Const. art. XX, § 22*; *Gov. Code § 13975*]. The ABC, governed by the Alcoholic Beverage Control Act [*Bus. & Prof. Code §§ 23000 et seq.*; *see also Gov. Code § 11340 et seq.* (APA); *4 Cal. Code Reg. §§ 1-150*], is the licensing and regulatory agency for persons and businesses engaged in the manufacture, importation, or sale of alcoholic beverages [*see Bus. & Prof. Code § 23001*].

The Alcoholic Beverage Control Appeals Board, also a constitutional agency, conducts specified powers of administrative review over orders and actions of the ABC [*see Cal. Const. art. XX, § 22*; *4 Cal. Code Reg. §§ 178-200.1*].

For detailed discussion of proceedings before the ABC and the Appeals Board, as well as judicial review of these proceedings, see Ch. 18, *Alcoholic Beverage Licenses* .

- **Address:** Department of Alcoholic Beverage Control (Headquarters), 3810 Rosin Court, Suite 150, Sacramento, CA 95834; Alcoholic Beverage Control Appeals Board, 660 J Street, Suite 443, Sacramento, CA 95814

- **Telephone:** (916) 263-6900 (ABC); (916) 445-4005 (Appeals Board)

- **Internet Site:** http://www.abc.ca.gov

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§ 470.66 Department of Motor Vehicles

The Department of Motor Vehicles (DMV) is a part of the Business, Transportation and Housing Agency in the executive branch of the government of the State of California [*Veh. Code § 1500*]. The DMV is governed by *Veh. Code §§ 1 et seq.* (definitions, Department of Motor Vehicles), 12500 et seq. (drivers' licenses) [*see also Gov. Code § 11340 et seq.* (APA); *13 Cal. Code Reg. §§ 100-100.90*]. The DMV is the agency that administers motor vehicle registration and motor vehicle driver licensing. It also regulates and licenses businesses associated with the manufacture, distribution, transport, and sale of motor vehicles [*cf.* § 470.57, concerning the regulation of mechanics and the vehicle repair industry by the Bureau of Automotive Repair]. The DMV's driver licensing functions include the following:

- Prescribing and providing applications for drivers' licenses [*Veh. Code § 1652(a)*.

- Issuing and renewing licenses [*Veh. Code §§ 12800 et seq.*

- Suspending and revoking licenses [*Veh. Code §§ 13350 et seq.*

- Holding investigations to determine whether a person's driving privileges should be restricted or terminated [*Veh. Code § 13800*].

- Conducting hearings, on demand of persons whose driving privileges have been restricted or terminated by the Board [*Veh. Code §§ 14100 et seq.*

For detailed discussion and forms relating to driver licensing proceedings before the DMV, see Ch. 92, *Automobiles: Drivers' Licenses* .

See also *§ 470.69*, discussing the New Motor Vehicle Board, which is a division of the DMV.

- **Address:** 4700 Broadway, Sacramento, CA 95820

- **Telephone:** (916) 657-7669

- **Internet Site:** http://www.dmv.ca.gov

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41-470 California Forms of Pleading and Practice--Annotated § 470.67

§ 470.67 Department of Real Estate

The Department of Real Estate (DRE) is a statutory agency within the Business and Transportation Agency [*Bus. & Prof. Code § 10050*], governed by the Real Estate Law [*Bus. & Prof. Code §§ 10000 et seq.*; *see also Gov. Code § 11340 et seq.* (APA); *10 Cal. Code Reg. §§ 2705-3109*]. The DRE is headed by the Real Estate Commissioner [*Bus. & Prof. Code § 10050*], who appoints members to the Real Estate Advisory Commission, which in turns advises and makes recommendations on policy to the Commissioner. The DRE functions as the licensing and disciplinary agency for the real estate agents [*see Bus. & Prof. Code § 10071*].

For discussion and forms relating to real estate brokers and salespersons generally, Ch. 103, *Brokers*. See also *§ 470.70*, regarding the Office of Real Estate Appraisers.

- **Address:** 2201 Broadway, Sacramento, CA 95818
- **Telephone:** (916) 227-0931
- **Internet Site:** http://www.dre.ca.gov

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41-470 California Forms of Pleading and Practice--Annotated § 470.68

§ 470.68 Medical Board of California

The Medical Board of California is an agency of the Department of Consumer Affairs [*Bus. & Prof. Code §§ 101(b), 2001*]. The Board is governed by and administers the Medical Practice Act [*Bus. & Prof. Code § 2000 et seq.*; *see also Gov. Code § 11340 et seq.* (APA); *16 Cal. Code Reg. §§ 1300-1353* (Division of Licensing), *16 Cal. Code Reg. §§ 1355-1364* (Division of Medical Quality)]. The Board functions as the licensing and disciplinary agency for physicians and surgeons and certain affiliated healing arts professionals.

The Board is responsible for enforcing professional standards and carrying out disciplinary actions against physicians [*Bus. & Prof. Code § 2004*].

Legal proceedings against the Board or its divisions may be instituted only in Sacramento, San Francisco, Los Angeles, or San Diego [*Bus. & Prof. Code § 2019*; *see McPheeters v. Board of Medical Examiners (1946) 74 Cal. App. 2d 46, 49, 168 P.2d 65* (superior court in Fresno County lacked jurisdiction in proceeding for writ of mandate to require Board to dismiss proceedings against physician)]. For detailed discussion and forms relating to the licensing and discipline of physicians, see Ch. 414, *Physicians: Licensing and Discipline* .

The Medical Board also oversees the licensing and disciplinary agencies of a number of "Affiliated Healing Arts Professions." See *§§ 470.54, 470.55, § 470.72, § 470.73, § 470.74* for discussion of some of these agencies: the Board of Podiatric Medicine, the Board of Psychology, the Physical Therapy Board, the Physician Assistant Committee, and the Speech-Language Pathology and Audiology Examining Committee, respectively. Contact the Medical Board for information concerning the licensing of other affiliated healing arts professionals, including midwives, opticians, acupuncturists, hearing aid dispensers, and respiratory care specialists.

See also *§ 470.71*, discussing the independent Osteopathic Medical Board.

- **Address:** 1426 Howe Avenue, Suite 54, Sacramento, CA 95825
- **Telephone:** (916) 263-2466

- **Internet Site:** http://www.medbd.ca.gov

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41-470 California Forms of Pleading and Practice--Annotated § 470.69

§ 470.69 New Motor Vehicle Board

The New Motor Vehicle Board is a statutory agency within the Department of Motor Vehicles [*Veh. Code § 3000*], and is governed by *Veh. Code § 3000 et seq.* [*see also Gov. Code § 11340 et seq.* (APA); *13 Cal. Code Reg. §§ 550-599*]. The Board oversees the licensing and regulation of new motor vehicle dealers and resolves franchise-related disputes concerning new car dealerships [*see Veh. Code §§ 3000-3069*)]. Under *Veh. Code § 3050*, which outlines the duties of the Board, the Board regulates the activities of a wide range of statutorily defined entities [*see, e.g., Veh. Code § 3050(c)* (requiring Board to consider matters concerning activities of new motor vehicle dealers, manufacturers, manufacturer branches, distributors, and distributor branches)].

The doctrine of exhaustion of administrative remedies applies to actions and proceedings before the Board. Before a person can seek judicial remedies in a matter within the Board's jurisdiction, the person must first seek relief through the remedies that are available through the Board [*Yamaha Motor Corp. v. Superior Court (1987) 195 Cal. App. 3d 652, 657-660, 240 Cal. Rptr. 806* (holding that cross-complaint for damages is barred due to cross-complainant's failure to seek administrative remedies before Board); *Yamaha Motor Corp. v. Superior Court (1986) 185 Cal. App. 3d 1232, 1240-1242, 230 Cal. Rptr. 382* (also applying exhaustion doctrine)]. When the administrative remedy is inadequate or the challenge is to the constitutionality of the Board itself or the Board's procedure, the party seeking relief need not exhaust administrative remedies before the Board [*Chrysler Corp. v. New Motor Vehicle Bd. (1979) 89 Cal. App. 3d 1034, 1039, 153 Cal. Rptr. 135]* .

- **Address:** 1507 21st Street, Suite 330, Sacramento, CA 95814
- **Telephone:** (916) 445-1888
- **Internet Site:** http://www.dmv.ca.gov (DMV generally); *see also* http://www.dca.ca.gov/r_r/newvehi1.htm (providing a brief description of the Board; one of many listings of various state and federal agencies maintained by the Department of Consumer Affairs)

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§ 470.70 Office of Real Estate Appraisers

Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), also entitled the "Real Estate Appraisal Reform Amendments" [*12 U.S.C. §§ 3310, 3331* et seq.; *see also 12 U.S.C. § 1844(b)* (Section 5 of the Bank Holding Company Act)] provides protection for federal financial and public policy interests in real estate related transactions by requiring real estate appraisals used in connection with federally related transactions to be performed in writing, in accordance with uniform standards, by appraisers whose competency has been demonstrated and whose professional conduct will be subject to effective supervision [*12 U.S.C. § 3305(d)*]. Licensing and certification are state functions overseen by the Appraisal Subcommittee of the Federal Financial Institutions Examination Council (FFIEC). The Appraisal Subcommittee (ASC) consists of representatives appointed by the heads of the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Office of Thrift Supervision and the National Credit Union Administration, and the Department of Housing and Urban Development. The ASC maintains a national registry of state licensed and certified appraisers, and ensures that each state appraiser certifying and licensing agency transmits to the ASC a roster of the state certified and licensed appraisers who are eligible to perform appraisals in federally related transactions, along with an annual registry fees. The ASC requires that all state licensing agencies remain totally independent agencies, answerable only to the governor or a cabinet level official who has no regulatory responsibility for real estate licensing, promotion, development or financing functions.

In response to this federal legislative scheme, the California Legislature enacted the Real Estate Appraisers' Licensing and Certification Law, and created an independent Office of Real Estate Appraisers, which is the agency that administers the real estate appraiser licensing program for California, in compliance with the federal mandate. The OREA is a statutory agency within the Business, Transportation and Housing Agency [*Bus. & Prof. Code § 11300 et. seq.*; *see also Bus. & Prof. Code § 475 et. seq.*; *Gov. Code § 11340 et. seq.* (APA); *10 Cal. Code Reg. § 3500 et. seq.*].

- **Address:** 1755 Creekside Oaks Drive, Suite 190, Sacramento, CA 95833-3637
- **Telephone:** (916) 263-0722; FAX (916) 263-0887
- **Internet Site:** http://www.orea.cahwnet.gov

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§ 470.71 Osteopathic Medical Board

The system of osteopathic healing was developed shortly after the end of the Civil War. Osteopathic medicine was originally a system of healing based on the theory that all diseases are caused by irregularities in the musculoskeletal structure that can be corrected primarily by manipulation and without the use of drugs. At present, although treatment of the musculoskeletal component of disease remains an integral part of osteopathic practice, the practice of osteopathic medicine is very similar to conventional (allopathic) medical practice [*D'Amico v. Board of Medical Examiners (1970) 6 Cal. App. 3d 716, 721, 86 Cal. Rptr. 245* ; *see* Gevitz, The DO's: Osteopathic Medicine in America (Johns Hopkins Univ. Press 1982)]. For example, osteopathic physicians and surgeons formerly had a more limited field of practice than medical doctors; among other things, they could not prescribe drugs [*Harlan v. Alderson (1921) 55 Cal. App. 263, 266, 203 P. 1014]* , or treat the human eye or fit eyeglasses [*In re Rust (1919) 181 Cal. 73, 78-79, 183 P. 548]* . Osteopathic physicians and surgeons and conventional medical doctors are now accorded equal professional status and privileges in California as licensed physicians and surgeons [*Bus. & Prof. Code §§ 2051, 2453(a)*]. Health facilities, health care service plans, nonprofit hospital service plans, disability insurance policies, self-insured employers, welfare benefit plans, and state agencies (including agencies of cities or other subdivisions of the state) are prohibited from discriminating, in employment and staff privilege matters, against licensed physicians on the basis of whether a physician holds a degree from an osteopathic college or a conventional medical school [*Bus. & Prof. Code § 2453(b)*]. Entities that contract with physicians and surgeons or osteopathic physicians to prde managed care or risk-based care must also not discriminate against osteopathic physicians and surgeons in bylaws and in certification requirements [*Bus. & Prof. Code § 2453(d), (h)*].

Both osteopathic physicians and surgeons and conventional medical doctors are awarded a physician's and surgeon's certificate after satisfactorily completing the educational and examination requirements for licensure [*Bus. & Prof. Code § 3600-5*; *Bus. & Prof. Code § 2050*]. Graduates of osteopathic colleges are known by the title "Doctor of Osteopathy" (D.O.), and are under the jurisdiction of the Osteopathic Medical Board of California (Board) [*Bus. & Prof. Code §§ 2450*; *16 Cal. Code Reg. § 1685(b)*]. Graduates of conventional medical schools are known as "Doctors of Medicine" or "M.D.'s," and are under the jurisdiction of the Medical Board of California [*Bus. & Prof. Code §§ 2004, 2055*; *see § 470.68*, discussing Medical Board of California].

A small number of licensees of the Board are under the jurisdiction of the Medical Board of California and are not

subject to the provisions of the Osteopathic Act. These are persons who obtained a degree from a California medical school before 1962, obtained an osteopathic physician's and surgeon's certificate, and received permission from the Board of Medical Examiners to use the initials "M.D." [*Bus. & Prof. Code §§ 2275, 2450*].

The Osteopathic Medical Board is an independent agency within Department of Consumer Affairs, and is governed by *Bus. & Prof. Code §§ 3600-1*-3600-5 [*see also Bus. & Prof. Code §§ 2450-2459, 3600*; *Gov. Code § 11340 et seq.* (APA); *16 Cal. Code Reg. §§ 1600-1697*]. As noted above, it is the licensing and disciplinary agency for D.O.'s, or osteopathic physicians and surgeons.

- **Address:** 444 North 3rd Street, Suite A-200, Sacramento, CA 95814
- **Telephone:** (916) 322-4306
- **Internet Site:** http://www.dca.ca.gov/r_r/osteopa1.htm

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§ 470.72 Physical Therapy Board

The Physical Therapy Board is a part of the Medical Board of California, Department of Consumer Affairs [*Bus. & Prof. Code § 2602 et seq.*; *see § 470.68*]. The Committee is governed by *Bus. & Prof. Code § 2600 et seq.* (Practice Act) [*see also Gov. Code § 11340 et seq.* (APA); *16 Cal. Code Reg. §§ 1398-1399.79*]. The Committee functions as the licensing and disciplinary agency for physical therapists.

- **Address:** 1426 Howe Ave., Suite 54, Sacramento, CA 95825
- **Telephone:** (916) 263-2550
- **Internet Site:** http://www.medbd.ca.gov (general site for Medical Board)

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§ 470.73 Physician Assistant Committee

The Physician Assistant Committee is a statutory agency within the Medical Board of California, Department of Consumer Affairs [*Bus. & Prof. Code §§ 100, 101(b), 3504*]. It is governed by *Bus. & Prof. Code §§ 2000-2515* (Medical Practice Act), and *Bus. & Prof. Code §§ 3500-3546* (Physician Assistant Practice Act) [*see also Gov. Code § 11340 et seq.* (APA); *16 Cal. Code Reg. §§ 1399.500-1399.556*].

The Committee regulates the practice of physician assistants; among other things, the Committee is authorized to issue licenses to and to discipline physicians assistants [*see Bus. & Prof. Code §§ 3509, 3513, 3517, 3519, 3527, 3529*].

- **Address:** 1426 Howe Ave., Suite 54, Sacramento, CA 95825
- **Telephone:** (916) 263-2670; (800) 555-8038; FAX (916) 263-2671
- **Internet Site:** http://www.dca.ca.gov/r_r/physasst.htm

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§ 470.74 Speech Language Pathology and Audiology Examining Committee

The Speech-Language Pathology and Audiology Examining Committee is a part of the Medical Board of California, Department of Consumer Affairs [*Bus. & Prof. Code §§ 100, 101(b), 2531*], and is governed by *Bus. & Prof. Code §§ 2530-2539* [*see also Gov. Code § 11340 et seq.* (APA); *16 Cal. Code Reg. §§ 1399.150-1399.197*]. The Committee, overseen by the Medical Board [*see § 470.68*], is the licensing and disciplinary agency for language pathologists and audiologists.

- **Address:** 1426 Howe Ave., Suite 54, Sacramento, CA 95825-3237
- **Telephone:** (916) 263-2666
- **Internet Site:** http://www.medbd.ca.gov (general site for Medical Board)

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§ 470.75 State Bar of California

The State Bar of California is a public corporation created under the state constitution. Every person admitted and licensed to practice law in California is required to be a member of the State Bar except while holding office as a judge of a court of record [*Cal. Const., art. VI, § 9*]. One of the State Bar's major functions is the admission and discipline of attorneys pursuant to the State Bar Act [*see Bus. & Prof. Code § 6000 et seq.*].

For detailed discussion and forms relating to proceedings by the State Bar or the State Bar Court relating to the admission or discipline of attorneys, see Ch. 70, *Attorney Admission* , and Ch. 71, *Attorney Discipline* .

- **Address:** 180 Howard Street, San Francisco, CA 94105-1639 (Main office)
- **Telephone:** (415) 538-2000
- **Internet Site:** http://www.calbar.org

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§ 470.76 California Board of Accountancy

The California Board of Accountancy is a statutory agency within the Department of Consumer Affairs. It is governed by the Accountancy Act [*Bus. & Prof. Code § 5000 et seq.*; *see also Gov. Code § 11340 et seq.* (APA); *16 Cal. Code Reg. §§ 1-99.1*]. The Board, among other things, has the following functions:

- Issues certificates to practice as certified public accountants (CPA's) [*Bus. & Prof. Code § 5080*].
- Issues permits to practicing public accountants (PA's) [*Bus. & Prof. Code § 5070*].
- Adopts standards of professional conduct for PA's and CPA's [*Bus. & Prof. Code § 5018*; *16 Cal. Code Reg. §§ 53-69.1*].
- Regulates the operation of accountancy corporations [*Bus. & Prof. Code § 5157*; *16 Cal. Code Reg. §§ 75.4-75.11*; *see also Corp. Code §§ 13400-13410* (Moscone-Knox Professional Corporations Act)].
- Enforces the provisions of the Accountancy Act and the regulations enacted pursuant to it [*Bus. & Prof. Code §§ 5100, 5101, 5122, 5156*].

For discussion and forms relating to the licensing and discipline of accountants, see Ch. 462, *Public Accountants* .

- **Address:** 2000 Evergreen Street, Suite 250, Sacramento, CA 95815
- **Telephone:** (916) 963-3680
- **Internet Site:** http://www.dca.ca.gov/cba

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§ 470.77 State Board of Registration for Geologists and Geophysicists

The Board for Geologists and Geophysicists is a statutory agency under the Department of Consumer Affairs [*Bus. & Prof. Code § 7810*]. The State Board of Registration is governed by and administers the Geologist and Geophysicist Act [*see Bus. & Prof. Code § 7800 et seq.*]. It functions to qualify and register, and adjudicate complaints against professional geologists and geophysicists.

Unless specifically exempted, anyone who offers to practice geology or geophysics for others is subject to the requirements of the Act [*Bus. & Prof. Code § 7832*]. Certain classes of geologic and geophysical work prepared for public or outside use must, subject to specified exceptions, be done by or under the direction of a registered geologist or geophysicist [*see Bus. & Prof. Code §§ 7835, 7835.1*]. If geologists or geophysicists form a business organization (e.g., a partnership or corporation) for professional practice purposes, at least one of the principals must be registered [*Bus. & Prof. Code § 7833*]. Individuals or entities whose primary business is not the practice of geology or geophysics for others may employ registered individuals to perform work incidental to the conduct of their business [*Bus. & Prof. Code § 7834*; *58 Ops. Cal. Atty Gen. 598, 599 (1975)]* .

- **Address:** 2535 Capitol Oaks Drive, Suite 300A, Sacramento, CA 95833-2926
- **Telephone:** (916) 263-2113; FAX (916) 263-2099
- **Internet Site:** http://www.dca.ca.gov/geology

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§ 470.78 State Board of Registration for Professional Engineers and Land Surveyors

The State Board of Registration for Professional Engineers and Land Surveyors is a statutory agency within the Department of Consumer Affairs [*Bus. & Prof. Code §§ 101(i), 6710*], and is governed by the Professional Engineers Act (*Bus. & Prof. Code §§ 6700-6799*) and the Land Surveyor's Act (*Bus. & Prof. Code §§ 8700-8806*) [*see also Gov. Code §§ 11340 et seq.* (APA); *16 Cal. Code Reg. §§ 400-465*]. The Board is the licensing and disciplinary agency for professional engineers and land surveyors [*Bus. & Prof. Code §§ 6700 et seq., 8700 et seq.*]. The Board functions autonomously from the other boards within the Department of Consumer Affairs [*Bus. & Prof. Code § 108*], and its determinations regarding registration and licensing and disciplinary actions are not subject to review by the Director of Consumer Affairs [*Bus. & Prof. Code § 109*].

- **Address:** 2535 Capitol Oaks Dr., Suite 300, Sacramento, CA 95833-2926
- **Telephone:** (916) 263-2222; FAX (916) 263-2246
- **Internet Site:** http://www.dca.ca.gov/pels

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§ 470.79 Structural Pest Control Board

The Structural Pest Control Board is under the Department of Consumer Affairs [*Bus. & Prof. Code § 8520*], and is governed by *Bus. & Prof. Code § 8500 et seq.* [*see also Gov. Code § 11340 et seq.* (APA); *16 Cal. Code Reg. §§ 1902-1999.1*]. The Board examines, licenses, and regulates persons practicing structural pest control.

Structural pest control covers a wide variety of activities regarding pests and wood destroying organisms [*Bus. & Prof. Code § 8505*]. With respect to household pests and wood-destroying organisms or other pests that may invade households or other structures, structural pest control includes engaging in, offering to engage in, advertising for, soliciting, or performing any of the following: identification of infestations; making inspections for the purpose of identifying infestations or infections; and making inspection reports, recommendations, estimates, and bids with respect to infestations or infections [*Bus. & Prof. Code § 8505*]. Structural pest control also includes making contracts or submitting bids for the performance of work, including the making of structural repairs or replacements or the use of insecticides, pesticides, rodenticides, fumigants, or related chemicals or substances or mechanical devices, for the purpose of eliminating, controlling, or preventing infestations of pests and organisms [*Bus. & Prof. Code § 8505*]. Household pests are those pests, other than wood destroying pests and organisms, that invade households and other structures, including, but not limited to, rodents, vermin, and insects [*Bus. & Prof. Code § 8505*].

- **Address:** 1422 Howe Ave., Suite 3, Sacramento, CA 95825
- **Telephone:** (916) 263-2540
- **Internet Site:** http://www.dca.ca.gov/r_r/pest1.htm

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§ 470.80 Veterinary Medical Board

The Veterinary Medical Board is a statutory agency within Department of Consumer Affairs [*Bus. & Prof. Code § 4800*], and is governed by the Veterinary Medicine Practice Act [*Bus. & Prof. Code § 4800 et seq.*; *see also Gov. Code § 11340 et seq.* (APA); *16 Cal. Code Reg. §§ 2000-2082*]. The Board, and the Registered Veterinary Technician Committee functions to protect consumers and animals through proper licensing and discipline of veterinarians and registered veterinary technicians.

- **Address:** 1420 Howe Avenue, Suite 6, Sacramento, CA 95825-3228
- **Telephone:** (916) 263-2610; FAX (916) 263-2621
- **Internet Site:** http://www.vmb.ca.gov

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§ 470A.02 Cross References

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[3] California Constitution

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Chapter 470A DUE PROCESS RESTRICTIONS ON PUBLIC AGENCIES
PART I. SCOPE

41-470A California Forms of Pleading and Practice--Annotated § 470A.01

§ 470A.01 Scope of Chapter

This chapter provides a discussion of procedural due process requirements applicable to an act, action, or proceeding by state or local public agency. The background discussion in Part II includes:

- Subpart A discusses the basic principles of due process [*see § 470A.10* et seq.].
- Subpart B discusses protected interests under due process [*see § 470A.20* et seq.].
- Subpart C discusses the balancing process used by the courts [*see § 470A.30* et seq.].
- Subpart D discusses the impact of due process requirements on agency procedures [*see § 470A.40* et seq.].

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For more general discussion of procedural due process restraints on administrative power, in a larger context discussing California public agency functions, powers, and organization generally, see Ch. 470, *Overview of Public Administrative Law* (general due process discussion is in §§ 470.12[5] and 470.16[2])

See also *§ 470.02* of that chapter for additional cross references.

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[Reserved]

§§ 470A.03[Reserved]

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§ 470A.10 Nature and Sources of Due Process Requirement

[1] General Requirements

Due process of law requires administrative agencies to follow certain procedures in order to protect the interests of the parties involved in administrative proceedings [*see § 470A.40* et seq.]. As discussed in [2]-[4], *below*, due process rights in administrative agency proceedings have two sources: federal and state constitutional provisions, and statutes that specifically set forth hearing procedures for an agency.

Since early in the twentieth century, courts have recognized that the concept of due process also has a "substantive" application--that is, laws cannot be made that have the effect of depriving persons of any protected interest in an arbitrary manner [*see, e.g., United States v. Carolene Products Co. (1938) 304 U.S. 144, 152-153, 58 S. Ct. 778, 82 L. Ed. 1234]* . Because substantive due process issues rarely arise in agency proceedings, this chapter focuses only on procedural due process issues. For discussion relating to substantive due process and the constitutionality of statutes generally, see Ch. 531, *Statutes and Ordinances* .

Due process challenges to agency action may be asserted in administrative mandate proceedings by a claim that the agency failed to proceed in the manner required by law or that the agency denied the petitioner a fair trial [*see Code Civ. Proc. § 1094.5(b)*]. See Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq., for detailed discussion and forms relating to judicial review by administrative mandate.

[2] United States Constitution

The *Fourteenth Amendment* states in part: "No [s]tate shall ... deprive any person of life, liberty, or property, without due process of law" [*U.S. Const., amend. XIV, § 1*]. This is the source of constitutional due process restrictions on California administrative agencies [*Goldberg v. Kelly (1970) 397 U.S. 254, 255, 261-264, 90 S. Ct. 1011, 25 L. Ed. 2d 287* (state and local agency procedure must satisfy *Fourteenth Amendment* due process requirements); *see U.S. Const., amend. V*, for the source of due process restrictions on federal agencies].

Application of the *Fourteenth Amendment* to state agencies gives rise to four issues:

- What specific interests constitute protected "life, liberty, or property" [*see § 470A.20* et seq.].
- Whether the action taken is "state action" [*see § 470A.11, below*].
- Whether the administrative proceedings are quasi-judicial or quasi-legislative in nature [*see § 470A.12, below*].
- What specific procedures are required to satisfy "due process" [*see § 470A.40* et seq., *below*].

The meaning of due process as required by the *Fifth* and *Fourteenth Amendments* was aptly expressed by *Justice Frankfurter in Rochin v. California (1952) 342 U.S. 165, 169, 72 S. Ct. 205, 96 L. Ed. 183* :

> These standards of justice [implicit in the due process clause] are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," or are "implicit in the concept of ordered liberty."

[3] California Constitution

The California Constitution provides that "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws" [*Cal. Const., art. I, § 7*]. This provision has been held to be identical in scope and purpose to the due process provision of the *Fourteenth Amendment to the United States Constitution* [*Kruger v. Wells Fargo Bank (1974) 11 Cal. 3d 352, 366-367, 113 Cal. Rptr. 449, 521 P.2d 441* (California due process provision assumed coextensive with *Fourteenth Amendment due process clause*); *Russell v. Carleson (1973) 36 Cal. App. 3d 334, 342, 111 Cal. Rptr. 497]* .

All administrative agencies, regardless of the method of their creation, are subject to the due process provisions of both the California and U.S. Constitutions [*see Kruger v. Wells Fargo Bank (1974) 11 Cal. 3d 352, 366-367, 113 Cal. Rptr. 449, 521 P.2d 441* (both constitutional provisions impose a prerequisite of state action; court held that due process requirements of neither applied to bank setoff, which was a private action); *Gray v. Superior Ct. (2005) 125 Cal. App. 4th 629, 636-637, 23 Cal. Rptr. 3d 50* (*Medical Board of California); Smith v. Bd. of Med. Qual. Assurance (1988) 202 Cal. App. 3d 316, 326-329, 248 Cal. Rptr. 704* ; *see also* [2], *above*].

California courts have stated, in decisions involving widely differing fact situations, that due process standards under the California Constitution may be higher than those under the U.S. Constitution. For example, the interpretation given by California courts to a protected "fundamental right" for the purpose of due process analysis under the state constitution is broader than that given by federal courts to a "fundamental right" under the U.S. Constitution [*Pipkin v. Board of Supervisors (1978) 82 Cal. App. 3d 652, 660, 147 Cal. Rptr. 502]* .

State courts may also be more liberal in treating expectancies or entitlements as protected rights [*Saleeby v. State Bar (1985) 39 Cal. 3d 547, 562, 216 Cal. Rptr. 367, 702 P.2d 525* ; *see* Part B, *below*, for a discussion of protected interests], and may find "state action" to be a broader concept than do federal courts [*see § 470A.11, below*]. Thus, for instance, involuntary lien procedures instituted by private parties have been invalidated as violative of the due process requirements of *Cal. Const., art. I, § 7(a)* [*Adams v. Department of Motor Vehicles (1974) 11 Cal. 3d 146, 157, 113 Cal. Rptr. 145, 520 P.2d 961* (involuntary sales provisions of garagemen's lien law invalidated); *Martin v. Heady (1980) 103 Cal. App. 3d 580, 589, 163 Cal. Rptr. 117* (involuntary sale provisions of aircraft lien law invalidated)]. In these instances, the court found state action based on the statutory origin of the laws, distinguishing them from consensual self-help common law remedies such as vehicle repossession [*Martin v. Heady (1980) 103 Cal. App. 3d*

580, 587, 163 Cal. Rptr. 117] .

[4] California Statutes

[a] Statutory Protections May Be More Stringent

Although this chapter deals particularly with the application of federal and state constitutional requirements as delineated by judicial doctrine, the statutory and regulatory provisions governing a particular agency are also important. In many instances, those provisions are very specific and more stringent than constitutional due process requirements [*see* [5], *below*].

[b] Administrative Procedure Act

The 1995 legislature enacted extensive new provisions and amendments to the Administrative Procedure Act (APA) that governs administrative adjudication [*Gov. Code §§ 11400-11470.50, 11500-11529*]. The new APA, operative effective July 1, 1997, governs adjudicative proceedings commenced on or after July 1, 1997 [*Gov. Code § 11400.10*]. Agencies are authorized to adopt interim or permanent regulations to govern adjudicative proceedings under the APA [*Gov. Code § 11400.20*]. See Ch. 473, *Public Agency Adjudication* , for a detailed discussion of the new APA provisions.

The revised APA includes a variety of new provisions. For example, Chapter 4.5 of the Act (*Gov. Code § 11400 et seq.*), includes:

- Alternative dispute resolution processes [*Gov. Code § 11420.10*].
- Informal hearings [*Gov. Code § 11445.10*].
- Emergency decision procedures [*Gov. Code § 11460.10*].
- Declaratory decision procedures [*Gov. Code § 11465.10*].
- Agency option to adopt APA procedures [*Gov. Code § 11410.40*], or to use APA procedures either to supplement existing procedures or to use when there is no other governing procedure [*Gov. Code § 11415.10*].

In addition, Chapter 4.5 of the new APA also includes a new administrative adjudication " *bill of rights*" [*Gov. Code § 11425.10 et seq.*], which provides nine procedural protections to private parties in agency adjudications [*Gov. Code § 11425.10(a)(1)-(9)*]:

- Notice and opportunity to be heard.
- Right to a copy of governing procedures.
- Public hearing.
- Separation of functions between prosecutors and adjudicators.
- Impartial decisionmaker.
- Decision on the record with statement of findings and reasons.

- Precedential decisions.
- Ban on ex parte contacts.
- Language assistance.

See Ch. 473, *Public Agency Adjudication* , for a detailed discussion of the administrative adjudication *bill of rights*.

Unless a more specific statute (such as a particular agency's enabling act) provides otherwise, the provisions of Chapter 4.5 such as those noted above apply to all state agencies with respect to adjudicative decisions by those agencies whenever an evidentiary hearing for fact determination is required to decide the case, pursuant to federal or state constitutional or statutory law [*Gov. Code §§ 11410.10, 11410.20*].

The formal hearing provisions of the APA (*Gov. Code § 11500 et seq.*) apply to existing licensing agencies who were subject to the prior law governing agency formal hearings [*Gov. Code § 11501* (repealed effective July 1, 1997)]. Agencies that are created on or after July 1, 1997, are subject to the formal hearing provisions unless the agency governing legislation provides otherwise. Existing agencies that are not currently subject to the formal hearing provisions have the option of following the new APA formal hearing procedures, but are not required to follow those procedures [*Gov. Code § 11501* (effective July 1, 1997)]. See Ch. 473, *Public Agency Adjudication* , et seq., for a detailed discussion of the new APA's requirements applicable to formal hearing procedures.

[c] Specific Agency Statutes

The enabling acts and regulations governing particular agencies contain hearing procedures for those agencies. Furthermore, the California codes [*see, e.g., Veh. Code §§ 13800-13954*] contain many specific provisions relating to procedural due process requirements for state departments and agencies. For discussion of licensing agency statutes generally, see Ch. 471B, *Licensing by Public Agencies* . For cross references to coverage elsewhere in this publication relating to proceedings before a number of specific public agencies, see *Ch. 470, Overview of Public Administrative Law, § 470.02*.

[5] Relationship Between Constitutional and Statutory Provisions

When a statute or administrative agency regulation sets forth hearing procedures that do not exceed constitutional requirements, or is silent with respect to hearing requirements and procedures, the sufficiency of the procedures must be evaluated using constitutional standards [*see Arnett v. Kennedy (1974) 416 U.S. 134, 163, 94 S. Ct. 1633, 40 L. Ed. 2d 15* (provisions of Lloyd-LaFollette Act, which conferred on nonprobationary federal employees the right not to be discharged except for "cause" and prescribing procedures for protecting that right, did not create an expectation of job retention in the employees requiring procedural protection under the Due Process Clause beyond that afforded by statute and agency regulations); *Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 215, 124 Cal. Rptr. 14, 539 P.2d 774* (provisions of State Civil Service Act, which did not provide employee with procedural rights exceeding constitutional requirements, was evaluated pursuant to federal and state constitutional standards)]. The interest involved, however, must be one that is constitutionally protected [*Mathews v. Eldridge (1976) 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18]* .

When the requirements of a statute exceed the minimum constitutional due process requirements, however, the requirements of the statute must be met [*People v. Johnson (1941) 42 Cal. App. 2d Supp. 827, 833, 42 Cal. App. 2d Supp. 827 , 109 P.2d 770]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationAlternative Dispute ResolutionAdministrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawAgency AdjudicationHearingsRight to HearingStatutory RightAdministrative LawJudicial ReviewRemediesMandamusConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionConstitutional LawSubstantive Due ProcessGeneral OverviewConstitutional LawEqual ProtectionScope of Protection

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§ 470A.11 State Action Within Meaning of Fourteenth Amendment

[1] State Action Requirement

The *due process clause of the Fourteenth Amendment* protects against the deprivation of certain individual rights [*see § 470A.22, below*] by "the state" [*U.S. Const., amend. XIV, § 1*]. The action of any governmental entity, including an administrative agency, constitutes "state action." Thus, state action generally arises as an issue when the action is taken by a private party who is not acting on behalf of the government [*see, e.g., Marsh v. Alabama (1946) 326 U.S. 501, 504, 66 S. Ct. 276, 90 L. Ed. 265* (actions of "company town" at issue)]. The state action issue is whether a sufficiently close nexus exists between the state and the private individual's challenged action so that the action may be fairly treated as that of the state itself [*Jackson v. Metropolitan Edison Co. (1974) 419 U.S. 345, 351, 95 S. Ct. 449, 42 L. Ed. 2d 477]* .

Procedural requirements arising out of common law and similar to those set forth in the *Fourteenth Amendment* may nonetheless apply to purely private action. For example, in *Gaenslen v. Board of Directors* [*Gaenslen v. Board of Directors (1985) 185 Cal. App. 3d 563, 232 Cal. Rptr. 239]* , the court held that although the actions of a private institution, such as a private hospital, are not state actions, "fair procedures" should be observed with respect to termination of a physician's staff membership, even though technical due process standards do not apply [*Gaenslen v. Board of Directors (1985) 185 Cal. App. 3d 563, 568-571, 232 Cal. Rptr. 239* ; *see also Applebaum v. Board of Directors (1980) 104 Cal. App. 3d 648, 656-659, 163 Cal. Rptr. 831* (summary dismissal of staff physician prohibited; some private enterprises, including hospitals, are so affected with public interest that fair procedure similar to due process is required)].

[2] Consequences of Indirect State Action

In a landmark case, *NAACP v. Alabama ex rel. Patterson (1958) 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488* , the United States Supreme Court held that if state action will certainly set in motion private action that will result in an infringement of one of the rights protected by the *Bill of Rights* pursuant to the *Fourteenth Amendment*, the state action can be forbidden [*NAACP v. Alabama ex rel. Patterson (1958) 357 U.S. 449, 466, 78 S. Ct. 1163, 2 L. Ed. 2d 1488* (state prohibited from compelling public disclosure of membership lists of civil rights organization because of possible

restraint on *First Amendment* freedom of association due to likely response by private parties to disclosure)].

California courts appear to have followed the *National Asso. for the A.C.P.* rationale prior to passage of the Public Records Act [*see Huntley v. Public Util. Com. (1968) 69 Cal. 2d 67, 69 Cal. Rptr. 605, 442 P.2d 685* (absent compelling legitimate state interest, *First* and *Fourteenth Amendments* preclude telephone company from requiring names and addresses of persons who transmit recorded messages); *Gov. Code § 6250 et seq.* (public records act)]. The application of the *National Asso. for the A.C.P.* rationale in California may be somewhat limited, however, by the California Public Records Act, the purpose of which is to increase the public's access to specified kinds of information [*see Gov. Code §§ 6250-6267*; *CBS, Inc. v. Block (1986) 42 Cal. 3d 646, 656-657, 230 Cal. Rptr. 362, 725 P.2d 470* (holding that records of applications for gun licenses must be made public)]. This apparent conflict between the holding of the United States Supreme Court and the state statute apparently has not been challenged, and has thus not been resolved. The difference may lie, however, in the fact that the NAACP records were those of a private organization being sought by a public agency, whereas the records sought in CBS were records that the state required to be kept by gun dealers. Quite simply, the expectation of privacy inherent in belonging to a private organization would be higher than it would be in making an application for a state registration. For a detailed discussion of the Public Records Act, see Ch. 470C, *Public Records Act* .

[3] Significant Versus Incidental State Action

The concept of "significant" state action determines the necessity for procedural due process application. The primary issue here has been whether a state law created new legal procedures, or if it merely codified common law practice.

For instance, a California court held that California's regulation of nonjudicial foreclosure procedure did not constitute state action; notice and hearing procedures required by state and federal constitutional due process provisions were thus inapplicable [*Garfinkle v. Superior Court (1978) 21 Cal. 3d 268, 276-277, 281-282, 146 Cal. Rptr. 208, 578 P.2d 925 , app. dism., 439 U.S. 949* ; *see Lawson v. Smith (N.D. Cal. 1975) 402 F. Supp. 851, 854* (applying California law)].

Another court reached a contrary result, however, when it held that aircraft lien involuntary sales constitute state action: due process rights were violated by a state law that did not require a hearing prior to involuntary sale [*Martin v. Heady (1980) 103 Cal. App. 3d 580, 589, 163 Cal. Rptr. 117]* . The court distinguished the involuntary sale procedures in this case from the nonjudicial foreclosure sales of real estate, vehicle repossessions, and bank set-offs by stating that the aircraft law was not a codification of prior common law, but entirely statutory, and hence subject to both federal and state due process requirements because of the state action [*Martin v. Heady (1980) 103 Cal. App. 3d 580, 587, 163 Cal. Rptr. 117]* . The Court of Appeal in *Martin* distinguished its California due process interpretation from that of the U.S. Supreme Court in *Flagg Brothers, Inc. v. Brooks (1978) 436 U.S. 149* , when the latter court upheld a New York warehouseman's lien law. It seems likely that in *Martin*, expenditures made by the owner for repairing the airplane may have been an important factor in persuading the court [*Martin v. Heady (1980) 103 Cal. App. 3d 580, 583-584, 163 Cal. Rptr. 117]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationFreedom of InformationDisclosure RequirementsGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionConstitutional LawSubstantive Due ProcessPrivacyGeneral Overview

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§ 470A.12 Nature of Administrative Proceedings Affected by Due Process Considerations

[1] Kinds of Proceedings Distinguished

To determine whether or not a public agency has abridged a client's due process rights, the attorney must determine whether the administrative action was of a kind affected by due process considerations. Three general categories of agency actions exist: adjudicative, quasi-legislative, and ministerial.

"Adjudicative" (quasi-judicial) actions are those in which the agency has discretion to apply a rule to a specific set of facts [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 34 n.2, 112 Cal. Rptr. 805, 520 P.2d 29* ; *Patterson v. Central Coast Regional Com. (1976) 58 Cal. App. 3d 833, 840, 130 Cal. Rptr. 169* . See Chs. 373- 373H for discussion of hearing requirements and procedures]. In this type of action the agency "adjudicates" or makes binding determinations that directly affect the legal rights of an individual [*see Hannah v. Larche (1960) 363 U.S. 420, 442, 80 S. Ct. 1502, 4 L. Ed. 2d 1307]* . An example of an adjudicative action is the determination of an application for a variance from an ordinance [*see, e.g., Topanga Asso. for a Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 514, 113 Cal. Rptr. 836, 522 P.2d 12]* , or the determination of salary or benefits to which a particular employee is entitled under a legislative scheme [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 44, 112 Cal. Rptr. 805, 520 P.2d 29]* . Thus, in the sense that a "quasi-judicial" action involves a binding determination affecting an individual's legal rights, it appears to go beyond formal adjudicatory hearings to include those actions, such as licensing determinations, that are conceptually more of an executive function than a judicial one [*see, e.g.*, discussion in [3], *below*].

"Quasi-legislative" (rulemaking) actions entail formulation of general rules that are applicable to future situations [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 34 n.2, 112 Cal. Rptr. 805, 520 P.2d 29* ; *Patterson v. Central Coast Regional Com. (1976) 58 Cal. App. 3d 833, 840, 130 Cal. Rptr. 169* . See Chs. 472-472B for rulemaking issues]. The APA defines regulation to include every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by the agency, or to govern the agency's procedure [*Gov. Code § 11342.600*]. Examples of quasi-legislative actions are enacting a zoning ordinance for

a specific area [*see* *Ensign Bickford Realty Corp. v. City Council (1977) 68 Cal. App. 3d 467, 473, 137 Cal. Rptr. 304* , *overruled in part by* *Hernandez v. City of Hanford (2007) 41 Cal. 4th 279, 59 Cal. Rptr. 3d 442, 159 P.3d 33]* , or setting government employee salaries or benefits [*Campbell Municipal Employees Assn. v. City of Campbell (1982) 131 Cal. App. 3d 416, 425 n.5, 182 Cal. Rptr. 461]* .

"Ministerial" actions are those executive actions that involve no exercise of discretion by the agency--that is, an administrative official or body is required by law to perform the action at the occurrence of a specific contingency [*Drummey v. State Bd. of Funeral Directors (1939) 13 Cal. 2d 75, 83, 87 P.2d 848* ; *Great Western Sav. & Loan Assn. v. City of Los Angeles (1973) 31 Cal. App. 3d 403, 413, 107 Cal. Rptr. 359]* .

[2] Applicability of Due Process to Adjudicatory Actions Only

Although any of the three basic types of agency action constitute "state action" [*see* discussion in *§ 470A.11[1], above*], procedural due process principles apply only to administrative proceedings that are adjudicative in nature; they do not apply to quasi-legislative or ministerial proceedings [*Hannah v. Larche (1960) 363 U.S. 420, 442, 80 S. Ct. 1502, 4 L. Ed. 2d 1307]* . This principle is based upon well established U.S. Supreme Court decisions [*Londoner v. Denver (1908) 210 U.S. 373, 386, 28 S. Ct. 708, 52 L. Ed. 1103* (due process of law requires opportunity for oral hearing to landowner who objected to street paving assessment against his land); *Bi-Metallic Inv. Co. v. State Bd. of Equalization (1915) 239 U.S. 441, 446, 36 S. Ct. 141, 60 L. Ed. 372* (no due process right to oral hearing when tax officials in Colorado increased the assessed value of all taxable property in City of Denver)].

The Administrative Procedure Act or APA (*Gov. Code § 11340 et seq.*) governs the disciplinary procedure of most business and professional licensing agencies and sets out in detail the procedural requirements for hearings. This act defines adjudicative proceeding to mean "... an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision" [*Gov. Code § 11405.20*]; it defines decision to mean "... agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person" [*Gov. Code § 11405.50(a)*].

In contrast to quasi-judicial action by an administrative agency, quasi-legislative action or an investigative proceeding ancillary to a quasi-legislative function is not subject to constitutional procedural due process requirements [*Oceanside Marina Towers Assn. v. Oceanside Community Development Com. (1986) 187 Cal. App. 3d 735, 744-745, 231 Cal. Rptr. 910* ; *see* Witkin, *Summary of California Law*, vol. 5, *Torts*, § 169 (10th ed. 2005)]. However, if the administrative action is legislative in nature, then due process of law does not apply to the affected property owners. Merger of separate land parcels, which automatically occurred on the effective date of a local ordinance that was adopted for that purpose, was a legislative action, and therefore the affected property owners did not have a due process right to notice and an opportunity to be heard before merger took place [*Moores v. Board of Supervisors (2004) 122 Cal. App. 4th 883, 889-890, 19 Cal. Rptr. 3d 206]* . Public policy has increasingly favored participation of the general public in administrative decisions, however, by providing means to express opinions and furnish facts [*see, e.g.,* *Stanson v. San Diego Coast Regional Com. (1980) 101 Cal. App. 3d 38, 48-49, 161 Cal. Rptr. 392* (complaining party could have sought relief from Regional Commission or California Coastal Commission, plus further relief from superior and appellate courts)]. For a quasi-legislative action, procedures such as notice and a hearing may be required by statute, even though they are not required by constitutional due process principles. Thus, a hearing is not necessarily "judicial" merely because it is required by statute [*Heist v. County of Colusa (1984) 163 Cal. App. 3d 841, 847, 213 Cal. Rptr. 278* (*Sts. & Hy. Code § 8323* required hearing, but due process was not to be extended beyond provisions of statute unless "direct property interest" could be identified in county road abandonment matter)].

If the only hearing requirement is based on a statute, constitutional guarantees requiring strict procedural rules do not apply and no particular formal procedure is required [*Emby Foods, Inc. v. Paul (1964) 230 Cal. App. 2d 687, 703, 41 Cal. Rptr. 365* ; *see also* *Stauffer Chemical Co. v. Air Resources Board (1982) 128 Cal. App. 3d 789, 794, 180 Cal. Rptr. 550* (interpreting *Health & Safety Code §§ 41502, 41504*); *Rivera v. Division of Industrial Welfare (1968) 265*

Cal. App. 2d 576, 586-587, 71 Cal. Rptr. 739 (hearing for purpose of finding facts and receiving opinions in order to set minimum wages)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawAgency RulemakingFormal RulemakingAdministrative LawAgency RulemakingInformal RulemakingConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionGovernmentsState & Territorial GovernmentsLicenses

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§§ 470A.13[Reserved]

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Volume 41: Overview of Public Administrative Law thru Review of Agency Rulemaking-Chs. 470-472B
Chapter 470A DUE PROCESS RESTRICTIONS ON PUBLIC AGENCIES
PART II. LEGAL BACKGROUND
B. Protected Interests

41-470A California Forms of Pleading and Practice--Annotated § 470A.20

§ 470A.20 Defining Protected Interests

[1] General Requirements

[a] U.S. Constitution

"Life," "liberty," or "property" may not be taken in an adjudicative governmental action without procedural due process consistent with the interest at stake. In the procedural due process context, no issue has arisen with regard to the meaning of "life"; however, the meanings of "liberty" and "property" have evolved considerably in constitutional litigation.

The U.S. Supreme Court initially defined the issue as whether a given interest had "vested," thus requiring a hearing with full procedural safeguards before a taking, or was merely a "privilege" that might be taken at the discretion of the government official with minimal or no procedural safeguards [*Barsky v. Board of Regents of N.Y. (1954) 347 U.S. 442, 451, 74 S. Ct. 650, 98 L. Ed. 829]* . Subsequently, the court adopted broad definitions of liberty and property while varying the required level of procedural due process, depending on a balancing of the relative importance of the liberty or property interest against the competing government interest [*Goldberg v. Kelly (1970) 397 U.S. 254, 266-268, 90 S. Ct. 1011, 25 L. Ed. 2d 287]* .

The U.S. Supreme Court now defines liberty and property interests more narrowly. The court has held that property interests are the creation of law and must be recognized by some independent source, such as state statutory or common law, in order to warrant procedural due process protection [*see* *Bishop v. Wood (1976) 426 U.S. 341, 344-345, 96 S. Ct. 2074, 48 L. Ed. 2d 684* (defining protected property interests)].

Some liberty interests, such as free speech rights [*Freedman v. Maryland (1965) 380 U.S. 51, 58-60, 85 S. Ct. 734, 13 L. Ed. 2d 649]* , rights of privacy [*Santosky v. Kramer (1982) 455 U.S. 745, 752-754, 102 S. Ct. 1388, 71 L. Ed. 2d 599]* , and the interest in freedom from confinement [*O'Connor v. Donaldson (1975) 422 U.S. 563, 573-576, 95 S. Ct. 2486, 45 L. Ed. 2d 396]* , are protected by the U.S. Constitution. However, other liberty interests, such as prisoners' rights, are protected from termination without procedural due process only if specifically recognized by state law [*Meachum v. Fano (1976) 427 U.S. 215, 225, 96 S. Ct. 2532, 49 L. Ed. 2d 451]* .

Importantly, although the question of whether something is a liberty or property interest is largely a matter of state law, once the state recognizes the interest, the required level of procedural due process becomes a matter of federal constitutional law [*Cleveland Bd. of Educ. v. Loudermill (1985) 470 U.S. 532, 541, 105 S. Ct. 1487, 84 L. Ed. 2d 494]* .

[b] California Constitution

The California courts have generally followed the U.S. Supreme Court lead in the area of procedural due process, with the state cases reflecting the same evolution from use of the rights-privileges test to a concern for identification of liberty and property interests [*Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 214, 124 Cal. Rptr. 14, 539 P.2d 774]* . While the older California cases state that the due process clause of the state constitution has the same meaning as that of the federal constitution [*see, e.g., Gray v. Hall (1928) 203 Cal. 306, 318, 265 P. 246]* , California courts have more recently used the due process clause of the California Constitution [*Cal. Const., art. I, § 7*] as an independent state ground to give a higher level of protection to various individual rights than that required by the U.S. Constitution [*see, e.g., People v. Mayoff (1986) 42 Cal. 3d 1302, 1312, 233 Cal. Rptr. 2, 729 P.2d 166* (setting stricter rule for aerial surveillance than U.S. Supreme Court in *California v. Ciraolo (1986) 476 U.S. 207*)]. The state due process clause has also been used to give broader definition to the concepts of liberty and property interests than the U.S. Supreme Court's definition under the federal due process clause. The California Supreme Court has ruled that, for any statutorily created benefit, even if the interest being terminated does not itself rise to the level of a protected property or liberty interest, the individual has an independent liberty interest in being free from arbitrary adjudicative action [*People v. Ramirez (1979) 25 Cal. 3d 260, 268, 158 Cal. Rptr. 316, 599 P.2d 622]* .

The California Court of Appeal applied the four Ramirez factors [*People v. Ramirez (1979) 25 Cal. 3d 260, 269, 158 Cal. Rptr. 316, 599 P.2d 622]* and held that the Department of Social Services was required by due process of law to tell individuals, with criminal convictions, what specific convictions seeking an exemption from the prohibition on being employed at community care facilities they have to discuss to obtain an exemption [*Gresher v. Anderson (2005) 127 Cal. App. 4th 88, 110, 25 Cal. Rptr. 3d 408]* .

The California Court of Appeal held that the California Constitution's right of privacy [*Cal. Const., art I, § 1*] as recognized by the California Supreme Court [*American Academy of Pedriatics v. Lungren (1997) 16 Cal. 4th 307, 330, 66 Cal. Rptr. 2d 210, 940 P.2d 797* ; *Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 35-37, 26 Cal. Rptr. 2d 834, 865 P.2d 633]* included a right of familial and informational privacy that a parent properly alleged was violated by the reporting by a social services agency (SSA) to the Department of Justice (DOJ) that a parent potentially exposed her child to harm as that parent would be listed in the Child Abuse Central Index (CACI). The court held that the privacy interests of the parent supported the parents' constitutional right to due process of law, the right to an opportunity to appear before the SSA to challenge a previously filed report, and a reasonable opportunity to rebut the charges [*Burt v. County of Orange (2004) 120 Cal. App. 4th 273, 284-286, 15 Cal. Rptr. 3d 373]* .

[2] Unintentional Deprivations Distinguished

Procedural due process rights are not involved when the government injures an individual by negligently taking away a liberty or property interest [*see Daniels v. Williams (1986) 474 U.S. 327, 332-333, 106 S. Ct. 662, 88 L. Ed. 2d 662* (alleged negligence of prison officials resulting in prisoner slipping on pillow left in hallway does not constitute deprivation of protected interest)]. A California Court of Appeal has held that reckless government conduct does not deprive an individual of rights for purposes of procedural due process [*Stalnaker v. Boeing Co. (1986) 186 Cal. App. 3d 1291, 1306-1308, 231 Cal. Rptr. 323]* . If the government has a duty to protect an individual and intentionally fails to perform that duty, however, the failure may be treated as the equivalent of an intentional taking for the purpose of procedural due process and the requirement of some post deprivation relief [*cf. Estelle v. Gamble (1976) 429 U.S. 97, 104, 97 S. Ct. 285, 50 L. Ed. 2d 251* (*intentional* failure to treat prisoner's illness, if proved, would constitute cruel and

unusual punishment)].

For discussion and forms relating to the liability of public agencies or officials for tortious conduct, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[3] California Approach to Protected Interests

The California Supreme Court has expressly accepted federal flexible due process analysis in evaluating due process rights to administrative hearings [*Mathews v. Eldridge (1976) 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18* ; *Civil Service Asso. v. San Francisco (1978) 22 Cal. 3d 552, 560-561, 150 Cal. Rptr. 129, 586 P.2d 162]* . The California courts' approach is to evaluate "the extent to which procedural protections can be tailored to promote more accurate and reliable administrative decisions in light of the governmental and private interests at stake" [*People v. Ramirez (1979) 25 Cal. 3d 260, 267, 158 Cal. Rptr. 316, 599 P.2d 622]* . In California, due process hearing rights are not determined by "whether or not the state limits administrative control over a statutory benefit or deprivation by the occurrence of specified conditions" [*People v. Ramirez (1979) 25 Cal. 3d 260, 267, 158 Cal. Rptr 316, 599 P.2d 622]* . Rather, under California law, "the due process safeguards required for protection of an individual's statutory interests must be analyzed in the context of the principle that freedom from arbitrary adjudicative procedures is a substantive element of one's liberty" [*People v. Ramirez (1979) 25 Cal. 3d 260, 268, 158 Cal. Rptr. 316, 599 P.2d 622]* .

In environmental cases, as well as general administrative law contexts, the California Supreme Court has employed a functional due process analysis to determine when administrative agencies must act by granting a hearing. "Due Process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest" [*Horn v. County of Ventura (1979) 24 Cal. 3d 605, 612, 156 Cal. Rptr. 718, 596 P.2d 1134]* . For example, in a local land use dispute, an adjacent landowner alleged that a proposed subdivision would substantially interfere with his use of the only access from his parcel to the public streets and would increase both traffic congestion and air pollution. The Supreme Court held that this allegation adequately described a deprivation sufficiently "substantial" to require procedural due process protection in the form of an adjudicatory process [*Horn v. County of Ventura (1979) 24 Cal. 3d 605, 615, 156 Cal. Rptr. 718, 596 P.2d 1134]* . Adjacent landowners had due process rights of notice and opportunity to be heard related to land use decisions including county vested rights determination under the California surface mining reclamation statute [*Pub. Res. Code § 2712*] applicable to mining property landowner because the issues to be decided were adjudicative not ministerial [*Calvert v. County of Yuba (2007) 145 Cal. App. 4th 613, 622-623, 51 Cal. Rptr. 3d 797]* . In a facial challenge to Department of Forestry procedures for approval of timber harvesting plans, the Court of Appeal concluded that "a due process right to a hearing cannot be assessed in the abstract." Although "[a] directly affected member of the public might well be able, in the circumstances of a given case, to demonstrate that he or she had been denied procedural due process notwithstanding full compliance with all applicable statutes and regulations," the notice and hearing procedures of the Department of Forestry were "adequate as a matter of procedural due process" [*Laupheimer v. State of California (1988) 200 Cal. App. 3d 440, 456-457, 246 Cal. Rptr. 82]* . The California Supreme Court seems to have abandoned the conventional threshold search for liberty or property interests to trigger procedural due process rights, at least in cases involving statutorily based rights [*People v. Ramirez (1979) 25 Cal. 3d 260, 267, 158 Cal. Rptr. 316, 599 P.2d 622]* . Instead, the Court has required a more flexible inquiry to determine both whether adjudicatory procedures are required, and, if so, what types of procedures are appropriate. The Supreme Court applied this flexible due process factor analysis in striking down the State Bar's refusal to grant a hearing to an applicant for reimbursement from the Client Security Fund, a fund from which the applicant had no right to any award. The Court noted that "California has expanded upon the federal analytical base by focusing on the administrative process itself" [*Saleeby v. State Bar (1985) 39 Cal. 3d 547, 564, 216 Cal. Rptr. 367, 702 P.2d 525]* .

Legal Topics:

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

Administrative LawAgency AdjudicationHearingsRight to HearingDue ProcessConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionConstitutional LawSubstantive Due ProcessPrivacyPersonal DecisionsConstitutional LawSubstantive Due ProcessPrivacyPersonal Information

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41-470A California Forms of Pleading and Practice--Annotated § 470A.21

§ 470A.21 Sources of Property Interests

[1] General Requirements

Property interests include more than actual ownership of real estate, chattels or money; they protect the security of interests that a person has already acquired in specific benefits [*Board of Regents v. Roth (1972) 408 U.S. 564, 571-572, 576, 92 S. Ct. 2701, 33 L. Ed. 2d 548]* . An abstract need or desire or a unilateral expectation is insufficient; rather, a legitimate claim of entitlement is required [*Board of Regents v. Roth (1972) 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548* ; *Fuchs v. Los Angeles County Civil Service Com. (1973) 34 Cal. App. 3d 709, 715, 110 Cal. Rptr. 311* (worker's hope of promotion did not constitute protected property interest)]. The federal constitution does not create property interests. Rather, they arise under existing rules or understandings that stem from an independent source, such as state law [*Board of Regents v. Roth (1972) 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548]* .

The primary way that property rights are created for purposes of procedural due process is through operation of state law [*Ryan v. California Interscholastic Federation-San Diego Section (2001) 94 Cal. App. 4th 1048, 1061-1062, 114 Cal. Rptr. 2d 798* (participation in interscholastic sports at the high school level is not a right or an entitlement under the California Constitution or California statutes)]. The federal constitution does not mention the right of personal ownership of property, but the civil and criminal laws of all states protect the right to own property. The debtors' rights cases, in which the U.S. Supreme Court declared unconstitutional state laws that allowed prejudgment attachment of debtors' property by creditors, without procedural due process, illustrate this aspect of state protection of private ownership of property [*see, e.g.,* *Sniadach v. Family Finance Corp. (1969) 395 U.S. 337, 341-342, 89 S. Ct. 1820, 23 L. Ed. 2d 349* ; *see* *North Georgia Finishing v. Di-Chem (1975) 419 U.S. 601, 608, 95 S. Ct. 719, 42 L. Ed. 2d 751* (holding summary prejudgment attachment proceedings inadequate to protect debtor's property interest)]. Once the state recognizes a property interest, the level of process required before the state can allow that interest to be taken in adjudicative proceedings becomes a matter of federal constitutional law.

[2] Government License

A government license may be either a liberty or property interest. Because of their economic significance, most licenses related to occupational or business activities are considered to be property interests [*see* *Barry v. Barchi (1979) 443*

U.S. 55, 64, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (interest of horse trainer in avoiding license suspension is substantial); *Gray v. Superior Ct. (2005) 125 Cal. App. 4th 629, 637-638, 23 Cal. Rptr. 3d 50* (physician has vested property interest in existing medical license); *Smith v. Bd. of Med. Qual. Assurance (1988) 202 Cal. App. 3d 316, 326, 248 Cal. Rptr. 704* (physician has property interest in license)]. When a licensing statute requires misconduct or cause for revoking a license, it has engendered a clear expectation of continued enjoyment of the licensee absent proof of culpable conduct; it thus creates a property interest, regardless of whether such an interest would have arisen from the mere existence ofthe license itself [*see Barry v. Barchi (1979) 443 U.S. 55, 64 n.11, 99 S. Ct. 2642, 61 L. Ed. 2d 365]* . Whether a legislature could ever delegate to an official the discretionary power to revoke a license summarily is debatable, given the importance of the interest and the absence of any history of at-will license revocation (*cf.* the history of at-will employment termination) [*see, e.g., Emslie v. State Bar (1974) 11 Cal. 3d 210, 228, 113 Cal. Rptr. 175, 520 P.2d 991* (license to practice law as valuable right, termination of which requires procedural due process)].

If, however, the statute prescribes nondiscretionary revocation on the occurrence of certain easily identifiable facts, for example on the failure to pay annual fees, the revocation would be a ministerial act [*see § 470A.12*], and no due process would be required [*compare Zike v. State Personnel Bd. (1983) 145 Cal. App. 3d 817, 822-823, 193 Cal. Rptr. 766* (determination of existence of justifiable excuse for employee absence under constructive resignation statute required procedural due process) *with Dixon v. Love (1977) 431 U.S. 105, 114-115, 97 S. Ct. 1723, 52 L. Ed. 2d 172* (nondiscretionary revocation of driver's license after specified number of tickets required no due process)].

Similarly, revocation of a professional license on the occurrence of certain easily identifiable facts, such as conviction of a felony, would not require a hearing [*see Black v. Romano (1985) 471 U.S. 606, 615-616, 105 S. Ct. 2254, 85 L. Ed. 2d 636* (holding automatic revocation of probation for commission of crime while on probation did not violate procedural due process)]. But, if revocation is limited to felonies involving moral turpitude or evidencing unfitness to practice the profession, then procedural due process would be required. Again, the result would be based on whether the act was ministerial or involved the exercise of discretion. However, a New York college that administered a distance learning nursing degree program did not have a property interest in the continued recognition of equivalency for that program by the California Board of Registered Nursing. Thus, the college did not have the right to an evidentiary hearing to challenge the Board's change in practice so that it would look at the course work completed by individual applicants for nursing licenses in California rather than grant a blanket equivalency recognition for all nursing graduates of that college [*Excelsior College v. Cal. Bd. of Registered Nursing (2006) 136 Cal. App. 4th 1218, 1237-1239, 39 Cal. Rptr. 3d 618]* . For further discussion of licensing, see Ch. 471B, *Licensing by Public Agencies* .

[3] Government Benefits

The government is not required to provide benefits such as welfare, unemployment compensation, or Social Security, but if it does so it must act consistently with constitutional rights. Just as the *equal protection clause* would not allow such benefits to be given only to persons of one race [*cf. Graham v. Richardson (1971) 403 U.S. 365, 376, 91 S. Ct. 1848, 29 L. Ed. 2d 534* (welfare conditioned on state citizenship violated *equal protection clause*)], so procedural due process protects against such benefits being removed arbitrarily. The benefits cases distinguish between those persons applying for the entitlement and those who already have it [*cf. Davis v. Commission on Judicial Qualifications (1977) 73 Cal. App. 3d 818, 141 Cal. Rptr. 75* (upholding California law allowing judge retired because of incapacity to apply for reinstatement and obligating state to abide by result of medical examination, but giving state discretion to refuse to allow medical examination at all)]. Some pretermination procedure is required before a currently held benefit can be taken [*compare Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 with Greenholtz v. Nebraska Penal Inmates (1979) 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668* (treating revocation of parole differently than initial grant)].

With regard to a benefit application, the administrator's initial determination is controlling until appealed or challenged collaterally through a procedure such as a petition for a writ of mandate. For termination of a benefit already possessed, however, the availability of procedures for collateral challenge does not satisfy the requirements of procedural due

process [*see, e.g.,* *Adams v. Department of Motor Vehicles (1974) 11 Cal. 3d 146, 157, 113 Cal. Rptr. 145, 520 P.2d 961* (mechanics' lien sale)].

[4] State Law That Requires "Cause" for Taking of an Interest

The state may create a protected property interest by setting the substantive standard for a taking of the claimed interest. The government employment cases illustrate this kind of property interest. If the state law provides that a government employee may be removed only "for cause," the employee has a protected property interest in the job [*Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 206-207, 124 Cal. Rptr. 14, 539 P.2d 774* ; *Coleman v. Department of Personnel Administration (1991) 52 Cal 3d 1102, 1112, 278 Cal. Rptr. 346, 805 P.2d 300* ; *Jones v. Omnitrans (2004) 125 Cal. App. 4th 273, 279-280, 22 Cal. Rptr. 3d 706* (employee of local public transit district could only be discharged for cause); *Townsel v. San Diego Metropolitan Transit Development Bd. (1998) 65 Cal. App. 4th 940, 950, 77 Cal. Rptr. 2d 231]* . On the other hand, if state law provides that an employee may be removed at the discretion of the supervisor, the employee has no protected property interest in the job [*Bishop v. Wood (1976) 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684* ; *Schnee v. Alameda Unified School District (2004) 125 Cal. App. 4th 555, 565, 22 Cal Rptr. 3d 800* (probationary teacher was properly classified under *Educ. Code § 44909* as second-year probationary employee, and school district had statutory authority to terminate employee without cause or without hearing procedures requiring for termination of permanent employees)].

Former deputy attorney general was terminated for cause without being given *Skelley* hearing to challenge termination, a violation of due process of law, as employee had civil service protection and could only be terminated for cause. Former deputy had resigned from job one month after termination date, and before *Skelley* hearing could be started. The Court of Appeal held that former deputy was entitled to back pay until date that State Personnel Board completed S *kelley* hearing process, and issued decision on the merits of employee's termination. Employee had been denied back pay after date of resignation, and Court of Appeal decision extended back pay rights for almost seven years [*Roe v. State Personnel Board (2004) 120 Cal. App. 4th 1029, 1032-1033, 16 Cal. Rptr. 3d 207]* .

Although state law may create a property interest by setting a substantive standard for its deprivation, the procedures specified by state law to accomplish that deprivation are not, as a matter of federal constitutional law of procedural due process, controlling [*Cleveland Bd. of Educ. v. Loudermill (1985) 470 U.S. 532, 541, 105 S. Ct. 1487, 84 L. Ed. 2d 494]* .

Once a governmental employee completes a probationary period and acquires permanent status, the governmental employer must strictly follow the established procedures to dismiss or demote a permanent employee [*California Sch. Employees Assn. v. Personnel Commission (1970) 3 Cal. 3d 139, 145, 89 Cal. Rptr. 620, 474 P.2d 436]* . This means that a probationary employee must receive effective notice of termination, and must be terminated prior to the expiration of the probationary period, or the employee will attain the status of a permanent employee and be entitled to the permanent employee dismissal procedures [*Wiles v. State Personnel Board (1942) 19 Cal. 2d 344, 350-351, 121 P.2d 673* ; *Santillano v. State Personnel Board (1981) 117 Cal. App. 3d 620, 623, 173 Cal. Rptr. 1* ; *Birdsall v. Carrillo (1991) 231 Cal. App. 3d 1426, 1432-1433, 282 Cal. Rptr. 504]* . Because probationary employees can be rejected without a hearing or good cause, and permanent employees cannot, the employees' status at the time of termination is critically important in determining the employees' rights and the governmental employers' responsibilities.

A police officer who was reassigned to a lower pay grade for failure to perform his duties satisfactorily has a property interest in not being reassigned arbitrarily or without good cause to the lower pay grade because the standards articulated under the police department manual for reassignment sets binding criteria that the department is required to follow [*Brown v. City of Los Angeles (2002) 102 Cal. App. 4th 155, 170-172, 125 Cal. Rptr. 2d 474]* .

[5] Government Contracts That Give Rise to Property Interests

If the state or a political subdivision of the state enters into a contract guaranteeing an individual a continuing right to some government benefit, absent some misconduct on the individual's part, the contract creates a property right. For example, public employment that is recognized by state law is a property interest protected by due process of law [*Bostean v. Los Angeles Unified School Dist. (1998) 63 Cal. App. 4th 95, 109, 73 Cal. Rptr. 2d 523* (due process requires notice and predeprivation opportunity to respond before public employee is placed on involuntary illness leave of absence)].

By contrast, when state law does not guarantee any property right in employment, for example, as a public school administrator, the employment is not a protected property right [*Barthuli v. Board of Trustees (1977) 19 Cal. 3d 717, 721, 139 Cal. Rptr. 627, 566 P.2d 261 , cert. denied, 434 U.S. 1040, 98 S. Ct. 782, 54 L. Ed. 2d 790 (1978)* (removal of school administrator was within discretion of school board)].

If the employing agency adopts employment policies that become part of an otherwise unprotected employment contract, these policies may give rise to protected property rights, potentially giving rise not only to a breach of contract action, but also to a constitutional claim of violation of procedural due process rights [*Jones v. Palm Springs Unified School Dist. (1985) 170 Cal. App. 3d 518, 527-528, 216 Cal. Rptr. 75* (employment policies adopted by school board that became part of school administrator's contract)].

A contractual claim for payment for services rendered under a government contract has been recognized as a protected property interest [*Lujan v. G & G Fire Sprinklers, Inc., (2001) 532 U.S. 189, 189-190, 121 S. Ct. 1446* (procedural due process of law satisfied by availability of civil lawsuit for breach of contract); *Bergeron v. Department of Health Services (1999) 71 Cal. App. 4th 17, 23, 83 Cal. Rptr. 2d 481]* . An unsuccessful low bidder on a school construction contract was entitled to due process hearing rights (notice and opportunity to respond) to challenge a school district's determination that the bidder was not responsible, and therefore should not be awarded the construction contract [*D.H. Williams Construction, Inc. v. Clovis Unified School District (2007) 146 Cal. App. 4th 757, 771-772, 53 Cal. Rptr. 3d 345]* .

Some contractual claims can not satisfy the protected property interest requirements for due process of law to apply. The California Court of Appeal held that a non profit corporation did not have a due process of law protected property interest in contracts with the county of Los Angeles to provide foster care services nor did it have a protected interest under a federal statute, the Adoption Assistance and Child Welfare Act [*42 U.S.C. § 671*]. The contracts were not permanent, there was no good cause for termination clause, and there was no extreme dependence by the non profit corporation on the continuation of the contract terms by the county. Thus, the county decision to confer do not refer status on the corporation did not violate due process of law [*Benn v. County of Los Angeles (2007) 150 Cal. App. 4th 478, 489-491, 58 Cal. Rptr. 3d 563]* . A pharmaceutical company did not have a protected property interest in continued listing by the Department of Health services of one of its drugs, Oxandin, in the AIDS Drug Assistance Program's drug formulary, and thus the company did not have due process hearing rights to a trial type hearing when the Department partially delisted its drug product. The future right to supply products pursuant to a governmental program is not a protected property interest [*Savient Pharmaceuticals, Inc. v. Department of Health Services (2007) 146 Cal. App. 4th 1457, 1471-1472, 53 Cal. Rptr. 3d 689]* .

[6] Custom or Practice as Source of Common Law Property Rights

Even in the absence of a specific statute, so-called common law property rights may be created if state action has historically and customarily recognized the right to particular benefits. For example, if the practice of a state university is automatically to give professors tenure after seven years of teaching, that custom and practice would create a reasonable expectation on the part of a qualifying professor and the absence of written policies would not be determinative [*Perry v. Sindermann (1972) 408 U.S. 593, 602-603, 92 S. Ct. 2694, 33 L. Ed. 2d 570]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewConstitutional LawEqual ProtectionScope of ProtectionGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsLicensesLabor & Employment LawEmployment RelationshipsAt-Will EmploymentPublic EmployeesLabor & Employment LawWrongful TerminationDefensesProperty InterestPublic Health & Welfare LawFood & NutritionFood Stamp ProgramGeneral Overview

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§ 470A.22 Sources of Liberty Interests

[1] Freedom From Confinement

Freedom from confinement, whether in an institution or under the restraints of parole or probation, and whether in the context of a criminal matter or a civil proceeding such as a juvenile adjudication or an involuntary civil commitment, is a liberty interest that may not be taken without procedural due process [*Gagnon v. Scarpelli (1973) 411 U.S. 778, 785, 93 S. Ct. 1756, 36 L. Ed. 2d 656* (revocation of parole and probation); *In re Gault (1967) 387 U.S. 1, 19-21, 87 S. Ct. 1428, 18 L. Ed. 2d 527* (juvenile proceedings); *O'Connor v. Donaldson (1975) 422 U.S. 563, 573-574, 95 S. Ct. 2486, 45 L. Ed. 2d 396* (civil commitment proceedings)]. Persons accused of crimes are protected by the specific guarantees of the Fourth through the *Eighth Amendments* [*U.S. Const., amends. IV-VIII*]. As a result of these specific guarantees, it is seldom necessary to discuss general procedural due process rights. In general, the closer the proceedings and the penalties to criminal proceedings, the higher the level of process required. Prison officials who were sued by plaintiff correctional officer under Section 1983 [*42 U.S.C. § 1983*] did not violate the liberty interest under federal due process of law of that correctional officer who was injured while breaking up a fight between rival gangs at Folsom State Prison. Plaintiff alleged that the prison officials had orchestrated the fight between rival gangs. Assuming the truth of that claim, there was no liberty interest violation because defendants did not restrain plaintiff's ability to act on his own behalf [*O'Dea v. Bunnell (2007) 151 Cal. App. 4th 214, 216-217, 59 Cal. Rptr. 3d 684]* .

[2] Fundamental Rights

The federal constitution specifically protects certain liberty interests, such as the right to free speech [*see U.S. Const. amend. I*]. Any government adjudicative action taking away such interests must conform to a high level of procedural due process [*Freedman v. Maryland (1965) 380 U.S. 51, 57-59, 85 S. Ct. 734, 13 L. Ed. 2d 649]* . Such rights do not depend for their protection on any source in state law [*see Board of Regents v. Roth (1972) 408 U.S. 564, 575, 92 S. Ct. 2701, 33 L. Ed. 2d 548* (probationary teacher, who had no state property right in continued government employment, would have been entitled to procedural due process if he had been fired for exercising free speech rights)]. Other fundamental liberty interests are not expressly protected by the constitution. The right to privacy, protecting primarily procreation and family-related choices, for example, has been held to be a fundamental right emanating from the penumbra of various provisions of the *Bill of Rights* and the liberty clause of the *Fourteenth Amendment* [*see Roe v.*

Wade (1973) 410 U.S. 113, 153, 93 S. Ct. 705, 35 L. Ed. 2d 147] .

Presumably, all fundamental interests, whether expressly or indirectly protected by the Constitution, are also protected from removal absent procedural due process, but the issue has seldom arisen, as protection of fundamental rights is generally sought under substantive constitutional provisions, under the compelling state interest test, rather than in the context of procedural due process, with its less demanding balancing approach [*but see* *Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal. 3d 294, 300, 308, 138 Cal. Rptr. 53, 562 P.2d 1302* (seizure and disposal of newsracks violated both procedural due process and free speech rights)].

[3] Nonfundamental Rights

The liberty concept includes interests that do not involve freedom from confinement and do not fall within the definition of fundamental rights. These other liberty interests, like property interests, seem to depend on some independent source, such as state law, for their protection. For example, if a prisoner is moved from a minimum security prison to a maximum security prison for alleged misconduct, a liberty interest may or may not be involved, depending on whether state law in some way limits the discretion of the prison officials to order the transfer [*Hewitt v. Helms (1983) 459 U.S. 460, 466, 103 S. Ct. 864, 74 L. Ed. 2d 675* ; *Meachum v. Fano (1976) 427 U.S. 215, 223-227, 96 S. Ct. 2532, 49 L. Ed. 2d 451]* .

[4] Reputation and Dignitary Interests

After earlier recognizing reputation as a liberty interest inherently protected by the Constitution [*see* *Goss v. Lopez (1975) 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725* (school disciplinary suspension affecting liberty interest in reputation); *Wisconsin v. Constantineau (1971) 400 U.S. 433, 437, 91 S. Ct. 507, 27 L. Ed. 2d 515* (state procedure denying persons labeled excessive drinkers right to purchase alcoholic beverages constituted taking both of liberty interest in being able to engage in socially acceptable drinking and of reputation)], the United States Supreme Court in *Paul v. Davis* [*Paul v. Davis (1976) 424 U.S. 693, 701-708, 96 S. Ct. 1155, 47 L. Ed. 2d 405]* retreated from this treatment of reputation. In *Paul*, the Court rejected reputation per se as an inherently protected liberty interest, but held that reputation combined with significant economic impact, such as foreclosure from future employment, might be a liberty interest requiring procedural due process [*Paul v. Davis (1976) 424 U.S. 693, 708-710, 96 S. Ct. 1155, 47 L. Ed. 2d 405]* . As *Paul* seemed to involve just such facts, it is hard to know how much economic impact is required. In any event, the purpose of the hearing, if any is required, is to correct any inaccuracy in the record, not to test the sufficiency of the reasons for the dismissal [*see* *Phillips v. Civil Service Com. (1987) 192 Cal. App. 3d 996, 1002, 237 Cal. Rptr. 751* (court concluded that issue of reinstatement was not before Commission)].

Reputation per se is a protected liberty interest under the due process clause of the California state constitution and California courts do not require any showing of economic harm [*Lubey v. City and County of San Francisco (1979) 98 Cal. App. 3d 340, 346, 159 Cal. Rptr. 440]* . All that is required in California, however, is the opportunity to protect one's reputation by correcting the record [*Phillips v. Civil Service Com. (1987) 192 Cal. App. 3d 996, 1002, 237 Cal. Rptr. 751]* . For example, an at-will public employee, whose employment was terminable without cause and who was discharged for reasons that damage his or her reputation or impose employment-related stigma making it more difficult to obtain other employment, has a protected liberty interest entitling him or her to a name-clearing hearing. Such a hearing does not, however, include a right to present additional evidence such as testimony of a witness elicted through direct or cross examination [*Holmes v. Hallinan (1999) 68 Cal. App. 4th 1523, 1530-1531, 81 Cal. Rptr. 2d 174* (investigator for district attorney terminated for dishonesty and for filing false application for workers' compensation benefits)].

On the other hand, state law does not entitle a public employee to a liberty-interest hearing when there was no present deprivation of a governmental benefit, but only damage to reputation that may result in future harm [*Caloca v. County of San Diego (1999) 72 Cal. App. 4th 1209, 1219-1220, 85 Cal. Rptr. 2d 660]* .

However, liberty interests are not recognized in all circumstances in which clearing one's name or protecting one's reputation is the concern of the individual affected by governmental action. For example, a police officer who voluntarily resigned from police employment did not have a protected liberty interest in correcting negative comments made in a post-resignation separation report. Thus, he was not entitled to an administrative hearing to clear his name [*Haight v. City of San Diego (1991) 228 Cal. App. 3d 413, 418-419, 278 Cal. Rptr. 334]* .

Further, no liberty interest was recognized in a case in which a high school athlete in an interscholastic sport asserted athletic ineligibility and loss of reputation when the CIF determined that the athlete's coach had violated CIF undue influence bylaws [*Ryan v. California Interscholastic Federation-San Diego Section (2001) 94 Cal. App. 4th 1048, 1065-1066, 114 Cal. Rptr. 2d 798]* .

Because freedom from arbitrary adjudicative procedure is a substantive element of liberty, the California Supreme Court in *California v. Ramirez* [*People v. Ramirez (1979) 25 Cal. 3d 260, 158 Cal. Rptr. 316, 599 P.2d 622]* held that no statutory benefit may be taken without procedural due process even if the benefit does not rise to the level of either a liberty or property interest. The court held that individuals always have a due process liberty interest both in fair and unprejudiced decision making and in being treated with dignity [*People v. Ramirez (1979) 25 Cal. 3d 260, 269, 158 Cal. Rptr. 316, 599 P.2d 622]* .

Ramirez was followed in a case in which a physician convicted of a drug-related offense sought admission to a work furlough program, a decision solely within the discretion of the furlough administrator and involving no statutory liberty interest. The court nevertheless held that the failure to give the physician a meaningful chance to defend his application to the program was contrary to his due process liberty interest both in fair and unprejudiced decisionmaking and in being treated with dignity [*In re Thomas (1984) 161 Cal. App. 3d 721, 728, 206 Cal. Rptr. 719]* . Another court, however, took a more restrictive approach in *Davis v. Commission on Judicial Qualifications* [*Davis v. Commission on Judicial Qualifications (1977) 73 Cal. App. 3d 818, 141 Cal. Rptr. 75]* , holding that *Ramirez* is limited to cases involving an individual's statutory interests [*Davis v. Commission on Judicial Qualifications (1977) 73 Cal. App. 3d 818, 825, 141 Cal. Rptr. 75]* . No *Ramirez* type statutory benefit or interest was recognized in a case in which a high school athlete in an interscholastic sport asserted athletic ineligibility and loss of reputation when the CIF determined that the athlete's coach had violated CIF undue influence bylaws [*Ryan v. California Interscholastic Federation-San Diego Section (2001) 94 Cal. App. 4th 1048, 1070-1072, 114 Cal. Rptr. 2d 798]* .

The California Supreme Court held that an at-will public employee who can be terminated without cause (and therefore has no due process property interest in continued employment) does have a liberty interest that is deprived when the termination includes charges that could negatively affect the employee's standing or associations in the community or that could negatively affect the employee's job related reputation. In that setting, the employee has the right to a name clearing hearing [*Katzberg v. Regents of the University of California (2002) 29 Cal. 4th 300, 305, 127 Cal Rptr.2d 482, 58 P.3d 339*]. The California Court of Appeal held that a physician who was released for non-disciplinary reasons from an exempt position with the City and County of San Francisco did not have a liberty interest that was deprived because no reasons for the release from employment with the city were publicly disclosed. Public disclosure of reason is required to establish stigma. Since there was no public disclosure of reasons, the physician's employment related reputation was not stigmatized [*Kreutzer v. City and County of San Francisco (2008) 166 Cal. App. 4th 306, 320-322, 82 Cal. Rptr. 3d 644*].

Given the uncertainty of the federal court definition of "liberty" and the California court's limitation on *Ramirez*, it is unclear how much *Ramirez* expands procedural protection in California beyond that required by the federal constitution.

Legal Topics:

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

Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionConstitutional LawBill of RightsFundamental RightsCriminal ProcessGeneral OverviewCriminal Law & ProcedureJuvenile OffendersJuvenile ProceedingsGeneral OverviewFamily LawFamily Protection & WelfareInvoluntary Commitment

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Chapter 470A DUE PROCESS RESTRICTIONS ON PUBLIC AGENCIES
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[Reserved]

§§ 470A.23[Reserved]

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41-470A California Forms of Pleading and Practice--Annotated § 470A.30

§ 470A.30 General Requirements

[1] Three Part Balancing Test

Life, liberty, or property cannot be taken in an adjudicative action without process consistent with the interest at stake. There is, however, no easy definition of the level of process due. The only certainty is that "some kind of hearing" is required [*Memphis Light, Gas, & Water Div. v. Craft (1978) 436 U.S. 1, 12, 98 S. Ct. 1554, 56 L. Ed. 2d 30* ; *see* Friendly, *Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1965)*]--a hearing "appropriate to the nature of the case" [*Mullane v. Central Hanover B. & T. Co. (1950) 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865]* . *Matthews v. Eldridge* [*Mathews v. Eldridge (1976) 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18]* specifies three factors that must be considered in determining the level of process due:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail.

This balancing test emphasizes first, the importance of the private interest at stake; second, the comparative accuracy of the procedure used by the government versus that desired; and third, the competing governmental interest in both the substantive merits and the need for administrative efficiency [*see* *Coleman v. Department of Personnel Administration (1991) 52 Cal. 3d 1102, 278 Cal. Rptr. 346, 805 P.2d 300* , and *Oberholzer v. Commission on Judicial Performance (1999) 20 Cal. 4th 371, 390-391, 84 Cal. Rptr. 2d 466, 975 P.2d 663* , for recent applications of the balancing test by the California Supreme Court].

The California Court of Appeal applied the three part balancing test to decide whether there was a right to present live rebuttal testimony, and whether there was a right to cross examine adverse witnesses in a contractor debarment administrative hearing held by a city council. The Court concluded that there was a substantial private interest at stake because of the substantial economic impact of permanent debarment on the contractor, that there were substantial governmental interests in dealing with contractors, and significant administrative and financial burdens associated with

more procedural safeguards, and the risk of error with existing procedures was minimal. Thus, the court concluded that due process of law did not require live testimony and did not require the right to cross-examine witnesses at the administrative hearing because the contractor took depositions of many of those witnesses, and presented that deposition testimony at the hearing before the City Council. The contractor was able to submit 400 pages of written materials, was able to make two 40-minute oral presentations to the city council, and was given the right to additional deposition transcripts and a supplemental brief after the hearing. Those procedures satisfied due process of law [*Southern California Underground Contractors, Inc. v. City of San Diego (2003) 108 Cal. App. 4th 533, 541, 549-551, 133 Cal. Rptr. 2d 527]* .

The California Court of Appeal applied the four part balancing test from *People v. Ramirez (1979) 25 Cal. 3d 260, 269, 158 Cal. Rptr. 316, 599 P.2d 622* to hold that a physician's due process rights were violated when the superior court issued an order prohibiting the doctor from practicing medicine as a condition of bail for criminal charges brought against the doctor. The doctor was not given notice or a full hearing before his license was effectively suspended [*Gray v. Superior Ct. (2005) 125 Cal. App. 4th 629, 637-638, 23 Cal. Rptr. 3d 50* ; *Smith v. Bd. of Med. Qual. Assurance (1988) 202 Cal. App. 3d 316, 327, 248 Cal. Rptr. 704* (four factor test used in this case)]. The fourth California factor is "the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official ..." [*quoting from People v. Ramirez (1979) 25 Cal. 3d 260, 269, 158 Cal. Rptr. 316, 599 P.2d 622* ; *Gray v. Superior Court (2005) 125 Cal. App. 4th 629, 638, 23 Cal. Rptr. 3d 50]* .

[2] California Approach to Balancing of Interests

With regard to the types of administrative hearing procedures required, the California Supreme Court has outlined four due process factors to be considered:

> (1) The private interest that will be affected by the official action;
>
> (2) The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;
>
> (3) The dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible governmental official; and
>
> (4) The governmental interest including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail [*People v. Ramirez (1979) 25 Cal. 3d 260, 269, 158 Cal. Rptr. 316, 599 P.2d 622]* .

Expressly approving two Court of Appeal decisions in the environmental law area [*Stanson v. San Diego Coast Regional Com. (1980) 101 Cal. App. 3d 38, 45, 161 Cal. Rptr. 392* ; *CEEED v. California Coastal Zone Conservation Com. (1974) 43 Cal. App. 3d 306, 329, 118 Cal. Rptr. 315]* , the California Supreme Court noted in a later case that "there is no precise manner of hearing which must be afforded; rather, the particular interests at issue must be considered in determining what kind of hearing is appropriate. A formal hearing, with full rights of confrontation and cross-examination is not necessarily required" [*Saleeby v. State Bar (1985) 39 Cal. 3d 547, 565, 216 Cal. Rptr. 367, 702 P.2d 525]* .

On the grounds that what must be afforded is a reasonable opportunity to be heard, the California Supreme Court did not require an oral hearing in a case involving a request for reimbursement from the client security fund of the State Bar. Rather, the California Supreme Court decided that an opportunity for written response would "give petitioner and other applicants an opportunity to respond to the Bar's proposed disposition of the request for reimbursement." The court described the goal of hearing requirements as affording "applicants a reasonable opportunity to raise objections to

the particular action the bar desires to take" [*Saleeby v. State Bar (1985) 39 Cal. 3d 547, 565, 216 Cal. Rptr. 367, 702 P.2d 525* , *citing* *Horn v. County of Ventura (1979) 24 Cal. 3d 605, 619, 156 Cal. Rptr. 718, 596 P.2d 1134]* . The court also required that the hearing result in findings necessary to make judicial review of the administrative adjudication meaningful. [*Saleeby v. State Bar (1985) 39 Cal. 3d 547, 566-567, 216 Cal. Rptr. 367, 702 P.2d 525]* . For discussion of judicial review, see Ch. 474, *Availability of Judicial Review for Agency Decisions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawJudicial ReviewGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionGovernmentsState & Territorial GovernmentsLicensesHealthcare LawBusiness Administration & OrganizationLicensesRevocation & Suspension

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41-470A California Forms of Pleading and Practice--Annotated § 470A.31

§ 470A.31 Method of Balancing Private Interests

[1] Judicial Practical Approach

Although the state enjoys considerable authority either to recognize or not recognize liberty or property interests, once a recognized interest is determined to have been taken, the courts take a commonsense approach in valuing the interest, examining its practical importance in the life of the affected person. For example, a government job is clearly more important than 10 days of public school education, so that job termination would require a higher level of process than a temporary school suspension. Similarly, permanent expulsion from public school would have a greater practical impact than a temporary suspension and would accordingly demand greater procedural safeguards [*Goss v. Lopez (1975) 419 U.S. 565, 584, 95 S. Ct. 729, 42 L. Ed. 2d 725]* . As a general rule, temporary deprivation of an interest is accorded a lower level of process than a permanent deprivation [*North Georgia Finishing v. Di-Chem (1975) 419 U.S. 601, 606, 95 S. Ct. 719, 42 L. Ed. 2d 751]* .

Cases involving driver's licenses illustrate the Court's practical approach in balancing private interests. *Bell v. Burson* [*Bell v. Burson (1971) 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90]* , which required a very high level of procedural due process before revocation of an uninsured driver's license following an accident, seems to recognize the practical importance of a driver's license in contemporary mobile society. In rejecting a procedural due process argument in *Dixon v. Love* [*Dixon v. Love (1977) 431 U.S. 105, 97 S. Ct. 1723, 52 L. Ed. 2d 172]* , involving the revocation of a driver's license after a certain number of infractions, however, the court compared the driver's license with the social security disability payments at issue in *Matthews v. Eldridge* [*Mathews v. Eldridge (1976) 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18]* ; it concluded that "a driver's license may not be so vital and essential as are social insurance payments on which the recipient may depend for his very subsistence" [*Dixon v. Love (1977) 431 U.S. 105, 113, 97 S. Ct. 1723, 52 L. Ed. 2d 172]* .

[2] Different Levels of Protection for Preexisting and Future Rights

The courts give a higher level of protection to preexisting rights than to future rights. In dicta, the Court in *Lyng v. Payne* [*Lyng v. Payne (1986) 476 U.S. 926, 106 S. Ct. 2333, 90 L. Ed. 2d 921]* said, with regard to an applicant's claim of inadequate notice of the availability of a low-interest loan, "We have never held that applicants for benefits, as

distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause" [*Lyng v. Payne (1986) 476 U.S. 926, 942, 106 S. Ct. 2333, 90 L. Ed. 2d 921]* . Cases involving parole [*see, e.g., Morrissey v. Brewer (1972) 408 U.S. 471, 485-486, 92 S. Ct. 2593, 33 L. Ed. 2d 484* ; *Black v. Romano (1985) 471 U.S. 606, 612, 105 S. Ct. 2254, 85 L. Ed. 2d 636]* also reflect the varying treatment of preexisting and potential rights, the difference between an initial request for parole and the revocation of parole being critical [*Greenholtz v. Nebraska Penal Inmates (1979) 442 U.S. 1, 9, 99 S. Ct. 2100, 60 L. Ed. 2d 668]* .

[3] Fundamental Rights Given Highest Level of Protection

Interests that are deemed fundamental rights for purposes of substantive due process and interests specifically mentioned in the *Bill of Rights* are entitled to the highest weight in applying the procedural due process balancing test [*Freedman v. Maryland (1965) 380 U.S. 51, 58-59, 85 S. Ct. 734, 13 L. Ed. 2d 649* (freedom of speech); *see Bellotti v. Baird (Bellotti II) (1979) 443 U.S. 622, 634, 99 S. Ct. 3035, 61 L. Ed. 2d 797* (court listed areas in which constitutional rights of minors are coextensive with adults before addressing constitutionality of statute that infringed privacy rights of minors seeking abortions)]. Normally, some formal predeprivation hearing, often before a judicial officer, would be required; however, sufficiently strong competing public interests might outweigh the need for predeprivation review [*cf. McKeiver v. Pennsylvania (1971) 403 U.S. 528, 541-551, 91 S. Ct. 1976, 29 L. Ed. 2d 647* (state's interest in benevolent, confidential approach to juvenile delinquency matters outweighed juvenile's private interest in trial by jury)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawPrivacy RightsGeneral OverviewConstitutional LawBill of RightsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionCriminal Law & ProcedurePostconviction ProceedingsParoleHealthcare LawTreatmentEnd-of-Life DecisionsAbortionRight to PrivacyTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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§ 470A.32 Method of Balancing Public Interests

[1] Subjective Nature of Government Decision

The objective or subjective nature of the government decision affects the nature of the hearing procedures afforded. For ministerial decisions, which are inherently objective and require consideration of easily identifiable factors that are often a matter of public record, the risk of error is so minimal as not to overcome the government's interest in efficiency; thus no due process is required [*see Mackey v. Montrym (1979) 443 U.S. 1, 6, 99 S. Ct. 2612, 61 L. Ed. 2d 321* (registrar of motor vehicles had no discretionary authority to do anything other than impose 90-day license suspension on driver who refused to take breath analysis test)].

Decisions that are extremely subjective in nature may not benefit from or be entitled to formal adjudicative procedures. For example, in *Board of Curators, Univ. of Mo. v. Horowitz* [*Board of Curators, Univ. of Mo. v. Horowitz (1978) 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124]* , academic decisions were held to be too subjective for meaningful review [*Board of Curators, Univ. of Mo. v. Horowitz (1978) 435 U.S. 78, 91-92, 98 S. Ct. 948, 55 L. Ed. 2d 124]* .

The Fourth District California Court of Appeal held that a graduate student in the department of history at the University of California at Irvine was not denied due process of law when he was denied advancement into the department's Ph.D. program and graduated with a master's degree. The department provided sufficient due process procedures because it informed the student that there were deficiencies with the student's academic performance, it explained to the student the consequences of deficient academic performance, and it made a careful and deliberate decision regarding the student's academic progress. The student did not have a right to a formal hearing to challenge the denial of advancement. Court will defer to faculty members academic decisions, will show respect for faculty professional judgments, and will only overturn such decisions on substantive due process grounds when the academic decision is a substantial departure form accepted academic norms [*Lachtman v. Regents of the University of California (2007) 158 Cal. App. 4th 187, 191-193, 70 Cal. Rptr. 3d 147*].

The necessity of relying on the government agency's experience, instinct, or expertise likewise tends against requiring a high level of process [*see, e.g., Greenholtz v. Nebraska Penal Inmates (1979) 442 U.S. 1, 8-13, 99 S. Ct. 2100, 60 L.*

Ed. 2d 668 (decisions of parole board held not to require formal hearing procedures)]. In juvenile cases, for example, the fact that the judge must consider the best interest of the child results in a more informal process than that required in a criminal trial, when the only issue is guilt or innocence [*see, e.g., In re Gault (1967) 387 U.S. 1, 14-15, 87 S. Ct. 1428, 18 L. Ed. 2d 527* (no right to jury trial in juvenile proceedings)]. A high level of predeprivation procedural due process is most appropriate when the decisionmaking official must make some factual determination and function like the judge in a civil or criminal case [*see, e.g., Morrissey v. Brewer (1972) 408 U.S. 471, 483-484, 92 S. Ct. 2593, 33 L. Ed. 2d 484* (parole revocation hearing)].

[2] When Immediate Response Is Needed to Exigent Circumstances

Exigent circumstances are the strongest example of a situation that justifies the taking of a liberty or property interest without some form of pretermination or predeprivation process. Nonetheless, if exigent circumstances require a taking of a liberty or property interest prior to a hearing, then post-deprivation relief must be readily available [*Carrera v. Bertaini (1976) 63 Cal. App. 3d 721, 728-729, 134 Cal. Rptr. 14]* . For example, if the child welfare authority had strong evidence that a child was a victim of sexual abuse, the child could be summarily removed from the home without a hearing [*Welf. & Inst. Code § 305(a)*]. The authority, however, would have the immediate obligation of seeking a judicial determination that the initial removal was proper and continued state involvement was justified [*Welf. & Inst. Code § 307.4*]. Even fundamental rights may be taken without a predeprivation hearing under sufficiently exigent circumstances. For example, *First Amendment* rights generally may not be limited without notice and an opportunity to respond, but if the threatened *First Amendment* activity presents a serious danger to the community and there is no opportunity to give notice, an ex parte hearing is appropriate [*Carroll v. President & Comm'rs of Princess Anne (1968) 393 U.S. 175, 180-181, 89 S. Ct. 347, 21 L. Ed. 2d 325]* . Even such lesser concerns as pedestrian and vehicular safety may justify summary removal of newsracks, despite the harm to free speech rights [*Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal. 3d 294, 313, 138 Cal. Rptr. 53, 562 P.2d 1302]* .

[3] Other Interests Justifying Summary Proceedings

Another factor that may justify a prehearing taking of a liberty or property interest is a need for an immediate, on-site response by government officials in such contexts as arrests for suspected criminal activity [*see Baker v. McCollan (1979) 443 U.S. 137, 145, 99 S. Ct. 2689, 61 L. Ed. 2d 433* (arrest of wrong brother made on probable cause in executing arrest warrant satisfied due process requirements)], prison discipline [*see Meachum v. Fano (1976) 427 U.S. 215, 224-225, 96 S. Ct. 2532, 49 L. Ed. 2d 451* (no hearing required prior to transfer of prisoner from minimum security to maximum security institution)], and school discipline [*see Goss v. Lopez (1975) 419 U.S. 565, 581-582, 95 S. Ct. 729, 42 L. Ed. 2d 725* (approving merely summary hearing prior to 10-day school suspension)]. For more serious deprivations, however, such as expulsion from school [*Goss v. Lopez (1975) 419 U.S. 565, 584, 95 S. Ct. 729, 42 L. Ed. 2d 725]* , or transfer to a mental hospital from a prison [*Vitek v. Jones (1980) 445 U.S. 480, 488, 100 S. Ct. 1254, 63 L. Ed. 2d 552]* , the need to maintain respect for public authority must give way to the more important liberty interest, and some sort of pretermination or predeprivation hearing is required.

In some situations, such as the prison setting, in which the Court has approved a lower level of process, it has acknowledged the greater expertise of the government official in making the needed decision [*see Vitek v. Jones (1980) 445 U.S. 480, 489-490, 100 S. Ct. 1254, 63 L. Ed. 2d 552* (due process required only that psychologist or psychiatrist at mental institution make determination that level of care in institution was appropriate for prisoner prior to prisoner's transfer to institution); *see also Parham v. J.R. (1979) 442 U.S. 584, 607-608, 99 S. Ct. 2493, 61 L. Ed. 2d 101* (due process was satisfied and no later process was required, in parent's commitment of child to mental institution for treatment, on opinion of institution's doctor that treatment would be beneficial for child)].

[4] Need for Administrative Efficiency

In *Mathews v. Eldridge (1976) 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18* , the Court recognized that any additional

accuracy gained through a higher level of process might be outweighed by the excessive cost involved. The need for administrative efficiency is balanced, however, against the importance of the private interests at stake [*Mathews v. Eldridge (1976) 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18]* . The more important the interest at stake, the greater the degree of accuracy required [*see, e.g., Veilleux v. Workers' Comp. Appeals Bd. (1985) 175 Cal. App. 3d 235, 242, 220 Cal. Rptr. 568* (disabled worker cannot have vocational rehabilitation benefits terminated without prior hearing)]. For example, a greater tolerance for inaccuracy would be present in the context of a 10-day school suspension than in that of expulsion [*Goss v. Lopez (1975) 419 U.S. 565, 576, 95 S. Ct. 729, 42 L. Ed. 2d 725* ; compare *Dixon v. Love (1977) 431 U.S. 105, 114-115, 97 S. Ct. 1723, 52 L. Ed. 2d 172* (important public interest in road safety and prompt removal of safety hazard justified immediate license revocation) with *Bell v. Burson (1971) 402 U.S. 535, 540, 91 S. Ct. 1586, 29 L. Ed. 2d 90* (when only purpose of statute was to obtain security from which to pay judgments against licensee resulting from accident, insufficient public interest to justify immediate license revocation)]. Moreover, when the underlying issues are complex and require difficult factual determinations, nearly the full panoply of procedural safeguards in civil cases may be required [*see Morrissey v. Brewer (1972) 408 U.S. 471, 488-489, 92 S. Ct. 2593, 33 L. Ed. 2d 484]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionCriminal Law & ProcedureJuvenile OffendersJuvenile ProceedingsGeneral OverviewCriminal Law & ProcedurePostconviction ProceedingsParoleFamily LawFamily Protection & WelfareChildrenAbuse, Endangerment & NeglectTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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41-470A California Forms of Pleading and Practice--Annotated § 470A.33

§ 470A.33 Impact of Availability of Post-Deprivation Due Process and Other Relief

The availability of post-deprivation due process or other post-deprivation relief will affect the kind of predeprivation process that is required. The existence of extensive post-deprivation relief does not justify a taking of a recognized interest without some kind of predeprivation process, but the existence of extensive post-deprivation relief is a relevant consideration in determining the required level of predeprivation process [*Cleveland Bd. of Educ. v. Loudermill (1985) 470 U.S. 532, 545, 105 S. Ct. 1487, 84 L. Ed. 2d 494* ; *Gilbert v. City of Sunnyvale (2005) 130 Cal. App. 4th 1264, 1280-1281, 31 Cal. Rptr. 3d 297* (discharged police officer was given sufficient notice and documents to defend himself in pre-termination hearing; officer was not entitled to full discovery of all documents; pre-termination procedures were adequate given officer's right to more elaborate post-termination hearing procedures)]. If the state affords extensive and formal post-deprivation relief, the predeprivation hearing may be more informal. Similarly, although the matter is not well settled, it appears that the presence of other forms of post-deprivation relief may affect the level of process. With regard to reputation interests, the availability of a post-deprivation defamation suit was significant to the court's holding in *Paul v. Davis, (1976) 424 U.S. 693, 698, 96 S. Ct. 1155, 47 L. Ed. 2d 405* , that reputation could be taken without prior procedural due process. While in most instances the availability of some collateral attack on government actions, such as injunction or mandamus proceedings, is no substitute for procedural due process in advance of the deprivation [*Fuentes v. Shevin (1972) 407 U.S. 67, 81-82, 92 S. Ct. 1983, 32 L. Ed. 2d 556]* , in some situations the availability of extensive and formal post-deprivation relief will be considered by the court in the balancing process [*see* *Hudson v. Palmer (1984) 468 U.S. 517, 534-535, 104 S. Ct. 3194, 82 L. Ed. 2d 393* (intentional destruction of prison inmate's property held not to violate procedural due process if adequate post-deprivation common law remedies exist)].

In *Memphis Light, Gas & Water Div. v. Craft (1978) 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30* , later injunctive relief restoring terminated utility services was inadequate procedural due process because even a temporary termination of utility service worked considerable harm. The risk of error in utility cutoff decisions was not so insubstantial as to warrant dispensing with all pretermination process prior to termination, and the availability of an injunction or other post-deprivation relief was too bounded by procedural restraints and too susceptible to delay to provide an effective safeguard against erroneous deprivation [*Memphis Light, Gas & Water Div. v. Craft (1978) 436 U.S. 1, 20-21, 98 S. Ct. 1554, 56 L. Ed. 2d 30]* . However, parking enforcement statute did not violate due process of law when it required

parties seeking to challenge parking tickets to deposit the amount of the parking penalty as a condition of being granted an administrative hearing with a refund of the deposited penalty if the claimant won their claim [*Tyler v. County of Alameda (1995) 34 Cal. App. 4th 777, 787-788, 40 Cal. Rptr. 2d 643* ; *Love v. City of Monterey (1995) 37 Cal. App. 4th 562, 564, 43 Cal. Rptr. 2d 911]* .

The U.S. Supreme Court rejected a challenge on due process grounds to the California prevailing wage law statutes which authorized the state Labor commissioner to withhold contract moneys when a contractor on a public works project violated prevailing wage laws. Under the statute, there was no right to a pre-withholding hearing. The contractor claimed a deprivation of property without due process of law. Due process of law was satisfied because existing judicial remedies for breach of contract provided adequate remedies for the party seeking to challenge withholding of those moneys [*Lujan v. G. & G. Fire Sprinklers, Inc. (2001) 532 U.S. 189, 121 S. Ct. 1446, 1452, 149 L. Ed. 2d 391]* . The California Court of Appeal determined that the Division of Labor Standards Enforcement did not provide the hearing required by law to a contractor who had funds withhold for violations of the prevailing wage laws. The court also held that a reasonable cause hearing, authorized under *8 Cal. Code Regs. § 16414*, was not an adequate hearing because it was not a trial type, administrative hearing that was required to satisfy the governing statute and due process requirements under *Lujan* [*Mobley v. Los Angeles Unified School Dist. (2001) 90 Cal. App. 4th 1221, 1241-1243]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawAgency AdjudicationHearingsRight to HearingStatutory RightConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionEnergy & Utilities LawUtility CompaniesService TerminationsPublic Contracts LawLabor LawsPrevailing Wage Standards

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[Reserved]

§§ 470A.34[Reserved]

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41-470A California Forms of Pleading and Practice--Annotated § 470A.40

§ 470A.40 Variable Nature of Due Process Procedures

Procedural due process does not require that the same procedures be followed in every case. For example, in *Fuentes v. Shevin* [*Fuentes v. Shevin (1972) 407 U.S. 67, 92 S. Ct. 1983]* , the U.S. Supreme Court recognized that although the household goods attached by a creditor are not necessarily of the same importance as wages [*Sniadach v. Family Finance Corp. (1969) 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349]* , and welfare benefits [*Goldberg v. Kelly (1970) 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287]* , they are nonetheless entitled to some level of procedural due process [*Fuentes v. Shevin (1972) 407 U.S. 67, 89, 92 S. Ct. 1983, 32 L. Ed. 2d 556]* . Each aspect of procedure required will vary depending on the competing state and private interests [*Coleman v. Department of Personnel Administration (1991) 52 Cal. 3d 1102, 1119, 278 Cal. Rptr. 346, 805 P.2d 300* (procedural due process protections apply to automatic resignation statute (*Gov. Code § 19996.2(a)*) under which a state employee who is absent without leave is deemed to have resigned from state employment; employees are entitled under due process to notice and opportunity to respond before neutral fact-finder, but not to post-resignation hearing)]. For example, notice is an elementary requirement when a liberty or property interest is taken, but the type of notice required will vary depending on the interest at stake [*compare* *Goss v. Lopez (1975) 419 U.S. 565, 581-582, 95 S. Ct. 729, 42 L. Ed. 2d 725* (only notice required for 10-day public school suspension was principal's informing student of suspension just before imposition of suspension) *with* *Morrissey v. Brewer (1972) 408 U.S. 471, 488-489, 92 S. Ct. 2593, 33 L. Ed. 2d 484* (formal notice of charges with adequate time to prepare defense required for parole revocation)]. Since the requirements of fair procedure vary to such a great degree, it is not possible to prescribe what procedures might be required in all cases or even in any particular case, but the range of possible procedures are discussed in *§§ 470A.41 -470A.47*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionEducation LawStudentsDisciplinary ProceedingsDue ProcessEducation LawStudentsDisciplinary ProceedingsNoticeEducation LawStudentsDiscipline MethodsSuspensionsLabor & Employment LawEmployment RelationshipsAt-Will EmploymentPublic Employees

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§ 470A.41 Range of Hearing Alternatives

[1] Informal Hearings

For relatively minor takings of property or liberty interests, even very informal procedures are sufficient for procedural due process. Thus, in *Goss v. Lopez (1975) 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725* , a 10-day suspension from school, although a taking of both a property interest and a liberty interest that required some level of process prior to the taking, was held a minor intrusion on the right to a public school education and a minimal blight on reputation warranting an extremely informal hearing consisting of the principal's informing the student of the suspension and the reasons for it and giving the student an opportunity to reply [*Goss v. Lopez (1975) 419 U.S. 565, 581-582, 95 S. Ct. 729, 42 L. Ed. 2d 725]* . In *Memphis Light, Gas & Water Div. v. Craft (1978) 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30* , involving the cut-off of public utility services, procedural due process entitled the customer only to an informal hearing consisting of talking to some utility employee who had the discretion to consider the customer's side of the story and, if acceptable, to decide not to discontinue utility services. The employee was not required to be a neutral party or to undertake a full consideration of all the customer's claims [*Memphis Light, Gas & Water Div. v. Craft (1978) 436 U.S. 1, 13-15, 98 S. Ct. 1554, 56 L. Ed. 2d 30]* . In a California case involving the right to participate in a work furlough, the court held that, despite the work furlough administrator's absolute statutory discretion to determine participation in the program, due process protection of dignitary interests required the administrator at least to consider, on a case-by-case basis, each applicant's claimed interest in participating [*In re Thomas (1984) 161 Cal. App. 3d 721, 728, 206 Cal. Rptr. 719]* .

When the administrative determination is made on the basis of expert opinion, an informal hearing, typically nonadversarial and conducted before the expert rather than a professional fact finder, is often all that is required [*see, e.g.,* *Youngberg v. Romeo (1982) 457 U.S. 307, 323, 102 S. Ct. 2452, 73 L. Ed. 2d 28* (involuntarily committed mentally ill person had due process right to treatment, but only as determined by institution's "appropriate professional"); *Vitek v. Jones (1980) 445 U.S. 480, 491, 100 S. Ct. 1254, 63 L. Ed. 2d 552* (due process for transfer of prisoner to mental hospital required only that psychologist or psychiatrist at hospital make determination that transfer was necessary); *Parham v. J.R. (1979) 442 U.S. 584, 613-616, 99 S. Ct. 2493, 61 L. Ed. 2d 101* (due process for commitment of juvenile by his parents or by state as ward of court to mental hospital required only finding by hospital

doctor that child needed kind of services that hospital could provide)].

An informal hearing is often all that is required before a prospective interest is taken [*Greenholtz v. Nebraska Penal Inmates (1979) 442 U.S. 1, 14-15, 99 S. Ct. 2100, 60 L. Ed. 2d 668* (application for parole or probation)]. When the interest is presently held, however, such as a previously granted parole or probation, a higher level of process is required before the interest may be revoked [*Morrissey v. Brewer (1972) 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484, 488-489* (parole or probation revocation)]. An informal hearing may be the only kind of procedural due process consistent with competing public interests. In *Smith v. Organization of Foster Families* [*Smith v. Organization of Foster Families (1977) 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14]* , for example, the U.S. Supreme Court expressed reluctance to recognize any procedural due process liberty interest in foster parents regarding the custody of a foster child, emphasizing the state's concern to protect the natural parents' substantive liberty interest in regaining custody without going through unnecessarily burdensome procedures [*Smith v. Organization of Foster Families (1977) 431 U.S. 816, 846, 97 S. Ct. 2094, 53 L. Ed. 2d 14* ; *see also Hewitt v. Helms (1983) 459 U.S. 460, 472, 103 S. Ct. 864, 74 L. Ed. 2d 675* (special demands of prison security required only "informal, nonadversary review" of record in proceedings to impose administrative segregation, despite prisoner's liberty interest in freedom from segregation)]. A California Court of Appeal has noted, however, that the case law is more equivocal on whether foster parents who have reason to expect a lasting relationship with the foster child have a protected liberty interest meriting a higher level of procedural due process [*In re Jamie G. (1987) 196 Cal. App. 3d 675, 682, 241 Cal. Rptr. 869]* .

[2] Formal Administrative Hearings

A petitioner's request for procedural due process often means the level of process found in a formal administrative hearing. The formal administrative hearing suggests several features, including the following [*see Andersen v. Regents of University of California (1972) 22 Cal. App. 3d 763, 770-773, 99 Cal. Rptr. 531 , cert. denied, 409 U.S. 1006, 93 S. Ct. 447, 34 L. Ed. 2d 298 (1972)]* :

- An impartial fact finder.
- An opportunity to present evidence, including the calling of witnesses.
- The opportunity to test the truthfulness of opposing testimony through the use of various techniques of the adversarial system, such as cross-examination.
- Representation by counsel of one's choice.

This kind of formal administrative hearing is required before the taking of such important interests as freedom from confinement. Thus, the Court has required a very high level of process in parole [*see Morrissey v. Brewer (1972) 408 U.S. 471, 486-487, 92 S. Ct. 2593, 33 L. Ed. 2d 484* (notice of hearing, its purposes, and alleged violations must be given parolee; parolee may appear, speak, present evidence, and, in certain circumstances, confront adverse witnesses)], and probation revocation proceedings [*see Gagnon v. Scarpelli (1973) 411 U.S. 778, 786, 93 S. Ct. 1756, 36 L. Ed. 2d 656]* . Because of the importance of professional and other licenses, a formal administrative hearing may also be required before such a license may be suspended or revoked. In most instances, state law provides a high level of procedural due process before suspension or revocation. Failure to accord this high level of process would seem to deny procedural due process rights [*see, e.g., In re Ruffalo (1968) 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117* ; *In re Strick (1983) 34 Cal. 3d 891, 898, 196 Cal. Rptr. 509, 671 P.2d 1251* (due process requires that attorney be given notice and opportunity to be heard before making of final disciplinary order); *Franz v. Board of Medical Quality Assurance (1982) 31 Cal. 3d 124, 140, 181 Cal. Rptr. 732, 642 P.2d 792* (due process requires, when agency intends to rely on members' expert knowledge to resolve legislative-fact issues, that it notify parties and provide opportunity for rebuttal)].

A sheriff's deputy who was given a written reprimand removing the deputy from a special assignment (SWAT team

duty) coupled with a related pay reduction was entitled under due process of law and under *Gov. Code § 3304* to a full evidentiary hearing to challenge the reprimand and pay reduction. The agency procedures did not provide a full evidentiary hearing, and thus the deputy was entitled to a full administrative appeal to the county civil service commission to obtain the evidentiary hearing [*Giuffre v. Sparks (1999) 76 Cal. App. 4th 1322, 1332-1333, 91 Cal. Rptr. 2d 171]* .

A police officer who was reassigned to a lower pay grade by his employer has a significant private interest in continued receipt of his paycheck [*Gilbert v. Homar (1997) 520 U. S. 924, 932, 117 S. Ct. 1807, 138 L. Ed. 2d 120]* , and therefore was entitled under due process of law to hearing procedures in which the police department had the burden of proof of showing that the criteria in the department manual for reassignment to a lower pay grade have been established. The agency procedures placed the burden of proof on the police officer, and that violated due process of law [*Brown v. City of Los Angeles (2002) 102 Cal. App. 4th 155, 175-177, 125 Cal. Rptr. 2d 474* ; *Los Angeles Police Protective League v. City of Los Angeles (2002) 102 Cal. App. 4th 85, 92-94, 124 Cal. Rptr. 2d 911]* . The due process right to a neutral decision maker was also violated because the police chief both authorized the reassignment to a lower pay grade, and was also the final decision maker at the end of the administrative hearing. This lack of neutrality, coupled with other factors, results in a significant risk of unfairness to the police officer, whose property interests under due process of law are adversely affected [*Brown v. City of Los Angeles (2002) 102 Cal. App. 4th 155, 177-179, 125 Cal. Rptr. 2d 474]* . However, limiting the pool of hearing officers to high ranking employees within the police department does not violate due process of law because the officers are employees of the police department, and the affected police officer picks three possible hearing officers from the list of eligible officers [*Brown v. City of Los Angeles (2002) 102 Cal. App. 4th 155, 178-179, 125 Cal. Rptr. 2d 474]* .

[3] More Than Informal But Less Than Formal Hearings

The cases on government employment have required a level of process somewhat above the informal hearings of *Goss v. Lopez* [*Goss v. Lopez (1975) 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725]* , but not of the formal adversarial variety of *Morrissey v. Brewer* [*Morrissey v. Brewer (1972) 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484]* . If state law recognizes a property interest in the job, someone other than the supervisor who made the initial decision to dismiss the employee must have the authority to review the dismissal, taking into consideration the employee's claim as well as the supervisor's assertions [*see, e.g.,* *Perry v. Sindermann (1972) 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570]* . The fact finder is not required to have the kind of independence expected of an administrative officer overseeing a formal administrative hearing, and the petitioner does not necessarily have the same right to representation by outside counsel. A more summary pretermination hearing is permissible if a more formal hearing occurs after termination [*Cleveland Bd. of Educ. v. Loudermill (1985) 470 U.S. 532, 547-548, 105 S. Ct. 1487, 84 L. Ed. 2d 494]* . State employees who are absent without leave and are subject to the automatic resignation provisions of California law [*Gov. Code § 19996.2(a)*] have due process rights that are triggered by the state involvement in the decision to treat an absent employee as someone who has automatically resigned. Due process procedures required in this situation are notice to the employee and the opportunity to respond before a neutral fact-finder. However, the employee is not entitled to a post-resignation administrative hearing [*Coleman v. Department of Personnel Administration (1991) 52 Cal. 3d 1102, 1119, 278 Cal. Rptr. 346, 805 P.2d 300]* . In one case, an asymmetrical hearing procedures did not violate due process of law [*California Consumer Health Care Council, Inc. v. California Department of Managed Health Care (2008) 161 Cal. App. 4th 684, 691-693, 74 Cal. Rptr. 3d 215* (hearing procedures did not violate due process of law when enrollees in health plans did not have the opportunity to see or rebut the filings of a health care plan, even thought the plan had the opportunity to see and rebut the filings of enrollees)].

In a public employment setting with unionized employees, the California Court of Appeal held that a collective bargaining agreement mandated grievance procedure provided adequate procedural due process protection to a union employee of a local public transit district facing discharge for cause. The employee's due process rights included notice, an opportunity to be heard, and the opportunity for arbitration of the employee's dismissal. However, the employee's union had the sole authority to request an arbitration hearing under the collective bargaining agreement, and the union

decided not to request arbitration of the former employee's discharge. The Court of Appeal held that this was sufficient due process procedures when the union is subject to a duty of fair representation toward its members [*Jones v. Omnitrans (2004) 125 Cal. App. 4th 273, 282-283, 22 Cal. Rptr. 3d 706* (employee of local public transit district was discharged for cause, and discharge was not arbitrated because union decided not to proceed to arbitration on employee's behalf)].

When a city holds a public hearing to determine whether to abate a public nuisance, the property owner whose property is affected has a due process right to adequate notice, and the opportunity to respond to the city's claims, but the owner is not entitled under due process of law procedural requirements to a formal hearing with discovery, testimony under oath, cross examination, and use of the subpoena power to compel witnesses' testimony [*Mohilef v. Janovici (1996) 51 Cal. App. 4th 267, 276, 58 Cal. Rptr. 2d 721]* . A dairy that discharged manure and waste water into a ditch that eventually led to pollution of waters in the Sacramento-San Joaquin Delta was ordered to cleanup and abate these discharges by a regional water quality control board without being given the opportunity for a pre-abatement order hearing. The dairy challenged the lack of a pre order hearing on due process grounds. The Court of Appeal rejected the challenge based on a balancing of competing interests under the *Matthews* test. The court concluded that the private interest of the dairy that was affected by the order was limited, that the existing procedures which included an informal opportunity to contest the order with the issuing regional board, the right to petition the State Board to review the order, and the right to seek judicial review to challenge the order minimized the risk of error, and the governmental interest was substantial, preventing damage to public health and safety from waste water discharges [*Machado v. State Water Resources Control Board (2001) 90 Cal. App. 4th 720, 726-728, 109 Cal. Rptr. 2d 116]* .

[4] Judicial Hearings

In some instances, procedural due process requires that a court in a civil proceeding make the necessary determination. The very fact that a judge and the judicial process are involved implies a high level of procedural due process. For example, in *Freedman v. Maryland* [*Freedman v. Maryland (1965) 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649]* , while the U.S. Supreme Court recognized the legitimacy of an administrative procedure for licensing sexually explicit movies, it required the agency either to grant a requested license or to obtain a judicial finding that the movie was not entitled to *first amendment* protection in order to deny a license. Any limitations imposed before the judicial proceeding had to be as short as possible consistent with the necessities of the judicial process [*Freedman v. Maryland (1965) 380 U.S. 51, 58-59, 85 S. Ct. 734, 13 L. Ed. 2d 649* ; *see also Bergeron v. Department of Health Services (1999) 71 Cal. App. 4th 17, 27, 83 Cal. Rptr. 2d 481* (judicial hearing satisfies due process requirements for Medi-Cal fraud investigation)].

Judicial protections for *first amendment* protected conduct (expressive conduct) have been codified in California legislation [*Code Civ. Proc. § 1094.8* (expedited judicial review of public agency decisions related to permits when those permits regulate *first amendment* protected conduct)].

For reputation interests, the availability of a post-deprivation defamation suit was significant to the Court's holding in *Paul v. Davis, (1976) 424 U.S. 693, 698, 96 S. Ct. 1155, 47 L. Ed. 2d 405* , that reputation could be taken without prior procedural due process. In other situations, the availability of extensive and formal post-deprivation relief will be considered by the court in the balancing process [*Hudson v. Palmer (1984) 468 U.S. 517, 534-535, 104 S. Ct. 3194, 82 L. Ed. 2d 393* (intentional destruction of prison inmate's property held not to violate procedural due process if adequate post-deprivation common law remedies exist)]. Common law tort remedies (civil lawsuit) were held to be sufficient to satisfy due process of law requirements in *Ingraham v. Wright (1977) 430 U.S. 651, 682-683, 97 S. Ct. 1401, 51 L. Ed. 2d 711* a case challenging the use of corporal punishment in a school system. The availability of judicial remedies to seek damages for excessive punishment led the court to hold that pre-action notice and an opportunity to be heard were not required before school administrators paddled students to maintain school discipline [*Ingraham v. Wright (1977) 430 U.S. 651,682-683, 430 U.S. 651, 683, 97 S. Ct. 1401, 51 L. Ed. 2d 711]* . Finally, the U.S. Supreme Court rejected a challenge on due process grounds to the California prevailing wage law statutes which authorized the

state Labor Commissioner to withhold contract moneys when a contractor on a public works project violated prevailing wage laws. Under the statute, there was no right to a pre-withholding hearing. The contractor claimed a deprivation of property without due process of law. Due process of law was satisfied because existing judicial remedies for breach of contract provided adequate remedies for the party seeking to challenge withholding of those moneys [*Lujan v. G. & G. Fire Sprinklers, Inc. (2001) 532 U.S. 189, 121 S. Ct. 1446, 1452, 149 L. Ed. 2d 391]* .

[5] Ministerial Decisions and Hearing Rights

Ministerial decisions ordinarily do not require additional procedures to ensure accuracy, and the U.S. Supreme Court has held that when the "substantial public interest in administrative efficiency would be impeded by the availability of a pretermination hearing in every case," procedural due process will not require such a hearing [*Dixon v. Love (1977) 431 U.S. 105, 114, 97 S. Ct. 1723, 52 L. Ed. 2d 172]* . In one ministerial case [*Escondido Imports, Inc. v. Department of Motor Vehicles (1983) 145 Cal. App. 3d 834, 839-840, 193 Cal. Rptr. 772]* , a California court upheld a Department of Motor Vehicles assessment of $5 to $15 fines on automobile dismantlers and dealers for failure to submit on time certain required documents. The court said that although procedural due process normally required a pretermination hearing, the small property interest and the minimal risk of error involved justified limiting relief to post-deprivation procedures [*see also* *Civil Service Asso. v. San Francisco (1978) 22 Cal. 3d 552, 562, 150 Cal. Rptr. 129, 586 P.2d 162* (involving five-day suspension of civil service employees without prior hearing); *Willson v. State Personnel Bd. (1980) 113 Cal. App. 3d 312, 317, 169 Cal. Rptr. 823* (allowing termination without prior hearing of person voluntarily absent for five consecutive working days under constructive resignation statute)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationHearingsRight to HearingDue ProcessConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechExpressive ConductConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionCriminal Law & ProcedureSentencingAlternativesCommunity ConfinementCriminal Law & ProcedureSentencingAlternativesProbationGeneral OverviewCriminal Law & ProcedurePostconviction ProceedingsParoleEnergy & Utilities LawUtility CompaniesService TerminationsGovernmentsState & Territorial GovernmentsLicenses

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§ 470A.42 Timing of Hearing

[1] General Requirement of Hearing Before Taking Property or Interest

In general, the state must afford "some kind of hearing" [*Wolff v. McDonnell (1974) 418 U.S. 539, 557-558, 94 S. Ct. 2963, 41 L. Ed. 2d 935]* before taking any liberty or property interest [*see* *Vaessen v. Woods (1984) 35 Cal. 3d 749, 757, 200 Cal. Rptr. 893, 677 P.2d 1183* (termination of AFDC benefits must be preceded by adequate notice and opportunity for recipient to challenge proposed action); *Bostean v. Los Angeles Unified School Dist. (1998) 63 Cal. App. 4th 95, 117, 73 Cal. Rptr. 2d 523* (due process requires notice and predeprivation opportunity to respond before public employee is placed on involuntary illness leave of absence); *State of California v. Superior Court (1984) 150 Cal. App. 3d 848, 863, 197 Cal. Rptr. 914* (hearing must be held before imposing discipline on real estate licensee)]. An "extraordinary situation" must exist before this requirement of a pretaking hearing is excused [*United States v. $8,850 (1983) 461 U.S. 555, 562 n.12, 103 S. Ct. 2005, 76 L. Ed. 2d 143* ; *Boddie v. Connecticut (1971) 401 U.S. 371, 378-379, 91 S. Ct. 780, 28 L. Ed. 2d 113]* .

The nature and scope of the required pretaking hearing depend on the relative weights of the competing government and private interests [*Mathews v. Eldridge (1976) 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18]* . In *Goldberg v. Kelly (1970) 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287* , which involved the termination of welfare benefits, the United States Supreme Court held that the governmental interest in the "speedy resolution of questions of eligibility" justified limiting the pretermination hearing to minimum procedural safeguards. However, the extensive procedure the Court required, giving the welfare recipient the right to a hearing with the chance to introduce oral evidence and cross-examine adverse witnesses, as well as the right to retained counsel, "closely approximated a judicial trial" [*Goldberg v. Kelly (1970) 397 U.S. 254, 267, 90 S. Ct. 1011, 25 L. Ed. 2d 287* ; *Mathews v. Eldridge (1976) 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18]* . Nonetheless, the Court in *Matthews v. Eldridge* [*Mathews v. Eldridge (1976) 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18]* , emphasized that no general requirement exists that a full evidentiary hearing be afforded before a taking of a liberty or property interest; rather, what is required is a prior hearing consistent with the competing interest [*Mathews v. Eldridge (1976) 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18]* .

The leading California case is *Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 124 Cal. Rptr. 14, 539 P.2d 774* , which held that the California statutes regulating state civil service employment violated procedural due process. Although California law allowed permanent employees to be removed only "for cause," the authorized state representative was allowed to dismiss or otherwise discipline an employee simply by notifying him or her. The employee was entitled on request to a full evidentiary hearing within a reasonable time after any serious disciplinary action, with the right to reinstatement and back pay if successful. Although a full evidentiary hearing was not required, at a minimum, preremoval safeguards must include notice of the proposed action, the reasons for the action, a copy of the charges and material on which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline [*Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 215, 124 Cal. Rptr. 14, 539 P.2d 774]* . These procedural protections apply to a permanent public employee who is demoted [*Ng v. State Personnel Bd. (1977) 68 Cal. App. 3d 600, 606, 137 Cal. Rptr. 387]* , suspended without pay [*Civil Service Asso. v. San Francisco (1978) 22 Cal. 3d 552, 558-560, 150 Cal. Rptr. 129, 586 P.2d 162]* , or dismissed [*Chang v. City of Palos Verdes Estates (1979) 98 Cal. App. 3d 557, 564, 159 Cal. Rptr. 630]* , but do not apply to an employee who has received a written reprimand because that employee does not suffer any loss of pay or benefits [*Stanton v. City of West Sacramento (1991) 226 Cal. App. 3d 1438, 1442, 277 Cal. Rptr. 478]* . A public employee who is demoted in lieu of being laid off is not entitled under due process of law to a pre-demotion hearing but rather a post-demotion hearing is enough [*Duncan v. Department of Personnel Administration (2000) 77 Cal. App. 4th 1166, 1170-1171, 92 Cal. Rptr. 2d 257]* .

Notice and hearing must come at a time "when the deprivation can be prevented" [*Fuentes v. Shevin (1972) 407 U.S. 67, 81, 92 S. Ct. 1983, 32 L. Ed. 2d 556]* . Temporary, nonfinal deprivations of property are likewise required to be preceded by notice and hearing [*Fuentes v. Shevin (1972) 407 U.S. 67, 85, 92 S. Ct. 1983, 32 L. Ed. 2d 556]* .

A community college instructor's due process rights were not violated by a pre-hearing termination notice because the court construed the notice to be invalid, and the instructor was given a fair hearing before an ALJ prior to the effective date of termination [*California Teachers Association v. Butte Community College District Board of Trustees (1996) 48 Cal. App. 4th 1293, 1306-1307, 56 Cal. Rptr. 2d 269]* .

The governing board of the Los Angeles Unified School District properly met in closed session consistent with *Gov. Code § 54957* to begin the process to dismiss a permanent certificated teacher without giving the teacher the 24-hour notice otherwise required by *Gov. Code § 54957*. This was because the 24-hour notice requirement did not apply when the public employee had the right to an evidentiary hearing under *Educ. Code § 44934* subsequent to the closed session. Furthermore, the teacher did not have a due process right to notice and opportunity to be heard before the governing board began the dismissal proceedings [*Kolter v. Commission of Professional Competence of the Los Angeles Unified School Dist. (2009) 170 Cal. App. 4th 1346, 1349, 88 Cal. Rptr. 3d 620]* .

A school bus driver who submitted an allegedly adulterated urine specimen in a random drug test was entitled by due process of law to a hearing before the DMV prior to the revocation of her school bus driver's certificate [*Menge v. Reed (2000) 84 Cal. App. 4th 1134, 1137-1138, 101 Cal Rptr. 2d 443]* .

Termination of doctor's hospital staff privileges for cause was challenged by doctor because of lack of a pre-termination hearing. The Court of Appeal concluded that physician had a due process and statutory [*Bus. & Prof. Code § 809*] right to a pre-termination hearing before staff privileges could be terminated [*Sahlolbei v. Providence Healthcare, Inc. (2003) 112 Cal. App. 4th 1137, 1147-1150, 5 Cal. Rptr. 3d 598]* . The Court of Appeal held that physician was entitled to a preliminary injunction reinstating staff privileges until the required hearing procedures were completed [*Sahlolbei v. Providence Healthcare, Inc. (2003) 112 Cal. App. 4th 1137, 1160, 5 Cal. Rptr. 3d 598]* . The court also held that physician did not have to exhaust internal hospital grievance procedures, including a post-termination procedure to assert a claim that the hospital failed to follow hearing procedures required by law (statutory procedures codified under *Bus & Prof. Code § 809*) [*Sahlolbei v. Providence Healthcare, Inc. (2003) 112 Cal. App. 4th 1137, 1154-1155, 5 Cal. Rptr. 3d 598]* .

The California Court of Appeal applied the four-part balancing test from *People v. Ramirez (1979) 25 Cal. 3d 260, 269, 158 Cal. Rptr. 316, 599 P.2d 622* to hold that a physician's due process rights were violated when the superior Court issued an order prohibiting the doctor from practicing medicine as a condition of bail for criminal charges brought against the doctor. The doctor was not given notice nor a full hearing before his license was effectively suspended [*Gray v. Superior Court (2005) 125 Cal. App. 4th 629, 637-638, 23 Cal. Rptr. 3d 50]* . The bail condition was requested by the Attorney General, who appeared for the Medical Board of California at the doctor's arraignment on criminal charges without giving advance notice to the doctor that the Board was going to request suspension of the doctor's license [*Gray v. Superior Court (2005) 125 Cal. App. 4th 629, 635-636, 23 Cal. Rptr. 3d 50]* . The court held that the doctor was deprived of the right to practice medicine without notice, without an opportunity to confront the charges and witnesses against him, and without a full hearing in violation of due process of law [*Gray v. Superior Court (2005) 125 Cal. App. 4th 629, 637-638, 23 Cal. Rptr. 3d 50]* .

However, the California Court of Appeal rejected both a facial and an as applied challenge to statutory procedures in the California Education Code [*Educ. Code § 56366.6(a), (b)*; *5* Cal. Code Regs.§ 3068] that provided for a post-suspension and post-revocation hearing to private special education schools that had their certifications to operate suspended or revoked by the Superintendent of Public Instruction. The schools argued that they were entitled to a pre-suspension or pre-revocation hearing. The Court of Appeal rejected that argument based upon the application of the three *Mathews v. Eldridge (1976) 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed 2d 18* factors, the private interest, the risk of error with existing procedures, and the governmental interest, as well as California due process of law principles [*Cal. Const., Art. 1, Sect. 7(a)*]. The court held that a post-suspension or post-revocation hearing satisfied due process of law requirements because it provides a reasonably prompt method for determining the validity of a suspension or revocation in circumstances in which there is a strong governmental interest--protecting disabled children [*Cal. Ass'n of PSES v. Cal. Dept. of Educ. (2006) 141 Cal. App. 4th 360, 374-376, 45 Cal. Rptr. 3d 888]* . Another California Court of Appeal upheld the constitutionality of statutory provisions [*Ins. Code § 1748.5*] that authorize the Insurance Commissioner to immediately suspend the license of an insurer when the licensee's have been charged with felony criminal offenses and the failure to issue a suspension order would threaten the solvency of the insurer, or cause financial or other injury to any person. In this case, bail bond licensees challenged the immediate suspension, and argued that they had a due process right to a pre-suspension hearing. The court rejected that challenge and held that an immediate post suspension hearing satisfied due process requirements in this case because there was a substantial governmental interest in prompt suspensions to preserve the insurance industry, and the public's confidence in that industry [*American Liberty Bail Bonds v. Garamendi (2006) 141 Cal. App. 4th 1044, 1058-1060, 46 Cal. Rptr. 3d 541]* .

[2] Limitations on General Rule

[a] When Termination of Liberty or Property Interest Is Temporary

In *Mathews v. Eldridge (1976) 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18* , the Court applied a balancing test [*see §§ 470A.30- 470A.33, above* , for discussion of balancing test] to uphold the termination of Social Security disability benefits prior to any oral hearing, let alone an evidentiary hearing. In general, no right exists to an evidentiary hearing before the temporary termination of a liberty or property interest [*Mathews v. Eldridge (1976) 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18]* . In *Matthews*, the recipient of medical benefits was entitled to written notice of termination and an opportunity to respond in writing. A formal evidentiary post-termination hearing with judicial review was available after a delay of a year or more. The Court noted that receipt of Social Security disability payments was not based on need, and that disabled persons might have other sources of support and would not necessarily be in the same desperate need as the recipient of welfare benefits, so an erroneous termination would not have universally the same adverse impact pending correction in posttermination administrative proceedings [*Mathews v. Eldridge (1976) 424 U.S. 319, 342, 96 S. Ct. 893, 47 L. Ed. 2d 18]* . Crucial to the Court's holding was its confidence in the existing pretermination procedures [*Mathews v. Eldridge (1976) 424 U.S. 319, 347, 96 S. Ct. 893, 47 L. Ed. 2d 18]* . Although procedural due process ordinarily requires a hearing, when the potential length or severity of the deprivation does not

indicate a likelihood of serious loss and the procedures underlying the predeprivation decision are reliable enough to minimize the risk of error, the government may act without providing additional advance procedural safeguards [*Memphis Light, Gas & Water Div. v. Craft (1978) 436 U.S. 1, 14-15, 98 S. Ct. 1554, 56 L. Ed. 2d 30]* .

[b] When Deprivation Is Necessary to Assure Public Health and Safety

Summary administrative action resulting in deprivation of significant property or liberty interests is justified when necessary to assure public health and safety [*Pollack v. Department of Motor Vehicles (1985) 38 Cal. 3d 367, 380, 211 Cal. Rptr. 748, 696 P.2d 141]* . In one case, for example, the U.S Supreme Court held that the authority of the secretary of the interior to order an immediate cessation of a surface mining operation did not violate the *Fifth Amendment due process clause* [*Hodel v. Virginia Surface Min. & Recl. Assn. (1981) 452 U.S. 264, 298-303, 101 S. Ct. 2352, 69 L. Ed. 2d 1]* .

[c] When Exigent Circumstances Exist

Exigent circumstances may justify the termination of a property or liberty interest without a prior hearing. *Goldberg v. Kelly (1970) 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287* recognized this exception to the general requirement of a pretermination hearing, but limited it to situations involving some immediate threat to the public coupled with some private interest of lesser importance [*Goldberg v. Kelly (1970) 397 U.S. 254, 263 n. 10, 90 S. Ct. 1011, 25 L. Ed. 2d 287]* . For example, although an official of a federally regulated bank had a property interest in continued employment, the governmental interest in the integrity of the banking system permitted a post-deprivation hearing rather than a prior hearing [*see Federal Deposit Ins. Corp. v. Mallen (1988) 486 U.S. 230, 241-242, 108 S. Ct. 1780, 100 L. Ed. 2d 265]* . Similarly, the integrity of the Medi-Cal system and the interest in preventing fraud justifies a temporary withholding of payments to those persons who are subject to criminal investigations for fraud [*see Bergeron v. Department of Health Services (1999) 71 Cal. App. 4th 17, 27, 83 Cal. Rptr. 2d 481]* .

Few modern U.S. Supreme Court cases have directly involved the exigent circumstances exception. In the debtor-creditor cases, the Court has recognized in dicta that summary seizure of a debtor's property would be appropriate in extraordinary situations, such as if the debtor were about to dispose of the disputed asset [*Sniadach v. Family Finance Corp. (1969) 395 U.S. 337, 339, 89 S. Ct. 1820, 23 L. Ed. 2d 349* ; *see also Blair v. Pitchess (1971) 5 Cal. 3d 258, 280, 96 Cal. Rptr. 42, 486 P.2d 1242* (striking down California claim and delivery statute)]. In *Barry v. Barchi* [*Barry v. Barchi (1979) 443 U.S. 55, 99 S. Ct. 2642, 61 L. Ed. 2d 365]* , the Court upheld the summary suspension of a licensed horse trainer. Although the trainer had a substantial property interest in the license, the state's important interest in assuring the integrity of the racing carried on under its auspices justified the summary action [*Barry v. Barchi (1979) 443 U.S. 55, 64, 99 S. Ct. 2642, 61 L. Ed. 2d 365]* .

The California Supreme Court, in a debtor-creditor case that rejected the emergency doctrine as justification for California's prehearing attachment procedures, analyzed the extraordinary circumstances that might justify summary procedures [*Randone v. Appellate Dep't of Superior Court (1971) 5 Cal. 3d 536, 554, 96 Cal. Rptr. 709, 488 P.2d 13]* :

> First, the seizures were undertaken to benefit the general public rather than to serve the interests of a private individual. ... Second, the procedures could only be initiated by an authorized governmental official charged with a public responsibility. ... Third, in each case the nature of the risks required immediate action, and any delay ... could potentially have caused serious harm to the public. Fourth, the property appropriated did not vitally touch an individual's life or livelihood. Finally, the "takings" were conducted under narrowly drawn statutes that sanctioned the summary procedure only when great necessity actually arose.

Many of the commonly cited summary seizure cases predate the modern concern for procedural due process, and their

application of the exigent circumstances test raises an unresolved issue: whether exigent circumstances must be present in the particular case as long as cases of that type typically present such circumstances. The older cases held that post-termination proceedings could correct for any error in the application of the particular facts [*see, e.g.,* *Ewing v. Mytinger & Casselberry, Inc. (1950) 339 U.S. 594, 600, 70 S. Ct. 870, 94 L. Ed. 1088* (approving seizure of vitamins for which false curative powers were claimed); *North American Cold Storage Co. v. Chicago (1908) 211 U.S. 306, 320, 29 S. Ct. 101, 53 L. Ed. 195* (seizure of poultry alleged to be unfit for human consumption)]. A recent California case emphasized that some emergency must exist in the actual case and that the governing statute must narrowly specify the extraordinary circumstances to which it applies; this approach seems closer to the spirit of modern procedural due process law [*Menefee & Son v. Department of Food & Agriculture (1988) 199 Cal. App. 3d 774, 782, 245 Cal. Rptr. 166]* .

Even when a prior hearing is unnecessary because a condition is so dangerous that it requires action be taken without delay, a hearing must be held after the emergency taking to review the action and to obtain relief if the initial taking was wrongful [*People v. Lockheed Shipbuilding & Constr. Co. (1973) 35 Cal. App. 3d 776, 781, 111 Cal. Rptr. 106* (safety order of California State Division of Industrial Safety); *see* *Barry v. Barchi (1979) 443 U.S. 55, 66, 99 S. Ct. 2642, 61 L. Ed. 2d 365]* .

In a case involving the impounding of farm animals, a California Court of Appeal held that neither the fact that the owner could initiate later procedures to review the propriety of the initial taking nor the fact that the owner probably was guilty of the violation justified the seizure without at least some form of notice and hearing. Summary seizure is justified, the court held, only when directly necessary to secure an important governmental or general public interest, or when there is a special need for very prompt action, and some government official exercises narrowly drawn statutory power in determining the emergency. Even when summary seizure is held consistent with procedural due process, the government has the responsibility to initiate a post-seizure hearing. The particular statute did not have such a requirement [*Carrera v. Bertaini (1976) 63 Cal. App. 3d 721, 727-730, 134 Cal. Rptr. 14]* . The availability of a collateral judicial remedy cannot sustain a seizure procedure that provides no hearing whatsoever, either before or after the taking [*Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal. 3d 294, 308-309, 138 Cal. Rptr. 53, 562 P.2d 1302* ; *Menefee & Son v. Department of Food & Agriculture (1988) 199 Cal. App. 3d 774, 781, 245 Cal. Rptr. 166]* .

[d] When Taking Is Incompatible With Any Form of Pretermination Hearing

Certain kinds of takings are incompatible with any form of pretermination hearing, so that aggrieved persons are necessarily limited to post-deprivation challenges to the governmental action. These kinds of takings include the arrest of an individual [*Baker v. McCollan (1979) 443 U.S. 137, 145, 99 S. Ct. 2689, 61 L. Ed. 2d 433]* , seizures of goods by customs officials [*United States v. $8,850 (1983) 461 U.S. 555, 562-563, 103 S. Ct. 2005, 76 L. Ed. 2d 143]* , and seizures of vehicles used for drug trafficking [*Calero-Toledo v. Pearson Yacht Leasing Co. (1974) 416 U.S. 663, 678-680, 94 S. Ct. 2080, 40 L. Ed. 2d 452]* .

[3] Administrative Delay as a Due Process Violation and Procedural Fairness

The court applies a balancing test to determine whether administrative delay violates procedural due process [*United States v. $8,850 (1983) 461 U.S. 555, 556, 103 S. Ct. 2005, 76 L. Ed. 2d 143* , citing *Barker v. Wingo (1972) 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101]* . In *United States v. $8,850 (1983) 461 U.S. 555, 103 S. Ct. 2005, 76 L. Ed. 2d 143* , the U.S. Supreme Court equated a customs seizure to the limitation on liberty of an indicted criminal defendant and applied the same balancing test, weighing the length of the delay, the reason for the delay, the defendant's assertion of his or her right, and prejudice to the defendant [*United States v. $8,850 (1983) 461 U.S. 555, 564, 103 S. Ct. 2005, 76 L. Ed. 2d 143* , citing *Barker v. Wingo (1972) 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101]* . No one factor is determinative, but the longer the delay, the greater the need for government justification [*United States v. $8,850 (1983) 461 U.S. 555, 565, 103 S. Ct. 2005, 76 L. Ed. 2d 143* ; *see also* *United States v. Von Neumann (1986) 474 U.S. 242, 250-251, 106 S. Ct. 610, 88 L. Ed. 2d 587* (36-day delay before decision in forfeiture remission case did not deny

due process); *Cleveland Bd. of Educ. v. Loudermill (1985) 470 U.S. 532, 547, 105 S. Ct. 1487, 84 L. Ed. 2d 494* (nine-month delay in post-termination hearing for government employee who had received informal pretermination hearing did not violate due process); *United States v. Thirty-seven Photographs (1971) 402 U.S. 363, 373-374, 91 S. Ct. 1400, 28 L. Ed. 2d 822* (seizure of free speech materials required hearing within 14 days)].

The California cases tend to require a more timely post-termination hearing when there has been a summary seizure, especially if the delay has resulted in some identifiable harm [*see, e.g., Menefee & Son v. Department of Food & Agriculture (1988) 199 Cal. App. 3d 774, 782, 245 Cal. Rptr 166* (delay in holding hearing following summary seizure of crop on which unauthorized poisons had been used prevented crop owner from plowing under tainted crop and planting new crop); *Carrera v. Bertaini (1976) 63 Cal. App. 3d 721, 726-727, 134 Cal. Rptr. 14* (lengthy delay in holding hearing after summary seizure of animals resulted in increased impound fees)].

Circumstances may justify administrative delays, especially when they are occasioned by conduct of the property holder rather than by the agency, and the delays are otherwise authorized and limited in scope [*see State Bd. of Equalization v. Ceniceros (1998) 63 Cal. App. 4th 122, 133-134, 73 Cal. Rptr. 2d 539* (no violation of due process in proceeding by tax assessor for continuances that were authorized by agency rule and were granted for limited purpose of evaluating evidence that had not been assessed beforehand due to nondisclosure by the taxpayer)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Forms of Pleading and Practice--Annotated

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Volume 41: Overview of Public Administrative Law thru Review of Agency Rulemaking-Chs. 470-472B
Chapter 470A DUE PROCESS RESTRICTIONS ON PUBLIC AGENCIES
PART II. LEGAL BACKGROUND
D. Impact of Due Process Requirements on Agency Procedures

41-470A California Forms of Pleading and Practice--Annotated § 470A.43

§ 470A.43 Timely and Adequate Notice

[1] Informal Notice

The most "elementary and fundamental requirement" for procedural due process is timely and adequate notice [*Mennonite Board of Missions v. Adams (1983) 462 U.S. 791, 801, 103 S. Ct. 2706, 77 L. Ed. 2d 180* (quoting *Mullane v. Central Hanover B. & T. Co. (1950) 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865*)]. What is timely and adequate notice will vary depending on the outcome of the *Matthews v. Eldridge* balancing test [*Mathews v. Eldridge (1976) 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18]* . In *Goss v. Lopez (1975) 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725* , a public school student was entitled to informal notice from the principal before a 10-day suspension. The informal notice consisted of the principal informing the student of the charges against him with the virtually simultaneous opportunity to offer a defense. The limited nature of the intrusion on liberty and property interests along with the need for the principal to take immediate, decisive action in order to protect the educational environment justified the informal notice [*Goss v. Lopez (1975) 419 U.S. 565, 580-583, 95 S. Ct. 729, 42 L. Ed. 2d 725]* .

A high school student who was given a five-day suspension for sexually related misbehavior was given adequate notice of the charges against him when the school administrator described the charged behavior to the student specifically enough so that the student could deny the behavior. The administrator was not required under due process of law to identify the student's accusers, and the charged student was not entitled to know the names of the student accusers due to the sexual misconduct nature of the charges [*Granowitz v. Redlands Unified School District (2003) 105 Cal. App. 4th 349, 356-357, 129 Cal. Rptr. 2d 410]* .

The California Department of Corrections did not violate a correction officer's due process rights by informally notifying the officer of the proposed discipline of demotion from corrections sergeant to corrections officer that the CDC might impose for the officer's misconduct. Further, the CDC later served the officer formal notice that satisfied the officer's *Skelly* rights [*Sulier v. State Personnel Board (2004) 125 Cal. App. 4th 21, 31-32, 22 Cal. Rptr. 3d 615]* .

The operator of a nude entertainment establishment was not denied any due process of law rights by the decision of the City of San Diego to suspend the operator's required police permit because the operator violated provisions of city

regulations that applied to his business. The California Court of Appeal rejected the operator's due process challenge based on untimely notice of the charged violations. Notice regarding most of the violations was given within two weeks of the date of the violation. Delay in the giving notice of the violations did not cause any actual prejudice to the operator, and there was no showing of lost witnesses or other evidence. The operator had the burden of proof of showing actual prejudice from delay, and there was no such proof. Finally, the suspension was based on numerous violations over an extended period of time, and the operator had more than sufficient notice of those violations [*Krontz v. City of San Diego (2006) 136 Cal. App. 4th 1126, 1140-1141, 39 Cal. Rptr. 3d 535]* .

[2] Formal Notice

When procedural due process requires a pretermination hearing of some level of formality, notice must include information about the right to the hearing in order to permit adequate preparation. In *Memphis Light, Gas & Water Div. v. Craft (1978) 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30* , involving termination of service by a public utility, the U.S. Supreme Court found the notification procedure inadequate because it was not reasonably calculated to inform the homeowner of the opportunity for some kind of hearing before a utility company employee for the purpose of disputing the utility bills [*Memphis Light, Gas & Water Div. v. Craft (1978) 436 U.S. 1, 13-15, 98 S. Ct. 1554, 56 L. Ed. 2d 30]* .

A school district's notice procedures may deny a terminated employee due process of law because those procedures are not reasonably calculated under the circumstances to inform the terminated employee of his right to request a hearing to challenge the termination [*California School Employees Association v. Livingston Unified School District (2007) 149 Cal. App. 4th 391, 400, 56 Cal. Rptr. 3d 923]* . The school district required that an employee request a hearing within five days of the date of mailing the notice to the employee. The former employee requested a hearing within five days of receiving actual notice of the termination. The notice was mailed during the summer time, when the school employee was not working and was on vacation. The districts notice procedures violated the reasonable calculated to inform standard for procedural due process of law termination [*California School Employees Association v. Livingston Unified School District (2007) 149 Cal. App. 4th 391, 400, 56 Cal. Rptr. 3d 923]* .

When the magnitude and processes of the taking approach those that occur in criminal cases or typical civil cases, the kind of notice required is likely to be more formal. For example, because of the consequences of parole or probation revocation and the nature of the fact-finding process, the parolee or probationer must be given a specific statement of the grounds for revocation [*Morrissey v. Brewer (1972) 408 U.S. 471, 488-489, 92 S. Ct. 2593, 33 L. Ed. 2d 484]* . In *Mennonite Board of Missions v. Adams (1983) 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180* , the U.S. Supreme Court found that the sale of real property for nonpayment of property taxes did not comport with procedural due process because the mortgagee of the property was not given formal notice of sale. The Court held that a state must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" [*Mennonite Board of Missions v. Adams (1983) 462 U.S. 791, 795, 103 S. Ct. 2706, 77 L. Ed. 2d 180* , citing *Mullane v. Central Hanover B. & T. Co. (1950) 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865]* . Publication of notice was inadequate as to someone known to have an interest in the property; constructive notice was sufficient only if the mortgagee was not "reasonably identifiable" [*Mennonite Board of Missions v. Adams (1983) 462 U.S. 791, 798, 103 S. Ct. 2706, 77 L. Ed. 2d 180]* . This rule was especially true when personal service or mailed notice were both inexpensive and more efficient ways of giving accurate notice.

For example, the posting of a summons for an unlawful detainer action on a tenant's door in a public housing project is inadequate notice because the posting could easily be removed without the tenant's knowledge; notice must be at least mailed [*Greene v. Lindsey (1982) 456 U.S. 444, 453-454, 102 S. Ct. 1874, 72 L. Ed. 2d 249]* . In addition, in a suspension of a student from college for cheating, adequate notice must include the specific charges, the names of any witnesses and "the gist of their proposed testimony" [*Andersen v. Regents of University of California (1972) 22 Cal. App. 3d 763, 771, 99 Cal. Rptr. 531 , cert. denied, 409 U.S. 1006 (1972)*].

In a physician licensing revocation action, due process of law required that the physician be given fair notice that the failure to complete a diversion program will be treated as unprofessional conduct that provided its own basis for discipline. While physician disciplinary proceeding are not penal (criminal), and the notice standards are not as specific or strict as in criminal law actions, the statute authorizing discipline must provide a reasonably clear basis for that discipline, and the physician has to be given notice of that consequence. The lack of such clear basis in the statue lead the court to interpret the statute to not provide authority to discipline a physician for failure to complete a diversion program [*Medical Board of California v. Superior Court (2003) 111 Cal. App. 4th 163, 173-175, 4 Cal. Rptr. 3d 403]* .

The California Fourth District, Division 1, Court of Appeal held that a correction officer dismissed from his job by the Department of Corrections and Rehabilitation for failing a drug test did not receive adequate notice that a foreign prescription, a Mexican diet medication, legally obtained in Mexico, that he took could result in a positive drug test for amphetamines. Without that adequate notice, dismissal as a penalty for failing a drug test was an abuse of discretion, and the court of appeal affirmed the judgment of the superior court vacating the decision of the State Personnel Board, upholding the termination [*Valenzuela v. California State Personnel Board (2007) 153 Cal. App. 4th 1179, 1180-1181, 63 Cal. Rptr. 3d 529]* .

The California Court of Appeal held that the Worker's Compensation Appeals Board (WCAB) violated due process of law by failing to give the Uninsured Employer's Fund notice and the opportunity to present evidence before the WCAB enforced new procedures against the Fund [*Rea v. Workers' Comp. Appeals Bd. (2005) 127 Cal. App. 4th 625, 643-644, 25 Cal. Rptr. 3d 828]* .

The California Court of Appeal held that the California Public Utilities Commission did not violate the due process rights of Cingular Wireless to notice that its conduct would subject it to substantial civil penalties for violating provisions of the public utility statutes [*Pub. Util. Code § 451*] that required regulated carriers to provide "adequate, efficient, just, and reasonable service" to customers. Fair notice was provided to the carrier because the carrier could reasonably discerned from the PUC's interpretations of this statute that its conduct was unjust and unreasonable [*Pacific Bell Wireless, LLC v. P.U.C. (2006) 140 Cal. App. 4th 718, 740-742, 44 Cal. Rptr. 3d 733]* . The California Court of Appeal denied a petition for a writ of review brought by wireless carriers to challenge a decision of the California Public Utilities Commission that imposed substantial fines ($12 million) against wireless service providers in California for unjust and unreasonable practices including charging customers early termination fees to cancel contracts without permitting a grace period, for failing to disclose to customers known network problems and misleading customers regarding network coverage and service. The court rejected the carriers preemption argument and held that the provisions of the Federal Communications Act of 1934, as amended by the Omnibus Budget Reconciliation Act of 1993, that preempt state and local regulation of market entry and rates charged by wireless mobile telephone providers [*47 U.S.C. § 332 (c)(3)(A)*] did not preempt decisions by the California Public Utilities. The court also upheld the imposition of substantial fines against the wireless carriers, and rejected due process arguments against the imposition of fines [*Pacific Bell Wireless, LLC v. P.U.C. (2006) 140 Cal. App. 4th 718, 729-747, 44 Cal. Rptr. 3d 733]* .

The California Court of Appeal affirmed the judgment of the superior court denying a construction company's petition for a writ of administrative mandate that requested reversal of the decision of the California Occupational Safety and Health Appeals Board, which upheld the decision of the California Department of Industrial Relations, Division of Occupational Safety and Health that cited the company for violation of a safety order, and assessed a $5,000 civil penalty against the company. The company was cited for a violation of General Industry Safety Order 1592 [*Cal. Code Regs., tit. 8, § 1592(e)*] as a result of an accident on the job that led to serious injuries suffered by an employee of the company [*Teichert Const. v. Cal. Occupational Safety and Health Appeals Board (2006) 140 Cal. App. 4th 883, 886-887, 44 Cal. Rptr. 3d 833]* . The Court of Appeal held that the regulation was not unconstitutionally vague under due process of law principles applicable to administrative regulations. The constitutional vagueness standard for administrative regulations are less strict than for criminal laws, and the vagueness challenge is assessed based on the complaining party's conduct in the specific facts of the case to which the regulation is being applied. The regulation was

upheld because the agency interpretation of the regulations meaning was reasonable under the circumstances [*Teichert Const. v. Cal. Occupational Safety and Health Appeals Board (2006) 140 Cal. App. 4th 883, 890-892, 44 Cal. Rptr. 3d 833]* .

The California Court of Appeal held that the Department of Social Services violated due process of law in not giving adequate notice to applicants for employment at licensed community care facilities who were disqualified from that type of employment based on prior convictions of criminal offenses that were not exemptible under governing law (crimes against individuals). The Court held that the Department was required to give applicants notice of the basis for a determination of ineligibility, including the standards used to make that determination, the documents of materials relied upon to make that determination, and the conviction charge. This would allow the applicant to correct an incorrect disqualification [*Doe v. Saenz (2006) 140 Cal. App. 4th 960, 996-998, 45 Cal. Rptr. 3d 126]* . Another California Court of Appeal held similarly that the Department violated due process notice requirements related to providing adequate notice to applicants seeking a criminal records exemption, so that they could work in a licensed community care facility [*Gresher v. Anderson (2005) 127 Cal. App. 4th 88, 108-109, 25 Cal. Rptr. 3d 408]* .

The California Court of Appeal held that the California Coastal Commission did not deprive a developer of the due process right to notice of a hearing in which the commission considered a citizen's group appeal of the granting of a coastal development permit sought by the developer. The court concluded that the notice given to the developer was adequate to inform him of the issues to be considered at the commission hearing. The written notice of the commission hearing considering the appeal of the coastal development permit merely stated the date, time, and place of the hearing, but the commission sent the developer a copy of the appeal document filed a by a group of local citizens, and that document contained a statement of the issues on appeal. Also, the developer was familiar with the issues to be appealed since he had participated in the development permit proceedings at the local government (county) level [*Benson v. Cal. Coastal Comm'n (2006) 139 Cal. App. 4th 348, 353-354, 42 Cal. Rptr. 3d 580]* .

[3] Lack of Notice in Exigent Circumstances

Liberty and property may be taken without notice if exigent circumstances affecting the public welfare exist [*see Goldin v. Public Utilities Commission (1979) 23 Cal. 3d 638, 663, 153 Cal. Rptr. 802, 592 P.2d 289* (phone use by prostitution business violated criminal statutes affecting public welfare, justifying termination without notice)]. In *Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal. 3d 294, 138 Cal. Rptr. 53, 562 P.2d 1302* , the California Supreme Court held an ordinance providing for the summary seizure of newsracks placed in unapproved locations in violation of both the *First Amendment* and procedural due process. While the city could immediately seize, without notice or hearing, any newsrack that posed a danger to pedestrians or vehicles, it otherwise could not routinely seize newsracks. Although the city informally tagged offending newsracks seven days prior to seizing them, the Court held this inadequate notice because (1) the statute did not require such tagging and (2) it did not clearly give actual notice to the owner. It was not enough that a person might happen to get notice; the law must require such notice [*Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal. 3d 294, 307 n.7, 138 Cal. Rptr. 53, 562 P.2d 1302]* . Notice after the seizure was inadequate, partly because no procedure existed for testing the legitimacy of the initial taking [*Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal. 3d 294, 307 n.7, 138 Cal. Rptr. 53, 562 P.2d 1302]* , but also because the initial seizure was contrary to the *First Amendment* rights of the public [*Kash Enterprises, Inc. v. City of Los Angeles (1977) 19 Cal. 3d 294, 309, 138 Cal. Rptr. 53, 562 P.2d 1302* ; *see also Skinner v. Superior Court (1977) 69 Cal. App. 3d 183, 137 Cal. Rptr. 851* (ex parte temporary restraining order authorizing seizure of personal property on premises of adult theater violated both *First Amendment* and procedural due process right to advance notice)].

When the general public interest is affected, notice requirements may be less strict than when an individual's right is affected. For example, when the relocation of a public facility is undertaken pursuant to a general plan for "public improvement," abutting property owners are not entitled to individual notice; adequate notice consists of publication of the intended change in land use, as provided by statute [*Oceanside Marina Towers Assn. v. Oceanside Community Development Com. (1986) 187 Cal. App. 3d 735, 744, 231 Cal. Rptr. 910]* . Full due process procedures are required

under other circumstances, however--for instance, when a person has spent large sums of money in reliance on a public land use plan, and the investment would be severely damaged by a change in land use [*Horn v. County of Ventura (1979) 24 Cal. 3d 605, 615, 156 Cal. Rptr. 718, 596 P.2d 1134* ; *Stanson v. San Diego Coast Regional Com. (1980) 101 Cal. App. 3d 38, 49, 161 Cal. Rptr. 392]* .

However, if the administrative action is legislative in nature, then due process of law does not apply to the affected property owners. Merger of separate land parcels, which automatically occurred on the effective date of a local ordinance that was adopted for that purpose, was a legislative action, and therefore the affected property owners did not have a due process right to notice and an opportunity to be heard before merger took place [*Moores v. Board of Supervisors (2004) 122 Cal. App. 4th 883, 889-890, 19 Cal. Rptr. 3d 206]* . Furthermore, even if agency action is adjudicative in nature, there is no right to an evidentiary hearing if there are no disputed fact issues to resolve [Central Cal. Power Agency No. 1 v. *County of Sonoma (2004) 122 Cal. App. 4th 1614, 1623-1624, 19 Cal. Rptr. 3d 713* (tax valuation issue could be established as a matter of law based on application of Constitutional provision's [*Cal. Const., art. XIII, § 11*] valuation formula to valuation data provided by taxpayer)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawAgency RulemakingRule Application & InterpretationGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionCriminal Law & ProcedureSentencingAlternativesProbationRevocationDue ProcessEducation LawStudentsDisciplinary ProceedingsDue ProcessEducation LawStudentsDiscipline MethodsSuspensionsHealthcare LawBusiness Administration & OrganizationLicensesRevocation & SuspensionReal Property LawZoning & Land UseConstitutional Limits

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41-470A California Forms of Pleading and Practice--Annotated § 470A.44

§ 470A.44 Burden of Proof

Few decisions involving a governmental taking of liberty or property interests discuss the required burden of proof. As in most civil cases, it would seem that the government official ordinarily should find by a preponderance of the evidence that the standard for a taking of the interest has been met. In cases involving very significant private interests, however, a higher standard of proof may be required. In criminal cases, the state must prove the defendant's guilt beyond a reasonable doubt, and the same standard has been applied to criminal charges brought against minors in juvenile proceedings, even though such proceedings may technically be civil in nature [*In re Winship (1970) 397 U.S. 358, 365-366, 90 S. Ct. 1068, 25 L. Ed. 2d 368]* . It is unlikely that the court would require proof beyond a reasonable doubt in situations dissimilar to criminal prosecutions, but determinations of important substantive rights may trigger the application of an intermediate standard of proof. For example, in a proceeding to terminate parental rights in preparation for placing a child for adoption, the court required a standard of clear and convincing proof, rather than the preponderance standard ordinarily applied in civil matters [*Santosky v. Kramer (1982) 455 U.S. 745, 769, 102 S. Ct. 1388, 71 L. Ed. 2d 599* ; *see also Freedman v. Maryland (1965) 380 U.S. 51, 58, 85 S. Ct. 734, 13 L. Ed. 2d 649* (state has heavy burden of showing that speech is not protected before restricting *First Amendment* rights)].

Besides considering the importance of the substantive rights involved, the courts will look to the subjective or objective factual nature of the issues in determining the standard of proof. For example, in *Addington v. Texas* [*Addington v. Texas (1979) 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323]* , involving proceedings for indefinite involuntary commitment to a state mental hospital, the U.S. Supreme Court rejected the "beyond a reasonable doubt" standard because of the inherent difficulty of satisfying that standard, given the subjective issues presented, and applied the *Matthews v. Eldridge* balancing test [*Mathews v. Eldridge (1976) 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18]* , in concluding that clear and convincing proof was required [*Addington v. Texas (1979) 441 U.S. 418, 425, 433, 99 S. Ct. 1804, 60 L. Ed. 2d 323]* . The Court also rejected the "clear, unequivocal and convincing" formulation it had required in a deportation case [*Woodby v. INS (1966) 385 U.S. 276, 285, 87 S. Ct. 483, 17 L. Ed. 2d 362]* , and a denaturalization case [*Schneiderman v. United States (1943) 320 U.S. 118, 125, 159, 63 S. Ct. 1333, 87 L. Ed. 1796]* , noting that the factual nature of the issues in the latter cases made them more susceptible of objective proof [*Addington v. Texas (1979) 441 U.S. 418, 424, 99 S. Ct. 1804, 60 L. Ed. 2d 323]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewCriminal Law & ProcedureTrialsBurdens of ProofGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofClear & Convincing ProofEvidenceProcedural ConsiderationsBurdens of ProofPreponderance of EvidenceEvidenceProcedural ConsiderationsBurdens of ProofProof Beyond Reasonable Doubt

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41-470A California Forms of Pleading and Practice--Annotated § 470A.45

§ 470A.45 Right to Counsel

The *Sixth Amendment* [*U.S. Const., amend. VI*] guarantees the right to counsel in all criminal proceedings, including the right to appointed counsel paid for by the state for indigent criminal defendants [*Argersinger v. Hamlin (1972) 407 U.S. 25, 26-27, 92 S. Ct. 2006, 32 L. Ed. 2d 530* ; *Gideon v. Wainwright (1963) 372 U.S. 335, 344-345, 83 S. Ct. 792, 9 L. Ed. 2d 799]* . In other than criminal and juvenile delinquency cases [*In re Gault (1967) 387 U.S. 1, 41-42, 87 S. Ct. 1428, 18 L. Ed. 2d 527]* , the Court has not required the appointment of counsel. In parole and probation revocation cases, however, the decision whether appointment of counsel is required must be made on a case-by-case basis, considering the nature of the defense, the complexity of the issues presented, and the ability of the probationer to represent his or her own interests [*Gagnon v. Scarpelli (1973) 411 U.S. 778, 790-791, 93 S. Ct. 1756, 36 L. Ed. 2d 656]* . In a parental rights termination proceeding, special circumstances, such as the complexity of the issues and the parent's inability to represent himself or herself, might require appointment of counsel [*Lassiter v. Department of Social Services (1981) 452 U.S. 18, 31-32, 101 S. Ct. 2153, 68 L. Ed. 2d 640]* . The right to appointment of counsel on due process grounds means the right to effective assistance of counsel [*In re Christina P. (1985) 175 Cal. App. 3d 115, 128-129, 220 Cal. Rptr. 525]* . In most licensing and entitlement hearings, appointed counsel paid by the state is not available for indigents. There is also no due process right to appointed counsel at public expense for indigents parents who are sued for child support to provide reimbursement for welfare payments [*Clark v. Superior Court (1998) 62 Cal. App. 4th 576, 586-587, 73 Cal. Rptr. 2d 53]* .

Parties have the right to retain counsel in administrative settings. In a case involving the claimed right to a hearing prior to the termination of welfare benefits, the U.S. Supreme Court emphasized that counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the recipient's interest, while downplaying the additional burden and formalization of hearing procedure when attorneys are involved [*Goldberg v. Kelly (1970) 397 U.S. 254, 270-271, 90 S. Ct. 1011, 25 L. Ed. 2d 287]* . Later cases have given more weight to the adverse impact of attorneys on procedures intended to be informal in nature. The harmful formalization of process was key to the decision in *Walters v. Nat'l Ass'n of Radiation Survivors (1985) 473 U.S. 305, 105 S. Ct. 3180, 87 L. Ed. 2d 220* , in which the Court upheld a $10 attorney fee limit for representation of veterans applying for disability benefits. The Court recognized that this fee limitation effectively barred all but veteran service volunteers from representing veterans, but held that such a limitation did not violate a veteran's right to procedural due process [

Walters v. Nat'l Ass'n of Radiation Survivors (1985) 473 U.S. 305, 323-324, 105 S. Ct. 3180, 87 L. Ed. 2d 220] . The Court in *Walters* cited a juvenile commitment case [*Parham v. J.R. (1979) 442 U.S. 584, 608-609, 99 S. Ct. 2493, 61 L. Ed. 2d 101]* , a school suspension case [*Goss v. Lopez (1975) 419 U.S. 565, 583, 95 S. Ct. 729, 42 L. Ed. 2d 725]* , and a prison discipline case [*Wolff v. McDonnell (1974) 418 U.S. 539, 570, 94 S. Ct. 2963, 41 L. Ed. 2d 935]* , as additional support for its sense that counsel is "not required in various proceedings that do not approximate trials, but instead are more informal and nonadversary" [*Walters v. Nat'l Ass'n of Radiation Survivors (1985) 473 U.S. 305, 334, 105 S. Ct. 3180, 87 L. Ed. 2d 220]* .

It is common practice for a lay person, such as a law student or paralegal, to represent an individual in some administrative hearings. The authority for lay representation is statutory, and generally provides that a party at an administrative hearing may appear in person, by attorney, or by any other agent or authorized representative [*see, e.g., Lab. Code § 5700* (workers' compensation hearings); *Unemp. Ins. Code § 1957* (unemployment insurance hearings); *Welf. & Inst. Code § 10950* (hearings for aid to families with dependent children)]. It is also common for legal aid attorneys, who do not charge indigents legal fees for their services, to represent individuals in entitlement hearings. Litigants in an administrative hearing do not have a due process right to a nonadversarial hearing in which the agency is not represented by counsel. The agency has the right to vigorous representation by counsel of its choice, even in an informal entitlements hearing [*Rauber v. Herman (1991) 229 Cal. App. 3d 942, 953, 280 Cal. Rptr. 785]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationHearingsRight to HearingGeneral OverviewConstitutional LawBill of RightsFundamental RightsCriminal ProcessAssistance of CounselCriminal Law & ProcedureCounselAssignmentCriminal Law & ProcedureTrialsDefendant's RightsRight to CounselConstitutional RightPublic Health & Welfare LawSocial ServicesLegal AidWorkers' Compensation & SSDISocial Security Disability InsuranceRepresentation

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41-470A California Forms of Pleading and Practice--Annotated § 470A.46

§ 470A.46 Additional Procedures Required for Fair Process

[1] Opportunity to Be Heard

In general, even informal hearings require that a party be given the opportunity to respond orally [*see, e.g., Memphis Light, Gas, & Water Div. v. Craft (1978) 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30* ; *Goss v. Lopez (1975) 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725* ; *see also Melissa J. v. Superior Court (1987) 190 Cal. App. 3d 476, 478, 237 Cal. Rptr. 5* (crime victim entitled to notice, right to appear and express his or her views, and have those views considered by court in connection with termination of restitution order in probation proceedings)]. In *Goldberg v. Kelly* [*Goldberg v. Kelly (1970) 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287, 299]* , the Court required that welfare recipients be given the opportunity to respond orally to the issues presented in a welfare termination hearing. Relying on the written record did not provide welfare recipients a fair opportunity to respond. In other instances involving fairly simple claims and claimants capable of adequately using the written format, a "hearing" might consist of reliance on the written submission of competing claims [*see, e.g., Escondido Imports, Inc. v. Department of Motor Vehicles (1983) 145 Cal. App. 3d 834, 838-839, 193 Cal. Rptr. 772* (administrative fines for improper filing of DMV documents by automotive dealer)]. To be meaningful, the opportunity to respond requires provision of adequate preparation time and demands that the agency do more than "go through the motions" [*Kempland v. Regents of University of California (1984) 155 Cal. App. 3d 644, 648-650, 202 Cal. Rptr. 275]* .

When ruling on what a "reasonable opportunity to be heard" entails, the California Supreme Court did not require an oral hearing in a case involving a request for reimbursement from the client security fund of the State Bar. Rather, the Court decided that an opportunity for written response would "give petitioner and other applicants an opportunity to respond to the Bar's proposed disposition of the request for reimbursement". The Court described the goal of hearing requirements as affording "applicants a reasonable opportunity to raise objections to the particular action the bar desires to take" [*Saleeby v. State Bar (1985) 39 Cal. 3d 547, 565, 216 Cal. Rptr. 367, 702 P.2d 525* , *citing Horn v. County of Ventura (1979) 24 Cal. 3d 605, 619, 156 Cal. Rptr. 718, 596 P.2d 1134]* . The Court also required that the hearing result in findings necessary to make judicial review of the administrative adjudication meaningful [*Saleeby v. State Bar (1985) 39 Cal. 3d 547*].

Aside from these flexible considerations, California courts have imposed relatively few specific due process hearing requirements on administrative adjudication. For example, unless a statute or regulation provides otherwise, there is no right to counsel in administrative adjudicatory proceedings [*White v. Division of Medical Quality (1982) 128 Cal. App. 3d 699, 707, 180 Cal. Rptr. 516* ; *Chevalier v. Dubin (1980) 104 Cal. App. 3d 975, 978-979, 164 Cal. Rptr. 118* ; *Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 539, 92 Cal. Rptr. 525]* . Moreover, although the rules against pecuniary conflicts of interest and biased decision-makers do apply to administrative adjudication [*American Motors Sales Corp. v. New Motor Vehicle Bd. (1977) 69 Cal. App. 3d 983, 990-991, 138 Cal. Rptr. 594]* , the California Supreme Court has upheld administrative hearings against due process challenges based on allegations of bias. The presumption of administrative regularity normally will prevent due process challenges based on allegations of bias from succeeding [*Andrews v. Agricultural Labor Rel. Bd. (1981) 28 Cal. 3d 781, 171 Cal. Rptr. 590, 623 P.2d 151]* . For example, in an airport permit amendment hearing held under the state APA, the Court of Appeal rejected a charge that "the hearing officer expressed an undisguised bias against certain participants. The court noted: "Those not present at the hearing cannot judge such matters as facial expressions and oral nuances, but the record indicates that this allegation is simply not true. It instead reveals that the hearing officer demonstrated remarkable patience and good humor in the face of attempts by counsel" to press matters outside the scope of the hearings [*Bakman v. Department of Transportation (1979) 99 Cal. App. 3d 665, 686, 160 Cal. Rptr. 583]* . Another Court of Appeal admonished: "Where due process requires an administrative hearing, an individual has the right to a tribunal which meets at least currently prevailing standards of impartiality. Biased decision makers are constitutionally impermissible and even the probability of unfairness is to be avoided" [*Blinder, Robinson & Co. v. Tom (1986) 181 Cal. App. 3d 283, 295, 226 Cal. Rptr. 339* (upholding an administrative hearing against conflict of interest charges)].

[2] Right to Present Witnesses and Documentary Evidence

In most informal proceedings, there may be no opportunity to present witnesses [*Goss v. Lopez (1975) 419 U.S. 565, 583, 95 S. Ct. 729, 42 L. Ed. 2d 725]* , but in most other settings some opportunity to do so is required. *The U.S. Supreme Court in Goldberg v. Kelly (1970) 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287* , found such a right in welfare termination proceedings. It held in *Morrissey v. Brewer (1972) 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484* , that a right to present witnesses exists in a parole revocation proceeding; but in *Gagnon v. Scarpelli (1973) 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656* , the Court held that in some circumstances "affidavits, depositions, and documentary evidence" might be appropriate substitutes for live testimony [*Gagnon v. Scarpelli (1973) 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656* , 783 n.5, *411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656]* . In prison disciplinary cases, the Court has recognized that unique security needs in a prison setting might justify limiting the usual right to call witnesses [*Wolff v. McDonnell (1974) 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935* ; *see also Ponte v. Real (1985) 471 U.S. 491, 105 S. Ct. 2192, 85 L. Ed. 2d 553* (prison officials may limit right to call witnesses without contemporaneous explanation)]. Other than in informal proceedings or unusual settings such as prisons, however, procedural due process includes the right to present witnesses and other evidence. However, there is no due process right to pretrial discovery in administrative hearings [*Gilbert v. City of Sunnyvale (2005) 130 Cal. App. 4th 1264, 1280-1281, 31 Cal. Rptr. 3d 297* (discharged police officer was given sufficient notice and documents to defend himself in pre-termination hearing; officer was not entitled to full discovery of all documents; pre-termination procedures were adequate given officer's right to more elaborate post-termination hearing procedures)].

The Court of Appeal held that the Medical Board of California deprived a physician of due process of law by conducting a fundamentally unfair physician license revocation hearing when the Board disqualified all of the doctor's experts as to standard of care, thereby precluding the doctor from putting on any evidence in his defense to charges that the doctor's treatment of several patients was grossly negligent or was an extreme departure from the standard of practice [*Sinaiko v. Superior Court (2004) 122 Cal. App. 4th 1133, 1137, 1141, 19 Cal. Rptr. 3d 371]* . The Court of Appeal also applied the independent judgment test to review the fairness of the administrative hearing as a matter of law [*Sinaiko v. Superior Court (2004) 122 Cal. App. 4th 1133, 1140-1141, 19 Cal. Rptr. 3d 371]* . Finally, the Court of Appeal held that this case must be remanded to the Medical Board to consider the evidence presented by the doctor's experts. It was not proper for the reviewing (superior) court to admit the evidence under *Code Civ. Proc. § 1094.5(e),*

and then to reweigh the evidence to support the Medical Board's fact findings because this was an unfair proceeding. It is the agency's responsibility to consider the evidence erroneously excluded, and to make an informed decision based on that evidence and agency expertise. Thus, a remand to the agency is required [*Sinaiko v. Superior Court (2004) 122 Cal. App. 4th 1133, 1146-1147, 19 Cal. Rptr. 3d 371]* .

The decision of a WCJ to exclude medical reports of a treating physician that had been offered in evidence by the injured worker to rebut a statutory presumption on the issue of permanent disability in worker's compensation proceedings violated due process of law. The report was admissible into evidence, and the injured worker had a due process right to present evidence, to have the evidence be considered by the WCJ, and to have the evidence be part of the record for decision on remand in the case [*Gaytan v. Worker's Compensation Appeals Board, Los Angeles Unified School District (2003) 109 Cal. App. 4th 200, 218-219, 134 Cal. Rptr. 2d 516]* .

Parent, who was a party to a guardianship proceeding, had the statutory right [*Cal. Probate Code § 1513(d)*] to have copies of a confidential investigative report provided to them and their attorney far enough in advance of the guardianship hearing to allow adequate time to review the report and to prepare for the guardianship hearing. The court did not hold that the failure to provide such reports violated due process of law, but the court concluded that the due process right to a hearing requires adequate time to review reports that may be relied on at the hearing so as to prepare for the hearing properly [*Tracy A. v. Superior Court (2004) 117 Cal. App. 4th 1309, 1318-1319, 12 Cal. Rptr. 3d 684]* .

A hearing before a city council in a contractor debarment proceeding that permitted only written submissions, and excluded the right to cross examine adverse witnesses and the right to examine live rebuttal witnesses at the hearing, did not violate due process of law. This was because the contractor took depositions of many of those witnesses, and presented that deposition testimony at the hearing before the City Council. The contractor was able to submit 400 pages of written materials, was able to make two 40-minute oral presentations to the city council, and was given the right to additional deposition transcripts and a supplemental brief after the hearing [*Southern California Underground Contractors v. City of San Diego (2003) 108 Cal. App. 4th 533, 541, 546-547, 133 Cal. Rptr. 2d 527]* .

Similarly, a pharmacist whose application for continued enrollment as a MediCal provider was denied because the pharmacist made false disclosures related to his disciplinary history did not have a due process right to present live testimony in the administrative appeal hearing. While the pharmacist had a liberty interest that was implicated by the Department's action in debarring him as a government contractor, the nature of the issues with false disclosure are such that live testimony is not necessary or even beneficial to the pharmacist. The only successful defense would be factual mistake, and that defense can be brought through written evidence and argument. Thus, the pharmacists due process rights to present evidence on his behalf are not denied because all material evidence in support of his challenge can be presented in writing [*Marvin Lieblein, Inc. v. Shewry (2006) 137 Cal. App. 4th 700, 721-723, 40 Cal. Rptr. 3d 547]* .

[3] Right to Cross-Examine Witnesses

A number of cases have said that the right to confront and cross-examine adverse witnesses is essential to procedural due process [*see, e.g.,* *Goldberg v. Kelly (1970) 397 U.S. 254, 268, 90 S. Ct. 1011, 25 L. Ed. 2d 287* ; *Jennings v. Jones (1985) 165 Cal. App. 3d 1083, 1088-1091, 212 Cal. Rptr. 134* (county's failure to have knowledgeable caseworker attend welfare benefit termination hearing denied rights of confrontation and cross-examination); *Mackler v. Alexis (1982) 130 Cal. App. 3d 44, 62-63, 181 Cal. Rptr. 613* (in driver's license suspension case, licensee was entitled to opportunity to confront and cross-examine arresting officer, subpoena of whom had been mailed to police department, which returned it with notation that officer was no longer employed by department; case remanded to give licensee chance to obtain officer's testimony)]. The right may be limited if there are overriding security needs, such as in prison cases [*Wolff v. McDonnell (1974) 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935]* , and some parole or probation revocation cases [*Gagnon v. Scarpelli (1973) 411 U.S. 778, 786, 93 S. Ct. 1756, 36 L. Ed. 2d 656* , *citing Morrissey v. Brewer (1972) 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484]* . The right to cross examine is not

violated when an agency witness is permitted to give direct testimony over a telephone at a civil penalty administrative hearing, so long as opposing counsel has the opportunity to cross examine the witness telephonically [*C & C Partners, Ltd. v. Department of Industrial Relations (1999) 70 Cal. App. 4th 603, 611-612, 82 Cal. Rptr. 2d 783]* .

The due process right to cross examine witnesses was not violated when a contractor in debarment proceedings was not allowed to cross examine witnesses (nor to present live rebuttal testimony) at the administrative hearing. The contractor was given the opportunity to cross examine employees of the city who conducted the investigation that lead to the debarment proceedings. The contractor took depositions of many of those witnesses, and presented that deposition testimony at the hearing before the City Council [*Southern California Underground Contractors v. City of San Diego (2003) 108 Cal. App. 4th 533, 546-548, 133 Cal. Rptr. 2d 527]* .

Two police officers who were disciplined by having memoranda placed in their personnel file, but who suffered no other job-related adverse consequences, were not entitled under due process of law to confront and cross examine witnesses against them in the administrative hearing at which they challenged the discipline. The officer's hearing rights were limited to the right to introduce evidence, a neutral fact finder, and the burden of proof placed on the police department to justify the discipline imposed [*James v. City of Coronado (2003) 106 Cal. App. 4th 905, 911-913, 131 Cal. Rptr 2d 85]* .

The California Court of Appeal held that mobile home park owners' due process of law rights were violated when a county rent review board denied the owners the right to cross examine opposing witnesses, tenants in the mobile home park, at a hearing before the Board to determine whether or not rent increases proposed by the owners violated the county rent control ordinance. The court also held that it violated due process of law to make fact findings against the owner based upon tenant testimony without cross examination of those tenant witnesses [*Manufactured Home Communities, Inc. v. County of San Luis Obispo (2008) 167 Cal. App. 4th 705, 708, 710-711, 84 Cal. Rptr. 3d 367*].

The due process of law right to cross examine witnesses was not violated in a rent review board hearing proceeding when the issues in the proceeding and the hearing record was based primarily on documentary evidence and reports from experts on both sides in the litigation for which there was no need to test credibility since the issues in the case did not turn on live witness testimony [*Stardust Mobile Estates v. City of San Buenaventura (2007) 147 Cal. App. 4th 1170, 1189-1190, 55 Cal. Rptr. 3d 218]* . The Court of Appeal also rejected procedural due process challenges based on the lack of discovery and based on conflicting advocacy and advisory roles by outside counsel for the rent board. The court concluded that discovery in mandate proceedings was limited because judicial review under *Code of Civil Procedure Section 1094.5* (administrative mandamus) was based on the hearing record before the agency. The Court of Appeal rejected the conflicting roles defense of unconstitutional bias even though the lawyer in question had advised the rent board. The Court distinguished the *Nightlife* case [*Nightlife Partners. v. City of Beverly Hills (2003)108 Cal. App. 4th 81, 133 Cal. Rptr. 2d 234]* factually because the reviewing body in the *Nightlife* was the city (which the lawyer did advise) and here the reviewing body was the superior court (whom the lawyer did not advise). The defense was rejected because the agency outside counsel did not advise the superior court at the same time as his law firm was acting as an advocate defending the city in the mandamus proceeding before the court [*Stardust Mobile Estates v. City of San Buenaventura (2007) 147 Cal. App. 4th 1170, 1189-1190, 55 Cal. Rptr. 3d 218]* .

[4] Right to Neutral Fact Finder

[a] Formal Hearings

The requirement of a neutral fact finder has been closely protected in order to prevent unjustified or mistaken deprivations and to promote participation and dialogue by affected individuals in the decisionmaking process [*Marshall v. Jerrico, Inc. (1980) 446 U.S. 238, 242, 100 S. Ct. 1610, 64 L. Ed. 2d 182]* . Criminal or civil cases in which the judge has an interest in the proceedings obviously violate due process [*Tumey v. Ohio (1927) 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749* ; *Ward v. Monroeville (1972) 409 U.S. 57, 59-62, 93 S. Ct. 80, 34 L. Ed. 2d 267]* . A state

administrative disciplinary board made up of the accused's competitors is inherently unfair [*Gibson v. Berryhill (1973) 411 U.S. 564, 578-579, 93 S. Ct. 1689, 36 L. Ed. 2d 488]* . A professional licensee, however, has no due process right to choose the class of adjudicator that will hear the evidence in a disciplinary proceeding [*Fort v. Board of Medical Quality Assurance (1982) 136 Cal. App. 3d 12, 22-24, 185 Cal. Rptr. 836]* .

When the ALJ has a strong direct financial interest in the resolution of the case, then the ALJ can be disqualified under the due process of law right to an impartial decision maker without a showing of actual bias [*Haas v. County of San Bernardino (2002) 27 Cal. 4th 1017, 1032-1034, 119 Cal. Rptr. 2d 341, 45 P.3d 280]* . However, when the financial interest is remote, indirect, and uncertain, then proof of actual bias is required to establish a violation of the due process right to an impartial decision maker. Proof of the appearance of bias is not sufficient [*Gai v. City of Selma (1998) 68 Cal. App. 4th 213, 219-220, 79 Cal. Rptr. 2d 910]* . Thus, when an administrative decision maker's financial interest was too remote, indirect, and uncertain, it did not operate to trigger the probability of actual bias standard for due process scrutiny of decision makers with financial interests [*Gai v. City of Selma (1998) 68 Cal. App. 4th 213, 228-229, 79 Cal. Rptr. 2d 910]* . The financial interest bias rule codified in the *Haas* case that is applicable to adjudicators does not apply to the legal advisor to an adjudicative agency, the city personnel board, because the legal advisor advised the board of applicable laws and did not act in an adjudicative role in the proceeding [*Gilbert v. City of Sunnyvale (2005) 130 Cal. App. 4th 1264, 1281-1282, 31 Cal. Rptr. 3d 297* (court rejected due process of law challenge to pre-termination hearing procedures brought by discharged police officer)]. The financial interest bias rule codified in the *Haas* case also was not violated by an award of $1.8 million in prehearing costs related to disciplinary proceedings against an accounting firm. The award was paid to the Board of Accountancy to reimburse the Board for extensive costs incurred in investigating and preparing for hearing a discipline case against the accounting firm. The Board did not have an improper pecuniary interest because the cost award was authorized and regulated by statute, *Bus. & Prof. Code § 5107*, and this statute protected the Board from improper influences related to the cost award. This is because the cost award was made by the administrative law judge (ALJ) who heard the case, and that ALJ did not have a financial interest in the cost award that he or she assessed. The Board has the authority to decrease or eliminate the award, or to affirm the award, but not to increase the cost award [*McBride v. California Board of Accountancy (2005) 130 Cal. App. 4th 518, 525-527, 30 Cal. Rptr. 3d 287]* . The appearance of bias standard applicable to trial court judges, set out in *Code Civ. Proc. § 170.1(a)(6)(c)*, does not apply to administrative hearing officers [*Gai v. City of Selma (1998) 68 Cal. App. 4th 213, 233, 79 Cal. Rptr. 2d 910]* .

An individual's right to a fair hearing is violated when different people hear the evidence and make the decision or order [*Rowen v. Workers' Comp. Appeals Bd. (1981) 119 Cal. App. 3d 633, 641-643, 174 Cal. Rptr. 185]* . When the decision is made on the basis of a transcript of evidence adduced at a hearing at which the decisionmaker was not present, however, due process does not necessarily require that the decisionmaker read the entire transcript; the extent to which an independent study of the evidence in the record is necessary is left to the wisdom and practical good sense of the decisionmaking agency [*Samaan v. Trustees of Cal. State University & Colleges (1983) 150 Cal. App. 3d 646, 661, 197 Cal. Rptr. 856]* . An individual's procedural due process rights were not denied when the original hearing officer who heard his case died before preparing a recommended decision, and a second hearing officer was appointed who reviewed all of the evidence presented at the hearing and prepared a recommended decision which was adopted by the administrative agency [*Keith v. San Bernardino County Retirement Bd. (1990) 222 Cal. App. 3d 411, 414-415, 271 Cal. Rptr. 649]* .

The California Court of Appeal held that due process of law required that the decision-maker hear the case, and that this required that the decision-maker hear the evidence and argument made by the parties. A property owner's due process of law right to a reasoned decision making process was denied by the city council members at a zoning appeals hearing in which most of the members were not paying attention to the arguments of the parties, several were talking on cell phones, engaging in side conversations, eating, reviewing paperwork, and standing and moving around the city council chambers. The property owner sought a variance from zoning requirements, and this request was opposed by neighbors of the owner. The city council members equally ignored both sides of this dispute. The Court of Appeal reversed the judgment of the trial court, and remanded for a new hearing before the city council [*Lacy Street Hospitality Service,*

Inc. v. City of Los Angeles (2004) 125 Cal. App. 4th 526, 529-531, 22 Cal. Rptr. 3d 805] .

A California court has held, in a case arising under the California APA, that due process is not violated when the individual responsible for the prosecution of an accusation also has the authority to make determinations concerning the materiality of the defendant's evidence [*Blinder, Robinson & Co. v. Tom (1986) 181 Cal. App. 3d 283, 290-296, 226 Cal. Rptr. 339]* . The court expressed reservations about the result in the case, however, noting that principles of stare decisis constrained its decision [*Blinder, Robinson & Co. v. Tom (1986) 181 Cal. App. 3d 283, 290, 226 Cal. Rptr. 339]* . A child care contractor that was debarred for three years by the state agency that administered child care contracts was entitled under a due process liberty interest claim to a hearing before an impartial arbiter or tribunal on justification for the debarment. Due process of law was violated when one member of the hearing panel had participated in agency staff decisions that were challenged in the hearing process since that member could not both investigate and adjudicate in the same case [*Golden Day Schools, Inc. v. State Department of Education (2000) 83 Cal. App. 4th 695, 709-711, 99 Cal. Rptr. 2d 917]* . For a detailed discussion of the role of the administrative law judge and the requirement for a neutral fact finder, see Ch. 473E, *Public Administrative Law Judges* .

The contractor in a contract debarment proceeding challenged the neutrality of the city council that brought that proceeding. The first argument was based on separation of functions, that the city was biased because it performed both prosecution and adjudication functions. The court rejected that challenge concluding that proof of actual bias was required, and that the right to an impartial decision maker is not violated by combination of functions. The second argument was that the city was biased because the contractor had filed a lawsuit against the city for money damages based on an improper debarment claim. The court rejected this argument concluding that there was no pecuniary interest on the part of the city or members of the city council that would disqualify them from deciding the debarment proceeding. City council members were not named as defendants. There is no financial benefit to the city from the debarment proceeding, and any financial loss resulting from a successful lawsuit against the city was too remote and uncertain to be disqualifying [*Southern California Underground Contractors v. City of San Diego (2003) 108 Cal. App. 4th 533, 548-550, 133 Cal. Rptr. 2d 527]* .

A planning commission member who wrote a newsletter article attacking a proposed real estate development project while that project was pending before the planning commission violated the "unacceptable probability of actual bias standard" by voting on the project as a planning commission member while at the same time having publicly opposed the project. The developer's due process of law right to an impartial decision maker was violated by the participation of the planning commission member in voting on the project while having prejudged the facts of the matter [*Nasha L.L.C. v. City of Los Angeles (2004) 125 Cal. App. 4th 470, 483-484, 22 Cal. Rptr. 3d 772]* .

[b] Informal Proceedings

Less formal settings require a lesser standard of neutrality on the part of the fact finder. In *Goldberg v. Kelly (1970) 397 U.S. 254, 271, 90 S. Ct. 1011, 25 L. Ed. 2d 287* , the Court disallowed the regular welfare caseworker from conducting the required hearing, but allowed a welfare official who had not participated in the initial determination to do so [*Goldberg v. Kelly (1970) 397 U.S. 254, 272, 90 S. Ct. 1011, 25 L. Ed. 2d 287]* . Similarly, in *Morrissey v. Brewer (1972) 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484* , the Court held that the accused parolee's parole officer couldnot conduct the preliminary probable cause hearing, but that some other parole officer could do so [*Morrissey v. Brewer (1972) 408 U.S. 471, 487, 92 S. Ct. 2593, 33 L. Ed. 2d 484]* . For the later full hearing on the violation, all that was required was a neutral and detached hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers [*Morrissey v. Brewer (1972) 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484]* .

A state prison supervisory staff member who has reviewed a report of a rule violation to classify a charge as either administrative or serious and to correct the report if necessary cannot, consistent with procedural due process requirements of a neutral fact-finder, conduct the disciplinary hearing on that report. The staff member has acted in a prosecutorial role and thus has been substantially involved in the circumstances underlying the charge [*People v.*

Superior Court (Hamilton) (1991) 230 Cal. App. 3d 1592, 1597-1598, 281 Cal. Rptr 900] .

In even more informal settings, the neutral fact finder must merely be independent enough to be able to make a decision either favorably or unfavorably; the fact finder is not required to be an outsider or to have no other involvement with the case. Thus, the principal could give the informal hearing in a school suspension case [*Goss v. Lopez (1975) 419 U.S. 565, 584, 95 S. Ct. 729, 42 L. Ed. 2d 725]* . the institution's doctor could make the determination in the case of parents voluntarily committing their child to a mental institution [*Parham v. J.R. (1979) 442 U.S. 584, 620-621, 99 S. Ct. 2493, 61 L. Ed. 2d 101]* , and an employee of a public utility could provide the necessary hearing before the termination of utility services [*Memphis Light, Gas & Water Div. v. Craft (1978) 436 U.S. 1, 16, 98 S. Ct. 1554, 56 L. Ed. 2d 30]* .

[5] Right to Written Statement

Both *Goldberg v. Kelly* [*Goldberg v. Kelly (1970) 397 U.S. 254, 271, 90 S. Ct. 1011, 25 L. Ed. 2d 287]* and *Morrissey v. Brewer* [*Morrissey v. Brewer (1972) 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484]* held that a fact finder's written statement of evidence and reasons for a decision are required before the taking. In *Goldberg v. Kelly*, a fact finder's written statement of evidence relied on in making the decision was required before terminating welfare; in *Morrissey v. Brewer*, it was a written statement of the reasons for a decision to revoke parole. A complete record or comprehensive opinion is not required in either instance, but some summary statement is required in order to facilitate judicial review and to assure that the decision was based on evidence obtained at the hearing [*Goldberg v. Kelly (1970) 397 U.S. 254, 271, 90 S. Ct. 1011, 25 L. Ed. 2d 287* ; *see also Bollinger v. San Diego Civil Service Com. (1999) 71 Cal. App. 4th 568, 577-578, 84 Cal. Rptr. 2d 27* (hearing officer's proposed decision adopted by agency sufficient; no due process right to opportunity to respond to such proposed decision so long as there was notice and opportunity to be heard at hearing held prior to decision)].

[6] Right to Judicial Review

The U.S. Supreme Court has never specified the contours of the right to judicial review of adjudicative agency decisions, in part because judicial review is generally present in some fashion. For example, in *Superintendent v. Hill (1985) 472 U.S. 445, 105 S. Ct. 2768, 86 L. Ed. 2d 356* , no direct review of a state prison's revocation of good time credits was provided, but collateral review was readily available. Even when the law states that no judicial review is available [*see, e.g., Walters v. Nat'l Ass'n of Radiation Survivors (1985) 473 U.S. 305, 307, 323, 105 S. Ct. 3180, 87 L. Ed. 2d 220]* , the Court has recognized its right to decide underlying constitutional issues [*Johnson v. Robison (1974) 415 U.S. 361, 94 S. Ct. 1160, 39 L. Ed. 2d 389]* .

The Court in *Hill* described the issue of the right to judicial review of administrative decisions as "a difficult question of constitutional law" [*Superintendent v. Hill (1985) 472 U.S. 445, 450, 105 S. Ct. 2768, 86 L. Ed. 2d 356]* , but did not attempt to resolve the problem. The Court noted that in *Ortwein v. Schwab (1973) 410 U.S. 656, 93 S. Ct. 1172, 35 L. Ed. 2d 572* , it had held that the due process clause was not violated by a mandatory filing fee for appeal of a welfare termination decision. Although *Ortwein's* allowance of the fee limited the right of judicial review of indigent claimants, the *Hill* Court stated that *Ortwein* did not purport to resolve the issue of the right to judicial review definitively. Although the issue is therefore unresolved, the Court's concern in *Hill* for finding some right to collateral review suggests that a total bar to judicial review of administrative decisions would be of doubtful constitutionality.

The California Supreme Court held that due process of law did not require full judicial review, including oral argument and a written judicial opinion, in every lawyer discipline proceeding in which an attorney filed a petition for supreme court review of a state bar court decision. The supreme court could summarily deny such a petition for review without violating due process of law [*In re Rose (2000) 22 Cal. 4th 430, 458, 93 Cal. Rptr. 2d 298, 993 P. 2d 956]* . The California Court of Appeal rejected a disbarred attorney's due process challenge to state bar procedures leading to his disbarment that provided the basis for denial of a real estate salesperson's license to the challenger. The court held that

due process of law did not require full judicial review by the California Supreme Court of the disbarment proceeding, and that due process of law was not violated because state bar court judges did not have judicial tenure [*Berg v. Davi (2005) 130 Cal App. 4th 223, 231-232, 29 Cal. Rptr. 3d 803]* .

However, due process of law does not provide litigants a second opportunity for judicial review in the superior court when the California Supreme court has summarily denied a petition for writ of mandate to challenge a decision of the State Energy Resources Conservation and Development Commission [*Santa Teresa Citizen Action Group v. State Energy Resources Conservation and Development Commission (2003) 105 Cal. App. 4th 1441, 1449-1450, 130 Cal. Rptr. 2d 392]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawAgency AdjudicationImpartialityGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionEvidenceDemonstrative EvidenceGeneral OverviewEvidenceTestimonyGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral Overview

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§ 470A.47 Procedural Due Process and Access to Government Funded Support

Little v. Streater (1981) 452 U.S. 1, 101 S. Ct. 2202, 68 L. Ed. 2d 627 , held that in a paternity action against an indigent father, procedural due process required the state to fund crucial blood grouping tests, as the lack of blood test evidence denied the father a meaningful opportunity to be heard [*Little v. Streater (1981) 452 U.S. 1, 16, 101 S. Ct. 2202, 68 L. Ed. 2d 627]* . The *Little v. Streater* Court labeled the child support element of the case quasi-criminal in nature [*Little v. Streater (1981) 452 U.S. 1, 10, 101 S. Ct. 2202, 68 L. Ed. 2d 627]* . In *Boddie v. Connecticut (1971) 401 U.S. 371, 380-383, 91 S. Ct. 780, 28 L. Ed. 2d 113* , the Court held that procedural due process prohibited a state from denying indigents access to divorce courts for inability to pay filing fees. In *United States v. Kras (1973) 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626* , however, the U.S. Supreme Court held that due process did not require waiver of filing fees for indigents seeking bankruptcy. Nor did the Court require waiver of mandatory fees for appellate review of an agency's decision reducing welfare benefits [*Ortwein v. Schwab (1973) 410 U.S. 656, 93 S. Ct. 1172, 35 L. Ed. 2d 572]* . In *Little v. Streater*, the Court distinguished these cases on the basis that in *Kras* and *Ortwein* other forms of relief were available, while only the divorce court was available in *Boddie*. In addition, *Boddie* involved fundamental rights of privacy related to marriage, while *Kras* and *Ortwein* involved no fundamental rights. *Little v. Streater* was more like *Boddie* on both measures, the Court held [*Little v. Streater (1981) 452 U.S. 1, 16, 101 S. Ct. 2202, 68 L. Ed. 2d 627]* .

In *Lassiter v. Department of Social Services (1981) 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640* , however, the Court held that procedural due process did not require appointment of counsel for indigent parents in a case brought by the state to terminate their parental status. A presumption exists that an indigent litigant has a right to appointed counsel only when threatened with deprivation of physical liberty [*Lassiter v. Department of Social Services (1981) 452 U.S. 18, 26-27, 101 S. Ct. 2153, 68 L. Ed. 2d 640]* . The *Matthews v. Eldridge* [*Mathews v. Eldridge (1976) 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18]* balancing factors might, in a given case, outweigh the presumption against appointment of counsel, but the *Lassiter* Court did not discuss in any detail the factors that might require appointment except to note that the inability of parents to represent themselves and the complexity of the issues would be relevant [*Lassiter v. Department of Social Services (1981) 452 U.S. 18, 31-32, 101 S. Ct. 2153, 68 L. Ed. 2d 640]* . A California court held that no constitutional right existed to an award of travel expenses incurred in connection with a parental rights termination proceeding [*In re Cleopatra D. (1987) 193 Cal. App. 3d 694, 698, 238 Cal. Rptr. 426]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsFiling FeesConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionConstitutional LawSubstantive Due ProcessPrivacyGeneral OverviewFamily LawParental Duties & RightsTermination of RightsGeneral OverviewFamily LawPaternity & SurrogacyProof of PaternityEvidenceBlood Tests

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§ 470A.48 Procedural Due Process and Hearing Costs

The California Supreme Court held that a statutory cost sharing provision [*Educ. Code § 44944*] that required a teacher who lost a suspension or dismissal hearing to pay one half of the costs of the administrative law judge who heard the case violated due process of law [*California Teachers Assn. v. State of California (1999) 20 Cal. 4th 327, 337, 84 Cal. Rptr. 2d 425, 975 P.2d 622]* . The California Court of Appeal held that a provision in a memorandum of understanding agreement (between a city and the public employees association) that required that an employee who sought to challenge their termination from public employment had to share equally in the cost of paying a hearing officer to hear the employee's appeal from a job termination violated the employee's due process of law right to a hearing, and this right could not be waived [*Florio v. City of Ontario (2005) 130 Cal. App 4th 1462, 1465-1467, 30 Cal. Rptr. 3d 841]* . The Fourth District Division 2 California Court of Appeal held that a provision in a memorandum of understanding (between a city and a public employee association) that required a disciplined city employee to pay one half of the hearing costs for an administrative appeal (binding arbitration) if the employee brought the appeal through a privately retained attorney rather than through the union violated due process of law [*Soto v. County of Riverside (2008) 162 Cal. App. 4th 492, 494, 76 Cal. Rptr. 3d 21*]. However, the California Court of Appeal rejected an argument that the financial interest bias rule codified in the *Haas* case was violated by an award of $1.8 million in pre-hearing costs related to disciplinary proceedings against an accounting firm. The Court held that the Board did not have an improper pecuniary interest in the outcome of the discipline proceedings. The award was paid to the Board of Accountancy to reimburse the Board for extensive costs incurred in investigating and preparing for hearing a discipline case against the accounting firm. The Board did not have an improper pecuniary interest because the cost award was authorized and regulated by statute, *Bus. & Prof. Code § 5107*, and this statute protected the Board from improper influences related to the cost award. This is because the cost award was made by the administrative law judge (ALJ) who heard the case, and that ALJ did not have a financial interest in the cost award that he or she assessed. The Board has the authority to decrease or eliminate the award, or to affirm the award, but not to increase the cost award [*McBride v. California Board of Accountancy (2005) 130 Cal. App. 4th 518, 525-527, 30 Cal. Rptr. 3d 287]* .

Legal Topics:

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

Administrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawAgency AdjudicationImpartialityGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law Judges

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[Reserved]

§§ 470A.49[Reserved]

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§ 470A.60 Federal Constitution

U.S. Const. amends. V, XIV

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California Const., art. I, § 7

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§ 470A.63 Decisions

Goldberg v. Kelly (1970) 397 U. S. 254, 255, 261-264, 90 S. Ct. 1011, 25 L. Ed. 2d 287

Mathews v. Eldridge (1976) 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18

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§ 470A.64 Law Reviews

Ogden, *Judicial Control of Administrative Delay, 3 U. Day. L. Rev. 345 (1978)*

Ogden, *Reducing Administrative Delay: Timeliness Standards, Judicial Review of Agency Procedures, Procedural Reform, and Legislative Oversight, 4 U. Day. L. Rev. 71 (1979)*

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§ 470A.65 Text References

Witkin, Summary of California Law, *Constitutional Law*, vol. 7, §§ 420, 434 (10th ed. 2005)

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[3] Allegations

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[5] Verification

[6] Undertaking for Provisional Relief

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Chapter 470B PUBLIC AGENCY MEETINGS
PART I. SCOPE

41-470B California Forms of Pleading and Practice--Annotated § 470B.01

§ 470B.01 Scope of Chapter

This chapter provides discussion in Part II of California's open meeting legislation, including the following:

- Subpart A [§ 470B.10 et seq.] discusses the Ralph M. Brown Act [*Gov. Code § 54950 et seq.*], which governs the meetings of "local agencies" [*see Gov. Code § 54951* (definition)].

- Subpart B [§ 470B.20 et seq.] covers the Bagley-Keene Open Meeting Act [*Gov. Code § 11120 et seq.*], which governs the meetings of other "state bodies" [*see Gov. Code § 11121* (definition)].

- Subpart C [§ 470B.30 et seq.] discusses the statutory requirements pertaining to the California Assembly and Senate [*Gov. Code §§ 9027-9031*], and other legislation relating to open meeting requirements of California public agencies.

The chapter also includes related research materials and procedural checklists in Parts III and IV, and the following related forms in Part V:

- Complaint for declaratory relief relating to the applicability of open meeting laws to state or local agencies [§ 470B.60].

- Complaint for injunctive relief relating to violation of open meeting laws by state or local agencies [§ 470B.61].

- Complaint for declaratory and injunctive relief relating to nullification of action taken by agency in violation of open meeting law [§ 470B.62].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationPublic MeetingsSunshine LegislationCivil ProcedureDeclaratory

Judgment ActionsState JudgmentsGeneral Overview

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§ 470B.02 Cross References

[1] Public Administrative Law Generally

For related general discussion of California public agency functions, powers, restrictions on powers, and organization within the executive branch of state government, see:

- Ch. 470, *Overview of Public Administrative Law*.
- Ch. 470A, *Due Process Restrictions on Public Agencies*.

For detailed discussion and forms relating to the law governing disclosure of public records under the California Public Records Act [*Cal. Gov. Code §§ 6250 et seq.*], see Ch. 470C, *Public Records Act* .

For discussion and forms relating generally to investigations and inspections by a public agency, see:

- Ch. 471, *Investigations by Public Agencies*.
- Ch. 471A, *Inspections by Public Agencies*.

For discussion and forms relating generally to licensing agencies and licensing proceedings, see:

- Ch. 471B, *Licensing by Public Agencies*.

For detailed discussion and forms relating generally to rule making functions of public agencies and judicial review of rule making, see:

- Ch. 472, *Public Agency Rules*.
- Ch. 472A, *Agency Rulemaking Procedures*.

- Ch. 472B, *Review of Agency Rulemaking*.

For detailed discussion and forms relating generally to the judicial or adjudicatory functions of California public agencies, see:

- Ch. 473, *Public Agency Adjudication*.
- Ch. 473A, *Commencing Agency Adjudication*.
- Ch. 473B, *Discovery in Agency Adjudications*.
- Ch. 473C, *Prehearing Procedures in Agency Adjudications*.
- Ch. 473D, *Prehearing Preparations in Agency Adjudications*.
- Ch. 473E, *Public Administrative Law Judges*.
- Ch. 473F, *Agency Adjudication Hearings*.
- Ch. 473G, *Agency Adjudication Decisions*.
- Ch. 473H, *Alternative Procedures for Agency Decisions*.

For detailed discussion and forms relating generally to review by California courts of agency adjudications, see:

- Ch. 474, *Availability of Judicial Review of Agency Decisions*.
- Ch. 474A, *Timing of Judicial Review of Agency Decisions*.
- Ch. 474B, *Standards in Reviewing Agency Decisions*.
- Ch. 474C, *Procedures in Reviewing Agency Decisions*.

[2] Judicial Remedies, Procedures, and Review

For discussion and forms relating generally to judicial remedies or review procedures that may be available, see:

- Ch. 40 et seq., *Appeal* (discussion and forms relating to civil appeals).
- Ch. 182, *Declaratory Relief* (discussion and forms relating to action for declaration of rights of respective parties in unlitigated civil controversy).
- Ch. 303, *Injunctions* (discussion and forms relating to injunctive relief generally).
- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to immediate judicial review of orders by extraordinary writ of mandate or prohibition).

[3] Other Matthew Bender Publications

For forms for use in drafting memoranda in judicial proceedings to reviewa public agency decision, see California Points and Authorities, Ch. 195, *Public Administrative Law* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawAgency InvestigationsGeneral OverviewAdministrative LawAgency InvestigationsScopeInspectionsAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawGovernmental InformationGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewRemediesDeclaratory JudgmentsAdministrative LawJudicial ReviewRemediesInjunctive ReliefAdministrative LawSeparation of PowersConstitutional ControlsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsState & Territorial GovernmentsLicenses

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[Reserved]

§§ 470B.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Open Meetings of Local Agencies: The Ralph M. Brown Act

41-470B California Forms of Pleading and Practice--Annotated § 470B.10

§ 470B.10 History and Purpose of the Brown Act

[1] History of the Act

Before enactment of the Ralph M. Brown Act [*Gov. Code § 54950 et seq.*] in 1953, other statutes required local public agencies, such as county boards of supervisors, to hold their meetings in public [*Gov. Code § 25080*]. The statute governing school board meetings [*Educ. Code § 35145*] now requires the meetings to be conducted in accordance with the Brown Act [*Educ. Code § 35145.5*; *see also* further discussion of *Educ. Code § 35145* in § 470B.31]. The existing open meeting statutes were subject to widespread evasion, however, through unannounced "sneak" meetings and through the use of euphemisms such as "executive session," "conference," "caucus," or "study or work session." Concern regarding the suppression of public information at the local government level resulted in an investigation by an Assembly Interim Committee on Judiciary, which submitted its report at the 1953 Legislative Session [*see Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors (1968) 263 Cal. App. 2d 41, 49-50, 69 Cal. Rptr. 480]* . The Committee Report stated that the public's right to open meetings was "a source of strength to our Country and must be protected at all costs" [*Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors (1968) 263 Cal. App. 2d 41, 49-50, 69 Cal. Rptr. 480]* . The recommendations of the Committee led to the adoption of the Ralph M. Brown Act (Brown Act) in 1953 [*see Gov. Code § 54950 et seq.*].

[2] Legislative Definition of Purpose

In enacting the Brown Act, the California Legislature declared that the public commissions, boards, councils, and other public agencies in California exist to aid in the conduct of the people's business, stating that the intent of the law was that public agencies take open actions and conduct public deliberations. The Legislature declared as follows [*Gov. Code § 54950*]:

> The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

[3] Basic Open Meetings Requirement

The basic requirement of the Brown Act is that all meetings of the legislative body of a local agency must be open and public, and all persons mustbe allowed to attend any meeting of the legislative body of a local agency, except as otherwise provided in the Act [*Gov. Code § 54953(a)*; *see § 470B.13* for exemptions allowing closed meetings]. Open and public meetings of legislative bodies of local agencies must comply with the requirements of Section 202 of the Americans with Disabilities Act of 1990 [*42 U.S.C. § 12132*], and with implementing federal regulations [*Gov. Code § 54953.2*]. No limit exists, however, on the amount of "openness" allowed by a local agency. Legislative bodies of local agencies may impose requirements that allow greater access to their meetings than that prescribed by the minimum standards set forth in the Brown Act [*Gov. Code § 54953.7*]. In addition, an elected legislative body of a local agency may impose these broader requirements on an appointed legislative body (of that agency), of which all or a majority of the members are appointed by or under the authority of the elected legislative body [*Gov. Code § 54953.7*].

The Act allows the use of teleconferencing, defined as a meeting of a legislative body, the members of which are in different locations but are connected by electronic means, through either audio or video, or both [*Gov. Code § 54953(b)*; *see also §§ 470B.11[6]*, and *470B.12[1]*, for further requirements for teleconferencing].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationPublic MeetingsGeneral OverviewAdministrative LawGovernmental InformationPublic MeetingsSunshine LegislationGovernmentsLocal GovernmentsAdministrative Boards

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A. Open Meetings of Local Agencies: The Ralph M. Brown Act

41-470B California Forms of Pleading and Practice--Annotated § 470B.11

§ 470B.11 Definitions Applicable to the Brown Act

[1] Local Agency

The Brown Act defines local agencies very broadly. A "local agency" means a county; city, whether general law [*see Gov. Code § 34102* (organized under the general law)] or chartered [*see Gov. Code § 34101* (organized under a charter); city and county; town; school district; municipal corporation; district; political subdivision; or any board, commission, or agency thereof; or other local public agency [*Gov. Code § 54951*]. In determining whether a specific public agency was covered by the Brown Act, a court concluded that in view of the legislative policy expressed in both the Brown Act and other statutes, the Legislature intended all agencies to be included in some open meeting act unless expressly excluded [*Torres v. Board of Commissioners (1979) 89 Cal. App. 3d 545, 549, 152 Cal. Rptr. 506]* . The court held that a housing authority created by *Health & Safety Code § 34200 et seq.* is included within the statutory definition of a local agency under the Brown Act, as either a "municipal corporation" or "other local public agency" or both, as those terms are used in *Gov. Code § 54951* [*Torres v. Board of Commissioners (1979) 89 Cal. App. 3d 545, 549, 152 Cal. Rptr. 506]* .

The California Court of Appeal held that a joint powers authority agency ("L.A. Impact") created by agreement (memorandum of understanding) of a number of cities within the County of Los Angeles was a local public agency within the meaning of *Gov. Code § 54951*, and thus was subject to the open meeting requirements of the Brown Act [*McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force (2005) 134 Cal. App. 4th 354, 358-360, 36 Cal. Rptr. 3d 47]* .

In addition, the California attorney general has opined that a California community college comes within the term "local agency" because it is a school district [*see Gov. Code § 54951*]. Meetings of its academic senate or faculty council are thus subject to the open meeting requirements of the Brown Act [*see 66 Ops. Cal. Atty. Gen. 252 (1983)]* .

[2] Meeting

The Brown Act defines the term "meeting" to mean any congregation of a majority of a legislative body at the same time and location, including the teleconference location as permitted by *Gov. Code § 54953*, to hear, discuss, deliberate,

or take action on any item that within the subject matter jurisdiction of the legislative body [*Gov. Code § 54952.2(a)*]. The writing of a letter by a city attorney to a local governing body in which the attorney expresses a legal opinion on an issue pending before the body is not a meeting under the Act [*Roberts v. City of Palmdale (1993) 5 Cal. 4th 363, 380-381, 20 Cal. Rptr. 2d 330, 853 P.2d 496]* . However, there is a meeting within the terms of the Brown Act when members of a legislative body gather to collectively acquire and exchange facts relating to a pending issue before the body [*Frazer v. Dixon Unified School Dist. (1993) 18 Cal. App. 4th 781, 796-797, 22 Cal. Rptr. 2d 641]* .

A majority of the members of a legislative body shall not, outside a meeting authorized under the Brown act, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body [*Gov. Code § 54952.2(b)(1)*]. This provision shall not be construed as preventing an employee or official of a local agency, from engaging in separate conversations or communications outside of a meeting authorized by the Brown act with members of a legislative body in order to answer questions or provide information regarding a matte that is within the subject matter jurisdiction of the local agency, if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body [*Gov. Code § 54952.2(b)(2);. see Wolfe v. City of Fremont (2006) 144 Cal. App. 4th 533, 548-550, 50 Cal. Rptr.3d 524* (citizen properly alleged in complaint that city council violated provisions of Brown Act when city council members had discussions among themselves on policy issue that led to collective concurrence that members would not challenge policy at public meeting of city council; however, city manager and police chief did not violate Brown act provisions in having one on one discussions of policy issues with individual city council members)]. Legislative bodies are permitted to use teleconferencing for all purposes in connection with any meeting within the subject matter jurisdiction of the legislative body [*Gov. Code § 54953 (b)(2)*; *see §§ 470B.11[6]*, and *470B.12[1]*, for discussion of teleconferencing requirements].

The Brown Act specifically excludes the following activities from the definition of "meeting" for purposes of the Act's requirements:

- Individual contacts or conversations between a member of a legislative body and any other person that do not violate subdivision (b) [*Gov. Code § 54952.2(c)(1)*].

- The attendance of a majority of the members of a legislative body at a conference or similar gathering open to the public that involves a discussion of issues of general interest to the public or to public agencies of the type represented by the legislative body, provided that a majority of the members do not discuss among themselves, other than as a part of the scheduled program, business of a specified nature that is within the subject matter jurisdiction of the local agency. Nothing in *Gov. Code § 54952.2(c)(2)* is intended to allow members of the public free admission to a conference or similar gathering at which the organizers have required other participants or registrants to pay fees or charges as a condition of attendance [*Gov. Code § 54952.2(c)(2)*].

- The attendance of a majority of the members of a legislative body at an open and publicized meeting organized to address a topic of local community concern by a person or organization other than the local agency, provided that a majority of the members do not discuss among themselves, other than as a part of the scheduled program, businessof a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency [*Gov. Code § 54952.2(c)(3)*].

- The attendance of a majority of the members of a legislative body at an open and noticed meeting of another body of the local agency, or at an open and noticed meeting of a legislative body of another local agency, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency [*Gov. Code § 54952.2(c)(4)*].

- The attendance of a majority of the members of a legislative body at a purely social or ceremonial occasion, provided that a majority of the members do not discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the legislative body of the local agency [*Gov. Code § 54952.2(c)(5)*].

- The attendance of a majority of the members of a legislative body at an open and noticed meeting of a standing committee of that body, provided that the members of the legislative body who are not members of the standing committee attend only as observers [*Gov. Code § 54952.2(c)(6)*].

[3] Legislative Body

The Brown Act defines legislative body to include the following:

- The governing body of a local agency or any other local body created by state or federal statute [*Gov. Code § 54952(a)*].

The California Court of Appeal held that the board of directors and the executive council of a joint powers authority agency ("L.A. Impact") created by agreement (memorandum of understanding) of a number of cities within the County of Los Angeles was a governing body of a local agency within the meaning of *Gov. Code § 54952(a)*, and thus was subject to the open meeting requirements of the Brown Act [*McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force (2005) 134 Cal. App. 4th 354, 362-363, 36 Cal. Rptr. 3d 47]* .

- A commission, committee, board, or other body of a local agency, whether permanent or temporary, decision-making or advisory, created by charter, ordinance, resolution, or formal action of a legislative body. However, advisory committees, composed solely of the members of the legislative body which are less than a quorum of the legislative body are not legislative bodies, except that standing committees of a legislative body, irrespective of their composition, which have a continuing subject matter jurisdiction, or a meeting schedule fixed by charter, ordinance, resolution, or formal action of a legislative body are legislative bodies [*Gov. Code § 54952(b)*].

- A board, commission, committee, or other multimember body that governs a private corporation, limited liability company, or entity in either of the following situations [*Gov. Code § 54952(c)(2)*]:

  - Is created by the elected legislative body in order to exercise authority that may lawfully be delegated by the elected governing body to a private corporation, limited liability company, or entity [*Gov. Code § 54952(c)(1)(A)*; *McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force (2005) 134 Cal. App. 4th 354, 362-363, 36 Cal. Rptr. 3d 47* (board of directors and the executive council of a joint powers authority agency ("L.A. Impact") created by agreement (memorandum of understanding) of a number of cities within the County of Los Angeles was a board or multi-member body of an entity within the meaning of *Gov. Code § 54952(c)(1)(A)*; *see International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc. (1999) 69 Cal. App. 4th 287, 299-300, 81 Cal. Rptr. 2d 456* ; *Epstein v. Hollywood Entertainment Dist. II Business Improvement Dist.(2001) 87 Cal. App. 4th 862, 876-877, 104 Cal. Rptr. 2d 857* (property owners association created to take over administrative functions of city is a legislative body within meaning of Brown Act)].

  - Receives funds from a local agency and the membership of whose governing body includes a member of the legislative body of the local agency appointed to that governing

body as a full voting member by the legislative body of the local agency [*Gov. Code § 54952(c)(1)(A), (B)*]. However, if a full voting member changes status to a nonvoting member, on or after February 9, 1996, the body is still subject to the open meeting act requirements notwithstanding the change in status of the member.

- The lessee of any hospital the whole or part of which is first leased pursuant to subdivision (p) of *Section 32121 of the Health and Safety Code* after January 1, 1994, where the lessee exercises any material authority of a legislative body of a local agency delegated to it by that legislative body whether the lessee is organized and operated by the local agency or by a delegated authority [*Gov. Code § 54952(d)*].

For purposes of open meeting requirements, an advisory committee that is composed exclusively of members of a local agency numbering less than a quorum of that agency is not a legislative body within the meaning of the law [former *Gov. Code § 54952.3*], and is not required to comply with the open meeting requirements of the Act [former *Gov. Code § 54952.3*; *Freedom Newspapers, Inc. v. Orange County Employees Retirement System (1993) 6 Cal. 4th 821, 824-825, 25 Cal. Rptr. 2d 148, 863 P.2d 218]* .

The California court of appeal held that two members of a city council did not violate the Brown Act's open meetings requirements when they met privately with various persons to discuss the response of the city to a state-mandated land use plan for the city. The two members constituted the entire membership of the city standing committee for land use planning, but this committee was not a standing committee within the meaning of *Gov. Code § 54952(b)* because the two members did not meet privately as members of that standing committee and that committee did not have jurisdiction over the city's response to the state mandated land use plan. The city council retained jurisdiction over that issue [*Taxpayers for Livable Communities v. City of Malibu (2005) 126 Cal. App. 4th 1123, 1127-1128, 24 Cal. Rptr. 3d 493]* . Further, the two members were not within the definition of "an other body of a local agency" [*Gov. Code § 54952(b)*] that is subject to the act. Rather, they were an exempt advisory body who did not constitute a quorum of the five member council and whose responsibility was to report back to the city council which retained the authority to make decision about the land use plan [*Taxpayers for Livable Communities v. City of Malibu (2005) 126 Cal. App. 4th 1123, 1128-1129, 24 Cal. Rptr. 3d 493]* .

The Brown Act also defines the term "member of a legislative body of a local agency" to be any person elected to serve as a member of a legislative body who has not yet assumed the duties of office. That person shall conform his or her conduct to the requirements of the Brown Act and shall be treated for purposes of enforcement of the Act as if he or she has already assumed office [*Gov. Code § 54952.1*; *see 216 Sutter Bay Associates v. County of Sutter (1997) 58 Cal. App. 4th 860, 878, 68 Cal. Rptr. 2d 492* (this requirement operative January 1, 1994, and is not retroactive)].

[4] Action Taken

The Brown Act's stated intent is that public agencies take action openly [*Gov. Code § 54950*; *see § 470B.10[2]*].The Act defines an "action taken" as a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order, or ordinance [*Gov. Code § 54952.6*]. For instance, when an attorney for a city redevelopment agency called each of its members, obtaining commitments to a course of action, "action" was taken within the meaning of the Brown Act. If a quorum of a legislative body's members intend to unite in an agreement to agree, a violation of the Brown Act has occurred [*Stockton Newspapers, Inc. v. Redevelopment Agency (1985) 171 Cal. App. 3d 95, 103, 214 Cal. Rptr. 561* (members concurred in purpose of arriving at collective commitment in serially conducted telephone poll)]. On the other hand, no action is taken for purposes of the Act when an agency confers with and gives direction to staff, but does not take an actual vote, and does not make any collective decision about a matter not listed on the agenda [*Boyle v. City of Redondo Beach (1999) 70 Cal. App. 4th 1109, 1118, 83 Cal.*

Rptr 2d 164 ; *Centinela Hospital Assn. v. City of Inglewood (1990) 225 Cal. App. 3d 1586, 1599, 275 Cal. Rptr. 901]* .

[5] Deliberation

The court of appeal has held that the Brown Act [*see Gov. Code § 54950* (declaration of intent); *see also § 470B.10[2]*] intended that deliberation, as well as action [*see* [4], *above*], occur openly and publicly [*Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors (1968) 263 Cal. App. 2d 41, 47, 69 Cal. Rptr. 480]* . Both deliberation and action are deemed essential elements of the collective decision making process. "Deliberation" is the process of examining, weighing, and reflecting on the reasons for or against a choice, and includes a public agency's ascertainment of facts, and connotes not only collective discussion, but the collective acquisition and exchange of facts preliminary to an ultimate decision [*Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors (1968) 263 Cal. App. 2d 41, 47-48, 69 Cal. Rptr. 480]* . While action-taking and deliberation can function separately, both must be taken in public view [*Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors (1968) 263 Cal.App. 2d 41, 48, 69 Cal. Rptr. 480]* . Note, however, that the criminal penalties in the Brown Act [*see Gov. Code § 54959*; *see also § 470B.15 [1]*] apply only when action is taken.

[6] Teleconferencing

The Act allows the use of teleconferencing for the benefit of the public and the legislative body of a local agency, in connection with any meeting or proceeding authorized by law. A teleconferenced meeting or proceeding must comply with all requirements of the law otherwise applicable to a specific type of meeting or proceeding [Gov. Code § 54053(b)(1)]. Teleconferencing may be used for all purposes in connection with any meeting within the subject matter jurisdiction of the legislative body of the local agency. All votes taken during a teleconferenced meeting must be by rollcall [*Gov. Code § 54953(b)(1)*].

Teleconferencing is defined as a meeting of a legislative body, the members of which are in different locations but are connected by electronic means, through either audio or video, or both [*Gov. Code § 54953(b)(4)*].

For additional requirements, including notice of and public access to teleconference locations, see *§ 470B.12[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Forms of Pleading and Practice--Annotated

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Volume 41: Overview of Public Administrative Law thru Review of Agency Rulemaking-Chs. 470-472B
Chapter 470B PUBLIC AGENCY MEETINGS
PART II. LEGAL BACKGROUND
A. Open Meetings of Local Agencies: The Ralph M. Brown Act

41-470B California Forms of Pleading and Practice--Annotated § 470B.12

§ 470B.12 Open Meeting Procedures

[1] Public Participation in General

Under the Brown Act, the following procedures and requirements apply to meetings of the legislative body of a local agency:

- As a condition of attendance at any meeting, a member of the public may not be required to register his or her name, provide any other information, complete a questionnaire, or otherwise fulfill any condition precedent to attendance. If an attendance list, register, questionnaire, or other similar document is posted at or near the entrance to the room where the meeting is being held, or is circulated to the people present at the meeting, the document must state clearly that (a) the signing, registering, or completing of the document is voluntary, and (b) any person may attend the meeting regardless of whether he or she signs, registers, or completes the document [*Gov. Code § 54953.3*].

- Any person who attends an open and public meeting of a legislative body of a local agency has the right to record the proceedings of the meeting with an audio or video recording or a still or motion picture camera in the absence of a reasonable finding by the legislative body of the local agency that the recording cannot continue without noise, illumination, or obstruction of view that constitutes, or would constitute a persistent disruption of the proceedings [*Gov. Code § 54953.5(a)*]. Other provisions [*Gov. Code § 54953.6*] limit local agencies' legislative bodies' prohibition or restriction of broadcasts of its open and public meetings without a reasonable finding. Any tape or film record of an open and public meeting is subject to inspection under the California Public Records Act [*Gov. Code § 6250 et seq.*], but these records may be destroyed or erased 30 days after the taping or recording. The local agency must provide a video or tape player without charge for the inspection of a video or tape recording of the proceedings of a meeting [*Gov. Code § 54953.5(b)*].

- "No legislative body of a local agency shall conduct any meeting in any facility that prohibits admitting any person on the basis of race, religious creed, color, national origin, ancestry, or sex or

which is inaccessible to disabled persons, or where members of the public may not be present without making a payment or purchase" [*Gov. Code § 54961(a)*]. Every local agency defined in the Brown Act [*see Gov. Code § 54951*] must comply with this requirement. Open and public meetings of legislative bodies of local agencies must comply with the requirements of Section 202 of the Americans with Disabilities Act of 1990 [*42 U.S.C. § 12132*], and with implementing federal regulations [*Gov. Code § 54953.2*].

- When the legislative body elects to use teleconferencing, it must post agendas at all teleconference locations and conduct teleconference meetings in a manner that protects the statutory and constitutional rights of the parties or the public appearing before the legislative body of a local agency. Each teleconference location must be identified in the notice and agenda of the meeting or proceeding and must be accessible to the public. During the teleconference, at least a quorum of the members of the legislative body must participate from locations within the boundaries of the territory over which the local agency exercises jurisdiction. The agenda must provide an opportunity for members of the public to address the legislative body directly pursuant to *Gov. Code § 54954.3* at each teleconference location [*Gov. Code § 54953(b)(3)*].

- Notwithstanding the provisions of *Gov. Code § 54953 (b)(3)*, when a health authority conducts a teleconference meeting, members who are outside the jurisdiction of the authority may be counted toward the establishment of a quorum when participating in the teleconference if at least 50 percent of the number of members that would establish a quorum are present within the boundaries of the territory over which the authority exercises jurisdiction, and the health authority provides a teleconference number, and associated access codes, if any, that allows any person to call in to participate in the meeting and that number and access codes are identified in the notice and agenda of the meeting [*Gov. Code § 54953(d)(1)*]. Furthermore, nothing in this subdivision shall be construed as discouraging health authority members from regularly meeting at a common physical site within the jurisdiction of the authority or from using teleconference locations within or near the jurisdiction of the authority. A teleconference meeting for which a quorum is established pursuant to this subdivision shall be subject to all other requirements of this section [*Gov. Code § 54953(d)(2)*]. For purposes of this section, health authorities are defined to include any entity created pursuant to *Sections 14018.7*, *14087.31*, *14087.35*, *14087.36*, *14087.38*, and *14087.9605 of the Welfare and Institutions Code*, any joint powers authority created pursuant to Article 1 (commencing with Section 6500) of Chapter 5 of Division 7 for the purpose of contracting pursuant to *Section 14087.3 of the Welfare and Institutions Code*, and any advisory committee to a county sponsored health plan licensed pursuant to Chapter 2.2 (commencing with *Section 1340) of Division 2 of the Health and Safety Code* if the advisory committee has 12 or more members [*Gov. Code § 54953(d)(3)*].

[2] Regular Meetings

[a] Time and Place of Meetings

[i] General Rule

Each legislative body of a local agency, except for advisory committees and standing committees, must designate the time and place for holding regular meetings by ordinance, resolution, by-laws, or by whatever other rule is required for the conduct of business by that body [*Gov. Code § 54954(a)*]. Meetings of advisory committees or standing committees, for which an agenda is posted at least 72 hours in advance of the meeting, are considered to be regular meetings of the legislative body [*Gov. Code § 54954(a)*].

The regular and special meetings of the legislative body must be held within the boundaries of the territory over which

the local agency exercises jurisdiction [*Gov. Code § 54954(b)*]. There are a number of statutory exceptions to the requirement that legislative bodies meet within the boundaries of their territory [*Gov. Code § 54954(b)*]. These include the following:

- Comply with the state or federal law or court order, or attend a judicial or administrative proceeding to which the local agency is a party [*Gov. Code § 54954(b)(1)*].

- Inspect real or personal property which cannot be conveniently brought within the boundaries of the territory over which the local agency exercises jurisdiction provided that the meeting's topic is limited to items directly related to the real or personal property [*Gov. Code § 54954(b)(2)*].

- Participate in meetings or discussions of multi agency significance that are outside the boundaries of a local agency's jurisdiction. However, any meeting or discussion held pursuant to this subdivision must take place within the jurisdiction of one of the participating local agencies and be noticed by all participating agencies as provided for in this chapter [*Gov. Code § 54954(b)(3)*].

- Meet in the closest meeting facility if the local agency has no meeting facility within the boundaries of the territory over which the local agency exercises jurisdiction, or at the principal office of the local agency if that office is located outside the territory over which the agency exercises jurisdiction [*Gov. Code § 54954(b)(4)*].

- Meet outside their immediate jurisdiction with elected or appointed officials of the United States or the State of California when a local meeting would be impractical, solely to discuss a legislative or regulatory issue affecting the local agency and over which the federal or state officials have jurisdiction [*Gov. Code § 54954(b)(5)*].

- Meet outside their immediate jurisdiction if the meeting takes place in or nearby a facility owned by the agency, provided that the topic of the meeting is limited to items directly related to the facility [*Gov. Code § 54954(b)(6)*].

- Visit the office of the local agency's legal counsel for a closed session on pending litigation held pursuant to Section 54956.9, when to do so would reduce legal fees or costs [*Gov. Code § 54954(b)(7)*].

Legislative bodies of all local agencies as defined in *Government Code § 54951* are prohibited from conducting meetings in any facility that prohibits the admittance of any person, or persons, on the basis of ancestry or based on any characteristic listed or defined in *Gov, Code § 11135*, or which is inaccessible to disabled persons, or where members of the public may not be present without making a payment or purchase [*Gov. Code § 54961*].

[ii] Governing Board of School District

Meetings of the governing board of a school district normally must be held within the district [*Gov. Code § 54954(c)*]. There are a number of statutory exceptions to the requirement that school board meetings be held within the district. These exceptions include all of the exceptions that apply to local agencies generally [*Gov. Code § 54954(c)*; *see* [i], *above*]. In addition, there are three specific exceptions for school districts. These include the following:

- Attend a conference on nonadversarial collective bargaining techniques [*Gov. Code § 54954(c)(1)*].

- Interview members of the public residing in another district with reference to the trustees' potential employment of an applicant for the position of the superintendent of the district [*Gov. Code § 54954(c)(2)*].

- Interview a potential employee from another district [*Gov. Code § 54954(c)(3)*].

[iii] Joint Powers Authorities

Meetings of joint powers authorities must be held within the territory of a member agency unless the authority has members throughout the state in which case it may meet at any facility in the state which complies with discrimination and access [*Gov. Code § 54961*] requirements [*Gov. Code § 54954(d)*; *see* [i], *above*]. Joint powers authority may also meet in places authorized as exceptions for local agencies [*Gov. Code § 54954(b), (d)*]. In an emergency [*Gov. Code § 54954(e)* ("by reason of fire, flood, earthquake, or other emergency")], if the designated meeting place is unsafe to meet, the meetings can be held for the duration of the emergency at a place designated by the presiding officer of the legislative body or his or her designee. The presiding officer or designee must notify local media that have requested notice [*Gov. Code § 54956*] of the changed place of meetings by the most rapid means of communication available at the time [*Gov. Code § 54954(e)*].

[iv] County Board of Supervisors

County boards of supervisors are required to adopt an ordinance establishing the times of their regular meetings, which must be held at the county seat [*Gov. Code § 25081*].

[v] City Councils

City councils of general law cities [*see Gov. Code § 34102* (organized under the general law, rather than under a charter)] are required to establish the time of their regular meetings at least once a month, by either ordinance or resolution [*Gov. Code § 36805*], and must hold their meetings within the corporate limits of the city and at a place designated by ordinance [*Gov. Code § 54954(b)*].

[b] Agenda and Public Notice Requirements

[i] Necessity of an Agenda

Before 1986, when *Gov. Code § 54954.2* was added [1986 Stats., ch. 641, § 5], no requirements existed in the Brown Act for an agenda or publicposting or other notice of that agenda, although many local agencies had statutes that required creation and public notice of an agenda, as well as conformance to that agenda. As long ago as 1858, however, the California Supreme Court declared that county boards of supervisors were required to have and conform to an agenda for special meetings in order to give interested persons the opportunity to appear and contest the allowance of perceived improper demands against the public treasury. In one instance, when a county board of supervisors failed to do so, the Supreme Court declared void an agreed-upon settlement of the treasurer's accounts [*County of Eldorado v. Reed (1858) 11 Cal. 130, 132]* . In addition, governing boards of school districts have been subject for several years to the requirement that an agenda be posted 72 hours before meetings [*see Educ. Code § 35145*; *Gov. Code § 54954.2*]. An agenda of a public meeting, when distributed to all or a majority of the members of a legislative body of a local agency for discussion or consideration at a public meeting, is a discoverable public record under the Public Records Act [*Gov. Code § 54957.5(a)*; *see Gov. Code §§ 6250-6267*; *see also* Ch. 470C, *Public Records Act*].

[ii] Agenda Requirements

Gov. Code § 54954.2 requires the legislative body of a local agency to post a regular meeting agenda in a location that is freely accessible to members of the public at least 72 hours before the meeting [*Gov. Code § 54954.2(a)*]. The agenda must (1) contain a brief, general description which generally will not exceed 20 words of each item of business to be discussed or transacted at the meeting, including items to be discussed in closed session, and (2) state the time and location of the regular meeting [*Gov. Code § 54954.2(a)*].

When requested, the agenda shall be made available in appropriate alternative formats to persons with a disability as required by Section 202 of the Americans with Disabilities Act of 1990 [*42 U.S.C. § 12132*] and with implementing federal regulations [*Gov. Code § 54953.2*]. The agenda shall include information regarding how, to whom, and when a request for disability-related modification or accommodation, including auxiliary aids or services, may be made by a person with a disability who requires a modification or accommodation in order to participate in a public meeting [*Gov. Code § 54954.2(a)*].

The agenda must describe the legislative body's business in enough detail to enable the general public to ascertain the nature of the business to be transacted. A misleading or inadequate description would violate this provision [*Carlson v. Paradise Unified Sch. Dist. (1971) 18 Cal. App. 3d 196, 200, 95 Cal. Rptr. 650]* . For example, an agenda description that stated only "Continuation school site change" was inadequate to provide notice that the board would consider discontinuing elementary education at the named school [*Carlson v. Paradise Unified Sch. Dist. (1971) 18 Cal.App. 3d 196, 200, 95 Cal. Rptr. 650]* . Closed session agenda items must be described in the agenda in a specific way that satisfies, or substantially complies with, statutory requirements [*Gov. Code § 54954.5*]. An agenda item for a closed session that stated "Public Employee Performance Evaluation (non-Tenured) Librarian," describing a session in which a community college district voted not to renew the contract of a librarian, satisfied the agenda description requirements of *Gov. Code § 54954.5* [*Furtado v. Sierra Community College (1998) 68 Cal. App. 4th 876, 883-884, 80 Cal. Rptr. 2d 589]* .

An agenda item for a closed session of a special meeting that stated: "Per *Government Code Section 54957*: Public Employee (employment contract)" did not satisfy the provisions of the Brown Act that require the agenda to "specify the business to be transacted or discussed" [*Gov. Code § 54956*], nor did it satisfy the provisions requiring that the agenda provide a "brief general description of each item of business to be transacted or discussed ..." [*Gov. Code § 54954.2*]. This agenda item was not sufficient to describe a closed session of a special meeting at which a city finance director was terminated from employment based on charges of misconduct [*Moreno v. City of King (2005) 127 Cal. App. 4th 17, 26-27, 25 Cal. Rptr. 3d 29]* . Further, the city failed to cure the agenda violation at a later meeting when it reported a denial of the former employee's tort claim in the minutes for that meeting but failed to correct the agenda for the prior meeting by disclosing that the employee's termination has been considered at the prior meeting [*Moreno v. City of King (2005) 127 Cal. App. 4th 17, 27-28, 25 Cal. Rptr. 3d 29]* .

[iii] Action on Agenda Items

The legislative body cannot take action or discussion on any item not appearing on the posted agenda [*Gov. Code § 54954.2(a)*; *Cohan v. City of Thousand Oaks (1994) 30 Cal. App. 4th 547, 556-557, 35 Cal. Rptr. 2d 782* (city council violated Brown Act provisions by amending agenda at meeting to add an appeal; "Emergency Situation" exception did not apply)]. There are a number of exceptions to the agenda requirement both for action and discussion. These include:

- A member of a legislative body or its staff may briefly respond to statements made or questions posed by persons exercising their public testimony rights [*Gov. Code § 54954.3*] under the law [*Gov. Code § 54954.2(a)*].

- On his or her own initiative, or in response to questions posed by the public, a member of a legislative body or its staff may ask a question for clarification, make a brief announcement, or make a brief report on his or her own activities [*Gov. Code § 54954.2(a)*].

- A member of a legislative body, or the body itself, subject to the rules and regulations of the legislative body, may provide a reference to staff or other resources for factual information, request staff to report back to the body at a subsequent meeting concerning any matter, or take action to direct staff to place a matter of business on a future agenda [*Gov. Code § 54954.2(a)*].

- A legislative body may take action on items of business not on the posted agenda after determining by a majority vote that an emergency situation exists [*Gov. Code § 54954.2(b)(1)*; *Cohan v. City of Thousand Oaks (1994) 30 Cal. App. 4th 547, 556-557, 35 Cal. Rptr. 2d 782* (city council violated Brown act provisions by amending agenda at meeting to add an appeal; "Emergency Situation" exception did not apply)]. An "emergency situation" means either a work stoppage or other activity severely impairing public health, safety, or both, as determined by a majority of the members [*see Gov. Code § 54956.5(a)*]; or a crippling disaster severely impairing public health, safety, or both, as determined by a majority [*see Gov. Code § 54956.5(b)*]. In addition, the situation must threaten to disrupt, or have resulted in actual disruption of, public facilities [*Gov. Code § 54956.5*; for a discussion of emergency meetings, *see* [5], *below*]. Before discussing emergency items, the legislative body must publicly identify the item [*Gov. Code § 54954.2(b)*].

- In a nonemergency situation, the governing body may determine by a two-thirds vote of the members of the legislative body present at the meeting that there is a need to take immediate action and that the need for action came to the attention of the local agency subsequent to the agenda posting, and then act on the item. If less than two thirds of the members are present, the determination must be unanimous [*Gov. Code § 54954.2(b)(2)*].

- A legislative body may take action on an item of business not appearing on the posted agenda if the item was posted for a previous meeting occurring no more than five calendar days before the date action is taken on the item, and at the previous meeting the item was continued to the meeting at which action is being taken [*Gov. Code § 54954.2(b)(3)*].

[c] Public's Opportunity to Address Legislative Body

Every agenda for a regular meeting [*see Gov. Code § 54954.2*; *see also* [b], *above*] must provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of that body [*Gov. Code § 54954.3(a)*]. No action can be taken on any item not appearing on the agenda, however, unless the action constitutes one of the exceptions to the agenda requirement [*Gov. Code § 54954.3(a)*; *see Gov. Code § 54954.2(b)*; *see also* [b], *above*]. However, the agenda need not provide an opportunity for the members of the public to address the legislative body on any item that has already been considered by a committee composed exclusively of members of the council or board at a public meeting in which all interested members of the public had the opportunity to address the committee on that item, before or during the committee's consideration of the item, unless the legislative body determines that the item has been substantially changed since the committee heard it [*Gov. Code § 54954.3(a)*; *Coalition of Labor, Ag. & Bus. v. County of Santa Barbara Board of Supervisors (2005) 129 Cal. App. 4th 205, 209-210, 28 Cal. Rptr. 3d 198* (*Gov. Code § 54954.3(a)* does not require Board of Supervisors to allow members of the public to address the Board on whether to place an item on the agenda of a board meeting)].

The legislative body of a local agency may adopt reasonable regulations to ensure that the public's opportunity to address that body is provided. Those regulations may limit the total amount of time allocated for public testimony on particular issues and for each individual speaker [*Gov. Code § 54954.3(b)*]. A local library commission did not violate the open meeting provisions of the Brown Act by not allowing a public comment period of three minutes for each speaker for each agenda item [*Chaffee v. San Francisco Public Library Comm'n (2005) 134 Cal. App. 4th 109, 115-116, 36 Cal. Rptr. 3d 1]* . The legislative body of a local agency may not prohibit criticism of the policies, procedures, programs, or services of the agency, or of the acts or omissions of the legislative body. Nothing in *Gov. Code § 54954.3* shall confer any privilege or protection for expression beyond that otherwise provided by law [*Gov. Code § 54954.3(c)*].

[d] Notice to Persons

Persons who wish to receive copies of agendas, or agenda document packets, for any meeting of a legislative body of a local agency that is subject to the Brown Act may request in writing that copies be mailed to them. When requested, the agenda and the documents in the agenda packet shall be made available in appropriate alternative formats to persons with a disability as required by Section 202 of the Americans with Disabilities Act of 1990 [*42 U.S.C. § 12132*], and with implementing federal regulations [*Gov. Code § 54954.1*]. When the written request is received, the legislative body, or its designee, must mail the requested materials at the time the agenda is posted under the law or upon distribution to all, or a majority of all, of the members of the legislative body, whichever occurs first [*Gov. Code § 54954.1*]. Requests for mailed copies of agendas or agenda packets are effective for the calendar year in which the request is filed, and must be renewed after January 1 of the next year. Mailing fees, not to exceed the cost of providing the service, can be established by the legislative body. If the requesting person does not receive the agenda or agenda packet, that does not invalidate the legislative body actions taken at the meeting for which the agenda or agenda packet was not received [*Gov. Code § 54954.1*].

Notwithstanding *Gov. Code § 6255* or other law, agendas of public meetings and any other writings, when distributed to all, or a majority of all, of the members of a legislative body of a local agency by any person in connection with a matter subject to discussion or consideration at an open meeting of the body, are disclosable public records under the California Public Records Act [Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1], and shall be made available upon request without delay. However, this section shall not include any writing exempt from public disclosure under *Gov. Code sections 6253.5*, *6254*, 6254.3, *6254.7*, 6254.15, 6254.16 or *6254.22* [*Gov. Code § 54957.5(a)*].

If a writing that is a public record under subdivision (a), and that relates to an agenda item for an open session of a regular meeting of the legislative body of a local agency, is distributed less than 72 hours prior to that meeting, the writing must be made available for public inspection pursuant to paragraph (2) at the time the writing is distributed to all, or a majority of all, of the members of the body [*Gov. Code § 54957.5(b)(1)*]. A local agency must make any writing described in paragraph (1) available for public inspection at a public office or location that the agency must designate for this purpose. Each local agency must list the address of this office or location on the agendas for all meetings of the legislative body of that agency. The local agency also may post the writing on the local agency's Internet website in a position and manner that makes it clear that the writing relates to an agenda item for an upcoming meeting [*Gov. Code § 54957.5(b)(2)*]. This subdivision is operative on July 1, 2008 [*Gov. Code § 54957.5(b)(3)*].

Writings that are public records and are distributed during a public meeting shall be made available for public inspection at the meeting if prepared by the local agency or a member of its legislative body, or after the meeting if prepared by some other person [*Gov. Code § 54957.5*]. These writings shall be made available in appropriate alternative formats upon request by a person with a disability, as required by Section 202 of the Americans with Disabilities Act of 1990 [*42 U.S.C. Sec. 12132*], and the federal rules and regulations adopted in implementation thereof [*Gov. Code § 54957.5(b)*]. The legislative body of a local agency is not prohibited from charging a fee or deposit for a copy of a public record pursuant to Section 6253, except that no surcharge shall be imposed on persons with disabilities in violation of Section 202 of the Americans with Disabilities Act of 1990 [*42 U.S.C. Sec. 12132*], and the federal rules and regulations adopted in implementation thereof [*Gov. Code § 54957.5(c)*]. This statute shall not be interpreted to limit or delay the public's right to inspect or obtain a copy of any record required to be disclosed under the requirements of the California Public Records Act [Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1]. This law shall not be interpreted to require a legislative body of a local agency to place any paid advertisement or any other paid notice in any publication [*Gov. Code § 54957.5(d)*].

[3] Special Meetings

[a] Notice to Members

If a public agency needs to hold a meeting at a time or place other than that specified for regular meetings [*see Gov. Code § 54954*; *see also* [2], *above*], either (1) the presiding officer of the legislative body, or (2) a majority of the members, may call a special meeting at any time [*Gov. Code § 54956*; *216 Sutter Bay Associates v. County of Sutter (1997) 58 Cal. App. 4th 860, 881, 68 Cal. Rptr. 2d 492]* . Written notice of the special meeting must be delivered either personally or by any other means to each member of the legislative body and must be received at least 24 hours before the time of the meeting specified in the notice. The call and notice must specify the time and place of the special meeting and the business to be transacted or discussed. The Brown Act specifically prohibits the legislative body from conducting any business not contained in this notice [*Gov. Code § 54956*]. No written notice need be given, however, to any member who (1) has filed a written waiver of notice (including a telegram) with the clerk or secretary at or prior to the meeting, or (2) actually attends the meeting when it convenes [*Gov. Code § 54956*].

[b] Notice to Public

In addition to notifying its individual members, a legislative body must provide notice to various other persons or entities as follows:

- The call and notice must be posted 24 hours before the special meeting in a location that is freely accessible to members of the general public [*Gov. Code § 54956*].

- Notice of the special meeting delivered personally or by any other means 24 hours in advance to news media that have requested written notice, including each local newspaper of general circulation, and radio or television stations. The requirements for notice to legislative body members, discussed in [a], *above*, apply equally to notice to the news media [*Gov. Code § 54956*]. The attorney general has indicated that it is not necessary to give this notice to a local newspaper of general circulation that has not submitted a written request for notice [*see 62 Ops. Cal. Atty. Gen. 658 (1979)]* .

- If the notice concerns the meeting of the legislative body [*see Gov. Code § 54954.1* (notice requirements for legislative body of local district)] of a local district, the legislative body must give notice, at least one week before the date set for the meeting, to any owner of property located within the district who has filed a written request [*Gov. Code § 54954.1*].

- If the special meeting is called less than seven days in advance, the legislative body may give whatever notice it deems to be practical [*Gov. Code § 54954.1*].

For a discussion of the requirements for notice and requests for notice applicable to district meetings, see [2][d], *above*.

[4] Adjourned or Continued Meetings

[a] Adjournment

When an insufficient number of members are present to conduct a meeting, a legislative body of a local agency may adjourn any regular or adjourned regular meeting or special or adjourned special meeting to a different time or place specified in the order of adjournment [*Gov. Code § 54955*]. For example, the attorney general has ruled that while a board of supervisors is required to hold its regular meetings at the county seat, an adjourned regular meeting may be held at any other location appropriate for the conduct of the county board's business [*see 58 Ops. Cal. Atty. Gen. 554 (1975)]* . If an insufficient number of members are present at the new meeting specified in the order of adjournment, the meeting may again be adjourned [*Gov. Code § 54955*]. If a quorum is not present at such a meeting, the members present may adjourn from one meeting to another [*see* [6], *below*, for a discussion of what constitutes a quorum with respect to various public agencies]. If all members are absent from a regular or adjourned regular meeting, the clerk or

secretary of the legislative body may declare the meeting adjourned to a stated time and place, and must cause a written notice of the adjournment to be given in the same manner as that required for a special meeting [*Gov. Code § 54955*; *see Gov. Code § 54956* (notice requirements for special meetings); *see also* [3], *above*]. Within 24 hours after the adjournment, a copy of the order or notice of adjournment must be conspicuously posted on or near the door of the place where the adjourned meeting was held [*Gov. Code § 54955*]. If the order of adjournment of a meeting fails to state the time at which the adjourned meeting will be held, by default, the meeting will be held at the usual hour specified for regular meetings [Gov. Cod § 54955]. A regular or adjourned regular meeting that is adjourned according to these rules is deemed to be a regular meeting for all purposes [*Gov. Code § 54955*].

[b] Continuation

A hearing that is being held, or is noticed or ordered to be held, by the legislative body (other than an advisory committee) of a local agency at any meeting may be continued, or recontinued, to any subsequent meeting. The procedures for continuation are the same as those for adjournment, discussed in [a], *above*. If the hearing is continued to a time less than 24 hours after the time specified in the order or notice of hearing, however, a copy of the order or notice of continuance must be posted immediately following the meeting at which the order or declaration of continuance was adopted or made [*Gov. Code § 54955.1*].

When a local agency legislative body schedules a continued public meeting at a later date to consider a single agenda, the body is not required to provide a general public comment period at each session. Rather, the legislative body is required to provide one general public comment period for that agenda that can be held at the continued meeting [*Chaffee v. San Francisco Library Commission (2004) 115 Cal. App. 4th 461, 468-469, 9 Cal. Rptr. 3d 336]* .

[5] Emergency Meetings

The Brown Act also provides for meetings in emergency situations in which prompt action is necessary due to the disruption or threatened disruption of public facilities. Emergency situation is defined to mean both of the following [*Gov. Code § 54956.5(a)*]:

- An emergency, which shall be defined as a work stoppage, crippling activity, or other activity that severely impairs public health, safety, or both, as determined by a majority of the members of the legislative body [*Gov. Code § 54956.5(a)(1)*].

- A dire emergency, which shall be defined as a crippling disaster, mass destruction, terrorist act, or threatened terrorist activity that poses peril so immediate and significant that requiring a legislative body to provide one- hour notice before holding an emergency meeting under this section may endanger the public health, safety, or both, as determined by a majority of the members of the legislative body [*Gov. Code § 54956.5(a)(2)*].

Subject to requested notice requirements, in the case of an emergency situation involving matters upon which prompt action is necessary due to the disruption or threatened disruption of public facilities, a legislative body may hold an emergency meeting without complying with either the 24-hour notice requirement or the 24-hour posting requirement of *Gov. Code § 54956* or both of the notice and posting requirements [*Gov. Code § 54956.5(b)(1)*].

Each local newspaper of general circulation and radio or television station that has requested notice of special meetings pursuant to *Gov. Code § 54956* shall be notified by the presiding officer of the legislative body, or designee thereof, one hour prior to the emergency meeting, or, in the case of a dire emergency, at or near the time that the presiding officer or designee notifies the members of the legislative body of the emergency meeting. This notice shall be given by telephone and all telephone numbers provided in the most recent request of a newspaper or station for notification of special meetings shall be exhausted. In the event that telephone services are not functioning, the notice requirements of this

section shall be deemed waived, and the legislative body, or designee of the legislative body, shall notify those newspapers, radio stations, or television stations of the fact of the holding of the emergency meeting, the purpose of the meeting, and any action taken at the meeting as soon after the meeting as possible [*Gov. Code § 54956.5(b)(2)*].

During a meeting held pursuant to this section, the legislative body may meet in closed session pursuant to *Gov. Code § 54957* if agreed to by a two-thirds vote of the members of the legislative body present, or, if less than two- thirds of the members are present, by a unanimous vote of the members present [*Gov. Code § 54956.5(c)*]. All special meeting requirements, as prescribed in *Gov. Code § 54956* shall be applicable to a meeting called pursuant to this section, with the exception of the 24-hour notice requirement [*Gov. Code § 54956.5(d)*].

The minutes of a meeting called pursuant to this section, a list of persons whom the presiding officer of the legislative body, or designee of the legislative body, notified or attempted to notify, a copy of the rollcall vote, and any actions taken at the meeting shall be posted for a minimum of 10 days in a public place as soon after the meeting as possible [*Gov. Code § 54956.5(e)*].

[6] Quorum

[a] Definition

A quorum of the members of a multi member body is the least number of them who together are legally competent to transact the business of the body [*see People v. Dale (1947) 79 Cal. App. 2d 370, 375, 179 P.2d 870* ; Black's Law Dictionary; Webster's Third New International Dictionary; *see also Nesbitt v. Bolz (1939) 13 Cal. 2d 677, 679-680, 91 P.2d 879]* . The common law rule is that a quorum is a simple majority, that is, the next whole number greater than half of the number of members, such as three of five members, four of six members, and so forth [*see FTC v. Flotill Products (1967) 389 U.S. 179, 183, 88 S. Ct. 401, 19 L. Ed. 2d 398]* .

Some statutes specify that a quorum of the members of a particular agency consists of a majority [*see, e.g., Bus. & Prof. Code § 5016*]. It is apparent that in such statutes the reference is to a simple majority [*see People v. Hecht (1895) 105 Cal. 621, 627, 38 P. 941* ; *Ursino v. Superior Court (1974) 39 Cal. App. 3d 611, 620, 114 Cal. Rptr. 404]* . In other cases the number of members constituting a quorum is in fact a simple majority specified in terms of numbers [*see, e.g., Bus. & Prof. Code §§ 4007, 18605* (six of ten-member Board of Pharmacy; five of eight-member Athletic Commission)].

When the statutes dealing with a particular agency do not specify the number of members constituting a quorum, but do require a number greater than a simple majority to concur in a decision, that number, and not a simple majority, constitutes a quorum [*see Ursino v. Superior Court (1974) 39 Cal. App. 3d 611, 620, 114 Cal. Rptr. 404* (local charter requiring four of five-member board of permit appeals to concur in rescinding building permit; four members as constituting quorum); *People v. Dale (1947) 79 Cal. App. 2d 370, 375, 179 P.2d 870* (concurrence of 12 of 19 grand jurors as necessary for indictment; 12 grand jurors as constituting quorum)].

When the statutes dealing with a particular agency specify neither the number of agency members constituting a quorum, nor the number of members whose concurrence is necessary for action to be taken by the agency, it is usually reasonable to assume that a simple majority of the agency members constitutes a quorum [*see Civ. Code § 12* (authority given jointly to three or more public officers as exercisable by majority unless law provides otherwise); *Code Civ. Proc. § 15* (same); *Ursino v. Superior Court (1974) 39 Cal. App. 3d 611, 620, 114 Cal. Rptr. 404* (applying *Civ. Code § 12* and *Code Civ. Proc. § 15* to local board of permit appeals but finding other provision in law governing board); *see also People v. Hecht (1895) 105 Cal. 621, 627, 38 P. 941* ; *Jacobs v. Board of Supervisors (1893) 100 Cal. 121, 132, 34 P. 630* ; *Ford v. Civil Service Commission (1958) 161 Cal. App. 2d 692, 697, 327 P.2d 148* (two of three county civil service commissioners at hearing as full commission)].

[b] Effect of Lack of Quorum

When the members of an agency must act collectively and in person, the effect of fewer than a quorum assembling is to render the agency incapable of proceeding [*see, e.g., Ursino v. Superior Court (1974) 39 Cal. App. 3d 611, 621, 114 Cal. Rptr. 404]* . Although it has been held that the requirements of due process are satisfied if a member who participates in an agency decision has read and considered the evidence presented at a hearing, or a transcript of it, even though he was not physically present when the evidence was produced [*see* Cooper v. State Bd. of Medical Examiners (1950) *35 Cal. 2d, 242, 246* , *35 Cal. 2d 242, 217 P.2d 630* ; *Le Strange v. City of Berkeley (1962) 210 Cal. App. 2d 313, 327, 26 Cal. Rptr. 550]* , this rule apparently does not relieve the agency of the requirement of having at least a quorum of its members present to engage in collective action, although the identity of those members may change.

[c] Number Required for Action

[i] Relation to Quorum

Once it has been determined how many agency members constitute a quorum [*see People v. Dale (1947) 79 Cal. App. 2d 370, 375, 179 P.2d 870]* , it is necessary to determine how many members of the agency must concur in a decision. The number of agency members whose concurring votes are necessary for agency action might be the same as that constituting a quorum, but often it is smaller.

[ii] Common Law Rule

The common law rule is that a simple majority of a collective body constitutes a quorum and that a majority of that quorum is authorized to act for the body [*FTC v. Flotill Products (1967) 389 U.S. 179, 183, 88 S. Ct. 401, 19 L. Ed. 2d 398]* . The United States Supreme Court has ruled that where the enabling statute is silent on the question, a federal administrative body is justified in adhering to the common law rule [*FTC v. Flotill Products (1967) 389 U.S. 179, 183-184, 88 S. Ct. 401, 19 L. Ed. 2d 398]* . It appears that in California, in the absence of a statute to the contrary, the concurrence of a majority of the whole number of members of a body is not necessary to a decision; rather only a majority of the number of members constituting a quorum need concur [*Nesbitt v. Bolz (1939) 13 Cal. 2d 677, 679, 91 P.2d 879* (appointments to fill two vacancies on five-member city council as validly made by two of three remaining members); *People ex rel. Hoffman v. Hecht (1895) 105 Cal. 621, 628, 38 P. 941* ; *People v. Harrington (1883) 63 Cal. 257, 260* ; *Ursino v. Superior Court (1974) 39 Cal. App. 3d 611, 620, 114 Cal. Rptr. 404* ; *Saks & Co. v. Beverly Hills (1951) 107 Cal. App. 2d 260, 265, 237 P.2d 32* ; *Martin v. Ballinger (1938) 25 Cal. App. 2d 435, 437, 77 P.2d 888]* .

[iii] Statutory Number of Quorum

A statute might specify the number of members of a multi-member agency who must concur in a decision [*see, e.g.,* former *Bus. & Prof. Code § 2108.5*; *see also Ursino v. Superior Court (1974) 39 Cal. App. 3d 611, 620, 114 Cal. Rptr. 404* (local charter provision)]. The number of concurring votes required by statute might be the same as a quorum [*see, e.g., Bus. & Prof. Code § 18605*] or might be smaller than a quorum [*see, e.g., Bus. & Prof. Code § 5524*]. Even if the unanimous concurrence of the members of an agency is required for a particular decision, a vacancy in the membership might not prevent obtaining the concurrence of all of the members; that is, the concurrence of all persons who are members at the time might be sufficient [*see People v. Bank of San Luis Obispo (1908) 154 Cal. 194, 202, 97 P. 306* (one vacancy in four-member agency as not invalidating decision concurred in by three persons remaining in office, when statute required that members "shall unanimously decide" matter in question); *see also Educ. Code § 35165*]. If statutory requirements as to the assembling of a quorum and the concurrence of a certain number of members have been met, it is irrelevant that a person not qualified to participate has purportedly participated in a meeting [*see People ex rel. State Lands Comm'n v. Superior Court (1974) 36 Cal. App. 3d 727, 744, 111 Cal. Rptr. 733* (purported unlawful participation by deputy sent by Lieutenant Governor to meeting of State Lands Commission as irrelevant where sufficient number of actual members concurred in decision)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 41: Overview of Public Administrative Law thru Review of Agency Rulemaking-Chs. 470-472B
Chapter 470B PUBLIC AGENCY MEETINGS
PART II. LEGAL BACKGROUND
A. Open Meetings of Local Agencies: The Ralph M. Brown Act

41-470B California Forms of Pleading and Practice--Annotated § 470B.13

§ 470B.13 Exemptions Allowing Closed Sessions

[1] Definitions

Closed meetings, generally referred to in the Brown Act as "closed sessions" or "executive sessions," are allowed for the purposes discussed in [2] through [19], *below*. A closed session is a portion of a meeting from which the public and news media are excluded. Closed sessions are allowed during regular meetings, adjourned regular meetings, special meetings, and adjourned special meetings, but not during emergency meetings [*see Gov. Code § 54956.5*].

[2] Personnel Exemption

[a] Public Employees

The governing body of a local agency may hold a closed session at any regular or special meeting to consider the appointment, employment, compensation, performance evaluation, discipline, or dismissal of a public employee, or to hear complaints or charges brought against that employee by another person or employee, unless the employee requests a public session [*Gov. Code § 54957*; *Hofman Ranch v. Yuba County Local Agency Formation Commission (2009) 172 Cal. App. 4th 805, 807-808, 91 Cal. Rptr. 3d 458* (agency properly conducted a closed session personnel evaluation of the executive officer of the agency under *Gov. Code § 54957* because that officer was considered to be an employee of the agency for purposes of *Gov. Code § 54957* even though he was a contractor hired to provide executive officer services)]. As a condition to holding a closed session on specific complaints or charges brought against an employee by another person or employee, the employee shall be given written notice of his or her right to have the complaints or charges heard in an open session rather than a closed session, which notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding the session. If notice is not given, any disciplinary or other action taken by the legislative body against the employee based on the specific complaints or charges in the closed session shall be null and void [*Gov. Code § 54957*; *Morrison v. Housing Authority of the City of Los Angeles Board of Commissioners (2003) 107 Cal. App. 4th 860, 875-877, 132 Cal. Rptr. 2d 453* (agency violated *Gov't Code § 54957* when it rejected hearing officer's findings, credibility determinations, and recommended discipline, and decided to hear case itself by making fact findings, credibility determinations, and deciding to terminate employee without giving affected employee notice of the right to request an open session for the hearing. Agency decision to terminate employee

without giving employee notice is "null and void")]. During the examination of a witness, the legislative body may also exclude from any public or closed meeting any or all other witnesses in the matter being investigated [*Gov. Code § 54957*].

The California court of appeal held that a city violated the Brown Act when it terminated the finance director of the city without giving the director advance notice that it would be considering complaints and charges against that employee at a closed session of a meeting of the city council. Advance notice was required by the provisions of *Gov. Code § 54957*. The city had received charges of misconduct against the director from the city manager, and the city council considered those charges and terminated the director at that meeting [*Moreno v. City of King (2005) 127 Cal. App. 4th 17, 29-30, 25 Cal. Rptr. 3d 29* ; *Bell v. Vista Uni. Sch. Dist. (2000) 82 Cal. App. 4th 672, 683-684, 98 Cal. Rptr. 2d 263* (advance notice required under *Gov. Code § 54957* before city can consider misconduct allegations against employee and decide to discipline employee)]. In doing so, the city violated the Brown Act. The court also upheld the superior court ruling that overturned the city's decision to terminate the employee declaring that decision null and void. The Court of appeal held that the city could not cure the violation of *Gov. Code Section 54957* through complying with the provisions of *Gov Code § 54960.1* because the cure provisions of that statute do not apply to violations of *Gov. Code § 54957* [*Moreno v. City of King (2005) 127 Cal. App. 4th 17, 29, 25 Cal. Rptr. 3d 29]* .

The governing board of the Los Angeles Unified School District properly met in closed session consistent with *Gov. Code § 54957* to begin the process to dismiss a permanent certificated teacher without giving the teacher the 24-hour notice otherwise required by *Gov. Code § 54957*. This was because the 24-hour notice requirement did not apply when the public employee had the right to an evidentiary hearing under *Educ. Code § 44934* subsequent to the closed session. Furthermore, the teacher did not have a due process right to notice and opportunity to be heard before the governing board began the dismissal proceedings [*Kolter v. Commission of Professional Competence of the Los Angeles Unified School Dist. (2009) 170 Cal. App. 4th 1346, 1349, 88 Cal. Rptr. 2d 620]* .

For example, in a case involving a meeting of the board of directors of a public hospital district, the board left its regular meeting to go into closed session to discuss the qualifications of two radiologists on the hospital staff. Subsequently, the board reconvened in open, public session, terminating its agreement with one radiologist, and later executing a written agreement with the other. The court approved this procedure on evidence that the closed session concerned the qualifications of the two radiologists and their ability to continue on the hospital staff. Subsequent discussions and actions during an open meeting were held to be appropriate and the entire process was held not violative of the Brown Act [*Letsch v. Northern San Diego County Hosp. Dist. (1966) 246 Cal. App. 2d 673, 678, 55 Cal. Rptr. 118]* .

Similarly, another court held that a community college district board of trustees properly met in closed session to consider the performance and to vote on the rehiring of a librarian. The board was not required to hold an open and public session as requested by the librarian because that requirement of *Gov. Code § 54957* only applies to consideration of specific complaints or charges brought against the employee, and not to personnel evaluations [*Furtado v. Sierra Community College (1998) 68 Cal. App. 4th 876, 881-882, 80 Cal. Rptr. 2d 589]* . Negative comments in a personnel evaluation do not constitute specific complaints or charges brought against an employee under *Gov. Code § 54957* [*Furtado v. Sierra Community College (1998) 68 Cal. App. 4th 876, 882-883, 80 Cal. Rptr. 2d 589]* . Another school district board also properly met in closed session to consider performance and retention of four probationary teachers [*Fischer v. Los Angeles Unified School Dist. (1999) 70 Cal. App. 4th 87, 96-97, 82 Cal. Rptr. 2d 452* (board was not required to hold an open and public session to conduct personnel evaluation but only to consider specific complaints and charges)]. Even when a body meets in closed session to consider specific charges or complaints against an individual, the closed session in not improper when the only action is to deliberate on whether to initiate a disciplinary action, and there is no evidentiary hearing that would trigger the statutory notice requirement [*Bollinger v. San Diego Civil Service Com. (1999) 71 Cal. App. 4th 568, 574-575, 84 Cal. Rptr. 2d 27* (city civil service commission considering charges against police officer)].

Public employees include officers and independent contractors who function as officers and employees but do not

include elected officials, members of legislative bodies, or other independent contractors. Closed sessions held pursuant to the personnel exemption can not include discussion or action on proposed compensation except for a reduction of compensation that results from the imposition of discipline. However, local agency officials can hold closed sessions pursuant to other law [*see Gov. Code §§ 37606, 37624.3*; *Health & Safety Code §§ 1461, 32106, 32155*] without violating the act [*Gov. Code § 54957*].

In one instance, a sheriff's lieutenant, who was also a lawyer, was dismissed from his position on the basis that his private practice of law conflicted with his duties as a peace officer. The dismissed employee argued that the civil service commission's decision to terminate him made during a closed session was unlawful, violating due process of law. The court held that a public agency may consider the dismissal of a public employee in a closed meeting, however, and upheld the dismissal [*Titus v. Civil Service Com. (1982) 130 Cal. App. 3d 357, 363, 181 Cal. Rptr. 699]* . In contrast, when a school board met in closed session to review the qualifications of individuals who were potential contractors to help the board in disposing of surplus real property, the court held that the personnel exemption does not extend to independent contractors, notwithstanding the board's discussion of sensitive personal qualifications [*Rowen v. Santa Clara Unified School Dist. (1981) 121 Cal. App. 3d 231, 235, 175 Cal. Rptr. 292]* .

The opinion of the California attorney general is that a closed session may not be held to discuss complaints against presiding officers of the governing body of a city, county, or special district. Thus, a chairman of a board, president of a board of a special district, or the mayor of a general law city [*see Gov. Code § 34102* (definition)] may not be deposed in closed session, nor may discussions concerning complaints against the performance of a specific officer be discussed in closed session [*see 61 Ops. Cal. Atty. Gen. 10 (1978)]* . On the other hand, a closed session may be proper under *Gov. Code § 54957* to interview candidates for school superintendent *[80 Ops. Cal. Atty. Gen. 308 (1997)* (committee formed by board of trustees of a school district to interview candidates for district superintendent and to make recommendation to board may hold closed session in order to question candidates candidly as to their qualifications and to discuss such qualifications freely without subjecting candidates to public embarrassment); *see also Gillespie v. San Francisco Pub. Library Com. (1998) 67 Cal. App. 4th 1165, 1168-1169, 79 Cal. Rptr. 2d 649* (city public library commission permitted under *Gov. Code § 54957* to meet in closed session to interview candidates and to make recommendation to mayor regarding appointment of acting city librarian)].

School board of trustees properly met in closed session consistent with *Gov. Code § 54957* to evaluate performance of school superintendent. Closed session performance evaluation is not limited to formal performance review, but can also include review of particular instances of job performance, as well as discussion of evaluation criteria, evaluation processes, and other preparatory matters [*Duval v. Board of Trustees (2001) 93 Cal. App. 4th 902, 909-910, 113 Cal. Rptr. 2d 517]* . However, when a school board intends to discuss a charge or complaint against a public employee in a closed session, it must give the employee 24-hour written notice of its intention, and it must advise the employee of the right to have the charges considered in public, as opposed to a closed session [*Bell v. Vista Unified Sch. Dist. (2000) 82 Cal. App. 4th 672, 681-682, 98 Cal. Rptr. 2d 263]* .

[b] Report on Action Taken

Any action taken to appoint, employ, dismiss, accept the resignation of, or otherwise affect the employment status of a public employee in closed session [*Gov. Code § 54957*] shall be reported at the public meeting during which the closed session is held. Any report required by this paragraph shall identify the title of the position. The general requirement of this paragraph notwithstanding, the report of a dismissal or the nonrenewal of an employment contract shall be deferred until the first public meeting following the exhaustion of administrative remedies, if any. Also, the vote or abstention of every member present at the closed session shall also be reported [*Gov. Code § 54957.1(a)(5)*]. When a city agency nominates candidates in a closed session, it is not required to comply with the reporting requirements of *Gov. Code § 54957.1(a)(5)* until the actual appointment of the successful candidate for the position [*Gillespie v. San Francisco Pub. Library Com. (1998) 67 Cal. App. 4th 1165, 1173-1174, 79 Cal. Rptr. 2d 649]* .

[3] Litigation Exemption

[a] Definitions

Before a specific statutory exemption [*Gov. Code § 54956.9*] was added to the Brown Act for attorney-client communications, the courts had already recognized the need for an exemption to the open meetings requirement based on the attorney-client relationship [*Evid. Code §§ 952-954*]. In one case, the California Court of Appeal stated: "The question, then, is whether the public meeting requirement of section 54953 abrogates by implication the statutory policy assuring opportunity for private legal consultation by public agency clients; or, in equivalent terms, whether the Brown Act supplies unmistakable evidence of a legislative intent to abolish that statutory policy ... " [*Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors (1968) 263 Cal. App. 2d 41, 55, 69 Cal. Rptr. 480* ; *see Sutter Sensible Planning, Inc. v. Board of Supervisors (1981) 122 Cal. App. 3d 813, 824, 176 Cal. Rptr. 342* (citing with approval *Sacramento Newspaper Guild* for proposition that Brown Act does not abrogate the attorney-client privilege)]. The court held that in enacting the Brown Act, the Legislature did not intend to supersede the attorney-client privilege [*Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors (1968) 263 Cal. App. 2d 41, 57, 69 Cal. Rptr. 480]* .

Effective January 1, 1985, *Gov. Code § 54956.9* was added to the Brown Act. For the first time, that Act specifically referred to the attorney-client relationship and the need for confidential communication between a local legislative body and its attorney. The section specifically allows the legislative body of a local agency, based on advice of its legal counsel, to hold a closed session to confer with, or to receive advice from, its legal counsel on pending litigation, when discussion in open session concerning these matters would prejudice the agency's position in the litigation [*Gov. Code § 54956.9*]. "Litigation" includes any adjudicatory proceeding, including eminent domain, before a court, an administrative body exercising its adjudicatory authority, a hearing officer, or an arbitrator. Litigation is considered to be "pending" in four situations:

1. When an adjudicatory proceeding has been initiated formally before a court, an administrative body exercising adjudicatory authority, or a hearing officer or an arbitrator, and the local agency is a party [*Gov. Code § 54956.9(a)*].

2. If a point has been reached when, in the opinion of the legislative body of the local agency on the advice of its legal counsel, and based on existing facts and circumstances, there is a significant exposure to litigation against the local agency [*Gov. Code § 54956.9(b)(1)*; *County of Los Angeles v. Superior Court (2005) 130 Cal. App. 4th 1099, 1105-1106, 30 Cal. Rptr. 3d 708* (federal agency proposed decision to cut Medicare funding to King/Drew medical center was a proper subject for a closed session of the Los Angeles County Board of Supervisors)].

3. When, based on existing facts and circumstances, the legislative body of the local agency is meeting only to decide whether a closed session is authorized [*Gov. Code § 54956.9(b)(2)*].

4. When, based on existing facts and circumstances, the legislative body of the local agency has decided to initiate or is deciding whether to initiate litigation [*Gov. Code § 54956.9(c)*].

For purposes of the second and third situations, *above*, "existing facts and circumstances" is defined to mean one of the following [*Gov. Code § 54956.9(b)(3)*]:

- Facts and circumstances that might result in litigation against the agency but which the agency believes are not yet known to a potential plaintiff or plaintiffs, which facts and circumstances need not be disclosed.

- Facts and circumstances, including, but not limited to, an accident, disaster, incident, or transactional occurrence that might result in litigation against the agency and that are known to a potential plaintiff or plaintiffs, which facts or circumstances shall be publicly stated on the agenda or announced.

- The receipt of a claim under the California Governmental Tort Claims Act or some other written communication from a potential plaintiff threatening litigation, which claim or communication shall be available for public inspection [*see Gov. Code § 54957.5*].

- A statement made by a person in an open and public meeting threatening litigation made on a specific matter within the responsibility of the legislative body.

- A statement threatening litigation made by a person outside an open and public meeting made on a specific matter within the responsibility of the local agency so long as the official or employee of the legislative body receiving knowledge of the threat makes a contemporaneous or other record of the statement prior to the meeting which record shall be available for public inspection under the law [*see Gov. Code § 54957.5*].

The California Court of Appeal held that the city council for the City of Malibu violated the Ralph M. Brown Act [*Gov. Code § 54956.9*] in approving in a closed session a settlement of an existing lawsuit between a developer and the city. The city relied on the pending litigation exception that allowed closed sessions for purposes of discussing settlement of existing lawsuits but the court held that this exception did not apply because the settlement contained provisions exempting the developer's development for zoning restrictions. The exemptions could only be made following public hearings in city council meetings [*Trancas Property Owners Association v. City of Malibu (2006) 138 Cal. App. 4th 172, 186-187, 41 Cal. Rptr. 3d 200]* .

[b] Procedures Required Prior to Closed Session

A local legislative body must follow specific procedures before it may go into closed session under this statutory exemption. It must state on the agenda or publicly announce the subdivision of the Government Code on which the closed session is based. If the session is closed because litigation has been formally initiated [*see Gov. Code § 54956.9(a)*], the body must also make a statement that specifically identifies the litigation to be discussed. It need not do so, however, if making this specific reference would jeopardize the agency's ability to either effectuate service of process or to conclude existing settlement negotiations [*Gov. Code § 54956.9*].

Legal counsel to the legislative body must prepare and submit to the agency a memorandum citing the specific reasons and legal authority for the closed session. It must also include either the title of existing litigation, if litigation has been formally initiated [*see Gov. Code § 54956.9(a)*], or a brief statement as to the existing facts and circumstances on which the closed session is based, if litigation is pending under other circumstances [*see Gov. Code § 54956.9(b), (c)*]. Counsel must submit the memorandum before the closed session if possible, and in any case no later than one week after the closed session. This memorandum is exempt from disclosure under the California Public Records Act [*Gov. Code § 54956.9*; *see Gov. Code § 6250 et seq.*; for a discussion of the Public Records Act, *see* Ch. 470C, *Public Records Act*].

[c] Exclusivity of Exemption

Before 1987, the question was unresolved as to whether the 1984 amendment to the Brown Act constituted the sole basis for using the attorney-client relationship as an exemption to the open meeting requirement, or whether it was an amplification of one particular aspect of this relationship. The question appears to have been answered in 1987, however, by the adoption of an amendment to *Gov. Code § 54956.9* that provides: "For purposes of this chapter, all expressions of the lawyer-client privilege other than those provided in this section are hereby abrogated. This section is

the exclusive expression of the lawyer-client privilege for purposes of conducting closed-session meetings pursuant to this chapter" [1987 Stats., ch. 1320, § 5]. This statute applies to limit the attorney-client privilege only as it relates to local governing body meetings, and does not eliminate the attorney-client privilege as it relates to written legal advice given by counsel to a local governing body [*Roberts v. City of Palmdale (1993) 5 Cal. 4th 363, 381, 20 Cal. Rptr. 2d 330, 853 P.2d 496]* .

The statutory exception in *Gov. Code § 54956.9* does not apply to a non profit corporation created by a city and thus the corporation may not meet in closed session with the attorney for the redevelopment agency of that city to discuss matters related to eminent domain litigation brought by the agency but in which the non profit corporation is not a party [*Shapiro v. Bd. of Dir. of the Centre City Dev. Corp. (2005) 134 Cal. App. 4th 170, 173-174, 35 Cal. Rptr. 3d 826]* .

[4] Employee Relations Exemption

Under the Meyers-Milias-Brown Act [*Gov. Code § 3500 et seq.*], public employees in California are permitted to organize themselves into employee organizations (*i.e.*, unions) for purposes of meeting and conferring (*i.e.*, bargaining) with their public employers regarding employment conditions, wages, hours, and other terms and conditions of employment [*see Gov. Code § 3500 et seq.*]. A specific exemption to the requirement of open public meetings in the Brown Act provides that the legislative body of the local agency may hold a closed session with its designated representatives regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits of its represented and unrepresented employees [*Gov. Code § 54957.6(a)*]. Before the closed session, the legislative body of the local agency must hold an open, public session in which it identifies its designated representatives [*Gov. Code § 54957.6(a)*]. The purpose of the closed session is to review the public agency's position and instruct its representative regarding negotiations. The closed sessions may take place before and during consultations and discussions with representatives of employee organizations and unrepresented employees. The legislative body may also meet with a state conciliator who has intervened in the proceedings [*Gov. Code § 54957.6(a)*].

Closed sessions with the local agency's designated representative regarding the salaries, salary schedules, or compensation paid in the form of fringe benefits may include discussion of an agency's available funds and funding priorities, but only insofar as these discussions relate to providing instructions to the local agency's designated representative. These closed sessions must not include final action on the proposed compensation of one or more unrepresented employees [*Gov. Code § 54957.6(a)*].

The Meyers-Milias-Brown Act [*Gov. Code § 3500 et seq.*] also provides that the scope of representation will include all matters relating to employment conditions and employer-employee relations, including but not limited to wages, hours, and other terms and conditions of employment [*Gov. Code § 3504*]. A subsequent amendment to the Brown Act provides that a legislative body [*see Gov. Code § 54952* (definition); *see also § 470B.11[3]*] of a public agency defined in *Gov. Code § 3501(c)* may hold closed sessions with its designated representatives on the mandatory subjects covered by the Meyers-Milias-Brown Act [*Gov. Code § 54957.6(b)*; *see Gov. Code § 3504*]. *Gov. Code § 3501(c)* provides that "public agency" means every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation, and every town, city, county, city and county, and municipal corporation, whether incorporated or not and whether chartered or not. While this listing is very broad, *Gov. Code § 3501(c)* provides that "public agency" does not mean a school district, a county board of education, a county superintendent of schools, or a personnel commission in a school district having a merit system [*Gov. Code § 3501(c)*; *see Educ. Code §§ 45100 et seq., 88000 et seq.*].

The legislative body of a local agency is permitted to hold closed sessions during a regular or special meeting to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee or to hear complaints or charges brought against the employee by another person or employee unless the employee requests a public session provided there is compliance with the notice requirements set forth below [*Gov. Code § 54957(b)(1)*]. As a condition to holding a closed session on specific complaints or charges brought against an employee by another

person or employee, the employee shall be given written notice of his or her right to have the complaints or charges heard in an open session rather than a closed session, which notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding the session. If notice is not given, any disciplinary or other action taken by the legislative body against the employee based on the specific complaints or charges in the closed session shall be null and void [*Gov. Code § 54957(b)(2)*]. The legislative body also may exclude from the public or closed meeting, during the examination of a witness, any or all other witnesses in the matter being investigated by the legislative body [*Gov. Code § 54957(b)(3)*]. The term "employee" is defined to include an officer or an independent contractor who functions as an officer or an employee but shall not include any elected official, member of a legislative body or other independent contractors. Nothing in this subdivision shall limit local officials' ability to hold closed session meetings pursuant to specific statutes [*Health & Safety Code §§ 1461, 32106*, and *32155*, and *Gov. Code §§ 37606*, and *37624.3*]. Closed sessions held pursuant to this subdivision shall not include discussion or action on proposed compensation except for a reduction of compensation that results from the imposition of discipline [*Gov. Code § 54957(b)(4)*].

[5] Exemption for Real Property Transactions

Legislative bodies of local agencies may hold closed sessions with their negotiator prior to the purchase, sale, exchange, or lease of real property owned or controlled by the local body to grant authority to their negotiator regarding the price and terms of payment for the purchase, sale, exchange, or lease (including renewal or renegotiation of a lease) [*Gov. Code § 54956.8*]. Certain procedural rules, however, must be followed. Before the closed session, the legislative body must hold an open, public meeting in order to identify the real property and the person or persons with whom its negotiator may negotiate. This exception also permits the holding of a closed session to discuss eminent domain proceedings [*Gov. Code §§ 54956.8, 54956.9*]. However, the legislative body may not meet in closed session to interview or review the qualifications of proposed independent contractors who will assist in real property transactions [*Rowen v. Santa Clara Unified School Dist. (1981) 121 Cal. App. 3d 231, 235, 175 Cal. Rptr. 292]* . Furthermore, agenda items related to real property transactions that went beyond, or were in addition to the "safe harbor" closed session agenda provisions [*Gov. Code § 54954.5*] had to be disclosed, so that even though a city council complied with the safe harbor provisions, it could be ordered to disclose additional agenda items for a closed session related to real property transactions under *Gov. Code § 54956.8* [*Shapiro v. San Diego City Council (2002) 96 Cal. App. 4th 904, 918-919, 117 Cal. Rptr. 2d 631]* . Finally, the scope of permissible discussion in a closed session related to real property transactions is defined by the agenda notice, public announcements, and the requirement that subjects or items that are not identified in the agenda cannot be discussed in the closed session under *Gov. Code § 54957.7(a)*) [*Shapiro v. San Diego City Council (2002) 96 Cal. App. 4th 904, 923-924, 117 Cal. Rptr. 2d 631]* .

[6] Exemption for License Applications by Persons With Prior Criminal Records

If an applicant for a license or license renewal has a prior criminal record, the local legislative body may meet in closed session to determine if the applicant is sufficiently rehabilitated to obtain the license. The applicant and the applicant's attorney may also attend this closed session. In the event that the legislative body determines that the license should be denied, it must offer the applicant the opportunity to withdraw the application. If he or she does so, no record will be kept of the discussions or the decision, and all matters relating to the closed session will be held confidential [*Gov. Code § 54956.7*].

If the applicant does not withdraw the application, the legislative body must take action at the public meeting during which the closed session is held or at its next public meeting, and must deny the application for the license. All matters relating to the closed session are confidential, however, and will not be disclosed without the consent of the applicant, except in an action by an applicant who has been denied a license challenging the denial of the license [*Gov. Code § 54956.7*].

[7] Exemption for Threats to Public Security

The legislative body of a local agency may hold closed sessions with the Attorney General, district attorney, agency counsel, sheriff, or chief of police, or their respective deputies, or a security consultant or a security operations manager, on matters posing a threat to the security of public buildings, a threat to the security of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electric service, or a threat to the public's right of access to public services or public facilities [*Gov. Code § 54957(a)*].

[8] Exemption for Multijurisdictional Law Enforcement Agencies

To prevent the impairment of ongoing law enforcement investigations, protect witnesses and informants, and permit discussion of effective course of action in particular cases, the Legislature has empowered certain multijurisdictional law enforcement agencies to hold closed sessions [*Gov. Code § 54957.8(b)*]. The legislative or advisory body of any multijurisdictional law enforcement agency may hold closed sessions for the following purposes [*Gov. Code § 54957.8(b)*]:

- To discuss the case records of any of its ongoing criminal investigations;
- To discuss the case records of any party to the joint powers agreement;
- To hear testimony from persons involved in its investigations; and
- To discuss courses of action in particular cases.

For the purposes of this exemption, a "multijurisdictional law enforcement agency" is a joint powers entity formed by two or more public agencies that provides law enforcement services for the parties to the joint powers agreement for the purpose of investigating criminal activity involving drugs; gangs; sex crimes; firearms trafficking or felony possession of a firearm; high technology, computer, or identity theft; human trafficking; or vehicle theft [*Gov. Code §§ 6502*, 54957.8(a); *see Gov. Code § 6500 et seq.* (joint powers agreements generally)]. One or more of the contracting agencies may be located outside California [*Gov. Code § 6502*].

[9] Exemption for Pension Fund Investment Transaction Decisions

A legislative body of a local agency with responsibility for investing pension funds is permitted to hold a closed session to consider the purchase or sale of particular, specific pension fund investments. Agency decisions about investment transactions made during the closed session must be made by roll call vote entered into the minutes of the closed session as provided in *Gov. Code § 54957.2* by law [*Gov. Code § 54956.81*]. Pension fund investment transaction decisions must be disclosed at the first open meeting of the legislative body of the local agency after the earlier of the close of the investment transaction or the transfer of the pension fund assets for the investment transaction [*Gov. Code § 54957.1(a)(7)*].

[10] Special Rules Regarding Local School Boards

Governing bodies of school districts must hold closed sessions when considering suspension of or disciplinary action (other than expulsion) against a student, unless the student or his or her parent requests a public session [*Educ. Code § 35146*]. This mandatory provision is designed to protect the privacy of certain information concerning school pupils that is required to be kept confidential pursuant to other provisions of the Education Code [*see Educ. Code § 49073 et seq.*; *see also Gov. Code § 54962* (providing that Brown Act is the sole source of authorization for closed sessions except as expressly provided by any provision of the Education Code pertaining to school and community college districts)].

[11] Confidentiality and Official Information Exemptions

Three California attorney general opinions conclude that specific confidentiality provisions of statutes other than the Brown Act may allow local agencies to hold closed sessions in order to carry out the intent and purpose of confidentiality requirements. These provisions are as follows:

1. *Gov. Code §§ 6254* and *6255* in the California Public Records Act [*Gov. Code § 6250 et seq.*; *see* Ch. 470C, *Public Records Act*], based on confidentiality requirements, require nondisclosure of certain public records [*see 61 Ops. Cal. Atty. Gen. 220 (1978)]* ;

2. The official information privilege found in *Evid. Code § 1040* may provide an appropriate basis for a closed session [*see 62 Ops. Cal. Atty. Gen. 150 (1979)]* ; and

3. As to the confidentiality requirements of the 1937 Retirement Act covering county retirement systems, *Gov. Code § 31532*, requiring medical records (among other things) to be kept confidential, may form the basis for a closed session in order for a county retirement board to consider these records in connection with an application for medical disability retirement [*see 65 Ops. Cal. Atty. Gen. 412 (1982)]* .

The legal effect of these three opinions is uncertain, however, since the 1987 California Legislature adopted *Gov. Code § 54962*, which provides: "Except as expressly authorized by this chapter, or by *Sections 1461*, *32106* and *32155 of the Health and Safety Code* or *Sections 37606* and *37624.3 of the Government Code* as they apply to hospitals, or by any provision of the Education Code pertaining to school districts and community college districts, no closed session may be held by any legislative body of any local agency" (as amended in 1994 by Senate Bill 752). The effect of this legislation on the subject of privileges based on confidentiality requirements of other statutes must await judicial interpretation.

Records of a licensed health plan that is governed by a county board of supervisors are exempt from disclosure. That exemption is maintained, and not waived, when records or information subject to the exemption is transmitted to the Board of Supervisors. The health care records that are subject to this exemption include provider rate or payment determinations, allocation or distribution methodologies for provider payments, formulae or calculations for these payments, and contract negotiations with providers of health care for alternative rates for a period of three years after the contract is fully executed [*Gov. Code § 6254.22*]. This same requirements of the law apply to local governments under the open meetings law [*Gov. Code § 54956.87(a)*]. A licensed health plan that is governed by a county board of supervisors has the authority to meet in closed session to discuss or take action on health plan trade secrets [*Health & Safety Code § 32106(c)*], with a brief general description of action taken or voting in the public report of the closed sessions [*Gov. Code § 54956.87(b)*]. Licensed health plan records are exempt from public disclosure under the public records act when they are part of an agenda of a public meeting, or other writings distributed to members of a legislative body of a local agency, as part of a public meeting [*Gov. Code § 54957.5*].

[12] Exclusion of Public Under Certain Conditions

In addition to the exemptions created by law for closed sessions discussed in [2]-[10], *above*, in certain circumstances a local public agency may continue a meeting after excluding some or all of those in attendance. When a public meeting is willfully interrupted by a group or groups of persons who render the orderly conduct of that meeting unfeasible, and order cannot be restored by the removal of the persons who are interrupting, the members of the legislative body conducting the meeting may order the meeting room cleared and continue in session (*i.e.*, closed session). In such a session, only matters appearing on the agenda may be considered. Representatives of the news media, other than those who participated in the disturbance, must be allowed to attend the session. The legislative body may also establish a procedure for readmitting any persons who were not responsible for willfully disturbing the orderly conduct of the meeting [*Gov. Code § 54957.9*].

[13] Exemption for Charge or Complaint Involving Information Protected by Federal Law

Gov. Code § 54956.86 provides that a legislative body of a local agency which provides services pursuant to *Welf. & Inst. Code § 14087.3* may hold a closed session to hear a charge or complaint from a member enrolled in its health plan if the member does not wish to have his or her name, medical status, or other information that is protected by federal law publicly disclosed. Prior to holding a closed session, the legislative body is required to give written information to the member about the member's right to have the charge or complaint heard in an open session rather than a closed session [*Gov. Code § 54956.86*].

[14] Grand Jury Testimony

In addition to the exemptions permitting closed sessions discussed in [2]-[12], *above*, the Brown Act does not require open proceedings in one other situation. The Brown Act must not be construed to prohibit members of the legislative body of a local agency from giving testimony in private before a grand jury, either as individuals or as a body [*Gov. Code § 54953.1*].

[15] Early Withdrawal of Deferred Compensation Plan Funds

Gov. Code § 54957.10 authorizes legislative bodies of local agencies to hold closed sessions to discuss the application for early withdrawal of funds in a deferred compensation plan by an employees of a local agency when the application is based on financial hardship arising from an unforeseeable emergency due to illness, accident, casualty, or other extraordinary event, as defined in the deferred compensation plan.

[16] County Health Plan Trade Secrets and Contracts

The governing boards of licensed county health plans may meet in closed session to discuss or take action on health plan trade secrets [*Gov. Code § 54956.87(b)*], and on matters related to contracts and contract negotiations with providers of health care services concerning all matters related to rates of payment [*Gov. Code § 54956.87(c)*].

[17] Exemption for Confidential Final Draft Audit Report

A legislative body of a local agency that has received a confidential final draft audit report from the Bureau of State Audits may hold a closed session to discuss its response to the report [*Gov. Code § 54956.75(a)*]. However, once the audit report is publicly released by the Bureau of State Audits, meetings to discuss the audit report must be conducted in an open session unless some other exemption applies [*Gov. Code § 54956.75(b)*].

[18] Exemption for Joint Powers Agency

A legislative body of a joint powers agency formed under *Gov. Code § 6500 et seq.* has the authority to adopt a policy or bylaw making confidential information received in closed sessions of the agency [*Gov. Code § 54956.96(a)*] with stated exceptions. When such a policy or bylaw has been adopted, the legislative body of a local agency member, with advice of counsel, may conduct a closed session discuss and take action upon information obtained in a closed session of the joint powers agency [*Gov. Code § 54956.96(b)*].

[19] Municipal Hospital Trade Secrets

When a municipal hospital established under law [*Gov. Code §§ 37600-37625*] is managed by a board of trustees that is appointed by the mayor, the city council may meet in a closed session held solely for the purpose of discussion, deliberation, or both, of reports involving trade secrets of the municipal hospital [*Gov. Code § 37606.1(a)*]. Except as provided in this statute, the closed session must comply with requirements of the Brown Act [*Gov. Code §§ 54950-54976*; *Gov. Code § 37606.1(a)*]. Hospital trade secrets, as defined in this statute, means a "trade secret," as

defined by law [*Civil Code § 3426.1(d)*], and which meets the following requirements [*Gov. Code § 37606.1(b)*]:

(1) Is necessary to initiate a new hospital service or program or add a hospital facility;

(2) Would, if prematurely disclosed, create a substantial probability of depriving the hospital of a substantial economic benefit.

The closed session exception provided in this statute to the general open meeting requirements for a meeting of the city council shall not apply to a meeting where there is action taken under law [*Gov. Code § 54952.6*; *Gov. Code § 37606.1(c)*]. Action taken is defined to mean a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or a negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance [*Gov. Code § 54952.6*]. Closed session meetings by city councils are not permitted for the purposes of discussing or deliberating, or to permit the discussion or deliberation in any closed meeting of, any proposals regarding any of the following [*Gov. Code § 37606.1(d)*]:

(1) The sale, conversion, contract for management, or leasing of any municipal hospital or the assets thereof, to any for profit or nonprofit entity, agency, association, organization, governmental agency, person, partnership, corporation, or hospital district;

(2) The conversion of any municipal hospital to any other form of ownership by the city; and

(3) The dissolution of the municipal hospital.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationGeneral OverviewAdministrative LawGovernmental InformationPublic MeetingsGeneral OverviewAdministrative LawGovernmental InformationPublic MeetingsGeneral OverviewAdministrative LawGovernmental InformationPublic MeetingsSunshine LegislationEducation LawFaculty & StaffDiscipline & DismissalGeneral OverviewEducation LawFaculty & StaffEvaluationsGeneral OverviewEducation LawStudentsDisciplinary ProceedingsGeneral OverviewEvidencePrivilegesAttorney-Client PrivilegeScopeEvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeGeneral OverviewGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsEmployees & OfficialsLabor & Employment LawCollective Bargaining & Labor RelationsRight to OrganizeLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationPublic EmployeesReal Property LawOwnership & TransferPublic Entities

California Forms of Pleading and Practice--Annotated

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§ 470B.14 Closed Session Procedures

[1] Disclosure of Issues Addressed

Before holding any closed session, the legislative body of the local agency must disclose, in an open meeting, the item or items to be discussed in the closed session [*Gov. Code § 54957.7(a)*]. The disclosure may take the form of a reference to the item or items as they are listed on the agenda. In a closed session, the legislative body may consider only those matters covered in its statement. [*Shapiro v. San Diego City Council (2002) 96 Cal. App. 4th 904, 923-924, 117 Cal. Rptr. 2d 631* (scope of permissible discussion in closed session defined by agenda notice, public announcements, and requirement that subjects or items that are not identified in the agenda can not be discussed in the closed session under *Gov. Code § 54957.7(a)*)]. However, the legislative body is not required or authorized to disclose information prohibited by state or federal law [*Gov. Code § 54957.7(a)*]. Closed session agenda items must be described in the agenda in a specific way that satisfies, or substantially complies with, statutory requirements [*Gov. Code § 54954.5* (also setting out the information for the various types of closed-session agenda items, which, if provided, constitutes substantial compliance); *see, e.g., Furtado v. Sierra Community College (1998) 68 Cal. App. 4th 876, 883-884, 80 Cal. Rptr. 2d 589* (agenda item for closed session stating "Public Employee Performance Evaluation (non-Tenured) Librarian" satisfied agenda-description requirements in reference to community college district board's consideration and vote on renewal of librarian's employment contract)].

[2] Closed Session Agenda Items Description

Gov. Code § 54954.5 provides a statutory list of closed session agenda item descriptions that are sufficient to comply with the law. These include:

- LICENSE/PERMIT DETERMINATION [closed session authorized by *Gov. Code § 54956.7*]

Applicant(s): _____ (Specify number of applicants) [*Gov. Code § 54954.5(a)*].

- CONFERENCE WITH REAL PROPERTY NEGOTIATORS [closed session authorized by *Gov. Code § 54956.8*]

Property: _____ (Specify street address, or if no street address, the parcel number or other unique reference, of the real property under negotiation)

Agency negotiator: _____ (Specify names of negotiators attending the closed session) (If circumstances necessitate the absence of a specified negotiator, an agent or designee may participate in place of the absent negotiator so long as the name of the agent or designee is announced at an open session held prior to the closed session.)

Negotiating parties: _____ (Specify name of party, not agent)

Under negotiation: _____ (Specify whether instruction to negotiator will concern price, terms of payment, or both) [*Gov. Code § 54954.5(b)*].

- CONFERENCE WITH LEGAL COUNSEL EXISTING LITIGATION [closed session authorized by *Gov. Code § 54956.9(a)*]

Name of case: _____ (Specify by reference to claimant's name, names of parties, case or claim numbers)

or

Case name unspecified: _____ (Specify whether disclosure would jeopardize service of process or existing settlement negotiations) [*Gov. Code § 54954.5(c)*].

- CONFERENCE WITH LEGAL COUNSEL ANTICIPATED LITIGATION [closed session authorized by *Gov. Code § 54956.9(b)*]

Significant exposure to litigation pursuant to subdivision (b) of (Specify number of potential cases) (In addition to the information noticed above, the agency may be required to provide additional information on the agenda or in an oral statement prior to the closed session pursuant to subparagraphs (B) to (E), inclusive, of paragraph (3) of subdivision (b) of Section 54956.9.)

Initiation of litigation pursuant to subdivision (c) of Section 54956.9: _____ (Specify number of potential cases) [*Gov. Code § 54954.5(c)*].

- LIABILITY CLAIMS [closed session authorized by *Gov. Code § 54956.95*]

Claimant: _____ (Specify name unless unspecified pursuant to Section 54961 Agency claimed against: _____ (Specify name) [*Gov. Code § 54954.5(d)*].

- THREAT TO PUBLIC SERVICES OR FACILITIES [closed session authorized by *Gov. Code § 54957*]

Consultation with: _____ (Specify name of law enforcement agency and title of officer, or name of applicable agency representative and title) [*Gov. Code § 54954.5(e)*].

- PUBLIC EMPLOYEE APPOINTMENT [closed session authorized by *Gov. Code § 54957*]

Title: _____ (Specify description of position to be filled) [*Gov. Code § 54954.5(e)*].

- PUBLIC EMPLOYMENT [closed session authorized by *Gov. Code § 54957*]

Title: _____ (Specify description of position to be filled) [*Gov. Code § 54954.5(e)*].

- PUBLIC EMPLOYEE PERFORMANCE EVALUATION [closed session authorized by *Gov. Code § 54957*]

Title: _____ (Specify position title of employee being reviewed) [*Gov. Code § 54954.5(e)*].

- PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE [closed session authorized by *Gov. Code § 54957*]

(No additional information is required in connection with a closed session to consider discipline, dismissal, or release of a public employee. Discipline includes potential reduction of compensation) [*Gov. Code § 54954.5(e)*].

- CONFERENCE WITH LABOR NEGOTIATORS [closed session authorized by *Gov. Code § 54957.6*]

Agency designated representatives: _____ (Specify names of designated representatives attending the closed session) (If circumstances necessitate the absence of a specified designated representative, an agent or designee may participate in place of the absent representative so long as the name of the agent or designee is announced at an open session held prior to the closed session.)

Employee organization: _____ (Specify name of organization representing employee or employees in question)

or

Unrepresented employee: _____ (Specify position title of unrepresented employee who is the subject of the negotiations) [*Gov. Code § 54954.5(f)*].

- CASE REVIEW PLANNING [closed session authorized by *Gov. Code § 54957.8*]

(No additional information is required in connection with a closed session to consider case review or planning) [*Gov. Code § 54954.5(g)*].

- REPORT INVOLVING TRADE SECRET [closed session authorized by *Health & Safety Code §§ 1461, 32106, 32155* or *Gov. Code §§ 37606, 37624.3*]

Discussion will concern: _____ (Specify whether discussion will concern proposed new service, program, or facility)

Estimated date of public disclosure: _____ (Specify month and year) [*Gov. Code § 54954.5(h)*].

- HEARINGS [closed session authorized by *Health & Safety Code §§ 1461, 32106, 32155* or *Gov. Code §§ 37606, 37624.3*]

Subject matter: _____ (Specify whether testimony/deliberation will concern staff privileges, report of medical audit committee, or report of quality assurance committee) [*Gov. Code § 54954.5(h)*].

- CHARGE OR COMPLAINT INVOLVING INFORMATION PROTECTED BY FEDERAL LAW [closed session authorized by *Gov. Code § 54956.86*]

(No additional information is required in connection with a closed session) [*Gov. Code § 54954.5*(*i*)].

- CONFERENCE INVOLVING A JOINT POWERS AGENCY (Specify by name) [closed session authorized by *Gov. Code § 54956.96*]

Discussion will concern: _____ (Specify closed session description used by the joint powers agency)

Name of local agency representative on joint powers agency board: _____ (Specify name)

(Additional information listing the names of agencies or titles of representatives attending the closed session as consultants or other representatives) [*Gov. Code § 54954.5(j)*].

- AUDIT BY BUREAU OF STATE AUDITS [closed session authorized by *Gov. Code § 54956.75* [*Gov. Code § 54954.5(k)*].

[3] Disclosure Requirements and Limitations

Prior to adjournment after any closed session, the legislative body must reconvene into open session and make any disclosures required by *Gov. Code § 54957.1* of action taken in the closed session [*Gov. Code § 54957.7(b)*; *see* [2], *below*].

The required disclosures may be made at the location announced in the agenda for the closed session, provided that the public is allowed to be present at that location for the purpose of hearing the disclosures [*Gov. Code § 54957.7(c)*].

Confidential information acquired during a closed session may not be disclosed by a person present at that closed session unless disclosure is authorized by the legislative body that called the closed session [*Gov. Code § 54963(a)*]. Confidential information is defined to mean a communication made in a closed session that is specifically related to the basis for the legislative body of a local agency to meet lawfully in closed session under the Ralph M. Brown Act [*Gov. Code § 54963(b)*]. Violations of the duty not to disclose confidential information include remedies currently available by law [*Gov. Code § 54963(c)*] including:

- Injunctive relief to prevent the disclosure of confidential information [*Gov. Code § 54963(c)(1)*];

- Disciplinary action against an employee who has willfully disclosed confidential information [*Gov. Code § 54963(c)(2)*], provided the employee has received training or been given notice of the requirements of this statute [*Gov. Code § 54963(d)*];

- Referral of a member of a legislative body who has willfully disclosed confidential information to the grand jury [*Gov. Code § 54963(c)(3)*].

Exceptions for conduct that does not violate the non disclosure duties [*Gov. Code § 54963(e)*] includes the following:

- Making a confidential inquiry or complaint to a district attorney or grand jury concerning a perceived violation of law, including disclosing facts to a district attorney or grand jury that are necessary to establish the illegality of an action taken by a legislative body of a local agency or the potential illegality of an action that has been the subject of deliberation at a closed session if that action were to be taken by a legislative body of a local agency [*Gov. Code § 54963(e)(1)*];

- Expressing an opinion concerning the propriety or legality of actions taken by a legislative body of a local agency in closed session, including disclosure of the nature and extent of the illegal or potentially illegal action [*Gov. Code § 54963(e)(2)*];

- Disclosing information acquired by being present in a closed session that is not confidential information [*Gov. Code § 54963(e)(3)*];

- Disclosures under whistle blower [*Lab. Code § 1102.5*; *Gov. Code § 53296*] statutes [*Gov. Code § 54963(e)(4)*].

[4] Public Reports

The local agency legislative body must publicly report any action taken in closed session and the vote or abstention of every member present thereon [*Gov. Code § 54957.1(a)*]. While the nature of the action taken determines the specific content requirements [*see Gov. Code § 54957.1(a)(1)-(6)*], the reports may be in an oral or written form [*Gov. Code § 54957.1(b)*].

The legislative body must provide copies of any documents that were finally approved or adopted in the closed session to any person making a proper request as specified in *Gov. Code § 54957.1(b)*. This documentation must be made available by the next business day following the meeting, unless the action taken results in substantive amendments to the related documents requiring retyping [*see Gov. Code § 54957.1(b), (c)*].

No action for injury to a reputational, liberty, or other personal interest may be commenced by or on behalf of any employee or former employee with respect to whom a disclosure is made in a public report by a legislative body [Gov. Code. § 54957.1(e)].

[5] Minute Book

The legislative body of a local agency may, by ordinance or resolution, designate a clerk, officer, or other employee of the local agency to attend each closed session and keep in a minute book a record of topics discussed and decisions made at the meeting. A minute book kept in this manner is not a public record subject to inspection under the Public Records Act [*Gov. Code § 6250 et seq.*; *see* Ch. 470C, *Public Records Act*], and must be kept confidential. This minute book will be available only to members of the legislative body, or if a violation of the Brown Act is alleged to have occurred at a closed session, to a court of general jurisdiction [*Gov. Code § 54957.2(a)*; *County of Los Angeles v. Superior Court (2005) 130 Cal. App. 4th 1099, 1106-1107, 30 Cal. Rptr. 3d 708* (minutes of closed session that did not violate Brown Act provisions are confidential, and cannot be disclosed pursuant to subpoena in discovery in a civil lawsuit, even if minutes are redacted)]. An elected legislative body of a local agency may require that each legislative body that has all or a majority of its members appointed by or under the authority of the elected legislative body keep a minute book [*Gov. Code § 54957.2(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationGeneral OverviewAdministrative LawGovernmental InformationPublic MeetingsGeneral OverviewAdministrative LawGovernmental InformationPublic MeetingsSunshine LegislationCivil ProcedureRemediesInjunctionsGeneral OverviewEducation LawFaculty & StaffDiscipline & DismissalAdministrative ProceedingsGeneral OverviewGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsLicenses

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§ 470B.15 Judicial Enforcement

[1] Criminal Enforcement

Each member of a local legislative body who (1) attends a meeting of that body at which action is taken in violation of any provision of the BrownAct and (2) intends to deprive the public of information to which the member knows or has reason to know the public is entitled under the Brown Act is subject to prosecution for a misdemeanor [*Gov. Code § 54959*]. Apparently, the member need not even participate in the activities; it seems to be sufficient if he or she merely attends with knowledge that the meeting violates the Brown Act. Not every violation of the Brown Act is a misdemeanor, however. The misdemeanor penalty is focused on the meeting in which action is taken, not on the meeting confined to deliberation. In this manner, the Legislature has made the criminal sanction narrower than the law's declaration of intended coverage. The penalty only applies when a crime is involved, that is, when action is taken [*Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors (1968) 263 Cal. App. 2d 41, 48, 69 Cal. Rptr. 480]* .

[2] Civil Enforcement

[a] Prevention of Violations or Determination of Act's Applicability

The Brown Act provides that any interested person may commence an action by mandamus, injunction [*see, e.g., Shapiro v. San Diego City Council (2002) 96 Cal. App. 4th 904, 916-917, 117 Cal. Rptr. 2d 631* (injunctive relief proper under *Gov. Code § 54960(a)* when there was a likelihood of future violations of the Brown Act by a city council)], or declaratory relief for the following purposes [*Gov. Code § 54960(a)*; *see, e.g., California Alliance for Utilities etc. Education v. City of San Diego (1997) 56 Cal. App. 4th 1024, 1031, 65 Cal. Rptr. 2d 833* (declaratory relief proper under *Gov. Code § 54960(a)* when group challenged city's compliance with Brown Act and alleged ripe actual controversy for declaratory relief based on claim of one past violation of Act by city)]:

- Stopping or preventing violations or threatened violations of the Act's provisions by members of the legislative body of a local agency;

- Determining the applicability of the Act to action or threatened future action of the legislative body;

- Determining whether any rule or action by the legislative body to penalize or otherwise discourage the expression of one or more of its members is valid or invalid under state or federal law;

- Compelling the legislative body to audio record its closed sessions pursuant to *Gov. Code § 54960(b)-(c)*.

The Brown Act has broad standing requirements, limited only to the "district attorney or any interested person" [*Gov. Code § 54960(a)*]. This broad standing requirement, coupled with the public's right to disclosure under the Act [*see Gov. Code § 54950*], has extended standing to any citizen or elector of the agency governed by the local body [*Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors (1968) 263 Cal. App. 2d 41, 46, 69 Cal. Rptr. 480]* . Whether a newspaper guild, which isa labor organization composed of professional working newspaper persons, has standing is questionable, however [*Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors (1968) 263 Cal. App. 2d 41, 46, 69 Cal. Rptr. 480]* .

The California Court of Appeal interpreted the "interested person" language of *Gov. Code § 54960(a)* and *Gov. Code § 54960.1(a)* very broadly to include citizens of the state of California, and not to be limited to residents or taxpayers of the city, county, or district legislative body whose action was being challenged on grounds of Brown Act violations. This broad interpretation meant that plaintiff, who was a taxpayer and resident of Los Angeles County, had standing to bring a Brown Act action against the Orange Unified School District even though he did not reside within the boundaries of the school district nor did he pay property taxes in that district. The court's rationale was that any citizen of California has the right to enforce the public's right to know what their elected governmental officials are doing, and whether they are following the law. Plaintiff is not required to have a personal stake in the lawsuit because he is enforcing public rights [*McKee v. Orange Unified Sch. Dist. (2003) 110 Cal. App. 4th 1310, 1316-1318, 2 Cal. Rptr. 3d 774]* . Members of a city council are not "interested persons" under *Gov. Code §§ 54960(a)* and *54960.1(a)* and therefore can not challenge actions of the city council in which they are members based on alleged Brown Act violations [*Holbrook v. City of Santa Monica (2006) 144 Cal. App. 4th 1242, 1251, 1253, 51 Cal. Rptr. 3d 181* (citizen or taxpayer standing rules cannot be used by public officials to challenge the validity of actions taken by the governmental body in which they work)].

While declaratory and injunctive relief is thus available under *Gov. Code § 54960* to challenge Brown Act violations by a legislative body subject to its provisions, a legislative body or a member of such a body may utilize this provision to stifle criticism of actions taken by that body. For example, when a district attorney issued a press release stating that school board members had committed minor violations of the Brown Act, a member of that board does not have a cause of action for declaratory or injunctive relief under *Gov. Code § 54960* to prevent the district attorney from further interference with the rights of that board member [*Ingram v. Dean Flippo (1999) 74 Cal. App. 4th 1280, 1282-1283, 89 Cal. Rptr. 2d 60]* .

In an action under *Gov. Code § 54960,* there is no right to conduct discovery of the personal recollections of members of a legislative body concerning unrecorded proceedings held in a closed session. A trial court may not properly compel answers to interrogatories seeking such recollections without violating the confidentiality of closed sessions for which the Brown Act provides. The Brown Act limits disclosure to *in camera* review of minute books of closed sessions, and to disclosure of tape recordings of closed sessions [*Kleitman v. Superior Court (1999) 74 Cal. App. 4th 324, 326-327, 87 Cal. Rptr. 2d 813]* .

For examples of a complaint for declaratory relief to determine the applicability of the Brown Act to an agency's actions and a complaint for an injunction enjoining an agency's violations of the Brown Act [*Gov. Code § 54960*], see *§§ 470B.60* and *470B.61*.

[b] Determination That Actions Violating Act Are Void

Before 1986, California courts repeatedly ruled that an action taken in violation of the Brown Act was not void [*see, e.g., Rowen v. Santa Clara Unified School Dist. (1981) 121 Cal. App. 3d 231, 236, 175 Cal. Rptr. 292* ; *Greer v. Board of Education (1975) 47 Cal. App. 3d 98, 122, 121 Cal. Rptr. 542]* . In 1986, however, *Gov. Code § 54960.1* was added to the Brown Act. It provides that the district attorney or any interested person may commence an action by mandamus or injunction for the purpose of obtaining a judicial determination that an action taken in violation of the Brown Act is void [*Gov. Code § 54960.1(a)*; *see Gov. Code §§ 54953, 54954.2, 54954.4, 54954.6, 54956, 54956.5*].

Before the district attorney or an interested person may commence an action to declare the act of the legislative body void, he or she must make a demand to the legislative body to cure or correct the action alleged to have been taken in violation of the Act. The demand must be written, and must clearly describe the challenged action and the nature of the alleged violation [*Gov. Code § 54960.1(b)*]. It must be made within 90 days from the date the challenged action was taken unless the action was taken in an open session but in violation of *Gov. Code § 54954.2* (agenda posting requirements), in which case the demand must be made within 30 days after the action was taken [*Gov. Code § 54960.1(c)(1)*].

Within 30 days following receipt of the demand, the legislative body must either (1) cure or correct the challenged action and inform the demanding party in writing of its cure or correction, or (2) inform the demanding party in writing of its decision not to cure or correct the challenged action [*Gov. Code § 54960.1(c)(2)*]. The fact that a legislative body takes action to cure or correct a previously taken action is not construed or admissible as evidence of a violation of the Brown Act [*Gov. Code § 54960.1(f)*].

If the legislative body takes no action within the 30-day period, the inaction is deemed to be a decision not to cure or correct the challenged action, and the 15-day period to commence an action for mandamus or injunction begins to run [*Gov. Code § 54960.1(c)(3)*]. The attorney general or interested party must file such an action within the earliest of the following: (1) 15 days after receiving the legislative body's written notice of its decision to cure or not to cure or correct the alleged violation; or (2) 15 days of expiration of the 30-day period to cure or correct [*Gov. Code § 54960.1(c)(4)*].

This procedure must be followed with respect to each discrete alleged violation of the Brown Act. For example, a Brown Act violation described in an amended complaint did not relate back to the original complaint when the original complaint alleged a separate violation at a different, earlier meeting of the same body [*Boyle v. City of Redondo Beach (1999) 70 Cal. App. 4th 1109, 1119, 83 Cal. Rptr 2d 164* (trial court properly dismissed amended complaint as time-barred under *Gov. Code § 54960.1(c)(3)*)].

A lack of action or failure to cure or correct the action allegedly taken in violation of the provisions of the Act is a condition precedent to a lawsuit seeking to invalidate that action [*Gov. Code § 54960.1(e)*; *cf. Boyle v. City of Redondo Beach (1999) 70 Cal. App. 4th 1109, 1118, 83 Cal. Rptr 2d 164* (when court finds that legislative body cured or corrected violation by subsequent action, it must dismiss with prejudice the action commenced on basis of that violation of that body, the court is required to dismiss the court action with prejudice)]. An action may not be deemed void if any of the following four conditions exist:

1. The action substantially complied with *Gov. Code §§ 54953* (requiring open meetings), 54954.2 (requiring agenda to be posted), 54956 (requiring written notice for special meetings), 54954.5 (closed session agenda requirements), 54954.6 (requiring public meetings and hearings to before adopting new or increased taxes or assessments), and 54956 (special meeting requirements) [*Gov. Code § 54960.1(d)(1)*];

2. The action was in connection with the sale or issuance of notes, bonds, or other evidences of indebtedness, or any contract, instrument, or agreement relating to notes, bonds, or other evidences of

indebtedness [*Gov. Code § 54960.1(d)(2)*];

3. The action gave rise to a contractual obligation, including a contract let by competitive bid, other than compensation for services in the form of salary of fees for professional services, on which a party has detrimentally relied in good faith and without notice of a challenge to the validity of the action [*Gov. Code § 54960.1(d)(3)*]; or

4. The action was in connection with the collection of any tax [*Gov. Code § 54960.1(d)(4)*].

For an example of a complaint for declaratory relief and injunction pursuant to *Gov. Code § 54960.1*, see *§ 470B.62*.

[3] Attorney's Fees and Costs

A court may award court costs and reasonable attorney's fees to the plaintiff in an action brought pursuant to *Gov. Code §§ 54960, 54960.1*, discussed in [2], *above*, if it finds that a legislative body of the local agency has violated the Brown Act [*Gov. Code § 54960.5*; *Galbisc v. Orosi Public Utility Dist. (2008) 167 Cal. App. 4th 1063, 1077-1079, 84 Cal. Rptr. 3d 788* (denial of attorney's fees under Brown Act was an abuse of discretion because district violated Brown Act in not allowing landowner to make public comment related to action to foreclose her land, and in improperly going into closed session without making required public disclosures); *see Los Angeles Times Communications LLC v. Los Angeles County Board of Supervisors (2003) 112 Cal. App. 4th 1313, 1330-1331, 5 Cal. Rptr. 3d 776* (absence of special circumstances to deny fee award means that fee award is required); *International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc. (1999) 69 Cal. App. 4th 287, 301, 81 Cal. Rptr. 2d 456]* . The local agency must pay the costs and fees; they do not become a personal liability of any public officer or employee of the agency [*Gov. Code § 54960.5*].

A defendant local public agency may recover court costs and reasonable attorney's fees when it has prevailed in a final determination of the action and the court finds that the action was clearly frivolous and totally lacking in merit [*Gov. Code § 54960.5*]. In determining the propriety of attorney's fees, trial courts are empowered and expected to determine societal importance of the rights litigated, the significance of the benefit, and the degree of public versus private benefit obtained through the lawsuit [*Common Cause v. Stirling (1983) 147 Cal. App. 3d 518, 522, 195 Cal. Rptr. 163]* .

For example, in *Common Cause v. Stirling (1983) 147 Cal. App. 3d 518, 195 Cal. Rptr. 163* , an eminent domain action by the San Diego City Council to acquire two parcels for park purposes, a city council member (Stirling) asked the city manager to postpone for one week the service of summons on the affected parties to allow the city council to reconsider the condemnation proceeding. The city manager then received a letter containing six of the nine council members' signatures that requested the city manager not to serve the summons. At the next regular meeting, the city council voted to abandon the eminent domain action. Common Cause wrote to the city attorney, contending that the council members' letter violated the Brown Act; the city attorney responded that no violation had occurred. Common Cause then sought declaratory relief. The trial court held that circulation of the letter constituted a violation of the Brown Act, but found that no attorney's fees should be awarded. The court of appeal reversed and remanded the case to the trial court to consider the award of attorney's fees [*Common Cause v. Stirling (1981) 119 Cal. App. 3d 658, 665, 174 Cal. Rptr. 200]* . The trial court denied the request for attorney's fees, but made a finding as to the reasonable amount of attorney's fees if an award were authorized.

On appeal, the court upheld the lower court's conclusion that the use of circulated letters constituted a Brown Act violation and supported a grant of attorney's fees [*Common Cause v. Stirling (1983) 147 Cal. App. 3d 518, 524-525, 195 Cal. Rptr. 163]* ; however, it stated that a trial court need not award attorney's fees to a prevailing plaintiff in every Brown Act violation [*Common Cause v. Stirling (1983) 147 Cal. App. 3d 518, 521, 195 Cal. Rptr. 163* ; *see Common Cause v. Stirling (1981) 119 Cal. App. 3d 658, 665, 174 Cal. Rptr. 200* (prior appeal on issue of propriety of attorney's fees award)]. The Court of Appeal held that lack of proof of special circumstances making a fee award unjust means

that a fee award is required [*Los Angeles Times Communications LLC v. Los Angeles County Board of Supervisors (2003) 112 Cal. App. 4th 1313, 1330-1331, 5 Cal. Rptr. 3d 776]* . Neither defendant's good faith nor the need to award fees to attract competent counsel are relevant factors to be considered by the court in deciding whether to award fees [*Los Angeles Times Communications LLC v. Los Angeles County Board of Supervisors (2003) 112 Cal. App. 4th 1313, 1333-1335, 5 Cal. Rptr. 3d 776]* .

Rather, a court must thoughtfully exercise its power under the appropriate provisions of the Brown Act and consider the following factors in exercising its discretion:

- In light of all the circumstances of a given case, whether awarding fees under the statute would be unjust (the burden of showing this inequity rests with the defendant).

- The necessity for the lawsuit [*Common Cause v. Stirling (1983) 147 Cal. App. 3d 518, 521, 195 Cal. Rptr. 163* ; *see Common Cause v. Stirling (1981) 119 Cal. App. 3d 658, 665, 174 Cal. Rptr. 200]* .

- The lack of injury to the public.

- The likelihood the problem would have been solved by other means.

- The likelihood of recurrence of the unlawful act in the absence of a lawsuit.

An award of attorneys fees by a trial court under the Brown Act is within the trial court's discretion [*Frazer v. Dixon Unified School Dist. (1993) 18 Cal. App. 4th 781, 800, 22 Cal. Rptr. 2d 641]* , and is reviewable on appeal for abuse of discretion [*Boyle v. City of Redondo Beach (1999) 70 Cal. App. 4th 1109, 1120, 83 Cal. Rptr 2d 164]* . An award of attorneys fees to a prevailing party plaintiff is justified by a public benefit when a litigant who successfully enforced the Brown Act deterred recurring violations of the Act which would have been harmful to the public generally [*International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc. (1999) 69 Cal. App. 4th 287, 301-302, 81 Cal. Rptr. 2d 456]* . However, an award of attorneys fees to a governmental defendant requires a showing that the plaintiff's action was clearly frivolous and totally lacking in merit under *Gov. Code § 54960.5*. Furthermore, the trial court is required to state with particularity the factual basis for the award when it awards attorneys fees on this basis as a matter of fairness and due process of law [Boyle v. *City of Redondo Beach (1999) 70 Cal. App. 4th 1109, 1120-1121, 83 Cal. Rptr 2d 164]* .

The trial court properly based its fee award on a reasonable market value standard based on a prevailing hourly rate in the community even though that rate exceeded the actual hourly rate charged by the plaintiff's lawyers in the case [*International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc. (1999) 69 Cal. App. 4th 287, 302-303, 81 Cal. Rptr. 2d 456]* .

A prevailing party plaintiff can recover reasonable attorneys fees that are necessary to successfully defend the judgment on appeal [*International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc. (1999) 69 Cal. App. 4th 287, 303-304, 81 Cal. Rptr. 2d 456]* . Similarly, outside counsel defendants were properly awarded attorneys fees and costs on appeal when the plaintiff's appeal was found to be totally lacking in merit [*Boyle v. City of Redondo Beach (1999) 70 Cal. App. 4th 1109, 1121-1122, 83 Cal. Rptr 2d 164]* . A statutory attorneys fee award under *Gov. Code § 54960.5* given to a prevailing plaintiff when a local agency has violated the Brown Act had to be apportioned between Brown Act claims and other damage claims for which there was no statutory fee award available [*Bell v. Vista Unified Sch. Dist. (2000) 82 Cal. App. 4th 672, 686-688, 98 Cal. Rptr. 2d 263]* .

[4] Appellate Review

The Court of Appeal applied the independent judgment standard of review to the trial court's decision that plaintiffs

lacked standing under the "interested person" language of *Gov. Code § 54960(a)* and *Gov. Code § 54960.1(a)*. The court decided that this was a question of statutory interpretation, which was a question of law subject to independent determination by the appellate court. The court also concluded that there was an application of law to fact issue in this action which was also subject to the same broad standard of review because the court would apply "the interpreted statute to undisputed facts" [*McKee v. Orange Unified Sch. Dist. (2003) 110 Cal. App. 4th 1310, 1316, 2 Cal. Rptr. 3d 774]* .

The court also rejected an argument that Plaintiff's appeal was moot because the school district defendant had sold the property that was the subject of the challenged agenda description under the Brown Act. The appeal was not moot because plaintiff sought declaratory and injunctive relief to require the school district to follow new procedures to prevent future Brown Act violations of the same type. Therefore, sale of the property does not make the appeal moot because the remedies requested by plaintiff to prevent future harm are still available [*McKee v. Orange Unified Sch. Dist. (2003) 110 Cal. App. 4th 1310, 1315, 2 Cal. Rptr. 3d 774]* .

The California Court of Appeal applied the independent judgment standard of review to determine appellate issues related to the applicability of the Brown Act to a local joint powers agency. The Court interpreted the meaning of two provisions of the act, the definition of a local agency, and the definition of legislative body, to determine whether a locally created joint powers agency was subject to the open meeting requirements of the Brown Act. The court held that the agency was a local agency and that the board of directors and the executive council of a joint powers authority agency ("L.A. Impact") was a governing body of a local agency within the meaning of *Gov. Code § 54952(a)*, and thus was subject to the open meeting requirements of the Brown Act [*McKee v. Los Angeles Interagency Metropolitan Police Apprehension Crime Task Force (2005) 134 Cal. App. 4th 354, 357-358, 36 Cal. Rptr. 3d 47]* .

Legal Topics:

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

§§ 470B.16[Reserved]

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41-470B California Forms of Pleading and Practice--Annotated § 470B.20

§ 470B.20 Nature and Purpose of the Bagley-Keene Act

[1] History of the Act and Relationship to Brown Act

Before enactment of the Bagley-Keene Open Meeting Act [*Gov. Code § 11120 et seq.*], most state agencies were required by their governing laws to hold open and public meetings [*see, e.g., Pub. Util. Code § 306(b)* (California Public Utilities Commission); *Health & Safety Code § 50916* (Housing Finance Agency)]. In 1967, the Bagley-Keene Open Meeting Act (Act) was adopted, requiring that all meetings of "state bodies" be open and public [1967 Stats., Ch. 1656, § 122]. The Act was patterned after the Ralph M. Brown Act (Brown Act) [*Gov. Code § 54950 et seq.*; *see § 470B.10* et seq.], relating to local agency meetings, which was enacted in 1953 [*see 67 Ops. Cal. Atty. Gen. 84, 89 (1984)]* . The Brown Act contains a number of exemptions and amplifications on the meeting requirements for local public agencies [*see Gov. Code § 54950 et seq.*]. Because of the similarity of the two acts, Part B contains numerous cross references to applicable discussion in Part A and is organized to facilitate comparison of the two acts.

[2] Legislative Findings and Declaration

When the California Legislature adopted the Bagley-Keene Act, it expressly declared the public policy of California to be that public agencies exist to aid in the conduct of the people's business and that the proceedings of public agencies are to be conducted openly so that the public may remain informed [*Gov. Code § 11120*]. The Act requires state agencies to take action and conduct deliberations openly [*Gov. Code § 11120*]. In a subsequent amendment to this legislative finding and declaration, the state lawmakers echoed their declaration to the Brown Act [*Gov. Code § 11120*; for the Brown Act declaration, *see Gov. Code § 54950 et seq.*; § 470B.10[2]]:

> The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

A California court of appeal has ruled that all agencies are to be included in some open meeting law unless they are expressly excluded [*Torres v. Board of Commissioners (1979) 89 Cal. App. 3d 545, 549, 152 Cal. Rptr. 506]* .

[3] Basic Open Meetings Requirement

The Act requires that all meetings of a state body be open and public and that all persons be allowed to attend any state body meeting, except as set forth in the Act [*Gov. Code § 11123(a)*; *see § 470B.23*]. In general, members of the public must have an opportunity to directly address the state body on each agenda item before or during the state body's consideration of the item [*Gov. Code § 11125.7(a)*; *see* § 470.22[1]]. Open and public meetings of state bodies must comply with the requirements of Section 202 of the Americans with Disabilities Act of 1990 [*42 U.S.C. § 12132*], and with implementing federal regulations [*Gov. Code § 11123.1*]. Every provision of the Act applies to every state body, unless a particular state body is specifically exempted by law or is covered by any other conflicting provision of law [*Gov. Code § 11127*]. For example, meetings of the Regents of the University of California are governed by *Const. art. IX, § 9*, and *Educ. Code § 92030*. The Board of Regents is subject to the requirements of the Bagley-Keene Act, but only because *Educ. Code § 92030* so provides [*Tafoya v. Hastings College (1987) 191 Cal. App. 3d 437, 443-445, 236 Cal. Rptr. 395* ; *66 Ops. Cal. Atty. Gen. 458, 461 (1983)]* . This requirement is subject to the exceptions provided in *Educ. Code § 92032* rather than the exceptions recognized by the Bailey-Keene Act [*see § 470B.23*]. Meetings of other university bodies, such as faculty meetings, are not subject to the Act [*Tafoya v. Hastings College (1987) 191 Cal. App. 3d 437, 443-445, 236 Cal. Rptr. 395* ; *66 Ops. Cal. Atty. Gen. 458, 461 (1983)]* . Every state body must provide a copy of the Act to each member of that state body when the member is appointed or assumes office [*Gov. Code § 11121.9*].

State agencies are permitted to have open or closed meetings by teleconference if the convening at one location of a quorum of the state body is difficult or impossible, subject to certain conditions [*see Gov. Code § 11123(b)(1)(A)-(F)*]. "Teleconference" is defined to mean a meeting of a state body, the members of which are at different locations, connected by electronic means, through either audio, or both audio and video. This law does not prohibit a state body from providing members of the public with additional locations in which the public may observe or address the state body by electronic means, through either audio or both audio and video [*Gov. Code § 11123(b)(2)*].

Legal Topics:

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California Forms of Pleading and Practice--Annotated

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Volume 41: Overview of Public Administrative Law thru Review of Agency Rulemaking-Chs. 470-472B
Chapter 470B PUBLIC AGENCY MEETINGS
PART II. LEGAL BACKGROUND
B. Open Meetings of State Bodies: The Bagley-Keene Open Meetings Act

41-470B California Forms of Pleading and Practice--Annotated § 470B.21

§ 470B.21 Definitions Applicable to Bagley-Keene Act

[1] State Body

[a] Entities Included Within Definition

The Bagley-Keene Act defines "state body" quite broadly. "State body" means every state board, commission, or similar multi member body of the state that is created by statute or required by law to conduct official meetings, and every commission created by executive order [*Gov. Code § 11121(a)*]. The Act also specifically includes the following in its definition of "state body":

- Any board, commission, committee, or similar multimember body of a state body that exercises any authority delegated to it by the state body [*Gov. Code § 11121(b)*].

- Any board, commission, committee, or similar multimember body on which a member of another state body serves in his or her official capacity as a representative of his or her primary state body, which is supported in whole or part by funds provided by the state body, whether the multimember body is organized and operated by the state body or by a private corporation [*Gov. Code § 11121(d)*].

- Any advisory board, commission, committee, subcommittee, or similar multimember advisory body of a state body, if created by formal action of a state body or by any member of the state body, and if the advisory body consists of three or more persons [*Gov. Code § 11121(c)*].

The Act also applies to any person appointed or elected to serve as a member of a state body who has not yet assumed the duties of office. That person is required to conform his or her conduct to the requirements of the Act and is treated as if he or she has already assumed office [*Gov. Code § 11121.95*].

The board of directors of the Pacific Grove-Asilomar Operating Corporation is considered to be a state body under *Gov. Code § 11121(b)*, and the meetings of the board of directors must be conducted consistent with the requirements of the Bagley-Keene Open Meetings Act [*Pub. Res. Code § 5080.24(d)*]. Similarly, the Electricity Oversight Board that has

oversight responsibility for the Independent System Operator and the Power Exchange [*Pub. Util. Code § 335*] must conduct its meeting consistent with the requirements of the Bagley-Keene Open Meetings Act [*Pub. Util. Code § 341.2*].

[b] Entities Excluded From Definition

The Act specifically exempts the following agencies from its definition of "state body":

- State agencies covered by Cal. Const. art. VI (the judicial department) [*Gov. Code § 11121.1(a)*].

- Districts or other local agencies covered by the Brown Act [*Gov. Code § 11121.1(b)*; *see Gov. Code § 54950 et seq.*; *see also § 470B.10* et seq.].

- State agencies provided for in Cal. Const. art. IV (the Legislature), whose meetings are required to be open to the public pursuant to the Grunsky-Burton Open Meeting Act [*Gov. Code § 11121.1(c)*; former *Gov. Code §§ 9027-9032* (Grunsky-Burton Open Meeting Act); *see § 470B.30* et seq.]. Note that the Grunsky-Burton Open Meeting Act was repealed and replaced by ballot initiative in 1984 [*see* former *Gov. Code §§ 9926-9929.5*]. Further action in 1989 replaced those codified initiative provisions with new legislation [*see Gov. Code §§ 9027-9031*]. Thus, the referenced exclusion of state legislative meetings covered by the Grunsky-Burton Open Meeting Act no longer has a valid law as its basis.

- State agencies, when involved in higher education labor relations [*Gov. Code § 11121.1(d)*; *see Gov. Code § 3596*].

- The Cancer Advisory Council in the State Department of Health Services [*Gov. Code § 11121.1(e)*; *see Health & Safety Code §§ 109260, 109390*].

- The Credit Union Advisory Committee established pursuant to *Fin. Code § 14380* [*Gov. Code § 11121.1(f)*].

Although the definition of "state body" in *Gov. Code § 11121* [*see* [a], *above*] would seem to be broad enough to include the University of California and multimember official bodies such as the Regents of the University of California, it has been held that the Legislature intended the Regents to be treated in a particular manner under the provisions of the Education Code and not as a state body under the Government Code [*Tafoya v. Hastings College (1987) 191 Cal. App. 3d 437, 445, 236 Cal. Rptr. 395* ; *66 Ops. Cal. Atty. Gen. 458, 461 (1983)* . For further discussion on the requirements applicable to the university and the Regents, *see § 470B.20[3]*].

[c] Application to Particular Agency

In a case determining which open meetings act, if any, applied to a housing authority created pursuant to state law [*see Health & Safety Code § 34200 et seq.*], the court of appeal concluded that the legislative policy expressed in both the Brown Act [*Gov. Code § 54950 et seq.*] and the Bagley-Keene Act [*Gov. Code § 11120 et seq.*], required that all agencies be included in some open meeting act unless expressly excluded [*Torres v. Board of Commissioners (1979) 89 Cal. App. 3d 545, 549, 152 Cal. Rptr. 506]* . The court ruled that while a housing authority may be a state agency for some purposes, it is more properly deemed a local agency under the Brown Act, and concluded that the Brown Act was applicable to that agency's meetings [*Torres v. Board of Commissioners (1979) 89 Cal. App. 3d 545, 549, 152 Cal. Rptr. 506* ; *see § 470B.11[1]*].

[2] Meeting

The term "meeting" is defined to include any congregation of a majority of the members of a state body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the state body to which it pertains [*Gov. Code § 11122.5(a)*]. Furthermore, a majority of the members of a state body shall not, outside of a meeting authorized by this chapter, use a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter of the state body [*Gov. Code 11122.5(b)(1)*]. Additionally, subsection (1) shall not be construed to prevent an employee or official of a state agency from engaging in separate conversations or communications outside of a meeting authorized by this chapter with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the state agency, if that person does not communicate to members of the legislative body the comments or position of any other member or members of the legislative body [*Gov. Code 11122.5(b)(2)*]. *Gov. Code § 11123* requires that all meetings of a state body shall be open and public and all persons shall be permitted to attend any meeting of a state body except when prohibited by the Brown Act [*Gov. Code § 11123(a)*]. The Open Meetings Act requirements do not prohibit the following:

- Individual contacts or conversations between a member of a state body and any other person that do not violate subsection (b) [*Gov. Code § 11122.5(c)(1)*];

- The attendance of a majority of the members of a state body at a conference or similar gathering open to the public that involves a discussion of issues of general interest to the public or to public agencies of the type represented by the state body, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specified nature that is within the subject matter jurisdiction of the state body. This is not intended to allow members of the public free admission to a conference or similar gathering at which the organizers have required other participants or registrants to pay fees or charges as a condition of attendance [*Gov. Code § 11122.5(c)(2)(A), (B)*];

- The attendance of a majority of the members of a state body at an open and publicized meeting organized to address a topic of state concern by a person or organization other than the state body, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the subject matter jurisdiction of the state body [*Gov. Code § 11122.5(c)(3)*];

- The attendance of a majority of the members of a state body at an open and noticed meeting of another state body or of a legislative body of a local agency as defined by Section 54951, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within the subject matter jurisdiction of the other state body [*Gov. Code § 11122.5(c)(4)*];

- The attendance of a majority of the members of a state body at a purely social or ceremonial occasion, provided that a majority of the members do not discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the state body [*Gov. Code § 11122.5(c)(5)*]; and

- The attendance of a majority of the members of a state body at an open and noticed meeting of a standing committee of that body, provided that the members of the state body who are not members of the standing committee attend only as observers [*Gov. Code § 11122.5(c)(6)*].

State agencies are prohibited from conducting meetings in any facility that prohibits the admittance of any person, or persons, on the basis of ancestry or based on any characteristic listed or defined in *Gov. Code § 11135*, or which is inaccessible to disabled persons, or where members of the public may not be present without making a payment or

purchase. This prohibition includes all state agencies defined to mean and include every state body, office, officer, department, division, bureau board, council, commission, or other state agency [*Gov. Code § 11131*].

[3] Teleconference Meetings

State bodies are not prohibited by the Act from holding an open or closed meeting by teleconference for the benefit of the public and state body [*Gov. Code § 11123(b)(1)*]. "Teleconference" is defined by the Act to mean a meeting of a state body, the members of which are at different locations, connected by electronic means, through either audio or both audio and video. Furthermore, the Act does not prohibit a state body from providing members of the public with additional locations in which the public may observe or address the state body by electronic means, through either audio or both audio and video [*Gov. Code § 11123(b)(2)*]. Teleconference meetings are required to comply with all applicable laws relating to a specific type of meeting or proceeding under the Act including the following specific listed requirements [*Gov. Code § 11123(b)(1)*]:

- The teleconferencing meeting shall comply with all requirements of the Act applicable to other meetings [*Gov. Code § 11123(b)(1)(A)*];

- The portion of the teleconferenced meeting that is required to be open to the public shall be audible to the public at the location specified in the notice of the meeting [*Gov. Code § 11123(b)(1)(B)*];

- If the state body elects to conduct a meeting or proceeding by teleconference, it shall post agendas at all teleconference locations and conduct teleconference meetings in a manner that protects the rights of any party or member of the public appearing before the state body. Each teleconference location shall be identified in the notice and agenda of the meeting or proceeding, and each teleconference location shall be accessible to the public. The agenda shall provide an opportunity for members of the public to address the state body directly pursuant to *Gov Code § 11125.7* at each teleconference location [*Gov. Code § 11123(b)(1)(C)*];

- All votes taken during a teleconferenced meeting shall be by rollcall [*Gov. Code § 11123(b)(1)(D)*];

- The portion of the teleconferenced meeting that is closed to the public may not include the consideration of any agenda item being heard pursuant to *Gov. Code § 11125.5* [*Gov. Code § 11123(b)(1)(E)*]; and

- At least one member of the state body shall be physically present at the location specified in the notice of the meeting [*Gov. Code § 11123(b)(1)(F)*].

[4] Action Taken

The Act states as its intent that state agencies take action openly [*Gov. Code § 11120*; *see § 470B.20*]. Under the Act, "action taken" is defined as a collective decision made by the members of a state body, a collective commitment or promise by the members of the state body to make a positive or negative decision, or an actual vote by members of a state body when sitting as a body or entity on a motion, proposal, resolution, order, or similar action [*Gov. Code § 11122*]. The attorney general has concluded that the election of officers constitutes "action taken" and must thus occur in an open meeting [*see 68 Ops. Cal. Atty Gen. 65 (1985)* ; *see Gov. Code § 11120*]. In a situation involving the California Commission on the Status of Women, a state body, the attorney general stated that the Commission could not elect its officers through the use of a secret ballot, a ballot by mail, or through the use of proxies. The open meeting requirement was intended to preclude secrecy at any stage of the proceedings, and thus prohibits the use of secret ballots even during a public meeting [*see 68 Ops. Cal. Atty. Gen. 65 (1985)]* . For a discussion of cases interpreting similar language in the Brown Act [*Gov. Code § 54950 et seq.*], see *§ 470B.11[5]*.

[5] Deliberation

The Act contains a deliberation element to the definition of meeting and to the prohibition on collective concurrence. Specifically, the term "meeting" is defined to include any congregation of a majority of the members of a state body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the state body to which it pertains [*Gov. Code § 11122.5(a)*]. Furthermore, the Act prohibits any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the state body to develop a collective concurrence as to action to be taken on an item by the members of the state body except when authorized by *Gov. Code § 11123* [*Gov. Code § 11122.5(b)*].

In construing the Brown Act's declaration of intent [*Gov. Code § 54950*], the court of appeal held that the Legislature intended deliberation, as well as action, to occur openly and publicly. The court defined "to deliberate" as the process of examining, weighing, and reflecting on the reasons for or against a choice [*Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors (1968) 263 Cal. App. 2d 41, 47, 69 Cal. Rptr. 480]* . For further discussion, see *§ 470B.11[6]*.

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41-470B California Forms of Pleading and Practice--Annotated § 470B.22

§ 470B.22 Open Meeting Procedures

[1] General Requirements

No person may be required to register his or her name, to provide other information, to complete a questionnaire, or otherwise to fulfill any condition precedent to his or her attendance at any meeting of a state body. If an attendance list, register, questionnaire, or similar document is posted at or near the entrance of the meeting room, or is circulated to persons present during the meeting, it must clearly state that the signing, registering, or completion of the document is voluntary, and that all persons may nevertheless attend the meeting if they decline to sign or register [*Gov. Code § 11124*]. Any person attending any meeting of a state body also has the right to make an audio or video recording of the proceedings, unless the state body reasonably finds that the recording constitutes a disruption of the proceedings [*Gov. Code § 11124.1*]. Public bodies are prohibited from conducting any meeting, conference, or other function in any facility that prohibits the admittance of any person or persons on the basis of race, religious creed, color, national origin, ancestry, or sex, or that is inaccessible to disabled persons, or where members of the public may not be present without making a payment or purchase [*Gov. Code § 11131*]. Open and public meetings of state bodies must comply with the requirements of Section 202 of the Americans with Disabilities Act of 1990 [*42 U.S.C. § 12132*], and with implementing federal regulations [*Gov. Code § 11123.1*]. Notices, agendas, announcements, or reports required under this law need not identify any victim or alleged victim of crime, tortious sexual conduct, or child abuse, unless the identity of the person has been publicly disclosed [*Gov. Code § 11131.5*].

Subject to specific exceptions [*see Gov. Code § 11125.7(c)-(f)*], the state body conducting the meeting must provide an opportunity for members of the public to directly address the state body on each agenda item before or during the state body's consideration of the item [*Gov. Code § 11125.7(a)*]. However, this rule does not apply if the agenda item has already been considered by a committee composed exclusively of members of the state body at a public meeting where members of the public were afforded the opportunity to address the committee on the item, unless the item has substantially changed since the committee heard the item [*Gov. Code § 11125.7(a)*].

The state body may adopt reasonable regulations to provide members of the public the opportunity to address that body [*Gov. Code § 11125.7(b)*]. For example, the state body may impose time restrictions on individual speakers or establish

time limits for public comment on particular issues.

Any person attending an open and public meeting of a state body has the right to record the proceedings by means of audio or video recorder, or still or motion picture camera, unless the state body reasonably finds that the recording can not continue without noise, illumination, or obstruction of view that constitutes, or would constitute, a persistent disruption of the proceedings [*Gov. Code § 11124.1(a)*]. No state body may prohibit or otherwise restrict the broadcast of its open and public meeting in the absence of a reasonable finding that the broadcast cannot be accomplished without noise, illumination, or obstruction of view that would constitute a persistent disruption of the proceedings [*Gov. Code § 11124.1(c)*]. Any tape or file record of an open and public meeting made for whatever purpose by or at the direction of the state body is subject to inspection under the California Public Records Act (*Gov. Code §§ 6250 et. seq.*), but may be erased or destroyed 30 days after the taping or recording. Any inspection of an audio tape or videotape recording must be provided without charge on an audio tape or videotape player made available by the state agency [*Gov. Code § 11124.1(b)*].

[2] Regular and Special Meetings

[a] Persons Entitled to Notice

State bodies are required to give notice of their meetings to any person who makes a written request for notice [*Gov. Code § 11125(a)*]. A person may request notice for all meetings or for a specific meeting or meetings. Additionally, at the state body's discretion, a person may request notice of only those meetings at which a particular subject or subjects, as specified in the request, will be discussed [*Gov. Code § 11125(d)*]. In litigation under the Act, a plaintiff's failure to allege that he or she requested notice deprives the plaintiff of standing to object to an agency's lack of compliance with the notice requirement [*American Petroleum Institute v. Knecht (1978) 456 F. Supp. 889, 913]* .

Notices of meetings of state bodies must comply with the requirements of Section 202 of the Americans with Disabilities Act of 1990 [*42 U.S.C. § 12132*], and with implementing federal regulations [*Gov. Code § 11125(f)*]. Specifically, these notices must be made available in appropriate alternative formats. The notice must include information regarding how, to whom, and by when a request for any disability-related modification or accommodation, including auxiliary aids or services, may be made by a person with a disability who requires these aids or services in order to participate in the public meeting [*Gov. Code § 11125(f)*].

If a person requests notice for more than one meeting, the state body must verify the accuracy of that person's mailing address at least once a year [*Gov. Code § 11125(e)*; *see Gov. Code § 14911* (requirements for state agency mailing lists)]. The state body is prohibited from charging a fee for providing the notice of meeting [*Gov. Code § 11126.7*].

[b] Time and Contents of Notice

The state body must give notice at least 10 days before a meeting [*Gov. Code § 11125(a)*]. It must include the name, address, and telephone number of any person who can provide further information prior to the meeting, but need not include a list of witnesses expected to appear at the meeting [*Gov. Code § 11125(a)*]. Notice must also be made available on the Internet. Notices of all public meetings and agendas must be posted on the agency web site home page at least ten days prior to the meeting at which the regulatory action is on the agenda [*Gov. Code § 11364(a)(2)*] with instructions as to how the public may participate in the meeting also posted [*Gov. Code § 11364(a)(3)*]. The written notice must also include the address of the internet site where these notices are made available. [*Gov. Code § 11125(a)*].

[c] Agenda Requirement

The notice of a meeting of a body that is a state body shall include a specific agenda for the meeting, containing a brief description of the items of business to be transacted or discussed in either open or closed session. A brief general description of an item generally need not exceed 20 words. A description of an item to be transacted or discussed in

closed session shall include a citation of the specific statutory authority under which a closed session is being held. No item shall be added to the agenda subsequent to the provision of this notice, unless otherwise permitted by statute [*Gov. Code § 11125(b)*]. Notice of a meeting of a state body that complies with this section shall also constitute notice of a meeting of an advisory body of that state body, provided that the business to be discussed by theadvisory body is covered by the notice of the meeting of the state body, the specific time and place of the advisory body's meeting is announced during the open and public state body's meeting, and the advisory body's meeting is conducted within a reasonable time of, and nearby, the meeting of the state body [*Gov. Code § 11125(c)*].

A state body may take action on items of business not appearing on the posted agenda under the following conditions [*Gov. Code § 11125.3(a)*]:

- Upon a determination by a majority vote of the state body that an emergency situation exists, as defined in *Gov. Code § 11125.5* [*Gov. Code § 11125.3(a)(1)*].

- Upon a determination by a two-thirds vote of the state body, or, if less than two-thirds of the members are present, a unanimous vote of those members present, that there exists a need to take immediate action and that the need for action came to the attention of the state body subsequent to the agenda being posted as specified in *Gov. Code § 11125* [*Gov. Code § 11125.3(a)(2)*].

Notice of the additional item to be considered shall be provided to each member of the state body and to all parties that have requested notice of its meetings as soon as is practicable after a determination of the need to consider the item is made, but shall be delivered in a manner that allows it to be received by the members and by newspapers of general circulation and radio or television stations at least 48 hours before the time of the meeting specified in the notice. Notice shall be made available to newspapers of general circulation and radio or television stations by providing that notice to all national press wire services. Notice shall also be made available on the Internet as soon as is practicable after the decision to consider additional items at a meeting has been made [*Gov. Code § 11125.3(b)*].

The attorney general has interpreted the specificity requirement of *Gov. Code § 11125(b)* [*see 67 Ops. Cal. Atty. Gen. 84 (1984)]* . In this specific instance, the State Board of Food and Agriculture had placed the following item on its agenda for a regular meeting:
Tuolumne River
San Joaquin River Flood Control Problem
[*attorney's name and law firm*].

When this item came before the Board at the meeting, the Board adopted a resolution that opposed any congressional action to designate the Tuolumne River as a wild and scenic river, and instructed the president of the Board to testify to that effect at a Senate hearing. In a requested opinion, the attorney general stated that the purpose of the specificity requirement is to provide advance information to interested members of the public concerning the state body's anticipated business [*see 67 Ops. Cal. Atty. Gen. 84, 87 (1984)]* . Citing the unabridged Webster's Third New International Dictionary (1961), the attorney general defined "specific" as characterized by precise formulation or accurate restriction, or free from any ambiguity resulting from careless lack of precision or omission of pertinent matter [*see 67 Ops. Cal. Atty. Gen. 84, 87 (1984)]* . The attorney general concluded that, under this definition, the meeting notice was inadequate [*see 67 Ops. Cal. Atty. Gen. 84, 87-88 (1984)]* . The attorney general further concluded, however, that the Bagley-Keene Act is directory, rather than mandatory, and thus failure to comply with its agenda provision did not invalidate the resolution adopted at that meeting [*see 67 Ops. Cal. Atty. Gen. 84, 92 (1984)]* .

The agenda of public meetings and other writings [*Gov. Code § 11125.1(f)*; *see Gov. Code § 6252*] distributed to all or a majority of the members of the state body by staff or others for discussion or consideration at a public meeting become public records under the California Public Records Act [*Gov. Code § 6250 et seq.*; *see* Ch. 470C, *Public Records Act*] on their distribution [*Gov. Code § 11125.1(a)*]. The agenda must be made available to persons requesting it [*Gov. Code*

§ 11125.1(a)-(d); *see Gov. Code § 6253.4*], subject to exemptions in the California Public Records Act [*Gov. Code § 11125.1(a)*; *see Gov. Code §§ 6253.5, 6254, 6254.7*]. These writings must be made available in appropriate alternative formats as required by Section 202 of the Americans with Disabilities Act of 1990 [*42 U.S.C. § 12132*], and implementing federal regulations, upon request by a person with a disability [*Gov. Code § 11125.1(b)*].

Writings that are public records under subdivision (a) and that are distributed to members of the state body prior to or during a meeting, pertaining to any item to be considered during the meeting, shall be made available for public inspection at the meeting if prepared by the state body or a member of the state body, or after the meeting if prepared by some other person [*Gov. Code § 11125.1(b)*].

When the state body is the Franchise Tax Board, prior to that state body taking final action on any item, writings pertaining to that item that are public records [*Gov. Code § 11125.1(a)*] which are prepaid and distributed to members of the state body by board staff or individual members prior to or during a meeting shall be [*Gov. Code § 11125.1(c)*]:

- Made available for public inspection at that meeting [*Gov. Code § 11125.1(c)(1)*];
- Distributed to all persons who request notice [*Gov. Code § 11125(a)*] in writing [*Gov. Code § 11125.1(c)(2)*];
- Made available on the Internet [*Gov. Code § 11125.1(c)(3)*].

When the state body is the State Board of Equalization taking final action on any item that does not involve a named tax or fee payer, writings pertaining to that item that are public records [*Gov. Code § 11125.1(a)*] which are prepared and distributed by board staff or individual members to members of the state body prior to or during a meeting shall be [*Gov. Code § 11125.1(d)*]:

- Made available for public inspection at that meeting [*Gov. Code § 11125.1(d)(1)*].
- Distributed to all persons who request or have requested copies of these writings [*Gov. Code § 11125.1(d)(2)*].
- Made available on the Internet [*Gov. Code § 11125.1(d)(3)*].

State bodies are not prohibited from charging a fee or deposit for a copy of a public record under *Gov. Code § 6253*, except that no surcharge shall be imposed on persons with disabilities in violation of Section 202 of the Americans with Disabilities Act of 1990 [*42 U.S.C. Sec. 12132*], and the federal rules and regulations adopted in implementation thereof [*Gov. Code § 11125.1(e)*].

State bodies are permitted to charge a fee or deposit for a copy of a public record under *Gov. Code § 6257* [*Gov. Code § 11125.1(e)*]. These writings are subject to the requirements of the California Public Records Act [*Gov. Code §§ 6250 et seq.*], and shall not be construed to limit or delay the public's right to inspect any record required to be disclosed by that Act, or to limit the public's right to inspect any record covered by that Act. This law does not apply to any writings solely because they are properly discussed in a closed session of a state body. A state body is not required to place any paid advertisement or any other paid notice in any publication [*Gov. Code § 11125.1(d)*].

[d] Notice of Advisory Board Meetings

A meeting notice that complies with the requirements discussed in [a]-[c], *above*, will also constitute notice of a meeting of an advisory body of that state body, if the following requirements are met [*Gov. Code § 11125(c)*]:

- The business to be discussed by the advisory body is covered by the notice of the meeting of the state body;

- The specific time and place of the advisory body's meeting is announced during the open and public state body's meeting; and

- The advisory body's meeting is conducted within a reasonable time of, and physically near to, the meeting of the state body.

[3] Emergency Meetings

[a] Definition of Emergency

If an "emergency situation" arises involving matters that require prompt action due to the disruption or threatened disruption of public facilities, the state body may hold an emergency meeting without complying with the 10-day-notice requirement [*Gov. Code § 11125.5(a)*; *see Gov. Code § 11125*; *see also* [2], *above*]. "Emergency situation" means one of the following situations, as determined by a majority of the members of the state body during a prior meeting or at the beginning of the emergency meeting:

- Work stoppage or other activity severely impairing public health, safety, or both health and safety [*Gov. Code § 11125.5(b)(1)*].

- Crippling disaster that severely impairs public health, safety, or both health and safety [*Gov. Code § 11125.5(b)(2)*].

[b] Special Procedures

One hour before the emergency meeting, the presiding officer of the state body, or a designee, must notify by telephone any newspaper of general circulation and radio or television station that has requested notice of meetings pursuant to *Gov. Code § 11125* [*Gov. Code § 11125.5(c)*; *see* [2], *above*]. Notice shall also be made available on the Internet as soon as is practicable after the decision to call the emergency meeting has been made. If telephone services are not working, this notice requirement is deemed waived; as soon as possible after the meeting, however, the presiding officer must notify the media of the fact of the emergency meeting, the purpose of the meeting, and any action taken at the meeting [*Gov. Code § 11125.5(c)*]. As soon after the meeting as possible, the state body must post in a public place for at least 10 days (1) the minutes of an emergency meeting (the minutes must also be made available on the Internet for a minimum of 10 days), (2) a list of persons whom the presiding officer of the state body notified or attempted to notify, (3) a copy of the roll-call vote, and (4) any actions taken at the meeting [*Gov. Code § 11125.5(d)*].

[4] Special Meetings

A special meeting may be called at any time by the presiding officer of the state body or by a majority of the members of the state body. A special meeting may only be called for specified purposes when compliance with the 10 day notice provisions would impose a substantial hardship on the state body or when immediate action is required to protect the public interest [*Gov. Code § 11125.4(a)*]. The specified purposes for which a special meeting is proper include:

- To consider pending litigation as defined by law [*Gov. Code § 11125.4(a)(1)*; *see Gov. Code § 11126(q)*].

- To consider proposed legislation [*Gov. Code § 11125.4(a)(2)*].

- To consider issuance of a legal opinion [*Gov. Code § 11125.4(a)(3)*].

- To consider disciplinary action involving a state officer or employee [*Gov. Code § 11125.4(a)(4)*].

- To consider the purchase, sale, exchange, or lease of state property [*Gov. Code § 11125.4(a)(5)*].

- To consider license examinations or applications [*Gov. Code § 11125.4(a)(6)*].

- To consider action on loans or grants under provisions of *Health and Safety Code § 50000 et seq.* [*Gov. Code § 11125.4(a)(7)*].

- To consider a response to a confidential final draft audit report received from the Bureau of State Audits [*Gov. Code § 11125.4(a)(8)*].

- To provide for an interim executive officer of a state body upon the death, incapacity, or vacancy in the office of the executive officer [*Gov. Code § 11125.4(a)(9)*].

When a special meeting is called for one of the stated purposes, the state body must provide notice of the special meeting to each member of the state body and to all parties that have requested notice of its meetings as soon as is practicable after the decision to call a special meeting has been made, but must deliver the notice in a manner that allows it to be received by the members and by newspapers of general circulation and radio or television stations at least 48 hours before the time of the special meeting specified in the notice. Notice must be made available to newspapers of general circulation and radio or television stations by providing notice to all national press wire services. Notice must also be made available on the Internet within the required time periods. The written notice must also include the address of the internet site where these notices are made available. The notice must specify the time and place of the special meeting and the business to be transacted. No other business may be considered at a special meeting by the state body. The written notice may be dispensed with as to any member who at or prior to the time the meeting convenes files with the clerk or secretary of the state body a written waiver of notice. The waiver may be given by telegram, facsimile transmission, or similar means. The written notice may also be dispensed with as to any member who is actually present at the meeting at the time it convenes. Notice is required under the Act regardless of whether any action is taken at the special meeting [*Gov. Code § 11125.4(b)*].

At the beginning of any special meeting, the state body must make a finding in open session that the delay necessitated by providing notice 10 days prior to a meeting as required by law [*see Gov. Code § 11125*] would cause a substantial hardship on the body or that immediate action is required to protect the public interest. The finding must set forth the specific facts that constitute the hardship to the body or the impending harm to the public interest. The finding must be adopted by a two-thirds vote of the body, or, if less than two-thirds of the members are present, a unanimous vote of those members present. The finding must be made available on the internet. Failure to adopt the finding terminates the meeting [*Gov. Code § 11125.4(c)*].

[5] Continuances

Any hearing being held or noticed or ordered to be held by a state body at any meeting may by order or notice of continuance be continued to any subsequent, noticed meeting of the state body [*Gov. Code § 11129*; *see Gov. Code § 11125* (notice provisions); *see also* [2], *above*]. A copy of the order or notice of continuance must be conspicuously posted on or near the door of the place where the hearing was held within 24 hours after the time of the continuance. If the hearing is continued to a time less than 24 hours after the time specified in the order of notice of hearing, however, posting must occur immediately following the meeting at which the order or declaration of continuance was adopted or made [*Gov. Code § 11129*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationGeneral OverviewAdministrative LawGovernmental InformationPublic MeetingsGeneral OverviewAdministrative LawGovernmental InformationPublic MeetingsSunshine LegislationCivil ProcedureJusticiabilityStandingGeneral OverviewConstitutional LawEqual ProtectionScope of ProtectionGovernmentsState & Territorial GovernmentsEmployees & Officials

California Forms of Pleading and Practice--Annotated

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Volume 41: Overview of Public Administrative Law thru Review of Agency Rulemaking-Chs. 470-472B
Chapter 470B PUBLIC AGENCY MEETINGS
PART II. LEGAL BACKGROUND
B. Open Meetings of State Bodies: The Bagley-Keene Open Meetings Act

41-470B California Forms of Pleading and Practice--Annotated § 470B.23

§ 470B.23 Exemptions Allowing Closed Sessions

[1] General Requirements

Closed meetings, generally referred to in the Bagley-Keene Act as "closed sessions" or "executive sessions," are permitted for the purposes discussed in [2]-[30], *below*. Despite the similarity between the Bagley-Keene Act and the Brown Act [*see § 470B.20*], the exceptions to the open meeting requirements are not identical, since the functions of state and local governments vary considerably [*see 68 Ops. Cal. Atty. Gen. 65, 67 (1985)]* . Because the basic purpose of each act is the same, however, the two acts should be construed in light of one another [*see 68 Ops. Cal. Atty. Gen. 65, 67 (1985)]* . A state body may not hold a closed session except as expressly authorized in the Bagley-Keene Act [*Gov. Code § 11132*]. State agencies are permitted to have open or closed meetings by teleconference if the convening at one location of a quorum of the state body is difficult or impossible, subject to certain conditions [*see Gov. Code § 11123(b)(1)(A)-(F)*]. "Teleconference" is defined to mean meeting of a state body, the members of which are at different locations, connected by electronic means, through either audio or video, or both [*Gov. Code § 11123(b)(2)*].

[2] Personnel

A state body may hold a closed session during a regular or special meeting to consider the appointment, employment, or dismissal of a public employee, or to hear complaints or charges brought against that employee by another person or employee unless the employee requests a public hearing [*Gov. Code § 11126(a)(1)*]. As a condition to holding a closed session for these matters, the state body must give the employee written notice of his or her right to have a public hearing rather than a closed session. The notice must be delivered to the employee personally or by mail at least 24 hours before the time for holding the regular or special meeting. Failure to provide this notice renders any disciplinary or other action taken against the employee void [*Gov. Code § 11126(a)(2)*]. The state body may exclude from either a public or closed session during the examination of a witness any other witness in the matter being investigated [*Gov. Code § 11126(a)(3)*]. After a public hearing or closed session, the state body may hold a closed session to deliberate on the decision [*Gov. Code § 11126(a)(4)*].

For the purposes of the personnel exemption, the term "employee" does not include any person who is elected or appointed to a public office by any state body [*Gov. Code § 11126(b)*]. Officers of the California State University who

receive compensation for their services (other than per diem and ordinary and necessary expenses) are considered "employees," however, when engaged in that capacity [*Gov. Code § 11126(b)*]. The term "employee" also includes persons exempt from civil service under the California Constitution [*Gov. Code § 11126(b)*; *Cal. Const., art VII, § 4(e)*]. The personnel exception was properly invoked by a board of trustees to discuss the return of a former chancellor to employment with the university [*Travis v. Board of Trustees of The California State University (2008) 161 Cal. App. 4th 335, 338, 73 Cal. Rptr. 3d 854* (personnel exception included closed session meeting of trustees to discuss a decision by a former chancellor to return from an extended leave of absence and assume a teaching job; trustees did not violate Bagley Keene Act in holding closed session for this purpose)].

[3] Examinations for Licensees

State bodies that administer licensing programs for persons engaging in businesses or professions may hold closed sessions to prepare, approve, grade, or administer examinations [*Gov. Code § 11126(c)(1)*].

[4] Privacy

An advisory body of a state agency that administers the licensing of persons engaged in businesses or professions may conduct closed sessions to discuss matters that the advisory body has found would constitute an unwarranted invasion of the privacy of the individual licensee or applicant if discussed in an open meeting [*Gov. Code § 11126(c)(2)*]. The advisory body, however, may not include a quorum of the members of the state body it advises [*Gov. Code § 11126(c)(2)*]. The matters that may be discussed include review of an applicant's qualifications for licensure, and an inquiry specifically related to the state body's enforcement program concerning an individual licensee or applicant, when the inquiry has occurred prior to the filing of a civil, criminal, or administrative disciplinary action against the licensee or applicant by the state body [*Gov. Code § 11126(c)(2)*].

[5] Administrative Adjudication Deliberation

A state body may hold a closed session to deliberate on a decision to be reached in a proceeding required to be conducted pursuant to Chapter 5, Administrative Adjudication: Formal Hearing, of the California APA, *Gov. Code § 11500 et seq.* [*Gov. Code § 11126(c)(3)*; *see* Ch. 473, *Public Agency Adjudication* et seq., for discussion of adjudicatory hearings].

[6] National Security

A state body may hold a closed session to consider matters affecting the national security [*Gov. Code § 11126(c)(4)*].

[7] Parole or Release

A state body may hold a closed session when considering and acting on the determination of a term, parole, or release of any individual or other disposition of an individual criminal case, or if public disclosure of the subjects under discussion or consideration is expressly prohibited by statute [*Gov. Code § 11126(c)(5)*]. Nothing in the Bagley-Keene Act, however, may be construed to grant a right to enter any correctional institution or the grounds of a correctional institution when that right is not otherwise granted by law [*Gov. Code § 11126(c)(5)*].

[8] Honorary Degrees and Donations

A state body may hold a closed session to consider the conferring of an honorary degree, or to consider the acceptance of a gift, donation, or bequest that the donor has requested in writing to be kept confidential [*Gov. Code § 11126(c)(6)*].

[9] Alcoholic Beverage Control Appeals Board

The Alcoholic Beverage Control Appeals Board may hold a closed session for the purpose of a deliberative conference [*Gov. Code § 11126(c)(7)*]. This section permits the holding of "a deliberative conference as provided in Section 11125." However, the cross reference is apparently a mistake, because *Gov. Code § 11125* relates neither to the Appeals Board nor to any deliberative conference. The provisions of the Business & Professions Code relating to the Alcoholic Beverage Control Appeals Board [*Bus. & Prof. Code §§ 23075-23077*] do not define that term. For a discussion of the functioning of the Alcoholic Beverage Control Appeals Board, see Ch. 18, *Alcoholic Beverage Licenses* .

[10] Real Property

A state body may hold closed sessions with its negotiator prior to the purchase, sale, exchange, or lease of real property by or for the state body in order to give instructions to the negotiator regarding the price and terms of payment [*Gov. Code § 11126(c)(8)(A)*]. Prior to the closed session, however, the state body must hold an open and public session in which it identifies the real property that is the subject of the negotiations and the person or persons with whom its negotiator may negotiate [*Gov. Code § 11126(c)(8)(B)*]. For purposes of this exemption, the term "negotiator" includes a member of the state body. The term "lease" includes renewal or renegotiation of a lease [*Gov. Code § 11126(c)(8)(C), (D)*]. Nothing in this exemption precludes a state body from holding a closed session for discussions regarding eminent domain proceedings pursuant to *Gov. Code § 11126(q)* [*Gov. Code § 11126(c)(8)(E)* (although the statute cites subdivision (q), 1996 Stats., ch. 1041, § 2 redesignated the subdivisions in *Gov. Code § 11126*, and the content formerly stated in subdivision (q) is now found in subdivision (e)); *see* [20] *below*].

[11] Postsecondary Education Commission, and Council for Private Postsecondary and Vocational Education

The California Postsecondary Education Commission may hold closed sessions to consider matters pertaining to the appointment or termination of the Director of the California Postsecondary Education Commission [*Gov. Code § 11126(c)(9)*]. The Council for Private Postsecondary and Vocational Education may hold closed sessions to consider matters pertaining to the appointment or termination of the Executive Director of the Council [*Gov. Code § 11126(c)(10)*].

[12] Franchise Tax Board

The Franchise Tax Board may hold a closed session for the purpose of discussing confidential tax returns or data when public disclosure of that information is prohibited by law [*Gov. Code § 11126(c)(11)*]. The Board may also consider matters regarding the appointment or removal of the Board's executive officer in closed session [*Gov. Code § 11126(c)(11)*]. The Board is not required to notice or disclose any confidential tax information considered in closed sessions, or documents executed in connection with the confidential information, the public disclosure of which is prohibited by law [*Gov. Code § 11126(c)(11)*; *see Rev. & Tax. Code § 19542 et seq.*].

[13] Corrections Standards Authority

The Correction Standards Authority may hold closed sessions when considering reports of crime conditions under *Penal Code § 6027*, which requires the Board to study crime in California and to report its findings to the governor and Legislature [*Gov. Code § 11126(c)(12)*].

[14] Air Resources Board

The State Air Resources Board may hold closed sessions when considering the proprietary specifications and performance data of manufacturers [*Gov. Code § 11126(c)(13)*].

[15] State Board of Education

The State Board of Education, or the Superintendent of Public Instruction, or any committee advising the Board or the Superintendent, may hold closed sessions to review and discuss the actual test content of assessment instruments that it is reviewing under *Educ. Code § 60600 et seq.*, or under *Educ. Code § 60850 et seq.*, to maintain the confidentiality of the assessments under review [*Gov. Code § 11126(c)(14)*].

[16] California Integrated Waste Management Board

The California Integrated Waste Management Board, and its auxiliary committees, may hold closed sessions to discuss confidential tax returns, trade secrets, confidential or proprietary information in its possession, and other data, the public disclosure of which is prohibited by law [*Gov. Code § 11126(c)(15)*].

[17] Pension Investment

A state body that invests retirement, pension, or endowment funds may hold closed sessions when considering investment decisions [*Gov. Code § 11126(c)(16)*]. For purposes of considering shareholder voting on corporate stocks held by the state body, closed sessions for the purpose of voting may be held only with respect to the election of corporate directors, the election of independent auditors, and financial issues that could have a material effect on the net income of the corporation. For the purpose of real property investment decisions that may be considered in a closed session, a state body need not identify the real property prior to the closed session, as otherwise required by *Gov. Code § 11126(c)(8)* [*Gov. Code § 11126(c)(16)*; *see* [10] regarding property identification requirements].

[18] Employee Salary

A state body, or any board, commission, administrative officer, or other representative properly designated by law or a state body, may hold closed sessions with its representatives (or a state conciliator who has intervened in the proceedings) in discharging its responsibilities with respect to public employee organizations [*see Gov. Code §§ 3500, 3512, 3525, 3540*], if the sessions relate to salaries, salary schedules, or compensation paid in the form of fringe benefits [*Gov. Code § 11126(c)(17)*].

[19] Criminal or Terrorist Activity Threats

A state body may hold closed sessions to consider matters posing a threat or potential threat of criminal or terrorist activity against the personnel, property, buildings, facilities, or equipment, including electronic data, owned, leased, or controlled by the state body, where disclosure of these considerations could compromise or impede the safety or security of the personnel, property, buildings, facilities, or equipment, including electronic data, owned, leased, or controlled by the state body [*Gov. Code § 11126(c)(18)(A)*]. A state body, at any regular or special meeting, may meet in a closed session for purposes of considering threats or potential threats upon a two-thirds vote of the members present at the meeting [*Gov. Code § 11126(c)(18)(B)*]. After meeting in closed session to consider threats or potential threats, the state body shall reconvene in open session prior to adjournment and report that a closed session was held to consider threats or potential threats, the general nature of the matters considered, and whether any action was taken in closed session [*Gov. Code § 11126(c)(18)(C)*]. After meeting in closed session to consider threats or potential threats, the state body shall submit to the Legislative Analyst written notification stating that it held this closed session, the general reason or reasons for the closed session, the general nature of the matters considered, and whether any action was taken in closed session. The Legislative Analyst shall retain for no less than four years any written notification received from a state body under this law [*Gov. Code § 11126(c)(18)(D)*].

[20] Public Utilities Commission

The Public Utilities Commission (PUC) may hold closed sessions to deliberate on the institution of proceedings or disciplinary actions against regulated utilities [*Gov. Code § 11126(d)(2)*]. The Act expressly provides, however, that meetings of the PUC in which the rates of entities under the Commission's jurisdiction are changed must be open and

public [*Gov. Code § 11126(d)(1)*].

The five Commissioners of the California Public Utilities Commission (PUC) met in closed session to discuss settlement of a lawsuit against the Commissioners brought by an electric utility. In the closed session, the commissioners voted unanimously to approve the settlement, and then reconvened in a public session to disclose the settlement of the lawsuit [*Southern California Edison Co. v. Peevey (2003) 31 Cal. 4th 781, 797-798, 3 Cal. Rptr. 3d 703, 74 P. 3d 795]* . The California Supreme Court held that the PUC was not required under the provisions of the Bagley-Keene Open Meetings Act [*Gov. Code § 11126(d)(1)* to hold the session discussing and approving this settlement in an open public session. This is because the settlement that the PUC accepted maintained the existing rates to be charged by the regulated utility and did not change those rates. Because the settlement did not change the rates charged by the utility, the requirements of *Gov. Code § 11126(d)(1)* did not require the PUC to hold an open and public session [*Southern California Edison Co. v. Peevey (2003) 31 Cal. 4th 781, 802-804, 3 Cal. Rptr. 3d 703, 74 P. 3d 795]* .

[21] Litigation

Based on the advice of its legal counsel, a state body may hold a closed session to confer with or receive advice from its legal counsel regarding pending litigation when discussion in open session would prejudice the position of the state body in the litigation [*Gov. Code § 11126(e)(1)*]. For purposes of the Bagley-Keene Act, all other expressions of the lawyer-client privilege are abrogated; *Gov. Code § 11126(e)(2)* is the exclusive expression of the lawyer-client privilege for purposes of conducting closed sessions [*Gov. Code § 11126(e)(2)*].

Litigation is considered pending only when one of the following circumstances exist [*Gov. Code § 11126(e)(2)*]:

- An adjudicatory proceeding in which the state body is a party has been formally initiated and is before a court, administrative body exercising adjudicatory authority, hearing officer, or an arbitrator [*Gov. Code § 11126(e)(3)*].

- A point has been reached when, in the opinion of the state body on the advice of its legal counsel based on existing facts and circumstances, a significant exposure to litigation against the state body exists [*Gov. Code § 11126(e)(4)(A)*].

- Based on existing facts and circumstances, the state body is meeting only to decide whether a closed session is authorized pursuant to subparagraph (A) [*Gov. Code § 11126(e)(4)(B)*].

- Based on existing facts and circumstances, the state body has decided to initiate or is deciding whether to initiate litigation [*Gov. Code § 11126(e)(5)(A)*].

"Litigation" includes any adjudicatory proceeding--including eminent domain--before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator [*Gov. Code § 11126(e)(5)(C)*]. The state body must follow specific procedures before it may go into closed session pursuant to the litigation exemption [*see Gov. Code § 11126(e)(5)(B)*; *see also § 470B.24[2]*].

The five Commissioners of the California Public Utilities Commission (PUC) met in closed session to discuss settlement of a lawsuit against the Commissioners brought by an electric utility. In the closed session, the commissioners voted unanimously to approve the settlement, and then reconvened in a public session to disclose the settlement of the lawsuit.

The agenda for the closed session did not identify the lawsuit about which settlement negotiations were discussed. The California Supreme court held that provisions of the Bagley-Keene Open Meetings Act [*Gov. Code § 11126(e)(1)*] and

Gov. Code § 11126.3(a)] were not violated by the PUC Commissioners by not only conducting settlement negotiations with counsel but also deciding to settle a lawsuit in a closed session when holding a closed session "is deemed necessary to avoid prejudice to a favorable settlement" [*Southern California Edison Co. v. Peevey (2003) 31 Cal. 4th 781, 797-798, 3 Cal. Rptr. 3d 703, 74 P. 3d 795]* . The Court further held that the PUC was not required under the provisions of the Bagley-Keene Open Meetings Act [*Gov. Code § 11126(e)(1)* and *Gov. Code § 11126.3(a)*] to announce in a public session the proposed settlement with the name of the lawsuit, and then seek public comment on the proposed settlement before voting in a public session whether to accept the settlement [*Southern California Edison Co. v. Peevey (2003) 31 Cal. 4th 781, 799-801, 3 Cal. Rptr. 3d 703, 74 P. 3d 795]* .

[22] Payment of Claims for Tort Liability

A state body operating under a joint powers agreement for insurance pooling may conduct a closed session to discuss a claim for the payment of tort or public liability losses incurred by the state body or any member agency under the joint powers agreement [*Gov. Code § 11126(f)(1)*; *see also Gov. Code § 54956.95*].

[23] State Board of Forestry

The examining committee established by the State Board of Forestry [*see Pub. Res. Code § 763*] may conduct a closed session to consider disciplinary action against an individual professional forester before filing an accusation against the forester [*Gov. Code § 11126(f)(2)*; *see Gov. Code § 11503* (filing of accusation); *see also* Ch. 473A, *Commencing Agency Adjudication*].

[24] Board of Accountancy

An administrative committee established by the State Board of Accountancy to investigate complaints [*see Bus. & Prof. Code § 5020*] may conduct a closed session to consider disciplinary action against an individual accountant before filing an accusation against the accountant [*Gov. Code § 11126(f)(3)*; *see Gov. Code § 11503* (filing of accusation)]. In addition, an examining committee established by the Board of Accountancy to determine certification [*see Bus. & Prof. Code § 5023*] may conduct a closed hearing to interview an individual applicant or accountant regarding the applicant's qualifications [*Gov. Code § 11126(f)(3)*].

[25] Delegated or Advisory Authority

A board, commission, committee, or other multimember body exercising authority delegated to it by a state body may conduct a closed session to consider any matter that could properly be considered in closed session by the state body whose authority it exercises [*Gov. Code § 11126(f)(4)*]. Similarly, a board, commission, committee, or other multimember body on which a member of a state body officially serves as a representative that is supported by the state body may conduct a closed session to consider any matter that could properly be considered by the state body [*Gov. Code § 11126(f)(5)*; *see Gov. Code § 11121* (definitions of state body)]. Finally, an advisory board, commission, committee, subcommittee, or other multimember advisory body consisting of three or more persons that was created by formal action of the state body may conduct a closed session to consider any matter that could properly be considered in a closed session by the state body it advises [*Gov. Code § 11126(f)(6)*].

[26] State Board of Equalization Exemption

The State Board of Equalization may hold closed sessions in order to hear confidential taxpayer appeals or data when public disclosure of that information is prohibited by law [*Gov. Code § 11126(f)(7)(B)*]. The Board may also hold a closed session to consider the appointment or removal of its executive secretary [*Gov. Code § 11126(f)(7)(A)*].

The Board is not required to disclose any action taken in closed sessions, or documents executed in connection with that action, the public disclosure of which is prohibited by law [*Gov. Code § 11126(f)(8)*; *see Gov. Code §§ 15619, 15641*;

Rev. & Tax. Code §§ 833, 7056, 8255, 9255, 11655, 30455, 32455, 38705, 38706, 43651, 45982, 46751, 50159, 55381, 60609].

[27] Earthquake Prediction Evaluation Council

The California Earthquake Prediction Evaluation Council or other body appointed to advise the Governor or the Director of the Office of Emergency Services regarding matters concerning volcanic or earthquake predictions [*see Gov. Code § 8590*] may hold closed sessions when considering the evaluation of possible predictions [*Gov. Code § 11126(f)(8)*].

[28] Teacher's Retirement Board; Board of Administration of the Public Employees Retirement System

The Teachers' Retirement Board and the Board of Administration of the Public Employees' Retirement System may hold a closed session to consider matters regarding the recruitment, appointment, employment, or removal of the chief executive officer of the State Teachers' Retirement System or the Public Employees' Retirement System. Further, either board may hold a closed session when considering matters regarding the recruitment or removal of the chief investment officer of the system under its jurisdiction [*Gov. Code § 11126(g)(1)*]. The Board of Administration of the Public Employees' Retirement System may also hold closed sessions when considering matters relating to the development of rates and competitive strategy for long term care insurance plans offered pursuant to Chapter 15 (commencing with Section 21660) of Part 3 of Division 5 of Title 2 [*Gov. Code § 11126(h)*].

[29] Commission on Teacher Credentialing

The Commission on Teacher Credentialing may hold closed sessions when considering matters relating to the recruitment, appointment, or removal of its executive director [*Gov. Code § 11126(g)(2)*].

[30] California Victim Compensation and Government Claims Board

When the California Victim Compensation and Government Claims Board conducts hearings on crime victim indemnification claims, the board is not required to identify the applicant in any notice, agenda, announcement, or report required by law when the applicant or applicant's representative does not request that the hearing be open to the public [*Gov. Code § 11125.8(a)*].

[31] Electricity Oversight Board

The Electricity Oversight Board [*Pub. Util. § 335*] may hold a closed session to consider the appointment of one or more candidates to the governing board of the Power Exchange, deliberate on matters involving the removal of a member of the governing board of the Power Exchange, or to consider a matter based on information that has received a grant of confidential status pursuant to regulations of the Oversight Board, provided that any action taken on such a matter shall be taken by vote in an open session [*Pub. Util. Code § 341.2*].

[32] Exemption for Confidential Final Draft Audit Report

A state body that has received a confidential final draft audit report from the Bureau of State Audits may hold a closed session to discuss its response to the report [*Gov. Code § 11126.2(a)*]. However, once the audit report is publicly released by the Bureau of State Audits, meetings to discuss the audit report must be conducted in an open session unless some other exemption applies [*Gov. Code § 11126.2(a)*].

[33] Indian Tribe Records or Information Related to Sale of Compact Assets or Bond Issuance by Tribe

A state body may conduct a closed session to consider any records or information of an Indian tribe or summaries or

analyses of those records received by the state in connection with the sale of compact assets or issuance of bonds [*Gov. Code § 63048.63(e)*].

[34] California Gambling Control Commission

The California Gambling Control Commission may hold closed sessions when discussing matters involving trade secrets, nonpublic financial data, confidential or proprietary information, and other data and information, the public disclosure of which is prohibited by law or a tribal-state gaming compact [*Gov. Code § 11126.4(a)*]. Discussion in closed session authorized by this section shall be limited to the confidential data and information related to the agenda item and shall not include discussion of any other information or matter [*Gov. Code § 11126.4(b)*]. Before going into closed session the commission shall publicly announce the type of data or information to be discussed in closed session, which shall be recorded upon the commission minutes [*Gov. Code § 11126.4(c)*]. Action taken on agenda items discussed pursuant to this section shall be taken in open session [*Gov. Code § 11126.4(d)*].

[35] Managed Risk Medical Insurance Board

The Managed Risk Medical Insurance Board may hold closed sessions when considering matters related to the development of rates and contracting strategy for entities contracting with the Board for health care plan purposes under provisions of the Insurance Code [*Gov. Code § 11126(i)*] including *Ins. Code §§ 12693, 12695, 12699.50* 12700 [*Gov. Code § 11126(i)*].

[36] State Compensation Insurance Fund

The board of the State Compensation Insurance Fund may hold closed sessions under the following circumstances [*Gov. Code § 11126(j)*]: (1) when considering matters related to claims pursuant to Chapter 1 (commencing with Section 3200) of Division 4 of the Labor Code, to the extent that confidential medical information or other individually identifiable information would be disclosed [*Gov. Code § 11126(j)(1)*]; (2) to the extent that matters related to audits and investigations that have not been completed would be disclosed [*Gov. Code § 11126(j)(2)*]; (3) to the extent that an internal audit containing proprietary information would be disclosed [*Gov. Code § 11126(j)(3)*]; and (4) to the extent that the session would address the development of rates, contracting strategy, underwriting, or competitive strategy, pursuant to the powers granted to the board in Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code, when discussion in open session concerning those matters would prejudice the position of the State Compensation Insurance Fund [*Gov. Code § 11126(j)(4)*]. The State Compensation Insurance Fund shall comply with the procedures specified in *Section 11125.4 of the Government Code* with respect to any closed session or meeting authorized by subdivision (j), and in addition shall provide an opportunity for a member of the public to be heard on the issue of the appropriateness of closing the meeting or session [*Gov. Code § 11126(k)*].

[37] Exclusion of Public Under Certain Conditions

In addition to the exemptions discussed in [2] to [35], *above* in certain circumstances a state body may continue a meeting after excluding some or all of those in attendance. When a meeting is willfully interrupted by a group or groups of persons who render the orderly conduct of that meeting unfeasible and order cannot be restored by the removal of the individuals who are interrupting, the state body may order the meeting room cleared and continue in session (*i.e.*, closed session) [*Gov. Code § 11126.5*]. In such a session, only matters appearing on the agenda may be considered. Representatives of the press or other news media, except those participating in the disturbance, must be allowed to attend any such closed session [*Gov. Code § 11126.5*]. The state body may also establish a procedure for readmitting any person who was not responsible for willfully disturbing the orderly conduct of the meeting [*Gov. Code § 11126.5*].

Legal Topics:

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

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§ 470B.24 Closed Session Procedures

[1] Statement of Reasons

Before holding any closed session, the state body is required to disclose, in an open meeting, the general nature of the item or items to be discussed in the closed session. The disclosure may take the form of a reference to the item or items as they are listed by number or letter in the agenda for the closed session [*Gov. Code § 11126.3(a)*]. The statement must cite the specific statutory authority, including the particular section, subdivision, and paragraph, under which the session is being held [*Gov. Code§ 11126.3(a)*]. If the session is closed under the authority of *Gov. Code § 11126(d)(2)*, the state body must state the title of or otherwise specifically identify the proceeding or disciplinary action contemplated. Should that body determine, however, that to do so would jeopardize the body's ability to effectuate service of process upon one or more unserved parties if the proceeding or disciplinary action is commenced or that to do so would fail to protect the private economic and business reputation of the person or entity if the proceeding or disciplinary action is not commenced, then the state body shall notice that there will be a closed session and describe in general terms the purpose of that session [*Gov. Code § 11126.3(a)*]. If the closed session is held pursuant to the litigation exemption [former *Gov. Code § 11126(q)*; *now see Gov. Code § 11126(e)*; *see also § 470B.23[20]*], the state body must include the title of the litigation to be discussed or otherwise specifically identify the litigation, unless the state body determines that to do so would jeopardize either (1) its ability to effectuate service of process on one or more unserved parties, or (2) its ability to conclude existing settlement negotiations to its advantage [*Gov. Code § 11126.3(a)*; *see* [3], *below*].

A closed session may be held only during a regular or special meeting of the state body [*Gov. Code § 11128*]. In the closed session, the state body may only consider those matters covered in its public statement [*Gov. Code § 11126.3(b)*]. The statement must be made as part of the notice of the meeting [*see Gov. Code § 11125* and § 470B.22[2]; *see also Educ. Code § 92032* (notice of closed meeting of Regents of the University of California)] and must be made part of any order or notice of continuance [*Gov. Code § 11126.3(c)*; *see Gov. Code § 11129* (notice of continuance)]. *Gov. Code § 11126.3*, requiring a statement of reasons, will not be construed to require or authorize a state body to give out names or other information, however, when that act would constitute an invasion of privacy or would otherwise unnecessarily divulge the particular facts concerning the closed session [*Gov. Code § 11126.3(e)*].

[2] Procedures Under Litigation Exception

When a closed session is held pursuant to the litigation exception [*Gov. Code § 11126(e)*; *see § 470B.23[20]*], the state body's legal counsel is required to prepare and submit to the members of the body a memorandum stating the specific reasons and the legal authority for the closed session. If the closed session relates to existing litigation, the memorandum must include the title of the litigation. If the closed session does not relate to existing litigation, the memorandum must include the facts and circumstances on which it is based [*Gov. Code § 11126(e)(5)(B)*]. The legal counsel must submit the memorandum to the state body prior to the closed session, if feasible, and in any case, no later than one week after the closed session. That memorandum is exempt from disclosure under the Public Records Act [*Gov. Code § 11126(e)(5)(B)*; *see Gov. Code § 6254.25*]. Disclosure of a memorandum is not deemed a waiver of the lawyer-client privilege under *Evid. Code § 950 et seq.* [*Gov. Code § 11126(e)(5)(D)*].

[3] Announcement of Additional Pending Litigation

If any additional pending litigation [*see Gov. Code § 11126(e)*; *see also § 470B.23[20]*] arises after the closed session agenda has been published, and postponement of that litigation would prevent the state body from complying with any statutory, court-ordered, or other legally imposed deadline, the state body may nonetheless proceed to discuss those matters in closed session [*Gov. Code § 11126.3(d)*]. It must publicly announce the title of the litigation, however, or otherwise specifically identify it, in the meeting. Such an announcement is deemed to fully comply with the agenda requirement [*Gov. Code § 11126.3(d)*].

[4] Minute Book

The state body must designate a clerk or other officer or employee to attend each closed session and to keep and enter in a minute book a record of topics discussed and decisions made at the meeting [*Gov. Code § 11126.1*]. The minute book is not a public record subject to inspection pursuant to the California Public Records Act [*Gov. Code § 6250 et seq.*; *see* Ch. 470C, *Public Records Act*], and must be kept confidential. The minute book must be available to members of the state body, however, and, if a violation of the Act is alleged to have occurred at a closed session, to a court considering the matter [*Gov. Code § 11126.1*]. The minute book may, but need not, consist of a recording of the closed session [*Gov. Code § 11126.1*].

[5] Public Report

A state body must publicly report at a subsequent public meeting any action taken and any roll-call vote taken to appoint, employ, or dismiss a public employee arising out of any closed session of the state body [*Gov. Code § 11125.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationPublic MeetingsGeneral OverviewAdministrative LawGovernmental InformationPublic MeetingsSunshine LegislationEvidencePrivilegesAttorney-Client PrivilegeWaiver

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B. Open Meetings of State Bodies: The Bagley-Keene Open Meetings Act

41-470B California Forms of Pleading and Practice--Annotated § 470B.25

§ 470B.25 Judicial Enforcement

[1] Criminal Enforcement

Each member of a state body who attends a meeting of the state body in violation of any provisions of the Bagley-Keene Open Meeting Act with knowledge of the fact that the meeting is illegal can be prosecuted and convicted of a misdemeanor [*Gov. Code § 11130.7*].

[2] Civil Enforcement

[a] Action to Stop or Prevent Violations of Act

Any interested person may commence an action by mandamus [*Code Civ. Proc. § 1084 et seq.*; *see* Ch. 358, *Mandate and Prohibition*], injunction [*Civ. Code § 3420 et seq.*; *Code Civ. Proc. § 525 et seq.*; *see* Ch. 303, *Injunctions*], or declaratory relief [*Code Civ. Proc. § 1060 et seq.*; *see* Ch. 182, *Declaratory Relief*] for the purpose of stopping or preventing violations or threatened violations of the Act, or to determine the applicability of the Act to actions or threatened future action by members of the state body [*Gov. Code § 11130*]. *Gov. Code § 11130(a)* provides for remedies to stop or prevent present or future violation of the act, and remedies to determine whether the act applies to a present or future action. It does not, however, provide a remedy for past actions or violations [*Regents of Univ. of Cal. v. Superior Court (1999) 20 Cal. 4th 509, 526, 536, 85 Cal. Rptr. 2d 257, 976 P.2d 808]* .

For examples of complaints for declaratory relief and injunction under *Gov. Code § 11130*, see *§§ 470B.60*, *470B.61*, respectively. For a discussion of judicial review proceedings, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

[b] Action to Declare State Body's Activities Void

Any interested person may commence an action by mandamus [*Code Civ. Proc. § 1084 et seq.*; *see* Ch. 358, *Mandate and Prohibition*], injunction [*Civ. Code § 3420 et seq.*; *Code Civ. Proc. § 525 et seq.*; *see* Ch. 303, *Injunctions*], or declaratory relief [*Code Civ. Proc. § 1060 et seq.*; *see* Ch. 182, *Declaratory Relief*] for the purpose of obtaining a

judicial determination that an action taken in violation of the Act's open meeting requirement [*Gov. Code § 11123(a)*; *see § 470B.20*] or notice requirement [*Gov. Code § 11125*] is void [*Gov. Code § 11130.3(a)*; *North Pacifica LLC v. California Coastal Commission (2008) 166 Cal. App. 4th 1416, 1427-1429, 83 Cal. Rptr. 3d 636* (developer properly challenged commission by seeking a writ of mandamus under code *Civ. Proc. § 1085* (ordinary mandamus), declaratory relief, and an injunction under *Gov. Code § 11130.3*; developer was not required to file a writ of administrative mandate under *Code Civ. Proc. § 1094.5*)]. The lawsuit must be filed within 90 days from the date the action was taken [*Gov. Code § 11130(a)*; *see also* 1999 Stats., ch. 383, § 6 (1999 amendment changing this limit from 30 to 90 days is intended to supersede *Regents of Univ. of Cal. v. Superior Court (1999) 20 Cal. 4th 509, 530-532, 85 Cal. Rptr. 2d 257, 976 P.2d 808* , holding that action under *Gov. Code § 11130.3(a)* is limited by the former 30-day limit)]. The Act specifically provides that the state body may cure or correct the challenged action [*Gov. Code § 11130.3(a)*]. A court will not find the state body's action to be void, however, if any of the following conditions exist [*Gov. Code § 11130.3(b)*]:

- The action was taken in connection with the sale or issuance of notes, bonds, or other evidences of indebtedness, or any contract, instrument, or agreement related thereto [*Gov. Code § 11130.3(b)(1)*].

- The action gave rise to a contractual obligation on which a party has, in good faith, detrimentally relied [*Gov. Code § 11130.3(b)(2)*].

- The action was in substantial compliance with the open meeting [*Gov. Code § 11123*] or notice [*Gov. Code § 11125*] requirements [*Gov. Code § 11130.3(b)(3)*; *North Pacifica LLC v. California Coastal Commission (2008) 166 Cal. App. 4th 1416, 1431-1434, 83 Cal. Rptr. 3d 636* (Commission's failure to give 10-day notice of public hearing to developer (who received actual notice six days before hearing) substantially complied [*Gov. Code § 11130.3(b)(3)*] with the obligations of the Bagley Keene Open Meetings Act statute because the Commission staff made a good faith effort to notify interested persons and the public about the date and time of the hearing. Furthermore, the developer failed to show prejudice from the Commission's failure to provide timely notice of the public hearing. Therefore, the Commission's actions taken at the public hearing were not invalid or nullified for failure to comply with the requirements of the Bagley Keene Open Meetings Act)].

- The action was taken in connection with the collection of any tax [*Gov. Code § 11130.3(b)(4)*].

For an example of a complaint for declaratory relief pursuant to *Gov. Code § 11130.3*, see *§ 470B.60*. For a discussion of judicial review proceedings, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

[3] Attorneys' Fees and Costs

The court may award court costs and reasonable attorneys' fees to the plaintiff in a lawsuit brought to declare an action to be in violation of the Act [*Gov. Code § 11130*] or to declare the action taken to be void [*Gov. Code § 11130.3*] when it can be shown that the state body has in fact violated provisions of law [*Gov. Code § 11130.5*]. The costs and fees must be paid by the state body, and will not become a personal liability of any public officer or employee of the state body [*Gov. Code § 11130.5*]. Courts may award court costs and reasonable attorneys' fees to a defendant in either kind of action, however, when (1) the defendant has prevailed in a final determination of the lawsuit, and (2) the court finds that the action was clearly frivolous and totally lacking in merit [*Gov. Code § 11130.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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& FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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[Reserved]

§§ 470B.26[Reserved]

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41-470B California Forms of Pleading and Practice--Annotated § 470B.30

§ 470B.30 Open Meeting Laws Governing the State Legislature

[1] General Requirements

Under legislation passed in 1989, various provisions and cases concerning open meetings and executive sessions of the Assembly and Senate, and their committees, subcommittees, and conference committees, were consolidated under *Gov. Code § 9027 et seq.* Before January 1, 1990, the applicable laws concerning open meetings of the State Legislature were found in the Grunsky-Burton Open Meeting Act [*see* former *Gov. Code §§ 9027-9031*], and the Legislative Reform Act of 1983 [*see* former *Gov. Code §§ 9926-9929.5*; *see also People's Advocate, Inc. v. Superior Court (1986) 181 Cal. App. 3d 316, 226 Cal. Rptr. 640]* .

[2] Place and Time of Meeting

The California Legislature is required to convene in regular sessions in Sacramento at 12p.m. on the first Monday in December of each even-numbered year [*Gov. Code § 9020*]. At that time, each legislative house is required to organize itself [*Gov. Code § 9020*]. Unless otherwise excepted [*see* [3], *below*], all meetings of the Assembly and Senate, and their committees, must be open and public [*Gov. Code § 9027*]. Any meeting that is required to be conducted openly must be held after full and timely notice to the public [*Gov. Code § 9028*].

[3] Closed Sessions

The Assembly and Senate, and their committees, may hold a closed session solely to consider or hold hearings on any of the following matters [*Gov. Code § 9029(a)*]:

- The appointment, employment, evaluation of performance, or dismissal of a public officer or employee [*Gov. Code § 9029(a)(1)*];

- Complaints or charges brought against a member of the Legislature or other public officer or employee [*Gov. Code § 9029(a)(1)*];

- Establishment of the classification or compensation of an employee of the Legislature [*Gov. Code § 9029(a)(1)*];

- Matters affecting the safety and security of members of the Legislature or its employees or the safety and security of any buildings and grounds used by the Legislature [*Gov. Code § 9029(a)(2)*]; or

- Conferences with, or receipt of advice from, legal counsel regarding pending or reasonably anticipated litigation [*see Gov. Code § 9029.5(d)* (definition)] when discussion in open session would not protect the interests of the house or committee regarding the litigation [*Gov. Code § 9029(a)(3)*; *see Gov. Code § 9029.5* (circumstances allowing closed session concerning litigation)].

Additionally, a caucus of the members of the Assembly or Senate, or both, which is composed of members of the same political party, may meet in closed session [*Gov. Code § 9029(b)*].

[4] Civil Remedies

Any interested person may seek mandamus [*Code Civ. Proc. § 1084*; *see* Ch. 358, *Mandate and Prohibition*], injunction [*Civ. Code § 3420 et seq.*; *Code Civ. Proc. § 525 et seq.*; *see* Ch. 303, *Injunctions*], or declaratory relief [*Code Civ. Proc. § 1060 et seq.*; *see* Ch. 182, *Declaratory Relief*] in order to stop or prevent violations or threatened violations of the open meeting requirements by members of the Legislature, or to determine the applicability of the open meeting requirements to actions or threatened future action of the Legislature or any of its committees [*Gov. Code § 9031*]. For a discussion of judicial review, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 470B.31 Open Meeting Laws Governing School Boards

[1] Governing Law

Both the Ralph M. Brown Act (Brown Act) [*Gov. Code § 54950 et seq.*] and provisions of the Education Code require the meetings of the governing board of any school district to be open to the public [*Educ. Code § 35145*; *see § 470B.10* et seq. for a discussion of the Brown Act]. *Educ. Code § 35145* requires all meetings of the governing board of any school district to be open to the public and conducted in accordance with the Brown Act [*Educ. Code § 35145*; *see Gov. Code § 54950 et seq.* (Brown Act); *see also § 470B.10* et seq.]. The meetings of school site councils and schoolsite advisory committees [*see Educ. Code § 35147(b)*] are not generally subject to the provisions of the open meetings laws [*Educ. Code § 35147(a)*], but these meetings must be open to the public with required notices of the meetings and posted agendas [*Educ. Code § 35147(c)*].

[2] Exemptions Allowing Closed Sessions

The Education Code requires the governing board of a school district to hold a closed session when (1) it is considering suspension of or disciplinary action (other than expulsion) against a student, and (2) a public hearing would lead to the disclosure of pupil records required to be kept confidential pursuant to *Educ. Code § 49073 et seq.* [*Educ. Code § 35146* (also providing that the requirement applies notwithstanding the provisions of the Brown Act, *Gov. Code § 54950 et seq.*; *see also* discussion in *§ 470B.13[8]*)]. A session may not be closed if the student's parent has requested an open meeting [*Educ. Code § 35146*; *see* [5], *below*].

[3] Regular Meeting Procedures

[a] Agenda Requirements

School boards must post an agenda at least 72 hours before a regular meeting. The agenda must contain a brief general description of each item of business to be discussed at the meeting and state the time and location of the regular meeting. It must be posted in a location that is freely accessible to members of the public [*Educ. Code § 35145(b)*; *Gov. Code § 54954.2*; *see § 470B.12[2]*].

[b] Public Participation

It is the intent of the Legislature that members of the public be able to place matters directly related to school district business on school board agendas [*Educ. Code § 35145.5*]. Every agenda for regular meetings of school boards must provide opportunities for members of the public to directly address the school board on any item of interest to the public, before or during the school board's consideration of the item, that is within the subject matter jurisdiction of the board [*Educ. Code § 35145.5*]. Governing boards must adopt reasonable regulations to ensure that this intent is carried out. These regulations may specify reasonable procedures to ensure the proper functioning of governing board meetings [*Educ. Code § 35145.5*]. The Legislature's intent, however, does not preclude the taking of testimony at regularly scheduled meetings on matters not on the agenda that any member of the public may wish to bring before the board, if no action is taken by the board on those matters at the same meeting at which the testimony is taken [*Educ. Code § 35145.5*].

[c] Minutes

Minutes must be taken at all meetings to record all actions taken by the governing board. The minutes are public records and must be made available to the public [*Educ. Code § 35145(a)*; *see Gov. Code § 6250* (Public Records Act); *see also* Ch. 470C, *Public Records Act*].

[4] Special Meeting Procedures

The presiding officer of the governing board of a school district or a majority of the board's members may call a special meeting at any time by delivering personally or by mail a written notice to each member of the board, and by delivering a copy to each local newspaper of general circulation, radio, or television station that has requested notice in writing [*Educ. Code § 35144*]. The notice must specify the time and place of the special meeting and the business to be transacted. No other business may be considered other than that specified in the notice [*Educ. Code § 35144*]. Written notice may be dispensed with as to any member who, at or prior to the time the meeting convenes, files a written waiver of notice (which may be a telegram) with the clerk or secretary of the board. Written notice may also be dispensed with as to any member who is actually present at the meeting when it convenes [*Educ. Code § 35144*]. The call and notice must also be posted at least 24 hours before the special meeting in a location that is freely accessible to members of the public and district employees [*Educ. Code § 35144*].

[5] Closed Session Procedures

As mentioned in [2], *above*, the authority of *Educ. Code § 35146* to permit a closed session is subject to question. This section requires that before calling a closed session the governing board of the district must notify the pupil and his or her parent or guardian if the pupil is a minor by registered or certified mail or personal service of its intent to call and hold a closed session. Unless the pupil or his or her parent or guardian makes a written request within 48 hours after receipt of notice that the hearing be held as a public meeting, the hearing will be conducted by the governing board in closed session [*Educ. Code § 35146*]. If a written request for an open meeting is served on the clerk or secretary of the governing board, the meeting will be public; however, any discussion that might conflict with any other pupil's right to privacy will take place in closed session. Whether the matter is considered at a closed session or a public meeting, the final action of the governing board must be taken at a public meeting, and the result of that action will be a public record of the school district [*Educ. Code § 35146*].

[6] Civil Enforcement

Any interested person may commence an action in mandamus [*Code Civ. Proc. § 1084 et seq.*; *see* Ch. 358, *Mandate and Prohibition*], or injunction [*Civ. Code § 3420 et seq.*; *Code Civ. Proc. § 525 et seq.*; *see* Ch. 303, *Injunctions*] for the purpose of obtaining a judicial determination that any action taken by the governing board in violation of the Education Code provisions is void [*Educ. Code § 35145(b)*; *see Gov. Code § 54960.1*; *see also § 470B.15[2]*]. For a

discussion of judicial review in general, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

Legal Topics:

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[Reserved]

§§ 470B.32[Reserved]

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§ 470B.40 Matthew Bender Publications

Forms for drafting memoranda of points and authorities for use in judicial review under the writ of ordinary mandamus and the writ of prohibition. california points and authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender)

Forms for drafting memoranda of points and authorities for use in judicial review under the writ of administrative mandamus. california points and authorities, Ch. 195, *Public Administrative Law* (Matthew Bender)

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§ 470B.41 State Statutes

Meetings of local educational agencies. *Educ. Code § 35140 et seq.*

Director of state department as permitted to designate deputy to act in his or her place at agency meetings. *Gov. Code § 7.5*

Constitutional officers as permitted to designate deputies to represent them at agency meetings. *Gov. Code § 7.6*

Meyers-Milias-Brown Act (meetings of public employers and employees to consult on employment, in lieu of collective bargaining). *Gov. Code § 3500 et seq.*

News coverage of agency meetings. *Gov. Code §§ 6090, 6091*

Bailey-Keene Open Meeting Act (meetings of state bodies). *Gov. Code § 11120 et seq.*

Ralph M. Brown Act (meetings of local agencies). *Gov. Code § 54950 et seq.*

Complete, faithful, and uninterrupted compliance with Ralph M. Brown Act as of overriding public importance. *Gov. Code § 54954.4(c)*

Open meeting requirements for meetings of governing board of community college districts. Gov. Code §§ 72121, 72129

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 470B.42 Decisions

[1] General

Advisory committee with less than quorum of members of governing board was not "legislative body" under former *Gov. Code § 54952.3*, repealed effective April 1, 1994, and was therefore excluded from open meeting requirements of *Brown Act. Freedom Newspapers, Inc. v. Orange County Employees Retirement System (1993) 6 Cal. 4th 821, 824, 25 Cal. Rptr. 2d 148, 863 P.2d 218*

Adjournment of local agency meeting to another time or place did not change character of meeting. *Redondo Beach v. Barkley (1907) 151 Cal. 176, 180, 90 P. 452*

Public officer who is ex officio member of board, commission, etc., exercising legislative or quasi-judicial functions is not permitted to act through deputy. *Webster v. Board of Education (1903) 140 Cal. 331, 332, 73 P. 1070*

Action taken without meeting is voidable if statute specifically requires meeting. *People v. Dunn (1891) 89 Cal. 228, 230, 26 P. 761*

Deliberative gatherings include meetings not only for collective decisionmaking, but also for the collective acquisition and exchange of facts preliminary to the ultimate decision. *Frazer v. Dixon Unified School Dist. (1993) 18 Cal. App. 4th 781, 794, 22 Cal. Rptr. 2d 641*

Fact that members of advisory task force are also members of Board of Supervisors does not make task force subject to open meeting provisions of Brown Act unless Board members participate in task force in "official capacity." Determination of whether public official appointed to serve on advisory task force is acting in "official capacity" includes consideration of whether local law or task force bylaws required official to serve on task force, and whether official was appointed to represent interest of its appointing entity. *Farron v. City and County of San Francisco (1989) 216 Cal. App. 3d 1071, 1075-1076, 265 Cal. Rptr. 317*

Nonprofit public benefit corporation operating hospital owned by local hospital district is not required to comply with

open meeting requirements of *Ralph M. Brown Act. Yoffie v. Marin Hospital Dist. (1987) 193 Cal. App. 3d 743, 755-756, 238 Cal. Rptr. 502*

Meeting is assemblage of several persons rather than single person acting alone. *Wilson v. San Francisco Mun. Ry. (1973) 29 Cal. App. 3d 870, 879-880, 105 Cal. Rptr. 855*

Meeting is both informal session for discussion and formal assembly for purpose of taking action. *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors (1968) 263 Cal. App. 2d 41, 50-51, 69 Cal. Rptr. 480*

[2] Agenda

Newspaper article about upcoming meeting is not substitute means of complying with agenda-posting requirement. *Santa Barbara Sch. Dist. v. Superior Court (1975) 13 Cal. 3d 315, 337, 118 Cal. Rptr. 637, 530 P.2d 605*

Consideration of any matter not shown in substance on posted agenda requires amendment of agenda and postponement of meeting, where law requires publicizing of agenda. *Santa Barbara Sch. Dist. v. Superior Court (1975) 13 Cal. 3d 315, 336, 118 Cal. Rptr. 637, 530 P.2d 605*

[3] Executive Sessions

Executive session is permitted under *Gov. Code § 54957* to evaluate employees performance but not to discuss salary. *San Diego Union v. City Council (1983) 146 Cal. App. 3d 947, 955-956, 196 Cal. Rptr. 45*

Executive session with county counsel did not violate Ralph M. Brown Act when purpose was to discuss possible litigation, and thus attorney-client privilege was applicable. *Sutter Sensible Planning, Inc. v. Board of Supervisors (1981) 122 Cal. App. 3d 813, 824, 176 Cal. Rptr. 342*

Gov. Code § 54950, requiring all meetings of legislative body of local agency to be open and public, provides basis for injunction restraining board of education and superintendent from meeting in closed sessions with prospective contractors and real estate specialists to discuss their qualifications to perform services. Prospective employees are independent contractors not subject to *Gov. Code § 54957*, which excepts evaluation of public employees from open meeting requirements. *Rowen v. Santa Clara Unified School Dist. (1981) 121 Cal. App. 3d 231, 234-236, 175 Cal. Rptr. 292*

[4] Labor Matters

Provisions of city charter giving civil service commission authority to reclassify and reallocate employment positions in city government does not conflict with meet and confer requirements of *Gov. Code § 3500 et seq.* *Building Material & Construction Teamsters' Union v. Farrell (1986) 41 Cal. 3d 651, 664-666, 224 Cal. Rptr. 688, 715 P.2d 648*

Meet-and-confer requirement of Meyers-Milias-Brown Act (*Gov. Code §§ 3500-3510*) is not inconsistent with county charter provision requiring civil service commission to hold public hearings before amending its rules and does not offend home-rule provisions of *Cal. Const., art. XI, § 3(a)*. *Los Angeles County Civil Service Comm'n v. Superior Court (1978) 23 Cal. 3d 55, 59, 151 Cal. Rptr. 547, 588 P.2d 249*

Requiring city through chief of police to meet in accordance with *Gov. Code § 3500 et seq.* prior to change of department rules or policies is valid provision in collective bargaining agreement. *Long Beach Police Officer Ass'n v. City of Long Beach (1984) 156 Cal. App. 3d 996, 1000, 203 Cal. Rptr. 494*

County does have duty to meet and confer pursuant to *Gov. Code § 3505* prior to changing working hours of county employees despite county's power to make change in hours because of provision of collective bargaining agreement. Union did not waive right to meet and confer under either clear and unmistakable relinquishment standard or totality of circumstances standard. *Independent Union of Pub. Service Employees v. County of Sacramento (1983) 147 Cal. App. 3d 482, 487-488, 195 Cal. Rptr. 206*

[5] Minutes

Keeping minutes is not constitutionally required except to extent record is required when action taken that affects individual's fundamental rights. *Kwock Jan Fat v. White (1919) 253 U.S. 454, 464, 40 S. Ct. 566, 64 L. Ed. 1010*

Failure to take minutes is not ground for invalidating action in absence of statutory requirement for minutes. *Gordon v. San Diego (1895) 108 Cal. 264, 269, 41 P. 301*

Events at meeting are provable by parol evidence in absence of minutes unless statute makes minutes only evidence of those events. *Gordon v. San Diego (1895) 108 Cal. 264, 269, 41 P. 301* ; *Carruth v. Madera (1955) 233 Cal. App.2d 688, 692-693, 43 Cal. Rptr. 855* ; *McFayden v. Calistoga (1925) 74 Cal. App. 378, 386, 240 P. 523*

Requirement to take minutes is generally directory rather than mandatory. *Carruth v. Madera (1965) 233 Cal. App. 2d 688, 693, 43 Cal. Rptr. 855*

Minutes are admissible to prove truth of matters set out in them, subject to rebuttal by other evidence. *Le Strange v. City of Berkeley (1962) 210 Cal. App. 2d 313, 327, 26 Cal. Rptr. 550*

Agency is entitled to amend minutes for correction. *Golden State Milk Products Co. v. Southern Sierras Power Co. (1931) 117 Cal. App. 121, 124, 3 P.2d 352*

[6] Notice Requirements

Test for sufficiency of notice is whether or not persons vitally interested in proposed action received fair warning. *Santa Barbara Sch. Dist. v. Superior Court (1975) 13 Cal. 3d 315, 334-336, 118 Cal. Rptr. 637, 530 P.2d 605*

Consequences of failure to comply with notice requirements are nothing more than liability for criminal sanctions. *Greer v. Board of Education (1975) 47 Cal. App. 3d 98, 122, 121 Cal. Rptr. 542* ; *Stribling v. Mailliard (1970) 6 Cal. App. 3d 470, 474-475, 85 Cal. Rptr. 924* ; *Old Town Development Corp. v. Urban Renewal Agency (1967) 249 Cal. App. 2d 313, 329, 57 Cal. Rptr. 426* ; *Claremont Taxpayers Ass'n v. Claremont (1963) 223 Cal. App. 2d 589, 593, 35 Cal. Rptr. 907* ; *Adler v. City Council (1960) 184 Cal. App. 2d 763, 774-775, 7 Cal. Rptr. 805*

Agency is not required to give more detailed notice than law requires. *Phillips v. Seely (1974) 43 Cal. App. 3d 104, 120, 117 Cal. Rptr. 863*

Action taken at meeting held without adequate notice is subject to injunction preventing agency from giving effect to decision. *Carlson v. Unified Sch. Dist. (1971) 18 Cal. App. 3d 196, 199-200, 95 Cal. Rptr. 650*

Failure to comply with notice requirements imposed by law renders meeting void unless each absent member properly waived right to receive notice. *Baumgardner v. City of Hawthorne (1951) 104 Cal. App. 2d 512, 514-515, 231 P.2d 864* ; *McFayden v. Calistoga (1925) 74 Cal. App. 378, 383, 240 P. 523* ; Reclamation Dist. No. 70 v. *Sherman (1909) 11 Cal. App. 399, 413, 105 P. 277* (dictum suggesting peculiar compelling facts might excuse inadequate notice)

Action taken at meeting not attended by some members because of inadequate notice was not subject to validation by ratification at later meeting. *Orange v. Clement (1919) 41 Cal. App. 497, 499, 183 P. 189*

[7] Procedures

Agency is empowered to adopt any suitable mode of proceeding at meeting in absence of controlling statute prescribing mode of proceeding. *McGregor v. Board of Trustees (1911) 159 Cal. 441, 446, 114 P. 566*

Brown Act was not violated by procedure of local housing authority when commissioners met in regular meeting, recessed for conference with counsel, and then reconvened to act on matter not listed on agenda, even though interested members of public audience left at recess, because usual practice had been to adjourn after conference with counsel. *Torres v. Board of Commissioners (1979) 89 Cal. App. 3d 545, 551, 152 Cal. Rptr. 506*

Necessity that prescribed formalities for meeting be complied with to take effective action. *Santa Monica Unified Sch. Dist. v. Persh (1970) 5 Cal. App. 3d 945, 952, 85 Cal. Rptr. 463* ; *Osborne v. Huntington Beach Union High School Dist. (1970) 5 Cal. App. 3d 510, 514, 85 Cal. Rptr. 793*

Substantial, not strict, compliance with prescribed formalities is sufficient. *Carruth v. Madera (1965) 233 Cal. App. 2d 688, 693, 43 Cal. Rptr. 855* ; *Cozzolino v. Fontana (1955) 136 Cal. App. 2d 608, 611-612, 289 P.2d 248* ; *Pasadena v. Paine (1954) 126 Cal. App. 2d 93, 96, 271 P.2d 577*

[8] Public Attendance

Executive session is continuation of meeting outside presence of public. *Edgar v. Oakland Museum Advisory Comm'n (1973) 36 Cal. App. 3d 73, 75, 111 Cal. Rptr. 364*

Personnel Board is entitled to deliberate on state civil service matter in executive session but as required to announce decision publicly. *California State Employees Ass'n v. State Personnel Bd. (1973) 31 Cal. App. 3d 1009, 1012-1013, 108 Cal. Rptr. 57*

Single agency official acting alone does not conduct meeting and open meeting laws are inapplicable. *Wilson v. San Francisco Mun. Ry. (1973) 29 Cal. App. 3d 870, 877-880, 105 Cal. Rptr. 855*

Agency member participating in illegal secret meeting is subject to criminal sanction only if action actually taken at meeting, not if meeting devoted solely to deliberation. *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors (1968) 263 Cal. App. 2d 41, 48, 69 Cal. Rptr. 480*

Agency is required to permit public audience to record meeting if recording done in nondisruptive manner. *Nevens v. Chino (1965) 233 Cal. App. 2d 775, 778, 44 Cal. Rptr. 50*

[9] Quorum

[a] Number Required for Quorum

Common-law rule requires simple majority for quorum. *FTC v. Flotill Products (1967) 389 U.S. 179, 183, 88 S. Ct. 401, 19 L. Ed. 2d 398*

Quorum is least number legally competent to transact business together. *Nesbitt v. Bolz (1939) 13 Cal. 2d 677, 679-680, 91 P.2d 879* ; *People v. Dale (1947) 79 Cal. App. 2d 370, 375, 179 P.2d 870*

Statutory requirement of majority quorum means simple majority. *People v. Hecht (1895) 105 Cal. 621, 627, 38 P. 941* ; *Ursino v. Superior Court (1974) 39 Cal. App. 3d 611, 620, 114 Cal. Rptr. 404*

Simple majority constitutes quorum when authorizing statute does not define quorum or specify number of people who need to concur in decision. *People v. Hecht (1895) 105 Cal. 621, 627, 38 P. 941* (citing former Pol. Code § 15, *now see Code Civ. Proc. § 15*; *Civ. Code § 12*); *Ford v. Civil Serv. Comm'n (1958) 161 Cal. App. 2d 692, 697, 327 P.2d 148* (citing *Civ. Code § 12*; *Code Civ. Proc. § 15*)

Assembling of quorum is necessary to enable agency to proceed with official business. *Ursino v. Superior Court (1974) 39 Cal. App. 3d 611, 621, 114 Cal. Rptr. 404*

Statutory requirement for concurrence of specified number in any decision makes that number a quorum if quorum not specifically defined. *Ursino v. Superior Court (1974) 39 Cal. App. 3d 611, 620, 114 Cal. Rptr. 404* ; *People v. Dale (1947) 79 Cal. App. 2d 370, 375, 179 P.2d 870*

[b] Number Required for Action

Common-law rule requires concurrence of at least majority of quorum for any decision. *FTC v. Flotill Products (1967) 389 U.S. 179, 183-184, 88 S. Ct. 401, 19 L. Ed. 2d 398*

Common-law rule applied in absence of contrary statutory provision. *Nesbitt v. Bolz (1939) 13 Cal. 2d 677, 679, 91 P.2d 879* ; *People ex rel. Hoffman v. Hecht (1895) 105 Cal. 621, 628, 38 P. 941* ; *People v. Harrington (1883) 63 Cal. 257, 260* ; *Ursino v. Superior Court (1974) 39 Cal. App. 3d 611, 620, 114 Cal. Rptr. 404* ; *Saks & Co. v. Beverly Hills (1951) 107 Cal. App. 2d 260, 265, 237 P.2d 32* ; *Martin v. Ballinger (1938) 25 Cal. App. 2d 435, 437, 77 P.2d 888*

Requirement for unanimous concurrence satisfied when all who were members at the time concurred, even though there was a vacancy in membership. *People v. Bank of San Luis Obispo (1908) 154 Cal. 194, 202, 97 P. 306*

Participation in meeting by person not qualified to vote is immaterial when required number of qualified votes cast. *People ex rel. State Lands Comm'n v. Superior Court (1974) 36 Cal. App. 3d 727, 744, 111 Cal. Rptr. 733*

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§ 470B.43 Attorney General Opinions

Committee formed by school district board of trustess to interview candidates for district superintendent could meet in closed session to conduct interview process, and to make recommendation of candidates to board (*Gov. Code § 54957*). *80 Ops. Cal. Atty. Gen. 308 (1997)*

Student body association of community college district is subject to open meeting requirements of Brown Act (*Gov. Code § 54950 et seq.*). *75 Ops. Cal. Att'y Gen. 143, 147-148 (1992)*

Meetings of task force comprised of private citizens appointed by and operating under direction of State Insurance Commissioner and created to render advice on public policy issues is not required to be open to public. *75 Ops. Cal. Att'y Gen. 263, 269-270 (1992)*

Legislative body of public agency may, at times, limit length of individual public testimony. *75 Ops. Cal. Att'y Gen. 89 (1992)*

Extent to which charter city may regulate communication between elected city officials and city employees or their representatives. *74 Ops. Cal. Att'y Gen. 42 (1991)*

Brown Act (*Gov. Code § 54950 et seq.*) requires deliberations of hearing board of air pollution control district, after certain public hearings, to be conducted in public. *71 Ops. Cal. Att'y Gen. 96 (1988)*

Adjudicatory proceeding exception to open meeting law (*Gov. Code § 54956.9*) properly invoked by city council to hold closed session meetings with its city attorney regarding proposed or tentative cease and desist order issued by regional water quality control board, even though one city agency already discussed order in open session. *69 Ops. Cal. Att'y Gen. 232 (1986)*

Posting public notices pursuant toGov. Code § 54974 is not required when city council of general law city fills unscheduled vacancy on city council by appointment; posting as required for filling of such vacancies on boards,

commissions, and committee for which legislative body has appointing power. *68 Ops. Cal. Att'y Gen. 122 (1985)*

California Commission on the Status of Women is not authorized to elect officers by secret or mail ballot, because of violations of Bagley-Keene Open Meeting Act. Legislative members of Commission are not authorized to send proxies to vote in their place when they cannot attend meeting. *68 Ops. Cal. Att'y Gen. 65 (1985)*

California Transportation Commission is not authorized to conduct interviews and reach decision regarding choice of executive director in closed session. However, potential candidates are able to be "screened" in closed session by advisory committee. *68 Ops. Cal. Att'y Gen. 34 (1985)*

Financial statements requested and received by county from potential bidders for refuse disposal contracts are confidential and not open to public when they are examined by committee of board of supervisors at meeting subject to Brown Act. 68 Ops. Cal. Att'y Gen. 16 (1985)

Closed session meetings of Airport Advisory Committee with counsel. *67 Ops. Cal. Att'y Gen. 111 (1984)*

"Specific agenda" requirements of Bagley-Keene Open Meeting Act. 67 Ops. Cal. Att'y Gen. 84 (1984)

Provisions of Bagley-Keene Open Meeting Act are inapplicable to bodies advising Regents of University of California or exercising authority delegated them by Regents. 66 Ops. Cal. Att'y Gen. 458 (1983)

Brown Act is inapplicable to retirement board meeting that involves discussion of medical records submitted in connection with disability retirement application. *65 Ops. Cal. Att'y Gen. 412, 414-415 (1982)*

Series of closed meetings between members of city council and citizens having business matters pending before council is violation of Ralph M. Brown Act when information regarding those matters is gathered or conveyed and meetings are held on successive dates and planned to insure no quorum of council will be present at any one meeting. *65 Ops. Cal. Att'y Gen. 63 (1982)*

Regents of the University of California are not subject to provisions of Bagley-Keene Open Meeting Act. *Cal. Const., Art IX, § 9(g)* and *Educ. Code § 92030* are not applicable to bodies that advise or exercise authority delegated to them by the Regents. 64 Ops. Cal. Att'y Gen. 875 (1981)

Applicability of open meeting requirements of Ralph M. Brown Act to meetings of SOFAR [South Fork of the American River] project. Coordinating Committee (composed of less than quorum of governing board of county water agency and less than quorum of independent board of irrigation district) is dependent on resolution of factual question of whether coordinating committee is in fact two subcommittees of the parent bodies ("less than a quorum" exception to open meeting requirement is applicable) or a single committee having independent existence, duties, and functions (open meeting requirements is applicable). *64 Ops. Cal. Att'y Gen. 856 (1981)*

Public does have right to inspect and receive copies of authorized tape recording of city council meeting made by city clerk to facilitate preparation of minutes. Destruction of such tape is authorized at any time if it was made and retained for sole purpose of facilitating preparation of minutes. *64 Ops. Cal. Att'y Gen. 317 (1981)*

Brown Act is violated when members of community redevelopment agency or their staffs hold series of closed meetings with city council or planning commission to convey information regarding agency's business, despite absence of quorum of any governmental body at any given meeting. *63 Ops. Cal. Att'y Gen. 153 (1980)*

Under provision of Brown Act, establishment of new administrative positions is not usually proper subject for executive session, but work load that is being performed by individuals who are incumbents of such positions is proper

subject under certain conditions. *63 Ops. Cal. Att'y Gen. 153 (1980)*

Two legislative bodies accompanied by their attorneys are not allowed to meet in executive session to discuss settlement of potential litigation unless matter already privileged or confidential under the provisions of Brown Act. 62 Ops. Cal. Att'y Gen. 150 (1979)

Directors of state departments are only members of California Council on Criminal Justice who may designate alternates to attend meetings for voting and quorum purposes pursuant to *Gov. Code § 7.6*. *62 Ops. Cal. Att'y Gen. 479 (1979)*

Gov. Code § 54956 does not require legislative body of special district to give 24-hour notice of special meeting to local newspaper unless newspaper has requested such notice in advance. *62 Ops. Cal. Att'y Gen. 658 (1979)*

Reasonable charge for mailed notice pursuant to *Gov. Code § 54954.1* is to be based on estimated cost of providing service. *62 Ops. Cal. Att'y Gen. 658 (1979)*

Board of supervisors meeting is not required by Brown Act to adhere to publicly published agenda. Salaries, salary schedules, or fringe benefits are only "meet and confer" subjects authorized to be discussed in executive sessions under the provisions of *Gov. Code § 54957.6* (construing *Gov. Code § 54957.6* prior to 1985 amendment). *61 Ops. Cal. Att'y Gen. 323 (1978)*

Board of supervisors or district board do not have authority to hold executive session to discuss complaints against their presiding officer before voting in open session as to whether or not he or she should be removed. *61 Ops. Cal. Att'y Gen. 10 (1978)*

"Meet and confer" session held pursuant to *Gov. Code § 3505* between representatives of county employee association and board of supervisors is not required to be open to the public, and there is no legal requirement that tape recording be made of such session. *61 Ops. Cal. Att'y Gen. 1 (1978)*

University of California Regents are permitted to consider subjects enumerated in former *Educ. Code § 23101* (now *Educ. Code § 92030*) at their executive sessions, which are not subject to "secret meeting law." Records of real estate or fiscal transaction conducted by Regents at executive sessions are protected from public disclosure until completion of transaction. *58 Ops. Cal. Att'y Gen. 273 (1975)*

Board of supervisors are required to hold regular meetings at county seat. Special sessions and adjourned regular meetings are permitted to be held elsewhere. *58 Ops. Cal. Att'y Gen. 554 (1975)*

Quasi-judicial meetings of county boards of education are required to be public. *57 Ops. Cal. Att'y Gen. 189 (1974)*

Meeting of board of supervisors without designated representative to discuss position on labor negotiations are required to be public. *57 Ops. Cal. Att'y Gen. 209 (1974)*

Brown Act is inapplicable to meetings of local admissions committee of county's superintendent of schools. *56 Ops. Cal. Att'y Gen. 14 (1973)*

Concurrence by majority of entire board of directors is necessary for action of county water district. *55 Ops. Cal. Att'y Gen. 26 (1972)*

Deputy is permitted to represent county treasurer on county employees' retirement board in both ministerial and discretionary matters. *52 Ops. Cal. Att'y Gen. 75 (1969)*

Executive session of local agency on labor matters is permissible after intervention of state conciliator. *51 Ops. Cal. Att'y Gen. 201 (1968)*

Deputies of ex officio members of State Teachers' Retirement Board are permitted to participate in board meetings to same extent as ex officio members themselves. Superintendent of Public Instruction and Controller are prohibited from both being represented by deputies at same meeting. *50 Ops. Cal. Att'y Gen. 120 (1967)*

Requirement that representative of organization appearing before public body identify all members of organization is constitutionally impermissible absent compelling interest. *46 Ops. Cal. Att'y Gen. 4 (1965)*

Members of press are barred from local agency executive session on personnel matter. *46 Ops. Cal. Att'y Gen. 34 (1965)*

Minutes of school board executive sessions on personnel matters are unavailable for public inspection absent majority vote of board. *44 Ops. Cal. Att'y Gen. 147 (1964)*

Local agency luncheon meetings are required to be public. *43 Ops. Cal. Att'y Gen. 36 (1964)*

Local agencies are required to hold executive sessions only during regular or special meetings for which notice has been given. *43 Ops. Cal. Att'y Gen. 79 (1964)*

Briefing sessions of local public officers are required to be public. *42 Ops. Cal. Att'y Gen. 61 (1963)*

City council is permitted to hold executive session to fill council vacancy. *40 Ops. Cal. Att'y Gen. 4 (1962)*

California Association of Port Authorities, organized under Federal law, is not subject to Brown Act. 39 Ops. Cal. Att'y Gen. 94 (1962)

Tape recordings of city council meetings are subject to public right of reasonable access and inspection. *39 Ops. Cal. Att'y Gen. 298 (1962)*

Board of supervisors are authorized to forbid radio broadcast of meeting. *38 Ops. Cal. Att'y Gen. 52 (1961)*

Executive session of city council and city attorney is permissible to discuss pending litigation. *36 Ops. Cal. Att'y Gen. 175 (1960)*

Brown Act is inapplicable to local agency committees consisting of less than quorum of members. *32 Ops. Cal. Att'y Gen. 240 (1958)*

Press is entitled to 24-hour notice of any special meeting of whole local public agency. *32 Ops. Cal. Att'y Gen. 240 (1958)*

Minutes of regular or special meetings of local public agency are public records. *32 Ops. Cal. Att'y Gen. 240 (1958)*

Action by two of three members of State Water Rights Board constitutes final action of board as whole. *28 Ops. Cal. Att'y Gen. 259 (1956)*

Resolution requiring citizens attending council meeting to register and remain silent is invalid. *27 Ops. Cal. Att'y Gen. 123 (1956)*

County board of supervisors are required to discuss welfare case records at public meeting, but to conceal identity of applicants for certain types of aid. *22 Ops. Cal. Att'y Gen. 224 (1953)*

Action on parole application is permissible at special meeting held at least 30 days after written notice sent to interested public agencies. *3 Ops. Cal. Att'y Gen. 88 (1944)*

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Livingston, *Organizations and Administrative Practice--A Balance to the Corporate State? 26 Hastings LJ 89 (1974)*

Review of Selected 1973 California Legislation, *5 Pacific LJ 483, 484 (1974)*

Sato, *"Municipal Affairs" in California, 60 Calif L Rev 1055 (1972)*

Note, *Collective Bargaining and the California Public Teacher: Public Meetings Under the Winton Act, 21 Stan L Rev 340, 358 (1969)*

Comment, *Access to Governmental Information in California, 54 Calif L Rev 1650 (1966)*

Herlick, *California Secret Meeting Law*, 37 State BJ 540 (1962)

tenBroek, *Welfare in the 1957 Legislature: Open Meetings, 46 Calif L Rev 331, 352 (1958)*

Pickerell, *Secrecy and the Access to Administrative Records, 44 Calif L Rev 305 (1956)*

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Witkin, California Procedure, vol. 9, *Administrative Proceedings*, §§ 6-8, 10-18, 20-27, 46 (4th ed. 1997)

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§ 470B.46 Internet References

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§ 470B.50 Declaratory Relief for Violation of Open Meeting Law

☐ Prepare complaint [*Gov. Code § 54960*; *see* discussion in *§ 470B.15[2][a]*; for form of complaint for declaratory relief, *see § 470B.60*].

☐ Verify complaint if desired [*see Code Civ. Proc. § 431.30(d)*; *see* discussion in *§ 470B.60[5]*; for form of verification, *see § 470B.61*].

☐ For procedural checklist for preparation of summons, service of summons and verified complaint and filing of verified complaint, see Ch. 2, *Procedural Guide for Civil Actions* .

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§ 470B.51 Injunctive Relief for Violation of Open Meeting Law

☐ Prepare complaint [*Gov. Code §§ 11130, 54960*; *see* discussion in *§ 470B.15[2][a]*; for forms of complaint for injunctive relief, *see §§ 470B.61, 470B.62*].

☐ For procedural checklist for preparation of summons, service of summons and verified complaint and filing of verified complaint, see Ch. 2, *Procedural Guide for Civil Actions* .

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Volume 41: Overview of Public Administrative Law thru Review of Agency Rulemaking-Chs. 470-472B
Chapter 470B PUBLIC AGENCY MEETINGS
PART IV. PROCEDURAL CHECKLIST

41-470B California Forms of Pleading and Practice--Annotated § 470B.52

§ 470B.52 Procedure to Nullify Action Violating Brown Act

[1] Demand to Legislative Body

☐ Prepare demand to legislative body to cure or correct action [*Gov. Code § 54960.1(b)*; *see* discussion in *§ 470B.15[2][b]*].

☐ Make demand in writing.

☐ Describe challenged action and nature of alleged violation.

☐ Make demand either:

☐ Within 90 days from date of challenged action [*Gov. Code § 54960.1(c)*; *see* discussion in *§ 470B.15[2][b]*].

☐ Within 30 days from date of action if action was taken in open session but in violation of *Gov. Code § 54954.2* [*Gov. Code § 54960.1(c)(1)*; *see* discussion in *§ 470B.15[2][b]*].

[2] Complaint for Declaratory and Injunctive Relief

☐ Prepare complaint [*Gov. Code §§ 11123, 11125*; for form of complaint, *see § 470B.62*].

☐ Verify complaint [*see Code Civ. Proc. § 527(a)*; § 470B.62[5]].

☐ File within applicable time period [*Gov. Code § 54960.1(c)(3), (4)*; § 470B.15[2][b]].

☐ For procedural checklist for preparation of summons, service of summons and verified complaint and filing of verified complaint, see Ch. 2, *Procedural Guide for Civil Actions* .

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41-470B California Forms of Pleading and Practice--Annotated §§ 470B.53-470B.59

[Reserved]

§§ 470B.53[Reserved]

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41-470B California Forms of Pleading and Practice--Annotated § 470B.60

§ 470B.60 Complaint for Declaratory Relief--Applicability of Open Meeting Law to State or Local Agency [Gov. Code §§ 11130, 54960]

[1] FORM Complaint for Declaratory Relief--Applicability of Open Meeting Law to State or Local Agency [Gov. Code §§ 11130, 54960]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DECLARATORY RELIEF
Defendant(s).	)	
	)	
	)	

_____

Plaintiff alleges:

1. Plaintiff is _____ [*describe plaintiff's status as interested person if defendants are members of county agency, e.g.*, a citizen resident in _____ County, a qualified elector registered to vote in that county, and a taxpayer in that county].

2. Defendants are the duly _____ [appointed *or* elected], qualified, and acting members of _____ [*specify agency, e.g.*, the _____ County Planning Commission].

3. _____ [*Describe controversy giving rise to action, e.g.*, On June 7, 1997, defendants gave public notice that they would meet on August 9, 1997, as the _____ County Planning Commission to

consider a redevelopment plan for a parcel known as Hillandale in the unincorporated territory of _____ County adjoining the City of _____. On the following day (June 8, 1997) defendants gave public notice that the scheduled meeting would be closed to the public. Thereupon plaintiff sent to defendants a letter protesting that a closed meeting would be in violation of *Sections 54950 et seq. of the Government Code*, the Ralph M. Brown Act, and demanding assurance from defendants that the scheduled meeting would be open in compliance with the requirements of that act. Defendants responded that certain (unspecified) matters would be considered which would bring the meeting within the provisions of Government Code Section 54957 and that, therefore, the meeting would not be open to the public].

4. Plaintiff desires a judicial determination of his/her rights, as an interested citizen, and defendants' duties, under the Ralph M. Brown Act, respecting the scheduled meeting referred to in Paragraph 3.

WHEREFORE, plaintiff prays judgment as follows:

l. For a declaration that the scheduled meeting referred to in Paragraph 3 is subject to the open meetings requirement of the Ralph M. Brown Act, *Sections 54950 et seq. of the Government Code*, and must be open to the public if held;

2. _____ [*Other relief, if desired and supported by appropriate allegations, e.g.,* injunctive relief (*see §§ 470B.61, 470B.62*)];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

The form in [1], *above*, is a complaint for use by an interested person seeking declaratory relief [*see Code Civ. Proc. § 1060 et seq.*] from an alleged violation or threatened violation of open-meeting laws. The complaint asks for a judgment declaring that the particular meeting is subject to the Brown Act and, therefore, must be held open to the public. Any interested person may sue [*Gov. Code §§ 11130* (state agency), 54960 (local agency)]. It has not been determined who is an interested person, but in view of the broad purpose of open-meeting laws [*see Gov. Code §§ 11120, 54950*], probably any citizen may sue respecting an agency meeting that he has a reasonable good-faith interest in attending. It has been suggested that an organization might not have standing to sue [*see Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors (1968) 263 Cal. App. 2d 41, 46, 69 Cal. Rptr. 480]* .

Injunctive relief or mandamus may also be obtained when appropriate [*Gov. Code §§ 11130, 54960*; *see* Civ. Code § 3420 et seq., Code Civ. Proc. § 525 et seq. (injunctive relief); *Code Civ. Proc. § 1084 et seq.* (mandamus)]. For forms of complaints seeking injunctions to prevent a violation of the open meeting laws or to nullify any action taken in violation those laws, see *§§ 470B.61*, *470B.62*, respectively. For a detailed discussion of injunctions, see Ch. 303, *Injunctions* . Regarding a proceeding for a writ of mandate, see Ch. 358, *Mandate and Prohibition* .

[3] Defendants

The defendants will be the members of the agency as such. An appropriate way to identify them in the caption is to list their names with a suitable descriptive phrase indicating that they are sued in their official, not their personal, capacities

(*e.g.*, "... as members of the Bonanza County Planning Commission"). This is an atypical case, the usual case being a lawsuit against the agency rather than the members of it; in this case, the illegal action is threatened, or has been taken, not by the agency but by the individual members, albeit in their official capacities as members.

[4] Allegations

Because the action seeks a declaratory judgment, the allegations should be those included in an ordinary complaint for declaratory relief [*see Code Civ. Proc. § 1060*]. For discussion, see Ch. 182, *Declaratory Relief* . The essential allegation is that an actual controversy exists between the parties as to their legal rights and duties [*Code Civ. Proc. § 1060*].

[5] Verification

A public agency, or any member of that agency acting in his or her official capacity, need not verify the answer even though the complaint is verified [*Code Civ. Proc. § 446(a)*]. However, verification of a complaint against a public agency does preclude a general denial in superior court and in some municipal court actions [*Code Civ. Proc. § 431.30(d)*]. For verification form, see *§ 470B.61*.

[6] Costs and Attorneys Fees

If the plaintiff is successful, he or she might recover his or her costs, which must be paid by the agency and may not be awarded against the individual members [*see Gov. Code §§ 11130.5, 54960.5*]. Attorney's fees probably are not recoverable in an action for declaratory relief only but might be recoverable if injunctive relief is also obtained [*see § 470B.61*]. If the plaintiff does not prevail, costs and attorney's fees might be awarded against him or her [*see Gov. Code §§ 11130.5, 54960.5*].

[7] Cross References

For discussion and forms relating to an action for declaratory relief, see Ch. 182, *Declaratory Relief*

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41-470B California Forms of Pleading and Practice--Annotated § 470B.61

§ 470B.61 Complaint for [Temporary Restraining Order and Preliminary and] Final Injunction--Violation of Open Meeting Law by State or Local Agency [Gov. Code §§ 11130, 54960]

[1] FORM Complaint for [Temporary Restraining Order and Preliminary and] Final Injunction--Violation of Open Meeting Law by State or Local Agency [Gov. Code §§ 11130, 54960]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR [TEMPORARY RESTRAIN-
_____ [*names*],	)	ING ORDER AND PRELIMINARY AND] FINAL
Defendant(s).	)	INJUNCTION(S)
	)	(Open Meeting Law)
	)	

_____

Plaintiff alleges:

1. [*Plaintiff's standing to sue. See § 470B.60, Paragraph 1*].

2. [*Capacities of defendants. See § 470B.60, Paragraph 2*].

3. _____ [*Describe violation or threatened violation of open meeting law to be enjoined, e.g.,* On August 9, 1997, defendants met as the _____ County Planning Commission to consider a redevelopment plan for a parcel known as Hillandale in the unincorporated territory of _____County adjoining the City of _____. Plaintiff was present when the meeting convened and sought to be admitted to the audience as an interested member of the public. Defendants refused to admit plaintiff or any other of the

several (about 30) interested persons who were then and there present seeking admission to the meeting place. Plaintiff protested that defendants' refusal to admit an audience of interested persons was a violation of the provisions of *Government Code Sections 54950 et seq.*, the Ralph M. Brown Act; but defendants persisted in refusing to admit plaintiff or anyone else. Defendants closed and locked the doors of the meeting place and conducted a meeting out of the presence of the public. Following the meeting, defendants posted a notice at the door of the meeting place announcing that the meeting had been ordered continued to September 6, 1997].

4. _____ [*Describe threatened violation if not described in Paragraph 3, e.g.*, Plaintiff has informed defendants that plaintiff wishes to attend the continued meeting on September 6, 1997, as an interested member of the public; and plaintiff has demanded assurance from defendants that the continued meeting will be open in compliance with the provisions of the Ralph M. Brown Act. Defendants have refused to give plaintiff such assurance; on the contrary, they have informed plaintiff that they intend to meet in a closed session on September 6, 1997].

5. Unless defendants are enjoined as plaintiff prays hereinafter, they will meet in a closed session on September 6, 1997, or on some other date, in violation of their obligations and the rights of plaintiff and other members of the public under the Ralph M. Brown Act.

6. _____ [*Allege facts supporting necessity, if any, for provisional injunctive relief, e.g.*, Plaintiff has pursued his/her judicial remedy with all deliberate speed and desires a judgment at the earliest possible date. Nevertheless, it appears that unless defendants are temporarily restrained and provisionally enjoined as plaintiff prays hereinafter, they will convene and conclude a closed meeting before the court can render judgment].

WHEREFORE, plaintiff prays judgment as follows:

1. _____ [*If seeking provisional preventive relief:* For a temporary restraining order and a preliminary injunction restraining and enjoining defendants from holding any meeting, other than one open to the public, for considering or acting on the matter described in Paragraph 3, pending judgment in this action];

2. For a final injunction enjoining defendants from holding any meeting, other than one open to the public, for considering or acting on the matter described in Paragraph 3;

3. For reasonable attorney's fees pursuant to _____ [*Government Code Section 11130.5 or Government Code Section 54960.5 depending on whether agency is state or local*];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____[*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a complaint for use by an interested person seeking an injunction to prevent a violation of an open meeting law [*see Gov. Code §§ 11130* (state agency), 54960 (local agency)]. Actions for injunctive relief are governed by *Civ. Code § 3420 et seq.* and *Code Civ. Proc. § 525 et seq.* If injunctive relief would be inadequate, an interested person may enforce his or her rights under the open meeting laws by obtaining a writ of mandate [*Gov. Code §§ 11130, 54960*]. The procedures for obtaining a writ of mandate are governed by *Code Civ. Proc. § 1084 et seq.*

[3] Allegations

The allegations should be those included in an ordinary complaint for injunctive relief. For detailed discussion, see Ch. 303, *Injunctions* .

[4] Costs and Attorneys Fees

The successful plaintiff may recover his or her costs, which must be paid by the agency and may not be awarded against the individual members [*see Gov. Code §§ 11130.5, 54960.5*]. When it is found that a state or local agency has violated the provisions of an applicable open meeting law, the plaintiff may be awarded reasonable attorney's fees [*Gov. Code §§ 11130.5, 54960.5*]. Threatening to hold a closed meeting in violation of an open meeting law is not itself a violation; only the actual holding of a closed meeting when the law requires an open meeting, is a violation. If either a state body or the legislative body of a local agency holds a closed meeting when an open meeting is required, an interested person may seek nullification of any action taken during that meeting [*see Gov. Code §§ 11123, 11130.3* (state body), and 54953, 54960.1 (legislative body of local agency); *see § 470B.62*].

If the plaintiff does not prevail, costs and attorney's fees may be awarded against him or her if the defendant prevails in a final determination of the action and the court finds the action was clearly frivolous and totally lacking in merit [*see Gov. Code §§ 11130.5, 54960.5*].

The criteria for awarding attorney's fees provided by *Code Civ. Proc. § 1021.5* (enforcement of important right affecting public interest) does not apply to the determination of the propriety of an award of attorney's fees under *Gov. Code § 54960.5*. Under *Gov. Code § 54960.5*, attorney's fees for plaintiff are presumptively appropriate unless defendant can show special circumstances rendering such an award unjust. *Common Cause v. Stirling (1981) 119 Cal. App. 3d 658, 662-663, 174 Cal. Rptr. 200*

[5] Verification

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. Although a public agency, or any member of that agency acting in his or her official capacity, need not verify the answer even though the complaint is verified [*Code Civ. Proc. § 446(a)*], verification of the complaint does preclude a general denial in superior court and in some municipal court actions [*Code Civ. Proc. § 431.30(d)*].

[6] Undertaking for Provisional Relief

A plaintiff who seeks provisional injunctive relief must be prepared to furnish an undertaking to secure the defendant

against any potential injury in the event the court finally decides that the plaintiff was not entitled to provisional relief [*see Code Civ. Proc. § 529*].

[7] Cross References

For discussion and forms relating to actions for injunctive relief and relief in the nature of a writ of mandate, see Ch. 303, *Injunctions* , and Ch. 358, *Mandate and Prohibition*

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41-470B California Forms of Pleading and Practice--Annotated § 470B.62

§ 470B.62 Complaint for Declaratory Relief and for Temporary Restraining Order and Preliminary and Final Injunction--Nullification of Action Taken by State Body or Legislative Body of Local Agency in Violation of Open Meeting Law [Gov. Code §§ 11130.3, 54960.1]

[1] FORM Complaint for Declaratory Relief and for Temporary Restraining Order and Preliminary and Final Injunction--Nullification of Action Taken by State Body or Legislative Body of Local Agency in Violation of Open Meeting Law [Gov. Code §§ 11130.3, 54960.1]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name* (*s*)],	)	COMPLAINT FOR DECLARATORY RELIEF
Defendant(s).	)	AND FOR [TEMPORARY RESTRAINING ORDER
	)	AND PRELIMINARY AND] PERMANENT IN-
	)	JUNCTION(S)

_____

Plaintiff alleges:

1. [*Plaintiff's standing to sue. See § 470B.60, Paragraph 1*].

2. [*Capacities of defendants. See § 470B.60, Paragraph 2*].

3. _____ [*Allege action taken, e.g.,* On _____[*date*], defendants met as the _____(*specify state body or legislative body of local agency*) to consider whether to adopt a plan to _____ (*specify*). Plaintiff was present when the meeting convened and sought to be admitted to the

audience as an interested member of the public. Defendants refused to admit plaintiff or any other of the _____(*approximation of number, e.g.,* several (approximately 30)) interested persons who were then and there present seeking admission to the meeting place. Plaintiff protested that defendants' refusal to admit an audience of interested persons was a violation of the provisions of Section _____ (11123 *or* 54953) of the Government Code, but defendants persisted in refusing to admit plaintiff or anyone else. Defendants closed and locked the doors of the meeting place and conducted a meeting out of the presence of the public. At the meeting, defendants voted to adopt the proposed plan].

[4. On _____[*date*], (*specify date within 30 days from date challenged action was taken*), plaintiff made a written demand of _____ (*specify legislative body of local agency*) to cure or correct _____ (*describe challenged action, e.g.,* the action taken to adopt the plan described above in Paragraph 3).]

[5. _____ (*Allege facts supporting necessity, if any, for provisional injunctive relief, e.g.,* Plaintiff has pursued his/her judicial remedy with all deliberate speed and within _____ (*allege if state agency* 30 days from the date the action by defendants was taken to adopt *or if local agency* 15 days of receipt of defendants' decision not to cure or correct the action taken to adopt) the plan described above in Paragraph 3, and desires a judgment at the earliest possible date. Nevertheless, it appears that unless defendants are temporarily restrained and provisionally enjoined as plaintiff prays hereinafter, they will take further action to enforce the adopted plan that will cause irreparable harm to the plaintiff, including _____).]

WHEREFORE, plaintiff prays judgment as follows:

[1. For a temporary restraining order and a preliminary injunction restraining and enjoining defendants from taking further action to enforce the action taken by defendants as described in Paragraph 3, pending judgment in this action;]

2. For a permanent injunction restraining and enjoining defendants from taking further action to enforce the action taken by defendants as described in Paragraph 3;

3. For a judgment declaring the action taken by defendants as described in Paragraph 3 as null and void;

4. For reasonable attorney's fees pursuant to Section _____ [11130.5 *or* 54960.5]. of the Government Code;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 470B.61*].

[2] Use of Form

[a] State Body

The form in [1], *above,* is a complaint for use by an interested person seeking to nullify an action taken by a state body

in violation of the open and public requirements [*see Gov. Code § 11123*] or the public notice requirements [*see Gov. Code § 11125*] of the open meeting law, and to restrain the state body from taking further action to enforce the unlawful action. The same result may be achieved by obtaining a writ of mandate, which is also available [*Gov. Code § 11130.3*; *see* Ch. 358, *Mandate and Prohibition*].

[b] Legislative Body of Local Agency

This form may also be used by an interested person seeking to nullify an action taken by the legislative body of a local agency in violation of the open and public requirements [*see Gov. Code § 54953*], the regular meeting agenda requirements [*see Gov. Code § 54954.2*], the requirements for describing closed-session items on the agenda [*see Gov. Code § 54954.5*], the new or increased tax or assessment public hearing notice requirements [*see Gov. Code § 54954.6*], the special meeting notice requirements of the Ralph M. Brown Act [*see Gov. Code § 54956*], and to restrain the legislative body from taking further action to enforce the unlawful action [*Gov. Code § 54960.1(a)*]. The same result may be achieved by obtaining a writ of mandate, which is also available [*Gov. Code § 54960.1(a)*; *see* Ch. 358, *Mandate and Prohibition*].

[3] Allegations

Since the action seeks a declaratory judgment and injunctive relief, the allegations should be those included in an ordinary complaint for declaratory and injunctive relief. Actions for declaratory relief are governed by *Code Civ. Proc. § 1060 et seq.* Actions for injunctive relief are governed by *Civ. Code § 3420 et seq.* and *Code Civ. Proc. § 525 et seq.* For detailed discussion, see Ch. 182, *Declaratory Relief* , and Ch. 303, *Injunctions* . When the complaint challenges action taken by the legislative body of a local agency, plaintiff must allege that action was taken within the meaning of *Gov. Code § 54960.1*, as illustrated in Paragraph 3 [Centinela Hospital Assn. v. City of Inglewood (1990) 225 Cal. App. 3d 1586 (petition for writ of mandate); *see Gov. Code § 54952.6* ("action taken" defined for purposes of *Gov. Code § 54960.1*)]. Additionally, when the complaint challenges action taken by the local legislative body, plaintiff should allege that, within 30 days from the date the challenged action was taken, plaintiff made a written demand on the legislative body of the local agency.

[4] Costs and Attorneys Fees

When the action of a state body is challenged, the court may award costs and attorney's fees to the plaintiff if the court finds that the state body violated the open and public requirements [*see Gov. Code § 11123*] or the public notice requirements [*see Gov. Code § 11125*] of the open meeting laws [*Gov. Code § 11130.5*]. When the action of the legislative body of a local agency is challenged, the court may award costs and attorney's fees to the plaintiff if the court finds that the legislative body violated the open and public requirements [*see Gov. Code § 54953*], the regular meeting agenda requirements [*see Gov. Code § 54954.2*], or the special meeting public notice requirements [*see Gov. Code § 54956*] of the Ralph M. Brown Act [*Gov. Code § 54960.5*]. However, the costs and fees must be awarded against the state body, or the legislative body of the local agency, and may not be awarded against its individual members [*Gov. Code §§ 11130.5, 54960.5*]. If the plaintiff does not prevail, costs and attorney's fees may be awarded against him or her if the defendant prevails in a final determination of the action and the court finds the action was clearly frivolous and totally lacking in merit [*Gov. Code §§ 11130.5, 54960.5*].

[5] Verification

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. Although a public agency, or any member of that agency acting in his or her official capacity, need not verify the answer even though the complaint is verified [*Code Civ. Proc. § 446(a)*], verification of the complaint does preclude a general denial in superior court and in some municipal court actions [*Code Civ. Proc. § 431.30(d)*]. For a verification form, see *§ 470B.61*. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts

that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan G. Co. v. San Juan R. etc. Assn. (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* . For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order or preliminary injunction, see Ch 303, *Injunctions* .

[6] Undertaking for Provisional Relief

A plaintiff who seeks provisional injunctive relief must be prepared to furnish an undertaking to secure the defendant against any potential injury in the event the court finally decides that the plaintiff was not entitled to provisional relief [*see Code Civ. Proc. § 529*].

[7] Cross References

For discussion and forms relating to actions for declaratory and injunctive relief and relief in the nature of a writ of mandate, see Ch. 182, *Declaratory Relief* , Ch. 303, *Injunctions* , and Ch. 358, *Mandate and Prohibition*

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Chapter 470C PUBLIC RECORDS ACT

41-470C California Forms of Pleading and Practice--Annotated 470C.syn

§ 470C.syn Synopsis to Chapter 470C: PUBLIC RECORDS ACT

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§ 470C.02 Cross References

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§§ 470C.03-470C.09 [Reserved]

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[1] Purpose of the Act

[2] History of Disclosure

[3] Disclosure Policy

[4] Agencies Subject to the Act

[5] Relationship to Other Disclosure Statutes

[a] Federal Freedom of Information Act

[b] Information Practices Act

[c] Legislative Open Records Act

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[1] Public Records Defined

[2] General Disclosure Policy and Exceptions

[3] Disclosure and Public Officials

[4] Display of Enforcement Order on Internet

[5] Information in Electronic Format

[6] Provision of Public Record to Private Entity

[7] Redaction of Social Security Numbers

[8] Truncation of Social Security Numbers

§ 470C.12 Procedures for Obtaining Records Under the Act

[1] Statutory Procedures

[2] Agency Procedural Regulations for Access to Public Records

[3] Discovery Practice

§ 470C.13 Exemptions from Disclosure

[1] Nature of Exemptions

[2] Waiver of Exemptions

[3] Election Materials

[4] Drafts, Notes, and Memoranda

[5] Litigation Records

[6] Personnel and Medical Records

[7] Financial Institution Records

[8] Geological and Plant Production Data

[9] Law Enforcement Records

[a] Generally

[i] Address of Persons Arrested, Victims, and Witnesses

[ii] Names of Peace Officers

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[11] Real Property Matters

[12] Tax Information

[13] Library Circulation Records

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[20] Health Care Service Provider Records

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[25] Address and Telephone Number Information for Government Employees

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[a] Exemption Not Absolute

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[vi] Attorneys Representing a Client

[36] DMV Test Results

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[41] Private Industry Wage Data

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[43] Home Address or Telephone Number of Public Official

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[45] Securities Brokers' Disciplinary Records

[46] Corporate Financial or Proprietary Information

[47] Local Utility Customer's Data

[48] Board of Control Victim Assistance Records

[49] Federal Insecticide, Fungicide, and Rodenticide Act

[50] Terrorist Attack Risk Assessments

[51] Advanced Health Care Directive Registry Information

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[5] Venereal Disease Records

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§ 470C.15 List of Exempt Records Statutes

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[5] Cable Television Subscriber Information to California Wine Grape Commission

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[11] Gambling Control Act to Guardianship

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[18] Pregnancy Tests to Pupil Records

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[1] FORM

[2] Use of Form

[3] Cross References

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6254.2]

[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Defendants

[4] Allegations

[5] Verification

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[7] Remedies to Compel Disclosure Under State Law

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

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[1] FORM

[2] Use of Form

[3] Verification

[4] Caption and Introduction

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PART I. SCOPE

41-470C California Forms of Pleading and Practice--Annotated § 470C.01

§ 470C.01 Scope of Chapter

This chapter discusses the California Public Records Act, including the following:

- Nature and purpose of the Public Records Act [*Gov. Code § 6250 et seq.*; *see § 470C.10*].
- Disclosure of and procedures for obtaining records under the Act [*see §§ 470C.11 -470C.12*].
- Exemptions from disclosure under the Act [*see § 470C.13*].
- Records exempt under other laws and comparable exemptions under the federal Freedom of Information Act [*see §§ 470C.14 -470C.16*].
- Judicial enforcement of rights under the Act [*see § 470C.17*].

This chapter also includes related a Research Guide [*see § 470C.30* et seq.] and Procedural Checklists [*see § 470C.40* et seq.] and the following related forms:

- Request for public records under *Gov. Code § 6253* [*see § 470C.50*].
- Affirmation of status required for requests made to the Department of Pesticide Regulation under *Gov. Code § 6254.2* [*see § 470C.51*].
- Complaints for declaratory relief [*see § 470C.52*] and for injunctive relief [*see § 470C.53*] to enforce a request for records under the Public Records Act.
- Petition for writ of mandate to enforce request for records under the Public Records Act [*see § 470C.54*].

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§ 470C.02 Cross References

[1] Public Administrative Law Generally

For related general discussion of California public agency functions, powers, restrictions on powers, and organization within the executive branch of state government, see:

- Ch. 470, *Overview of Public Administrative Law*.
- Ch. 470A, *Due Process Restrictions on Public Agencies*.

For discussion and forms related generally to public agency meetings, *see*:

- Ch. 470B, *Public Agency Meetings*.

For discussion and forms relating generally to investigations and inspections by a public agency, *see*:

- Ch. 471, *Investigations by Public Agencies*.
- Ch. 471A, *Inspections by Public Agencies*.

For discussion and forms relating generally to licensing agencies and licensing proceedings, *see*:

- Ch. 471B, *Licensing by Public Agencies*.

For detailed discussion and forms relating generally to rule making functions of public agencies and judicial review of rule making, *see*:

- Ch. 472, *Public Agency Rules*.

- Ch. 472A, *Agency Rulemaking Procedures*.
- Ch. 472B, *Review of Agency Rulemaking*.

For detailed discussion and forms relating generally to the judicial or adjudicatory functions of California public agencies, *see*:

- Ch. 473, *Public Agency Adjudication*.
- Ch. 473A, *Commencing Agency Adjudication*.
- Ch. 473B, *Discovery in Agency Adjudications*.
- Ch. 473C, *Prehearing Procedures in Agency Adjudications*.
- Ch. 473D, *Prehearing Preparation in Agency Adjudications*.
- Ch. 473E, *Public Administrative Law Judges*.
- Ch. 473F, *Agency Adjudication Hearings*.
- Ch. 473G, *Agency Adjudication Decisions*.
- Ch. 473H, *Alternative Procedures for Agency Decisions*.

For detailed discussion and forms relating generally to review by California courts of agency adjudications, *see*:

- Ch. 474, *Availability of Judicial Review of Agency Decisions*.
- Ch. 474A, *Timing of Judicial Review of Agency Decisions*.
- Ch. 474B, *Standards in Reviewing Agency Decisions*.
- Ch. 474C, *Procedures in Reviewing Agency Decisions*.

[2] Judicial Remedies, Procedures, and Review

For discussion and forms relating generally to judicial remedies or review procedures that may be available, *see*:

- Ch. 40, *Appeal: An Overview* through Ch. 54, *Appeal: California Supreme Court Review* (discussion and forms relating to civil appeals).
- Ch. 182, *Declaratory Relief* (discussion and forms relating to action for declaration of rights of respective parties in unlitigated civil controversy).
- Ch. 303, *Injunctions* (discussion and forms relating to injunctive relief generally).
- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to immediate judicial review of orders by extraordinary writ of mandate or prohibition).

[3] Other Chapters Relating to Public Information

- For discussion and forms relating to public information under other statutes, such as the Information Practices Act, *see Ch. 429, Privacy, § 429.60* et seq.

[4] Other Matthew Bender Publications

- For forms for use in drafting memoranda in judicial proceedings to review a public agency decision, *see* California Points and Authorities, Ch. 195, *Public Administrative Law* .

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[Reserved]

§§ 470C.03[Reserved]

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41-470C California Forms of Pleading and Practice--Annotated § 470C.10

§ 470C.10 Nature and Purpose of the Public Records Act

[1] Purpose of the Act

This chapter discusses the California Public Records Act [*Gov. Code §§ 6250-6276.48*] (the Act), the statutory scheme that provides for the disclosure of public records. In adopting the Act in 1968, the California Legislature declared that every person in California has a fundamental and necessary right to access to information concerning the conduct of the people's business. At the same time, the Legislature recognized the right of individuals to privacy [*Gov. Code § 6250*; *Black Panther Party v. Kehoe (1974) 42 Cal. App. 3d 645, 652, 117 Cal. Rptr. 106* ; *Rosenthal v. Hansen (1973) 34 Cal. App. 3d 754, 760, 110 Cal. Rptr. 257]* . The Act's objective is to increase freedom of information, and it is designed to give public access to information in possession of public agencies [*Los Angeles Police Dept. v. Superior Court (1977) 65 Cal. App. 3d 661, 668, 135 Cal. Rptr. 575]* . The disclosure of public records under the Act requires the balancing of two fundamental competing interests: 1) the right of privacy recognized in the California Constitution [*Cal. Const. Art. I, § 1*]; and 2) public access to governmental information to maintain accountability and to prevent secrecy in government [*Versaci v. Superior Ct. (2005) 127 Cal. App. 4th 805, 812-813, 26 Cal. Rptr. 3d 92 , quoting Gilbert v. City of San Jose (2003) 114 Cal. App. 4th 606, 610, 7 Cal. Rptr. 3d 692]* .

[2] History of Disclosure

Under the common law, every interested person was entitled to inspect public records [*Mushet v. Department of Pub. Service (1917) 35 Cal. App. 630, 636, 170 P. 653]* . In addition, for many years California statutes have reflected a strong public policy in favor of disclosure of public records [*see* former *Code Civ. Proc. §§ 1892-1894*, enacted in 1872 and repealed in 1968]. Although constitutional rights to complete disclosure under the *First* and *Fourteenth Amendments to the United States Constitution* have been asserted in order to avoid certain exemptions from public disclosure, judicial decisions have not yet assigned a constitutional ground for this right of access [*EPA v. Mink (1973) 410 U.S. 73, 94, 93 S. Ct. 827, 35 L. Ed. 2d 119* (construing federal *Freedom of Information Act); Black Panther Party v. Kehoe (1974) 42 Cal. App. 3d 645, 654, 117 Cal. Rptr. 106* (construing Public Records Act)].

[3] Disclosure Policy

The general policy of the Act favors disclosure. An agency must find a specific exemption from the general policy [

Gov. Code §§ 6254, 6255; *see also § 470C.13, below*] to avoid disclosure [*Cook v. Craig (1976) 55 Cal. App. 3d 773, 781, 127 Cal. Rptr. 712* ; *State of California ex rel. Division of Industrial Safety v. Superior Court (1974) 43 Cal. App. 3d 778, 783, 117 Cal. Rptr. 726*]. The burden of establishing an exemption is on the public agency [*Gov. Code § 6255*; *Citizens for a Better Environment v. Department of Food & Agriculture (1985) 171 Cal. App. 3d 704, 712, 217 Cal. Rptr. 504* ; *Vallejos v. California Highway Patrol (1979) 89 Cal. App. 3d 781, 787, 152 Cal. Rptr. 846]* . For discussion of the exemptions from disclosure, *see § 470C.13, below*].

[4] Agencies Subject to the Act

Because the general policy of the Act favors disclosure of documents in government possession [*Cook v. Craig (1976) 55 Cal. App. 3d 773, 781, 127 Cal. Rptr. 712]* , the list of public agencies covered by the Act is almost completely inclusive at both the state and local levels. "State agencies" is defined as every state office, officer, department, division, bureau, board, and commission or other state body or agency, except those covered by Article IV (the state Legislature). [However, *Cal. Const. art. IV, § 20*, regarding fish and game districts, is not included within this exception *Gov. Code § 6252(a)*], and Article VI (the judicial department) of the California Constitution [*Gov. Code § 6252(a)*; Cal. Const. arts. IV, VI]. "Local agencies" is defined as a county; city, whether general law or chartered; city and county; school district; municipal corporation; district; political subdivision; any board, commission, or agency thereof; other local public agency; or nonprofit entities that are legislative bodies of a local agency under *Gov. Code § 54952(c), (d)* [*Gov. Code § 6252(a)*]. "Public agency" means any state or local agency [*Gov. Code § 6252(d)*]. However, state university-affiliated, non profit auxiliary corporations established by law [*Educ. Code § 89901*] are not "state agencies" for purposes of the California Public Records Act because they are nongovernmental organizations which are not included within the statutory definition [*Gov. Code § 6252(a)*; *California State University v. Superior Court (2001) 90 Cal. App. 4th 810, 829-830, 108 Cal. Rptr. 2d 870]* .

[5] Relationship to Other Disclosure Statutes

[a] Federal Freedom of Information Act

The Act was modeled after the Federal Freedom of Information Act (FOIA) [*5 U.S.C. § 552*] which was adopted in 1966 [*Citizens for a Better Environment v. Department of Food & Agriculture (1985) 171 Cal. App. 3d 704, 712, 217 Cal. Rptr. 504* ; *Cook v. Craig (1976) 55 Cal. App. 3d 773, 781, 127 Cal. Rptr. 712]* . Although differences exist between the Act and the FOIA [*Black Panther Party v. Kehoe (1974) 42 Cal. App. 3d 645, 652, 117 Cal. Rptr. 106]* ; *Gov. Code § 6252(e)*; *California State University v. Superior Court (2001) 90 Cal. App. 4th 810, 829-830, 108 Cal. Rptr. 2d 870]* , references to the FOIA and to federal cases decided under the FOIA can be used to interpret the Public Records Act [*Times Mirror Co. v. Superior Court (1991) 53 Cal. 3d 1325, 1347, 283 Cal. Rptr. 893, 813 P.2d 240* ; *American Civil Liberties Union Foundation v. Deukmejian (1982) 32 Cal. 3d 440, 447, 186 Cal. Rptr. 235, 651 P.2d 822* ; *Black Panther Party v. Kehoe (1974) 42 Cal. App. 3d 645, 653, 117 Cal. Rptr. 106]* . This ability of the courts to draw on the Act's federal counterpart for judicial construction and legislative history becomes a useful tool when California cases construing the Act are lacking. Both acts reflect a general policy of disclosure that can be accomplished by narrow construction of the statutory exemptions [*South Coast Newspapers, Inc. v. City of Oceanside (1984) 160 Cal. App. 3d 261, 267-268, 206 Cal. Rptr. 527]* . The two statutes should receive a parallel construction [*American Civil Liberties Union Foundation v. Deukmejian (1982) 32 Cal. 3d 440, 451, 186 Cal. Rptr. 235, 651 P.2d 822]* .

For example, in construing the exemption for preliminary drafts, notes, or interagency or intraagency memoranda [*Gov. Code § 6254(a)*; *see § 470C.13[4], below*], the California courts have reviewed the federal FOIA and its construction for guidance [*Citizens for a Better Environment v. Department of Food & Agriculture (1985) 171 Cal. App. 3d 704, 711, 217 Cal. Rptr. 504]* . Similarly, the California Supreme Court has used the federal statute for guidance in construing the criminal investigation records exemption [*American Civil Liberties Union Foundation v. Deukmejian (1982) 32 Cal. 3d 440, 447-449, 186 Cal. Rptr. 235, 651 P.2d 822* ; *Gov. Code § 6254(f)*], and in recognizing a deliberative process interest similar to the executive privilege exemption under the federal FOIA. This deliberative

process interest is recognized under the "public interest" residual exemption that includes a balancing of interests test [*Times Mirror Co. v. Superior Court (1991) 53 Cal. 3d 1325, 1339-1342, 283 Cal. Rptr. 893, 813 P.2d 240* ; § 470C.13[50], *below*, for discussion of this exemption]. However, when FOIA definitions, and definitions of "state agency" in the California Public Records Act are not the same, the California courts will follow the California Act, and not follow FOIA [*Gov. Code § 6252(e)*; *California State University v. Superior Court (2001) 90 Cal. App. 4th 810, 829-830, 108 Cal. Rptr. 2d 870]* . For a comparison of the exemptions under the Public Records Act and the Freedom of Information Act, *see § 470C.16*, *below*. For a general discussion of the FOIA, *see Moore's Federal Practice, Chapter 26, General Provisions Governing Discovery, P 26.52[6][d], 26.70[3][a]* (Matthew Bender), and Bender's Forms of Discovery, Ch. 14, *Freedom of Information Law and Discovery* (Matthew Bender).

[b] Information Practices Act

The Information Practices Act of 1977 [*Civ. Code §§ 1798-1798.78*; *Kruger v. Department of Motor Vehicles (1993) 13 Cal. App. 4th 541, 551, 16 Cal. Rptr. 2d 584* (DMV collection of information in electronic printout about driver's accident record does not violate driver's rights under Information Practices Act and complies with DMV's statutory duty under *Veh. Code § 1806*)] is a law designed to protect personal and confidential information held by various state agencies. The Court of Appeal held that the Commission on Teacher Credentialing (COTC) was not required, in investigative stage of teacher misconduct action, to disclose address and other personal information about complaining witnesses. Disclosing the name of the complaining witness was sufficient, and redacting of address and other personal information related to witness was authorized by Information Practices Act (*Civil Code § 1798*) [*California Teachers Assn. v. California Com. on Teacher Credentialing (2003) 111 Cal. App. 4th 1001, 1009-1010, 4 Cal. Rptr. 3d 369]* . The applicable COTC regulation [*5 Cal. Code Regs. § 80307*] which authorized disclosure of addresses and other information without consent of witness, and without connection to the charges, was overturned [*California Teachers Assn. v. California Com. on Teacher Credentialing (2003) 111 Cal. App. 4th 1001, 1011-1012, 4 Cal. Rptr. 3d 369]* . Although a discussion of that act is beyond the scope of this chapter, the act is related to the Public Records Act. Under the Information Practices Act, no agency may disclose any personal information in a manner that would link the information disclosed to the individual to whom it pertains, unless the disclosure of the information meets certain criteria [*Civ. Code § 1798.24*]. One of the exceptions to this prohibition is a disclosure made pursuant to the Public Records Act [*Civ. Code § 1798.24(g)*]. Thus, disclosure of personal information, if it can be made to fit within the general requirements of the Act, would not be prohibited by the Information Practices Act *[64 Ops. Cal. Atty. Gen. 575, 588 (1981)* ; *Civ. Code §§ 1798.70, 1798.75*]. The California Court of Appeal held that taxpayers had properly alleged claims for damages and injunctive relief under the Information Practices Act [*Civil Code §§ 1798.3, 1798.32*] based on claims that the Franchise Tax Board had improperly used nonpersonal information of taxpayers to determine tax liability without the Board complying with the requirements of the IPA, but the claims for damages were barred under the Government Claims Act [*Gov. Code §§ 815, 905.2*] for failure to timely file a notice of claim with the Board [*Bates v. Franchise Tax Board (2004) 124 Cal. App. 4th 367, 378-379, 21 Cal. Rptr. 3d 285]* . For additional discussion and forms relating to the Information Practices Act of 1977, see Ch. 470C, *Public Records Act* .

The Regents of the University of California did not violate the Information Practices Act (IPA) [*Civ. Code §§ 1798-1798.78*] when they did not retain and return midterm and final exams taken by a student who filed a lawsuit that challenged the failure to maintain and return those exams [*Moghadam v. Regents of University of California (2008) 169 Cal. App. 4th 466, 468-469, 86 Cal. Rptr. 3d 739*]. The IPA was not violated by the Regents because student exams are not "records" within the meaning of the IPA. The IPA, as defined in *Civil Code §§ 1798.3, 1798.14* requires public agencies to maintain records that contain personal information about individuals. The university does not maintain student exams in a central location, and student exams do not contain personal information about the students. Therefore, the IPA does not apply to student exams [*Moghadam v. Regents of University of California (2008) 169 Cal. App. 4th 466, 477-479, 86 Cal. Rptr. 3d 739*].

[c] Legislative Open Records Act

Although records of the California Legislature are specifically exempted from the Public Records Act [*Gov. Code § 6252(a)*] in 1975 the California Legislature adopted a law declaring that access to information concerning the conduct of the people's business by the Legislature is a fundamental and necessary right of every citizen in California [*Gov. Code § 9070*]. That law, known as the Legislative Open Records Act, outlines procedures for access to these records [*Gov. Code §§ 9070-9079*]. The "Legislature" is defined to include any member of the Legislature; any Legislative Officer; any standing, joint, or select committee or subcommittee of the Senate and Assembly; and any other agency or employee of the Legislature [*Gov. Code § 9072(b)*]. Legislative records are any writing prepared on or after December 2, 1974 containing information relating to the conduct of the public's business prepared, owned, used, or retained by the Legislature [*Gov. Code § 9072(c)*]. The Act provides for judicial relief [*Gov. Code §§ 9076, 9077*], and provides for costs and reasonable attorneys' fees, either to a successful plaintiff or to the public agency in the event the plaintiff's case is determined to be clearly frivolous [*Gov. Code § 9079*]. For a discussion of related legislation requiring open meetings of the Legislature [*Gov. Code §§ 9027-9031*], see Ch. 470B, *Public Agency Meetings* .

The California Court of Appeal held that the California legislature did not violate the Legislative Open Records Act [*Gov. Code §§ 9070-9080*] in not disclosing records related to the Capital Park Safety and Security Improvements Project because those records were exempt under *Gov. Code § 9075(h)*: Correspondence of and to individual Members of the Legislature and their staff; and (i) Records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege [*Zumbrun Law Firm v. California Legislature (2008) 165 Cal. App. 4th 1603, 1620-1621, 82 Cal. Rptr. 3d 525*]. Furthermore, the legislature was not required to provide a privilege log to justify the applicability of particular exemptions to specific documents and it would be sufficient to describe the documents in general and how specific exemptions applied to those documents in general, relying upon the California Supreme court decision in *Haynie v. Superior Court (2001) 26 Cal. 4th 1061, 1074-1075, 112 Cal. Rptr. 2d 80, 31 P.3d 760* [*Zumbrun Law Firm v. California Legislature (2008) 165 Cal. App. 4th 1603, 1621-1622, 82 Cal. Rptr. 3d 525*].

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§ 470C.11 Disclosure of Records Under the Act

[1] Public Records Defined

Under the Act, a "public record" is any writing that contains information relating to the public's business that is prepared, owned, used, or retained by any state or local agency, regardless of physical form or characteristics. Public records in the custody of, or maintained by, the Governor's office means any writing prepared on or after January 6, 1975 [*Gov. Code § 6252(e)*]. The term "writing" is defined to mean any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored [*Gov. Code § 6252(g)*].

The California Supreme Court held that information relating to California peace officers that is maintained in an electronic database by the California Commission on Peace Officer Standards and Training was a "public record" within the meaning of the California Public Records Act [*Gov. Code § 6252(e), (g)*]. Disclosure of this information was requested by the Los Angeles Times. The information requested included the peace officer's name and birth date, employing department, appointment dates, termination dates, and reason for termination. The Commission denied the request. The superior court ordered disclosure of the peace officer's name, employing agency, date of new appointment, and termination date [*Commission on Peace Officer Standards and Training v. Superior Court (2007) 42 Cal. 4th 278, 287-289, 64 Cal. Rptr. 3d 661, 165 P.3d 462]* . The California Supreme Court also held that these records were not exempt from disclosure under *Penal Code §§ 832.7, 832.8*, peace officer personnel records [*Commission on Peace Officer Standards and Training v. Superior Court (2007) 42 Cal. 4th 278, 298-299, 64 Cal. Rptr. 3d 661, 165 P.3d 462]* , and that no other statutory exemption in the California Public Records Act applied to exempt disclosure of these records. However, the California Supreme Court also held that the Commission could seek to justify exclusion from the disclosed records of information about specific officers because disclosure of that information would jeopardize the safety or efficacy of the peace officers. The exclusion would be based on a showing under the personnel and medical records exemption [*Gov. Code § 6254(c)*; *Commission on Peace Officer Standards and Training v. Superior Court (2007) 42 Cal. 4th 278, 284, 303, 64 Cal. Rptr. 3d 661, 165 P.3d 462]* .

The definition of "public records" is intended to cover every conceivable kind of record that is involved in the governmental process and will pertain to any new form of recordkeeping instrument as it is developed [*Gov. Code § 6252(e)*; *Coronado Police Officers Assn. v. Carroll (2003) 106 Cal. App. 4th 1001, 1006, 131 Cal. Rptr. 2d 553* ; *Versaci v. Superior Ct. (2005) 127 Cal. App. 4th 805, 813, 26 Cal. Rptr. 3d 92]* . Only purely personal information unrelated to the conduct of the public's business could be considered exempt from this definition, for example, a shopping list phoned from home or a letter to a public officer from a friend that is totally void of reference to governmental activities [*San Gabriel Tribune v. Superior Court (1983) 143 Cal. App. 3d 762, 774, 192 Cal. Rptr. 415* ; *58 Ops. Cal. Atty. Gen. 629, 633 (1975)]* . The mere custody of a writing by a public agency in and of itself, however, does not make it a public record. If the record is kept by an officer because it is necessary or convenient to the discharge of his or her official duty, then it is a public record [*Braun v. City of Taft (1984) 154 Cal. App. 3d 332, 340, 201 Cal. Rptr. 654]* . "Public records" also includes the identity of donors and license agreements with those donors who gave money for the construction of a state university multipurpose arena and who received a multiyear license for use of a luxury suite in that arena. This information constitutes public records because these donor records and license agreements are "used" and/or "retained" by a state university, and they relate to the operation of a public facility built and operated on land owned by a public university [*Gov. Code § 6252(e)*; *California State University v. Superior Court (2001) 90 Cal. App. 4th 810, 824-825, 108 Cal. Rptr. 2d 870]* .

Public records also includes all employment contracts between a state or local agency and any public official or public employee. These public records are not exempt from disclosure under the specific exemptions [*Gov. Code § 6254*] and not under the public interest exemption [*Gov. Code § 6255*]. Therefore, they are disclosable under the Act [*Gov. Code § 6254.8*].

However, a county public defender's electronic database that contained existing public defender client files, information from publicly available sources, such as newspaper articles, court files, police reports, and also contained impeachment evidence, was not a public record within the meaning of *Gov. Code § 6252(e)*. This is because the primary purpose of the database, used by the public defender's office to represent indigent criminal defendants, is a private function, not a public function [*Coronado Police Officers Association v. Carroll (2003) 106 Cal. App. 4th 1001, 1006-1008, 131 Cal. Rptr. 2d 553]* .

Furthermore, computer software developed by a state or local agency is not itself a public record under the Act. The agency may sell, lease, or license the software for commercial or noncommercial use [*Gov. Code § 6254.9(a)*]. Computer software is defined to include computer mapping systems, computer programs, and computer graphics systems [*Gov. Code § 6254.9(b)*]. No implied warranty on the part of the State of California or any local agency for errors, omissions, or other defects in any computer software is created for software provided under this law [*Gov. Code § 6254.9(c)*]. The public record status of information is not changed merely because it is stored in a computer. Public records stored in a computer shall be disclosed as required by this law [*Gov. Code § 6254.9(d)*]. Copyright protections are not limited by this law [*Gov. Code § 6254.9(e)*].

Public records also include all information, analyses, plans, or specifications that disclose the nature, extent, quantity, or degree of air contaminants or other pollution which any article, machine, equipment, or other contrivance will produce, which any air pollution control district or air quality management district, or any other state or local agency or district, requires any applicant to provide before the applicant builds, erects, alters, replaces, operates, sells, rents, or uses the article, machine, equipment, or other contrivance [*Gov. Code § 6254.7(a)*]. Public records also include: (1) All air or other pollution monitoring data, including data compiled from stationary sources [*Gov. Code § 6254.7(b)*]; and (2) All records of notices and orders directed to the owner of any building of violations of housing or building codes, ordinances, statutes, or regulations which constitute violations of standards provided in *Civil Code § 1941.1*, and records of subsequent action with respect to those notices and orders [*Gov. Code § 6254.7(c)*].

[2] General Disclosure Policy and Exceptions

The legislative policy behind the Act favors disclosure [*Berkeley Police Assn. v. City of Berkeley (1977) 76 Cal. App. 3d 931, 941, 143 Cal. Rptr. 255]* . Two exceptions exist, however, to the general disclosure policy. An agency may justify the withholding of a record in one of two ways [*CBS, Inc. v. Block (1986) 42 Cal. 3d 646, 652, 230 Cal. Rptr. 362, 725 P.2d 470]* : (1) Demonstrating that the requested record is exempt under one of the categories of disclosure-exempt material set forth in the Act [*Gov. Code § 6254*; *§ 470C.13, below*]; or (2) Showing the applicability of the "residual" exemption in the form of a balancing test. The residual exemption applies when the agency can demonstrate that, on the facts of a particular case, the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record [*Gov. Code § 6255*; *§ 470C.13[50], below*]. The burden of establishing an exemption is on the public agency [*Vallejos v. California Highway Patrol (1979) 89 Cal. App. 3d 781, 787, 152 Cal. Rptr. 846]* . Disclosure is thus required unless the agency asserts one of these exemptions [*Gov. Code § 6255*; *Berkeley Police Assn. v. City of Berkeley (1977) 76 Cal. App. 3d 931, 941-942, 143 Cal. Rptr. 255]* . The Act does not limit access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure [*Gov. Code § 6257.5*].

[3] Disclosure and Public Officials

The Second District, Division 3, California Court of Appeal held that the City of Long Beach, and its city attorney, were authorized to seek disclosure of public records held by another public agency, the Los Angeles Unified School District (LAUSD), relating to a school construction project undertaken by LAUSD [*Los Angeles Unified School District v. Superior Court (2007) 151 Cal. App. 4th 759, 762, 60 Cal. Rptr. 3d 445]* . The Court of Appeal held that the city was a person within the meaning of the California Public Records Act [*Gov. Code §§ 6252(c), 6253*; *Los Angeles Unified School District v. Superior Court (2007) 151 Cal. App. 4th 759, 770-772, 60 Cal. Rptr. 3d 445]* . The Court of Appeal also held that the city attorney was a person within the meaning of the California Public Records Act [*Gov. Code § 6252(c)*] and as an elected official had the right to request these records under the California Public Records Act [*Gov. Code § 6252.5*; *Los Angeles Unified School District v. Superior Court (2007) 151 Cal. App. 4th 759, 774-775, 60 Cal. Rptr. 3d 445]* .

A city official has no greater power to compel disclosure by another official than does a member of the public [*Parrott v. Rogers (1980) 103 Cal. App. 3d 377, 383, 163 Cal. Rptr. 75]* . A "member of the public" means any person, except a member, agent, officer, or employee of a federal, state, or local agency acting within the scope of his or her membership, agency, office, or employment [*Gov. Code § 6252(b)*]. Person is defined to include any natural person, corporation, partnership, limited liability company, firm, or association [*Gov. Code § 6252(c)*]. The policy in favor of public disclosure requires disclosure of records that illuminate how public officials carry out the duties entrusted to them [*Citizens for a Better Environment v. Department of Food & Agriculture (1985) 171 Cal. App. 3d 704, 715, 217 Cal. Rptr. 504]* . Notwithstanding the definition of "member of the public" [*Gov. Code § 6252(b)*], an elected member or officer of any state or local agency is entitled to access to public records of that agency on the same basis as any other person. The law will not limit the ability of elected members or officers to access public records permitted by law in the administration of their duties [*Gov. Code § 6252.5*]. This does not constitute a change in, but is declaratory of, existing law [*Gov. Code § 6252.5*]. Notwithstanding *Gov. Code Section 6252.5*, or any other provisions of law, when the members of a legislative body of a local agency are authorized to access a writing of the body or of the agency as permitted by law in the administration of their duties, the local agency as defined in *Gov. Code Section 54951* shall not discriminate between or among any of those members as to which writing or portion thereof is made available or when it is made available [*Gov. Code § 6252.7*].

A state or local agency may not allow another party to control the disclosure of information that is otherwise subject to disclosure under this act [*Gov. Code § 6253.3*]. Furthermore, notwithstanding any contract term to the contrary, a contract entered into by a state or local agency subject to this act, including the University of California, that requires a private entity to review, audit, or report on any aspect of that agency shall be public to the extent the contract is otherwise subject to disclosure under this act [*Gov. Code § 6253.31*].

[4] Display of Enforcement Order on Internet

Every final enforcement order issued by an environmental enforcement agency that is part of the California Environmental Protection Agency as part of enforcing that agency's laws is required to be displayed on the agency's Internet website, if the final enforcement order is a public record that is not exempt from disclosure under the Act [*Gov. Code § 6253.8(a)*]. This disclosure requirement applies to the California Environmental Protection Agency and to all of the following entities within the agency:

- The State Air Resources Board.
- The California Integrated Waste Management Board.
- The State Water Resources Control Board, and each California regional water quality control board.
- The Department of Pesticide Regulation.
- The Department of Toxic Substances Control [*Gov. Code § 6253.8(b)*].

An enforcement order is final either: 1) when the time for judicial review has expired on or after January 1, 2001, or when all means of judicial review have been exhausted on or after January 1, 2001; or 2) in addition to the above requirements, with regard to a final enforcement order issued by the State Water Resources Control Board or a California regional water quality control board, only final enforcement orders adopted by that board or a regional board at a public meeting must be displayed [*Gov. Code § 6253.8(c)*]. Orders must be displayed for at least one year [*Gov. Code § 6253.8(d)*]. The California Environmental Protection Agency shall oversee the implementation [*Gov. Code § 6253.8(e)*], which is effective on April 1, 2001 [*Gov. Code § 6253.8(f)*].

[5] Information in Electronic Format

Any agency that has information that constitutes an identifiable public record not exempt from disclosure that is in an electronic format shall make that information available in an electronic format when requested by any person [*Gov. Code § 6253.9(a)*]. The agency is required to make the information available in any electronic format in which it holds the information. Agencies are required to provide a copy of an electronic record in the format requested if the requested format is one that has been used by the agency to create copies for its own use or for provision to other agencies. The cost of duplication shall be limited to the direct cost of producing a copy of a record in an electronic format [*Gov. Code § 6253.9(a)(1), (2)*]. However, the requester is required to bear the cost of producing a copy of the record, including the cost to construct a record, and the cost of programming and computer services necessary to produce a copy of the record when [*Gov. Code § 6253.9(b)*]: (1) In order to comply with the law, the public agency would be required to produce a copy of an electronic record and the record is one that is produced only at otherwise regularly scheduled intervals; or (2) The request would require data compilation, extraction, or programming to produce the record [*Gov. Code § 6253.9(b)(1), (2)*]. Public agencies are not required to reconstruct a record in an electronic format if the agency no longer has the record available in that format [*Gov. Code § 6253.9(c)*]. Also, if the request is for information in other than electronic format and the information also is in electronic format, the agency may inform the requester that the information is available in electronic format [*Gov. Code § 6253.9(d)*]. Agencies are not: (1) permitted to make information available only in an electronic format [*Gov. Code § 6253.9(e)*]; (2) required to release an electronic record in the electronic form in which it is held by the agency if its release would jeopardize or compromise the security or integrity of the original record or of any proprietary software in which it is maintained [*Gov. Code § 6253.9(f)*]; and (3) permitted to allow public access to records held by any agency to which access is otherwise restricted by statute [*Gov. Code § 6253.9(g)*].

[6] Provision of Public Record to Private Entity

State and local agencies are not permitted to sell, exchange, furnish, or otherwise provide a public record subject to disclosure to a private entity in a manner that prevents a state or local agency from providing the record directly. State or local agencies are not required to use the State Printer to print public records, and are not prohibited from destroying records pursuant to law [*Gov. Code § 6270(a)*]. These requirements do not apply to contracts entered into prior to January 1, 1996, between the County of Santa Clara and a private entity for the provision of public records subject to disclosure [*Gov. Code § 6270(b)*].

[7] Redaction of Social Security Numbers

To protect against identity theft, local agencies are required to redact social security numbers from records before disclosing those records to the public [*Gov. Code § 6254.29(a)*]. Local agencies are not required to disclose social security numbers [*Gov. Code § 6254.29(b)*].

[8] Truncation of Social Security Numbers

The social security number truncation program requires county recorders to redact the first five digits of a social security number to protect against identity theft [*Gov. Code § 27300*]. Under these provisions [*Gov. Code § 27300-27302*] As used in this article, the following terms have the following meanings: "Official record" means the permanent archival record of all instruments, papers, and notices as accepted for recording by a county recorder [*Gov. Code § 27300(a)*]; "Public record" means a record that is in an electronic format and is an exact copy of an official record except that any social security number contained in the copied record is truncated. The public record shall have the same legal force and effect as the official record [*Gov. Code § 27300(a)*]; "Truncate" means to redact the first five digits of a social security number [*Gov. Code § 27300(c)*]; and "Truncated social security number" means a social security number that displays only the last four digits of the number [*Gov. Code § 27300(d)*].

Under this law the county recorder of each county must establish a social security number truncation program in order to create a public record version of each official record [*Gov. Code § 27301*]. The program must include both of the following components, which the recorder must implement concurrently:

> (1) For each official record recorded between January 1, 1980, and December 31, 2008, the recorder must create in an electronic format an exact copy of the record except that any social security number contained in the copied record must be truncated. In order to create a public record copy, the recorder must first truncate the social security numbers in all records that already exist in an electronic format and then create an electronic version of all other records and truncate social security numbers contained in those records. Each group of records must be handled in descending chronological order [*Gov. Code § 27301(a)*];
>
> (2) For each official record recorded on or after January 1, 2009, the recorder must create a copy of that record in an electronic format and truncate any social security number contained in that record [*Gov. Code § 27301(b)*];
>
> (3) Nothing in this article must be construed to restrict, delay, or modify access to any official record, or modify any existing agreements regarding access to any official record, prior to the creation and availability of a public record version of that official record. A county recorder must not charge any new fee or increase any existing fees in order to fund the social security number truncation program pursuant to this article, except as provided in *Gov. Code § 27361(d)* [*Gov. Code § 27301(c)*]; and
>
> (4) Notwithstanding subdivisions (a) and (b), a county recorder must not be required to create a public record version of an official record if the fee authorized in Section 27304 is determined by the recorder to be insufficient to meet the cost of creating the public record version. In that case, the county

recorder must determine whether the fee is sufficient to meet the cost of creating a public record version of only a fraction of the official records described in subdivisions (a) and (b). If the fee is sufficient to meet the cost of creating a public record version of a fraction of the official records, the recorder must be required to create a public record version of that fraction only [*Gov. Code § 27301(d)*].

A county recorder shall be deemed to be in compliance with the requirements of Section 27301 and must not be liable for failure to truncate a social security number if he or she uses due diligence to locate social security numbers in official records and truncate social security numbers in the public record version of those official records. The use of an automated program with a high rate of accuracy must be deemed to be due diligence [*Gov. Code § 27302(a)*]. In the event that a county recorder fails to truncate a social security number contained in a public record, any person may request that the county recorder truncate the social security number contained in that record. Notwithstanding that a county recorder may be deemed to be in compliance with Section 27301 pursuant to subdivision (a), a county recorder that receives a request that identifies the exact location of an untruncated social security number within a specifically identified public record, must truncate that number within 10 business days of receiving the request. The public record with the truncated social security number must replace the record with the untruncated number [*Gov. Code § 27302(b)*].

When a public record version of an official record exists, both of the following must apply:

(a) Upon a request for inspection, copying, or any other public disclosure of an official record that is not exempt from disclosure, a county recorder must make available only the public record version of that record;

(b) A county recorder must publicly disclose an official record only in response to a subpoena or order of a court of competent jurisdiction [*Gov. Code § 27303(a),(b)*].

Funding for the program can be obtained as follows:

(1) Each county may use funds generated by fees authorized by subdivision (d) of Section 27361 to implement a social security number truncation program required by this article [*Gov. Code § 27304(a)*];

(2) No later than June 1, 2008, the county recorder of each county must petition the board of supervisors in that county for the authority to levy the fee authorized by subdivision (d) of Section 27361. [*Gov. Code § 27304(b)*]; and

(3) It is the intent of the Legislature that in the interest of enabling county recorders to act expeditiously to protect the privacy of Californians, counties be permitted to seek revenue anticipation loans or other outside funding sources for the implementation of a social security number truncation program to be secured by the anticipated revenue from the fee authorized by subdivision (d) of Section 27361. [*Gov. Code § 27304(c)*].

To assist the Legislature in monitoring the progress of each county recorder's social security number truncation program, the County Recorders Association of California, no later than January 1, 2009, and annually thereafter, must submit to the chairpersons of the Assembly Committee on Judiciary and of the Senate Committee on Judiciary, and to the Office of Privacy Protection, or any successor agency, a report on the progress each county recorder has made in complying with this article [*Gov. Code § 27305(a)*]. Upon the Office of Privacy Protection making a determination that all counties have completed the component of the program described in subdivision (a) of Section 27301, the report described in subdivision (a) of this section must no longer be required. [*Gov. Code § 27305(b)*]. A county recorder is authorized to take all actions required by this article notwithstanding subdivision (d) of Section 27203 or any other provision of law [*Gov. Code § 27307*].

Nothing in this chapter must be construed to require the disclosure by a county recorder of any "official record" if a

"public record" version of that record is available pursuant to Article 3.5 (commencing with Section 27300) of Chapter 6 of Part 3 of Division 2 of Title 3 law [*Gov. Code § 6254.27*]. Nothing in this chapter must be construed to require the disclosure by a filing office of any "official record" if a "public record" version of that record is available pursuant to *Section 9526.5 of the Commercial Code* [*Gov. Code § 6254.28*].

The Franchise Tax Board is required to truncate social security numbers on lien abstracts and other board records that are public records. Notwithstanding any other provision of law, unless prohibited by federal law, the Franchise Tax Board must truncate social security numbers on lien abstracts and any other records created by the board that are disclosable under Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 before disclosing the record to the public. For purposes of this section, "truncate" means to redact the first five digits of a social security number [*Gov. Code § 15705*].

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Chapter 470C PUBLIC RECORDS ACT
PART II. LEGAL BACKGROUND

41-470C California Forms of Pleading and Practice--Annotated § 470C.12

§ 470C.12 Procedures for Obtaining Records Under the Act

[1] Statutory Procedures

The act provides that public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record unless exempt from disclosure. Furthermore, any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law [*Gov. Code § 6253(a)*]. Unless a record is exempt from disclosure, all state and local agencies, upon a request for a copy of records that reasonably describes an identifiable record or records, are required to make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee if applicable. The fee may be either a statutory fee or, if no fee is specified by statute, a fee covering the direct costs of duplication [*Gov. Code § 6253(b)*; *North County Parents v. Department of Education (1994) 23 Cal. App. 4th 144, 147-148, 28 Cal. Rptr.2d 359]* . When a statutory fee is greater than actual cost, the statutory fee prevails [*Shippen v. Department of Motor Vehicles (1984) 161 Cal. App. 3d 1119, 1124-1127, 208 Cal. Rptr. 13]* . Agencies have discretion to waive or reduce copying fees [*Gov. Code § 6253(b)*; *North County Parents v. Department of Education (1994) 23 Cal. App. 4th 144, 148-149, 28 Cal. Rptr. 2d 359]* . Upon request, an exact copy shall be provided unless impracticable to do so [*Gov. Code § 6253(b)*]. The right to inspect and the right to receive copies are coextensive [*Rosenthal v. Hansen (1973) 34 Cal. App. 3d 754, 759, 110 Cal. Rptr. 257]* . A request for records does not have to be in writing under the California Public Records Act [*Los Angeles Times v. Alameda Corridor Transp. Authority (2001) 88 Cal. App. 4th 1381, 1392-1393, 107 Cal. Rptr. 2d 29]* . For form for Request for Records, *see § 470C.50*.

The right of inspection (including the right to receive copies) is limited, however, by a rule of reasonableness [*Bruce v. Gregory (1967) 65 Cal. 2d 666, 676, 56 Cal. Rptr. 265, 423 P.2d 193* ; *Rosenthal v. Hansen (1973) 34 Cal. App. 3d 754, 761, 110 Cal. Rptr. 257]* . Thus, for instance, in a case involving a general request for a copy of a seven volume loose-leaf set of documents, the court held that an agency could impose reasonable restrictions on requests for voluminous classes of documents and provide copies only in response to specific requests for specific documents [*Rosenthal v. Hansen (1973) 34 Cal. App. 3d 754, 761, 110 Cal. Rptr. 257]* . Citizens of other states may make a request for the disclosure of records to the same extent as citizens of California [*Connell v. Superior Court (1997) 56 Cal. App. 4th 601, 611-612, 65 Cal. Rptr. 2d 738]* . The requesting party may be a commercial entity using the information

for strictly commercial purposes [*Connell v. Superior Court (1997) 56 Cal. App. 4th 601, 617, 65 Cal. Rptr. 2d 738]* .

The statutory procedures require each agency, upon a request for a copy of records, within 10 days from receipt of the request, to determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and to notify promptly the person making the request of the determination and the reasons therefor. In unusual circumstances, the time limit prescribed may be extended by written notice by the head of the agency or his or her designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. No notice shall specify a date that would result in an extension for more than 14 days [*Gov. Code § 6253(c)*].

The California Supreme Court applied the public interest statutory exemption [*Gov. Code § 6255*] and held that the City of Los Angeles Department of Airports did not have to disclose proposals for commercial use of airport property that were submitted under a request for proposals (RFP) process until the Department had completed negotiations with bidders. Public disclosure could occur after the department had finished negotiations and made a recommendation for final approval by the awarding authority, but before the awarding authority made a final approval decision. The public interest in non disclosure at the negotiating stage outweighed the public interest in disclosure [*Michaelis, Montanari & Johnson v. Superior Court (2006) 38 Cal. 4th 1065, 1067, 1077, 44 Cal. Rptr. 3d 663, 136 P.3d 194]* . The California Supreme Court rejected an argument that agencies should be required to disclose otherwise exempt documents when the agency failed to comply with the timing requirements of the statute [*Gov. Code § 6253(c)*]. The Court concluded that disclosure was unduly harsh as a penalty for delay, and this remedy was not expressly authorized by the statute [*Michaelis, Montanari & Johnson v. Superior Court (2006) 38 Cal. 4th 1065, 1072-1073, 44 Cal. Rptr. 3d 663, 136 P.3d 194]* .

"Unusual circumstances" means the following, but only to the extent reasonably necessary to the proper processing of the particular request [*Gov. Code § 6253(c)(1)-(4)*]:

- The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.

- The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request.

- The need for consultation, which shall be conducted with all practicable speed, with another agency having substantial interest in the determination of the request or among two or more components of the agency having substantial subject matter interest therein.

- The need to compile data, to write programming language or a computer program, or to construct a computer report to extract data.

Agencies are not permitted to delay or obstruct the inspection or copying of public records. The notification of denial of any request for records required by [*Gov. Code § 6255*] shall set forth the names and titles or positions of each person responsible for the denial [*Gov. Code § 6253(d)*]. Furthermore, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in the act [*Gov. Code § 6253(e)*]. However, in responding to a request for public records, agencies are not required to provide a list or inventory of all potentially responsive records [*Haynie v. Superior Court (2001) 26 Cal. 4th 1061, 1064, 1075, 112 Cal. Rptr. 2d 80, 31 P.3d 760]* .

[2] Agency Procedural Regulations for Access to Public Records

Any agency may adopt regulations stating the procedures to be followed when making its records available in

accordance with *Gov. Code § 6253.4*. Agencies adopting such regulations must post a copy of their guidelines in a conspicuous public place at the agencies' offices. In addition, agencies must make a copy of their guidelines available free of charge to any person requesting their records [*Gov. Code § 6253.4(a)*].

Gov. Code § 6253.4(a) also sets forth a comprehensive list of state and local bodies that are required to establish written guidelines for accessibility of records. Guidelines and regulations adopted pursuant to *Gov. Code § 6253.4* must be consistent with all other sections of the California Public Records Act (*Gov. Code §§ 6250-6277*), and must reflect the Legislature's intent to make the records accessible to the public [*Gov. Code § 6253.4(b)*]. Guidelines and regulations adopted by agencies pursuant to *Gov. Code § 6253.4* must not operate to limit the hours public records are open for inspection as prescribed in *Gov. Code § 6253* [*Gov. Code § 6253.4(b)*]. Except as prohibited by law, a state or local agency may adopt requirements allowing faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in the Public Records Act [*Gov. Code § 6253(e)*].

The following state and local agencies are required to adopt written guidelines for accessibility of records [*Gov. Code § 6253.4(a)*]:

- Department of Motor Vehicles
- Department of Consumer Affairs
- Department of Transportation
- Department of Real Estate
- Department of Corrections
- Department of the Youth Authority
- Department of Justice
- Department of Insurance
- Department of Corporations
- Department of Managed Health Care
- Secretary of State
- State Air Resources Board
- Department of Water Resources
- Department of Parks and Recreation
- San Francisco Bay Conservation and Development Commission
- State Board of Equalization
- State Department of Health Care Services

- Employment Development Department
- State Department of Public Health
- State Department of Social Services
- State Department of Mental Health
- State Department of Developmental Services
- State Department of Alcohol and Drug Abuse
- Office of Statewide Health Planning and Development
- Public Employees' Retirement System
- Teachers' Retirement Board
- Department of Industrial Relations
- Department of General Services
- Department of Veterans Affairs
- Public Utilities Commission
- California Coastal Commission
- State Water Resources Control Board
- San Francisco Bay Area Rapid Transit District
- All regional water quality control boards
- Los Angeles County Air Pollution Control District
- Bay Area Air Pollution Control District
- Golden Gate Bridge, Highway and Transportation District
- Department of Toxic Substances Control
- Office of Environmental Health Hazard Assessment

For a list of administrative regulations, *see § 470C.32, below*.

[3] Discovery Practice

The provisions of the Act are not deemed to affect the rights of litigants including parties to administrative proceedings under the laws of discovery, nor are they deemed to limit or impair any rights of discovery in a criminal case [*Gov.*

Code § 6260]. For example, in a case involving a wrongful death action against a city and its police officers, the plaintiff attempted to obtain certain evidence through discovery from the defendant police officers. The city claimed absolute privilege under *Evid. Code § 1040(b)(1)*, on the grounds that disclosure was forbidden by *Gov. Code § 6254(f)*. The court held that the effect of *Gov. Code § 6254* is limited to inspections under the Public Records Act and has no application to any procedures not under the Act. Further, it cited *Gov. Code § 6250* as authority for the proposition that the Act does not affect the rights of litigants in discovery [*Shepherd v. Superior Court (1976) 17 Cal. 3d 107, 123-124, 130 Cal. Rptr. 257, 550 P.2d 161* ; *Rubin v. City of Los Angeles (1987) 190 Cal. App. 3d 560, 585, 235 Cal. Rptr. 516* (citing Shepherd)]. A request for public documents under the Public Records Act may not be denied merely because the documents may be subject to discovery should the petitioner decide to file a civil lawsuit [*Wilder v. Superior Court (1998) 66 Cal. App. 4th 77, 82-83, 77 Cal. Rptr. 2d 629]* .

Thus, the exemptions from the public disclosure requirement apply only to proceedings under the Public Records Act, and may not be used by a public entity in order to evade discovery in a judicial proceeding [*Shepherd v. Superior Court (1976) 17 Cal. 3d 107, 123-124, 130 Cal. Rptr. 257, 550 P.2d 161* ; *Marylander v. Superior Court (2000) 81 Cal. App. 4th 1119, 1125, 97 Cal. Rptr. 2d 439* (exemption under *Gov. Code § 6254(l)* for correspondence to Governor is inapplicable to discovery request in ongoing civil litigation)]. Conversely, however, if a party to pending litigation attempts to use the Public Records Act to gain access to documents for use in the lawsuit after access has been denied through use of discovery procedures, the exemptions from disclosure found in the Public Records Act, including any privileges found in the Evidence Code, may be used to justify nondisclosure of the documents [*County of Los Angeles v. Superior Court (2000) 82 Cal. App. 4th 819, 830-835, 98 Cal. Rptr. 2d 564* ; *Gov. Code § 6254(k)*].

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§ 470C.13 Exemptions from Disclosure

[1] Nature of Exemptions

The Act provides a number of specific and general exemptions from disclosure, discussed in [2]-[50], *below*. The exemptions are in the nature of privileges that an agency must assert in order to avoid disclosure [*Berkeley Police Assn. v. City of Berkeley (1977) 76 Cal. App. 3d 931, 941, 143 Cal. Rptr. 255]* . An agency's failure to raise a particular exemption waives its right to tender policy arguments related to that exemption. In other words, an agency cannot assert general policy reasons for withholding requested records. The only method of avoiding disclosure is to assert one or more particular statutory privileges [*Citizens for a Better Environment v. Department of Food & Agriculture (1985) 171 Cal. App. 3d 704, 716, 217 Cal. Rptr. 504]* . Because the Act, like the federal Freedom of Information Act (FOIA) [*5 U.S.C. § 552*], reflects a general policy of disclosure, its policy can only be accomplished by narrow construction of these categories of statutory privileges [*San Gabriel Tribune v. Superior Court (1983) 143 Cal. App. 3d 762, 772-773, 192 Cal. Rptr. 415]* .

The exemptions, however, are permissive, not mandatory. *Gov. Code § 6254* provides that nothing in that section prevents any agency from opening its records to public inspection, unless disclosure is otherwise prohibited [*Gov. Code § 6254.7*; *Gov. Code § 6254.13*] by law [*Gov. Code § 6254*]. Therefore, an agency has the discretion not to claim a statutory exemption. It may choose to disclose records, despite the existence of an applicable exemption, if a dominating public interest favors disclosure [*Black Panther Party v. Kehoe (1974) 42 Cal. App. 3d 645, 656, 117 Cal. Rptr. 106]* . The statutory exemptions permit nondisclosure, but do not prohibit disclosure [*Black Panther Party v. Kehoe (1974) 42 Cal. App. 3d 645, 656, 117 Cal. Rptr. 106]* . Nonetheless, when contemplating disclosure, an agency must determine whether disclosure is prohibited by some other law [*Gov. Code § 6254*]. A statutory list of exempt records laws is contained in *§ 470C.15, below* .

[2] Waiver of Exemptions

Notwithstanding any other provision of law, whenever a state or local agency discloses a public record that is otherwise exempt from the provisions of the Public Records Act [*Gov. Code §§ 6250-6277*], to any member of the public, this disclosure shall constitute a waiver of the exemptions specified in *Gov. Code §§ 6254, 6254.7*, or other similar provisions of law [*Gov. Code § 6254.5*]. For the purposes of *Gov. Code § 6254.5*, "agency" includes a member, agent,

or officer or employee of the agency acting within the scope of his or her membership, agency, office, or employment [*Gov. Code § 6254.5*]. *Gov. Code § 6254.5* shall not apply to the following disclosures [*Gov. Code § 6254.5*]:

- Disclosure made pursuant to the Information Practices Act [*Civ. Code § 1798 et seq.*], or discovery proceedings [*Gov. Code § 6254.5(a)*];

- Disclosures made through other legal proceedings [*Gov. Code § 6254.5(b)*];

- Disclosures within the scope of a disclosure of a statute that limits disclosure of specified writing to certain purposes [*Gov. Code § 6254.5(c)*];

- Disclosures not required by law, and prohibited by formal action of an elected legislative body of the local agency that retains the writings [*Gov. Code § 6254.5(d)*];

- Disclosures made to any governmental agency that agrees to treat the disclosed material as confidential. Only persons authorized in writing by the person in charge of the agency are permitted to obtain the information. Any information obtained by the agency shall only be used for purposes that are consistent with existing law [*Gov. Code § 6254.5(e)*];

- Disclosures of records relating to a financial institution or its affiliate, if the disclosures are made to the financial institution or affiliate by a state agency responsible for the regulation or supervision of the financial institution or affiliate [*Gov. Code § 6254.5(f)*];

- Disclosures of records relating to any person that is subject to the jurisdiction of the Department of Corporations, if the disclosures are made to the person that is the subject of the records for the purpose of corrective action by that person, or if a corporation, to an officer, director, or other key personnel of the corporation for the purpose of corrective action, or to any other person to the extent necessary to obtain information from that person for the purpose of an investigation by the Department of Corporations [*Gov. Code § 6254.5(g)*];

- Disclosures made by the Commissioner of Financial Institutions under the authority of *Fin. Code §§ 280, 282, 8009, 18396* [*Gov. Code § 6254.5(h)*]; and

- Disclosures of records relating to any person that is subject to the jurisdiction of the Department of Managed Health Care, if the disclosures are made to the person that is the subject of the records for the purpose of corrective action by that person, or if a corporation, to an officer, director, or other key personnel of the corporation for the purpose of corrective action, or to any other person to the extent necessary to obtain information from that person for the purpose of an investigation by the Department of Managed Health Care [*Gov. Code § 6254.5(i)*].

[3] Election Materials

Certain election materials are not public records [*Gov. Code § 6253.5*]. These materials include city, county, district, and statewide initiative, referendum, or recall petitions; petitions for an election to fill a school district board vacancy [*Educ. Code § 5091*]; petitions for the reorganization of school and community college districts [*Educ. Code §§ 35700, 35711, 74000, 74264*]; and all memoranda prepared by county clerks in examination of these petitions. Disclosure of these materials is expressly prohibited, except to the following persons: (1) the public employees who receive, examine, or preserve them; (2) proponents of the petition, when a petition is found to be insufficient; and (3) certain public officers on approval of the superior court [*Gov. Code § 6253.5*].

Information compiled by public officers that would reveal the identity of persons who have requested bilingual ballots or pamphlets may not be provided to any person other than those public officers and employees who are responsible for receiving and processing the requests [*Gov. Code § 6253.6(a)*].

[4] Drafts, Notes, and Memoranda

Preliminary drafts, notes, or interagency or intraagency memoranda that are not retained by the agency in the ordinary course of business are exempt if the public interest in withholding these records clearly outweighs the public interest in disclosure [*Gov. Code § 6254(a)*]. Three conditions must be met for exemption under this provision: (1) the record sought must be a preliminary draft, note, or memorandum; (2) the record sought must not be retained by the public agency in the ordinary course of business, and (3) the public interest in withholding must clearly outweigh the public interest in disclosure [*Citizens for a Better Environment v. Department of Food & Agriculture (1985) 171 Cal. App. 3d 704, 711, 217 Cal. Rptr. 504]* . The burden of proof and of persuasion of the existence of each condition is on the public agency [*Citizens for a Better Environment v. Department of Food & Agriculture (1985) 171 Cal. App. 3d 704, 712, 217 Cal. Rptr. 504]* .

The purpose of the exemption is to provide a measure of agency privacy for written discourse concerning matters with pending administrative action [*Citizens for a Better Environment v. Department of Food & Agriculture (1985) 171 Cal. App. 3d 704, 712, 217 Cal. Rptr. 504]* . If preliminary materials are not customarily discarded or have not in fact been discarded as is customary, they must be disclosed [*Citizens for a Better Environment v. Department of Food & Agriculture (1985) 171 Cal. App. 3d 704, 714, 217 Cal. Rptr. 504]* . The fact that a document contains an opinion or judgment does not immunize it from disclosure. An opinion that is recommendatory, however, may be isolated from its factual surroundings and be withheld [*Citizens for a Better Environment v. Department of Food & Agriculture (1985) 171 Cal. App. 3d 704, 717, 217 Cal. Rptr. 504]* .

[5] Litigation Records

Records pertaining to pending litigation to which the public agency is a party or claims made pursuant to the California Tort Claims Act [*Gov. Code §§ 810, 996.6*] are exempt until the litigation is finally adjudicated or otherwise settled [*Gov. Code § 6254(b)*]. This exemption essentially provides public agencies with the protections of the attorney-client and the attorney work product privileges for a limited period while litigation is in process [State of California ex rel. Division of Industrial Safety v. Superior *Court (1974) 43 Cal. App. 3d 778, 783, 117 Cal. Rptr. 726]* . However, the exemption for litigation records [*Gov. Code § 6254(b)*] protects litigation records generally while the exemption for records protected under other laws [*Gov. Code § 6254(k)*] protects privileged materials including records that are subject to the attorney-client privilege [*Roberts v. City of Palmdale (1993) 5 Cal. 4th 363, 372, 20 Cal. Rptr. 2d 330, 853 P.2d 496]* . Thus, writings that are relevant to pending litigation, including but not limited to those protected by the attorney-client privilege, are protected under the litigation records exemption, while attorney-client privileged writings that are not related to pending litigation are protected under the records protected under other laws exemption [*Gov. Code § 6254(k)*; *Roberts v. City of Palmdale (1993) 5 Cal. 4th 363, 372-373, 20 Cal. Rptr. 2d 330, 853 P.2d 496]* .

However, a claim filed with a public entity under the Tort Claims Act does not itself constitute a "record pertaining to pending litigation" and is subject to public disclosure [*Poway Unified School Dist. v. Superior Court (1998) 62 Cal. App. 4th 1496, 1502-1505, 73 Cal. Rptr. 2d 777* (claim filed by student against public school district was subject to request for disclosure made by newspaper)].

The court of appeal has interpreted this exemption to apply only to documents specifically prepared for use in litigation [*Fairley v. Superior Court (1998) 66 Cal. App. 4th 1414, 1420-1422, 78 Cal. Rptr. 2d 648]* . If the document was prepared for dual purposes, the document is exempted from disclosure if the "dominant purpose" behind preparation of the document was pending litigation [*Fairley v. Superior Court (1998) 66 Cal. App. 4th 1414, 1420, 78 Cal. Rptr. 2d 648]* . The exemption does not prevent access to documents relevant to later-instituted litigation [*Fairley v. Superior*

Court (1998) 66 Cal. App. 4th 1414, 1420-1421, 78 Cal. Rptr. 2d 648] . However, correspondence between opposing counsel in litigation or correspondence with opposing parties that was intended to be confidential to non-parties outside the litigation is protected from disclosure to non-parties under the litigation records exemption [*Gov. Code § 6254(b)*; *Board of Trs. of the Cal. State Univ. v. Superior Court (2005) 132 Cal. App. 4th 889, 899-900, 34 Cal. Rptr. 3d 82]* . The litigation records exemption does not include deposition transcripts, which are normally available to the public under the discovery act provisions [*Cal. Code Civ. Proc. § 2025.570*] unless a protective order has been issued. Deposition transcripts are not confidential within the meaning of the litigation records exemption [*Board of Trs. of the Cal. State Univ. v. Superior Court (2005) 132 Cal. App. 4th 889, 901-902, 34 Cal. Rptr. 3d 82]* .

Moreover, if the documents do not fall under the pending litigation exception or another exception, an application for disclosure of documents brought under the Public Records Act may not be denied merely because discovery of the documents has previously been denied in a civil case, unless the requirements for application of the doctrine of collateral estoppel have been met [*County of Los Angeles v. Superior Court (2000) 82 Cal. App. 4th 819, 826-835, 98 Cal. Rptr. 2d 564]* .

[6] Personnel and Medical Records

Personnel, medical, or similar files are exempt if their disclosure would constitute an unwarranted invasion of personal privacy [*Gov. Code § 6254(c)*]. The California Supreme Court held that information relating to California peace officers that is maintained in an electronic database by the California Commission on Peace Officer Standards and Training was a "public record" within the meaning of the California Public Records Act [*Gov. Code § 6252(e), (g)*]. Disclosure of this information was requested by the Los Angeles Times. The information requested included the peace officer's name and birth date, employing department, appointment dates, termination dates, and reason for termination. The Commission denied the request. The superior court ordered disclosure of the peace officer's name, employing agency, date of new appointment, and termination date [*Commission on Peace Officer Standards and Training v. Superior Court (2007) 42 Cal. 4th 278, 287-289, 64 Cal. Rptr. 3d 661, 165 P.3d 462]* . The California Supreme Court also held that these records were not exempt from disclosure under *Penal Code §§ 832.7, 832.8*, peace officer personnel records [*Commission on Peace Officer Standards and Training v. Superior Court (2007) 42 Cal. 4th 278, 298-299, 64 Cal. Rptr. 3d 661, 165 P.3d 462]* , and that no other statutory exemption in the California Public Records Act applied to exempt disclosure of these records. The California Supreme Court rejected the argument that the records kept by the Commission were categorically exempt under *Gov. Code § 6254(c)* because the privacy and safety interest of the peace officers as a group did not outweigh the public interest in disclosure of the information. Thus, disclosure of these records would not constitute an unwarranted invasion of personal privacy. However, the California Supreme Court also held that the Commission could seek to justify exclusion from the disclosed records of information about specific officers because disclosure of that information would jeopardize the safety or efficacy of the peace officers. The exclusion would be based on a showing under the personnel and medical records exemption [*Gov. Code § 6254(c)*], and under the public interest exemption [*Gov. Code § 6255*]. The California Supreme Court remanded the case back to the superior court to allow the Commission to make such a showing [*Commission on Peace Officer Standards and Training v. Superior Court (2007) 42 Cal. 4th 278, 301-303, 64 Cal. Rptr. 3d 661, 165 P.3d 462]* .

The California Supreme Court held that salary information for specific public employees of the City of Oakland earning $100,000 or more per year was a disclosable "public record" within the meaning of the California Public Records Act [*Gov. Code §§ 6252(d), 6253(a)*]. Disclosure of this information was requested by reporters for the Contra Costa Times from the City of Oakland for the 2003-2004 fiscal year. The City refused to provide salary information for specific individuals claiming this information was exempt from disclosure. After allowing intervention by two public employee unions, the superior court ordered disclosure of the salary information and rejected claims for exemption based on the privacy interests of the individuals, and for police officers, the peace officer personnel records exemption. The court of appeal denied the petition of the two unions challenging disclosure. [*International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal. 4th 319, 327-329, 64 Cal. Rptr. 3d 693, 165 P.3d 488*]. The California Supreme Court held that the salary information was not exempt form disclosure under the

personnel and medical records exemption [*Gov. Code § 6254(c)*] because disclosure of this information did not constitute an unwarranted invasion of personal privacy. The California Supreme Court relied upon the public policy supporting the adoption of the public records act, that public access to information about government is essential to government accountability, and that the right of public access to governmental information is protected not only by the California Public Records Act [*Gov. Code § 6250*], but also by provisions of the California Constitution [*Cal. Const., art. 1, § 3(b)(1)*; *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal. 4th 319, 329-331, 64 Cal. Rptr. 3d 693, 165 P.3d 488*]. The California Supreme Court noted that claims for exemption of salary information for particular public employees based upon concerns specific to that employee, such as undercover police officers, could be made under either the personnel and medical records [*Gov. Code § 6254(c)*] or the public interest exemption [*Gov. Code § 6255*], but that neither the city or the unions provided such information to the superior court [*International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal. 4th 319, 336-338, 64 Cal. Rptr. 3d 693, 165 P.3d 488*]. The California Supreme Court also rejected a claim that disclosure of salary information would violate the public employees right to privacy under the California Constitution [*Cal. Const., art. 1, § 1*] because the public interest in disclosure of this information outweighs the privacy interest of the employees [*International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal. 4th 319, 338-340, 64 Cal. Rptr. 3d 693, 165 P.3d 488*]. Finally, the California Supreme court held that the peace officers personal records exemption [*Gov. Code § 6254(k), Penal Code §§ 832.7, 832.8*] did not include salary information of peace officers as one of the categories of information exempt from disclosure [*Penal Code § 832.8*], and thus this exemption did not apply to police officer salary information [*International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal. 4th 319, 344-346, 64 Cal. Rptr. 3d 693, 165 P.3d 488*].

In a case involving the personnel file of a city firefighter, the court held that the first page of the firefighter's salary card containing his address, birth date, phone number, social security and credit union numbers, and his salary did not fall within this exemption because disclosure of that information was not an invasion of personal privacy [*Braun v. City of Taft (1984) 154 Cal. App. 3d 332, 345, 201 Cal. Rptr. 654]* . It also stated that the word "files" in the statutory exemption does not imply an all-or-nothing disclosure policy. In light of the Act's policy favoring disclosure, partial disclosure of a file is permitted; only the specific material in a file that would result in an unwarranted invasion of personal privacy is exempt [*Braun v. City of Taft (1984) 154 Cal. App. 3d 332, 341, 201 Cal. Rptr. 654]* .

Similarly, contracts of employment of public officials are not exempt [*Gov. Code § 6254.8*]. For example, although the board of directors of a hospital district is not required to report at a public meeting its determination (in executive session) of the hospital administrator's compensation, that compensation is a matter of public record under *Gov. Code § 6254.8* as an integral part of the administrator's employment contract *[63 Ops. Cal. Atty. Gen. 215, 221 (1980)]* .

The California court of appeal held that the personal performance goals of the former superintendent of a community college district were not part of the superintendent's employment contract within the provisions of *Gov. Code § 6254.8* because the employment contract mentioned future goal setting in one paragraph of the contract. That was not sufficient evidence to show that the parties to this contract intended to incorporate the performance goals of the superintendent into the contract. Thus, these goals were not part of the contract, and therefore were not disclosable under the provisions of *Gov. Code § 6254.8* [*Versaci v. Superior Ct. (2005) 127 Cal. App. 4th 805, 817, 26 Cal. Rptr. 3d 92]* . The performance goals were also exempt from disclosure under *Gov. Code § 6254(c)* because the superintendent's privacy interests outweighed the public interest in disclosure of the goals [*Versaci v. Superior Ct. (2005) 127 Cal. App. 4th 805, 818-820, 26 Cal. Rptr. 3d 92]* .

Finally, the identity of individuals with criminal convictions who were given exemptions by the Department of Social Services to allow them to work at licensed child day care facilities and a list of facilities that employ these persons is not exempt from disclosure under *Gov. Code § 6254(c)* [*CBS Broadcasting, Inc. v. Superior Court (2001) 91 Cal. App. 4th 892, 906-907, 110 Cal. Rptr. 2d 889]* .

The Court of Appeal upheld the decision of the trial court in granting a preliminary injunction to order disclosure of salary information for city employees by job title, but without disclosing the names of the city employees who held those jobs under provisions of the California Public Records Act, *Gov. Code §§ 6254(c)* (personnel and medical records), 6255 (public interest exception), and 6254.8 (public employee employment contracts) [Teamsters Local 856 v. *Priceless, LLC (2003) 112 Cal. App. 4th 1500, 1522-1523, 5 Cal. Rptr. 3d 847]* .

The Court of Appeal upheld the decision of the trial court ordering disclosure of personnel records related to a specific incident in which aschool district employee was disciplined. The school district argued that the exemption for personnel records, disclosure of which would constitute an unwarranted invasion of personal privacy [*Cal. Gov. Code § 6254(c)*] and the public interest exemption [*Cal. Gov. Code § 6255(a)*], were applicable and provided a basis for the district not to disclose the records. The district argued that the standard for disclosure in this setting required a showing of reasonable cause that the complaint or charge was true, or a showing that the charge led to discipline being imposed on the employee. The Court of Appeal rejected this standard and concluded that the court must review the records to determine the reliability of the documents so that the court can decide whether the complaint was well founded. Neither the truth of the charges nor the fact of employee discipline are necessary elements for showing a well founded complaint that should be disclosed. In this case, based on a review of the records, the court concluded thatthe complaint was well founded, and the records should be disclosed [*Bakersfield City School District v. Superior Court (2004) 118 Cal. App. 4th 1041, 1046-1047, 13 Cal. Rptr. 3d 517]* .

The California Court of Appeal granted a writ of mandate and ordered disclosure of an investigator's report which assessed misconduct charges brought against a school district superintendent who was also the principal of the high school in the school district. In ordering disclosure of the report, the court of appeal conditioned disclosure on the redaction of all identifying information in the report, such as names, home addresses, telephone numbers, and job titles of any persons interviewed or mentioned in the investigator's report, including students, parents, staff members, and faculty members [*BRV, Inc. v. Superior Court (2006) 143 Cal. App. 4th 742, 759-760, 49 Cal. Rptr. 3d 519]* . The Court of Appeal considered the applicability of three exemptions to disclosure of the investigator's report:

(1) Personnel records, disclosure of which would constitute an unwarranted invasion of personal privacy [*Gov. Code § 6254(c)*];

(2) The public interest exemption [*Gov. Code § 6255*]; and

(3) Pupil records that are exempt from disclosure unless there is written parental consent or a court order [*Educ. Code § 49076*].

The court of appeal held that the investigator's report (related to misconduct charges against the superintendent) were not pupil records within the meaning of the education code provision, because the report did not directly relate to a student, and was not maintained by the school district in the ordinary course of business, unlike student information such as grade transcripts and class schedules [*BRV, Inc. v. Superior Court (2006) 143 Cal. App. 4th 742, 754-755, 49 Cal. Rptr. 3d 519]* . The court of appeal analyzed the personnel records and public interest exemptions from disclosure using the same test for both exemptions, whether the privacy interests of the superintendent were outweighed by the public interest in disclosure of the report. The court of appeal held that the public interest in disclosure outweighed the superintendent's privacy interests in the report because the superintendent was a public official who had a reduced expectation of privacy related to his public employment, and the public had a strong interest in learning why the superintendent was exonerated in the report, and how the school district treated the accusations against the superintendent, which had been addressed in a closed session of the school board. Thus, the court held that the public interest in disclosure outweighed the superintendent's privacy interests [*BRV, Inc. v. Superior Court (2006) 143 Cal. App. 4th 742, 758-759, 49 Cal. Rptr. 3d 519]* .

[7] Financial Institution Records

Records are exempt when they are contained in and related to applications filed with state agencies responsible for regulating or supervising the issuance of securities of financial institutions (including banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies). Associated notes and other information are also exempt [*Gov. Code § 6254(d)*]. Specifically, what is included within this exemption is the following records: (1) Applications filed with any state agency responsible for the regulation or supervision of the issuance of securities of financial institutions, including, but not limited to, banks, savings and loan associations, industrial loan companies, credit unions, and insurance companies [*Gov. Code § 6254(d)(1)*]; (2) Examination, operating, or condition reports prepared by, or on behalf of, or for the use of any state agency referred to in item (1) [*Gov. Code § 6254(d)(2)*]; (3) Preliminary drafts, notes, or interagency or intra-agency communications prepared by, or on behalf of, or for the use of any state agency referred to in item (1) [*Gov. Code § 6254(d)(3)*]; and (4) Information received in confidence by any state agency referred to in item (1) [*Gov. Code § 6254(d)(4)*].

[8] Geological and Plant Production Data

Geological or geophysical data, plant production data, and similar information relating to utility systems development or market or crop reports that have been obtained in confidence from any person are also exempt under the Act [*Gov. Code § 6254(e)*]. For example, in a case involving the disclosure of pesticide spray reports, a court held that the exemption for crop reports applies only to reports specifying the nature, extent, type, or magnitude of crops being grown [*Uribe v. Howie (1971) 19 Cal. App. 3d 194, 212, 96 Cal. Rptr. 493]* . The court holding was based on the exemption's purpose to protect the financial confidentiality of growers' enterprises. The existence of standardized pricing in the commodity markets would allow an outsider to estimate fairly accurately a growers' income based on knowledge of the quantity of the commodity to be harvested; thus, making the reports public might interfere with futures trading on commodity markets [*Uribe v. Howie (1971) 19 Cal. App. 3d 194, 212, 96 Cal. Rptr. 493]* .

[9] Law Enforcement Records

[a] Generally

Records of complaints, investigations, intelligence information and security procedures of various state and local criminal justice agencies, including the office of the Attorney General, the Department of Justice, and the California Emergency Management Agency, are exempt [*Gov. Code § 6254(f)*; *Dixon v. Superior Court (2009) 170 Cal. App. 4th 1271, 1273-1274, 88 Cal. Rptr. 3d 847* (coroner and autopsy reports that constitute investigations of a suspected homicide death are exempt from disclosure under the law enforcement records exemption (*Gov. Code § 6254(f)*) when the prospect of criminal law enforcement proceedings is concrete and definite); *County of Los Angeles v. Superior Court (2005) 130 Cal. App. 4th 1099, 1106-1107, 30 Cal. Rptr. 3d 708* (letters prepared by district attorney's office that are part of an investigative file related to whether county violated Brown Act are exempt from disclosure under law enforcement records exemption (*Gov. Code § 6254(f)*)]. The exemption also includes customer lists provided to a state or local police agency by an alarm or security company when the agency requests such list from the company [*Gov. Code § 6254(f)*]. This exemption is not absolute [*South Coast Newspapers, Inc. v. City of Oceanside (1984) 160 Cal. App. 3d 261, 267-269, 206 Cal. Rptr. 527]* . First, the exemption does not apply when a request for inspection is made by a district attorney [*Gov. Code § 6262*]. Moreover, an agency must disclose basic information regarding the incident to the victims, any insurance carrier that may have claims filed with it as a result of the incident, and any person who suffered damage as a result of the incident, unless disclosure would endanger the safety of an involved person or the successful completion of the investigation [*Gov. Code § 6254(f)*]. In addition, the agency must make public certain information relating to the person arrested and the complaints or requests received by the agency (along with the responses), as long as disclosure would not endanger any person's safety or the successful completion of the investigation [*Gov. Code § 6254(f)(1), (2)*].

Police officers, indicted for committing felonies, sought a protective order to prohibit district attorney from disclosing

urinalysis test results that were part of confidential peace officer personnel records. The court of appeal held that the testresults were exempt from disclosure under the California Public Records Act [*Gov. Code § 6254(f)* (law enforcement records exemption)]. This is because the results were obtained as part of a administrative investigation under *Gov. Code § 3303*, and the results of the tests were contained in both police investigative files, and files kept by the district attorney's office. District attorney and police investigative files are within the exemption for law enforcement records [*Fagan v. Superior Court (2003) 111 Cal. App. 4th 607, 615, 4 Cal. Rptr. 3d 239]* .

[i] Address of Persons Arrested, Victims, and Witnesses

The agency must disclose the current address of every person arrested by the agency and the current address of the victim of a crime, when the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator [Bus. & Prof. Code § 6254(f)(3)]. This disclosure duty is limited to current information related to contemporaneous police activity [*County of Los Angeles v. Superior Court (1993) 18 Cal. App. 4th 588, 602, 22 Cal. Rptr. 2d 409]* . Law enforcement officers and employees are prohibited from disclosing the address or telephone number of crime victims or witnesses to arrested persons or persons charged with criminal offenses involving those victims or witnesses. However, the defendant's lawyer can obtain this information [*Gov. Code § 6254(f)(2)*; *Pen. Code § 841.5*].

The language of the California statutory exemption for law enforcement investigative records [*Gov. Code § 6254(f)*] should not be interpreted toincorporate criteria from the Freedom of Information Act [*5 U.S.C. § 552(b)(7)(A)-(F)*] (FOIA) [*Williams v. Superior Court (1993) 5 Cal. 4th 337, 354, 19 Cal. Rptr. 2d 882, 852 P.2d 377]* . Unlike FOIA, which exempts law enforcement records or information only to the extent that one of seven criteria are satisfied and otherwise compels disclosure, the California act exempts law enforcement investigatory records from disclosure but does authorize disclosure of information taken from the records [*Williams v. Superior Court (1993) 5 Cal. 4th 337, 354, 19 Cal. Rptr. 2d 882, 852 P.2d 377]* . The exemption for investigatory files does not terminate with the conclusion of the investigation. Once an investigation has commenced because there is a concrete and definite prospect of enforcement proceedings at that time, materials that relate to the investigation, and thus properly belong in the file, remain exempt subject to the terms of the statute [*Williams v. Superior Court (1993) 5 Cal. 4th 337, 354-362, 19 Cal. Rptr. 2d 882, 852 P.2d 377* (citing *Uribe v. Howie (1971) 19 Cal. App. 3d 194, 212-213, 96 Cal. Rptr. 493* , for definition of investigation)]. So, for example, the California Public Records Act [*Gov. Code §§ 6250-6277*] does not compel disclosure of a district attorney's criminal investigation files concerning a local official, even if the investigation has been closed [*Rivero v. Superior Court (1997) 54 Cal. App. 4th 1048, 1050, 63 Cal. Rptr. 2d 213]* . Investigative records related to charges of police misconduct were exempt from disclosure under *Gov. Code § 6254(f)*. This exemption included a non public letter written by an investigative officer after the date that the investigation was closed. The content of the letter was related to the investigation and contained the opinions of the letter writer as to the investigation. The letter was part of the investigative file, and the exemption continues even though the investigation has been completed [*Rackauckas v. Superior Court (2002) 104 Cal. App. 4th 169, 176-178, 128 Cal. Rptr. 2d 234]* . However, records of a police investigation related to a traffic stop and detention were exempt from disclosure under the law enforcement records exemption even though no criminal prosecution was bought based on the traffic stop. Investigative records are exempt whether or not there is a concrete and definite prospect of enforcement proceedings. Also, tape recordings of citizen complaints are also within the law enforcement records exemption [*Haynie v. Superior Court (2001) 26 Cal. 4th 1061, 1064, 1072, 112 Cal. Rptr. 2d 80, 31 P.3d 760]* .

[ii] Names of Peace Officers

The California Public Records Act also requires a sheriff to disclose to a newspaper the names of peace officers who fired shots at a citizen. The names are not exempt under *Gov. Code § 6254(c)* (personnel files) or *Gov. Code § 6254(k)* (privileged records). Similarly, *Penal Code §§ 832.7-832.8* do not apply [*New York Times Co. v. Superior Court (1997) 52 Cal. App. 4th 97, 103, 60 Cal. Rptr. 2d 410]* .

[b] Standards

[i] Generally

In a case involving the California Division of Industrial Safety, the Division sought to avoid discovery of certain documents by asserting that its role in enforcing the California Occupational Safety and Health Act of 1973 [*Lab. Code §§ 6300-6331*] permitted it to resist disclosure under *Gov. Code § 6254(f)*. The court found that the exemption referred only to the enforcement of penal statutes, stating that a "concrete and definite" prospect of criminal law enforcement must exist to make this subdivision apply [*State of California ex rel. Division of Industrial Safety v. Superior Court (1974) 43 Cal. App. 3d 778, 784, 117 Cal. Rptr. 726*].

[ii] Regulatory Agencies

Even though regulatory agencies accumulate numerous records which may, under certain circumstances, be used in disciplinary proceedings, these records are not necessarily exempt as investigatory files. It is not enough that the record is labeled "investigatory" and that a possibility exists of an enforcement proceeding. Every administrative agency enforces statutes, conducts investigations, and incidentally compiles investigatory files. The Legislature did not intend to include all such files within the exemption. Otherwise, the exemption would swallow the Act's general policy of disclosure. The "concrete and definite" standard also applies to regulatory agencies that enforce disciplinary proceedings [*Uribe v. Howie (1971) 19 Cal. App. 3d 194, 212-213, 96 Cal. Rptr. 493]* . However, the exemption from disclosure for investigatory files does not end when the specific investigation has been completed. Those files remain exempt under the terms of the statute [*Williams v. Superior Court (1993) 5 Cal. 4th 337, 361-362, 19 Cal. Rptr. 2d 882, 852 P.2d 377]* . Criminal offender records information is ordinarily not a public record [*Younger v. Berkeley City Council (1975) 45 Cal. App. 3d 825, 832, 119 Cal. Rptr. 830]* .

[10] Examination Materials

Test questions, scoring keys, and other examination data used in a state licensing examination, examination for employment, or academic examination are exempt, except as provided in the statutes governing standardized tests used for admission to postsecondary institutions [*Gov. Code § 6254(g)*; *Educ. Code §§ 99150-99164*].

[11] Real Property Matters

The contents of real estate appraisals and engineering and feasibility estimates made by state and local agencies relating to the acquisition of real property or to prospective public supply and construction contracts are exempt, until all of the property has been acquired or all of the contract has been performed. Records of eminent domain proceedings, however, are not affected by this exemption [*Gov. Code § 6254(h)*]. The purchase price and other consideration paid by the public entity becomes public information that is available after acquisition of the property by eminent domain [*Gov. Code § 7275*].

[12] Tax Information

Information required from any taxpayer (1) in connection with the collection of local taxes, (2) that is received in confidence, and (3) and the disclosure of which would result in unfair competitive disadvantage to the person supplying the information, is exempt [*Gov. Code § 6254(i)*]. Homeowners' exemption claims and information and records in the property assessor's office that are not required by law to be kept or prepared by the assessor are not public documents and are not open to public inspection [*Rev. & Tax. Code § 408(a)*]. An assessee's own information, however, must be disclosed to him or her [*Rev. & Tax. Code § 408(d), (e)* (right to inspect or copy relevant market data and other relevant information related to assessment and appraisal of assessee's property)] and disclosure may also be made to law enforcement and other official agencies [*Rev. & Tax. Code § 408(b)*]. The assessor must also disclose information, including social security numbers, to the tax collector when requested by the tax collector to prepare the delinquent

portion of the unsecured tax roll [*Rev. & Tax. Code § 408(c)*].

[13] Library Circulation Records

Library circulation records kept for the purpose of identifying the borrower of items in the library, and library and museum materials made or acquired and presented solely for reference or exhibition purposes, are exempt. This exemption, however, does not apply to records of fines imposed on library borrowers [*Gov. Code § 6254(j)*]. Furthermore, *Gov. Code § 6267* provides that all registration and circulation records of any library that is in whole or in part supported by public funds must remain confidential and will not be disclosed to any person or agency, except (1) by a person acting within the scope of his or her duties within the administration of the library, (2) by a person with written authorization from the individual to whom the records pertain, or (3) by court order. The term "registration records" includes any information that a library requires a patron to provide in order to become eligible to borrow books and other materials; the term "circulation records" includes any information that identifies a patron borrowing particular books and other material. The exemption in *Gov. Code § 6267* does not apply to statistical reports of registration and circulation, nor to records of fines collected by the library [*Gov. Code § 6267*].

[14] Records Exempt Under Other Laws

Any record whose disclosure is exempted or prohibited by federal or other state law is exempt [*Gov. Code § 6254(k)*]. This exemption includes, but is not limited to, provisions of the Evidence Code relating to privilege [*Gov. Code § 6254(k)*; *Evid. Code §§ 900-1070* (privileges)], including the attorney-client privilege [*Roberts v. City of Palmdale (1993) 5 Cal. 4th 363, 372-373, 20 Cal. Rptr. 2d 330, 853 P.2d 496; Evid. Code § 1157 (records of organized medical peer review committees are exempt from discovery in civil lawsuits); Evid. Code § 1157.6 (records of quality assurance committees of county operated mental health facilities are exempt from discovery in civil lawsuits); County of Los Angeles v. Superior Court (2006) 139 Cal. App. 4th 8, 10, 42 Cal. Rptr.3d 390]* . This exemption also includes provisions of the Penal Code [*Gov. Code § 6254(k)*; *Penal Code §§ 832.7, 832.8*] including peace officer personnel records [*Copley Press, Inc. v. Superior Court (2006) 39 Cal. 4th 1272, 1283-1284, 48 Cal. Rptr. 3d 183, 141 P.3d 288]* . Documents prepared by counsel related to license agreements being negotiated between a governmental agency and a private company were within the attorney-client privilege [*Evid. Code §§ 952, 954*], and the privilege was not waived [*Evid. Code § 912* (privilege not waived by reasonably necessary disclosures)] by exchange of these documents in the negotiation process. Thus, the documents were privileged and exempt from disclosure under *Gov. Code § 6254(k)* [*STI Outdoor v. Superior Court (2001) 91 Cal. App. 4th 334, 339-341, 109 Cal. Rptr. 2d 865]* . This exemption is not independent; it merely incorporates other prohibitions established by law [*CBS, Inc. v. Block (1986) 42 Cal. 3d 646, 656, 230 Cal. Rptr. 362, 725 P.2d 470]* . Thus, a court's rejection of the claim of exemption under *Gov. Code § 6255* (the "residual" exemption) and *Evid. Code § 1040* (the privilege for official information) similarly require rejection of a claim of exemption under *Gov. Code § 6254(k)* [*CBS, Inc. v. Block (1986) 42 Cal. 3d 646, 656, 230 Cal. Rptr. 362, 725 P.2d 470* ; *California State University v. Superior Court (2001) 90 Cal. App. 4th 810, 832-833, 108 Cal. Rptr. 2d 870]* .

The California Supreme Court applied the records exempt under other laws exemption [*Gov. Code § 6254(k)*] and held that the statutory provisions governing confidentiality of peace officer personnel records [*Penal Code §§ 832.7, 832.8*] did not apply to exempt disclosure of peace officer employees' salary information [*International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal. 4th 319, 344-346, 64 Cal. Rptr. 3d 693, 165 P.3d 488]* , and did not apply to exempt disclosure of the peace officer's name, employing agency, date of new appointment, and termination date, information maintained electronically by the Commission [*Commission on Peace Officer Standards and Training v. Superior Court (2007) 42 Cal. 4th 278, 287-289, 64 Cal. Rptr. 3d 661, 165 P.3d 462]* . For further discussion of these cases, see *§ 470C.14[9]*. The California Supreme Court also held that when a criminal defendant makes a *Pitchess* motion, the defendant can file a sealed declaration or affidavit to protect attorney client privileged information and work product information, and the sealed declaration must be redacted (excluding privileged information) before the declaration is disclosed to the city attorney representing the police officer

whose personnel information is sought to be disclosed [*Evid. Code § 1043(b)(2),(3)*; *Garcia v. Superior Court (2007) 42 Cal. 4th 63, 76-78, 63 Cal. Rptr. 3d 948, 163 P.3d 939]* .

The California Supreme Court applied the records exempt under other laws' statutory exemption [*Gov. Code § 6254(k)*] and held that the statutory provisions governing confidentiality of peace officer personnel records [*Penal Code §§ 832.7, 832.8*] applied to prevent disclosure of appeal records including the name of the police officer related to a police officer's administrative appeal to the San Diego County Civil Service Commission of discipline imposed on that officer by the San Diego County Sheriff's Department [*Copley Press, Inc. v. Superior Court (2006) 39 Cal. 4th 1272, 1279, 48 Cal. Rptr. 3d 183, 141 P.3d 288]* . The California Supreme Court held that the confidentiality provisions of *Penal Code § 832.7* (making confidential personnel records of police officers maintained by the employing agency) applied to administrative appeals to county service commissions [*Copley Press, Inc. v. Superior Court (2006) 39 Cal. 4th 1272, 1284-1285, 48 Cal. Rptr. 3d 183, 141 P.3d 288]* . The California Supreme Court also held that the county civil service commission was included within the definition of the employing agency for purposes of *Penal Code § 832.7* [*Copley Press, Inc. v. Superior Court (2006) 39 Cal. 4th 1272, 1287-1288, 48 Cal. Rptr. 3d 183, 141 P.3d 288]* . The California Supreme Court also held that the identity of the police officer was protected from disclosure, along with records related to the officer's appeal [*Copley Press, Inc. v. Superior Court (2006) 39 Cal. 4th 1272, 1297-1298, 48 Cal. Rptr. 3d 183, 141 P.3d 288]* , and that *Penal Code § 832.7* was not unconstitutional under the provisions of *Cal. Const. Art. 1, § 3(b)(1)* (public right to access to governmental meetings and records) [*Copley Press, Inc. v. Superior Court (2006) 39 Cal. 4th 1272, 1300-1301, 48 Cal. Rptr. 3d 183, 141 P.3d 288]* .

The California Court of Appeal affirmed a writ of mandate petition granted by the superior court that concluded the City of Berkeley's Police Review Commission (PRC) had violated the confidentiality of peace officer personnel records under *Penal Code § 832.7*, as interpreted in the Copley Press decision, because the PRC hearings into complaints of police misconduct were public hearings and members of the public had access to PRC reports, investigations, and findings. The Court of Appeal affirmed the mandate order requiring the City of Berkeley and the PRC to maintain the confidentiality of police officer records, prohibit members of the public from attending PRC complaint hearings, and prohibit public access to PRC reports, investigations, or findings [*Berkeley Police Association v. City of Berkeley (2008) 167 Cal. App. 4th 385, 388, 84 Cal. Rptr. 3d 130*].

The California Supreme Court held that derivative information developed as a result of disclosures under the *Pitchess (Pitchess v. Superior Court 11 Cal. 3d 531, 540, 113 Cal. Rptr. 897, 522 P. 2d 305]* motion procedure can be disclosed and used only in the proceeding in which the disclosure is ordered. Otherwise, the protective order authorized under *Evid. Code § 1045(e)* prohibits disclosure of that information in any other judicial proceeding. Thus, if counsel obtains complainant information in one case through the granting of a *Pitchess* motion, that leads to the discovery of derivative information (information other than the name address, and telephone number of a complaining party, and other witnesses identity), that derivative information may only be used in that judicial proceeding and it subject to a protective order. However, if the same lawyer files a *Pitchess* motion in another case representing another party, and that lawyer obtains the same complainant information as in the prior motion, they are permitted to use the same derivative information in the new proceeding and that does not violate the protective order rules [*Chambers v. Appellate Division of the Superior Court (2007) 42 Cal. 4th 673, 680-682, 68 Cal. Rptr. 3d 43, 170 P.3d 617*]. The California Supreme Court held that when a trial court improperly failed to review a peace officer's personnel records in camera under the provisions of *Penal Code § 832.7* and *Evid. Code § 1043(b)*, the proper remedy was to remand the matter to the trial court with an order to review the records. The Supreme Court also held that if relevant information in confidential personnel records was not disclosed, then the judgment is reversible only if there is a reasonable probability that a different result would have occurred if the information had been disclosed [*People v. Gaines (2009) 46 Cal. 4th 172, 176-177, 92 Cal. Rptr. 3d 627, 205 P.3d 1074*)].

The identity of individuals with criminal convictions who were given exemptions by the Department of Social Services to allow them to work at licensed child day care facilities and a list of facilities that employ these persons is not exempt from disclosure under *Gov. Code § 6254(k)* [*CBS Broadcasting, Inc. v. Superior Court (2001) 91 Cal. App. 4th 892,*

907-908, 110 Cal. Rptr. 2d 889] . Disclosure of this information would not violate *Penal Code §§ 11105, 11142* (which restrict disclosure of criminal history information) because a criminal conviction is a matter of public record, and therefore there is no grounds for an exemption under *Gov. Code § 6254(k)* [*CBS Broadcasting, Inc. v. Superior Court (2001) 91 Cal. App. 4th 892, 907-908, 110 Cal. Rptr. 2d 889]* .

In addition, *Evid. Code § 1041(a)* provides that, except as provided in *Evid. Code § 1041*, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in *Evid. Code § 1041(b)* purporting to disclose a violation of a law of the United States or of California or of a public entity in California, and to prevent another from disclosing such identity, if the privilege is claimed by a person authorized by the public entity to do so and the following conditions are met [*Evid. Code § 1041(a)*]:

(1) Disclosure is forbidden by an act of Congress or by California statute;

(2) Disclosure of the informer's identity is against the public interest because there is a necessity for preserving the confidentiality of the informer's identity that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the identity of the informer be disclosed in the proceeding.

In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered. *Evid. Code § 1041* applies only if the information is furnished in confidence to a law enforcement officer, a representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated, or any person for the purpose of transmittal to a person listed in paragraph (1) or (2) [*Evid. Code § 1041(b)*]. Although *Evid. Code § 1041* does not specifically address the disclosure requirement of the Public Records Act, *Gov. Code § 6254(k)* provides that records whose disclosure is exempt pursuant to provisions of the Evidence Code relating to privilege are exempt from the Public Records Act [*Gov. Code §§ 6250-6277*].

Disclosure of public school student records relating to student expulsions, required under *Educ. Code § 48918*, is prohibited under the requirements of the Family Educational Rights and Privacy Act (FERPA) [*20 U.S.C. § 1232g*]. Federal law preempts the provisions of *Educ. Code § 48918*. Student records information is exempt from disclosure under federal law even if the student name and other identifying information is redacted from an expulsion record because the record would still contain student information that is protected from disclosure. Nondisclosure is also consistent with the requirements of *Gov. Code § 6254(k)* [*Rim of the World Unified School Dist. v. Superior Court (2003) 104 Cal. App. 4th 1393, 1398-1400, 129 Cal. Rptr. 2d 11]* .

The Regents of the University of California did not violate The Information Practices Act (IPA) [*Civil Code §§ 1798-1798.78*] when they did not retain and return midterm and final exams taken by a student who filed a lawsuit that challenged the failure to maintain and return those exams [*Moghadam v. Regents of University of California (2008) 169 Cal. App. 4th 466, 468-469, 86 Cal. Rptr. 3d 739*]. The IPA was not violated by the Regents because student exams are not "records" within the meaning of the IPA. The IPA, as defined in *Civil Code §§ 1798.3, 1798.14* requires public agencies to maintain records that contain personal information about individuals. The university does not maintain student exams in a central location, and student exams do not contain personal information about the students. Therefore, the IPA does not apply to student exams [*Moghadam v. Regents of University of California (2008) 169 Cal. App. 4th 466, 477-479, 86 Cal. Rptr. 3d 739*].

Investigative reports prepared under *Prob. Code § 1513* that are part of a probate court guardianship proceeding are confidential but parties to the guardianship proceeding and their attorneys are entitled to copies of the report in a timely manner before the guardianship hearing to allow adequate time to prepare for the hearing [*Prob. Code § 1513(d)*; *Tracy A. v. Superior Court (2004) 117 Cal. App. 4th 1309, 1318-1319, 12 Cal. Rptr. 3d 684]* .

Complaints of discrimination filed against two community college police officers, one by a faculty member, and one by a student, had to be disclosed to the officers under provisions of the Public Safety Officers Procedural Bills of Rights Act [*Gov. Code § 3305*] that require public safety officers to read and sign comments adverse to their employment interests before the comments are entered into a personnel file or used in a personnel matter against the employee. The complaints were made to the college administration, Office of Affirmative Action. The court held that disclosure was required under *Gov. Code § 3305*. Because the court ordered disclosure only to the two police officers, and not to the general public, the Court did not decide whether disclosure was required under the California Public Records Act [*Gov. Code §§ 6254, 6255*]. However, the court rejected an argument that the two complaints were protected from disclosure under the Family Educational and Privacy Act (FERPA) [*20 U.S.C. § 1232g(a)(4)(A)* & *(b)(2)*]. The court reasoned that one complaint was brought by a faculty member (to whom the FERPA statute did not apply because it dealt with student records), and disclosure of the other complaint by a student to the police officer did not violate federal law [*Seligsohn v. Day (2004) 121 Cal. App. 4th 518, 531-532, 16 Cal. Rptr. 3d 909]* . A police officer did not have the right under the Public Safety Officers Procedural *Bill of Rights* Act (POBRA) provisions [*Gov. Code §§ 3305, 3306.5*] to review all investigative materials maintained by the police department related to complaints against the officer, but only those materials that contained complaints or adverse comments against the officer so that the officer had the opportunity to respond to the complaints or adverse comments [*McMahon v. City of Los Angeles (2009) 172 Cal. App. 4th 1324, 1327-1328, 92 Cal. Rptr. 3d 68]* .

The Second District, Division 1, California Court of Appeal held that confidential records maintained by the Commission on Judicial Performance related to complaints against judges are official records that are protected by the official records privilege under *Evid. Code § 1040*. These records can not be disclosed using the *Pitchess* motion procedure [*Pitchess v. Superior Court 11 Cal. 3d 531, 540, 113 Cal. Rptr. 897, 522 P.2d 305*], and an in camera review of these judicial records is improper [*Commission on Judicial Performance v. Superior Court (2007) 156 Cal. App.4th 617, 623-625, 67 Cal. Rptr. 3d 434*].

The California Court of Appeal applied the records exempt under other laws statutory exemption [*Gov. Code § 6254(k)*] and held that the common law principle that the mental processes of legislators could not be probed through the judicially ordered discovery process means that public records related to legislative processes that may reveal legislators' motives for passing specific laws are protected from disclosure under this statutory exemption [*Gov. Code § 6254(k)*; *Sutter's Place v. Superior Court (2008) 161 Cal. App. 4th 1370, 1378-1379, 75 Cal. Rptr. 3d 9* (public records related to legislative history of ordinance are protected from disclosure under statutory exemption because they would reveal the mental processes and motives of the legislators in denying a hardship exemption to the business)].

[15] Correspondence With Governor's Office

Correspondence sent to or written by the governor or employees of the governor's office, as well as correspondence in the custody of or maintained by the governor's legal affairs secretary, is exempt [*Gov. Code § 6254(l)*]. The California Supreme Court construed this exemption to be limited to communications by letter and not to include the governor's appointment calendars and schedules [*Times Mirror Co. v. Superior Court (1991) 53 Cal. 3d 1325, 1336-1337, 283 Cal. Rptr. 893, 813 P.2d 240]* . However, letters and application forms received by the Governor's office from applicants for appointment to a vacant county supervisor's office do constitute correspondence under the statute and the Supreme Court's standard [California *First Amendment Coalition v. Superior Court (1998) 67 Cal. App. 4th 159, 169, 78 Cal. Rptr. 2d 847]* . However, public records may not be transferred to the custody of the governor's legal affairs secretary to evade the disclosure provisions of the Act [*Gov. Code § 6254(l)*].

[16] Public Records and Writings of Governor

Public records, as defined in *Gov. Code § 6252*, in the custody or control of the Governor when he or she leaves office, either voluntarily or involuntarily, shall, as soon as is practical, be transferred to the State Archives. The Governor, by written instrument, the terms of which must be made public, may restrict public access to any of the transferred public

records, or any other writings transferred, that have not already been made accessible to the public, notwithstanding any other provision of law. With respect to public records, public access, as otherwise provided for by *Gov. Code §§ 6250-6277*, shall not be restricted for a period greater than 50 years or until the death of the Governor, whichever is later. Nor shall there be any restriction whatsoever with respect to enrolled-bill files, press releases, speech files, or writings relating to applications for clemency or extradition in cases that have been closed for a period of at least 25 years. The Secretary of State, as custodian of the State Archives, must make all those public records and other writings available to the public, subject to any restrictions permitted by law [*Gov. Code § 6268*].

Except with regard to enrolled-bill files, press releases, speech files, or writings relating to applications for clemency or extradition, the statute does not apply to public records or other writings in the direct custody or control of any Governor who held office between 1974 and 1988 (Ronald Reagan, Edmund G. Brown, Jr., and George Deukmejian) at the time of leaving office, except to the extent that that Governor may voluntarily transfer those records or other writings to the State Archives [*Gov. Code § 6268*].

The public records and other writings of any Governor who held office between 1974 and 1988 may be transferred to any educational or research institution in California, notwithstanding any other provision of law. With respect to public records, however, public access, as otherwise provided for by law, shall not be restricted for a period greater than 50 years or until the death of the Governor, whichever is later. No records or writings may be transferred pursuant to *Gov. Code § 6268* unless the institution receiving them agrees to maintain, and does maintain, the materials according to commonly accepted archival standards. No public records transferred shall be destroyed by that institution without prior written approval of the Secretary of State, as custodian of the State Archives, who may require that the records be placed in the State Archives rather than be destroyed. An institution receiving those records or writings shall allow the Secretary of State, as custodian of the State Archives, to copy, at state expense, and to make available to the public any and all public records, and inventories, indices, or finding aids relating to those records, that the institution makes available to the public generally. Copies of those records in the custody of the State Archives shall be given the same legal effect as is given to the originals [*Gov. Code § 6268*].

[17] Legislative Counsel Records

Records in the custody of or maintained by the legislative counsel are also exempt [*Gov. Code § 6254(m)*]. However, records maintained by the legislative counsel that are part of the public data base [*Gov. Code § 10248*] are not exempt from disclosure [*Gov. Code § 6254(m)*]. These records include certain information about bills introduced into the legislature, proceedings of the houses and committees of the legislature, statutes that have been enacted by the legislature, and the California Constitution [*Gov. Code § 10248*; *Gov. Code § 9075(f)*].

[18] Financial Data

Statements of personal worth or personal financial data required by a licensing agency and filed with the agency by a license applicant to establish personal qualification for the license, certificate, or permit are exempt [*Gov. Code § 6254(n)*]. This exemption applies only to financial data given to obtain a license, and is thus narrower than the comparable exemption in the federal Freedom of Information Act (FOIA) [*5 U.S.C. § 552*]. The term "license" in *Gov. Code § 6254(n)* must be construed narrowly in order to give effect to the legislative intent that favors disclosure over secrecy in government [*San Gabriel Tribune v. Superior Court (1983) 143 Cal. App. 3d 762, 779, 192 Cal. Rptr. 415]* . Thus, for instance, financial data given by a waste disposal company pursuant to a contract with the city is not subject to this exemption. If the Legislature had intended a broad exemption to apply to financial statements, it would not have limited the exemption only to applicants with licensing agencies [*San Gabriel Tribune v. Superior Court (1983) 143 Cal. App. 3d 762, 779, 192 Cal. Rptr. 415]* .

Financial data submitted to the California Pollution Control Financing Authority [*Health & Safety Code §§ 44500-44557* (California Pollution Control Financing Authority Act)] is also exempt when an authorized officer of that

Authority determines that disclosure would be competitively injurious to the applicant and the data is required in order to obtain guarantees from the United States Small Business Administration [*Gov. Code § 6254(o)*].

[19] Employee Relations Data

Employee relations data are exempt. Employee relations data include data relating to state employer-employee relations [*Gov. Code §§ 3512-3524* (Ralph C. Dills Act)], state employee organizations [*Gov. Code §§ 3525-3536*], and higher education employer-employee relations [*Gov. Code §§ 3560-3599*], that reveal a state agency's work product (including deliberative processes, impressions, evaluations, opinions, recommendations, meeting minutes, research, theories, or strategy), or that provide instruction, advice, or training to employees who do not have full collective bargaining and representation rights [*Gov. Code § 6254(p)*].

[20] Health Care Service Provider Records

Additional exempt records include records relating to health care services providers' negotiations [*Welf. & Inst. Code §§ 14081-14087.29* (selective provider contracts), 14087.5-14087.95 (county health system), 14089-14089.5 (expanded choice of health care systems)] that reveal the special negotiator's work product (including deliberative processes, discussions, communications, or any other portion of the negotiations with providers of health care services; impressions; opinions; recommendations; meeting minutes; research; theories; or strategy), or that provide instruction, advice, or training to employees [*Gov. Code § 6254(q)*]. Contracts for inpatient services, however, are generally open to inspection one year after they are fully executed, except portions containing rates of payment, which are generally open to inspection three years thereafter [*Gov. Code § 6254(q)* (contracts may also be inspected at any time by Joint Legislative Audit Committee and the Legislative Analyst's Office)].

[21] Health Care Plan Records

No law shall require the disclosure of records of a health plan that is licensed pursuant to the Knox-Keene Health Care Service Plan Act of 1975 and that is governed by a county board of supervisors. Records that may not be disclosed include paper records, records maintained in the management information system, or records in any other form, that relate to provider rate or payment determinations, allocation or distribution methodologies for provider payments, formulae or calculations for these payments, and contract negotiations with providers of health care for alternative rates. They cannot be disclosed for a period of three years after the contract is fully executed. Administrative transmission of these records does not constitute a waiver of this exemption from disclosure [*Gov. Code § 6254.22*].

[22] In-Home Supportive Service Records

Information regarding persons paid by the state to provide in-home supportive services under the In-Home Supportive Services Program governed by the Welfare & Institutions Code is not subject to public disclosure. Certain administrative exceptions exist solely for transmitting copies of names, addresses, and telephone numbers of the persons to authorized agents or organizations for the purposes of employee organizing, representation, and assistance activities of a labor organization [*Gov. Code § 6253.2*].

[23] Native American Grave Records

Records of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects described in *Sections 5097.9* and *5097.993 of the Public Resources Code* maintained by, or in the possession of, the Native American Heritage Commission, another state agency, or a local agency [*Gov. Code § 6254(r)*].

[24] Hospital Records

A final accreditation report of the Joint Commission on Accreditation of Hospitals, which has been transmitted to the

State Department of Health Services [*Health & Safety Code § 1282(b)*] is exempt [*Gov. Code § 6254(s)*]. Records of a local hospital district [*Health & Safety Code §§ 32000-32492*] or the records of a municipal hospital formed by law [*Gov. Code §§ 37600, 37650*], relating to any contract with an insurer or a nonprofit hospital plan for patient services at alternative rates [*Ins. Code §§ 10133, 11512*] are also exempt. However, the record will become open to inspection within one year after the contract is fully executed [*Gov. Code § 6254(t)*].

[25] Address and Telephone Number Information for Government Employees

The home addresses and home telephone numbers of state employees, school district employees, or county office of education employees are not public records and are specifically prohibited from public inspection. However, disclosure may be made to (1) an agent or family member of the individual to whom the information pertains; (2) an officer or employee of another state agency, school district, or county office of education when necessary for the performance of its official duties; (3) an employee organization, pursuant to regulations and decisions of the Public Employment Relations Board, unless the employee performs law enforcement functions or has requested in writing that the information not be disclosed; and (4) an agent or employee of a health benefit plan [*Gov. Code § 6254.3(a)(1)-(4)*]. However, upon written request of any employee, a state agency, school district, or county office of education shall not disclose the employee's home address or home telephone number to an employee organization, and an agency shall remove the employee's home address and home telephone number from any mailing list maintained by the agency, except if the list is used exclusively by the agency to contact the employee [*Gov. Code § 6254.3(b)*].

[26] Air Pollution Control District Information

Trade secret information submitted to air pollution control districts does not constitute a public record [*Gov. Code § 6254.7(d)*; *Mansonite Corp. v. Superior Court (1994) 25 Cal. App. 4th 1045* ; *see* [29], *below*. The term "trade secret" includes any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information that (1) is not patented, (2) is known only to certain individuals within a commercial concern who use it to produce a product or service with commercial value, and (3) gives its user the opportunity to obtain a business advantage over competitors who do not know or use it. All air pollution emission data, including data that constitute trade secret information, are public records [*Gov. Code § 6254.7(d), (e)*; *Masonite Corp. v. Superior Court (1994) 25 Cal. App. 4th 1045, 1056-1058, 31 Cal. Rptr. 2d 173]* . Data used to calculate the costs of obtaining emissions offsets are not public records. However, certain information for a permit to construct, obtained from an applicant who is required to obtain offsets, is a public record if the permit is issued, but is not a public record if the permit is not issued and the application is denied. This information includes data obtained from the applicant consisting of the year the offset transaction occurred; the amount of offsets purchased by pollutant; and the total cost, by pollutant, of the offsets purchased [*Gov. Code § 6254.7(f)*].

[27] Archeological Site Records

Records that relate to archaeological site information and reports maintained by, or in the possession of, the Department of Parks and Recreation, the State Historical Resources Commission, the State Lands Commission, the Native American Heritage Commission, another state agency, or a local agency, including the records that the agency obtains through a consultation process between a California Native American tribe and a state or local agency are not public records [*Gov. Code § 6254.10*].

[28] Legal Counsel Memoranda

Memoranda that (1) are submitted to a state body or the legislative body of a local agency by its legal counsel and (2) relate to closed sessions for the purpose of discussing pending litigation [*Gov. Code §§ 11126(q), 54956.9*] are not public records and are not available for disclosure until the litigation has been finally adjudicated or otherwise settled [*Gov. Code § 6254.25*]. The memoranda are also protected by the attorney work-product privilege until the pending litigation has been finally adjudicated or otherwise settled [*Roberts v. City of Palmdale (1993) 5 Cal. 4th 363, 378, 20*

Cal. Rptr. 2d 330, 853 P.2d 496] . Written legal opinions by the attorney for a local governing body that are not related to pending litigation but are protected by the attorney-client privilege are protected from disclosure under the Public Record Act exemption [*Gov. Code § 6254(k)*] or for records exempt under other laws [*Gov. Code § 6254.25*].

[29] Trade Secrets

[a] Exemption Not Absolute

Before 1970, the Act expressly exempted trade secrets [under former *Gov. Code § 6254(d)*]. Exemptions for trade secrets must now be found under exemptions or prohibitions in provisions of federal or state law, including the Evidence Code [*Gov. Code § 6254(k)*; *CBS, Inc. v. Block (1986) 42 Cal. 3d 646, 656, 230 Cal. Rptr. 362, 725 P.2d 470]* . *Evid. Code § 1060* creates a privilege for trade secrets. The owner of a trade secret has a privilege to refuse to disclose it, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. The trade secret privilege is not absolute, however. For example, in a case in which a county agricultural commissioner sought to withhold pesticide records, he asserted the trade secret privilege. The court held that the qualification in *Evid. Code § 1060*, which states that "allowance of the privilege will not tend to conceal fraud or otherwise work injustice," requires a balancing of interests to determine if the exemption will be allowed [*Uribe v. Howie (1971) 19 Cal. App. 3d 194, 96 Cal. Rptr. 493]* . The court reasoned that an absolute privilege for all trade secrets could amount to a legally sanctioned license for unfair competition or fraud and could enable the continued use of dangerous materials by a party asserting the privilege [*Uribe v. Howie (1971) 19 Cal. App. 3d 194, 206, 96 Cal. Rptr. 493]* .

Ins. Code § 1861.07 requires public disclosure of information provided to the Insurance Commissioner by regulated insurance companies, including insurer developed community service statements that contain statistical information by zip code that allow the commissioner to determine which communities in California are underserved by insurance companies. *Ins. Code § 1861.07* does not authorize a trade secret exemption under *Gov. Code § 6254(k)* that would prevent disclosure of community service statements under the Public Records Act. Thus, the insurers' claim that these statements are trade secrets that are exempt from disclosure was rejected by the California Supreme Court. Public disclosure of the statements by the Insurance Commissioner was proper [*State Farm Mutual Automobile Ins. Co. v. Garamendi (2004) 32 Cal. 4th 1029, 1046-1047, 12 Cal. Rptr. 3d 343, 88 P.3d 71]* .

Trade secrets and other confidential information that are contained in records of county health authorities and commissions are exempt from disclosure under the provisions of *Gov. Code § 6276.24*, and are exempt from disclosure under local laws [*Gov. Code § 6276.24*].

[b] Federal Insecticide, Fungicide, and Rodenticide Act

The Director of Pesticide Regulation, upon his or her initiative, or upon receipt of a request for the release of data submitted and designated as a trade secret by a registrant or applicant, shall determine whether any or all of the data so submitted is a properly designated trade secret. In order to assure that the interested public has an opportunity to obtain and to review pesticide safety and efficacy data and to comment prior to the expiration of the public comment period on a proposed pesticide registration, the director shall provide notice to interested persons when an application for registration enters the registration evaluation process [*Gov. Code § 6254.2(b)*]. If the director determines that the data is not a trade secret, the director shall notify the registrant or applicant by certified mail [*Gov. Code § 6254.2(c)*]. The registrant or applicant shall have 30 days after receipt of this notification to provide the director with a complete justification and statement of the grounds on which the trade secret privilege is claimed. This justification and statement shall be submitted by certified mail [*Gov. Code § 6254.2(d)*]. The director shall determine whether the data is protected as a trade secret within 15 days after receipt of the justification and statement or, if no justification and statement is filed, within 45 days of the original notice. The director shall notify the registrant or applicant and any party who has requested the data of thedetermination by certified mail. If the director determines that the data is not protected as a

trade secret, the final notice shall also specify a date,not sooner than 15 days after the date of mailing of the final notice, when the data shall be available to any person requesting information [*Gov. Code § 6254.2(e)*].

"Trade secret" means data that is nondisclosable under *7 U.S.C. § 136h(d)(1)* of the federal Insecticide, Fungicide, and Rodenticide Act [*Gov. Code § 6254.2(f)*]. This law shall be operative only so long as, and to the extent that, enforcement of *7 U.S.C. § 136h(d)(1)* of the federal Insecticide, Fungicide, and Rodenticide Act has not been enjoined by federal court order, and shall become inoperative if an unappealable federal court judgment or decision becomes final that holds that paragraph invalid, to the extent of the invalidity [*Gov. Code § 6254.2(g)*].

The California Court of Appeal held that the Department of Pesticide Regulation did not have authority under the California Public Records Act [*Gov. Code § 6254.2*] to either disclose or use data submitted by a pesticide manufacturer for evaluating applications for pesticide registrations submitted by other manufacturers without the consent of the manufacturer who submitted the data [*Syngenta Crop Protection, Inc. v. Helliker (2006) 138 Cal. App. 4th 1135, 1170-1172, 42 Cal. Rptr. 3d 191]* .

For further discussion regarding the federal Insecticide, Fungicide, and Rodenticide Act *see § 470C.13[49]* and for form for affirmation of status for information to Department of Pesticide Regulation, *see § 470C.51*.

[30] Firearm License Applications

Information in applications for licenses for firearms is exempt if it meets both of the following criteria [*Gov. Code § 6254(u)(1)*]: (A) The license applied for is issued by the sheriff of a county or by the chief or other head of a municipal police department; and (B) The information indicates where or when the applicant is vulnerable to attack or it concerns the medical or psychological history of the applicant or of members of the applicant's family. In addition, the following information is exempt: (1) The home address and telephone number of peace officers, judges, court commissioners, and magistrates that are set forth in applications for licenses to carry firearms issued under *Penal Code § 12050* by the sheriff of a county or the chief or other head of a municipal police department [*Gov. Code § 6254(u)(2)*]; and (2) The home address and telephone number of peace officers, judges, court commissioners, and magistrates that are set forth in licenses to carry firearms issued under *Penal Code § 12050* by the sheriff of a county or the chief or other head of a municipal police department [*Gov. Code § 6254(u)(3)*].

[31] Managed Risk Medical Insurance Board Records (Health Care)

Records of the Managed Risk Medical Insurance Board Records (Health Care) [*Ins. Code §§ 12695-12699.50, 12700-12739.4*] are exempt if they: (1) reveal deliberative processes, discussions, communications, or any other portion of the negotiations with health plans; (2) disclose impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the board or its staff; or (3) include records that provide instruction, advice, or training to employees [*Gov. Code § 6254(v)(1)*]. Health coverage contracts under this program may be inspected under the public records act one year after execution [*Gov. Code § 6254(v)(2)(A)* (health coverage contracts entered into on or after July 1, 1991)], oramendment [*Gov. Code § 6254(v)(2)(B)* (health coverage contracts entered into prior to July 1, 1991, but amended on or after July 1, 1991)], except for contractual provisions containing rates of payment, which may be inspected three years after the rest of the contract or amendment is open to inspection [*Gov. Code § 6254(v)(3)*]. However, the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The Joint Legislative Audit Committee shall maintain the confidentiality of the contracts and amendments thereto, until the contract or amendments to a contract is open to inspection [*Gov. Code § 6254(v)(4)*].

Records of the Major Risk Medical Insurance Program related to activities governed by *Ins. Code §§ 10700 et seq.* are exempt to the extent that they reveal the deliberative processes, discussions, communications, or any other portion of the negotiations with health plans, or the impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the Board or its staff, or records that provide instructions, advice, or training to

employees [*Gov. Code § 6254(w)(1)*]. Health coverage contracts [*Ins. Code §§ 10700 et seq.*], except for the portion containing payment rates, shall be open to inspection one year after they have been fully executed [*Gov. Code § 6254(w)(2)*]. Health plan contracts shall be open to inspection by the Joint Legislative Audit Committee on a confidential basis until the contract is open to inspection [*Gov. Code § 6254(w)(3)*].

[32] Managed Risk Medical Insurance Board Records

Except as provided in *Gov. Code § 6254.7* (air pollution data as public records), nothing in the California Public Records Act (*Gov. Code §§ 6250-6277*) may be construed to require disclosure of records of the Managed Risk Medical Insurance Board related to activities governed by *Ins. Code §§ 12693 et seq.* (health insurance coverage for low income families ineligible for Medi-Cal) that reveal the deliberative processes, discussions, communications, or any other portion of the negotiations with health plans, or the impressions, opinions, recommendations, meeting minutes, research, work product, theories or strategy of the board or its staff, or records that provide instructions, advice, or training to employees [*Gov. Code § 6254(y)(1)*]. Except for portions of contracts that contain rates of payment, contracts entered into on or after January 1, 1998, and amendments to those contracts, must be open to inspection one year after they have been fully executed [*Gov. Code § 6254(y)(2)*]. Three years after a contract or amendment is open to inspection, the portion of the contract or amendment containing the rates of payment must be open to inspection [*Gov. Code § 6254(y)(3)*]. Health plan contracts shall be open to inspection by the Joint Legislative Audit Committee on a confidential basis until the contract is open to inspection [*Gov. Code § 6254(y)(4)*].

The disclosure exemption authorized by *Gov. Code § 6254(y)(1)* also includes contracts, deliberative process, discussions, communications, negotiations with health plans, impressions, opinions, recommendations meeting minutes, research, work product, theories or strategy of applicants under *Ins. Code § 12699.50 et seq.* [*Gov. Code § 6254(y)(5)*]. Also exempt from disclosure are MRMI Board records related to employee activities covered by *Labor Code § 2120 et seq.* including records that reveal deliberative processes, discussions, communications, or contract negotiations, or impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy of the Board or its staff, or records with employee instructions, advice or training [*Gov. Code § 6254(y)(1)*].

[33] Service Contractor Financial Data

Except as provided in *Gov. Code § 6254.7* (air pollution data as public records), nothing in the California Public Records Act (*Gov. Code §§ 6250-6277*) may be construed to require disclosure of the following [*Gov. Code § 6254(x)*]: financial data contained in applications for registration, or registration renewal, as a service contractor filed with the Director of the Department of Consumer Affairs under *Bus. & Prof. Code § 9800 et seq.* for the purpose of establishing the service contractor's net worth; or financial data regarding funded accounts held in escrow for service contracts held in force in California by a service contractor.

[34] Housing Records

Except as provided in *Gov. Code § 6254.7* (air pollution data as public records), nothing in the California Public Records Act (*Gov. Code §§ 6250-6277*) requires disclosure of records of the residence address of any person contained in the records of the Department of Housing and Community Development, if the person has requested confidentiality of that information under *Health & Safety Code § 18081* [*Gov. Code § 6254.1(a)*]. Pursuant to *Health & Safety Code § 18081*, a person who has furnished necessary information regarding registration and title status of a manufactured home, mobilehome, commercial coach, truck camper, or floating home to the Department of Housing and Community Development may request that his or her home address remain confidential [*Health & Safety Code § 18081*].

[35] Address Information in DMV Records

Nothing in the California Public Records Act [*Gov. Code §§ 6250-6277*] requires the disclosure of the residence or mailing address of any person in any record of the Department of Motor Vehicles except in accordance with *Veh. Code*

§ 1808.21 [*Gov. Code § 6254.1(b)*]. Pursuant to *Veh. Code § 1808.21*, any residence address in any record of the Department of MotorVehicle is confidential, and disclosure to any person, except to a court, law enforcement agency, or other government agency or as authorized in *Veh. Code § 1808.22*, is prohibited [*Veh. Code § 1808.21(a)*; *Veh. Code § 1808.21(c)* (provider of mailing address must declare truth of information and consent to service of process at that address)]. Release of any complete or partial mailing address in any record of the Department of Motor Vehicles may be restricted for purposes related to the reasons for which the information was collected, including, but not limited to, the assessment of driver risk or ownership of vehicles or vessels [*Veh. Code § 1808.21(b)*].

[a] Procedures to Protect Confidentiality

Any person who has access to confidential or restricted information from the Department of Motor Vehicles must establish procedures to protect the confidentiality of those records. If confidential or restricted addresses are released to any agent of a person authorized to obtain restricted addresses [*Veh. Code §§ 1808.21*, *1808.22*, *1810.2* (commercial requestor accounts), or *§ 1810.7 Veh. Code* § 1810.7 access to DMV electronic data base for commercial use)], the person must require the agent to take all steps necessary to ensure confidentiality of these addresses and to prevent any release of the information to a third party. No agent may obtain or use any confidential or restricted records from requestor-code holders for any purpose other than the reason the information was requested by the requestor-code holder who originally obtained the information [*Veh. Code § 1808.47*]. The home addresses of certain people, including legislators, judges and court commissioners, district attorneys, public defenders, peace officers, and other specified people with responsibilities related to law enforcement or corrections, are confidential [*Veh. Code §§ 1808.4*, *1808.6*].

[b] Suppression

[i] Procedure

Any registration or driver's license record of a person may be suppressed from any other person, except for those persons specified [*Veh. Code § 1808.21(a)* (that is, a court, law enforcement agency, or other government agency)], or as authorized by law [*Veh. Code § 1808.22*], if the person requesting the suppression submits verification acceptable to the department that he or she has reasonable cause to believe that he or she is the subject of a stalking [*Civ. Code § 1708.7*, or *Penal Code § 646.9*], or that there exists a threat of death or great bodily injury to his or her person [as defined in *Penal Code § 12022.7(d)*;[*Veh. Code § 1808.21(d)(1)*].

[ii] Duration

Once a record has been suppressed under this provision, each request for information about that record must be authorized by the subject of therecord or verified as legitimate by other investigative means by the department before the information is released [*Veh. Code § 1808.21(d)(2)*]. Suppression of a record lasts for one year after approval by the department. Not less than 60 days before the date the suppression of the record would otherwise expire, the department must notify the subject of the record of its impending expiration [*Veh. Code § 1808.21(e)*]. The suppression may be continued for two additional periods of one year each if a letter is submitted to the department stating that the person continues to have a reasonable cause to believe that he or she is the subject of stalking or that there exists a threat of death or great bodily injury. The suppression may be additionally continued at the end of the second one-year period by submitting verification acceptable to the department. The notification must instruct the person of the method to reapply for record suppression [*Veh. Code § 1808.21(e)*].

[iii] Documentation

"Verification acceptable to the department" means recent police reports, court documentation, or other documentation from a law enforcement agency [*Veh. Code § 1808.21(f)*].

[iv] Penalties for Disclosure

Wrongful disclosure of Motor Vehicle Records may result in civil penalties payable to the Department of Motor Vehicles, revocation of requestor-code privileges, and criminal prosecution [*Veh. Code § 1808.45* (criminal penalties), *Veh. Code § 1808.46* (civil penalties and sanctions)].

[v] Exemptions

The restriction under *Veh. Code § 1808.21* does not apply to a release to a court, a law enforcement agency or other governmental agency, or a person who has been issued a requestor code [*Veh. Code § 1810.2* (commercial requestor accounts); *Veh. Code § 1808.21(b)*]. The restriction under *Veh. Code § 1808.21* does not apply to a financial institution licensed by the state or federal government to do business in California that states under penalty of perjury that it has obtained a written waiver of *Veh. Code § 1808.21* signed by the individual whose address is requested. It also does not prohibit the Department of Motor Vehicles from providing the address of any person who has entered into an agreement held by that institution prior to July 1, 1990, so long as that agreement remains in effect [*Veh. Code § 1808.22(a)*]. The restriction under *Veh. Code § 1808.21* does not apply to an insurance company licensed to do business in California if the company, under penalty of perjury, requests the information for the purpose of obtaining the address of another motorist or vehicle owner involved in an accident with its insured, or requests the information on an individual who has signed a written waiver under *Veh.Code § 1808.21* or on individuals insured under a policy if a named insured of that policy has signed a written waiver [*Veh. Code § 1808.22(b)*].

[vi] Attorneys Representing a Client

The restriction under *Veh. Code § 1808.21* does not apply to an attorney if the attorney states, under penalty of perjury, that the information regarding the residential address of the registered owner or driver is necessary in order to represent his or her client in a criminal or civil action that directly involves the use of the motor vehicle that is pending, is to be filed, or is being investigated [*Veh. Code § 1808.22(c)*]. Information requested pursuant to *Veh. Code § 1808.22(c)* is subject to all of the following [*Veh. Code § 1808.22(c)*]:

- The attorney must state that the criminal or civil action that is pending, is to be filed, or is being investigated related directly to the use of that motor vehicle or motorcycle [*see State Farm Mut. Auto. Ins. Co. v. Department of Motor Vehicles (1997) 53 Cal. App. 4th 1076, 1082, 62 Cal. Rptr. 2d 178* (inquiry into potential conversion claim is investigation of action that "directly involves use of motor vehicle" within meaning of *Veh. Code § 1808.22(c)*)];

- The case number, if any, or the names of expected parties, to the extent they are known to the attorney requesting the information, must be listed on the request;

- A residence address obtained from the DMV shall not be used for any purpose other than in furtherance of the case cited or action to be filed or that is being investigated;

- If no action is filed within a reasonable time, the residence address information must be destroyed;

- No attorney shall request residence address information pursuant to *Veh. Code § 1808.22(c)* in order to sell the information to any person; and

- Within 10 days of receipt of a request, the DMV must notify every individual whose residence address has been requested pursuant to *Veh. Code § 1808.22(c)*.

A knowing violation of *Veh. Code § 1808.22(c)(1), (2), (3), (4),* or *(5)* in furtherance of another crime is subject to the same penalties as that other crime [*Veh. Code § 1808.22(d)*].

[36] DMV Test Results

Nothing in the California Public Records Act (*Gov. Code §§ 6250-6277*) requires the disclosure of the results of a test undertaken pursuant to *Veh. Code § 12804.8* [*Gov. Code § 6254.1(c)*]. *Veh. Code § 12804.8* authorizes the Department of Motor Vehicles to conduct studies to develop and identify examinations and tests to more accurately identify persons who,due to physical or mental factors, are not competent or qualified to safely operate motor vehicles [*Veh. Code § 12804.8(a)*]. The department may require any person applying for an original driver's license or renewal, or a person subject to reexamination, to submit to one or more tests or examinations that are part of the study [*Veh. Code § 12804.8(b)*]. However, the results and information obtained during the study through the tests and examinations must be used only to assess and to select tests and examinations for use by the department [*Veh. Code § 12804.8(c)*]. The results of the tests are confidential and may not be disclosed to any person [*Veh. Code § 12804.8(c)*].

[37] Unlisted or Unpublished Telephone Numbers

In addition, the Public Records Act excludes from disclosure requirements unlisted or unpublished telephone numbers obtained by law enforcement, fire protection, public health, city or county emergency services, or private for-profit agencies for the purpose of responding to a 911 call or of communicating an imminent threat to life or property [*Gov. Code § 6254(z)*; *Pub. Util. Code § 2891.1(c)(2)*].

[38] Voter Registration Information for Public Legal and Law Enforcement Personnel

Voter registration information is confidential and is exempt from disclosure if the person registering to vote, or reregistering to vote, requests confidentiality at the time of registration and the person is a public legal or law enforcement person or a related person. The information that is exempt from disclosure includes home address, telephone number, occupation, precinct number, and prior registration information that is shown on the voter registration card [*Gov. Code § 6254.4(a)*]. The confidential information also includes California driver's license number, California identification card number, social security numbers, and any other unique identifier used for voter identification or registration [*Gov. Code § 6254.4(c)*]. The signature of the voter that is shown on the voter registration card is also confidential and shall not be disclosed to any person [*Gov. Code § 6254.4(d)*]. Persons who are eligible for confidential voter registration includes active or retired judges, district attorneys, public defenders, police officers, employees of police or sheriffs offices, and spouses or children of any of the above persons if the spouse and children live in the same household [Gov. Code § 4254.4(a)(1)-(6)]. Confidentiality is applicable only to records prepared or generated on or after the date the voter is granted confidentiality [*Gov. Code § 6254.4(b)*]. Disclosure of the home address or telephone number of a police officer, police or sheriff employee, or spouse or child living with the police officer or employee is a criminal offense [*Gov. Code § 6254.4(d)*].

[39] Health Service Contract Negotiations Records

Records of the Department of Corrections relating to health care services contract negotiations that reveal the deliberative processes, discussions, communications, or any other portion of the negotiations are exempt from disclosure, including, but not limited to, records related to those negotiations such as meeting minutes, research, work product, theories, or strategy of the department, or its staff, or members of the California Medical Assistance Commission, or its staff, who act in consultation with, or on behalf of, the department [*Gov. Code § 6254.14(a)*].

Except for the portion of a contract that contains the rates of payment, contracts for health services entered into by the Department of Corrections or the California Medical Assistance Commission on or after July 1, 1993, shall be open to inspection one year after they are fully executed. In the event that a contract for health services that is entered into prior to July 1, 1993, is amended on or after July 1, 1993, the amendment, except for any portion containing rates of payment, shall be open to inspection one year after it is fully executed. Three years after a contract or amendment is open to inspection, the portion of the contract or amendment containing the rates of payment shall be open to inspection.

Notwithstanding any other provision of law, the entire contract or amendment shall be open to inspection by the Joint Legislative Audit Committee and the Bureau of State Audits. The Joint Legislative Audit Committee and the Bureau of State Audits shall maintain the confidentiality of the contracts and amendments until the contract or amendment is fully open to inspection by the public [*Gov. Code § 6254.14(a)*]. Confidentiality of health care provider contracts, and of the contracting process, is intended to protect the competitive nature of the negotiation process, and shall not affect public access to other information relating to the delivery of health care services *Gov. Code § 6254.14(a)*]. The inspection authority and confidentiality requirements established in *Gov. Code § 6254 (q), (v),* and *(w)* for the Legislative Audit Committee shall also apply to the Bureau of State Audits *Gov. Code § 6254.14(b)*].

[40] Public School Examination Materials

Members of the legislature and the Governor can request disclosure of test questions or materials that would be used to administer an examination as part of a statewide testing program of public school pupils. However, individual examinations that have been administered to a student andhave been scored may not be disclosed. The requestor can view the materials at a location chosen by the State Department of Education, and must keep confidential the materials reviewed [*Gov. Code § 6254.13*].

[41] Private Industry Wage Data

Whenever a city and county or a joint powers agency, pursuant to a mandatory statute or a charter provision to collect private industry wage data for salary-setting purposes or to a contract entered into to implement that mandate, is provided that data by the federal Bureau of Labor Statistics on the basis that the identity of private industry employers remain confidential, the identity of the employers shall not be open to the public or be admitted as evidence in any action or special proceeding [*Gov. Code § 6254.6*].

[42] Electronically Collected Personal Information

Agencies are not required to disclose records that relate to electronically collected personal information, as defined by *Gov. Code § 11015.5*, received, collected, or compiled by a state agency [*Gov. Code § 6254.20*].

[43] Home Address or Telephone Number of Public Official

No state or local agency shall post the home address or telephone number of any elected or appointed official on the Internet without first obtaining the written permission of that individual [*Gov. Code § 6254.21(a)*]. No person shall knowingly post the home address or telephone number of any elected or appointed official, or of the official's residing spouse or child on the Internet knowing that person is an elected or appointed official and intending to cause imminent great bodily harm that is likely to occur or threatening to cause imminent great bodily harm to that individual. A violation of this subdivision is a misdemeanor. A violation of this subdivision that leads to the bodily injury of the official, or his or her residing spouse or child, is a misdemeanor or a felony [*Gov. Code § 6254(b)*].

Furthermore, no person, business, or association shall publicly post or publicly display on the Internet the home address or telephone number of any elected or appointed official if that official has made a written demand of that person, business, or association to not disclose his or her home address or telephone number [*Gov. Code § 6254.21(c)(1)(A)*]. A written demand made under this paragraph by a state constitutional officer, a mayor, or a member of the Legislature, a city council, or a board of supervisors shall include a statement describing a threat or fear for the safety of that official or of any person residing at the official's home address [*Gov. Code § 6254.21(c)(1)(B)*]. A written demand made under this paragraph by an elected official shall be effective for four years, regardless of whether or not the official's term has expired prior to the end of the four-year period [*Gov. Code § 6254.21(c)(1)(C)*]. A person, business, or association that receives the written demand of an elected or appointed official pursuant to this paragraph shall remove the official's home address or telephone number from public display on the Internet within 48 hours of delivery of the written demand, and shall continue to ensure that this information is not reposted on the same Internet website, subsidiary site,

or any other Internet website maintained by the recipient of the written demand [*Gov. Code § 6254.21(c)(1)(D)(i)*]. After receiving the elected or appointed official's written demand, the person, business, or association shall not transfer the appointed or elected official's home address or telephone number to any other person, business, or association through any other medium [*Gov. Code § 6254.21(c)(1)(D)(ii)*]. Subsection (ii) shall not be deemed to prohibit a telephone corporation, as defined in *Section 234 of the Public Utilities Code*, or its affiliate, from transferring the elected or appointed official's home address or telephone number to any person, business, or association, if the transfer is authorized by federal or state law, regulation, order, or tariff, or necessary in the event of an emergency, or to collect a debt owed by the elected or appointed official to the telephone corporation or its affiliate [*Gov. Code § 6254.21(c)(1)(D)(iii)*]. For purposes of this paragraph, "publicly post" or "publicly display" means to intentionally communicate or otherwise make available to the general public [*Gov. Code § 6254.21(c)(1)(E)*].

An official whose home address or telephone number is made public as a result of a violation of paragraph (1) may bring an action seeking injunctive or declarative relief in any court of competent jurisdiction. If a court finds that a violation has occurred, it may grant injunctive or declarative relief and shall award the official court costs and reasonable attorney's fees.

A fine not exceeding $1,000 may be imposed for a violation of the court's order for an injunction or declarative relief obtained pursuant to this paragraph [*Gov. Code § 6254.21(c)(2)*]. An elected or appointed official may designate in writing the official's employer, a related governmental entity, or any voluntary professional association of similar officials to act, on behalf of that official, as that official's agent with regard to making a written demand pursuant to this section. A written demand made by an agent pursuant to this paragraph shall include a statement describing a threat or fear for the safety of that official or of any person residing at the official's home address [*Gov. Code § 6254.21(c)(3)*].

No person, business, or association shall solicit, sell, or trade on the internet the home address or telephone number of an elected or appointed official with the intent to cause imminent great bodily harm to the official or to any person residing at the official's home address [*Gov. Code § 6254.21(d)(1)*]. Notwithstanding any other provision of law, an official whose home address or telephone number is solicited, sold, or traded in violation may bring an action in any court of competent jurisdiction. If a jury or court finds that a violation has occurred, it shall award damages to that official in an amount up to a maximum of three times the actual damages but in no case less than four thousand dollars ($4,000) [*Gov. Code § 6254.21(d)(2)*].

An interactive computer service or access software provider, as defined in *Section 230(f) of Title 47 of the United States Code*, shall not be liable under this section unless the service or provider intends to abet or cause imminent great bodily harm that is likely to occur or threatens to cause imminent great bodily harm to an elected or appointed official [*Gov. Code § 6254.21(e)*].

"Elected or appointed official" includes, but is not limited to, all of the following [*Gov. Code § 6254.21(f)(14), (15),* and *(16)*]:

(1) State constitutional officers.

(2) Members of the Legislature.

(3) Judges and court commissioners.

(4) District attorneys.

(5) Public defenders.

(6) Members of a city council.

(7) Members of a board of supervisors.

(8) Appointees of the Governor.

(9) Appointees of the Legislature.

(10) Mayors.

(11) City attorneys.

(12) Police chiefs and sheriffs.

(13) Public safety officials.

(14) State administrative law judges.

(15) Federal judges and federal defenders.

(16) Members of the United States Congress and appointees of the President.

Nothing in this section is intended to preclude punishment instead under *Sections 69, 76,* or *422 of the Penal Code,* or any other provision of law [*Gov. Code § 6254.21(g)*].

Public safety officials are defined as [*Gov. Code § 6254.24*]:

- An active or retired peace officer as defined [*Penal Code §§ 830,* and *830.1*] by law [*Gov. Code § 6254.24(a)*];

- An active or retired public officer or other person listed in *Veh. Code §§ 1808.2* and *1808.6* [*Gov. Code § 6254.24(b)*];

- An "elected or appointed official" as defined [*Gov. Code § 6254.21(f)*] by law [*Gov. Code § 6254.24(c)*];

- An attorney employed by the Department of Justice, the State Public Defender, or a county office of the district attorney or public defender the United States Attorney, or the Federal Public Defender [*Gov. Code § 6254.24(d)*];

- A city attorney and an attorney who represent cities in criminal matters [*Gov. Code § 6254.24(e)*];

- A specified employee of the Department of Corrections and Rehabilitation who supervises inmates or is required to have a prisoner in his or her care or custody [*Gov. Code § 6254.24(f)*].

- A sworn or nonsworn employee who supervises inmates in a city police department, a county sheriff's office, the Department of the California Highway Patrol, federal, state, or a local detention facility, and a local juvenile hall, camp, ranch, or home, and a probation officer as defined by law [*Gov. Code § 6254.24(g)*].

- A federal prosecutor, a federal criminal investigator, and a National Park Service Ranger working in

California [*Gov. Code § 6254.24(h)*].

- The surviving spouse or child of a peace officer defined by law [*Penal Code § 830*], if the peace officer died in the line of duty [*Gov. Code § 6254.24(i)*].

- State and federal judges and court commissioners [*Gov. Code § 6254.24(j)*].

- An employee of the Attorney General, a district attorney, or a public defender who submits verification from the Attorney General, district attorney, or public defender that the employee represents the Attorney General, district attorney, or public defender in matters that routinely place that employee in personal contact with persons under investigation for, charged with, or convicted of, committing criminal acts [*Gov. Code § 6254.24(k)*].

- A nonsworn employee of the Department of Justice or a police department or sheriff's office that, in the course of his or her employment, is responsible for collecting, documenting, and preserving physical evidence at crime scenes, testifying in court as an expert witness and other technical duties, and a nonsworn employee that, in the course of his or her employment, performs a variety of standardized and advanced laboratory procedures in the examination of physical crime evidence, determines their results, and provides expert testimony in court [*Gov. Code § 6254.24(l)*].

[44] Chemical Substance Information

Agencies are not required to disclose records that relate to volatile organic compounds or chemical substances information received or compiled by an air pollution control officer under Health & Safety code § 42303.2 [*Gov. Code § 6254.11*].

[45] Securities Brokers' Disciplinary Records

Any information reported to the North American Securities Administrators Association/National Association of Securities Dealers' Central Registration Depository and compiled as disciplinary records which are made available to the Department of Corporations through a computer system, shall constitute a public record. Notwithstanding any other provision of law, the Department of Corporations may disclose that information and the current license status and the year of issuance of the license of a broker-dealer upon written or oral request under *Corp. Code § 25247* [*Gov. Code § 6254.12*].

[46] Corporate Financial or Proprietary Information

Agencies are not required to disclose records that are any of the following: corporate financial records, corporate proprietary information including trade secrets, and information relating to siting within the state furnished to a government agency by a private company for the purpose of permitting the agency to work with the company in retaining, locating, or expanding a facility within California. Except as provided below, incentives offered by state or local government agencies, if any, shall be disclosed upon communication to the agency or the public of a decision to stay, locate, relocate, or expand, by a company, or upon application by that company to a governmental agency for a general plan amendment, rezone, use permit, building permit, or any other permit, whichever occurs first.

The agency shall delete, prior to disclosure to the public, information that is exempt from any record describing state or local incentives offered by an agency to a private business to retain, locate, relocate, or expand the business within California [*Gov. Code § 6254.15*].

[47] Local Utility Customer's Data

Agencies are not required to disclose the name, credit history, utility usage data, home address, or telephone number of utility customers of local agencies, except that disclosure of name, utility usage data, and the home address of utility customers of local agencies shall be made available upon request as follows [*Gov. Code § 6254.16*]:

- To an agent or authorized family member of the person to whom the information pertains [*Gov. Code § 6254.16(a)*].

- To an officer or employee of another governmental agency when necessary for the performance of its official duties [*Gov. Code § 6254.16(b)*].

- Upon court order or the request of a law enforcement agency relative to an ongoing investigation [*Gov. Code § 6254.16(c)*].

- Upon determination by the local agency that the utility customer who is the subject of the request has used utility services in a manner inconsistent with applicable local utility usage policies [*Gov. Code § 6254.16(d)*].

- Upon determination by the local agency that the utility customer who is the subject of the request is an elected or appointed official with authority to determine the utility usage policies of the local agency, provided that the home address of an appointed official shall not be disclosed without his or her consent [*Gov. Code § 6254.16(e)*].

- Upon determination by the local agency that the public interest in disclosure of the information clearly outweighs the public interest in nondisclosure [*Gov. Code § 6254.16(f)*].

[48] Board of Control Victim Assistance Records

The Act does not require disclosure of records of the State Board of Control that relate to a request for assistance under *Gov. Code §§ 13959 et seq.* [*Gov. Code § 6254.17(a)*]. *Gov. Code § 6254.17* shall not apply to a disclosure of the following information, if no information is disclosed that connects the information to a specific victim, derivative victim, or applicant under *Gov. Code §§ 13959 et seq.* [*Gov. Code § 6254.17(b)*]: (1) The amount of money paid to a specific provider of services; or (2) Summary data concerning the types of crimes for which assistance is provided.

[49] Federal Insecticide, Fungicide, and Rodenticide Act

The Public Records Act (*Gov. Code §§ 6250-6277*) sets out special rules providing for disclosure of pesticide safety and efficacy information when it is disclosable under *7 U.S.C. § 136h(d)(1)* of the Federal Insecticide, Fungicide, and Rodenticide Act and when other specified conditions are met [*Gov. Code § 6254.2*]. Specifically, the Act does not exempt from public disclosure the same categories of pesticide safety and efficacy information that are disclosable under federal law [*7 U.S.C. § 136h(d)(1)*], if the individual requesting the information is not an officer, employee, or agent specified in *Gov. Code § 6254.2(h)* and signs the affirmation specified in *Gov. Code § 6254.2(h)* [*Gov. Code § 6254.2(a)*].

Without regard to the limits on disclosure herein, the director may disclose information submitted by an applicant or registrant to any person in connection with a public proceeding conducted under law or regulation, if the director determines that the information is needed to determine whether a pesticide, or any ingredient of any pesticide, causes unreasonable adverse effects on health or the environment [*Gov. Code § 6254.2(i)*]. The director shall maintain records of the names of persons to whom data is disclosed and the persons or organizations they represent and shall inform the applicant or registrant of the names and the affiliation of these persons [*Gov. Code § 6254.2(j)*].

The director shall not knowingly disclose information submitted to the state by an applicant or registrant pursuant to *Food & Agric. Code §§ 12811 et seq.* to any officer, employee, or agent of any business or other entity engaged in the production, sale, or distribution of pesticides in countries other than the United States or in countries in addition to the United States, or to any other person who intends to deliver this information to any foreign or multi-national business or entity, unless the applicant or registrant consents to the disclosure. The director shall require an affirmation to be signed by the person who requests such information [*Gov. Code § 6254.2(h)*]. Form for Affirmation of Status *see § 470C.51*.

Any officer or employee of the state or former officer or employee of the state who, because of this employment or official position, obtains possession of, or has access to, material which is prohibited from disclosure, and who, knowing that disclosure of this material is prohibited, willfully discloses the material in any manner to any person not entitled to receive it, shall, upon conviction, be punished by a fine of not more than ten thousand dollars ($10,000), or by imprisonment in the county jail for not more than one year, or by both fine and imprisonment.

For purposes of *Gov. Code § 6254.2(l)*, any contractor with the state who is furnished information, or any employee of any contractor, shall be considered an employee of the state [*Gov. Code § 6254.2(l)*]. The law does not prohibit any person from maintaining a civil action for wrongful disclosure of trade secrets [*Gov. Code § 6254.2(m)*]. The director may limit an individual to one request per month if the director determines that a person has made a frivolous request within the past 12-month period [*Gov. Code § 6254.2(n)*].

For discussion of trade secret implications under the Federal Insecticide, Fungicide, and Rodenticide Act *see* § 470C.13[29][b].

[50] Terrorist Attack Risk Assessments

Documents prepared by or for state or local agencies for distribution or consideration in closed session of public agency meetings that assess the agencies vulnerability to terrorist attack or other criminal acts intended to disrupt the public agency's operation are exempt from disclosure [*Gov. Code § 6254(aa)*].

Furthermore, critical infrastructure information, as defined in *Section 131(3) of Title 6 of the United States Code*, that is voluntarily submitted to the California Emergency Management Agency for use by that office, including the identity of the person who or entity that voluntarily submitted the information is exempt from disclosure. As used in this subdivision, "voluntarily submitted" means submitted in the absence of the office exercising any legal authority to compel access to or submission of critical infrastructure information. This subdivision shall not affect the status of information in the possession of any other state or local governmental agency [*Gov. Code § 6254(ab)*].

The Sixth District California Court of Appeal upheld the decision of the superior court ordering disclosure by the County of Santa Clara of geographic information system (GIS) base maps prepared by the county. The county unsuccessfully argued that the Critical Infrastructure Information (CII) federal statute [*6 U.S.C. §§ 131-134*] preempted state law and prohibited disclosure of the base maps. The court held that the federal act did not apply to submitters of information and the county was a submitter of information, not a recipient of information to which the federal act [*6 U.S.C. §§ 131-134*] and regulations [*6 C.F.R. § 29.8(g)*] did apply. Thus, federal law did not forbid disclosure of the base maps [County of Santa Clara v. Superior court *(6th Dist., 2009) 170 Cal. App. 4th 1301, 1314-1316, 89 Cal. Rptr. 3d 374]* . Also, the county argued that the public interest exemption [*Gov. Code § 6255*] was applicable, and provided a basis for the county to not disclose the records. The court of appeal rejected that argument and held that the public interest in disclosure outweighed the public interest in non disclosure. The court of appeal weighed disclosure interests (public scrutiny of public records) against non disclosure interests (financial and security interests), and found that the balance between those two interests justified disclose of the information [County of Santa Clara v. Superior court *(2009) 170 Cal. App. 4th 1301, 1323-1324, 89 Cal. Rptr. 3d 374]* .

Additionally, risk assessment or railroad infrastructure protection program information that has been filed with the

Public Utilities Commission, the Director of Homeland Security, and the Office of Emergency Services under the provisions of *Public Utilities Code §§ 7665-7667* is exempt from disclosure [*Gov. Code § 6254.23*].

[51] Advanced Health Care Directive Registry Information

Information provided to the Secretary of State by a person for the purpose of registration in the Advance Health Care Directive Registry are exempt from disclosure except that those records shall be released at the request of a health care provider, a public guardian, or the registrant's legal representative. However, agencies may open their records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law. Also, a health facility may disclose to a certified bargaining agent relevant financing information pursuant to Section 8 of the National Labor Relations Act [*Gov. Code § 6254(ac)*].

[52] Reproductive Health Services Facility Information

There is an exemption from disclosure for any personal information received, collected, or compiled by a public agency regarding the employees, volunteers, board members, owners, partners, officers, or contractors of a reproductive health services facility who have notified the public agency pursuant to *Gov. Code § 6254.18(d)* if the personal information is contained in a document that relates to the facility [*Gov. Code § 6254.18(a)*]. For purposes of this exemption, "Contractor" means an individual or entity that contracts with a reproductive health services facility for services related to patient care [*Gov. Code § 6254.18(b)(1)*]. "Personal information" means the following information related to an individual that is maintained by a public agency: social security number, physical description, home address, home telephone number, statements of personal worth or personal financial data filed pursuant to *Gov. Code § 6254(n)*, personal medical history, employment history, electronic mail address, and information that reveals any electronic network location or identity [*Gov. Code § 6254.18(b)(2)*]. "Public agency" includes the following [*Gov. Code § 6254.18(b)(3)*]:

- State Department of Health Care Services [*Gov. Code § 6254.18(b)(3)(A)*],
- Department of Consumer Affairs [*Gov. Code § 6254.18(b)(3)(B)*],
- Department of Managed Health Care [*Gov. Code § 6254.18(b)(3)(C)*]; and
- State Department of Public Health [*Gov. Code § 6254.18(b)(3)(D)*].

"Reproductive health services facility" means the office of a licensed physician and surgeon whose specialty is family practice, obstetrics, or gynecology, or a licensed clinic, where at least 50 percent of the patients of the physician or the clinic are provided with family planning or abortion services [*Gov. Code § 6254.18(b)(4)*].

The exemption from disclosure provided by this section to an individual who is an employee, volunteer, board member, officer, or contractor of a reproductive health services facility is applicable when the individual has notified the public agency to which his or her personal information is being submitted or has been submitted that he or she falls within the protections of this statute. The reproductive health services facility shall retain a copy of all notifications submitted pursuant to this section [*Gov. Code § 6254.18(d)*]. This notification shall be valid if it complies with all of the following requirements:

- Is on the official letterhead of the facility [*Gov. Code § 6254.18(d)(1)*];
- Is clearly separate from any other language present on the same page and is executed by a signature that serves no other purpose than to execute the notification [*Gov. Code § 6254.18(d)(2)*];

- Is signed and dated by both of the following [*Gov. Code § 6254.18(d)(3)(A), (B)*]:
  - The individual whose information is being submitted; and
  - The executive officer or his or her designee of the reproductive health services facility.

The exemption for disclosure for personal information authorized by this statute shall be effective from the time of notification pursuant to *Gov. Code § 6254.18(d)* until either one of the following occurs:

- Six months after the date of separation from a reproductive health services facility for an individual who has served for not more than one year as an employee, contractor, volunteer, board member, or officer of the reproductive health services facility [*Gov. Code § 6254.18(e)(1)*]; or

- One year after the date of separation from a reproductive health services facility for an individual who has served for more than one year as an employee, contractor, volunteer, board member, or officer of the reproductive health services facility [*Gov. Code § 6254.18(e)(2)*].

Within 90 days of separation of an employee, contractor, volunteer, board member, or officer of the reproductive health services facility who has provided notice to a public agency pursuant to subdivision (c), the facility shall provide notice of the separation to the relevant agency or agencies [*Gov. Code § 6254.18(f)*].

The exemption from disclosure does not prevent the disclosure by a government agency of data regarding age, race, ethnicity, national origin, or gender of individuals whose personal information is protected pursuant to this section, so long as the data contains no individually identifiable information [*Gov. Code § 6254.18(g)*]. Any person may institute proceedings for injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to obtain access to employment history information pursuant to *Gov. Code § 6258* and *Gov. Code § 6259*. If the court finds, based on the facts of a particular case, that the public interest served by disclosure of employment history information clearly outweighs the public interest served by not disclosing the information, the court shall order the officer or person charged with withholding the information to disclose employment history information or show cause why he or she should not do so pursuant to *Gov. Code § 6259* [*Gov. Code § 6254.18(c)*].

[53] Public Investment Funds Alternative Investment Records

Notwithstanding any provision of this chapter or other law, the following records regarding alternative investments in which public investment funds invest shall not be subject to disclosure, unless the information has already been publicly released by the keeper of the information [*Gov. Code § 6254.26 (a)(1)-(6)*]:

- Due diligence materials that are proprietary to the public investment fund or the alternative investment vehicle.

- Quarterly and annual financial statements of alternative investment vehicles.

- Meeting materials of alternative investment vehicles.

- Records containing information regarding the portfolio positions in which alternative investment funds invest.

- Capital call and distribution notices.

- Alternative investment agreements and all related documents.

Notwithstanding the above, the following information contained in records regarding alternative investments in which public investment funds invest shall be subject to disclosure and shall not be considered a trade secret exempt from disclosure [*Gov. Code § 6254.26 (b)(1)-(9)*]:

- The name, address, and vintage year of each alternative investment vehicle.

- The dollar amount of the commitment made to each alternative investment vehicle by the public investment fund since inception.

- The dollar amount of cash contributions made by the public investment fund to each alternative investment vehicle since inception.

- The dollar amount, on a fiscal year end basis, of cash distributions received by the public investment fund from each alternative investment vehicle.

- The dollar amount, on a fiscal year end basis, of cash distributions received by the public investment fund plus remaining value of partnership assets attributable to the public investment fund's investment in each alternative investment vehicle.

- The net internal rate of return of each alternative investment vehicle since inception.

- The investment multiple of each alternative investment vehicle since inception.

- The dollar amount of the total management fees and costs paid on an annual fiscal year end basis, by the public investment fund to each alternative investment vehicle.

- The dollar amount of cash profit received by public investment funds from each alternative investment vehicle on a fiscal year end basis.

For purposes of this section, the following definitions shall apply [*Gov. Code § 6254.26 (c)(1)-(4)*]:

- "Alternative investment" means an investment in a private equity fund, venture fund, hedge fund, or absolute return fund.

- "Alternative investment vehicle" means the limited partnership, limited liability company, or similar legal structure through which the public investment fund invests in portfolio companies.

- "Portfolio positions" means individual portfolio investments made by the alternative investment vehicles.

- "Public investment fund" means any public pension or retirement system, and any public endowment or foundation.

[54] State Compensation Insurance Fund Records

The following records of the State Compensation Insurance Fund are not subject to disclosure [*Gov. Code § 6254(ad)*]:

- Records related to claims pursuant to Chapter 1 (commencing with Section 3200) of Division 4 of

the Labor Code, to the extent that confidential medical information or other individually identifiable information would be disclosed [*Gov. Code § 6254(ad)(1)*];

- Records related to the discussions, communications, or any other portion of the negotiations with entities contracting or seeking to contract with the fund, and any related deliberations [*Gov. Code § 6254(ad)(2)*];

- Records related to the impressions, opinions, recommendations, meeting minutes of meetings or sessions that are lawfully closed to the public, research, work product, theories, or strategy of the fund or its staff, on the development of rates, contracting strategy, underwriting, or competitive strategy pursuant to the powers granted to the fund in Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code [*Gov. Code § 6254(ad)(3)*];

- Records obtained to provide workers' compensation insurance under Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code, including, but not limited to, any medical claims information, policyholder information provided that nothing in this paragraph shall be interpreted to prevent an insurance agent or broker from obtaining proprietary information or other information authorized by law to be obtained by the agent or broker, and information on rates, pricing, and claims handling received from brokers [*Gov. Code § 6254(ad)(4)*];

- Records that are trade secrets pursuant to Section 6276.44, or Article 11 (commencing with Section 1060) of Chapter 4 of Division 8 of the Evidence Code, including without limitation, instructions, advice, or training provided by the State Compensation Insurance Fund to its board members, officers, and employees regarding the fund's special investigation unit, internal audit unit, and informational security, marketing, rating, pricing, underwriting, claims handling, audits, and collections [*Gov. Code § 6254(ad)(5)(A)*]; Notwithstanding subparagraph (A), the portions of records containing trade secrets shall be available for review by the Joint Legislative Audit Committee, the Bureau of State Audits, Division of Workers' Compensation, and the Department of Insurance to ensure compliance with applicable law [*Gov. Code § 6254(ad)(5)(A)*];

- Internal audits containing proprietary information and the following records that are related to an internal audit [*Gov. Code § 6254(ad)(6)(A)*]: Personal papers and correspondence of any person providing assistance to the fund when that person has requested in writing that his or her papers and correspondence be kept private and confidential. Those papers and correspondence shall become public records if the written request is withdrawn, or upon order of the fund [*Gov. Code § 6254(ad)(5)(A)(i)*]; Papers, correspondence, memoranda, or any substantive information pertaining to any audit not completed or an internal audit that contains proprietary information [*Gov. Code § 6254(ad)(5)(A)(ii)*]; Notwithstanding subparagraph (A), the portions of records containing proprietary information, or any information specified in subparagraph (A) shall be available for review by the Joint Legislative Audit Committee, the Bureau of State Audits, Division of Workers' Compensation, and the Department of Insurance to ensure compliance with applicable law [*Gov. Code § 6254(ad)(5)(B)*];

- Except as provided in subparagraph (C), contracts entered into pursuant to Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code shall be open to inspection one year after the contract has been fully executed [*Gov. Code § 6254(ad)(7)(A)*]. If a contract entered into pursuant to Chapter 4 (commencing with Section 11770) of Part 3 of Division 2 of the Insurance Code is amended, the amendment shall be open to inspection one year after the amendment has been fully executed [*Gov. Code § 6254(ad)(7)(B)*]. Three years after a contract or amendment is open to inspection pursuant to this subdivision, the portion of the contract or amendment containing the rates of payment shall be open to inspection [*Gov. Code § 6254(ad)(7)(C)*]. Notwithstanding any other provision of law,

the entire contract or amendments to a contract shall be open to inspection by the Joint Legislative Audit Committee. The committee shall maintain the confidentiality of the contracts and amendments thereto until the contract or amendments to a contract are open to inspection pursuant to this paragraph [*Gov. Code § 6254(ad)(7)(D)*]. Nothing in this paragraph is intended to apply to documents related to contracts with public entities that are not otherwise expressly confidential as to that public entity [*Gov. Code § 6254(ad)(7)(E)*]. For purposes of this paragraph, "fully executed" means the point in time when all of the necessary parties to the contract have signed the contract [*Gov. Code § 6254(ad)(7)(F)*].

[55] Public Interest Exemption

In addition to the various specific exemption categories discussed in [1] through [54] *above*, the Public Records Act provides for a generalized or "residual" exemption when it can be shown that on the facts of a particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record [*Gov. Code § 6255*; *California State University v. Superior Court (2001) 90 Cal. App. 4th 810, 824-825, 108 Cal. Rptr. 2d 870* ; *Black Panther Party v. Kehoe (1974) 42 Cal. App. 3d 645, 657, 117 Cal. Rptr. 106]* . The Act also refers to the right of individuals to privacy in its legislative findings and declarations [*Gov. Code § 6250*]. One exemption, for preliminary drafts, notes, or interagency or intraagency memoranda, is expressly made subject to this balancing test [*Gov. Code § 6254(a)*]. The balancing of interests must be made by the public agency, and then by the reviewing court if the person requesting records challenges the agency's nondisclosure. A clear overbalance on the side of confidentiality must be shown [*Black Panther Party v. Kehoe (1974) 42 Cal. App. 3d 645, 657, 117 Cal. Rptr. 106]* .

The California Supreme Court interpreted the "public interest" statutory exemption [*Gov. Code § 6255*], and held that the Governor of Californiaproperly refused a request to disclose his daily, weekly, and monthly appointment calendars and schedules for a five-year period of time. The court concluded that the public interest in nondisclosure of these records outweighed the public interest in disclosure [*Times Mirror Co. v. Superior Court (1991) 53 Cal. 3d 1325, 1332, 283 Cal. Rptr. 893, 813 P.2d 240]* . In so holding, the court relied on two interests: the governor's deliberative process privilege and the governor's interest in physical security. The court balanced the competing interest between disclosure and nondisclosure as to both interests, and concluded that both interests would be better served by nondisclosure [*Times Mirror Co. v. Superior Court (1991) 53 Cal. 3d 1325, 1345-1347, 283 Cal. Rptr. 893, 813 P.2d 240]* . As to the deliberative process privilege, the court analogized this privilege to the "executive privilege" exemption recognized under the federal Freedom of Information Act [*5 U.S.C. § 552*]. It concluded that a deliberative process privilege was recognized in California under the "public interest" statutory exemption [*Times Mirror Co. v. Superior Court (1991) 53 Cal. 3d 1325, 1342-1344, 283 Cal. Rptr. 893, 813 P.2d 240]* . As to physical security, the court concluded that disclosure of the governor's detailed daily and weekly schedules could pose a security risk to the governor because the governor's regular patterns of activity could be disclosed and used by someone intending to harm the governor [*Times Mirror Co. v. Superior Court (1991) 53 Cal. 3d 1325, 1346-1347, 283 Cal. Rptr. 893, 813 P.2d 240]* .

The California Supreme Court applied the public interest statutory exemption [*Gov. Code § 6255*] and held that the City of Los Angeles Department of Airports did not have to disclose proposals for commercial use of airport property that were submitted under a request for proposals (RFP) process until the Department had completed negotiations with bidders. Public disclosure could occur after the department had finished negotiations and made a recommendation for final approval by the awarding authority, but before the awarding authority had made a final approval decision. The public interest in non disclosure at the negotiating stage outweighed the public interest in disclosure [*Michaelis, Montanari & Johnson v. Superior Court (2006) 38 Cal. 4th 1065, 1067, 1077, 44 Cal. Rptr. 3d 663, 136 P.3d 194]* .

In a case decided since Times Mirror, the public interest exemption was also applied to prevent disclosure to the Los Angeles Times of copies of applications submitted to the Governor by persons seeking appointment to the county Board of Supervisors. A California court of appeal first determined that like the Governor's appointment calendars and

schedules sought in Times Mirror, the Board of Supervisor applications were subject to the deliberative process privilege of *Gov. Code § 6255*. The court then subjected the documents to the Times Mirror balancing test before determining that the public interest in nondisclosure outweighed the public interest in disclosure [California *First Amendment Coalition v. Superior Court (1998) 67 Cal. App. 4th 159, 169-174, 78 Cal. Rptr. 2d 847* ; *Wilson v. Superior Court (1996) 51 Cal. App. 4th 1136, 1144, 59 Cal. Rptr. 2d 537]* .

In one case, pesticide reports were sought from a county agricultural commissioner by an agricultural worker. The court weighed (1) the commissioner's argument that full disclosure to him would be inhibited if users thought their information would be made public against (2) the interest of the public in studying the effects of pesticides on humans. The court ruled that disclosure outweighed confidentiality because of the importance of the information on public health and medical treatment [*Uribe v. Howie (1971) 19 Cal. App. 3d 194, 210, 96 Cal. Rptr 493]* .

In another case, the Division of Industrial Safety was ordered by the trial court to disclose certain information relating to a bridge collapse. On appeal, the agency argued that to require disclosure would "dry up" their sources of information; if it were known that their records would be public, employers and employees would be reluctant to provide them with the information needed to keep every employee in the state safe. The appellate court ruled that the opposite effect may occur. Later discovery of adverse information in the agency's files might possibly cause employers to exercise greater care in industrial safety. This rationale, coupled with the legal requirement that employers must already provide this information, caused the court to rule that on balance the public interest would be better served by disclosure [*State of California ex rel. Division of Industrial Safety v. Superior Court (1974) 43 Cal. App. 3d 778, 786, 117 Cal. Rptr. 726*].

In a third case, the State Board of Equalization was ordered to disclose documents which revealed the Board's practices in interpreting and applying administrative regulations governing sales and use taxes. Confidential taxpayer information had been stricken from the documents before disclosure. The party who requested disclosure of these documents was willing to pay reasonable processing costs. Under these circumstances, the public interest in disclosure outweighed the burden on the Board [*State Bd. of Equalization v. Superior Court (1992) 10 Cal. App. 4th 1177, 1185, 1190-1191, 13 Cal. Rptr. 2d 342]* .

In a fourth case, the court held that a city was not required to disclose telephone numbers that were contained in telephone bills of city council members and city employees made while on trips conducting official business for the city. This information was protected under the deliberative process privilege [*Rogers v. Superior Court (City of Burbank) (1993) 19 Cal. App. 4th 469, 475, 23 Cal. Rptr. 2d 412*)].

In a fifth case, a state university was ordered to disclose documents containing the identity of anonymous donors and license agreements with those donors who gave money for the construction of a state university multipurpose arena and who received a multiyear license for use of a luxury suite in that arena. The court held that the public interest in disclosure of the records was not outweighed by the interest in non-disclosure [*California State University v. Superior Court (2001) 90 Cal. App. 4th 810, 833-834, 108 Cal. Rptr. 2d 870]* .

In a sixth case, a county public defender was not required to disclose information contained in an electronic database that included client files, publicly available information such as newspaper articles, and impeachment evidence, because the public interest in nondisclosure of the records, based on the public defender's responsibility to provide representation to indigent criminal defendants, and the adverse consequences that public access to that database would have for the responsibility, outweighs the public interest in disclosure of the records. Thus, the public interest exemption recognized in *Gov. Code § 6255* is applicable to the public defender database, and prohibits disclosure of the database informationto the public [*Coronado Police Officers Association v. Carroll (2003) 106 Cal. App. 4th 1001, 1015-1016, 131 Cal. Rptr. 2d 553]* .

The identity of individuals with criminal convictions who were given exemptions by the Department of Social Services to allow them to work at licensed child day care facilities and a list of facilities that employ these persons is not exempt

from disclosure under *Gov. Code § 6255(c)*. This is because the public interest in disclosure is not outweighed by the public interest in non-disclosure. The state agency has the burden of showing that non disclosure is justified. In this case, the criminal conviction and the license held by the individual are public records and the licensed child care facilities do not have privacy interests in this context. Substantial costs that would be incurred by the agency to compile an accurate list are not a valid reason for non-disclosure [*CBS Broadcasting, Inc. v. Superior Court (2001) 91 Cal. App. 4th 892, 908-909, 110 Cal. Rptr. 2d 889]* .

The Court of Appeal upheld the decision of the trial court ordering disclosure of personnel records related to a specific incident in which a school district employee was disciplined. The school district argued that the exemption for personnel records, disclosure of which would constitute an unwarranted invasion of personal privacy [*Cal. Gov. Code § 6254(c)*] and the public interest exemption [*Cal. Gov. Code § 6255(c)*], were applicable and provided a basis for the district to not disclose the records. The district argued that the standard for disclosure in this setting required a showing of reasonable cause that the complaint or charge was true, or a showing that the charge led to discipline being imposed on the employee. The Court of Appeal rejected this standard, and concluded that the court must review the records to determine the reliability of the documents so that the court can decide whether the complaint was well founded. Neither the truth of the charges nor the fact of employee discipline are necessary elements for showing a well founded complaint that should be disclosed. When a complaint is well founded, the public interest in disclosure outweighs the privacy interest of the employee. In this case, based on a review of the records, the court concluded that the complaint was well founded, and the records should be disclosed [*Bakersfield City School District v. Superior Court (2004) 118 Cal. App. 4th 1041, 1046-1047, 13 Cal. Rptr. 3d 517]* .

The Sixth District California Court of Appeal upheld the decision of the superior court ordering disclosure by the County of Santa Clara of geographic information system (GIS) base maps prepared by the county. The county argued that the public interest exemption [*Gov. Code § 6255*] was applicable, and provided a basis for the county to not disclose the records. The court of appeal rejected that argument and held that the public interest in disclosure outweighed the public interest in non disclosure. The court of appeal weighed disclosure interests (public scrutiny of public records) against nondisclosure interests (financial and security interests), and found that the balance between those two interests justified disclose of the information [*County of Santa Clara v. Superior Court (2009) 170 Cal. App. 4th 1301, 1323-1324, 89 Cal. Rptr. 3d 374]* . Furthermore, the court held that the California Public Records Act [*Gov. Code § 6254.9*] did not provide for copyright protection of public records maintained by the county, and that the county could not insist on an end-user agreement as a condition of disclosure to protect any copyright interest [*County of Santa Clara v. Superior Court (2009) 170 Cal. App. 4th 1301, 1335-1336, 89 Cal. Rptr. 3d 374]* .

California Forms of Pleading and Practice--Annotated

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Chapter 470C PUBLIC RECORDS ACT
PART II. LEGAL BACKGROUND

41-470C California Forms of Pleading and Practice--Annotated § 470C.14

§ 470C.14 Records Exempt Under Other Laws

[1] Court Records

Although court records are public records [*Estate of Hearst (1977) 67 Cal. App. 3d 777, 785, 136 Cal. Rptr. 821]* , specific statutory exemptions exist [*Gov. Code § 6252(a)*]. For example, *Gov. Code § 6252(a)* excludes records of agencies provided for in Article VI of the California Constitution which governs the state court system [*Copley Press v. Superior Court (Adams) (1992) 6 Cal. App. 4th 106, 112, 7 Cal. Rptr. 2d 841]* . The following records are confidential and may not be disclosed to members of the public: (1) juvenile court documents [*Welf. & Inst. Code § 827*; *In re Gina S. (2005) 133 Cal. App. 4th 1074, 1078, 35 Cal. Rptr. 3d 277* (mother was entitled to inspect juvenile court files related to dependency proceeding of her daughter, but not to copy files unless authorized by court order); *People v. Superior Court of Tulare County (2003) 107 Cal. App. 4th 488, 490-491, 132 Cal. Rptr. 2d 144* (grand jury properly denied request to inspect juvenile court records under provisions of *Welf. & Inst. Code § 827* when grand jury asserted right to inspect records under authority of *Penal Code § 925* without making specific showing of good cause for inspection of records); *In re Keisha T. (1995) 38 Cal. App. 4th 220, 231-232, 44 Cal. Rptr. 2d 822* (Juvenile court exercises discretion on whether to grant media access to confidential court records in juvenile dependency cases)]; (2) court records relating to commitment proceedings of a mentally abnormal sex offender [*Welf. & Inst. Code § 4135*]; and (3) records relating to actions to declare a minor child free from parental custody and control [*Fam. Code § 7805*]. However, the court clerk's initial or rough minutes are court records which should be available for public inspection [*Copley Press v. Superior Court (Adams) (1992) 6 Cal. App. 4th 106, 115-116, 7 Cal. Rptr. 2d 841]* .

The First District, Division 1, California Court of Appeal held that a criminal defendant who was indicted by a grand jury can prevent public disclosure of the grand jury transcript until the trial is completed by showing prejudice under the reasonable likelihood of prejudice standard of *Penal Code § 938.1*. That standard is controlling when a newspaper seeks to contest the sealing of a grand jury transcript not the *First Amendment* substantial probability standard that applies to ensure the press and the public a right of access to judicial proceedings [*Alvarez v. Superior Court (2007) 154 Cal. App. 4th 642, 645-646, 64 Cal. Rptr. 3d 854]* .

Probation reports prepared as part of the criminal court sentencing process can be disclosed to the public for 60 days after sentencing occurs. However, after 60 days access is restricted under *Penal Code § 1203.05* and requires the filing

of a petition for members of the general public, including newspapers, to gain access to the reports. The Court of Appeal reversed the granting of a petition by the trial court that allowed a newspaper access to a defendant's probation report after the 60-day time period had expired. The Court of Appeal ruled that the defendant, who was the subject of the report, has a privacy interest in the personal information contained in the report after the 60-day time period has expired. The Court of Appeal held that the defendant has the right to notice and an opportunity to be heard at an in camera hearing related to personal information in the report that the subject wants to keep confidential. If no hearing is requested, the whole probation report can be disclosed. If a hearing is held, the court is required to balance the defendant's privacy interest in confidentiality of personal information against the benefit provided by the release of that information. Once the court has balanced those competing interests, the court has discretion to decide whether to redact personal information from the report. Once that decision is made, the court should release the part of the report that has not been redacted [*People v. Connor (2004) 115 Cal. App. 4th 669, 676-677, 9 Cal. Rptr. 3d 521]* . The California Court of Appeal held that a probationer facing probation revocation proceedings had the right to inspect non-confidential portions of his probation file kept by the county probation department, and the superior court had statutory authority under *Penal Code § 1203.10* to allow that inspection [*County of Placer v. Superior Court (2005) 130 Cal. App. 4th 807, 809, 30 Cal. Rptr. 3d 617]* .

County records related to reimbursement of travel expenses for judges, and court management employees, are exempt from disclosure under the courts records exemption [*Gov. Code § 6252(a)*]. However, the Judicial Council adopted Rule 6.702, which required the trial courts to maintain records related to court budgets, and management information, and to disclose these records upon a valid written request [Cal. Ct. Rule 6.702]. Furthermore, petitions to enforce disclosure of records under the Rule must be filed with the superior court, not the court of appeal [*Orange County Employees Assn., Inc. v. Superior Court (2004) 120 Cal. App. 4th 287, 290-292, 15 Cal. Rptr. 3d 201]* .

Confidential personal information of a witness to or victim of a crime that is contained in a police report, arrest report, or investigative report submitted to a court by a prosecutor to support bringing of criminal charges or to support the issuance of a search warrant or an arrest warrant is protected from disclosure based on mutually agreed procedures between the courts, prosecutors, and law enforcement agencies in each county [*Penal Code § 964(a)*]. "Confidential personal information" includes, but is not limited to, an address, telephone number, driver's license or California Identification Card number, social security number, date of birth, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings or checking account number, or credit card number [*Penal Code § 964(b)*].

Other court records protected from disclosure include confidential information related to minors in guardianship proceedings, in which disclosure is limited to the courts, and to court-appointed investigators, child protective services workers, and juvenile probation officers. Family law court and a court hearing a probate guardianship matter shall, upon request from the juvenile court in any county, provide to the court all available information the court deems necessary to make a determination regarding the best interest of a child, who is the subject of a proceeding before the juvenile court. The information shall also be released to a child protective services worker or juvenile probation officer acting within the scope of his or her duties in that proceeding. Any information released pursuant to this section that is confidential pursuant to any other provision of law shall remain confidential and may not be released, except to the extent necessary to comply with this law. No records shared pursuant to this section may be disclosed to any party in a case unless the party requests the agency or court that originates the record to release these records and the request is granted. In counties that provide confidential family law mediation, or confidential dependency mediation, those mediations are not covered by this law [*Welf. & Inst. Code § 204*]. Similarly, the family law court is required to, upon request from the court in any county hearing a probate guardianship matter proceeding before the court, provide to the court all available information the court deems necessary to make a determination regarding the best interest of a child, as described in *Fam. Code § 3011*, who is the subject of the proceeding. The information shall also be released to a guardianship investigator, as provided in *Prob. Code § 1513(a)*, acting within the scope of his or her duties in that proceeding. Any information released under this law that is confidential under other laws shall remain confidential and may not be released, except to the extent necessary to comply with this law. No records shared under this law may be disclosed to

any party in a case unless the party requests the agency or court that originates the record to release these records and the requestis granted. In counties that provide confidential family law mediation, or confidential dependency mediation, those mediations are not covered by this law [*Prob. Code § 1514.5*].

Court records related to evaluations of children for custody or visitation purposes are also confidential, and protected from disclosure. In any proceeding involving child custody or visitation rights, if a report containing psychological evaluations of a child or recommendations regarding custody of, or visitation with, a child is submitted to the court, including, but not limited to, a report created under *Fam. Code § 3110 et seq.*, a recommendation made to the court under *Fam. Code § 3183*, and a written statement of issues and contentions under *Fam. Code § 3151(b)*, that information shall be contained in a document that shall be placed in the confidential portion of the court file of the proceeding, and may not be disclosed [*Fam. Code § 3025.5*], except to the following persons:

- A party to the proceeding and his or her attorney [*Fam. Code § 3025.5(a)*];

- A federal or state law enforcement officer, judicial officer, court employee, or family court facilitator for the county in which the action was filed, or an employee or agent of that facilitator, acting within the scope of his or her duties [*Fam. Code § 3025.5(b)*];

- A counsel appointed for the child under *Fam. Code § 3150* [*Fam. Code § 3025.5(c)*]; and

- Any other person upon order of the court for good cause [*Fam. Code § 3025.5(d)*].

[2] Mentally Disabled Persons Records

Records and information relating to services provided to mentally disabled persons [*Welf. & Inst. Code §§ 4000-7700*] are confidential. These records may be disclosed only in limited circumstances, such as in communications between professionals regarding treatment [*Welf. & Inst. Code § 5328(a)*], when the patient has authorized disclosure [*Welf. & Inst. Code § 5328(b), (d)*], or for research purposes [*Welf. & Inst. Code § 5328*]. Information and records may also be disclosed to the California Protection and Advocacy Agency [*Welf. & Inst. Code §§ 4900-4905*] for the protection and advocacy of the rights of mentally disabled persons [*Welf. & Inst. Code § 5328.06*].

[3] Child Abuse Reports

Disclosure of information that would identify persons reporting child abuse is prohibited. These records are confidential [*Penal Code § 11167(d)*]. Disclosure may be made only between child protection agencies, to counsel representing child protective agencies, or appointed counsel [*Welf. & Inst. Code § 317(c)* (statute under which counsel are appointed)], to district attorneys in criminal prosecutions, child abuse proceedings [*Welf. & Inst.Code § 602*], or dependent children proceedings [*Fam. Code § 7800 et seq.*; *Welf. & Inst. Code § 300*], or county counsel in dependent children proceedings [*Fam. Code § 7800 et seq.*; *Welf. & Inst. Code § 300*], to a licensing agency when abuse in a care facility is reasonably suspected, when the identified persons waive confidentiality, or by court order [*Penal Code § 11167(d)*]. Furthermore, agencies or persons who receive information about the identity of persons reporting child abuse are prohibited from disclosing the identity of reporting persons to the employer of that person, unless the employee consents, or disclosure is required by court order [*Penal Code § 11167(d)*].

[4] Acquired Immune Deficiency Syndrome Records

Public health records relating to acquired immune deficiency syndrome (AIDS) that are developed or acquired by state or local public health agencies and that would identify the patient are not public records. Those records are confidential and must not be disclosed, except as provided by law for public health purposes or pursuant to written authorization by the patient [*Health & Safety Code § 120980(a), (b)*]. The unauthorized disclosure of these records may result in civil

penalties of no less than $1,000 and no more than $5,000 [*Health & Safety Code § 120980(a)-(c)*].

[5] Venereal Disease Records

Reports of examinations, cases, investigations, and all records relating to them, made under the regulations for the control of venereal disease have been declared to be confidential by the State Department of Health Services. Those records are not open to public inspection and may not be divulged, except as necessary for the preservation of the public health [*17 Cal. Code Reg. § 2636(b)*]. Based on the balancing test of the Public Records Act [*Gov. Code § 6255*], the California attorney general has advised that this restriction is legal *[53 Ops. Cal. Atty. Gen. 10, 11 (1970)]* . The test used is that on the facts of the particular case, the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record [*Gov. Code § 6255*]. The attorney general reasoned that persons in possession of venereal disease information would not disclose it to the appropriate medical authorities unless assured of confidentiality *[53 Ops. Cal. Atty. Gen. 10, 11 (1970)* ; *Gov. Code § 6255*].

[6] Welfare Records

All applications and records concerning individuals who are recipients of public social services are confidential. These records are not open to examination for any purpose not directly connected with administration of a social services program, or an investigation or proceeding connected with the administration of a program [*Welf. & Inst. Code § 10850(a), (f)*].No person may publish, disclose, or permit disclosure for other purposes [*Welf. & Inst. Code § 10850(b)*]. A knowing disclosure is a misdemeanor [*Welf. & Inst. Code § 10850(e)*]. However, welfare employees are permitted to disclose confidential information about welfare recipients or applicants relating to criminal acts committed against welfare workers. The permitted disclosure is to law enforcement agencies investigating criminal acts [*Welf. & Inst. Code § 10850(f)*].

Because this privilege is conditional, some disclosure is allowed when it can be shown that the welfare of a minor child requires it [*In re Lynna B. (1979) 92 Cal. App. 3d 682, 705, 155 Cal. Rptr. 256]* . The legislative purpose in providing for confidentiality of public social service records is to protect the right of privacy of the recipient of those benefits [*In re Lynna B. (1979) 92 Cal. App. 3d 682, 705, 155 Cal. Rptr. 256]* .

Applications and records concerning persons who are applicants for Medi-Cal benefits are confidential and are not open to examination for any purpose not directly connected with administration of the Medi-Cal program [*Welf. & Inst. Code § 14100.2*]. Statutory confidentiality can be enforced in court by the agency [*Dept. of Health Serv. v. Superior Court (1991) 232 Cal. App. 3d 776, 782-783, 283 Cal. Rptr. 546]* .

The exemption from disclosure of minor foster child information provided by *Welf. & Inst. Code § 827* does not apply after the death of a minor foster child, and the county welfare agency is required to disclose the name, date of birth, and the date of death of the child to the public entity against whom a personal injury claim is brought [*Gov. Code § 6252.6*].

[7] Official Information

A public entity has a privilege to refuse to disclose information in the following instances: (1) the information was acquired in confidence by a public employee in the course of his or her duty; (2) the information was not open or officially disclosed to the public before the claim of privilege is made; and (3) disclosure is forbidden by an act of Congress or a state statute; or (4) disclosure is against the public interest because a necessity exists for preserving the confidentiality of the information that outweighs the need for disclosure in the interest of justice [*Evid. Code § 1040(a), (b)*]. The privilege must be claimed by a person authorized by the public entity to do so [*Evid. Code § 1040(b)*]. A public employee may not claim the privilege, however, if any person authorized to claim it has consented to disclosure [*Evid. Code § 1040(b)(2)*].

In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered [*Evid. Code § 1040(b)(2)*; *County of San Diego v. Superior Court (1986) 176 Cal. App. 3d 1009, 1025-1026, 222 Cal. Rptr. 484* (example of analysis of public interest based on balancing of need for preserving confidentiality and disclosure in interests of justice)].

However, the interest of the public agency in investigating wrongdoing would support the public interest in confidentiality of the records because disclosure of audit manuals would make it easier for licensees to avoid detection of violations of the law [*Suarez v. Office of Administrative Hearings (2004) 123 Cal. App. 4th 1191, 1195-1196, 20 Cal. Rptr. 3d 618* (ALJ ordered disclosure of Department of Real Estate Audit Manual and Enforcement Deputy Manual to real estate broker charged with fraud. Disclosure was ordered after broker brought motion to compel production of manuals as part of discovery process related to administrative hearing. Broker argued that manuals were relevant to issues in hearing. The Court of Appeal upheld the Superior Court's grant of a petition for a writ of administrative mandate prohibiting disclosure of the manuals. The Court of Appeal held that the audit method used by DRE auditors would not provide the licensee a relevant defense to the charges brought against him, and therefore the need for disclosure of the records (to provide information relevant to the licensee's defense) was outweighed by the public interest in confidentiality)].

Furthermore, the Employment Development Department may disclose to law enforcement agencies information relating to a person for whom an arrest warrant for commission of a felony has been issued [*Evid. Code § 1040(c)*; *Unemp. Ins. Code §§ 1095(k), 2714(b)*].

[8] Building Plans

The building department of every city or county must maintain an official copy of the plans of every building for which the department issued a building permit [*Health & Safety Code § 19850*]. The official copies of those plans are public records and are available for inspection only on the premises of the building department. Copying is specifically prohibited; plans may be copied only with the written permission of both the certified, licensed, or registered professional (or successor) who signed the original documents, and the owner of the building, or by court order [*Health & Safety Code § 19851*]. The certified, licensed, or registered professional (or successor) must not withhold his or her permission unreasonably [*Health & Safety Code § 19851(a)*]. Any city or county building department requested to copy building plans will request permission to do so from the professional and the owner [*Health & Safety Code § 19851(b)*]. The request to the certified, licensed, or registered professional may be by registered mail [*Health & Safety Code § 19851(d)*]. The building department will also furnish an affidavit to be completed by the requesting party [*Health & Safety Code § 19851(c)*]. The certified, licensed, or registered professional's refusal to comply with a request sent by the building department is unreasonable if the professional either fails to respond within 30 to 60 days or refuses to permit the copying after receiving the signed affidavit specified in *Health & Safety Code § 19851(c)* and the registered letter specified in *Health & Safety Code § 19851(d)* [*Health & Safety Code § 19851(f)*].

A building designer has a common law copyright in house plans that he or she creates. The filing of the plans in a local building department does not make them a public record in the sense that the public has the right to use the plans [*Smith v. Paul (1959) 174 Cal. App. 2d 744, 751, 345 P.2d 546]* .

[9] Peace Officer Personnel Records

The California Supreme Court held that information relating to California peace officers that is maintained in an electronic database by the California Commission on Peace Officer Standards and Training was a "public record" within the meaning of the California Public Records Act [*Gov. Code § 6252(e), (g)*]. Disclosure of this information was requested by the Los Angeles Times. The information requested included the peace officer's name and birth date, employing department, appointment dates, termination dates, and reason for termination. The Commission denied the request. The superior court ordered disclosure of the peace officer's name, employing agency, date of new appointment,

and termination date. The court of appeal granted a writ of mandate prohibiting disclosure. The California Supreme Court reversed the judgment of the court of appeal [*Commission on Peace Officer Standards and Training v. Superior Court (2007) 42 Cal. 4th 278, 287-289, 64 Cal. Rptr. 3d 661, 165 P.3d 462]* . The California Supreme Court held that these peace officer records were not exempt from disclosure under *Penal Code §§ 832.7, 832.8*, peace officer personnel records exemption, because the information sought including the name of the peace officer, the employing department, the appointment date, and any termination date were not types of information specifically listed in *Penal Code § 832.8*, and therefore this information was not protected from disclosure under both statutes [*Penal Code §§ 832.7, 832.8*] merely because this information was maintained in a file that also included protected categories of information [*Commission on Peace Officer Standards and Training v. Superior Court (2007) 42 Cal. 4th 278, 291-293, 64 Cal. Rptr. 3d 661, 165 P.3d 462]* . The California Supreme Court also held that the "employment history" category of protected information listed in *Penal Code § 832.8* exempted from disclosure information about prior employment, not current employment information, and thus the information maintained by the Commission was not covered by this exemption [*Commission on Peace Officer Standards and Training v. Superior Court (2007) 42 Cal. 4th 278, 294-296, 299, 64 Cal. Rptr. 3d 661, 165 P.3d 462]* . However, the California Supreme Court also held that the Commission could seek to justify exclusion from the disclosed records of information about specific officers because disclosure of that information would jeopardize the safety or efficacy of the peace officers. The exclusion would be based on a showing under the personnel and medical records exemption [*Gov. Code § 6254(c)*] and under the public interest exemption [*Gov. Code § 6255*; *Commission on Peace Officer Standards and Training v. Superior Court (2007) 42 Cal. 4th 278, 301-303, 64 Cal. Rptr. 3d 661, 165 P.3d 462]* .

The California Supreme Court held that salary information for specific public employees of the City of Oakland earning $100,000 or more per year was a disclosable "public record" within the meaning of the California Public Records Act [*Gov. Code §§ 6252(d), 6253(a)*]. Disclosure of this information was requested by reporters for the Contra Costa Times from the City of Oakland for the 2003-2004 fiscal year. The City refused to provide salary information for specific individuals claiming this information was exempt from disclosure. After allowing intervention by two public employee unions, the superior court ordered disclosure of the salary information and rejected claims for exemption based on the privacy interests of the individuals, and for police officers, the peace officer personnel records exemption. The court of appeal denied the petition of the two unions challenging disclosure [*International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal. 4th 319, 327-329, 64 Cal. Rptr. 3d 693, 165 P.3d 488]* . The California Supreme Court rejected exemptions claims based upon the personnel and medical records exemption [Gov. Code § 6354(c) [*International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal. 4th 319, 336-338, 64 Cal. Rptr. 3d 693, 165 P.3d 488]* and based upon the privacy provisions of the California Constitution [*Cal. Const., art.1, § 1*; *International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal. 4th 319, 338-340, 64 Cal. Rptr. 3d 693, 165 P.3d 488]* . Finally, the California Supreme Court held that the peace officers' personal records exemption [*Gov. Code § 6254(k)*; *Penal Code §§ 832.7, 832.8*] did not include salary information of peace officers as one of the categories of information exempt from disclosure [*Penal Code § 832.8*], and thus this exemption did not apply to police officer salary information. Thus, police officer salary information was disclosable [*International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal. 4th 319, 344-346, 64 Cal. Rptr. 3d 693, 165 P.3d 488]* .

The California Supreme Court applied the records exempt under other laws statutory exemption [*Gov. Code § 6254(k)*] and held that the statutory provisions governing confidentiality of peace officer personnel records [*Penal Code §§ 832.7, 832.8*] applied to prevent disclosure of appeal records including the name of the police officer related to a police officer's administrative appeal to the San Diego County Civil Service Commission of discipline imposed on that officer by the San Diego County Sheriff's Department [*Copley Press, Inc. v. Superior Court (2006) 39 Cal. 4th 1272, 1279, 48 Cal. Rptr. 3d 183, 141 P.3d 288]* . The California Supreme Court held that the confidentiality provisions of *Penal Code § 832.7* (making confidential personnel records of police officers maintained by the employing agency) applied to administrative appeals to county service commissions [*Copley Press, Inc. v. Superior Court (2006) 39 Cal. 4th 1272, 1284-1285, 48 Cal. Rptr. 3d 183, 141 P.3d 288]* . The California Supreme Court also held that the county civil service

commission was included within the definition of the employing agency for purposes of *Penal Code § 832.7* [*Copley Press, Inc. v. Superior Court (2006) 39 Cal. 4th 1272, 1287-1288, 48 Cal. Rptr. 3d 183, 141 P.3d 288]* . The California Supreme Court also held that the identity of the police officer was protected from disclosure, along with records related to the officer's appeal [*Copley Press, Inc. v. Superior Court (2006) 39 Cal. 4th 1272, 1297-1298, 48 Cal. Rptr. 3d 183, 141 P.3d 288]* , and that *Penal Code § 832.7* was not unconstitutional under the provisions of *Cal. Const. Art. 1, § 3(b)(1)* (public right to access to governmental meetings and records) [*Copley Press, Inc. v. Superior Court (2006) 39 Cal. 4th 1272, 1300-1301, 48 Cal. Rptr. 3d 183, 141 P.3d 288]* .

Peace officer personnel records and the information contained in those records are confidential and cannot be disclosed in criminal or civil litigation except according to discovery procedures mandated by law [*Penal Code § 832.7*; *Becerrada v. Superior Court (2005) 131 Cal. App. 4th 409, 412-413, 31 Cal. Rptr. 3d 735* (police officers, parts of whose personnel files were disclosed to defense in criminal prosecution, had right to disclosure of same information from their own personnel files. The court held that releasing that information would not violate the right to a fair trial and would protect the officer's privacy interests)]. Non-litigants seeking to disclose information protected by this privilege must proceed under the provision of the California Public Records Act when the records are not sought in connection with a pending lawsuit [*City of Richmond v. Superior Court (1995) 32 Cal. App. 4th 1430, 1433, 38 Cal. Rptr.2d 632]* . Peace officer personnel records include records and information relating to "marital status, family members, educational and employment history, home addresses," and other information [*Penal Code § 832.8*; *City of Hemet v. Superior Court (1995) 37 Cal. App. 4th 1411, 1422-1423, 44 Cal. Rptr.2d 532* (records related to investigation of complaints against a police officer are included within peace officers records)]. A citizen's review board narrative report discussing the death of a civilian in an officer involved shooting was protected from disclosure under *Penal Code § 832.7* and *Penal Code § 832.8* because the report was considered to be confidential personnel records of peace officers [*Davis v. City of San Diego (2003) 106 Cal. App. 4th 893, 899-901, 131 Cal. Rptr. 2d 266]* and because the statutory protection against disclosure applies not only to discovery motions in civil and criminal cases under *Evid. Code § 1043* but also to voluntary public disclosure by the city [*Davis v. City of San Diego (2003) 106 Cal. App. 4th 893, 901-903, 131 Cal. Rptr. 2d 266]* .

Police officers, indicted for committing felonies, sought a protective order to prohibit district attorney from disclosing urinalysis test results that were part of confidential peace officer personnel records. These test results were obtained as part of an administrative investigation, and were contained in police investigative files, as well as district attorney files. The court held that the test results, protected by the confidential peace officer personnel records exception, could be properly obtained by the district attorney, under the provisions of Gov. Code § 832.7(a), but could not be publicly disclosed by the district attorney except under the provisions of *Evid. Code § 1043*, and with the court making determinations as to admissibility (*Evid. Code § 350*), relevance (*Evid. Code § 1043(b)(3)*), and the need for a protective order (*Evid. Code § 1045(d)*) [*Fagan v. Superior Court (2003) 111 Cal. App. 4th 607, 610, 4 Cal. Rptr. 3d 239]* .

Spouse of police officer filed divorce action, and, as part of divorce proceedings, sought discovery of police officer's payroll records from employer of officer. Employer failed to produce records. The Court of Appeal held that police officer payroll records are protected under Gov. Code § 832.8 (confidential peace officer personnel records) and normally are not disclosable except consistent with the requirements of Evid. Code § 843 and Evid. Code § 845. However, the Court of Appeal also held that an exception to the statutory discovery requirements under Evid. Code §§ 843 and 845 would be recognized when discovery of payroll records is sought in a divorce action between a peace officer and spouse [*City of Los Angeles v. Superior Court (2003) 111 Cal. App. 4th 883, 885-886, 3 Cal. Rptr. 3d 915]* .

The financial records exception does not apply when a former spouse of a police officer seeks discovery of non-financial information from the police officer's personnel records in a dissolution proceeding. In this case, the former spouse sought discovery of information related to misconduct complaints made against the police officer. The former spouse made claims of stalking and domestic violence against the police officer. The Court of Appeal held that this type

of information was relevant to child custody and visitation issues in the dissolution proceeding, thus requiring the superior court to examine the records in camera to determine whether the information should be disclosed [*Slayton v. Superior Court (2006) 146 Cal. App. 4th 55, 60-62, 52 Cal. Rptr. 3d 731]* .

Discovery of peace officer personnel record information requires compliance with discovery procedures including filing a written motion with the court that is supported by an affidavit showing good cause for disclosure, and giving written notice to the governmental entity that has possession of that personnel record [*Evid. Code § 1043*; *Brant v. Superior Court (2003) 108 Cal. App. 4th 100, 108-110, 132 Cal. Rptr. 2d 783* (defendant's motion to discover complaints in arresting officers' personnel files under the provisions of *Evid. Code § 1043* was improperly denied by trial court, because defendant satisfied good cause standard for discovery of personnel records); *Michael v. Gates (1995) 38 Cal. App. 4th 737, 740* (*Evid. Code § 1043* does not apply to a city attorney's review of personnel records of a police officer who is testifying as an expert witness in a lawsuit against the city)]. The conditional privilege for peace officer personnel records applies not only to the records and information in the records but also to information that is both in the records and available elsewhere [*Hackett v. Superior Court (Glin) (1993) 13 Cal. App. 4th 96, 100-102, 16 Cal. Rptr. 2d 405* (home address of peace officer)]. The good cause standard [*Evid. Code § 1043(b)*] for discovery of peace officer personnel records of officers who arrested the defendant seeking discovery of the records in a criminal proceeding requires a showing that the records sought are material to the pending litigation [*Hurd v. Superior Court (2006) 144 Cal. App. 4th 1100, 1106-1108, 50 Cal. Rptr. 3d 893* (materiality requirement applied to post conviction habeas corpus statute [*Penal Code § 1054.9*]; habeas corpus challenger allowed to seek discovery of material peace officer personnel records even though records were not requested during criminal prosecution)]. To obtain in chambers review of the records by the judge, it is enough for the defendant to show that the "scenario of alleged officer misconduct could or might have occurred" [*Warrick v. Superior Court (2005) 35 Cal. 4th 1011, 1016, 29 Cal. Rptr. 3d 2, 112 P.3d 2]* . The good cause requirement for discovery of peace officer personnel records [*Evid. Code § 1043(b)*; *City of Santa Cruz v. Municipal Court (1989) 49 Cal. 3d 74, 84, 260 Cal. Rptr. 520, 776 P.2d 222]* applies to juvenile proceedings and permits discovery of discipline imposed on arresting police officers [*Evid. Code § 1045(a)*; *City of San Jose v. Superior Court (1993) 5 Cal. 4th 47, 53-55, 19 Cal. Rptr. 2d 73, 850 P.2d 621]* . The good cause standard for disclosure of records was satisfied as to records of complaints of workplace violence when the complaining witness, a fellow deputy sheriff, refused to speak with the defense investigator about the complaint [*Alvarez v. Superior Court (2004) 117 Cal. App. 4th 1107, 1113, 12 Cal. Rptr. 3d 252]* .

Criminal defendant sought discovery of civilian complaint documents and psychological records in former police officer's personnel records as part of a search for exculpatory information (under *Brady v. Maryland (1963) 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215*) and for impeachment information (under *Pitchess v. Superior Court of Los Angeles County (1974) 113 Cal. Rptr. 897, 522 P.2d 305*) that could be used when former officer testified as a witness for the prosecution in the action against the defendant. Defendant moved for an in camera review of the former officer's personnel records by the court. The trial court denied the motion. The Court of Appeal held that it was an abuse of discretion for the trial court to have denied the motion for in camera review because defendant made sufficient showing of materiality under the *Brady* standard, and sufficient showing of good cause under the *Pitchess* standard to justify an in camera review [*Abatti v. Superior Court (2003) 112 Cal. App. 4th 39, 58-60, 4 Cal. Rptr. 3d 767* ; *Uybungco v. Superior Court (2008) 163 Cal. App. 4th 1043, 1050-1052, 78 Cal. Rptr. 3d 30* (good cause shown for in camera review of four police officers personnel records to search for complaints of false police reports)].

DMV was required to disclose to prosecutors under compulsion of a subpena duces tecum unredacted confidential medical records maintained by DMV under the authority of *Veh. Code § 1808.5* relating to a driver charged with the crime of vehicular homicide. DMV claimed that the records were privileged under both *Veh. Code § 1808.5* (confidential medical records), and under *Evid. Code § 1040* (privilege for official information). The court rejected those claims, holding that *Veh. Code § 1808.5* does not independently establish a privilege of non disclosure, and that under *Evid. Code § 1040*, the records had to be disclosed because the need for disclosure outweighed DMV's interest in maintaining the confidentiality of these records [*Department of Motor Vehicles v. Superior Court (2002) 100 Cal. App. 4th 363, 366-368, 122 Cal. Rptr. 2d 504]* .

The five-year time limit on disclosure of citizen complaints under *Evid. Code § 1045(b)(1)* is not unconstitutional on its face, and did not deny due process of law to a criminal defendant who was unable to compel disclosure of a ten year old complaint against the police officer that arrested defendant [*City of Los Angeles v. Superior Court (2002) 29 Cal. 4th 1, 10-12, 124 Cal. Rptr. 2d 202, 52 P.3d 129]* . However, a police department was required to disclose records containing the arresting officers personnel files from employment with other law enforcement agencies going back for the five year time period under *Evid. Code § 1045* [*Fletcher v. Superior Court (2002) 100 Cal. App. 4th 386, 406-407, 123 Cal. Rptr. 2d 99]* .

Law enforcement departments or agencies are required to release copies of complaining parties' own statements to the complaining party at the time the complaint is filed [*Penal Code § 832.7(b)*].

Routine disclosure by public entity employers of confidential peace officer personnel records at public disciplinary hearings violates the provisions of *Penal Code § 832.7* and provides the basis for declaratory relief when the officer objects to disclosure of confidential records [San Diego Police Officers Association v. City of *San Diego Civil Service Commission (2003) 104 Cal. App. 4th 275, 287-288, 128 Cal. Rptr. 2d 248]* .

Once good cause and materiality are established for a hybrid Brady/Pitchess motion, the trial court can be required to review the peace officer's personnel files in camera to determine whether or not the files contain information that should be disclosed [*Abatti v. Superior Court (2003) 112 Cal. App. 4th 39, 42-43, 4 Cal. Rptr. 3d 767]* . Defendant's criminal conviction was reversed and remanded because the trial court improperly denied defendant's motion for an in camera inspection of arresting officer's personnel records related to dishonesty and filing false reports, notwithstanding that defendant satisfied statutory requirements for such inspection of officer records. On remand, trial court ordered to conduct in camera inspection of these records [*People v. Johnson (2004) 118 Cal. App. 4th 292, 296-297, 12 Cal. Rptr. 3d 885]* . However, the Court of Appeal reversed an order of the trial court granting full disclosure of a police internal affairs report related to a claim of excessive force brought by a jail inmate against a sheriff's deputy in a civil lawsuit. The court of appeal held that the part of the report containing the investigating officer's analysis and conclusions had to be redacted from the report before disclosure would be allowed [*Haggerty v. Superior Court (2004) 117 Cal. App. 4th 1079, 1082, 12 Cal. Rptr. 3d 467]* . Disclosure of individual earnings information of peace officers by name pursuant to the Public Records Act requires compliance with the provisions of *Penal Code § 832.7* before disclosure is made, and including notice and hearing rights for the peace officer under Evid. Code §§ 1043, 1046 [Teamsters Local 856 v. *Priceless LLC (2003) 112 Cal. App. 4th 1500, 1525-1526, 5 Cal. Rptr. 3d 847]* .

[10] Indian Tribe Records or Information

Indian tribe records and information are protected from disclosure under the provisions of *Gov. Code § 63048.63*. Legislative declarations provide:

- The financial and legal records of California Indian tribes and tribal business enterprises are records of a sovereign nation and are not subject to disclosure by private citizens or the state. This is explicitly recognized in amendments to tribal-state gaming compacts ratified by the Legislature, which provide for the securitization of annual payments to be received from the tribes by the state or by an agency, trust, fund, or entity specified by the state [*Gov. Code § 63048.63(a)(1)*];

- In order to review the records of any Indian tribe relative to this securitization, the compacts require the execution of nondisclosure agreements [*Gov. Code § 63048.63(a)(2)*];

- State entities statutorily charged with participating in the bond sale cannot perform those duties in the absence of that agreement, and the Legislature hereby acknowledges and agrees that documents containing tribal information are not public records, shall not be discussed in an open meeting, and that

state officials privy to that information may execute nondisclosure agreements [*Gov. Code § 63048.63(a)(3)*].

Neither the California Public Records Act [*Gov. Code § 6250 et seq.*] nor other provisions of law shall permit the disclosure of any records of an Indian tribe received by the state, or by an agency, trust fund, or entity specified by the state, in connection with the sale of any portions of the designated tribal-state gaming compact assets or the issuance of bonds, or any summaries or analyses. The transmission of the records, or the information contained in those records in an alternative form, to the state or the special purpose trust shall not constitute a waiver of exemption from disclosure, and the records and information once transmitted to the state or special purpose trust shall be subject to this same exemption from disclosure [*Gov. Code § 63048.63(b)*]. The state and the special purpose trust are authorized to enter into nondisclosure agreements with Indian tribes [*Gov. Code § 63048.63(c)*]. The nondisclosure agreements may include provisions limiting the representatives of the state and the special purpose trust authorized to review or receive records of the Indian tribe to those individuals directly working on the sale of portions of the designated compact assets or the issuance of the bonds [*Gov. Code § 63048.63(d)*].

[11] Factor Replacement Therapy Contracts

The health services department may enter into contracts with one or more manufacturers on a negotiated or bid basis as the purchaser, but not the dispenser or distributor, of factor replacement therapies under the California Children's Services Program for the purpose of enabling the department to obtain the full range of available therapies and services required for clients with hematological disorders at the most favorable price and to enable the department, notwithstanding any other provision of state law, to obtain discounts, rebates, or refunds from the manufacturers based upon the large quantities purchased under the program. Contracts entered under this law are confidential and exempt from disclosure under the California Public Records Act (*Gov. Code § 6250 et seq.*) [*Health & Safety Code § 123853(a)*].

California Forms of Pleading and Practice--Annotated

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Volume 41: Overview of Public Administrative Law thru Review of Agency Rulemaking-Chs. 470-472B
Chapter 470C PUBLIC RECORDS ACT
PART II. LEGAL BACKGROUND

41-470C California Forms of Pleading and Practice--Annotated § 470C.15

§ 470C.15 List of Exempt Records Statutes

[1] Nature of Exemptions

The Public Records Act [*Gov. Code §§ 6250-6277*] was amended in 1998 to provide a list of statutes that identify exemptions [*Gov. Code §§ 6276.02-6276.48*]. The legislative intent in enacting these lists is the following [*Gov. Code § 6275*]:

- To assist members of the public and state and local agencies in identifying exemptions to the California Public Records Act;

- To ensure that, after January 1, 1999, each addition or amendment to a statute that exempts any information contained in a public record from disclosure pursuant to subdivision (k) of Section 6254 [*Gov. Code § 6254(k)*] shall be listed and described in the statutory list of exemptions pursuant to a bill authorized by a standing committee of the Legislature to be introduced during the first year of each session of the Legislature

- To enable the statutes to operate to exempt certain records, or portions thereof, from disclosure;

- To be advised that the statutes listed and described [*Gov. Code §§ 6276.02-6276.48*] may not be inclusive of all exemptions;

- To note that the listing of a statute does not itself create an exemption;

- To caution requesters of public records and public agencies to review the applicable statute to determine the extent to which the statute, in light of the circumstances surrounding the request, exempts public records from disclosure;

- To advise that records or information that are exempt from disclosure under *Gov. Code § 6254(k)* may include, but shall not be limited to, records or information identified in these statutes [*Gov. Code §*

6276].

[2] Acquired Immune Deficiency Syndrome to Advance Health Care Directive Registry

Gov. Code § 6276.02 contains an alphabetical list of the following statutes:

- Acquired Immune Deficiency Syndrome, blood test results, written authorization not necessary for disclosure, *Health & Safety Code § 121010*.

- Acquired Immune Deficiency Syndrome, blood test subject, compelling identity of, *Health & Safety Code § 120975*.

- Acquired Immune Deficiency Syndrome, confidentiality of personal data of patients in State Department of Public Health programs, *Health & Safety Code § 120820*.

- Acquired Immune Deficiency Syndrome, confidentiality of research records, *Health & Safety Code § 121090*, *121095*, *121115*, and *121120*.

- Acquired Immune Deficiency Syndrome, confidentiality of vaccine volunteers, *Health & Safety Code § 121280*.

- Acquired Immune Deficiency Syndrome, confidentiality of information obtained in prevention programs at correctional facilities and law enforcement agencies, *Penal Code §§ 7552*, *7554*.

- Acquired Immune Deficiency Syndrome, confidentiality of test results of person convicted of prostitution, *Penal Code § 1202.6*.

- Acquired Immune Deficiency Syndrome, disclosure of results of HIV test, penalties, *Health & Safety Code § 120980*.

- Acquired Immune Deficiency Syndrome, personal information, insurers tests, confidentiality of, *Ins. Code § 799*.

- Acquired Immune Deficiency Syndrome, public safety and testing disclosure, *Health & Safety Code §§ 121065*, *121070*.

- Acquired Immune Deficiency Syndrome Research and Confidentiality Act, production or discovery of records for use in criminal or civil proceedings against subject prohibited, *Health & Safety Code § 121100*.

- Acquired Immune Deficiency Syndrome Public Health Records Confidentiality Act, personally identifying information confidentiality, *Health & Safety Code § 121025*.

- Acquired Immune Deficiency Syndrome, test of criminal defendant pursuant to search warrant requested by victim, confidentiality of, *Penal Code § 1524.1*.

- Acquired Immune Deficiency Syndrome, test results, disclosure to patient's spouse and others, *Health & Safety Code § 121015*.

- Acquired Immune Deficiency Syndrome, test of person under Youth Authority, disclosure of results,

Welf. & Inst. Code § 1768.9.

- Acquired Immune Deficiency Syndrome Research and Confidentiality Act, financial audits or program evaluations, *Health & Safety Code § 121085*.

- Acquired Immune Deficiency Syndrome Research and Confidentiality Act, violations, *Health & Safety Code § 121100*.

- Acquired Immune Deficiency Syndrome Research and Confidentiality Act, personally identifying research records not to be disclosed, *Health & Safety Code § 121075*.

- Acquired Immune Deficiency Syndrome Research and Confidentiality Act, permittee disclosure, *Health & Safety Code § 121080*.

- Administrative procedure, adjudicatory hearings, interpreters, *Gov. Code § 11513*.

- Adoption records, confidentiality of, *Health & Safety Code § 102730*.

- Advance Health Care Directive Registry, exemption from disclosure for registration information provided to the Secretary of State, *Gov. Code § 6254 (ac)*.

[3] Aeronautics Act to Avocado Handler Transaction Records

Gov. Code § 6276.04 contains an alphabetical list of the following statutes:

- Aeronautics Act, reports of investigations and hearings, *Pub. Util. Code § 21693*.

- Agricultural producers marketing, access to records, *Food & Agric. Code § 59616*.

- Aiding disabled voters, *Elec. Code § 14282*.

- Air pollution data, confidentiality of trade secrets, *Gov. Code § 6254.7*; *Health & Safety Code §§ 42303.2, 43206*.

- Air toxics emissions inventory plans, protection of trade secrets, *Health & Safety Code § 44346*.

- Alcohol and drug abuse records and records of communicable diseases, confidentiality of, *Health & Safety Code § 123125*.

- Alcoholic beverage licensees, confidentiality of corporate proprietary information, *Bus. & Prof. Code § 25205*.

- Ambulatory Surgery Data Record, confidentiality of identifying information, *Health and Safety Code § 128737*.

- Apiary registration information, confidentiality of, *Food & Agric. Code § 29041*.

- Archaeological site information and reports maintained by state and local agencies, disclosure not required, *Gov. Code § 6254.10*.

- Arrest not resulting in conviction, disclosure or use of records, *Lab. Code §§ 432.7, 432.8*.

- Arsonists, registered, confidentiality of certain information, *Penal Code § 457.1*.

- Artificial insemination, donor not natural father, confidentiality of records, *Fam. Code § 7613*.

- Assessor's records, confidentiality of information in, *Rev. & Tax. Code § 408*.

- Assessor's records, confidentiality of information in, *Rev. & Tax Code § 451*.

- Assessor's records, display of documents relating to business affairs or property of another, *Rev. & Tax Code § 408.2*.

- Assigned risk plans, rejected applicants, confidentiality of information, *Ins. Code § 11624*.

- Attorney applicant, investigation by State Bar, confidentiality of, *Bus. & Prof. Code § 6060.2*.

- Attorney-client confidential communication, *Bus. & Prof. Code § 6068*; *Evid. Code §§ 952, 954*.

- Attorney, disciplinary proceedings, confidentiality prior to formal proceedings, *Bus. & Prof. Code § 6086.1*.

- Attorney, disciplinary proceeding, State Bar access to nonpublic court records, *Bus. & Prof. Code § 6090.6*.

- Attorney, law corporation, investigation by State Bar, confidentiality of, *Bus. & Prof. Code § 6168*.

- Attorney work product confidentiality in administrative adjudication, *Gov. Code § 11507.6*.

- Attorney, work product, confidentiality of, *Bus. & Prof. Code § 6202*.

- Attorney work product, discovery, *Code Civ. Proc. § 2018.010-2018.080*.

- Auditor General, access to records for audit purposes, *Gov. Code §§ 10527, 10527.1*.

- Auditor General, disclosure of audit records, *Gov. Code § 10525*.

- Automated forward facing parking control devices, confidentiality of video imaging records from the devices, *Veh. Code § 40240*.

- Automated traffic enforcement system, confidentiality of photographic records made by the system, *Veh. Code § 21455.5*.

- Automobile Insurance Claims Depository, confidentiality of information, *Ins. Code § 1876.3*.

- Automobile insurance, investigation of fraudulent claims, confidential information, *Ins. Code § 1872.8*.

- Avocado handler transaction records, confidentiality of information, *Food & Agric. Code § 44984*.

[4] Bank and Corporation Tax to Business and Professions Licensee Exemption for Social Security Numbers

Gov. Code § 6276.06 contains an alphabetical list of the following statutes:

- Bank and Corporation Tax, disclosure of information, *Rev. & Tax. Code § 19542 et seq.*
- Bank employees, confidentiality of criminal history information, *Fin. Code §§ 777.5, 4990*.
- Bank reports, confidentiality of, *Fin. Code § 289*.
- Basic Property Insurance Inspection and Placement Plan, confidential reports, *Ins. Code § 10097*.
- Beef Council of California, confidentiality of fee transactions information, Food & Agric. Code § 6469.1.
- Bids, confidentiality of, *Pub. Contract Code § 10304*.
- Birth, death, and marriage licenses, confidential information contained in, *Health & Safety Code §§ 102100, 102110* and 102230.
- Birth defects, monitoring, confidentiality of information collected, *Health & Safety Code § 103850*.
- Birth, live, confidential portion of certificate, *Health & Safety Code §§ 102340, 102475, 103525, 103590*.
- Blood tests, confidentiality of hepatitis and AIDS carriers, *Health & Safety Code § 1603.1*.
- Blood-alcohol percentage test results, vehicular offenses, confidentiality of, *Veh. Code § 1804*.
- Business and professions licensee exemption for social security number, *Bus. & Prof. Code § 30*.

[5] Cable Television Subscriber Information to California Wine Grape Commission

Gov. Code § 6276.08 contains an alphabetical list of the following statutes:

- Cable television subscriber information, confidentiality of, *Penal Code § 637.5*.
- California AIDS Program, personal data, confidentiality, *Health & Safety Code § 120820*.
- California Apple Commission, confidentiality of lists of persons, *Food & Agric. Code § 75598*.
- California Apple Commission, confidentiality of proprietary information from producers or handlers, *Food & Agric. Code § 75633*.
- California Asparagus Commission, confidentiality of lists of producers, *Food & Agric. Code § 78262*.
- California Asparagus Commission, confidentiality of proprietary information from producers, *Food & Agric. Code § 78288*.

- California Avocado Commission, confidentiality of information from handlers, *Food & Agric. Code § 67094*.

- California Avocado Commission, confidentiality of proprietary information from handlers, *Food & Agric. Code § 67104*.

- California Cherry Commission, confidentiality of proprietary information from producers, processors, shippers, or grower-handlers, *Food & Agric. Code § 76144*.

- California Children's Services Program, confidentiality of factor replacement therapy contracts, *Health & Safety Code § 123853*.

- California Cut Flower Commission, confidentiality of lists of producers, *Food & Agric. Code § 77963*.

- California Cut Flower Commission, confidentiality of proprietary information from producers, *Food & Agric. Code § 77988*.

- California Date Commission, confidentiality of proprietary information from producers and grower-handlers, *Food & Agric. Code § 77843*.

- California Egg Commission, confidentiality of proprietary information from handlers or distributors, *Food & Agric. Code § 75134*.

- California Forest Products Commission, confidentiality of lists of persons, *Food & Agric. Code § 77589*.

- California Forest Products Commission, confidentiality of proprietary information from producers, *Food & Agric. Code § 77624*.

- California Iceberg Lettuce Commission, confidentiality of information from handlers, *Food & Agric. Code § 66624*.

- California Kiwifruit Commission, confidentiality of proprietary information from producers or handlers, *Food & Agric. Code § 68104*.

- California Navel Orange Commission, confidentiality of proprietary information from producers or handlers and lists of producers and handlers, *Food & Agric. Code § 73257*.

- California Pepper Commission, confidentiality of lists of producers and handlers, *Food & Agric. Code § 77298*.

- California Pepper Commission, confidentiality of proprietary information from producers or handlers, *Food & Agric. Code § 77334*.

- California Pistachio Commission, confidentiality of proprietary information from producers or processors, *Food & Agric. Code § 69045*.

- California Salmon Commission, confidentiality of fee transactions records, *Food & Agric. Code § 76901.5*.

- California Salmon Commission, confidentiality of request for list of commercial salmon vessel operators, *Food & Agric. Code § 76950*.

- California Seafood Council, confidentiality of fee transaction records, *Food & Agric. Code § 78553*.

- California Seafood Council, confidentiality of information on volume of fish landed, *Food & Agric. Code § 78575*.

- California Sheep Commission, confidentiality of proprietary information from producers or handlers and lists of producers, *Food & Agric. Code § 76343*.

- California State University contract law, bids, questionnaires and financial statements, *Pub. Contract Code § 10763*.

- California State University Investigation of Reported Improper Governmental Activities Act, confidentiality of investigative audits completed pursuant to the act, *Educ. Code § 89574*.

- California Table Grape Commission, confidentiality of information from shippers, *Food & Agric. Code § 65603*.

- California Tomato Commission, confidentiality of lists of producers, handlers, and others, *Food & Agric. Code § 78679*.

- California Tomato Commission, confidentiality of proprietary information, *Food & Agric. Code § 78704*.

- California Tourism Marketing Act, confidentiality of information pertaining to businesses paying the assessment under the act, *Gov. Code § 13995.54*.

- California Victim Compensation and Government Claims Board, disclosure not required of records relating to assistance requests under Article 1 (commencing with Section 13950) of Chapter 5 of Part 4 of Division 3 of Title 2, *Gov. Code § 6254.17*.

- California Walnut Commission, confidentiality of lists of producers, *Food & Agric. Code § 77101*.

- California Walnut Commission, confidentiality of proprietary information from producers or handlers, *Food & Agric. Code § 77154*.

- California Wheat Commission, confidentiality of proprietary information from handlers and lists of producers, *Food & Agric. Code § 72104*.

- California Wheat Commission, confidentiality of requests for assessment refund, *Food & Agric. Code § 72109*.

- California Wine Commission, confidentiality of proprietary information from producers or vintners, *Food & Agric. Code § 74655*.

- California Wine Grape Commission, confidentiality of proprietary information from producers and vintners, *Food & Agric. Code § 74955*.

[6] Cancer Registries to Community College Employee

Gov. Code § 6276.10 contains an alphabetical list of the following statutes:

- Cancer registries, confidentiality of information, *Health & Safety Code § 103885*.
- Candidate for local nonpartisan elective office, confidentiality of ballot statement, *Elec. Code § 13311*.
- Child abuse information, exchange by multidisciplinary personnel teams, *Welf. & Inst. Code § 830*.
- Child abuse report and those making report, confidentiality of, *Penal Code §§ 11167, 11167.5*.
- Child care liability insurance, confidentiality of information, *Ins. Code § 1864*.
- Child concealer, confidentiality of address, *Penal Code § 278.7*.
- Child custody investigation report, confidentiality of, *Fam. Code § 3111*.
- Child day care facility, nondisclosure of complaint, *Health & Safety Code § 1596.853*.
- Child health and disability prevention, confidentiality of health screening and evaluation results, *Health & Safety Code § 124110*.
- Child sexual abuse reports, confidentiality of reports filed in a contested proceeding involving child custody or visitation rights, *Fam. Code § 3118*.
- Child support, confidentiality of income tax return, *Fam. Code § 3552*.
- Child support, promise to pay, confidentiality of, *Fam. Code § 7614*.
- Childhood lead poisoning prevention, confidentiality of blood lead findings, *Health & Safety Code § 124130*.
- Cigarette tax, confidential information, *Rev. & Tax. Code § 30455*.
- Civil actions, delayed disclosure for 30 days after complaint filed, *Code Civ. Proc. § 482.050*.
- Closed sessions, document assessing vulnerability of state or local agency to disruption by terrorist or other criminal acts, *Gov. Code § 6254(aa)*.
- Closed sessions, meetings of local governments, pending litigation, *Gov. Code § 54956.9*.
- Colorado River Board, confidential information and records, *Water Code § 12519*.
- Commercial fishing licensee, confidentiality of records, *Fish & Game Code § 7923*.
- Commercial fishing reports, *Fish & Game Code § 8022*.
- Community care facilities, confidentiality of client information, *Health & Safety Code § 1557.5*.

- Community college employee, candidate examination records, confidentiality of, *Educ. Code § 88093*.

- Community college employee, notice and reasons for nonreemployment, confidentiality, *Educ. Code § 87740*.

[7] Conservatee to Customer List of Telephone Answering Service

Gov. Code § 6276.12 contains an alphabetical list of the following statutes:

- Conservatee, confidentiality of the conservatee's report, *Prob. Code § 1826*.

- Conservatee, estate plan of, confidentiality of, *Prob. Code § 2586*.

- Conservatee with disability, confidentiality of report, *Prob. Code § 1827.5*.

- Conservator, confidentiality of conservator's birth date and driver's license number, *Prob. Code § 1834*.

- Conservator, supplemental information, confidentiality of, *Prob. Code § 1821*.

- Conservatorship, court review of, confidentiality of report, *Prob. Code § 1851*.

- Consumer fraud investigations, access to complaints and investigations, *Gov. Code § 26509*.

- Consumption or utilization of mineral materials, disclosure of, *Pub. Res. Code § 2207.1*.

- Contractor, evaluations and contractor responses, confidentiality of, *Pub. Contract Code § 10370*.

- Contractor, license applicants, evidence of financial solvency, confidentiality of, *Bus. & Prof. Code § 7067.5*.

- Controlled Substance Law violations, confidential information, *Gov. Code § 818.7*.

- Controlled substance offenders, confidentiality of registration information, *Health & Safety Code § 11594*.

- Cooperative Marketing Association, confidential information disclosed to conciliator, *Food & Agric. Code § 54453*.

- Coroner, inquests, subpoena duces tecum, *Gov. Code § 27491.8*.

- County aid and relief to indigents, confidentiality of investigation, supervision, relief, and rehabilitation records, *Welf. & Inst. Code § 17006*.

- County alcohol programs, confidential information and records, *Health & Safety Code § 11812*.

- County Employees' Retirement, confidential statements and records, *Gov. Code § 31532*.

- County mental health system, confidentiality of client information, *Welf. & Inst. Code § 5610*.

- County social services, investigation of applicant, confidentiality, *Welf. & Inst. Code § 18491*.

- County social services rendered by volunteers, confidentiality of records of recipients, *Welf. & Inst. Code § 10810*.

- County special commissions, disclosure of health care peer review and quality assessment records not required, *Welf. & Inst. Code § 14087.58*.

- County special commissions, disclosure of records relating to the commission's rates of payment for publicly assisted medical care not required, *Welf. & Inst. Code § 14087.58*.

- Court files, access to, restricted for 60 days, *Code Civ. Proc. § 1161.2*.

- Court reporters, confidentiality of records and reporters, *Gov. Code § 68525*.

- Court-appointed special advocates, confidentiality of information acquired or reviewed, *Welf. & Inst. Code § 105*.

- Crane employers, previous business identities, confidentiality of, *Lab. Code § 7383*.

- Credit unions, confidentiality of investigation and examination reports, *Fin. Code § 14257*.

- Credit unions, confidentiality of employee criminal history information, *Fin. Code § 14409.2*.

- Criminal defendant, indigent, confidentiality of request for funds for investigators and experts, *Penal Code § 987.9*.

- Criminal offender record information, access to, *Penal Code §§ 11076, 11077, 11081, 13201, 13202*.

- Crop reports, confidential, *Gov. Code § 6254(e)*.

- Customer list of employment agency, trade secret, *Bus. & Prof. Code § 16607*.

- Customer list of telephone answering service, trade secret, *Bus. & Prof. Code § 16606*.

[8] Dairy Council of California to Driving School and Driving Instructor Licensee Records

Gov. Code § 6276.14 contains an alphabetical list of the following statutes:

- Dairy Council of California, confidentiality of ballots, *Food & Agric. Code § 64155*.

- Death, report that physician's or podiatrist's negligence or incompetence may be cause, confidentiality of, *Bus. & Prof. Code § 802.5*.

- Dental hygienist drug and alcohol diversion program, confidentiality of records pertaining to treatment, *Bus. & Prof. Code § 1966.5*.

- Dentist advertising and referral contract exemption, *Bus. & Prof. Code § 650.2*.

- Dentist, alcohol or dangerous drug rehabilitation and diversion, confidentiality of records, *Bus. & Prof. Code § 1698*.

- Department of Consumer Affairs licensee exemption for alcohol or dangerous drug treatment and rehabilitation records, *Bus. & Prof. Code § 156.1*.

- Department of Motor Vehicles, confidentiality of information provided by an insurer, *Veh. Code § 4750.4*.

- Department of Motor Vehicles, confidentiality of the home address of specified persons in the records of the Department of Motor Vehicles, *Veh. Code § 1808.6*.

- Developmentally disabled conservatee confidentiality of reports and records, *Health & Safety Code §§ 416.8, 416.18*.

- Developmentally disabled person, access to information provided by family member, *Welf. & Inst. Code § 4727*.

- Developmentally disabled person and person with mental illness, access to and release of information about, by protection and advocacy agency, *Welf. & Inst. Code § 4903*.

- Developmentally disabled person, confidentiality of patient records, state agencies, *Welf. & Inst. Code § 4553*.

- Developmentally disabled person, confidentiality of records and information, *Welf. & Inst. Code §§ 4514, 4518*.

- Diesel Fuel Tax information, disclosure prohibited, *Rev. & Tax. Code § 60609*.

- Disability compensation, confidential medical records, *Unemp. Ins. Code § 2714*.

- Disability insurance, access to registered information, *Ins. Code § 789.7*.

- Discrimination complaint to Division of Labor Standards Enforcement, confidentiality of witnesses, *Lab. Code § 98.7*.

- Dispute resolution participants confidentiality, *Bus. & Prof. Code § 471.5*.

- Division of Workers' Compensation, confidentiality of data obtained by the administrative director and derivative works created by the division, *Labor Code §§ 3201.5, 3201.7*, and *3201.9*.

- Division of Workers' Compensation, individually identifiable information and residence addresses obtained or maintained by the division on workers' compensation claims, confidentiality of, *Labor Code § 138.7*.

- Division of Workers' Compensation, individually identifiable information of health care organization patients, confidentiality of, *Labor Code § 4600.5*.

- Division of Workers' Compensation, individual workers' compensation claim files and auditor's

working papers, confidentiality of, *Labor Code § 129*.

- Division of Workers' Compensation, peer review proceedings and employee medical records, confidentiality of, *Labor Code § 4600.6*.

- Domestic violence counselor and victim, confidentiality of communication, *Evid. Code §§ 1037.2, 1037.5*.

- Driver arrested for traffic violation, notice of reexamination for evidence of incapacity, confidentiality of, *Veh. Code § 40313*.

- Driving school and driving instructor licensee records, confidentiality of, *Veh. Code § 11108*.

[9] Educational-Psychologist-Patient to Executive Department

Gov. Code § 6276.16 contains an alphabetical list of the following statutes:

- Educational psychologist-patient, privileged communication, *Evid. Code § 1010.5*.

- Electronic and appliance repair dealer, service contractor, financial data in applications, *Gov. Code § 6254(x)*.

- Electronic Recording Delivery Act of 2004, exemption from disclosure for computer security reports, *Gov. Code § 27394*.

- Emergency Care Data Record, exemption from disclosure for identifying information, *Health & Safety Code § 128736*.

- Emergency Medical Services Fund, patient named, *Health & Safety Code § 1797.98c*.

- Emergency medical technicians, confidentiality of disciplinary investigation information, *Health & Safety Code § 1798.200*.

- Emergency Medical Technician-Paramedic (EMT-P), exemption from disclosure for records relating to personnel actions against, or resignation of, an EMT-P for disciplinary cause or reason, *Health & Safety Code § 1799.112*.

- Eminent domain proceedings, use of state tax returns, *Code Civ. Proc. § 1263.520*.

- Employment agency, confidentiality of customer list, *Bus. & Prof. Code § 16607*.

- Employment application, nondisclosure of arrest record or certain convictions, *Lab. Code §§ 432.7, 432.8*.

- Employment Development Department, furnishing materials, *Unemp. Ins. Code § 307*.

- Enteral nutrition products, confidentiality of contracts by the State Department of Health Care Services with manufacturers of enteral nutrition products, *Welf. & Inst. Code § 14195.8*.

- Equal wage rate violation, confidentiality of complaint, *Lab. Code § 1197.5*.

- Equalization, State Board of, prohibition against divulging information, *Gov. Code § 15619*.

- Escrow Agents' Fidelity Corporation, confidentiality of examination and investigation reports, *Fin. Code § 17336*.

- Escrow agents' confidentiality of reports on violations, *Fin. Code § 17414*.

- Escrow agents' confidentiality of state summary criminal history information, *Fin. Code § 17414.1*.

- Estate tax, confidential records and information, *Rev. & Tax. Code §§ 14251*.

- Excessive rates or complaints, reports, *Ins. Code § 1857.9*.

- Executive Department, closed sessions and the record of topics discussed, *Gov. Code §§ 11126, 11126.1*.

- Executive Department, investigations and hearings, confidential nature of information acquired, *Gov. Code § 11183*.

[10] Family Court to Fur Dealer Licensee

Gov. Code § 6276.18 contains an alphabetical list of the following statutes:

- Family Court, records, *Fam. Code § 1818*.

- Farm product processor license, confidentiality of financial statements, *Food & Agric. Code § 55523.6*.

- Farm product processor licensee, confidentiality of grape purchases, *Food & Agric. Code § 55601.5*.

- Fee payer information, prohibition against disclosure by Board of Equalization and others, *Rev & Tax. Code § 55381*.

- Financial institutions, issuance of securities, reports and records of state agencies, *Gov. Code § 6254(d)*.

- Financial statements of insurers, confidentiality of information received, *Ins. Code § 925.3*.

- Financial statements and questionnaires, of prospective bidders for the state, confidentiality of, *Pub. Contract Code § 10165*.

- Financial statements and questionnaires, of prospective bidders for California State University contracts, confidentiality of, *Pub. Contract Code § 10765*.

- Firearms, centralized list of exempted federal firearms licensees, disclosure of information compiled from, *Penal Code § 12083*.

- Firearms, centralized list of dealers and licensees, disclosure of information compiled from, *Penal Code § 12071*.

- Firearm license applications, *Gov. Code § 6254(u)*.

- Firearm sale or transfer, confidentiality of records, *Penal Code § 12082*.

- Fishing and hunting licenses, confidentiality of names and addresses contained in records submitted to the Department of Fish and Game to obtain recreational fishing and hunting licenses, Fish & Game Code § 1059.6.

- Food stamps, disclosure of information, *Welf. & Inst. Code § 18909*.

- Foreign marketing of agricultural products, confidentiality of financial information, *Food & Agric. Code § 58577*.

- Forest fires, anonymity of informants, *Pub. Res. Code § 4417*.

- Foster homes, identifying information, *Health & Safety Code § 1536*.

- Franchise Tax Board, access to Franchise Tax Board information by the State Department of Social Services, *Welf. & Inst. Code § 11025*.

- Franchise Tax Board, auditing, confidentiality of, *Gov. Code § 90005*.

- Franchises, applications, and reports filed with Commissioner of Corporations, disclosure and withholding from public inspection, *Corp. Code § 31504*.

- Fur dealer licensee, confidentiality of records, *Fish & Game Code § 4041*.

[11] Gambling Control Act to Guardianship

Gov. Code § 6276.22 contains an alphabetical list of the following statutes:

- Gambling Control Act, exemption from disclosure for records of the California Gambling Control Commission and the Department of Justice, *Bus. & Prof. Code §§ 19819, 19821*.

- Genetically Handicapped Person's Program, confidentiality of factor replacement therapy contracts, *Health & Safety Code § 125191*.

- Governor, correspondence of and to Governor and Governor's office, *Gov. Code § 6254(l)*.

- Governor, transfer of public records in control of, restrictions on public access, *Gov. Code § 6268*.

- Grand jury, confidentiality of request for special counsel, *Penal Code § 936.7*.

- Grand jury, confidentiality of transcription of indictment or accusation, *Penal Code § 938.1*.

- Group Insurance, Public Employees, *Gov. Code § 53202.25*.

- Guardian, confidentiality of report used to check ability, *Prob. Code § 2342*.

- Guardianship, confidentiality of report regarding the suitability of the proposed guardian, *Prob. Code § 1543*.

- Guardianship, disclosure of report and recommendation concerning proposed guardianship of person or estate, *Prob. Code § 1513*.

[12] Hazardous Substance to Tax Information

Gov. Code § 6276.24 contains an alphabetical list of the following statutes:

- Hazardous substance tax information, prohibition against disclosure, *Rev & Tax. Code § 43651*.

- Hazardous waste control, business plans, public inspection, *Health & Safety Code § 25506*.

- Hazardous waste control, notice of unlawful hazardous waste disposal, *Health & Safety Code § 25180.5*.

- Hazardous waste control, trade secrets, disclosure of information, *Health & Safety Code §§ 25511, 25538*.

- Hazardous waste control, trade secrets, procedures for release of information, *Health & Safety Code § 25358.2*.

- Hazardous waste generator report, protection of trade secrets, *Health & Safety Code §§ 25244.21, 25244.23*.

- Hazardous waste licenseholder disclosure statement, confidentiality of, *Health & Safety Code § 25186.5*.

- Hazardous waste recycling information clearing house, confidentiality of trade secrets, Health & Safety Code § 25107.

- Hazardous waste recycling, list of specified hazardous wastes, trade secrets, *Health & Safety Code § 25175*.

- Hazardous waste recycling, trade secrets, confidential nature, *Health & Safety Code §§ 25173, 25180.5*.

- Healing arts licensees, central files, confidentiality, *Bus. & Prof. Code § 800*.

- Health authorities, special county, confidentiality of records, *Welf. & Inst. Code §§ 14087.35, 14087.36, 14087.38*.

- Health care provider disciplinary proceeding, confidentiality of documents, *Bus. & Prof. Code § 805.1*.

- Health care service plans, review of quality of care, privileged communications, [*Health & Safety Code §§ 1370, 1380*.

- Health commissions, special county, confidentiality of peer review proceedings, rates of payment,

and trade secrets, *Welf. & Inst. Code § 14087.31*.

- Health facilities, patient's rights of confidentiality, *Health & Safety Code §§ 128735, 128755, 128765*.

- Health personnel, data collection by the Office of Statewide Health Planning and Development, confidentiality of information on individual licentiates, Health & Safety Code § *127780*.

- Health plan governed by a county board of supervisors, exemption from disclosure for records relating to provider rates or payments for a three-year period after execution of the provider contract, *Gov. Code §§ 6254.22*, 54056.87.

- Hereditary Disorders Act, legislative finding and declaration, confidential information, *Health & Safety Code §§ 124975, 124980*.

- Hereditary Disorders Act, rules, regulations, and standards, breach of confidentiality, *Health & Safety Code § 124980*.

- HIV, disclosures to blood banks by department or county health officers, *Health & Safety Code § 1603.1*.

- Home address of public employees and officers in Department of Motor Vehicles, records, confidentiality of, *Veh. Code §§ 1808.2, 1808.4*.

- Horse racing, horses, blood or urine test sample, confidentiality, *Bus. & Prof. Code § 19577*.

- Hospital district and municipal hospital records relating to contracts with insurers and service plans, *Gov. Code § 6254(t)*.

- Hospital final accreditation report, *Gov. Code § 6254(s)*.

- Housing authorities, confidentiality of rosters of tenants, *Health & Safety Code § 34283*.

- Housing authorities, confidentiality of applications by prospective or current tenants, *Health & Safety Code § 34332*.

[13] Improper Governmental Activities Reporting to Investigative Consumer Reporting Agency

Gov. Code § 6276.26 contains an alphabetical list of the following statutes:

- Improper governmental activities reporting, confidentiality of identity of person providing information, *Gov. Code § 8547.5*.

- Improper governmental activities reporting, disclosure of information, *Gov. Code § 8547.6*.

- Industrial loan companies, confidentiality of financial information, *Fin. Code § 18496*.

- Industrial loan companies, confidentiality of investigation and examination reports, *Fin. Code § 18394*.

- Influenza vaccine, trade secret information and information relating to recipient of vaccine, Health 7 safety Code § 120155.

- In forma pauperis litigant, rules governing confidentiality of financial information, *Gov. Code § 68511.3*.

- Infrastructure information, exemption from disclosure for information voluntarily submitted to the California Emergency Management Agency, *Gov. Code § 6254(ab)*.

- In-Home Supportive Services Program, exemption from disclosure for information regarding persons paid by the state to provide in-home supportive services, *Gov. Code § 6253.2*.

- Initiative, referendum, recall, and other petitions, confidentiality of names of signers, *Gov. Code § 6253.5*.

- Insurance claims analysis, confidentiality of information, *Ins. Code § 1875.16*.

- Insurance Commissioner, confidential information, *Ins. Code §§ 735.5*, 1067.11, *1077.3*, *12919*.

- Insurance Commissioner, informal conciliation of complaints, confidential communications, *Ins. Code § 1858.02*.

- Insurance Commissioner, information from examination or investigation, confidentiality of, SIns. Code §§ 1215.7, 1433, 1759.3.

- Insurance Commissioner, writings filed with nondisclosure, *Ins. Code § 855*.

- Insurance fraud reporting, information acquired not part of public record, *Ins. Code § 1873.1*.

- Insurance licensee, confidential information, *Ins. Code § 1666.5*.

- Insurer application information, confidentiality of, *Ins. Code § 925.3*.

- Insurer financial analysis ratios and examination synopses, confidentiality of, *Ins. Code § 933*.

- Integrated Waste Management Board information, prohibition against disclosure, *Rev. & Tax. Code § 45982*.

- International wills, confidentiality of registration information filed with the Secretary of State, *Probate Code § 6389*.

- Intervention in regulatory and ratemaking proceedings, audit of customer seeking and award, *Pub. Util. Code § 1804*.

- Investigation and security records, exemption from disclosure for records of the Attorney General, the Department of Justice, the California Emergency Management Agency, and state and local police agencies, *Gov. Code § 6254(f)*.

- Investigative consumer reporting agency, limitations on furnishing an investigative consumer report, *Civ. Code § 1786.12*.

[14] Joint Legislative Ethics Committee to Los Angeles County Tourism Marketing Commission

Gov. Code § 6276.28 contains an alphabetical list of the following statutes:

- Joint Legislative Ethics Committee, confidentiality of reports and records, *Gov. Code § 8953*.
- Judicial candidates, confidentiality of communications concerning, *Gov. Code § 12011.5*.
- Judicial proceedings, confidentiality of employer records of employee absences, *Labor Code § 230.2*.
- Jurors' lists, lists of registered voters and licensed drivers as source for, *Code Civ. Proc. § 197*.
- Juvenile court proceedings to adjudge a person a dependent child of court, sealing records of, *Welf. & Inst. Code § 389*.
- Juvenile criminal records, dissemination to schools, *Welf. & Inst. Code § 828.1*.
- Juvenile delinquents, notification of chief of police or sheriff of escape of minor from secure detention facility, *Welf. & Inst. Code § 1155*.
- Labor dispute, investigation and mediation records, confidentiality of, *Lab. Code § 65*.
- Lanterman-Petris-Short Act, mental health services recipients, confidentiality of information and records, mental health advocate, *Welf. & Inst Code §§ 5540, 5541, 5542, 5550*.
- Law enforcement vehicles, registration disclosure, *Veh. Code § 5003*.
- Legislative Counsel records, *Gov. Code § 6254(m)*.
- Library circulation records and other materials, *Gov. Code §§ 6254(i), 6267*.
- Life and disability insurers, actuarial information, confidentiality of, *Ins. Code § 10489.15*.
- Litigation, confidentiality of settlement information, *Gov. Code § 68513*.
- Local agency legislative body, closed sessions, disclosure of materials, *Gov. Code § 54956.9*.
- Local government employees, confidentiality of records and claims relating to group insurance, *Gov. Code § 53202.25*.
- Local summary criminal history information, confidentiality of, *Penal Code § 13300, 13305*.
- Local agency legislative body, closed session, nondisclosure of minute book, *Gov. Code § 54957.2*.
- Local agency legislative body, meeting, disclosure of agenda, *Gov. Code § 54957.5*.
- Long-term health facilities, confidentiality of complaints against, *Health & Safety Code § 1419*.
- Long-term health facilities, confidentiality of records retained by State Department of Public Health,

Health & Safety Code § 1439.

- Los Angeles County Tourism Marketing Commission, confidentiality of information obtained from businesses to determine their assessment, *Gov. Code § 13995.108*.

[15] Managed Care Health Plans to Multijurisdictional Drug Law Enforcement Agency

Gov. Code § 6276.30 contains an alphabetical list of the following statutes:

- Managed care health plans, confidentiality of proprietary information, *Welf. & Inst. Code § 14091.3*.

- Major Risk Medical Insurance Program, negotiations with health plans, Gov. Code *Welf. & Inst. § 6254(v)*, (y).

- Mandated blood testing and confidentiality to protect public health, prohibition against compelling identification of test subjects, *Health & Safety Code § 120975*.

- Mandated blood testing and confidentiality to protect public health, unauthorized disclosures of identification of test subjects, Health & Safety Code §§ 1603.1, 1603.3, and 121022.

- Mandated blood testing and confidentiality to protect public health, disclosure to patient's spouse, sexual partner, needle sharer, or county health officer, *Health & Safety Code § 121015*.

- Manufactured home, mobile home, floating home, confidentiality of home address of registered owner, *Health & Safety Code § 18081*.

- Marital confidential communications, *Evid. Code §§ 980, 981, 982, 983, 984, 985, 986, 987*.

- Market reports, confidential, *Gov. Code § 6254(e)*.

- Marketing of commodities, confidentiality of financial information, *Food & Agric. Code § 58781*.

- Marketing orders, confidentiality of process distributors' information, *Food & Agric. Code § 59202*.

- Marriage, confidential, certificate, *Fam. Code § 511*.

- Medi-Cal Benefits Program, confidentiality of information, *Welf. & Inst. Code § 14100.2*.

- Medi-Cal Benefits Program, Request of Department for Records of Information, *Welf. & Inst. Code § 14124.89*.

- Medi-Cal Fraud Bureau, confidentiality of complaints, *Gov. Code § 12528*.

- Medi-Cal managed care program, exemption from disclosure for financial and utilization data submitted by Medi-Cal managed care health plans to establish rates, *Welf. & Inst. Code § 14301.1*.

- Medi-Cal program, exemption from disclosure for best price contracts between the State Department of Health Care Services and drug manufacturers, *Welf. & Inst. Code § 14105.33*.

- Medical information, disclosure by provider unless prohibited by patient in writing, *Civ. Code §*

56.16.

- Medical information, types of information not subject to patient prohibition of disclosure, *Civ. Code § 56.30*.

- Medical and other hospital committees and peer review bodies, confidentiality of records, *Evid. Code § 1157*.

- Medical or dental licensee, action for revocation or suspension due to illness, report, confidentiality of, *Bus. & Prof. Code § 828*.

- Medical or dental licensee, disciplinary action, denial or termination of staff privileges, report, confidentiality of, *Bus. & Prof. Code §§ 805, 805.1, 805.5*.

- Meetings of state agencies, disclosure of agenda, *Gov. Code § 11125.1*.

- Mentally abnormal sex offender committed to state hospital, confidentiality of records, *Welf. & Inst. Code § 4135*.

- Mentally disordered and developmentally disabled offenders, access to criminal histories of, *Penal Code § 1620*.

- Mentally disordered persons, court-ordered evaluation, confidentiality of reports, *Welf. & Inst. Code § 5202*.

- Mentally disordered or mentally ill person, confidentiality of written consent to detainment, *Welf. & Inst. Code § 5326.4*.

- Mentally disordered or mentally ill person, voluntarily or involuntarily detained and receiving services, confidentiality of records and information, *Welf. & Inst. Code §§ 5328, 5328.15, 5328.2, 5328.4, 5328.8*, and *5328.9*.

- Mentally disordered or mentally ill person, weapons restrictions, confidentiality of information about, *Welf. & Inst. Code § 8103*.

- Milk marketing, confidentiality of records, *Food & Agric. Code § 61443*.

- Milk product certification, confidentiality of, *Food & Agric. Code § 62121*.

- Milk, market milk, confidential records and reports, *Food & Agric. Code § 62243*.

- Milk product registration, confidentiality of information, *Food & Agric. Code § 38946*.

- Milk equalization pool plan, confidentiality of producers' voting, *Food & Agric. Code § 62716*.

- Mining report, confidentiality of report containing information relating to mineral production, reserves, or rate of depletion of mining operation, *Pub. Res. Code § 2207*.

- Minor, criminal proceeding testimony closed to public, *Penal Code § 859.1*.

- Minority and women's business data possessed by state agencies, confidentiality of, *Gov. Code § 15339.30* [repealed 2003].

- Minors, material depicting sexual conduct, records of suppliers to be kept and made available to law enforcement, *Labor Code § 1309.5*.

- Misdemeanor and felony reports by police chiefs and sheriffs to Department of Justice, confidentiality of, *Penal Code §§ 11107, 11107.5*.

- Monetary instrument transaction records, confidentiality of, *Penal Code § 14167*.

- Missing persons' information, disclosure of, *Penal Code §§ 14201, 14203*.

- Morbidity and mortality studies, confidentiality of records, *Health & Safety Code § 100330*.

- Motor vehicle accident reports, disclosure, *Veh. Code §§ 16005, 20012, 20014*.

- Motor vehicles, department of, public records, exceptions, *Veh. Code §§ 1808-1808.7*.

- Motor vehicle insurance fraud reporting, confidentiality of information acquired, *Ins. Code § 1874.3*.

- Motor vehicle liability insurer, data reported to Department of Insurance, confidentiality of, *Ins. Code § 11628*.

- Multijurisdictional drug law enforcement agency, closed sessions to discuss criminal investigation, *Gov. Code § 54957.8*.

[16] Narcotic Addict Outpatient Revocation Proceeding to Osteopathic Physician and Surgeon

Gov. Code § 6276.32 contains an alphabetical list of the following statutes:

- Narcotic addict outpatient revocation proceeding, confidentiality of reports, *Welf. & Inst. Code § 3152.5*.

- Narcotic and drug abuse patients, confidentiality of records, *Health & Safety Code § 11845.5*.

- Native American graves, cemeteries and sacred places, records of, *Gov. Code § 6254(r)*.

- Notary public, confidentiality of application for appointment and commission, *Gov. Code § 8201.5*.

- Nurse, alcohol or dangerous drug diversion and rehabilitation records, confidentiality of, *Bus. & Prof. Code § 2770.12*.

- Obscene matter, defense of scientific or other purpose, confidentiality of recipients, *Penal Code § 311.8*.

- Occupational safety and health investigations, confidentiality of complaints and complainants, *Lab. Code § 6309*.

- Occupational safety and health investigations, confidentiality of trade secrets, *Lab. Code § 6322*.

- Official information acquired in confidence by public employee, disclosure of, *Evid. Code §§ 1040, 1041*.

- Oil and gas, confidentiality of proposals for the drilling of a well, *Pub. Res. Code § 3724.4*.

- Oil and gas, disclosure of onshore and offshore exploratory well records, *Pub. Res. Code § 3234*.

- Oil and gas, disclosure of well records, *Pub. Res. Code § 3752*.

- Oil and gas leases, surveys for permits, confidentiality of information, *Pub. Res. Code § 6826*.

- Oil spill fee payer information, prohibition against disclosure, *Rev. & Tax. Code § 46751*.

- Older adults receiving county services, providing information between county agencies, confidentiality of, *Welf. & Inst. Code § 9401*.

- Organic food certification organization records, release of, *Health & Safety Code § 110845*.

- Osteopathic physician and surgeon, rehabilitation and diversion records, confidentiality of, *Bus. & Prof. Code § 2369*.

[17] Parole Revocation Proceedings to Postmortem or Autopsy Photos

Gov. Code § 6276.34 contains an alphabetical list of the following statutes:

- Parole revocation proceedings, confidentiality of information in reports, *Penal Code § 3063.5*.

- Passenger fishing boat licenses, records, *Fish & Game Code § 7923*.

- Paternity, acknowledgment, confidentiality of records, *Health & Safety Code § 102760*.

- Patient-physician confidential communication, *Evid. Code §§ 992, 994*.

- Patient records, confidentiality of, *Health & Safety Code § 123135*.

- Payment instrument licensee records, inspection of, *Fin. Code § 33206*.

- Payroll records, confidentiality of, *Lab. Code § 1776*.

- Peace officer personnel records, confidentiality of, *Penal Code §§ 832.7, 832.8*.

- Penitential communication between penitent and clergy, *Evid. Code §§ 1032, 1033*.

- Personal Care Services Program, exemption from disclosure for information regarding persons paid by the state to provide personal care services, *Gov. Code § 6253.2*.

- Personal Income Tax, disclosure of information, *Rev. & Tax. Code § 19542*.

- Personal information, Information Practices Act, prohibitions against disclosure by state agencies,

Civ. Code §§ 1798.24, 1798.75.

- Personal information, subpoena of records containing, *Code Civ. Proc. § 1985.4*.

- Personal representative, confidentiality of personal representative's birth date and driver's license number, *Prob. Code § 8404*.

- Personnel Administration, Department of, confidentiality of pay data furnished to, *Gov. Code § 19826.5*.

- Petition signatures, *Elec. Code § 18650*.

- Petroleum supply and pricing, confidential information, *Pub. Res. Code §§ 25364, 25366*.

- Pharmacist, alcohol or dangerous drug diversion and rehabilitation records, confidentiality of, *Bus. & Prof. Code § 4372*.

- Physical therapist or assistant, records of dangerous drug or alcohol diversion and rehabilitation, confidentiality of, *Bus. & Prof. Code § 2667*.

- Physical or mental condition or conviction of controlled substance offense, records in Department of Motor Vehicles, confidentiality of, *Veh. Code § 1808.5*.

- Physician and surgeon, rehabilitation and diversion records, confidentiality of, *Bus. & Prof. Code § 2355*.

- Physician assistant, alcohol or dangerous drug diversion and rehabilitation records, confidentiality of, *Bus. & Prof. Code § 3534.7*.

- Physician competency examination, confidentiality of reports, *Bus. & Prof. Code § 2294*.

- Physicians and surgeons, confidentiality of reports of patients with a lapse of consciousness disorder, *Health & Safety Code § 103900*.

- Physician Services Account, confidentiality of patient names in claims, *Welf. & Inst. Code § 16956*.

- Pilots, confidentiality of personal information, *Harb. & Nav. Code § 1157.1*.

- Pollution Control Financing Authority, financial data submitted to, *Gov. Code § 6254(o)*.

- Postmortem or autopsy photos, *Code Civ. Proc. § 129*.

[18] Pregnancy Tests to Pupil Records

Gov. Code § 6276.36 contains an alphabetical list of the following statutes:

- Pregnancy tests by local public health agencies, confidentiality of, *Health & Safety Code § 123380*.

- Pregnant women, confidentiality of blood tests, *Health & Safety Code § 125105*.

- Prehospital emergency medical care, release of information, *Health & Safety Code §§ 1797.188, 1797.189*.

- Prenatal syphilis tests, confidentiality of, *Health & Safety Code § 120705*.

- Prescription drug discounts, confidentiality of corporate proprietary information, *Health & Safety Code § 130506*.

- Prisoners, behavioral research on, confidential personal information, *Penal Code § 3515*.

- Prisoners, confidentiality of blood tests, *Penal Code § 7530*.

- Prisoners, medical testing, confidentiality of records, *Penal Code §§ 7517, 7540*.

- Prisoners, transfer from county facility for mental treatment and evaluation, confidentiality of written reasons, *Penal Code § 4011.6*.

- Private industry wage data collected by public entity, confidentiality of, *Gov. Code § 6254.6*.

- Private railroad car tax, confidentiality of information, *Rev. & Tax Code § 11655*.

- Probate referee, disclosure of materials, *Prob. Code § 8908*.

- Probation officer reports, inspection of, *Penal Code § 1203.05*.

- Produce dealer, confidentiality of financial statements, *Food & Agric. Code § 56254*.

- Products liability insurers, transmission of information, Ins. Code § *1857.9*.

- Professional corporations, financial statements, confidentiality of, *Corp. Code § 13406*.

- Property on loan to museum, notice of intent to preserve an interest in, not subject to disclosure, *Civ. Code § 1899.5*.

- Property taxation, confidentiality of change of ownership, *Rev. & Tax. Code § 481*.

- Property taxation, confidentiality of exemption claims, *Rev. & Tax. Code § § 63.1, 69.5, 408.2*.

- Property taxation, confidentiality of property information, *Gov. Code § 15641*] and *Rev. & Tax. Code § 833*.

- Proprietary information, availability only to the director and other persons authorized by the operator and the owner, *Pub. Res. Code § 2778*.

- Psychologist and client, confidential relations and communications, *Bus. & Prof. Code § 2918*.

- Psychotherapist-patient confidential communication, *Evid. Code §§ 1012, 1014*.

- Public employees' home addresses and telephone numbers, confidentiality of, *Gov. Code § 6254.3*.

- Public Employees' Medical and Hospital Care Act, confidentiality of data relating to health care services rendered by participating hospitals to members and annuitants, *Gov. Code § 22854.5*.

- Public Employees' Retirement System, confidentiality of data filed by member or beneficiary with board of administration, *Gov. Code § 20134*.

- Public investment funds, exemption from disclosure for records regarding alternative investments, *Gov. Code § 6254.26*.

- Public school employees organization, confidentiality of proof of majority support submitted to Public Employment Relations Board, *Gov. Code §§ 3544, 3544.1, 3544.5*.

- Public social services, confidentiality of digest of decisions, *Welf. & Inst. Code § 10964*.

- Public social services, confidentiality of information regarding child abuse or elder or dependent persons abuse, *Welf. & Inst. Code § 10850.1*.

- Public social services, confidentiality of information regarding eligibility, *Welf. & Inst. Code § 10850.2*.

- Public social services, confidentiality of records, *Welf. & Inst. Code § 10850*.

- Public social services, disclosure of information to law enforcement agencies, *Welf. & Inst. Code § 10850.3*.

- Public social services, disclosure of information to law enforcement agencies regarding deceased applicant or recipient, *Welf. & Inst. Code § 10850.7*.

- Public utilities, confidentiality of information, *Pub. Util. Code § 583*.

- Pupil, confidentiality of personal information, *Educ. Code § 45345*.

- Pupil drug and alcohol use questionnaires, confidentiality of, *Health & Safety Code § 11605*.

- Pupil, expulsion hearing, disclosure of testimony of witness and closed session of district board, *Educ. Code § 48918*.

- Pupil, personal information disclosed to school counselor, confidentiality of, *Educ. Code § 49602*.

- Pupil record contents, records of administrative hearing to change contents, confidentiality of, *Educ. Code § 49070*.

- Pupil records, access authorized for specified parties, *Educ. Code § 49076*.

- Pupil records, disclosure in hearing to dismiss or suspend school employee, *Educ. Code § 44944.1*.

- Pupil records, release of directory information to private entities, *Educ. Code §§ 49073, 49073.5*.

[19] Radioactive Materials to Reward by Governor

Gov. Code § 6276.38 contains an alphabetical list of the following statutes:

- Radioactive materials, dissemination of information about transportation of, *Veh. Code § 33002*.

- Railroad infrastructure protection program, disclosure not required for risk assessments filed with the Public Utilities Commission, the Secretary of California Emergency Management, or the California Emergency Management Agency, *Gov. Code § 6254.23*.

- Real estate broker, annual report to Department of Real Estate of financial information, confidentiality of, *Bus. & Prof. Code § 10232.2*.

- Real property, acquisition by state or local government, information relating to feasibility, *Gov. Code § 6254(h)*.

- Real property, change in ownership statement, confidentiality of, *Gov. Code § 27280*.

- Records of contract purchasers, inspection by public prohibited, *Mil. & Vet. Code § 85*.

- Registered public obligations, inspection of records of security interests in, *Gov. Code § 5060*.

- Registration of exempt vehicles, nondisclosure of name of person involved in alleged violation, *Veh. Code § 5003*.

- Rehabilitation, Department of, confidential information, *Welf. & Inst. Code § 19016*.

- Reinsurance intermediary-broker license information, confidentiality of, *Ins. Code § 1781.3*.

- Relocation assistance, confidential records submitted to a public entity by a business or farm operation, *Gov. Code § 7262*.

- Rent control ordinance, confidentiality of information concerning accommodations sought to be withdrawn from, *Gov. Code § 7060.4*.

- Report of probation officer, inspection, copies, *Penal Code § 1203.05*.

- Repossession agency licensee application, confidentiality of information, *Bus. & Prof. Code §§ 7503, 7504, 7506.5*.

- Reproductive health facilities, disclosure not required for personal information regarding employees, volunteers, board members, owners, partners, officers, and contractors of a reproductive health services facility who have provided requisite notification, *Gov. Code § 6254.18*.

- Residence address in any record of Department of Housing and Community Development, confidentiality of, *Gov. Code § 6254.1*.

- Residence address in any record of Department of Motor Vehicles, confidentiality of, *Gov. Code § 6254.1*, and *Veh. Code § 1808.21*.

- Residence and mailing addresses in records of Department of Motor Vehicles, confidentiality of, *Veh. Code § 1810.7*.

- Residential care facilities, confidentiality of resident information, *Health & Safety Code § 1568.08*.

- Residential care facilities for the elderly, confidentiality of client information, *Health & Safety Code § 1569.315*.

- Respiratory care practitioner, professional competency examination reports, confidentiality of, *Bus. & Prof. Code § 3756*.

- Restraint of trade, civil action by district attorney, confidential memorandum, *Bus. & Prof. Code § 16750*.

- Reward by governor for information leading to arrest and conviction, confidentiality of person supplying information, *Penal Code § 1547*.

- Safe surrender site, confidentiality of information pertaining to a parent or individual surrendering a child, *Health & Safety Code §1255.7*.

[20] Sales and Use Tax to Social Security Numbers Within Records of Local Agencies

Gov. Code § 6276.40 contains an alphabetical list of the following statutes:

- Sales and use tax, disclosure of information, *Rev. & Tax. Code § 7056*.

- Santa Barbara Regional Health Authority, exemption from disclosure for records maintained by the authority regarding negotiated rates for the California Medical Assistance Program, *Welf. & Inst. Code § 14499.6*.

- Savings association employees, disclosure of criminal history information, Fin. Code § 6525.

- Savings associations, inspection of records by shareholders, *Fin. Code § 6050*.

- School district governing board, disciplinary action, disclosure of pupil information, *Educ. Code § 35146*.

- School employee, merit system examination records, confidentiality of, *Educ. Code § 45274*.

- School employee, notice and reasons for hearing on nonreemployment of employee, confidentiality of, *Educ. Code §§ 44948.5, 44949*.

- School meals for needy pupils, confidentiality of records, *Educ. Code § 49558*.

- Sealed records, arrest for misdemeanor, *Penal Code § 851.7*.

- Sealed records, misdemeanor convictions, *Penal Code § 1203.45*.

- Sealing and destruction of arrest records, determination of innocence, *Penal Code § 851.8*.

- Search warrants, special master, *Penal Code § 1524*.

- Sex change, confidentiality of birth certificate, *Health & Safety Code § 103440*.

- Sex offenders, registration form, *Penal Code § 290.021*.

- Sexual assault forms, confidentiality of, *Penal Code § 13823.5*.

- Sexual assault counselor and victim, confidential communication, *Evid. Code §§ 1035.2, 1035.4, 1035.8*.

- Shorthand reporter's complaint, *Bus. & Prof. Code § 8010*.

- Small family day care homes, identifying information, *Health & Safety Code § 1596.86*.

- Social security number, applicant for driver's license or identification card, non disclosure of, *Veh. Code § 1653.5*, and *Gov. Code § 6254.29*.

- Social security number, official record or official filing, nondisclosure of, *Comm. Code § 9526.5*, and *Gov. Code §§ 6254.27, 6254.28*.

- Social Security Number Truncation Program, *Gov. Code § 27300 et. seq.*

- Social security numbers within records of local agencies, nondisclosure of, *Gov. Code § 6254.29*.

[21] State Agency Activities to Sturgeon Egg Processors

Gov. Code § 6276.42 contains an alphabetical list of the following statutes:

- State agency activities relating to unrepresented employees, *Gov. Code § 6254(p)*.

- State agency activities relating to providers of health care, *Gov. Code § 6254(a)*.

- State Auditor, access to barred records, *Gov. Code § 8545.2*.

- State Auditor, confidentiality of records, *Gov. Code §§ 8545, 8545.1, 8545.3*.

- State civil service employee, confidentiality of appeal to state personnel board, *Gov. Code § 18952*.

- State civil service employees, confidentiality of reports, *Gov. Code § 18573*.

- State civil service examination, confidentiality of application and examination materials, *Gov. Code § 18934*.

- State Compensation Insurance Fund, exemption from disclosure for various records maintained by the State Compensation Insurance Fund, *Gov. Code § 6254 (ad)*.

- State Contract Act, bids, questionnaires and financial statements, *Pub. Contract Code § 10165*.

- State Contract Act, bids, sealing, opening and reading bids, *Pub. Contract Code § 10304*.

- State Energy Resources Conservation and Development Commission, confidentiality of proprietary

information submitted to, *Pub. Res. Code § 25223*.

- State hospital patients, information and records in possession of Superintendent of Public Instruction, confidentiality of, *Educ. Code § 56863*.

- State Long-Term Care Ombudsman, access to government agency records, *Welf. & Inst. Code § 9723*.

- State Long-Term Care Ombudsman office, confidentiality of records and files, *Welf. & Inst. Code § 9725*.

- State Long-Term Care Ombudsman office, disclosure of information or communications, *Welf. & Inst. Code § 9715*.

- State Lottery Evaluation Report, disclosure, *Gov. Code § 8880.46*.

- State prisoners, exemption from disclosure for surveys by the California Research Bureau of children of female prisoners, *Penal Code § 7443*.

- State summary criminal history information, confidentiality of information, *Penal Code §§ 11105, 11105.1, 11105.3, 11105.4*.

- State Teachers' Retirement System, confidentiality of information filed with the system by a member, participant, or beneficiary, *Educ. Code §§ 22306, 26215*.

- Sterilization of disabled, confidentiality of evaluation report, *Prob. Code § 1955*.

- Strawberry marketing information, confidentiality of, *Food & Agric. Code § 63124*.

- Structural pest control licensee records relating to pesticide use, confidentiality of, *Food & Agric. Code § 15205*.

- Student driver, records of physical or mental condition, confidentiality of, *Veh. Code § 12661*.

- Student, community college, information received by school counselor, confidentiality of, *Educ. Code § 72621*.

- Student, community college, records, limitations on release, *Educ. Code § 76243*.

- Student, community college, record contents, records of administrative hearing to change contents, confidentiality of, *Educ. Code § 76232*.

- Student, sexual assault on private higher education institution campus, confidentiality of information, *Educ. Code § 94385*.

- Student, sexual assault on public college or university, confidentiality of information, *Educ. Code § 67385*.

- Sturgeon egg processors, records, *Fish & Game Code § 10004*.

[22] Taxpayer Information to Trust Companies

Gov. Code § 6276.44 contains an alphabetical list of the following statutes:

- Taxpayer information, confidentiality, local taxes, *Gov. Code § 6254(i)*.

- Tax preparer, disclosure of information obtained in business of preparing tax returns, *Bus. & Prof. Code § 17530.5*.

- Teacher, credential holder or applicant, information provided to Commission on Teacher Credentialing, confidentiality of, *Educ. Code § 44341*.

- Teacher, certified school personnel examination results, confidentiality of, *Educ. Code § 44289*.

- Telephone answering service customer list, trade secret, *Bus. & Prof. Code § 16606*.

- Timber yield tax, disclosure to county assessor, *Rev. & Tax. Code § 38706*.

- Timber yield tax, disclosure of information, *Rev. & Tax Code § 38705*.

- Title insurers, confidentiality of notice of noncompliance, *Ins. Code § 12414.14*.

- Tobacco products, exemption from disclosure for distribution information provided to the State Department of Public Health, *Bus. & Prof. Code § 22954*.

- Tow truck driver, information in records of California Highway Patrol, Department of Motor Vehicles, or other agencies, confidentiality of, *Veh. Code §§ 2431, 2432.3*.

- Toxic substances, Department of, inspection of records of, *Health & Safety Code § 25152.5*.

- Trade secrets, *Evid. Code § 1060*.

- Trade secrets, confidentiality of, occupational safety and health inspections, *Lab. Code § 6322*.

- Trade secrets, disclosure of public records, *Civ. Code § 3426.7*.

- Trade secrets, food, drugs, cosmetics, nondisclosure, *Health & Safety Code §§ 110165, 110370*.

- Trade secrets, protection by Director of the Department of Pesticide Regulation, *Gov. Code § 6254.2*.

- Trade secrets and proprietary information relating to pesticides, confidentiality of, *Food & Agric. Code §§ 14022, 14023*.

- Trade secrets, protection by Director of Industrial Relations, *Lab. Code § 6396*.

- Trade secrets relating to hazardous substances, disclosure of, *Health & Safety Code §§ 25358.2, 25358.7*.

- Traffic violator school licensee records, confidentiality of, *Veh, Code § 11212*.

- Traffic offense, dismissed for participation in driving school or program, record of, confidentiality of, *Veh. Code § 1808.7*.

- Transit districts, questionnaire and financial statement information in bids, *Pub. Util. Code § 99154*.

- Tribal-state gaming contracts, exemption from disclosure for records of an Indian tribe relating to securitization of annual payments, *Gov. Code § 63048.63*.

- Trust companies, disclosure of private trust confidential information, *Fin. Code § 1582*.

[23] Unclaimed Property to Wards and Dependent Children, Inspection of Juvenile Court Documents

Gov. Code § 6276.46 contains an alphabetical list of the following statutes:

- Unclaimed property, Controller records of, disclosure, *Code Civ. Proc. § 1582*.

- Unemployment compensation, disclosure of confidential information, *Unemp. Ins. Code § 2111*.

- Unemployment compensation, information obtained in administration of code, *Unemp. Ins. Code § 1094*.

- Unemployment fund contributions, publication of annual tax paid, *Unemp. Ins. Code § 989*.

- University of California, exemption from disclosure for information submitted by bidders for award of best value contracts, *Public Contract § 10506.6*.

- Unsafe working condition, confidentiality of complainant, *Lab. Code § 6309*.

- Use fuel tax information, disclosure prohibited, *Rev. & Tax. Code § 9255*.

- Utility systems development, confidential information, *Gov. Code § 6254(e)*.

- Utility user tax return and payment records, exemption from disclosure, *Rev. & Tax. Code § 7284.6*.

- Vehicle registration, financial responsibility verification study, confidentiality of information, *Veh. Code §§ 4750.2* [repealed 2004], *4750.4*.

- Vehicle accident reports, disclosure of, *Veh. Code §§ 16005*, *20012*, *20014* and *Sts. & Hy. Code § 27177*.

- Vehicular offense, record of, confidentiality five years after conviction, *Veh. Code § 1807.5*.

- Veterans Affairs, Department of, confidentiality of records of contract purchasers, *Mil. & Vet. Code § 85*.

- Veterinarian or animal health technician, alcohol or dangerous drugs diversion and rehabilitation records, confidentiality of, *Bus. & Prof. Code § 4871*.

- Victims' Legal Resource Center, confidentiality of information and records retained, *Penal Code § 13897.2*.

- Voter, registration by confidential affidavit, *Elec. Code § 2194*.

- Voter registration card, confidentiality of information contained in, *Gov. Code § 6254.4*.

- Voting, secrecy, *Evid. Code § 1050*.

- Wards and dependent children, inspection of juvenile court documents, *Welf. & Inst. Code § 827*.

[24] Wards and Dependent Children Release of Description Information about Minor Escapees to Youth Service Bureau

Gov. Code § 6276.48 contains an alphabetical list of the following statutes:

- Wards, petition for sealing records, *Welf. & Inst. Code § 781*.

- Winegrowers of California commission, confidentiality of producers' or vintners' proprietary information, *Food & Agric. Code §§ 74655, 74955*.

- Workers' Compensation Appeals Board, injury or illness report, confidentiality of, *Lab. Code § 6412*.

- Workers' compensation insurance, dividend payment to policyholder, confidentiality of information, *Ins. Code § 11739*.

- Workers' compensation insurance fraud reporting, confidentiality of information, Ins. Code § *1877.4*.

- Workers' compensation insurer or rating organization, confidentiality of notice of noncompliance, *Ins. Code § 11754*.

- Workers' compensation insurer, rating information, confidentiality of, *Ins. Code § 11752.7*.

- Workers' compensation, notice to correct noncompliance, *Ins. Code § 11754*.

- Workers' compensation, release of information to other governmental agencies, *Ins. Code § 11752.5*.

- Workers' compensation, self-insured employers, confidentiality of financial information, *Lab. Code § 3742*.

- Workplace inspection photographs, confidentiality of, *Lab. Code § 6314*.

- Youth Authority, parole revocation proceedings, confidentiality of, *Welf. & Inst. Code § 1767.6*.

- Youth Authority, release of information in possession of Youth Authority for offenses *Welf. & Inst. Code §§ 676, 1764.1, 1764.2*.

California Forms of Pleading and Practice--Annotated

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Volume 41: Overview of Public Administrative Law thru Review of Agency Rulemaking-Chs. 470-472B
Chapter 470C PUBLIC RECORDS ACT
PART II. LEGAL BACKGROUND

41-470C California Forms of Pleading and Practice--Annotated § 470C.16

§ 470C.16 Comparable Exemptions in the Public Records Act and the Federal Freedom of Information Act (FOIA)

[1] List of Comparable Exemptions

The California Public Records Act and the federal FOIA receive parallel interpretations. Thus, cases under the federal FOIA are often helpful in arguing exemption issues under the California Act. The following is a list of analogous exemptions in the two acts:

PUBLIC RECORDS ACT	FOIA
Drafts, notes, and memoranda [Gov. Code § 6254(a)]	[5 U.S.C. § 552(b)(5)]
Litigation records [Gov. Code § 6254(b)]	No comparable exemption
Personnel and medical records [Gov. Code § 6254(c)]	[5 U.S.C. § 552(b)(6)]
Financial regulatory agency records [Gov. Code § 6254(d)]	[5 U.S.C. § 552(b)(8)]
Geological and geophysical data [Gov. Code § 6254(e)]	[5 U.S.C. § 552(b)(9)]
Criminal investigation records [Gov. Code § 6254(f)]	[5 U.S.C. § 552(b)(7)]
Examination materials [Gov. Code § 6254(g)]	No comparable exemption
Real property matters [Gov. Code § 6254(h)]	No comparable exemption
Tax information [Gov. Code § 6254(i)]	No comparable exemption

Library circulation records [Gov. Code § 6254(j), 6267]	No comparable exemption
Records exempt under other laws [Gov. Code § 6254(k)]	[5 U.S.C. § 552(b)(3)]
Governor and legislative counsel records [Gov. Code § 6254(l), (m)]	No comparable exemption
Financial data submitted to licensing agency [Gov. Code § 6254(n)]	[*see* 5 U.S.C. § 552(b)(4)]
Financial data submitted to California Pollution Control Financing Authority [Gov. Code § 6254(o)]	[*see* 5 U.S.C. § 552(b)(4)]
Employee relations data [Gov. Code § 6254(p)]	No comparable exemption
Records relating to health care service providers [Gov. Code § 6254(q)]	No comparable exemption
Cultural heritage records [Gov. Code § 6254(r)]	No comparable exemption
Hospital documents [Gov. Code § 6254(s), (t)]	No comparable exemption
Applications for firearms licenses [Gov. Code § 6254(u)]	No comparable exemption
Collection agency licensure residence addresses [Gov. Code Section § 6254(v)]	No comparable exemption
Major Risk Medical Insurance Program Records [Gov. Code § 6254(w), (x)]	No comparable exemption
Records pertaining to archeological sites [Gov. Code § 6254.10]	No comparable exemption
Legal counsel memoranda [Gov. Code § 6254.25]	No comparable exemption
Residual exemption (balancing test) [Gov. Code § 6255]	No comparable exemption

[2] Use of FOIA Exemptions in California cases

- For a case regarding exemptions for drafts, notes, interagency or intraagency memoranda [*Gov. Code § 6254(a)*], *see Citizens for a Better Environment v. Department of Food & Agriculture (1985) 171 Cal. App. 3d 704, 711-718, 217 Cal. Rptr. 504* .

- For a case regarding exemptions for personnel and medical records [*Gov. Code § 6254(c)*], *see American Civil Liberties Union Foundation v. Deukmejian (1982) 32 Cal. 3d 440, 446, 186 Cal. Rptr. 235, 651 P.2d 822* ; *Versaci v. Superior Court (2005) 127 Cal. App. 4th 805, 818-820, 26 Cal. Rptr. 3d*

92 (extensive discussion of FOIA exemption 6).

- For cases regarding the criminal investigation records exemption [*Gov. Code § 6254(f)*], *see American Civil Liberties Union Foundation v. Deukmejian (1982) 32 Cal. 3d 440, 447-452, 186 Cal. Rptr. 235, 651 P.2d 822* ; *South Coast Newspapers, Inc. v. City of Oceanside (1984) 160 Cal. App. 3d 261, 267-271, 206 Cal. Rptr. 527* .

- For a case discussing the deliberative process interest under "public interest" residual exemption (balancing test) analogous to FOIA executive privilege exemption [*Gov. Code § 6255*], *see Times Mirror Co. v. Superior Court (1991) 53 Cal. 3d 1325, 1347, 283 Cal. Rptr. 893, 813 P.2d 240* .

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41-470C California Forms of Pleading and Practice--Annotated § 470C.17

§ 470C.17 Judicial Enforcement of Rights Under the Public Records Act

[1] Enforcement by Use of Injunctive or Declaratory Relief or Writ of Mandate

A member of the public may institute proceedings for injunctive or declaratory relief or a writ of mandate in order to enforce the right to inspect or receive a copy of any public record or any class of public records [*Gov. Code § 6258*]. The court is required to set times for responsive pleadings and to hold hearings in a manner that will secure a decision at the earliest possible time [*Gov. Code § 6258*]. For an example of a complaint for declaratory relief to enforce request for public records, see § 470C.52 Form, *below*. For an example of a complaint for an injunction to compel access to public records, see *§ 470C.53* Form, *below*. For an example of a petition for Writ of Mandate to enforce request for public records, see *§ 470C.54* Form, *below*.

When a public agency that has possession of public records subject to the California Public Records Act [*Gov. Code §§ 6250-6277*] has denied a public member's request for disclosure of records, the public agency may not file a court action for declaratory relief under *Code Civ. Proc. § 1060* to determine whether the public agency is required to disclose the requested records. The exclusive statutory procedure to resolve a disclosure of records issue in court is provided in the Act, in *Gov. Code §§ 6258*, and *6259*. These provisions authorize a member of the public to litigate whether particular public records must be disclosed, but they do not authorize a public agency with public records to seek a judicial determination as to whether requested records must be disclosed [*Filarsky v. Superior Court (2002) 28 Cal. 4th 419, 426-427, 121 Cal. Rptr. 2d 844, 49 P.3d 194]* . However, taxpayers could properly bring a declaratory and injunctive relief action against local and state government bodies (including cities, counties, and the state of California, among others) under *Code Civ. Proc. § 526a* to challenge the illegal expenditure of public funds by those bodies related to public records. Litigation related to public records is not limited to challenges under the California Public Records Act [*County of Santa Clara v. Superior Court (2009) 171 Cal. App. 4th 119, 123-124, 89 Cal. Rptr. 3d 520]* .

[2] Orders to Show Cause for Disclosure

With a verified complaint that public records are being improperly withheld from a member of the public, the court orders the officer or person charged with withholding the record to disclose it or to show cause why he or she should not do so. The court may examine the record in camera, if necessary [*Gov. Code § 6259(a)*; *Evid. Code § 915(b)*]. If the court finds that the public official's refusal to disclose is not justified [*Gov. Code §§ 6254-6255*], it will order the

official to make the record public. If the court finds that the refusal was justified, it will return the item to the public official without disclosing its content with an order supporting the decision refusing disclosure [*Gov. Code § 6259(b)*].

[3] Judicial Review

A decision of the court is not a final judgment or order subject to appeal [*Code Civ. Proc. § 904.1*], but is immediately reviewable by the appellate court by way of an extraordinary writ [*Gov. Code § 6259(c)*; *Code Civ. Proc. §§ 1067-1077*; *CBS Broadcasting, Inc. v. Superior Court (2001) 91 Cal. App. 4th 892, 905-906, 110 Cal. Rptr. 2d 889* ; *Versaci v. Superior Ct. (2005) 127 Cal. App. 4th 805, 812, 26 Cal. Rptr. 3d 92]* . The exclusive nature of review by extraordinary writ does not violate the appellate jurisdiction section of the California Constitution [*Powers v. City of Richmond (1995) 10 Cal. 4th 85, 90-91, 40 Cal. Rptr. 2d 839, 893 P.2d 1160]* . The standard of review for writ review of trial court orders requiring disclosure or upholding a refusal to disclose records varies with the nature of the question presented. For questions of law, including questions as to the interpretation of the Public Records Act, and application of the act to undisputed facts, the standard is de novo [*Becerrada v. Superior Court (2005) 131 Cal. App. 4th 409, 412-413, 31 Cal. Rptr. 3d 735* (standard of review of questions of law is de novo when reviewing court is deciding discovery issues related to peace officer personnel records and Pitchess motions)]. For questions of fact, the standard is substantial evidence [*CBS Broadcasting, Inc. v. Superior Court (2001) 91 Cal. App. 4th 892, 905-906, 110 Cal. Rptr. 2d 889* ; *Versaci v. Superior Ct. (2005) 127 Cal. App. 4th 805, 812, 26 Cal. Rptr. 3d 92* ; *San Lorenzo Valley Cmty. Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist. (2006) 139 Cal. App. 4th 1356, 1412-1413, 44 Cal. Rptr. 3d 128* (plaintiffs' challenge to school districts document production under Public Records Act was not supported by substantial evidence that defendants had withheld document and records required to be disclosed under the California Public Records Act)].

The petition for an extraordinary writ must be filed within 20 days after service of notice of entry of the order, or 25 days if notice is served by mail. The trial court may for good cause extend the time for up to 20 days. The trial court order or judgment will not be stayed pending appeal unless the petitioning party shows irreparable harm and probable success on the merits [*Gov. Code § 6259(c)*; County of Santa Clara v. Superior court *(6th Dist., 2009) 170 Cal. App. 4th 1301, 1311-1312, 89 Cal. Rptr. 3d 374* (writ review by county that was ordered to disclose information under Public Records act. Court granted temporary stay pending completion of writ review; scope of review in writ proceeding is the same as with first appeals under public records act; information sought was geographic information system (GIS) base map)]. The California Supreme Court interpreted the amended judicial review provisions of the statute [*Gov. Code § 6259(c)*], and concluded that trial court orders under the California Public Records Act are reviewable on the merits [*Times Mirror Co. v. Superior Court (1991) 53 Cal. 3d 1325* ; *see also State Bd. of Equalization v. Superior Court (1992) 10 Cal. App. 4th 1177, 1185-1186, 13 Cal. Rptr. 2d 342]* . For discussion and examples of this writ, *see* Ch. 492, *Review (Certiorari), Writ of*. The court's orders are enforced through contempt proceedings [*Gov. Code 6259(c)*; *Code Civ. Proc. 1209-1222*]. For a discussion of those proceedings and applicable forms, *see* Ch. 135, *Contempt* .

Another court interpreted *Gov. Code § 6259 (c)* to permit the court to decide the merits of an attempted appeal from a non-appealable judgment or order by treating the appeal as a writ proceeding. The order in question denied plaintiff access to records in the defendant's public defender database. Plaintiff filed a notice of appeal, and the appellate court treated the appeal as a writ proceeding, holding that this appeal satisfied the two elements necessary to treat an ineffective appeal as a proper writ of mandate proceeding: 1) briefs and record of the parties include all the required elements of an original mandate proceeding under *California Rules of Court, Rule 8.490*; and 2) extraordinary circumstances justifying treating the appeal as a proper writ proceeding [*Coronado Police Officers Association v. Carroll (2003) 106 Cal. App. 4th 1001, 1005-1006, 131 Cal. Rptr. 2d 553]* .

The California Court of Appeal dismissed a petition for a writ of mandate under *Gov. Code § 6259(c)* to challenge the denial of a petition for a writ of mandate sought by a newspaper in the superior court to obtain e-mails exchanged between a member of a city council and the Lawrence Livermore National Laboratory. The newspaper sought the e-mails claiming that they were public records that had to be disclosed under the California Public Records Act. The

dismissal by the court of appeal was based on the newspaper's failure to name the city council member as a real party in interest in the appellate original proceeding after having named the city council member as a party in the superior court proceeding. The city council member was held to be an indispensable party under *Code Civ. Proc. § 389*, thereby justifying dismissal of the proceeding in the court of appeal. The city council member had unique interests related to whether her e-mails sent from home on a private e-mail account that discussed city business were public records [*Tracy Press, Inc. v. Superior Court (2008) 164 Cal. App. 4th 1290, 1294-1296, 80 Cal. Rptr. 3d 464*].

[4] Costs and Attorney Fees

The court awards court costs and reasonable attorney's fees to a plaintiff who prevails in litigation. Those costs and fees must be paid by the public agency of which the public official is a member or employee; they do not become a personal liability of the official. If the court finds that the plaintiff's case is clearly frivolous, it will award court costs and reasonable attorney's fees to the public agency [*Gov. Code § 6259(d)*]. A litigant is a prevailing party pursuant to *Gov. Code 6259(d)* when he or she files a lawsuit that results in the defending agency releasing a copy of a previously withheld document. Furthermore, the award of costs andattorneys' fees [*Belth v. Garamendi (1991) 232 Cal. App. 3d 896, 901-902, 283 Cal. Rptr. 829]* . For this purpose, an appellate court has held that "prevail in litigation" includes resolution in the plaintiff's favor when the plaintiff files an action that results in the defendant releasing a previously withheld document [*Belth v. Garamendi (1991) 232 Cal. App. 3d 896, 898, 283 Cal. Rptr. 829* ; *Los Angeles Times v. Alameda Corridor Transp. Authority (2001) 88 Cal. App. 4th 1381, 1390-1391, 107 Cal. Rptr. 2d 29* (media company was prevailing plaintiff even though it obtained disclosure order as to only one of two documents); *San Lorenzo Valley Cmty. Advocates for Responsible Educ. v. San Lorenzo Valley Unified Sch. Dist. (2006) 139 Cal. App. 4th 1356, 1421-1422, 44 Cal. Rptr. 3d 128* (plaintiffs were not entitled to attorneys fees under the public records act (*Gov. Code § 6259(d)*) because they did not prevail, as their lawsuit did not cause the defendant public entity to release previously withheld public records)]. This situation includes the voluntary relinquishment of a document by a private party following a plaintiff's suit against a public agency seeking disclosure of that document after the agency's refusal to do so [*Belth v. Garamendi (1991) 232 Cal. App. 3d 896, 899-903, 283 Cal. Rptr. 829* (involving insurance company's consent to waiver of statutory confidentiality following plaintiff's suit against Insurance Commissioner)]. A party who compels disclosure has a right to attorney's fees under *Gov. Code 6259(d)* even if the prevailing party is not technically the "plaintiff" in the action, for example, if the action was before the court because the public agency first filed a petition for a protective order to prevent disclosure [*Fontana Police Dep't v. Villegas-Banuelos (1999) 74 Cal. App. 4th 1249, 1252-1253, 88 Cal. Rptr. 2d 641]* .

The court of appeal upheld the reasonableness of a $10,620 attorney's fee award against a city that was authorized by *Code Civ. Proc. § 1021.5* based on proof that counsel had spent 47.2 hours of attorney time on the representation, and based on a $225 hourly rate that the plaintiff's proof established was a reasonable rate based on the attorney's experience, specialized skill, and awards at that hourly rate in other cases. The award was based on the lodestar test, which measures the fee award based on reasonable hours times a reasonable hourly rate [*Davis v. City of San Diego (2003) 106 Cal. App. 4th 893, 903-904, 131 Cal. Rptr. 2d 266]* . The California Court of Appeal affirmed an award of attorney's fees in the amount of $244,287.50 under *Gov. Code § 6259* to litigants who were successful in receiving a court order requiring production of documents (related to a pending subdivision proposal) under the Public Records Act. The Court of Appeal held that the hours charged were reasonable, that no reduction of hours based upon degree of success was required, and that the application of a 1.25 multiplier to the lodestar amount was valid [*Bernardi v. County of Monterey (2008) 167 Cal. App. 4th 1379, 1389-1391, 84 Cal. Rptr. 3d 754*].

The California Court of Appeal held that a party was successful in obtaining access to records under the Public Records Act, and thus was a prevailing party entitled to recover attorney's fees under *Gov. Code § 6259* even though the landowner was denied access to all records because she was denied access to the premises of the district to inspect documents. The landowner prevailed on that claim and that was sufficient to satisfy the prevailing party requirement for recovery of attorneys fees [*Galbiso v. Orosi Public Utility Dist. (2008) 167 Cal. App. 4th 1063, 1086-1088, 84 Cal. Rptr. 3d 788*].

A trial court order denying attorneys fees under the California Public Records Act is reviewable on appeal, not by the extraordinary writ process under *Gov. Code § 6259(c)* [*Los Angeles Times v. Alameda Corridor Transp. Authority (2001) 88 Cal. App. 4th 1381, 1385-1386, 107 Cal. Rptr. 2d 29* ; *Butt v. City of Richmond (1996) 44 Cal. App. 4th 925, 929, 931, 52 Cal. Rptr. 2d 232]* . Also, an order denying attorneys fees is an appealable final judgment under *Code Civ. Proc. § 904.1* even though the underlying order providing disclosure of records is not an appealable final judgment [*Los Angeles Times v. Alameda Corridor Transp. Authority (2001) 88 Cal. App. 4th 1381, 1388-1389, 107 Cal. Rptr. 2d 29]* . A motion for attorney's fees is timely if it is brought within the time for filing a notice of appeal which is 180 days when a records disclosure order is issued by the court but not mailed by the clerk of the court nor served by the parties under the provisions of *California Rule of Court Rule 3.1702(b)* [*Los Angeles Times v. Alameda Corridor Transp. Authority (2001) 88 Cal. App. 4th 1381, 1389-1390, 107 Cal. Rptr. 2d 29]* .

An order denying a petition for writ of mandamus to compel disclosure of public records is a final judgment, and filing a timely notice of appeal (within 180 days) from that order is mandatory and jurisdictional. The filing of a later judgment containing the same order of the trial court does not alter the time limits for filing the notice of appeal. Failure to file a timely notice of appeal means that the appeal is untimely and must be dismissed [*Laraway v. Pasadena Unified School District (2002) 98 Cal. App. 4th 579, 582-584, 120 Cal. Rptr. 2d 213]* .

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[Reserved]

§§ 470C.18[Reserved]

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41-470C California Forms of Pleading and Practice--Annotated § 470C.30

§ 470C.30 Related Matthew Bender Publications

Bender's Forms of Discovery, Vol. 16, Ch. 14, *Freedom of Information Law and Discovery* (Matthew Bender)

Moore's Federal Practice, vol. 4, ch. 26, *General Provisions Governing Discovery*, P 26.52[6][d], 26.70[3][a] (Matthew Bender)

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41-470C California Forms of Pleading and Practice--Annotated § 470C.31

§ 470C.31 State Statutes

Burden of proof regarding refusal to disclose. *Gov. Code § 6255*

Copies of records on request. *Gov. Code § 6253*

Definitions. *Gov. Code § 6252*

Disclosure to District Attorney. *Gov. Code § 6265*

Duty to disclose. *Gov. Code § 6253, 6253.4(a)*

Exemptions. *Gov. Code § 6254*

Exemptions from duty to provide access. *Gov. Code §§ 6253.5, 6253.6, 6254, 6255*

Inspection. *Gov. Code § 6253(a)*

Legislative findings and declarations. *Gov. Code § 6250*

Proceedings for injunctive or declaratory relief or writ of mandate, for refusal to disclose. *Gov. Code § 6258*

Proceedings for verified petition to compel disclosure of records. *Gov. Code § 6259*

Public access to public records. *Gov. Code §§ 6253, 6253.4*

Public records in custody and control of Governor. *Gov. Code § 6268*

Public records open to inspection. *Gov. Code § 6253*

Segregation of nonconfidential information. *Gov. Code § 6253(a)*

Selective disclosure. *Gov. Code § 6254.5*

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41-470C California Forms of Pleading and Practice--Annotated § 470C.32

§ 470C.32 Administrative Regulations

Application for declaratory decision and related comments for agency subject to Office of Administrative Hearings regulations *1 Cal. Code Reg. § 1276(d)*

Public hearing records or transcripts for State Board of Control *2 Cal. Code Reg. § 617.1*

Applications and application materials for crime victims indemnification program of State Board of Control *2 Cal. Code Reg. § 647.24(e)*

Claims records maintained by State Controller *2 Cal. Code Reg. § 1145.2(c)*

Good cause definition includes pending public records request (Commission on State Mandates) *2 Cal. Code Reg. § 1181.1(g)*

Subpoena of documents excludes records accessible to public under public records act (Commission on State Mandates). [*2 Cal. Code Reg. § 1187.7(g)*].

Target Business Enterprise applications for certification and related documents (Office of State Treasurer). [*2 Cal. Code Reg. § 1899.531(d)*].

Official Records of hearing cases before Fair Employment and Housing Commission. *2 Cal. Code Reg. § 7404*

Requests for and formal written advice by Fair Political Practices Commission. *2 Cal. Code Reg. § 18329*

Complaints, responses, investigative files and information by Fair Political Practices Commission. *2 Cal. Code Reg. § 18362*

Ballot designation worksheets filed with Secretary of State's office. *2 Cal. Code Reg. § 20711*

Written decisions of Secretary of State related to ballot designations. *2 Cal. Code Reg. § 20718(c)*

Hearing transcripts of milk marketing proceeding at Food and Agriculture Department. *3 Cal. Code Reg. § 2080.4(j)*

Designation of confidential information submitted to California Pollution Control financing Authority. *4 Cal. Code Reg. § 8080(a)(4)*

Disclosure of confidential information submitted to California Pollution Control financing Authority. *4 Cal. Code Reg. § 8081(a)(4)*

Brownfield project application information submitted to California Pollution Control financing Authority. *4 Cal. Code Reg. § 8092(n)(3)*

Tax credit application information submitted to California Tax Credit Allocation Committee. *4 Cal. Code Reg. §§ 10322(h)(1)(J), 10345*

Inspection and copying of public records of the state Department of *Education. 5* Cal. Code Reg. §§ 50, 51

Inspection and copying of public records of the California State Library. *5 Cal. Code Reg. §§ 20134, 20310*

Affirmative action plans of California Community Colleges. *5 Cal. Code Reg. § 53003(d)*

Incident review committee records and reports related to navigational incidents by pilots licensed by the State Board of Pilot Commissioners for the Bays of San Francisco, San Pablo, and Suisin. *7 Cal. Code Reg. § 210(h)*

Qualified Medical Evaluator application for appointment or reappointment information submitted to Department of Industrial Relations Industrial Medical Council. *8 Cal. Code Reg. §§ 100, 104*

Farm worker housing assistance application information submitted to California Tax Credit Allocation Committee. *4 Cal. Code Reg. § 11002(t)(1)(I)*

Trade secret protection for information as to chemical identity of hazardous substance submitted to Division of Industrial Safety of Department of Industrial Relations. *8 Cal. Code Reg. § 5194(i)(12)*

Fees for copies of public documents and electronic records of the Division of Worker's Compensation of Department of Industrial Relations. *8 Cal. Code Reg. § 9990*

Agricultural Labor Relations Board public records. *8 Cal. Code Reg. § 20600*

Individual information in applications by workers' compensation health care provider organizations submitted to the Department of Corporations. 10 Cal. Code Reg. § 1959.1

Independent audit reports submitted to Commissioner of Financial Institutions. *10 Cal. Code Reg. § 30.1000*

Department of Savings and Loan public records. *10 Cal. Code Reg. §§ 102.201, 102.202, 102.203*

Department of Corporations public records. *10 Cal. Code Reg. §§ 250.9, 250.9.1, 250.10*

Broker-Dealer application information submitted to Department of Corporations. *10 Cal. Code Reg. §§ 260.211,*

260.211.1

Investment advisor certificate application information submitted to Department of Corporations. *10 Cal. Code Reg. § 260.231*

Independent audit reports submitted to Department of Corporations. *10 Cal. Code Reg. § 1950.200*

Individual information in applications by workers' compensation health care provider organizations submitted to the Department of Corporations. 10 Cal. Code Reg. § 1959.1

Bail charges schedule filed by bail bond licensee with Insurance Commissioner. *10 Cal. Code Reg. § 2094*

Financial statements filed under the conflict of interest code with Insurance Commissioner. *10 Cal. Code Reg. § 2690.65*

Confidential information submitted to Insurance Commissioner related to California residential earthquake recovery fund. *10 Cal. Code Reg. § 2698.20*

Confidential information submitted to the Department of Commerce competitive technology program. *10 Cal. Code Reg. §§ 5440, 5441*

Charitable trust records filed with Attorney General. *11 Cal. Code Reg. § 310*

Application information filed with Attorney General by international student exchange visitor placement organizations. *11 Cal. Code Reg. § 352*

Confidentiality of endangered species information generated by voluntary local programs for the Fish and Game Commission. *14 Cal. Code Reg. § 786.2(d)*

Conversion application information submitted to Department of Forestry and Fire Protection. *14 Cal. Code Reg. §§ 1101, 1103.2*

Well record information filed with Department of Conservation. *14 Cal. Code Reg. §§ 1995[n], 1998.2*

Proprietary records and information submitted to the Department of Conservation. *14 Cal. Code Reg. § 2080*

Individual recycling center information submitted to Department of Conservation. *14 Cal. Code Reg. § 2945*

State Coastal Conservancy public records. *14 Cal. Code Reg. § 13706*

Final EIR (environmental impact report) public record of Resources Agency. *14 Cal. Code Reg. § 15095*

California Integrated Waste Management Board public records. *14 Cal. Code Reg. §§ 17041[n], 17047*

Confidential (trade secret and proprietary) information submitted to California Integrated Waste Management Board. *14 Cal. Code Reg. §§ 17948, 18612, 18619.4*

Corrections Department records and information. *15 Cal. Code Reg. § 3380*

Application records and information submitted to Contractor's State License Board. *16 Cal. Code Reg. § 863*

Records and information filed with State Board of Pharmacy. *16 Cal. Code Reg. § 1700*

Trade secret information submitted to Department of Health Services. *17 Cal. Code Reg. § 33040(c)(2)(E)*

Disclosure of public records related to subpoenas and discovery in Air Resources Board adjudicatory hearing procedures. *17 Cal. Code Reg. §§ 60048, 60055.9, 60055.25, 60055.26, 60065.9, 60065.26, 60075.7*

Procedures for disclosure of public records at Air Resources Board. *17 Cal. Code Reg. §§ 91000[n], 91022*

Inspection of public meeting records at State Board of Equalization. 18 Cal. Code Reg. § 5085

Procedures for public access to tax and fee program records maintained by State Board of Equalization. *18 Cal. Code Reg. § 8000[n], 8016*

Paper filings and materials submitted to Energy Resources Conservation and Development Commission. *20 Cal. Code Reg. § 1209(d)*

Proposals and materials submitted for the public interest energy research program at the Energy Resources Conservation and Development Commission. *20 Cal. Code Reg. § 2129*

Procedures for disclosure of records at Energy Resources Conservation and Development Commission. *20 Cal. Code Reg. §§ 2503, 2504, 2505*

County quarterly noise monitoring reports maintained by Division of Aeronautics of Department of Transportation. *21 Cal. Code Reg. § 5045*

Safe use determination requests and information for drinking water at Health and Welfare Agency. 22 Cal. Code Reg. §§ 12104(c)(7), 12302

Environmental health standard information. *22 Cal. Code Reg. § 66260.2*

Documents related to enforcement actions under environmental health standards. *22 Cal. Code Reg. §§ 67450.2(2)(D), 67450.3(10)(H)*

Inspection and copying of contractor records at Department of Community Services and Development standards. *22 Cal. Code Reg. § 100860*

Records and information maintained by Department of Child Support Services. *22 Cal. Code Reg. § 111440*

Environmental documents prepared by or considered by State Water Resources Control Board and Regional Water Quality Control Boards. *23 Cal. Code Reg. § 3762*

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41-470C California Forms of Pleading and Practice--Annotated § 470C.33

§ 470C.33 Decisions

Grand Jury's nature as judicial entity and important public interests requiring its institutional secrecy as exempting it and its evidentiary materials from Public Records Act. *McClatchy Newspapers v. Superior Court (1988) 44 Cal. 3d 1162, 1183, 245 Cal. Rptr. 774, 751 P.2d 1329*

Necessity of preserving confidentiality of records pertaining to permits for concealed weapons as not outweighed by public's right to disclosure of records. *CBS, Inc. v. Block (1986) 42 Cal. 3d 646, 656, 230 Cal. Rptr. 362, 725 P.2d 470*

State Medical Board did not violate California Public Records Act by posting address of record for licensed physician on public internet site, even if the address of record is the physician's home address because the Board gave physicians options of using business address or providing a post office box number accompanied by a street address that would remain confidential. *Lorig v. Medical Board (2000) 78 Cal. App. 4th 462, 467-468, 92 Cal. Rptr. 2d 862*

Under balancing test of *Gov. Code § 6255*, public interest in nondisclosure of names, addresses, and telephone numbers of airport noise complainants clearly outweighed public interest in disclosure; city already provided detailed information about public complaints of airport noise and disclosure of detailed personal information would have chilling effect on future complaints. *City of San Jose v. Superior Court (1999) 74 Cal. App. 4th 1008, 1023-1024, 88 Cal. Rptr. 2d 552*

Requirements for the request form, detail required, and amount of records requested. [California *First Amendment Coalition v. Superior Court (1998) 67 Cal. App. 4th 159, 78 Cal. Rptr. 2d 847]* .

State courts are expressly exempt from provisions of *Gov. Code § 6250 et seq.*; law-enforcement personnel possess videotape of execution of search warrant (made inside home of criminal defendant's psychotherapist) on behalf of court only, with no other right to it; media not entitled to pretrial disclosure of videotape. *Oziel v. Superior Court (1990) 223 Cal. App. 3d 1284, 1292-1293, 273 Cal. Rptr. 196*

Local Water District's records, showing names of individual residential customers who exceeded water allotment for first billing period of water rationing as well as amount of excess use and penalties imposed, as public records subject to disclosure to newspaper under Public Records Act. *New York Times v. Superior Court (1990) 218 Cal. App. 3d 1579, 1586, 268 Cal. Rptr. 21*

Former *Gov. Code § 6257* (now *Gov. Code § 6253*) requiring state agencies to provide records to public on payment of direct costs of duplication or statutory fee, as not precluding Department of Motor Vehicles from charging fee in excess of its duplication costs as allowed by *Veh. Code § 1811*. *Shippen v. Department of Motor Vehicles (1984) 161 Cal. App. 3d 1119, 1124-1125, 208 Cal. Rptr. 13*

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§ 470C.34 Attorney General Opinions

Claims for exemptions from school parcel tax. *81 Ops. Cal. Atty. Gen. 383 (1998)*

Gang related intelligence information records not disclosed. *79 Ops. Cal. Atty. Gen. 206 (1996)*

Identity of persons making airport noise complaints. *78 Ops. Cal. Atty. Gen. 103 (1995)*

Local detention facility plans not disclosed. *73 Ops. Cal. Atty. Gen. 236 (1990)*

Pending litigation records. *71 Ops. Cal. Atty. Gen. 235 (1988)*

California Highway Patrol motor carrier records. *69 Ops. Cal. Atty. Gen. 129 (1986)*

City manager performance awards. *68 Ops. Cal. Atty. Gen. 73 (1985)*

Guaranteed student loan information. *67 Ops. Cal. Atty. Gen. 414 (1984)*

California law enforcement records exemption compared to federal law. *66 Ops. Cal. Atty. Gen. 272 (1983)*

School textbooks and written instructional materials. *64 Ops. Cal. Atty. Gen. 186 (1981)*

Authorized tape recording of city council meeting. *64 Ops. Cal. Atty. Gen. 317 (1981)*

Employment information for carpenters on publicly financed projects. *64 Ops. Cal. Atty. Gen. 575 (1981)*

News media access to identity of real estate license applicants. *63 Ops. Cal. Atty. Gen. 46 (1980)*

Identity of concealed weapons permit holders. *62 Ops. Cal. Atty. Gen. 402 (1979)*

State registered bond ownership records. *62 Ops. Cal. Atty. Gen. 436 (1979)*

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§ 470C.35 Law Reviews

Comment, *The California Public Records Act: The Public's Right of Access to Governmental Information, 7 Pacific L.J. 105 (1976).*

Schaffer, et al., *A Look at the California Records Act and Its Exemptions, 4 Golden Gate L. Rev. 203 (1974).*

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§ 470C.36 Text References

Witkin, California Procedure, vol. 9, Administrative Proceedings, § 94 (4th ed., 1997)

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§ 470C.37 Internet References

California Home Page. This site includes links to other sites maintained by numerous state agencies. *http://www.ca.gov*

Office of Administrative Hearings. This site includes: information and location concerning specific OAH offices; an OAH hearing guide; information concerning Administrative Procedure Act statutes, regulations, and proposed regulations; OAH forms; information concerning alternative dispute resolution procedures; and declaratory decisions. *http://www.dgs.ca.gov/oah* **NOTE:** The OAL is required by *Gov. Code § 11340.1(b)* to make the full text of the California Code of Regulations, with reference citations and history notes, available on the Internet free of charge.

Office of Administrative Law. This site includes: OAL publications; links to OAL statutes and regulations relating to rulemaking; regulations submitted to the OAL for review, and information for contacting or providing input to the OAL regarding rulemaking. *http://www.oal.ca.gov*

California Courts. This site includes: general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most Court of Appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. *http://www.courtinfo.ca.gov*

California Legislative Information. This site includes: text of constitution, codes, and statutes (including complete text of APA); and information concerning pending legislation. *http://www.leginfo.ca.gov*

Matthew Bender. This site includes: links to Matthew Bender publications and Shepard's citation service. *http://www.bender.com*

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§§ 470C.38[Reserved]

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§ 470C.40 Requesting Records Under the Act

☐ Prepare request for records [*Gov. Code § 6253*; *see* discussion in *§ 470C.12*; for form of request for records, *see § 470C.50*].

☐ Check agency procedures [*Gov. Code § 6253.4*; *see* discussion in *§ 470C.12[2]*].

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§ 470C.41 Affirmation of Status

☐ Prepare affirmation of status form [*Gov. Code § 6254.2*; *see § 470C.51* for form and discussion].

☐ Check agency procedures [*Gov. Code § 6254.2*; *see* discussion in *§ 470C.13[12]*].

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41-470C California Forms of Pleading and Practice--Annotated § 470C.42

§ 470C.42 Declaratory Relief to Enforce Request for Records Under Public Records Act

☐ Prepare complaint [*Gov. Code §§ 6258, 6259*; *see* discussion in *§ 470C.17*; for forms of complaint for declaratory, *see § 470C.52*].

☐ For procedural checklist for preparation of summons, service of summons and verified complaint and filing of verified complaint, *see* Ch. 518, *Service of Summons and Papers* .

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§ 470C.43 Injunctive Relief to Enforce Request for Records Under Public Records Act

☐ Prepare complaint [*Gov. Code §§ 6258, 6259*; *see* discussion in *§ 470C.17*; for forms of complaint for injunctive relief, *see § 470C.53*].

☐ For procedural checklist for preparation of summons, service of summons and verified complaint and filing of verified complaint, *see* Ch. 518, *Service of Summons and Papers* .

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§ 470C.44 Mandamus Relief to Enforce Request for Records Under Public Records Act

☐ Prepare complaint [*Gov. Code §§ 6258, 6259*; *see* discussion in *§ 470C.17*; for forms of petition for writ of mandamus relief, *see § 470C.54*].

☐ For procedural checklist for preparation of summons, service of summons and verified complaint and filing of verified complaint, *see* Ch. 518, *Service of Summons and Papers* .

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[Reserved]

§§ 470C.45[Reserved]

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§ 470C.50 Request for Public Records [Gov. Code § 6253]

[1] FORM Request for Public Records

TO: _____[*Name of agency*]
Attention: Custodian of Records

Please provide to the undersigned the following records in your possession:

_____[*List the records sought with as much specificity as possible*]

By law you have 10 calendar days in which to comply with this request. Authorized fees will be paid to you on delivery, pursuant to an itemized invoice.

This request is made pursuant to *Government Code § 6256*.

_____[*Name, address, and telephone number of person making request*]

[2] Use of Form

The form in [1], *above*, is for use to request public records pursuant to *Government Code § 6253*. Any request for information must be focused and specific. The right of inspection (including the right to receive copies) is limited, however, by a rule of reasonableness [*Bruce v. Gregory (1967) 65 Cal. 2d 666, 676, 56 Cal. Rptr. 265, 423 P.2d 193* ; *Rosenthal v. Hansen (1973) 34 Cal. App. 3d 754, 761, 110 Cal. Rptr. 257]* .

A request for records does not have to be in writing under the California Public Records Act [*Los Angeles Times v. Alameda Corridor Transp. Authority (2001) 88 Cal. App. 4th 1381, 1392-1393, 107 Cal. Rptr. 2d 29]* .

Each agency, upon a request for a copy of records, shall, within 10 days from receipt of the request, determine whether the request, in whole or in part, seeks copies of disclosable public records in the possession of the agency and shall promptly notify the person making the request of the determination and the reasons therefor. In unusual circumstances,

the time limit prescribed in this section may be extended by written notice by the head of the agency or his or her designee to the person making the request, setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. No notice shall specify a date that would result in an extension for more than 14 days [*Gov. Code § 6253(c)*].

[3] Cross References

For further discussion regarding requests for records, *see sect; 470C.12*, *above*.

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41-470C California Forms of Pleading and Practice--Annotated § 470C.51

§ 470C.51 Affirmation of Status for Requests for Information to Department of Pesticide Regulation [Gov. Code § 6254.2]

[1] FORM Affirmation of Status for Requests for Information to Department of Pesticide Regulation

I have requested access to information submitted to the Department of Pesticide Regulation (or previously submitted to the Department of Food and Agriculture) by a pesticide applicant or registrant pursuant to the California Food and Agricultural Code. I hereby affirm all of the following statements:

(1) I do not seek access to the information for purposes of delivering it or offering it for sale to any business or other entity, including the business or entity of which I am an officer, employee, or agent engaged in the production, sale, or distribution of pesticides in countries other than the United States or in countries in addition to the United States, or to the officers, employees, or agents of such a business or entity.

(2) I will not purposefully deliver or negligently cause the data to be delivered to a business or entity specified in paragraph (1) or its officers, employees, or agents.

I am aware that I may be subject to criminal penalties under *Section 118 of the Penal Code* if I make any statement of material facts knowing that the statement is false or if I willfully conceal any material fact.

_____ _____

Name of Requester Name of Requester's Organization

_____ _____

Signature of Re- Address of Requester

quester

Date	Request No.	Telephone Number of Requester
_____	_____	_____
	_____	_____

Name, Address, and Telephone Number of Requester's Client, if the requester has requested access to the information on behalf of someone other than the requester or the requester's organization listed above.

[2] Use of Form

The form of affirmation of status in [1], *above*, is required by *Gov. Code § 6254.2*. The director of the Department of Pesticide Regulation may not knowingly disclose information submitted to the state by an applicant or registrant pursuant to *Food & Agric. Code §§ 12811 et seq.* to any officer, employee, or agent of any business or other entity engaged in the production, sale, or distribution of pesticides in countries other than the United States or in countries in addition to the United States, or to any other person who intends to deliver this information to any foreign or multi-national business or entity, unless the applicant or registrant consents to the disclosure. To implement this subdivision, the director shall require that the above affirmation be signed by the person who is requesting the information [*Gov. Code § 6254.2(h)*].

[3] Cross References

For further discussion regarding the federal Insecticide, Fungicide and Rodenticide Act and trade secret implications, *see §§ 470C.13[29][b], 470C.13[49], above*

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Chapter 470C PUBLIC RECORDS ACT
PART V. FORMS

41-470C California Forms of Pleading and Practice--Annotated § 470C.52

§ 470C.52 Complaint for Declaratory Relief to Enforce Request for Records Under Public Records Act [Gov. Code § 6258]

[1] FORM Complaint for Declaratory Relief to Enforce Request for Records Under Public Records Act

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], Defendant(s).	)	COMPLAINT FOR DECLARATORY RELIEF
	)	
	)	

_____

Plaintiff alleges:

1. Plaintiff is _____[*describe plaintiff's status as interested person*] residing in [*or* the agency records are located in] _____ County, California.

2. Defendant _____[*name of agency*] is, and at all times mentioned herein was, an agency of the _____[*state*] government, which _____ [*state functions and duties of agency, e.g.,* is an agency charged with enforcement of air quality laws].

3. [*Describe controversy giving rise to action, e.g.,* On June 7, 1997, Plaintiff completed and filed with defendant agency a written request to inspect or receive copies of the following public records: [*describe records as stated in request*]: which records defendant agency had maintained at the agency office in Sacramento, California. On July 7, 1997, Defendant agency refused to permit Plaintiff to inspect or receive copies of these records. Defendant agency claimed that the records were exempt from disclosure under the public interest exemption [*Gov. Code § 6255*]. Plaintiff claims that the public interest exemption does not prohibit disclosure of these records, and that Plaintiff is entitled to

disclosure of these records under the Public Records Act [*Gov. Code § 6253*].

4. Plaintiff desires a judicial determination of his/her rights, as an interested citizen, and defendants' duties, under the Public Records Act, respecting the records referred to in Paragraph 3.

WHEREFORE, plaintiff prays judgment as follows:

l. For a declaration that the records referred to in Paragraph 3 are subject to disclosure under the Public Records Act [*Gov. Code § 6253*] and that disclosure is not prohibited under the public interest exemption [*Gov. Code § 6255*];

2. [*Other relief, if desired and supported by appropriate allegations, e.g.*, injunctive relief (*see § 470C.53* for form)];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

The form in [1], *above*, is a complaint for use by an interested person seeking declaratory relief [*see Code Civ. Proc. § 1060 et seq.*] from an alleged violation or threatened violation of the Public Records Act. The complaint asks for a judgment declaring that the particular records are subject to disclosure under the Public Records Act, and that disclosure is not prohibited under the public interest exemption of the Public Records Act. The Plaintiff must be someone who has requested records, and the agency has denied the request to inspect a copy of those records.

Injunctive relief or mandamus may also be obtained when appropriate [*Gov. Code § 6258*; *see* Civ. Code § 3420 et seq., Code Civ. Proc. § 525 et seq. (injunctive relief); *Code Civ. Proc. § 1084 et seq.* (mandamus)]. For forms of complaints seeking injunctions or a writ of mandate to prevent a violation of the public records act, *see* Chs. 470C.53, 470C.54, respectively. For a detailed discussion of injunctions, *see* Ch. 303, *Injunctions* . Regarding a proceeding for a writ of mandate, see Ch. 358, *Mandate and Prohibition* .

[3] Defendants

The defendant will almost always be the state agency from whom the records have been requested. An appropriate way to identify the defendant is to name the agency as the defendant.

[4] Allegations

Because the action seeks a declaratory judgment, the allegations should be those included in an ordinary complaint for declaratory relief [*see Code Civ. Proc. § 1060*]. For discussion, *see* Ch. 182, *Declaratory Relief* . The essential allegation is that an actual controversy exists between the parties as to their legal rights and duties [*Code Civ. Proc. § 1060*].

[5] Verification

A public agency, or any member of that agency acting in his or her official capacity, need not verify the answer even though the complaint is verified [*Code Civ. Proc. § 446(a)*]. However, verification of a complaint against a public

agency does preclude a general denial [*Code Civ. Proc. § 431.30(d)*]. For verification form, *see* Ch. 470B.61.

[6] Costs and Attorneys Fees

If the plaintiff is successful and is the prevailing party, he or she will recover costs and attorneys fees, which must be paid by the agency and may not be awarded against the individual public official employee or member [*Gov. Code § 6259(d)*]. If the plaintiff does not prevail, Defendant can recover costs and attorney's fees from the plaintiff when the court finds that plaintiff's claim is clearly frivolous [*see Gov. Code § 6259(d)*].

[7] Remedies to Compel Disclosure Under State Law

Gov. Code § 6258 provides for "proceedings" to obtain injunctive or declaratory relief or a writ of mandate to enforce the right to inspection or receipt of a copy of a public record. In addition, *Gov. Code § 6259* provides for a procedure to compel disclosure by means of a "verified petition." However, it is unclear whether *Gov. Code § 6259* refers to the same proceedings as those under *Gov. Code § 6258*, inasmuch as *Gov. Code § 6259(c)* also refers to an "action filed" and provides a procedure for review for orders resulting from such an action.

For discussion and forms regarding declaratory relief, *see* Ch. 182, *Declaratory Relief* . For discussion of mandate proceedings, *see* Ch. 358, *Mandate and Prohibition* , which also contains forms that may be adapted to seek relief under *Gov. Code § 6258*. For a detailed discussion of injunctions, *see* Ch. 303, *Injunctions* .

[8] Time for Responsive Pleadings and Hearings Under State Law

Under *Gov. Code § 6258*, the times for responsive pleadings and for hearings are set by the judge of the court (for the purpose of expediency) rather than by the Code of Civil Procedures provisions that would otherwise govern.

For discussion and forms relating to an action for declaratory relief, see Ch. 182, *Declaratory Relief* .

[9] Cross References

For discussion and forms regarding declaratory relief, *see* Ch. 182, *Declaratory Relief*

For discussion of mandate proceedings, *see* Ch. 358, *Mandate and Prohibition* , which also contains forms that may be adapted to seek relief under *Gov. Code § 6258*

For a detailed discussion of injunctions, *see* Ch. 303, *Injunctions*

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue* , Pt. I

For alternative forms of verification, see Ch. 572, *Verification*

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41-470C California Forms of Pleading and Practice--Annotated § 470C.53

§ 470C.53 Complaint for Injunctive Relief to Enforce Request for Records Under Public Records Act [Gov. Code § 6258]

[1] FORM Complaint for Injunctive Relief to Enforce Request for Records Under Public Records Act

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*], and DOES I	)	COMPLAINT FOR INJUNCTION
through _____, Defendants.	)	(Violation Regarding Government Records)
	)	

_____

Plaintiff alleges:

1. Plaintiff is a natural person. _____ [Plaintiff is, and at all times mentioned herein was, a resident of *or* Plaintiff's principal place of business in located in *or* The agency records described herein are situated in] _____ County, California.

2. Defendant _____[*name of agency*] is, and at all times mentioned herein was, an agency of the _____[*state*] government, which _____ [*state functions and duties of agency, e.g.,* is a law enforcement agency charged with the enforcement of law and order].

3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as Does I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when these are ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by the conduct of such fictitiously named defendants.

4. Defendant _____[*name of agency*] maintains the following records: _____[*identify records*].

5. Defendant _____[*name*] is, and at all times mentioned herein was, the _____[*title of head of agency*] of _____[*name of agency*]. [Defendant(s) _____[*name(s) of agency employee(s) joined as defendants*] [is *or* are] _____, and at all times mentioned herein [was *or* were] _____[*describe status and duties as employee(s) of defendant agency, and responsibility for maintaining records*].

6. The information contained in the aforementioned records _____ [is not personal or confidential *or* which is not personal or confidential can be severed from any confidential information contained in the same record without undue difficulty].

7. On or about _____[*date*], plaintiff requested that defendants provide him/her with _____ [access to *or* copies of] the aforementioned records. [Plaintiff's request reasonably described the aforementioned records and was made in accordance with defendant agency's rules stating the time, place and procedures for obtaining _____ [access to *or* copies of public records.] [*If plaintiff has made a written request, add Copies of plaintiff's request are herein enclosed as Exhibit* _____ *and made a part thereof.*]

8. Plaintiff [has tendered *or* was at all times herein mentioned ready to tender] $_____ in fees to cover defendant agency's costs in providing _____ [access to *or* copies of] the aforementioned records.

9. Defendants have refused to provide plaintiff with _____ [access to *or* copies of] the aforementioned records.

10. Plaintiff has exhausted all administrative remedies provided by defendant agency in that _____[*describe steps taken by plaintiff seeking administrative remedies provided by defendant agency's internal procedures, and defendant's denial of such remedies at each step*].

11. Plaintiff has no adequate remedies at law in that _____ [*specify facts in addition to those previously alleged showing inadequacy of any legal remedy to which plaintiff might be entitled, e.g.,* monetary damages will not compensate plaintiff for deprivation of access to the information which plaintiff is seeking].

12. Plaintiff has incurred reasonable attorney's fees in the amount of $_____ in maintaining this action.

WHEREFORE, plaintiff prays judgment against defendants and each of them as follows:

1. For a permanent injunction, enjoining defendants, and each of them and their agents, servants, and employees, and all persons acting under, in concert with, or for defendants to provide plaintiff with _____ [access to *or* copies of] the aforementioned records [on payment of a fee covering the costs to defendant agency of providing such _____ [access *or* copies]];

2. In the alternative, if portions of the aforementioned records are found to be confidential, for a permanent injunction, enjoining defendants, and each of them and their agents, servants, and employees, and all persons acting under, in concert with, or for defendants to provide plaintiff with copies of all non-confidential portions of the above records, after any confidential portions thereof have been deleted, on payment of a fee covering the costs to defendant agency of providing such copies;

3. For reasonable attorney's fees as determined by the court;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Use of Form

The form in [1], *above*, is for use in an action for an injunction ordering a state agency and its appropriate responsible employees to provide access to or copies of nonconfidential information contained in a public record [*see Gov. Code §§ 6253, 6253.4(a), 6258*]. It is advisable to obtain verification of any complaint filed under *Gov. Code § 6258*, as *Gov. Code § 6259* refers to a verification.

[3] Allegations

This form alleges:

- The existence of public records (Paragraph 6).
- That plaintiff attempted to inspect or requested copies of records (Paragraph 8).
- That plaintiff tendered or was ready to tender required fees [*Gov. Code § 6257*] (Paragraph 9).
- That defendants refused to permit inspection or provide access to copies [*Gov. Code §§ 6253(a), 6253.4*] (Paragraph 10).
- The plaintiff's exhaustion of administrative remedies (Paragraph 11).
- The lack of legal remedies [*see Code Civ. Proc. § 526* first subd (4)] (Paragraph 12).
- Attorney's fees [*Gov. Code § 6259*] (Paragraph 13).

Declaratory relief or mandamus may also be obtained when appropriate [*Gov. Code § 6258*; *see* Civ. Code § 3420 et seq., Code Civ. Proc. § 1060 et seq. (declaratory relief); *Code Civ. Proc. § 1084 et seq.* (mandamus)]. For forms of complaints seeking declaratory relief or a writ of mandate to prevent a violation of the public records act, *see* Chs. 470C.52, 470C.54, respectively.

[4] Cross References

For discussion and forms regarding declaratory relief, *see* Ch. 182, *Declaratory Relief*

For discussion of mandate proceedings, *see* Ch. 358, *Mandate and Prohibition* , which also contains forms that may be adapted to seek relief under *Gov. Code § 6258*

For a detailed discussion of injunctions, *see* Ch. 303, *Injunctions*

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue* , Pt. I

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41-470C California Forms of Pleading and Practice--Annotated § 470C.54

§ 470C.54 Petition for Writ of Mandate to Enforce Request for Records Under Public Records Act [Gov. Code § 6259]

[1] FORM Petition for Writ of Mandate to Enforce Request for Records Under Public Records Act

SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____

_____ [*name*], Petitioner,	)	
vs.	)	NO. _____
_____ [*name*], Respondents.	)	PETITION FOR WRIT OF MANDATE
	)	
	)	

_____

Petitioner respectfully represents:

1. Petitioner, _____, is a resident of _____ County, California. [*If petitioner is not an individual, state petitioner's identity as corporation, partnership, or other entity*].

2. Respondent _____ [*identify, e.g.,* Air Resources Board of the State of California] is _____ [*status of respondent in state government, e.g.,* an administrative agency within the California Environmental Protection Agency, which is a department in the Resources Agency of the state government].

3. On _____[*date*], Petitioner completed and filed with defendant agency a written request to inspect or receive copies of the following public records: _____[*describe records as stated in request*]. Petitioner's request reasonably described these records and was made in accordance with defendant agency's rules stating the time, place and procedures for obtaining _____ [access to *or* copies of] public records. Copies of plaintiff's request are herein enclosed as Exhibit _____ and made a part thereof.

4. Respondent agency maintained these records at the agency office in Sacramento, California.

5. On _____[*date*], Respondent agency refused to permit Petitioner to inspect or receive copies of these records. Respondent agency claimed that the records were exempt from disclosure under the public interest exemption to the Public Records Act [*Gov. Code § 6255*]. A copy of Respondent agency's decision to prohibit disclosure is attached as Exhibit _____.

6. Petitioner claims that the public interest exemption does not prohibit disclosure of these records, and that Petitioner is entitled to disclosure of these records under the Public Records Act [*Gov. Code § 6253*]. The information contained in these records is not subject to the public interest exemption because _____[*specify*].

7. Petitioner _____ [has tendered *or* was at all times herein mentioned ready to tender] $_____ in fees to cover respondent agency's costs in providing _____ [access to *or* copies of] the aforementioned records.

8. Respondent agency has refused to provide petitioner with _____ [access to *or* copies of] these records.

9. Respondent agency is obligated to disclose these records to Petitioner under the Public Records Act [*Gov. Code § 6253*].

10. Petitioner has exhausted all administrative remedies provided by Respondent agency in that _____[*describe steps taken by plaintiff seeking administrative remedies provided by defendant agency's internal procedures, and defendant's denial of such remedies at each step*].

11. Petitioner has no adequate remedies at law in that _____ [*specify facts in addition to those previously alleged showing inadequacy of any legal remedy to which petitioner might be entitled, e.g.,* monetary damages will not compensate petitioner for deprivation of access to the information which petitioner is seeking].

12. Petitioner has incurred costs in the amount of $_____ and reasonable attorney's fees in the amount of $_____.

WHEREFORE, petitioner prays judgment as follows:

[1. *If alternative writ procedure is used:* For an alternative writ of mandate directing respondent agency disclose the public records requested by Petitioner or to show cause why respondent agency should not do so;]

2. For a peremptory writ of mandate _____[*to the same effect as the alternative writ except for the order to show cause or set out terms at length as in Paragraph 1 of this prayer, omitting words relating to order to show cause*];

3. For costs and reasonable attorney's fees, in addition to any other relief granted or other costs awarded;

4. For costs of suit herein incurred [and for reasonable litigation expenses]; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a petition for a writ of mandate for use by the person aggrieved to obtain judicial review of a state agency decision to withhold disclosure of a public record under the Public Records Act [*Gov. Code § 6259(a)*].

For discussion and forms regarding declaratory relief, *see* Ch. 182, *Declaratory Relief* . For discussion of mandate proceedings, *see* Ch. 358, *Mandate and Prohibition* , which also contains forms that may be adapted to seek relief under *Gov. Code § 6258*. For a detailed discussion of injunctions, *see* Ch. 303, *Injunctions* .

[3] Verification

A verification is required [*Code Civ. Proc. § 1086*]. The requirements for a verification are set out in *Code Civ. Proc. § 446* [*see Code Civ. Proc. § 1109*; *see also Code Civ. Proc. § 2015.5* (form of declaration under penalty of perjury)]. If the petition was inadvertently not verified, the court may allow an amendment for the purpose of supplying a verification [*Franchise Tax Bd. v. Municipal Court (1975) 45 Cal. App. 3d 377, 384, 119 Cal. Rptr. 552]* .

[4] Caption and Introduction

The petition will be filed in the superior court. The caption will, therefore, reflect that fact and identify the county where the petition is filed [*see Code Civ. Proc. §§ 422.30* (caption of pleading), 1109]. In setting out the title of the proceeding [*see Code Civ. Proc. §§ 422.30* (caption of pleading), 1109], counsel should describe the respondent as an administrative agency without using any individual's name. Generally, the petition should name as respondent the decision-making authority of the agency [*Elliott v. Contractors' State License Board (1990) 224 Cal. App. 3d 1048, 1056, 274 Cal. Rptr. 286]* , particularly since the petitioner may otherwise run the risk of denial of the writ for failure to state a cause of action because the appropriate agency decision-making authority is not named as a party [*see Elliott v. Contractors' State License Bd. (1990) 224 Cal. App. 3d 1048, 1050, 1056, 274 Cal. Rptr. 286* (declining to consider whether petitioner's failure to name appropriate decision-making authority would have been sufficient reason, standing alone, to deny writ)].

The parties are customarily called "petitioner" and "respondent" because the initial pleading is customarily called a "petition" [*see* Code Civ. Proc. § 1086]. The parties may be called "plaintiff" and "defendant" [*Code Civ. Proc. § 1063*], but this is seldom done. If there are two or more petitioners or respondents, all must be identified in the caption of the petition [*Code Civ. Proc. §§ 422.40, 1109*].

The character of the proceeding, which must be briefly stated in the caption [*see Cal. Rules of Ct., Rule 2.111(6)*], is sufficiently described by the phrase "PETITION FOR WRIT OF MANDATE [*Code Civ. Proc. § 1086*]." Generally, there is no requirement that the petition expressly refer to *Code Civ. Proc. § 1086*. Whether or not a local rule requires

it, inclusion of a citation to *Code Civ. Proc. § 1086* in the caption is advisable because it will avoid confusion [*see Grimes v. Hoschler (1974) 12 Cal. 3d 305, 308 n.3, 115 Cal. Rptr. 625, 525 P.2d 65]* . It is customary to begin the petition with an introductory phrase such as "Petitioner respectfully represents" or, more simply, "Petitioner alleges."

[5] Essential Allegations

The petition must state facts tending to show the following:

- The Respondent agency is obligated to disclose the records under the Public Records Act [*Gov. Code §§ 6253, 6259(b)*].

- The Respondent agencies refusal to disclose the records is not justified under the exemption provisions of the Public Records Act [*Gov. Code §§ 6254, 6255*].

- The petitioner is beneficially interested in issuance of the writ--that is, he or she has standing to sue [*see Code Civ. Proc. § 1086*].

- The petitioner has exhausted administrative remedies [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 291-296, 109 P.2d 942]* .

- The petitioner has no plain and speedy remedy in the ordinary course of law [*see Code Civ. Proc. § 1086*].

[6] Identity of Petitioner

If the petitioner is not a natural person, the petition should allege the petitioner's identity as an existing legal entity entitled to sue (i.e., to come into court) [*see Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6]* . This is sometimes referred to as the capacity to sue.

[7] Petitioner's Standing to Sue

A petition for writ of mandate will be granted only where it is necessary to protect a substantial right and only when it is shown that some substantial damage will be suffered by the petitioner if the petition is denied. The writ will not be issued except on the verified petition of a person beneficially interested [*see Code Civ. Proc. § 1086*]; it will not be issued where the petitioner fails to show that it will subserve or protect some right or interest of his or hers; it will not be issued where it is apparent that the petitioner has no direct interest in the act sought to be coerced and that no benefit can accrue to him or her from its performance. Therefore, it is necessary for the petitioner to allege facts showing that he or she has some right or interest in the act sought to be coerced. In other words, the petitioner must show in his or her petition that he or she has standing to sue. This is the nature of the requirement concerning beneficial interest [*see Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6* (distinguishing capacity and standing to sue)].

[8] Attorneys' Fees

Attorneys fees and costs are recoverable by a prevailing plaintiff, and by a defendant when plaintiff's claim is clearly frivolous [*Gov. Code § 6259(d)*].

[9] Prayer for Relief

The prayer must necessarily be framed in terms of the relief which the court may give in light of what the petitioner will prove. An alternative writ will be requested unless the notice procedure is used. The petitioner should specify what terms he or she desires in the alternative writ.

A peremptory writ should be requested, of course. If the notice procedure is used instead of the alternative writ procedure, the desired terms of the peremptory writ should be recited. If an alternative writ is sought, however, it is sufficient to refer to the terms of the alternative writ (except for the language respecting the order to show cause).

Attorney's fees and reasonable litigation expenses should be requested if they can properly be sought, and a request for costs should be included.

[10] Service

When a petition for a writ of mandate is filed, it must be accompanied by proof of service of a copy of the petition on the respondent and the real party in interest named in the petition. The petition is served according to the provisions of *Code Civ. Proc. §§ 1010-1020* governing the service of papers generally. However, if a petition is sought pursuant to the provisions of *Code Civ. Proc. § 1088.5* (filed in a trial court and no alternative writ sought), proof of service need not be filed with the petition, and the action may be filed and served in the same manner as an ordinary action. When the real party in respondent's interest is a board or commission, the service must be made on the presiding officer, or on the secretary, or on a majority of the members, of the board or commission [*Code Civ. Proc. § 1107*].

[11] Cross References

For discussion and forms regarding declaratory relief, *see* Ch. 182, *Declaratory Relief*

For discussion of mandate proceedings, *see* Ch. 358, *Mandate and Prohibition* , which also contains forms that may be adapted to seek relief under *Gov. Code § 6258*

For a detailed discussion of injunctions, *see* Ch. 303, *Injunctions*

For other forms for use in mandate proceedings, including writs of mandate, alternative, and peremptory writs, *see* Ch. 474C, *Procedures in Reviewing Agency Decisions* .

For forms of allegations of petitioner's (or plaintiff's) capacity to sue, *see* Ch.20, *Allegations Commonly Used*

For alternative forms of captions and introductions, and discussion of the subject, *see* Ch. 108, *Captions and Introductions*

For discussion and forms of verification, *see* Ch. 572, *Verification*

For memoranda of points of points and authorities supporting and opposing petitions for writs of mandate generally, *see* California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender).

For memoranda of points and authorities supporting and opposing petitions for administrative mandate, *see* California Points and Authorities, Ch. 195, *Public Administrative Law* (Matthew Bender)

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Chapter 471 INVESTIGATIONS BY PUBLIC AGENCIES

41-471 California Forms of Pleading and Practice--Annotated 471.syn

§ 471.syn Synopsis to Chapter 471: INVESTIGATIONS BY PUBLIC AGENCIES

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[4] Other Matthew Bender Publications

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§ 471.01 Scope of Chapter

This chapter provides discussion and forms relating to agency information gathering, investigations, and subpoenas. The legal background discussion in Part II includes the following:

- Subpart A, discussing information gathering through records and reports required to be filed or maintained by licensees or other regulated entities [*see § 471.10* et seq.].

- Subpart B, discussing agency investigations, including scope of authority, types of investigations, and investigative hearings [*see § 471.20* et seq.].

- Subpart C, discussing agency subpoenas, including powers, enforcement, and remedies and defenses [*see § 471.30* et seq.].

Part V provides related forms, the latter including forms of complaint to enjoin improper agency investigative activity [*see § 471.70* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsGeneral OverviewAdministrative LawAgency InvestigationsScopeSubpoenasAdministrative LawGovernmental InformationGeneral OverviewAdministrative LawGovernmental InformationFreedom of InformationRemediesInjunctive Relief

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§ 471.02 Cross References

[1] Related Agency Proceedings

For related discussion and forms relating generally to inspections by a public agency, see Ch. 471A, *Inspections by Public Agencies* .

For discussion and forms relating to licensing agencies and licensing procedures, see Ch. 471B, *Licensing by Public Agencies* .

[2] Public Administrative Law Generally

For general discussion of California public agency functions, powers, restrictions on powers, and organization within the executive branch of state government, see:

- Ch. 470, *Overview of Public Administrative Law*.
- Ch. 470A, *Due Process Restrictions on Public Agencies*.
- Ch. 470B, *Public Agency Meetings*.

For detailed discussion and forms relating to the law governing disclosure of public records under the California Public Records Act [*Cal. Gov. Code §§ 6250 et seq.*], see Ch. 470C, *Public Records Act* .

For detailed discussion and forms relating generally to rule making functions of public agencies and judicial review of rule making, see:

- Ch. 472, *Public Agency Rules*.
- Ch. 472A, *Agency Rulemaking Procedures*.

- Ch. 472B, *Review of Agency Rulemaking*.

For detailed discussion and forms relating generally to the judicial or adjudicatory functions of California public agencies, see:

- Ch. 473, *Public Agency Adjudication*.
- Ch. 473A, *Commencing Agency Adjudication*.
- Ch. 473B, *Discovery in Agency Adjudications*.
- Ch. 473C, *Prehearing Procedures in Agency Adjudications*.
- Ch. 473D, *Prehearing Preparations in Agency Adjudications*.
- Ch. 473E, *Public Administrative Law Judges*.
- Ch. 473F, *Agency Adjudication Hearings*.
- Ch. 473G, *Agency Adjudication Decisions*.
- Ch. 473H, *Alternative Procedures for Agency Decisions*.

For detailed discussion and forms relating generally to review by California courts of agency adjudications, see:

- Ch. 474, *Availability of Judicial Review of Agency Decisions*.
- Ch. 474A, *Timing of Judicial Review of Agency Decisions*.
- Ch. 474B, *Standards in Reviewing Agency Decisions*.
- Ch. 474C, *Procedures in Reviewing Agency Decisions*.

See also [4], *below*.

[3] Related Judicial Remedies, Procedures, and Review

For general discussion and forms relating to judicial remedies and procedures that may be available, see:

- Ch. 40, *Appeal: An Overview*, through Ch. 54, *Appeal: California Supreme Court Review* (discussion and forms relating to civil appeals).
- Ch. 119, *Claim and Delivery* (discussion and forms relating to actions for claim and delivery generally).
- Ch. 303, *Injunctions* (discussion and forms relating to injunctive relief generally).
- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to review of orders by extraordinary writ of mandate or prohibition generally).

[4] Other Matthew Bender Publications

For forms for use in drafting memoranda in judicial proceedings to review a public agency decision, see California Points and Authorities, Ch. 195, *Public Administrative Law* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency InvestigationsScopeInspectionsAdministrative LawAgency RulemakingState ProceedingsAdministrative LawGovernmental InformationFreedom of InformationDisclosure RequirementsGeneral OverviewAdministrative LawGovernmental InformationPublic MeetingsGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewAdministrative LawSeparation of PowersConstitutional ControlsGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicenses

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[Reserved]

§§ 471.03[Reserved]

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A. Agency Information Gathering

41-471 California Forms of Pleading and Practice--Annotated § 471.10

§ 471.10 Agency Authority to Gather Information Through Record Keeping Requirements

[1] Overview of Information Gathering or Investigative Power

While legislative bodies regulate certain activities by enacting laws, responsibility for the day-to-day regulation and enforcement of these laws is frequently delegated to an administrative agency [*see* Ch. 470, *Overview of Public Administrative Law* , for a discussion of the power to delegate]. To carry out this delegation of power and to regulate fairly and efficiently, an agency must be able to acquire information. The agency uses this information for a number of purposes, including the following:

- Developing agency rules and regulations [*see* Chs. 472, *Public Agency Rules* , et seq. (discussion and forms relating to agency rule making)].

- Adjudicating a specific matter [*see* Ch. 473, *Public Agency Adjudication* , et seq. (discussion and forms relating to agency adjudications)].

- Confirming a suspicion that a law or regulation was violated, or determining that it was not [*Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 529, 15 Cal. Rptr. 630, 364 P.2d 462 , quoting United States v. Morton Salt Co. (1950) 338 U.S. 632, 642-643, 70 S. Ct. 357, 94 L. Ed. 401, 46 F.T.C. 1436]* , for example, in pursuing a claim that a licensee has violated applicable licensing laws [*see* Ch. 471B, *Licensing by Public Agencies* (discussion and forms relating to licensing)].

- Guiding the agency in the administration of any other matter relating to activities and subjects under its statutory jurisdiction.

Administrative agencies may compel the surrender of needed information in at least three ways:

- Through application of laws that require agency regulatees to keep records and file reports [*see* [2], [3], and [4], *below*].

- By issuing subpoenas compelling testimony or documents [*see §§ 471.30, 471.31*].

- By inspecting records or premises.

This chapter focuses on the first two methods: required records and the issuance of subpoenas. It also focuses on the ways in which a respondent may prevent the agency from gathering unauthorized information, or using unauthorized methods to obtain information, by either of these methods. For discussion and forms relating to the third method, agency inspections, see Ch. 471A, *Inspections by Public Agencies* .

Note that many of the principles that support or limit the power of agencies to compel information apply to all three data collection methods.For example, all three methods are subject to constitutional protections against unreasonable searches and seizures [*see U.S. Const., amend. IV*; *Cal. Const., art. I, § 13*].

[2] Record Keeping Requirements

A principal way that administrative agencies obtain needed information is by enforcing laws or regulations that require records or reports from regulated entities or individuals. In general, these laws or regulations make information available in one of two ways:

- Requiring the regulated entity to keep records and make them available to the agency.

- Requiring the regulated entity to file reports with the agency containing or summarizing specified information.

A requirement for recordkeeping or report filing may be specified directly in a statute, or indirectly through authorized agency regulations. While the number and variety of these requirements is enormous, the truth seems to be that an organized society often imposes such burdens on its members [*see California v. Byers (1971) 402 U.S. 424, 427-428, 91 S. Ct. 1535, 29 L. Ed. 2d 9* (noting that "[an organized society] commands the filing of tax returns for income; it requires producers and distributors of consumer goods to file informational reports on the manufacturing process and the content of products, on the wages, hours, and working conditions of employees ... [t]hose who borrow money on the public market or issue securities for sale to the public must file various information reports ... industries must report periodically the volume and content of pollutants discharged into our waters and atmosphere ... [c]omparable examples are legion.")].

In California, many statutes either directly compel or authorize various administrative agencies to compel regulated entities to keep records or to file reports. Examples of such provisions include the following:

- Annual reports to be filed by real property securities dealers [*Bus. & Prof. Code § 10238.1*; *see also* California Legal Forms, Ch. 30, *Subdivision Regulation*, Forms 30.12, 30.12E (Matthew Bender); California Real Estate Law & Practice, §§ 60.74[1], 60.75[2] (Matthew Bender)].

- Records to be kept open by weighmasters for inspection by the director of the Department of Food and Agriculture [*Bus. & Prof. Code § 12716*].

- Annual reports to be filed by licensed wine growers [*Bus. & Prof. Code § 23327*].

- Prescription forms and other records to be maintained by practitioners and pharmacists prescribing or distributing narcotics [*Health & Safety Code §§ 11179,, 11190*].

- Business records and annual reports required of surplus line brokers [*Ins. Code § 1768*; *see California Insurance Law & Practice, § 62.08[2]* (Matthew Bender)].

- Recordkeeping requirements for life or disability insurers [*Ins. Code § 10508*; *see California Insurance Law & Practice, § 61.07[2]* (Matthew Bender).].

- Apprenticeship reports by apprentice embalmers [*Bus. & Prof. Code § 7665*].

Environmental agencies frequently require reports as part of their general powers of inquiry under *Gov. Code § 11181*. Moreover, many California statutes require or authorize state and local agencies have specific statutory authorization to require reports from persons and entities subject to regulation. The following are examples of required reports with regard to environmental matters:

- Hazardous waste generators are required to make reports to the Department of Health under *Health & Safety Code § 25155.8*. *Health & Safety Code § 25244.4* requires an additional report every two years from every hazardous waste generator regarding changes in the volume and toxicity of wastes generated.

- Hazardous waste storage facilities must submit a detailed hydrogeological assessment report regarding surface impoundments to the Regional Water Board under *Health & Safety Code § 25208.8*.

- *Water Code § 13383* authorizes the regional water quality board to establish reporting requirements for discharge permit holders, such as dredge or fill dischargers, and sewage treatment works.

- Under the federal Emergency Planning and Community Right-to-Know-Act, [*42 U.S.C. §§ 11001-11050*; for regulations, see 40 C.F.R. §§ 370-370.41] owners and operators of facilities where hazardous substances or chemicals or toxic chemicals are present must report annually on such substances to the State Emergency Response Commission, the relevant Local Emergency Planning Committee, and the fire department with jurisdiction over the facility.

It is therefore apparent that recordkeeping and reporting requirements run the gamut of regulated entities and individuals, and offer administrative agencies ready access to a wide range of information.

[3] Scope of Agency Authority

The scope of authority vested in administrative agencies to regulate, and thus to require recordkeeping and report filing, is often expansive. For example, automotive repair dealers must keep legible copies of the following records available for inspection during normal business hours for noless than three years: (1) all invoices relating to automotive repair; (2) all written estimates pertaining to work performed; and (3) all work orders or contracts for repairs, parts, and labor [*Bus. & Prof. Code § 9884.11*; *16 Cal. Code Reg. § 3358*].

The courts frequently give an expansive reading to the kinds of information that agencies may obtain under recordkeeping or report filing statutes. In one case, for example, a county assessor asked to see taxpayer business records under statutes entitling the assessor to examine "data relevant to ... an estimate of value" [*Rev. & Tax. Code § 441(d)*], and "business records relevant to the ... value of all property" [*Rev. & Tax. Code § 470(a)*]. The taxpayer refused to furnish the requested records, claiming that the word "data" should be construed to mean only facts, whereas much of what was sought was interpretive material. The court disagreed and held that the assessor was entitled to enforcement of a subpoena duces tecum to compel the taxpayer to produce the records. The court stated that the statutes in question were "broad grants of power to the Assessor to demand information," and that there was nothing in them to justify a distinction between facts and interpretive data [*Roberts v. Gulf Oil Corp. (1983) 147 Cal. App. 3d 770, 780-783, 195 Cal. Rptr. 393]* .

This ruling furnishes two lessons. First, the courts look to an agency's statutory authority in determining what records an agency may compel a regulated party to keep or to report. Second, in looking at the statutory authority, the court will read that authority broadly in light of the agency's purpose.

In another setting, the California Supreme Court recognized the authority of an agency to require disclosure of information by a regulated industry even though disclosure was not expressly authorized by the governing statute nor by the agency regulations when the information was necessary to the agency's responsibility to regulate and approve timber harvesting plans [*Sierra Club v. State Board of Forestry (1994) 7 Cal. 4th 1215, 1228-1229, 32 Cal. Rptr. 2d 19, 876 P.2d 505]* .

For discussion of the scope of the agency investigative power in general, see *§ 471.20[1]*. For discussion of the necessity of statutory authority for agency subpoena power, see *§ 471.30[1]*.

[4] Required Findings

State agencies that impose reporting requirements on businesses by regulations adopted under the Administrative Procedure Act must make specific findings that "it is necessary for the health, safety, or welfare of the people of the state that the regulation apply to businesses." [*Gov. Code § 11346.3(c)*]. Otherwise, "no administrative regulation which requires a report shall apply to businesses ..." [*Gov. Code § 11346.3(c)*].

[5] Penalties

Some recordkeeping and reporting statutes provide penalties for noncompliance, including criminal sanctions. Imposing criminal sanctions may trigger constitutional requirements [*see, e.g., People v. Hutchings (1977) 69 Cal. App. 3d Supp. 33, 36, 69 Cal. App. 3d Supp. 33 , 138 Cal. Rptr. 584* (holding former *Lab. Code §§ 1174* and *1175* unconstitutional as requiring all employers to permit unreasonable search and seizure or be found guilty of misdemeanor)]. However, federal and state constitutions place only limited restraints on the power of administrative agencies to compel recordkeeping and reporting [*see § 471.11*]. Some state statutes requiring reports provide penalties for noncompliance. For example, the failure of anyone storing hazardous wastes to submit the required hydrogeological assessment report regarding surface impoundments to the Regional Water Board [*Health & Safety Code § 25208.8*] results in civil liability, as does the filing of a false report. This civil liability may be as much as $10,000 per day for failure to file and up to $25,000 per day for false reports [*Health & Safety Code § 25208.9*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency InvestigationsConstitutional RightsSearch & SeizureAdministrative LawAgency InvestigationsScopeGeneral OverviewAdministrative LawAgency InvestigationsScopeInspectionsAdministrative LawAgency InvestigationsScopeSubpoenasAdministrative LawAgency InvestigationsScopeSubpoenasAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawGovernmental InformationGeneral OverviewAdministrative LawGovernmental InformationRecordkeeping & ReportingAdministrative LawSeparation of PowersConstitutional ControlsGeneral OverviewCivil ProcedureJurisdictionGeneral OverviewConstitutional LawBill of RightsFundamental RightsSearch & SeizureGeneral OverviewConstitutional LawBill of RightsFundamental RightsSearch & SeizureScope of ProtectionContracts LawSales of GoodsDamages & RemediesGeneral OverviewCriminal Law & ProcedureCriminal OffensesControlled SubstancesGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewCriminal Law & ProcedureSearch & SeizureGeneral OverviewCriminal Law & ProcedureDiscovery & InspectionSubpoenasGeneral OverviewEnvironmental LawAssessment & Information AccessAudits & Site AssessmentsEnvironmental LawHazardous Wastes & Toxic SubstancesEmergency Planning & Community Right to

KnowGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicensesInsurance LawIndustry RegulationGeneral OverviewInsurance LawIndustry RegulationFederal RegulationsGeneral OverviewInsurance LawIndustry RegulationInsurance Company OperationsConducting BusinessSurplus Lines InsurersTax LawState & Local TaxesAdministration & ProceedingsGeneral Overview

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§ 471.11 Constitutional Privileges Limiting Duty to Record or Report Information

[1] General Requirements

Statutory and regulatory recordkeeping and reporting requirements must comply with both the federal [*People v. Hutchings (1977) 69 Cal. App. 3d Supp. 33, 36, 69 Cal. App. 3d Supp. 33 , 138 Cal. Rptr. 584* (dismissing misdemeanor complaint charging refusal to comply with subpoena for records on the ground that former *Lab. Code §§ 1174* and *1175* are unconstitutional because they authorize unreasonable searches and seizures in violation of *U.S. Const., amend. IV*); *see Shapiro v. United States (1948) 335 U.S. 1, 32-35, 68 S. Ct. 1375, 92 L. Ed. 1787* (price control reporting requirements questioned under privilege against self-incrimination of *U.S. Const., amend. V*, but upheld)], and state constitutions [*see Wilson v. California Health Facilities Com. (1980) 110 Cal. App. 3d 317, 324-326, 167 Cal. Rptr. 801* (disclosure requirement for licensed health facilities subject to *Cal. Const., art. I, § 1*, but requirement upheld under rational relation test)]. This means that "there are limits which the government cannot constitutionally exceed in requiring the keeping of records" [*Shapiro v. United States (1948) 335 U.S. 1, 32, 68 S. Ct. 1375, 92 L. Ed. 1787]* .

The principal constitutional challenges to recordkeeping and reporting requirements involve violations of the prohibition against unreasonable searches and seizures [*see* [3], *below*], the privilege against self-incrimination [*see* [4], *below*], and the right of privacy [*see* [5], *below*]. Due process challenges to these requirements, though still raised, are seldom successful for the reasons discussed in [2], *below*.

[2] Due Process of Law

[a] Police Power and Rational Relation Test

While due processes challenges to recordkeeping and reporting statutes continue, these challenges have very little chance of success because statutes and rules that involve social and economic regulation, public health and safety, are exercises of the state's police power [*see* 4 Blackstone, *Commentaries* 162 ("[t]he police power is the power that concerns the due regulation and domestic order of the state")]. The police power is an attribute of sovereignty and is founded on the duty of the state to protect its citizens and provide for the safety, good order and well-being of society [

McKay Jewelers, Inc. v. Bowron (1942) 19 Cal. 2d 595, 600, 122 P.2d 543] .

The power cannot be precisely defined, because any definition is merely "the product of legislative determinations addressed to the purposes of government," and those purposes are "neither abstractly nor historically capable of complete definition" [Rodda, "The Accomplishment of Aesthetic Purposes Under the Police Power," *27 S. Cal. L. Rev. 149, 152 (1954)*].

A few of "the more conspicuous examples of the traditional application of the police power" are "[p]ublic safety, public health, morality, peace and quiet, [and] law and order." These examples "merely illustrate the scope of the power and do not delimit it" [*Berman v. Parker (1954) 348 U.S. 26, 32, 75 S. Ct. 98, 99 L. Ed. 27]* . Exercises of the state's police power are assessed under the rational relationship test [*see* *Duke Power Co. v Carolina Env. Study Gp. (1978) 438 U.S. 59, 83-87, 98 S. Ct. 2620, 57 L. Ed. 2d 595* (economic regulation presumed constitutional and weighed under rational relation test); *Whalen v. Roe (1977) 429 U.S. 589, 596-598, 97 S. Ct. 869, 51 L. Ed. 2d 64* (statute regulating dangerous drugs upheld as valid exercise of police power and the product of orderly and rational legislative decision); *New Orleans v. Dukes (1976) 427 U.S. 297, 303-306,96 S. Ct. 2513, 49 L. Ed. 2d 511* (city ordinance limiting pushcart food vendors in French Quarter upheld under rational relation test as valid regulation of local economy under police power); *Kelley v. Johnson (1976) 425 U.S. 238, 245-248, 96 S. Ct. 1440, 47 L. Ed. 2d 708* (hair-length rule for law enforcement officers upheld as having rational relation to state's protection of safety of persons and property under police power); *Wilson v. California Health Facilities Com. (1980) 110 Cal. App. 3d 317, 322-325, 167 Cal. Rptr. 801* (health care facility reporting requirement upheld under rational relation test as proper exercise of state's police power based on legitimate state interest in public health and safety)].

In consequence, a law requiring reports on or records of regulated activities will pass constitutional muster if it meets all of the following criteria [*California Bankers Ass'n v. Shultz (1974) 416 U.S. 21, 45-50, 94 S. Ct. 1494, 39 L. Ed. 2d 812* ; *see* *Wilson v. California Health Facilities Com. (1980) 110 Cal. App. 3d 317, 322-325, 167 Cal. Rptr. 801* (health care facility reporting requirement upheld as proper exercise of police power based on legitimate state interest in health and economic regulation and reasonable relation of requirement to this state interest); *Blinder v. Division of Narcotic Enforcement (1972) 25 Cal. App. 3d 174, 179-184, 101 Cal. Rptr. 635* (statutes regulating methadone treatment of addicts upheld against due process challenge by addicts and doctors on grounds that statutes were exercise of police power in public interest; the means are reasonably necessary for the purpose; and they are not unduly oppressive)]:

- The government has the power to regulate or forbid the activity concerned.

- There is a rational relationship between the recordkeeping or reporting requirement and the government's objective.

- The burdens of compliance are reasonable.

[b] Power to Regulate

The first requirement for the validity of a statute challenged as a violation of due process is that the government must have the power to regulate or forbid the activity concerned [*see* [a], *above*]. The police power is very broad, and the role of the courts in determining the validity of a legislative exercise of that power is very narrow [*Kelley v. Johnson (1976) 425 U.S. 238, 247-248, 96 S. Ct. 1440, 47 L. Ed. 2d 708* ; *Berman v. Parker (1954) 348 U.S. 26, 32, 75 S. Ct. 98, 99 L. Ed. 27]* .

When the exercise of the police power is involved, "the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation" [*Berman v. Parker (1954) 348 U.S. 26, 32, 75 S. Ct. 98, 99 L. Ed. 27]* . Police power is the power inherent in a government to enact laws, within constitutional limits, to protect the order,

safety, health, morals, and general welfare of society [*Blinder v. Division of Narcotic Enforcement (1972) 25 Cal. App. 3d 174, 179, 101 Cal. Rptr. 635* , *quoting In re Rameriz (1924) 193 Cal. 633, 649-650, 226 P. 914]* . A state has a legitimate interest in regulating areas subject to the police power [*Wilson v. California Health Facilities Com. (1980) 110 Cal. App. 3d 317, 323, 167 Cal. Rptr. 801]* . Legislative choices within the scope of this power are presumed to be valid, and the party challenging the law must show that the Legislature acted arbitrarily or irrationally before the law may be struck down [*New Orleans v. Dukes (1976) 427 U.S. 297, 303-306, 96 S. Ct. 2513, 49 L. Ed. 2d 511* ; *Kelley v. Johnson (1976) 425 U.S. 238, 247-248, 96 S. Ct. 1440, 47 L. Ed. 2d 708* ; *Wilson v. California Health Facilities Com. (1980) 110 Cal. App. 3d 317, 323, 167 Cal. Rptr. 801]* .

[c] Rational Relation to State Interest

The Legislature has acted arbitrarily or irrationally, and its exercise of the police power is invalid despite the presumption of validity, if the statute adopted bears no rational relation to the legitimate state interest that it was adopted to further [*New Orleans v. Dukes (1976) 427 U.S. 297, 303-306, 96 S. Ct. 2513, 49 L. Ed. 2d 511* (city ordinance limiting pushcart food vendors in French Quarter upheld as rational way to aid local economy by preserving appeal of area); *Kelley v. Johnson (1976) 425 U.S. 238, 247-248, 96 S. Ct. 1440, 47 L. Ed. 2d 708* (regulation limiting hair length of law enforcement officers has rational connection to promotion of public safety); *California Bankers Ass'n v. Shultz (1974) 416 U.S. 21, 49, 94 S. Ct. 1494, 39 L. Ed. 2d 812* (requiring drawee banks to keep copies of negotiable instruments is reasonable way to preserve evidence for possible criminal proceedings even though the principal congressional concern is with the banks' customers); *Wilson v. California Health Facilities Com. (1980) 110 Cal. App. 3d 317, 322-325, 167 Cal. Rptr. 801* (requiring financial disclosure by health care facilities is reasonable way to assure availability of health services for all)].

In one case, for example, plaintiffs challenged a federal law that set a $560 million limit on liability for nuclear power accidents, arguing that the law violated due process because it allowed injury to occur without adequate compensation to the victims and because the amount fixed bore no rational relation to the potential losses. The United States Supreme Court disagreed. The Court said that the figure chosen was arbitrary only in the sense that any preset limit on recovery is necessarily an arbitrarily chosen figure, and that the provision did not violate due process because the limit set was rationally related to the congressional goal of encouraging private industry participation in nuclear power by setting a statutory limit on liability [*Duke Power Co. v Carolina Env. Study Gp. (1978) 438 U.S. 59, 83-87, 98 S. Ct. 2620, 57 L. Ed. 2d 595]* .

[d] Burdens of Compliance

Even an otherwise proper exercise of the police power may be found to violate due process, if the burdens of complying with its requirements would be unduly oppressive [*California Bankers Ass'n v. Shultz (1974) 416 U.S. 21, 50, 94 S. Ct. 1494, 39 L. Ed. 2d 812* ; *Serve Yourself Gas etc. Assn. v. Brock (1952) 39 Cal. 2d 813, 817-819, 249 P.2d 545* ; *Blinder v. Division of Narcotic Enforcement (1972) 25 Cal. App. 3d 174, 179, 184, 101 Cal. Rptr. 635]* . For statutes that require records or reports, the alleged burden is usually a matter of the cost of keeping the records or filing the reports. For example, when the federal government adopted a statue requiring banks to keep copies of certain negotiable instruments for possible future use as evidence in criminal proceedings, the banks claimed a violation of due process, urging that the cost of keeping these records would be unduly burdensome. The United States Supreme Court disagreed, pointing out that the banks were federally insured. This meant that the recordkeeping requirement was merely in the nature of a condition on the receipt of public funds [*California Bankers Ass'n v. Shultz (1974) 416 U.S. 21, 50, 94 S. Ct. 1494, 39 L. Ed. 2d 812]* .

[3] Search and Seizure

Whether a particular recordkeeping or reporting requirement violates the proscription against unreasonable searches and seizures in the federal [*U.S. Const., amends. IV, XIV*], or state [*Cal. Const., art. I, §§ 1, 13*] constitutions is a question

that usually arises when either (1) the agency performs a regulatory inspection of records, or (2) the agency issues a subpoena for the production of documents or records [*see § 471.31 [1]*, for discussion of the effect of the ban on unreasonable searches and seizures upon agency subpoena power; *see also* Ch. 471A, *Inspections by Public Agencies* , for discussion of inspections and the ban on unreasonable searches and seizures].

Even when a statute gives an agency access to required records, the *Fourth Amendment* still applies [*see, e.g.,* *People v. Hutchings (1977) 69 Cal. App. 3d Supp. 33, 36, 69 Cal. App. 3d Supp. 33* , *138 Cal. Rptr. 584* (holding former *Lab. Code §§ 1174* and *1175* unconstitutional for authorizing unreasonable searches and seizures)].

Warrantless search or inspection provisions in regulatory statutes are not per se unconstitutional; the reasonableness of a warrantless search will depend upon the specific enforcement needs and privacy guarantees of each statute [*Roberts v. Gulf Oil Corp. (1983) 147 Cal. App. 3d 770, 789, 195 Cal. Rptr. 393* , quoting *Marshall v. Barlow's Inc. (1978) 436 U.S. 307, 321-322, 98 S. Ct. 1816, 56 L. Ed. 2d 305]* . The United States Supreme Court explained this statement by noting two situations in which warrantless inspection statutes might be upheld. First, if the statute applies to a specific industry, then regulations might already be so pervasive that a Colonnade-Biswell exception to the warrant requirement could apply [*Marshall v. Barlow's Inc. (1978) 436 U.S. 307, 321, 98 S. Ct. 1816, 56 L. Ed. 2d 305* ; *see* Ch. 471A, *Inspections by Public Agencies* , for discussion of this exception to the warrant requirement for pervasively regulated businesses]. Second, the statute might be one that provides for resort to judicial enforcement when entry is refused [*Marshall v. Barlow's Inc. (1978) 436 U.S. 307*]. This means that, as a rule, statutes that allow a warrantless inspection of required records must provide for judicial review of the reasonableness of the agency's demand for inspection before imposing penalties for refusal to comply [*People v. Hutchings (1977) 69 Cal. App. 3d Supp. 33* ; *see* *See v. Seattle (1967) 387 U.S. 541, 87 S. Ct. 1737, 18 L. Ed. 2d 943* (warrantless search unconstitutional because actual search should be at least as limited by *Fourth Amendment* requirements as an agency subpoena, which may not be enforced by an agency inspector in the field, but must be subjected to judicial review before compliance may be compelled); *Roberts v. Gulf Oil Corp. (1983) 147 Cal. App. 3d 770, 789, 195 Cal. Rptr. 393* (statute requiring taxpayer to give records to assessor upheld because taxpayer may seek judicial review of reasonableness of request before complying)].

PRACTICE TIP:

Analyzing Constitutional Issues. *Fourth amendment* issues arise only when a search is involved. If no search is involved, the agency can only compel disclosure of the records through the agency subpoena power, which does not involve a search because the subpoenaed party usually must bring the records to the agency office to comply with the subpoena.

[4] Self-Incrimination

[a] Nature of Privilege Against Self-Incrimination

The *Fifth Amendment to the Federal Constitution* provides that "no person ... shall be compelled in any criminal case to be a witness against himself" [*U.S. Const., amend. V*]. The *Fifth Amendment* has been held applicable to state proceedings under the *Fourteenth Amendment* [*Malloy v. Hogan (1964) 378 U.S. 1, 3, 84 S. Ct. 1489, 12 L. Ed. 2d 653* ; *Prudhomme v. Superior Court (1970) 2 Cal. 3d 320, 323, 85 Cal. Rptr. 129, 466 P.2d 673* ; *see U.S. Const., amend. XIV*; *see also Evid. Code §§ 930* (defendant in criminal case privileged to extent provided in state and federal constitutions), 940 (witness privileged to extent provided in state and federal constitutions)]. The California Constitution similarly guarantees the privilege against self-incrimination [*Cal. Const., art. I, § 15*; *see also Evid. Code §§ 930* (defendant in criminal case privileged to extent provided in state and federal constitutions), 940 (witness privileged to extent provided in state and federal constitutions)].

Although the language of the *Fifth Amendment* limits the privilege to criminal defendants, judicial decisions have extended the availability of the privilege to witnesses in any kind of proceeding [*Gonzales v. Superior Court (1980) 117 Cal. App. 3d 57, 62, 178 Cal. Rptr. 358* ; *see* *Kastigar v. United States (1972) 406 U.S. 441, 444, 92 S. Ct. 1653,*

32 L. Ed. 2d 212 (privilege against self-incrimination may be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory, and protects against any disclosures that the witness reasonably believes could be used in criminal prosecution or could lead to other evidence that might be so used)].

[b] Application of Privilege to Recording and Reporting Requirements

[i] Required Records and Natural Persons

Despite the apparent breadth of its coverage [*see* [a], *above*], the privilege against self-incrimination affords little protection against administrative agency recordkeeping or reporting requirements [*see generally* 1 Davis, Administrative Law Treatise, Ch. 4, *Investigation*, §§ 4.16-4.23 (2d ed. 1978)].

Initially, and most significantly, the privilege does not apply to those records that a regulated person or entity is required by law to keep [*Shapiro v. United States (1948) 335 U.S. 1, 32-33, 68 S. Ct. 1375, 92 L. Ed. 1787* ; *Craib v. Bulmash (1989) 49 Cal. 3d 475, 487-490, 261 Cal. Rptr. 686, 777 P.2d 1120* ; *People v. Thayer (1965) 63 Cal. 2d 635, 643, 47 Cal. Rptr. 780, 408 P.2d 108 , cert. denied, 384 U.S. 908, 86 S. Ct. 1342, 16 L. Ed. 2d 361 (1966)]* . Note that the privilege may nonetheless apply to records required by law, if the compulsory disclosure of those records confronts the party claiming the privilege with a substantial hazard of self-incrimination [*see* discussion in [ii], *below*].

Another factor that limits the use of the privilege to defeat administrative record keeping and reporting requirements is the rule that the privilege protects only natural persons from compulsory self-incrimination through their own testimony or through the compelled production of personal records or effects. The privilege does not apply to organizations [*Bellis v. United States (1974) 417 U.S. 85, 87-90, 94 S. Ct. 2179, 40 L. Ed. 2d 678* ; *United States of America v. White (1944) 322 U.S. 694, 698-701, 64 S. Ct. 1248, 88 L. Ed. 1542* ; *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 44-46, 99 Cal. Rptr. 791]* . Thus, the privilege does not protect corporations, large unincorporated associations, or even most partnerships from compulsory disclosure of their records tending to incriminate the organizations [*see Bellis v. United States (1974) 417 U.S. 85, 88, 94-98, 94 S. Ct. 2179, 40 L. Ed. 2d 678* (small partnership); *United States of America v. White (1944) 322 U.S. 694, 698-701, 64 S. Ct. 1248, 88 L. Ed. 1542* (labor union); *United States v. Bausch & Lomb Optical Co. (1944) 321 U.S. 707, 726, 64 S. Ct. 805, 88 L. Ed. 1024* (corporation); *Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 529, 15 Cal. Rptr. 630, 364 P.2d 462* (corporation); *but see United States v. Slutsky (S.D. N.Y. 1972) 352 F. Supp. 1105, 1107-1109* (small family partnership's records deemed personal records of partners)]. Because most administrative record keeping and reporting requirements apply primarily to business entities and their activities, the privilege against self-incrimination is rarely asserted to oppose agency enforcement of these requirements.

[ii] Factors Considered by Courts in Determining Application of Privilege

Because of the two limitations on the privilege discussed in [i], *above*, statutory and regulatory reporting requirements generally have been held not to violate the privilege against self-incrimination. When a particular reporting provision is challenged, the courts balance the public need for disclosure against the individual's claim to constitutional protection [*California v. Byers (1971) 402 U.S. 424, 427, 91 S. Ct. 1535, 29 L. Ed. 2d 9* ; *Blinder v. Division of Narcotic Enforcement (1972) 25 Cal. App. 3d 174, 188, 101 Cal. Rptr. 635]* . To invoke the privilege against self-incrimination, the claimant must demonstrate that the compelled disclosures will confront him or her with "substantial hazards of self-incrimination" [*California v. Byers (1971) 402 U.S. 424, 429, 91 S. Ct. 1535* ; *Blinder v. Division of Narcotic Enforcement (1972) 25 Cal. App. 3d 174, 186, 101 Cal. Rptr. 635]* .

If the statute is regulatory in nature, rather than criminal, and is based on a strong public policy in favor of disclosure, the mere possibility of incrimination will not defeat it. Thus, in *United States v. Sullivan* it was held that the privilege could not be invoked by a bootlegger to justify his failure to file an income tax return on the ground that the return would tend to incriminate him by revealing an unlawful source of income [*United States v. Sullivan (1927) 274 U.S.*

259, 263-264, 47 S. Ct. 607, 71 L. Ed. 1037 ; *see also California v. Byers (1971) 402 U.S. 424, 428-430, 91 S. Ct. 1535, 29 L. Ed. 2d 9 (California statute upheld that required driver in "hit and run" accident to stop and give name and address)* ; *Fahlgren v. Department of Motor Vehicles (1986) 186 Cal. App. 3d 930, 936, 231 Cal. Rptr. 229* (financial responsibility law requirement to report traffic accidents did not violate privilege when report used as evidence in suspension of license proceeding); *Blinder v. Division of Narcotic Enforcement (1972) 25 Cal. App. 3d 174, 186-189, 101 Cal. Rptr. 635* (compulsory disclosure provisions related to methadone treatment of narcotic addicts does not violate either reporting physicians' or addicts' privilege against self-incrimination); *Machado v. State Water Resources Control Board (2001) 90 Cal. App. 4th 720, 728-729, 109 Cal. Rptr. 2d 116* (record keeping and reporting requirements of wastewater discharges imposed on dairy as part of clean up and abatement order issued by water quality board did not violate dairy owners' *fifth amendment* privilege against self-incrimination)].

A reporting requirement confronts the party required to report with a substantial hazard of self-incrimination, and thereby violates the privilege against self-incrimination, when the requirement involves any of the following [*California v. Byers (1971) 402 U.S. 424, 429-431, 91 S. Ct. 1535, 29 L. Ed. 2d 9* ; *Grosso v. United States (1968) 390 U.S. 62, 67-69, 88 S. Ct. 709, 19 L. Ed. 2d 906* ; *Blinder v. Division of Narcotic Enforcement (1972) 25 Cal. App. 3d 174, 186-189, 101 Cal. Rptr. 635]* :

- An obligation to keep and preserve records different from those customarily kept.

- Disclosures extracted from a highly selective group inherently suspect of criminal activities.

- An area permeated with criminal statutes, as distinguished from an essentially noncriminal and regulatory area of inquiry [*see, e.g., Leary v. United States (1969) 395 U.S. 6, 13, 16-18, 89 S. Ct. 1532, 23 L. Ed. 2d 57* (registration and compliance with provisions of marijuana transfer tax violated *Fifth Amendment* privilege against self-incrimination); *Haynes v. United States (1968) 390 U.S. 85, 96-100, 88 S. Ct. 722, 19 L. Ed. 2d 923* (law requiring registration of proscribed firearms invalid under *Fifth Amendment*); *Marchetti v. United States (1968) 390 U.S. 39, 57, 88 S. Ct. 697, 19 L. Ed. 2d 889* (requirement that gamblers register for and pay federal occupational tax violated privilege against self-incrimination); *Albertson v. Subversive Activities Control Bd. (1965) 382 U.S. 70, 79, 86 S. Ct. 194, 15 L. Ed. 2d 165* (orders of Subversive Activities Control Board requiring Communist Party members to register with Board held to violate privilege against self-incrimination)].

[5] Privacy

Cal. Const., art. I, § 1 expressly provides a right to privacy. The provision is directed against government or business "snooping" into personal information, the retention of unnecessary information by these entities, and their misuse of such information when reasonable checks on its accuracy did not exist [*White v. Davis (1975) 13 Cal. 3d 757, 775, 120 Cal. Rptr. 94, 533 P.2d 222* ; *Roberts v. Gulf Oil Corp. (1983) 147 Cal. App. 3d 770, 790, 195 Cal. Rptr. 393]* .

The California Constitution appears to protect a larger zone of privacy than the federal right [*Wilson v. California Health Facilities Com. (1980) 110 Cal. App. 3d 317, 324, 167 Cal. Rptr. 801]* , which is applicable to the states under the *Fourteenth Amendment* [*Roe v. Wade (1973) 410 U.S. 113, 153, 93 S. Ct. 705, 35 L. Ed. 2d 147]* . The California Constitution provides few independent restraints on agency record keeping and reporting requirements, however, as shown by the following examples:

- Article I, Section 1 does not preclude an agency from collecting information it needs. The right of privacy is, for example, no bar to the inspection of taxpayer records by a county assessor or the Franchise Tax Board [*Roberts v. Gulf Oil Corp. (1983) 147 Cal. App. 3d 770, 790, 195 Cal. Rptr. 393]* .

- The state constitutional provision does not protect corporations, but rather individuals [*Roberts v.*

Gulf Oil Corp. (1983) 147 Cal. App. 3d 770, 791-793, 195 Cal. Rptr. 393 ; *see Ion Equipment Corp. v. Nelson (1980) 110 Cal. App. 3d 868, 878, 168 Cal. Rptr. 361* (corporation has no common law right of privacy); *but see H & M Associates v. City of El Centro (1980) 109 Cal. App. 3d 399, 409-412, 167 Cal. Rptr. 392* (holding a partnership could state a cause of action for invasion of privacy, citing *Cal. Const., art. I, § 1*)].

Reporting requirements that compel the *public disclosure* of reported information may run afoul of Article I, section 1, however, at least where the information disclosed is deemed personal [*cf. City of Carmel-by-the-Sea v. Young (1970) 2 Cal. 3d 259, 85 Cal. Rptr. 1, 466 P.2d 225* (public officer financial disclosure law held invalid as overbroad intrusion into right of privacy because it required public disclosure of personal financial information and failed to limit disclosure requirement to those matters that might give rise to conflict of interest); *Wilson v. California Health Facilities Com. (1980) 110 Cal. App. 3d 317, 167 Cal. Rptr. 801* (accounting and reporting requirements of California Health Facilities Disclosure Act held valid against right of privacy challenge by limited partnership because health and health care laws are presumptively valid, and because scope of required disclosure was properly limited and consistent with legitimate state interest in health care)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsConstitutional RightsGeneral OverviewAdministrative LawAgency InvestigationsConstitutional RightsSelf-Incrimination PrivilegeAdministrative LawAgency InvestigationsScopeGeneral OverviewAdministrative LawAgency InvestigationsScopeInspectionsAdministrative LawAgency InvestigationsScopeSubpoenasAdministrative LawGovernmental InformationRecordkeeping & ReportingConstitutional LawBill of RightsFundamental RightsSearch & SeizureGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessSelf-Incrimination PrivilegeConstitutional LawSubstantive Due ProcessPrivacyGeneral OverviewGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsPolice PowerGovernmentsState & Territorial GovernmentsPolice Power

California Forms of Pleading and Practice--Annotated

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Volume 41: Overview of Public Administrative Law thru Review of Agency Rulemaking-Chs. 470-472B
Chapter 471 INVESTIGATIONS BY PUBLIC AGENCIES
PART II. LEGAL BACKGROUND
A. Agency Information Gathering

41-471 California Forms of Pleading and Practice--Annotated §§ 471.12-471.19

[Reserved]

§§ 471.12[Reserved]

California Forms of Pleading and Practice--Annotated

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B. Agency Investigations

41-471 California Forms of Pleading and Practice--Annotated § 471.20

§ 471.20 Agency Investigations

[1] Definitions

[a] Investigation

Investigation is a broad term and connotes all forms of administrative fact-finding. Often it denotes either:

- The process of uncovering wrongdoing as the first step in a disciplinary or law enforcement proceeding or as a prelude to a judicial proceeding [*see, e.g., California School Employees Assn. v. Personnel Com. of Pajaro Valley Unified School Dist. (1970) 3 Cal. 3d 139, 144, 89 Cal. Rptr. 620, 474 P.2d 436]* , or

- A studious inquiry in the nature of research for the purpose of supporting an agency policy decision or providing useful information to government officials or the general public [*see, e.g., 18 Ops. Cal. Att'y Gen. 45, 47 (1951)]* .

[b] Examination

An administrative examination is often the same sort of inquiry as an inspection, but it usually connotes a more thorough and searching inquiry. The most common example is the driver's license examination, consisting of a written test of knowledge, a test of vision, and a test of driving skill. Financial audits are sometimes called examinations (hence, for example, bank examiners). Similarly, professional licensing examinations are long and challenging.

[2] Nature of Investigative Power

Administrative investigations may be undertaken for many different purposes, although the object in every case is only to collect information. The various purposes include:

- To provide a factual basis for adopting regulations [*see, e.g., Rivera v. Division of Industrial*

Welfare (1968) 265 Cal. App. 2d 576, 586-588, 71 Cal. Rptr. 739] .

- To determine whether a license should be issued [*see, e.g., Bus. & Prof. Code § 23958* (investigation of applicantfor liquor license)].

- To determine whether a disciplinary proceeding, for suspension or revocation of a license, should be begun [*see, e.g., Humane Soc'y of the United States of America, Cal. Branch, Inc. v. Merrill (1962) 199 Cal. App. 2d 115, 119-120, 18 Cal. Rptr. 701]* .

- To deter socially undesirable conduct and protect the public [*see, e.g., People v. Hyde (1974) 12 Cal. 3d 158, 166, 115 Cal. Rptr. 358, 524 P.2d 830* (antihijacking search at airport)].

- To collect information for the use of government officials or the general public [*see, e.g., 18 Ops. Cal. Att'y Gen. 45, 47 (1951)]* .

Administrative power to investigate is very broad. The Supreme Court has said that the power to make administrative inquiry is not derived from a judicial function but is more analogous to the power of a grand jury, which does not depend on a case or controversy to get evidence (i.e., to inform itself) but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that the law is not being violated [*Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 529, 15 Cal. Rptr. 630, 364 P.2d 462]* .

[3] Investigative Hearings and Administrative Trials

[a] Role of Administrative Personnel

Administrative investigations may, but need not, be conducted in the form of a hearing. Where an investigation is being conducted in hearing form, it is important to understand the differences between such an investigative hearing and an administrative trial (i.e., an adjudicative hearing). See Ch. 473, *Public Agency Adjudication* , et seq., for discussion of adjudicative hearings that are administrative trials.

In an investigative hearing, agency personnel usually assume a relatively passive and neutral role. Their purpose is to gather information by hearing testimony, which they may sometimes have to elicit and which they have the power to compel by means of subpoena, and by receiving arguments from interested persons. In an administrative trial, on the other hand, agency personnel take an active role and assume an adversary position. Their purpose is not to gather information, since that task would already have been done in an investigation. The objective is to present evidence in the presence of an accused, to receive any evidence the accused wishes to present on his or her behalf, and to make a record of the evidence relating to the question of whether a license application should be granted or a license should be suspended or revoked.

[b] Procedural Rights of Subject

Since an administrative investigation that focuses on a licensee or a license applicant is analogous to a grand jury investigation [*Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 529, 15 Cal. Rptr. 630, 364 P.2d 462]* . The investigation does not result directly in a deprivation of the subject's liberty or property [*Hannah v. Larche (1960) 363 U.S. 420, 441, 80 S. Ct. 1502, 4 L. Ed. 2d 1307]* . The subject has virtually none of the procedural rights that are associated with the concept of procedural due process such as notice, an opportunity to appear (in person or by counsel) and refute evidence against him or her, and the right to judicial review of the agency's decision; a statute may, however, give the subject procedural rights, in which case due process requires that the statute be followed [*see McCartney v. Commission on Judicial Qualifications (1974) 12 Cal. 3d 512, 519, 116 Cal. Rptr. 260, 526 P.2d 268* ; *Rivera v. Division of Industrial Welfare (1968) 265 Cal. App. 2d 576, 586-588, 71 Cal. Rptr. 739]* . See further discussion in *§*

471.22.

[4] Mandatory vs. Discretionary Exercise of Investigative Power

A statute may expressly direct an agency to conduct an investigation in certain circumstances [*see, e.g., Lab. Code §§ 1173, 1181, 1187*; *Rivera v. Division of Industrial Welfare (1968) 265 Cal. App. 2d 576, 588, 71 Cal. Rptr. 739]* . The duty to investigate may also be inferred where the statutes are not explicit [*see, e.g., Goytino v. McAleer (1906) 4 Cal. App. 655, 657-659, 88 P. 991]* . The general rule is that where an agency is authorized to act in particular factual situations, it has a duty to make an investigation sufficient to ascertain whether the facts exist which may trigger administrative action [*see Laurelle v. Bush (1911) 17 Cal. App. 409, 415-416, 119 P. 953* ; *Goytino v. McAleer (1906) 4 Cal. App. 655, 658-659, 88 P. 991]* .

The head of each department in the state government has discretionary investigative power concerning virtually any subject in which he or she may have a legitimate official interest [*Gov. Code § 11180*]. Although there are only about 30 denominated departments in the state government, most of the agencies which in fact head the other 30-odd departments have the same power by reason of special statutory cross references to it [*see, e.g., Educ. Code § 89043* (trustees of the California state university system), *Water Code § 183* (State Water Resources Control Board)].

In addition, statutes governing a particular agency may give discretionary power to investigate [*see, e.g., Fish & Game Code § 1006*; *Gov. Code § 18670*]. In the absence of an applicable statute, courts will generally infer a grant of as much investvestigative power as an agency reasonably needs to accomplish the tasks assigned it by the Legislature [*see Laurelle v. Bush (1911) 17 Cal. App. 409, 119 P. 953]* .

An agency's discretionary power to investigate is very broad, but there are limits. The statutes which the agency purports to administer and pursuant to which it conducts an investigation are the source of its power, whether that power is expressly given or must be inferred. Hence, if an agency extends its investigation into an area not sanctioned by its governing law, the investigation may, to that extent, be stopped by injunction [*see Berkeley Chiropractic College v. Compton (1929) 97 Cal. App. 790, 791-793, 276 P. 361]* .

[5] Persons Subject to Investigation

[a] Licensees

Licensees and applicants for licenses obviously may be subject to administrative investigations. Licensing laws routinely require or allow it [*see, e.g., Bus. & Prof. Code § 23958*; *Health & Safety Code § 1421(a)*; *Veh. Code § 11714*].

[b] Nonregulated Persons

Administrative investigations often probe the affairs of persons not subject to regulation by the investigating agency [*see, e.g., People v. Hyde (1974) 12 Cal. 3d 158, 166, 115 Cal. Rptr. 358, 524 P.2d 830* (antihijacking search at airport); *Vidaurri v. Superior Court (1970) 13 Cal. App. 3d 550, 552, 91 Cal. Rptr. 704* (inspection of citrus trees in back yard, to detectpest infestation); *Tellis v. Municipal Court (1970) 5 Cal. App. 3d 455, 457, 85 Cal. Rptr. 459* (sanitation inspection of dwelling)]. In some cases, the subject of the investigation is even required by statute to cooperate [*see, e.g., Rev. & Tax. Code §§ 18401-18417, 18408* (tax returns)] or may be compelled by subpoena to give evidence [*see Redding Pine Mills v. State Bd. of Equalization (1958) 157 Cal. App. 2d 40, 43-45, 320 P.2d 25]* . Generally, if the agency has a legitimate official interest in getting the information it seeks, there can be no objection to the fact of the investigation. The methods used, however, might be subject to challenge, and the scope of the investigation or the extent to which the subject is compelled to cooperate may be questioned.

[c] Recipients of Social Services

Conditioning the continued receipt of welfare benefits on the recipient's acquiescence to periodic warrantless home visits for the purpose of uncovering fraud may be constitutional in some circumstances [*see Wyman v. James (1971) 400 U.S. 309, 317, 91 S. Ct. 381, 27 L. Ed. 2d 408]* , but there are limits to the practice [*see Parrish v. Civil Serv. Comm'n (1967) 66 Cal. 2d 260, 268-270, 57 Cal. Rptr. 623, 425 P.2d 223* (predawn raids on recipients' homes as unconstitutional invasion of privacy)]. Investigative methods such as cross checking information stored in separate agencies' electronic data banks are generally held constitutional [*see Carleson v. Superior Court (1972) 27 Cal. App. 3d 1, 10, 103 Cal. Rptr. 824]* .

County requirement of a home visit to an applicant's residence as a condition of receipt of CalWORKS benefits was held to be valid under state law. County requirement was not preempted by state law, did not violate fraud investigation requirements of *Welf. & Inst. Code § 11055.5*, and did not violate constitutional privacy rights of recipients [*Smith v. Los Angeles County Board of Supervisors (2002) 104 Cal. App. 4th 1104, 1109, 128 Cal. Rptr. 2d. 700]* .

[6] Statutory Scope of Authority

[a] General Requirements

Both federal and state law recognize that administrative agencies need information. Consequently, the law allows these agencies a broad investigative authority, a power of inquisition, that is analogous to a grand jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not [*United States v. Morton Salt Co. (1950) 338 U.S. 632, 642-643, 70 S. Ct. 357, 94 L. Ed. 401, 46 F.T.C. 1436* ; *Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 529, 15 Cal. Rptr. 630, 364 P.2d 462* ; *see* LaFave, *Search and Seizure* (2d ed. 1987), § 4.13(b)].

Agency investigative power is at bottom statutory. Either the agency is expressly authorized to investigate by a statute [*see, e.g., Bus. & Prof. Code § 4380* (Pharmacy Board authorized to investigate suspected violations of Pharmacy Act)], or the courts will infer a grant of as much investigative power as the agency needs to accomplish the tasks assigned it by the Legislature [*see Laurelle v. Bush (1911) 17 Cal. App. 409, 415-416, 119 P. 953* (power to license motion picture exhibitors implies power to inquire into propriety of granting license as being reasonably necessary to licensing power)].

Although agency investigative power is very broad, it is not limitless. If the power to investigate is not granted in and may not be implied from the statute that the agency is seeking to enforce, then the investigation is unlawful and may be enjoined [*Berkeley Chiropractic College v. Compton (1929) 97 Cal. App. 790, 793-794, 276 P. 361]* . It is, however, not sufficient grounds for a court challenge to an agency's investigative authority to claim that the subject of the investigation is outside the agency's jurisdiction. Determining whether a subject is within the scope of its jurisdiction is a proper matter for an agency to investigate [*Hill v. Brisbane (1944) 66 Cal. App. 2d 15, 18-21, 151 P.2d 578* (under doctrine of exhaustion of administrative remedies, hospital's claim of exemption from Unemployment Insurance Act was matter to be determined by Employment Commission)].

[b] Mandatory or Discretionary Authority

Sometimes the exercise of the investigative power is mandatory. For example, *Bus. & Prof. Code § 9882.5* commands the director of the Department of Consumer Affairs to investigate on a continuing basis to gather evidence of violations of the Automotive Repair Act. At other times, the exercise of the power is discretionary, as when *Bus. & Prof. Code § 5525* authorizes the State Board of Architectural Examiners to employ inspectors and investigators as it may deem necessary to carry out its duties. In addition to matters that an agency may have the sole or primary statutory authority to investigate, every department head has the discretionary authority to investigate anything that falls within the department's jurisdiction [*Gov. Code § 11180*; *see § 471.30[1]*]. Departments are categories of governmental functions.

The executive and administrative work of state government is divided into departments "as provided by law" [*Gov. Code § 11150*]. These departments are discussed, but not defined, in *Gov. Code §§ 11150-11201*. There are about 30 officially designated departments, such as the Department of Consumer Affairs [*Bus. & Prof. Code § 100*], and about 30 more de facto departments. See Ch. 470, *Overview of Public Administrative Law* , for further discussion and detail concerning specific agencies and their organization.

[7] Public Sources and Data Sharing, and the Right of Privacy

Much of the information acquired by an agency is obtained from public sources, such as the telephone book, or from other agencies. With the rapid development of computerized information systems, the exchange of data between agencies has been simplified. It was largely in recognition of this phenomenon and its attendant potential for abuse that the people of California amended *Cal. Const., art. I, § 1* to include a right of privacy [*see § 471.11[5]*. For discussion of right of privacy as a limit on agency subpoena power, see *§ 471.32[2][e]*. Notwithstanding California's express right of privacy, to date there have been few judicially imposed restraints on inter-agency information sharing for two principal reasons:

- Corporations enjoy neither the protections of *Cal. Const., art. I, § 1*, nor a fundamental right of privacy under the federal constitution [*Roberts v. Gulf Oil Corp. (1983) 147 Cal. App. 3d 770, 790-795, 195 Cal. Rptr. 393]* . As a result, many regulated businesses are not in a position to challenge inter-agency data exchange on privacy grounds.

- The courts are generally unwilling to find a violation of an individual's right of privacy when an agency uses internal or agency-shared information, so long as the agency uses the information for a purpose that is within the scope of the rule or statute that authorizes the agency to gather or use the information [*see Belmont v. State Personnel Bd. (1974) 36 Cal. App. 3d 518, 524-526, 111 Cal. Rptr. 607* (suspension of psychiatric social workers for failure to provide information on welfare recipients for entry into data base upheld on ground that storage of the information in computer for use by Department of Social Welfare did not violate privacy of recipients)].

Thus, for example, the disclosure of information about a welfare client to a Department of Public Welfare employee, whose duty it was to investigate allegations of welfare fraud, did not violate the client's right of privacy [*Haskins v. San Diego County Dept. of Public Welfare (1980) 100 Cal. App. 3d 961, 971, 161 Cal. Rptr. 385]* . If personal information gathered for agency use is communicated to the public, however, this is an invasion of privacy [*Central Valley Chap. 7th Step Foundation v. Younger (1979) 95 Cal. App. 3d 212, 236, 157 Cal. Rptr. 117* ; *see White v. Davis (1975) 13 Cal. 3d 757, 775, 120 Cal. Rptr. 94, 533 P.2d 222* (purposes of *Cal. Const., art. I, § 1*, include preventing the improper use of information properly obtained for a specific purpose)].

[8] Police Techniques Including Entrapment or Fraudulent Inducement

In addition to the informal information-gathering techniques cited in [7], *above*, investigating agencies also use more sophisticated techniques akinto those used by police, such as the use of undercover agents or decoys. An agency may not, however, use evidence in administrative proceedings when it was obtained by entrapment [*Patty v. Board of Medical Examiners (1973) 9 Cal. 3d 356, 362-367, 107 Cal. Rptr. 473, 508 P.2d 1121]* , or by fraudulent inducement [*Redner v. Workmen's Comp. Appeals Bd. (1971) 5 Cal. 3d 83, 93-95, 95 Cal. Rptr. 447, 485 P.2d 799]* .

For example, in one case the Supreme Court reversed the board's suspension of a doctor's license to practice, ruling that the doctor had been entrapped; lured and induced into unprofessional conduct by young women employed to ensnare him. The Court stressed the doctor's previously unblemished record and his illness at the time of the offense. The Court also noted that the employment of young women to obtain illegally prescribed drugs from elderly male doctors is not a new tactic to agents of the Board [*Patty v. Board of Medical Examiners (1973) 9 Cal. 3d 356, 361, 369, 107 Cal.*

Rptr. 473, 508 P.2d 1121] .

In another case, the California Supreme Court reversed the Workmen's Compensation Appeals Board, and ordered a referee's determination of permanent partial disability reinstated. One reason for the Court's decision was the use by the Board of motion picture evidence obtained by fraudulent inducement. The workers' compensation insurer hired an investigator. The investigator befriended plaintiff, invited plaintiff to his ranch, got plaintiff drunk, then took everyone horseback riding. The Court held that the pictures of plaintiff horseback riding could not be used to support the Board's decision that plaintiff was not disabled because this evidence had been obtained by fraud [*Redner v. Workmen's Comp. Appeals Bd. (1971) 5 Cal. 3d 83, 87, 93-95, 95 Cal. Rptr. 447, 485 P.2d 799]* .

[9] Records and Reports

Records that must be kept for or reports that must be made to an agency [*see § 471.10*] are another source of information for the investigating agency. While a regulating agency does have some power to coerce a regulated entity to surrender its documents or records by an implied threat to deny a license or impose a sanction, it is nonetheless true that almost all the information the agencies get from private parties comes in voluntarily [1 Davis, Administrative Law Treatise (2d ed. 1978), Ch. 4, "Investigation," § 4.4].

[10] Inspections and Discovery

An investigating agency may also obtain information through on-site inspections of specified areas of closely regulated activities. For example, *Bus. & Prof. Code § 25755* authorizes law enforcement officers to visit and inspect the premises of alcoholic beverage sales licensee. For detaileddiscussions and forms relating to inspections, see Ch. 471A, *Inspections by Public Agencies* .

Once formal proceedings have been initiated, an agency may continue to obtain information under pertinent administrative discovery provisions, principally the discovery provisions of the Administrative Procedure Act (APA) [*see Gov. Code §§ 11505, 11507.5 et seq.*; *see also* detailed discussion in Ch. 473B, *Discovery in Agency Adjudications*].

[11] Subpoenas

If other methods of information gathering prove unsatisfactory, an investigating agency may compel the production of information by the use of a subpoena [*City of Vacaville v. Pitamber (2004) 124 Cal. App. 4th 739, 21 Cal. Rptr. 3d 396* (city of Vacaville requested audit of hotel operator's records to determine compliance with city imposed transient occupancy tax. Hotel operator refused, city council issued subpoena, superior court ordered compliance, and Court of Appeal affirmed superior court order requiring hotel operator to comply with subpoena)]. For a discussion of the subpoena power exercised by administrative agencies, see *§ 471.30* et seq.

[12] Judicial Deferral to Pending Agency Investigations

When an action raises questions within the scope of a regulatory agency's purview, the court should defer to the agency's expertise [*Industrial Commun. Sys., Inc. v. Pacific Tel. & Tel. Co. (9th Cir. 1974) 505 F.2d 152, 156-157* ; *Pacific Bell v. Superior Court (1986) 187 Cal. App. 3d 137, 140, 231 Cal. Rptr. 574]* . This principle is known as the doctrine of primary jurisdiction. If an agency investigation is pending that encompasses issues involved in the court action, and if the agency has primary jurisdiction (for discussion regarding primary jurisdiction, *see* Ch. 474, *Availability of Judicial Review of Agency Decisions*), the court will defer to the agency by granting a stay of the action pending resolution of the investigation [*Pacific Bell v. Superior Court (1986) 187 Cal. App. 3d 137, 140-141, 231 Cal. Rptr. 574]* .

[13] Challenging Investigative Authority

The scope of an administrative investigation may be challenged in a lawsuit [*see, e.g., Berkeley Chiropractic College v. Compton (1929) 97 Cal. App. 790, 791-793, 276 P. 361* (injunction issued to stop overly broad investigation)]. It is not a ground for challenge, however, that the subject is not regulated by the investigating agency. The very purpose of the investigation might be to determine whether the subject belongs to the class of persons regulated by the agency [*see Hill v. Brisbane (1944) 66 Cal. App. 2d 15, 19, 151 P.2d 578]* . Nor would a challenge on the ground of violating the separation of powers doctrine be tenable [*see Globe Cotton Oil Mills v. Zellerbach (1927) 200 Cal. 276, 277, 252 P. 1038]* . For adiscussion of civil remedies for abuses of investigative power, see § 471.23, *below*.

[14] Public Attendance at Investigative Hearings

Whatever right the public has to attend an investigative hearing comes from statute, since there is no such right under the state or federal constitution [*see Hannah v. Larche (1960) 363 U.S. 420, 442-452, 80 S. Ct. 1502, 4 L. Ed. 2d 1307* (public investigative hearing as not required by due process)]. California law generally requires public meetings for both state agencies [*Gov. Code § 11120 et seq.*], and local agencies [*Gov. Code § 54950 et seq.* (Ralph M. Brown Act)], subject to some exceptions. This topic is discussed in Ch. 470B, *Public Agency Meetings* .

[15] Public Access to Investigative Data

Accessibility of information in agency files in California is governed by the California Public Records Act [*Gov. Code § 6250 et seq.*] The act generally requires disclosure of agency records to the public but specifies numerous categories of records that are exempt from the general disclosure requirement.

Of particular interest in administrative proceedings to obtain information is the following category of items exempt from general disclosure: "Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, ... any state or local police agency, ... or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes" [*Gov. Code § 6254(f*); *see American Civil Liberties Union Foundation v. Deukmejian (1982) 32 Cal. 3d 440, 450, 452, 186 Cal. Rptr. 235, 651 P.2d 822* (definition of "intelligence information")].

This exemption is qualified by a listing of *information* that must be disclosed, even though the *records* containing the information may be withheld [*Gov. Code § 6254(f*); *Williams v. Superior Court (1993) 5 Cal. 4th 337, 348-350, 19 Cal. Rptr. 2d 882, 852 P.2d 377]* . However, the requirement to disclose specified information does not apply if the disclosure would have certain specified undesirable consequences (such as endangering a person involved in an investigation).

Also, on the request of a victim or the parent or guardian of a minor victim, when information is disclosed concerning any of numerous specified sex crimes and crimes involving interference with civil rights, the victim's identity or the nature of the crime may be withheld [*Gov. Code § 6254(f*); *Williams v. Superior Court (1993) 5 Cal. 4th 337, 350, 19 Cal. Rptr. 2d 882, 852 P.2d 377]* .

An "investigatory file" exempt from disclosure under this statute is one containing information relating to a proceeding for correctional, law enforcement, or licensing purposes, when there is a concrete and definite prospect that the proceeding will be held [*Williams v. Superior Court (1993) 5 Cal. 4th 337, 355-356, 19 Cal. Rptr. 2d 882, 852 P.2d 377* ; *Uribe v. Howie (1971) 19 Cal. App. 3d 194, 212-213, 96 Cal. Rptr. 493]* . A law enforcement purpose is one in aid of enforcing the penal laws [*State of California ex rel. Division of Industrial Safety v. Superior Court (1974) 43 Cal. App. 3d 778, 783-784, 117 Cal. Rptr. 726]* . A record that is not itself exempt from disclosure can become exempt from disclosure by being "compiled" into an exempt "investigatory file" [*Williams v. Superior Court (1993) 5 Cal. 4th 337, 354, 19 Cal. Rptr. 2d 882, 852 P.2d 377]* . Consumer complaints to an agency are exempt from disclosure whether or not they are in any investigatory file [*Black Panther Party v. Kehoe (1974) 42 Cal. App. 3d 645, 650-654,*

117 Cal. Rptr. 106] .

The exemption from disclosure that covers investigatory files does not end when the investigation ends. While there may be reasons of policy that would support a time limitation on the exemption for investigatory files, such a limitation is virtually impossible to reconcile with the language and history of *Gov. Code § 6254(f)* [*Williams v. Superior Court (1993) 5 Cal. 4th 337, 355, 360-362, 19 Cal. Rptr. 2d 882, 852 P.2d 377]* . In addition to the general exemptions from disclosure set out in the California Public Records Act [*Gov. Code § 6250 et seq.*], there are many specific exemptions in statutes governing particular agencies [*see, e.g., Fish & Game Code § 8022*; *Gov. Code § 18934*; *Welf. & Inst. Code § 10850*].

For detailed discussion and forms relating to disclosure under the California Public Records Act, see Ch. 470C, Public Records Act.

[16] Divulging Evidence of Unlawful Activity

In connection with investigations and actions, a state agency department head may divulge evidence of unlawful activity discovered from records or testimony not otherwise privileged or confidential to the Attorney General or to any prosecuting attorney who has a responsibility for investigating the unlawful activity discovered, or to any government agency responsible for enforcing laws related to the unlawful activity discovered [*Gov. Code § 11181(g)*]. Except in reporting to the department head or when called on to testify in any court or proceeding at law or as provided in *Gov. Code § 11181(g)*, any officer who divulges information acquired from private books, documents, or papers of any person, while acting or claiming to act under an authorization pursuant to an investigation or hearing, is guilty of a misdemeanor and disqualified from acting in any official capacity in the department [*Gov. Code § 11183*].

[17] Discovery of Agency Investigative Documents

The Court of Appeal held that for purposes of civil discovery, in litigation between the People of the State of California and vision companies forviolations of optometry practice statutes, that state agencies, who were not parties to the lawsuit, were separate entities from the state attorney general's office, who represented the People in the civil lawsuit, and the attorney general's office could not be compelled under *Code Civ. Proc. § 2031* [repealed 2004] to produce documents in the possession of those non-party state agencies, such as the Department of Consumer Affairs, unless the agency had a role in investigating the matter that was subject to litigation [*People ex rel. Lockyer v. Superior Court (2004) 122 Cal. App. 4th 1060, 1076-1078, 1080, 19 Cal. Rptr. 3d 324]* . The court cited and relied upon the Court of Appeal decision in *People v. Superior Court (2000) 80 Cal. App. 4th 1305, 1309, 96 Cal. Rptr. 2d 264* (people not required to produce in criminal discovery records in possession of California Department of Corrections (CDC) because CDC was not investigating agency in prison murder prosecution). For other non-party state agencies, the documents could only be compelled by issuing a subpoena for production of documents to the agency itself. Production of these documents could not be compelled by serving a deposition notice on the attorney general's office. For this purpose, those other agencies were treated as non-party witnesses, and not as officers or agents of the Attorney General's office [*People ex rel. Lockyer v. Superior Court (2004) 122 Cal. App. 4th 1060, 1076-1078, 1080, 19 Cal. Rptr. 3d 324]* . For purposes of civil discovery, different state agencies are separate entities, and this is consistent with the structure of those agencies under various statutory provisions that create and empower these agencies [*Gov. Code § 11180* (investigatory authority of department heads)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 471.21 Investigative Hearing

[1] Not Required

There is no constitutional requirement that an investigation be conducted in the form of a hearing [*see Hannah v. Larche (1960) 363 U.S. 420, 442, 80 S. Ct. 1502, 4 L. Ed. 2d 1307* ; *McCartney v. Commission on Judicial Qualifications (1974) 12 Cal. 3d 512, 519, 116 Cal. Rptr. 260, 526 P.2d 268* ; *In re Bye (1974) 12 Cal. 3d 96, 100-101, 115 Cal. Rptr. 382, 524 P.2d 854]* , nor is there any general statutory requirement for an investigative hearing. However, particular statutes may require a hearing, and there is general statutory authorization to conduct an investigation in the form of a hearing if the agency so chooses [*see Gov. Code § 11181*].

[2] Notice

Notice to the person who is the subject of a hearing is required only when the hearing is adjudicative [*San Diego Bldg. Contractors Assn. v. City Council (1974) 13 Cal. 3d 205, 217, 118 Cal. Rptr. 146, 529 P.2d 570]* . If the hearing is merely investigative, notice to the subject is not required unless a statute mandates notice [*McCartney v. Commission on JudicialQualifications (1974) 12 Cal. 3d 512, 519-520, 116 Cal. Rptr. 260, 526 P.2d 268]* . There is no general statutory notice requirement.

[3] Apprisal, Confrontation, and Cross Examination

Unless a statute gives the right, the subject of an investigative hearing has no right to be informed of the nature and substance of complaints against him, no right to confront witnesses against him, and no right to cross examine witnesses [*Hannah v. Larche (1960) 363 U.S. 420, 441-443, 448, 80 S. Ct. 1502, 4 L. Ed. 2d 1307]* . There is no general statute giving any of these rights.

[4] Right to Testify

Although the point has not been litigated in California, it appears that the subject of an investigative hearing has no right to appear and testify on his or her own behalf, since he or she has no right to notice, apprisal, confrontation, or cross

examination.

[5] Right to Counsel

[a] Sixth Amendment

The constitutional right to the assistance of counsel [*see U.S. Const., amend. VI*; *Cal. Const., art. I, § 15*] exists only in criminal prosecutions. There is no constitutional right to counsel in civil proceedings, even those in which an important right or a property interest of a party is at stake [*Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 539-540, 92 Cal. Rptr. 525]* . Administrative proceedings are civil in nature. Even proceedings to revoke or suspend a license or to carry out other administrative action of like nature are not criminal or quasi criminal. The purpose of such a proceeding is not to punish the subject; rather, the purpose is to protect the public. Public respect for and confidence in persons regulated by the state depends on disciplining and removing dishonest, immoral, disreputable, and incompetent practitioners [*Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 540, 92 Cal. Rptr. 525]* .

[b] Due Process

The assistance of counsel for witnesses and subjects of administrative investigations is not an essential element of due process [*see In re Groban (1957) 352 U.S. 330, 332-333, 335, 77 S. Ct. 510, 1 L. Ed. 2d 376]* .

[c] Statutory Provisions

Under federal law, a person subpoenaed to appear at an investigative proceeding may be accompanied and represented by counsel [*5 U.S.C. § 555(a)*; *United States v. Smith (D. Conn. 1949) 87 F. Supp. 293, 294* (construing predecessor statute)]. Under California law, however, a person subpoenaed to appear at an investigative proceeding has no such right. The Administrative Procedure Act, or APA (*Gov. Code § 11340 et seq.*) guaranties the assistance of counsel only for persons who are subjects of state adjudicative proceedings [*see Gov. Code §§ 11505(b), 11509*].

No statute forbids a witness's being accompanied or represented by counsel when appearing at an investigative proceeding. However, the agency conducting the investigation has power to exclude a witness's counsel or to limit counsel's participation to merely advising the witness, since a witness has no right to be accompanied or represented by counsel.

[6] Nonattorney Representation

An agency has power to permit a witness's being accompanied or represented at an investigative proceeding by someone other than an attorney. This power is specifically acknowledged by federal law [*see 5 U.S.C. § 555(b)*; Local Union No. 742, *United Brotherhood of Carpenters & Joiners of America v. National Labor Relations Bd. (D.C. Cir. 1967) 377 F.2d 929, 930, 126 U.S. App. D.C. 290]* . Persons appearing at an Internal Revenue Service proceeding have a right to be represented by a certified public accountant [*5 U.S.C. § 500(c)*]. State and local agencies have this power, even though state law does not acknowledge it. No statute withholds the power.

An artifical person, such as a corporation, must necessarily be represented by someone, since an artificial person has no corporeal existence. A subpoena directed to a corporation, for instance, implicitly commands the appearance of those persons who are responsible for conducting its affairs [*Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 528 n.1, 15 Cal. Rptr. 630, 364 P.2d 462]* .

[7] Place of Attendance

Gov. Code § 11185 provides that a person is not obliged to attend as a witness in any matter under *Gov. Code § 11180 et seq.* (governing investigations by state agencies) at a place out of the county in which he resides, unless the distance

is less than 50 miles from his place of residence. The policy embodied in this provision is to spare a person undue hardship by limiting the distance that he can be required to travel for the purpose of giving evidence [*In re Morelli (1970) 11 Cal. App. 3d 819, 831, 91 Cal. Rptr. 72* (construing *Code Civ. Proc. § 1989*)].

Application of this provision depends on determining a witness's place of residence. Residence is an elusive and indefinite term [*Briggs v. Superior Court (1947) 81 Cal. App. 2d 240, 245, 183 P.2d 758]* . Probably the best definition for use in the present context is any place with which the witness has a sojourning connection. Presumably, if a witness goes to or remains at a given place periodically in the course of conducting his or her affairs, he or she would suffer no undue hardship in being compelled to attenda legal proceeding at that place. Thus, a witness's residence for the purpose of applying *Gov. Code § 11185* and *Code Civ. Proc. § 1989* could be the place where he or she receives mail and maintains a telephone, even though he or she does not live there [*see In re Morelli (1970) 11 Cal. App. 3d 819, 831, 832, 91 Cal. Rptr. 72]* .

Gov. Code § 11185 governs only those investigations conducted pursuant to *Gov. Code § 11180 et seq.* When an agency exercises a subpoena power given by other statutes, *Gov. Code § 11185* has no effect. For example, the Corporations Commissioner has power under the Corporate Securities Act of 1968 (*Corp. Code § 25000 et seq.*), and under the California Commodity Law of 1990 (*Corp. Code § 29500 et seq.*), and under the Franchise Investment Law (*Corp. Code § 31000 et seq.*), to issue subpoenas for the attendance of witnesses at investigative proceedings [*Corp. Code §§ 25531(c), 29541, 31401*]. None of these laws contains an exemption provision similar to *Gov. Code § 11185* that would be applicable in an investigation under any of these laws. Therefore, a witness subpoenaed pursuant to the commissioner's special power under any of these laws is obliged to attend at any place within the state.

[8] Costs and Expenses

[a] Witnesses

An officer or employee of the state or of a political subdivision of the state who appears at an investigative proceeding pursuant to a subpoena is not entitled to any fee, but he or she is entitled to a mileage allowance. Any other witness appearing pursuant to a subpoena is entitled to both a fee and a mileage allowance. The amounts of fees and mileage allowances are the same as those for witnesses in civil cases: $35 for each day of actual attendance; $.20 for each mile actually traveled, one way. They are payable by the agency which issued the subpoena [*Gov. Code § 11191*; *see Gov. Code § 68093* (amounts)].

The general rule is that witnesses in civil cases may demand the payment of their mileage and fees for one day, in advance, and, when so demanded, shall not be compelled to attend until the allowances are paid [*Gov. Code § 68097*]. Witnesses served with an administrative subpoena may have the same right [*see McLeod v. Board of Pension Commissioners (1970) 14 Cal. App. 3d 23, 31, 94 Cal. Rptr. 58]* . Exceptions to the rule apply to employees of the Department of Justice who are peace officers or analysts in technical fields, members of the California Highway Patrol (including vehicle inspection specialists), members of the California State Police, peace officer in the State Fire Marshal's office, other state employees, sheriffs, deputy sheriffs, marshals, deputy marshals, district attorney inspectors, probation officers, building inspectors, firefighters, and city police officers [*Gov. Code § 68097*]. These exceptions are set out in *Gov. Code § 68097.1 et seq.* For discussion, see *Ch. 535, Subpoena, § 535.19*.

[b] Litigants in Enforcement Proceeding

The prevailing party in a proceeding for enforcement of an administrative subpoena is probably entitled to recover costs. The enforcement proceeding is a special proceeding [*see Code Civ. Proc. §§ 22, 23*]. The prevailing party in a special proceeding is entitled to recover costs unless the law governing the proceeding prohibits recovering costs or leaves the award of costs to the discretion of the court [*see Code Civ. Proc. § 1032*; *Schmidt v. Klotz (1900) 130 Cal. 223, 224, 62 P. 470* (construing predecessor statute); *see also Code Civ. Proc. §§ 1028, 1029* (costs as recoverable

against state or local agency)]. The law governing an enforcement proceeding neither prohibits recovering costs nor leaves the award of costs to the discretion of the court. Therefore, it appears that costs may be recovered.

Code Civ. Proc. § 1032 provides that except as otherwise provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding [*Code Civ. Proc. § 1032(b)*]. The term "prevailing party" includes (a) the party with a net monetary recovery; (b) a defendant in whose favor a dismissal is entered; (c) a defendant where neither plaintiff nor defendant obtains any relief; and (d) a defendant as against those plaintiffs who do not recover any relief against that defendant [*Code Civ. Proc. § 1032(a)(4)*]. In any other situation, the prevailing party must be as determined by the court and, under those circumstances, the court in its discretion may allow costs or not and, if allowed, may apportion costs between the parties on the same or adverse sides pursuant to rules adopted under *Code Civ. Proc. § 1034* [*Code Civ. Proc. § 1032(a)(4)*]. For detailed discussion and forms relating to the recovery of costs under these and related provisions, see Ch. 174, *Costs and Attorney's Fees* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 471.22 Investigative Remedies

[1] Injunctive Relief

[a] Suit by Subject of Investigation

The subject of an administrative investigation may obtain injunctive relief when the investigation is outside the scope of the agency's authority [*see Berkeley Chiropractic College v. Compton (1929) 97 Cal. App. 790, 793, 276 P. 361]* , when the statute pursuant to which the agency acts is unconstitutional [*see Bueneman v. City of Santa Barbara (1937) 8 Cal. 2d 405, 407, 65 P.2d 884]* , or when the agency is acting unconstitutionally [*see Downing v. Cal. State Board of Pharmacy (1948) 85 Cal. App. 2d 30, 36, 192 P.2d 39]* .

For a form of complaint, see *§ 471.70*.

Injunctive relief is not available to prevent the execution of a public statute, by officers of the law, for the public benefit [*Civ. Code § 3423(f)*; *see Code Civ. Proc. § 526(b)(6)*]. Neither is injunctive relief available wherepecuniary compensation would afford adequate relief [*see Civ. Code § 3422*; *Code Civ. Proc. § 526*].

Under the California Tort Claims Act (*Gov. Code § 810 et seq.*), administrative agencies and their employees are immune from liability for injury caused by an employee's beginning any administrative proceeding within the scope of his or her employment, even if he or she acts maliciously and without probable cause [*Gov. Code § 821.6*]. Therefore, a person who is wrongfully subjected to an investigation will often be unable to obtain compensatory relief. For discussion and forms relating to actions against agencies or agency officers under the Tort Claims Act, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

School district employees, who investigated violation of prevailing wage law which led to withholding of public works contract payments to contractor by school district and who also testified at reasonable cause hearing related to payment withholding, had immunity from civil rights liability for damages under Section 1983 for testifying at an administrative hearing. The parties' disagreement about the application of relevant law to known facts did not give rise to civil rights violations [*Mobley v. Los Angeles Unified School Dist. (2001) 90 Cal. App. 4th 1221, 1238-1240]* .

[b] Suit by Taxpayer

A taxpayer who has standing under *Code Civ. Proc. § 526a* may obtain injunctive relief to prevent the illegal expenditure or waste of, or injury to, the estate, funds, or property of a county, town, city, or city and county. This is an indirect means of stopping or preventing an unlawful administrative investigation [*see, e.g.,* *Wirin v. Horrall (1948) 85 Cal. App. 2d 497, 504-505, 193 P.2d 470]* . For a form of complaint, see *§ 471.71*.

Code Civ. Proc. § 526a refers to resident taxpayers, but a nonresident taxpayer who otherwise has standing under that statute may sue [*Irwin v. Manhattan Beach (1966) 65 Cal. 2d 13, 19-20, 51 Cal. Rptr. 881, 415 P.2d 769]* .

Although no statute authorizes a similar taxpayer action against state officials concerning state funds or property, a state taxpayer may sue for similar relief [*see, e.g.,* *California State Employees' Assn. v. Williams (1970) 7 Cal. App. 3d 390, 392, 86 Cal. Rptr. 305* ; *Ahlgren v. Carr (1962) 209 Cal. App. 2d 248, 254, 25 Cal. Rptr. 887* ; *see also* *Duskin v. San Francisco Redevelopment Agency (1973) 31 Cal. App. 3d 769, 773, 107 Cal. Rptr. 667]* . See also discussion and forms in Ch. 303, *Injunctions* .

[2] Civil Rights Act of 1871

If an investigation entails deprivation of federal constitutional rights, an action for appropriate relief may be brought in a state court [*Brown v. Pitchess (1975) 13 Cal. 3d 518, 521-523, 119 Cal. Rptr. 204, 531 P.2d 772]* pursuant to the Civil Rights Act of 1871 [*42 U.S.C. § 1983*]. A state or county may not be sued under the Civil Rights Act of 1871 for damages, as it is not a "person" within the meaning of the act [*see* *Diamond v. Pitchess (9th Cir. 1969) 411 F.2d 565, 567* ; *Taylor v. Mitzel (1978) 82 Cal. App. 3d 665, 670, 147 Cal. Rptr. 323]* . Similarly, a civil rights action for damages under *42 U.S.C. § 1983* cannot be brought against an administrative agency of a state [*Sykes v. California (Dep't of Motor Vehicles) (9th Cir. 1974) 497 F.2d 197, 201-202* (Department of Motor Vehicles not a "person" within meaning of act; *overruled on other grounds* in *Life Ins. Co.of N. America v. Reichardt (9th Cir. 1979)591 F.2d 499, 503 n.7*); *see* *Heath v. Redbud Hosp. Dist. (ND Cal. 1977) 436 F. Supp. 766, 767-768]* . The court in *Sykes* partially relied on *Monroe v. Pape (1961) 365 U.S. 167, 189-192, 81 S. Ct. 473, 5 L. Ed. 2d 492* , which held municipalities to be immune from suit under the act. However, *Monroe* was overruled in *Monell v. Dep't of Soc. Servs. (1978) 436 U.S. 658, 663, 694-695, 701, 98 S. Ct. 2018, 56 L. Ed. 2d 611* , in which the United States Supreme Court determined that local governments are not absolutely immune from civil liability under *42 U.S.C. § 1983*. The Court stated that when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts an injury, the government as an entity is responsible under *42 U.S.C. § 1983*.

The Court extended the holding of *Monell* in *Owen v. City of Independence (1980) 100 S. Ct. 1398* , in which it held that municipalities do not have any qualified immunity for good-faith constitutional violations under *42 U.S.C. § 1983*. Nevertheless, since the *Monell* and *Owen* decisions involved only suits against local governments and municipalities, it is not clear if these decisions change the rule that state agencies and states are immune from liability for damages under the Civil Rights Act.

It should be noted that governmental agencies may be sued for injunctive relief alone under *42 U.S.C. § 1983* to prevent continuing violations of federal statutes [*Ybarra v. Los Altos Hills (N.D. Cal. 1973) 370 F. Supp. 742, 746]* . Employees of public agencies are subject to suit under *42 U.S.C. § 1983* [*see, e.g.,* Ybarra v. Los Altos Hills (9th Cir. [Cal] 1974) *503 F.2d 250, 252-253]* .

For additional discussion of the liability of agencies under *42 U.S.C. § 1983*, and of qualified immunity based on good faith, Ch. 112, *Civil Rights: Government-Funded Programs and Activities*.

[3] Damages for Failure to Investigate and Negligent Investigation

Neither a public agency nor a public employee is liable for injuries caused by failure to make an inspection of property to determine if it complies with health and safety standards, except where the property belongs to theagency itself [*Gov. Code §§ 818.6, 821.4*]. This immunity does not extend to such investigative acts as testing substances for toxicity [*Sava v. Fuller (1967) 249 Cal. App. 2d 281, 292-293, 57 Cal. Rptr. 312]* , or checking the qualifications of foster parents [*Elton v. County of Orange (1970) 3 Cal. App. 3d 1053, 1059, 84 Cal. Rptr. 27]* .

Public employees and agencies are generally immune from liability for injuries caused by discretionary acts, even when discretion was abused [*Gov. Code §§ 815.2(a), 820.2*; *see* Ch. 464, *Public Entities and Officers: California Tort Claims Act*]. This immunity extends to making basic policy decisions only, however, and not to discretionary acts in the course of implementing those decisions [*Johnson v. State of California (1968) 69 Cal. 2d 782, 793, 73 Cal. Rptr. 240, 447 P.2d 352]* . Therefore, it probably protects agencies and employees from liability arising from deciding whether or not to make an investigation, when that decision is not governed by a mandatory statute; but it would not protect against liability arising from the negligent conduct of an investigation.

[4] Writ of Mandate to Compel Investigation

When an agency is directed by law to conduct an investigation, or when it is an abuse of discretion not to conduct an investigation, the agency may be compelled by a writ of mandate to conduct whatever investigation is reasonably called for [*see Faulkner v. California Toll Bridge Auth. (1953) 40 Cal. 2d 317, 326-334, 253 P.2d 659]* . For example, when the county charter required the board of supervisors to investigate prevailing wages in private industry before fixing compensation for civil service employees, that investigation was subject to the compulsion of a writ of mandate [*Walker v. County of Los Angeles (1961) 55 Cal. 2d 626, 639, 12 Cal. Rptr. 671, 361 P.2d 247]* . For a discussion of mandate proceedings and suitable forms, see Ch. 358, *Mandate and Prohibition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsGeneral OverviewAdministrative LawSeparation of PowersLegislative ControlsScope of Delegated AuthorityCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionCivil Rights LawImmunity From LiabilityLocal OfficialsGeneral OverviewCivil Rights LawSection 1983 ActionsGeneral OverviewGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsLocal GovernmentsFinanceGovernmentsState & Territorial GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsFinanceTortsPublic Entity LiabilityImmunityAbsolute ImmunityTortsPublic Entity LiabilityImmunityQualified ImmunityTortsPublic Entity LiabilityLiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview

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Chapter 471 INVESTIGATIONS BY PUBLIC AGENCIES
PART II. LEGAL BACKGROUND
B. Agency Investigations

41-471 California Forms of Pleading and Practice--Annotated §§ 471.23-471.29

[Reserved]

§§ 471.23[Reserved]

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Chapter 471 INVESTIGATIONS BY PUBLIC AGENCIES
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C. Agency Subpoena Power

41-471 California Forms of Pleading and Practice--Annotated § 471.30

§ 471.30 Power of Agencies to Issue Subpoenas

[1] Nature and Purpose of the Power

[a] Statutory Authority

A grant of subpoena power to an agency allows it to carry out its rulemaking, adjudicatory, and investigative functions. The power to subpoena is not an inherent power of an agency, but must be authorized by statute [*see* 18 Ops. Cal. Atty. Gen. 236 (1951)]. If the agency is a local agency, the subpoena power may be conferred by local ordinance as well as by statute [*see* 18 Ops. Cal. Atty. Gen. 236 (1951)]. If there is nostatutory grant of express or implied power to issue subpoenas, then the agency does not have this power, because the authority to issue subpoenas exists inherently only in courts of law [Wigmore, *Evidence* (McNaughton rev. 1961), § 2195].

While a state agency subpoena may be issued under the APA (*see Gov. Code § 11450.10 et seq.*), if the discovery process in an adjudicatory proceeding [*see* Ch. 473B, *Discovery in Agency Adjudications* , and Ch. 473F, *Agency Adjudication Hearings* , for a discussion of this process], the primary issuance of an "administrative" subpoena by a state agency occurs pursuant to *Gov. Code § 11180 et seq.*

Although nothing in *Gov. Code § 11180 et seq.* precludes the agency from using administrative subpoenas for information gathering purposes after the initiation of California APA or non-APA proceedings, the administrative subpoena is most commonly used to compel testimony or production of documents during a state agency investigation [*DuFauchard v. U.S. Financial Management, Inc. (4th Dist., 2009) 169 Cal. App. 4th 1502, 1514-1516, 87 Cal. Rptr. 3d 615* (investigative subpoena that sought records related to non-California residents business activities with California company was proper and valid because agency had proper investigative authority under *Gov. Code § 11180*, and *Fin. Code § 12106*; *State ex rel. Dept. of Pesticide Regulation v. Pet Food Exp. Ltd. (3rd Dist. 2008)165 Cal. App. 4th 841, 853-855, 81 Cal. Rptr. 3d 486* (order compelling compliance with investigative subpoena was valid because records sought were reasonably relevant and production of documents under subpoena did not violate *Fourth Amendment* protections against unreasonable searches and seizures)].

The subpoena power of state agencies is governed mainly by *Gov. Code §§ 11181, 11184*, and *11186-11188*, but may

also be governed by statutes relating to particular agencies [*see, e.g., Gov. Code § 18671* (Personnel Board); *Ins. Code § 12924(a)* (Insurance Commissioner); *Water Code § 1080* (Water Resources Control Board)].

A state agency may issue subpoenas for the attendance of witnesses and the production of books, papers, accounts, documents, and testimony, in any proceeding pertinent or material to an investigation, in any part of the state [*Gov. Code § 11181*]. The only condition precedent is that an investigation be underway. It may be any kind of authorized investigation [*see Paladini v. Superior Court (1918) 178 Cal. 369, 373, 173 P. 588]* , and it is not necessary that any adjudicative proceeding be pending [*Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 528-529, 15 Cal. Rptr. 630, 364 P.2d 462* ; *see United States v. Morton Salt Co. (1950) 338 U.S. 632, 651-654, 70 S. Ct. 357, 94 L. Ed. 401, 46 F.T.C. 1436* (regulatory agency's prerogative to subpoena corporate records merely to ascertain whether corporation is complying with law)].

There is no general statutory authorization for local agencies to issue subpoenas, but particular agencies are specially authorized [*see, e.g., Gov. Code §§ 25170,* (boards of supervisors), 31110.2 (county civil service commission), 37104 (city councils); *Health & Safety Code § 34318(b)* (local housing authority); *Pub. Util. Code § 28773* (Bay Area Rapid Transit Board of Directors); *Rev. & Tax Code §§ 454* (county tax assessor), 1609.4 (local board of equalization)].

The Sixth District California Court of Appeal upheld the enforcement of a subpoena duces tecum authorized by the City of Santa Cruz under the statutory authority of *Gov. Code § 37104* for the purposes of conducting a tax compliance audit of a hotel operators records to determine compliance with a city imposed transient occupancy tax that must be collected from guests by the hotel, and then remitted to the city [*City of Santa Cruz v. Patel (2007) 155 Cal. App. 4th 234, 239-240, 65 Cal. Rptr. 3d 824]* . The court of appeal held that the superior court orders compelling compliance with the subpoena duces tecum issued under the statutory authority of *Gov. Code § 37104* are final judgments that are appealable under *Code Civ. Proc. § 904.1* [*City of Santa Cruz v. Patel (2007) 155 Cal. App. 4th 234, 241-243, 65 Cal. Rptr. 3d 824]* . The California Court of Appeal also rejected constitutional challenges to the hotel transient occupancy text based upon due process of law (void for vagueness) and based on equal protection of the laws [*City of Santa Cruz v. Patel (2007) 155 Cal. App. 4th 234, 247-249, 65 Cal. Rptr. 3d 824]* . Finally, the California Court of Appeal upheld the validity of the subpoena, and rejected a challenge based upon the *Fourth Amendment*. The court held that subpoena issuance did not require a showing by the city of probable cause that the hotel was not complying with the requirements of the tax ordinance [*City of Santa Cruz v. Patel (2007) 155 Cal. App. 4th 234, 249-251, 65 Cal. Rptr. 3d 824]* . Subpoena enforcement does not require a search warrant, but does require a showing that: 1) the subpoena was authorized by an ordinance or similar enactment; 2) the subpoena serves a valid legislative purpose; and 3) the records sought are reasonable relevant to the subject matter of the investigation [*Connecticut Indemnity Co. v. Superior Court (2000) 23 Cal. 4th 807* , 810, *98 Cal. Rptr. 2d 221, 3 P.3d 868]* . The Court of Appeal upheld the validity of this subpoena concluding that the tax compliance audit of an uncooperative taxpayer was authorized by the ordinance and served a valid legislative purpose, and the subpoena sought relevant records. There was a right to judicial review. Thus, the subpoena was valid and enforceable [*City of Santa Cruz v. Patel (2007) 155 Cal. App. 4th 234, 250-252, 65 Cal. Rptr. 3d 824]* .

The California Court of Appeal upheld the enforcement of a subpoena duces tecum authorized by the City Council of Vacaville, and issued by the Mayor of Vacaville under the statutory authority of *Gov. Code § 37104*. The subpoena was issued for the purpose of auditing a hotel operator's records to determine whether the operator had complied with the cityimposed transient occupancy tax. The Court of Appeal held that using the subpoena power to conduct tax audits was part of a valid legislative investigation authorized by *Gov. Code § 37104* [*City of Vacaville v. Pitamber (2004) 124 Cal. App.4th 739, 747-748, 21 Cal. Rptr. 3d 396]* . In so holding, the Court of Appeal cited and relied upon the California Supreme Court decision in *Connecticut Indemnity Co. v. Superior Court (2000) 23 Cal 4th 807, 810, 98 Cal. Rptr. 2d 221, 3 P. 3d 868* , which upheld the use of an investigative subpoena by a city when there was no formal proceeding before the city at the time of the investigation.

The provisions of *Gov. Code § 11180 et seq.* authorize each department (*see § 471.20[1][b]* for discussion of

departments) of state government to investigate any matter under its jurisdiction [*People ex rel. Franchise Tax Bd. v. Superior Court (1985) 164 Cal. App. 3d 526, 537, 210 Cal. Rptr. 695]* . *Gov. Code § 11180* provides that the head of each state department may investigate the following:

- All matters relating to the business activities and subjects under the department's jurisdiction.
- The violation of any law or any rule or order of the department.
- Any other matter that some rule of law authorizes the department to investigate.

[b] Issuance of Subpoena

Administrative subpoenas are to be issued by the "heads of state departments" [*Gov. Code § 11181(e)*; *see* Ch. 470, *Overview of Public Administrative Law* (discussing heads of departments)]. In practice, subordinates routinely issue subpoenas pursuant to a delegation or power [*see Gov. Code § 11182*]. Subpoenas duces tecum may be issued without any supporting affidavit, in contrast to the practice respecting civil subpoenas duces tecum [*see Code Civ. Proc. §§ 1985, 2020(d)(1), (e)*]. The reason is that there is no applicant. The agency issuing the subpoena is in the position of a judge issuing a subpoena on his or her own behalf. The person to whom an administrative subpoena duces tecum is directed has the equivalent of the protection given by civil procedure, however, because the agency is powerless to enforce its own subpoena. The agency must turn to a court for enforcement. Thus, whereas judicial review of the propriety of issuing the subpoena precedes issuance of a civil subpoena duces tecum, it follows issuance of an administrative subpoena duces tecum. The person to whom the subpoena is directed has the same amount of protection in either case.

Except for prescribing who may serve an administrative subpoena [*see Gov. Code § 11184*], the Government Code is silent on the manner of service. Therefore, the Supreme Court has held that administrative subpoenas should be served in the same manner as service of summons in a civil action [*see Code Civ. Proc. § 413.10 et seq.*; for discussion, *see* Ch.518, *Service of Summons and Papers*], to the extent the governing statutes can be adapted; substantial noncompliance with those statutes may render the subpoena unenforceable [*Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 530-531, 15 Cal. Rptr. 630, 364 P.2d 462]* .

As part of an investigation, *Gov. Code § 11181* authorizes the department to inspect books and records [*Gov. Code § 11181(a)*; *see* Ch. 471A, *Investigations by Public Agencies*], and to issue subpoenas to compel the attendance of witnesses and the production of papers, books, accounts, and documents [*Gov. Code § 11181(e)*]. The power to issue subpoenas may be delegated by the agency head to "any officer of the department" [*Gov. Code § 11182*]. In practice, subordinates routinely issue subpoenas pursuant to a delegation or power. Department heads also have the authority to promulgate interrogatories pertinent or material to any inquiry, investigation, hearing, proceeding, or action [*Gov. Code § 11181(f)*].

[2] Geographic Scope

State agency subpoenas may be issued in any part of the state, and state agency heads may designate any person to serve process for the department [*Gov. Code § 11184*]. The geographic scope of local agency subpoenas must be found in the applicable statute or ordinance. If the law is silent on the subject of jurisdiction, it is not clear whether a local agency subpoena is enforceable outside its local boundaries.

[3] Confidentiality

Gov. Code § 11183 makes the information acquired by an investigating agency confidential [*see Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 673 n.2, 678, 156 Cal. Rptr. 55]* . An officer who divulges

information that he or she has acquired from private documents while acting or claiming to act under the authority of *Gov. Code §§ 11180-11191* is guilty of a misdemeanor and is disqualified from acting in any official capacity in the agency. There are three exceptions to this rule. An officer may divulge information acquired during an investigation when the officer engages in any of the following activities [*Gov. Code § 11183*]:

- Making a report to the department head.
- Testifying in court or in a legal proceeding, at which he or she has been called.
- Divulging evidence of unlawful activity to the attorney general, to a prosecuting attorney, or to any agency responsible for enforcing a law that has been broken [*see Gov. Code § 11181(g)* (authorizing disclosure of evidence of unlawful activity discovered in connection with investigation)].

The Attorney General or prosecuting attorney is also permitted to disclose documents or information acquired pursuant to the investigation toanother agency provided that the receiving agency maintains the confidentiality of the documents or information received [*Gov. Code § 11180.5*].

[4] Formal Proceedings or Charges Not Required

Through its investigative and subpoena powers, a state agency may compel the production of information without initiating a formal proceeding or filing charges against one from whom the evidence is sought [*Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 528-529, 15 Cal. Rptr. 630, 364 P.2d 462* ; *People ex rel. Franchise Tax Bd. v. Superior Court (1985) 164 Cal. App. 3d 526, 538, 210 Cal. Rptr. 695* ; *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 38, 99 Cal. Rptr. 791]* . Consequently, an agency may subpoena a witness and take his or her statement before beginning an adjudicatory proceeding. The practical result is that the agency may conduct discovery before ever initiating formal proceedings. However, the agency must use the subpoena. It cannot demand production of records without giving the business owner the opportunity for judicial review by issuing a subpoena and seeking court enforcement [*Pinney v. Phillips (1991) 230 Cal. App. 3d 1570, 1589, 281 Cal. Rptr. 904]* .

Similarly, local city councils can use the investigative subpoena power to conduct audits of tax records, without beginning a tax enforcement proceeding, against the party from whom the records are sought. The California Court of Appeal upheld the enforcement of a subpoena duces tecum authorized by the City Council of Vacaville, and issued by the Mayor of Vacaville under the statutory authority of *Gov. Code § 37104*. The subpoena was issued for the purpose of auditing a hotel operator's records to determine whether the operator had complied with the city imposed transient occupancy tax. The Court of Appeal held that using the subpoena power to conduct tax audits was part of a valid legislative investigation authorized by *Gov. Code § 37104* [*City of Vacaville v. Pitamber (2004) 124 Cal. App. 4th 739, 747-748 21 Cal. Rptr. 3d 396]* . In so holding, the Court of Appeal cited and relied upon the California Supreme Court decision in *Connecticut Indemnity Company v. Superior Court (2000) 23 Cal 4th 807, 810, 98 Cal. Rptr. 2d 221, 3 P. 3d 868* , which upheld the use of an investigative subpoena by a city when there was no formal proceeding before the city at the time of the investigation.

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(2007) 155 Cal. App. 4th 234, 247-249, 65 Cal. Rptr. 3d 824] . Finally, the California Court of Appeal upheld the validity of the subpoena, and rejected a challenge based upon the *Fourth Amendment*. The court held that subpoena issuance did not require a showing by the city of probable cause that the hotel was not complying with the requirements of the tax ordinance [*City of Santa Cruz v. Patel (2007) 155 Cal. App. 4th 234, 249-251, 65 Cal. Rptr. 3d 824]* . Subpoena enforcement does not require a search warrant, but does require a showing that: 1) the subpoena was authorized by an ordinance or similar enactment; 2) the subpoena serves a valid legislative purpose; and 3) the records sought are reasonable relevant to the subject matter of the investigation [*Connecticut Indemnity Co. v. Superior Court (2000) 23 Cal. 4th 807* , 810, *98 Cal. Rptr. 2d 221, 3 P.3d 868]* . The Court of Appeal upheld the validity of this subpoena concluding that the tax compliance audit of an uncooperative taxpayer was authorized by the ordinance and served a valid legislative purpose, and the subpoena sought relevant records. There was a right to judicial review. Thus, the subpoena was valid and enforceable [*City of Santa Cruz v. Patel (2007) 155 Cal. App. 4th 234, 250-252, 65 Cal. Rptr. 3d 824]* .

[5] Subpoena Duces Tecum to Corporation or Partnership

An agency's subpoena duces tecum may be directed to a corporation or partnership without naming a specific officer or partner. The order to the business entity is considered an order to those who are officially responsible for the conduct of its affairs [*Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 528 n.1, 15 Cal. Rptr. 630, 364 P.2d 462* ; *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 42, 99 Cal. Rptr. 791]* .

[6] Compliance With Agency Subpoena Is Voluntary Because Agency Cannot Enforce It

The recipient of an agency subpoena may choose not to comply with the subpoena, because the agency lacks the power to enforce it. Because the agency can and probably will apply to the courts for enforcement of its subpoena, it is not usually wise for the recipient to refuse to comply unless the recipient believes that the subpoena is legally or constitutionally defective [*see* *People v. West Coast Shows, Inc. (1970) 10 Cal. App. 3d 462, 470, 89 Cal. Rptr. 290* (party who believes subpoena is defective need not respond because agency lacks power to compel compliance); for discussion of court enforcement of agency subpoenas, *see § 471.31*]. An agency cannot enforce its subpoena because of the requirements of the *Fourth Amendment* and because it lacks the contempt power [*see 471.31[1]*]. The recipient is required to comply only when a court orders the recipient to comply [*People ex rel. Franchise Tax Bd. v. Superior Court (1985) 164 Cal. App. 3d 526, 540, 210 Cal. Rptr. 695* ; *People v. West Coast Shows, Inc. (1970) 10 Cal. App. 3d 462, 470, 89 Cal. Rptr. 290* ; *see § 471.31[4]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsGeneral OverviewAdministrative LawAgency InvestigationsScopeInspectionsAdministrative LawAgency InvestigationsScopeSubpoenasAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawGovernmental InformationGeneral OverviewAdministrative LawSeparation of PowersConstitutional ControlsGeneral OverviewConstitutional LawBill of RightsFundamental RightsSearch & SeizureScope of ProtectionCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsState & Territorial GovernmentsEmployees & Officials

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§ 471.31 Court Enforcement of Subpoenas

[1] Subpoena as Search

[a] Contempt Power

Because of its intrusive nature, an administrative subpoena is considered a constructive search within the meaning of the *Fourth Amendment of the U.S. Constitution* [*United States v. Morton Salt Co. (1950) 338 U.S. 632, 651-653, 70 S. Ct. 357, 94 L. Ed. 401, 46 F.T.C. 1436* ; *Oklahoma Press Pub. Co. v. Walling (1945) 327 U.S. 186, 202-207, 66 S. Ct. 494, 90 L. Ed. 614* ; *Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 529, 15 Cal. Rptr. 630, 364 P.2d 462* ; *see also California Restaurant Assn. v. Henning (1985) 173 Cal. App. 3d 1069, 1075, 219 Cal. Rptr. 630* (administrative subpoena considered constructive search within meaning of *Fourth Amendment*)].

The *Fourth Amendment* (*U.S. Const., amend. IV*) requires that there exist a mechanism by which validation, modification, or nullification of the subpoena can be judicially resolved, without penalty, before compliance with the subpoena can be exacted [*California Restaurant Assn. v. Henning (1985) 173 Cal. App. 3d 1069, 1075, 219 Cal. Rptr. 630 , citing See v. Seattle (1967) 387 U.S. 541, 544-545, 87 S. Ct. 1737, 18 L. Ed. 2d 943* ; *see People v. Hutchings (1977) 69 Cal. App. 3d Supp. 33, 36, 69 Cal. App. 3d Supp. 33 , 138 Cal. Rptr. 584* (dictum)].

Unless the power to punish a witness for contempt is explicitly conferred by law, it does not exist [*see Marcus v. Workmen's Comp. Appeals Bd. (1973) 35 Cal. App. 3d 598, 603, 111 Cal. Rptr. 101]* . With a few exceptions, no contempt power is conferred on state and local agencies. Exceptionsinclude the Public Utilities Commission [*see Cal. Const., art. XII, § 6*] and the Workmen's Compensation Appeals Board [*see Cal. Const., art. XIV, § 4*; *Lab. Code §§ 133, 134*]. Therefore, most state and local agencies lack the power to enforce their own subpoenas. They must apply to the superior court for an order of enforcement.

Because of this constitutional requirement that a subpoena must be judicially approved before compliance with the subpoena may be compelled, and because an administrative agency has no direct power to punish for contempt unless it is specifically authorized by law to do so [*Dibb v. County of San Diego (1994) 8 Cal. 4th 1200, 1218-1219, 36 Cal. Rptr. 2d 55, 884 P.2d 1003* (courts are the only bodies that can adjudicate and punish contempts, not agencies, unless

the constitution provides otherwise); *People v. Schwarz (1926) 78 Cal. App. 561, 570, 248 P. 990]* , an administrative agency must turn to the courts to enforce its subpoenas. The mechanism for enforcement is a petition for an order to compel compliance, discussed in [2], *below*.

[b] Refusal to Attend

If the person to whom an administative subpoena is directed believes that it is defective for any reason, he or she may simply refuse to attend. The person will not risk being punished or penalized in so doing because an agency has no means of enforcing its own subpoena. To secure enforcement, the agency must arrange a noticed hearing in the superior court [*see Gov. Code §§ 11187, 11188*]. At that hearing, the person to whom the subpoena is directed may present his or her reasons for refusing to attend as the subpoena commands [*see People v. West Coast Shows, Inc. (1970) 10 Cal. App. 3d 462, 470, 89 Cal. Rptr. 290* , 89 Cap Rptr 290]. The court will order compliance with the subpoena if it finds that the subpoena conforms to statutory and constitutional standards [*see* [2], *below*]. The enforcement hearing is begun by issuance of an order to show cause directed to the person who received the subpoena. Whereas the subpoena might safely be ignored, the order to show cause obliges the respondent to appear and make his or her case or suffer a default order of compliance [*see Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 530, 15 Cal. Rptr. 630, 364 P.2d 462]* . Failure to obey an order of compliance is contempt [*Gov. Code § 11188*].

[c] Refusal to Be Sworn as Witness

If the person to whom the subpoena is directed appears as it commands, he or she has no privilege to refuse to be sworn as a witness. That privilege belongs only to a criminal defendant during the prosecution [*see Evid. Code § 930*; *Black v. State Bar (1972) 7 Cal. 3d 676, 688, 103 Cal. Rptr. 288, 499 P.2d 968* ; *People v. Whelchel (1967) 255 Cal. App. 2d 455, 460, 63 Cal. Rptr. 258]* .

[d] Refusal to Give Testimony

The privilege against compelled self-incrimination [*see U.S. Const., amend. V*; *Malloy v. Hogan (1964) 378 U.S. 1, 6, 84 S. Ct. 1489, 12 L. Ed. 2d 653* ; *see also Cal. Const., art. I, § 15*] may be invoked by a witness in an administrative investigation [*In re Gault (1967) 387 U.S. 1, 47-48, 87 S. Ct. 1428, 18 L. Ed. 2d 527* ; *Black v. State Bar (1972) 7 Cal. 3d 676, 685, 103 Cal. Rptr. 288, 499 P.2d 968]* . The privilege may not be invoked by a nonwitness to prevent a witness from giving testimony that might incriminate the nonwitness [*California Bankers Ass'n v. Shultz (1974) 416 U.S. 21, 55, 94 S. Ct. 1494, 39 L. Ed. 2d 812]* , nor may it be invoked by a witness to avoid incriminating someone else [*Rogers v. United States (1951) 340 U.S. 367, 371, 71 S. Ct. 438, 95 L. Ed. 344* ; *Hale v. Henkel (1906) 201 U.S. 43, 69-70, 26 S. Ct. 370, 50 L. Ed. 652]* .

The privilege may not be invoked on behalf of a corporation [*Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 529, 15 Cal. Rptr. 630, 364 P.2d 462]* , or an unincorporated association [*United States v. White (1944) 322 U.S. 694, 701, 64 S. Ct. 1248, 88 L. Ed. 1542]* , or a partnership [*Bellis v. United States (1974) 417 U.S. 85, 93-94, 94 S. Ct. 2179, 40 L. Ed. 2d 678]* . However, an officer or agent of a corporation or some other artifical person may invoke the privilege on his/her own behalf [*McLain v. Superior Court of Sacramento County (1950) 99 Cal. App. 2d 109, 117, 221 P.2d 300* ; *see United States v. Lawn (S.D.N.Y. 1953) 115 F. Supp. 674, 677]* .

The privilege may not be invoked except to avoid being punished for a crime [*People v. Whelchel (1967) 255 Cal. App. 2d 455, 460, 63 Cal. Rptr. 258]* . An answer may not be withheld in reliance on the privilege simply because the answer would reveal reprehensible, but not criminal, acts by the witness [*Johnson v. State Bar (1935) 4 Cal. 2d 744, 752, 52 P.2d 928]* . An answer may not be withheld simply because it would establish a ground on which the witness's license might be denied, suspended, or revoked [*Black v. State Bar (1972) 7 Cal. 3d 676, 687, 103 Cal. Rptr. 288, 499 P.2d 968* ; *Paladini v. Superior Court (1918) 178 Cal. 369, 372-373, 173 P. 588]* . Even when an answer might tend to prove the witness guilty of a crime, it may not be withheld in reliance on the privilege if the witness is immune

from punishment for the crime [*see People v. King (1967) 66 Cal. 2d 633, 642, 58 Cal. Rptr. 571, 427 P.2d 171* ; *McLain v. Superior Court (1950) 99 Cal. App. 2d 109, 115-118, 221 P.2d 300]* .

[2] Petition for Order to Comply

The superior court of the county in which an administrative hearing is held has jurisdiction to compel (1) the attendance of witnesses, (2) the giving of testimony, and (3) the production of documents required by agency investigative subpoenas issued pursuant to *Gov. Code § 11181* [*Gov. Code § 11186*; *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 37, 99 Cal. Rptr. 791]* . If a witness refuses to attend or to testifyor to produce papers required by an investigational subpoena, the department head may petition the superior court in the county in which the hearing is pending for an order compelling the witness to attend and testify or produce the required papers [*Gov. Code § 11187*; *Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 528, 15 Cal. Rptr. 630, 364 P.2d 462]* . The use of the term "hearing" in *Gov. Code § 11187* does not restrict judicial enforcement only to those subpoenas issued after formal proceedings have commenced. The word "hearing" is meant to include all circumstances in which a subpoena may be issued under *Gov. Code § 11181* [*see § 470.30[1]*]. Effective administration by the departments often depends on investigations that do not lead to a formal hearing, and those investigations would often be ineffective without the aid of compulsory process [*Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 528, 15 Cal. Rptr. 630, 364 P.2d 462]* . Investigative subpoenas that are issued by city councils under the authority of *Gov. Code § 37104* also do not have to be preceded by the city commencing a formal proceeding [*Connecticut Indemnity Company v. Superior Court (2000) 23 Cal 4th 807, 810, 98 Cal. Rptr. 2d 221, 3 P. 3d 868* (California Supreme Court upheld the use of an investigative subpoena by a city when there was no formal proceeding before the city at the time of the investigation); *City of Vacaville v. Pitamber (2004) 124 Cal. App. 4th 739, 747-748 21 Cal. Rptr. 3d 396* (Court of Appeal affirmed enforcement of investigative subpoena issued by city council to audit tax records of hotel operator)].

The process for enforcing a subpoena or an interrogatory starts with a witnesses' refusal to answer any interrogatory, to attend or testify, or to produce any papers required by subpoena. Under those circumstances, a department head may petition the superior court in the county in which the hearing is pending for an order compelling the person to answer the interrogatories, to attend and testify or to produce the papers required by the subpoena before the officer named in the subpoena [*Gov. Code § 11187*]. The petition must state the following:

- That due notice of the time and place for answering the interrogatories, testifying or producing of the papers was given [*Gov. Code § 11187(a)*].

- That the person was subpoenaed in the manner prescribed by law [*Gov. Code § 11187(b)*].

- That the person failed and refused to answer the interrogatories, to attend or testify or to produce the papers required by subpoena before the officer in the cause or proceeding named in the subpoena, or has refused to answer questions propounded to him or her in the course of the investigation or hearing [*Gov. Code § 11187(c)*].

[3] Hearing on Order to Show Cause (OSC)

[a] Issuance of Order to Show Cause (OSC)

When the agency files a petition for an order to compel compliance with a subpoena, the court enters an order to show cause (OSC) [*Gov. Code § 11188*]. The subpoena, petition, and order to show cause must be served on the affected parties [*Gov. Code §§ 11184, 11188*], in the same manner as provided for service of a summons [*Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 530, 15 Cal. Rptr. 630, 364 P.2d 462* ; *see Code Civ. Proc. § 412.10 et seq.* (summons), 413.10 et seq. (service of summons)].

[b] Hearing on OSC Is Special Proceeding

A hearing on the order to show cause under *Gov. Code § 11188* is a special proceeding [*People ex rel. Franchise Tax Bd. v. Superior Court (1985) 164 Cal. App. 3d 526, 538, 210 Cal. Rptr. 695]* , in which the superior court's jurisdiction is limited to determining whether the subpoena conforms to "legal" and "constitutional" standards [*People ex rel. Franchise Tax Bd. v. Superior Court (1985) 164 Cal. App. 3d 526, 539, 210 Cal. Rptr. 695* ; *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 39, 99 Cal. Rptr. 791]* .

The court may not address substantive issues because such review would effectively undermine the agency's performance of its statutory duties, usurping the agency's authority [*Hill v. Brisbane (1944) 66 Cal. App. 2d 15, 20, 151 P.2d 578]* .

As a special proceeding defined by the statute that authorizes it [*People ex rel. Franchise Tax Bd. v. Superior Court (1985) 164 Cal. App. 3d 526, 539, 210 Cal. Rptr. 695]* , a hearing on an order to show cause is not a hearing in the nature of that on a motion to quash [*People ex rel. Franchise Tax Bd. v. Superior Court (1985) 164 Cal. App. 3d 526, 539, 210 Cal. Rptr. 695* ; *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 40, 99 Cal. Rptr. 791* ; *see § 471.32[1]*, for discussion of a motion to quash]. A hearing in which the subpoenaed person may dispute and contradict the facts alleged in support of the agency's subpoena is not within the contemplation of *Gov. Code § 11188* [*Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 40, 99 Cal. Rptr. 791* ; *see People v. West Coast Shows, Inc. (1970) 10 Cal. App. 3d 462, 468-470, 89 Cal. Rptr. 290* (*Gov. Code § 11180 et seq.* are not unconstitutional for failure to follow *Code Civ. Proc. §§ 1985, 2036*); *but see Wood v. Superior Court (1985) 166 Cal. App. 3d 1138, 1148-1150, 212 Cal. Rptr. 811* (compliance of subpoena with constitutional right of privacy may require broader inquiry), discussed in *§ 471.32[2][e]*].

[c] Compliance With Legal and Constitutional Standards

"Legal" standards have been complied with if the subpoena has been "regularly issued by the head of the department" [*Gov. Code § 11188*; *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 39, 99 Cal. Rptr. 791* ; *People ex rel. Franchise Tax Bd. v. Superior Court (1985) 164 Cal. App. 3d 526, 539, 210 Cal. Rptr. 695]* . The term "regularly issued" means in accordance with *Gov. Code §§ 11180, 11181, 11182, 11184*, and *11185*, regarding matters that may be investigated, acts authorized in connection with investigations, and service of process [*Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 39, 99 Cal. Rptr. 791* ; *People ex rel. Franchise Tax Bd. v. Superior Court (1985) 164 Cal. App. 3d 526, 539, 210 Cal. Rptr. 695]* .

An administrative subpoena will satisfy constitutional standards and be enforced if it is issued for a lawfully authorized purpose within the power of the agency to command and the documents demanded must be relevant to the purpose of the investigation and adequate but not excessive [*Oklahoma Press Pub. Co. v. Walling (1946) 327 U.S. 186, 209, 66 S. Ct. 494, 90 L.Ed. 614* ; *Craib v. Bulmash (1989) 49 Cal. 3d 475, 482, 261 Cal. Rptr. 686, 777 P.2d 1120* ; *Millan v. Restaurant Enterprises Group, Inc. (1993) 14 Cal. App. 4th 477, 480-481, 18 Cal. Rptr. 2d 198]* .

Issuance of the subpoena must also comply with "constitutional" standards [*see People ex rel. Franchise Tax Bd. v. Superior Court (1985) 164 Cal. App. 3d 526, 539, 210 Cal. Rptr. 695* ("department heads cannot compel the production of evidence in disregard of constitutional rights and safeguards")]. Constitutional issues to be considered include (1) the privilege against self-incrimination, (2) the ban on unreasonable searches and seizures, and (3) the right of privacy [*see, e.g., Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 529, 15 Cal. Rptr. 630, 364 P.2d 462* (unreasonable searches and seizures; privilege against self-incrimination); *Wood v. Superior Court (1985) 166 Cal. App. 3d 1138, 1145-1150, 212 Cal. Rptr. 811* (right of privacy); *Barnes v. Molino (1980) 103 Cal. App. 3d 46, 54-56, 162 Cal. Rptr. 786* (unreasonable searches and seizures; privilege against self-incrimination); *Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 676-682, 156 Cal. Rptr. 55* (unreasonable searches and seizures; right of privacy)]. Constitutional issues involving agency subpoenas are discussed in *§ 471.32[2]*.

The Sixth District California Court of Appeal upheld the enforcement of a subpoena duces tecum authorized by the City of Santa Cruz under the statutory authority of *Gov. Code § 37104* for the purposes of conducting n tax compliance audit of a hotel operators records to determine compliance with a city imposed transient occupancy tax that must be collected from guests by the hotel, and then remitted to the city [*City of Santa Cruz v. Patel (2007) 155 Cal. App. 4th 234, 239-240, 65 Cal. Rptr. 3d 824]* . The court of appeal held that the superior court orders compelling compliance with the subpoena duces tecum issued under the statutory authority of *Gov. Code § 37104* are final judgments that are appealable under *Code Civ. Proc. § 904.1* [*City of Santa Cruz v. Patel (2007) 155 Cal. App. 4th 234, 241-243, 65 Cal. Rptr. 3d 824]* . The California Court of Appeal also rejected constitutional challenges to the hotel transient occupancy text based upon due process of law (void for vagueness) and based on equal protection of the laws [*City of Santa Cruz v. Patel (2007) 155 Cal. App. 4th 234, 247-249, 65 Cal. Rptr. 3d 824]* . Finally, the California Court of Appeal upheld the validity of the subpoena, and rejected a challenge based upon the *Fourth Amendment*. The court held that subpoena issuance did not require a showing by the city of probable cause that the hotel was not complying with the requirements of the tax ordinance [*City of Santa Cruz v. Patel (2007) 155 Cal. App. 4th 234, 249-251, 65 Cal. Rptr. 3d 824]* . Subpoena enforcement does not require a search warrant, but does require a showing that: 1) the subpoena was authorized by an ordinance or similar enactment; 2) the subpoena serves a valid legislative purpose; and 3) the records sought are reasonable relevant to the subject matter of the investigation [*Connecticut Indemnity Co. v. Superior Court (2000) 23 Cal. 4th 807* .810, *98 Cal. Rptr. 2d 221, 3 P. 3d 868]* . The Court of Appeal upheld the validity of this subpoena concluding that the tax compliance audit of an uncooperative taxpayer was authorized by the ordinance and served a valid legislative purpose, and the subpoena sought relevant records. There was a right to judicial review. Thus, the subpoena was valid and enforceable [*City of Santa Cruz v. Patel (2007) 155 Cal. App. 4th 234, 250-252, 65 Cal. Rptr. 3d 824]* .

[4] Order to Comply

When, after hearing arguments, the court is satisfied that the subpoena meets the requisite legal and constitutional standards, it must order the subpoenaed person to comply [*Gov. Code § 11188*]. Failure to obey the order to comply will be treated as a contempt of court [*Gov. Code § 11188*; *see Code Civ. Proc. §§ 1209-1222* (contempt of court); *see also* Ch. 135, *Contempt*], and the offender may be subject to penalties that include fines and imprisonment [*see Code of Civ. Proc. §§ 1218(a)* (fine and/or imprisonment), 1219 (compelling performance by imprisonment)].

Also, parties to actions or their agents who are subject to a court order as parties and who are adjudged guilty of contempt for violating that courtorder can be held responsible to pay the opposing parties reasonable attorneys fees and costs in bringing the contempt enforcement proceeding [*Code Civ. Proc. § 1218(a)*].

[5] Appellate Review

The Sixth District California Court of Appeal upheld the enforcement of a subpoena duces tecum authorized by the City of Santa Cruz under the statutory authority of *Gov. Code § 37104* for the purposes of conducting a tax compliance audit of a hotel operator's records to determine compliance with a city imposed transient occupancy tax that must be collected from guests by the hotel, and then remitted to the city [*City of Santa Cruz v. Patel (2007) 155 Cal. App. 4th 234, 239-240, 65 Cal. Rptr. 3d 824]* . The court of appeal held that the superior court orders compelling compliance with the subpoena duces tecum issued under the statutory authority of *Gov. Code § 37104* are final judgments that are appealable under *Code Civ. Proc. § 904.1* [*City of Santa Cruz v. Patel (2007) 155 Cal. App. 4th 234, 241-243, 65 Cal. Rptr. 3d 824]* . An order compelling compliance with an administrative subpoena is appealable as a final judgment under *Code Civ. Proc. § 904.1(a) (1)* [*State ex rel. Dept. of Pesticide Regulation v. Pet Food Exp. Ltd. (3rd Dist. 2008)165 Cal. App. 4th 841, 851-853, 81 Cal. Rptr. 3d 486* ; *People ex rel. DuFauchard v. U.S. Financial Management, Inc. (4th Dist., 2009) 169 Cal. App. 4th 1502, 1509-1511, 87 Cal. Rptr. 3d 615*].

The California courts of appeal are apparently in conflict on the issue of whether orders issued by a court pursuant to *Gov. Code § 11188* compelling compliance with investigational subpoenas are appealable, or whether appellate review

must be sought via a writ of ordinary mandamus [*cf.* *Barnes v. Molino (1980) 103 Cal. App. 3d 46, 50-51, 162 Cal. Rptr. 786* (not appealable); *Wood v. Superior Court (1985) 166 Cal. App. 3d 1138, 1140, 212 Cal. Rptr. 811* (dictum citing *Franchise Tax Board v. Barnhart (1980) 105 Cal. App. 3d 274, 277, 164 Cal. Rptr. 331* (appealable as final judgments in special proceedings))].

The better view appears to be that such orders are appealable [*Tom v. Schoolhouse Coins, Inc. (1987) 191 Cal. App. 3d 827, 828-829 n.1, 236 Cal. Rptr. 541* ; *Millan v. Restaurant Enterprises Group, Inc. (1993) 14 Cal. App. 4th 477, 484-485, 18 Cal. Rptr. 2d 198* (subpoena enforcement orders are appealable); *see* *Arnett v. Dal Cielo (1996), 14 Cal. 4th 4, 18, 56 Cal. Rptr. 2d 706, 923 P. 2d 1, 18* (citing *Millan*, but noting that "the parties do not question that holding, and it is therefore not before us for review"); *but see* *P.E.R.B. v. Superior Court (1993) 13 Cal. App. 4th 1816, 1819, 17 Cal. Rptr. 2d 323* (superior court decision to deny enforcement of administrative subpeona is reviewable by writ of mandate)].

On appeal, the court will review the issue of whether a subpoena meets constitutional standards for enforcement as a question of law and will apply the de novo (independent judgment) standard [*Millan v. Restaurant Enterprises Group, Inc. (1993) 14 Cal. App. 4th 477, 484-485, 18 Cal. Rptr. 2d 198* (subpoena enforcement orders are appealable)].

For further discussion of mandamus, see Ch 474, *Availability of Judicial Review of Agency Decisions* , et seq., and Ch. 358, *Mandate and Prohibition* . For discussion of appeals, see Ch. 40, *Appeal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsConstitutional RightsSearch & SeizureAdministrative LawAgency InvestigationsConstitutional RightsSelf-Incrimination PrivilegeAdministrative LawAgency InvestigationsScopeSubpoenasCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureSanctionsContemptCriminal ContemptCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsStandards of ReviewDe Novo ReviewConstitutional LawBill of RightsFundamental RightsSearch & SeizureScope of ProtectionConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessSelf-Incrimination PrivilegeConstitutional LawSubstantive Due ProcessPrivacyGeneral Overview

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Chapter 471 INVESTIGATIONS BY PUBLIC AGENCIES
PART II. LEGAL BACKGROUND
C. Agency Subpoena Power

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§ 471.32 Remedies and Defenses to Agency Subpoenas

[1] Motions to Quash

Code Civ. Proc. §§ 1985-1997 apply to the issuance of subpoenas as a way to compel the production of evidence in judicial proceedings [*People v. West Coast Shows, Inc. (1970) 10 Cal. App. 3d 462, 469, 89 Cal. Rptr. 290]* . *Gov. Code §§ 11180-11191*, on the other hand, apply not to judicial proceedings but to statutorily authorized investigations [*People v. West Coast Shows, Inc. (1970) 10 Cal. App. 3d 462, 470, 89 Cal. Rptr. 290]* .

A person served with an investigative subpoena under *Gov. Code §§ 11180-11191* need not respond if he or she believes the subpoena tobe legally or constitutionally defective [*see §§ 471.30[6], 471.31[1]*]. The agency cannot impose contempt or any other penalty [*People v. West Coast Shows, Inc. (1970) 10 Cal. App. 3d 462, 470, 89 Cal. Rptr. 290* ; *see §§ 471.30[6], 471.31[1]*]. The burden and obligation is then on the agency to seek court enforcement of its subpoena [*Gov. Code §§ 11187, 11188*; *People v. West Coast Shows, Inc. (1970) 10 Cal. App. 3d 462, 470, 89 Cal. Rptr. 290* ; *see §§ 471.30[6], 471.31, above*]. Because the hearing on an order to show cause offers the opportunity to raise these issues, a motion to quash is neither contemplated by statute nor is it required by the constitution [*People ex rel. Franchise Tax Bd. v. Superior Court (1985) 164 Cal. App. 3d 526, 539, 210 Cal. Rptr. 695]* .

The superior court has jurisdiction to entertain an affirmative challenge to a subpoena issued by a city under *Gov. Code § 37104*, and is not limited to a contempt proceeding under *Gov. Code § 37106 et seq.* The proper way for such an affirmative challenge to be made is through a complaint for declaratory or injunctive relief or a petition for a writ of mandate [*Connecticut Indemnity Co. v. Superior Court (1999) 73 Cal. App. 4th 540, 550-553, 86 Cal. Rptr. 2d 515* (citing *Dibb v. County of San Diego (1994) 8 Cal. 4th 1200, 1218, 36 Cal. Rptr. 2d 55, 884 P.2d 1003* ; holding insurer had standing to assert privacy interest of an insured and resist disclosure of information in insurer's possession)].

For a discussion of motions to quash administrative subpoenas, see Chapter 473F, *Agency Adjudication Hearings* . For discussion of the difference between administrative subpoenas under the California APA and departmental investigative subpoenas, see *§ 471.30[1]*.

[2] Defenses and Privileges

[a] General Requirements

Because a court hearing held pursuant to an agency petition for enforcement of a subpoena is a "special proceeding" [*People ex rel. Franchise Tax Bd. v. Superior Court (1985) 164 Cal. App. 3d 526, 538, 210 Cal. Rptr. 695]* , the court may consider only limited issues. The court may not inquire into any of the specific matters the Legislature has entrusted to the agency's determination, because such a judicial proceeding might circumvent the agency's authority, and thus destroy the value of the agency [*Hill v. Brisbane (1944) 66 Cal. App. 2d 15, 20, 151 P.2d 578]* . A hearing held pursuant to *Gov. Code § 11188* is confined to a determination of whether the administrative subpoena conforms to the appropriate legal and constitutional standards [*People ex rel. Franchise Tax Bd. v. Superior Court (1985) 164 Cal. App. 3d 526, 539, 210 Cal. Rptr. 695* ; *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 39, 99 Cal. Rptr. 791* ; *see* [b]-[e], *below* and discussion in *§ 471.31[3]*]. Thus, any challenge to an order for enforcement of a subpoena must be based on at least one of these grounds.

Although two appellate court cases [*People ex rel. Franchise Tax Bd. v. Superior Court (1985) 164 Cal. App. 3d 526, 539, 210 Cal. Rptr. 695* ; *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 39, 99 Cal. Rptr. 791]* and *Gov. Code § 11188* indicate that a regularly issued subpoena must be enforced (if it is constitutional), one Court of Appeals has indicated that enforcement of an administrative subpoena may be denied when the material sought is attorney work product or is privileged [*see* [6], *below*].

In this case, the superior court denied an agency's petition to compel production of a subpoenaed health study in part because the study was protected under the work product doctrine and by the physician-patient privilege. The Court of Appeal reversed, not because work product and the evidentiary privileges do not apply to administrative subpoenas, but because the grounds for application did not exist in this particular case [*Kizer v. Sulnick (1988) 202 Cal. App. 3d 431, 435, 439-442, 248 Cal. Rptr. 712* ; for discussion of evidentiary privileges and the work product doctrine, *see* California Trial Guide, Unit 51 (Matthew Bender); *see also* Ch. 473B, *Discovery in Agency Adjudications* , and Ch. 473F, *Agency Adjudication Hearings*].

[b] Legal Standards

Legal standards are met if the subpoena was "regularly issued" by the department head [*Gov. Code § 11188*]. The term "regularly issued" means issued according to *Gov. Code §§ 11180, 11181, 11182, 11184,* and *11185* [*People ex rel. Franchise Tax Bd. v. Superior Court (1985) 164 Cal. App. 3d 526, 539, 210 Cal. Rptr. 695* ; *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 39, 99 Cal. Rptr. 791]* . These sections specify the subject areas that an agency may investigate, delineate the power of the agency head including the power to subpoena and the ability to delegate that power, and describe the procedure for service of process [*Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 39, 99 Cal. Rptr. 791* ; *see Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 530-531, 15 Cal. Rptr. 630, 364 P.2d 462* (service held improper, order of contempt annulled)].

Unless the subpoena fails to meet constitutional standards, if the court decides the subpoena was regularly issued, it must enter an order requiring that the person comply with the subpoena [*Gov. Code § 11188*; *but see Kizer v. Sulnick (1988) 202 Cal. App. 3d 431, 435, 439-442, 248 Cal. Rptr. 712* (enforcement of administrative subpoena may be denied because matter sought is privileged, but grounds for application of privilege do not exist in this case); *P.E.R.B. v. Superior Court (1993) 13 Cal. App. 4th 1816, 1830-1832, 17 Cal. Rptr. 2d 323* (superior court required to enforce administrative subpoena and defer to agency on question of jurisdiction)]. Even if a subpoena is regularly issued, the subpoena may not be enforced if it would violate the constitutional rights of the person being forced to comply [*Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 529, 15 Cal. Rptr.630, 364 P.2d 462* ; *People ex rel. Franchise Tax Bd. v. Superior Court (1985) 164 Cal. App. 3d 526, 539, 210 Cal. Rptr. 695]* . Those rights are discussed in [c] through [e], *below*.

[c] Unreasonable Searches and Seizures

The Sixth District California Court of Appeal upheld the enforcement of a subpoena duces tecum authorized by the City of Santa Cruz under the statutory authority of *Gov. Code § 37104* for the purposes of conducting a tax compliance audit of a hotel operator's records to determine compliance with a city imposed transient occupancy tax that must be collected from guests by the hotel, and then remitted to the city [*City of Santa Cruz v. Patel (2007) 155 Cal. App. 4th 234, 239-240, 65 Cal. Rptr. 3d 824]* . The California Court of Appeal also rejected constitutional challenges to the hotel transient occupancy text based upon due process of law (void for vagueness) and based on equal protection of the laws [*City of Santa Cruz v. Patel (2007) 155 Cal. App. 4th 234, 247-249, 65 Cal. Rptr. 3d 824]* . Finally, the California Court of Appeal upheld the validity of the subpoena, and rejected a challenge based upon the *Fourth Amendment*. The court held that subpoena issuance did not require a showing by the city of probable cause that the hotel was not complying with the requirements of the tax ordinance [*City of Santa Cruz v. Patel (2007) 155 Cal. App. 4th 234, 249-251, 65 Cal. Rptr. 3d 824]* . Subpoena enforcement does not require a search warrant, but does require a showing that: 1) the subpoena was authorized by an ordinance or similar enactment; 2) the subpoena serves a valid legislative purpose; and 3) the records sought are reasonable relevant to the subject matter of the investigation [*Connecticut Indemnity Co. v. Superior Court (2000) 23 Cal. 4th 807* .810, *98 Cal. Rptr. 2d 221, 3 P.3d 868]* . The court of appeal upheld the validity of this subpoena concluding that the tax compliance audit of an uncooperative taxpayer was authorized by the ordinance and served a valid legislative purpose, and the subpoena sought relevant records. There was a right to judicial review. Thus, the subpoena was valid and enforceable [*City of Santa Cruz v. Patel (2007) 155 Cal. App. 4th 234, 250-252, 65 Cal. Rptr. 3d 824]* .

The subpoenas of investigating agencies are considered constructive searches subject to the requirements of the *Fourth* and *Fourteenth Amendments* [*California Restaurant Assn. v. Henning (1985) 173 Cal. App. 3d 1069, 1075, 219 Cal. Rptr. 630* ; *See v. Seattle (1967) 387 U.S. 541, 545, 87 S. Ct. 1737, 18 L. Ed. 2d 943* ; *Hale v Henkel (1906) 201 U.S. 43, 76-77, 26 S. Ct. 370, 50 L. Ed. 652* ; *Boyd v. United States (1886) 116 U.S. 616, 622-635, 6 S. Ct. 524, 29 L. Ed. 746* ; *see U.S. Const., amends. IV, XIV*]. It is well established in California that department heads cannot compel the production of evidence in disregard of the constitutional provisions prohibiting unreasonable searches and seizures [*Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 529, 15 Cal. Rptr. 630, 364 P.2d 462]* .

The requirements of the prohibition against unreasonable searches and seizures are easily met, however, if the subject of a subpoena is a business entity. In that case, the intrusion is reasonable and the subpoena is constitutionally valid when the following three requirements are met [*Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 529, 15 Cal. Rptr. 630, 364 P.2d 462* ; *see Wood v. Superior Court (1985) 166 Cal. App. 3d 1138, 1146, 212 Cal. Rptr. 811* (higher requirements for intrusions on personal privacy); *see also* discussion in [e], *below*]:

- The agency demanding production is authorized to make the inquiry.

- The demand is not too indefinite. A request is sufficiently definite when the subpoena is "reasonably specific" in identifying the books and documents to be produced [*Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 42, 99 Cal. Rptr. 791]* .

- The information sought is reasonably relevant. The information sought is reasonably relevant to the intended investigation if it is not plainly incompetent or irrelevant to the purposes of the agency's investigation [*Younger v. Jensen (1980) 26 Cal. 3d 397, 406, 161 Cal. Rptr. 905, 605 P.2d 813]* .

In a leading case the Supreme Court articulated a test that applied *Fourth Amendment* requirements only by analogy. The view that a subpoena could be enforced only when a specific charge or complaint was pending was explicitly rejected. Instead, the investigation need only be for a lawfully authorized purpose, within the power of the legislative body to command. In addition, the requirement of probable cause supported by oath or affirmation, which is literally applicable in the case of a warrant, is satisfied as long as the subpoenaed documents are relevant to the inquiry. Beyond this the *Fourth Amendment* requirement of reasonableness, including particularity in describing the place to be searched

andthe persons or things to be seized, comes down to a specification of the documents to be produced that is adequate, but not excessive, for the purposes of the relevant inquiry [*Oklahoma Press Pub. Co. v. Walling (1946) 327 U.S. 186, 209, 66 S. Ct. 494, 90 L. Ed. 614* ; *Craib v. Bulmash (1989) 49 Cal. 3d 475, 482, 261 Cal. Rptr. 686, 777 P.2d 1120]* . However, the subpoenaed person must have the opportunity for judicial review before suffering any penalties for refusing to comply with the subpoena [*Craib v. Bulmash (1989) 49 Cal. 3d 475, 482, 261 Cal. Rptr. 686, 777 P.2d 1120* ; *cf. See v. Seattle (1967) 387 U.S. 541, 544-545, 87 S. Ct. 1737, 18 L. Ed. 2d 943* (dictum)].

Therefore, when an agency's action is limited to issuance and service of a subpoena, and the subpoena does not authorize actual entry into nonpublic areas or immediate inspection but merely requests future production of specified records at a specified place, the subpoenaed person may not insist upon a showing of probable cause. Instead, the test is reasonableness in terms of the breadth and relevance of the subpoena [*Craib v. Bulmash (1989) 49 Cal. 3d 475, 483, 261 Cal. Rptr. 686, 777 P.2d 1120* ; *see, e.g., Donovan v. Lone Steer, Inc. (1984) 464 U.S. 408, 410-411, 413, 415, 104 S. Ct. 769, 78 L. Ed. 2d 567* ; *California Bankers Ass'n v. Shultz (1974) 416 U.S. 21, 66-67, 94 S. Ct. 1494, 39 L. Ed. 2d 812* (Treasury Regulation requirement for banks to report certain customer transactions as not unreasonable); *United States v. Powell (1964) 379 U.S. 48, 57, 85 S. Ct. 248, 13 L. Ed. 2d 112* (IRS summons for records relating to company tax returns as not required to be supported by probable cause to suspect fraud); *McPhaul v. United States (1960) 364 U.S. 372, 382-383, 81 S. Ct. 138, 5 L. Ed. 2d 136* (congressional committee subpoena as not overbroad despite assertion that existence of records was never established); *United States v. Morton Salt Co. (1950) 338 U.S. 632, 651-653, 70 S. Ct. 357, 94 L. Ed. 401, 46 F.T.C. 1436* (FTC order for corporate reports, needed to prove compliance with prior decree, as not unreasonable); *Younger v. Jensen (1980) 26 Cal. 3d 397, 404-405, 161 Cal.Rptr. 905, 605 P.2d 813* ; *Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 529, 15 Cal. Rptr. 630, 364 P.2d 462]* .

A subpoena duces tecum may be resisted on *Fourth Amendment* grounds if it directs the production of an unreasonable number of documents unrelated to the purpose of the investigation. This defect usually occurs when the description of the documents sought is very general [*see Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 529, 15 Cal. Rptr. 630, 364 P.2d 462]* , but the problem can be avoided by making the investigation itself very general [*see McPhaul v. United States (1960) 364 U.S. 372, 381, 81 S. Ct. 138, 5 L. Ed. 2d 136]* . The California Court of Appeal rejected a constitutional overbreadth challenge to an investigative subpoena issued by a city council under the authority of *Gov. Code § 37104* to compel a hotel operator to produce tax records for a city audit of compliance with the city's transient occupancy tax. The hotel operator argued that thesubpoena sought production of records that were not required to be kept by the city ordinance which imposed the occupancy tax. The Court of Appeal rejected that challenge and concluded that the ordinance gave adequate notice of the records required to be kept [*City of Vacaville v. Pitamber (2004) 124 Cal. App. 4th 739, 746-747, 21 Cal. Rptr. 3d 396* (Court of Appeal affirmed enforcement of investigative subpoena issued by city council to audit tax records of hotel operator)].

In practice the subpoena is unlikely to have this defect [*see, e.g., Brown v. United States (1927) 276 U.S. 134, 143, 48 S. Ct. 288, 72 L. Ed. 500* ; *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 41-42, 99 Cal. Rptr. 791]* , but in some cases the subpoena has been too broad [*see, e.g., Paladini v. Superior Court (1918) 178 Cal. 369, 374-375, 173 P. 588]* .

A subpoena duces tecum may be resisted on *Fourth Amendment* grounds if it does not sufficiently identify the person who is to respond; but this defect, too, seldom occurs. A subpoena directed to an artifical person such as a corporation, or one directed to a partnership, is not defective in this regard since it must be deemed directed to the person or persons responsible for conducting the affairs of the corporation, partnership, or other artificial person [*Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 528 n.1, 15 Cal. Rptr. 630, 364 P.2d 462* ; *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 42, 99 Cal. Rptr. 791]* .

These rules are equally applicable to individuals and corporations, notwithstanding the fact that virtually all of the cases have dealt with subpoenas for corporate records. Moreover, no *Fourth Amendment* privacy claim can be asserted against an administrative subpoena limited to the production of records that the subpoenaed individual is required to maintain

or file with a government agency, for the express purpose of agency inspection, under lawful statutes or regulations [*Craib v. Bulmash (1989) 49 Cal. 3d 475, 485, 261 Cal. Rptr. 686, 777 P.2d 1120* ; *Millan v. Restaurant Enterprises Group, Inc. (1993) 14 Cal. App. 4th 477, 493, 18 Cal. Rptr. 2d 198* (enforcement rules as applicable equally to records that must be filed as well as records that must be maintained, at least when filed records are open to public inspection)].

Finally, this analysis of *Fourth Amendment* issues also disposes of any probable-cause argument that might be made under the analogous search-and-seizure provision in the California constitution [*Craib v. Bulmash (1989) 49 Cal. 3d 475, 485 n.12, 261 Cal. Rptr. 686, 777 P.2d 1120* ; *see Cal. Const., art. I, § 13*].

When a subpoena impinges on interests in personal privacy, the statute must meet higher standards of need, specificity, and relevancy [*see* *Wood v. Superior Court (1985) 166 Cal. App. 3d 1138, 1146-1147, 212 Cal. Rptr. 811* (subpoena for patient medical records); *Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 156 Cal. Rptr. 55* (subpoena for patient medical records)]. For discussion of the requirements imposed on agency subpoenas by the right of privacy, see [e], *below*.

[d] Privilege Against Self-Incrimination

The subpoena of an investigating agency may not be enforced in violation of an individual's privilege against self-incrimination [*Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 529, 15 Cal. Rptr. 630, 364 P.2d 462]* . The privilege, however, is a personal privilege. Neither a corporation nor a person having custody of corporate records is entitled to refuse to produce the records by claiming the privilege against self-incrimination [*Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 529, 15 Cal. Rptr. 630, 364 P.2d 462]* . While as a personal privilege the privilege against self-incrimination is to be limited to natural persons [*United States of America v. White (1944) 322 U.S. 694, 698, 701, 64 S. Ct. 1248, 88 L. Ed. 1542]* , records held in certain partnerships or loose, informal associations of individuals may be covered by the privilege [*Barnes v. Molino (1980) 103 Cal. App. 3d 46, 56, 162 Cal. Rptr. 786* ; *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 45, 99 Cal. Rptr. 791]* . The test is whether under all the circumstances the organization has a character so impersonal that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only [*United States of America v. White (1944) 322 U.S. 694, 701, 64 S. Ct. 1248, 88 L. Ed. 1542* ; *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 46, 99 Cal. Rptr. 791]* .

In addition, the privilege against self-incrimination cannot be raised in objection to a subpoena at an OSC hearing held pursuant to *Gov. Code § 11188* [*Barnes v. Molino (1980) 103 Cal. App. 3d 46, 56, 162 Cal. Rptr. 786* ; *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 39, 99 Cal. Rptr. 791]* . For discussion of hearings on orders to show cause, see *§ 471.31[3]*. The privilege cannot be asserted until a question has been put to the witness under oath, and then only if the answer to the question would tend to incriminate the witness [*Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 39, 99 Cal. Rptr. 791]* . If a subpoenaed witness refuses to answer a specific question or refuses to testify altogether before the officer named in the subpoena, and asserts the privilege against self-incrimination, the superior court, under *Gov. Code § 11186*, makes the final determination on whether the answer may truly tend to incriminate the witness [*Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 40, 99 Cal. Rptr. 791]* .

A person may be compelled to produce documents in the form of records that are required to be kept by a government regulatory scheme if (1) the government's purpose in requiring that the records be kept is essentially regulatory and (2) the records required to be kept are of a kind customarily kept by persons engaged in the regulated activity [*Grosso v. United States (1968) 390 U.S. 62, 67-69, 88 S. Ct. 709, 19 L. Ed. 2d 906* ; *Marchetti v. United States (1968) 390 U.S. 39, 57, 88 S. Ct. 697, 19 L. Ed. 2d 889* ; *Shapiro v. United States (1948) 335 U.S. 1, 5, 17, 19-22, 68 S. Ct. 1375, 92 L. Ed. 1787]* .

Consistent with the traditional exemption of required records from the *Fifth Amendment* privilege against compulsory

self-incrimination, a person must unconditionally respond to a court order enforcing an agency's subpoena for records that the person is statutorily required to maintain. The privilege does not apply when the reporting requirement is intended to promote a legitimate regulatory aim, is not directed at activities or persons that are inherently criminal, and only requires minimal disclosure of information of a kind customarily kept in the ordinary course of business [*Craib v. Bulmash (1989) 49 Cal. 3d 475, 478, 486-490, 261 Cal. Rptr. 686, 777 P.2d 1120]* .

[e] Privacy

[i] General Requirements

The right of privacy guaranteed by the California Constitution [*Cal. Const., art. I, § 1*] has been held to limit the subpoena power of investigating agencies [*see, e.g.,* *Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 679-682, 156 Cal. Rptr. 55* (right of privacy requires Board to show compelling state interest in medical records of patients of doctor who is being investigated)]. This limitation does not apply, however, unless a reasonable expectation of privacy exists in theinformation subpoenaed [*Tom v. Schoolhouse Coins, Inc. (1987) 191 Cal. App. 3d 827, 830, 236 Cal. Rptr. 541* ; *People ex rel. Franchise Tax Bd. v. Superior Court (1985) 164 Cal. App. 3d 526, 541, 210 Cal. Rptr. 695]* .

Because a person or business involved in an area subject to federal or state regulation [*see* *Tom v. Schoolhouse Coins, Inc. (1987) 191 Cal. App. 3d 827, 830, 236 Cal. Rptr. 541* (investors in regulated securities had no reasonable expectation that identity would be withheld from state and federal agencies)], or agency reporting requirements [*see* *People ex rel. Franchise Tax Bd. v. Superior Court (1985) 164 Cal. App. 3d 526, 541, 210 Cal. Rptr. 695* (taxpayer had no reasonable expectation of privacy as to information required to be included in return)] can seldom have a reasonable expectation of privacy in that area, successful challenges to the subpoenas of investigating agencies have to date involved subpoenas seeking information about third parties who are not the object of the investigation [*see* *Wood v. Superior Court (1985) 166 Cal. App. 3d 1138, 1147-1149, 212 Cal. Rptr. 811* (overbroad subpoenas of Board investigating prescription practices of doctors violated privacy rights of patients whose medical records were sought); *Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 679-682, 156 Cal. Rptr. 55* (right of privacy requires Board to show compelling state interest in medical records of patients of doctor who is being investigated)].

Further, the right to privacy is no bar to a subpoena when the statute or rules governing the investigation have confidentiality requirements that are sufficient to see that the privacy of those involved is not invaded [*Doyle v. State Bar (1982) 32 Cal. 3d 12, 20-21, 184 Cal. Rptr. 720, 648 P.2d 942* ; *Tom v. Schoolhouse Coins, Inc. (1987) 191 Cal. App. 3d 827, 830, 236 Cal. Rptr. 541]* . It has been suggested that the confidentiality requirements of *Gov. Code § 11183* [*see* discussion in *§ 471.30[3]*] may be a sufficient protection [*see* *Tom v. Schoolhouse Coins, Inc. (1987) 191 Cal. App. 3d 827, 830, 236 Cal. Rptr. 541]* .

When a city sought disclosure pursuant to an investigative subpoena under *Gov. Code § 37104*, of information in which it had an interest as a prospective litigant, one Court of Appeal held that the city in such circumstances could obtain information only to the extent it was discoverable by an actual litigant under *Code Civ. Proc. § 2017(b)* [repealed 2004]. In this particular case, the city's interests in disclosure as a prospective litigant against potentially responsible parties in a groundwater contamination clean up action did not justify overcoming the privacy interests of prospective defendants [*Connecticut Indemnity Co. v. Superior Court (1999) 73 Cal. App. 4th 540, 556-557, 86 Cal. Rptr. 2d 515]* .

[ii] Standards for Application of the Challenge

Even when a reasonable expectation of privacy exists, the right to privacy does not bar every intrusion, but merely requires that any intrusion mustbe justified by a compelling state interest [*White v. Davis (1975) 13 Cal. 3d 757, 775, 120 Cal. Rptr. 94, 533 P.2d 222* ; *Tom v. Schoolhouse Coins, Inc. (1987) 191 Cal. App. 3d 827, 830, 236 Cal. Rptr.*

541 ; *Wood v. Superior Court (1985) 166 Cal. App. 3d 1138, 1147, 212 Cal. Rptr. 811]* that outweighs an individual's right to privacy [*Department of Fair Employment and Housing v. Superior Court (2002) 99 Cal. App. 4th 896, 905, 121 Cal. Rptr. 2d 615* ; *Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 680, 156 Cal. Rptr. 55]* . It is not enough, however, to show a compelling state interest and point out a statute authorizing an investigation [*Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 681, 156 Cal. Rptr. 55]* . A good cause showing for the subpoena must also exist, and the agency must use the least intrusive means [*Tom v. Schoolhouse Coins, Inc. (1987) 191 Cal. App. 3d 827, 830-831, 236 Cal. Rptr. 541* ; *Wood v. Superior Court (1985) 166 Cal. App. 3d 1138, 1148-1149, 212 Cal. Rptr. 811* ; *Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 681, 156 Cal. Rptr. 55]* to accomplish the state's compelling interest by a subpoena that is narrowly and specifically drawn [*Doyle v. State Bar (1982) 32 Cal. 3d 12, 20-21, 184 Cal. Rptr. 720, 648 P.2d 942* ; *Wood v. Superior Court (1985) 166 Cal. App. 3d 1138, 1148-1149, 212 Cal. Rptr. 811* ; *Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 681, 156 Cal. Rptr. 55]* .

The requirement of good cause merely calls for a factual exposition of a reasonable ground for the order sought, a showing of the relevance and materiality of the records sought to the subject of the investigation [*Doyle v. State Bar (1982) 32 Cal. 3d 12, 20, 184 Cal. Rptr. 720, 648 P.2d 942* (client trust fund records necessary to determine whether attorney misappropriated funds); *Kizer v. Sulnick (1988) 202 Cal. App. 3d 431, 438, 248 Cal. Rptr. 712* (health study sought by subpoena clearly material and relevant to investigation by *Department of Health); Wood v. Superior Court (1985) 166 Cal. App. 3d 1138, 1149, 212 Cal. Rptr. 811* (demand for complete medical records of patients excessive for Board audit of physician's Schedule II prescriptions); *Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 681, 156 Cal. Rptr. 55* (no showing of relevance or materiality offered in declaration)].

The requirement that the intrusion be limited to the least intrusive means means that even when enforcement is granted, there should be no undue or unnecessary invasion of privacy. That is, the intrusion should be no greater than is necessary to achieve the compelling state interest that justifies it [*Doyle v. State Bar (1982) 32 Cal. 3d 12, 20, 184 Cal. Rptr. 720, 648 P.2d 942* (client trust fund records necessary to determine whether attorney misappropriated funds); *Department of Fair Employment and Housing v. Superior Court (2002) 99 Cal. App. 4th 896, 905, 121 Cal. Rptr. 2d 615* (disclosure of third party tenant and applicant rental records necessary to determine whether unlawful housing discrimination occurred; compelling state interest in prohibiting housing discriminationoutweighs third party tenant privacy interests); *Tom v. Schoolhouse Coins, Inc. (1987) 191 Cal. App. 3d 827, 830-831, 236 Cal. Rptr. 541* (demand for customer names and addresses a de minimus intrusion justified by compelling state interest in enforcing securities laws; there was no less intrusive way to accomplish the investigation); *Wood v. Superior Court (1985) 166 Cal. App. 3d 1138, 1149, 212 Cal. Rptr. 811* (demand for complete medical records of patients excessive for board audit of physician's Schedule II prescriptions); *Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 681, 156 Cal. Rptr. 55]* .

The subpoena and the enforcing order must be so narrowly and specifically drawn as to accomplish the state's compelling interest by the least intrusive means [*Wood v. Superior Court (1985) 166 Cal. App. 3d 1138, 1148-1149, 212 Cal. Rptr. 811* ; *Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 681, 156 Cal. Rptr. 55]* .

[iii] Successful Challenges in Medical Records Cases

The only two cases that have sustained a right of privacy challenge to the enforcement of an investigating agency's subpoena involved subpoenas seeking the production of medical records [*see* *Wood v. Superior Court (1985) 166 Cal. App. 3d 1138, 1147-1149, 212 Cal. Rptr. 811* ; *Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 679-682, 156 Cal. Rptr. 55]* .

In these medical records cases, the courts have ruled that the protection of the patient's privacy interest requires an investigating agency to do two things: (1) the agency must take reasonable steps to notify the patient of its proposed

examination, and (2) if the patient does not waive the privacy interest, the agency must provide competent evidence that permits a court to make an independent finding that the agency has good cause for seeking the records [*Wood v. Superior Court (1985) 166 Cal. App. 3d 1138, 1149, 212 Cal. Rptr. 811* ; *Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 680, 156 Cal. Rptr. 55]* .

The custodian of the patient's records has standing to assert the absent patient's privacy interest [*Wood v. Superior Court (1985) 166 Cal. App. 3d 1138, 1145, 212 Cal. Rptr. 811]* .

Even in a medical records case, the right of privacy is no bar to the enforcement of an agency subpoena if sufficient steps are taken to protect the patient's privacy. Thus, an order compelling compliance with a subpoena for patient medical records was upheld when the subpoena sought neither disclosure of the patients' identities nor identifying medical information [*Board of Medical Quality Assurance v. Hazel Hawkins Memorial Hospital (1982) 135 Cal. App. 3d 561, 565, 185 Cal. Rptr. 405* ; *see Kizer v. Sulnick (1988) 202 Cal. App. 3d 431, 438-439, 248 Cal. Rptr. 712* (subpoena for health study upheld when record did not disclose whether study referred to individually identifiable medical records; if such recordsare part of the study, right to privacy requires only that any named medical records be deleted or, if feasible, that information that identifies participants be deleted); *Wood v. Superior Court (1985) 166 Cal. App. 3d 1138, 1149, 212 Cal. Rptr. 811* (scope of administrative warrant must be carefully tailored to avoid securing improper records, if possible, or steps must be taken to conceal identity of patient)].

The term, "discovery," in *Evid. Code § 1157*, has its well established legal meaning of a formal exchange of evidentiary information between parties to a pending action, and that meaning does not include an investigative subpoena issued by an administrative agency under *Gov. Code § 11181(e)* [*Arnett v. Dal Cielo (1996), 14 Cal. 4th 4, 24, 56 Cal. Rptr. 2d 706, 923 P. 2d 1, 18]* .

[iv] Non-Medical Records Cases

In cases that do not involve medical records, right of privacy challenges to investigational subpoenas generally fail, not only when asserted by the subpoenaed party on his or her own behalf, but also when asserted on behalf of absent third parties [*see, e.g.,* *Department of Fair Employment and Housing v. Superior Court (2002) 99 Cal. App. 4th 896, 905, 121 Cal. Rptr. 2d 615* (disclosure of third party tenant and applicant rental records necessary to determine whether unlawful housing discrimination occurred; compelling state interest in prohibiting housing discrimination outweighs third party tenant privacy interests); *Tom v. Schoolhouse Coins, Inc. (1987) 191 Cal. App. 3d 827, 830-831, 236 Cal. Rptr. 541* (demand for customer names and addresses upheld against coin seller's assertion of customers' privacy rights as a de minimus intrusion justified by compelling state interest in enforcing securities laws); *People ex rel. Franchise Tax Bd. v. Superior Court (1985) 164 Cal. App. 3d 526, 541, 210 Cal. Rptr. 695* (Tax Board administrative subpoena duces tecum requiring insurance company to identify policyholders under annuity plan held not to violate policyholders' right of privacy because the information was required by law to be reported and they had no reasonable expectation of privacy); *Barnes v. Molino (1980) 103 Cal. App. 3d 46, 52, 162 Cal. Rptr. 786* (right of privacy may limit subpoenas of medical records of patients not otherwise involved in the administrative inquiry, but does not affect administrative power to subpoena corporate records); *see also* *Doyle v. State Bar (1982) 32 Cal. 3d 12, 20, 184 Cal. Rptr. 720, 648 P.2d 942* (client trust fund records necessary to determine whether attorney misappropriated funds)].

[v] Private Club Membership Lists

A Court of Appeal vacated a trial court order enforcing an administrative subpoena, issued by the Franchise Tax Board, that sought disclosure ofthe membership list of a private club. The appellate court based its decision on the *First Amendment* associational privacy rights possessed by members of the private club. It concluded that the Board had not shown a compelling state interest sufficient to overcome privacy rights. The Board claimed that it needed to enforce the subpoena because it was looking for information relating to illegal tax deductions by club members. However, the Board had no specific evidence that there were such violations. Furthermore, the Board claimed that enforcement of the

subpoena was a necessary means to implement its tax enforcement program. The court rejected this argument and concluded that less restrictive means, such as individualized tax audits or changing tax forms, were available [*Pacific Union Club v. Superior Court (1991) 232 Cal. App. 3d 60, 81, 283 Cal. Rptr. 287]* .

[f] Statutory Privileges

When a subpoena duces tecum is directed to an attorney, for production of a client's papers, it may be resisted by the client, and must be resisted by the attorney, on the basis of the attorney-client privilege, if the papers were delivered by the client to the attorney in connection with the client's seeking legal services [*see Fisher v. United States (1976) 425 U.S. 391, 404, 96 S. Ct. 1569, 48 L. Ed. 2d 39* ; *see also Evid. Code §§ 954, 955*]. Statutory privileges against disclosure of confidential information [*see Evid. Code §§ 900-1070*] are available to witnesses in administrative investigations and to nonwitnesses who have the statutory right to prevent a witness from giving certain testimony [*see Evid. Code § 910*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsConstitutional RightsSearch & SeizureAdministrative LawAgency InvestigationsConstitutional RightsSelf-Incrimination PrivilegeAdministrative LawAgency InvestigationsScopeSubpoenasCivil ProcedureDiscoveryPrivileged MattersWork ProductGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawBill of RightsFundamental RightsSearch & SeizureGeneral OverviewConstitutional LawBill of RightsFundamental RightsSearch & SeizureScope of ProtectionConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessSelf-Incrimination PrivilegeConstitutional LawSubstantive Due ProcessPrivacyGeneral OverviewConstitutional LawSubstantive Due ProcessPrivacyPersonal InformationEvidencePrivilegesAttorney-Client PrivilegeGeneral OverviewHealthcare LawBusiness Administration & OrganizationPatient ConfidentialityGeneral Overview

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[Reserved]

§§ 471.33[Reserved]

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§ 471.40 Federal Constitution

Freedom from unreasonable searches and seizures. *U.S. Const., amend. IV*

Privilege against self-incrimination. *U.S. Const., amend. V*

Right to counsel. *U.S. Const., amend. VI*

Due process and *equal protection clauses. U.S. Const., amend. XIV, § 1*

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§ 471.41 State Constitution

Due process and *equal protection clauses*. *Cal. Const., art. I, § 7(a)*

Freedom from unreasonable searches and seizures. *Cal. Const., art. I, § 13*

Privilege against self-incrimination. *Cal. Const., art. I, § 15*

Right to counsel. *Cal. Const., art. I, § 15*

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§ 471.42 State Statutes

Administrative Procedure Act. *Gov. Code § 11340 et seq.*

Investigative powers of heads of departments. *Gov. Code § 11180 et seq.*

Open meeting laws. *Gov. Code §§ 11120 et seq.* (state), 54950 et seq. (local; Ralph M. Brown Act)

Public Records Act. *Gov. Code § 6250 et seq.*

Privileges against disclosure in testimony. *Evid. Code § 900 et seq.*

Privileged official information. *Evid. Code § 1040*

Inspection warrants. *Code Civ. Proc. § 1822.50 et seq.*

Subpoena powers of county supervisors and city councils. *Gov. Code §§ 25170, 37104*

Subpoena powers of local tax assessor. *Rev. & Tax Code § 454*

Subpoena powers of local board of equalization. *Rev. & Tax Code § 1609.4*

Service of summons in civil action (applicable to service of administrative subpoena by judicial decision). *Code Civ. Proc. §§ 413.10-417.40*

Investigators of various state agencies as having authority of peace officers. *Bus. & Prof. Code § 7011.5*; *Penal Code § 830.3*

Legal Topics:

For related research and practice materials, see the following legal topics:
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41-471 California Forms of Pleading and Practice--Annotated § 471.43

§ 471.43 Decisions

[1] Administrative Subpoenas

[a] Requirements

Administrative subpoena can be issued in connection with any type of authorized investigation. *Paladini v. Superior Court (1918) 178 Cal. 369, 373, 173 P. 588*

Adjudicative proceeding is not required to be pending in order for agency to issue subpoena. *Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 528-529, 15 Cal. Rptr. 630, 364 P.2d 462*

Regulatory agency is entitled to subpoena corporate records merely to satisfy itself that law is being obeyed. *United States v. Morton Salt Co. (1950) 338 U.S. 632, 651-654, 70 S. Ct. 357, 94 L. Ed. 401, 46 F.T.C. 1436*

State Attorney General's power under *Gov. Code § 11180* to investigate possible antitrust violations by means of administrative subpoenas is not dependent on any predetermination that violations actually or even probably had taken place. *Younger v. Jensen (1980) 26 Cal. 3d 397, 404-406, 161 Cal. Rptr. 905, 605 P.2d 813*

Franchise Tax Board (FTB) has power to issue administrative subpoenas under Political Reform Act for production of records of registered lobbyists; administrative subpoena by FTB is required to be narrowly drawn under authority of *Fair Political Practices Com. v. Superior Court (1979) 25 Cal. 3d 33, 157 Cal. Rptr. 855, 599 P.2d 46* . *Franchise Tax Board v. Barnhart (1980) 105 Cal. App. 3d 274, 278-281, 164 Cal. Rptr. 331*

Administrative subpoena duces tecum does not require affidavit of good cause. *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 40-41, 99 Cal. Rptr. 791* ; *People v. West Coast Shows, Inc. (1970) 10 Cal. App. 3d 462, 470, 89 Cal. Rptr. 290*

Service of administrative subpoenas is governed by statutes governing service of civil subpoenas, to extent applicable. *Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 530-531, 15 Cal. Rptr. 630, 364 P.2d 462*

[b] Appealability of Order to Comply

Order by trial court to comply with subpoena duces tecum issued by Commissioner of Corporations in connection with investigation pursuant to *Gov. Code § 11188* is not appealable since it is not judgment within definition of *Code Civ. Proc. § 577* and is not listed as appealable order in *Code Civ. Proc. § 904.1*. *Barnes v. Molino (1980) 103 Cal. App. 3d 46, 51, 162 Cal. Rptr. 786*

[c] Enforcement

Agency lacks power to punish for contempt unless power explicitly conferred by law. *Marcus v. Workmen's Comp. Appeals Bd. (1973) 35 Cal. App. 3d 598, 603, 111 Cal. Rptr. 101*

Enforcement of state agency subpoena by judicial proceeding under *Gov. Code §§ 11186-11188*. *Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 530-531, 15 Cal. Rptr. 630, 364 P.2d 462* ; *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 39-40, 99 Cal. Rptr. 791*

[d] Refusal to Attend or Be Sworn

Motion to quash subpoena is inappropriate and unnecessary in administrative proceedings. *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 40, 99 Cal. Rptr. 791*

Procedure for resisting command to attend is to simply fail to attend and then to argue invalidity of subpoena at subsequent judicial proceeding for enforcement. *Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 530-531, 15 Cal. Rptr. 630, 364 P.2d 462* ; *People v. West Coast Shows, Inc. (1970) 10 Cal. App. 3d 462, 470, 89 Cal. Rptr. 290*

Privilege of witness to refuse to be sworn attaches only to criminal defendant. *Black v. State Bar (1972) 7 Cal. 3d 676, 688, 103 Cal. Rptr. 288, 499 P.2d 968* ; *People v. Whelchel (1967) 255 Cal. App. 2d 455, 460, 63 Cal. Rptr. 258*

[e] Refusal to Produce Documents

Subpoena duces tecum is subject to resistance on ground of unlawful search or seizure. *Oklahoma Press Pub. Co. v. Walling (1946) 327 U.S. 186, 209, 66 S. Ct. 494, 90 L. Ed. 614* ; *Hale v. Henkel (1906) 201 U.S. 43, 76, 26 S. Ct. 370, 50 L. Ed. 652* ; *Boyd v. United States (1886) 116 U.S. 616, 622, 6 S. Ct. 524, 29 L. Ed. 746* ; *Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 529, 15 Cal. Rptr. 630, 364 P.2d 462*

Fourth Amendment protection extends to corporations and other artifical persons. *Oklahoma Press Pub. Co. v. Walling (1946) 327 U.S. 186, 205, 66 S. Ct. 494, 90 L. Ed. 614*

Subpoena duces tecum is subject to constitutional challenge if investigation unauthorized, demand of subpoena too indefinite, or information sought irrelevant. *Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 529, 15 Cal. Rptr. 630, 364 P.2d 462*

Sufficiency of description of documents sought in subpoena duces tecum. *McPhaul v. United States (1960) 364 U.S. 372, 382, 81 S. Ct. 138, 5 L. Ed. 2d 136* ; *Brown v. United States (1927) 276 U.S. 134, 143, 48 S. Ct. 288, 72 L. Ed. 500* ; *Paladini v. Superior Court (1918) 178 Cal. 369, 374-375, 173 P. 588* ; *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 41-42, 99 Cal. Rptr. 791*

Sufficiency of description of person to whom subpoena duces tecum is directed. *Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 528 n. 1, 15 Cal. Rptr. 630, 364 P.2d 462* ; *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 42, 99 Cal. Rptr. 791*

Relevance of information sought to pending investigation. *McPhaul v. United States (1960) 364 U.S. 372, 381, 81 S. Ct. 138, 5 L. Ed. 2d 136* ; *Oklahoma Press Pub. Co. v. Walling (1946) 327 U.S. 186, 209, 66 S. Ct. 494, 90 L. Ed. 614* ; *Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 529, 15 Cal. Rptr. 630, 364 P.2d 462* ; *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 40, 99 Cal. Rptr. 791* ; *People v. West Coast Shows Inc. (1970) 10 Cal. App. 3d 462, 470, 89 Cal. Rptr. 290*

Subpoena duces tecum is subject to resistance on ground of privilege against self-incrimination. *Bellis v. United States (1974) 417 U.S. 85, 87, 94 S. Ct. 2179, 40 L. Ed. 2d 678* ; *Boyd v. United States (1886) 116 U.S. 616, 633, 6 S. Ct. 524, 29 L. Ed. 746*

Privilege against self-incrimination does not protect papers prepared by and in custody of taxpayer's accountant from compelled production pursuant to subpoena directed to accountant. *Fisher v. United States (1976) 425 U.S. 391, 412-413, 96 S. Ct. 1569, 48 L. Ed. 2d 39*

Custodian's privilege against self-incrimination does not protect papers incriminating someone else from compelled production pursuant to subpoena directed to custodian. *Rogers v. United States (1951) 340 U.S. 367, 371, 71 S. Ct. 438, 95 L. Ed. 344*

Subject's privilege against self-incrimination does not protect papers incriminating subject from compelled production pursuant to subpoena directed to custodian. *California Bankers Ass'n v. Shultz (1974) 416 U.S. 21, 55, 94 S. Ct. 1494, 39 L. Ed. 2d 812* ; *Perlman v. United States (1918) 247 U.S. 7, 15, 38 S. Ct. 417, 62 L. Ed. 950* ; *Johnson v. United States (1913) 228 U.S. 457, 458, 33 S. Ct. 572, 57 L. Ed. 919*

Subject's privilege against self-incrimination as not protecting papers incriminating subject, and delivered by subject to custodian, from compelled production pursuant to subpoena directed to custodian. *Couch v. United States (1974) 409 U.S. 322, 327, 93 S. Ct. 611, 34 L. Ed. 2d 548*

Subject's privilege against self-incrimination does not protect papers incriminating subject, and illegally in custodian's hands, from compelled production pursuant to subpoena directed to custodian. *Couch v. United States (1974) 409 U.S. 322, 331 n. 14, 93 S. Ct. 611, 34 L. Ed. 2d 548* ; *Burdeau v. McDowell (1921) 256 U.S. 465, 476, 41 S. Ct. 574, 65 L. Ed. 1048*

Attorney-client privilege does protect papers incriminating client from production pursuant to subpoena directed to attorney. *Fisher v. United States (1976) 425 U.S. 391, 402-406, 96 S. Ct. 1569, 48 L. Ed. 2d 39*

Privilege against self-incrimination does not protect papers incriminating artificial person (*e.g.*, corporation) from production pursuant to subpoena directed to such artificial person or its agent. *Bellis v. United States (1974) 417 U.S. 85, 90-100, 94 S. Ct. 2179, 40 L. Ed. 2d 678* ; *United States v. Morton Salt Co. (1949) 338 U.S. 632, 652, 70 S. Ct. 357, 94 L. Ed. 401, 46 F.T.C. 1436* ; *United States v. White (1944) 322 U.S. 694, 699-701, 64 S. Ct. 1248, 88 L. Ed. 1542* ; *Grant v. United States (1913) 227 U.S. 74, 77-79, 33 S. Ct. 190, 57 L. Ed. 423* ; *Wheeler v. United States (1913) 226 U.S. 478, 489-490, 33 S. Ct. 158, 57 L. Ed. 309* ; *Dreier v. United States (1911) 221 U.S. 394, 400, 31 S. Ct. 550, 55 L. Ed. 784* ; *Wilson v. United States (1911) 221 U.S. 361, 374, 382, 31 S. Ct. 538, 55 L. Ed. 771* ; *Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 529, 15 Cal. Rptr. 630, 364 P.2d 462* ; *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 44-45, 99 Cal. Rptr. 791*

Privilege against self-incrimination does not extend to records required to be kept by governmental regulatory laws.

Grosso v. United States (1968) 390 U.S. 62, 69, 88 S. Ct. 709, 19 L. Ed. 2d 906 ; *Marchetti v. United States (1968) 390 U.S. 39, 57, 88 S. Ct. 697, 19 L. Ed. 2d 889* ; *Shapiro v. United States (1948) 335 U.S. 1, 5, 17-22, 68 S. Ct. 1375, 92 L. Ed. 1787* ; *Boyd v. United States (1886) 116 U.S. 616, 624-625, 6 S. Ct. 524, 29 L. Ed. 746* ; *Blinder v. Division of Narcotic Enforcement (1972) 25 Cal. App. 3d 174, 187-188, 101 Cal. Rptr. 635*

Administrative subpoena duces tecum issued by Commissioner of Corporations in investigating possible offer and sale of unqualified securities, which required seller of numismatic coins to disclose names and addresses of its customers, does not violate of customers' right to privacy guaranteed by *Cal. Const., art. I, § 1*, because public interest in disclosure outweighs privacy interest. *Tom v. Schoolhouse Coins, Inc. (1987) 191 Cal. App. 3d 827, 829-831, 236 Cal. Rptr. 541*

Subject's privilege against self-incrimination does not protect papers sought in investigation to determine whether corporate securities laws have been violated where one Commissioner of Corporations was authorized to make inquiry under *Corp. Code § 25531*, demand was not too indefinite (after modification of order by Court of Appeal), and information sought was reasonably relevant to investigation. *Barnes v. Molino (1980) 103 Cal. App. 3d 46, 51-55, 162 Cal. Rptr. 786*

State agency is not able to avoid due process restraints merely by making reference to broad investigation enabling statute but is required to show that person's constitutional rights are not infringed; if disclosure is compelled after requisite balancing of rights and finding of compelling state interest, order is required to be drawn with narrow specificity. *Division of Medical Quality v. Gherardini (1979) 93 Cal. App. 3d 669, 681, 156 Cal. Rptr. 55*

[f] Refusal to Testify

Privilege against self-incrimination is applicable in administrative proceedings. *In re Gault (1967) 387 U.S. 1, 47-48, 87 S. Ct. 1428, 18 L. Ed. 2d 527* ; *Black v. State Bar (1972) 7 Cal. 3d 676, 685, 103 Cal. Rptr. 288, 499 P.2d 968*

Privilege is invocable by natural person for own benefit but not to prevent others from testifying. *California Bankers Ass'n v. Shultz (1974) 416 U.S. 21, 55, 94 S. Ct. 1494, 39 L. Ed. 2d 812* ; *Bellis v. United States (1974) 417 U.S. 85, 88, 94 S. Ct. 2179, 40 L. Ed. 2d 678* ; *Rogers v. United States (1951) 340 U.S. 367, 371, 71 S. Ct. 438, 95 L. Ed. 344* ; *Hale v. Henkel (1906) 201 U.S. 43, 69-70, 26 S. Ct. 370, 50 L. Ed. 652* ; *Black v. State Bar (1972) 7 Cal. 3d 676, 685, 103 Cal. Rptr. 288, 499 P.2d 968*

Privilege is not invocable for benefit of corporation, unincorporated association, or partnership. *Bellis v. United States (1974) 417 U.S. 85, 88, 94 S. Ct. 2179, 40 L. Ed. 2d 678* ; *United States v. White (1944) 322 U.S. 694, 701, 64 S. Ct. 1248, 88 L. Ed. 1542* ; *Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 529, 15 Cal. Rptr. 630, 364 P.2d 462* ; *West Coast Home Improvement Co., Inc. v. Contractors' State License Bd. (1945) 72 Cal. App. 2d 287, 164 P.2d 811*

Agent of artifical person retains personal privilege not to incriminate self by testimony. *United States v. Lawn (S.D. N.Y. 1953) 115 F. Supp. 674, 677* ; *McLain v. Superior Court of Sacramento County (1950) 99 Cal. App. 2d 109, 117, 221 P.2d 300*

Agent of artificial person is not privileged to withhold principal's records to avoid self-incrimination. *Bellis v. United States (1974) 417 U.S. 85, 88, 94 S. Ct. 2179, 40 L. Ed. 2d 678* ; *United States v. White (1944) 322 U.S. 694, 701, 64 S. Ct. 1248, 88 L. Ed. 1542* ; Brovelli v. Superior Court (1961) 56Cal. 2d 524, 529, *56 Cal. 2d 524, 15 Cal. Rptr. 630, 364 P.2d 462* ; *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 44-45, 99 Cal. Rptr. 791*

Privilege is invocable only to avoid punishment for crime. *Johnson v. State Bar (1935) 4 Cal. 2d 744, 752, 52 P.2d 928* ; *People v. Whelchel (1967) 255 Cal. App. 2d 455, 460, 63 Cal. Rptr. 258*

Invocation of privilege is not valid cause for discipline. *Spevack v. Klein (1967) 385 U.S. 511, 514, 87 S. Ct. 625, 17 L. Ed. 2d 574*

Privilege is not invocable until question is put to witness and unless answer would tend to incriminate witness. *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 39-40, 99 Cal. Rptr. 791*

Privilege is not invocable by beneficiary of statutory immunity. *Kastigar v. United States (1972) 406 U.S. 441, 443, 453, 92 S. Ct. 1653, 32 L. Ed. 2d 212* ; *People v. King (1967) 66 Cal. 2d 633, 642, 645, 58 Cal. Rptr. 571, 427 P.2d 171* ; *McLain v. Superior Court (1950) 99 Cal. App. 2d 109, 113, 115-118, 221 P.2d 300*

Whether or not appellant had valid claim of privilege against self-incrimination is determinable only in context of refusal to answer after specific questions were asked and such determination is not capable of being made at hearing held pursuant to *Gov. Code § 11188* (order to comply with subpoena duces tecum). *Barnes v. Molino (1980) 103 Cal. App. 3d 46, 56, 162 Cal. Rptr. 786*

[2] Discretionary Investigations

Legislative goals are not to be frustrated because of omission to specify investigative power of administrative agency. *Laurelle v. Bush (1911) 17 Cal. App. 409, 415-416, 119 P. 953*

[3] Hearings

[a] General Requirements

Adjudicative hearing styled as investigation nevertheless requires observance of procedural safeguards. *People v. Lockheed Shipbuilding & Constr. Co. (1973) 35 Cal. App. 3d 776, 781, 111 Cal. Rptr. 106*

Adjudicative hearing is usually required to precede administrative action except in emergency situations. *Sokol v. Public Utilities Com. (1966) 65 Cal. 2d 247, 251-256, 53 Cal. Rptr. 673, 418 P.2d 265* ; *Affonso Bros. v. Brock (1938) 29 Cal. App. 2d 26, 32, 84 P.2d 515* (emergency situation)

Investigation is not constitutionally required to be held in hearing form. *McCartney v. Commission on Judicial Qualifications (1974) 12 Cal. 3d 512, 519, 116 Cal. Rptr. 260, 526 P.2d 268* ; *In re Bye (1974) 12 Cal. 3d 96, 100-101, 115 Cal. Rptr. 382, 524 P.2d 854* ; *CEEED v. California Coastal Zone Conservation Com. (1974) 43 Cal. App. 3d 306, 317, 118 Cal. Rptr. 315*

[b] Place of Attendance

Application of *Gov. Code § 11185* limiting distance witness is required to travel to attend hearing pursuant to subpoena. *In re Morelli (1970) 11 Cal. App. 3d 819, 831, 832, 91 Cal. Rptr. 72* (construing *Code Civ. Proc. § 1989*, a substantially similar statute prior to its 1981 amendment); *Briggs v. Superior Court (1947) 81 Cal. App. 2d 240, 245, 183 P.2d 758* (discussing concept of residence)

[4] Inspection Warrants

Code Civ. Proc. § 1822.50 has no applicability to inspections of licensed businesses. *People v. Firstenberg (1979) 92 Cal. App. 3d 570, 583, 155 Cal. Rptr. 80*

Procedural statutes respecting inspection warrants [*Code Civ. Proc. § 1822.50 et seq.*] required to be read in conjunction with statutes authorizing administrative searches. *Currier v. City of Pasadena (1975) 48 Cal. App. 3d 810, 815, 121 Cal. Rptr. 913*

Scope of inspection warrant statutes. *Vidaurri v. Superior Court (1970) 13 Cal. App. 3d 550, 553, 91 Cal. Rptr. 704*

Hearsay in affidavit for issuance of warrant. *Aguilar v. Texas (1964) 378 U.S. 108, 114-115, 84 S. Ct. 1509, 12 L. Ed. 2d 723* ; *Halpin v. Superior Court (1972) 6 Cal. 3d 885, 892, 101 Cal. Rptr. 375, 495 P.2d 1295* ; *People v. Hamilton (1969) 71 Cal. 2d 176, 179-180, 77 Cal. Rptr. 785, 454 P.2d 681*

Description in inspection warrant of place to be searched. *People v. Wheeler (1973) 30 Cal. App. 3d 282, 298, 106 Cal. Rptr. 260*

[5] Mandatory Investigations

Requirement to conduct investigation is inferrable from governing statutes in appropriate case. *Goytino v. McAleer (1906) 4 Cal. App. 655, 657-659, 88 P. 991*

Investigation is implicitly required where agency authorized to act only if certain conditions prevail. *Laurelle v. Bush (1911) 17 Cal. App. 409, 415-416, 119 P. 953*

[6] Nature of Investigative Power

Administrative investigative power is analogous to that of grand jury. *Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 529, 15 Cal. Rptr. 630, 364 P.2d 462*

Constitutionality of conditioning receipt of welfare benefits on acquiescence to warrantless investigations in nature of home visits to recipients. *Wyman v. James (1971) 400 U.S. 309, 317, 91 S. Ct. 381, 27 L. Ed. 2d 408*

Power to investigate persons not subject to regulation. *Redding Pine Mills v. State Bd. of Equalization (1958) 157 Cal. App. 2d 40, 43-45, 320 P.2d 25 , cert. denied, 358 U.S. 818, 79 S. Ct. 29, 3 L. Ed. 2d 60*

Data sharing between agencies is permissible investigative technique. *Carleson v. Superior Court (1972) 27 Cal. App. 3d 1, 10, 103 Cal. Rptr. 824* ; *Belmont v. State Personnel Bd. (1974) 36 Cal. App. 3d 518, 524, 526, 111 Cal. Rptr. 607*

Use of undercover agents is permissible subject to limitations for prevention of entrapment. *Patty v. Board of Medical Examiners (1973) 9 Cal. 3d 356, 359-360, 367-369, 107 Cal. Rptr. 473, 508 P.2d 1121* ; *Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 69, 64 Cal. Rptr. 785, 435 P.2d 553* ; *Whitlow v. Board of Medical Examiners (1967) 248 Cal. App. 2d 478, 489-490, 56 Cal. Rptr. 525*

Use of evidence obtained by deceitful means on part of others (not agency investigators) is impermissible. *Redner v. Workmen's Comp. Appeals Bd. (1971) 5 Cal. 3d 83, 94-97, 95 Cal. Rptr. 447, 485 P.2d 799*

[7] Notice of Investigation

Subject of investigation is not constitutionally entitled to notice of investigation. *McCartney v. Commission on Judicial Qualifications (1974) 12 Cal. 3d 512, 519, 116 Cal. Rptr. 260, 526 P.2d 268*

[8] Procedural Rights of Subject

Administrative investigation does not directly affect persons legal rights or impose penalty. *Hannah v. Larche (1960) 363 U.S. 420, 441, 80 S. Ct. 1502, 4 L. Ed. 2d 1307*

Public employee is not entitled on any constitutional ground to refuse to cooperate with investigation into whether he should be disciplined; employee is properly subjected to discipline for refusal to cooperate in investigation. *Kelly v. State Personnel Bd. (1979) 94 Cal. App. 3d 905, 911-913, 156 Cal. Rptr. 795*

Adjudicative proceeding directly affects person's legal rights. *People v. Lockheed Shipbuilding & Constr. Co. (1973) 35 Cal. App. 3d 776, 780, 111 Cal. Rptr. 106*

Adjudicative proceeding requires hearing. *Endler v. Schutzbank (1968) 68 Cal. 2d 162, 171-182, 65 Cal. Rptr. 297, 436 P.2d 297*

Procedural rights of subject in adjudicative hearing. *English v. City of Long Beach (1950) 35 Cal. 2d 155, 158-159, 217 P.2d 22*

Requirement of record in adjudicative proceeding. *Topanga Ass'n for a Scenic Community v. Los Angeles County (1974) 11 Cal. 3d 506, 515-516, 113 Cal. Rptr. 836, 522 P.2d 12* Investigative proceeding is not required to conform to requirements of due process imposed on adjudicative proceedings. *McCartney v. Commission on Judicial Qualifications (1974) 12 Cal. 3d 512, 519, 116 Cal. Rptr. 260, 526 P.2d 268*

Rights of apprisal, confrontation, and cross examination are not constitutionally required to be preserved in investigative proceeding. *Hannah v. Larche (1960) 363 U.S. 420, 441-443, 448, 80 S. Ct. 1502, 4 L. Ed. 2d 1307*

Right to counsel is not constitutionally required to be preserved in investigative proceeding. *In re Groban (1957) 352 U.S. 330, 332-333, 335, 77 S. Ct. 510, 1 L. Ed. 2d 376* ; *Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 539-540, 92 Cal. Rptr. 525*

[9] Public Access to Investigative Data

Intelligence information relating to law enforcement or licensing investigations that is exempt from public disclosure pursuant to *Gov. Code § 6254(f)* includes information relating to criminal activity that may identify persons mentioned in agency's files as possibly involved in or associated with criminal activities or suspected criminals, that may identify confidential sources, and that is treated by original sources as confidential. *American Civil Liberties Union Foundation v. Deukmejian (1982) 32 Cal. 3d 440, 450 n.11, 452, 186 Cal. Rptr. 235, 651 P.2d 822*

Exemption of *Gov. Code § 6254(a)*(exemption of particular records) requires showing that (1) record sought is preliminary draft, note, or memorandum, (2) record is not retained by public agency in ordinary course of business, and (3) public interest in withholding must clearly outweigh public interest in disclosure. *Citizens for a Better Environment v. Department of Food & Agriculture (1985) 171 Cal. App. 3d 704, 711-712, 217 Cal. Rptr. 504*

Department of Health Services audit manual constitutes law enforcement materials and exempt from disclosure pursuant to *Gov. Code § 6255*. *Eskaton Monterey Hospital v. Myers (1982) 134 Cal. App. 3d 788, 793, 184 Cal. Rptr. 840*

In action under Public Records Act [*Gov. Code § 6250 et seq.*] by applicant for special deputy status to compel

department to permit inspection of application file, trial court erroneously concluded that all matters within file were privileged; segregation and disclosure of nonexempt material is required under act. *Johnson v. Winter (1982) 127 Cal. App. 3d 435, 439-440, 179 Cal. Rptr. 585*

Issues underlying question of whether or not investigative data should be opened to public inspection. *Black Panther Party v. Kehoe (1974) 42 Cal. App. 3d 645, 651-652, 117 Cal. Rptr. 106*

Public interest exception to disclosure under Public Records Act [*Gov. Code §§ 6250-6261*; *now see Gov. Code § 6250 et seq.*]. *State of California ex rel. Division of Industrial Safety v. Superior Court (1974) 43 Cal. App. 3d 778, 786, 117 Cal. Rptr. 726* ; *Uribe v. Howie (1971) 19 Cal. App. 3d 194, 210, 96 Cal. Rptr. 493*

Investigative file exemption applys where prospect of enforcement proceeding is concrete and definite. *Uribe v. Howie (1971) 19 Cal. App. 3d 194, 212-213, 96 Cal. Rptr. 493*

Investigative file exemption is not applicable to administrative proceedings. *California ex rel. Div. of Indus. Safety v. Superior Court (1974) 43 Cal. App. 3d 778, 783-784, 117 Cal. Rptr. 726*

Consumer complaint files are generally exempt from disclosure. *Black Panther Party v. Kehoe (1974) 42 Cal. App. 3d 645, 650-654, 657-658, 117 Cal. Rptr. 106*

[10] Public Attendance at Investigative Hearings

Desirability of allowing public to attend investigative hearing. *FCC v. Schreiber (1965) 381 U.S. 279, 294, 85 S. Ct. 1459, 14 L. Ed. 2d 383*

Public investigative hearing is generally not required by due process guaranty. *Hannah v. Larche (1960) 363 U.S. 420, 442-452, 80 S. Ct. 1502, 4 L. Ed. 2d 1307* ; *Bowles v. Baer (7th Cir. 1944) 142 F.2d 787, 788-789* ; *Woolley v. United States (9th Cir. 1938) 97 F.2d 258, 262*

[11] Remedies

[a] Injunctive Relief

Injunctive relief is available to person aggrieved by investigation beyond scope of agency's power or pursuant to unconstitutional statute or conducted in unconstitutional manner. *Bueneman v. City of Santa Barbara (1937) 8 Cal. 2d 405, 407, 65 P.2d 884* ; *Downing v. Cal. State Board of Pharmacy (1948) 85 Cal. App. 2d 30, 36, 192 P.2d 39* ; *Berkeley Chiropractic College v. Compton (1929) 97 Cal. App. 790, 793, 276 P. 361*

[b] Taxpayer Action

Taxpayer action to stop investigation on grounds of waste of public funds. *Irwin v. Manhattan Beach (1966) 65 Cal. 2d 13, 19-20, 51 Cal. Rptr. 881, 415 P.2d 769* ; *Duskin v. San Francisco Redevelopment Agency (1973) 31 Cal. App. 3d 769, 773, 107 Cal. Rptr. 667* ; *California State Employees' Assn. v. Williams (1970) 7 Cal. App. 3d 390, 392, 86 Cal. Rptr. 305* ; *Ahlgren v. Carr (1962) 209 Cal. App. 2d 248, 254, 25 Cal. Rptr. 887* ; *Wirin v. Horrall (1948) 85 Cal. App. 2d 497, 504-505, 193 P.2d 470*

[c] Damages Action

Action for damages arising from unlawful administrative search. *Silva v. MacAuley (1933) 135 Cal. App. 249, 253, 26 P.2d 887* ; *Ryan v. Crist (1914) 23 Cal. App. 744, 745, 139 P. 436*

[d] Suppression of Illegal Evidence

Evidence illegally seized during administrative search is suppressible in subsequent criminal trial. *Mapp v. Ohio (1961) 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081* ; *Dyas v. Superior Court (1974) 11 Cal. 3d 628, 635-636, 114 Cal. Rptr. 114, 522 P.2d 674* ; *Kaplan v. Superior Court (1971) 6 Cal. 3d 150, 155-161, 98 Cal. Rptr. 649, 491 P.2d 1* ; *People v. Martin (1955) 45 Cal. 2d 755, 761, 290 P.2d 855* ; *People v. Scott (1974) 43 Cal. App. 3d 723, 727, 117 Cal. Rptr. 925*

Evidence of crime legitimately discovered during administrative search is admissible in subsequent criminal trial. *People v. Hyde (1974) 12 Cal. 3d 158, 166, 115 Cal. Rptr. 358, 524 P.2d 830*

Admissibility in subsequent civil trial of evidence illegally seized during administrative search. *City & County of San Francisco v. City Inv. Corp. (1971) 15 Cal. App. 3d 1031, 1039, 93 Cal. Rptr. 690*

Suppression of evidence in administrative proceeding. *Patty v. Board of Medical Examiners (1973) 9 Cal. 3d 356* ; *Redner v. Workmen's Comp. Appeals Bd. (1971) 5 Cal. 3d 83, 94-97, 95 Cal. Rptr. 447, 485 P.2d 799* ; *In re Martinez (1970) 1 Cal. 3d 641, 649-650, 83 Cal. Rptr. 382, 463 P.2d 734* ; *Governing Board v. Metcalf (1974) 36 Cal. App. 3d 546, 549, 111 Cal. Rptr. 724*

Recovery of illegally seized property. *Silva v. MacAuley (1933) 135 Cal. App. 249, 253-254, 26 P.2d 887*

Action for damages based on failure to investigate or on negligent investigation. *Johnson v. State of California (1968) 69 Cal. 2d 782, 793, 73 Cal. Rptr. 240, 447 P.2d 352* ; *Elton v. County of Orange (1970) 3 Cal. App. 3d 1053, 1056, 1059, 84 Cal. Rptr. 27* ; *Sava v. Fuller (1967) 249 Cal. App. 2d 281, 292-293, 57 Cal. Rptr. 312* ; *Glickman v. Glasner (1964) 230 Cal. App. 2d 120, 125-126, 40 Cal. Rptr. 719*

Writ of mandate is available to compel agency to make investigation in appropriate case. *Faulkner v. California Toll Bridge Auth. (1953) 40 Cal. 2d 317, 326-334, 253 P.2d 659*

Requirements for issuance of writ of mandate. *People ex rel. Younger v. El Dorado County (1971) 5 Cal. 3d 480, 491, 96 Cal. Rptr. 553, 487 P.2d 1193* ; *People ex rel. Fund American Companies v. California Ins. Co. (1974) 43 Cal. App. 3d 423, 431, 117 Cal. Rptr. 623* ; *Taschner v. City Council (1973) 31 Cal. App. 3d 48, 55-56, 107 Cal. Rptr. 214*

[e] Civil Rights Act of 1871

State and federal courts have concurrent jurisdiction of actions under Civil Rights Act of 1871 [*42 U.S.C. § 1983*]. *Brown v. Pitchess (1975) 13 Cal. 3d 518, 521-523, 119 Cal. Rptr. 204, 531 P.2d 772*

Local government entities are immune from respondeat superior liability under *42 U.S.C. § 1983* for acts of agents and employees but are not absolutely immune from all civil liability for rights violations. *Monell v. Dep't of Soc. Servs. (1978) 436 U.S. 658, 694-695, 98 S. Ct. 2018, 56 L. Ed. 2d 611* (overruling *Monroe v. Pape (1961) 365 U.S. 167, 189-192, 81 S. Ct. 473, 5 L. Ed. 2d 492*)

State or county is not subject to suit under Civil Rights Act of 1871. *Diamond v. Pitchess (9th Cir. 1969) 411 F.2d 565, 567*

Public entity (hospital) is subject to suit under Civil Rights Act of 1871. *McCabe v. Nassau County Medical Center (2nd Cir. [NY] 1971) 453 F.2d 698, 702-703*

Local government entity is not liable for punitive damages under *42 U.S.C. § 1983*. *Newport v. Fact Concerts, Inc. (1981) 453 U.S. 247, 271, 101 S. Ct. 2748, 69 L. Ed. 2d 616*

Personnel of state or local agency is subject to suit under Civil Rights Act of 1871. Ybarra v. Los Altos Hills (9th Cir. [Cal] 1974) *503 F.2d 250, 252-253*

[12] Required Reports and Record Keeping

Power of government to require reports or record keeping by regulated persons. *California v. Byers (1971) 402 U.S. 424, 427-428, 91 S. Ct. 1535, 29 L. Ed.2d 9* ; *Blinder v. Division of Narcotic Enforcement (1972) 25 Cal. App. 3d 174, 179-182, 101 Cal. Rptr. 635*

Reporting or record-keeping requirement is consistent with substantive due process if part of legitimate regulatory scheme, rationally connected with regulatory purpose, and not resulting in harrassment or oppression. *California Bankers Ass'n v. Shultz (1974) 416 U.S. 21, 49-50, 94 S. Ct. 1494, 39 L. Ed. 2d 812* ; *In re Lifschutz (1970) 2 Cal. 3d 415, 425, 85 Cal. Rptr. 829, 467 P.2d 557* ; *Serve Yourself Gas etc. Assn., Inc. v. Brock (1952) 39 Cal. 2d 813, 817-820, 249 P.2d 545* ; *Blinder v. Divison of Narcotic Enforcement (1972) 25 Cal. App. 3d 174, 179-184, 101 Cal. Rptr. 635*

Reporting or record-keeping requirement imposed on religious organization engaged in secular activities does not interfere with freedom of religion. *Gospel Army v. City of Los Angeles (1945) 27 Cal. 2d 232, 242-250, 163 P.2d 704*

Reporting or record-keeping requirement infringing on fundamental personal liberties is unconstitutional. *City of Carmel-by-the-Sea v. Young (1970) 2 Cal. 3d 259, 263, 268, 270, 85 Cal. Rptr. 1, 466 P.2d 225*

[13] Unauthorized Investigations

Administrative investigation is subject to challenge on ground of lack of authority. *Berkeley Chiropractic College v. Compton (1929) 97 Cal. App. 790, 791-793, 276 P. 361*

Necessity to exhaust administrative remedies before suing to stop unauthorized investigation. *Hill v. Brisbane (1944) 66 Cal. App. 2d 15, 19, 151 P.2d 578*

Separation of powers doctrine provides grounds for challenging authority to make particular investigation. *Globe Cotton Oil Mills v. Zellerbach (1927) 200 Cal. 276, 277, 252 P. 1038*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawAgency InvestigationsConstitutional RightsSearch & SeizureAdministrative LawAgency InvestigationsConstitutional RightsSelf-Incrimination PrivilegeAdministrative LawAgency InvestigationsScopeSubpoenasAdministrative LawGovernmental InformationPersonal InformationConditions of DisclosureGeneral OverviewAdministrative LawGovernmental InformationRecordkeeping & ReportingAdministrative LawSeparation of PowersGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil

ProcedureRemediesWritsCommon Law WritsMandamusCivil Rights LawSection 1983 ActionsScopeConstitutional LawBill of RightsFundamental RightsSearch & SeizureScope of ProtectionConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessSelf-Incrimination PrivilegeEvidencePrivilegesAttorney-Client PrivilegeGeneral Overview

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41-471 California Forms of Pleading and Practice--Annotated § 471.44

§ 471.44 Attorney General Opinions

Claim filed against public agency under California Tort Claims Act is not exempt from disclosure under *Gov. Code § 6254(b). 71 Ops. Cal. Att'y Gen. 235 (1988)*

Phrase "records pertaining to pending litigation" in *Gov. Code § 6254(b)* of Public Records Act defined. *71 Ops. Cal. Att'y Gen. 235 (1988)*

Records generated in ordinary course of business that may be relevant in future litigation are not exempt from disclosure under *Gov. Code § 6254(b)* of Public Records Act. 71 Ops. Cal. Att'y Gen. 235 (1988)

Police records required to be disclosed under Gov. Code § 6245(f) of Public Records Act are not exempt from disclosure under *Gov. Code § 6254(b)* if relevant in pending litigation to which agency is party. *71 Ops. Cal. Att'y Gen. 235 (1988)*

Motor carrier records of Department of California Highway Patrol are not exempt from disclosure to general public. *69 Ops. Cal. Att'y Gen. 129 (1986)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationPersonal InformationConditions of DisclosureGeneral OverviewAdministrative LawGovernmental InformationRecordkeeping & ReportingTortsPublic Entity LiabilityLiabilityClaim PresentationGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral Overview

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PART III. RESEARCH GUIDE

41-471 California Forms of Pleading and Practice--Annotated § 471.45

§ 471.45 Internet References

California Home Page. This site includes links to other sites maintained by numerous state agencies. http://www.ca.gov

Office of Administrative Hearings. This site includes: information and location concerning specific OAH offices; an OAH hearing guide; information concerming Administrative Procedure Act statutes, regulations, and proposed regulations; OAH forms; information concerning alternative dispute resolution procedures; and declaratory decisions. http://www.dgs.ca.gov/oah

NOTE: On and after July 1, 1998, The OAL is required by *Gov. Code § 11340.1(b)* to make the full text of the California Code of Regulations, with reference citations and history notes, available on the Internet free of charge.

Office of Administrative Law. This site includes: OAL publications; links to OAL statutes and regulations relating to rulemaking; regulations submitted to the OAL for review, and information for contacting or provding input to the OAL regarding rulemaking. http://www.oal.ca.gov

California Courts. This site includes: general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most Court of Appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes: text of constitution, codes, and statutes (including complete text of APA); and information concerning pending legislation. http://www.leginfo.ca.gov

Matthew Bender. This site includes: links to Matthew Bender publications and Shepard's citation service. http://www.bender.com

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationAlternative Dispute ResolutionAdministrative LawAgency RulemakingState ProceedingsCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewGovernmentsCourtsCreation & OrganizationGovernmentsLegislationEnactment

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[Reserved]

§§ 471.46[Reserved]

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PART IV. PROCEDURAL CHECKLIST

41-471 California Forms of Pleading and Practice--Annotated § 471.60

§ 471.60 Injunctive Relief

☐ Prepare complaint [see discussion in *§ 471.22[1]*; for forms if complaint, *see §§ 471.70, 471.71*].

☐ Verify complaint for injunctive relief [*see* discussion in *§ 471.70[3]*].

☐ For procedural checklist for preparation of summons, service of summons and verified complaint and filing of verified complaint, see Ch. 2, *Procedural Guide for Civil Actions* .

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[Reserved]

§§ 471.61[Reserved]

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PART V. FORMS

41-471 California Forms of Pleading and Practice--Annotated § 471.70

§ 471.70 Complaint for Injunctive Relief by Subject of Investigation Challenging Unlawful Administrative Investigation

[1] FORM Complaint for Injunctive Relief by Subject of Investigation Challenging Unlawful Administrative Investigation

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	COMPLAINT FOR INJUNCTIVE RELIEF
Defendant(s).	)	
	)	
	)	

Plaintiff alleges:

1. _____ [*Allege plaintiff's status, if other than natural person, and representative capacity in which suit is brought, if not brought on plaintiff's own behalf*].

2. _____ [*Allege facts showing personal or property interest plaintiff sues to protect, such as ownership or possession of real property, occupational status, right to conduct particular business, etc.*].

3. Defendant [_____ (*name and/or title*)] is, and at all times herein mentioned was, an administrative agency in the government of the _____ [*specify, e.g.*, State of California].

[_____ (*Identify other defendants, if any, such as investigators, who are sued as employees of the*

agency, in separate subparagraphs)].

[_____ (*Name "Doe" defendants, if any, e.g.,* Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names)].

4. On or about _____[*date*], defendant [_____ (*name*)] began an investigation _____[*describe nature of investigation*]. This investigation has continued to the present time and is now being pursued. In the course of this investigation, defendant _____[*name*], as Chief Inspector for _____[*name*], and defendants DOES I-_____, inclusive, have done the following acts and threaten to do the following acts or similar acts: _____[*describe investigative acts against plaintiff's interest*].

5. Unless the investigation is stopped, _____ [plaintiff *or name of person on whose behalf plaintiff sues*] will suffer _____[*describe anticipated injuries*].

6. The investigation is _____ [unlawful *or* being conducted in an unlawful manner] with respect to plaintiff's interests hereinabove described in that _____ [*specify why investigation may be enjoined*].

7. _____ [*Allege steps taken to exhaust administrative remedies, if any, and steps taken by way of self-help or informal attempts to get relief, such as demand to agency that investigation be stopped*].

8. _____[*If plaintiff has suffered injuries for which damages will compensate, and if there is any culpable defendant not immune from liability, allege facts showing compensable injury*].

9. _____ [*If plaintiff needs provisional relief and wishes to use the complaint as an application for it, allege facts showing such need*].

WHEREFORE, plaintiff prays judgment as follows:

1. That defendant[s _____ (*names*)] and all persons acting under, in concert with, or for _____[said] defendant(s) be enjoined permanently from continuing the investigation, directly or indirectly, insofar as it may concern plaintiff's interests hereinabove described [*if affirmative action is needed, add:* and be further enjoined to _____ (*specify*)];

[2. That plaintiff have and recover from defendants _____(*names*), jointly and severally, damages in the sum of $_____ and in such further sums as may be determined before judgment (*if appropriate, add:* plus exemplary damages in the sum of $_____);]

3. For costs of suit herein incurred; [and]

4. For such other and further relief as the court may deem proper.

[*If plaintiff seeks provisional relief on the basis of the complaint, ADD the following:*]

AND WHEREFORE, plaintiff prays that a temporary restraining order and a preliminary injunction be issued enjoining defendant[s _____ (*names*)] and all persons acting under, in concert with, or for _____[said] defendant(s), from continuing the investigation, directly or indirectly, insofar as it may concern plaintiff's interests hereinabove described, during the pendency of this action.

[*CONTINUE*]

_____ [*Law firm, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*status of party*]

VERIFICATION

I, _____[*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is a complaint for injunctive relief for use by a person subject to an administrative investigation to stop the investigation because it is unlawful or it is being conducted in an unlawful manner as respects the plaintiff's interests [*see, e.g.*, *Berkeley Chiropractic College v. Compton (1929) 97 Cal. App. 790, 791-793, 276 P. 361* ; for discussion, *see § 471.22[1][a]*]. The form includes an optional claim for damages, for use in an appropriate case. The form may also be used, by including other optional parts, to obtain provisional relief. If plaintiff seeks provisional relief, he or she should be prepared to furnish a bond [*see Code Civ. Proc. § 529*].

[3] Verification

A complaint for a preliminary injunction must be verified or accompanied by affidavits (or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*]) showing the grounds for granting the injunction. Furthermore, if a temporary restraining order is also sought, the verified complaint or the affidavits (declarations) must show that great or irreparable injury would result to the applicant before the matter can be heard on notice [*Code Civ. Proc. § 527(a)*].

Verification [*see Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or preliminary injunction on a complaint, instead of on affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) [*see Code Civ. Proc. § 527(a)*]. Otherwise, verification of this complaint is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. § 446*] and precludes a general denial [*Code Civ. Proc. § 431.30(d)*].

[4] Contents of Complaint

In the caption as well as the body of the complaint (*see* Paragraph 3) the defendant agency will be designated as a multimember body or an administrative officer. The designation in the foregoing form is appropriate for a multimember body such as the Medical Board of California. The form *set out in Ch. 471B, Licensing by Public Agencies, § 471B.100[1]*, illustrates the proper designation of an administrative officer, such as the Director of Food and Agriculture. In no case should the agency be called a department or a division or the like, since those terms do not describe an agency [*see* the discussion in Ch. 470, *Overview of Public Administrative Law*].

[5] Allegations

The allegations reflect the standard allegations in a complaint for injunctive relief [*see* Ch. 303, *Injunctions*]. It is particularly important to state that an administrative investigation is in progress (Paragraph 4), that it has adversely affected and will adversely affect plaintiff's interests (Paragraph 5), and that, for specified reasons, it is unlawful or is being conducted in an unlawful manner (Paragraph 6). Allegations respecting injuries compensable by the payment of damages (Paragraph 7) may be included if there is any culpable defendant who is not immune from liability under the Tort Claims Act (*Gov. Code § 810 et seq.*; *see* Ch. 464, *Public Entities and Officers: California Tort Claims Act*].

[6] Cross References

For a general discussion of injunctive relief in civil actions, see Ch.303, *Injunctions*

For a discussion of governmental immunity and suits for damages public employees and agencies, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

For discussion and forms relating to verification generally, see Ch. 572, *Verification*

For memoranda of points and authorities supporting and opposing issuance of preliminary injunctions, see California Points and Authorities, Ch. 116, *Injunctions* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityLiabilityState Tort Claims ActsRemedies

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41-471 California Forms of Pleading and Practice--Annotated § 471.71

§ 471.71 Complaint for Injunctive Relief by Taxpayer to Prevent Waste of Public Funds Challenging Unlawful Administrative Investigation [Code Civ. Proc. § 526a]

[1] FORM Complaint for Injunctive Relief by Taxpayer to Prevent Waste of Public Funds Challenging Unlawful Administrative Investigation [Code Civ. Proc. § 526a]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	COMPLAINT FOR INJUNCTIVE RELIEF
Defendant(s).	)	
	)	
	)	

_____

Plaintiff alleges:

1. Plaintiff is a _____ [corporation *or* citizen resident in the _____ (*governmental entity, e.g.*, City of Los Angeles *or* State of California)]. Plaintiff _____ [is assessed for and is liable to pay a tax in _____ (*governmental entity*) *or* paid a tax in _____ (*governmental entity*) on _____ (*date within one year before complaint was filed*)]. Plaintiff brings this action as a taxpayer pursuant to *Section 526a of the Code of Civil Procedure.*

2. Defendant _____[*name*] is _____[*defendant's status as officer or agent of governmental entity or person acting in its behalf*]. _____[*Identify other individual defendants*].

The _____ [*governmental entity, e.g.*, City of Los Angeles] is made a defendant for the reason that

_____[*reason why governmental entity, which should be plaintiff, is not prosecuting action*].

3. On or about _____[*date*], defendant _____[*name*] began an investigation to _____[*describe nature of investigation*]. The investigation is continuing.

4. Unless the investigation is stopped, a sum in excess of $_____ of the funds of _____[*governmental entity*] will be expended on account of it.

5. The investigation is _____ [unlawful *or* being conducted in an unlawful manner] in that _____[*specify why investigation may be enjoined*].

6. _____[*Allege steps taken to exhaust administrative remedies, if any, and steps taken by way of self-help or informal attempts to get relief, such as demand to responsible governmental officers and agents or local legislative body that investigation be stopped*].

7. _____[*If plaintiff wishes provisional relief and wishes to use the complaint as an application for it, allege facts showing need for it*].

WHEREFORE, plaintiff prays judgment as follows:

1. That defendant(s) _____[*name(s)*] and all persons acting under, in concert with, or for said defendant(s) be enjoined permanently from expending any of the funds of _____[*governmental entity*], directly or indirectly, in support of the investigation hereinabove described [*if affirmative action is needed, add:* and be further enjoined to _____ (*specify*)];

2. For costs of suit herein incurred; [and]

3. For such other and further relief as the court may deem proper.

[*If plaintiff seeks provisional relief on the basis of the complaint, ADD the following:*]

AND WHEREFORE, plaintiff prays that a temporary restraining order and a preliminary injunction be issued enjoining defendant(s) _____[*name(s)*] and all persons acting under, in concert with, or for said defendant(s), from expending any of the funds of _____[*governmental entity*], directly or indirectly, in support of the investigation hereinabove described, during the pendency of this action.

[CONTINUE]

_____ [*Law firm, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*status of party*]

[*Verification, if desired. See § 471.70.*]

[2] Use of Form

The form in [1], *above*, is a complaint for injunctive relief for use by a taxpayer to stop the expenditure of public funds in support of an administrative investigation, on the ground that the investigation is unlawful or is being conducted in an unlawful manner [*see Code Civ. Proc. § 526a*; *Wirin v. Horrall (1948) 85 Cal. App. 2d 497, 504-505, 193 P.2d 470* ; for discussion, *see § 471.22[1][b]*].

[3] Verification

For discussion of verification, see *§ 471.70[3]*.

[4] Standing to Sue

Although *Code Civ. Proc. § 526a*, authorizing the action with respect to protecting the funds of local governments, refers to a resident taxpayer, a nonresident taxpayer has standing if he meets the other criteria [*Irwin v. Manhattan Beach (1966) 65 Cal. 2d 13, 19-20, 51 Cal. Rptr. 881, 415 P.2d 769]* .

[5] Suit to Preserve State Funds

No statute authorizes a taxpayer action to preserve state funds, but the cases recognize a state taxpayer's standing to sue [*see, e.g.,* *California State Employees' Assn. v. Williams (1970) 7 Cal. App. 3d 390, 392, 86 Cal. Rptr. 305]* .

[6] Defendants

Under *Code Civ. Proc. § 526a*, the defendants should include the officer, agent, or other person acting on behalf of, and responsible for spending or disbursing the funds of, the governmental entity. The governmental entity itself should be made a defendant [*see Code Civ. Proc. § 382*] since the action is for its benefit [*see* *Osburn v. Stone (1915) 170 Cal. 480, 483, 150 P. 367]* . The agency conducting the investigation should also be made a defendant.

[7] Cross References

For general discussion and forms relating to *Code Civ. Proc. § 526a*, see Ch. 464, *Public Entities and Officers: Taxpayer's Actions* .

For additional cross references, see *§ 471.70[6]*.

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41-471A California Forms of Pleading and Practice--Annotated 471A.syn

§ 471A.syn Synopsis to Chapter 471A: PUBLIC AGENCY INSPECTIONS

§ 471A.01 Scope of Chapter

§ 471A.02 Cross References

[1] Related Agency Proceedings

[2] Public Administrative Law Generally

[3] Related Judicial Remedies, Procedures, and Review

[4] Other Matthew Bender Publications

§§ 471A.03-471A.09 [Reserved]

§ 471A.10 Agency Inspection Powers

[1] Nature and Purpose of Power

[2] Statutory Source of Power

[3] Definition of Inspection

§ 471A.11 Components of Administrative Search

[1] Intrusion

[2] Private Area

[3] Administrative Agent

[4] Regulatory Purpose

§ 471A.12 Inspection Procedures and Search Warrants

[1] Warrant Generally Required

[2] Administrative Search Warrants

[a] Definition of Inspection Warrant and Purposes for Which Warrant May Be Issued

[b] Definition of Cause and Requirements to Issue Warrants

[c] Grounds for, Contents of, and Duration of Warrant

[d] Conduct of Inspection, Forcible Entry, and Notice

[e] Criminal Penalties for Refusal to Permit Authorized Inspection

[3] Warrantless Inspections

[a] Pervasively Regulated Industries

[i] Rationale for Warrantless Inspection of Pervasively Regulated Industries

[ii] Determining Reasonableness of Warrantless Inspection

[b] Other Exceptions to Warrant Requirement

[i] Introduction

[ii] Open Fields

[iii] Plain View

[iv] Consent

[v] Exigent Circumstances

§ 471A.13 Constitutional Protections Under the Fourth, Fifth, and Fourteenth Amendments

[1] Prohibition Against Unreasonable Searches and Seizures

[a] Application of Exclusionary Rule to Criminal and Administrative Proceedings

[b] Subpoenas

[2] Privilege Against Self-Incrimination

[3] Requirement of Due Process

§ 471A.14 Obtaining Judicial Relief From Unlawful Inspections

[1] Injunctions

[2] Writ of Mandate

[3] Damages

[4] Suppression of Evidence

§§ 471A.15-471A.19 [Reserved]

§ 471A.20 Federal Constitution

§ 471A.21 State Constitution

§ 471A.22 State Statutes

§ 471A.23 Decisions

[1] Administrative Searches

[2] Warrant Required

[3] Warrantless Inspections

[4] Exceptions to Warrant Requirement

[a] Consent

[b] Plain View

[c] Exigent Circumstances

[d] Pervasively Regulated Industries

[e] Public Facilities

[f] Welfare Cases

§ 471A.24 Law Reviews

§ 471A.25 Internet References

§§ 471A.26-471A.39 [Reserved]

§ 471A.40 Agency Inspection Power

[1] Ascertain the Scope of the Agency's Inspection Power

[2] Ascertain If Inspection Violates Constitutional or Statutory Protections

[3] Ascertain If Inspection May Be Enjoined Because It Exceeds the Scope of the Agency's Authority

[4] Determine Whether Warrant Was Executed as Required by Statute

§ 471A.41 Judicial Relief

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PART I. SCOPE

41-471A California Forms of Pleading and Practice--Annotated § 471A.01

§ 471A.01 Scope of Chapter

This chapter provides a discussion of agency inspection powers, procedures, limitations, and remedies. This legal discussion in Part II includes the following:

- Agency inspection powers, including the nature, purpose, and source of those powers, as well as the components of an administrative search [*see §§ 471A.10, 471A.11*].

- Agency inspection procedures including warrant requirements, procedures, and exceptions [*see § 471A.12*].

- Limitations on agency inspections, including constitutional protections under the *Fourth*, *Fifth*, and *Fourteenth Amendments to the U.S. Constitution* [*see § 471A.13*].

- Judicial remedies for unlawful inspections [*see § 471A.14*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsConstitutional RightsGeneral OverviewAdministrative LawAgency InvestigationsConstitutional RightsSearch & SeizureAdministrative LawAgency InvestigationsConstitutional RightsSelf-Incrimination PrivilegeAdministrative LawAgency InvestigationsScopeInspectionsConstitutional LawBill of RightsFundamental RightsSearch & SeizureScope of ProtectionConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionConstitutional LawEqual ProtectionScope of Protection

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§ 471A.02 Cross References

[1] Related Agency Proceedings

For related discussion and forms relating generally to investigations by a public agency, see Ch. 471, *Investigations by Public Agencies* .

For discussion and forms relating to licensing agencies and licensing procedures, see Ch. 471B, *Licensing by Public Agencies* .

[2] Public Administrative Law Generally

For general discussion of California public agency functions, powers, restrictions on powers, and organization within the executive branch of state government, see:

- Ch. 470, *Overview of Public Administrative Law*.
- Ch. 470A, *Due Process Restrictions on Public Agencies*.
- Ch. 470B, *Public Agency Meetings*.

For detailed discussion and forms relating to the law governing disclosure of public records under the California Public Records Act [*Cal. Gov. Code §§ 6250 et seq.*], see Ch. 470C, *Public Records Act* .

For detailed discussion and forms relating generally to rule making functions of public agencies and judicial review of rule making, see:

- Ch. 472, *Public Agency Rules*.
- Ch. 472A, *Agency Rulemaking Procedures*.

- Ch. 472B, *Review of Agency Rulemaking*.

For detailed discussion and forms relating generally to the judicial or adjudicatory functions of California public agencies, see:

- Ch. 473, *Public Agency Adjudication*.
- Ch. 473A, *Commencing Agency Adjudication*.
- Ch. 473B, *Discovery in Agency Adjudications*.
- Ch. 473C, *Prehearing Procedures in Agency Adjudications*.
- Ch. 473D, *Prehearing Preparations in Agency Adjudications*.
- Ch. 473E, *Public Administrative Law Judges*.
- Ch. 473F, *Agency Adjudication Hearings*.
- Ch. 473G, *Agency Adjudication Decisions*.
- Ch. 473H, *Alternative Procedures for Agency Decisions*.

For detailed discussion and forms relating generally to review by California courts of agency adjudications, see:

- Ch. 474, *Availability of Judicial Review of Agency Decisions*.
- Ch. 474A, *Timing of Judicial Review of Agency Decisions*.
- Ch. 474B, *Standards in Reviewing Agency Decisions*.
- Ch. 474C, *Procedures in Reviewing Agency Decisions*.

See also [4], *below*.

[3] Related Judicial Remedies, Procedures, and Review

For general discussion and forms relating to judicial remedies and procedures that may be available, see:

- Ch. 40, *Appeal: An Overview*, through Ch. 54, *Appeal: California Supreme Court Review* (discussion and forms relating to civil appeals).
- Ch. 119, *Claim and Delivery* (discussion and forms relating to actions for claim and delivery generally).
- Ch. 303, *Injunctions* (discussion and forms relating to injunctive relief generally).
- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to review of orders by extraordinary writ of mandate or prohibition generally).

[4] Other Matthew Bender Publications

For forms for use in drafting memoranda in judicial proceedings to review a public agency decision, see California Points and Authorities, Ch. 195, *Public Administrative Law* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency InvestigationsGeneral OverviewAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawGovernmental InformationPersonal InformationConditions of DisclosureGeneral OverviewAdministrative LawGovernmental InformationPublic MeetingsGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewAdministrative LawSeparation of PowersConstitutional ControlsGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicenses

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[Reserved]

§§ 471A.03[Reserved]

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41-471A California Forms of Pleading and Practice--Annotated § 471A.10

§ 471A.10 Agency Inspection Powers

[1] Nature and Purpose of Power

This chapter focuses on the important agency investigative tool of inspections. Agencies use inspections principally to assess compliance with laws that the agency is charged with enforcing, especially laws that affect the public health, safety, or welfare. For example, health inspectors may go to restaurants to check sanitary conditions, and pharmacy inspectors may inspect pharmacies and check stocks of dangerous drugs and dangerous drug records [*Bus. & Prof. Code §§ 4010, 4231, 4232*]. While administrative agencies are granted the statutory power of inspection to fulfill their legislative mandates, this power is limited in scope and conduct. Thus, when a government administrative agent inspects the property of a private individual or business, questions of constitutional rights arise [*see § 471A.13*], and an administrative inspection warrant may be required [*see § 471A.12*].

[2] Statutory Source of Power

The power of an administrative agency to make an inspection is not an inherent agency power, but must arise from statute. Virtually all highly regulated or licensed businesses or activities are subject to statutorily authorized inspection by a responsible regulating agency. Statutory authorization for these inspections is usually couched in fairly broad terms [*see, e.g., Fish & Game Code §§ 1006* (Department of Fish and Game personnel may inspect any premises or receptacle where animals may be held for sale or transport), 7702 (Department of Fish and Game personnel may "enter and examine" any place of business handling or manufacturing fish products and examine any books and records "containing any account of fish caught, bought, canned, packed, stored or sold"); *Health & Safety Code §§ 1278, 1282, 1417-1439.8* (authorizing Department of Health Services personnel to enter and inspect the premises and records of health care facilities); *Pub. Res. Code § 2208* (director or qualified assistant authorized to enter and inspect any mine, quarry, well, etc.)]. For example, the Department of Alcoholic Beverage Control is authorized to inspect the records and premises of liquor licensees as it "may deem necessary to perform its duties" [*Bus. & Prof. Code § 25753*], and the commissioner of agriculture or his or her designee may enter and inspect any "premises, plant, conveyance, or thing in his jurisdiction" "whenever necessary" [*Food & Agric. Code § 5023*].

[3] Definition of Inspection

Administrative inspections usually involve observation or testing of places and things [*see, e.g., Air Pollution Variance Bd. v. Western Alfalfa (1974) 416 U.S. 861, 862-863, 94 S. Ct. 2114, 40 L. Ed. 2d 607* (test of smoke emissions from chimney on company's premises); *United States v. Biswell (1972) 406 U.S. 311, 312, 92 S. Ct. 1593, 32 L. Ed. 2d 87* (search of commercial storeroom and seizure of unlicensed firearms); *Kim v. Dolch (1985) 173 Cal. App. 3d 736, 741, 219 Cal. Rptr. 248* (inspection of massage parlors)], but may also involve inspection of records [*see, e.g., Bus. & Prof. Code § 25753* (Department of Alcoholic Beverage Control authorized to inspect records of liquor licensees)], or even search of people [*see, e.g., 8 U.S.C. §§ 1228(a),* 1227 (inspection of aliens entering U.S.)].

The term inspection commonly denotes an administrative inquiry undertaken by observation or testing or both. In common usage, an inspection is a close and critical viewing for the purpose of ascertaining the quality or condition of some place, thing, or person, particularly when the inspector is looking for defects or errors. Administrative inspections are generally directed at places [*see, e.g., Wood v. Kalbaugh (1974) 39 Cal. App. 3d 926, 929, 114 Cal. Rptr. 673* (inspection of premises to detect broken gas pipes)] or things [*see, e.g., O'Hare v. Peacock Dairies, Inc. (1938) 26 Cal. App. 2d 345, 349, 353, 79 P.2d 433* (inspection of dairy cattle and testing of milk for disease)], but may also be directed at people [*see, e.g., Reid v. INS (1975) 420 U.S. 619, 622, 95 S. Ct. 1164, 43 L. Ed. 2d 501* (inspection of alien seeking to enter country)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsConstitutional RightsGeneral OverviewAdministrative LawAgency InvestigationsConstitutional RightsSearch & SeizureAdministrative LawAgency InvestigationsScopeInspectionsAdministrative LawSeparation of PowersLegislative ControlsScope of Delegated Authority

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§ 471A.11 Components of Administrative Search

[1] Intrusion

A search, whether administrative or not, is an intrusive activity, that is, "an invasion and quest, a looking for and seeking out" [*Bielicki v. Superior Court (1962) 57 Cal. 2d 602, 605, 21 Cal. Rptr. 552, 371 P.2d 288]* . It is not necessarily physically intrusive, however; for example, a search may be conducted by electronic eavesdropping or merely looking at or into something as well as by conventional methods [*see, e.g.,* *Lorenzana v. Superior Court (1973) 9 Cal. 3d 626, 639, 108 Cal. Rptr. 585, 511 P.2d 33]* .

[2] Private Area

Regardless of how intrusive a government agent might be in looking for something, there is no search in the constitutional sense unless there is an invasion into some area reasonably regarded by the victim as private[*Katz v. United States (1967) 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576* ; *Lorenzana v. Superior Court (1973) 9 Cal. 3d 626, 637, 108 Cal. Rptr. 585, 511 P.2d 33]* .

A private area for this purpose certainly includes an apartment [*Camara v. Municipal Court (1967) 387 U.S. 523, 528-529, 87 S. Ct. 1727, 18 L. Ed. 2d 930]* , but may also be the nonpublic parts of commercial premises [*See v. Seattle (1967) 387 U.S. 541, 543, 87 S. Ct. 1737, 18 L. Ed. 2d 943]* , an enclosed back yard [*Vidaurri v. Superior Court (1970) 13 Cal. App. 3d 550, 553, 91 Cal. Rptr. 704]* , or a boat [*Tellis v. Municipal Court (1970) 5 Cal. App. 3d 455, 458, 85 Cal. Rptr. 459]* . On the other hand, the remains of a fire-gutted building might not be private [*City & County of San Francisco v. City Inv. Corp. (1971) 15 Cal. App. 3d 1031, 1039, 93 Cal. Rptr. 690]* .

[3] Administrative Agent

One of the characteristics of an administrative search, distinguishing it from a criminal law enforcement search, is the fact that it is conducted by someone other than a law enforcement officer, that is, an agency employee such as an agricultural or building inspector [*see* *Vidaurri v. Superior Court (1970) 13 Cal. App. 3d 550, 552, 91 Cal. Rptr. 704* ; *Tellis v. Municipal Court (1970) 5 Cal. App. 3d 455, 458, 85 Cal. Rptr. 459]* .

[4] Regulatory Purpose

The other distinguishing feature of an administrative search is that the purpose is not criminal law enforcement but, rather, enforcement of whatever regulatory laws the agency in question is charged with administering [*see, e.g., Currier v. Pasadena (1975) 48 Cal. App. 3d 810, 815, 121 Cal. Rptr. 913* ; *see also People v. Hyde (1974) 12 Cal. 3d 158, 165, 115 Cal. Rptr. 358, 524 P.2d 830]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsConstitutional RightsSearch & SeizureAdministrative LawAgency InvestigationsScopeInspectionsGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsEmployees & Officials

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41-471A California Forms of Pleading and Practice--Annotated § 471A.12

§ 471A.12 Inspection Procedures and Search Warrants

[1] Warrant Generally Required

In general, the constitutionality of a search is determined by whether a person has exhibited a reasonable expectation of privacy and, if so, whether that expectation has been violated by unreasonable governmental intrusion [*People v. Chapman (1984) 36 Cal. 3d 98, 106, 201 Cal. Rptr. 628, 679 P.2d 62* ; *Betchart v. Department of Fish & Game (1984) 158 Cal. App. 3d 1104, 1107, 205 Cal. Rptr. 135]* . Thus, when an administrative inspection intrudes on a reasonable expectation of privacy, the protections against unreasonable searches and seizures, expressed in both the *Fourth Amendment of the U.S. Constitution* and corresponding provisions of the California Constitution, apply [*see Currier v. City of Pasadena (1975) 48 Cal. App. 3d 810, 815-817, 121 Cal. Rptr. 913* (city ordinance authorizing warrantless search was, on its face, violation of both state and federal constitutions, but was upheld when read together with inspection warrant requirements of *Code Civ. Proc. §§ 1822.50-1822.57* (now *Code Civ. Proc. §§ 1822.50-1822.59*))].

The *Fourth Amendment to the U.S. Constitution* states: "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." It applies to state action under the *due process clause of the Fourteenth Amendment* [*Mapp v. Ohio (1961) 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 81 S. Ct. 1684, 86 Ohio Law Abs. 513* ; *see U.S. Const., amend. XIV*]. *Cal. Const., art. I, § 13,* and the *Fourth Amendment* prohibit unreasonable searches and seizures in almost the same words [*see Cal. Const., art. I, § 13* ("[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized")]. Thus, similar standards apply under both provisions, and the California courts have cited and followed major United States Supreme Court cases such as *Camara v. Municipal Court (1967) 387 U.S. 523, 534, 540, 87 S. Ct. 1727, 18 L. Ed. 2d 930* , in concluding that administrative inspections generally require a search warrant [*see, e.g., Salwasser Manufacturing Co. v. Municipal Court (1979) 94 Cal. App. 3d 223, 228-229, 156 Cal. Rptr. 292* (*Fourth Amendment* requires search warrant for routine administrative searches)].

Counsel should be sure to check the latest search and seizure cases; this law has been changing based on the shift to

increasingly conservative majorities in both the California Supreme Court and the United States Supreme Court.

An agency usually must obtain a search warrant before conducting an "inspection" of a person, house, papers, or effects [*Camara v. Municipal Court (1967) 387 U.S. 523, 528-534, 540, 87 S. Ct. 1727, 18 L. Ed. 2d 930* ; *Salwasser Manufacturing Co.v. Municipal Court (1979) 94 Cal. App. 3d 223, 228-229, 156 Cal. Rptr. 292* ; *Currier v. City of Pasadena (1975) 48 Cal. App. 3d 810, 815-817, 121 Cal. Rptr. 913* ; *Vidaurri v. Superior Court (1970) 13 Cal. App. 3d 550, 553-554, 91 Cal. Rptr. 704]* . Because "administrative searches ... are significant intrusions upon the interests protected by the *Fourth Amendment*, [administrative inspections] conducted without a warrant procedure lack the traditional safeguards which the *Fourth Amendment* guarantees to the individual. ... " [*Camara v. Municipal Court (1967) 387 U.S. 523, 534, 87 S. Ct. 1727, 18 L. Ed. 2d 930]* .Warrantless searches are, however, permitted in some situations, as discussed in [3], *below*.

[2] Administrative Search Warrants

[a] Definition of Inspection Warrant and Purposes for Which Warrant May Be Issued

Most agency inspections are conducted with the consent of the person affected. If consent is denied, however, the inspecting agency must usually ask a court for an administrative inspection warrant [*see* *Camara v. Municipal Court (1967) 387 U.S. 523, 539-540, 87 S. Ct. 1727, 18 L. Ed. 2d 930* (warrant should normally be sought only after entry is refused); *Salwasser Manufacturing Co. v. Municipal Court (1979) 94 Cal. App. 3d 223, 234, 156 Cal. Rptr. 292* (probable cause requirement will arise only in "those relatively few situations" in which consent to an inspection is refused)].

In California, inspection warrants are governed by *Code Civ. Proc. §§ 1822.50-1822.59*. This statutory scheme applies only when a warrant is required, and thus is usually not applied to licensed or highly regulated businesses or activities, which usually are subject to an exception to the warrant requirement [*People v. Firstenberg (1979) 92 Cal. App. 3d 570, 583, 155 Cal. Rptr. 80* ; *see* discussion in [3][a], *below*].

Under *Code Civ. Proc. § 1822.50*, an inspection warrant is a written order signed by a judge directing a state or local official to "conduct any inspection required or authorized by state or local law or regulation relating to building, fire, safety, plumbing, electrical, health, labor, or zoning" [*Code Civ. Proc. § 1822.50*; *see also Penal Code § 1523* (search warrant defined)].

In addition, a warrant may be issued under *Code Civ. Proc. §§ 1822.50-1822.59* authorizing either:

- The Fish and Game Department to inspect places where fish, amphibia, or aquatic life are held or stored [*Code Civ. Proc. § 1822.58*].

- The Food and Agriculture Department to inspect a specified urban area for animal or plant pest or disease eradication, provided the warrant covers only the exterior of places, dwellings, structures, premises, or vehicles [*Code Civ. Proc. § 1822.59*].

Administrative agencies that have civil litigation pending against a company regulated by that agency may conduct compliance inspections under the administrative inspection warrant statute, *Code Civ. Proc. § 1822.50*, of that company's premises while litigation is pending and are not required to conduct inspections under the civil discovery statutes that apply to civil litigation [*Department of Toxic Substances Control v. Superior Court (1996) 44 Cal. App. 4th 1418, 1425-1427, 52 Cal. Rptr. 2d 412]* .

[b] Definition of Cause and Requirements to Issue Warrants

Unless a specific provision of state or federal law makes another standard applicable, administrative inspection warrants may be issued only on a showing of "cause" by the agency. The warrant must be supported by an affidavit that particularly describes the purpose for the inspection and the place, dwelling, structure, premises, or vehicle to be inspected. The affidavit must contain either a statement that consent to inspect has been sought and refused, or a listing of facts or circumstances that reasonably justify the failure to seek consent [*Code Civ. Proc. § 1822.51*]. The showing of "cause" required for the issuance of an administrative inspection warrant is not the same as the traditional "probable cause"--that is, probable cause to believe a violation of law or regulation has occurred applicable in criminal cases [*see, e.g.,* *Salwasser Manufacturing Co. v. Municipal Court (1979) 94 Cal. App. 3d 223, 231-234, 156 Cal. Rptr. 292* (administrative inspection with penal consequences requires showing of probable cause to believe a violation currently exists on the premises to be inspected)].

The "cause" necessary to support an administrative inspection warrant is present if either:

- Reasonable legislative or administrative standards for conducting a routine or area inspection are satisfied [*Department of Toxic Substances Control v. Superior Court (1996) 44 Cal. App. 4th 1418, 1424-1425, 52 Cal. Rptr. 2d 412* (legislative and administrative standards for conducting unannounced routine inspections of Hazardous Waste Control Facilities under authority of *Health & Safety Code § 25185* are reasonable)].

- There is reason to believe that a condition of non-conformity exists with respect to the particular place to be inspected [*Code Civ. Proc. § 1822.52*; *see* *City and County of San Francisco v. Municipal Court (1985) 167 Cal. App. 3d 712, 719-721, 213 Cal. Rptr. 477* (reasonable legislative and administrative standards for area inspection satisfied by city's inspection to determine conformity with housing and other building codes as part of residential assistance program)].

Thus, it has been held under the California Occupational Safety and Health Act (Cal/OSHA) [*Lab. Code § 6300 et seq.*] that, because of the possible far-reaching penal consequences of a Cal/OSHA inspection, the federal and state constitutional protections against unreasonable search and seizure apply, and mandate a probable cause requirement for inspection warrants [*Salwasser Manufacturing Co. v. Municipal Court (1979) 94 Cal. App. 3d 223, 231, 156 Cal. Rptr. 292]* . The court in *Salwasser* contrasted Cal/OSHA and the comparable federal statute by noting that the only criminal penalty under federal law is for a willful violation that causes the death of an employee [*29 U.S.C. § 666(e)*], but the criminalsanctions under Cal/OSHA permeate the entire inspection process [*Salwasser Manufacturing Co. v. Municipal Court (1979) 94 Cal. App. 3d 223, 230, 156 Cal. Rptr. 292]* .

[c] Grounds for, Contents of, and Duration of Warrant

Before issuing an inspection warrant, the judge may examine the applicant or other witnesses under oath to satisfy himself or herself of the existence of grounds for granting the application [*Code Civ. Proc. § 1822.53*]. If satisfied that the proper standard for the issuance of the warrant has been met [*see* [b], *above*], the judge must issue a warrant that (1) specifically describes the "place, dwelling, structure, premises, or vehicle" to be inspected, (2) states the purpose of the search, and (3) sets forth any limitation on the inspection [*Code Civ. Proc. § 1822.54*].

An inspection warrant is valid for the time stated in the warrant, but not for more than 14 days, unless it is extended or renewed by the judge who signed and issued the original warrant. The judge may extend or renew the warrant if satisfied that the extension or renewal is in the public interest. The warrant must be executed and returned within the time specified or within the extended or renewed time, or it is void [*Code Civ. Proc. § 1822.55*].

[d] Conduct of Inspection, Forcible Entry, and Notice

Inspections under an inspection warrant must take place between 8:00 a.m. and 6:00 p.m. in the presence of the owner

or occupant of the described place or vehicle [*Code Civ. Proc. § 1822.56*]. The issuing court may order otherwise, however, if the inspecting agency makes a showing that an exception "is reasonably necessary to effectuate the purpose of the regulation being enforced" [*Code Civ. Proc. § 1822.56*].

Inspection by forcible entry is not allowed under an inspection warrant unless forcible entry has been expressly authorized by the issuing judge. This authority may be granted only if the agency can show either of the following [*Code Civ. Proc. § 1822.56*]:

- Facts creating a reasonable suspicion of a violation of a state or local law or regulation that would pose an immediate threat to health or safety.

- Facts establishing that reasonable attempts to serve a previous warrant have failed.

If the agency asked for a consent to the inspection, but was refused, notice must be given that a warrant has been issued. The notice must be given at least 24 hours before the warrant is executed. Notice is not required if the judge finds that immediate execution is "reasonably necessary in the circumstances shown" [*Code Civ. Proc. § 1822.56*].

[e] Criminal Penalties for Refusal to Permit Authorized Inspection

Any person who willfully refuses to allow an inspection lawfully authorized by a warrant issued under *Code Civ. Proc. §§ 1822.50-1822.59* is guilty of a misdemeanor [*Code Civ. Proc. § 1822.57*]. Thus, failure to comply is not a violation unless the warrant was properly issued under *Code Civ. Proc. §§ 1822.50-1822.59* and the inspection is a lawful search. The inspection is not a lawful search if it violates any of the constitutional limits on inspection explained in § 471A.13.

[3] Warrantless Inspections

[a] Pervasively Regulated Industries

[i] Rationale for Warrantless Inspection of Pervasively Regulated Industries

Although warrants are generally required for administrative inspections [*see* [1], *above*], there is an exception for pervasively regulated industries. In *Camara v. Municipal Court* [*Camara v. Municipal Court (1967) 387 U.S. 523, 534, 539, 87 S. Ct. 1727, 18 L. Ed. 2d 930]* , and the companion case of *See v. Seattle* [*See v. Seattle (1967) 387 U.S. 541, 545, 87 S. Ct. 1737, 18 L. Ed. 2d 943]* , the United States Supreme Court concluded that, except in emergency situations, administrative agencies could not conduct routine inspections of dwellings or commercial premises not open to the public without first obtaining an inspection warrant. The *See* court acknowledged, however, that business premises may reasonably be inspected without a warrant in many situations when the same inspection of a private residence would constitute an unreasonable search; it also recognized the validity of accepted regulatory techniques such as licensing programs that require inspections prior to operating a business or marketing a product [*See v. Seattle (1967) 387 U.S. 541, 546, 87 S. Ct. 1737, 18 L. Ed. 2d 943]* .

Hence, warrantless inspections of closely regulated activities are permissible. As the Supreme Court subsequently explained in *Donovan v. Dewey* [*Donovan v. Dewey (1981) 452 U.S. 594, 598-599, 101 S. Ct. 2534, 69 L. Ed. 2d 262* (footnote and citation omitted)]:

> The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections.

[ii] Determining Reasonableness of Warrantless Inspection

The validity of specific warrantless inspections of closely regulated activities has been left to be resolved on a case-by-case basis under thegeneral *Fourth Amendment* standard of reasonableness [*See v. Seattle (1967) 387 U.S. 541, 546, 87 S. Ct. 1737, 18 L. Ed. 2d 943* ; *People v. Firstenberg (1979) 92 Cal. App. 3d 570, 577, 155 Cal. Rptr. 80* ; *see U.S. Const., amend. IV*]. In determining the "reasonableness" of legislation authorizing warrantless searches, the court considers the following three factors:

- Whether the affected business or industry is one that is pervasively regulated [*Kim v. Dolch (1985) 173 Cal. App. 3d 736, 742, 219 Cal. Rptr. 248]* . The assurance of regularity provided by an administrative warrant may be unnecessary when the industry or activity is, or has historically been, subject to close supervision and inspection in the public interest so that "the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes" [*United States v. Biswell (1972) 406 U.S. 311, 316, 92 S. Ct. 1593, 32 L. Ed. 2d 87* (warrantless inspections of firearms dealers under federal Gun Control Act upheld)].

- Whether a strong governmental interest exists in warrantless inspections of the affected industry. A strong governmental interest exists when the legislation embodies important goals and frequent unannounced inspections are necessary to attain those goals [*Kim v. Dolch (1985) 173 Cal. App. 3d 736, 744-745, 219 Cal. Rptr. 248* (massage parlor inspections); *see, e.g.,* *United States v. Biswell (1972) 406 U.S. 311, 315-317, 92 S. Ct. 1593, 32 L. Ed. 2d 87* (firearm inspection); *Donovan v. Dewey (1981) 452 U.S. 594, 600-604, 101 S. Ct. 2534, 69 L. Ed. 2d 262* (mine inspections); *Betchart v. Department of Fish & Game (1984) 158 Cal. App. 3d 1104, 1109-1110, 205 Cal. Rptr. 135* (wild game hunting inspections); *People v. Harbor Hut Restaurant (1983) 147 Cal. App. 3d 1151, 1156, 196 Cal. Rptr. 7* (wholesale fish dealers inspections); *People v. Di Bernardo (1978) 79 Cal. App. 3d Supp. 5, 7, 79 Cal. App. 3d Supp. 5* , *79 Cal. App. 3d Supp. 5, 144 Cal. Rptr. 902* (commercial fishing vessel inspections)].

- Whether the law is so narrowly drawn as to accomplish the government's important objectives without unduly infringing on *Fourth Amendment* rights, thus providing an adequate substitute for a warrant [*Donovan v. Dewey (1981) 452 U.S. 594, 603-605, 101 S. Ct. 2534, 69 L. Ed. 2d 262* ; *Kim v. Dolch (1985) 173 Cal. App. 3d 736, 745-746, 219 Cal. Rptr. 248* ; *People v. Harbor Hut Restaurant (1983) 147 Cal. App. 3d 1151, 1156, 196 Cal. Rptr. 7]* . Only a limited right to warrantless inspection adequately replaces the warrant's function of establishing the lawful limits of the inspector's power to search [*Kim v. Dolch (1985) 173 Cal. App. 3d 736, 746, 219 Cal. Rptr. 248* , *quoting* *Camara v. Municipal Court (1967) 387 U.S. 523, 532, 87 S. Ct. 1727, 18 L. Ed. 2d 930]* .

In *Marshall v. Barlow's Inc. (1978) 436 U.S. 307, 325, 98 S. Ct. 1816, 56 L. Ed. 2d 305* , the Supreme Court struck down the warrantless inspection provision of the Occupational Safety and Health Act of 1970, which applied to all businesses engaged in interstate commerce, rather than to persons engaged in a particular licensed industry. This holding did not limit the exception to the warrant requirement allowed for inspections of pervasively regulated industries in the leading cases of *Colonnade Catering Corp. v. United States (1970) 397 U.S. 72, 77, 90 S. Ct. 774, 25 L. Ed. 2d 60* , and *United States v. Biswell (1972) 406 U.S. 311, 316, 92 S. Ct. 1593, 32 L. Ed. 2d 87* , but rather expressly approved the holdings in those cases [*Marshall v. Barlow's Inc. (1978) 436 U.S. 307, 313, 98 S. Ct. 1816, 56 L. Ed. 2d 305]* .

Warrantless inspections of pervasively regulated businesses must satisfy three criteria [*New York v. Burger (1987) 482 U.S. 691, 702-703, 107 S. Ct. 2636, 96 L. Ed. 2d 601* ; *see also* *Michigan v. Clifford (1984) 464 U.S. 287, 291-292, 104 S. Ct. 641, 78 L. Ed. 2d 477]* :

- A substantial governmental interest must support the regulatory scheme that uses warrantless inspections;

- The warrantless inspection must be necessary to further the regulatory scheme; and

- The inspection program must provide a constitutionally adequate substitute for a warrant in terms of the certainty and regularity of its application.

The warrantless inspection exception for pervasively regulated industries specifically does not apply merely because a business is subject to state licensing requirements. The three criteria must also be satisfied [*Pinney v. Phillips (1991) 230 Cal. App. 3d 1570, 1585-1586, 281 Cal. Rptr. 904]* .

A warrantless inspection of insurance records required to be kept by law that was authorized by *Ins. Code § 1727* violated an insurance broker's *Fourth Amendment* right to be protected against unreasonable searches and seizures. While the insurance industry is closely regulated, the statutory warrantless search did not satisfy any of the three criteria, and thus the Insurance commissioner exceeded its authority and could not revoke the license of the insurance broker for refusing to allow a warrantless search [*De La Cruz v. Quackenbush (2000) 80 Cal. App. 4th 775, 785-787, 96 Cal. Rptr 2d 92]* .

California courts, like the federal courts, have allowed warrantless inspections of the property and records of closely regulated industries and businesses in a number of contexts [*see, e.g.,* *Kim v. Dolch (1985) 173 Cal. App. 3d 736, 742-747, 219 Cal. Rptr. 248* (massage parlors); *People v. Harbor Hut Restaurant (1983) 147 Cal. App. 3d 1151, 1154-1156, 196 Cal. Rptr. 7* (wholesale fish dealers); *People v. Firstenberg (1979) 92 Cal. App. 3d 570, 581, 155 Cal. Rptr. 80* (skilled nursing facilities); *People v. Easley (1979) 90 Cal. App. 3d 440, 443-445, 153 Cal. Rptr. 396* (auto dismantling); *People v. White (1968) 259 Cal. App. 2d Supp. 936, 939-942, 259 Cal. App. 2d Supp. 936* , *259 Cal. App. 2d Supp. 936, 65 Cal. Rptr. 923* (convalescent hospitals); *People v. Lisner (1967) 249 Cal. App. 2d 637, 641, 57 Cal. Rptr. 674* (public bars); alcoholic beverage saleslicensees, *Bus. & Prof. Code § 25755(b), (c)*]. Most of these businesses engaged in activities that have a high risk of illegal conduct or of serious danger to the public, such that frequent unannounced inspections are essential for the protection of the public or for the enforcement of the statutory purpose [*Pinney v. Phillips (1991) 230 Cal. App. 3d 1570, 1584, 281 Cal. Rptr. 904]* . The administrative warrant requirements set out in Code*Civ. Proc. §§ 1822.50-1822.59* [*see* [2], *above*] do not apply to inspections of licensed businesses that are governed by the rules enunciated in *Colonnade Catering Corp. v. United States (1970) 397 U.S. 72, 90 S. Ct. 774, 25 L. Ed. 2d 60* , and *United States v. Biswell (1972) 406 U.S. 311, 92 S. Ct. 1593, 32 L. Ed. 2d 87* . The requirements of *Code Civ. Proc. §§ 1822.50-1822.59* are intended to comply with the rule stated in *Camara v. Municipal Court (1967) 387 U.S. 523, 539, 87 S. Ct. 1727, 18 L. Ed. 2d 930* [*see* [1], *above*] regarding when a warrant is constitutionally required [*People v. Firstenberg (1979) 92 Cal. App. 3d 570, 583, 155 Cal. Rptr. 80]* .

The California courts have frequently found partial or sole justification for warrantless inspections by using the legal fiction of implied consent. Under this approach, consent to inspections is implied whenever a business accepts a license to engage in the regulated activity [*People v. Firstenberg (1979) 92 Cal. App. 3d 570, 581, 155 Cal. Rptr. 80* ; *see Betchart v. Department of Fish & Game (1984) 158 Cal. App. 3d 1104, 1110, 205 Cal. Rptr. 135* (hunter); *People v. Harbor Hut Restaurant (1983) 147 Cal. App. 3d 1151, 1154-1156, 196 Cal. Rptr. 7* (wholesale fish dealer); *People v. White (1968) 259 Cal. App. 2d Supp. 936, 940-942, 259 Cal. App. 2d Supp. 936* , *259 Cal. App. 2d Supp. 936, 65 Cal. Rptr. 923* (hospital); *Cooley v. State Bd. of Funeral Directors (1956) 141 Cal. App. 2d 293, 298, 296 P.2d 588* (funeral director)].

[b] Other Exceptions to Warrant Requirement

[i] Introduction

The same exceptions to the *Fourth Amendment* warrant requirement that are recognized in criminal cases appear to apply to administrative inspections as well. These exceptions include open fields, plain view, consent, and exigent circumstances, which are detailed in [ii] to [v], *below*.

[ii] Open Fields

An exception for "open fields" exists because society is not prepared to recognize an individual's expectation of privacy in an open field as a reasonable expectation [*Oliver v. United States (1984) 466 U.S. 170, 179, 104 S. Ct. 1735, 80 L. Ed. 2d 214]* . Thus, administrative agency personnel may inspect open fields without the necessity of obtaining an inspection warrant [*Air Pollution Variance Bd. v. Western Alfalfa Corp. (1974) 416 U.S. 861, 865, 94 S. Ct. 2114, 40 L. Ed. 2d 607* ; *Betchart v. Department of Fish & Game (1984) 158 Cal. App. 3d 1104, 1107, 205 Cal. Rptr. 135]* . The open field rationale was used to justify aerial photography of a chemical plant after the owner of the plant refused to allow an on-site inspection by agency inspectors [*Dow Chemical Co. v. United States (1986) 476 U.S. 227, 106 S. Ct. 1819, 90 L. Ed. 2d 226*].

[iii] Plain View

No administrative warrant is necessary to inspect or seize items in "plain view," that is, objects "in the plain view of an officer who has a right to be in the position to have that view" [*People v. Marshall (1968) 69 Cal. 2d 51, 57-58, 69 Cal. Rptr. 585, 442 P.2d 665* ; *see City etc. San Francisco v. City Investment Corp. (1971) 15 Cal. App. 3d 1031, 1039, 93 Cal. Rptr. 690* ("to observe what is perfectly apparent to any member of the public who happens to be near the premises is not a search")].

[iv] Consent

No warrant is required if consent to search has been given. When an agency has received a voluntary consent to its inspection of an otherwise private area, it need not obtain a warrant [*see Blair v. Pitchess (1971) 5 Cal. 3d 258, 274-275, 96 Cal. Rptr. 42, 486 P.2d 1242* ; *Currier v. City of Pasadena (1975) 48 Cal. App. 3d 810, 815, 121 Cal. Rptr. 913* ; *City etc. San Francisco v. City Investment Corp. (1971) 15 Cal. App. 3d 1031, 1039 n.1, 93 Cal. Rptr. 690]* . In criminal law, whether an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority is a question of fact to be determined in the light of all the circumstances [*People v. Michael (1955) 45 Cal. 2d 751, 753, 290 P.2d 852]* . The same rationale appears to apply to administrative inspections [*see Currier v. City of Pasadena (1975) 48 Cal. App. 3d 810, 815, 121 Cal. Rptr. 913* (ordinance conditioning issuance of a certificate of occupancy on consent to inspection held unconstitutional unless coupled with warrant requirement)].

[v] Exigent Circumstances

Exigent circumstances also justify an exception to the warrant requirement. Exigent circumstances include the possible imminent destruction or loss of evidence [*see, e.g., People v. Di Bernardo (1978) 79 Cal. App. 3d Supp. 5, 7, 79 Cal. App. 3d Supp. 5* , *79 Cal. App. 3d Supp. 5, 144 Cal. Rptr. 902* (warrantless search of commercial fishing vessel justified due to mobile and temporal nature of the evidence)], and other emergency situations, such as immediate peril to the public health or safety [*see, e.g., People v. Roberts (1956) 47 Cal. 2d 374, 377-380, 303 P.2d 721* (emergency entry to give aid not unreasonable); *Romero v. Superior Court (1968) 266 Cal. App. 2d 714, 717-722, 72 Cal. Rptr. 430* (search by firemen for explosives justified as emergency)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsConstitutional RightsSearch & SeizureAdministrative LawAgency InvestigationsScopeInspectionsConstitutional LawBill of RightsFundamental RightsSearch & SeizureGeneral OverviewConstitutional LawBill of RightsFundamental RightsSearch & SeizureExigent CircumstancesConstitutional

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§ 471A.13 Constitutional Protections Under the Fourth, Fifth, and Fourteenth Amendments

[1] Prohibition Against Unreasonable Searches and Seizures

[a] Application of Exclusionary Rule to Criminal and Administrative Proceedings

The exclusionary rule is the remedy that allows the individual to enforce his or her rights when the government transgresses the constitutional limits on administrative inspections. The quality of the protection provided by the exclusionary rule varies depending on the nature of the proceeding in which the evidence is offered. It is clear that the evidence may not be used against an individual in a criminal prosecution [*see See v. Seattle (1967) 387 U.S. 541, 542, 545-546, 87 S. Ct. 1737, 18 L. Ed. 2d 943* (*Fourth Amendment* bars prosecution of person who has refused to allow warrantless code-enforcement inspection of commercial structure); *Vidaurri v. Superior Court (1970) 13 Cal. App. 3d 550, 552-554, 91 Cal. Rptr. 704* (marijuana plant seen by Department of Agriculture pest inspector during warrantless inspection of defendant's fenced back yard was not admissible in evidence because search was illegal)].

The extent to which the exclusionary rule bars the use of evidence in a non-criminal administrative hearing, however, is determined on a case-by-case basis [*Emslie v. State Bar (1974) 11 Cal. 3d 210, 229-230, 113 Cal. Rptr. 175, 520 P.2d 991* ; *United States v. Janis (1976) 428 U.S. 433, 446-447, 49 L. Ed. 2d 1046, 96 S. Ct. 3021* ; *I.N.S. v. Lopez-Mendoza (1984) 468 U.S. 1032, 1051-1052, 104 S. Ct. 3479, 82 L. Ed. 2d 778]* . Factors bearing on admissibility include the following [*Emslie v. State Bar (1974) 11 Cal. 3d 210, 226-228, 113 Cal. Rptr. 175, 520 P.2d 991]* :

- Whether the state would profit by its own wrong in using evidence obtained by an unconstitutional method, and whether exclusion of the evidence would have a deterrent effect on future abuses by government officials.

- Whether a close identity exists between the civil administrative proceeding and the aims and objectives of criminal law enforcement.

- Whether a strong relationship exists between the policy underlying the exclusionary rule and the administrative proceedings.

- Whether the magnitude of societal costs that might result from extending the exclusionary rule to the proceeding would be significant.

- Whether the evidence was obtained under circumstances that "shock the conscience" to the point that due process considerations could not countenance any governmental use of the evidence.

The exclusionary rule has not yet been applied in license revocation proceedings [*see Emslie v. State Bar (1974) 11 Cal. 3d 210, 229, 113 Cal. Rptr. 175, 520 P.2d 991* (procedural due process does not require application of exclusionary rule to state bar disciplinary proceedings because there would be no deterrent effect on law enforcement officers if the rule were applied); *Pating v. Board of Medical Quality Assurance (1982) 130 Cal. App. 3d 608, 623-626, 182 Cal. Rptr. 20* (balancing public protection against possible deterrent effect on law enforcement officers, exclusionary rule not applicable in disciplinary proceeding against doctor)].

Under federal law, the exclusionary rule has not been applied to several types of administrative proceedings [*United States v. Janis (1976) 428 U.S. 433, 447, 49 L. Ed. 2d 1046, 96 S. Ct. 3021* (federal civil tax assessment proceeding); *I.N.S. v. Lopez-Mendoza (1984) 468 U.S. 1032, 1052, 104 S. Ct. 3479, 82 L. Ed. 2d 778* (INS civil deportation proceeding)].

[b] Subpoenas

As discussed in Ch. 471, *Public Agency Investigations* , an agency may issue a subpoena duces tecum to inspect business books or records as part of its investigative powers. Such a subpoena will not violate *Fourth Amendment constitution*al protections against unreasonable searches and seizures as long as the following conditions are met [*Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 529, 15 Cal. Rptr. 630, 364 P.2d 462]* :

- The demanding agency is authorized to make the inquiry.

- The inquiry is not too indefinite.

- The information sought is reasonably relevant to the subject of the inquiry.

If the personal privacy interest of third parties is involved, however, as for example when an agency requests the personal medical records of patients treated by a physician who is under investigation, the agency will be required to show that a compelling government interest at stake and that the request is the least intrusive means of satisfying this compelling interest [*Wood v. Superior Court (1985) 166 Cal. App. 3d 1138, 1148, 212 Cal. Rptr. 811* ; *see Ch. 471, Public Agency Investigations, §§ 471.30[5], 471.32[2][e]*].

[2] Privilege Against Self-Incrimination

An administrative agency inspection of business books and records may give rise to a constitutional claim for violation of the protection against self-incrimination [*see Ch. 471, Public Agency Investigations, § 471.11[4]*]. Since the "required records" doctrine was handed down in the case of Shapiro v. United States (1947) *335 U.S. 1, 32-35, 68 S. Ct. 1375, 92 L. Ed. 1787* , however, warrantless inspections generally are valid against a claimof self-incrimination when a statute requires certain records to be maintained, and an agency is authorized to inspect those records. Moreover, corporations and most other business entities are not entitled to assert the privilege as to their business records [*see Ch. 471, Public Agency Investigations, § 471.11[4]*].

[3] Requirement of Due Process

Even an otherwise permissible search may be conducted in a manner so unreasonable as to violate an individual's due

process rights. The U.S. Supreme Court has indicated, for example, that the otherwise constitutional home visitation requirements of a state welfare system would not pass constitutional muster if the visit in question was an "early morning mass raid" on the home of a welfare recipient [*Wyman v. James (1971) 400 U.S. 309, 326, 91 S. Ct. 381, 27 L. Ed. 2d 408]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsConstitutional RightsGeneral OverviewAdministrative LawAgency InvestigationsConstitutional RightsSearch & SeizureAdministrative LawAgency InvestigationsConstitutional RightsSelf-Incrimination PrivilegeAdministrative LawAgency InvestigationsScopeInspectionsAdministrative LawAgency InvestigationsScopeSubpoenasConstitutional LawBill of RightsFundamental RightsSearch & SeizureGeneral OverviewConstitutional LawBill of RightsFundamental RightsSearch & SeizureExclusionary RuleConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessSelf-Incrimination Privilege

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§ 471A.14 Obtaining Judicial Relief From Unlawful Inspections

[1] Injunctions

Although no express provision exists for it in either the injunction [*see Civ. Code §§ 3420-3423*; *Code Civ. Proc. §§ 525-534*], or administrative inspection warrant [*see Code Civ. Proc. §§ 1822.50-1822.59*] statutes, it is clear that an injured party may obtain injunctive relief from an agency inspection when the inspection exceeds the agency's authority. An injunction may be granted to prevent an agency from breaching an obligation [*see Civ. Code § 1427* (an obligation is a legal duty, etc.)] that it owes to the party applying for the injunction if pecuniary compensation would not afford that party adequate relief [*Civ. Code § 3422(1)*; *Code Civ. Proc. § 526(a)(4)*]. This principle clearly applies to the acts of state agencies. Unavailable money damages are obviously not adequate relief, and the California Tort Claims Act (*Gov. Code § 810 et seq.*) provides that public entities are not liable in tort for injuries they cause (except as otherwise provided by statute) [*Gov. Code § 815(a)*; *see* Ch. 464, *Public Entities and Officers: California Tort Claims Act* , for discussion of the California Tort Claim Act]. The Tort Claims Act does not, however, limit the right to obtain relief ot her than money or damages against a public entity or public employee [*Gov. Code § 814*]. Relief other than money includes injunctions [*see* Senate Legislative Committee Comment on *Gov. Code § 814* (right to relief other than money means that, for example, there is a right to enjoin the enforcement of unconstitutional statutes even though public entities are immune from liability for enforcing such statutes)].

Although a court may not ordinarily interfere with legislative or discretionary acts of a public entity, public entities may be enjoined from "acting, or proposing to act, in excess of their jurisdiction and without authority" [*San Ysidro Irr. Dist. v. Superior Court (1961) 56 Cal. 2d 708, 719-720, 16 Cal. Rptr. 609, 365 P.2d 753* (injunction of irrigation district upheld)]. Similarly, although it is unlawful to enjoin the execution of a public statute by officers of the law for the public benefit [*Code Civ. Proc. § 526(b)(4)*; *Civ. Code § 3423(d)*], this limitation does not apply in the following circumstances [*see* Ch. 303, *Injunctions*]:

- The statute being enforced is invalid or unconstitutional [*Conover v. Hall (1974) 11 Cal. 3d 842, 850, 114 Cal. Rptr. 642, 523 P.2d 682]* .

- The statute is being applied to a matter outside its terms [*MacLeod v. City of Los Altos (1960) 182*

Cal. App. 2d 364, 369-370, 6 Cal. Rptr. 326] .

- The officer has exceeded his or her authority [*Financial Indem. Co. v. Superior Court (1955) 45 Cal. 2d 395, 402, 289 P.2d 233]* .

- A facially valid statute is being unconstitutionally applied [*Brock v. Superior Court (1939) 12 Cal. 2d 605, 610, 86 P.2d 805]* .

Thus, for example, law enforcement officers may be enjoined from interfering with another's business by acts that are beyond their authority or beyond the proper scope of their duties [*Crittenden v. Superior Court (1964) 61 Cal. 2d 565, 568, 39 Cal. Rptr. 380, 393 P.2d 692* ; *Uptown Enterprises v. Strand (1961) 195 Cal. App. 2d 45, 53, 15 Cal. Rptr. 486]* .

An injunction is the proper remedy for threatened repeated acts of trespass [*Slater v. Pacific American Oil Co. (1931) 212 Cal. 648, 655, 300 P. 31* ; *Uptown Enterprises v. Strand (1961) 195 Cal. App. 2d 45, 52, 15 Cal. Rptr. 486]* , as well as for completed acts that will probably recur [*Rosicrucian Fellow. v. Rosicrucian Etc. Ch. (1952) 39 Cal. 2d 121, 144, 245 P.2d 481* ; *Fretz v. Burke (1967) 247 Cal. App. 2d 741, 744, 55 Cal. Rptr. 879]* . This is because the recurrence of the wrong means that money damages would not be an adequate relief without a multiplicity of suits [*Slater v. Pacific American Oil Co. (1931) 212 Cal. 648, 655, 300 P. 31]* . Preventing a multiplicity of suits, like the inadequacy of money damages, is grounds for an injuction [*Civ. Code § 3422(1), (3)*; *Code Civ. Proc. § 526(a)(4), (6)*].

A regulated business faced with an agency that claims the right to make inspections that exceed its authority is in a very strong position to claim that these wrongs will recur and that any trespass involved in the inspections will be repeated. The right to enjoin threatened acts of trespass by law enforcement officers acting beyond the scope of their proper duties is measured by the same standard as the right to enjoin similar acts by other persons [*Uptown Enterprises v. Strand (1961) 195 Cal. App. 2d 45, 53, 15 Cal. Rptr. 486]* .

If law enforcement officers can be enjoined when acting beyond their authority, it seems clear that agency investigators engaged in unlawfulinspections can also be enjoined. Once an agency begins an administrative proceeding to penalize alleged violations discovered during an unlawful inspection, however, the accused is probably required to challenge the legality of the inspection in the administrative proceeding itself, because judicial relief from administrative action is not available until administrative remedies have been exhausted. This requirement applies even when the accused wishes to challenge the jurisdiction of the agency or the constitutionality of the laws under which it acts [*Tushner v. Griesinger (1959) 171 Cal. App. 2d 599, 605-606, 341 P.2d 416]* .

For a complaint form that may be used by the subject of an unlawful administrative investigation to seek injunctive relief, see *Ch. 471, Public Agency Investigations, § 471.70*. For a complaint form that may be used by a taxpayer to sue to enjoin an unlawful administrative investigation to prevent the waste of public funds, see *Ch. 471, Public Agency Investigations, § 471.71* [*see Code Civ. Proc. § 526a* (taxpayer action to prevent illegal expenditure or waste of public funds or property)].

[2] Writ of Mandate

After the completion of the administrative proceeding, the accused may apply for a writ of mandate to challenge both the administrative decision and the legality of the inspection. When a writ is issued for the purpose of inquiring into the validity of a final administrative order or decision [*Code Civ. Proc. § 1094.5(a)*], the issues include whether the agency proceeded without, or in excess of, jurisdiction [*Code Civ. Proc. § 1094.5(b)*]. For a discussion of administrative mandate proceedings, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

[3] Damages

An unlawful administrative search may give rise to an action for damages [*see Silva v. MacAuley (1933) 135 Cal. App. 249, 253, 26 P.2d 887* ; *Ryan v. Crist (1914) 23 Cal. App. 744, 745, 139 P. 436]* , including exemplary damages in an appropriate case [*see Civ. Code § 3294*]. However, public employees are immune from liability for injuries caused by their nonnegligent acts in executing or enforcing any law [*Gov. Code § 820.4*] and for injuries caused by entering property pursuant to express or implicit legal authorization [*Gov. Code § 821.8*]. In other cases, unless similarly immunized by statute, public employees are liable for injuries caused by their acts and omissions, to the same extent as are private persons [*Gov. Code § 820(a)*]. An administrative agency is liable for injuries caused by the acts or omissions of an employee if (1) the act or omission occurred within the scope of employment and (2) the employee, or his or her personal representative, is liable [*Gov. Code § 815.2(a)*].

For detailed discussion and forms relating to actions for damages against public employees and agencies, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

If an unlawful administrative search entails deprivation of federal constitutional rights, an action for appropriate relief may be brought in a state court pursuant to the Civil Rights Act of 1871 (*42 U.S.C. § 1983*) [*Brown v. Pitchess (1975) 13 Cal. 3d 518, 521-523, 119 Cal. Rptr. 204, 531 P.2d 772]* . A state or county may not be sued under the Civil Rights Act of 1871 for damages, as it is not a "person" within the meaning of the act [*see Diamond v. Pitchess (9th Cir. 1969) 411 F.2d 565, 567* ; *Taylor v. Mitzel (1978) 82 Cal. App. 3d 665, 670, 147 Cal. Rptr. 323]* . Similarly, a civil rights action for damages under *42 U.S.C. § 1983* cannot be brought against an administrative agency of a state [*Sykes v. California (Dep't of Motor Vehicles) (9th Cir. 1974) 497 F.2d 197, 201-202* (Department of Motor Vehicles not a "person" within meaning of act; overruled on other grounds in *Life Ins. Co. of N. America v. Reichardt (9th Cir. 1979) 591 F.2d 499, 503 n. 7*); *see Heath v. Redbud Hosp. Dist. (ND Cal. 1977) 436 F. Supp. 766, 767-768]* . The court in *Sykes* partially relied on *Monroe v. Pape (1961) 365 U.S. 167, 189-192, 81 S. Ct. 473, 5 L. Ed. 2d 492* , which held municipalities to be immune from suit under the act. However, the *Monroe* was overruled in *Monell v. Dep't of Soc. Servs. (1978) 436 U.S. 658, 663, 694-695, 701, 98 S. Ct. 2018, 56 L. Ed. 2d 611* , in which the United States Supreme Court determined that local governments are not absolutely immune from civil liability under *42 U.S.C. § 1983*. The Court stated that when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts an injury, the government as an entity is responsible under *42 U.S.C. § 1983*.

The Court extended the holding of *Monell* in *Owen v. City of Independence (1980) 445 U.S. 622, 638, 657, 100 S. Ct. 1398, 63 L. Ed. 2d 673* , in which it held that municipalities do not have any qualified immunity for good-faith constitutional violations under *42 U.S.C. § 1983*. Nevertheless, since the *Monell* and *Owen* decisions involved only suits against local governments and municipalities, it is not clear if these decisions change the rule that state agencies and states are immune from liability for damages under the Civil Rights Act. It should be noted that governmental agencies may be sued for injunctive relief alone under *42 U.S.C. § 1983* to prevent continuing violations of federal statutes [*Ybarra v. Los Altos Hills (N.D. Cal. 1973) 370 F. Supp. 742, 746]* . Employees of public agencies are subject to suit under *42 U.S.C. § 1983* [*see, e.g., Ybarra v. Los Altos Hills (9th Cir. 1974) 503 F.2d 250, 252-253]* .

For additional discussion of the liability of agencies under *42 U.S.C. § 1983*, and of qualified immunity based on good faith, see Ch. 112, *Civil Rights: Government-Funded Programs and Activities* .

[4] Suppression of Evidence

Evidence obtained by administrative personnel during an unconstitutional search may not be used in a criminal trial [*Dyas v. Superior Court (1974) 11 Cal. 3d 628, 635-636, 114 Cal. Rptr. 114, 522 P.2d 674* ; *see People v. Scott (1974) 43 Cal. App. 3d 723, 727, 117 Cal. Rptr. 925]* , regardless of whether it was the defendant or some other person whose rights were violated by the search [*see Kaplan v. Superior Court (1971) 6 Cal. 3d 150, 155-161, 98 Cal. Rptr. 649, 491 P.2d 1* ("vicarious exclusionary rule"); *People v. Martin (1955) 45 Cal. 2d 755, 761, 290 P.2d 855]* . On the other

hand, if an administrative search is valid, then whatever evidence of crime is discovered may be used in a subsequent criminal trial [*see, e.g.,* *People v. Hyde (1974) 12 Cal. 3d 158, 166, 115 Cal. Rptr. 358, 524 P.2d 830]* . Evidence obtained during an unconstitutional administrative search might also be held inadmissible in a civil trial [*see* *City & County of San Francisco v. City Inv. Corp. (1971) 15 Cal. App. 3d 1031, 1039, 93 Cal. Rptr. 690* (objection to admission of evidence properly overruled when evidence in plain view)].

Illegally obtained evidence might be admissible in administrative adjudicative proceedings [*see* *In re Martinez (1970) 1 Cal. 3d 641, 649-650, 83 Cal. Rptr. 382, 463 P.2d 734* ; *Governing Board v. Metcalf (1974) 36 Cal. App. 3d 546, 549, 111 Cal. Rptr. 724]* , but an agency is barred from using evidence obtained by entrapment and other evidence "inconsistent with the dignity of its proceedings and the fair administration of justice" [*Patty v. Board of Medical Examiners (1973) 9 Cal. 3d 356, 364-365, 107 Cal. Rptr. 473, 508 P.2d 1121* ; *Redner v. Workmen's Comp. Appeals Bd. (1971) 5 Cal. 3d 83, 94-97, 95 Cal. Rptr. 447, 485 P.2d 799]* .

Legal Topics:

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[Reserved]

§§ 471A.15[Reserved]

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Due process and *equal protection clauses. U.S. Const., amend. XIV, § 1*

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For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsSearch & SeizureGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessSelf-Incrimination PrivilegeConstitutional LawBill of RightsFundamental RightsCriminal ProcessAssistance of CounselConstitutional LawEqual ProtectionScope of Protection

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§ 471A.21 State Constitution

Due process and *equal protection clauses*. *Cal. Const., art. I, § 7(a)*

Freedom from unreasonable searches and seizures. *Cal. Const., art. I, § 13*

Privilege against self-incrimination. *Cal. Const., art. I, § 15*

Right to counsel. *Cal. Const., art. I, § 15*

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§ 471A.22 State Statutes

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Investigative powers of heads of departments. *Gov. Code §§ 11180-11191*

Open meeting laws. *Gov. Code §§ 11120-11131* (state), 54950-54961 (local; Ralph M. Brown Act)

Public Records Act. *Gov. Code § 6250 et seq.*

Privileges against disclosure in testimony. *Evid. Code §§ 900-1070*

Privileged official information. *Evid. Code § 1040*

Inspection warrants. *Code Civ. Proc. § 1822.50 et seq.*

Subpoena powers of county supervisors and city councils. *Gov. Code §§ 25170, 37104*

Subpoena powers of local tax assessor. *Rev. & Tax Code § 454*

Subpoena powers of local board of equalization. *Rev. & Tax Code § 1609.4*

Service of summons in civil action (applicable to service of administrative subpoena by judicial decision). *Code Civ. Proc. §§ 413.10-417.40*

Investigators of various state agencies as having authority of peace officers. *Bus. & Prof. Code § 7011.5*; *Penal Code § 830.3*

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§ 471A.23 Decisions

[1] Administrative Searches

Fourth Amendment is applicable to states through *Fourteenth Amendment*. *Mapp v. Ohio (1961) 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, 86 Ohio Law Abs. 513*

Fourth Amendment requirements are applicable to all government agents, not just criminal law enforcement officers. *Camara v. Municipal Court (1967) 387 U.S. 523, 528, 87 S. Ct. 1727, 18 L. Ed. 2d 930*

Components of administrative search are intrusion into area reasonably regarded as private by government agent for regulatory purpose. *Camara v. Municipal Court (1967) 387 U.S. 523, 528-529, 87 S. Ct. 1727, 18 L. Ed. 2d 930* ; *People v. Hyde (1974) 12 Cal. 3d 158, 165, 115 Cal. Rptr. 358, 524 P.2d 830* ; *Lorenzana v. Superior Court (1973) 9 Cal. 3d 626, 639, 108 Cal. Rptr. 585, 511 P.2d 33* ; *Vidaurri v. Superior Court (1970) 13 Cal. App. 3d 550, 552, 91 Cal. Rptr. 704*

[2] Warrant Required

Warrant is implicitly required by *Fourth Amendment*. *Camara v. Municipal Court (1967) 387 U.S. 523, 528-529, 87 S. Ct. 1727, 18 L. Ed. 2d 930* ; *See v. Seattle (1967) 387 U.S. 541, 543, 546, 87 S. Ct. 1737, 18 L. Ed. 2d 943*

Warrantless search is justifiable on theory of implied consent by regulated person. *Paladini v. Superior Court (1918) 178 Cal. 369, 373, 173 P. 588* ; *Cooley v. State Bd. of Funeral Directors (1956) 141 Cal. App. 2d 293, 298, 296 P.2d 588* ; *People v. White (1968) 259 Cal. App. 2d Supp. 936, 942, 259 Cal. App. 2d Supp. 936* , *259 Cal. App. 2d Supp. 936, 65 Cal. Rptr. 923*

Warrantless search is justifiable on theory of diminished or absent expectations of privacy. *United States v. Biswell (1972) 406 U.S. 311, 316, 92 S. Ct. 1593, 32 L. Ed. 2d 87* ; *City & County of San Francisco v. City Investment Corp. (1971) 15 Cal. App. 3d 1031, 1039, 93 Cal. Rptr. 690*

Burden of justifying search is on government if victim shows lack of warrant. *People v. Lanthier (1971) 5 Cal. 3d 751, 755, 97 Cal. Rptr. 297, 488 P.2d 625* ; *Horack v. Superior Court (1970) 3 Cal. 3d 720, 725, 91 Cal. Rptr. 569, 478 P.2d 1*

[3] Warrantless Inspections

Health & Safety Code § 1597.556, which authorizes unannounced and warrantless inspections of family day care homes, does not violate *U.S. Const., amend. IV*, because *22 Cal. Code Reg. § 88030* restricts areas to be searched to those where children have access and limits hours at which searches may be conducted to those during which family day care takes place. *Rush v. Obledo (9th Cir. 1985) 756 F.2d 713, 721-722*

Health & Safety Code § 1596.852, which permits general warrantless searches at any time of any place providing care and supervision to children, violates *U.S. Const., amend. IV*, because statute is unlimited by current regulations. *Rush v. Obledo (9th Cir. 1985) 756 F.2d 713, 721-722*

Veh. Code § 2805, permitting warrantless searches of auto dismantling yards by Highway Patrol for purpose of locating stolen vehicles, does not authorize general searches of dismantling yard premises. *Lewis v. McMasters (9th Cir. 1981) 663 F.2d 954, 955*

Search is exploratory investigation, invasion and quest, looking for and seeking out. *Bielicki v. Superior Court (1962) 57 Cal. 2d 602, 605, 21 Cal. Rptr. 552, 371 P.2d 288*

Search includes electronic eavesdropping and visual observation. *Lorenzana v. Superior Court (1973) 9 Cal. 3d 626, 639, 108 Cal. Rptr. 585, 511 P.2d 33*

Fourth Amendment protection extends to any place where victim had reasonable expectation of privacy. *Katz v. United States (1967) 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576* ; *People v. Dumas (1973) 9 Cal. 3d 871, 881-883, 109 Cal. Rptr. 304, 512 P.2d 1208* ; *Lorenzana v. Superior Court (1973) 9 Cal. 3d 626, 637, 108 Cal. Rptr. 585, 511 P.2d 33*

[4] Exceptions to Warrant Requirement

[a] Consent

Warrantless search is not invalid if conducted pursuant to consent. *Camara v. Municipal Court (1967) 387 U.S. 523, 528-529, 87 S. Ct. 1727, 18 L. Ed. 2d 930* ; *See v. Seattle (1967) 387 U.S. 541, 545, 87 S. Ct. 1737, 18 L. Ed. 2d 943* ; *United States v. Thriftimart, Inc. (9th Cir. 1970) 429 F.2d 1006, 1010* ; *Parrish v. Civil Service Com. (1967) 66 Cal. 2d 260, 268-270, 57 Cal. Rptr. 623, 425 P.2d 223*

Right to *Fourth Amendment* protection against search of dwelling is not dependent on property interest but is dependent instead on reasonable expectations of privacy. *Mancusi v. DeForte (1968) 392 U.S. 364, 368, 88 S. Ct. 2120, 20 L. Ed. 2d 1154* ; *Jones v. United States (1960) 362 U.S. 257, 266, 80 S. Ct. 725, 4 L. Ed. 2d 697*

Landlord's consent validates search of public areas, but not tenant's quarters, in apartment building, even where tenant absent. *Camara v. Municipal Court (1967) 387 U.S. 523, 540, 87 S. Ct. 1727, 18 L. Ed. 2d 930* ; *Chapman v. United States (1960) 365 U.S. 610, 616, 617, 81 S. Ct. 776, 5 L. Ed. 2d 828*

Landlord's consent validates search of unoccupied apartment. *People v. Carr (1972) 8 Cal. 3d 287, 298, 104 Cal.*

Rptr. 705, 502 P.2d 513

Rule against validation of search of occupied hotel room pursuant clerk's or manager's consent, or pursuant to guest's implicit consent for routine or emergency entry, is applicable in cases of administrative searches. *Stoner v. California (1964) 376 U.S. 483, 488, 489, 84 S. Ct. 889, 11 L. Ed. 2d 856* ; *People v. Superior Court (1970) 3 Cal. App. 3d 648, 654, 83 Cal. Rptr. 732*

Warrantless search by state investigator of restaurant's business records is lawful and obtained with voluntary consent where manager of restaurant was too busy to discuss bookkeeping with investigator, directed him to bookkeeper, and bookkeeper gave necessary information without objection. *People v. Los Angeles Palm, Inc. (1981) 121 Cal. App. 3d 25, 29-32, 175 Cal. Rptr. 257*

Validation of search by consent of coowner or joint occupant. *Jackson v. Official Representatives & Employees of the Los Angeles Police Dep't (9th Cir. 1973) 487 F.2d 885, 886* ; *People v. Duren (1973) 9 Cal. 3d 218, 241, 107 Cal. Rptr. 157, 507 P.2d 1365* ; *People v. Shelton (1964) 60 Cal. 2d 740, 745, 36 Cal. Rptr. 433, 388 P.2d 665* ; *Tompkins v. Superior Court (1963) 59 Cal. 2d 65, 69, 27 Cal. Rptr. 889, 378 P.2d 113* ; *People v. Superior Court (1970) 3 Cal. App. 3d 648, 654, 83 Cal. Rptr. 732*

Validation of search by consent of victim's agent authorized to give consent. *People v. Superior Court (1970) 3 Cal. App. 3d 648, 654, 83 Cal. Rptr. 732*

Validation of search by consent of person apparently authorized to give consent. *People v. Carr (1972) 8 Cal. 3d 287, 298, 104 Cal. Rptr. 705, 502 P.2d 513*

Validation of search of business premises by consent of victim's partner or employee. United States v. Alfred M. Lewis, Inc. (9th Cir. [Nev] 1970) *431 F.2d 303, 306* ; *Application of Fried (S.D. N.Y. 1946) 68 F. Supp. 961 , modified on other grounds in In re Fried (2nd Cir. 1947) 161 F.2d 453 , cert. denied, 331 U.S. 858, 67 S. Ct. 1751, 91 L. Ed. 1865 (1947)* ; *United States v. Antonelli Fireworks Co. (W.D. N.Y. 1943) 53 F. Supp. 870, 874 , aff'd, 155 F.2d 631 (2nd Cir. 1946) , cert. denied, 329 U.S. 742, 67 S. Ct. 49, 91 L. Ed. 640 (1946)* ; *Raine v. United States (9th Cir. 1924) 299 F. 407, 411 , cert. denied, 266 U.S. 611, 45 S. Ct. 94, 69 L. Ed. 467*

Consent not voluntarily given is equivalent to no consent. *Parrish v. Civil Serv. Comm'n (1967) 66 Cal. 2d 260, 268-270, 57 Cal. Rptr. 623, 425 P.2d 223*

Voluntariness of consent is question of fact. *People v. Reyes (1974) 12 Cal. 3d 486, 501, 116 Cal. Rptr. 217, 526 P.2d 225*

Victim's knowledge of right to withhold consent is relevant, but consent not vitiated by failure to warn of right. *People v. Reyes (1974) 12 Cal. 3d 486, 501, 116 Cal. Rptr. 217, 526 P.2d 225* ; *Blair v. Pitchess (1971) 5 Cal. 3d 258, 275 n. 8, 96 Cal. Rptr. 42, 486 P.2d 1242*

Consent is vitiated by victim's certain knowledge that withholding consent will have adverse consequences. *Parrish v. Civil Serv. Comm'n (1967) 66 Cal. 2d 260, 268-270, 57 Cal. Rptr. 623, 425 P.2d 223* ; *Currier v. Pasadena (1975) 48 Cal. App. 3d 810, 815, 121 Cal. Rptr. 913*

Coercive effect of official request for consent is less in administrative setting than in criminal law enforcement setting. *United States v. Thriftimart, Inc. (9th Cir. 1970) 429 F.2d 1006, 1009-1010*

Consent is ineffective where obtained after search or after illegal entry. *People v. Haven (1963) 59 Cal. 2d 713, 718, 31 Cal. Rptr. 47, 381 P.2d 927*

Consent is ineffective where induced by governmental agent through deceit or active coercion. *Blair v. Pitchess (1971) 5 Cal. 3d 258, 276, 96 Cal. Rptr. 42, 486 P.2d 1242* ; *People v. Roberts (1956) 47 Cal. 2d 374, 378, 303 P.2d 721* ; *Lord v. Kelley (D. Mass. 1963) 223 F. Supp. 684, 690 , appeal dismissed 334 F.2d 742 (1964)*

Government has burden of proof on question of whether absence of warrant is excused by consent. *Blair v. Pitchess (1971) 5 Cal. 3d 258, 274, 96 Cal. Rptr. 42, 486 P.2d 1242* ; *People v. Haven (1963) 59 Cal. 2d 713, 717, 31 Cal. Rptr. 47, 381 P.2d 927*

[b] Plain View

Warrant is not required to conduct search in nature of observing things in plain view. *Katz v. United States (1967) 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576* ; *City & County of San Francisco v. City Investment Corp. (1971) 15 Cal. App. 3d 1031, 1039, 93 Cal. Rptr. 690*

Warrant is not required to enter public parts of business premises for purpose of conducting search by viewing things in plain view. *Air Pollution Variance Bd. v. Western Alfalfa (1974) 416 U.S. 861, 864-865, 94 S. Ct. 2114, 40 L. Ed. 2d 607*

Warrant is not required to search abandoned structure. *City & County of San Francisco v. City Investment Corp. (1971) 15 Cal. App. 3d 1031, 1039, 93 Cal. Rptr. 690*

[c] Exigent Circumstances

Warrantless administrative search is validated by emergency requiring search immediately. *Camara v. Municipal Court (1967) 387 U.S. 523, 539, 87 S. Ct. 1727, 18 L. Ed. 2d 930* ; *People v. Lanthier (1971) 5 Cal. 3d 751, 755-756, 97 Cal. Rptr. 297, 488 P.2d 625* ; *People v. Roberts (1956) 47 Cal. 2d 374, 377, 303 P.2d 721*

[d] Pervasively Regulated Industries

Reasonableness of search is determined by balancing governmental need against individual's right of privacy. *United States v. Biswell (1972) 406 U.S. 311, 316-317, 92 S. Ct. 1593, 32 L. Ed. 2d 87* ; *Camara v. Municipal Court (1967) 387 U.S. 523, 536-537, 87 S. Ct. 1727, 18 L. Ed. 2d 930* ; *People v. Hyde (1974) 12 Cal. 3d 158, 166, 115 Cal. Rptr. 358, 524 P.2d 830*

Requirement of reasonableness is applicable whether or not search is authorized by statute. *Youghiogheny & Ohio Coal Co. v. Morton (S.D. Ohio 1973) 364 F. Supp. 45, 50, 41 Ohio Misc. 6*

Warrantless inspection of closely regulated business premises is unreasonable unless (1) there is substantial governmental interest that informs regulatory scheme pursuant to which inspection is made; (2) warrantless inspections are necessary to further regulatory scheme; and (3) statutory inspection program, in terms of certainty and regularity of its application, provides constitutionally adequate substitute for warrant. *People v. Paulson (1990) 216 Cal. App. 3d 1480, 1485, 265 Cal. Rptr. 579*

Warrantless administrative search of regulated person's business premises is permissible if authorized by statute. *United States v. Biswell (1972) 406 U.S. 311, 317, 92 S. Ct. 1593, 32 L. Ed. 2d 87*

30 U.S.C. § 813(a), authorizing warrantless inspections of undergroundand surface mines pursuant to Federal Mine

Safety and Health Act of 1977, does not violate *Fourth Amendment* prohibition against unreasonable searches and seizures. *Donovan v. Dewey (1981) 452 U.S. 594, 601-605, 101 S. Ct. 2534, 69 L. Ed. 2d 262*

Mere fact that administrative search was conducted pursuant to administrative statute that proscribed criminal conduct does not make search unconstitutional. *People v. Paulson (1990) 216 Cal. App. 3d 1480, 1485-1486, 265 Cal. Rptr. 579*

Acceptance of license required to operate skilled nursing facility does carry with it burden of submission to inspections which reasonably further enforcement of regulatory scheme of health care industry; consequently, warrantless health department inspection of nursing home's business records was constitutional. *People v. Firstenberg (1979) 92 Cal. App. 3d 570, 574, 581, 155 Cal. Rptr. 80*

Authorization in statute is not required to be specific. *People v. Maxwell (1969) 275 Cal. App. 2d Supp. 1026, 1028-1029, 275 Cal. App. 2d Supp. 1026* , *275 Cal. App. 2d Supp. 1026, 80 Cal. Rptr. 86*

Authorization is required to be reasonably limited in scope. *United States v. Biswell (1972) 406 U.S. 311, 315, 92 S. Ct. 1593, 32 L. Ed. 2d 87* ; *United States ex rel. Terraciano v. Montanye (2nd Cir. 1974) 493 F.2d 682, 684-685*

Exceeding statutory authority invalidates search. *Colonnade Catering Corp. v. United States (1970) 397 U.S. 72, 76-77, 90 S. Ct. 774, 25 L. Ed. 2d 60* ; *People v. Lisner (1967) 249 Cal. App. 2d 637, 642, 57 Cal. Rptr. 674*

[e] Public Facilities

Indiscriminate screening of potential users of public facilities, without warrants, is permissible. *United States v. Davis (9th Cir. 1973) 482 F.2d 893, 895-896* ; *United States v. Schafer (9th Cir. 1972] 461 F.2d 856, 858-859* ; *Downing v. Kunzig (6th Cir. 1972) 454 F.2d 1230, 1232-1233* ; *People v. Hyde (1974) 12 Cal. 3d 158, 115 Cal. Rptr. 358, 524 P.2d 830* ; *Morad v. Superior Court (1975) 44 Cal. App. 3d 436, 439-442, 118 Cal. Rptr. 519*

[f] Welfare Cases

Constitutionality of conditioning receipt of welfare benefits on acquiescence to warrantless administrative searches in form of home visits. *Wyman v. James (1971) 400 U.S. 309, 317, 91 S. Ct. 381, 27 L. Ed. 2d 408* ; *Parrish v. Civil Serv. Comm'n (1967) 66 Cal. 2d 260, 268-271, 57 Cal. Rptr. 623, 425 P.2d 223*

Legal Topics:

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§ 471A.24 Law Reviews

Caso, *Nonconsensual Cal/OSHA Inspections After Salwasser: They're Still Illegal*, *14 Pac. L.J. 913 (1983)*

Comment, *Unconstitutional California OSHA Searches: The Employer Strikes Back? 12 Pac. L.J. 1171 (1981)*

Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See*, *61 Calif. L. Rev. 1011 (1973)*

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§ 471A.25 Internet References

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Office of Administrative Hearings. This site includes: information and location concerning specific OAH offices; an OAH hearing guide; information concerming Administrative Procedure Act statutes, regulations, and proposed regulations; OAH forms; information concerning alternative dispute resolution procedures; and declaratory decisions. http://www.dgs.ca.gov/oah **NOTE:** On and after July 1, 1998, The OAL is required by *Gov. Code § 11340.1(b)* to make the full text of the California Code of Regulations, with reference citations and history notes, available on the Internet free of charge.

Office of Administrative Law. This site includes: OAL publications; links to OAL statutes and regulations relating to rulemaking; regulations submitted to the OAL for review, and information for contacting or provding input to the OAL regarding rulemaking. http://www.oal.ca.gov

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§§ 471A.26[Reserved]

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§ 471A.40 Agency Inspection Power

[1] Ascertain the Scope of the Agency's Inspection Power

- ☐ Ascertain statutory authority to inspect [*see § 471A.10[2]*].
- ☐ Ascertain whether any exceptions apply to requirement for search warrant [*see § 471A.12[3]*].
  - ☐ Business or industry is pervasively regulated [*see § 471A.12[3][a]*].
  - ☐ Open plain or plain view inspections [*see § 471A.12[3][b]*].
  - ☐ Consent to seach [*see § 471A.12[3][b][iv]*].
  - ☐ Exigent circumstances [*see § 471A.12[3][v]*].

[2] Ascertain If Inspection Violates Constitutional or Statutory Protections

- ☐ Warrantless search [*see § 471A.13*].
- ☐ Defective warrant [*see § 471A.12[2]*].
  - ☐ Permitted purpose of warrant [*see § 471A.12[2][a]*].
  - ☐ Properly supported affidavit [*see § 471A.12[2][b]*].

☐ Specific description of place to be inspected and the purpose of the inspection [*see § 471A.12[2][b]*].

☐ Showing that consent was not needed, or was sought and refused [*see § 471A.12[2][b]*].

☐ Proper cause for issuance of warrant [*see § 471A.12[2][b]*].

☐ Warrant properly describes inspection place, purpose, and any limits on inspection [*see § 471A.12[2][c]*].

[3] Ascertain If Inspection May Be Enjoined Because It Exceeds the Scope of the Agency's Authority

☐ Determine scope of authority [*see § 471A.14[1]*].

[4] Determine Whether Warrant Was Executed as Required by Statute

☐ Time limits for execution and return of warrant [*see § 471A.12[2][c]*].

☐ Time and manner of inspection [*see § 471A.12[2][d]*].

☐ Authorized forcible entry [*see § 471A.12[2][d]*].

☐ Notice of warrant issuance after refusal of consent to inspection [*see § 471A.12[2][d]*].

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§ 471A.41 Judicial Relief

☐ Injunction [*see* discussion in § 474A.14[1]; *see Ch. 471, Investigations by Public Agencies, § 471.60*].

☐ Writ of mandate [*see* discussion in § 474A.14[2]; *see* Ch. 474, *Availability of Judical Review* et seq.].

☐ Action for damages [*see* discussion in *§ 471A.14[3]*].

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[2] Related Licensing Coverage

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[5] Political and Religious Beliefs

[6] Reputation

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[b] Graduation From Approved School

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41-471B California Forms of Pleading and Practice--Annotated § 471B.01

§ 471B.01 Scope of Chapter

Part II of this chapter discusses general California law governing licensing, including the following:

- Subpart A discusses the nature and powers of governmental licensing [*see § 471B.10* et seq.].
- Subpart B discusses qualifications for licenses, including requirements, conditions, licensing fees, and examinations [*see § 471B.20* et seq.].
- Subpart C discusses denial of licenses [*see § 471B.40* et seq.].
- Subpart D discusses disciplinary proceedings relating to licenses [*see § 471B.50* et seq.].
- Subpart E discusses judicial review of licensing agency decisions [*see § 471B.60* et seq.].
- Subpart F discusses civil and criminal liability for violating licensing requirements [*see § 471B.70* et seq.].

Part V sets out related forms, including forms of petitions for writ of mandate or an alternative writ of mandate for use in a proceeding to compel certain actions on the part of a licensing agency [*see § 471B.100* et seq.], and forms of pleadings for use in an action to challenge licensing requirements [*see § 471B.112* et seq.].

Part VI, the Appendix to this chapter, sets out a list of statutes governing the licensing procedures for particular businesses and professions or vocations [*see § 471B.140* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLocal GovernmentsLicensesGovernmentsState &

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§ 471B.02 Cross References

[1] Public Administrative Law Generally

For general discussion of California public agency functions, powers, restrictions on powers, and organization within the executive branch of state government, see:

- Ch. 470, *Overview of Public Administrative Law*.
- Ch. 470A, *Due Process Restrictions on Public Agencies*.
- Ch. 470B, *Public Agency Meetings*.

For detailed discussion and forms relating to the law governing disclosure of public records under the California Public Records Act [*Cal. Gov. Code §§ 6250 et seq.*], see Ch. 470C, *Public Records Act* .

For detailed discussion and forms relating generally to investigations and inspections by a public agency (including those performed in connection with the issuance or revocation of a license or in connection with disciplinary proceedings involving a licensee), see:

- Ch. 471, *Investigations by Public Agencies*.
- Ch. 471A, *Inspections by Public Agencies*.

For detailed discussion and forms relating generally to rule making functions of public agencies and judicial review of rule making, see:

- Ch. 472, *Public Agency Rules*.
- Ch. 472A, *Agency Rulemaking Procedures*.

- Ch. 472B, *Review of Agency Rulemaking*.

For detailed discussion and forms relating generally to the judicial or adjudicatory functions of California public agencies, see:

- Ch. 473, *Public Agency Adjudication*.
- Ch. 473A, *Commencing Agency Adjudication*.
- Ch. 473B, *Discovery in Agency Adjudications*.
- Ch. 473C, *Prehearing Procedures in Agency Adjudications*.
- Ch. 473D, *Prehearing Preparations in Agency Adjudications*.
- Ch. 473E, *Public Administrative Law Judges*.
- Ch. 473F, *Agency Adjudication Hearings*.
- Ch. 473G, *Agency Adjudication Decisions*.
- Ch. 473H, *Alternative Procedures for Agency Decisions*.

For detailed discussion and forms relating generally to review by California courts of agency adjudications, see:

- Ch. 474, *Availability of Judicial Review of Agency Decisions*.
- Ch. 474A, *Timing of Judicial Review of Agency Decisions*.
- Ch. 474B, *Standards in Reviewing Agency Decisions*.
- Ch. 474C, *Procedures in Reviewing Agency Decisions*.

See also [3] and [4], *below*.

[2] Related Licensing Coverage

For related discussion and forms covering licensing issues or particular licensing agencies, see:

- Ch. 18, *Alcoholic Beverage Licenses* (discussion and forms relating to licensing proceedings before the department of Alcoholic Beverage Control).
- Ch. 20, *Allegations Commonly Used* (forms of allegations that party is licensed).
- Ch. 56, *Architects* (discussion relating to licensing by State Board of Architectural Examiners).
- Ch. 71, *Attorney Discipline* (discussion and forms relating to licensing and discipline of attorneys and proceedings before the State Bar and the State Bar Court).

- Ch. 92, *Automobiles: Drivers' Licenses* (discussion and forms relating to drivers' licensing and proceedings before the Department of Motor Vehicles).

- Ch. 104, *Building Contracts*, § 104.70 et seq. (discussion relating to licensing and discipline of building contractors by the Contractors' State License Board).

- Ch. 209, *Dentists* (discussion and forms relating to licensing and discipline of dentists and proceedings before the Board of Dental Examiners).

- Ch. 214, *Drugs and Pharmacists* (discussion and forms relating to licensing and discipline of pharmacists and proceedings before the State Board of Pharmacy).

- Ch. 359, *Marriage*, § 359.40 et seq. (discussion and forms relating to marriage licensing by county clerks).

- Ch. 361, *Mechanics' Liens*, Pt. IV (form of demurrer for failure to allege that plaintiff is a licensed contractor).

- Ch. 414, *Physicians: Licensing and Discipline* (discussion and forms relating to licensing and discipline of physicians and proceedings before the Medical Board of California).

- Ch. 462, *Public Accountants* (discussion relating to licensing and discipline of public accountants and proceeding before the State Board of Accountancy).

- Ch. 512, *Schools: Certification, Dismissal, and Related Employment Issues* (discussion and forms relating to teacher certification and dismissal proceedings before the State Board of Education and local boards).

[3] Judicial Review

For discussion and forms relating to general judicial remedies that may be available in a proceeding involving a licensing agency, see:

- Ch. 40, *Appeal: An Overview*, through Ch. 54, *Appeal: California Supreme Court Review* (discussion and forms relating to civil appeals).

- Ch. 182, *Declaratory Relief* (discussion and forms relating to action for declaration of rights of respective parties in unlitigated civil controversy).

- Ch. 303, *Injunctions*, (discussion and forms relating to action to obtain immediate temporary restraint or permanent injunction to prevent harmful acts).

- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to immediate judicial review of orders by extraordinary writ of mandate or prohibition).

[4] Other Matthew Bender Publications

For forms for use in drafting memoranda in judicial proceedings to review a public agency decision, see California Points and Authorities, Ch. 195, *Public Administrative Law* (Matthew Bender).

For legal forms respecting license and permit bonds, see California Legal Forms, Ch. 79, *Suretyship, Guaranty, and Indemnity* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency InvestigationsConstitutional RightsGeneral OverviewAdministrative LawAgency InvestigationsScopeInspectionsAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawGovernmental InformationPersonal InformationConditions of DisclosureGeneral OverviewAdministrative LawGovernmental InformationPublic MeetingsGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicenses

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[Reserved]

§§ 471B.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Nature and Powers of Governmental Licensing

41-471B California Forms of Pleading and Practice--Annotated § 471B.10

§ 471B.10 Nature of Governmental Licensing

A licensing law is an exercise of the police power of government [*see Binford v. Boyd (1918) 178 Cal. 458, 462, 174 P. 56* ; *Western Indem. Co. v. Pillsbury (1915) 170 Cal. 686, 694, 151 P. 398* ; *Pennington v. Bonelli (1936) 15 Cal. App. 2d 316, 319-320, 59 P.2d 448]* . Some business license laws are enacted under the taxing power, however [*see* discussion in *§ 471B.12[2]*].

The most notable subjects of licensing laws are those relating to various professions and vocations [*see* discussion in *§ 471B.12[6]*]. Licensing laws cover many other diverse activities, however, including marriage, driving motor vehicles, diverting streams, and transporting explosives.

A licensing law is not necessarily a unified enactment. The whole of a particular licensing law might be contained in a number of separate code sections and supplemental administrative regulations [*see, e.g., West Covina Enterprises, Inc. v. Chalmers (1958) 49 Cal. 2d 754, 758-761, 322 P.2d 13]* , or set out partially in the Constitution [*see, e.g., Cal. Const., art. XX, § 22* (alcoholic beverage licensing)] or initiative measures [*see, e.g.,* Stats. 1923, p. xx (Chiropractic Act)]. In some cases, provisions of two different licensing laws might have to be read together [*see, e.g., Barondon Corp. v. Nakawatase (1961) 196 Cal. App. 2d 392, 393, 398, 16 Cal. Rptr. 472]* . A licensing law does not necessarily refer to licenses; it may take the form of a revenue law [*see* discussion in *§ 471B.12[1], [2]*] or use some other such as permit or franchise [*see Copt-Air v. City of San Diego (1971) 15 Cal. App. 3d 984, 987-988, 93 Cal. Rptr. 649]* .

The application for and the denial, suspension, and revocation of licenses are generally governed by *Bus. & Prof. Code §§ 460* and *475 et seq.*. For a list of statutes requiring licenses for particular businesses and professions, see the Appendix at the end of this chapter (§ 471B.140 et seq.).

However it may be drafted, whatever form it might take, and whether or not it consists of many separate parts, every licensing law has three essential elements:

- A licensing law describes a class of persons to whom it applies by defining an activity in which these persons might engage. The law applies to all who engage in that activity [*see, e.g., Bus. & Prof. Code §*

4050 (specifying activities that may only be performed by registered pharmacist)].

- A licensing law provides that anyone who engages in the subject activity without a license is guilty of an offense [*see, e.g., Bus. & Prof. Code § 4380 et seq.* (penalties for violation of registration requirements for pharmacists)].

- A licensing law, therefore, necessarily provides for obtaining a license [*see, e.g., Bus. & Prof. Code § 4110 et seq.* (procedure for becoming registered pharmacist and obtaining permit to operate pharmacy)].

Provisions respecting the obtaining of a license cover three related subjects. First, there is the necessary matter of setting up a means of administering the law: either establishing a new agency or assigning administration to an existing agency. Second, licensing standards must be selected and defined. Third, a licensing procedure must be prescribed. Licensing standards and procedure are often left in large part to the discretion of the responsible agency [*see Ex Parte McManus (1907) 151 Cal. 331, 337, 90 P. 702]* .

Licensing laws regulating an activity of a continuing nature usually also cover a fourth and fifth element. In these instances, the fourth element usually provides for periodic renewal of licenses; the purpose is sometimes regulatory but generally is only to raise revenue to fund administration of the law [*see, e.g., Bus. & Prof. Code § 4401* (renewal of pharmacist's registration)]. The fifth element covers suspension or revocation of a license when the licensee violates a prescribed code of conduct, providing the standards comprising the code of conduct, the agency responsible for enforcing the standards, and the procedures to be followed by the agency [*see, e.g., Bus. & Prof. Code § 4300 et seq.* (disciplinary procedure for suspending or revoking license of registered pharmacist)]. In a few instances the disciplinary aspect of a licensing law will include provisions for the imposition of financial penalties in addition to suspension or revocation of the license [*see, e.g., Bus. & Prof. Code § 4331* (monetary fine imposed when pharmacist fails to keep prescription file as required by law)].

Disciplinary procedure, when included in a licensing law, is often that provided by the Administrative Procedure Act or APA (*Gov. Code § 11500 et seq.*), the a general administrative procedural law [*see, e.g., Bus. & Prof. Code § 4300(e)* (disciplinary proceeding against pharmacist is governed by APA)].

Licensing laws that usually do not have the fourth and fifth elements discussed above are those relating to activities that are not of a continuing nature, for example, the marriage license law [*Fam. Code §§ 306, 350 et seq.*]. Most permit laws fall into this category.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewFamily LawMarriageCertificates & LicensesGeneral OverviewGovernmentsLocal GovernmentsLicensesGovernmentsLocal GovernmentsPolice PowerGovernmentsState & Territorial GovernmentsLicensesGovernmentsState & Territorial GovernmentsPolice PowerTax LawState & Local TaxesFranchise TaxGeneral Overview

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§ 471B.11 Status of License

[1] General Requirements

A government regulatory license is a privilege. The word "privilege" means a private law. In ancient Rome, a *privilegium* was an imperial grant, to some individual, of an extraordinary right [*see* Black's Law Dictionary (5th ed. 1979) at 1079]. The effect of a *privilegium* was to clothe the person, for whose benefit the law was decreed, with immunity from punishment to which others, not beneficiaries of the special law, were liable if they undertook to do what the favored person was privileged to do. A licensing law creates the modern equivalent of the *privilegium*.

If there were no licensing laws, anyone would have a right to do whatever is not prohibited. By enacting a licensing law, the government obliterates everyone's right to engage in the subject activity and empowers an administrative agency to restore that right to individual members of an objectively defined class. The definitive criteria are the licensing standards. Thus, a license, like the ancient *privilegium*, is the government's grant of an extraordinary right to an individual. A license is the functional equivalent of a private law enabling some individual to do with impunity what anyone else would do only at the risk of being punished. In short, a license is a privilege [*see Galvan v. Superior Court (1969) 70 Cal. 2d 851, 856, 76 Cal. Rptr. 642, 452 P.2d 930* ; *Garcia v. Halsett (1970) 3 Cal. App. 3d 319, 324, 82 Cal. Rptr. 420]* .

[2] Due Process Protections

Unlike the imperial *privilegium*, as discussed in [1], *above*, a regulatory license is not subject to being given and taken away at the whim of the sovereign. The federal and state Constitutions interpose between the government and the individual a guaranty that no person shall be deprived of liberty or property without due process [*U.S. Const., amend. XIV, § 1*; *Cal. Const., art. I, § 7(a)*].

With respect to governmental licensing for regulatory purposes, this guaranty has several meanings. First, it means that when the government imposes a regulatory licensing program, the qualifications for a license must be specified so that everyone may know what they are, and those qualifications must not be unreasonable [*see Perrine v. Municipal Court (1971) 5 Cal. 3d 656, 661-663, 97 Cal. Rptr. 320, 488 P.2d 648]* .

Second, the guaranty means that anyone having those qualifications is entitled to a fair and reasonable chance to show that he or she has them, and that on showing his or her qualifications and paying any prescribed, but not unreasonable, license fee, an applicant is entitled (that is, has a right) to receive a license [*see Andrews v. State Board of Registration (1954) 123 Cal. App. 2d 685, 692-694, 267 P.2d 352]* .

Third, the guaranty of due process means that no individual license may be taken away, either temporarily or permanently, except for some reasonable cause rationally established by a procedure that reasonably permits the licensee to present evidence and argue against taking away the license [*see Endler v. Schutzbank (1968) 68 Cal. 2d 162, 170-173, 65 Cal. Rptr. 297, 436 P.2d 297* ; *Fascination, Inc. v. Hoover (1952) 39 Cal. 2d 260, 271, 246 P.2d 656]* .

Thus, although a license is essentially the grant of privilege, constitutional due process protections confer a right to obtain or retain that privilege by meeting rational and reasonable prescribed requirements.

For more detailed discussion of procedural due process protections, as they apply to public agencies, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewConstitutional LawSubstantive Due ProcessGeneral OverviewGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicenses

California Forms of Pleading and Practice--Annotated

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41-471B California Forms of Pleading and Practice--Annotated § 471B.12

§ 471B.12 Types of Licensing Laws

[1] Revenue Laws

A law might purport to be a revenue law yet actually may be a licensing law, and vice versa; for example, local business license laws are in fact revenue laws [*see* discussion in [2], *below*]. It is common knowledge that the taxing power can be used effectively for regulation in lieu of the police power [*see, e.g., United States v. Kahriger (1953) 345 U.S. 22, 27-28, 73 S. Ct. 510, 97 L. Ed. 754* (occupational tax on gamblers; overruled on other grounds in *Marchetti v. United States (1968) 390 U.S. 39, 54, 88 S. Ct. 697, 19 L. Ed. 2d 889*); *City of Glendale v. Trondsen (1957) 48 Cal. 2d 93, 103, 308 P.2d 1]* . Moreover, nearly every true licensing law includes a revenue provision requiring the payment of a license fee [*see* discussion in *§ 471B.27*].

A revenue law will be upheld regardless of its regulatory effect, even if a regulatory purpose is evident, provided it taxes an activity that is subject to the government's taxing power and does not contravene the guaranties of equal protection and due process or any specific constitutional provision respecting the taxing power [*see, e.g., United States v. Sanchez (1950) 340 U.S. 42, 44-45, 71 S. Ct. 108, 95 L. Ed. 47]* .

[2] Local Business License Laws

Municipalities are empowered to raise revenue by imposing a license requirement on local businesses [*see Gov. Code § 37101*]. To call such a taxing scheme a licensing scheme is misleading, since the only purpose is to raise revenue, and regulation is not involved [*see Cooper v. Michael (1967) 257 Cal. App. 2d 176, 179, 64 Cal. Rptr. 842* ; *Citrus Belt S. & L. Assn. v. California Franchise Tax Bd. (1963) 218 Cal. App. 2d 584, 590, 32 Cal. Rptr. 579]* . The distinction is most evident in the rule that an activity subject to state licensing requirements may also be subject to local business license requirements, that is, it may also be taxed locally [*San Francisco v. Insurance Co. (1887) 74 Cal. 113, 122, 15 P. 380]* . Moreover, the license fee collected locally, being in fact a tax, need have no relation to the cost of regulating the business or activity taxed, whereas the fee payable to a regulatory agency for a license must be reasonably related to the costs of regulation [*McAdams Oil Co. v. Los Angeles (1939) 32 Cal. App. 2d 359, 363, 89 P.2d 729]* .

When a local government intends to regulate an activity instead of taxing it, a permit is generally required, so-called to

distinguish the government's intent to regulate rather than to license (*i.e.*, tax) the activity [*see, e.g., In re Groves (1960) 54 Cal. 2d 154, 156, 4 Cal. Rptr. 844, 351 P.2d 1028 , cert. denied sub nom., Groves v. Kettmann (1960) 364 U.S. 900, 81 S. Ct. 238, 5 L. Ed. 2d 196]* .

A local ordinance requiring payment of a license fee is operative only within the territorial limits of the municipality, and affects only those engaged in the business or profession with those limits [*Franklin v. Peterson (1948) 87 Cal. App. 2d 727, 730, 197 P.2d 788]* . For forms of complaint and allegation for use in alleging the invalidity of a license tax on the ground that the plaintiff was not doing business in the municipality, see §§ 471B.182, 471B.185.

[3] Land Use Planning Laws

Land-use laws such as zoning laws and local building permit laws are licensing laws. Similar state laws such as the California Coastal Act of 1976 (*Pub. Res. Code § 30000 et seq.*) are also licensing laws. Variances and conditional-use permits are special kinds of licenses, for example.

Land-use planning is, however, a distinct area of law treated separately in Ch. 579, *Zoning and Planning*. See also the more detailed discussion and forms in California Real Estate Law And Practice, Ch. 250, *Development of Land Use Control in California* et seq. (Matthew Bender).

[4] Securities Regulation Laws

The Corporate Securities Law of 1968 (*Corp. Code § 25000 et seq.*) and similar state and federal laws regulating transactions in securities or other investment devices can be, and often are to some extent, licensing laws. For instance, a permit is required for certain securities transactions [*see, e.g., Corp. Code § 25121*].

Securities regulation is, however, a distinct area of the law treated, together with franchise regulation, in Ch. 515, *Securities and Franchise Regulation*. See also the transaction-oriented coverage in California Legal Forms, Vol. 2, Ch. 6, *Corporate Securities* (Matthew Bender), and Ballantine & Sterling, California Corporation Laws (Matthew Bender).

[5] Proprietary Licenses

A government, particularly a local government, may be engaged in proprietary activities, such as operating an opera house. Individuals and corporations engaged in proprietary activities may give licenses to others; for example, the owner of land may give a license to another to enter and use it, and the owner of a patent may give licenses to manufacturers to make the product or use the formula or design in question. Governments may do the same, to the extent of being engaged in proprietary activities. A proprietary license is merely permission from the proprietor to use his or her property. In giving such a license, a government does not assume regulatory power over the license holder but must, as must any other proprietor, look to the law governing property and contracts, and private rights generally, in the event the license holder abuses his or her privilege [*see Copt-Air v. City of San Diego (1971) 15 Cal. App. 3d 984, 988-989, 93 Cal. Rptr. 649* (permission to land helicopters on city property is proprietary license)].

While a proprietary licensee is protected by the law of contracts against the proprietor's (government's) unilateral modification of his or her rights under the license, a regulatory licensee has no such protection. A regulatory license is not a contract. The government is free to charge or increase the requirements it imposes on regulatory licensees, and to make the new requirement applicable to present licensees as well as future licensees [*see Serenko v. Bright (1968) 263 Cal. App. 2d 682, 686-687, 70 Cal. Rptr. 1* (implied consent law requiring blood alcohol tests of drivers suspected of drunk driving is constitutional when applied to drivers licensed before law took effect); *Castleman v. Scudder (1947) 81 Cal. App. 2d 737, 740, 185 P.2d 35* ; *In re Carlson (1927) 87 Cal. App. 584, 588-589, 262 P. 792]* .

For further discussion of patent rights, including patent licensing agreements, see Ch. 411, *Patents and Inventions* . For

discussion of trademarks and trade names, including the licensing of trademarks, see Ch. 549, *Trademarks and Trade Names* .

[6] Professional and Vocational Licenses

When a profession or occupation (that is, a means of earning a living) is one of which it can be fairly said that those pursuing it should have particular qualifications, it is within the power, and ordinarily is the duty, of the Legislature or other law-enacting body to exact reasonable assurances of those pursuing the profession or occupation that they do possess such qualifications [*In re Porterfield (1946) 28 Cal. 2d 91, 99-100, 168 P.2d 706]* .

A licensing law may also prohibit particular combinations of license holders for business purposes. For example, combinations between licensed physicians and dispensing opticians or pharmacists are forbidden [*Bus. & Prof. Code § 654*; *Magan Medical Clinic v. Cal. State Bd. of Medical Examiners (1967) 249 Cal. App. 2d 124, 128-143, 57 Cal. Rptr. 256* ; *see Bus. & Prof. Code §§ 654.1, 655*].

On judicial review of a licensing statute, the test is whether the challenged law reasonably relates to a legitimate governmental interest. The strict scrutiny test, which might sometimes be given to statutes that impact on employment, is generally not applicable in challenges to licensure qualification when the profession at issue is one whose technical complexity and intimate relationship to the public interest and welfare require greater deference to the legislative judgment. The rational relationship test applies to both equal protection and due process challenges [*Horeczko v. State Bd. of Registration (1991) 232 Cal. App. 3d 1352, 1358-1359, 284 Cal. Rptr. 149* (challenge to statutory requirement that registration as a civil engineer is required for licensure as geotechnical engineer, regardless of individual's practical professional experience)].

For cross references to coverage of specific professional and vocational licensing agencies, see *§ 471B.02[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawSubstantive Due ProcessScope of ProtectionConstitutional LawEqual ProtectionLevel of ReviewConstitutional LawEqual ProtectionScope of ProtectionGovernmentsLocal GovernmentsFinanceGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsFinanceGovernmentsState & Territorial GovernmentsLicensesPatent LawOwnershipGeneral OverviewTax LawState & Local TaxesGeneral OverviewTax LawState & Local TaxesFranchise TaxGeneral Overview

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§ 471B.13 Governmental Licensing Power

[1] Subjects of Licensing Power

[a] General Rules

Except to the extent it is constitutionally forbidden to interfere with personal liberties or to legislate on particular subjects, the Legislature has plenary power to make any activity the subject of a licensing law [*see Fitts v. Superior Court (1936) 6 Cal. 2d 230, 234, 57 P.2d 510* (Legislature's power is not granted, only restricted, by Constitution)]. As used in *Bus. & Prof. Code § 475 et seq.* relating to the denial, suspension, and revocation of licenses, the term "license" includes a certificate, registration, or other means to engage in a business or profession regulated by the Business and Professions Code [*Bus. & Prof. Code § 477(b)*].

The power of a county board of supervisors or city council to enact a licensing law [*see Cal. Const., art. XI, §§ 5(a)* (charter city), 7 (other city, county)] extends to the same subjects that the Legislature's power embraces [*Carlin v. City of Palm Springs (1971) 14 Cal. App. 3d 706, 711,92 Cal. Rptr. 535]* , but can operate only within the county or city limits [*see Harriman v. City of Beverly Hills (1969) 275 Cal. App. 2d 918, 926, 80 Cal. Rptr. 426]* . The Legislature, however, has more freedom of choice in the exercise of its power [*see* discussion under [2], *below*].

[b] Use of Public Property

[i] Streets and Parks

Except to the extent it is specifically restrained by the Constitution [*see, e.g., Cal. Const., art. I, § 25* (right to fish public lands and waters)], the government's police power extends to regulating (that is, licensing) the use of public property by private persons. With respect to the use of streets and places such as parks where persons can congregate, the government's legitimate regulatory interest is confined to protecting public health and safety, maintaining traffic with minimal interruption, and preserving the right of every person to go about in public places with maximum freedom of movement [*see Shuttlesworth v. City of Birmingham (1969) 394 U.S. 147, 152, 89 S. Ct. 935, 22 L. Ed. 2d 162* ; *San Francisco Street Artists Guild v. Scott (1974) 37 Cal. App. 3d 667, 674, 112 Cal. Rptr. 502]* . In regulating the use

of streets and other public places, the government must necessarily balance the competing interests of those who would simply travel on the streets or walk about in parks and those who would do more, such as parade or hold meetings and demonstrations [*see Dillon v. Municipal Court (1971) 4 Cal. 3d 860, 868, 94 Cal. Rptr. 777, 484 P.2d 945]* . Streets and parks have traditionally been places where citizens can and do exercise the rights of free speech and assembly, and the liberty of citizens to congregate in public places is constitutionally protected [*see Hague v. C.I.O. (1939) 307 U.S. 496, 515-516, 59 S. Ct. 954, 83 L. Ed. 1423* ; *People v. Duffy (1947) 79 Cal. App. 2d Supp. 875, 882-886, 79 Cal. App. 2d Supp. 875 , 179 P.2d 876]* .

A parade or demonstration may be, and often is, recognized as a means of exercising the freedom of speech, as well as the freedom of assembly; hence, governmental regulation of parades and demonstrations often may be, and in the typical case is, subject to limitations embodied in the principles of *U.S. Const., amend. I* [*see Shuttlesworth v. City of Birmingham (1969) 394 U.S. 147, 152, 89 S. Ct. 935, 22 L. Ed. 2d 162* ; *People v. Duffy (1947) 79 Cal. App. 2d Supp. 875, 885, 79 Cal. App. 2d Supp. 875 , 179 P.2d 876]* .

The government may not regulate the message or the communicative aspect of a parade or demonstration, but it may regulate where and when citizens congregate and move en masse, notwithstanding that the freedoms of speech and assembly might incidentally be curtailed to some extent, provided objective criteria for regulation are set up and licenses (parade permits, for example) cannot be withheld on administrative whim [*see United States v. O'Brien (1968) 391 U.S. 367, 376-377, 88 S. Ct. 1673, 20 L. Ed. 2d 672* ; *Dillon v. Municipal Court (1971) 4 Cal. 3d 860, 869-870, 94 Cal. Rptr. 777, 484 P.2d 945* ; *Burton v. Municipal Court (1968) 68 Cal. 2d 684, 690-691, 68 Cal. Rptr. 721, 441 P.2d 281* ; *see also Cantwell v. Connecticut (1940) 310 U.S. 296, 306-307, 60 S. Ct. 900, 84 L. Ed. 1213* ; *Perrine v. Municipal Court (1971) 5 Cal. 3d 656, 662, 97 Cal. Rptr. 320, 488 P.2d 648 , cert. denied, 404 U.S. 1038, 92 S. Ct. 710, 30 L. Ed. 2d 729 (1972)]* .

For further discussion of permissible limitations on *First Amendment* freedoms at gatherings, see Ch. 59, *Assemblies and Meetings* .

[ii] School Buildings

The Civic Center Act (*Educ. Code §§ 38130 et seq., 82537 et seq.*) empowers the governing boards of local school and community college districts to grant the use of school facilities or grounds as a civic center for public, literary, scientific, recreational, educational, or public agency meetings, for the discussion of matters of general or public interest, for the conduct of religious services on a temporary basis, for child care or day care programs, for the administration of employment examinations or instruction by public agencies, for supervised recreational activities, for mass care and welfare shelters during disasters, and for any other purposes deemed appropriate by the governing board [Educ. Code § 30831; *see also* Gov. Code § 30834]. Gov. Code §§ 82537 and 82542, relating to community college districts, grant governing boards of community college districts similar powers.

The government is not obliged to make school property available for public use, but if the government does open schools to groups of citizens, it may not arbitrarily exclude certain groups or make access to the school property dependent on unconstitutional conditions [*Danskin v. San Diego Unified Sch. Dist. (1946) 28 Cal. 2d 536, 545, 171 P.2d 885* ; *see also Wirta v. Alameda-Contra Costa Transit Dist. (1967) 68 Cal. 2d 51, 55-56, 64 Cal. Rptr. 430, 434 P.2d 982]* . In particular, a group may not be denied access, if school property has been opened to public gatherings, on the basis of a governing board's antipathy for certain views espoused by the group's members, since that would be an unconstitutional infringement on the freedom of speech [*see Dunbar v. Governing Board (1969) 275 Cal. App. 2d 14, 18, 79 Cal. Rptr. 662* ; *but see American Civil Liberties Union v. Board of Education (1963) 59 Cal. 2d 203, 213, 28 Cal. Rptr. 700, 379 P.2d 4 , cert. denied, 375 U.S. 823, 84 S. Ct. 64, 11 L. Ed. 2d 56* (finding constitutional a restriction conditioning access to school property on applicant's statement that he or she does not intend to put property to illegal use)].

[2] State Preemption

If the Legislature has exercised its power to such a degree that the state law occupies the entire field, local powers are to that extent preempted [*see Robillwayne Corp. v. City of Los Angeles (1966) 241 Cal. App. 2d 57, 60-63, 50 Cal. Rptr. 1* ; *People v. Levering (1981) 122 Cal. App. 3d Supp. 19, 21, 122 Cal. App. 3d Supp. 19* , *176 Cal. Rptr. 297]* . Regarding the validity of a local business license law covering the same subject as a state licensing law, see the discussion in *§ 471B.12[2]*. The Legislature's power to regulate is preemptive of local power if the Legislature so intends in a given case, whether or not the state law completely covers the subject [*see Lancaster v. Municipal Court (1972) 6 Cal. 3d 805, 807-808, 100 Cal. Rptr. 609, 494 P.2d 681* ; *Maloy v. Municipal Court (1968) 266 Cal. App. 2d 414, 418, 72 Cal. Rptr. 207* ; *Lasley v. Baldwin (1958) 159 Cal. App. 2d 468, 470, 324 P.2d 108]* .

The Legislature's intention is sometimes clearly expressed [*see, e.g., Bus. & Prof. Code § 460* (prohibition against local licensing of state licensees)], and in such a case, it will be given effect as expressed [*see Watson v. County of Merced (1969) 274 Cal. App. 2d 263, 265, 78 Cal. Rptr. 807]* . If a statute does not contain a clear expression of the Legislature's intention, judicial interpretation must cure the omission [*see, e.g., Stewart v. County of San Mateo (1966) 246 Cal. App. 2d 273, 282, 54 Cal. Rptr. 599]* . An intention to preempt will generally be found if (1) the statute is so pervasive that the interference (preemption intended) is inescapable, or (2) it is broad enough or so designed that supplemental local regulation was evidently not contemplated by the Legislature [*see Galvan v. Superior Court (1969) 70 Cal. 2d 851, 857-858, 76 Cal. Rptr. 642, 452 P.2d 930]* .

Courts generally deny the power of local government to supplement a state regulatory scheme by adding requirements or restrictions [*see, e.g., Verner, Hibly & Dunn v. Monte Sereno (1966) 245 Cal. App. 2d 29, 33, 53 Cal. Rptr. 592* ; *Agnew v. City of Culver City (1956) 147 Cal. App. 2d 144, 149-150, 304 P.2d 788]* . Nevertheless, a local government is not necessarily prohibited from all administrative oversight of persons licensed or otherwise regulated by the state. For example, a local requirement for gun registration has been found not to be incompatible with the state's licensing scheme, since mere registration involves no regulation [*see Galvan v. Superior Court (1969) 70 Cal. 2d 851, 860-864, 76 Cal. Rptr. 642, 452 P.2d 930]* .

The preemption doctrine does not prevent local regulation of matters related to the subjects of state regulatory schemes. For instance, there is no conflict between state licensing of certain professionals and local regulation of the location of professional offices and the condition of buildings [*see City & County of San Francisco v. Boss (1948) 83 Cal. App. 2d 445, 449-450, 189 P.2d 32]* . Such local regulation is independently within the power of local government, and the impact on licensees of the state is only coincidental. There is no local regulation of licensees such as would be invalid under the doctrine of preemption.

Local regulation that more directly restricts a licensee of the state might, nevertheless, be within the power of local government. For example, by requiring that electrical work on buildings within a city conform to a specific safety standards, a city substantially restricts a state-licensed contractor in the pursuit of his or her trade. Such regulation is within the proper scope of the city's police power and the incidental restriction on a state-licensed contractor is lawful [*see Agnew v. City of Culver City (1956) 147 Cal. App. 2d 144, 157-159, 304 P.2d 788]* . For forms of complaint and allegation for use in alleging the preemption of a field by state regulation, see *§ 471B.113* et seq.

[3] Supremacy of National Government

The United States Constitution, the laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States are the supreme law of the United States, and the judges in every state are to be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding [U.S. Const., art. VI]. Thus, a state or local licensing law that conflicts with the federal Constitution, a federal law, or a treaty to which the United States is a party is unenforceable to the extent of the conflict. For example, a law providing for suspension or revocation of a contractor's license in the event the contractor avoids his or her obligations by being adjudged a bankrupt frustrates

the purposes of the Bankruptcy Act (*11 U.S.C. § 101 et seq.*) and is, therefore, invalid under the supremacy clause [*Grimes v. Hoschler (1974) 12 Cal. 3d 305, 308-314, 115 Cal. Rptr. 625, 525 P.2d 65 , cert. denied, 420 U.S. 973, 95 S. Ct. 1394, 43 L. Ed. 2d 653 (1975)]* .

[4] Grandfather Clauses

A grandfather clause in a licensing law exempts persons who are engaged in the regulated activity at a specified date (usually when the law takes effect) or who meet other conditions from certain requirements, such as attaining a specified educational level or passing an examination, and permits the licensing of such persons if they meet the remaining requirements prescribed in the law. Occasionally a grandfather clause exempts certain persons from all requirements in the licensing law, thus allowing them to continue being engaged in the regulated activity without obtaining a license [*see, e.g., Benor v. Board of Medical Examiners (1970) 8 Cal. App.3d 542, 546, 87 Cal. Rptr. 415]* . As long as it does not produce or perpetuate an invidious discrimination or unreasonableness, a grandfather clause is constitutional [*see In re Weisberg (1932) 215 Cal. 624, 631, 12 P.2d 446* ; *Ex parte Whitley (1904) 144 Cal. 167, 172-177, 77 P. 879]* .

There appears to be no constitutional necessity for including a grandfather clause in a licensing law. The prohibition against depriving a person of liberty or property without due process of law [*U.S. Const., amend. XIV, § 1*; *Cal. Const., art. I, § 7(a)*], for instance, is no obstacle to applying a newly enacted licensing law to persons engaged in the regulated activity when the law takes effect as well as to persons who thereafter undertake that activity. The possibility that an established business will be ruined because the proprietor cannot qualify for a license does not undermine the law, and withholding a license from an established proprietor who is not qualified does not deprive him or her of liberty or property without due process of law, if eligibility requirements are reasonable [*see McDonough v. Goodcell (1939) 13 Cal. 2d 741, 751-752, 91 P.2d 1035]* .

[5] Reciprocity Provisions

Respecting the subject of governmental licensing, reciprocity is a policy of accommodation for persons licensed elsewhere and wishing to obtain California licenses, or wishing to engage in the regulated activity temporarily in California. A reciprocity provision applicable to a person licensed elsewhere and wishing to obtain a California license usually allows such a person to qualify for a California license without meeting all of the requirements imposed on a person who is not licensed anywhere [*see, e.g., Bus. & Prof. Code § 2135*]. In the case of a person licensed elsewhere who wishes to engage in the regulated activity temporarily in California, a reciprocity provision usually allows limited engagements for specific purposes, such as practicing medicine in connection with teaching in a medical college [*see, e.g., Bus. & Prof. Code § 2113*]. The fact that other persons licensed in a particular state or foreign country have received licenses in California under a reciprocity provision does not mean that the standards for licensing in the other state or foreign country have been accepted by the responsible agency. Reciprocity licensing is merely an approval of a particular applicant's qualifications [*Akopiantz v. Board of Medical Examiners (1961) 190 Cal. App. 2d 81, 91, 11 Cal. Rptr. 810 , cert. denied, 368 U.S. 929, 82 S. Ct. 368, 7 L. Ed. 2d 193]* . For further discussion of certification of out-of-state physicians and reciprocity, see Ch. 414, *Physicians: Licensing and Discipline* .

[6] Students, Trainees, and Apprentices

A licensing law may constitutionally permit unlicensed, restricted practice of a profession, or otherwise engaging in the regulated activity, by students, trainees, or apprentices [*see Magit v. Board of Medical Examiners (1961) 57 Cal. 2d 74, 82, 17 Cal. Rptr. 488, 366 P.2d 816]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawSupremacy ClauseFederal PreemptionConstitutional LawBill of RightsFundamental

FreedomsFreedom of AssemblyConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of FreedomConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewEducation LawAdministration & OperationPropertyEquipment & FacilitiesGovernmentsLocal GovernmentsLicensesGovernmentsLocal GovernmentsPolice PowerGovernmentsState & Territorial GovernmentsLicensesGovernmentsState & Territorial GovernmentsPolice Power

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[Reserved]

§§ 471B.14[Reserved]

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§ 471B.20 Personal Characteristics

[1] Age

A licensing law may constitutionally preclude minors from engaging in the regulated activity, even though some minors would undoubtedly be able to meet all of the qualifications (except for age) set for adults [*see, e.g., Buelke v. Levenstadt (1923) 190 Cal. 684, 688-689, 214 P. 42* (driver's license)].

[2] Character

Bus. & Prof. Code § 475 provides that a license may not be denied on the "grounds of a lack of good moral character or any similar ground relating to an applicant's character, reputation, personality, or habits" [*Bus. & Prof. Code § 475(c)*; *see Bus. & Prof. Code § 477* ("license" defined)]. No person applying for licensure under the Business and Professions Code is required to submit to any licensing board any attestation by other persons to his or her good moral character [*Bus. & Prof. Code § 484*]. Counsel should note that *Bus. & Prof. Code §§ 475* and *484* do not apply to licensure or registration of persons pursuant to the State Bar Act (*Bus. & Prof. Code § 6000 et seq.*), the Alcoholic Beverage Control Act (*Bus. & Prof. Code § 23000 et seq.*), or the Gaming Registration Act (*Bus. & Prof. Code § 19800 et seq.*) [*Bus. & Prof. Code § 476*]. Applicants to the State Bar, for example, are required to demonstrate that they are of good moral character [*Bus. & Prof. Code § 6062(a)(2), (b)(2)*]. For detailed coverage of the provisions governing licensing in regard to the practice of law and the alcoholic beverage business, see respectively Ch. 71, *Attorney Discipline* , and Ch. 18, *Alcoholic Beverage Licenses* .

[3] Criminal Record

[a] General Rules

Many licensing laws allow the responsible agency to deny a license application if the applicant has a criminal record [*see, e.g., Bus. & Prof. Code § 22253* (tax preparers); for discussion of a criminal record as evidence of an applicant's reputation, *see* [6], *below*]. Such a licensing law is not an ex post facto law [*see Ellis v. Dept. of Motor Vehicles (1942) 51 Cal. App. 2d 753, 758-759, 125 P.2d 521]* .

A license application denial may not be based on a crime that has no relation to the applicant's fitness for the license in question [*see Perrine v. Municipal Court (1971) 5 Cal. 3d 656, 664, 97 Cal. Rptr. 320, 488 P.2d 648 , cert. denied, 404 U.S. 1038, 92 S. Ct. 710, 30 L. Ed. 2d 729 (1972)]* . By contrast, a pending indictment for activities related to the licensed activity is a valid reason for denial of a license in the public interest, as long as no special rights, such as the right to freedom of expression, are involved [*Goldberg v. Barger (1974) 37 Cal. App. 3d 987, 997, 112 Cal. Rptr. 827]* . A license application may be denied on the basis of the criminal record of one other than the license applicant, when the other person's criminal record relates to the applicant's suitability for a license [*see Lopez v. McMahon (1988) 205 Cal. App. 3d 1510, 1516-1520, 253 Cal. Rptr. 321* (denial of day care center license based on prior felony record of applicant's spouse)]. For further discussion of denial of licenses based on a criminal conviction, see *§ 471B.71*.

[b] Criminal Proceedings Not Resulting in Conviction

No state or local public agency may, on an initial application for any license, certificate, or registration, ask for or require the applicant to reveal a record of arrest that did not result in a conviction or plea of *nolo contendere* [*Bus. & Prof. Code § 461*].

[c] Licensing Ex-Convicts

Notwithstanding any other provision of the Business and Professions Code, any individual who, while imprisoned in a state correctional institution, is trained, in the course of a rehabilitation program approved by the particular licensing agency concerned and provided by the correctional institution, in a particular skill, occupation, or profession for which a license is required by the Business and Professions Code must not, when released from the institution, be denied the right to take any examination required to obtain the license, and shall not be denied such license, because of his or her imprisonment or the conviction from which the imprisonment resulted or because he or she obtained his or her training in a correctional institution, if the licensing agency, on the recommendation of the Community Release Board or the Youth Authority Board, as the case may be, finds that he or she is a fit person to be licensed [*Bus. & Prof. Code § 23.9*; *see In re Bogart (1973) 9 Cal. 3d 743, 749-750, 108 Cal. Rptr. 815, 511 P.2d 1167 , appeal dismissed, 415 U.S. 903, 94 S. Ct. 1395, 39 L. Ed. 2d 460* (statute construed and applied in disbarment proceeding)].

[4] Habits

Habits are a manifestation of a person's character [*see* discussion of character in [2], *above*]. *Bus. & Prof. Code § 475* provides that "[a] license shall not be denied ... on the grounds of lack of good moral character or any similar ground relating to an applicant's character, reputation, personality, or habits" [*Bus. & Prof. Code § 475(c)*].

For example, a licensing law may not constitutionally preclude a person from engaging in the regulated activity on the basis of the person's sexual habits. Nevertheless, a licensing law may effect such a preclusion to the extent that those habits show the person is unfit to engage in the regulated activity [*see Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 230-233, 82 Cal. Rptr. 175, 461 P.2d 375]* .

[5] Political and Religious Beliefs

The protection of association as provided in *U.S. Const., amend. I* prohibits a state from excluding a person from a profession or punishing him or her solely because he or she is a member of a particular political organization or because he or she holds certain beliefs [*Baird v. State Bar of Arizona (1971) 401 U.S. 1, 6, 91 S. Ct. 702, 27 L. Ed. 2d 639* ; *Raffaelli v. Committee of Bar Examiners (1972) 7 Cal. 3d 288, 296, 101 Cal. Rptr. 896, 496 P.2d 1264]* . The California Constitution provides that a person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of creed [*Cal. Const., art. I, § 8*].

[6] Reputation

Bus. & Prof. Code § 475 generally provides that "[a] license shall not be denied ... on the grounds of lack of good moral character or any similar ground relating to an applicant's character, reputation, personality, or habits" [*Bus. & Prof. Code § 475(c)*]. Some licensing laws [*see, e.g., Ins. Code § 1668*], however, empower the responsible agency to deny an application for a license on account of the applicant's reputation. Such laws are not unconstitutional, provided that the applicant's reputation is relevant to the license sought [*see Goldberg v. Barger (1974) 37 Cal. App. 3d 987, 992-994, 112 Cal. Rptr. 827]* .

[7] Residence

Unless the government can show a compelling necessity, a law may not constitutionally preclude a person from obtaining a license solely on the ground that the person is not a resident of the state (or city or county) or has not been a resident for a specified period [*see Raffaelli v. Committee of Bar Examiners (1972) 7 Cal. 3d 288* , and cases cited therein; *see also Johnson v. Hamilton (1975) 15 Cal. 3d 461, 469-472, 125 Cal. Rptr. 129, 541 P.2d 881* , and cases cited therein (durational residence requirements for voters and candidates are unconstitutional)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of AssociationConstitutional LawBill of RightsFundamental FreedomsFreedom of ReligionGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of ReligionGeneral OverviewGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicenses

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§ 471B.21 Educational and Vocational Qualifications

[1] Bona Fide Status as Practitioner or Tradesperson

At least one licensing law imposes the requirement that an applicant must show his or her "status as a bona fide" member of the class affected by the law--in this case, a bona fide manufacturer, transporter, or dealer of motor vehicles [*Veh. Code § 11701*]. The constitutional provision for licensing the operators of bona fide public eating places to deal in liquor [*Cal. Const., art. XX, § 22*] is a similar provision.

Such a licensing standard is not invalid if it can be given a reasonable interpretation rationally connected with the purpose of the licensing law [*see Merrill v. Department of Motor Vehicles (1969) 71 Cal. 2d 907, 920-921, 80 Cal. Rptr. 89, 458 P.2d 33* (applicant under *Veh. Code § 11701* is required to show reputation for honesty, fair dealing, and freedom from deceit)].

[2] Education

[a] General Requirements

A licensing law may constitutionally preclude a person who has not attained a prescribed educational level from engaging in the regulated activity [*see Ex Parte Whitley (1904) 144 Cal. 167, 177-178, 77 P. 879]* . The law may also require that an applicant's education be received at a school accredited by a particular accrediting organization [*see Arwine v. Board of Med. Examiners (1907) 151 Cal. 499, 503, 91 P. 319* ; *Packer v. Board of Behavioral Science Examiners (1975) 52 Cal. App. 3d 190, 196-197, 125 Cal. Rptr. 96]* or at a school approved by the licensing agency. Moreover, a licensing law may constitutionally set up different educational levels as equal alternative standards, if no invidious discrimination results [*see Ex Parte Whitley (1904) 144 Cal. 167, 177-178, 77 P. 879]* . A licensing law may not arbitrarily preclude a person from engaging in a regulated activity on the basis of failure to meet prescribed educational requirements. For example, if the law permits graduates of allopathic medical schools to become licensed to practice medicine but withholds the same privilege from graduates of osteopathic medical schools, when it may be conceded that the quality of medical education in the one kind of school is equal to that in the other, the distinction between allopaths and osteopaths is arbitrary and cannot stand as a basis for granting or denying license applications [

see D'Amico v. Board of Medical Examiners (1974) 11 Cal. 3d 1, 24, 112 Cal. Rptr. 786, 520 P.2d 10] .

[b] Graduation From Approved School

If a licensing law precludes issuing a license to a person who is not a graduate of a school approved by the responsible agency, an applicant will be obliged to prove that he or she was graduated from an approved school. Acceptable proof of graduation may be limited to a diploma or similar document [*see Arwine v. Board of Med. Examiners (1907) 151 Cal. 499, 503-504, 91 P. 319]* . In empowering an agency to approve schools, the Legislature need not set out the standards that the agency must use. It is sufficient to prescribe the minimum education (what courses, how many hours, teaching methods, etc.) and to direct the agency to determine whether this minimum education is, in fact, available at particular schools [*see Ex parte Whitley (1904) 144 Cal. 167, 178-181, 77 P. 879* ; *Savelli v. Board of Medical Examiners (1964) 229 Cal. App. 2d 124, 141-142, 40 Cal. Rptr. 171 , cert. denied, 380 U.S. 934, 85 S. Ct. 940, 13 L. Ed. 2d 821 (1965)]* . A licensing agency's approval of a school is not necessarily related to accreditation by one of the many private organizations that accredit schools. Unless the governing law provides otherwise, an agency with approval power is not required to approve all accredited schools, or any of them, and may approve nonaccredited schools. However, a trend toward linking approval with accreditation seems to be developing [*see Packer v. Board of Behavioral Science Examiners (1975) 52 Cal. App. 3d 190, 197, 125 Cal. Rptr. 96* (noting that "[p]rivate accrediting agencies encourage sound educational development and provide an ongoing review of the qualifications of educational institutions in a manner which could not be duplicated with reasonable expense by the state")]. Agency approval is valuable to a school. A school has standing to challenge an agency's decision to disapprove it [*see Cleveland Chiropractic Colle v. State Bd. of Chiropractic Examiners (1970) 11 Cal. App. 3d 25, 33-48, 89 Cal. Rptr. 572]* .

[3] Job Training

To require that an applicant for a license must have served a certain period of apprenticeship or on-the-job training is similar to requiring experience in the regulated activity [*see* discussion in [4], *below*]. Whereas experience may properly be required, and experience may certainly be gained during apprenticeship or on-the-job training, a requirement that experience be gained in this way would in most cases be invalid because it empowers those who are already licensed to exclude others from their trade, occupation, business, or profession. For example, former *Bus. & Prof. Code § 2552* imposed an apprenticeship requirement on applicants for a dispensing optician's license, but the Supreme Court struck it down. The Court stated that "[i]f [former] section 2552, subdivision (a) is sustained, persons excluded from the occupation of optical dispensing because of the refusal of licensed opticians to employ them for the [prescribed] five-year period, no matter what the reason for such refusal might be, will have no remedy, for licensed opticians are under no duty to employ anyone, for five years or for any other period. Moreover, presently licensed dispensing opticians will be given virtually absolute economic control over those employees who are required to serve under them in order to attain future professional objectives" [*Blumenthal v. Board of Medical Examiners (1962) 57 Cal. 2d 228, 236, 18 Cal. Rptr. 501, 368 P.2d 101]* .

[4] Previous Experience

[a] General Rules

A licensing law may constitutionally preclude a person who does not have specified experience in the regulated activity from engaging in the regulated activity, provided the definition of acceptable experience is not arbitrary. For example, former *Bus. & Prof. Code § 2552* (discussed in [3], *above*) required an applicant for a dispensing optician's license to have at least (1) five full years of actual experience in taking facial measurements and fitting and adjusting lenses or frames in an establishment or establishments of a registered dispensing optician, or (2) five years experience as a dispensing optician licensed in another state. The Supreme Court found this requirement to be arbitrary. It stated that the experience necessary to qualify a person to dispense optical goods, whatever level of expertise is demanded, is obtainable in a variety of ways. The Court commented that former *Bus. & Prof. Code § 2552* prescribed only two ways to qualify, neither of which could reasonably be thought to be superior to others. The Court concluded that former *Bus.*

& Prof. Code § 2552 contravened the constitutional requirement that regulatory legislation avoid arbitrary and unreasonable classifications [*see Blumenthal v. Board of Medical Examiners (1962) 57 Cal. 2d 228, 234-235, 18 Cal. Rptr. 501, 368 P.2d 101]* .

[b] Recommendations

If a licensing law requires an applicant to have certain experience, it may also require an applicant to establish this condition by producing affidavits from others [*see Blumenthal v. Board of Medical Examiners (1962) 57 Cal. 2d 228, 237, 18 Cal. Rptr. 501, 368 P.2d 101]* . In other words, the applicant may be required to establish a reputation for being experienced [*see* discussion in *§ 471B.20[6]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawSubstantive Due ProcessGeneral OverviewGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicenses

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41-471B California Forms of Pleading and Practice--Annotated § 471B.22

§ 471B.22 Prohibition Against Discrimination

Discrimination under the civil rights laws [*Civil Code § 51*] based on race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation is prohibited, and the enforcement of provisions of the Fair Employment and Housing Act do not repeal, limit, or restrict the provisions of the civil rights law [*Gov. Code § 12993(a), (c), 12993.5*].

For further discussion of prohibitions against discrimination generally, see Ch. 115, *Civil Rights: Employment Discrimination* , Ch. 116, *Civil Rights: Discrimination in Business Establishments* , and Ch. 117, *Civil Rights: Housing Discrimination* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewCivil Rights LawPublic FacilitiesGeneral OverviewGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicensesLabor & Employment LawDiscriminationGeneral OverviewLabor & Employment LawDiscriminationAccommodation

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§ 471B.23 Furnishing Social Security or Federal Employer Identification Number to Licensing Body

Notwithstanding any other provision of law, any board as defined in *Bus. & Prof. Code § 22*, the State Bar, and the Department of Real Estate must, at the time of issuance or renewal of a license, require a licensee that is a partnership to provide its federal employer identification number and require all other types of licensees to provide their social security numbers [*Bus. & Prof. Code § 30(a)*; *see Bus. & Prof. Code § 22* ("board" defined)]. If a licensee is an entity, a licensing board so defined must require, when issuing or renewing that license, that the licensee provide the provide the social security number of each individual listed on the license and any person who qualifies the license [*Bus. & Prof. Code § 30(l)*].

The purpose of this requirement is to enable either number to be used to identify persons affected by state tax laws and persons who are more than 30 days in arrears in making family support payments pursuant to an order or judgment for support. To this end, these numbers, when furnished pursuant to *Bus. & Prof. Code § 30*, can only be used for these identification purposes [*Bus. & Prof. Code § 30(j)*]. Furthermore, notwithstanding the inspection requirements of the California Public Records Act [*see Gov.Code § 6250 et seq.*], these numbers, when so furnished, are not deemed to be public records and are therefore not available to the public for inspection [*Bus. & Prof. Code § 30(h)*; *see Bus. & Prof. Code § 30(i), (k)* (disclosure of numbers as prohibited except in statutorily authorized instances)].

For purposes of the requirement, "licensee" means any entity, other than a corporation, authorized by a license, certificate, registration, or other means to engage in a business or profession regulated by the Business and Professions Code or referred to in *Bus. & Prof. Code § 1000* (chiropractic) or 3600 (osteopathic). For purposes of the requirement, "license" includes a certificate, registration, or any other authorization needed to engage in such businesses or professions [*Bus. & Prof. Code § 30(e)*].

Any licensee who fails to provide the requisite federal employer identification number or social security number will be reported by the licensing board to the Franchise Tax Board. Any licensee who is so reported and who still fails to provide the number after notice to do so by the Franchise Tax Board [*see Rev. & Tax. Code § 19528(b)(1)*] is subject to a penalty [*Bus. & Prof. Code § 30(b)*; *Rev. & Tax. Code § 19528(b)(2)* (penalty); *see Bus. & Prof. Code § 30(d)* (information about licensees that licensing board may transmit to Franchise Tax Board)]. In addition, a licensing board

may not process any application for an original license or for renewal of a license unless the applicant or licensee provides its federal employer identification number or social security number where requested on the application [*Bus. & Prof. Code § 30(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationPersonal InformationGeneral ExemptionsFamily LawChild SupportObligationsEnforcementLicensesGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicensesLegal EthicsPractice QualificationsReal Property LawBrokersDiscipline, Licensing & RegulationTax LawState & Local TaxesFranchise TaxGeneral Overview

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41-471B California Forms of Pleading and Practice--Annotated § 471B.24

§ 471B.24 Compliance With Support Order or Judgment

[1] Qualification for License Issuance or Renewal

Each person who applies for the issuance or renewal of a license to operate a motor vehicle, or a license, certificate, registration, or other means to engage in a business or profession that is regulated by a state board, and who has not complied with a judgment or order for child or family support, is subject to the nonissuance or nonrenewal of the license under *Welf. & Inst. Code § 11350.6* (repealed; *see now Fam. Code § 17520*) [*Bus. & Prof. Code § 31(b)*]. Compliance with these procedures is also an expressly required qualification for licensure or license renewal in both the Department of Consumer Affairs [*see Bus. & Prof. Code § 29.5*; *see also Bus. & Prof. Code § 23* ("department" defined), *Bus. & Prof. Code § 101* (list of agencies comprising department)] and the State Bar of California [*see Bus. & Prof. Code § 6143.5*].

[2] Duration of Qualification Requirement

The state boards described in *Fam. Code § 17520(a)(2)* (set out in [3], *below*) may only issue a temporary, not a permanent, license to any person who is on a certified list stating that he or she is not in compliance with a support order or judgment [*see Fam. Code § 17520(e)(2)(A)*]. Under certain circumstances, a board may suspend the license of an individual who has been out of compliance with a judgment or support order for over four months [*Fam. Code § 17520(e)(3)*].

[3] Definitions

"Compliance with a judgment or order for support" means that, as set forth in a judgment or order for child or family support rendered by or registered in a court of this state, the obligor is no more than 30 calendar days in arrears in (1) making payments in full for current support, (2) making periodic payments on a support arrearage, or (3) making periodic payments on a reimbursement for public assistance [*Fam. Code § 17520(a)(4)*; *see Fam. Code § 17520(b)*]. "Compliance with a judgment or order for support" also means that, concerning a judgment or order for child or family support, the obligor has obtained a judicial finding that equitable estoppel, as provided in statute or case law, precludes enforcement of the order [*Fam. Code § 17520(a)(4)*]. "Support" is not specifically defined, but appears to mean child or

family, rather than solely spousal, support [*see Fam. Code § 17520(a)(4)*]. For further discussion of the type of support covered by the statute, see the Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement*.

A "board" is defined as the State Board of Chiropractic Examiners, the Board of Osteopathic Examiners, the State Bar, the Department of Real Estate, any entity specified in *Bus. & Prof. Code § 101* (agencies included in the State Department of Consumer Affairs--for a list of the more significant subagencies in this department, see *Ch. 470, Overview of Public Administrative Law, § 470.20[2]*), and any other state agency that issues a license, certificate, or registration authorizing a person to engage in a business or profession [*Fam. Code § 17520(a)(2)*].

A "license" includes active or inactive membership in the State Bar [*see Bus. & Prof. Code § 6143.5*], as well as a certificate, permit, registration, or any other authorization issued by a board that allows a person to engage in a business, occupation, or profession, or to operate a commercial motor vehicle [*Fam. Code § 17520(a)(2)*]. A "licensee" is any person who holds a license, certificate, permit, registration, or other authorization issued by a board to engage in a business, occupation, or profession [*Fam. Code § 17520(a)(6)*]. A "licensee" is also any person who holds a commercial driver's license as defined in *Veh. Code § 15210* [*Fam. Code § 17520(a)(6)*].

[4] Overview of License Withholding Procedures

Initially, each county district attorney supplies the State Department of Social Services, on a monthly basis, with the names of and statutorily specified information about individuals who are not in compliance with a judgment or order for child support [*Fam. Code § 17520(b)*]. Next, the State Department of Social Services, acting as a clearinghouse for the monthly lists received from the district attorneys, consolidates the lists and, also on a monthly basis, provides a copy of a consolidated list to each state board responsible for the regulation of licenses [*Fam. Code § 17520(c)*].

On receipt of the consolidated list, each licensing board then notifies any applicant on the list of the board's intent to withhold issuance or renewal of the applicant's license [*Fam. Code § 17520(d), (e), (f)*]. The board must, however, issue a temporary license to any applicant on the list who is otherwise eligible for licensure [*Fam. Code § 17520(e)(1), (2)*]. When economically feasible for boards and the State Department of Social Services, the Department may request suspension of the license of an individual out of compliance with a judgment or order for over four months.

The license is subject to suspension by the board, provided the license is not otherwise eligible for renewal within six months of the date of the request [*Fam. Code § 17520(e)(3)(A)*]. Automatic suspension of the license will result 150 days after notice to the individual, unless a notice of compliance is received [*Fam. Code § 17520(e)(3)(B)*].

On receipt of board notification of intent to suspend or withhold issuance or renewal of license, the applicant can obtain review from a district attorney of placement of his or her name on the list [*Fam. Code § 17520(g)-(j)*]. If desired, the applicant can also seek superior court judicial review of the district attorney's adverse decision [*Fam. Code § 17520(k)*].

When the applicant comes into compliance with the support judgment or order, or otherwise prevails on district attorney or judicial review, he or she is issued a release by the district attorney [*Fam. Code § 17520(j), (k)*]. The release serves to notify the applicant and the board that, for the purposes of the statute, the applicant is in compliance with the support order or judgment and is therefore entitled to issuance or renewal of the license, absent ineligibility on any other grounds [*Fam. Code § 17520(l)*].

For detailed discussion and forms relating to these license withholding procedures, see Ch. 259, *Family Law Enforcement: Special Remedies for Support Enforcement* .

[5] Issuance of Temporary License

If a person is otherwise eligible for issuance or renewal of a license, but has been certified to a board as not in

compliance with a support order or judgment, the board must issue the person a temporary license, valid for 150 days [*Fam. Code § 17520(e)(2)(A)*]. The temporary license cannot be extended. Moreover, only one temporary license can be issued during a regular license term, and it must coincide with the first 150 days of that term. As this provision applies to a commercial driver's license, "license term" is deemed to be 12 months from the date the application fee is received by the Department of Motor Vehicles. A license for the full or remainder of the license term will be issued or renewed only when the applicant comes into compliance with the support judgment or order, or otherwise prevails on district attorney or judicial review of certification, and he or she is issued a release by the district attorney [*Fam. Code § 17520(e)(2)(B)*; *see Fam. Code § 17520(j), (l)*].

[6] Contesting Issuance of Temporary License or Denial of Permanent License

The review process set forth in *Fam. Code § 17520(h)* is the applicant's sole administrative remedy for contesting the issuance of a temporary license or the denial of a license under *Fam. Code § 17520* [*Fam. Code § 17520(o)*]. For discussion of this process, and the possible availability of judicial remedies in addition to or in lieu of this administrative remedy, see Ch. 258, *Family Law Enforcement: Special Remedies for Support Enforcement* .

Thus, an agency decision to issue only a temporary license or renewal or to deny issuance of a permanent license or renewal under this statute is not reviewable by administrative mandate under *Code Civ. Proc. § 1094.5*. Moreover, the procedures specified in the Administrative Procedure Act (*Gov. Code § 11500 et seq.*) do not apply to an agency's denial of, or failure to issue or renew, a license under *Fam. Code § 17520* [*Fam. Code § 17520(o)*].

[7] Adoption of Implementing Regulations

The State Department of Social Services and state boards, as appropriate, are required to adopt regulations necessary to implement *Fam. Code § 17520* [*Fam. Code § 17520(s)*]. Any rules and regulations issued pursuant to the statute may be adopted as emergency regulations in accordance with the Administrative Procedure Act. The adoption of these regulations is deemed an emergency, and necessary for the immediate preservation of the public peace, health, and safety or general welfare. The regulations become effective immediately on filing with the Secretary of State [*Fam. Code § 17520(r)*].

[8] Agency Assessment of Fee Surcharge

Regardless of any other provision of law, the boards and departments subject to *Fam. Code § 17520* may levy a surcharge on any fee or fees collected pursuant to law, with the approval of the appropriate department director, to cover the costs of implementing and administering the statute. The surcharge may be adopted without the necessity of adopting or amending regulations pursuant to the Administrative Procedure Act [*Fam. Code § 17520(n)*].

[9] Use or Release of Information

Any board receiving an inquiry as to the licensed status of an applicant who has had a license denied or who has been granted a temporary license under *Fam. Code § 17520* can respond only that the license was denied or the temporary license was issued pursuant to that statute. Information collected pursuant to the statute is subject to the Information Practices Act of 1977 [*Fam. Code § 17520(q)*; *see Civ. Code §§ 1798 et seq., 1798.76*]. For discussion of the act, see Ch. 429, *Privacy* . The release or other use of information received by a board under *Fam. Code § 17520*, except as authorized by that statute, is a misdemeanor [*Fam. Code § 17520(u)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawGovernmental InformationPersonal InformationConditions of DisclosureGeneral OverviewAdministrative LawJudicial ReviewReviewabilityGeneral

OverviewFamily LawChild SupportObligationsEnforcementLicensesFamily LawMarital Termination & Spousal SupportSpousal SupportGeneral OverviewFamily LawMarital Termination & Spousal SupportSpousal SupportEnforcementGeneral OverviewGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicensesTransportation LawPrivate VehiclesVehicle RegistrationGeneral Overview

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§ 471B.25 Licensing Examinations

[1] Oral and Written Examinations

Unless otherwise expressly provided by law, any agency governed by the Business and Professions Code may appoint, with the approval of the Director of Consumer Affairs, commissioners on examination to give the whole or any part of any examination. Such a commissioner need not be a member of the agency but must have the same qualifications as a member and will be subject to the same rules [*Bus. & Prof. Code §§ 23.6, 111*; *see Bus. & Prof. Code § 451* (prohibition against appointing public or lay member of agency to conduct examination)]. An agency may not delegate solely to a public or lay member the actual preparation, administration, or grading of examinations [*Bus. & Prof. Code § 451*].

[2] Second or Subsequent Attempt to Pass

No agency in the Department of Consumer Affairs may on the basis of an applicant's failure to complete prior examinations successfully, impose any additional limitations, restrictions, prerequisites, or requirements on any applicant who wishes to participate in subsequent examinations, except that any examining agency that allows an applicant conditional credit for successfully completing a divisible part of an examination may require that the applicant be reexamined in those parts successfully completed if the applicant has not successfully completed all parts of the examination within a required period of time established by the examining agency [*Bus. & Prof. Code § 135*; *see Bus. & Prof. Code § 101* (list of included agencies); *see also* a listing of the more significant subagencies in this departement in Ch. 470, *Overview of Public Administrative Law*, § 470.20[2]]. This provision does not require the exemption of an applicant, making a second or subsequent attempt to pass an examination or part of an examination, from the regular fees and requirements normally associated with examinations [*Bus. & Prof. Code § 135*].

[3] Subversion of Licensing Examination

[a] General Rules

It is a misdemeanor for any person to engage in any conduct that subverts or attempts to subvert any licensing

examination or the administration of an examination. Punishable conduct includes the following [*Bus. & Prof. Code § 123*]:

- Conduct violating the security of the examination materials.
- Removing from the examination room any examination materials without authorization.
- Unauthorized reproduction by any means of any portion of the licensing examination.
- Aiding by any means the unauthorized reproduction of any portion of the actual licensing examination.
- Paying or using professional or paid examination-takers for the purposes of reconstructing any portion of the licensing examination.
- Obtaining examination questions, or other examination material, except by specific authorization, either before, during or after an examination.
- Using or purporting to use any examination questions or materials that were improperly removed or taken from any examination for the purpose of instructing or preparing any applicant for examination.
- Selling, distributing, buying, receiving, or having unauthorized possession of any portion of a future, current, or previously administered licensing examination.
- Communicating with any other examinee during the administration of a licensing examination.
- Copying answers from another examinee or permitting one's answers to be copied by another examinee.
- Having in one's possession during the administration of the licensing examination any books, equipment, notes, written or printed materials, or data of any kind, other than the examination materials distributed, or otherwise authorized to be in one's possession during the examination.
- Impersonating any examinee or having an impersonator take the licensing examination on one's behalf.

Nothing in *Bus. & Prof. Code § 123* precludes prosecution under the authority provided for in any other provision of law. In addition to any other penalties, a person found guilty of violating *Bus. & Prof. Code § 123* will be liable for the actual damages sustained by the agency administering the examination not to exceed $10,000 and the costs of litigation [*Bus. & Prof. Code § 123*].

[b] Injunction or Restraining Order

Whenever any person has engaged, or is about to engage, in any acts or practices that constitute or will constitute, a violation of *Bus. & Prof. Code § 123* (*see* [a], *above*), the superior court in and for the county wherein the acts or practices take place, or are about to take place, may issue an injunction, or other appropriate order, restraining such conduct on application of an agency, the Attorney General, or the district attorney of the county [*Bus. & Prof. Code § 123.5*]. Proceedings under *Bus. & Prof. Code § 123.5* are governed by *Code Civ. Proc. § 525 et seq.* The remedy provided for in *Bus. & Prof. Code § 123.5* is in addition and is not a limitation on, the authority provided for in any other provision of law.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 41: Overview of Public Administrative Law thru Review of Agency Rulemaking-Chs. 470-472B
Chapter 471B LICENSING BY PUBLIC AGENCIES
PART II. LEGAL BACKGROUND
B. Qualifications for Licensing

41-471B California Forms of Pleading and Practice--Annotated § 471B.26

§ 471B.26 Conditions on Issuance of License

[1] General Requirements

A licensing law, especially one of the permit type such as a local government might enact, may impose conditions on the issuance of a license, in addition to or instead of licensing standards in the nature of personal qualifications. As a general rule, a condition may not be one that an applicant would reasonably lack the power to fulfill [*see, e.g., Tarbox v. Board of Supervisors (1958) 163 Cal. App. 2d 373, 377-378, 329 P.2d 553]* , but there are exceptions [*see, e.g., In re Petersen (1958) 51 Cal. 2d 177, 182-184, 331 P.2d 24 , appeal dismissed, 360 U.S. 314, 79 S. Ct. 1294, 3 L. Ed. 2d 1259 (1959)* (permit for certain uses of public street issuable on condition that abutting property owners approve)].

Moreover, a condition might be reasonable in some circumstances but unreasonable in others [*see Sunset Amusement Co. v. Board of Police Commissioners (1972) 7 Cal. 3d 64, 84, 101 Cal. Rptr. 768, 496 P.2d 840 , appeal dismissed, 409 U.S. 1121, 93 S. Ct. 940, 35 L. Ed. 2d 254 (1973)* ; *Flores v. Los Angeles Turf Club (1961) 55 Cal. 2d 736, 743, 13 Cal. Rptr. 201, 361 P.2d 921* (condition, in both cases, was control of behavior of others)].

Conditions on the issuance of subdivision building permits are common and may include, for example, dedicating part of the property in question to public use [*see Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 119 , 10 Cal. 3d 110, 109 Cal. Rptr. 799, 514 P.2d 111]* , or starting the construction project within a specified time [*see Morgan v. County of San Diego (1971) 19 Cal. App. 3d 636, 641, 97 Cal. Rptr. 180]* . A condition may not be unreasonable, that is, it must have a rational connection with a legitimate government purpose [*see Perrine v. Municipal Court (1971) 5 Cal. 3d 656, 663, 97 Cal. Rptr. 320, 488 P.2d 648 , cert. denied, 404 U.S. 1038, 92 S. Ct. 710, 30 L. Ed. 2d 729 (1972)]* . However, comparatively stringent conditions may be imposed if the activity in question is harmful enough that it might be prohibited instead of licensed [*see, e.g., San Francisco Street Artists Guild v. Scott (1974) 37 Cal. App. 3d 667, 674, 112 Cal. Rptr. 502]* .

[2] Bonds, Insurance, and Proof of Financial Responsibility

[a] General Requirements

Furnishing a bond, contracting for insurance, or giving other proof of financial responsibility may be required of a license applicant in an appropriate case [*see, e.g., Bell v. Burson (1971) 402 U.S. 535, 539, 91 S. Ct. 1586, 29 L. Ed. 2d 90* (dictum; statutory requirement that all motorists carry liability insurance or post security as not violating *U.S. Const., amend. XIV*)]. However, the requirement must be reasonably related to protecting the public in dealing with the licensee. A bond requirement for the protection of any person having dealings with the licensee is too broad, for example [*see In re Weisberg (1932) 215 Cal. 624, 632, 12 P.2d 446]* .

[b] Bond as Condition of Reinstatement

Some licensing laws require the furnishing of a bond as a condition of reinstatement of a license that has been suspended or revoked, instead of a condition precedent to issuing a license in the first instance. Such a requirement is apparently constitutional, since a bond might be required in the first instance [*see Koop v. Structural Pest Control Bd. (1969) 276 Cal. App. 2d 249, 256, 81 Cal. Rptr. 154* (clearly accepting, although not discussing, such a bond requirement)].

[3] Oath of Allegiance and Loyalty

A statutory requirement that a licensee take an oath to support the constitutions of the United States and California is not in and of itself unconstitutional [*see Raffaelli v. Committee of Bar Examiners (1972) 7 Cal. 3d 288, 297, 101 Cal. Rptr. 896, 496 P.2d 1264]* . Other types of oaths, however, may be unenforceable due to unconstitutionality; such oaths include the following [*Cole v. Richardson (1972) 405 U.S. 676, 680-681, 92 S. Ct. 1332, 31 L. Ed. 2d 593* (summarizing prior Supreme Court cases involving licensing oaths)]:

- Oaths that impinge on rights guaranteed by *U.S. Const., amends. I* and *XIV*, such as oaths relating to the licensee's political beliefs.

- Oaths to the effect that one has not engaged, or will not engage, in protected speech activities, such as criticizing institutions of government, discussing political doctrine that approves the overthrow of certain forms of government, and supporting candidates for political office.

- Oaths taking the form of denying past, or abjuring future, associational activities within constitutional protection; such protected activities include membership in organizations having illegal purposes unless one knows of the purpose and shares a specific intent to promote the illegal purpose.

- Oaths that are so vague that people of common intelligence must necessarily guess at their meaning and differ as to their application.

In cases finding particular licensing oaths unconstitutional, an underlying, seldom articulated concern running throughout the cases is that the oaths under consideration often required individuals to reach back into their past to recall minor, sometimes innocent, activities. The oaths put the government into the censorial business of investigating, scrutinizing, interpreting, and then penalizing or approving the political viewpoints' and past activities of individuals [*Cole v. Richardson (1972) 405 U.S. 676, 681, 92 S. Ct. 1332, 31 L. Ed. 2d 593]* .

[4] Agreement Not to Interfere With Other Licensee's Rights

The requirement that a licensee not interfere with equal rights of other licensees is a reasonable requirement and condition on which to base the issuance and continuance of a license [*Sheehan v. Division of Motor Vehicles (1934) 140 Cal. App. 200, 203, 35 P.2d 359]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of AssociationConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechPolitical SpeechGovernmentsLocal GovernmentsFinanceGovernmentsLocal GovernmentsLicensesInsurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageProof of Financial ResponsibilityReal Property LawSubdivisionsGeneral Overview

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§ 471B.27 License Fees

[1] Reasonableness Required

A regulatory license fee may not be more than is reasonably necessary for the purpose of regulation. It may cover the costs of issuing licenses and maintaining supervision of the regulated activity, whether those costs are direct or indirect [*County of Plumas v. Wheeler (1906) 149 Cal. 758, 763-764, 87 P. 909]* . A fee is presumptively reasonable but may be shown to be unreasonable [*Watson v. County of Merced (1969) 274 Cal. App. 2d 263, 268, 78 Cal. Rptr. 807]* . For a form of allegation for use in a complaint to declare a license tax invalid on the ground that the tax is excessive, see *§ 471B.116*.

[2] Payment by Legally Unlicensed Persons

By operation of a grandfather clause, certain persons may be entitled to engage in a regulated activity without a license [*see* discussion in *§ 471B.13[4]*]. These persons may be required, nevertheless, to pay an annual license fee [*see Matter of Application of Victor (1915) 27 Cal. App. 73, 76-78, 148 P. 975]* .

[3] Proration for Short Term

When the term of any license issued by any agency in the Department of Consumer Affairs [*see Bus. & Prof. Code § 101* (list of included agencies); *see also* a listing of the more significant subagencies in this departement in Ch. 470, *Overview of Public Administrative Law*, § 470.20[2]] exceeds one year, initial license fees for licenses that are issued during a current license term must be prorated on a yearly basis [*Bus. & Prof. Code § 134*].

[4] Limitation on Delinquency Penalty

Except as otherwise provided by law, the delinquency, penalty, or late fee for any licensee within the Department of Consumer Affairs is 50 percent of the renewal fee for a license in effect on the date of the renewal of the license, but not less than $25 or more than $150 [*Bus. & Prof. Code § 163.5*; *see Bus. & Prof. Code § 101* (list of included agencies); *see also* a listing of the more significant subagencies in this departement in Ch. 470, *Overview of Public Administrative*

Law, § 470.20[2]].

[5] Limitation on Reinstatement Surcharge

If a reinstatement or similar fee is charged for reinstatement of a license, the reinstatement fee is 150 percent of the renewal fee for a license in effect on the date of the reinstatement of the license, but not more than $25 in excess of the renewal fee, except that, in the event that the fee is fixed by statute at less than 150 percent of the renewal fee and less than the renewal fee plus $25, the fee fixed by statute will be charged [*Bus. & Prof. Code § 163.5*].

[6] Approval of Fee Change by Director of Consumer Affairs

Notwithstanding any other provision of law to the contrary, no fee change promulgated by any agency in the Department of Consumer Affairs [*see Bus. & Prof. Code § 101* (list of included agencies); *see also* a listing of the more significant subagencies in this departement in Ch. 470, *Overview of Public Administrative Law*, § 470.20[2]] can take effect pending compliance with the requirements of *Bus. & Prof. Code § 313.1* (governing director's review of agency rulemaking and fee changes) [*Bus. & Prof. Code § 313.1(a)*].

Prior law permitted the director to disapprove any fee change within 30 days after submission to him or her for review. Under prior law, if the director disapproved the fee change, the change had no force or effect unless the disapproval was reversed by a unanimous vote of the members of the agency that proposed the change [*see* former *Bus. & Prof. Code § 313.1(b)*, as amended by Stats. 1984, ch. 144, § 4].

Current law contains no such explicit permission and reversal mechanism [*see Bus. & Prof. Code § 313.1*, as amended by Stats. 1991, ch. 654, § 4, and Stats. 1992, ch. 1289, § 2]. However, current law permits the director to affirmatively approve a proposed fee change at any time within 30 days after it has been submitted to him or her for review. In the event of such approval, the change becomes effective on compliance with the requirements of *Bus. & Prof. Code § 313.1* (governing director's review of agency rulemaking and fee changes) and with the rulemaking and rulemaking review requirements, as set forth in *Gov. Code § 11340 et seq.* of the Administrative Procedure Act [*Bus. & Prof. Code § 313(e)* (as amended by Stats. 1991, ch. 654, § 4, and Stats. 1992, ch. 1289, § 2)].

[7] Refund of Fees

With the approval of the Director of Consumer Affairs, the agencies in the Department of Consumer Affairs [*see Bus. & Prof. Code § 101* (list of included agencies); *see also* a listing of the more significant subagencies in this departement in Ch. 470, *Overview of Public Administrative Law*, § 470.20[2]] may make refunds to applicants who are found ineligible to take the examinations or whose credentials are insufficient to entitle them to certificates or licenses [*Bus. & Prof. Code § 158*]. Notwithstanding any other provision of law, any application fees collected illegally, by mistake or inadvertence, or in error, must be refunded [*Bus. & Prof. Code § 158*].

Legal Topics:

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

§§ 471B.28[Reserved]

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41-471B California Forms of Pleading and Practice--Annotated § 471B.40

§ 471B.40 Statutory Grounds for Denial

[1] General Requirements

Bus. & Prof. Code § 475 et seq. set forth grounds on which a license may be denied, suspended, or revoked. In addition to *Bus. & Prof. Code § 475 et seq.*, which, as noted below, apply to a wide variety of business and professional licenses, numerous statutes and regulations pertaining to particular professions and businesses specify qualifications that must be met by a licensee in order to obtain a license. These qualifications, if not met, can constitute grounds for denial of a license. Consequently, counsel must refer to both *Bus. & Prof. Code § 475 et seq.* and to the particular statutes and regulations governing the particular business and profession for which a license is sought, in order to determine whether adequate legal grounds exist for the denial of a license. The discussion in this part focuses on the statutes having general application to most types of licenses, that is, *Bus. & Prof. Code § 475 et seq.*

For discussion of the statutes applicable to specific licenses, see the particular substantive chapter [*see, e.g.*, Ch. 414, *Physicians: Licensing and Discipline*]. For cross references listing these chapters, see *§ 471B.02[2]*; see also the Appendix at the end of this chapter, listing statutory provisions governing particular professional and commercial licenses (§ 471B.140 et seq.). For general coverage of governmental licensing authority, see Subpart B, § 471B.20 et seq.

Bus. & Prof. Code § 475 et seq. govern the denial of licenses based on the following grounds [*Bus. & Prof. Code § 475(a)*]:

- Knowingly making a false statement of material fact, or knowingly omitting to state a material fact, in an application for a license.

- Conviction of a crime.

- Commission of any act involving dishonesty, fraud, or deceit with the intent to substantially benefit himself, herself, or another, or substantially injure another.

- Commission of any act which, if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license.

Bus. & Prof. Code § 475 et seq. govern notwithstanding any other provisions of the Business and Professions Code [*Bus. & Prof. Code § 475(a)*]. That is, the provisions control over inconsistent statutes in other parts of the Code [*see Pieri v. Fox (1979) 96 Cal. App. 3d 802, 809, 158 Cal. Rptr. 256]* .

The provisions, however, do not apply to applicants for licenses under the State Bar Act (*Bus. & Prof. Code § 6000 et seq.*), the Alcoholic Beverage Control Act (*Bus. & Prof. Code § 23000 et seq.*), or the Gaming Registration Act (*Bus. & Prof. Code § 19800 et seq.*) [*see Bus. & Prof. Code § 476*]. For coverage of the provisions governing licensing in regard to the practice of law and the alcoholic beverage business, see respectively Ch. 71, *Attorneys Discipline* , and Ch.18, *Alcoholic Beverage Licenses* .

[2] Definitions

As used in *Bus. & Prof. Code § 475 et seq.*, the term "board" includes bureau, commission, committee, department, division, examining committee, program, and agency [*Bus. & Prof. Code § 477(a)*]. (Hereinafter, the term "agency" will be used in place of "board.") The term "license" includes certificate, registration, or other means to engage in a business or profession regulated by the Business and Professions Code [*Bus. & Prof. Code § 477(b)*].

[3] False Statement of Fact in Application

An agency may deny a license regulated by the Business and Professions Code on the ground that the applicant knowingly made a false statement of fact required to be revealed in the application for the license [*Bus. & Prof. Code § 480(c)*].

[4] Dishonest Acts

An agency may deny a license regulated by the Business and Professions Code on the ground that the applicant does any act involving dishonesty, fraud, or deceit with the intent to substantially benefit himself, herself, or another, or substantially injure another [*Bus. & Prof. Code § 480(a)(2)*]. Denial on this ground, however, is only proper when the act is substantially related to the qualifications, functions, or duties of the business or profession for which application is made [*Bus. & Prof. Code § 480(a)*].

[5] Acts That Would Be Ground for Suspension If Performed by Licentiate

An agency may deny a license regulated by the Business and Professions Code on the ground that the applicant has done any act that if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of a license [*Bus. & Prof. Code § 480(a)(3)*]. Denial on this ground, however, is only proper when the act is substantially related to the qualifications, functions, or duties of the business or profession for which application is made [*Bus. & Prof. Code § 480(a)*].

[6] Conviction of Crime

[a] General Requirements

An agency may deny a license regulated by the Business and Professions Code on the ground that the applicant has been convicted of a crime, provided that the crime is substantially related to the qualifications, functions, or duties of the business or profession for which application is made [*Bus. & Prof. Code § 480(a)(1), (3)*; *Harrington v. Department of Real Estate (1989) 214 Cal. App. 3d 394, 402, 263 Cal. Rptr. 528* ; *214 Cal. App. 3d 394, 263 Cal.*

Rptr. 528] .

[b] Nature of Conviction

For purposes of *Bus. & Prof. Code § 480(a)*, a "conviction" includes the following [*Bus. & Prof. Code § 480(a)(1)*]:

- A plea of guilty.
- A verdict of guilty.
- A conviction following a plea of *nolo contendere*.

[c] Finality of Conviction

Any action that an agency is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under *Penal Code § 1203.4* [*Bus. & Prof. Code § 480(a)(1)*].

[d] Rehabilitation

Notwithstanding any other provision of the Business and Professions Code, no person may be denied a license solely on the basis that he or she has been convicted of a felony, if he or she has obtained a certificate of rehabilitation under *Penal Code § 4852.01 et seq.* Furthermore, no person may be denied a license solely on the basis that he or she has been convicted of a misdemeanor if he or she has met all applicable requirements of the criteria of rehabilitation developed by the agency to evaluate the rehabilitation of a person when considering the denial of a license [*Bus. & Prof. Code § 480(b)*].

Each agency under the provisions of the Business and Professions Code must develop criteria to evaluate the rehabilitation of a person when considering the denial of a license by the agency under *Bus. & Prof. Code § 480* [*Bus. & Prof. Code § 482(a)*]. Each agency must take into account all competent evidence of rehabilitation furnished by the applicant [*Bus. & Prof. Code § 482*]. As a general rule, agencies publish their rehabilitation criteria in the California Code of Regulations [*see, e.g., 16 Cal. Code Reg. § 99.1* (criteria used by State Board of Accountancy)].

[e] Record of Conviction as Conclusive

Notwithstanding any other provision of law, in a proceeding conducted by an agency within the Department of Consumer Affairs pursuant to law to deny an application for a license or to suspend or revoke a license or otherwise take disciplinary action against a person who holds a license, on the ground that the applicant has been convicted of a crime substantially related to the qualifications, functions, and duties of the licensee in question, the record of conviction of the crime will be conclusive evidence of the fact that the conviction occurred, but only of that fact. The agency may inquire into the circumstances surrounding the commission of the crime in order to fix the degree of discipline or to determine if the conviction is substantially related to the qualifications, functions, and duties of the licensee in question [*Bus. & Prof. Code § 493*]. As used in *Bus. & Prof. Code § 493*, "license" includes certificate, permit, authority, and registration [*Bus. & Prof. Code § 493*].

[7] Substantial Relationship of Crime or Act to Qualifications

Each agency under the provisions of the Business and Professions Code is required to develop criteria to aid it when considering the denial of a license, to determine whether a crime or act is substantially related to the qualifications, functions, or duties of the business or profession it regulates [*Bus. & Prof. Code § 481*]. As a general rule, agencies

publish their "substantial relationship" criteria in the California Code of Regulations [*see, e.g, 16 Cal. Code Reg. § 1770* (Board of Pharmacy)].

[8] Good Moral Character

A license may not be denied on the grounds of a lack of good moral character or any similar ground relating to an applicant's character, reputation, personality, or habits [*Bus. & Prof. Code § 475(c)*]. In addition, no person applying for licensure under the Business and Profession Code will be required to submit to any licensing agency any attestation by other persons to his or her good moral character [*Bus. & Prof. Code § 484*; *but see Bus. & Prof. Code § 476* (exceptions) and discussion in [1], *above*].

[9] Subversion of Licensing Examination

A board may deny a license on the ground that an applicant or licensee has violated *Bus. & Prof. Code § 123* pertaining to the subversion of licensing examinations [*Bus. & Prof. Code § 496*; *see* discussion in *§ 471B.25[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 471B.41 Drug Diversion Program

Notwithstanding any other provision of law, successful completion of any diversion program under the Penal Code, or successful completion of an alcohol and drug problem assessment program under *Veh. Code § 23249.50*, will not prohibit an agency established under Bus. & Prof. Code § 500 et seq. (pertaining to the healing arts), or an initiative act referred to in such statutes, from taking disciplinary action against a licensee or from denying a license for professional misconduct, notwithstanding that evidence of that misconduct may be recorded in a record pertaining to an arrest [*Bus. & Prof. Code § 492* (exception for program operated by agency)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 471B.42 Proceeding After Withdrawal of Application

The withdrawal of an application for a license after it has been filed with an agency in the Department of Consumer Affairs will not, unless the agency has consented in writing to the withdrawal, deprive the agency of its authority to institute or continue a proceeding against the applicant for the denial of the license on any ground provided by law or to enter an order denying the license on any such ground [*Bus. & Prof. Code § 118(a)*].

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§ 471B.43 Denial of Application

[1] General Procedure

On denial of an application for a license under *Bus. & Prof. Code §§ 480-489*, the agency must either file and serve a statement of issues in accordance with *Gov. Code §§ 11500-11528* or notify the applicant that the application is denied. If the agency notifies the applicant that the application is denied, it must state the reason for the denial and that the applicant has the right to a hearing under *Gov. Code § 11500 et seq.* if a written request for hearing is made within 60 days after service of the notice of denial. Unless a written request for a hearing is made within this 60-day period, the applicant's right to a hearing is deemed waived [*Bus. & Prof. Code § 485*; *but see Bus. & Prof. Code § 489* (no right to hearing on denial if agency also denied applicant's application on identical ground during the preceding year)].

Service of the notice of denial may be made in the manner authorized for service of summons in civil actions [*see Code Civ. Proc. § 413.10 et seq.*; *see also* Ch. 518, *Service of Summons and Papers*], or by registered mail addressed to the applicant at the latest address furnished by him or her to the agency. Service by mail is complete on the date of mailing [*Bus. & Prof. Code § 485*].

For discussion and forms relating to administrative trial procedures under *Gov. Code § 11500 et seq.*, see Ch. 473, *Public Agency Adjudication* et seq.

[2] Hearing on Denial

If a hearing is requested by the applicant, the agency must conduct the hearing within 90 days from the date the hearing is requested unless the applicant requests or agrees in writing to a postponement or continuance of the hearing. Notwithstanding this rule, the Office of Administrative Hearings may order, or on a showing of good cause, grant a request for, up to 45 additional days within which to conduct a hearing, except in cases involving alleged examination or licensing fraud, in which cases the period may be up to 180 days. In no case may more than two such orders be made or requests be granted [*Bus. & Prof. Code § 487*].

[3] Denial Based on Identical Grounds in Consecutive Years

Any agency in the Department of Consumer Affairs that is authorized by law to deny an application for a license on the grounds specified in *Bus. & Prof. Code § 480* may deny an application on such ground without a hearing, if within one year previously, and after proceedings conducted in accordance with *Gov. Code § 11500 et seq.*, the agency has denied an application from the same applicant on the same ground [*Bus. & Prof. Code § 489*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationHearingsRight to HearingGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessMethodsMailConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessDouble JeopardyGovernmentsState & Territorial GovernmentsLicenses

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§ 471B.44 Duty of Agency to Provide Information Regarding Reapplication

When an agency has denied an application for a license under *Bus. & Prof. Code §§ 480-489*, it must inform the applicant, in the notice of denial or in the decision itself, of the earliest date on which the applicant may reapply for the license [*Bus. & Prof. Code § 486(a)*]. In addition, the agency must inform the applicant that all competent evidence of rehabilitation presented will be considered on a reapplication [*Bus. & Prof. Code § 486(b)*]. Along with the decision, or notice of denial, the agency must serve a copy of its criteria relating to rehabilitation [*Bus. & Prof. Code § 486*].

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[Reserved]

§§ 471B.45[Reserved]

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§ 471B.50 Nature of Suspension and Revocation Proceedings

A proceeding to revoke or suspend a license is not a criminal or quasi-criminal prosecution. The purpose of such a proceeding is not to punish but to afford protection to the public on the rationale that respect and confidence of the public is merited by eliminating from the ranks of practitioners those who are dishonest, immoral, disreputable, or incompetent [*Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 540, 92 Cal. Rptr. 525]* . Even the possibility that criminal charges might result from an administrative proceeding does not transform the nature of the proceeding from a civil to a criminal one [*see* *In re Groban (1957) 352 U.S. 330, 332-333, 77 S. Ct. 510, 1 L. Ed. 2d 376]* .

The judicial characterization of suspension and revocation proceedings as "non-criminal" is significant for several reasons. An administrative agency is not required to conduct its proceedings for the revocation of a license in accordance with the theories or rules developed in the field of criminal law [*Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 540, 92 Cal. Rptr. 525* ; *Lax v. Board of Medical Quality Assurance (1981) 116 Cal. App. 3d 669, 676, 172 Cal. Rptr. 258* ; *see, e.g.,* *Foster v. McConnell (1958) 162 Cal. App. 2d 701, 707, 329 P.2d 32* (accusations and representations in license revocation proceeding are not required to be proved beyond a reasonable doubt)]. In addition, because a proceeding to revoke or suspend a license is not equivalent to a criminal proceeding, the constitutional protection against "double punishment" [*Cal. Const., art. I, § 15*] is not violated when an agency suspends or revokes a license based on a licensee's criminal conviction [*see* *Hough v. McCarthy (1960) 54 Cal. 2d 273, 282, 5 Cal. Rptr. 668, 353 P.2d 276* ; *Beamon v. Dept. of Motor Vehicles (1960) 180 Cal. App. 2d 200, 210, 4 Cal. Rptr. 396]* .

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41-471B California Forms of Pleading and Practice--Annotated § 471B.51

§ 471B.51 Due Process Standards

[1] General Requirements

The government may not lawfully suspend or revoke a person's license without due process of law [*U.S. Const., amend. XIV*; *Cal. Const., art. I, § 7(a)*; *see, e.g., Endler v. Schutzbank (1968) 68 Cal. 2d 162, 169-170, 65 Cal. Rptr. 297, 436 P.2d 297]* . This rule applies not only to an initial suspension or revocation, but also to the revocation of probation, when probation may be imposed, and the subsequent suspension or revocation of a license [*see Ralph Williams Ford v. New Car Dealers Policy & Appeals Bd. (1973) 30 Cal. App. 3d 494, 500-501, 106 Cal. Rptr. 340 , cert. denied, 414 U.S. 974, 94 S. Ct. 283, 38 L. Ed. 2d 217]* .

However, when the license is one that confers no property or liberty interest on the licensee, there is no right to a hearing either before or after suspension or revocation of the license [*see, e.g., Nichols v. County of Santa Clara (1990) 223 Cal. App. 3d 1236, 1241-1245, 273 Cal. Rptr. 84* (license to carry concealed firearm issued under *Penal Code § 12050*)]. Additionally, if the license is not one that constitutes a statutorily conferred benefit sufficient to trigger procedural protections under the due process clause of the California Constitution prior to revocation, there is no right to a hearing either before or after suspension or revocation of the license [*see, e.g., Nichols v. County of Santa Clara (1990) 223 Cal. App. 3d 1236, 1245-1246, 273 Cal. Rptr. 84]* . Finally, even if the license constitutes a statutorily conferred benefit under the due process clause of the state Constitution, a balancing of the governmental and the private interests at stake may lead to the conclusion that no procedural protection is required either before or after suspension or revocation of the license [*see, e.g., Nichols v. County of Santa Clara (1990) 223 Cal. App. 3d 1236, 1246-1247, 273 Cal. Rptr. 84]* .

For detailed discussion of due process requirements as they apply to public agencies, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

[2] Right to Counsel

In a licensee disciplinary action (such as an action to revoke or suspend a license), the licensee is entitled to have counsel of his or her own choosing, for whom he or she must pay the attorney's fees. There is no constitutional right to

appointed counsel; thus, a licensee is not denied due process of law when counsel is not furnished him or her, even though he or she is unable to afford counsel [*Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 543, 92 Cal. Rptr. 525* ; *see U.S. Const., amend. VI*; *Cal. Const., art. I, § 15*; *see also White v. Board of Medical Quality Assurance (1982) 128 Cal. App. 3d 699, 707, 180 Cal. Rptr. 516* (rejecting argument that licensee has right to "effective" counsel in disciplinary action)].

[3] Right to Hearing

When an independent judicial or quasi-judicial determination of facts must be made as a basis for suspension or revocation, a license may not be suspended without granting a hearing to the licensee [*Slaughter v. Edwards (1970) 11 Cal. App. 3d 285, 294, 90 Cal. Rptr. 144]* . A hearing on the merits is necessary when an administrative agency is charged by law with the duty of issuing licenses on specified terms and conditions. Such an agency becomes a quasi-judicial body for determining the facts and exercising sound and legal discretion in the performance of its duty. While its procedure may be somewhat informal, the informality does not justify the denial of a hearing [*Andrews v. State Board of Registration (1954) 123 Cal. App. 2d 685, 692, 267 P.2d 352]* .

No hearing is necessary when the suspension or revocation of the license results from ministerial action rather than judicial or quasi-judicial action, that is, when the ascertainment of the specified event making it mandatory to suspend or revoke is a question of law. This rule is applied and a mandatory duty to revoke is imposed when the licensee has been convicted of a specified crime. In that case, there is no real necessity to examine the facts, resolve any conflicts in the evidence, and exercise any judgment with respect thereto. The only question is a legal one: whether the licensee was convicted of a crime specified in the statute. In this case, due process is satisfied because the licensee had his or her day in court when he or she was put on trial and convicted of the crime [*Slaughter v. Edwards (1970) 11 Cal. App. 3d 285, 293-294, 90 Cal. Rptr. 144* ; *see Yeoman v. Department of Motor Vehicles (1969) 273 Cal. App. 2d 71, 76-77, 78 Cal. Rptr. 251]* .

[4] Impact of Changes in Law

If the Legislature simultaneously (1) repeals a licensing law, (2) enacts a new law to replace it, (3) includes in the new law a specific prohibition that is substantially the same as one in the repealed law, and (4) makes violation of the newly enacted prohibition a ground for suspending or revoking a license, and if under the repealed law a violation of the similar superseded prohibition was a ground for suspending or revoking a license, then there is no denial of due process in suspending or revoking, under the new law, the license of a person who obtained his or her license under the repealed law and who, before the simultaneous repeal and enactment, violated the prohibition as set out in the repealed law [*see Sobey v. Molony (1940) 40 Cal. App. 2d 381, 383-391, 104 P.2d 868]* .

If the Legislature simultaneously (1) repeals a penal statute and (2) amends another statute so as to carry forward the substance of the repealed statute, there is no denial of due process in treating a conviction under the repealed statute as a conviction for the purpose of suspending or revoking a license pursuant to a licensing law that makes conviction of the crime described in the repealed statute a ground for suspension or revocation [*see Plomteaux v. Department of Motor Vehicles (1975) 51 Cal. App. 3d 177, 180-181, 123 Cal. Rptr. 889]* .

There is no denial of due process in suspending or revoking the license of a person who obtained it before the effective date of an amendment adding the particular ground, on which the license was suspended or revoked, to the list of grounds set out in the licensing law [*see Serenko v. Bright (1968) 263 Cal. App. 2d 682, 687, 70 Cal. Rptr. 1* (suspension of driver's license for failure to submit to blood alcohol test pursuant to recently enacted implied consent law)].

[5] Proceeding After Suspension of License

The suspension, expiration, or forfeiture by operation of law of a license issued by an agency in the Department of Consumer Affairs, or its suspension, forfeiture, or cancellation by order of the agency or by order of a court of law, or its surrender without the written consent of the agency, will not, during any period in which it may be renewed, restored, or reinstated, deprive a board of its authority to institute or continue a disciplinary proceeding against the licensee on any ground provided by law or to enter an order suspending or revoking a license or otherwise taking disciplinary action against a licensee on any such ground [*Bus. & Prof. Code § 118(b)*]. There is no denial of due process in giving this authority to a licensing agency [*see Cal. Pacific Collections, Inc. v. Powers (1969) 70 Cal. 2d 135, 139-141, 74 Cal. Rptr. 289, 449 P.2d 225* ; *70 Cal. 2d 135, 74 Cal. Rptr. 289, 449 P.2d 225]* .

[6] Proceeding After Criminal Acquittal

If a licensee committed an act that is both a criminal offense and a ground for suspending or revoking his or her license, the responsible agency may proceed against him or her with a view to suspending or revoking the license even if he or she has been acquitted in a trial for the criminal offense [*see Traxler v. Board of Medical Examiners (1933) 135 Cal. App. 37, 39-40, 26 P.2d 710* ; *Bold v. Board of Medical Examiners (1933) 135 Cal. App 29, 33-35, 26 P.2d 707* ; *Tapley v. Abbott (1931) 111 Cal. App. 397, 399-400, 295 P. 911]* . The purpose of the administrative proceeding is not to punish the licensee; the purpose is to protect the public [*see, e.g., Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 73 n.6, 64 Cal. Rptr. 785, 435 P.2d 553]* . Therefore, there is no double jeopardy problem, and the guaranty of due process is not violated, when a licensee is both prosecuted for a criminal offense and proceeded against administratively with the possibility that his or her license will be suspended or revoked [*see Petrucci v. Board of Medical Examiners (1975) 45 Cal. App. 3d 83, 87-88, 117 Cal. Rptr. 735]* . In addition, the administrative proceeding is not barred by the doctrine of res judicata, because the acquittal in the criminal prosecution is based on the reasonable doubt standard, while a decision in an administrative proceeding against a licensee is based on the lesser preponderance of the evidence standard [*see Holt v. Department of Food & Agriculture (1985) 171 Cal. App. 3d 427, 433, 218 Cal. Rptr. 1]* .

[7] Multiple Proceedings Against One Licensee

If a person holding two different licenses does an act that is a ground for suspension or revocation of each license, there is no denial of due process when he or she is subjected first to a disciplinary proceeding respecting one of the licenses and then to a second proceeding, before a different agency, respecting the other license [*see Cooper v. State Board of Public Health (1951) 102 Cal. App. 2d 926, 930, 229 P.2d 27]* .

[8] Specifying Grounds in Licensing Law

Due process requires that the specification in a licensing law of grounds for suspension or revocation of a license be given a relatively strict construction. Acts that are not fairly within the specific descriptions of grounds for disciplinary actions may not be the basis for suspending or revoking a license [*see Barron v. Board of Dental Examiners (1930) 109 Cal. App. 382, 384-385, 293 P. 144]* . For discussion of statutory construction principles, see *§ 471B.52[1]*.

[9] Suspension or Revocation Without Fault

The Supreme Court has held, by comparison with the tort theory of strict liability, that a license may be suspended or revoked in specified circumstances whether or not there is any evidence that the licensee was in fact culpable [*see Sandstrom v. Cal. Horse Racing Board (1948) 31 Cal. 2d 401, 406, 189 P.2d 17 , cert. denied, 335 U.S. 814, 69 S. Ct. 31, 93 L. Ed. 369]* .

Similarly, a licensee can be disciplined for conduct that was not knowingly or willfully done by the licensee because the licensee was responsible for the acts of its agents or employees [*Stokes v. California Horse Racing Board (2002) 98 Cal. App. 4th 477, 479-480, 119 Cal. Rptr. 2d 792* (licensed horse trainer disciplined for entering horse in race when horse was not eligible based upon actions of licensee's brother as agent of licensee)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawSeparation of PowersConstitutional ControlsGeneral OverviewConstitutional LawBill of RightsFundamental RightsRight to Bear ArmsConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionGovernmentsLegislationExpirations, Repeals & SuspensionsGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicenses

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§ 471B.52 Construction of Specific Licensing Statutes

[1] Basic Rules

Licensing statutes are subject to judicial construction and interpretation [*Medical Board of California v. Superior Court (2001) 88 Cal. App. 4th 1001, 1004-1005, 106 Cal. Rptr. 2d 381* (court of appeal construed *Bus. & Prof. Code §§ 141, 2350*, which provided a basis for discipline of a physician in California based on out of state discipline)]. The following discussion in [2]-[9], *below*, covers basic rules that courts have formulated to deal with specific types of language in particular licensing statutes; these rules, by way of analogy, may be used as an aid in construing licensing statutes.

[2] Aiding and Abetting Unlicensed Person

If a licensing law specifies aiding and abetting an unlicensed person as a ground for suspending or revoking a license [*see, e.g., Bus. & Prof. Code § 1680(c)*], or specifies aiding and abetting a licensed person to practice, or otherwise engage in the regulated activity, unlawfully [*see, e.g., Bus. & Prof. Code § 1680(d)*], it must be construed to specify aiding and abetting with knowledge that the other person is unlicensed or is practicing, or otherwise engaging in the regulated activity, unlawfully [*see Osborne v. Baughman (1927) 85 Cal. App. 224, 227-228, 259 P. 70* ; *see also Lassen v. Board of Dental Examiners (1914) 24 Cal. App. 767, 771-772, 142 P. 505* (evidence of knowledge)]. One court has stated that the word "aid" imputes no knowledge or notice of the unlawful act or purpose, while the word "abet" presupposes a guilty knowledge on the part of the accused individual. Under this construction, statutes setting up aiding and abetting as grounds for license suspension or revocation should be interpreted to apply to the abetting, rather than to the merely aiding, party [*Barrett v. Board of Osteopathic Exmrs. (1935) 4 Cal. App. 2d 135, 139, 40 P.2d 923]* .

The California Medical Board's decision to fine a physician $500 for aiding the unlicensed practice of medicine in violation of *Bus. & Prof. Code § 2264* was upheld by the court of appeal. The court concluded that there was substantial evidence in the administrative record before the board that the physician had knowledge that the clinic where he practiced was partially owned by two individuals who were not licensed to practice medicine in California [*Steinsmith v. Medical Board of California (2000) 85 Cal. App. 4th 458, 465-466, 102 Cal. Rptr. 2d 115]* .

[3] Breaches of Confidence

If a licensing law specifies "willful betraying of a professional secret" [*see, e.g., Bus. & Prof. Code § 2379* [repealed 1980]], or a substantially similar act, as a ground for suspending or revoking a license, it may not be construed as describing any and all disclosures that a licensee might intentionally make. Rather, it must be construed as describing a disclosure that is harmful to the client, patient, or the like, and which the licensee knows or should know would be harmful, in effect a disclosure that the licensee ought not to make and knows he or she ought not to make, but makes anyway, for an improper purpose [*see McPheeters v. Board of Medical Examiners (1930) 103 Cal. App. 297, 299-301, 284 P. 938]* .

[4] Conviction of Crime

[a] Felony

If a licensing law specifies conviction of a felony as a ground for suspending or revoking a license, the law of the forum where the offender (licensee) is convicted determines whether the offense is a felony [*see Furnish v. Board of Medical Examiners (1957) 149 Cal. App. 2d 326, 330, 308 P.2d 924, 309 P.2d 493]* .

[b] Conviction on Nolo Contendere Plea

Unless the governing law specifies otherwise, a conviction on a plea of *nolo contendere* is not the equivalent of a conviction on a plea or verdict of guilty. When a licensing law specifies merely a conviction, without expressly including conviction on a plea of *nolo contendere* as a ground for suspending or revoking a license, it refers only to a conviction on a plea or verdict of guilty [*see Cartwright v. Board of Chiropractic Examiners (1976) 16 Cal. 3d 762, 768-774, 129 Cal. Rptr. 462, 548 P.2d 1134]* .

[c] Multiple Convictions

The rule respecting conviction on a plea of *nolo contendere* also applies when a licensing law specifies multiple convictions as a ground for suspending or revoking a license. For instance, a law that specifies conviction of more than one misdemeanor without also specifying that conviction includes a conviction on a plea of *nolo contendere* refers only to convictions on pleas or verdicts of guilty. For the purpose of applying the law, a person who has been convicted on two different occasions, once on a plea of *nolo contendere* and another time on a plea or verdict of guilty, has not been convicted of more than one misdemeanor [*see Grannis v. Board of Medical Examiners (1971) 19 Cal. App. 3d 551, 559-560, 96 Cal. Rptr. 863]* .

[d] Crime Involving Moral Turpitude

When a licensing law specifies conviction of a crime involving moral turpitude as a ground for suspending or revoking a license, it refers to conviction of an offense that necessarily, and in every case, indicates moral turpitude. Only if the minimum elements for a conviction necessarily involve moral turpitude and a conviction cannot be had without proof of facts showing moral turpitude can the conviction be held to be of an offense involving moral turpitude [*Lorenz v. Board of Medical Examiners (1956) 46 Cal. 2d 684, 687, 298 P.2d 537* ; *see Cartwright v. Board of Chiropractic Examiners (1976) 16 Cal. 3d 762, 766-768, 129 Cal. Rptr. 462, 548 P.2d 1134]* .

As a general rule, crimes that involve moral turpitude are those that reveal the convicted person's dishonesty, general readiness to do evil, bad character, moral depravity, or intent to corrupt others [*see Clerici v. Department of Motor Vehicles (1990) 224 Cal. App. 3d 1016, 1027-1028, 274 Cal. Rptr. 230* (proceedings relating to denial of application for, rather than suspension or revocation of, license)]. While the definition of moral turpitude is generally amorphous, moral turpitude is inherent in crimes involving fraudulent intent and intentional dishonesty for purposes of personal gain or other corrupt purposes [*see Clerici v. Department of Motor Vehicles (1990) 224 Cal. App. 3d 1016, 1028, 274 Cal.*

Rptr. 230] . For further discussion of licensing laws specifying moral turpitude, immoral conduct, and related grounds for suspending or revoking a license, see [7], *below.*

[5] Deceptive Advertising

When a licensing law specifies deceptive or misleading advertising as a ground for suspending or revoking a license [*see, e.g., Bus. & Prof. Code § 1680(h)*], falsity is not a necessary element unless the law specifies false and misleading advertising [*see Webster v. Board of Dental Examiners (1941) 17 Cal. 2d 534, 541-542, 110 P.2d 992]* . Intent to deceive or mislead is not necessarily an implied element [*see Smulson v. Board of Dental Examiners (1941) 47 Cal. App. 2d 584, 588, 118 P.2d 483]* . A specification of the ground in these words, "the making use of any advertising statements of a character tending to deceive or mislead the public," as they appear in *Bus. & Prof. Code § 1680(h),* is not so vague or uncertain as to invalidate the provision [*see Smulson v. Board of Dental Examiners (1941) 47 Cal. App. 2d 584, 588, 118 P.2d 483* (interpreting former *Bus. & Prof. Code § 1680*)].

[6] Fraudulent Acts

A licensing law may specify fraudulent or dishonest acts as a ground for suspending or revoking a license. The word "dishonest" is not unconstitutionally vague and the word "fraudulent" does not mean criminally fraudulent or deceitful, but includes both criminal and noncriminal fraud [*see Wayne v. Bureau of Private Investigators & Adjusters (1962) 201 Cal. App. 2d 427, 436-440, 20 Cal. Rptr. 194]* .

[7] Immoral Conduct and Moral Turpitude

As used in the context of professional licensing, "moral turpitude" is a term of art that has more precise meaning in its application to a particular profession. Because the right to practice a profession is sufficiently precious to surround it with a panoply of legal protection, terms such as "immoral," "unprofessional," and "moral turpitude" constitute only lingual abstractions until they are applied to a specific occupation and given content by reference to fitness for the performance of that vocation [*In re Johnson (1992) 1 Cal. 4th 689, 698, 4 Cal. Rptr. 2d 170, 822 P.2d 1317* ; *Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 239, 220, 82 Cal. Rptr. 175, 461 P.2d 375]* . Thus, if a licensing law specifies immoral or unprofessional conduct, an act or a crime involving moral turpitude, or gross immorality, as a ground for suspending or revoking a license, the only constitutional interpretation of that language is an act showing the licensee's unfitness to continue being engaged in the regulated activity [*see Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 229-233, 82 Cal. Rptr. 175, 461 P.2d 375]* .

However, what constitutes unfitness to continue being engaged in a regulated activity is a matter of opinion. In *Morrison,* the Supreme Court held that a teacher's license could not be revoked merely because he had had a brief homosexually oriented relationship [*Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 235-238, 82 Cal. Rptr. 175, 461 P.2d 375]* . In a later case, *Pettit v. State Board of Education (1973) 10 Cal. 3d 29, 109 Cal. Rptr. 665, 513 P.2d 889* , the Court upheld the revocation of a teacher's license, that action having been taken because the teacher had participated in various sexual acts at a private club, had been arrested on that ground by an undercover police officer who observed those acts, and had been convicted (by plea bargain) of violating former *Penal Code § 650*1/2 (outraging public decency). In *Pettit,* the teacher and her husband had also appeared on two local television shows, in disguise to hide their identities, and had discussed in that forum their philosophy in favor of nonconventional sexual lifestyles. In upholding the revocation of the teacher's license in *Pettit,* the Supreme Court discussed at length why the *Morrison* case was not applicable [*Pettit v. State Board of Education (1973) 10 Cal. 3d 29, 34-35, 109 Cal. Rptr. 665, 513 P.2d 889]* .

[8] Misrepresentation of Professional Status

When a licensing law specifies misrepresentation of a licensee's professional status, such as a physician representing himself or herself to be a doctor of osteopathy (D.O.) without being entitled to use that designation [*see Bus. & Prof.*

Code § 2276], as a ground for suspending or revoking a license, it must be construed as referring to a representation that the licensee either knows or ought reasonably to know is mistaken. Innocent misrepresentation may not be a ground for discipline [*see Allegretti v. Bd. of Osteopathic Examiners (1956) 145 Cal. App. 2d 435, 440, 302 P.2d 694]* . Furthermore, the law must be construed as referring to a material misrepresentation. If a licensee's professional status is not related to his or her qualifications for the license, his or her misrepresentation of that status is irrelevant. For instance, at one time a doctorate degree was not required in order to obtain a psychologist's license [*but see Bus. & Prof. Code § 2914* (amended in 1967 to require doctorate degree)]. Therefore, a psychologist licensed under the former law could not be disciplined for misrepresenting himself or herself as the holder of a doctorate degree [*Packer v. Board of Medical Examiners (1974) 37 Cal. App. 3d 63, 70-71, 112 Cal. Rptr. 76]* .

[9] Unprofessional Conduct

If a licensing law specifies unprofessional conduct as a ground for suspending or revoking a license, and whether or not the law defines unprofessional conduct as including certain specified acts, it must be construed as referring to an act that shows the licensee's unfitness to continue being engaged in the licensed activity [*see Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 229-233, 82 Cal. Rptr. 175, 461 P.2d 375* ; *see also* [7], *above*]. The Medical Board of California properly imposed discipline (two year probation period) on a physician for unprofessional conduct by the physician based of a finding of two repeated acts of professional negligence by the physician [*Zabetian v. Medical Board of California (2000) 80 Cal. App. 4th 462, 468-469, 94 Cal. Rptr. 2d 917]* .

A licensed court reporter who was charged with repeated failure to pay subcontractor shorthand reporters for services performed on behalf of the reporter could not be disciplined by the Court Reporters Board for unprofessional conduct under *Bus. & Prof. Code § 8025(d)* because the scope of shorthand reporting practice does not include business or accounting practice related to shorthand duties. Thus, the reporters nonpayment of subcontractors was not unprofessional conduct in the practice of shorthand reporting, which is defined under *Bus. & Prof. Code § 8017* to include preparation and execution of the transcript but not business or accounting practices [*Hall v. Court Reporters Board of California (2002) 98 Cal. App. 4th 633, 639-640, 119 Cal. Rptr. 2d 847]* . However, a physician could be disciplined for unprofessional conduct under *Bus. & Prof. Code § 2239(a)* when the physician had two or more convictions for misdemeanor alcohol related driving violations [*Griffiths v. Superior Court (2002) 96 Cal. App. 4th 757, 762, 117 Cal. Rptr. 2d 445]* . The physician's constitutional rights to due process of law and equal protection of the law are not violated by discipline based on alcohol consumption related convictions because there is a rational connection between those convictions and a physician's license to practice medicine [*Griffiths v. Superior Court (2002) 96 Cal. App. 4th 757, 770-771, 117 Cal. Rptr. 2d 445]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesFraudGeneral OverviewCriminal Law & ProcedureGuilty PleasGeneral OverviewEducation LawFaculty & StaffQualificationsCertification & LicensureRevocation & SuspensionGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicensesHealthcare LawBusiness Administration & OrganizationLicensesRevocation & SuspensionHealthcare LawBusiness Administration & OrganizationPatient ConfidentialityBreach

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§ 471B.53 Suspension or Revocation of License

[1] General Grounds

As discussed in *§ 471B.52[1]*, numerous statutes set forth standards for revocation and suspension of particular types of business and professional licenses. In addition to these specific statutes, however, are general statutes, which govern suspension and revocation without regard to the particular type of license involved. These provisions, *Bus. & Prof. Code §§ 475 et. seq*, govern the suspension and revocation of licenses based on the following grounds [*Bus. & Prof. Code § 475(b)*]:

- Knowingly making a false statement of material fact, or knowingly omitting to state a material fact, in an application for a license.
- Conviction of a crime.

For general discussion of *Bus. & Prof. Code § 475 et seq.*, see *§ 471B.40*.

[2] Criminal Conviction

Under *Bus. & Prof. Code § 490*, an agency may suspend or revoke a license on the ground that the licensee has been convicted of a crime, if the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued [*Bus. & Prof. Code § 490*]. For purposes of *Bus. & Prof. Code § 490*, a "conviction" includes the following [*Bus. & Prof. Code § 490*]:

- A plea of guilty.
- A verdict of guilty.
- A conviction following a plea of *nolo contendere*.

Any action that an agency is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under *Penal Code § 1203.4* [*Bus. & Prof. Code § 490*]. *Bus. & Prof. Code § 493*, relating to the conclusive effect of a record of conviction, applies in license revocation and suspension proceedings. For discussion of this provision, see *§ 471B.40[6][e]*.

Discipline imposed on a dentist by the Board of Dental Examiners under *Bus. & Prof. Code §§ 1670*, and *1670.1*, based on misdemeanor convictions of the dentist and entered into pursuant to a stipulation between the dentist and the Board could not be set aside even though the criminal convictions were later vacated by the granting of a habeas corpus writ because the dentist is bound by the stipulation [*Stermer v. Board of Dental Examiners (2002) 95 Cal. App. 4th 128, 130-131, 115 Cal. Rptr. 2d 294]* .

[3] False Statement of Fact

[a] License Application

A board may revoke, suspend, or otherwise restrict a license on the ground that the licensee, in support of another person's application for license, knowingly made a false statement of a material fact to the board regarding the application [*Bus. & Prof. Code § 499*; *see Bus. & Prof. Code § 478* ("material" defined)].

[b] Misrepresentation or Omission of Material Fact

[i] In License Application

A board may revoke, suspend, or otherwise restrict a license on the ground that the licensee secured the license by knowing misrepresentation of a material fact or by knowingly omitting to state a material fact [*Bus. & Prof. Code § 498*; *see Bus. & Prof. Code § 478* ("material" defined)]. Revocation of a license can also be based on improper conduct that occurred before the license was issued [*Hughes v. Board of Architectural Examiners (1998) 17 Cal. 4th 763, 768, 72 Cal. Rptr. 2d 624, 952 P. 2d 641]* .

[ii] To Licensing Board

A board may revoke, suspend, or otherwise restrict a license on the ground that the licensee secured the license by knowing misrepresentation of a material fact or by knowingly omitting to state a material fact [*Bus. & Prof. Code § 498*; *see Bus. & Prof. Code § 478* ("material" defined)]. A board may revoke, suspend, or otherwise restrict a license on the ground that the licensee, in support of another person's application for license, knowingly omitted to state a material fact to the board regarding the application [*Bus. & Prof. Code § 499*; *see Bus. & Prof. Code § 478* ("application" and "material" defined)].

[4] Subversion of Examination

A board may deny, suspend, or otherwise restrict a license on the ground that an applicant or licensee has violated *Bus. & Prof. Code § 123*, pertaining to the subversion of licensing examinations [*Bus. & Prof. Code § 496*; *see* discussion in *§ 471B.40[9]*].

[5] Unlawful Discrimination

In addition to the general grounds for discipline established by *Bus. & Prof. Code § 475 et seq.*, every person who holds a license under the Business and Professions Code is subject to disciplinary action under the provisions of the code applicable to that person if, because of the applicant's race, color, sex, religion, ancestry, physical disability, marital status, or national origin, he or she refuses to perform the licensed activity or aids or incites the refusal to perform the

licensed activity by another licensee, or if he or she makes any discrimination or restriction in the performance of the licensed activity [*Bus. & Prof. Code § 125.6*].

Bus. & Prof. Code § 125.6, however, does not require a person licensed under *Bus. & Prof. Code § 500 et seq.* (healing arts) to permit an individual to participate in, or benefit from, the licensed activity of the licensee when that individual poses a direct threat to the health or safety of others. For this purpose, "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids and services [*Bus. & Prof. Code § 125.6*].

These provisions also are not applicable to discrimination by employers with regard to employees or prospective employees, against specified clubs because of discriminatory membership policies, or with regard to architectural barriers to an individual with physical disabilities if the barriers conform to applicable building codes [*see Bus. & Prof. Code § 125.6*].

[6] Improper Grounds

[a] Bankruptcy

A licensing law that specifies bankruptcy as a ground for suspending or revoking a license is unconstitutional as a violation of the supremacy clause [U.S. Const., art. VI; *Grimes v. Hoschler (1974) 12 Cal. 3d 305, 308-314, 115 Cal. Rptr. 625, 525 P.2d 65 , cert. denied, 420 U.S. 973, 95 S. Ct. 1394, 43 L. Ed. 2d 653 (1975)* ; *see 11 U.S.C. § 525(a)* (precluding denial, revocation, suspension, or refusal to renew license of debtor solely because of status as debtor under Bankruptcy Act or because of debtor's failure to pay discharged debt); *but see Brookman v. State Bar (1988) 46 Cal. 3d 1004, 1009, 251 Cal. Rptr. 495, 760 P.2d 1023* (restitution of discharged debt is permissible condition of probation in State Bar disciplinary proceeding)].

[b] Client Security Fund Claim

A licensing law that specifies payment of a client security fund claim as a ground for automatic suspension of a license is unconstitutional to the extent that it does not give the licensee an opportunity to appear at a hearing and contest the propriety of paying the claim from the fund [*Slaughter v. Edwards (1970) 11 Cal. App. 3d 285, 295, 90 Cal. Rptr. 144]* .

[c] Moral Character

A license may not be suspended or revoked on the grounds of lack of good moral character or any similar ground relating to an applicant's character, reputation, personality, or habits [*Bus. & Prof. Code § 475(c)*].

[d] Sexual Conduct or Orientation

A licensing law may not constitutionally make a licensee's sexual conduct or inclination a ground for suspending or revoking his or her license except to the extent that such conduct or inclination shows the licensee as unfit to continue being engaged in the regulated activity [*see Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 229-233, 82 Cal. Rptr. 175, 461 P.2d 375]* .

[7] Fraud or Deceit

A board may revoke, suspend, or otherwise restrict a license on the ground that the licensee secured the license by fraud or deceit [*Bus. & Prof. Code § 498*]. Revocation by DMV of a vehicle salesperson's license was upheld on judicial review when the salesperson committed fraud in violation of *Veh. Code § 11705(a)(14)* by selling a motor vehicle to a buyer when the salesperson's company did not have title to the vehicle [*Provenzano v. Department of Motor Vehicles*

(2002) 93 Cal. App. 4th 1315, 1318, 1321, 113 Cal. Rptr. 2d 800] .

[8] Effect of Drug Diversion Program

Notwithstanding any other provision of law, successful completion of any diversion program under the Penal Code, or successful completion of an alcohol and drug problem assessment program under *Veh. Code § 23249.50*, will not prohibit an agency established under *Bus. & Prof. Code § 500 et seq.* (pertaining to the healing arts), or an initiative act referred to in such statutes, from taking disciplinary action against a licensee for professional misconduct, notwithstanding that evidence of that misconduct may be recorded in a record pertaining to an arrest [*Bus. & Prof. Code § 492* (exception for program operated by agency)].

[9] Evidence

When an administrative agency initiates an action to suspend or revoke a license, the burden of proving the facts necessary to support the action rests with the agency making the allegation. Until the agency has met its burden of going forward with the evidence necessary to sustain a finding, the licensee has no duty to rebut the allegations or otherwise respond [*Daniels v. Department of Motor Vehicles (1983) 33 Cal. 3d 532, 536, 189 Cal. Rptr. 512, 658 P.2d 1313]* . The burden of proof in administrative proceedings involving the revocation or suspension of a professional license is clear and convincing proof to a reasonable certainty [*James v. Board of Dental Examiners (1985) 172 Cal. App. 3d 1096, 1105, 218 Cal. Rptr. 710]* . Hearsay evidence alone is insufficient to support revocation of a license [*Nardoni v. McConnell (1957) 48 Cal. 2d 500, 504, 310 P.2d 644* ; *Carl S. v. Commission for Teacher Preparation & Licensing (1981) 126 Cal. App. 3d 365, 369, 178 Cal. Rptr. 753* ; *see also Dyer v. Watson (1953) 121 Cal.App. 2d 84, 92, 262 P.2d 873* (mere uncorroborated hearsay does not constitute substantial evidence)]. If review of a recommendation of a disciplinary board is sought, the burden is on the one seeking review to show that the board's findings are not supported by the evidence or that its recommendation is erroneous or unlawful [*Simmons v. State Bar (1969) 70 Cal. 2d 361, 364, 74 Cal. Rptr. 915, 450 P.2d 291]* .

For further discussion of procedures under *Gov. Code § 11500 et seq.* in a proceeding to revoke or suspend a license, see Ch. 473, *Public Agency Adjudication* , et seq.

[10] Information to Ex-Licensee

On suspension or revocation of a license by an agency on one or more of the grounds specified in *Bus. & Prof. Code § 490* (that is, a criminal conviction), the agency must send the following items to the ex-licensee [*Bus. & Prof. Code § 491*]:

- A copy of the provisions of *Gov. Code § 11522*, regarding the requirements for restoration of rights [for discussion of restoration of rights, *see* § 473.35].

- A copy of the criteria relating to rehabilitation formulated by the agency under *Bus. & Prof. Code § 482* [for discussion of *Bus. & Prof. Code § 482, see § 471B.40[6][d]*].

[11] Interim Suspension or Restrictions

[a] General Requirements

A board or an administrative law judge sitting alone may, on receiving a petition, issue an interim order suspending any licensee or imposing license restrictions, including, but not limited to, mandatory biological fluid testing, supervision, or remedial training [*Bus. & Prof. Code § 494(a)*]. "Board" includes an allied health agency within the jurisdiction of the Medical Board of California and also the Osteopathic Medical Board of California and the State Board of Chiropractic Examiners. The procedures described here are not applicable to the Medical Board of California, the Board of Podiatric

Medicine, or the State Athletic Commission [*Bus. & Prof. Code § 494(m)*].

For discussion of similar procedures that are applicable to the Medical Board of California and the Board of Podiatric Medicine [*see Gov. Code § 11529*; *see also* Ch. 414, *Physicians: Licensing and Discipline*].

[b] Petition for Interim Order of Suspension or Restrictions

In the case of a board, a petition for an interim order may be filed by the executive officer. In the case of a bureau or program, a petition may be filed by the chief or program administrator, as the case may be [*Bus. & Prof. Code § 494(l)*]. The petition must include affidavits that demonstrate to the satisfaction of the board both of the following:

- The licensee has engaged in acts or omissions constituting a violation of a provision of the Business and Professions Code or has been convicted of a crime substantially related to licensed activity [*Bus. & Prof. Code § 494(a)(1)*]. A plea or verdict of guilty or a conviction after a plea of *nolo contendere* is deemed to be a conviction. A certified record of the conviction is conclusive evidence of the fact that the conviction occurred. A board may take action on a petition for an interim order for suspension or restrictions notwithstanding the fact that an appeal of the conviction may be taken [*Bus. & Prof. Code § 494(j)*].

- That permitting the licensee to continue to engage in the licensed activity, or permitting the licensee to continue in the licensed activity without restrictions, would endanger the public health, safety, or welfare [*Bus. & Prof. Code § 494(a)(2)*].

[c] Notice of Hearing on Petition

No interim order may be issued without notice to the licensee unless it appears from the petition and supporting documents that serious injury would result to the public before the matter could be heard on notice [*Bus. & Prof. Code § 494(b)*].

Normally the licensee must be given at least 15 days' notice of the hearing on the petition for an interim order. The notice must include documents submitted to the board in support of the petition. If the order was initially issued without notice, the licensee is entitled to a hearing on the petition within 20 days after the issuance of the interim order. The licensee must be given notice of the hearing within two days after issuance of the initial interim order and must receive all documents in support of the petition. The failure of the board to provide a hearing within 20 days following the issuance of the interim order without notice, unless the licensee waives his or her right to the hearing, results in the dissolution of the interim order by operation of law [*Bus. & Prof. Code § 494(c)*].

[d] Hearing on Petition

At the hearing on the petition for an interim order, the licensee may [*Bus. & Prof. Code § 494(d)*]:

- Be represented by counsel.

- Have a record made of the proceedings, copies of which must be available to the licensee upon payment of costs computed in accordance with the provisions for transcript costs for judicial review contained in the Administrative Procedure Act [*see Gov. Code § 11523*].

- Present affidavits and other documentary evidence.

- Present oral argument.

[e] Decision on Petition

The board or an administrative law judge sitting alone must issue a decision on the petition for an interim order within five business days following submission of the matter. The standard of proof required to obtain an interim order is a preponderance of the evidence. If the interim order was previously issued without notice, the board must determine whether the order will remain in effect, be dissolved, or be modified [*Bus. & Prof. Code § 494(e)*].

[f] Accusation Following Issuance of Interim Order

The board must file an accusation within 15 days after the issuance of an interim order. In the case of an interim order issued without notice, the time runs from the date of the order issued after the noticed hearing. If the licensee files a notice of defense, the hearing must be held within 30 days after the agency's receipt of the notice of defense. A decision must be rendered on the accusation no later than 30 days after submission of the matter. Failure to comply with any of these requirements results in the dissolution of the interim order by operation of law [*Bus. & Prof. Code § 494(f)*].

[g] Judicial Review of Interim Orders

Interim orders are subject to judicial review pursuant to the administrative mandamus statute [*see Code Civ. Proc. § 1094.5*]. The petition for review must be heard only in the superior court in either Sacramento County, San Francisco, Los Angeles County, or San Diego County. The review of an interim order must be limited to a determination of whether the board abused its discretion in the issuance of the interim order. Abuse of discretion is established if the respondent board has not proceeded in the manner required by law or if the court determines that the interim order is not supported by substantial evidence in light of the whole record [*Bus. & Prof. Code § 494(g)*].

[h] Role of Administrative Law Judge

The board may, in its sole discretion, delegate the hearing on any petition for an interim order to an administrative law judge in the Office of Administrative Hearings. If the board hears the noticed petition itself, an administrative law judge must preside at the hearing, rule on the admission and exclusion of evidence, and advise the board on matters of law. The board must exercise all other powers relating to the conduct of the hearing but may delegate any or all of them to the administrative law judge.

When the petition has been delegated to an administrative law judge, he or she must sit alone and exercise all of the powers of the board relating to the conduct of the hearing. A decision issued by an administrative law judge sitting alone is final when it is filed with the board. If the administrative law judge issues an interim order without notice, he or she must preside at the noticed hearing if available, otherwise another administrative law judge may hear the matter. The decision of the administrative law judge sitting alone, on the petition for an interim order, is final, subject only to judicial review [*Bus. & Prof. Code § 494(h)*].

[i] Noncompliance With Interim Order

Failure to comply with an interim order constitutes a separate cause for disciplinary action against any licensee, which may be heard at, and as a part of, the noticed hearing on the accusation. Allegations of noncompliance with the interim order may be filed at any time before the rendering of a decision on the accusation. Violation of the interim order is established on proof that the licensee was on notice of the interim order and its terms and that the order was in effect at the time of the violation. The finding of a violation of an interim order made at the hearing on the accusation must be reviewed as a part of any review of a final decision of the agency [*Bus. & Prof. Code § 494(i)*].

If the interim order issued by the agency provides for anything less than a complete suspension of the licensee from his or her business or profession, and the licensee violates the interim order before the hearing on the accusation, the agency may, upon notice to the licensee and proof of the violation, modify or expand the interim order [*Bus. & Prof. Code §*

494(i)]. Interim orders for suspension or restrictions are in addition to, and not a limitation on, the authority to seek injunctive relief provided in any other provision of law [*Bus. & Prof. Code § 494(k)*].

[12] Summary Suspension

The Court of Appeal upheld the authority of a hospital peer review committee to summarily suspend a doctor's hospital clinical privileges to protect the well-being of prospective patients at that hospital. The doctor suffered from depression, mental distress, and severe family and personal stresses, that made it very difficult for her to act professionally toward her patients. The hospital acted under the statutory authority of *Bus. & Prof. Code § 809.5*, which authorized medical peer review bodies to suspend clinical privileges of a doctor immediately when there was imminent danger to the health of any person. The hospital based its suspension decision on the risks to prospective patients at the hospital. The court of appeal held that harm to prospective patients was within the scope of the hospital peer review body's authority to summarily suspend a physician, given that the needs of public safety outweigh the doctor's due process rights [*MedicalStaff of Sharp Mem'l Hosp. v. Superior Court (2004) 121 Cal. App. 4th 173, 181-183, 16 Cal. Rptr. 3d 769]* .

[13] Public Reprovals

Notwithstanding any other provision of law, any entity authorized to issue a license or certificate pursuant to the Business and Professions Code may publicly reprove a licentiate or certificate holder under that code, for any act that would constitute grounds to suspend or revoke a license or certificate. Any proceedings for public reproval, public reproval and suspension, or public reproval and revocation must be conducted in accordance with *Gov. Code § 11500 et seq.* [*Bus. & Prof. Code § 495*; for discussion of *Gov. Code § 11500 et seq., see* Ch. 473, *Public Agency Adjudication* , et seq.].

[14] Reinstatement of License

If a person's license is revoked, and he or she later seeks reinstatement of the license, the person has no greater rights than a person seeking an original license [*Crandell v. Fox (1978) 86 Cal. App. 3d 760, 763, 150 Cal. Rptr. 426* ; *Housman v. Board of Medical Examiners (1948) 84 Cal. App. 2d 308, 312, 190 P.2d 653]* .

For forms of petition for reconsideration or restoration of rights, see *Ch. 473G, Agency Adjudication Decisions, §§ 473G.70, 473G.71*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewAdministrative LawAgency AdjudicationHearingsRight to HearingGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawJudicial ReviewRemediesMandamusBankruptcy LawDischarge & DischargeabilityGeneral OverviewCriminal Law & ProcedurePreliminary ProceedingsPretrial DiversionGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesHealthcare LawBusiness Administration & OrganizationHospital PrivilegesProfessional ReviewHealthcare LawBusiness Administration & OrganizationLicensesRevocation & SuspensionTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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[Reserved]

§§ 471B.54[Reserved]

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41-471B California Forms of Pleading and Practice--Annotated § 471B.60

§ 471B.60 Judicial Review by Writ of Mandate

[1] Administrative Mandate

A writ of mandate under *Code Civ. Proc. § 1094.5* (commonly termed the "writ of administrative mandate") provides the basic framework by which an aggrieved party to an administrative proceeding may seek judicial review of any final order or decision rendered by a state or local agency [*Bixby v. Pierno (1971) 4 Cal. 3d 130, 137, 93 Cal. Rptr. 234, 481 P.2d 242* ; *see Code Civ. Proc. §§ 1084-1097, 1107-1109*]. It is the proper method to seek review of a decision denying an application for a license [*Savelli v. Board of Medical Examiners (1964) 229 Cal. App. 2d 124, 142, 40 Cal. Rptr. 171]* , or an order revoking or suspending a license [*Dare v. Bd. of Medical Examiners (1943) 21 Cal. 2d 790, 795-796, 136 P.2d 304]* .

For forms of a petition for a writ of administrative mandate and of an alternative writ of mandate for use after the denial of a license application, see *§§ 471B.104, 471B.105*. For forms of petition for a writ of administrative mandate and of alternative writs of mandate for use after the revocation or suspension of a license, see *§§ 471B.106, 471B.111*.

For detailed discussion and forms relating to judicial review of administrative adjudications, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

[2] Ordinary Mandate

If an agency's action is quasi-legislative (e.g., the adoption of regulations) or merely ministerial (*i.e.*, action involving no exercise of discretion in its performance), and does not make a determination within its quasi-judicial function, an action for traditional mandate under *Code Civ. Proc. § 1085* is appropriate [*Rich v. State Bd. of Optometry (1965) 235 Cal. App. 2d 591, 600-602, 45 Cal. Rptr. 512* ; *see* Ch. 358, *Mandate and Prohibition*]. For forms of a petition for mandate and of an alternative writ of mandate for use to compel an agency to act on a license application, see *§§ 471B.100, 471B.101*. For forms for use to compel an agency to set aside a summary denial of an application, see *§§ 471B.102, 471B.103*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicenses

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§ 471B.61 Review Governed by Special Statutes

In some instances, review may be governed by a special statute. For example, in a mandate proceeding to review a decision by the Medical Board of California to deny an application for a license, a statutory provision requires the use the substantial evidence test and may not use the independent judgment test [*Bus. & Prof. Code § 2087*; *see* further discussion of standards of review in partidcular situations in Ch. 474B, *Standards in Reviewing Agency Decisions*].

Venue is also limited by statute to the superior courts located in the cities of Los Angeles, Sacramento, San Diego, and San Francisco [*Bus. & Prof. Code §§ 2019, 2087*].

Any person refused certification to the Supreme Court for admission to practice law may have the action of the Board of Governors of the State Bar, or of the Committee of Bar Examiners, reviewed by the Supreme Court, in accordance with the procedure prescribed by the court. These actions are now directed to the State Bar Court prior to discretionary review by the Supreme Court [*Bus. & Prof. Code § 6066*; *see Cal. Rules of Ct., Rule 9.13* (procedure); *see generally* Ch. 71, *Attorney Discipline*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewReviewabilityJurisdiction & VenueAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesHealthcare LawBusiness Administration & OrganizationLicensesGeneral OverviewLegal EthicsPractice Qualifications

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§ 471B.62 Agency Decisions Not Subject to Review by Director of Consumer Affairs

[1] General Rule

Except as provided in *Bus. & Prof. Code § 109(b), (c)* (discussed under [2], *below*), the decisions of any of the agencies in the Department of Consumer Affairs [*see Bus. & Prof. Code § 101* (list of included agencies)] with respect to setting standards, conducting examinations, passing candidates, and revoking licenses are not subject to review by the Director of Consumer Affairs but are final within the limits provided by the Business and Professions Code that are applicable to the particular agency [*Bus. & Prof. Code § 109(a)*].

[2] Exceptions for Director's Investigation or Intervention

The director may initiate an investigation of any allegations of misconduct in the preparation, administration, or scoring of an examination that is administered by a board, or in the review of qualifications that are a part of the licensing process of any board. The director initiates an investigation by requesting one, and makes the request either of the Division of Investigation through the chief of the division or of any law enforcement agency in the jurisdiction in which the alleged misconduct occurred [*Bus. & Prof. Code § 109(b)*].

Additionally, the director may intervene in any matter of any board when an investigation by the Division of Investigation discloses probable cause to believe that the conduct or activity of a board, or its members or employees, constitutes a violation of criminal law. In this context, "intervene" may include, but is not limited to, an application for a restraining order or injunctive relief as specified in *Bus. & Prof. Code § 123.5* (availability of injunctive relief to restrain or enjoin conduct that subverts or attempts to subvert any licensing examination or the administration of an examination) [*Bus. & Prof. Code § 109(c)*; *see Bus. & Prof. Code §§ 123* (conduct constituting subversion of licensing examinations or administration of examinations), 123.5 (injunctive relief to restrain or enjoin that conduct), both discussed in *§ 471B.40[9], above*]. For the purposes of *Bus. & Prof. Code § 109*, the director is deemed to have standing under *Bus. & Prof. Code § 123.5*. In the event of a conflict in pursuing an action thereunder, the director is required to seek representation of the Attorney General or other appropriate counsel [*Bus. & Prof. Code § 109(c)*]. Intervention may also include, but is not limited to, a referral or request for criminal prosecution [*Bus. & Prof. Code § 109(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency InvestigationsGeneral OverviewAdministrative LawJudicial ReviewReviewabilityGeneral OverviewCivil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewGovernmentsState & Territorial GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsLicenses

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[Reserved]

§§ 471B.63[Reserved]

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41-471B California Forms of Pleading and Practice--Annotated § 471B.70

§ 471B.70 Basic Remedies Against Violator

[1] Injunctive Relief

[a] Violation of Provisions Enforced by Department of Consumer Affairs

The superior court in the county in which any person has engaged or is about to engage in any act that constitutes a violation of a chapter of the Business and Professions Code administered or enforced by an agency in the Department of Consumer Affairs [*see Bus. & Prof. Code § 101* (list of included agencies); *see also* a list of the more significant subagencies in this department in Ch. 470, *Overview of Public Administrative Law*, § 470.20[2]] may, on a petition filed by the agency with the approval of the Director of Consumer Affairs, issue an injunction or other appropriate order restraining that conduct.

The injunction proceedings are governed by *Code Civ. Proc. § 525 et seq.* [*Bus. & Prof. Code § 125.5(a)*]. For discussion of procedures for obtaining injunctions generally, see Ch. 303, *Injunctions* .

In certain cases, an agency may have specific statutory authority to pursue injunction proceedings in a manner other than that specifically provided by *Bus. & Prof. Code § 125.5*. For instance, the Medical Board of California is authorized to sue without first obtaining permission from the Director of Consumer Affairs [*see Bus. & Prof. Code § 2311*; *see also Code Civ. Proc. § 1859* (when general and specific statutory provisions are inconsistent, specific provision controls over general provision)].

In some cases licensees are empowered to sue. For example, ten or more licensed physicians and surgeons may sue to enjoin a violation by a fellow licensee of the licensing requirements of the Medical Practice Act [*see Bus. & Prof. Code § 2311*]. Injunctive relief is also available when a person engages, or is about to engage in conduct that subverts a licensing examination [*see* discussion in *§ 471B.40[9]*].

[b] Violation of Provisions Enforced by Boards Overseeing Healing Arts or Professions and Vocations Generally

Temporary restraining orders or other injunctive relief similar to that available under *Bus. & Prof. Code § 125.5* [*see* [1][a], *above*] is also available for violations of provisions administered or enforced by a board referred to in *Bus. & Prof. Code § 500 et seq.* (boards governing the healing arts) or *Bus. & Prof. Code § 5000 et seq.* (boards governing the professions and vocations generally) [*see Bus. & Prof. Code §§ 125.7* (restraining order procedure for healing arts boards), 125.8 (restraining order procedure for professions and vocations boards)].

[2] Restitution

The superior court in the county in which any person has engaged in any act that constitutes a violation of a chapter of the Business and Professions Code administered or enforced by an agency in the Department of Consumer Affairs [*see Bus. & Prof. Code § 101* (list of included agencies); *see also* a list of the more significant subagencies within this department in Ch. 470, *Overview of Public Administrative Law*, § 470.20[2]] may, on a petition filed by the agency with the approval of the Director of Consumer Affairs, order that person to make restitution to persons injured as a result of the violation [*Bus. & Prof. Code § 125.5(b)*].

[3] Reimbursement of Agency's Expenses

The court may order a person subject to an injunction or restraining order under *Bus. & Prof. Code § 125.5(a)* [*see* [1], *above*] or subject to an order requiring restitution under *Bus. & Prof. Code § 125.5(b)* [*see* [2], *above*], to reimburse the petitioning agency for expenses incurred by the agency in its investigation related to its petition [*Bus. & Prof. Code § 125.5(c)*].

Additionally, except when a specific statutory provision in a specific board's licensing act provides for recovery of costs in an administrative disciplinary proceeding [*see Bus. & Prof. Code § 125.3(j)*] and except as otherwise provided by law, in any order issued in resolution of a disciplinary proceeding before any board within the Department of Consumer Affairs or before the Osteopathic Medical Board or the board created by the Chiropractic Initiative Act the board may request the administrative law judge to direct a licentiate found to have committed one or more violations of the licensing act to pay a sum not exceeding the reasonable costs of the investigation and enforcement of the case [*Bus. & Prof. Code § 125.3(a)*]. If the disciplined licentiate is a corporation or a partnership, the order may be made against the licensed corporate entity or licensed partnership [*Bus. & Prof. Code § 125.3(b)*].

A certified copy of the actual costs, or a good faith estimate of costs when actual costs are not available, signed by the entity bringing the proceeding or its designated representative is prima facie evidence of the reasonable costs of investigation and prosecution of the case. Costs include the amount of investigative and enforcement costs up to the date of the hearing, including, but not limited to, charges imposed by the Attorney General [*Bus. & Prof. Code § 125.3(c)*].

The administrative law judge must make a proposed finding of the amount of reasonable costs of investigation and prosecution of the case when requested by the board [*Bus. & Prof. Code § 125.3(d)*; for discussion of the proposed finding requirement in general under the Administrative Procedure Act, *see* Ch. 473G, *Agency Adjudication Decisions*]. This finding is not reviewable by the board to increase the cost award. The board may, however, reduce or eliminate the award or remand to the administrative law judge if the proposed decision fails to make the requested finding on costs [*Bus. & Prof. Code § 125.3(d)*].

When an order for recovery of costs is made and timely payment is not made as directed in the board's decision, the board may enforce the order for repayment in any appropriate court. This enforcement right is in addition to any other rights the board may have as to any licentiate to pay costs [*Bus. & Prof. Code § 125.3(e)*; *see* discussion in [4], *below*]. In any action for recovery of costs, proof of the board's decision is conclusive proof of the validity of the order and terms for payment [*Bus. & Prof. Code § 125.3(f)*].

As a general rule, the board cannot renew or reinstate the license of any licentiate who has failed to pay all *Bus. & Prof. Code § 125.3* costs as ordered [*Bus. & Prof. Code § 125.3(g)(1)*]. In its discretion, however, the board may conditionally renew or reinstate, for a maximum of one year, the license of a licentiate who demonstrates financial hardship and who enters into a formal agreement with the board to reimburse the board within that one-year period for the unpaid costs [*Bus. & Prof. Code § 125.3(g)(2)*]. All costs recovered under *Bus. & Prof. Code § 125.3* are considered a reimbursement for costs incurred and must be deposited in the fund of the board recovering the costs to be available on appropriation by the Legislature [*Bus. & Prof. Code § 125.3(h)*]. Nothing in *Bus. & Prof. Code § 125.3* prevents a board from including the recovery of the costs of investigation and enforcement of a case in any stipulated settlement [*Bus. & Prof. Code § 125.3(i)*].

Chiropractic Board order requiring a disciplined chiropractor to pay $17,500 costs to reimburse the Board for pre hearing investigative and prosecution costs in his case was challenged on grounds that the regulation which authorized payment of pre hearing costs, *16 Cal. Code Reg. § 317.5*, was facially unconstitutional because it violated the due process of law rights of the chiropractor ordered to pay those costs. The due process of law violation alleged was that the prospect of having to pay such costs would discourage chiropractors from requesting hearings when facing discipline charges brought by the Board. The California Supreme court rejected this claim, and held that the regulation is not unconstitutional on its face, and did not violate due process of law [*Zuckerman v. State Board of Chiropractic Examiners (2002) 29 Cal. 4th 32, 46-48, 124 Cal. Rptr. 2d 701, 53 P. 3d 119]* . The Court analyzed the due process claim based on the three factors set forth in the US Supreme Court decision in *Mathews v. Eldridge (1976) 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18* , and concluded that the discretionary nature of the authority to award costs and the availability of judicial review to challenge specific costs orders reduced the risk of error for such orders and satisfied due process of law requirements [*Zuckerman v. State Board of Chiropractic Examiners (2002) 29 Cal. 4th 32, 44-46, 124 Cal. Rptr. 2d 701, 53 P.3d 119]* .

[4] Cumulation of Remedies

The remedies provided for in *Bus. & Prof. Code § 125.5*, injunctive relief and restitution, are cumulative and may be pursued in addition to any other remedy authorized by the Business and Professions Code [*Bus. & Prof. Code § 125.5(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsGeneral OverviewAdministrative LawJudicial ReviewReviewabilityGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsGovernmentsState & Territorial GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsLicensesHealthcare LawBusiness Administration & OrganizationLicensesRequirements

California Forms of Pleading and Practice--Annotated

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Volume 41: Overview of Public Administrative Law thru Review of Agency Rulemaking-Chs. 470-472B
Chapter 471B LICENSING BY PUBLIC AGENCIES
PART II. LEGAL BACKGROUND
F. Violation of License Requirement

41-471B California Forms of Pleading and Practice--Annotated § 471B.71

§ 471B.71 Issuance of Citation by Agency

[1] Licensee

Any board, bureau, or commission within the Department of Consumer Affairs, the Osteopathic Medical Board, or the board created by the Chiropractic Initiative Act, that does not have an existing system for issuance of citations to order abatement or to impose an administrative fine may establish a regulatory system for the issuance of citations to licensees, other than collection agencies, repossessors, private detectives, alarm companies, and employment agencies licensed under former *Bus. & Prof. Code § 9941(b)(1)* (general), (6) (employer retained), or (7) (nurses' registry [repealed 1989]). The citation may contain an order of abatement or an order to pay an administrative fine assessed by the issuing entity if the licensee is in violation of the applicable licensing act or any related regulation [*Bus. & Prof. Code § 125.9(a)*; *see Bus. & Prof. Code § 12.5* (power to issue citation for violation of statute includes power to issue citation for violation of regulation adopted pursuant to statute)].

A citation must describe in writing the violation with specificity and, if appropriate, fix a reasonable time for abatement [*Bus. & Prof. Code § 125.9(b)(1), (2)*]. The maximum fine that may be imposed is $2,500 for each inspection or investigation [*Bus. & Prof. Code § 125.9(b)(3)* (fine of $2,500 authorized, however, for each violation or count of fraudulent billing)]. The citation must also inform the licensee of his or her right to a hearing to contest the finding of violation and that a hearing must be requested within 30 days of the date of issuance of the citation or assessment. Hearings are subject to the provisions of *Gov. Code § 11500 et seq.* If no hearing is requested, payment of the fine shall not constitute an admission of the violation charged. Failure to pay the fine may result in disciplinary action [*Bus. & Prof. Code § 125.9(b)(4), (5)*].

[2] Unlicensed Person

[a] Acting in Capacity of Licensee

Any board, bureau, or commission with the Department of Consumer Affairs may establish, by regulation, a system for the issuance of a citation to an unlicensed person similar to that discussed in [1], *above*, other than those exempted from the provisions of the applicable licensing act, acting in the capacity of a licensee or registrant under the jurisdiction of

that board, bureau, or commission. Any administrative citation system so adopted must meet the requirements of *Bus. & Prof. Code § 125.9*. The adoption of the administrative citation system does not preclude the use of other enforcement statutes for unlicensed activities, at the discretion of the adopting board, bureau, or commission [*Bus. & Prof. Code § 148*].

[b] Advertising in Telephone Directory

In addition to the administrative citation systems of *Bus. & Prof. Code §§ 125.9* and *148*, an agency in the Department of Consumer Affairs listed in *Bus. & Prof. Code § 149(e)* may issue a citation to a person who the agency believes is advertising in a telephone directory concerning the offer or performance of services that the person is not properly licensed to offer or perform [*Bus. & Prof. Code § 149(a)*]. The following agencies are authorized to issue these citations [*Bus. & Prof. Code § 149(e)*]:

- The Bureau of Barbering and Cosmetology.
- The Cemetery and Funeral Bureau.
- The Veterinary Medical Board.
- The Hearing Aid Dispensers Advisory Committee.
- The Landscape Architects Technical Committee.
- The California Board of Podiatric Medicine.
- The Respiratory Care Board of California.
- The Bureau of Electronic and Appliance Repair, Home Furnishings, and Thermal Insulation.
- The Bureau of Security and Investigative Services.
- The Bureau of Automotive Repair.
- The California Architects Board.
- The Speech-Language Pathology and Audiology Board.
- The Board for Professional Engineers and Land Surveyors.
- The Board of Behavioral Sciences.
- The Structural Pest Control Board within the Department of Pesticide Regulation.
- The Acupuncture Board.
- The Board of Psychology.
- The California Board of Accountancy.
- The Naturopathic Medicine Committee.

The citation can only by issued after investigation and with probable cause that the person is so advertising. Furthermore, the citation can both order the person to cease the advertising and request that the telephone company furnishing services to the person disconnect telephone service to any number contained in the advertising [*Bus. & Prof. Code § 149(a)*].

The person cited can contest the citation. To do so, he or she must notifiy the agency in writing that he or she intends to contest. Thereafter, the agency must afford the person an opportunity for a hearing, as specified in *Bus. & Prof. Code § 125.9* (discussed under [1], *above*). The action required by the citation is stayed pending the hearing [*Bus. & Prof. Code § 149(b)*].

If the person to whom a citation and order of correction is issued fails to comply with order of correction after that order becomes final, the agency must inform the Public Utilities Commission of the violation. The Public Utilities Commission, in turn, must require the telephone company furnishing service to the cited person to disconnect telephone service to any number contained in the advertising. The good faith compliance by a telephone corporation with an order of the Public Utilities Commission to terminate service is a complete defense to any civil or criminal action brought against the telephone corporation arising from the termination of service [*Bus. & Prof. Code § 149(c), (d)*].

[3] Business Dealings With Violator of Licensing Law

Notwithstanding any other provision of law, it is a misdemeanor to sell equipment, supplies, or services to any person with knowledge that the equipment, supplies, or services are to be used in the performance of a service or contract in violation of the licensing requirements of the Business and Professions Code; however, it is not unlawful to make cash sales of less than $100 [*Bus. & Prof. Code § 128*]. On the other hand, since the purpose of a licensing law is to protect the public, a person who patronizes an unlicensed professional or business person cannot be deemed implicated in any offense against the licensing law involved and cannot be prosecuted for conspiring to violate that law [*In re Marriage of Russo (1971) 21 Cal. App. 3d 72, 92, 98 Cal. Rptr. 501]* .

[4] Availability of Treble Damages When Injury or Damage Caused by Unlicensed Person

Any unlicensed person who causes injury or damage to another person as a result of providing goods or performing services for which a license is required under *Bus. & Prof. Code § 500 et seq.* (healing arts) or any initiative act referred to therein, *Bus. & Prof. Code § 5000 et seq.* (professions and vocations generally), *Bus. & Prof. Code § 18600 et seq.* (boxing and wrestling), or *Bus. & Prof. Code § 19000 et seq.* (home furnishings) is liable to the injured person for treble the amount of damages assessed in a civil action in any court having proper jurisdiction [*Code Civ. Proc. § 1029.8(a)*].

The court may, in its discretion, award all costs and attorney's fees to the injured person if that person prevails in the action [*Code Civ. Proc. § 1029.8(a)*]. The additional damages provided by *Code Civ. Proc. § 1029.8(a)* cannot exceed $10,000 [*Code Civ. Proc. § 1029.8(c)*]. Also, *Code Civ. Proc. § 1029.8(a)* does not confer an additional cause of action or affect or limit any other remedy including, but not limited to, a claim for exemplary damages [*Code Civ. Proc. § 1029.8(b)*].

For the purposes of imposing treble damages under *Code Civ. Proc. § 1029.8*, the term "unlicensed person" does not apply to any of the following [*Code Civ. Proc. § 1029.8(d)*]:

- Any person, partnership, corporation, or other entity providing goods or services under the good faith belief that it is properly licensed and acting within the proper scope of that licensure.

- Any person, partnership, corporation, or other entity whose license has expired for nonpayment of license renewal fees, but who is eligible to renew that license without the necessity of applying and

qualifying for the original license.

- Any person, partnership, or corporation licensed under *Bus. & Prof. Code § 2700 et seq.* (nursing) or 2840 et seq. (vocational nursing) who provides professional nursing services under an existing license, if the action arises from a claim that the licensee exceeded the scope of practice authorized by his or her license.

Code Civ. Proc. § 1029.8 does not apply to any action for unfair trade practices brought against an unlicensed person under the Unfair Practices Act (*Bus. & Prof. Code § 17000 et seq.*) by a person who holds a license that is required, or closely related to the license that is required, to engage in those activities performed by the unlicensed person [*Code Civ. Proc. § 1029.8(e)*]. For a form of allegation that treble damages under *Code Civ. Proc. § 1029.8* are appropriate in a given case, see Ch. 177, *Damages* , Pt I.

[5] Recovery of Compensation by Unlicensed Person

[a] Required Allegation and Proof

Bus. & Prof. Code § 143 requires a party seeking to collect compensation for the performance of an act or contract for which a license is required to allege and prove that he or she was duly licensed at all times during the performance of the act or contract for which a license is required, regardless of the merits of the cause of action brought by the person [*Bus. & Prof. Code § 143(a)*]. This requirement applies in any action for compensation brought in a California court, whether in law or in equity, to persons engaged in any business or profession for which a license is required by the Department of Consumer Affairs or by an entity within the Department [*Bus. & Prof. Code § 143(a)*].

The judicial doctrine of substantial compliance does not apply to the requirements of allegation and proof under *Bus. & Prof. Code § 143* [*Bus. & Prof. Code § 143(b)*]. *Bus. & Prof. Code § 143* does not apply to an act or contract that is considered to qualify as a lawful practice of a licensed occupation or profession pursuant to *Bus. & Prof. Code § 121*, that is, practice of an occupation or profession during the period between renewal of a license and receipt of evidence of renewal [*Bus. & Prof. Code §§ 121, 143(c)*].

For a form of demurrer based on the ground that the plaintiff has failed to comply with *Bus. & Prof. Code § 143*, see *§ 471B.119*.

[b] Contractual Disability

Some licensing laws penalize a failure to obtain a license by disabling the person, who should have obtained a license, from suing on any contract for services requiring a license [*see, e.g., Bus. & Prof. Code § 7031* (contractors)]. The operation of these types of laws has been extended to a surety company that undertook to complete its principal's performance of a (construction) contract. Since the surety was unlicensed, it was not permitted to recover [*General Ins. Co. of America v. St. Paul Fire & Marine Ins. Co. (1974) 38 Cal. App. 3d 760, 765, 113 Cal. Rptr. 613]* .

The statement that contracts made by unlicensed persons are void when the governing law includes such a disability provision, which is sometimes found in cases [*see, e.g., Wood v. Krepps (1914) 168 Cal. 382, 386, 143 P. 691]* , is not literally true. Whereas the unlicensed party is disabled from suing on such a contract, he or she is nevertheless subject to being sued by the other party. The contract is not void; it is merely unenforceable by one of the parties [*see Holland v. Morgan & Peacock Properties (1959) 168 Cal. App. 2d 206, 211, 335 P.2d 769]* .

For a form of affirmative defense to allege that a contract action is brought by an unlicensed person, see § 471B.188.

[6] Crimes Involving License Certificates

Any person who does any of the following is guilty of a misdemeanor:

- Displays or causes or permits to be displayed or has in his or her possession either (a) a canceled, revoked, supspended, or fraudulently altered license or (b) a fictitious license or any document simulating a license certificate or purporting to be or to have been issued as a license certificate, provided that the surviving spouse of a deceased accountant may possess or display a certificate officially canceled by the Board of Accountancy [*Bus. & Prof. Code §§ 119(a), 120*].

- Lends his or her license certificate to any other person or knowingly permits the use of it by another [*Bus. & Prof. Code § 119(b)*].

- Displays or represents any license certificate not issued to him or her as being his or her own [*Bus. & Prof. Code § 119(c)*].

- Fails or refuses to surrender to the issuing agency on its lawful demand any license certificate that has been suspended, revoked, or canceled [*Bus. & Prof. Code § 119(d)*].

- Knowingly permits any unlawful use of a license certificate issued to him or her [*Bus. & Prof. Code § 119(e)*].

- Photographs, photostats, duplicates, or in any way reproduces any license certificate or facsimile of a license certificate in such a manner that it could be mistaken for a valid license certificate or displays or has in his or her possession any such photograph, photostat, duplicate, reproduction, or facsimile unless authorized by the Business and Professions Code [*Bus. & Prof. Code § 119(f)*].

- Buys or receives a fraudulent, forged, or counterfeited license knowing that it is fraudulent, forged, or counterfeited. Fraudulent means to contain any misrepresentation of fact [*Bus. & Prof. Code § 119(g)*].

[7] Criminal Prosecution of Unlicensed Persons

[a] General Requirements

Every person who practices, offers to practice, or advertises any business, trade, profession, occupation, or calling, or who uses any title, sign, initials, card, or device to indicate that he or she is qualified to practice any business, trade, profession, occupation, or calling for which a license, registration, or certificate is required by any California law, without holding a current and valid license, registration, or certificate as prescribed by law, is guilty of a misdemeanor [*Bus. & Prof. Code § 16240*; *see In re Groves (1960) 54 Cal. 2d 154, 158, 4 Cal. Rptr. 844, 351 P.2d 1028 , cert. denied sub nom., Groves v. Kettmann (1960) 364 U.S. 900, 81 S. Ct. 238, 5 L. Ed. 2d 196* (*Bus. & Prof. Code § 16240* as encompassing violations of county or municipal licensing ordinances, as well as statewide laws)].

[b] Infraction Procedure for Specified Violations

Notwithstanding any other provision of law, unlicensed activity in specified businesses and professions regulated by the Department of Consumer Affairs and in violation of the licensing statutes set forth in *Bus. & Prof. Code § 146(c)* is an infraction subject to the procedures of *Penal Code §§ 19.6* (infractions not punishable by imprisonment) and 19.7 (application of misdemeanor laws to infractions) [*Bus. & Prof. Code § 146(a)*].

The infraction procedure applies to the following persons practicing in violation of registration, licensing, certification, or other authorization requirements:

- Acupuncturists [*see Bus. & Prof. Code §§ 146(c)(7), 4935*].
- Architects [*see Bus. & Prof. Code §§ 146(c)(10), 5536*].
- Barbering, cosmetology, and electrolysis practitioners [*see Bus. & Prof. Code §§ 146(c)(13), 7317*].
- Cemetery brokers and cemetery salespersons [*see Bus. & Prof. Code §§ 146(c)(21), 9681*].
- Civil, electrical, and mechanical engineers [*see Bus. & Prof. Code §§ 146(c)(11), 6704*].
- Clinical social workers [*see Bus. & Prof. Code §§ 146(c)(9), 4996*].
- Funeral directors and embalmers [*see Bus. & Prof. Code §§ 146(c)(16), 7617, 7641*].
- Geologists and geophysicists [*see Bus. & Prof. Code §§ 146(c)(17), 7872(a)*].
- Home furnishings workers [*see Bus. & Prof. Code §§ 146(c)(24), 19049*].
- Land surveyors [*see Bus. & Prof. Code §§ 146(c)(20), 8725*].
- Locksmiths [*see Bus. & Prof. Code §§ 146(c)(12), 6980.10*].
- Marriage, family, and child counselors [*see Bus. & Prof. Code §§ 146(c)(18), 4980*].
- Medical practitioners (physicians and surgeons) [*see Bus. & Prof. Code §§ 146(c)(1), 2052, 2054*].
- Pharmacists [*see Bus. & Prof. Code §§ 146(c)(5), 4080*].
- Physical therapists [*see Bus. & Prof. Code §§ 146(c)(2), 2630*].
- Private detectives [*see Bus. & Prof. Code §§ 146(c)(15), 7520*].
- Psychologists [*see Bus. & Prof. Code §§ 146(c)(3), 2903*].
- Repossessors and alarm company operators [*see Bus. & Prof. Code §§ 146(c)(14), 7502, 7592*].
- Respiratory care practitioners [*see Bus. & Prof. Code §§ 146(c)(4), 3760, 3761*].
- Service dealers [*see Bus. & Prof. Code §§ 146(c)(22), 9840*] and, until 1998, service contractors [*see Bus. & Prof. Code §§ 146.5(c)(19), (d), 9855.1, 9855.9*].
- Shorthand reporters [*see Bus. & Prof. Code §§ 146(c)(18), 8016*].
- Structural pest control, pest control, and household pest control workers [*see Bus. & Prof. Code §§ 146(c)(19), 8505*].
- Tax preparers and tax interviewers associated with tax preparers [*see Bus. & Prof. Code §§ 146(c)(23)*, 22256].

- Veterinarians [*see Bus. & Prof. Code §§ 146(c)(6), 4825*].

The infraction procedure applies in both of the following situations [*Bus. & Prof. Code § 146(a)*]:

- A complaint or a written notice to appear in court, pursuant to *Penal Code § 853.5 et seq.* (misdemeanor citation procedure), is filed in court charging the offense as an infraction, unless the defendant at the time of arraignment, after being advised of his or her rights, elects to have the case proceed as a misdemeanor.

- The court, with the consent of the defendant and the prosecution, determines that the offense is an infraction, in which case the case proceeds as if the defendant has been arraigned on an infraction complaint. The infraction procedure, however, does not apply to a violation of the licensing statutes contained in the foregoing list if the defendant's license, registration, or certificate has previously been revoked or suspended [*Bus. & Prof. Code § 146(b)*].

When the procedure applies, a violation of any of the statutes in the foregoing list is an infraction, even if the statute classifies violation as a misdemeanor [*see, e.g., Bus. & Prof. Code §§ 4996* (violation of statute requiring licensing of clinical social workers as misdemeanor), 5536 (violation of statute requiring licensing of architects as misdemeanor)], punishable by a fine of not less than $250 and not more than $1,000. No portion of the minimum fine can be suspended by the court unless, as a condition of suspension, the defendant is required to submit proof of a current valid license, registration, or certificate for the profession or business that was the basis for the conviction [*Bus. & Prof. Code § 146(d)*].

Any employee so designated by the director of the Department of Consumer Affairs has the authority to issue the written notice to appear in court pursuant to *Penal Code § 853.5*. However, the employee can only exercise this authority when the violation is committed in his or her presence. Furthermore, exercise of the employee's authority is limited to issuance of written notices to appear for infraction violations of specified provisions of the Busness and Professions Code. Finally, the grant of this authority to the employee does not render the employee a peace officer and does not entitle the employee to safety member retirement benefits [*Bus. & Prof. Code § 147(a)*].

[c] Evidence of Licensed Status

The certificate of the officer in charge of the records of any agency in the Department of Consumer Affairs [*see Bus. & Prof. Code § 101* (list of included agencies)] stating that any person was or was not on a specified date, or during a specified period of time, licensed under the provisions of law administered by the agency will be admitted in any court as prima facie evidence of the facts therein recited [*Bus. & Prof. Code § 162*].

[d] Arrest or Charge on Failure to Present License Certificate When Requested

A law enforcement officer who observes a person engaged in any activity for which a license is required may demand to see the license certificate, with no other probable cause than that observation. The officer is not required to give a *Miranda*-type warning or otherwise to advise the suspect of his or her procedural rights. The suspect's admission that he or she has no license, if he or she admits it in response to the officer's request, may be used against him or her even though it is a self-incriminating statement [*see Kennett v. Municipal Court, Los Angeles Judicial Dist. (C.D. Cal. 1968) 290 F. Supp. 746, 747* ; *People v. Nunn (1968) 264 Cal. App. 2d 919, 922, 70 Cal. Rptr. 869* (driver's license)].

[e] Receiving or Expecting Compensation

Practicing a profession, or otherwise engaging in a regulated activity, without a license is an offense, if a statute so provides, whether or not the offender received or expected compensation, unless the statute specifies the receipt or

expectation of compensation as an element of the offense, in which case there is no offense if that condition is not fulfilled [*see People v. Vermillion (1916) 30 Cal. App. 417, 418, 158 P. 504]* .

[f] Conspiracy to Commit Offense

Any person licensed under *Bus. & Prof. Code §§ 1 et seq.* (Department of Consumer Affairs), 500 et seq. (healing arts), or 5000 et seq. (professions and vocations generally), respectively, is guilty of a misdemeanor and subject to disciplinary action under the Business and Professions Code if he or she conspires with a person not so licensed to violate any provision of the Business and Professions Code, or if he or she, with intent to aid or assist that person in violating those provisions, allows his or her license to be used by that person or acts as his or her agent or partner [*Bus. & Prof. Code § 125*].

Additionally, practicing a profession or otherwise engaging in a regulated activity for which a license is required without obtaining the appropriate license generally constitutes a misdemeanor [*see* [7][a], *above*]. Persons who conspire to commit the offense, however, are guilty of a felony [*Penal Code § 182*; *People v. Nunn (1944) 65 Cal. App. 2d 188, 191-192, 150 P.2d 476]* . Persons acting in concert and violating the prohibition against unlicensed practice are not necessarily guilty of conspiracy. If they act from an honest mistaken belief that they are not violating the law, they are not conspirators [*see People v. Bernhardt (1963) 222 Cal. App. 2d 567, 585-586, 35 Cal. Rptr. 401]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingGeneral OverviewAdministrative LawAgency InvestigationsGeneral OverviewCivil ProcedureRemediesDamagesPunitive DamagesContracts LawDefensesPublic Policy ViolationsCriminal Law & ProcedureCriminal OffensesInchoate CrimesConspiracyGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewEvidenceHearsayExceptionsPublic RecordsGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesHealthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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41-471B California Forms of Pleading and Practice--Annotated §§ 471B.72-471B.79

[Reserved]

§§ 471B.72[Reserved]

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§ 471B.80 Federal Constitution

Privileges and immunities clauses. U.S. *Const., art. IV, § 2*; *U.S. Const., amend. XIV, § 1*

Supremacy clause. U.S. Const., art. VI

Reservation of rights to people or states. *U.S. Const., amend. IX*

Equal protection and due process clauses. *U.S. Const., amend. XIV, § 1*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawCongressional Duties & PowersReserved PowersConstitutional LawSupremacy ClauseGeneral OverviewConstitutional LawEqual ProtectionScope of ProtectionConstitutional LawPrivileges & Immunities

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§ 471B.81 State Constitution

Inalienable rights clause. *Cal. Const., art. I, § 1*

Equal protection and due process clauses. *Cal. Const., art. I, § 7(a)*

Privileges and immunities clause. *Cal. Const., art. I, § 7(b)*

Prohibition against invidious discrimination. *Cal. Const., art. I, § 8*

Reservation of rights to people. *Cal. Const., art. I, § 24*

Regulatory powers of local governments. *Cal. Const., art. XI, §§ 5(a)* (charter city), 7 (other city, county)

State as having exclusive right and power to license and regulate manufacture, sale, purchase, possession, and transportation of intoxicating liquor within state. *Cal. Const., art. XX, § 22*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawCongressional Duties & PowersReserved PowersConstitutional LawRelations Among GovernmentsPrivileges & ImmunitiesConstitutional LawBill of RightsGeneral OverviewConstitutional LawSubstantive Due ProcessGeneral OverviewConstitutional LawEqual ProtectionScope of ProtectionGovernmentsState & Territorial GovernmentsLicenses

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§ 471B.82 State Statutes

[1] Administrative Procedure Act

Administrative Adjudication, *Gov. Code §§ 11500-11529*

[2] Related Statutes

[a] Administrative Proceedings

[i] General Rule

Notice by any board is generally required to be given by regular mail or personal service to licensee's last known address, at board's option. *Bus. & Prof. Code § 124*

Administrative adjudication under Administrative Procedures Act. *Gov. Code § 11500-11529*

[ii] Disciplinary Action

Effect of conviction of crime substantially related to qualifications, functions, and duties of licensee. *Bus. & Prof. Code § 480*

Enjoining violations of licensing provisions. *Bus. & Prof. Code §§ 125.5, 125.7, 125.8*

Discrimination by licensees as basis for disciplinary action and restraining orders. *Bus. & Prof. Code § 125.6*

Disciplinary action for licensee's failure to record cash transactions in payment of employee wages. *Bus. & Prof. Code § 140*

Denial, suspension, and revocation of licenses. *Bus. & Prof. Code § 475 et seq.*

Public reprovals. *Bus. & Prof. Code § 495*

Issuance of injunction for subversion of licensing examination. *Bus. & Prof. Code § 123.5*

[iii] Review

Finality of decisions of boards in Department of Consumer Affairs; investigation and intervention by Director of Consumer Affairs. *Bus. & Prof. Code § 109*

Decisions of Board of Governors of State Bar as reviewed by writ of review in Supreme Court or court of appeal. *Bus. & Prof. Code §§ 6066, 6082*

Writ of mandate inquiring into validity of administrative licensing decision. *Code Civ. Proc. §§ 1084 et seq., 1107 et seq.*

Time for filing petition for writ of mandate for review of adjudicatory decision of local agency. *Code Civ. Proc. § 1094.6*

Writ of mandate to review decisions of agencies under Administrative Procedure Act (*Gov. Code § 11500 et seq.*). *Gov. Code § 11523*

[b] Application Process

Authority of board after withdrawal of application for license or after suspension, expiration, or forfeiture of license. *Bus. & Prof. Code § 118*

Provision of legal assistance to person supplying expertise to board in evaluating licensee or applicants in event that civil action is brought arising out of evaluation or testimony given to agency. *Bus. & Prof. Code § 154.5*

Agency is not permitted to ask applicant about arrests that did not result in conviction. *Bus. & Prof. Code § 461*

Applicant for state license is required to designate workers' compensation insurance carrier. *Bus. & Prof. Code § 16545*

[c] Complaints to Boards

Complaint procedures for boards on receipt of complaints respecting licensees; requirement to notify complainants of actions taken. *Bus. & Prof. Code § 129*

[d] Compliance With Family Support Order or Judgment

Applicant for issuance or renewal of license who is not in compliance with judgment or order for family support as subject to procedures for withholding issuance or renewal of license. *Bus. & Prof. Code §§ 29.5, 31*; *Welf. & Inst. Code § 11350.6*

Licensee as required at time of issuance or renewal of license to provide federal employer identification number or

social security number. *Bus. & Prof. Code § 30*

[e] Continuing Education Requirements

Development of guidelines for components of mandatory continuing education programs in Department of Consumer Affairs. *Bus. & Prof. Code § 166*

[f] Examinations

Administration of licensing examinations. *Bus. & Prof. Code §§ 23.6, 111, 135, 451*

Subversion of licensing examination. *Bus. & Prof. Code §§ 123, 123.5, 496*

Director of Department of Consumer Affairs is required to adopt regulations to implement, interpret, and make specific provisions of Americans with Disabilities Act (*42 U.S.C. § 12101 et seq.*) as they relate to examination process for professional licensing and certification programs. *Bus. & Prof. Code § 313.2*

[g] Expert Evidence

Evid. Code § 730, authorizing court to appoint expert to investigate, to render report, or to testify at trial, does not permit person to perform act for which license is required unless person holds appropriate license to perform act. *Evid. Code § 730*

[h] Expiration and Renewal of License

License expiring during war. *Bus. & Prof. Code §§ 114-115*

Licensee who sought renewal of license prior to expiration date as not engaging illegally in business or profession during any period of delay not caused by applicant. *Bus. & Prof. Code § 121*

[i] License Fees and Taxes

Reduction of license fees in event of surplus funds. *Bus. & Prof. Code § 128.5*

License or permit fees. *Bus. & Prof. Code §§ 134, 158, 163.5, 313.1*; *Gov. Code §§ 13142, 13143*

To protect taxpayer's privacy, receipt for business license tax based on gross receipts is not permitted to include amount of gross receipts or cost of tax. *Bus. & Prof. Code §§ 16110-16112*

[j] Penal Provisions

Acts involving misuse of license certificate that constitute misdemeanor. *Bus. & Prof. Code §§ 119, 120*

Conspiracy with unlicensed person to violate Business and Professions Code as misdemeanor. *Bus. & Prof. Code § 125*

Misdemeanor to sell equipment, supplies, or services that are to be used in performance of service or contract in

violation of licensing requirements. *Bus. & Prof. Code § 128*

Acting without license when license required is misdemeanor. *Bus. & Prof. Code § 16240*

Granting of license to gamble is felony. *Penal Code § 337*

Misuse of license fee receipt is misdemeanor. *Penal Code § 431*

Sale of blank license certificates is felony. *Penal Code § 432*

[k] Power to License

City or county as not allowed to prohibit holder of state license from engaging in business for which licensed. *Bus. & Prof. Code § 460*

Licensing by cities. *Bus. & Prof. Code §§ 16000-16003*; *Gov. Code § 37101 et seq.*

Licensing by counties. *Bus. & Prof. Code §§ 16100-16104*

Licensing by state. *Bus. & Prof. Code § 16200 et seq.*

[l] Training

Licensing of person who received training for licensed occupation in correctional institution. *Bus. & Prof. Code § 23.9*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawJudicial ReviewRemediesMandamusCivil ProcedureRemediesWritsCommon Law WritsMandamusCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewFamily LawChild SupportObligationsEnforcementLicensesGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsLicenses

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§ 471B.83 California Code of Regulations

NOTE:

the regulations listed in [1] and [2], *below*, are those governing businesses and professions licensed by agencies within the Department of Consumer Affairs [*see Bus. & Prof. Code § 101*], arranged in alphabetical order by the type of business or profession. They do not set out an exhaustive list of administrative regulations pertaining to licensing. Other licensing regulations may be found in Titles 3 (Agriculture), 4 (Alcoholic Beverages), 10 (Investments), and 13 (Motor Vehicles) of the California Code of Regulations. For a detailed list of statutes governing the licensing of particular businesses and professions, see the Appendix: Table of Licensing Statutes after the Forms, at the end of this chapter (§ 471B.140 et seq.).

[1] Healing Arts Professions

Acupuncturists. *16 Cal. Code Reg. § 1399.400 et seq.*

Chiropractors. *16 Cal. Code Reg. § 300 et seq.*

Clinical social workers. *16 Cal. Code Reg. § 1873 et seq.*

Dentists. *16 Cal. Code Reg. § 1000 et seq.*

Educational psychologists. *16 Cal. Code Reg. §§ 1854-1858*

Hearing aid dispensers. *16 Cal. Code Reg. § 1399.100 et seq.*

Marriage, family, and child counselors. *16 Cal. Code Reg. § 1830 et seq.*

Marriage, family, and child counseling corporations. *16 Cal. Code Reg. §§ 1850.6-1850.8*

Nurses, registered. *16 Cal. Code Reg. § 1402 et seq.*

Nurses, vocational. *16 Cal. Code Reg. § 2502 et seq.*

Nursing home administrators. *16 Cal. Code Reg. § 3102 et seq.*

Opticians. *16 Cal. Code Reg. § 1399.200 et seq.*

Optometrists. *16 Cal. Code Reg. § 1501.1 et seq.*

Osteopaths. *16 Cal. Code Reg. § 1600 et seq.*

Pharmacists. *16 Cal. Code Reg. § 1703 et seq.*

Physical therapists. *16 Cal. Code Reg. § 1398 et seq.*

Physicians. *16 Cal. Code Reg. § 1300 et seq.*

Physicians' assistants. *16 Cal. Code Reg. § 1399.500 et seq.*

Podiatrists. *16 Cal. Code Reg. § 1399.650 et seq.*

Psychiatric technicians. *16 Cal. Code Reg. § 2562 et seq.*

Psychologists. *16 Cal. Code Reg. § 1380 et seq.*

Respiratory therapists. *16 Cal. Code Reg. § 1399.300 et seq.*

Speech pathologists and audiologists. *16 Cal. Code Reg. § 1399.150 et seq.*

Veterinarians. *16 Cal. Code Reg. § 2000 et seq.*

[2] Non-Healing Arts Professions and Vocations

Accountants. *16 Cal. Code Reg. § 1 et seq.*

Architects. *16 Cal. Code Reg. § 100 et seq.*

Auctioneers and auction companies. *16 Cal. Code Reg. §§ 3525-3526*

Automotive repair dealers, official stations, adjusters, and installers. *16 Cal. Code Reg. § 3300 et seq.*

Barbers. *16 Cal. Code Reg. § 200 et seq.*

Boxing, wrestling, and martial arts; professional and amateur regulations. *4 Cal. Code Reg. § 201 et seq.* (professional boxing), 502 (martial arts and kickboxing), 601 (amateur boxing), 802 (wrestling)

Cemetery brokers and salespersons. *16 Cal. Code Reg. § 2300 et seq.*

Collection and investigative services. *16 Cal. Code Reg. § 600 et seq.*

Contractors. *16 Cal. Code Reg. § 810 et seq.*

Cosmetologists. *16 Cal. Code Reg. § 900 et seq.*

Dispute resolution services. *16 Cal. Code Reg. § 3600 et seq.*

Dry cleaners. *16 Cal. Code Reg. § 500 et seq.*

Electronic and appliance repair dealers. *16 Cal. Code Reg. § 2700 et seq.*

Employment agencies. *16 Cal. Code Reg. § 2802 et seq.*

Employment counseling services. *16 Cal. Code Reg. §§ 2897-2898.1*

Engineers and land surveyors. *16 Cal. Code Reg. § 400 et seq.*

Funeral directors and embalmers. *16 Cal. Code Reg. § 1202 et seq.*

Geologists and geophysicists. *16 Cal. Code Reg. § 3000 et seq.*

Guide dog trainers. *16 Cal. Code Reg. § 2250 et seq.*

Home furnishings business. *4 Cal. Code Reg. §§ 1106-1108, 1380 et seq., 1383 et seq.*

Landscape architects. *16 Cal. Code Reg. § 2602 et seq.*

Nurses' registries. *16 Cal. Code Reg. §§ 2895.1-2896.2*

Shorthand reporters. *16 Cal. Code Reg. § 2400 et seq.*

Structural pest control operators. *16 Cal. Code Reg. § 1902 et seq.*

Tax preparers. *16 Cal. Code Reg. § 3201 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingFormal RulemakingGovernmentsState & Territorial GovernmentsLicensesHealthcare LawBusiness Administration & OrganizationLicensesRequirements

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§ 471B.84 Decisions

[1] Classification

Classification for licensing purposes is within Legislature's discretion. Legislature's determination is not to be overthrown unless it is palpably arbitrary. *In re Schmolke (1926) 199 Cal. 42, 48, 248 P. 244 , appeal denied, 273 U.S. 646, 47 S. Ct. 244, 71 L. Ed. 820*

[2] Contract by Unlicensed Person

When statute enacted for protection of public requires license for the doing of certain acts and imposes penalty for violation, contract to perform such acts entered into by unlicensed person is illegal and unenforceable. *Owen v. Off (1951) 36 Cal. 2d 751, 753, 227 P.2d 457*

When contract calls for hybrid services, some requiring license and some not, and contract can be interpreted in particular case to require work for which no license necessary, licensing act is inapplicable. *Broffman v. Newman (1989) 213 Cal. App. 3d 252, 262, 261 Cal. Rptr. 532*

When contract is illegal due to party's failure to secure license and transaction has been wholly consummated concerning parties designed to be protected by licensing statute, culpable party is not permitted to rely on licensing requirement to retain proceeds of transaction and avoid payment to innocent party. *Holland v. Morgan & Peacock Properties (1959) 168 Cal. App. 2d 206, 211, 335 P.2d 769*

[3] Control of Customers

Licensing agency is generally not permitted to impose on its licensees responsibility of governing conditions beyond their control. However, business catering to general public was, under certain circumstances, properly held accountable for disruptive conduct of patrons, whether on or off premises. Sunset Amusement Co. v. Board of Police

Commissioners (1972) 7 Cal. 3d64, 84, *7 Cal. 3d 64, 101 Cal. Rptr. 768, 496 P.2d 840 , appeal dismissed, 409 U.S. 1121, 93 S. Ct. 940, 35 L. Ed. 2d 254 (1973)*

[4] Criminal Conviction

Discipline is proper based on licensee's plea of *nolo contendere*. Licensee is not entitled to relitigate issue of guilt. *Arneson v. Fox (1980) 28 Cal. 3d 440, 446-450, 170 Cal. Rptr. 778, 621 P.2d 817*

Agency does have authority to deny license regulated by Business and Professions Code on basis that licensee has been convicted of crime, but only if crime is substantially related to qualifications, functions, or duties of business or profession for which application is made. *Pieri v. Fox (1979) 96 Cal. App. 3d 802, 805-806, 158 Cal. Rptr. 256*

Bus. & Prof. Code § 475(c), providing that license may not be denied, suspended, or revoked on grounds of lack of good moral character, applys only to evidence of bad moral character other than criminal convictions. *Brandt v. Fox (1979) 90 Cal. App. 3d 737, 743, 153 Cal. Rptr. 683*

Criminal conviction provides possible basis of license revocation or suspension proceedings even if licensee has fulfilled all conditions of his or her probation in relation to conviction. *Copeland v. Dept. of Alcoholic Bev. Control (1966) 241 Cal. App. 2d 186, 188, 50 Cal. Rptr. 452*

Conviction of felony is reasonable classification for denying business or professional license. *Hirsch v. City & County of San Francisco (1956) 143 Cal. App. 2d 313, 325, 300 P.2d 177*

[5] Death of Licensee

Death of licensee terminates disciplinary proceedings against him or her. *Warren v. Real Estate Commissioner (1961) 193 Cal. App. 2d 579, 579, 14 Cal. Rptr. 632* ; *Orchard v. Pancoast (1955) 133 Cal. App. 2d 52, 55, 283 P.2d 309*

[6] Due Process

Power to determine eligibility to qualify for licensed activity is required to be accompanied by safeguards affording applicant protection against arbitrary or self-motivated action. *Packer v. Board of Behavioral Science Examiners (1975) 52 Cal. App. 3d 190, 197, 125 Cal. Rptr. 96*

[7] Employees of Licensee

Duties of licensee are nondelegable to independent contractor or to employee. Licensee is not permitted to insulate himself or herself from regulation by electing to function through employees or independent contractors. *Rob-Mac, Inc. v. Department of Motor Vehicles (1983) 148 Cal. App. 3d 793, 797, 196 Cal. Rptr. 398* ; *Camacho v. Youde (1979) 95 Cal. App. 3d 161, 165, 157 Cal. Rptr. 26*

Licensee who elects to operate his or her business through employees is responsible to licensing authority for employees' conduct in exercise of license. Licensee is also responsible for acts of his or her agents or employees done in course of his or her business in operation of the license. *Rob-Mac, Inc. v. Department of Motor Vehicles (1983) 148 Cal. App. 3d 793, 797, 196 Cal. Rptr. 398* ; *Arenstein v. California State Bd. of Pharmacy (1968) 265 Cal. App. 2d 179, 192, 71 Cal. Rptr. 357*

[8] Entrapment Defense

Defense of entrapment is available in administrative proceedings at which revocation or suspension of a license to practice a profession or business is at issue. *Patty v. Board of Medical Examiners (1973) 9 Cal. 3d 356, 367, 107 Cal. Rptr. 473, 508 P.2d 1121* ; *White v. Board of Medical Quality Assurance (1982) 128 Cal. App. 3d 699, 708, 180 Cal. Rptr. 516*

[9] Judicial Review

On judicial review of administrative proceeding revoking or suspending license, independent review of facts by court is generally proper, because revocation or suspension affects vested right. *Berlinghieri v. Department of Motor Vehicles (1983) 33 Cal. 3d 392, 396, 188 Cal. Rptr. 891, 657 P.2d 383*

Independent judgment test is proper to review revocation or suspension of license. *Bixby v. Pierno (1971) 4 Cal. 3d 130, 146, 93 Cal. Rptr. 234, 481 P.2d 242*

Substantial evidence test is proper to review denial of application for license. *Merrill v. Department of Motor Vehicles (1969) 71 Cal. 2d 907, 916, 80 Cal. Rptr. 89, 458 P.2d 33* ; *Harrington v. Department of Real Estate (1989) 214 Cal. App. 3d 394, 404, 263 Cal. Rptr. 528*

Propriety of penalty imposed on licensee by administrative agency is matter within its discretion and, absent manifest abuse, is not disturbed on review by trial or appellate court. *Dresser v. Board of Medical Quality Assurance (1982) 130 Cal. App. 3d 506, 518, 181 Cal. Rptr. 797*

In case involving agency's initial determination whether individual qualifies to enter a profession or trade, court will uphold agency decision unless it lacks substantial evidentiary support. *Crandell v. Fox (1978) 86 Cal. App. 3d 760, 763-764, 150 Cal. Rptr. 426* ; *Housing Development Co. v. Hoschler (1978) 85 Cal. App. 3d 379, 386, 149 Cal. Rptr. 400*

[10] Laches

Failure to raise laches defense at administrative hearing constitutes waiver of laches defense when seeking judicial review of agency decision. *Jenron Corp. v. Department of Social Services (1997) 54 Cal. App. 4th 1429, 1437, 63 Cal. Rptr. 2d 508* .

Trial court has inherent power to dismiss administrative proceedings brought to revoke state-issued license when there has been unreasonable delay between discovery of facts constituting reason for revocation and commencement of revocation proceedings, and when licensee has been prejudiced by delay. *Gates v. Department of Motor Vehicles (1979) 94 Cal. App. 3d 921, 925, 156 Cal. Rptr. 791*

When trial court dismisses administrative proceeding based on administrative delay, determination may be reversed only on showing of manifest abuse of discretion resulting in miscarriage of justice. *Gates v. Department of Motor Vehicles (1979) 94 Cal. App. 3d 921, 925, 156 Cal. Rptr. 791*

Existence of laches in license revocation proceeding is a question of fact. Laches is not present when delay has not resulted in prejudice to licensee. *Rudolph v. Athletic Commission (1960) 177 Cal. App. 2d 1, 22, 1 Cal. Rptr. 898*

[11] Licensing Ordinances and Statutes

[a] General Rules

Licensing ordinance seems to vest unlimited discretion in a licensing agency and this does not necessarily invalidate ordinance. *Sunset Amusement Co. v. Board of Police Commissioners (1972) 7 Cal. 3d 64, 73, 101 Cal. Rptr. 768, 496 P.2d 840 , appeal dismissed, 409 U.S. 1121, 93 S. Ct. 940, 35 L. Ed. 2d 254 (1973)*

Statute that discriminates against individuals or corporations solely because they are new to profession or occupation violates constitutional protection against arbitrary discrimination, unless statute has relationship to public interest. *Accounting Corp. v. St. Bd. of Accountancy (1949) 34 Cal. 2d 186, 190, 208 P.2d 984*

Any financial disclosure required by licensing ordinance is required to be reasonably related to purpose of ordinance. *Perlman v. Municipal Court (1979) 99 Cal. App. 3d 568, 577, 160 Cal. Rptr. 567*

If discretion in the licensing official or agency is authorized by licensing ordinance, ordinance is required to include sufficient due process safeguards to insure swift and adequate remedy by appeal. *Perlman v. Municipal Court (1979) 99 Cal. App. 3d 568, 577, 160 Cal. Rptr. 567*

[b] Construction

Licensing statutes that impose penalties for failure to comply with statutory requirements are construed strictly against state or licensing authority and construed liberally in favor of those against whom state or licensing authority seeks to impose penalty. *People v. Vis (1966) 243 Cal. App. 2d 549, 554, 52 Cal. Rptr. 527*

[c] Provisions Implicating First Amendment Rights

Licensing statutes and ordinances implicating rights under *U.S. Const., Amend. I*, are required to set forth precise, objective standards to circumscribe discretion of officials in granting or denying licenses. *Burton v. Municipal Court (1968) 68 Cal. 2d 684, 691, 68 Cal. Rptr. 721, 441 P.2d 281* ; *Ebel v. City of Garden Grove (1981) 120 Cal. App. 3d 399, 406, 176 Cal. Rptr. 312* ; *Barry v. City of Oceanside (1980) 107 Cal. App. 3d 257, 261-262, 165 Cal. Rptr. 697* ; *107 Cal. App. 3d 257, 165 Cal. Rptr. 697*

Ordinance mandating denial of license to conduct *First Amendment* related business on basis of prior misconduct is sustainable only if clear and present danger exists that serious substantive evil would result from granting license. *EWAP, Inc. v. City of Los Angeles (1979) 97 Cal. App. 3d 179, 185, 158 Cal. Rptr. 579*

[12] Licensing Power

[a] City

City, in exercise of police power, has authority to determine that certain businesses require constant police supervision and that licenses to conduct such businesses will not be issued as matter of course to every applicant. *Saunders v. City of Los Angeles (1969) 273 Cal. App. 2d 407, 412, 78 Cal. Rptr. 236*

[b] County

Noncharter county has authority to require legitimate business to obtain license if county's purpose is to regulate or to raise funds to be used in regulating business. *In re Gritton (1956) 46 Cal. 2d 856, 859, 300 P.2d 7* ; *Cooper v. Michael (1967) 257 Cal. App. 2d 176, 177-178, 64 Cal. Rptr. 842*

County has constitutional power to regulate and license for purposes of health and safety. *People v. Perrine (1975) 47 Cal. App. 3d 252, 260, 120 Cal. Rptr. 640*

[c] State Government

State's power to grant privilege on its own conditions is limited. State is prohibited from requiring relinquishment of constitutional rights. *Frost Trucking Co. v. R.R. Commission (1926) 271 U.S. 583, 594, 46 S. Ct. 605, 70 L. Ed. 1101*

When profession or occupation is one of which it can be fairly said that those pursuing it should have particular qualifications, Legislature has authority to exact reasonable assurances of those pursuing profession or occupation that they do possess such qualifications. *In re Porterfield (1946) 28 Cal. 2d 91, 99-100, 168 P.2d 706*

Even though license to practice trade is generally considered vested property right, license to sell liquor as privilege that can be granted or withheld by state and revoked independently of any showing of fault of licensee. *Yu v. Alcoholic Bev. etc. Appeals Bd. (1992) 3 Cal. App. 4th 286, 297, 4 Cal. Rptr. 2d 280*

Legislature, in demanding some standard of efficiency of those applying for licenses to practice a profession, has authority to require applicants to be graduates of a school, the standards of which may be in no particular less than those prescribed by an association or board of national significance. *Packer v. Board of Behavioral Science Examiners (1975) 52 Cal. App. 3d 190, 196, 125 Cal. Rptr. 96* ; *Beard v. State Bd. of E. & F. Directors (1931) 111 Cal. App. 559, 561, 295 P. 1052*

When state enacts statutes regulating business and requiring license to be obtained by anyone engaged therein, exercise of state's regulatory power is necessarily limited to activities carried on within territorial limits of state. *Conderback, Inc. v. Standard Oil Co. (1966) 239 Cal. App. 2d 664, 676-677, 48 Cal. Rptr. 901*

[13] License Taxes

[a] General Requirements

General policy of California opposed to raising of revenue by collection of direct taxes is condition precedent to conduct of business. *In re Gritton (1956) 46 Cal. 2d 856, 858, 300 P.2d 7* ; *Cooper v. Michael (1967) 257 Cal. App. 2d 176, 177, 64 Cal. Rptr. 842*

Absence of regulatory provisions, amount of tax imposed, and nature of subjects of taxation are factors that court may consider in determining whether ordinance was imposed solely for purpose of raising revenue. *Ex parte Braun (1903) 141 Cal. 204, 206, 74 P. 780* (habeas corpus proceeding to test validity of municipal ordinance)

When taxing business within city, city is prohibited from taxing portion of business's gross receipts that is derived from or fairly attributable to its business activities carried on outside city limits. Apportionment is constitutionally required when failure to apportion would operate to unfairly discriminate against intercity businesses by subjecting such business to measure of taxation that is not fairly apportioned to quantum of business actually done in taxing jurisdiction. *Programming-Enterprises, Inc. v. City of Los Angeles (1989) 215 Cal. App. 3d 281, 289, 263 Cal. Rptr. 558*

Regulatory fee is properly imposed under local police power when fee constitutes amount necessary to carry out purposes and provisions of regulation. *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist. (1988) 203 Cal. App. 3d 1132, 1146 n.18, 250 Cal. Rptr. 420*

Power to impose valid regulatory fees is not dependent on legislatively authorized taxing power, but as existing

pursuant to direct grant of police power under *Cal. Const., art. XI, § 7.* *Mills v. County of Trinity (1980) 108 Cal. App. 3d 656, 662, 166 Cal. Rptr. 674*

Municipality, under its police power, has authority to impose license fee for purpose of regulation, not revenue, when fee constitutes amount necessary to legitimately aid in regulation and when fee does not exceed necessary or probable administrative expense of issuance, inspection, and regulation of its subject matter. *United Business Com. v. City of San Diego (1979) 91 Cal. App. 3d 156, 165, 154 Cal. Rptr. 263*

Licensing tax statute containing no regulatory provisions and only providing for subjects and amounts of taxation clearly imposes tax solely for purpose of raising revenue. *Oakland Raiders v. City of Berkeley (1976) 65 Cal. App. 3d 623, 627, 137 Cal. Rptr. 648*

License tax ordinance drafted by noncharter county solely as a revenue measure is invalid. Validity of such ordinance is determined by evaluation of drafter's actual intent in drafting ordinance. *Cooper v. Michael (1967) 257 Cal. App. 2d 176, 178, 180, 64 Cal. Rptr. 842*

Statutory prohibition against revenue-raising ordinances by noncharter counties in *Bus. & Prof. Code § 16100* does not extend to cities. *Cooper v. Michael (1967) 257 Cal. App. 2d 176, 178, 64 Cal. Rptr. 842*

Levy of license taxes by city for revenue purposes is municipal affair. City has authority to impose and collect such taxes for revenue purposes. *Arnke v. City of Berkeley (1960) 185 Cal. App. 2d 842, 848, 8 Cal. Rptr. 645*

[b] Classification

Classification and subdivision of occupations, businesses, and activities for purposes of assessment of license fees is proper provided that classification is reasonable. *United Business Com. v. City of San Diego (1979) 91 Cal. App. 3d 156, 177-178, 154 Cal. Rptr. 263*

Classification providing different charges for those engaged in same business is required to be founded on natural and reasonable distinction. *Clark v. City of San Pablo (1969) 270 Cal. App. 2d 121, 127, 75 Cal. Rptr. 726*

[14] Moral Turpitude

In professional licensing context, "moral turpitude" is term of art having more precise meaning when applied to particular profession. Terms like "immoral," "unprofessional," and "moral turpitude" are mere lingual abstractions until applied to specific occupation and fitness therefor. *In re Johnson (1992) 1 Cal. 4th 689, 698, 4 Cal. Rptr. 2d 170, 822 P.2d 1317*

Substantial or rational nexus is required to exist between criminal or otherwise immoral conduct and qualifications, functions, or duties of individual in or applying for license in licensed occupation. *Clerici v. Department of Motor Vehicles (1990) 224 Cal. App. 3d 1016, 1029-1030, 274 Cal. Rptr. 230*

Purpose of moral turpitude standard in license regulatory statutes is not to punish but to protect members of public when they deal with licensed individual. *Clerici v. Department of Motor Vehicles (1990) 224 Cal. App. 3d 1016, 1027, 274 Cal. Rptr. 230*

Determination of whether conduct involves "moral turpitude" is question of law to be reviewed by appellate court. Moral turpitude is inherent in crimes involving fraudulent intent or intentional dishonesty for personal gain. *Harrington v. Department of Real Estate (1989) 214 Cal. App. 3d 394, 400-401, 263 Cal. Rptr. 528*

[15] Nature and Purpose of License

License regulates activities based on determination of licensee's qualifications. *People ex rel. Deukmejian v. County of Mendocino (1984) 36 Cal. 3d 476, 485, 204 Cal. Rptr. 897, 683 P.2d 1150*

License provides permission or authority to do particular thing, to exercise particular privilege, or to carry on particular business or pursue certain profession. *Galvan v. Superior Court (1969) 70 Cal. 2d 851, 856, 76 Cal. Rptr. 642, 452 P.2d 930* ; *Blatz Brewing Co. v. Colllins (1945) 69 Cal. App. 2d 639, 643, 160 P.2d 37*

License has no elements of contract and confers personal privilege rather than absolute right. *San Gabriel Tribune v. Superior Court (1983) 143 Cal. App. 3d 762, 779, 192 Cal. Rptr. 415*

Licensing statutes are intended to protect public. *Nationwide Investment Corp. v. California Funeral Service, Inc. (1974) 40 Cal. App. 3d 494, 503, 114 Cal. Rptr. 77*

License confers personal privilege that must be exercised pursuant to any restrictions existing at time license is granted, and also under any restrictions reasonably imposed after license is granted. *Rosenblatt v. Cal. St. Bd. of Pharmacy (1945) 69 Cal. App. 2d 69, 74, 158 P.2d 199*

[16] Reinstatement

Applicant for reinstatement of license has no greater rights than person seeking original license. *Crandell v. Fox (1978) 86 Cal. App. 3d 760, 763, 150 Cal. Rptr. 426*

[17] Reports to Officials

Failure to make required reports to responsible agency provides permissible ground for suspending or revoking license. *Evilsizor v. Dept. of Motor Vehicles (1967) 251 Cal. App. 2d 216, 218-220, 59 Cal. Rptr. 375*

[18] Res Judicata

Exoneration in prior civil action or acquittal in criminal proceeding is not res judicata in subsequent administrative license proceedings. *Lundborg v. Director Dept. Professional etc. Standards (1967) 257 Cal. App. 2d 141, 146, 64 Cal. Rptr. 650*

Doctrine of res judicata estops licensee from impeaching prior adverse judgment in license suspension or revocation proceeding instituted on the basis of the prior judgment. *Richards v. Gordon (1967) 254 Cal. App. 2d 735, 738, 62 Cal. Rptr. 466* ; *Contractors' State License Board v. Superior Court of Los Angeles County (1960) 187 Cal. App. 2d 557, 562, 10 Cal. Rptr. 95*

[19] Right to Enter Profession

Right to be admitted to profession is not explicitly or implicitly guaranteed by *United States Constitution. D'Amico v. Board of Medical Examiners (1974) 11 Cal. 3d 1, 18, 112 Cal. Rptr. 786, 520 P.2d 10*

[20] Statute of Limitations

License suspension or revocation proceedings are not governed by criminal statutes of limitation. *Wayne v. Bureau of Private Investigators & Adjusters (1962) 201 Cal. App. 2d 427, 439, 20 Cal. Rptr. 194*

[21] Unclean Hands

In administrative mandate proceeding in which contractor sought writ of mandate to set aside license revocation, writ was properly denied and license was properly revoked on grounds of unclean hands based on agency's unchallenged allegation in answer to writ that contractor fraudulently obtained license in first instance. *Elliott v. Contractors' State License Bd. (1990) 224 Cal. App. 3d 1048, 1054-1056, 274 Cal. Rptr. 286*

[22] Use of License

Owner of license is obligated to see that license is not used in violation of law. *Ford Dealers Ass'n v. Department of Motor Vehicles (1982) 32 Cal. 3d 347, 360, 185 Cal. Rptr. 453, 650 P.2d 328*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsRes JudicataAdministrative LawGovernmental InformationRecordkeeping & ReportingAdministrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewStandards of ReviewDe Novo ReviewAdministrative LawJudicial ReviewStandards of ReviewSubstantial EvidenceConstitutional LawBill of RightsFundamental FreedomsGeneral OverviewContracts LawDefensesIllegal BargainsGovernmentsLegislationInterpretationGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLegislaturesGovernmentsState & Territorial GovernmentsLicenses

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§ 471B.85 Attorney General Opinions

Scope of real estate licensing exemptions contained in *Bus. & Prof. Code § 10133.1*. *68 Ops. Cal. Atty. Gen. 286 (1985)*

City or county lacks authority to establish licensing program regulating transportation of hazardous material over roadways within its jurisdiction. *67 Ops. Cal. Atty. Gen. 1 (1984)*

United States citizenship is not valid requisite for licensure. *55 Ops. Cal. Atty. Gen. 80 (1972)*

Comprehensive state statutory scheme regulating practice of profession does not necessarily preclude local lobbying control regulation. *41 Ops. Cal. Atty. Gen. 86 (1963)*

Statute providing that license is void after transfer is self-executing. *10 Ops. Cal. Atty. Gen. 62 (1947)*

Prisoners are not covered by licensing requirements. *6 Ops. Cal. Atty. Gen. 202 (1945)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesTransportationGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicensesReal Property LawBrokersDiscipline, Licensing & Regulation

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§ 471B.86 Law Reviews

Cathcard and Graff, *Occupational Licensing: Factoring It Out, 9 Pac. L.J. 147 (1978)*

Barron, *Business and Professional Licensing--California, A Representative Example, 18 Stan. L. Rev. 640 (1966)*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicenses

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§ 471B.87 Text References

Witkin, California Procedure, vol. 3, *Actions*, § 27; vol. 5, *Pleading*, § 859; vol. 8, *Enforcement of Judgment*, §§ 50, 406-413; vol. 8, *Extraordinary Writs*, §§ 279-281, 285, 291-294 (4th ed. 1997)

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 452, 455, 456, 491-502; vols. 7, 8, *Constitutional Law*, §§ 491, 522, 797, 804; vol. 9, *Taxation*, §§ 5, 45-51,83,264-270; vol. 9, *Corporations*, § 32; vol. 9, *Partnership*, § 16 (9th ed.1987-1989)

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§ 471B.88 Internet References

California Home Page. This site includes links to other sites maintained by numerous state agencies. http://www.ca.gov

Office of Administrative Hearings. This site includes: information and location concerning specific OAH offices; an OAH hearing guide; information concerming Administrative Procedure Act statutes, regulations, and proposed regulations; OAH forms; information concerning alternative dispute resolution procedures; and declaratory decisions. http://www.dgs.ca.gov/oah **NOTE:** On and after July 1, 1998, The OAL is required by *Gov. Code § 11340.1(b)* to make the full text of the California Code of Regulations, with reference citations and history notes, available on the Internet free of charge.

Office of Administrative Law. This site includes: OAL publications; links to OAL statutes and regulations relating to rulemaking; regulations submitted to the OAL for review, and information for contacting or provding input to the OAL regarding rulemaking. http://www.oal.ca.gov

California Courts. This site includes: general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most Court of Appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes: text of constitution, codes, and statutes (including complete text of APA); and information concerning pending legislation. http://www.leginfo.ca.gov

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§ 471B.89[Reserved]

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PART IV. PROCEDURAL CHECKLIST

41-471B California Forms of Pleading and Practice--Annotated § 471B.90

§ 471B.90 Writ of Mandate to Compel Agency to Act on License Application

☐ Prepare petition for writ of mandate [*Code Civ. Proc. § 1085*; *see* discussion in *§ 471B.60[2*]; for a form of petition *see § 471B.100*].

☐ All papers must comply with superior court rules [*see Cal. Rules of Ct., Rules 2.100, 3.110*].

☐ Verify petition [*Code Civ. Proc. § 1086*; *see* discussion in *§ 471B.100[3]*].

☐ Prepare memorandum of points and authorities [*see* discussion in *§ 471B.100[2]*].

☐ Prepare proposed alternative writ [*Code Civ. Proc. § 1087*; for a form, *see § 471B.101*].

☐ Serve copy of petition and memorandum of points and authorities on respondent and real party in interest [*Code Civ. Proc. §§ 1107, 1109*; *see* discussion in *§ 471B.100[2], [9]*].

☐ File petition and proof of service with court [*Code Civ. Proc. § 1107*; *see* discussion in *§ 471B.100[2], [9]*].

☐ For more detailed procedural checklist for use in ordinary mandate proceedings, see Ch. 358, *Mandate and Prohibition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesReal Parties in InterestGeneral OverviewCivil ProcedureRemediesWritsCommon Law

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PART IV. PROCEDURAL CHECKLIST

41-471B California Forms of Pleading and Practice--Annotated § 471B.91

§ 471B.91 Writ of Administrative Mandate to Review Denial of License Application

☐ Prepare petition for writ of administrative mandate [*see* discussion in *§ 471B.60[1*]; for a form, *see § 471B.104*].

☐ All papers must comply with superior court rules [*see Cal. Rules of Ct., Rules 2.100, 3.110*].

☐ Verify petition [*Code Civ. Proc. § 1086*; *see* discussion in *§ 471B.104[3]*].

☐ Prepare memorandum of points and authorities.

☐ Prepare proposed alternative writ [*Code Civ. Proc. § 1087*; for a form, *see § 471B.105*].

☐ Serve copy of petition and memorandum of points and authorities on respondent and real party in interest [*Code Civ. Proc. §§ 1107, 1109*].

☐ File petition and proof of service with court [*Code Civ. Proc. § 1107*].

☐ For more detailed procedural checklist for use in administrative mandate proceedings, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusGovernmentsLocal GovernmentsLicensesGovernmentsState &

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41-471B California Forms of Pleading and Practice--Annotated § 471B.92

§ 471B.92 Writ of Administrative Mandate to Review Suspension or Revocation of License

☐ Prepare petition for writ of mandate [*Code Civ. Proc. §§ 1087, 1094.5*; *see* discussion in *§ 471B.60[1*]; for forms, *see §§ 471B.106, 471B.110*].

☐ All papers must comply with superior court rules [*see Cal. Rules of Ct., Rules 2.100, 3.110*].

☐ Verify petition [*Code Civ. Proc. § 1086*; *see* discussion in *§§ 471B.106[3], 471B.110[3]*].

☐ Prepare memorandum of points and authorities.

☐ Prepare proposed alternative writ [*Code Civ. Proc. § 1087*; for forms, *see §§ 471B.107, 471B.111*].

☐ Prepare proposed order to stay decision, if applicable [*see* discussion in *§ 471B.106[5*]; for forms, *see §§ 471B.106 -471B.107*].

☐ Serve copy of petition and memorandum of points and authorities on respondent and real party in interest [*see Code Civ. Proc. § 1094.5(g), (h)(1)*; *Code Civ. Proc. §§ 1107, 1109*].

☐ File petition and proof of service with court [*Code Civ. Proc. § 1107*; § 471B.106[4]].

☐ For more detailed procedural checklist for use in administrative mandate proceedings, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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PART IV. PROCEDURAL CHECKLIST

41-471B California Forms of Pleading and Practice--Annotated § 471B.93

§ 471B.93 Writ of Mandate to Compel Agency to Set Aside Summary Denial of Application

☐ Prepare petition for writ of mandate [*Code Civ. Proc. §§ 1085, 1086*; *see* discussion in *§ 471B.60[2*]; for a form, *see § 471B.102*].

☐ All papers must comply with superior court rules [*see Cal. Rules of Ct., Rules 2.100, 3.110*].

☐ Verify petition [*Code Civ. Proc. § 1086*; § 471B.102[3]].

☐ Prepare memorandum of points and authorities [*see § 471B.100[2]*].

☐ Prepare proposed alternative writ [*Code Civ. Proc. § 1087*; for a form, *see § 471B.103*].

☐ Serve copy of petition and memorandum of points and authorities on respondent and real party in interest [*Code Civ. Proc. §§ 1107, 1109*].

☐ File petition and proof of service with court [*Code Civ. Proc. § 1107*].

☐ For more detailed procedural checklist for use in ordinary mandate proceedings, see Ch. 358, *Mandate and Prohibition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLocal

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41-471B California Forms of Pleading and Practice--Annotated § 471B.94

§ 471B.94 Writ of Mandate to Allow Petitioner to Resume Business Operation and to Compel Return of License

☐ Prepare petition for writ of mandate [*Code Civ. Proc. § 1085*; for a form, *see § 471B.108*].

☐ All papers must comply with superior court rules [*see Cal. Rules of Ct., Rules 2.100, 3.110*].

☐ Verify petition [*Code Civ. Proc. § 1086*; *see* discussion in *§ 471B.108[3]*].

☐ Prepare memorandum of points and authorities.

☐ Prepare alternative writ [*see Code Civ. Proc. §§ 1085, 1087*; for a form, *see § 471B.109*].

☐ Serve copy of petition and memorandum of points and authorities on respondent and real party in interest [*Code Civ. Proc. §§ 1107, 1109*].

☐ File petition and proof of service with court [*Code Civ. Proc. § 1107*].

☐ For more detailed procedural checklist for use in ordinary mandate proceedings, see Ch. 358, *Mandate and Prohibition* .

Legal Topics:

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

§§ 471B.95[Reserved]

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PART V. FORMS

41-471B California Forms of Pleading and Practice--Annotated § 471B.100

§ 471B.100 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] in Proceedings to Compel Administrative Agency to Act on License Application

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] in Proceedings to Compel Administrative Agency to Act on License Application

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR WRIT OF MANDATE
Respondent.	)	
	)	
	)	

Petitioner alleges:

1. Petitioner is _____ [*identify petitioner and describe capacity, if other than as an individual, in which the proceeding is being brought*].

[*EITHER, if respondent is multimember agency*]

2. Respondent _____ [*identify agency, e.g.,* Medical Board of California] was, and now is, a statewide administrative agency created and existing under laws of California, and possessing sole jurisdiction to issue licenses to _____ [*specify, e.g.,* practice medicine] in California.

[*OR, if respondent is individual administrative officer*]

2. Respondent _____[*name*] is _____ [*identify title and agency. e.g.,* Director of Motor Vehicles] in the government of the State of California and is sued herein in that official capacity and not personally.

[*CONTINUE*]

3. Respondent has a clear, present, and ministerial duty to accept and process applications for a license to _____ [*specify, e.g.,* practice medicine in this state] by reason of _____[*describe and cite to statute, ordinance, administrative regulation, or other authority that makes respondent's duty mandatory and not subject to exercise of discretion*].

4. Petitioner has a clear, present, and substantial right to the performance of respondent's duty in that petitioner has duly applied for such license and has _____ [paid *or* tendered] the application fee of $_____ required by _____[*specify statute, ordinance, administrative regulation, or other authority*], but respondent has failed and refused to perform that duty in petitioner's case.

5. Petitioner is a person beneficially interested in the issuance of the writ in that petitioner has duly applied for the license.

6. Petitioner has exhausted administrative remedies by _____[*describe acts taken to exhaust remedies*].

7. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition, in that petitioner can only obtain a license to _____[*specify*] by respondent's acting on petitioner's application, and damages would be inadequate, as well as unobtainable, relief.

WHEREFORE, petitioner prays:

1. That the court issue an alternative writ of mandate commanding respondent to accept and process petitioner's application for a license to _____[*specify*], according to law, or to show cause before this court at a time specified by court order why respondent has not done so and why a peremptory writ should not issue.

2. That, on the return of the alternative writ and the hearing of this petition, this court issue its peremptory writ of mandate commanding respondent to accept and process petitioner's application for a license to _____[*specify*], according to law;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*date*]
Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]
_____ [*signature*]

[2] Use of Form

The form of petition set out in [1], *above,* is for use in seeking a licensing to compel an agency to act on an application submitted to that agency [*see Code Civ. Proc. §§ 1085, 1086*]. The petitioner's objective is not to obtain a license directly, but merely to force the agency to grant or deny his or her application. When a writ must be obtained to compel agency action, a denial should be anticipated; hence, the petitioner should be prepared to file a second petition, after denial, seeking review of the agency's decision to deny the application. The form *set out in § 471B.102* may be used in the event of a summary denial.

If the agency holds a hearing, review may be had in the superior court pursuant to *Code Civ. Proc. § 1094.5* (so-called "administrative mandate") [*see* § 471B.174]. Administrative mandate is discussed in detail in Ch. 474, *Judicial Review of Agency Decisions* , et seq.

Proof of service on each respondent and real party in interest of a copy of a petition that seeks an alternative writ must accompany the petition when it is offered for filing except when, in its discretion and for good cause, the court has granted the application for the writ ex parte [*Code Civ. Proc. § 1107*; for a discussion of serving the petition, *see* Ch. 358, *Mandate and Prohibition*].

Points and authorities also customarily accompany a petition filed in a superior court, although they do not appear to be expressly required by statute [*but see Code Civ. Proc. § 1090* (mandate proceeding referred to as "motion"); *Cal. Rules of Ct., Rules 3.1103* (application for writ of mandate as "law and motion proceeding"), 3.1113 (points and authorities required to be served with any "notice of motion"); for discussion and forms, see Ch. 417, *Points and Authorities*].

When no alternative writ is sought, proof of service of a copy of the petition need not accompany the application, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

[3] Verification

A writ of mandate may be issued only on the verified petition of the person beneficially interested [*Code Civ. Proc. § 1086*]. The verification may be by declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*] or by affidavit [*see Code Civ. Proc. § 2009*].

[4] Allegations

[a] Generally

The petition alleges:

- The identity and capacity of petitioner and respondent (Paragraphs 1, 2).

- The existence of respondent's duty (Paragraph 3) [*see Code Civ. Proc. § 1085*; *People ex rel. Younger v. County of El Dorado (1971) 5 Cal. 3d 480, 491, 96 Cal. Rptr. 553, 487 P.2d 1193]* .

- The petitioner's right (Paragraph 4) [*see Code Civ. Proc. § 1085*; *People ex rel. Younger v. El Dorado County (1971) 5 Cal. 3d 480, 491, 96 Cal. Rptr. 553, 487 P.2d 1193]* .

- The beneficial interest of petitioner (Paragraph 5) [*see Code Civ. Proc. § 1086*; *Carsten v. Psychology Examining Com. (1980) 27 Cal. 3d 793, 796, 166 Cal. Rptr. 844, 614 P.2d 276]* .

- The exhaustion of administrative remedies (Paragraph 6) [*Metcalf v. County of Los Angeles (1944) 24 Cal. 2d 267, 269, 148 P.2d 645* ; *Igna v. City of Baldwin Park (1970) 9 Cal. App. 3d 909, 914, 88 Cal. Rptr. 581]* .

- The lack of an adequate remedy (Paragraph 7) [*see Betancourt v. Workmen's Comp. App. Bd. (1971) 16 Cal. App. 3d 408, 412, 94 Cal. Rptr. 9]* .

[b] Identity of Petitioner (Paragraph 1)

If the petitioner is not a natural person, the petition should allege the petitioner's identity as an existing legal entity entitled to sue [*see Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6]* . This is sometimes referred to as the capacity to sue.

[c] Description of Respondent (Paragraph 2)

A writ of mandate may be issued to "any inferior tribunal, corporation, board, or person" [*Code Civ. Proc. § 1085*], and the petition must state facts tending to show that the respondent is such an entity. In the caption and the body of the petition the respondent may be described either as a multimember agency or as an individual administrative officer. The respondent should not be described as a department, division, or the like, because those terms do not refer to an agency [*see* discussion in Ch. 470, *Overview of Public Administrative Law*].

[d] Facts Subject to Judicial Notice (Paragraph 3)

Ultimate facts that are provable by judicial notice [*see Evid. Code § 451*], such as that the agency is required to process applications for a certain type of license, should be alleged. There is some authority in decisions of the Supreme Court that such facts will be "noticed" whether or not they have been alleged [*see Loranger v. Nadeau (1932) 215 Cal. 362, 365, 10 P.2d 63* (overruled on different ground in *Reich v. Purcell (1967) 67 Cal. 2d 551, 555, 63 Cal. Rptr. 31, 432 P.2d 727*); *see also Stanton v. Dumke (1966) 64 Cal. 2d 199, 201-202, 49 Cal. Rptr. 380, 411 P.2d 108* (court is required to consider facts subject to judicial notice as though they are alleged in petition when ruling on sufficiency of demurrer)]. The better practice, however, is to allege such facts.

[e] Petitioner's Beneficial Interest (Paragraphs 4, 5)

The requirement that the petitioner be "beneficially interested" in the issuance of the writ [*see Code Civ. Proc. § 1086*] reflects the general rule established by case law that a writ of mandate will not be issued when it would be of no benefit to the applicant, or when the right sought to be enforced is merely abstract and is not attended by any substantial benefit to the applicant [*see Spotton v. Superior Court (1918) 177 Cal. 719, 720, 171 P. 801* ; *Gay v. Torrance (1904) 145 Cal. 144, 147, 78 P. 540]* . It must appear from the petition that a right or interest of the petitioner will be protected or subserved by issuance of the writ [*see Ellis v. Workman (1904) 144 Cal. 113, 115, 77 P. 822]* .

[f] Exhaustion of Administrative Remedies (Paragraph 6)

Exhaustion of administrative remedies by the petitioner is generally required before administrative proceedings can be reviewed by a court [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 292-293, 109 P.2d 942]* . However, *Gov. Code § 11523* grants judicial review by way of writ of mandate concerning those agencies governed by the administrative adjudication procedures of the Administrative Procedure Act (APA) [*Gov. Code § 11500 et seq.*], even though there has been no petition for reconsideration before the agency, and hence no exhaustion of administrative remedies in the traditional sense. If the agency is not governed by the APA, the petition must show that the petitioner has made motions for rehearing, and done such other things as to constitute exhaustion of administrative remedies.

[g] Lack of Plain, Speedy, and Adequate Remedy (Paragraph 7)

The writ must be issued in all cases in which there is no plain, speedy, and adequate remedy, in the ordinary course of the law [*Code Civ. Proc. § 1086*].

[5] Availability of Damages for Licensing Activities

Code Civ. Proc. § 1095 provides that if a petitioner for mandamus recovers judgment, he or she may also recover damages that have been sustained and that the damages must be recovered against the public entity represented by an officer but not against the officer. A public entity, however, is not liable for an injury caused by the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke any license when the public entity or an employee of the public entity is authorized by enactment to determine whether or not a license should be issued, denied, suspended, or revoked [*Gov. Code § 818.4*].

Thus, when the denial of a license is challenged by an application for a writ of mandate, the licensing immunity precludes the award of damages in the mandate proceeding even if the writ is granted [*State of California v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 245-247, 115 Cal. Rptr. 497, 524 P.2d 1281*]. The licensing immunity does not prevail, however, over the liability of a public entity for failure to perform a mandatory duty (such as acting on a license application pursuant to statutory directive) because the immunity only applies when the public entity is authorized to exercise discretion [*see Morris v. County of Marin (1977) 18 Cal. 3d 901, 911-916, 136 Cal. Rptr. 251, 559 P.2d 606]* .

For further discussion of the licensing immunity, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[6] Costs

The prayer should contain an explicit request for costs, which are recoverable under *Code Civ. Proc. § 1095* in an original proceeding for a writ of mandate [*Gould v. Moss (1910) 158 Cal. 548, 549, 111 P. 925]* . Costs are not recoverable unless specifically awarded in the judgment, costs being a matter of the court's discretion rather than a matter of right [*see Gould v. Moss (1910) 158 Cal. 548, 549, 111 P. 925]* . Respondent, if successful, may also recover his or her costs if the court specifically awards costs, despite the reference in *Code Civ. Proc. § 1095* to "the applicant" without a corresponding reference to the respondent [*Union Trust Co. v. Superior Court (1939) 13 Cal. 2d 541, 543-544, 90 P.2d 582]* .

[7] Jurisdiction

A writ of mandate may be issued by any court, except a municipal court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act that the law specially enjoins, as a duty resulting from an office, trust, or station: or to compel the admission of a party to the use and enjoyment of a right or office to which he or she is entitled, and from which he or she is unlawfully precluded by such inferior tribunal, corporation, board, or person [*Code Civ. Proc. § 1085*].

The Supreme Court, the court of appeal, and the superior court have concurrent jurisdiction to hear an original proceeding for a writ of mandate [*see Cal. Const., art. VI, § 10*]. As a matter of policy, however, the higher courts normally refuse to exercise their original jurisdiction when the proceeding could be heard by a lower court [*see Cohen v. Superior Court (1968) 267 Cal. App. 2d 268, 270-271, 72 Cal. Rptr. 814* (reporting and examining the policy)]. Therefore, this petition should usually be filed in the superior court [*see Cal. Rules of Ct., Rule 8.490* (petition filed in reviewing court but that may be filed in lower court is required to state circumstances making issuance of writ by reviewing court proper); *Roma Macaroni Factory v. Giambastiani (1933) 219 Cal. 435, 436-437, 27 P.2d 371* (courts of appeal and Supreme Court will exercise jurisdiction when some emergency exists or when public welfare is involved)].

[8] Venue

Code Civ. Proc. § 393(1)(b), providing that the proper county for trial of an action against a public officer, for an act done by him or her in virtue or his or her office, is the county in which the cause, or some part thereof arose, applies to mandate proceedings [*see Code Civ. Proc. § 1109*; *see also Duval v. Contractors State License Board (1954) 125 Cal. App. 2d 532, 533-535, 271 P.2d 194* (*Code Civ. Proc. § 393(1)(b)* as applicable to "administrative mandate" proceedings under *Code Civ. Proc. § 1094.5*)]. The application of *Code Civ. Proc. § 393(1)(b)* may involve a problem concerning "where the cause or some part thereof arose." The underlying purpose of statutory provisions concerning venue for actions against state agencies is to afford to the citizen a forum that is not so distant and remote that access to it is difficult and expensive. It is the Legislature's policy to afford to a person adversely affected by the rulings of public agencies a forum for the resolution of disputes that is as convenient and inexpensive as possible. To that end, statutory provisions concerning venue are to be liberally construed in favor of the private litigant [*Regents of University of California v. Superior Court (1970) 3 Cal. 3d 529, 536, 541, 91 Cal. Rptr. 57, 476 P.2d 457]* .

[9] Service of Petition

Code Civ. Proc. § 1107 requires service of the petition before it is filed, with a proviso that the court may allow the petition to be filed and then served. Local practices vary among the counties, and counsel should check with the clerk to learn how to proceed in the county where the petition is to be filed. For discussion of service of papers, see Ch. 518, *Service of Summons and Papers* .

[10] Limitation Period

The statutory periods within which petitions for writ of mandate may be filed are not jurisdictional (in contrast to periods within which appeals may be taken) but are merely periods of limitation. Rules of law relating to the limitation of actions are applicable to mandate proceedings [*see Ginns v. Savage (1964) 61 Cal. 2d 520, 524, 39 Cal. Rptr. 377, 393 P.2d 689* (dictum reporting rules)].

[11] Appeal

The superior court's denial of a petition for a writ of mandate is a final judgment from which an appeal may be taken [*People v. Thompson (1885) 66 Cal. 398, 5 P. 686]* . For forms relating to appeals from judgments of the superior court, see Ch. 40, *Appeal* .

[12] Cross References

For a form of alternative writ of mandate relating to this form, see *§ 471B.101*.

For discussion, forms, and a procedural checklist guide relating to ordinary mandate proceedings, see Ch. 358, *Mandate and Prohibition* .

For memoranda of points and authorities for use in mandate proceedings generally, see California Points And Autorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender).

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Volume 41: Overview of Public Administrative Law thru Review of Agency Rulemaking-Chs. 470-472B
Chapter 471B LICENSING BY PUBLIC AGENCIES
PART V. FORMS

41-471B California Forms of Pleading and Practice--Annotated § 471B.101

§ 471B.101 Alternative Writ of Mandate in Proceedings to Compel Administrative Agency to Act on License Application

[1] FORM Alternative Writ of Mandate in Proceedings to Compel Administrative Agency to Act on License Application

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	ALTERNATIVE WRIT OF MANDATE
Respondent.	)	
	)	
	)	

The people of the State of California to the respondent(s) _____[*designate respondent*]:

WHEREAS, it appears by the verified petition of _____[*name*], the petitioner beneficially interested herein, that you, _____[*designate respondent*], have a clear, present, and ministerial duty to accept and process applications for a license to _____[*specify*], and have failed to comply with your duty in petitioner's case, and

WHEREAS, it appears that petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, and that an Alternative Writ of Mandate should issue herein in accordance with the prayer of the petition,

THEREFORE, we command that, immediately on receipt of this writ, you accept and process petitioner's application for a license to _____[*specify*], or that you show cause before this court, on _____[

date], at _____[*time*], why you have not done so.

WITNESS the Honorable _____[*name*], Judge of the above-entitled court.

Dated: _____.

Attested by my hand and the seal of this court this _____ day of _____[*month and year*].

_____ [*name of clerk*]
Clerk of the _____ Court
By _____ [*signature*]
Deputy Clerk

ORDER

Let the within writ issue.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form in [1], *above*, is an alternative writ of mandate, directing an administrative agency to act on a license application [*see Code Civ. Proc. § 1087*]. This form may be used as the writ prayed for by the form *set out in § 471B.100*. For discussion and forms relating to the noticed application procedure, which may be used in place of the alternative writ procedure, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

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41-471B California Forms of Pleading and Practice--Annotated § 471B.102

§ 471B.102 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] in Proceedings to Compel Administrative Agency to Set Aside Summary Denial of Application

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] in Proceedings to Compel Administrative Agency to Set Aside Summary Denial of Application

[*Caption. See § 471B.100.*]

Petitioner alleges:

1. [*Capacity of petitioner. See § 471B.100, Paragraph 1*].

2. [*Identification of respondent. See § 471B.100, Paragraph 2*].

3. Respondent has a clear, present, and ministerial duty to process applications for a license to _____ [*specify, e.g.,* drive motor vehicles] by reason of _____[*describe and cite to statute, ordinance, administrative regulation, or other authority that makes respondent's duty mandatory and not subject to exercise of discretion*], and particularly to _____[*specify particular duty not performed in present case*].

4. Petitioner has a clear, present, and substantial right to the performance of respondent's duty in that petitioner has duly applied for such license and is qualified to receive it; but respondent summarily denied petitioner's application without _____[*specify failure to perform duty in connection with processing application*].

5. [*Petitioner's interest in writ. See § 471B.100, Paragraph 5*].

6. [*Exhaustion of administrative remedies. See § 471B.100, Paragraph 6*].

7. [*Lack of adequate remedy and damages. See § 471B.100, Paragraph 7*].

WHEREFORE, petitioner prays:

1. That the court issue an alternative writ of mandate commanding respondent to set aside the decision to deny petitioner's application for a license to _____[*specify*] and to reconsider it, and particularly to _____[*specify duty not performed*], according to law, or to show cause before this court at a time specified by court order why respondent has not done so and why a peremptory writ should not issue;

2. That on the return of the alternative writ and the hearing of this petition, this court issue its peremptory writ of mandate commanding respondent to set aside the decision to deny petitioner's application for a license to _____[*specify*] and to reconsider in specific regard to _____[*specify duty not performed*], according to law;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*date*]
Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[*Verification. See § 471B.100.*]

[2] Use of Form

The petition in [1], *above*, is a general form for use in seeking a writ of mandate to compel an administrative agency to set aside a summary decision to deny a license application and to reconsider it, particularly performing some duty that was not performed on the original consideration [*see Code Civ. Proc. §§ 1085, 1086*].

If the duty not performed is to hold an evidentiary hearing, however, the appropriate proceeding is one for a writ of mandate under *Code Civ. Proc. § 1094.5* [*see* Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.]. That proceeding is also appropriate whenever the decision to deny an application was made following a hearing. The petitioner's objective is not to obtain a license directly, but merely to force the agency to proceed as the law requires. In the event of a subsequent denial on the merits, when there is no procedural defect, the remedy is a mandate proceeding under *Code Civ. Proc. § 1094.5* in which the writ is sought against an abuse of discretion [*see § 471B.104*].

[3] Verification

A writ of mandate may be issued only on the verified petition of the person beneficially interested [*Code Civ. Proc. § 1086*]. The verification may be by declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*] or by affidavit [*see Code Civ. Proc. § 2009*].

[4] Cross References

For additional discussion of the content of and procedure relating to a petition for writ of mandate, see also *§ 471B.100*.

For the related form of alternative writ of mandate, see *§ 471B.103*.

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41-471B California Forms of Pleading and Practice--Annotated § 471B.103

§ 471B.103 Alternative Writ of Mandate in Proceedings to Compel Administrative Agency to Set Aside Summary Denial of Application

[1] FORM Alternative Writ of Mandate in Proceedings to Compel Administrative Agency to Set Aside Summary Denial of Application

[*Caption. See Form § 471B.101.*]

The people of the State of California to the respondent(s) _____[*designate respondent*]:

WHEREAS, it appears by the verified petition of _____[*name*], the petitioner beneficially interested herein, that you, _____[*designate respondent*], have a clear, present, and ministerial duty to accept and process applications for a license to _____[*specify*], and to _____[*specify particular duty not performed*], and that you summarily denied petitioner's application without _____[*specify duty not performed*], and

WHEREAS, it appears that petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, and that an Alternative Writ of Mandate should issue herein in accordance with the prayer of the petition,

THEREFORE, we command that, immediately on receipt of this writ, you set aside your decision to deny petitioner's application for a license to _____[*specify*], and to reconsider it and to _____[*specify duty not performed*], according to law, or that you show cause before this court, on _____[*date*], at _____[*time*], why you have not done so.

WITNESS the Honorable _____[*name*], Judge of the above-entitled court.

Dated: _____.

Attested by my hand and the seal of this court this _____ day of _____[*month and*

year].

_____ [*name of clerk*]
Clerk of the _____ Court
By _____ [*signature*]
Deputy Clerk

ORDER

Let the within writ issue.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form in [1], *above*, is an alternative writ of mandate, directing an administrative agency to set aside a summary decision to deny a license application, and to reconsider it, particularly performing some duty that was not performed on the original consideration [*see Code Civ. Proc. § 1087*].

[3] Cross References

For the related form of petition for a writ of mandate, see *§ 471B.102*.

For brief discussion relating to alternative writs, see *§ 471B.101[2]*.

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41-471B California Forms of Pleading and Practice--Annotated § 471B.104

§ 471B.104 Petition for Writ of Administrative Mandate [Code Civ. Proc. § 1094.5] in Proceedings to Compel State Agency to Issue License

[1] FORM Petition for Writ of Administrative Mandate [Code Civ. Proc. § 1094.5] in Proceedings to Compel State Agency to Issue License

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR WRIT OF MANDATE
Respondent.	)	
	)	
	)	

Petitioner alleges:

1. [*Capacity of petitioner. See § 471B.100, Paragraph 1*].

2. [*Identification of respondent. See § 471B.100, Paragraph 2*].

3. Under _____ [*specify statute(s) governing business or profession, e.g., Section 2960 of the Business and Professions Code*], respondent has discretion to determine _____ [*specify, e.g.,* whether on the facts cause exists for denying an application for licensure as a psychologist]. Under _____ [*specify statute(s) requiring hearing, e.g., Section 2965 of the Business and Professions Code* and *Sections 11500-11529 of the Government Code*], the _____[*name of agency*] is required to hold a hearing for the purpose of making such a determination and to take evidence at such hearing.

4. On or about _____[*date*], petitioner filed an application with respondent _____[*name of agency*] for a license _____ [to *or* for] _____[*specify business or profession*] pursuant to _____[*specify statute*]. The application was in proper form and contained a full and correct statement of all matters required to be contained therein. Petitioner has, at all times mentioned herein, complied with all provisions of law required on his/her part to be performed incident to obtaining such a license.

5. Respondent ordered a hearing for the purpose of obtaining evidence on which to determine whether petitioner's application should be granted. Such hearing was held in _____[*city*], California, on _____[*date*], before _____ [*specify person or persons who presided at hearing, e.g.,* _____ (*name*), a duly appointed and acting hearing officer].

6. On _____[*date*], the hearing officer prepared a proposed decision recommending that petitioner's application for a license be denied. A copy of the proposed decision is attached hereto as Exhibit A and made a part hereof. Respondent adopted the proposed decision as its decision and order on _____[*date*], and it became effective on _____[*date*]. A copy of respondent's decision is attached hereto as Exhibit B and made a part hereof.

7. [*If appeal within administrative agency is provided, allege taking of appeal and determination adverse to petitioner*].

8. The order of the _____[*name of agency*] denying petitioner a license to _____[*specify business or profession*] is invalid for the following reasons:

a. _____ [*List separately each ground on which petitioner claims the order is invalid, e.g.,* The hearing officer found that _____ (*state all findings*). Under the _____ (*name of code*), the _____ (*name of agency*) does not have authority to deny a license on the basis of any of the facts set out in the findings].

b. _____ [*As another example,* At the hearing, petitioner tried to offer in evidence to show that _____ (*specify facts provable by evidence in question*). This evidence was in the form of _____ (*specify, e.g.,* a certified abstract of the record of the Court of _____ (*jurisdiction*)). The hearing officer ruled that this evidence was not admissible and it was not received].

c. _____ [*As another example,* The hearing officer found that _____ (*state all findings*). The evidence received at the hearing does not support these findings, as petitioner alleges more particularly hereinafter].

[*EITHER*]

9. A verbatim transcript of the record of the hearing, containing the evidence received, is attached hereto as Exhibit C and made a part hereof.

[*OR*]

9. The substance of the evidence received at the hearing is as follows: _____[*state substance of evidence*].

[*CONTINUE*]

10. _____ [*If petitioner claims that the evidence does not support the findings, add:* The evidence does not support the findings for the following reasons: _____ (*specify*)].

11. _____ [*If petitioner claims that incompetent evidence was received, add:* Petitioner objected at the hearing to the following evidence, on the grounds indicated, but in each instance petitioner's objection was not sustained, and the evidence was received: _____ (*identify evidence, e.g.,* the testimony of _____ (*name*), which was offered to show _____ (*specify*)), _____ (*state ground for objection, e.g.,* and which was objected to on the ground that _____ (*specify*))].

[12. Petitioner has the following relevant evidence that was not presented at the hearing: _____ (*describe completely*). This evidence could not be produced at the hearing because _____ (*specify why, in the exercise of reasonable diligence, petitioner could not produce evidence*). This evidence tends to show that _____ (*state what evidence will prove*).]

13. Petitioner does not have a plain, speedy, and adequate remedy in the ordinary course of law in that no _____[further] appeal can be taken from the decision of respondent _____[*name of agency*].

WHEREFORE, petitioner prays judgment as follows:

1. For an alternative writ of mandate directing respondents to set aside the order of _____[*date*] [and to reconsider whether petitioner is entitled to receive a license as applied for], or in the alternative to show cause before this court at a specified time and place why a peremptory writ of mandate granting petitioner the license applied for should not be issued;

2. For a peremptory writ of mandate to the same effect as the alternative writ except for the order to show cause;

3. For costs of suit herein incurred _____ [*add, if appropriate:* including $_____ for preparation of the record of the hearing]; and

4. For such other and further relief as the court may deem proper.

_____ [*date*]
Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[*Verification. See § 471B.100.]*

[2] Use of Form

The form of petition for writ of mandate in [1], *above,* may be used to obtain review by the superior court of an order or decision of a state agency refusing to issue a license to the petitioner [*see Code Civ. Proc. § 1094.5*].

[3] Verification

A writ of mandate may be issued only on the verified petition of the person beneficially interested [*Code Civ. Proc. § 1086*]. The verification may be by declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*] or by affidavit [*see Code Civ. Proc. § 2009*].

[4] Mandate to Compel Issuance of License

A writ of mandate may be issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which, by law, a hearing is required to be given, evidence is required to be taken, and discretion in the determination of the facts is vested in the inferior tribunal, corporation, board, or officer [*Code Civ. Proc. § 1094.5(a)*]. This applies to the decision of an agency denying a license to engage in a profession or business [*see, e.g., Savelli v. Board of Medical Examiners (1964) 229 Cal. App. 2d 124, 130-131, 40 Cal. Rptr. 171]* .

[5] Allegations

[a] Generally

The allegations in the petition must state facts showing the following:

- Discretion to determine certain relevant facts is vested in the agency (Paragraph 3) [*Code Civ. Proc. § 1094.5(a)*].

- By law, a hearing is required to be held for the purpose of determining those facts (Paragraph 3) [*Code Civ. Proc. § 1094.5(a)*].

- Evidence is required to be taken at the hearing (Paragraph 3) [*Code Civ. Proc. § 1094.5(a)*].

- A final administrative order was made as a result of the hearing and the determination of those facts (Paragraphs 4-6) [*Code Civ. Proc. § 1094.5(a)*].

- The order is invalid because of one or more of the following defects (Paragraphs 8-12):

  - The agency proceeded without, or in excess or, jurisdiction [*Code Civ. Proc. § 1094.5(b)*].

  - The petitioner was denied a fair trial [*Code Civ. Proc. § 1094.5(b)*].

  - The agency abused its discretion, which is established if the agency did not proceed in the manner required by law (which in most cases will result either in the denial of a fair trial or in a finding that the agency proceeded without, or in excess of, jurisdiction), if the order is not supported by the findings resulting from the administrative hearing, or if the findings are not supported by the evidence [*Code Civ. Proc. § 1094.5(b)*]. If this defect is alleged as the cause of the order's invalidity, the petition must also allege the substance of the evidence or, alternatively, and if there is a record of the evidence, that the record is incorporated by reference and attached as an exhibit.

Irrespective of the foregoing, if there is relevant evidence that, in the exercise of reasonable diligence, the petitioner could not have produced at the hearing, and which was not produced, the petition should allege the substance of the evidence together with facts showing that it could not have been produced at the hearing in the exercise of reasonable diligence [*see Code Civ. Proc. § 1094.5(e)*].

In addition to all of the foregoing, the petition must state facts showing the following:

- The petitioner is beneficially interested in the issuance of the writ of mandate [*Code Civ. Proc. § 1086*].

- The petitioner has no plain, speedy, and adequate remedy in the ordinary course of the law [*Code Civ. Proc. § 1086*].

[b] Petitioner's Beneficial Interest

When an agency has refused to issue a license, it is necessary to allege facts showing that the petitioner is actually qualified to receive a license as applied for, and that all application requirements were complied with (Paragraph 4) [*see Hippen v. Ford (1900) 129 Cal. 315, 316, 61 P. 929]* . An allegation that the petitioner is qualified to receive the license applied for, and that he or she duly applied for it, should be sufficient [*see Hippen v. Ford (1900) 129 Cal. 315, 316, 61 P. 929* (conceding sufficiency of allegation that petitioner duly complied with all laws, rules, ordinances, and regulations of municipality, and performed all and every requirement necessary thereunder for issuance of liquor license)].

[c] Final Administrative Order

The purpose of administrative mandate is to inquire into the validity of a "final administrative order or decision made as the result of" an administrative proceeding in which a hearing is required to be provided [*see Code Civ. Proc. § 1094.5(a)*]. Therefore, the petition should contain a narrative of events demonstrating that the order denying petitioner's license is a final order (Paragraph 6).

[d] Invalidity of Order

The reasons why the order is alleged to be invalid may be stated in statutory terms, for the court's convenience in understanding the basis for the petitioner's complaint (Paragraph 8). However, statutory language alone is insufficient; facts must be alleged [*see, e.g., Ward v. County of Riverside (1969) 273 Cal. App. 2d 353, 358, 78 Cal. Rptr. 46]* . Counsel should take care to make the grounds for objection clear. The bases for objection given in *Code Civ. Proc. § 1094.5* are somewhat confusing because of apparent overlap, but counsel should try to be as clear as possible in stating what defects form the basis of the petitioner's complaint. If counsel is unsure whether a particular defect is, for example, a denial of a fair hearing, or a failure to proceed in the manner required by law, the statutory language should be omitted and only the facts should be alleged.

When the agency's action is based on its questionable interpretation of a statute (rather than on a disputable finding of fact), that interpretation may be challenged in a mandate proceeding; and while the agency's interpretation will be given great weight by the courts, it is the duty of the courts, not of the administrative agencies, to state the true meaning of a statute finally and conclusively [*see Bodinson Mfg. Co. v. California E. Com. (1941) 17 Cal. 2d 321, 325-326, 109 P.2d 935]* . In the hearing on the petition for writ of mandate, the petitioner may attack the credibility of witnesses who testified at the agency hearing, and if credibility of a witness is to be an issue in the mandate proceeding, the petition should allege the facts on which petitioner will base the attack [*see Dare v. Bd. of Medical Examiners (1943) 21 Cal. 2d 790, 799-800, 136 P.2d 304]* .

[e] Evidence Presented at Administrative Hearing

The petition need not refer to the evidence unless the petitioner's objection relates to an evidentiary matter. In most cases, the petitioner will allege that the findings are not supported by the evidence, usually because this will be the only claim reasonably open to argument. In such a case, the petitioner must either have attached to it, as an exhibit, a complete transcript of all of the evidence on which the agency acted or, at the minimum, allege the substance of all of

the evidence received at the hearing [*see Faulkner v. Cal. Toll Bridge Authority (1953) 40 Cal. 2d 317, 330-331, 253 P.2d 659]* . There is some difference of opinion concerning whether a transcript should be attached, some practitioners preferring to allege the substance of the evidence instead. In some cases, a transcript might be unavailable due to time limitations. In any event, all of the evidence, not just the evidence favorable to the petitioner, would have to be alleged (Paragraph 9) [*see Bennett v. Brady (1936) 17 Cal. App. 2d 114, 116, 61 P.2d 530* (petition alleging only favorable evidence is demurrable)].

[f] Objection to Incompetent Evidence

If the petitioner complains that incompetent evidence was received at the hearing, it must appear that he or she made a timely and appropriate objection to receiving it; otherwise, he or she may not raise the issue in the mandate proceeding (Paragraph 11) [*see Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 545, 92 Cal. Rptr. 525]* . Since the denial of a license involves the application of the substantial evidence test, an order or a decision denying a license will not be set aside merely because of erroneous rulings on the admissibility of evidence, if there is properly admitted substantial evidence supporting the findings [*see English v. City of Long Beach (1950) 35 Cal. 2d 155, 159, 217 P. 2d 22]* .

[g] Consideration of "Outside Evidence"

Action by an agency, exercising an adjudicatory function. amounts to denial of a hearing when the action is based on evidence of which the person who is affected by the action was not informed, and which he or she had no opportunity to controvert. An administrative agency that is required to make determinations of fact after a hearing cannot act on its own information, and it can consider nothing as evidence that was not introduced at a hearing of which the parties had notice or at which they were present. The fact that there may be substantial and properly introduced evidence that supports the board's ruling is immaterial. The requirement of a hearing necessarily contemplates a decision in light of the evidence there introduced [*English v. City of Long Beach (1950) 35 Cal. 2d 155, 159, 217 P. 2d 22]* .

[h] Evidence Not Produced at Administrative Hearing

If there is relevant evidence that the petitioner did not produce at the administrative hearing, for the reason that it could not have been produced with the exercise of reasonable diligence, then, in a case in which an agency has refused to issue a license, the court may remand the case for a rehearing (Paragraph 12) [*see Code Civ. Proc. § 1094.5(e)*].

[6] Disposition of Case

[a] Remand for Rehearing

When it appears that a rehearing would be appropriate, the court may remand the case [*see Code Civ. Proc. § 1094.5(f)*]. This may be done (1) when findings are inadequate; (2) when a hearing was not held but should have been held; (3) when evidence was improperly excluded; (4) when outside evidence was considered; or (5) when evidence was discovered after the hearing [*see Code Civ. Proc. § 1094.5(a), (b), (e)*]. The court's authority is not limited to specified cases, however, and the court may remand whenever, in the court's discretion, that would be appropriate [*see Code Civ. Proc. § 1094.5(e)*].

[b] Setting Aside Administrative Decision

In any case in which the court finds in favor of the petitioner, the court should order the decision resulting from the administrative hearing to be set aside [*Code Civ. Proc. § 1094.5(f)*]. When the court's judgment rests on a conclusion that the evidence does not support the findings, the court may or may not also remand for a rehearing. Because the "substantial evidence" test applies to denial of a license, the court necessarily lacks authority to substitute its own decision for that of the agency [*see Code Civ. Proc. § 1094.5(c)*], and remand must follow as a matter of course. The

prayer should specifically request remand for reconsideration or the court might overlook it as the appropriate remedy.

[7] Request for Costs

If the petitioner has incurred the expense of preparing all or any part of the record, the prayer should contain a request for costs including a specified amount for preparation of the record. Such an expense is specifically recoverable as a cost by the prevailing party [*Moran v. Board of Medical Examiners (1948) 32 Cal. 2d 301, 315, 196 P.2d 20]* . The expense of preparing all or any part of the record is a taxable cost under *Code Civ. Proc. § 1094.5(a)*, whether the record has been prepared for a mandate proceeding or for an administrative proceeding, by which the petitioner seeks to exhaust his or her administrative remedies [*Ralph's Chrysler-Plymouth v. New Car Dealers Policy & Appeals Bd. (1973) 8 Cal. 3d 792, 796, 106 Cal. Rptr. 169, 505 P.2d 1009]* .

[8] Cross References

For additional discussion of the content of and procedure relating to a petition for a writ of mandate, see also *§ 471B.100*.

For the related form of alternative writ of administrative mandate, see *§ 471B.105*.

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§ 471B.105 Alternative Writ of Administrative Mandate in Proceedings to Compel State Agency to Issue License

[1] FORM Alternative Writ of Administrative Mandate in Proceedings to Compel State Agency to Issue License

[*Caption. See § 471B.101.*]

The people of the State of California to the respondent, _____[*name and title or other designation of respondents*]:

WHEREAS, it appears by the verified petition of _____[*name*], the petitioner beneficially interested herein, that you, _____[*name of administrative body*], of the State of California, have rendered a decision and order dated _____, improperly denying the application or petitioner _____[*name*] for a _____[*specify business or profession*] license, and

WHEREAS, it appears that petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, and that an Alternative Writ of Mandate should issue herein in accordance with the prayer of this petition,

THEREFORE, we command that, immediately on receipt of this writ, you make and enter an order vacating and setting aside the decision of _____[*date*], denying petitioner's application for a license _____ [to *or* for] _____[*specify business or profession*], and issue such license to petitioner, or that you show cause before this court [in Department _____ thereof], on _____[*date*] at _____[*time*], why you have not done so.

WITNESS the Honorable _____[*name*], Judge of the above-entitled court.

Dated: _____.

Attested by my hand and the seal of this court this _____ day of _____[*month and year*].

_____ [*name of clerk*]
Clerk of the _____ Court
By _____ [*signature*]
Deputy Clerk

ORDER

Let the within writ issue.
Dated: _____.

_____ [*signature*]
Judge of the_____ Court

[2] Use of Form

The form in [1], *above*, is an alternative writ of mandate directing a respondent board to issue a license to the petitioner or to show cause why it has not done so [*see Code Civ. Proc. § 1087*]. This form may be used as the writ prayed for in the form *set out in § 471B.104* when, as is usually the case, the writ is issued by a superior court. Courts of appeal generally prepare their own writs of mandate.

[3] Cross References

For brief discussion relating to alternative writs, see *§ 471B.101[2]*.

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41-471B California Forms of Pleading and Practice--Annotated § 471B.106

§ 471B.106 Petition for Writ of Administrative Mandate [Code Civ. Proc. § 1094.5] in Proceedings to Compel State Agency to Vacate Order Revoking or Suspending License and to Stay Enforcement of Order

[1] FORM Petition for Writ of Administrative Mandate [Code Civ. Proc. § 1094.5] in Proceedings to Compel State Agency to Vacate Order Revoking or Suspending License and to Stay Enforcement of Order

[*Caption. See § 471B.104.*]

1. [*Capacity of petitioner. See § 471B.100, Paragraph 1*].

2. [*Identification of respondent. See § 471B.100, Paragraph 2*].

3. Under Section(s) _____ of the _____[*state name of code governing the business or profession*], respondent _____[*name of agency*] has discretion to determine _____ [*state relevant facts, e.g.,* whether a license to _____ (*specify business or profession*) should be _____ (revoked *or* suspended)]. Under Section(s) _____ of the _____[*state name of code*], respondent _____[*name of agency*] is required to hold a hearing for the purpose of making such a determination and to take evidence at such hearing.

4. On _____[*date*], petitioner was issued a license _____ [to *or* for] _____[*specify business or profession*] by respondent; petitioner possessed the license at all times thereafter until _____[*date*], when the license was _____ [revoked *or* suspended], as hereinafter alleged. [During the period in which petitioner possessed the license, petitioner actively engaged in business as a _____ (*specify*) under the license].

5. On _____[*date*], _____ [a charge was filed against petitioner with respondent by _____ (*name*) *or* respondent filed a charge against petitioner] accusing him/her of _____[*specify alleged misconduct*]. A copy of the charge is attached hereto as Exhibit A and made a part hereof.

6. Respondent ordered a hearing for the purpose of obtaining evidence on which to determine whether the charge was true, and whether petitioner's license should be revoked or suspended if the charge was found to be true. The hearing was held in _____[*city*], California, on _____[*date*], before _____[*name*], a duly appointed and acting hearing officer.

7. On _____[*date*], the hearing officer prepared a proposed decision finding that the charges were true and that petitioner's license should be _____ [revoked *or* suspended for a period of _____ (*specify duration*)]. A copy of the proposed decision is attached hereto as Exhibit B and made a part hereof. Respondent adopted the proposed decision as its decision and order on _____[*date*], and it became effective on _____[*date*], on which latter date petitioner's license was _____ [revoked *or* suspended until _____ (*date*)]. A copy of the decision is attached here as Exhibit C and made a part hereof.

8. [*If appeal within administrative agency is provided, allege taking of appeal and determination adverse to petitioner*].

9. The order of the _____[*name of agency*] _____ [revoking *or* suspending] petitioner's license to _____[*specify business or profession*] is invalid for the following reasons:

a. _____ [*List separately each ground on which petitioner claims the order is invalid, e.g.,* The hearing officer found that _____ (*state all findings*). Under the _____ (*name of code*) the _____ (*name of agency*) does not have authority to _____ (revoke *or* suspend) a license on the basis of any of the facts set out in the findings].

b. _____ [*As another example,* At the hearing petitioner tried to offer evidence to show that _____ (*specify facts provable by evidence in question*). This evidence was in the form of _____ (*specify, e.g.,* a certified abstract of the record of the _____ Court of _____ (*jurisdiction*)). The hearing officer ruled that this evidence was not admissible and it was not received].

c. _____ [*As another example,* The hearing officer found that _____ (*state all findings*). The evidence received at the hearing does not support these findings, as petitioner alleges more particularly hereinafter].

[*EITHER*]

10. A verbatim transcript of the record of the hearing, containing the evidence received, is attached hereto as Exhibit D and made a part hereof.

[*OR*]

10. The substance of the evidence received at the hearing is as follows: _____[*state substance of evidence*].

[*CONTINUE*]

11. _____ [*If petitioner claims that the evidence does not support the findings, add:* The evidence does

not support the findings for the following reasons: _____ (*specify*)].

12. _____ [*If petitioner claims that incompetent evidence was received, add:* Petitioner objected at the hearing to the following evidence, on the grounds indicated, but in each instance petitioner's objection was not sustained, and the evidence was received: _____ (*identify evidence, e.g.,* the testimony of _____ (*name*), which was offered to show _____ (*specify*)), _____ (*state ground for objection, e.g.,* and which was objected to on the ground that _____ (*specify*))].

[13. Petitioner has the following relevant evidence that was not presented at the hearing: _____ (*describe completely*). This evidence could not be produced at the hearing because _____ (*specify why, in the exercise of reasonable diligence, petitioner could not produce evidence*). This evidence tends to show that _____ (*state what evidence will prove*).]

14. Petitioner does not have a plain, speedy, and adequate remedy in the ordinary course of law in that _____ [*state facts showing absence of another adequate remedy, e.g., Government Code section 11523* provides the only method of review].

WHEREFORE, petitioner prays:

1. That this court issue its alternative writ of mandate directed to respondent, commanding respondent to vacate and set aside its decision and order of _____ [revocation *or* suspension] referred to above, or to show cause before this court at a specified time and place why this has not been done;

2. For an order staying the operation of the order _____ [revoking *or* suspending] petitioner's license privileges pending final judgment herein;

3. That, on the hearing of this application and the return thereto, if any, this court issue its peremptory writ of mandate commanding respondent to set aside its order;

4. For costs of suit herein incurred [including $_____ for preparation of the record of hearing]; and

5. For such other and further relief as the court may deem proper.

_____ [*date*]
Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[*Verification. See § 471B.100.*]

[2] Use of Form

The form of petition in [1], *above,* is for use to compel a state agency to set aside an order revoking or suspending a license. It requests a court to issue a writ of mandate pursuant to *Code Civ. Proc. § 1094.5*.

[3] Verification

A writ of mandate may be issued only on the verified petition of the person beneficially interested [*Code Civ. Proc. § 1086*]. The verification may be by declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*] or by affidavit [*see Code Civ. Proc. § 2009*].

[4] Proof of Service

An application for a stay of an administrative order or decision must be accompanied by proof of service of a copy of the application on the respondent [*see Code Civ. Proc. § 1094.5(g)*].

[5] Stay of Administrative Order

[a] Generally

Except as provided in *Code Civ. Proc. § 1094.5(h)*, the court in which proceedings under *Code Civ. Proc. § 1094.5* are instituted may stay the operation of the administrative order or decision pending the judgment of the court, or until the filing of a notice of appeal from the judgment, or until the expiration of time for filing such notice, whichever occurs first. No stay will be imposed or continued if the court is satisfied that it is against the public interest [*Code Civ. Proc. § 1094.5(g)*].

[b] Pursuant to Statute

Code Civ. Proc. § 1094.5(h) establishes the standard for obtaining a stay of an administrative order or decision of an agency that issues licenses pursuant to *Bus. & Prof. Code § 500 et seq.* (healing arts), the Osteopathic Initiative Act, or the Chiropractic Initiative Act. The standard established by *Code Civ. Proc. § 1094.5(h)* also applies with respect to the orders or decisions of other state agencies, but only when the agency has adopted the proposed decision of the administrative law judge in its entirety or has adopted the proposed decision but reduced the proposed penalty pursuant to *Gov. Code § 11517(c)(2)*; otherwise, the standard in *Code Civ. Proc. § 1094.5(g)* applies [*Code Civ. Proc. § 1094.5(h)(2)*].

Under *Code Civ. Proc. § 1094.5(h)*, the court in which proceedings under *Code Civ. Proc. § 1094.5* are instituted may stay the operation of the administrative order or decision of any licensed hospital or any state agency made after a hearing required by statute to be conducted under the provisions of the Administrative Procedure Act (*Gov. Code § 11500 et seq.*), conducted by the agency itself or a hearing officer on the staff of the Office of Administrative Hearings pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing such notice, whichever occurs first. However, the stay must not be imposed or continued unless the court is satisfied that the public interest will not suffer and that the licensed hospital or agency is unlikely to prevail ultimately on the merits [*Code Civ. Proc. § 1094.5(h)(1)*].

[c] Service of Application of Stay

The application for a stay of an administrative decision under either *Code Civ. Proc. § 1094.5(g)* or *(h)* must be accompanied by proof of service of a copy of the application on the respondent. Service must be made in the manner provided by *Code Civ. Proc. § 410.10 et seq.* or *Code Civ. Proc. § 1010 et seq.* [*Code Civ. Proc. § 1094.5(g), (h)(1)*].

[6] Allegation of Petitioner's Beneficial Interest

If an existing license has been taken away or suspended, the beneficial interest of the licensee (petitioner) is clear [*see Carsten v. Psychology Examining Com. (1980) 27 Cal. 3d 793, 796-797, 166 Cal. Rptr. 844, 614 P.2d 276]* . No additional facts need to be alleged to establish a beneficial interest.

[7] Cross References

For general discussion of petitions for writs of administrative mandate and additional cross references, see *§ 471B.104[2]* et seq.

For further discussion of a stay under *Code Civ. Proc. § 1094.5(h)*, see Ch. 414, *Physicians: Licensing and Discipline*

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41-471B California Forms of Pleading and Practice--Annotated § 471B.107

§ 471B.107 Alternative Writ of Mandate in Proceedings to Compel State Agency to Vacate Order Revoking or Suspending License and to Stay Enforcement of Order

[1] FORM Alternative Writ of Mandate in Proceedings to Compel State Agency to Vacate Order Revoking or Suspending License and to Stay Enforcement of Order

[*Caption. See § 471B.101.*]

The people of the State of California to the respondent, _____[*name and title or other designation of respondents*]:

WHEREAS, it appears by the verified petition of _____[*name*], the petitioner beneficially interested herein, that you, _____[*name of administrative body*], of the State of California, are proceeding under a [null and void] order improperly _____ [revoking *or* suspending] the _____[*specify business or profession*] license of the petitioner, and

WHEREAS, it appears that petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, and that an Alternative Writ of Mandate should issue herein in accordance with the prayer of this petition,

THEREFORE, we command that, immediately on receipt of this writ, you vacate and set aside such order _____ [revoking *or* suspending] the license of petitioner, or to show cause before this court [in Department _____ thereof], on _____[*date*] at _____[*time*], why you have not done so.

Pending the adjudication of this writ of mandate:

YOU ARE HEREBY ORDERED to stay the enforcement of your decision and order.

WITNESS the Honorable _____[*name*], Judge of the above-entitled court.

Dated: _____.

Attested by my hand and the seal of this court this _____ day of _____[*month and year*].

_____ [*name of clerk*]
Clerk of the _____ Court
By _____ [*signature*]
Deputy Clerk

ORDER

Let the within writ issue.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form in [1], *above*, is an alternative writ of mandate, directing a respondent board to vacate an order revoking or suspending petitioner's license, and staying enforcement of the order, pending determination of the mandamus proceedings [*see Code Civ. Proc. § 1087*]. This form may be used as the writ prayed for in § 471B.106.

[3] Cross references

For brief discussion relating to alternative writs, see *§ 471B.101[2]*.

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41-471B California Forms of Pleading and Practice--Annotated § 471B.108

§ 471B.108 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] in Proceedings to Compel City or County and Local Peace Officer to Allow Petitioner to Resume Operation of Business and Return License Improperly Seized

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] in Proceedings to Compel City or County and Local Peace Officer to Allow Petitioner to Resume Operation of Business and Return License Improperly Seized

[*Caption. See § 471B.100.*]

Petitioner alleges:

1. [*Capacity of petitioner. See § 471B.100, Paragraph 1*].

2. Respondent _____[*name of city or county*] at all times herein mentioned was, and now is, a _____ [municipal corporation *or* county] organized and existing under the laws of California.

3. Respondent _____[*name*] at all times herein mentioned was, and now is, the duly appointed, qualified and acting _____ [chief of police of such city *or* sheriff of such county].

4. At all times herein mentioned, petitioner was engaged in the operation of a _____[*specify type*] business in _____[*city*], California, and the holder of a license to operate such business, duly issued by the _____ [city *or* county], and complied in all respects with the conditions of the license.

5. On or about _____[*date*], the _____ [city council of the city *or* board of supervisors of the county] enacted Ordinance No. _____ entitled "_____." This ordinance became effective on _____[*date*], and at all times since that date has been, and now is, in full force and effect. The ordinance provides that no one may operate a _____[*specify type*] business in the _____ [city *or* county] without at all times displaying in a conspicuous place in the business a duly

issued license to operate such business.

6. On or about _____[*date*], respondent _____ [*name]*, purportedly acting in his/her official capacity as _____ [chief of police *or* sheriff], ordered petitioner to close his/her place of business under threat of arrest; in compliance with such instruction, petitioner closed his/her place of business and the business has been closed since that date.

7. On or about _____[*date*], respondent _____[*name*], purportedly acting in his/her official capacity, entered petitioner's place of business and seized petitioner's license to operate the place of business and has, at all times since that date, had possession, and now has possession, of the license.

8. No criminal or civil proceedings of any nature in connection with petitioner's operation of his/her business, and no proceedings of any nature respecting the suspension or revocation of petitioner's license to operate his/her business had, at any time prior to _____[*date*], been initiated, nor have any proceedings of any such nature been initiated at any time since. Respondent _____[*name*], in ordering petitioner to close his/her place of business and in seizing petitioner's license, acted arbitrarily, capriciously, without jurisdiction, and without any authority or warrant of law.

9. Petitioner has demanded of respondents, and each of them, that they allow him/her to resume operation of his/her business without threat of arrest or prosecution, and has demanded that physical possession of the license be restored to him/her, but respondents have failed and refused, and continue to fail and refuse to comply with the request.

10. Petitioner is unable to resume operation of the business without threat of arrest or prosecution and, even if he/she did so, would be violating the ordinance requiring that a license to operate such a business be conspicuously displayed, inasmuch as the respondent _____[*name*] has possession of the license and petitioner is unable to obtain possession of it from him/her.

11. Petitioner has no plain, speedy, and adequate remedy in the ordinary case of law in that _____[*state facts showing absence of another adequate remedy*].

WHEREFORE, petitioner prays:

1. That this court issue its alternative writ of mandate commanding respondents to revoke and set aside the order directing petitioner to close his/her business, and further commanding them to restore to petitioner physical possession of the license to operate his/her business, or to show cause before this court at a specified time and place why they have not done so;

2. That, on the hearing of this application and the return thereto, if any, this court issue its peremptory writ of mandate commanding respondents to revoke and set aside the order directing petitioner to close his/her business and to restore to petitioner physical possession of the license to operate his/her business;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*date*]
Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Petitioner

[*Verification. See § 471B.100.*]

[2] Use of Form

The form of petition for writ of mandate in [1], *above*, is for use to compel a city or county and a local peace officer to allow the petitioner to resume the operation of his or her business and return his or her license that was improperly seized.

[3] Verification

A writ of mandate may be issued only on the verified petition of the person beneficially interested [*Code Civ. Proc. § 1086*]. The verification may be by declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*] or by affidavit [*see Code Civ. Proc. § 2009*].

[4] Writ of Mandate

A writ of mandate may be issued by any court, except a municipal court, to an inferior board (such as a board of supervisors or city council) or person (such as a peace officer) to compel the admission of a party (such as a licensee) to the use and enjoyment of a right to which he or she is entitled, and from which he or she is unlawfully precluded by such inferior board or person [*see Code Civ. Proc. § 1085*].

The writ must be issued in all cases in which there is not a plain, speedy, and adequate remedy in the ordinary course of law [*Code Civ. Proc. § 1086*]. However, the writ only may be issued on the verified petition of the party beneficially interested [*Code Civ. Proc. § 1086*].

Counsel should note that this petition involves "traditional mandate," rather than "administrative mandate" under *Code Civ. Proc. § 1094.5*. Relief under *Code Civ. Proc. § 1094.5* is only available when the underlying action is an administrative order or decision conforming to certain statutory requirements [*see Code Civ. Proc. § 1094.5(a)*; *see also § 471B.104[2]* et seq.].

[5] Cross References

For additional discussion of the content of and the procedure relating to a petition for a writ of mandate, see *§ 471B.100*.

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41-471B California Forms of Pleading and Practice--Annotated § 471B.109

§ 471B.109 Alternative Writ of Mandate in Proceedings to Compel City or County and Local Peace Officer to Allow Petitioner to Resume Operation of Business and Return License Improperly Seized

[1] FORM Alternative Writ of Mandate in Proceedings to Compel City or County and Local Peace Officer to Allow Petitioner to Resume Operation of Business and Return License Improperly Seized

[*Caption. See § 471B.101.*]

The people of the State of California to the respondent(s) _____[*designate respondents*]:

WHEREAS, it appears by the verified petition of _____[*name*], the petitioner beneficially interested herein, that you, _____[*designate respondents*], acted without authority or warrant of law in ordering the closure of the business of petitioner, seizing possession of the petitioner's _____[*specify business or profession*] license, and refusing petitioner's requests to resume operation of his/her business and regain physical possession of his/her license, and

WHEREAS, it appears that petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, and that an Alternative Writ of Mandate should issue herein in accordance with the prayer of the petition,

THEREFORE, we command that, immediately on receipt of this writ, you revoke and set aside the order directing petitioner to close his/her business, and that you restore to petitioner physical possession of the license to operate his/her business, or that you show cause before this court, on _____[*date*], at _____[*time*], why you have not done so.

WITNESS the Honorable _____[*name*], Judge of the above-entitled court.

Dated: _____.

Attested by my hand and the seal of this court this _____ day of _____[*month and*

year].

_____ [*name of clerk*]
Clerk of the _____ court
By _____ [*signature*]
Deputy Clerk

ORDER

Let the within writ issue.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form in [1], *above*, is an alternative writ of mandate, directing a local government entity and/or a local peace officer to restore petitioner's license and to revoke and set aside a prior order closing the petitioner's business, or to show cause why it has not done so [*see Code Civ. Proc. §§ 1085, 1087*].

[3] Cross References

For brief discussion relating to alternative writs, see *§ 471B.101[2]*.

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41-471B California Forms of Pleading and Practice--Annotated § 471B.110

§ 471B.110 Petition for Writ of Administrative Mandate [Code Civ. Proc. § 1094.5] in Proceedings to Compel City or County to Vacate Order Revoking Business License on Ground Business Constitutes Public Nuisance

[1] FORM Petition for Writ of Administrative Mandate [Code Civ. Proc. § 1094.5] in Proceedings to Compel City or County to Vacate Order Revoking Business License on Ground Business Constitutes Public Nuisance

[*Caption. See § 471B.104.*]

Petitioner alleges:

1. [*Capacity of petitioner. See § 471B.100, Paragraph 1*].

2. Respondent _____ [city *or* county] of _____ at all times herein mentioned was, and now is, a _____ [city *or* county], organized and existing under the laws of California.

3. At all times herein mentioned, the respondents _____[*names*] composed, and do now compose, the _____ [City Council of such city *or* Board of Supervisors of such county] and, as such body, have sole jurisdiction to issue and revoke license for the operation of _____[*specify business*] in said _____[*name of city or county*].

4. Under _____[*cite applicable city or county ordinance by title and date of passage*] respondent _____ [City Council *or* Board of Supervisors] has discretion to determine _____ [*state relevant facts, e.g.,* whether a business constitutes a public nuisance under _____ (*cite city or county ordinance or state code section*)]. Under _____[*cite applicable city or county ordinance*], the _____ [City Council *or* Board of Supervisors] is required to hold a hearing and to take evidence in making this determination.

5. On _____[*date*], petitioner was issued a license by respondents to operate a _____[*type of business*] at _____[*city*], California; petitioner possessed such license

at all times thereafter until _____[*date*], when it was revoked, as hereinafter described. During such period, petitioner actively engaged in the operation of a _____[*specify business*] under the license.

6. At all times herein mentioned, _____[*cite applicable state code section or city or county ordinance by title and date of passage*] provided, and it does now provide, that _____[*set out language stating what constitutes public nuisance*].

7. On _____[*date*], _____ [_____ (*name*) filed a charge against petitioner with respondent *or* respondent _____ (*name*) filed a charge against petitioner] accusing him/her of maintaining a public nuisance. A copy of the charge is attached hereto as Exhibit A and made a copy hereof.

8. Respondents ordered a hearing for the purpose of obtaining evidence on which to determine whether the charge was true and whether petitioner's license should be revoked or suspended if the charge was found to be true. The hearing was held in _____[*city*], California, on _____[*date*], before _____[*name*], a duly appointed and acting hearing officer.

9. On _____[*date*], following such hearing, respondent members of the _____ [City Council *or* Board of Supervisors] voted to revoke petitioner's license on the ground that his/her place of business constituted a public nuisance, as defined by _____[*specify statute or ordinance*]. [*If right to request rehearing is provided, allege request and refusal.*] Pursuant to such decision, petitioner's license was revoked, effective _____[*date*].

10. The decision of the _____ [City Council *or* Board of Supervisors] revoking petitioner's license to _____[*specify business or profession*] is invalid for the following reasons:

a. _____ [*List separately each ground on which petitioner claims the order is invalid, e.g.,* The hearing officer found that _____ (*state all findings*). Under _____ (*cite statute or ordinance*), the _____ (City Council *or* Board of Supervisors) does not have authority to revoke a license on the basis of any of the facts set out in the findings].

b. _____ [*As another example,* At the hearing, petitioner tried to offer evidence to show that _____ (*specify facts provable by evidence in question*). This evidence was in the form of _____ (*specify, e.g.,* a certified abstract of the record of the _____ Court of _____ (*jurisdiction*)]. The hearing officer ruled that this evidence was not admissible and it was not received].

c. _____ [*As another example,* The hearing officer found that _____ (*state all findings*). The evidence received at the hearing does not support these findings, as petitioner alleges more particularly hereinafter].

[*EITHER*]

11. A verbatim transcript of the record of the hearing, containing the evidence received, is attached hereto as Exhibit B and made a part hereof.

[*OR*]

11. The substance of the evidence received at the hearing is as follows: _____[*state substance of*

evidence].

[*CONTINUE*]

12. _____ [*If petitioner claims that the evidence does not support the findings, add:* The evidence does not support the findings for the following reasons: _____ (*specify*)].

13. _____ [*If petitioner claims that incompetent evidence was received, add:* Petitioner objected at the hearing to the following evidence, on the grounds indicated, but in each instance petitioner's objection was not sustained, and the evidence was received: _____ (*identify evidence, e.g.,* the testimony of _____ (*name*), which was offered to show _____ (*specify*)), _____ (*state ground for objection, e.g.,* and which was objected to on the ground that _____ (*specify*))].

[14. Petitioner has the following relevant evidence that was not presented at the hearing: _____ (*describe completely*). This evidence could not be produced at the hearing because _____ (*specify why, in the exercise of reasonable diligence, petitioner could not produce evidence*). This evidence tends to show that _____ (*state what evidence will prove*).]

15. Petitioner has exhausted all remedies that exist under the ordinances of such _____ [city *or* county] to obtain reinstatement of his/her license.

16. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law in that _____[*state facts showing absence of another adequate legal remedy*].

WHEREFORE, petitioner prays:

1. That this court issue its alternative writ of mandate commanding respondents to vacate their order revoking petitioner's license or to show cause before this court at a specified time and place why this has not been done;

2. That, on hearing of this application and the return thereto, if any, this court issue its peremptory writ of mandate commanding respondents to set aside their order;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*date*]
Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[*Verification. See § 471B.100.*]

[2] Use of Form

The form in [1], *above,* is a petition for a writ of administrative mandate to compel a municipal or county government to

vacate its order revoking a business license on the ground that the business constitutes a public nuisance [*see Code Civ. Proc. § 1094.5*].

[3] Verification

A writ of mandate may be issued only on the verified petition of the person beneficially interested [*Code Civ. Proc. § 1086*]. The verification may be by declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*] or by affidavit [*see Code Civ. Proc. § 2009*].

[4] Cross References

For additional discussion and cross references relating to petitions for writs of administrative mandate, see *§ 471B.104[2]* et seq.

For general discussion and forms for use in actions involving public nuisance, see Ch. 391, *Nuisance* .

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41-471B California Forms of Pleading and Practice--Annotated § 471B.111

§ 471B.111 Alternative Writ of Administrative Mandate in Proceedings to Compel City or County to Vacate Order Revoking Business License on Ground Business Constitutes Public Nuisance

[1] FORM Alternative Writ of Administrative Mandate in Proceedings to Compel City or County to Vacate Order Revoking Business License on Ground Business Constitutes Public Nuisance

[*Caption. See § 471B.101.*]

WHEREAS, it appears by the verified petition of _____[*name*], the petitioner beneficially interested herein, that you, the _____ [city *or* county] of _____, are proceeding under an invalid order improperly revoking the _____[*specify business or profession*] license of the petitioner on the ground that petitioner's place of business constituted a public nuisance as defined by _____[*specify statute or ordinance*], and

WHEREAS, it appears that petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, and that an Alternative Writ of Mandate should issue herein in accordance with the prayer of this petition,

THEREFORE, we command that, immediately on receipt of this writ, you vacate and set aside such order revoking the license of petitioner, or to show cause before this court, on _____[*date*] at _____[*time*], why you have not done so.

Pending the adjudication of this writ of mandate:

YOU ARE HEREBY ORDERED to stay the enforcement of your decision and order.

WITNESS the Honorable _____[*name*], Judge of the above-entitled court.

Dated: _____.

Attested by my hand and the seal of this court this _____ day of _____[*month and year*].

_____ [*name of clerk*]
Clerk of the _____ Court
By _____ [*signature*]
Deputy Clerk

ORDER

Let the within writ issue.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form in [1], *above*, is an alternative writ of mandate, directing a municipal or county government to vacate its order revoking a business license on the ground that the business constitutes a public nuisance [*see Code Civ. Proc. § 1087*]. This form may be used as the writ prayed for in § 471B.110.

[3] Cross References

For brief discussion of alternative writs of mandate, see *§ 471B.101[2]*.

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41-471B California Forms of Pleading and Practice--Annotated § 471B.112

§ 471B.112 Complaint for Declaratory and Injunctive Relief Challenging Local Licensing Requirement [General Form]

[1] FORM Complaint for Declaratory and Injunctive Relief Challenging Local Licensing Requirement [General Form]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DECLARATORY AND IN-
_____ [*name*],	)	JUNCTIVE RELIEF
Defendants.	)	(Invalid Licensing Requirement)
	)	
	)	

_____

Plaintiff alleges:

1. Defendant _____[*name of city or county*] at all times herein mentioned was, and now is, a _____ [municipal corporation *or* county], organized and existing under the laws of the State of California.

2. Defendants _____[*names*] at all times herein mentioned composed, and now compose, the duly elected and qualified _____ [City Council of defendant city *or* Board of Supervisors of defendant county].

3. Defendant _____[*name*] at all times herein mentioned was, and now is, the duly appointed, qualified, and acting _____ [*state official title, e.g.,* City Clerk of defendant city *or* Tax Collector of

defendant county], charged by law with the power and duty to _____ [issue *or* renew] licenses for _____ [the operation of _____ (*specify type*) businesses *or* engagement in the occupation of _____ (*specify*)] in defendant _____ [city *or* county] and to collect fees for such licenses.

4. Plaintiff is, and at all times herein mentioned was, engaged in the _____ [operation of a _____ (*specify type*) business *or* occupation of a _____ (*specify*)] in _____[*city*], California. [*If plaintiff has state license for such business or occupation, so allege*.]

5. On or about _____[*date*], the _____ [City Council *or* Board of Supervisors] enacted Ordinance No. _____, entitled "_____," [which ordinance amended and is now a part of Section _____ of the Municipal Code of defendant city]. The ordinance was approved by the _____ [*specify official, e.g.,* Mayor *or* County Supervisor] on or about _____[*date*], and, at all times since that date, has been, and now is, in full force and effect. _____ [The ordinance provides that _____ (*set forth relevant provisions*) *or* A copy of the ordinance is attached hereto as Exhibit A and made a part hereof].

6. Defendant _____[*name*], on or about _____[*date*], made demand on plaintiff to obtain a license and pay the fee provided for the license, pursuant to the provisions of the ordinance. Plaintiff has at all times refused, and still refuses, to obtain the license or pay any fee therefor and has continued, and still continues, to _____ [operate his/her business *or* engage in his/her occupation]; defendant has informed plaintiff that if he/she continues to _____ [operate his/her business *or* engage in his/her occupation] without obtaining a license and paying the fee prescribed by the ordinance, he/she will be prosecuted to the full extent of the law and will be enjoined from so _____ [operating his/her business *or* engaging in his/her occupation].

7. An actual controversy has arisen and now exists between plaintiff and defendants in that plaintiff contends that such ordinance is invalid and that plaintiff may lawfully _____ [operate his/her business *or* engage in his/her occupation] without obtaining a license or paying any fee therefor, whereas defendants dispute such contention and contend that the ordinance is in all respects valid and must be complied with by plaintiff.

8. [*Allege invalidity of ordinance and reasons for invalidity. See forms of allegations in §§ 471B.113-471B.118*].

9. Plaintiff desires a declaration of his/her rights with respect to the validity of the ordinance. Such a declaration is necessary and appropriate at this time in order that plaintiff may ascertain his/her rights and duties without subjecting himself/herself to criminal liability for violation of the ordinance.

10. Plaintiff has no plain, speedy, and adequate remedy in the ordinary course of law in that further discussion with defendants would be futile, ineffective, and useless in the light of defendants' contentions and the threat of criminal prosecution.

11. Unless and until defendants' enforcement of the ordinance in question is forthwith enjoined and restrained by order of this court, it will cause great and irreparable injury to plaintiff in that plaintiff will be deprived of his/her right to earn a living, will be deprived of his/her property without due process of law, and will be subjected to a criminal prosecution.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. That the court declare the respective rights and duties of plaintiff and defendants, and each of them, under the ordinance in question, and that by such declaration and judgment it be declared that the ordinance is invalid and has no application to plaintiff;

2. That an order issue requiring defendant to show cause, if any they have, why they should not be enjoined as hereinafter set forth during the pendency of this action;

3. That a permanent injunction issue, enjoining defendants, and each of them, and their agents, servants, and employees, and all persons acting under or in concert with or for them from enforcing, applying, or requiring adherence to the provisions of the ordinance;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification. See § 471B.100.*]

[2] Use of Form

The form of complaint in [1], *above*, is for use to secure declaratory and injunctive relief if the plaintiff is threatened with a criminal prosecution for violation of an invalid licensing ordinance.

[3] Verification

A complaint for a preliminary injunction must be verified or accompanied by affidavits (or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*]) showing the grounds for granting the injunction. Furthermore, if a temporary restraining order is also sought, the verified complaint or the affidavits (declarations) must show that great or irreparable injury would result to the applicant before the matter can be heard on notice [*Code Civ. Proc. § 527(a)*].

Verification [*see Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or preliminary injunction on a complaint, instead of on affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) [*see Code Civ. Proc. § 527(a)*]. Otherwise, verification of this complaint is not required, but verification of the complaint requires the defendant to file a verified answer and precludes a general denial [*Code Civ. Proc. §§ 431.30(d), 446*].

[4] Allegations

The form contains the following allegations:

- The defendants' capacities (Paragraphs 1-3).

- The facts giving rise to the adverse contentions of the parties to the action (Paragraphs 4-6).

- The existence of an actual controversy between the parties and the contentions of each party (Paragraphs 7, 8) [*see Code Civ. Proc. § 1060*].

- That the plaintiff desires a declaration of his or her rights and duties, and that the declaration is necessary and appropriate in order that plaintiff may ascertain his or her legal position (Paragraph 9) [*see*

Code Civ. Proc. § 1060].

- The absence of an adequate remedy at law (Paragraph 10).

- That plaintiff will suffer great and irreparable injury if enforcement is not enjoined (Paragraph 11) [*see Code Civ. Proc. § 526(a)(2)*].

[5] Determination of Validity of Ordinance

Both declaratory and injunctive relief are available for the purpose of determining the validity of a challenged ordinance [*Abbott v. City of Los Angeles (1960) 53 Cal. 2d 674, 678 n.2, 3 Cal. Rptr. 158, 349 P.2d 974* ; *Andrews v. City of Piedmont (1929) 100 Cal. App. 700, 700-701, 281 P. 78]* .

[6] Jurisdiction

[a] Declaratory Relief

This action for declaratory relief is in the jurisdiction of the superior court as an unlimited civil case [*Code Civ. Proc. §§ 85, 86, 580(b)(5), 1060*; *see Code Civ. Proc. § 86(a)(7)(A)* (restricted extent to which declaratory relief may be maintained as limited civil case); *see* Ch. 182, *Declaratory Relief*].

[b] Injunction

An action seeking permanent injunctive relief is in the jurisdiction of the superior court as an unlimited civil case [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*].

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41-471B California Forms of Pleading and Practice--Annotated § 471B.113

§ 471B.113 Allegation That Field Is Preempted by Laws of the State of California [General Form]

[1] FORM Allegation That Field Is Preempted by Laws of the State of California [General Form]

At all times herein mentioned, Section(s) _____ of the _____[*title*] Code of the State of California set forth, and it/they do[es] now set forth, a comprehensive scheme and system for the licensing of all persons engaged in the _____ [operation of _____ (*specify type*) business *or* occupation of _____ (*specify*)] in California; this/these statute(s) was/were, and is/are, intended by the Legislature to, and it/they do[es], provide the sole licensing requirements imposed in such field in California; by reason thereof the ordinance is[, and at all times herein mentioned was,] invalid.

[2] Use of Form

The form of allegation in [1], *above*, is for use in a complaint challenging a local licensing requirement on the ground that the field has been preempted by state legislation. It may be used as Paragraph 8 of § 471B.112[1], to state plaintiff's contentions. A local ordinance that is in conflict with a general law adopted by the Legislature is invalid if it attempts to impose additional requirements in a field that is preempted by the general law [*Agnew v. Los Angeles (1958) 51 Cal. 2d 1, 5, 330 P.2d 385]* .

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§ 471B.114 Allegation That Field Is Preempted by Laws of the State of California and That Ordinance Imposes License Fee for Regulatory Purposes

[1] FORM Allegation That Field Is Preempted by Laws of the State of California and That Ordinance Imposes License Fee for Regulatory Purposes

The ordinance providing for payment of an annual license fee of _____ [$_____ *or* _____ percent of (gross) annual receipts] is, and at all times herein mentioned was, intended and designed solely as a regulatory measure to impose on persons desiring to engage in the _____ [operation of _____ (*specify type*) business *or* occupation of _____ (*specify*)] in defendant city. Such ordinance imposes a requirement in addition to those provided for by the Legislature of this state in enactment of the statute. Such ordinance is not, and at no time mentioned herein was, intended or designed, wholly or partially, as a revenue measure.

[2] Use of Form

The form of allegation in [1], *above*, is for use in a complaint challenging a local licensing requirement on the ground that a license fee was intended to regulate a field covered by state legislation rather than to raise revenue. It may be used as Paragraph 8 of § 471B.112[1], to state plaintiff's contentions.

[3] Invalidity of License Fee in Preempted Field

A municipality may tax a state-licensed occupation as it does other trades, professions, and businesses, but it may not exact fees as the price of a license that the city cannot require because the field has been preempted by state legislation [*Agnew v. Los Angeles (1958) 51 Cal. 2d 1, 7, 330 P.2d 385]* .

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§ 471B.115 Allegation That Business License Tax Is Invalid Because Plaintiff Is Not Doing Business in the City

[1] FORM Allegation That Business License Tax Is Invalid Because Plaintiff Is Not Doing Business in the City

The ordinance requiring the payment of a license tax or fee in order to make deliveries of products in the city is unconstitutional and void in regard to plaintiff because plaintiff has no place of business, no agents, and no terminals in the city; plaintiff's sole activity in the city consists of the occasional delivery of goods to various places of business; by reason of these activities plaintiff is not engaged in business in the city, and there is no taxable event occurring there that can be taxed by means of extracting a license fee, or by other means.

[2] Use of Form

The form of allegation in [1], *above*, is for use in a complaint challenging a local licensing requirement on the ground that the license tax required cannot apply to a plaintiff who does not engage in business in that city. It may be used as Paragraph 8 of § 471B.112[1] to state plaintiff's contentions.

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41-471B California Forms of Pleading and Practice--Annotated § 471B.116

§ 471B.116 Allegation That Business License Tax Is Invalid Because Amount of Tax Is Excessive

[1] FORM Allegation That Business License Tax Is Invalid Because Amount of Tax Is Excessive

The tax imposed by such ordinance is so large that it suppresses and prohibits plaintiff's exercise of his/her occupation, and is therefore invalid.

[2] Use of Form

The form of allegation in [1], *above*, is for use in a complaint challenging a local business requirement on the ground that the license tax required is excessive. This allegation may be used as Paragraph 8 of § 471B.112[1] to state plaintiff's contentions.

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§ 471B.117 Allegation That Business License Tax Is Invalid Because of Discriminatory Classification

[1] FORM Allegation That Business License Tax Is Invalid Because of Discriminatory Classification

The ordinance exempts from its operation businesses of a character identical to that of plaintiff although bearing another name in that _____[*specify discrimination*] and is invalid as an unjust discrimination.

[2] Use of Form

The form of allegation in [1], *above*, is for use in a complaint challenging a local licensing requirement on the ground that the licensing classification is discriminatory. It may be used as Paragraph 8 of § 471B.112[1] to state plaintiff's contentions.

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41-471B California Forms of Pleading and Practice--Annotated § 471B.118

§ 471B.118 Affirmative Defense When Contract Action Brought by Unlicensed Person

[1] FORM Affirmative Defense When Contract Action Brought by Unlicensed Person

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

1. Plaintiff entered into the contract with defendant and acted as a _____[*specify profession or business*] within the meaning of Section _____ of the _____[*title*] Code but without the necessary license therefor, as required by Section _____ of the _____[*title*] Code.

[*EITHER*]

2. Therefore, plaintiff is barred by Section _____ of the _____[*title*] Code from bringing or maintaining any action for collection of compensation for performance of the contract or of any act thereunder.

[*OR*]

2. The license is required _____ [to prevent improper persons from engaging in such work *or* for the protection of the public] and therefore plaintiff is prohibited from recovering on the contract.

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer by defendant to a complaint on a contract if the plaintiff engaged in a profession or business in which a license is required, and he or she did not possess such a license. It contains alternative allegations to meet situations in which such contracts are expressly declared void by a statute [*see, e.g., Bus. & Prof. Code § 7031* (contractors)], or in which the invalidity stems from the regulatory nature of the license requirement [*see Wood v. Krepps (1914) 168 Cal. 382, 386-387, 143 P. 691]* .

For a list of specific licensing statutes, see the Appendix (§ 471B.140 et seq.).

[3] Cross References

For general discussion of answers and affirmative defenses and forms of answers, see Ch. 26, *Answers* .

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41-471B California Forms of Pleading and Practice--Annotated § 471B.119

§ 471B.119 General Demurrer Based on Failure to Allege License in Action to Recover Compensation for Activity Requiring License

[1] FORM General Demurrer Based on Failure to Allege License in Action to Recover Compensation for Activity Requiring License

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DEMURRER OF _____ [*name*] TO
vs.	)	COMPLAINT OF _____ [*name*],
_____ [*name*],	)	SUPPORTING MEMORANDUM AND NOTICE
Defendant.	)	OF HEARING
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

Defendant demurs to the complaint herein on the following ground:

The complaint does not state facts sufficient to constitute a cause of action in that plaintiff has failed to allege that he/she/it was licensed at all times during the performance of the _____ [act *or* contract] for which plaintiff seeks compensation from defendant. Plaintiff is required under Section _____ of the Business and Professions Code to have been duly licensed at the time he/she/it performed the _____ [act *or* contract] for which he/she/it seeks compensation. Because *Section 143 of the Business and Professions Code*

requires plaintiff to allege and prove licensure at all times during the performance of the _____ [act *or* contract] for which compensation is sought, plaintiff's complaint seeking compensation fails to state a cause of action.

[WHEREFORE, defendant prays that this demurrer be sustained (without leave to amend), that plaintiff take nothing by his/her/its complaint, that defendant have judgment for his/her/its costs, and for all other proper relief.]

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant

[2] Use of Form

The form in [1], *above,* is for use in objecting, by demurrer, to a complaint seeking compensation for professional services on the ground that the pleading does not state facts sufficient to constitute a cause of action because the plaintiff has failed to allege that he or she was duly licensed at all times during the performance of the professional services [*Bus. & Prof. Code § 143(a)*]. This defect must appear on the face of the complaint [*see Code Civ. Proc. § 430.30(a)*]. The form should not be used if the plaintiff seeking compensation is not required to be licensed by the Department of Consumer Affairs or by an entity within the Department [*Bus. & Prof. Code § 143(a)*]. Furthermore, this form should not be used if, at the time the services were performed, the plaintiff had renewed his or her license and was waiting for receipt of proof of renewal [*see Bus. & Prof. Code §§ 121, 143(c)*].

[3] Accompanying Papers

A party filing a demurrer is required to serve and file with it a notice of hearing [*Cal. Rules of Ct., Rule 3.1320*] and a memorandum in support of each ground asserted in the demurrer [*Cal. Rules of Ct., Rule 3.1113*; for discussion and forms, *see* Ch. 417, *Points and Authorities*].

[4] Cross References

For a form of affirmative defense on this ground, see *§ 471B.118*.

For general discussion of demurrers, see Ch. 206, *Demurrers and Motions for Judgments on the Pleadings* .

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[Reserved]

§§ 471B.120[Reserved]

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NOTE:

This table lists specific licensing statutes, arranged alphabetically by the type of business or profession. It is extensive but not intended to be an exhaustive list of all licensing statutes. Some statutes that regulate businesses or professions may not use specific terms such as "licensing" or "certification," so counsel should still review appropriate California codes when researching businesses or professions not listed here. Many regulations also apply to particular businesses or professions; for example, see the regulations listed in the Research Guide under California Code of Regulations, *above*.

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§ 471B.130 Automobile Industry

Automobile dealers, manufacturers, or transporters. *Veh. Code §§ 9262, 11700 et seq.*

Automobile dismantlers. *Veh. Code § 11500 et seq.*

Automobile lessor-retailers. *Veh. Code § 11600 et seq.*

Automobile salespersons. *Veh. Code § 11800 et seq.*

Automotive lamp- and brake-adjusting stations. *Bus. & Prof. Code § 9887.1 et seq.*

Automotive repair. *Bus. & Prof. Code § 9884 et seq.*

Drivers' licenses. *Veh. Code § 12500 et seq.*

Mobile home and commercial coach dealers. *Health & Safety Code §§ 18021.5-18024.6, 18045 et seq.*

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§ 471B.131 Brokers

Mineral, oil, and gas brokers. *Bus. & Prof. Code §§ 10500, 10500.5, 10502,* 10508-10512, *10515-10519.1*

Motor transportation brokers. *Pub. Util. Code § 4801 et seq.*

Personal property brokers. *Fin. Code § 22200 et seq.*

Real estate brokers and salespersons. *Bus. & Prof. Code §§ 10130 et seq., 10150 et seq.*

Securities broker-dealers. *Corp. Code § 25200 et seq.*

Yacht and ship brokers. *Harb. & Nav. Code §§ 708, 710-712*

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§ 471B.132 Businesses

Adoption agencies. *Fam. Code §§ 8609, 8801(b), 8542*; *Welf. & Inst. Code § 16100*

Auction companies and auctioneers. *Civ. Code § 1812.600*.

Barbering, cosmetology, and electrolysis. *Bus. & Prof. Code § 7317*

Blood production (human whole blood and human whole blood derivatives). *Health & Safety Code §§ 1602.5, 1609, 1613 et seq.*

Check sellers and cashers. *Fin. Code § 12200 et seq.*

Clinical social worker corporations. *Bus. & Prof. Code § 4998 et seq.*

Home furnishings businesses. *Bus. & Prof. Code § 19049 et seq.*

Loans, small; making or negotiating. *Fin. Code § 22200 et seq.*

Marriage, family, or child counseling corporations. *Bus. & Prof. Code §§ 4987.5-4988.2*

Outdoor advertising businesses. *Bus. & Prof. Code §§ 5231, 5301-5303*

Prepaid rental listing services. *Bus. & Prof. Code §§ 10167-10167.8, 10167.13-10167.16*

Referral agencies (referrals to extended care, skilled nursing home, or intermediate care facility). *Health & Safety Code § 1400 et seq.*

Shorthand reporting corporations. *Bus. & Prof. Code §§ 8040-8047*

Talent agencies. *Lab. Code § 1700.5*

Trading stamp companies. *Bus. & Prof. Code §§ 17750-17765*

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§ 471B.133 Care Facilities

Child day-care facility. *Health & Safety Code § 1596.70 et seq.*

Clinics. *Health & Safety Code § 1200 et seq.*

Community care facilities. *Health & Safety Code § 1500 et seq.*

Family day-care homes. *Health & Safety Code § 1597.30 et seq.*

Health facilities (including hospitals). *Health & Safety Code § 1250 et seq.*

Health facilities (provisional license). *Health & Safety Code §§ 1268.5, 1437*

Hospices. *Health & Safety Code § 1745 et seq.*

Life care institutions for the aged. *Health & Safety Code § 1770 et seq.*

Pediatric day health and respite care facilities. *Health & Safety Code § 1760 et seq.*

Residential care facilities for elderly. *Health & Safety Code § 1569 et seq.*

Residential care facilities for persons with chronic life-threatening illnesses. *Health and Safety Code § 1568.01 et seq.*

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§ 471B.134 Firearms and Other Weapons

Firearms capable of being concealed, carrying of. *Penal Code § 12050*

Firearms, sale or other transfer of. *Penal Code §§ 12070, 12071*

Machine guns, sale of. *Penal Code § 12250*

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§ 471B.135 Food and Agricultural Industries

Agricultural pest control advisers. *Food & Agric. Code §§ 12001, 12021-12024*

Agricultural pest control applicators. *Food & Agric. Code §§ 12201-12205, 14151-14155*

Agricultural pest control businesses. *Food & Agric. Code § 11701 et seq.*

Agricultural produce dealers. *Food & Agric. Code § 56181 et seq.*

Alcoholic beverages. *Bus. & Prof. Code § 23300 et seq.*

Cigarettes, sale of. *Rev. & Tax. Code § 30140 et seq.*

Commercial fish business. *Fish & Game Code § 8030 et seq.*

Crop seed cleaning. *Food & Agric. Code § 7601 et seq.*

Dairy produce exchanges. *Food & Agric. Code § 57131 et seq.*

Farm labor contractors. *Lab. Code § 1683 et seq.*

Feeding garbage to swine. *Food & Agric. Code § 10981 et seq.*

Fertilizing materials, manufacture or distribution of. *Food & Agric. Code §§ 14591 et seq., 14651*

Livestock and poultry commercial feed manufacturers or distributors. *Food & Agric. Code § 15051 et seq.*

Livestock remedy, hazardous; sale of. *Food & Agric. Code § 14321 et seq.*

Maintenance gardener pest control operators. *Food & Agric. Code §§ 11703, 11704, 11734*

Manufacturing milk handlers. *Food & Agric. Code § 61490 et seq.*

Milk and dairy products distributors. *Food & Agric. Code § 62141 et seq.*

Milk products plants. *Food & Agric. Code § 35011 et seq.*

Nursery stock, sale of. *Food & Agric. Code § 6701 et seq.*

Pet food and horse slaughterers, pet food processors, horsemeat and pet food importers, renderers, or haulers of dead large domesticated animals. *Food & Agric. Code § 19220 et seq.*

Poultry meat inspectors. *Food & Agric. Code § 25051 et seq.*

Poultry plant operators. *Food & Agric. Code § 24741 et seq.*

Processors of farm products. *Food & Agric. Code §§ 55481 et seq., 55521 et seq.*

Retail Food Facilities Law. *Health & Safety Code § 27500 et seq.*

Slaughter of animals for food. *Food & Agric. Code §§ 22001, 22001.5, 22005, 22031, 22044 et seq.*

Stockyards. *Food & Agric. Code § 21731 et seq.*

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§ 471B.136 Funeral Industry

Cemetery brokers. *Bus. & Prof. Code §§ 9676, 9700 et seq.*

Cremated remains disposers. *Bus. & Prof. Code §§ 9607.6, 9740-9749.5, 9760.5, 9760.6*

Embalmers. *Bus. & Prof. Code §§ 7640 et seq., 7680 et seq., 7725-7729*

Funeral directors. *Bus. & Prof. Code § 7615 et seq., 7680 et seq., 7725-7729*

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§ 471B.137 Gaming and Sports

Boxing, wrestling, and martial arts; professional and amateur regulations. *Bus. & Prof. Code § 18600 et seq.*

Gaming clubs. *Bus. & Prof. Code § 19800 et seq.*

Horse racing. *Bus. & Prof. Code § 19460 et seq.*

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41-471B California Forms of Pleading and Practice--Annotated § 471B.138

§ 471B.138 Healing Arts Professions and Occupations

Acupuncturist. *Bus. & Prof. Code § 4935 et seq.*

Animal health technicians. *Bus. & Prof. Code § 4836 et seq.*

Chiropractors. Stats. 1923, p. xx (Chiropractic Act); *see* Deering's Business and Professions Code, Appendix I, or West's *Business and Professions Code, § 1000-1* et seq.

Clinical laboratory bioanalysts and technologists. *Bus. & Prof. Code § 1260 et seq.*

Clinical social workers. *Bus. & Prof. Code § 4996 et seq.*

Dentists. *Bus. & Prof. Code § 1627 et seq.*

Drugless practitioners. *Bus. & Prof. Code § 2500 et seq.*

Emergency medical technicians. *Health & Safety Code § 1797.210 et seq.*

Hearing aids, fitting and selling. *Bus. & Prof. Code § 3350 et seq.*

Midwives. *Bus. & Prof. Code § 2505 et seq.*

Nurse anesthetists. *Bus. & Prof. Code § 2825 et seq.*

Nurses, registered. *Bus. & Prof. Code § 2732 et seq.*

Nurses, vocational. *Bus. & Prof. Code §§ 2857, 2866 et seq.*

Nurses' registries. *Civ. Code §§ 1812.524 et seq.*

Nursing home administrators. *Health & Safety Code §§ 1416-1416.66*

Opticians. *Bus. & Prof. Code § 2550 et seq.*

Optometrists. *Bus. & Prof. Code § 3040 et seq.*

Osteopaths. Stats. 1923, p. xxv (Osteopathic Act); *see* Deering's Business and Professions Code Appendix II, or West's *Business and Professions Code, § 3600-1* et seq.

Pharmacists. *Bus. & Prof. Code § 4080 et seq.*

Physical therapist assistants. *Bus. & Prof. Code § 2655 et seq.*

Physical therapists. *Bus. & Prof. Code §§ 2630 et seq., 2660-2661*

Physicians. *Bus. & Prof. Code §§ 2050 et seq., 2080 et seq.*

Podiatrists. *Bus. & Prof. Code § 2472 et seq.*

Psychiatric technicians. *Bus. & Prof. Code § 4510 et seq.*

Psychological assistants. *Bus. & Prof. Code § 2913*

Psychologists. *Bus. & Prof. Code § 2940 et seq.*

Respiratory therapists. *Bus. & Prof. Code § 3700 et seq.*

Speech-language pathologists and audiologists. *Bus. & Prof. Code §§ 2532-2535.4*

Veterinarians. *Bus. & Prof. Code § 4825 et seq.*

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§ 471B.139 Insurance Industry

Bail bonds. *Ins. Code § 1800 et seq.*

Insurance adjusters and public insurance adjusters. *Ins. Code §§ 14000 et seq., 15000 et seq.*

Insurance agents and brokers. *Ins. Code § 1621 et seq.*

Life and disability insurance analysts. *Ins. Code § 1831 et seq.*

Underwritten title companies. *Ins. Code § 12389*

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41-471B California Forms of Pleading and Practice--Annotated § 471B.140

§ 471B.140 Nonhealing Arts Professions and Occupations

Accountants. *Bus. & Prof. Code § 5070 et seq.*

Alarm company operators. *Bus. & Prof. Code § 7593 et seq.*

Architects. *Bus. & Prof. Code §§ 5536, 5550 et seq.*

Asbestos consultants. *Bus. & Prof. Code § 7180 et seq.*

Attorneys. *Bus. & Prof. Code § 6060 et seq.*

Commodity merchants. *Corp. Code § 29500 et seq.*

Contractors. *Bus. & Prof. Code § 7000 et seq.*; *Gov. Code § 37101.7*

Crane certifiers. *Lab. Code § 7375 et seq.*

Electronic repair dealers. *Bus. & Prof. Code §§ 9802-9806, 9830-9841, 9873*

Engineers. *Bus. & Prof. Code §§ 6730-6731.4, 6750 et seq.*

Explosive blasters. *Lab. Code §§ 6710, 6711, 7990 et seq.*

Geologists and geophysicists. *Bus. & Prof. Code §§ 7840 et seq., 7880 et seq.*

Home improvement contractors and salespersons of home improvement contracts. *Bus. & Prof. Code § 7153 et seq.*

Interior designers. *Bus. & Prof. Code § 5800 et seq.*

Landscape architects. *Bus. & Prof. Code § 5615*

Land surveyors. *Bus. & Prof. Code §§ 8708, 8725 et seq.*

Locksmiths. *Bus. & Prof. Code § 6980 et seq.*

Maritime pilots. *Harb. & Nav. Code §§ 1140-1143, 1170 et seq.*

Marriage, family, or child counselors. *Bus. & Prof. Code §§ 4980.01-4984.7*

Private detectives. *Bus. & Prof. Code § 7512 et seq.*

Process servers. *Bus. & Prof. Code § 22350 et seq.*

Repossessors of personal property. *Bus. & Prof. Code § 7500 et seq.*

Service contractors. *Bus. & Prof. Code § 9855 et seq.*

Shorthand reporters. *Bus. & Prof. Code § 8020 et seq.*

Social workers. *Bus. & Prof. Code § 4992 et seq.*

Structural pest control operators. *Bus. & Prof. Code § 8550 et seq.*

Radioactive materials driver. *Veh. Code §§ 12524, 14611, 32002.5*

Telephonic sellers. *Bus. & Prof. Code § 17511 et seq.*

Ticket sellers. *Bus. & Prof. Code § 22500 et seq.*

Transmitters of money abroad. *Fin. Code § 1800 et seq.*

Travelers check issuers. *Fin. Code § 1851 et seq.*

Waste tire haulers. *Pub. Res. Code § 42950 et seq.*

Weighing or measuring device repairpersons. *Bus. & Prof. Code § 12532 et seq.*

Weighmasters. *Bus. & Prof. Code § 12700 et seq.*

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41-471B California Forms of Pleading and Practice--Annotated § 471B.141

§ 471B.141 Real Estate Industry

Escrow agents. *Fin. Code § 17200 et seq.*

Real estate appraisers. *Bus. & Prof. Code § 11300 et seq.*

Real estate brokers and salespersons. *Bus. & Prof. Code §§ 10130 et seq., 10150 et seq.*

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41-471B California Forms of Pleading and Practice--Annotated § 471B.142

§ 471B.142 Schools and Instructors

Barber colleges. *Bus. & Prof. Code § 6534 et seq.*

Cosmetology schools. *Bus. & Prof. Code § 7362*

Driving schools and driving instructors. *Veh. Code § 11100 et seq.*

Guide dog trainers. *Bus. & Prof. Code § 7209 et seq.*

Teachers. *Educ. Code §§ 44250 et seq., 44330 et seq., 44420 et seq., 87200 et seq., 87330 et seq.*

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41-471B California Forms of Pleading and Practice--Annotated § 471B.143

§ 471B.143 Storage Industry

Underground hazardous substance storage tank testing. *Health & Safety Code § 25284.4*

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41-471B California Forms of Pleading and Practice--Annotated § 471B.144

§ 471B.144 Transportation Industry

Carriers, charter-party. *Pub. Util. Code § 5371 et seq.*

Carriers, household goods. *Pub. Util. Code §§ 5133-5136, 5281-5286*

Carriers, private. *Pub. Util. Code § 4005 et seq.*

Commercial passenger fishing boats. *Fish & Game Code § 7920*

Private school bus contractors. *Veh. Code § 2570 et seq.*

Vehicles for hire. *Veh. Code §§ 16501, 21100(b), 21112*

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PART I. SCOPE

41-472 California Forms of Pleading and Practice--Annotated § 472.01

§ 472.01 Scope of Chapter

This chapter provides an overview discussion of rulemaking by California public agencies. The legal background discussion in Part II includes the following:

- Subpart A discusses formal agency rulemaking; its nature, delegation of rulemaking authority, review of rulemaking authority by the Office of Administrative Law (OAL), and the use of agency adjudication to make rules [*see §§ 472.10 -472.14*].

- Subpart B discusses informal agency rulemaking; rule adoption requirements and exceptions, and determinations by the OAL [*see §§ 472.20 -472.22*].

Part V includes forms for use in requesting an OAL determination with regard to an agency's informal rule adoption [*see §§ 472.60, 472.61*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingFormal RulemakingAdministrative LawAgency RulemakingInformal RulemakingAdministrative LawAgency RulemakingState Proceedings

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41-472 California Forms of Pleading and Practice--Annotated § 472.02

§ 472.02 Cross References

[1] Related Coverage of Agency Rule Making

For further discussion and forms relating to the legislative or rulemaking functions of California public agencies, including judicial review of these functions, see:

- Ch. 472A, *Agency Rulemaking Procedures*.
- Ch. 472B, *Review of Agency Rulemaking*.

For discussion and forms relating to the law governing access to and conduct of meetings by California public agencies, including rule making meetings, see Ch. 470B, *Public Agency Meetings* .

[2] Judicial Remedies and Review

For discussion and forms relating to civil actions for declaratory or injunctive relief generally, which may be available to review administrative regulations, see respectively Ch. 182, *Declaratory Relief* , and Ch. 303, *Injunctions* .

For discussion and appropriate forms relating to a proceeding for a writ of review, which may be available to obtain a judicial determination as to the validity of a regulation adopted by certain state agencies, see Ch. 492, *Review (Certiorari), Writ of*.

For other discussion and forms relating to judicial review generally, see:

- Ch. 40, *Appeal: An Overview*, through Ch. 54, *Appeal: California Supreme Court Review* (discussion and forms relating to civil appeals).
- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to immediate judicial review of orders by extraordinary writ of mandate or prohibition).

[3] Public Administrative Law Generally

For related discussion of California public administrative law generally, including discussion of public agency functions and powers (including adjudicative or quasi-judicial powers), and organization generally, see Ch. 470, *Overview of Public Administrative Law* (general discussion of judicial power is in § 470.12[5]). For detailed discussion of the general procedures imposed in agency proceedings by constitutional due process and related statutory requirements, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

For detailed discussion and forms relating to the law governing disclosure of public records under the California Public Records Act [*Cal. Gov. Code §§ 6250 et seq.*], see Ch. 470C, *Public Records Act* .

For detailed discussion and forms relating generally to agency investigations and inspections, see Ch. 471, *Investigations by Public Agencies* , and Ch. 471A, *Inspections by Public Agencies* .

For detailed discussion and forms concerning quasi-judicial agency action, or public agency adjudication, and detailed discussion and forms relating to judicial review of such adjudications, see respectively Ch. 473, *Public Agency Adjudication* , et seq., and Ch. 474, *Availability of Judicial Review of Agency Decisions* .

[4] Specific Public Agencies

For a brief discussion of the Public Utilities Commission's constitutional authority to exercise legislative or rulemaking power, see Ch. 480, *Public Utilities* .

For coverage relating to specifically public agencies (primarily with respect to their adjudicative rather than rule making activities), see *Ch. 470, Overview of Public Administrative Law, § 470.02[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsGeneral OverviewAdministrative LawAgency InvestigationsScopeInspectionsAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingState ProceedingsAdministrative LawGovernmental InformationFreedom of InformationDisclosure RequirementsGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral Overview

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[Reserved]

§§ 472.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Agency Formal Rulemaking

41-472 California Forms of Pleading and Practice--Annotated § 472.10

§ 472.10 Governing Law

The procedures used by most public agencies for rulemaking are set out in that part of the Administrative Procedure Act (APA) entitled "Administrative Regulations and Rulemaking," that is, *Gov. Code § 11340 et seq.*

The provisions of *Gov. Code § 11340 et seq.* collectively comprise Chapter 3.5 of Part I (State Departments and Agencies) of Division 3 (Executive Department) of Title 2 (State Government) of the Government Code. This law is referred to hereafter for convenience as "Chapter 3.5." This chapter, together with Chapter 4 (*Gov. Code § 11370* ("Office of Administrative Hearings"), Chapter 4.5 ("Administrative Adjudication: General Provisions," *Gov. Code § 11400 et seq.*), and Chapter 5 ("Administrative Adjudication: Formal Hearings," *Gov. Code § 11500 et seq.*)), comprise the Administrative Procedure Act; hereafter the APA.

As discussed in Subpart B. (§ 472.20 et seq.), various other statutes or constitutional provisions apply to authorize and otherwise govern the rulemaking of specific agencies.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingState Proceedings

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A. Agency Formal Rulemaking

41-472 California Forms of Pleading and Practice--Annotated § 472.11

§ 472.11 Nature and Purpose of Formal Rulemaking

Legislative bodies at both the state and national levels often delegate their power to make laws to administrative agencies [*see § 472.13* for a discussion of delegation; *see also* Ch. 470, *Overview of Public Administrative Law*]. Those agency-created laws are known as "rules" or "regulations," as distinguished from "statutes" enacted by the legislative branch of state government.

A dramatic increase in the number of administrative rules and regulations beginning in the 1930's led to concerns about agency accountability and responsiveness, leading in turn to the enactment of Chapter 3.5, the rulemaking procedures of the APA (*Gov. Code § 11340 et seq.*) [*see Gov. Code § 11340* (legislative finding and declaration); *see also* discussion in [1], *above*]. The APA established the Office of Administrative Law (OAL) to oversee the adoption of regulations [*Gov. Code §§ 11340.1, 11340.2*; *see § 472.14[4]*].

Two objectives of the APA rulemaking provisions are as follows [*California Optometric Assn. v. Lackner (1976) 60 Cal. App. 3d 500, 506, 131 Cal. Rptr. 744]* :

- To encourage meaningful public participation in the administrative rulemaking process through a system of formal rulemaking, which requires that regulations (a) are promulgated subject to public notice and comment before being enforced, and (b) are centrally compiled, and thus accessible to affected parties [*see Gov. Code §§ 11346-11347.3*; *see also* Ch. 472A, *Agency Rulemaking Procedures* , for a discussion of specific rulemaking requirements]. This system is intended to guarantee a minimum level of accountability and responsiveness by administrative agencies to the public [*Gov. Code § 11346*; [*Gov. Code § 11342.520* (agency defined); *Gov. Code § 11340.9(a)* (judicial and legislative agencies excluded)].

- To allow effective judicial review of rulemaking by ensuring that a reviewing court, when determining whether a challenged enactment is reasonably necessary or within the agency's authority, will have ready access to the key documents considered by the agency in formulating the rule. Thus, the APA requires the rulemaking agency to prepare as part of the official rulemaking record a Final

Statement of Reasons explaining why the proposed rule is needed [*Gov. Code 11346.9*; *see* Ch. 472B, *Review of Agency Rulemaking* , for a discussion of judicial review of administrative rulemaking].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingFormal RulemakingAdministrative LawAgency RulemakingState ProceedingsAdministrative LawJudicial ReviewGeneral Overview

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41-472 California Forms of Pleading and Practice--Annotated § 472.12

§ 472.12 Benefits and Limitations of Formal Rulemaking

[1] Benefits

In *Chamber of Commerce v. Occupational Safety & Health Administration (D.C. Cir. 1980) 636 F.2d 464, 470-471* , the federal court of appeals for the District of Columbia, a tribunal noted for its expertise in federal administrative law, summarized the numerous benefits of formal rulemaking to both the public and the agency. The court stated that parties affected by the proposed legislation are the obvious beneficiaries of formal procedures. Prior notice and an opportunity to comment permits them to voice their objections before the agency takes final action. Expressing concerns in the rulemaking process may be the only defense mechanism available to an affected party [*Chamber of Commerce v. Occupational Safety & Health Administration (D.C. Cir. 1980) 636 F.2d 464, 470-471]* . The court noted that public comments may also benefit the public agency. Public participation increases the agency's knowledge of (1) specific information relating to the proposed regulation, (2) additional policy considerations, (3) weaknesses in the proposed regulation (such as unforeseen detrimental consequences), and (4) alternative means of achieving the same objective. Furthermore, charting changes in policy direction with the aid of those who will be affected helps dispel suspicions of agency predisposition, unfairness, arrogance, improper influences, and ulterior motivation, thus decreasing the likelihood that opponents will attempt to sabotage the rule's implementation and enforcement [*Chamber of Commerce v. Occupational Safety & Health Administration (D.C. Cir. 1980) 636 F.2d 464, 470-471]* .

[2] Limitations

There are several limitations on formal rulemaking in California. First, the process takes at least several months, including 45 days for initial public notice and 30 days for review by the OAL [*Gov. Code §§ 11346.4(a), 11349.3(a)*; *see* Ch. 472A, *Agency Rulemaking Procedures* , for further discussion regarding specific rulemaking procedures]. Through careful advance planning, however, an agency can often ensure that the necessary regulations are on the books when needed.

Furthermore, the APA provides for emergency adoption (within 10 days or less) of regulations that are found to be necessary for the immediate preservation of the public peace, health and safety, or general welfare [*Gov. Code § 11346.1(b)*; *see* Ch. 472A, *Agency Rulemaking Procedures*].

In addition, substantial rulemaking agency staff time is needed to prepare the numerous documents that the APA requires to be placed in the rulemaking record, and to summarize and respond to public comments. Finally, agencies may suffer some loss of flexibility when they need to respond immediately to unforeseeable problems that do not rise to the level of a statutory "emergency"; regulations promulgated in that situation must comply with the lengthy APA formal rulemaking process.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingFormal RulemakingAdministrative LawAgency RulemakingState ProceedingsLabor & Employment LawOccupational Safety & HealthAdministrative ProceedingsRulemaking

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A. Agency Formal Rulemaking

41-472 California Forms of Pleading and Practice--Annotated § 472.13

§ 472.13 Delegation of Rulemaking Authority

[1] General Requirements

[a] Source of Rulemaking Authority

The California Constitution, in its "separation of powers" doctrine, divides the powers of the state into legislative, executive, and judicial powers, and provides that no person who exercises one power may exercise another [*Cal. Const., art. III, § 3*]. The legislative power of the state is vested in the Legislature and in the people [*Cal. Const., art. IV, § 1*]. Consequently, most state agencies, as extensions of the executive branch of state government, have no inherent legislative powers with which to enact regulations [*Ferdig v. State Personnel Bd. (1969) 71 Cal. 2d 96, 103-104, 77 Cal. Rptr. 224, 453 P.2d 728]* .

The Constitution does, however, authorize certain governmental agencies to exercise legislative power:

- The Judicial Council [*Cal. Const., art. IV, §§ 6, 18(f)*].

- The Personnel Board [*Cal. Const., art. VII, §§ 2(c), 3, 6(b), (c)*; *see* Ch. 118, *Civil Service*].

- The Board of Education [*Cal. Const., art. IX, § 7*; *State Bd. of Education v. Honig (1993) 13 Cal. App. 4th 720, 751-752, 16 Cal. Rptr. 2d 727* (State Board of Education has been delegated legislative power to adopt regulations that are not in conflict with governing statute); *see* Ch. 512, *Schools: Certification, Dismissal, and Related Employment Issues*].

- The Regents of the University of California [*Cal. Const., art. IX, § 9(a)*].

- The Public Utilities Commission [*Cal. Const., art. XII, §§ 2, 4-6*; *see* Ch. 480, *Public Utilities*].

[b] Permissible Delegation

Delegation of limited rulemaking power by the Legislature to administrative agencies that have not already received a constitutional grant of legislative power has long been accepted as a necessity in a complex governmental system [*see* Davis, *Administrative Law Treatise,* ch. 3 (2d ed. 1978)]. Courts have recognized that legislative bodies have neither the resources nor the expertise to deal adequately with every question potentially within their jurisdictions [*see Kugler v. Yocum (1968) 69 Cal. 2d 371, 383-384, 71 Cal. Rptr. 687, 445 P.2d 303]* , and have held that the Legislature may therefore delegate "quasi-legislative" powers to state agencies [*First Industrial Loan Co. v. Daugherty (1945) 26 Cal. 2d 545, 549, 159 P.2d 921]* . Even if an agency derives some of its powers directly from the California Constitution, the Legislature is not precluded from delegating some of its own powers to the agency [*Sandstrom v. Cal. Horse Racing Bd. (1948) 31 Cal. 2d 401, 413, 189 P.2d 17 , cert. denied, 335 U.S. 814, 69 S. Ct. 31, 93 L. Ed. 369 (1948)]* .

The Legislature's function is the determination and formulation of the basic policy; attainment of that policy may be left to administrative agencies. After declaring a policy and fixing a primary standard for the exercise of delegated legislative power, the Legislature may confer upon administrative agencies the power to "fill up the details" by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect [*First Industrial Loan Co. v. Daugherty (1945) 26 Cal. 2d 545, 549, 159 P.2d 921* ; *State Comp. Ins. Fund v. State Bd. of Equalization (1993) 14 Cal. App. 4th 1295, 1299, 18 Cal. Rptr. 2d. 526* (delegation of legislative power to agency must contain an intelligible standard that is capable of administrative application by the agency)].

Delegation is restricted only by the judicially developed principle that delegation of uncontrolled authority to make fundamental policy determinations is invalid [*People v. Wright (1982) 30 Cal. 3d 705, 712-713, 180 Cal. Rptr. 196, 639 P.2d 267* ; *Clean Air Constituency v. California State Air Resources Bd. (1974) 11 Cal. 3d 801, 816-817, 114 Cal. Rptr. 577, 523 P.2d 617* ; *People v. Martin (1989) 211 Cal. App. 3d 699, 710, 259 Cal. Rptr. 770]* .

The California Supreme Court has not defined the term "fundamental policy determination." *Nevertheless, in California Medical Assn. v. Lackner (1981) 124 Cal. App. 3d 28, 177 Cal. Rptr. 188* , the court of appeal held that the critical question in determining if a decision is "fundamental" is whether or not the Legislature has previously made a basic policy decision that provides a standard or guide for the exercise of administrative discretion [*California Medical Assn. v. Lackner (1981) 124 Cal. App. 3d 28, 41, 177 Cal. Rptr. 188* ; *see, e.g., People v. Martin (1989) 211 Cal. App. 3d 699, 710, 259 Cal. Rptr. 770* (legislature expressed intent to protect health and environment by regulating hazardous waste, provided general definition of hazardous waste, and directed Department of Health Services to make list of hazardous wastes; held to be reasonable grant of power to agency, providing adequate standards to guide agency)].

In *Lackner,* the court found that the decision of the Department of Health Services to promulgate informed consent regulations was not a decision on a truly fundamental issue that could only be made by the Legislature; statutory standards governed the department's exercise of discretion [*California Medical Assn. v. Lackner (1981) 124 Cal. App. 3d 28, 41, 177 Cal. Rptr. 188]* . In *Kugler v. Yocum (1968) 69 Cal. 2d 371, 71 Cal. Rptr. 687, 445 P.2d 303* , the court found the determination that firemen's wages in one city should be comparable to those in another city, was a "fundamental policy issue," the setting of the particular salaries by an administrative body or officer merely constituted implementation of that policy [*Kugler v. Yocum (1968) 69 Cal. 2d 371, 377-378, 71 Cal. Rptr. 687, 445 P.2d 303]* .

In *Clean Air Constituency v. California State Air Resources Bd. (1974) 11 Cal. 3d 801, 114 Cal. Rptr. 577, 523 P.2d 617* , the California Supreme Court stated that the enactment of a statute requiring installation of pollution control devices in motor vehicles was a fundamental policy determination that urgent action needed to be taken against auto pollution. The state air resources board, by delaying implementation of that program due to its own concerns regarding energy consumption, essentially made an impermissible, contrary fundamental policy decision that energy consumption was more important than pollution control [*Clean Air Constituency v. California State Air Resources Bd. (1974) 11 Cal. 3d 801, 816-818, 114 Cal. Rptr. 577, 523 P.2d 617]* . For other examples of decisions that constitute "fundamental policy decisions," see Ch. 470, *Overview of Public Administrative Law* .

[c] Sources of Delegation of Rulemaking Power

Quasi-legislative powers are delegated to most state agencies either in their enabling statutes, the statutes they are to administer, or in laws of general application to some or all agencies. *Gov. Code § 6253.4(a)* authorizes certain state agencies to establish procedural rules for making records available to the public [*see Gov. Code § 6253.4(a)*; *see also* Ch. 470C, *Public Records Act*]. No quasi-legislative authority is delegated to a California state agency by a court decision, or by the regulations, statutes, or constitution of the United States government; however, a California statute may empower a state agency to adopt rules to implement or interpret a court decision or specified United States laws or regulations. For example, in *California Welfare Rights Organization v. Carleson* [*California Welfare Rights Organization v. Carleson (1971) 4 Cal. 3d 445, 93 Cal. Rptr. 758, 482 P.2d 670]* , the California Supreme Court held valid a regulation promulgated by the Department of Social Welfare that raised the AFDC amount specified by *Welf. & Inst. Code § 11450(a)* to conform to increases set by federal law. The statute required the AFDC amount to be increased or decreased in accordance with federal law [*California Welfare Rights Organization v. Carleson (1971) 4 Cal. 3d 445, 452-454, 93 Cal. Rptr. 758, 482 P.2d 670]* . In this type of situation, the court decision or the laws and regulations of the United States merely help to define the scope of the statutory delegation.

[d] Subdelegation

Although an administrative agency may also delegate its assigned functions and duties to another body or officer, quasi-legislative duties generally may not be delegated [*see* Davis, *Administrative Law Treatise* (2nd ed, 1978), vol. 2, ch. 3, § 3.17]. For discussion of this further level of delegation, *see* Ch. 470, *Overview of Public Administrative Law* .

[2] Express and Implied Delegation

A delegation of rulemaking authority can be express, implied, or both [*Gov. Code § 11342.2*]. An express delegation specifies that a certain state agency or category of agency may or must adopt rules or regulations, and often specifies the purpose of those rules or regulations. For example, *Gov. Code § 11342.4* provides that the OAL shall adopt, amend, or repeal regulations for the purpose of carrying out the provisions of this chapter [*Gov. Code § 11342.4*; *see Gov. Code § 11342.550* (Office of Administrative Law defined)]. "This chapter" refers to Chapter 3.5, the APA administrative regulation and rulemaking provisions (*Gov. Code §§ 11340 et seq.*). An implied delegation arises from a power or a duty given to a state agency, when the adoption of a regulation is needed for the due and efficient exercise of the powers expressly granted [*see Bank of Italy v. Johnson (1926) 200 Cal. 1, 20, 251 P. 784]* . The powers of an agency include those that may fairly be implied from the statute granting the powers [*Dickey v. Raisin Proration Zone (1944) 24 Cal. 2d 796, 810, 151 P.2d 505* ; *see also Rich Vision Centers, Inc. v. Bd. of Medical Examiners (1983) 144 Cal. App. 3d 110, 114, 192 Cal. Rptr. 455]* . An implied power must be indispensable; any reasonable doubt as to its existence is resolved against the agency [*see Addison v. Dept. of Motor Vehicles (1977) 69 Cal. App. 3d 486, 498, 138 Cal. Rptr. 185]* . Implied rulemaking authority may occur in conjunction with, or in the absence of, express rulemaking authority.

Similarly, agencies may only exercise those powers that are delegated by the governing legislation that creates the agency and gives the agency authority to act. For example, the California Court of Appeal held that the California Coastal Commission did not have statutory authority under California Coastal Act [*Pub. Res. §§ 30000 et. seq.*] to condition issuance of a coastal zone development permit based on considering impacts on coastal zone of the part of a proposed project outside the coastal zone [*Sierra Club v. California Coastal Com. (2005) 35 Cal. 4th 839, 843-844, 28 Cal. Rptr. 3d 316, 111 P.3d 294]* .

[3] Assessing the Scope of Authority Delegated

[a] When Agency May Interpret Delegating Statute

The extent to which a state agency may interpret the statute or statutes from which it draws its quasi-legislative authority is an important delegation issue. Unless authorized to do so by the Legislature, a state agency may not

interpret any statute, including a delegation of authority, that is certain and unambiguous [*Bank of Alameda County v. McColgan (1945) 69 Cal. App. 2d 464, 470, 159 P.2d 31]* . When interpretation of a statute delegating rulemaking authority is necessary, however, the agency given the delegation may reasonably interpret it [*Ralphs Grocery Co. v. Reimel (1968) 69 Cal. 2d 172, 176, 70 Cal. Rptr. 407, 444 P.2d 79]* . For example, a state agency may interpret a statute through the adoption of a regulation when the statute is ambiguous [*Dillman v. McColgan (1944) 63 Cal. App. 2d 405, 409-410, 146 P.2d 978]* . A regulation interprets a statute if it construes the statute, rather than merely implementing it [*Blumenfeld v. San Francisco Bay Conservation & Dev. Com. (1974) 43 Cal. App. 3d 50, 57, 117 Cal. Rptr. 327]* . For example, an interpretive regulation might define statutory terms, clarify the meaning of a statute, or explain the policy embodied in the statute [*see* *Wotton v. Bush (1953) 41 Cal. 2d 460, 464, 261 P.2d 256* (regulation defined statutory terms); *Blumenfeld v. San Francisco Bay Conservation & Dev. Com. (1974) 43 Cal. App. 3d 50, 57, 117 Cal. Rptr. 327* (regulation defined statutory terms)].

[b] Interpretation May Not Exceed Delegated Authority

Any regulation adopted by a state agency, including one that interprets a delegation of authority, must be within the scope of the authority conferred upon the agency [*Gov. Code § 11342.1*]. A regulation that is beyond the scope of that authority is void [*Gov. Code § 11342.1*; *State Farm Mutual Automobile Insurance Company v. Garamendi (2004) 32 Cal. 4th 1029, 1040-1042, 12 Cal. Rptr. 3d 343, 88 P.3d 71* (regulation promulgated by Insurance Commissioner that authorized public inspection of insurer community service statement data was valid and within the scope of statutory authority of *Ins. Code § 1861.07*); *State Farm Mutual Automobile Insurance Company v. Garamendi (2004) 32 Cal. 4th 1029, 1040-1042, 12 Cal. Rptr. 3d 343, 88 P.3d 71* (regulation promulgated by Insurance Commissioner that authorized public inspection of insurer community service statement data was valid and within the scope of statutory authority of *Ins. Code § 1861.07*); *Bearden v. U.S. Borax, Inc. (2006) 179 L.R.R.M. (BNA) 2993, 138 Cal. App. 4th 429, 432, 435-437, 41 Cal. Rptr. 3d 482* (Industrial Welfare Commission Order that authorized exemption from second meal break for employees covered by a collective bargaining agreement was invalid because it was inconsistent with the language of the governing statutes, *Labor Code §§ 226.7, 512(a), 516*, and therefore exceeded the scope of agency authority to adopt regulations under *Gov. Code §§ 11342.1, 11342.2*); *Mineral Ass'ns Coal. v. State Mining & Geology Bd. (2006) 138 Cal. App. 4th 574, 579, 589, 41 Cal. Rptr. 3d 544* (agency regulation (*14 Cal. Code Regs. § 3805.5(d)*) requiring concurrence of Director of Department of Conservation in lead agency determinations was within Board's statutory authority and was not in conflict with the governing statute (*Pub. Res. Code §§ 2710 et seq., 2775*)); *Pulaski v. California Occupational Safety and Health Standards Bd. (1999) 75 Cal. App. 4th 1315, 1341-1342, 90 Cal. Rptr. 2d 54* ; *Morris v. Williams (1967) 67 Cal. 2d 733, 748, 63 Cal. Rptr. 689, 433 P.2d 697]* . A regulation that enlarges or exceeds the authority delegated to the agency by the statute is invalid [*People ex rel. Dept. of Alcoholic Beverage Control v. Miller Brewing Company (2002) 104 Cal. App. 4th 1189, 1198-1199, 128 Cal. Rptr. 2d 861]* . To be within the scope of authority, a regulation must be compatible with the purposes of the program it implements [*Vaessen v. Woods (1984) 35 Cal. 3d 749, 764, 200 Cal. Rptr. 893, 677 P.2d 1183* (court enjoined enforcement of California AFDC regulation that conflicted with policy of federal AFDC statutes because it defined "income" to include income tax refunds for purposes of reducing AFDC benefits)]. It must conform to the "legislative will" [*Morris v. Williams (1967) 67 Cal. 2d 733, 737, 63 Cal. Rptr. 689, 433 P.2d 697* (court invalidated Medi-Cal regulations that eliminated some health services entirely, although statute that the regulations interpreted required "proportionate reductions" in services)].

A regulation cannot reject explicit legislative determinations. For example, in *Cooper v. Swoap* [*Cooper v. Swoap (1974) 11 Cal. 3d 856, 115 Cal. Rptr. 1, 524 P.2d 97]* , the California Supreme Court held invalid an AFDC regulation that reduced an AFDC grant to a recipient who shared housing with a recipient of an adult aid program. The court found that the regulation conflicted with a statute that explicitly prohibited the imputation of an adult aid recipient's benefit as income to anyone else [*Cooper v. Swoap (1974) 11 Cal. 3d 856, 864-865, 115 Cal. Rptr. 1, 524 P.2d 97]* . Agency standards can not create exemptions that are not provided for by statute [*Communications Relay Corp. v. County of Los Angeles (2005) 130 Cal. App. 4th 162, 169-170, 30 Cal. Rptr. 3d 1* (agency standard providing for an exemption from statutory licensing requirement could not create valid exemption when statute did not authorize an exemption)].

An interpretation of a statute, whether it establishes a legislative mandate or delegates discretionary rulemaking authority, must be based on the language used in the statute [*see Select Base Materials, Inc. v. Bd. of Equalization (1959) 51 Cal. 2d 640, 645, 335 P.2d 672]* ; however, an administrative agency is not limited to the exact provisions of a statute in adopting regulations to implement its mandate. For example, in *Ford Dealers Assn. v. Dept. of Motor Vehicles* [*Ford Dealers Assn. v. Dept. of Motor Vehicles (1982) 32 Cal. 3d 347, 185 Cal. Rptr. 453, 650 P.2d 328]* , the California Supreme Court held that a regulation that defined "advertising" to include both oral and written statements did not conflict with the statute it interpreted, even though that statute used "advertise" only with reference to written statements [*Ford Dealers Assn. v. Dept. of Motor Vehicles (1982) 32 Cal. 3d 347, 362, 185 Cal. Rptr. 453, 650 P.2d 328]* . Initiative measures should also be interpreted consistent with the usual and ordinary meaning of its terms [*Tain v. State Bd. of Chiropractic Exam's (2005) 130 Cal. App. 4th 609, 614, 616-617, 30 Cal. Rptr. 3d 330* (Chiropractic Act, adopted by initiative in 1992, establishes a scope of chiropractic practice that excludes use of drugs, surgery, or obstetrics by chiropractors; initiative measures interpreted by courts usingtechniques similar to statutory interpretation; Court upheld those scope of practice limits, including an agency regulation, and rejected a constitutional challenge to them based on equal protection of law)].

When appellate courts interpret statutes, the court will look to the language of the statute, as well as the statutory purpose. The legislative intent of the statute may be determined from the language of the statute if it is clear and unambiguous, but if not, the literal meaning will give way to interpretation based on legislative intent, and harmonizing all related provisions of the statute [*State v. Unumprovident Corp. (2006) 140 Cal. App. 4th 442, 445-446, 44 Cal. Rptr. 3d 491]* .

The California Supreme Court deferred to the agency interpretation by the California Department of Social Services (CDSS) of its governing statute [Fam. Code' 8617] because of agency expertise, and because the interpretation was adopted at "authoritative legal and policymaking levels of the agency." The agency had interpreted the statute to permit second parent adoptions. The CDSS had adopted forms and procedures to "facilitate second parent adoptions." The challenge was based on the argument that CDSS, an executive branch agency, exercised legislative powers, by recognizing a type of adoption that was not authorized by the legislature. The Court rejected this challenge and held that CDSS had reasonably interpreted a statute authorizing independent adoptions to allow the type of adoption for which they had provided forms and procedures [*Sharon S. v. Superior Court (2003) 31 Cal. 4th 417, 436-437, 2 Cal. Rptr. 3d 699, 73 P. 3d 554]* .

When the legislature delegates regulatory authority to an administrative agency, the legislature must make the fundamental policy determinations. If the legislature delegates unrestricted authority to an agency to make fundamental policy decisions, then the delegation of powers to the agency is unconstitutional as a violation of separation of powers. If the legislation contains standards, or if there are procedural safeguards, such as a requirement that the agency adopt regulations that are not inconsistent with the statute and that are reasonably necessary to implement the purpose of the legislation, then the delegation of powers to the agency is proper [*Clean Air Constituency v. California State Air Resources Bd. (1974) 11 Cal. 3d 801, 816-817, 114 Cal. Rptr. 577, 523 P. 2d 617* ; *see also People v. Wright (1982) 30 Cal. 3d 705, 712-713, 180 Cal. Rptr. 196, 639 P. 2d 267]* .

[c] Agency's Interpretations Are Generally Followed

In general, an agency's interpretation of its own authority is followed by the courts and by the OAL, unless the interpretation is clearly erroneous [*see Cal. Drive-In Restaurant Assn. v. Clark (1943) 22 Cal. 2d 287* ; *1 Cal. Code Reg. § 14*; Ch. 472B, *Agency Rulemaking Procedures*]. When the Legislature has delegated to an administrative agency the responsibility to implement a statutory scheme through rules and regulations, the courts will interfere only where the agency has clearly overstepped its statutory authority or violated a constitutional mandate [*Ford Dealers Assn. v. Dept. of Motor Vehicles (1982) 32 Cal. 3d 347, 356, 185 Cal. Rptr. 453, 650 P.2d 328]* . Agency quasi-legislative interpretations will be deferred to by the courts when the agency interpretation was within the scope of statutory

authority, and the agency interpretation was reasonably necessary to carry out the purpose of the statutory provision [*Ramirez v. Yosemite Water Co. (1999) 20 Cal. 4th 785, 800, 85 Cal Rptr., 2d 844, 978 P 2d 2* (Industrial Wage Commission (IWC) wage order (agency regulation) interpreting term "outside salesperson" entitled to deference under two-part test); *Megrabian v. Saenz (2005) 130 Cal. App. 4th 468, 480-482, 30 Cal. Rptr. 3d 262* (DSS regulatory interpretation of California public assistance statute provision providing that date of entry meant date of acquiring current immigration status, rather than date of physical entry into U.S., was entitled to deference by courts)]. A general grant of powers implies the right and duty to adopt regulations reasonably necessary to exercise those powers [*Laurelle v. Bush (1911) 17 Cal. App. 409, 415-416, 119 P. 953]* . Deference to the agency in such a case is a recognition that discretion in the use of quasi-legislative powers has been delegated, and a recognition that continuous, flexible, and expert regulation is necessary [*see* *Ralphs Grocery Co. v. Reimel (1968) 69 Cal. 2d 172, 176, 70 Cal. Rptr. 407, 444 P.2d 79]* . Courts will defer to reasonable agency interpretations of the agency's governing statute [*Western States Petroleum Association v. State Dept. of Health Services (2002) 99 Cal. App. 4th 999, 1006-1007, 122 Cal. Rptr. 2d 117* ; *Park Medical Pharmacy v. San Diego Orthopedic Associates Medical Group, Inc. (2002) 99 Cal. App. 4th 247, 259-260, 120 Cal. Rptr. 2d 858* (agencies interpretations of statute consistent with appellate court's interpretation of statute); *Californians for Safe Prescriptions v. California State Bd. of Pharmacy (1993) 19 Cal. App. 4th 1136, 1149-1150, 23 Cal. Rptr. 2d 755]* . However, an agency interpretation of a statute that is not persuasive will not be deferred to by the courts and will not govern the interpretive issue [*Katz v. Los Gatos-Saratoga Joint Union High School District (2004) 117 Cal. App. 4th 47, 67-69, 11 Cal. Rptr. 3d 546]* . Furthermore, a California Court of Appeal held that a federal DOL opinion letter would be evaluated under the federal weak deference standard of *Christensen v. Harris County (2000) 529 U.S. 576, 120 S. Ct. 1655, 146 L. Ed. 2d 621* and *Skidmore v. Swift & Co. (1944) 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124* . The court concluded that the opinion in that letter would not be deferred to, as it lacked the power to persuade on the interpretive issue [*Bell v. Farmers Ins. Exch. (2004) 115 Cal. App. 4th 715, 733-735, 9 Cal. Rptr. 3d 544* ; *Conley v. Pacific Gas & Electric Co. (2005) 131 Cal. App. 4th 260, 270-271, 31 Cal. Rptr. 3d 719* (DLSE advice letters interpretation rejected by court of appeal on merits)].

Agency interpretive regulations will be deferred to by the courts when the interpretation is persuasive, based on the application of a number of factors including the following: the interpretation has been followed consistently by the agency, it concerns policy and discretion, the agency has an interpretative advantage over the courts, and it was not adopted in response to litigation [*Ramirez v. Yosemite Water Co. (1999) 20 Cal. 4th 785, 801, 85 Cal Rptr. 2d 844, 978 P. 2d 2* ; *Megrabian v. Saenz (2005) 130 Cal. App. 4th 468, 484-486, 30 Cal. Rptr. 3d 262* (DSS regulatory interpretation of California public assistance statute provision providing that date of entry meant date of acquiring current immigration status, rather than date of physical entry into U.S., was entitled to deference by courts)]. The California Supreme Court held that Judicial Council Rule 1460, which interpreted the provisions of *Welf. & Inst. Code § 366.21*(e), was entitled to great weight, and could only be overturned if it was clearly erroneous [*Sara M. v. Superior Court (2005) 36 Cal. 4th 998, 1013-1015, 32 Cal. Rptr. 3d 89, 116 P. 3d 550]* . The Supreme Court went on to uphold that interpretation (permitting the juvenile court to terminate reunification services when the parent has failed to contact or visit their child for six months after reunification services have begun) [*Sara M. v. Superior Court (2005) 36 Cal. 4th 998, 1016-1017, 32 Cal. Rptr. 3d 89, 116 P. 3d 550]* .

The California Court of Appeal gave deference to the interpretation of the State Board of Equalization (SBE) as to what was "business income" for purposes of California tax law, and held that the SBE correctly interpreted that statute [*Jim Beam Brands Co., v. Franchise Tax Bd. (2005) 133 Cal. App. 4th 514, 521-523, 34 Cal. Rptr. 3d 874]* . The California Court of Appeal gave deference to the Department of Managed Health Care's interpretation of *Health & Safety Code § 1371.4* (that health care providers have the right to privately enforce provisions of the statute through filing lawsuits under the unfair competition law, as well as for breach of contract, and quantum meruit, when a health care plan did not provide adequate reimbursement for the value of service rendered by emergency room physicians) and concluded that physicians had standing to file a lawsuit against a health care service plan [*Bell v. Blue Cross of Cal. (2005) 131 Cal. App. 4th 211, 217-219, 31 Cal. Rptr. 3d 688]* . The California Court of Appeal gave limited deference to the agency interpretation of statutory term ("subterranean stream") related to agency water law jurisdiction that was determined by agency in adjudicatory capacity in permitting proceeding [*North Gualala Water Co. v. State Water Resources Control*

Board (2006) 139 Cal. App. 4th 1577, 1589-1590, 43 Cal. Rptr. 3d 821] .

A court that is reviewing an agency interpretation of its governing statute will give substantial weight to that agency interpretation. This is true even when the interpretation is found in Board annotations containing staff-attorney legal opinions, and is not contained in either substantive or interpretive rules, so long as that interpretation is consistent with the court's own independent analysis of the same statute, when the interpretation is based on agency expertise acquired in enforcing the statute interpreted, and when the interpretation has been consistent over a long period of time [*Yamaha Corp. of Am. v. State Bd. of Equalization (1999) 73 Cal. App. 4th 338, 351-353, 86 Cal. Rptr. 2d 362* ; *Reilly v. City and County of San Francisco (2006) 142 Cal. App. 4th 480, 491-492, 48 Cal. Rptr. 3d 291* (state board of equalization annotations are entitled to some weight because of agency expertise and due to consistent and long standing nature of agency interpretation but annotation interpretations are not binding on court of appeal which independently determined meaning of statutory term); *Spanish Speaking Citizens' Foundation, Inc. v. Low (2001) 85 Cal. App. 4th 1179* , as modified on denial of rehearing, 2001 Cal. App. LEXIS 39, 103 Cal. Rptr. 2d 75 (agency interpretation of weight ordering mandate in statute entitled to strong claim of deference based on technical expertise and time and effort spent addressing issue); *Sully-Miller Contracting Co. v. Cal. Occupational Safety & Health Appeals Bd. (2006) 138 Cal. App. 4th 684, 693, 41 Cal. Rptr. 3d 742* (board interpretation of term "dual employer" based on workers compensation law, and applied to worker safety law, was deferred to by appellate court under great weight standard in applying dual employer concept to substantial evidence review of board finding that plaintiff appellant was employer of deceased worker); *Sneed v. Saenz (2004) 120 Cal. App. 4th 1220, 1234, 1246, 16 Cal. Rptr. 3d 563* (Department of Social Services agency interpretation of meaning of term "child support" in maximum family grant statute upheld by Court of appeal as being consistent with language of statute and legislative intent); *PG & E Corp. v. Public Utilities Com. (2004) 118 Cal. App. 4th 1174, 1194-1196, 13 Cal. Rptr. 3d 630* (PUC's interpretation of the scope of agency jurisdiction is not controlling, is scrutinized more carefully, and is given the weight justified by the carefulness, thoroughness, and consistency of the agencies reasoning in support of the interpretation); *California Career Schools v. DMV (2004) 120 Cal. App. 4th 10, 14-16, 15 Cal. Rptr. 3d 813* (DMV interpretation of term commercial vehicle in governing statute [*Cal. Veh. Code § 260*] was given deference by Court of Appeal based on agency expertise); *Southern California Edison Co. v. Public Utilities Comm'n of the State of California (2004) 117 Cal. App. 4th 1039, 1049, 12 Cal. Rptr. 3d 441* (court of appeal deferred to PUC interpretation of *Pub. Util. Code § 1802*. Courts will give considerable deference to PUC's interpretations of the Public Utilities code when those interpretations are reasonably related to statutory purposes and language)].

However, agency regulations that contain interpretations of the agencies governing statute that are inconsistent with the statute as interpreted bythe courts are invalid and unenforceable [*Esberg v. Union Oil Company of California (2002) 28 Cal. 4th 262, 269-270, 121 Cal. Rptr. 2d 203, 47 P.3d 1069* (FEHA regulation that interpreted FEHA statute to prohibit age discrimination in employment benefits was inconsistent with statutory interpretation of FEHA as decided by California Supreme Court, which limited FEHA Act protection to exclude employee benefits, and therefore regulation was invalid and unenforceable); *Kaiser Foundation Health Plan, Inc. v. Zingale (2002) 99 Cal. App. 4th 1018, 1028-1029, 121 Cal. Rptr. 2d 741* (agency regulation mandating that health care plans provide coverage of all medically necessary outpatient prescription drugs exceeded scope of agency authority under governing statute; regulation was invalid and unenforcable); *Blue v. Bonta (2002) 99 Cal. App. 4th 980, 990-992, 121 Cal. Rptr. 2d 483* (medical regulation that excluded coverage for stairway chair lifts is invalid because inconsistent with the statute that requires coverage of durable medical equipment; agency interpretation rejected by court that treated issue as question of law with independent judgment review; no specialized administrative expertise or agency factual inquiry required); *Gebremicael v. Cal. Comm'n on Teacher Credentialing (2004) 118 Cal. App. 4th 1477, 1485-1486, 13 Cal. Rptr. 3d 777* (Commission argued that nature of crime was controlling under governing statute for determining whether applicant for teaching credential was convicted of felony, and therefore ineligible for teaching credential. The court of appeal rejected commission interpretation of governing statute, and concluded that the nature of punishment imposed is controlling, particularly in cases in which the offense can be either a felony or a misdemeanor)]. The California Supreme Court interpreted the provisions of the Public Employees' Retirement Law (PERL) [*Gov. Code § 21156*] which authorize disability retirements for state employees who are unable to perform their duties in state service due to

physical or mental incapacity. The issue in the case was whether a state employee could qualify for disability retirement benefits by showing inability to perform the usual duties of his existing job as a police officer, or whether the employee also had toshow the inability to perform the usual duties of police officers workingfor other California law enforcement agencies that were subject to the PERL statute. The court majority adopted the latter interpretation, and rejected the opinion of CALPERS, the agency charged with administering the PERL statute, offered in an amicus curie brief, that the showing required by the court's opinion would be unworkable [*Nolan v. City of Anaheim (2004) 33 Cal. 4th 335, 343-345, 14 Cal. Rptr. 3d 857, 92 P. 3d 350]* .

The 10-day stay time period authorized by *Gov. Code § 11521(a)* for review by a state agency of a filed petition for reconsideration is the maximum time period that an agency may stay the effective date of the decision while it considers the petition for reconsideration. The Medical Board of California granted a 28-day stay of the decision, and then ordered reconsideration of the Board's previous decision to dismiss accusations of misconduct against a physician. The California Supreme Court held that the Board's order granting reconsideration was void for lack of jurisdiction because the Board only had authority to stay the decision for 10 days, not 28 days [*Bonnell v. Medical Board (2003) 31 Cal. 4th 1255, 1258, 82 P.3d 740]* . The court based the decision on the clear language of the statute that the 10-day limit applied to filed petitions. The Supreme Court relied on the plain language of the statute, did not use legislative history, and did not defer to and rejected the contrary agency interpretation that the 30-day stay period could be applied to filed petitions [*Bonnell v. Medical Board (2003) 31 Cal. 4th 1255, 1264-1266, 82 P.3d 740]* .

Agency interpretations that are articulated in litigating positions are not entitled to much weight, but the fact that the agency changes its interpretation of a statute does not preclude the court from accepting the changed interpretation since both interpretations may be legally permissible [*Citicorp North American Inc. v. Franchise Tax Bd. (2000) 83 Cal. App. 4th 1403, 1419-1420, 100 Cal. Rptr. 2d 509]* . Agency interpretations of statutes and regulations in the area of the agency's expertise are given great weight by the courts but they are not binding [*Brown v. Fair Political Practices Com. (2000) 84 Cal. App. 4th 137, 150-151, 100 Cal. Rptr. 2d 606]* . Agency interpretations of regulations issued by the agency are entitled to some weight (persuasive but not controlling) [Diablo Valley College Faculty Senate v. Contra Costa Community College district *(2007) 148 Cal. App. 4th 1023, 1034-1035, 56 Cal. Rptr. 3d 294* (Chancellor's interpretation of governing regulations for statewide community college system)]. Courts will not defer to agency interpretations when the interpretation was not consistently maintained over a long period of time [*Van Wagner Communications, Inc. v. City of Los Angeles (2000) 84 Cal. App. 4th 499, 509-510, 100 Cal. Rptr. 2d 922]* . When a court decides an issue related to interpreting an agency regulation, it does not defer to agency expertise in interpreting the regulation when the plain language of the regulation compels an interpretation different from the agency, or when the language of the rule does not require administrative expertise to interpret [*Southern California Edison Co. v. Public Utilities Com'n (2000) 85 Cal. App. 4th 1086, 1105-1106, 102 Cal. Rptr. 2d 684]* . No deference will be given by a reviewing court to an agency interpretation of a statute if the agency is not responsible for enforcing the statute [*Cequel III Communications I, LLC v. Local Agency Formation Commission of Nevada County (2007) 149 Cal. App. 4th 310, 317, 57 Cal. Rptr. 3d 32* (LAFCO determination that public utility district had statutory authority to provide cable television services was not entitled to deference because commission did not have responsibility for enforcing the relevant statute)].

However, the California Court of Appeal reversed the decision of the ABC (Board) that had itself reversed the decision of the DABC (Department's) suspending the license of an alcoholic beverage wholesale distributor for violating provisions of *Bus. & Prof. Code §§ 25500(a)(2)* and *25503(h)* prohibiting sponsor payments by wholesale distributors. The Board reversed the Department decision, concluding that the plain language of Rule 106(i)(2) [*4 Cal. Code Reg § 106(i)(2)*] authorized the wholesaler's sponsorship. The Board rejected the Department's interpretation of this rule. The California Court of Appeal overturned the Board decision and deferred to the Department's interpretation of this rule, Rule 106(i)(2) [*4 Cal. Code Reg § 106 (i)(2)*], which limits scholarships given by suppliers at sponsored contests or races to bona fide amateur or professional organizations, to exclude ACOP, an organization that promoted itself and the products and services of its sponsors in the alcoholic beverage industry. The Court accepted that interpretation of the Department, and based deference on the rationale of the administrative expertise of the Department which was familiar

with its own regulations. The Court also noted that it would defer to the Department's contemporaneous interpretation of a rule enforced by the department unless that interpretation was clearly erroneous or unauthorized [*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2005) 128 Cal. App. 4th 1195, 1204-1205, 27 Cal. Rptr. 3d 766]* .

The Court of Appeal reversed the decision of the ABC (Board) which had reversed the order of the DABC (Department) suspending a liquor licensee's license for 10 days. The suspension was ordered because the licensee sold alcohol to an underage decoy, in violation of *Bus. & Prof. Code § 25658(a)*. The Board reversed the suspension because the police officer had the decoy (an underage person purchasing alcohol) make the required face to face identification of the alcohol seller outside the store premises, not inside. The Board interpreted *Cal. Code Reg., tit 4. § 141(b)(5)* to require an inside the premises face to face identification. The Board based its reversal on lack of compliance with the regulation. The Court of Appeal rejected the Board's interpretation, and held that the plain language of the regulation, as well as its history, did not support an inside the store premises identification requirement. The Court of Appeal annulled the Board decision, and remanded the action back to the Board to reinstate the license suspension. The Court of Appeal used similar principles, plain language, and history of the regulation, to decide the regulation interpretation question as would be used to decide a question of statutory interpretation. The court did not defer to the agency interpretation nor did it rely on agency expertise [*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (2003) 109 Cal. App. 4th 1687, 1696-1698, 1 Cal. Rptr. 3d 339]* .

The Court of Appeal reversed the trial court decision granting a writ of mandate, and held that the Insurance Commissioner's interpretation of its own regulations was entitled to deference by the trial court and should be followed. The interpretive issue related to when a worker's compensation claim is officially closed because of the claimant's failure to prosecute the claim. The Insurance Commissioner interpreted that requirement to mean that the WCAB or a Court had to take official action to dismiss the claim for failure to prosecute. The employer argued that the insurer's closing of a claim file was sufficient. The employer's experience rating was based in part on the number of past meritorious claims. The Court of Appeal held that the Insurance Commissioner's interpretation was entitled to deference because of agency expertise citing *Yamaha Corp. of Am. v. State Bd. of Equalization (1998) 19 Cal. 4th 1, 12, 78 Cal. Rptr 2d 1, 960 P. 2d 1031* (deference based on agency expertise, when agency has comparative interpretive advantage over courts, agency interpretation formally adopted and followed consistently), and this expertise driven interpretation is controlling notwithstanding that the language of the regulation could be read another way [*Simi Corp. v. Garamendi (2003) 109 Cal. App. 4th 1496, 1511-1512, 1 Cal. Rptr. 3d 207]* .

The Third District California Court of Appeal gave deference to the interpretation by the state water resources control board of requirements in its own regulations governing water quality objectives for bacteria in groundwater [*County of Sacramento v. State Water Resources Control Board (2007) 153 Cal. App. 4th 1579, 1586-1588, 64 Cal. Rptr. 3d 302]* . The Third District, Division 1, California Court of Appeal applied the weak deference standard to the State Water Resources Control Board interpretation of the provisions of *Health and Safety Code § 25299.57(d)(3)*(A, B) based upon the validity, thoroughness, and consistency and reasoning of the agency interpretation with the ultimate question of statutory interpretation subject to the de novo independent review standard [*Kelsoe v. State Water Resources Control Bd. (2007) 153 Cal. App. 4th 569, 573* (Board required to consider permit waiver so that gas station operator may be able to obtain reimbursement for cleanup costs associated with underground petroleum storage tanks.)].

The Court of Appeal reversed the trial court decision granting a writ of mandate setting aside the granting of a water quality discharge permit to a refinery. The trial court decision was based on the lack of a numeric water quality based effluent limit for dioxin discharges. The trial court granted the writ of mandate on the grounds that controlling federal regulations required a numeric limit. The court of Appeal reversed the trial court decision, and concluded that the federal regulation did not require a numeric limit in all cases. The Court based this conclusion on a California water quality state agency decision which interpreted federal water quality law to not require numeric limits in permits in all cases. The water quality agencies determined that the challenged permit would be issued without a numeric limit because such a limit was not feasible. Therefore the permit was not invalid for failure to contain a numeric limit on

discharges [*Communities for a Better Environment v. State Water Resources Control Bd. (2003) 109 Cal. App. 4th 1089, 1103-1105, 1 Cal. Rptr. 3d 76]* .

The California Court of Appeal gave substantial deference to the State Water Resources Control Board's interpretation of Term 9 which set limitations on a water permit holder's right to divert water from a river to maintain in stream flows to protect fish life. The court found that this interpretation was reasonable. Although the agency developed this interpretation in an adjudicatory capacity in a permitting proceeding, the court of appeal relied on policies used to support court deference to agency interpretations of their own regulations, noting that agency interpretation of regulations are entitled to great weight unless unauthorized, unreasonable, or clearly erroneous. This interpretation was found to be reasonable [*North Gualala Water Co. v. State Water Resources Control Board (2006) 139 Cal. App. 4th 1577, 1607-1608, 43 Cal. Rptr. 3d 821]* .

When a court is engaged in judicial review of agency regulations, it differentiates between substantive and interpretive rules in the review process. The court treats substantive rules as similar to statutes, whereas it gives interpretive rules different levels of deference based on a number of factors [*Yamaha Corp. of Am. v. State Bd. of Equalization (1998) 19 Cal. 4th 1, 7-10, 78 Cal. Rptr. 2d 1, 960 P.2d 1031* ; *Slocum v. State Bd. of Equalization (2005) 134 Cal. App. 4th 969, 974-976, 36 Cal. Rptr. 3d 627* (SBE interpretation contained in reassessment rule [SBE Rule 139] entitled to some but not substantial deference, and rule was held to be invalid because it was inconsistent with the authorizing statute [*Rev & T. Code § 170(a)(2)*], and the California Constitution [*Cal. Const. Art. 13, § 15*])].

When an appellate court interprets an agency regulation, the court is guided by the need to carry out regulatory intent, to look at the words used in the regulation, to define those words consistent with the regulatory context and not in conflict with the agency's enabling statute, and to harmonize all provisions of the regulation, if possible [*Environmental Charter High School v. Centinela Valley Union High School Dist. (2004) 122 Cal. App. 4th 139, 148-149, 18 Cal. Rptr. 3d 417* (school district decision to deny charter school use of district facilities for 2003-2004 school year was reviewed under ordinary mandate)].

When a court reviews a state statute that has a federal counterpart, but the two are substantially different, it is erroneous for the court to rely on federal regulations or or other interpretations of the federal statute in its interpretation of the state statute [*Ramirez v. Yosemite Water Company, Inc. (1999) 20 Cal. 4th 785, 797-799, 85 Cal. Rptr. 2d 844, 978 P.2d 2]* . However, when state regulations, like IWC wage orders, are modeled on federal statutes and regulations, federal law becomes relevant to interpretation, especially when the enforcing agency, DLSE, follows federal law in interpreting state regulations [*Bell v. Farmers Insurance Exchange (2001) 87 Cal. App. 4th 805, 815-816, 105 Cal. Rptr. 2d 59]* . The California courts look to federal judicial decisions in interpreting provisions of California statutes governing employment discrimination and disability discrimination because federal and state discrimination laws are similar [*Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 354, 8 P.3d 1089* ; *Knight v. Hayward Unified Sch. Dist. (2005) 132 Cal. App. 4th 121, 128-130, 33 Cal. Rptr. 3d 287* , 33 Cal. Rpr. 3d 287]. Similarly, California courts look to interpretations of the federal Equal Employment Opportunity Commission (EEOC) when deciding interpretive questions under the California statutes (FEHA) related to disability discrimination [*Knight v. Hayward Unified Sch. Dist. (2005) 132 Cal. App. 4th 121, 130-131, 33 Cal. Rptr. 3d 287* , 33 Cal. Rpr. 3d 287]. Similarly, California courts will use federal judicial decisions and EEOC interpretations of Title VII of the 1964 Civil Rights Act when interpreting provisions of the California FEHA statute related to claims of sexual harassment in employment [*Miller v. Dep't of Corr. (2005) 36 Cal. 4th 446, 463-464, 30 Cal. Rptr. 3d 797, 115 P.3d 77]* .

The California Court of Appeal gave no deference to the Department of Insurance's interpretation of *Ins. Code § 1861.10(a)*. The court ruled that *Ins. Code § 1861.10(a)* did not provide a private right of action. Deference was rejected because the interpretive issue was not a technical issue related to insurance rates within the expertise of the agency, but rather was a legal issue of statutory interpretation within the expertise of the courts. Also, deference was rejected because the Department of Insurance did not carefully consider the interpretive issue, did not maintain the interpretation consistently over time, did not formally adopt the interpretation as a regulation, and did not adopt the interpretation

contemporaneously with the passage of Proposition 103 [*Farmers Ins. Exch. v. Superior Court (2006) 137 Cal. App. 4th 842, 858-859, 40 Cal. Rptr. 3d 653]* .

Another California Court of Appeal upheld the Insurance Commissioner's decision to impose Fair Plan Assessments [*Ins. Code § 10095(c)*] against insurer's who had withdrawn from the California insurance market but who were required to participate for two years after the insurers had premiums written in that market. The court upheld the Insurance Commissioner's interpretation of the scope of the Fair Plan Assessment Liability for withdrawn insurers, and concluded that the Commissioner's interpretation would be deferred to because it was thoroughly considered, was consistent with the applicable Fair Plan statutes, was a long standing agency interpretation, and was consistent with public policy [*Ohio Casualty Ins. Co. v. Garamendi (2006) 137 Cal. App. 4th 64, 78-79, 39 Cal. Rptr. 3d 758]* .

Another California court of Appeal rejected a challenge to the Board of Registered Nursing's interpretation of *Bus. & Prof. Code § 2376 (a)(2)* by a New York college that administered a distance learning nursing degree program. The Board rejected a previously long held interpretation of the statute under which the Board had prospectively evaluated the programs of nursing schools. The Board's new interpretation of the statute concluded that the Board could only evaluate the adequacy of nursing degree programs by assessing the curriculum of an individual applicant for California nursing licenses. The Court of appeal noted that the Board was not bound by a prior erroneous interpretation. The court also held that the board's new interpretation was too narrow, and that the Board had discretion to complete prospective program based evaluations but was not required to use that method of evaluation [*Excelsior College v. Cal. Bd. of Registered Nursing (2006) 136 Cal. App. 4th 1218, 1231-1232, 39 Cal. Rptr. 3d 618]* .

The California Court of Appeal applied a respectful but not deferential standard of review of interpretations by the State Personnel Board of its governing statute. The court noted that statutory interpretation is ultimately the responsibility of reviewing courts, but that appropriate respect would be given to agency interpretations [*California Dept. of Corrections v. State Personnel Bd. (2004) 121 Cal. App. 4th 1601, 1611-1612, 18 Cal. Rptr. 3d 390]* . The Court of Appeal upheld as reasonable an SPB interpretation that employers must solicit views of employees before demoting those employees [*California Dept. of Corrections v. State Personnel Bd. (2004) 121 Cal. App. 4th 1601, 1612-1613, 18 Cal. Rptr. 3d 390]* . However, the Court of Appeal did not defer to SPB's decision as to which version of a statute to apply to an employee's challenge of a demotion. The Court of Appeal decided that issue itself because this was not an interpretation question, on which the agency would have expertise, but rather a general legal question as to prospective versus retroactive application of a statute [California Dep't of Corr. v. State Pers. *Bd. (2004) 121 Cal App. 4th 1601, 1615-1616, 18 Cal. Rptr. 3d 390]* .

The California Court of Appeal applied a limited deference standard of reviewto the State Board of Equalizations's (SBE) interpretations of California business taxation statutes that were at issue in a dispute between Amdahl Corporation and the California Franchise Tax Board (FTB). The court acknowledged SBE's expertise in interpreting those laws which results from SBE's experience in hearing and deciding appeals from tax determinations by the FTB. The Court also noted that an agency interpretation that has been maintained consistently and uniformly over a long period of time is entitled to much stronger deference, while an agency interpretation that is the result of an agency change in position, or reinterpretation, of the statute in entitled to less deference. While agencies are legally entitled to change their interpretation of a governing statute, such a change in position can weaken the persuasive value of their interpretation. In this action, SBE changed its position on several statutory interpretation issues that were related to taxation of dividends from subsidiaries in unitary groups, and related to taxation of foreign tax refunds paid to subsidiaries. Because of these changes, the Court of Appeal applied a limited deference standard of review to the SBE interpretation [*Fujitsu IT Holdings, Inc. v. Franchise Tax Bd. (2004) 120 Cal. App. 4th 459, 470-471, 15 Cal. Rptr. 3d 473]* .

The California Supreme Court gave respectful but not deferential weight to the interpretations of the prevailing wage law contained in regulations of the Department of Industrial Relations. When looking at regulatory interpretations, the court noted that these are one of several interpretive tools that help the appellate courts determine the meaning of the

statutory term. However, the regulatory interpretation is not controlling, and the courts will independently determine the meaning of the statutory language [*City of Long Beach v. Department of Industrial Relations (2004) 34 Cal. 4th 942, 951-952, 22 Cal. Rptr. 3d 518, 102 P.3d 904]* .

The California Supreme Court gave no deference to agency interpretations of the governing statute, the Knox Keene Act provisions contained in *Bus. & Prof. Code § 2556* (prohibiting business and financial relationship between opticians and licensed optometrists), that were contained in two documents: 1) a petition filed by the California attorney general, representing the California Board of Optometry with the Federal Trade Commission; and 2) internal memoranda from the Medical Board of California's division of licensing and from the Department of Corporations. The agencies had the responsibility for administering the Knox Keene Act. The interpretations were entitled to no deference because these documents were not produced at the time of statutory enactment, but rather much later. Also, the documents did not discuss the relevant statutory language, and their content did not contain a careful discussion of the issue before the Supreme Court. The memoranda are advice letters written by agency staff, and those memos are entitled to less deference than a formally adopted agency regulation. Finally, appellate courts are less deferential to agency interpretations of governing statutes because the agency does not have a comparative advantage over the appellate courts in interpreting statutes [*People v. Cole (2006) 38 Cal. 4th 964, 987-988, 44 Cal. Rptr. 3d 261, 135 P.3d 669]* .

The California Supreme Court gave significant weight to interpretations of the State Board of Equalization (SBE) that when changes in federal tax liability are made by the IRS, the four-year general tax statute of limitations [*Rev. & Tax. Code § 19057*] for giving notice of deficiency assessments is replaced by the limitations provisions of *Rev. & Tax. Code §§ 19059* (FTB has two years from date taxpayers notify board of IRS deficiency assessment) and 19060 (notice of state tax deficiency assessment can be given at any time when taxpayer fails to give notice to board of federal tax deficiency assessment). While the Supreme Court retained the ultimate responsibility for interpreting those statutory provisions, the court gave substantial weight to the SBE's longstanding statutory construction of the four year statute's applicability because the SBE is the state agency charged with the enforcement of the statute [*Ordlock v. Franchise Tax Bd. (2006) 38 Cal. 4th 897, 910-911, 44 Cal. Rptr. 3d 212, 135 P.3d 628]* .

The California Supreme Court held that a 2003 legislative amendment to the California Fair Employment and Housing Act provisions [*Gov. Code § 12940(j)(1)*] which provided for employer liability for sexual harassment of employees by third party non-employees (including customers and clients) clarified existing law, and therefore the amended statute could be applied to a lawsuit that was pending before the California courts at the time of the enactment of the legislative amendment. The Supreme Court rejected an argument that the legislative amendment had retroactive effect, and thus could not be applied to pending cases [*Carter v. California Dept. of Veterans Affairs (2006) 38 Cal. 4th 914, 918, 44 Cal. Rptr. 3d 223, 135 P.3d 637]* . An agency regulation that conflicts with the provisions of the governing statute is invalid because it exceeds the authority of the agency to adopt regulations under that statute [Citizens to Save Cal. v. Fair Political Practices Comm'n *(2006) 145 Cal. App. 4th 736, 739-741, 52 Cal Rptr. 3d 17]* . The legislature can not declare existing law in a later amendment that is contrary to a definitive interpretation of a California statute by the California Supreme Court, but if the California Supreme Court has not definitively interpreted a statue, the legislature can clarify the meaning by a later amendment. That amendment will be considered to be declaratory of existing law and applicable to pending cases [*Carter v. California Dept. of Veterans Affairs (2006) 38 Cal. 4th 914, 922-923, 44 Cal. Rptr. 3d 223, 135 P.3d 637]* . The California Supreme Court rejected the statutory interpretation advocated by the California VA because that interpretation was contrary to language in the uncodified portion (section one) of *Gov. Code § 12940*, which portion could be used to determine legislative intent even though the uncodified portion was not enacted as binding law [*Carter v. California Dept. of Veterans Affairs (2006) 38 Cal. 4th 914, 924-925, 44 Cal. Rptr. 3d 223, 135 P.3d 637]* . An agency regulation that conflicts with the provisions of the governing statute is invalid because it exceeds the authority of the agency to adopt regulations under that statute [*Citizens to Save Cal. v. Fair Political Practices Comm'n (2006) 145 Cal. App. 4th 736, 739-741, 52 Cal Rptr. 3d 17]* .

[4] Chapter 3.5 of the APA

Chapter 3.5 (*Gov. Code § 11340 et seq.*), the rulemaking provisions of the APA, delegate quasi-legislative authority (that is, authority to adopt, amend, and repeal regulations effectuating the APA) to the Office of Administrative Law (OAL) but to no other state agencies [*Gov. Code §§ 11342.1, 11342.4*; *see § 472.11* (purpose of OAL)]. Instead, the provisions established conditions that state agencies must satisfy for the valid exercise of any quasi-legislative authority conferred by a statute, such as the agency's enabling act [*see Gov. Code § 11346*].

Chapter 3.5 does the following:

- Sets legal standards that each regulation must satisfy [*see Gov. Code §§ 11342.1, 11342.2, 11349.1*].

- Sets filing and publication requirements for regulations [*Gov. Code §§ 11343-11343.8*].

- Sets basic minimum procedural requirements for the adoption, amendment, or repeal of administrative regulations [*Gov. Code § 11346*].

- Provides for a comprehensive judicial-like review of regulations by the OAL, an independent state agency [*Gov. Code §§ 11349-11349.6, 11349.7*; *see* Ch. 472A, *Agency Rulemaking Procedures* , for a discussion of specific rulemaking requirements].

A regulation that must be adopted pursuant to Chapter 3.5 [*see § 472.15*], must be submitted to the OAL for review and filing with the secretary of state [*Gov. Code §§ 11343, 11349.1*].

The OAL must review each regulation adopted pursuant to Chapter 3.5 for compliance with minimum rulemaking procedures set by the chapter and for compliance with six standards established by the chapter: necessity, authority, clarity, consistency, reference, and nonduplication [*Gov. Code § 11349.1*; *see* Ch. 472A, *Agency Rulemaking Procedures* , for discussion of these standards].

Chapter 3.5 establishes presumptions that apply to a regulation once it has been filed with the secretary of state [*Gov. Code § 11343.6*], and published in the California Code of Regulations [*Gov. Code § 11344.6*]. It requires the courts to take judicial notice of a regulation, or the repeal of a regulation, published in the California Code of Regulations [*Gov. Code § 11344.6*]. It also provides for the judicial review of rules and regulations [*Gov. Code § 11350-11351*; *see* Ch. 472B, *Review of Agency Rulemaking* , for a discussion of the judicial review of rules and regulations].

The OAL has authority and responsibility to do the following [*Gov. Code § 11340.4(a)*]:

- Study administrative rulemaking [*Gov. Code § 11340.4(a)(1)*].

- Submit suggestions relating to rulemaking to the various agencies in the interest of fairness, uniformity, and the expedition of business [*Gov. Code § 11340.4(a)(2)*].

- Report its recommendations to the Governor and Legislature at the commencement of each general session [*Gov. Code § 11340.4(a)(3)*].

Other state agencies are required to give the OAL ready access to their records and full information and reasonable assistance in any matter of research requiring recourse to the agencies or to data within the agencies knowledge or control. However, agencies are not required to provide access to records required by statute to be confidential [*Gov. Code § 11340.4(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawJudicial ReviewStandards of ReviewRule InterpretationAdministrative LawJudicial ReviewStandards of ReviewStatutory InterpretationAdministrative LawSeparation of PowersLegislative ControlsExplicit Delegation of AuthorityAdministrative LawSeparation of PowersLegislative ControlsImplicit Delegation of AuthorityAdministrative LawSeparation of PowersLegislative ControlsScope of Delegated AuthorityConstitutional LawSeparation of PowersGovernmentsLegislationInitiative & ReferendumGovernmentsLegislationInterpretation

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Chapter 472 PUBLIC AGENCY RULES
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§ 472.14 Review of Rulemaking Authority by the OAL

[1] Power of Review

The Office of Administrative Law (OAL) is empowered to disapprove a regulation submitted for review [*see Gov. Code §§ 11349.3, 11349.6*; *see* Ch. 472A, *Agency Rulemaking Procedures* (discussion of formal rulemaking procedures)], or to repeal a regulation that is the subject of a request from the Legislature for a priority review if the regulation is not authorized by law, *i.e.*, does not meet the "authority" and "reference" standards [*Gov. Code §§ 11349.1(a)(2), 11349.7*; *see* Ch. 472B, *Review of Agency Rulemaking* (for discussion of priority review)].

Other grounds for the disapproval of a regulation by the OAL are set out in *Gov. Code §§ 11346.1, 11349.1*; *see § 472.13[4]*. If a regulation is disapproved by the OAL, the regulation cannot become effective unless the disapproval is overruled by the governor [*see Gov. Code § 11349.5*], or unless the OAL approves the regulation on resubmission [*see Gov. Code § 11349.4*]. The reasons for the disapproval of a regulation must be explained by the OAL in a written opinion [*Gov. Code § 11349.3*], which must be published in the California Regulatory Code Supplement [*Gov. Code § 11344(b)*; *see* Ch. 472A, *Agency Rulemaking Procedures* , for a discussion of the California Regulatory Code Supplement].

In its review of a regulation for compliance with the "authority" and "reference" standards [*see Gov. Code § 11349.1(a)(2), (5)*; *see also § 472.13[4]*], the Office of Administrative Law has the power to determine whether a regulation is within the scope of the rulemaking power delegated to the agency that adopted the regulation [*see 1 Cal. Code Reg. § 14*]. As defined in the APA, the term "authority" means the provision of law that permits or obligates the agency to adopt, amend, or repeal a regulation [*Gov. Code § 11349(b)*], and the term "reference" means the statute, court decision, or other provision of law that the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation [*Gov. Code § 11349(e)*]. Together, these standards refer to the power of an agency to adopt a particular regulation [*1 Cal. Code Reg. § 14*].

[2] Applicable Presumptions

The decision by the OAL as to whether a regulation is authorized by law is governed by *1 Cal. Code Reg. § 14*. That

section requires the OAL to presume in its review that any statute cited by the agency as "authority" or "reference" for the delegation of rulemaking authority to it is constitutional, in the absence of an appellate court decision to the contrary [*1 Cal. Code Reg. § 14(c)(2)*]. The OAL must also presume that a regulation satisfies the "authority" standard if the "authority note" for the regulation includes a citation to a provision in the California Constitution or a California statute that expressly or impliedly permits or obligates the agency to adopt, amend, or repeal the regulation [*1 Cal. Code Reg. § 14(a)*]. All regulations transmitted to the OAL must include an "authority note" containing a citation to the provision(s) of law that authorize the adoption of the regulation. When a regulation is printed in the California Code of Regulations, the authority note is printed with it [*Gov. Code § 11343.1*].

Similarly, the OAL must presume that a regulation satisfies the "reference" standard if the "reference note" for the regulation cites to a provision of the California Constitution, a provision of a California statute, a provision of a federal statute or regulation, or a court decision or order that the agency is empowered to implement, interpret, or make specific [*1 Cal. Code Reg. § 14(b)*]. A reference note containing a citation to the provision(s) of law that the regulation implements, interprets, or makes specific must accompany each regulation transmitted to the OAL for review. When a regulation is printed in the California Code of Regulations, a reference note is printed with it [*Gov. Code § 11343.1*].

These presumptions regarding the authority and reference standards will be conclusive unless (1) the agency's interpretation alters, amends, or enlarges the scope of the power conferred on it; (2) a public comment (during the rulemaking) challenges the agency's authority; or (3) a judicial interpretation of a provision of law cited as "authority" or "reference" contradicts the agency's interpretation [*1 Cal. Code Reg. § 14(c)(1)*]. When the presumptions do not apply, the OAL must determine whether or not the regulation is within the scope of the agency's rulemaking authority, using the same analytical approach employed by the California Supreme Court and the California courts of appeal, as evidenced in published opinions of those courts [*1 Cal. Code Reg. § 14(c)*; *see § 472.13[3*], for a discussion of an agency's interpretation of its own authority].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingFormal RulemakingAdministrative LawAgency RulemakingState ProceedingsAdministrative LawJudicial ReviewStandards of ReviewStatutory InterpretationEvidenceInferences & PresumptionsGeneral Overview

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§ 472.15 Use of Adjudication to Make General Rules

[1] General Requirements

Agency actions may be divided into three basic categories: administrative, quasi-judicial, and quasi-legislative. An agency may use a combination of these powers to carry out its responsibilities; however, the APA requires quasi-legislative power to be exercised in accordance with its formal rulemaking procedures [*see Gov. Code § 11347.5*; *see § 472.20[1]*]. Therefore, an agency's actions must always be examined to determine whether they constitute the exercise of quasi-legislative power, that is, the formulation of rules for future general applicability. A particular problem concerns the use of administrative adjudication or decisionmaking with respect to a particular case that may in effect constitute administrative rulemaking if the ruling from that case is general in application [*see* Davis, *Administrative Law Treatise* (2nd ed. 1978), vol. 2, ch. 7].

[2] Categories of Agency Actions

[a] Quasi-Legislative Actions

A quasi-legislative action involves the formulation or adoption of a broad, generally applicable policy or rule of conduct that is based on general public policy and is intended to govern future decisions [*Horn v. County of Ventura (1979) 24 Cal. 3d 605, 612-614, 156 Cal. Rptr. 718, 596 P.2d 1134* ; *see § 472.13*, regarding delegation of quasi-legislative powers to agencies]. For example, a policy that a 25-foot public access strip will be required as a condition to granting permits for beach-front property development is a quasi-legislative action [*see Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal. 3d 158, 168, 188 Cal. Rptr. 104, 655 P.2d 306]* .

[b] Quasi-Judicial Actions

Quasi-judicial power is the power to declare the law as necessary in order to adjudicate specific rights in an administrative proceeding. A quasi-judicial action involves the application of a rule to the peculiar facts of an individual case in a quasi-adjudicatory context, such as in a license revocation proceeding [*see Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal. 3d 158, 168, 188 Cal. Rptr. 104, 655 P.2d 306]* . Although an agency may

make a final determination regarding the facts of a case, the courts are empowered to make the final determination regarding the application of the law to those facts [*Bodinson Mfg. Co. v. California E. Com. (1941) 17 Cal. 2d 321, 326, 109 P.2d 935]* .

[c] Administrative Actions

There are two types of "administrative" actions: (1) carrying out an express and unambiguous legal requirement (set forth in the California Constitution, statutes, regulations, or court orders), such as informing a permit applicant that his or her application cannot be processed absent the statutorily mandated fee; and (2) pure case-by-case determinations. As stated in *California Coastal Farms v. Agricultural Labor Relations Bd. (1980) 111 Cal. App. 3d 734, 740, 168 Cal. Rptr. 838* , pure case-by-case determinations do not involve the implementation of a general policy by ad hoc means [*California Coastal Farms v. Agricultural Labor Relations Bd. (1980) 111 Cal. App. 3d 734, 739, 168 Cal. Rptr. 838* (criteria applied to one case only)]. In that case, the agency developed a set of guidelines to limit picketing in response to a complaint in a particular case; the court upheld the agency's decision to address the immediate problem without articulating rules of general applicability. The practice of pure case-by-case determination must be distinguished from the much different situation in which the agency announces a rule of general applicability without first publishing that rule in the California Code of Regulations, and then proceeds to enforce the rule.

For example, in *San Diego Nursery Co. v. Agricultural Labor Relations Bd. (1979) 100 Cal. App. 3d 128, 134, 160 Cal. Rptr. 822* , the court ruled against an agency that had announced an uncodified general policy and then proceeded to apply it in specific situations. In short, an agency need not develop a general rule to cover a problem left unresolved in pertinent codified law, but if it does have such a general rule (possibly developed through administrative adjudication), this rule must be formally adopted pursuant to the APA absent an express statutory exception from APA requirements [*see Gov. Code §§ 11346, 11340.5*; discussion in *§§ 472.20, 472.21*].

[3] Comparison of Federal and California Law

Federal agencies often have considerable discretion under federal law to use either formal rulemaking or ad hoc adjudication to formulate rules oriented toward future decisions [*see, e.g.,* *NLRB v. Bell Aerospace Co. (1974) 416 U.S. 267, 94 S. Ct. 1757, 40 L. Ed. 2d 134* ; 1 Koch, *Administrative Law and Practice* (1985), p. 73; *see also Securities and Exchange Commission v. Chenery Corp. (1947) 332 U.S. 194, 67 S. Ct. 1575, 91 L. Ed. 1995]* . The U.S. Supreme Court has not abandoned this principle despite sharp criticism [*see, e.g.,* 1 Koch, *Administrative Law and Practice* (1985), pp. 73-75; *Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal. 3d 392, 414 n. 11, 128 Cal. Rptr. 183, 546 P.2d 687]* .

Though this principle of federal administrative law has been quoted in some recent California judicial dicta [*Agricultural Labor Relations Bd. v. California Coastal Farms, Etc. (1982) 31 Cal. 3d 469, 478, 183 Cal. Rptr. 231, 645 P.2d 739* ; *California Coastal Farms v. Agricultural Labor Relations Bd. (1980) 111 Cal. App. 3d 734, 168 Cal. Rptr. 838* ; *but see* *Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal. 3d 392, 414 n.11, 128 Cal. Rptr. 183, 546 P.2d 687* (taking note of intense criticism of NLRB's refusal to adopt any regulations at all)], research has failed, with one predictable exception, to disclose any published California appellate opinion in which the principle has been specifically relied on to uphold an uncodified agency rule. That exception allows an agency to establish a particular interpretation of a statute or regulation by obtaining judicial approval, normally in a published appellate opinion [*see, e.g.,* *California Coastal Com. v. Quanta Investment Corp. (1980) 113 Cal. App. 3d 579, 170 Cal. Rptr. 263]* . Similarly, an agency with statutory authorization to obtain court orders under certain circumstances is free to do so to address problems arising in one particular situation; the agency will not be prohibited from seeking a court order simply because it could conceivably have attacked the underlying general policy question through a formal rulemaking effort [*California Coastal Farms v. Agricultural Labor Relations Bd. (1980) 111 Cal. App. 3d 734, 740, 168 Cal. Rptr. 838* (ALRB sought order setting standards of picketing conduct in response to unfair labor practice allegation)].

Notwithstanding the argument that agency discretion to use administrative adjudication to formulate future-oriented rules has been established in California case law, it is likely that any such principle has not survived the 1983 enactment of *Gov. Code § 11340.5*. That section prohibits state agencies from relying in any way on uncodified rules that modify or supplement duly adopted provisions of law, unless the rule has been adopted as a regulation pursuant to the APA [*Gov. Code § 11340.5*; *see* discussion in *§ 472.20[1]*]. Further, *Gov. Code § 11346* provides that APA rulemaking requirements apply to all exercises of quasi-legislative power, and that any modifications to APA requirements must be expressly stated in other legislation [*Gov. Code § 11346*].

No statutes expressly authorize agencies to elect to forego formal rulemaking in favor of case-by-case administrative adjudication as a means of creating rules to implement statutes administered by the agency. In fact, case law supports the proposition that:

- Procedural rules governing quasi-judicial administrative proceedings must be adopted pursuant to the APA [*see, e.g., City of Santa Barbara v. California Coastal Zone Conservation Com. (1977) 75 Cal. App. 3d 572, 580, 142 Cal. Rptr. 356* (invalidating uncodified rule stating where permit appeals must be filed)].

- Substantive rules governing quasi-judicial administrative hearings must be adopted pursuant to the APA [*Johnston v. Dept. of Personnel Administration (1987) 191 Cal. App. 3d 1218, 236 Cal. Rptr. 853* (invalidating uncodified rule that statutory hearing to protest transfer of state employee was available only for geographical transfers)].

[4] Precedent Decisions

In light of the APA's requirement that agency regulations must be formally adopted [*see Gov. Code §§ 11340.5, 11342.600* (regulation defined)] discussed in [2], *above*, precedent decisions (*i.e.*, decisions expressly adopted as having precedential authority) that satisfy the requirements of *Gov. Code § 11425.60* are not rulemaking, and do not have to be adopted pursuant to rulemaking procedure [*Gov. Code § 11425.60(b)*; *see* further discussion of precedent decisions in Ch. 473, *Public Agency Adjudication*].

Certain agencies, such as the Employment Development Department and the Fair Political Practices Commission, are authorized by statute [*Unemp. Ins. Code § 409* (EDD); *Gov. Code § 83114* (FPPC); *2 Cal. Code Reg. §§ 18320-18326* (FPPC)] to issue precedent decisions or opinions on questions of how the laws administered by these agencies should be interpreted [*see Gov. Code § 12935* (Fair Employment and Housing Commission may certify any of its opinion as precedent opinions); 1 Cal. Code Reg. § 7403 (selection criteria for certification; selected cases not intended to be regulations as defined in *Gov. Code § 11342.545*)]. The difficulty with these authorizing statutes is that they do not create express exemptions from APA rulemaking requirements of Chapter 3.5 (*Gov. Code § 11340 et seq.*).

By contrast, the commissioner of corporations also has the discretionary authority to issue interpretive opinions on request from interested persons [*Corp. Code § 25618*; *10 Cal. Code Reg. § 250.12(a)*], but these opinions apply only to the transaction identified in the request. They may not be relied on in connection with any other transaction [*10 Cal. Code Reg. § 250.12(a)*; *but see Bus. & Prof. Code § 20009*, which permits the corporations commissioner's interpretive opinions under the Franchise Investment Law to be used as prima facie evidence of the existence of a "franchise" under the Franchise Relations Act].

Thus, these agencies will want to follow the requirements of *Gov. Code § 11425.60* to set up precedent decision policies that do not require use of rulemaking procedures

As an alternative to developing a precedent decision system that does not need to comply with rulemaking requirements, agencies could adopt rules, pursuant to the APA, that were developed in particular cases but are intended

to be applied in the future in similar cases. Formal adoption serves the basic APA goals of fostering meaningful public participation in rulemaking and permitting effective judicial review [*see California Optometric Assn. v. Lackner (1976) 60 Cal. App. 3d 500, 506, 131 Cal. Rptr. 744* ; *see also* discussion in *§ 472.11*].

For example, it would seem preferable to adopt formally a rule addressing a certain problem after full discussion in the rulemaking process with all segments of the affected public, than to crystallize the policy in a precedent opinion following a proceeding involving only one private party. In some administrative proceedings, the private party may even lack legal representation, raising concerns that both sides of the legal question at issue have not been fully briefed. Any attempt to create a precedent decision system solely by regulation would probably be invalid, based on the proposition that an agency cannot delegate to itself, by regulation, the power to avoid statutory APA requirements [Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132, 1135-1136 (applying California law), followed in *Faunce v. Denton (1985) 167 Cal. App. 3d 191, 213 Cal. Rptr. 122* ; 1987 OAL Determination No. 5 (State Personnel Board), p. 12; *1 Cal. Code Reg. § 121(a)* (regulatory agency rule will be deemed invalid and unenforceable unless formally adopted pursuant to APA or exempted by statute from APA requirements); *but see* 1 Cal. Code Reg. § 7403.5 (Fair Employment and Housing Commission may issue interpretive guidelines on issues raised by precedential decisions, regulations, and statutes)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationDecisionsStare DecisisAdministrative LawAgency RulemakingFormal RulemakingAdministrative LawInformal Agency ActionsAdministrative LawJudicial ReviewStandards of ReviewStatutory InterpretationAdministrative LawSeparation of PowersLegislative ControlsImplicit Delegation of Authority

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[Reserved]

§§ 472.16[Reserved]

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41-472 California Forms of Pleading and Practice--Annotated § 472.20

§ 472.20 Requirement That Agencies Formally Adopt Rules as Regulations

[1] Statutory Ban on Underground Regulations

An agency may decide that the process of holding hearings on a proposed regulation is too burdensome, and therefore attempt to implement a proposal by calling it a "policy" or "rule," rather than a "regulation." In response to a persistent problem of uncodified rules (also known as "underground regulations"), the Legislature enacted *Gov. Code § 11340.5*, which prohibits state agencies from relying in any way on uncodified rules that modify or supplement duly adopted provisions of law. It forbids state agencies from issuing, utilizing, enforcing, or attempting to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that is a regulation as defined in *Gov. Code § 11342.600* (regulation defined), unless the guideline or other rule has been adopted as a regulation and filed with the secretary of state [*Gov. Code § 11340.5(a)*; *see* Ch. 472A, *Agency Rulemaking Procedures* , for a discussion of formal rulemaking procedures].

As discussed in *§ 472.22*, the OAL may issue determinations regarding whether particular uncodified agency rules are "regulations" as defined in the APA [*Gov. Code § 11340.5(b)*; *State Water Resources Control Bd. v. OAL (1993) 12 Cal. App. 4th 697, 701-702, 16 Cal. Rptr. 2d 25]* . Appellate courts will review challenges to OAL determinations as questions of law by independent-judgment review [*Grier v. Kizer (1990) 219 Cal. App. 3d 422, 424, 268 Cal. Rptr. 244* ; *State Water Resources Control Bd. v. OAL (1993) 12 Cal. App. 4th 697, 701-702, 16 Cal. Rptr. 2d 25]* .

The Department of Labor Standards Enforcement could not utilize an uncodified policy to enforce the prevailing wage laws against a contractor, because the policy was a rule of general application that implemented, interpreted, and made specific the governing statute. Therefore, it was necessary to promulgate the policy under Chapter 3.5 (*Gov. Code § 11340 et seq.*), the rulemaking procedures of the APA, before it could be so enforced [*Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc., (1990) 221 Cal. App. 3d 114, 128-129, 270 Cal. Rptr. 75* ; *see Gov. Code § 11340.5*]. Since it cannot be adopted, the enforcing court will not give deference to the policy as an agency's interpretation of its governing statute [*Armistead v. State Personnel Bd. (1978) 22 Cal.3d 198, 204, 149 Cal. Rptr. 1, 583 P. 2d 744]* , and implementation of the policy will be prohibited by the granting of a writ of mandate [*Grier v. Kizer, 219 Cal. App. 3d 422, 428, 268 Cal. Rptr. 244 (1990)* ; *Union of American Physicians & Dentists v. Kizer, 223*

Cal. App. 3d 490, 494, 272 Cal. Rptr. 886 (1990)] .

In *Tidewater Marine Western, Inc., v. Bradshaw (1996) 14 Cal. 4th 557, 927 P.2d 296* , the California Supreme Court held that the Department of Labor Standards Enforcement policy for determining whether to apply Industrial Welfare Commission wage orders to maritime employees was a regulation within the meaning of the California APA and was void, and not entitled to deference, because the policy was not properly adopted as a regulation under the APA. In so holding, the California Supreme Court discussed extensively the issue of when interpretations by agencies are and are not regulations that have to be adopted using APA procedure [*Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 576-577, 927 P.2d 296* ; *see* [3], *below*].

The California Supreme Court held that the Department of Toxic Substances Control interpretation of a statute that virtually all California corporations with 50 or more employees "use, generate, store, or conduct activities in this state related to hazardous activities" [*Health & Safety Code § 25205.6(b)*] was a regulation subject to APA requirements, and was therefore invalid because the interpretation was not properly adopted as a regulation under the provisions of the California APA [*Gov. Code § 11340.5(a)*]. The Supreme Court also held that the interpretation was not exempt from regulation under the only legally tenable interpretation of a provision of the law, *Gov. Code § 11340.9*. The court held that the challenger of the regulation, Morning Star Company, was entitled to declaratory relief determining that the interpretation regulation was invalid. The Supreme Court reversed the judgment of the Court of Appeal, and remanded the lawsuit to the department for further proceedings. Morning star had challenged the validity of a hazardous materials fee collected from corporations by the State Board of Equalization. Under the Department's interpretation, virtually all California corporations had to pay the annual hazardous materials fee. Morning Star paid the fee, and then sued for a refund, arguing that as a company that offered labor services to tomato processing companies, it did not use hazardous materials in its business, and the Department's interpretation was overly broad [*Morning Star Co. v. State Bd. of Equalization (2006) 38 Cal. 4th 324, 327-328, 334, 42 Cal. Rptr. 3d 47, 132 P.3d 249]* .

The prohibition on underground regulations applies even though the agency is delegated constitutional authority to act. The agency's governing procedures and criteria for action must be adopted as a regulation [*Engelmann v. State Bd. of Education (1991) 2 Cal. App. 4th 47, 49, 3 Cal. Rptr. 2d 264]* . The California Court of Appeal held that the Worker's Compensation Appeals Board (WCAB) adopted new regulations in a WCAB decision without complying with the rule-making requirements of the APA. These procedures were adopted in a WCAB decision, but they were not valid precedential decisions within the meaning of *Gov. Code § 11425.60*. Rather, these procedures were designed to implement the Board's interpretation of *Labor Code § 3716* and thus, they were within the statutory definition of regulation under *Gov. Code § 11342.600* as they "implemented, interpreted, or made specific the law enforced by the agency" [*Rea v. Workers' Comp. Appeals Bd. (2005) 127 Cal. App. 4th 625, 646-648, 25 Cal. Rptr. 3d 828]* .

The California Court of Appeal rejected a challenge to the Board of Registered Nursing's interpretation of *Bus. & Prof. Code § 2376 (a)(2)* by a New York college that administered a distance learning nursing degree program. The Board rejected a previously long held interpretation of the statute under which the Board had prospectively evaluated the programs of nursing schools. The Board's new interpretation of the statute concluded that the Board could only evaluate the adequacy of nursing degree programs by assessing the curriculum of individual applicant for California nursing licenses. The Court of Appeal held that the Board's decision to enforce the specific language of the statute did not constitute an underground regulation and therefore did not violate provisions of the Administrative Procedure Act [*Gov. Code § 11340.5*], which prohibits agencies from relying on underground regulations that have not been properly adopted using APA rulemaking procedure [*Excelsior College v. California Board of Registered Nursing (2006) 136 Cal. App. 4th 1218, 1239-1240, 39 Cal. Rptr. 3d 618]* .

Courts are not required to defer to agency interpretations or determinations as to whether they have complied with APA rulemaking requirements because agencies do not have expertise greater than the courts in making these determinations [*California Advocates for Nursing Home Reform v. Bonta (2003) 106 Cal. App. 4th 498, 505-506, 130 Cal. Rptr. 2d 823]* .

[2] Regulation Defined

The definition of "regulation" in the APA is very broad. "Regulation" means every rule, regulation, order, or standard of general application, or the amendment, supplement, or revision of any such rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, with specified exceptions [*Gov. Code § 11342.600* (regulation defined); *see* discussion of exceptions in § 472.21[1][b]-[j]].

This definition has been broadly interpreted by the courts, notably by the *California Supreme Court in Armistead v. State Personnel Bd. (1978) 22 Cal. 3d 198, 203, 149 Cal. Rptr. 1, 583 P.2d 744* . Medi-Cal program audits that used a challenged methodology which was applied in every medical case audit was determined to be a regulation [*Gov. Code § 11342(g)*; *Grier v. Kizer (1990) 219 Cal. App. 3d 422, 431, 268 Cal. Rptr. 244]* , but auditing methods that were designed to be used at a particular audit location were determined not to be regulations [*Taye v. Coye (1994) 29 Cal. App. 4th 1339, 1346, 35 Cal. Rptr. 2d 27]* .

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind, or order [*Roth v. Dept. of Veterans Affairs (1980) 110 Cal. App. 3d 622, 167 Cal. Rptr. 552]* .

California's definition of "regulation," that is, those agency enactments that are invalid absent adoption through the formal rulemaking process, is much more inclusive than the definition contained in the federal Administrative Procedure Act [*5 U.S.C. §§ 500-576*], which provides two noteworthy exceptions: "interpretive guidelines" and "policy statements" [*Armistead v. State Personnel Bd. (1978) 22 Cal. 3d 198, 202 n.2, 149 Cal. Rptr. 1, 583 P.2d 744* ; *see 5 U.S.C. §§ 552(a)(1)(D), (a)(2)(B), 553(b)(3)(A),* (d)(2)]. These interpretive guidelines and policy statements are effective 30 days after publication in the Federal Register. They are therefore subject to a publication requirement, but not to public notice and comment requirements [*5 U.S.C. § 553(b), (d)*].

Many California agency enactments that are substantially equivalent to federal interpretive guidelines or policy statements are subject to neither public notice and comment nor prior publication requirements [*see* 1986 OAL Determination No. 2 (Coastal Commission guidelines and statements)]. For example, the Commissioner of Corporations publishes "Releases" that contain information concerning the regulatory activities of the commissioner, and indicate policies, interpretive opinions, and other matters of interest to the persons subject to the commissioner's jurisdiction [*see* former 10 Cal. Admin. Code § 250.8 (repealed)]. In those Releases, the commissioner may classify persons, prescribe different requirements for different classes, and waive requirements when, in his or her opinion, the requirement is not necessary in the public interest or for the protection of investors [*Corp. Code § 25610*; *see e.g.,* Release 14-G (April 26, 1988) (waiving requirement of *10 Cal. Code Reg. § 260.607(d)(3)* that department employees file semiannual report of securities holdings)].

The Air Resources Board was not required to complete a separate rule-making proceeding under the APA to readopt local rules as state regulations when the local rules were already validly adopted by the SCAQMD. The Board could adopt the rules provisions and include those provisions in the state implementation plan without completing new rule-making proceedings [*Sherwin-Williams Co. v. South Coast Air Quality Management District (2001) 86 Cal. App. 4th 1258* , as modified, *86 Cal. App. 4th 1258*].

[3] Interpretations

Gov. Code § 11342.600 (regulation defined) requires that agency "interpretations" of statutes and regulations be formally adopted if these interpretations are articulated in the form of general rules; however, an agency remains free to "apply" existing law to particular factual situations [*Bendix Forest Products Corp. v. Division of Occupational Saf. & Health (1979) 25 Cal. 3d 465, 158 Cal. Rptr. 882, 600 P.2d 1339* (order that company provide hand protection to

employees was specific application of existing laws rather than exercise of quasi-legislative power); 1986 OAL Determination No. 7 (Sept. 24, 1986; Docket No. 86-003), California Regulatory Notice Register 86, No. 4I-Z, October 10, 1986, p. B-14 (State Personnel Board bulletin simply informed interested parties of court decision construing controlling statutes)].

Careful attention must be paid to the word "interpret"; *Gov. Code § 11342.600* (regulation defined) must be read together with other applicable statutes, notably *Gov. Code §§ 11346, 11340.5*, and in light of pertinent judicial holdings. These authorities indicate that agency "interpretations" of statutes and regulations need not be adopted pursuant to the APA unless those interpretations involve the quasi-legislative creation of a "new regulation or standard" [*Bendix Forest Products Corp. v. Division of Occupational Saf. & Health (1979) 25 Cal. 3d 465, 472, 158 Cal. Rptr. 882, 886, 600 P.2d 1339* (emphasis added)]. The "new" rule or standard may be something as simple as a rule setting a deadline for receipt of applications for highway construction funds [*City of San Marcos v. California Highway Com. (1976) 60 Cal. App. 3d 383, 408, 131 Cal. Rptr. 804]* , or as complex as a wholly new inmate classification system for the state prison system [*Stoneham v. Rushen (1982) 137 Cal. App. 3d 729, 188 Cal. Rptr. 130]* . The basic principle seems to be that an agency may "apply" a self-executing statute without resort to the regulatory process, but may not fill in statutory gaps or resolve statutory ambiguities without undertaking a formal rulemaking [*see, e.g.,* *Goleta Valley Community Hospital v. Dept. of Health Services (1983) 149 Cal. App. 3d 1124, 197 Cal. Rptr. 294* (declaring invalid an agency interpretation that adopted one of two possible readings of an ambiguous regulation)]. As the decisions in *Goleta Valley* indicates, agencies may run afoul of the APA in resolving ambiguities in not only statutes, but also regulations [*see also* 1986 OAL Determination No. 4 (declaring invalid a Board of Equalization bulletin adopting one of three possible interpretations of the constitutional term "pipeline")]. An agency interpretation that is "inconsistent with... [the] plain language" of the regulation is invalid [*Motion Picture Studio Teachers & Welfare Workers v. Millan (1996) 51 Cal. App. 4th 1190, 1196-1197, 59 Cal. Rptr. 2d 608* (agency interpretation of regulation allowing studio teachers to qualify with single credential was inconsistent with plain language of regulation that required two distinct credentials)].

In *Tidewater Marine Western, Inc., v. Bradshaw (1996) 14 Cal. 4th 557, 927 P.2d 296* , the California Supreme Court held that the Department of Labor Standards Enforcement policy for determining whether to apply Industrial Welfare Commission wage orders to maritime employees was a regulation within the meaning of the California APA and was void, and not entitled to deference, because the policy was not properly adopted as a regulation under the APA [*Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 576-577, 59 Cal. Rptr. 2d 186, 927 P.2d 296]* . The agency interpretation of "hours worked" in the DLSE's 1989 Operations and Procedural Manual was entitled to no deference by a reviewing court under the principles of the Tidewater case because it was not a properly adopted regulation, even though the interpretation was one of long standing [*Morillion v. Royal Packing Company (2000) 22 Cal. 4th 575, 581-582, 94 Cal. Rptr. 2d 3, 995 P.2d 139]* . The Court discussed extensively the issue of when interpretations by agencies are and are not regulations that have to be adopted using APA procedure [*Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 576-577, 927 P.2d 296]* . The Court noted that adjudicatory interpretations that are case-specific are not regulations even though they may have precedential value in future similar adjudication cases [*Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 571, 927 P.2d 296* ; citing *Bendix Forest Products Corp. v. Division of Occupational Saf. & Health (1979) 25 Cal. 3d 465, 471, 158 Cal. Rptr. 882, 600 P. 2d 1339* ; *Carmona v. Division of Industrial Safety (1975) 13 Cal. 3d 303, 309-310, 118 Cal. Rptr. 473, 530 P.2d 161* ; *Taye v. Coye (1994) 29 Cal. App. 4th 1339, 1345, 35 Cal. Rptr. 2d 27* ; and *Aguilar v. Association for Retarded Citizens (1991) 234 Cal. App. 3d 21, 28, 285 Cal. Rptr. 515]* .

Similarly, the Court noted that advice letters to private parties, and policy manuals that provide a restatement or summary, without commentary, of the agency's prior decision in specific cases, and its prior advice letters, are not regulations and are not subject to the APA rulemaking process [*Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 571, 927 P.2d 296]* .

The Court also listed a number of agency policies that the courts have held to be, and not to be, regulations subject to the APA rulemaking process [*Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 572, 927 P.2d*

296] . These include the following examples of policies that were determined to be regulations subject to the APA rulemaking requirements:

- An informational "bulletin" defining terms of art and establishing a rebuttable presumption [*Union of American Physicians & Dentists v. Kizer (1990) 223 Cal. App. 3d 490, 501, 272 Cal. Rptr. 886]* .

- A "policy of choosing the most closely related classification" for determining prevailing wages for unclassified workers [*Division of Lab.Stds. Enforcement v. Ericsson Information Systems, Inc. (1990) 221 Cal. App. 3d 114, 128, 270 Cal. Rptr. 75]* .

- A policy memorandum declaring that work performed outside one's job classification does not count toward qualifying for a promotion [*Ligon v. State Personnel Bd. (1981) 123 Cal. App. 3d 583, 588, 176 Cal. Rptr. 717]* .

Examples of policies that courts determined not to be regulations included the following:

- A Franchise Tax Board decision to exclude investment proceeds in determining the unitary tax obligation of a large multinational corporation in a particular tax case is not a rule because it is not applicable to a range of cases [*General Motors Corp. v. Franchise Tax Board (2006) 39 Cal. 4th 773, 789, 47 Cal. Rptr. 3d 233, 139 P.3d 1183]* .

- A Department of Justice checklist that officers use when administering an intoxilyzer test [*People v. French (1978) 77 Cal. App. 3d 511, 519, 143 Cal. Rptr. 782]* .

- The determination whether in a particular case an employer must pay employees when it requires to be on its premises and on call, but whom it permits to sleep [Aguilar v. Association for Retarded citizens *(1991) 234 Cal. App. 3d 21, 25-28, 285 Cal. Rptr. 515]* .

- A contractual pooling procedure whereby construction tax revenues are allocated among a county and its cities in the same ratio as sales tax revenues [*City of San Joaquin v. State Bd. of Equalization (1970) 9 Cal. App. 3d 365, 375, 88 Cal. Rptr. 12]* .

- Resolutions approving construction of the Richmond-San Rafael Bridge and authorizing issuance of bonds [*Faulkner v. Cal. Toll Bridge Authority (1953) 40 Cal. 2d 317, 323-324, 253 P.2d 659]* .

The Court of Appeal held that an audit guide, used to identify suggested audit procedures under *Educ. Code § 14503(a)*, was not an invalid underground regulation because it was not intended to apply generally to codify audit procedures. Rather, the audit guide provided suggested procedures, which the auditor had discretion to follow. The audit guide was a tool that the auditor had the option to utilize, but it was not a rule of general application [*Modesto City Sch. v. Education Audits Appeal Panel (2004) 123 Cal. App. 4th 1365, 1381-1382, 20 Cal. Rptr. 3d 831]* .

The Third District California Court of Appeal held that the drug formulary maintained by the Department of Health Services for the AIDS Drug Assistance Program's (ADAP) under the statutory authority of *Health & Safety Code § 120955(a)(2)* is a rule of general application that is within the APA definition of a regulation. Thus, the decision to partially delist the drug Oxandin from the drug formulary must comply with APA rulemaking procedure requirements [*Savient Pharmaceuticals, Inc. v. Department of Health Services (2007) 146 Cal. App. 4th 1457, 1469-1471, 53 Cal. Rptr. 3d 689]* . In another case, the Third District California Court of Appeal held that the Department of Health Services interpretation of *Health and Safety Code § 1204 (b)(1)* language defining what surgical clinics must be licensed by the Department is a regulation that must be adopted in compliance with APA rulemaking procedures [*Capen v. Shewry (2007) 155 Cal. App. 4th 378, 388-390, 65 Cal. Rptr. 3d 890]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingInformal RulemakingAdministrative LawAgency RulemakingRule Application & InterpretationGeneral OverviewAdministrative LawAgency RulemakingState ProceedingsAdministrative LawJudicial ReviewStandards of ReviewDe Novo ReviewAdministrative LawJudicial ReviewStandards of ReviewStatutory Interpretation

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PART II. LEGAL BACKGROUND
B. Informal Rulemaking

41-472 California Forms of Pleading and Practice--Annotated § 472.21

§ 472.21 Exceptions to Formal Adoption Requirement

[1] General Exceptions

[a] Construction of General Exceptions

The APA contains several exceptions to its formal rulemaking requirements. The basic requirement forbids a state agency from using any rule that meets the APA definition of a "regulation" unless it has been formally adopted and filed with the secretary of state [*see Gov. Code §§ 11340.5, 11342.600* (regulation defined), and discussion in *§ 472.20[2*]; *see also* Ch. 472A, *Agency Rulemaking Procedures* , for a discussion of formal rulemaking procedures].

The main exceptions to the formal procedures consist of rules that either do not meet the definition of "regulation" [*Gov. Code § 11342.600* (regulation defined); *see § 472.20[2]*], discussed in [b]-[d], *below*], or rules that are not required to be filed with the secretary of state [*Gov. Code § 11343*, discussed in [e]-[h], *below*]. The most frequently used exemptions in each of these two categories are discussed first. In addition, as discussed in [i], *below*, emergency regulations are excepted from some formal rulemaking requirements. Finally, as discussed in [j], *below*, some authority supports the proposition that previously agreed-upon contract provisions may not later be attacked as violative of the APA by a party to the contract. These general exceptions contrast with specific exceptions, discussed in [2], *below*, that exempt a particular agency, program, or rule.

These general exceptions to the APA rulemaking requirement have been construed according to the following rules:

- When a statute contains an exception to a general rule articulated in the statute, that exception should be strictly construed [*Goins v. Bd. of Pension Commissioners (1979) 96 Cal. App. 3d 1005, 158 Cal. Rptr. 470]* .

- A specific provision should be construed with reference to the entire statutory scheme of which it is a part [*Bowland v. Municipal Court (1976) 18 Cal. 3d 479, 489, 134 Cal. Rptr. 630, 556 P.2d 1081]* .

- A statute should be construed with a view toward promoting rather than defeating its general purpose

and the policy behind it [*Fig Garden Park No. 2 Assn. v. Local Agency Formation Comm. (1984) 162 Cal. App. 3d 336*].

- The exceptions should be narrowly construed to further the APA's basis goals of meaningful public participation and effective judicial review [*see California Optometric Assn. v. Lackner (1976) 60 Cal. App. 3d 500, 510, 131 Cal. Rptr. 744, 751* ; 1986 OAL Determination No. 5, p. 10].

For discussion of the rulemaking procedures applicable when an agency action is exempt from the APA requirements, *see* Chapter 472A, *Agency Rulemaking Procedures* .

[b] Rules Relating Only to Internal Management of the Rulemaking Agency

Regulations that relate only to the internal management of a state agency are exempt from rulemaking requirements [*Gov. Code § 11340.9(d)*]. The internal management exception is narrow in scope and does not apply to agency policies that affect a class of persons other than employees of the originating agency [*Armistead v. State Personnel Bd. (1978) 22 Cal. 3d 198, 149 Cal. Rptr.1, 583 P.2d 744* ; *Stoneham v. Rushen (1982) 137 Cal. App. 3d 729, 188 Cal. Rptr. 130* ; 1987 OAL Determination No. 9, pp. 12-14]. Agency rules that affect the protest rights of third party bidders are not within the "internal management" exception [*United Systems of Arkansas, Inc. v. Stamison (1998) 63 Cal. App. 4th 1001, 1010-1011, 74 Cal. Rptr. 2d 407]* .

[c] Forms Prescribed by State Agency

Forms prescribed by a state agency or any instructions relating to the use of the form are exempt from rulemaking requirements [*Gov. Code § 11340.9(c)*]. However, this exception does not limit any requirement that a regulation be adopted using required rulemaking procedures when a regulation is needed to implement the law under which the form is issued [*Gov. Code § 11340.9(c)*].

Although forms themselves need not be adopted pursuant to the California APA, it is clear from the second clause of the forms exception language in *Gov. Code § 11340.9(c)* that the exception does not apply to agency rules implementing the law under which the form is issued. Consequently, case law interpreting the forms exception indicates that (1) embedding rules or interpretations within a form does not insulate the rules from APA requirements, and (2) the use of a form resulting in a regulatory effect does not insulate the regulation from APA requirements [*see City of Santa Barbara v. California Coastal Zone Conservation Com. (1977) 75 Cal. App. 3d 572, 580, 142 Cal. Rptr. 356* ; *Stoneham v. Rushen (1982) 137 Cal. App. 3d 729, 737-738, 188 Cal. Rptr. 130* ; *see also* 1987 OAL Determination No. 16, pp. 21-27 (discussing the extensive use of forms in state government)].

[d] Legal Rulings of Counsel Issued by Board of Equalization or Franchise Tax Board

Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization are exempt from rulemaking requirements [*Gov. Code § 11340.9(b)*]. The OAL concluded in a "determination" [*see § 472.22*] that this exception covered certain correspondence originated by Board of Equalization legal staff, but would not be read so broadly as to give a blanket APA exemption to virtually any tax-related Board policy [1986 OAL Determination No. 3, pp.15-17].

[e] Rules That Are Not Generally Applicable

A regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state is exempt from rulemaking requirements [*Gov. Code § 11340.9(i)*].

[f] Rules That Establish or Fix Rates, Prices, or Tariffs

A regulation that establishes or fixes rates, prices, or tariffs is exempt from rulemaking requirements [*Gov. Code § 11340.9(g)*]. The scope of this exception is unclear, but courts have on several occasions drawn attention to the fact that rules found to be exempt from APA requirements under the rate, price, and tariff exception tend to be part and parcel of an alternative statutory scheme requiring noticed public hearings [*State Comp. Ins. Fund v. McConnell (1956) 46 Cal. 2d 330, 343, 294 P.2d 440* (citing former *Ins. Code § 11734*); *California Assoc. of Nursing Homes, etc. v. Williams (1970) 4 Cal. App. 3d 800, 821, 85 Cal. Rptr. 735* (citing *Pub. Util. Code §§ 1701-1710*); *see also Alta Bates Hospital v. Lackner (1981) 118 Cal. App. 3d 614, 623, 624 n.5, 175 Cal. Rptr. 196* (former *Welf. & Inst. Code § 14120(f)* required consultation with interest group prior to decreasing rates)]. There is some persuasive authority that the exception should be read to encompass not only "rates," "prices," and "tariffs," but also "fees" *[66 Ops. Cal. Atty. Gen. 505 (1983)* (Department of Developmental Services parental fee schedule)].

Rules are regulations subject to the provisions of the California Administrative Procedure Act (APA) when the agency intends that the rule apply generally to a class of cases, rather than to a specific case, and the rule implements, interprets, or makes specific the law enforced or administered by the agency [*Morning Star Co. v. State Board of Equalization (2006) 38 Cal. 4th 324, 333-334, 42 Cal. Rptr. 3d 47, 132 P.3d 249 , quoting the California Supreme Court decision in Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 571, 59 Cal. Rptr. 2d 186, 927 P.2d 296*]. The lethal injection protocol adopted by the California Department of Corrections and Rehabilitation (CDCR) was a regulation subject to the APA requirements because it implemented a statutory directive and it satisfied the rule of general application requirement even though only a small number of persons were subject to the protocol [*Morales v. California Department of Corrections and Rehabilitation (2008) 168 Cal. App. 4th 729, 736-738, 85 Cal. Rptr. 3d 724*].

By contrast, 1986 OAL Determination No. 5 found that the exception did not cover the Board of Osteopathic Examiners' "annual tax and registration fee," reasoning that, inter alia, when exceptions to a general rule are specified by statute, other exceptions are not to be applied or presumed [1986 OAL Determination No. 5, pp. 9-12, *quoting Wildlife Alive v. Chickering (1976) 18 Cal. 3d 190, 195-196, 132 Cal. Rptr. 377, 553 P.2d 537]* .

The insurance commissioner's rate regulations adopted pursuant to Proposition 103 are within the rate setting exception. Therefore they do not require review by OAL, and they are not deemed to be invalid because OAL has disapproved of the rate regulations [*20th Century Ins. Co. v. Garamendi (1994) 8 Cal. 4th 216, 271, 878 P.2d 566]* .

A rate-setting manual, developed by an agency to provide formulas for reimbursing providers of programs administered by the agency, was held not be an invalid underground regulation, even though it had not been adopted as a published regulation, when it had been incorporated by reference into a properly adopted published regulation. The incorporation-by-reference process does not violate the policy against underground regulations [*Kings Rehabilitation Center, Inc. v. Premo (1999) 69 Cal. App. 4th 215, 217-218, 81 Cal. Rptr. 2d 406]* .

The Department of Water Resources (DWR) is not required to hold a public hearing and is not required to follow APA required rule making procedures before DWR determined recoverable costs and submitted a "revenue requirement" to the PUC to be incorporated into utility rates paid by PG & E. The revenue requirement is neither a quasi-legislative act, nor a regulation under the APA [*Pacific Gas & Electric v. State Department of Water Resources (2003) 112 Cal. App. 4th 477, 502-505, 5 Cal. Rptr. 3d 283]* .

[g] Building Standards

An agency is not required to transmit a copy of a regulation to the secretary of state if the regulation adopted or amended is a building standard [*Gov. Code § 11343(a)*]. "Building standard" is defined as any rule, regulation, order, or other requirement that specifically regulates, requires, or forbids the method of use, properties, performance, or types of materials used in the construction or renovation of a building or structure [*Health & Safety Code § 18909(a)*; *see Gov. Code § 11343(a)*]. For a discussion of the rulemaking procedures applicable to building standards, see Ch. 472A,

Agency Rulemaking Procedures .

[h] Rules Relating to Use of Public Works

A regulation that relates to the use of public works, including streets and highways, is exempt from rulemaking requirements when the effect of the regulation is indicated to the public by means of signs or signals or when the regulation determines uniform standards and specifications for official traffic control devices under *Veh. Code § 21400* [*Gov. Code § 11340.9(h)*].

[i] Emergency and Financial Regulations

Emergency regulations [*Gov. Code § 11346.1(b)*; *see* Ch. 472A, *Agency Rulemaking Procedures*] and regulations adopted pursuant to *Fin. Code §§ 8054* and *3373* (conforming rights or obligations of state banks or savings and loans to those provided by federal law or regulation) are not true general exceptions to formal rulemaking requirements, but they are subject only to limited requirements [*Gov. Code § 11346.1(a)*; *see Gov. Code §§ 11346.1, 11343.4, 11349.6*]. Emergency for purposes of defining when emergency regulations can be adopted means "a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare" [*Gov. Code § 11342.545*]. For a discussion of the rulemaking requirements applicable to emergency and financial regulations, see Ch. 472A, *Agency Rulemaking Procedures* .

[j] Agreed-Upon Contract Provisions

Some authority supports the proposition that contract provisions previously agreed to by a party may not later be attacked as violative of the APA by that party. For example, in *City of San Joaquin v. State Bd. of Equalization (1970) 9 Cal. App. 3d 365, 88 Cal. Rptr. 12* , the court held that a sales tax allocation method was part of a contract that plaintiff had signed without protest, and refused to find any violation of the APA [*City of San Joaquin v. State Bd. of Equalization (1970) 9 Cal. App. 3d 365, 376, 88 Cal. Rptr. 12* ; *see also Roth v. Dept. of Veterans Affairs (1980) 110 Cal. App. 3d 622, 629-630, 167 Cal. Rptr. 552* ; *Nadler v. California Veterans Bd. (1984) 152 Cal. App. 3d 707, 719, 199 Cal. Rptr. 546]* . Nevertheless, *Gov. Code § 11346* contains no provision for nonstatutory exceptions to the APA requirements. It provides that any modifications to APA requirements must be "expressly" stated in other legislation [*Gov. Code § 11346*].

Furthermore, it is generally established that a party to an illegal contract cannot be estopped from relying on the illegality [*see International Assn. of Fire Fighters v. City of San Leandro (1986) 181 Cal. App 3d 179, 182, 226 Cal. Rptr. 238* (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed)], and that a party to a "contract of adhesion" may attack it on that basis [*Perdue v. Crocker National Bank (1985) 38 Cal. 3d 913, 926, 216 Cal. Rptr. 345, 702 P.2d 503* ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable); *see Civ. Code § 1670.5*].

[k] Department of Finance Budget Instructions

Actions by the Department of Finance to adopt and update instructions to state or local agencies for preparing, developing, or administering the state budget, including instructions in the State Administrative Manual, are exempt from OAL review [*Gov. Code § 11357(b)*].

[l] Safe Neighborhood Parks, Clean Water, Clean Air, and Coastal Protection Bond Act of 2000 Regulations

Adoption or revision of regulations, guidelines or criteria to implement the Safe Neighborhood Parks, Clean Water, Clean Air, and Coastal Protection Bond Act of 2000 [*Pub. Res. Code § 5096.300 et seq.*], California Clean Water, Clean Air, Safe Neighborhood Parks, and Coastal Protection Act of 2002 [*Pub. Res. Code § 5096.600 et. seq.*], and the Water Security, Clean Drinking Water, Coastal and Beach Protection Act of 2002 [*Water Code § 79500*] are exempt from

rulemaking requirements including being exempt from OAL review. This exemption includes the following specific actions by the State Water Resources Control Board [*Gov. Code § 11352*]: (1) the issuance, denial, or waiver of any water quality certification as authorized under *Water Code § 13160* [*Gov. Code § 11352(a)*]; (2) the issuance, denial, or revocation of waste discharge requirements and permits pursuant to *Water Code §§ 13263, 13377* and waivers issued pursuant to *Water Code § 13269* [*Gov. Code § 11352(b)*]; and (3) the development, issuance, and use of the guidance document pursuant to *Water Code § 13383.7* [*Gov. Code § 11352(c)*]. Rather, adoption or revision must be accomplished by means of a public process reasonably calculated to give those persons interested in their adoption or revision an opportunity to be heard [*Gov. Code § 11361*].

[m] Regulations Containing the Only Legally Tenable Interpretation of a Provision of Law

A regulation that embodies the only legally tenable interpretation of a provision of law is exempt from rulemaking requirements [*Gov. Code § 11340.9(f)*].

The California Court of Appeal held that the Department of Pesticide Regulation violated APA rule making requirements when it issued *Notice 2002-3* containing data requirements for registering new pesticide products and when it amended regulations related to submission of data by pesticide manufacturers without following the notice and comment procedures of the APA. The Department erroneously relied on the changes without regulatory effect exemptions provided by the Office of Administrative Law Regulations [*Cal. Code Regs., tit. 1, § 100*], and failed to prepare a public report as required by Department regulations [*Cal. Code Regs., tit. 3, § 6170*]. The Department also could not rely on the only legally tenable interpretation of a provision of law exemption [*Syngenta Crop Protection, Inc v. Helliker (2006) 138 Cal. App. 4th 1135, 1179-1181, 42 Cal. Rptr. 3d 191]* .

The California Supreme Court held that the Department of Toxic Substances Control interpretation of a statute that virtually all California corporations with 50 or more employees "use, generate, store, or conduct activities in this state related to hazardous activities" [*Health & Safety Code § 25205.6*] was a regulation subject to APA requirements, and was therefore invalid because the interpretation was not properly adopted as a regulation under the provisions of the California APA [*Gov. Code § 11340.5(a)*]. The Supreme Court also held that the interpretation was not exempt from regulation under the only legally tenable interpretation of a provision of the law exception, *Gov. Code § 11340.9*. This exception did not apply because the Department interpretation did not follow directly and inescapably from the statute in question [*Morning Star Co. v. State Bd. of Equalization (2006) 38 Cal. 4th 324, 327-328, 340, 42 Cal. Rptr. 3d 47, 132 P.3d 249]* .

[n] Regulations Containing Agency Enforcement Criteria

A regulation that establishes criteria or guidelines to be used by the staff of an agency in performing an audit, investigation, examination, or inspection, settling a commercial dispute, negotiating a commercial arrangement, or in the defense, prosecution, or settlement of a case if disclosure of the criteria or guidelines would do any of the following [*Gov. Code § 11340.9(e)*]:

- Enable a law violator to avoid detection [*Gov. Code § 11340.9(e)(1)*];
- Facilitate a disregard of requirements imposed by law [*Gov. Code § 11340.9(e)(2)*]; or
- Give clearly improper advantage to a person who is in an adverse position to the state [*Gov. Code § 11340.9(e)(3)*].

[2] Specific Exceptions to Formal Adoption Requirements

Exceptions to the general APA rulemaking requirement must be expressly created by statute [Gov. Code. § 11346]. A

number of exceptions appear outside of the APA, covering specific agencies or programs. For example, *Gov. Code § 8880.26(a)* exempts the California Lottery Commission from review by the OAL. It provides that the APA does not apply to any rule or regulation promulgated by the California Lottery Commission [*Gov. Code § 8880.26(a)*]. Another example is contained in *Welf. & Inst. Code § 14105.395*, which exempts drug criteria published by the State Department of Health Services from the rulemaking provisions of the APA [*Welf. & Inst. Code § 14105.395*; *Paleski v. State Dept of Health Services (2006) 144 Cal. App. 4th 713, 728-730, 51 Cal. Rptr. 3d 28* (department not required to comply with APA rulemaking provisions but has to follow Medical Act notice and comment procedures)].

Another example is contained in *Food & Agric. Code § 14* which exempts marketing orders issued under the California Marketing Act of 1937 from the rulemaking provisions of the APA [*Food & Agric. Code § 58601 et seq.*]. This is because *Food & Agric. Code § 14* satisfies a two part test in that: (1) the specific non-APA statute was enacted after 1947; and (2) the specific non-APA statute shows an express intention to supplant or limit the APA [*Voss v. Superior Court (1996) 46 Cal. App. 4th 900, 909-911, 54 Cal. Rptr. 2d 225* ; *see Engelmann v. State Bd. of Education (1991) 2 Cal. App. 4th 47, 59* , *2 Cal. App. 4th 47, 3 Cal. Rptr. 2d 264* (two part test articulated in another context)].

Other exceptions are provided in: (1) *Education Code §§ 89030(b), 89500(b)*, which exempts rulemaking by the Trustees of the California State University from the rulemaking requirements of the APA [*Educ. Code § 89030(b)*]; (2) *Gov. Code § 14615.1(a)*, which exempts the Department of General Services from complying with APA requirements when adopting provisions of the State Contracting Manual [*Gov. Code § 14615.1(a)*; *San Joaquin Helicopters v. Dept. of Forestry (2003) 110 Cal. App. 4th 1549, 1553, 3 Cal. Rptr. 3d 246* (Court of Appeal upheld constitutionality of *Gov. Code § 14615.1* rejecting challenge based on the single subject rule of *Cal Const. Art IV, § 9*, and holding that DGS could properly rely on a provision of the State Contracting Manual, Section 6.05, to award an interim contract while a bid protest was pending notwithstanding that Section 6.05 had not been adopted following the rule making procedures of the California APA)]; and (3) *Gov. Code § 18211*, which exempts rulemaking by the State Personnel Board from the rulemaking requirements of the APA, except for specified subjects to which the APA rulemaking provisions apply [*Gov. Code §§ 18211, 18215, 18216*].

The lethal injection protocol adopted by the California Department of Corrections and Rehabilitation (CDCR) was a regulation subject to the APA requirements because it implemented a statutory directive and it satisfied the rule of general application requirement even though only a small number of persons were subject to the protocol [*Morales v. California Department of Corrections and Rehabilitation (2008) 168 Cal. App. 4th 729, 736-738, 85 Cal. Rptr. 3d 724*]. The lethal injection protocol was not subject to the single prison exception codified in *Penal Code § 5058(c)(1)* because the protocol impacts the performance of many functions outside the specific prison (San Quentin) in which inmates may be executed [*Morales v. California Department of Corrections and Rehabilitation (2008) 168 Cal. App. 4th 729, 739-741, 85 Cal. Rptr. 3d 724*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsGeneral OverviewAdministrative LawAgency RulemakingFormal RulemakingAdministrative LawAgency RulemakingState ProceedingsContracts LawDefensesIllegal BargainsGovernmentsLegislationInterpretationGovernmentsPublic ImprovementsGeneral OverviewGovernmentsState & Territorial GovernmentsFinanceGovernmentsState & Territorial GovernmentsGaming & Lotteries

California Forms of Pleading and Practice--Annotated

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§ 472.22 Office of Administrative Law Determinations

[1] Nature of Determination Process

Before 1983, the only way to attack an uncodified "underground regulation" was in a judicial proceeding. With the enactment of *Gov. Code § 11340.5*, the Office of Administrative Law became authorized to issue "determinations" as to whether an uncodified guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule is a regulation under the APA [*see Gov. Code § 11342.600* (regulation defined); *see* discussion in *§ 472.20[2]*] and therefore subject to its requirements [*Gov. Code § 11340.5(a)*; *see* Ch. 472A, *Agency Rulemaking Procedures* , for a discussion of required procedures] regarding formal adoption [*see Gov. Code § 11340.5(b)*; *see generally* Bolz and Garcia, *The Other Side of Administrative Law*, California Lawyer, Nov. 1987, pp. 47-52]. The process of obtaining a determination from the OAL regarding the legality of an uncodified agency rule was intended by the Legislature to be an inexpensive alternative to litigation [1986 OAL Determination No. 3, n.6]. This process may be initiated by a member of the public, pursuant to a request for determination [*1 Cal. Code Reg. § 122*; *see* [2], *below*], or on the OAL's own motion [*1 Cal. Code Reg. § 128*].

If the OAL concludes that a particular uncodified agency rule is a "regulation" as defined in the APA [*Gov. Code § 11342.600* (regulation defined); *see* discussion in *§ 472.20[2]*], it issues a determination that the rule is invalid and unenforceable unless formally adopted pursuant to the APA [*1 Cal. Code Reg. § 121(a)*; *see, e.g.,* 1987 OAL Determination No. 4 (finding State Labor Commissioner Interpretive Bulletin 85-4 invalid and unenforceable unless adopted per APA)]. The determination may conclude that the challenged agency rule is not a "regulation" [*see, e.g.,* 1986 OAL Determination 6 (upholding all but one paragraph of a San Francisco Bay Conservation and Development Commission document); *see § 472.21[1*], regarding rules that do not fall within the statutory definition of "regulation"], or that the challenged rule, although a "regulation," has been exempted by statute from the APA [*1 Cal. Code Reg. § 121(a)*; *see Gov. Code § 11346*; *see also* discussion in *§ 472.21* (exceptions from adoption requirements)].

[2] Attempted Informal Resolution

Persons concerned about agency use of an apparent "underground regulation" should bring the matter to the attention of the head of the rulemaking agency before filing a request for determination with the OAL. Though not a legal

requirement, this action should be undertaken as a matter of courtesy to the agency staff and as a way of ensuring that the person with legal responsibility for conduct of agency affairs is personally apprised of the problem. This process may also result in a timesaving, informal resolution of any disagreement.

[3] Request for Determination

[a] Standing

Any person may file a request for determination with the OAL. There is no "standing" requirement for filing a request [*1 Cal. Code Reg. § 121(b)*; *Gov. Code § 11340.5*; 1986 OAL Determination No. 3, pp. 4-6] and no filing fee. If a copy of the challenged rule is unavailable, however, the person submitting the request (the requester) is required to supply the OAL with a factual description of the rule and its application to the requester or other affected persons [*1 Cal. Code Reg. § 122(a)(3)*; *see* discussion in [b], *below*].

[b] Contents

A request for determination must be written, and must contain all of the following information [*1 Cal. Code Reg. § 122*]:

- The name and address of the person making the request [*1 Cal. Code Reg. § 122(a)(1)*].

- The name of the agency that has issued, or is utilizing, enforcing, or attempting to enforce the uncodified rule [*1 Cal. Code Reg. § 122(a)(2)*. The OAL regulations prescribing procedures for processing requests use the term "state agency rule" to refer to what this publication describes as the "uncodified rule." *see 1 Cal. Code Reg. § 121(c)* (definition of "state agency rule")].

- A copy of the uncodified rule or a factual description of the rule and its application to the person making the request or other affected persons [*1 Cal. Code Reg. § 122(a)(3)(A), (B)*; 1986 OAL Determination No. 4, p. 4]. If a copy of the uncodified rule is not available, a description of the method of issuance, utilization, enforcement, or attempted enforcement must appear in the request [*1 Cal. Code Reg. § 122(a)(3)(B)*; 1987 OAL Determination No. 10, n.8].

- A dated and signed statement that the requester declares under penalty of perjury [*see Code Civ. Proc. § 2015.5*] that he or she believes that the information contained in the request and any other written information or evidence submitted with the request is true and [*1 Cal. Code Reg. § 122(b)*].

- A copy of a signed and dated statement under penalty of perjury telling how and when the person making the request transmitted the documents to the head of the state agency [*1 Cal. Code Reg. § 122(c)*; *see* [c], *below*].

If the request is submitted by a state agency, it must contain the following two additional matters [*1 Cal. Code Reg. § 122(d)*]:

- The signature and certification of the head of the agency or his or her authorized representative, in accordance with *Code Civ. Proc. § 2015.5* [*1 Cal. Code Reg. § 122(d)*].

- The legal analysis and conclusions of the agency's legal counsel [*1 Cal. Code Reg. § 122(d)*].

Legal argument in the request may be included, but it is not required [1987 OAL Determination No. 3, pp. 5-6]. The fact that the challenged rule may be the subject of pending judicial or administrative proceedings does not prevent the

OAL from accepting the request or issuing a determination [1986 OAL Determination No. 3, pp. 4-9], although the determination may ultimately be found to be inadmissible in these other proceedings [*see* [7], *below*]. A proposal to screen out such requests prior to acceptance was abandoned during the rulemaking, leading to adoption of the regulations governing processing of requests for determination [Rulemaking File 85-0930-1, item 3 (proposed regulatory text); on file at the OAL].

[c] Submission of Copy to Affected Agency

Any person who submits a request for determination to the OAL must first transmit a copy of the request and any written information or evidence contained in or submitted with the request to the head of the state agency whose rule is the subject of the request [*1 Cal. Code Reg. § 122(c)*]. "Transmit" means to deliver physically the document to the addressee, or to deposit it into the United States mail or other mail delivery service [*1 Cal. Code Reg. § 121(d)*]. A copy of a signed and dated statement made under penalty of perjury relating how and when the requester transmitted a copy of the request to the agency head must accompany the filing of the request for determination at the OAL [*1 Cal. Code Reg. § 122(c)*; *see* [b], *above*].

[4] Review of Submitted Requests

The OAL must review each submitted request and acknowledge receipt in writing within five working days [*1 Cal. Code Reg. § 123*]. If the request does not comply with the requirements of *1 Cal. Code Reg. § 122*, discussed in [1][b], *above*, the receipt letter must notify the requester of the requirements that must be complied with before the request can be accepted [*1 Cal. Code Reg. § 122(e)*]. There is no time limit in which the requester must reply. If the submitted (or resubmitted) request meets the requirements of *1 Cal. Code Reg. § 122*, the OAL must accept it [*1 Cal. Code Reg. §§ 122(e), 123, 126*; 1986 OAL Determination No. 3, pp. 4-9; 1987 OAL Determination No. 3, pp. 3-9].

The OAL will consider all requests that meet the requirements in the order in which they were received [*1 Cal. Code Reg. §§ 123, 126*]. Each request is assigned a docket number (e.g., 88-020), which indicates the order within the calendar year in which the request was received. This provision concerning resolution of requests "in the order received" was incorporated into the regulations in response to comments submitted during the rulemaking process. Focusing on a draft regulation permitting the OAL to decide which requests warranted issuance of a determination, these comments contended that "the public interest in agencies enforcing only duly adopted regulations" would be better served by the OAL issuing a determination on each procedurally sufficient request, rather than initially screening each complete request in terms of various criteria (e.g., number of people affected by the uncodified rule) in order to decide whether or not the OAL would issue a determination [Rulemaking File 85-0930-01, item 13 (Final Statement of Reasons, Part 2, p. 2); item 5 (Air Resources Board letter of June 17, 1985, p. 2)]. As soon as possible after receipt and within available program resources, the OAL begins active consideration of each request. It must then give written notification of that fact to both the requester and the affected rulemaking agency [*1 Cal. Code Reg. § 123*].

[5] Public Comment

[a] Notice Inviting Comment

When the OAL begins active consideration of a request, it must publish the request for determination or a summary of the request in the California Regulatory Notice Register (Notice Register), together with a notice inviting comment from any interested person [*1 Cal. Code Reg. § 124(a)*]. The notice must state that any information or evidence submitted must be in writing, and must be submitted within 30 days after publication of the notice. It must also specify that any written information or evidence received by the OAL from the public within that 30-day period will be considered in making a determination [*1 Cal. Code Reg. § 124(a)*].

If the OAL has undertaken to issue a determination on its own motion, the notice must state that fact. The notice must also include a description of the state agency rule that is the subject of the determination [*1 Cal. Code Reg. § 128*].

[b] Submission of Information or Evidence

Any person submitting written information or evidence to the office in response to the notice must accompany that material with two statements. First, he or she must include a signed and dated declaration, made under penalty of perjury, that he or she believes that the material is true and correct [*1 Cal. Code Reg. § 124(b)*]. Second, he or she must include a signed and dated statement made under penalty of perjury stating how and when he or she transmitted a copy of the material to the head of the state agency whose rule is the subject of the request. Any person who submits information or evidence in response to a notice of a request for determination must first transmit a copy of that material to the head of the applicable state agency [*1 Cal. Code Reg. § 124(c)*]. In making its determination, the OAL must consider all written information and evidence that it has received from the public that complies with the above criteria [*1 Cal. Code Reg. § 125(a)*; *see 1 Cal. Code Reg. §§ 122, 124*]. Only information or evidence meeting all of the above criteria will be considered by the OAL in making its determination [*1 Cal. Code Reg. § 125(f)*].

[6] Response of Rulemaking Agency

In making its determination, the OAL must also consider written material submitted by the state agency. The agency may submit information or evidence regarding whether the rule under consideration is a regulation, or a response to information or evidence submitted by the public. However, the OAL will only consider written information or evidence that is prepared as follows [*1 Cal. Code Reg. § 125(b)*]:

- Received prior to or within 45 days after publication of the request in the Notice Register [*1 Cal. Code Reg. § 125(b)*; 1987 OAL Determination No. 3, pp. 3, 9].

- Signed and verified in accordance with *Code Civ. Proc. § 2015.5* by the head of the agency or by his or her authorized representative [*1 Cal. Code Reg. § 125(c)*].

- Accompanied by a signed and dated statement under penalty of perjury proving that the response was transmitted by the agency to the requester at the same time it was sent to the OAL [*1 Cal. Code Reg. § 125(d)*].

[7] Issuance and Effect of Determinations

[a] Issuance

The OAL must issue its written determination (including reasons supporting the determination) within 75 days from the date of publication of the notice regarding the commencement of active consideration of the request for determination--that is, 75 days after publication in the Notice Register [*1 Cal. Code Reg. § 126*]. If the OAL has issued the determination on its own motion, the determination must include the fact that issuance was on the OAL's own motion, and must include a description of the state agency rule that is the subject of the determination [*1 Cal. Code Reg. § 128*].

[b] Availability to Public

Each determination must be filed on issuance with the secretary of state, and becomes effective on the thirtieth day after filing [*Gov. Code § 11340.5(c)(1)*; *1 Cal. Code Reg. §§ 126, 127*]. A copy of the determination and supporting reasons must be transmitted to (1) the requester, (2) the agency, (3) the governor, and (4) both houses of the Legislature [*Gov. Code § 11340.5(c)(2)*; *1 Cal. Code Reg. § 127*]. The OAL must also make its determinations available to the public and the courts [*Gov. Code § 11340.5(c)(4)*], and must publish a summary of the determination in the Notice Register within 15 days of issuance [*Gov. Code § 11340.5(c)(3)*]. The complete determination and supporting reasons must thereafter be published in the Notice Register [*1 Cal. Code Reg. § 127*].

The Notice Register is available from the Regulatory Determinations Unit, Office of Administrative Law, 555 Capitol Mall, Suite 1290, Sacramento, California 95814, (916) 323-6225, on an annual subscription basis. A detailed determinations index listing parties requesting determinations, affected agencies, challenged rules, and so forth is also available from the OAL. Back issues of determinations are available at a small charge. OAL regulations outlining how to request a regulatory determination are also available from the OAL [*see* [2], *above*].

[c] Agency Response

Although a determination is not binding on a state agency, the agency will generally reexamine the challenged rule after a favorable determination. It may initiate a rulemaking proceeding [*see* Ch. 472A, *Agency Rulemaking Procedures*], or resolve the problem to the requester's satisfaction [*see* Bolz and Garcia, *The Other Side of Administrative Law*, California Lawyer, Nov. 1987, pp. 47-52].

[8] Admissibility in Court

In order to insure that the administrative review of a rule is exhausted before it is litigated [1986 OAL Determination No. 3, n. 6; *see* [1], *above*], *Gov. Code § 11340.5(e)* provides that determinations are admissible in court or in administrative hearings, unless the following specified circumstances are all present [*Gov. Code § 11340.5(e)*]:

- The court or other proceeding involves the same party that sought the determination.
- The proceeding began prior to the filing of the request.
- In the proceeding, the issue is whether the rule that is the legal basis for the adjudicatory action is a "regulation" as defined in the APA [*Gov. Code §§ 11342.600* (regulation defined); *see § 472.20[2]*].

The legislative history of *Gov. Code § 11340.5(e)* indicates that the provision was intended to limit somewhat the ability of the defendant in an ongoing legal proceeding to obtain a determination in the midst of the proceeding. No published appellate decisions have yet addressed the admissibility of determinations in other proceedings; however, at least one trial court has admitted a determination [*see* 1987 OAL Determination No. 3] in a subsequent lawsuit attacking an uncodified agency manual and ruled the manual invalid [Herships & Oldfield v. McCarthy, Super. Ct. Sacramento County, 1987, No. 350531 (order issuing injunction re Classification Manual filed June 1, 1987)]. In a second court action [*see* 1986 OAL Determination No. 2], a trial court granted the request of the rulemaking agency for an order declaring the determination invalid on the grounds that the challenged documents (though apparently regulatory) were nonetheless within the scope of an express statutory exemption to the APA [California Coastal Commission v. OAL (Super. Ct. San Francisco County, 1987, No. 859416)].

In comparison, when a rule has become a "regulation" approved by the OAL [*Gov. Code § 11349.3*] and is subsequently challenged in a declaratory relief action [*Gov. Code § 11350*], the court *may not* consider the OAL's approval (or the governor's overruling of the OAL's disapproval) in that action [*Gov. Code § 11350(c)*; *see* Ch. 472B, *Review of Agency Rulemaking*].

[9] Judicial Review of Determinations

Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination be modified or set aside. The petition must be filed within 30 days of the date the determination is published [*Gov. Code § 11340.5(d)*]. For further discussion of judicial review of determinations, see Ch. 472B, *Review of Agency Rulemaking* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceAdmissibilityGeneral OverviewAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingState ProceedingsAdministrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewRemediesDeclaratory JudgmentsCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewEvidenceProcedural ConsiderationsRule Application & Interpretation

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§§ 472.23[Reserved]

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§ 472.30 State Constitution

Administrative agencies that have constitutional authority to exercise (limited) legislative power

Board of Education. *Cal. Const., art. IX, § 7.5*

Judicial Council. *Cal. Const., art. VI, §§ 6, 18*

Personnel Board. *Cal. Const., art. VII, §§ 2(c), 3, 6(b), (c)*

Public Utilities Commission. *Cal. Const., art. XII, §§ 2, 4, 6*

Regents of the University of California. *Cal. Const., art. IX, § 9(a)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawSeparation of PowersConstitutional ControlsGeneral Overview

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§ 472.31 State Statutes

General provisions for adoption of regulations. *Gov. Code §§ 11346-11346.9*

Filing and publication of regulations. *Gov. Code §§ 11343-11343.8*

California Code of Regulations and Register. *Gov. Code §§ 11344-11344.9*

Procedure for adoption of regulations. *Gov. Code §§ 11346-11346.9*

Exemptions from procedural requirements. *Gov. Code § 11346.1*

Judicial review of regulation by declaratory relief action. *Gov. Code § 11350*

Review of Public Utilities Commission regulation. *Pub. Util. Code § 1759*

Review of Workmen's Compensation Appeals Board regulation. *Lab. Code § 5955*

Review of regulation of Bd. of Governors of State Bar respecting law corporations. *Bus. & Prof. Code § 6170*

Regulation requiring report does not apply to small business unless state agency finds its applicability necessary for health, safety, or welfare of people of state. *Gov. Code § 11346.3*

Cost impact statements are required. *Gov. Code § 11346.5(a)(9)*

Administrative agencies are required to write regulations in plain, straightforward language. *Gov. Code § 6215*

Publication of rulemaking calendar. *Gov. Code § 11017.6*

Judicial review of validity of regulation ordered repealed or disapproved by Office of Administrative Law is available by declaratory relief action. *Gov. Code § 11350.3*

Reasonable litigation expenses are recoverable by prevailing small business or licensee in civil action against state regulatory agency involving regulatory functions of state agency. *Code Civ. Proc. § 1028.5*

Statutory procedure for adoption of regulations generally [*Gov. Code §§ 11346-11347.3*] are not applicable to adoptions of regulations under *Fin. Code §§ 8054, 3373*, although *Gov. Code §§ 11346.1, 11343.4*, and *11349.6* apply. *Gov. Code § 11346.1(a)*

Administrative review of proposed regulations. *Gov. Code § 11349 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingFormal RulemakingAdministrative LawAgency RulemakingState ProceedingsAdministrative LawJudicial ReviewRemediesDeclaratory JudgmentsCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral Overview

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§ 472.32 Administrative Regulations

Criteria applied in review of proposed regulations. *1 Cal. Code Reg. §§ 5-120*

Procedures for regulatory determinations. *1 Cal. Code Reg. §§ 121-128*

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§ 472.33 Decisions

[1] Generally

Special authorization is not required for adoption of operational or procedural regulations. *Bank of Italy v. Johnson (1926) 200 Cal. 1, 20, 251 P. 784*

Necessity for authorization to adopt legislative regulation. *City & County of San Francisco v. Padilla (1972) 23 Cal. App. 3d 388, 400, 100 Cal. Rptr. 223*

Administrative regulation has force and effect of statute. *Associated Beverage Co. v. Bd. of Equalization (1990) 224 Cal. App. 3d 192, 201, 273 Cal. Rptr. 639* ; *Dabis v. San Francisco Redevelopment Agency (1975) 50 Cal. App. 3d 704, 706, 122 Cal. Rptr. 800* ; *Rigley v. Bd. of Retirement (1968) 260 Cal. App. 2d 445, 450, 67 Cal. Rptr. 185*

Legislature (Congress) is empowered to delegate administrative "power to fill up the details" in general legislation. *Wayman v. Southard (1825) 23 U.S. 1, 42-43, 6 L. Ed. 253*

Regulation is presumptively valid on all grounds in proceeding challenging validity. *Credit Ins. General Agents Asso. v. Payne (1976) 16 Cal. 3d 651, 657, 128 Cal. Rptr. 881, 547 P.2d 993* ; *Ray v. Parker (1940) 15 Cal. 2d 275, 309, 101 P.2d 665* ; *California Assoc. of Nursing Homes, etc. v. Williams (1970) 4 Cal. App. 3d 800, 810, 84 Cal. Rptr. 590*

Necessity that local agency comply with any procedural requirements made applicable by local charter. *Conroy v. Wolff (1950) 34 Cal. 2d 745, 748, 214 P.2d 529*

Local legislative body is not empowered to impose procedural requirements on local agency in contravention of local charter. *McDonald's Systems of California, Inc. v. Bd. of Permit Appeals (1975) 44 Cal. App. 3d 525, 537, 119 Cal. Rptr. 26*

Inconsistency between two regulations of same agency does not raise presumption of implicit repeal of earlier

regulation unless inconsistency is not otherwise reconcilable. *California Drive-In Restaurant Assn. v. Clark (1943) 22 Cal. 2d 287*

Power to adopt regulations necessarily includes power to amend them. *Hatch v. Ward (1946) 27 Cal. 2d 883, 887, 168 P.2d 22*

Party challenging validity of administrative rule bears burden of stating and establishing grounds of its challenge; agency is not required to anticipate and refute objections to rule. *Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist. (1989) 49 Cal. 3d 408, 427 n.20, 261 Cal. Rptr. 384, 777 P.2d 157*

Agency does not declare statute unconstitutional and does not refuse to enforce it by complying with legislative directive to implement statute to extent it does not conflict with federal law. *Reese v. Kizer (1988) 46 Cal. 3d 996, 998, 1002, 251 Cal. Rptr. 299, 760 P.2d 495*

Administrative agency is not limited to exact provisions of statute in adopting regulations to enforce its mandate; agency is authorized to "fill up details" of statutory scheme. *Ford Dealers Assn. v. Dept. of Motor Vehicles (1982) 32 Cal. 3d 347, 362, 185 Cal. Rptr. 453, 650 P.2d 328*

Internal management exception [*Gov. Code § 11342(b)*], excusing noncompliance with statutory rulemaking procedures, has narrow scope; exception is inapplicable when rule is to have general application and is to affect persons subject to regulation by agency. *Union of American Physicians & Dentists v. Kizer (1990) 223 Cal. App. 3d 490, 497, 272 Cal. Rptr. 886* ; *Grier v. Kizer (1990) 219 Cal. App. 3d 422, 435-438, 440, 268 Cal. Rptr. 244*

Policy creating standard for application of already-established wage rates, to cover situation not addressed in statute or regulations, is required to be promulgated under APA rulemaking procedures. *Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc. (1990) 221 Cal. App. 3d 114, 128, 270 Cal. Rptr. 75*

Internal administrative order does not supersede legislation adopted by board of supervisors. *Hock Investment Co. v. City and County of San Francisco (1989) 215 Cal. App. 3d 438, 448, 263 Cal. Rptr. 665*

[2] Agency Interpretation of Statute

Agency construction of statute that agency is charged with enforcing is given great respect by courts except when clearly erroneous. *National Indemnity Co. v. Garamendi (1991) 233 Cal. App. 3d 392, 404, 284 Cal. Rptr. 278*

[3] Emergency Regulations

Question whether emergency exists to justify adoption of emergency regulation is primarily addressed to agency's discretion. *Schenley Affiliated Brands Corp. v. Kirby (1971) 21 Cal. App. 3d 177, 194-195, 98 Cal. Rptr. 609*

[4] Hearings

Constitutional due process issue is not raised by interested parties' claim of lack of fair or reasonable opportunity to respond to agency staff report prior to hearing when agency acting in quasi-legislative capacity. *Western Oil & Gas Assn. v. Air Resources Bd. (1984) 37 Cal. 3d 502, 525, 208 Cal. Rptr. 850, 691 P.2d 606*

Hearing is not generally constitutionally required before agency may take legislative action. *Ford Dealers Assn. v. Dept. of Motor Vehicles (1982) 32 Cal. 3d 347, 364 n.10, 185 Cal. Rptr. 453, 650 P.2d 328* ; *San Diego Bldg.*

Contractors Assn. v. City Council (1974) 13 Cal. 3d 205, 211, 118 Cal. Rptr. 146, 529 P.2d 570 (hearing as generally required only in adjudicative proceeding); *Franchise Tax Bd. v. Superior Court (1950) 36 Cal. 2d 538, 549, 225 P.2d 905* ; *California Citizens Band Assn. v. United States (9th Cir. [Cal] 1967) 375 F.2d 43, 50 , cert. denied, 389 U.S. 844*

Procedural requirements for legislative action are found in governing statutes rather than constitutional guaranties of due process. *Rivera v. Division of Industrial Welfare (1968) 265 Cal. App. 2d 576, 587, 71 Cal. Rptr. 739*

Due process requires compliance with any statutory requirement for hearing. *People v. Johnson (1941) 42 Cal. App. 2d Supp. 827*

Statutory limitations on production of evidence and opportunity to be heard at legislative hearing do not offend due process. *Franchise Tax Bd. v. Superior Court (1950) 36 Cal. 2d 538, 550, 225 P.2d 905* ; *Ray v. Parker (1940) 15 Cal. 2d 275, 304, 101 P.2d 665*

Agency is entitled to act on basis of evidence gathered and summarized by employees rather than evidence agency members personally received in hearing. *Schecter v. County of Los Angeles (1968) 258 Cal. App. 2d 391, 397, 65 Cal. Rptr. 739* ; *Vita-Pharmacals, Inc. v. Bd. of Pharmacy (1952) 110 Cal. App. 2d 826, 831, 243 P.2d 890*

Interested persons are not entitled to cross examine witnesses in legislative hearing. *Rivera v. Division of Industrial Welfare (1968) 265 Cal. App. 2d 576, 590, 71 Cal. Rptr. 739*

Opportunity to cross examine witnesses is procedural feature agencies should be encouraged to adopt although not legally required to adopt. *Emby Foods, Inc. v. Paul (1964) 230 Cal. App. 2d 687, 703, 41 Cal. Rptr. 365*

[5] Interpretive Regulations

Regulations adopted by agency are required to be consistent and not in conflict with statute; regulations that alter, amend, or enlarge statute, or impair its scope are void, and courts are obligated to strike down such regulations. *Ontario Community Foundation, Inc. v. State Bd. of Equalization (1984) 35 Cal. 3d 811, 816-817, 201 Cal. Rptr. 165, 678 P.2d 378* ; *Associated Beverage Co. v. Bd. of Equalization (1990) 224 Cal. App. 3d 192, 201, 273 Cal. Rptr. 639*

Regulations adopted by administrative agency are required to be consistent with, not in conflict with, and reasonably necessary to effectuate purpose of, statute authorizing regulation. *Woods v. Superior Court (1981) 28 Cal. 3d 668, 679, 170 Cal. Rptr. 484, 620 P.2d 1032*

When statute confers upon state agency authority to adopt regulations to implement, interpret, make specific or otherwise carry out its provisions, agency's regulations must be consistent and not in conflict with statute. *Washington v. Bd. of Supervisors (1993) 18 Cal. App. 4th 981, 985, 22 Cal. Rptr. 2d 852*

Agency is without discretion to promulgate regulation that is inconsistent with governing statute. *Associated Beverage Co. v. Bd. of Equalization (1990) 224 Cal. App. 3d 192, 201, 273 Cal. Rptr. 639*

Agency is not generally authorized to construe statute that is unambiguous. *Louis Stores, Inc. v. Dept. of Alcoholic Beverage Control (1962) 57 Cal. 2d 749, 759-760, 22 Cal. Rptr. 14, 371 P.2d 758*

Agency is not authorized to change meaning given by Legislature to statutory term. *Cooper v. Swoap (1974) 11 Cal. 3d 856* , cert. denied *419 U.S. 1022, 42 L. Ed. 2d 296, 95 S. Ct. 497; California Welfare Rights Organization v. Brian (1974) 11 Cal. 3d 237* , cert. denied *419 U.S. 1022 Rosas v. Montgomery (1970) 10 Cal. App. 3d 77, 87, 88 Cal. Rptr.*

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Agency is not authorized to rewrite statute to make it conform to presumed legislative intention that is unexpressed. *Macomber v. State Social Welfare Bd. (1959) 175 Cal. App. 2d 614, 617, 346 P.2d 808*

Interpretative regulation exceeding agency's authority is nevertheless valid in special circumstances. *Richfield Oil Corp. v. Crawford (1952) 39 Cal. 2d 729, 735-738, 249 P.2d 600*

Administrative construction of statute is persuasive but not binding on court. *Whitcomb Hotel, Inc. v. Cal. Emp. Com. (1944) 24 Cal. 2d 753, 757-758, 151 P.2d 233*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 472.34 Attorney General Opinions

Substantial compliance with Government Code procedural requirements. *48 Ops. Cal. Att'y Gen. 117 (1966)*

Printing and distribution of emergency regulations. *43 Ops. Cal. Att'y Gen. 121 (1964)*

Form adopted for regular use as regulation. *25 Ops. Cal. Att'y Gen. 241 (1955)*

Regulation is valid if not arbitrary or in excess of scope of authority. *20 Ops. Cal. Att'y Gen. 120 (1952)*

Regulation is required to conform to legislative intent. *11 Ops. Cal. Att'y Gen. 105 (1948)*

Before allowing claim filed by local agency for reimbursement of state-mandated costs, Commission on State Mandates is required to determine if claim meets either constitutional definition of "costs mandated by the state" under *Gov. Code § 17514* or *Rev. & Tax. Code § 2207* or *2207.5* [Rev. & Tax. Code §§ 2207, 2207.5 were repealed by Stats. 1989, ch. 589, effective January 1, 1990]. *68 Ops. Cal. Att'y Gen. 244 (1985)*

67 Cal. Op. Att'y Gen. 50 (1984)

State agency conducting rule-making proceeding is prohibited from establishing and enforcing deadline that is prior to rule-making hearing by which written comments must be submitted for consideration by agency [former *Gov. Code §§ 11346.5(a)(7)* (*now see Gov. Code § 11346.5(a)(9), 11346.8*)]. *64 Ops. Cal. Att'y Gen. 312 (1981)*

When agency has adopted administrative regulation in accordance with procedural steps specified in old statute governing such procedures but, before agency submits regulation for filing with Secretary of State, new statutory procedures replace old ones, procedural steps completed by agency prior to new statute's operative date are controlled by old statute and not required to be repeated; however, when new statute imposes new procedural step, regulation-adopting agency is required to comply with new step when requiring such compliance would not render previously completed steps invalid. *63 Ops. Cal. Att'y Gen. 326 (1980)*

Administrative regulations are permitted to be substantially changed during adoption process after public hearings have been held and prior to issuance, as long as they relate directly to same subject or issue. *63 Ops. Cal. Att'y Gen. 143 (1980)*

32 Cal. Op. Att'y Gen. 25 (1958) ; *25 Ops. Cal. Att'y Gen. 241 (1955)*

30 Ops. Cal. Att'y Gen. 194 (1957)

28 Cal. Op. Att'y Gen.227 (1956)

Division of Housing (superseded). *27 Ops. Cal. Att'y Gen. 56 (1956)*

Bureau of Vocational Rehabilitation (superseded). *20 Ops. Cal. Att'y Gen. 288 (1952)*

17 Cal. Op. Att'y Gen. 199 (1951)

17 Cal. Op. Att'y Gen. 72 (1951) ; *10 Ops. Cal. Att'y Gen. 275 (1947)*

15 Cal. Op. Att'y Gen. 267 (1950)

15 Cal. Op. Att'y Gen. 16 (1950)

12 Cal. Op. Att'y Gen. 319 (1948)

12 Cal. Op. Att'y Gen. 305 (1948)

Department of Social Welfare (superseded). *12 Ops. Cal. Att'y Gen. 83 (1948)*

Social Welfare Board (superseded). *12 Ops. Cal. Att'y Gen. 83 (1948)*

12 Cal. Op. Att'y Gen. 44 (1948)

Board of Drycleaners (superseded). *12 Ops. Cal. Att'y Gen. 34 (1948)*

11 Cal. Op. Att'y Gen. 87 (1948)

Board of *Education. 10* Ops. Cal. Att'y Gen. 243 (1947)

Legal Topics:

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§ 472.35 Law Reviews

Gordon, *Compensable Regulatory Taking: A Tollbooth Rises on Regulation Road*, 12 Real Est. L.J. 211 (1984)

Livingston, *Organizations and Administrative Practice--A Balance to the Corporate State? 26 Hastings LJ 89 (1974)*

Hannon, *The Philosophy of Administrative Law Making*, 42 State BJ 661 (1967)

Hutchinson, *Rule Making Function of California Administrative Agencies, 15 Hastings LJ 272 (1964)*

Harris, *State Regulation of Hazards Growing Out of the Use of Atomic Energy, 46 Calif. L. Rev. 84 (1958)*

Comment, *Administrative Law and Procedure: Emergency Regulations*, 27 So. Calif. L. Rev. (1953)

Comment, *The Void for Vagueness Rule in California, 41 Calif. L. Rev. 523, 529*-532 (1953)

Note, *Administrative Law: Agency Authority to Develop Policy by Adjudication Rather Than Rule, 36 Calif. L. Rev. 619 (1948)*

Newman, *How Courts Interpret Regulations, 35 Calif. L. Rev. 509 (1947)*

Comment, *Administrative Law: Retroactive Revision of Invalid Regulations, 35 Calif. L. Rev. 92 (1947)*

Note, *Constitutional Law: Delegation of Legislative Power to Administrative Officers: Discretion to Grant or Refuse Permits, 19 Calif. L. Rev. 448 (1931)*

Thelen, *Practice and Procedure Before Administrative Tribunals, 16 Calif. L. Rev. 208 (1928)*

Comment, *Constitutional Law: Delegation of Legislative Power to Administrative Officers: Discretion to Grant or*

Refuse Licenses and Permits, and Power to Make Rules, 15 Calif. L. Rev. 408 (1927)

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§ 472.36 Text References

Witkin, Summary of California Law, vol. 7, *Constitutional Law*, § 674-676 (10th ed. 2005)

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§ 472.37 Internet References

Office of Administrative Law. This site includes: OAL publications; links to OAL statutes and regulations relating to rulemaking; regulations submitted to the OAL for review, and information for contacting or providing input to the OAL regarding rulemaking. http://www.oal.ca.gov **NOTE:** On and after July 1, 1998, The OAL is required by *Gov. Code § 11340.1(b)* to make the full text of the California Code of Regulations, with reference citations and history notes, available on the Internet free of charge.

California Home Page. This site includes links to other sites maintained by numerous state agencies. http://www.ca.gov

Department of Consumer Affairs. This site includes links to sites maintained by many state agencies that are under this department, as well as links to agency sites. http://www.dca.ca.gov

California Courts. This site includes: general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most Court of Appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes: text of constitution, codes, and statutes (including complete text of APA); and information concerning pending legislation. http://www.leginfo.ca.gov

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[Reserved]

§§ 472.38[Reserved]

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Chapter 472 PUBLIC AGENCY RULES
PART IV. PROCEDURAL CHECKLIST

41-472 California Forms of Pleading and Practice--Annotated § 472.50

§ 472.50 Determine the Extent of the Agency's Rulemaking Authority

[1] Ascertain the Source of the Agency's Rulemaking Authority

☐ Direct constitutional grant of authority [*see § 472.13[1][a]*].

☐ Express or implied statutory delegation from the legislature [*see § 472.13[2]*].

[2] Ascertain the Scope of an Agency's Rulemaking Authority

☐ Certain and unambiguous statutory delegations of authority may not be interpreted by an agency [*see § 472.13[3][a]*].

☐ Delegated scope of authority may not be altered or enlarged by an agency [*see § 472.13[3][b]*].

☐ Both courts and OAL will generally follow an agency's interpretation of its own authority [*see § 472.13[3][c]*].

[3] Ascertain If an Informal Agency Rule Is Subject to Challenge for Failure to Comply With Formal Rulemaking Procedures

☐ Determine whether the rule is a "regulation" under the APA definition [*see § 472.20[2]*].

☐ Determine whether the rule is not subject to one of the following general exceptions [*see § 472.21[1]*].

☐ It relates only to internal management of rulemaking agency [*see § 472.21[1][b]*].

☐ It is a legal ruling of counsel issued by the Board of Equalization or the Franchise Tax Board [*see § 472.21[1][d]*].

☐ It is a form or instructions relating to a form [*see § 472.21[1][c]*].

☐ It establishes or fixes rates, prices, or tariffs [*see § 472.21[1][f]*].

☐ It relates to the use of public works [*see § 472.21[1][h]*].

☐ It relates to a specifically named person and is not generally applicable [*see § 472.21[1][e]*].

☐ It constitutes a building standard [*see § 472.21[1][g]*].

☐ Determine whether the rule is not subject to a specific statutory exception [*see § 472.21[2]*].

[4] Ascertain the Procedure for Obtaining an OAL "Determination" That an Agency's Informal Rule Is Invalid

☐ The challenging party files a request for determination with OAL [*see § 472.60* and the form *set out in § 472.60*].

☐ OAL reviews the request [*see § 472.22[4]*].

☐ OAL invites public comment on the request [*see § 472.22[5]*].

☐ OAL accepts response from the affected agency [*see § 472.22[6]*].

☐ OAL issues written determination [*see § 472.22[7]*].

☐ Challenging party may seek judicial review of unfavorable determination [*see § 472.22[9]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingFormal RulemakingAdministrative LawAgency RulemakingInformal RulemakingAdministrative LawJudicial ReviewStandards of ReviewStatutory InterpretationAdministrative LawSeparation of PowersLegislative ControlsExplicit Delegation of AuthorityAdministrative LawSeparation of PowersLegislative ControlsImplicit Delegation of Authority

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PART IV. PROCEDURAL CHECKLIST

41-472 California Forms of Pleading and Practice--Annotated § 471.51

§ 471.51 Request for Determination

[1] Informal Resolution

☐ Prior to request for determination, bring matter to attention of head of rulemaking agency [*see* discussion in *§ 472.2[2]*].

☐ If results are not satisfactory, follow procedures in [2], *below.*

[2] Procedure for Request for Determination

☐ Prepare request for determination and declaration supporting request [*1 Cal. Code Reg. § 122*; *see* discussion in *§§ 472.22[1], 472.22[3][b]* (contents of request); for form of declaration supporting the request, *see § 472.60*].

☐ Transmit copy of request to head of state agency [*1 Cal. Code Reg. § 122(c)*; *see* discussion in *§ 472.22[3][c]*].

☐ Prepare declaration of transmittal [§ 472.22[3][c]; for a form of declaration of transmittal, *see § 472.61*].

☐ File request for determination, supporting declaration, and transmittal declaration with OAL [*1 Cal. Code Reg. § 122(c)*; *see* discussion in *§ 472.22[3][c]*].

Legal Topics:

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

Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingInformal Rulemaking

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41-472 California Forms of Pleading and Practice--Annotated §§ 472.52-472.59

[Reserved]

§§ 472.52[Reserved]

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Chapter 472 PUBLIC AGENCY RULES
PART V. FORMS

41-472 California Forms of Pleading and Practice--Annotated § 472.60

§ 472.60 Request and Declaration in Support of Request for OAL Determination [Gov. Code § 11340.5]

[1] FORM Request and Declaration in Support of Request for OAL Determination [Gov. Code § 11340.5]

REQUEST FOR DETERMINATION

TO: The Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, CA 95814-4602

1. My name and address is: _____[*specify*].

[*EITHER*]

2. _____[*Specify name of agency*] _____ [has issued *and/or* is utilizing *and/or* is enforcing *and/or* is attempting to enforce] the following state agency rule:

_____[*Set out text of rule if available*].

[*OR*]

2. _____[*Specify name of agency*] _____ [has issued *and/or* is utilizing *and/or* is enforcing *and/or* is attempting to enforce] a state agency rule as follows: _____[*When text of state agency rule is not available, set out a factual description of the rule and its application to the requester, or to other affected persons, in the method of the rule's issuance, utilization, enforcement, or attempted enforcement*].

[*CONTINUE*]

DECLARATION

I, _____, declare under penalty of perjury under the laws of the State of California that I believe that all written information contained in this Request for Determination and all other written information submitted with this Request for Determination is true and correct and that this declaration was executed this _____ day of _____[*month*], _____[*year*], at _____, California.

_____ [*signature*]
_____ [*typed or printed name*]

[2] Use of Form

The form set out in [1], *above*, is for use in requesting an OAL determination; the declaration portion of the form substantially reflects the content of a printed form of declaration available from the OAL. The declaration must accompany the request and be signed by the requester. The request must also be accompanied by a declaration of transmittal to the agency that issued the rule that is subject of the request [*see § 472.61*]. For discussion of how this form is used, see *§ 472.22[3]*.

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PART V. FORMS

41-472 California Forms of Pleading and Practice--Annotated § 472.61

§ 472.61 Transmittal Declaration of Documents to Head of Affected State Agency [1 Cal. Code Reg. § 122(c)]

[1] FORM Transmittal Declaration of Documents to Head of Affected State Agency [1 Cal. Code Reg. § 122(c)]

TRANSMITTAL DECLARATION

I, _____, declare under penalty of perjury under the laws of the State of California that the documents contained herein were first transmitted by the United States mail on _____[*date*], to the head of the state agency whose rule is the subject of this Request for Determination at this address:

Name/Title
_____
_____

Agency
_____

Address
_____

City/State
_____

and that this declaration was executed this _____ day of _____[*month*], _____[*year*], at _____, California.

_____ [*signature*]
_____ [*typed or printed name*]

[2] Use of Form

The optional transmittal declaration form in [1], *above*, is an example of a printed form available from the OAL. For discussion of how this form is used, see *§ 472.22[3]*.

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41-472A California Forms of Pleading and Practice--Annotated 472A.syn

§ 472A.syn Synopsis to Chapter 472A: AGENCY RULEMAKING PROCEDURES

§ 472A.01 Scope of Chapter

§ 472A.02 Cross References

[1] Related Coverage of Agency Rule Making

[2] Judicial Remedies and Review

[3] Public Administrative Law Generally

[4] Specific Public Agencies

§§ 472A.03-472A.09 [Reserved]

§ 472A.10 Governing Law

§ 472A.11 Rulemaking Procedures Under the APA

[1] Agencies Subject to Rulemaking Requirements

[2] Agency Use of Internet and Electronic Communication in Rulemaking

[3] Unique Identification Number for each Regulatory Rulemaking Action

[4] Public Participation Prior to Notice of Proposed Rulemaking

§ 472A.12 Public Notice

[1] General Requirements

[2] Content Requirements

[a] General Information

[b] Economic Impact on Business

[c] Cost Impact

[d] Plain English Policy

[3] Publication Requirements

[4] Mailing Requirements

[5] The California Regulatory Notice Register

§ 472A.13 Public Response to Proposed Regulation

[1] Opportunities for Public Response

[a] Publication of Notice of Proposed Action

[b] Change in Text of Proposed Regulation

[2] Public Comment

[a] Standards Subject to Comment

[b] Review of Public Comments

[3] Public Hearing

§ 472A.14 Agency Rationale for Adoption of Regulations

[1] Initial Statement of Reasons

[2] Final Statement of Reasons

[3] Updated Informative Digest

[4] Waiver of the Rationale Requirement

§ 472A.15 Special Procedures for Emergency Regulations

§ 472A.16 OAL Review of Regulations

[1] Transmittal of Adopted Regulation to OAL

[2] Review of Rulemaking File for Completeness

[a] General Requirements

[b] Required Contents

[c] Estimate of Costs and Savings

[3] Review for Compliance With Standards

[a] General Requirements

[b] Necessity

[c] Authority

[d] Clarity

[e] Consistency

[f] Reference

[g] Nonduplication

[4] Review of Emergency Regulations

[a] Procedure

[b] Effective Period of Regulation

[5] Return of Regulation During Review

[6] Approval or Disapproval of Regulations

[a] General Requirements

[b] Effective Date of Approved Regulations

[c] Effect of Filing and Publishing Approved Regulations

[d] Disapproved Regulations

§ 472A.17 Publication of Regulations

[1] The California Code of Regulations

[a] General Requirements

[b] History

[c] Contents

[2] The California Regulatory Code Supplement

[a] General Requirements

[b] Contents

[3] Historical Research of Regulations

[a] History Notes

[b] Method of Tracing a Regulation's History

§ 472A.18 Requests for Review of Regulations

[1] Legislative Requests for Review of Codified Regulations

[2] Public Requests for Review of Regulations

[a] Petition for Adoption, Amendment, or Repeal of a Regulation

[b] Request for OAL Determination Regarding Uncodified Regulation

§ 472A.19 Removal of Regulation on Repeal of Statutory Authority

§§ 472A.20-472A.29 [Reserved]

§ 472A.30 Exemptions From the APA Rulemaking Provisions

[1] General Exemptions

[2] Agencies Specifically Exempted by Statute

[3] Actions Specifically Exempted by Statute

[4] Emergency Regulations

§ 472A.31 Procedures for Rulemaking Actions Not Subject to Complete APA Coverage

[1] Under Agency Enabling Statutes

[a] Insurance Commissioner's Regulations

[b] Department of Transportation Regulations

[c] Building Standards and Applicable Administrative Regulations

[d] Public Utilities Commission Regulations

[e] Regulations of Division of Worker's Compensation

[f] Workers' Compensation Appeals Board Regulations

[g] Financial Regulations

[h] Regulations of the Trustees of the California State University

[i] Regulations of the State Personnel Board

[j] Regulations of the Fish and Game Commission

[k] California Industrial Welfare Commission

[2] Nonstatutory Procedures

§ 472A.32 Elective Use of APA Procedures for Non-APA Rulemaking

§ 472A.33 Public Records and Open Meetings

[1] Public Records Act

[2] Open Meetings Legislation

§§ 472A.34-472A.39 [Reserved]

§ 472A.40 State Constitution

§ 472A.41 State Statutes

§ 472A.42 Administrative Regulations

§ 472A.43 Decisions

[1] Generally

[2] Emergency Regulations

[3] Hearings

[4] Notice Requirements

[5] Record of Hearing

§ 472A.44 Attorney General Opinions

[1] Interpretation of Government Code Procedural Requirements

[2] Applicability of Government Code Procedural Requirements

§ 472A.45 Law Reviews

§ 472A.46 Text References

§ 472A.47 Internet References

§§ 472A.48-472A.59 [Reserved]

§ 472A.60 Determine the Applicable Agency Rulemaking Procedure

[1] Identify the APA Procedures That an Agency Must Follow Under the APA for Non-Emergency Regulations

[2] Identify the Procedures That an Agency Must Follow Under the APA for "Emergency" Regulations

[3] Consider the Standards Used by the OAL When Reviewing Regulations

[4] Ascertain the Consequences of OAL Approval of a Regulation

[5] Ascertain the Consequences of OAL Disapproval

[6] Ascertain What Procedures Apply to Rulemaking Actions Not Subject to the APA

§ 472A.61 Review of Regulation

[1] Petition to Adopt, Amend, or Repeal a Regulation

[2] Reconsideration of Decision on Petition

§§ 472A.62-472A.69 [Reserved]

§ 472A.70 Petition for Adoption, Amendment or Repeal of a Regulation [Gov. Code § 11340.6]

[1] FORM

[2] Use of Form

[3] Cross References

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Chapter 472A AGENCY RULEMAKING PROCEDURES
PART I. SCOPE

41-472A California Forms of Pleading and Practice--Annotated § 472A.01

§ 472A.01 Scope of Chapter

This chapter discusses the procedures that govern the promulgation or adoption of regulations and rules by California public agencies. The legal background discussion in Part II includes the following:

- Subpart A discusses agency rulemaking procedures under the California Administrative Procedure Act (APA) provisions and review of regulations by the Office of Administrative Law (OAL) [*see § 472A.10* et seq.].

- Subpart B discusses agency rulemaking procedures for agencies that are not subject to the APA, including exemptions, and agency specific rulemaking procedures [*see § 472A.30* et seq.].

Part V includes a form of petition to request that a public agency amend, repeal, or adopt a regulation [*see § 472A.70*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingState Proceedings

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PART I. SCOPE

41-472A California Forms of Pleading and Practice--Annotated § 472A.02

§ 472A.02 Cross References

[1] Related Coverage of Agency Rule Making

For further discussion and forms relating to the legislative or rulemaking functions of California public agencies, including an overview of rule adoption requirements and judicial review of these functions, see respectively:

- Ch. 472, *Public Agency Rules*.
- Ch. 472B, *Review of Agency Rulemaking*.

For discussion and forms relating to the law governing access to and conduct of meetings by California public agencies, including rule making meetings, see Ch. 470B, *Public Agency Meetings* .

[2] Judicial Remedies and Review

For discussion and forms relating to civil actions for declaratory or injunctive relief generally, which may be available to review administrative regulations, see respectively Ch. 182, *Declaratory Relief* , and Ch. 303, *Injunctions* .

For discussion and appropriate forms relating to a proceeding for a writ of review, which may be available to obtain a judicial determination as to the validity of a regulation adopted by certain state agencies, see Ch. 492, *Review (Certiorari), Writ of*.

For other discussion and forms relating to judicial review generally, see:

- Ch. 40, *Appeal: An Overview*, through Ch. 54, *Appeal: California Supreme Court Review* (discussion and forms relating to civil appeals).
- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to immediate judicial review of orders by extraordinary writ of mandate or prohibition).

[3] Public Administrative Law Generally

For related discussion of California public administrative law generally, including discussion of public agency functions and powers (including adjudicative or quasi-judicial powers), and organization generally, see Ch. 470, *Overview of Public Administrative Law* (general discussion of judicial power is in §§ 470.12[5]). For detailed discussion of the general procedures imposed in agency proceedings by constitutional due process and related statutory requirements, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

For detailed discussion and forms relating to the law governing disclosure of public records under the California Public Records Act [*Cal. Gov. Code §§ 6250 et seq.*], see Ch. 470C, *Public Records Act* .

For detailed discussion and forms relating generally to agency investigations and inspections, see, Ch. 471, *Investigations by Public Agencies* , and Ch. 471A, *Inspections by Public Agencies* .

For detailed discussion and forms concerning quasi-judicial agency action, or public agency adjudication, and detailed discussion and forms relating to judicial review of such adjudications, see respectively Ch. 473, *Public Agency Adjudication* , et seq., and Ch. 474, *Availability of Judicial Review of Agency Decisions* .

[4] Specific Public Agencies

For a brief discussion of the Public Utilities Commission's constitutional authority to exercise legislative power, see Ch. 480, *Public Utilities* .

For coverage relating to specifically public agencies (primarily with respect to their adjudicative rather than rule making activities), see *Ch. 470, Overview of Public Administrative Law, § 470.02[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency InvestigationsGeneral OverviewAdministrative LawAgency InvestigationsScopeInspectionsAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawGovernmental InformationPersonal InformationConditions of DisclosureGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewRemediesInjunctive ReliefAdministrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewRemediesProhibitionConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthority

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Chapter 472A AGENCY RULEMAKING PROCEDURES
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41-472A California Forms of Pleading and Practice--Annotated §§ 472A.03-472A.09

[Reserved]

§§ 472A.03[Reserved]

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Chapter 472A AGENCY RULEMAKING PROCEDURES
PART II. LEGAL BACKGROUND
A. Rulemaking Under the APA

41-472A California Forms of Pleading and Practice--Annotated § 472A.10

§ 472A.10 Governing Law

The procedures used by most public agencies for rulemaking are set out in that part of the Administrative Procedure Act (APA) entitled "Administrative Regulations and Rulemaking," that is, *Gov. Code § 11340 et seq.*

The provisions of *Gov. Code § 11340 et seq.* collectively comprise Chapter 3.5 of Part I (State Departments and Agencies) of Division 3 (Executive Department) of Title 2 (State Government) of the Government Code. This law is referred to hereafter for convenience as "Chapter 3.5."

Together with Chapter 4 ("Office of Administrative Hearings," *Gov. Code § 11370 et seq.*), Chapter 4.5 ("Administrative Adjudication: General Provisions," *Gov. Code § 11400 et seq.*), and Chapter 5 ("Administrative Adjudication: Formal Hearings," *Gov. Code § 11500 et seq.*), these provisions comprise and may be cited as the Administrative Procedure Act (hereafter the APA) [*see Gov. Code § 11370*].

As discussed in Subpart B [*see § 472A.30* et seq.], various other statutes or constitutional provisions apply to authorize and otherwise govern the rulemaking of specific agencies.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingState Proceedings

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Chapter 472A AGENCY RULEMAKING PROCEDURES
PART II. LEGAL BACKGROUND
A. Rulemaking Under the APA

41-472A California Forms of Pleading and Practice--Annotated § 472A.11

§ 472A.11 Rulemaking Procedures Under the APA

[1] Agencies Subject to Rulemaking Requirements

Chapter 3.5 (*Gov. Code § 11340 et seq.*) of the California Administrative Procedure Act (APA) [for discussion, *see § 472A.10*] sets out the procedures for agency promulgation of regulations as well as review of proposed regulations of most agencies by the Office of Administrative Law (OAL) [*see Gov. Code § 11342.550* (definition)].

The term "agency" or "state agency" includes all departments within the executive branch of government that are not otherwise specifically excepted from these APA provisions [*Gov. Code § 11342.520* (definition); *see, e.g., Gov. Code §§ 11343, 11351*].

Agencies in the judicial or legislative departments of the state government are by definition specifically exempted [*Gov. Code § 11340.9* (definition); *see also Lauderbach v. Zolin (1995) 35 Cal. App. 4th 578, 585, 41 Cal. Rptr. 2d 434* (APA rulemaking requirements do not apply to statutory enactments)]. This exemption would include, for example, agencies within the judicial branch other than the courts themselves, such as the Judicial Council and the Commission on Judicial Performance.

Other agencies within the executive branch that are exempt from all or part of the APA rulemaking procedures of Chapters 3.5 are discussed in Subpart B [*see § 472A.30* et seq.].

The California APA's procedural requirements include:

- Notice to the public [*Gov. Code §§ 11346.4, 11346.5*; *see § 472A.12*].

- An opportunity for public response to the merits of the state agency's proposed action [*Gov. Code § 11346.8*; *see § 472A.13*].

- Explanation by the adopting agency of its reasons for the proposed regulation [*Gov. Code §§*

11346.2, *11346.3*; *see § 472A.14*].

- Review by the Office of Administrative Law (OAL) to determine whether the adopted regulation actually becomes law or is returned to the state agency without approval [*Gov. Code §§ 11349.1*, *11349.3(a)*; *see § 472A.16*].

- Publication of approved regulations [*Gov. Code § 11344*; *see § 472A.17*].

The OAL compiles and publishes the official regulations and notices thereof in the California Regulatory Notice Register [*Gov. Code § 11344.1*; *see § 472A.12[5]*], the California Code of Regulations [*Gov. Code § 11344(a)*; *see § 472A.17[1]*], and the California Code of Regulations Supplement [*Gov. Code § 11344(b)*; *see § 472A.17[2]*].

Note that the statutes specifically governing a particular agency often impose additional procedural rulemaking requirements that are not supplanted by the general California APA requirements [*Gov. Code § 11346*].

[2] Agency Use of Internet and Electronic Communication in Rulemaking

"Electronic communication" is defined to mean electronic transmission of written or graphical material by electronic mail, facsimile, or other means, but does not include voice communication [*Gov. Code § 11340.85(a)*]. Agencies may permit and encourage, but may not require, use of electronic communication, in rulemaking [*Gov. Code § 11340.85(b)(1)*]. Agencies may publish or distribute by electronic communication rulemaking documents required by statute or regulation but agencies are prohibited from exclusively using elecronic communication to publish or distribute rulemaking documents [*Gov. Code § 11340.85(b)(2)*]. Rulemaking notices required by statute or regulation may be delivered by electronic communication to any person who has expressly indicated a willingness to receive the notice by electronic communication [*Gov. Code § 11340.85(b)(3)*]. A comment regarding a regulation may be delivered to an agency by means of electronic communication [*Gov. Code § 11340.85(b)(4)*]. A petition related to a regulation may be delivered by electronic communication to an agency that has expressly indicated a willingness to receive a petition by electronic communication [*Gov. Code § 11340.85(b)(5)*]. A petition regarding a regulation may be delivered to an agency by means of electronic communication if the agency has expressly indicated a willingness to receive a petition by means of electronic communication [*Gov. Code § 11340.85(b)(5)*].

Agencies that maintain internet web sites or other similar forums for the electronic publication or distribution of written material are required to publish information regarding a proposed regulation or regulatory repeal or amendment including the following materials on the agency web site or other forum [*Gov. Code § 11340.85(c)*]:

- Public notices required by statute or regulation. [*Gov. Code § 11340.85(c)(1)*];

- The initial statement of reasons prepared under *Gov. Code § 11346.2(b)* [*Gov. Code § 11340.85(c)(2)*];

- The final statement of reasons prepared under *Gov. Code § 11346.9(a)* [*Gov. Code § 11340.85(c)(3)*];

- Notice of a decision not to proceed under *Gov. Code § 11347* [Gov. Code § 11340.85c)(4)];

- The text of a proposed action or instructions on how to obtain a copy of the text [*Gov. Code § 11340.85(c)(5)*];

- A statement of any decision made by the office regarding a proposed action [*Gov. Code § 11340.85(c)(6)*];

- The date a rulemaking action is filed with the Secretary of State [*Gov. Code § 11340.85(c)(7)*];

- The effective date of a rulemaking action [*Gov. Code § 11340.85(c)(8)*]; and

- A statement to the effect that a business or person submitting a comment regarding a proposed action has the right to request a copy of the final statement of reasons [*Gov. Code § 11340.85(c)(9)*].

- The text of a proposed emergency adoption, amendment, or repeal of a regulation pursuant to Section 11346.1 and the date it was submitted to the office for review and filing [*Gov. Code § 11340.85(c)(10)*].

A document that is required to be posted pursuant to subdivision (c) shall be posted within a reasonable time after issuance of the document, and shall remain posted until at least 15 days after the rulemaking action is filed with the Secretary of State or notice of a decision not to proceed is published pursuant to *Gov Code § 11347* [*Gov. Code § 11340.85(d)*].

Publication under these requirements supplements any other required form of publication or distribution. Failure to comply with these requirements is not grounds for disapproval of a proposed regulation. Agencies are not required to establish or maintain websites or other forums for electronic publication or distribution of written material [*Gov. Code § 11340.85(d)*]. OAL is not precluded by this statute from requiring agencies to submit to OAL in electronic form rulemaking materials to be published in the California Code of Regulations or the California Regulatory Notice Register [*Gov. Code § 11340.85(e)*]. This statute is intended tomake the regulatory process more user-friendly and to improve communication between interested parties and the regulatory agencies [*Gov. Code § 11340.85(f)*].

A new requirement for state agencies conducting rule making proceedings and other activities is that every state agency, as defined in *Gov. Code § 11000*, shall post on its homepage of its website, no later than January 1, 2007, a link entitled "Decisions Pending and Opportunities for Public Participation" where the link contains all of the following information [*Gov. Code § 11364(a)(1)-(5)*] :

(1) All applicable bulletins and notices required pursuant to this chapter.

(2) Notices of all public meetings and agendas. This information shall be posted in compliance with the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Division 3 of Title 2), the Bagley-Keene Open Meeting Act (Article 9 (commencing with Section 11120) of Division 3 of Title 2) or other applicable provisions of law, but no later than 10 days before the meeting where the regulatory action is on the agenda.

(3) Instructions on how the public may submit written comments or otherwise participate in administrative procedures, meetings, and hearings with a link entitled "How to Participate."

(4) A link to the text of all regulations and statutes related to current bulletins and notices entitled "Laws and Regulations Relevant to Current Public Proceedings." This requirement can be met by a link to another Web site containing the proposed regulation or statute.

(5) A link that provides an opportunity for the public to comment on draft regulations pursuant to this chapter through electronic mail or by facsimile entitled "Submit Your Comments on Draft Regulations Here."

Furthermore, every state agency shall, to the extent practicable and can be done utilizing existing resources, have hearings on proposed regulations televised over the Internet via a webcast or other technology [*Gov. Code § 11364(b)*]. These requirements only apply to state agencies that otherwise have an Internet website and are in addition to any other

information that is otherwise required by law [*Gov. Code § 11364(c)(1)*]. This statute does not affect the discretion of a state governmental entity to do either of the following [*Gov. Code § 11364(c)(2)(A), (B)*]:

(A) Post on its website or the internet information in addition to what is required to be disclosed by this article.

(B) Post accurate, useful, and explanatory plain language information.

[3] Unique Identification Number for each Regulatory Rulemaking Action

OAL is required to establish a system to assign a unique identification number to each regulatory action of a state agency [*Gov. Code § 11341(a)*]. Both OAL and the state agency undertaking the regulatory action are required to use the identification number assigned by OAL to refer to the regulatory action for which a notice has already been published in the California Regulatory Notice Register [*Gov. Code § 11341(b)*]. The identification number is required to provide sufficient information for a member of the public to identify and track a regulatory action both with OAL and with the state agency taking the regulatory action. No other information relating to the regulatory action shall be required of a member of the public if the identification number of the regulatory action has been provided [*Gov. Code § 11341(c)*]. However, the requirements of this law are not effective until January 1, 2002 [*Gov. Code § 11345*].

[4] Public Participation Prior to Notice of Proposed Rulemaking

State agencies that propose to adopt regulations are required, prior to publication of the notice required by *Gov. Code § 11346.5*, to involve parties who would be subject to the proposed regulations in public discussions regarding these proposed regulations, when the proposed regulations involve complex proposals or a large number of proposals that cannot easily be reviewed during the comment period. This requirements is designed to increase public participation and improve the quality of regulations [*Gov. Code § 11346.45(a)*]. Public discussion requirements do not apply to state agencies that are required to implement federal law and regulations for which there is little or no discretion on the part of the state to vary [*Gov. Code § 11346.45(b)*]. If the agency does not or cannot comply with public discussion requirements, the agency is required to state the reasons for noncompliance with reasonable specificity in the rulemaking record [*Gov. Code § 11346.45(c)*]. Public discussion requirements are not subject to judicial review nor to OAL review under *Gov. Code § 11349.1* [*Gov. Code § 11346.45(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingFormal RulemakingAdministrative LawAgency RulemakingNotice RequirementsAdministrative LawAgency RulemakingState ProceedingsAdministrative LawGovernmental InformationPublic MeetingsSunshine Legislation

California Forms of Pleading and Practice--Annotated

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Chapter 472A AGENCY RULEMAKING PROCEDURES
PART II. LEGAL BACKGROUND
A. Rulemaking Under the APA

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§ 472A.12 Public Notice

[1] General Requirements

Once an agency has developed the specific language of a proposed regulation, the APA requires that those persons who are interested, affected, or both, by the proposed state action, receive proper notice of its pendency or initiation in advance of any formal action on the matter [*Gov. Code § 11346.4(a)*].

This notice of the proposed regulatory action must follow a prescribed format [*see* [2], *below*], and meet both publication requirements [*see* [3], *below*], and mailing requirements [*see* [4], *below*]. These requirements are temporarily waived when an agency adopts "emergency" regulations [*Gov. Code §§ 11346.1(a), 11349.6*; *see § 472A.13*].

The publication and mailing requirements must be satisfied at least 45 days prior to either the close of the public comment period or the public hearing [*Gov. Code § 11346.4(a)*]. That is, once publication of the notice has been accomplished, the agency can take no further action on the proposal until a minimum of 45 days has passed. During this period the agency is required to accept written comments from the public. These comments become part of the record of the rulemaking proceeding and must be addressed in that record by the agency [*Gov. Code §§ 11346.9(a)(3), 11347.3(a)(6)*; *see § 472A.13*].

Unless the APA requirements are met, the agency does not formally establish jurisdiction to commence rulemaking activity. Only a valid publication of notice will support the final adoption and approval of a regulation adopted pursuant to that notice [*Gov. Code § 11349.3(b)*; *see Gov. Code § 11346.2* (notice requirement)]. Regulations adopted pursuant to a defective notice may be invalidated by a court [*Gov. Code § 11350(a)*].

Thus, a practitioner's initial inquiry in challenging a regulatory action should be whether the agency satisfied the notice publication and mailing requirements, in order to preserve this issue for the court's consideration in an action challenging the procedural validity of the adoption of a regulation [*Gov. Code § 11350*; *see* Ch. 472B, *Review of Agency Rulemaking* , for a discussion of judicial review of agency rulemaking].

[2] Content Requirements

[a] General Information

The notice must contain information adequate to define the scope of the changes the state agency is proposing. This notice is reviewed by the OAL to ensure that the specific minimum information required by the APA is included [*Gov. Code §§ 11347.3(a)(2), 11349.1(a)*; *see § 472A.16*]. Any other requirements prescribed by other statutes are in addition to, and not in lieu of, the APA form and manner of notice requirements [*Gov. Code § 11346.4(f)*].

The APA requires at a minimum that the published notice contain all of the following [*Gov. Code § 11346.5(a)*]:

- A statement of the time, place, and nature of proceedings for the adoption, repeal, or amendment of regulations [*Gov. Code § 11346.5(a)(1)*].

- Reference to the authority under which the regulation is proposed, and a reference to the specific statutory code sections or other legal authority that is being implemented, interpreted, or made specific [*Gov. Code § 11346.5(a)(2)*].

- An informative digest containing a clear and concise summary of any existing laws and regulations directly related to the proposed action and the effect the proposed action would have [*Gov. Code § 11346.5(a)(3)*]. If the proposed action differs substantially from an existing comparable federal regulation or statute, this digest must also include a brief description of the significant differences and the full citation of the federal regulations or statutes and a summary of agency efforts to minimize duplication and conflicts pursuant to law [*Gov. Code § 11349(f)*]. The digest must be drafted in a format similar to the legislative counsel's digest on legislative bills [*Gov. Code § 11346.5(a)(3)*].

- Any other matters prescribed by a statute applicable to the specific state agency or to any specific regulation or class of regulations [*Gov. Code § 11346.5(a)(4)*].

- A determination as to whether the regulation imposes a mandate on local agencies or school districts, and if so, whether the mandate requires state reimbursement [*Gov. Code § 11346.5(a)(5)*; *see Gov. Code §§ 17500-17630*].

- An estimate prepared in accordance with instructions adopted by the Department of Finance pursuant to *Gov. Code § 11346.5(a)(6)* of the cost or savings to any state agency, the cost to any local agency or school district that is required to be reimbursed by the state [*see Gov. Code §§ 17500-17630*], other nondiscretionary cost or savings imposed on local agencies, and the cost or savings in federal funding to the state. "Cost or savings" means additional costs or savings, both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations [*Gov. Code § 11346.5(a)(6)*].

- A statement that the adopting agency must determine that no reasonable alternative considered by the agency or that has otherwise been identified and brought to the attention of the agency would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action [*Gov. Code § 11346.5(a)(12)*].

- The name and telephone number of the following persons [*Gov. Code § 11346.5(a)(13)*]: the agency representative and designated backup contact person to whom inquiries concering the proposed administrative action may be directed [*Gov. Code § 11346.5(a)(13)(A)*] and an agency person or persons designated to respond to questions on the substance of the proposed regulations, where appropriate [*Gov. Code § 11346.5(a)(13)(B)*].

- The date by which written comments on the proposed action must be received in order to be considered by the agency before it adopts the final proposal [*Gov. Code § 11346.5(a)(14)*].

- Reference to the fact that the agency proposing the action has prepared a statement of reasons for the proposed action, has available all the information on which its proposal is based, and has available the express terms of the proposed action [*Gov. Code § 11346.5(a)(15)*; *see § 472A.14*]. The agency contact person named in the notice is required to make available to the public on request the express terms of the proposed action using underline or italics to indicate additions to, and strikeout to indicate deletions from, the California Code of Regulations. The agency contact person is also required to make available to the public on request the location of public records, including reports, documentation, and other materials, related to the proposed action [*Gov. Code § 11346.5(b)*].

- A statement that if a public hearing has not been scheduled, any interested person or his or her duly authorized representative may request that one be held; however, this request must be made no later than 15 days prior to the close of the written comment period [*Gov. Code § 11346.5(a)(16)*; *see Gov. Code § 11346.8* (procedures to request a public hearing)].

- A statement indicating that the full text of any regulation changed after the public hearing (or end of the comment period if no hearing is held) [*Gov. Code § 11346.8*] will be available to the public for at least 15 days before the agency adopts its final action on the regulation [*Gov. Code § 11346.5(a)(17)*].

[b] Economic Impact on Business

State agencies proposing to adopt or amend or repeal administrative regulations are required to assess the potential for adverse economic impact on California business enterprises and individuals, avoiding the imposition of unnecessary or unreasonable regulations or reporting, record keeping, or compliance requirements. To assess this potential when proposing to adopt, amend, or repeal a regulation, agencies are required to [*Gov. Code § 11346.3(a)*]:

- Obtain adequate information concerning the need for, and consequences of, proposed governmental regulation.

- Consider the impact of regulations on businesses with consideration of industries affected. Agencies are required to make this assessment early in the regulatory process.

If a state agency proposing to adopt or amend any administrative regulation determines that the action *may have* a significant adverse economic impact on business, it must include the following information in the notice of proposed action [*Gov. Code § 11346.5(a)(7)*]:

- An identification of the types of businesses that would be affected.

- A description of the projected reporting, recordkeeping, and other compliance requirements that would result from the proposed action. No administrative regulation that requires a report will apply to businesses [*see Gov. Code § 11342.610(a)* (small business defined)] unless the state agency adopting the regulation makes a finding that it is necessary for the health, safety, or welfare of the people of California [*Gov. Code § 11346.3(c)*].

- The following statement: "The (*name of agency*) finds that the (adoption/amendment) of this regulation may have a significant adverse economic impact on businesses. The (*name of agency*) (has/has not) considered proposed alternatives that would lessen any adverse economic impact on

business, and invites you to submit such proposals."

Submissions may include the following considerations:

- The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to businesses.

- Consolidation or simplification of compliance and reporting requirements for businesses.

- The use of performance standards rather than prescriptive standards [*see Gov. Code § 11342.570* (performance standard defined); *Gov. Code § 11342.590* (prescriptive standard defined)].

- Exemption or partial exemption from the regulatory requirements for businesses.

The state agency proposing to adopt or amend any regulation must refer in the notice to any studies or relevant data that were relied on in making the determination that the regulation has no adverse impact [*Gov. Code § 11346.5(a)(8)*].

If the state agency determines that the action *will not have* a significant adverse economic impact on business including the ability of California businesses to compete with businesses in other states, it must make a declaration to that effect in the notice of proposed action [*Gov. Code § 11346.5(a)(8)*]. The stated effect (or noneffect) of the action on business including the ability of California businesses to compete with businesses in other states, is purely a notice requirement; the OAL has no jurisdiction to pass on the merits of the proposal because of its effect on business [*Gov. Code § 11346.5(a)(8)*].

[c] Cost Impact

The notice of proposed action must also include a description of all cost impacts, known to the agency at the time the notice of proposed action is submitted to the office, that a representative private person or business would necessarily incur in reasonable compliance with the proposed action. If no cost impacts are known to the agency, it shall state the following: "The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action" [*Gov. Code § 11346.5(a)(9)*].

[d] Plain English Policy

Agencies that propose to adopt or amend administrative regulations that affect small businesses must adopt a plain English policy [*Gov. Code § 11346.5(a)(3)(B)*]. The reason for this requirement is that small businesses are at a distinct disadvantage in complying with administrative regulations because they do not have the resources to hire experts to assist them in understanding and complying with those regulations [*Gov. Code § 11340(g)*].

Plain English is defined to mean language that satisfies the standard of clarity provided in *Gov. Code § 11349* [*Gov. Code § 11342.580*]. The plain English policy means that agencies are required to meet the following requirement in the process of adopting or amending regulations, adopt a plain English policy statement overview for each proposed regulation that would explain all of the following: (a) the broad objectives of the proposed regulation; and (b) the specific objectives of the proposed regulation, if appropriate [*Gov. Code § 11346.5(a)(3)(B)*].

[3] Publication Requirements

The state agency must deliver to the OAL a copy of the notice of proposed action [*Gov. Code § 11343(d)*]. If the OAL finds that all requirements have been met, it will approve the notice and publish it in the California Regulatory Notice Register [*see* [5], *below*] as prepared by the OAL for each state agency's notice of regulatory action [*Gov. Code §*

11346.4(a)(5), (d)].

Publication of a legally sufficient notice in the California Regulatory Notice Register establishes, for a period of one year, the agency's jurisdiction to adopt a final action regarding regulations proposed by the published notice [*Gov. Code § 11346.4(b)*]. If the regulatory action proposed in the notice is not completed and transmitted to OAL within the one-year period, the agency must initiate the entire process again beginning with the publication and mailing of a new notice [*Gov. Code § 11346.4(b)*]. When appropriate in the judgment of the state agency, the notice will also be published in the form and manner that the state agency prescribes [*Gov. Code § 11346.4(a)(4)*]. The notice of proposed action shall also be posted on the agency's website if the agency has a website [*Gov. Code § 11346.4(a)(6)*].

[4] Mailing Requirements

Once the OAL has approved the notice for publication, the agency must then mail a copy to the following [*Gov. Code § 11346.4(a)*]:

- Every person who has filed a request for notice of regulatory actions with the state agency. Each state agency is required to give a person filing a request for notice of regulatory action the option of being notified of all proposed regulatory actions or being notified of regulatory actions concerning one or more particular programs of the state agency [*Gov. Code § 11346.4(a)(1)*].

- The director of the department, when the state agency is within a state department [*Gov. Code § 11346.4(a)(2)*].

- A representative number of small business enterprises or their representatives that have been identified as being affected by the proposed action. Representative for the purposes of this paragraph includes, but is not limited to, a trade association, industry association, professional association, or any other business group or association of any kind that represents a business enterprise or employees of a business enterprise [*Gov. Code § 11346.4(a)(3)*].

- Any person or group of persons whom the agency believes to be interested in the proposed action.

Notwithstanding this mailing requirement, failure to mail notice to any person listed above will not invalidate any action taken by a state agency [*Gov. Code § 11346.4(f)*]. It is doubtful that the statute intends to completely excuse the agency from complying with mailing requirements. It is more likely that the rule simply means that an agency's good faith attempt to comply with the mailing requirement will preclude any challenge to the agency's action, based on its inadvertent failure to fully comply. The rulemaking record must contain a statement confirming that the agency complied with the notice requirement [*Gov. Code § 11347.3(a)*; *see § 472A.16*]. The agency, however, is not required to provide a copy of its mailing list to support that statement [*1 Cal. Code Reg. § 86*].

[5] The California Regulatory Notice Register

The official notices of regulatory changes proposed by state agencies are published in a weekly publication, called the California Regulatory Notice Register (Notice Register), each Friday [*Gov. Code § 11344.1(a)(1)*; *1 Cal. Code Reg. § 5*]. In addition, the Notice Register contains formal notices approved by OAL for the week, a summary of regulations filed with the secretary of state that week, and other information relating to the regulatory process. The publication date of the notice is the first day of the 45-day minimum public comment period [*see Gov. Code § 11346.4*]. OAL is also required to publish summaries of all regulation decisions issued in the previous week detailing the reasons for disapproval of a regulation, the reasons for not filing an emergency regulation, and the reasons for repealing a regulation. OAL must also publish a quarterly index of regulation decisions in the California Regulatory Notice Register [*Gov. Code § 11344.1(a)(3)*]. OAL is also required to post on its website, on a weekly basis *Gov. Code §*

11344.1(c)]: The California Regulatory Notice Register, and each issue shall stay posted for at least 18 months [*Gov. Code § 11344.1(c)(1)*]; and one or more Internet links to assist the public to gain access to to the text of regulations proposed by state agencies *Gov. Code § 11344.1(c)(2)*]. OAL does not have to make available on its website the California Regulatory Notice Register until January 1, 2002 [*Gov. Code § 11345*].

The Notice Register also includes the OAL's detailed letters of disapproval of regulations, a list by title and section of regulations approved and filed with the secretary of state that week, and information regarding regulatory determinations [*Gov. Code § 11340.5(c)(3)*; *1 Cal. Code Reg. § 127*]. A subscription to the Notice Register may be obtained from the General Services Department, Publications Section, P.O. Box 1015, North Highland, California 95660 [*Gov. Code § 11344.4*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingFormal RulemakingAdministrative LawAgency RulemakingNotice RequirementsAdministrative LawAgency RulemakingRule Application & InterpretationValidityAdministrative LawAgency RulemakingState ProceedingsAdministrative LawJudicial ReviewGeneral OverviewGovernmentsState & Territorial GovernmentsFinance

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§ 472A.13 Public Response to Proposed Regulation

[1] Opportunities for Public Response

[a] Publication of Notice of Proposed Action

The APA provides a series of opportunities for the regulated public to comment throughout the various stages of the process. The first opportunity occurs at the time the notice of proposed action is published in the Notice Register. During the 45 days immediately following the publication of the notice [*Gov. Code § 11346.4(a)*], the agency is required to accept written comments [*Gov. Code § 11346.8(a)*; *see* [2], *below*]. Each state agency subject to rule making requirements is required to keep its rulemaking records on all of that agency's pending rule making actions, in which the notice has been published in the California Regulatory Notice Register, current and in one central location [*Gov. Code § 11348*].

The notice procedure does not require an agency to schedule a hearing. Furthermore, due process does not require a hearing. A quasi-legislative rulemaking action is not subject to procedural requirements imposed by due process of law; those requirements apply only to "adjudicative" actions [*Franchise Tax Board v. Superior Court (1950) 36 Cal. 2d 538, 549, 225 P.2d 905* ; Rivera v. Division of Industrial Welfare (1968) 265 Cal. App. 2d576, 587, *265 Cal. App. 2d 576, 71 Cal. Rptr. 739* ; *see* Ch. 470A, *Due Process Restrictions on Public Agencies* , for discussion of due process requirements applicable to administrative agencies].

If the agency's notice indicates a time and place for a public hearing, that hearing is the next opportunity for public response [*see Gov. Code § 11346.5(a)(1)*]. At the hearing, statements, arguments, or contentions may be presented either orally, in writing, or both [*Gov. Code § 11346.8(a)*; *see* [3], *below*].

Even if the published notice does not include a time and place for such a hearing, any interested person or his or her duly authorized representative person may request that a hearing be held, and the agency is then required to hold a hearing [*Gov. Code § 11346.8(a)*]. The request must be made in writing no later than 15 days prior to the close of the written comment period [*Gov. Code § 11346.8(a)*]. Once the date for the requested public hearing has been set, the agency is required, "to the extent practicable," to mail notice of the date, time, and place of the hearing to each person

who has filed a request with the agency to be notified of all regulatory actions it proposes [*Gov. Code § 11346.8(a)*]. Apparently, an agency's attempt to comply with the mailing requirement will preclude any challenge to the agency's action based on its inadvertent failure to fully comply [*see Gov. Code § 11346.4(f)* (similar provision applicable to notice of proposed action); *see also § 472.11[4]*].

When an agency decides not to proceed with a proposed action after having published a notice of proposed action under *Gov. Code § 11346.4*, the agency is required to deliver notice of the decision not to proceed to OAL for publication in the California Regulatory Notice Register [*Gov. Code § 11347(a)*]. Publication of a notice not to proceed terminates the effect of the notice of proposed action referred to in the notice. However, an agency is not prohibited by this statute from proposing a new regulatory action that is similar or identical to a regulatory action that was previously the subject of a notice not to proceed [*Gov. Code § 11347(b)*].

[b] Change in Text of Proposed Regulation

The next opportunity for public comment occurs if the agency makes a change to the text of the regulation that was originally provided in the notice [*see Gov. Code § 11346.5*], other than a change that is (1) nonsubstantial or solely grammatical in nature, or (2) sufficiently related to the original text that the public was adequately placed on notice that the change could result from the originally proposed regulatory action [*Gov. Code § 11346.8(c)*]. Changes are "nonsubstantial" if they clarify without materially altering the requirements, rights, responsibilities, conditions, or prescriptions contained in the original text [*1 Cal. Code Reg. § 40*]. Changes to the original text will be deemed to be "sufficiently related" if a reasonable member of the directly affected public could have determined from the notice that these changes to the regulation could have resulted [*1 Cal. Code Reg. § 42*].

Changes that are substantial or not sufficiently related under these standards trigger a formal notice and mailing procedure similar to the initial notice and mailing process [*see § 472A.11*]. The rulemaking record [*see § 472A.16[2]*] must contain a statement that confirms that the agency complied with this procedure and specifies the date of compliance [*1 Cal. Code Reg. § 44(b)*]. Within 15 calendar days prior to the adoption of a change, the agency must mail a notice stating the period within which comments will be accepted and a copy of the full text of the regulation as it was originally proposed (with the proposed change clearly indicated) [*16 Cal. Code Reg. § 46*] to all persons who meet one or more of the following requirements [*1 Cal. Code Reg. § 44(a)*]:

- Testified at the public hearing.
- Submitted written comments at the public hearing.
- Sent comments that were received by the agency during the public comment period.
- Requested notification from the agency of the availability of the change.

In addition to complying with these mailing requirements, the agency must make available for public review and comment any new supporting documents and/or information on which its rationale for the action is based. The documents and information must be specifically described in the notice, along with information regarding where and when they are available for public inspection. The agency is required to make the documents and information available for public inspection at the specified location for at least 15 calendar days before the resulting regulations can be adopted [*1 Cal. Code Reg. § 45(a), (b)*].

When an agency adds any technical, theoretical, or empirical study, report, or similar document to the rule making file after publication of the notice of proposed action and relies on the document in proposing the action, the agency is required to make the document available to rulemaking participants and the public [*Gov. Code § 11347.1(a)*]. At least 15 calendar days before the proposed action is adopted by the agency, the agency is required to mail a notice identifying

the added document and stating the place and business hours that the document is available for public inspection [*Gov. Code § 11347.1(b)*] to the following persons:

- Persons who testified at the public hearing [*Gov. Code § 11347.1(b)(1)*];

- Persons who submitted written comments at the public hearing [*Gov. Code § 11347.1(b)(2)*];

- Persons whose comments were received by the agency during the public comment period [*Gov. Code § 11347.1(b)(3)*]; and

- Persons who requested notification from the agency of the availability of changes to the text of the proposed regulation [*Gov. Code § 11347.1(b)(4)*].

Also, the document must be made available for public inspection at the location described in the notice for at least 15 calendar days before the proposed action is adopted by the agency [*Gov. Code § 11347.1(c)*]. Written comments on the document or information received by the agency during the availability period must be summarized and responded to in the final statement of reasons [*Gov. Code § 11347.1(d)*]. The rulemaking file shall contain a statement confirming that the agency complied with the requirements of this statute and stating the date on which the notice was mailed [*Gov. Code § 11347.1(e)*]. If there are no persons listed above, then the rulemaking file is required to contain a confirming statement to that effect [*Gov. Code § 11347.1(f)*].

[2] Public Comment

[a] Standards Subject to Comment

Because of the extensive procedural and substantive requirements imposed by the APA, comments may be made regarding various aspects of a proposed regulation. Any of the procedural requirements under the APA are proper subject matter for challenge by public comment [*see Gov. Code § 11346.8(a)*]. In addition, comments may be directed to the six substantive standards [*see § 472A.16[3]*] that the OAL will use in reviewing each regulation [*Gov. Code §§ 11349, 11349.1*]. These standards include the following:

- Whether the agency has met its burden of proving that it is necessary to adopt the particular regulation in order to effectuate the purposes of the underlying enabling statute [*Gov. Code § 11349(a), (f)*; *1 Cal. Code Reg. §§ 10, 11*].

- Whether this particular agency has the authority to adopt the regulation [*Gov. Code § 11349(b)*; *1 Cal. Code Reg. § 14*].

- Whether the regulation, as proposed, is clearly written [*Gov. Code § 11349(c)*; *1 Cal. Code Reg. § 16*].

- Whether the regulation is consistent with other laws of the state [*Gov. Code § 11349(d)*].

- Whether the agency has cited the appropriate statute that it is implementing, interpreting, or making specific [*Gov. Code § 11349(e)*; *1 Cal. Code Reg. § 14*].

- Whether the regulation does not duplicate other statutes or regulations [*Gov. Code § 11349(f)*; *1 Cal. Code Reg. § 12*].

Also, comments may challenge or refute any of the studies, data, or reports relied on by the agency in proposing the

regulation [*see Gov. Code §§ 11346.2, 11346.9*; *see also § 472A.14*]. For that reason, the agency is prohibited from adding any material to the rulemaking record after the close of the public hearing or comment period, unless provisions have been made for public comment on the matter [*Gov. Code § 11346.8(d)*].

[b] Review of Public Comments

Review of the public comments on regulatory proposals is a key element in OAL's process of determining whether a regulation has fully satisfied the six substantive standards [*see Gov. Code § 11349.1*; § 472A.16[3]]. The policy of the state, as enunciated in the APA, places great emphasis on the consideration by both OAL and the state agencies of comments from the public. Therefore, in its final statement of reasons for proposing the adoption, amendment, or repeal of a regulation [*see § 472A.14[2]*], each agency is required either (1) to prepare written responses for review by the OAL to each of the public comments made regarding the proposed regulation, or (2) to revise the regulation to accommodate each comment [*Gov. Code § 11346.9(a)(3)*]. If the agency fails to take either action, the OAL must disapprove the regulation [*Gov. Code § 11349.3(b)*]. For further discussion of the consideration of public comment in the rulemaking process, *see § 472A.14*.

[3] Public Hearing

If a public hearing is held, it is not an adversary hearing; it is simply an occasion for interested persons to present their views to the agency. The agency must allow any interested person or his or her duly authorized representative to present statements, arguments, or contentions [*see Gov. Code § 11346.8(a)*]. The express statutory requirements of notice and hearing [*see Gov. Code §§ 11346.4-11346.8*] include the implicit requirements that (1) the agency must act reasonably on the basis of evidence received, and (2) the evidence must be disclosed at the hearing and made part of the record [*California Asso. of Nursing Homes, etc. v. Williams (1970) 4 Cal. App. 3d 800, 810-811, 85 Cal. Rptr. 735]* .

The agency or its representative has the authority to administer oaths or affirmations [*see Gov. Code § 11346.8(b)*]. However, persons placed under oath are simply interested persons stating opinions and arguments. The law does not require that an opportunity for cross examination exist under those circumstances [*Rivera v. Division of Industrial Welfare (1968) 265 Cal. App. 2d 576, 590, 71 Cal. Rptr. 739]* , although an agency may permit reasonable cross examination [*E.M. Consumer Corp. v. Christensen (1975) 47 Cal. App. 3d 642, 652, 121 Cal. Rptr. 177]* .

The agency may continue or postpone a hearing from time to time, and to a place it determines [*see Gov. Code § 11346.8(b)*]. The transcript, recording, or minutes of the completed public hearing must be included in the agency's rulemaking file, which must be submitted to the OAL [*Gov. Code § 11347.3(a)(8)*; *see § 472A.14*]. If a comment made at a public hearing raises a new issue concerning a proposed regulation and a member of the public requests additional time to respond to the new issue before the state agency takes final action, it is the intent of the legislature that rulemaking agencies consider granting the request for additional time if, under the circumstances, granting the request is practical and does not unduly delay action on the regulation [*Gov. Code § 11346.8(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingFormal RulemakingAdministrative LawAgency RulemakingInformal RulemakingAdministrative LawAgency RulemakingNotice RequirementsAdministrative LawAgency RulemakingState Proceedings

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A. Rulemaking Under the APA

41-472A California Forms of Pleading and Practice--Annotated § 472A.14

§ 472A.14 Agency Rationale for Adoption of Regulations

[1] Initial Statement of Reasons

The APA imposes stringent requirements on a state agency to fully explain its rationale for each regulation it proposes to adopt. This rationale is set forth in the "Initial Statement of Reasons," which must be submitted to the OAL and made available to the public on request, along with the notice of proposed action [*Gov. Code § 11346.2*; *see § 472A.16* (rulemaking file)]. The statement shall include, but not be limited to, the following [*Gov. Code § 11346.2(b)*]:

- A statement of the specific purpose of each adoption, amendment, or repeal and the rationale for the agency's determination that each adoption, amendment, or repeal is reasonably necessary to carry out the purpose for which it is proposed. When the adoption or amendment of a regulation would mandate the use of specific technologies or equipment, a statement of the reasons why the agency believes these mandates or prescriptive requirements are required [*Gov. Code § 11346.2(b)(1)*].

- An identification of each technical, theoretical, and empirical study, report, or similar document on which the agency is relying in proposing the adoption, amendment, or repeal of a regulation [*Gov. Code § 11346.2(b)(2)*].

- A description of the reasonable alternatives to the regulation and the agency's reasons for rejecting those alternatives. In the case of a regulation that would mandate the use of specific technologies or equipment or prescribe specific actions or procedures, the imposition of performance standards shall be considered as an alternative [*Gov. Code § 11346.2(b)(3)(A)*].

- A description of any reasonable alternatives the agency has identified or that have otherwise been identified and brought to the attention of the agency that would lessen any adverse impact on small business. The agency is not required to artificially construct alternatives or to justify why it has not identified alternatives [*Gov. Code § 11346.2(b)(3)(B)*].

- Agencies are not required to construct alternatives artificially, describe unreasonable alternatives, or justify why the agency has not described alternatives, notwithstanding the requirements of *Gov. Code § 11346.2(b)(3)(A)*, and *(B)* [*Gov. Code § 11346.2(b)(3)(C)*].

- Facts, evidence, documents, testimony, or other evidence upon which the agency relies to support a finding that the action will nor have a significant adverse economic impact on business [*Gov. Code § 11346.2(b)(4)*].

- Departments, Boards, and Commissions within the Environmental Protection Agency, the Resources agency, or the State Fire Marshal must describe efforts, connected to a proposed rulemaking action, to avoid unnecessary duplication or conflicts with federal regulations contained in the Code of Federal Regulations addressing the same issues. These agencies may adopt regulations different from federal regulations contained in the Code of Federal Regulations addressing the same issues upon a finding of one or more of the following justifications [*Gov. Code § 11346.2(b)(6)*]: (a) the differing state regulations are authorized by law [*Gov. Code § 11346.2(b)(6)(A)*]; (b) the cost of differing state regulations is justified by the benefit to human health, public safety, public welfare, or the environment [*Gov. Code § 11346.2(b)(5)*]; or (c) both of these factors.

Furthermore, a state agency that adopts or amends a regulation mandated by federal law or regulations, the provisions of which are identical to a previously adopted or amended federal regulation, shall be deemed to have complied with the requirements of *Gov. Code § 11346.2(b)* if a statement to the effect that a federally mandated regulation or amendment to a regulation is being proposed, together with a citation to where an explanation of the provisions of the regulation can be found, is included in the notice of proposed adoption or amendment prepared consistent with *Gov. Code § 11346.5*.

However, the agency shall comply fully with rulemaking requirements of *Gov. Code § 11340 et seq.* as to regulation provisions that differ from similar provisions of federal regulations [*Gov. Code § 11346.2(c)*].

[2] Final Statement of Reasons

The agency must also prepare a "Final Statement of Reasons." This statement must be submitted to the OAL (along with an updated informative digest, discussed in [3], *below*) when the proposed regulation has been adopted and submitted to the OAL for review [*see § 472A.15*]. At a minimum, this final statement must include the following [*Gov. Code § 11346.9(a)*]:

- An update of the information contained in the Initial Statement of Reasons. If the update identifies any data or technical, theoretical, or empirical study, report, or other similar document on which it has relied to justify the adoption or amendment of the regulation, but which was not identified in the initial statement of reasons or otherwise made available for public review or comment, it must provide for such review and comment before submitting the regulation to the OAL [*Gov. Code § 11346.9(a)(1)*; *see Gov. Code § 11346.8*].

- The agency's determination of whether the regulation imposes a mandate on local agencies or school districts. If it determines that the regulation would impose a local mandate, the agency must indicate whether the mandate is reimbursable [*see Gov. Code §§ 17500-17630*]. If the agency finds that the mandate is not reimbursable, it must explain how it reached that conclusion [*Gov. Code § 11346.9(a)(2)*].

- A summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change. This requirement

applies only to objections or recommendations specifically directed at the agency's proposed action or the procedures followed by the agency in proposing or adopting the action [*Gov. Code § 11346.9(a)(3)*], the only kind of objection or recommendation the agency must respond to, and the only kind that the OAL may rely on in disapproving a regulation. Whether a public comment is actually a comment capable of consideration by OAL is determined on a case-by-case basis. An excellent source for guidance, however, are the disapproval decisions by OAL, which are published weekly in the Code Supplement and the Regulatory Notice Register.

- A determination with supporting information that no alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed than the final version. This inquiry must also examine whether any of the alternatives considered would be less burdensome to affected private persons than the regulation adopted and still be as effective [*Gov. Code § 11346.9(a)(4)*].

- An explanation setting forth the reasons for rejecting any proposed alternatives that would lessen the adverse impact on small businesses [*Gov. Code § 11346.9(a)(5)*].

[3] Updated Informative Digest

The agency must also prepare an update of the informative digest prepared at the commencement of the rulemaking proceeding, which must be submitted to the OAL along with the adopted regulation [*Gov. Code § 11346.9(b)*; *see § 472A.16*]. The agency is required to provide a clear and concise summary of the immediately preceding laws and regulations, if any, relating directly to the final version of the regulation and the effect the regulations, as adopted, would have on this body of law. The informative digest must be drafted in a format similar to the legislative counsel's digest on legislative bills [*Gov. Code § 11346.9(b)*].

The purpose of this provision is to ensure that the agency action takes into account any intervening changes in statutes or other relevant law that would have a direct bearing on the outcome of the proposed regulation. For example, it is possible that the statute authorizing the regulation, although in existence at the commencement of the rulemaking process, is repealed or substantially amended before the final version of the regulation is submitted to OAL. In that case, there is a significant probability that the regulation would fail the authority standard [*see Gov. Code § 11349.1(a)(2)*; § 472A.16[3]], since the OAL reviews the statutory authority for the regulation as it exists at the time the regulation is submitted to OAL, rather than at the time the action was begun [*see 1 Cal. Code Reg. § 14*].

[4] Waiver of the Rationale Requirement

A state agency that adopts or amends a regulation that is (1) mandated by a federal statute or regulation, and (2) identical to a previously adopted or amended federal regulation, will be deemed to have complied with the statement requirements [*see* [1]-[3], *above*] under certain circumstances. The agency must include in the initial notice [*Gov. Code § 11346.5*; *see § 472A.12*]:

- A statement that a federally mandated regulation or amendment to a regulation is being proposed.

- A citation to an explanation of the provisions of the regulation [*Gov. Code § 11346.9(c)*].

Even if the agency invokes the waiver, however, it will be lost with regard to any provisions in the proposed agency regulation that are different from the corresponding provisions of the federal regulation. Full compliance with all APA requirements is necessary with respect to those provisions that vary from the corresponding provisions of the federal regulation [*Gov. Code § 11346.9(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingState ProceedingsGovernmentsState & Territorial GovernmentsFinance

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41-472A California Forms of Pleading and Practice--Annotated § 472A.15

§ 472A.15 Special Procedures for Emergency Regulations

State agencies have the authority to adopt, amend, or repeal regulations under emergency circumstances, defined to mean a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or welfare [*Gov. Code § 11342.545*], without having to follow the usual rule making procedure requirements for non emergency regulations [*Gov. Code §§ 11346.1, 11346.9*]. For example, the Department of Health services properly issued interim emergency regulations governing alien eligibility for pregnancy related care, which were designed to comply with provisions of controlling federal law that made the existing state welfare laws (which allowed publicly funded routine prenatal care for illegal aliens) invalid [*Doe v. Wilson (1997) 57 Cal. App. 4th 296, 300, 67 Cal. Rptr. 2d 187]* .

The notice and hearing requirements [*see Gov. Code §§ 11346-11347.3* (APA Chapter 3.5, Article 5, discussed in *§§ 472A.12 -472A.14*)] do not apply [*Gov. Code § 11346.1(a)*]. Instead at least five working days before submitting an emergency regulation to the office, the adopting agency must send a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. The notice shall include both of the following [*Gov. Code § 11346.1(a)(2)(A),(B)*]: the specific language proposed to be adopted; and the finding of emergency required by law [*Gov. Code § 11346.1(b)*]. However, an agency is not required to provide this notice if the emergency situation clearly poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest [*Gov. Code § 11346.1(a)(3)*].

Agencies that adopt, amend, or repeal emergency regulations are required to make a finding that the adoption of a regulation or order of repeal is necessary to address an emergency [*Gov. Code § 11346.1(b)(1)*]. Agency findings of an emergency are required to include a written statement that contains the information required by law [*Gov. Code § 11346.5(a)(2)-(6)*] and must also include a description of the specific facts demonstrating the existence of an emergency and the need for immediate action, and demonstrating, by substantial evidence, the need for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency. The finding of emergency shall also identify each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies. The enactment of an urgency statute shall not, in and of itself, constitute a need for immediate action [*Gov. Code § 11346.1(b)(2)*]. A finding of emergency based only upon expediency, convenience, best interest, general public need, or speculation, shall not be adequate to demonstrate the

existence of an emergency. If the situation identified in the finding of emergency existed and was known by the agency adopting the emergency regulation in sufficient time to have been addressed through non emergency regulations adopted by law [*Gov. Code §§ 11346-11348*] the finding of emergency shall include facts explaining the failure to address the situation through non emergency regulations [*Gov. Code § 11346.1(b)(2)*]. The statement and the regulation and order of repeal shall be filed immediately with the Office of Administrative Law [*Gov. Code § 11346.1(b)(3)*]. Additional procedural requirements apply to regulations relating to building standards [*Gov. Code § 11346.1(c)*]. The OAL is required to review the regulation within 10 days after submission [*Gov. Code § 11349.6(b)*; *see § 472A.16[4]*].

The emergency regulation or order of repeal shall become effective on filing or on any later date specified by the state agency in a written instrument filed with, or as a part of, the regulation or order of repeal [*Gov. Code § 11346.1(d)*]. No regulation, amendment, or order of repeal initially adopted as an emergency regulatory action shall remain in effect more than 180 days unless the adopting agency has complied with the requirements of *Gov Code §§ 11346.2-11347.3*, either before adopting an emergency regulation or within the 180-day period. The adopting agency, prior to the expiration of the 180-day period, shall transmit to the Office of Administrative Law for filing with the Secretary of State the adopted regulation, amendment, or order of repeal, the rule making file, and a certification that requirements of the law [*Gov Code §§ 11346.2-11347.3*], were complied with either before the emergency regulation was adopted or within the 180-day period [*Gov. Code § 11346.1(e)*]. If an emergency amendment or order of repeal is filed and the adopting agency fails to comply with these requirements, the regulation as it existed prior to the emergency amendment or order of repeal shall thereupon become effective and after notice to the adopting agency by the office shall be reprinted in the California Code of Regulations [*Gov. Code § 11346.1(f)*]. If a regulation is originally adopted and filed as an emergency and the adopting agency fails to comply with these requirements, this failure shall constitute a repeal of the regulation and after notice to the adopting agency by the office, shall be deleted [*Gov. Code § 11346.1(g)*]. The office may approve not more than two readoptions, each for a period not to exceed 90 days, of an emergency regulation that is the same as or substantially equivalent to an emergency regulation previously adopted by that agency. Readoption shall be permitted only if the agency has made substantial progress and proceeded with diligence to comply with these requirements [*Gov. Code § 11346.1(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 472A.16 OAL Review of Regulations

[1] Transmittal of Adopted Regulation to OAL

After an agency has complied with the APA requirements for public notice and hearing, it may adopt the proposed regulation. The only statutory requirement for the actual adoption, amendment, or repeal of a regulation is that the agency must first "consider all relevant matter presented to it" [*Gov. Code § 11346.8(a)*].

After adopting a regulation, an agency must transmit a certified copy of the regulation to the OAL for filing with the Secretary of State [*Gov. Code § 11343(a)*]. Certification must be made by the head of the state agency or his or her designee. The certification and delegation must be in writing [*Gov. Code § 11343(f)*]. As discussed below, the agency must also transmit its complete rulemaking file to the OAL.

[2] Review of Rulemaking File for Completeness

[a] General Requirements

The OAL is required to review all regulations adopted pursuant to *Gov. Code §§ 11346-11347.3* and submitted to it for publication in the California Regulatory Code Supplement and transmittal to the Secretary of State [*Gov. Code § 11349.1(a)*].

This review is restricted to the regulation itself and the record of the rulemaking proceeding [*Gov. Code § 11349.1(a)*]. A complete rulemaking file, therefore, must be submitted to the OAL together with the adopted regulation. Unless the record is complete, it is not "ripe" for consideration by the OAL.

A rulemaking record and the adopted regulation it supports will be returned to an agency without OAL review if (1) the file is incomplete [*Gov. Code §§ 11347.3, 11349.1(f)*; *see* [b], *below*], or (2) the cost impact statement is missing or deficient [*Gov. Code § 11349.1(d)*; *see* [c], *below*].

Furthermore, the agency may request, on its own initiative, the return of the regulation and file [*Gov. Code § 11349.3(c)*

; *see* [5], *below*].

[b] Required Contents

In order for the OAL to establish jurisdiction to review a regulation, the rulemaking record must contain all of the following [*Gov. Code § 11347.3*]:

- Copies of any petitions received from interested persons proposing the adoption, amendment, or repeal of the regulation, and a copy of any decision required by law [*see Gov. Code § 11340.7(d)*] that grants a petition in whole or in part [*Gov. Code § 11347.3(b)*; *see § 472A.18*].

- All published notices of proposed adoption, amendment, or repeal of the regulation [*see § 472A.12*], and an updated informative digest, the initial statement of reasons, and the final statement of reasons [*see § 472A.14*].

- The agency's determination, together with the supporting data, of whether the regulation imposes a mandate on local agencies or school districts [*see Gov. Code §§ 11346.5(a)(5)*].

- The agency's determination, together with the supporting data, of whether the adopted regulation would have a significant adverse economic impact on business including the ability of California businesses to compete with businesses in other states [*see Gov. Code § 11346.5*].

- The agency's estimate, together with the supporting data and calculations, of the cost or savings to any state agency, and the cost to local agencies and/or school districts that require reimbursements for those costs [*see Gov. Code § 11346.5(a)(6)*].

- All data and other factual information, any studies or reports, and written comments submitted to the agency in connection with the adoption, amendment, or repeal of the regulation [*see § 472A.13*].

- All data and other factual information, technical, theoretical, and empirical studies or reports, if any, on which the agency is relying in the adoption, amendment, or repeal of a regulation, including any cost impact estimates [*see Gov. Code §§ 11346.3, 11346.5*].

- A transcript, recording, or minutes of any public hearing connected with the adoption, amendment, or repeal of the regulation [*see § 472A.13*].

- The date on which the agency made available to the public, for 15 days prior to the adoption, amendment, or repeal of the regulation, the full text of the regulation [*see Gov. Code § 11346.8(c)*] if the agency made changes to the version of the regulation noticed to the public.

- The text of regulations as originally proposed and the modified text of regulations, if any, that were made available to the public prior to adoption.

- Any other information, statement, report, or data that the agency is required by law to consider or prepare in connection with the adoption, amendment, or repeal of a regulation.

- An index or table of contents that identifies each item contained in the rulemaking record. This document must include an affidavit or a declaration made under penalty of perjury in the form specified by *Code Civ. Proc. § 2015.5* by the agency official who has compiled the rulemaking record, specifying the date on which the record was closed, and that the record or the copy, if submitted, is complete.

When an agency has filed its rulemaking record, the OAL has three working days to determine whether the record is complete and may therefore be reviewed. If any of the required documents [*see Gov. Code § 11347.3(a), (b)* (list of required documents)] are absent from the rulemaking record, the OAL is required to return the record to the submitting agency with a notice identifying the deficiency [*Gov. Code § 11349.1(f)*]. If no notice of deficiency is mailed to the adopting agency within that time, a rulemaking file will be deemed submitted as of the date it was originally received by the OAL [*Gov. Code § 11349.1(f)*]. A rulemaking file will not be deemed submitted until each identified deficiency has been corrected [*Gov. Code § 11349.1(f)*]. If the record is determined to be complete, it is submitted to the OAL legal staff for review [*see* [3], *below*]. This review must be completed within 30 days of this date of submission or the regulation is deemed approved by operation of law [*Gov. Code § 11349.3(a)*].

[c] Estimate of Costs and Savings

The OAL is required to return any rulemaking record if the adopting agency has not prepared the cost or savings estimate required by the APA [*Gov. Code § 11349.1(d)(1)*; *see Gov. Code § 11346.5(a)(6)*]. This estimate requires the agency to identify (1) the cost or savings to any state agency, (2) the cost to any local agency or school district that requires reimbursement [*see Gov. Code §§ 11500-11630*], (3) any other nondiscretionary cost or savings imposed on local agencies, and (4) the cost or savings in federal funding to the state [*Gov. Code § 11346.5(a)(6)*].

In addition, the OAL will return any regulation if the adopting agency has prepared the estimate [*see Gov. Code § 11346.5(a)(6)*], but failed to include the data used, calculations made, and the summary report of the estimate in the rulemaking file [*Gov. Code § 11349.1(d)(1)*].

Finally, the OAL will return any regulation if the agency has prepared an estimate that indicates that the regulation will result in a reimbursable [*Gov. Code §§ 17500-17630*] cost to local agencies or school districts, but has failed to include any of the following [*Gov. Code § 11349.1(d)(2)*]:

- An assessment of the potential for adverse economic impact of regulations on California business and individuals [*Gov. Code § 11346.3(a)*].

- A citation to an item in the Budget Act for the fiscal year in which the regulation will go into effect as the source from which the controller may pay the claims of local agencies or school districts [*Gov. Code § 11349.1(d)(3)(A)*].

- A citation to an accompanying appropriations bill as the source of funds from which the controller may pay the claims of local agencies or school districts [*Gov. Code § 11349.1(d)(3)(B)*].

- A letter or other documentation from the Department of Finance stating that the Department has approved a request by the agency that funds be included in the Budget Bill for the next following fiscal year to reimburse local agencies or school districts for the costs mandated by the regulation [*Gov. Code § 11349.1(d)(3)(C)*].

- A letter or other documentation from the Department of Finance stating that the Department has authorized the augmentation of the amount available for expenditure under the agency's appropriation in the Budget Act that is for reimbursement to local agencies or school districts from the unencumbered balances of other appropriations in the Budget Act, and that this augmentation is sufficient to reimburse local agencies or school districts for their cost mandated by the regulation [*Gov. Code § 11349.1(d)(3)(D)*].

The OAL must notify the Department of Finance of all regulations that are returned for any of the above five reasons [

Gov. Code § 11349.1(e)].

[3] Review for Compliance With Standards

[a] General Requirements

The Office of Administrative Law reviews regulations by using six standards: necessity, authority, clarity, consistency, reference, and nonduplication [*Gov. Code § 11349.1(a)*]. The OAL must approve a regulation that complies with these standards, unless the agency has failed to comply with the rulemaking procedures set forth in the APA [*Gov. Code §§ 11349.1(a), 11349.3(b)*].

Therefore, a person who wishes to challenge a proposed regulation must direct his or her written comment [*Gov. Code § 11346.8(a)*; *see § 472A.13[2]*], or statement at a hearing [*Gov. Code § 11346.8(a)*; *see § 472A.13[3]*], to one of these standards, to the data relied on by the agency in support of the regulation [*Gov. Code § 11346.2*], or to a procedural irregularity [*Gov. Code §§ 11349.1(a), 11349.3(b)*; *see § 472A.13*].

The OAL has adopted regulations, set forth in *1 Cal. Code Reg. §§ 10-120*, governing the procedures it uses to review regulations submitted to it [*see Gov. Code § 11349.1(c)*]. A discussion of those regulations is included in the following coverage of the six individual standards in [b]-[g], *below*.

[b] Necessity

"Necessity" means that the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation. For purposes of this standard, "evidence" includes facts, studies, and expert opinion [*Gov. Code § 11349(a)*; *California Forestry Association v. California Fish & Game Commission (2007) 156 Cal. App. 4th 1535, 1553-1554, 68 Cal. Rptr. 3d 391* (regulation that listed endangered species of Coho Salmon satisfied the necessity standard because the underlying statute (CESA) was not self implementing)].

In order to meet the necessity standard, the record must specifically include [*1 Cal. Code Reg. § 10(b)*]:

- A description of the public problem, administrative requirement, or other condition or circumstance that each provision of the regulation is intended to address.

- Information explaining why each provision of the adopted regulation is required to carry out the described purpose of the provision. That information includes facts, studies, or expert opinion. When the explanation is based on policies, conclusions, speculation, or conjecture, the rulemaking record must also include supporting facts, studies, expert opinion, or other information. An "expert" for these purposes is a person who possesses special skill or knowledge by reason of study or experience that is relevant to the regulation in question [*1 Cal. Code Reg. § 10(b)*].

In reviewing the rulemaking record for compliance with these two requirements, the OAL may not dispute the decision of a rulemaking agency to adopt a particular regulatory provision when the information provided for it is also adequate to support one or more alternative conclusions [*1 Cal. Code Reg. § 10(a)*]. If an agency adopts a regulation that is identical to another statute, regulation, or standard, however, the "necessity" standard will be met if the record demonstrates that the specific provisions adopted in the regulation are mandated by a California statute or other applicable law [*1 Cal. Code Reg. § 11*].

[c] Authority

"Authority" means the provision of law that permits or obligates an agency to adopt, amend, or repeal a regulation [*Gov. Code § 11349(b)*]. In addition, *Gov. Code § 11145* provides that no state agency may adopt or enforce any rule or

regulation that if violated could result in the imposition of a fine, imprisonment, or both, unless a statute specifically authorizes that imposition for a violation of the rule or regulation. All regulations transmitted to the OAL must include an "authority note" containing a citation to the provision(s) of law that authorize the adoption of the regulation [*see Gov. Code § 11344(d)*; *see 1 Cal. Code Reg. § 14(d)*]. When a regulation is printed in the California Code of Regulations, the authority note is printed with it [*see Gov. Code § 11344(d)*].

In reviewing a regulation for compliance with the authority requirement, the OAL will presume that authority exists only if the agency cites either of the following [*1 Cal. Code Reg. § 14(a)*]:

- A California constitutional or statutory provision that expressly permits or obligates the agency to adopt, amend, or repeal the regulation.

- A California constitutional or statutory provision that grants a power to the agency that impliedly permits or obligates the agency to adopt, amend, or repeal the regulation in order to achieve the purpose for which the power was granted.

For additional discussion of authority, see Ch. 472, *Public Agency Rules* .

[d] Clarity

"Clarity" means that the regulation is written or displayed in such a manner that its meaning will be easily understood by the persons "directly affected" by it [*Gov. Code § 11349(c)*]. In reviewing the regulation for compliance with this standard, the OAL may consider the clarity of the proposed regulation in the context of related regulations [*Gov. Code § 11349.1(b)*]. A regulation will be presumed not to comply with the clarity standard when one or more of the following is true [*1 Cal. Code Reg. § 16(a)*]:

- The regulation can, on its face, be reasonably and logically interpreted to have more than one meaning, and the varying interpretations cannot be harmonized by settled rules of construction.

- The language conflicts with the agency's description of the effect of the regulation.

- The regulation uses terms that do not have meanings generally familiar to those directly affected by the regulation, and those terms are not defined in the regulation or in the governing statute.

- The regulation uses language incorrectly, for example, it contains incorrect spelling, grammar, or punctuation.

- The regulation presents information in a format that is not readily understandable by persons directly affected by it.

- The regulation does not use citation styles that clearly identify published material cited in the regulation.

Persons are presumed to be "directly affected" by the regulation if they are legally required to comply with the regulation or to enforce it, or if they receive a benefit or detriment from the enforcement of the regulation that is not common to the public in general [*1 Cal. Code Reg. § 16(b)*].

[e] Consistency

"Consistency" means being in harmony with, and not in conflict with or contradictory to, any existing statutes, court

decisions, or other provisions of law [*Gov. Code § 11349(d)*].

[f] Reference

"Reference" means the statute, court decision, or other provision of law that the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation [*Gov. Code § 11349(e)*]. All regulations transmitted to the OAL must include a notation indicating a reference to that statute or other authority [*see Gov. Code § 11344(d)*].

When a regulation is printed in the California Code of Regulations, a reference note must be printed with it [*see Gov. Code § 11344(d)*; *see 1 Cal. Code Reg. § 14(d)*]. Reference will be presumed to exist if an agency is empowered to implement, interpret, or make specific one of the following cited in the reference note proposed for printing in the California Code of Regulations [*1 Cal. Code Reg. § 14(b)*]:

- A California constitutional provision.
- A California statute.
- A federal statute or regulation.
- A court decision or order.

For additional discussion of the reference standard, see Chapter 472, *Public Agency Rules* .

[g] Nonduplication

"Nonduplication" means that a regulation does not serve the same purpose as a state or federal statute or other regulation [*Gov. Code § 11349(f)*]. A regulation "serves the same purpose" if it either repeats or rephrases in whole or in part a state or federal statute or regulation [*1 Cal. Code Reg. § 12(a)*]. This standard requires that an agency proposing to amend or adopt a regulation must identify any state or federal statute or regulation that is overlapped or duplicated by the proposed regulation, and justify any overlap or duplication [*Gov. Code § 11349(f)*; *California Forestry Association v. California Fish & Game Commission (2007) 156 Cal. App. 4th 1535, 1554-1555, 68 Cal. Rptr. 3d 391* (regulation that listed endangered species of Coho Salmon satisfied non-duplication standard because focus of regulation was narrower in protecting species from extinction in California, and thus regulation did not duplicate parallel regulations issued under federal statutes (FESA)].

The nonduplication standard is intended to prevent the indiscriminate incorporation of statutory language in a regulation [*Gov. Code § 11349(f)*]. It is not intended to prohibit state agencies from printing relevant portions of enabling legislation in regulations when the duplication is necessary to satisfy the clarity standard [*Gov. Code § 11349(f)*; *see Gov. Code § 11349.1(a)(3)* (clarity standard)].

Therefore, a regulation that duplicates or overlaps another statute or regulation meets the nonduplication standard if the other statute or regulation is cited as authority or reference, and duplication or overlap is necessary to satisfy the clarity standard [*1 Cal. Code Reg. § 12(b)(1)*]. Justification for duplication must be provided by inclusion of facts, explanations, expert opinions, or other information in the rulemaking record that establish that the overlap is necessary for the regulation to satisfy the clarity standard [*1 Cal. Code Reg. § 12(b)(1)*].

Further, if the agency is adopting or amending federally mandated regulations that duplicate previously adopted or amended federal regulations, the nonduplication standard is met if a statement to that effect and the applicable federal citation is included in the notice of proposed adoption or amendment [*1 Cal. Code Reg. § 12(b)(2)*; *see Gov. Code § 11346.2(c)*; *see also § 472A.14[4]*].

Finally, a regulation that duplicates another statute or regulation meets the nonduplication standard if the duplication is mandated or authorized by a specified statute or other provision of law [*1 Cal. Code Reg. § 12(b)(3)*]. The rulemaking record must contain a statement identifying the statute or regulation that it overlaps or duplicates and must identify the provision of law that mandates or permits that overlap or duplication. The statement must provide the information necessary to locate the full text of the statute or regulation [*1 Cal. Code Reg. § 12(b)(3)*].

[4] Review of Emergency Regulations

[a] Procedure

Emergency regulations adopted without notice and public comment or hearing [*Gov. Code § 11346.1(b)*; *see § 472A.15*] must be reviewed by the OAL within 10 calendar days after submission [*Gov. Code § 11349.6(b)*]. After posting a notice of the filing of a proposed emergency regulation on its Internet web site, the office shall allow interested persons five calendar days to submit comments on the proposed emergency regulations unless the emergency situation clearly poses such an immediate serious harm that delaying action to allow public comment would be inconsistent with the public interest. The office shall disapprove the emergency regulations if it determines that the situation addressed by the regulations is not an emergency, or if it determines that the regulation fails to meet the standards [*Gov Code §§ 11346.1, 11349.1*] required by law [*Gov. Code § 11349.6(b)*]. During the review of an emergency regulation, the OAL in most cases has only the agency's written finding of emergency and the accompanying regulation before it [*see Gov. Code § 11346.1(b)*; *see § 472A.15*]. The statement of emergency describes specific facts showing the need for immediate action [*Gov. Code § 11346.1(b)*; *see § 472A.15*]. Compared to the information available to OAL during the review of a rulemaking record [*see* [2], *above*], little data is available for review of most emergency actions. Therefore, the OAL accepts public comments during the 10-day period. If as a result of public comments the OAL considers any information not submitted to it by the rulemaking agency when determining whether to file emergency regulations, the OAL must provide the rulemaking agency with an opportunity to rebut or comment on that information [*Gov. Code § 11349.6(c)*].

If the OAL finds that the regulation and its accompanying statement of emergency meets APA requirements, it must file the regulation or the order of repeal with the secretary of state. The office of administrative law may approve not more than two readoptions, each for a period not to exceed 90 days, of an emergency regulation that is the same as or substantially equivalent to an emergency regulation previously adopted by that agency. Readoption shall be permitted only if the agency has made substantial progress and proceeded with diligence to comply with the requirements of law [*Gov. Code § 11346.1(h)*].

An emergency regulation becomes effective on filing, or on any later date specified by the agency in a written instrument filed with or as part of the regulation or repeal [*Gov. Code § 11346.1(d)*]. If the OAL determines either that the emergency regulation fails to satisfy the requirement that it is "necessary for the immediate preservation of the public peace, health and safety, or general welfare," that the regulation fails to meet the six APA standards [*see Gov. Code § 11349(a)*; *see* [3], *above*], or that the agency failed to comply with the emergency adoption procedures set forth in *Gov. Code § 11346.1(b), (c)*, however, it will not file the regulation with the secretary of state [*Gov. Code § 11349.6(b)*].

[b] Effective Period of Regulation

An emergency regulation will remain in effect only 180 days, unless the adopting agency does one of the following:

- Complies with the general notice and hearing requirements prior to adopting the emergency [*Gov. Code §§ 11346.4-11346.8*; *see §§ 472A.12, 472A.13*] regulation.

- Formally adopts the emergency regulation pursuant to the APA rulemaking provisions (*Gov. Code § 11340 et seq.*) during the 180-day period [*Gov. Code § 11346.1(e)*].

When the agency completes the formal adoption process within the 180-day period, it must transmit to the OAL for filing with the secretary of state the adopted regulation and rulemaking file, and a certification ("certificate of compliance") that one of these two requirements was satisfied [*Gov. Code § 11346.1(e)*]. Within 30 days after a certificate of compliance has been filed, the OAL must review the regulation and hearing record. It must either approve the regulation, or repeal the regulation if it fails to comply with either of the two requirements [*Gov. Code § 11349.6(d)*]. If the agency fails to submit the certificate of compliance, that failure will constitute a repeal of a regulation originally adopted as an emergency regulation.

After notice to the adopting agency, the OAL will delete the emergency regulation [*Gov. Code § 11346.1(g)*]. If the emergency regulation was filed as an amendment to an existing regulation, failure to submit the certificate of compliance results in the unamended version becoming effective. After notice to the adopting agency, the OAL will reprint it in the Code of Regulations [*Gov. Code § 11346.1(f)*].

[5] Return of Regulation During Review

An agency may request the OAL to return a regulation prior to completion of the OAL's review [*Gov. Code § 11349.3(c)*]. All requests for the return of a regulation must be submitted in writing no later than one week following the request [*Gov. Code § 11349.3(c)*]. When a regulation is returned at the request of the adopting agency, the regulation must be resubmitted to the OAL for review within one year following the publication of the original notice [*Gov. Code § 11349.3(c)*; *see Gov. Code § 11346.4(b)*]. If not resubmitted within one year, the agency must initiate and complete the entire APA procedure as though no prior action had been taken on the regulation [*Gov. Code § 11349.3(c)*]. The OAL cannot initiate the return of a regulation pursuant to agency request as an alternative to the APA disapproval procedure [*Gov. Code § 11349.3(d)*; *see* [6][d], *below*].

[6] Approval or Disapproval of Regulations

[a] General Requirements

Within 30 calendar days after a regulation has been submitted to the OAL for review, the OAL must either approve it and submit it to the secretary of state for filing [*see* [b]-[c], *below*], or disapprove it [*Gov. Code § 11349.3(a)*; *see* [d], *below*]. If the OAL fails to act within 30 days, the regulation will be deemed to have been approved, and the OAL must transmit it to the secretary of state for filing [*Gov. Code § 11349.3(a)*].

[b] Effective Date of Approved Regulations

In general, a regulation or an order of repeal becomes effective 30 days after the OAL files it with the secretary of state [*Gov. Code § 11343.4*]. However, four exceptions to this rule apply. These exceptions are:

- If the statute that authorizes the regulation specifically prescribes a different effective date, that date prevails [*Gov. Code § 11343.4(a)*]. On the other hand, if the agency fails to adopt the regulation by the date specified in the statute, the regulation becomes effective on filing by the OAL in order to avoid retroactive applications of the regulations.

- If the regulation was adopted under *Fin. Code § 3373* or *8054* (relating to changes in state regulations to correspond to changes in federal regulations), it will become effective on filing, or on any later date specified by the state agency in a written instrument filed with, or as part of, the regulation or order of repeal [*Gov. Code § 11343.4(b)*; *Fin. Code § 3373(b)(3)*].

- The agency may prescribe a later date in a written instrument filed with, or as part of, the regulation or order of repeal [*Gov. Code § 11343.4(b)*].

- The OAL may prescribe a date earlier than 30 days after filing, if the agency makes a written request showing good cause why that date should prevail [*Gov. Code § 11343.4(c)*; *Fin. Code § 3373(b)(3)*].

[c] Effect of Filing and Publishing Approved Regulations

Once the OAL has filed a certified copy of a regulation or an order of repeal with the secretary of state, that filing raises the following rebuttable presumptions [*Gov. Code § 11343.6*]:

- That the regulation was duly adopted [*Gov. Code § 11343.6(a)*].

- That the regulation was duly filed and made available for public inspection at the day and hour endorsed on it [*Gov. Code § 11343.6(b)*].

- That all requirements of the APA and the regulations of the OAL relative to that regulation have been met [*Gov. Code § 11343.6(c)*].

- That the text of the certified copy of the regulation or order of repeal is the text of the regulation or order of repeal as adopted [*Gov. Code § 11343.6(d)*].

The APA directs the courts to take judicial notice of the contents of the certified copy of each regulation and of each order of repeal duly filed [*Gov. Code § 11343.6*]. Once the regulation or order of repeal is filed with the secretary of state, the OAL publishes it in the California Code of Regulations [*Gov. Code § 11344(a)*; *see § 472A.17*].

The courts are directed to take judicial notice of the contents of each regulation or order of repeal that is printed or that is incorporated by appropriate reference into the Code or Supplement as compiled by the OAL [*Gov. Code § 11344.6*]. Further, the publication of a regulation in the Code, or its Supplement, raises a rebuttable presumption that the text of the regulation as published is the text of the regulation adopted [*Gov. Code § 11344.6*].

[d] Disapproved Regulations

The OAL may only disapprove a regulation for failure to comply with the six substantive standards [*see Gov. Code § 11349.1*, and discussion in [3], *above*], or for failure to comply with the procedural requirements of the APA [*Gov. Code § 11349.3(b)*]. The OAL must return a disapproved regulation to the agency within 30 working days after the regulation was submitted for review [*Gov. Code § 11349.3(a)*], and must accompany the regulation with a notice specifying the reasons for disapproval [*Gov. Code § 11349.3(b)*]. Within seven calendar days after issuing this notice, the OAL will send the agency a written decision detailing the reasons for disapproval [*Gov. Code § 11349.3(b)*].

An agency may rewrite and resubmit a disapproved regulation within 180 days of receipt of the written decision, without being subject to the notice and public hearing requirements [*Gov. Code §§ 11346.4, 11346.5, 11346.8*; *see §§ 472A.12, 472A.13*], as long as the substantive provisions of the regulation are not significantly changed [*Gov. Code § 11349.4(a)*; *Californians v. State Bd. of Pharmacy (1993) 19 Cal. App. 4th 1136, 1145, 23 Cal. Rptr. 2d 755]* .

If the regulation is significantly changed, or is not resubmitted within the 120 days, however, the agency must effectively begin the process again commencing with the publication and notice requirements [*Gov. Code § 11349.4(a)*]. The director of the OAL may, on a showing of good cause made by the agency, grant an extension of the 120-day time period [*Gov. Code § 11346.1(a)*]. When an agency resubmits a withdrawn or disapproved regulation to the OAL, it must (1) identify the prior withdrawn or disapproved regulation by date of submission to the OAL, (2)

specify the portion of the prior rulemaking record that should be included in the resubmission, and (3) submit to the office a copy of the prior rulemaking record, if that record has been returned to the agency by the OAL [*Gov. Code § 11349.4(c)*].

Once a previously disapproved regulation is rewritten and resubmitted to OAL within the 120-day time period, the OAL's review is limited to (1) those reasons expressly identified in the written decision of disapproval, or (2) those issues arising as a result of a substantial change to a provision of the resubmitted regulation, or as a result of intervening statutory changes or intervening court orders or decisions [*Gov. Code § 11349.4(b)*].

An agency may also ask the governor to overrule the OAL's disapproval of a proposed regulation [*Gov. Code § 11349.5(a), (e)*] by filing a written request for review with the governor's legal affairs secretary within 10 days after receiving the OAL's written disapproval opinion [*Gov. Code § 11349.5(a)*]. A copy of the request will be delivered to the OAL on the day that it is delivered to the governor's office, and the OAL must respond within 10 days [*Gov. Code § 11349.5(b)*].

The governor's office will send a written decision to the requesting agency and the OAL within 15 days after receiving the OAL's response [*Gov. Code § 11349.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingFormal RulemakingAdministrative LawAgency RulemakingInformal RulemakingAdministrative LawAgency RulemakingNotice RequirementsAdministrative LawAgency RulemakingRule Application & InterpretationGeneral OverviewAdministrative LawAgency RulemakingState ProceedingsGovernmentsState & Territorial GovernmentsFinanceGovernmentsState & Territorial GovernmentsPolice Power

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41-472A California Forms of Pleading and Practice--Annotated § 472A.17

§ 472A.17 Publication of Regulations

[1] The California Code of Regulations

[a] General Requirements

The Office of Administrative Law is required to provide for the official compilation, printing, and publication of the periodic adoption, amendment, and repeal of regulations. That publication is called the California Code of Regulations (sometimes, for convenience, referred to in this publication as "the Code" or as the C.C.R.) [*Gov. Code § 11344(a)*].

On and after July 1, 1998, the Office of Administrative Law is required to make available on the Internet, free of charge, the full text, including complete authority, reference citations, and history notes [*Gov. Code § 11340.1(b)*], of the California Code of Regulations, and may contract with another state agency or a private entity to provide this service [*Gov. Code § 11344(a)*].

Before 1988, this publication was called the California Administrative Code [Stats. 1987, Ch. 1375, § 3.5]; any references to the California Administrative Code found in statutes, cases, or other publications cited in this publication should be contrued as references to the C.C.R.

The OAL is also required to provide for the compilation, printing, and publication of weekly updates to the California Code of Regulations [*Gov. Code § 11344(b)*]. That publication is called the California Regulatory Code Supplement (formerly called the California Administrative Code Supplement or the California Administrative Register) [*see* [2], *below*].

There has been much confusion over which of these publications should be consulted to locate the most recent change to a regulation. Therefore, this discussion and the discussion in [2], *below*, include a brief historical coverage of each publication, as well as a discussion of the changes to the contents of these publications effective January 1, 1988.

The OAL sells subscriptions to the Code [*Gov. Code § 11344.4*]. A subscription may be obtained from the General Services Department, Publications Section, P.O. Box 1015, North Highland, California 95660.

[b] History

The original version of the California Code of Regulations was published in 1945 and has been continuously updated by amendments published in the California Regulatory Code Supplement. The C.C.R. was first authorized by the Legislature in 1941, and the original version was published in three bound volumes on March 22, 1945, and contained 23 titles. Among the first regulations published in the new Code were those of the State Codification Board. These regulations prescribed the form for filing regulations, and the form and time of printing regulations. It is significant to note that there is no mention of a procedure for external review of the regulations before filing or publication.

[c] Contents

The C.C.R. historically and currently includes all regulations promulgated by state agencies except those that have been incorporated by reference to extrinsic documents or publications [*see 1 Cal. Code Reg. § 20* (incorporation by reference defined)].

Currently, there are 26 titles in the California Code of Regulations:

- Title 1, General Provisions.
- Title 2, Administration.
- Title 3, Food and Agriculture.
- Title 4, Business Regulations.
- Title 5, Education.
- Title 6, Reserved.
- Title 7, Harbors and Navigation.
- Title 8, Industrial Regulations.
- Title 9, Institutions.
- Title 10, Investments.
- Title 11, Law.
- Title 12, Military and Veterans Affairs.
- Title 13, Motor Vehicles.
- Title 14, Natural Resources.
- Title 15, Crime Prevention and Corrections.
- Title 16, Consumer Affairs.
- Title 17, Public Health.

- Title 18, Public Revenue.
- Title 19, Public Safety.
- Title 20, Public Utilities and Energy.
- Title 21, Public Works.
- Title 22, Social Security.
- Title 23, Waters.
- Title 24, Building Standards.
- Title 25, Housing and Community Development.
- Title 26, Toxics.

Regulations within each title are published in uninterrupted numerical sequence throughout the titles. Therefore, in a title with multiple articles, the first regulation in Article 1 would be Section 1. If Article 1 contained 97 sections, the first regulation in Article 2 would be section 98. Regulations published in the C.C.R. are cited first by title number and then by section. For example, "*2 Cal. Code Reg. § 1*" is the proper citation for *Title 2 of the California Code of Regulations, Section 1*.

The titles generally describe the contents of the regulations contained in them. To locate regulations within a general title governing a specific subject matter, it is best to select the general title that would be most likely to include the specific subject matter and attempt to narrow the scope of the subject matter down to the section level. Each title contains a descriptive table of contents at the beginning of each of its divisions. This table lists the individual divisions within the title. Regulations of individual agencies usually appear within these divisions. A precise regulation may usually be located by studying the table of contents for each division.

Because the Code is organized according to agency responsibility and not by subject matter, it is difficult to determine whether all regulations governing a particular matter have been located. Therefore, each agency's regulations throughout the 58 volumes must be manually examined in order to compile a complete listing of governing regulations by subject matter.

As a public service, OAL provides assistance in locating specific citations to regulations. However, a fee is charged for the tracing service.

Regulations governing the general subject matter of "Toxics," as defined by the state agencies in Title 26, however, do have a comprehensive index. Regulations of all agencies governing this subject matter--some 22 agencies--appear in this precursor to an comprehensive index to the entire C.C.R.

[2] The California Regulatory Code Supplement

[a] General Requirements

The California Regulatory Code Supplement (Supplement) is designed to provide updates of the California Code of Regulations (C.C.R.) [*Gov. Code § 11344(b)*]. It was formerly called the California Administrative Code Supplement or

the California Administrative Register [*see* former *Gov. Code § 11344(a)*].

However, the updates have historically been, and continue to be, referred to as "Registers" when bound in volumes. Complete sets of Registers are located at the OAL and the State Library in Sacramento.

The Supplement formerly was provided on a periodic basis. The bound volumes were numbered sequentially as they were issued; therefore, the issue dates do not necessarily correspond to the year the supplements contained therein were first published. In 1953, the Supplement began to be published on a weekly basis [*see Gov. Code § 11344(b)* (requiring "weekly" updates)]. It is now cited by the week of publication.

The OAL sells subscriptions to the C.C.R. and the Supplement [*Gov. Code § 11344.4*]. A subscription may be obtained from the General Services Department, Publications Section, P.O. Box 1015, North Highland, California 95660.

[b] Contents

The Supplement is required to contain the following five types of information [*Gov. Code § 11344(b)*]:

- All amendments to the Code as filed with the secretary of state [*Gov. Code § 11344(b)(1)*]. The *first amendments* to the original Code were published on May 15, 1945, and have been published continuously since then.

- A summary of all regulations filed with the secretary of state in the previous week [*Gov. Code § 11344(b)(2)*].

- All regulation decisions issued in the previous week, detailing the reasons for disapproval of a regulation, the reasons for not filing an emergency regulation, and the reasons for repealing an emergency regulation [*Gov. Code § 11344(b)(3)*].

- A quarterly index of regulation decisions [*Gov. Code § 11344(b)(3)*].

- The governor's action in reviewing the OAL's disapprovals, decisions to repeal, the agency's request for review, the OAL's response thereto, and the decisions of the governor's office [*Gov. Code § 11344(b)(4)*; *see Gov. Code § 11349.7*].

[3] Historical Research of Regulations

[a] History Notes

From the publication of the first Code to the present, as changes to the original version of a regulation were published, a historical place mark for each version was published as a "History Note." This note appears at the end of each regulation (section), and provides information regarding amendments, repeals, renumberings, the effective date of the various preceding versions of the regulation, and the effective date of the most current version.

For example, Register 2, dated November 16, 1945, includes the revisions to regulations published in Register 1 dated May 15, 1945, which contains the revisions to the original California Code of Regulations published on March 22, 1945, etc.

If a history note does not appear at the end of a regulation, it is probably because that particular regulation was adopted simultaneously with a number of other regulations. When the changes to a regulation have been adopted as part of a group of regulations in one regulatory action, the history note is not published for each regulation, but instead appears

once at either the beginning or the end of the group. An integral part of the history note of each regulation adopted after 1980 is a citation to the statute or other source of law that empowers the agency to adopt it [*Gov. Code § 11344(a), (d)*]. This authority citation is the same one required to satisfy the "authority standard" for OAL approval of a regulation [*Gov. Code § 11349.1*; *see § 472A.16[3]*].

Also included in each history note for regulations adopted after 1980 is a "reference" citation. This is the same citation required to satisfy the "reference standard" for OAL approval of a regulation [*Gov. Code § 11349.1(a)(5)*; *see § 472A.16[3]*].

[b] Method of Tracing a Regulation's History

"History notes" are the primary source for compiling a complete record of a regulation; the note is the only mechanism for tracing all actions taken regarding a regulation. By tracing through a regulation's history note, the text of any of its earlier versions can be located, since the history note traces the regulation all the way back to the text as originally adopted. For example, locating the text of a regulation first published in the original version of the Code in 1945 requires a search back to the *first amendment* to the Code as published on May 15, 1945.

This approach to tracing a regulation back to its origin is similar to searching for title to real property: the person searching must begin with the latest "recorded" version of the subject regulation as "recorded" by the OAL in the Code or its Supplement, and trace its publication history back through the history note or notes in prior Registers. If the history note in the current version of the Code does not trace the regulation back to its original date of adoption, it will cite to an earlier Register for a "prior history." That Register will continue the history from the last referenced date in the prior register to a given date, with the last entry (reading from the bottom up) in that Register indicating either the date of original adoption or citing a reference to an earlier Register to continue the search. It may also include the text of the regulation as it was published on the last date described by the note.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingState Proceedings

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41-472A California Forms of Pleading and Practice--Annotated § 472A.18

§ 472A.18 Requests for Review of Regulations

[1] Legislative Requests for Review of Codified Regulations

The OAL may initiate a priority review of any existing regulation on the request of any standing, select, or joint committee of the Legislature that believes the regulation does not meet APA standards [*Gov. Code § 11349.7*; *see Gov. Code § 11349.1*]. However, this type of review is infrequently used. For further discussion of priority review, see Chapter 472B, *Review of Agency Rulemaking* .

[2] Public Requests for Review of Regulations

[a] Petition for Adoption, Amendment, or Repeal of a Regulation

Any interested person may petition a state agency to request the adoption, amendment, or repeal of a regulation, unless the right to petition for adoption of a regulation is restricted by statute to a designated group, or the form of procedure for such a petition is otherwise prescribed by statute [*Gov. Code § 11340.6*; *see also Pub. Util. Code § 1708.5* (petition specific to Public Utitlities Commission to adopt, amend, or repeal regulation with agency-specific procedures)].

The petition must state, in clear and concise language [*Gov. Code § 11340.6*]:

- The substance or nature of the regulation, amendment, or repeal requested.
- The reason for the request.
- Reference to the authority of the state agency to take the action requested.

Counsel preparing a petition for adoption of a regulation, for example, should become familiar with the formal adoption requirements that the agency must satisfy [*see §§ 472A.12 -472A.16*]. Presumably, the inclusion of documentation that would help satisfy those requirements will increase the likelihood that the agency will grant the petition.

On receipt of a petition, the state agency must notify the petitioner in writing of receipt. Within 30 days, the agency must either send the petitioner a written denial of the petition, indicating why the agency has reached that decision on the merits of the petition, or schedule the matter for public hearing in accordance with APA notice and hearing requirements [*Gov. Code § 11340.7(a)*; *see Gov. Code §§ 11346.4-11346.8*; *see also §§ 472A.12, 472A.13*]. The agency may grant or deny the petition in part, and may grant any other relief or take any other action that it determines is warranted. It must notify the petitioner in writing of that action [*Gov. Code § 11340.7(b)*].

State agency decisions on petitions, whether granting or denying the petitions, must be written and transmitted to the Office of Administrative Law for publication in the California Regulatory Notice Register at the earliest practicable date. The decision must identify the agency, the party submitting the petition, the provisions of the California Code of Regulations affected, the authority to take the requested action, the reasons supporting the agency determination, an agency contact person, and the right of interested persons to obtain copies of the petition from the agency [*Gov. Code § 11340.7(d)*]. For a form of petition for consideration, see *§ 472A.70*.

Any interested person may request reconsideration of any part or all of an agency's decision on a petition, no later than 60 days after the date of the decision. The request for reconsideration must conform to the requirements applicable to an original petition [*see Gov. Code § 11347*], and must include the reason or reasons that the agency should reconsider its previous decision [*Gov. Code § 11340.7(c)*]. The agency must respond to the petition for reconsideration in the same manner as to an original petition [*Gov. Code § 11340.7(c)*; *see Gov. Code § 11340.7(a)*].

[b] Request for OAL Determination Regarding Uncodified Regulation

Any person may notify the OAL of an agency's issuance, enforcement, or use of a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that the agency has not formally adopted and filed with the secretary of state pursuant to California APA requirements [*Gov. Code § 11349(b)*]. The OAL may issue a determination as to whether that "underground regulation" is actually a regulation as defined in the APA [*see Gov. Code § 11342.600* (regulation defined)], and thus subject to the APA's formal rulemaking requirements [*Gov. Code § 11349(b)-(e)*].

For further discussion of OAL determinations, see *Ch. 472, Public Agency Rules, § 472.20* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingFormal RulemakingAdministrative LawAgency RulemakingRule Application & InterpretationGeneral OverviewAdministrative LawAgency RulemakingRule Application & InterpretationValidityGovernmentsLegislationExpirations, Repeals & Suspensions

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§ 472A.19 Removal of Regulation on Repeal of Statutory Authority

If the statutory authority for a regulation is repealed or becomes ineffective or inoperative, the OAL will order the adopting agency to show cause why the regulation should not be repealed for lack of statutory authority [*Gov. Code § 11349.8(a)*]. On notification of the OAL's order to show cause, the agency has 30 days to respond. The agency's response to the OAL's order to show cause may contain reasons for why the regulation should not be repealed [*see Gov. Code § 11349.8(b)*].

If the authorizing statute is simultaneously repealed and substantially reenacted through a single piece of legislation, or subsequent legislation clearly shows a specific legislative intent to reenact the statute's substance, the regulation will not be repealed [*Gov. Code § 11349.8(b)(1)*]. If the statute is temporarily repealed, or rendered ineffective or inoperative by a provision of law that is effective only for a limited period, the regulation is similarly affected [*Gov. Code § 11349.8(b)(2)*]. If the statute being repealed, or becoming ineffective or inoperative by its own terms, is to remain in full force and effect regarding events occurring before the date of repeal or ineffectiveness, the regulation will have the same force and effect [*Gov. Code § 11349.8(b)(3)*].

After the 30-day response period terminates, the OAL will either inform the agency that the order to show cause has been withdrawn or notify the agency of its reasons for the repeal and of its intent to file a notice of repeal with the Secretary of State [*Gov. Code § 11349.8(d)*]. The agency has the right to appeal the OAL's decision to issue a notice of repeal [*Gov. Code § 11349.8(e)*; *see Gov. Code § 11349.9* (appeal procedure)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingRule Application & InterpretationGeneral OverviewAdministrative LawAgency RulemakingRule Application & InterpretationValidityAdministrative LawSeparation of PowersLegislative ControlsExplicit Delegation of AuthorityGovernmentsLegislationEffect & OperationOperabilityGovernmentsLegislationExpirations, Repeals & Suspensions

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[Reserved]

§§ 472A.20[Reserved]

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PART II. LEGAL BACKGROUND
B. Non-APA Rulemaking

41-472A California Forms of Pleading and Practice--Annotated § 472A.30

§ 472A.30 Exemptions From the APA Rulemaking Provisions

[1] General Exemptions

The APA provisions regarding adoption of regulations do not apply to any rule that does not meet the APA definition of "regulation" [*see Gov. Code § 11342.600* (regulation defined)], or to any regulation that is not required to be filed with the secretary of state [*Gov. Code § 11346.1(a)*].

For a discussion of these exemptions from the rulemaking provisions of the APA, see *Chapter 472, Public Agency Rules, § 472.20* et seq. Further, as discussed in [2]-[3], *below*, some state agency rulemaking is fully or partially exempt from the provisions of Chapter 3.5 (*Gov. Code § 11340 et seq.*), the rulemaking provisions of the APA [*see Gov. Code § 11346* (requirements of APA may be expressly superseded or modified by statute); *Voss v. Superior Court (1996) 46 Cal. App. 4th 900, 909-911, 54 Cal. Rptr. 2d 225* (marketing orders under the California Marketing Act of 1937 are exempt from the rulemaking requirements of APA under *Food & Agric. Code § 14*)].

[2] Agencies Specifically Exempted by Statute

The APA provides that the following agencies are exempt from most of its rulemaking provisions [*Gov. Code § 11351(a)*]:

- The Public Utilities Commission [*see* Cal. Const., art. XII; *see* Ch. 480, *Public Utilities*].

- The Division of Industrial Accidents and the Workers' Compensation Appeals Board regulations [*see* Ch. 577, *Workers' Compensation*].

Only the procedural regulations must be filed for public record and published [*Gov. Code § 11351(a)*; *see Gov. Code §§ 11343-11344.9*].

However, these agencies must publish in the Notice Register those regulations that they adopt that must be filed with the secretary of state under *Gov. Code § 11343* [*Gov. Code § 11351(b)*; *see Gov. Code § 11346.4(a)(5)*, and discussion

in *§ 472A.12[5]*].

[3] Actions Specifically Exempted by Statute

Actions that issue, deny, or waive water quality certifications as authorized [*Water Code § 13160*] are exempt from APA rule-making procedures [*Gov. Code § 11352(a)*]. Similarly, actions that issue, deny, or revoke waste discharge requirements, permits [*Water Code §§ 13263, 13377*], and waivers [*Water Code § 13269*] are exempt from APA rulemaking procedures [*Gov. Code § 11352(b)*].

[4] Emergency Regulations

Emergency regulations [*Gov. Code § 11346.1(b)*; *see § 472A.15*] and regulations adopted pursuant to *Fin. Code §§ 8054* and *3373* (conforming rights or obligations of state banks or savings and loans to those provided by federal law or regulation) are not true general exceptions to formal rulemaking requirements, but are subject only to limited requirements [*Gov. Code § 11346.1(a)*; *see Gov. Code §§ 11346.1, 11343.4, 11349.6*].

But this exception for emergency regulations is only temporary, since the procedural requirements of the APA must be satisfied within 180 days from the date an emergency regulation becomes effective unless that time is extended [*see Gov. Code § 11346.1(e)*; *see § 472A.16[4]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingFormal RulemakingEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewEnvironmental LawWater QualityClean Water ActDischarge PermitsGeneral PermitsEnvironmental LawWater QualityClean Water ActWater Quality StandardsWorkers' Compensation & SSDIAdministrative ProceedingsGeneral Overview

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§ 472A.31 Procedures for Rulemaking Actions Not Subject to Complete APA Coverage

[1] Under Agency Enabling Statutes

[a] Insurance Commissioner's Regulations

Procedures for rulemaking actions not subject to the APA may be found in the provisions of the particular statutory scheme that authorizes non-APA rulemaking--that is, in the statutes that establish the agency or that the agency is authorized to administer. For example, regulations of the commissioner of insurance that change the method of rating premiums for workers' compensation insurance are exempt from the APA [*State Comp. Ins. Fund v. McConnell (1956) 46 Cal. 2d 330, 343, 294 P.2d 440]* . The commissioner has statutory authority to approve or disapprove premium rates charged by California insurers for workers compensation insurance [*Ins. Code § 11735, 11737*]. Before disapproving rates, the commissioner is required to hold a hearing. The commissioner is also required to issue an order specifying why the rate was disapproved, and how it does not satisfy the requirements of the law [*Ins. Code § 11737*]. Reasonable notice is required [*State Comp. Ins. Fund v. Maloney (1953) 121 Cal. App. 2d 33, 42, 262 P.2d 662]* .

The commissioner of insurance is also authorized to adopt a plan for the apportionment of assigned risk drivers among insurers [*Ins. Code § 11620(a)*]. The plan may include premium rates for assigned risk automobile liability coverage [*Ins. Code § 11624*]. The Insurance Code requires only that changes to the plan must be made after a public hearing [*Ins. Code § 11620(b)*], and 60 days notice of those hearings must be published in newspapers of general circulation in San Francisco and in Los Angeles [*Ins. Code § 11620(b)*].

[b] Department of Transportation Regulations

The Department of Transportation is authorized to prescribe uniform standards and specifications for all official traffic control devices placed pursuant to the Vehicle Code. Prior consultation with local agencies and public hearings are required [*Veh. Code § 21400*]. The Department is also authorized to determine and publicize specifications for uniform types of devices to be placed upon a highway to warn traffic of work that is being performed on the highway. Prior notice and a public hearing is required [*Veh. Code § 21400*].

[c] Building Standards and Applicable Administrative Regulations

Rulemaking procedures for building standards (defined in *Health & Safety Code § 18909*), and for administrative regulations that apply directly to the implementation or enforcement of a building standard, are set out in the California Building Standards Law [*see Health & Safety Code §§ 18900-18901*] as well as the APA. Building standards and administrative regulations that apply directly to the implementation or enforcement of a building standard are not subject to the requirements of *Gov. Code §§ 11349-11349.6*, concerning OAL review of regulations [*Gov. Code § 11356(a)*], but those building standards must be adopted according to the APA procedures set out in *Gov. Code §§ 11346-11347.3*.

The OAL may not, however, disapprove those building standards nor refuse to publish any notice of proposed building standards if either has been approved by the California Building Standards Commission and submitted to the OAL [*Gov. Code § 11356(b)*; *see Health & Safety Code § 18935* (notice of proposed building standards or proposed administrative regulations that apply directly to the implementation or enforcement of a building standard)].

Building standards and administrative regulations that apply directly to the implementation or enforcement of a building standard must satisfy requirements set out in *Health & Safety Code § 18930*. The California Building Standards Commission reviews building standards and administrative regulations that apply directly to the implementation or enforcement of a building standard for compliance with procedural requirements and standards [*Health & Safety Code §§ 18930, 18931, 18935, 18937*; *Plastic Pipe and Fittings Ass'n v. Cal. Bldg Stds Comm'n (2004) 124 Cal. App. 4th 1390, 1404-1405, 22 Cal. Rptr. 3d 393* (Commission adopted Uniform Plumbing Code provisions but excluded provisions of Code allowing use of PEX pipes because of concerns about public health. Trade association challenged exclusion by writ of mandate in superior court. The Court of Appeal reversed the superior court grant of petition allowing challenge)]. With specified exceptions, building standards and administrative regulations that apply directly to the implementation or enforcement of a building standard do not become effective until 180 days after they are published in the triennial edition of the California Building Standards Code or one of its annual supplements [*Health & Safety Code §§ 18938, 18942*].

[d] Public Utilities Commission Regulations

Rulemaking procedures applicable to the Public Utilities Commission are set out in the APA and in regulations adopted by the Commission. The California Constitution authorizes the Public Utilities Commission to set rates and adopt rules "for the transportation of property by transportation companies" [*Cal. Const., art. XII, § 4*], and to fix rates and adopt rules for public utilities [*Cal. Const., art. XII, § 6*].

By regulation, the Commission has established its own rulemaking procedures [*see 20 Cal. Code Reg. §§ 14.1-14.6*]. The Commission's regulations define rulemaking, list the types of proceedings in which the Commission may elect to use rulemaking, provide for notice of rulemaking, provide for proposals, comments, and exceptions, and set form requirements for proposals, comments, and exceptions [*see 20 Cal. Code Reg. §§ 14.1-14.6*]. In addition, the procedural rules of the Commission are subject to certain APA requirements. Notices of proposed procedural rules of the Commission must be published in the California Regulatory Notice Register, and after adoption, must be filed with the secretary of state and published in the California Code of Regulations [*Gov. Code § 11351*].

For further discussion and form relating to the PUC, see Ch. 480, *Public Utilities* .

[e] Regulations of Division of Worker's Compensation

Rulemaking procedures applicable to the Division of Worker's Compensation are set out in the Labor Code and in the APA. The administrative director of the Division of Worker's Compensation has express authorization to adopt rules and regulations to enforce Division 4 of the Labor Code [*Lab. Code § 5307.3*; *see Lab. Code §§ 3200-6002*], which

concerns workers' compensation and insurance, and is empowered to "do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon them" by the Labor Code, including the Workers' Compensation Appeals Board and the administrative director [*Lab. Code § 133*].

Lab. Code § 5307.4 establishes the timing and required contents of notices of proposed rulemaking by the director, specifies to whom notice must be given, and provides an opportunity for interested persons to participate in the rulemaking process. Public hearings are required [*Lab. Code § 5307.3*]. *Lab. Code § 5307.4* also provides for the dissemination of adopted rules and a statement of reasons after the adoption of the rules.

Regulations adopted by the Division are subject to all parts of the APA rulemaking provisions of Chapter 3.5 (*Gov. Code § 11340 et seq.*), except for the judicial review provisions of Article 8 of that chapter (*Gov. Code §§ 11350-11350.3*) [*Gov. Code § 11351(c)*].

For detailed discussion and forms relating to the workers' compensation proceedings, see Ch. 577, *Workers' Compensation* .

[f] Workers' Compensation Appeals Board Regulations

Rulemaking procedures applicable to the Workers' Compensation Appeals Board are set out in both the Labor Code and in the APA. The Board, a part of the Division of Worker's Compensation, is a tribunal of limited jurisdiction for the adjudication of workers' compensation matters [*Cal. Const., art. XIV, § 4*; *Lab. Code §§ 5300-5301*]. The Board has express authorization to adopt rules of practice and procedure [*Lab. Code § 5307*] and is empowered to "do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon" the Board under the Labor Code [*Lab. Code § 133*]. Limited procedures apply to the Board's rulemaking.

A notice of proposed rulemaking regarding such rules must be published in the California Regulatory Notice Register [*Gov. Code § 11351*]. Public hearings are required [*Lab. Code § 5307*]. Procedural rules of the Board must be noticed in the California Regulatory Notice Register, filed with the secretary of state, and published in the California Code of Regulations [*Gov. Code § 11351(a)*].

For detailed discussion and forms relating to the workers' compensation proceedings, see Ch. 577, *Workers' Compensation* .

[g] Financial Regulations

The Financial Code provides no opportunity for public involvement in the adoption of parity regulations adopted by the savings and loan commissioner or to certain Regulation O regulations adopted by the superintendent of banks. The savings and loan commissioner is authorized to adopt regulations to give state chartered savings and loan associations the same rights, powers, privileges, or duties as are extended by statute or regulation to federally chartered savings and loan associations doing business in this state [*Fin. Code § 8054*]. The superintendent of banks is authorized to adopt by regulation specified changes made to federal Regulation O [*see 12 C.F.R. §§ 215.2, 215.3, 215.4, 215.5, 215.7,* or *215.8*] by the Board of Governors of the Federal Reserve System [*Fin. Code § 3373*].

Those regulations are subject to APA provisions applicable to emergency regulations [*see Gov. Code §§ 11346.1, 11343.4, 11349.6*], but are not otherwise subject to the procedural requirements of the APA [*Fin. Code § 8054*]. The regulations become effective on filing with the secretary of state, unless a later date is specified by the commissioner [*Gov. Code § 11343.4(b)*; *Fin. Code § 3373(b)(3)*]. No other rulemaking procedures are prescribed in the Financial Code for these regulations.

[h] Regulations of the Trustees of the California State University

Educ. Code § 89030.1 adopts a set of rulemaking procedures that are to be used by the Trustees of the California State University instead of the rulemaking procedures of Chapter 3.5 (*Gov. Code § 11340 et seq.*), the rulemaking provisions of the APA [*Educ. Code § 89030.1*].

The specific statutory rulemaking procedures to be used include the following:

- Proposed regulations are reviewed for necessity and other criteria by the office of general counsel of the trustees (instead of the Office of Administrative law) [*Educ. Code § 89030.1(a)*].

- Notice of proposed regulation requirements are established (45 days notice prior to public hearing) [*Educ. Code § 89030.1(b)*].

- Opportunity for the public to comment at a public hearing on the proposed regulation is provided [*Educ. Code § 89030.1(c)*].

- Rulemaking file requirements are established (the Trustees must maintain the rulemaking file with specified items) [*Educ. Code § 89030.1(d)*].

- Transmittal upon adoption and publication requirements are established (the Trustees must transmit adopted regulations to the Secretary of States office for filing) [*Educ. Code § 89030.1(e)*].

[i] Regulations of the State Personnel Board

Gov. Code § 18211 exempts the State Personnel Board generally from the rulemaking procedure requirements of Chapter 3.5 (*Gov. Code § 11340 et seq.*), the rulemaking provisions of the APA [*Gov. Code § 18211*], except for the following:

- Regulations relating to contracting out, which must follow APA rulemaking procedures [*Gov. Code § 18216*].

- Regulations concerning seven subjects listed in *Gov. Code § 18215*, which must follow some requirements of APA procedure [*Gov. Code§ 18215(a)*], but are exempt from other requirements [*Gov. Code § 18215(b)*].

The procedural requirements that the State Personnel Board are required to follow are designed to provide basic minimum procedural requirements [*Gov. Code § 18210*]. The term "regulations" is defined for purposes of State Personnel Board rulemaking, with four exemptions in *Gov. Code § 18212*.

Selection and examination regulations can be adopted without public notice and comment [*Gov. Code § 18213*]. Specific rulemaking procedures are set forth in *Gov. Code § 18214*.

For further discussion and forms relating to the State Personnel Board, see Ch. 118, *Civil Service* .

[j] Regulations of the Fish and Game Commission

The California Fish and Game Commission has the authority to adopt regulations under the Fish & Game Code, and is exempt under *Fish & Game Code § 202* from the rulemaking requirements of the California Administrative Procedures Act that require specific time periods for adoption, amendment, or repeal of regulations, including *Gov. Code §§ 11343.4, 11346.4, 11346.8, 11347.1* [*Fish & Game Code § 202*].

[k] California Industrial Welfare Commission

The California Industrial Welfare Commission (IWC) was delegated the authority under *Labor Code § 517(a)* to adopt wage orders relating to elections to adopt and repeal alternative workweek schedules. The IWC adopted Wage Order No. 16-2001 (Wage Order 16 [*8 Cal. Code Reg. § 11160*]) applicable to the construction industry that required new alternative workweek schedules elections when the number of employees working for 30 days increased above 50% since the prior election. The California court of Appeal overturned the decision of the superior court which had invalidated the wage order. The superior court gave three reasons for setting aside the wage order: 1) lack of required adequate statement of the basis for the rule; 2) lack of proper publication of the wage order; and 3) the wage order is unreasonable, arbitrary, capricious, and unfair because it contained an unworkable definition of a specific craft in the construction industry [*Small v. Superior Court (2007) 148 Cal. App. 4th 222, 226-228, 55 Cal. Rptr. 3d 410]* . The California court of Appeal held that the regulation was not invalid, and that the IWC adopted an adequate statement of the basis of the wage order [*Small v. Superior Court (2007) 148 Cal. App. 4th 222, 233-234, 55 Cal. Rptr. 3d 410]* . It also held that the party challenging lack of publication failed to satisfy the burden of proof required to prove that defense, and thus the presumption of official duty (publication was presumed) was sufficient to reject the lack of publication reason [*Small v. Superior Court (2007) 148 Cal. App. 4th 222, 236-237, 55 Cal. Rptr. 3d 410]* . Finally, the court of appeal rejected the third reason that the work unit definition was unreasonable and arbitrary. The court noted that the definition in question was adopted by a two thirds vote of the IWC, which contained both employer and employee board memebrs, that the definition was supported by substantial evidence, and that the IWC was delegated the authority to make policy decisions of this type [*Small v. Superior Court (2007) 148 Cal. App. 4th 222, 237-238, 55 Cal. Rptr. 3d 410]* .

[2] Nonstatutory Procedures

When a quasi-legislative rulemaking action is exempt from all or a part of the procedural requirements of the APA [*see* discussion in *§ 472A.11* et seq.], and rulemaking procedures for the action have not been established by statute [*see* [1], *above*], an agency may choose its rulemaking procedures.

A quasi-legislative rulemaking action is not subject to procedural requirements imposed by due process of law; those requirements apply only to "adjudicative" actions [*Franchise Tax Board v. Superior Court (1950) 36 Cal. 2d 538, 549, 225 P.2d 905* ; *Rivera v. Division of Industrial Welfare (1968) 265 Cal. App. 2d 576, 587, 71 Cal. Rptr. 739* ; *see* Ch. 470A, *Due Process Restrictions on Public Agencies* , for detailed discussion of due process requirements applicable to administrative agencies].

Nonetheless, in conducting non-APA rulemaking, an agency must follow certain principles that have arisen from court decisions on rulemaking. For example, the procedures used must be fair [*see* *Rivera v. Division of Industrial Welfare (1968) 265 Cal. App. 2d 576, 587, 71 Cal. Rptr. 739]* , and reasonable [*see* *State Comp. Ins. Fund v. Maloney (1953) 121 Cal. App. 2d 33, 42, 262 P.2d 662]* .

An agency may not use a rulemaking proceeding as a facade for a private decision [*see* *California Optometric Assn. v. Lackner (1976) 60 Cal. App. 3d 500, 510-511, 131 Cal. Rptr. 744]* .

Furthermore, an identified body of evidence on which the agency based its quasi-legislative act may be required to permit effective judicial review [*see* *California Optometric Assn. v. Lackner (1976) 60 Cal. App. 3d 500, 510-511, 131 Cal. Rptr. 744]* .

Finally, principles of fairness may require a public hearing before a state agency adopts a quasi-legislative act [*see* *Stauffer Chemical Co. v. Air Resources Board (1982) 128 Cal. App. 3d 789, 794, 180 Cal. Rptr. 550]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingState ProceedingsBanking LawDepository InstitutionsState Savings AssociationsEducation LawAdministration & OperationBoards of Postsecondary SchoolsAuthorityEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthorityGovernmentsState & Territorial GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsEmployees & OfficialsReal Property LawZoning & Land UseBuilding & Housing CodesTransportation LawCommercial VehiclesTraffic RegulationWorkers' Compensation & SSDIGeneral Overview

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§ 472A.32 Elective Use of APA Procedures for Non-APA Rulemaking

Administrative agencies have wide latitude in fashioning procedures and pursuing their methods of inquiry [*see California Asso. of Nursing Homes, etc. v. Williams (1970) 4 Cal. App. 3d 800, 813, 85 Cal. Rptr. 735]* . An agency may choose to use APA procedures in its non-APA rulemaking, unless otherwise provided by law [*Gov. Code § 11343.8*]. Those procedures provide an opportunity for substantial public participation [*see § 472A.13*].

On the request of a state agency, the OAL may file with the secretary of state and may publish in any manner it believes proper, any regulation or order of repeal of a regulation not required to be filed [*Gov. Code § 11343.8*].

Thus, all quasi-legislative regulations adopted by state agencies may be filed with the secretary of state and published in the California Code of Regulations.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingState Proceedings

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§ 472A.33 Public Records and Open Meetings

[1] Public Records Act

The APA specifically provides that public records, including reports, documentation, and other materials, related to a proposed action taken under the APA are available to the public upon request [*Gov. Code § 11346.5(b)*]. Furthermore, the California Public Records Act (*Gov. Code §§ 6250-6267*) requires any public record on which a non-APA rulemaking is based to be made available for public inspection [*Gov. Code § 6253.4*] and copying [*Gov. Code § 6253*], unless it is exempt from disclosure under express provisions of that Act or the public interest in withholding the particular record clearly outweighs the public interest served by its disclosure [*Gov. Code § 6255*].

For detailed discussion and forms relating to the California Public Records Act, see Chapter 470C, *Public Records Act* .

[2] Open Meetings Legislation

The Bagley-Keene Open Meeting Act (*Gov. Code § 11120 et seq.*) requires that meetings regarding non-APA rulemaking conducted by a multi-member state body must be "open and public," except when a closed session isspecifically authorized [*Gov. Code § 11123*]. Notice of those meetings must be given in advance of the meeting to any person who requests notice in writing [*Gov. Code § 11125(a)*].

Writings regarding non-APA rulemaking that are distributed to a majority of the members of a state body for discussion at a public meeting of that body are public records and must be made available for public inspection [*Gov. Code § 11125.1*].

For detailed discussion and forms relating to the agley-Keene Open Meeting Act and open meetings legislation generally, see Ch. 470B, *Public Agency Meetings* .

Legal Topics:

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

Administrative LawGovernmental InformationGeneral OverviewAdministrative LawGovernmental InformationPersonal InformationAccess to RecordsAdministrative LawGovernmental InformationPublic MeetingsGeneral OverviewAdministrative LawGovernmental InformationPublic MeetingsSunshine Legislation

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[Reserved]

§§ 472A.34[Reserved]

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§ 472A.40 State Constitution

Administrative agencies that have constitutional authority to exercise (limited) legislative power

Board of Education. *Cal. Const., art. IX, § 7.5*

Judicial Council. *Cal. Const., art. VI, §§ 6, 18*

Personnel Board. *Cal. Const., art. VII, §§ 2(c), 3, 6(b),(c)*

Public Utilities Commission. *Cal. Const., art. XII, §§ 2, 4, 6*

Regents of the University of California. *Cal. Const., art. IX, § 9(a)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawSeparation of PowersConstitutional ControlsGeneral OverviewEducation LawAdministration & OperationBoards of Postsecondary SchoolsAuthorityEducation LawDepartments of EducationState Departments of EducationState Boards of EducationEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthority

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§ 472A.41 State Statutes

General provisions for adoption of regulations. *Gov. Code §§ 11346.2-11346.9*

Filing and publication of regulations. *Gov. Code § 11343 et. seq.*

California Code of Regulations and Register. *Gov. Code § 11344 et. seq.*

Procedure for adoption of regulations. *Gov. Code § 11346 et. seq.*

Exemptions from procedural requirements. *Gov. Code § 11351*

Judicial review of regulation by declaratory relief action. *Gov. Code § 11350*

Review of Public Utilities Commission regulation. *Pub. Util. Code § 1759*

Review of Workmen's Compensation Appeals Board regulation. *Lab. Code § 5955*

Review of regulation of Board of Governors of State Bar respecting law corporations. *Bus. & Prof. Code § 6170*

Regulation requiring report does not apply to small business unless state agency finds its applicability necessary for health, safety, or welfare of people of state. *Gov. Code § 11346.3*

Cost impact statements are required. *Gov. Code § 11346.5(a)(9)*

Administrative agencies are required to write regulations in plain, straightforward language. *Gov. Code § 6215*

Publication of rulemaking calendar. *Gov. Code § 11017.6*

Judicial review of validity of regulation ordered repealed or disapproved by Office of Administrative Law is available by declaratory relief action. *Gov. Code § 11350.3*

Reasonable litigation expenses are recoverable by prevailing small business or licensee in civil action against state regulatory agency involving regulatory functions of state agency. *Code Civ. Proc. § 1028.5*

Statutory procedure for adoption of regulations generally [*Gov. Code §§ 11346-11347.3*] are not applicable to adoptions of regulations under *Fin. Code §§ 8054* although *Gov. Code §§ 11346.1, 11343.4,* and *11349.6* apply. *Gov. Code § 11346.1(a)*

Administrative review of regulations. *Gov. Code § 11349 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingRule Application & InterpretationValidityAdministrative LawGovernmental InformationRecordkeeping & ReportingAdministrative LawJudicial ReviewRemediesDeclaratory JudgmentsAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthorityEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsJudicial ReviewWorkers' Compensation & SSDIAdministrative ProceedingsJudicial ReviewGeneral Overview

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§ 472A.42 Administrative Regulations

Criteria applied in review of proposed regulations. *1 Cal. Code Reg. §§ 5-120*

Procedures for regulatory determinations. *1 Cal. Code Reg. §§ 121-128*

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§ 472A.43 Decisions

[1] Generally

Necessity that local agency comply with any procedural requirements made applicable by local charter. *Conroy v. Wolff (1950) 34 Cal. 2d 745, 748, 214 P.2d 529*

Local legislative body is not empowered to impose procedural requirements on local agency in contravention of local charter. *McDonald's Systems of California, Inc. v. Board of Permit Appeals (1975) 44 Cal. App. 3d 525, 537, 119 Cal. Rptr. 26*

Inconsistency between two regulations of same agency does not raise presumption of implicit repeal of earlier regulation unless inconsistency is not otherwise reconcilable. California Drive-In *California Drive-In Restaurant Asso. v. Clark (1943) 22 Cal. 2d 287, 292, 140 P.2d 657*

Exemption from general procedural requirements [*Gov. Code § 11343 et. seq.*] for regulation relating to internal management [*Gov. Code § 11342* [repealed 2000]] means regulation relating to accounting techniques and similar matters, not matters involving important public interest. *Poschman v. Dumke (1973) 31 Cal. App. 3d 932, 943, 107 Cal. Rptr. 596*

Power to adopt regulations necessarily includes power to amend them. *Hatch v. Ward (1946) 27 Cal. 2d 883, 887, 168 P.2d 22*

Party challenging validity of administrative rule bears burden of stating and establishing grounds of its challenge; agency is not required to anticipate and refute objections to rule. *Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist. (1989) 49 Cal. 3d 408, 427 n.20, 261 Cal. Rptr. 384, 777 P.2d 157*

Agency does not declare statute unconstitutional and does not refuse to enforce it by complying with legislative directive to implement statute to extent it does not conflict with federal law. *Reese v. Kizer (1988) 46 Cal. 3d 996, 998, 1002, 251 Cal. Rptr. 299, 760 P.2d 495*

[2] Emergency Regulations

Question whether emergency exists to justify adoption of emergency regulation is primarily addressed to agency's discretion. *Schenley Affiliated Brands Corp. v. Kirby (1971) 21 Cal. App. 3d 177, 194-195, 98 Cal. Rptr. 609*

Court is empowered to review finding of emergency and to invalidate emergency regulation if so-called emergency was not crisis situation. *Poschman v. Dumke (1973) 31 Cal. App. 3d 932, 941, 942, 107 Cal. Rptr. 596*

Agency's repeated or habitual use of emergency adoption procedure is abuse of power and ground for invalidating so-called emergency regulation. *Poschman v. Dumke (1973) 31 Cal. App. 3d 932, 941, 107 Cal. Rptr. 596* ; *California Asso. of Nursing Homes, etc. v. Williams (1970) 4 Cal. App. 3d 800, 812, 812 n. 16, 84 Cal. Rptr. 590*

[3] Hearings

Constitutional due process issue is not raised by interested parties' claim of lack of fair or reasonable opportunity to respond to agency staff report prior to hearing when agency acting in quasi-legislative capacity. *Western Oil & Gas Assn. v. Air Resources Board (1984) 37 Cal. 3d 502, 525, 208 Cal. Rptr. 850, 691 P.2d 606*

Hearing is not generally constitutionally required before agency may take legislative action. *Ford Dealers Ass'n v. Department of Motor Vehicles (1982) 32 Cal. 3d 347, 364 n.10, 185 Cal. Rptr. 453, 650 P.2d 328* ; *San Diego Bldg. Contractors Assn. v. City Council (1974) 13 Cal. 3d 205, 211, 118 Cal. Rptr. 146, 529 P.2d 570* (hearing as generally required only in adjudicative proceeding); *Franchise Tax Bd. v. Superior Court (1950) 36 Cal. 2d 538, 549, 225 P.2d 905* ; California Citizens Band Assn. v. United States (9th Cir. [Cal] 1967) *375 F.2d 43, 50 , cert. denied, 389 U.S. 844, 88 S. Ct. 96, 19 L. Ed. 2d 112*

Procedural requirements for legislative action are found in governing statutes rather than constitutional guaranties of due process. *Rivera v. Division of Industrial Welfare (1968) 265 Cal. App. 2d 576, 587, 71 Cal. Rptr. 739*

Due process requires compliance with any statutory requirement for hearing. *People v. Johnson (1941) 42 Cal. App. 2d Supp. 827, 833 , 109 P.2d 770*

Statutory limitations on production of evidence and opportunity to be heard at legislative hearing do not offend due process. *Franchise Tax Bd. v. Superior Court (1950) 36 Cal. 2d 538, 550, 225 P.2d 905* ; *Ray v. Parker (1940) 15 Cal. 2d 275, 304, 101 P.2d 665*

Agency is entitled to act on basis of evidence gathered and summarized by employees rather than evidence agency members personally received in hearing. *Schecter v. County of Los Angeles (1968) 258 Cal. App. 2d 391, 397, 65 Cal. Rptr. 739* ; *Vita-Pharmacals, Inc. v. Bd. of Pharmacy (1952) 110 Cal. App. 2d 826, 831, 243 P.2d 890*

Interested persons are not entitled to cross examine witnesses in legislative hearing. *Rivera v. Division of Industrial Welfare (1968) 265 Cal. App. 2d 576, 590, 71 Cal. Rptr. 739*

Opportunity to cross examine witnesses is procedural feature agencies should be encouraged to adopt although not legally required to adopt. *Emby Foods, Inc. v. Paul (1964) 230 Cal. App. 2d 687, 703, 41 Cal. Rptr. 365*

[4] Notice Requirements

Agency is not confined to adopting regulation described in notice of hearing but is empowered to adopt different

regulation dealing with subject of proposed regulation. *Schenley Affiliated Brands Corp. v. Kirby (1971) 21 Cal. App. 3d 177, 193, 98 Cal. Rptr. 609*

[5] Record of Hearing

Agency is required to make record of evidence received at legislative hearing and forming basis for legislative action. *California Asso. of Nursing Homes, etc. v. Williams (1970) 4 Cal. App. 3d 800, 810-812, 84 Cal. Rptr. 590*

Agency is not required to include in record evidence of type any interested person could find by resorting to standard research sources such as libraries but as required to include evidence produced by agency investigators or other governmental agents and not generally available. *Rivera v. Division of Industrial Welfare (1968) 265 Cal. App. 2d 576, 588-590, 71 Cal. Rptr. 739*

Record is not required to include information which law forbids agency to disclose. *City & County of San Francisco v. Superior Court (1951) 38 Cal. 2d 156, 162, 238 P.2d 581*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsContentsAdministrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewAdministrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingState ProceedingsConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsCharters

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41-472A California Forms of Pleading and Practice--Annotated § 472A.44

§ 472A.44 Attorney General Opinions

[1] Interpretation of Government Code Procedural Requirements

Substantial compliance with Government Code procedural requirements. *48 Ops. Cal. Att'y Gen. 117 (1966)*

Printing and distribution of emergency regulations. *43 Ops. Cal. Att'y Gen. 121 (1964)*

Form adopted for regular use as regulation. *25 Ops. Cal. Att'y Gen. 241 (1955)*

Regulation is valid if not arbitrary or in excess of scope of authority. *20 Ops. Cal. Att'y Gen. 120 (1952)*

Regulation is required to conform to legislative intent. *11 Ops. Cal. Att'y Gen. 105 (1948)*

[2] Applicability of Government Code Procedural Requirements

Before allowing claim filed by local agency for reimbursement of state-mandated costs, Commission on State Mandates is required to determine if claim meets either constitutional definition of "costs mandated by the state" under *Gov. Code § 17514* or *Rev. & Tax. Code § 2207* or *2207.5* [*Rev. & Tax. Code §§ 2207, 2207.5* were repealed by Stats. 1989, ch. 589, effective January 1, 1990]. *68 Ops. Cal. Att'y Gen. 244 (1985)*

Department of Health Services. 67 Ops. Cal. Att'y Gen. 50, 53-54 (1984)

State agency conducting rule-making proceeding is prohibited from establishing and enforcing deadline that is prior to rule-making hearing by which written comments must be submitted for consideration by agency [former *Gov. Code §§ 11346.5(a)(7)* (*now see Gov. Code § 11346.5(a)(9)*), 11346.8]. *64 Ops. Cal. Att'y Gen. 312 (1981)*

When agency has adopted administrative regulation in accordance with procedural steps specified in old statute governing such procedures but, before agency submits regulation for filing with Secretary of State, new statutory

procedures replace old ones, procedural steps completed by agency prior to new statute's operative date are controlled by old statute and not required to be repeated; however, when new statute imposes new procedural step, regulation-adopting agency ts required to comply with new step when requiring such compliance would not render previously completed steps invalid. *63 Ops. Cal. Att'y Gen. 326 (1980)*

Administrative regulations are permitted to be substantially changed during adoption process after public hearings have been held and prior to issuance, as long as they relate directly to same subject or issue. *63 Ops. Cal. Att'y Gen. 143 (1980)*

Director of Industrial Relations. 32 Ops. Cal. Att'y Gen. 25 (1958) ; *25 Ops. Cal. Att'y Gen. 241 (1955)*

Labor Commissioner. 30 Ops. Cal. Att'y Gen. 194 (1957)

Board of Forestry. 28 Ops. Cal. Att'y Gen. 227 (1956)

Division of Housing (superseded). *27 Ops. Cal. Att'y Gen. 56 (1956)*

Bureau of Vocational Rehabilitation (superseded). *20 Ops. Cal. Att'y Gen. 288 (1952)*

Board of Barber Examiners. 17 Ops. Cal. Att'y Gen. 199 (1951)

Fish and Game Commission. 17 Ops. Cal. Att'y Gen. 72 (1951) ; *10 Ops. Cal. Att'y Gen. 275 (1947)*

Real Estate Commissioner. 15 Ops. Cal. Att'y Gen. 267 (1950)

Board of Equalization. 15 Ops. Cal. Att'y Gen. 16 (1950)

Industrial Welfare Commission. 12 Ops. Cal. Att'y Gen. 319 (1948)

Fire Marshal. 12 Ops. Cal. Att'y Gen. 305 (1948)

Department of Social Welfare (superseded). *12 Ops. Cal. Att'y Gen. 83 (1948)*

Social Welfare Board (superseded). *12 Ops. Cal. Att'y Gen. 83 (1948)*

Athletic Commission. 12 Ops. Cal. Att'y Gen. 44 (1948)

Board of Drycleaners (superseded). *12 Ops. Cal. Att'y Gen. 34 (1948)*

Adjutant General. 11 Ops. Cal. Att'y Gen. 87 (1948)

Board of *Education. 10* Ops. Cal. Att'y Gen. 243 (1947)

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingFormal RulemakingAdministrative LawAgency RulemakingRule Application & InterpretationValidityAdministrative LawSeparation of PowersLegislative ControlsScope of Delegated AuthorityGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsState & Territorial GovernmentsFinance

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41-472A California Forms of Pleading and Practice--Annotated § 472A.45

§ 472A.45 Law Reviews

Gordon, *Compensable Regulatory Taking: A Tollbooth Rises on Regulation Road*, 12 Real Est. L.J. 211 (1984)

Livingston, *Organizations and Administrative Practice--A Balance to the Corporate State? 26 Hastings L.J. 89 (1974)*

Hannon, *The Philosophy of Administrative Law Making*, 42 State B.J. 661 (1967)

Hutchinson, *Rule Making Function of California Administrative Agencies, 15 Hastings L.J. 272 (1964)*

Harris, *State Regulation of Hazards Growing Out of Use of Atomic Energy, 46 Calif. L. Rev. 84 (1958)*

Comment, *Administrative Law and Procedure: Emergency Regulations*, 27 So. Cal. L. Rev. (1953)

Comment, *The Void for Vagueness Rule in California, 41 Calif. L. Rev. 523, 529*-532 (1953)

Note, *Administrative Law: Agency Authority to Develop Policy by Adjudication Rather Than Rule, 36 Calif. L. Rev. 619 (1948)*

Newman, *How Courts Interpret Regulations, 35 Calif. L. Rev. 509 (1947)*

Comment, *Administrative Law: Retroactive Revision of Invalid Regulations, 35 Calif. L. Rev. 92 (1947)*

Note, *Constitutional Law: Delegation of Legislative Power to Administrative Officers: Discretion to Grant or Refuse Permits, 19 Calif. L. Rev. 448 (1931)*

Thelen, *Practice and Procedure Before Administrative Tribunals, 16 Calif. L. Rev. 208 (1928)*

Comment, *Constitutional Law: Delegation of Legislative Power to Administrative Officers: Discretion to Grant or*

Refuse Licenses and Permits, and Power to Make Rules, 15 Calif. L. Rev. 408 (1927)

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingRule Application & InterpretationGeneral OverviewAdministrative LawSeparation of PowersConstitutional ControlsGeneral OverviewAdministrative LawSeparation of PowersLegislative ControlsGeneral OverviewAdministrative LawSeparation of PowersLegislative ControlsExplicit Delegation of AuthorityConstitutional LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsOverbreadth & VaguenessGovernmentsCourtsCreation & OrganizationGovernmentsLegislationEnactment

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§ 472A.46 Text References

Witkin, Summary of California Law, vol. 7, *Constitutional Law*, §§ 674-676 (10th ed 2005)

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§ 472A.47 Internet References

Office of Administrative Law. This site includes: OAL publications; links to OAL statutes and regulations relating to rulemaking; regulations submitted to the OAL for review, and information for contacting or provding input to the OAL regarding rulemaking. http://www.oal.ca.gov **NOTE:** On and after July 1, 1998, The OAL is required by *Gov. Code § 11340.1(b)* to make the full text of the California Code of Regulations, with reference citations and history notes, available on the Internet free of charge.

California Home Page. This site includes links to other sites maintained by numerous state agencies. http://www.ca.gov

Department of Consumer Affairs. This site includes links to sites maintained by many state agencies that are under this department, as well as links to agency sites. http://www.dca.ca.gov

California Courts. This site includes: general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most Court of Appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes: text of constitution, codes, and statutes (including complete text of APA); and information concerning pending legislation. http://www.leginfo.ca.gov

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[Reserved]

§§ 472A.48[Reserved]

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41-472A California Forms of Pleading and Practice--Annotated § 472A.60

§ 472A.60 Determine the Applicable Agency Rulemaking Procedure

[1] Identify the APA Procedures That an Agency Must Follow Under the APA for Non-Emergency Regulations

☐ Send notice of proposed action to OAL, with initial statement of reasons for the action [*see § 472A.11[3]*].

☐ Provide notice to the public of the proposed regulation [*see § 472A.11*].

☐ Accept public comment on the proposed regulation [*see § 472A.12*].

☐ Hold a public hearing, if requested by any interested person [*see § 472A.12[1]*].

☐ Review public comments submitted in writing or at hearing [*see § 472A.12[2]*].

☐ Submit regulation, final statement of reasons, digest and rulemaking record to OAL for review [*see § 472A.15*].

[2] Identify the Procedures That an Agency Must Follow Under the APA for "Emergency" Regulations

☐ Prepare written statement containing specific facts showing need for immediate action [*see § 472A.14*].

☐ Submit proposed regulation and statement to OAL for review [*see § 472A.14*].

[3] Consider the Standards Used by the OAL When Reviewing Regulations

☐ For nonemergency regulations, the completeness of the rulemaking file [*see § 472A.15[2]*].

☐ For emergency regulations, whether the regulation is necessary for the immediate preservation of public peace, health and safety, or general welfare [*see § 472A.15[4]*].

☐ Determine compliance with six substantive standards [*see § 472A.15[3]*].

- ☐ Necessity [*see § 472A.15[3][b]*].
- ☐ Authority [*see § 472A.15[3][c]*].
- ☐ Clarity [*see § 472A.15[3][d]*].
- ☐ Consistency [*see § 472A.15[3][e]*].
- ☐ Reference [*see § 472A.15[3][f]*].
- ☐ Nonduplication [*see § 472A.15[3][g]*].

[4] Ascertain the Consequences of OAL Approval of a Regulation

☐ OAL submits approved regulation to Secretary of State for filing [*see § 472A.15[6]*].

☐ Regulation becomes effective 30 days after filing [*see § 472A.15[6]*].

☐ Emergency regulation remains valid for 120 days unless agency formally adopts it [*see § 472A.14*].

☐ OAL publishes the regulation in the California Code of Regulations [*see § 472A.15[6]*].

[5] Ascertain the Consequences of OAL Disapproval

☐ OAL returns regulation to the agency within 30 days after submission [*see § 472A.15[6]*].

☐ OAL sends the agency a written decision stating reasons for disapproval [*see § 472A.15[6]*].

☐ Agency may resubmit disapproved regulation within 120 days without notice and hearing [*see § 472A.15[6]*].

[6] Ascertain What Procedures Apply to Rulemaking Actions Not Subject to the APA

☐ Any procedures required by the statute governing the agency [*see § 472A.31[1]*].

☐ If no statutory procedures apply, any fair procedures that agency chooses to use [*see § 472A.31[2]*].

☐ The agency may elect to use APA procedures [*see § 472A.32*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingState Proceedings

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41-472A California Forms of Pleading and Practice--Annotated § 472A.61

§ 472A.61 Review of Regulation

[1] Petition to Adopt, Amend, or Repeal a Regulation

☐ Prepare petition [*Gov. Code § 11340.6*; *see* discussion in *§ 472A.18[2][a]*; obtain petition from agency or use *form in § 472A.70* if agency does not provide petition].

☐ Submit petition to state agency [§ 472A.18[2][a]].

[2] Reconsideration of Decision on Petition

☐ Prepare petition for reconsideration [*Gov. Code § 11340.7(c)*; *see Gov. Code § 11347*; *see* discussion in *§ 472A.18[2][a]*].

☐ Submit petition to state agency [*see* discussion in *§ 472A.18[2][a]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral Overview

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[Reserved]

§§ 472A.62[Reserved]

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41-472A California Forms of Pleading and Practice--Annotated § 472A.70

§ 472A.70 Petition for Adoption, Amendment or Repeal of a Regulation [Gov. Code § 11340.6]

[1] FORM Petition for Adoption, Amendment or Repeal of a Regulation [Gov. Code § 11340.6]

RULEMAKING PROCEDURE

TO: _____[*name and address of agency*]

Pursuant to *Government Code sections 11340.6* and *11340.7*, I _____[*name*], hereby petition to _____ [adopt *or* amend *or* repeal] Title _____ [*numbe* r], California Code of Regulations, section _____[*number*] in the following manner: _____[*state substance or nature of the proposed adoption, amendment, or repeal*]. The reason for this request is: _____[*specify reason*]. The _____[*name of agency*] has the authority to make the requested change pursuant to _____[*specify applicable code and section*].
Dated: _____.

_____ [*signature*]
_____ [*typed name*]
_____ [*address*]

[2] Use of Form

Some agencies may supply a form to use for a petition. The letter format in [1], *above*, is suggested for petitions to agencies that do not supply a form.

[3] Cross References

See *§ 472A.18[2][a]* for discussion of the petition process, and requirements for petitions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral Overview

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Chapter 472B REVIEW OF AGENCY RULEMAKING

41-472B California Forms of Pleading and Practice--Annotated 472B.syn

§ 472B.syn Synopsis to Chapter 472B: REVIEW OF AGENCY RULEMAKING

§ 472B.01 Scope of Chapter

§ 472B.02 Cross References

[1] Related Coverage of Agency Rule Making

[2] Judicial Remedies and Review

[3] Public Administrative Law Generally

[4] Specific Public Agencies

§§ 472B.03-472B.09 [Reserved]

§ 472B.10 Governing Law

§ 472B.11 Decision to Seek Judicial Review of Regulations

[1] General Requirements

[2] Alternatives to Judicial Review

[a] Petition for Amendment or Repeal

[b] Priority Review

[c] Defense of Regulation's Invalidity

[d] Review of Informal Rules

§ 472B.12 Preliminary Activities

[1] Review of Regulatory Code Supplement

[2] Review of the Rulemaking Record

[a] Availability of Agency Files

[b] Method of Requesting Files

[c] Purpose of Review

§ 472B.13 Preenforcement Judicial Review of Rulemaking

[1] Remedies, Forum, and Venue

[2] Declaratory Relief

[a] General Requirements

[b] Exceptions

[c] Grounds for Declaration of Invalidity

[d] Determination of Validity of Disapproved or Repealed Regulation

[3] Writ of Mandate

[4] Injunction

§ 472B.14 Prerequisites to Judicial Review

[1] General Requirements

[2] Standing

[3] Ripeness

[4] Exhaustion of Administrative Remedies

§ 472B.15 Standards of Judicial Review

[1] Scope of Review

[2] Presumption of Validity

[3] Deference to Agency's Authority

[4] Specific Grounds for Declaration of Invalidity

[a] Action Exceeds Agency's Authority

[b] Action Violates Controlling Constitutional or Statutory Provision

[c] Regulation Is Unclear

[d] Action Lacks Sufficient Evidentiary Support for Necessity

[i] "Reasonably Necessary" Standard

[ii] Standard for Emergency Regulations

[e] Action Is Procedurally Defective

§ 472B.16 Judicial Review of Rulemaking in Enforcement Actions

§ 472B.17 Estoppel and Rulemaking

§§ 472B.18-472B.29 [Reserved]

§ 472B.30 State Constitution

§ 472B.31 State Statutes

§ 472B.32 Administrative Regulations

§ 472B.33 Decisions

[1] Generally

[2] Judicial Proceedings

[3] Review

§ 472B.34 Law Reviews

§ 472B.35 Text References

§ 472B.36 Internet References

§§ 472B.37-472B.49 [Reserved]

§ 472B.50 Determine the Appropriate Method of Judicial Review of Agency Rulemaking

[1] Ascertain If an Action for Declaratory Relief Is Appropriate

[2] Ascertain the Preliminary Activities the Plaintiff Should Perform Before Filing Action

[3] Ascertain the Following Issues Before Filing Action

[4] Ascertain Whether the Plaintiff Should Seek Other Remedies in Declaratory Relief Action

[5] Ascertain the Specific Grounds That May Support a Declaration of Invalidity

[6] Ascertain Methods That May Be Used to Challenge the Validity of a Regulation If the Agency Has Already Initiated Enforcement Proceedings

§ 472B.51 Seeking Declaratory Relief Prior to Enforcement of Regulation

[1] Prior to Litigation

§ 472B.52 Declaratory Relief to Determine Validity of Regulation

[1] Declaratory Relief

§§ 472B.53-472B.59 [Reserved]

§ 472B.60 Complaint for Declaratory and Injunctive Relief Regarding Validity of Administrative Regulation [Gov. Code § 11350]

[1] FORM

[2] Use of Form

[3] Verification

[4] Jurisdiction and Venue

[5] Allegations

[6] Interested Persons

[7] Scope of Review

[8] Administrative Remedies

[9] Injunction

[10] Costs and Attorney's Fees

[11] Exceptional Cases

[12] Cross References

§ 472B.61 Complaint for Declaratory Relief Regarding Validity of Administrative Regulation Disapproved or Ordered Repealed by the OAL

[1] FORM

[2] Use of Form

[3] Verification

[4] Relief Available

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PART I. SCOPE

41-472B California Forms of Pleading and Practice--Annotated § 472B.01

§ 472B.01 Scope of Chapter

This chapter provides discussion and forms relating to judicial review of administrative rulemaking by California public agencies pursuant to an action for declaratory relief and related remedies. The legal background discussion in Part II includes the following:

- An overview of judicial review, preliminary activities, and preenforcement proceedings [*see § 472B.10* et seq.].

- Prerequisites to judicial review, standards of review, enforcement on review, and defenses such as estoppel [*see § 472B.13* et seq.].

Part V includes forms of complaints for declaratory relief and related remedies for use in obtaining superior court review of an agency's adoption or amendment of a regulation or rule [*see §§ 472B.60, 473B.61*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingState ProceedingsAdministrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewRemediesDeclaratory JudgmentsAdministrative LawJudicial ReviewRemediesDeclaratory JudgmentsAdministrative LawJudicial ReviewStandards of ReviewGeneral Overview

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41-472B California Forms of Pleading and Practice--Annotated § 472B.02

§ 472B.02 Cross References

[1] Related Coverage of Agency Rule Making

For further discussion and forms relating to the legislative or rulemaking functions of California public agencies, including an overview of rule adoption requirements and judicial review of these functions, see respectively:

- Ch. 472, *Public Agency Rules*.
- Ch. 472A, *Agency Rulemaking Procedures*.

For discussion and forms relating to the law governing access to and conduct of meetings by California public agencies, including rule making meetings, see Ch. 470B, *Public Agency Meetings* .

[2] Judicial Remedies and Review

For discussion and forms relating to civil actions for declaratory or injunctive relief generally, which be available to review administrative regulations, see respectively Ch. 182, *Declaratory Relief* , and Ch. 303, *Injunctions* .

For discussion and appropriate forms relating to a proceeding for a writ of review, which may be available to obtain a judicial determination as to the validity of a regulation adopted by certain state agencies, see Ch. 492, *Review (Certiorari), Writ of*.

For other discussion and forms relating to judicial review generally, see:

- Ch. 40, *Appeal: An Overview*, through Ch. 54, *Appeal: California Supreme Court Review* (discussion and forms relating to civil appeals).
- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to immediate judicial review of orders by extraordinary writ of mandate or prohibition).

[3] Public Administrative Law Generally

For related discussion of California public administrative law generally, including discussion of public agency functions and powers (including adjudicative or quasi-judicial powers), and organization generally, see Ch. 470, *Overview of Public Administrative Law* (general discussion of judicial power is in §§ 470.12[5]). For detailed discussion of the general procedures imposed in agency proceedings by constitutional due process and related statutory requirements, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

For detailed discussion and forms relating to the law governing disclosure of public records under the California Public Records Act [*Cal. Gov. Code §§ 6250 et seq.*], see Ch. 470C, *Public Records Act* .

For detailed discussion and forms relating generally to agency investigations and inspections, see, Ch. 471, *Investigations by Public Agencies* , and Ch. 471A, *Inspections by Public Agencies* .

For detailed discussion and forms concerning quasi-judicial agency action, or public agency adjudication, and detailed discussion and forms relating to judicial review of such adjudications, see respectively Ch. 473, *Public Agency Adjudication* , et seq., and Ch. 474, *Availability of Judicial Review of Agency Decisions* .

[4] Specific Public Agencies

For a brief discussion of the Public Utilities Commission's constitutional authority to exercise legislative power, see Ch. 480, *Public Utilities* .

For coverage relating to specifically public agencies (primarily with respect to their adjudicative rather than rule making activities), see *Ch. 470, Overview of Public Administrative Law, § 470.02[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 472B REVIEW OF AGENCY RULEMAKING
PART I. SCOPE

41-472B California Forms of Pleading and Practice--Annotated §§ 472B.03-472B.09

[Reserved]

§§ 472B.03[Reserved]

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41-472B California Forms of Pleading and Practice--Annotated § 472B.10

§ 472B.10 Governing Law

The procedures used by most public agencies for rulemaking are set out in that part of the Administrative Procedure Act (APA) entitled "Administrative Regulations and Rulemaking," that is, *Gov. Code § 11340 et seq.*.

The provisions of *Gov. Code § 11340 et seq.* collectively comprise Chapter 3.5 of Part I (State Departments and Agencies) of Division 3 (Executive Department) of Title 2 (State Government) of the Government Code. This law is referred to hereafter for convenience as "Chapter 3.5."

Together with Chapter 4 ("Office of Administrative Hearings," *Gov. Code § 11370 et seq.*), Chapter 4.5 ("Administrative Adjudication: General Provisions," *Gov. Code § 11400 et seq.*), and Chapter 5 ("Administrative Adjudication: Formal Hearings," *Gov. Code § 11500 et seq.*), these provisions comprise and may be cited as the Administrative Procedure Act; hereafter the APA) [*see Gov. Code § 11370*].

As discussed *below*, various other statutes or constitutional provisions may apply to authorize and otherwise govern the rulemaking of specific agencies.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingState Proceedings

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41-472B California Forms of Pleading and Practice--Annotated § 472B.11

§ 472B.11 Decision to Seek Judicial Review of Regulations

[1] General Requirements

Because an administrative regulation is a product of legislation by an administrative agency, acting either pursuant to authorization from the Legislature or on the basis of direct authorization in the California Constitution to exercise limited legislative power, a regulation has the force and effect of law [*see* Ch. 472, *Public Agency Rules* , for a discussion of an agency's quasi-legislative authority]. Thus, the validity of a regulation may be tested in a judicial proceeding by the same method used to test the enforceability of a statute. The discussion in this chapter relates exclusively to challenges to regulations in the California courts, with primary coverage of judicial review of regulations promulgated by state agencies under the California Administrative Procedure Act (APA) [*see Gov. Code § 11340 et seq.*].

In order to obtain judicial review pursuant to an action for declaratory relief [*see § 472B.13[2]*], that action must be brought before formal proceedings are instituted to enforce the regulation. After enforcement proceedings have begun, that remedy is no longer available, because the doctrine of exhaustion of administrative remedies then applies [*see Tushner v. Griesinger (1959) 171 Cal. App. 2d 599, 605, 341 P.2d 416* ; *see § 472B.14[4]*]. An attorney who represents businesses or individuals may save his or her clients time and trouble by attacking a regulation's validity before it is enforced against the clients [*see* Bolz & Garcia, *The Other Side of Administrative Law*, Cal. Lawyer 47, 52 (Nov. 1987)]. This chapter briefly addresses challenges to a regulation's validity during enforcement proceedings.

For a general discussion of administrative enforcement proceedings, however, see Ch. 473, *Public Agency Adjudication* , et seq., and Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

If the regulation that a person wishes to have reviewed is not being enforced, that is, it is not being applied by the agency to the objecting party as part of formal adjudicatory proceedings, the party may seek the preenforcement remedy of declaratory relief, often coupled with a petition for injunction or writ of mandate [*see § 472B.13*].

In contrast, if the regulation is already being enforced, the party challenging the regulation may only do so as a defense during the administrative hearing; judicial review of that hearing is limited to a petition for administrative mandamus [

Code Civ. Proc. § 1094.5; *see § 472B.15*].

As discussed in [2], *below*, several alternatives to judicial review may be used to accomplish the same result. These alternatives include a petition to the agency for amendment or repeal of the regulation [*Gov. Code §§ 11340.6, 11340.7*; *see* [2][a], *below*], priority review of the regulation by the Office of Administrative Law (OAL), [*Gov. Code § 11349.7*; *see* [2][b], *below*], and challenge to the regulation during an action initiated by the agency to enforce the regulation [*Gov. Code §§ 11500-11528*; *see* [2][c], *below*]. If the regulation has not been formally adopted pursuant to the California APA, it may be challenged in a request for OAL determination, and subsequently be reviewed by a court [*Gov. Code § 11340.5(b)*; *see* [2][d], *below*].

[2] Alternatives to Judicial Review

[a] Petition for Amendment or Repeal

Any interested person may petition a state agency, requesting it to amend or repeal a regulation [*Gov. Code § 11340.6*]. For discussion and an example of a petition requesting amendment or repeal of a regulation, see *Ch. 472A, Agency Rulemaking Procedures, § 472A.70*.

The petition for amendment or repeal of a regulation may be made in the nature of a settlement offer, that is, it may be used to persuade the agency to take the desired action voluntarily. Informal consultations with the agency, when possible, are useful to determine in advance what theagency's response will be. That determination will be a factor in assessing the utility of this type of petition in the particular case.

[b] Priority Review

The "priority review" procedure authorized by *Gov. Code § 11349.7* is used infrequently. That section requires the OAL, on the request of a standing, select, or joint committee of the California Legislature, to review a regulation that the committee believes does not meet California APA standards [*Gov. Code § 11349.7*; *see Gov. Code § 11340.7* (regulatory standards)]. The OAL must notify interested persons, publish in the California Regulatory Notice Register [*see* Ch. 472A, *Agency Rulemaking Procedures*] the fact that a priority review has been requested, and consider all written comments submitted by interested persons as well as the information contained in the rulemaking record [*Gov. Code § 11349.7*]. The OAL will then determine if the regulation should be repealed. It must reach a decision within 90 calendar days of the receipt of the written request [*Gov. Code § 11349.7*].

If the OAL decides that the regulation should be repealed, it must issue an order to show cause to the agency. The agency is given 60 days to respond, and the public is also given the opportunity for further comment. The 60-day time limit may be extended by the OAL for a maximum additional period of 30 days [*Gov. Code § 11349.7(a), (b)*]. The OAL must review and consider all information submitted by the agency and the public, and must reach a final determination within 60 days of receiving the agency's response. If a determination is not reached within 60 days, the regulation will be deemed to meet the standards set forth in *Gov. Code § 11349.1* [*Gov. Code § 11349.7(c)*]. If the OAL determines that a regulation fails to meet the standards, it must prepare and make public a statement of reasons, transmit an order of repeal to the secretary of state for filing [*Gov. Code § 11349.7(c)*], and publish the order of repeal in the California Regulatory Code Supplement [*Gov. Code § 11349.7(e)*]. However, the governor may overrule the decision to repeal. Notice of that action must be published in the California Regulatory Notice Register [*Gov. Code § 11349.7(d)*; *see* Ch. 472A, *Agency Rulemaking Procedures*]. The entire process, beginning with the lodging of the request with the OAL, will take from five to seven months.

[c] Defense of Regulation's Invalidity

A person wishing to challenge a regulation may wait until the agency brings an action to enforce the regulation and then raise invalidity of the regulation as a defense [*see § 472B.16*]. It is less risky, however, for a person, such as a licensee,

to challenge a regulation before it is specifically applied to that person in an enforcement proceeding. Using an enforcement proceeding to challenge a regulation subjects the person to possible disciplinary action, such as denial or suspension of a license or even criminal prosecution [*Chas. L. Harney, Inc. v. Contractors' Bd. (1952) 39 Cal. 2d 561, 564, 247 P.2d 913* ; *see* Ch. 473, *Public Agency Adjudication* , et seq., for coverage of adjudicatory hearings].

[d] Review of Informal Rules

In California (unlike the federal system) [*see, e.g., 5 U.S.C. §§ 552(a)(1)(D), 552(a)(2)(B), 553(b)(3)(A), (d)(2)* (exemption from the Federal APA's procedural requirements for "interpretive rules" and "policy statements")], when an agency adopts a rule, guideline, or policy that meets the APA definition of a regulation [*Gov. Code § 11342.600* (regulation defined)] without following the APA procedures and is not statutorily exempt from the APA requirements, the regulation is not lawfully adopted and may be challenged on that basis.

Prior to 1983, the only way to challenge such a regulation was by judicial review. Since 1983, however, a specific, inexpensive alternative to judicial review is available in the form of a "request for determination" directed to the OAL under *Gov. Code § 11340.5* [*see* Bolz & Garcia, *The Other Side of Administrative Law*, Cal. Lawyer 47, 50-52 (Nov. 1987)]. For coverage of the procedure and requirements for filing a request for determination, *see* Ch. 472, *Public Agency Rules*, § 472B.20 et seq.

An OAL determination that the regulation is invalid is not binding on state agencies, but it gives significant support to a court challenge. Moreover, such a determination from the OAL usually obviates going to court at all; agencies generally reexamine the challenged rule and either initiate a rulemaking proceeding or resolve the problem to the regulated party's satisfaction [*see* Bolz & Garcia, *The Other Side of Administrative Law*, Cal. Lawyer 47, 52 (Nov. 1987)]. If the OAL determines that the regulation is valid, any interested person may obtain judicial review of the determination by filing a written petition requesting that the OAL determination be modified or set aside. The petition must be filed with the court within 30 days after the date the determination is published [*Gov. Code § 11340.5(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingRule Application & InterpretationBinding EffectAdministrative LawAgency RulemakingRule Application & InterpretationValidityAdministrative LawAgency RulemakingState ProceedingsAdministrative LawJudicial ReviewRemediesDeclaratory JudgmentsAdministrative LawJudicial ReviewRemediesInjunctive ReliefAdministrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewReviewabilityExhaustion of RemediesAdministrative LawJudicial ReviewReviewabilityStanding

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§ 472B.12 Preliminary Activities

[1] Review of Regulatory Code Supplement

When judicial review of a formally adopted administrative regulation [*see* § 472B.1[1], *below*], or defense of such an action [*see § 472B.10[2][c]*] is contemplated, a preliminary review of the actions preceding its adoption is usually necessary. If the regulation has been duly adopted by an agency of the State of California ("State agency" does not include judicial or legislative bodies for purposes of the APA) [*Gov. Code § 11340.9(a)*], the Office of Administrative Law (OAL), which is the control agency, will have a record of the action [*see* Ch. 472A, *Agency Rulemaking Procedures* , for a discussion of the OAL and its procedures].

Actions taken by the OAL in connection with the regulation may be traced through the California Regulatory Code Supplement [*see Gov. Code § 11344(b)*]. This publication was formerly called the "California Administrative Register" [*see* former Gov. Code. Code § 11344(a)], and the bound volumes are still referred to as "registers" [*see* Ch. 472A, *Agency Rulemaking Procedures* , for a discussion of the procedure for tracing the history of action on a regulation].

At first glance, this published record appears to contain nothing more than a brief reference to the regulations filed with the secretary of state and the text of decisions of disapproval [*see Gov. Code § 11349.3(a)*] of regulations by the OAL. A search of the Supplement prior to the notice of the proceeding objected to, however, may produce a decision of disapproval of an earlier attempt by the agency to adopt the same regulation in a somewhat different form. The existing regulation may have been adopted through a "resubmittal" or through an entirely different rulemaking proceeding. The prior disapproval may have raised issues much like those being considered as the basis for judicial review. If so, the discussion in the notice of disapproval could provide helpful information and legal analysis.

[2] Review of the Rulemaking Record

[a] Availability of Agency Files

As with the appeal from the judgment of a court or the judicial review of an administrative trial-type hearing, the record of the rulemaking proceeding must be analyzed as part of the challenging or defending party's decisionmaking process. State agencies are required to maintain a file of each rulemaking proceeding that will be deemed to be the record for that

rulemaking proceeding [*Gov. Code § 11347.3(a)*].

Public agencies not subject to the APA will also maintain records of their rulemaking proceedings, although the contents of those records may not be prescribed by state statute, local ordinance, or internal rule. Those records must reflect the "body of evidence upon which the agency acted," which is deemed to be indispensable to judicial review [*California Optometric Assn. v. Lackner (1976) 60 Cal. App. 3d 500, 510-511, 131 Cal. Rptr. 744]* .

[b] Method of Requesting Files

Prior to litigation, the rulemaking record may be obtained through a request pursuant to the California Public Records Act [*Gov. Code §§ 6250-6267*; for discussion, *see* Ch. 470C, *Public Records Act*]. After the commencement of litigation, the record may be obtained through discovery procedures. *Gov. Code § 11347.3(d)* provides that the agency file of the rulemaking proceeding must be made available by the agency to the public and to the courts in connection with the review of the regulation. Agencies are required to maintain rulemaking files, or to transmit the rulemaking files to the state archives, after the agencies have received the rulemaking files form the Office of Administrative Law [*Gov. Code § 11347.3(e), (f)*].

This unqualified availability appears to support requests for the record under the California Public Records Act, notwithstanding the litigation exception of *Gov. Code § 6254(b)*. That section provides that records pertaining to pending litigation to which the public agency is a party or claims made pursuant to the California Tort Claims Act [*see Gov. Code § 810 et seq.* (California Tort Claims Act)] are exempt until the litigation is finally adjudicated or otherwise settled [*Gov. Code § 6254(b)*].

The file of the rulemaking proceeding that resulted in the adoption of the regulation objected to should be requested, together with the record of any previous, unsuccessful rulemaking proceeding concerning the same specific subject matter.

[c] Purpose of Review

The record of a state agency rulemaking subject to the APA should be carefully scrutinized in light of the substantive standards set forth in *Gov. Code § 11349.1* and the procedural requirements of the APA [*see 1 Cal. Code Reg. §§ 10-120*, discussed in Ch. 472A, *Agency Rulemaking Procedures* , for interpretations and applications of these rulemaking provisions of the APA by the OAL]. In addition, that scrutiny in all cases should extend to the other nonstatutory standards of review, discussed in *§ 472B.15*. Although in a declaratory relief action [*Gov. Code § 11350*; *see § 472B.13[2]*], courts look for substantial compliance with the APA [*Gov. Code § 11350(a)*], each and every failure to comply with the provisions of the APA should be noted. If a sufficient number of minor failures to comply with the APA are identified, the agency (or the court) may deem that the record reflects a "substantial failure to comply with the provisions" of the APA within the meaning of *Gov. Code § 11350(a)*.

The statements in the record pertaining to reasons for adopting the regulation should be measured against the factual information in the record. In non-APA proceedings, the equivalent information (reasons versus facts in the record) should be evaluated.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 472B.13 Preenforcement Judicial Review of Rulemaking

[1] Remedies, Forum, and Venue

The choice of remedies for the party seeking preenforcement judicial review of a section of the California Code of Regulations seldom varies. The primary remedy is a declaratory judgment [*Code Civ. Proc. §§ 1060-1062.5*] that the regulation is invalid [*Gov. Code § 11350*; *see* [2], *below*]. An action for declaratory relief is cumulative with other remedies [*see Code Civ. Proc. §§ 1060, 1062*].

Therefore, the initiating document should be a complaint for declaratory relief, which may be combined with a petition for a writ of mandamus, and for injunction [*see* [2]-[4], *below*]. In order to bring any judicial action, the prerequisites for judicial review must be met, as discussed in *§ 472B.14*.

The superior court is the proper forum for the judicial challenge of a regulation [*Gov. Code § 11350(a)*]. The venue of the action is determined in accordance with the rules ordinarily applied in civil actions [*Gov. Code § 11350(a)*; *see Code Civ. Proc. §§ 392-402*]. Under those rules, venue is dependent on the location of the agency's principal office or the location of an office of the attorney general [*Gov. Code § 11350(a)*; *see Code Civ. Proc. § 401*].

[2] Declaratory Relief

[a] General Requirements

The specific remedy provided for challenge to a regulation prior to enforcement is the action for declaratory relief under *Gov. Code § 11350*. That section provides that any interested person may obtain a judicial declaration regarding the validity of any regulation, with certain exceptions [*see* [b], *below*], by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure [*Gov. Code § 11350(a)*; *see Code Civ. Proc. §§ 1060-1062.5*]. *Gov. Code § 11350* is, in effect, an amendment of *Code Civ. Proc. § 1060*, adding to the cases described in the latter section in which a person may sue for declaratory relief [*County of Los Angeles v. State Dep't of Public Health (1958) 158 Cal. App. 2d 425, 443-444, 322 P.2d 968]* .

It allows a person who is potentially subject to an administrative regulation to determine before committing himself or

herself to a course of action that might be in conflict with the regulation whether the regulation is valid and must be followed [*K. & W. Pharmacy, Inc. v. State Dep't of Social Welfare (1969) 275 Cal. App. 2d 139, 141, 79 Cal. Rptr. 598]* . The right to a judicial determination is not affected by the challenging party's failure either to file a petition for adoption, amendment, or repeal of the regulation [*see Gov. Code §§ 11340.6, 11340.7(a)*; *see also* Ch. 472A, *Agency Rulemaking Procedures*], or to seek reconsideration of the agency's decision on a filed petition [*Gov. Code § 11350(a)*; *see Gov. Code § 11347.1(c)*].

An example of proper use of an action for declaratory relief is to challenge the validity of an agency policy or regulation [*see, e.g., Agnew v. State Board of Equalization (1999) 21 Cal. 4th 310, 319-320, 87 Cal. Rptr. 2d 423, 981 P. 2d 52* (holding that policy of the State Board of Equalization, not adopted as regulation, relating to payment of accrued interest on tax deficiency before considering refund claim, may be reviewed through declaratory relief action under *Gov. Code § 11350(a)* without exhausting administrative remedies before *Board); Slocum v. State Bd. of Equalization (2005) 134 Cal. App. 4th 969, 974-976, 36 Cal. Rptr. 3d 627* (SBE interpretation contained in reassessment rule [SBE Rule 139] entitled to some but not substantial deference, and rule was held to be invalid because it was inconsistent with the authorizing statute [*Rev & T. Code § 170(a)(2)*], and the California constitution [*Cal. Const. Art. 13, § 15*])].

An action for declaratory relief may not be used to review an adjudicative order or decision [*State of California v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 251, 115 Cal. Rptr. 497, 524 P.2d 1281*]. For discussion of the appropriate remedy for an adjudicative action, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq. For an example of a complaint for declaratory relief under *Gov. Code § 11350*, see *§ 472B.50, below*.

For general discussion and forms relating to civil actions for declaratory relief generally, see Ch. 182, *Declaratory Relief* .

[b] Exceptions

An action for declaratory relief under *Gov. Code § 11350* may not be used to challenge any regulation adopted by the Public Utilities Commission, the Division of Industrial Accidents, or the Workers' Compensation Appeals Board [*Gov. Code § 11351(a)*]. Furthermore, since the term "state agency" as used in the California Administrative Procedure Act does not include an agency in the judicial or legislative departments of the state government [*Gov. Code § 11340.9(a)*], the validity of a regulation adopted by an agency in the judicial or legislative branches of the state government may not be tested by an action for declaratory relief.

Finally, an action for declaratory relief may not be used to test the validity of a rule that is not deemed to be a "regulation" according to the California Administrative Procedure Act definition. That definition expressly excludes rules that relate only to the internal management of a state agency, legal rulings of counsel issued by the franchise tax board or state board of equalization, or any form prescribed by a state agency or any instructions relating to the use of the form [*Gov. Code § 11342.600* (regulation defined); *Gov. Code § 11340.9(b), (c), (d)*; *see* Ch. 472, *Public Agency Rules*].

[c] Grounds for Declaration of Invalidity

The APA provides that a regulation challenged pursuant to an action for declaratory relief may be declared to be invalid for any one or more of the following reasons [*Gov. Code § 11350(a), (b)*; *see § 472B.15*, for discussion of judicially established standards that predate the APA standards]:

- It substantially fails to comply with the provisions of the APA.

- In the case of an emergency regulation or order to repeal [*Gov. Code §§ 11346.1, 11349.6*], the facts recited in the statement do not constitute an emergency within the provisions of *Gov. Code § 11346.1* [

see Ch. 472A].

- The agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence [*see Gov. Code §§ 11349(a), 11349.1(a)(1)*].

- The agency declaration that a regulation will not have significant adverse economic impact upon small businesses is not supported by substantial evidence in the record [*Gov. Code § 11350(b)(2)*].

In any action for declaratory relief brought with respect to a regulation, the court will not consider the approval of the regulation by the OAL [*see Gov. Code § 11349.3(a)*], or the governor's overruling of a decision of the OAL disapproving the regulation [*Gov. Code § 11350(c)*; *see Gov. Code § 11349.3(b)*].

An agency policy that is not adopted in a formal regulation and does not constitute a long standing-agency interpretation is reviewable by the court independently as a question of law without deference to the agency interpretation and without following the more limited standard of review applicable to formally adopted regulations [*Agnew v. State Board of Equalization (1999) 21 Cal. 4th 310, 321-322, 87 Cal. Rptr. 2d 423, 981 P. 2d 52]* .

See generally Ch. 472A, *Agency Rulemaking Procedures* .

[d] Determination of Validity of Disapproved or Repealed Regulation

Any interested person may bring a declaratory relief action in the superior court [*see Code Civ. Proc. § 1060*], to determine the validity of a regulation that the OAL has disapproved or ordered repealed [*Gov. Code § 11350.3*; *see Gov. Code §§ 11349.7* (priority review of regulations), 11349.3 (approval or disapproval of regulations), 11349.6 (approval or disapproval of emergency regulations)]. Presumably, an "interested person" could be a person who would have benefited or suffered a detriment by reason of repeal or OAL disapproval, but it could also include the agency that submitted the regulation for approval. The court may declare the regulation valid if it determines that the regulation meets the six substantive standards used by the OAL [*see Gov. Code § 11349.1(a)*; *see also* Ch. 472A, *Agency Rulemaking Procedures*] and that the agency has complied with the provisions of the APA. If the court makes such a determination, it may order the OAL to file the regulation with the Secretary of State immediately [*Gov. Code § 11350.3*]. For an example of a complaint for declaratory relief under *Gov. Code § 11350.3, see § 472B.61*, and Ch. 182, *Declaratory Relief* .

[3] Writ of Mandate

A petition for writ of mandamus (also called writ of mandate) [*Code Civ. Proc. § 1084*] under *Code Civ. Proc. §§ 1084-1097* is often coupled with the complaint for declaratory relief in an action seeking judicial review of a regulation [*see Gong v. City of Fremont (1967) 250 Cal. App. 2d 568, 574, 58 Cal. Rptr. 664* (declaratory relief claim asserting constitutional challenge that could not be raised in mandamus proceeding joined with mandamus action)]. A writ of mandate may be issued to any inferior tribunal, corporation, board, or person to compel the performance of an act that the law specially enjoins as a duty resulting from an office, trust, or station [*Code Civ. Proc. § 1085*]. The writ is sought to invoke the court's power to order the agency to perform ministerial acts (often a necessary adjunct to declaratory relief), as well as an independent form of relief. This writ, which is used when a regulation is challenged prior to enforcement, must not be confused with the "writ of administrative mandamus," which is prescribed for the review of administrative trial-type (quasi-judicial) hearings under *Code Civ. Proc. § 1094.5*.

A petition for writ of mandate would not seem to invite a court to interfere with the exercise of legislative power by directing repeal of a regulation. Moreover, the availability of injunctive relief [*see* [4], *below*] would normally preclude

a mandate proceeding; *Code Civ. Proc. § 1086* requires a lack of an adequate remedy in the ordinary course of law. In a mandate proceeding brought to nullify an administrative regulation, however, the California Supreme Court ordered issuance of a writ of mandate directing the agency to rescind the regulation in its entirety [*California Welfare Rights Organization v. Brian (1974) 11 Cal. 3d 237, 243-244, 113 Cal. Rptr. 154, 520 P.2d 970]* .

In *Clean Air Constituency v. California State Air Resources Bd. (1974) 11 Cal. 3d 801, 114 Cal. Rptr. 577, 523 P.2d 617* , the California Supreme Court stated that the writ of mandate may be used to review the validity of a quasi-legislative action [*Clean Air Constituency v. California State Air Resources Bd. (1974) 11 Cal. 3d 801, 809, 114 Cal. Rptr. 577, 523 P.2d 617]* .

The extent of the relief afforded by mandamus is confined to ministerial acts, that is, the writ will not order the agency to exercise its discretion in a specific manner. For example, an agency may be ordered to promulgate its regulations according to law; however, the court may not order the agency to adopt specific language in its regulations. The agency has the function of making the applicable rules in the area; the judiciary should avoid attempting to invade what is essentially a legislative function [*Pillsbury v. South Coast Regional Com. (1977) 71 Cal. App. 3d 740, 756, 139 Cal. Rptr. 760]* .

A medical device manufacturer (Baxter) that manufactured prescription medical devices which contained a chemical plasticizer (DEHP) that came into contact with the human body filed an administrative petition with the Office of Environmental Health Hazard Assessment (OEHHA) asking OEHHA to promulgate a regulation determining that DEHP exposure did not pose a significant risk of cancer in humans, and therefore Baxter would be exempt from having to post a warning under the requirements of Proposition 65 [*Health & Safety Code § 25249.10(c)*]. OEHHA denied the petition, and Baxter filed a petition for a writ of mandate, which the trial court denied on grounds that neither Proposition 65 nor OEHHA regulations required the agency to promulgate regulations or make findings that DEHP did not provide a significant risk of cancer in humans. The trial court allowed Baxter to amend its complaint to request declaratory relief under *Code Civ. Proc. § 1060* to seek the same type of relief, essentially a declaration that exposure to DEHP in Baxter's medical device products did not create a significant risk of cancer in humans, and therefore no warning of such exposure was required under exemptions recognized by the law [*Health & Safety Code § 25249.10(c)*]. The trial court granted that declaratory judgment, and the Court of Appeal affirmed the judgment for declaratory relief [*Baxter Healthcare Corp. v. Denton (2004) 120 Cal. App. 4th 333, 344-345, 15 Cal. Rptr. 3d 430]* .

For discussion and forms relating to judicial review generally by way of petition for extraordinary writ of mandate, see Ch. 358, *Mandate and Prohibition* ; see also Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

[4] Injunction

The complaint or petition for judicial review often states an action for injunction [*Code Civ. Proc. §§ 525-534*], as well as declaratory relief and mandamus. If a party wants affirmative relief against enforcement, as well as a declaration of a regulation's invalidity, an action for injunctive relief is appropriate. Since mandamus is used to "compel the performance of an act," injunctive relief is often necessary to prohibit acts by the agency, both preliminarily and, following judgment, permanently. A court may not enjoin enforcement of a valid regulation, but if the regulation is declared to be invalid, the court may enjoin enforcement [*see, e.g.,* *Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal. 3d 392, 401, 128 Cal. Rptr. 183, 546 P.2d 687]* . An injunction prohibiting enforcement of a public statute because the agency responsible for statutory enforcement failed to enact implementing regulations that were arguably required by the statute was reversed on appeal. The appellate court held that the granting of the injunction was improper because: 1) the statute provided that the agency could adopt regulations when necessary, which gives the agency discretion whether to adopt regulations; and 2) the statutory terms were detailed and precise, and thus were specific enough for enforcement by the agency without the adoption of implementing regulations. The scope of court authority to reverse an agency decision not to begin rule making proceedings is very narrow [*Alfaro v. Terhune (2002) 98 Cal. App. 4th 492, 503-505, 120 Cal. Rptr. 2d 197]* .

For an example of a complaint for injunction, combined with a complaint for declaratory relief, see *§ 472B.60*. For injunctions in general, see Ch. 303, *Injunctions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingRule Application & InterpretationValidityAdministrative LawJudicial ReviewRemediesDeclaratory JudgmentsAdministrative LawJudicial ReviewRemediesInjunctive ReliefAdministrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewCivil ProcedureVenuePublic Officials

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Volume 41: Overview of Public Administrative Law thru Review of Agency Rulemaking-Chs. 470-472B
Chapter 472B REVIEW OF AGENCY RULEMAKING
PART II. LEGAL BACKGROUND

41-472B California Forms of Pleading and Practice--Annotated § 472B.14

§ 472B.14 Prerequisites to Judicial Review

[1] General Requirements

The terms "standing," "ripeness," and "exhaustion of administrative remedies" commonly arise in the context of challenges to regulations, and the first two are frequently raised as affirmative defenses in these actions--for example, "plaintiff/petitioner lacks standing" or "this action is not ripe for judicial review."

[2] Standing

Gov. Code § 11350(a) expressly allows "any interested person" to seek declaratory relief. "Any interested person" has been interpreted to include even persons who are potentially subject to the regulation [*Stoneham v. Rushen (1984) 156 Cal. App. 3d 302, 310, 203 Cal. Rptr. 20]* . Moreover, *Gov. Code § 11350* expressly states that standing to seek a judicial determination is not affected by a person's failure to file a petition for amendment or repeal [*see Gov. Code § 11340.7*], or a request for reconsideration of such a petition, with the agency [*Gov. Code § 11350(a)*].

The courts have been somewhat more restrictive with respect to standing to bring actions for injunction and mandamus. With respect to an injunction, a plaintiff must plead facts showing a wrongful act that directly resulted in a violation of his or her legal rights in order to have standing to maintain an action for injunction in an individual capacity [*United States v. Superior Court (1941) 19 Cal. 2d 189, 198, 120 P.2d 26]* . With respect to mandamus, the courts will require the petitioner to demonstrate that the writ is necessary to enforce or protect a specific legal right that is clear, present, certain, and substantial [*American Friends Service Committee v. Procunier (1973) 33 Cal. App. 3d 252, 256, 109 Cal. Rptr. 22* ; *see also Parker v. Bowron (1953) 40 Cal. 2d 344, 354, 254 P.2d 6* (unions that sought writ to compel city officials to set salaries for city employees at rate equal to private industry lacked standing because no benefit would accrue to them if writ were issued)]. There is an exception to this rule when the question is one of public, as opposed to private, interest and petitioner seeks performance of a public duty. In those cases, the usual requirements are relaxed [*American Friends Service Committee v. Procunier (1973) 33 Cal. App. 3d 252, 256, 109 Cal. Rptr. 22]* . The rationale is that the petitioner need not show that he or she has any legal or special interest in the result; it is sufficient that he or she is interested as a citizen in having the laws executed and the duty in question enforced [*American Friends Service Committee v. Procunier (1973) 33 Cal. App. 3d 252, 256, 109 Cal. Rptr. 22* , citing *Bd. of Soc. Welfare v. County of L.A. (1945) 27 Cal. 2d 98, 100-101, 162 P.2d 627* (purpose of nonprofit corporation plaintiffs in seeking writ of

mandate for prison reform constituted "enforcement of a public duty")].

[3] Ripeness

Because courts will not issue purely advisory opinions, the action of the agency must be ripe for review [*see, e.g., Gov. Code § 11350(a)*; *Code Civ. Proc. § 1060* (requiring "actual controversy" for declaratory relief action)]. Ripeness requires that the courts evaluate the rulemaking action as to the fitness of the issues for judicial review and the hardship to the parties if the courts refuse to review the action at the time they are requested to do so [*Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal. 3d 158, 171-174, 188 Cal. Rptr. 104, 655 P.2d 306* ; *Farm Sanctuary, Inc. v. Department of Food & Agriculture (1998) 63 Cal. App. 4th 495, 501-502, 74 Cal. Rptr. 2d 75]* . For further discussion of ripeness for judicial review and the timing of review generally, see Ch. 474A, *Availability of Judicial Review of Agency Decisions*. That chapter also includes discussion of when an issue is moot.

[4] Exhaustion of Administrative Remedies

Exhaustion of administrative remedies is not a valid defense in an action for judicial review of administrative rulemaking. As noted [*see § 472B.13[2][a]*], a petition to the agency for repeal or amendment of a regulation pursuant to *Gov. Code §§ 11340.6* and *11340.7* is available but not mandatory [*Motion Picture Studio Teachers & Welfare Workers v. Millan (1996) 51 Cal. App. 4th 1190, 1197-1199, 59 Cal. Rptr. 2d 608* (party challenging agency interpretation of regulation who is seeking to "enforce ... [a] regulation as written" is not required to petition agency to amend regulation prior to seeking judicial review by writ of mandate)]. *Gov. Code § 11350(a)*, in stating that the right to judicial determination is not affected by a person's failure to file a petition with the agency, makes it plain that persons wishing to challenge the validity of a regulation in court are not required to petition the agency first for repeal or amendment. The court in *Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132, 1139* , interpreted *Gov. Code § 11350(a)* to dispense with the requirement of exhaustion of the administrative remedy in declaratory relief cases in which injunctive relief is also sought. The same rationale would probably apply in cases that also seek mandamus [*Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132, 1139]* . Although the *Hillery* court involved only a petition for injunctive relief, the court stated that its construction of *Gov. Code § 11350(a)* was in accord with the decision in *Stoneham v. Rushen (1982) 137 Cal. App. 3d 729, 188 Cal. Rptr. 130* , which involved a writ of mandate [*Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132, 1139]* . The *Stoneham* court granted both declaratory relief and a writ of mandamus, and set forth the procedural history of the case, without mentioning whether the petitioners had sought administrative relief first [*Stoneham v. Rushen (1982) 137 Cal. App. 3d 729, 737, 188 Cal. Rptr. 130]* .

Similarly, no authority supports the proposition that a plaintiff/petitioner must have participated in the rulemaking process in order to avoid the defense of failure to exhaust administrative remedies. For further discussion of the requirement of exhaustion of administrative remedies in the context of the timing of judicial review, see Ch. 474A, *Timing of Judicial Review of Agency Decisions* .

Legal Topics:

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§ 472B.15 Standards of Judicial Review

[1] Scope of Review

In an action for declaratory relief regarding the validity of a regulation, *Gov. Code § 11350* sets forth four standards under which the reviewing court may declare a regulation to be invalid. First, a regulation is invalid for a substantial failure to comply with the provisions of the APA [*Gov. Code § 11350(a)*]. This language appears to include both:

- The substantive standards of necessity, clarity, authority, reference, consistency, and nonduplication used by the OAL to review regulations submitted to it [*Gov. Code § 11349.1(a)*].

- The procedural requirements stated elsewhere in the APA.

For a discussion of those substantive standards and procedural requirements, see Ch. 472A, *Agency Rulemaking Procedures* [*see also* Bolz & Garcia, *The Other Side of Administrative Law*, Cal. Lawyer 47-52 (Nov. 1987)].

Second, an emergency regulation may be declared to be invalid on the ground that the facts recited in the finding of emergency prepared under law [*Gov. Code § 11346.1(b)*] do not constitute an emergency within the provisions of *Gov. Code § 11346.1* [*Gov. Code § 11350(a)*; *see* Ch. 472A, *Agency Rulemaking Procedures* , for a discussion of emergency regulations].

Third, a regulation may be declared invalid if the agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence [*Gov. Code § 11350(b)(1)*]. Finally, a regulation may be declared invalid if the agency declaration that a regulation will not have significant adverse economic impact upon businesses [*see Gov. Code § 11346.5(a)(8)*] is not supported by substantial evidence in the record [*Gov. Code § 11350(b)(2)*].

The effective date of *Gov. Code § 11349.1* (July 1, 1980), which sets forth the APA's substantive standards, should be noted in examining the appellate decisions concerning the scope of judicial review. Many of those decisions were

rendered in actions predating the substantive standards of that section. The earlier cases do not discuss *Gov. Code § 11349.1*, and speak only in terms of the judicially established standards discussed in [4], *below*. These latter standards are still used by the courts; *Gov. Code § 11350* does not appear to require the courts to rely exclusively on failures to comply with the APA for grounds to declare regulations invalid. Nevertheless, it is almost invariably true that a non-APA ground for declaring a regulation invalid may be restated as a failure to comply with the APA.

[2] Presumption of Validity

The plaintiff has the burden of proving that the regulation in question is invalid. The agency's action comes before the court with a presumption of correctness and regularity [*see Credit Ins. General Agents Asso. v. Payne (1976) 16 Cal. 3d 651, 657, 128 Cal. Rptr. 881, 547 P.2d 993]* . Once a regulation has been filed with the secretary of state for publication in the California Code of Regulations, it is presumed to have been duly adopted in compliance with the APA [*Gov. Code§ 11343.6(a)*; *see Stoneham v. Rushen (1984) 156 Cal. App. 3d 302, 308, 203 Cal. Rptr. 20]* .

The action of the OAL in approving a regulation or the governor's overruling of a disapproval of a regulation by the OAL will not be considered by a court in any action for declaratory relief brought with respect to a regulation [*Gov. Code § 11350(c)*]. In contrast, an OAL "determination" of whether an uncodified rule is a regulation subject to the approval process may be considered by a court, unless the court proceeding concerns the same issue and parties and was initiated before the request for determination [*Gov. Code § 11340.5(e)*; *see* Ch. 472, *Public Agency Rules*].

[3] Deference to Agency's Authority

The California Supreme Court has stated in *Western Oil & Gas Assn. v. Air Resources Board (1984) 37 Cal. 3d 502, 208 Cal. Rptr. 850, 691 P.2d 606* , that the courts exercise limited review of administrative rulemaking actions out of deference to the separation of powers between the legislative and the judicial branches, and to the presumed expertise of the agency within the scope of its authority. A reviewing court will not substitute its policy judgment for the agency's in the absence of an arbitrary decision [*Western Oil & Gas Assn. v. Air Resources Board (1984) 37 Cal. 3d 502, 509, 208 Cal. Rptr. 850, 691 P.2d 606]* . In *Western Oil*, the plaintiff oil companies challenged a series of air pollution regulations on the grounds that, among other things, the Board (1) had failed to consider the economic effects of the regulations, and (2) did not base the regulations on the Health Department's recommendations, despite the Board's lack of medical expertise in its membership [*Western Oil & Gas Assn. v. Air Resources Board (1984) 37 Cal. 3d 502, 507, 208 Cal. Rptr. 850, 691 P.2d 606]* .

Although the Court ultimately found that the Legislature did not require the Board to consider the economic effects and that the Board was required to consider, but not adopt, the Health Department's recommendations [*Western Oil & Gas Assn. v. Air Resources Board (1984) 37 Cal. 3d 502, 507, 208 Cal. Rptr. 850, 691 P.2d 606]* , the facts of this case illustrate that a person challenging regulations by judicial review should consider attacking the agency's "presumed expertise" by addressing both evidence that the agency considered in adopting the regulation as well as evidence it did not consider [*see §§ 472B.13, 472B.14*, for a discussion of grounds for declaring a regulation invalid].

The California Supreme Court has articulated the following rules regarding the deference a court must exercise with respect to the administrative agency that promulgated the regulation [*Ontario Community Foundation v. State Bd. of Equalization (1984) 35 Cal. 3d 811, 816, 201 Cal. Rptr. 165, 678 P.2d 378* ; *see Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist. (1989) 49 Cal. 3d 408, 425, 261 Cal. Rptr. 384, 777 P.2d 157* (construction of statute by agency charged with its enforcement is entitled to great weight especially when interpretation is congruent with its language and apparent purpose)]:

> • In determining the proper interpretation of a statute and the validity of an administrative regulation, the administrative agency's construction is entitled to great weight, and if there appears to be a reasonable basis for it, a court will not substitute its judgment for that of the administrative body.

- An agency's regulations must be consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose.

- The function of the court is to inquire into the legality of regulations, not their wisdom.

- Whatever the force of administrative construction, final responsibility for the interpretation of the law rests with the courts.

The California Supreme Court applied a deferential standard of review to a city charter provision. That provision exempted public safety officer promotional rules changes related to compliance with anti discrimination laws from requirements of binding arbitration when there was a collective bargaining impasse between the city and the unions representing fire fighters, and other public safety officers. The provisions in question, S.F. Charter § A8.590-5(g)(3) of the Charter of the City and County of San Francisco, gave the city substantial discretion to determine necessary anti discrimination law compliance measures, and the deferential standard of review followed from that grant of discretionary authority. The Supreme Court also upheld the validity of the promotion rule change and concluded that the change in promotion rules was reasonably related to compliance with anti discrimination laws. Since the rules change was valid, the exemption from binding arbitration was enforceable [San Francisco Fire Fighters Local 798 v. *City & County of San Francisco (2006) 38 Cal. 4th 653, 661-662, 42 Cal. Rptr. 3d 868, 133 P.3d 1028]* .

[4] Specific Grounds for Declaration of Invalidity

[a] Action Exceeds Agency's Authority

An administrative regulation is not valid unless it is within the scope of authority [*Gov. Code § 11349.1(a)(2)* ("authority" standard)] conferred on the adopting agency by the enabling statute [*Gov. Code §§ 11342.1, 11342.2*; *see* Ch. 472, *Public Agency Rules* , for a discussion of the quasi-legislative authority of administrative agencies].

As discussed in Chapter 472A, *Agency Rulemaking Procedures* , the agency must cite authority and reference for each regulation that it submits to the OALfor review and ultimate publication in the California Code of Regulations [*Gov. Code § 11349.1*]. An authority note is printed following each regulation in the California Code of Regulations [*see Gov. Code § 11349.8(b)(1)*; *1 Cal. Code Reg. § 14(d)*].

In reviewing an action for declaratory relief and injunction against an agency, the California Supreme Court reiterated the well-settled rule that a regulation that exceeds the agency's authority will be declared invalid [*Association for Retarded Citizens v. Department of Developmental Services (1985) 38 Cal. 3d 384, 391, 211 Cal. Rptr. 758, 696 P.2d 150* (agency spending directives requiring regional centers to cut back in particular manner exceeded agency's authority when statute did not permit agency to control regional centers)]. Although the construction of a statute by the agency is entitled to great weight, final responsibility for the interpretation of the law rests with the courts. In interpreting the statute, if the court concludes that the administrative action under attack has in effect altered or amended the statute or enlarged or impaired its scope, the court must declare it void [*Association for Retarded Citizens v. Department of Developmental Services (1985) 38 Cal. 3d 384, 391, 211 Cal. Rptr. 758, 696 P.2d 150* ; *Morris v. Williams (1967) 67 Cal. 2d 733, 748, 63 Cal. Rptr. 689, 433 P.2d 697* (Court invalidated Medi-Cal regulations that eliminated some health services entirely, even though statute that the regulations interpreted required "proportionate reductions" in services)].

On the other hand, unless an agency's rules are ambiguous, the court will uphold the agency rules if the rules do not exceed the agency's statutory authority [*Public Resources Protection Assn. v. Dept. of Forestry & Fire Protection (1994) 7 Cal. 4th 111, 121-122, 27 Cal. Rptr. 2d 11, 865 P. 2d 728* (court upheld validity of forest practice rules adopted by *Department of Forestry); Robin J. v. Superior Court (2004) 124 Cal. App. 4th 414, 422-423, 21 Cal. Rptr. 3d 417* (Court of Appeal rejected challenge to validity of regulation and held that regulation governing visitation

between sex offenders and children did not exceed scope of authority of governing statute [*Penal Code § 5058*], and was not inconsistent with the other applicable statutes [*Penal Code § 1202.05* and *Welf & Inst. Code § 362.6* that governed the parties claims in the lawsuit]); *Coors Brewing Co. v. Stroh (2001) 86 Cal. App. 4th 768, 771-772, 103 Cal. Rptr. 2d 570* (court upheld validity of alcoholic beverage control regulation that prohibited cash prize sweepstakes because the regulation did not operate more broadly than the statutory prohibition that the regulation implemented)]. When an agency that is acting pursuant to statutory authority adopts regulations to implement or interpret a statute those regulations are presumed to be valid and binding and will be enforced by the courts unless the regulations are inconsistent with the statute or are arbitrary and capricious [*Tomlinson v. Qualcomm, Inc. (2002) 97 Cal. App. 4th 934, 940-941, 118 Cal. Rptr. 2d 822* (FEHC regulation held to be valid, and not inconsistent with provisions of California Family Rights Act [*Gov. Code §§ 12945.1-12945.2*])].

[b] Action Violates Controlling Constitutional or Statutory Provision

A regulation that is inconsistent [*Gov. Code § 11349.1(a)(4)* ("consistency" standard)] and in conflict with the statute that authorizes the state agency to adopt regulations implementing, interpreting, making specific, or otherwise carrying out its provisions is invalid [*Gov. Code § 11342.2*; *Slocum v. State Bd. of Equalization (2005) 134 Cal. App. 4th 969, 974-976, 36 Cal. Rptr. 3d 627* (SBE interpretation contained in reassessment rule [SBE Rule 139] entitled to some but not substantial deference, and rule was held to be invalid because inconsistent with the authorizing statute [*Rev & T. Code § 170(a)(2)*], and the California constitution [*Cal. Const. Art. 13, § 15*]); *T.H. v. San Diego Unified Sch. Dist. (2004) 122 Cal. App. 4th 1267, 1280, 1285, 19 Cal. Rptr. 3d 532* (school district regulation that mandated referral to an expulsion hearing process for all expulsion offenses was not inconsistent with state statute that gave school principals discretion not to refer students for expulsion hearings in some circumstances; regulation satisfied consistency requirement); *Home Depot, U.S.A., INC. v. Contractors' State License Bd. (1996) 41 Cal. App. 4th 1592, 1606-1608 49 Cal. Rptr. 2d 302* ; *Professional Engineers in California Government v. State Personnel Board (2001) 90 Cal. App. 4th 678, 705-706, 109 Cal. Rptr. 2d 375* (administrative regulations that violate implementing statutes exceed the statutory authority of the agency and are therefore invalid); *see* Ch. 472A, *Agency Rulemaking Procedures* , for a discussion of the consistency standard].

In reviewing an action for declaratory relief and injunction under the predecessor statute to *Gov. Code § 11350* [*see* former Gov. Code. Code § 11440], the California Supreme Court stated that when the Legislature has delegated to an administrative agency the responsibility to implement a statutory scheme through rules and regulations, a court will interfere only when the agency has clearly overstepped its statutory authority or violated its constitutional mandate [*Ford Dealers Ass'n v. Department of Motor Vehicles (1982) 32 Cal. 3d 347, 356, 185 Cal. Rptr. 453, 650 P.2d 328* (court held that DMV regulations did not exceed scope of authorizing statute)].

In addition, the "consistency" standard requires the regulation to be in harmony with, and not in conflict with or contradictory to, other existing statutes, court decisions, or other provisions of law such as the federal or state constitutions [*Gov. Code § 11349(d)* (definition of "consistency"); *T.H. v. San Diego Unified Sch. Dist. (2004) 122 Cal. App. 4th 1267, 1280, 1285, 19 Cal. Rptr. 3d 532* (school district regulation that mandated referral to an expulsion hearing process for all expulsion offenses was not inconsistent with state statute that gave school principals discretion not to refer students for expulsion hearings in somecircumstances; nor did the regulations violate students' due process of law rights to notice in an expulsion hearing requirement); *Marshall v. McMahon (1993) 17 Cal. App. 4th 1841, 1848-1850, 22 Cal. Rptr. 2d 220* (DSS regulations upheld as being consistent with governing statute)]. Special attention must be given to this standard in light of the constitutional prohibition against California agencies refusing to enforce statutory provisions because of constitutional infirmities. In California, an agency must enforce a statute even in the face of its clear inconsistency with a constitutional provision absent a holding of unconstitutionality by an appellate court [*Cal. Const., art. III, § 3.5(a)*; *Lockyer v. City & County of San Francisco (2004) 33 Cal. 4th 1055, 1085-1086, 17 Cal. Rptr. 3d 225, 95 P. 3d 459* (a local executive official, who had a ministerial duty to enforce a state statute limiting marriage to couples of the opposite sex, exceeded his authority when he decided unilaterally that the marriage statute was unconstitutional and ordered the clerk office's to start issuing marriage licenses to same-sex couples. A local

executive official does not possess the authority to refuse to enforce a state statute without a court first determining that the statute is unconstitutional)]. The consistency standard does not, however, preclude the agency from interpreting existing law in the course of discharging its statutory duties [*Regents of University of California v. Public Employment Relations Bd. (1983) 139 Cal. App. 3d 1037, 1042, 189 Cal. Rptr. 298]* .

[c] Regulation Is Unclear

Two separate standards require a regulation to be clearly drafted. First, under the APA and its accompanying regulations a statute must meet the substantive standard of clarity to be effective [*Gov. Code § 11349.1(a)(3)*; *see 1 Cal. Code Reg. § 16*]. "Clarity" means written or displayed so that the meaning of the regulation will be easily understood by those persons directly affected by it [*Gov. Code § 11349(c)*]. If the language of a rule is susceptible to two interpretations in the minds of persons directly affected by the rule, it should be considered unclear [*see* Bolz & Garcia, *The Other Side of Administrative Law*, Cal. Lawyer 47, 48 (Nov. 1987)]. The clarity standard is discussed in Chapter 472A, *Agency Rulemaking Procedures* .

Second, it is a well-settled principle of constitutional law that a law that either forbids or requires the doing of an act in terms so vague that people of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law [*Connally v. General Constr. Co. (1926) 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322* (statute requiring contractors to pay employees no less than current rate of wages in location where work is performed is so uncertain that it deprives contractors of property without due process); *Cranston v. City of Richmond (1985) 40 Cal. 3d 755, 763, 221 Cal. Rptr. 779, 710 P.2d 845* (regulation allowing discharge of city employee for "conduct unbecoming an employee of the city service" was not unconstitutionally vague as applied to police officer engaged in illegal and dangerous conduct)]. Although challenges for vagueness arise most often in the criminal context, the prohibition against vagueness extends to civil statutes and administrative regulations as well [*see Cranston v. City of Richmond (1985) 40 Cal. 3d 755, 764, 221 Cal. Rptr. 779, 710 P.2d 845]* .

On the other hand, although noncriminal enactments have been subjected to scrutiny on grounds of vagueness, especially in cases involving the right to practice a recognized profession or the exercise of other fundamental rights, that scrutiny has normally been limited to situations in which *First Amendment* rights have been at stake [*Goldin v. Public Utilities Commission (1979) 23 Cal. 3d 638, 658-659, 153 Cal. Rptr. 802, 592 P.2d 289* (vagueness challenge to PUC rule, which allowed telephone disconnection on probable cause that telephone was being used in violation of law, was unsuccessful because no fundamental right was involved)].

When an administrative regulation is challenged, the standard of constitutional vagueness is less strict than when a criminal law is attacked [*Ford Dealers Ass'n v. Department of Motor Vehicles (1982) 32 Cal. 3d 347, 366, 185 Cal. Rptr. 453, 650 P.2d 328* (court found DMV regulation that advertised offers be "based on facts" and "clearly set forth" to overcome vagueness attack); *Papachristou v. City of Jacksonville (1972) 405 U.S. 156, 162, 92 S. Ct. 839, 31 L. Ed. 2d 110* (municipal vagrancy ordinance with criminal penalties was held void for vagueness because it failed to give fair notice that particular conduct was forbidden)].

If the challenge does not involve *First Amendment* freedoms, the regulation must be examined in light of the facts of the case at hand [*Cranston v. City of Richmond (1985) 40 Cal. 3d 755, 764-765, 221 Cal. Rptr. 779, 710 P.2d 845* (holding that, under the facts, city regulation permitting discharge for "conduct unbecoming an employee of the city" was not unconstitutionally vague)]. For further discussion of the constitutional vagueness standard, see Ch. 531, *Statutes and Ordinances* .

[d] Action Lacks Sufficient Evidentiary Support for Necessity

[i] "Reasonably Necessary" Standard

Under the APA, whenever by the express or implied term of a statute a state agency has the authority to adopt regulations to implement, interpret, make specific, or otherwise carry out the provision of the statute, no regulation adopted will be valid or effective unless it is "reasonably necessary" to effectuate the purpose of the statute [*Gov. Code § 11342.2*; *see Gov. Code § 11349.1(a)(1)* ("necessity" standard for OAL review); *Coalition for Reasonable Regulation of Naturally Occurring Substances v. California Air Res. Bd. (2004) 122 Cal. App. 4th 1249, 1258-1259, 19 Cal. Rptr. 3d 635* (regulation upheld under "reasonablynecessary" standard); *County of Santa Cruz v. State Bd. of Forestry (1998) 64 Cal. App. 4th 826, 834-835, 75 Cal. Rptr. 2d 393]* .

"Necessity" means that the agency's record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation. "Evidence" includes facts, studies, and expert opinion [*Gov. Code § 11349(a)*]. *Gov. Code § 11350(b)* specifically states that a regulation may be declared invalid pursuant to a declaratory relief action if the agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, court decision, or law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence [*Gov. Code § 11350(b)*; *Coalition for Reasonable Regulation of Naturally Occurring Substances v. California Air Res. Bd. (2004) 122 Cal. App. 4th 1249, 1265, 19 Cal. Rptr. 3d 635* (regulation supported by substantial evidence that agency complied with regulatory requirements); *Pulaski v. California Occupational Safety and Health Standards Board (1999) 75 Cal. App. 4th 1315, 1329-1330, 90 Cal. Rptr. 2d 54]* . The evidence considered by the court consists of all material maintained in the rulemaking record [*Gov. Code § 11350(b)*; *see Gov. Code § 11340.5*; *see also* Ch. 472A, *Agency Rulemaking Procedures*].

Before the 1979 revisions to the APA, courts searched for "any evidence" in the rulemaking record to support the action of the agency [*see* former Gov. Code.Code §§ 11349(a), 11350(b) (before requirement that necessity be supported by substantial evidence)]. In the absence of "any evidence" supporting the action, a rulemaking action could be deemed arbitrary and capricious and the regulation invalid [*see* former Gov. Code. Code §§ 11349(a), 11350(b)]. This rule remains valid for non-APA rulemaking proceedings. The substantial evidence test is used by the superior court hearing the original proceeding [*Gov. Code § 11350(a)*]. On appeal from the judgment of a trial court in an action to review a regulation, the standard of review is identical to the rule in other cases on appeal [*see* Ch. 474B, *Standards in Reviewing Agency Decisions* , and Ch. 474C, *Procedures in Reviewing Agency Decisions*].

[ii] Standard for Emergency Regulations

An additional standard applies to the review of emergency regulations. A court may declare an emergency regulation or order invalid on the ground that the facts recited in the finding of emergency prepared under law [*Gov. Code § 11346.1(b)*] do not constitute an emergency within the provisions of *Gov. Code § 11346.1* [*Gov. Code § 11350(a)*]. Under that section, a state agency may adopt an "emergency" regulation or order of repeal if it makes a finding of emergency. "Emergency" is defined by law to mean a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare [*Gov. Code § 11342.545*]. The finding must be set forth in a written statement [*Gov. Code § 11346.1(b)(1), (2)*].

[e] Action Is Procedurally Defective

A regulation may be declared invalid for a substantial failure to comply with the provisions of the APA [*see Gov. Code § 11350(a)*; *Gov. Code §§ 11346-11347.5* (procedure for adoption of regulations); *Pulaski v. California Occupational Safety and Health Standards Board (1999) 75 Cal. App. 4th 1315, 1327-1328, 90 Cal. Rptr. 2d 54]* . The procedural requirements imposed by the APA are discussed in Chapter 472A, *Agency Rulemaking Procedures* .

In general, the APA emphasizes proper notice to the public, particularly those persons directly affected by the proposed regulation [*Gov. Code §§ 11346.4(a)(1), 11346.5(a)(7), 11346.9(a)(1), 11346.8(c)*]. Further applications and interpretations of the notice requirements of the California APA by the OAL are found in the OAL's regulations [*1 Cal. Code Reg. §§ 44, 45*]. These regulations are entitled to great weight, due to the fact that the OAL is the agency charged

with the administration of the APA [*Gov. Code §§ 11340.1, 11342.4*; *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1981) 29 Cal. 3d 101, 111, 172 Cal. Rptr. 194, 624 P.2d 244]* .

For example, in a declaratory relief and mandamus action, an association of nursing homes challenged the validity of a regulation on the grounds that the agency administrator failed to hold hearings required by the APA prior to adopting the regulation [*California Asso. of Nursing Homes, etc. v. Williams (1970) 4 Cal. App. 3d 800, 85 Cal. Rptr. 735]* . In that case, the court found that the agency's failure to hold hearings establishing an evidentiary record thwarted judicial review of the regulation and constituted a substantial failure to comply with the procedural requirements of the APA. Therefore, the court held that the challenged regulation was invalid [*California Asso. of Nursing Homes, etc. v. Williams (1970) 4 Cal. App. 3d 800, 816, 84 Cal. Rptr. 590]* .

Although procedural defects in rulemaking proceedings may be fatal to the regulation, they will not be deemed to offend due process. Constitutional due process guarantees do not attach to administrative agency rulemaking, or "quasi-legislative," proceedings [*Ford Dealers Ass'n v. Department of Motor Vehicles (1982) 32 Cal. 3d 347, 364, 185 Cal. Rptr. 453, 650 P.2d 328* ; *California Optometric Assn. v. Lackner (1976) 60 Cal. App. 3d 500, 505-509, 131 Cal. Rptr. 744]* . Due process requirements apply only to administrative proceedings that are adjudicative in nature[*Hannah v. Larche (1960) 363 U.S. 420, 442, 80 S. Ct. 1502, 4 L. Ed. 2d 1307]* . For further discussion of due process as it relates to administrative agencies, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingRule Application & InterpretationValidityAdministrative LawJudicial ReviewRemediesDeclaratory JudgmentsAdministrative LawJudicial ReviewRemediesInjunctive ReliefAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewAdministrative LawJudicial ReviewStandards of ReviewRule InterpretationAdministrative LawSeparation of PowersLegislative ControlsScope of Delegated AuthorityConstitutional LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsOverbreadth & Vagueness

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§ 472B.16 Judicial Review of Rulemaking in Enforcement Actions

If the regulation objected to is already being enforced--that is, applied by the agency to the objecting party as part of formal adjudicatory proceedings--the time for the preenforcement remedy of declaratory relief has passed [*see Tushner v. Griesinger (1959) 171 Cal. App. 2d 599, 606, 341 P.2d 416* ; *see* also *§ 472B.11*]. The party seeking to challenge the regulation may raise the issue of the regulation's validity as a defense during the administrative hearing, however, and should challenge the validity of the regulation at all stages of the agency proceedings in order to lay a foundation for later attack of the regulation in court if the agency upholds the regulation. After a hearing in which the agency upholds the regulation, the party objecting to the regulation may seek judicial review pursuant to a petition for administrative mandate [*Code Civ. Proc. § 1094.5*]. A petition may set forth various grounds for the writ [*Code Civ. Proc. § 1094.5*]. A party objecting to the regulation's validity should allege that the agency has abused its discretion, and/or proceeded in excess of its jurisdiction, depending on the nature of the alleged defect in the regulation [*see Code Civ. Proc. § 1094.5(b)*]. Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence [*Code Civ. Proc. § 1094.5(b)*].

Similarly, a party objecting to a regulation in an enforcement action may assert the agency's non-compliance with specific language of the regulation as a defense to an administrative enforcement action. An agency can not avoid its duty to comply with specific language of a regulation by asserting its authority to interpret the regulation [*Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal. App. 4th 575, 580, 79 Cal. Rptr. 2d 126]* . However, the defense of non-compliance with the language of a regulation does not constitute a defense to a criminal prosecution unless the legislature has already defined the crime and the penalty, and has authorized the agency to enact rules related to that defined crime [*People v. Figueroa (1999) 68 Cal. App. 4th 1409, 1414-1415, 81 Cal. Rptr. 2d 216]* .

For a complete discussion of the writ of administrative mandate, the procedures for filing the petition, and the applicable standards for review, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingRule Application & InterpretationValidityAdministrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewStandards of ReviewAbuse of DiscretionAdministrative LawJudicial ReviewStandards of ReviewExceeding Statutory AuthorityAdministrative LawJudicial ReviewStandards of ReviewRule Interpretation

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§ 472B.17 Estoppel and Rulemaking

The estoppel doctrine may also be used to challenge an agency's regulation. The doctrine of equitable estoppel results from a representation of fact that the party making the representation is not legally permitted to deny [*Baillargeon v. Department of Water & Power (1977) 69 Cal. App. 3d 670, 678, 138 Cal. Rptr. 338* ; *see* Witkin, Summary of California Law, vol. 11, *Equity*, § 176 et seq. (9th ed. 1990)]. It may be applied against the government when justice requires it [*City of Long Beach v. Mansell (1970) 3 Cal. 3d 462, 489, 91 Cal. Rptr. 23, 476 P.2d 423]* . The Supreme Court has established the following four elements that are necessary to make a successful claim of equitable estoppel against a public agency [*Driscoll v. City of Los Angeles (1967) 67 Cal. 2d 297, 305, 61 Cal. Rptr. 661, 431 P.2d 245]* :

(1) The agency has knowledge of the facts,

(2) The adverse party has no knowledge of the facts,

(3) The agency intends that the adverse party will rely on its representations, and

(4) The adverse party relies on misrepresentations of the agency to his or her injury.

In general, the argument of estoppel is most likely to succeed in the defense of enforcement actions [*see § 472B.16*] because of its focus on equitable relief to specific parties relying on the representation of the agency. Nevertheless, estoppel has also been raised as the basis of an affirmative claim for relief. For example, in *Shoban v. Board of Trustees (1969) 276 Cal. App. 2d 534, 81 Cal. Rptr. 112* , teachers were classified for salary purposes according to a school district regulation, and induced to work for the district on the basis of that classification. The district later determined that the teachers had been erroneously classified, reclassified them, and withheld the salary overpayments from their current paychecks. The teachers sought a writ of mandate compelling the agency to restore them to their original classification, and the district cross-complained for declaratory relief regarding the classification. The appellate court affirmed issuance of the writ, and held that the district was estopped from applying the regulation to those teachers and from recovering the alleged overpayments [*Shoban v. Board of Trustees (1969) 276 Cal. App. 2d 534, 81 Cal. Rptr. 112]* . The Supreme Court of California applied the estoppel doctrine to allow welfare recipients to raise estoppel

as a defense in an administrative hearing when a state welfare agency sought to recoup from welfare recipients those overpayments [*Lentz v. McMahon (1989) 49 Cal. 3d 393, 397, 261 Cal. Rptr. 310, 777 P.2d 83]* .

The Public Utilities Commission could not use the defense of estoppel against a regulated utility because the Commission could not show evidence of reliance by the agency necessary to establish estoppel [*Southern California Edison Co. v. Public Utilities Com'n (2000) 85 Cal. App. 4th 1086, 1110-1111, 102 Cal. Rptr. 2d 684]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingRule Application & InterpretationValidityAdministrative LawJudicial ReviewRemediesDeclaratory JudgmentsAdministrative LawJudicial ReviewRemediesMandamusCivil ProcedureEquityGeneral Overview

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[Reserved]

§§ 472B.18[Reserved]

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§ 472B.30 State Constitution

Administrative agencies that have constitutional authority to exercise (limited) legislative power:

Board of Education. *Cal. Const., art. IX, § 7.5*

Judicial Council. *Cal. Const., art. VI, §§ 6, 18*

Personnel Board. *Cal. Const., art. VII, §§ 2(c), 3, 6(b), (c)*

Public Utilities Commission. *Cal. Const., art. XII, §§ 2, 4, 6*

Regents of the University of California. *Cal. Const., art. IX, § 9(a)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawSeparation of PowersConstitutional ControlsGeneral OverviewEducation LawAdministration & OperationBoards of Postsecondary SchoolsAuthorityEducation LawDepartments of EducationState Departments of EducationState Boards of EducationEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthorityGovernmentsState & Territorial GovernmentsEmployees & Officials

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§ 472B.31 State Statutes

General provisions for adoption of regulations. *Gov. Code §§ 11346.2-11346.9*

Filing and publication of regulations. *Gov. Code § 11343 et seq.*

California Code of Regulations and Register. *Gov. Code § 11344 et seq.*

Procedure for adoption of regulations. *Gov. Code § 11346 et seq.*

Exemptions from procedural requirements. *Gov. Code § 11346.1*

Judicial review of regulation by declaratory relief action. *Gov. Code § 11350*

Review of Public Utilities Commission regulation. *Pub. Util. Code § 1759*

Review of Workmen's Compensation Appeals Board regulation. *Lab. Code § 5955*

Review of regulation of Board of Governors of State Bar respecting law corporations. *Bus. & Prof. Code § 6170*

Regulation requiring report does not apply to small business unless state agency finds its applicability necessary for health, safety, or welfare of people of state. *Gov. Code § 11346.3*

Cost impact statements are required. *Gov. Code § 11346.5(a)*

Administrative agencies are required to write regulations in plain, straightforward language. *Gov. Code § 6215*

Publication of rulemaking calendar. *Gov. Code § 11017.6*

Judicial review of validity of regulation ordered repealed or disapproved by Office of Administrative Law is available by declaratory relief action. *Gov. Code § 11350.3*

Reasonable litigation expenses are recoverable by prevailing small business or licensee in civil action against state regulatory agency involving regulatory functions of state agency. *Code Civ. Proc. § 1028.5*

Statutory procedure for adoption of regulations generally [*Gov. Code §§ 11346-11347.3*] are not applicable to adoptions of regulations under *Fin. Code §§ 8054* although *Gov. Code §§ 11346.1, 11343.4,* and *11349.6* apply. *Gov. Code § 11346.1(a)*

Administrative review of regulations. *Gov. Code § 11349 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingRule Application & InterpretationValidityAdministrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewRemediesDeclaratory Judgments

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§ 472B.32 Administrative Regulations

Criteria applied in review of proposed regulations. *1 Cal. Code Reg. §§ 5-120*

Procedures for regulatory determinations. *1 Cal. Code Reg. §§ 121-128*

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§ 472B.33 Decisions

[1] Generally

Special authorization is not required for adoption of operational or procedural regulations. *Bank of Italy v. Johnson (1926) 200 Cal. 1, 20, 251 P. 784*

Necessity for authorization to adopt legislative regulation. *City & County of San Francisco v. Padilla (1972) 23 Cal. App. 3d 388, 400, 100 Cal. Rptr. 223*

Administrative regulation has force and effect of statute. *Associated Beverage Co. v. Board of Equalization (1990) 224 Cal. App. 3d 192, 201, 273 Cal. Rptr. 639* ; *Dabis v. San Francisco Redevelopment Agency (1975) 50 Cal. App. 3d 704, 706, 122 Cal. Rptr. 800* ; *Rigley v. Board of Retirement (1968) 260 Cal. App. 2d 445, 450, 67 Cal. Rptr. 185*

Legislature (Congress) is empowered to delegate administrative "power to fill up the details" in general legislation. *Wayman v. Southard (1825) 23 U.S. 1, 42-43, 6 L. Ed. 253*

Regulation is presumptively valid on all grounds in proceeding challenging validity. *Credit Ins. Gen. Agents Ass'n v. Payne (1976) 16 Cal. 3d 651, 657, 128 Cal. Rptr. 881, 547 P.2d 993* ; *Ray v. Parker (1940) 15 Cal. 2d 275, 309, 101 P.2d 665* ; *California Asso. of Nursing Homes, etc. v. Williams (1970) 4 Cal. App. 3d 800, 810, 84 Cal. Rptr. 590*

Necessity that local agency comply with any procedural requirements made applicable by local charter. *Conroy v. Wolff (1950) 34 Cal. 2d 745, 748, 214 P.2d 529*

Local legislative body is not empowered to impose procedural requirements on local agency in contravention of local charter. *McDonald's Systems of California, Inc. v. Board of Permit Appeals (1975) 44 Cal. App. 3d 525, 537, 119 Cal. Rptr. 26*

Inconsistency between two regulations of same agency does not raise presumption of implicit repeal of earlier regulation unless inconsistency is not otherwise reconcilable. *California Drive-In Restaurant Assn. v. Clark (1943) 22*

Cal. 2d 287

Power to adopt regulations necessarily includes power to amend them. *Hatch v. Ward (1946) 27 Cal. 2d 883, 887, 168 P.2d 22*

Party challenging validity of administrative rule bears burden of stating and establishing grounds of its challenge; agency is not required to anticipateand refute objections to rule. *Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist. (1989) 49 Cal. 3d 408, 427 n.20, 261 Cal. Rptr. 384, 777 P.2d 157*

Agency does not declare statute unconstitutional and does not refuse to enforce it by complying with legislative directive to implement statute to extent it does not conflict with federal law. *Reese v. Kizer (1988) 46 Cal. 3d 996, 998, 1002, 251 Cal. Rptr. 299, 760 P.2d 495*

Administrative agency is not limited to exact provisions of statute in adopting regulations to enforce its mandate; agency is authorized to "fill up details" of statutory scheme. *Ford Dealers Ass'n v. Department of Motor Vehicles (1982) 32 Cal. 3d 347, 362, 185 Cal. Rptr. 453, 650 P.2d 328*

Internal management exception [*Gov. Code § 11342(b)*], excusing noncompliance with statutory rulemaking procedures, has narrow scope; exception is inapplicable when rule is to have general application and is to affect persons subject to regulation by agency. *Union of American Physicians & Dentists v. Kizer (1990) 223 Cal. App. 3d 490, 497, 272 Cal. Rptr. 886* ; *Grier v. Kizer (1990) 219 Cal. App. 3d 422, 435-438, 440, 268 Cal. Rptr. 244*

Policy creating standard for application of already-established wage rates, to cover situation not addressed in statute or regulations, is required to be promulgated under APA rulemaking procedures. *Division of Lab. Stds. Enforcement v. Ericsson Information Systems, Inc. (1990) 221 Cal. App. 3d 114, 128, 270 Cal. Rptr. 75*

Internal administrative order does not supersede legislation adopted by board of supervisors. *Hock Investment Co. v. City and County of San Francisco (1989) 215 Cal. App. 3d 438, 448, 263 Cal. Rptr. 665*

[2] Judicial Proceedings

Interested persons not entitled to statutory "fair hearings" because not applicants for, nor recipients of, social service benefits, and otherwise having standing to complain, are permitted to challenge invalid regulations by mandamus pursuant to *Code Civ. Proc. § 1085* or by action for declaratory relief pursuant to *Code Civ. Proc. § 1060* [*Gov. Code § 11350*]. *Woods v. Superior Court (1981) 28 Cal. 3d 668, 682, 170 Cal. Rptr. 484, 620 P.2d 1032*

Validity of regulation mandating denial of application for welfare benefits are properly contested at both state (or "fair") hearing provided by *Welf. & Inst. Code § 10950* and in subsequent judicial review under *Code Civ. Proc. § 1094.5*. *Woods v. Superior Court (1981) 28 Cal. 3d 668, 677, 170 Cal. Rptr. 484, 620 P.2d 1032*

Mandate is appropriate remedy to compel administrative agency to issue regulations when agency has mandatory duty to adopt such regulations pursuant to statute. *Newland v. Kizer (1989) 209 Cal. App. 3d 647, 654-656, 257 Cal. Rptr. 450*

Writ of mandate is proper to compel Director of Corrections to comply with Administrative Procedure Act and promulgate regulations; trial court retains inherent power to make any orders necessary and proper for complete enforcement of peremptory writ it had issued, including determination of adequacy of regulations promulgated in compliance with writ. *Stoneham v. Rushen (1984) 156 Cal. App. 3d 302, 306-307, 310-311, 203 Cal. Rptr. 20*

Gov. Code § 11350 authorizing action for declaratory judgment to test validity of regulation is, in effect, amendment of *Code Civ. Proc. § 1060*, adding to cases there described in which person may sue for declaratory judgment. *County of Los Angeles v. State Dep't of Public Health (1958) 158 Cal. App. 2d 425, 443-444, 322 P.2d 968*

Court is empowered to enjoin enforcement of invalid regulation. *Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal. 3d 392, 401, 128 Cal. Rptr. 183, 546 P.2d 687* ; *Brock v. Superior Court (1938) 11 Cal. 2d 682, 686-688, 81 P.2d 931*

Court is empowered, in appropriate case, to issue writ of mandate compelling agency to repeal invalid regulation. *Clean Air Constituency v. California State Air Resources Bd. (1974) 11 Cal. 3d 801, 809, 819-820, 114 Cal. Rptr. 577, 523 P.2d 617* ; *California Welfare Rights Organization v. Brian (1974) 11 Cal. 3d 237, 243-244, 113 Cal. Rptr. 154, 520 P.2d 970*

Writ of prohibition or habeas corpus is available in appropriate case for relief against invalid regulation. *In re Petersen (1958) 51 Cal. 2d 177, 181, 331 P.2d 24* (habeas corpus); *Moore v. Municipal Court (1959) 170 Cal. App. 2d 548, 552-554, 339 P.2d 196*

Regulation adopted by local agency is not subject to judicial notice. *Fickeisen v. Civil Service Com. (1950) 98 Cal. App. 2d 419, 423, 220 P.2d 605*

Publication of state agency's regulation is not condition precedent to court's taking judicial notice of it. *People v. Haugh (1963) 216 Cal. App. 2d 603, 607, 31 Cal. Rptr. 74*

[3] Review

Analysis of validity of regulation is essentially same as in case of review of constitutionality of statute. *Knudsen Creamery Co. v. Brock (1951) 37 Cal. 2d 485, 494, 234 P.2d 26*

Regulation held within scope of agency's authority. *Credit Ins. General Agents Asso. v. Payne (1976) 16 Cal. 3d 651, 653, 656, 128 Cal. Rptr. 881, 547 P.2d 993* ; *Kerr's Catering Service v. Department of Industrial Relations (1962) 57 Cal. 2d 319, 330, 19 Cal. Rptr. 492, 369 P.2d 20 , cert. denied, 371 U.S. 818, 83 S. Ct. 31, 9 L. Ed. 2d 58* ; *California Drive-in Restaurant Ass'n v. Clark (1943) 22 Cal. 2d 287, 302, 140 P.2d 657*

Regulation held to exceed scope of agency's authority. *First Industrial Loan Co. v. Daugherty (1945) 26 Cal. 2d 545, 551, 556, 159 P.2d 921* ; *Whitcomb Hotel, Inc. v. Cal. Emp. Com. (1944) 24 Cal. 2d 753, 756-759, 151 P.2d 233* ; *Stanislaus County Dairymen's Protection Ass'n v. Stanislaus County (1937) 8 Cal. 2d 378, 391-392, 65 P.2d 1305* ; *Boone v. Kingsbury (1928) 206 Cal. 148, 160-163, 273 P. 797*

Requirement that regulation be reasonably necessary does not refer to strict necessity but requires reasonable relation to statutory objective. *Credit Ins. General Agents Asso. v. Payne (1976) 16 Cal. 3d 651, 657, 128 Cal. Rptr. 881* P.2d 993; *Schenley Affiliated Brands Corp. v. Kirby (1971) 21 Cal. App. 3d 177, 187, 98 Cal. Rptr. 609*

Reasonableness is implicitly required where agency empowered to adopt regulations. *Ex parte McManus (1907) 151 Cal. 331, 336-337, 90 P. 702*

Issue of reasonable necessity is not related to question whether regulation is wise or sensible; court is not entitled to substitute its legislative judgment for agency's. *Morris v. Williams (1967) 67 Cal. 2d 733, 737, 63 Cal. Rptr. 689, 433 P.2d 697* ; *Pitts v. Perluss (1962) 58 Cal. 2d 824, 834, 27 Cal. Rptr. 19, 377 P.2d 83*

Regulation is invalid if varying, enlarging, or restricting terms of statute it purports to implement. *First Industrial Loan Co. v. Daugherty (1945) 26 Cal. 2d 545, 550, 159 P.2d 921* ; *Hodge v. McCall (1921) 185 Cal. 330, 334, 197 P. 86* ; *In re Potter (1913) 164 Cal. 735, 737-740, 130 P. 721* ; *California Teachers Assn. v. Commission on Teacher Credentialing (1992) 7 Cal. App. 4th 1469, 1475, 10 Cal. Rptr. 2d 126*

Agency is without power to amend regulation so as to change definition of term where Legislature has implicitly adopted administrative definition. *Cooper v. Swoap (1974) 11 Cal. 3d 856, 868, 115 Cal. Rptr. 1, 524 P.2d 97 , cert. denied, 419 U.S. 1022, 95 S. Ct. 498, 42 L. Ed. 2d 296*

Regulation conflicting with statute is not invalid if conflict authorized by *Legislature. Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal. 3d 392, 420, 128 Cal. Rptr. 183, 546 P.2d 687*

Regulation infringing on area where another agency has exclusive control is invalid. *Western Oil & Gas Ass'n v. Orange County Air Pollution Control Dist. (1975) 14 Cal. 3d 411, 418-421, 121 Cal. Rptr. 249, 534 P.2d 1329*

Administrative regulations that alter or amend statute or enlarge or impair its scope are void and are required to be struck down by courts. *Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist. (1992) 9 Cal. App. 4th 644, 655, 11 Cal. Rptr. 2d 850*

In determining whether regulations are reasonably necessary to effectuate statutory purpose, court does not intervene in absence of arbitrary or capricious decision and court does not need to make such determination if regulations transgress statutory power. *Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist. (1992) 9 Cal. App. 4th 644, 655, 11 Cal. Rptr. 2d 850*

Regulation challenged as inconsistent with terms or intent of authorizing statute is subject to greater judicial scrutiny than regulation merely challenged as abuse of discretion. *California Ass'n of Psychology Providers v. Rank (1990) 51 Cal. 3d 1, 11-12, 270 Cal. Rptr. 796, 793 P.2d 2*

Administrative action is required to be within scope of authority conferred by enabling statute; administrative directive that in effect alters or amends enabling statute, or enlarges or impairs its scope, is void. *Association for Retarded Citizens v. Department of Developmental Services (1985) 38 Cal. 3d 384, 391, 211 Cal. Rptr. 758, 696 P.2d 150* ; *Norman v. McMahon (1990) 225 Cal. App. 3d 1450, 1453-1454, 275 Cal. Rptr. 698*

In action challenging validity of administrative regulation, trial court did not commit error in refusing to allow plaintiffs to present additional evidence as to reasonableness of regulation because trial court is limited to examination of administrative record. *Ford Dealers Ass'n v. Department of Motor Vehicles (1982) 32 Cal. 3d 347, 365 n.11, 185 Cal. Rptr. 453, 650 P.2d 328*

Administrative regulations are not unconstitutionally vague, even if portions of them must be refined and developed on case-by-case basis. *Wallace Berrie & Co. v. State Bd. of Equalization (1985) 40 Cal. 3d 60, 65, 219 Cal. Rptr. 142, 707 P.2d 204* ; *Ford Dealers Ass'n v. Department of Motor Vehicles (1982) 32 Cal. 3d 347, 365-369, 185 Cal. Rptr. 453, 650 P.2d 328*

Court's role in reviewing administrative regulations is limited to inquiring into legality of challenged regulation by determining whether or not regulation (1) is within scope of authority conferred on agency and (2) is reasonably necessary to effectuate purpose of authorizing statute. *Ford Dealers Ass'n v. Department of Motor Vehicles (1982) 32 Cal. 3d 347, 355, 185 Cal. Rptr. 453, 650 P.2d 328*

When regulation is consistent with statute and reasonably necessary to effectuate statute's purpose, task of reviewing court is to decide whether agency reasonably interpreted legislative mandate. *Associated Beverage Co. v. Board of*

Equalization (1990) 224 Cal. App. 3d 192, 201, 273 Cal. Rptr. 639

Limited scope of review when regulation is consistent with statute and reasonably necessary to effectuate statute's purpose does not constitute judicial interference with administrative discretion in that aspect of rule making that requires high degree of technical skill and expertise. *Associated Beverage Co. v. Board of Equalization (1990) 224 Cal. App. 3d 192, 201, 273 Cal. Rptr. 639*

On appellate court review of trial court's order in *Code Civ. Proc. § 1085* mandate proceeding, determination of Office of Administrative Law (OAL) that challenged "underground" regulation was invalid is entitled to due consideration, because OAL is charged with interpreting whether agency rule is regulation as defined in *Gov. Code § 11342(b). Union of American Physicians & Dentists v. Kizer (1990) 223 Cal. App. 3d 490, 497, 272 Cal Rptr. 886*

Permanent interpretive guidelines adopted by California Coastal Commission are not subject to review by *Office of Administrative Law. California Coastal Com. v. Office of Admin. Law (1989) 210 Cal. App. 3d 758, 761-764, 258 Cal. Rptr. 560* (construing *Pub. Res. Code § 30333*)

Scope of review of administrative agency's regulations is limited to considering whether challenged provisions are consistent and not in conflict with enabling statute, and reasonably necessary to effectuate its purpose. *301 Ocean Avenue Corp. v. Santa Monica Rent Control Board (1985) 175 Cal. App. 3d 149, 154, 221 Cal. Rptr. 610*

Administrative order which is legislative in character is subject to same tests of validity as act of *Legislature. Horwarth v. Local Agency Formation Com. (1983) 143 Cal. App. 3d 177, 182, 191 Cal. Rptr. 593*

Task of court reviewing administrative agency's regulation is that of deciding whether or not agency reasonably interpreted legislative mandate. *Woods v. Superior Court (1981) 28 Cal. 3d 668, 679, 170 Cal. Rptr. 484, 620 P.2d 1032*

On judicial review of validity of administrative regulation, party challenging regulation has burden of proof because action of administrative agency comes before court with presumption of correctness and regularity. *Geftakys v. State Personnel Board (1982) 138 Cal. App. 3d 844, 867, 188 Cal. Rptr. 305*

Judicial review of quasi-legislative acts of administrative agency is limited to examination of proceedings before agency to determine whether agency's action arbitrary, capricious, or entirely lacking in evidentiary support, or whether it has failed to follow procedure and give notices required by law; reasoning or wisdom underlying agency action is beyond scope of inquiry. *Geftakys v. State Personnel Board (1982) 138 Cal. App. 3d 844, 867, 188 Cal. Rptr. 305*

Scope of judicial inquiry into quasi-legislative actions of state agency is restricted to examination of record for procedural compliance and to determine whether or not action taken is arbitrary, capricious, or entirely lacking in evidentiary support; reasoning or wisdom underlying agency action is beyond scope of inquiry. *Stauffer Chemical Co. v. Air Resources Board (1982) 128 Cal. App. 3d 789, 796, 180 Cal. Rptr. 550*

Industrial Welfare Commission's statements of basis, as required by *Lab. Code § 1177*, sufficiently support administrative orders regulating wages, hours, and conditions of employment when statements detailed factual, legal, and policy considerations that reasonably related to issuance of order. *California Manufacturers Assn. v. Industrial Welfare Com. (1980) 109 Cal. App. 3d 95, 106-115, 167 Cal. Rptr. 203*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingRule Application & InterpretationValidityAdministrative LawAgency

RulemakingState ProceedingsAdministrative LawJudicial ReviewRemediesDeclaratory JudgmentsAdministrative LawJudicial ReviewRemediesInjunctive ReliefAdministrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewRemediesProhibitionAdministrative LawJudicial ReviewStandards of ReviewRule InterpretationAdministrative LawSeparation of PowersLegislative ControlsExplicit Delegation of AuthorityAdministrative LawSeparation of PowersLegislative ControlsImplicit Delegation of Authority

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41-472B California Forms of Pleading and Practice--Annotated § 472B.34

§ 472B.34 Law Reviews

Gordon, *Compensable Regulatory Taking: A Tollbooth Rises on Regulation Road*, 12 Real Est. L.J. 211 (1984)

Livingston, *Organizations and Administrative Practice--A Balance to the Corporate State? 26 Hastings L.J. 89 (1974)*

Hannon, *The Philosophy of Administrative Law Making*, 42 State BJ 661 (1967)

Hutchinson, *Rule Making Function of California Administrative Agencies, 15 Hastings L.J. 272 (1964)*

Harris, *State Regulation of Hazards Growing Out of Use of Atomic Energy, 46 Calif. L. Rev. 84 (1958)*

Comment, *Administrative Law and Procedure: Emergency Regulations*, 27 So Cal. L Rev (1953)

Comment, *The Void for Vagueness Rule in California, 41 Calif. L. Rev. 523, 529*-532 (1953)

Note, *Administrative Law: Agency Authority to Develop Policy by Adjudication Rather Than Rule, 36 Calif. L. Rev. 619 (1948)*

Newman, *How Courts Interpret Regulations, 35 Calif. L. Rev. 509 (1947)*

Comment, *Administrative Law: Retroactive Revision of Invalid Regulations, 35 Calif. L. Rev. 92 (1947)*

Note, *Constitutional Law: Delegation of Legislative Power to Administrative Officers: Discretion to Grant or Refuse Permits, 19 Calif. L. Rev. 448 (1931)*

Thelen, *Practice and Procedure Before Administrative Tribunals, 16 Calif. L. Rev. 208 (1928)*

Comment, *Constitutional Law: Delegation of Legislative Power to Administrative Officers: Discretion to Grant or*

Refuse Licenses and Permits, and Power to Make Rules, 15 Calif. L. Rev. 408 (1927)

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewAdministrative LawAgency RulemakingRule Application & InterpretationGeneral OverviewAdministrative LawSeparation of PowersConstitutional ControlsGeneral OverviewAdministrative LawSeparation of PowersLegislative ControlsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsOverbreadth & Vagueness

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§ 472B.35 Text References

Witkin, Summary of California Law, vol. 7, *Constitutional Law*, § 533-535 (9th ed 1988)

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41-472B California Forms of Pleading and Practice--Annotated § 472B.36

§ 472B.36 Internet References

NOTE: On and after July 1, 1998, The OAL is required by *Gov. Code § 11340.1(b)* to make the full text of the California Code of Regulations, with reference citations and history notes, available on the Internet free of charge.

Office of Administrative Law. This site includes: OAL publications; links to OAL statutes and regulations relating to rulemaking; regulations submitted to the OAL for review, and information for contacting or provding input to the OAL regarding rulemaking. http://www.oal.ca.gov

California Home Page. This site includes links to other sites maintained by numerous state agencies. http://www.ca.gov

Department of Consumer Affairs. This site includes links to sites maintained by many state agencies that are under this department, as well as links to agency sites. http://www.dca.ca.gov

California Courts. This site includes: general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most Court of Appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes: text of constitution, codes, and statutes (including complete text of APA); and information concerning pending legislation. http://www.leginfo.ca.gov

Matthew Bender. This site includes: links to Matthew Bender publications and Shepard's citation service. http://www.bender.com

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[Reserved]

§§ 472B.37[Reserved]

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41-472B California Forms of Pleading and Practice--Annotated § 472B.50

§ 472B.50 Determine the Appropriate Method of Judicial Review of Agency Rulemaking

[1] Ascertain If an Action for Declaratory Relief Is Appropriate

☐ The challenged action is quasi-legislative (rulemaking) rather than judicial (adjudicatory) [*see § 472B.10[1]*].

☐ Agency has not yet started enforcement proceedings against the party challenging the regulation [*see § 472B.10[1]*].

☐ None of the following alternatives to declaratory relief is appropriate or desirable:

- ☐ Petition for amendment or repeal of the regulation [*see § 472B.10[2][a]*].
- ☐ Priority review by OAL [*see § 472B.10[2][b]*].
- ☐ Defense in an enforcement action [*see § 472B.10[2][c]*].
- ☐ Review of the informal rule pursuant to a request for OAL determination [*see § 472B.10[2][d]*].

[2] Ascertain the Preliminary Activities the Plaintiff Should Perform Before Filing Action

☐ Review of the regulatory code supplement [*see § 472B.11[1]*].

☐ Review of the rulemaking record [*see § 472B.11[2]*].

[3] Ascertain the Following Issues Before Filing Action

☐ Plaintiff's standing to bring action [*see § 472B.13[2]*].

☐ Ripeness of the controversy [*see § 472B.13[3]*].

☐ Whether administrative remedies have been exhausted (non-APA cases) [*see § 472B.13[4]*].

☐ The appropriate court [*see § 472B.12[1]*].

☐ The appropriate venue [*see § 472B.12[1]*].

[4] Ascertain Whether the Plaintiff Should Seek Other Remedies in Declaratory Relief Action

☐ Writ of mandamus [*see § 472B.12[3]*].

☐ Injunction [*see § 472B.12[4]*].

[5] Ascertain the Specific Grounds That May Support a Declaration of Invalidity

☐ The regulation substantially fails to comply with the APA [*see § 472B.14[1]*].

☐ The facts in the statement of emergency (for emergency regulations) do not constitute an emergency [*see § 472B.14[1]*].

☐ The agency's determination of necessity is not supported by substantial evidence [*see § 472B.14[4][d]*].

☐ The action exceeds the agency's authority [*see § 472B.14[4][a]*].

☐ The action violates a controlling constitutional or statutory provision [*see § 472B.14[4][b]*].

☐ The regulation is unclear [*see § 472B.14[4][c]*].

☐ The action is procedurally defective [*see § 472B.14[4][e]*].

[6] Ascertain Methods That May Be Used to Challenge the Validity of a Regulation If the Agency Has Already Initiated Enforcement Proceedings

☐ Assert the invalidity of the regulation as a defense in the administrative hearing [*see § 472B.15*].

☐ Raise the issue of estoppel in the administrative hearing [*see § 472B.16*].

☐ Seek a writ of administrative mandamus if the agency upholds the validity of the regulation [*see § 472B.15*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingRule Application & InterpretationValidityAdministrative LawJudicial ReviewRemediesDeclaratory JudgmentsAdministrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewReviewabilityExhaustion of RemediesAdministrative LawJudicial ReviewReviewabilityRipenessAdministrative LawJudicial ReviewReviewabilityStandingAdministrative LawJudicial ReviewStandards of ReviewExceeding Statutory AuthorityAdministrative LawJudicial ReviewStandards of ReviewSubstantial Evidence

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41-472B California Forms of Pleading and Practice--Annotated § 472B.51

§ 472B.51 Seeking Declaratory Relief Prior to Enforcement of Regulation

[1] Prior to Litigation

☐ Review actions preceding adoption of regulation [*see* discussion in *§ 472B.12[1]*].

☐ Request rulemaking record for review [*see* discussion in *§ 472B.12[2]*].

☐ Note each and every failure to comply with the APA [*see* discussion in *§ 472B.12[c]*].

☐ Prepare complaint for declaratory relief [for a form, *see*, *§ 472B.60*].

☐ If desired, combine with petition for writ of mandamus, petition for injunction, or both [*see* discussion in *§ 472B.13[3], [4]*].

☐ Prepare verification or accompanying affidavits supporting allegations in complaint.

☐ Be prepared to furnish a bond if seeking temporary restraining order or preliminary injunction.

☐ File action for declaratory relief in superior court [*Gov. Code § 11350(a)*; *see* discussion in *§ 472B.13[2][a]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingState ProceedingsAdministrative LawJudicial ReviewRemediesDeclaratory JudgmentsAdministrative LawJudicial ReviewRemediesInjunctive Relief

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41-472B California Forms of Pleading and Practice--Annotated § 472B.52

§ 472B.52 Declaratory Relief to Determine Validity of Regulation

[1] Declaratory Relief

☐ Prepare complaint for declaratory relief [*Gov. Code § 11350.3*; *see* discussion in *§ 472B.13[2][d]*; for a form, *see*, *§ 472B.61*].

☐ File action for declaratory relief in superior court [*Gov. Code § 11350(a)*; *see* discussion in *§ 472B.13[2][d]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingRule Application & InterpretationValidityAdministrative LawJudicial ReviewRemediesDeclaratory JudgmentsAdministrative LawJudicial ReviewStandards of ReviewRule Interpretation

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[Reserved]

§§ 472B.53[Reserved]

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PART V. FORMS

41-472B California Forms of Pleading and Practice--Annotated § 472B.60

§ 472B.60 Complaint for Declaratory and Injunctive Relief Regarding Validity of Administrative Regulation [Gov. Code § 11350]

[1] FORM Complaint for Declaratory and Injunctive Relief Regarding Validity of Administrative Regulation [Gov. Code § 11350]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DECLARATORY RELIEF AND [TEMPORARY RESTRAINING PRELIMINARY AND] FINAL INJUNCTION(S)
_____ [*names*],	)	
Defendants.	)	
	)	

Plaintiff alleges:

1. Plaintiff is _____ [*status as interested person, e.g., if attacking regulation of Medical Board of California*, a duly licensed and practicing physician].

2. Defendant is the _____ [*official status, e.g.*, Medical Board of California, an administrative agency in the state government].

3. _____ [*Identify regulation in question, e.g.*, On January 18, 1998, defendant adopted a regulation _____ (*particular identification, if any, e.g.* thereafter published as Section _____ of Title _____ of the California Code of Regulations), a copy of which is attached hereto as Exhibit A and incorporated herein *or set out text of regulation if copy is not attached, e.g.*, the provisions of which are as

follows: _____ (*verbatim text*)].

4. _____ [*State nature of present controversy, e.g.*, Pursuant to that regulation, defendant has demanded that plaintiff report all of the information required by the regulation to be reported to defendant; and defendant has threatened to begin disciplinary proceedings against plaintiff if plaintiff does not comply with the regulation. Plaintiff has refused to comply for the reason, which plaintiff has communicated to defendant, that enforcement of the regulation against plaintiff would violate plaintiff's constitutional rights].

5. The regulation in question is not valid for the reason that _____[*specify*].

6. _____[*State facts showing exhaustion of administrative remedies, or lack of administrative remedy, or excuse for failure to exhaust administrative remedies*].

7. _____ [*State facts showing need for preventive relief, if needed, including facts showing need for provisional relief, e.g.*, Because of plaintiff's refusal to comply with the regulation, defendant has begun a disciplinary proceeding against plaintiff which will result in the suspension, or possibly the revocation, of plaintiff's license unless this court enjoins the administrative proceeding pending judgment in this action and thereafter permanently enjoins defendant from prosecuting any disciplinary proceeding against plaintiff because of plaintiff's noncompliance with the regulation. In addition, unless this court gives appropriate provisional and final preventive relief, plaintiff will be obliged to defend himself/herself in administrative proceedings, against charges having no legal merit].

WHEREFORE, plaintiff prays judgment as follows:

1. For a declaration that the regulation referred to in Paragraph 3 is not valid and that plaintiff has no legal duty to comply with it;

2. _____ [*For preventive relief, e.g.*, For a temporary restraining order and preliminary injunction enjoining defendant from enforcing or attempting to enforce the regulation against plaintiff, and from beginning, threatening to begin, or carrying on any disciplinary proceeding against plaintiff because of failure to comply with the regulation, pending judgment in this action; and for a final injunction permanently enjoining defendant from doing any of those acts after judgment];

3. For costs of suit herein incurred [and for reasonable litigation expenses]; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____[*name*], am the plaintiff in this action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to matters therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by any interested person wishing a judicial declaration as to the validity of an administrative regulation. The prescribed remedy is an action for declaratory relief [*Gov. Code § 11350*].

[3] Verification

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. The public entity defendant need not verify its answer even though the complaint is verified [*see Code Civ. Proc. § 446(a)*]. However, the verification of the complaint against the public entity does preclude a general denial [*see Code Civ. Proc. § 431.30(d)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan G. Co. v. San Juan R. etc. Assn. (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* . For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

[4] Jurisdiction and Venue

The complaint must be filed in the superior court. Venue is to be determined by the rules ordinarily applied in civil actions [*Gov. Code § 11350*]. For a discussion of venue, see Ch. 571, *Venue* .

[5] Allegations

The complaint must show how the plaintiff is interested in a judicial declaration of the validity of the regulation in question; and it must show an actual controversy relating to the legal rights and duties of the respective parties [*Code Civ. Proc. § 1060*; *Gov. Code § 11350*].

[6] Interested Persons

A person is sufficiently interested to sue under *Gov. Code § 11350* if there is an actual controversy relating to his or her and the agency's (defendant's) legal rights and duties under the regulation in question [*see* Code Civ. Proc. § 1060; *Gov. Code § 11350*]. Thus, a trade association whose members are subject to the regulation, but which is not itself subject to it, has been held not to have sufficient interest to sue [*Associated Boat Industries v. Marshall (1951) 104 Cal. App. 2d 21, 22-23, 230 P.2d 379]* . On the other hand, a corporation has been held to have a sufficient interest to sue where, although not subject itself to the regulation in question, it would suffer impairment of existing contractual rights if the regulation were enforced [*Sperry & Hutchinson Co. v. Cal. State Bd. of Pharmacy (1966) 241 Cal. App. 2d 229, 232-233, 50 Cal. Rptr. 489]* . The requirement that the plaintiff be interested simply reflects the basic principle that actions must be prosecuted by the real party in interest except as otherwise provided by statute [*see Code Civ. Proc. § 367*].

[7] Scope of Review

When an administrative regulation is challenged in a declaratory relief action, the court's task is to inquire into the legality of the challenged regulation, not its wisdom [*Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal. 3d 392, 411, 128 Cal. Rptr. 183, 546 P.2d 687]* . The regulation will be presumed valid [*see, e.g.,* *Ralphs Grocery Co. v. Reimel (1968) 69 Cal. 2d 172, 175, 70 Cal. Rptr. 407, 444 P.2d 79]* .

The presumption may be overcome by showing any of three following particular defects, among others that might be imagined [*see Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal. 3d 392, 411, 128 Cal. Rptr. 183, 546 P.2d 687]* :

- There was a substantial failure to comply with the provisions of *Gov. Code § 11340 et seq.* (adoption, filing, publication, and review of regulations) [*Gov. Code § 11350*].

- The regulation is not within the scope of authority conferred on the agency by the Legislature [*see Gov. Code § 11342.1*].

- The regulation is not consistent and not in conflict with the enabling statute and is not reasonably necessary to effectuate the purpose of the statute [*Gov. Code § 11342.2*].

If the regulation purports to be an emergency regulation, it might also be invalidated because of the absence of a genuine emergency [*see Gov. Code § 11350(a)*].

In addition to any other ground which may exist, a regulation may be declared invalid if the court cannot find that the record of the rulemaking proceeding [*see Gov. Code § 11347.3*] supports the agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute, decision, or other legal provision being implemented, interpreted, or made specific by the regulation. Alternatively a regulation may be declared invalid if the agency declaration, pursuant to Gov. Code§ 11346.5(a)(8), that adoption or amendment of the regulation will not have a significant adverse economic impact on business, is in conflict with substantial evidence in the record [*Gov. Code § 11350(b)*].

The approval of a regulation by the Office of Administrative Law or the governor's overruling of a decision to disapprove a regulation [*see Gov. Code § 11349 et seq.*] may not be considered by a court in any action for declaratory relief brought with respect to the regulation [*Gov. Code § 11350(c)*].

[8] Administrative Remedies

As in many other situations, the plaintiff is required to exhaust administrative remedies, if he or she has any; and it must affirmatively appear in the complaint that he or she has complied with the requirement, or that he or she should be excused for failing to comply, or that the requirement does not apply because there is no administrative remedy. Allegations respecting administrative remedies should be simple statements of fact as to what the plaintiff did or as to the absence of an administrative remedy. It is not sufficient simply to state that he or she has exhausted his or her administrative remedies. The right to judicial determination of the validity of a regulation is not affected by the failure either to petition or to seek reconsideration of a petition filed pursuant to *Gov. Code § 11340.7* (petitions to adopt, amend, or repeal administrative regulations) before the agency promulgating the regulation [*Gov. Code § 11350(a)*].

[9] Injunction

In an appropriate case the plaintiff may seek preventive relief (by provisional or final injunction) as well as a mere declaratory judgment [*see Code Civ. Proc. § 1062* (cumulation of remedies)]. It will be necessary to show grounds for such relief by proper allegations [*see Civ. Code § 3422* (final injunction); *Code Civ. Proc. § 526* (provisional injunction)].

If the plaintiff seeks provisional preventive relief (temporary restraining order and preliminary injunction), he or she must be prepared to furnish a bond [*see Code Civ. Proc. § 529*]; and if the complaint is used (instead of an affidavit) to support a prayer for such relief, it must be verified [*see Code Civ. Proc. § 527*]. Provisional preventive relief may be

sought whether or not the plaintiff also seeks permanent preventive relief. For discussion and forms for use in an action for preventive relief, see Ch. 303, *Injunctions* .

[10] Costs and Attorney's Fees

Costs are recoverable by the plaintiff if he or she prevails [*see Code Civ. Proc. §§ 1028, 1029*]. Reasonable litigation expenses not in excess of $7,500, including attorney's fees, are recoverable by a prevailing small business or licensee (defined in *Code Civ. Proc. § 1028.5(c), (d)*, respectively) in an action between the business or licensee and a state regulatory agency involving to the agency's regulatory functions as applied to the small business or licensee, if the court determines that the action of the agency was undertaken without substantial justification [*see Code Civ. Proc. § 1028.5*].

[11] Exceptional Cases

The validity of a regulation adopted by the Public Utilities Commission or Workmen's Compensation Appeals Board may not be tested in an action for declaratory relief [*see Gov. Code § 11351*]. The remedy is a certiorari proceeding in an appellate court [*see Lab. Code § 5950*; *Pub. Util. Code § 1756*]. This is also apparently true with respect to regulations adopted by the Alcoholic Beverage Control Appeals Board [*see Bus. & Prof. Code § 23090*] and the Director of Alcoholic Beverage Control [*see Schenley Affiliated Brands Corp. v. Kirby (1971) 21 Cal. App. 3d 177, 195-196, 98 Cal. Rptr. 609]* .

[12] Cross References

For discussion and forms relating to a proceeding for review of regulations of the Alcoholic Beverage Control Appeals Board and the Director of Alcoholic Beverage Control, see Ch. 18, *Alcoholic Beverage Licenses and Ch. 492, Review (Certiorari), Writ of.*

For discussion and forms relating to actions for declaratory judgment and preventive relief, see Ch. 182, *Declaratory Relief* , and Ch. 303, *Injunctions* .

For discussion and forms relating to a proceeding for review of regulations of the Public Utilities Commission or the Workmen's Compensation Appeals Board, see Ch. 492, *Review (Certiorari), Writ of.*

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PART V. FORMS

41-472B California Forms of Pleading and Practice--Annotated § 472B.61

§ 472B.61 Complaint for Declaratory Relief Regarding Validity of Administrative Regulation Disapproved or Ordered Repealed by the OAL

[1] FORM Complaint for Declaratory Relief Regarding Validity of Administrative Regulation Disapproved or Ordered Repealed by the OAL

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*], individually and	)	
on behalf of all others similarly situated,	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DECLARATORY RELIEF
_____ [*names*],	)	
Defendants.	)	
	)	

_____

Plaintiff alleges:

1. [Status of plaintiff as interested person; *see § 472B.60, Paragraph 1.*]

2. Defendant Office of Administrative Law is an office of the government of the State of California. Defendant _____[*name*] is the Director of defendant Office of Administrative Law and is responsible for its direction and control.

3. On _____[*date*], _____ [*specify agency that adopted regulation in question, e.g.*, the Medical Board of California] duly adopted Regulation No. _____, hereinafter referred to as "the regulation," _____ [which provided as follows: "_____" (*quote regulation*) *or* a true

copy of which is attached hereto as Exhibit A, and incorporated by reference herein].

4. On _____[*date*], the Office of Administrative Law _____ [*specify action taken by office, e.g.,* disapproved the regulation submitted for review pursuant to _____ (*Government Code section 11349.3 or Government Code section 11349.6 or Government Code section 11349.7*)] _____ [*specify reasons given for action by office, e.g.,* for failure to meet the standards set forth in *Government Code section 11346.1 or* for failure of the Medical Board of California to comply with the provisions of *Government Code section 11340 et seq.*].

5. An actual controversy has arisen and now exists between plaintiff and defendants, in that plaintiff contends that the regulation is valid and enforceable because _____ [*specify reasons why regulation valid e.g.*, the Medical Board of California complied with the provisions of *Government Code section 11340 et seq. or* the regulation meets the standards set forth in *Government Code section 11346.1*], whereas defendants dispute this contention.

6. Plaintiff desires a declaration as to the validity of the regulation. Such a declaration is necessary and appropriate at this time under the circumstances in order that plaintiff may ascertain his or her rights and duties with respect to the regulation. _____ [*Specify present controversy, e.g.*, Pursuant to the regulation, plaintiff has been exempt from reporting to the Medical Board of California information otherwise required. With the appeal of the regulation plaintiff is now no longer exempt and is required to report the information].

7. _____[*Specify facts showing exhaustion or lack of administrative remedies or excuse for failure to exhaust administrative remedies*].

WHEREFORE, plaintiff prays judgment as follows:

1. For a declaration that the regulation is valid;

2. For an order directing the Office of Administrative Law to file the regulation with the Secretary of State;

3. For costs of suit incurred herein; and

4. For such other and further relief as the court deems proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired; see § 472B.60.*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by any interested person wishing a judicial declaration of the validity of an administrative regulation disapproved or ordered repealed by the Office of Administrative Law pursuant to *Gov. Code § 11349.3, 11349.6* or *11349.7* [*Gov. Code § 11350.3*].

[3] Verification

The public entity defendant need not verify its answer even though the complaint is verified [*see Code Civ. Proc. § 446(a)*]. However, the verification of the complaint against the public entity does preclude a general denial in superior

court and in some municipal court actions [*see Code Civ. Proc. § 431.30(d)*].

[4] Relief Available

The court may declare the regulation valid if it determines that the regulation meets the standards set forth in *Gov. Code § 11349.1* and that the agency has complied with the provisions of *Gov. Code §§ 11340-11356*. If the court determines that the regulation is valid it may order the Office of Administrative Law to immediately file the regulation with the Secretary of State [*Gov. Code § 11350.3*].

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Chapter 473 PUBLIC AGENCY ADJUDICATION

41A-473 California Forms of Pleading and Practice--Annotated 473.syn

§ 473.syn Synopsis to Chapter 473: PUBLIC AGENCY ADJUDICATION

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§ 473.01 Scope of Chapter

This chapter provides an overview discussion of agency adjudication in California public administrative law. The background discussion in Part II includes:

- Subpart A discusses general hearing procedures for public agency adjudications under the California Administrative Procedure Act (*Gov. Code § 11340 et seq.*) [*see § 473.10* et seq.].

- Subpart B discusses the fair procedure requirements of the Administrative Procedure Act's "Adjudication *Bill of Rights*" (Gov. Code. Code § 11425.10) [*see § 473.20*].

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§ 473.02 Cross References

[1] Related Coverage of Agency Adjudication

For related discussion and forms providing more detailed coverage of the other stages of an agency adjudication under the formal hearing provisions of the APA, see:

- Ch. 473A, *Commencing Agency Adjudication*.
- Ch. 473B, *Discovery in Agency Adjudications*.
- Ch. 473C, *Prehearing Procedures in Agency Adjudications*.
- Ch. 473D, *Prehearing Preparations in Agency Adjudications*.
- Ch. 473E, *Public Administrative Law Judges*.
- Ch. 473F, *Agency Adjudication Hearings*.
- Ch. 473G, *Agency Adjudication Decisions*.

For related discussion and forms providing more detailed coverage of adjudication methods under the APA other than that of formal hearing, see Ch. 473H, *Alternative Adminstrative Adjudication Procedures* .

For detailed discussion and forms relating generally to licensing agencies, including licensing adjudications, see Ch. 471B, *Licensing by Public Agencies* .

[2] Judicial Review

For detailed discussion and forms relating generally to review by California courts of agency adjudications, see:

- Ch. 474, *Availability of Judicial Review of Agency Decisions*.
- Ch. 474A, *Timing of Judicial Review of Agency Decisions*.
- Ch. 474B, *Standards in Reviewing Agency Decisions*.
- Ch. 474C, *Procedures in Reviewing Agency Decisions*.

For other related discussion and forms relating to judicial review generally, see:

- Ch. 40, *Appeal: An Overview*, through Ch. 54, *Appeal: California Supreme Court Review* (discussion and forms relating to civil appeals).
- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to immediate judicial review of orders by extraordinary writ of mandate or prohibition).
- Ch. 492, *Review (Certiorari), Writ of* (discussion and forms relating to immediate judicial review of civil proceedings by extraordinary writ of review).

[3] Public Administrative Law Generally

For related discussion of California public administrative law generally, including discussion of public agency functions and powers (including adjudicative or quasi-judicial powers), and organization generally, see Ch. 470, *Overview of Public Administrative Law* (general discussion of judicial power is in § 470.12[5]). For detailed discussion of the general procedures imposed in agency proceedings by constitutional due process and related statutory requirements, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

For discussion and forms relating to the law governing access to and conduct of meetings by California public agencies, see Ch. 470B, *Public Agency Meetings* .

For detailed discussion and forms relating to the law governing disclosure of public records under the California Public Records Act [*Cal. Gov. Code §§ 6250 et seq.*], see Ch. 470C, *Public Records Act* .

For detailed discussion and forms relating generally to agency investigations and inspections, see:

- Ch. 471, *Investigations by Public Agencies*.
- Ch. 471A, *Inspections by Public Agencies*.

For detailed discussion and forms relating generally to the legislative or rulemaking functions of California public agencies, including judicial review of these functions, see:

- Ch. 472, *Public Agency Rules*.
- Ch. 472A, *Agency Rulemaking Procedures*.
- Ch. 472B, *Review of Agency Rulemaking*.

[4] Specific Public Agencies

For related coverage of adjudicative proceedings before particular public agencies, see:

- Ch. 18, *Alcoholic Beverage Licenses* (discussion and forms relating to licensing proceedings before the department of Alcoholic Beverage Control).

- Ch. 70, *Attorney Admission* and Ch. 71, *Attorney Discipline* (discussion and forms relating to licensing and discipline of attorneys and proceedings before the State Bar and the State Bar Court).

- Ch. 92, *Automobiles: Drivers' Licenses* (discussion and forms relating to drivers' licensing and proceedings before the Department of Motor Vehicles).

- Ch. 104, *Building Contracts*, § 104.70 et seq. (discussion relating to licensing and discipline of building contractors by the Contractors' State License Board).

- Ch. 118, *Civil Service* (discussion and forms relating to proceedings before the Personnel Board).

- Ch. 209, *Dentists* (discussion and forms relating to licensing and discipline of dentists and proceedings before the Board of Dental Examiners).

- Ch. 214, *Drugs and Pharmacists* (discussion and forms relating to licensing and discipline of pharmacists and proceedings before the State Board of Pharmacy).

- Ch. 414, *Physicians: Licensing and Discipline* (discussion and forms relating to licensing and discipline of physicians and proceedings before the Medical Board of California).

- Ch. 480, *Public Utilities* (discussion and forms relating to proceedings before the Public Utilities Commission).

- Ch. 512, *Schools: Certification, Dismissal, and Related Employment Issues*, (discussion and forms relating to teacher certification and dismissal proceedings before the State Board of Education and local boards).

- Ch. 527, *Social Services* (discussion and forms relating to proceedings before the State Department of Social Service or the State Department of Health Services).

- Ch. 564, *Unemployment and Disability Insurance*, §§ 564.30 et seq., 564.100 et seq. (discussion and forms relating to proceedings before the Unemployment Insurance Appeals Board).

- Ch. 575, *Waters*, §§ 575.10 et seq., 575.210 et seq. (discussion and forms relating to proceedings before the State Water Resources Control Board and local water districts).

- Ch. 577, *Workers' Compensation* (discussion and forms relating to proceedings before the Division of Workers' Compensation and the Workers' Compensation Appeals Board).

For additional cross references to coverage of other particular public agencies, see *§ 470.02[2]*.

[5] Other Chapters Relating to Public Agencies

For discussion and forms relating to claims and actions under the California Tort Claims Act (Gov. Code. Code § 810 et seq.), for damages for injuries arising from the tortious conduct of public agencies or their officers and employees, see

Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawGovernmental InformationPublic MeetingsGeneral OverviewAdministrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewRemediesProhibitionAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicenses

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[Reserved]

§§ 473.03[Reserved]

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A. Administrative Adjudication in General

41A-473 California Forms of Pleading and Practice--Annotated § 473.10

§ 473.10 Administrative Adjudications and Administrative Rule Making Distinguished

Many administrative agencies have both rulemaking and adjudicative powers, which are similar to the legislative and judicial powers of legislatures and courts. Rulemaking actions, often referred to as "quasi-legislative" actions, entail formulation of general rules that are applicable to future situations [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 34 n. 2, 112 Cal. Rptr. 805, 520 P.2d 29]* . Examples of quasi-legislative actions are enacting a zoning ordinance for a specific area [*see Ensign Bickford Realty Corp. v. City Council (1977) 68 Cal. App. 3d 467, 473, 137 Cal. Rptr. 304]* , or setting government employee salaries or benefits [*Campbell Municipal Employees Assn. v. City of Campbell (1982) 131 Cal. App. 3d 416, 425 n. 5, 182 Cal. Rptr. 461]* . The rulemaking power of administrative agencies is discussed in detail in Ch. 472, *Public Agency Rules* , et seq.

In contrast, "adjudicative" actions, often referred to as "quasi-judicial" actions, are those in which the agency has discretion to apply a rule to a specific set of facts [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 34 n. 2, 112 Cal. Rptr. 805, 520 P.2d 29]* . The agency "adjudicates" when it makes a binding determination that directly affect the legal rights of a particular individual [*Hannah v. Larche (1960) 363 U.S. 420, 442, 80 S. Ct. 1502, 4 L. Ed. 2d 1307]* . Thus, adjudicative actions include those that might otherwise be categorized as executive actions, whenever these are discretionary rather than ministerial actions and involve a binding determination affecting legal rights.

Examples of an adjudicative action are the determination of an application for a variance from an ordinance [*see, e.g., Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 514, 113 Cal. Rptr. 836, 522 P.2d 12*], and the determination of salary or benefits to which a particular employee is entitled under a legislative scheme [*see Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 44, 112 Cal. Rptr. 805, 520 P.2d 29]* .

Formal agency adjudications, in the form of adjudicatory agency hearings under the Administrative Procedure Act, or APA (Gov. Code. Code § 11340 et seq.), or under non-APA adjudicatory proceedings, are the focus of this chapter and Ch. 473A, *Commencing Agency Adjudication*, et seq. Adjudicatory agency hearings under the APA are governed by Chapters 4.5 and 5 (Administrative Adjudication) of Division 3 (Executive Department) of Title 2 (California State

Government) of the Government Code [Gov. Code § 11400 et seq. and *Gov. Code § 11500 et seq.*]. The major category of adjudications requiring these type hearings are themselves the primary example of a binding determination affecting a legal right, that is, proceedings to determine whether to revoke, suspend, deny, or refuse to renew a license [*see Gov. Code §§ 11503, 11504*]. See further discussion in *§ 473.13*. See also further discussion and forms regarding adjudicatory licensing proceedings generally in Ch. 471B, *Licensing by Public Agencies*.

Whether an action is quasi-judicial or quasi-legislative is important to determine. When an agency conducts a quasi-judicial or adjudicatory proceeding, the affected private party has a right to a hearing [*Anton v. San Antonio Community Hosp., 19 Cal. 3d 802, 829, 140 Cal. Rptr. 442, 567 P.2d 1162 (1977)* (decision to take away doctor's hospital staff privileges for misconduct is adjudicatory, and doctor is entitled to adjudicatory hearing)]. When an agency engages in quasi-legislative or rulemaking action, however, there is no right to any hearing [City of Santa Cruz v. Local Agency Formation Com., 76 Cal. App. 3d 381, 388, *76 Cal. App. 3d 381, 142 Cal. Rptr. 873 (1978)* (agency decision to approve annexation decision is legislative in nature, and no judicial hearing is required before decision is made); *Mateo-Woodburn v. Fresno Community Hospital & Medical Center, 221 Cal. App.3d 1169, 1182-84, 270 Cal. Rptr. 894 (1990)* (when a hospital changes its policy governing anesthetist staffing, no individual doctor has a right to an adjudicatory hearing before the policy can go into effect)]. In other words, the due process right to a hearing arises when an action is adjudicatory rather than legislative [*Atkins v. Parker (1985) 472 U.S. 115, 129, 105 S. Ct. 2520, 86 L. Ed. 2d 81* ; *Londoner v. Denver (1908) 210 U.S. 373, 28 S. Ct. 708, 52 L. Ed. 1103* ; *Bi-Metallic Inv. Co. v. State Board of Equalization (1915) 239 U.S. 441, 445, 36 S. Ct. 141, 60 L. Ed. 372]* . See further discussion in *§ 473.12*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationHearingsRight to HearingGeneral OverviewAdministrative LawAgency RulemakingGeneral OverviewGovernmentsLocal GovernmentsAdministrative Boards

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A. Administrative Adjudication in General

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§ 473.11 Administrative Ajudication and Civil Trial Compared

Formal administrative hearing practice is similar to trial practice, although it generally involves informal, simplified procedures. An attorney representing a party in an administrative proceeding should recognize that despite these procedural differences, adjudicatory proceedings may also involve important substantive and constitutional issues. The client's interests, therefore, should be protected as diligently as in a proceeding before a judicial tribunal.

Differences between a trial and an administrative hearing include the following:

- The parties in an administrative hearing are referred to as complainant and respondent, rather than plaintiff and defendant [*see Gov. Code § 11500(b), (c)* (defining "party" and "respondent" for purposes of *Gov. Code § 11500 et seq.*, governing administrative adjudication hearings)].

- Decisions are rendered by an administrative law judge (ALJ) or by the agency itself, rather than by a trial judge [*see Gov. Code § 11517(a)*, (b) (under the APA, an ALJ and/or agency decides a case); *see* Ch. 473E, *Public Administrative Law Judges*].

- The time frame for an administrative hearing is generally much shorter than for a civil trial.

- The provisions of the APA (or statutes and regulations governing a particular agency) govern the conduct of the hearing, discovery, and prehearing motions and conferences, rather than the Evidence Code and the Code of Civil Procedure [*see Evid. Code § 300* (Evidence Code applies to court actions except as otherwise provided by statute); *Gov. Code § 11513(c)* (hearings not conducted according to technical rules of evidence, except as provided in *APA); Aluisi v. County of Fresno (1960) 178 Cal. App. 2d 443, 451, 2 Cal. Rptr. 779* (administrative hearings are not governed by Code of Civil Procedure provisions); *see also* Ch. 473B, *Discovery in Agency Adjudications* , Ch. 473C, *Prehearing Procedures in Agency Adjudications* , and Ch. 473F, *Agency Adjudication Hearings*].

- Although decisions in both forums are subject to judicial review, administrative decisions are

> reviewed primarily by seeking administrative mandamus relief from the superior court, while trial court decisions are usually reviewed in the court of appeal [*see* Ch. 474, *Availability of Judicial Review of Agency Decisions*].

For further comparison of formal administrative hearings and civil trials, see Chapter 473F, *Agency Adjudication Hearings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawJudicial ReviewRemediesMandamus

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§ 473.12 Due Process Considerations in Administrative Adjudications

The United States and California Constitutions state that no person may be deprived of liberty or property without due process of law [*U.S. Const., amend. XIV, § 1*; *Cal. Const., art. I, § 7(a)*]. These constitutional guarantees apply to administrative adjudicatory action [*Goldberg v. Kelly (1970) 397 U.S. 254, 263, 90 S. Ct. 1011, 25 L. Ed. 2d 287* ; *Kruger v. Wells Fargo Bank (1974) 11 Cal. 3d 352, 366-367, 113 Cal. Rptr. 449, 521 P.2d 441* (California due process provision held to be identical in scope and purpose to the due process provision of the *Fourteenth Amendment to the United States Constitution*)]. Courts balance several factors to determine what procedural due process requires in a particular case [*Mathews v. Eldridge (1976) 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18* ; *Goldberg v. Kelly (1970) 397 U.S. 254, 263, 90 S. Ct. 1011]* .

Two basic due process issues may arise: (1) whether due process requires a hearing, and (2) what procedures are required at the hearing to satisfy due process requirements. These issues generally arise with respect to agencies or procedures that are not governed by the APA or other statutes governing adjudication [*see* discussion in *§ 473.13*]. Often, statutory adjudication requirements are very specific and more stringent then constitutional due process requirements.

For a detailed discussion of federal and state constitutional due process requirements as delineated by judicial doctrine, as well as related statutory law, see Chapter 470A, *Due Process Restrictions on Public Agencies* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingDue ProcessConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of Protection

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A. Administrative Adjudication in General

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§ 473.13 The Administrative Adjudication Provisions of the APA

[1] Chapters 4.5 and 5 of the APA

Two chapters of the Government Code comprise the Administrative Adjudication provisions of the Administrative Procedure Act (APA) and govern administrative adjudication generally. These chapters were enacted or revised extensively by 1995 legislation that became operative July 1, 1997 [1995 Stats, ch. 938; *see also Gov. Code §§ 11400.10(a), 11501*], and are as follows [*Gov. Code § 11400(a)*]:

- Chapter 4.5, Administrative Adjudication: General Provisions (*Gov. Code § 11400 et seq.*); and
- Chapter 5, Administrative Adjudication: Formal Hearings (*Gov. Code § 11500 et seq.*).

For convenience, they are termed hereafter simply as Chapter 4.5 and Chapter 5.

The APA consists of Chapters 4.5 and 5, together with the rule making and other provisions of Chapters 3.5 (*Gov. Code § 11340 et seq.*) and 4 (*Gov. Code § 11370 et seq.*) [*see Gov. Code § 11370*]. Technically, these four chapters are not chapters of the APA itself, but are chapters within Part 1 (State Departments and Agencies) of Division 3 (Executive Department) of Title 2 (California State Government) of the Government Code.

The provisions of Chapter 4.5 are new as of July 1, 1997 [*see Gov. Code § 11400.10(a)*]. Chapter 5, which formerly contained all the administrative adjudication provisions of the APA, was significantly amended as of July 1, 1997: now it is only a part of the administrative adjudication provisions. Thus, any references in another statute or other law (rule of court, executive order, or regulation) to former provisions of Chapter 5 (*Gov. Code § 11500 et seq.*) are to be construed to applicable provisions of Chapter 4.5 [*see Gov. Code § 11400(b)*]. *Gov. Code § 11400(b)* makes clear that references to the administrative adjudication provisions of the APA (which were previously in Chapter 5 only) are references to both Chapters 4.5 and 5 [25 Cal. L. Rev. Comm. Reports 55 (1995)].

Some of the new administrative adjudication provisions are based on provisions of the "1981 Model State APA" [Model

State Administrative Procedure Act (1981), promulgated by the National Conference of Commissioners on Uniform State Laws; *see* 15 U.L.A. 1 (1990)], and the "Federal APA" [Federal Administrative Procedure Act (*5 U.S.C. §§ 551-583, 701*-706, 1305, 3105, 3344, 5372, 7521 and related sections)]. Section comments from the California Law Revision Commission to these new provisions of the APA often refer to these sources [25 Cal. L. Rev. Comm. Reports 55 (1995)].

[2] Supplementary Regulations Governing Agency Adjudications

Under the new APA administrative adjudication provisions, agencies have authority to adopt, before, on, or after July 1, 1997, interim or permanent regulations to adjudicative proceedings under Chapter 4.5 or Chapter 5. However, agencies are not authorized by this section to adopt regulations to govern adjudicative proceedings required to be conducted by an administrative law judge employed by the Office of Administrative Hearings, except to the extent the regulations are otherwise authorized by statute [*Gov. Code § 11400.20(a)*].

Revisions of regulations that merely conform to the new law may be adopted by simplified procedures under the rulemaking provisions of the California APA pursuant to *1 Cal. Code Reg. § 100* [25 Cal. L. Rev. Comm. Reports 55 (1995)].

Except as provided in *Gov. Code § 11351* (which governs application of APA rulemaking procedures to the Public Utilities Commission, the Division of Worker's Compensation, and the Worker's Compensation Appeals Board), interim regulations need not comply with the provisions of Article 5 (*Gov. Code § 11346 et seq.*), entitled Public Participation: Procedure for Adoption of Regulations, and governing APA rulemaking procedures, or with the provisions of Article 6 (*Gov. Code § 11349 et seq.*), entitled Review of Proposed Regulations and governing Office of Administrative Law review of agency regulations), both part of Chapter 3.5 (Gov. Code. Code § 11340 et seq.), entitled Administrative Regulations and Rulemaking. The interim regulations must, however, comply with Chapter 3.5 in all other respects [*Gov. Code § 11400.20(b)(1)*].

The effect of these provisions is to allow agencies may adopt interim procedural regulations without the normal notice and hearing and Office of Administrative Law review processes of the rulemaking provisions of the APA. However, this does not excuse compliance with the other rulemaking provisions, including, but not limited to, requirements that:

- Regulations be consistent and not in conflict with statute and reasonably necessary to effectuate the purpose of the statute under *Gov. Code § 11342.2*.

- Regulations be filed and published under *Gov. Code §§ 11343-11344.9*.

- Regulations are subject to judicial review under *Gov. Code § 11350*.

Compliance with these requirements is not required for agencies exempted under *Gov. Code § 11351* [25 Cal. L. Rev. Comm. Reports 55 (1995)].

Interim regulations are only valid through December 31, 1998. They may be replaced by or readopted as permanent regulations before then, through the standard administrative rulemaking process. In case permanent regulations are pending on December 31, 1998, interim regulations may be extended up to three months. Permanent regulations governing administrative adjudication are subject to normal rulemaking procedures other than review for necessity under *Gov. Code § 11349.1* (Office of Administrative Law) or 11350 (declaratory relief) in the case of permanent regulations promulgated during the transitional period [25 Cal. L. Rev. Comm. Reports 55 (1995); *see Gov. Code § 11400.20(b)(2)* and *(3)*].

For detailed discussion and forms relating to the rulemaking provisions of the APA, see Ch. 472, *Public Agency Rules* .

[3] Office of Administrative Hearings Regulations Governing Hearing Procedures

The Office of Administrative Hearings adopted regulations [*1 Cal. Code Reg. §§ 1000-1440* (1997)] to govern hearing procedures in hearings conducted before OAH administrative law judges [*1 Cal. Code Reg. § 1000* (1998)]. The regulations cover the subjects of general APA hearing procedures [*1 Cal. Code Reg. §§ 1000-1046* (1998)], special hearing procedures [*1 Cal. Code Reg. §§ 1100-1148* (1997)], alternative dispute resolution procedures [*1 Cal. Code Reg. §§ 1200-1292* (1999)], arbitration procedures for state contract act contract claims [*1 Cal. Code Reg. §§ 1300-1393* (1997)], and protest arbitration procedures *1 Cal. Code Reg. §§ 1000-1440* (1998)]. The basic purpose [*1 Cal. Code Reg. § 1000* (1998)], definitions [*1 Cal. Code Reg. § 1002* (1998)], and principles of interpretation [*1 Cal. Code Reg. § 1004* (1998)], are set forth in specific regulations. Other specific regulations will be cited and discussed in subsections of Ch. 473, and in Ch 473A through Ch 473H.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawAgency RulemakingFormal Rulemaking

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§ 473.14 Definitions in the APA Administrative Adjudication Provisions

[1] Applicability of Definitions in Chapters 4.5 and 5

There are two sets of definitions that govern different aspects of administrative adjudication. The first set, part of the general adjudication provisions of Chapter 4.5 (*Gov. Code § 11405.10 et seq.*) govern the construction of terms in that chapter [*Gov. Code § 11405.10*]. The second set, set out in *Gov. Code § 11500*, govern construction of terms for the formal hearing procedure under Chapter 5 (*Gov. Code § 11500 et seq.*) [25 Cal. L. Rev. Comm. Reports 55 (1995)].

The following list of definitions details the terms that are defined in the two sets, including when the same or similar term is defined in both sets:

- Adjudicative Proceeding [*Gov. Code § 11405.20*].
- Agency [*Gov. Code §§ 11405.30, 11500(a)*].
- Agency Head [*Gov. Code § 11405.40*], and the related term Agency Member [*Gov. Code § 11500(e)*].
- Decision [*Gov. Code § 11405.50*].
- Party [*Gov. Code §§ 11405.60, 11500(b)*], and the related term Respondent [*Gov. Code § 11500(c)*].
- Person [*Gov. Code § 11405.70*].
- Presiding Officer [*Gov. Code § 11405.80*] and the related term Administrative Law Judge [*Gov. Code § 11500(d)*].

Because Chapter 4.5 applies to adjudicative proceedings required to be conducted under Chapter 5 unless the statutes

related to the proceeding provide otherwise [*Gov. Code § 11501(c)*], the definitions in Chapter 4.5 appear to apply to proceedings under Chapter 5 to the extent that they are not inconsistent with definitions set out in Chapter 5 under *Gov. Code § 11500*.

[2] Definitions

[a] "Adjudicative Proceeding"

"Adjudicative proceeding" is defined to mean an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision [*Gov. Code § 11405.20*]. There is no comparable definition in Chapter 5, *Gov. Code § 11500*.

[b] "Agency"

"Agency" is defined in Chapter 4.5 to mean a board, bureau, commission, department, division, office, officer or other administrative unit, including the agency head, and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf of or under the authority of the agency head. To the extent it purports to exercise authority under Chapter 4.5, an administrative unit otherwise qualifying as an agency shall be treated as a separate agency even if the unit is located within or subordinate to another agency [*Gov. Code § 11405.30*].

This definition in *Gov. Code § 11405.30* is drawn from 1981 Model State APA § 1-102(1) and supplements *Gov. Code § 11000* (defining "state agency" generally). The intent of the definition is to subject as many governmental units as possible to this chapter. The definition explicitly includes the agency head and those others who act for an agency, so as to effect the broadest possible coverage. The definition also would include a committee or council. The last sentence of this definition is in part derived from Federal APA § 551(1) (1988), treating as an agency "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." A similar provision in *Gov. Code § 11405.30* is used to avoid difficulty in ascertaining which is the agency in a situation where an administrative unit is within or subject to the jurisdiction of another administrative unit. An administrative unit of an agency that has no authority to issue decisions or take other action on behalf of an agency is not an "agency" within the meaning of this section [25 Cal. L. Rev. Comm. Reports 55 (1995)].

"Agency" is defined, for purposes of Chapter 5, to include the state boards, commissions, and officers to which this chapter is made applicable by law, except that wherever the word "agency" alone is used the power to act may be delegated by the agency, and wherever the words "agency itself" are used the power to act shall not be delegated unless the statutes relating to the particular agency authorize the delegation of the agency's power to hear and decide [*Gov. Code § 11500(a)*]. This definition was amended to reference to an enumeration of specific agencies in former Gov. Code. Code § 11501. *Gov. Code § 11501(a)* now provides that the application of Chapter 5 to the hearings of any given agency is to be determined by the statutes relating to that agency [25 Cal. L. Rev. Comm. Reports 55 (1995)].

[c] "Agency Head"

"Agency head" is defined in Chapter 4.5 to mean a person or body in which the ultimate legal authority of an agency is vested, and includes a person or body to which the power to act is delegated pursuant to authority to delegate the agency's power to hear and decide [*Gov. Code § 11405.40*]. The first part of this definition is taken from Model State APA § 1-102(3). The definition of agency head is included to differentiate for some purposes between the agency as an organic entity that includes all of its employees, and those particular persons in which the final legal authority over its operations is vested. The last part of the definition is drawn from *Gov. Code § 11500(a)* (defining "agency" for purposes of Chapter 5), relating to use of the term, "agency itself," to refer to a nondelegable power to act. An agency may delegate review authority [25 Cal. L. Rev. Comm. Reports 55 (1995)]. There is no comparable definition of agency head in Chapter 5, *Gov. Code § 11500*.

"Agency member," a related term, is defined, for purposes of Chapter 5, to mean any person who is a member of any agency to which Chapter 5 applies and includes any person who himself or herself constitutes an agency [*Gov. Code § 11500(e)*]. For example, the Department of Motor Vehicles (DMV) [*Veh. Code § 1500*] is headed by a Director [*Veh. Code § 1504*]. DMV must conduct license revocation and suspension hearings pursuant to the formal hearing procedures of Chapter 5 of the California APA [*Veh. Code § 11509(c)*]. In contrast, the New Motor Vehicle Board is a multimember agency, with nine members [*Veh. Code §§ 3000, 3001*], that regulates the new motor vehicle industry [*Veh. Code § 3000 et seq.*], and is part of the DMV [*Veh. Code § 3000*].

[d] "Decision"

"Decision" is defined in Chapter 4.5 to mean an agency action of specific application that determines a legal right, duty, privilege, immunity or other legal interest of a particular person [*Gov. Code § 11405.50(a)*]. The definition of decision in this statute does not limit the precedential effect of a decision under *Gov. Code § 11425.60* [*Gov. Code § 11405.50(b)(1)*], nor does it limit the authority of an agency to make a declaratory decision under *Gov. Code § 11465.10 et seq.* [*Gov. Code § 11405.50(b)(2)*]. There is no comparable definition in Chapter 5, *Gov. Code § 11500*.

The definition of decision in *Gov. Code § 11405.50(a)* is taken from the 1981 Model State APA § 1-102(5). The definition makes clear that it includes only legal determinations made by an agency that are of specific applicability because they are addressed to particular or named persons. More than one identified person may be the subject of a decision. Person includes legal entity and governmental subdivision under *Gov. Code § 11405.70* [25 Cal. L. Rev. Comm. Reports 55 (1995)].

A decision includes every agency action that determines any of the legal rights, duties, privileges, or immunities of a specific, identified individual or individuals. In contrast, a regulation, as defined under *Gov. Code § 11342*, is an agency action of general application, applicable to all members of a described class. The decision definition statute should not be interpreted to expand the types of cases in which an adjudicative proceeding is required. Under *Gov. Code § 11410.10*, an adjudicative proceeding is required under Chapter 4.5 only when another statute or the constitution requires such a proceeding [25 Cal. L. Rev. Comm. Reports 55 (1995)].

Consistent with the definition of "decision" in this statute, rate making and licensing determinations of specific application, addressed to named or particular parties such as a certain power company or a specific licensee, are decisions subject to Chapter 4.5. However, ratemaking and licensing actions of general application, addressed to all members of a described class of providers or licensees, are regulations as defined in *Gov. Code § 11342* [25 Cal. L. Rev. Comm. Reports 55 (1995)].

Furthermore, some decisions may have precedential effect under *Gov. Code § 11425.60* [25 Cal. L. Rev. Comm. Reports 55 (1995)].

[e] "Party"

"Party" is defined in Chapter 4.5 to include the agency that is taking action, the person to which the agency action is directed, and any other person named as a party or allowed to appear or intervene in the proceeding. If the agency that is taking action and the agency that is conducting the adjudicative proceeding are separate proceedings, the agency that is taking action is a party and the agency that is conducting the adjudicative proceeding is not a party [*Gov. Code § 11405.60*].

The first sentence of the definition of party in *Gov. Code § 11405.60* is taken from *Gov. Code § 11500(b)* (*see below*) and 1981 Model State APA § 1-102(6). The second sentence is new [25 Cal. L. Rev. Comm. Reports 55 (1995)]. Person is defined in *Gov. Code § 11405.70* [*see* [g], *below*] and includes legal entity and governmental subdivisions. Under this

definition, if an officer or employee of an agency appears in an official capacity, the agency and not the person is the party. A staff division authorized to act on behalf of the agency may be a party under Chapter 4.5 because of the definition of agency [*see* [c], *above*] under *Gov Code § 11405.30* [25 Cal. L. Rev. Comm. Reports 55 (1995)]. The definition of party in this statute does not address the question of whether a person is entitled to judicial review. Standing to seek judicial review is dealt with in other law [25 Cal. L. Rev. Comm. Reports 55 (1995)].

"Party" is defined for purposes of Chapter 5 to include the agency, the respondent, and any other person, other than an officer or employee of the agency in his or her official capacity, who has been allowed to appear or participate in the proceeding [*Gov. Code § 11500(b)*]. The related term,"respondent" is defined for purposes of Chapter 5 to mean any person against whom an accusation is filed under *Gov. Code § 11503*, or against whom a statement of issues is filed under *Gov. Code § 11504* [*Gov. Code § 11500(c)*; *see* Ch. 473A, *Commencing Agency Adjudication* , for discussion of accusations and statements of issue].

[f] "Person"

"Person" is defined for purposes of Chapter 4.5 to include an individual, partnership, corporation, governmental subdivision or unit of a governmental subdivision, or public or private organization or entity of any character [*Gov. Code § 11405.70*].

This definition supplements the definition of person in *Gov. Code § 17*. This definition is drawn from 1981 Model State APA, § 1-102(8), and includes the trustee of a trust or other fiduciary. This definition is broader than the *Gov. Code § 17* definition of person in that it also applies to a governmental subdivision or unit. This aspect of the definition would include an agency other than the agency against which rights under this chapter are asserted by the person. Including these agencies and units of government insures, therefore, that other agencies or other governmental bodies can, for example, apply to an agency for a decision, and will be accorded all the other rights that a person has under Chapter 4.5 [25 Cal. L. Rev. Comm. Reports 55 (1995)].

There is no comparable definition of person in Chapter 5, *Gov. Code § 11500*.

[g] "Presiding Officer"

"Presiding officer" is defined for purposes of Chapter 4.5 to mean the agency head, member of the agency head, administrative law judge, hearing officer, or other person who presides in an adjudicative proceeding [*Gov. Code § 11405.80*]. This section is intended for drafting convenience [25 Cal. L. Rev. Comm. Reports 55 (1995)]. The related term, "administrative law judge," is defined for purposes of Chapter 5, to mean in individual qualified under *Gov. Code § 11502* [*Gov. Code § 11500(d)*]. See Ch. 473E, *Public Administrative Law Judges* , for discussion of the role of ALJ's.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesGovernmentsLocal GovernmentsAdministrative Boards

California Forms of Pleading and Practice--Annotated

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Volume 41A: Public Agency Adjudications Judicial Review-Chs. 473-479
Chapter 473 PUBLIC AGENCY ADJUDICATION
PART II. LEGAL BACKGROUND
A. Administrative Adjudication in General

41A-473 California Forms of Pleading and Practice--Annotated § 473.15

§ 473.15 Applicability of the APA Administrative Adjudication Provisions

[1] Applicability of Chapter 4.5

[a] Proceedings Subject to Chapter 4.5 in General

The general administrative adjudication provisions of Chapter 4.5 apply to all state agency adjudicatory proceedings that are required by statute or constitutional provision, including proceedings under Chapter 5 [*see Gov. Code § 11410.10 et seq.*; *Gov. Code § 11501(c)* (Chapter 4.5 applies to an adjudicative proceeding required to be conducted under Chapter 5, unless the statutes relating to the proceeding provide otherwise); 25 Cal. L. Rev. Comm. Reports 55 (1995); *see* further discussion in [b] et seq., *below*].

The provisions only apply, however, to adjudicative proceeding commenced on or after July 1, 1997, or to proceedings commenced before that date but remanded from a court or other agency on or after July 1, 1997 [*Gov. Code § 11400.10(b), (c)*].

As discussed further in [b][iii] and [2], *below*, the Chapter 4.5 requirements apply to formal hearings conducted under Chapter 5, but also to other types of adjudication proceedings. For discussion of the specific provisions of Chapter 4.5 that apply generally to administrative adjudications, whether or not a formal hearing is required under Chapter 5, see *§§ 473.16* and *473.20* et seq. For detailed discussion and forms relating to Chapter 4.5 requirements in the context of a formal hearing under Chapter 5, see Ch. 473A, *Commencing Agency Adjudication* , through Ch. 473G, *Agency Adjudication Decisions* . For detailed discussion and forms relating to the various alternative adjudication procedures under Chapter 4.5, (e.g., alternative dispute resolution, declaratory decision, emergency decision, and informal hearing), see Ch. 473H, *Alternative Adminstrative Adjudication Procedures* .

[b] Agency Adjudication Required by Statute or Constitutional Provision

[i] General Rule

Chapter 4.5, Administrative Adjudication: General Provisions (*Gov. Code § 11400 et seq.*) applies to a decision by an

agency if, under the federal or state Constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation or issuance of a decision [*Gov. Code § 11410.10*; *see also* general discussion in [a], *above*].

Gov. Code § 11410.10 states the general principle that an agency must conduct an appropriate adjudicative proceeding before issuing a decision when a statute or the due process clause of the federal or state constitutions necessitates an evidentiary hearing for determination of facts. That hearing is a process in which a neutral decision maker makes a decision based exclusively on the evidence contained in a record made at the hearing or on matters officially noticed. The hearing must at least permit a party to introduce evidence, make an argument to the presiding officer, and rebut opposing evidence [25 Cal. L. Rev. Comm. Reports 55 (1995)].

The applicability of Chapter 4.5 is the same as coverage by the existing provision for administrative mandamus under *Code Civ. Proc. § 1094.5(a)*, which states that *Code Civ. Proc. § 1094.5* applies only when an agency has issued a final decision "as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the [agency]." Numerous cases have applied *Code Civ. Proc. § 1094.5* broadly to administrative proceedings in which a statute requires an "administrative appeal" or some other functional equivalent of an evidentiary hearing for determination of facts--an on-the-record or trial-type hearing [25 Cal. L. Rev. Comm. Reports 55 (1995); *see, e.g., Eureka Teachers Assn. v. Board of Educ. of Eureka City Schools (1988) 199 Cal. App. 3d 353, 244 Cal. Rptr. 240* (teacher's right to appeal grade change was right to hearing, and *Code Civ. Proc. § 1094.5(a)* applies); *Chavez v. Civil Service Comm'n of Sacramento County (1978) 86 Cal. App. 3d 324, 150 Cal. Rptr. 197* (right of "appeal" means hearing required, and *Code Civ. Proc. § 1094.5* is available)].

[ii] Proceedings in Which Chapter 4.5 Does Not Apply

In many cases, statutes or the constitution call for administrative proceedings that do not rise to the level of an evidentiary hearing as defined in *Gov. Code § 11410.10*. For example, the constitution or a statute might require only a consultation or a decision that is not based on an exclusive record or a purely written procedure or an opportunity for the general public to make statements. In some cases, the agency has discretion to provide or not provide the procedure. Chapter 4.5 does not apply in those cases. Examples of cases in which the required procedure does not meet the standard of an evidentiary hearing for determination of facts are [25 Cal. L. Rev. Comm. Report 55 (1995)]:

- Informal consultation between student and disciplinarian before brief suspension from school [*Goss v. Lopez (1975) 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725]* .

- Informal nonadversary review of decision to place prisoner in administrative segregation, prisoner has right to file written statement [*Hewitt v. Helms (1983) 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675]* .

- Informal opportunity for employee to respond orally or in writing to charges of misconduct prior to removal from government job [*Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 124 Cal. Rptr. 14, 539 P. 2d 774]* .

- Hearing is discretionary not mandatory, and *Code Civ. Proc. § 1094.5(a)* is not applicable [*Marina County Water Dist. v. State Water Resources Control Bd. (1984) 163 Cal. App. 3d 132, 209 Cal. Rptr. 212]* .

- Prisoner's right to appeal decision does not require a hearing, and *Code Civ. Proc. § 1094.5* is not applicable [*Wasko v. Department of Corrections (1989) 211 Cal. App. 3d 996, 1001-1002, 259 Cal. Rptr. 764]* .

Chapter 4.5 does not apply to agency action that is pursuant to statutes that do not require evidentiary hearings. Such statutes include the California Environmental Quality Act (*Pub. Res. Code § 21000 et seq.*), the Bagley-Keene Open Meeting Act (*Gov. Code § 11120 et seq.*), and the California Public Records Act (*Gov. Code § 6250 et seq.*) [25 Cal. L. Rev. Comm. 55 (1995)].

Chapter 4.5 applies only to proceedings for issuing a "decision," and a decision is an agency action of specific application that determines a legal right, duty, privilege, immunity or other legal interest of a particular person under *Gov. Code § 11405.50*. Therefore, Chapter 4.5 does not apply to agency actions that do not determine a person's legal interests. Similarly, Chapter 4.5 does not apply to rulemaking, which is agency action of general applicability [25 Cal. L. Rev. Comm. Report 55 (1995)].

Chapter 4.5 does not apply when a hearing is required by agency regulations, not a statute or the constitution. Agencies are encouraged to provide procedural protections by regulation even though not required to do so by statute or the constitution. An agency may provide an appropriate procedure for a decision for which an adjudicative proceeding is not required under *Gov. Code § 11415.50* [25 Cal. L. Rev. Comm. Reports 55 (1995)].

The Third District California Court of Appeal held that Section 98 [*Labor Code § 98*] hearings conducted by the Labor commissioner are not subject to the provisions of Chapter 4.5 of the California Administrative Procedures Act because those hearings are discretionary and not required by Section 98. Chapter 4.5 applies to agency decisions in which a hearing is required by statute or constitutional provision, and it does not apply when a hearing is not required by statute [*Gov. Code § 11410.10*; *Corrales v. Bradstreet (2007) 153 Cal. App. 4th 33, 54-56, 62 Cal. Rptr. 3d 440]* . The court of appeal also held that an evidentiary hearing is not required by the constitution (due process of law) because an employer has the right to obtain a trial de novo in the superior court following an adverse decision from a Section 98 hearing. The trial de novo satisfies the requirements of due process of law, so that a Section 98 hearing is not required to protect the employer's due process right to protect their property interest in money [*Corrales v. Bradstreet (2007) 153 Cal. App. 4th 33, 59-61, 62 Cal. Rptr. 3d 440]* . The court of appeal also rejected arguments for the application of Chapter 4.5 based on *Gov. Code § 11410.20* (listing agencies subject to Chapter 4.5) and *Gov. Code § 11410.40* (agencies may adopt provisions of Chapter 4.5 by regulation or ordinance). The listing of agencies subject to Chapter 4.5 did not resolve the issue of what agency decisions were subject to Chapter 4.5, and that issue is controlled by the hearings required by law provision of the APA [*Gov. Code § 11410.10*]. The DLSE did not properly adopt the APA when it issued a memorandum to that effect [*Corrales v. Bradstreet (2007) 153 Cal. App. 4th 33, 56-58, 62 Cal. Rptr. 3d 440]* . Therefore, the Labor commissioner could not utilize the provisions of *Gov. Code § 11425.60* (precedent decision) to designate the *Hartwig* decision as a precedent decision. This is because the *Hartwig* proceeding was a Section 98 proceeding to which Chapter 4.5 did not apply, including *Gov. Code § 11425.60*. Thus, it was invalid to designate Hartwig as a precedent decision [*Corrales v. Bradstreet (2007) 153 Cal. App. 4th 33, 65, 68, 62 Cal. Rptr. 3d 440]* .

[iii] Type of Hearing When Chapter 4.5 Applies

Gov. Code § 11410.10 does not specify what type of adjudicative proceeding should be conducted. If an adjudicative proceeding is required within the meaning of this section, the proceeding may be a formal hearing procedure under Chapter 5 (*Gov. Code § 11500 et seq.*). Thus, Chapter 4.5 provisions apply to any proceeding under Chapter 5 [25 Cal. L. Rev. Comm. Reports 55 (1995); *see also* discussion in [f], *below*].

A proceeding subject to Chapter 4.5 may also governed by some other hearing procedure provided by a statute applicable to the particular proceeding [25 Cal. L. Rev. Comm. Reports 55 (1995)].

Chapter 4.5 itself makes available several alternatives to the formal hearing procedure under Chapter 5. For example, an informal hearing [*Gov. Code §§ 11445.10-11445.60*], an emergency decision [*Gov. Code §§ 11460.10-11460.80*], or a declaratory decision [*Gov. Code §§ 11465.10-11465.70*]. *Gov. Code § 11410.10* does not prohibit the waiver of any

procedure [*Gov. Code § 11415.40*], or the settlement of any case [*Gov. Code § 11415.60*], without use of all available proceedings [25 Cal. L. Rev. Comm. Reports 55 (1995)].

See also discussion in [a], *above*, and [2], *below*.

[c] State Agencies Subject to Chapter 4.5

Except as otherwise expressly provided by statute, Chapter 4.5 applies to all agencies of the State of California [*Gov. Code § 11410.20(a)*]. However, Chapter 4.5 does not apply to the California Legislature, the California courts or judicial branch, or the California Governor or the office of the Governor [*Gov. Code § 11410.20(b)*].

Gov. Code § 11410.20 applies Chapter 4.5 to all state agencies unless specifically excepted. The intent of this statute is to apply the provisions to as many state governmental units as possible. Subdivision (a) is taken from 1981 Model State APA § 1-103(a), while subdivision (b) is taken from 1981 Model State APA § 1-102(1). Exemptions from Chapter 4.5 are to be construed narrowly. *Gov. Code § 11410.20(b)* exempts the entire judicial branch, and is not limited to the courts, thus exempted agencies within the judicial branch include the Judicial Council, the Commission on Judicial Appointments, the Commission on Judicial Performance, and the Judicial Criminal Justice Planning Committee. The provision also exempts the Governor's office, and is not limited to the Governor. For an express statutory exception to this latter exemption, *see Bus. & Prof. Code § 106.5*, providing that "proceedings for removal [by the Governor of a board member in the Department of Consumer Affairs] shall be conducted in accordance with the provisions of Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code, and the Governor shall have all the powers granted therein" [25 Cal. L. Rev. Comm. Reports. 55 (1995)].

Chapter 4.5 does not apply to specified proceedings of the following agencies [25 Cal. L. Rev. Comm. Reports 55 (1995)]:

- Alcoholic Beverage Control Appeals Board [*Bus. & Prof. Code § 23083*; *see* Ch. 18, *Alcoholic Beverage Licenses*].

- University of California [*Educ. Code § 92001*].

- Public Employment Relations Board [*Gov. Code §§ 3541.3, 3563*; *see* Ch. 118, *Civil Service*].

- Commission on State Mandates [*Gov. Code § 17533*].

- Agricultural Labor Relations Board [*Lab. Code § 1144.5*].

- Military Department [*Mil. & Vet. Code § 105*].

- Department of Corrections [*Penal Code § 2600*; *Department of Corrections v. Office of Administrative Hearings (1997) 53 Cal. App. 4th 780, 786, 61 Cal. Rptr. 2d 903* (APA procedures are not required to be used, except for appointment of an ALJ, in Department of Correction hearings related to "involuntary administration of psychotropic medication" to prisoners)], Board of Prison Terms, Youth Authority, Youthful Offender Parole Board, and Narcotic Evaluation Authority [*Penal Code § 3006*; *Welf. & Inst. Code §§ 1788, 3158*].

- Public Utilities Commission [*Pub. Util. Code § 1701*; *see* Ch. 480, *Public Utilities*].

- State Bar of California [*Bus. & Prof. Code § 1701*; *see* Ch. 70, *Attorney Admission* , and Ch. 71, *Attorney Discipline*].

However, see discussion in [e], *below*, of exempt agencies discretion to adopt provisions of Chapter 4.5 to govern their proceedings.

[d] Local Agencies

Local agencies are defined to mean a county, city, district, public authority, public agency, or other political subdivision or public corporation in the state other than the state [*Gov. Code § 11410.30(a)*]. Chapter 4.5 does not apply to local agencies except to the extent the provisions are made applicable by statute [*Gov. Code § 11410.30(b)*; *Southern California Underground Contractors, Inc. v. City of San Diego (2003) 108 Cal. App. 4th 533, 547, 133 Cal. Rptr. 2d 527* (APA provisions apply to state agencies not local entities)]. Chapter 4.5 applies to an agency created or appointed by joint or concerted action of the state and one or more local agencies [*Gov. Code § 11410.30(c)*; *Patterson Flying Service v. California Department of Pesticide Regulation (2008) 161 Cal. App. 4th 411, 421-422, 74 Cal. Rptr. 3d 290* (provisions of chapter 4.5 apply to hearings conducted under the authority of the county agricultural commissioner, because the office of county agricultural commissioner is a local agency created or appointed by concerted action of the state and one or more local agencies. The hearing provided the opportunity for the flying service to contest a fine imposed on them for not properly following the label directions for the application of pesticides)].

Gov. Code § 11410.30 is taken from 1981 Model State APA § 1-102(1). Local agencies are excluded because of the very different circumstances of local government units when compared to state bodies. This statute explicitly applies Chapter 4.5 provisions to joint state and local bodies, so as to effect the broadest possible coverage [25 Cal. L. Rev. Comm. Reports 55 (1995)]. The administrative adjudication provisions of the California APA are also made applicable by statute to local agencies in a number of circumstances including the following [25 Cal. L. Rev. Comm. Reports 55 (1995)]:

- Suspension or dismissal of permanent employee by school district [*Educ. Code § 44944*; *see* Ch. 512, *Schools: Certification, Dismissal, and Related Employment Issues*].

- Nonreemployment of probationary employee by school district [*Educ. Code § 44948.5*].

- Evaluation, dismissal, and imposition of penalties on certificated personnel by community college district [*Educ. Code § 87679*].

See also discussion in [2], *below* (adjudicative proceeding under Chapter 5), and [f], *below* (state agency proceedings subject to Chapter 5 requirements).

[e] Adoption by Exempt Agencies

Notwithstanding any other provisions of *Gov. Code §§ 11410.10-11410.50* (relating to the application of Chapter 4.5 provisions), an agency may adopt, by regulation, ordinance, or other appropriate action, either all or part of the Chapter 4.5 provisions for the formulation of a decision, even though the agency or decision is exempt from application of Chapter 4.5 [*Gov. Code § 11410.40*].

Gov. Code § 11410.40 is new. An agency may elect to apply Chapter 4.5 even though the agency would otherwise be exempt or the particular action would otherwise be exempt [25 Cal. L. Rev. Comm. Reports 55 (1995)]. Exempt agencies would include specified state agencies, *see* [b], *above*, most local agencies, see [c], *above*, and agency adjudicative action when a hearing is not mandated by statute or constitutional requirements, see [a], *above*.

[f] Application of Chapter 4.5 to Agency Proceedings Under Chapter 5

Chapter 4.5 applies to an adjudicative proceeding required to be conducted under Chapter 5 (*Gov. Code § 11500 et seq.*), unless the statutes relating to the proceeding provide otherwise [*Gov. Code §§ 11410.50, 11501(c)*].

Gov. Code § 11410.50 makes clear that the provisions of Chapter 4.5 supplement the formal hearing provisions of Chapter 5. Thus, if an agency is required by statute to conduct a hearing under Chapter 5, the agency may, unless a statute provides otherwise, elect to use alternative dispute resolution or the informal hearing procedure or other appropriate provisions of Chapter 4.5. Also, the general provisions of Chapter 4.5 restricting ex parte communications, regulating precedent decisions, and other provisions, apply to a hearing under Chapter 5 [25 Cal. L. Rev. Comm. Reports 55 (1995); *see* discussion in [2], *below*].

[g] Quasi-Public Entities

Quasi-public entities are defined as an entity, other than a governmental agency, whether characterized by statute as a public corporation, public instrumentality, or otherwise, that is expressly created by statute for the purpose of administration of a state function [*Gov. Code § 11410.60(a)*]. The provisions of Chapter 4.5 apply to adjudicative proceedings conducted by quasi-public entities when the following three conditions are met [*Gov. Code § 11410.60(b)*]:

- A statute vests the power of decision in the quasi-public entity [*Gov. Code § 11410.60(b)(1)*].

- A statute, the United States Constitution, or the California Constitution, requires an evidentiary hearing for determination of facts for formulation and issuance of the decision. Nothing in this section is intended to create an evidentiary hearing requirement that is not otherwise statutorily or constitutionally imposed [*Gov. Code § 11410.60(b)(2)*].

- The decision is not otherwise subject to administrative review in an adjudicative proceeding to which this chapter applies [*Gov. Code § 11410.60(b)(3)*].

Three statutory definitions are set forth for application of Chapter 4.5 to decisions by quasi-public entities [*Gov. Code § 11410.60(c)*]:

- "Agency" as defined by law [*Gov. Code § 11405.30*; *see § 473.14[2][b]*] includes quasi-public entities [*Gov. Code § 11410.60(c)(1)*].

- "Regulation" includes a rule promulgated by a public entity [*Gov. Code § 11410.60(c)(2)*].

- Language assistance requirements [*Gov. Code § 11435.05 et seq.*; *see § 473.29*] in adjudicative proceedings apply to quasi-public entities as to state agencies under *Gov. Code § 11018* [*Gov. Code § 11410.60(c)(3)*].

The requirements of *Gov. Code § 11410.60(c)* are to be strictly interpreted to carry out legislative intent to apply Chapter 4.5 only to decisions by quasi-public entities that are expressly created by statute to administer a state function [*Gov. Code § 11410.60(d)*]. The requirements of this statute do not apply to a decision made on authority of an approved plan of operation of quasi-public entities regulated or supervised by the Insurance Commissioner [*Gov. Code § 11410.60(e)*].

The Law Revision Commission comments explain the scope of this *Gov. Code § 11410.60* further: it applies Chapter 4.5 to adjudicative decisions of quasi-public entities for which an evidentiary hearing by the quasi-public entity is statutorily or constitutionally required. A typical decision of this type might involve resolution of a membership assessment protest or a hearing on a claim that has been denied (provided the statute or constitution requires a hearing for a decision of that type [*see Gov. Code Section 11405.50* ("decision" is action of specific application that determines

legal right or other legal interest of particular person)]. Chapter 4.5 does not apply to legislative actions such as an election or negotiation and adoption of a health and welfare benefits plan, pension trust, or collective bargaining agreement by an industry or labor organization [27 Cal. L. Rev. Comm. Reports 593-594 (1997)].

Gov. Code § 11410.60 does not apply to an entity unless that entity was expressly created by statute for the purpose of administering a state function. Thus Chapter 4.5 governs hearings required to be held by a statutory entity such as the Winegrowers of California Commission [*Food & Agric. Code § 74061*] or the Escrow Agents Fidelity Corporation [*Fin. Code § 17311*]. But the statute does not govern hearings of a private entity such as a licensed health care provider [*Health and Safety Code § 1200 et. seq.*], a labor organization, or a board of trustees established pursuant to statute under an interindemnity, reciprocal, or interinsurance contract between members of a cooperative corporation [*Ins. Code § 1280.7*]. *Gov. Code § 11410.60* does not apply to the State Bar, including proceedings of the State Bar court [27 Cal. L. Rev. Comm. Reports 593-594 (1997); *see Bus. & Prof. Code § 6001*].

The intent of *Gov. Code § 11410.60* is to provide fair hearing rules where a statute or the constitution requires a hearing. It is not intended to create any new hearing requirements. Thus, for example, this section does not apply to a decision of the Travel Consumer Restitution Corporation where the statute requires that the claim be decided on the written record, "with no hearing to be held" [27 Cal. L. Rev. Comm. Reports 593-594 (1997); *see Bus. & Prof. Code § 17550.47*].

Although *Gov. Code § 11410.60(b)* makes Chapter 4.5 inapplicable to a quasi-public entity decision if the decision is otherwise reviewable in a proceeding governed by this chapter, the quasi-public entity may voluntarily adopt the procedural protections provided in this chapter [27 Cal. L. Rev. Comm. Reports, pp. 593-594 (1997); *see Gov. Code § 11410.40* (election to apply administrative adjudication provisions)].

[2] Applicability of Chapter 5

[a] Applicability Determined by Statutes Relating to Specific Agency

The provisions of Chapter 5, Administrative Adjudication: Formal Hearings (*Gov. Code § 11500 et seq.*), apply to any agency as determined by the statutes relating to that agency [*Gov. Code § 11501(a)*; *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2002) 99 Cal. App. 4th 880, 883-885, 121 Cal. Rptr. 2d 729* (*Bus. & Prof. Code § 24210* authorized director to appoint ALJ, who was employee of Department, to hear and decide case, and that statute was controlling under *Gov Code §§ 11501(a), 11415.10,* and *11415.20* not APA requirement contained in *Gov. Code § 11502* that ALJ's from Office of Administrative Hearings be used)]. The provisions of Chapter 5 also apply to adjudicative proceedings of an agency created on or after July 1, 1997, unless the statutes relating to the proceeding provide otherwise [*Gov. Code § 11501(b)*].

The provisions of Chapter 4.5, Administrative Adjudication: General Provisions (*Gov. Code § 11400 et seq.*), apply to an adjudicative proceeding required to be conducted under Chapter 5, unless the statutes relating to the proceeding provide otherwise [*Gov. Code § 11501(c)*; *see* also *Gov. Code § 11410.50*, and discussion in [1][f], *above*].

Gov. Code § 11501 was amended to make Chapter 5 the default procedure, absent a contrary statute, for agencies created after July 1, 1997, the operative date of the 1995 amendments to the APA adjudication provisions. Chapter 5 is supplemented by the general provisions on administrative adjudication found in Chapter 4.5, which apply to proceedings under Chapter 5. Thus, if an agency is required by statute to conduct a hearing under Chapter 5, the agency may, unless a statute provides otherwise, elect to use alternative dispute resolution or the informal hearing procedure or other appropriate provisions of Chapter 4.5. Also, the general provisions of Chapter 4.5 restricting ex parte communications, regulating precedent decisions, and other provisions, apply to a hearing under Chapter 5 [25 Cal. L. Rev. Comm. Reports 55 (1995); *see also Gov. Code § 11502* (use of administrative law judges under Chapter 4.5)].

A listing of specific agencies to which Chapter 5 applies, found in former *Gov. Code § 11501(b)*, was deleted by the

1995 amendments as obsolete. The application of Chapter 5 to the hearings of an agency is determined by the statutes relating to that agency [25 Cal. L. Rev. Comm. Reports 55 (1995)].

Ch. 473A, *Commencing Agency Adjudication*, through Ch. 473G, *Agency Adjudication Decisions*, discuss the applicable law governing administrative adjudication for state agencies subject to Chapter 5 requirements, including discussion of the Chapter 4.5 requirements that also apply in formal hearings that are the focus of Chapter 5.

[b] Most Licensing Agencies Are Subject to Chapter 5

Most state licensing agencies were subject to Chapter 5 requirements under the former adjudication provisions of the APA. These continue to be subject to the amended requirements of the new Chapter 5, and are now, in addition, subject to the newly added procedural requirements of Chapter 4.5.

The enabling act for each of these licensing agencies, which delineates the powers and duties for that agency, will state, in one form or another, that agency is required to follow the provisions of Chapter 5 of the California APA (*Gov. Code § 11500*) when it is conducting licensing hearings. For example, see the following list of licensing agencies (extensive but not exhaustive); the citation following each listed agency provides the statute which makes the agency subject to the provisions of Chapter 5 (and therefore also subject to Chapter 4.5 pursuant to *Gov. Code §§ 11400(b), 11410.50*, and *11501(c)*):

- Medical Board of California [*Bus. & Prof. Code § 2230*].

- Board of Psychology (part of the Division of Allied Health Professions of the Medical Board of California) [*Bus. & Prof. Code § 2965*].

- Physical Therapy Examining Committee of California (part of the Division of Allied Health Professions of the Medical Board of California) [*Bus. & Prof. Code § 2660*].

- Speech-Language Pathology and Audiology Examining Committee (part of the Division of Allied Health Professions of the Medical Board of California) [*Bus. & Prof. Code § 2533.2*].

- Physician Assistant Examining Committee (part of the Division of Allied Health Professions of the Medical Board of California) [*Bus. & Prof. Code § 3528*].

- California Board of Podiatric Medicine (part of the Division of Allied Health Professions of the Medical Board of California) [*Bus. & Prof. Code § 2230*].

- Board of Registered Nursing (within the Department of Consumer Affairs) [*Bus. & Prof. Code § 2750*].

- Board of Dental Examiners (within the Department of Consumer Affairs) [*Bus. & Prof. Code §§ 1670, 1747*].

- California State Board of Pharmacy (within the Department of Consumer Affairs) [*Bus. & Prof. Code § 4350(c)*].

- Board of Vocational Nurse and Psychiatric Technician Examiners (within the Department of Consumer Affairs) [*Bus. & Prof. Code §§ 2875* (LVN's), 4520 (LPT's)].

- Veterinary Medical Board (within the Department of Consumer Affairs) [*Bus. & Prof. Code § 4875*].

- Osteopathic Medical Board of California (within the Department of Consumer Affairs) [*Bus. & Prof. Code § 2230*].

- Board of Chiropractic Examiners (within the Department of Consumer Affairs) [*16 Cal.Code Reg. § 305*].

- State Board of Accountancy (within the Department of Consumer Affairs) [*Bus. & Prof. Code § 485*].

- Board of Architectural Examiners (within the Department of Consumer Affairs) [*Bus. & Prof. Code § 5561.5*].

- State Board of Registration for Geologists and Geophysicists (within the Department of Consumer Affairs) [*Bus. & Prof. Code §§ 485, 7861*].

- State Board of Registration for Professional Engineers and Land Surveyors (within the Department of Consumer Affairs) [*Bus. & Prof. Code §§ 495, 6776* (engineers), 8781 (land surveyors)].

- Contractors State License Board (within the Department of Consumer Affairs) [*Bus. & Prof. Code §§ 495, 7091*].

- Structural Pest Control Board (within the Department of Consumer Affairs) [*Bus. & Prof. Code §§ 8568, 8620*].

- Commission on Teacher Credentialing (part of State Board of Education) [*Educ. Code §§ 44244, 44246*].

- Bureau of Security and Investigative Services (within the Department of Consumer Affairs) [Bus. & Prof. Code §§ *6980.30, 7510, 7591.19*].

- Bureau of Electronic and Appliance Repair (within the Department of Consumer Affairs) [*Bus. & Prof. Code § 9848*].

- Bureau of Automotive Repair (within the Department of Consumer Affairs) [*Bus. & Prof. Code §§ 9884.14, 9889.1*; *Health & Safety Code §§ 44053(a), 44057*].

- Department of Alcoholic Beverage Control (within Business, Transportation, and Housing Agency) [*Bus. & Prof. Code §§ 24016, 24300(a)*].

- Department of Real Estate (within Business, Transportation, and Housing Agency) [*Bus. & Prof. Code §§ 10100, 10152*].

- Office of Real Estate Appraisers (within Business, Transportation, and Housing Agency) [*Bus. & Prof. Code § 485*].

- Department of Motor Vehicles (within Business, Transportation, and Housing Agency) [*Veh. Code §§ 11509(c), 11512(b), 11605(b), 11613(c), 11705(c), 11705.4(b), 11708(b), 11808, 11903(a), 14112*].

- New Motor Vehicle Board (within Department of Motor Vehicles) [*Veh. Code §§ 3066(a), 3067*].

- California Horse Racing Board [*Bus. & Prof. Code § 19461*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationAlternative Dispute ResolutionAdministrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawInformal Agency ActionsConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsState & Territorial GovernmentsLicenses

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§ 473.16 The General Adjudication Procedures of Chapter 4.5

[1] General Provisions for Application of Adjudication Procedures

[a] Adjudication Provisions Supplement Other Controlling Law

The governing procedure by which an agency conducts an adjudicative proceeding is determined by the statutes and regulations applicable to that proceeding [*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2002) 99 Cal. App. 4th 880, 883-885, 121 Cal. Rptr. 2d 729* (*Bus. & Prof. Code § 24210* authorized director to appoint ALJ, who was employee of Department, to hear and decide case, and that statute was controlling under *Gov Code §§ 11501(a), 11415.10,* and *11415.20* not APA requirement contained in *Gov. Code § 11502* that ALJ's from Office of Administrative Hearings be used)]. If no other governing procedure is provided by statute or regulation, an agency may conduct an adjudicative proceeding under the administrative adjudication provisions of the APA [*Gov. Code § 11415.10(a)*]. The first sentence of *Gov. Code § 11415.10(a)* is taken from *Gov. Code § 11501(a)* (formal hearing procedure applies to agency as determined by statutes relating to agency), while the second sentence enables an agency to use the procedures provided in both Chapter 4.5 and Chapter 5, without further action, in any case where there is no other applicable governing procedure [25 Cal. L. Rev. Comm. Reports 55 (1995); *see Gov. Code § 11400(a)* (adjudication provisions of the APA consists of Chapters 4.5, *Gov. Code § 11400 et seq.*, and *5, Gov. Code § 11500 et seq.*)].

Chapter 4.5 (*Gov. Code § 11400 et seq.*) supplements the governing procedure by which an agency conducts an adjudicative proceeding [*Gov. Code § 11415.10(b)*]. This provision makes clear that the provisions of Chapter 4.5 supplement whatever procedure may otherwise govern a specific agency adjudication, whether they may be the formal hearing procedures of Chapter 5 or some other governing procedural law [25 Cal. L. Rev. Comm. Reports 55 (1995)].

Some of the provisions of Chapter 4.5 are optional, for example, the informal hearing procedures of *Gov. Code § 11445.10 et seq.*, the emergency decision procedures of *Gov. Code § 11460.10 et seq.*, and the declaratory decision procedures of *Gov. Code § 11465.10 et seq.* (*see* Ch. 473H, *Alternative Administrative Adjudication Procedures* , for detailed discussion of these procedures). The agency determines whether to use any of the optional provisions. The optional provisions do not replace any other agency procedures that serve the same purpose. For example, the informal

hearing procedure provided in this chapter does not replace an agency's own informal hearing procedure, but offers a supplemental alternative. Likewise, the emergency decision procedure does not replace an agency's own procedures for interim suspension or other immediate action, but provides an alternative means of proceeding that an agency may use [25 Cal. L. Rev. Comm. Reports 55 (1995)].

Other provisions of Chapter 4.5 are mandatory (*see, e.g., Gov. Code § 11425.10*, the administrative adjudication "*bill of rights*," discussed in *§ 473.20*). The mandatory provisions govern any adjudicative proceeding to which Chapter 4.5 is applicable. Moreover, pursuant to Gov. Code § 11415.10(b), they also apply to supplement any other applicable governing procedure by which an agency conducts an adjudicative proceeding, except to the extent the mandatory provisions are inconsistent with the statutes setting out that governing procedure. In other words, Chapter 4.5 provisions are not intended to override a conflicting or inconsistent statute or inconsistent federal law that governs a particular matter [25 Cal. L. Rev. Comm. Reports 55 (1995); *see Gov. Code § 11415.20* (state or a federal statute or regulation applicable to a particular agency or proceeding prevails over a conflicting or inconsistent provision of Chapter 4.5); *see also* discussion in [b], *below* (Governor may suspend operation of a provision of Chapter 4.5 if loss or delay of federal funds would result from its application)].

[b] Governor's Limited Power to Suspend Adjudication Procedure

To the extent necessary to avoid a loss or delay of funds or services from the federal government that would otherwise be available to the state, The Governor may do any of the following by executive order [*Gov. Code § 11415.30(a)*]:

- Suspend, in whole or in part, any administrative adjudication provision of the Administrative Procedure Act [*Gov. Code § 11415.30(a)(1)*].

- Adopt a rule of procedure that will avoid the loss or delay [*Gov. Code § 11415.30(a)(2)*].

The governor must rescind an executive order issued under this statute as soon as it is no longer necessary to prevent the loss or delay of funds or services from the federal government [*Gov. Code § 11415.30(b)*]. If an administrative adjudication provision is suspended or rule of procedure is adopted under this statute, the Governor is required promptly to report the suspension or adoption to the legislature. The report shall include recommendations concerning any legislation that may be necessary to conform the provision to federal law [*Gov. Code § 11415.30(c)*].

Gov. Code § 11415.30 is taken from 1981 Model State APA § 1-104 [*see also Gov. Code § 8571* (power of Governor to suspend statute in emergency)], but is extended to include a delay in receipt, as well as a loss, of federal funds, and actions that may be taken include provision of an alternate procedure as well as suspension of an existing procedure. The administrative adjudication provisions referred to in *Gov. Code § 11415.30* are the provisions of Chapter 4.5 (*Gov. Code § 11400 et seq.*) and Chapter 5 (*Gov. Code § 11500 et seq.*) [25 Cal. L. Rev. Comm. Reports 55 (1995); *see Gov. Code § 11400(a)* (providing that Chapters 4.5 and 5 are the administrative adjudication provisions of APA)].

Gov. Code § 11415.30 permits specific functions of agencies to be exempted from applicable administrative adjudication provisions of the APA only to the extent necessary to prevent the loss or delay of federal funds or services. The test to be met is simply whether, as a matter of fact, there will actually be a loss or delay of federal funds or services if there is no suspension or adoption of an alternate procedure. The suspension or adoption is effective only so long as and to the extent necessary to avoid the contemplated loss or delay [25 Cal. L. Rev. Comm. Reports 55 (1995)]. The governor cannot issue an executive order merely on the receipt of a federal agency certification that a suspension or adoption of an alternate procedure is necessary. The suspension or adoption must be actually necessary. That is, the Governor must first decide that the federal agency is correct in its assertion that federal funds may lawfully be delayed or withheld from the state agency if that agency complies with certain administrative adjudication provisions of the APA, and that the federal agency intends to exercise its authority to withhold or delay those funds if certain administrative adjudication provisions of the Administrative Procedure Act are followed. However, if these two

requirements are met, the Governor may suspend the provision or adopt an alternate procedure [25 Cal. L. Rev. Comm. Reports 55 (1995)].

[c] Voluntary Waiver of Rights Conferred by Adjudication Provisions

Except to the extent provided by another statute or regulation, a person may waive a right conferred on that person by the administrative adjudication provisions of the APA [*Gov. Code § 11415.40*; *see Gov. Code § 11400(a)* (referring to Chapters 4.5, *Gov. Code § 11400 et seq.*, and *5*, *Gov. Code § 11500*, as the administrative adjudication provisions of APA)].

Gov. Code § 11415.40 is taken from 1981 Model State APA § 1-105. It embodies the standard notion of waiver, which requires an intentional relinquishment of a known right. This statute applies to all affected persons, whether or not parties. A right under the administrative adjudication provisions of the Administrative Procedure Act is subject to waiver in the same way that a right under any other civil statute is normally subject to waiver. Although a right may be waived by inaction, a written waiver is ordinarily preferable. A waiver by inaction may be the procedural result of a failure to act [25 Cal. L. Rev. Comm. Reports 55 (1995); *see, e.g., Gov. Code § 11506* (failure to file notice of defense is waiver of right to hearing)].

The administrative adjudication provisions referred to by *Gov. Code § 11415.40* are those in Chapter 4.5 (*Gov. Code § 11400 et seq.*) and Chapter 5 (*Gov. Code § 11500 et seq.*) [25 Cal. L. Rev. Comm. Reports 55 (1995); *see Gov. Code § 11400(a)* (Chapters 4.5 and 5 are the administrative adjudication provisions of APA)].

[d] Procedure Used When Adjudicative Proceeding not Required

An agency may provide any appropriate procedure for a decision for which an adjudicative proceeding is not required [*Gov. Code § 11415.50(a)*]. This provision is subject, of course, to other statutory law that may provide a procedure for decision in a specific agency action [25 Cal. L. Rev. Comm. Reports 55 (1995); *see Gov. Code § 11415.20* (conflicting or inconsistent statute controls over general provisions of Chapter 4.5)].

An adjudicative proceeding is not required for informal fact finding or an informal investigatory hearing, or a decision to initiate or not initiate an investigation, prosecution or other proceeding before the agency, another agency, or a court, whether in response to an application for an agency decision or otherwise [*Gov. Code § 11415.50(b)*]. This provision is taken in part from 1981 Model State APA § 4-101(a), and lists situations in which an agency may issue a decision without first conducting an adjudicative proceeding. For example, a law enforcement officer may, without first conducting an adjudicative proceeding, issue a "ticket" that will lead to a proceeding before an agency or court. Likewise, an agency may commence an adjudicative proceeding without first conducting a proceeding to decide whether to issue the pleading. Nothing in *Gov. Code § 11415.50(b)* implies that Chapter 4.5 applies in a proceeding in which a hearing is not statutorily or constitutionally required [25 Cal. L. Rev. Comm. Reports 55 (1995); *see* Gov. Code. Code § 11410.10 (Chapter 4.5 applies to constitutionally and statutorily required hearings)].

[e] Agency Decision by Mutual Settlement

An agency may formulate and issue a decision by settlement, pursuant to an agreement of the parties, without conducting an adjudicative proceeding [*Gov. Code § 11415.60(a)*].

Subject to *Gov. Code § 11415.60(c)* (discussed *below*), the settlement may be on any terms the parties determine to be appropriate [*Gov. Code § 11415.60(a)*]. Notwithstanding any other provisions of law, no evidence of an offer of compromise or settlement made in settlement negotiations is admissible in an adjudicative proceeding or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose, and no evidence of conduct or statements made in settlement negotiations is admissible to prove liability for any loss or damage, except to the extent

provided in *Evid. Code § 1152*. Nothing in this subdivision makes inadmissible any public document created by a public agency [*Gov. Code § 11415.60(a)*].

Gov. Code § 11415.60(a) codifies the ruling in *Rich Vision Centers, Inc. v. Board of Medical Examiners (1983) 144 Cal. App. 3d 110, 192 Cal. Rptr. 455* . It is analogous to *Gov. Code § 11420.30* (confidentiality of communications in alternative dispute resolution). The parties are, of course, free to make a stipulation concerning confidentiality of offers of compromise or settlement that goes beyond or otherwise varies the protection of this statute [25 Cal. L. Rev. Comm. Reports 55 (1995); *but see Gov. Code § 11415.20* (any conflicting or inconsistent statute controls)].

A settlement may be made before or after issuance of an agency pleading, except that in an adjudicative proceeding to determine whether an occupational license should be revoked, suspended, limited, or conditioned, a settlement may not be made before issuance of the agency pleading. A settlement may be made before, during, or after the hearing [*Gov. Code § 11415.60(b)*].

A settlement is subject to any necessary agency approval. An agency head may delegate the power to approve a settlement. The terms of a settlement may not be contrary to statute or regulation, except that the settlement may include sanctions the agency would otherwise lack power to impose [*Gov. Code § 11415.60(c)*]. *Gov. Code § 11415.60(c)* recognizes that some other statutes provide for agency approval of a settlement. For example, see the following [25 Cal. L. Rev. Comm. Reports 55 (1995)]:

- Authority of State Personnel Board to approve settlements [*Gov. Code § 18681*].
- Approval in labor standards enforcement [*Lab. Code § 98.2(d)*].
- Approval of worker's compensation settlement [*Lab. Code § 5001*].
- Approval by Governor of settlement by State Lands Commission [*Pub. Res. Code § 6107*].
- Approval of tax settlements [*Rev. & Tax. Code §§ 7093.5, 9271, 19442, 30459.1, 32471, 40211, 41171, 43522, 45867, 50156.11, 55332*].

[2] General Procedural Provisions of Chapter 4.5

[a] Authority of Agency Head Following Decision

The agency head may do any of the following with respect to the decision of the presiding officer or the agency [*Gov. Code § 11440.10(a)*]:

- Determine to review some but not all issues, or not to exercise any review [*Gov. Code § 11440.10(a)(1)*].
- Delegate its review authority to one or more persons [*Gov. Code § 11440.10(a)(2)*].
- Authorize review by one or more persons, subject to further review by the agency head [*Gov. Code § 11440.10(a)(3)*].

By regulation an agency may mandate review, or may preclude or limit review of a decision of the presiding officer or the agency [*Gov. Code § 11440.10(b)*].

Gov. Code § 11440.10 is taken from *Gov. Code § 11500(a)* (power to act may be delegated by agency) and 1981

Model State APA § 4-216(a)(1)-(2). It is subject to a contrary statute that may, for example, require the agency head itself to hear and decide a specific issue [25 Cal. L. Rev. Comm. Reports 55 (1995); *see, e.g., Greer v. Board of Education (1975) 47 Cal. App. 3d 98, 111, 121 Cal. Rptr. 542* (school board, rather than hearing officer, formerly required to determine issues under Educ. Code § 13443); *see Gov. Code §§ 11415.20* (conflicting or inconsistent statute controls), 11500(a) (power to act may not be delegated where action required by "agency itself" under formal hearing procedure)].

[b] General Provision for Service and Notice

Service of a writing on, or giving of a notice to, a person in a procedure provided in Chapter 4.5 (*Gov. Code § 11400 et seq.*) is subject to the following provisions [*Gov. Code § 11440.20*]:

- The writing or notice shall be delivered personally or sent by mail or other means to the person at the person's last known address or, if the person is a party with an attorney or other authorized representative of record in the proceeding, to the party's attorney or other authorized representative. If a party is required by statute or regulation to maintain an address with the agency, the party's last known address is the address maintained with the agency [*Gov. Code § 11440.20(a)*].

- Unless a provision specifies the form of mail, service or notice by mail may be by first class mail, registered mail, or certified mail, by mail delivery service, by facsimile transmission if complete and without error, or by other electronic means as provided by regulation, in the discretion of the sender [*Gov. Code § 11440.20(b)*].

The application of *Gov. Code § 11440.20* is limited to the procedures in Chapter 4.5. It does not, for example, apply to formal hearing procedures under Chapter 5 (*Gov. Code § 11500 et seq.*), which include their own notice and service provisions [25 Cal. L. Rev. Comm. Reports 55 (1995); *see Gov. Code § 11505*].

Gov. Code § 11440.20(b) authorizes delivery by a commercial delivery service as well as by the United States Postal Service. Proof of service may be made by any appropriate method, including proof in the manner provided for civil actions or proceedings [25 Cal. L. Rev. Comm. Reports 55 (1995); *see Code Civ. Proc. § 1013(a)*; *Cal. Rules of Ct., Rule 2.306(h)* (proof of service by facsimile transmission); for general discussion and forms relating to proof of service, *see* Ch. 518, *Service of Summons and Papers*].

[c] Conduct of Hearing by Electronic Means

The presiding officer is permitted to conduct all or part of a hearing by telephone, television, or other electronic means if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits [*Gov. Code § 11440.30(a)*]. The presiding officer may not conduct all or part of a hearing by telephone, television, or other electronic means if a party objects [*Gov. Code § 11440.30(b)*].

Gov. Code § 11440.30(a) is taken from 1981 Model State APA § 4-211(4), allowing the presiding officer to conduct all or part of the hearing by telephone, televisions, or other electronic means, such as a telephone conference call. The opportunity to observe exhibits includes a reasonable opportunity to examine and object to exhibits before or at the hearing. While *Gov. Code § 11440.30(a)* permits the conduct of proceedings by telephone, television, or other electronic means, the presiding officer may of course conduct the proceeding in the physical presence of all participants [25 Cal. L. Rev. Comm. Reports 55 (1995)].

[d] Sexual Conduct Evidence in Sexual Harassment, Sexual Assault, or Sexual Battery Proceedings

In employment discrimination and harassment cases [*see Gov. Code § 12940(h), (i)*], civil service discipline cases [*see*

Gov. Code § 19572], and civil service discrimination cases [*see Gov. Code § 19702*], alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is subject to the following limitations:

- Evidence is not discoverable, unless it is to be offered at a hearing to attack the credibility of the complainant [*Gov. Code § 11440.40(a)(1)* (only the scope of discovery is limited, not the methods of discovery)].

- Evidence is not admissible at the hearing, unless offered to attack the credibility of the complainant [*Gov. Code § 11440.40(a)(2)*].

- Reputation or opinion evidence regarding the sexual behavior of the complainant is not admissible for any purpose. At the hearing, this evidence is presumed inadmissible absent an offer of proof that establishes both of the following [*Gov. Code § 11440.40(b)*]:

  - The relevance and reliability of the offered evidence; and

  - The probative value of the evidence offered is not substantially outweighed by the probability that its admission will create substantial danger of undue prejudice or confuse the issue.

"Complainant" is defined to mean a person claiming to have been subjected to conduct that constitutes sexual harassment, sexual assault, or sexual battery [*Gov. Code § 11440.40(c)*].

Gov. Code § 11440.40 applies not only to agency hearings under Chapter 5 (formal hearing provisions; *Gov. Code § 11500 et seq.*), but also to agency hearings subject to Chapter 4.5 (general and alternative hearing provisions; *Gov. Code § 11400 et seq.*) [25 Cal. L. Rev. Comm. Reports 55 (1995)]. These include state agency (*Gov. Code § 11410.20*) hearings when under the federal or state constitution, or a federal or state statute, an evidentiary hearing for determination of facts is required to formulate and issue a decision [25 Cal. L. Rev. Comm. Reports 55 (1995); *Gov. Code § 11410.10*; *see Evid. Code §§ 783, 1106* (similar privileges that apply to court proceedings)].

[e] Intervention Procedures

[i] Intervention Allowed When Permitted by Regulation

Gov. Code § 11440.50 provides for intervention in adjudicative proceedings. This intervention provision applies to the adjudicative proceedings of a state agency only if that agency provides by regulation that *Gov. Code § 11440.50* applies to that agency's proceedings [*Gov. Code § 11440.50(a)*].

Gov. Code § 11440.50(a) makes clear that it does not apply to a proceeding unless an agency has acted to make it applicable. This statute provides an optional means by which an agency can provide for intervention. This statute does not provide an exclusive intervention procedure, and an agency may adopt other intervention rules or may preclude intervention entirely, subject to due process limitations [25 Cal. L. Rev. Comm. Reports 55 (1995)].

[ii] Motion for Intervention

When the intervention procedures have been made applicable, intervention decisions are made by the presiding officer (*see Gov. Code § 11405.80*, defining presiding officer) in the proceeding [*Gov. Code § 11440.50(b)-(e)*].

The prospective intervenor must make a motion for intervention to the presiding officer. The motion must be granted by

the presiding officer if four conditions are satisfied [*Gov. Code § 11440.50(b)(1)-(4)*]:

- The motion must be submitted in writing, and copies must be served on all parties identified in the agency's pleading [*Gov. Code § 11440.50(b)(1)*].

- The motion should be made as early as practicable in advance of the hearing, and, if there is a prehearing conference [*see Gov. Code § 11511.5*], then the motion should be made in advance of the prehearing conference and should be resolved at the prehearing conference [*Gov. Code § 11440.50(b)(2)*].

- The motion must establish that the proposed intervenor qualifies as an intervenor either under a statute or regulation, or by stating facts that demonstrate that the proposed intervenor's legal rights, duties, privileges, or immunities will be substantially affected by the proceedings [*Gov. Code § 11440.50(b)(3)*].

- The presiding officer must determine that allowing the intervention will not impair the interests of justice as well as the orderly and prompt conduct of the proceeding [*Gov. Code § 11440.50(b)(4)*].

Gov. Code § 11440.50(b)(1) is taken from 1981 Model State APA § 4-209(a). It provides that the presiding officer must grant the motion to intervene if a party satisfies the standards of the section. *Gov. Code § 11440.50(b)(3)* confers standing on an applicant to intervene on demonstrating that the applicant's "legal rights, duties, privileges, or immunities will be substantially affected by the proceeding" [*see Horn v. County of Ventura (1979) 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134* (right to notice and hearing if agency action will constitute substantial deprivation of property rights)]. However, *Gov. Code § 11440.50(b)(4)* imposes the further limitation that the presiding officer may grant the motion for intervention only on determining that "the interests of justice and the orderly and prompt conduct of the proceeding will not be impaired by allowing the intervention." The presiding officer is thus required to weigh the impact that the proceeding will have on the legal rights of the applicant for intervention, as opposed to against the interests of justice and the need for orderly and prompt proceedings [25 Cal. L. Rev. Comm. Reports 55 (1995)].

[iii] Conditional Intervention

When a proposed intervenor qualifies for intervention, conditions on the intervenor's participation in the proceedings can be imposed by the presiding officer, either when the intervention motion is granted, or at a later time [*Gov. Code § 11440.50(c)*]. *Gov. Code § 11440.50(c)* is taken from 1981 Model State APA § 4-209(c); it authorizes the presiding officer to impose conditions on the intervenor's participation in the proceeding and is intended to permit the presiding officer to facilitate reasonable intervenor involvement without subjecting the proceeding to unreasonably burdensome or repetitious presentations [Cal. L. Rev. Comm. Comments, 25 Cal. L. Rev. Comm. 55 (1995)]. Conditions may include the following [*Gov. Code § 11440.50(c)(1)-(4)*]:

- Limiting the intervenor's participation to designated issues in which the intervenor has a particular interest demonstrated by the motion [*Gov. Code § 11440.50(c)(1)*].

- Limiting or excluding the use of discovery, cross-examination, and other procedures involving the intervenor so as to promote the orderly and prompt conduct of the proceeding [*Gov. Code § 11440.50(c)(2)*].

- Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceeding [*Gov. Code § 11440.50(c)(3)*].

- Limiting or excluding the intervenor's participation in settlement negotiations [*Gov. Code §*

11440.50(c)(4)].

[iv] Order Granting or Denying Motion

The procedures for intervention orders require the presiding officer to issue an order either granting or denying the intervention motion, specifying any conditions in the order, and briefly stating the reasons for the order as early as practicable in advance of the hearing. The intervention order can be modified at any time by the presiding officer, who must state reasons for the modification. The presiding officer must give prompt notice of all intervention orders, whether granting, denying, or modifying intervention, to all parties to the proceeding, and to the proposed intervenor [*Gov. Code § 11440.50(d)*]. *Gov. Code § 11440.50(d)* is taken from 1981 Model State APA § 4-209(d). By requiring advance notice of the presiding officer's order granting, denying, or modifying intervention, this provision is intended to give the parties and the applicant's for intervention an opportunity to prepare for the adjudicative proceeding [25 Cal. L. Rev. Comm. Reports 55 (1995)].

[v] Order Not Reviewable

The presiding officer's determination as to intervention motions is not subject to administrative or judicial review. It is to be made in light of the two standards for determining intervention motions: whether the interests of justice and the prompt and orderly conduct of the proceedings will be impaired by allowing intervention. The determination is made in the sole discretion, and based on the knowledge and judgment at that time, of the presiding officer [*Gov. Code § 11440.50(e)*].

[vi] Adoption of Alternatives to Intervention

Agencies are not prohibited by *Gov. Code § 11440.50* from adopting regulations that permit participation by a person short of intervention as a party, subject to the requirements of *Gov. Code § 11430.10 et seq.* (governing ex parte communications) [*Gov. Code § 11440.50(f)*]. *Gov. Code § 11440.50(f)* recognizes that there are ways whereby an interested person can have an impact on an ongoing adjudication without assuming the substantial litigation costs of becoming a party and without unnecessarily complicating the proceeding through the addition of more parties. Agency regulations may provide, for example, for filing amicus briefs, testifying as a witness, or contributing to the fees of a party [25 Cal. L. Rev. Comm. Reports 55 (1995)].

[f] Written Communications

Any person submitting a written communication, which is specifically generated for the purpose of being presented at the agency hearing to which it is being communicated, to a state agency in a quasi-judicial proceeding that is directly paid for by anyone other then the person who submitted the written communication shall clearly indicate any person who paid to produce the written communication [*Gov. Code § 11440.60(b)*]. A state agency may refuse or ignore a written communication submitted by an attorney or any other authorized representative on behalf of a client in a quasi-judicial proceeding, unless the written communication clearly indicates the client on whose behalf the communication is submitted to the state agency [*Gov. Code § 11440.60(c)*].

Controlling definitions for this disclosure requirement are as follows:

- "Written communication" is defined to mean any report, study, survey, analysis, letter, or any other document [*Gov. Code § 11440.60(a)(2)*].

- "Quasi-judicial" proceeding is defined to include a proceeding to determine the rights or duties of a person under existing laws, regulations, or policies; a proceeding involving the issuance, amendment, or revocation of a permit or license; a proceeding to enforce compliance with existing law or to impose sanctions for violations of existing law; a proceeding at which action is taken involving the purchase or

sale or property, goods, or services by an agency; or a proceeding at which an action is taken awarding a grant or a contract [*Gov. Code § 11440.60(a)(1)*].

[3] Other Provisions in Chapter 4.5

For discussion of other general agency adjudication procedures provided for in Chapter 4.5 (*Gov. Code § 11400 et seq.*), see the following:

- The administrative adjudication "*bill of rights*" [*see § 473.20* et seq.].

- Procedures that may be used instead of the formal hearing procedures of Chapter 5 (*Gov. Code § 11500 et seq.*), i.e., alternative dispute resolution (*Gov. Code § 11420.10 et seq.*), informal hearing and decision (Gov. Code § 1145.10 et seq.), emergency decision (*Gov. Code § 11460.10 et seq.*), declaratory decision (*Gov. Code § 11465.10 et seq.*), and conversion of proceeding from one type to another (*Gov. Code § 11470.10 et seq.*) [*see* Ch. 473H, *Alternative Adminstrative Adjudication Procedures*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewAdministrative LawAgency AdjudicationHearingsRight to HearingWaiverAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawAgency AdjudicationReview of Initial DecisionsAdministrative LawInformal Agency Actions

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[Reserved]

§§ 473.17[Reserved]

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41A-473 California Forms of Pleading and Practice--Annotated § 473.20

§ 473.20 Summary of Administrative Adjudication "Bill of Rights"

The administrative adjudication "*bill of rights*," *Gov. Code §§ 11425.10-11425.60*, and specifically *Gov. Code § 11425.10*, specifies the minimum due process and public interest requirements that must be satisfied in a hearing that is subject to Chapter 4.5 (*see* discussion in *§ 473.15[1]*) [25 Cal. L. Rev. Comm. Reports 55 (1995)].

These requirements are [*Gov. Code § 11425.10(a)(1)-(9)*]:

- The agency shall give the person to which the agency action is directed notice and an opportunity to be heard [*Gov. Code § 11425.10(a)(1)*; *see § 473.21*].

- The agency shall make available to the person to which the agency action is directed a copy of the governing procedure, including a statement whether Chapter 5 (*Gov. Code § 11500 et seq.*) is applicable to the proceeding [*Gov. Code § 11425.10(a)(2)*; *see § 473.22*].

- The hearing shall be open to public observation as provided in *Gov. Code § 11425.20* [*Gov. Code § 11425.10(a)(3)*; *see § 473.23*].

- The adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions within the agency as provided in *Gov. Code § 11425.30* [*Gov. Code § 11425.10(a)(4)*; *see § 473.24*].

- The presiding officer is subject to disqualification for bias, prejudice, or interest as provided in *Gov. Code § 11425.40* [*Gov. Code § 11425.10(a)(5)*; *see § 473.25*].

- The decision shall be in writing, be based on the record, and include a statement of the factual and legal basis of the decision as provided in *Gov. Code § 11425.50* [*Gov. Code § 11425.10(a)(6)*; *see § 473.26*].

- A decision may not be relied on as precedent unless the agency designates and indexes the decision as precedent as provided in *Gov. Code § 11425.60* [*Gov. Code § 11425.10(a)(7)*; *see § 473.27*].

- Ex parte communications shall be restricted as provided in *Gov. Code § 11430.10* [*Gov. Code § 11425.10(a)(8)*; *see § 473.28*].

- Language Assistance shall be made available as provided in *Gov. Code § 11435.05* by an agency described in *Gov. Code § 11018* or *11435.15* [*Gov. Code § 11425.10(a)(9)*; *see § 473.29*].

The requirements of *Gov. Code § 11425.10(a)* apply to the governing procedure by which an agency conducts an adjudicative proceeding without further action by the agency, and they prevail over a conflicting or inconsistent provision of the governing procedure, subject to *Gov. Code § 11415.20* [*Gov. Code § 11425.10(b)*]. The governing procedure by which an agency conducts an adjudicative proceeding may, however, include provisions equivalent to, or more protective of the rights of the person to which the agency action is directed than, the requirements of this section [*Gov. Code § 11425.10(b)*].

Under *Gov. Code § 11425.10 (b)*, the requirements of *Gov. Code § 11425.10(a)* are self executing, they are part of the governing procedure by which an agency conducts an adjudicative proceeding whether or not regulations address the matter. The section does not, however, override conflicting or inconsistent state statutes, or federal statutes or regulations [25 Cal. L. Rev. Comm. Reports 55 (1996); *see Gov. Code § 11415.20* (conflicting or inconsistent statute controls)].

If the governing procedure includes regulations that are at variance with the requirements of this section, it is desirable, but not necessary, that the agency revise the regulations. The requirements of this section apply regardless of the regulations. Conforming regulations may be adopted by a simplified procedure under the rulemaking provisions of the Administrative Procedure Act pursuant to *1 Cal. Code Reg. § 100*. Nothing in this section precludes the agency from adopting additional or more extensive requirements than those prescribed by this section [25 Cal. L. Rev. Comm. Reports 55 (1996)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsStare DecisisAdministrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawAgency AdjudicationImpartialityGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of Protection

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41A-473 California Forms of Pleading and Practice--Annotated § 473.21

§ 473.21 Notice and Opportunity to Be Heard

The agency is required to give the person to which the agency action is directed notice and an opportunity to be heard [*Gov. Code § 11425.10(a)(1)*; *Southern California Underground Contractors, Inc v. City of San Diego (2003) 108 Cal. App. 4th 533, 547, 133 Cal. Rptr. 2d 527* (provisions of Section 11425.10 apply to state agencies not local entities)]. This is a fundamental requirement of procedural due process of law [*Goldberg v. Kelly (1970) 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287]* . Since this right is fundamental to fair procedure, it is applicable to all state agency hearings that are subject to Chapter 4.5 (*Gov. Code § 11400 et seq.*) and Chapter 5 (*Gov. Code § 11500 et seq.*).

The operator of a nude entertainment establishment was not denied any due process of law rights by the decision of the City of San Diego to suspend the operator's required police permit because the operator violated provisions of city regulations that applied to his business. The California Court of Appeal rejected the operator's due process challenge based on untimely notice of the charged violations. Notice regarding most of the violations was given within two weeks of the date of the violation. Delay in the giving notice of the violations did not cause any actual prejudice to the operator, and there was no showing of lost witnesses or other evidence. The operator had the burden of proof of showing actual prejudice from delay, and there was no such proof. Finally, the suspension was based on numerous violations over an extended period of time, and the operator had more than sufficient notice of those violations [*Krontz v. City of San Diego (2006) 136 Cal. App. 4th 1126, 1140-1141, 39 Cal. Rptr. 3d 535]* .

The specific details of notice requirements vary. *Gov. Code § 11440.20* governs notice requirements in adjudicative proceedings that are subject to Chapter 4.5, but not Chapter 5 proceedings [*see § 473.16[2][b]*, for discussion of specific procedural requirements for service and notice under *Gov. Code § 11440.20*]. *Gov. Code §§ 11505, 11506, 11509* govern notice requirements in adjudicative proceedings that are subject to Chapter 5 [*see § 473A.11[6], [10]*, for discussion of specific procedural requirements in adjudicative proceedings that are subject to Chapter 5].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingDue ProcessConstitutional LawBill of

RightsFundamental RightsProcedural Due ProcessScope of Protection

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§ 473.22 Right to a Copy of Governing Procedure

The agency is required to make available to the person to which the agency action is directed a copy of the governing procedure, including a statement whether Chapter 5 (*Gov. Code § 11500 et seq.*) is applicable to the proceeding [*Gov. Code § 11425.10(a)(2)*].

Gov. Code § 11425.10(a)(2) requires only that the agency "make available" a copy of the applicable hearing procedure. This requirement is subject to a rule of reasonableness in the circumstances and does not necessarily require the agency routinely to provide a copy to a person each time agency action is directed to the person. The requirements may be satisfied, for example, by the agency's offer to provide a copy on request [25 Cal. L. Rev. Comm. Reports 55 (1995)].

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§ 473.23 Public Hearing

An additional procedural right is that the hearing shall be open to public observation as provided in *Gov. Code § 11425.20* [*Gov. Code §§ 11425.10(a)(3)*; 11425.20(a)]. However, the presiding officer has express authority to order closure of a hearing or make other protective orders to the extent necessary or proper [*Gov. Code § 11425.20(a)*] for any of the following purposes:

- To satisfy the United States Constitution, the California Constitution, federal or state statute, or other law, including but not limited to laws protecting privileged, confidential, or other protected information [*Gov. Code § 11425.20(a)(1)*]. This exception includes statutory protection of trade secrets and other confidential information or privileged information under such statutes as, for example, Evid. Code §§ 1060-1063, Fin. Code §§ 1939, 16120, and 18496 [25 Cal. L. Rev. Comm. Reports 55 (1995)].

- To ensure a fair hearing in the circumstances of the particular case [*Gov. Code § 11425.20(a)(2)*].

- To conduct the hearing, including the manner of examining witnesses, in a way that is appropriate to protect a minor witness or a witness with a developmental disability, as defined in *Welf. & Inst. Code § 4512*, from intimidation or other harm, taking into account the rights of all persons [*Gov. Code § 11425.20(a)(3)*]. This exception codifies part of the decision of *Seering v. Department of Social Services (1987) 194 Cal. App. 3d 298, 239 Cal. Rptr. 422* . The rights of persons taken into account includes the rights of the parties to observe the proceedings in an appropriate manner [25 Cal. L. Rev. Comm. Reports 55 (1995)].

Under the new act, when a hearing is conducted by telephone, television, or other electronic means [*see Gov. Code § 11512(d)* (with consent of all parties, hearing proceedings may be reported electronically), discussed in *§ 473.16[2][c]*], the public hearing procedural requirements are satisfied if members of the public have an opportunity to do both of the following [*Gov. Code § 11425.20(b)*]:

- At reasonable times, hear or inspect the agency's record, and inspect any transcript obtained by the

agency [*Gov. Code § 11425.20(b)(1)*].

- To be physically present at the place where the presiding officer is conducting the hearing [*Gov. Code § 11425.20(b)(2)*].

The right of the public to be present where a hearing is being conducted telephonically does not include the right to participate, and the right of the public to inspect the record does not impose a duty on the agency to provide a copy independent of the California Public Records Act (*Gov. Code § 6250 et seq.*, discussed in Ch. 470C, *Public Records Act*) [25 Cal. L. Rev. Comm. Reports 55 (1995)].

Presiding officers have authority to conduct all or part of a hearing by telephone, television, or other electronic means (such as a conference telephone call) if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits [*Gov. Code § 11440.30(a)*]. The presiding officer also has the authority to conduct the hearing in the physical presence of all participants [25 Cal. L. Rev. Comm. Reports 55 (1995)]. If any party objects, the presiding officer may not conduct all or part of a hearing by telephone, television, or other electronic means [*Gov. Code § 11440.30(b)*].

Gov. Code § 11440.30 supplements the Bagley-Keene Open Meeting Act, *Gov. Code § 11120 et seq.* (discussed in Ch. 470B, *Open Meeting Law*). Closure of a hearing should be done only to the extent necessary under this section, taking into account the substantial public interest in open proceedings. It should be noted that under the open meeting law deliberations on a decision to be reached based on evidence introduced in an adjudicative proceeding may be made in closed session [25 Cal. L. Rev. Comm. Reports 55 (1995); *see Gov. Code § 11126(d)*]. Under the open meeting law, a settlement proposal may be considered by the agency in closed session if it sustains its substantial burden of showing the prejudice to be suffered from conducting an open meeting [25 Cal. L. Rev. Comm. Reports 55 (1995); *see Gov. Code § 11126(d), (q)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawAgency AdjudicationPresiding OfficersDuties & PowersAdministrative LawGovernmental InformationPublic MeetingsSunshine LegislationConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionEvidencePrivilegesTrade SecretsGeneral Overview

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§ 473.24 Separation of Function Between Prosecutors and Adjudicators

The adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions within the agency as provided in *Gov. Code § 11425.30* [*Gov. Code § 11425.10(a)(4)*].

Gov. Code § 11425.30, in turn, requires internal separation of functions within an agency, which means that the same individual within an agency can not perform inconsistent functions in the same case before the agency [*Gov. Code § 11425.30*]. This section provides that a presiding officer [*see Gov. Code § 11405.80* (defining presiding officer)] is disqualified from presiding in an adjudicative proceeding [*see Gov. Code § 11405.20* (defining adjudicative proceeding)] in the following two situations:

- The person has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage [*Gov. Code § 11425.30(a)(1)*].

- The person is subject to the authority, direction, or discretion of a person who has served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage [*Gov. Code § 11425.30(a)(2)*].

Serving means that the person has personally carried out the function and not merely supervised or been organizationally connected with a person who has personally carried out the function. Substantial involvement in a case is required, not merely marginal or trivial participation. What is disqualifying is meaningful participation that is likely to affect an individual with a commitment to a particular result in a case [25 Cal. L. Rev. Comm. Reports 55 (1995)].

However, a presiding officer is not disqualified in the following two circumstances:

- A person may serve as presiding officer in successive stages of an adjudicative proceeding [*Gov. Code § 11425.30(b)(1)*].

- A person who has participated only as a decisionmaker or as an advisor to a decisionmaker in a

> determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding or its preadjudicative stage may serve as presiding officer in the proceeding [*Gov. Code § 11425.30(b)(2)*].

The first exception allows a decisionmaker to act in a similar capacity at both the probable cause and final hearing stages. However, the person can not be the decisionmaker at the hearing stage if the person acted in a prosecutorial, investigative, or advocacy role at the probable cause stage [25 Cal. L. Rev. Comm. Reports 55 (1995)]. Finally, these separation of functions requirements apply also to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated [*Gov. Code § 11425.30(c)*].

Separation of functions is also required as a matter of due process of law when local agency adjudicators decide whether to renew business licenses. A city attorney who acted as an advocate for the city urging nonrenewal of a business license at the application stage could not, consistent with due process of law, act as an advisor to the city manager who decided the business's administrative appeal from the denial of the application and acted as an adjudicative decision maker. This violated the due process of law right to an impartial decision maker [*Nightlife Partners LTD. v. City of Beverly Hills (2003) 108 Cal. App. 4th 81, 97-98, 133 Cal. Rptr. 2d 234]* . Similarly, a city attorney who acted as an advocate for the city in a lawsuit brought by a terminated city employee could not also, consistent with due process of law court, act as a decision maker, in the employee's administrative appeal of their termination, which was officially decided by the city manager but in which the city attorney prepared the recommended decision which the city attorney followed [*Walker v. City of Berkeley (9th Cir. 1991) 951 F. 2d 182, 185]* . A terminated police officer challenged the fairness of the administrative hearing before the personnel board of the city on due process of law grounds because the same lawyer who represented the city (Santa Ana) as an advocate in the administrative hearing also had acted as an advisor to the personnel board (the adjudicative decision maker) in other cases, although the lawyer did not act in such a dual capacity in this particular case. The court of appeal held that this was sufficient to show the probability of actual bias, based on the influence that the attorney would have with the board because of the advisory role the attorney played, such that the board would be more likely to believe the attorney for the police department than to believe the plaintiff. The board should not have allowed its legal advisor to act as an advocate before that same board because this creates a substantial risk that the board's judgment will be influenced in favor of the litigant represented by their legal advisor. The employee's right to an impartial decision maker is violated. The court of appeal reversed the judgment terminating the police officer, and remanded the proceeding back to the local agency for a new hearing [*Quintero v. City of Santa Ana (2003) 114 Cal. App. 4th 810, 816-818, 7 Cal. Rptr. 3d 896]* . None of the local agencies in these cases was subject to the California APA, which is limited to state agencies.

The due process of law right to cross examine witnesses is not violated in a rent review board hearing proceeding where the issues in the proceeding and the hearing record was based primarily on documentary evidence and reports from experts on both sides in the litigation for which there was no need to test credibility since the issues in the case did not turn on live witness testimony [*Stardust Mobile Estates v. City of San Buenaventura (2007) 147 Cal. App. 4th 1170, 1189-1190, 55 Cal. Rptr. 3d 218]* . The Court of Appeal also rejected procedural due process challenges based on the lack of discovery and based on conflicting advocacy and advisory roles by outside counsel for the rent board. The court concluded that discovery in mandate proceedings was limited because judicial review under *Code Civ. Proc. § 1094.5* (administrative mandamus) was based on the hearing record before the agency. The Court of Appeal rejected the conflicting roles defense of unconstitutional bias even though the lawyer in question had advised the rent board. The court distinguished the *Nightlife* case [*Nightlife Partners. v. City of Beverly Hills (2003) 108 Cal. App. 4th 81, 133 Cal. Rptr. 2d 234]* factually because the reviewing body in the *Nightlife* case was the city (which the lawyer did advise) and here the reviewing body was the superior court (whom the lawyer did not advise). The defense was rejected because the agency outside counsel did not advise the superior court at the same time as his law firm was acting as an advocate defending the city in the mandamus proceeding before the court [*Stardust Mobile Estates v. City of San Buenaventura (2007) 147 Cal. App. 4th 1170, 1189-1190, 55 Cal. Rptr. 3d 218]* .

Another California Court of Appeal rejected a due process of law challenge in a *Skelly* [*Skelly v. State Personnel*

Board (1975) 15 Cal. 3d 194, 539 P.2d 774] hearing context based upon the practice that the same public employee that investigated and then initiated the employee discipline proceeding also acted as the *Skelly* [*Skelly v. State Personnel Board (1975) 15 Cal. 3d 194, 539 P.2d 774]* hearing officer. That same employee also made the recommendation that the employee be discharged. There was no due process of law violation because the agency hearing procedure after the *Skelly* [*Skelly v. State Personnel Board (1975) 15 Cal. 3d 194, 539 P.2d 774]* hearing included the following elements: another supervisor imposed the penalty, there was a full evidentiary hearing before a neutral hearing examiner, and there was review of the hearing examiners decision by the civil service commission board [*Flippin v. Los Angeles City Board of Civil Service Commissioners (2007) 148 Cal. App. 4th 272, 282-283, 55 Cal. Rptr. 3d 458]* .

This provision, dealing with the extent to which a person may serve as presiding officer at different stages of the same proceeding, should be distinguished from *Gov. Code § 11430.10*, which prohibits certain ex parte communications. The policy issues regarding ex parte communications between two persons differ from the policy issues in this provision regarding the participation by one individual in two stages of the same proceeding. There may be other grounds for disqualification, however, in the event of improper ex parte communications [25 Cal. L. Rev. Comm. Reports 55 (1995); *see Gov. Code § 11430.60* (disqualification of presiding officer), 11425.40 (disqualification of presiding officer for bias, prejudice, or interest); *see* discussion in *§ 473.25*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationImpartialityGeneral OverviewAdministrative LawAgency AdjudicationImpartialityParticipation in ProsecutionAdministrative LawAgency AdjudicationPresiding OfficersGeneral OverviewGovernmentsLocal GovernmentsAdministrative Boards

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§ 473.25 Disqualification of Presiding Officer for Bias, Interest, or Prejudice

The presiding officer is subject to disqualification for bias, prejudice, or interest as provided in *Gov. Code § 11425.40* [*Gov. Code § 11425.10(a)(5)*].

The APA "impartial decision maker" standard of *Gov. Code § 11425.40* states that the presiding officer (*see Gov. Code § 11405.80*, defining presiding officer) is subject to disqualification for bias, prejudice, or interest in the proceeding [*Gov. Code § 11425.40(a)*]. Other than that general language, no specific disqualification standards are stated.

However, the following grounds are specified as not sufficient for disqualification [*Gov. Code § 11425.40(b)*]:

- The presiding officer is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group [*Gov. Code § 11425.40(b)(1)*].

- The presiding officer has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding [*Gov. Code § 11425.40(b)(2)*].

- The presiding officer has, as a lawyer or public official, participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding [*Gov. Code § 11425.40(b)(3)*].

These three non-disqualification grounds are taken from similar language in *Code Civ. Proc. § 170.2*. The law revision comments note, as to the second ground, that expressions on views may lead to disqualification under *Gov. Code § 11425.30* (neutrality of presiding officer) [25 Cal. L. Rev. Comm. Reports 55 (1995)]. These provisions governing disqualification also apply to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated [*Gov. Code § 11425.40(c)*].

Gov. Code § 11425.40 applies in all administrative adjudications subject to Chapter 4.5, including a hearing under

Chapter 5 (formal hearing). It supersedes a provision formerly found in *Gov. Code § 11512(c)*. It applies whether the presiding officer serves alone or with others [25 Cal. L. Rev. Comm. Reports 55 (1995)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationImpartialityGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersGeneral Overview

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§ 473.26 Written Decision Stating Factual and Legal Basis

An administrative adjudication decision must be in writing, be based on the record, and include a statement of the factual and legal basis of the decision as provided in *Gov. Code § 11425.50* [*Gov. Code §§ 11425.10(a)(6), 11425.50(a)*].

The statement of the factual basis for the decision may be in the language of, or by reference to, the pleadings. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the decision. If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it [*Gov. Code § 11425.50(b)*]. A trial court is required to give great weight to credibility determinations of state agency hearing officers under *Gov. Code § 11425.50(b)*, even when it conducts an independent review under *Code Civ. Proc. § 1094.5* [*Fukuda v. City of Angels Camp (1999) 20 Cal. 4th 805, 819, 85 Cal. Rptr. 2d 696, 977 P.2d 693* ; *Mason v. Office of Administrative Hearings (2001) 89 Cal. App. 4th 1119, 1138-1139, 108 Cal. Rptr. 2d 102* (court of appeal reversed trial court decision which had reversed decision of ALJ which had detailed fact findings. The court of appeal's reversal, relying heavily on *Fukuda*, was based on the failure of petitioner to meet the burden of proof of showing that the administrative findings were contrary to the weight of the evidence in a developmental disabilities case in which there was detailed expert testimony of physicians and psychologists)]. ALJ credibility determinations that are unrelated to witness demeanor, manner or attitude are not entitled to special weight in reviewing the administrative record for substantial evidence, and *Gov. Code § 11425.50* is not applicable in these circumstances. ALJ credibility determinations are unrelated when the ALJ does not identify observed demeanor, manner, or attitude of the witness [*California Youth Authority v. State Personnel Board (2002) 104 Cal. App. 4th 575, 579-580, 128 Cal. Rptr. 2d 514]* .

The California Court of Appeal reversed the Board's (ABC Board) decision which had reversed a license suspension decision of the department (Dept. ABC) based on fact finding by the ALJ that the licensee did not reasonably rely on a fake ID to sell alcoholic beverages to an underage buyer, a violation of the alcohol control laws. The Court of Appeals

reversal was based on deference to the ALJ's findings of fact which were based on the ALJ's observations of physical evidence (the fake ID) at the hearing. Both the Court of Appeals, and the Board were required to give deference to the ALJ's fact finding [*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2004) 118 Cal. App. 4th 1429, 1445-1446, 13 Cal. Rptr. 3d 826]* .

The statement of the factual basis for the decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding. The presiding officer's experience, technical competence, and specialized knowledge may be used in evaluating evidence [*Gov. Code § 11425.50(c)*; *Vinson v. Snyder (1999) 75 Cal. App. 4th 182, 186-188, 89 Cal. Rptr. 2d 44* (presiding officer may use his or her experience, technical competence, and specialized knowledge to evaluate evidence without establishing the officer's basis for expertise in the record)].

The information that may be contained in the decision, including a summary of the evidence relied on, is not limited by the requirements of *Gov. Code § 11425.50* [*Gov. Code § 11425.50(d)*].

Finally, a penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule subject to the rulemaking provisions of Chapter 3.5, Administrative Regulations and Rulemaking (*Gov. Code § 11340 et seq.*), unless it has been adopted as a regulation pursuant to those provisions [*Gov. Code § 11425.50(e)*; *see* Ch. 473G, *Agency Adjudication Decisions* , for discussion of the agency decision process in formal hearings under Chapter 5].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsContentsAdministrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewAdministrative LawJudicial ReviewAdministrative RecordGeneral OverviewAdministrative LawJudicial ReviewStandards of ReviewGeneral Overview

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§ 473.27 Agency Decision Must Be Designated to Be Precedent Authority

An agency adjudicative decision may not be relied on as precedent unless the agency designates and indexes that decision as precedent as provided in *Gov. Code § 11425.60* [*Gov. Code §§ 11425.10(a)(7), 11425.60(a)*]. In other words, an agency decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency [*Gov. Code § 11425.60(a)*]. The effect of *Gov. Code § 11425.60(a)* is to limit the authority of an agency to rely on any previous decision unless that decisions has been publicly announced as one having precedential authority [25 Cal. L. Rev. Comm. Reports 55 (1997)].

An agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5 (*Gov. Code § 11340 et seq.*), the rulemaking procedures of the APA [*Gov. Code § 11425.60(b)*; *see* Ch. 472, *Public Agency Rules* , et seq., for discussion and forms relating to APA rule making procedures].

Gov. Code § 11425.60(b) provision provides recognition for the need that agencies have to be able to make law and policy through adjudication as well as through rulemaking. It codifies the practice of a number of agencies to designate important decisions as precedential. These agencies include the Fair Employment and Housing Commission [*Gov. Code § 12935(h)*], the State Personnel Board [*Gov. Code § 19582.5*], and the Unemployment Insurance Appeals Board [*Unemp. Ins. Code § 409*]. *Gov. Code § 11425.60* is intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision. An agency may not by precedent decision revise or amend an existing regulation or adopt a rule that has no adequate legislative basis [25 Cal. L. Rev. Comm. Reports 55 (1995)].

The precedent designation system authorized by this statute is an exception from the requirements of *Gov. Code § 11340.5* (prohibiting "underground regulations" [25 Cal. L. Rev. Comm. Reports 55 (1995) (*see* 1993 OAL Det. No. 1 (ruling by Office of Administrative Law that agency designation of decision as precedential violated former Gov. Code. Code § 11347.5 (*now see Gov. Code § 11340.5*) unless made pursuant to rulemaking procedures))]. Nonetheless, agencies are encouraged to express precedent decisions in the form of regulations, to the extent practicable [25 Cal. L.

Rev. Comm. Reports 55 (1995)].

An agency's designation of a decision, or part of a decision, or failure to designate a decision or part of a decision, as a precedent decision is not subject to judicial review [*Gov. Code § 11425.60(b)*].

An agency is required to maintain an index of significant legal and policy determinations made in precedent decisions. The index must be updated at least annually, unless no precedent decision has been designated since the last preceding update. The index shall be made available to the public by subscription, and its availability shall be publicized annually in the California Regulatory Notice Register [*Gov. Code § 11425.60(c)*]. The index is a public record, available for public inspection and copying [25 Cal. L. Rev. Comm. Reports 55 (1995)].

The statutory requirements for designating and indexing precedent decisions applies to decisions issued on or after July 1, 1997. Agencies are not precluded by this law from designating and indexing as a precedent decision a decision issued before July 1, 1997 [*Gov. Code § 11425.60(d)*]. Making the precedent decision requirements prospective only is designed to minimize the potential burden on agencies [25 Cal. L. Rev. Comm. Report 55 (1995)].

Gov. Code § 11425.60 limits the authority of an agency to rely on previous decisions unless the decisions have been publicly announced as precedential [25 Cal. L. Rev. Comm. Reports 55 (1995)].

The Third District California Court of Appeal held that Section 98 [*Labor Code § 98*] hearings conducted by the Labor commissioner are not subject to the provisions of Chapter 4.5 of the California Administrative Procedures Act because those hearings are discretionary and not required by Section 98. Chapter 4.5 applies to agency decisions in which a hearing is required by statute or constitutional provision, and it does not apply when a hearing is not required by statute [*Gov. Code § 11410.10*; *Corrales v. Bradstreet (2007) 153 Cal. App. 4th 33, 54-56, 62 Cal. Rptr. 3d 440]* . The court of appeal also held that an evidentiary hearing is not required by the constitution (due process of law) because an employer ha the right to obtain a trial de novo in the superior court following an adverse decision from a Section 98 hearing. The trial de novo satisfies the requirements of due process of law, so that a Section 98 hearing is not required to protect the employer's due process right to protect their property interest in money [*Corrales v. Bradstreet (2007) 153 Cal. App. 4th 33, 59-61, 62 Cal. Rptr. 3d 440]* . The court of appeal also rejected arguments for the application of Chapter 4.5 based on *Gov. Code § 11410.20* (listing agencies subject to Chapter 4.5), and *Gov. Code § 11410.40* (agencies may adopt provisions of Chapter 4.5 by regulation or ordinance). The listing of agencies subject to Chapter 4.5 did not resolve the issue of what agency decisions were subject to Chapter 4.5, and that issue is controlled by the hearings required by law provision of the APA [*Gov. Code § 11410.10*]. The DLSE did not properly adopt the APA when it issued a memorandum to that effect [*Corrales v. Bradstreet (2007) 153 Cal. App. 4th 33, 56-58, 62 Cal. Rptr. 3d 440]* . Therefore, the Labor commissioner could not utilize the provisions of *Gov. Code § 11425.60* (precedent decision) to designate the *Hartwig* decision as a precedent decision. This is because the *Hartwig* proceeding was a Section 98 proceeding to which Chapter 4.5 did not apply, including *Gov. Code § 11425.60*. Thus, it was invalid to designate *Hartwig* as a precedent decision [*Corrales v. Bradstreet (2007) 153 Cal. App. 4th 33, 65, 68, 62 Cal. Rptr. 3d 440]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 473.28 Prohibition on Ex Parte Communications

[1] General Prohibition

Ex parte communications must be restricted as provided *Gov. Code § 11430.10* [*Gov. Code § 11425.10(a)(8)*]. The general prohibition of *Gov. Code § 11430.10* is that, while a proceeding is pending, there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication [*Gov. Code § 11430.10(a)*].

The Department of Alcoholic Beverage Control violated the ex parte contact provisions of the California Administrative Procedures Act [*Gov. Code § 11430.10*] by following the practice of having the department prosecutor prepare a hearing report after the hearing and issuance of a proposed decision by the Administrative Law Judge and then submitting that report to the chief counsel of the Department before a final decision was reached by the director of the Department in that case [*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal. 4th 1, 4-6, 50 Cal. Rptr. 3d 585, 145 P.3d 462]* . The prosecutor's hearing report contained summaries of the issues and evidence presented at the hearing by the prosecutor as well as a recommended resolution of the case with supporting reasons. The report was submitted by the department prosecutor (who had represented the department at an evidentiary hearing before an ALJ) on an ex parte basis to the Chief Counsel of the Department, the prosecutor's supervisor, and the decision making advisor to the Director of the department. The report was not made part of the record in the case, and the report was not served on counsel for the affected licensee. In each of the adjudicatory hearing matters in which this practice was challenged, the ALJ issued a proposed decision dismissing the accusation against an alcoholic beverage licensee (e.g., for selling alcoholic beverages to underage customers), and the Director of the Department rejected that proposed decision, and substituted a department decision suspending the licenses of the licensees for a period of time (15 to 25 days) [*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal. 4th 1, 6-8, 50 Cal. Rptr. 3d 585, 145 P.3d 462]* . The ban on ex parte contacts is designed to ensure a limited internal separation of functions between prosecutorial and decision-making employees who work for a single agency that combines both prosecution and adjudication in the same agency [*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal. 4th 1, 9-11, 50 Cal. Rptr. 3d 585, 145*

P.3d 462] . The California Supreme Court held that the ban on ex parte contacts applies to communications with both presiding officers and agency heads, and includes both the hearing stage and the decision stage of the adjudication [*Gov. Code § 11430.10(a)*]. The California Supreme Court ordered the reversal of the Department decisions ordering the suspension of alcoholic beverage licenses in these cases [*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal. 4th 1, 16-18, 50 Cal. Rptr. 3d 585, 145 P.3d 462]* .

The California Court of Appeal held that the Department of Alcoholic Beverage Control violated provisions of the California Administrative Procedures Act [*Gov. Code § 11430.10*] because the Department prosecutor sent an ex parte communication (prosecutor's hearing report) to the department decision maker prior to the time the decision maker decided whether or not to adopt the proposed decision of the administrative law judge [*Chevron Stations Inc. v. Alcoholic Beverage Control Appeals Board (2007) 149 Cal. App. 4th 116, 127, 57 Cal. Rptr. 3d 6]* . The Court of Appeal in Chevron Stations relied upon the decision of the California Supreme Court in the Quintenar case [*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal. 4th 1, 4-6, 50 Cal. Rptr. 3d 585, 145 P. 3d 462* (Department rejected ALJ proposed decision)]. The Court of Appeal held that the ex parte communication violated the California Administrative Procedures Act [*Gov. Code § 11430.10*] even though the Department adopted the proposed decision of the administrative law judge [*Chevron Stations Inc. v. Alcoholic Beverage Control Appeals Board (2007) 149 Cal. App. 4th 116, 127, 57 Cal. Rptr. 3d 6]* . The Court of Appeal also held that the licensee established a prima facie case of a violation of the ex parte communications prohibition in *Gov. Code §§ 11430.10 to 11430.70*. Once that showing was made, the Department had the burden of proof to justify the department's practices under the APA, and the department failed to meet that burden of proof before the Board. The court of appeal rejected the department's efforts to make this showing for the first time on appeal [*Chevron Stations Inc. v. Alcoholic Beverage Control Appeals Board (2007) 149 Cal. App. 4th 116, 131-133, 57 Cal. Rptr. 3d 6]* .

The California Sixth District Court of Appeal held that the Department of Alcoholic Beverage Control violated provisions of the California Administrative Procedures Act [*Gov. Code § 11430.10*] because the Department allowed its decision makers to have access to prosecuting attorneys reports of hearings prior to the time the decision maker decided whether or not to adopt the proposed decision of the administrative law judge. These hearing reports were not part of the administrative record in the case, and allowing the decision maker access to the reports resulted in extra-record information being considered by the decision maker, in violation of the administrative law principle that the agency record provides the exclusive basis for the decision [*Rondon v. Alcoholic Beverage Control Appeals Board (2007) 151 Cal. App. 4th 1274, 1288-1290, 60 Cal. Rptr.3d 295]* . The Sixth District Court of Appeal in *Rondon* relied upon the decision of the California Supreme Court in the *Quintenar* case [*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal. 4th 1, 4-6, 50 Cal. Rptr. 3d 585, 145 P.3d 462]*

In *Rondon*, the Sixth District Court of Appeal held that the prosecutor's hearing report was an ex parte communication and that providing access to that report by the Department decision maker violated the California Administrative Procedures Act [*Gov. Code § 11430.10*] even though the Department adopted the proposed decision of the administrative law judge revoking Rondon's retail on sale beer and wine license [*Rondon v. Alcoholic Beverage Control Appeals Board (2007) 151 Cal. App. 4th 1274, 1288-1290, 60 Cal. Rptr.3d 295]* . The Sixth District Court of Appeal also held that the prosecutor's hearing report was extra-record information that violated the administrative law principal that the decision of the administrative agency has to be based on the evidence in the record for decision, not on information outside the record [*Rondon v. Alcoholic Beverage Control Appeals Board (2007) 151 Cal. App. 4th 1274, 1289-1290, 60 Cal. Rptr. 3d 295]* . The court of appeal relied upon on the California Supreme Court decisions in *LaPrade v. Department of Water & Power (1945) 27 Cal. 2d 47, 51-52, 162 P.2d 13* , and *English v. City of Long Beach (1950) 35 Cal. 2d 155, 158, 217 P.2d 22]* . The Sixth District Court of Appeal also decided that no showing of prejudice was required to justify reversal of the Department decision revoking Rondon's license to sell beer and wine [*Rondon v. Alcoholic Beverage Control Appeals Board (2007) 151 Cal. App. 4th 1274, 1290-1291, 60 Cal. Rptr. 3d 295]* . Finally the Sixth District Court of Appeal allowed the introduction of extra-record evidence at the appeal stage on the issue whether the prosecutor's hearing report was distributed or made available to the decision maker [*Rondon v. Alcoholic Beverage Control Appeals Board (2007) 151 Cal. App. 4th 1274, 1286-1287, 60 Cal. Rptr. 3d 295]* . Finally,

the Sixth District Court of Appeal required that Department show a lack of access, or screening of the decision maker, from access to the prosecutor's hearing report [*Rondon v. Alcoholic Beverage Control Appeals Board (2007) 151 Cal. App. 4th 1274, 1287-1288, 60 Cal. Rptr. 3d 295]* . The Sixth District Court of Appeal relied upon the decision in *Howitt v. Superior Court (1992) 3 Cal. App. 4th 1575, 1587, 5 Cal. Rptr. 2d 196* .

In a decision made prior to the adoption of *Gov Code § 11430.10*, the California Court of Appeal held that an improper ex parte communication was made to the ALJ by a lawyer for one party who stated that he feared for his and his co-counsel's safety, as the other party to the adjudication was acting irrationally in the proceeding [*Matthew Zaheri Corp. v. New Motor Vehicle Board (1997) 55 Cal. App. 4th 1305, 1312-1313, 64 Cal. Rptr. 2d 705]* . The court held that this was an improper ex parte communication, that it was improper not to disclose the communication, but the court upheld the decision reached following the hearing concluding that the merits of the decision were not adversely affected by the communication. The agency placed a state police officer in the hearing room to provide better security in the hearing [*Matthew Zaheri Corp. v. New Motor Vehicle Board (1997) 55 Cal. App. 4th 1305, 1312-1313, 64 Cal. Rptr. 2d 705]* .

[2] Definitions

Ex parte communications are improper in some circumstances, but not others [*see Gov. Code § 11430.10 et seq.*].

For purposes of the general prohibition (discussed in [1], *above*), a proceeding is pending from the issuance of an agency's pleading, or from an application for an agency decision, whichever is earlier [*Gov. Code § 11430.10(c)*].

The term "interested person outside the agency" is based on federal administrative law [25 Cal. L. Rev. Comm. Reports 55 (1995); *see 5 U.S.C. § 557(d)(1)(A)*; *PATCO v, Federal Labor Relations Authority (1982) 685 F.2d 547, 562, 222 U.S. App. D.C. 97* (interpreting the federal standard to include persons with interest beyond that of members of the general public)]. The pendency of a proceeding includes any period of time between the time an application for a hearing is made and the time the agency's pleading is issued [25 Cal. L. Rev. Comm. Reports 55 (1995)].

If, while the proceeding is pending, but before serving as presiding officer, a person receives a communication of a type that would violate the provisions of this law if received while the person was serving as a presiding officer, the person, promptly after starting to serve, shall disclose the content of the communication on the record and give all parties an opportunity to address it in the manner provided in *Gov. Code § 11430.50* [*Gov. Code § 11430.40(c)*; *see* [4], *below*].

[3] Permissible Ex Parte Communications

Ex parte communications that are proper under the act include several categories. The first category, generally permissible communications specifically authorized, include the following:

- Communications, including a communication from an employee or representative of an agency that is a party, made on the record at the hearing [*Gov. Code § 11430.10(b)*].

- Communications that are required for the disposition of an ex parte matter specifically authorized by statute [*Gov. Code § 11430.20(a)*].

- Communications that concern a matter of procedure or practice, including a request for a continuance, that is not in controversy [*Gov. Code § 11430.20(b)*]. This exception does not preclude communications made to a presiding officer or staff assistant regarding noncontroversial matters of procedure and practice, such as the format of pleadings, number of copies required, manner of service, and calendaring and status discussions. Such topics are not considered to be part of the merits of the proceeding provided they are noncontroversial in the context of the specific case [25 Cal. L. Rev. Comm.

Reports 55 (1995)].

The second category of permissible ex parte communications are those communications otherwise prohibited from an employee or representative of an agency that is a party to a presiding officer, in the following circumstances:

- The communication is for the purpose of assistance and advice to the presiding officer from a person who has not served as investigator, prosecutor or advocate in the proceeding or its preadjudicative stage. An assistant or advisor may evaluate the evidence in the record but shall not furnish, augment, diminish, or modify the evidence in the record [*Gov. Code § 11430.30(a)*].

- The communication is for the purpose of advising the presiding officer concerning a settlement proposal advocated by the advisor [*Gov. Code § 11430.30(b)*].

- The communication is for the purpose of advising the presiding officer concerning any of the following matters in an adjudicative proceeding that is non-prosecutorial in character [*Gov. Code § 11430.30(c)*], including:

  - The advice involves a technical issue in the proceeding and the advice is necessary for, and is not otherwise reasonably available to, the presiding officer, provided the content of the advice is disclosed on the record and all parties are given an opportunity to address it in the manner provided in *Gov. Code § 11430.50* [*Gov. Code § 11430.30(c)(1)*; *see* [c], *below*].

  - The advice involves an issue in a proceeding of the San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water Resources Control Board, or a regional water quality control board [*Gov. Code § 11430.30(c)(2)*].

The third and final category of permissible ex parte communications include the following:

- The presiding officer's authority to conduct in camera examination of evidence in a proceeding (*see Gov. Code § 11507.7(d), (e)*) is not limited by the prohibition on ex parte communications [*Gov. Code § 11430.10*; 25 Cal. L. Rev. Comm. Reports 55 (1995)].

- Presiding officers are not prohibited from communicating with adversaries. Only communications from adversaries to presiding officers are precluded. However, presiding officers should give assistance or advice with caution, since there may be an appearance of unfairness if assistance or advice is given to some parties but not others [*Gov. Code § 11430.10*; 25 Cal. L. Rev. Comm. Reports 55 (1995)].

- Presiding officers are not prohibited from consulting with other agency personnel when the agency conducting the hearing is not a party to the proceeding [*Gov. Code § 11430.10*; 25 Cal. L. Rev. Comm. Reports 55 (1995)].

[4] Consequences of Ex Parte Communication Violations

When an improper ex parte communication is made, there are three consequences, disclosure, notice and opportunity to respond, and if necessary, disqualification of the presiding officer. If a presiding officer receives an improper communication, the officer must place in the record of the proceeding [*Gov. Code § 11430.50(a)*] the following:

- If the communication is written, the writing and any written response of the presiding officer to the

communication [*Gov. Code § 11430.50(a)(1)*].

- If the communication is oral, a memorandum stating the substance of the communication, any response made by the presiding officer, and the identity of each person from whom the presiding officer received the communication [*Gov. Code § 11430.50(a)(2)*].

The presiding officer must also notify all parties that an ex parte communication has been made a part of the record [*Gov. Code § 11430.50(b)*]. If a party requests an opportunity to address the communication within 10 days after receipt of notice of the communication [*Gov. Code § 11430.50(c)*]:

- That party must be permitted to comment on the communication [*Gov. Code § 11430.50(c)(1)*]; and

- The presiding officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that has been concluded [*Gov. Code § 11430.50(c)(2)*].

If a presiding officer receives an improper ex parte communication, the presiding officer may be disqualified [*Gov. Code § 11430.60*]. Disqualification is permitted if it is necessary to eliminate the effect of the ex parte communication [25 Cal. L. Rev. Comm. Reports 55 (1995)]. If the presiding officer is disqualified, the portion of the record pertaining to the ex parte communication may be sealed by protective order of the disqualified presiding officer [*Gov. Code § 11430.60*].

The purpose of sealing is to remove the improper communication from the view of the successor presiding officer, while preserving it as a sealed part of the record, for purposes of subsequent administrative or judicial review. Granting a protective order is permissive, not mandatory, and is within the discretion of the presiding officer who has knowledge of the improper ex parte communication [25 Cal. L. Rev. Comm. Reports 55 (1995)].

[5] Application to Agency Head

Agency heads [*see Gov. Code § 11405.40* (defining agency head)] who are decision makers are subject to the same requirements as to ex parte communications with several qualifications. The same requirements that govern ex parte communications to presiding officers also govern ex parte communications in an adjudicative proceeding to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated [*Gov. Code § 11430.70(a)*].

There is an exception, however, that applies to individualized ratemaking proceedings. An ex parte communication to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated is permissible in an individualized ratemaking proceeding if the content of the communication is disclosed on the record and all parties are given an opportunity to address it in the manner provided in *Gov. Code § 11430.50* [*Gov. Code § 11430.70(b)*; *see* discussion in [4], *above*].

Furthermore, there is a prohibition on direct or indirect communication, while a proceeding is pending regarding the merits of any issue in the proceeding, between the presiding officer and the agency head or other person or body to which the power to hear or decide in the proceeding is delegated [*Gov. Code § 11430.80(a)*]. This rule does not apply when the agency head or other person to which the power to hear or decide in the proceeding is delegated serves as both presiding officer and agency head, or when the presiding officer does not issue a decision in the proceeding [*Gov. Code § 11430.80(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationImpartialityGeneral OverviewAdministrative LawAgency AdjudicationImpartialityEx Parte ContactsAdministrative LawAgency AdjudicationImpartialityParticipation in ProsecutionAdministrative LawAgency AdjudicationPresiding OfficersGeneral Overview

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§ 473.29 Language Assistance

[1] General Rule Requiring Language Assistance

Language assistance must be made available as provided in *Gov. Code § 11435.05* by an agency described in *Gov. Code § 11018* or *11435.15* [*Gov. Code § 11425.10(a)(9)*].

[2] When the Rule Applies

[a] Generally When Party or Witness Needs Assistance

Under the APA, administrative hearings and medical examinations conducted for the purpose of determining compensation or monetary awards, are conducted in the English language [*Gov. Code § 11435.20(a)*].

If a party or the party's witness does not proficiently speak or understand English and requests language assistance before the commencement of the hearing or medical examination, the agency must comply with language assistance requirements (*see Gov. Code § 11435.05 et seq.* (legal requirements)), and the party or witness will be provided with an interpreter by the agency [*Gov. Code § 11435.20(b)*].

[b] Agencies Required to Provide Language Assistance

Language assistance must be made available as required by *Gov. Code § 11435.05 et seq.* by state agencies described in *Gov. Code § 11018* (state agencies that conduct administrative hearings but are not subject to Chapter 5, Administrative Adjudication: Formal Hearings, Gov. Code §§ 11500 et seq.) and *Gov. Code § 11435.15* (listed state agencies) [*Gov. Code § 11425.10(a)(9)*].

The listed state agencies in *Gov. Code § 11435.15* include the following agencies [*Gov. Code § 11435.15(a)*]:

- Agricultural Labor Relations Board.

- Department of Alcohol and Drug Abuse.
- State Athletic Commission.
- California Unemployment Insurance Appeals Board.
- Board of Prison Terms.
- State Board of Barbering and Cosmetology.
- State Department of Developmental Services.
- Public Employment Relations Board.
- Franchise Tax Board.
- State Department of Health Services.
- Department of Housing and Community Development.
- Department of Industrial Relations.
- State Department of Mental Health.
- Department of Motor Vehicles.
- Notary Public Section, Office of Secretary of State.
- Public Utilities Commission.
- Office of Statewide Health Planning and Development.
- State Department of Social Services.
- Worker's Compensation Appeals Board.
- Department of the Youth Authority.
- Youthful Offender Parole Board.
- Department of Insurance.
- State Personnel Board.
- California Board of Podiatric Medicine.
- Board of Psychology.

The listed agencies must comply with language assistance requirements notwithstanding general provisions that Chapter 4.5, Administrative Adjudication: General Provisions (*Gov. Code § 11400 et seq.*), does not apply to some or all of an

agency's adjudicative proceeding [*Gov. Code § 11435.15(d)*]. The language assistance article's requirements are limited to adjudicative proceedings in which, under the federal or state constitution or a federal or state statute, an evidentiary hearing for determination of facts is required for formulation and issuance of a decision under the requirements of *Gov. Code § 11410.10* [25 Cal. L. Rev. Comm. Reports 55 (1995)].

Agencies that are not listed may chose to adopt language assistance procedures, provided that interpreter selection is consistent with the requirements of *Gov. Code § 11435.30* [*Gov. Code § 11435.15(b)*]. Agencies may also provide interpreters for non-adjudicative proceedings, such as informal fact finding and informal investigatory hearings [*Gov. Code § 11435.15(c)*].

[3] Language Assistance Requirements

Language assistance is defined to mean oral interpretation or written translation into English of a language other than English or of English into another language for a party or witness who cannot speak or understand English or who can do so only with difficulty [*Gov. Code § 11435.05*]. However, interpretation for deaf or hard of hearing parties or witnesses in adjudicative proceedings is governed by *Evidence Code § 754* [*Gov. Code § 11435.10*]. The primary language assistance requirement is that the agency will provide a party or witness with an interpreter when the party or witness is not proficient in the English language [*Gov. Code § 11435.20(b)*]. Agencies must advise parties of interpreter rights when the agency advises that same party of the hearing date or medical examination. Agencies should also encourage parties that are in need of an interpreter to give timely notice to the agency conducting the hearing or medical examination so that appropriate arrangements can be made [*Gov. Code § 11435.60*]. A Spanish speaking motorist whose driver's license was suspended for refusing to take a blood alcohol test challenged the suspension because DMV failed to notify him of the right to have an interpreter at the hearing at the same time that DMV notified the driver when the hearing was scheduled to occur. Failure to provide simultaneous notice of hearing date and interpreter rights violates *Gov. Code § 11435.60*, but this was harmless error because the driver was notified of interpreter rights when he was provided the notice of suspension of his license by the arresting officer, and driver failed to show any prejudice to him from the lack of an interpreter at the DMV hearing [*Leal v. Gourley (2002) 100 Cal. App. 4th 963, 968-970, 123 Cal. Rptr. 2d 220]* . DMV is only required by statute [*Gov. Code § 11435.60*] to provide the notice of the right to an interpreter in English, not other languages [*Leal v. Gourley (2002) 100 Cal. App. 4th 963, 970-971, 123 Cal. Rptr. 2d 220]* . Interpreters must normally be certified [*Gov. Code § 11435.55*], must not have had any involvement in the issues of the case prior to the hearing [*Gov. Code § 11435.65(b)*], and are subject to confidentiality rules of the agency, if any, that apply to the adjudicative proceeding [*Gov. Code § 11435.65(a)*].

[4] Interpreter Requirements

Hearing interpreters must be certified under *Gov. Code § 11435.30* [*Gov. Code § 11435.55(a)*]. However, if a certified interpreter can not be present at the hearing, the hearing agency has discretionary authority to provisionally qualify and use another interpreter [*Gov. Code § 11435.55(a)*]. Medical examination interpreters must be certified under *Gov. Code § 11435.35* [*Gov. Code § 11435.55(b)*]. However, if a certified interpreter can not be present at the medical examination, the physician provisionally may use another interpreter if that fact is noted in the record of the medical evaluation [*Gov. Code § 11435.55(b)*]. The State Personnel Board is required to designate the languages for which certification of administrative hearing interpreters [*Gov. Code § 11435.30*] and medical examination interpreters [*Gov. Code § 11435.35*] shall be established [*Gov. Code § 11435.40(a)*].

The languages designated shall include, but not be limited to, Spanish, Tagalog, Arabic, Cantonese, Japanese, Korean, Portuguese, and Vietnamese until the State Personnel Board finds that there is an insufficient need for interpreting assistance in these languages [*Gov. Code § 11435.40(a)*].

Language designations are to be based on four criteria [*Gov. Code § 11435.40(b)*]:

- The language needs of non-English speaking persons appearing before the administrative agencies, as determined by consultation with the agencies [*Gov. Code § 11435.40(b)(1)*].

- The cost of developing a language examination [*Gov. Code § 11435.40(b)(2)*].

- The availability of experts needed to develop a language examination [*Gov. Code § 11435.40(b)(3)*].

- Other information the State Personnel Board deems relevant [*Gov. Code § 11435.40(b)(4)*].

The State Personnel Board can charge fees for application to take interpreter examinations, and for annual renewal of certification [*Gov. Code § 11435.45*]. The State Personnel Board has the responsibility to establish, maintain, and annually update lists of certified administrative hearing [*Gov. Code § 11435.30(a)*] and medical examination [*Gov. Code § 11435.35(a)*] interpreters that the Board determines meets minimum standards in interpreting skills and linguistic abilities in languages [*Gov. Code § 11435.40*] designated by the Board [*Gov. Code § 11435.30(a)*; *Gov. Code § 11435.35(a)*].

Listed certified administrative hearing interpreters may be examined by each employing agency to determine the interpreter's knowledge of the employing agency's technical program terminology and procedures [*Gov. Code § 11435.30(a)*]. Court interpreters certified under *Gov. Code § 68562*, and interpreters listed on the Board's recommended list of court and administrative hearing interpreters prior to July 1, 1993, are deemed certified as administrative hearing interpreters [*Gov. Code § 11435.30(b)*]. Court interpreters certified under *Gov. Code § 68562*, and certified administrative hearing interpreters, are deemed certified as medical examination interpreters [*Gov. Code § 11435.35(b)*].

Under three circumstances, the Board can remove persons from the certified interpreters lists [*Gov. Code § 11435.50*]:

- The person is deceased [*Gov. Code § 11435.50(a)*].

- The person notifies the Board that the person is unavailable for work [*Gov. Code § 11435.50(b)*].

- The person does not pay a required annual renewal fee [*Gov. Code § 11435.50(c)*].

[5] Costs of Interpreters

Interpreter costs are paid as determined by the presiding officer at the hearing. The agency that has jurisdiction over the matter will pay interpreter costs if the presiding officer orders the agency to pay the costs. Otherwise, the party requesting the interpreter will pay interpreter costs [*Gov. Code § 11435.25(a)*]. The presiding officer's decision to direct payment shall be based upon an equitable consideration of all the circumstances in each case, such as the ability of the party in need of the interpreter to pay [*Gov. Code § 11435.25(b)*]. However, in hearings before the Worker's Compensation Appeals Board or the Division of Worker's Compensation relating to worker's compensation claims, the payment of the costs of providing an interpreter shall be governed by the rules and regulations of the WCAB, or the Administrative Director of the DWC, as appropriate [*Gov. Code § 11435.25(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewEvidenceCompetencyInterpreters

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[Reserved]

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§ 473.40 Federal Constitution

Due process clause. *U.S. Const., amend. XIV, § 1*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral Overview

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Due process clause. *Cal. Const., art. I, § 7(a)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 473.42 State Statutes

[1] Administrative Procedure Act

Accusation. *Gov. Code § 11503*

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Agency decisional authority. *Gov. Code § 11440.10*

Agencies to which act applies. *Gov. Code §§ 11410.10, 11501*

Amendment of pleadings. *Gov. Code §§ 11507, 11516*

Applicability of provisions to statement of issues. *Gov. Code § 11504.5*

Conduct of hearing. *Gov. Code § 11512*

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Contempt. *Gov. Code § 11455.10 et seq.*

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Conversion of Proceedings *Gov. Code § 11470.10 et seq.*

Decision. *Gov. Code §§ 11516-11520, 11526*

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Definitions of terms. *Gov. Code §§ 11405.10 et seq., 11500*

Depositions. *Gov. Code § 11511*

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Time and place of hearing. *Gov. Code § 11508*

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[2] Related Statutes

Affidavit of good cause as required for subpoena duces tecum. *Code Civ. Proc. § 1985*

Witness served with subpoena as entitled to demand one day's fees and mileage allowance. *Code Civ. Proc. § 1987*

Witness fees and mileage allowances. *Gov. Code §§ 11191, 68093, 68097.2*

Right to have subpoena issued. *Gov. Code § 11190*

Office of Administrative Hearings. *Gov. Code § 11370.1 et seq.*

Board of supervisors of county as empowered to establish county hearing officer. *Gov. Code §§ 27720, 27721*

Oaths used in civil proceedings. *Code Civ. Proc. §§ 2094-2097*

Evidentiary effect of plea of nolo contendere. *Penal Code § 1016*

Legal Topics:

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§ 473.43 Decisions

Disciplinary action against licensee, finding licensee guilty of gross incompetence, is invalid when administrative record is completely devoid of any statute, rule, regulation, or evidence of an implied standard by which to measure competence of licensee's conduct. *Wheeler v. State Bd. of Forestry (1983) 144 Cal. App. 3d 522, 527-528, 192 Cal. Rptr. 693*

Administrative regulations that violate acts of Legislature are void. *Selby v. Department of Motor Vehicles (1980) 110 Cal. App. 3d 470, 474, 168 Cal. Rptr. 36*

Act in excess of agency's authority under enabling law are void. *Frates v. Burnett (1970) 9 Cal. App. 3d 63, 71, 87 Cal. Rptr. 731*

Subject of administrative proceeding is entitled to have statutory procedures strictly followed and fairly construed. *California Sch. Employees Assn. v. Personnel Commission (1970) 3 Cal. 3d 139, 145, 89 Cal. Rptr. 620, 474 P.2d 436*

Administrative regulation contrary to enabling law is void. *California Sch. Employees Assn. v. Personnel Commission (1970) 3 Cal. 3d 139, 144, 89 Cal. Rptr. 620, 474 P.2d 436*

Agency is not free to ignore its own validly established procedures. *Frates v. Burnett (1970) 9 Cal. App. 3d 63, 71, 87 Cal. Rptr. 731*

Reference to Administrative Procedure Act for guidance is proper in case not governed by act or other law. *Rudolph v. Athletic Commission (1960) 177 Cal. App. 2d 1, 12, 1 Cal. Rptr. 898*

Requirements of due process. *Connolly Development, Inc. v. Superior Court of Merced County (1976) 17 Cal. 3d 803, 818, 823, 132 Cal. Rptr. 477, 553 P.2d 637* ; *Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 208-209, 124 Cal. Rptr. 14, 539 P.2d 774* ; *Beaudreau v. Superior Court (1975) 14 Cal. 3d 448, 458, 121 Cal. Rptr. 585, 535 P.2d 713*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 473.44 Attorney General Opinions

Office of administrative hearings precluded from using electronic recording devices instead of using certified shorthand reporters in hearings even if parties waive requirement of "phonographic reporter" under *Gov. Code § 11512(d)*. *65 Ops. Cal. Att'y Gen. 682, 687 (1982)*

Record of conviction is evidence in proceeding under Administrative Procedure Act (against certificated teacher). *34 Ops. Cal. Att'y Gen. 34 (1959)*

Calling respondent as witness in proceeding under Administrative Procedure Act. 11 Ops. Cal. Att'y Gen. 116 (1948)

Administrative Procedure Act supersedes former Cleaning and Dyeing Act respecting disciplinary proceeding against licensee. *8 Ops. Cal. Att'y Gen. 24 (1946)*

Selection of place of hearing under *Gov. Code § 11508*. *7 Ops. Cal. Att'y Gen. 257 (1946)*

Reinstatement of revoked license by Real Estate Commissioner under *Gov. Code § 11522*. *7 Ops. Cal. Att'y Gen. 264 (1946)*

Determination by mail vote whether administrative proceeding shall be presided over by hearing officer acting alone. *7 Ops. Cal. Att'y Gen. 274 (1946)*

Evidence in proceeding under Administrative Procedure Act. 6 Ops. Cal. Att'y Gen. 219 (1945)

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Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceAdmissibilityHearsayAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPresiding OfficersDuties & PowersAdministrative LawInformal Agency ActionsAdministrative LawJudicial ReviewGeneral OverviewGovernmentsState & Territorial GovernmentsLicenses

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Witkin, California Evidence, Ch. III, *Judicial Notice*, §§ 150-191; Ch. X, *Witnesses*, §§ 787-791; Ch. XII, *Introduction of Evidence at Trial*, §§ 1223-1275 (2d ed.)

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Office of Administrative Hearings. This site includes: information and location concerning specific OAH offices; an OAH hearing guide; information concerming Administrative Procedure Act statutes, regulations, and proposed regulations; OAH forms; information concerning alternative dispute resolution procedures; and declaratory decisions. http://www.dgs.ca.gov/oah **NOTE:** On and after July 1, 1998, The OAL is required by *Gov. Code § 11340.1(b)* to make the full text of the California Code of Regulations, with reference citations and history notes, available on the Internet free of charge.

Office of Administrative Law. This site includes: OAL publications; links to OAL statutes and regulations relating to rulemaking; regulations submitted to the OAL for review, and information for contacting or provding input to the OAL regarding rulemaking. http://www.oal.ca.gov

California Home Page. This site includes links to other sites maintained by numerous state agencies. http://www.ca.gov

Department of Consumer Affairs. This site includes links to sites maintained by many state agencies that are under this department, as well as links to agency sites. http://www.dca.ca.gov

California Courts. This site includes: general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most Court of Appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes: text of constitution, codes, and statutes (including complete text of APA); and information concerning pending legislation. http://www.leginfo.ca.gov

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§ 473A.01 Scope of Chapter

This chapter discusses California public administrative law relating to the commencement of an agency adjudication. It focuses primarily on the commencement procedures applicable to formal hearing conducted under the Administrative Procedure Act (APA). Discussion in Part II includes the following:

- Requirements for pleadings and issues in administrative hearings [*see §§ 473A.10, 473A.11*).

- Other provisions and law affecting the commencement of a formal hearing, such as limitation periods, the defense of laches, procedures relating to parties and other interested persons and to the consolidation or severance of hearings [*see §§ 473A.12 -473A.15*).

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§ 473A.02 Cross References

[1] Related Coverage of Agency Adjudication

For general discussion and overview of agency adjudication under the Administrative Procedure Act (APA), see Ch. 473, *Public Agency Adjudication* .

For related discussion and forms providing coverage of the other stages of an agency adjudication under the formal hearing provisions of the APA, see:

- Ch. 473A, *Commencing Agency Adjudication*.
- Ch. 473B, *Discovery in Agency Adjudications*.
- Ch. 473C, *Prehearing Procedures in Agency Adjudications*.
- Ch. 473D, *Prehearing Preparations in Agency Adjudications*.
- Ch. 473E, *Public Administrative Law Judges*.
- Ch. 473F, *Agency Adjudication Hearings*.
- Ch. 473G, *Agency Adjudication Decisions*.

For related discussion and forms providing more detailed coverage of adjudication methods under the APA other than that of formal hearing, see Ch. 473H, *Alternative Adminstrative Adjudication Procedures* .

For detailed discussion and forms relating generally to licensing agencies, including licensing adjudications, see Ch. 471B, *Licensing by Public Agencies* .

[2] Judicial Review

For detailed discussion and forms relating generally to review by California courts of agency adjudications, see:

- Ch. 474, *Availability of Judicial Review of Agency Decisions*.
- Ch. 474A, *Timing of Judicial Review of Agency Decisions*.
- Ch. 474B, *Standards in Reviewing Agency Decisions*.
- Ch. 474C, *Procedures in Reviewing Agency Decisions*.

For other related discussion and forms relating to judicial review generally, see:

- Ch. 40, *Appeal: An Overview*, through Ch. 54, *Appeal: California Supreme Court Review* (discussion and forms relating to civil appeals).
- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to immediate judicial review of orders by extraordinary writ of mandate or prohibition).
- Ch. 492, *Review (Certiorari), Writ of* (discussion and forms relating to immediate judicial review of civil proceedings by extraordinary writ of review).

[3] Public Administrative Law Generally

For related discussion of California public administrative law generally, including discussion of public agency functions and powers (including adjudicative or quasi-judicial powers), and organization generally, see Ch. 470, *Overview of Public Administrative Law* (general discussion of judicial power is in § 470.12[5]). For detailed discussion of the general procedures imposed in agency proceedings by constitutional due process and related statutory requirements, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

For discussion and forms relating to the law governing access to and conduct of meetings by California public agencies, see Ch. 470B, *Public Agency Meetings* .

For detailed discussion and forms relating to the law governing disclosure of public records under the California Public Records Act [*Cal. Gov. Code §§ 6250 et seq.*], see Ch. 470C, *Public Records Act* .

For detailed discussion and forms relating generally to agency investigations and inspections, see:

- Ch. 471, *Investigations by Public Agencies*.
- Ch. 471A, *Inspections by Public Agencies*.

For detailed discussion and forms relating generally to the legislative or rulemaking functions of California public agencies, including judicial review of these functions, see:

- Ch. 472, *Public Agency Rules*.
- Ch. 472A, *Agency Rulemaking Procedures*.
- Ch. 472B, *Review of Agency Rulemaking*.

[4] Specific Public Agencies

For related coverage of adjudicative proceedings before particular public agencies, see:

- Ch. 18, *Alcoholic Beverage Licenses* (discussion and forms relating to licensing proceedings before the department of Alcoholic Beverage Control).

- Ch. 70, *Attorney Admission*, and Ch. 71, *Attorney Discipline* (discussion and forms relating to licensing and discipline of attorneys and proceedings before the State Bar and the State Bar Court).

- Ch. 92, *Automobiles: Drivers' Licenses* (discussion and forms relating to drivers' licensing and proceedings before the Department of Motor Vehicles).

- Ch. 104, *Building Contracts*, § 104.70 et seq. (discussion relating to licensing and discipline of building contractors by the Contractors' State License Board).

- Ch. 118, *Civil Service* (discussion and forms relating to proceedings before the Personnel Board).

- Ch. 209, *Dentists* (discussion and forms relating to licensing and discipline of dentists and proceedings before the Board of Dental Examiners).

- Ch. 214, *Drugs and Pharmacists* (discussion and forms relating to licensing and discipline of pharmacists and proceedings before the State Board of Pharmacy).

- Ch. 414, *Physicians: Licensing and Discipline* (discussion and forms relating to licensing and discipline of physicians and proceedings before the Medical Board of California).

- Ch. 480, *Public Utilities* (discussion and forms relating to proceedings before the Public Utilities Commission).

- Ch. 512, *Schools: Certification, Dismissal, and Related Employment Issues* (discussion and forms relating to teacher certification and dismissal proceedings before the State Board of Education and local boards).

- Ch. 527, *Social Services* (discussion and forms relating to proceedings before the State Department of Social Service or the State Department of Health Services).

- Ch. 564, *Unemployment and Disability Insurance*, § 564.10 et seq. and § 564.100 et seq. (discussion and forms relating to proceedings before the Unemployment Insurance Appeals Board).

- Ch. 575, *Waters*, § 575.10 et seq. and § 575.210 et seq. (discussion and forms relating to proceedings before the State Water Resources Control Board and local water districts).

- Ch. 577, *Workers' Compensation* (discussion and forms relating to proceedings before the Division of Workers' Compensation and the Workers' Compensation Appeals Board).

For additional cross references to coverage of other particular public agencies, see *§ 470.02[2]*.

[5] Other Chapters Relating to Public Agencies

For discussion and forms relating to claims and actions under the California Tort Claims Act (*Gov. Code § 810 et seq.*) for damages for injuries arising from the tortious conduct of public agencies or their officers and employees, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewRemediesProhibitionAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of Protection

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[Reserved]

§§ 473A.03[Reserved]

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§ 473A.10 Agency Discretion to Commence Adjudicatory Proceedings

[1] Ways to Initiate Proceedings

A variety of ways exist to initiate administrative adjudicative proceedings. For administrative adjudications not governed by the adjudication provisions of the California APA (*Gov. Code § 11400 et seq.* and *Gov. Code § 11500 et seq.*), the method of initiating the proceedings depends on the agency's governing law.

This chapter and Ch. 473B, *Discovery in Agency Adjudications*, through Ch. 473G, *Agency Adjudication Decisions*, focus on formal hearings under the administrative adjudication provisions of the APA (*Gov. Code § 11340 et seq.*). These are governed primarily by Chapter 5 (*Gov. Code § 11500 et seq.*), which sets out the formal hearing procedures that comprise one part of the APA administrative adjudication provisions. The Chapter 5 procedures are supplemented by relevant provisions of Chapter 4.5 (*Gov. Code § 11400 et seq.*), which sets out general provisions that make up the remainder of the APA administrative adjudication provisions [*see Ch. 473, Public Agency Adjudication, § 473.13[1*], for further explanation of the APA and the administrative adjudication provisions of Chapters 4.5 and 5 that comprise a part of the APA]. The formal hearing procedures under Chapter 5 are those which most licensing agencies must use in disciplinary or license denial proceedings [*see Ch. 473, Public Agency Adjudication, § 473.15*, for detailed discussion of what proceedings are governed by Chapter 5].

Thus, for example, under Chapter 5 of the APA adjudication provisions, disciplinary hearings against licensees begin with the filing of an accusation [*Gov. Code § 11503*], and license denial hearings begin with the filing of a statement of issues [*Gov. Code § 11504*]. For further discussion of these initial pleadings, see *§ 473A.11*.

Regardless of whether the proceedings of an agency must be initiated with an accusation, statement of issues, or other formal pleading, the first step toward a hearing is often taken when a third party, such as a consumer or another licensee, makes a complaint or report to the agency or requests the agency to hold a hearing [*see § 473A.14*, for discussion of third party participation]. Most agencies are expressly authorized to receive complaints. For example, *Bus. & Prof. Code § 129(b)* requires every Department of Consumer Affairs agency to receive complaints about its licensees.

[2] Agency Discretion

Although a third party may complain to an agency about a licensee or even request a hearing, the agency is not required to hold a hearing. Whether to file an accusation or other pleading and hold a hearing on such a complaint or request is within the agency's discretion [*see Hogen v. Valley Hospital (1983) 147 Cal. App. 3d 119, 123-125, 195 Cal. Rptr. 5* (report about licensee to *Board of Medical Quality Assurance); Humane Society etc., California Branch Inc. v. Merrill (1962) 199 Cal. App. 2d 115, 118, 18 Cal. Rptr. 701* (complaint against certificate holder filed with Board of Public Health); *Spear v. Board of Medical Examiners (1956) 146 Cal. App. 2d 207, 212, 303 P.2d 886* (Board of Medical Examiners requested to file accusation against licensee)].

If an agency has a legal duty to exercise its discretion, the courts can compel the agency to do so [Whitten v. California State Board, etc. *(1937) 8 Cal. 2d 444, 446-447, 65 P.2d 1296* ; *Anderson v. City of Los Angeles (1973) 30 Cal. App. 3d 219, 227, 106 Cal. Rptr. 299* ; *Stevens v. Fox Realty Corp. (1972) 23 Cal. App. 3d 199, 206, 100 Cal. Rptr. 63]* , but they cannot compel it to exercise that discretion in any particular manner. Once an agency has exercised its discretion, the courts will not interfere, unless it is shown that the agency has abused its discretion [*Paule v. State Personnel Board (1974) 38 Cal. App. 3d 32, 36, 113 Cal. Rptr. 38* ; *Spear v. Board of Medical Examiners (1956) 146 Cal. App. 2d 207, 212-214, 303 P.2d 886]* . The court may not substitute its discretion for that of the agency [*Spear v. Board of Medical Examiners (1956) 146 Cal. App. 2d 207, 212, 303 P.2d 886]* .

Even when a third party files an accusation [*see Humane Society etc., California Branch Inc. v. Merrill (1962) 199 Cal. App. 2d 115, 118-120, 18 Cal. Rptr. 701* (complainant cannot compel Board of Public Health to file accusation, but complainant may file one)], the agency may treat the accusation, and whether to hold a hearing on that accusation, as a matter for its discretion as it would any other public complaint, unless the party has a statutory right to a hearing or a constitutional right to be heard [*see Horn v. County of Ventura (1979) 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134* (due process requires that landowner not be deprived of property rights by administrative action without notice and opportunity to be heard); *see also* discussion in *§ 473A.14[2]*].

The procedure of filing an accusation or statement of issues to initiate a hearing is intended primarily for the benefit of the licensee or applicant, who does have a right to be heard by the agency, but may waive that right [*Gov. Code § 11506(c)* (failure to file notice of defense as waiver of right to hearing); *see Gov. Code §§ 11503* (hearing to revoke or suspend license or other privilege initiated by filing accusation), 11504 (hearing to determine whether license or other privilege should be granted or denied initiated by filing statement of issues), and discussion in *§ 473A.11[6][b]*].

[3] Definitions

Chapter 5 (*Gov. Code § 11500 et seq.*), governing formal hearings under the APA (*Gov. Code § 11340 et seq.*), begins with a list of definitions that include the following [*Gov. Code § 11500*; *see* discussion in [1], *above*, and Ch. 473, *Public Agency Adjudication*, § 473.13[1], for discussion regarding Chapter 5 and other components of the APA]:

- "Agency" includes the state boards, commissions, and officers to which Chapter 5 (*Gov. Code § 11500 et seq.*) is made applicable by law. When the word "agency" alone is used, the power to act may be delegated by the agency, but when the words "agency itself" are used, the power to act shall not be delegated unless the statutes relating to the particular agency authorize delegation of the agency's power to hear and decide [*Gov. Code § 11500(a)*].

- "Party" includes the agency, the respondent, and any person, other than an officer or employee of the agency acting in an official capacity, who has been allowed to appear or participate in the proceeding [*Gov. Code § 11500(b)*].

- "Respondent" means any person against whom an accusation or statement of issues is filed [*see Gov. Code §§ 11503, 11504* (accusation and statement of issues, respectively); *see also Gov. Code § 11500(c)* and discussion in *§ 473A.11[3], [4]*].

These definitions apply to all other provisions in Chapter 5, unless the context or subject matter indicates otherwise [*Gov. Code § 11500*]. In addition, certain definitions set out in Chapter 4.5 also apply to proceedings under Chapter 5, to the extent that the provisions of Chapter 4.5 apply to formal hearings under Chapter 5 unless inconsistent with statutes specifically applicable to that proceeding [*Gov. Code § 11501(c)*]. For example, the following definition of "adjudicatory hearing" applies in that there is no definition of this term in Chapter 5 [*Gov. Code § 11405.20*]:

- "Adjudicative proceeding" is an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision.

Applicable provisions of Chapter 4.5 are discussed when relevant in this chapter. For detailed discussion of the additional definitions under Chapter 4.5 that may apply, see *Chapter 473, Public Agency Adjudication, § 473.14*.

[4] Office of Administrative Hearings Regulations Governing Hearing Procedures

The Office of Administrative Hearings adopted regulations [*1 Cal. Code Reg. §§ 1000-1440* (1997)] to govern hearing procedures in hearings conducted before OAH administrative law judges [*1 Cal. Code Reg. § 1000* (1998)]. The regulations cover the subjects of general APA hearing procedures [*1 Cal. Code Reg. §§ 1000-1046* (1998)], special hearing procedures [*1 Cal. Code Reg. §§ 1100-1148* (1997)], alternative dispute resolution procedures [*1 Cal. Code Reg. §§ 1200-1292* (1999)], arbitration procedures for state contract act contract claims [*1 Cal. Code Reg. §§ 1300-1393* (1997)], and protest arbitration procedures *1 Cal. Code Reg. §§ 1000-1440* (1998)]. The basic purpose [*1 Cal. Code Reg. § 1000* (1998)], definitions [*1 Cal. Code Reg. § 1002* (1998)], and principles of interpretation [*1 Cal. Code Reg. § 1004* (1998)], are set forth in specific regulations. Specific regulations applicable to Ch. 473A, Commencing Agency Adjudication, include the following: format and filing of papers [*1 Cal. Code Reg. § 1006* (1998)]; service and proof of service [*1 Cal. Code Reg. § 1008* (1998)]; pleadings, notice of defense and withdrawal of defense [*1 Cal. Code Reg. § 1014* (1998)]; and agency request for hearing and notice of hearing [*1 Cal. Code Reg. § 1018* (1998)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingGeneral OverviewAdministrative LawAgency AdjudicationHearingsRight to HearingStatutory RightAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawJudicial ReviewStandards of ReviewAbuse of DiscretionConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionGovernmentsState & Territorial GovernmentsLicenses

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§ 473A.11 Pleadings

[1] Nature of Administrative Pleadings

Two kinds of pleadings are used to begin formal hearings under the APA. A hearing to determine whether a license or other privilege will be revoked or suspended begins with an accusation [*see* further discussion in [3], *below*]. A license denial hearing begins with a statement of issues [*see* further discussion in [4], *below*].

If the APA formal hearing provisions (*Gov. Code § 11500 et seq.*) do not apply, there is no requirement as to the form of an initial pleading unless the agency's governing statutes impose such a requirement [*see Rudolph v. Athletic Commission (1960) 177 Cal. App. 2d 1, 12-13, 1 Cal. Rptr. 898* (when due process protections apply, they require an initial pleading to give notice and state the right to an opportunity to be heard, but no particular form required); *see* Ch. 470A, *Due Process Restrictions on Public Agencies* , for detailed discussion of procedural due protections as they apply to agency actions or proceedings].

Thus, when no specific statutory requirements apply, the only requirement is that the initial pleading must be informative enough to allow the responding party to prepare a defense [*Yanke v. State Dep't of Public Health (1958) 162 Cal. App. 2d 600, 603, 328 P.2d 556]* . Non-APA pleadings often are typically not as formal as those under required under the formal hearing requirements of the APA. For example, a non-California APA disciplinary action may be initiated by a specially prepared document, such as a "notice of disciplinary action," or by a mere letter.

Non-APA hearings on an agency's denial of a requested action, such as the denial of a license application, are sometimes initiated by pleadings similar to a statement of issues.

Whether the APA's formal hearing provisions of Chapter 5 (*Gov. Code § 11500 et seq.*) apply to a particular adjudication by a particular agency depends on the statutes relating to that agency [*Gov. Code § 11501(a)*]. In general, the provisions of Chapter 5 apply when they are made applicable by the statutes relating to that agency [*Gov. Code §§ 11500(a), 11501(a)*]. These are hereafter referred to as the "enabling statues" for a particular agency.

In addition, any agencies created on or after July 1, 1997, are subject to the formal hearing requirements of Chapter 5

unless the enabling statutes of that agency provide otherwise [*Gov. Code § 11501(b)*].

Finally, as mentioned above, the provisions of Chapter 4.5, the general procedures of the administrative adjudication provisions (*Gov. Code § 11400 et seq.*), apply to an adjudicative proceeding required to be conducted under Chapter 5, unless the statutes relating to the proceeding provide otherwise [*Gov. Code § 11501(c)*]. This means also that the provisions of Chapter 4.5 apply to decisions of agencies when federal or state constitutional or statutory law require an evidentiary hearing to determine facts so as to formulate and issue a decision [*Gov. Code § 11410.10*].

Thus any agency, for example the Department of Motor Vehicles (listed as an agency subject to Chapter 5 pursuant to former *Government Code Section 11501(b)(41)*), must follow the APA adjudication procedures unless its enabling statutes provide otherwise [*Gov. Code §§ 11400(b), 11501(a),(c)*; *see Serenko v. Bright (1968) 263 Cal. App. 2d 682, 689-690, 70 Cal. Rptr. 1]* .

See *Chapter 473, Public Agency Adjudication, §§ 473.13, 473.15*, for further discussion.

[2] Who May Initiate Adjudication Proceedings

[a] Agency Employees and Public Officers

Unless the agency's governing statute expressly states who can or cannot initiate a proceeding, an administrative adjudication usually is initiated by a pleading signed and filed by an agency employee or a public officer [*see* discussion in [3], and [4], *below*, for explanation of the two principal kinds of initial pleadings].

Thus, *Gov. Code §§ 11503* and *11504* require that the initial pleading be verified, "unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held."

In practice, the public officer is usually a deputy attorney general, although some statutes authorize particular public officials outside the agency to initiate administrative actions [*see, e.g., Bus. & Prof. Code § 24203* (authorizing hearings on accusations by local legislative bodies and police officials against liquor licensees)].

[b] Investigative Personnel

Agency personnel who conduct investigations may also sign and file charges [*Jacobs v. Board of Dental Examiners (1922) 189 Cal. 709, 713, 209 P. 1006]* . This dual function is not a violation of due process [*Greer v. Board of Education (1975) 47 Cal. App. 3d 98, 119-120, 121 Cal. Rptr. 542]* .

[c] Participation in Adjudication by Agency Member Who Files Charges

If an agency board member files the charges, however, that member may not participate in the adjudication of the charges unless his or her participation is necessary for the matter to be determined [*Pacific Mut. Life Ins. Co. v. McConnell (1955) 44 Cal. 2d 715, 723-724, 285 P.2d 636 , appeal dismissed, 350 U.S. 984, 76 S. Ct. 473, 100 L. Ed. 852 (1956)* ; *Nider v. Homan (1939) 32 Cal. App. 2d 11, 17, 89 P.2d 136]* . To avoid this problem, most boards have their executive officer file the charges.

[d] Third Parties

A private third party may also file an accusation in a proceeding under the California APA [*Gov. Code § 11503*; *Humane Society etc., California Branch Inc. v. Merrill (1962) 199 Cal. App. 2d 115, 120, 18 Cal. Rptr. 701]* . Unless the governing laws require the agency to hold a hearing when an accusation is filed, the accusation (or statement of issues) will be treated like any other public complaint [*see* discussion in *§ 473A.10* regarding an agency's discretion to act]. The agency is free to ignore an accusation (or statement of issues) filed by a third party complainant unless the

third party has a due process right to a hearing [*Spear v. Board of Medical Examiners (1956) 146 Cal. App. 2d 207, 212, 303 P.2d 886* ; *see* discussion in [3] and [4] below; for detailed discussion of the application of due process protections to administrative adjudications, *see* Ch. 470A, *Due Process Restrictions on Public Agencies*].

[3] Accusation

[a] Nature of Accusation

The APA requires an agency seeking to revoke, suspend, limit, or condition a right, authority, license, or privilege to initiate the action by filing a written accusation. The accusation is a statement of charges that must comply with the following requirements [*Gov. Code § 11503*]:

- States the acts and omissions with which the respondent is charged so the respondent is able to prepare a defense.
- Specifies the statutes and rules that the respondent is alleged to have violated.
- Is drafted in ordinary and concise language.

Compliance with these requirements is a statutory predicate to disciplinary action [*Linda Jones General Builder v. Contractors' State License Board (1987) 194 Cal. App. 3d 1320, 1324, 1326, 240 Cal. Rptr. 180* ; *Bohemian Club v. Fair Employment & Housing Com. (1986) 187 Cal. App. 3d 1, 24, 231 Cal. Rptr. 769 , appeal dismissed, 484 U.S. 805, 108 S. Ct. 51, 98 L. Ed. 2d 16 (1987)* ; *Wheeler v. State Bd. of Forestry (1982) 144 Cal. App. 3d 522, 526-527, 192 Cal. Rptr. 693]* . An accusation satisfied the requirements of *Gov. Code § 11503* when it stated that the applicant for a real estate license had been denied a license on the grounds that he had been disbarred from the practice of law, and the accusation set forth the statutory sections and Rules of Professional Conduct sections that the applicant had violated which provided the basis for disbarment. The accusation was not required to set forth specific acts of dishonesty committed by the applicant [*Berg v. Davi (2005) 130 Cal. App. 4th 223, 228-229, 29 Cal. Rptr. 3d 803]* .

See *§ 473A.50* for a form of accusation, and § 473A.51 for a form of notice of accusation.

[b] Fair Notice

In administrative proceedings, courts are more concerned with fair notice to the respondent than adherence to the technical rules of pleading [*see, e.g.,* *Stearns v. Fair Employment Practice Com. (1971) 6 Cal. 3d 205, 213, 98 Cal. Rptr. 467, 490 P.2d 1155* (because administrative pleadings not bound by strict rules of pleading, variance between accusation and proof presents no ground for reversal as long as respondent is informed of substance of charge); *Cooper v. Board of Medical Examiners (1975) 49 Cal. App. 3d 931, 941-942, 123 Cal. Rptr. 563* (vagueness in accusation not material under liberal rules of administrative pleading as long as respondent is informed of substance of charge); *Wright v. Munro (1956) 144 Cal. App. 2d 843, 848, 301 P.2d 997* (in administrative proceedings, courts are more concerned with fair notice to respondent than with technical rules of pleading)].

The accusation must specify enough facts to notify the respondent of the agency's allegations and permit the respondent to gather witnesses and evidence to refute the allegations [*Hostetter v. Alderson (1952) 38 Cal. 2d 499, 502, 241 P.2d 230* ; *Stoumen v. Munro (1963) 219 Cal. App. 2d 302, 306-307, 33 Cal. Rptr. 305]* . The agency is not required to identify all the circumstances of the acts alleged or to specify the evidence that it will present to support the charges [*Nelson v. Dept. Alcoholic Bev. Control (1959) 166 Cal. App. 2d 783, 787-788, 333 P.2d 771* ; *Mast v. State Board of Optometry (1956) 139 Cal. App. 2d 78, 90-91, 293 P.2d 148]* .

However, procedural due process requires that the board give the accused party fair notice of charges that the agency is

going to rely upon to support discipline [*Sanchez v. City of Los Angeles (2006) 140 Cal. App. 4th 1069, 1080-1082, 45 Cal. Rptr. 3d 188* (notice of proposed 20-day disciplinary suspension was not sufficient to give officer timely notice of proposed pay grade reduction within one-year time period; officer was entitled to reinstatement in pay grade to officer status held before discipline was imposed); *Stokes v. California Horse Racing Board (2002) 98 Cal. App. 4th 477, 482-483, 119 Cal. Rptr. 2d 792* (licensed horse trainer received fair notice of charges against him that Board relied upon as basis for discipline)]. Failure to give fair notice violates procedural due process [*Smith v. State Bd. of Pharmacy (1995) 37 Cal. App. 4th 229, 241-242, 43 Cal. Rptr. 2d 532* (Board's failure to inform pharmacist that it was going to rely on a theory that he was negligent as pharmacist in charge violated procedural due process of law requirements)].

In a physician licensing revocation action, due process of law required that the physician be given fair notice that the failure to complete a diversion program would be treated as unprofessional conduct that provided its own basis for discipline. While physician disciplinary proceeding are not penal (criminal), and the notice standards are not as specific or strict as in criminal law actions, the statute authorizing discipline must provide a reasonably clear basis for that discipline, and the physician has to be given notice of that consequence. The lack of such clear basis in thestatute lead the court to interpret the statute as not providing authority to discipline a physician for failure to complete a diversion program [*Medical Board of California v. Superior Court (2003) 111 Cal. App. 4th 163, 173-175, 4 Cal. Rptr. 3d 403]* .

However, a governing statute (*e.g., Educ. Code § 89539*) may restrict an agency's authority to consider additional facts and circumstances in reviewing an employee termination decision. In that circumstance, the agency must rely on the original charges stated in the notice of dismissal, and may not amend the notice of dismissal to add new charges either before, or after the hearing [*Brooks v. State Personnel Bd. (1990) 222 Cal. App. 3d 1068, 1074-1075, 272 Cal. Rptr. 292* ; *Brown v. State Personnel Bd. (1985) 166 Cal. App. 3d 1151, 1164-65, 213 Cal. Rptr. 53]* . Furthermore, the agency may not rely on the amended charges in reaching its decision [*Brooks v. State Personnel Bd. (1990) 222 Cal. App. 3d 1068, 1074-1075, 272 Cal. Rptr. 292]* .

[c] Allegations

Accusations and similar non-APA initial pleadings should contain all of the allegations necessary under the APA and other statutes governing the agency action. These pleadings generally contain allegations concerning:

- Jurisdiction [*see, e.g., Bus. & Prof. Code § 118(b)*].
- Statutory grounds for the action.
- Specific conduct.
- Prior discipline.
- A prayer for relief.

The pleadings often must be verified [*see* [7], *below*] and must be properly served [*see* [9], *below*].

An accusation must state the acts and omissions with which the respondent is charged so that the respondent is able to prepare a defense [*see* [a], *above*, for general requirements].

For non-California APA proceedings, courts have held that statutory allegations are accepted only if the statute itself is explicit enough to advise the respondent of the particular offense forming the basis of the charge [*Smulson v. Board of Dental Examiners (1941) 47 Cal. App. 2d 584, 589, 118 P.2d 483]* .

Legal conclusions couched as pleading allegations are considered mere surplusage and may be disregarded, so long as the statement of charges is otherwise sufficient [*Shewbridge v. Police Commission (1944) 64 Cal. App. 2d 787, 791, 149 P.2d 429]* .

[4] Statement of Issues

[a] Definition

A statement of issues is necessary to initiate a formal hearing under the APA to determine whether a right, authority, privilege, or license should be granted, issued, or renewed [*Gov. Code § 11504*].

A statement of issues is a written specification of the statutes and rules with which the respondent must show that he or she has complied; the respondent demonstrates this compliance by producing proof at the hearing. The statement of issues also includes any matters that have come to the attention of the initiating party, the party who files the statement of issues, that would authorize a denial of the agency action that is sought [*Gov. Code § 11504*].

[b] Applicability of California APA Accusation Provisions

The APA's provisions for proceedings on an accusation (*see generally Gov. Code § 11400 et seq.* and *Gov. Code § 11505 et seq.*), also apply to proceedings on a statement of issues [*Gov. Code § 11504.5*]. When, however, the hearing is held at the request of the respondent, the following exceptions apply [*Gov. Code § 11504*; *see* [9], *below*]:

- The provisions of *Gov. Code § 11505* (service of the accusation, discussed in [9], *below*) and *Gov. Code § 11506* (notice of defense, discussed in [6], *below*) do not apply.

- The statement of issues together with the notice of hearing must be delivered or mailed to the parties as provided in *Gov. Code § 11509*.

[c] Form of Statement of Issues and Verification

The form of a statement of issues is similar to that of an accusation [*see* [3], *above*]. It should inform the parties of the specific factual issues raised regarding the agency action sought or the denial of that action. It usually contains a statement that the complainant is acting in an official capacity and sets out the statutory and regulatory provisions applicable to the agency's action. A public employee is immune from liability for his or her disposition of a license application if he or she is authorized to make the determination in question [*see Gov. Code § 821.2*]. Further, a statement of issues need not be verified if issued by a public officer in his or her official capacity, or by an employee of the agency before which the hearing is to be held [*see Gov. Code § 11504*; *see also* [7], *below*]. See *§ 473A.52*, for a statement of issues form.

[d] Service of Statement of Issues

A statement of issues is generally sent in one of two ways:

- Usually an agency denying a license or other privilege sends a denial letter to the applicant; if the applicant responds with a request for a hearing, the agency sends a statement of issues [*cf. Akopiantz v. Board of Medical Examiners (1956) 146 Cal. App. 2d 331, 332, 304 P.2d 52* (hearing on denial of certificate held without any statement of issues by agency when physician requested hearing and waived statement of issues)]. In this situation, when the hearing is held at the request of the respondent, the provisions of *Gov. Code § 11505* (service of accusation) and *Gov. Code § 11506* (notice of defense) do not apply, and the statement of issues together with the notice of hearing is delivered or mailed to the parties as provided in *Gov. Code § 11509* [*Gov. Code § 11504*; *see* discussion in [9][b], [c], *below*]. See

§ 473A.53, for a form of request for hearing.

- Sometimes an agency sends a statement of issues in lieu of a letter of denial. On these occasions, the statement of issues is served in the same way as an accusation [*Gov. Code § 11504*]. In other words, a statement of issues is served in the same way as an accusation whenever the agency serves it before the respondent requests a hearing [*see* discussion in [9][a], *below*].

Even though *Gov. Code § 11506* (notice of defense, discussed in [6], *below*) does not apply when a hearing on a statement of issues is initiated by the respondent's request for a hearing, it has been suggested that the respondent in such a proceeding should nonetheless plead, file, and serve on all parties before the hearing, any of the defenses described in *Gov. Code § 11506* that he or she wishes to raise [*see* Bobby, *An Introduction to Practice and Procedure Under the California Administrative Procedure Act, 15 Hast. L. J. 258, 261 (1964)*].

[5] Amending, Supplementing, or Correcting Accusations or Statements of Issues

Technical defects in accusations or statements of issues can be rectified in a variety of ways. The APA allows the agency to file or accept the filing of an amended or supplemental accusation or statement of issues before the matter is submitted for decision [*Gov. Code § 11507*; *Button v. Board of Administration (1981) 122 Cal. App. 3d 730, 738, 176 Cal. Rptr. 218* (statement of issues); *Stuck v. Board of Medical Examiners (1949) 94 Cal. App. 2d 751, 756, 211 P.2d 389* (accusation)].

More than one amendment may be permitted [*see 20 Ops. Cal. Atty. Gen. 192, 193 (1952)]* . The APA also allows an agency to order amendment of an accusation or statement of issues after the case is submitted for decision [*Gov. Code § 11516*; *Taylor v. City of Los Angeles (1997) 60 Cal. App. 4th 611, 617, 70 Cal. Rptr. 2d 521]* . An amendment after the case is submitted for decision is generally intended to conform the initial pleading to the proof made at the hearing.

For non-APA proceedings, the liberal rules governing administrative pleadings should allow an agency to amend the initial pleading before the hearing [*see Cook v. Civil Service Commission (1960) 178 Cal. App. 2d 118, 126-127, 2 Cal. Rptr. 836* (dismissal of police officer by municipal commission after hearing on amended pleadings upheld)]. After the hearing commences, agencies not governed by the APA probably have the same right as APA agencies to amend the initial pleading [*see Tapley v. Abbott (1931) 111 Cal. App. 397, 400, 295 P. 911* (finding of unprofessional conduct upheld despite amendment of pleadings during hearing to conform to proof); *see also Gov. Code § 11516* (APA agencies)].

The California Court of Appeal reversed the Superior Court's dismissal of an enforcement action brought by the Labor Commissioner to enforce an order requiring an employer to rehire an employee with back pay. The Labor Commissioner claimed that the employer had fired the employee in retaliation for the making of a Cal-OSHA complaint against the employer's place of business, and that this was a wrongful retaliatory termination that is prohibited by the provisions of *Labor Code § 6310*. At trial before the superior court, the employer testified that she fired the employee out of fear that the employee would be the next one to file a Cal-OSHA complaint. The Court of Appeal held that the Labor commissioner had jurisdiction in these circumstances over a preemptive termination claim under *Labor Code Section 6310*, which specifically requires that employees actually make workplace safety complaints for the wrongful termination law to apply. The Court of Appeal held that the statute included preemptive termination claims within the scope of the Labor Commissioner's jurisdiction, and that proof of a preemptive termination did not constitute improper variance with the pleadings and the administrative decision, which had plead that a workplace safety violation had been made prior to termination of the employee [*Lujan v. Minagar (2004) 124 Cal. App. 4th 1040, 1047-1048, 21 Cal. Rptr. 3d 861]* .

A pleading that contains some allegations in entirely general terms is not fatally defective when the agency proceeds against the respondent only on other more specific allegations. Thus, an accusation that charged improper and unethical

acts "including but not limited to the following" did not deny due process when the agency proceeded against the respondent only on the specifically enumerated charges [*Cooper v. Board of Medical Examiners (1975) 49 Cal. App. 3d 931, 941-942, 123 Cal. Rptr. 563]* . The liberal rules of administrative pleading require mainly that the pleadings give sufficient notice to enable the accused to prepare a defense [*Hostetter v. Alderson (1952) 38 Cal. 2d 499, 502, 241 P.2d 230* ; *see* discussion in [3][b], *above*].

Technical defects in the pleadings may also be cured if the respondent indicates personal knowledge of the alleged incident. In one case, the respondents in a liquor license suspension proceeding objected to the form of the accusation, claiming that it did not enable them to identify the transactions in which they were alleged to have sold liquor to obviously intoxicated persons. The court held that the vague description of the buyer in the second count of the accusation did not hamper respondents in the preparation of their defense because one of the respondents, when testifying in his own defense, readily identified the incident and the customer, and named several people who were present at the time [*Burako v. Munro (1959) 174 Cal. App. 2d 688, 690-691, 345 P.2d 124]* .

All parties must be notified of an amended or supplemental accusation or statement of issues. When new charges are presented, the agency must give the respondent a reasonable opportunity to prepare a defense. The agency has discretion to allow the respondent to file a further pleading. New charges, however, are deemed controverted, and objections to the amended or supplemental accusation or statement of issues may be made orally and will be noted on the record [*Gov. Code § 11507*]. If the agency orders amendment of the accusation or statement of issues after the case is submitted for decision, each party will be given the opportunity to argue for reopening the case to introduce additional evidence. If it is shown that the party will be prejudiced unless the case is reopened, the agency must reopen the case to permit introduction of additional evidence [*Gov. Code § 11516*].

[6] Notice of Defense

[a] Nature of Notice of Defense

When an accusation is served on a respondent in a formal hearing under the APA proceeding, the respondent may request a hearing by filing a notice of defense with the agency [*Gov. Code § 11506(a)*].

A form notice of defense accompanies the accusation when it is served [Gov. Code. § 11505(a)]. The notice usually consists of:

- A brief statement that the respondent acknowledges service of the accusation and the attending forms required by *Gov. Code § 11505*.
- A request for hearing.

See also discussion in [c], *below*, for a detailed list of what the notice of defense may contain.

A notice must be in writing, must be signed by or on behalf of the respondent, and must state the respondent's mailing address. The form notice need not be used [*Gov. Code § 11506(d)*]. For forms that may be used in filing a notice of defense, see *§ 473A.54*.

[b] Effect of Notice of Defense or Failure to File Notice

The notice of defense is deemed a specific denial of all parts of the accusation not expressly admitted [*Gov. Code § 11506(c)*; *but see* [d], *below* (discussing requirement to object specifically as to the form of an accusation)].

Failure to file a notice constitutes a waiver of the right to a hearing. However, even when the right to a hearing has been

waived by the failure to file a notice of defense, agencies have, and sometimes exercise, the discretion to grant hearings despite the waiver [*Gov. Code § 11506(c)*]. A respondent may request a grant of hearing by way of relief from default for his or her failure to file the notice of defense [*see Gov. Code § 11520(b), (c)*; for a form that may be used to request that the failure to file a notice of defense not be deemed a waiver of the right to a hearing, *see § 473A.57*].

[c] Contents of Notice

In addition to requesting a hearing, a notice of defense may include the following [*Gov. Code § 11506(a)*]:

- An objection to the accusation on the ground that it does not state acts or omissions on which the agency may proceed [*see* [d], *below*].

- An objection to the form of the accusation on the ground that it is so indefinite or uncertain that the respondent cannot identify the transaction or prepare a defense [*see* [d], *below*].

- An admission of the accusation in whole or in part [*see* [f], *below*].

- New matter by way of defense [*see* [f], *below*].

- An objection to the accusation on the ground that compliance with the requirements of a regulation would result in a material violation of another regulation enacted by another department affecting substantive rights [*see* [g], *below*].

[d] Objection as to Form or Sufficiency of Accusation

Failure to object to *form* of the accusation, on the ground that it is so indefinite or uncertain that the respondent cannot identify the transaction or prepare a defense, waives that objection [*Gov. Code § 11506(a)(3), (c)*; *Shea v. Board of Medical Examiners (1978) 81 Cal. App. 3d 564, 576, 146 Cal. Rptr. 653* ; *Collins v. Board of Medical Examiners (1972) 29 Cal. App. 3d 439, 444, 105 Cal. Rptr. 634* ; *Goldsmith v. Cal. State Bd. of Pharmacy (1961) 191 Cal. App. 2d 866, 872-873, 13 Cal. Rptr. 139]* .

On the other hand, an objection that the accusation does not state acts or omissions on which the agency may proceed raises a question of the agency's jurisdiction over the subject matter. This objection is not waived and may be raised at any stage of the proceeding, including an appeal [*Manning v. Watson (1952) 108 Cal. App. 2d 705, 710, 239 P.2d 688* ; *Stuck v. Board of Medical Examiners (1949) 94 Cal. App. 2d 751, 755, 211 P.2d 389]* . This rule applies to non-APA proceedings as well [*Mumaw v. City of Glendale (1969) 270 Cal. App. 2d 454, 459-460, 76 Cal. Rptr. 245]* .

[e] Number of Notices and Time of Filing

The notice of defense must be filed within 15 days after service of the accusation. The respondent may file one or more notices of defense on any or all of the grounds listed in [c], *above*, but all of them must be filed within the time specified, unless the agency in its discretion authorizes the filing of a later notice [*Gov. Code § 11506(a)*]. For a form that may be used to request an extension of time to file a notice of defense, see *§ 473A.56*.

[f] Admissions and Statements in Mitigation

Admissions can be made at any time before or during the hearing. Although one function of the notice of defense is to allow the respondent to admit the accusation in whole or in part (*Gov. Code § 11506(a)(4)*; *see* discussion in [c], *above*), admissions are rarely included in a notice of defense as a matter of practice. Practical considerations dictate that admissions should be few and should be limited to admissions of fact, rather than admissions of violations [*see also* discussion in *§ 473A.54[3] -[8]*].

When admissions are made, they do not preclude evidence of aggravation or mitigation, because such evidence concerns the penalty to be imposed, not the guilt or innocence of the respondent. When making an admission, a respondent should nevertheless expressly reserve the right to offer evidence in mitigation.

Prior to 1997, a respondent was entitled to file a statement by way of mitigation even if he or she did not file a notice of defense [*see* former *Gov. Code § 11506(d)*]. That provision has been eliminated in conformity with the requirement that a respondent now file a notice of defense or else waive his or her right to a hearing [*Gov. Code § 11506(c)*; *see* discussion in [b], *above*]. A respondent wishing to present evidence by way of mitigation must therefore file a notice of defense and simply present the evidence at the hearing as part or all of his or her defense [*see* 25 Cal. L. Rev. Comm. Report 55 (1995), comments to *Gov. Code §§ 11506, 11520*].

[g] Affirmative Defenses

Although affirmative defenses may be raised in the notice of defense [*Gov. Code § 11506(a)(5)*; *see* discussion in [c], *above*], it appears that the failure to raise an affirmative defense in the notice of defense does not waive that defense [*see* discussion in *§ 473A.54[3], [4]*]. Two items in *Gov. Code § 11506(c)* support this statement:

- *Gov. Code § 11506(c)* provides that any objection to the form of an accusation must be raised in the notice of defense or that objection is waived [*see* [d], *above*]. Under the rule of statutory interpretation *expressio unius est exclusio alterius* ("the expression of one excludes the other"), the explicit provision for a waiver of objection as to form implies that any other objection not explicitly mentioned is not similarly waived if it not raised [*see Southern Cal. Gas Co. v. Public Utilities Com. (1979) 24 Cal. 3d 653, 659, 156 Cal. Rptr. 733, 596 P.2d 1149* ; *Garson v. Juarique (1979) 99 Cal. App. 3d 769, 774-775, 160 Cal. Rptr. 461* ; *see also* California Points and Authorities, Ch. 217, *Statutory Interpretation*].

- *Gov. Code § 11506(c)* also says that a notice of defense is deemed a specific denial of all parts of the accusation not expressly admitted [*see* discussion in [b], *above*].

At least one court, however, did seem to find the failure to raise an affirmative defense in the notice of defense a significant point. In that case the court twice stressed the respondent's failure to raise a claim of laches in the notice of defense, noting that it was of interest that no new matter by way of defense was alleged; but the court's holding that the claim failed was based only its conclusion that the claim was first raised on appeal and no evidence in support of it had been offered in the administrative proceeding or in superior court [*Windham v. Board of Medical Quality Assurance (1980) 104 Cal. App. 3d 461, 465, 474, 163 Cal. Rptr. 566* (citation omitted)].

Unless some strategic reason exists for withholding a particular affirmative defense, the whole question may be avoided by presenting new matter by way of defense in the notice, as allowed by *Gov. Code § 11506(a)(5)*.

The affirmative defense that compliance with the requirements of a regulation would result in the material violation of another agency's regulation [*see Gov. Code § 11506(a)(6)*] is a recent response to the classic dilemma illustrated by the case of *Barnard v. Carey* [*Barnard v. Carey (D.C. Ohio 1945) 60 F. Supp. 539]* . In *Barnard*, the Internal Revenue Service was threatening to tax soya butter and require it to be labeled as oleomargarine, while the Federal Security Agency threatened to impose penalties if it was labeled as oleomargarine. In the absence of express statutory authority, the federal court used its general equitable jurisdiction and inherent power to resolve the dilemma. A similar dilemma involving regulations can now be raised at the administrative level pursuant to *Gov. Code § 11506(a)(6)*.

[h] Notice of Defense Not Required When Respondent Has Already Requested Hearing

When an agency serves a statement of issues on a respondent before the respondent has made any request for a hearing,

the APA requires the respondent to file a notice of defense [*Gov. Code §§ 11504, 11504.5*]. If, however, the agency files a statement of issues in response to a respondent's request for a hearing, the requirements for filing a notice of defense do not apply [*Gov. Code § 11504*]. Although the respondent is not required to file a notice of defense in the latter event, he or she does not appear to be precluded from doing so, to raise any of the matters listed in *Gov. Code § 11506(a)* (discussed in [c], *above*).

[i] Non-APA Proceedings

In non-APA proceedings, no notice of defense requirement exists. Parties must check the appropriate statutes, ordinances, or regulations to see whether a responsive pleading is required, the form it must take, and the applicable filing procedure. Although failure to raise a jurisdictional issue in a responsive pleading would not waive the issue [*Mumaw v. City of Glendale (1969) 270 Cal. App. 2d 454, 459-460, 76 Cal. Rptr. 245]* , the failure to object that the complaint does not give adequate notice of the charges may waive any such defects in the complaint [*Vaughn v. Board of Police Commrs. (1943) 59 Cal. App. 2d 771, 778, 140 P.2d 130 , appeal dismissed, 321 U.S. 751, 64 S. Ct. 639, 88 L. Ed. 1052 (1943)]* .

[7] Verification

Under the APA, both accusations and statements of issues must be verified unless made by a public officer acting in his or her official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief [*Gov. Code §§ 11503, 11504*]. A notice of defense does not have to be verified; it need only be signed by or on behalf of the respondent and include the respondent's mailing address [*Gov. Code § 11506(d)*].

In the absence of a statutory requirement for verification, pleadings in non-APA proceedings do not have to be verified [*Sullivan v. State Bar (1946) 28 Cal. 2d 488, 493-494, 170 P.2d 888 , overruled on other grounds*; *Stratmore v. State Bar (1975) 14 Cal. 3d 887, 890, 123 Cal. Rptr. 101, 538 P.2d 229* ; *Board of Education v. Jewett (1937) 21 Cal. App. 2d 64, 69, 68 P.2d 404]* . Guidance for verification procedures can be found in the statutes governing verification in civil pleadings [*see Code Civ. Proc. § 446* (verification of pleadings in civil actions)]. For a discussion of verification of pleadings in civil actions, with related forms, see Ch. 572, *Verification* .

[8] Filing

Administrative pleadings, including APA accusations and statements of issues, are usually "filed" with the administrative agency involved. Accusations and statements of issues are not filed with the Office of Administrative Hearings (OAH). The OAH becomes involved only if the agency sends it the case for hearing. Under the APA, every hearing in a contested case must be presided over by an administrative law judge (ALJ). The agency itself decides whether (1) the ALJ hears the case alone or (2) the agency hears the case with the ALJ [*Gov. Code § 11512(a)*].

The ALJ is assigned by the OAH [*see Gov. Code § 11370.3* (director of OAH assigns an ALJ to every APA hearing and may on agency's request assign an ALJ or other hearing officer to other administrative proceedings)]. After a case has been assigned to an ALJ, copies of all pleadings, motions, and other appropriate documents filed with an agency should also be sent to the ALJ. For further discussion and forms relating to assignment and other procedures involving the ALJ, see Ch. 473E, *Public Administrative Law Judges* .

What constitutes "filing" depends on the agency's practice. When a particular pleading is deemed filed by an agency, the date of filing should be indicated on the document. This date is essential for determining time-limit issues. A notice of defense [*see* discussion in [6], *above*] under the APA must be filed within 15 days of service of an accusation [*Gov. Code § 11505(a), (b)*]. A notice of defense is "filed" when it is delivered or mailed to the agency within 15 days after the accusation was personally served on or mailed to the respondent [*Gov. Code §§ 11506(e)* (definition of "filed" with reference to notice of defense), 11505(b) (delivery or mailing within 15 days required)].

[9] Service

[a] Accusations and Statements of Issues

Accusations may be served by sending a copy of the accusation and the required accompanying information to the respondent by regular mail addressed to the last known address of the respondent, or by personal service, at the option of the agency [*Bus. & Prof. Code § 124*]. Statements of issues may be served in the same way unless the respondent has already requested a hearing [*Gov. Code § 11504*; *see* discussion in [b], *below*].

The agency may not make an order that adversely affects the respondent's rights, however, unless the respondent has been served personally or by registered mail, or has filed a notice of defense or otherwise appeared. Service by registered mail to the latest address on file with the agency is effective if the agency requires the respondent to keep his or her current address on file with the agency [*Gov. Code § 11505(c)*]. Registered mail service to an established business address that the regulated business is required to file with the agency satisfies due process requirements of notice prior to license revocation proceedings because this method of notice is reasonably likely to inform the regulated party [*Evans v. Department of Motor Vehicles (1994) 21 Cal. App. 4th 958, 970-971, 26 Cal. Rptr.2d 460* ; *Baughman v. Medical Board (1995) 40 Cal. App. 4th 398, 403, 46 Cal. Rptr. 498* ; *Miller Family Home, Inc. v. Department of Social Services (1997) 57 Cal. App. 4th 488, 492-493, 67 Cal. Rptr. 2d 171]* . Because of this limit on their power to make orders adverse to the respondent, agencies usually effect service by personal service or registered mail. Proof of service can be made as in civil actions [*Gov. Code § 11505(c)*]. Proof of service in civil actions is governed by *Code Civ. Proc. § 417.10 et seq.* [*see generally* Ch. 518, *Service of Summons and Papers*].

While the agency may include any information it deems appropriate, when the accusation or statement of issues is served it *must* be accompanied by the following documents [*Gov. Code § 11505(a)*]:

- A form notice of defense.
- Copies of *Gov. Code §§ 11507.5-11507.7* governing discovery in APA proceedings.
- A statement that the respondent may request a hearing by filing a notice of defense within 15 days after service of the accusation or statement of issues, and that failure to do so will constitute a waiver of the right to a hearing. The statement to the respondent must also include (a) notice that the respondent may be represented by counsel; (b) the name and address of the agency person to contact for discovery; and (c) information on postponing the hearing [*Gov. Code § 11505(b)*].

[b] Statements of Issues Served and Filed in Response to a Respondent's Request for a Hearing

As noted in [a], *above*, a statement of issues in response to a respondent's request for a hearing [*Gov. Code § 11504*] is served and filed differently from a statement of issues served before the respondent has made any request for a hearing. The latter type of statement is similar in nature to an accusation and is subject to the same service and filing requirements [*see* discussion in [a], *above*]. A statement of issues served after a respondent's request for hearing is, by contrast, delivered or mailed to the parties along with a notice of hearing at least 10 days before the hearing [*Gov. Code § 11509*]. The service must include copies of *Gov. Code §§ 11507.5-11507.7*, relating to discovery in APA proceedings, and the name and address of the agency person to contact for discovery [*Gov. Code § 11504*].

For further discussion of the requirements for a notice of hearing, see [c], and [10][b], *below*.

[c] Notice of Hearing Under the APA

In APA proceedings, the agency must either mail or deliver a notice of hearing to all parties [*Gov. Code § 11509*]. The

notice must be delivered or mailed at least 10 days before the hearing [*Gov. Code § 11509*]. For discussion of this requirement, see [10][b], *below*.

[d] Notice of Hearing in Non-California APA Proceedings

In non-APA proceedings, service of pleadings and other documents is sometimes provided for by statute or ordinance. In the absence of statutory requirements for service, some form of actual notice is required [*Simpson v. City of Los Angeles (1953) 40 Cal. 2d 271, 280, 253 P.2d 464 , appeal dismissed, 346 U.S. 802, 74 S. Ct. 37, 98 L. Ed. 333 (1953)* ; *see Milliken v. Meyer (1940) 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278* (due process requires a form of service of process that gives actual notice of the proceedings and an opportunity to be heard)].

[10] Notice of Hearing

[a] Due Process Requirements

Adequate notice of hearing is essential to procedural due process [*Carstens v. Pillsbury (1916) 172 Cal. 572, 577, 158 P. 218* ; *People v. Lockheed Shipbuilding & Constr. Co. (1973) 35 Cal. App. 3d 776, 780-781, 111 Cal. Rptr. 106* ; *Rudolph v. Athletic Commission (1960) 177 Cal. App. 2d 1, 12-13, 1 Cal. Rptr. 898]* . An agency cannot require that adequate notice be waived [*Carroll v. California Horse Racing Bd. (1940) 16 Cal. 2d 164, 168-169, 105 P.2d 110]* . For a discussion of the right to notice of administrative action, see Chapter 473, *Public Agency Adjudication* [*see also* Ch. 470A, *Due Process Restrictions on Public Agencies*].

When a party wants to object to notice, the party should not wait for the hearing to do so. Rather, the party should make a showing of prejudice and request a continuance; if the party has been notified to attend a proceeding, and does so, the party does not have the basis to complain of the insufficiency of the notice [*DeLuca v. Board of Supervisors (1955) 134 Cal. App. 2d 606, 609, 286 P.2d 395]* .

The operator of a nude entertainment establishment was not denied any due process of law rights by the decision of the City of San Diego to suspend the operators required police permit because the operator violated provisions of city regulations that applied to his business. The California Court of Appeal rejected the operators due process challenge based on untimely notice of the charged violations. Notice regarding most of the violations was given within two weeks of the date of the violation. Delay in the giving notice of the violations did not cause any actual prejudice to the operator, and there was no showing of lost witnesses or other evidence. The operator had the burden of proof of showing actual prejudice from delay, and there was no such proof. Finally, the suspension was based on numerous violations over an extended period of time, and the operator had more than sufficient notice of those violations [*Krontz v. City of San Diego (2006) 136 Cal. App. 4th 1126, 1140-1141, 39 Cal. Rptr. 3d 535]* .

The California Court of Appeal held that the California Coastal Commission did not deprive a developer of the due process right to notice of a hearing in which the commission considered a citizen's group appeal of the granting of a coastal development permit sought by the developer. The court concluded that the notice given to the developer was adequate to inform him of the issues to be considered at the hearing. The written notice of the commission hearing considering the appeal of the coastal development permit merely stated the date, time, and place of the hearing, but the commission sent the developer a copy of the appeal document filed by a group of local citizens, and that document contained a statement of the issues on appeal. Also, the developer was familiar with the issues to be appealed since he had participated in the development permit proceedings at the local government (county) level [*Benson v. Cal. Coastal Comm'n (2006) 139 Cal. App. 4th 348, 353-354, 42 Cal. Rptr. 3d 580]* .

[b] APA Notice Requirements

The California APA requires an agency to deliver or mail a notice of hearing to all parties at least 10 days before the hearing. The hearing itself cannot be held until the time for respondent to file a notice of defense has expired (15 days

after service of the accusation or statement of issues) [*Gov. Code § 11509*; *see Gov. Code §§ 11505, 11506* (notice of defense); *see also* discussion in [6], *above*]. Although it may include other information, the notice must be substantially in the form required by statute [*Gov. Code § 11509*].

[c] Computing Time Period for Notice

In computing the 10-day-notice period under the California APA, the day of mailing or delivery is excluded and the last day is included [*Code Civ. Proc. §§ 12, 1013*]. This method of computation was apparently applied incorrectly in one case [*Cooper v. Board of Medical Examiners (1975) 49 Cal. App. 3d 931, 123 Cal. Rptr. 563]* in which the Board of Medical Examiners failed to give notice "*at least* 10 days prior to the hearing" [*Gov. Code § 11509*] because it convened a hearing on the tenth day. The hearing should have begun on the eleventh day [*Cooper v. Board of Medical Examiners (1975) 49 Cal. App. 3d 931, 942, 123 Cal. Rptr. 563]* .

One court of appeal panel held that the extension of time provided by *Code Civ. Proc. § 1013(a)* for service by mail does not apply to notice of hearing under *Gov. Code § 11509* [*Governing Board v. Felt (1976) 55 Cal. App. 3d 156, 163, 127 Cal. Rptr. 381]* , because *Code Civ. Proc. § 1013(a)* applies only when some act must be done or a right exercised within a specified number of days after service, and does not apply to the right to be present at a proceeding for which a prescribed notice must be given [*Brown v. Rouse (1897) 115 Cal. 619, 621-622, 47 P. 601]* .

Subsequently, however, *Code Civ. Proc. § 1013(a)* was amended [1980 Stats., ch. 196, § 2], to provide that the extension of notice time for mailing now applies to notice of a hearing or other proceeding, and includes "any prescribed period of notice." Whether *Code Civ. Proc. § 1013(a)* applies to administrative proceedings is not clear. It has been held that it does apply to the time allowed to appeal a decision of the Department of Alcoholic Beverage Control to the Alcoholic Beverage Control Appeals Board [*Pesce v. Dept. Alcoholic Bev. Control (1958) 51 Cal. 2d 310, 313, 333 P.2d 15]* . Assuming that *Code Civ. Proc. § 1013* applies to administrative proceedings, it is arguable that the minimum period of time for a notice of hearing should be 15 days from the date of mailing if the place of address is within California [*see Code Civ. Proc. § 1013(a)* (service of notice by mail extends prescribed period of notice by five days when place of address is within California); *Code Civ. Proc. § 1013(c), (e)* (time extended by two court days when notice is served by facsimile transmission, express mail, or other overnight delivery service)].

In practice, APA notices of hearing usually provide more than either 10 or 15 days' notice. Notices are sent out soon after the Office of Administrative Hearings (OAH) gives the agency a hearing date. For calendar reasons, OAH regularly sets hearings three or four months in advance.

[d] Postage and Correct Address Not Required for Service by Mail

A mailed notice of hearing under the APA does not require a correct address or prepaid postage, as long as these defects do not impede the respondent's receipt of the notice [*Governing Board v. Felt (1976) 55 Cal. App. 3d 156, 163-164, 127 Cal. Rptr. 381]* . The mailing requirement of *Gov. Code § 11509* is substantially complied with if the improperly mailed notice is deposited in the mail and reaches the respondent as effectively and speedily as one correctly addressed with adequate postage [*Governing Board v. Felt (1976) 55 Cal. App. 3d 156, 163-164, 127 Cal. Rptr. 381* ; *Vo v. Board of Medical Quality Assurance (1991) 235 Cal. App. 3d 820, 825, 826 n.2, 1 Cal. Rptr. 2d 127]* .

[e] Notice of Continued Hearings

The APA does not provide for notice of a continued hearing. Although notice of a continued hearing may not be required when the respondent knows or should know the time and date of the continued hearing [*see McPheeters v. Board of Medical Examiners (1947) 82 Cal. App. 2d 709, 715, 187 P.2d 116]* , agencies routinely serve notices of continued hearings.

[11] Time and Place of Hearing

The date, time, and place of a APA hearing is set forth in the notice of hearing [*see Gov. Code § 11509*]. The date and time of the hearing is usually determined by the Office of Administrative Hearings (OAH) calendar. The place of hearing may be determined by the APA, by the agency, or by agreement of the parties. In the absence of an agreement by the parties, the place of hearing is normally determined either by where the transaction in issue occurred or where the respondent resides.

The time and place of hearing is determined by the agency. The agency shall consult the office, and subject to the availability of its staff, shall determine the time and place of the hearing. The hearing shall be held at a hearing facility maintained by the office in Sacramento, Oakland, Los Angeles, or San Diego and shall be held at the facility that is closest to the location where the transaction occurred or the respondent resides [*Gov. Code § 11508(a)*]. Alternatively, the hearing may be held at either of the following places [*Gov. Code § 11508(b)(1), (2) Gov. Code § 11508(b)(1), (2)*]:

> (1) A place selected by the agency that is closer to the location where the transaction occurred or the respondent resides.
>
> (2) A place within the state selected by agreement of the parties. The respondent may move for, and the administrative law judge has discretion to grant or deny, a change in the place of the hearing. A motion for a change in the place of the hearing shall be made within 10 days after service of the notice of hearing on the respondent [*Gov. Code § 11508(c)*]. Unless good cause is identified in writing by the administrative law judge, hearings shall be held in a facility maintained by the office. [*Gov. Code § 11508*].

If the places where the transaction occurred and where the respondent resides are in different appellate districts, and two different hearinglocations are possible, the agency can pick either county [*Gov. Code § 11508(b)(1)*; *Cal-Am Corp. v. Department of Real Estate (1980) 104 Cal. App. 3d 453, 459, 163 Cal. Rptr. 729]* .

For the convenience of parties and witnesses, and for other reasons such as the incarceration of the respondent, the agency may select a hearing place nearer to the place where the transaction occurred or where the respondent resides than the counties designated for hearings [*Gov. Code § 11508(b)(1)*; *see Campbell v. Board of Dental Examiners (1971) 17 Cal. App. 3d 872, 876-877, 95 Cal. Rptr. 351* (hearing for dentist jailed in San Diego properly held in San Diego although he lived elsewhere); *McPheeters v. Board of Medical Examiners (1947) 82 Cal. App. 2d 709, 713-715, 187 P.2d 116* (when respondent resides and transaction occurred in Fresno, agency may hold hearing in Sacramento rather than Los Angeles because Sacramento is closer to Fresno)].

The parties may mutually agree to have the hearing held any place within California [*Gov. Code § 11508(b)(2)*].

The OAH or the agency normally determines the exact location of the hearing within the appropriate county. Hearings in Los Angeles, Oakland, San Diego, and Sacramento are usually held at the local OAH hearing rooms, but are sometimes held in other parts of the counties. Regardless of where the hearing is held, the actual hearing room should be a place in keeping with a formal, quasi-judicial proceeding.

Respondent may move for, and the administrative law judge has discretion to grant or deny, a change in the place of hearing. If respondent wants to change the place of hearing, respondent must make a motion for a change in the place of the hearing within 10 days after service of the notice of hearing on respondent [*Gov. Code § 11508(c)*].

[12] Affirmative Defenses

In any adjudicatory proceeding, new matter constituting a defense should be raised early and in the pleadings whenever possible. In civil court proceedings, affirmative defenses are raised in the answer [*Code Civ. Proc. § 431.30(b)(2)*]. In

APA proceedings, "new matter by way of defense" may, but need not, be raised in the notice of defense [*Gov. Code § 11506(a)(5)*; *see* discussion in [6][g], *above*].

In other administrative proceedings, affirmative defenses should be raised in accordance with the agency's practice. For example, affirmative defenses are raised in the answer in compensation hearings [*Lab. Code § 5505*]. As with civil proceedings, an affirmative defense not raised in the pleadings may be deemed waived in a compensation hearing [*Lab. Code § 5505*]. Although most ALJs and agencies are liberal in allowing presentation of evidence of defenses regardless of whether the defense could havebeen pleaded, it is a good practice to plead them [*see also* discussion in [6][g], *above*].

The APA procedural requirements refer to "any new matter by way of defense" [*Gov. Code § 11506(a)(5)*; *see* discussion in [6][g], *above*]. What constitutes an affirmative defense in non-APA proceedings is less clear. Issues of estoppel, laches, lapse of the applicable statute of limitation, illegality, res judicata, waiver, bankruptcy, and similar matters that go beyond just showing that the administrative charges are not true should be raised as affirmative defenses. Anything the respondent intends to rely on that has not been put at issue by the agency should be affirmatively pleaded to prevent either waiver or unfair surprise.

For further discussion of laches and statutes of limitation, *see § 473A.12*.

[13] Demurrers

Under the APA, a challenge to the sufficiency of the accusation or statement of issues should be included as part of the respondent's notice of defense, although the respondent is not precluded from raising the objection later [*Gov. Code § 11506(a)(2)*; *see* discussion in [6], *above*].

Similarly, special demurrers based on the form of an allegation, such as a claim that the allegation is indefinite or uncertain [*see Gov. Code § 11506(a)(3)* (respondent may object in notice of defense that form of accusation or statement of issues is so indefinite or uncertain that respondent cannot identify the transaction or prepare a defense)], must also be included in the notice of defense, in order to allow the administrative law judge to consider the objection, and, if it is sustained, to allow time to amend the pleading [*see Gov. Code § 11507* (amended or supplemental pleadings, discussed in [5], *above*)]. *Gov. Code § 11506(b)* provides that the respondent's failure to object to the indefiniteness or uncertainty of the accusation or statement of issues in his or her notice of defense waives all objections as to the form of the accusation or statement [*see* discussion in [6][d], *above*].

Objections to the form of the accusation or statement of issues in the notice of defense usually are not communicated to the assigned ALJ until the notice of defense is marked with the other pleadings at the start of the hearing. By this time, any vagueness or uncertainty in the pleadings may have been cured by discovery [*see* Ch. 473B, *Discovery in Agency Adjudications* , for discussion of discovery in administrative hearings], or by the respondent's own knowledge of the event that the pleadings imperfectly describe [*see Burako v. Munro (1959) 174 Cal. App. 2d 688, 690-691, 345 P.2d 124* (vagueness of allegations in accusation held not to have hampered respondents in preparing defense, because one respondent, testifying in own defense, readily identified the incident and customer, and named several people who were present)]. In practice, an ALJ confronted with impermissibly vague pleadings may provide a limited continuance to a respondent who can establish an inability to prepare a defense or actual surprise at the hearing. However, an ALJ sitting alone cannot grant a motion to dismiss [*Kramer v. State Board of Accountancy (1962) 200 Cal. App. 2d 163, 175, 19 Cal. Rptr. 226]* .

As for non-APA proceedings, the specific procedures of a number of agencies provide some method by which a respondent may test the sufficiency of written allegations by a demurrer or demurrer-type objection. If no express provision exists for a demurrer, it will be implied [*see Dyment v. Board of Medical Examiners (1922) 57 Cal. App. 260, 262-264, 207 P. 409* (considerations of justice and natural rights require that no one be brought to trial on insufficient charges; this rule applies to medical board license hearings)]. As with APA procedures, any special

demurrer or objection as to form, uncertainty, or indefiniteness, should be raised as early as possible to allow for consideration and amendment, or it may be deemed waived.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawAgency AdjudicationHearingsRight to HearingStatutory RightAdministrative LawAgency AdjudicationImpartialityParticipation in ProsecutionAdministrative LawAgency AdjudicationPrehearing ActivityConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of Protection

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§ 473A.12 Limitations of Action and Laches

[1] Applicability

Statutes limiting the time in which an administrative proceeding may be begun are sometimes included in an agency's governing act. These specific statutes of limitation should be raised as affirmative defenses [*see* discussion in *§ 473A.11[12]*]. For example, an accusation against a licensee regulated by the Board of Behavioral Sciences must be brought within three years from the date the Board discovers the alleged act or omission that is the basis for disciplinary action, or within seven years from the date the alleged act or omission that is the basis for disciplinary action occurred, whichever occurs first [*Bus. & Prof. Code § 2960.05(a)*].

An accusation brought against a real estate licensee for disciplinary action must be filed within three years of the occurrence of the grounds for disciplinary action [*Bus. & Prof. Code § 10101*]. An accusation brought under *Bus. & Prof. Code § 10177(f)* (suspension of a license issued by a different government agency) against a real estate licensee whose law license was suspended by the State Bar was timely filed when it was brought within three years of the date of the suspension of the licensee's law license. The date of the suspension was the date of occurrence of the grounds of the suspension, not the date of the underlying misconduct that led to suspension of the law license [*Herrera v. Department of Real Estate (2001) 88 Cal. App. 4th 776, 779-780, 106 Cal. Rptr. 2d 232]* .

Accusations that are brought by the Department of Fair Employment and Housing against employers for violations of the Fair Employment and Housing Act, must be brought within two years after the filing of the complaint for group or class complaints under *Gov. Code § 12961*, two years after the filing of complaints under *Civil Code § 51.7*, and one year after the filing of the complaint for all other complaints [*Gov. Code § 12965(a)*].

Statutes of limitation barring civil actions do not apply to administrative actions. In the absence of a specific limitations statute pertaining to an administrative action, that action is not barred by the mere lapse of time [*Bernd v. Eu (1979) 100 Cal. App. 3d 511, 515-516, 161 Cal. Rptr. 58]* . However, if the delay in commencing an administrative proceeding is an unreasonable delay and the respondent has been prejudiced by this delay, courts have the inherent power to dismiss the proceeding [*Fahmy v. Medical Bd. of California (1995) 38 Cal. App. 4th 810, 815-816, 45 Cal. Rptr. 2d 486* (laches defense not established because doctor could not prove prejudice in Board's delay in bringing disciplinary

charges against doctor); *Gates v. Department of Motor Vehicles (1979) 94 Cal. App. 3d 921, 925, 156 Cal. Rptr. 791* (on petition for a writ of mandamus)].

The time to be considered in determining whether an unreasonable delay has occurred is the period from the time the agency learned or should have learned the facts on which the action is based to the time the action was formally commenced [*Gore v. Board of Medical Quality Assurance (1980) 110 Cal. App. 3d 184, 193, 167 Cal. Rptr. 881]* .

The courts also have inherent power to dismiss an administrative proceeding that has been commenced but has not been diligently prosecuted [*Steen v. City of Los Angeles (1948) 31 Cal. 2d 542, 546-547, 190 P.2d 937]* . In measuring "diligence," the courts apply notions of laches borrowed from the civil law [*Hope Rehabilitation Services v. Department of Rehabilitation (1989) 212 Cal. App. 3d 938, 948, 261 Cal. Rptr. 123* ; *Brown v. State Personnel Bd. (1985) 166 Cal. App. 3d 1151, 1159, 213 Cal. Rptr. 53]* .

[2] Elements of Laches

[a] Unreasonable Delay and Resulting Prejudice

The defense of laches requires unreasonable delay and either the respondent's acquiescence to the act complained of, or prejudice to the respondent resulting from the delay. There is no fixed rule on the circumstances that must exist or on the period of time that must elapse before the doctrine of laches applies. What makes delay unreasonable is that it results in prejudice [*Hope Rehabilitation Services v. Department of Rehabilitation (1989) 212 Cal. App. 3d 938, 948, 261 Cal. Rptr. 123* ; *Brown v. State Personnel Bd. (1985) 166 Cal. App. 3d 1151, 1159, 213 Cal. Rptr. 53]* .

[b] Determining When Delay Is Unreasonable

In administrative cases when no specific statute of limitations applies, but a statute governs an analogous action at law, that period may be borrowed as a measure of the outer limit of reasonable delay. Whether the court will borrow the statutory period depends on the strength of the analogy between the action at law and the administrative proceeding [*Brown v. State Personnel Bd. (1985) 166 Cal. App. 3d 1151, 1158-1160, 213 Cal. Rptr. 53]* .

[c] Determining Prejudice Resulting From Delay

Prejudice from delay is often difficult to prove. The inability of a witness to recall exact words is not sufficient [*Vaughn v. State Bar (1973) 9 Cal. 3d 698, 702-703, 108 Cal. Rptr. 806, 511 P.2d 1158]* . A general claim of prejudice is not sufficient, and prejudice cannot be presumed [*Caldwell v. State Bar (1975) 13 Cal. 3d 488, 496, 119 Cal. Rptr. 217, 531 P.2d 785* ; *Lewis v. State Bar (1973) 9 Cal. 3d 704, 714, 108 Cal. Rptr. 821, 511 P.2d 1173* ; *Fahmy v. Medical Bd. of California (1995) 38 Cal. App. 4th 810, 815-816, 45 Cal. Rptr. 2d 486* (laches defense not established because doctor could not prove prejudice in Board's delay in bringing disciplinary charges against doctor)]. Added difficulty in locating a witness and the loss of a record to determine a conflict in testimony are not necessarily prejudicial [*see* *Taylor v. State Bar (1974) 11 Cal. 3d 424, 434-435, 113 Cal. Rptr. 478, 521 P.2d 470* (loss of contact with witness not prejudicial when party had six months after trial hearing and before hearing of disciplinary board to locate witness and to apply for leave to present additional evidence; claimed certificate of good standing from time when State Bar did not keep such records could have been substantiated by offer in evidence of copy allegedly given to party)]. When the memories of witnesses have diminished to the point that the respondent cannot engage in effective cross-examination, then respondent has been prejudiced by the delay [*Gates v. Department of Motor Vehicles (1979) 94 Cal. App. 3d 921, 925-926, 156 Cal. Rptr. 791]* .

The burden of proving prejudice is on the party asserting it [*Conti v. Board of Civil Service Commissioners (1969) 1 Cal. 3d 351, 361, 82 Cal. Rptr. 337, 461 P.2d 617]* . When the delay exceeds the period of an analogous statute of limitations that has been "borrowed" by the court [*see* discussion in [b], *above*], however, the violation of the analogous statute shifts the burden to the agency to prove that the delay was excusable and that the respondent was not prejudiced

by it [*Brown v. State Personnel Bd. (1985) 166 Cal. App. 3d 1151, 1161, 213 Cal. Rptr. 53]* .

This burden may be very difficult to meet. To excuse delay, the responsible party must show that exceptional circumstances prevented earlier action. Under these circumstances, mere detrimental reliance on the status quo by the affected party is enough to establish prejudice [*Brown v. State Personnel Bd. (1985) 166 Cal. App. 3d 1151, 1161-1162, 213 Cal. Rptr. 53]* .

[3] Application of Laches by Agency Itself

Agencies as well as courts can apply the laches doctrine to dismiss administrative actions; this issue should be raised at the administrative level [*see, e.g.,* *Brown v. State Personnel Bd. (1985) 166 Cal. App. 3d 1151, 1155, 213 Cal. Rptr. 53* (at outset of board hearing, respondent argued that two of the three instances charged were so remote that delay in prosecution should bar their use in the proceeding against him)].

To avoid concerns about waiving laches as an affirmative defense, and to avoid claims that respondent has not exhausted his or her administrative remedies, respondent's counsel should raise laches early as an affirmative defense and make an adequate showing on the record of both unreasonable delay and prejudice. How the ALJ determines the issue may depend on whether the judge has authority to make a final decision [*see* Ch. 473E, *Public Administrative Law Judges*].

If the final decision rests with the agency itself, a decision on laches will be reserved and made part of the judge's proposed decision. If the agency decides not to adopt a proposed decision to dismiss for laches, there will be an administrative hearing on the merits. Counsel must be prepared at the hearing to defend on the merits.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationHearingsGeneral OverviewGovernmentsLegislationStatutes of LimitationsPleading & ProofGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 473A.13 Unconstitutional Statutes

Cal. Const., art. III, § 3.5, casts some doubt on whether the constitutionality of a statute on which an agency is proceeding can be raised in an administrative proceeding as an affirmative defense or in a demurrer to the agency's allegations. Section 3.5 declares that an administrative agency has no power to do the following [*Cal. Const., art. III, § 3.5*]:

- Declare a statute unenforceable or refuse to enforce it on the basis that it is unconstitutional unless an appellate court has found the statute unconstitutional.

- Declare a statute unenforceable or refuse to enforce it on the basis of federal preemption unless an appellate court has so held.

- Declare a statute unconstitutional.

Although *Cal. Const., art. III, § 3.5*, seems to preclude or severely restrict constitutional challenges at an administrative hearing, these issues should be raised in the pleadings at the administrative level and a record should be made of the challenge. There are several reasons for doing this.

First, the section by its terms does not prevent the mere hearing of a constitutional challenge, only the declaration that a statute is unconstitutional or the refusal to enforce it on this basis [*Cal. Const., art. III, § 3.5*]. These terms have led one federal court, applying California law, to hold that the failure to raise a constitutional challenge at the administrative level may limit a later court challenge [*see Southern Pacific Transp. Co. v. Public Utilities Com. (9th Cir. 1983) 716 F.2d 1285, 1291* (preemption claim not raised in administrative hearing is res judicata after California Supreme Court's denial of petition for review)]. Two divisions of the California court of appeals, however, have disagreed [*see Cowan v. Myers (1986) 187 Cal. App. 3d 968, 975-976, 232 Cal. Rptr. 299* (requirement of exhaustion of remedies no bar when state statute challenged as violation of federal law); *Chevrolet Motor Division v. New Motor Vehicle Bd. (1983) 146 Cal. App. 3d 533, 539, 194 Cal. Rptr. 270* (failure to challenge constitutionality of statute before administrative tribunal does not waive the issue)].

It is impossible to predict the extent to which an ALJ will allow evidence on a constitutional challenge that may be irrelevant to the issues the agency can actually decide.

Second, *Cal. Const., art. III, § 3.5*, applies to challenges to statutes. It does not affect an agency's enforcement of its own rules or its power to examine evidence concerning them in light of constitutional standards [*Goldin v. Public Utilities Commission (1979) 23 Cal. 3d 638, 669 n.18, 153 Cal. Rptr. 802, 592 P.2d 289* ; *Lewis-Westco & Co. v. Alcoholic Bev. etc. Appeals Bd. (1982) 136 Cal. App. 3d 829, 840, n. 12, 186 Cal. Rptr. 552* ; *see* Dash, Inc. v. Alcoholic Beverage Control Appea ls *Bd. (9th Cir. 1982) 683 F.2d 1229, 1233-1235* (applying California Law)]. Thus, if the challenge affects regulations, the agency has the power to decide it.

Third, an agency can still interpret the law in discharging its duties. The agency may consult federal law (or constitutional law) to determine if the state law can be enforced without offending the federal law (or the constitution). The preemption issue or the constitutional challenge can thus be resolved by interpreting the state law in a way that avoids the issue [*see* *Regents of University of California v. Public Employment Relations Bd. (1983) 139 Cal. App. 3d 1037, 1042, 189 Cal. Rptr. 298]* . In addition, an agency decision on nonconstitutional issues may obviate the consideration of constitutional challenges [*see* *Leek v. Washington Unified School Dist. (1981) 124 Cal. App. 3d 43, 53, 177 Cal. Rptr. 196]* .

Fourth, the constitutional challenge may go to legislation already held unconstitutional in the past and that is thus now "patently unconstitutional." If a law is patently unconstitutional, *Cal. Const., art. III, § 3.5*, does not bar an agency from recognizing that fact by refusing to enforce the law [*see* *Schmid v. Lovette (1984) 154 Cal. App. 3d 466, 473-474, 201 Cal. Rptr. 424]* .

Fifth, if *Cal. Const., art. III, § 3.5*, does prevent the agency from acting on the challenge, a proper record can obviate the need for taking evidence in a later court challenge. The record will expedite the court proceedings and eliminate the issue of whether the respondent exhausted its administrative remedies. A proper record is important because it allows the respondents to show that they exhausted their administrative remedies even when alleging constitutional violations [*Leek v. Washington Unified School Dist. (1981) 124 Cal. App. 3d 43, 53, 177 Cal. Rptr. 196]* .

The Court of Appeal held that the Public Utilities Commission was not prohibited by *Cal. Const. Art. III, § 3.5* (administrative agency prohibited from declaring unenforceability or refusing to enforce state statute on grounds that statute is unconstitutional, or inconsistent with federal law, unless appellate court has made such a determination of unconstitutionality, or prohibited by federal law) from enforcing a state statute on grounds that the statute was inconsistent with another state statute that the PUC was required to enforce. PUC did not violate separation of powers by refusing to enforce the inconsistent statute [*Burlington Northern and Santa Fe Railway Co. v. Public Utilities Commission (2003) 112 Cal. App. 4th 881, 887-888, 891, 5 Cal. Rptr. 3d 503]* .

A local executive official, the Mayor of the City and County of San Francisco, who had a ministerial duty to enforce a state statute limiting marriage to couples of the opposite sex, exceeded his authority when he decided unilaterally that the marriage statute was unconstitutional and ordered the clerk office's to start issuing marriage licenses to same sex couples. A local executive official does not possess the authority to refuse to enforce a state statute without a court first determining that the statute is unconstitutional. The California Supreme Court issued a writ of mandate ordering the Mayor and other San Francisco officials to enforce the state marriage statute and to correct the consequences of past unauthorized actions [*Lockyer v. City and County of San Francisco (2004) 33 Cal. 4th 1055, 1068-1069, 17 Cal. Rptr. 3d 225, 95 P.3d 459]* . The California Supreme Court did not decide whether the provisions of *Cal. Const. art. III, § 3.5* apply to local officials or merely to state administrative agencies, but the court extensively discussed the history and background that led to the adoption of that provision of the constitution. The court did decide that California law prior to the adoption of that constitutional provision did not allow local officials the authority to determine the constitutionality of state statutes [*Lockyer v. City and County of San Francisco (2004) 33 Cal. 4th 1055, 1092-1093, 17 Cal. Rptr. 3d 225, 95 P.3d 459]* , and did decide that the provisions of *Cal. Const. art. III, § 3.5* "did not grant or

expand" local executive officials authority to determine whether a particular state statute was unconstitutional [*Lockyer v. City and County of San Francisco (2004) 33 Cal. 4th 1055, 1085-1086, 17 Cal. Rptr. 3d 225, 95 P.3d 459]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityExhaustion of RemediesAdministrative LawSeparation of PowersConstitutional ControlsAuthority to AdjudicateValidity of LegislationConstitutional LawSupremacy ClauseFederal Preemption

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§ 473A.14 Parties and Interested Third Persons

[1] Definition of Party and Participation of Third Persons

The APA defines a "party" to include the agency, the respondent, and "any person, other than an officer or an employee of the agency in his or her official capacity, who has been allowed to appear or participate in the proceeding" [*Gov. Code § 11500(b)*; *see also Gov. Code § 11405.60*, definition of party for purposes of *Gov. Code § 11400 et seq.*]. This definition, along with other provisions of the APA [*see, e.g., Gov. Code § 11507* (filing of amended or supplemental accusations or statements of issues); *see also* discussion in *§ 473A.11[5]*], make it clear that agencies may allow interested third persons to become parties and participate in APA adjudicatory proceedings. Further, third persons may be allowed to file verified accusations and statements of issues [*Gov. Code §§ 11503, 11504*; *Humane Society etc., California Branch Inc. v. Merrill (1962) 199 Cal. App. 2d 115, 120, 18 Cal. Rptr. 701* ; *see § 473A.11[2][c]*]. In addition to this general authority for third party participation, specific authority can be found in some agency statutes [*see, e.g., Bus. & Prof. Code §§ 24013, 24201* (protests and accusations to Department of Alcoholic Beverage Control); *Pub. Util. Code § 1702* (Public Utilities Commission); *see also* [3], *below*, for a discussion of the new intervention statute].

When no statutory authority exists for third-party participation, an agency may either allow or refuse the participation [*see 32 Ops. Cal. Atty. Gen. 297, 301 (1959)]* . Third-party participation can satisfy the public's desire to be heard, provide additional facts for sound decision making, and balance competing interests. Of course, unlimited participation can also unnecessarily prolong proceedings, increase costs to all participants, and otherwise unfairly interfere with the rights of the original parties. The existence and scope of third-party participation may depend on the balance between these benefits and drawbacks [*see* Note, "Administrative Law: Third-Party Participation in Adjudicative Administrative Hearings in California," *47 Calif. L. Rev. 747, 749 (1959)*].

Determination of who may or must be a party to an administrative proceeding depends on the purpose and effect of the proceeding and the statute under which it is brought. For example, when the parents of a handicapped child sought an administrative hearing to compel the county education office to provide therapy for the child, the county's motion to join the California Children's Services (CCS) as a necessary party was denied. The court of appeals affirmed, noting that the county's claim that CCS was obliged to pay for the therapy was extraneous to the statutory purpose of the hearing,

which was to insure that the services were provided [*Nevada County Office of Education v. Riles (1983) 149 Cal. App. 3d 767, 775-777, 197 Cal. Rptr. 152]* .

The Court of Appeal held that a tenant who challenged in court a decision of a rent stabilization board denying her request for a rent reduction and rent rollback was required to name the landlord from whom she rented as a necessary party to the judicial proceeding brought under *Code Civ. Proc. § 1094.6*. Because the landlord had an interest in the subject of the action that would be impaired if the tenant prevailed in court, the landlord was required to be named under *Code Civ. Proc. § 389(a)*. The Court of Appeal considered the landlord to be an indispensable party whose absence was fatal to the tenant's claims, and whose absence could not be changed because the tenant's petition was untimely [*Liang v. San Francisco Residential Rent Stabilization and Arbitration Bd. (2004) 124 Cal.App. 4th 775, 778, 21 Cal. Rptr. 3d 715]* . The Court of Appeal in *Liang* cited, and relied upon *Save Our Bay, Inc. v. San Diego Unified Port Dist. (1996) 42 Cal. App. 4th 686, 692, 49 Cal. Rptr. 2d 847* .

[2] Due Process Right to Participate

Neither agency permission nor statutory authority for third-party participation is necessary if that participation is required by due process. In the leading case on point, the California Supreme Court found that approval of subdivisions by local governments involves the application of general standards to specific parcels of real property and therefore is adjudicatory in nature [*Horn v. County of Ventura (1979) 24 Cal. 3d 605, 614, 156 Cal. Rptr. 718, 596 P.2d 1134* ; for discussion of the importance of the distinction between the adjudicatory and rulemaking proceedings of an agency, *see* Ch. 470A, *Due Process Restrictions on Public Agencies* , and Ch. 473, *Public Agency Adjudication*]. The Court concluded that whenever approval of a subdivision will constitute a substantial or significant deprivation of the property rights of other landowners, the affected persons are entitled to a reasonable notice and an opportunity to be heard before the approval occurs [*Horn v. County of Ventura (1979) 24 Cal. 3d 605, 616, 156 Cal. Rptr. 718, 596 P.2d 1134]* .

However, if the administrative action is legislative in nature, then due process of law does not apply to the affected property owners. Merger of separate land parcels, which automatically occurred on the effective date of a local ordinance that was adopted for that purpose, was a legislative action, and therefore the affected property owners did not have a due process right to notice and an opportunity to be heard before merger took place [*Moores v. Board of Supervisors of Mendocino Cty. (2004) 122 Cal. App. 4th 883, 889-890, 19 Cal. Rptr. 3d 206]* .

See also discussion in [3], *below*, regarding intervention.

[3] Intervention

If the agency's governing law grants a party the right to file an accusation or protest, it has been suggested that the party should intervene by filing an accusation or protest with the agency and serving a copy on the other party or parties. If intervention is allowed, but is discretionary, the third party should file a motion to intervene supported by a declaration showing the interest that entitles him or her to intervene [CEB, *California Administrative Hearing Practice* (1984), §§ 2.45-2.47].

Such intervention is allowed under *Gov. Code § 11440.50*. These intervention provisons apply to the adjudicative proceedings of a state agency only if that agency provides by regulation that *Gov. Code § 11440.50* applies to that agency's proceedings [*Gov. Code § 11440.50(a)*]. Thus, use of the intervention provisions is optional. When these provisions have been made applicable, intervention decisions are made by the presiding officer in the proceeding [*Gov. Code § 11440.50(b)-(e)*; *see Gov. Code § 11405.80* (definiting presiding officer)].

The prospective intervenor must make a motion for intervention to the presiding officer. The motion must be granted if four conditions are satisfied [*Gov. Code § 11440.50(b)(1)-(4)*]:

- The motion must be submitted in writing, and copies must be served on all parties identified in the agency's pleading [*Gov. Code § 11440.50(b)(1)*].

- The motion should be made as early as practicable in advance of the hearing, and, if there is a prehearing conference [*see Gov. Code § 11511.5*], then the motion should be made in advance of the prehearing conference and should be resolved at the prehearing conference [*Gov. Code § 11440.50(b)(2)*].

- The motion must establish that the proposed intervenor qualifies as an intervenor either under a statute or regulation, or by stating facts that demonstrate that the proposed intervenor's legal rights, duties, privileges, or immunities will be substantially affected by the proceedings [*Gov. Code § 11440.50(b)(3)*].

- The presiding officer must determine that allowing the intervention will not impair the interests of justice as well as the orderly and prompt conduct of the proceeding [*Gov. Code § 11440.50(b)(4)*].

When a proposed intervenor qualifies for intervention, conditions on the intervenor's participation in the proceedings can be imposed by the presiding officer, either when the intervention motion is granted, or at a later time [*Gov. Code § 11440.50(c)*]. Conditioning intervenor participation allows the presiding officer to balance the benefits of reasonable intervenor involvement against the risks of unreasonably burdensome or repititous presentations [Cal. L. Rev. Comm. Comments, 25 Cal. L. Rev. Comm. 55 (1995)]. Conditions can include the following [*Gov. Code § 11440.50(c)(1)-(4)*]:

- Limiting the intervenor's partcipation to designated issues in which the intervenor has a particular interest demonstrated by the motion [*Gov. Code § 11440.50(c)(1)*].

- Limiting or excluding the use of discovery, cross-examination, and other procedures involving the intervenor so as to promote the orderly and prompt conduct of the proceeding [*Gov. Code § 11440.50(c)(2)*].

- Requiring two or more intervenors to combine their presentations of evidence and argument, cross-examination, discovery, and other participation in the proceeding [*Gov. Code § 11440.50(c)(3)*].

- Limiting or excluding the intervenor's participation in settlement negotiations [*Gov. Code § 11440.50(c)(4)*].

The procedures for intervention orders require the presiding officer to issue an order either granting or denying the intervention motion, specifying any conditions in the order, and briefly stating the reasons for the order as early as practicable in advance of the hearing. The intervention order can be modified at any time by the presiding officer, who must state reasons for the modification. The presiding officer must give prompt notice of all intervention orders, whether granting, denying, or modifying intervention, to all parties to the proceeding, and to the proposed intervenor [*Gov. Code § 11440.50(d)*]. The presiding officers determinations as to intervention motions are not subject to administrative or judicial review. This includes the two standards for determining intervention motions, whether the interests of justice and the prompt and orderly conduct of the proceedings will be impaired by allowing intervention. These determinations are made in the sole discretion, and based on the knowledge and judgment at that time, of the presiding officer [*Gov. Code § 11440.50(e)*].

Agencies are not prohibited by this statute from adopting regulations that permit participation by a person short of intervention as a party, subject to the requirements of *Gov. Code § 11430.10 et seq.* (governing ex parte communications) [*Gov. Code § 11440.50(f)*]. Examples of non-party participation include filing amicus briefs, testifying as a witness, or contributing to the fees of a party [25 Cal. L. Rev. Comm. Reports 55 (1995)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawJudicial ReviewReviewabilityGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of Protection

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§ 473A.15 Consolidation and Severance

Gov. Code § 11507.3 provides for consolidation and severance of adjudicative proceedings. When proceedings that involve a common question of law or fact are pending, the administrative law judge may order a joint hearing of any or all the matters at issue in the proceedings. This order can be based on the motion of a party, or on the administrative law judge's own motion. The administrative law judge may order all the proceedings consolidated and may make orders concerning the procedure that may tend to avoid unnecessary costs or delay [*Gov. Code § 11507.3(a)*].

Similarly, the administrative law judge may order a separate hearing of any issue, including an issue raised in the notice of defense, or of any number of issues. This order can be based on the motion of a party, or on the administrative law judge's own motion. The standards for granting separate hearings include furthering convenience, avoiding prejudice, or expedition or economy will be served by separate hearings [*Gov. Code § 11507.3(b)*].

Thus, for state agencies subject to the APA's formal hearing provisions of Gov. Code *§ 11500 et seq., Gov. Code* § 11507.3 provides ample authority for consolidation and severance motions. However for agencies that are not subject to these provisions, the standards used in civil court actions [*see Code Civ. Proc. § 1048*], can be applied to administrative hearings and these hearings may be consolidated if they have common issues of law or fact or involve the same respondent. The agency has discretion whether or not to consolidate hearings [*Bostick v. Martin (1966) 247 Cal. App. 2d 179, 183, 55 Cal. Rptr. 322]* . Some agencies have express authority to exercise this discretion [*see, e.g., Pub. Util. Code § 1703 (PUC)*]. For discussion regarding when the formal hearing provisions apply pursuant to *Gov. Code § 11501*, see Ch. 473, *Public Agency Adjudication* .

Other than *Gov. Code § 11507.3*, the principal limit on agency discretion is derived from the leading case of *Ashbacker Radio Corp. v. Federal Communications Com.* [*Ashbacker Radio Corp. v. Federal Com. Com. (1945) 326 U.S. 327, 66 S. Ct. 148, 90 L. Ed. 108]* . In *Ashbacker*, the court held "that where two bona fide applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him" [*Ashbacker Radio Corp. v. Federal Com. Com. (1945) 326 U.S. 327, 333, 66 S. Ct. 148, 90 L. Ed. 108]* . The "Ashbacker Doctrine" [*see Bostick v. Martin (1966) 247 Cal. App. 2d 179, 183, 55 Cal. Rptr. 322]* can be viewed as limiting agency discretion whenever interests are so dependent on one another that fairness requires that the proceedings be consolidated.

For agencies that are not subject to *Gov. Code § 11507.3*, it is fair to say that many agencies will grant requests for consolidation because it saves time, but requests for severance will be granted on a showing of good cause. Severance is disfavored because it usually results in a greater expenditure of time and money. To avoid wasting the time of all concerned, motions to consolidate or sever should be made as early as possible. For general discussion of prehearing motions, see Ch. 473C, *Prehearing Procedures in Agency Adjudications* .

For motions that are not subject to *Gov. Code § 11507.3*, the law governing consolidation and severance can be based the Code of Civil Procedure. Thus, factors considered in deciding whether to consolidate or sever include the following [*see Code Civ. Proc. § 1048* (grounds for consolidation or severance in civil actions)]:

- The identity of the law, facts, or parties between (or among) the cases.
- Possible prejudice to the parties.
- The complexity of the issues.
- Possible delays.
- Convenience and economy.

For discussion and forms relating to consolidation and severance in civil actions, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityCivil ProcedurePretrial MattersConsolidation of Actions

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[Reserved]

§§ 473A.16[Reserved]

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§ 473A.20 Federal Constitution

Due process clause. *U.S. Const., amend. XIV, § 1*

Legal Topics:

For related research and practice materials, see the following legal topics:
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41A-473A California Forms of Pleading and Practice--Annotated § 473A.21

§ 473A.21 State Constitution

Due process clause. *Cal. Const., art. I, § 7(a)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of Protection

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§ 473A.22 State Statutes

[1] Administrative Procedure Act

Accusation. *Gov. Code § 11503*

Administrative adjudication *bill of rights*. *Gov. Code §§ 11425.10-11425.60*

Administrative Law Judges. *Gov. Code § 11502*

Affidavits. *Gov. Code § 11514*

Agency decisional authority. *Gov. Code § 11440.10*

Agencies to which act applies. *Gov. Code §§ 11410.10, 11501*

Amendment of pleadings. *Gov. Code §§ 11507, 11516*

Applicability of provisions to statement of issues. *Gov. Code § 11504.5*

Conduct of hearing. *Gov. Code § 11512*

Consolidation of proceedings. *Gov. Code § 11507.3*

Contempt. *Gov. Code §§ 11455.10-11455.30*

Continuances. *Gov. Code § 11524*

Conversion of proceedings. *Gov. Code §§ 11470.10-11470.50*

Decision. *Gov. Code §§ 11516-11520, 11526*

Declaratory decision. *Gov. Code §§ 11465.10-11465.70*

Definitions of terms. *Gov. Code §§ 11405.10-11405.80, 11500*

Depositions. *Gov. Code § 11511*

Discovery. *Gov. Code §§ 11507.5-11507.7*

Disqualification. *Gov. Code §§ 11425.30, 11425.40, 11512*

Emergency decision. *Gov. Code §§ 11460.10-11460.80*

Evidence. *Gov. Code §§ 11435.10, 11440.40, 11513*

Ex parte communications. *Gov. Code §§ 11430.10-11430.80*

Hearings by electronic means. *Gov. Code § 11440.30*

Informal hearings. *Gov. Code § 11445.10-11445.60*

Intervention. *Gov. Code § 11440.50*

Language assistance. *Gov. Code § 11435.05-11435.65*

Judicial review. *Gov. Code § 11523*

Notice of defense. *Gov. Code § 11506*

Notice of hearing. *Gov. Code § 11509*

Oaths. *Gov. Code § 11528*

Official notice. *Gov. Code § 11515*

Reconsideration. *Gov. Code § 11521*

Reporting proceedings. *Gov. Code § 11512*

Restoration of rights. *Gov. Code § 11522*

Separate hearings. *Gov. Code § 11507.3*

Service and notice. *Gov. Code § 11440.20*

Service of initial pleading. *Gov. Code § 11505*

Settlement conferences. *Gov. Code § 11511.7*

Sexual harrassment. *Gov. Code § 11440.40*

Statement of issues. *Gov. Code § 11504*

Subpoenas. *Gov. Code §§ 11450.05-11450.50*

Time and place of hearing. *Gov. Code § 11508*

Waiver of rights. *Gov. Code § 11415.40*

[2] Related Statutes

Affidavit of good cause as required for subpoena duces tecum. *Code Civ. Proc. § 1985*

Witness served with subpoena as entitled to demand one day's fees and mileage allowance. *Code Civ. Proc. § 1987*

Witness fees and mileage allowances. *Gov. Code §§ 11191, 68093, 68097.2*

Right to have subpoena issued. *Gov. Code § 11190*

Office of Administrative Hearings. *Gov. Code §§ 11370.3, 11370.5*

Board of supervisors of county as empowered to establish county hearing officer. *Gov. Code §§ 27720, 27721*

Oaths used in civil proceedings. *Code Civ. Proc. § 2094*

Evidentiary effect of plea of nolo contendere. *Penal Code § 1016*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 473A.23 Decisions

[1] Consolidation and Severance

Agency is entitled to consolidate cases having common ground. *Ashbacker Radio Corp. v. Federal Communications Comm'n (1945) 326 U.S. 327, 330-333, 66 S. Ct. 148, 90 L. Ed. 108* ; *Bostick v. Martin (1966) 247 Cal. App. 2d 179, 183, 55 Cal. Rptr. 322*

Time limit for decision imposed by statute is directory or mandatory. *Henderling v. Carleson (1974) 36 Cal. App. 3d 561, 566, 111 Cal. Rptr. 612* (mandatory in circumstances); *Koehn v. State Board of Equalization (1958) 166 Cal. App. 2d 109, 118-119, 333 P.2d 125* (directory); *Peak v. Industrial Acc. Comm'n (1947) 82 Cal. App. 2d 926, 932, 187 P.2d 905* (directory)

Decision is required to include written findings where findings required. *In re Sturm (1974) 11 Cal. 3d 258, 266, 272, 113 Cal. Rptr. 361, 521 P.2d 97*

Findings are not required to be stated with same formality as in judgment. *Savelli v. Board of Medical Examiners (1964) 229 Cal. App. 2d 124, 134, 40 Cal. Rptr. 171*

[2] Initial Pleading

[a] Generally

Minimum requirement for initial pleading: sufficiently informative to enable respondent to prepare defense. *Sunset Amusement Co. v. Board of Police Comm'rs (1972) 7 Cal. 3d 64, 81, 101 Cal. Rptr. 768, 496 P.2d 840* ; *Stoumen v. Munro (1963) 219 Cal. App. 2d 302, 306-307, 33 Cal. Rptr. 305*

[b] Amendment

Agency's right to amend initial pleading before hearing. *Cook v. Civil Service Commission (1960) 178 Cal. App. 2d 118, 126-127, 2 Cal. Rptr. 836*

Amendment of initial pleading without giving respondent opportunity to prepare defense before hearing is error. *Raab v. Department of Alcoholic Beverage Control (1960) 177 Cal. App. 2d 333, 334, 2 Cal. Rptr. 26*

Agency's right to amend initial pleading after hearing. *Stearns v. Fair Employment Practice Com. (1971) 6 Cal. 3d 205, 212-215, 98 Cal. Rptr. 467, 490 P.2d 1155* ; *Tapley v. Abbott (1931) 111 Cal. App. 397, 400-401, 295 P. 911*

[c] Complainant

Private individual is complainant. *Humane Society etc., California Branch, Inc. v. Merrill (1962) 199 Cal. App. 2d 115, 119-120, 119-120 n. 1, 18 Cal. Rptr. 701*

[d] Contents

Disciplinary proceeding is required by *Gov. Code § 11503* to be initiated by accusation that specifies statutes and rules that licensee is alleged to have violated; fulfillment of this requirement is statutory predicate for disciplinary action; hence, only violations charged in accusation will support disciplinary action, as disciplinary action cannot be founded on charge not made. *Linda Jones General Builder v. Contractors' State License Board (1987) 194 Cal. App. 3d 1320, 1324, 1326, 240 Cal. Rptr. 180*

Accusation to initiate disciplinary proceedings is required by *Gov. Code § 11503* to specify statutes and rules allegedly violated. *Wheeler v. State Bd. of Forestry (1983) 144 Cal. App. 3d 522, 527-528, 192 Cal. Rptr. 693*

Contents are required to give adequate notice; technical rules of pleading are secondary. Stearns v. Fair Employment Practice Com. (1971) 6 Cal. 3d205, 213-214, *6 Cal. 3d 205, 98 Cal. Rptr. 467, 490 P.2d 1155* ; *Burako v. Munro (1959) 174 Cal. App. 2d 688, 691, 345 P.2d 124*

Allegation of facts supporting alternative theories are permissible. *Stearns v. Fair Employment Practice Com. (1971) 6 Cal. 3d 205, 212, 98 Cal. Rptr. 467, 490 P.2d 1155*

Contents, in case not governed by APA, are not required to conform to any model except to extent other statute may otherwise provide; general requirement that pleading be sufficiently informative to permit respondent to prepare defense. *Rudolph v. Athletic Com. of California (1960) 177 Cal. App. 2d 1, 1 Cal. Rptr. 898* ; *Yanke v. State Dep't of Public Health (1958) 162 Cal. App. 2d 600, 603, 328 P.2d 556*

Mistaken citation of law respondent is alleged to have violated is inconsequential in otherwise sufficient pleading. *Homan v. Board of Dental Examiners (1927) 202 Cal. 593, 597-598, 262 P. 324*

Contents are permitted to be phrased in statutory terms if no statute prohibits it. *Smulson v. Board of Dental Examiners (1941) 47 Cal. App. 2d 584, 589, 118 P.2d 483* ; *Gustason v. Bd. of Osteopathic Exmrs. (1935) 10 Cal. App. 2d 436, 438, 51 P.2d 1106*

[3] Intervention

Right of third party to intervene in administrative proceeding. *Crumpler v. Board of Administration (1973) 32 Cal. App. 3d 567, 575, 108 Cal. Rptr. 293*

[4] Limitations and Laches

Time for beginning administrative proceeding is unlimited except to extent statute specifically limits it. *In re Lowenthal (1889) 78 Cal. 427, 429, 21 P. 7* ; *Saxton v. State Bd. of Educ. (1934) 137 Cal. App. 167, 172, 29 P.2d 873* ; *Bold v. Board of Medical Examiners (1933) 133 Cal. App. 23, 25, 23 P.2d 826*

Lack of diligent prosecution is ground for dismissing administrative proceeding. *Steen v. City of Los Angeles (1948) 31 Cal. 2d 542, 546-547, 190 P.2d 937*

[5] Notice

Personal delivery of initial pleading is not required unless statute provides otherwise. *Colyear v. Tobriner (1936) 7 Cal. 2d 735, 743, 62 P.2d 741* ; *McGinn v. Board of Health (1931) 113 Cal. App. 228, 230, 298 P. 118* ; *Curtin v. Board of Police Comm'rs (1925) 74 Cal. App. 77, 86, 239 P. 355*

Method of service is irrelevant where respondent actually receives notice. *Simpson v. Los Angeles (1953) 40 Cal. 2d 271, 280-281, 253 P.2d 464* ; *McGinn v. Board of Health (1931) 113 Cal. App. 228, 230-231, 298 P. 118* ; *Small v. Smith (1971) 16 Cal. App. 3d 450, 457, 94 Cal. Rptr. 136*

[6] Responsive Pleading

[a] Generally

Reference to APA in cases not governed by act is permissible to determine reasonable time for responsive pleading. *Rudolph v. Athletic Commission (1960) 177 Cal. App. 2d 1, 12, 1 Cal. Rptr. 898*

[b] Demurrer

Right to demur by separate pleading in case not governed by *APA. Dyment v. Board of Medical Examiners (1922) 57 Cal. App. 260, 263-264, 207 P. 409*

Agency is without jurisdiction if initial pleading fails to state acts or omissions on which agency may proceed. *Rapaport v. Civil Serv. Comm'n (1933) 134 Cal. App. 319, 325, 25 P.2d 265*

Agency is without jurisdiction if no statute authorizes proceeding. *O'Neil v. Department of Professional & Vocational Standards (1935) 7 Cal. App. 2d 395, 397-398, 46 P.2d 234*

Objection to form of initial pleading is analogous to demurrer for uncertainty. *Stuck v. Board of Medical Examiners (1949) 94 Cal. App. 2d 751, 756, 211 P.2d 389*

[7] Setting for Hearing

Change of venue for administrative hearing is matter of agency discretion. *Keller Industries, Inc. v. Occupational Safety & Health Appeals Bd. (1981) 124 Cal. App. 3d 469, 474-476, 177 Cal. Rptr. 136* (discretion is not abused when agency refused to change venue from city which was 64 miles from litigant's place of business absent showing that selection was made arbitrarily or with improper motive)

Reference to APA in cases not governed by act is permissible to determine time for hearing. *Rudolph v. Athletic Commission (1960) 177 Cal. App. 2d 1, 12, 1 Cal. Rptr. 898*

Change of venue. *Campbell v. Board of Dental Examiners (1971) 17 Cal. App. 3d 872, 876-877, 95 Cal. Rptr. 351*

[8] Statement of Issues

Agency's right to amend statement of issues pursuant to *Gov. Code § 11507* is not abused when independent challenge of disability claim is allowed despite its omission in initial statement of issues. *Button v. Board of Administration (1981) 122 Cal. App. 3d 730, 738, 176 Cal. Rptr. 218*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsContentsAdministrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 473A.24 Text References

Judicial Council of California, Tenth Biennial Report (1944)

California Administrative Hearing Practice (Cal CEB 2000)

Witkin, California Evidence (2d ed), Ch. III, *Judicial Notice*, §§ 150-191; Ch. X, *Witnesses*, §§ 787-791; Ch. XII, *Introduction of Evidence at Trial*, §§ 1223-1275

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§ 473A.25 Internet References

Office of Administrative Hearings. This site includes: information and location concerning specific OAH offices; an OAH hearing guide; information concerming Administrative Procedure Act statutes, regulations, and proposed regulations; OAH forms; information concerning alternative dispute resolution procedures; and declaratory decisions. http://www.dgs.ca.gov/oah **NOTE:** On and after July 1, 1998, The OAL is required by *Gov. Code § 11340.1(b)* to make the full text of the California Code of Regulations, with reference citations and history notes, available on the Internet free of charge.

Office of Administrative Law. This site includes: OAL publications; links to OAL statutes and regulations relating to rulemaking; regulations submitted to the OAL for review, and information for contacting or providing input to the OAL regarding rulemaking. http://www.oal.ca.gov

California Home Page. This site includes links to other sites maintained by numerous state agencies. http://www.ca.gov

Department of Consumer Affairs. This site includes links to sites maintained by many state agencies that are under this department, as well as links to agency sites. http://www.dca.ca.gov

California Courts. This site includes: general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most Court of Appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes: text of constitution, codes, and statutes (including complete text of APA); and information concerning pending legislation. http://www.leginfo.ca.gov

Matthew Bender. This site includes: links to Matthew Bender publications and Shepard's citation service.
http://www.bender.com

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationAlternative Dispute ResolutionAdministrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency RulemakingGeneral OverviewGovernmentsCourtsCreation & OrganizationGovernmentsLegislationEnactment

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PART III. RESEARCH GUIDE

41A-473A California Forms of Pleading and Practice--Annotated §§ 473A.26-473A.39

[Reserved]

§§ 473A.26[Reserved]

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PART IV. PROCEDURAL CHECKLIST

41A-473A California Forms of Pleading and Practice--Annotated § 473A.40

§ 473A.40 Determine the Methods by Which the Agency Initiates Adjudicatory Hearings

☐ Ascertain the extent to which the hearing is subject to the California APA [*see § 473A.11[1]*].

☐ Ascertain what pleadings are used to initiate a hearing [*see § 473A.11[3], [4]*]:

☐ An accusation initiates a hearing to determine if a license or other privilege will be revoked or suspended [*see § 473A.11[3]*].

☐ A statement of issues initiates a license denial hearing [*see § 473A.11[4]*].

☐ Ascertain if the accusation or statement of issues meets content requirements [*see § 473A.11[3], [4]*].

☐ Ascertain if the accusation or statement of issues has been properly served and accompanied by the required information [*see § 473A.11[3], [4]*].

☐ Ascertain if respondent must file a notice of defense in order to receive a hearing [*see § 473A.11[6][b], [9][b]*]:

☐ If a statement of issues was filed in response to respondent's request for a hearing, no notice of defense is required [*see § 473A.11[9][b]*].

☐ Otherwise, failure to file a notice of defense waives the right to a hearing [*see § 473A.11[6][b]*].

- ☐ Ascertain if the parties received sufficient notice of the hearing [*see § 473A.11[10]*].
- ☐ Ascertain if the hearing is barred by laches [*see § 473A.12*].
- ☐ Ascertain if client should request consolidation or severance [*see § 473A.15*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationPrehearing Activity

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PART IV. PROCEDURAL CHECKLIST

41A-473A California Forms of Pleading and Practice--Annotated § 473A.41

§ 473A.41 Responding to Accusation Under APA Guidelines

[1] Request Hearing by Notice of Defense

☐ Prepare notice of defense [*Gov. Code § 11506*; *see § 473A.11[6*]; for a form, *see § 473A.54*].

☐ Request hearing.

☐ Sign or have respondent sign notice.

☐ State respondent's (or counsel's) mailing address.

☐ Verification not required [*Gov. Code § 11506(d)*].

☐ Request extension of time to file notice of defense, if necessary [*see § 473A.11[6][e]*; for a letter to request extension of time, *see § 473A.56*]].

☐ File notice of defense with agency making accusation [*Gov. Code § 11506(a)*; *see § 473A.11[6][a]*; for a form, *see § 473A.54*].

☐ Must be filed within 15 days after service of accusation.

☐ Include letter stating the following [for a letter, *see*, *§ 473A.55*]:

☐ Dates counsel is not available.

☐ Preference of hearing location.

☐ If pointing out new matter [*see § 473A.54[8]*], request that preliminary hearing be set.

☐ Send copy of notice and letter to Hearing Officer in Charge at Sacramento or Los Angeles office of the OAL.

☐ Send to attention of calendar clerk.

[2] Motion for Consolidation

☐ Prepare motion [*see Gov. Code § 11507.3*; *see also § 473A.15*]].

☐ File with agency.

[3] Motion for Severance

☐ Prepare motion [*see Gov. Code § 11507.3*; *see also § 473A.15*]].

☐ File with agency.

[4] Request Hearing Without Notice of Defense

☐ Prepare request to set aside default [*Gov. Code § 11506*; *see Gov. Code § 11520(b), (c)*; for a form, see *§ 473A.57*].

☐ File with agency.

[5] Inadequate Notice of Hearing

☐ Object to notice of hearing.

☐ Make a showing of prejudice and request a continuance [*see § 473A.11[10][a]*].

[6] Change Location of Hearing

☐ Prepare motion to change location of hearing.

☐ File within 10 days after service of notice of hearing [*Gov. Code § 11508(c)*; *see § 473A.11[11]*].

[7] Prior to Hearing

☐ After appointment of ALJ, send copies of all pleadings, motions, and other appropriate documents filed with the agency to ALJ.

☐ Gather witnesses and evidence to refute allegations in accusation.

☐ Prepare affirmative defenses, if applicable (may be raised in notice of defense) [*see § 473A.11[12]*].

☐ Prepare evidence of aggravation or mitigation, if applicable [*see § 473A.11[6][f]*].

☐ Prepare defense to amended or supplemental accusation [*see § 473A.11[5]*].

☐ File further pleading if permitted by agency, or

☐ Make orally at hearing, for the record.

[8] Reopening Case After Submitted for Decision

☐ Agency orders amendment of accusation after case is submitted for decision.

☐ Argue for reopening of case.

☐ Case is reopened.

☐ Introduce additional evidence.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law Judges

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41A-473A California Forms of Pleading and Practice--Annotated § 473A.42

§ 473A.42 Responding to Statement of Issues When Agency Sends Letter of Denial of Privilege

[1] Requesting a Hearing

☐ Prepare a request for a hearing [*Gov. Code § 1504*; *see § 473A.11[4][d]*; for a form, see *§ 473A.53*].

☐ File with agency denying privilege.

[2] Notice of Defense

☐ Prepare notice of defense (optional, but recommended) [*Gov. Code § 11506*; *see § 473A.11[4][d]*; for a form, *see § 473A.54*].

☐ Sign or have respondent sign notice.

☐ State respondent's (or counsel's) mailing address.

☐ Verification not required [*Gov. Code § 11506(d)*].

☐ Include letter stating the following [for a letter, *see § 473A.55*]:

☐ Tell agency which dates counsel is not available.

☐ State preference of hearing location.

☐ If pointing out new matter [*see § 473A.54[8]*], request that preliminary hearing be

set.

☐ File notice and letter with agency [*see Gov. Code § 11504*; *see also § 473A.11[4][b]*].

☐ Serve notice and letter on all parties before the hearing.

☐ Send copy of notice and letter to Hearing Officer in Charge at Sacramento or Los Angeles office of the OAL.

☐ Send to attention of calendar clerk.

[3] Inadequate Notice of Hearing

☐ Object to inadequate notice of hearing [*see Gov. Code § 11509*; *see also § 473A.11[9][b]*].

☐ Make a showing of prejudice and request a continuance [*see § 473A.11[10][a]*].

[4] Change Location of Hearing

☐ Prepare motion to change location of hearing.

☐ File within 10 days after service of notice of hearing [*Gov. Code § 11508(c)*; *see § 473A.11[11]*].

[5] Motion for Consolidation

☐ Prepare motion [*see Gov. Code § 11507.3*; *see also § 473A.15*]].

☐ File with agency.

[6] Motion for Severance

☐ Prepare motion [*see Gov. Code § 11507.3*; *see also § 473A.15*]].

☐ File with agency.

[7] Prior to Hearing

☐ After appointment of ALJ, send copies of all pleadings, motions, and other appropriate documents filed with the agency.

☐ Prepare evidence to produce proof at hearing to demonstrate compliance with statutes and rules cited in statement of issues.

☐ Prepare affirmative defenses, if applicable (may be raised in notice of defense) [*see § 473A.11[12]*].

☐ Prepare evidence of aggravation or mitigation, if applicable [*see § 473A.11[6][f]*].

☐ Prepare defense to amended or supplemental accusation [*see § 473A.11[5]*].

☐ File further pleading if permitted by agency, or

☐ Make orally at hearing, for the record.

[8] Reopening Case After Submitted for Decision

☐ Agency orders amendment of accusation after case is submitted for decision.

☐ Argue for reopening.

☐ Case is reopened.

☐ Introduce additional evidence.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law Judges

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41A-473A California Forms of Pleading and Practice--Annotated § 473A.43

§ 473A.43 Statement of Issues Sent by Agency in Lieu of Letter of Denial

[1] Notice of Defense

☐ Prepare notice of defense (required) [*Gov. Code §§ 11504, 11504.5*; *see § 473A.11[6][h]*; for a form, see *§ 473A.54*].

☐ Request hearing.

☐ Sign or have respondent sign notice.

☐ State respondent's (or counsel's) mailing address.

☐ Verification not required [*Gov. Code § 11506(d)*].

☐ Request extension of time to file notice of defense, if necessary [*see § 473A.11[6][e]*; for a letter to request extension of time, *see § 473A.56*]].

☐ File notice of defense with agency [*see Gov. Code § 11504*; § 473A.11[4][b]].

☐ Serve on all parties before the hearing.

☐ Include letter stating the following [for a letter, *see § 473A.55*]:

☐ Tell agency which dates counsel is not available.

☐ State preference of hearing location.

☐ If pointing out new matter [*see § 473A.54[8]*], request that preliminary hearing be set.

☐ Send copy of notice and letter to Hearing Officer in Charge at Sacramento or Los Angeles office of the OAL.

☐ Send to attention of calendar clerk.

[2] Inadequate Notice of Hearing

☐ Objection to notice of hearing.

☐ Make a showing of prejudice and request a continuance [*see § 473A.11[10][a]*].

[3] Change Location of Hearing

☐ Prepare motion to change place of hearing.

☐ File within 10 days after service of notice of hearing [*Gov. Code § 11508(c)*; *see § 473A.11[11]*].

[4] Motion for Consolidation

☐ Prepare motion [*see Gov. Code § 11507.3*; *see § 473A.15*]].

☐ File with agency.

[5] Motion for Severance

☐ Prepare motion [*see Gov. Code § 11507.3*; *see § 473A.15*]].

☐ File with agency.

[6] Prior to Hearing

☐ After appointment of ALJ, send copies of all pleadings, motions, and other appropriate documents filed with the agency.

☐ Prepare defense to amended or supplemental statement of issues [*see § 473A.11[5]*].

☐ File further pleading if permitted by agency, or

☐ Make orally at hearing, for the record.

[7] Reopening Case After Submitted for Decision

☐ Agency orders amendment of accusation after case is submitted for decision.

☐ Argue for reopening.

☐ Case is reopened

☐ Introduce additional evidence.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law Judges

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41A-473A California Forms of Pleading and Practice--Annotated § 473A.44

§ 473A.44 Non-APA Agencies

[1] Responsive Pleadings

- ☐ Check appropriate statutes, ordinances, or regulations for the following:
  - ☐ Requirement of responsive pleading.
  - ☐ Form of responsive pleading.
  - ☐ Filing procedure.
- ☐ Verification requirement [*see § 473A.11[7]*].
  - ☐ Check applicable statute.
- ☐ Service [*see § 473A.11[9][d]*].
  - ☐ Check applicable statute or ordinance; if none, actual notice is required.

[2] Affirmative Defenses

- ☐ Raise in accordance with agency practice [*see § 473A.11[12]*].

[3] Demurrer or Demurrer-Type Objection

☐ Check applicable statute or ordinance; if none:

☐ Provision for demurrer is implied [*see § 473A.11[13]*].

☐ Raise as early as possible.

[4] Consolidation or Severance

☐ Check applicable statute or ordinance, or

☐ See *Code Civ. Proc. § 1048* in considering whether to consolidate or sever [*see § 473A.15*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law Judges

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41A-473A California Forms of Pleading and Practice--Annotated § 473A.45

§ 473A.45 Third Party Participation

[1] Third Party Filing Accusation Under APA

☐ Prepare form of accusation [*Gov. Code § 11503*; *see § 473A.11[3]*; for a form, see *§ 473A.50*].

☐ Verify accusation [*Gov. Code § 11503*].

☐ File accusation with appropriate agency.

[2] Intervention Permitted by Agency Law

☐ File accusation or protest with agency [*see § 473A.14[3]*].

☐ Serve copies on other parties.

[3] Intervention Is Discretionary

☐ Prepare motion to intervene [*see Gov. Code § 11440.50*; *see also § 473A.14[3]*].

☐ Prepare and attach supporting declaration showing interest.

☐ File motion and declaration with presiding officer.

☐ File motion in advance of hearing or prehearing conference [*Gov. Code § 11440.50(b)(2)*].

☐ Serve on all parties [*Gov. Code § 11440.50(b)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing Activity

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41A-473A California Forms of Pleading and Practice--Annotated §§ 473A.46-473A.49

[Reserved]

§§ 473A.46[Reserved]

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41A-473A California Forms of Pleading and Practice--Annotated § 473A.50

§ 473A.50 Accusation [Gov. Code § 11503]

[1] FORM Accusation [Gov. Code § 11503]

BEFORE THE _____ [*agency*]

	)	
In the Matter of	)	NO. _____
_____ [*name*],	)	ACCUSATION
Respondent.	)	
	)	

_____

1. I am _____ [*name of third party or title of agency official, e.g.,* Chief Legal Officer of _____ (*name of agency*)], and file this Accusation _____ [*specify standing to file the pleading, e.g.,* in my official capacity as Chief Legal Officer].

2. During the times mentioned in this accusation, Respondent, _____[*name*], was and is _____ [*specify respondent's legal status, e.g.,* holder of a professional license in _____(*specify*)], and _____[*specify agency*] _____ [issued *or* renewed] that license on _____[*date*].

3. _____ [Consistent with *or* Under the authority of] _____[*specify relevant statute or agency regulation*], Respondent _____[*name*] is charged with the following grounds for _____ [revocation *or* suspension *or other disciplinary limitation or condition on license, privilege, right, or authority*] of his/her _____[*specify license*]:

[*Set forth specific grounds*]

4. These grounds are based upon the following specific _____ [facts *or* conduct]:

[*Set forth specific facts or conduct in ordinary and concise language*]

5. Respondent's conduct violates the following specific laws: _____[*cite specific statutes or agency regulations that are the basis for the accusation*].

6. _____ [*Specify agency action requested, e.g.,* The revocation] of Respondent's _____[*specify license, privilege, etc.*] is requested under the legal authority of _____[*specify relevant statute or regulation*].

_____ [*date*]

_____[*signature*]

_____ [*typed name and official title, if any*]

[2] Use of Form

The form in [1], *above,* is an example of the accusation used by a public agency to initiate an agency adjudication under the APA formal hearing provisions (*Gov. Code § 11500 et seq.*) to suspend, revoke, limit, or make conditional a license, privilege, right, or authority [*Gov. Code § 11503*]. It may be used with appropriate modification by a third party to complain to a public agency concerning the conduct of a licencee or other privilege holder subject to that agency's regulation. The public agency then has discretion to initiate an accusation based on that complaint [*see* discussion in *§ 473A.10[1]*].

It must be verified unless, as is usually the case, it is made by a public officer acting in his or her offical capacity or by an employee of the agency before the proceeding is to be held. The verification may be made on information and belief [*Gov. Code § 11503*].

[3] Cross References

See *§ 473A.11[3]* for detailed discussion of the requirements pertaining to an accusation. See *§§ 473.10[1], [2], 473A.11[2][d],* and *473A.14* for discussion relating to third party complainants.

See Ch. 572, *Verification* , for discussion and forms relating to verification of pleadings generally.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsTerminationsGeneral Overview

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PART V. FORMS

41A-473A California Forms of Pleading and Practice--Annotated § 473A.51

§ 473A.51 Statement to Respondent [Gov. Code § 11505]

[1] FORM Statement to Respondent [Gov. Code § 11505]

BEFORE THE _____ [*agency*]

	)	
In the Matter of	)	NO. _____
_____ [*name*],	)	STATEMENT TO RESPONDENT
Respondent.	)	
	)	

_____

To: _____[*name*], Respondent:

You are notified that a written accusation was filed against you, as repondent, on _____[*date*], with _____[*name of agency or board*] charging that there are grounds for _____ [*specify potential action, e.g.*, revoking your _____ (*specify license*) issued or renewed by that agency on _____ (*date*)].

The following items are included with this statement:

1. A copy of the accusation.

2. A form of Notice of Defense for your use in responding to the accusation.

3. A copy of *Government Code Sections 11507.5*, *11507.6*, and *11507.7*, relating the procedures for obtaining discovery from _____[*name of agency or board*].

Unless a written request for a hearing, signed by on behalf of the respondent named in the attached accusation, is delivered or mailed to the agency within 15 days after the accusation was personally served on you or mailed to you, _____[*specify name of agency*] may proceed upon the accusation without a hearing. The request for a hearing may be made by delivering or mailing the enclosed form, entitled Notice of Defense, or by delivering or mailing a notice of defense as provided in *Section 11506 of the Government Code* to: _____[*specify name and address of agency*]. You may, but need not, be represented by counsel at any or all stages of these proceedings.

If you desire the names and addresses of witnesses or an opportunity to inspect and copy the items mentioned in *Section 11507.6 of the Government Code* in the possession, custody or control of the agency, you may contact: _____[*specify name and address of appropriate person in the agency*].

The hearing may be postponed for good cause. If you have good cause, you are obliged to notify the agency, or, if an administrative law judge has been assigned to the hearing, the Office of Administrative Hearings, within 10 working days after you discover the good cause. Failure to give notice within 10 days will deprive you of a postponement.

_____ [*date*]

_____ [*signature*]

_____ [*typed name and title of agency official*]

[2] Use of Form

The form in [1], *above,* is an example of the type of statement that is required to be provided by an agency to a respondent named in an accusation, to be delievered with the accusation in order to provide the respondent with the information required under *Gov. Code § 11503*. This form conforms to *Gov. Code § 11503(b),* which sets out the required form of the statement to respondent.

[3] Cross References

See *§ 473A.11[9]* for detailed discussion of the requirements pertaining to the statement to respondent; see also *§ 473A.50* for a form of accusation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesCivil ProcedurePleading & PracticePleadingsGeneral Overview

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41A-473A California Forms of Pleading and Practice--Annotated § 473A.52

§ 473A.52 Statement of Issues [Gov. Code § 11504]

[1] FORM Statement of Issues [Gov. Code § 11504]

BEFORE THE _____ [*agency*]

	)	
In the Matter of	)	NO. _____
_____ [*name*],	)	STATEMENT OF ISSUES
Respondent.	)	
	)	

_____

1. I am the _____ [*title, e.g.,* Chief Legal Officer] of _____[*name of agency*], and file this statement of issues in my official capacity as _____ [*specify, e.g.,* Chief Legal Officer].

2. Under the authority of *Government Code Section 11504*, you are notified that you have a right to a hearing to determine whether _____[*specify nature of action such as granting of right, authority, license, or privilege*] should be _____ [granted *or* issued *or* renewed].

3. You must prove compliance at the hearing with _____[*cite specific statutes or regulations*] by producing proof at the hearing.

4. Also, the following particular matters have come to the agency's attention and would authorize denial by the agency of the action requested by you: _____[*specify*].

5. Unless a written request for a hearing signed by or on behalf of the person named as respondent is delivered or mailed to the agency within 15 days after this statement of issues was personally served on you or mailed to you,

_____[*specify name of agency*] may proceed upon the matter without a hearing.

6. If you desire the names and addresses of witnesses or an opportunity to inspect and copy the items mentioned in *Section 11507.6 of the Government Code* in the possession, custody or control of the agency, you may contact: _____[*specify name and address of appropriate person in the agency*].

7. The hearing may be postponed for good cause. If you have good cause, you are obliged to notify the agency, or, if an administrative law judge has been assigned to the hearing, the Office of Administrative Hearings, within 10 working days after you discover the good cause. Failure to give notice within 10 days will deprive you of a postponement.

8. The following items are enclosed:

A. Copies of *Government Code Sections 11507.5*, *11507.6*, and *11507.7*, relating the procedures for obtaining discovery from _____ [*name of agency or board*].

B. Request for Hearing Form.

_____ [*date*]

_____ [*signature*]

_____ [*typed name and title of agency official*]

[2] Use of Form

The form in [1], *above,* is an example of a statement of issues, the pleading used by a public agency to initiate an agency adjudication under the APA formal hearing provisions (*Gov. Code § 11500 et seq.*) to determine whether a license, privilege, right, or authority should be granted, issued, or renewed [*Gov. Code § 11504*].

It must be verified unless, as is usually the case, it is made by a public officer acting in his or her offical capacity or by an employee of the agency before the proceeding is to be held [*Gov. Code § 11504*].

[3] Cross References

See *§ 473A.11[4]*, for detailed discussion of the requirements pertaining to a statement of issues. See Ch. 572, *Verification* , for discussion and forms relating to verification of pleadings generally.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law Judges

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41A-473A California Forms of Pleading and Practice--Annotated § 473A.53

§ 473A.53 Request for Hearing [Gov. Code § 11504]

[1] FORM Request for Hearing [Gov. Code § 11504]

BEFORE THE _____ [*agency*]

	)	
In the Matter of	)	NO. _____
_____ [*name*],	)	REQUEST FOR HEARING
[Applicant *or* Licensee].	)	
	)	

_____

To: _____[*specify name of agency*]:

_____[*Name*], [an applicant for *or* the holder of] a _____ (*specify license or other privilege*)], received a letter dated _____ from _____[*specify name of agency*], denying his/her [application *or* request for renewal]. Accordingly, his/she requests a hearing on this matter as authorized in *Government Code Section 11504*.

_____ [*date*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent

Address: _____

_____

Telephone: _____

[2] Use of Form

The form in [1], *above*, is for use by an applicant or license holder whose application for a license or whose request for renewal has been denied by the licensing agency; it requests a hearing on the denial under *Gov. Code § 11504*. The form is used when:

- The APA's formal hearing provisions (*Gov. Code § 11500 et seq.*) apply.

- The licensing agency sent a letter of denial as distinguished from a statement of issues. If the agency serves and files and statement of issues, the applicant or license holder is then the respondent to that pleading and must file instead a notice of defense under *Gov. Code § 11506*.

[3] Cross References

See *§ 473A.11[4]*, for detailed discussion of the requirements pertaining to a statement of issues under *Gov. Code § 11504*.

See *§ 473A.11[4][d]* for discussion of the procedure for request for hearing when an agency sends a letter of denial rather than a statement of issues.

See *§ 473A.54* for a form of notice of defense.

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Chapter 473A COMMENCING AGENCY ADJUDICATION
PART V. FORMS

41A-473A California Forms of Pleading and Practice--Annotated § 473A.54

§ 473A.54 Notice of Defense [Gov. Code § 11506]

[1] FORM Notice of Defense [Gov. Code § 11506]

BEFORE THE _____ [*agency*]

	)	
In the Matter of	)	NO. _____
_____ [*name*],	)	NOTICE OF DEFENSE
Respondent.	)	
	)	

_____

Respondent _____[*name*] requests that a hearing be held in this matter and further responds as follows:

[*EITHER*]

1. Objects to the [accusation *or* statement of issues] on the ground that it does not state acts or omissions on which this agency may proceed.

[*AND/OR*]

2. Objects to the form of the [accusation *or* statement of issues] on the ground that it is so indefinite and uncertain that he/she cannot identify the transaction and prepare a defense.

[*AND/OR*]

3. Admits that the allegations of Paragraph _____[*number*] of the _____ [accusation *or* statement of issues] are true but denies all other allegations of the _____ [accusation *or* statement of issues].

[*AND/OR*]

4. Objects to the _____ [accusation *or* statement of issues] on the ground that, under the circumstances, compliance with the requirements of _____[*specify regulation providing basis for agency's accusation*] would result in a material violation of _____[*specify other regulation*] that was enacted by _____[*specify other department*] and that affects substantive rights.

[*AND/OR*]

5. Alleges by way of defense that _____[*specify*].

6. Presents new matter by way of defense as follows: _____[*specify*].

Respondent's mailing address is the address of counsel shown above.

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent

[2] Use of Form

The form of notice of defense in [1], *above*, is for use by the respondent in an administrative trial. It may be used instead of the short-form notice of defense provided by the agency [*see Gov. Code § 11505*]. Regular pleading paper such as counsel uses in civil matters is appropriate. Counsel's name, address, State Bar membership number, and telephone number should appear in the upper left-hand corner.

[3] Contents

A notice of defense must be in writing. It must be signed by or on behalf of the respondent. It must state the respondent's mailing address (which may be counsel's address). It need not be verified (whether or not the initial pleading is verified), and it need not follow any particular form [*Gov. Code § 11506(c)*]. The notice may be filed by either delivering it or mailing it to the agency as provided in *Gov. Code § 11505* [*Gov. Code § 11506(e)*].

In the notice of defense the respondent may do any or all of the following [*Gov. Code § 11506(a)*]:

- Request a hearing;

- Object to the initial pleading on the ground that it does not state acts or omissions on which the agency may proceed;

- Object to the form of the initial pleading on the ground that it is so indefinite or uncertain that the respondent cannot identify the transaction or prepare his or her defense;

- Admit the truth of the initial pleading or parts of it;

- Object to the initial pleading on the ground that, under the circumstances, compliance with the requirements of a regulation would result in a material violation of another regulation that was enacted by another department and that affects substantive rights; and

- Present new matter by way of defense.

If the initial pleading is subject to a valid objection, the agency, if it is the complainant, has the unqualified right to amend it at any time before the matter is submitted for decision [*Gov. Code § 11507*].

[4] Request for Hearing

A request for a hearing should be included in every notice of defense unless counsel does not want a hearing for tactical reasons. When the notice of defense is sent to the agency, counsel should also send a letter [*see § 473A.55*] telling the agency which dates on his or her calendar are not open and when and where he or she would prefer to have the hearing. Such a letter might be helpful in getting the hearing set for a convenient time and place.

[5] Copies

Copies of the notice of defense and the letter should be sent to the Hearing Officer in Charge at the Sacramento or Los Angeles office of the Office of Administrative Hearings, marked to the attention of the calendar clerk. If counsel wishes for tactical reasons to avoid a hearing, the best way is to concede the merits of the case against his or her client. However, some agencies have power to go on with a hearing nevertheless [*see, e.g., Bus. & Prof. Code § 118*].

[6] Objections

[a] Failure to State Sufficient Facts

The objection that the initial pleading does not state acts or omissions on which the agency may take action [*Gov. Code § 11506(a)(2)*] is equivalent to a general demurrer for failure to state facts sufficient to constitute a cause of action [*see Code Civ. Proc. § 430.10(e)*] and essentially asserts a lack of jurisdiction.

Counsel should be careful not to confuse this objection with an objection to the form of the pleading [*see Collins v. Board of Medical Examiners (1972) 29 Cal. App. 3d 439, 444, 105 Cal. Rptr. 634* (even the court was confused)].

[b] Form of Initial Pleading

An objection to the form of the initial pleading that it is so indefinite or uncertain that the respondent cannot identify the transaction in question or prepare his or her defense, is deemed waived if not asserted in the notice of defense [*Gov. Code § 11506(b)*]. The analogous objection in a civil action is a special demurrer on the ground of uncertainty [*see Code Civ. Proc. § 430.10(f)*; *Wade v. Markwell & Co. (1953) 118 Cal. App. 2d 410, 418, 258 P.2d 497* (waiver)]. This objection deserves the most careful attention from respondent's counsel. There is only one opportunity to make it, and

often it will be the only viable objection.

When only part of the pleading is subject to objection, it is appropriate to limit the objection to specified defective parts instead of objecting to the entire pleading.

[7] Admissions and Denials

Counsel will need to study the particular case to determine which admissions, if any, should be made. Facts of record about which there can be no reasonable dispute may safely be admitted; to do so will show an attitude of cooperation, which may be helpful to the respondent's case. Generally, however, admissions should be few, and they should always concern facts, never violations. It is unnecessary to make any denials unless admissions are made, and then a denial is necessary only to distinguish what is admitted. The notice of defense is deemed a specific denial of all parts of the initial pleading not expressly admitted [*Gov. Code § 11506*; *see Gov. Code §§ 11504, 11504.5*].

[8] New Matter

A statement of new matter by way of defense is equivalent to an affirmative defense in a civil action [*see Code Civ. Proc. § 431.30(b)(2)*]. It appears from the statute that a failure to state new matter in the notice of defense would not deprive the respondent of the unstated defenses [*Gov. Code § 11506(b)*], which he or she would be entitled to raise at the hearing. In practice, administrative law judges tend to allow new matter to be presented at the hearing notwithstanding that no mention of such matter was made in the notice of defense. In considering whether to state new matter in the notice of defense, counsel should consider at least two points. First, a tactical decision not to state new matter in the notice of defense may have the undesirable effect of annoying the administrative law judge or agency at the hearing, if a dilatory purpose is apparent and a continuance becomes necessary to enable the complainant to prepare to meet the newly raised defense. Second, if the complainant or the agency appears to be ignorant of some fact and would not have begun or would not continue the proceeding if the fact were known, it is probably prudent to state that fact in the notice of defense, since it could bring a speedy resolution of the proceeding in the respondent's favor. However, if new matter stated in the notice of defense would not clearly be determinative, perhaps it should be withheld until events at the hearing require raising it to save the respondent's case.

The question, whether a statute is unconstitutional, may not be raised in defense, unless unconstitutionality of the statute has been determined by an appellate court. The same is true as to the question, whether or not a statute is unenforceable under federal law or regulation. A constitutional amendment prohibits an administrative agency from declaring a statute unconstitutional in any circumstance and from declaring a statute unenforceable because of a conflict with the state or federal constitution or a federal law or regulation unless an appellate court has so decided [*Cal. Const., art. III, § 3.5*]. Nevertheless, counsel may consider pointing out unofficially that a relevant statute appears to be unconstitutional or unenforceable under federal law or regulation, in the hope that the agency will desist. Also, a continuance might be sought for the purpose of seeking a judicial determination as to the constitutionality or enforceability of a relevant statute.

If the notice of defense states a matter which counsel believes should be heard before the hearing, this sometimes can be arranged. In the letter accompanying the notice of defense [*see § 473A.55*] counsel should point out this special matter and ask that a preliminary hearing be set for resolving it. Although the agency might ignore this request, the hearing officer, when one is assigned, will receive the copies of the letter and the notice of defense forwarded to the Office of Administrative Hearings, and he or she might set the special matter for a preliminary hearing.

[9] Entrapment Defense

The defense of entrapment is available in administrative proceedings at which revocation or suspension of a license to practice a profession or conduct a business is at issue [*Patty v. Board of Medical Examiners (1973) 9 Cal. 3d 356,*

367, 107 Cal. Rptr. 473, 508 P.2d 1121] . An agency may not rely on evidence obtained by deceitful inducement of a licensee to engage in activities which he or she would otherwise not have undertaken [*see Patty v. Board of Medical Examiners (1973) 9 Cal. 3d 356, 365, 107 Cal. Rptr. 473, 508 P.2d 1121* ; *Redner v. Workmen's Comp. Appeals Bd. (1971) 5 Cal. 3d 83, 95, 95 Cal. Rptr. 447, 485 P.2d 799]* .

The defense rests on broadly stated grounds of sound public policy and good morals [*Patty v. Board of Medical Examiners (1973) 9 Cal. 3d 356, 363, 107 Cal. Rptr. 473, 508 P.2d 1121* ; *People v. Benford (1959) 53 Cal. 2d 1, 8-9, 345 P.2d 928]* , and is crucial to the fair administration of justice. The function of an enforcement agency is to investigate, not instigate, and to discover, not promote, crime; to apprehend the guilty, not to seduce the innocent [*Patty v. Board of Medical Examiners (1973) 9 Cal. 3d 356, 364, 367, 107 Cal. Rptr. 473, 508 P.2d 1121]* .

[10] Cross References

For detailed discussion of the requirement relating to the notice of defense, see *§ 473A.11[6]*.

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§ 473A.55 Letter to Accompany Notice of Defense

[1] FORM Letter to Accompany Notice of Defense

_____ [*agency*]

_____ [*address*]

Attention: _____ [*name*]

Re: In the Matter of _____ [*name*], Respondent

No. _____

Dear _____:

Enclosed and transmitted herewith for filing are the original and one copy of the respondent's Notice of Defense in the above-entitled matter.

The following dates are not open on my calendar: _____[*specify*]. The hearing in this matter should not be set for one of those dates, if possible.

If possible, the respondent and I would prefer to have the hearing set for one of the following dates and at one of the following places:

Dates: _____ [*specify*].
Places: _____ [*specify*].

Very truly yours,

_____ [*signature*]

Attorney for Respondent

[2] Use of Form

The form of letter in [1], *above*, is for use by the respondent's counsel and should accompany the notice of defense when it is filed. For the related form of notice of defense, see *§ 473A.54*.

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§ 473A.56 Letter Request for Extension of Time [Gov. Code § 11506]

[1] FORM Letter Request for Extension of Time [Gov. Code § 11506]

_____ [*agency*]

_____ [*address*]

Attention: _____ [*name*]

Re: In the Matter of _____ [*name*], Respondent

No. _____

Dear _____:

Respondent _____[*name*] requests an extension of time to and including _____[*date*], within which to file a notice of defense or other appropriate responsive pleading.

Please countersign and return the enclosed copy of this letter to confirm that an extension is granted as requested. If this request will not be granted, please telephone me _____[collect] at the earliest possible time.

Very truly yours,

_____ [*signature*]

Attorney for Respondent

The above request for extension is granted.

_____ [*agency*]

By: _____ [*signature*]

[*title*]

[2] Use of Form

The form of letter request in [1], *above*, is for use by the respondent who wishes an extension of time in which to respond. For the related form of notice of defense, see *§ 473A.54*.

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§ 473A.57 Request to Set Aside Default [Gov. Code § 11506]

[1] FORM Request to Set Aside Default [Gov. Code § 11506]

BEFORE THE _____ [*agency*]

	)	
In the Matter of	)	NO. _____
_____ [*name*],	)	REQUEST TO SET ASIDE DEFAULT
Respondent.	)	
	)	

_____

Respondent requests that his/her failure to file a notice of defense not be deemed a waiver of his/her right to a hearing and that a hearing nevertheless be granted. In support of this request, respondent submits the _____ [*specify, e.g.*, declaration] attached hereto.

_____ [*signature*]

Attorney for Respondent

DECLARATION

I, declare:

_____[*State facts supporting request*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form of request in [1], *above*, to set aside a default is for use by the respondent, when the time for filing a notice of defense under *Gov. Code § 11506* or other responsive pleading has passed.

[3] Cross References

See *§ 473A.11[6]* for detailed discussion of notice of defense.

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§ 473B.syn Synopsis to Chapter 473B: DISCOVERY IN AGENCY ADJUDICATIONS

§ 473B.01 Scope of Chapter

§ 473B.02 Cross References

[1] Related Coverage of Agency Adjudication

[2] Judicial Review

[3] Public Administrative Law Generally

[4] Other Related Chapters

[5] Related Matthew Bender Publications

§§ 473B.03-473B.09 [Reserved]

§ 473B.10 Governing Law

§ 473B.11 Basic Definitions Governing Discovery

§ 473B.12 Methods of Discovery Under the California APA

[1] Exclusive Provision for Discovery

[2] Depositions Not Allowed for Prehearing Discovery

[3] Interrogatories Allowed Only as Form of Written Request

[4] Subpoenas for Production of Documents

[a] Scope of Application

[b] Issuance of Subpoenas for Discovery Purposes

[c] Who May Issue Subpoena

[d] Service of Subpoena

[e] Enforcement of Subpoena

§ 473B.13 Scope of Discovery Under the APA

§ 473B.14 Administrative Discovery Procedures

[1] Request for Discovery

[2] Time Limits

[a] Statutory Time Limits

[b] Availability of Discovery Before Notice of Defense Is Filed

[3] Method for Requesting Discovery

[a] Service by Mail

[b] Keeping Copy of Request and Proof of Service

[4] Complying With Discovery Request

[5] Costs of Copying

§ 473B.15 Limits and Conditions on Discovery

[1] General Limitations

[2] Privileges

[a] Privileged Matter Not Discoverable

[b] The Presumption of Confidentiality and the Burden of Proof

[3] Physician-Patient Privilege

[4] Attorney Work Product

[5] Official Information

[6] Sexual Conduct

§ 473B.16 Enforcement of Discovery Under the California APA

[1] Motion to Compel Discovery

[2] Serving and Filing the Motion

[3] Answer and Hearing on Motion to Compel

[4] In Camera Inspection

[5] Order Granting or Denying Motion

[6] Review of Judge's Order

[7] Sanctions

§ 473B.17 Non-APA Statutory Discovery

[1] Applicability of Non-California APA Discovery Statutes

[2] Investigation and Enforcement

[3] Private Parties

§ 473B.18 Nonstatutory Court Authorized Discovery

[1] Availability

[2] Governing Law

§§ 473B.19-473B.29 [Reserved]

§ 473B.30 Federal Constitution

§ 473B.31 State Constitution

§ 473B.32 State Statutes

[1] Administrative Procedure Act

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§ 473B.33 Decisions

[1] General Requirements

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§§ 473B.36-473B.49 [Reserved]

§ 473B.50 Obtaining and Responding to Administrative Discovery

[1] Ascertain Applicable Law Governing Discovery in the Proceeding

[2] Obtaining Discovery Under the APA

[3] Complying With Request for Administrative Discovery Under the APA

§ 473B.51 Initiation of Discovery Under the APA

[1] Notice of Defense

[2] Request for Discovery

[3] Service of Written Request

[4] Noncompliance with Request for Discovery-Petitioner's Option

[5] Respondent's Options

§ 473B.52 Subpoena and Subpoena Duces Tecum

[1] Requesting Subpoena

[2] Service

§ 473B.53 Deposition of Unavailable Witness Under APA Guidelines

[1] Petition for Deposition of Unavailable Witness

[2] Filing

[3] Service

[4] Order Issued

§§ 473B.54-473B.59 [Reserved]

§ 473B.60 Petition to Take Deposition of Unavailable Witness [Gov. Code § 11511]

[1] FORM

[2] Use of Form

[3] Verification

[4] Procedure

[5] Cross References

§ 473B.61 Request for Discovery [Gov. Code § 11507.6]

[1] FORM

[2] Use of Form

[3] Content of Request

§ 473B.62 Notice of Noncompliance With Request for Discovery [Gov. Code § 11507.6]

[1] FORM

[2] Use of Form

[3] Cross References

§ 473B.63 Motion to Compel Discovery [Gov. Code § 11507.7]

[1] FORM

[2] Use of Form

[3] Supporting Papers

[4] Service and Filing

[5] Cross References

§ 473B.64 Answer to Motion to Compel Discovery [Gov. Code § 11507.7(c)]

[1] FORM

[2] Use of Form

[3] Supporting Papers

§ 473B.65 Order Granting Motion to Compel Discovery [Gov. Code § 11507.7(f)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 473B.66 Order Denying Motion to Compel Discovery [Gov. Code § 11507.7(f)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 473B.67 Order to Show Cause In Re Contempt [Gov. Code § 11455.20]

[1] FORM

[2] Use of Form

[3] Cross References

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§ 473B.01 Scope of Chapter

This chapter discusses discovery procedures in an agency adjudication, primarily those that apply to formal hearings under the California Administrative Procedure Act (APA). The discussion in Part II includes the following:

- The requirements relating to discovery in formal hearings under the APA administrative adjudication provisions [*see §§ 473B.10 -473B.15*).

- Limits and conditions on discovery, enforcement of discovery, non-APA statutory discovery, and nonstatutory court authorized discovery [*see §§ 473B.16* -473B.19].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationPrehearing Activity

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§ 473B.02 Cross References

[1] Related Coverage of Agency Adjudication

For general discussion and overview of agency adjudication under the Administrative Procedure Act (APA), see Ch. 473, *Public Agency Adjudication* .

For related discussion and forms providing coverage of the other stages of an agency adjudication under the formal hearing provisions of the APA, see:

- Ch. 473A, *Commencing Agency Adjudication.*
- Ch. 473C, *Prehearing Procedures in Agency Adjudications.*
- Ch. 473D, *Prehearing Preparations in Agency Adjudications.*
- Ch. 473E, *Public Administrative Law Judges* .
- Ch. 473F, *Agency Adjudication Hearings* .
- Ch. 473G, *Agency Adjudication Decisions* .

For related discussion and forms providing more detailed coverage of adjudication methods under the APA other than that of formal hearing, see Ch. 473H, *Alternative Adminstrative Adjudication Procedures* .

For detailed discussion and forms relating generally to licensing agencies, including licensing adjudications, see Ch. 471B, *Licensing by Public Agencies* .

[2] Judicial Review

For detailed discussion and forms relating generally to review by California courts of agency adjudications, see:

- Ch. 474, *Availability of Judicial Review of Agency Decisions* .
- Ch. 474A, *Timing of Judicial Review of Agency Decisions* .
- Ch. 474B, *Standards in Reviewing Agency Decisions* .
- Ch. 474C, *Procedures in Reviewing Agency Decisions* .

For other related discussion and forms relating to judicial review generally, see:

- Ch. 40, *Appeal: An Overview,* through Ch. 54, *Appeal: California Supreme Court Review* (discussion and forms relating to civil appeals).
- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to immediate judicial review of orders by extraordinary writ of mandate or prohibition).
- Ch. 492, *Review (Certiorari), Writ of* (discussion and forms relating to immediate judicial review of civil proceedings by extraordinary writ of review).

[3] Public Administrative Law Generally

For related discussion of California public administrative law generally, including discussion of public agency functions and powers (including adjudicative or quasi-judicial powers), and organization generally, see Ch. 470, *Overview of Public Administrative Law* (general discussion of judicial power is in *§ 470.12[5]*). For detailed discussion of the general procedures imposed in agency proceedings by constitutional due process and related statutory requirements, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

For discussion and forms relating to the law governing access to and conduct of meetings by California public agencies, see Ch. 470B, *Public Agency Meetings* .

For detailed discussion and forms relating to the law governing disclosure of public records under the California Public Records Act [*Cal. Gov. Code §§ 6250 et seq.*], see Ch. 470C, *Public Records Act* .

For detailed discussion and forms relating generally to agency investigations and inspections, see:

- Ch. 471, *Investigations by Public Agencies* .
- Ch. 471A, *Inspections by Public Agencies* .

For detailed discussion and forms relating generally to the legislative or rulemaking functions of California public agencies, including judicial review of these functions, see:

- Ch. 472, *Public Agency Rules* .
- Ch. 472A, *Agency Rulemaking Procedures* .
- .

For additional cross references to coverage of particular public agencies, see *§ 470.02[2]*.

[4] Other Related Chapters

For discussion and forms of affidavits and declarations under penalty of perjury in civil actions generally, see Ch. 15, *Affidavits, Certificates, and Declarations* .

For discussion and forms relating to contempt proceedings in civil actions generally, see Ch. 135, *Contempt* .

For discussion and forms relating to discovery in civil actions generally, see Ch. 190- 200, *Discovery* .

For further discussion and forms relating to subpoenas in civil actions generally, see Ch. 535, *Subpoena* .

For discussion and forms relating to proof of service in civil actions generally, see Ch. 518, *Service of Summons and Papers* .

[5] Related Matthew Bender Publications

For additional detailed discussion relating to discovery in civil actions, see DeMeo, California Deposition and Discovery Practice, Chs. 21-32 (Matthew Bender); California Trial Guide, Unit 51; Ch. 190-200, *Discovery* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewRemediesProhibitionAdministrative LawJudicial ReviewStandards of ReviewGeneral Overview

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[Reserved]

§§ 473B.03[Reserved]

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PART II. LEGAL BACKGROUND

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§ 473B.10 Governing Law

Some agencies have their own specific discovery statutes as a part of their enabling law. In these cases, their specific discovery statutes apply whether or not they are otherwise subject to the APA [*see Serenko v. Bright (1968) 263 Cal. App. 2d 682, 689, 70 Cal. Rptr. 1* (California APA is a general law that yields to specific statutes)].

Discovery under the administrative adjudication provisions of the APA (*Gov. Code § 11340 et seq.*) are governed generally by *Gov. Code § 11507.6* [*see also Gov. Code §§ 11507.5, 11507.7, 11511*]. These statutory discovery provisions of the APA, first enacted in 1968, supplanted case law that had previously shaped administrative discovery, with respect to any proceeding subject to the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*) [*Gov. Code § 11507.5*; *Gilbert v. Superior Court (1987) 193 Cal. App. 3d 161, 166, 238 Cal. Rptr. 220* ; *Board of Medical Quality Assur. v. Superior Court (1977) 73 Cal. App. 3d 860, 862, 141 Cal. Rptr. 83]* . For further discussion of the APA, its administrative adjudication provisions (*Gov. Code § 11400 et seq.* and *Gov. Code § 11500 et seq.*), and the applicability of those provisions, see Ch. 470, *Overview of Public Administrative Law* , and Ch. 473, *Public Agency Adjudication* .

Discovery in agency adjudications not subject to the APA, and in which no other specific discovery statute applies, are governed by the decisional law that has developed non-statutory administrative discovery along principles of common law [*see, e.g., Shively v. Stewart (1966) 65 Cal. 2d 475, 55 Cal. Rptr. 217, 421 P.2d 65* (legislative silence regarding administrative discovery leaves to the courts the task of shaping administrative discovery); *Romero v. Hern (1969) 276 Cal. App. 2d 787, 791, 81 Cal. Rptr. 281]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationPrehearing Activity

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§ 473B.11 Basic Definitions Governing Discovery

Chapter 5 (*Gov. Code § 11500 et seq.*), governing formal hearings under the APA (*Gov. Code § 11340 et seq.*), begins with a list of definitions that include the following [*Gov. Code § 11500*; *see Ch. 473, Public Agency Adjudication, § 473.13[1]*, for discussion regarding Chapter 5 and other components of the APA]:

- "Agency" includes the state boards, commissions, and officers to which Chapter 5 (*Gov. Code § 11500 et seq.*) applies by law. When the word "agency" alone is used, the power to act may be delegated by the agency, but when the words "agency itself" are used, the power to act shall not be delegated unless the statutes relating to the particular agency authorize delegation of the agency's power to hear and decide [*Gov. Code § 11500(a)*].

- "Party" includes the agency, the respondent, and any person (other than an officer or employee of the agency acting in an official capacity) who has appeared or participated in the proceeding [*Gov. Code § 11500(b)*].

- "Respondent" means any person against whom an accusation is filed. [*Gov. Code § 11500(c)*; *see Gov. Code §§ 11503, 11504*, and discussion in Ch. 473A, *Commencing Agency Adjudication* , regarding accusation and statement of issues as initial pleadings used by agency to initiate agency adjudication pursuant to formal hearing procedures of *Gov. Code § 11500 et seq.*].

These definitions apply to all other provisions in Chapter 5, including those relating to discovery, unless the context or subject matter indicates otherwise [*Gov. Code § 11500*]. In addition, certain definitions set out in Chapter 4.5 also apply to proceedings under Chapter 5, to the extent that the provisions of Chapter 4.5 apply to formal hearings under Chapter 5 unless inconsistent with statutes specifically applicable to that proceeding [*Gov. Code § 11501(c)*]. For example, the following definition of "adjudicatory hearing," applies in that there is no definition of this term in Chapter 5 [*Gov. Code § 11405.20*]:

- "Adjudicative proceeding" is an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision.

Applicable provisions of Chapter 4.5 are discussed when relevant in this chapter. For detailed discussion of the additional definitions under Chapter 4.5 that may apply, see *Chapter 473, Public Agency Adjudication, § 473.14*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing Activity

California Forms of Pleading and Practice--Annotated

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§ 473B.12 Methods of Discovery Under the California APA

[1] Exclusive Provision for Discovery

Gov. Code § 11507.6 provides the exclusive right to and method of discovery for adjudicatory proceedings under the APA's Chapter 5 (*Gov. Code § 11500 et seq.*, entitled Administrative Adjudication: Formal Hearings) [*Gov. Code § 11507.5*; *Gilbert v. Superior Court (1987) 193 Cal. App. 3d 161, 166-167, 238 Cal. Rptr. 220]* . For discussion of when the APA applies to an administrative adjudication, *see* Ch. 473, *Public Agency Adjudication*].

Gov. Code § 11507.6 basically provides that a party may obtain discovery by means of a "written request made to another party," and may thereby obtain the names and addresses of witnesses known to the other party, as well as specified statements, writings, and reports for inspection and copying [*Gov. Code § 11507.6*].

Thus, although it sets outs an extensive list of information and materials that may be discovered, it does not provide much detail concerning the method of discovery, other than to specify a "written request" for discovery and to provide that written materials may be inspected and copied. It makes no mention, for example, of the primary methods of discovery in civil actions, such as depositions, interrogatories, and the use of subpoenas to compel the production of documents. Case law clarifying the availability, or nonavailability, of these methods is in [2] through *[4], below*. The items discoverable and the procedures for obtaining discovery by written request under *Gov. Code § 11507.6* are discussed in *further detail in §§ 473B.13* and *473B.14*; limits and conditions affecting prehearing discovery are discussed in *§ 473B.15*.

[2] Depositions Not Allowed for Prehearing Discovery

The APA allows the use of depositions solely to take the testimony of a witness who will be unable to attend the hearing or who cannot be compelled to attend [*Gov. Code § 11511*; *Kenneally v. Medical Board of California (1994) 27 Cal. App. 4th 489, 502-503, 32 Cal. Rptr.2d 504* (physician was not denied equal protection of the law and *Gov. Code § 11511* was not unconstitutional in restricting discovery depositions to witnesses whose testimony is material and who are unable to attend a hearing or cannot be required to attend a hearing)]. California courts have consistently denied all attempts to conduct discovery using the witness-deposition provision of *Gov. Code § 11511* [*see* *Shively v. Stewart (1966) 65 Cal. 2d 475, 478-479, 55 Cal. Rptr. 217, 421 P.2d 65* (*Gov. Code § 11511* provides for depositions, not for

discovery, but only to secure evidence for use at the hearing); *Stevenson v. State Bd. of Medical Examiners (1970) 10 Cal. App. 3d 433, 439, 88 Cal. Rptr. 815* (no agency duty to issue subpoenas under *Gov. Code § 11511* for prehearing discovery); *Everett v. Gordon (1968) 266 Cal. App. 2d 667, 669, 671-673, 72 Cal. Rptr. 379* (petition to compel the issuance of subpoenas for prehearing depositions denied); *Cooper v. Board of Medical Examiners (1975) 49 Cal. App. 3d 931, 123 Cal. Rptr. 563* (no statutory or common law right for psychologist to take deposition of witness before hearing)].

On verified petition of a party, an administrative law judge, or, if an administrative law judge has not been appointed, an agency may order that the testimony of any material witness residing within or without the state be taken by deposition in the manner prescribed by law for depositions in civil actions [*Gov. Code § 11511*]. The petition must set forth the following [*Gov. Code § 11511*]:

- Nature of the pending proceeding.
- Name and address of the witness whose testimony is desired.
- Showing of the materiality of the testimony.
- Showing that the witness will be unable or can not be compelled to attend.

The petition must also request an order requiring the witness to apear and testify before an officer named in the petition for that purpose. The petitioning party must serve notice of hearing and a copy of the petition on the other parties at least 10 days before the hearing. When the witness resides outside the state and when the administrative law judge or agency has ordered the taking of the testimony by deposition, the agency shall obtain an order of court to that effect by filing a petition in the Superior Court in Sacramento County. The court proceedings shall be consistent with the provisions of *Gov. Code § 11189* [*Gov. Code § 11511*]. See *§ 473B.60* for a form for a petition for an order to take the deposition of an unavailable witness.

[3] Interrogatories Allowed Only as Form of Written Request

Gov. Code § 11507.6 authorizes discovery through written requests made to another party. Although interrogatories are not specifically mentioned in *Gov. Code § 11507.6*, at least one court has allowed discovery in the form of written interrogatories rather than written requests when applying *Gov. Code § 11507.6*. In that case the court of appeal stated that there was no reason why the respondent should be denied that information because he asked for it in interrogatories rather than in requests [*Romero v. Hern (1969) 276 Cal. App. 2d 787, 794, 81 Cal. Rptr. 281]* . The court held that the "interrogatories" need not be answered under oath, and it also applied *Gov. Code § 11507.6* to determine which interrogatories the agency was required to answer. Overbroad interrogatories ("shotgun" requests) need not be answered [*Romero v. Hern (1969) 276 Cal. App. 2d 787, 793-795, 81 Cal. Rptr. 281]* . For discussion of the materials discoverable under *Gov. Code § 11507.6, see § 473B.13*.

In that the scope of discovery is narrower and replies need not be given under oath, a request for discovery in an APA proceeding given in the form of interrogatories is quite different from a set of interrogatories in a civil action [*see Code Civ. Proc. §§ 2017.010* (discovery in civil actions generally includes any relevant matter that is not privileged), 2030.010(a) (interrogatories in civil actions must be answered under oath); *see also* Ch. 194, *Discovery: Interrogatories* , for discussion of discovery in civil actions generally]. In fact, the court ruling that permitted "interrogatories" was concerned merely with their form, allowing them only to the extent that they were essentially written requests for discovery that could be answered pursuant to the scope and limits of *Gov. Code § 11507.6*.

Thus, most APA discovery requests are not styled as interrogatories but simply as written requests for discovery. See *§ 473B.61*, for a written request for discovery form.

[4] Subpoenas for Production of Documents

[a] Scope of Application

Chapter 4.5 (*Gov. Code § 11400 et seq.*) includes the provisions governing subpoenas in administrative adjudications under the APA. The provisions, set out in *Gov. Code § 11450.05 et seq.*, apply to formal APA adjudication hearing under Chapter 5 (*Gov. Code § 11500 et seq.*) [*Gov. Code § 11450.05(a)*].

Agencies that are not subject to the Chapter 5 requirements may nevertheless use the APA subpoena procedures. When an agency opts to use the provisions, all provisions of *Gov. Code § 11450.05 et seq.* apply, including but not limited to the issuance of a subpoena requested by a party or an attorney of record for a party under *Gov. Code § 11450.20* [*Gov. Code § 11450.05(b)*].

See Ch. 473, *Public Agency Adjudication* for further discussion concerning the proceedings to which Chapters 4.5 and 5 apply.

[b] Issuance of Subpoenas for Discovery Purposes

For discovery purposes, an administrative subpoena is available chiefly for purpose of inspecting records or documents. Under *Gov. Code § 11450.05 et seq.*, subpoenas and subpoenas duces tecum may be issued either [*Gov. Code § 11450.10(a)*]:

- To compel attendance at a hearing.
- To compel production of documents at any reasonable time and place or at a hearing.

Alternatively, a custodian of documents that is the subject of a subpoena duces tecum may satisfy the subpoena by delivery of the documents or a copy of the documents, or by making the documents available for inspection or copying, together with an affidavit that satisfies *Evidence Code § 1561* [*Gov. Code § 11450.10(b)*]. This latter procedure is similar to the practice in civil actions under *Code Civ. Proc. § 2020* [25 Cal. L. Rev. Comm. Reports 55 (1995)].

If a custodian does not comply with the subpoena, the subpoena can be enforced, and the custodian can be compelled to appear and produce the documents under the enforcement provisions of *Gov. Code § 11455.10 et seq.* [*see Gov. Code § 11455.10(e)*; 25 Cal. L. Rev. Comm. Reports 55 (1995)].

Effective July 1, 1997, the use of subpoenas in discovery is broader than formerly, in that a subpoena duces tecum may be issued for production of documents at any reasonable time and place, as well as at a hearing. Witness subpoenas are still limited to attendance at hearings [*Gov. Code § 11450.10(a)*]. Decisions under the prior law should be distinguished; decided under former *Gov. Code § 11510*, they did not permit subpoenas for prehearing discovery, but restricted the use of subpoenas only to compel attendance of witnesses or evidence at the hearing [*Shively v. Stewart (1966) 65 Cal. 2d 475, 478-479, 55 Cal. Rptr. 217, 421 P. 2d 65* ; *Stevenson v. State Bd. of Medical Examiners (1970) 10 Cal. App. 3d 433, 88 Cal. Rptr. 815* ; *Gilbert v. Superior Court (1987) 193 Cal. App. 3d 161, 165-167, 238 Cal. Rptr. 220]* .

For discussion of the subpoena requirements in the context of agency investigations as distinguished from discovery, see Ch. 471, *Investigations by Public Agencies* .

[c] Who May Issue Subpoena

Subpoenas and subpoenas duces tecum can be issued by the agency or the presiding officer at the request of a party, or by the attorney of record for a party, in accordance with *Code Civ. Proc. § 1985 et seq.* [*Gov. Code § 11450.20(a)*].

Gov. Code § 11450.20(a) is intended to incorporate the statutory privacy protections applicable in civil actions [25 Cal. L. Rev. Comm Reports 55 (1995)]. The primary privacy provisions are contained in *Code Civ. Proc. § 1985.3*, which protects and defines personal records of consumers [*Code Civ. Proc. § 1985.3(a)(1)*], and which provides for notice to consumers whose personal records are subject to a subpoena [*Code Civ. Proc. § 1985.3(e)*]. It also incorporates other procedures set out in Gov. Code § 1985 et seq., such as the requirement that a subpoena duces tecum can not be issued unless an affidavit satisfying the requirements of *Code Civ. Proc. § 1985* is completed. When the APA subpoena provision do not address a particular procedural issue relating to subpoenas, the provisions of *Code Civ. Proc. § 1985 et seq.* may be looked at to provide analogous procedures [25 Cal. L. Rev. Comm. Reports 55 (1995); *see also Sehlmeyer v. Department of General Services (1993) 17 Cal. App. 4th 1072, 21 Cal. Rptr. 2d 840]* . See Ch. 535, *Subpoenas* , for further discussion and forms relating to subpoenas in civil actions and the requirements of *Code Civ. Proc. § 1985 et seq.*

Gov. Code § 11450.20(a) also permits attorneys of record for a party to issue subpoenas, as well as the agency and presiding officer. This is an expansion of subpoena issuers permitted under the APA, in comparison with former APA provisions in effect before July 1, 1997 [25 Cal. L. Rev. Comm. Reports 55 (1995)].

[d] Service of Subpoena

Subpoenas may be served throughout California and must be served in accordance with *Code Civ. Proc. §§ 1987* (personal service of subpoena on witness) and 1988 (personal service of subpoena by sheriff on concealed witness) [*Gov. Code § 11450.20(b)*].

Alternatively, subpoenas and subpoenas duces tecum can be delivered by certified mail return receipt requested or by messenger [*Gov. Code § 11450.20(b)*]. Service by messenger is completed when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, or in person, and identifies himself or herself either by reference to date of birth and driver's license number or Department of Motor Vehicles identification number, or the sender may verify receipt of the subpoena by obtaining other identifying information from the recipient. The sender is required to make a written notation of the acknowledgement. A subpoena that is properly issued and acknowledged consistent with these requirements is as enforceable as a subpoena that is personally served [*Gov. Code § 11450.20(b)*].

Witnesses who are residents of the State of California at the time of service of the subpoena are required to attend the hearing to which they have been subpoenaed, but non-residents are not required to attend [*Gov. Code § 11450.20(c)*].

[e] Enforcement of Subpoena

A witness who fails to comply with a subpoena that has been properly issued and acknowledged can be punished for failure to comply with the subpoena as a contempt, and the subpoena can state these consequences [*Gov. Code § 11450.20(b)*]. Enforcement of subpoenas is authorized under *Gov. Code § 11455.10 et seq.* [25 Cal. L. Rev. Comm. Reports 55 (1995); *see* discussion of these provisions in *§ 473B.16*]. A witness can be held in contempt for failing or refusing, without substantial justification, to comply with a subpoena as well as other types of orders [*Gov. Code § 11455.10(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency InvestigationsScopeSubpoenas

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§ 473B.13 Scope of Discovery Under the APA

Under the discovery provision of the APA (*Gov. Code § 11340 et seq.*), a party is entitled to the following [*Gov. Code § 11507.6*]:

- To obtain from another party the names and addresses of known witnesses, regardless of whether they are intended to testify at the hearing.

- To inspect and make a copy of specified writings or documents in the possession or custody or under the control of the other party.

The writings and documents specified are [*Gov. Code § 11507.6*]:

- Statements of persons other than the respondent, who are named in the initial administrative pleading or any additional pleading, when it is claimed that the act or omission of the respondent as to this person is the basis for the proceeding.

- A statement pertaining to the subject matter of the proceeding made by any party to another party or person.

- Statements of witnesses then proposed to be called by the party, and of other persons having personal knowledge of the acts, omissions, or events that are the basis for the proceeding, not otherwise included in the two preceding types of statements.

- All writings, including but not limited to reports of mental, physical, and blood examinations and things that the party then proposes to offer in evidence.

- Any other writing or thing that is relevant and would be admissible in evidence.

- Investigative reports made by or on behalf of the agency or other party, pertaining to the subject

matter of the proceeding, to the extent that these reports:

- Contain the names and addresses of witnesses or persons having personal knowledge of the acts, omissions, or events that are the basis of the proceeding.

- Reflect matters perceived by the investigator in the course of his or her investigation.

- Contain, or include by attachment, any statement or writing described above, or any summary of such statement or writing.

"Statements" are defined for the purposes of this provision to include [*Gov. Code § 11507.6*]:

- Statements signed or otherwise authenticated by the person described.

- Stenographic, mechanical, electrical, or other recordings or transcripts of oral statements by the person described, or written reports or summaries of these oral statements.

Gov. Code § 11507.6 does not authorize the inspection or copying of anything that is privileged from disclosure by law or is otherwise made confidential or protected as the attorney's work product [*Gov. Code § 11507.6*; *see* discussion in *§ 473B.15* for discussion of these and certain other statutory limits on discovery].

It is apparent that the scope of administrative prehearing discovery under *Gov. Code § 11507.6* is more limited than the scope of discovery in civil actions. In a civil action, a party may generally obtain discovery on any unprivileged matter that is relevant, if the matter is either admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence [*Code Civ. Proc. § 2017.010*; *see* Ch. 190- 200, *Discovery*]. Moreover, oral depositions may be taken in civil actions, whereas only the statements and writing set out above may be obtained in administrative discovery [*see also* discussion in *§ 473B.12*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 473B.14 Administrative Discovery Procedures

[1] Request for Discovery

To initiate discovery under the APA (*Gov. Code § 11340 et seq.*), the party seeking discovery must make a written request to another party [*Gov. Code § 11507.6*]. Other than the requirement of a writing, the statute prescribes no particular form [*see § 473B.12[3]* (discussing the effect of framing the request in the form of interrogatories)].

Making a written request for discovery is the only step required to perfect a right to California APA discovery. Thus, for example, declarations or affidavits showing good cause are not required [*but see § 473B.12[4]* (discussing requirements for administrative subpoena)].

See *§ 473B.61* for a form of request for discovery.

[2] Time Limits

[a] Statutory Time Limits

The request for discovery must be made before the hearing and within 30 days after the agency serves the initial pleading. If an additional pleading (such as an amended or supplemental accusation or statement of issues) is served, discovery requests must be made within 15 days of this service [*Gov. Code § 11507.6*].

Adequate time usually exists for discovery because the Office of Administrative Hearings (OAH) normally sets hearing dates at least 60 to 90 days after service of the initial pleading. If an additional pleading is filed less than 15 days before the hearing, a party might be entitled to a continuance to allow discovery. If the new pleading presents new charges, the respondent is expressly entitled to a reasonable time after service to prepare a defense, which may require a reasonable opportunity for further discovery as well [*Gov. Code § 11507*; for discussion of amending, supplementing, and correcting pleadings, *see* Ch. 473A, *Commencing Agency Adjudication*].

If the time for discovery expires before the respondent hires an attorney, the attorney should explain the situation to the agency and ask for more time to conduct discovery. The agency is very likely to cooperate. For discussion of how

failure to comply with these limits may curtail discovery, see *§ 473B.15[1]*.

[b] Availability of Discovery Before Notice of Defense Is Filed

It appears that discovery is available only after the respondent files a notice of defense. *Gov. Code § 11507.6* provides that a party is entitled to discovery "after the initiation of a proceeding" in which a respondent or other party is entitled to a hearing on the merits. A respondent, in turn, is not entitled to a hearing on the merits until he or she files a notice of defense [*see Gov. Code § 11506(c)* (failure to file notice of defense waives respondent's right to hearing); *see* Ch. 473A, *Commencing Agency Adjudication*]. As a practical matter, many respondents file a request for discovery at the time of filing the notice of defense.

[3] Method for Requesting Discovery

[a] Service by Mail

Discovery is initiated by the parties without the approval or control of the Office of Administrative Hearings or the courts. Requests usually are served by mail. The formal hearing provisions of the APA's Chapter 5 (*Gov. Code § 11500 et seq.*) does not specify whether timeliness of the request is determined by the date that the request is mailed or the date that the other party receives it. Mailing within the time limits is probably adequate [*cf. Code Civ. Proc. § 1013(a)* (service by mail in civil actions is complete at the time of deposit in a post office, mail box, or similar facility); *Code Civ. Proc. § 1013(c), (e)* (time is extended by two court days when notice is served by facsimile transmission, express mail, or other overnight delivery service); *Cal. Rules of Ct., Rule 2.306(h)* (proof of service by facsimile transmission)].

[b] Keeping Copy of Request and Proof of Service

The requesting party should keep a copy of the original request, together with proof of service, in case it becomes important in the subsequent administrative hearing or in a court proceeding. The original is not made part of the administrative record unless it is used for determining motions, evidentiary objections, credibility of witnesses, or other matters connected with the administrative hearing.

[4] Complying With Discovery Request

Because the APA discovery provision, *Gov. Code § 11507.6*, does not provide a formal method for complying with a discovery request, the parties and their attorneys usually arrange an exchange of documents or agree on a time for inspecting and copying. The APA also fails to fix a time limit on compliance, although *Gov. Code § 11507.7(a)* provides that a party may file a motion with the administrative law judge to compel compliance after 30 days [*see* discussion in *§ 473B.15*].

In any case, requests should be complied with within a reasonable time. Failure to comply may be cause for continuance of the administrative hearing or may serve as the basis for a motion to exclude or strike evidence.

[5] Costs of Copying

Because *Gov. Code § 11507.6* entitles a party to inspect and copy documents [*see* discussion in *§ 473B.13*], but does not require the other party to furnish copies, the party who wants the copies must pay for them unless the agency provides the copies. Many agencies do provide copies of discoverable documents, generally for a small fee.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 473B.15 Limits and Conditions on Discovery

[1] General Limitations

As discussed more fully in §§ *473B.13[1]* and *473B.14*, a party to an administrative adjudication governed by the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*) is limited exclusively to the scope of discovery under *Gov. Code § 11507.6* [*Gov. Code § 11507.5*]. *Gov. Code § 11507.6*, in turn, permits discovery only from another party, and only specified statements, writings in the other party's possession or control. Prehearing depositions and formal interrogatories are not allowed, so that no procedure exists to question another party in order to determine the extent of discoverable material in the other party's possession or control. Because the APA lacks procedures for determining the extent of discoverable matters, voluntary and good faith compliance by the parties is necessary for effective discovery.

The request for discovery must be made within the time periods set forth [*Gov. Code § 11507.6*; *see* discussion in *§ 473B.14[2]*]. Although *Gov. Code § 11524(a)* provides that the agency or the administrative law judge may grant a continuance for good cause shown, discovery may be denied if a party fails to comply with statutory requirements [*see Lax v. Board of Medical Quality Assurance (1981) 116 Cal. App. 3d 669, 675-676, 172 Cal. Rptr. 258* (failure to file petition to compel discovery within time allowed amounts to waiver of right to continuance); *Stevenson v. State Bd. of Medical Examiners (1970) 10 Cal. App. 3d 433, 88 Cal. Rptr. 815* (petition for depositions under *Gov. Code § 11511* properly denied because petition failed to establish the materiality of the testimony as required by *Gov. Code § 11511*)]. *Gov. Code § 11507.6* does not require that a response to a request for discovery be made under oath.

[2] Privileges

[a] Privileged Matter Not Discoverable

The APA discovery provision does not authorize the discovery of any writing or thing that is legally privileged from disclosure or is otherwise made confidential or protected as attorney work product [*Gov. Code § 11507.6(f)*]. This encompasses all privileges that normally could be invoked by a litigant in a civil court case, as well as the attorney work-product protection [*see Code Civ. Proc. §§ 2016(b)* (application of privilege restrictions to civil court discovery), *2018* (attorney work-product protection)].

Privileges set out in the Evidence Code are expressly made applicable to both APA and non-APA administrative adjudications [*see Evid. Code §§ 901* ("proceeding" is any action, hearing, investigation, inquest, or inquiry in which testimony can be compelled pursuant to law, including a proceeding conducted by an administrative agency or hearing officer), *910* (*Evid. Code § 900 et seq.*, concerning privileges, apply in all proceedings except as otherwise provided by statute)].

Detailed discussion and forms relating to evidentiary privileges and the attorney work-product protection may be found in Ch. 191, *Discovery: Privileges and Other Discovery Limitaitons* [*see also* DeMeo, California Deposition and Discovery Practice, Chs. 21-32 (Matthew Bender); California Trial Guide, Unit 51 (Matthew Bender)]. The evidentiary privileges and statutory protections against disclosure are:

- Attorney work-product protection [*Code Civ. Proc. § 2018.010-2018.080*; *see also* discussion in *[4], below*].

- Lawyer-client communications [*Evid. Code §§ 950-962*].

- Marital communications and privilege not to testify against spouse [*Evid. Code §§ 970-987*].

- Physician-patient communications [*Evid. Code §§ 990-1007*; *see also* discussion in *[3], below*].

- Psychotherapist-patient communications [*Evid. Code §§ 1010-1027*].

- Clergy-penitent communications [*Evid. Code §§ 1030-1034*].

- Victim-counselor communications for sexual assault or domestic violence [*Evid. Code §§ 1035-1037.7*].

- Official records and information [*Evid. Code §§ 1040-1047*; *see also* discussion in *[5], below*].

- Political vote [*Evid. Code § 1050*].

- Trade secrets [*Evid. Code § 1060*].

- Privilege against self-incrimination [*Evid. Code § 940*; for discussion of the privilege against self-incrimination in agency investigations and inspections, *see* respectively Ch. 471, *Investigations by Public Agencies* , and Ch. 471A, *Inspections by Public Agencies*].

- Protection of newsperson from contempt for refusal to disclose news sources [*Evid. Code § 1070*].

The evidentiary privileges in *Evid. Code §§ 900-1070* apply even though the rules of evidence themselves do not apply to APA hearings [*Evid. Code § 910* (privileges apply except as otherwise provided by statute; statute making rules of evidence inapplicable does not make privileges inapplicable); *Gov. Code § 11513(c)* (with certain exceptions, APA hearings need not be conducted according to technical rules of evidence, but rules of privilege are effective to extent otherwise required by statute to be recognized at hearing); for discussion of the evidentiary rules applicable to administrative hearings, *see* Ch. 473F, *Agency Adjudication Hearings*].

The privilege afforded a defendant in a criminal case (*Evid. Code § 930*) to refuse to respond as a witness and testify is not available to parties in an administrative proceeding [*McComb v. Superior Court (1977) 68 Cal. App. 3d 89, 96-98, 137 Cal. Rptr. 233]* . Thus, a party can be compelled to appear and testify, but he or she may invoke the privilege against self-incrimination and refuse to disclose matters that may tend to incriminate him or her [*San Francisco*

Unified School Dist. v. Superior Court (1981) 116 Cal. App. 3d 231, 235, 172 Cal. Rptr. 42] .

[b] The Presumption of Confidentiality and the Burden of Proof

The burden of establishing that a matter is privileged is generally on the party asserting the privilege [*San Diego Professional Asso. v. Superior Court of San Diego County (1962) 58 Cal. 2d 194, 199, 23 Cal. Rptr. 384, 373 P.2d 448* ; *Chronicle Pub. Co. v. Superior Court (1960) 54 Cal. 2d 548, 565, 7 Cal. Rptr. 109, 354 P.2d 637]* . In contrast to this general rule, communications between the following parties are presumed to have been made in confidence [*Evid. Code § 917*]:

- Attorney-client.
- Physician-patient.
- Psychotherapist-patient.
- Clergy-penitent.
- Husband-wife or marital.

The opponent of the claim of privilege has the burden of overcoming this presumption by proving that the communication was not confidential [*Evid. Code § 917*]. This presumption and the attendant shift in the burden of proof only arise, however, after the party claiming the privilege shows that the applicable relationship exists. For example, a party who claims the psychotherapist-patient privilege must first show that he or she was a "patient" [*see Evid. Code § 1011* (definition of patient for purposes of psychotherapist-patient privilege)], and that the person consulted was a "psychotherapist" [*Mahoney v. Superior Court (1983) 142 Cal. App. 3d 937, 940-941, 191 Cal. Rptr. 425* ; *see Evid. Code § 1010* (definition of psychotherapist for purposes of psychotherapist-patient privilege)].

[3] Physician-Patient Privilege

The physician-patient privilege [*Evid. Code §§ 990-1007*] is one of the privileges that may be asserted in response to an administrative request for discovery [*Evid. Code §§ 910, 990-1007*; *see* discussion in *[2][a], above*]. *Evid. Code § 1007* purports to limit the privilege by providing that it does not exist in a proceeding (defined under *Evid. Code § 901* to include investigations and inquiries) brought by a public entity to determine whether a right, authority, license, or privilege should be revoked, suspended, terminated, limited, or conditioned.

This limitation on the physician-patient privilege, however, is itself limited by case law holding that the physician-patient privilege creates a "zone of privacy" protected by California's constitutional right to privacy [*Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 678-679, 156 Cal. Rptr. 55* ; *see Cal. Const., art. I, § 1* (right of privacy)]. Thus, notwithstanding *Evid. Code § 1007*, the physician-patient privilege can be asserted against a request for discovery by an administrative agency.

The right to privacy is not absolute, but an invasion of this right must be justified by a compelling state interest, unless the patient has waived the right of privacy by consenting to the intrusion [*White v. Davis (1975) 13 Cal. 3d 757, 775, 120 Cal. Rptr. 94, 533 P.2d 222* ; *Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 679-681, 156 Cal. Rptr. 55]* . If there has been no waiver, the agency must show that there is good cause for production of the material sought [*Pating v. Board of Medical Quality Assurance (1982) 130 Cal. App. 3d 608, 618, 182 Cal. Rptr. 20* ; *Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 679-682, 156 Cal. Rptr. 55]* . For discussion of agency investigative subpoenas and the right of privacy, including an explanation of "good cause," see Ch. 471, *Investigations by Public Agencies* .

For detailed, general discussion relating to the physician-patient communication privilege, see Ch. 191, *Discovery: Privileges and Other Discovery Limitaitons* [*see also* DeMeo, California Deposition and Discovery Practice, Chs. 21-32 (Matthew Bender); California Trial Guide, Unit 51 (Matthew Bender)].

[4] Attorney Work Product

Under Chapter 5 (*Gov. Code § 11500 et seq.*), the formal hearing provisions of the APA (*Gov. Code § 11500 et seq.*), a party may refuse to disclose information that is protected by the attorney work product rule [*Gov. Code § 11507.6*].

The protection of attorney work-product rule provides absolute protection from discovery for any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories [*Code Civ. Proc. § 2018.030(a)*]. Other work product of an attorney is not discoverable unless the denial of discovery will unfairly prejudice the party seeking it or will result in an injustice [*Code Civ. Proc. § 2018.030(b)*].

The California State Bar, however, may discover the work product of an attorney against whom disciplinary charges are pending, if the work product is relevant to issues of breach of duty by the lawyer. Discovery of this material is subject to approval of the client for whom the work was done. On request and with a showing of good cause, the discovery will also be subject to a protective order to ensure the confidentiality of the work product except for its use by the State Bar in disciplinary investigations and its consideration under seal in State Bar Court proceedings. When a client initiates a complaint against his or her attorney, that client's approval of discovery of the work product is deemed to have been granted [*Code Civ. Proc. § 2018.070(c)*; for detailed discussion of the non-APA disciplinary proceedings conducted by the State Bar, *see* Ch. 71, *Attorney Discipline*].

The work product privilege does not apply to work product that is relevant to an issue of breach by an attorney of a duty owed to a client arising out of the attorney-client relationship. Thus, clients or former clients who sue lawyers for professional negligence can obtain discovery of attorney work product relevant to their claim [*Code Civ. Proc. § 2018(f)*].

For detailed, general discussion and forms relating to the attorney work-product protection, see Ch. 191, *Discovery: Privileges and Other Discovery Limitaitons* [*see also* DeMeo, California Deposition and Discovery Practice (Matthew Bender); California Trial Guide, Unit 51 (Matthew Bender)].

[5] Official Information

"Official information" is information acquired in confidence by a public employee in the course of the employee's duties and not open to or disclosed to the public [*Evid. Code § 1040(a)*]. A public entity, which includes public agencies [*Evid. Code § 200*], has a privilege to refuse to disclose official information if the privilege is claimed by a person authorized by the agency to do so. Disclosure also must either be forbidden by a federal or California statute or be against the public interest. A disclosure is against the public interest if the necessity of preserving the confidentiality of the information outweighs the necessity for disclosure in the interest of justice [*Evid. Code § 1040(b)(2)*].

However, the interest of the public agency in investigating wrongdoing would support the public interest in confidentiality of the records because disclosure of audit manuals would make it easier for licensees to avoid detection of violations of the law [*Suarez v. Office of Administrative Hearings (2004) 123 Cal. App. 4th 1191, 1195-1196, 20 Cal. Rptr. 3d 618]* . In *Suarez*, an ALJ ordered disclosure of a Department of Real Estate Audit Manual and Enforcement Deputy Manual to a real estate broker charged with fraud. Disclosure was ordered after the broker brought a motion to compel production of the manuals as part of the discovery process related to administrative hearing. Broker argued that manuals were relevant to issues in hearing. The ALJ conducted an in camera examination of the manuals before ordering disclosure. The Court of Appeal upheld the Superior Court's grant of a petition for a writ of

administrative mandate prohibiting disclosure of the manuals under the provisions of *Evid. Code § 1040(b)(2)*. The Court of Appeal held that the audit method used by DRE auditors would not provide the licensee a relevant defense to the charges brought against him, and therefore the need for disclosure of the records (to provide information relevant to the licensee's defense) was outweighed by the public interest in confidentiality [*Suarez v. Office of Admin. Hearings (2004) 123 Cal. App. 4th 1191, 1195-1196, 20 Cal. Rptr. 3d 618]* .

This privilege does not apply, however, if any person authorized to do so consents that the information be disclosed in the proceeding [*Evid. Code § 1040(b)(2)*]. This exception seems to provide a party with access to information the agency plans to introduce at the hearing. Whether it would allow discovery of official information used in the case but not intended to be used in the hearing is not clear.

For detailed, general discussion and forms relating to official information privilege, see Ch. 191, *Discovery: Privileges and Other Discovery Limitaitons* [*see also* DeMeo, California Deposition and Discovery Practice, Chs. 21-32 (Matthew Bender); California Trial Guide, Unit 51 (Matthew Bender)].

[6] Sexual Conduct

In employment discrimination and harassment cases [*see Gov. Code § 12940(h), (i)*], civil service discipline cases [*see Gov. Code § 19572*], and civil service discrimination cases [*see Gov. Code § 19702*], that allege conduct that constitutes sexual harassment, sexual assault, or sexual battery, any evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is not discoverable, unless it is to be offered at a hearing to attack the credibility of the complainant [*Gov. Code § 11440.40(a)*]. At the hearing, this evidence is presumed inadmissible absent an offer of proof that establishes the following [*Gov. Code § 11440.40(b)*]:

- The relevance and reliability of the offered evidence.

- The probative value of the evidence offered is not substantially outweighed by the probability that its admission will create substantial danger of undue prejudice or confuse the issue.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency InvestigationsConstitutional RightsSelf-Incrimination PrivilegeConstitutional LawSubstantive Due ProcessPrivacyGeneral OverviewEvidencePrivilegesAttorney-Client PrivilegeGeneral OverviewEvidencePrivilegesClergy CommunicationsGeneral OverviewEvidencePrivilegesDoctor-Patient PrivilegeGeneral OverviewEvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeGeneral OverviewEvidencePrivilegesMarital PrivilegesGeneral OverviewEvidencePrivilegesPsychotherapist-Patient PrivilegeGeneral Overview

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§ 473B.16 Enforcement of Discovery Under the California APA

[1] Motion to Compel Discovery

Gov. Code § 11507.7 provides the remedy for failure to comply with a discovery request under the APA formal hearing provisions (*Gov. Code § 11500 et seq.*). Any party claiming that the party's request for discovery pursuant to *Gov. Code § 11507.6* has not been complied with may serve and file with the administrative law judge a motion to compel discovery. The motion must do the following [*Gov. Code § 11507.7(a)*]:

- Name as respondent the party refusing or failing to comply with *Gov. Code § 11507.6*.
- State facts showing that the respondent failed or refused to comply with *Gov. Code § 11507.6*.
- Describe the matter sought to be discovered.
- Give the reason or reasons why the matter is discoverable under *Gov. Code § 11507.6*.
- Show that a reasonable and good faith attempt to contact the respondent for an informal resolution has been made.
- Give the ground or grounds of respondent's refusal, as far as known to the moving party.

The motion to compel should contain a clear, complete, and concise statement of each of these items. Because the time for argument and additional evidence may be very limited, the motion, answer, and supporting documents should be complete. For purposes of filing, the motion should be filed with the administrative law judge who has been assigned to hearing the case.

See *§ 473B.63* for a form of motion to compel discovery.

[2] Serving and Filing the Motion

The motion to compel discovery must be served on the respondent party and filed with the administrative law judge within 15 days after the respondent first evidenced failure or refusal to comply with the request for discovery, within 30 days after the request was made and the respondent party has failed to reply to it, or within another time provided by stipulation, whichever period is longer.

Under case law interpreting the former law in effect prior to July 1, 1997, failure to move to compel compliance within the applicaable time periods could be treated as a waiver of the right to do so [*Lax v. Board of Medical Quality Assurance (1981) 116 Cal. App. 3d 669, 675-676, 172 Cal. Rptr. 258* (failure to file petition to compel discovery within time allowed amounts to waiver of right to get continuance to file petition)].

Although *Gov. Code § 11507.7* prescribes no particular method of service, the motion should be served in the same way as a summons in a civil action; the reasoning is that, despite explicit provision, it is reasonable to assume that Legislature intended to refer to normal practice in civil proceedings [*see § 473B.63*; *see also Code Civ. Proc. § 413.10 et seq.* (service of summons); Ch. 518, *Service of Summons and Papers*].

[3] Answer and Hearing on Motion to Compel

The hearing on the motion to compel discovery shall be held within 15 days after the motion is made, or a later time that the administrative law judge may on the judge's own motion for good cause determine. The responding party has the right to serve and file a written answer or other response to the motion before or at the time of the hearing [*Gov. Code § 11507.7(c)*].

Most answers claim that the requested discovery is not discoverable matter under *Gov. Code § 11507.6*. They may also claim that the requested discovery is privileged, confidential, attorney work product [*Gov. Code § 11507.6(f)*; *see § 473B.16[2], [4]*], or evidence of a complainant's sexual conduct [*Gov. Code § 11440.40*; *see § 473B.15[6]*]. Agencies often claim that the requested information is official information [*Evid. Code § 1040*; *see § 473B.15[5]*], or otherwise not discoverable pursuant to a special statute [*see Gilbert v. Superior Court (1987) 193 Cal. App. 3d 161, 167-176, 238 Cal. Rptr. 220* (writ of mandate to compel compliance with subpoenas before administrative hearing denied because records sought were privileged under *Welf. & Inst. Code §§ 4514*, 5238)].

See *§ 473B.64* for a form of answer to a motion to compel.

[4] *In Camera* Inspection

Where the matter sought to be discovered is under the custody or control of the respondent party and the party responding to the motion claims that the matter is not discoverable under *Gov. Code § 11507.6* or is privileged, the administrative law judge may order lodged with it matters provided in *Evidence Code § 915(b)*, and may examine the material *in camera* consistent with *Evid. Code § 915(b)* [*Gov. Code § 11507.7(d)*]. For discussion of *Evid. Code § 915*, *see* DeMeo, california deposition and discovery practice, Ch. 21, § 21.21[3].

When possible, the responding party should have the material available at the time of the order so that it can be delivered to the judge for examination, if an examination is ordered.

[5] Order Granting or Denying Motion

The administrative law judge will decide the case on the matters examined in camera, the papers filed by the parties, and such oral argument and additional evidence as the administrative law judge may allow [*Gov. Code § 11507.7(e)*]. Unless otherwise stipulated by the parties, the administrative law judge shall no later than 15 days after the hearing make its order denying or granting the motion. The order shall be in writing setting forth the matters the moving party is entitled to discover under *Gov. Code § 11507.6*. A copy of the order shall be served forthwith by mail by the

administrative law judge on the parties. If the order grants the motion in whole or in part, the order shall not become effective until 10 days after the date the order is served. When the order denies relief to the moving party, the order shall be effective on the date it is served [*Gov. Code § 11507.7(f)*]. See *§§ 473B.65* and *473B.66* for forms of orders granting or denying relief.

[6] Review of Judge's Order

The administrative law judge's order compelling discovery is enforceable by certification to the superior court of facts to justify the contempt sanction [*see Gov. Code §§ 11455.10-11455.20*]. A court judgment of contempt is not appealable [*see Code Civ. Proc. §§ 904.1(a), 1222*]. The administrative law judge may also impose monetary sanctions for bad faith tactics, which are reviewable in the same manner as the decision in the proceeding [*see Gov. Code § 11455.30*; *see* 25 Cal. L. Rev. Comm. Reports 55 (1995), Comments to *Gov. Code § 11507.7*].

[7] Sanctions

Contempt sanctions can be imposed against a party who fails or refuses, without substantial justification, to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer, or who moves to compel discovery without substantial justification [*Gov. Code § 11455.10*].

Court enforcement of contempt sanctions uses an order to show cause procedure. The presiding officer or the agency head may certify the facts that justify the contempt sanction against a person to the superior court in and for the county where the proceeding is conducted. The court shall thereupon issue an order directing the person to appear before the court at a specified time and place, and then and there to show cause why the person should not be punished for contempt. The order and a copy of the certified statement shall be served on the person. Upon service of the order and a copy of the certified statement, the court has jurisdiction of the contempt proceeding [*Gov. Code § 11455.20(a)*]. The contempt procedures, penalties, and purging grounds are the same as those used in the trial of a civil action in the superior court [*Gov. Code § 11455.20(b)*].

Monetary sanctions are also authorized. The presiding officer may order a party, the party's attorney or other authorized representative, or both to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in *Code Civ. Proc. § 128.5* [*Gov. Code § 11455.30(a)*]. Bad faith actions or tactics could include failure or refusal to comply with a deposition order, discovery request, subpoena or other order of the presiding officer in discovery, or moving to compel discovery, frivolously or solely intended to cause delay. A person who requests a hearing without legal grounds would not be subject to sanctions under this section unless the request was made in bad faith or solely intended to cause unnecessary delay [*see* 25 Cal. L. Rev. Comm. Reports 55 (1995)]. The order, or denial of an order, is subject to judicial review in the same manner as a decision in the proceeding [*see* Ch. 474, *Availability of Judicial Review of Agency Decisions* et seq.]. The order is enforceable in the same manner as a money judgment or by the contempt sanction [*Gov. Code § 11455.30(b)*].

For detailed discussion and forms relating to contempt, enforcement of money judgments, and sanctions generally, see respectively Ch. 135, *Contempt* , Ch. 254, *Executions and Enforcement of Judgments* , and Ch. 510, *Sanctions* .

In view of potential sanction liability, parties should be careful about refusing or limiting discovery without substantial justification. If counsel or client is determined to resist a discovery request, and if counsel feels that the material sought is not or may not be discoverable, sending a formal notice of noncompliance to the requesting party by certified mail, with plausible reasons for resisting the request, may favorably impress the administrative law judge when he or she is later deciding whether to impose sanctions [*see Gov. Code § 11507.6(f)* (things not discoverable in APA proceedings); *see also § 473B.13*].

See *§ 473B.62* for a form of notice of non-compliance with an administrative discovery request.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPresiding OfficersDuties & PowersCivil ProcedureSanctionsContemptGeneral OverviewEvidencePrivilegesAttorney-Client PrivilegeGeneral OverviewEvidencePrivilegesGovernment PrivilegesOfficial Information PrivilegeGeneral Overview

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§ 473B.17 Non-APA Statutory Discovery

[1] Applicability of Non-California APA Discovery Statutes

Discovery under the APA discovery provisions (*Gov. Code § 11507.6*) applies only to agency adjudication proceedings under the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*) [*see Gov. Code § 11507.5*; *Bertch v. Social Welfare Dep't (1955) 45 Cal. 2d 524, 527, 289 P.2d 485* ; for discussion of which agency adjudication proceedings are subject to the formal hearing provision of Chapter 5, *see* Ch. 473, *Public Agency Adjudication*].

In a few instances, when the APA provisions do not apply, the provisions of the Civil Discovery Act [*Code Civ. Proc. §§ 2016.010-2016.070*] have been made specifically applicable. For example, *Educ. Code § 44944(a)* makes the act applicable in proceedings for dismissal or suspension of school district employees. Absent such a specific statutory authorization, the act does not apply to administrative proceedings [*Code Civ. Proc. § 2016*; *Romero v. Hern (1969) 276 Cal. App. 2d 787, 790, 81 Cal. Rptr. 281]* .

The Legislature has also enacted numerous statutes governing administrative discovery in proceedings not covered by the APA. Under these non-APA discovery statutes, the range of discovery provided varies from the right of a civil servant to inspect relevant documents and interview other employees when facing adverse action [*Gov. Code § 19574.1*; *see Gov. Code § 19570* (adverse action defined)], to the right of a school district employee in a suspension or dismissal proceeding to employ the full range of discovery allowed in superior court civil actions [*Educ. Code § 44944(a)*].

If a specific discovery statute applies to an administrative proceeding, it controls over the APA discovery provisions that might otherwise apply [*San Francisco Unified School Dist. v. Superior Court (1981) 116 Cal. App. 3d 231, 235, 172 Cal. Rptr. 42]* .

[2] Investigation and Enforcement

Most of the non-APA discovery provisions are not so much discovery provisions as they are provisions that authorize state officials and administrative boards to use specific discovery techniques to aid in their investigations and in the enforcement of their regulatory programs. The power to employ information-gathering techniques in connection with agency investigations in general is authorized by *Gov. Code § 11180 et seq.* [*see* Ch. 471, *Investigations by Public*

Agencies for detailed discussion of agency investigations]. The following matters are among those subject to special statutes authorizing administrative discovery in connection with administrative investigations and enforcement proceedings:

- Meat and Poultry Inspection Act investigations [*Food & Agric. Code § 18906*; *see Food & Agric. Code § 18650 et seq.*].

- Escrow agent hearings and investigations [*Fin. Code § 17611*].

- Depositions in investigations by the Fish and Game Commission [*Fish & Game Code §§ 309, 5934*].

- Hearings by the judicial qualification commission [*Gov. Code §§ 68752, 68753*].

- Hearings by the labor commissioner [*Lab. Code § 92*].

- Unemployment insurance appeals, proceedings, hearings, or investigations [*Unemp. Ins. Code § 1953*].

- Investigating powers of commissioner of corporations [*Corp. Code § 25531*].

- Depositions in investigations or hearings before the Public Utilities Commission [*Pub. Util. Code § 1794*].

- Teacher suspension or dismissal proceedings [*Educ. Code § 44944(a)*].

[3] Private Parties

Non-APA statutory discovery is also available to private parties in some administrative proceedings. The following matters are among those subject to statutes that authorize non-California APA administrative discovery for private parties:

- State Personnel Board hearings [*Gov. Code § 19574.1*; *see Nightingale v. State Personnel Board (1972) 7 Cal. 3d 507, 516-518, 102 Cal. Rptr. 758, 498 P.2d 1006* (when civil servant in disciplinary proceeding failed to show good cause for issuance of interrogatories, court declined to decide whether discovery available was limited to right to inspect documents and interview other employees provided by *Gov. Code § 19574.1*); Ch. 117, *Civil Service*].

- Depositions in investigations or hearings before the Public Utilities Commission [*Pub. Util. Code § 1794*; *see* Ch. 480, *Public Utilities*].

- Teacher suspension or dismissal proceedings [*Educ. Code § 44944(a)*; *see* Ch. 512, *Schools: Certification, Dismissal, and Related Employment Issues*].

- Discovery in workers' compensation proceedings [*Lab. Code § 5710*; *see* Ch. 577, *Workers' Compensation*].

- Depositions in fishway hearings [*Fish & Game Code § 5934*].

- Discovery in peace officer employment discipline proceedings [*Gov. Code § 3303(g)*; *Hinrichs v. County of Orange (2004) 125 Cal. App. 4th 921, 928-929, 23 Cal. Rptr. 3d 186* (sheriffs' department

employee had right to discovery of non-confidential reports related to officer's misconduct, and sheriff's department had statutory obligation to disclose reports)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityCivil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionGovernmentsLocal GovernmentsAdministrative Boards

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§ 473B.18 Nonstatutory Court Authorized Discovery

[1] Availability

If the administrative proceeding is not governed by the California APA, and even if there is no other statutory authority for discovery [*see § 473B.18*], it nevertheless may be possible to obtain discovery when "modern concepts of administrative adjudication call for common law rules to permit and regulate the use of the agencies' subpoena power to secure prehearing discovery" [*Shively v. Stewart (1966) 65 Cal. 2d 475, 479, 55 Cal. Rptr. 217, 421 P.2d 65]* . Common law rules have been applied to administrative procedures by court decisions whenever it appears necessary to promote fair hearings and effective judicial review [*Shively v. Stewart (1966) 65 Cal. 2d 475, 479, 55 Cal. Rptr. 217, 421 P.2d 65]* . For example, discovery is appropriate in state bar disciplinary proceedings [*Brotsky v. State Bar (1962) 57 Cal. 2d 287, 298-302, 19 Cal. Rptr. 153, 368 P.2d 697* ; *see* Ch. 71, *Attorney Discipline* , for discussion and forms relating to State Bar proceedings].

[2] Governing Law

Shively v. Stewart (1966) 65 Cal. 2d 475, 55 Cal. Rptr. 217, 421 P.2d 65 , is the leading decision regarding common law administrative discovery. This decision arose from an administrative adjudication to revoke the medical licenses of several doctors for performing illegal abortions. The proceeding was brought under the APA before the APA had been amended to provide for discovery. The doctors against whom the proceeding was brought sought subpoenas duces tecum requesting prehearing depositions and production of documents. The Court analogized providing discovery in administrative proceedings to court-developed discovery in criminal cases [*Shively v. Stewart (1966) 65 Cal. 2d 475, 478-480, 55 Cal. Rptr. 217, 421 P.2d 65]* .

On a showing of good cause and materiality, governed by the standards applicable to civil discovery, and not those for issuing subpoenas duces tecum under *Code Civ. Proc. § 1985*, the Court allowed subpoenas for the production of any statements made by women named in the accusations and their husbands, and copies of bills, letters, and documents with respect to treatment given the women. Further, the Court allowed depositions of agency employees to enable the doctors to establish good cause for the production of other documents in the agency's files [*Shively v. Stewart (1966) 65 Cal. 2d 475, 481-482, 55 Cal. Rptr. 217, 421 P.2d 65]* .

The *Shively* decision did not extend discovery to deposing material witnesses generally [*Everett v. Gordon (1968) 266 Cal. App. 2d 667, 671-673, 72 Cal. Rptr. 379]* .

When seeking discovery under *Shively*, the following considerations are important:

- *Shively* arose out of a disciplinary proceeding that the Court described as having a punitive character because the agency could prohibit the accused doctors from practicing their profession [*Shively v. Stewart (1966) 65 Cal. 2d 475, 480, 55 Cal. Rptr. 217, 421 P.2d 65]* .

- Since the enactment of *Gov. Code § 11507.6* in 1968, discovery in California APA licensing proceedings (and other California APA proceedings) is exclusively governed by *Gov. Code § 11507.6* [*Gov. Code § 11507.5*; *see § 473B.12[1]*]. The reasoning in *Shively* is still valid, but its application is now much more limited to non-APA proceedings.

- Although there is no absolute right to see everything in an agency's files, items need not be admissible in the hearing to be discoverable [*Shively v. Stewart (1966) 65 Cal. 2d 475, 481, 55 Cal. Rptr. 217, 421 P.2d 65]* .

- A showing of good cause and materiality is required, but this showing is governed by discovery standards [*Shively v. Stewart (1966) 65 Cal. 2d 475, 481, 55 Cal. Rptr. 217, 421 P.2d 65* (thus, because a weighing of good cause and materiality according to discovery standards would have entitled a defendant charged with criminal abortion to pretrial discovery of statements by the alleged victims to the police, doctors in a disciplinary hearing were entitled to prehearing discovery of statements by the women treated and their husbands)].

- *Shively* has been interpreted as allowing depositions only for ascertaining discoverable matter and preserving testimony as in criminal discovery [*Everett v. Gordon (1968) 266 Cal. App. 2d 667, 72 Cal. Rptr. 379* ; *Stevenson v. State Bd. of Medical Examiners (1970) 10 Cal. App. 3d 433, 88 Cal. Rptr. 815* ; *Grannis v. Board of Med. Examiners (1971) 19 Cal. App. 3d 551, 96 Cal. Rptr. 863* ; *see Gov. Code § 11190* (any party to departmental hearing has right to attendance of witnesses on his or her behalf at the hearing or on deposition)]. But inspection of documents under *Shively*, on a showing of good cause and materiality, may extend as far as discovery under *Gov. Code § 11507.6* [*Romero v. Hern (1969) 276 Cal. App. 2d 787, 793, 81 Cal. Rptr. 281]* .

Finally, governmental agencies do not have to rely on court-created discovery rights. They have extensive investigatory and subpoena power that gives them discovery capabilities for gathering information from both party and nonparty sources [*Gov. Code §§ 11180-11191*]. The investigative power of agencies is liberally construed [*Brovelli v. Superior Court (1961) 56 Cal. 2d 524, 527-529, 15 Cal. Rptr. 630, 364 P.2d 462]* . Agencies can obtain information even before filing an initial pleading [*Gov. Code § 11189*. *See* discussion in *§ 473B.17*; *see also* Ch. 471, *Investigations by Public Agencies* , and Ch. 471A, *Inspections by Public Agencies*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceAdmissibilityGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency InvestigationsGeneral OverviewAdministrative LawAgency InvestigationsScopeSubpoenas

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[Reserved]

§§ 473B.19[Reserved]

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§ 473B.30 Federal Constitution

Due process clause. *U.S. Const., amend. XIV, § 1*

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§ 473B.31 State Constitution

Due process clause. *Cal. Const., art. I, § 7(a)*

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§ 473B.32 State Statutes

[1] Administrative Procedure Act

Accusation. *Gov. Code § 11503*

Administrative adjudication *bill of rights*. *Gov. Code §§ 11425.10-11425.60*

Administrative Law Judges. *Gov. Code § 11502*

Affidavits. *Gov. Code § 11514*

Agency decisional authority. *Gov. Code § 11440.10*

Agencies to which act applies. *Gov. Code §§ 11410.10, 11501*

Amendment of pleadings. *Gov. Code §§ 11507, 11516*

Applicability of provisions to statement of issues. *Gov. Code § 11504.5*

Conduct of hearing. *Gov. Code § 11512*

Consolidation of proceedings. *Gov. Code § 11507.3*

Contempt. *Gov. Code §§ 11455.10-11455.30*

Continuances. *Gov. Code § 11524*

Conversion of proceedings. *Gov. Code §§ 11470.10-11470.50*

Decision. *Gov. Code §§ 11516-11520, 11526*

Declaratory decision. *Gov. Code §§ 11465.10-11465.70*

Definitions of terms. *Gov. Code §§ 11405.10-11405.80, 11500*

Depositions. *Gov. Code § 11511*

Discovery. *Gov. Code §§ 11507.5-11507.7*

Disqualification. *Gov. Code §§ 11425.30, 11425.40, 11512*

Emergency decision. *Gov. Code §§ 11460.10-11460.80*

Evidence. *Gov. Code §§ 11435.10, 11440.40, 11513*

Ex parte communications. *Gov. Code §§ 11430.10-11430.80*

Hearings by electronic means. *Gov. Code § 11440.30*

Informal hearings. *Gov. Code §§ 11445.10-11445.60*

Intervention. *Gov. Code § 11440.50*

Language assistance. *Gov. Code §§ 11435.05-11435.65*

Judicial review. *Gov. Code § 11523*

Notice of defense. *Gov. Code § 11506*

Notice of hearing. *Gov. Code § 11509*

Oaths. *Gov. Code § 11528*

Official notice. *Gov. Code § 11515*

Reconsideration. *Gov. Code § 11521*

Reporting proceedings. *Gov. Code § 11512*

Restoration of rights. *Gov. Code § 11522*

Separate hearings. *Gov. Code § 11507.3*

Service and notice. *Gov. Code § 11440.20*

Service of initial pleading. *Gov. Code § 11505*

Settlement conferences. *Gov. Code § 11511.7*

Sexual harassment. *Gov. Code § 11440.40*

Statement of issues. *Gov. Code § 11504*

Subpoenas. *Gov. Code §§ 11450.05-11450.50*

Time and place of hearing. *Gov. Code § 11508*

Waiver of rights. *Gov. Code § 11415.40*

[2] Related Statutes

Affidavit of good cause as required for subpoena duces tecum. *Code Civ. Proc. § 1985*

Witness served with subpoena as entitled to demand one day's fees and mileage allowance. *Code Civ. Proc. § 1987*

Witness fees and mileage allowances. *Gov. Code §§ 11191, 68093, 68097.2*

Right to have subpoena issued. *Gov. Code § 11190*

Office of Administrative Hearings. *Gov. Code §§ 11370.1-11370.5*

Board of supervisors of county as empowered to establish county hearing officer. *Gov. Code §§ 27720, 27721*

Oaths used in civil proceedings. *Code Civ. Proc. § 2094*

Evidentiary effect of plea of nolo contendere. *Penal Code § 1016*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceAdmissibilityGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawAgency InvestigationsScopeSubpoenas

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41A-473B California Forms of Pleading and Practice--Annotated § 473B.33

§ 473B.33 Decisions

[1] General Requirements

Disciplinary action against licensee, finding licensee guilty of gross incompetence, is invalid when administrative record is completely devoid of any statute, rule, regulation, or evidence of an implied standard by which to measure competence of licensee's conduct. *Wheeler v. State Bd. of Forestry (1983) 144 Cal. App. 3d 522, 527-528, 192 Cal. Rptr. 693*

Administrative regulations that violate acts of Legislature are void. *Selby v. Department of Motor Vehicles (1980) 110 Cal. App. 3d 470, 474, 168 Cal. Rptr. 36*

Act in excess of agency's authority under enabling law are void. *Frates v. Burnett (1970) 9 Cal. App. 3d 63, 71, 87 Cal. Rptr. 731*

Subject of administrative proceeding is entitled to have statutory procedures strictly followed and fairly construed. *California School Employees Assn. v. Personnel Com. of Pajaro Valley Unified School Dist. (1970) 3 Cal. 3d 139, 145, 89 Cal. Rptr. 620, 474 P.2d 436*

Administrative regulation contrary to enabling law is void. *California School Employees Assn. v. Personnel Com. of Pajaro Valley Unified School Dist. (1970) 3 Cal. 3d 139, 144, 89 Cal. Rptr. 620, 474 P.2d 436*

Agency is not free to ignore its own validly established procedures. *Frates v. Burnett (1970) 9 Cal. App. 3d 63, 71, 87 Cal. Rptr. 731*

Reference to Administrative Procedure Act for guidance is proper in case not governed by act or other law. *Rudolph v. Athletic Commission (1960) 177 Cal. App. 2d 1, 12, 1 Cal. Rptr. 898*

Requirements of due process. *Connolly Development, Inc. v. Superior Court of Merced County (1976) 17 Cal. 3d 803, 818, 823, 132 Cal. Rptr. 477, 553 P.2d 637* ; *Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 208-209, 124*

Cal. Rptr. 14, 539 P.2d 774 ; *Beaudreau v. Superior Court (1975) 14 Cal. 3d 448, 458, 121 Cal. Rptr. 585, 535 P.2d 713*

[2] Depositions of Witnesses

Issuance of subpoena for taking witness's deposition is discretionary act. *Stevenson v. State Bd. of Medical Examiners (1970) 10 Cal. App. 3d 433, 439, 88 Cal. Rptr. 815*

Right to depose witness who will be absent from hearing, in case not governed by the Administrative Procedure Act (hereinafter referred to as "APA"), if agency has subpoena power. *Walker Mining Co. v. Industrial Acci. Com. (1939) 35 Cal. App. 2d 257, 262, 95 P.2d 188*

[3] Discovery Against Party

Gov. Code §§ 11507.5-11507.7 are exclusive discovery statutes in administrative proceedings; *Gov. Code § 11510*, governing subpoenas to produce documents and witnesses at administrative hearing, does not provide for discovery prior to administrative hearing. *Gilbert v. Superior Court (1987) 193 Cal. App. 3d 161, 166, 238 Cal. Rptr. 220*

Request by attorney to receive service of all papers for client survives dismissal of proceeding to enforce discovery when request withdrawn or nullified, so that subsequent service of second set of interrogatories on attorney is proper. *Department of Fair Employment & Housing v. Superior Court (1981) 116 Cal. App. 3d 149, 152, 171 Cal. Rptr. 863*

Right to discovery in case not governed by *APA. Shively v. Stewart (1966) 65 Cal. 2d 475, 479-480, 55 Cal. Rptr. 217, 421 P.2d 65*

[4] Subpoenas

Administrative subpoenas pursuant to *Gov. Code § 11180 et seq.* *Pating v. Board of Medical Quality Assurance (1982) 130 Cal. App. 3d 608, 616-618, 182 Cal. Rptr. 20*

Court opinion enunciating rule that declaration in support of investigative subpoena duces tecum for production of patient's hospital records must show good cause, including allegations of fact to demonstrate relevance or materiality of patient's medical records to general charges against doctor, and must show that request can be granted without abuse of third party's constitutionally protected right of privacy (*Cal. Const., art. I, § 1*) is not retroactive. *Pating v. Board of Medical Quality Assurance (1982) 130 Cal. App. 3d 608, 618-620, 182 Cal. Rptr. 20*

Issuance of subpoena under APA is ministerial act before hearing and discretionary act after hearing has begun. *Shively v. Stewart (1966) 65 Cal. 2d 475, 480-481, 55 Cal. Rptr. 217, 421 P.2d 65*

Agency having power to issue subpoena not governed by APA, is required to issue subpoena when requested. *McLeod v. Board of Pension Commissioners (1970) 14 Cal. App. 3d 23, 28-29, 94 Cal. Rptr. 58*

Witness served with administrative subpoena is entitled to demand one day's fees and mileage allowance. *McLeod v. Board of Pension Commissioners (1970) 14 Cal. App. 3d 23, 31, 94 Cal. Rptr. 58*

Agency lacks power to enforce its own subpoena. *Crocker v. Conrey (1903) 140 Cal. 213, 217, 73 P. 1006*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency InvestigationsScopeSubpoenasAdministrative LawAgency RulemakingRule Application & InterpretationValidityAdministrative LawSeparation of PowersLegislative ControlsScope of Delegated AuthorityConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of Protection

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41A-473B California Forms of Pleading and Practice--Annotated § 473B.34

§ 473B.34 Text References

Judicial Council of California, Tenth Biennial Report (1944)

Witkin, California Evidence, Ch. III, *Judicial Notice*, §§ 150-191; Ch. X, *Witnesses*, §§ 787-791; Ch. XII, *Introduction of Evidence at Trial*, §§ 1223-1275 (2d ed.)

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceJudicial NoticeGeneral OverviewEvidenceProcedural ConsiderationsGeneral Overview

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§ 473B.35 Internet References

Office of Administrative Hearings. This site includes: information and location concerning specific OAH offices; an OAH hearing guide; information concerning Administrative Procedure Act statutes, regulations, and proposed regulations; OAH forms; information concerning alternative dispute resolution procedures; and declaratory decisions. http://www.dgs.ca.gov/oah **NOTE:** On and after July 1, 1998, The OAL is required by *Gov. Code § 11340.1(b)* to make the full text of the California Code of Regulations, with reference citations and history notes, available on the Internet free of charge.

Office of Administrative Law. This site includes: OAL publications; links to OAL statutes and regulations relating to rulemaking; regulations submitted to the OAL for review, and information for contacting or provding input to the OAL regarding rulemaking. http://www.oal.ca.gov

California Home Page. This site includes links to other sites maintained by numerous state agencies. http://www.ca.gov

Department of Consumer Affairs. This site includes links to sites maintained by many state agencies that are under this department, as well as links to agency sites. http://www.dca.ca.gov

California Courts. This site includes: general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most Court of Appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes: text of constitution, codes, and statutes (including complete text of APA); and information concerning pending legislation. http://www.leginfo.ca.gov

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http://www.bender.com

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationAlternative Dispute ResolutionAdministrative LawAgency RulemakingGeneral OverviewGovernmentsCourtsCreation & OrganizationGovernmentsLegislationEnactment

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[Reserved]

§§ 473B.36[Reserved]

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PART IV. PROCEDURAL CHECKLIST

41A-473B California Forms of Pleading and Practice--Annotated § 473B.50

§ 473B.50 Obtaining and Responding to Administrative Discovery

[1] Ascertain Applicable Law Governing Discovery in the Proceeding

☐ California APA [*see § 473B.13*].

☐ Other statute [*see § 473B.18*].

☐ Court [*see* § 473B.19].

[2] Obtaining Discovery Under the APA

☐ Request for discovery, to another party, to obtain witness names and address and specified statement and writings in possession or control of that party [*Gov. Code § 11507.6*; *see § 473B.14*].

☐ Request must be made in writing after filing notice of defense, within 30 days after agency filing of initial pleading, and before hearing [*Gov. Code § 11507.6*; *see § 473B.14*].

☐ If other party refuses or fails to comply with request for discovery, and such refusal or failure is not based on valid privilege or protection, serve and file motion with ALJ to compel discovery, within 15 days after first evidence of refusal or failure, within 30 days after service of request, or within time stipulated, whichever is longer [*Gov. Code § 11507.7*; *see § 473B.16*].

☐ If order compelling compliance is obtained by other party still does not comply, utilize sanction procedure [*see § 473B.17*].

[3] Complying With Request for Administrative Discovery Under the APA

☐ Determine extent of discovery to be provided: witness names and address and specified writings or statements in party's possession or control, not otherwise privileged from disclosure or protected by attorney work product doctrine [*Gov. Code § 11507.6*; *see §§ 473B.14, 473B.15*].

☐ Comply or make objection to compliance within time required [*Gov. Code § 11507.6*; *see § 473B.15*].

☐ If other party makes motion to compel, prepare response to motion, giving basis or bases for refusal, for example, evidentiary privilege or attorney work product protection [*Gov. Code § 11507.7*; *see § 473B.16*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing Activity

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41A-473B California Forms of Pleading and Practice--Annotated § 473B.51

§ 473B.51 Initiation of Discovery Under the APA

[1] Notice of Defense

☐ File notice of defense [*Gov. Code § 11507.6*; *see Gov. Code § 11506(c)*; *see also § 473B.14[2][b]*; for further discussion, see *§ 473A.11[6]*; for a form, see *§ 473A.54*].

[2] Request for Discovery

☐ Prepare and deliver written request for discovery [*Gov. Code § 11507.6*; *see §§ 473B.12[3], 473B.14[1]*; for a form, see *§ 473B.61*].

☐ Request may be filed with the notice of defense [*see § 473B.14[2][b]*].

☐ Timing of request.

☐ Make request before hearing and within 30 days after agency serves initial pleading [Gov. Code § 11570.6; *see § 473B.14[2][a]*].

☐ Additional agency pleadings.

☐ Request discovery within 15 days of service of additional agency pleading (for example, amended or supplemental accusation or statement of issues) [Gov. Code § 11570.6; *see § 473B.14[2][a]*].

[3] Service of Written Request

☐ Mail copy to party [*see Code Civ. Proc. § 1013*; *see also § 473B.14[3]*].

[4] Noncompliance with Request for Discovery-Petitioner's Option

☐ Prepare motion to compel discovery [*Gov. Code § 11507.7(a)*; *§ 473B.16*; for a form, *see § 473B.63*].

☐ Attach supporting declaration and memorandum of points and authorities (optional) [*see § 473B.63[3]*].

☐ Prepare, and file with motion, order granting motion to compel discovery [*Gov. Code § 11507.7(f)*; for a form, *see § 473B.65*].

☐ Serve and file motion with ALJ within whichever period of the following is longer [*see Gov. Code § 11507.7(b)*; *Code Civ. Proc. § 413.10*; *see also § 473B.16[2]*]:

☐ Fifteen days after respondent first evidenced failure or refusal to comply.

☐ Thirty days after request was made.

☐ Another time provided for by stipulation.

☐ Hearing on motion to compel will be held within 15 days after motion is made [*Gov. Code § 11507.7(c)*; *see § 473B.16[3]*].

[5] Respondent's Options

☐ Noncompliance with request for discovery.

☐ Prepare notice of noncompliance [*Gov. Code § 11507.6*; for a form, see *§ 473B.62*].

☐ Send to requesting party by certified mail [*see § 473B.16[7]*].

☐ Answer to motion to compel discovery.

☐ Prepare answer to motion to compel discovery [*Gov. Code § 11507.7(c)*; *see § 473B.16[3]*; for a form, see *§ 473B.64*].

☐ Prepare, and file with answer, order denying motion to compel discovery [*Gov. Code § 11507.7(f)*; for a form, see *§ 473B.66*].

☐ File before or at time of hearing [*Gov. Code § 11507.7(c)*; *see § 473B.16[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing Activity

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41A-473B California Forms of Pleading and Practice--Annotated § 473B.52

§ 473B.52 Subpoena and Subpoena Duces Tecum

[1] Requesting Subpoena

☐ Party requests subpoena or subpoena duces tecum from agency or presiding officer [*Gov. Code § 11450.20(a)*; *see Code Civ. Proc. § 1985 et seq.*; *see also § 473B.12[4][c]*], or

☐ Respondent's attorney of record may issue [*Gov. Code § 11450.20(a)*; *see Code Civ. Proc. § 1985 et seq.*; *see also § 473B.12[4][c]*].

[2] Service

☐ Serve according to *Code Civ. Proc. §§ 1987, 1988* [*Gov. Code § 11450.20(b)*; *see § 473B.12[4][d]*], or

☐ Deliver by certified mail return receipt requested, or

☐ By messenger.

☐ Witness must acknowledge receipt of subpoena.

☐ Sender must make written notation of acknowledgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing Activity

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41A-473B California Forms of Pleading and Practice--Annotated § 473B.53

§ 473B.53 Deposition of Unavailable Witness Under APA Guidelines

[1] Petition for Deposition of Unavailable Witness

☐ Prepare petition [*Gov. Code § 11511*; *see § 473B.12[2]*]; for a form see, *§ 473B.60*].

☐ Verify petition [*see Gov. Code § 11511*].

[2] Filing

☐ File petition with ALJ, or

☐ File with agency if ALJ has not been appointed.

[3] Service

☐ Serve copy of petition and notice of hearing on other parties [Gov. Code § 15111; *see § 473B.12[2]*].

☐ Serve at least 10 days before hearing.

[4] Order Issued

☐ Proceed as though in a civil action [*see § 473B.60[4]*; Ch. 190- 200, *Discovery*].

☐ Witness resides outside of California.

☐ Agency must obtain court order to take deposition [Gov. Code § 15111; *see § 473B.12[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law Judges

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[Reserved]

§§ 473B.54[Reserved]

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PART V. FORMS

41A-473B California Forms of Pleading and Practice--Annotated § 473B.60

§ 473B.60 Petition to Take Deposition of Unavailable Witness [Gov. Code § 11511]

[1] FORM Petition to Take Deposition of Unavailable Witness [Gov. Code § 11511]

Petition for Order to Take Deposition [*Gov. Code § 11511*]

BEFORE THE _____ [*agency*]

In the Matter of _____ [*name*], Respondent.	)))))	NO. _____ PETITION FOR ORDER TO TAKE DEPOSITION

Respondent represents as follows:

1. _____ [*Nature of pending proceeding, e.g.*, This proceeding was begun by _____ (*name of agency or complainant*) pursuant to Section _____ (11503 *or* 11504) of the Government Code for the purpose of _____ (*specify, in statutory language*)].

2. The testimony of _____[*name*], whose address is _____[*specify*], is material to the issues in this proceeding in that _____[*specify*].

3. _____[*Name*] _____ [will be unable *or* cannot be compelled] to attend the hearing in this proceeding because _____[*specify*].

WHEREFORE, respondent requests that an order be issued requiring _____[*name*] to appear and testify before _____[*name of officer who will take deposition*], _____ [*title, e.g.,* a notary public *or other statement showing person's qualification to take deposition*].

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent

VERIFICATION

I, _____[*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing or petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in *[1]*, above, is a petition for use by the respondent wishing to take the deposition of a witness who will be unavailable at the hearing [*Gov. Code § 11511*; *see § 473B.12[2]* for further discussion].

[3] Verification

The petition must be verified and must contain (1) a statement of the nature of the pending proceeding, (2) the name and address of the witness whose testimony is desired, (3) a showing of the materiality of his or her testimony, (4) a showing that he or she will be unable to attend the hearing or cannot be compelled to attend, and (5) a request for an order requiring the witness to appear and testify before an officer named in the petition for that purpose [*Gov. Code § 11511*].

The purpose of identifying in the petition the person before whom the deposition will be given is, evidently, to facilitate the obtaining of a commission in the event one is needed. The taking of the deposition by a person qualified to do so but not identified in the petition would appear to be an inconsequential irregularity, at least when the deposition is taken within the state and no actual prejudice is shown [*see Reimel v. House (1969) 268 Cal. App. 2d 780, 782-787, 74 Cal. Rptr. 345]* .

[4] Procedure

The petition is filed with the administrative law judge, or, if an administrative law judge has not been appointed, with the agency. The petitioner must serve notice of hearing and a copy of the petition on the other parties at least 10 days before the hearing. If the order is issued, the respondent then proceeds as though in a civil action. If the witness resides outside the state, the agency is required, after the administrative law judge, or the agency, has issued its order, to obtain a court order for the taking of the deposition. A proceeding for this purpose would be maintained in the superior court in Sacramento County [*Gov. Code § 11511*]. The reason for this requirement is that many states enforce commissions to take depositions only if the commissions issue from the court of a sister state [*see* Judicial Council of California, 10th Biennial Report (1944), pages 18, 19, quoted in *Reimel v. House (1969) 268 Cal. App. 2d 780, 784, 74 Cal. Rptr. 345]*
.

[5] Cross References

For discussion of the provision under *Gov. Code § 11511* for taking the deposition of a witness who will be unavailable at the hearing, see *§ 473B.12[2]*.

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41A-473B California Forms of Pleading and Practice--Annotated § 473B.61

§ 473B.61 Request for Discovery [Gov. Code § 11507.6]

[1] FORM Request for Discovery [Gov. Code § 11507.6]

BEFORE THE _____ [*agency*]

	)	
In the Matter of	)	NO. _____
_____ [*name*],	)	REQUEST FOR DISCOVERY
Respondent.	)	
	)	

_____

To _____[*agency or person*]:

Pursuant to *Section 11507.6 of the Government Code*, Respondent _____[*name*] requests that you furnish the following to the undersigned at _____[*address*], at the earliest possible time after receiving this request, but in no event later than 30 days after receipt of this request absent a stipulation extending that time:

1. The names and addresses of witnesses to the extent known to you, including, but not limited to, those whom you intend to call to testify at the hearing.

2. The following statement or writings, for inspection or copying, or copies thereof:

a. _____ [*List here and in following paragraphs the items specified in Gov. Code § 11507.6, using general descriptions, e.g.*, Any statement pertaining to the subject matter of this proceeding, made by any party to any other party or person, which is in your possession or custody or under your control].

b. etc.

_____ [*date*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent

[2] Use of Form

The form in *[1]*, above, is for use by a respondent in an agency adjudication under the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*) to obtain prehearing discovery from the complaining agency under *Gov. Code § 11507.6*.

[3] Content of Request

The request for discovery must be written, but there is no other explicit requirements as to form or content [*see Gov. Code § 11507.6*]. For purposes of the record, however, the request should be formulated in the fashion of this form, that is, a paper to be filed in the proceeding. The content will vary according to what information the requesting party wants. For listing of the specific items discoverable under *Gov. Code § 11507.6*, see *§ 473B.14[1]*.

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41A-473B California Forms of Pleading and Practice--Annotated § 473B.62

§ 473B.62 Notice of Noncompliance With Request for Discovery [Gov. Code § 11507.6]

[1] FORM Notice of Noncompliance With Request for Discovery [Gov. Code § 11507.6]

BEFORE THE _____ [*agency*]

	)	
In the Matter of	)	NO. _____
_____ [*name*],	)	NOTICE OF NONCOMPLIANCE WITH RE-
Respondent.	)	QUEST FOR DISCOVERY
	)	

_____

To _____[*party requesting discovery*]:

Your request for discovery dated _____, will not be complied with in the following respects, for the reason that the _____[information requested *or* _____ (writing *or* thing) sought to be _____ (inspected *or* copied) [is privileged from disclosure by law [and protected as an attorney's work product in that _____ (*specify*)]:

1. _____ [*In this and sequential paragraphs, as needed, list respects in which compliance is refused, e.g.*, Medical records pertaining to _____ (*name*) will not be made available for inspection or copying _____ (because disclosure of such records is prohibited by *Section 994 of the Evidence Code*)].

2. etc.

_____ [*date*]

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent

[2] Use of Form

The form in *[1]*, above, is for use by a respondent in an agency adjudication under the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*), to provide notice to the complaining agency (or other party requesting discovery), of noncompliance based on an evidentiary privilege or other reason for nondisclosure or noncompliance.

[3] Cross References

For discussion of when sanctions will be imposed for failure to comply with a discovery request, see *§ 473B.16[7]*.

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Chapter 473B DISCOVERY IN AGENCY ADJUDICATIONS
PART V. FORMS

41A-473B California Forms of Pleading and Practice--Annotated § 473B.63

§ 473B.63 Motion to Compel Discovery [Gov. Code § 11507.7]

[1] FORM Motion to Compel Discovery [Gov. Code § 11507.7]

BEFORE THE _____ [*agency*]

In the Matter of _____ [*name*], Respondent.	)))))	NO. _____ MOTION TO COMPEL DISCOVERY

Moving Party respectfully represents:

1. Moving Party and respondent are parties in an administrative proceeding pending before the _____[*agency*] entitled _____[*name of proceeding*], No. _____. Procedural matters in that proceeding are governed by *Government Code Sections 11500-11529* of the Administrative Procedure Act.

2. Within the time required by *Section 11507.6 of the Government Code*, the moving party made a written request to _____[*specify opposing party*] for discovery pursuant to that section. A copy of that request is attached hereto as Exhibit A and made a part hereof. The matters sought to be discovered are described in Exhibit A.

3. The matters sought to be discovered are specified in *Section 11507.6 of the Government Code* as discoverable matters, subject only to such protection against disclosure as the law affords on principles of privilege or confidentiality

or under the doctrine of attorney's work product. The matters requested are discoverable in that [*specify reasons*].

4. Respondent has failed and refused to comply with the request for discovery in that _____[*state facts showing how respondent has failed or refused to comply; specify extent of failure to comply*].

5. Moving Party has made a reasonable and good faith attempt to contact the respondent for an informal resolution of the issue and [*specify facts relating to the attempt and why informal resolution was not successful or did not occur*].

6. Respondent has [failed *or* refused] to comply with the request for discovery _____ [for reasons unknown to petitioner *or* on the ground(s), as stated by respondent, that _____ (*specify*)].

WHEREFORE, moving party prays that an order be issued, as follows:

1. That moving party is entitled to prompt and effective discovery of all matters referred to in the request [and not heretofore discovered]; and

2. That respondent be ordered to comply fully with the request forthwith.

Respectfully submitted,_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Moving Party

[2] Use of Form

The form in *[1], above*, is for use by respondent (or other party) in an agency adjudication under the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*) to move to compel compliance with a previously served request for discovery under *Gov. Code § 11507.6*.

[3] Supporting Papers

Gov. Code § 11507.7, providing for the motion to compel, does not require verification or other support, but it is recommended that the motion be supported by a declaration or memorandum or points and authorities, or both, stating factual and legal reasons why compliance with the request should be ordered.

[4] Service and Filing

The motion should be served and filed within one of the following: (1) 15 days after the respondent first evidenced failure or refusal to comply with *Gov. Code § 11507.6*; (2) within 30 days after the request was made and the party has failed to reply to the request; or (3) within another time provided by stipulation, whichever period is longer [*see Gov. Code § 11507.7(b)*].

Although the method of service is not prescribed in *Gov. Code § 11507.7*, it is reasonable to assume that service should be made as in any other civil proceeding.

[5] Cross References

For discussion and forms relating to affidavits and declarations under penalty of perjury in civil actions generally, see

Ch. 15, *Affidavits, Certificates, and Declarations* .

For discussion and forms relating to memoranda of points and authorities in civil law and motions generally, see Ch. 417, *Points and Authorities* .

For discussion and forms relating to service of papers, see Ch. 518, *Service of Summons and Papers* .

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41A-473B California Forms of Pleading and Practice--Annotated § 473B.64

§ 473B.64 Answer to Motion to Compel Discovery [Gov. Code § 11507.7(c)]

[1] FORM Answer to Motion to Compel Discovery [Gov. Code § 11507.7(c)]

BEFORE THE _____ [*agency*]

In the Matter of _____ [*name*], Respondent.	)))))	NO. _____ ANSWER TO MOTION TO COMPEL DISCOVERY

Respondent respectfully answers the motion as follows:

1. The allegations of Paragraph _____ [*number*] are true.

2. The allegations of Paragraph _____ [*number*] are true, except that it is not true that _____[*specify*].

3. Except as hereinabove admitted, the allegations of the motion are denied.

4. The following matters referred to in the motion are not discoverable under *Section 11507.6 of the Government Code*, for the reasons specified [*in the following paragraph(s) state the reasons based on statutory or decisional law that the matters are not discoverable despite the provisions of Gov. Code § 11507.6*]:

a. _____ [*Specify item*] is privileged from disclosure by Section _____ [*number*] of the Evidence [*or other code as may be applicable*] Code.

b. _____ [*Item*] is confidential and not subject to discovery under the decision of the Supreme Court in the case of _____ [*name and citation of case*].

c. _____ [*Item*] is the work product of respondent's attorney and as such is protected from discovery.

5. On _____[*date*], respondent notified moving party in writing that respondent would not comply with moving party's request for discovery with respect to the matters mentioned in Paragraph 4 above, for the reasons therein stated. A copy of that notice is attached hereto as Exhibit A and made a part hereof.

WHEREFORE, respondent prays that the moving party be denied [any relief *or* any discovery as to the items specified in this answer] and that his/her motion be accordingly denied [as to the items specified in this answer].

Respectfully submitted,_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*status and name of respondent or other answering party*]

[*Verification. See § 473B.60.*]

[2] Use of Form

The form of answer in *[1], above*, is for use by the respondent in an administrative proceeding for compliance with a request for discovery. See *§ 473B.16* for discussion of legal requirements for this proceeding.

[3] Supporting Papers

The same considerations with respect to supporting papers offering factual and legal support apply to the answer as well as to the motion to compel. See *§ 473B.63[3]*.

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41A-473B California Forms of Pleading and Practice--Annotated § 473B.65

§ 473B.65 Order Granting Motion to Compel Discovery [Gov. Code § 11507.7(f)]

[1] FORM Order Granting Motion to Compel Discovery [Gov. Code § 11507.7(f)]

BEFORE THE _____ [*agency*]

In the Matter of _____ [*name*], Respondent.	)))))	NO. _____ ORDER

The motion of _____[*name*], moving party, pursuant to *Section 11507.7 of the Government Code*, to compel discovery in an administrative proceeding came on regularly for hearing on _____[*date*], the Honorable _____[*name*], Administrative Law Judge, presiding. Moving party appeared by his/her attorney, _____[*name*]; respondent appeared by his/her attorney, _____[*name*]. The administrative law judge has reviewed the and papers on file herein [and the evidence produced at the hearing] and has considered arguments of counsel.

NOW THEREFORE, IT IS ORDERED that respondent comply fully, completely, in good faith, and forthwith with the request for discovery made to respondent by moving party on _____[*date*], a copy of which is attached hereto as Exhibit A and made a part hereof, by furnishing the following information to moving party and permitting moving party to inspect and copy the following writings and things:

1. _____[*Here, and in subsequently numbered paragraphs, list information, writings, and things*].

IT IS FURTHER ORDERED that respondent's claim of privilege is overruled and disallowed as to each of the foregoing.

[On proof made to the satisfaction of the administrative law judge, the judge finds that respondent failed or refused without substantial justification to comply with the requirements of *Section 11507.6 of the Government Code*.

THEREFORE IT IS FURTHER ORDERED that moving party have and recover from respondent the sum of $_____ as and for a reasonable attorney's fee and the sum of $_____ as and for costs herein incurred.]

_____[*date*]

_____ [*signature*]

Administrative Law Judge

[2] Use of Form

The form in *[1], above*, is for use by the respondent (or other party) in an agency adjudication under the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*), who has brought a motion to compel administrative discovery under *Gov. Code §§ 11507.6, 11507.7*. The form is for submission to the ALJ for use as the order granting the motion.

[3] Cross References

For a discussion of enforcing discovery requests under the APA, see *§ 473B.16*.

For a form of a motion to compel discovery, see *§ 473B.63*.

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41A-473B California Forms of Pleading and Practice--Annotated § 473B.66

§ 473B.66 Order Denying Motion to Compel Discovery [Gov. Code § 11507.7(f)]

[1] FORM Order Denying Motion to Compel Discovery [Gov. Code § 11507.7(f)]

BEFORE THE _____ [*agency*]

	)	
In the Matter of	)	NO. _____
_____ [*name*],	)	ORDER
Respondent.	)	
	)	

_____

The motion of _____[*name*], moving party, pursuant to *Section 11507.7 of the Government Code*, to compel discovery in an administrative proceeding came on regularly for hearing on _____[*date*], the Honorable _____[*name*], Administrative Law Judge, presiding. Moving party appeared by his/her attorney, _____[*name*]; respondent appeared by his/her attorney, _____[*name*]. The administrative law judge has reviewed the and papers on file herein [and the evidence produced at the hearing] and has considered arguments of counsel.

NOW, THEREFORE, IT IS ORDERED that moving party be and hereby is denied any relief under the motion and that the motion is dismissed.

[On proof made to the satisfaction of the administrative law judge, the judge finds that moving party filed the motion to compel discovery without substantial justification.

IT IS FURTHER ORDERED that respondent have and recover from moving party the sum of $_____ as and for a reasonable attorney's fee and the sum of $_____ as and for

costs herein incurred.]

_____ [*date*]

_____ [*signature*]

Administrative law judge

[2] Use of Form

The form in *[1]*, above, is for use by the respondent (or other party) in an agency adjudication under the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*), who has opposed a motion to compel administrative discovery under *Gov. Code §§ 11507.6, 11507.7*. The form is for submission to the ALJ for use as the order denying the motion.

[3] Cross References

For a discussion of enforcing discovery under the APA, see *§ 473B.16*.

For a form of an answer to a motion to compel discovery, see *§ 473B.64*.

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41A-473B California Forms of Pleading and Practice--Annotated § 473B.67

§ 473B.67 Order to Show Cause In Re Contempt [Gov. Code § 11455.20]

[1] FORM Order to Show Cause In Re Contempt [Gov. Code § 11455.20]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER TO SHOW CAUSE IN RE CONTEMPT
Respondent.	)	
	)	
	)	

To _____[*name*], above-named respondent:

YOU ARE HEREBY ORDERED to appear before the above-entitled court [in _____ (Department *or* Division)_____ of], located at _____[*name of building, street address, and city*], on _____, [*date and time*], then and there to show cause, if any you have, why you should not be punished for contempt based on the facts set forth in the certified statement attached hereto as Exhibit A to the Order To Show Cause.

_____ [*date*]

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form of order to show cause in *[1]*, above, is used for proceeding to enforce contempt sanctions in the Superior Court against a party to an agency adjudication under the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*) for failure to comply with an order to provide discovery as required under *Gov. Code §§ 11507.6* and *11507.7* [*Gov. Code §§ 11455.10(e), 11455.20*].

[3] Cross References

For a discussion of the legal requirements that must be established before sanctions will be imposed for failure to comply with a discovery request, see *§ 473B.16[7]*.

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41A-473C California Forms of Pleading and Practice--Annotated 473C.syn

§ 473C.syn Synopsis to Chapter 473C: PREHEARING PROCEDURES IN AGENCY ADJUDICATIONS

§ 473C.01 Scope of Chapter

§ 473C.02 Cross References

[1] Related Coverage of Agency Adjudication

[2] Judicial Review

[3] Public Administrative Law Generally

§§ 473C.03-473C.09 [Reserved]

§ 473C.10 Governing Law

[1] APA Requirements

[2] Office of Administrative Hearings Regulations Governing Hearing Procedures

§ 473C.11 "Demurrer" or Challenge to Sufficiency of Agency Pleading

§ 473C.12 Motions for Consolidation or Severance

[1] Motions to Consolidate Under the APA

[2] Motion to Consolidate Non-APA Proceedings

[3] Agency Discretion to Grant Consolidation

[a] Consolidation Is Favored But Discretionary

[b] Exceptions: Consolidation Required or Not Available

[4] Motions to Sever

[5] Procedure for Motion to Sever or Consolidate

§ 473C.13 Motions to Dismiss

[1] Dismissal for Failure to State Prima Facie Case

[2] Dismissal by Agency

[3] Voluntary Dismissal by Applicant for License or Permit

§ 473C.14 Other Prehearing Motions

[1] Making and Arguing Prehearing Motions

[2] Motion to Exclude Respondent During Testimony of Minor Who Is Alleged Victim of Sexual Abuse

[3] Motions to Compel Release of Confidential Records

[4] Motions for Change in Place of Hearing

[a] Nature of Motion

[b] Place of Hearing

[c] Grounds for Motion

[d] Procedure for Motion

[e] Discretion to Grant or Deny

[5] Motions in Limine

[6] Motions to Stay, Dismiss, or Continue Action Due to Bankruptcy

§ 473C.15 Continuances

[1] Definition

[2] Authority

[3] Hearing Schedules and Strict Construction of OAH Continuance Policy

[4] Grounds for Continuance

[a] Good Cause Showing Required

[b] OAH Continuance Policy

[i] Grounds Listed in OAH Continuance Policy as Constituting Good Cause

[ii] Establishing Good Cause

[c] Related Judicial Proceedings as Basis for Continuance

[i] Civil Actions

[ii] Criminal Cases

[5] Procrastination or Lack of Preparation as Grounds for Denial of Continuance

[6] Discretion of ALJ

[a] Discretion to Grant or Deny Continuance

[b] Abuse of Discretion

[7] Procedure for Requesting Continuance

[a] Who May Grant a Continuance

[b] When to Request Continuance

[c] Making the Request

[d] Partial Continuance

[e] Poll of Counsel, Ruling, and Rescheduling

[f] Oral Argument

[8] Judicial Review of Denial of Application for Continuance

[9] Notice of Continued Hearing

§§ 473C.16-473C.19 [Reserved]

§ 473C.20 Prehearing Conferences

[1] Background

[2] Provisions of Governing Statute

[a] Motion for Conference and Notice of Conference

[b] Subject Matter of Conference

[c] Conduct of Prehearing Conference

[d] Conversion of Prehearing Conference Into Alternative Dispute Resolution or Informal Hearing Procedure by Consent of Parties

[e] Prehearing Orders

[3] Case Management Program Criteria

[4] Case Management Program Procedures

[a] Scheduling Conference and OAH Notice Form

[b] Preparation for Conference and Attendance of Trial Counsel

[c] Stipulations and Admissions

[d] Exhibits

[e] Witnesses

[i] Witness Lists

[ii] Expert Witnesses

[iii] Estimated Length of Testimony and Summary of Testimony

[iv] Special Arrangements

[v] Rulings on Identity and Number and Motions to Exclude

[f] Prehearing Orders

[i] Requirement of Order and Reporting

[ii] Briefs

[iii] Judicial Review of Prehearing Order as Final Administrative Order

[5] Responsibility of Administrative Law Judge in Case Management Program

§ 473C.21 Negotiation and Settlement

[1] Settlement Conferences

[a] Availability of Formal Conference With ALJ

[b] Assignment to ALJ

[c] Scheduling, Notice, and Preparation

[d] Timing of Settlement Negotiations

[2] Agency Authority to Settle

[3] Disciplinary Guidelines

[4] Model Disciplinary Orders

[5] Costs or Restitution as Condition of Settlement

[6] Diversion Programs

[7] Procedures for Implementing Settlement

[8] Alternative Dispute Resolution Procedures

[9] Informal Hearing Procedures

§§ 473C.22-473C.29 [Reserved]

§ 473C.30 Federal Constitution

§ 473C.31 State Constitution

§ 473C.32 State Statutes

[1] Administrative Procedure Act

[2] Related Statutes

§ 473C.33 Decisions

[1] Consolidation and Severance

[2] Continuances

[3] Demurrer

[4] Nonsuit

[5] Setting for Hearing

§ 473C.34 Internet References

§§ 473C.35-473B.39 [Reserved]

§ 473C.40 Prehearing Conference

[1] Motion for Prehearing Conference

[2] Preparation for Prehearing Conference

§ 473C.41 Settlement Conferences

[1] Preparation

[2] Implementation of Settlement

§ 473C.42 Motion for Change in Place of Hearing

[1] Motion

§ 473C.43 Requesting a Continuance

[1] Timing of Request

[2] Where to Make Request

[3] Oral Argument

[4] Continuance by Stipulation

[5] Partial Continuance

[6] Judicial Review of Denial of Continuance

§ 473C.44 Miscellaneous Prehearing Motions

[1] Formal APA Hearings

[2] Non-APA Proceedings

§§ 473C.45-473C.49 [Reserved]

§ 473C.50 Motion for Order Setting Matter for Prehearing Conference and Supporting Declaration [Gov. Code § 11511.5(a)]

[1] FORM

[2] Use of Form

[3] Memorandum

[4] Cross References

§ 473C.51 Order for Prehearing Conference [Gov. Code § 11511.5(e)]

[1] FORM

[2] Use of Form

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PART I. SCOPE

41A-473C California Forms of Pleading and Practice--Annotated § 473C.01

§ 473C.01 Scope of Chapter

This chapter provides a discussion of prehearing motions and conferences in California public administrative law. The legal discussion in Part II includes the following:

- Subpart A discusses prehearing motions and conferences including motions to consolidate and sever, demurrers, motions to dismiss, and motions for continuance [*see §§ 473C.10 -473C.15*].

- Subpart B discusses prehearing conferences, negotiation, and settlement [*see §§ 473C.20* -473C.22].

Part V includes a forms of motion and declaration for an order setting a matter for a prehearing conference [*see § 473C.50*] and a form of order setting the conference [*see § 473C.51*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing Activity

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PART I. SCOPE

41A-473C California Forms of Pleading and Practice--Annotated § 473C.02

§ 473C.02 Cross References

[1] Related Coverage of Agency Adjudication

For general discussion and overview of agency adjudication under the Administrative Procedure Act (APA), see Ch. 473, *Public Agency Adjudication* .

For related discussion and forms providing coverage of the other stages of an agency adjudication under the formal hearing provisions of the APA, see:

- Ch. 473A, *Commencing Agency Adjudication* .
- Ch. 473B, *Discovery in Agency Adjudications* .
- Ch. 473D, *Prehearing Preparations in Agency Adjudications* .
- Ch. 473E, *Public Administrative Law Judges* .
- Ch. 473F, *Agency Adjudication Hearings* .
- Ch. 473G, *Agency Adjudication Decisions* .

For related discussion and forms providing more detailed coverage of adjudication methods under the APA other than that of formal hearing, see Ch. 473H, *Alternative Adminstrative Adjudication Procedures* .

For detailed discussion and forms relating generally to licensing agencies, including licensing adjudications, see Ch. 471B, *Licensing by Public Agencies* .

[2] Judicial Review

For detailed discussion and forms relating generally to review by California courts of agency adjudications, see:

- Ch. 474, *Availability of Judicial Review of Agency Decisions* .
- Ch. 474A, *Timing of Judicial Review of Agency Decisions* .
- Ch. 474B, *Standards in Reviewing Agency Decisions* .
- Ch. 474C, *Procedures in Reviewing Agency Decisions* .

For other related discussion and forms relating to judicial review generally, see:

- Ch. 40 et seq., *Appeal: An Overview,* through Ch. 54, *Appeal: California Supreme Court Review* (discussion and forms relating to civil appeals).
- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to immediate judicial review of orders by extraordinary writ of mandate or prohibition).
- Ch. 492, *Review (Certiorari), Writ of* (discussion and forms relating to immediate judicial review of civil proceedings by extraordinary writ of review).

[3] Public Administrative Law Generally

For related discussion of California public administrative law generally, including discussion of public agency functions and powers (including adjudicative or quasi-judicial powers), and organization generally, see Ch. 470, *Overview of Public Administrative Law* (for general discussion of judicial power, *see § 470.12[5]*). For detailed discussion of the general procedures imposed in agency proceedings by constitutional due process and related statutory requirements, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

For discussion and forms relating to the law governing access to and conduct of meetings by California public agencies, see Ch. 470B, *Public Agency Meetings* .

For detailed discussion and forms relating to the law governing disclosure of public records under the California Public Records Act [*Cal. Gov. Code §§ 6250 et seq.*], see Ch. 470C, *Public Records Act* .

For detailed discussion and forms relating generally to agency investigations and inspections, see:

- Ch. 471, *Investigations by Public Agencies* .
- Ch. 471A, *Inspections by Public Agencies* .

For detailed discussion and forms relating generally to the legislative or rulemaking functions of California public agencies, including judicial review of these functions, see:

- Ch. 472, *Public Agency Rules* .
- Ch. 472A, *Agency Rulemaking Procedures* .
- Ch. 472B, *Review of Agency Rulemaking* .

For additional cross references to coverage of particular public agencies, see *§ 470.02[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency InvestigationsGeneral OverviewAdministrative LawAgency InvestigationsScopeInspectionsAdministrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewStandards of ReviewGeneral Overview

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[Reserved]

§§ 473C.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Prehearing Motions and Continuances

41A-473C California Forms of Pleading and Practice--Annotated § 473C.10

§ 473C.10 Governing Law

[1] APA Requirements

Prehearing motions and conferences for agency adjudications are governed by various statutes under the APA formal hearing provisions (*Gov. Code § 11500 et seq.*), by statute relating to specific agency proceedings, and by decisional law [*see, e.g., Gov. Code § 11507.3* (consolidation in APA hearings); *Pub. Util. Code § 1703* (consolidation in PUC proceedings); *Bostick v. Martin (1966) 247 Cal. App. 2d 179, 183, 55 Cal. Rptr. 322* (consolidation in other agency proceedings)].

[2] Office of Administrative Hearings Regulations Governing Hearing Procedures

The Office of Administrative Hearings adopted regulations [*1 Cal. Code Reg. §§ 1000-1440* (1997)] to govern hearing procedures in hearings conducted before OAH administrative law judges [*1 Cal. Code Reg. § 1000* (1998)]. The regulations cover the subjects of general APA hearing procedures [*1 Cal. Code Reg. §§ 1000-1046* (1998)], special hearing procedures [*1 Cal. Code Reg. §§ 1100-1148* (1997)], alternative dispute resolution procedures [*1 Cal. Code Reg. §§ 1200-1292* (1999)], arbitration procedures for state contract act contract claims [*1 Cal. Code Reg. §§ 1300-1393* (1997)], and protest arbitration procedures *1 Cal. Code Reg. §§ 1000-1440* (1998)]. The basic purpose [*1 Cal. Code Reg. § 1000* (1998)], definitions [*1 Cal. Code Reg. § 1002* (1998)], and principles of interpretation [*1 Cal. Code Reg. § 1004* (1998)], are set forth in specific regulations. The regulations that are applicable to Ch. 473C, Agency Pre hearing Procedures, include the following: ex parte applications for temporary or interim orders [*1 Cal. Code Reg. § 1012* (1998)]; consolidated proceedings and separate hearings [*1 Cal. Code Reg. § 1016* (1998)]; motion for continuance of hearing [*1 Cal. Code Reg. § 1042* (1998)]; motions [*1 Cal. Code Reg. § 1022* (1998)]; subpoenas and motion for a protective order [*1 Cal. Code Reg. § 1024* (1998)]; pre hearing conferences [*1 Cal. Code Reg. § 1026* (1998)]; settlement conferences and settlements [*1 Cal. Code Reg. § 1028* (1998)]; and peremptory challenges [*1 Cal. Code Reg. § 1034* (1998)].

Legal Topics:

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

Administrative LawAgency AdjudicationAlternative Dispute ResolutionAdministrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationPrehearing Activity

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41A-473C California Forms of Pleading and Practice--Annotated § 473C.11

§ 473C.11 "Demurrer" or Challenge to Sufficiency of Agency Pleading

In agency adjudications under the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*), the responding party may plead a "general demurrer" (*i.e.*, object to the sufficiency of the accusation or statement of issues on the ground that it does not state acts or omissions upon which the agency may proceed) or a "special demurrer" (*i.e.*, object on the ground of uncertainty or indefiniteness) pursuant to *Gov. Code § 11506(a)(2),(3)*]. These objections must be raised in the respondent's notice of defense [*see Gov. Code § 11506*]. For further discussion of the notice of defense, and specifically of the "demurrer" objections of *Gov. Code § 11506(a)(2),(3)*, see *Ch. 473A, Commencing Agency Adjudication, §§ 473A.11[6], [13], 473A.54*. For discussion of these objections in non-APA proceedings, see *§ 473.11[13]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationPrehearing Activity

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Chapter 473C PREHEARING PROCEDURES IN AGENCY ADJUDICATIONS
PART II. LEGAL BACKGROUND
A. Prehearing Motions and Continuances

41A-473C California Forms of Pleading and Practice--Annotated § 473C.12

§ 473C.12 Motions for Consolidation or Severance

[1] Motions to Consolidate Under the APA

Gov. Code § 11507.3 provides for consolidation and severance of administrative adjudicative proceedings conducted under the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*). For discussion regarding when an agency adjudication is subject to the APA's formal hearing provisions, see Ch. 473, *Public Agency Adjudication* .

When proceedings that involve a common question of law or fact are pending, the administrative law judge may order a joint hearing of any or all the matters at issue in the proceedings. This order can be based on the motion of a party, or on the administrative law judge's own motion. The administrative law judge may order all the proceedings consolidated and may make orders concerning the procedure that may tend to avoid unnecessary costs or delay [*Gov. Code § 11507.3(a)*].

Gov. Code § 11507.3 is based upon *Code Civ. Proc. § 1048*, and is broad enough to enable related cases to be consolidated in a single proceeding even if they were initiated before separate agencies [25 Cal. L. Rev. Comm. Reports 55 (1995); *see* Ch. 125, *Consolidation, Severance, and Coordination of Actions* (for discussion and forms relating to consolidation and severance in civil actions generally)]. Thus, an agency may conduct a consolidated hearing when more than one of its licensees have allegedly engaged in common activities that are grounds for discipline, for example, the Department of Real Estate may file a consolidated accusation against licensed mortgage loan brokers, salespersons, and brokers involved in a single fraudulent transaction. Similarly, separate agencies may now file a consolidated accusation against a single respondent who comes within the jurisdiction of more than one agency. For example, the filing of fraudulent Medi-Cal claims by a physician may be grounds for suspension of that provider by the Department of Health Services [*see Welf. & Inst. Code §§ 14123* (grounds for suspension), *14124* (notice of Medi-Cal suspension to appropriate state licensing agency)] as well as grounds for discipline by the Board of Medical Quality Assurance [*see Bus. & Prof. Code §§ 2004, 2220-2222, 2227-2228, 2234* (disciplinary provisions for unprofessional conduct)]. The latter type of consolidation was not available under the former APA provisions in effect prior to July 1, 1997.

[2] Motion to Consolidate Non-APA Proceedings

In an agency adjudication not subject to the APA's formal hearing provisions [*see [1], above*], the standards used in civil court actions may be applied, and adjudications may be consolidated at the discretion of the agency when they have common issues of law or fact or involve the same respondent [*Bostick v. Martin (1966) 247 Cal. App. 2d 179, 183, 55 Cal. Rptr. 322* ; *see Code Civ. Proc. § 1048* and discussion in Ch. 125, *Consolidation, Severance, and Coordination of Actions*].

Some agencies have express authority, outside the APA, to exercise discretion in consolidating hearings [*see, e.g., Pub. Util. Code § 1703 (PUC)*; Ch. 480, *Public Utilities*].

For agencies that are not subject to *Gov. Code § 11507.3*, it is fair to say that many agencies will grant requests for consolidation because it saves time. To avoid wasting the time of all concerned, motions to consolidate should be made as early as possible. Motions should be based on the following grounds under the general civil procedure set out in *Code Civ. Proc. § 1048*:

- The identity of the law, facts, or parties between or among the proceedings.
- Possible prejudice to the parties.
- The complexity of the issues.
- Possible delays.
- Convenience and economy.

For discussion and forms relating to consolidation in civil actions generally, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

[3] Agency Discretion to Grant Consolidation

[a] Consolidation Is Favored But Discretionary

The decision to consolidate or to refuse to consolidate matters for hearing is within the discretion of the administrative law judge under *Gov. Code § 11507.3(a)*. In non-APA hearings it is within the discretion of the agency [*Bostick v. Martin (1966) 247 Cal. App. 2d 179, 183, 55 Cal. Rptr. 322]* .

Agencies usually favor consolidation and are generally inclined to grant it when a timely request is made, because consolidation saves time and expense. Other than the provisions of *Gov. Code § 11507.3(a)*, there are two limits on the scope of the agency's discretion to grant or deny consolidation, discussed in *[b], below*.

[b] Exceptions: Consolidation Required or Not Available

Although the decision to consolidate or to refuse to consolidate matters for hearing is within the discretion of the administrative law judge under *Gov.Code § 11507.3(a)*, and otherwise, within the discretion of the agency [*Bostick v. Martin (1966) 247 Cal. App. 2d 179, 183, 55 Cal. Rptr. 322]* , this discretion is subject to limits. One such limit is the principle known as the *Ashbacker* doctrine from *Ashbacker Radio Corp. v. Federal Com. Com.* [*Ashbacker Radio Corp. v. Federal Com. Com. (1945) 326 U.S. 327, 66 S. Ct. 148, 90 L. Ed. 108]* , which held that when a hearing will result in the allocation of a single license that constitutes a business opportunity, competing applicants must be considered in a consolidated proceeding [*Ashbacker Radio Corp. v. Federal Com. Com. (1945) 326 U.S. 327, 333, 66 S. Ct. 148, 90 L. Ed. 108]* . *Ashbacker* was cited with approval in *Bostick v. Martin (1966) 247 Cal. App. 2d 179, 55 Cal. Rptr. 322* , which concerned mutually exclusive applications for a single opportunity to establish a savings and

loan company in a designated area [*Bostick v. Martin (1966) 247 Cal. App. 2d 179, 183, 55 Cal. Rptr. 322]* .

Note also that, as distinguished from a consolidation of several named parties, there can be no class-action type proceeding involving the representation of similarly situated but absent class members. The APA lacks any provision for handling a proceeding involving a class of similarly situated individuals, such as, for example, procedures to give notice to absent class members, and is therefore constitutionally inadequate for class-action type hearings [*Rose v. City of Hayward (1981) 126 Cal. App. 3d 926, 936, 179 Cal. Rptr. 287]* . Non-APA proceedings share the same limitation; for example, one court held that a judicial class action was not barred by the applicants' failure to exhaust administrative remedies, because no adequate administrative remedy existed [*Ramos v. County of Madera (1971) 4 Cal. 3d 685, 690-691, 94 Cal. Rptr. 421, 484 P.2d 93* (determination of entitlement to welfare benefits of a group of similarly situated applicants under *Welf. & Inst. Code § 10950 et seq.*)].

[4] Motions to Sever

Gov. Code § 11507.3 provides for the severance of adjudicative proceedings, as well as consolidation, in agency adjudications conducted under the APA formal hearing provisions (*Gov. Code § 11500 et seq.*).

The administrative law judge may order a separate hearing of any issue, including an issue raised in the notice of defense, or of any number of issues. This order can be based on the motion of a party, or on the administrative law judge's own motion. The considerations for determining whether to grant separate hearings include furthering convenience, avoiding prejudice, and serving expedition or economy [*Gov. Code § 11507.3(b)*]. *Gov. Code § 11507.3* provides ample ample authority for severance motions [25 Cal. L. Rev. Comm. Reports 55 (1995)].

With regard to non-APA proceedings, it is fair to say that requests for severance are disfavored and unlikely to be granted absent good cause, in that holding separate hearings would take longer and cost more than a single hearing. To avoid wasting the time of all concerned, motions to sever should be made as early as possible. For motions that are not subject to *Gov. Code § 11507.3*, the law governing severance can be based the general civil procedure under *Civ. Proc. § 1048* [*see [2*], *above*, setting out considerations that apply to severance as well as consolidation motions, and Ch. 125, *Consolidation, Severance, and Coordination of Actions* , for discussion and forms relating to severance in civil actions generally].

[5] Procedure for Motion to Sever or Consolidate

A motion to consolidate or sever in a proceeding under the APA's formal hearing provisions should be addressed to the administrative law judge who has been assigned to hear the case [*Gov. Code § 11507.3*].

For Non-APA proceedings, the motion should be made to the agency itself. While neither the OAH, the State Personnel Board, nor the Public Employment Relations Board conducts the equivalent of a law and motion department, it is best to submit the motion in a timely manner, in writing, and with supporting affidavits. A party in opposition should promptly file its response with supporting affidavits. In general, prompt submission and response will get a motion considered sooner and more fully. A vague or unsupported motion is likely to be handled very summarily, whereas a precise and specific motion that is fully supported with arguments and affidavits is more likely to be considered and decided on the merits.

The ruling on a motion to consolidate or sever is customarily made without opportunity for oral argument. Other agencies may, by their own procedural rule or on request, permit argument before ruling on the motion.

Legal Topics:

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

Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPresiding OfficersDuties & PowersCivil ProcedurePretrial MattersConsolidation of Actions

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§ 473C.13 Motions to Dismiss

[1] Dismissal for Failure to State Prima Facie Case

A motion to dismiss for failure to establish a prima facie case (*i.e.*, one that would entitle the agency to prevail if no evidence to the contrary is offered by the respondent) cannot be granted by an ALJ sitting alone [*O'Mara v. State Bd. of Pharmacy (1966) 246 Cal. App. 2d 8, 10-11, 54 Cal. Rptr. 862* ; *Kramer v. State Board of Accountancy (1962) 200 Cal. App. 2d 163, 175, 19 Cal. Rptr. 226* ; *Frost v. State Personnel Board (1961) 190 Cal. App. 2d 1, 5-6, 11 Cal. Rptr. 718* ; *see Maganini v. Quinn (1950) 99 Cal. App. 2d 1, 8, 221 P.2d 241* ; *Black's Law Dictionary* (5th ed. 1979), p. 1071].

The APA contains no authority for such a motion. Moreover, it would be procedurally awkward, in that a dismissal is a final decision, and the APA gives the agency the power of final decision [*see Gov. Code § 11517(c)(1), (2)* (ALJ sitting alone submits proposed decision to agency, which may accept, modify, or reject it); *see* further discussion in Ch. 473G, *Agency Adjudication Decisions*]. Thus, the agency would have to hear the motion, and the hearing would consequently be delayed whenever the motion was made in order to refer it to the agency for determination [*Kramer v. State Board of Accountancy (1962) 200 Cal. App. 2d 163, 175, 19 Cal. Rptr. 226* ; *Frost v. State Personnel Board (1961) 190 Cal. App. 2d 1, 5-6, 11 Cal. Rptr. 718]* .

A motion to dismiss for failure to establish a prima facie case is the equivalent of a motion for nonsuit in a civil action; a motion for nonsuit is made at the conclusion of the plaintiff's case-in-chief, and the testimony presented is presumed to be true for purposes of ruling on the motion [*see Code Civ. Proc. § 581c(a),(c)*; *Estate of Callahan (1967) 67 Cal. 2d 609, 612-613, 63 Cal. Rptr. 277, 432 P.2d 965]* . This procedure would further be improper in an agency adjudication under the APA formal hearing provisions (*Gov. Code § 11500 et seq.*), because in these proceedings, the complainant has a statutory right to call the respondent as an adverse witness if the respondent does not elect to testify in his or her own behalf [*Gov. Code § 11513(b)*; *see* further discussion in Ch. 473F, *Agency Adjudication Hearings*]. Thus, the complainant's evidentiary presentation is not complete until the respondent has testified or the complainant has waived its right to call and examine the respondent [*O'Mara v. State Bd. of Pharmacy (1966) 246 Cal. App. 2d 8, 11, 54 Cal. Rptr. 862* ; *see Gov. Code § 11513(b)* (right to call respondent and examine as if under cross-examination)].

In addition, the right of the complainant agency to amend the accusation after the case has been submitted for decision, and reopen the matter for the taking of further evidence [*Gov. Code § 11516*], would appear also to preclude the ALJ granting a motion to dismiss based on failure to present a prima facie case, even after the respondent's testimony has been presented.

Motions that the ALJ cannot rule on before or during the hearing may, however, be taken under submission with the case. Thus, for example, if such a motion for dismissal were made at the conclusion of the hearing, and the ALJ determination that the complainant had not established a prime facie case, the ALJ may express that determination in his or her proposed decision submitted to the agency. The agency may then adopt, modify, or reject the proposed decision, including the ALJ's determination on that motion [*Gov. Code § 11517(c)(2)*; *see* further discussion in Ch. 473G, *Agency Adjudication Decisions*].

[2] Dismissal by Agency

In APA adjudications and other agency hearings, the agency may dismiss its own proceeding [*see Kendall v. Bd. of Osteopathic Examiners (1951) 105 Cal. App. 2d 239, 248-249, 233 P.2d 107 (APA hearing)* ; *Steen v. City of Los Angeles (1948) 31 Cal. 2d 542, 546-547, 190 P.2d 937* (local agency exercising quasi-judicial functions has inherent power independent of statutory provisions to dismiss proceeding on motion of respondent when proceeding is not diligently prosecuted); *Mauer v. The State Bar (1933) 219 Cal. 271, 275, 26 P.2d 14* (three of five charges against attorney dismissed by State Bar after investigation)].

In this event, a subsequent refiling of the matter may raise an objection of laches, or an objection that the matter is barred by the statute of limitations governing the subject agency [*see Brown v. State Personnel Bd. (1985) 166 Cal. App. 3d 1151, 1157-1163, 213 Cal. Rptr. 53* (professor dismissed by personnel board ordered reinstated, because five-year delay in bringing charges raised bar of laches); *Steen v. City of Los Angeles (1948) 31 Cal. 2d 542, 546-547, 190 P.2d 937* (local administrative agency exercising quasi-judicial functions has inherent power independent of statutory provisions to dismiss proceeding on motion of respondent when proceeding is not diligently prosecuted); for discussion of laches in administrative actions, *see* Ch. 473A, *Commencing Agency Adjudication*].

[3] Voluntary Dismissal by Applicant for License or Permit

The applicant for a permit or license may withdraw the application and move for dismissal of the proceedings. In this situation, it appears that the agency must grant the dismissal, unless there is express statutory authority for the agency to retain jurisdiction, or unless the public interest requires a determination of the matter [*see McDonald v. State Bar (1943) 22 Cal. 2d 768, 771, 141 P.2d 217* ; *Miller v. Board of Police Commissioners (1960) 181 Cal. App. 2d 562, 563-564, 5 Cal. Rptr. 272* (although applicants for business permit requested withdrawal of permit, after hearing but before decision, local ordinance provided that withdrawal of application did not deprive board of power to deny permit); *Johnstone v. Richardson (1951) 103 Cal. App. 2d 41, 48, 229 P.2d 9* (administrative action revoking seasonal license may be reviewed even though term for license has expired, because otherwise judicial power of review would be defeated)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 473C.14 Other Prehearing Motions

[1] Making and Arguing Prehearing Motions

Individual APA cases are selected for a prehearing conference pursuant to *Gov. Code § 11511.5* [*see* discussion in *§ 473C.20*]. The prehearing conference is customarily the only opportunity provided to argue prehearing motions. Prehearing motions should be addressed to the presiding ALJ, in writing, with points and authorities and affidavits as necessary. A motion filed only with the agency will not necessarily be forwarded to the assigned ALJ before the hearing begins. Depending on the nature and timeliness of the motion, the ALJ may rule on the motion prior to hearing. Customarily, the matter is taken under submission to be addressed in the proposed decision.

[2] Motion to Exclude Respondent During Testimony of Minor Who Is Alleged Victim of Sexual Abuse

A motion to exclude the respondent during the testimony of a minor who is the alleged victim of sexual abuse should be made before the hearing to allow time to secure closed-circuit television facilities. This exclusion is deemed not to violate constitutional or statutory rights to confront and cross-examine adverse witnesses when the respondent is able to do the following [*Seering v. Dept. of Social Services (1987) 194 Cal. App. 3d 298, 303-306, 239 Cal. Rptr. 422* ; *see U.S. Const., amend. VI*; *Cal. Const., art. I, § 15*; *Gov. Code § 11513(b)*]:

- View the testimony by closed-circuit television.
- Consult with counsel before the minor is cross-examined.

In *Seering*, the complainant's motion to exclude was supported by a declaration by the minor's psychiatrist that if the minor were required to testify in the presence of the respondents she might suffer exacerbated fear and additional injury, and by the minor's testimony that she was fearful of testifying in front of one of the respondents [*Seering v. Dept. of Social Services (1987) 194 Cal. App. 3d 298, 303, 239 Cal. Rptr. 422]* .

No decisions have been reported in which exclusion was granted based only on a lay person's affidavit (*e.g.*, a declaration by a parent); nor have reported decisions extended the exclusions to a competent adult victim fearful of

testifying before a respondent [*but see Gov. Code § 11440.40(b)* (absent an offer of proof, evidence of complainant's sexual conduct with persons other than an alleged perpetrator is presumed inadmissible), and discussion of this provisions in Ch. 473F, *Agency Adjudication Decisions*]. Nonetheless, there appears to be no reason why it cannot be persuasively argued that the interest in avoiding the psychological harm, cited by the *Seering* court, should apply also to developmentally disabled adults or other clients of community care facilities [*see Health & Safety Code §§ 1502(a), 1508, 1509, 1550* ("community care facilities" defined; license requirements); *Seering v. Dept. of Social Services (1987) 194 Cal. App. 3d 298, 304-305, 239 Cal. Rptr. 422* (interest to be served by exclusion procedure was ascertainment of truth without undue psychological harm to minor witnesses who were demonstrably afraid)].

[3] Motions to Compel Release of Confidential Records

A party seeking the release of confidential records, such as medical records, in an administrative hearing may be required to establish that the disclosure of the records is justified by a compelling interest. California's constitutional right of privacy (*Cal. Const., art I, § 1*) requires that any invasion of personal privacy be justified by a compelling state interest [*White v. Davis (1975) 13 Cal. 3d 757, 775, 120 Cal. Rptr. 94, 533 P.2d 222]* . Before the hearing, the ALJ or the reviewing court may review the records *in camera* and direct their release only if they meet the compelling interest criteria [*see Gov. Code § 11450.30(b)* (ALJ has authority to grant protective order against enforcement of subpoena to protect against violations of right to privacy)]. For example, investigative subpoenas of the Medical Board of California for the production of the medical records of a licensee-physician's patients are an invasion of the patients' privacy absent patient consent or a compelling state interest. Yet the interest of the Medical Board in investigating the alleged unprofessional conduct of a physician qualifies as a compelling state interest, although even that interest is not enough to justify an overbroad subpoena. The state's intrusion on personal privacy, even though justified by a compelling state interest, must nonetheless be accomplished by the least intrusive means [*see Wood v. Superior Court (1985) 166 Cal. App. 3d 1138, 1147-1150, 212 Cal. Rptr. 811* ; *Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 679-682, 156 Cal. Rptr. 55* (decisions relating to Board of Medical Quality Assurance, now the Medical Board of California)]. For discussion of the right to privacy and its impact on agency investigations, see Ch. 471, *Investigations by Public Agencies* .

[4] Motions for Change in Place of Hearing

[a] Nature of Motion

In agency adjudications conducted under the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*), *Gov. Code § 11508(c)* allows the respondent to move for, and gives the administrative law judge the discretion to grant or deny, a change in the place of the hearing. A motion for a change in the place of the hearing must be made within 10 days after service of the notice of hearing on the respondent [*Gov. Code § 11508(c)*].

Gov. Code § 11508(c) codifies a practice authorizing a motion for change of venue recognized by the courts [25 Cal. L. Rev. Comm. Reports 55, 227 (1995); *see Keller Industries, Inc. v. Occupational Safety & Health Appeals Bd. (1981) 124 Cal. App. 3d 469, 471, 473-476, 177 Cal. Rptr. 136* ; *Campbell v. Board of Dental Examiners (1971) 17 Cal. App. 3d 872, 875-877, 95 Cal. Rptr. 351* ; *see also Code Civ. Proc. § 397* (grounds for change of venue in civil actions)].

In making a change of venue determination, the administrative law judge may weigh the detriment to the moving party of the initial location against the cost to the agency and other parties of relocating the site. Failure to move for a change in the place of the hearing within the 10 day period waives the right to object to the place of the hearing [25 Cal. L. Rev. Comm. Reports 55, 227 (1995)]. When seeking a new place for the hearing, the moving party can choose any of the places designated in *Gov. Code § 11508(a), (b)* [*see* discussion in *[b], below*]. For discussion and forms relating to change of venue proceedings in civil actions, see Ch. 571, *Venue* .

[b] Place of Hearing

The place for the hearing is a matter of agency discretion under the APA's formal hearing provisions (*Gov.Code § 11500 et seq.*) [*see Gov. Code § 11508(a)* and discussion in Ch. 473A, *Commencing Agency Adjudication* ; *see also Campbell v. Board of Dental Examiners (1971) 17 Cal. App. 3d 872, 876-877, 95 Cal. Rptr. 351* ; *McPheeters v. Board of Medical Examiners (1947) 82 Cal. App. 2d 709, 713-715, 187 P.2d 116]* .

Similarly, the place for hearing is a matter for agency discretion under a number of specific agency statutes, such as the following:

- Public Employees Retirement System [*Gov. Code § 20134* (place of hearing by Board of Administration of the Public Employees Retirement System)].

- Teacher's Retirement Board [*Educ. Code § 22217*].

- Department of Real Estate [*Bus. & Prof. Code § 11019*; *see Cal.-Am. Corp. v. Department of Real Estate (1980) 104 Cal. App. 3d 453, 163 Cal. Rptr. 729* (interpreting language of place where transactions occurred as place of hearing for Deaprtment of Real Estate agency hearing)].

- Department of Alcoholic Beverage Control [*Bus. & Prof. Code § 24300*].

- Occupational Safety and Health Appeals Board [*8 Cal. Code Reg. § 376(b)*].

The time and place of hearing is determined by the agency. The agency shall consult the office, and subject to the availability of its staff, shall determine the time and place of the hearing. The hearing shall be held at a hearing facility maintained by the office in Sacramento, Oakland, Los Angeles, or San Diego and shall be held at the facility that is closest to the location where the transaction occurred or the respondent resides [*Gov. Code § 11508(a)*]. Alternatively, the hearing may be held at either of the following places [*Gov. Code § 11508(b)(1), (2)*]:

(1) A place selected by the agency that is closer to the location where the transaction occurred or the respondent resides.

(2) A place within the state selected by agreement of the parties. The respondent may move for, and the administrative law judge has discretion to grant or deny, a change in the place of the hearing. A motion for a change in the place of the hearing shall be made within 10 days after service of the notice of hearing on the respondent [*Gov. Code § 11508(c)*]. Unless good cause is identified in writing by the administrative law judge, hearings shall be held in a facility maintained by the office [*Gov. Code § 11508*; *see also Ch 473A, Commencing Agency Adjudication, § 473A.11[11]* for discussion of place of hearing].

In practice, cases are customarily set in the county appropriate for the district where the transaction that gave rise to the hearing occurred, which is often the district where the respondent's business or residence is located and usually the most convenient location for the witnesses and respondent. Reconvening in a second location for taking testimony is usually unnecessary, because *Gov. Code § 11450.20(b)* provides for the service of subpoenas throughout California [for discussion of the issuance of subpoenas under *Gov. Code § 11450.05 et seq., see* Ch. 473F, *Agency Adjudication Hearings*].

[c] Grounds for Motion

Under *Gov. Code § 11508(c)*, grounds for changing the place of hearing are not specifically set forth in the language of the statute, but the Law Revision Commission Comments to that section provide that grounds for change of venue include selection of an improper county and promotion of the convenience of witnesses and ends of justice [1995 Cal. L. Rev. Comm. Reports 55, 227 (1995); *cf. Code Civ. Proc. § 397*].

Under *Code Civ. Proc. § 397(a),(c)*, the superior court in a civil action may change venue:

- When the court designated in the complaint is not the proper court [*Code Civ. Proc. § 397(a)* (improper venue); *see Hamilton v. Superior Court of San Mateo County (1974) 37 Cal. App. 3d 418, 112 Cal. Rptr. 450* (proper court motion)].

- When the convenience of witnesses and the ends of justice would be promoted by the change [*Code Civ. Proc. § 397(c)* (inconvenient venue); *see Richfield Hotel Management, Inc. v. Superior Court (Riddell) (1994) 22 Cal. App. 4th 222, 27 Cal. Rptr. 2d 161* (inconvenient venue motion)].

When the motion to change the place of hearing is based on improper venue (improper place of hearing), the moving party would need to establish that the place of hearing chosen did not satisfy one of the four options under *Gov. Code § 11508* [*Gov. Code § 11508(a), (b)(1), (2), (3)*; *see [b], above*]. When the motion to change the place of hearing is based on inconvenient venue (inconvenient place of hearing), the moving party would need to establish that, although the place of hearing chosen did satisfy one of the four options under *Gov. Code § 11508*, the chosen place of hearing is inconvenient to the parties, and there is another proper venue under *Gov. Code § 11508* that is more convenient to the parties and witnesses. For example, if the agency has chosen the place of hearing under *Gov. Code § 11508(a)* designating one of the four main OAH offices, and a hearing location under *Gov. Code § 11508(b)(2)*, at a place nearer to respondent's residence or the place that the transaction occurred, is both proper and more convenient, then the moving party could request a change in the place of hearing to the latter location. Also, case law has established standards for transfers for convenience which required a showing of economic loss to respondent combined with inconvenience to witnesses [*see Keller Industries, Inc. v. Occupational Safety & Health Appeals Bd. (1981) 124 Cal. App. 3d 469, 474-476, 177 Cal. Rptr. 136* (motion for change of venue properly denied because respondent's claim that it would be forced to close its plant during the hearing and witnesses would be inconvenienced was not supported with sufficient facts); *Code Civ. Proc. § 397(c)* (motion for change of venue may be granted in civil actn when convenience of witnesses and ends of justice would be promoted by the change)].

A motion for change of venue to permit an on-the-spot examination of a site or premises is generally not favored for the following reasons:

- The time and inconvenience involved in convening the parties, counsel, the court reporter, and the ALJ at the site.

- The difficulty of creating a record of the site viewing.

- The availability of other means to convey the same information, such as videotape, pictures, blueprints, and diagrams.

[d] Procedure for Motion

Gov. Code § 11508(c) allows the respondent to move for, and gives the administrative law judge the discretion to grant or deny, a change in the place of the hearing. A motion for a change in the place of the hearing must be made within 10 days after service of the notice of hearing on the respondent [*Gov. Code § 11508(c)*].

Thus, the motion should be filed with the administrative law judge who has been assigned to the hearing. Notice should be given to the other parties. As in a civil action, the motion should be in writing and should be accompanied by a memorandum of points and authorities. In making a change of venue determination, the administrative law judge may weigh the detriment to the moving party of the initial location against the cost to the agency and other parties of relocating the site. Failure to move for a change in the place of the hearing within the 10 day period waives the right to object to the place of the hearing [25 Cal. L. Rev. Comm. Reports 55, 227 (1995)].

The motion should be accompanied by a supporting affidavit or declaration making a convincing factual showing of the need for a change of hearing [*see [e], below*].

[e] Discretion to Grant or Deny

The administrative law judge has the discretion to grant or deny a motion for change of venue; a court will not overturn the agency's decision unless the agency abused that discretion [*Keller Industries, Inc. v. Occupational Safety & Health Appeals Bd. (1981) 124 Cal. App. 3d 469, 474-476, 177 Cal. Rptr. 136]* . The standard for determining whether the agency has abused its discretion depends on how the denial is brought up for review. The general standard for determining abuse of discretion will be that for either administrative mandate or traditional mandate [*Code Civ. Proc. §§ 1085, 1094.5*; for further discussion, *see* Ch. 474C, *Procedures in Reviewing Agency Decisions*]. One court of appeal upheld a denial noting that the appellant had not presented facts to the agency to make a convincing showing in support of the change so as to make denial an abuse of discretion [*Keller Industries, Inc. v. Occupational Safety & Health Appeals Bd. (1981) 124 Cal. App. 3d 469, 475, 177 Cal. Rptr. 136]* .

[5] Motions in Limine

A motion in limine, a motion "on the threshold," is a motion in advance of a proceeding that requests an order that particular evidence be excluded or be admitted only on specified conditions, because the probative value of the evidence is outweighed by the potential for prejudice, or the evidence is protected or privileged [*see* Ch. 373, *Motions in Limine*]. For example, in a civil action the exclusion of expert-witness testimony on a motion in limine was upheld, because the offered testimony was speculative, conjectural, and remote, and thus potentially confusing [*Hyatt v. Sierra Boat Co. (1978) 79 Cal. App. 3d 325, 337-339, 145 Cal. Rptr. 47]* . Examples of motions in limine granted in administrative proceedings include the following:

- Records of the witness's alcoholism treatment ordered not to be disclosed in the hearing absent prehearing compliance with federal disclosure procedures [*see 42 U.S.C. § 290dd-2* (confidentiality of patient records)].

- Names and identifying information contained in patient psychiatric records ordered to be stricken before the documents are marked [*see Board of Medical Quality Assurance v. Hazel Hawkins Memorial Hospital (1982) 135 Cal. App. 3d 561, 565, 185 Cal. Rptr. 405* (subpoena for medical records not an invasion of privacy when it does not seek names or identifying information)].

The motion in limine should be addressed to the presiding judge of the OAH office that will hear the case with appropriate points and authorities (although the motion in civil actions is frequently oral, it is nevertheless advisable to present supporting points and authorities). The staffing limitations of the OAH rarely permit oral argument of the motion prior to hearing unless the case is selected for a prehearing conference [*see Gov. Code § 11511.5* (prehearing conferences), and discussion in *§ 473C.20*]. For a discussion of motions in limine in civil actions, see Ch. 373, *Motions in Limine* .

[6] Motions to Stay, Dismiss, or Continue Action Due to Bankruptcy

A motion to stay, dismiss, or continue a disciplinary matter because the respondent (as an individual or licensed business entity) has filed for bankruptcy is rarely granted even when the subject license, such as an alcoholic beverage license, can be sold or otherwise considered an asset. The discipline of errant licensees is an exercise of a licensing board's police powers to protect the health and welfare of California citizens [*Binford v. Boyd (1918) 178 Cal. 458, 462, 174 P. 56* ; *Pennington v. Bonelli (1936) 15 Cal. App. 2d 316, 319-320, 59 P.2d 448]* and is not barred by *11 U.S.C. § 525*, which protects bankrupts and debtors against discriminatory treatment.

In particular, *11 U.S.C. § 525(a)* provides that a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, or other similar grant to a person solely because that person is or has been a bankrupt or a debtor or has not paid a debt that was discharged under the Bankruptcy Act [*see 11 U.S.C. §§ 101-1330*]. The purpose of this provision is to insure that bankrupts get the fresh start that the Bankruptcy Act is intended to provide [*Parker v. Contractors State License Bd. (1986) 187 Cal. App. 3d 205, 208-209, 231 Cal. Rptr. 577]* .

Although *11 U.S.C. § 525(a)* bars a licensing board from proceeding against a licensee solely because the licensee sought the protection of the Bankruptcy Act, it does not excuse otherwise impermissible conduct by a licensee. For example, a fraudulent diversion by a licensed contractor of contributions intended for a union health plan creates a debt that may be discharged in bankruptcy proceedings, but the underlying fraud may be charged as grounds to revoke the contractor's license [*Parker v. Contractors State License Bd. (1986) 187 Cal. App. 3d 205, 208-212, 231 Cal. Rptr. 577]* .

Similarly, the Illinois Racing Board's denial of a racing license to a bankrupt was held to be a legitimate exercise of a state occupational licensing board's police power, and not barred by *11 U.S.C. § 525(a)*, because the board's decision was supported by several nondiscriminatory reasons [*In re Alessi (N.D. Ill. 1981) 12 Bankr. 96]* .

The exercise of police power by the licensing entity must be both nondiscriminatory and nonpecuniary. The licensing proceeding cannot seek to recover funds for a debt excused in the bankruptcy proceeding [*In re Aegean Fare, Inc. (D. Mass. 1983) 35 B.R. 923* ; *In re Rath Packing Company (N.D. Iowa 1983) 35 B.R. 615* ; *In re Gencarelli (D.R.I. 1981) 14 B.R. 751]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityAdministrative LawGovernmental InformationPersonal InformationConditions of DisclosureGeneral OverviewBankruptcy LawDebtor Benefits & DutiesDiscriminatory Treatment ProtectionConstitutional LawSubstantive Due ProcessPrivacyPersonal InformationGovernmentsState & Territorial GovernmentsLicensesGovernmentsState & Territorial GovernmentsPolice Power

California Forms of Pleading and Practice--Annotated

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Volume 41A: Public Agency Adjudications Judicial Review-Chs. 473-479
Chapter 473C PREHEARING PROCEDURES IN AGENCY ADJUDICATIONS
PART II. LEGAL BACKGROUND
A. Prehearing Motions and Continuances

41A-473C California Forms of Pleading and Practice--Annotated § 473C.15

§ 473C.15 Continuances

[1] Definition

A continuance is an order postponing a hearing or other proceeding until a specified date or for a specified period [*see generally* Ch. 136, *Continuances*]. For discussion of motions to stay, dismiss, or continue an action because the respondent has filed for bankruptcy, see *§ 473C.14[6]*.

[2] Authority

Agencies possess the inherent power to postpone a hearing for good cause [*Powers v. Commission on Professional Competence (1984) 157 Cal. App. 3d 560, 571, 204 Cal. Rptr. 185* ; *Shoults v. Alderson (1921) 55 Cal. App. 527, 531, 203 P. 809]* .

For most agencies, that is, those that are subject to the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*), this power has been codified in *Gov. Code § 11524(a)*. When an ALJ grants a continuance under *Gov. Code § 11524(a)*, the time limit for commencing a hearing is extended for the period of time equal to the continuance [*see Educ. Code § 44944(a)*; *Wilmot v. Commission on Professional Competence (1998) 64 Cal. App. 4th 1130, 1142-1143, 75 Cal. Rptr. 2d 656]* . Once an ALJ has been assigned to the hearing by the Office of Administrative Hearings (OAH), a continuance may be granted only by the assigned ALJ or by the presiding judge of the appropriate regional office of the OAH for good cause shown [*Gov. Code § 11524(a)*]. For discussion of what constitutes good cause, see *[4][a], below*].

[3] Hearing Schedules and Strict Construction of OAH Continuance Policy

The OAH maintains regional offices in Los Angeles, Oakland, Sacramento, and San Diego [*Gov. Code § 11508(a)*]. Cases are scheduled for both Sacramento and Oakland from the Sacramento office. Agencies determine the location, estimate duration of the hearing, and reserve the needed hours or days of hearing time in a particular location with the appropriate OAH regional office.

Calendar staff of the regional offices schedule the requested matter, usually several months in advance of the hearing;

the agency provides notice of hearing [*see Gov. Code § 11509* (notice of hearing); for discussion of notice of hearing, *see* Ch. 473A, *Commencing Agency Adjudication*].

Requests for hearings outside the regional office cities are collected by geographic area, and a circuit trip is scheduled for a week of hearing and travel time. Thus, a late request for a continuance of a case would disrupt the schedule and waste hearing time. A hearing in an outlying city that is not completed in the scheduled time not only results in the usual difficulty and cost increases attendant on reconvening the parties, counsel, and the ALJ, but also these problems are exacerbated by the difficulty of rescheduling the added hearing and travel time with other hearings in that geographic area.

Because of these problems of scheduling and increased costs, and because of statutory mandates for prompt hearings [*see, e.g., Educ. Code § 44944* (a hearing to dismiss or suspend a certificated school employee must begin within 60 days after the demand for hearing); *Health & Safety Code § 1551* (Department of Social Services licensees whose community care facilities have been closed by a temporary suspension order have a right to a hearing within 30 days)], the OAH strictly construes its continuance policy [California Administrative Procedure Act Procedures for Administrative Adjudication, Appendix I, Continuance Policy (1987) (OAH Continuance Policy)], and the grounds for continuance.

The OAH Continuance Policy provides: "Unreasonably late requests for continuances, or requests without merit, will not be looked upon favorably. Such requests impede the orderly resolution of disputes and timely administration of justice." The details of this policy and grounds for continuance are discussed in *[4], below*.

[4] Grounds for Continuance

[a] Good Cause Showing Required

The granting of a continuance, whether under the California APA or the inherent power of an agency to postpone the time for a hearing [*see* [2], *above*], depends on the showing of good cause [*Gov. Code § 11524(a)*; *Powers v. Commission on Professional Competence (1984) 157 Cal. App. 3d 560, 570-571, 204 Cal. Rptr. 185* ; *see Curtis v. Underwood (1894) 101 Cal. 661, 669, 36 P. 110* (inherent power of courts to postpone for good cause)]. A DMV hearing officer had good cause to grant a continuance of a DMV hearing so that a police office could testify that he was on duty when he observed the motorist drive his car. The testimony would provide proper foundation for the admission of police reports related to stop of driver for DUI violation. Motorist objected to admission of police reports because of lack of foundation. Also the motorist was not prejudiced by the delay in hearing [*Bussard v. Department of Motor Vehicles (2008) 164 Cal. App. 4th 858, 864-866, 79 Cal. Rptr. 3d 414*].

Gov. Code § 11524 provides no definition of "good cause," but the OAH Continuance Policy and certain court decisions do provide some grounds for continuance that have been approved as constituting "good cause."

[b] OAH Continuance Policy

[i] Grounds Listed in OAH Continuance Policy as Constituting Good Cause

The OAH Continuance Policy is available as Appendix I of the Administrative Procedure Act Procedures for Adjudication, a bound pamphlet published biannually by the OAH.

Copies may be obtained from the OAH at 501 J Street, Suite 230, Sacramento, CA 95814.

The OAH Continuance Policy lists the following events or conditions as the only grounds constituting good cause to continue a hearing [OAH Continuance Policy, Part III]:

- The death of a party, the representative or attorney of a party, a witness to an essential fact, or the parent, child, or a member of the household of any of these, when it is not feasible to substitute another representative, attorney, or witness because of the proximity of the hearing date.

- An order of the administrative law judge, such as an order to compel discovery under *Gov. Code § 11507.7* (motion to compel discovery pursuant to request for discovery under *Gov. Code § 11507.6*) [*see* discussion of orders to compel discovery in Ch. 473B, *Discovery in Agency Adjudications*].

- The incapacitating illness of a party, the representative or attorney of a party, or a witness to an essential fact, when it is not feasible to substitute another representative, attorney, or witness because of the proximity of the hearing date. The ALJ considering a request for continuance on this basis may require a statement by the attending physician reciting the nature and probable duration of the illness and the extent of incapacitation [OAH Continuance Policy, Part IV].

- Lack of notice of the hearing as required in *Gov. Code § 11509* [for discussion of the notice of hearing required under *Gov. Code § 11509*, see Ch. 473A, *Commencing Agency Adjudication*].

- A material change in the status of the case when a change in the parties or pleadings requires postponement, or an executed settlement or stipulated findings of fact obviate the need for a hearing. A partial amendment of the pleadings is not good cause for continuance to the extent that the unamended portion of the pleadings is ready to be heard. The probable resolution of other litigation that may affect the outcome or duration of the hearing or the extent of the parties' participation in the hearing may constitute a material change warranting continuance.

- A stipulation for a continuance signed by all of the parties or their authorized representatives, including an agency representative, that is communicated with a request for continuance to the OAH no later than 25 working days before the hearing. Even with a stipulation, the duration of the hearing may make a continuance inappropriate.

- The substitution of the representative or attorney of a party on a showing that the substitution is required.

- The unavailability of a party, representative, attorney, or witness to an essential fact because of a necessary, conflicting appearance in a judicial matter when (a) the person did not know of the conflict when the hearing date was set and could neither anticipate nor avoid it, and (b) a request for continuance is immediately communicated to the OAH.

- The unavailability of a party, representative, or material witness due to an unavoidable emergency.

[ii] Establishing Good Cause

Part IV of the OAH Continuance Policy provides that, to establish good cause, the evidence of the event or condition that constitutes good cause must be evidence of the sort and to the degree that responsible persons would rely on it in the conduct of serious affairs [*see Gov. Code § 11513(c)* (with certain exceptions, any relevant evidence is admissible in an California APA hearing if it is the sort of evidence that responsible persons are accustomed to rely on in the conduct of serious affairs); *see also* Ch. 473F, *Agency Adjudication Hearings*].

The agency or ALJ considering a request for continuance based on a claim of incapacitating illness may require the requesting party to provide a written statement by the attending physician reciting the nature and probable duration of the illness and the extent of incapacitation. A party requesting a continuance because of a conflict due to a judicial

matter must provide the identity of the court and the caption and case number when making the request for the continuance [OAH Continuance Policy, Part IV].

[c] Related Judicial Proceedings as Basis for Continuance

[i] Civil Actions

A related judicial proceeding [*see [b], above*] may be grounds for a continuance, but the existence of a civil suit involving the same parties or the same transaction does not always merit a continuance. Even though the OAH Continuance Policy provides that the probable resolution of other litigation that may affect the outcome or duration of the hearing or the parties' participation in the hearing may constitute a material change that warrants a continuance [OAH Continuance Policy, Part III(E)], the ALJ commonly considers several other factors, including the following:

- The public protection purposes of license discipline proceedings. The court in a civil action can award damages, but cannot revoke a license, discipline the licensee, or otherwise use the remedies available to a licensing agency to protect the public.

- Agency disciplinary proceedings are subject to a different and higher burden of proof than civil actions: in a disciplinary action to revoke or suspend a professional license, the standard of proof is clear and convincing evidence to a reasonable certainty [*Ettinger v. Board of Medical Quality Assurance (1982) 135 Cal. App. 3d 853, 856, 185 Cal. Rptr. 601* ; *see* Ch. 473F, *Agency Adjudication Hearings*].

- The issues to be determined in the two proceedings are seldom identical.

Statements by the appellate court in one reported decision suggest that the agency should permit a continuance for the resolution of a related suit; the statements are dicta, however, and the court did not address the public protection issue. In this case, *Contractors' State License Board v. Superior Court of Los Angeles County (1960) 187 Cal. App. 2d 557, 10 Cal. Rptr. 95* , a customer sued a contractor for breach of a contract to build a swimming pool. The buyer also complained to the Contractors' State License Board, which instituted disciplinary proceedings. The contractor then cross-complained, and joined the Board as a cross-defendant in the suit, asking the superior court to enjoin the Board's proceedings pending trial of the contract action. The superior court granted the injunction, and the Board appealed. The Court of Appeal held that the superior court should vacate the injunction, because it had no power to enjoin the Board from performing its statutory duties. The appellate court added, however, that the contractor could ask the Board for a stay of its proceedings until the contract question was determined, "and it is not to be assumed that the Board will arbitrarily deny such a stay in view of the fact that" a finding that the contractor breached his contract "would be res adjudicata against [the contractor] in the disciplinary proceedings" [*Contractors' State License Board v. Superior Court of Los Angeles County (1960) 187 Cal. App. 2d 557, 562, 10 Cal. Rptr. 95* ; for discussion of res judicata in administrative hearings, *see* Ch. 473F, *Agency Adjudication Hearings*].

Requests for continuance because of a related civil action are commonly made when a party injured by the licensee in the transaction that is the basis for the disciplinary action brought by the agency has also filed a civil suit. For example, a customer may notify the Contractors' State License Board of defective construction work, then file a civil suit for damages against the same contractor [*see, e.g.,* *Contractors' State License Board v. Superior Court of Los Angeles County (1960) 187 Cal. App. 2d 557, 559, 10 Cal. Rptr. 95* (customer sued contractor for breach of contract to build swimming pool and also complained to Board, which instituted disciplinary proceedings)]. Similarly, a buyer of real property who is to testify about fraudulent sales practices in the Department of Real Estate's proceedings to suspend or revoke a real estate salesperson's license may also have sued that licensee and the supervising broker for damages.

[ii] Criminal Cases

The conviction of a crime may result in the denial of an application for an occupational or professional license [*Bus. & Prof. Code §§ 118, 475, 480, 489*], the suspension or revocation of a license [*Bus. & Prof. Code § 490*], or public reproval [*Bus. & Prof. Code § 495*]. In general, an administrative agency need not stay its hearing while criminal charges are pending against the respondent [*Hankla v. Governing Bd. (1975) 46 Cal. App. 3d 644, 652-653, 120 Cal. Rptr. 827* ; *Savoy Club v. Board of Supervisors (1970) 12 Cal. App. 3d 1034, 1038-1040, 91 Cal. Rptr. 198* ; *Funke v. Department of Motor Vehicles (1969) 1 Cal. App. 3d 449, 454, 81 Cal. Rptr. 662]* . Furthermore, granting an indefinite continuance of an administrative hearing on disciplinary charges to a licensee who is incarcerated in another state but who is represented by counsel solely because the licensee is incarcerated is an abuse of discretion, and does not satisfy good cause standards of *Gov. Code § 11524(a)* [*Arnett v. Office of Admin. Hearings (1996) 49 Cal. App. 4th 332, 342-343, 56 Cal. Rptr. 2d 774]* .

[5] Procrastination or Lack of Preparation as Grounds for Denial of Continuance

The OAH does not look with favor on tardy requests for continuances [OAH Continuance Policy; *see* [3], *above*]. An application for a continuance must be filed within 10 working days after the party discovered or should have discovered the event or condition that establishes good cause for the continuance [*Gov. Code § 11524(b)*; *see [7][b], below*].

Under the OAH policy and the statute's requirements, a request for a continuance based on the applicant's procrastination or failure to prepare will almost certainly be denied. Examples include the following:

- Counsel is unprepared for the hearing [*Rudolph v. Athletic Commission (1960) 177 Cal. App. 2d 1, 12-14, 1 Cal. Rptr. 898* (counsel requested continuance to enable him to prepare defense, claiming 15 days' notice insufficient; appellate court held hearing officer's denial of motion was not abuse of discretion, and licensee was not denied due process)].

- Discovery was not timely requested [*see Gov. Code § 11507.6* (discovery requests); *see also* Ch. 473B, *Discovery in Agency Adjudications*].

- Discovery rights were not promptly enforced [*see Gov. Code § 11507.7* (motions to compel discovery); *see also* Ch. 473B, *Discovery in Agency Adjudications* ; *Lax v. Board of Medical Quality Assur., Dep't of Consumer Affairs (1981) 116 Cal. App. 3d 669, 172 Cal. Rptr. 258* (failure of licensee to timely enforce discovery under *Gov. Code § 11507.7*].

- Counsel failed to subpoena necessary witnesses or documents [*see Gov. Code § 11450.10 et seq.* (subpoenas for attendance or production of documents at hearing); *see also* Ch. 473F, *Agency Adjudication Hearings* ; *Dresser v. Board of Medical Quality Assurance (1982) 130 Cal. App. 3d 506, 517-518, 181 Cal. Rptr. 797* (denial of continuance to secure attendance of expert witness no abuse of discretion, because licensee failed to subpoena witness despite ample notice of hearing and three prior continuances on other grounds); *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control (1966) 65 Cal. 2d 349, 55 Cal. Rptr. 23, 420 P.2d 735]* .

- The party was unreasonably slow to retain counsel [*Skipitar v. Munro (1959) 175 Cal. App. 2d 1, 4-6, 345 P.2d 508* (when licensee requested continuance on the day of hearing to obtain an attorney, no abuse of discretion to deny continuance)].

[6] Discretion of ALJ

[a] Discretion to Grant or Deny Continuance

There is no absolute right to a continuance. *Gov. Code § 11524(a)* provides that the agency *may* grant continuances.

Thus, whether agency grants or denies the continuance is a matter for the ALJ's discretion, or that of the agency if it hears the request [*Dresser v. Board of Medical Quality Assurance (1982) 130 Cal. App. 3d 506, 518, 181 Cal. Rptr. 797* ; *Cooper v. Board of Medical Examiners (1975) 49 Cal. App. 3d 931, 123 Cal. Rptr. 563* ; *Savoy Club v. Board of Supervisors (1970) 12 Cal. App. 3d 1034, 1038, 91 Cal. Rptr. 198* ; *Ring v. Smith (1970) 5 Cal. App. 3d 197, 201, 85 Cal. Rptr. 227* ; *Givens v. Dept. of Alcoholic Bev. Control (1959) 176 Cal. App. 2d 529, 532, 1 Cal. Rptr. 446* ; for discussion of who may grant a continuance, *see [7][a], below*].

Some of the factors that an ALJ may consider in exercising that discretion include the following:

- The sufficiency of the showing made in support of the request [*see County of San Bernardino v. Doria Mining & Engineering Corp. (1977) 72 Cal. App. 3d 776, 783-784, 140 Cal. Rptr. 383* (statement about substitution of attorneys insufficient to support motion for continuance in civil action without affirmative showing that substitution was required in interests of justice); *Taylor v. Gordon (1951) 102 Cal. App. 2d 233, 240, 227 P.2d 64* (unsworn statement of attorney that he had been told client had measles insufficient to support motion for continuance in civil action); *see also Gov. Code § 11524(a)* (showing of good cause required), and discussion in *[4][a], above*].

- The timing of the request [*Skipitar v. Munro (1959) 175 Cal. App. 2d 1, 4-6, 345 P.2d 508* (no abuse of discretion to deny continuance when licensee requested a continuance on the day of hearing to obtain an attorney); *see* discussion in *[5], above*, and *[7][b], below*].

- The likelihood that permitting the continuance will result in the production of additional relevant evidence [*Wisuri v. Newark School Dist. (1966) 247 Cal. App. 2d 239, 243, 55 Cal. Rptr. 490]* .

[b] Abuse of Discretion

The ALJ's denial of a request for continuance will be reversed only for an abuse of discretion [*Cooper v. Board of Medical Examiners (1975) 49 Cal. App. 3d 931, 944, 123 Cal. Rptr. 563* ; *Savoy Club v. Board of Supervisors (1970) 12 Cal. App. 3d 1034, 1038, 91 Cal. Rptr. 198]* . In determining whether an abuse of discretion has occurred, the reviewing court considers the sufficiency of the showing by the requesting party, and whether the denial operated to deprive that party of a fair hearing [*see County of San Bernardino v. Doria Mining & Engineering Corp. (1977) 72 Cal. App. 3d 776, 783-784, 140 Cal. Rptr. 383* (request for continuance based on substitution of attorneys denied when there was no affirmative showing that the substitution was required in the interests of justice); *Wood v. City Civil Service Commission (1975) 45 Cal. App. 3d 105, 110, 119 Cal. Rptr. 175]* .

Courts have upheld, as within the administrative law judge's discretion, continuances of hearings granted on the judge's own motion, to continue hearings due to calendar congestion [*Powers v. Bakersfield City School Dist. (1984) 157 Cal. App. 3d 560, 204 Cal. Rptr. 185* ; *Young v. Governing Bd. (1974) 40 Cal. App. 3d 769, 115 Cal. Rptr. 456]* . For discussion of the showing necessary to establish abuse of discretion when a writ of administrative mandamus is sought under *Code Civ. Proc. § 1094.5* to review a final administrative order or decision, see Chapter 474B, *Standards in Reviewing Agency Decisions* [*see also Code Civ. Proc. § 1094.5(b)*].

[7] Procedure for Requesting Continuance

[a] Who May Grant a Continuance

Until the case is assigned to an ALJ, the agency that filed the case may grant a continuance [*Gov. Code § 11524(a)*; OAH Continuance Policy, Section I(C)]. Requests at that early stage should be made directly to the agency.

After assignment, only the presiding judge of the appropriate regional office of the Office of Administrative Hearings

where the case is to be heard, his or her designee [OAH Continuance Policy, Section I(C)], or the assigned ALJ can grant a continuance [*Gov. Code § 11524(a)*]. The case is deemed "assigned" to an ALJ when it is scheduled for specific hearing dates [OAH Continuance Policy, Section I(B)].

[b] When to Request Continuance

The OAH Continuance Policy states that a hearing may be continued at any time if good cause exists [*but see* discussion in [5], *above* (procrastination as grounds for denial of a request for continuance)]. The issue, however, of when a hearing may be continued, is not the same as that as when a request for continuance must be filed. The party requesting a continuance must apply for the continuance within 10 working days after the party discovered or should have discovered the event or condition that establishes the good cause for the continuance [*Gov. Code § 11524(b)*]. A continuance may be granted for good cause after the 10 working days have passed, but only if the party seeking the continuance is not responsible for and has made a good faith effort to prevent the condition or event establishing the good cause [*Gov. Code § 11524(b)*].

Depending on the ground for the request, special time limits may apply. For example, if continuance is by stipulation of the parties, the signed stipulation and a request for continuance must be communicated to the OAH no later than 25 working days before the hearing [OAH Continuance Policy, Part III(F)]. Similarly, if a continuance is requested on the ground of unavailability due to a necessary, conflicting appearance in a judicial matter, the conflict and the request must be immediately communicated to the OAH [OAH Continuance Policy, Part III(H); *see* [4][b][i], *above*].

[c] Making the Request

In practice, counsel can request a continuance by telephoning the presiding judge of the OAH regional office that will hear the matter, and stating the basis for the request with appropriate specifics as described in the OAH Continuance Policy, such as the nature and duration of an illness or the particulars of a judicial conflict [for details of the required particulars, see OAH Continuance Policy, Parts III, IV; *see also [4][b], above*]. As a courtesy, and to mitigate agency opposition to the continuance, counsel should first advise the agency counsel or the deputy attorney general representing the agency of the grounds for the continuance, and explore whether alternative arrangements can be made. Thus, a declaration in lieu of the appearance of an unavailable witness, or a stipulation concerning a factual matter, might resolve the problem without the need for a continuance. The agency attorney (or deputy attorney general) customarily opposes the continuance request. One reason for such opposition is that the client agency is charged for the reserved hearing time if another matter cannot be scheduled for that time.

[d] Partial Continuance

If the petitioner has only one witness who is unavailable or a calendar conflict for only a portion of the dates set for the hearing, the petitioner should consider requesting only a partial continuance. Agency counsel may well accept a proposal that the agency present its case-in-chief and the parties reconvene later for respondent's witnesses, or that the matter be heard with the exception of a single unavailable witness. In practice, a continuance request to which agency counsel assents is more likely to be granted.

[e] Poll of Counsel, Ruling, and Rescheduling

The ALJ to whom the continuance request is made polls the opposing counsel to determine if the request is opposed. When the ALJ rules on the request, both counsel will be orally advised of the ruling. The ALJ may condition granting the request on the prompt rescheduling of the case for specified dates or may leave resetting the matter to the agency counsel. A party who is considering a request for a continuance should include the question of rescheduling in his or her considerations.

The availability of hearing dates for the continued matter is particularly important for cases scheduled in outlying areas.

Requests for hearings outside the regional office cities are collected by geographic area, and a circuit trip is scheduled for a week of hearing and travel time. When such a case is continued, it cannot simply be assigned to the next hearing date if the hearing is still to be held on the circuit, but must be rescheduled by the same process, which will require waiting until there are enough hearings in that area to justify scheduling a circuit trip for an ALJ. A considerable delay may therefore result.

[f] Oral Argument

Due to staffing limitations, the OAH does not customarily hear argument on motions such as a request for a continuance. The parties have no right to oral argument on the matter. If the request for continuance is denied, or if the requesting party believes that the request merits oral argument, a request for a brief hearing of that matter may be made to the ALJ who is considering the request. If oral argument is permitted, the request for continuance should be reduced to writing with appropriate declarations, then served on opposing counsel and filed with the OAH in advance of the time set for argument.

[8] Judicial Review of Denial of Application for Continuance

An application for judicial review of the denial by an ALJ of a continuance request must be filed in superior court within 10 working days following the denial or be barred from judicial review as a matter of jurisdiction [*Gov. Code § 11524(c)*]. The party applying for review must give notice to the agency and to any other parties. This notice may be given orally at the same time the application is denied or in writing when application is made in court for judicial relief. These provisions do not apply to the Department of Alcoholic Beverage Control [*Gov. Code § 11524(c)*]. For discussion of the Department of Alcoholic Beverage Control, generally, see Ch. 18, *Alcoholic Beverage Licenses* . If there is no written order of denial by the ALJ, counsel can file a declaration stating that the request was denied.

[9] Notice of Continued Hearing

The California APA contains no requirement of formal notice of a continued hearing. It is enough if the respondent has actual knowledge of the date of the hearing [*McPheeters v. Board of Medical Examiners (1947) 82 Cal. App. 2d 709, 715, 187 P.2d 116]* . If a respondent has neither formal notice nor actual knowledge, the respondent has been denied due process [*see Goldberg v. Kelly (1970) 397 U.S. 254, 267, 90 S. Ct. 1011, 25 L. Ed. 2d 287* (basic requirement of due process is the opportunity to be heard; there must be timely and adequate notice)]. For discussion of the general requirement of notice of hearing under *Gov. Code § 11509*, see Chapter 473A, *Commencing Agency Adjudication* . For discussion of due process considerations in administrative proceedings generally, see Ch.470A, *Due Process Restrictions on Public Agencies* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceAdmissibilityGeneral OverviewAdministrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPresiding OfficersDuties & PowersAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionGovernmentsState & Territorial GovernmentsLicenses

California Forms of Pleading and Practice--Annotated

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Volume 41A: Public Agency Adjudications Judicial Review-Chs. 473-479
Chapter 473C PREHEARING PROCEDURES IN AGENCY ADJUDICATIONS
PART II. LEGAL BACKGROUND
A. Prehearing Motions and Continuances

41A-473C California Forms of Pleading and Practice--Annotated §§ 473C.16-473C.19

[Reserved]

§§ 473C.16[Reserved]

California Forms of Pleading and Practice--Annotated

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Volume 41A: Public Agency Adjudications Judicial Review-Chs. 473-479
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PART II. LEGAL BACKGROUND
B. Prehearing Conferences, and Negotiation and Settlement

41A-473C California Forms of Pleading and Practice--Annotated § 473C.20

§ 473C.20 Prehearing Conferences

[1] Background

The matters heard by the Office of Administrative Hearings (OAH) range in complexity from a license denial based on a final criminal conviction that involves relatively simple questions of law and fact, to multi-party matters scheduled for several months of hearing that involve complex legal issues and technical, difficult factual disputes. Before 1987, the difficulty of hearing the more complex cases without some prehearing clarification of factual and legal issues prompted informal prehearing conferences. The increasing number of these complex cases caused the OAH to propose amending the California APA to provide statutory authority for prehearing and settlement conferences. The amendment, *Gov. Code § 11511.5*, was enacted effective January 1, 1987 [Stats. 1986, Ch. 597, § 2; Ch. 899, § 1].

The prehearing conference, like a pretrial conference in a civil matter is held to identify and define factual and legal issues and to expedite the hearing [*see Gov. Code § 11511.5(b)(1) to (12)*; *cf.* Cal. Rules of Ct, Rule 212, and discussion in Ch. 425, *Pretrial Proceedings*]. It may also be used:

- To explore settlement possibilities and consider settlement conferences [*Gov. Code §§ 11511.5(b)(1), 11511.7*].

- The use of alternate dispute resolution procedures [*Gov. Code §§ 11511.5(b)(11), 11420.10-11420.30*; *see* discussion in *§ 473C.21[8*], *below*, and Ch. 473H, *Alternative Procedures for Agency Decisions* (discussion of alternative dispute resolution)].

- The use of informal hearing procedures [*Gov. Code §§ 11511.5(b)(11), 11445.10-11445.60*; *see* discussion in *§ 473C.21[9*], *below*, and Ch. 473H, *Alternative Procedures for Agency Decisions* (discussion of informal hearings)].

[2] Provisions of Governing Statute

[a] Motion for Conference and Notice of Conference

A prehearing conference may be held on the motion of a party or by the order of the administrative law judge [*Gov. Code § 11511.5(a)*]. For a form that may be used in moving for a prehearing conference, see *§ 473C.50*. The ALJ will set the time and place for the conference, and the ALJ is required to give reasonable written notice of the conference to all parties [*Gov. Code § 11511.5(a)*]. The conference is conducted by the ALJ [*Gov. Code § 11511.5(a)*].

[b] Subject Matter of Conference

The prehearing conference may deal with one or more of the following [*Gov. Code § 11511.5(b)*]:

- Exploration of settlement possibilities [*Gov. Code § 11511.5(b)(1)*; *see Gov. Code § 11511.7* and *§ 473C.21*].

- Preparation of stipulations [*Gov. Code § 11511.5(b)(2)*].

- Clarification of issues [*Gov. Code § 11511.5(b)(3)*].

- Rulings on the identity and the number of witnesses [Gov. Code § 1511.5(b)(4)].

- Objections to offers of evidence [*Gov. Code § 11511.5(b)(5)*].

- Order of presentation of evidence and cross-examination [*Gov. Code § 11511.5(b)(6)*].

- Rulings regarding issuance of subpoenas and protective orders [*Gov. Code § 11511.5(b)(7)*; *see Gov. Code § 11450.05 et seq.* (governing subpoenas), and discussion regarding subpoenas in Ch. 473B, *Discovery in Agency Adjudications* , and Ch. 473F, *Agency Adjudication Hearings*].

- Schedules for the submission of written briefs [*Gov. Code § 11511.5(b)(8)*].

- Schedules for the commencement and conduct of the hearing [*Gov. Code § 11511.5(b)(8)*].

- Exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing [*Gov. Code § 11511.5(b)(9)*; *see* 25 Cal. L. Rev. Comm. Reports 55, 232 (1995) (noting that this provision is not intended to provide a new discovery procedure; if a party has not availed itself of discovery within the time periods provided by *Gov. Code Section 11507.6*, it should not be permitted to use the prehearing conference as a substitute for statutory discovery; the prehearing conference is limited to an exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing)].

- Motions for intervention [*Gov. Code § 11511.5(b)(10)*; *see* Ch. 473A, *Commencing Agency Adjudication* , and Ch. 473F, *Agency Adjudication Hearings* , for further discussion regarding intervention].

- Exploration of the possibility of using alternate dispute resolution or informal hearing procedures [*Gov. Code § 11511.5(b)(11)*; *see* Ch. 473H, *Alternative Procedures for Agency Decisions* for further discussion regarding alternative dispute resolution and informal hearing procedures].

- Any other matters that will promote the orderly and prompt conduct of the hearing [*Gov. Code § 11511.5(b)(12)*].

[c] Conduct of Prehearing Conference

The administrative law judge may conduct all or part of the prehearing conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in and to hear the entire proceeding while it is taking place [*Gov. Code § 11511.5(c)*].

While *Gov. Code § 11511.5(c)* permits the conduct of proceedings by telephone, television, or other electronic means (including conference telephone calls), the presiding officer may of course conduct the proceedings in the physical presence of all participants [25 Cal. L. Rev. Comm. Reports 55 (1995)].

[d] Conversion of Prehearing Conference Into Alternative Dispute Resolution or Informal Hearing Procedure by Consent of Parties

With the parties consent, the prehearing conference can be converted into one of the following [*Gov. Code § 11511.5(d)*]:

- An immediate alternative dispute resolution proceeding.
- An immediate informal hearing.
- An alternative dispute resolution proceeding to be conducted at another time.
- An informal hearing to be conducted at another time, subject to the right of a party to object to the use of the informal hearing procedure under *Gov. Code § 11445.30*.

See further discussion in *§ 473C.21[8],[9]*, and discussion and forms relating to these procedures, see Ch. 473H, *Alternative Procedures for Agency Decisions* [*see also Gov. Code § 11420.10 et seq.*].

[e] Prehearing Orders

The ALJ issues a prehearing order incorporating the matters determined at the prehearing conference. The ALJ may direct one or more of the parties to prepare a prehearing order [*Gov. Code § 11511.5(e)*]. For an example of a prehearing conference order, see *§ 473C.51*.

[3] Case Management Program Criteria

The staffing limitations of the OAH do not permit a prehearing conference in every case; typical short cases do not require a conference. The presiding ALJ of each regional office, or a designee, selects the cases that will be included in what the OAH calls the Case Management Program (CMP). In the first year after the enactment of *Gov. Code § 11511.5*, the cases designated for case management had one or more of the following characteristics:

- Scheduled for four or more days of hearing.
- Filed as Commission on State Mandate test claims [*see Gov. Code §§ 17550-17616* (reimbursement of local agencies and school districts for costs mandated by state)].
- Filed as toxic substances violations [*see Health & Safety Code § 25187* (hearings on hazardous waste and hazardous substance violations)].
- Filed as Stull Act teacher dismissal proceedings [*see Educ. Code §§ 44932* (grounds for dismissal), *44944* (conduct of hearing); *see* Ch. 512, *Schools: Certification, Dismissal, and Related Employment*

Issues].

- Involved numerous parties.

Cases in which respondents are not represented by counsel are rarely assigned to case management.

[4] Case Management Program Procedures

[a] Scheduling Conference and OAH Notice Form

Matters assigned to the Case Management Program will be set for a prehearing conference before the ALJ who will eventually hear the case [*Gov. Code § 11511.5(a)*; *see [2][a], above*]. If settlement negotiations take place, however, OAH policy provides for referral of the negotiations to another ALJ [*see § 473C.21[1][b]*].

The conference is usually set in the regional office about six to eight weeks before the hearing, but may be conducted by a telephone conference call. The notice form used by the OAH identifies the following matters that may be considered at the prehearing conference; the matters listed in this form are similar to, but not identical with, the subjects for prehearing conferences listed in *Gov. Code § 11511.5(b)* [*see [2][b], above*]:

- Clarification of factual and legal issues in dispute.

- Stipulations to factual matters and to the admission of exhibits, including waiving foundation requirements and waiving other objections regarding exhibits and testimony.

- Special defenses, such as collateral estoppel or res judicata, entrapment, discriminatory enforcement, and statute of limitations or laches.

- Jurisdictional and due process matters, including objections to the form and sufficiency of pleadings, motions to consolidate, and motions to sever.

- The identity of and limitations on the number of witnesses, the need for interpreters, and the scheduling and order of witnesses.

- Resolution of remaining discovery problems, claims of privilege, motions to quash, protective orders, and subpoenas.

- Exchange of witness lists and of exhibits or documents to be offered in evidence at the hearing.

- Motions for Intervention.

- Use of alternative dispute resolution or informal hearing procedures.

- Any other matters that will promote the orderly and efficient conduct of the hearing.

[b] Preparation for Conference and Attendance of Trial Counsel

Thorough preparation for the prehearing conference is essential to achieve its purposes and to make the arrangements necessary to an orderly and efficient hearing. Counsel should prepare written motions with points and authorities as necessary and send copies to opposing counsel and the ALJ before the prehearing conference. Trial counsel, rather than junior associates without authority to act for the client, must attend. Counsel should either obtain authority from the

client to enter into stipulations and agreements or insure that the client is present.

[c] Stipulations and Admissions

The judge will attempt to narrow the contested issues by seeking stipulations and admissions, and may order amendment or clarification of the pleadings [*see Gov. Code § 11511.5(b)(2)* (matters that may be dealt with at prehearing conference include the preparation of stipulations); *see also [2][b], above*]. When the facts are essentially undisputed, the parties can avoid the expense of an unnecessary hearing by providing the ALJ with a statement of stipulated facts. The remaining legal issues can be briefed and argued, as necessary.

[d] Exhibits

Parties are customarily ordered to produce a written list of all exhibits at the prehearing conference [*Gov. Code § 11511.5(b)(9)*], as well as a copy of each exhibit so that it may be marked. The ALJ may mark the exhibits at the conference, or direct counsel to do so. If opposing counsel has not received a set of exhibits during discovery, an additional set of exhibits must be provided for opposing counsel. To avoid confusion at the hearing, voluminous documents, such as medical records or a title insurance file, require uniform pagination. Counsel may be directed to meet after the conference to eliminate duplicate exhibits, paginate exhibits, "sanitize" exhibits by striking protected or identifying information (such as the last name of a patient), or to copy video and audio tapes [*see Board of Medical Quality Assurance v. Hazel Hawkins Memorial Hospital (1982) 135 Cal. App. 3d 561, 565, 185 Cal. Rptr. 405* (subpoena of medical records upheld against right of privacy challenge because the subpoena sought neither disclosure of the patients' identity nor identifying medical information)].

The ALJ will ask the parties to agree to waive foundation requirements for exhibits and to stipulate that the exhibits are admissible. Frequently, parties agree to the admission of all exhibits at the prehearing conference, perhaps because prehearing conferences tend to be less antagonistic and confrontational than hearings.

[e] Witnesses

[i] Witness Lists

Counsel are required to present a complete witness list at the prehearing conference [*Gov. Code § 11511.5(b)(9)*]. The list must identify any expert witnesses, and provide a curriculum vitae or resume for each. Failure to identify a witness before the hearing may provide grounds to exclude the testimony of that witness [*Aengst v. Board of Medical Quality Assurance (1980) 110 Cal. App. 3d 275, 283, 167 Cal. Rptr. 796* (evidence of polygraph test properly excluded because polygraph was of questionable scientific reliability and was administered by friendly polygrapher, and appellant failed to include name of polygrapher in witness list before hearing)].

[ii] Expert Witnesses

The ALJ will seek stipulations that the individuals offered as expert witnesses are experts, and will review the proposed scope of the experts' testimony. Frequently, parties offer written reports by the experts, and stipulations to admit the reports as direct evidence may eliminate the need for calling an expert witness on peripheral issues. Lengthy and complex hypothetical questions are frequently posed to expert witnesses, and the questions may be made even less intelligible by the direction that the expert assume additional facts or elements. The ALJ may order the parties to reduce all proposed hypothetical questions to writing and provide copies to opposing counsel and the ALJ before the hearing.

To save costs and accommodate the schedule of an expert witness, a party may request that the witness be scheduled for a specific time, and that the testimony of other witnesses be interrupted, if necessary, for the examination of the expert. If the expert testimony will contain, or the subject of the hearing involves, scientific, technical, or arcane terms, the ALJ may require the parties to furnish a glossary of any such words or terms.

[iii] Estimated Length of Testimony and Summary of Testimony

An accurate estimate of the expected length of the testimony of proposed witnesses is essential to determining if the time reserved for hearing is sufficient, thus avoiding the delay and expense of reconvening the parties, counsel, and the ALJ for continued hearings. Continuances are disfavored, and the need for such a delay must be promptly communicated to the prehearing judge [*Gov. Code § 11524(b)* (party must ordinarily apply for continuance within 10 working days of discovering need); *see also § 473C.15[7][b]*]. Counsel may be required to furnish brief statements of the matters to which each witness will testify.

In practice, discussion of summaries of testimony in the conference has shortened the hearing by eliminating the need to call some witnesses. In one conference, for example, a witness summary revealing that various witnesses would be called to testify as custodians of records could prompt a stipulation that the records be admitted. In another case, the proposed testimony of a property appraiser about methods of valuation and the value of the subject property might become unnecessary if the parties stipulate that the appraiser's report can come in as direct evidence. The summary of proposed testimony also might allow prehearing orders limiting the questions that can be posed. For example, a summary stating that a police officer will be called to testify about a report of child abuse at a child day-care facility may prompt a prehearing direction by the ALJ that the proposed witness will not be asked the identity of the caller, because such information is protected by *Health & Safety Code § 1596.853(b)*.

[iv] Special Arrangements

Any need for special arrangements for witnesses should be raised at the prehearing conference. Such special arrangements might include the following:

- Need for an interpreter [*Gov. Code §§ 11435.15(a), 11435.20(b), 11435.60*; *see* Ch. 473F, *Agency Adjudication Hearings*].

- Accessibility for handicapped persons.

- Scheduling problems.

- Exclusions to protect alleged minor victims of abuse [*see Seering v. Dept. of Social Services (1987) 194 Cal. App. 3d 298, 303-306, 239 Cal. Rptr. 422* (exclusion of respondent to protect minor upheld); *see also § 473C.13[4][b]*].

[v] Rulings on Identity and Number and Motions to Exclude

At the prehearing conference, the ALJ may rule on the identity and number of witnesses [*Gov. Code § 11511.5(b)(4)*]. At the prehearing conference or the start of the hearing, counsel may make a motion to exclude witnesses until they have testified.

[f] Prehearing Orders

[i] Requirement of Order and Reporting

The preferences of individual ALJs vary with regard to the reporting of the proceeding. Frequently, the conference is off the record during discussion of the items enumerated in the OAH Notice [*see [4][a], above*], and the reporter is called in near the end of the conference to transcribe the stipulations, agreements, admissions, and rulings made. In addition, the ALJ will issue, or direct a party to prepare for his or her signature, a written prehearing order memorializing these matters [*Gov. Code § 11511.5(e)*; *see [2][c], above*].

[ii] Briefs

Another matter that may arise at the prehearing conference is the schedule for submission of written briefs [*Gov. Code § 11511.5(b)(8)*; *see also [2][b], above*]. Parties may be directed, or may request the opportunity, to file points and authorities on evidentiary or legal issues on which a ruling is not made at the prehearing conference itself. Usually, the ALJ will issue a prehearing order ruling on the disputed matter sufficiently in advance of the hearing date to permit counsel to adjust their presentation or strategy. As for whether the order is subject to judicial review before the hearing, see *[iii], below*. Points on which briefs have been filed and orders issued include the following:

- The admissibility of polygraph results [*see Aengst v. Board of Medical Quality Assurance (1980) 110 Cal. App. 3d 275, 283, 167 Cal. Rptr. 796* (polygraph evidence ruled inadmissible by ALJ)].

- Testimony by respondent's former attorney about advice given to respondent on the ultimate question of law.

- The disclosure of the names of child-abuse informants [*see Health & Safety Code § 1596.853(b)* (names of persons complaining about violations of applicable requirements by child day-care facility will not be disclosed to licensee)].

- The exclusion of evidence allegedly found in an illegal search when the search was conducted by a police agency unrelated to the complainant [*see Governing Board v. Metcalf (1974) 36 Cal. App. 3d 546, 111 Cal. Rptr. 724* (exclusionary rule does not apply to proceeding to discipline teacher on moral grounds)].

[iii] Judicial Review of Prehearing Order as Final Administrative Order

Whether the prehearing order is a "final administrative order" subject to judicial review by a petition for administrative mandamus before the hearing begins apparently depends on the scope of the order and its effect on the hearing. No reported cases address this issue.

[5] Responsibility of Administrative Law Judge in Case Management Program

The OAH Case Management Program provides, with few exceptions, that the ALJ who will hear the case on its merits will conduct the prehearing conference, issue all prehearing orders, and otherwise have responsibility for the expeditious and orderly conduct of the case. If there is to be a settlement conference, however, OAH policy dictates that the ALJ who is to hear the case should refer the matter to another ALJ for a settlement conference [*see Gov. Code § 11511.7(b)*, and discussion in *§ 473C.21[1][b]*].

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41A-473C California Forms of Pleading and Practice--Annotated § 473C.21

§ 473C.21 Negotiation and Settlement

[1] Settlement Conferences

[a] Availability of Formal Conference With ALJ

Exploration of settlement possibilities in prehearing conferences under the California APA is expressly provided for in *Gov. Code § 11511.5(b)(1)*, but prehearing conferences are available only for selected complex cases.

Gov. Code § 11511.7 authorizes settlement conferences to be held for agency adjudications conducted under the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*). The administrative law judge may order the parties to attend and participate in a settlement conference. The administrative law judge shall set the time and place for the settlement conference, and shall give reasonable written notice to all parties [*Gov. Code § 11511.7(a)*]. Under this section, settlement conferences may, but are not required to, be separate from the prehearing conference at which exploration of settlement issues may occur. Attendance and participation at the settlement conference is mandatory. Communications made in settlement negotiations are protected under *Gov. Code § 11415.60* [25 Cal. L. Rev. Comm. Reports 55 (1995)].

Gov. Code § 11415.60 allows agencies to make decisions by settlement [*see* generally Ch. 473H, *Alternative Procedures for Agency Decisions*]. Because the settlement practices and procedures of agencies that are not subject to the formal hearing provisions of the APA may vary, counsel should consult the administrative agency to determine the particular practices employed and settlement resources available.

[b] Assignment to ALJ

Although prehearing conferences are normally handled by the ALJ who is to hear the case on its merits, settlement conferences are referred to another ALJ as a matter of OAH policy. *Gov. Code § 11511.7* authorizes settlement conferences to be held for agency adjudications conducted under the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*). The administrative law judge at the settlement conference shall not preside at the hearing unless otherwise stipulated by the parties. The administrative law judge may conduct all or part of the settlement conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in

and to hear the entire proceeding while it is taking place [*Gov. Code § 11511.7(b)*].

[c] Scheduling, Notice, and Preparation

For the convenience of counsel, a settlement conference may be scheduled after the prehearing conference and on the same day. Notice of a settlement conference is customarily given by the appropriate OAH regional office. *Gov. Code § 11511.7* authorizes settlement conferences to be held for agency adjudications conducted under the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*). The administrative law judge is required to give reasonable written notice to all parties of the settlement conference. The Counsel should either appear with their clients or have authorization to enter settlement agreements. The staff limitations of the OAH preclude serial settlement conferences. To take advantage of the settlement conference, counsel must arrive with a realistic view of what can be achieved and with various settlement proposals prepared.

[d] Timing of Settlement Negotiations

The timing of settlement negotiations is critical. While respondents are usually more amenable to settlement as the hearing date approaches, agencies that have invested the time and expense to prepare for hearing become less and less inclined to settle as the hearing date draws nearer. Respondents' counsel should initiate settlement efforts promptly after receipt of the accusation [*see Gov. Code § 11503* (initiation of California APA disciplinary hearing by filing of accusation)], or other initial pleading. The prayer for relief or the recommendation for discipline in the pleading will suggest a starting point for settlement negotiations.

[2] Agency Authority to Settle

Agencies and agency attorneys have the same options to settle cases on any legitimate terms as are available to private litigants and attorneys [*Rich Vision Centers, Inc. v. Board of Medical Examiners (1983) 144 Cal. App. 3d 110, 117, 192 Cal. Rptr. 455]* . In addition to the authority to explore settlement possibilities in prehearing conferences granted by *Gov. Code § 11511.5(b)(1)*, agencies have the implied authority to negotiate settlement terms not expressly authorized by statute, including terms that provide for cost recovery, as long as the settlement provisions do not violate public policy [*Rich Vision Centers, Inc. v. Board of Medical Examiners (1983) 144 Cal. App. 3d 110, 114-116, 192 Cal. Rptr. 455]* . This implied authority was recognized in the leading case of *Rich Vision Centers, Inc. v. Board of Medical Examiners (1983) 144 Cal. App. 3d 110, 192 Cal. Rptr. 455* , in which the court of appeal noted that this authority would provide the following benefits to both parties [*Rich Vision Centers, Inc. v. Board of Medical Examiners (1983) 144 Cal. App. 3d 110, 115, 192 Cal. Rptr. 455]* :

- Greater flexibility in resolving disputes.
- Increased economy and efficiency.
- Time saved.
- Fewer enforcement problems, because any conditions imposed on a licensee are voluntarily accepted.

Gov. Code § 11511.7 authorizes settlement conferences to be held for agency adjudications conducted under the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*). *Gov. Code § 11415.60(a)* codifies the rule in the *Rich Vision* case [25 Cal. L. Rev. Comm. Reports 55, 150 (1995)]. *Gov. Code § 11415.60(a)* provides, in relevant part, that an agency may formulate and issue a decision by settlement, pursuant to an agreement of the parties, without conducting an adjudicative proceeding. Subject to *Gov. Code § 11415.60(c)*, the settlement may be on any terms the parties determine are appropriate [*Gov. Code § 11415.60(a)*]. *Gov. Code § 11415.60(c)* provides, in turn, that a settlement is

subject to any necessary agency approval. *Gov. Code § 11415.60* is subject to a specific statute to the contrary governing the matter [*see Gov. Code § 11415.20* (conflicting or inconsistent statute controls)]. *Gov. Code § 11415.60(c)* recognizes that some other statutes provide for agency approval of a settlement; these statutes include the following [25 Cal. L. Rev. Comm. Reports 55, 150 (1995)]:

- State Personnel Board authority to approve settlements [*Gov. Code § 18681*].
- Labor standards enforcement settlement approval [*Lab. Code § 98.2(d)*].
- Worker's compensation settlement approval [*Lab. Code § 5001*].
- Governor's approval of State Lands Commission settlement [*Pub. Res. Code § 6107*].
- Approval of tax settlements [*Rev. & Tax. Code §§ 7093.5, 9271, 19442, 30459.1, 32471, 40211, 41171, 43522, 45867, 50156.11, 55332*].

[3] Disciplinary Guidelines

Most licensing agencies have disciplinary guidelines that recommend maximum and minimum penalties for particular violations. For example, the Medical Board of California publishes The Manual of Disciplinary Guidelines and Model Disciplinary Orders. A copy of the manual is available from the Board's Sacramento office. The Bureau of Automotive Repair publishes the Bureau of Automotive Repair Guidelines for Disciplinary Penalties and Terms of Probation (dated July 3, 1987). A copy of these guidelines may be obtained by a written request to either the Bureau or the deputy attorney general who is representing the Bureau in a given action. Both of these agencies have adopted disciplinary guidelines. Familiarity with these guidelines and the recommended maximum and minimum penalties can help counsel to prepare a settlement offer that the agency is more likely to accept.

Comparing the recommended penalties for different offenses may indicate the ranking or significance of the violation in that agency's disciplinary scheme, and may thus suggest how willing the agency is likely to be to negotiate. Counsel should also consult the guidelines to see how the severity of the penalty to be imposed is determined. Knowing the aggravating and mitigating factors that apply to the client's case will allow counsel to make a better bargain for the client. For a list of some of the agencies that have disciplinary guidelines or model disciplinary orders, see [4], *below*.

[4] Model Disciplinary Orders

Another factor that counsel should be aware of before beginning settlement talks is model disciplinary orders, also called model probationary conditions. These model orders are proposed revocation language and probation terms suggested by the licensing agency. For example, the Board of Pharmacy in its regulations sets disciplinary conditions of probation that apply to a pharmacist [*16 Cal. Code Reg. § 1773*], or a pharmacy permit [*16 Cal. Code Reg. § 1773*], unless the Board directs otherwise [*16 Cal. Code Reg. §§ 1773(a), 1774(a)*]. Knowledge of the applicable probation options will help counsel to devise a reasonable settlement offer and to get the best deal for the client.

In addition to the Board of Pharmacy, agencies that have established model disciplinary orders, disciplinary guidelines, or both, include, but are not limited to, the following:

- The Board of Registered Nursing.
- The Board of Chiropractic Examiners.
- The Contractors' State License Board.

- The Board of Dental Examiners.
- The Psychology Examining Committee.
- The Structural Pest Control Board.
- The Board of Vocational Nurse and Psychiatric Technician Examiners.
- The Medical Board of California.
- The Bureau of Automotive Repair.
- The Department of Real Estate.

A copy of the guidelines or the model disciplinary orders is usually available from the agency in question on request.

[5] Costs or Restitution as Condition of Settlement

Some agencies have the authority to require the payment of costs or restitution. These payments may be imposed as a condition of settlement. For example, agencies authorized to recover the costs of the investigation and prosecution of the disciplinary proceeding if the accusation is sustained include, but are not limited to, the following:

- The Podiatry Examining Committee [*Bus. & Prof. Code § 2497.5*].
- The Board of Pharmacy [*Bus. & Prof. Code § 125.3*].
- The Acupuncture Committee [*Bus. & Prof. Code § 4959*].

Similarly, the Contractors' State License Board has the authority to order a licensee to pay a specified sum to an injured owner of a construction project in lieu of correcting deficient work [*Bus. & Prof. Code § 7099*; *16 Cal. Code Reg. § 881*].

[6] Diversion Programs

Various health-related licensing agencies have established programs to identify and rehabilitate licensees impaired by abuse of alcohol and other drugs, and mental and physical illness [*see, e.g., Bus. & Prof. Code §§ 2770-2770.14*; *16 Cal. Code Reg. §§ 1446-1449* (nurses); *Bus. & Prof. Code § 4360* (pharmacists); *Bus. & Prof. Code § 2243*; *16 Cal. Code Reg. §§ 1357-1357.8* (doctors); *Bus. & Prof. Code §§ 2340-2356* (doctors); *16 Cal. Code Reg. §§ 1357-1357.8* (physicians and surgeons)].

Counsel who represent impaired licensees in disciplinary proceedings should consider using available diversion programs even if the impairment is not the focus of the accusation. For example, although drug abuse may have contributed to a physician's grossly negligent treatment of a patient, an accusation may charge the violation without reference to the impairment, which may be unknown to the licensing agency. On the other hand, alcohol or drug dependency or mental or physical illness of a licensee that could endanger public safety can itself be the basis for license discipline. In either case, the licensee's successful and cooperative participation in the diversion program can stay the prosecution of the license discipline proceeding [*see, e.g., Bus. & Prof. Code § 4360* (pharmacy diversion program is voluntary alternative to traditional discipline); *but see Bus. & Prof. Code § 4369(b)* (participation no defense to disciplinary action by Pharmacy Board)].

Violation of diversion program requirements, including alcohol or drug testing requirements, may lift the stay [*see, e.g., 16 Cal. Code Reg. §§ 1357.5* (causes for termination of physician's participation in diversion program), 1358 (alcohol and drug tests may be required of physician on probation)]. The records of diversion programs are confidential and are purged after the licensee's completion of the program [*see, e.g., Bus. & Prof. Code § 2770.12* (nurses); *16 Cal. Code Reg. § 1449* (nurses)].

If the agency does not conduct a diversion program, counsel may wish to propose participation in Alcoholics Anonymous, Narcotics Anonymous, or a similar program as part of a negotiated settlement.

[7] Procedures for Implementing Settlement

A proposed settlement agreement reached by the parties in a licensing proceeding with or without the participation of the ALJ must be adopted or approved by the board or agency itself [*Gov. Code § 11415.60(c)*; *Rich Vision Centers, Inc. v. Board of Medical Examiners (1983) 144 Cal. App. 3d 110, 115, 192 Cal. Rptr. 455]* . Once the parties in a licensing proceeding have executed a stipulated settlement, the licensee can not withdraw his or her consent to the terms of the settlement until the agency has had a reasonable opportunity to act upon the settlement [*Frankel v. Board of Dental Examiners (1996) 46 Cal. App. 4th 534, 552-553, 54 Cal. Rptr. 2d 128]* .

However, note that discipline imposed on a dentist by the Board of Dental Examiners under *Bus. & Prof. Code §§ 1670* and *1670.1* based on misdemeanor convictions of the dentist and entered into pursuant to a stipulation between the dentist and the Board could not be set aside even though the criminal convictions were later vacated by the granting of a habeas corpus writ because the dentist is bound by the stipulation [*Stermer v. Board of Dental Examiners (2002) 95 Cal. App. 4th 128, 130-131, 115 Cal. Rptr. 2d 294]* .

The ALJ or the parties' counsel will customarily write the settlement agreement in the form of a proposed decision [*see Gov. Code § 11517(c)(1)* (ALJ hearing case alone will submit proposed decision to agency)]. The admitted or stipulated facts, jurisdictional findings, and the statutory basis for discipline should be set forth as well as the settlement terms.

[8] Alternative Dispute Resolution Procedures

Under the new law, agencies have the option, with the consent of all parties, to refer disputes that are the subject of adjudicative proceedings to resolution by alternative dispute resolution procedures including the following [*Gov. Code § 11420.10(a)(1), (2), (3)*]:

- Mediation by a neutral mediator.
- Binding arbitration by a neutral arbitrator.
- Nonbinding arbitration by a neutral arbitrator.

The specific governing law applicable to a particular agency, that requires use of arbitration or mediation in adjudicative proceedings, is controlling over this law, and this law applies to agencies that are not subject to specific statutory requirements unless the agency adopts regulations making this law inapplicable to adjudicative proceedings before this agency [*Gov. Code § 11420.10(b), (c)*]. The Office of Administrative Hearings [*Gov. Code §§ 11370.3, 11370.5*] is required to adopt model regulations for alternative dispute resolution [*Gov. Code § 11420.20*], and the law provides for confidentiality of communications in alternative dispute resolution proceedings [*Gov. Code § 11420.30*].

For more detailed dicussion, see Ch. 473H, *Alternative Procedures for Agency Decisions* .

[9] Informal Hearing Procedures

Agencies may conduct adjudicative proceedings using the informal hearing procedures provided for and subject to the limitations of *Gov. Code § 11445.10 et seq.* [*Gov. Code § 11445.10(a)*]. For further discussion of this procedure, see Ch. 473H, *Alternative Procedures for Agency Decisions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationAlternative Dispute ResolutionAdministrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPresiding OfficersDuties & PowersAdministrative LawSeparation of PowersLegislative ControlsImplicit Delegation of AuthorityGovernmentsState & Territorial GovernmentsLicensesHealthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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Chapter 473C PREHEARING PROCEDURES IN AGENCY ADJUDICATIONS
PART II. LEGAL BACKGROUND
B. Prehearing Conferences, and Negotiation and Settlement

41A-473C California Forms of Pleading and Practice--Annotated §§ 473C.22-473C.29

[Reserved]

§§ 473C.22[Reserved]

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41A-473C California Forms of Pleading and Practice--Annotated § 473C.30

§ 473C.30 Federal Constitution

Due process clause. *U.S. Const., amend. XIV, § 1*

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41A-473C California Forms of Pleading and Practice--Annotated § 473C.31

§ 473C.31 State Constitution

Due process clause. *Cal. Const., art. I, § 7(a)*

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41A-473C California Forms of Pleading and Practice--Annotated § 473C.32

§ 473C.32 State Statutes

[1] Administrative Procedure Act

Accusation. *Gov. Code § 11503*

Administrative adjudication *bill of rights*. *Gov. Code §§ 11425.10-11425.60*

Administrative Law Judges. *Gov. Code § 11502*

Affidavits. *Gov. Code § 11514*

Agency decisional authority. *Gov. Code § 11440.10*

Agencies to which act applies. *Gov. Code §§ 11410.10, 11501*

Amendment of pleadings. *Gov. Code §§ 11507, 11516*

Applicability of provisions to statement of issues. *Gov. Code § 11504.5*

Conduct of hearing. *Gov. Code § 11512*

Consolidation of Proceedings. *Gov. Code § 11507.3*

Contempt. *Gov. Code §§ 11455.10-11455.30*

Continuances. *Gov. Code § 11524*

Conversion of Proceedings. *Gov. Code §§ 11470.10-11470.50*

Decision. *Gov. Code §§ 11516-11520, 11526*

Declaratory Decision. *Gov. Code §§ 11465.10-11465.70*

Definitions of terms. *Gov. Code §§ 11405.10-11405.80, 11500*

Depositions. *Gov. Code § 11511*

Discovery. *Gov. Code §§ 11507.5-11507.7*

Disqualification. *Gov. Code §§ 11425.30, 11425.40, 11512*

Emergency decision. *Gov. Code §§ 11460.10-11460.80*

Evidence. *Gov. Code §§ 11435.10, 11440.40, 11513*

Ex parte communications. *Gov. Code §§ 11430.10-11430.80*

Hearings by electronic means. *Gov. Code § 11440.30*

Informal hearings. *Gov. Code §§ 11445.10-11445.60*

Intervention. *Gov. Code § 11440.50*

Language assistance. *Gov. Code §§ 11435.05-11435.65*

Judicial review. *Gov. Code § 11523*

Notice of defense. *Gov. Code § 11506*

Notice of hearing. *Gov. Code § 11509*

Oaths. *Gov. Code § 11528*

Official notice. *Gov. Code § 11515*

Reconsideration. *Gov. Code § 11521*

Reporting proceedings. *Gov. Code § 11512*

Restoration of rights. *Gov. Code § 11522*

Separate hearings. *Gov. Code § 11507.3*

Service and notice. *Gov. Code § 11440.20*

Service of initial pleading. *Gov. Code § 11505*

Settlement conferences. *Gov. Code § 11511.7*

Sexual harrassment. *Gov. Code § 11440.40*

Statement of issues. *Gov. Code § 11504*

Subpoenas. *Gov. Code §§ 11450.05-11450.50*

Time and place of hearing. *Gov. Code § 11508*

Waiver of rights. *Gov. Code § 11415.40*

[2] Related Statutes

Affidavit of good cause as required for subpoena duces tecum. *Code Civ. Proc. § 1985*

Witness served with subpoena as entitled to demand one day's fees and mileage allowance. *Code Civ. Proc. § 1987*

Witness fees and mileage allowances. *Gov. Code §§ 11191, 68093, 68097.2*

Right to have subpoena issued. *Gov. Code § 11190*

Office of Administrative Hearings. *Gov. Code §§ 11370.3-11370.5*

Board of supervisors of county as empowered to establish county hearing officer. *Gov. Code §§ 27720, 27721*

Oaths used in civil proceedings. *Code Civ. Proc. § 2094*

Evidentiary effect of plea of nolo contendere. *Penal Code § 1016*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawJudicial ReviewGeneral Overview

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41A-473C California Forms of Pleading and Practice--Annotated § 473C.33

§ 473C.33 Decisions

[1] Consolidation and Severance

Agency is entitled to consolidate cases having common ground. *Ashbacker Radio Corp. v. Federal Communications Comm'n (1945) 326 U.S. 327, 330-333, 66 S. Ct. 148, 90 L. Ed. 108* ; *Bostick v. Martin (1966) 247 Cal. App. 2d 179, 183, 55 Cal. Rptr. 322*

Time limit for decision imposed by statute is directory or mandatory. *Henderling v. Carleson (1974) 36 Cal. App. 3d 561, 566, 111 Cal. Rptr. 612* (mandatory in circumstances); *Koehn v. State Board of Equalization (1958) 166 Cal. App. 2d 109, 118-119, 333 P.2d 125* (directory); *Peak v. Industrial Acci. Com. (1947) 82 Cal. App. 2d 926, 932, 187 P.2d 905* (directory)

Decision is required to include written findings where findings required. *In re Sturm (1974) 11 Cal. 3d 258, 266, 272, 113 Cal. Rptr. 361, 521 P.2d 97*

Findings are not required to be stated with same formality as in judgment. *Savelli v. Board of Medical Examiners (1964) 229 Cal. App. 2d 124, 134, 40 Cal. Rptr. 171 , cert. denied, 380 U.S. 934, 85 S. Ct. 940, 13 L. Ed. 2d 821 (1965)*

[2] Continuances

Appellant is not entitled to continuance for purpose of filing petition to compel discovery pursuant to *Gov. Code § 11507.7* when limitation period for filing petition has expired. *Lax v. Board of Medical Quality Assur. (1981) 116 Cal. App. 3d 669, 675-676, 172 Cal. Rptr. 258*

Respondent is not entitled to continuance for purpose of obtaining counsel or having counsel present if given adequate opportunity to get counsel and have counsel present. *Skipitar v. Munro (1959) 175 Cal. App. 2d 1, 4-6, 345 P.2d 508*

[3] Demurrer

Right to demur by separate pleading in case not governed by *APA. Dyment v. Board of Medical Examiners (1922) 57 Cal. App. 260, 263-264, 207 P. 409*

Agency is without jurisdiction if initial pleading fails to state acts or omissions on which agency may proceed. *Rapaport v. Civil Serv. Comm'n (1933) 134 Cal. App. 319, 325, 25 P.2d 265*

Agency is without jurisdiction if no statute authorizes proceeding. *O'Neil v. Department of Professional & Vocational Standards (1935) 7 Cal. App. 2d 395, 397-398, 46 P.2d 234*

Objection to form of initial pleading is analogous to demurrer for uncertainty. *Stuck v. Board of Medical Examiners (1949) 94 Cal. App. 2d 751, 756, 211 P.2d 389*

[4] Nonsuit

Hearing officer is not empowered to grant request in nature of motion for nonsuit. *O'Mara v. State Bd. of Pharmacy (1966) 246 Cal. App. 2d 8, 11, 54 Cal. Rptr. 862*

[5] Setting for Hearing

Change of venue for administrative hearing is matter of agency discretion. *Keller Industries, Inc. v. Occupational Safety & Health Appeals Bd. (1981) 124 Cal. App. 3d 469, 474-476, 177 Cal. Rptr. 136* (discretion is not abused when agency refused to change venue from city which was 64 miles from litigant's place of business absent showing that selection was made arbitrarily or with improper motive)

Reference to APA in cases not governed by act is permissible to determine time for hearing. *Rudolph v. Athletic Commission (1960) 177 Cal. App. 2d 1, 12, 1 Cal. Rptr. 898*

Change of venue. *Campbell v. Board of Dental Examiners (1971) 17 Cal. App. 3d 872, 876-877, 95 Cal. Rptr. 351*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsContentsAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPresiding OfficersDuties & Powers

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§ 473C.34 Internet References

Office of Administrative Hearings. This site includes: information and location concerning specific OAH offices; an OAH hearing guide; information concerning Administrative Procedure Act statutes, regulations, and proposed regulations; OAH forms; information concerning alternative dispute resolution procedures; and declaratory decisions. http://www.dgs.ca.gov/oah

Office of Administrative Law. This site includes: link to text of Cal. Code of Regulations (http://ccr.oal.ca.gov); OAL publications; links to OAL statutes and regulations relating to rulemaking; regulations submitted to the OAL for review, and information for contacting or provding input to the OAL regarding rulemaking. http://www.oal.ca.gov

California Home Page. This site includes links to other sites maintained by numerous state agencies. http://www.ca.gov

Department of Consumer Affairs. This site includes links to sites maintained by many state agencies that are under this department, as well as links to agency sites. http://www.dca.ca.gov

California Courts. This site includes: general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most Court of Appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes: text of constitution, codes, and statutes (including complete text of APA); and information concerning pending legislation. http://www.leginfo.ca.gov

Matthew Bender. This site includes: links to Matthew Bender publications and Shepard's citation service. http://www.bender.com

Legal Topics:

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

§§ 473C.35[Reserved]

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41A-473C California Forms of Pleading and Practice--Annotated § 473C.40

§ 473C.40 Prehearing Conference

[1] Motion for Prehearing Conference

☐ Prepare motion [*Gov. Code § 11511.5(a)*; *see § 473C.20[2]*]; for a form, *see § 473C.50*].

☐ Prepare declarations, as necessary.

☐ Prepare points and authorities, as necessary [*see § 473C.20[4][b]*].

☐ File with ALJ.

[2] Preparation for Prehearing Conference

☐ Prepare prehearing conference order [*Gov. Code § 11511.5(e)*; *see § 473C.20[2][e]*; for a form, *see § 473C.51*].

☐ Send copies to opposing counsel.

☐ Send copies to ALJ.

☐ Prepare stipulations [*see § 473C.20[4][c]*].

☐ Prepare written list of all exhibits for marking [*see § 473C.20[4][d]*].

☐ Prepare witness list [*Gov. Code § 11511.5(b)(9)*; *see § 473C.20[4][e]*].

☐ Identify expert witnesses on list [*see § 473C.20[4][e][ii]*].

☐ Provide curriculum vitae or resume for each expert witness.

☐ Prepare proposed hypothetical questions in writing, if requested by ALJ.

☐ Provide copies to ALJ before hearing.

☐ Provide copies to opposing counsel before hearing.

☐ Make request that expert witnesses be scheduled for a specific time.

☐ Provide glossary of terms if requested by the ALJ.

☐ Prepare request for special arrangements [*see § 473C.20[4][e][iv]*].

☐ Prepare motion to exclude witnesses until they testify [*see § 473C.20[4][e][v]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyExpertsQualifications

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41A-473C California Forms of Pleading and Practice--Annotated § 473C.41

§ 473C.41 Settlement Conferences

[1] Preparation

☐ Prepare various settlement proposals [*see § 473C.21[1][c]*].

[2] Implementation of Settlement

☐ Prepare proposed settlement agreement [*see Gov. Code § 11517(c)(1)*; *see § 473C.21[7]*].

☐ Execute and have opposing party execute agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing Activity

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41A-473C California Forms of Pleading and Practice--Annotated § 473C.42

§ 473C.42 Motion for Change in Place of Hearing

[1] Motion

- ☐ Prepare motion [*see § 473C.14[4]*].
  - ☐ Prepare and attach memorandum of points and authorities.
  - ☐ Prepare and attach supporting declaration or affidavit.
- ☐ Filing.
  - ☐ File with ALJ assigned to the hearing.
  - ☐ File within 10 days after service of notice of hearing [*Gov. Code § 11508(c)*].
- ☐ Notice.
  - ☐ Give notice to other parties.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law Judges

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41A-473C California Forms of Pleading and Practice--Annotated § 473C.43

§ 473C.43 Requesting a Continuance

[1] Timing of Request

☐ Request within 10 working days after the discovery of, or when the event or condition that establishes good cause for the continuance, should have been discovered [*Gov. Code § 11524(b)*; *see § 473C.15[7][b]*].

[2] Where to Make Request

☐ Prior to assignment to ALJ, request continuance from agency [*Gov. Code § 11524(a)*; *see § 473C.15[7][a]*].

☐ After assignment to ALJ, make request to appropriate regional OAH [*Gov. Code § 11524(a)*; *see § 473C.15[7][a]*].

☐ Telephone request to presiding judge of the OAH regional office that will hear the matter [*see § 473C.15[7][c]*].

[3] Oral Argument

☐ Request brief hearing for oral argument (optional) [*see § 473C.15[7][f]*]. If granted:

☐ Prepare request in writing to present at hearing.

☐ Attach appropriate declarations.

☐ Serve on opposing counsel.

☐ File with OAH.

[4] Continuance by Stipulation

☐ Inform OAH no later than 25 working days before hearing [*see § 473C.15[7][b]*].

[5] Partial Continuance

☐ Consider request for partial continuance [*see § 473C.15[7][d]*].

[6] Judicial Review of Denial of Continuance

☐ Prepare application for judicial review [*see § 473C.15[8]*].

☐ File in superior court within 10 working days following denial [*Gov. Code § 11524(c)*; *see § 473C.15[8]*].

☐ Notify agency and other parties.

☐ Give orally at time application is denied, or

☐ In writing when application is made.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawJudicial ReviewGeneral Overview

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41A-473C California Forms of Pleading and Practice--Annotated § 473C.44

§ 473C.44 Miscellaneous Prehearing Motions

[1] Formal APA Hearings

☐ Preparing motions generally [*see § 473C.14*].

☐ Address to presiding ALJ.

☐ Attach points and authorities and affidavits, as necessary.

☐ Attach supporting declarations or affidavits, as necessary.

☐ Demurrer

☐ Raise in notice of defense [*Gov. Code § 11506*; *see § 473A.11[6]*].

☐ General demurrer [*Gov. Code § 11506(a)(2), (3)*; *see § 473C.11*].

☐ Special demurrer [*Gov. Code § 11506(a)(2), (3)*; *see § 473C.11*].

☐ Motion to consolidate [*Gov. Code § 11507.3*; *see § 473C.12[1]*].

☐ Motion to sever [*Gov. Code § 11507.3*; *see § 473C.12[4]*].

☐ Motion to exclude respondent during testimony of minor who is alleged victim of sexual abuse [*see*

§ 473C.14[2]].

☐ Motion to compel release of confidential records [*see § 473C.14[3]*].

☐ Motion in limine [*see § 473C.14[5]*].

[2] Non-APA Proceedings

☐ Motion to consolidate [*see Code Civ. Proc. § 1048* (grounds under general civil procedure); *see also § 473C.12[2]*].

☐ Make as early as possible.

☐ Attach supporting affidavits [*see § 473C.12[5]*].

☐ Address to and file with agency [*see § 473C.12[5]*].

☐ Motion to sever [*Gov. Code § 11507.3*; *see Code Civ. Proc. § 1048* (grounds under general civil procedure); *see also § 473C.12[4]*].

☐ Make as early as possible.

☐ Attach supporting affidavits [*see § 473C.12[5]*].

☐ Address to and file with agency [*see § 473C.12[5]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityCivil ProcedurePretrial MattersConsolidation of Actions

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41A-473C California Forms of Pleading and Practice--Annotated §§ 473C.45-473C.49

[Reserved]

§§ 473C.45[Reserved]

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PART V. FORMS

41A-473C California Forms of Pleading and Practice--Annotated § 473C.50

§ 473C.50 Motion for Order Setting Matter for Prehearing Conference and Supporting Declaration [Gov. Code § 11511.5(a)]

[1] FORM Motion for Order Setting Matter for Prehearing Conference and Supporting Declaration [Gov. Code § 11511.5(a)]

BEFORE THE _____ [*agency*]

In the Matter of _____ [*name*], Respondent.	)))))	NO. _____ MOTION FOR ORDER SETTING MATTER FOR PREHEARING CONFERENCE AND SUPPORTING DECLARATION OF _____ [*name*]

_____

Respondent _____[*name*] moves the administrative law judge for an order that a prehearing conference be conducted in the above-entitled matter. The motion is made on the grounds that _____[*specify grounds*], and that a prehearing conference will promote the orderly and prompt conduct of the hearing. The motion is based on the declaration(s) of _____ [*name(s)*] and the memorandum of points and authorities served and filed herewith, and on the records and file herein.

_____ [*date*]
Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent

[*Include declaration in support of motion for order setting matter for prehearing conference, if necessary*]

DECLARATION

I, _____[*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for respondent *or other statement as appropriate*].

2. _____[*In this and subsequent paragraphs, set forth facts within declarant's personal knowledge showing that a prehearing conference will promote the orderly and prompt conduct of the hearing*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form of motion in *[1], above*, is for use by the respondent in an agency adjudication to secure a prehearing conference. The administrative law judge may conduct the conference on the motion of a party or by the judge's own order. If a conference is ordered, the administrative law judge must set the time and place for the conference and give reasonable written notice to all parties [*Gov. Code § 11511.5(a)*].

[3] Memorandum

It is not clear whether a memorandum must accompany a motion for a prehearing conference [*see Gov. Code § 11511.5(a)*], but it is highly recommended. In civil law and motion practice in superior and municipal courts, however, the absence of a memorandum may be construed by the court as an admission that a motion is not meritorious and cause for its denial [*see Cal. Rules of Ct., Rules 3.1100, 3.1113*].

[4] Cross References

See *§ 473C.20* for discussion of the legal requirements related to prehearing conferences, and see *§ 473C.20[2][b]*, for an enumeration of the matters that may raised in the conference. See also discussion in *§ 473C.20[4][b]* regarding the motion and supporting papers.

For discussion and form relating to declarations in civil actions generally, see Ch.15, *Affidavits, Certificates, and Declarations* .

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41A-473C California Forms of Pleading and Practice--Annotated § 473C.51

§ 473C.51 Order for Prehearing Conference [Gov. Code § 11511.5(e)]

[1] FORM Order for Prehearing Conference [Gov. Code § 11511.5(e)]

BEFORE THE _____ [*agency*]

	)	
In the Matter of	)	NO. _____
_____ [*name*],	)	PREHEARING CONFERENCE ORDER
Respondent.	)	
	)	

_____

A prehearing conference in the above-entitled matter was held before the undersigned on _____[*date*]. _____ [*Specify name of each attorney appearing and party represented, and name of each party appearing in person, e.g.,* _____ (*name*) appeared as counsel for the _____ (*agency*) and _____ (*name*) appeared as counsel for respondent].

[*Set forth nature of case and matters resolved at conference, e.g.:*]

1. Nature of Case. This is an adjudicatory hearing for _____[*set forth concise and descriptive statement of case*].

2. Stipulations. The following matters have been stipulated to by the parties: _____[*specify, setting forth each matter in a separately lettered subparagraph*].

3. Clarification of Issues. The following are the issues remaining in dispute and the factual and legal contentions made

by each party with respect to them: _____ [*list each disputed issue in a separately lettered subparagraph followed by factual and legal contentions of each party with respect to it*].

4. Rulings. The following rulings were made at the prehearing conference: _____ [*specify rulings on identity and limitation of number of witnesses, issuance of subpoenas and protective orders, evidentiary rulings, and/or the order of presentation of evidence and cross examination, setting forth concise and descriptive statement of each ruling in a separately lettered subparagraph*].
_____ [*date*]

_____ [*signature*]
Administrative Law Judge

[2] Use of Form

The form of order in *[1], above*, is for use by respondent in an agency adjudication to assist the administrative law judge to prepare a prehearing order. When a prehearing conference is held, the administrative law judge is required to issue a prehearing order incorporating the matters determined at the prehearing conference. The administrative law judge may direct one or more of the parties to prepare the order [*Gov. Code § 11511.5(e)*; *see § 473C.20*].

For an enumeration of matters that may be raised at the conference, see *§ 473C.20[2][b]*.

Legal Topics:

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

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41A-473D California Forms of Pleading and Practice--Annotated 473D.syn

§ 473D.syn Synopsis to Chapter 473D: PREHEARING PREPARATIONS IN AGENCY ADJUDICATIONS

§ 473D.01 Scope of Chapter

§ 473D.02 Cross References

[1] Related Coverage of Agency Adjudication

[2] Judicial Review

[3] Public Administrative Law Generally

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[2] Investigators

[a] Arrival of Investigator

[b] Duty to Talk With Investigator

[c] Duty to Allow Records to Be Viewed or Copied

[i] Agency Subpoena Power

[ii] Medical Records and the Right to Privacy

[d] Duty to Cooperate With Agency Investigations

[3] Request for Interview by Agency at Agency Offices

[4] Demand for Investigative Deposition

[5] Diversion Programs

[6] Malpractice

[7] Going Direct to Agency Counsel

§ 473D.11 Tactics and Preparation After Accusation or Charging Document Is Served

[1] Service of Accusation or Statement of Issues

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[a] Notice of Defense

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[3] APA Discovery

[a] Requests for Discovery

[b] Continuing Discovery

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[e] Enforcement of Discovery Rights

[f] Prehearing Depositions

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§ 473D.12 Scheduling and Continuances

[1] Setting the Hearing Date

[2] Requesting a Continuance

[a] OAH Does Not Favor Continuances

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§ 473D.13 Prehearing Conferences

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[3] Use of Experts

[4] Organization of Documents

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[a] Taking Statements

[b] Rehearsal of Witness

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[b] Rehearsal of Client

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§ 473D.15 Settlements

[1] Desirability of Settlement

[2] Settlement Conferences

[3] Evaluating an Administrative Case

[4] Tactical Considerations in Communicating With Agency Counsel

[5] Authority to Settle

[6] Creative Settlement Options

[7] Stipulating for Settlement

[a] Necessity for Writing

[b] Consent of Client

[8] Post-Settlement Considerations

§§ 473D.16-473D.19 [Reserved]

§ 473D.20 Introduction to Prehearing Tactics and Procedures

§ 473D.21 Prehearing Injunctions and Restraining Orders

[1] Overview

[2] Injunctions Against Violations of Statutes Administered by Boards Within Department of Consumer Affairs

[a] General Requirements

[b] Restitution to Victims and Reimbursement of Agency

[c] Remedy Not Exclusive

[d] Use in Conjunction With Other Statutes Authorizing Injunctive Relief

[3] Orders Restraining Licensees From Practicing Healing Arts

[a] General Requirements

[b] Supporting Affidavits and Memorandum of Points and Authorities

[c] Issuance of Temporary Restraining Order (TRO)

[4] Orders Restraining Licensees From Practicing Professions Other Than Healing Arts

[5] Professional and Vocational Licensing Statutes Authorizing Injunctive Relief

[6] Citation Enforcement System

§ 473D.22 Seeking Prehearing Injunctive Relief

§ 473D.23 Opposing Petitions for Prehearing Injunctive Relief

§ 473D.24 Prehearing Termination of Licensee's Telephone Service

[1] When to Seek Termination

[2] Authority for Termination

[3] Method to Secure Termination

[4] Method to Restore Telephone Service

§ 473D.25 Evidence by Affidavit

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§§ 473D.27-473D.39 [Reserved]

§ 473D.40 Federal Constitution

§ 473D.41 State Constitution

§ 473D.42 State Statutes

[1] Administrative Procedure Act

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§ 473D.43 Decisions

§ 473D.44 Text References

§ 473D.45 Internet References

§§ 473D.46-473D.49 [Reserved]

§ 473D.50 Determine the Appropriate Respondent Tactics With Respect to Investigation and Preparation for Hearing

§ 473D.51 Determine the Likelihood That an Agency May Take Unanticipated Prehearing Steps in a Professional or Vocational Licensing Proceeding

§ 473D.52 Response to Accusation or Statement of Issues

§ 473D.53 Preparation for Hearing

[1] Review

[2] Investigation

[3] Witnesses

[4] Documents

[5] Client

[6] Demonstrative Evidence

[7] Briefs

§ 473D.54 Requesting Discovery Under the APA

[1] Request for Discovery

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PART I. SCOPE

41A-473D California Forms of Pleading and Practice--Annotated § 473D.01

§ 473D.01 Scope of Chapter

This chapter discusses the prehearing preparation and tactics in a public agency adjudication, primarily one conducted under the Administrative Procedure Act (APA). The legal background discussion in Part II includes the following:

- Subpart A discusses respondent's tactical considerations in investigation, scheduling and other prehearing matters [*see §§ 473D.10 -473D.15*].

- Subpart B discusses agency counsel's prehearing tactics in professional and vocational licensing cases including action such as injunctive relief, termination of a licensee's telephone service, evidence by affidavit, and prehearing briefs [*see §§ 473D.20 -473D.26*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency InvestigationsGeneral OverviewAdministrative LawJudicial ReviewRemediesInjunctive ReliefGovernmentsState & Territorial GovernmentsLicenses

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PART I. SCOPE

41A-473D California Forms of Pleading and Practice--Annotated § 473D.02

§ 473D.02 Cross References

[1] Related Coverage of Agency Adjudication

For general discussion and overview of agency adjudication under the Administrative Procedure Act (APA), see Ch. 473, *Public Agency Adjudication* .

For related discussion and forms providing coverage of the other stages of an agency adjudication under the formal hearing provisions of the APA, see:

- Ch. 473A, *Commencing Agency Adjudication* .
- Ch. 473B, *Discovery in Agency Adjudications* .
- Ch. 473C, *Prehearing Procedures in Agency Adjudications* .
- Ch. 473E, *Public Administrative Law Judges* .
- Ch. 473F, *Agency Adjudication Hearings* .
- Ch. 473G, *Agency Adjudication Decisions* .

For related discussion and forms providing more detailed coverage of adjudication methods under the APA other than that of formal hearing, see Ch. 473H, *Alternative Administrative Adjudication Procedures* .

For detailed discussion and forms relating generally to licensing agencies, including licensing adjudications, see Ch. 471B, *Licensing by Public Agencies* .

[2] Judicial Review

For detailed discussion and forms relating generally to review by California courts of agency adjudications, see:

- Ch. 474, *Availability of Judicial Review of Agency Decisions* .
- Ch. 474A, *Timing of Judicial Review of Agency Decisions* .
- Ch. 474B, *Standards in Reviewing Agency Decisions* .
- Ch. 474C, *Procedures in Reviewing Agency Decisions* .

For other related discussion and forms relating to judicial review generally, see:

- Ch. 40, *Appeal: An Overview,* through Ch. 54, *Appeal: California Supreme Court Review* (discussion and forms relating to civil appeals).
- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to immediate judicial review of orders by extraordinary writ of mandate or prohibition).
- Ch. 492, *Review (Certiorari), Writ of* (discussion and forms relating to immediate judicial review of civil proceedings by extraordinary writ of review).

[3] Public Administrative Law Generally

For related discussion of California public administrative law generally, including discussion of public agency functions and powers (including adjudicative or quasi-judicial powers), and organization generally, see Ch. 470, *Overview of Public Administrative Law* (general discussion of judicial power is in §§ *470.12[5]*). For detailed discussion of the general procedures imposed in agency proceedings by constitutional due process and related statutory requirements, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

For discussion and forms relating to the law governing access to and conduct of meetings by California public agencies, see Ch. 470B, *Public Agency Meetings* .

For detailed discussion and forms relating to the law governing disclosure of public records under the California Public Records Act [*Cal. Gov. Code §§ 6250 et seq.*], see Ch. 470C, *Public Records Act* .

For detailed discussion and forms relating generally to agency investigations and inspections, see:

- Ch. 471, *Investigations by Public Agencies* .
- Ch. 471A, *Inspections by Public Agencies* .

For detailed discussion and forms relating generally to the legislative or rulemaking functions of California public agencies, including judicial review of these functions, see:

- Ch. 472, *Public Agency Rules* .
- Ch. 472A, *Agency Rulemaking Procedures* .
- Ch. 472B, *Review of Agency Rulemaking* .

For additional cross references to coverage of particular public agencies, see *§ 470.02[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral Overview

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[Reserved]

§§ 473D.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Respondent's Prehearing Preparation

41A-473D California Forms of Pleading and Practice--Annotated § 473D.10

§ 473D.10 Tactics and Preparation Prior to Service of the Accusation or Charging Document

[1] Importance of Early Action

The time before the accusation or charging document is served is crucial to the investigation and preparation of an administrative law case [*see* Ch. 473A, *Commencing Agency Adjudication* , for a discussion of the initial pleadings in agency hearings].

If a licensee or other person learns that charges are about to be filed, it may be possible to intervene with the administrative agency and prevent formal charges. If counsel is consulted at this time, he or she can initiate discussions to try to satisfy the agency without the need for a hearing. Clients should be advised to call as soon as they realize that they may be the subject of an investigation. If counsel believes that the agency is mistaken in its approach or that extenuating or mitigating circumstances would dissuade the agency from noticing a hearing or imposing penalties, it may be appropriate to talk with the agency or its investigator. Just learning why the agency is investigating the client and what the agency knows may justify talks with the agency.

The period before charges are filed is the only opportunity that counsel will have to avoid some of the following negatives:

- The time and expense consumed by an investigation and hearing.

- The bad publicity, with attendant harm to the client's business and the client's reputation, that the mere filing of charges, or even an investigation without charges, may generate [*see [6], below*].

- The possibility of revealing information that may be used against the client in criminal or administrative proceedings [*see [2][b], [d], below*].

- The possibility of violating the rights of another in attempting to cooperate with the agency [*see [2][c], below*].

[2] Investigators

[a] Arrival of Investigator

An individual may first discover that he or she is the subject of concern to an agency when approached by the agency's investigator. Typically, the investigator arrives at the client's place of business or employment unannounced, and seeks to discuss the matter with the client or asks for the production of documents. Because an administrative hearing is not a criminal case, due process does not require the investigator to inform a licensee of his or her rights regarding the investigation [*see* Ch. 470A, *Due Process Restrictions on Public Agencies* , for a discussion of procedural due process requirements applicable to agency actions].

As discussed in *[b], below*, the licensee may choose to remain silent unless required by statute to cooperate with the investigator. In any event, an attorney representing a person or business licensed by the state, should advise his or her client to get in touch immediately if they are approached by a state investigator.

[b] Duty to Talk With Investigator

In general, a person has no duty to talk with an investigator. However, particular statutes require licensees to cooperate with agency investigations (*see [d], below*). If the person under investigation does speak with the investigator, the declarant's statements will be admissible against him or her in any subsequent administrative hearing as statements by a party [*see Evid. Code § 1220* (statements offered against the declarant in an action in which he or she is a party are not barred by the hearsay rule)]. Under the special rules applicable to APA hearings, even hearsay is admissible to supplement or explain other evidence, but hearsay is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action [*Gov. Code § 11513(c)(d)*; *see* Ch. 473F, *Agency Adjudication Hearings*]. Statements by employees may also be introduced against the licensee at a subsequent hearing as authorized admissions if the declarant was authorized to speak for the licensee [*see Evid. Code § 1222* (authorized admissions not barred by hearsay rule); *see also* California Trial Guide, Unit 40, § 40.32]. For these reasons, counsel should be consulted immediately on contact by an investigator, so that it can be determined when and if discussions with the agency's representative should occur.

[c] Duty to Allow Records to Be Viewed or Copied

[i] Agency Subpoena Power

Frequently, investigators will serve an investigative subpoena [*see Gov. Code §§ 11180-11191* (investigative subpoenas of state agencies)]. State agencies have the power to serve subpoenas requesting the production of documents [*Gov. Code § 11181(e)*], promulgating interrogatories pertinent or material to any inquiry, investigation, hearing, proceeding, or action [*Gov. Code § 11181(f)*] or, on occasion, requesting that the person submit to a prehearing deposition under oath [*Gov. Code § 11189*].

If the person served with the subpoena declines to appear or to provide the requested materials, the agency may proceed to the superior court to seek enforcement of the subpoena [*see Gov. Code §§ 11187* (petition to superior court to compel attendance of witness or production of documents), 11188 (court order, contempt power)]. There are no penalties for failing to honor the subpoena prior to a court order directing that the person served comply with the subpoena [*People v. West Coast Shows, Inc. (1970) 10 Cal. App. 3d 462, 470, 89 Cal. Rptr. 290]* . If an investigative subpoena is issued to depose a licensee, he or she may refuse to answer specific questions by invoking the privilege against self-incrimination [*Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 39, 99 Cal. Rptr. 791]* .

Attorneys called by clients who have been visited by an investigator should caution those clients not to produce any documents and not to discuss anything with the investigator until the attorney has had an opportunity to review the subpoena, if any, and make inquiries concerning the purpose of the investigator's visit. Attorney and client can then

decide whether the client will gain or lose by cooperating with the agency.

For detailed discussion regarding administrative subpoenas used for investigative purposes, see Ch. 471, *Investigations by Public Agencies* .

[ii] Medical Records and the Right to Privacy

If the investigative subpoena demands patient records from a health care provider, the provider may be in a dilemma. Patients have a right to privacy in their medical records. If a physician discloses those records prior to a court order, he or she may well violate the patient's right to privacy [*see Cutter v. Brownbridge (1986) 183 Cal. App. 3d 836, 843, 845-848, 228 Cal. Rptr. 545* (declaration by psychotherapist, describing his diagnosis of patient and disclosing personal details learned in therapy, violated patient's constitutional right to privacy, and was not protected by the *Civ. Code § 47(b)* privilege for statements in official proceedings unless the therapist first asserted the psychotherapist-patient privilege as provided in *Evid. Code § 1015*)].

Without the patient's consent, a state agency may not have access to patients' medical records unless it first shows good cause. Good cause may be shown by the presentation of competent evidence sufficient to permit a court to make an independent finding that the particular records sought are relevant, material, and essential to a focused inquiry within the agency's authority [*Wood v. Superior Court (1985) 166 Cal. App. 3d 1138, 1149, 212 Cal. Rptr. 811* ; *see* Ch. 471, *Investigations by Public Agencies*].

Health care providers, therefore, need to exercise special caution in complying with investigative subpoenas. Contact with counsel is absolutely necessary to make certain that the rights of both the patients and the health care provider are protected.

[d] Duty to Cooperate With Agency Investigations

A few statutes require cooperation with agency investigations. For example, *Bus. & Prof. Code § 7111.1* provides that the failure or refusal of a licensee of the Contractors' State License Board to respond to a written request to cooperate in the investigation of a complaint against that licensee is cause for disciplinary action. No appellate decisions, however, define cooperation in this context or discuss the inevitable tension between the individual's constitutional rights (i.e., the privilege against self-incrimination and the right to privacy) [*see U.S. Const., amend. V* (privilege against self-incrimination); *Cal. Const., art. I, § 1* (right to privacy)]. This tension is heightened by the disciplinary sanctions and criminal penalties that many licensing laws impose for violation of their provisions. A licensee who refuses to cooperate may be penalized by the agency. A licensee who cooperates may waive constitutional protections by providing information that will be used to discipline or criminally punish the licensee.

For discussion of constitutional rights as a bar to agency investigations, see Ch. 470, *Overview of Public Administrative Law* .

[3] Request for Interview by Agency at Agency Offices

Instead of sending an investigator to visit the person under review, the agency may request that the person come to the agency offices for an interview. Both the Contractors' State License Board and the Medical Board of California use this procedure. Because agency investigators are skillful at interviewing, a licensee or person under investigation should never attend such a meeting without counsel present.

[4] Demand for Investigative Deposition

An agency has the power to demand that a person appear at an appointed place, generally the attorney general's office, and submit to questioning under oath by the agency or its representative [*see Gov. Code §§ 11180-11191* (agency

investigative powers), *11181(e)* (power to subpoena attendance of witnesses and production of testimony), *11181(f)* (power to promulgate interrogatories pertinent or material to any inquiry, investigation, hearing, proceeding, or action), *11189* (deposition procedures)].

As with the production of documents [*see* discussion in *[2][c][i], above*], no penalties exist for refusing to be deposed until a court has ordered the deposition [*see Gov. Code §§ 11188* (court may exercise contempt power on failure to comply with order), *11189* (court may punish for contempt after order on petition for deposition); *Marcus v. Workmen's Comp. Appeals Bd. (1973) 35 Cal. App. 3d 598, 603, 111 Cal. Rptr. 101* (agencies have no inherent contempt power)].

After a court order, if the person still declines to appear and testify, the court may enforce the subpoena through its contempt powers [*Gov. Code § 11188*]. For discussion and forms relating to contempt orders generally, see Ch. 135, *Contempt* .

[5] Diversion Programs

If substance abuse by a licensee is at issue, many agencies provide diversion programs as a possible alternative to disciplinary action.

For example, a physician may apply for the Medical Board of California's diversion program [*see 16 Cal. Code Reg. §§ 1357-1357.8*]. If a licensee voluntarily enters the diversion program, that fact is confidential and will not be shared with the Board's enforcement division [*16 Cal. Code Reg. § 1357.8(a)*].

Information received before the physician's acceptance into the program or that does not relate to the physician's application to or participation in the program is not confidential, however, and may be used in disciplinary or criminal proceedings against the physician [*16 Cal. Code Reg. § 1357.8(b)*].

On the successful completion of the diversion program, the program records for that physician will be destroyed [*Bus. & Prof. Code § 2355(a)*]. Similar programs exist for registered nurses [*see Bus. & Prof. Code §§ 2770-2770.14*; *16 Cal. Code Reg. §§ 1446-1449*], pharmacists [*see Bus. & Prof. Code § 4360*], and dentists [*see Bus. & Prof. Code §§ 1695-1699*; *16 Cal. Code Reg. §§ 1020.1-1020.8*].

For additional discussion of diversion programs, see Chapter 473C, *Prehearing Procedures in Agency Adjudications* .

[6] Malpractice

If malpractice is at issue, it is sometimes appropriate to retain experts, prepare a report on the circumstances surrounding the alleged malpractice, and provide it to the agency. This lets the agency know the licensee's defense, but it also may convince the agency not to file an accusation. The filing of an accusation may do serious harm to the client's professional standing or personal reputation that cannot be overcome by a victory in the hearing.

[7] Going Direct to Agency Counsel

If counsel or the client has had difficult relations with the agency or its investigators, and if counsel feels that there is an absolute defense to any potential charges, calling the agency's counsel may resolve the matter without formal charges. On rare occasions, informal settlements can be made even when the client is not entirely innocent. These infrequent victories depend in large part on counsel's creativity in fashioning a settlement that will satisfy the agency that it has done its duty in protecting the public.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceAdmissibilityHearsayAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency InvestigationsGeneral OverviewAdministrative LawAgency InvestigationsScopeSubpoenasConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionConstitutional LawSubstantive Due ProcessPrivacyGeneral OverviewHealthcare LawBusiness Administration & OrganizationPatient ConfidentialityGeneral OverviewTortsMalpractice & Professional LiabilityGeneral Overview

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§ 473D.11 Tactics and Preparation After Accusation or Charging Document Is Served

[1] Service of Accusation or Statement of Issues

In formal hearings under the APA, there are two kinds of charging documents. Hearings to discipline licensees begin with an accusation [*Gov. Code § 11503*], and hearings on the denial of an application for the grant or renewal of a license or other privilege begin with a statement of issues [*Gov. Code § 11504*].

The statement of issues is served in the same way as an accusation unless the hearing is held at the respondent's request [*Gov. Code § 11504*].

The accusation or statement of issues must be accompanied by the following [*Gov. Code § 11505(a)*]:

- A statement that respondent may request a hearing by filing a notice of defense [*see [2], below*], and that failure to do so waives the right to a hearing.
- A form entitled "Notice of Defense," that may be used to request a hearing [*see [2][a], below*].
- A copy of the discovery provisions of the APA [*see Gov. Code §§ 11507.5-11507.7*].

Usually, the accusation or statement of issues is also accompanied by the agency's request for discovery under *Gov. Code § 11507.6*. For discussion of discovery provisions and tactics, see *[3], below*, and Chapter 473B, *Discovery in Agency Adjudications* .

For discussion about the legal requirements related to accusations and statement of issues, see Ch. 473A, *Commencing Agency Adjudication* .

[2] Response to Accusation or Statement of Issues

[a] Notice of Defense

Counsel's first response to agency charges should be to file the notice of defense, which may be signed by the respondent or by counsel on behalf of respondent [*Gov. Code § 11506(d)*]. Although the notice of defense must be filed within 15 days after respondent receives the accusation [*Gov. Code § 11506(a)*], it is not unusual for the person charged to bring the accusation and other materials to counsel more than 15 days after receiving the accusation. When that happens, counsel should immediately call the agency's counsel and request additional time to file the notice of defense. Agency counsel will usually cooperate, and a time may be agreed on between counsel when the notice of defense is due [*see Gov. Code § 11506(b)* (failure to file notice of defense waives right to hearing, but agency may authorize filing of a later notice); *Gov. Code § 11506(c)* (agency may in its discretion grant a hearing even though respondent has failed to file a timely notice of defense, and has waived right to a hearing)]. If the notice of defense is not filed within the time required by statute or the time agreed on, the agency may hold a default hearing [*Gov. Code §§ 11506(c), 11520(b)*].

For detailed discussion and forms relating to notice of defense, see Ch. 473A, *Commencing Agency Adjudication* . For discussion of default hearings, see Ch. 473F, *Agency Adjudication Hearings* .

[b] Special Notice of Defense

The charges in an accusation must be specific enough so that the respondent can prepare his or her defense [*Gov. Code § 11503*]. Vague and uncertain allegations that do not detail the facts or conduct on which the accusation is based are subject, in effect, to a special demurrer [*Gov. Code § 11506(a)(3)*]. To make such a "demurrer," counsel must include an objection to the form of the accusation in the notice of defense [*see Gov. Code § 11506(a)(3)*]. The objections to the form of the accusation should be specific and detailed. If only some of the allegations are vague or uncertain, the objection should specify those allegations. Counsel should request a prehearing conference on the objections raised [*see Gov. Code § 11511.5(a)* (prehearing conferences authorized); *see also § 473D.13*], because if the charges are not fleshed out before the hearing, counsel will be unable to prepare an adequate defense for respondent.

If respondent has already filed the notice of defense without including any objection to the form of the accusation, counsel should simply file a special notice of defense making that objection. The accusation is subject to challenge until the time allowed for filing a notice of defense has passed [*Gov. Code § 11506(b)* (respondent may file one or more notices of defense on any or all the specified grounds within the time stated)]. Even if the time for filing has passed, counsel should nonetheless prepare a special notice of defense detailing why the form of the accusation is deficient, and file it with the Office of Administrative Hearings (OAH) [*Gov. Code §§ 11370.3-11370.5*] or with the agency itself if the agency uses in-house administrative law judges (ALJ). Even when the time for filing a notice of defense has passed, the OAH tends to hear and consider counsel's objections so as not to waste time when the hearing commences.

[3] APA Discovery

[a] Requests for Discovery

Counsel should request discovery.

Discovery in APA proceedings is governed by *Gov. Code §§ 11507.5-11507.7*. Discovery in non-APA proceedings may be governed by special statutes or regulations of the charging agency [*see, e.g., Educ. Code § 44944(a)* (school district employee in suspension or dismissal proceeding may employ the full range of discovery allowed in superior court civil actions)]. In the absence of any statutory or regulatory provision, the courts have held that fairness and "modern concepts of administrative adjudication" usually require some form of discovery [*Shively v. Stewart (1966) 65 Cal. 2d 475, 479-482, 55 Cal. Rptr. 217, 421 P.2d 65]* .

To request discovery under the APA, a party must serve a written request for discovery on the other party before the hearing and within 30 days after service by the agency of the initial pleading or within 15 days after service of any

additional pleading [*Gov. Code § 11507.6*]. Although these time limits should be strictly complied with if possible, an attorney who is not retained until after the 30-day time period has elapsed should nonetheless file a discovery request with the agency. Agencies usually honor late discovery requests, because adequate discovery before the hearing saves everyone time in the long run. Granting a late discovery request can help save time in the following ways:

- Facts learned in discovery may lead to settlement.
- Discovery can clarify the factual and legal issues.
- If a document is not available because a late discovery request is denied, respondent will simply request a subpoena requiring the production of that document at the hearing. Subpoenas can be issued by the agency or the assigned ALJ, at the request of a party, or by the attorney of record for a party [*Gov. Code § 11450.20(a)*]. Subpoena requests made before or during the hearing may be granted, provided that legal requirements are satisfied [*Gov. Code §§ 11450.10(a), 11450.20(a), (b)*].

When a document is produced at the hearing, counsel will probably request a recess or continuance [*see Gov. Code § 11524(a)* (agency may grant continuances); *see § 473D.12[2]*] to examine the document. Thus, the subpoena procedure causes delay and inconvenience for all parties, but discovery allows all materials to be reviewed well in advance of the hearing.

For detailed discussion of administrative discovery, see Ch. 473B, *Discovery in Agency Adjudications* .

[b] Continuing Discovery

The discovery request should ask for continuing discovery, that is, counsel should request that the other party continue to make discoverable material available for inspection or copying when that material is received after the other party has complied with the initial discovery request. In exchange, counsel should promise agency counsel that the agency's discovery request will be considered a request for continuing discovery. Continuing discovery can help prevent the delays that may result when documents are produced at the last minute. For discussion of possible delays produced by lack of discovery, see *[a], above*. There is no statutory basis for a continuing discovery request, but it makes good practical sense, and agency attorneys are usually willing to cooperate.

For discussion regarding what is discoverable material in an administrative hearing, see *[d], below*, and Ch. 473B, *Discovery in Agency Adjudications.*

[c] Agency Files

Respondent's discovery request should demand discovery of three files:

- The agency counsel's file.
- The agency's file on the respondent.
- The investigator's file.

The deputy attorney general or agency counsel will have a file that includes documents or materials provided by the investigator. This is the file agency counsel will copy and forward in response to a discovery request, but there are two other crucial files. The investigator has his or her own file, usually with handwritten notes, working papers, or both. These notes and working papers can be invaluable in determining the sources of the investigator's information. This file should reveal the people to whom the investigator talked and his or her impressions of witnesses. The agency should

also have a file on the respondent, especially if the case is a licensing agency case. This file will include the licensee's application and renewal forms and may contain other useful material, such as complaints against the licensee.

Sometimes agency counsel will object to the inspection of the investigator's file by respondent's counsel on the ground that the file is privileged because it is official information [*see Evid. Code § 1040* (privilege of public entity to bar disclosure of official information); *Gov. Code § 11507.6(f)* (privileged or confidential material including attorney work product is not subject to administrative discovery)]. For further discussion, see Ch. 473B, *Discovery in Agency Adjudications* .

[d] Scope of APA Discovery

Under the APA, a party is entitled to discover any names and addresses of witnesses known to the other party and to inspect and copy any writing or other thing that is relevant, admissible, and in the possession, custody, or control of the other party [*Gov. Code § 11507.6*]. Discovery does not include attorney work product, confidential matters, or anything that is privileged from disclosure by law [*Gov. Code § 11507.6(f)*]. In certain proceedings alleging sexual misconduct [*see Gov. Code §§ 12940* (employment discrimination and harassment cases), *19572* (civil service discipline cases), *19702* (civil service discrimination cases)], evidence of the complainant's sexual conduct with anyone except the alleged perpetrator is generally not discoverable [*Gov. Code § 11440.40*]. For discussion of non-APA discovery and a more detailed discussion of the scope of APA discovery, see Ch. 473B, *Discovery in Agency Adjudications* .

[e] Enforcement of Discovery Rights

Any party may seek to enforce a discovery request [*see Gov. Code § 11507.6*; *see also [a], above*] by filing a motion to compel discovery with the administrative law judge who has been assigned to hear the case [*Gov. Code § 11507.7(a)*]. The motion must show that the moving party made a reasonable and good faith attempt to contact the other party for an informal resolution of the discovery issue. For more detailed discussion, see Ch. 473B, *Discovery in Agency Adjudications* .

[f] Prehearing Depositions

Gov. Code § 11511 allows a party to petition the administrative law judge, or if an administrative law judge has not been appointed, the agency, to take the testimony of any material witness by deposition on a showing that the testimony of the witness will be material and that the witness is unable to attend or cannot be compelled to attend the hearing. On this showing, the administrative law judge, or the agency may order the witness to be deposed in accordance with *Gov. Code § 11189*, which provides for depositions pursuant to an investigative subpoena. For discussion of investigative subpoenas, see Ch. 471, *Investigations by Public Agencies* .

Since no witness outside of California can be compelled by subpoena to attend an administrative hearing [*Gov. Code § 11450.20(b)*], *Gov. Code § 11511* appears to allow counsel to depose any out-of-state witness, even one who intends to appear at the hearing. *Gov. Code § 11511* was intended to allow depositions for the preservation of testimony, not for discovery, but, as a practical matter, discovery is precisely what takes place [*Shively v. Stewart (1966) 65 Cal. 2d 475, 478-479, 55 Cal. Rptr. 217, 421 P.2d 65]* . For more detailed discussion, see Ch. 473B, *Discovery in Agency Adjudications* .

[g] Eliminating Surprise

Between the end of the time for filing a discovery request and the beginning of the hearing, some discoverable evidence is almost always found [*see Gov. Code § 11507.6* (scope and request for discovery); *see also* [a] and [d], *above*]. If agency counsel and respondent's counsel have agreed to continuing discovery, the risk of being surprised at the hearing by newly uncovered evidence is minimized. If, however, opposing counsel do not cooperate, or if either party suspects that discoverable matter is being concealed, this problem should be raised with the agency or the ALJ as soon as

possible, at the prehearing conference, if one is being held [*Gov. Code § 11511.5* (prehearing conferences authorized); *see also § 473D.13*; for extended discussion, *see* Ch. 473C, *Prehearing Procedures in Agency Adjudications*].

To promote the orderly conduct of hearings and to keep gamesmanship at a minimum, ALJs are often willing to order complete discovery prior to hearing even when the time allowed for a discovery request under *Gov. Code § 11507.6* has passed [*see* discussion in *[a*], *above* and Ch. 473B, *Discovery in Agency Adjudications*].

If discoverable material is offered in evidence at the hearing that was not produced prior to hearing, counsel should move for a continuance of the hearing to review this evidence [*see Gov. Code § 11524* (continuances); *see also § 473D.12*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawAgency InvestigationsScopeGeneral OverviewAdministrative LawAgency InvestigationsScopeSubpoenasGovernmentsState & Territorial GovernmentsLicenses

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41A-473D California Forms of Pleading and Practice--Annotated § 473D.12

§ 473D.12 Scheduling and Continuances

[1] Setting the Hearing Date

After a notice of defense is filed by the respondent under the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*), the agency counsel will request a hearing date from the calendar clerk at the Office of Administrative Hearings (OAH). Usually, agency counsel informs the calendar clerk of the dates on which he or she is available for hearing.

Unfortunately, respondent's counsel frequently is not asked when he or she is available for hearing, which can cause problems, because continuances are not favored by OAH administrative law judges (ALJ), as explained in *[2], below*.

See Ch. 473C, *Prehearing Procedures in Agency Adjudications* , for detailed discussion of continuance motions.

[2] Requesting a Continuance

[a] OAH Does Not Favor Continuances

A party may apply for a continuance, but neither the OAH nor the agencies subject to the APA favor continuances, and the ALJs are not enthusiastic about granting them [*see* the OAH Continuance Policy, available from the OAH as Appendix I to the APA, Procedures for Administrative Adjudication (1987)]. The primary reason for this reluctance is that OAH hearing calendars are fully and precisely scheduled, so that any cancellation is likely to leave a gap that cannot be filled. This lost hearing time wastes the time and money of all parties, and it annoys the OAH considerably. If the hearing time cannot be rescheduled, the complainant agency usually has to pay for that time, which displeases the agency. For further discussion of the OAH attitude to continuances, see Chapter 473C, *Prehearing Procedures in Agency Adjudications* .

[b] Possible Solutions

The best solution to the continuance problem is to try to avoid ever needing one. The attempt to avoid needing a continuance is important even if it becomes necessary to ask for a continuance, because whether a continuance will be

allowed often depends on how hard the requesting party tried to avoid needing it. For example, a continuance applied for after the 10-day limit set out in *Gov. Code § 11524(b)* may nonetheless be granted for good cause if the party asking for the continuance is not responsible for the condition or event establishing the good cause, and has in fact made a good faith effort to prevent that condition or event [*Gov. Code § 11524(b)*]. Before requesting a continuance, counsel should consider approaching the agency or its counsel and trying to negotiate a solution. A continuance that is supported by the agency is much more likely to be accepted by the ALJ. For example, perhaps a partial continuance would be sufficient. Agency counsel may well accept a proposal that the agency present its case-in-chief and the parties reconvene later for respondent's witnesses, or that the matter be heard with the exception of a single unavailable witness. Or perhaps a declaration in lieu of the appearance of an unavailable witness, or a stipulation concerning a factual matter, might resolve the problem without the need for a continuance.

If the need for a continuance is unavoidable, and the agency is not interested in any compromises, it is best to move for a continuance as soon as is feasible, and to support the motion as strongly as possible. Do not merely ask for a continuance. The request for continuance must state in detail the facts that establish good cause, and the existence of these facts should be fully supported with sworn affidavits. Counsel should also file a memorandum of points and authorities citing any authorities that support the request. Counsel should notify opposing counsel of the motion, and furnish him or her with a copy of the motion and supporting papers. If counsel does not have time for the formality of a written motion, the request can be made orally. Many ALJs even accept continuance requests over the telephone. But however the request is made, counsel should be prepared to support that request as fully as if it were a written motion.

For detailed discussion of continuances, see Ch. 473C, *Prehearing Procedures in Agency Adjudications* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationPrehearing Activity

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41A-473D California Forms of Pleading and Practice--Annotated § 473D.13

§ 473D.13 Prehearing Conferences

[1] Purpose of Prehearing Conference

On the motion of a party or by order of an ALJ, the ALJ may hold a prehearing conference [*Gov. Code § 11511.5(a)*]. This conference may deal with any matter that will promote the orderly and prompt conduct of the hearing [*Gov. Code § 11511.5(b)(12)*]. In practice, the purposes of the prehearing conference include the following:

- To insure that the ALJ understands all of the issues to be presented at the hearing.
- To insure that all documents are identified and prepared.
- To insure that all witnesses are identified to each party.
- To promote fairness and avoid the gamesmanship aspect of adversary proceedings.
- To explore settlement possibilities.
- To explore the possibilities of using alternative dispute resolution

procedure, and informal hearing procedures.

The prehearing conference is an opportunity for both counsels to discuss settlement possibilities, or to resolve evidentiary issues and to clarify legal issues [*Gov. Code § 11511.5(b)*]. The prehearing conference also affords counsel for both parties a unique opportunity to know what the adversary is going to present at trial [*see Gov. Code § 11511.5(b)(9)* (exchange of witness lists and exhibits and documents to be offered in evidence at the hearing)]. On occasion, this knowledge promotes settlements. For further discussion of settlement tactics, see *§ 473D.15*. For further discussion of prehearing conferences, including a complete list of the matters that may be considered at a prehearing conference, see Chapter 473C, *Prehearing Procedures in Agency Adjudications* .

[2] Preparation for Prehearing Conference

At the prehearing conference, the ALJ typically requires all parties to be prepared to present all of the documentary evidence available, to identify witnesses, and to discuss the issues involved in the hearing. Counsel should come to the prehearing conference prepared as if he or she were going to the hearing [*see § 473D.14*]. Counsel's preparations for the conference should include at least the following:

- All documents should be indexed in the order of presentation planned for the hearing.

- All legal arguments should be fully briefed with trial briefs on issues of evidence as well as any other matters of law that will come before the judge at the hearing.

- Counsel should be generally prepared to argue his or her position on every significant issue of law or fact.

- If objections are contemplated at hearing, counsel should be ready to make those objections at the prehearing conference.

- A trial brief should be prepared to support counsel's arguments at the prehearing conference.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing Activity

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§ 473D.14 Preparation for Hearing

[1] Reviewing the Charging Document

Preparation is the key to winning, and preparation begins with a thorough review of the accusation or other charging document. Only by a meticulous review of each and every fact on which the charges are based and a similar review of the elements of the cause of action alleged can counsel begin to prepare for hearing.

For every fact essential to each allegation, counsel should do the following:

- Determine how that fact will be proved.
- Determine whether there is sufficient evidence to prove the fact.
- Determine whether there is any basis for objection to the evidence.
- Determine whether any other facts potentially disprove or mitigate the fact alleged.

Only by a detailed review like that described above will counsel be able to determine whether the conduct alleged falls within the jurisdiction of the complainant agency and whether any legal defenses exist to the facts, if proved.

[2] Investigation

After a careful review of the administrative agency's charging documents [*see [1], above*], counsel should tenaciously investigate every fact at issue. The key is to take nothing for granted. For purposes of investigation, counsel should assume that every fact alleged in the charging document is or may be false. Simply because a charging document is filed by a state agency or by the attorney general's office does not mean that the facts have been verified independently by counsel for the agency. Every witness, every potential witness, and every document should be scrutinized thoroughly.

The allegations of counsel's own client should be regarded, privately, with the same skepticism and subjected to a scrutiny equally rigorous.

[3] Use of Experts

If the preparation or presentation of the case calls for an expert, get the best expert you can afford. Administrative cases often require experts, especially when a professional is accused of failing to conform to the standards of the profession. Charges of this kind may be leveled at any licensed professional, including a neurosurgeon [*see Bus. & Prof. Code § 2234* (physicians and surgeons may be disciplined for unprofessional conduct, including negligence and incompetence); *see* also Ch. 414, *Physicians: Licensing and Discipline*], a pest control operator [*see Bus. & Prof. Code §§ 8642, 8643* (negligence as basis for disciplinary action against pest control operator)], or an engineer [*see Bus. & Prof. Code § 6775(b)* (board may discipline licensed engineer for negligence or incompetence)]. The standards by which the malpractice of these different professionals is determined will vary from agency to agency. The elucidation of these standards frequently requires the testimony or advice of experts.

Use of the best expert available is important, because a capable and persuasive expert can educate the ALJ into understanding and accepting respondent's view of the issue. The quality of expert assistance also offers counsel a possible advantage over the agency, because agencies often do not retain experts of unimpeachable quality. Counsel cannot afford to throw away this potential advantage by simply putting up one expert for every agency expert. Counsel must "out-expert" the agency by using only well qualified experts. If the problem involves a complicated roof construction project, counsel should seek out the most prominent roof expert in the state rather than employing any contractor who happens to have a license to build roofs. This advice may seem self-evident, but failure to get truly expert advice and testimony on technical issues is a frequent and costly mistake.

[4] Organization of Documents

Many administrative cases involve extensive documentation. For example, appeals from Medi-Cal audits [*see Welf. & Inst. Code §§ 14170* (audit of Medi-Cal payments), *14171* (administrative appeal of Medi-Cal audits)] involve large numbers of documents that must be categorized and presented to the ALJ in an organized, readable fashion. Hospital charts and physicians' or dentists' records can also be lengthy and complicated. Counsel must make certain to organize these documents for presentation to the ALJ so that all of the following are true:

- The documents are readable and make sense in themselves.
- The documents are labeled and organized so that each document is clearly related to the applicable charge or defense.
- The documents are understandable in the context of the case.

No matter how thorough the prepared documentation is and no matter how completely it supports respondent's case, all documentation is useless unless the ALJ can read it and understand it. To insure that the documents do make a clear and persuasive presentation, counsel must organize them into a cohesive package, then index and tabulate the documents so that the ALJ can review them with a minimum of effort. This organizational process will also help counsel to determine which documents are relevant and which support counsel's position.

[5] Preparation of Witnesses

[a] Taking Statements

It seems obvious that witnesses need to be prepared before they testify, but it is surprising how many witnesses are put on the stand without any preparation. The first issue in witness preparation is whether to take a formal statement from

that witness. Written statements of witnesses are discoverable [*Gov. Code § 11507.6(c)*], but counsel's notes on an interview are attorney work product and are protected from discovery [*Gov. Code § 11507.6(f)*; *see § 473D.11[3][d]*]. The question counsel must determine for each witness is whether it is more important to preserve the testimony of that witness against possible failures of recollection by taking a signed statement or to guard that witness's testimony from discovery by recording it only in the form of interview notes. In either event, counsel should interview every witness who may be called to testify.

For further discussion see Ch. 473B, *Discovery in Agency Adjudications* .

[b] Rehearsal of Witness

To insure that the witness is truly prepared, counsel should rehearse the witness's testimony and the expected cross-examination. This rehearsal will give the witness confidence and prepare the witness for what will happen during the course of the testimony. At the hearing, the witness's character may be attacked, and his or her credibility may be questioned. Failure to prepare the witness for this cross-examination is unfair to the witness, and can be costly for the client. Counsel should test the witness's observations or opinions and challenge his or her assumptions. The bases for opinions of expert witnesses need to be meticulously examined. Alerting a witness to his or her weaknesses is essential to preparation of the witness.

[6] Preparation of Client

[a] Education of Client

Counsel should inform the client how the hearing will be conducted and what may happen during the proceedings. The client should be fully informed on all facts and issues pertinent to the hearing. The client must understand the weaknesses and strengths of his or her case. For example, if the client is a physician facing discipline for negligence or incompetence [*see Bus. & Prof. Code § 2234* (unprofessional conduct); *see also* Ch. 414, *Physicians: Licensing and Discipline*], the client must become an expert in all of the medical procedures at issue. Do not assume that the client is an expert on any given medical issue merely because the client is a licensed physician. Counsel should retain consultants who are recognized experts to school the client, if necessary. The client should consult and study authoritative medical textbooks. The client should even be tested by the consultants or by counsel on all the relevant medical issues. The goal is to instill confidence in the client as well as to educate the client.

On the importance of retaining the best experts available, see *[3], above*.

[b] Rehearsal of Client

After the client has been educated, he or she should be rehearsed. The client must know what questions counsel will ask on direct examination and must rehearse answering those questions. Tone of voice, posture, and manner of speaking, as well as the content of the answer, all determine the credibility of the client. Rehearsal of cross-examination is even more important. Here, counsel must anticipate the questions that opposing counsel will ask. Counsel must help the client learn how to answer the tough questions. Of course, the best advice is to tell the truth, but how the truth is told sometimes makes the difference. For example, whether the client should merely answer a question as briefly as possible or should embellish the answer with explanations is a tactical decision counsel should make *in advance* on every point that can be anticipated.

[7] Use of Demonstrative Evidence

Demonstrative evidence, also known as "real evidence," is evidence other than testimony that is addressed directly to the senses; physical objects, such as models, charts, photographs, clothing, and weapons, are examples [*see Black's Law Dictionary* (5th ed., 1979), p. 389].

Demonstrative evidence is admissible, and counsel should always consider using it [*see Gov. Code § 11513(c)* (relevant evidence admissible); *Evid. Code § 140* ("evidence" includes material objects and other things presented to the senses offered to prove the existence or nonexistence of a fact)]. Charts and graphs to explain complicated financial issues, diagrams to portray the scene of a significant incident, or anatomical exhibits to clarify medical issues can be crucial to the success of counsel's case. Frequently, when an attractively done chart is used, the ALJ will focus on the chart throughout the testimony. If counsel's point is evident from the chart, counsel is getting that point across visually as well as verbally.

Counsel should also consider using slide shows. For example, in a hearing involving medical malpractice, a slide presentation can be used to demonstrate that the physician/client is an expert on the medical procedure in question. The client can act as a teacher, and if the performance effectively demonstrates the client's knowledge, it can help persuade the ALJ that the client did not commit malpractice. A slide show is also an excellent technique to clarify the medical issues by visualization. The value of demonstrative evidence in any case involving complex issues cannot be underestimated.

For discussion of evidentiary rules in administrative hearings, see Ch. 473F, *Agency Adjudication Hearings* .

[8] Trial Briefs

Preparing trial briefs on the legal issues involved in the hearing is important, not only because it allows counsel to prepare for the relevant legal issues in advance of the hearing, but also because the briefs may assist the ALJ in resolving those issues. It is important that trial briefs be ready and be presented at the outset of the hearing. Resolving legal issues at this early stage may eliminate the need for some testimony or dictate the presentation of evidence during the hearing. Also, a well-researched trial brief may favorably impress the ALJ.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewEvidenceDemonstrative EvidenceAdmissibilityEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyLay WitnessesGeneral Overview

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§ 473D.15 Settlements

[1] Desirability of Settlement

Settlement is often desirable to reduce the expense of a hearing and to ensure the result. Early settlement can also preclude or minimize the damaging notoriety that the investigation, charges, and hearing may produce. Because settlement talks are almost always appropriate, the prehearing conference may be used for this purpose [*see Gov. Code § 11511.5(b)(1)* (permissible matters in rehearing conference include exploration of settlement possibilities), and discussion in *§ 473D.13*]. For further discussion of settlement procedures under the APA, see Ch. 473C, *Prehearing Procedures in Agency Adjudications* .

[2] Settlement Conferences

Gov. Code § 11511.7 authorizes settlement conferences to be held for agencies subject to the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*). The administrative law judge may order the parties to attend and participate in a settlement conference. The administrative law judge shall set the time and place for the settlement conference, and shall give reasonable written notice to all parties [*Gov. Code § 11511.7(a)*]. Under this section, settlement conferences may, but are not required to, be separate from the prehearing conference at which exploration of settlement issues may occur. Attendance and participation at the settlement conference is mandatory. Communications made in settlement negotiations are protected under *Gov. Code § 11415.60*[25 Cal. L. Rev. Comm. Reports 55, 150 (1995)].

Gov. Code § 11415.60 allows agencies to make decisions by settlement. See Ch. 473H, *Alternative Procedures for Agency Decisions* , for a fuller discussion of this provision. Because the settlement practices and procedures of agencies that are not subject to Chapter 5 of the APA vary, counsel should consult the administrative agency to determine the particular practices employed and settlement resources available.

[3] Evaluating an Administrative Case

As in civil actions, counsel must properly evaluate the case by making an objective assessment of the relevant strengths and weaknesses of the positions of both sides. A skeptical evaluation of all factual allegations and a realistic appraisal of

the legal issues should give counsel a reasonable idea of the probabilities of success or failure.

[4] Tactical Considerations in Communicating With Agency Counsel

The tactical issue in discussing settlement with agency counsel is always how much of the case to reveal. Although both sides will reveal a great deal during prehearing discovery, counsel may still hesitate to disclose additional information. For example, because APA does not provide for the use of depositions for discovery purposes, although depositions may be used to obtain testimony of an unavailable witness [*see Shively v. Stewart (1966) 65 Cal. 2d 475, 478-479, 55 Cal. Rptr. 217, 421 P.2d 65* (*Gov. Code § 11511* provides for depositions not for discovery, but to secure evidence for use at the hearing); *see also* Ch. 473B, *Discovery in Agency Adjudications* , and discussion in *§ 473D.11[3][f]*], agency counsel has no way of discovering the testimony of respondent's experts unless they have prepared written statements outlining their expected testimony [*see Gov. Code § 11507.6(c)* (statements of witnesses are discoverable)]. In order to settle a case, counsel may need to reveal expert testimony and any other evidence he or she intends to produce. If counsel is certain that the agency intends to try the matter, however, he or she should not gratuitously inform the opponent of the evidence and testimony that will be produced at hearing.

[5] Authority to Settle

In many cases, agency counsel will not have the ultimate authority to settle. In particular, settlement stipulations in cases involving license discipline must be approved by a vote of the licensing board [*Rich Vision Centers, Inc. v. Board of Medical Examiners (1983) 144 Cal. App. 3d 110, 115, 192 Cal. Rptr. 455]* . Usually, however, agency counsel and agency staff have a good idea of what the board will approve, and agreed-on stipulations are rarely disapproved.

Gov. Code § 11511.7 authorizes settlement conferences to be held for agency adjudications conducted under the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*). *Gov. Code § 11415.60(a)* also provides that an agency may formulate and issue a decision by settlement, pursuant to an agreement of the parties, without conducting an adjudicative proceeding. Subject to *Gov. Code § 11415.60(c)*, the settlement may be on any terms the parties determine are appropriate [*Gov. Code § 11415.60(a)*]. *Gov. Code § 11415.60(c)* provides, in relevant part, that a settlement is subject to any necessary agency approval [*Gov. Code § 11415.60(c)*; *see* Ch. 473H, *Alternative Procedures for Agency Decisions* , for a fuller discussion of settlement]. *Gov. Code § 11415.60* is subject to a specific statute to the contrary governing the matter [*see Gov. Code § 11415.20* (conflicting or inconsistent statute controls)]. These provisions codify the rule in the *Rich Vision* case and recognize that in some instances other statutes provide for agency approval of a settlement [25 Cal. L. Rev. Comm. Reports 55, 150 (1995)].

See Ch. 473C, *Prehearing Procedures in Agency Adjudications* , for further discussion of settlement authority.

As a practical matter, most agency counsel are willing to settle cases and will be amenable to reasoned discussions. The following are among the factors that may influence agency willingness to settle:

- The agency's belief in the strength of its case.
- The seriousness of the alleged violation.
- The agency's intent to either obtain compliance or impose penalties.
- The proximity of the hearing.

Sometimes, agency counsel is reluctant to settle due to unrealistic notions regarding the strength of the agency's case. In that situation, counsel must try to educate opposing counsel without antagonizing him or her, and without revealing all of counsel's anticipated hearing tactics.

[6] Creative Settlement Options

A great variety of settlement options exist in administrative cases. For example, in administrative professional disciplinary actions, the options are far broader than simple suspension of the professional license. Appropriate solutions could include the following:

- Expanded continuing education [*see, e.g., 16 Cal. Code Reg. § 1773(a)(4), (b)(1)* (probation conditions for pharmacist)].

- Community service time [*see, e.g., Bus. & Prof. Code § 2228(d)* (community service as probation option for physicians); *see also* Ch. 414, *Physicians: Licensing and Discipline*].

- Entry into drug or alcohol diversion programs [*see, e.g.,* Cal. Code Reg. §§ 1357-1357.8 (diversion program for physicians); for discussion of the regulation of physicians, *see also* Ch.414, *Physicians: Licensing and Discipline*].

- Monitoring of the client's professional practice [*see, e.g., 16 Cal. Code Reg. § 1773(a)(3), (b)(4)* (probation conditions for pharmacist)].

- Fiscal or accounting controls.

Many other solutions may be available depending on the charges and the facts of the case. Respondent's counsel may ask the agency counsel about these potential solutions. Agency counsel are often willing to cooperate in developing solutions that fit the problem.

[7] Stipulating for Settlement

[a] Necessity for Writing

All settlements should be reduced to writing. The language of the settlement document is critical because it will define the duties and obligations of both parties during the post-settlement stage [*see [7], below*]. Frequently, settlements result in the imposition of probation in license discipline cases. The stipulation generally provides that violating the terms of probation is in and of itself a cause for disciplinary action. Therefore, each and every proposed term and condition of probation must be carefully scrutinized to check that respondent can comply with the terms, that the terms are reasonable, and that the language of the stipulation expresses the terms clearly. For example, if continuing education is a requirement of probation, clarify whether a continuing education must be approved in advance by the agency or what courses will be acceptable, and whether the respondent will be required to take a test on the subject matter of the continuing education course [*see, e.g., Bus. & Prof. Code § 2228(a)* (additional professional training and passing examination as probation option for physicians); *see also* Ch. 414, *Physicians: Licensing and Discipline*].

[b] Consent of Client

Because of the serious consequences to the client that may occur following settlement with the agency, counsel must explain the full ramifications of any settlement in detail to the client before the client can truly be considered to have given an informed consent to the settlement. For example, possible ramifications of settlement might include the following:

- Further disciplinary action by a hospital in a medical malpractice case.

- The cancellation of professional liability insurance.

- Newspaper or television publicity.

- Charges brought by other licensing agencies, if the client has multiple professional licenses.

- Action by state Medi-Cal authorities [*see Welf. & Inst. Code §§ 14000-14196* (the Medi-Cal Act)], or by federal Medicaid [*see 42 U.S.C. §§ 1396-1396s* (Medicaid provisions)] and Medicare [*see 42 U.S.C. §§ 1395-1395ccc* (Medicare provisions)] authorities.

- Disciplinary actions by professional societies or trade associations of which the client is a member.

- Permanent loss of clients or business during a suspension period.

Therefore, counsel should review the written stipulation with the client line by line, to ensure that he or she understands and agrees to each and every term of the stipulation.

[8] Post-Settlement Considerations

As discussed in *[7][a], above*, a violation of a settlement stipulation is often a violation of the respondent's probation, and will probably lead to disciplinary action. Counsel must therefore thoroughly advise the client of what the settlement terms require during the post-settlement period. For example, if approval of continuing education or agreements or arrangements with third parties is part of the settlement, counsel must impress on the client the importance of requesting approval in a timely fashion. If license suspension is a term of the settlement, counsel must ensure that the client understands what suspension really means so that there is not even the appearance of impropriety during the suspension period [*see, e.g., 16 Cal. Code Reg. § 1772* (suspended pharmacist must not enter any pharmacy prescription area or engage in any pharmacy-related service)]. If monetary payments are a term of the settlement, counsel must stress the importance of making those payments on time. Counsel should continue to advise the client through the period of the settlement, because counsel probably understands the terms and obligations incurred in the settlement better than anyone else. Proper performance of settlement obligations is absolutely necessary if the client is to avoid further difficulties with the agency.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityContracts LawTypes of ContractsSettlement Agreements

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Chapter 473D PREHEARING PREPARATIONS IN AGENCY ADJUDICATIONS
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A. Respondent's Prehearing Preparation

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[Reserved]

§§ 473D.16[Reserved]

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41A-473D California Forms of Pleading and Practice--Annotated § 473D.20

§ 473D.20 Introduction to Prehearing Tactics and Procedures

Many practitioners make the mistake of treating the notice of defense [*see* Ch. 473A, *Commencing Agency Adjudication*] and prehearing discovery [*see* Ch. 473B, *Discovery in Agency Adjudications*] as the beginning and end of the prehearing phase of a professional or vocational license discipline case. There are, however, prehearing tactics and procedures that can be used during this phase to control the scope and direction of a case or to otherwise secure an advantage. Although most of the tactics discussed in this chapter are used by counsel for the administrative agency, it is important for counsel for the responding licensee or registrant to be aware of these tactics.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityGovernmentsState & Territorial GovernmentsLicensesHealthcare LawBusiness Administration & OrganizationLicensesRevocation & SuspensionLegal EthicsSanctionsDisciplinary ProceedingsGeneral Overview

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41A-473D California Forms of Pleading and Practice--Annotated § 473D.21

§ 473D.21 Prehearing Injunctions and Restraining Orders

[1] Overview

To understand the role of prehearing injunctions and restraining orders in agency prehearing practice, the following five questions should be considered:

- Who may seek injunctive relief or a restraining order against a licensee? The answer depends on the statute that is the basis for the equitable relief. Some statutes allow the licensing agency itself to file the appropriate petition with the court [*see, e.g., Bus. & Prof. Code § 125.5(a)* (authorization for superior court issuance of injunction on petition filed by board)], while other statutes may also allow the petition to be filed by either the attorney general or the local district attorney [*see, e.g., Bus. & Prof. Code § 3430* (authorization for superior court issuance of injunction on petition filed by Hearing Aid Dispensers Examining Committee, attorney general, or county district attorney)].

- What relief can be granted by the court? Again, the answer depends on the statute that authorizes the equitable relief. Some statutes allow for injunctive relief, restraining orders, or both [*see, e.g., Bus. & Prof. Code §§ 125.5(a)* (injunction, other appropriate restraining order), *125.7* (temporary restraining order, other appropriate order)]. Other statutes allow for orders of restitution to persons injured as a result of the licensee's acts and omissions, and even reimbursement to the petitioning agency for expenses incurred in the investigation relating to the petition [*see, e.g., Bus. & Prof. Code § 125.5(b)* (restitution), *§ 125.5(c)* (reimbursement to board for expenses)]. Significantly, most of these remedies are nonexclusive, and counsel for the licensee may be faced with multiple grounds for equitable relief in the same petition [*see, e.g., Bus. & Prof. Code § 125.5(d)* (remedy provided by *§ 125.5* "shall be in addition to, and not a limitation on," authority provided in any other Bus. & Prof. Code section)].

- When will a licensing agency seek equitable relief? A licensing agency is most likely to seek injunctive relief against a licensee when: (a) the prohibited acts or omissions are of relatively recent origin; (b) the prohibited acts or omissions will continue unless judicially restrained; (c) the prohibited

acts or omissions possibly constitute a threat to the public health, safety, or welfare; and (d) enough evidence has been gathered to sustain the allegations at an administrative hearing.

- Where will an agency file a petition for injunctive relief against a licensee? Again, this answer depends on the statute that constitutes the basis for the relief sought. For example, some statutes require the petition to be filed in the superior court for the county where the acts or omissions occurred [*see, e.g., Bus. & Prof. Code § 125.5(a), (b)*], while others require the petition to be filed in the superior court in the county of the licensee's place of business or residence [*see, e.g., Bus. & Prof. Code § 7028.3* (contractor's license law)].

- Why will a licensing agency seek this form of relief? Most administrative agencies do not routinely seek equitable relief against licensees before an administrative disciplinary hearing. This relief is usually sought when the licensee's acts or omissions under the color of the license constitute an ongoing or impending threat to the public health, safety, and welfare, or when the prohibited acts will continue unless enjoined or restrained by a court [*see, e.g., Bus. & Prof. Code § 125.8(a)*].

The statutes authorizing injunctive relief discussed in the sections below are Business and Professions Code statutes that generally tie in with administrative actions. Other statutes exist in the Business and Professions Code that authorize injunctive relief, but that do not necessarily tie in with administrative disciplinary actions against a licensee. Sections not related to administrative discipline are not within the scope of this chapter.

[2] Injunctions Against Violations of Statutes Administered by Boards Within Department of Consumer Affairs

[a] General Requirements

Bus. & Prof. Code § 125.5 authorizes the issuance of injunctions or other appropriate restraining orders against persons who have engaged or are about to engage in acts constituting violations of the statutes or regulations administered or enforced by any board within the Department of Consumer Affairs. The term "board" includes a commission, bureau, division, agency, and a medical quality review committee [*Bus. & Prof. Code § 125.5(a)*]. Jurisdiction to issue the relief is vested in the superior court for the county in which the violation occurs or is about to occur. The petition is filed by the administrative agency charged with enforcing the statute in question, with the approval of the director of the Department of Consumer Affairs. Proceedings under *Bus. & Prof. Code § 125.5* are governed by *Code Civ. Proc. §§ 525-534*, which relate to injunctive relief [*Bus. & Prof. Code § 125.5(a)*]. See Ch. 303, *Injunctions* , for detailed discussion and forms relating to injunctive relief in civil actions.

[b] Restitution to Victims and Reimbursement of Agency

In addition to authorizing the issuance of injunctive or other appropriate relief, *Bus. & Prof. Code § 125.5* further authorizes the appropriate superior court to issue orders as follows:

- For any person who has violated the statutes or regulations administered or enforced by any board within the Department of Consumer Affairs, to make restitution to persons injured as a result of the violation. The court may only order this relief, however, if the board files a petition with approval of the director of the Department of Consumer Affairs seeking this relief [*Bus. & Prof. Code § 125.5(b)*].

- For a person subject to an injunction or restraining order [*see Bus. & Prof. Code § 125.5(a)*], or a person required to make restitution [*see Bus. & Prof. Code § 125.5(b)*], to reimburse the petitioning board for expenses incurred by the board in the investigation relating to the petition [*Bus. & Prof. Code § 125.5(c)*].

Also, licensing boards may request administrative law judges in disciplinary proceedings to order a licensee found to have committed a violation of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case [*Bus. & Prof. Code § 125.3(a)*].

[c] Remedy Not Exclusive

The remedy provided by *Bus. & Prof. Code § 125.5* is not exclusive. The remedy operates as an addition to, rather than a limitation on, other statutes in the Business and Professions Code that authorize injunctive relief or other appropriate restraining orders [*Bus. & Prof. Code § 125.5(d)*; *see, e.g., Bus. & Prof. Code § 125.7*].

[d] Use in Conjunction With Other Statutes Authorizing Injunctive Relief

Although *Bus. & Prof. Code § 125.5* may be used alone, the statute is more commonly used in tandem with the portion of an agency's statutes that specifically authorize injunctive relief or restraining orders for violating that agency's laws or regulations. *Bus. & Prof. Code § 125.5* is commonly used on its own when an agency seeks to curtail unlicensed activity on the part of an individual who is not licensed with, or registered by, the agency in question; however, *Bus. & Prof. Code § 125.5* does not authorize the court to restrain the licensee from engaging in a profession for which he or she is licensed. Rather, it authorizes the court to enjoin or restrain the respondent from violating the licensing laws in question [*cf. Bus. & Prof. Code §§ 125.5* and *125.7*].

[3] Orders Restraining Licensees From Practicing Healing Arts

[a] General Requirements

Bus. & Prof. Code § 125.7 authorizes a court, on petition filed by the board, to issue temporary restraining orders (TROs), or other appropriate orders to restrain a licensee from engaging in all or any part of the business or profession for which he or she is licensed. *Bus. & Prof. Code § 125.7* applies to the boards in the Department of Consumer Affairs that regulate the healing arts professions, including the Chiropractic and Osteopathic Boards [*Bus. & Prof. Code § 125.7*; *see Bus. & Prof. Code §§ 500-4998*]. The remedies of *Bus. & Prof. Code § 125.7* are in addition to those set forth in *Bus. & Prof. Code § 125.5* [*Bus. & Prof. Code § 125.7*].

Jurisdiction is vested in the superior court for the county in which the licensee has engaged, or is about to engage, in acts or omissions constituting violations of the appropriate licensing statutes [*Bus. & Prof. Code § 125.7*]. Proceedings under *Bus. & Prof. Code § 125.7* are governed by the Code of Civil Procedure chapter relating to injunctive relief [*see Code Civ. Proc. §§ 525-534*], unless otherwise specifically stated in the statute [*Bus. & Prof. Code § 125.7(c)*]. In contrast to *Bus. & Prof. Code § 125.5*, the petition seeking relief does not require the approval of the director of the Department of Consumer Affairs; however, the petition must be accompanied by supporting affidavit(s) and a memorandum of points and authorities [*Bus. & Prof. Code § 125.7*; *see [b], below*].

Bus. & Prof. Code § 125.7 is most commonly used by agencies against healing arts practitioners who have committed acts or omissions constituting gross negligence, incompetence, or repeated negligent acts, and who give the appearance that they will continue to commit such acts or omissions unless prevented from practicing as authorized by their license or certificate. Because of the extreme nature of this remedy, the use of the remedy is reserved for instances in which the public is palpably at risk. Further, *Bus. & Prof. Code § 125.7* is sometimes used in conjunction with *Bus. & Prof. Code § 125.5* if the board is seeking reimbursement of investigative expenses and/or restitution to persons injured as a result of the licensee's violations of the statutes governing his or her licensed activities.

[b] Supporting Affidavits and Memorandum of Points and Authorities

A petition for relief under *Bus. & Prof. § 125.7* must be accompanied by appropriate supporting affidavit(s) and a

memorandum of points and authorities. The supporting affidavits must show that the licensee has engaged in or is about to engage in acts or omissions constituting a violation of the appropriate regulatory statutes. If the court is satisfied that the continued licensed activity of the licensee will endanger the public health, safety, or welfare, the court may issue an order temporarily restraining the licensee's licensed activity [*Bus. & Prof. § 125.7(a)*]. Although the statute specifies that the affidavits themselves must show the commission or impending commission of the proscribed acts or omissions, the statute does not state whether the affidavit must also show the threat to the public health, safety, or welfare. Because the courts almost invariably decide this type of case on the affidavits alone, the better practice is to include both elements in the affidavit(s). The superior court may not issue a TRO, or any other appropriate order, however, without notice to the licensee unless it appears from the facts shown in the supporting affidavit(s) that serious injury would result to the public before the matter could be heard on notice [*Bus. & Prof. Code § 125.7(b)*].

For forms of memoranda for use supporting a petition for a TRO, see California Points and Authorities, Ch. 116, *Injunctions* (Matthew Bender); see also Ch. 303, *Injunctions* , for discussion and forms relating to TRO's generally.

[c] Issuance of Temporary Restraining Order (TRO)

When a superior court issues a TRO pursuant to *Bus. & Prof. Code § 125.7*, several time clocks are set in motion. Within a time period to be allowed by the court, but in any event no more than 30 days after the issuance of the TRO, the petitioning board must file an accusation against the respondent licensee pursuant to *Gov. Code § 11503* [*Bus. & Prof. Code § 125.7(d)*]. The accusation must be served on the licensee pursuant to the APA [*Bus. & Prof. Code § 125.7(d)*; *see Gov. Code § 11505*; *see* Ch. 473A, *Commencing Agency Adjudication*]. Although *Bus. & Prof. Code § 125.7(d)* does not specify whether the accusation must be served within the designated period, this apparent ambiguity is seldom a problem, inasmuch as the evidence supporting the petition is generally the same evidence that supports the accusation. Thus, because the board's case is usually completed or nearing completion when the petition is filed, it is not uncommon for the accusation to be prepared contemporaneously with the petition for temporary restraining order, and to be submitted as an attachment to the petition.

Once the accusation is filed and served, the licensee must be accorded all the rights and privileges of the formal hearing provisions of the APA (*Gov. Code § 11500 et seq.*). If a licensee respondent requests a hearing on the accusation, however, the board must provide the licensee with a hearing within 30 days of the date of request. Further, a decision must be rendered by the board within 15 days of the date the decision is received from the administrative law judge. If the board fails to provide the licensee with a timely hearing or decision, the court may nullify the previously issued restraining order. [*Bus. & Prof. Code § 125.7(d)*]. A restraining order issued pursuant to *Bus. & Prof. Code § 125.7* is dissolved by operation of law when the board's decision becomes subject to judicial review pursuant to *Code Civ. Proc. § 1094.5* (administrative mandamus) [*Bus. & Prof. Code § 125.7(d)*; *see Gov. Code § 11523*; *see also* Ch. 474, *Availability of Judicial Review of Agency Decisions* et seq., for detailed discussion of judicial review].

[4] Orders Restraining Licensees From Practicing Professions Other Than Healing Arts

Bus. & Prof. Code § 125.8 authorizes a court, on petition filed by the board, to issue TROs, or other appropriate orders to restrain a licensee from engaging in all or any part of the business or profession for which he or she is licensed. *Bus. & Prof. Code § 125.8* applies to those boards in the Department of Consumer Affairs that regulate the professions and vocations other than the healing arts; specifically, the boards regulating accountants, attorneys, architects, advertisers, contractors, collection agencies [*see Bus. & Prof. Code §§ 5000-9998.8*], boxin wrestling, martial arts [*see Bus. & Prof. Code §§ 18600-18880*], and the home furnishings industry [*see Bus. & Prof. Code §§ 19000-19214*]. There are numerous professions and vocations in which an unethical or incompetent licensee can so endanger the public health, safety, and welfare that the licensee must be immediately restrained, pending a disciplinary hearing to revoke the license or registration. For example, *Bus. & Prof. Code § 125.8* is commonly used by the Bureau of Automotive Repair to temporarily restrain licensees who issue large numbers of certificates of compliance to vehicles that do not actually comply with the applicable pollution control standards.

The remedies of *Bus. & Prof. Code § 125.8* are in addition to those set forth in *Bus. & Prof. Code § 125.5* [*Bus. & Prof. Code § 125.8*]. Jurisdiction is vested with the superior court for the county in which the licensee has engaged, or is about to engage, in acts or omissions constituting violations of the appropriate licensing statutes [*Bus. & Prof. Code § 125.8*]. The proceedings under *Bus. & Prof. Code § 125.8* are governed by the Code of Civil Procedure chapter relating to injunctive relief (*Code Civ. Proc. §§ 525-534*) [*Bus. & Prof. Code § 125.8(c)*]. The procedures under *Bus. & Prof. Code § 125.8* are virtually identical to those of *Bus. & Prof. Code § 125.7*, and the above discussion of *Bus. & Prof. Code § 125.7* is generally applicable to *Bus. & Prof. Code § 125.8* [*see [3], above*].

[5] Professional and Vocational Licensing Statutes Authorizing Injunctive Relief

Many additional statutes in the Business and Professions Code relate directly to injunctions or restraining orders for violations of specific professional or vocational licensing statutes. Although such professional and vocational licensing statutes can generally be used independently, they are nonexclusive remedies and are routinely used in conjunction with *Bus. & Prof. Code §§ 125.5, 125.7* or *125.8* [*see [2]-[4], above*].

Virtually all of the specific professional and vocational licensing statutes that authorize the granting of injunctive relief require that any proceedings under the applicable section be governed by the Code of Civil Procedure chapter relating to injunctive relief [*see Code Civ. Proc. §§ 525-534*]. Some of these sections also specify that a petition for injunctive relief need not allege facts showing or attempting to show a lack of an adequate remedy at law or irreparable injury [*see, e.g., Bus. & Prof. Code § 9851* (relating to the Bureau of Electronic and Appliance Repair)]. Even in the absence of a statutory waiver of this showing, however, there is essentially a de facto presumption of inadequate remedy or irreparable injury to the public if violations of professional or vocational statutes are allowed to continue unabated. For example, if a legislative body has authorized an injunctive remedy in the context of a violation of a professional or vocational statute, the Legislature has determined as a matter of law that irreparable injury attends a violation of the statute [*Porter v. Fiske (1946) 74 Cal. App. 2d 332, 338, 171 P.2d 971]* . Similarly, this rationale applies to the less drastic relief afforded by a TRO, which accomplishes the same purpose as an injunction, but for a more limited time [*Paul v. Wadler (1962) 209 Cal. App. 2d 615, 625, 26 Cal. Rptr. 341* ; *see § 473D.22*].

Most of the professional and vocational licensing statutes that authorize injunctive relief empower the court to enjoin violations of the specific licensing act of which the statute is a part. Some of the licensing statutes authorizing injunctive relief go further, and also empower the court to issue TROs that actually restrain the licensee from engaging in the specified profession or vocation [*see, e.g., Bus. & Prof. Code § 7028.3* (contractors' licenses)]. The various statutes also differ as to who is authorized to petition for injunctive relief. Most statutes authorize either the agency itself or the executive officer of the agency to seek the injunctive relief [*see, e.g., Bus. & Prof. Code § 5122*]. Other statutes also authorize the attorney general or the district attorney of the county where the violations took place to seek the specified injunctive relief [*see, e.g., Bus. & Prof. Code § 3430* (hearing aid dispensers)].

Some statutes authorize more than one licensing agency to seek injunctive relief. For example, *Bus. & Prof. Code § 2545* authorizes the Board of Optometry, the Division of Allied Health Professions of the Medical Board of California, and the Osteopathic Medical Board of California, as well as the attorney general's office, and the district attorney's office in the county where the violation took place, to seek injunctive relief and restraining orders against licensees who violate the statutory requirements. Further, some licensing acts relating to healing arts allow 10 or more individuals who are licensed under a specific act to petition to enjoin or restrain someone similarly licensed from violating their common licensing act [*Bus. & Prof. Code § 3094* (optometry)]. Because only a licensing agency is empowered to bring disciplinary action against a licensee, however, in the event that an injunction is granted based on a petition brought by 10 or more licensees against a fellow licensee, an undertaking is generally required pursuant to *Code Civ. Proc. § 529* [*Code Civ. Proc. § 529* (undertaking, justification of sureties); *see* Ch. 538, *Suretyship, Bonds, and Undertaking*]. Public entities or officers are exempt from this undertaking requirement [*Code Civ. Proc. § 995.220* (public entities exempt from bond requirements in actions or proceedings)].

[6] Citation Enforcement System

Bus. & Prof. Code § 125.9 authorizes most licensing agencies within the Department of Consumer Affairs to establish by regulation a citation enforcement system which allows the agency to issue to a licensee a citation containing an order of abatement or an order to pay an administrative fine assessed by the agency when the licensee has violated the relevant licensing act or related agency regulations [*Bus. & Prof. Code § 125.9(a)*]. Order of abatement issued under the citation system are an administrative alternative to a court injunction. Licensees who wish to contest a citation can request a hearing that will be held under the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*) [*Bus. & Prof. Code § 125.9(b)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersGovernmentsState & Territorial GovernmentsLicensesHealthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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§ 473D.22 Seeking Prehearing Injunctive Relief

A petition to a superior court for injunctive relief and/or a restraining order before an administrative hearing regarding professional or vocational licensing matters should be reserved for situations in which it is apparent that the licensee's prohibited conduct will continue unabated unless enjoined or restrained by the court. Once the determination is made to draft and file the petition, several factors must be considered, as follows:

- Whether the petition is being filed in the proper superior court. Some statutes require the petition to be filed in the superior court for the county in which a licensee has committed, or is about to commit, the act or omission that constitutes a violation of the statutes governing his or her licensed activities [*see, e.g., Bus. & Prof. Code §§ 125.5, 125.7, 125.8*]. Other statutes may allow more latitude, and may also authorize the filing of the petition in the superior court for the county in which the licensee maintains a place of business or resides [*see, e.g., Bus. & Prof. Code § 7028.3* (contractor's license law)].

- Whether the investigation of the facts necessary to support the imposition of discipline against the licensee has been completed. The facts that support the imposition of discipline that will be alleged in the accusation are the same facts that are necessary to support the granting of the petition for prehearing injunctive relief or restraining order.

- Whether the contents of the petition are sufficient for the court to grant the relief.

A grant of equitable relief requires more than the mere recitation in the petition of the facts tending to show violations of a licensing law. Such a petition rises or falls on the basis of the supporting affidavits. The most helpful affidavits are those that educate the court by setting forth acts illustrating violation or threatened violation of a licensing law, blending these facts into the specific statute that has been or is about to be violated. If appropriate, the affidavit should illustrate how the violation constitutes a threat to the health, safety, and welfare of the public. For example, in one case in the author's experience, a successful petition for a TRO against an automotive repair dealer who was violating the smog check statutes was supported by affidavits of Bureau of Automotive Repair program representatives who had examined certain noncomplying vehicles that were falsely certified by the respondent. The affiants: (1) stated the facts

surrounding their inspections of several vehicles, noting the instances in which the emission control devices were missing from the vehicles, (2) identified the pollutants that each device would control were it in place, and the statutory and regulatory violations committed by the licensee for certifying a vehicle lacking the required emission control devices, and (3) concluded with their opinions that the escape of the various pollutants into the atmosphere as a result of the required devices being missing constituted a danger to the health, safety, and welfare of the public. These affidavits provided the judge with a preview of the complainant's case against the licensee at the administrative hearing and showed a reasonable probability that the licensing agency would prevail on the merits at the administrative hearing.

When a public agency seeks to enjoin a violation of a statute specifically providing for injunctive relief, a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant when the agency establishes that it is reasonably probable that the agency will prevail on the merits. The court must evaluate the relative actual harm to the parties only if the defendant shows that he or she will suffer grave or irreparable harm from issuance of a preliminary injunction. Once the defendant has made such a showing, an injunction will issue only if, after considering the certainty of the outcome of the merits and the consequences to each party of granting or denying an injunction, the court determines that an injunction is proper. An injunction may legitimately issue, however, if it is fairly clear that the agency will prevail on the merits, even though the agency is unable to prevail in the balancing of probable harm, as long as the defendant's probable harm does not outweigh the harm likely to result from the denial of an injunction [*IT Corp. v. County of Imperial (1983) 35 Cal. 3d 63, 73, 196 Cal. Rptr. 715, 672 P.2d 121]* .

For a licensing agency to establish a reasonable probability that it will prevail on the merits, it is helpful to the agency to have the accusation prepared at the time the petition is filed, with the accusation appended to the petition as an exhibit. The court is then informed as to the statutory violations alleged in the accusation and is able evaluate whether the evidence, as articulated in the affidavits, supports these allegations. Including the accusation as an exhibit is particularly helpful when the agency is seeking injunctive relief or a restraining order pursuant to *Bus. & Prof. Code §§ 125.7* or *125.8*, because it shows the court that the agency is prepared to give the licensee a hearing on the matters alleged in the accusation within the time frames set forth in those statutes [*see § 473D.21[3], [4], above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersGovernmentsLocal GovernmentsLicenses

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§ 473D.23 Opposing Petitions for Prehearing Injunctive Relief

Counsel for the licensee respondent has a difficult task in opposing a proceeding to enjoin or restrain the client's licensed activities before an administrative disciplinary hearing. The licensing agency has almost always completed its investigation leading up to the filing of disciplinary action against the licensee, and the facts gathered during the investigation are set forth in support of the petition. Counsel for the licensee must counter this advantage on short notice, with a limited chance to conduct an independent investigation of the facts. Further, if the petition is granted and the accusation is served immediately thereafter, counsel for the licensee may have only 45 days or less to prepare for the hearing.

Counsel for the licensee, however, may be able to counter the licensing agency's tactical advantage. Ideally, the licensee will have knowledge of the impending proceeding during the course of the investigation, and will immediately inform counsel. Once counsel learns of the investigation, counsel should contact the licensing agency to attempt to establish the exact nature of the investigation and to see if the matter can somehow be resolved. If it appears that the client is in fact violating the agency's regulatory statutes, counsel should advise the client to comply with the regulatory statutes. Once the nature of the investigation is determined, counsel should start to prepare a defense immediately and should try to anticipate whether the alleged violations are of such a nature that the licensing agency may attempt to secure prehearing injunctive relief or a restraining order against his or her client.

In practice, attorneys routinely discover the nature of the violations that their clients have allegedly committed when the client presents counsel with a copy of the petition for injunctive relief. In this situation, because the courts typically decide these cases on the basis of the affidavits and witnesses are seldom permitted to testify [*see § 473D.25*], counsel should immediately focus on securing information for the preparation of counter-affidavits. The affidavits should be geared toward showing the court that it is not reasonably probable that the licensing agency will prevail on the merits at the administrative hearing. If the licensee respondent is unable to make this showing, the affidavits should attempt to demonstrate to the court that the potential harm to the defendant in granting the equitable relief so outweighs any potential harm to the public that no injunction should issue even though the agency is likely to prevail on the merits [*see IT Corp. v. County of Imperial (1983) 35 Cal. 3d 63, 73, 196 Cal. Rptr. 715, 672 P.2d 121]* . Counsel should also consider presenting mitigating evidence by affidavit that tends to show that the alleged violations will not continue.

Finally, if the case against the licensee seems particularly compelling, counsel should consider seeking a stipulation from the petitioner under which the licensee would agree to curtail certain licensed activities pending a final decision in the administrative matter. For example, a physician who practices obstetrics and gynecology might stipulate that he or she would practice no obstetrics, the source of the alleged violations, in return for being allowed to practice gynecology until a final decision and order was issued following the administrative hearing. Similarly, an automotive repair dealer might stipulate that no smog inspections, the source of the alleged violations, would be performed until a final decision and order was issued following an administrative hearing, in return for being allowed to conduct business as an automotive repair dealer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency InvestigationsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsGovernmentsState & Territorial GovernmentsLicenses

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41A-473D California Forms of Pleading and Practice--Annotated § 473D.24

§ 473D.24 Prehearing Termination of Licensee's Telephone Service

[1] When to Seek Termination

When a licensee's telephone is used to violate or assist in violating the law, the licensing agency, under certain circumstances, may petition the superior court for a finding of probable cause to terminate the licensee's telephone service. Although the licensing agency may seek this action against the licensee independent of any license discipline proceeding, procedures for terminating a licensee's telephone service are usually coupled with a disciplinary action against the licensee. An agency's action to terminate a licensee's telephone service almost always occurs prior to an administrative disciplinary hearing. Because some professions and vocations licensed or regulated by the state, such as collection agencies, repossessors, and television and appliance repair services, are particularly telephone intensive, the licensed activities may be severely curtailed by terminating telephone service [*see Bus. & Prof. Code § 149* (statutory authority for designated agencies to seek termination of telephone service when unlicensed persons perform services requiring license from designated agency)].

[2] Authority for Termination

The authority for court-ordered termination of telephone service is found in Public Utilities Commission Decision No. 91188, Case No. 4930 [3 Cal. PUC 2d 87; *see Goldin v. Public Utilities Commission (1979) 23 Cal. 3d 638, 646, 153 Cal. Rptr. 802, 592 P.2d 289* ; *see also* PUC Decision No. 71797 (1966) (Rule 31)]. Pursuant to this rule, the California Public Utilities Commission requires every communications utility operating under its jurisdiction to refuse service to a new applicant and to disconnect existing service to a customer on receipt from any authorized official of a law enforcement agency of a writing, signed by a magistrate [*see Penal Code §§ 807, 808*], finding that probable cause exists to believe either of the following [3 Cal. PUC 2d 87, 91 (App. B)]:

- That the use made or to be made of the service is prohibited by law.

- That the service is or will be used as an instrumentality, directly or indirectly, to violate or to assist in the violation of the law.

The magistrate's writing must also include a finding that probable cause exists to believe not only that the subject telephone facilities have been or are about to be used in the commission or facilitation of illegal acts, but that the character of these acts is such that, absent immediate and summary action in the premises, significant dangers to public health, safety, or welfare will result [3 Cal. PUC 2d 87, 91-92 (App. B)].

The California Supreme Court has determined that these provisions for denying or terminating telephone service satisfy the constitutional requirements of due process [*Goldin v. Public Utilities Commission (1979) 23 Cal. 3d 638, 646, 153 Cal. Rptr. 802, 592 P.2d 289* (the constitutional safeguards required by the Court in addition to those set forth in Rule 31 [PUC Decision No. 71797 (1966)]] have been incorporated into PUC Decision No. 91188 [3 Cal. PUC 2d 87, 91 (App. B); *see* *Sokol v. Public Utilities Commission (1966) 65 Cal. 2d 247, 53 Cal. Rptr. 673, 418 P.2d 265]* .

Thus, the discontinuance of communication facilities used in the commission or furtherance of illegal acts may be proper without a prior hearing, provided that any person aggrieved by the action receives immediate notice and has the right to immediately file a complaint to request interim relief pending resolution of the complaint [*Goldin v. Public Utilities Commission (1979) 23 Cal. 3d 638, 646, 153 Cal. Rptr. 802, 592 P.2d 289* ; *see* PUC Decision No. 91188, 3 Cal. PUC 2d 87, 91 (App. B)].

[3] Method to Secure Termination

A licensing agency may terminate a licensee's telephone service by filing a complaint in the superior court seeking findings of probable cause to terminate telephone service pursuant to the appropriate rules of the communications utility that provides the telephone service. Although this complaint may be filed alone, it is usually coupled with a petition for a TRO and/or injunctive relief. The complaint for findings of probable cause should clearly set forth the authority of the court to grant this relief and should possibly include a copy of the Public Utilities Commission Order requiring utilities to include the termination provisions in their tariff schedules, as well as the tariff rule itself [*see* PUC Decision No. 91188 (1980), 3 Cal. PUC 2d 87, 89, 91 (App. B)].

The affidavits used to support a petition for a TRO or other injunctive relief will generally support a finding of probable cause to terminate telephone service. The affidavits should clearly show that the licensee's telephone number has been or is being used in the commission or facilitation of illegal acts. The affiants must also state that the character of these acts is such that, absent immediate and summary action, significant dangers to the public health, safety, or welfare will result [*see* PUC Decision No. 91188 (1980), 3 Cal. PUC 2d 87, 91-92 (App. B); *see also* *Goldin v. Public Utilities Commission (1979) 23 Cal. 3d 638, 664, 153 Cal. Rptr. 802, 592 P.2d 289]* . Once the magistrate makes a finding of probable cause, and the finding is delivered to the communications utility by an authorized official of the law enforcement agency, the utility must immediately disconnect the telephone service, or refuse service to the new applicant [*see* PUC Decision No. 91188 (1980), 3 Cal. PUC 2d 87, 91-92 (App. B)].

The utility must immediately notify the applicant or subscriber in writing that the disconnection or refusal of service is made pursuant to a request by a law enforcement agency. The notice must identify the agency and include a copy of the rule with an accompanying statement that the applicant or subscriber may request information and assistance from the Commission at its San Francisco or Los Angeles office [PUC Decision No. 91188 (1980), 3 Cal. PUC 2d 87, 92 (App. B); *see [4], below*].

[4] Method to Restore Telephone Service

An applicant or subscriber whose telephone service has been denied or disconnected pursuant to this rule and who wishes to have the service initiated or restored must file a complaint with the Commission and may include a request for interim relief in the complaint. Once this relief is requested, the Commission must schedule a public hearing on the complaint to be held within 20 calendar days of the filing of the complaint. This remedy is exclusive. The concerned law enforcement agency has the right to notice of the hearing from the Commission, and has the right to participate in

the hearing, including the right to present evidence and argument, and to present and cross-examine witnesses [PUC Decision No. 91188 (1980), 3 Cal. PUC 2d 87, 92 (App. B)].

At the expiration of 15 days after the refusal or disconnection of service, the utility must, on written request of the applicant or subscriber, provide or restore service unless the law enforcement agency gives the utility written notice of the agency's objection to the provision or restoration of service. If the law enforcement agency objects, the sole remedy of the applicant or subscriber is to file a complaint with the Commission as described above [PUC Decision No. 91188 (1980), 3 Cal. PUC 2d 87, 93 (App. B)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionEnergy & Utilities LawUtility CompaniesService TerminationsGovernmentsState & Territorial GovernmentsLicenses

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41A-473D California Forms of Pleading and Practice--Annotated § 473D.25

§ 473D.25 Evidence by Affidavit

[1] General Procedure

Gov. Code § 11514 (affidavits) sets forth a procedure by which a party may introduce affidavits into evidence as if the affiant had testified orally at the hearing. This procedure may cripple opposing counsel's case if the attorney inadvertently waives the right to cross-examine the affiant by failing to request cross-examination within the proscribed time. A party to a hearing or a continued hearing may introduce an affidavit into evidence, with the same effect as if the affiant had testified orally at the hearing but without having the affiant subject to cross-examination, if the following requirements are met [*Gov. Code § 11514(a)*]:

- The party mails or delivers a copy of any affidavit that the party proposes to introduce into evidence to the opposing party at least 10 days before the hearing.

- The party mails or delivers proper notice with the affidavit [*see Gov. Code § 11514(b)*; *see also [2], below*].

- The opposing party does not request cross-examination of the affiant in a timely manner.

An opposing party who fails to request cross-examination of an affiant in a timely manner is not entitled to complain on appeal of a deprivation of rights by the admission of the affidavit into evidence [*see Park Motors, Inc. v. Cozens (1975) 49 Cal. App. 3d 12, 17-18, 122 Cal. Rptr. 337]* . If the opposing party properly requests the right to cross-examine the affiant, however, and the proponent does not produce the affiant at the hearing, the affidavit may be introduced into evidence, but is only accorded the same effect as other hearsay evidence and thus does not support a finding in and of itself [*Gov. Code §§ 11513(c), (d), 11514(a)*]. Because a request to cross-examine the affiant does not require the proponent to produce the affiant at the hearing, the opposing party should subpoena the affiant if cross-examination is desired [*see 6 Ops. Cal. Atty. Gen. 219 (1945)]* .

There are several circumstances under which counsel should consider using *Gov. Code § 11514*, including the

following:

- When the affiant is potentially unavailable as a witness.
- When the demeanor of a potential witness may be harmful to the case or may cast doubts on the witness's credibility.
- When a potential witness's testimony would be brief and not pivotal.
- When a potential witness would be called solely as a character witness.
- When a proposed witness may be vulnerable to cross-examination.

In addition, in some situations the parties may wish to agree on evidence by affidavit, such as when both parties agree on the contents of the proposed testimony, the witness is not necessarily a key witness, and cross-examination of the witness would not be particularly productive or enlightening. Counsel for the opposing party may also consider waiving the right to cross-examine an affiant whose physical appearance on the witness stand may be quite compelling, such as an elderly person, child, or member of the clergy, and whose cross-examination might not be particularly helpful to the cross-examining party.

[2] Required Notice

Gov. Code § 11514(b) sets forth the requirements for the notice accompanying the copy of the affidavit sent to opposing counsel. The notice must be substantially in the form set forth in the statute and must inform the recipient of the following matters [*Gov. Code § 11514(b)*]:

- The accompanying affidavit of the named affiant will be introduced as evidence at the hearing.
- The named affiant will not be called to testify orally at the hearing.
- Opposing counsel will not be entitled to question the named affiant at the hearing unless opposing counsel notifies the proponent of the affidavit or the proponent's attorney that counsel wishes to cross-examine the affiant.
- Opposing counsel must mail or deliver the request to cross-examine the affiant to the proponent of the affidavit or the proponent's attorney on or before a specified date that is seven days after the mailing or delivery date of the affidavit to opposing counsel.

Note that *Gov. Code § 11514* sets a minimum but not a maximum time for service of the notice of intent to introduce the affidavit and of the affidavit itself. Thus, a tactical advantage may be gained by serving the required notice at the earliest possible time, either with or immediately after the agency's complaint, or with or immediately after the notice of defense for the respondent. Although this step may be tactically effective, it may not stimulate a cordial relationship between opposing counsel.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceAdmissibilityGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceAdmissibilityHearsayAdministrative LawAgency AdjudicationPrehearing ActivityEvidenceTestimonyExaminationCross-ExaminationGeneral Overview

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41A-473D California Forms of Pleading and Practice--Annotated § 473D.26

§ 473D.26 Prehearing Briefs

Some attorneys habitually prepare the equivalent of a trial brief to be presented to the administrative law judge (ALJ) at the commencement of the hearing. In general, however, this step does not give the party a particular tactical advantage, because: (1) the ALJ does not normally read these briefs until conclusion of the hearing, or (2) the hearing may focus on issues other than those raised in the brief. Further, the opposing party is invariably given an opportunity to rebut the points raised in the brief, usually after having had the benefit of hearing and seeing the evidence.

If counsel for one of the parties has a significant issue that he or she feels should be brought to the attention of the ALJ at the outset of the hearing, counsel would be better served by submitting a prehearing brief to the ALJ, with a copy to opposing counsel, approximately two weeks before the hearing the commences. This tactic is particularly helpful when: (1) there is a possibility that the statute of limitations may bar the agency from taking disciplinary action against the licensee, or (2) an issue of res judicata or estoppel may have an impact on the forthcoming administrative hearing. The filing of a prehearing brief may be beneficial in that the brief can serve to focus the ALJ's attention on the issues as defined by the attorney filing the brief, and enable the ALJ to anticipate, and prepare for, issues that may be raised by a party as a preliminary matter. The brief might otherwise be irrelevant to the matters alleged in the administrative complaint, but that may nonetheless aid in the presentation of a particular defense. Although a well-written and well-reasoned prehearing brief may be of assistance in securing favorable preliminary rulings, counsel should be mindful of the fact that ALJs do not have the authority to summarily dismiss a case [*see Frost v. State Personnel Board (1961) 190 Cal. App. 2d 1, 10, 11 Cal. Rptr. 718* ; *see also* Ch. 473C, *Prehearing Procedures in Agency Adjudications*].

The use of a preliminary brief is not appropriate in all circumstances, and counsel should carefully consider whether there is a preliminary issue of sufficient importance to warrant briefing. Further, even if such issues exist, counsel may nevertheless wish to forego the filing of a preliminary brief to avoid educating the opposition as to the theory of his or her case prematurely.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsRes JudicataAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPresiding OfficersDuties & PowersGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsState & Territorial GovernmentsLicenses

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[Reserved]

§§ 473D.27[Reserved]

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41A-473D California Forms of Pleading and Practice--Annotated § 473D.40

§ 473D.40 Federal Constitution

Due process clause. *U.S. Const., amend. XIV, § 1*

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§ 473D.41 State Constitution

Due process clause. *Cal. Const., art. I, § 7(a)*

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41A-473D California Forms of Pleading and Practice--Annotated § 473D.42

§ 473D.42 State Statutes

[1] Administrative Procedure Act

Accusation. *Gov. Code § 11503*

Administrative adjudication *bill of rights*. *Gov. Code §§ 11425.10-11425.60*

Administrative Law Judges. *Gov. Code § 11502*

Affidavits. *Gov. Code § 11514*

Agency decisional authority. *Gov. Code § 11440.10*

Agencies to which act applies. *Gov. Code §§ 11410.10, 11501*

Amendment of pleadings. *Gov. Code §§ 11507, 11516*

Applicability of provisions to statement of issues. *Gov. Code § 11504.5*

Conduct of hearing. *Gov. Code § 11512*

Consolidation of proceedings. *Gov. Code § 11507.3*

Contempt. *Gov. Code §§ 11455.10-11455.30*

Continuances. *Gov. Code § 11524*

Conversion of proceedings. *Gov. Code §§ 11470.10-11470.50*

Decision. *Gov. Code §§ 11516-11520, 11526*

Declaratory decision. *Gov. Code §§ 11465.10-11465.70*

Definitions of terms. *Gov. Code §§ 11405.10-11405.80, 11500*

Depositions. *Gov. Code § 11511*

Discovery. *Gov. Code §§ 11507.5-11507.7*

Disqualification. *Gov. Code §§ 11425.30, 11425.40, 11512*

Emergency decision. *Gov. Code §§ 11460.10-11460.80*

Evidence. *Gov. Code §§ 11435.10, 11440.40, 11513*

Ex parte communications. *Gov. Code §§ 11430.10-11430.80*

Hearings by electronic means *Gov. Code § 11440.30*

Informal hearings. *Gov. Code § 11445.10-11445.60*

Intervention. *Gov. Code § 11440.50*

Language assistance. *Gov. Code § 11435.05-11435.65*

Judicial review. *Gov. Code § 11523*

Notice of defense. *Gov. Code § 11506*

Notice of hearing. *Gov. Code § 11509*

Oaths. *Gov. Code § 11528*

Official notice. *Gov. Code § 11515*

Reconsideration. *Gov. Code § 11521*

Reporting proceedings. *Gov. Code § 11512*

Restoration of rights. *Gov. Code § 11522*

Separate hearings. *Gov. Code § 11507.3*

Service and notice. *Gov. Code § 11440.20*

Service of initial pleading. *Gov. Code § 11505*

Settlement conferences. *Gov. Code § 11511.7*

Sexual harassment. *Gov. Code § 11440.40*

Statement of issues. *Gov. Code § 11504*

Subpoenas. *Gov. Code §§ 11450.05-11450.50*

Time and place of hearing. *Gov. Code § 11508*

Waiver of rights. *Gov. Code § 11415.40*

[2] Related Statutes

Affidavit of good cause required for subpoena duces tecum. *Code Civ. Proc. § 1985*

Witness served with subpoena entitled to demand one day's fees and mileage allowance. *Code Civ. Proc. § 1987*

Witness fees and mileage allowances. *Gov. Code §§ 11191, 68093, 68097.2*

Right to have subpoena issued. *Gov. Code § 11190*

Office of Administrative Hearings. *Gov. Code §§ 11370.3-11370.5*

Board of supervisors of county empowered to establish county hearing officer. *Gov. Code §§ 27720, 27721*

Oaths used in civil proceedings. *Code Civ. Proc. §§ 2094-2097*

Evidentiary effect of plea of nolo contendere. *Penal Code § 1016*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawJudicial ReviewGeneral OverviewGovernmentsLocal GovernmentsAdministrative Boards

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§ 473D.43 Decisions

Appellant is not entitled to continuance for purpose of filing petition to compel discovery pursuant to *Gov. Code § 11507.7* when limitation period for filing petition has expired. *Lax v. Board of Medical Quality Assurance (1981) 116 Cal. App. 3d 669, 675-676, 172 Cal. Rptr. 258*

Respondent is not entitled to continuance for purpose of obtaining counsel or having counsel present if given adequate opportunity to get counsel and have counsel present. *Skipitar v. Munro (1959) 175 Cal. App. 2d 1, 4-6, 345 P.2d 508*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 473D.44 Text References

Judicial Council of California, Tenth Biennial Report (1944)

California Administrative Hearing Practice (Cal. C.E.B. 1984)

Witkin, California Evidence, Ch. III, *Judicial Notice*, §§ 150-191; Ch. X, *Witnesses*, §§ 787-791; Ch. XII, *Introduction of Evidence at Trial*, §§ 1223-1275 (2d ed.)

Legal Topics:

For related research and practice materials, see the following legal topics:
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41A-473D California Forms of Pleading and Practice--Annotated § 473D.45

§ 473D.45 Internet References

Office of Administrative Hearings. This site includes: information and location concerning specific OAH offices; an OAH hearing guide; information concerning Administrative Procedure Act statutes, regulations, and proposed regulations; OAH forms; information concerning alternative dispute resolution procedures; and declaratory decisions. http://www.dgs.ca.gov/oah **NOTE:** On and after July 1, 1998, The OAL is required by *Gov. Code § 11340.1(b)* to make the full text of the California Code of Regulations, with reference citations and history notes, available on the Internet free of charge.

Office of Administrative Law. This site includes: OAL publications; links to OAL statutes and regulations relating to rulemaking; regulations submitted to the OAL for review, and information for contacting or providing input to the OAL regarding rulemaking. http://www.oal.ca.gov

California Home Page. This site includes links to other sites maintained by numerous state agencies. http://www.ca.gov

Department of Consumer Affairs. This site includes links to sites maintained by many state agencies that are under this department, as well as links to agency sites. http://www.dca.ca.gov

California Courts. This site includes: general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most Court of Appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes: text of constitution, codes, and statutes (including complete text of APA); and information concerning pending legislation. http://www.leginfo.ca.gov

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Legal Topics:

For related research and practice materials, see the following legal topics:
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41A-473D California Forms of Pleading and Practice--Annotated §§ 473D.46-473D.49

[Reserved]

§§ 473D.46[Reserved]

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41A-473D California Forms of Pleading and Practice--Annotated § 473D.50

§ 473D.50 Determine the Appropriate Respondent Tactics With Respect to Investigation and Preparation for Hearing

☐ Ascertain the status of the investigation.

- ☐ A charging document has been filed.
- ☐ An investigator has approached the client.
- ☐ The agency has requested documents from the client.

☐ If the client has been approached by an investigator, determine what degree of cooperation with the investigation is advisable or required.

☐ If the agency has requested documents, decide whether to surrender them.

☐ If the client is mentally ill or a substance abuser, determine if the agency has a diversion program that may be available as an alternative to discipline [*see § 473D.10[5]*].

☐ Ascertain desirability of moving for a continuance of the hearing [*see § 473D.12*].

☐ Ascertain desirability of moving for a prehearing conference [*see § 473D.13*].

☐ Ascertain what must be done to prepare for the hearing [*see § 473D.14*].

☐ If desirable, ascertain how to pursue settlement [*see § 473D.15*].

☐ Ascertain what actions client must take to avoid any post-settlement problems with the agency [*see § 473D.15[8]*].

☐ Compliance with the terms of the settlement agreement.

☐ Prompt filing of any reports.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency InvestigationsGeneral Overview

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§ 473D.51 Determine the Likelihood That an Agency May Take Unanticipated Prehearing Steps in a Professional or Vocational Licensing Proceeding

☐ Ascertain the likelihood that a prehearing injunction and restraining order may be issued [*see §§ 473D.21 -473D.23*].

☐ Ascertain the likelihood that on order terminating licensee's telephone service will be issued [*see § 473D.24*].

☐ Determine whether to use affidavits to present evidence [*see § 473D.25*].

☐ Determine whether to use prehearing briefs to prepare the administrative law judge for issues to be raised as a preliminary matter [*see § 473D.26*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesInjunctionsTemporary Restraining OrdersEnergy & Utilities LawUtility CompaniesService TerminationsGovernmentsState & Territorial GovernmentsLicenses

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41A-473D California Forms of Pleading and Practice--Annotated § 473D.52

§ 473D.52 Response to Accusation or Statement of Issues

☐ Prepare notice of defense [*see § 473D.11[2][a]*; for a form, see *§ 473A.54*; for further discussion of the notice of defense, see *§§ 473A.11[6]*, *473A.40*].

☐ Include objection to form of accusation, if applicable [*see Gov. Code § 11506(a)(3)*; *see § 473D.11[2][b]*].

☐ Request prehearing conference on objections raised [*see Gov. Code § 11511.5(a)*; *see also § 473D.11[3][b]*].

☐ File within 15 days after respondent receives accusation [*Gov. Code § 11506(a)*; *see § 473D.11[2][a]*].

☐ Call agency's counsel and request additional time to file notice of defense, if necessary [*see Gov. Code § 11506(b), (c)*; *see also § 473D.11[2][a]*].

☐ Objections to form of accusation not included in notice of defense.

☐ File special notice of defense making the objection [*see Gov. Code § 11506(b)*; *see also § 473D.11[3][b]*].

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41A-473D California Forms of Pleading and Practice--Annotated § 473D.53

§ 473D.53 Preparation for Hearing

[1] Review

☐ Review the accusation or charging document [*see § 473D.14[1]*].

[2] Investigation

☐ Investigate facts at issue [*see § 473D.14[2]*].

[3] Witnesses

☐ Obtain expert witnesses [*see § 473D.14[3]*].

☐ Prepare witnesses [*see § 473D.14[5]*].

☐ Written statement [*see § 473D.14[5][a]*].

☐ Rehearse witnesses [*see § 473D.14[5][b]*].

[4] Documents

☐ Organize documents [*see § 473D.14[4]*].

[5] Client

☐ Prepare client [*see § 473D.14[6]*].

☐ Educate client [*see § 473D.14[6][a]*].

☐ Rehearse client [*see § 473D.14[6][b]*].

[6] Demonstrative Evidence

☐ Prepare demonstrative evidence [*see § 473D.14[7]*].

[7] Briefs

☐ Prepare trial briefs [*see § 473D.14[8]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewEvidenceDemonstrative EvidenceGeneral OverviewEvidenceTestimonyExpertsGeneral Overview

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Chapter 473D PREHEARING PREPARATIONS IN AGENCY ADJUDICATIONS
PART IV. PROCEDURAL CHECKLIST

41A-473D California Forms of Pleading and Practice--Annotated § 473D.54

§ 473D.54 Requesting Discovery Under the APA

[1] Request for Discovery

☐ Prepare written request [for a form, see *§ 473B.61*; for further discussion, see *§§ 473A.14[1], 473B.50*].

☐ Request applicable files [*see § 473D.11[3][c]*].

☐ Include request for continuing discovery [*see § 473D.11[3][b]*].

☐ Service

☐ Serve request before hearing and within 30 days after service by agency of initial pleading [*Gov. Code § 11507.6*; *see § 473D.11[3][a]*].

☐ Serve within 15 days after service of any additional pleading [*Gov. Code § 11507.6*; *see § 473D.11[3][a]*].

[2] Motion to Compel Discovery

☐ Prepare motion [*see Gov. Code § 11507.6*; *see also § 473D.11[3][e]*; for a form, see *§ 473B.63*; for further discussion, see *§§ 473B.16, 473B.50[4]*].

☐ File with ALJ [*Gov. Code § 11507.7(a)*].

☐ See Ch. 473B for detailed discussion.

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Chapter 473E PUBLIC ADMINISTRATIVE LAW JUDGES

41A-473E California Forms of Pleading and Practice--Annotated 473E.syn

§ 473E.syn Synopsis to Chapter 473E: PUBLIC ADMINISTRATIVE LAW JUDGES

§ 473E.01 Scope of Chapter

§ 473E.02 Cross References

[1] Related Coverage of Agency Adjudication

[2] Judicial Review

[3] Public Administrative Law Generally

[4] Other Related Chapters

§§ 473E.03-473E.09 [Reserved]

§ 473E.10 Governing Statutes

§ 473E.11 Status and Appointment of ALJs Under the APA

[1] Office of Administrative Hearings

[a] Purpose of OAH

[b] Staff of Administrative Law Judges

[c] Costs

[2] Qualifications

[3] Duties

§ 473E.12 Role and Function of ALJs in APA Hearings

[1] Hearing by ALJ Alone or ALJ With Agency Members

[2] ALJ Hearing Case Alone

[3] Agency Itself Hearing Case

[4] Power of Decision

§ 473E.13 Agency Hearing Officers in Non-APA Hearings

[1] General Requirements

[2] Role and Function

[3] County Hearing Officers

§§ 473E.14-473E.19 [Reserved]

§ 473E.20 Fair Hearing Standards

[1] Introduction

[2] Constitutional Standard

[3] APA Standard

[4] Non-APA Standards

§ 473E.21 Grounds for Disqualification

[1] Bias and Prejudice

[2] Prejudgment

[a] Questions of Law or Policy

[b] Adjudicative Facts

[3] Personal Prejudice

[4] Financial Interest

[a] Direct Interest

[b] Restriction of Competitors

[c] Composition of Board

[d] Political Reform Act of 1974

[5] Personal Involvement or Relationship

[a] Friends, Acquaintances, and Coworkers

[b] Former Counsel or Co-counsel

[c] Family Relationship to Party

[d] Family Relationship With Lawyer in Proceeding

[e] Personal Knowledge

[6] Other Grounds for Disqualification

[a] Lack of Impartiality

[b] Physical Impairment

[7] Non-Disqualification Grounds

[8] Multiple Roles of Agencies

[a] Prosecution, Investigation, and Adjudication

[i] Constitutional Standards

[ii] APA Standard

[b] Legal Representation

[c] Party Who Imposed Penalty Must Consent to Reduction of Penalty by Reviewing Body

§ 473E.22 Disqualification Procedures

[1] APA Procedures

[a] Request for Disqualification, Waiver, and Timeliness

[b] Contents of Affidavit

[c] Determination of Bias

[d] Peremptory Challenges

[2] Non-APA Procedures

[3] Judicial Review of Decision

§ 473E.23 Rule of Necessity

[1] General Requirements

[2] APA Proceedings

§ 473E.24 Ex Parte Communications

[1] Introduction

[2] APA Requirements

[a] Definitions and Basic Prohibitions

[b] Permissible Communications

[c] Consequences of Violations

[d] Application to Agency Head

[3] Non-APA Requirements

§ 473E.25 ALJ Code of Ethics

[1] Applicability

[2] Incorporation of Code of Judicial Ethics

[a] Code of Judicial Ethics Incorporated Generally

[b] Excluded Provisions of Code of Judicial Ethics

[3] Compliance With and Enforcement of Code

[4] Collective Bargaining Rights Not Affected

§§ 473E.26-473E.29 [Reserved]

§ 473E.30 Federal Constitution

§ 473E.31 State Constitution

§ 473E.32 State Statutes

[1] Administrative Procedure Act

[2] Related Statutes

§ 473E.33 Decisions

[1] Conduct of Hearing

[2] Disqualification of Agency Member

[3] Disqualification of Administrative Law Judge

§ 473E.34 Text References

§ 473E.35 Internet References

§§ 473E.36-473E.39 [Reserved]

§ 473E.40 Request for Disqualification of ALJ or Agency Member

[1] Motion to Disqualify

[2] Peremptory Challenge

§ 473E.41 Disqualification in Non-APA Procedures

§ 473E.42 Waiver of Disqualification

[1] Written Waiver

§§ 473E.43-473E.59 [Reserved]

§ 473E.60 Motion to Disqualify ALJ or Agency Member and Supporting Declaration [Gov. Code § 11512(c)]

[1] FORM

[2] Use of Form

§ 473E.61 Written Waiver of Disqualification [Gov. Code § 11512(c)]

[1] FORM

[2] Use of Form

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41A-473E California Forms of Pleading and Practice--Annotated § 473E.01

§ 473E.01 Scope of Chapter

This chapter provides a discussion of administrative law judges (ALJs) in California public administrative law. The legal background discussion in Part II includes the following:

- Subpart A discusses ALJ issues including appointment, status, role, and function of ALJs, the Office of Administrative Hearings (OAH), the role of ALJs both in adjudications under the Administrative Procedure Act (APA) non-APA agency adjudications [*see §§ 473E.11 -473E.13*].

- Subpart B discusses impartial decision making and bias, including fair hearing standards, bias and prejudice, disqualification procedures, the rule of necessity, and ex parte communications [*see §§ 473E.20 -473E.24*].

Part V includes a form of motion to disqualify an administrative law judge or agency member [*see § 473E.60*] and a form of waiver of disqualification [*see § 473E.61*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationImpartialityGeneral OverviewAdministrative LawAgency AdjudicationImpartialityEx Parte ContactsAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawAgency AdjudicationPresiding OfficersDuties & Powers

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§ 473E.02 Cross References

[1] Related Coverage of Agency Adjudication

For related discussion and forms providing more detailed coverage of the other stages of an agency adjudication under the formal hearing provisions of the APA, see:

- Ch. 473, *Public Agency Adjudication*.
- Ch. 473A, *Commencing Agency Adjudication*.
- Ch. 473B, *Discovery in Agency Adjudications*.
- Ch. 473C, *Prehearing Procedures in Agency Adjudications*.
- Ch. 473D, *Prehearing Preparations in Agency Adjudications*.
- Ch. 473F, *Agency Adjudication Hearings*.
- Ch. 473G, *Agency Adjudication Decisions*.

For related discussion and forms providing more detailed coverage of adjudication methods under the APA other than that of formal hearing, see Ch. 473H, *Alternative Adminstrative Adjudication Procedures* .

For detailed discussion and forms relating generally to licensing agencies, including licensing adjudications, see Ch. 471B, *Licensing by Public Agencies* .

For additional cross references to coverage of agency adjudications before specific agencies, see *Ch. 470, Overview of Public Administrative Law, § 470.02[2]*.

[2] Judicial Review

For detailed discussion and forms relating generally to review by California courts of agency adjudications, see:

- Ch. 474, *Availability of Judicial Review of Agency Decisions*.
- Ch. 474A, *Timing of Judicial Review of Agency Decisions*.
- Ch. 474B, *Standards in Reviewing Agency Decisions*.
- Ch. 474C, *Procedures in Reviewing Agency Decisions*.

For other related discussion and forms relating to judicial review generally, see:

- Ch. 40, *Appeal: An Overview*, through Ch. 54, *Appeal: California Supreme Court Review* (discussion and forms relating to civil appeals).
- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to immediate judicial review of orders by extraordinary writ of mandate or prohibition).
- Ch. 492, *Review (Certiorari), Writ of* (discussion and forms relating to immediate judicial review of civil proceedings by extraordinary writ of review).

For forms for use in drafting memoranda in judicial proceedings to review a public agency decision, see California Points and Authorities, Ch. 195, *Public Administrative Law* (Matthew Bender).

[3] Public Administrative Law Generally

For related discussion of California public administrative law generally, including discussion of public agency functions and powers (including adjudicative or quasi-judicial powers), and organization generally, see Ch. 470, *Overview of Public Administrative Law* (for general discussion of judicial power, see *§ 470.12[5]*). For detailed discussion of the general procedures imposed in agency proceedings by constitutional due process and related statutory requirements, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

For discussion and forms relating to the law governing access to and conduct of meetings by California public agencies, see Ch. 470B, *Public Agency Meetings* .

For detailed discussion and forms relating to the law governing disclosure of public records under the California Public Records Act [*Cal. Gov. Code §§ 6250 et seq.*], see Ch. 470C, *Public Records Act* .

For detailed discussion and forms relating generally to agency investigations and inspections, see:

- Ch. 471, *Investigations by Public Agencies*.
- Ch. 471A, *Inspections by Public Agencies*.

For detailed discussion and forms relating generally to the legislative or rulemaking functions of California public agencies, including judicial review of these functions, see:

- Ch. 472, *Public Agency Rules*.

- Ch. 472A, *Agency Rulemaking Procedures*.
- Ch. 472B, *Review of Agency Rulemaking*.

[4] Other Related Chapters

For discussion and forms relating to the disqualification of judges in civil actions generally, see Ch. 317, *Judges* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationAlternative Dispute ResolutionAdministrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawJudicial ReviewGeneral Overview

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[Reserved]

§§ 473E.03[Reserved]

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§ 473E.10 Governing Statutes

Administrative Law Judges (ALJs) and the Office of Administrative Hearings (OAH) is governed generally by Chapter 4, "Office of Administrative Hearings," Gov. Code. Code §§ 11370-11370.5. Chapter 4 is one of four Government Code chapters that comprise the Administrative Procedure Act (APA); the others are Chapter 3.5 (Rulemaking; Gov. Code. Code § 11340 et seq., Chapters 4.5 and 5 (Administrative Adjudication; Gov. Code. Code § 11400 et seq. and Gov. Code. Code § 11500 et seq., [*see* Gov. Code. Code § 11370 (citation of APA)]. Technically, these four chapters are not chapters of the APA itself, but are chapters within Part 1 (State Departments and Agencies) of Division 3 (Executive Department) of Title 2 (California State Government) of the Government Code. For convenience, they are often referred to simply as Chapter 4, Chapter 4.5, etc.

The conduct and disqualification of ALJs, when acting as the presiding officer in an administration adjudication, are governed also by Article 6 of Chapter 4.5, "The Administrative Adjudication *Bill of Rights*," Gov. Code. Code §§ 11425.10-11425.60, and Article 7, "Ex Parte Communication," Gov. Code. Code §§ 11430.10-11430.80.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationImpartialityGeneral Overview

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41A-473E California Forms of Pleading and Practice--Annotated § 473E.11

§ 473E.11 Status and Appointment of ALJs Under the APA

[1] Office of Administrative Hearings

[a] Purpose of OAH

The Office of Administrative Hearings (the OAH), previously called the Office of Administrative Procedure, was established by the APA as a centralized office, responsible for the conduct of administrative hearings [*Gov. Code § 11370.2*]. The OAH combines the hearing functions that, in dissimilar and disparate ways, had been formerly exercised by the staff and boards of various licensing agencies. It was designed, in other words, to establish uniformity in agency proceedings and eliminate "an almost unbelievable diversity" in agency procedures that had arisen in the absence of any centralized organizing agency [*see* Tenth Biennial Report of the Judicial Council of California, Dec. 31, 1944, pp. 10, 11].

The OAH has promulgated administrative regulations under *Gov. Code § 11370.5(b)* which set out the procedures by which OAH conducts hearings before ALJ's who work for the OAH [*see 1 Cal. Code Reg. § 1000 et seq.*]. These regulations should be consulted to determine specific procedural requirements during the prehearing, hearing, and post-hearing stages of proceedings before such ALJ's.

[b] Staff of Administrative Law Judges

The OAH is under the direction and control of an executive officer known as the director [*Gov. Code §§ 11370.1, 11370.2(a)*], who is appointed by the governor subject to confirmation of the Senate [*Gov. Code § 11370.2(b)*].

The director must appoint and maintain a staff of full-time ALJs [*Gov. Code § 11370.3*; *see Gov. Code § 11502* (qualifications), and discussion in [3], *below*]. The director may also appoint a staff of pro tempore, part-time ALJs sufficient to fill the needs of the various state agencies [*Gov. Code § 11370.3*]. The director assigns an ALJ in the following instances [*Gov. Code § 11370.3*]:

- For any adjudicatory hearing under the APA's formal hearing provisions (Gov. Code. Code § 11500

et seq.).

- At the request of any agency, and at the director's discretion, to conduct other administrative proceedings not arising under the APA's formal hearing provisions.

The ALJs of the OAH are deemed to be employees of the OAH, rather than of the agency to which they are assigned. Note that, after the enactment of the APA in 1945 and before 1985, ALJs were known as "hearing officers" [*see* Stats. 1985, Ch. 324]; decisions under the prior law thus use this term.

When the Judicial Council recommended formation of a centralized agency to maintain a staff of qualified hearing officers that state agencies would be required to use in adjudicatory hearings, it observed that the success of such a plan required hearing officers to be well-qualified in the fields of law and procedure and, thus, accorded the position a relatively independent status [Tenth Biennial Report of the Judicial Council of California, Dec. 31, 1944, p. 13]. As a result, the ALJs have the independence and tenure necessary for them to perform their duties free from outside influences, which the Council believed would result from civil service status and employment subject to the control of the central agency rather than the licensing agencies [Tenth Biennial Report of the Judicial Council of California, Dec. 31, 1944, p. 14].

[c] Costs

The costs of the ALJs' services are borne by the agencies that use them [*Gov. Code § 11370.4*]. The parent agency of the OAH, the State Department of General Services, annually establishes hourly rates for its ALJs and shorthand reporters that are calculated to cover the OAH's costs of the operation, including personnel, travel, training, and other expenses [*see Gov. Code § 11370.4*]. ALJs maintain records of the time devoted to such things as preparation for and conduct of the hearing, researching and writing the decision, and travel associated with each case, all of which is billed to the agency.

Licensing agencies authorized to collect costs of investigation and prosecution may request that the ALJ fix appropriate costs in the proposed decision [*see, e.g., Bus. & Prof. Code § 2497.5* (Board of Podiatric Medicine)]. Costs of a teacher dismissal or suspension hearing are shared equally by the governing board of the school district that filed the accusation and the dismissed or suspended teacher; when an accusation is dismissed, the costs are borne by the district alone [*Educ. Code § 44944(e)*].

[2] Qualifications

To ensure that the positions will be held by persons of experience who are qualified in the procedural field, *Gov. Code § 11502(b)* requires each ALJ to have been admitted to law practice in California for at least five years immediately preceding the appointment [*Gov. Code § 11502(b)*; *see* Tenth Biennial Report of the Judicial Council of California, Dec. 31, 1944, p. 14]. The term "immediately" means that the appointee must have been in practice at least five years continuously, counting back from the date of appointment. In addition, each judge must possess any additional qualifications established by the State Personnel Board for the particular class of position involved [*Gov. Code § 11502(b)*]. That Board conducts civil service examinations as necessary to establish lists of qualified individuals from which the director may appoint ALJs. A presiding ALJ, designated by the director, performs supervisory and administrative functions in each of the regional offices located in Oakland, San Diego, Sacramento, and Los Angeles [*see Gov. Code § 11508(a)* (location of hearings)].

[3] Duties

The primary duty of an ALJ is to preside over adjudicatory hearings in contested APA cases [*Gov. Code §§ 11502, 11512(a)*; for further discussion of that duty, *see § 473E.12*]. In addition, ALJs conduct other kinds of hearings for state

agencies and boards, and conduct civil service hearings, retirement system entitlement hearings, and other matters for local agencies, cities, and counties. Since 1965, California counties and other local public entities have been authorized to contract with the OAH for the services of an ALJ to conduct their hearing proceedings [*Gov. Code § 27727*]. The role and function of the ALJ in these other kinds of hearings is usually set out in the relevant civil service rules, retirement provisions, or regulations of the agency that has contracted with the OAH for that service [*see, e.g., Gov. Code § 27722* (county hearings)]. The cost of the ALJ is charged at the same hourly rate established for APA matters [*see* [1][c], *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawAgency AdjudicationPresiding OfficersDuties & PowersGovernmentsLocal GovernmentsEmployees & Officials

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§ 473E.12 Role and Function of ALJs in APA Hearings

[1] Hearing by ALJ Alone or ALJ With Agency Members

Any hearing in a contested case conducted under the APA's formal hearing provisions (Gov. Code. Code § 11500 et seq.) must be presided over by an ALJ [*Gov. Code § 11512(a)*].

The particular agency, however, determines whether the assigned ALJ will hear the case alone, or whether the "agency itself" (*i.e.*, agency members) will hear the case together with the ALJ [*Gov. Code § 11512(a)*; *Usher v. County of Monterey (1998) 65 Cal. App. 4th 210, 218-219, 76 Cal. Rptr. 2d 274]* . That agency cannot assign a hearing officer to preside over the hearing, but must assign an ALJ to preside over the hearing, or have the agency hear the case with an ALJ presiding [*Gov. Code § 11512(a)*; *Gov. Code § 21156*; *Langan v. City of El Monte (2000) 79 Cal. App. 4th 608, 617-618, 94 Cal. Rptr. 2d 254]* . The ALJ's duties vary depending on this determination. An agency may change its initial determination regarding who will hear the case. The court of appeal has held that due process was not denied to a respondent when an agency itself started to hear a case, but midway through the hearing decided to withdraw and let the ALJ continue to hear the case alone [*Feist v. Rowe (1970) 3 Cal. App. 3d 404, 421, 83 Cal. Rptr. 465]* . This same procedure is authorized by *Gov. Code § 11512(e)*, for circumstances in which an agency quorum no longer exists while a hearing is in progress [*Gov. Code § 11512(e)*].

The requirement that an ALJ hear the case, either alone or with agency members, was designed to eliminate the actual or seeming unfairness whenever agency members hearing the case would seek legal advice from the prosecuting agency attorney because of their unfamiliarity with procedural law and complex legal issues [Tenth Biennial Report of the Judicial Council, Dec. 31, 1944, pp. 19, 20].

[2] ALJ Hearing Case Alone

In practice, most cases under the APA are heard by ALJs sitting alone. Agency members generally participate only in important cases, cases requiring the application of specialized knowledge, or cases involving agency policy. The matters most frequently heard by an agency itself are Board of Medical Quality license discipline accusations in which either incompetence or gross negligence is alleged [*Bus. & Prof. Code §§ 2234(b), (d), 2332(d), (e)*], and petitions to restore a

suspended license or amend probationary terms filed with the Board of Medical Quality or Board of Registered Nursing [*Gov. Code § 11522*; *Bus. & Prof. Code §§ 2332(f), 2760*]. The latter are typically brief hearings conducted during the agency's regularly scheduled meetings. A respondent does not have a right to a hearing by the agency itself [*Gov. Code § 11512(a)*], and the difficulty of convening board or commission members for a lengthy hearing conducted during the business day accounts for the relative infrequency of the agency hearings.

When an ALJ alone hears a case, he or she exercises all the powers necessary to conduct the hearing [*Gov. Code § 11512(b)*]. In effect, the ALJ is a deputy of the agency [Tenth Biennial Report of the Judicial Council, Dec. 31, 1944, p. 20]. The ALJ must conduct the hearing, weigh the evidence, and research and apply the law. Within 30 days after the case is submitted, the ALJ must prepare a proposed written decision containing a statement of the factual and legal basis of the decision, and the penalty, if any, in a form that may be adopted by the agency as the decision in the case [*Gov. Code §§ 11517(c)(1), 11425.50*].

In one of the earlier appellate decisions following the initial enactment of APA, the court of appeal concluded that, so long as the agency retains the authority to approve or reject the proposed decision of an ALJ, its delegation of power to the ALJ, to decide the case alone, is specifically authorized by statute and is not a violation of due process [*Hohreiter v. Garrison (1947) 81 Cal. App. 2d 384, 398-399, 184 P.2d 323]* . *Gov. Code § 11517* provides that when an ALJ acts alone, the agency may adopt his or her decision without reading or otherwise familiarizing itself with the record [*Hohreiter v. Garrison (1947) 81 Cal. App. 2d 384, 398-399, 184 P.2d 323* ; *see Griggs v. Board of Trustees (1964) 61 Cal. 2d 93, 98, 37 Cal. Rptr. 194, 389 P.2d 722* (interpreting similar provisions in Education Code governing teacher dismissal hearings); for discussion of the record on decision, *see* Ch. 473G, *Agency Adjudication Decisions*].

This principle was extended one step further in a case in which the hearing officer who conducted the hearing died before preparing a recommended decision. The agency appointed a new hearing officer who reviewed all of the evidence presented at the hearing and prepared a recommended decision that the agency adopted [*Keith v. San Bernardino County Retirement Bd. (1990) 222 Cal. App. 3d 411, 414-415, 271 Cal. Rptr. 649]* .

[3] Agency Itself Hearing Case

When the agency itself hears the case, the ALJ presides at the hearing, rules on the admission and exclusion of evidence, swears witnesses, advises the agency on matters of law, and otherwise assists the agency as requested [*Gov. Code § 11512(b)*]. While the agency itself may exercise all other powers relating to the conduct of the hearing, it may also delegate any or all of those powers to the ALJ [*Gov. Code § 11512(b)*].

[4] Power of Decision

Whether the ALJ alone or the agency itself has heard the case, the agency has the power to decide the case [*Gov. Code § 11517(c)(2)*]. If an ALJ has heard the case, the agency may take one of the following actions [*Gov. Code § 11517(c)(2)*]:

- Adopt the ALJ's proposed decision in its entirety [*Gov. Code § 11517(c)(2)(A)*].

- Reduce or otherwise mitigate any proposed penalty and adopt the balance of the proposed decision [*Gov. Code § 11517(c)(2)(B)*].

- Make technical or other minor changes in the proposed decision and adopt it as the decision. Action by the agency under this option is limited to a clarifying change or a change of a similar nature that does not affect the factual or legal basis of the proposed decision [*Gov. Code § 11517(c)(2)(C)*].

- Reject the proposed decision and decide the case on the record, including the transcript, or an agreed

statement of the parties, with or without taking additional evidence [*Gov. Code § 11517(c)(2)(E)*].

- Reject the proposed decision and refer the case to the same ALJ if reasonably available, otherwise to another ALJ to take additional evidence [*Gov. Code § 11517(c)(2)(D)*].

The agency's authority to decide the case includes the authority to decide some but not all of the issues in the case [*Gov. Code § 11517(c)(2)(E)(iii)*].

When the ALJ hears the case alone, the agency's power of decision includes the power to review any evidentiary rulings of the ALJ who conducted the hearing [*Gov. Code § 11512(b)*], but this review power can not be exercised until the ALJ's hearing is completed, and the ALJ has issued a proposed decision. It is not proper for the agency to review evidentiary rulings of the ALJ before the hearing has been completed [*Fireman's Fund Insurance Companies v. Quackenbush (1997) 52 Cal. App. 4th 599, 605-608, 60 Cal. Rptr. 2d 732* (Insurance Commissioner could not review on interlocutory basis evidentiary rulings of ALJ conducting Prop. 103 rollback hearing, while hearing was still pending under requirements of APA, *Gov. Code § 11512*, and agency-specific provisions of Insurance Code)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawAgency AdjudicationPresiding OfficersDuties & Powers

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§ 473E.13 Agency Hearing Officers in Non-APA Hearings

[1] General Requirements

Various state agencies employ in-house hearing officers or ALJs to conduct hearings which are not subject to the APA's formal hearing provisions (Gov. Code. Code § 11500) [*see Gov. Code § 11501(a)* (APA applies only to extent required by agency's governing law); *see* Ch. 473, *Public Agency Adjudication*].

Appointment of in house ALJ's who are employees of the agency whose cases they adjudicate is frequently authorized by the agency governing statute, and that specific statute is controlling as to ALJ appointment over the more general provisions of the APA which require use of OAH ALJ's [*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (2002) 99 Cal. App. 4th 880, 883-885, 121 Cal. Rptr. 2d 729* Cal. Rptr. 2d729 (*Bus. & Prof. Code § 24210* authorized director to appoint ALJ, who was employee of Department, to hear and decide case, and that statute was controlling under *Gov Code §§ 11501(a), 11415.10*, and *11415.20* not APA requirement contained in *Gov. Code § 11502* that ALJ's from Office of Administrative Hearings be used)].

Non-APA hearings include the following:

- Social services entitlement proceedings [*Welf. & Inst. Code §§ 10950-10967*; *see* Ch. 517, *Social Services*].

- Hearings to suspend or revoke motor vehicle operator licenses [*Veh. Code §§ 12500, 13350-13368, 14100*; *see* Ch. 92, *Automobiles: Drivers' Licenses*].

- Civil service hearings [*Gov. Code §§ 18670-18683*; *see* Ch. 118, *Civil Service*].

- Medi-Cal audit appeals [*Welf. & Inst. Code §§ 14123, 14124*].

Although in-house hearing officers are frequently employed by and under the direction of the same agency that is the

investigator and prosecutor in the matter, this combination of functions within the agency is not, per se, a violation of due process without a showing of actual bias [*Griggs v. Board of Trustees (1964) 61 Cal. 2d 93, 98, 37 Cal. Rptr. 194, 389 P.2d 722* ; *see § 473E.21[6]*]. Employment of the ALJ (and payment of the ALJ) by the agency holding the hearing does not violate the due process of law right to an impartial decision maker, and does not require disqualification of the ALJ because the financial interest of the ALJ is too remote to require disqualification without a showing of actual bias. Furthermore, ALJ's are unlikely to be influenced to rule in favor of their employer by the desire for continued employment, because ALJ's are protected by civil service law [*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2002) 99 Cal. App. 4th 880, 885-887, 121 Cal. Rptr. 2d 729]* . However, when the ALJ has a strong direct financial interest in the resolution of the case, then the ALJ can be disqualified without a showing of actual bias [*Haas v. County of San Bernardino (2002) 27 Cal. 4th 1017, 1032-1034, 119 Cal. Rptr. 2d 341, 45 P.3d 280]* . Similarly, appointment of the ALJ by the department does not violate due process of law because bias will not be presumed based on appointment, no showing of actual bias was made, and there was adequate judicial review of the ALJ's decision by the Board, and the courts [*CMPB Friends, Inc. v. Alcoholic Beverage Control Appeals Board (2002) 100 Cal. App. 4th 1250, 1257-1259, 122 Cal. Rptr. 2d 914]* . However, internal separation of functions is required by *Gov. Code § 11425.10(a)* [*see § 473E.21*].

[2] Role and Function

The role and function of hearing officers or ALJs in non-California APA matters is established by statutory or other authority permitting delegation of the agency's adjudicatory function. For example, the State Personnel Board can properly delegate conduct of the evidentiary hearing and preparation of a proposed decision to its hearing officer and may adopt a proposed decision upholding the dismissal of civil service employees without review of the record, evidence, or written arguments of the parties [*Gov. Code § 19582(a), (b)*; *see Fichera v. State Personnel Board (1963) 217 Cal. App. 2d 613, 618-619, 32 Cal. Rptr. 159* (dismissal of police officers by state personnel board upheld)].

[3] County Hearing Officers

The board of supervisors of any county may appoint an attorney as county hearing officer to hear contested matters for the various boards, agencies, commissions, or committees of the county [*Gov. Code § 27720*]. A county hearing officer, or a deputy or assistant hearing officer, must be an attorney admitted to practice for at least five years prior to appointment [*Gov. Code § 27724*]. The hearing officer may be authorized by ordinance or resolution to do any of the following [*Gov. Code § 27721*]:

- Conduct the county hearing.
- Issue subpoenas.
- Receive evidence.
- Administer oaths.
- Rule on questions of law and the admissibility of evidence.
- Prepare a record of the proceedings.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationImpartialityGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawAgency AdjudicationPresiding

OfficersDuties & PowersGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsEmployees & Officials

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[Reserved]

§§ 473E.14[Reserved]

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§ 473E.20 Fair Hearing Standards

[1] Introduction

An attorney representing a party in an administrative adjudication should ensure that the presiding ALJ, agency members, or presiding officer will provide his or her client with a fair hearing. Fair hearing standards that must be met are set forth in the due process clauses of the United States and California Constitutions [*see* [2], *below*], in the APA, and in other statutes and regulations governing specific agencies [*see § 473E.12[3], [4]*]. The APA also sets standards of conduct concerning ex parte communications with the ALJ or presiding officer [*see § 473E.24*]. In addition, certain fact situations may arise that indicate an adjudicator's bias or inability to conduct a fair hearing [*see § 473E.21*].

The procedures required to challenge the impartiality of an ALJ or agency member are set forth in the APA and other statutes and regulations governing particular agencies [*see § 473E.22*]. However, the "rule of necessity" may require a person who is otherwise disqualified to participate in an administrative hearing [*see* discussion in *§ 473E.23*]. The APA sets forth specific rules governing ex parte communications between the adjudicator and persons interested in the outcome of the hearing.

[2] Constitutional Standard

An impartial, unbiased adjudicator is an essential element of procedural due process [*U.S. Const., amend. XIV, § 1*; *Cal. Const., art. I, § 7* (due process clauses); *Marshall v. Jerrico, Inc. (1980) 446 U.S. 238, 242, 100 S. Ct. 1610, 64 L. Ed. 2d 182* ; *Morrissey v. Brewer (1972) 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484* ; *Goldberg v. Kelly (1970) 397 U.S. 254, 271, 90 S. Ct. 1011, 25 L. Ed. 2d 287]* . Thus, a respondent whose professional future will be determined by a licensing agency or whose livelihood or property interests will be affected by a contested proceeding has an absolute right to the consideration of the case by an objective, competent, and fair ALJ or agency. As the U.S. Supreme Court stated in *Marshall v. Jerrico, Inc. (1980) 446 U.S. 238, 242, 100 S. Ct. 1610, 64 L. Ed. 2d 182* :

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the

> promotion of participation and dialogue by affected individuals in the decisionmaking process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law.

Fairness requires an absence of actual bias in the trial of cases, and should preclude even the probability of bias [*In re Murchison (1954) 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942]* . Procedural due process of law standards are violated when an agency decision maker has a personal financial interest in the proceedings [*Gibson v. Berryhill (1973) 411 U.S. 564, 579, 93 S. Ct. 1689, 36 L. Ed. 2d 488]* . However, the institutional structure of agencies that combines investigation, prosecution, and adjudication in the same agency does not violate due process of law [*Withrow v. Larkin (1975) 421 U.S. 35, 56-57, 95 S. Ct. 1456, 43 L. Ed. 2d 712]* .

A county retirement board did not violate due process of law by both investigating and adjudicating retirement benefits applications. The Board can select unilaterally and compensate hearing officers consistent with due process of law. Due process of law does not require that the applicant participate in the hearing officer selection process Board selection and compensation of hearing officers does not, by itself, establish bias against applicants for retirement benefits on the part of the hearing officers [*McIntyre v. Santa Barbara County Employees' Retirement System (2001) 91 Cal. App. 4th 730, 735-736, 110 Cal. Rptr. 2d 565]* .

When the ALJ has a strong direct financial interest in the resolution of the case, then the ALJ can be disqualified under the due process of law right to an impartial decision maker without a showing of actual bias [*Haas v. County of San Bernardino (2002) 27 Cal. 4th 1017, 1032-1034, 119 Cal. Rptr. 2d 341, 45 P.3d 280]* . However, when the financial interest is remote, indirect, and uncertain, then proof of actual bias is required to establish a violation of the due process right to an impartial decision maker. Proof of the appearance of bias is not sufficient [*Gai v. City of Selma (1998) 68 Cal. App. 4th 213, 219-220, 79 Cal. Rptr. 2d 910]* . Thus, when an administrative decision maker's financial interest was too remote, indirect, and uncertain, it did not operate to trigger the probability of actual bias standard for due process scrutiny of decision makers with financial interests [*Gai v. City of Selma (1998) 68 Cal. App. 4th 213, 228-229, 79 Cal. Rptr. 2d 910]* . The appearance of bias standard applicable to trial court judges, set out in *Code Civ. Proc. § 170.1(a)(6)(c)*, does not apply to administrative hearing officers [*Gai v. City of Selma (1998) 68 Cal. App. 4th 213, 233, 79 Cal. Rptr. 2d 910]* .

For a complete discussion of procedural due process requirements applicable to administrative adjudication, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

[3] APA Standard

The APA requires an ALJ or agency member to voluntarily disqualify himself or herself and withdraw from any case in which there are grounds for disqualification, including disqualification under *Gov. Code § 11425.40* (bias, prejudice, or interest) [*Gov. Code § 11512(c)*; *see § 473E.21* for grounds for disqualification]. The parties may waive the disqualification by a writing that recites the grounds for disqualification. A waiver is effective only when signed by all parties, accepted by the administrative law judge, or agency member, and included in the record. For a form of waiver, see *§ 473E.61*.

Any party may request the disqualification of any ALJ or agency member by filing an affidavit, prior to the taking of evidence at a hearing, stating specifically the grounds for claiming that the administrative law judge or agency member is disqualified [*Gov. Code § 11512(c)*; *see § 473E.22*, for a discussion of procedural requirements for disqualification]. Ex parte communications with presiding officers are also prohibited in certain circumstances and are permissible in other circumstances [*see Gov. Code §§ 11430.10-11430.80*, and discussion in *§ 473E.24*]. A presiding officer who receives an improper ex parte communication may be disqualified [*Gov. Code § 11430.60*; *see § 473E.24*].

The APA impartial decision maker standard states general grounds for disqualification including bias, prejudice, or

interest in the proceeding [*Gov. Code § 11425.40(a)*; *State Water Resources Control Board Cases (2006) 136 Cal. App. 4th 674, 840-842, 39 Cal. Rptr. 3d 189* (Board members participation in rule making proceedings with water policy council, as well as staff communications about related matters did not provide a valid basis for disqualification of Board members based on bias, prejudice, or interest in the proceeding under *Gov. Code § 11425.40(a)*)], and the act states specific grounds that are not sufficient for disqualification [*Gov. Code § 11425.40(b)*; *see §§ 473E.21, 473E.22*].

The right to challenge an adjudicator on the grounds of bias, prejudice, or financial interest is a departure from common law principles. For that reason, and because delay and calendaring difficulties necessarily result from such challenges, the Judicial Council drafted the APA to require that a motion for disqualification be timely made and supported by an affidavit [Tenth Biennial Report of the Judicial Council of California, Dec. 31, 1944, pp. 18-20; *see Gov. Code § 11512(c)*, and discussion in *§ 473E.22*].

Agency hearing officers and agencies that conduct proceedings not governed by Chapter 5, the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*) are subject to the impartial decision maker requirements of Chapter 4.5, that is, *Gov. Code §§ 11425.10(5)* and *11425.40*, if those agencies are state agencies, and a hearing is constitutionally or statutorily required [*Gov. Code §§ 11410.10, 11410.20(a)*; for further discussion of these provisions, determining the applicability of Chapter 4.5 provisions, *see Ch. 473, Public Agency Adjudication, § 473.15*].

[4] Non-APA Standards

Agencies that are not subject to the requirements of the APA may be subject to fair hearing standards, established by regulation or agency policy, similar to the APA impartial decision maker standard. For example, ALJs who conduct proceedings for the Department of Developmental Services are subject to an agency promulgated "fair and impartial hearing" standard [*17 Cal. Code Reg. § 50604(A)*]. Similarly, the hearing officer in a Medi-Cal proceeding for the Department of Health Services, and in a Department of Mental Health proceeding, is subject to disqualification if he or she is unable to provide a fair or impartial hearing, or if he or she has an interest in the proceedings [*22 Cal. Code Reg. § 51043(a)*; *9 Cal. Code Reg. § 1565*]. A workers' compensation judge is subject to the same standards that govern referees [*8 Cal. Code Reg. § 10452*; *Lab. Code § 5311*; *see Code Civ. Proc. § 641* (grounds for disqualification of referees)].

If no regulations or informal guidelines provide fair hearing standards, the adjudicator's impartiality may still be reviewed on appeal, pursuant to a writ of administrative mandate [*see Code Civ. Proc. § 1094.5*; *Clark v. City of Hermosa Beach (1996) 48 Cal. App. 4th 1152, 1168-1169, 56 Cal. Rptr. 2d 223* (writ of mandate under *Code Civ. Proc. § 1094.5* is proper vehicle to review claim of property owner that city had denied owner fair hearing)]. The writ is framed as an inquiry into the validity of an administrative decision, specifically, the deprivation of a fair hearing [*see Code Civ. Proc. §§ 1094.5(a), 1094.5(b)*; *see § 473E.22[4]*]. For further discussion of judicial review pursuant to a writ of administrative mandate, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationImpartialityGeneral OverviewAdministrative LawAgency AdjudicationImpartialityEx Parte ContactsAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawJudicial ReviewRemediesMandamusConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of Protection

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§ 473E.21 Grounds for Disqualification

[1] Bias and Prejudice

Certain factual situations involving the adjudicator's lack of impartiality in an administrative hearing are quite common and have been the subject of numerous judicial opinions. Some situations, such as financial interest in the outcome, have been addressed in statutes or rules [*see* [4], *below*].

When considering making a request to disqualify an adjudicator [*see § 473E.22*], it is important to determine the existence of all possible grounds for disqualification; the cumulative impact of several kinds of bias may be just as important for disqualification as that of one overriding basis [Maloney, *Disqualification of Administrative Law Judges in California, 16 U.S.F. L. Rev. 229, 243*-244 (1982)].

It is useful to refer to the provisions of *Code Civ. Proc. § 170.1*, and case law construing that statute, for specific grounds for disqualification that apply to judges in civil actions [*Code Civ. Proc. § 170.1*]. Many of these grounds can be adapted to disqualification motions brought in administrative hearings [*see* detailed discussion in Ch. 317, *Judges*].

In *Andrews v. Agricultural Labor Relations Bd. (1981) 28 Cal. 3d 781, 171 Cal. Rptr. 590, 623 P.2d 151* , the California Supreme Court articulated a two-part process for disqualification based on bias. First, the affidavit for disqualification must set forth "legally sufficient facts demonstrating bias." Second, the bias or prejudice must be "sufficient to impair the judge's impartiality" [*Andrews v. Agricultural Labor Relations Bd. (1981) 28 Cal. 3d 781, 792, 171 Cal. Rptr. 590, 623 P.2d 151]* . The first part of the test is crucial, because once the existence of bias has been established, it will not be difficult to demonstrate that a fair and impartial trial or hearing appears improbable. The challenging party must show actual bias, rather than the mere appearance of bias [*Andrews v. Agricultural Labor Relations Bd. (1981) 28 Cal. 3d 781, 793, 171 Cal. Rptr. 590, 623 P.2d 151* ; *see also Clark v. City of Hermosa Beach (1996) 48 Cal. App. 4th 1152, 1172-1173, 56 Cal. Rptr. 2d 223* (city council member had conflict of interest and personal animosity toward property owner, and therefore property owner was deprived of right to impartial decisionmaker which is a fair hearing requirement)].

Thus, the *appearance* of bias standard set out in *Code Civ. Proc. § 170.1(a)(6)(c)*, while applicable to trial court judges, does not apply to administrative hearing officers. Proof of actual bias, rather than its appearance, is necessary to show a violation of the due process right to an impartial decision maker in an administrative hearing [*Gai v. City of Selma (1998) 68 Cal. App. 4th 213, 219-220, 228-233, 79 Cal. Rptr. 2d 910* (administrative decision maker's financial interest was too remote, indirect, and uncertain to trigger the probability of actual bias standard for due process scrutiny of decision makers with financial interests)].

The APA impartial decision maker standard states that the presiding officer is subject to disqualification for bias, prejudice, or interest in the proceeding [*Gov. Code § 11425.40(a)*; *Gov. Code § 11405.80* (definition of presiding officer)]. Other than that general language, no specific disqualification standards are stated in the act. Also, the act states specific grounds that are not sufficient for disqualification [*Gov. Code § 11425.40(b)*; *see* [7], *below*]. Disqualification grounds apply also to agency heads and other persons or bodies to which the power to hear or decide in the proceeding is delegated [*Gov. Code § 11425.40(c)*], and agencies that conduct adjudicative proceedings have the option of adopting regulations that authorize peremptory challenges of the presiding officer [*Gov. Code § 11425.40(d)*; *see Gov. Code § 11405.20* and discussion in *§ 473E.22*].

[2] Prejudgment

[a] Questions of Law or Policy

Historically, the preconceptions or bias that an ALJ or agency member brings to an adjudication regarding issues of law or policy have not been deemed to be grounds for disqualification [*Andrews v. Agricultural Labor Relations Bd. (1981) 28 Cal. 3d 781, 790, 171 Cal. Rptr. 590, 623 P.2d 151* ; *see* Davis, Administrative Law Treatise, vol. 3, § 19:2 (2d ed. 1980)]. In contrast to the broad variety of matters heard by courts, the subject matter of cases heard by a particular administrative agency and its ALJs and hearing officers is necessarily limited by the jurisdiction of the agency. Thus, an agency adjudicator is predictably familiar with the elements of, and case law concerning, the most common proceedings before the agency. For example, entrapment is frequently asserted in accusations concerning the sale of alcoholic beverages to a minor [*Bus. & Prof. Code § 25658*] who turns out to be a police decoy. Entrapment is also a common defense in other kinds of disciplinary hearings [*see, e.g.,* *Patty v. Board of Medical Examiners (1973) 9 Cal. 3d 356, 107 Cal. Rptr. 473, 508 P.2d 1121* (entrapment defense asserted in Board of Medical Examiners hearing, to charges of unprofessional conduct in prescribing narcotics for nonmedical use); *Wong v. State Bar (1975) 15 Cal. 3d 528, 125 Cal. Rptr. 482, 542 P.2d 642* (entrapment defense asserted in hearing by Disciplinary Board of State Bar, to charges of soliciting money to bribe policemen to permit illegal gambling)]. Consequently, an ALJ who has repeatedly encountered the issue would be expected to know the relevant case law. This familiarity with the relevant law is an element of competence, rather than impermissible prejudgment [*see* Davis, *Administrative Law Treatise*, vol. 3, § 19:2 (2d ed. 1980)].

Even a publicly expressed view concerning the wisdom or desirability of a law or precedent will not disqualify the proponent of that view from hearing a matter to which the law will pertain [*Christal v. Police Commission (1939) 33 Cal. App. 2d 564, 571, 92 P.2d 416* (an advocate of rule requiring police officers to testify before grand jury was not disqualified from deciding whether the rule had been violated); *see* *Fairfield v. Superior Court (1975) 14 Cal. 3d 768, 772, 122 Cal. Rptr. 543, 537 P.2d 375* (campaign promises of an elected official)].

In *Laird v. Tatum (1972) 409 U.S. 824, 93 S. Ct. 7, 34 L. Ed. 2d 50* , a memorandum decision on a motion to recuse (*i.e.*, disqualify), the U.S. Supreme Court considered prejudgment of legal issues reflected in announced or established opinions. The Court found that neither the oath, the disqualification statute, nor the practice of the former justices of the Court guarantees a litigant that each judge will start off "from dead center" in his or her willingness or ability to reconcile the opposing arguments of counsel with his or her understanding of the Constitution and the law; quite simply, it is not a ground for disqualification that a judge has previously expressed an understanding of the meaning of some particular provision of the Constitution [*Laird v. Tatum (1972) 409 U.S. 824, 839, 93 S. Ct. 7, 34 L. Ed. 2d 50]* .

Two of the three grounds that are expressly deemed not sufficient grounds by themselves for disqualification are similar to the prejudgment issues discussed above [*Gov. Code § 11425.40(b)*]. These are that a presiding officer is not disqualified solely because that officer:

- Has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding [*Gov. Code § 11425.40(b)(2)*].

- Has as a lawyer or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding [*Gov. Code § 11425.40(b)(3)*].

These standards are taken from *Code Civ. Proc. § 170.2* [25 Cal. L. Rev. Comm. Reports 55, 159 (1995)].

A party to an administrative hearing may argue that an adjudicator's mind is "irrevocably closed" on a legal issue, as illustrated by prior statements or involvement [*Trade Com. v. Cement Institute (1948) 333 U.S. 683, 701, 68 S. Ct. 793, 92 L. Ed. 1010, 44 F.T.C. 1460* ; *cf. American Cyanamid Company v. F. T. C. (1966) 363 F.2d 757* (agency chairperson had served as counsel to the investigating agency)]. Nevertheless, it is highly unlikely that an agency member could ever be disqualified on that basis, if for no other reason than the impossibility of proof [*see* Davis, *Administrative Law Treatise*, vol. 3, § 19:2 (2d ed. 1980)]. A possibly applicable civil litigation standard that is somewhat similar to, or can be used to raise, prejudgment or closed mind issues, is the "substantial doubt about the judge's capacity to be impartial" standard [*Code Civ. Proc. § 170.1(a)(6)(B), (C)*; *see* Ch. 317, *Judges*].

[b] Adjudicative Facts

In contrast to the prejudgment of legal or policy issues, and adjudicator's prejudgment of the controversy itself, that is, the facts at issue in a case, is generally a ground for disqualification [*Andrews v. Agricultural Labor Relations Bd. (1981) 28 Cal. 3d 781, 790, 171 Cal. Rptr. 590, 623 P.2d 151* ; *see* Davis, *Administrative Law Treatise*, vol. 3, § 19:2 (2d ed. 1980)]. Prejudgment of the facts constitutes actual bias for purposes of the *Andrews* test [*Andrews v. Agricultural Labor Relations Bd. (1981) 28 Cal. 3d 781, 792, 171 Cal. Rptr. 590, 623 P.2d 151* ; *see* [1], *above*]. The mere exposure to adjudicative facts prior to the hearing, however, is not necessarily grounds for disqualification [Davis, *Administrative Law Treatise*, vol. 3, § 19:2 (2d ed. 1980)]. A party attempting to disqualify an adjudicator on the basis of prejudgment of facts may encounter difficulties in proof. Direct evidence of prejudgment of the facts at issue can be found if the adjudicator has made the prejudgment on the record [*see, e.g., Pacific etc. Conference of United Methodist Church v. Superior Court (1978) 82 Cal. App. 3d 72, 87-88, 147 Cal. Rptr. 44* (judge indicated in a letter to all counsel that plaintiffs would probably prevail in the case)].

Prejudgment of the controversy itself or the facts of a particular case may also be demonstrated by prior statements made outside of the court records [*see, e.g., Perlman v. Shasta Joint Jr. College Dist. Bd. of Trustees (1970) 9 Cal. App. 3d 873, 883, 88 Cal. Rptr. 563* (board decided case pursuant to telephone conversations prior to hearing); *Cinderella Career and Finishing Schools, Inc. v. F. T. C. (1970) 425 F.2d 583, 591, 138 U.S. App. D.C. 152* (agency's chairman made speech announcing his position about facts prior to hearing)]. A possibly applicable civil litigation standard that is somewhat similar to, or can be used to raise, prejudgment of adjudicative facts issues, is the "substantial doubt about the judge's capacity to be impartial" standard [*Code Civ. Proc. § 170.1(a)(6)(B), (C)*; *see* Ch. 317, *Judges*].

[3] Personal Prejudice

A personal bias or prejudice toward a person, as distinguished from an attitude about an issue, may be a ground for disqualification when it is strong enough. Prejudice may take the form of either animosity or favoritism [*see* Davis, *Administrative Law Treatise*, vol. 3, § 19:5 (2d ed, 1980)]. The ALJ's conduct during the hearing may be used to show a

degree of partiality that denied a party a fair hearing. It is often difficult, however, to prove a sufficient degree of prejudice. For example, prejudice or bias justifying disqualification will not be assumed from any of the following:

- An adjudicator's uniform belief in the evidence offered by one party [*Andrews v. Agricultural Labor Relations Bd. (1981) 28 Cal. 3d 781, 795, 171 Cal. Rptr. 590, 623 P.2d 151]* .

- Brusque or hostile behavior [*West Coast etc. Co. v. Contractors' etc. Bd. (1945) 72 Cal. App. 2d 287, 299-300, 164 P.2d 811]* .

- Interposing cross-examination [*Rudolph v. Athletic Commission (1960) 177 Cal. App. 2d 1, 15, 1 Cal. Rptr. 898]* .

Uniform rulings for one party in a case have been used to claim bias against the other party, with mixed success [*see* Davis, *Administrative Law Treatise*, vol. 3, § 19:5 (2d ed, 1980)]. In *Labor Board v. Pittsburgh S. S. Co. (1949) 337 U.S. 656, 69 S. Ct. 1283, 93 L. Ed. 1602* , a key case on the issue of partiality, the Supreme Court reversed a federal appellate court decision that held that the evaluation of evidence by a hearing officer of the National Labor Relations Board demonstrated prejudice. The lower court had found that the unvarying repudiation of every witness for the petitioner because of falsity, evasion, or faint recollection, along with the consistent exaltation of every union witness as truthful, forthright, and accurate, completely destroyed any confidence that it might otherwise place in the findings of the trial examiner [*Labor Board v. Pittsburgh S. S. Co. (1948) 167 F.2d 126, 128-129]* . Based on a review of the entire transcript, however, the Supreme Court stated that total rejection of an opposing view does not, by itself, impugn the integrity or competence of a trier of fact. Instead, the Court found that the record displayed a "discriminating evaluation of the facts" [*Labor Board v. Pittsburgh S. S. Co. (1949) 337 U.S. 656, 659-660, 69 S. Ct. 1283, 93 L. Ed. 1602]* .

An applicable civil litigation standard that is somewhat similar to, or can be used to raise, personal prejudice issues, is the "substantial doubt about the judge's capacity to be impartial" standard [*Code Civ. Proc. § 170.1(a)(6)(B), (C)*; *see* Ch. 317, *Judges*]. The standard provides that bias or prejudice towards a lawyer in the proceeding may be grounds for disqualification [*Code Civ. Proc. § 170.1(a)(6)*]. Also, personal bias or prejudice concerning a party would satisfy this standard, and is serious enough in civil litigation to be a nonwaivable ground for disqualification [*Code Civ. Proc. § 170.3(b)(2)(A)*].

[4] Financial Interest

[a] Direct Interest

A lack of objectivity and fairness that would require disqualification is presumed when the adjudicator has a substantial and direct financial interest in the subject of, or is a party to, a contested hearing. When the adjudicator has a financial interest or economic stake in the contested matter, the likelihood of bias is so great that no additional proof of actual bias is required for disqualification [*Haas v. County of San Bernardino (2002) 27 Cal. 4th 1017, 1020, 119 Cal. Rptr. 2d 341, 45 P.3d 280* (disqualification of hearing officer upheld based on financial interest bias grounds which violated due process of law because hearing officer was hired on ad hoc basis by county attorney, and chances for future appointment by county may be based on county preferences for hearing officers whose past decisions ruled in favor of county); *Andrews v. AgriculturalLabor Relations Bd. (1981) 28 Cal. 3d 781, 793 n. 5, 171 Cal. Rptr. 590, 623 P.2d 151* ; *Nissan Motor Corp. v. New Motor Vehicle Bd. (1984) 153 Cal. App. 3d 109, 116, 202 Cal. Rptr. 1]* .

Financial interest bias on the part of a judge violates the due process of law right to an impartial decision maker [*Goldberg v. Kelly (1970) 397 U.S. 254, 267, 271, 90 S. Ct. 1011, 25 L. Ed. 2d 287* (right to an impartial decisionmaker)]. The due process financial interest disqualification standards apply equally to administrative law judges and temporary administrative hearing officers. Bias is presumed when there is a direct financial interest on the part of a

judge [*Haas v. County of San Bernardino (2002) 27 Cal. 4th 1017, 1024-1025, 1020, 119 Cal. Rptr. 2d 341, 45 P.3d 280]* . Disqualifying financial interests include the following: 1) judges compensation is dependent on the result of the adjudication [*Haas v. County of San Bernardino (2002) 27 Cal. 4th 1017, 1030-1031, 1020, 119 Cal. Rptr. 2d 341, 45 P.3d 280* (administrative hearing officer has disqualifying financial interest in outcome of adjudication based on prospect of future employment by county who hired hearing officer on ad hoc basis); *Ward v. Village of Monroeville, Ohio (1972) 409 U.S. 57, 60, 93 S. Ct. 80, 34 L. Ed. 2d 267* (judge who was also local mayor added to village budget from fines imposed is judge's court); *Tumey v. State of Ohio (1927) 273 U.S. 510, 523, 47 S. Ct. 437, 71 L. Ed. 749* (judge's salary paid out of fines imposed in judge's court)] and 2) a judge adjudicates their own case [*Haas v. County of San Bernardino (2002) 27 Cal. 4th 1017, 1027-1028, 119 Cal. Rptr. 2d 341, 45 P.3d 280* ; *Aetna Life Ins. Co. v. Lavoie, (1986) 475 U.S. 813, 821-825, 106 S. Ct. 1580, 89 L. Ed. 2d 823* (state supreme court justice had disqualifying financial interest in participating in ruling on bad faith refusal to pay insurance claim when judge had a similar claim pending in the same court system); *Gibson v. Berryhill (1973) 411 U.S. 564, 578-579, 93 S. Ct. 1689, 36 L. Ed. 2d 488* (professional optometrist board members could not adjudicate discipline cases against corporate optometrists because revocation decisions would increase business opportunities for professional optometrists); *Friedman v. Rogers (1979) 440 U.S. 1, 18-19, 99 S. Ct. 887, 59 L. Ed. 2d 100* (due process requirements are more strict in discipline cases, because there is a right to an impartial decision maker, and outside of discipline action state optometry board could consist of majority of independent optometrists without violating due process of law)].

The financial interest bias rule codified in the *Haas* case that is applicable to adjudicators does not apply to the legal advisor to an adjudicative agency, the city personnel board, because the legal advisor advised the board of applicable laws and did not act in an adjudicative role in the proceeding [*Gilbert v. City of Sunnyvale (2005) 130 Cal. App. 4th 1264, 1281-1282, 31 Cal. Rptr. 3d 297* (court rejected due process of law challenge to pre-termination hearing procedures brought by discharged police officer)]. The financial interest bias rule codified in the *Haas* case also was not violated by an award of $1.8 million in prehearing costs related to disciplinary proceedings against an accounting firm. The award was paid to the Board of Accountancy to reimburse the Board for extensive costs incurred in investigating and preparing for hearing a discipline case against the accounting firm. The Board did not have an improper pecuniary interest because the cost award was authorized and regulated by statute, *Bus. & Prof. Code § 5107*, and this statute protected the Board from improper influences related to the cost award. This is because the cost award was made by the administrative law judge (ALJ) who heard the case, and that ALJ did not have a financial interest in the cost award that he or she assessed. The ALJ was employed by the Office of Administrative Hearings, and did not benefit financially for the cost award. The Board has the authority to decrease or eliminate the award, or to affirm the award, but not to increase the cost award [*McBride v. The Bd. of Accountancy of the State of Cal. (2005) 130 Cal. App. 4th 518, 525-527, 30 Cal. Rptr. 3d 287]* .

However, employment of the ALJ (and payment of the ALJ) by the agency holding the hearing does not violate the due process of law right to an impartial decision maker, and does not require disqualification of the ALJ because the financial interest of the ALJ is too remote to require disqualification without a showing of actual bias. ALJ's are unlikely to be influenced to rule in favor of their employer by the desire for continued employment, because ALJ's are protected by civil service law. Furthermore, the ALJ can not be disqualified based upon reasonable doubts about the impartiality of the ALJ because there is nothing in the record as to the selection process of ALJ's for particular hearings that supports a claim of bias, and bias will not be presumed [*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2002) 99 Cal. App. 4th 880, 885-887, 121 Cal. Rptr. 2d 729]* . However, when the ALJ has a strong direct financial interest in the resolution of the case, then the ALJ can be disqualified without a showing of actual bias [*Haas v. County of San Bernardino (2002) 27 Cal. 4th 1017, 1032-1034, 119 Cal. Rptr. 2d 341, 45 P.3d 280]* . The *Haas* rule was held not to be applicable to the ALJ employment facts and circumstances presented in the Department case [*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2002) 99 Cal. App. 4th 880, 885-887, 121 Cal. Rptr. 2d 729* (ALJ's were appointed under the provisions of *Bus. & Prof. Code § 24210*)].

Payment of attorney's fees under *Labor Code § 98.2* to the Labor Commissioner for representing an indigent employee

at the de novo hearing before the superior court did not violate the due process of law rights of the employer because there was no showing that the hearing officer was biased, and no showing that the hearing officer had a financial interest in the case. Attorneys fees that are collected by the agency (Labor Commissioner) from employer parties does not violate due process of law rights of employers [*Lolley v. Campbell (2002) 28 Cal. 4th 367, 370-371, 121 Cal. Rptr. 2d 571, 48 P.3d 1128]* .

The applicable civil litigation standard disqualifies a judge from deciding a lawsuit when the judge, the judge's spouse, and a minor child of the judge living in the household, have a financial interest, including fiduciary financial interests, in the subject matter or in a party to the proceeding [*Code Civ. Proc. § 170.1(a)(3)*; *see* Ch. 317, *Judges*].

[b] Restriction of Competitors

Licensing and other actions of agencies or boards may have an economic effect on the subject licensees or industry, including the licensed agency or board members themselves. For example, a board may have the power to determine the number of competitors that licensees will have [*see Bus. & Prof. Code § 23958* (Department of Alcoholic Beverage Control may deny an application for a license if issuance would result in or add to an undue concentration of licenses)].

Because the minimum educational and training standards and examinations required of applicants are set by the various professional licensing agencies [*see, e.g., Bus. & Prof. §§ 2493* (podiatry), 2736 (nursing), 10153 (real estate)], standards established to assure the competency of licensees necessarily limit the number of practitioners in a given field [*see Chevrolet Motor Division v. New Motor Vehicle Bd. (1983) 146 Cal. App. 3d 533, 538, 194 Cal. Rptr. 270* (discussion of the distinction between a board's regulation of members of its own occupation and attempted regulation of the economic interests of others with that occupational group)].

Only a direct and personal financial involvement, however, would disqualify a member from deciding a contested case. For example, in one instance, a determination of the Alabama Board of Optometry that employment by a corporation constituted unprofessional conduct would have eliminated nearly half of the optometrists in the state, with the result that the Board members and other private practitioners "would fall heir to this business." The federal district court concluded that the Board members' personal pecuniary interests were so great that the Board could not constitutionally hear the matter. The U.S. Supreme Court affirmed, holding that disqualification for financial interest applies to administrative adjudicators, as well as members of the judiciary [*Gibson v. Berryhill (1973) 411 U.S. 564, 579, 93 S. Ct. 1689, 36 L. Ed. 2d 488]* .

[c] Composition of Board

The membership of many state boards and commissions is established in statute or regulation to reflect or represent particular views or expertise. For example, the State Building Standards Commission membership must include an architect, a civil engineer, a representative of organized labor in the building trades, and a licensed contractor [*Health & Safety Code § 18921*].

Three cases involving the New Motor Vehicle Board establish that the economic effect of the composition of such an agency, as well as the financial interests of individual members, may be evaluated for bias. In *American Motors Sales Corp. v. New Motor Vehicle Bd. (1977) 69 Cal. App. 3d 983, 138 Cal. Rptr. 594* , the appellate court held that the composition of the state New Motor Vehicle Board, which required that four members be new car dealers, denied a vehicle franchisor an unbiased hearing in violation of due process of its termination of a franchise [*American Motors Sales Corp. v. New Motor Vehicle Bd. (1977) 69 Cal. App. 3d 983, 987, 138 Cal. Rptr. 594]* . The court found that the Board's dealer members have an economic stake in every franchise termination case that comes before them. The ability of franchisors to terminate any dealership, including that of a Board member, depends on the Board's interpretation of "good cause." It is to every dealer's advantage not to permit termination for low sales performance. If the franchise of a direct competitor of a dealer member is being terminated, however, the member may be more financially interested in

ruling in favor of the franchisor. The court observed that the objectionable financial interests need not be uniform or identical among the Board members. The objectionable feature of dealer-membership on the Board is the likelihood that such a controversy will be decided on the financial interests of the Board members, rather than on the merits [*American Motors Sales Corp. v. New Motor Vehicle Bd. (1977) 69 Cal. App. 3d 983, 987-988, 138 Cal. Rptr. 594]* .

A subsequent statutory amendment that allowed the dealer members to participate in, but not decide, contested matters did not cure the constitutional defect. In *Chevrolet Motor Division v. New Motor Vehicle Bd (1983) 146 Cal. App. 3d 533, 194 Cal. Rptr. 270* , the court found that the presence of biased members on the Board presents a substantial probability that decisions will be made on the basis of inappropriate considerations, and the fact that those members do not technically "decide" the disputes does not alter that probability [*Chevrolet Motor Division v. New Motor Vehicle Bd. (1983) 146 Cal. App. 3d 533, 540-541, 194 Cal. Rptr. 270]* .

Similarly, in *Nissan Motor Corp. v. New Motor Vehicle Bd. (1984) 153 Cal. App. 3d 109, 202 Cal. Rptr. 1* , the appellate court was persuaded by the manufacturer's argument that the statutory scheme ensured lopsided participation of the car dealers in the Board proceeding without any representation by the manufacturers, and thereby denied the manufacturers the right to a fair hearing by an adjudicatory body free from bias and financial interest. Due to the constitutional infirmity of the cited statutory sections, the court held the decision of the Board to be void in its entirety [*Nissan Motor Corp. v. New Motor Vehicle Bd. (1984) 153 Cal. App. 3d 109, 113, 202 Cal. Rptr. 1]* .

Licensing agency boards benefit from the expertise brought to issues before those agencies by professional licensees' who are board members. The value of the expertise is offset somewhat by professional interests. Having public (non-professional) board members provides neutrality, or lack of professional interests, but these members often lack expertise in the profession that they are regulating.

[d] Political Reform Act of 1974

The Political Reform Act of 1974 [*see Gov. Code § 81000 et seq.*] requires every agency to promulgate a conflict of interest code [*Gov. Code § 87300*]. The code must include a provision disqualifying any agency employee from any action in which the employee has a financial interest, when it is reasonably foreseeable that the interest may be materially affected by the decision [*Gov. Code § 87302(c)*; *see Gov. Code § 87103*].

An ALJ or agency member has a "financial interest" if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public in general, on the adjudicator or his or her family, business, or property in which he or she has an interest [*Gov. Code § 87103*]. For example, an adjudicator would be barred from participating in a license discipline proceeding that would affect a nursing home in which the adjudicator held stock or other financial interests [*see Gov. Code § 87103* ("financial interests" defined)].

Hearing the application for retirement benefits of a member of the Public Employment Retirement System in which the adjudicator is also a member would not be prohibited, however, because denial or approval of the application would not have a "material" financial effect on the adjudicator's financial interest in the benefit system [*see Gov. Code § 87103* ("financial interests" defined)].

State agency policy makers, such as board or commission members, may not accept honoraria for speeches nor gifts over $250, if the member would be required to report the receipt of income or gifts on their statement of economic interest [*Gov. Code §§ 89502* (honorarium), 89503 (gifts over $250)].

A party should be able to easily ascertain an adjudicator's financial interests. The majority of state-employed ALJs and hearing officers are required by the Political Reform Act of 1974 and the conflict of interest codes of their respective agencies to complete and file statements disclosing their financial interests, including other employment for compensation, positions with businesses or other entities, property interests, and loans [*Gov. Code §§ 87200, 87302(c)*;

see Gov. Code §§ 87300-87313 (requiring each agency to adopt a conflict of interest code)]. These disclosure statements must be filed within 30 days of assuming office, unless the individual resigns the position within 12 months of the initial appointment, or within 30 days of receiving notice of the filing obligation [*Gov. Code § 87302(a), (d)*]. To establish disqualification due to financial interest, counsel may append the statement, which is a public record, to the affidavit submitted when requesting disqualification [*see Gov. Code § 11512(c)* (request pursuant to APA); *see also § 473E.22*, and discussion of access to public records under the Public Records Act, *Gov. Code § 6250 et seq.* in Ch. 470C, *Public Records Act*].

The Political Reform Act contains a "rule of necessity" exception, which allows an adjudicator who would otherwise be disqualified by his or her financial interest to nonetheless participate in a decision if the matter could not legally be acted on or decided without his or her participation [*Gov. Code § 87302(c)*]. The exception apparently applies only to agency heads or administrative officers, rather than ALJs or hearing officers assigned to conduct the hearing. For further discussion of the rule of necessity, see *§ 473E.23*.

[5] Personal Involvement or Relationship

[a] Friends, Acquaintances, and Coworkers

A party to an administrative adjudication may perceive an ALJ or agency member to be partial toward personal friends and acquaintances involved in the proceedings [*see* Maloney, *Disqualification of Administrative Law Judges in California, 16 U.S.F. L. Rev. 229, 243*-244 (1982)]. For example, the investigators, peace officers, and staff of the various state licensing agencies frequently testify before ALJs of the OAH. Employees of the same agency may appear before in-house hearing officers in benefit hearings, and appointing authorities may participate in civil service proceedings with equivalent regularity.

Friendship and business associations with participants in a proceeding, however, generally do not constitute grounds for disqualification [*Parrish v. Board of Comm'rs, 524 F.2d 98, 102* (judge's business associations and friendship with some of defendants and counsel did not constitute grounds for disqualification). Note: a business association will probably result in disqualification, however, if the adjudicator has a financial interest in the outcome due to this association [*see* [4], *above*]. The fact that an adjudicator knows a witness or party, and has a general belief in that individual's honesty, does not demand disqualification or indicate that the evidence will not be fairly weighed [*Rohr v. Johnson (1944) 65 Cal. App. 2d 208, 211, 150 P.2d 5]* . Nonetheless, the ALJ or hearing officer should avoid making off-the-record remarks or behavior that would suggest to a respondent or private counsel that the adjudicator is acquainted with agency counsel or witnesses.

[b] Former Counsel or Co-counsel

Frequently, an ALJ or agency hearing officer has either been the attorney for a party involved in a present action or proceeding, or has practiced with the current counsel. The provisions of *Code Civ. Proc. § 170.1(a)(2)* that require disqualification of a judge who has served as counsel for a party to the current case in a proceeding involving the same issues are instructive (but not directly applicable) for ALJs or hearing officers. Nonetheless, a "cooling off" period in which the newly appointed adjudicator refrains from hearing cases involving his prior client agency or cases about which he or she has personal knowledge is advisable.

[c] Family Relationship to Party

ALJs and agency members are not necessarily disqualified on the basis of a family relationship with a party. In contrast, a judge is prohibited from hearing an action in which he or she is a party, or is related to a party or agent of a party by specified consanguinity or affinity [*Code Civ. Proc. § 170.1(a)(4)*; *see* Ch. 317, *Judges*]. The regulations governing specific agencies may, however, require disqualification when the adjudicator is related to a party. For example, the regulations governing the Workers' Compensation Appeals Board incorporate the standards applicable to referees,

which include disqualification on the ground of kinship [*8 Cal. Code Reg. § 10452*; *Lab. Code § 5311*; *see Code Civ. Proc. § 641* (grounds for disqualification of referees)]. Similarly, a hearing panel member in a Board of Prison Terms proceeding may be disqualified on the basis of a close personal relationship with the prisoner [*15 Cal. Code Reg. § 2250*].

[d] Family Relationship With Lawyer in Proceeding

When a judge, or judge's spouse, has a family relationship, as defined by statute, with a lawyer in the proceeding, or the associate of a lawyer in the proceeding, the applicable civil litigation standard calls for disqualification of the judge [*Code Civ. Proc. § 170.1(a)(5)*]. It is not clear whether this standard will apply to ALJs or agency members, or even whether this type of conflict will occur very frequently. For further discussion of this grounds for disqualification, see Ch. 317, *Judges* .

[e] Personal Knowledge

When a judge, or judge's spouse, or family member of the judge or spouse, as defined by statute, to the judge's knowledge, is likely to be a material witness in the proceeding, then the judge is deemed to have a disqualifying personal knowledge of disputed evidentiary facts relating to the proceeding under the applicable civil litigation standard [*Code Civ. Proc. § 170.1(a)(1)*]. It is not clear whether this standard will apply to ALJs or agency members, or even whether this type of conflict will occur very frequently. For further discussion of this grounds for disqualification see Ch. 317, *Judges* .

[6] Other Grounds for Disqualification

[a] Lack of Impartiality

Under the applicable civil litigation standard, a judge may be disqualified under three related standards focusing on impartiality. These three standards are [*Code Civ. Proc. § 170.1(a)(6)*]:

- The judge believes that his or her recusal would further the interests of justice.
- The judge believes that there is a substantial doubt as to his or her capacity to be impartial.
- A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial. It is not clear whether this standard will apply to ALJs or agency members, or even whether this type of conflict will occur very frequently.

A planning commission member who wrote a newsletter article attacking a proposed real estate development project while that project was pending before the planning commission violated the "unacceptable probability of actual bias standard" by voting on the project as a planning commission member while at the same time having publicly opposed the project. The developer's due process of law right to an impartial decision maker was violated by the participation of the planning commission member in voting on the project while having prejudged the facts of the matter [*Nasha L.L.C. v. City of Los Angeles (2004) 125 Cal. App. 4th 470, 483-484, 22 Cal. Rptr. 3d 772]* .

The appearance of bias standard (reasonable doubts about a hearing officer's impartiality) was found to be applicable in an administrative hearing conducted by a hospital to determine whether a physician should have his hospital staff privileges revoked [*Yaqub v. Salinas Valley Mem. Healthcare Sys. (2004) 122 Cal. App. 4th 474, 484-485, 18 Cal. Rptr. 3d 780*]. The Court of Appeal relied upon the fair hearing standards for hospital peer review hearings codified in *Bus. & Prof. Code § 809.2(a)* [*Yaqub v. Salinas Valley Mem. Healthcare Sys. (2004) 122 Cal. App. 4th 474, 487-488, 18 Cal. Rptr. 3d 780]* . The standard was met as to the presiding officer, a retired judge, who presided over a three-member hearing panel, because the judge had a lengthy relationship with the hospital that was a party to the

administrative hearing. This relationship included the judge's service on the Hospital Foundation's Board of Governors, a fund raising entity, as well as the judge's prior service as a mediator, arbitrator, and hearing officer in cases in which the hospital was a party. The hospital had hired the judge as a hearing officer for several cases related to doctor's hospital privileges, including a previous case with the same physician as had challenged the hearing officer in this case [*Yaqub v. Salinas Valley Mem. Healthcare Sys. (2004) 122 Cal. App. 4th 474, 483-484, 18 Cal. Rptr. 3d 780]* . The court of appeal held that these facts met the *Haas* standard for avoiding "potential financial conflicts of interest in the selection of administrative hearing officers to obviate even the possibility of bias" [*Yaqub v. Salinas Valley Mem. Healthcare Sys. (2004) 122 Cal. App. 4th 474, 485-486, 18 Cal. Rptr. 3d 780]* . These facts met the appearance of bias standard, and the retired judge hearing officer had the potential for further appointments by the hospital to be a hearing officer in other cases, and this circumstance created a "possible temptation" to favor the hospital [*Yaqub v. Salinas Valley Mem. Healthcare Sys. (2004) 122 Cal. App. 4th 474, 484-485, 18 Cal. Rptr. 3d 780]* . Based on this holding, the Court of Appeal reversed the judgment of the trial court denying a writ of mandate under *Code Civ. Proc. § 1094.5(b)*, and ordered that the writ be granted, and the challenged administrative decision be set aside [*Yaqub v. Salinas Valley Mem. Healthcare Sys. (2004) 122 Cal. App. 4th 474, 488, 18 Cal. Rptr. 3d 780]* .

For further discussion of this grounds for disqualification, see Ch. 317, *Judges* .

[b] Physical Impairment

When a judge is temporarily or permanently physically impaired such that the judge is unable to properly perceive the evidence or is unable to properly conduct the proceedings, then the judge is disqualified under the applicable civil litigation standard [*Code Civ. Proc. § 170.1(a)(7)*]. It is not clear whether this standard will apply to ALJs or agency members, or even whether this type of conflict will occur very frequently. For further discussion of this grounds for disqualification see Ch. 317, *Judges* .

[7] Non-Disqualification Grounds

Under the new act, the APA impartial decision maker standard states general grounds for disqualification including bias, prejudice, or interest in the proceeding [*Gov. Code § 11425.40(a)*], and the act states three specific grounds that are not sufficient for disqualification without further evidence of bias, interest, or prejudice on the part of the presiding officer [*Gov. Code § 11425.40(b)*]. These grounds include the following reasons that the judge:

- Is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group [*Gov. Code § 11425.40(b)(1)*].

- Has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding [*Gov. Code § 11425.40(b)(2)*].

- Has as a lawyer or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding [*Gov. Code § 11425.40(b)(3)*].

These three non-disqualification grounds are taken from similar language in *Code Civ. Proc. § 170.2*. The law revision comments note, as to the second ground, that expressions on views may lead to disqualification under *Gov. Code § 11425.30* (neutrality of presiding officer) [25 Cal. L. Rev. Comm. Reports 55, 159 (1995); *see* [8], *below*, for discussion of this issue]. These provisions governing disqualification also apply to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated [*Gov. Code § 11425.40(c)*].

The Court of Appeal held that a hearing officer's previous service on a hearing panel in a case between the same hospital and the same doctor with similar issues in both hearings was not disqualifying because the hearing officer was

not reviewing a previous decision made by him in the same case. Rather, the hearing officer was considering a new but related set of issues in a new administrative proceeding. Hearing officers are precluded from reviewing their own decisions, but not from hearing a new case that is factually related to a previous case heard by them. The Court of Appeal relied upon the fair hearing standards for hospital peer review hearings codified in *Bus. & Prof. Code § 809.2(a)* [*Yaqub v. Salinas Valley Mem. Healthcare Sys. (2004) 122 Cal. App. 4th 474, 487-488, 18 Cal. Rptr. 3d 780]* .

[8] Multiple Roles of Agencies

[a] Prosecution, Investigation, and Adjudication

[i] Constitutional Standards

California licensing boards and agencies receive complaints, reports, and notification of criminal convictions of licensees. They review qualifications and conduct investigations that may result in an accusation, denial of a license application, or other action against a licensee; they also initiate actions to deny, limit, and revoke licenses, as part of their licensing responsibilities. The agency also serves as adjudicator in those actions even when the agency members do not participate in the hearing [*see Gov. Code § 11512(a)*; *see also § 473E.11[1]*]. Under the APA, the agency makes the ultimate decision to adopt, reject, or otherwise act on the proposed decision of the ALJ [*Gov. Code § 11517(c)(2)*; *see § 473E.11[4]*].

Under both federal and California law, this combination of investigatory, prosecutory, and adjudicatory functions within an agency, commission, or board is not, per se, a violation of due process absent a showing of actual bias [*Withrow v. Larkin (1975) 421 U.S. 35, 46, 95 S. Ct. 1456, 43 L. Ed. 2d 712* ; *Kloepfer v. Commission on Judicial Performance (1989) 49 Cal. 3d 826, 833-834, 264 Cal. Rptr. 100, 782 P.2d 239* ; *Griggs v. Board of Trustees (1964) 61 Cal. 2d 93, 98, 37 Cal. Rptr. 194, 389 P.2d 722* ; *Hohreiter v. Garrison (1947) 81 Cal. App. 2d 384, 392, 184 P.2d 323* . *see Howitt v. Superior Court (1992) 3 Cal. App. 4th 1575, 5 Cal. Rptr. 2d 196* (different lawyers in county counsel's office could represent employee and advise board, thus combining advocacy role with role as advisor to decision making body, so long as the two lawyers are screened from contact with each other related to the representation)].

A county retirement board did not violate due process of law by both investigating and adjudicating retirement benefits applications. The Board can select unilaterally and compensate hearing officers consistent with due process of law. Due process of law does not require that the applicant participate in the hearing officer selection process Board selection and compensation of hearing officers does not, by itself, establish bias against applicants for retirement benefits on the part of the hearing officers [*McIntyre v. Santa Barbara County Employees' Retirement System (2001) 91 Cal. App. 4th 730, 735-736, 110 Cal. Rptr. 2d 565]* . In *Hohreiter v. Garrison (1947) 81 Cal. App. 2d 384, 184 P.2d 323* , an insurance agent whose license was revoked characterized the insurance commissioner as "... accuser and judge [who] by his decision won his own case," although the commissioner had adopted without change the decision of the hearing officer. The court in *Hohreiter* observed that no court has held proceedings to be invalid, the trial abortive, and the accused deprived of due process of law, simply because an administrative board both prefers and tries the charge. It stated that the mere fact that the administrative board is both accuser and judge in no way adversely affects the rights of the accused [*Hohreiter v. Garrison (1947) 81 Cal. App. 2d 384, 392-393, 184 P.2d 323* ; *see Kloepfer v. Commission on Judicial Performance (1989) 49 Cal. 3d 826, 833-834, 264 Cal. Rptr. 100, 782 P.2d 239* (Commission on Judicial Performance may combine accusatory, investigatory, and adjudicatory functions in proceedings against judge); *Chosick v. Reilly (1954) 125 Cal. App. 2d 334, 338, 270 P.2d 547* (Board of Equalization could serve as both accuser and judge in revocation of liquor license); *Murphy v. Board of Medical Examiners (1946) 75 Cal. App. 2d 161, 162-163, 170 P.2d 510* (Board of Medical Examiners could make the accusation against a doctor, as well as hear the evidence and render a decision to revoke his license)].

Similarly, in a teacher dismissal proceeding, the court observed that the responsibility to issue pleadings to dismiss a teacher and the authority to act on the proposed decision of the hearing officer who conducted the contested hearing

were necessarily vested in a single agency, the school board. It stated that, by the very nature of the administrative process, the agency or one of its agents or representatives is bound to be involved in the initiation and prosecution of charges [*Greer v. Board of Education (1975) 47 Cal. App. 3d 98, 119-120, 121 Cal. Rptr. 542]* . An independent inquiry by a school board prior to a formal hearing is not inconsistent with its power to hold the formal hearing [*Greer v. Board of Education (1975) 47 Cal. App. 3d 98, 119-120, 121 Cal. Rptr. 542]* .

However, a child care contractor that was debarred for three years by the state agency that administered child care contracts was entitled under a due process liberty interest claim to a hearing before an impartial arbiter or tribunal on justification for the debarment. Due process of law was violated when one member of the hearing panel had participated in agency staff decisions that were challenged in the hearing process as that member could not both investigate and adjudicate in the same case [*Golden Day Schools, Inc. v. State Department of Education (2000) 83 Cal. App. 4th 695, 709-711, 99 Cal. Rptr. 2d 917]* .

A police officer who was reassigned to a lower pay grade by his employer has a significant private interest in continued receipt of his paycheck [*Gilbert v. Homar (1997) 520 U.S. 924, 932, 117 S. Ct. 1807, 138 L. Ed. 2d 120]* , and therefore was entitled under due process of law to hearing procedures in which the police department had the burden of proof of showing that the criteria in the department manual for reassignment to a lower pay grade have been established. The agency procedures placed the burden of proof on the police officer, and that violated due process of law [*Brown v. City of Los Angeles (2002) 102 Cal. App. 4th 155, 175-177, 125 Cal. Rptr. 2d 474* ; *Los Angeles Police Protective League v. City of Los Angeles (2002) 102 Cal. App. 4th 85, 92-94, 124 Cal. Rptr. 2d 911]* . The due process right to a neutral decision maker was also violated because the police chief both authorized the reassignment to a lower pay grade and was also the final decision maker at the end of the administrative hearing. This lack of neutrality, coupled with other factors, results in a significant risk of unfairness to the police officer, whose property interests under due process of law are adversely affected [*Brown v. City of Los Angeles (2002) 102 Cal. App. 4th 155, 177-179, 125 Cal. Rptr. 2d 474]* . However, limiting the pool of hearing officers to high ranking employees within the police department does not violate due process of law because the officers are employees of the police department, and the affected police officer picks three possible hearing officers from the list of eligible officers [*Brown v. City of Los Angeles (2002) 102 Cal. App. 4th 155, 178-179, 125 Cal. Rptr. 2d 474]* .

Separation of functions is also required as a matter of due process of law when local agency adjudicators decide whether to renew business licenses. A city attorney who acted as an advocate for the city urging nonrenewal of a business license at the application stage could not, consistent with due process of law, act as an advisor to the city manager who decided the business's administrative appeal from the denial of the application and acted as an adjudicative decision maker. This violated the due process of law right to an impartial decision maker [*Nightlife Partners Ltd. v. City of Beverly Hills (2003) 108 Cal. App. 4th 81, 97-98, 133 Cal. Rptr. 2d 234]* . Similarly, a city attorney who acted as an advocate for the city in a lawsuit brought by a terminated city employee could not also, consistent with due process of law court, act as a decision maker, in the employee's administrative appeal of their termination, which was officially decided by the city manager but in which the city attorney prepared the recommended decision that the city attorney followed. [*Walker v. City of Berkeley (9th Cir. 1991) 951 F. 2d 182, 185]* . The California Supreme Court held that due process of law was not violated when an attorney for the State Water Resources Control Board was the agency prosecutor in a specific administrative proceeding and that same agency attorney advised the Board in an unrelated administrative proceeding [*Morongo Band of Mission Indians v. State Water Resources Control Board (2009) 45 Cal. 4th 731, 734, 88 Cal. Rptr. 3d 610, 199 P. 3d 1142]* . In so holding, the California Supreme Court concluded that neither due process of law nor the California APA are violated by combining advocacy and advising functions within the same agency so long as there is separation of functions internally on a case by case basis. Thus, the same agency employee could not perform conflicting functions (advocacy versus advising) in the same case. To establish that the tribunal is biased in the due process manner requires a showing of actual bias when separation of function issues are the bases for showing bias. The probability of bias standard was rejected by the court in this setting, and that standard only applies when there are disqualifying financial interests [*Morongo Band of Mission Indians v. State Water Resources Control Board (2009) 45 Cal. 4th 731, 737-738, 88 Cal. Rptr. 3d 610, 199 P. 3d 1142 , disapproving Quintero v. City*

of Santa Ana (2003) 114 Cal. App. 4th 810, 7 Cal. Rptr. 3d 896 (an agency attorney who performs conflicting roles of advocacy and advising agency in unrelated cases violate due process of law)]. None of the local agencies in these cases was subject to the California APA, which is limited to state agencies.

The First District Division 1 California Court of appeal held that a property owner was not denied due process of law because of dual incompatible roles of an agency attorney because the attorney acted only in a legal advisory role for the agency at the administrative hearing level and did not act as an advocate at that level [*Witt Home Ranch, Inc. v. County of Sonoma (2008) 165 Cal. App. 4th 543, 568-570, 81 Cal. Rptr. 3d 123*].

[ii] APA Standard

Agency proceeding subject to Chapter 5, the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*), must satisfy the internal separation of functions requirements that are part of the APA's Administrative Adjudication *Bill of Rights* [*Gov. Code §§ 11425.10(4), 11425.30*]. Specifically, this requires that the adjudicative function must be separated from the investigative, prosecutorial, and advocacy functions within the agency as provided in *Gov. Code § 11425.30* [*Gov. Code § 11425.10(4)*].

Gov. Code § 11425.30 requires internal separation of functions within an agency, which means that the same individual within an agency can not perform inconsistent functions in the same case before the agency [*Gov. Code § 11425.30*]. This section provides that a presiding officer is disqualified from presiding in an adjudicative proceeding in the following two situations [*see Gov. Code §§ 11405.80* (defining presiding officer), 11405.20 (defining adjudicative proceeding)]:

- The person has served as investigator, prosecutor, or advocate in the proceeding or its pre-adjudicative stage [*Gov. Code § 11425.30(a)(1)*].

- The person is subject to the authority, direction, or discretion of a person who has served as investigator, prosecutor, or advocate in the proceeding or its pre-adjudicative stage [*Gov. Code § 11425.30(a)(2)*].

Serving means that the person has personally carried out the function and not merely supervised or been organizationally connected with a person who has personally carried out the function. Substantial involvement in a case is required, not merely marginal or trivial participation. What is disqualifying is meaningful participation that is likely to affect an individual with a commitment to a particular result in a case [25 Cal. L. Rev. Comm. Reports 55, 157 (1995)].

However, a presiding officer is not disqualified in the following two circumstances:

- A person may serve as presiding officer in successive stages of an adjudicative proceeding [*Gov. Code § 11425.30(b)(1)*].

- A person who has participated only as a decision maker or as an advisor to a decision maker in a determination of probable cause or other equivalent preliminary determination in an adjudicative proceeding or its pre-adjudicative stage may serve as presiding officer in the proceeding.

The first exception allows a decision maker to act in a similar capacity at both the probable cause and final hearing stages. However, the person can not be the decisionmaker at the hearing stage if the person acted in a prosecutorial, investigative, or advocacy role at the probable cause stage [25 Cal. L. Rev. Comm. Reports 55, 157 (1995)]. Finally, these separation of functions requirements apply also to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated [*Gov. Code § 11425.30(c)*].

Agency hearing officers and agencies that conduct proceedings not governed by Chapter 5 (*Gov. Code § 11500 et seq.*), the APA's formal hearing provisions, are subject to the internal separation of function requirements of *Gov. Code §§ 11425.10(4), 11425.30* if those agencies are state agencies and an evidentiary hearing is required to held by statute or constitutional provision [*Gov. Code §§ 11410.10, 11410.20(a)*; *see* Ch. 473, *Public Agency Adjudication* , for further discussion of these requirements].

[b] Legal Representation

Administrative agencies customarily obtain legal advice from the same counsel that represents their interests in contested administrative hearings. The majority of state licensing agencies, including the Board of Medical Quality Assurance, Contractors' State License Board, Board of Registered Nursing, and the Bureau of Automotive Repair, are represented by the attorney general's office in license disciplinary hearings. The deputy assigned to advise the agency in its executive sessions may have represented the agency in the contested matter at hand.

In contrast, agencies such as the Department of Real Estate, Department of Alcoholic Beverage Control, and Department of Motor Vehicles, which are represented by house counsel in licensing hearings, rely on that counsel for legal advice. No reported California case suggests that such a system is impermissible; the situation may be inevitable in public agencies [*Ford v. Civil Service Commission (1958) 161 Cal. App. 2d 692, 697, 327 P.2d 148* (members of county counsel's office represented both recorder's office, which had fired respondent, and civil service commission, which conducted hearing to review termination)].

[c] Party Who Imposed Penalty Must Consent to Reduction of Penalty by Reviewing Body

In some cases, regulations or local charters may require the consent of the official who imposed a penalty before an administrative reviewing body may reduce that penalty. This kind of requirement does not violate due process by denying the penalized party a fair and impartial decision maker. For example, a city charter provision gave city employees the right to have disciplinary measures reviewed by the Board of Civil Service Commissioners, but limited the Board's authority by providing that any penalty reduction recommended by the Board must be consented to by the same official who originally imposed the penalty. The court rejected a due process challenge to this charter provision, analogizing it to those procedures in which an agency investigates, files a charge, and then adjudicates the matter [*Burrell v. City of Los Angeles (1989) 209 Cal. App. 3d 568, 577-581,257 Cal. Rptr. 427]* . For decisions stating that it is not a denial of due process for an agency to both prosecute and adjudicate, see [a][i], *above*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationImpartialityGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsFinancial InterestsCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPersonal BiasConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionGovernmentsLocal GovernmentsAdministrative Boards

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§ 473E.22 Disqualification Procedures

[1] APA Procedures

[a] Request for Disqualification, Waiver, and Timeliness

A party may request the disqualification of an ALJ or agency member who has not voluntarily withdrawn under disqualification standards [*see Gov. Code § 11425.40*] by filing an affidavit prior to the taking of evidence at a hearing [*Gov. Code § 11512(c)*].

The parties may waive the disqualification by a writing that recites the grounds for disqualification. A waiver is effective only when signed by all parties, accepted by the administrative law judge or agency member, and included in the record [*Gov. Code § 11512(c)*; *see § 473E.61*, for a waiver form]. Waiver of disqualification here is similar to waiver of disqualification of judges in civil litigation [*see Code Civ. Proc.§ 170.3(b)(1)*; *see* Ch. 317, *Judges*].

The issue of disqualification must be timely raised at the administrative level. It cannot be first asserted on judicial review [*Franz v. Board of Medical Quality Assurance (1982) 31 Cal. 3d 124, 143, 181 Cal. Rptr. 732, 642 P.2d 792* ; *Kendall v. Bd. of Osteopathic Examiners (1951) 105 Cal. App. 2d 239, 248, 233 P.2d 107* ; *Barkin v. Board of Optometry (1969) 269 Cal. App. 2d 714, 719, 75 Cal. Rptr. 337]* . Because of last-minute settlements and other matters that affect the hearing calendar, however, a party's attorney may be unable to identify the particular ALJ assigned to the hearing until shortly before the matter commences. To allow a timely motion to disqualify, diligent counsel with a valid concern about the bias of a particular ALJ should contact the presiding judge of that office to request early identification of the assigned personnel.

The identity of board and commission members is readily available from their staff, but counsel can rarely predict which members will be present at a meeting to consider a particular proposed decision. The Board of Medical Quality Assurance and other agencies that have matters heard by a panel of the agency [*see Gov. Code § 11512(a)*] customarily notify counsel before the hearing of the name of the members who will sit. Because the motion for disqualification can be made only after the identity is known, the "timeliness" of a motion should date from that notification rather than the notice setting the matter for hearing.

Although the APA requires the affidavit to be filed before the hearing commences [*Gov. Code § 11512(c)*], it does not set forth the procedure to be used when bias is discovered after the hearing commences. Presumably, a party who for good reason was unaware of a fact establishing bias prior to the hearing may raise the issue of bias and move to disqualify immediately on discovering the grounds for bias [*see Code Civ. Proc. § 170.3(c)(1)* (party may request disqualification of judge at earliest opportunity after discovery of facts constituting grounds for disqualification)].

[b] Contents of Affidavit

The affidavit [*see Code Civ. Proc. § 2003* ("affidavit" defined as written declaration under oath, made without notice to adverse party)] must state with particularity the grounds on which the party claims that the administrative law judge or agency member is disqualified [*Gov. Code § 11512(c)*; for a form of motion to disqualify and supporting declaration, which, under *Code Civ. Proc. § 2015.5*, may be used in lieu of an affidavit, *see § 473E.60*]. It must state facts, rather than conclusions and assertions, that establish grounds for disqualification under the relevant standards which include:

- Bias, prejudice, and interest [*Gov. Code § 11425.40*; *see § 473E.21[1] to [7]*].
- Combination of functions [*Gov. Code § 11425.30*; *see § 473E.21[8]*].
- Ex parte communications [*Gov. Code § 11430.60*; *see § 473E.24*].

Because voir dire of the ALJ and panel members is not permitted, if a party believes that an agency member is biased but cannot establish this fact by affidavit, counsel will not have an opportunity at the hearing to attempt to establish the charge [*see, e.g., Cooper v. Board of Medical Examiners (1975) 49 Cal. App. 3d 931, 946, 123 Cal. Rptr. 563* (holding that the respondent, a licensed psychologist, had no right to examine agency members or the ALJ as to possible disqualification on voir dire); *see also Feist v. Rowe (1970) 3 Cal. App. 3d 404, 414, 83 Cal. Rptr. 465* (teacher dismissal hearing pursuant to *Educ. Code § 44944*)].

[c] Determination of Bias

The APA provides that the unchallenged agency members must review the affidavit when it alleges bias of a member of the agency [*Gov. Code § 11512(c)*]. In practice, panel or agency members frequently withdraw when any member is challenged, even though the unchallenged members would provide a quorum, and permit the ALJ to hear the matter alone. Nonetheless, the APA prohibits agency members from withdrawing voluntarily or from being disqualified if the disqualification would prevent the existence of a quorum qualified to act in a particular case, except that a substitute qualified to act may be appointed by the appointing authority [*Gov. Code § 11512(c)*].

This would mean that in cases in which the agency hears the action with the administrative law judge, the agency may appoint qualified substitutes, such as other members of a multi member board, as an alternative to either designating the ALJ to hear the case alone, or retaining disqualified agency members to hear the case to preserve a quorum. When an affidavit is filed against an ALJ who will hear the case alone, the ALJ must decide the matter [*Gov. Code § 11512(c)*]. When both the ALJ and the agency will hear the case, the agency must make the determination regarding the ALJ's bias [*Gov. Code § 11512(c)*].

In practice, when other staff are available to hear the matter, many ALJs will elect to remove themselves once challenged, even when not persuaded that the affidavit establishes bias. These challenges are carefully scrutinized, however, to assure that the motion is not a veiled effort at "judge-shopping," or a tactical measure to continue the case. This concern about challenges solely for purposes of delay was identified by the Judicial Council's report proposing the disqualification procedure in the APA [Tenth Biennial Report of the Judicial Council of California, Dec. 31, 1944, p. 21]. Counsel or parties should not anticipate that a challenge to a particular ALJ will delay or continue the proceeding;

sufficient staff are usually available to whom cases can be reassigned when the motion is granted.

[d] Peremptory Challenges

Agencies that conduct adjudicative proceedings may provide by regulation for peremptory challenge of the presiding officer [*Gov. Code § 11425.40(d)*]. Peremptory challenges are used in jury selection in civil litigation, to excuse jurors from sitting on a trial jury, without specific proof of grounds for disqualification [*see Code Civ. Proc § 226(b)*; *see* Ch. 322, *Juries and Verdicts*]. Peremptory challenges are also used in civil litigation to disqualify a trial judge without specific proof of grounds for disqualification [*Code Civ. Proc. § 170.6*; *see* Ch. 317, *Judges*]. Under the APA standard, peremptory challenges are not allowed unless a specific agency adopts a regulation authorizing peremptory challenges of the presiding officer.

This peremptory challenge by regulation standard applies in all administrative adjudication subject to Chapter 4.5 (*Gov. Code § 11400 et seq.*), and in those administrative adjudications subject to Chapter 5, the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*) [25 Cal. L. Rev. Comm. Reports 55 (1995) *see* Ch. 473, *Public Agency Adjudication* , for more detailed discussion of the applicability of various provisions of the APA].

[2] Non-APA Procedures

Agencies not subject to the APA are generally subject to statutes or regulations that govern the procedure for disqualification of the ALJ or hearing officer. Many of these statutes and regulations contain provisions similar to those of the APA. For example, proceedings to disqualify a workers' compensation judge under *Lab. Code § 5311* are initiated by filing a petition, which must be supported by an affidavit stating in detail facts establishing grounds for disqualification [*8 Cal. Code Reg. § 10452*]. A party requesting the disqualification of a hearing officer in a Medi-Cal proceeding must file an affidavit stating in detail the basis for his or her claim that a fair and impartial hearing cannot be given, or stating that the hearing officer has an interest in the proceeding [*22 Cal. Code Reg. § 51043(b)*].

If the governing statutes and regulations do not require a specific procedure, the party wishing to disqualify an ALJ or hearing officer may make a motion supported by an affidavit based on that required by the APA.

[3] Judicial Review of Decision

The determination of any agency member or ALJ to refuse to disqualify himself or herself, or the administrative decision regarding bias, is subject to review pursuant to a writ of administrative mandate [*see Code Civ. Proc. § 1094.5*]. The writ is framed as an inquiry into the validity of an administrative decision, specifically, the deprivation of a fair hearing [*see Code Civ. Proc. §§ 1094.5(a), 1094.5(b)*]. This method of judicial review is discussed in Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq. Even if a member of an agency should have been disqualified, however, reversible error does not occur when a quorum or sufficient number of qualified agency members adopted or made the decision [*Thompson v. City of Long Beach (1953) 41 Cal. 2d 235, 243, 259 P.2d 649]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 473E.23 Rule of Necessity

[1] General Requirements

Even when an ALJ, agency member, or other hearing officer is disqualified from hearing a case, he or she may still be required to serve under the "rule of necessity." This rule allows an otherwise disqualified person to hear and decide a contested matter when that person's participation is indispensable to the conduct or resolution of the case, and his or her refusal to act would prevent a determination of the proceeding [*Nider v. Homan (1939) 32 Cal. App. 2d 11, 17-18, 89 P.2d 136* ; *see* Davis, *Administrative Law Treatise* (2d ed. 1980), Vol. 3, § 19:9].

Although the rule of necessity applies to individual adjudicators or officials [*Federal Construction Co. v. Curd (1918) 179 Cal. 489, 493, 177 P. 469* ; *Scannell v. Wolff (1948) 86 Cal. App. 2d 489, 492, 195 P.2d 536]* , it usually involves membership on the only board or agency that is authorized to decide an issue [*Aluisi v. County of Fresno (1960) 178 Cal. App.2d 443, 452, 2 Cal. Rptr. 779]* . For example, in *Aluisi v. County of Fresno (1960) 178 Cal. App. 2d 443, 2 Cal. Rptr. 779* , the court stated that only the appointed civil service commission can dismiss a civil service employee and held that the commission was required to hear and decide a dismissal matter, despite allegations that its members were biased [*Aluisi v. County of Fresno (1960) 178 Cal. App. 2d 443, 452, 2 Cal. Rptr. 779]* . Similarly, in court in *Gonsalves v. City of Dairy Valley (1968) 265 Cal. App. 2d 400, 71 Cal. Rptr. 255]* , found that, because granting a zoning variance is reserved to the elected city council, council members need not disqualify themselves from that decision, even when each councilman had a financial interest in the applicant business [*Gonsalves v. City of Dairy Valley (1968) 265 Cal. App. 2d 400, 404, 71 Cal. Rptr. 255]* . The court in *Gonsalves* summarized the rule of necessity as follows [*Gonsalves v. City of Dairy Valley (1968) 265 Cal. App. 2d 400, 404, 71 Cal. Rptr. 255]* :

> The rule is well settled that where an administrative body has a duty to act upon a matter which is before it and is the only entity capable to act in the matter, the fact that the members may have a personal interest in the result of the action taken does not disqualify them to perform their duty. It is a rule of necessity which has been followed consistently.

The rule applies when an entire board or commission is subject to disqualification, or when a quorum could not be achieved absent the disqualified members [*Aluisi v. County of Fresno (1960) 178 Cal. App. 2d 443, 452, 2 Cal. Rptr.*

779] . When a quorum or sufficient number of qualified members would remain after the challenged or disqualified members step down, however, the rule of necessity does not apply or insulate the agency decision from reversal [*Nider v. Homan (1939) 32 Cal. App. 2d 11, 18, 20, 89 P.2d 136]* . The California Court of Appeal applied the "rule of necessity" to prohibit a doctor's claim that the board of directors of a private hospital medical center which had terminated the doctor's staff privileges was structurally biased against the doctor. The court extended the rule of necessity to a private body, the hospital's board of directors, because the hospital had been delegated by statute the authority to provide peer review of physicians [*Weinberg v. Cedars Sinai Med. Ctr. (2004) 119 Cal. App. 4th 1098, 1112-1113, 15 Cal. Rptr. 3d 6]* .

The rule does not shelter the decision reached by the board or agency from judicial scrutiny for bias; it permits the board or agency to make a decision that can be reviewed [*Dyment v. Board of Medical Examiners (1922) 57 Cal. App. 260, 266, 207 P. 409]* . The court reviewing the decision of such a commission must inquire whether there was a fair trial. A fair trial contemplates an impartial trial [*Aluisi v. County of Fresno (1960) 178 Cal. App. 2d 443, 452, 2 Cal. Rptr. 779* ; *Barkin v. Board of Optometry (1969) 269 Cal. App. 2d 714, 718-719, 75 Cal. Rptr. 337]* . For a detailed discussion of fair trial issues, see Ch. 474B, *Standards in Reviewing Agency Decisions* .

[2] APA Proceedings

The APA has codified the rule of necessity in *Gov. Code § 11512(c)*, which provides that no agency member may withdraw voluntarily or be subject to disqualification, if his or her disqualification would prevent the existence of a quorum qualified to act in the particular case [*Gov. Code § 11512(c)*]. When the Judicial Council recommended codification of the rule in the APA, it recognized that the rule was well established in California law: "This section preserves the 'rule of necessity' ... which will not permit disqualification where it would render the agency incapable of acting" [Tenth Biennial Report of the Judicial Council of California, Dec. 31, 1944, p. 20]. The statutory rule of necessity does not apply to an ALJ in a APA matter. Thus, a disqualified ALJ must withdraw from any case in which he or she cannot accord a fair and impartial hearing [*Gov. Code § 11512(c)*], and another ALJ will be assigned to the matter. This makes sense because there are more than one ALJ who can be assigned to hear an administrative hearing.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationImpartialityGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersGeneral OverviewAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewGovernmentsLocal GovernmentsAdministrative Boards

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§ 473E.24 Ex Parte Communications

[1] Introduction

An ex parte communication by a party or interested individual to an ALJ or agency member during an administrative adjudication is defined to be a communication made while a proceeding is pending to the presiding officer in that proceeding by an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication [*Gov. Code § 11430.10(a)*]. Ex parte communications raise the following significant concerns:

- The message will affect the adjudicator's neutrality and objectivity.

- The information or opinion transmitted will not be reflected in the record or be available for consideration by a court reviewing the adjudicator's decision.

- A party unaware of the content of the communication will be unaware of the need to rebut the information.

Ex parte communications also raise fairness concerns, that both sides will not be heard in a contested case, or that one side has greater influence because that side can present their argument without being challenged by their opponent.

It is unethical for a lawyer to make an improper ex parte communication to a judge or judicial officer upon the merits of a contested matter pending before the judge [*Cal. Rules Prof. Conduct, Rule 5-300(B)*], and it is improper for judges to make or receive similar ex parte communications from a lawyer in a pending or impending proceeding [Cal. Rules of Ct., Appen., Div. II, Code of Judicial Ethics, Canon 3C(7)].

Ex parte communications are a greater problem in administrative agencies than in civil or criminal litigation, because agencies frequently communicate with regulated industries, licensees, or both, on an ex parte basis when deciding policy issues in rulemaking. Thus, the agency and interested outsiders will be talking frequently about issues of

common interest. However, improper ex parte communications are prohibited in contested adjudicative hearings [*see* [2], *below*].

[2] APA Requirements

[a] Definitions and Basic Prohibitions

Under APA provisions that became operative July 1, 1997, ex parte communications are improper in some circumstances and are proper in others [*Gov. Code §§ 11430.10-11430.80*]. The prohibition on ex parte communications provides that while the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication [*Gov. Code § 11430.10(a)*]. For purposes of this prohibition, a proceeding is pending from the issuance of an agency's pleading, or from an application for an agency decision, whichever is earlier [*Gov. Code § 11430.10(c)*].

The term "interested person outside the agency" is based on federal administrative law [25 Cal. L. Rev. Comm. Reports 55,164 (1995); *see 5 U.S.C. § 557(d)(1)(A)*; *PATCO v, Federal Labor Relations Authority (1982) 685 F.2d 547, 562, 222 U.S. App. D.C. 97* (interpreting the federal standard to include persons with interest beyond that of members of the general public)]. The pendency of a proceeding includes any period of time between the time an application for a hearing is made and the time the agency's pleading is issued [25 Cal. L. Rev. Comm. Reports 55, 164 (1995)].

Furthermore, if, while the proceeding is pending but before serving as presiding officer, a person receives a communication of a type that would violate the provisions of this law if received while the person was serving as a presiding officer, the person, promptly after starting to serve, shall disclose the content of the communication on the record and give all parties an opportunity to address it in the manner provided in *Gov. Code § 11430.50* [*Gov. Code § 11430.40(c)*; *see* [c], *below*].

[b] Permissible Communications

Ex parte communications that are proper under the act include several categories. The first category, general permissible communication specifically authorized by the language of the act, include the following:

- Communications, including a communication from an employee or representative of an agency that is a party, made on the record at the hearing [*Gov. Code § 11430.10(b)*].

- Communications that are required for the disposition of an ex parte matter specifically authorized by statute [*Gov. Code § 11430.20(a)*].

- Communications that concern a matter of procedure or practice, including a request for a continuance, that is not in controversy [*Gov. Code § 11430.20(b)*]. This exception does not preclude communications made to a presiding officer or staff assistant regarding noncontroversial matters of procedure and practice, such as the format of pleadings, number of copies required, manner of service, and calendaring and status discussions. Such topics are not considered to be part of the merits of the proceeding provided they are noncontroversial in the context of the specific case [25 Cal. L. Rev. Comm. Reports 55, 165 (1995)].

Under a second category, communications otherwise prohibited, from an employee or representative of an agency that is a party to a presiding officer, are permissible in the following circumstances:

- The communication is for the purpose of assistance and advice to the presiding officer from a person

who has not served as investigator, prosecutor or advocate in the proceeding or its pre-adjudicative stage. An assistant or advisor may evaluate the evidence in the record but shall not furnish, augment, diminish, or modify the evidence in the record [*Gov. Code § 11430.30(a)*].

- The communication is for the purpose of advising the presiding officer concerning a settlement proposal advocated by the advisor [*Gov. Code § 11430.30(b)*].

- The communication is for the purpose of advising the presiding officer concerning any of the following matters in an adjudicative proceeding that is non-prosecutorial in character including [*Gov. Code § 11430.30(c)*]:

  - The advice involves a technical issue in the proceeding and the advice is necessary for, and is not otherwise reasonably available to, the presiding officer, provided the content of the advice is disclosed on the record and all parties are given an opportunity to address it in the manner provided in *Gov. Code § 11430.50* [*Gov. Code § 11430.30(c)(1)*; *see* [c], *below*].

  - The advice involves an issue in a proceeding of the San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water Resources Control Board, or a regional water quality control board [*Gov. Code § 11430.30(c)(2)*].

A third (and final) category is comprised of permissible communications noted in the Law Revision Commission comments, including the following:

- The presiding officer's authority to conduct in camera examination of evidence in a proceeding [*see Gov. Code § 11507.7(d), (e)*] is not limited by the prohibition on ex parte communications [*Gov. Code § 11430.10*; 25 Cal. L. Rev. Comm. Reports 55, 164 (1995)].

- Presiding officers are not prohibited from communicating with adversaries. Only communications from adversaries to presiding officers are precluded. However, presiding officers should give assistance or advice with caution, since there may be an appearance of unfairness if assistance or advice is given to some parties but not others [25 Cal. L. Rev. Comm. Reports 55, 164 (1995); *see Gov. Code § 11430.10*].

- Presiding officers are not prohibited from consulting with other agency personnel when the agency conducting the hearing is not a party to the proceeding [25 Cal. L. Rev. Comm. Reports 55, 164 (1995); *Gov. Code § 11430.10*].

[c] Consequences of Violations

When an improper ex parte communication is made, there are three consequences, disclosure, notice and opportunity to respond, and if necessary, disqualification of the presiding officer. If a presiding officer receives an improper communication, the officer must place the following in the record of the proceeding [*Gov. Code § 11430.50(a)*]:

- If the communication is written, the writing and any written response of the presiding officer to the communication [*Gov. Code § 11430.50(a)(1)*].

- If the communication is oral, a memorandum stating the substance of the communication, any response made by the presiding officer, and the identity of each person from whom the presiding officer received the communication [*Gov. Code § 11430.50(a)(2)*].

The presiding officer must also notify all parties that an ex parte communication has been made a part of the record [*Gov. Code § 11430.50(b)*]. If a party requests an opportunity to address the communication within 10 days after receipt of notice of the communication [*Gov. Code § 11430.50(c)*]:

- The party must be permitted to comment on the communication [*Gov. Code § 11430.50(c)(1)*].

- The presiding officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that has been concluded [*Gov. Code § 11430.50(c)(2)*].

If a presiding officer receives an improper ex parte communication, the presiding officer may be disqualified [*Gov. Code § 11430.60*]. Disqualification is permitted if it is necessary to eliminate the effect of the ex parte communication [25 Cal. L. Rev. Comm. Reports 55, 169 (1995)]. If the presiding officer is disqualified, the portion of the record pertaining to the ex parte communication may be sealed by protective order of the disqualified presiding officer [*Gov. Code § 11430.60*]. The purpose of sealing is to remove the improper communication from the view of the successor presiding officer, while preserving it as a sealed part of the record, for purposes of subsequent administrative or judicial review. Granting a protective order is permissive, not mandatory, and is within the discretion of the presiding officer who has knowledge of the improper ex parte communication [25 Cal. L. Rev. Comm. Reports 55, 169 (1995)].

[d] Application to Agency Head

Agency heads [*see Gov. Code § 11405.40* (defining agency head)] who are decision makers are subject to the same requirements as to ex parte communications with several qualifications. The same requirements that govern ex parte communications to presiding officers also govern ex parte communications in an adjudicative proceeding to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated [*Gov. Code § 11430.70(a)*].

There is, however, an exception that applies to individualized rate making proceedings. An ex parte communication to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated is permissible in an individualized rate making proceeding if the content of the communication is disclosed on the record and all parties are given an opportunity to address it in the manner provided in *Gov. Code § 11430.50* [*Gov. Code § 11430.70(b)*; *see* [c], *above*].

Furthermore, there is a prohibition on direct or indirect communication, while a proceeding is pending regarding the merits of any issue in the proceeding, between the presiding officer and the agency head or other person or body to which the power to hear or decide in the proceeding is delegated [*Gov. Code § 11430.80(a)*]. This rule does not apply when the agency head or other person to which the power to hear or decide in the proceeding is delegated serves as both presiding officer and agency head, or when the presiding officer does not issue a decision in the proceeding [*Gov. Code § 11430.80(b)*].

[3] Non-APA Requirements

Non-APA proceedings are governed by *Cal. Rules Prof. Conduct, Rule 5-300(B)*, which prohibits a State Bar member from communicating with a judicial officer on the merits of a contested matter before that officer, except in open court or under other exceptions [*Cal. Rules Prof. Conduct, Rule 5-300(B)* (other exceptions include consent and ex parte matters; *see Cal. Rules Prof. Conduct, Rule 5-300(B)(1)-(5)*); for further discussion, *see* Ch. 72, *Attorney Practice and Ethics*].

The California Court of Appeal held that an ex parte communication by the chief of staff of a hospital to the Board of

Directors of the hospital that related to the Board's decision to terminate a doctor's staff privileges was not improper (even though the content of the chief of staff's report was not placed in the record of the peer review proceeding) because the doctor failed to raise the issue before the Board, thereby waiving the right to raise the issue on appeal and because the doctor failed to show actual bias from the giving of the report to the board as such reports were authorized by the constitution of the medical staff [*Weinberg v. Cedars Sinai Med. Ctr. (2004) 119 Cal. App. 4th 1098, 1115-1116, 15 Cal. Rptr. 3d 6]* .

Because of the scope of the APA ex parte requirements, non-APA requirements would apply primarily to hearings before local agencies [*see* Ch. 473, *Public Agency Adjudication* , for further discussion of the scope of application of APA provisions].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationImpartialityEx Parte ContactsAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawAgency AdjudicationPresiding OfficersDuties & Powers

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§ 473E.25 ALJ Code of Ethics

[1] Applicability

The ALJ ethics provisions may be referred to as the Administrative Adjudication Code of Ethics [*Gov. Code § 11475*]. For convenience it is here referred to as the ALJ Code of Ethics.

The ALJ Code of Ethics applies to the following persons:

- An administrative law judge, by which is meant an incumbent of that position, as defined by the State Personnel Board, for each class specification for Administrative Law Judge [*Gov. Code § 11475.10(a)(1)*].

- A presiding officer to which the ALJ Code of Ethics is made applicable by statute or regulation [*Gov. Code § 11475.10(a)(2)*; *see also Gov. Code § 11405.80* (defining "presiding officer")].

Under *Gov. Code § 11475.10(a)(1)*, the ALJ Code of Ethics applies not only to ALJ's who preside at adjudicative hearing but also to any supervisory or management level administrative law judge or chief administrative law judge whose function relates directly or indirectly to the adjudicative process.

Conversely, under *Gov. Code § 11475.10(a)(2)*, the ALJ Code of Ethics does not apply to an to an agency head or hearing officer who presides in an administrative adjudication but who is not an ALJ, absent a special statute or regulation. The language "statute or regulation" means that the ALJ Code of Ethics may be made applicable, in situations when it would otherwise not apply, both by the Legislature and also by a particular agency that, by regulation, elects to make it applicable [Cal. L. Rev. Comm. Comment to *Gov. Code § 11475.10*; *see* discussion in [4], *below*]. When the ALJ Code of Ethics does not apply, other ethical considerations may nevertheless apply to the hearing and nonhearing conduct of state agency presiding officers [Cal. L. Rev. Comm. Comment to *Gov. Code § 11475.10* (citing, for example, *Gov. Code § 19572*, relating to cause for discipline)].

The ALJ Code of Ethics applies notwithstanding any general statute providing that *Gov. Code § 11400 et seq.* does not apply to some or all of a particular state agency's adjudicative proceedings [*Gov. Code § 11475.10(b)*]. In other words, it applies to an ALJ even when the proceeding over which he or she is presiding is otherwise exempt from Chapter 4.5 (), the APA's general provisions relating to administrative adjudications [Cal. L. Rev. Comm. Comment to *Gov. Code § 11475.10*; *see, e.g. Gov. Code § 15609.5* (Board of Equalization proceedings exempt); *Pub. Util. Code § 1701* (PUC proceedings exempt)].

[2] Incorporation of Code of Judicial Ethics

[a] Code of Judicial Ethics Incorporated Generally

Except as otherwise provided (*see Gov. Code § 11475.40*, discussed in [b], *below*), the Code of Judicial Ethics adopted by the Supreme Court under *Cal. Const., art. VI, § 18(m)* governs the hearing and nonhearing conduct of an ALJ or other presiding officer to which the ALJ Code of Ethics applies [*Gov. Code § 11475.20*].

The effect of *Gov. Code § 11475.20* is to incorporate generally the Code of Judicial Ethics into the ALJ Code of Ethics. The Code of Judicial Ethics thus becomes applicable generally in administrative adjudications [Cal. L. Rev. Comm. Comment to *Gov. Code § 11475.20*]. This incorporation by reference includes subsequent amendments and additions to the Code of Judicial Ethics, as adopted by the Supreme Court effective January 15, 1996. It is intended that interpretations of the Code of Judicial Ethics in its application to the judicial system, whether made by court rule or decision, should also be applied in administrative adjudication, to the extent relevant to the circumstances of administrative adjudication [Cal. L. Rev. Comm. Comment to *Gov. Code § 11475.20*]. The text of the Code of Judicial Conduct, set out in Cal. Rules of Ct., Appen., Div. II, Code of Judicial Ethics, may be found at the Internet site of the California Judiciary [*see* http://www.courtinfo.ca.gov]. For discussion of the Code of Judicial Ethics in the context of disqualification of judges for cause, see Ch. 317, *Judges* , Part III.

Because the Code of Judicial Ethics governs the conduct of judges, the following definitions apply to provide a general guide in converting terms in the Code of Judicial Ethics for application to administrative adjudications [Cal. L. Rev. Comm. Comment to *Gov. Code § 11475.30*]:

- "Appeal" means administrative review [*Gov. Code § 11475.30(a)*].

- "Court" means the agency conducting an adjudicative proceeding [*Gov. Code § 11475.30(b)*].

- "Judge" means administrative law judge or other presiding officer to which the ALJ Code of Ethics applies. Related terms, including "judicial," "judiciary," and "justice," mean comparable concepts administrative adjudication [*Gov. Code § 11475.30(c)*].

- "Law" includes regulation and precedent decision [*Gov. Code § 11475.30(d)*].

It is intended that these definitions be applied in a manner to effectuate their general purpose without requiring strict or grammatically precise rigidity in the conversion of terms. Likewise, other terms not included in these definitions should be converted in an appropriate manner to effectuate the general intent to apply the Code of Judicial Ethics to the circumstances of administrative adjudication [Cal. L. Rev. Comm. Comment to *Gov. Code § 11475.30*].

The provisions of the Code of Judicial Ethics thus incorporated are designed to supplement other standards that also apply to the conduct of an ALJ, including the following [Cal. L. Rev. Comm. Comment to *Gov. Code § 11475.20*]:

- Disqualification for bias (*see Gov. Code § 11425.40* and discussion in *§ 473E.21[1]*).

- Enforcement of the ALJ Code of Ethics (*see Gov. Code § 11475.50* and discussion in [3], *below*).

- Disciplinary action for failure of good behavior (*see Gov. Code § 19572*).

- The requirements generally applicable to designated employees of state agencies (*see Gov. Code § 89500 et seq.*).

[b] Excluded Provisions of Code of Judicial Ethics

Notwithstanding the general incorporation of the Code of Judicial Ethics into the ALJ Code of Ethics (*see* [a], *above*), the following provisions of the Code of Judicial Ethics are expressly excluded from the ALJ Code of Ethics:

- Canon 3B(7), to the extent it relates to ex parte communications [*Gov. Code § 11475.40(a)*; *see* Cal. Rules of Ct., Appen., Div. II, Code of Judicial Ethics, Canon 3B(7)]. This exclusion reflects that fact that special provisions, and not the Code of Judicial Ethics, govern ex parte communications in administrative adjudication [Cal. L. Rev. Comm. Comment to *Gov. Code § 11475.40*; *see* discussion in *§ 473E.24*].

- Canon 3B(10) (judge may not express opinion of jury verdict to jurors) [*Gov. Code § 11475.40(b)*; *see* Cal. Rules of Ct., Appen., Div. II, Code of Judicial Ethics, Canon 3B(10)]. This exclusion simply reflects the fact that juries are not used in administrative adjudication [Cal. L. Rev. Comm. Comment to *Gov. Code § 11475.40*].

- Canon 3D(3) (judge required to report indictment or conviction of most crimes to Commission on Judicial Performance) [*Gov. Code § 11475.40(c)*; *see* Cal. Rules of Ct., Appen., Div. II, Code of Judicial Ethics, Canon 3D(3)]. This exclusion reflects the fact that the provision is not relevant to ALJ's, who are not under the jurisdiction of the Commission on Judicial Performance [Cal. L. Rev. Comm. Comment to *Gov. Code § 11475.40*].

- Canon 4C (restricting a judge's participation in governmental, civic, or charitable activities) [*Gov. Code § 11475.40(d)*; *see* Cal. Rules of Ct., Appen., Div. II, Code of Judicial Ethics, Canon 4C]. This exclusion means that an ALJ law judge is not precluded from engaging in activities of this type, except to the extent the activities may conflict with general limitations on the administrative law judge's conduct [Cal. L. Rev. Comm. Comment to *Gov. Code § 11475.40* (citing, for example, the general limitations on extrajudicial activities set out in Cal. Rules of Ct., Appen., Div. II, Code of Judicial Ethics, Canon 4A].

- Canons 4E(1), 4F, and 4G [*Gov. Code § 11475.40(e)*; *see* Cal. Rules of Ct., Appen., Div. II, Code of Judicial Ethics, Canons 4E(1), 4F, 4G]. The exclusion of these provisions, relating to fiduciary activities, private employment in alternative dispute resolution, and the practice of law, reflect the fact that these matters are the subject of the employing agency's incompatible activity statement pursuant to *Gov. Code § 19990* [Cal. L. Rev. Comm. Comment to *Gov. Code § 11475.40*].

- Canons 5A through 5D; however, the introductory paragraph of Canon 5 applies to persons subject to the ALJ Code of Ethics notwithstanding *Gov. Code § 3201 et seq.*, relating to political activities of public employees [*Gov. Code § 11475.40(f)*; *see* Cal. Rules of Ct., Appen., Div. II, Code of Judicial Ethics, Canons 5A-5D]. Under this exclusion, an ALJ or other presiding officer must avoid political activity that may create the appearance of political bias or impropriety, such as participation in political activity related to an issue that may come before the ALJ or other presiding officer. By making the introductory paragraph of Cal. Rules of Ct., Appen., Div. II, Code of Judicial Ethics, Canons 5 applicable, this subsection limits the political activities of administrative law judges even though other

public employees might be able to participate in those activities under the *Hatch Act* (*Gov. Code § 3201 et seq.*). This subsection is not intended to preclude an ALJ or other presiding officer from appearing at a public hearing or officially consulting with an executive or legislative body or public official in matters concerning the judge's private economic or personal interests, or to otherwise engage in political activities relating to salaries, benefits, and working conditions [Cal. L. Rev. Comm. Comment to *Gov. Code § 11475.40*; *see also* discussion of *Gov. Code § 11475.70* in [4], *below*].

- Canon 6 (regarding compliance with the Code of Judicial Ethics) [*Gov. Code § 11475.40(g)*; *see* Cal. Rules of Ct., Appen., Div. II, Code of Judicial Ethics, Canon 6]. The exclusion of Canon 6 reflects the fact that its provisions are superseded by the compliance and enforcement provisions of *Gov. Code §§ 11475.50* and *11475.60* (discussed in [3], *below*) [Cal. L. Rev. Comm. Comment to *Gov. Code § 11475.40*].

Generally, the exclusions of *Gov. Code § 11475.40* are designed to adapt the Code of Judicial Ethics for application to ALJ's. Other provisions of the Code of Judicial Ethics, although not expressly excluded, may be minimally relevant to an ALJ [Cal. L. Rev. Comm. Comment to *Gov. Code § 11475.40* (citing, for example, Cal. Rules of Ct., Appen., Div. II, Code of Judicial Ethics, Canon 3C(4) (administrative responsibilities of judges)].

[3] Compliance With and Enforcement of Code

Except as provided in *Gov. Code § 11475.60(b)*, a person to whom the ALJ Code of Ethics applies must comply immediately with all applicable provisions of the Code of Judicial Ethics [*Gov. Code § 11475.60(a)*]. *Gov. Code § 11475.60(b)* sets out a transition clause with respect to compliance with Canon 4D(2), relating to business and commercial activities. Specifically, a person to whom the ALJ Code of Ethics applies must comply with Canon 4D(2) of the Code of Judicial Ethics as soon as reasonably possible and must do so in any event within a period of one year after the ALJ Code of Ethics operative date (*i.e.*, within one year after January 1, 1999) [*Gov. Code § 11475.60(b)*; *see also* Cal. Rules of Ct., Appen., Div. II, Code of Judicial Ethics, Canon 4D(2)].

A violation of an applicable provision of the Code of Judicial Ethics, or a violation of the restrictions and prohibitions on accepting honoraria, gifts, or travel that otherwise apply to elected state officers pursuant to *Gov. Code § 89500*, by an ALJ, or other presiding officer to whom the ALJ Code of Ethics applies, is cause for discipline by the employing agency pursuant to *Gov. Code § 19572* [*Gov. Code § 11475.50*]. This provision, which supersedes Cal. Rules of Ct., Appen., Div. II, Code of Judicial Ethics, Canon 6A, is not precatory but mandatory. Appropriate discipline is the responsibility of the agency that employs the ALJ. Thus, if an ALJ employed by the OAH violates the code of ethics in a hearing conducted for another agency, the OAH is the disciplining entity, and not the other agency. An agency may apply appropriate disciplinary procedures [Cal. L. Rev. Comm. Comment to *Gov. Code § 11475.50*]. It should be noted that a person may also institute disciplinary proceedings directly before the State Personnel Board with the consent of the board [Cal. L. Rev. Comm. Comment to *Gov. Code § 11475.50* (citing *Gov. Code § 19583.5* and *2* Cal. Code Reg. 51.9)].

A violation of the ALJ Code of Ethics by an ALJ is not per se grounds for disqualification, or reversal of a decision, of that ALJ, but the violation may be indicative of the ALJ's violation of other procedural requirements [Cal. L. Rev. Comm. Comment to *Gov. Code § 11475.50* (citing, as an example, disqualification for bias, etc., under *Gov. Code § 11425.40*); for further discussion of disqualification, *see § 473E.21* and *§ 473E.23*].

[4] Collective Bargaining Rights Not Affected

Nothing in the ALJ Code of Ethics is to be construed or is intended to limit or affect the rights of an ALJ or other presiding officer under *Gov. Code § 3512 et seq.* [*Gov. Code § 11475.70*]. This provision makes it clear that the ALJ Code of Ethics does not interfere with collective bargaining rights guaranteed to state employees under the Ralph C.

Dills Act (*Gov. Code § 3512 et seq.*). These include the right to form, join, and participate in activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations, to refuse to join or participate in the activities of employee organizations, or to represent themselves individually in their employment relations with the state [Cal. L. Rev. Comm. Comment to *Gov. Code § 11475.70*].

Legal Topics:

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

§§ 473E.26[Reserved]

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§ 473E.30 Federal Constitution

Due process clause. *U.S. Const., amend. XIV, § 1*

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§ 473E.31 State Constitution

Due process clause. *Cal. Const., art. I, § 7(a)*

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§ 473E.32 State Statutes

[1] Administrative Procedure Act

Accusation. *Gov. Code § 11503*

Administrative adjudication *bill of rights*. *Gov. Code §§ 11425.10-11425.60*

Administrative Law Judges. *Gov. Code § 11502*

Affidavits. *Gov. Code § 11514*

Agency decisional authority. *Gov. Code § 11440.10*

Agencies to which act applies. *Gov. Code §§ 11410.10, 11501*

Amendment of pleadings. *Gov. Code §§ 11507, 11516*

Applicability of provisions to statement of issues. *Gov. Code § 11504.5*

Conduct of hearing. *Gov. Code § 11512*

Consolidation of proceedings. *Gov. Code § 11507.3*

Contempt. *Gov. Code §§ 11455.10-11455.30*

Continuances. *Gov. Code § 11524*

Conversion of proceedings. *Gov. Code §§ 11470.10-11470.50*

Decision. *Gov. Code §§ 11516-11520, 11526*

Declaratory decision. *Gov. Code §§ 11465.10-11465.70*

Definitions of terms. *Gov. Code §§ 11405.10-11405.80, 11500*

Depositions. *Gov. Code § 11511*

Discovery. *Gov. Code §§ 11507.5-11507.7*

Disqualification. *Gov. Code §§ 11425.30, 11425.40, 11512*

Emergency decision. *Gov. Code §§ 11460.10-11460.80*

Evidence. *Gov. Code §§ 11435.10, 11440.40, 11513*

Ex parte communications. *Gov. Code. §§ 11430.10-11430.80*

Hearings by electronic means. *Gov. Code § 11440.30*

Informal hearings. *Gov. Code § 11445.10-11445.60*

Intervention. *Gov. Code § 11440.50*

Language assistance. *Gov. Code § 11435.05-11435.65*

Administrative Adjudication Code of Ethics (also referred to in this chapter as the ALJ Code of Ethics). *Gov. Code § 11475 et seq.*

Judicial review. *Gov. Code § 11523*

Notice of defense. *Gov. Code § 11506*

Notice of hearing. *Gov. Code § 11509*

Oaths. *Gov. Code § 11528*

Official notice. *Gov. Code § 11515*

Reconsideration. *Gov. Code § 11521*

Reporting proceedings. *Gov. Code § 11512*

Restoration of rights. *Gov. Code § 11522*

Separate hearings. *Gov. Code § 11507.3*

Service and notice. *Gov. Code § 11440.20*

Service of initial pleading. *Gov. Code § 11505*

Settlement conferences. *Gov. Code § 11511.7*

Sexual harassment. *Gov. Code § 11440.40*

Statement of issues. *Gov. Code § 11504*

Subpoenas. *Gov. Code §§ 11450.05-11450.50*

Time and place of hearing. *Gov. Code § 11508*

Waiver of rights. *Gov. Code § 11415.40*

[2] Related Statutes

Affidavit of good cause as required for subpoena duces tecum. *Code Civ. Proc. § 1985*

Witness served with subpoena as entitled to demand one day's fees and mileage allowance. *Code Civ. Proc. § 1987*

Witness fees and mileage allowances. *Gov. Code §§ 11191, 68093, 68097.2*

Right to have subpoena issued. *Gov. Code § 11190*

Office of Administrative Hearings. *Gov. Code §§ 11370.1-11370.5*

Board of supervisors of county as empowered to establish county hearing officer. *Gov. Code §§ 27720, 27721*

Oaths used in civil proceedings. *Code Civ. Proc. §§ 2094-2097*

Evidentiary effect of plea of nolo contendere. *Penal Code § 1016*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 473E.33 Decisions

[1] Conduct of Hearing

Who may or must be party to administrative proceeding depends on purpose and effect of proceeding and particular statute under which proceeding brought; standard set out in *Code Civ. Proc. § 389*, requiring joinder of necessary and indispensable parties in judicial proceedings, is not appropriate for administrative proceedings when joinder of parties would defeat purpose of administrative proceeding. *Nevada County Office of Education v. Riles (1983) 149 Cal. App. 3d 767, 775, 777, 197 Cal. Rptr. 152*

Agency is entitled to allow hearing officer to conduct hearing alone and present proposed decision to agency. *Armistead v. City of Los Angeles (1957) 152 Cal. App. 2d 319, 324, 313 P.2d 127*

Agency is entitled to begin hearing along with hearing officer and then withdraw midway through, leaving hearing officer to conclude hearing alone. *Feist v. Rowe (1970) 3 Cal. App. 3d 404, 421, 83 Cal. Rptr. 465*

[2] Disqualification of Agency Member

In case not governed by APA, bias and prejudice are not implied and are required to be clearly established; party's unilateral perception of bias is insufficient, standing alone, to serve as basis for disqualification of adjudicator; prejudice is required to be shown against particular party and required to be significant enough to impair adjudicator's impartiality. *Gray v. City of Gustine (1990) 224 Cal. App. 3d 621, 632, 273 Cal. Rptr. 730*

In case not governed by APA, challenge to fairness of adjudicator is required to set forth concrete facts demonstrating bias or prejudice. *Gray v. City of Gustine (1990) 224 Cal. App. 3d 621, 632, 273 Cal. Rptr. 730*

In case not governed by APA, fact that city council members heard evidence of city manager's investigation of police chief is insufficient, standing alone, to recuse city council from hearing chief's case. *Gray v. City of Gustine (1990) 224 Cal. App. 3d 621, 632, 273 Cal. Rptr. 730*

Rule of necessity: member may not be disqualified if presence necessary to enable agency to act. *Caminetti v. Pac. Mutual L. Ins. Co. (1943) 22 Cal. 2d 344, 366, 139 P.2d 908 , cert. denied sub nom., Neblett v. Caminetti (1944) 320 U.S. 802, 64 S. Ct. 428, 88 L. Ed. 484*

Respondent is not entitled to examine agency members as on voir dire to determine ground for disqualification. *Feist v. Rowe (1970) 3 Cal. App. 3d 404, 414, 83 Cal. Rptr. 465*

Necessity to present ground for disqualification at hearing if then known; necessity to follow established disqualification procedure, if any. *Kendall v. Bd. of Osteopathic Examiners (1951) 105 Cal. App. 2d 239, 233 P.2d 107*

Disqualification in case not governed by *APA. Aluisi v. County of Fresno (1960) 178 Cal. App. 2d 443, 449-450, 452, 2 Cal. Rptr. 779 , cert. denied sub nom., Boyd v. Fresno County 364 U.S. 893, 81 S. Ct. 224, 5 L. Ed. 2d 188*

Agency member is not disqualified because of foreknowledge of evidence. *Wisuri v. Newark School Dist. (1966) 247 Cal. App. 2d 239, 243, 55 Cal. Rptr. 490*

Agency member is not disqualified because of personal opinion about wisdom of law to be enforced. *Western Airlines, Inc. v. Schutzbank (1968) 258 Cal. App. 2d 218, 231, 66 Cal. Rptr. 293*

[3] Disqualification of Administrative Law Judge

Any person with relevant knowledge is entitled to make affidavit to support request for disqualification of hearing officer. *Feist v. Rowe (1970) 3 Cal. App. 3d 404, 413, 83 Cal. Rptr. 465*

Necessity to present ground for disqualification at hearing, if ground then known. *Kendall v. Bd. of Osteopathic Examiners (1951) 105 Cal. App. 2d 239, 248, 233 P.2d 107*

Legal Topics:

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Chapter 473E PUBLIC ADMINISTRATIVE LAW JUDGES
PART III. RESEARCH GUIDE

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§ 473E.34 Text References

Judicial Council of California, Tenth Biennial Report (1944)

California Administrative Hearing Practice (Cal. C.E.B. 1984)

Witkin, California Evidence, Ch. III, *Judicial Notice*, §§ 150-191; Ch. X, *Witnesses*, §§ 787-791; Ch. XII, *Introduction of Evidence at Trial*, §§ 1223-1275 (2d ed.)

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceAdmissibilityGeneral OverviewEvidenceJudicial NoticeGeneral Overview

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§ 473E.35 Internet References

Office of Administrative Hearings. This site includes information and location concerning specific OAH offices; an OAH hearing guide; information concerning Administrative Procedure Act statutes, regulations, and proposed regulations; OAH forms; information concerning alternative dispute resolution procedures; and declaratory decisions. http://www.dgs.ca.gov/oah **NOTE:** On and after July 1, 1998, The OAL is required by *Gov. Code § 11340.1(b)* to make the full text of the California Code of Regulations, with reference citations and history notes, available on the Internet free of charge.

Office of Administrative Law. This site includes OAL publications; links to OAL statutes and regulations relating to rulemaking; regulations submitted to the OAL for review, and information for contacting or providing input to the OAL regarding rulemaking. http://www.oal.ca.gov

California Home Page. This site includes links to other sites maintained by numerous state agencies. http://www.ca.gov

Department of Consumer Affairs. This site includes links to sites maintained by many state agencies that are under this department, as well as links to agency sites. http://www.dca.ca.gov

California Courts. This site includes general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most Court of Appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes text of constitution, codes, and statutes (including complete text of APA); and information concerning pending legislation. http://www.leginfo.ca.gov

Matthew Bender. This site includes links to Matthew Bender publications and Shepard's citation service.
http://www.bender.com

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationAlternative Dispute ResolutionAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPresiding OfficersGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law Judges

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[Reserved]

§§ 473E.36[Reserved]

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41A-473E California Forms of Pleading and Practice--Annotated § 473E.40

§ 473E.40 Request for Disqualification of ALJ or Agency Member

[1] Motion to Disqualify

☐ Prepare motion [*Gov. Code § 11512(c)*; *see § 473E.22[1][a]*; for a form, see *§ 473E.60*].

☐ Prepare affidavit [*Gov. Code § 11512(c)*; *see § 473E.22[1][b]*; for a form, see *§ 473E.60*, which includes a declaration that may be used in lieu of an affidavit under *Code Civ. Proc. § 2015.5*].

☐ File affidavit or declaration prior to hearing [*Gov. Code § 11512(c)*; *see § 473E.22[1][a]*].

[2] Peremptory Challenge

☐ Do agency regulations allow a peremptory challenge [*Gov. Code § 11425.40(d)*; *see § 473E.22[1][d]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationImpartialityGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersGeneral Overview

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41A-473E California Forms of Pleading and Practice--Annotated § 473E.41

§ 473E.41 Disqualification in Non-APA Procedures

☐ Check applicable statutes or regulations [*see § 473E.22[2]*].

☐ If provisions for disqualification do not exist, make a motion supported by affidavit based on APA procedures [*see §§ 473E.22[2], 473E.40*; for a form, see *§ 473E.60*].

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§ 473E.42 Waiver of Disqualification

[1] Written Waiver

☐ Prepare written waiver [*Gov. Code § 11512(c)*; *see § 473E.22[1][a]*; for a form of waiver, see *§ 473E.61*].

☐ Obtain all parties' signatures.

☐ Obtain acceptance of ALJ or agency member.

☐ Have included in the record.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationImpartialityGeneral Overview

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[Reserved]

§§ 473E.43[Reserved]

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PART V. FORMS

41A-473E California Forms of Pleading and Practice--Annotated § 473E.60

§ 473E.60 Motion to Disqualify ALJ or Agency Member and Supporting Declaration [Gov. Code § 11512(c)]

[1] FORM Motion to Disqualify ALJ or Agency Member and Supporting Declaration [Gov. Code § 11512(c)]

BEFORE THE _____ [*name of agency*]

In the matter of _____ [*name*], Respondent	)))))	No. _____ REQUEST TO DISQUALIFY [ADMINISTRATIVE LAW JUDGE *or* AGENCY MEMBER]

_____

Respondent requests that _____[*name of agency*] issue an order disqualifying _____ [*name of person to be disqualified*], the _____ [administrative law judge *or* agency member] from participating in this matter. This motion is made on the ground that _____ [*name of person to be disqualified*] cannot accord a fair and impartial hearing or consideration in this matter, as set forth in the supporting declaration, which is attached hereto.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent

DECLARATION IN SUPPORT OF MOTION FOR DISQUALIFICATION

I, _____ [*name of respondent*], Respondent in this matter, declare that _____ [*name of person to be disqualified*], the _____ [administrative law judge *or* agency member], cannot accord a fair and impartial hearing or consideration in this matter, for the following reasons: _____[*state specific reasons*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

Respondent

[2] Use of Form

The form in [1], *above*, is an example of a request for disqualification and a supporting declaration that conform to the APA requirements [*see Gov. Code § 11512(c)*]. For agencies not subject to the APA, counsel should check the governing statutes and regulations for any different requirements.

Code Civ. Proc. § 2003 requires an affidavit to be written and made under oath [*Code Civ. Proc. § 2003*; *see Code Civ. Proc. § 2015.5* (requirements for declaration under penalty of perjury in lieu of affidavit)].

For a discussion of the disqualification procedures, see *§ 473E.22*.

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41A-473E California Forms of Pleading and Practice--Annotated § 473E.61

§ 473E.61 Written Waiver of Disqualification [Gov. Code § 11512(c)]

[1] FORM Written Waiver of Disqualification [Gov. Code § 11512(c)]

BEFORE THE _____ [*name of agency*]

In the matter of _____ [*name*], Respondent	)))))	No. _____ WRITTEN AGREEMENT TO WAIVE DISQUALIFICATION

It is hereby agreed by the parties that the disqualification of Administrative Law Judge _____, the presiding officer of the hearing in the above matter, on the basis that this judge is disqualified because of (specify grounds) to preside in the hearing in the above matter is hereby waived.
Dated: _____.

_____

Signature of Agency Representative

_____

Signature of Respondent

[2] Use of Form

The form in [1], *above*, is a waiver for use when all the parties in an administrative hearing agree to waive the

disqualification of the judge.

Under *Gov. Code § 11512(c)*, the parties may waive disqualification of the presiding officer by a writing that recites the grounds for disqualification. A waiver is effective only when signed by all parties, accepted by the administrative law judge or agency member, and included in the record. For further discussion of the procedures required to waive the disqualification of an administrative law judge, see *§ 473E.22[1][a]*.

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41A-473F California Forms of Pleading and Practice--Annotated 473F.syn

§ 473F.syn Synopsis to Chapter 473F: AGENCY ADJUDICATION HEARINGS

§ 473F.01 Scope of Chapter

§ 473F.02 Cross References

[1] Related Coverage of Agency Adjudication

[2] Judicial Review

[3] Public Administrative Law Generally

[4] Specific Public Agencies

[5] Other Related Chapters

§§ 473F.03-473F.09 [Reserved]

§ 473F.10 Nature of Agency Hearings

§ 473F.11 Presiding Officer at Hearing

[1] Administrative Law Judge

[2] Agency Members

§ 473F.12 Public Hearings

[1] APA Provisions

[2] Relationship to Open Meetings Acts

[3] Exclusion of Witnesses

[4] Exclusion of Parties

[5] Office of Administrative Hearings Regulations Governing Hearing Procedures

§ 473F.13 English Language and Language Assistance

[1] When APA Requirements Apply

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[3] Interpreter Requirements

[4] Costs of Interpreters

§ 473F.14 Subpoenas

[1] APA Procedures

[a] Scope of Application

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[c] Issuer

[d] Service

[e] Enforcement

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[g] Witnesses, Mileage, and Fees

[h] Written Notice

[2] Non-APA Procedures

§ 473F.15 Conduct of the Hearing

[1] Opening Statements

[a] When Opening Statements Are Used

[b] Guidelines for Use

[2] Hearing Briefs

[3] Oaths and Affirmations

[4] Direct Examination

[a] Nature and Purpose

[b] Guidelines for Direct Examination of Witnesses

[c] Guidelines for Refreshing Witness's Recollection

[5] Expert Witnesses

[a] Nature of Experts

[b] Qualification

[6] Cross-Examination

[a] Nature and Purpose

[b] Guidelines for Cross-Examination of Witnesses

[7] Redirect and Recross-Examination

[8] Examination by ALJ or Agency Member

[9] Rebuttal Evidence

[10] Bifurcation

[a] Nature of Bifurcation

[b] Reasons for Requesting Bifurcation

[c] Procedure and Ruling on Motion

[11] Depositions

[a] Authority to Order

[b] Contents of Petition

[c] Procedure for Petition and Order Taking Deposition

[12] Motion for Nonsuit or Dismissal

[13] Argument

[a] Order of Presentation

[b] Guidelines for Argument

[c] Written Argument

[14] Holding Record Open

[15] Decision

[16] Sanctions and Enforcement

[a] Sanctions

[b] Enforcement

[17] Right to Counsel

§ 473F.16 Record of the Hearing

[1] Reporting

[2] Transcripts

§ 473F.17 Defaults

[1] APA Proceedings

[a] License Issuance and Renewal Cases

[b] License Discipline Cases

[c] Mitigation

[d] Reconsideration of Default

[2] Non-APA Defaults

§ 473F.18 Persuasion

[1] Persuasion in Administrative Hearings

[2] Guidelines for Persuasion

§§ 473F.19-473F.29 [Reserved]

§ 473F.30 Administrative Rules of Evidence

[1] Criminal Rules of Evidence Are Generally Inapplicable

[2] Liberal Nature of Rules

[3] Guidelines for Production of Evidence

§ 473F.31 Basic Hearing Objections

[1] Irrelevant Evidence

[2] Evidence That Necessitates Undue Consumption of Time

[3] Objectionable Form of Question

[a] Leading Questions

[b] Narrative Questions

[c] Other Objectionable Questions

[4] Cumulative Evidence

[5] Guidelines for Objection Procedure

[6] Offers of Proof

[7] Foundation and Authentication

[a] Establishing a Proper Foundation

[b] Authentication of Writings

[8] Secondary Evidence Rule

[9] Failure to Object

§ 473F.32 Administrative Hearsay

[1] General Requirements

[2] Objection Requirement

[3] Other Inadmissible Hearsay

[4] Non-APA Hearings

§ 473F.33 Privileges

[1] Application in Administrative Proceedings

[2] Self-Incrimination

[a] Compared to Application in Civil and Criminal Trials

[b] Application to Public Employees

[c] Application to Drivers' Licenses

[3] Sexual Privacy

[a] Scope of Privilege

[b] APA Proceedings

§ 473F.34 Exclusionary Rule

[1] General Requirements

[2] Application to Administrative Proceedings

[a] Factors Used to Determine Application

[b] Administrative Inspections

[c] Vicarious Exclusionary Rule

[d] Guidelines for Objecting to Illegally Obtained Evidence

§ 473F.35 Illegally Obtained Confessions and Entrapment

§ 473F.36 Presumptions

[1] Nature and Types

[2] Rebuttable Presumptions

§ 473F.37 Affidavits

§ 473F.38 Official Notice

[1] Nature of Official Notice

[2] Matters Subject to Official Notice

[3] Notice and Opportunity to Refute

§ 473F.39 Mitigation, Extenuation, and Rehabilitation Evidence

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[2] Mitigation and Extenuation Evidence

[a] Use of Evidence

[b] Examples of Evidence

[c] Presentation of Evidence

[3] Rehabilitation Evidence

[a] Nature of Evidence

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[4] Admissions of Liability

§ 473F.40 Views

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§ 473F.41 Res Judicata and Collateral Estoppel

[1] Nature of Doctrines

[2] Application to Administrative Hearings

[a] Required Elements

[b] Role of Burden of Proof

[3] Offensive Use of Collateral Estoppel

§§ 473F.42-473F.49 [Reserved]

§ 473F.50 Order of Proof

[1] General Requirements

[2] Customary Order in Civil Cases

[3] Modification of Customary Order in Administrative Hearings

[4] Order in Particular Matters

[5] Consideration on Appeal

§ 473F.51 Determining Burden of Proof

[1] General Rules

[2] APA Provisions

[3] License and Permit Applications

[4] License Renewal

[5] License Discipline

[a] Revocation and Suspension

[b] Citations

[6] License Reinstatement

[7] Employee Discipline

[a] Proceedings to Dismiss or Discipline

[b] Civil Service Employees

[c] Name-Clearing Hearings

[8] Teacher Dismissal or Suspension

[9] Benefit Entitlement

[10] Safety Regulation Enforcement

[11] Review on Appeal

§ 473F.52 Standard of Proof

[1] Preponderance of Evidence Standard

[2] Clear and Convincing Evidence Standard

[a] Applicable to Revocation of Professional Licenses

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[c] Inapplicable to Teacher Dismissal Hearings

[d] Instructions Regarding Standard

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§ 473F.53 Meeting the Burden of Proof

[1] Admissions

[a] Types of Admissible Evidence

[b] Criminal Admissions

[2] Hearsay

[a] Need for Objection

[b] Exceptions to Hearsay

[3] Res Judicata and Collateral Estoppel

[4] Official Notice

[a] Used to Satisfy Burden of Proof

[b] Practical Considerations

§ 473F.54 Shifting the Burden of Proof

[1] Equitable Estoppel

[a] Nature of Doctrine

[b] Application to Administrative Agencies

[c] When Estoppel Does Not Apply

[2] Affirmative Defenses

[a] Burden on Respondent

[b] Claim of Discrimination

[c] Discrimination in License Testing Procedures

§§ 473F.55-473F.59 [Reserved]

§ 473F.60 Federal Constitution

§ 473F.61 State Constitution

§ 473F.62 State Statutes

[1] Administrative Procedure Act

[2] Related Statutes

§ 473F.63 Decisions

[1] General Requirements

[2] Conduct of Hearing

[3] Contempt

[4] Disqualification of Counsel

[5] Estoppel

[6] Evidence

[7] Expert Witnesses

[8] Presiding Officers

[9] Hearings

[10] Judicial Notice

[11] Jurisdiction

[12] Nonsuit

[13] Official Notice

[14] Order and Burden of Proof

[15] Record of Proceedings

[16] Right to Counsel

[17] Stay of Execution

[18] Subpoenas

§ 473F.64 Text References

§ 473F.65 Internet References

§§ 473F.66-473F.69 [Reserved]

§ 473F.70 Prehearing Considerations

[1] Exclusion of Witnesses

[2] Interpreters

[3] Witness Fees and Mileage

§ 473F.71 Preparation for Hearing

[1] Opening Statement

[2] Hearing Brief

[3] Witnesses

[4] Expert Witnesses

[5] Bifurcation

[6] Depositions

[7] Closing Argument

§ 473F.72 Subpoena and Subpoena Duces Tecum

[1] Procedure

[2] Party Served With Subpoena

§ 473F.73 Use of Affidavits at Hearing

[1] Affidavits

[2] Party Receiving Affidavit and Notice

§ 473F.74 Official Notice

[1] Request

[2] Refuting Officially Noticed Matter

§ 473F.75 Default

[1] Failure to File Notice of Defense or to Attend Hearing

[2] Respondent Fails to Receive Actual Notice

§§ 473F.76-473F.89 [Reserved]

§ 473F.90 Notice of Intention to Use Affidavit or Declaration [Gov. Code § 11514]

[1] FORM

[2] Use of Form

§ 473F.91 Request for Official Notice [Gov. Code § 11515]

[1] FORM

[2] Use of Form

§ 473F.92 Request for Opportunity to Refute Officially Noticed Matter [Gov. Code § 11515]

[1] FORM

[2] Use of Form

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PART I. SCOPE

41A-473F California Forms of Pleading and Practice--Annotated § 473F.01

§ 473F.01 Scope of Chapter

This chapter discusses hearings in administrative adjudications in California public agencies. The legal background discussion in Part II includes the following:

- Subpart A, discussing the nature of agency hearings and hearing procedures governing language assistance, subpoenas, conduct of the hearing, record of the hearing, defaults, and argument [*see §§ 473F.10* -473F.19].

- Subpart B, discussing rules of evidence in agency hearings, including administrative rules of evidence, basic hearing objections, administrative hearsay, privileges, the application of the exclusionary rule, illegally obtained confessions and entrapment, presumptions, affidavits, "judicial" or official notice, mitigation, extenuation, and rehabilitation evidence, views, and claim and issue preclusion [*see §§ 473F.30 -473F.41*].

- Subpart C, discussing burden of proof in agency hearings, the order of proof, determining the applicable burden of proof, standard of proof, meeting the burden of proof, and shifting the burden of proof [*see §§ 473F.50 -473F.54*].

Part V includes a form of notice of intention to use a declaration or affidavit [*see § 473F.90*], a form of request for official notice [§ 473F.91], and a form of request for opportunity to refute any officially matter [*see § 473F.92*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsCollateral EstoppelAdministrative LawAgency AdjudicationDecisionsRes JudicataAdministrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceAdmissibilityGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceAdmissibilityHearsay

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§ 473F.02 Cross References

[1] Related Coverage of Agency Adjudication

For related discussion and forms providing more detailed coverage of the other stages of an agency adjudication under the formal hearing provisions of the APA, see:

- Ch. 473, *Public Agency Adjudication*.
- Ch. 473A, *Commencing Agency Adjudication*.
- Ch. 473B, *Discovery in Agency Adjudications*.
- Ch. 473C, *Prehearing Procedures in Agency Adjudications*.
- Ch. 473D, *Prehearing Preparations in Agency Adjudications*.
- Ch. 473E, *Public Administrative Law Judges*.
- Ch. 473G, *Agency Adjudication Decisions*.

For related discussion and forms providing more detailed coverage of adjudication methods under the APA other than that of formal hearing, see Ch. 473H, *Alternative Administrative Adjudication Procedures* .

For detailed discussion and forms relating generally to licensing agencies, including licensing adjudications, see Ch. 471B, *Licensing by Public Agencies* .

[2] Judicial Review

For detailed discussion and forms relating generally to review by California courts of agency adjudications, see:

- Ch. 474, *Availability of Judicial Review of Agency Decisions*.
- Ch. 474A, *Timing of Judicial Review of Agency Decisions*.
- Ch. 474B, *Standards in Reviewing Agency Decisions*.
- Ch. 474C, *Procedures in Reviewing Agency Decisions*.

For other related discussion and forms relating to judicial review generally, see:

- Ch. 40 et seq., *Appeal* (discussion and forms relating to civil appeals).
- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to immediate judicial review of orders by extraordinary writ of mandate or prohibition).
- Ch. 492, *Review (Certiorari), Writ of* (discussion and forms relating to immediate judicial review of civil proceedings by extraordinary writ of review).

[3] Public Administrative Law Generally

For related discussion of California public administrative law generally, including discussion of public agency functions and powers (including adjudicative or quasi-judicial powers), and organization generally, see Ch. 470, *Overview of Public Administrative Law* (for general discussion of judicial power, *see § 470.12[5]*). For detailed discussion of the general procedures imposed in agency proceedings by constitutional due process and related statutory requirements, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

For discussion and forms relating to the law governing access to and conduct of meetings by California public agencies, see Ch. 470B, *Public Agency Meetings* .

For detailed discussion and forms relating to the law governing disclosure of public records under the California Public Records Act [*Cal. Gov. Code §§ 6250 et seq.*], see Ch. 470C, *Public Records Act* .

For detailed discussion and forms relating generally to agency investigations and inspections, see:

- Ch. 471, *Investigations by Public Agencies.*
- Ch. 471A, *Inspections by Public Agencies.*

For detailed discussion and forms relating generally to the legislative or rulemaking functions of California public agencies, including judicial review of these functions, see:

- Ch. 472, *Public Agency Rules*.
- Ch. 472A, *Agency Rulemaking Procedures*.
- Ch. 472B, *Review of Agency Rulemaking*.

[4] Specific Public Agencies

For related coverage of adjudicative proceedings before particular public agencies, see:

- Ch. 18, *Alcoholic Beverage Licenses* (discussion and forms relating to licensing proceedings before the department of Alcoholic Beverage Control).

- Ch. 70, *Attorney Admission* and Ch. 71, *Attorney Discipline* (discussion and forms relating to licensing and discipline of attorneys and proceedings before the State Bar and the State Bar Court).

- Ch. 92, *Automobiles: Drivers' Licenses* (discussion and forms relating to drivers' licensing and proceedings before the Department of Motor Vehicles).

- Ch. 104, *Building Contracts*, § 104.70 et seq. (discussion relating to licensing and discipline of building contractors by the Contractors' State License Board).

- Ch. 118, *Civil Service* (discussion and forms relating to proceedings before the Personnel Board).

- Ch. 209, *Dentists* (discussion and forms relating to licensing and discipline of dentists and proceedings before the Board of Dental Examiners).

- Ch. 214, *Drugs and Pharmacists* (discussion and forms relating to licensing and discipline of pharmacists and proceedings before the State Board of Pharmacy).

- Ch. 414, *Physicians: Licensing and Discipline* (discussion and forms relating to licensing and discipline of physicians and proceedings before the Medical Board of California).

- Ch. 480, *Public Utilities* (discussion and forms relating to proceedings before the Public Utilities Commission).

- Ch. 512, *Schools: Certification, Dismissal, and Related Employment Issues* (discussion and forms relating to teacher certification and dismissal proceedings before the State Board of Education and local boards).

- Ch. 527, *Social Services* (discussion and forms relating to proceedings before the State Department of Social Service or the State Department of Health Services).

- Ch. 564, *Unemployment and Disability Insurance*, § 564.30 et seq. and § 564.100 et seq. (discussion and forms relating to proceedings before the Unemployment Insurance Appeals Board).

- Ch. 575, *Waters* (discussion and forms relating to proceedings before the State Water Resources Control Board and local water districts).

- Ch. 577, *Workers' Compensation* (discussion and forms relating to proceedings before the Division of Workers' Compensation and the Workers' Compensation Appeals Board).

For additional cross references to coverage of other particular public agencies, see *Ch. 470, Overview of Public Administrative Law, § 470.02[2]*.

[5] Other Related Chapters

For discussion and forms relating to trial proceedings in civil actions generally, see Ch. 551, *Trial* .

For discussion and forms relating to default proceedings in civil actions generally, see Ch. 205, *Defaults and Default Judgments* , and Ch. 489, *Relief From Judgments and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationAlternative Dispute ResolutionAdministrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral Overview

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[Reserved]

§§ 473F.03[Reserved]

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§ 473F.10 Nature of Agency Hearings

An administrative hearing is a proceeding similar to a nonjury civil court trial. The degree of formality varies with the kind of hearing, but most administrative hearings are formal and conducted in a quasi-judicial manner [*see Nishkian v. City of Long Beach (1951) 103 Cal. App. 2d 749, 752, 230 P.2d 156* (hearings must be at least quasi-judicial in nature, and must provide a record for court review)]. Thus, good trial skills and preparation are as necessary in administrative hearings as they are in court trials. This subpart compares hearing practice to trial practice, emphasizing the differences. It discusses preliminary matters such as subpoenas and covers hearings from opening statements to submission. Hearings conducted by administrative law judges alone are compared with those conducted by administrative law judges with agency members present. It also points out, as some of the common errors committed by lawyers during agency hearings, and includes a few general trial practice techniques that apply to hearings as well.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral Overview

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§ 473F.11 Presiding Officer at Hearing

[1] Administrative Law Judge

An administrative law judge (ALJ) or other hearing officer usually presides over an administrative hearing. The case may also, however, be heard by agency members directly [*see Gov. Code § 11512(a)*; *see* [2], *below*]. When an ALJ alone hears a case, he or she has all the powers necessary to conduct the hearing [*Gov. Code § 11512(b)*]. An ALJ's discretion is broad, but limited by the statutes or ordinances applicable to the hearing and due process [*see Rose v. City of Hayward (1981) 126 Cal. App. 3d 926, 936-937, 179 Cal. Rptr. 287* (ALJ presiding over APA hearing must exercise discretion within scope of statutory and constitutional limitations; thus, ALJ could not hear class action in violation of statute); *see also* Ch. 470A, *Due Process Restrictions on Public Agencies* (discussion of due process issues)].

For example, the ALJ can determine the order of proof [*Feist v. Rowe (1970) 3 Cal. App. 3d 404, 412, 83 Cal. Rptr. 465]* . Other actions, such as determining motions, are also within the judge's discretion [*Ehrlich v. McConnell (1963) 214 Cal. App. 2d 280, 287, 29 Cal. Rptr. 283]* . The judge controls the order of testimony and the introduction of evidence [*Douglass v. Board of Medical Quality Assurance (1983) 141 Cal. App. 3d 645, 658-659, 190 Cal. Rptr. 506]* . For detailed discussion and forms relating to the duties of an ALJ or presiding officer, see Ch. 473E, *Public Administrative Law Judges* .

[2] Agency Members

Some administrative hearings are heard directly by agency members, with an ALJ presiding [*see Gov. Code § 11512(a)*]. When that is the case, the administrative law judge presides at the hearing, rules on the admission and exclusion of evidence, and advises the agency on matters of law. The agency exercises all other powers relating to the conduct of the hearing but may delegate any of the powers to the ALJ [*Gov. Code § 11512(b)*]. Whether agency members hear a case depends on the particular nature of the case and the availability of the professional members. Professional agency members sometimes hear cases involving professional licensing discipline. Long-running cases are usually heard by an ALJ alone, however, because of the unavailability of members. Even if an APA case begins with agency members hearing it, the ALJ will complete the hearing alone if a quorum is lost during the hearing [*Gov. Code § 11512(e)*].

Because agency members are similar to a jury, counsel should use all of the persuasive trial techniques he or she would use in a jury trial. Agency members differ from a jury, however, in that they usually have expertise in the professional subject matter of the hearing and have a special commitment to their profession. Attorneys must thus consider this factor when presenting the case. For further discussion of the specific powers exercised by the agency itself in an administrative hearing, see Ch. 473E, *Public Administrative Law Judges* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceAdmissibilityGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawAgency AdjudicationPresiding OfficersDuties & PowersEvidenceTestimonyPresentation of Evidence

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§ 473F.12 Public Hearings

[1] APA Provisions

The APA's Administrative Adjudication *Bill of Rights* (*Gov. Code §§ 11425.10-11425.60*) applies to agency hearings conducted under the APA's formal hearings formal hearing provisions (*Gov. Code § 11500 et seq.*) [*see Gov. Code §§ 11410.50, 11501*]. This *bill of rights* specifies the minimum due process and public interest requirements that must be satisfied [25 Cal. L. Rev. Comm. Reports 55, 154 (1995)].

One of the procedural requirements is a public hearing, specifically that the hearing shall be open to public observation [*Gov. Code §§ 11425.10(3), 11425.20(a)*]. However, the presiding officer has express authority to order closure of a hearing or make other protective orders to the extent necessary or proper for any of the following purposes [*Gov. Code § 11425.20(a)*]:

- To satisfy the United States Constitution, the California Constitution, federal or state statute, or other law, including but not limited to laws protecting privileged, confidential, or other protected information [*Gov. Code § 11425.20(a)(1)*]. This exception includes statutory protection of trade secrets and other confidential information or privileged information under such statutes as, for example, Evid. Code§§ 1060-1063, Fin. Code §§ 1939, and 18496 [25 Cal. L. Rev. Comm. Reports 55, 156 (1995)].

- To ensure a fair hearing in the circumstances of the particular case [*Gov. Code § 11425.20(a)(2)*].

- To conduct the hearing, including the manner of examining witnesses, in a way that is appropriate to protect a minor witness or a witness with a developmental disability, as defined in *Welf. & Inst. Code § 4512*, from intimidation or other harm, taking into account the rights of all persons [*Gov. Code § 11425.20(a)(3)*]. This exception codifies part of the decision of *Seering v. Department of Social Services (1987) 194 Cal. App. 3d 298, 239 Cal. Rptr. 422* . The rights of persons taken into account includes the rights of the parties to observe the proceedings in an appropriate manner [25 Cal. L. Rev. Comm. Reports 55, 156 (1995)].

Public hearing rights are also provided to police officers charged with misconduct under the Police Officers *Bill of Rights* statute [*Gov. Code § 3304*] because the police officers have an interest in receiving vindication, and the county has provided no reason to justify a closed hearing [*Caloca v. County of San Diego (2002) 102 Cal. App. 4th 433, 445-447, 126 Cal. Rptr. 2d 3]* .

When a hearing is conducted by telephone, television, or other electronic means [*see Gov. Code § 11512(d)* (with consent of all parties, hearing proceedings may be reported electronically)], the public hearing procedural requirements are satisfied if members of the public have an opportunity to do both of the following [*Gov. Code § 11425.20(b)*]:

- At reasonable times, hear or inspect the agency's record, and inspect any transcript obtained by the agency [*Gov. Code § 11425.20(b)(1)*].

- Be physically present at the place where the presiding officer is conducting the hearing [*Gov. Code § 11425.20(b)(2)*].

The right of the public to be present where a hearing is being conducted telephonically does not include the right to participate, and the right of the public to inspect the record does not impose a duty on the agency to provide a copy independent of the California Public Records Act (*Gov. Code § 6250 et seq.*) [25 Cal. L. Rev. Comm. Reports 55, 156 (1995); for discussion of the Public Records Act, *see* Ch. 470C, *Public Records Act*].

Presiding officers have authority to conduct all or part of a hearing by telephone, television, or other electronic means (such as a conference telephone call) if each participant in the hearing has an opportunity to participate in and to hear the entire proceeding while it is taking place and to observe exhibits [*Gov. Code § 11440.30(a)*; 25 Cal. L. Rev. Comm. Reports 55, 179 (1995)]. The presiding officer also has the authority to conduct the hearing in the physical presence of all participants [25 Cal. L. Rev. Comm. Reports 55, 179 (1995)]. If any party objects, the presiding officer may not conduct all or part of a hearing by telephone, television, or other electronic means [*Gov. Code § 11440.30(b)*].

[2] Relationship to Open Meetings Acts

Neither the Bagley-Keene Open Meeting Act (*Gov. Code § 11120 et seq.*; governing state bodies) nor the Ralph M. Brown Act (*Gov. Code § 54950 et seq.*; governing local agencies), which provide for open agency meetings, have been applied to administrative hearings. It is unlikely that they could be applied, because administrative hearings are neither meetings of a state or legislative body, nor legislative hearings [*see Gov. Code §§ 11123* (state body meetings must be open), 54953 (meetings of local agency legislative body must be open)]. They are judicial-like adjudicatory hearings.

Nevertheless, the practice of holding open administrative hearings is consistent with California's public policy of open meetings as expressed in those acts [*see Gov. Code §§ 11120, 54950* (declarations of legislative intent that people of California remain informed regarding acts of public agencies)]. Furthermore, some rules applicable to administrative hearings contain provisions similar to these acts. For example, non-APA hearing rules may provide for closed hearings in employee discipline cases unless the employee requests a public hearing. Similarly, in APA hearings conducted by the agency itself [*see Gov. Code § 11512(a)*], the ALJ presiding at the hearing generally has the board, panel, or commission hearing the case go into closed session to decide the case. Both open meeting acts provide for closed sessions in employee matters [*Gov. Code §§ 11126(a), 54957*; *see Titus v. Civil Service Com. (1982) 130 Cal. App. 3d 357, 363, 181 Cal. Rptr. 699* (local agency held closed session to consider dismissal of sheriff's department employee); *Cooper v. Board of Medical Examiners (1975) 49 Cal. App. 3d 931, 948-949, 123 Cal. Rptr. 563* (state agency held closed session to consider revocation of psychologist's license to practice)].

The California Law Revision Commission Comments relating to *Gov. Code § 11425.20* notes that the provisions of this section supplement the Bagley-Keene Open Meetings Act. Closure of a hearing should be done only to the extent

necessary under this section, taking into account the substantial public interest in open proceedings. Under the open meeting law deliberations on a decision to be reached based on evidence introduced in an adjudicative proceeding may be made in a closed session [*Gov. Code § 11126(d)*]. Also, under the open meeting law, a settlement proposal may be considered by the agency in closed session if it sustains the substantial burden of showing the prejudice to be suffered from conducting an open meeting, citing *Gov. Code § 11126(d), (q)* [25 Cal. L. Rev. Comm. Reports 55, 156 (1995)].

Finally, the public hearing requirements do not apply to a prehearing conference, settlement conference, or proceedings for alternative dispute resolution other than binding arbitration [*Gov. Code § 11425.20(c)*; for discussion of prehearing and settlement conferences and proceedings for alternative dispute resolution, *see* respectively Ch. 473C, *Prehearing Procedures in Agency Adjudications* , and Ch. 473H, *Alternative Procedures for Agency Decisions*].

For detailed discussion of the Bagley-Keene Open Meeting Act and Ralph M. Brown Act, relating to open agency meetings, see Ch. 470B, *Public Agency Licensing* .

[3] Exclusion of Witnesses

The APA does not provide for the exclusion of witnesses. In practice, however, witnesses are often excluded from administrative hearings so that they cannot hear other witnesses' testimony, in civil actions [*see Evid. Code § 777* (witnesses may be excluded from courtroom when other witnesses are testifying)].

Any request or motion to exclude witnesses should be made before any testimony is heard. The ALJ has the discretion to refuse the request, but usually grants it. The ALJ may first ask the requesting counsel why the witnesses should be excluded, however, particularly if it appears the request is made out of habit. While opposing counsel can certainly request that the exclusion be mutual, the judge is likely to exclude all witnesses even if a mutual request is not made [*see Evid. Code § 777(a)* (court may exclude any witness not under examination); *People v. Guy (1961) 191 Cal. App. 2d 714, 719, 13 Cal. Rptr. 17* (exclusion of witnesses in criminal trial)].

[4] Exclusion of Parties

Parties usually cannot be excluded from hearings [*see, e.g., Evid. Code § 777(b)* (party to an action cannot be excluded from court trial)]. A party in a civil proceeding has a due process right, under the *Fifth* and *Fourteenth Amendments to the U.S. Constitution*, to cross-examine and confront witnesses [*In re Mary S. (1986) 186 Cal. App. 3d 414, 419, 230 Cal. Rptr. 726* ; *see* Ch. 470A, *Due Process Restrictions on Public Agencies* (discussing due process as it applies in agency proceedings)].

In administrative proceedings, this right is often afforded by statute; the APA expressly grants parties the right to cross-examine and confront adversary witnesses [*Gov. Code § 11513(b)*; *see § 473F.15[4], [6]*]. However, a licensee incarcerated in another state but who is represented by counsel does not have an absolute right to be present at an administrative hearing at which disciplinary charges against him will be adjudicated [*Arnett v. Office of Admin. Hearings (1996) 49 Cal. App. 4th 332, 338, 56 Cal. Rptr. 2d 774]* .

Different rules apply to cases involving possible minor victims of a party, in which the minor may feel unable to testify freely in the presence of that party [*see Gov. Code § 11425.20(a)(3)* (authority of presiding officer to close hearing or make other protective orders when witness is a minor), and discussion in [1], *above*]. In administrative hearings, like other criminal and civil proceedings, the right to cross-examine and confront a minor witness can be adequately protected through the use of closed-circuit television, without having the party physically present in the room where the minor is testifying [*Seering v. Department of Social Services (1987) 194 Cal. App. 3d 298, 304-305, 239 Cal. Rptr. 422* (in hearing involving revocation of day care license based on alleged child molestation, licensee was excluded from hearing during child's testimony)]. In an appropriate case, the minor witness could probably give the testimony outside the hearing room [*see Penal Code § 1347* (in criminal sexual abuse cases, minor's testimony may be taken outside

courtroom and transmitted via closed-circuit television)]. However, this arrangement would not allow the judge much control over (or observation of) the minor witness during testimony [*see Gov. Code § 11425.20(a)(3)* (authority of presiding officer to close hearing or make other protective orders when witness is a minor), and discussion in [1], *above*].

[5] Office of Administrative Hearings Regulations Governing Hearing Procedures

The Office of Administrative Hearings adopted regulations [*1 Cal. Code Reg. §§ 1000-1440* (1997)] to govern hearing procedures in hearings conducted before OAH administrative law judges [*1 Cal. Code Reg. § 1000* (1998)]. The regulations cover the subjects of general APA hearing procedures [*1 Cal. Code Reg. §§ 1000-1046* (1998)], special hearing procedures [*1 Cal. Code Reg. §§ 1100-1148* (1997)], alternative dispute resolution procedures [*1 Cal. Code Reg. §§ 1200-1292* (1999)], arbitration procedures for state contract act contract claims [*1 Cal. Code Reg. §§ 1300-1393* (1997)], and protest arbitration procedures *1 Cal. Code Reg. §§ 1000-1440* (1998)]. The basic purpose [*1 Cal. Code Reg. § 1000* (1998)], definitions [*1 Cal. Code Reg. § 1002* (1998)], and principles of interpretation [*1 Cal. Code Reg. § 1004* (1998)], are set forth in specific regulations. The regulations that are applicable to Ch. 473F Agency Adjudication Hearings, include the following: conduct of hearing by telephone, television or other electronic means [*1 Cal. Code Reg. § 1030* (1998)]; interpreters and accommodations [*1 Cal. Code Reg. § 1032* (1998)]; conduct of proceedings and sealing the record [*1 Cal. Code Reg. § 1036* (1998)]; and request for expenses after default [*1 Cal. Code Reg. § 1044* (1998)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceAdmissibilityPrivilegeAdministrative LawAgency AdjudicationPresiding OfficersDuties & PowersAdministrative LawGovernmental InformationPublic MeetingsSunshine LegislationEvidenceTestimonyPresentation of Evidence

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§ 473F.13 English Language and Language Assistance

[1] When APA Requirements Apply

Under the APA, administrative hearings and medical examinations conducted for the purpose of determining compensation or monetary awards, are conducted in the English language [*Gov. Code § 11435.20(a)*]. If a party or the party's witness does not proficiently speak or understand English and requests language assistance before the commencement of the hearing or medical examination, and the agency must comply with language assistance requirements of the APA, then the party or witness will be provided with an interpreter by the agency [*Gov. Code § 11435.20(b)*; *see Gov. Code §§ 11435.05-11435.65* (language assistance legal requirements)].

Language assistance in administrative hearings is part of the APA's Administrative Adjudication *Bill of Rights* (*Gov. Code §§ 11425.10-11425.60*) [*see* further discussion in Ch. 473, *Public Agency Adjudication*]. Language assistance must be made available as required by *Gov. Code §§ 11435.05-11435.65* by state agencies described in *Gov. Code § 11018* (state agencies that conduct administrative hearings but are not subject to Chapter 5, the APA's formal hearing provisions; *Gov. Code § 11500 et seq.*) and *Gov. Code § 11435.15* (listed state agencies) [*Gov. Code § 11425.10(a)(9)*]. The listed state agencies in *Gov. Code § 11435.15* include the following agencies [*Gov. Code § 11435.15(a)*]:

- Agricultural Labor Relations Board.
- Department of Alcohol and Drug Abuse.
- State Athletic Commission.
- California Unemployment Insurance Appeals Board.
- Board of Prison Terms.
- State Board of Barbering and Cosmetology.

- State Department of Developmental Services.
- Public Employment Relations Board.
- Franchise Tax Board.
- State Department of Health Services.
- Department of Housing and Community Development.
- Department of Industrial Relations.
- State Department of Mental Health.
- Department of Motor Vehicles.
- Notary Public Section, Office of Secretary of State.
- Public Utilities Commission.
- Office of Statewide Health Planning and Development.
- State Department of Social Services.
- Worker's Compensation Appeals Board.
- Department of the Youth Authority.
- Youthful Offender Parole Board.
- Department of Insurance.
- State Personnel Board.
- California Board of Podiatric Medicine.
- Board of Psychology.

These listed agencies must comply with language assistance requirements notwithstanding other provisions in Chapter 4.5, the general administrative adjudication provisions of the APA (*Gov. Code § 11400 et seq.*), which include the language assistance requirements, that provide that the chapter's provisions do not apply to some or all of an agency's adjudicative proceedings [*Gov. Code § 11435.15(d)*].

The language assistance article's requirements are limited to adjudicative proceedings in which an evidentiary hearing for determination of facts is required for formulation and issuance of a decision by federal or state constitutional provisions or by federal or state statute [25 Cal. L. Rev. Comm. Reports 55, 172 (1995); *see Gov. Code § 11410.10*]. However, agencies that are not listed may chose to adopt language assistance procedures, provided that interpreter selection is consistent with the requirements of *Gov. Code § 11435.30* [*Gov. Code § 11435.15(b)*]. Agencies may also provide interpreters for nonadjudicative proceedings, such as informal fact finding and informal investigatory hearings [

Gov. Code § 11435.15(c)].

[2] Language Assistance Requirements

Language assistance is defined to mean oral interpretation or written translation into English of a language other than English or of English into another language for a party or witness who cannot speak or understand English or who can do so only with difficulty [*Gov. Code § 11435.05*]. However, interpretation for deaf or hard of hearing parties or witnesses in adjudicative proceedings is governed by *Evid. Code § 754* [*Gov. Code § 11435.10*]. The primary language assistance requirement is that the agency will provide a party or witness with an interpreter when the party or witness is not proficient in the English language [*Gov. Code § 11435.20(b)*]. Agencies must advise parties of interpreter rights when the agency advises that same party of the hearing date or medical examination. Agencies should also encourage parties that are in need of an interpreter to give timely notice to the agency conducting the hearing or medical examination so that appropriate arrangements can be made [*Gov. Code § 11435.60*]. Interpreters must normally be certified [*Gov. Code § 11435.55*], must not have had any involvement in the issues of the case prior to the hearing [*Gov. Code § 11435.65(b)*], and are subject to confidentiality rules of the agency, if any, that apply to the adjudicative proceeding [*Gov. Code § 11435.65(a)*].

[3] Interpreter Requirements

Hearing interpreters must be certified under *Gov. Code § 11435.30* [*Gov. Code § 11435.55(a)*]. However, if a certified interpreter can not be present at the hearing, the hearing agency has discretionary authority to provisionally qualify and use another interpreter [*Gov. Code § 11435.55(a)*]. Medical examination interpreters must be certified under *Gov. Code § 11435.35* [*Gov. Code § 11435.55(b)*]. However, if a certified interpreter can not be present at the medical examination, the physician provisionally may use another interpreter if that fact is noted in the record of the medical evaluation [*Gov. Code § 11435.55(b)*]. The State Personnel Board is required to designate the languages for which certification of administrative hearing interpreters and medical examination interpreters shall be established [*Gov. Code § 11435.40(a)*; *see Gov. Code §§ 11435.30, 11435.35*]. The languages designated shall include, but not be limited to, Spanish, Tagalog, Arabic, Cantonese, Japanese, Korean, Portuguese, and Vietnamese, until the State Personnel Board finds that there is an insufficient need for interpreting assistance in these languages [*Gov. Code § 11435.40(a)*]. Language designations are to be based on four criteria [*Gov. Code § 11435.40(b)*]:

- The language needs of non-English speaking persons appearing before the administrative agencies, as determined by consultation with the agencies [*Gov. Code § 11435.40(b)(1)*].
- The cost of developing a language examination [*Gov. Code § 11435.40(b)(2)*].
- The availability of experts needed to develop a language examination [*Gov. Code § 11435.40(b)(3)*].
- Other information the State Personnel Board deems relevant [*Gov. Code § 11435.40(b)(4)*].

The State Personnel Board can charge fees for application to take interpreter examinations, and for annual renewal of certification [*Gov. Code § 11435.45*]. The State personnel Board has the responsibility to establish, maintain, and annually update lists of certified administrative hearing and medical examination interpreters that the Board determines meet minimum standards in interpreting skills and linguistic abilities in languages designated by the Board [*Gov. Code § 11435.40*; *see Gov. Code §§ 11435.30(a), 11435.35(a)*].

Listed certified administrative hearing interpreters may be examined by each employing agency to determine the interpreter's knowledge of the employing agency's technical program terminology and procedures [*Gov. Code § 11435.30(a)*]. Court interpreters certified under *Gov. Code § 68562*, and interpreters listed on the Board's recommended list of court and administrative hearing interpreters prior to July 1, 1993, are deemed certified as administrative hearing

interpreters [*Gov. Code § 11435.30(b)*]. Court interpreters certified under *Gov. Code § 68562*, and certified administrative hearing interpreters, are deemed certified as medical examination interpreters [*Gov. Code § 11435.35(b)*].

Under three circumstances, the Board can remove persons form the certified interpreters lists [*Gov. Code § 11435.50*]:

- The person is deceased.
- The person notifies the Board that the person is unavailable for work.
- The person does not pay a required annual renewal fee.

Gov. Code § 11435.60 requires an applicable agency, like DMV, to give notice of the right to an interpreter at the same time as giving notice of administrative hearing dates. A Spanish speaking motorist whose driver's license was suspended for refusing to take a blood alcohol test challenged the suspension because DMV failed to notify him of the right to have an interpreter at the hearing at the same time that DMV notified the driver when the hearing was scheduled to occur. Failure to provide simultaneous notice of hearing date and interpreter rights violates *Gov. Code § 11435.60*, but this was harmless error because the driver was notified of interpreter rights when he was provided the notice of suspension of his license by the arresting officer, and driver failed to show any prejudice from the lack of an interpreter at the DMV hearing [*Leal v. Gourley (2002) 100 Cal. App. 4th 963, 968-970, 123 Cal. Rptr. 2d 220]* . DMV is only required by statute [*Gov. Code § 11435.60*] to provide the notice of the right to an interpreter in English, not other languages [*Leal v. Gourley (2002) 100 Cal. App. 4th 963, 970-971, 123 Cal. Rptr. 2d 220]* .

[4] Costs of Interpreters

Interpreter costs are paid as determined by the presiding officer at the hearing. The agency that has jurisdiction over the matter will pay interpreter costs if the presiding officer orders the agency to pay the costs. Otherwise, the party requesting the interpreter will pay interpreter costs [*Gov. Code § 11435.25(a)*]. The presiding officer's decision to direct payment shall be based upon an equitable consideration of all the circumstances in each case, such as the ability of the party in need of the interpreter to pay [*Gov. Code § 11435.25(b)*].

However, in hearings before the Worker's Compensation Appeals Board or the Division of Worker's Compensation, relating to worker's compensation claims, the payment of the costs of providing an interpreter shall be governed by the rules and regulations of the WCAB, or the Administrative Director of the DWC, as appropriate [*Gov. Code § 11435.25(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewEvidenceCompetencyInterpretersWorkers' Compensation & SSDIAdministrative ProceedingsHearings & Review

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§ 473F.14 Subpoenas

[1] APA Procedures

[a] Scope of Application

Gov. Code §§ 11450.05-11450.50 govern subpoena practice in administrative adjudication. They apply to adjudicative proceedings, as defined by *Gov. Code § 11405.20*, which are required to be conducted under Chapter 5, the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*) [*Gov. Code § 11450.05(a)*; *see Gov. Code § 11501* for the scope of application of Chapter 5, and discussion in *Ch. 473, Public Agency Adjudication, § 473.15*].

Agencies that are not subject to the formal hearing provisions of the APA are permitted to use the subpoena procedures under *Gov. Code § 11450.05 et seq.* When they are used, all the provisions of *Gov. Code §§ 11450.05-11450.50* apply to the agency adopting them, including but not limited to issuing a subpoena requested by a party or an attorney or record for a party under *Gov. Code § 11450.20* [*Gov. Code § 11450.05(b)*].

[b] Issuance

Under *Gov. Code §§ 11450.05-11450.50*, subpoenas and subpoenas duces tecum can be issued for attendance at a hearing and for production of documents at any reasonable time and place or at a hearing [*Gov. Code § 11450.10(a)*].

Alternatively, a custodian of documents that is the subject of a subpoena duces tecum may satisfy the subpoena by delivery of the documents or a copy of the documents, or by making the documents available for inspection or copying, together with an affidavit that satisfies *Evidence Code § 1561* [*Gov. Code § 11450.10(b)*]. This latter procedure is similar to the practice in civil actions under *Code Civ. Proc. § 2020.010* [25 Cal. L. Rev. Comm. Reports 55, 189 (1995); for detailed discussion of *Code Civ. Proc. § 2020.010*, *see* Ch. 195, *Discovery: Inspection of Tangible Evidence*].

If a custodian does not comply with the subpoena, the subpoena can be enforced, and the custodian can be compelled to appear and produce the documents under the APA provisions for the enforcement of orders and imposition of sanctions

(*Gov. Code § 11455.10 et seq.*) [*Gov. Code § 11455.10(e)*; 25 Cal. L. Rev. Comm. Reports 55, 189 (1995)].

[c] Issuer

Subpoenas and subpoenas duces tecum can be issued by the agency or the presiding officer at the request of a party, or by the attorney of record for a party, in accordance with *Code Civ. Proc. §§ 1985-1985.4* [*Gov. Code § 11450.20(a)*]. This provision incorporates privacy protections from civil practice [25 Cal. L. Rev. Comm Reports 55, 190 (1995)]. The primary privacy provisions are contained in *Code Civ. Proc. § 1985.3*, which protects and defines personal records of consumers and provides for notice to consumers whose personal records are being subpoenaed. Similar provisions, in *Code Civ. Proc. § 1985.6*, protect employment records.

Attorneys of record for a party can issue subpoenas, as well as the agency and presiding officer. This is an expansion of subpoena issuers, as compared to APA provision in effect prior to July 1, 1997 [25 Cal. L. Rev. Comm. Reports 55, 190 (1995)].

Furthermore, a subpoena duces tecum can not be issued unless an affidavit is completed satisfying the requirements of *Code Civ. Proc. § 1985* (affidavit showing good cause for production of materials described and requested in subpoena duces tecum) [25 Cal. L. Rev. Comm. Reports 55, 190 (1995)].

When the subpoena provisions do not address a particular procedural issue relating to subpoenas, the provisions of *Code Civ. Proc. §§ 1985-1985.4* may be looked to for analogous procedures [*see* 25 Cal. L. Rev. Comm. Reports 55, 190 (1995); *see also Sehlmeyer v. Department of General Services (1993) 17 Cal. App. 4th 1072, 21 Cal. Rptr. 2d 840]* . For discussion and forms relating to subpoenas in civil actions generally, see Ch. 535, *Subpoena* .

[d] Service

Subpoenas may be served throughout California, and must be served in accordance with *Code Civ. Proc. §§ 1987* (personal service of subpoena on witness) and 1988 (personal service of subpoena by sheriff on concealed witness) [*Gov. Code § 11450.20(b)*]. Alternatively, subpoenas and subpoenas duces tecum can be delivered by certified mail return receipt requested or by messenger [*Gov. Code § 11450.20(b)*]. Service by messenger is completed when the witness acknowledges receipt of the subpoena to the sender, by telephone, by mail, or in person, and identifies himself or herself either by reference to date of birth and driver's license number or Department of Motor Vehicles identification number, or the sender may verify receipt of the subpoena by obtaining other identifying information from the recipient. The sender is required to make a written notation of the acknowledgment. A subpoena that is properly issued and acknowledged consistent with these requirements is as enforceable as a subpoena that is personally served [*Gov. Code § 11450.20(b)*]. Witnesses who are residents of the State of California at the time of service of the subpoena are required to attend the hearing to which they have been subpoenaed, but non-residents are not required to attend [*Gov. Code § 11450.20(c)*].

[e] Enforcement

A witness who fails to comply with a subpena that has been properly issued and acknowledged can be punished for failure to comply with the subpoena as a contempt, and the subpoena can state these consequences [*Gov. Code § 11450.20(b)*]. Enforcement of subpoenas is authorized under *Gov. Code §§ 11455.10-11455.20* [25 Cal. L. Rev. Comm. Reports 55, 190 (1995)]. These provisions supplant the provisions of former Gov. Code. Code § 11525 [*see Parris v. Zolin (1996) 12 Cal. 4th 839, 843, 50 Cal. Rptr 2d 109, 911 P. 2d 9* (construing enforcement language of former Gov. Code. Code § 11525 as requiring agency to transmit certification of facts to enforcing court for court to have jurisdiction to begin contempt proceedings)].

Persons who fail or refuse to comply with a subpoena, without substantial justification, are subject to the contempt

sanction [*Gov. Code § 11455.10(e)*; *see § 473F.15[16]* (enforcement of orders and sanctions)].

A party requesting a continuance based upon the failure of a witness to appear at the time and place required for the appearance or testimony pursuant to the subpoena must prove that the party has complied with these requirements. The continuance shall only be granted for a period of time that would allow personal service of the subpoena and in no event longer than that allowed by law [*Gov. Code § 11450.20(b)*].

[f] Objections and Protective Orders

Persons who are served with subpoenas or subpoenas duces tecum may object to the terms of the subpoena by a motion for a protective order, including a motion to quash [*Gov. Code § 11450.30(a)*]. The objection shall be resolved by the presiding officer on terms and conditions that the presiding officer declares. The presiding officer may make another order that is appropriate to protect the parties or the witness from unreasonable or oppressive demands, including violations of the right to privacy [*Gov. Code § 11450.30(b)*].

A subpoena or subpoena duces tecum that is issued by the agency on its own motion may be quashed by the agency [*Gov. Code § 11450.30(c)*]. This statute addresses matters not previously covered by statute but covered by regulation in some agencies [25 Cal. L. Rev. Comm. Reports 55, 190 (1995); *see, e.g., 20 Cal. Code Reg. § 61* (Public Utilities Commission); *see also Code Civ. Proc. §§ 1985-1987.3* and Ch. 535, *Subpoena* (subpoenas in civil actions generally)].

[g] Witnesses, Mileage, and Fees

Witnesses appearing pursuant to a subpoena or a subpoena duces tecum, who are not parties to the proceeding, are entitled to receive the same mileage and fees allowed by law to a witness in a civil case [*Gov. Code § 11450.40(a), (b)*]. Payment of the fees must be made by the party at whose request the witness was compelled by subpoena to attend [*Gov. Code § 11450.40*]. Officer or employees of the state or political subdivisions of the state are not entitled to receive fees under this statute [*Gov. Code § 11450.40(b)*]. Mileage and fees for witnesses in civil cases are determined by *Gov. Code §§ 68092.5-68093*. Witness fees for public officers and employees are governed by *Gov. Code §§ 68096.1-68097.10* [25 Cal. L. Rev. Comm. Reports 55, 191 (1995)].

[h] Written Notice

As an alternative to service of a subpoena when a party witness or person for whose benefit a proceeding is prosecuted or defended is sought to be produced, a written notice can be served on the attorney for the party or person requiring the witness to attend, with the time and place of the hearing specified. Service of the written notice to attend must be made in the manner and is subject to the conditions provided in *Code Civ. Proc. § 1987* (service of written notice to attend in a civil action) [*Gov. Code § 11450.50(a)*; *see* Ch. 535, *Subpoena* , for further discussion of these requirements in civil actions].

[2] Non-APA Procedures

Many statutes and ordinances governing specific agencies provide for the issuance of subpoenas in non-APA administrative hearings and other proceedings. The procedure for their issuance and use depends on the statutory authority and practice of the agency issuing them. Non-APA "state departments" have express statutory authority to issue subpoenas for the attendance of witnesses and the production of documents [*Gov. Code § 11181(e)*]. The executive and administrative work of state government is divided into "departments as provided by law" [*Gov. Code § 11150*]. These departments are discussed, but not defined, in *Gov. Code §§ 11150-11201*. There are about 30 officially designated departments and about 30 more de facto departments, as discussed in more detail in Ch. 470, *Overview of Public Administrative Law* .

School boards have the authority to issue subpoenas to compel attendance of witnesses at disciplinary hearings

conducted by the school board under the provisions of *Educ. Code § 48918(i)(1)*. That authority is discretionary, not mandatory, and a school board's decision to not issue subpoenas is reviewed for abuse of discretion [*Woodbury v. Brown-Dempsey (2003) 108 Cal. App. 4th 421, 438-439, 134 Cal. Rptr. 2d 124* (no abuse of discretion found in school board's denial of subpoenas for witnesses in disciplinary hearing because there was no showing that witnesses for whom subpoenas were sought had any relevant information to give relating to the factual issues in the hearing)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency InvestigationsScopeSubpoenasEducation LawStudentsDisciplinary ProceedingsWitnessesLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 41A: Public Agency Adjudications Judicial Review-Chs. 473-479
Chapter 473F AGENCY ADJUDICATION HEARINGS
PART II. LEGAL BACKGROUND
A. Hearing Procedures

41A-473F California Forms of Pleading and Practice--Annotated § 473F.15

§ 473F.15 Conduct of the Hearing

[1] Opening Statements

[a] When Opening Statements Are Used

In contrast to civil court trials [*see Code Civ. Proc. §§ 607(1)* (jury trials), 631.7 (nonjury trials)], attorneys for the parties do not generally make opening statements in administrative hearings. Opening statements are primarily made when a board, panel, or commission is hearing the case, rather than an ALJ sitting alone, or when a case is factually complex [*see Gov. Code § 11512(a)* and discussion in *§ 473F.11*]. Sometimes the respondent's opening statement is reserved until the beginning of the respondent's case-in-chief. For a general discussion of opening statements in civil actions, see Ch. 551, *Trial* .

[b] Guidelines for Use

When an opening statement is made, the following general guidelines should be followed:

- Use the statement to present the theory of the case and facts that you intend to prove.
- Use the statement to tell a story or preview testimony, but not to present argument.
- Make the statement clear, concise, and positive in tone.
- Do not overstate evidence.
- If appropriate, use the statement to volunteer weaknesses without unduly emphasizing them.

[2] Hearing Briefs

A hearing brief is also appropriate in a complex case. The brief should be served on the judge and other parties as early

as possible. There is no particular form for a hearing brief, but it should be short and cover issues that will arise during the hearing, such as evidentiary problems, burden of proof, or order of proof. The brief should also contain a statement of the case and any special law the judge should be aware of before and during the hearing.

[3] Oaths and Affirmations

Testimony taken from witnesses in administrative hearings must have the same threshold guarantee of truthfulness as testimony taken in a court [*Marlow v. Orange County Human Services Agency (1980) 110 Cal. App. 3d 290, 293, 167 Cal. Rptr. 776]* . Testimony not given under oath may raise due process issues [*see Broussard v. Regents of University of California (1982) 131 Cal. App. 3d 636, 184 Cal. Rptr. 460* ; *see also* Ch. 470A, *Due Process Restrictions On Public Agencies* (discussing due process requirements as they apply to agency proceedings)].

The APA expressly requires oral evidence to be given under oath or affirmation [*Gov. Code § 11513(a)*]. If a witness refuses to take an oath or affirmation after being ordered to do so by the ALJ, that fact can be certified to the superior court for an order to show cause why the witness should not be held in contempt [*Gov. Code §§ 11455.10(b), 11455.20(a),* and discussion in *§ 473F.15[16]* (enforcement of orders and sanctions)].

Oaths or affirmations are usually administered by the ALJ or hearing reporter, but any agency, agency member, secretary of an agency, hearing reporter, or ALJ has the power to administer oaths and affirmations [*Gov. Code § 11528*]. Because the APA does not prescribe the specific form of oath or affirmation to be used in an administrative hearing, the oath or affirmation used in civil actions and proceedings should be sufficient [*see Code Civ. Proc. § 2094*, and Ch. 392, *Oath and Affirmation*].

[4] Direct Examination

[a] Nature and Purpose

Direct examination of witnesses is fundamental to trial and administrative hearing practice; virtually all administrative hearings include direct examination. The APA expressly provides for the right to examine witnesses in hearings conducted under Chapter 5 (*Gov. Code § 11500 et seq.*), the APA's formal hearing provisions [*Gov. Code § 11513(b)*]. Furthermore, the right to present and rebut evidence, which includes the right to direct examination of witnesses, is part of the APA's Administrative Adjudication *Bill of Rights*, which applies to all state agency hearings, whether or not the agency is required to follow the APA formal hearings provisions, so long as the agency adjudication is one in which an evidentiary hearing is required by federal or state constitutional provisions or by federal or state statutes [*Gov. Code §§ 11410.10, 11410.20*].

Under the administrative adjudication *bill of rights*, the agency is required to give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence [*Gov. Code § 11425.10(a)(1)*]. Due process may also require direct examination of witnesses [*see Goldberg v. Kelly (1970) 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287* (due process requirements applicable when New York welfare authorities terminated federal aid without notice or hearing); *but see Mathews v. Eldridge (1976) 424 U.S. 319, 340, 96 S. Ct. 893, 47 L. Ed. 2d 18* (due process does not require evidentiary hearing prior to initial termination of social security disability benefit payments)].

For a complete discussion of procedural due process requirements applicable to adjudicatory hearings, see Ch. 470A, *Due Process Restrictions on Public Agencies* . For further discussion of the applicability of the APA administrative adjudication provisions under Chapter 4.5 (general, including the Administrative *Bill of Rights*) and Chapter 5 (formal hearing), see *Ch. 473, Public Agency Adjudication, § 473.15*.

[b] Guidelines for Direct Examination of Witnesses

Direct examination should clearly, logically, and convincingly present the facts. This objective may be ensured by complying with the following procedures:

- Properly prepare the witness before he or she is called, so the witness knows what questions are going to be asked and is prepared to answer them.

- Ensure that the witness is able to testify from memory without frequent reference to investigative reports and other documents [*see* [c], *below* (refreshing a witness's recollection)]. It is important to control the use of documents carefully, and encourage witnesses not to bring documents to the witness stand; the witness, rather than the documents, should be the focus of attention.

- Organize the direct examination by chronology or some other logical order. Set up the background and scene before eliciting the action.

- Keep direct examination questions short and simple:

  - Ask only questions regarding "who, what, where, when, how, or why."

  - Ask open-ended questions, such as "What happened next?"

  - Use common words; avoid "police talk" and other "insider jargon" that could confuse the witness or reporter, and antagonize the opposing counsel and judge.

  - Listen to the witness's answer and appear interested in his or her answer.

For a discussion of direct examination (*see Evid. Code §§ 760-778*) in trial court proceedings in civil actions, see Ch. 551, *Trial* .

[c] Guidelines for Refreshing Witness's Recollection

With proper preparation, a witness's present recollection will rarely have to be refreshed. When necessary, however, the following procedures may be used:

- To properly establish a foundation for refreshing recollection, ensure that the witness's memory has really been exhausted by asking the witness directly whether he or she remembers anything else.

- If the witness should remember additional facts, ask the witness whether there is anything that would refresh his or her recollection.

- If the witness identifies a report or other document that would refresh his or her recollection, do the following:

  - Mark it for identification.

  - Show document to opposing counsel and indicate that fact on the record.

  - Give the exhibit to the witness, ask whether he or she recognizes it, and have the witness read it.

  - Ask the witness whether the exhibit has refreshed his or her recollection on the

subject.

- Take the exhibit back from the witness.

- Have the witness testify on the basis of the refreshed recollection.

If this procedure does not refresh a witness's recollection, a statement previously made by the witness may be admissible as past recollection recorded, an exception to the hearsay rule [*see Evid. Code § 1237*; *see also* discussion in *§ 473F.30* et seq., regarding evidentiary rules]. For further discussion concerning refreshing a witness's recollection in civil actions generally, see Ch. 551, *Trial* , and *California Trial Guide, Unit 20, § 20.16* (Matthew Bender).

[5] Expert Witnesses

[A] Nature of Experts

Administrative hearings frequently involve expert witnesses. An expert witness has special knowledge, skill, experience, training, or education on the subject of the testimony [*Evid. Code § 720*]. In court proceedings, an expert's opinion is limited to those subjects that, because they are sufficiently beyond common experience, require an expert's opinion to assist the trier of fact [*Evid. Code § 801(a)*]. The expert's opinion must be based on matters, perceived by or personally known to the expert, of a type that reasonably may be relied on by an expert in forming the opinion [*see Evid. Code § 801(b)*]. Expert observation of proposed special education placement for autistic child before due process hearing was required, and it was improper for the superior court to deny an order compelling the school district to allow the expert hired by the parents of the child to observe the proposed placement before the due process hearing [*Benjamin G. v. California Special Ed. Hearing Office (2005) 131 Cal. App. 4th 875, 883-884, 32 Cal. Rptr. 3d 366]* . For further discussion of the rules governing experts in court proceedings in civil actions, see Ch. 551, *Trial* .

[b] Qualification

If the opposing party does not make a lack-of-qualification objection, a witness may testify as an expert witness without being formally qualified as an expert [*see Evid. Code § 720(a)* (expertise must be shown when other party objects)]. If that party does object, the qualification question becomes a preliminary fact to be determined by the ALJ [*see Evid. Code § 405* (determinations of preliminary fact)]. The determination is within the sound discretion of the judge [*Cooper v. Board of Medical Examiners (1975) 49 Cal. App. 3d 931, 947, 123 Cal. Rptr. 563]* .

What attorneys frequently overlook when qualifying an expert is that the qualification must relate to the particular subject about which the expert is asked to express an opinion [*Miller v. Los Angeles County Flood Control Dist. (1973) 8 Cal. 3d 689, 700-701, 106 Cal. Rptr. 1, 505 P.2d 193* ; *Hyman v. Gordon (1973) 35 Cal. App. 3d 769, 774, 111 Cal. Rptr. 262]* . For this reason, it is often impossible to determine whether a qualification is sufficient until the question for the expert opinion is actually asked. Thus, the time to object is immediately after an opinion question.

The Court of Appeal held that the Medical Board of California deprived a physician of due process of law by conducting a fundamentally unfair physician license revocation hearing when the Board disqualified all of the doctor's experts as to standard of care thereby precluding the doctor from putting on any evidence in his defense to charges that the doctors treatment of several patients was grossly negligent or was an extreme departure from the standard of practice [*Sinaiko v. Superior Court (2004) 122 Cal. App. 4th 1133, 1137, 1141, 19 Cal. Rptr. 3d 371]* . The Court of Appeal also applied the independently judgment test to review the fairness of the administrative hearing as a matter of law [*Sinaiko v. Superior Court (2004) 122 Cal. App. 4th 1133, 1140-1141, 19 Cal. Rptr. 3d 371]* . Finally the Court of Appeal held that this case must be remanded to the Medical Board to consider the evidence presented by the doctor's experts. It was not proper for the reviewing (superior) court to admit the evidence under *Code Civ. Proc. § 1094.5(e)*, and then to reweigh the evidence to support the Medical Board's fact findings because this was an unfair proceeding. It

is the agency's responsibility to consider the evidence erroneously excluded and to make an informed decision based on that evidence and agency expertise. Thus, a remand to the agency is required [*Sinaiko v. Superior Court (2004) 122 Cal. App. 4th 1133, 1146-1147, 19 Cal. Rptr. 3d 371]* .

The qualification of an expert witness in administrative proceedings is similar to the procedure in courts. No formal tender of the expert witness is made. After questions concerning qualifications are asked, the standard kind of questions to elicit opinion follow. If there is some question about the qualification of the witness to answer an opinion question, a lack-of-qualification objection should be raised immediately after the question is asked. The ALJ will then determine whether the expert is qualified to testify. To help in the determination, the objecting attorney may conduct voir dire; sometimes the judge will ask questions. For further discussion of the qualification of experts, see *California Trial Guide, Unit 60, § 60.30* (Matthew Bender).

[6] Cross-Examination

[a] Nature and Purpose

Like direct examination (*see* [4], *above*), due process may require the right to cross-examine in administrative hearings [*see* *Goldberg v. Kelly (1970) 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287* (due process requirements applicable when New York welfare authorities terminated federal aid without notice or hearing); *Jennings v. Jones (1985) 165 Cal. App. 3d 1083, 1091, 212 Cal. Rptr. 134* (county's refusal to provide caseworker at welfare pre-termination hearing denied respondent due process right of cross-examination); *but see* *Mathews v. Eldridge (1976) 424 U.S. 319, 340, 96 S. Ct. 893, 47 L. Ed. 2d 18* (due process does not require evidentiary hearing prior to initial termination of social security disability benefit payments)].

The APA expressly provides for the right to examine witnesses in hearings that are subject to Chapter 5, the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*) [*Gov. Code § 11513(b)*]. Furthermore, the right to present and rebut evidence, which includes the right to direct and cross-examination of witnesses, is part of the APA's Administrative Adjudication *Bill of Rights*, which applies to all state agency hearings, whether or not the agency is required to follow Chapter 5, so long as that agency is required to hold an evidentiary hearing by federal or state constitutional provisions or by federal or state statutes [*Gov. Code §§ 11410.10, 11410.20*].

Under the administrative adjudication *bill of rights*, the agency is required to give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence [*Gov. Code § 11425.10(a)(1)*]. Furthermore, the formal hearing provisions of the APA expressly provide that each party has the right to cross-examine opposing witnesses [*Gov. Code § 11513(b)*]. The scope of cross-examination under the formal hearing provisions is not limited to the scope of the direct examination; a witness may be cross-examined on any relevant matter [*Gov. Code § 11513(b)*]. If the respondent does not testify in his or her own behalf, he or she may be called, typically by the agency, and examined as if under cross-examination [*Gov. Code § 11513(b)*]. Parties also have the right to impeach witnesses regardless of which party first called the witness to testify [*Gov. Code § 11513(b)*]. For a discussion of cross-examination principles in civil proceedings, see California Trial Guide, Unit 70 (Matthew Bender).

[b] Guidelines for Cross-Examination of Witnesses

The following guidelines are intended to help an attorney avoid the most common mistakes made on cross-examination in an administrative hearing:

- Cross-examine any witness that will help your client's case more than harm it; but never cross-examine a witness whose testimony can further harm your client's case and cannot help it.

- Attempt to obtain favorable testimony by getting the witness to agree to facts that favor your client's

case and support your client's theory.

- Attempt to discredit the witness's testimony by asking questions that will show bias, prejudice, contradiction, and other factors that make the witness less believable.

- In order to both obtain favorable testimony and make the witness less believable, get the favorable facts first, while the witness's credibility is still high.

- Never use cross-examination to repeat, and thereby make more clear and compelling, the other side's case. A witness's testimony almost never falls apart during a second telling; instead, it usually makes the other side's case more clear and compelling and helps that side carry its burden of proof. When respondent is not represented, however, counsel for the agency may want to ask some questions of the respondent to assure fairness and to make a more complete record [*see Gonzalez v. Freeman (D.C. Cir. 1964) 334 F.2d 570, 578-579, 118 U.S. App. D.C. 180* (governmental agency has an obligation to be fair)].

- Control the witness with precise leading questions:

  - Ask the witness to answer "yes" or "no" whenever possible.

  - Avoid open-ended questions that begin with "how" or "why."

- Never argue with a witness; arguing is unprofessional and is a no-win situation for the attorney, since only the witness is under oath.

[7] Redirect and Recross-Examination

In court trials, a witness who has been examined once cannot be reexamined as to the same matter without discretionary leave of court, but the witness may be reexamined as to any new matter on which he or she has been examined by the other party [*Evid. Code § 774*]. Redirect and recross-examination of a witness is customarily permitted in administrative hearings.

Unlike direct and cross-examination [*see* [4], [6], *above*], there is no express provision in the APA concerning the scope of redirect and recross. ALJ's generally follow the approach used in court trials. They are often very liberal in permitting additional questions, but if questioning becomes extensive, they will warn all counsel and then require that additional questions be within the scope of prior questions [*see* Ch. 551, *Trial* , for further discussion of examination of witnesses in civil actions].

[8] Examination by ALJ or Agency Member

ALJs will sometimes ask a witness questions if testimony needs clarification or if information that is important to deciding the case has not been sufficiently covered [*see Estate of Dupont (1943) 60 Cal. App. 2d 276, 289-290, 140 P.2d 866* (judge had power to question various witnesses in probate matter)]. They usually ask questions after the parties are through examining the witness and then allow the parties to ask follow-up questions. If the matter is being heard by the agency directly, agency members will often ask questions. The presiding ALJ or agency practice controls the procedure by which they ask questions [*see Gov. Code § 11512(b)*]. Neither the ALJ nor agency members should ask questions in such a way as to become an advocate of one of the parties or show partiality or bias [*Cooper v. Superior Court (1961) 55 Cal. 2d 291, 301, 10 Cal. Rptr. 842, 359 P.2d 274]* . If a party has grounds for objecting to a question asked by the ALJ or agency member, he or she should object. Under the APA, the ALJ will rule on the objection [*see Gov. Code § 11512(b)*]. Furthermore, ALJ rulings admitting and excluding evidence are reviewed in the

same manner and to the same extent as the ALJ's proposed decision in the proceeding [*Gov. Code § 11512(b)*].

[9] Rebuttal Evidence

Rebuttal evidence in administrative proceedings is usually evidence put on by the agency after the respondent and other parties have rested their case-in-chief. The right to present evidence in response to rebuttal evidence is expressly permitted by the APA and is grounded in the due process required in administrative proceedings [*Hegglin v. Workers' Comp. Appeals Bd. (1971) 4 Cal. 3d 162, 175, 93 Cal. Rptr. 15, 480 P.2d 967* ; *Pence v. Industrial Acci. Com. (1965) 63 Cal. 2d 48, 50-51, 45 Cal. Rptr. 12, 403 P.2d 140* ; *see Gov. Code §§ 11425.10(a)(1)* (APA administrative adjudication *bill of rights*), and 11513(b) (APA formal hearing provisions)].

It is not always clear, however, what constitutes proper rebuttal. The scope of rebuttal is largely in the discretion of the judge [*Diamond Springs Lime Co. v. American River Constructors (1971) 16 Cal. App. 3d 581, 604, 94 Cal. Rptr. 200* (trial court has discretionary authority over the scope of rebuttal)]. In rebuttal, an ALJ may allow evidence that could have been presented in the case-in-chief [*see, e.g., Code Civ. Proc. § 607(6)* (after parties in court have presented their evidence, they may only offer rebuttal evidence unless court permits them to offer evidence on their original case)].

However, ALJs often will not allow rebuttal evidence that is cumulative or properly part of the case-in-chief [*see People v. Carter (1957) 48 Cal. 2d 737, 753, 312 P.2d 665]* . For this reason, an attorney should never save evidence from his or her case-in-chief to present in rebuttal, and should only use rebuttal to contradict or clarify new and unexpected evidence presented by the other side.

An ALJ who has a very restricted view of what is proper rebuttal can waste time, since this approach tends to force the parties to put everything into their case-in-chief, even when the evidence may turn out to be unnecessary. If a case is likely to have rebuttal evidence, it is a good idea to discuss with the ALJ his or her approach to that evidence before resting the case-in-chief. For further discussion of rebuttal evidence and the evidentiary rules applicable at an administrative hearing, see *§ 473F.30* et seq.

[10] Bifurcation

[a] Nature of Bifurcation

Administrative hearings are occasionally bifurcated: the ALJ opens the hearing, receives some evidence, and continues the remainder of the evidence-taking to a time in the future. The ALJ may set that future date at the time of bifurcation or may leave it to be set later. Bifurcation should be contrasted with continuance, which involves continuing an entire hearing at a later date. Bifurcation should also be contrasted with consolidation and severance under *Gov. Code § 11507.3*, which involves combining or separating matters for hearing. See Ch. 473C, *Prehearing Procedures in Agency Adjudications* , for discussion of continuances, consolidation, and severance.

[b] Reasons for Requesting Bifurcation

A party's reasons for moving to bifurcate a hearing include the reasons for granting continuances generally. Counsel should consult the "California Administrative Procedure Act Procedures for Administrative Adjudication, Appendix I, Continuance Policy" (OAH Continuance Policy), a bound pamphlet published biannually by the Office of Administrative Hearings. Copies may be obtained from the OAH, 501 J St., Suite 230, Sacramento, CA 95814. Reasons for bifurcation may be unique to a particular hearing, for example, a party may move to bifurcate a hearing for one of the following reasons:

- To avoid inconveniencing witnesses. In APA hearings and other administrative hearings, the unavailability of a respondent's witness is generally good cause for a continuance [*see, e.g.,* OAH Continuance Policy § III-H]. Thus, when unavailability becomes known only at the time of the hearing,

it may support a motion to bifurcate. By bifurcating the hearing rather than continuing it in its entirety, the testimony of witnesses who are present can be taken, and the respondent's case, or just the testimony of the unavailable witness, can be received later.

- To commence the hearing within a statutorily required period by opening the record to receive some documentary evidence or to call a witness to be sworn [*see Powers v. Commission on Professional Competence (1984) 157 Cal. App. 3d 560, 563-564, 204 Cal. Rptr. 185* (to comply with statutory period, ALJ convened hearing within 60 days after request for hearing was filed to swear in witness and then accept request for continuance)].

See Ch. 473C, *Prehearing Procedures in Agency Adjudications* , for further discussion relating to the OAH Continuance Policy and continuances generally.

[c] Procedure and Ruling on Motion

By analogy to the procedure for requesting a continuance, a party probably should make a motion to bifurcate a hearing in writing, or orally on the record [*see* OAH Continuance Policy §§ I-D, III (request for continuance must be written or made orally on the record)]. Bifurcation of a hearing, however, is not favored by most ALJs. First, it often creates future calendar problems. When the case comes up again, the original judge must generally hear it since some evidence has already been received. Second, bifurcation creates a delay in deciding the case. When the case is heard again, the evidence heard at the earlier time has begun to fade from memory, making it more difficult to decide. This is why, in the analogous case of continuances, it is within the sound discretion of the ALJ to grant or deny them [*Gov. Code § 11524*; OAH Continuance Policy].

For a general discussion of the bifurcation of a court trial in a civil action, see Ch. 425, *Pretrial Proceedings* .

[11] Depositions

[a] Authority to Order

Under the APA, any party to an administrative proceeding may petition an administrative law judge, or if an administrative law judge has not been appointed, the agency to order the taking of the deposition of an unavailable material witness, residing in or out of the state, for use in the hearing [*Gov. Code § 11511*; *Kenneally v. Medical Board of California (1994) 27 Cal. App. 4th 489, 502-503, 32 Cal. Rptr.2d 504* (physician was not denied equal protection of the law and *Gov. Code § 11511* was not unconstitutional in restricting discovery depositions to witnesses whose testimony is material and who are unable to attend a hearing or cannot be required to attend a hearing)].

Giving the ALJ authority to order depositions eliminates the concern that courts have expressed regarding the constitutionality of an agency combining its accusatory and adjudicatory functions when it orders a deposition [*see Blinder, Robinson & Co. v. Tom (1986) 181 Cal. App. 3d 283, 226 Cal. Rptr. 339* (court of appeal held constitutional the procedure of having the agency order the deposition, when party challenged former *Gov. Code § 11511* on grounds that it allows prosecuting attorney to make rulings on relevance of adversary's evidence)].

[b] Contents of Petition

The petition must be verified and must set forth all of the following [*Gov. Code § 11511*]:

- The nature of the pending proceeding.

- The name and address of the witness.

- A showing of why the witness's testimony is material.
- A showing that the witness is unable or cannot be compelled to attend.
- A request for an order requiring the witness to appear and testify before an officer named in the petition.

Ordering a deposition is not a ministerial act by the agency [*Stevenson v. State Bd. of Medical Examiners (1970) 10 Cal. App. 3d 433, 439, 88 Cal. Rptr. 815]* . Thus, the requirements of the Government Code should be strictly observed, in particular the required showings of materiality and inability to attend the hearing. For an example of a petition for an order of deposition, see Ch. 473B, *Discovery in Agency Adjudications* .

[c] Procedure for Petition and Order Taking Deposition

The petitioner is required to serve notice of hearing and a copy of the petition on the other parties at least 10 days before the hearing [*Gov. Code § 11511*]. If the witness resides outside California, and the ALJ or the agency has ordered the taking of the testimony by deposition, the agency is required to first obtain a court order for the deposition by filing a petition in the Sacramento Superior Court [*Gov. Code § 11511*], and the court proceedings will follow *Gov. Code § 11189* (petition procedure). A court order is necessary because many states enforce commissions to take depositions only if the commissions issue from a court of another state [*see* Judicial Council of California, 10th Biennial Report (1944), pp. 18, 19; *see also* *Reimel v. House (1969) 268 Cal. App. 2d 780, 784, 74 Cal. Rptr. 345* (quoting Judicial Council report)].

[12] Motion for Nonsuit or Dismissal

Motions for nonsuit or dismissal [*see Code Civ. Proc. §§ 581, 581c*], and all other motions in the nature of a demurrer to the evidence made during court trials are generally not appropriate during an administrative hearing. Neither the APA, nor most other statutes and regulations governing non-APA hearings, provide for these motions.

In addition to this lack of authority, the granting of such a motion might be procedurally awkward, because in many administrative proceedings conducted by an ALJ alone, the final decision rests with the agency, following a proposed decision by the ALJ [*see Gov. Code §§ 11440.10* (general procedural provisions), and 11517(b) (formal APA hearing)]. Because a dismissal is a final decision, the agency would need to hear the motion, requiring a delay in the ordinary proceedings before the ALJ.

For these reasons, ALJs cannot entertain motions to dismiss an action at the close of an agency's evidence [*Kramer v. State Board of Accountancy (1962) 200 Cal. App. 2d 163, 175, 19 Cal. Rptr. 226* ; *Frost v. State Personnel Board (1961) 190 Cal. App. 2d 1, 10, 11 Cal. Rptr. 718]* . Under the APA, these motions could also be premature because an agency's case may include evidence from the respondent if he or she does not testify in his or her own behalf [*see Gov. Code § 11513(b)*; *O'Mara v. State Bd. of Pharmacy (1966) 246 Cal. App. 2d 8, 10-11, 54 Cal. Rptr. 862]* .

Motions that the ALJ cannot hear during the hearing might, however, be taken under submission with the case. For example, the applicant for a permit or license might move to withdraw the application prior to the submission of the ALJ's proposed decision on it [*see, e.g.,* *Miller v. Board of Police Commissioners (1960) 181 Cal. App. 2d 562, 563-564, 5 Cal. Rptr. 272* (although applicants for business permit requested withdrawal of permit after hearing but prior to filing of proposed decision with board, local ordinance provided that withdrawal of application did not deprive board of power to deny permit)]. The ALJ can then determine the motion in the proposed decision submitted to the agency [*Gov. Code § 11517(c)(1)*]. The agency will then adopt, modify, or reject the proposed decision including the decision on the motion [*Gov. Code § 11517(c)(2)*; *see* Ch. 473G, *Agency Adjudication Decisions* , for further discussion].

[13] Argument

[a] Order of Presentation

At the close of evidence and before submission of the case, the parties in administrative hearings often present oral argument. By analogy to cases heard by a trial court, the presiding ALJ may limit the duration of argument [*see, e.g., People v. Stout (1967) 66 Cal. 2d 184, 200, 57 Cal. Rptr. 152, 424 P.2d 704* (trial court's imposition of two-hour limit on final argument held to be reasonable exercise of court's discretion)]. Limitations are rarely necessary, however, because the parties usually keep their argument short. Counsel for the agency usually opens and closes the argument. The respondent argues between the opening and closing. However, the parties may waive any argument. If the agency waives opening argument, the respondent argues and the agency makes its closing argument. The agency's closing argument should be limited to rebuttal of the respondent's argument [*Kling v. Crown Finance Corp. (1944) 63 Cal. App. 2d 33, 35, 146 P.2d 54]* .

By analogy to cases heard in court, the respondent may then be allowed to reply to the agency's closing argument [*see Potapoff v. Mattes (1933) 130 Cal. App. 421, 426, 19 P.2d 1016* (court permitted defendants to reply to plaintiff's closing argument)].

[b] Guidelines for Argument

For an effective argument when arguing the facts and theory of the case, the following guidelines may be helpful:

- Organize the argument by the specific allegations in the pleadings.
- Emphasize the allegations most in dispute.
- Weave the law into the facts and allegations.
- Whenever possible, include a specific recommended disposition of the case. For example, if recommending probation would be appropriate, address the conditions of probation.

[c] Written Argument

Argument may also be written. It is often written in complex factual cases and in cases raising unusual questions of law. ALJs usually grant a request by a party to submit written argument. A time schedule for receiving written argument is then established, and the record will be held open to receive the argument [*see* [14], *below*].

[14] Holding Record Open

Occasionally in administrative hearings, a need will arise to hold the record of the hearing open to receive additional evidence at a later time. The evidence may be documentary or testimonial [*see Gov. Code § 11513(b)* (party has right to introduce exhibits as evidence in hearing)]. Requests to hold the record open should be made during the hearing, and a time for the future submission of the case should be set. If the additional evidence must be rebutted by the other side, the record will also be held open to allow rebuttal.

[15] Decision

Whether the ALJ alone or the agency itself has heard the case, governing statutes generally grant the power of decision to the agency. The ALJ usually prepares the written decision for the agency. Under the APA, if an ALJ has heard the case alone, he or she must prepare a proposed decision in the case within 30 days after the case is submitted [*Gov. Code § 11517(c)(1)*]. The agency may then adopt, modify, or reject the ALJ's proposed decision [*Gov. Code § 11517(c)(2)*].

If the agency itself has heard the case, the agency members decide the case during an executive session, with the ALJ present as an advisor [*Gov. Code § 11517(b)(1), (3)*]. No member who did not hear the evidence may vote on the decision [*Gov. Code § 11517(b)(2)*; *Feist v. Rowe (1970) 3 Cal. App. 3d 404, 417-419, 83 Cal. Rptr. 465]* .

For a complete discussion of agency decisions, see Ch. 473G, *Agency Adjudication Decisions* .

[16] Sanctions and Enforcement

[a] Sanctions

The orders of a presiding officer are enforceable through the use of the contempt sanction [*Gov. Code § 11455.10*] and monetary sanctions [*Gov. Code § 11455.30*]. The presiding officer can order a party, the party's attorney, or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in *Code Civ. Proc. § 128.5* [*Gov. Code § 11455.30(a)*].

Monetary sanctions can be awarded against a party, including an agency, for bad faith actions or tactics. Bad faith actions or tactics could include failure or refusal to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer in discovery, or moving to compel discovery, frivolously or solely intended to cause delay. A person who requests a hearing without legal grounds would not be subject to sanctions under this statute unless the request was made in bad faith or frivolous or solely intended to cause unnecessary delay [25 Cal. L. Rev. Comm. Reports 55 (1995); *see* Ch. 510, *Sanctions* , for discussion of sanctions in civil actions]. Orders imposing or denying monetary sanctions are subject to judicial review in the same manner as a decision in the proceeding. Sanctions orders are enforceable in the same manner as a money judgment or by the contempt sanction [*Gov. Code § 11455.30(b)*].

Contempt sanctions can be imposed against persons in an adjudicative proceeding before an agency, for any of the following [*Gov. Code §§ 11455.10, 11405.20, 11405.30, 11405.70*]:

- Disobedience of or resistance to a lawful order [*Gov. Code § 11455.10(a)*].

- Refusal to take the oath or affirmation as a witness or thereafter refusal to be examined [*Gov. Code § 11455.10(b)*].

- Obstruction or interruption of the due course of the proceeding during a hearing or near the place of the hearing by any of the following [*Gov. Code § 11455.10(c)*; *see also Code Civ. Proc. § 1209*; *see* Ch. 135, *Contempt* , for discussion of contempt sanctions in civil actions]:

  - Disorderly, contemptuous, or insolent behavior toward the presiding officer while conducting the proceeding [*Gov. Code § 11455.10(c)(1)*].

  - Breach of the peace, boisterous conduct, or violent disturbance [*Gov. Code § 11455.10(c)(2)*].

  - Other unlawful interference with the process or the proceedings of the agency [*Gov. Code § 11455.10(c)(3)*].

- Violation of the prohibition of ex parte communications under *Gov. Code §§ 11430.10-11430.70* [*Gov. Code § 11455.10(d)*; *see* Ch. 473, *Public Agency Adjudication* , and 473E, *Public Administrative Law Judges* , for discussion of ex parte communications].

- Failure or refusal, without substantial justification, to comply with a deposition order, discovery request, subpoena, or other order of the presiding officer, or moving, without substantial justification, to compel discovery [*Gov. Code § 11455.10(e)*; *see* Ch. 473B, *Discovery in Agency Adjudications* , for discussion of discovery].

[b] Enforcement

Orders imposing or denying monetary sanctions are subject to judicial review in the same manner as a decision in the proceeding. Monetary sanctions orders are enforceable in the same manner as a money judgment or by the contempt sanction [*Gov. Code § 11455.30(b)*; *see* Ch. 254, *Executions and Enforcement of Judgments*].

The presiding officer or agency head may certify the facts that justify the contempt sanction against a person to the superior court in and for the county where the proceeding is conducted. The court must thereupon issue an order directing the person to appear before the court at a specified time and place, and then and there to show cause why the person should not be punished for contempt. The order and a copy of the certified statement must be served on the person. Upon service of the order and a copy of the certified statement, the court has jurisdiction of the matter [*Gov. Code § 11455.20(a)*]. The same proceedings can be used, the same penalties imposed, and the person charged may purge the contempt in the same way, as in the case of a person who has committed a contempt in the trial of a civil action in the superior court [*Gov. Code § 11455.20(b)*; *see Code Civ. Proc. §§ 1209-1222* for laws governing contempt proceedings in civil actions; *see also* Ch. 135, *Contempt* (contempt proceedings in civil actions)].

[17] Right to Counsel

A party to an administrative proceeding is entitled to be represented by retained counsel when the proceeding is such that the party's interest might be prejudiced if the right to representation by counsel were denied [*Steen v. Board of Civil Service Commrs. (1945) 26 Cal. 2d 716, 727, 160 P.2d 816* ; *Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 540, 92 Cal. Rptr. 525]* . Although the right to counsel is not essential to a fair hearing in all types of administrative proceedings [*see Perlman v. Shasta Joint Jr. College Dist. Bd. of Trustees (1970) 9 Cal. App. 3d 873, 879-880, 88 Cal. Rptr. 563* (right to counsel not essential to fair hearing in proceedings for suspension of college student)], in proceedings to revoke or suspend a license or other administrative action of a disciplinary nature the licensee is entitled to have counsel of his or her own choosing [*Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 543-544, 92 Cal. Rptr. 525* ; *see also Gov. Code § 11509* (form for notice of hearing includes statement of parties' right to be represented by counsel at own expense)]. However, due process does not require that counsel be furnished to a licensee when the licensee personally cannot afford to hire counsel [*Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 543, 92 Cal. Rptr. 525* ; *see Gov. Code § 11509* (form for notice of hearing includes statement that party is not entitled to appointment of attorney at public expense)]. Further, in administrative proceedings no constitutional requirement exists that the hearing officer or the agency advise a party that he or she is entitled to be represented by counsel, although in proceedings subject to the APA [*Gov. Code § 11340 et seq.*], there is a statutory requirement that the agency notify all parties before the hearing of their right to be represented by counsel [*Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 543-544, 92 Cal. Rptr. 525* ; *see Gov. Code § 11509*; *see also Gov. Code §§ 11500(a)* ("agency" defined), 11501(a) (application of *Gov. Code § 11500 et seq.* to agencies as determined by statutes relating to those agencies); *see also* Ch. 473, Public Agency Adjudication]. The availability of the *Fifth Amendment* privilege against self-incrimination is deemed sufficient protection against the possibility that criminal charges might arise out of the conduct for which disciplinary proceedings are brought [*Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 541, 92 Cal. Rptr. 525* ; *see In re Groban (1957) 352 U.S. 330, 333, 77 S. Ct. 510, 1 L. Ed. 2d 376* (witnesses compelled to testify before state fire marshal have no constitutional right to counsel); *but see Szmaciarz v. State Personnel Bd. (1978) 79 Cal. App. 3d 904, 917-919, 145 Cal. Rptr. 396* (privilege against self-incrimination unavailable and adverse inferences from refusal to testify may be drawn in administrative hearing on suspension of correctional officer, unless state seeks to subject officer to some criminal liability)].

The general common law rule that corporations must be represented by counsel (licensed attorneys) in litigation before courts of record (other than small claims courts) does not apply to adjudicative proceedings before administrative tribunals, and the Board's decision to affirm the Department's revocation of a corporation's liquor license was not void for lack of jurisdiction because non attorney president of corporation represented corporation in administrative license revocation hearing [*Camille v. Alcoholic Beverage Control Appeals Board (2002) 99 Cal. App. 4th 1094, 1101-1103, 121 Cal. Rptr. 2d 758]* .

The California Court of Appeal upheld the Superior Court's assumption of jurisdiction over the law practice of a former attorney who had resigned from the state bar while disciplinary charges were pending. The State Bar of California had requested the assumption of jurisdiction, authorized by *Bus. & Prof. Code § 6180*, because the former attorney represented clients in state administrative hearings, including hearings of the Medical Board of California. The court of Appeal concluded that the former attorney was representing clients in state agency hearings, and he was not eligible to practice law. The court of Appeal also held that the Superior Court could not lawfully assume jurisdiction over the former attorney's federal agency practice because state law prohibiting unauthorized practice of law is preempted by federal regulations setting standards for practice by attorneys before federal courts and agencies [*Benninghoff v. Superior Court (2006) 136 Cal. App. 4th 61, 64-65, 38 Cal. Rptr. 3d 759]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceAdmissibilityGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceAdmissibilityPrivilegeCivil ProcedureSanctionsContemptCivil ContemptConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessSelf-Incrimination PrivilegeEvidenceCompetencyAffirmations & OathsEvidenceTestimonyExaminationCross-ExaminationScopeEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyExpertsQualificationsEvidenceTestimonyRefreshing RecollectionGeneral Overview

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§ 473F.16 Record of the Hearing

[1] Reporting

In virtually all administrative proceedings, a record is kept. Express or implied statutory requirements, or agency practice, determines the requirement and method of recording. Due process may also require the hearing to be recorded [*see Goldberg v. Kelly (1970) 397 U.S. 254, 267, 90 S. Ct. 1011, 25 L. Ed. 2d 287* (due process requirements applicable when New York welfare authorities terminated federal aid without notice or hearing); *Aluisi v. County of Fresno (1958) 159 Cal. App. 2d 823, 828, 324 P.2d 920* (record of administrative proceeding was inadequate to enable court to determine validity of administrative action)].

The APA requires that agency hearings conducted under Chapter 5, the formal hearing provisions of the APA (*Gov. Code § 11500 et seq.*), to be reported by a stenographic reporter [*Gov. Code § 11512(d)*]. This means recording by any method whereby a literal record is made of what is said, from which an accurate transcription can be made by audio or visual methods [*Funke v. Department of Motor Vehicles (1969) 1 Cal. App. 3d 449, 455 , 1 Cal. App. 3d 449, 81 Cal. Rptr. 662* (proceedings reported by stenographer using Stenocord machine comply with statutory requirement)]. With the consent of the parties, however, hearings may be reported electronically [*Gov. Code § 11512(d)*]. If properly done, electronic reporting can provide a record of about the same quality as that of reporters. Nonetheless, before consenting to electronic reporting, it is important to carefully consider the need for an accurate transcript in the future proceedings [*see County of Madera v. Holcomb (1968) 259 Cal. App. 2d 226, 230-231, 66 Cal. Rptr. 428* (electrical recording device rendered certain portions of record unclear); *Aluisi v. County of Fresno (1958) 159 Cal. App. 2d 823, 824-825, 324 P.2d 920* (because shorthand reporter was unavailable for hearing, electrical device was used that rendered incomplete record of proceedings)].

The Court of Appeal upheld a judgment setting aside the DMV's suspension of a motorist's driver's license after an administrative per se law suspension hearing which was challenged by the motorist in court. The judgment was set aside because the DMV failed to file with the court a complete administrative record of the hearing. The DMV lost a portion of the hearing record because the hearing tape containing the testimony of the motorist and his expert witness was erased. The DMV also refused to pay the cost of reconstructing the missing part of the hearing record, $1,500 for the

motorist's attorney and expert witness to appear at a new hearing [*Frase v. Gourley (2000) 85 Cal. App. 4th 762, 764-765, 102 Cal. Rptr. 2d 432]* .

The *Frase* case decision was distinguished in the decision in *Leal v. Gourley (2002) 100 Cal. App. 4th 963, 970-972, 123 Cal. Rptr. 2d 220* , based on a failure of the driver to request that DMV improve the transcript, or provide assistance in scheduling a new hearing [*Leal v. Gourley (2002) 100 Cal. App. 4th 963, 970-971, 123 Cal. Rptr. 2d 220]* .

The Court of Appeal reversed the County of Merced's granting of a conditional use permit, and the county's certifying of a final environmental impact report under the California Environmental Quality Act (CEQA), for a project approval sought by a mining company. The court held that the county failed to provide an adequate and complete administrative record for judicial review making it difficult for the appellate court to determine whether the county make the necessary findings required by CEQA before issuing the permit [*Protect Our Water v. County of Merced (2003) 110 Cal. App. 4th 362, 372-374, 1 Cal. Rptr. 3d 726]* .

Under the APA Administrative Adjudication *Bill of Rights*, which applies to all state agency hearings in which an evidentiary hearing is required, by federal or state constitutional provisions, or by federal or state statute (including but not limited to hearing under the APA formal hearing provisions), the agency is required to base its decision on the record of the hearing [*Gov. Code §§ 11425.10, 11410.20*]. It is difficult to enforce a decision on the record requirement without a transcript of the hearing.

It was reversible error for the superior court to decide an administrative mandamus case and to deny the petition without reviewing the administrative record. In denying the petition before the administrative record had been prepared, the court was unable to weigh the evidence and to decide the sufficiency of the evidence to support the fact findings that provided the basis for the agency decision [*Ocheltree v. Gourley (2002) 102 Cal. App. 4th 1013, 1017-1018, 126 Cal. Rptr. 2d 77]* .

[2] Transcripts

In hearings governed by Chapter 5, the APA formal hearing provisions (*Gov. Code § 11500 et seq.*), parties may order transcripts from the Office of Administrative Hearings by making a request for a complete or partial record of the proceedings [*Gov. Code § 11523*]. For administrative hearings that are subject to the administrative adjudication *bill of rights*, that applies to all state agency hearings, whether or not the agency is required to follow the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*), whenever the agency is required to hold an evidentiary hearing by federal or state constitutional provisions, or by federal or state statutes, that agency is required to base its decision on the record of the hearing [*Gov. Code §§ 11425.10, 11410.20*; *see* Ch. 473, *Public Agency Adjudication* , for discussion of the scope of application of these APA provisions].

It is difficult to enforce a decision on the record requirement without a transcript. In those case, as well as in non-APA hearings, parties may obtain transcripts from the agency or from the reporter directly. In some cases, tape recordings may have to be transcribed by the party requesting a transcript [*see* *Darley v. Ward (1980) 28 Cal. 3d 257, 261, 168 Cal. Rptr. 481, 617 P.2d 1113]* .

It is important to learn the procedures for reporting and transcribing the hearing being conducted. If the procedures raise concerns about an adequate record, these concerns should be resolved before the hearing begins. In some cases, it may be advisable to hire an additional reporter to come in to record the proceedings to preserve a record and provide a transcript. The cost of such a record might even be recovered if a judicial review is successful [*Marlow v. Orange County Human Services Agency (1980) 110 Cal. App. 3d 290, 294-295, 167 Cal. Rptr. 776* (respondent who hired court reporter for hearing, despite tape recording by agency, was reasonable, and therefore cost of reporting was properly awarded to him)]. If a daily transcript is desired, it is almost always necessary to provide for them personally.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawJudicial ReviewAdministrative RecordGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionGovernmentsCourtsCourt Personnel

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§ 473F.17 Defaults

[1] APA Proceedings

[a] License Issuance and Renewal Cases

A hearing to determine whether a right, authority, license, or privilege should be granted, issued, or renewed is initiated by filing a statement of issues [*Gov. Code § 11504*]. The agency may deny issuance in the form of a statement of issues, or it may simply deny issuance and provide the statement if the unsuccessful applicant requests a hearing on the denial [*Gov. Code § 11504*]. A respondent who has not requested a hearing defaults either by failing to file a notice of defense to the statement within 15 days after service of a statement of issues or by failing to appear at the hearing [*Gov. Code §§ 11504, 11504.5, 11520(a)*; *see Gov. Code § 11506(a)* (time limit for notice of defense)].

However, notwithstanding the default of the respondent, the agency or the ALJ, before a proposed decision is issued, have discretion to grant a hearing on reasonable notice to the parties. If the agency and the ALJ make conflicting orders under this provision, the agency order takes precedence [*Gov. Code § 11520(b)*]. Also, the ALJ may order the respondent, or the respondent's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of the respondent's failure to appear at the hearing [*Gov. Code § 11520(b)*].

Furthermore, within seven days after service on the respondent of a decision based on the respondent's default, the respondent may serve a written motion requesting that the decision be vacated and stating the grounds relied upon. The agency in its discretion may vacate the decision and grant a hearing on a showing of good cause [*Gov. Code § 11520(c)*]. Good cause includes, but is not limited to, the following:

- Failure of the person to receive notice served pursuant to *Gov. Code § 11505* [*Gov. Code § 11520(c)(1)*].

- Mistake, inadvertence, surprise, or excusable neglect [*Gov. Code § 11520(c)(2)*].

For discussion and forms relating to a statement of issues and other initial agency pleadings, see Ch. 473A, *Commencing Agency Adjudication* . For discussion and forms relating to default procedures and relief from default in civil actions generally, see Ch. 205, *Defaults and Default Judgments* , and Ch. 489, *Relief From Judgments and Orders* .

Agencies governed by Chapter 5, the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*), handle a default in different ways. Some agencies never file a statement of issues unless the applicant requests a hearing [*see Gov. Code § 11504* (agency must provide statement upon request for hearing)]. Other agencies will sometimes file a statement of issues without an applicant's request for hearing. When an applicant requests a hearing and the agency files a statement of issues, some agencies will not set the matter for hearing if they do not receive a notice of defense. The agency will write its own default decision [*see Gov. Code § 11520(a)* (agency may take action when respondent fails to file notice of defense)].

Other agencies will set the matter for hearing, regardless of not receiving a notice of defense, if the proof of the allegations in the case involves testimony in addition to documents. If the agency receives a notice of defense but the respondent does not appear at the hearing, some agencies will take the case off calendar and write their own default decision. Other agencies will withdraw the case only if it is a documentary case and without testimony. In summary, the practices of agencies vary greatly with respect to defaults in statement of issues cases, and often depend on the kind of case. Practices also change within agencies over time. It is thus important to contact the agency to determine its current default practice.

[b] License Discipline Cases

An agency initiates a hearing to determine whether a right, authority, license, or privilege should be revoked, suspended, limited, or conditioned by filing an accusation [*Gov. Code § 11503*; *see* Ch. 473A, *Commencing Agency Adjudication*].

The agency has express authority to treat either the respondent's failure to file a notice of defense within 15 days after service of an accusation or respondent's failure to appear at the hearing, as a default [*Gov. Code §§ 11506(c), 11520(a)*]. However, notwithstanding the default of the respondent, the agency or the ALJ, before a proposed decision is issued, have discretion to grant a hearing on reasonable notice to the parties. If the agency and the ALJ make conflicting orders under this provision, the agency order takes precedence [*Gov. Code § 11520(b)*]. Also, the ALJ may order the respondent, or the respondent's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of the respondent's failure to appear at the hearing [*Gov. Code § 11520(b)*].

Within seven days after service on the respondent of a decision based on the respondent's default, the respondent may serve a written motion requesting that the decision be vacated and stating the grounds relied upon. The agency in its discretion may vacate the decision and grant a hearing on a showing of good cause [*Gov. Code § 11520(c)*]. Good cause includes, but is not limited to, the following:

- Failure of the person to receive notice served pursuant to *Gov. Code § 11505* [*Gov. Code § 11520(c)(1)*].

- Mistake, inadvertence, surprise, or excusable neglect [*Gov. Code § 11520(c)(2)*].

As in license issuance cases [*see* [a], *above*], the proper agency practice for defaults in accusation cases is not completely clear. In accusation cases, the agency has the burden of proof. Thus, hearings are normally held regardless of a respondent's failure to file a notice of defense or appear at the hearing [*see Gov. Code § 11520(a)*]. Failure to file a timely notice of defense to an accusation is a waiver of the right to a hearing, however, and granting a hearing is then discretionary with the agency [*Gov. Code §§ 11506(c), 11520(b)*]. When respondent fails to file a notice of defense or

fails to appear at the hearing, the agency may act based on the respondent's admissions, affidavits, and "other evidence" [*Gov. Code § 11520(a)*]. *Gov. Code § 11520(a)* strongly implies that this "other evidence" is evidence taken in a hearing. It must be relevant evidence [*see Carl S. v. Commission for Teacher Preparation & Licensing (1981) 126 Cal. App. 3d 365, 369, 178 Cal. Rptr. 753* (court held that hearsay evidence was incompetent and therefore insufficient to support commission's finding that respondent was unfit to teach)].

For these reasons, agencies usually have a default hearing in accusation cases regardless of whether a notice of hearing is filed. At the hearing, the agency attorney presents the case very much like a contested case, except that affidavits are more often used [*see Gov. Code § 11520(a)* (agency may use affidavits as evidence)]. Unsworn multiple hearsay statements are not sufficient [*Carl S. v. Commission for Teacher Preparation & Licensing (1981) 126 Cal. App. 3d 365, 372, 178 Cal. Rptr. 753]* .

[c] Mitigation

Under the new act, former Gov. Code. Code § 11520(b), relating to the right of a defaulting respondent to make a showing by way of mitigation, is superseded by the procedures to cure a default under *Gov. Code § 11520(b), (c)*. Under those procedures, as explained in [a], and [b], *above*, the ALJ or agency have discretion to do the following [*Gov. Code § 11520*]:

- Grant a hearing notwithstanding respondent's default.
- Vacate a decision and grant a new hearing.

The respondent may make a showing by way of mitigation as a defense in the hearing [25 Cal. L. Rev. Comm. Reports 55, 251 (1995)]. What this means is that if respondent wants to present mitigation defense, he or she has to invoke the procedures to cure a default under *Gov. Code § 11520(b), (c)*.

[d] Reconsideration of Default

When a default decision has been made, by the agency alone or by an ALJ whose decision is adopted by the agency [*see Gov. Code § 11517(c)(2)*], a respondent may still be able to get a hearing on the merits. Under the new act, within seven days after service on the respondent of a decision based on the respondent's default, the respondent may serve a written motion requesting that the decision be vacated and stating the grounds relied upon. The agency in its discretion may vacate the decision and grant a hearing on a showing of good cause [*Gov. Code § 11520(c)*]. Good cause includes, but is not limited to, the following:

- Failure of the person to receive notice served pursuant to *Gov. Code § 11505* [*Gov. Code § 11520(c)(1)*].
- Mistake, inadvertence, surprise, or excusable neglect [*Gov. Code § 11520(c)(2)*].

When a respondent is seeking reconsideration of a default based on failure to receive actual notice of the hearing, respondent must support the claim of lack of actual notice with proof and must show that lack of notice was not due to inexcusable neglect or to respondent avoiding service [*Evans v. Department of Motor Vehicles (1994) 21 Cal. App. 4th 958, 974-976, 26 Cal. Rptr. 2d 460]* . The agency may order a reconsideration of all or part of the case, on its own motion or on the petition of any party, within any of the following time limits [*Gov. Code § 11521(a)*]:

- Thirty days after the delivery or mailing of the decision to respondent.
- The effective date of the decision, if it occurs before that 30-day period elapses.

- The expiration of a stay (which may not be longer than 30 days) granted by the agency to enable the respondent to request a reconsideration.

The APA does not prescribe the form and contents of a petition by the respondent. Because most agencies prefer to have decisions made on the merits, they may grant the petition for reconsideration. Therefore, if a respondent has received a default decision and desires a hearing, it is important to contact the agency immediately and petition for reconsideration, setting forth good reasons for having a further hearing. The agency itself may reconsider the case on all pertinent parts of the record, and any additional evidence and argument permitted, or it may assign the case to an administrative law judge [*Gov. Code § 11521(b)*].

[2] Non-APA Defaults

In non-APA hearings, when a respondent is given adequate notice and an opportunity to defend, agencies also have the power to proceed in default [*Rinaldo v. Board of Medical Exmrs. (1935) 5 Cal. App. 2d 345, 351, 42 P.2d 724* (board revoked doctor's license to practice at hearing which respondent did not attend); *McGinn v. Board of Health (1931) 113 Cal. App. 228, 231, 298 P. 118* (board discharged hospital watchman at hearing that respondent did not attend)].

A statute usually provides the authority for default on respondent's failure to file a required response or to appear at a hearing; however, the authority may be implied. Because the procedure for handling default cases varies from agency to agency, uniform practices cannot be assumed; the agency should be contacted in each individual case. Most non-APA agencies can also set aside a default or reconsider a default decision if they still have jurisdiction to do so under their statute or other governing authority [*see, e.g.,* Cal. State B. Rules Proc., Rule 555 (default due to nonappearance of respondent at formal hearing may be set aside for good cause upon timely application)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationHearingsRight to HearingWaiverEvidenceRelevanceRelevant EvidenceGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicenses

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A. Hearing Procedures

41A-473F California Forms of Pleading and Practice--Annotated § 473F.18

§ 473F.18 Persuasion

[1] Persuasion in Administrative Hearings

Because most administrative hearings are conducted by an individual ALJ who may have some background in the administrative subject area of the hearing, persuasion techniques in an administrative hearing are different from those in a jury trial, and sometimes different than those in a court trial. The points discussed in [2], *below*, should be considered regarding persuasion in an administrative hearing.

For a discussion of persuasion in court trials generally, see Ch. 551, *Trial* .

[2] Guidelines for Persuasion

The following guidelines are intended to help an attorney determine which persuasion techniques to exercise in an administrative hearing:

- Prove all of your facts in the hearing; don't expect another chance to prove your case. The administrative hearing is the "trial" of the facts and usually creates the only record on which the facts will be determined and reviewed.

- Always make a full understandable record, because the ALJ, or the judge who later reviews the record, may not be knowledgeable about technical subjects.

- Avoid extensive review of an expert's qualifications; less time is expended when resumes are used.

- Avoid theatrics, which are generally inappropriate; it is far more effective to fully and efficiently prove your case.

- Use objections; this use improves the quality of proof and increases your knowledge about avoiding objections and presenting evidence properly.

- Know and understand the law, including regulations, that apply to the procedures in the hearing.
- Be creative:
    - Explore procedures that can help resolve the controversy or portions of it.
    - Consider the use of stipulations of fact, prehearing and settlement conferences, motions in limine, and other resolution procedures.
- Be flexible; not all administrative hearings are alike, and due to the limited use of discovery, unexpected events often occur.
- Properly prepare witnesses and exhibits:
    - Schedule witnesses to avoid long waits.
    - Have exhibits in presentable form with copies for the other side.
- Be professional:
    - Respect the judge, opposing parties, and witnesses.
    - Act and look well prepared and knowledgeable.
    - Demonstrate dedication to your client within the bounds of fairness.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral Overview

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[Reserved]

§§ 473F.19[Reserved]

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§ 473F.30 Administrative Rules of Evidence

[1] Criminal Rules of Evidence Are Generally Inapplicable

The rules of evidence in administrative hearings are administrative rules, neither purely criminal nor purely civil. Without a statute making it applicable, the California Evidence Code does not apply to administrative proceedings [*Evid. Code § 300* (applicable to court actions, except as otherwise provided by statute)]. Although administrative proceedings may be punitive in nature, they are not criminal in nature and need not be conducted in accordance with the rules of procedure or evidence employed in criminal courts [*Webster v. Board of Dental Examiners (1941) 17 Cal. 2d 534, 537, 110 P.2d 992* ; *Suckow v. Alderson (1920) 182 Cal. 247, 251, 187 P. 965* ; *Gilbert v. Superior Court (1987) 193 Cal. App. 3d 161, 173, 238 Cal. Rptr. 220* ; *Gore v. Board of Medical Quality Assurance (1980) 110 Cal. App. 3d 184, 198, 167 Cal. Rptr. 881]* . In some instances, however, criminal rules of evidence may apply [*see Coburn v. State Personnel Bd. (1978) 83 Cal. App. 3d 801, 809-810, 148 Cal. Rptr. 134* (disciplinary hearing of State Personnel Board applied evidence code provisions regarding misdemeanor conviction); *see also §§ 473F.33, 473F.34*].

[2] Liberal Nature of Rules

Administrative proceedings are not conducted according to strict or technical rules of evidence [*Coburn v. State Personnel Bd. (1978) 83 Cal. App. 3d 801, 809, 148 Cal. Rptr. 134* ; *Camp v. Brock (1946) 170 P.2d 702]* . The APA (*Gov. Code § 11340 et seq.*) provides that an administrative hearing under Chapter 5, the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*), need not be conducted according to technical rules relating to evidence and witnesses, except as provided in the APA [*Gov. Code § 11513(c)*].

Thus, relevant evidence will be admitted if it is the kind of evidence on which responsible people are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make the admission of that evidence over objection improper in civil actions [*Gov. Code § 11513(c)*; *see § 473F.31[1]*].

Hearsay evidence that is not admissible in civil actions can be used to supplement or explain other evidence but over timely objection is not sufficient by itself to support a fact finding [*Gov. Code § 11513(d)*; *see § 473F.32*]. Rules of privilege are applicable [*Gov. Code § 11513(e)*; *see § 473F.33*]. The presiding officer has discretion to exclude

evidence if its probative value is outweighed by the probability that its admission will necessitate undue consumption of time [*Gov. Code § 11513(f)*; *see § 473F.31*]. The "irrelevant and unduly repetitious" evidence standard of former *Gov. Code § 11513* is replaced by the general standard of *Evidence Code § 352* [25 Cal. L. Rev. Comm. Reports 55, 240 (1995)]. *Evidence Code § 352* provides as follows: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury" [*Evid. Code § 352*; *see* California Trial Guide (Matthew Bender), for more detailed discussion of evidence issues in civil actions].

Although administrative rules of evidence are not strict, parties to an administrative proceeding have a due process right to a fair hearing, which includes the right to present issues of fact and law in a deliberate, regular, and orderly manner [*H. Moffatt Co. v. Hecke (1924) 68 Cal. App. 35, 39, 228 P. 546]* . The APA expressly provides for such a hearing that includes the following protections [*Gov. Code § 11513(a), (b)*; *see Desert Turf Club v. Board of Supervisors (1956) 141 Cal. App. 2d 446, 455, 296 P.2d 882* (common sense and fair play dictate certain basic requirements for the conduct of any hearing at which facts will be determined)]:

- Testimony on oath or affirmation.
- The right to call and examine witnesses.
- The right to introduce exhibits.
- The right to cross-examine opposing witnesses on any relevant matter.
- The right to impeach any witness.
- The right to rebut evidence.

[3] Guidelines for Production of Evidence

Administrative rules of evidence are an amalgam of evidentiary principles. Administrative law judges (ALJs) determine them by looking to express statutory provisions such as *Gov. Code § 11513*, rules that the courts have applied to administrative proceedings, rules of evidence in both criminal and civil cases, and general common law evidentiary principles. Like other judges, however, ALJs vary in their application of evidentiary rules during administrative proceedings. Counsel in an administrative hearing should generally comply with the following guidelines:

- Produce evidence in the same manner as in a civil court trial.
- Raise novel or unusual evidentiary issues before or as early as possible during the hearing.
- Do not rely on the liberal application of rules of evidence when preparing for an administrative hearing.
- Present all admissible evidence at the administrative hearing, rather than saving it for a possible court review [*see Greenblatt v. Munro (1958) 161 Cal. App. 2d 596, 326 P.2d 929* (party in administrative hearing cannot make skeletal presentation with expectation of making a more complete showing before a court)].

Legal Topics:

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

Administrative LawAgency AdjudicationHearingsEvidenceAdmissibilityHearsayAdministrative LawAgency AdjudicationHearingsEvidenceAdmissibilityPrivilegeConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewEvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsEvidenceRelevanceConfusion, Prejudice & Waste of TimeEvidenceRelevanceRelevant EvidenceEvidenceTestimonyExaminationCross-ExaminationGeneral Overview

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§ 473F.31 Basic Hearing Objections

[1] Irrelevant Evidence

Irrelevant evidence is objectionable [*Evid. Code §§ 350* (no evidence is admissible except relevant evidence), and 351 (except as otherwise provided by statute, all relevant evidence is admissible; *Neely v. California State Personnel Bd. (1965) 237 Cal. App. 2d 487, 493, 47 Cal. Rptr. 64* (irrelevant evidence could not be inquired into at personnel hearing))].

To be relevant, evidence (including credibility evidence) must have "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action" [*Evid. Code § 210*]. Under the APA, any relevant evidence will be admitted if it is the sort of evidence "on which responsible persons are accustomed to rely in the conduct of serious affairs," regardless of the existence of any common law or statutory rule that might make the admission of the evidence over objection improper in civil actions [*Gov. Code § 11513(c)*]. For further discussion of the relevance objection in the context of court trials, see California Trial Guide, Unit 22, Pts. C-F (Matthew Bender).

[2] Evidence That Necessitates Undue Consumption of Time

In court proceedings, an objection can be made whenever a question is asked that reasonably calls for an answer that has already been given [*see Evid. Code §§ 765(a), 774*; *see also California Trial Guide, Unit 20, § 20.15[11]* (Matthew Bender)].

In APA administrative proceedings, however, the presiding officer has discretion to exclude evidence if its probative value is outweighed by the probability that its admission will necessitate undue consumption of time [*Gov. Code § 11513(f)*]. *Gov. Code § 11513(f)* replaces the "irrelevant and unduly repetitious" evidence standard of former Gov. Code. Code § 11513 with the general standard of *Evidence Code § 352* [25 Cal. L. Rev. Comm. Reports 55, 240 (1995); *see Evid. Code § 352(a)* (court has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time)]. In practice, an ALJ is usually concerned about the needless consumption of time as are other judges. An objection on the basis of repetitious evidence should be stated as "undue consumption of time," although the objection is sometimes incorrectly expressed as "asked and

answered."

[3] Objectionable Form of Question

[a] Leading Questions

Objections to the form of questions can and should be made. For example, leading questions [*see Evid. Code § 764*] are improper except when used during cross-examination and in a few other circumstances, such as for preliminary questions and when memory has been exhausted. When leading questions are used, they move the focus of the testimony from the witness to the examiner and thereby detract from the impact of the answer. For this reason, the opposing side infrequently objects to leading questions. Nevertheless, they should not be used for persuasive testimony. See also discussion in *California Trial Guide, Unit 20, § 20.15[1]* (Matthew Bender).

[b] Narrative Questions

Narrative questions, that is, those that are excessively open-ended [*see Evid. Code § 765(a)*], are objectionable because they allow a witness to inject inadmissible evidence into a hearing without an opportunity for objection. In addition to being objectionable, it is often an ineffective way of presenting testimony. See also *California Trial Guide, Unit 20, § 20.15[2]* (Matthew Bender).

[c] Other Objectionable Questions

Objections are also appropriate for questions that assume facts not in evidence or misstate evidence, or that are confusing, misleading, ambiguous, vague, unintelligible, speculative, compound, or argumentative [*see Evid. Code § 765*]. These kinds of questions are inefficient and often elicit ineffective testimony. For a discussion of these and other objections to the form of a question, see *California Trial Guide, Unit 20, § 20.15*.

[4] Cumulative Evidence

Cumulative evidence results when many witnesses give essentially the same testimony without adding anything new, or when many exhibits demonstrate the same thing. Like unduly repetitious evidence, it is objectionable [*see Evid. Code § 352* (admission of evidence necessitates undue consumption of time)]. In administrative proceedings the ALJ is not the final judge of facts, however, because the agency makes the final decision [*see Gov. Code § 11517*; *see also § 473F.10* et seq.].

Therefore, cumulative evidence can be properly included in cases with sharply conflicting testimony [*see Evans v. Industrial Acci. Com. (1945) 71 Cal. App. 2d 244, 248-249, 162 P.2d 488* (cumulative evidence was allowed in case in which respondent claimed that dermatitis was contracted in course of employment, and evidence conflicted regarding whether disease was confined to exposed parts of body)]. See also *California Trial Guide, Unit 20, § 22.50[3]* (Matthew Bender).

[5] Guidelines for Objection Procedure

Objections in an administrative hearing should be made in the same way they are made in court proceedings. The following guidelines cover the main procedural points:

- Make the objection promptly.
- If the question is improper, object before the witness begins to answer.
- Allow the question to be completed before objecting, except when it becomes apparent that the

question itself is prejudicial as well as objectionable. In hearings with only an ALJ or hearing officer [*see Gov. Code § 11512(a)*], however, there is less possibility of prejudice than in hearings with a board or panel.

- Make an initial objection. If the objection is not so obvious that it is ruled on immediately, follow the initial objection with specific grounds for the objection. The grounds should be stated succinctly and should not include extensive argument--for example, "The question is leading," or "The question calls for an irrelevant answer," or simply, "Irrelevant."

- If argument on the objection is appropriate, wait for the ALJ to invite argument or ask to be heard. After an objection to the form of a question is made, opposing counsel will often voluntarily reform the question and no ruling on the objection will be necessary. If a ruling is necessary, however, and the ALJ does not make a clear ruling, ask for a ruling.

- If an objection is made either during the answer or at its end--for example, when the answer is unresponsive--include a motion to strike the improper part of the answer. In administrative proceedings, motions to strike are not granted frequently, but they should be made to protect the record.

[6] Offers of Proof

Offers of proof are especially important in administrative proceedings, because the records of these hearings are frequently reviewed by administrative bodies with final decision authority or appellate review authority, and by the courts. If an objection is sustained and results in the exclusion of important evidence, counsel should make an offer of proof if there is a question about the correctness of the ALJ's ruling. A reviewing authority will then be aware of what evidence was excluded. To make an offer of proof, counsel must simply ask the ALJ for permission to do so. The ALJ will normally grant permission, but he or she may have the attorney make the offer after any board or panel members are dismissed [*see Gov. Code § 11517(b)(1)* (members of agency may hear case together with ALJ)]. The offer of proof should consist of the substance, purpose, and relevance of the excluded evidence [*see Evid. Code § 354(a)* (applicable in court proceedings)]. For a discussion of the offer of proof in a trial court context, see Ch. 551, *Trial* .

[7] Foundation and Authentication

[a] Establishing a Proper Foundation

Foundations for exhibits should be established in administrative hearings in the same manner as in court proceedings [*see White v. Board of Medical Quality Assurance (1982) 128 Cal. App. 3d 699, 705-706, 180 Cal. Rptr. 516* (court refused to admit document of several hundred pages, when lack of foundation required court to speculate on its relevancy and reliability); *see also Evid. Code §§ 403, 405* (applicable to court proceedings)]. Although technical rules of evidence are not followed in administrative hearings, establishing a proper foundation for documents and other exhibits goes to their relevance and credibility [*see Gov. Code § 11513(c)*; *see also § 473F.30*]. A proper foundation can establish whether the evidence is the sort of evidence "on which responsible persons are accustomed to rely in the conduct of serious affairs" [*Gov. Code § 11513(c)* (requirement for admissibility); *see § 473F.30*]. A forensic lab that tested motorist's blood for alcohol and which reported blood alcohol reading of.08 or above did not comply with state regulations requiring new blood alcohol testing procedures, and therefore test results were not sufficiently reliable for use under the administrative per se suspension law [*Baker v. Gourley (2002) 98 Cal. App. 4th 1263, 1264-1265, 120 Cal. Rptr. 2d 348* (reversal of driver's license suspension under administrative per se suspension law because DMV is required to establish that motorist had blood alcohol level at.08 or above at the time of driving to suspend motorists driver's license. Introduction of valid chemical test results is a necessary element of proof, as DMV can not show substantial evidence of that BA level merely by behavior associated with intoxication, and DMV could not rely on chemical test results as lab which tested blood sample did not comply with state regulations requiring new alcohol

testing procedures)].

Another California Court of Appeal held that breath alcohol test results were admissible in DMV administrative per se driver's license suspension hearing but the results were not entitled to much weight because the results were unreliable, as the administering officer failed to follow the guidelines contained in administrative regulations [*17 Cal. Code Regs. §§ 1215.1(b), 1219.3*], which required a 15-minute observation period before the administration of the breath test. Because the test results had so little weight, they did not adequately support a fact finding that the motorist was driving with a blood alcohol level in excess of 0.08. Thus, the DMV order suspending the motorist's license was reversed because the blood alcohol level fact finding was not supported by evidence of sufficient reliability [*Roze v. Dept. of Motor Vehicles (2006) 141 Cal. App. 4th 1176, 1188-1190, 46 Cal. Rptr. 3d 829]* .

However, in criminal prosecutions for driving under the influence of alcohol, the Highway Patrol's lack of compliance with administrative regulations in administering alcohol screening tests does not preclude admission of those test results for lack of reliability. Rather, substantial compliance with administrative regulations is an alternative means of assuring reliability, and the trial court could also have admitted the test results based on other indicia of reliability [*People v. Williams (2002) 28 Cal. 4th 408, 416-418, 121 Cal. Rptr. 2d 854, 49 P.3d 203]* .

Furthermore, a forensic alcohol analysis prepared by a criminalist was inadmissible and did not come within the public employee records exception [*Evid. Code § 1280*] to the hearsay rule because DMV, which had the burden of proof on this issue provided no foundation evidence to show that the criminalist had an official duty to perform and record the forensic alcohol analysis results. Without the foundation evidence, the hearsay exception did not apply, the evidence was hearsay, and the evidence could not provide sufficient evidence to support a fact finding as to the driver's blood alcohol level [*Furman v. Department of Motor Vehicles (2002) 100 Cal. App. 4th 416, 418-419, 122 Cal. Rptr. 2d 520]* .

The California Court of Appeal held that a one-week delay in the preparation of report of forensic alcohol test results raised substantial concerns about lapse of memory by analysts that had conducted the test, such that the report was not found to be timely, and the official records exception to the hearsay rule [*Evid. Code § 1280(b)*] did not apply to allow the reports to be admissible in the DMV license suspension administrative hearing. Timeliness of the report is a foundational requirement for admissibility of reports under the official records hearsay exception [*Glatman v. Valverde (2006) 146 Cal. App. 4th 700, 703-705, 53 Cal. Rptr. 3d 319]* .

Proponents of an exhibit should always offer it when the witness is still on the stand, usually immediately after the foundation is established, in order to avoid forgetting to move exhibits into evidence before resting the proponents' case, or forgetting entirely. Counsel objecting to a lack of proper foundation should do so when the exhibit is offered into evidence, not when it is marked for identification. From the proponents' point of view, if an objection is sustained, the witness will still be available to supply missing foundation elements. For further discussion of establishing a proper foundation, see *California Trial Guide, Unit 21, § 21.11* (Matthew Bender).

[b] Authentication of Writings

Writings and conversations must be authenticated for the same reasons that a foundation should be established [*see Evid. Code §§ 1400-1421* (authentication of documents in court proceedings)]. For example, signed writings usually must be shown to have authentic signatures. The identity of parties to a conversation must also be demonstrated. Videotapes are considered to be writings that must be authenticated before being admitted into evidence. Unauthenticated videotapes cannot be properly admitted into evidence, and without an authenticating foundation these videotapes are considered to be irrelevant and unreliable evidence [*Ashford v. Culver City Unified Sch. Dist. (2005) 130 Cal. App. 4th 344, 349-351, 29 Cal. Rptr. 3d 728]* . For a discussion of authentication, see California Trial Guide, Unit 30 (Matthew Bender).

[8] Secondary Evidence Rule

The content of a writing may be proved by an otherwise admissible original [*Evid. Code § 1520*]. However, under the "Secondary Evidence Rule," the content may also generally be proved by otherwise admissible secondary evidence [*Evid. Code § 1521(a)*]. Secondary evidence must be excluded only when the court determines a genuine dispute exists concerning material terms of the writing and justice requires the exclusion, or if admission would be unfair [*Evid. Code § 1521(a)*]. Secondary evidence must be authenticated in order to be "otherwise admissible" [*Evid. Code §§ 1401, 1521(c)*]. Oral testimony is generally not admissible to prove the content of a writing, except under limited statutory exceptions [*Evid. Code § 1523*].

The Secondary Evidence Rule has replaced the former "Best Evidence Rule" in California [*see* Cal. L. Rev. Comm. Comment to *Evid. Code § 1521*]. The newer rule conforms more closely to the practice in administrative adjudication proceedings, in which authenticated secondary evidence, such as a photocopy or computer printout, is admitted so long as it is relevant and of a type upon which responsible persons customarily rely in serious affairs [*see Gov. Code § 11513(c)* and discussion in *§ 473F.30*; *see also Evid. Code §§ 1552, 1553* (printed representations of computer information and images stored on a video or digital medium are presumed to be accurate representations of the information and images represented)].

For more detailed discussion of the Secondary Evidence Rule, see California Trial Guide, Unit 31 (Matthew Bender).

[9] Failure to Object

In trial courts, the failure to make a timely objection to the admission of evidence or a motion to strike and to clearly give grounds for the objection or motion can constitute a waiver of the right to complain about the erroneous admission of evidence [*Evid. Code § 353* (verdict or judgment will not be reversed based on erroneous admission of evidence when no objection or motion to exclude evidence was made)]. The same rule applies in administrative hearings [*see Savelli v. Board of Medical Examiners (1964) 229 Cal. App. 2d 124, 139, 40 Cal. Rptr. 171* (court found that hearsay evidence was of probative value when it was not objected to when offered); *Tennant v. Civil Service Com. (1946) 77 Cal. App. 2d 489, 498, 175 P.2d 568* (respondent could not later object to fact that report was not introduced at hearing, after he failed to object at hearing)]. This rule applies even if the party failing to object is unrepresented [*August v. Department of Motor Vehicles (1968) 264 Cal. App. 2d 52, 64, 70 Cal. Rptr. 172]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceAdmissibilityGeneral OverviewEvidenceAuthenticationGeneral OverviewEvidenceDemonstrative EvidenceFoundational RequirementsEvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsEvidenceProcedural ConsiderationsObjections & Offers of ProofOffers of ProofEvidenceProcedural ConsiderationsObjections & Offers of ProofTimelinessEvidenceRelevanceConfusion, Prejudice & Waste of TimeEvidenceRelevanceRelevant EvidenceEvidenceTestimonyExaminationLeading Questions

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§ 473F.32 Administrative Hearsay

[1] General Requirements

"Hearsay evidence" is evidence of a statement that is made other than by a witness while testifying at the hearing that is offered to prove the truth of the matter asserted [*Evid. Code § 1200(a)*]. It can consist of oral or written verbal expression, or nonverbal conduct intended as a substitute for oral or written verbal expression [*Evid. Code § 225*]. Videotapes can also be hearsay evidence. Videotapes are considered to be writings that must be authenticated before being admitted into evidence. Unauthenticated videotapes cannot be properly admitted into evidence, and without an authenticating foundation these videotapes are considered to be irrelevant and unreliable evidence. Admission of these videotapes was objected to and the videotapes (of a school district employee) were hearsay evidence offered to prove the truth of the matter asserted [*Ashford v. Culver City Unified Sch. Dist. (2005) 130 Cal. App. 4th 344, 350-351, 29 Cal. Rptr. 3d 728]* . In contrast to court proceedings, objectionable hearsay is often admissible in administrative proceedings. For a discussion of application of the hearsay rule and its exceptions in civil trials, see California Trial Guide, Unit 40 (Matthew Bender).

The APA provides that hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection is not sufficient in itself to support a finding unless it would be admissible over objection in civil actions [*Gov. Code § 11513(d)*]. The objection is timely if made before submission of the case or on reconsideration [*Gov. Code § 11513(c)*].

The Third District California Court of Appeal held that the admission into evidence of a prior administrative law judge decision was permissible under *Gov. Code § 11513(c)* because the ALJ decision was reliable evidence. That decision, which was hearsay, properly supplemented other evidence under *Gov. Code § 11513(d)*, and did not consume an undue amount of time under *Gov. Code § 11513(f)*. The prior judge's decision assisted in proving that two teachers had special training and experience for teaching community day school, and therefore the school district was justified in laying off more senior teachers and retaining these two teachers consistent with the requirements of *Educ. Code § 44955(d)*. The prior ALJ decision addressed a prior reduction in force by the same school district, and the qualifications of the same two teachers were discussed in that prior decision [*Bledsoe v. Biggs Unified School District (2009)170 Cal. App. 4th*

127, 140-142, 88 Cal. Rptr. 3d 13] .

This otherwise objectionable hearsay evidence that is used to supplement or explain other evidence is referred to as "administrative hearsay." The rule that administrative hearsay may not be used by itself and without other evidence to support a finding of fact is called the "residuum rule." A finding cannot be based on administrative hearsay without a residuum of other evidence that supplements or explains the finding [*Gov. Code § 11513(d)*; *Berg v. Davi (2005) 130 Cal. App. 4th 223, 229-230, 29 Cal. Rptr. 3d 803* (hearsay evidence contained in State Bar Court and Review Department opinions, and in unpublished court of appeal decision upholding fraud judgment opinion was hearsay evidence admitted for purpose of supplementing or explaining other admissible evidence and this hearsay evidence was properly admitted for this purpose under *Gov. Code § 11513 (d)*)].

The California Supreme Court decided issues related to the admissibility and sufficiency under *Gov. Code § 11513(c)* of unsworn police reports used in administrative per se hearings conducted by the DMV. The Court decided that a police officer's unsworn report, containing both an admission by a defendant that he was driving a car at the time of an arrest for driving while intoxicated and witness statements that defendant was driving while intoxicated, was admissible under *Gov. Code Section 11513(c)* in a driver's license suspension hearing under "administrative per se" procedure for purposes of showing that defendant was driving at the time of arrest [*Lake v. Reed (1997) 16 Cal. 4th 448, 460-461, 65 Cal. Rptr. 2d 860, 940 P. 2d 311]* . The police officer's report fit under the public employee hearsay exception, and the driver's admission fit under the party admission exception. The other witness statements are admissible to supplement the statements admitted under hearsay exceptions, and the evidence presented was sufficient to prove that defendant was driving at the time of the arrest [*Lake v. Reed (1997) 16 Cal. 4th 448, 461-462, 65 Cal. Rptr. 2d 860, 940 P. 2d 311]* . Further, an unsworn and uncertified blood or urine forensic laboratory report showing the blood alcohol level of a driver arrested for driving while intoxicated is admissible under *Gov. Code Section 11513(c)*, and is within the public employees exception to the hearsay rule [*Lake v. Reed (1997) 16 Cal. 4th 448, 466-467, 65 Cal. Rptr. 2d 860, 940 P. 2d 311]* .

There is a substantial amount of case law that similarly addresses administrative hearsay issues [*Jackson v. Department of Motor Vehicles (1994) 22 Cal. App. 4th 730, 737, 27 Cal. Rptr.2d 712* (driver's admission that he was driving motor vehicle that was contained in arresting officer's arrest report is competent evidence under hearsay exceptions for admissions by a party and for public employee records); *see* *Lake v. Reed (1997) 16 Cal. 4th 448, 467, 65 Cal. Rptr. 2d 860, 940 P. 2d 311* (forensic alcohol report is official DMV record admissible at administrative per se hearing when admission requirements are satisfied); *Shea v. Department of Motor Vehicles (1998) 62 Cal. App. 4th 1057, 1059, 72 Cal. Rptr. 2d 896* (forensic alcohol report prepared by an unsupervised trainee inadmissible as official record); Manning v. Department of motor vehicles *(1998) 61 Cal. App. 4th 273, 276* , *61 Cal. App. 4th 273, 71 Cal. Rptr. 2d 647* (forensic alcohol report inadmissible when unsupervised trainee performed test and there was discrepancy between signature date and date test sample went to laboratory); *Carlton v. Department of Motor Vehicles (1988) 203 Cal. App. 3d 1428, 1432, 250 Cal. Rptr. 809* (police officer's opinion in computerized accident report held to be hearsay and insufficient to support a license revocation because the report would not be admissible under the business records or official records exceptions to the hearsay rule); *Szmaciarz v. State Personnel Bd. (1978) 79 Cal. App. 3d 904, 913-914, 145 Cal. Rptr. 396* (hearsay testimony of witnesses regarding respondent's marijuana use was admissible, because it would be admissible in a civil action over objection as an admission by a party); *Hildebrand v. Department of Motor Vehicles (2007) 152 Cal. App. 4th 1562, 1571-1573, 62 Cal. Rptr. 3d 234* (fire captains' hearsay statement was admissible in administrative hearing both as part of arresting officer's arrest report (admissible as a public employee record) and was admissible (under *Gov. Code § 11513(d)* to supplement driver's statements at the time of the arrest (admissible as a party admission)); *McNary v. Department of Motor Vehicles (1996) 45 Cal. App. 4th 688, 694-695, 53 Cal. Rptr. 2d 55* (officer's sworn report containing report of another officer's personal observations that arrested person had been driving are admissible public employee records; citing and following *Gananian); Robertson v. Zolin (1996) 44 Cal. App. 4th 147, 152-153, 51 Cal. Rptr 2d 420* (hearsay evidence offered by driver supplemented DMV evidence and was sufficient to support finding that blood test was not reliable); *Gananian v. Zolin (1995) 33 Cal. App. 4th 634, 640, 39 Cal. Rptr. 2d 384* (officer's sworn report containing report of another officer's personal observations are

admissible public employee records); *Cantrell v. Zolin (1994) 23 Cal. App. 4th 128, 133-134, 28 Cal. Rptr. 2d 238* (officer's statement was not hearsay as to reasonable cause to believe issue)].

A scientific investigation division report, showing the blood alcohol level of a driver, was not properly authenticated because the report was not signed and thus the report did not come within the official records exception to the hearsay rule. The report was hearsay within the meaning of *Gov. Code § 11513(d),* and did not satisfy the requirements of that section for admissibility over objection in civil actions. Therefore, the report, which provided the only evidence of blood alcohol level, was not substantial evidence to support a finding necessary to support a license suspension for driving with a blood-alcohol level of .08 or more, and a driver's license suspension was properly revoked [*Jacobson v. Gourley (2000) 83 Cal. App. 4th 1331, 1333-1334, 100 Cal. Rptr. 2d 349]* .

Forensic lab blood test results were not admissible in evidence in DMV administrative hearing because the Department of Justice (DOJ) lab report containing the test results was not prepared at or near the time of the recorded event, as required for the public employee records exception [*Evid. Code § 1280(b)*] to the hearsay rule. Thus, it was not an abuse of discretion for the trial court to exclude the lab report of the blood test results from admission into evidence. Preparation of the report one week after the analysis was completed was not sufficient in the absence of any information as to when the test results were entered into the lab database [*Molenda v. Department of Motor Vehicles (2009) 172 Cal. App. 4th 974, 990-991, 91 Cal. Rptr. 3d 792]* . Also, *Veh. Code § 23612(g)(2)* permits the DMV to receive or retrieve electronically evidence of a licensee's blood alcohol results directly from a government forensic database and provides that the electronic information is the best available evidence of the test results, but *Veh. Code § 23612(g)(2)* is not an exception to the hearsay rule. Thus, the lab report could be challenged on hearsay grounds notwithstanding compliance with the requirements of *Veh. Code § 23612(g)(2)* [*Molenda v. Department of Motor Vehicles (2009) 172 Cal. App. 4th 974, 996-997, 91 Cal. Rptr. 3d 792]* . Furthermore, the PAS test results were not admissible because of inadequate foundation since there was insufficient evidence that the test results met the foundations requirements of the DMV regulations [*17 Cal. Code Regs. §§ 1215*-1222.2]. The evidence related to PAS test results also did not meet the foundational requirements of properly functioning equipment, a properly administered test, and a qualified operator [*Molenda v. Department of Motor Vehicles (2009) 172 Cal. App. 4th 974, 1000-1001, 91 Cal. Rptr. 3d 792]* . Finally the DMV cannot rely upon the presumption of official duty codified in *Evid. Code § 664* to establish the foundation for admissibility of the PAS test results [*Molenda v. Department of Motor Vehicles (2009) 172 Cal. App. 4th 974, 1004-1005, 91 Cal. Rptr. 3d 792]* .

The California Court of Appeal held that Medi-Cal patient's claim detail reports (prepared by the state department of health services) that were used for an audit comparison with patient records for purposes of determining compliance by dentists with Denti-Cal program requirements were official records within the meaning of *Evid. Code § 1280,* and were therefore admissible as an exception to the hearsay rule in an administrative hearing, and did not have to be authenticated to be admissible in the administrative hearing [*Bhatt v. Dep't of Health Servs. (2005) 133 Cal. App. 4th 923, 929-931, 35 Cal. Rptr. 3d 335]* .

The California Supreme Court held that an arresting officer's unsworn statement contained in an unsworn report that supplemented the officer's sworn report of the arrest of a motorist for violating drunk driving laws could be admitted into evidence in a DMV administrative per se license suspension hearing, and the unsworn report could be used by the DMV for purposes of deciding a motorists' challenge to the license suspension. The unsworn report was admissible under the provisions of *Veh. Code § 13557* allowing admission of other evidence related to the sworn report notwithstanding that the unsworn report is hearsay evidence [*MacDonald v. Gutierrez (2004) 32 Cal. 4th 150, 153, 81 P.3d 975]* . Another Court of Appeal reversed a trial court decision that reversed a DMV administrative per se law decision suspending a motorist's drivers license for driving with a blood alcohol level of.08 or more. The court of appeal held that the driver had the burden of proof to show that blood collection procedures were not properly performed. There is a rebuttable presumption under *Evid. Code § 664* that the procedures were properly completed [*Petricka v. Department of Motor Vehicles (2001) 89 Cal. App. 4th 1341, 1347-1348, 107 Cal. Rptr. 2d 909]* . The presumption under *Evid. Code § 664* of proper completion of a breath test by a police officer was not rebutted by testimony that

continuous observation of a motorist for 15 minutes before giving a breath test does not require direct and unbroken eye contact for the time period [*Manriquez v. Gourley (2003) 105 Cal. App. 4th 1227, 1238-1240, 130 Cal. Rptr. 2d 209]* .

The Court of Appeal upheld the DMV's suspension of a motorist's drivers license for driving under the influence of alcohol (DUI) notwithstanding that the arresting "officer failed to sign the portion of the sworn arrest report certifying that he [the officer] obtained ... [the driver's] breath test samples in the regular course of duties." The court held that there was substantial evidence based on two alternative grounds: 1) the statutory presumption of *Evid. Code § 664* that the police officer properly administered the breath test with properly operating equipment, and 2) the officer provided sworn testimony at the DMV suspension hearing which supported the reliability of the breath test results [*Morgenstern v. Department of Motor Vehicles (2003) 111 Cal. App. 4th 366, 369, 374, 4 Cal. Rptr. 3d 46]* . The Court of Appeal upheld the DMV's suspension of a motorist's drivers license for driving under the influence of alcohol (DUI) notwithstanding a challenge to the adequacy of facts supporting probable cause to arrest the motorist for drunk driving. The Court held that the police officer's report contained specific facts supporting the probable cause requirements, and that report was supplemented by live testimony at the hearing, and other unsworn police reports [*Grundy v. Gourley (2003) 110 Cal. App. 4th 20, 24-25, 1 Cal. Rptr. 3d 104]* .

[2] Objection Requirement

Under the new act, the APA provides that hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection is not sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The objection is timely if made before submission of the case or on reconsideration [*Gov. Code § 11513(c)*]. This provision, operative July 1, 1997, expressly requires a timely objection and therefore resolves a former split in the courts over whether an objection was required for administrative hearsay to be insufficient to support fact findings other than when it is used to supplement or explain other evidence.

This split existed under former Gov. Code. Code § 11513(c), as interpreted by the various districts of the California Court of Appeal regarding whether administrative hearsay that has not been objected to may be used to make a finding of fact. The First District Court of Appeal had repeatedly held that administrative hearsay that has not been objected to is sufficient to support a finding in the absence of contrary evidence, that is, an objection is necessary to preclude use of hearsay alone to make a finding of fact [*see Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 546, 92 Cal. Rptr. 525* (court stated that hearsay evidence that has not been objected to serves to shift the burden of producing evidence of the existence or nonexistence of fact disclosed); *Kirby v. Alcoholic Bev. etc. Appeals Bd. (1970) 8 Cal. App. 3d 1009, 1019-1020, 87 Cal. Rptr. 908* (court stated that hearsay admitted without objection will have probative value unless there is some admissible evidence to the contrary); *Savelli v. Board of Medical Examiners (1964) 229 Cal. App. 2d 124, 139, 40 Cal. Rptr. 171 , cert. denied, 380 U.S. 934, 85 S. Ct. 940, 13 L. Ed. 2d 821 (1964)* (court permitted introduction of objectionable hearsay admitted without objection to be considered in support of a finding)].

The Second, Third, and Fourth Districts, however, did not require an objection to preclude use of administrative hearsay alone to support a finding of fact [*see San Dieguito Union High School Dist. v. Commission on Professional Competence (1985) 174 Cal. App. 3d 1176, 1189, 220 Cal. Rptr. 351* (court stated that lack of an objection does not convert incompetent evidence into substantial evidence to support a finding); *Martin v. State Personnel Bd. (1972) 26 Cal. App. 3d 573, 582-583, 103 Cal. Rptr. 306* (court stated that, contrary to *Savelli, Kirby,* and *Borror* cases, the absence of objection to hearsay will not support a finding of fact); *see also* discussion in *Frudden Enterprises, Inc. v. Agricultural Labor Relations Bd. (1984) 153 Cal. App. 3d 262, 270 n.5, 201 Cal. Rptr. 371* (split of authority between districts regarding effect of objection to hearsay is inapplicable to ALRB proceedings, which are not governed by the APA)].

As noted above, the new act resolves this split by expressly requiring an objection for administrative hearsay to be sufficient.

[3] Other Inadmissible Hearsay

Although administrative hearsay is admissible in administrative hearings over objection that it is hearsay [*Gov. Code § 11513(c)*], it may be inadmissible for other reasons. For example, a proper foundation is required for many documents, writings, and other exhibits that may contain contain administrative hearsay. Even before the hearsay issue arises, counsel must lay a proper foundation for these hearsay exhibits and authenticate them [*see § 473F.31[7]*]. Administrative hearsay may not be admissible because it is not "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs" [*Gov. Code § 11513(c)*]. Double and triple hearsay and hearsay that is little more than gossip can be inadmissible because it is so unreliable. This threshold test of reliability applies to any relevant evidence being offered in an administrative hearing.

For example, videotapes can also be considered to be hearsay evidence. Videotapes are considered to be writings that must be authenticated before being admitted into evidence. Unauthenticated videotapes cannot be properly admitted into evidence, and without an authenticating foundation these videotapes are considered to be irrelevant and unreliable evidence. Admission of these videotapes was objected to and the videotapes (of a school district employee) were considered to be hearsay evidence offered to prove the truth of the matter asserted [*Ashford v. Culver City Unified Sch. Dist. (2005) 130 Cal. App. 4th 344, 350-351, 29 Cal. Rptr. 3d 728]* .

[4] Non-APA Hearings

Standards of hearsay admissibility can also apply in non-APA administrative hearings [*see Minaker v. Adams (1921) 55 Cal. App. 374, 377, 203 P. 806* (order of board of medical examiners revoking a license was not reversed on ground that some of evidence was hearsay, because sufficient proper evidence was also given)].

But the hearsay rules are sometimes different in non-APA proceedings. For example, various courts have held that hearsay admitted without objection is sufficient to sustain a finding in Agricultural Labor Relations Board proceedings [*see Frudden Enterprises, Inc. v. Agricultural Labor Relations Bd. (1984) 153 Cal. App. 3d 262, 270, 201 Cal. Rptr. 371* (split of authority between districts regarding effect of objection to hearsay is inapplicable to ALRB proceedings, which are not governed by the APA); *see also Flaherty v. Board of Retirement (1961) 198 Cal. App. 2d 397, 414, 18 Cal. Rptr. 256* (court stated that hearsay, if not objected to when offered, can be of probative value); *Fox v. San Francisco Unified School District (1952) 111 Cal. App. 2d 885, 891, 245 P.2d 603* (by failing to appear at hearing, respondent waived right to object that testimony was hearsay, when that hearsay was of sufficient probative value to show cause for his dismissal)].

By statute, those proceedings are conducted, so far as practicable, in accordance with the Evidence Code [*Lab. Code § 1160.2*], which requires a timely and specific objection on the record before a judgment will be reversed due to the erroneous admission of evidence [*see Evid. Code § 353(a)*].

At least one court has held that, in the absence of a statutory authorization, it is error to admit hearsay over objection in administrative hearings [*August v. Department of Motor Vehicles (1968) 264 Cal. App. 2d 52, 64, 70 Cal. Rptr. 172]* . For this reason, counsel should check the statutes and evidentiary rules for particular non-APA agency proceedings to determine the standard to be applied to hearsay.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceAdmissibilityHearsayEvidenceDemonstrative EvidenceFoundational RequirementsEvidenceDemonstrative EvidenceVisual FormatsEvidenceHearsayRule ComponentsStatementsEvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsEvidenceProcedural ConsiderationsObjections & Offers of ProofTimeliness

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§ 473F.33 Privileges

[1] Application in Administrative Proceedings

The privileges set forth in the Evidence Code division on privileges apply in both APA and non-APA administrative proceedings [*Evid. Code § 901*; *Gov. Code § 11513(e)*].

Those privileges include all of those that normally could be invoked in a civil court case, including:

- Lawyer-client [*Evid. Code §§ 950-962*].
- Husband-wife [*Evid. Code §§ 970-987*].
- Physician-patient [*Evid. Code §§ 990-1007*].
- Psychotherapist-patient [*Evid. Code §§ 1010-1027*].
- Clergyman-penitent [*Evid. Code §§ 1030-1034*].
- Sexual assault victim-counselor [*Evid. Code §§ 1035-1036.2*].
- Trade secrets [*Evid. Code § 1060*].
- Self-incrimination [*Evid. Code § 940*].
- News sources [*Evid. Code § 1070*].

A testimonial privilege must be properly claimed by the party who is entitled to invoke the privilege in the administrative hearing, or the privilege will be waived and testimony that is excludable under the privilege will be

admissible at the hearing [*Calvert v. State Bar (1991) 54 Cal. 3d 765, 781, 1 Cal. Rptr. 2d 684, 819 P.2d 424]* . For further discussion of privileges, see Ch. 191, *Discovery: Privileges and Other Discovery Limitaitons* , and California Trial Guide, Unit 51 (Matthew Bender).

Other privileges required by statute to be recognized at the hearing also apply [*Gov. Code § 11513(e)*]. For example, all information and records obtained while providing services to mentally or developmentally disabled persons are confidential [*Welf. & Inst. Code §§ 4514, 5328*; *see Macomber v. State Personnel Bd. (1987) 197 Cal. App. 3d 986, 995-996, 242 Cal. Rptr. 631* (medical records of psychiatric patients were privileged and not subject to subpoena duces tecum when no exceptions to privilege applied); *Gilbert v. Superior Court (1987) 193 Cal. App. 3d 161, 169, 238 Cal. Rptr. 220* (operators of community care facility for developmentally disabled youths were not entitled to production of patients' confidential records in license revocation proceedings; those records are absolutely privileged except for specific exceptions)].

In the absence of a statute, privileges are not recognized [*Evid. Code § 911*; *Gov. Code § 11513(e)*; *see Chronicle Pub. Co. v. Superior Court (1960) 54 Cal. 2d 548, 565, 7 Cal. Rptr. 109, 354 P.2d 637* (burden of establishing that the evidence is within the terms of the statute creating privilege is on party asserting the privilege)].

With respect to communications between welfare claimants and lay representatives authorized to represent them in hearings under the Aid to Families with Dependent Children program, however, a privilege has been found to be implicit in a statute authorizing the representation [*Welfare Rights Organization v. Crisan (1983) 33 Cal. 3d 766, 772, 190 Cal. Rptr. 919, 661 P.2d 1073]* .

When a privilege is invoked, no adverse inference may be drawn from its invocation [*Evid. Code § 913(a)*].

The protection that the law affords to an attorney's work product is often described as a privilege [*see, e.g., National Steel Products Co. v. Superior Court (1985) 164 Cal. App. 3d 476, 485, 210 Cal. Rptr. 535]* , but it is not one of the privileges set out in *Evid. Code §§ 900-1070*. It has been suggested that this protection is more accurately described as the work product doctrine [*Kizer v. Sulnick (1988) 202 Cal. App. 3d 431, 435 n.3, 248 Cal. Rptr. 712]* . For discussion of the work product doctrine, see Ch. 191, *Discovery: Privileges and Other Discovery Limitaitons* , and California Trial Guide, Unit 51 (Matthew Bender). The work product doctrine applies to protect attorney work product from administrative discovery and administrative subpoenas [*Gov. Code § 11507.6(f)*; *Kizer v. Sulnick (1988) 202 Cal. App. 3d 431, 435, 440-441, 248 Cal. Rptr. 712* ; *see* Ch. 473B, *Discovery in Agency Adjudications* ; *see also* Ch. 471, *Investigations by Public Agencies*].

Another privilege recognized by law is the right to make a privileged publication or broadcast in legislative, judicial, or other proceedings authorized by law that are judicially reviewable by writ of mandate [*Civ. Code § 47(b)*; *Ellenberger v. Espinosa (1994) 30 Cal. App. 4th 943, 953, 36 Cal. Rptr. 2d 360* (statements made by former patients of dentist in administrative proceedings against dentist brought by Board of Dental Examiners give rise to a claim of privilege under *Civ. Code §§ 47* and *43.8* from civil liability for damages caused by the statements)].

Unlike other privileges, this privilege does not protect against disclosure of testimonial or documentary evidence. Rather, this privilege provides immunity from civil liability for tort damages against the maker of the statement if the statement is made in an official proceeding, such as in an adjudicatory hearing before an administrative law judge in which the statement would otherwise lead to liability because it is defamatory. The privilege does not apply to communications made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of that communication is otherwise privileged under this statute [*Civ. Code § 47(b)(2)*]. For purposes of this exception, "physical evidence" is defined as evidence under the Evidence Code [*see Evid. Code § 250*] or as property under the Code of Civil Procedure [*Civ. Code § 47(b)(2)*; *see Code Civ. Proc. § 2031*].

The purpose of this exception is to make it easier to disclose destruction of documents or other physical evidence in litigation so that sanctions, penalties, or civil liability can be enforced against the person destroying the documents. The scope of this privilege and the exception include agency adjudication under the APA, because these proceedings are judicially reviewable by writ of mandate [*see Civ. Code § 47(b)*].

[2] Self-Incrimination

[a] Compared to Application in Civil and Criminal Trials

The privilege afforded a defendant in a criminal case to refuse to respond as a witness and to testify [*Evid. Code §§ 404, 940*; *see California Trial Guide, Unit 51, § 51.30[2]* (Matthew Bender)] is not available to parties in administrative proceedings [*In re Vaughan (1922) 189 Cal. 491, 495, 209 P. 353* ; *McComb v. Superior Court (1977) 68 Cal. App. 3d 89, 98, 137 Cal. Rptr. 233]* .

A party in an administrative proceeding may invoke the privilege against self-incrimination, however, if called as a witness [*Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 542, 92 Cal. Rptr. 525]* .

In APA proceedings, if a respondent does not testify in his or her own behalf, he or she may be called and examined as if under cross-examination [*Gov. Code § 11513(b)*]. One court has interpreted this provision as a requirement that the agency rest its case temporarily, to allow the respondent to exercise his or her right to testify, before the agency can call the respondent as its own witness [*O'Mara v. State Bd. of Pharmacy (1966) 246 Cal. App. 2d 8, 12, 54 Cal. Rptr. 862]* .

This interpretation apparently has given rise to the agency practice of resting, subject to calling the respondent as a witness if he or she does not testify. The procedure is a compromise between the criminal rule that a defendant may not be compelled to be a witness [*Evid. Code § 930*], and the rule in civil cases that a party can be called at any time [*Evid. Code § 776(a)*; *see 11 Ops. Cal. Atty. Gen. 116 (1948)* (respondent in administrative hearing may not be called as a witness until he or she has had an opportunity to testify in his or her own behalf and has failed to do so)].

[b] Application to Public Employees

In administrative proceedings, public employees may also exercise their privilege against self-incrimination. By doing so, however, they may risk the loss of their employment if its exercise is inconsistent with their public duty [*see Steinmetz v. Cal. State Board of Education (1955) 44 Cal. 2d 816, 824-825, 285 P.2d 617 , cert. denied, 351 U.S. 915, 76 S. Ct. 708, 100 L. Ed. 1448* (college professor who refused to disclose whether he was Communist party member was required to choose between disclosing information relevant to his fitness for public employment, and losing that employment)]. Public employees sometimes must yield some of the privileges that are enjoyed by other citizens [*Garner v. U.S. (1976) 424 U.S. 648, 655, 424 U.S. 648, 655, 96 S. Ct. 1178, 47 L. Ed. 2d 370* ; *Forstner v. City Etc. of San Francisco (1966) 243 Cal. App. 2d 625, 632, 52 Cal. Rptr. 621* ; *see Gardner v. Broderick (1968) 392 U.S. 273, 279, 88 S. Ct. 1913, 20 L. Ed. 2d 1082* (policeman may not, however, be dismissed from office for refusing to waive privilege against self-incrimination)].

The California Supreme Court held that a county could terminate a county employee for insubordination based on the employee's assertion of the privilege against self incrimination as grounds for refusal to answer questions in a county internal investigation of the employee's conduct without the county granting the employee immunity from criminal prosecution based upon answers to those questions [*Spielbauer v. County of Santa Clara (2009) 45 Cal. 4th 704, 710, 88 Cal. Rptr. 3d 590, 199 P.3d 1125]* . The Supreme Court explained that a public employee can be compelled by threat of job discipline to answer employer's questions so long as the employee is not required to waive the constitutional protection against criminal use of the answers. The public employer is not required to seek and obtain a formal grant of immunity as a condition of requiring answers to questions [*Spielbauer v. County of Santa Clara (2009) 45 Cal. 4th*

704, 710, 88 Cal. Rptr. 3d 590, 199 P.3d 1125] .

[c] Application to Drivers' Licenses

The privilege against self-incrimination does not permit an individual to avoid the suspension of his or her driver's license under the financial responsibility law [*Fahlgren v. Department of Motor Vehicles (1986) 186 Cal. App. 3d 930, 937, 231 Cal. Rptr. 229* ; *Veh. Code §§ 16000-16075* (financial responsibility law)].

A driver's own accident report can be used to suspend his or her license [*Fahlgren v. Department of Motor Vehicles (1986) 186 Cal. App. 3d 930, 936, 231 Cal. Rptr. 229]* .

[3] Sexual Privacy

[a] Scope of Privilege

The constitutional right of sexual privacy, both within and without the marital relationship, is a fundamental liberty arising from both the United States and California constitutions. The California right has been described as a protective "zone of privacy" surrounding sexual behavior. The right to sexual privacy may be asserted by refusing to answer questions that unreasonably intrude on the right. The right is not absolute, but disclosure of sexual information cannot be compelled if disclosure would not serve the compelling state interest of facilitating truth in legal proceedings [*see Vinson v. Superior Court (1987) 43 Cal. 3d 833, 841, 239 Cal. Rptr. 292, 740 P.2d 404* (mere initiation of sexual harassment suit does not waive plaintiff's sexual privacy interests)].

[b] APA Proceedings

In employment discrimination and harassment cases [*see Gov. Code § 12940(h), (i)*], civil service discipline cases [*see Gov. Code § 19572*], and civil service discrimination cases [*see Gov. Code § 19702*], alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, evidence of specific instances of a complainant's sexual conduct with individuals other than the alleged perpetrator is subject to the following limitations:

- The evidence is not discoverable, unless it is to be offered at a hearing to attack the credibility of the complainant [*Gov. Code § 11440.40(a)(1)* (only the scope of discovery is limited, not the methods of discovery)].

- The evidence is not admissible at the hearing, unless offered to attack the credibility of the complainant [*Gov. Code § 11440.40(a)(2)*].

Also, reputation or opinion evidence regarding the sexual behavior of the complainant is not admissible for any purpose. At the hearing, this evidence is presumed inadmissible absent an offer of proof that establishes the following [*Gov. Code § 11440.40(b)*]:

- The relevance and reliability of the offered evidence.

- That the probative value of the evidence offered is not substantially outweighed by the probability that its admission will create substantial danger of undue prejudice or confuse the issue.

Complainant is defined to mean a person claiming to have been subjected to conduct that constitutes sexual harassment, sexual assault, or sexual battery [*Gov. Code § 11440.40(c)*].

The provisions of this statute apply not only to agency hearings under Chapter 5, the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*), but also to agency hearings subject to Chapter 4.5, the APA's general provisions for

administrative adjudications (*Gov. Code § 11400 et seq.*) [25 Cal. L. Rev. Comm. Reports 55 (1995)].

These include state agency evidentiary hearings that are required under federal or state constitutional provisions or under federal or state statute [*Gov. Code §§ 11410.10, 11410.20*; *see Evid. Code §§ 783, 1106* (for similar privileges that apply to court proceedings)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceAdmissibilityPrivilegeConstitutional LawSubstantive Due ProcessPrivacyGeneral OverviewEvidencePrivilegesAttorney-Client PrivilegeGeneral OverviewEvidencePrivilegesClergy CommunicationsGeneral OverviewEvidencePrivilegesDoctor-Patient PrivilegeGeneral OverviewEvidencePrivilegesPsychotherapist-Patient PrivilegeGeneral OverviewEvidencePrivilegesSelf-Incrimination PrivilegeGeneral Overview

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§ 473F.34 Exclusionary Rule

[1] General Requirements

The *Fourth Amendment to the United States Constitution* protects individuals from unreasonable searches and seizures [*U.S. Const., amend. IV*]. In *Mapp v. Ohio (1961) 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081* , the U.S. Supreme Court held that the protection of the *Fourth Amendment* extends to the states through the *Fourteenth Amendment*.

Thus, evidence obtained in violation of the Constitution is inadmissible in a state court [*Mapp v. Ohio (1961) 367 U.S. 643, 655, 81 S. Ct. 1684, 6 L. Ed. 2d 1081]* . This exclusionary rule was first applied in criminal cases [*see, e.g., People v. Bilderbach (1965) 62 Cal. 2d 757, 763-764, 44 Cal. Rptr. 313, 401 P.2d 921* (discussion of exclusionary rule as applied to admissibility of marijuana found in defendant's car during illegal search)].

However, it has also been applied in selected civil proceedings. For example, it has been used in a proceeding for forfeiture of a car used in unlawful transportation of marijuana when there was a close identity to the aims and objectives of criminal law enforcement [*People v. One 1960 Cadillac Coupe (1964) 62 Cal. 2d 92*]. It has also been applied in a civil narcotic addict commitment proceeding that was closely identified with the aims and objectives of criminal law enforcement and the deterrent policy for applying the rule [*People v. Moore (1968) 69 Cal. 2d 674, 72 Cal. Rptr. 800, 446 P.2d 800 , overruled on other grounds*; *People v. Thomas (1977) 19 Cal. 3d 630, 139 Cal. Rptr. 594, 566 P.2d 228]* . For further discussion of the exclusionary rule, see California Criminal Defense Practice, Divisions III, IV, and IX (Matthew Bender).

[2] Application to Administrative Proceedings

[a] Factors Used to Determine Application

In contrast to criminal and civil proceedings, the exclusionary rule has generally not been applied in administrative proceedings. In *Emslie v. State Bar (1974) 11 Cal. 3d 210, 113 Cal. Rptr. 175, 520 P.2d 991* , the California Supreme Court identified the following factors that should be balanced to determine whether the exclusionary rule applies in a particular proceeding [*Emslie v. State Bar (1974) 11 Cal. 3d 210, 227-228, 113 Cal. Rptr. 175, 520 P.2d 991]* :

- Whether the purposes of the proceeding are similar to the aims and objectives of criminal law enforcement.

- Whether application of the rule would serve any real deterrence to illegal searches and seizures in the type of case.

- The social consequences of its application.

- Whether the evidence was obtained under circumstances that shock the conscience.

Based on these factors, the Court did not apply the rule in state bar disciplinary proceedings [*Emslie v. State Bar (1974) 11 Cal. 3d 210, 230, 113 Cal. Rptr. 175, 520 P.2d 991]* . It particularly noted the lack of any deterrent effect, the social consequences of applying the rule, and the effect thereof on the integrity of the judicial process. The Court noted, however, that it is possible that the demands of due process could not countenance use of evidence obtained by unlawful means in a proceeding conducted by a governmental agency. It stated that the rules must be worked out ona case-by-case basis in this and other license revocation proceedings [*Emslie v. State Bar (1974) 11 Cal. 3d 210, 230, 113 Cal. Rptr. 175, 520 P.2d 991]* .

In an administrative parole revocation proceeding, the Court refused to apply the exclusionary rule because while some identity existed between the revocation proceedings and the aims and objectives of criminal law enforcement, practically no deterrent effect would be gained by its application [*In re Martinez (1970) 1 Cal. 3d 641, 649-650, 83 Cal. Rptr. 382, 463 P.2d 734]* . Similarly, because of a lack of deterrence, the exclusionary rule was not applied to the dismissal of an elementary school teacher for public sexual conduct. The court recognized the importance of teachers setting proper examples for children, and that children are entitled to special protection [*Governing Board v. Metcalf (1974) 36 Cal. App. 3d 546, 111 Cal. Rptr. 724]* .

In *Gordon J. v. Santa Ana Unified School Dist. (1984) 162 Cal. App. 3d 530, 208 Cal. Rptr. 657* , the court of appeal restated the general inapplicability of the exclusionary rule to administrative proceedings, and refused to apply the rule in high school disciplinary proceedings against a student for possession of marijuana [*Gordon J. v. Santa Ana Unified School Dist. (1984) 162 Cal. App. 3d 530, 546, 208 Cal. Rptr. 657]* . The court considered the social costs in terms of harm to other students and damage to the morale of parents and teachers [*Gordon J. v. Santa Ana Unified School Dist. (1984) 162 Cal. App. 3d 530, 546, 208 Cal. Rptr. 657]* . The court pointed out that while administrative penalties may also be punitive, they are primarily designed to protect the public from the practices of the offender; this distinction justifies the general rule that the remedy of exclusion is not available in administrative proceedings [*Gordon J. v. Santa Ana Unified School Dist. (1984) 162 Cal. App. 3d 530, 546, 208 Cal. Rptr. 657]* .

The Fourth District, Division 3, California Court of Appeal refused to apply the exclusionary rule to exclude evidence that a driver was driving while intoxicated in a DMV administrative hearing. The driver argued that the evidence should be excluded because the arresting officer's stop of the motorist was invalid. The stop was invalid because it was based on outdated information that the driver's vehicle had been stolen. The superior court excluded the same evidence and dismissed criminal charges of driving while intoxicated against the same driver relying upon the California Supreme Court decision in *People v. Ramirez (1983) 34 Cal. 3d 541, 194 Cal. Rptr. 454, 668 P.2d 761* [*Park v. Valverde (2007) 152 Cal. App. 4th 877, 879-881, 61 Cal. Rptr. 3d 895]* . In deciding to not apply the exclusionary rule to administrative proceedings, the court concluded that any additional deterrent value (deterring police misconduct) of applying the rule to DMV proceedings was offset by the danger to both the motorist and the public form drunk driving, given the DMV's primary responsibility to protect the public from drunk drivers by getting those drivers off the roads [*Park v. Valverde (2007) 152 Cal. App. 4th 877, 886-888, 61 Cal. Rptr. 3d 895]* .

In a related area, involuntary conservatorship proceedings, the California Supreme Court refused to apply the

exclusionary rule to those proceedings and used the test of whether the deterrent effect of the rule outweighed its social costs [*Conservatorship of Susan T. (1994) 8 Cal. 4th 1005, 1018-1021, 36 Cal. Rptr.2d 40, 884 P.2d 988]* . Similarly, the California Supreme court concluded that evidence that has been ordered suppressed in a criminal proceeding under *Penal Code § 1538.5(d)* is admissible in a DMV license suspension administrative hearing because neither *Penal Code § 1538.5(d)* nor the exclusionary rule apply to administrative proceedings [*Gikas v. Zolin (1993) 6 Cal. 4th 841, 858-860, 25 Cal. Rptr 2d 500, 863 P.2d 745]* . The California Court of Appeal held that a police officer had reasonable cause to stop a motorist's vehicle to investigate erratic driving based on a call from an anonymous cell phone user. Therefore evidence of the motorist driving while intoxicated that was obtained by the police officer as a result of that stop was admissible in an administrative hearing conducted by the Department of Motor Vehicles (DMV) to suspend the motorist's license for drunken driving. The court of Appeal did not decide whether the criminal law exclusionary rule applied to DMV administrative hearings [*Lowry v. Gutierrez (2005) 129 Cal. App. 4th 926, 929-930, 28 Cal. Rptr. 3d 912]* .

[b] Administrative Inspections

The *Fourth Amendment* also prohibits unreasonable searches without a warrant in the form of an administrative inspection [*Camara v. Municipal Court (1967) 387 U.S. 523, 534, 87 S. Ct. 1727, 18 L. Ed. 2d 930* (inspection of personal residence); *See v. Seattle (1967) 387 U.S. 541, 545-546, 87 S. Ct. 1737, 18 L. Ed. 2d 943* (inspection of commercial premises)].

If evidence obtained during an illegal administrative inspection is offered in an administrative proceeding, the factors set out in *Emslie v. State Bar (1974) 11 Cal. 3d 210, 113 Cal. Rptr. 175, 520 P.2d 991* [*see* [a], *above*] should be used to determine if the evidence should be excluded.

Although that evidence generally will not be excluded, the balance may be different if an administrative agency is doing the inspection. Specifically, the deterrence factor may be more important. Although criminal authorities may not consider the effect that an illegal search and seizure will have on a later administrative proceeding before conducting the illegal search, administrative authorities would be more aware of the administrative implications. It should be noted, however, that the granting of many licenses by the state is subject to the condition and implied consent of the licensee that the premises, books, and records related to the licensed activity are open for inspection in order to effectively supervise and regulate the activity. Reasonable inspection is often required by the statutes regulating the licensed activity. The absence of a warrant would not necessarily mean an administrative inspection is illegal [*see Rush v. Obledo (9th Cir. 1985) 756 F.2d 713, 722* (statute permitting warrantless searches of licensed day-care facilities did not violate *Fourth Amendment*, when regulation limited time and place of searches)].

Further, not all routine administrative investigations are considered unreasonable without an administrative warrant [*see, e.g., Wyman v. James (1971) 400 U.S. 309, 91 S. Ct. 381, 27 L. Ed. 2d 408* (routine visit by caseworker to home of AFDC recipient was not unreasonable search in violation of *Fourth Amendment*); *People v. Firstenberg (1979) 92 Cal. App. 3d 570, 155 Cal. Rptr. 80 , cert. denied, 444 U.S. 1012, 100 S. Ct. 660, 62 L. Ed. 2d 641 (1980)* (warrantless inspection of licensed nursing facility was not unreasonable search in violation of *Fourth Amendment*, when statutory inspection provisions limited time, place, and scope of search)].

For a more extensive discussion of administrative inspections and the constitutional requirements for use of warrants, see Ch. 471A, *Inspections by Public Agencies* .

[c] Vicarious Exclusionary Rule

In the past, the "vicarious exclusionary rule" was applied in California to give criminal defendants standing to object to the introduction of evidence seized in violation of the rights of a third person, rather than just the rights of the defendant [*People v. Martin (1955) 45 Cal. 2d 755, 290 P.2d 855]* .

The truth-in-evidence provision of Proposition 8 [*Cal. Const., art. I, § 28(d)*] abrogated that rule [*In re Lance W. (1985) 37 Cal. 3d 873, 210 Cal. Rptr. 631, 694 P.2d 744]* . Since the vicarious exclusionary rule no longer applies in criminal proceedings, it is extremely unlikely that it will apply in administrative proceedings [*see Pating v. Board of Medical Quality Assurance (1982) 130 Cal. App. 3d 608, 624-625, 182 Cal. Rptr. 20* (in case decided before Proposition 8, court refused to apply vicarious exclusionary rule, citing lack of authority for extension of criminal rule to civil administrative proceedings)].

[d] Guidelines for Objecting to Illegally Obtained Evidence

Counsel should object to illegally obtained evidence at the administrative level [*Savoy Club v. Board of Supervisors (1970) 12 Cal. App. 3d 1034, 1042, 91 Cal. Rptr. 198]* , in accordance with the following guidelines:

- Raise a search and seizure issue as early in the administrative proceeding as possible.

- A written motion in limine to exclude evidence made in advance of the hearing or during a prehearing conference is appropriate.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsConstitutional RightsSearch & SeizureAdministrative LawAgency InvestigationsScopeInspectionsConstitutional LawBill of RightsFundamental RightsSearch & SeizureExclusionary RuleConstitutional LawBill of RightsFundamental RightsSearch & SeizureScope of ProtectionConstitutional LawBill of RightsFundamental RightsSearch & SeizureWarrants

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§ 473F.35 Illegally Obtained Confessions and Entrapment

With respect to both the exclusion of an illegally obtained confession or admission in an administrative proceeding and the availability of an entrapment defense in such a proceeding, factors similar to those set out in *Emslie v. State Bar (1974) 11 Cal. 3d 210, 113 Cal. Rptr. 175, 520 P.2d 991* [*see § 473F.34[2][a]*], should be considered.

The California Supreme Court has held that exclusion of an illegally obtained confession is not necessary in an administrative parole revocation proceeding, but exclusion may result if the confession had been coerced or had resulted from egregious police conduct [*In re Martinez (1970) 1 Cal. 3d 641, 650, 83 Cal. Rptr. 382, 463 P.2d 734* ; *see Emslie v. State Bar (1974) 11 Cal. 3d 210, 227, 113 Cal. Rptr. 175, 520 P.2d 991]* .

In an administrative license revocation proceeding, the California Supreme Court held that the defense of entrapment is available because of the social policy that the state has no business fostering crime, and because the state objective of ferreting out physicians who engage in illegal drug traffic is not furthered by entrapment of a doctor who would otherwise not have engaged in such traffic [*Patty v. Board of Medical Examiners (1973) 9 Cal. 3d 356, 107 Cal. Rptr. 473, 508 P.2d 1121* ; *see Emslie v. State Bar (1974) 11 Cal. 3d 210, 229, 113 Cal. Rptr. 175, 520 P.2d 991]* .

In a workers' compensation proceeding, the California Supreme Court excluded a movie obtained by fraudulent inducements of private investigators. The deceitful inducements caused the applicant to engage in the filmed activities [*Redner v. Workmen's Comp. Appeals Bd. (1971) 5 Cal. 3d 83, 97, 95 Cal. Rptr. 447, 485 P.2d 799* (movie showed applicant riding horseback, despite claims of disability)].

In State Bar proceedings, the entrapment defense has been held not to apply when no employees of the State Bar played a role in the entrapment [*Wong v. State Bar (1975) 15 Cal. 3d 528, 531, 125 Cal. Rptr. 482, 542 P.2d 642]* .

The entrapment defense in administrative proceedings requires proof that the law enforcement officers conducted themselves in ways, such as pressuring the person by overbearing conduct such as badgering, cajoling, or importuning the person, that were likely to induce a normally law abiding person to commit an illegal act. It is not enough to prove that only an opportunity to act improperly was given to the person [*Arellanes v. Civil Service Com. (1996) 41 Cal.*

App. 4th 1208, 1216-1217, 49 Cal. Rptr. 2d 73 (deputy sheriff failed to prove that his discharge was due to entrapment) citing *People v. Lee (1990) 219 Cal. App. 3d 829, 835, 268 Cal. Rptr. 595]* .

The exclusion of illegally obtained confessions and admissions and the availability of the entrapment defense are issues decided on a case-by-case basis. Like the exclusionary rule, these issues should be raised as early as possible.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceAdmissibilityConstitutional ProtectionsHealthcare LawBusiness Administration & OrganizationLicensesRevocation & SuspensionLegal EthicsSanctionsDisciplinary ProceedingsHearingsWorkers' Compensation & SSDIAdministrative ProceedingsFraud

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§ 473F.36 Presumptions

[1] Nature and Types

Although the APA does not mention presumptions, the presumptions applicable to court proceedings [*see Evid. Code §§ 600-669.5*] have been applied in administrative proceedings.

A presumption is not evidence; it is an assumption of fact that the law requires to be made from another fact, or group of facts, established in the case [*Evid. Code § 600(a)*]. In contrast, inferences are rational deductions of fact drawn from other established facts that are not required by law [*Evid. Code § 600(b)*].

Some presumptions can be conclusive [*Evid. Code § 601*]. For example, the facts recited in a written instrument (recitals) are conclusively presumed to be true as between the parties to that instrument, or their successors [*Evid. Code § 622*]. Most presumptions are rebuttable [*see Evid. Code §§ 601-602*]. Many statutes providing that a fact or group of facts is prima facie evidence of another fact create rebuttable presumptions [*Evid. Code § 602*].

[2] Rebuttable Presumptions

Some rebuttable presumptions affect the burden of producing evidence. In administrative proceedings, they require the ALJ to apply the presumption unless other evidence contradicts the assumed fact. If the other evidence is substantial so that the contrary of the presumption could properly be found, the presumption drops out of the ALJ's decision making process and the formerly assumed fact is simply determined on all the evidence [*Evid. Code § 604*].

In that case, if the party relying on the original presumption produced no independent evidence to support it, the formerly assumed fact could not be found. Further, the burden of proof would not change. If the evidence is not sufficient to meet a party's burden of proof regarding the formerly assumed fact, the other party will prevail. Other rebuttable presumptions affect the burden of proof itself. When they apply, the other party has the burden of proof to show the nonexistence of the assumed fact [*Evid. Code § 606*].

The other party must not only put on substantial evidence to support a finding of nonexistence, but must also carry the

burden of proof on the issue [*see Evid. Code § 550*]. The party with the burden of proof on an issue takes the risk of losing if there is a failure of proof.

It is therefore important to determine the type of rebuttable presumption. Presumptions affecting the burden of producing evidence are used simply to facilitate the determination of a particular issue [*Evid. Code § 603*]. For example, the presumption that letters properly addressed and mailed were received is such a presumption [*Evid. Code § 641*]. Presumptions established to implement some public policy, other than the determination of a particular issue, affect the burden of proof [*Evid. Code § 605*].

For example, an employer who fails to secure the payment of workers' compensation is presumed negligent [*Lab. Code § 3708*]. This presumption is clearly based on public policy and affects the burden of proof. In a dental license suspension case, the court applied the rebuttable presumption that the law has been obeyed [*Messner v. Board of Dental Examiners (1927) 87 Cal. App. 199, 205, 262 P. 58]* .

A similar rebuttable presumption, applied in an action to suspend or revoke a securities broker's certificate, is the presumption against fraud [*Abrams v. Daugherty (1922) 60 Cal. App. 297, 304, 212 P. 942]* . There is also a presumption of fair dealing [*Transportation Bldg. Co. v. Daugherty (1946) 74 Cal. App. 2d 604, 614, 169 P.2d 470]* . A rebuttable presumption that the regular course of business was followed affects the burden of producing evidence. That presumption has been applied in a liquor license suspension case [*Kirby v. Alcoholic Bev. etc. Appeals Bd. (1970) 8 Cal. App. 3d 1009, 1017, 87 Cal. Rptr. 908]* .

Similarly, it is presumed that administrative agencies have properly performed their duties [*Martin v. Alcoholic Bev. etc. Appeals Bd. (1959) 52 Cal. 2d 259, 264, 341 P.2d 291* ; *Utah Construction Co. v. Richardson (1921) 187 Cal. 649, 654, 203 P. 401]* .

For example, the Department of Motor Vehicles (DMV) can rely on the official duty presumption provided by *Evid. Code § 664* when police officers comply with the requirements of Title 17 [*17 Cal. Code Reg. §§ 1219 to 1221.5*] to conduct breath tests to determine the blood alcohol level of drivers arrested for driving under the influence of alcohol. When the presumption is applicable, the test results are presumed to be valid, the test results are admissible in evidence, and the DMV does not have to provide any additional evidence to support the test results. At that point, the driver may rebut the presumption by offering evidence that Title 17 was, in fact, not complied with, notwithstanding the presumption. If the driver is successful, then the presumption is rebutted, and the test results are not admissible, absent additional foundational evidence being offered by the DMV. If the driver is not successful, than the presumption is not rebutted, the evidence is admissible, and the DMV's license suspension decision is supported by substantial evidence [*Hernandez v. Gutierrez (2003) 114 Cal. App. 4th 168, 172-173, 176, 7 Cal. Rptr. 3d 307* (driver failed to rebut presumption of official duty by failing to show lack of compliance with requirements of Title 17)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewEvidenceInferences & PresumptionsPresumptionsEvidenceInferences & PresumptionsRebuttal of PresumptionsEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

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§ 473F.37 Affidavits

Agencies often use affidavits to avoid bringing in witnesses to testify to records, files, and computerized information. Agencies may use them in default cases without giving any notice to the defaulting party [*Gov. Code § 11520(a)*].

In a APA administrative hearing, affidavits, which would otherwise be hearsay, may be treated as oral testimony in two circumstances. First, the parties may stipulate to so treat them. Second, *Gov. Code § 11514* requires a party to mail or deliver a copy of any affidavit that the party proposes to introduce into evidence, together with a notice regarding the opposing party's right to cross-examine the affiant [*Gov. Code § 11514(b)*] to the opposing party at least 10 days before the hearing [*Gov. Code § 11514(a)*; *see § 473F.90*, for a form that can be used to give notice].

If a party fails to satisfy the mailing or delivering within 10 days requirement, then the affidavit can not be admitted into evidence at the hearing [*McNary v. Department of Motor Vehicles (1996) 45 Cal. App. 4th 688, 53 Cal. Rptr. 2d 55]* . If the party meets the 10 day requirement, then the opposing party will waive any right to cross-examine the affiant unless he or she mails or delivers a request to cross-examine to the proponent within seven days following the proponent's mailing or delivery of the affidavit and notice [*Gov. Code § 11514(a)*].

If such a waiver occurs, the proponent can offer the affidavit at the hearing, and it will be given the same effect as if the affiant had testified orally [*Gov. Code § 11514(a)*]. If the opposing party properly requests cross-examination but the proponent does not physically produce the affiant as a witness at the hearing, the affidavit can still be introduced into evidence, but as administrative hearsay [*Gov. Code § 11514(a)*; *Monaghan v. Department of Motor Vehicles (1995) 35 Cal. App. 4th 1621, 1626-1627, 42 Cal. Rptr. 2d 167* ; *see Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 598, 155 Cal. Rptr. 63* (court applied rule similar to that contained in APA to Unemployment Insurance Appeals Board, which is not governed by the APA); *see also § 473F.32* (administrative hearsay)].

This statutory administrative hearsay exception does not restrict admission in administrative hearings of evidence that is hearsay but that satisfies other exceptions to the hearsay rule [*Poland v. Department of Motor Vehicles (1995) 34 Cal. App. 4th 1128, 1139, 40 Cal. Rptr. 2d 693]* . To assure the right to cross-examine, therefore, the opposing party should subpoena the affiant.

If an affidavit is used like oral testimony, it may still be subject to objection for reasons other than hearsay. For example, parts of it may not be the sort of evidence "on which responsible persons are accustomed to rely in the conduct of serious affairs" [*Gov. Code § 11513(c)*; *see § 473F.31[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceAdmissibilityHearsayEvidenceHearsayExceptionsGeneral Overview

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§ 473F.38 Official Notice

[1] Nature of Official Notice

In reaching a decision in a APA proceeding, the ALJ and agency may take "official notice" of any fact that may be judicially noticed by a court [*see Evid. Code §§ 450-460* (judicial notice)], and of any generally accepted technical or scientific matter within the agency's special field [*Gov. Code § 11515*].

Like judicial notice in court proceedings, the use of official notice in administrative proceedings establishes a relevant law or fact without the necessity of formal proof. Officially noticed facts can be used to contradict other facts and can be the basis of a finding of fact [*Mack v. State Board of Education (1964) 224 Cal. App. 2d 370, 373, 36 Cal. Rptr. 677]* . Official notice can be substituted for expert testimony [*Franz v. Board of Medical Quality Assurance (1982) 31 Cal. 3d 124, 140, 181 Cal. Rptr. 732, 642 P.2d 792]* . Official notice can also be taken in non-APA hearings [*Cantrell v. Board of Supervisors (1948) 87 Cal. App. 2d 471, 477, 197 P.2d 218]* .

[2] Matters Subject to Official Notice

Matters that may be officially noticed include the following:

- Matters of scientific certainty [*McAllister v. Workmen's Comp. App. Bd. (1968) 69 Cal. 2d 408, 414, 71 Cal. Rptr. 697, 445 P.2d 313* (fact that smoke is visible because it contains incompletely oxidized materials may be officially noticed)].

- An agency's own files and records [*Broyles v. Mahon (1925) 72 Cal. App. 484, 491, 237 P. 763]* .

- The existence and contents of permits and license ordinances [*Greif v. Dullea (1944) 66 Cal. App. 2d 986, 998, 153 P.2d 581]* .

- Matters within the expertise of board members [*Franz v. Board of Medical Quality Assurance (1982) 31 Cal. 3d 124, 140, 181 Cal. Rptr. 732, 642 P.2d 792* (lay board members were qualified to

determine whether actions of hospital were grossly negligent); *Arenstein v. California State Bd. of Pharmacy (1968) 265 Cal. App. 2d 179, 194, 71 Cal. Rptr. 357* (ingredients of drug and whether it constitutes dangerous drug under statute was scientific matter within special field of State Board of Pharmacy)].

[3] Notice and Opportunity to Refute

The agency or ALJ may take official notice of a matter either before or after submission of a case [*Gov. Code § 11515*]. The parties present at the hearing must be informed of the matters to be officially noticed, and those matters must be noted or referred to in the record or appended to the record [*Gov. Code § 11515*]. On request, parties must be given a reasonable opportunity to refute the officially noticed matters by evidence or by written or oral presentation of authority. The agency may determine the manner of refutation [*Gov. Code § 11515*]. See *§ 473F.92*, for a form requesting opportunity to refute officially noticed matters.

If a party wants the ALJ or agency to take official notice of a matter, he or she must make a request and give notice to the other party. The notice to the parties may be given orally or in writing. It must be complete and specific enough to give an effective opportunity for rebuttal, and help build a record adequate for judicial review.

The administrative record or decision should indicate what matters were officially noticed on the basis of agency expertise [*Franz v. Board of Medical Quality Assurance (1982) 31 Cal. 3d 124, 140, 181 Cal. Rptr. 732, 642 P.2d 792]* . If the request and notice come after the matter is submitted and the record is closed, the record must be reopened to give the other party a reasonable opportunity to refute the matter with evidence or other authority [*Gov. Code § 11515*]. For an example of a party's request for official notice, see *§ 473F.91*.

It is common in administrative hearings for agency counsel to request the ALJ to take official notice of matters in the pleadings, such as the name of the complainant, the capacity in which the complainant made the accusation or statement of issues, and statutory and regulatory matter set out in the pleadings. Counsel generally makes an oral request to notice such matters at the beginning of the hearing, and, in the absence of a proper objection, the ALJ normally grants the request.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceOfficial NoticeEvidenceJudicial NoticeGeneral Overview

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§ 473F.39 Mitigation, Extenuation, and Rehabilitation Evidence

[1] General Requirements

In many administrative proceedings, particularly those involving licensing, evidence of mitigation, extenuation, and rehabilitation is more important than evidence disproving a code violation. It is both necessary and entirely appropriate for a respondent's attorney to put on strong mitigation, extenuation, and rehabilitation evidence at the same time allegations of any wrongdoing are being contested. This evidence often achieves a client's ultimate goal of retaining or acquiring a license, even though the license may be conditioned or subject to terms of probation. The respondent has greatest control over this type of evidence.

[2] Mitigation and Extenuation Evidence

[a] Use of Evidence

Mitigation and extenuation evidence are similar. Mitigation evidence reduces moral culpability for a violation of the law. Extenuation evidence renders a violation less aggravated or reprehensible. Both can affect an administrative penalty. Mitigation evidence is not admissible to justify or excuse the violation; it only goes to moral culpability and penalty [*Richards v. Gordon (1967) 254 Cal. App. 2d 735, 742, 62 Cal. Rptr. 466]* . For example, mitigation evidence cannot be used to deny a criminal conviction [*see Bus. & Prof. Code § 493* (record of conviction is conclusive evidence of the fact that the conviction occurred)].

[b] Examples of Evidence

Mitigation and extenuation evidence in licensing cases can include evidence of the following:

- The facts and circumstances surrounding the commission of a crime [*Bus. & Prof. Code § 493* (board may inquire into circumstances surrounding commission of crime to fix the degree of discipline)].

- The economic, employment, professional, and personal consequences to the respondent and to others

that certain penalties will have.

- The respondent's professional reputation, license history, and employment record.

- The respondent's attempt to mitigate injuries to others.

- The respondent's good faith [*O'Reilly v. Board of Medical Examiners (1967) 66 Cal. 2d 381, 388, 58 Cal. Rptr. 7, 426 P.2d 167* (doctor's unprofessional conduct in allowing unlicensed doctors to practice medicine was mitigated by his good faith in allowing them to "assist" him)].

- The respondent's personal history and reputation.

[c] Presentation of Evidence

Mitigation and extenuation evidence are usually presented during a respondent's defense. Counsel may use affidavits or written statements. If they are not otherwise admissible, the agency counsel may stipulate to their introduction, usually as administrative hearsay [*Gov. Code § 11513(c)*; *see § 473F.32*], rather than a substitute for oral testimony.

Former Gov. Code. Code § 11520(b), relating to the right of a defaulting respondent to make a showing by way of mitigation, is superseded by the procedures to cure a default under *Gov. Code § 11520(b), (c)*. Under those procedures, as explained § 473F.17[1][a], and [b], the ALJ or agency have discretion to:

- Grant a hearing notwithstanding respondent's default [*Gov. Code § 11520(b)*].

- Vacate a decision and grant a new hearing [*Gov. Code § 11520(c)* (agency only)].

The respondent may make a showing by way of mitigation as a defense in the hearing [25 Cal. L. Rev. Comm. Reports 55, 251 (1995)]. What this means is that if respondent wants to present a mitigation defense and mitigation evidence, he or she has to invoke the procedures to cure a default under *Gov. Code § 11520(b), (c)*, to be able to do so.

[3] Rehabilitation Evidence

[a] Nature of Evidence

Rehabilitation evidence concerns the restoration of dignity and capacity. It relates only to what an individual has done since a violation that might provide justification for the agency to completely or partially ignore that violation. Rehabilitation evidence is especially important in license application cases. Conduct that would have prevented an individual from obtaining a license in the past may not affect the present, due to intervening time and efforts on the part of the individual to become entitled to the license. Because of the time that elapses between conduct that subjects a licensee to discipline and the actual discipline, rehabilitation evidence may also be presented to help determine an appropriate discipline when it is imposed. Rehabilitation evidence is the primary evidence presented in reinstatement and reduction of penalty hearings [*see Gov. Code § 11522* (reinstatement and reduction procedures)].

[b] Criteria for Rehabilitation

Some agencies have regulations that set out criteria, relating directly to the licensed activity, to evaluate the rehabilitation of a licensee [*see Bus. & Prof. Code § 480* (board may deny a license based on conviction of a crime or act of fraud or deceit)]. The key to showing rehabilitation is showing changed behavior by evidence of affirmative action on the part of the respondent [*Housman v. Board of Medical Examiners (1948) 84 Cal. App. 2d 308, 318, 190 P.2d 653]* . Some general rehabilitation evidence includes the following:

- The respondent's activities since the offensive conduct including personal stability, employment history, community involvement, educational and rehabilitation programs.

- The respondent's acceptance of responsibility for the past conduct and current attitude toward it.

- The respondent's current reputation, both generally and with respect to the past conduct.

- The time that has elapsed since the past conduct without other problems of a similar nature, and respondent's efforts to avoid those problems.

If an agency has established specific criteria for evaluating rehabilitation, evidence should be directed to these criteria [*see, e.g., Bus. & Prof. Code § 480(b)* (license cannot be denied if person has met all of rehabilitation criteria developed by a board regulated by the Business and Professions Code)].

No person can be denied a license solely on the basis of a felony conviction, if a certificate of rehabilitation has been received [*Bus. & Prof. Code § 480(b)*; *see Penal Code § 4852.01* (certificate of rehabilitation)].

[4] Admissions of Liability

In adjudicative proceedings subject to Chapter 4 (commencing with *Gov. Code § 11400*) or Chapter 5 (commencing with *Gov. Code § 11500*), the portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability. A statement of fault, however, which is part of, or in addition to, any of the above shall not be inadmissible pursuant to this section [*Gov. Code § 11440.45(a)*; *Evid. Code § 1160*]. "Accident" is defined to mean an occurrence resulting in injury or death to one or more persons which is not the result of willful action by a party [*Gov. Code § 11440.45(b)(1)*]. "Benevolent gestures" are defined to mean actions which convey a sense of compassion or commiseration emanating from humane impulses [*Gov. Code § 11440.45(b)(2)*]. "Family" is defined to mean the spouse, parent, grandparent, stepmother, stepfather, child, grandchild, brother, sister, half brother, half sister, adopted children of parent, or spouse's parents of an injured party [*Gov. Code § 11440.45(b)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceAdmissibilityGeneral OverviewGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicenses

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41A-473F California Forms of Pleading and Practice--Annotated § 473F.40

§ 473F.40 Views

[1] Use in Administrative Proceedings

Code Civ. Proc. § 651 provides that a court may order a judge or jury to view property, places, objects, experiments, or demonstrations [*Code Civ. Proc. § 651*].

Although the APA is silent on taking views outside the hearing room, parties to administrative proceedings sometimes request the ALJ to take views. The ALJ may grant the request if there is a real need for the view, and the need is not outweighed by the time it will consume. Often, however, the view is not really needed because it would constitute cumulative evidence [*see § 473F.31[4]*], and the time it takes would be wasteful. Therefore, counsel should carefully address both of these concerns in the request for the view. ALJs are sometimes skeptical about the value of a view.

In the context of special education law, the California Court of Appeal held that expert observation of a proposed special education placement for autistic child before a due process hearing was required, and it was improper for the superior court to deny an order compelling the school district to allow the expert hired by the parents of the child to observe the proposed placement before the due process hearing [*Benjamin G. v. California Special Ed. Hearing Office (2005) 131 Cal. App. 4th 875, 883-884, 32 Cal. Rptr. 3d 366]* . While expert observation is not the same as a view, and this precedent is limited to the area of special education law, observation of a building or an accident scene may be useful to preparation for a hearing.

[2] Entering on Record

Making views a part of the record is also difficult. Conversations during the view must be reported or otherwise placed into the record [*see Code Civ. Proc. § 651(b)* (proceedings at a view must be recorded to the same extent as courtroom proceedings)].

A possible alternative to actually reporting during the view is to carefully put on the record, before the view takes place, exactly what the parties want the ALJ to see during the view. The ALJ may then be able to take the view without additional conversation on the record. After the view, the ALJ can put on the record exactly what was seen. Other

procedures are possible and may be stipulated to as long as the record is complete. Any finding of fact based on a view must be supported by the record. See Ch. 473G, *Agency Adjudication Decisions* , for a discussion of the record for decision.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceAdmissibilityGeneral OverviewEvidenceDemonstrative EvidenceGeneral OverviewEvidenceRelevanceConfusion, Prejudice & Waste of Time

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41A-473F California Forms of Pleading and Practice--Annotated § 473F.41

§ 473F.41 Res Judicata and Collateral Estoppel

[1] Nature of Doctrines

A decision in a prior administrative or judicial proceeding may be admitted to determine a later collateral administrative or judicial proceeding under the doctrine of collateral estoppel. Collateral estoppel precludes a party from relitigating in a second proceeding matters litigated and determined in a prior proceeding [*Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd. (1962) 58 Cal. 2d 601, 604, 25 Cal. Rptr. 559, 375 P.2d 439* ; *Lucido v. Superior Court (1990) 51 Cal. 3d 335, 347-348, 272 Cal. Rptr. 767, 795 P. 2d 1223* (collateral estoppel was not applicable to preclude subsequent criminal prosecution of individual when same issue arose at probation revocation hearing and probation was not revoked. This was because of public policy including the integrity of judicial determinations); *Castillo v. City of Los Angeles (2001) 92 Cal. App. 4th 477, 481-483, 111 Cal. Rptr. 2d 870* (issue preclusion (collateral estoppel) based on prior administrative adjudication of same issue, whether discharge was for good cause, applied to preclude subsequent civil lawsuit for wrongful discharge because the issues were the same, the issues were actually and necessarily litigated; the judgment in the administrative proceedings were final and on the merits)].

Collateral estoppel is a secondary aspect of res judicata, the doctrine that bars a second suit on the same cause of action between the same parties or parties in privity with them [*Clark v. Lesher (1956) 46 Cal. 2d 874, 880, 299 P.2d 865* ; for discussion of res judicata and the consequences of failing to seek judicial review of an administrative determination, *see* Ch. 474, *Availability of Judicial Review of Agency Decisions*]. Collateral estoppel focuses on issues litigated, while res judicata focus on causes of action.

A workers' compensation claimant filed a worker's compensation claim before the Workers' Compensation Appeals Board (WCAB) against an illegally uninsured employer while at the same time filing a civil action in Superior Court for negligence against the same employer as authorized by *Labor Code § 3706*. The claimant settled the civil action for $20,000 without seeking approval of the WCAB as to the settlement, and the civil action was dismissed with prejudice. The employer then moved to dismiss the worker's compensation claim based on the settlement of the Superior Court action. The Court of Appeal held that res judicata principles did not require the dismissal of the worker's compensation claim. The civil action for negligence and the worker's compensation claim were based on two different primary rights,

and were therefore different claims. The court also held that the legislature had intended cumulative remedies to be available for workers in these cases, in which an employer was illegally uninsured [*Le Parc Community Association v. Workers' Compensation Appeals Board (2003) 110 Cal. App. 4th 1161, 1171-1174, 2 Cal. Rptr. 3d 408]* .

Res judicata has barred the relitigation in a collateral civil proceeding of a zoning issue previously decided by a city board of permit appeals [*City and County of San Francisco v. Ang (1979) 97 Cal. App. 3d 673, 159 Cal. Rptr. 56]* . It has also barred a second appeal to an administrative board on the issue of timeliness of the first appeal to the same administrative board when no statute provided for reconsideration [*Hollywood Circle, Inc. v. Department of Alcoholic Beverage Control (1961) 55 Cal. 2d 728, 13 Cal. Rptr. 104, 361 P.2d 712]* .

A party's failure to challenge adverse findings of a quasi-judicial administrative agency proceeding by means of a mandate action in the superior court means that those findings are binding in a later civil action [*Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 484, 131 Cal. Rptr. 90, 551 P.2d 410* ; Risam v. *County of Los Angeles (2002) 99 Cal. App. 4th 412, 419-420, 121 Cal. Rptr. 2d 267* (employee's failure to challenge agency decision finding no FEHA violation bound employee and prohibited later civil action by employee alleging FEHA violation)]. When a public employee files discrimination claims against a public employer based on the California Fair Employment and Housing Act (FEHA) [*Gov. Code § 12900*], and based on Title VII of the Federal Civil Rights Act of 1964 (Title VII) [*42 U.S.C. § 2000e*], the employee's failure to have the public employer agency's final adverse findings judicially reviewed and set aside means that those adverse findings are binding on the public employee in a later civil action as to claims under the California FEHA, but the adverse findings are not binding as to claims under Title VII. [*Johnson v. City of Loma Linda (2000) 24 Cal. 4th 61, 65-66, 99 Cal. Rptr. 2d 316, 5 P.3d 874* ; *Miller v. City of Los Angeles (2009) 169 Cal. App. 4th 1373, 1380-1382, 87 Cal. Rptr. 3d 510* (citing the *Johnson* case; discharged employee's FEHA complaint was barred by former employee's failure to timely file a petition for administrative mandamus to challenge decision of Board of Civil Service Commissioners; former employee withdrew from administrative hearing process after hearing officer had submitted report recommending discharge of the former employee); *Brand v. Regents of the University of California (2008) 159 Cal. App. 4th 1349, 1368-1370, 72 Cal. Rptr.3d 419* (citing the *Johnson* case; internal grievance decision denying employee's grievances did not have collateral estoppel impact on later lawsuit by employee against university employer for damages for unlawful retaliation under whistleblower protection statute. This was because the fact-finding procedures used in the grievance process did not have judicial or quasi-judicial character necessary for collateral estoppel to apply)].

The California Court of Appeal relied on the *Johnson* decision to hold that a city firefighter who was dismissed for cause was precluded from relitigating in later court actions adverse determinations made by the city council because the firefighter failed to seek judicial review and failed to overturn the city council decision. Thus, the principles of issue preclusion prohibit the firefighter from relitigating issues determined against him in the city council dismissal decision [*Smith v. City of Napa (2004) 120 Cal. App. 4th 194, 198-199, 14 Cal. Rptr. 3d 908]* . However, the California Supreme Court held that a state employee pursuing a whistleblower retaliation complaint under *Gov. Code § 8547.8* against agency officials where the state employee worked was only required to pursue a complaint with the State Personnel Board under *Gov. Code § 19683*. The employee was not required to request a hearing before an ALJ working for the State Personnel Board (SPB), nor was the employee required to seek judicial review under administrative mandamus before filing a civil action for damages based on whistleblower retaliation. The employee was only required to receive the findings of the executive officer of the SPB based on review of the complaint. The employee was not required to exhaust administrative or judicial remedies to challenge those findings before filing a civil lawsuit. Furthermore, the executive officer's findings (which were adverse to the employee) were not binding on the employee as a matter of issue preclusion because the executive officer's findings were not a final judgment following an administrative hearing [*State Board of Chiropractic Examiners v. Superior Court (2009) 45 Cal. 4th 963, 968, 973, 89 Cal. Rptr. 3d 576, 201 P. 3d 457]* .

Similarly, although the doctrine of collateral estoppel developed to give conclusive effect to a prior court adjudication, the California Supreme Court has held that it also applies when the prior adjudication was administrative [*People v.*

Sims (1982) 32 Cal. 3d 468, 477, 186 Cal. Rptr. 77, 651 P.2d 321 ; *Bronco Wine Co. v. Frank A. Logoluso Farms (1989) 214 Cal. App. 3d 699, 708, 262 Cal. Rptr. 899* ; *Oquendo v. California Institution for Women (1989) 212 Cal. App. 3d 520, 523, 260 Cal. Rptr. 688]* .

[2] Application to Administrative Hearings

[a] Required Elements

The California Supreme Court reaffirmed the continued validity under stare decisis (precedent decision) of the court's previous decision in *People v. Sims (1982) 32 Cal. 3d 468, 186 Cal. Rptr. 77, 651 P.2d 321* , which applied collateral estoppel provisions to administrative agency decisions and holding that a subsequent criminal prosecution for the same misconduct could be precluded by collateral estoppel when the agency decision exonerated the welfare recipient of welfare fraud charges [*People v. Garcia (2006) 39 Cal. 4th 1070, 1074, 48 Cal. Rptr. 3d 75, 141 P.3d 197]* . The California Supreme Court concluded that the continued validity of *People v. Sims* was not affected by 1984 statutory amendments to *Welf. & Inst. Code § 11483* because the state of California had the discretion to seek restitution first or prosecution first under those amendments [*People v. Garcia (2006) 39 Cal. 4th 1070, 1082-1083, 48 Cal. Rptr. 3d 75, 141 P.3d 197]* . The California Supreme Court also concluded that the continued validity of *People v. Sims* was not affected by the 1990 California Supreme Court decision in *Lucido v. Superior Court (1990) 51 Cal. 3d 335, 272 Cal. Rptr. 767, 795 P. 2d 1223* in which the court held that collateral estoppel did not prohibit relitigation in a criminal proceeding of an issue previously litigated in a probation revocation hearing in which the defendant prevailed [*People v. Garcia (2006) 39 Cal. 4th 1070, 1083-1084, 48 Cal. Rptr. 3d 75, 141 P.3d 197]* . However, the doctrine of collateral estoppel precluded relitigation in a criminal prosecution for welfare fraud and perjury of issues that were actually litigated and necessarily determined in a prior administrative proceeding [*People v. Garcia (2006) 39 Cal. 4th 1070, 1089, 48 Cal. Rptr. 3d 75, 141 P.3d 197]* . The California Supreme Court remanded the case to the Court of Appeal to determine whether the issues actually litigated in the administrative proceeding were identical to the issues in the criminal proceeding. The Court of Appeal on remand is required to determine whether the same issues of welfare fraud and perjury were litigated in the administrative proceeding as were litigated in the criminal proceeding in which the defendant welfare recipient was convicted of welfare fraud and perjury after the agency decision determined that welfare overpayments were the result of administrative error [*People v. Garcia (2006) 39 Cal. 4th 1070, 1090-1091, 48 Cal. Rptr. 3d 75, 141 P.3d 197]* .

The California Court of Appeal held that a public transportation authority was not collaterally estopped from litigating the issue of the composition of a public employee bargaining unit that included supervisors and managers because there was a prior proceeding in which the department of industrial relations identified as the existing bargaining unit five years prior to the current proceeding. Collateral estoppel did not apply because the appealing parties failed to satisfy their burden of proof to show that the same issue was actually litigated in the prior proceeding. This was because the record of the prior proceeding was incomplete, and the court could not determine to what extent this same issue was actually litigated in the prior proceeding [*Santa Clara Valley Trans. Auth. v. Rea (2006) 140 Cal. App. 4th 1303, 1311-1313, 45 Cal. Rptr. 3d 511]* .

In *People v. Sims (1982) 32 Cal. 3d 468, 186 Cal. Rptr. 77, 651 P.2d 321* , the California Supreme Court held that an administrative Department of Social Services "fair hearing" decision, which exonerated a welfare recipient of fraud charges, collaterally estopped a subsequent criminal prosecution for the same misconduct. The Court adopted the principle that collateral estoppel may be applied to decisions made by administrative agencies when (1) the administrative agency is acting in a judicial capacity, (2) the agency resolves disputed issues of fact properly before it, and (3) all parties have had an adequate opportunity to litigate their claims [*People v. Sims (1982) 32 Cal. 3d 468, 479, 186 Cal. Rptr. 77, 651 P.2d 321]* .

The court stated that application of collateral estoppel to these administrative decisions comports with the public policy underlying the doctrine of limiting litigation by preventing a party who has had one fair trial on an issue from again

drawing it into controversy [*People v. Sims (1982) 32 Cal. 3d 468, 479, 186 Cal. Rptr. 77, 651 P.2d 321]* . The Court found (1) that the Department of Social Services hearing was a judicial-like adversary proceeding because of the procedures it followed and the adjudicatory nature of the hearing officer's decision, (2) that the Department had statutory jurisdiction to decide the disputed issues of fact, and (3) that the fair hearing provided the parties an adequate opportunity to fully litigate their claims [*People v. Sims (1982) 32 Cal. 3d 468, 479-481, 186 Cal. Rptr. 77, 651 P.2d 321]* .

The Court also found that the three requirements of traditional collateral estoppel had been met: (1) the issue decided at the previous proceeding was identical to the one sought to be litigated, (2) the administrative decision resulted in a final judgment on the merits, and (3) the party against whom collateral estoppel was asserted was a party or in privity with a party at the prior proceeding, because the county (which litigated in the fair hearing), and district attorney's office (which sought to prosecute the criminal proceeding), were both county agencies representing the interests of the state [*People v. Sims (1982) 32 Cal. 3d 468, 484-487, 186 Cal. Rptr. 77, 651 P.2d 321* ; *see* *Lerner v. Los Angeles City Board of Education (1963) 59 Cal. 2d 382, 398, 29 Cal. Rptr. 657, 380 P.2d 97* (agents of the same government are in privity with each other, since they represent the right of the government); *Pitts v. City of Sacramento (2006) 138 Cal. App. 4th 853, 858, 41 Cal. Rptr. 3d 838* (issue preclusion did not apply to police officer's second mandate proceeding, as findings on this issue in a prior lawsuit were not essential to the judgment because the appellate court affirmed the prior judgment on a different basis than this particular issue); *Bronco Wine Co. v. Frank A. Logoluso Farms (1989) 214 Cal. App. 3d 699, 708, 262 Cal. Rptr. 899* (collateral estoppel not applicable because issues were not identical); *City of Gilroy v. State Bd. of Equalization (1989) 212 Cal. App. 3d 589, 605-606, 260 Cal. Rptr. 723* (collateral estoppel not applicable because party to be estopped was neither a party to nor in privity with a party to the prior determination); *Carmel Valley Fire Protection Dist. v. State of California (1987) 190 Cal. App. 3d 521, 536, 234 Cal. Rptr. 795* (the various state agencies are agents of the state in privity with other state agencies)].

A dental patient acted as an assignee of the dentist and asserted a claim against the dentist's professional liability insurer for breach of contract for refusing to defend or indemnify dentist in the dental patient's underlying tort action for sexual misconduct against the dentist. The Court of Appeal held that the patient was collaterally estopped from asserting in the action against the insurer that the dentist's conduct was negligent and therefore within the scope of risks covered by the insurance policy. Collateral estoppel was based on the Dental Board's findings that the dentist had sexually abused the patient, and that the dentist was found to have committed intentional misconduct with the patient. Those findings were contained in a Dental Board decision that was final, and that was preceded by a full adversary adjudicatory hearing before an ALJ who took testimony and made findings that the dentist's conduct was intentional and sexually motivated. The patient litigated these issues in the ALJ hearing. Therefore, she is bound by the agency findings, and she is estopped to deny that the conduct of the dentist was intentional. The patient is the dentists' assignee in this action, and she is held to be in privity with the dentist, and equally estopped as a privy as she would be as a party [*Marie Y. v. General Star Indemnity Co. (2003) 110 Cal. App. 4th 928, 954-956, 2 Cal. Rptr. 3d 135]* .

The Court of Appeal held that a contractor licensee regulated by the Contractor's State License Board (CSLB) was judicially estopped from asserting in a civil lawsuit that he had withdrawn from completing a development project based on advice of counsel when the contractor had taken an inconsistent position before the CSLB and had asserted that he had not abandoned the project. The Board concluded that there was no basis for disciplining the contractor licensee because of lack of proof that the contractor had abandoned the project. The court of appeal concluded that judicial estoppel applied because the two positions taken by the contractor were inconsistent. The court also noted that collateral estoppel may apply and lead to the same result [*Furia v. Helm (2003) 111 Cal. App. 4th 945, 957-959]* .

It should also be noted that the issues presented in an administrative proceeding are often different from those in companion criminal prosecutions and civil cases. Courts have refused to apply the *Sims* rule when the issues in the different proceedings were not identical [*see* *People v. Wilson (1985) 169 Cal. App. 3d 1149, 1157, 215 Cal. Rptr. 694* (issue in administrative hearing was termination of welfare benefits due to financial disqualification; the issue in the subsequent criminal case was welfare fraud and perjury); *People v. Rodriguez (1984) 160 Cal. App. 3d 650, 653, 206*

Cal. Rptr. 79 (issue at administrative hearing was termination of AFDC and food stamp benefits based on husband's residency on particular date; issue in criminal complaint was welfare fraud based on different residency dates)].

As discussed in [b], *below*, the issues in criminal and administrative proceedings may not be identical due to the different burden of proof. Thus, for example, the California Supreme court held that dismissal of criminal charges for drunk driving by a court, based on its determination that the arrest of defendant for driving while intoxicated was unlawful, did not preclude the administrative agency (DMV), from relitigating the issue of the lawfulness of the arrest in administrative proceedings that the agency held to determine whether to suspend defendant's driver's license for driving while intoxicated [*Gikas v. Zolin (1993) 6 Cal. 4th 841, 857, 25 Cal. Rptr. 2d 500, 863 P. 2d 745]* .

Similarly, one court of appeal held that the doctrine of res judicata did not apply to preclude a civil proceeding for unfair business practices in which civil penalties were sought against an owner of an auto repair business when a prior administrative proceeding against the same owner for the same violations of the Automotive Repair Act led to a determination that the owner's business registration was suspended for 14 days, the owner was required to pay $4,600 in investigation costs, and the owner's registration was placed on a three-year probation [*People v. Damon (1996) 51 Cal. App. 4th 958, 964, 972, 59 Cal. Rptr. 2d 504]* .

Another court of appeal held that an arbitration decision of a state agency does not be given preclusive effect to a civil rights cause of action under section 1983 (*42 U.S.C. § 1983*), when to do so would be contrary to the intent of Congress in creating that cause of action [*Brosterhous v. State Bar of California (1996) 12 Cal. 4th 315, 326-327, 48 Cal. Rptr. 2d 87, 906 P.2d 1242]* .

The Court of Appeal held that a prior judicial challenge to an interim housing code enforcement program based on whether that program was exempt from environmental review under CEQA did not have collateral estoppel effect on a later judicial challenge to a permanent housing code enforcement program based on whether the permanent program was exempt from environmental review under CEQA. The inapplicability of collateral estoppel to preclude the second challenge to the permanent program was based on the difference in the two programs as to duration and scope which meant that the exemption from environmental review issues were also different [*Apartment Assn. of Greater Los Angeles v. City of Los Angeles (2001) 90 Cal. App. 4th 1162, 1168-1170, 109 Cal. Rptr. 2d 504]* .

The California Court of Appeal held that the completion of a Public Utilities Commission (PUC) investigation into fraud charges against a regulated utility (Pacific Gas & Electric Company (PG&E) without the PUC reaching any decision about those charges did not have collateral estoppel effect on a related civil lawsuit claim for fraud damages brought against PG&E by consumers [*Wise v. Pacific Gas & Elec. Co. (2005) 132 Cal. App. 4th 725, 742-743, 34 Cal. Rptr. 3d 222]* . The fraud issues had been referred to the PUC under the doctrine of primary jurisdiction, and the trial court had stayed the civil lawsuit pending PUC resolution of the fraud issues. When the PUC closed its investigation, having taken no action, the trial court lifted the stay, and granted a motion for judgment on the pleadings brought by PG&E. The court of appeal reversed the judgment, and held the PUC decision to close the investigation did not have collateral estoppel effect on the civil lawsuit because there was no PUC ruling or decision on the merits, there were no parties to the proceeding, and the PUC was not acting in an adjudicatory capacity [*Wise v. Pacific Gas & Elec. Co. (2005) 132 Cal. App. 4th 725, 742-743, 34 Cal. Rptr. 3d 222]* .

Another California Court of Appeal held that collateral estoppel principles precluded a challenger to the denial of a real estate license from offering evidence impeaching prior judgments against the challenger in a civil fraud lawsuit and a state bar disbarment proceeding. These judgments were used as the basis of license denial by the Department of Real Estate. The ALJ ruled at the challenger's hearing that this evidence could not be admitted, as these were final judgments, and collateral estoppel principles prohibited impeachment of those judgments. This ruling was upheld on appeal [*Berg v. Davi (2005) 130 Cal. App. 4th 223, 230-231, 29 Cal. Rptr. 3d 803]* .

The California Court of Appeal held that while claim preclusion (res judicata) and issue preclusion (collateral estoppels)

principles are applicable to wage claim decisions by the California Labor Commissioner under *Lab. Code § 98*, because wage claim orders are final, binding judgments under *Lab. Code § 98.2*, claim preclusion (res judicata) principles did not bar the filing of common law and statutory tort claims by plaintiff employees against defendant employers, because the Labor Commissioner did not have subject matter jurisdiction, the authority to adjudicate, those type of tort claims, only wage claims [*Noble v. Draper (2008) 160 Cal. App. 4th 1, 11-13, 73 Cal. Rptr. 3d 3*]. However, collateral estoppels principles do apply to bar one of the plaintiff's tort claims based on the Labor Commissioner's finding in the prior wage claim administrative proceeding that this plaintiff was not an employee of the defendant employer [*Noble v. Draper (2008) 160 Cal. App. 4th 1, 5, 73 Cal. Rptr. 3d 3*].

The First District Division 5, California Court of Appeal held that the *Cal. Const. art. 13, § 32* language, "No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature," which is also known as the "pay first, litigate later" rule takes precedence over principles of collateral estoppel. Thus, a company's declaratory and injunctive relief action against the State of California was properly dismissed. The company sought a declaratory judgment that the company did not owe $1.2 million in state taxes because its drivers were independent contractors, not employees of the company. The company argued that the State of California was collaterally estopped from relitigating the employee issue because in prior state administrative agency proceedings between the company and the state of California, the company's drivers were determined to be independent contractors, not employees. The court of appeal held that the Section 32 principle takes precedence over collateral estoppel. The State was not precluded from relitigating the employment status issue against the company, and from collecting the tax. The company's challenge to the employment tax liability would have to be litigated after the company paid the tax [*California Logistics, Inc. v. State of California (2008) 161 Cal. App. 4th 242, 245-247, 73 Cal. Rptr. 3d 825*].

[b] Role of Burden of Proof

In *People v. Sims (1982) 32 Cal. 3d 468, 186 Cal. Rptr. 77, 651 P.2d 321* [*see* [a], *above*], collateral estoppel was applied in favor of a defendant in a later criminal prosecution.

The higher burden of proof in the later proceeding did not prevent application of the doctrine, because if the agency failed to meet the first, lower burden (preponderance of the evidence), it would necessarily fail to meet the higher burden required in the criminal proceeding [*People v. Sims (1982) 32 Cal. 3d 468, 485, 186 Cal. Rptr. 77, 651 P.2d 321]* .

If a defendant were acquitted in a criminal proceeding with a higher burden of proof, however, the acquittal does not mean that the criminal proceeding bars an administrative proceeding with a lower burden of proof [*Holt v. Department of Food & Agriculture (1985) 171 Cal. App. 3d 427, 433, 218 Cal. Rptr. 1* (acquittal of respondent in prior criminal proceedings did not bar subsequent administrative action, because different burden of proof made the issues in each proceeding nonidentical)].

In a criminal motion to suppress evidence, however, when the burden of proof is a preponderance of the evidence, collateral estoppel has been applied to an administrative proceeding [*Buttimer v. Alexis (1983) 146 Cal. App. 3d 754, 194 Cal. Rptr. 603]* .

[3] Offensive Use of Collateral Estoppel

The use of collateral estoppel may be either defensive (the plaintiff is estopped from litigating a claim that the plaintiff previously litigated and lost against another defendant) or offensive (the defendant is estopped from relitigating issues that the defendant previously litigated and lost against another plaintiff). Both the United States Supreme Court and a California Court of Appeal have suggested that the offensive use of collateral estoppel is less likely to promote judicial

economy and may be unfair to the defendant [*Parklane Hosiery Co. v. Shore (1979) 439 U.S. 322, 329-330, 99 S. Ct. 645, 58 L. Ed. 2d 552* ; *Imen v. Glassford (1988) 201 Cal. App. 3d 898, 906, 247 Cal. Rptr. 514]* . Both courts nonetheless held that the offensive use of collateral estoppel should be permitted in the broad discretion of the trial court [*Parklane Hosiery Co. v. Shore (1979) 439 U.S. 322, 331, 99 S. Ct. 645, 58 L. Ed. 2d 552* ; *Imen v. Glassford (1988) 201 Cal. App. 3d 898, 906, 247 Cal. Rptr. 514]* .

The offensive use of collateral estoppel should not be allowed, however, when the plaintiff could have joined in the first proceeding [*Parklane Hosiery Co. v. Shore (1979) 439 U.S. 322, 331, 99 S. Ct. 645, 58 L. Ed. 2d 552* ; Restatement (Second) of Judgments, § 29(3) and Comment e] or when its use would be unfair to the defendant, as when the defendant has little incentive to vigorously defend in the first proceeding [*Parklane Hosiery Co. v. Shore (1979) 439 U.S. 322, 330-331, 99 S. Ct. 645, 58 L. Ed. 2d 552* ; *Imen v. Glassford (1988) 201 Cal. App. 3d 898, 906-907, 247 Cal. Rptr. 514]* .

Although the court of appeals in *Imen* did allow the offensive use of an administrative determination [*Imen v. Glassford (1988) 201 Cal. App. 3d 898, 906-908, 247 Cal. Rptr. 514]* , it has been suggested that the offensive use of collateral estoppel may require a stronger showing that the prior opportunity to litigate was adequate [*Parklane Hosiery Co. v. Shore (1979) 439 U.S. 322, 331 n.16, 99 S. Ct. 645, 58 L. Ed. 2d 552]* .

The Court of Appeal held that the public interest exception to collateral estoppel applied to permit relitigation of an issue of law, whether a school district complied with the requirements of a statute [*Educ. Code § 51747*], related to short term independent study requirements, notwithstanding that a prior appeal panel had upheld the school district's compliance with the statute. The public interest exception is based on Section 28 of the Restatement Second of Judgments [Rest. 2d Judgments § 28]. The court held that the exception was applicable in this case because of the impact of applying collateral estoppel to future cases raising issues related to public funding of school districts throughout the State of California [*Modesto City Sch. v. Education Audits Appeal Panel (2004) 123 Cal. App. 4th 1365, 1379-1380, 20 Cal. Rptr. 3d 831]* . The court cited and relied upon the California Supreme Court decision in *Arcadia Unified School Dist. v. State Dept. of Education (1992) 2 Cal. 4th 251, 259, 5 Cal. Rptr. 2d 545, 825 P.2d 438* .

The California Supreme Court held that the state Water Resources Control Board was not collaterally estopped from requiring a timber company to comply with water quality monitoring requirements notwithstanding that the state Department of Forestry had approved the timber company's timber harvesting plan, and that plan did not contain water quality requirements to protect rivers near the areas to be logged. The state water board and regional water quality boards had participated in the timber harvesting plan approval process but they were not collaterally estopped from imposing their own requirements. The two reasons that collateral estoppel did not apply were that 1) the forest practices act had a savings clause stating that the forest practice act did not operate as a limitation on the authority of other state agencies to regulate under other statutes; and 2) the interagency review and approval process that led to the adoption of the timber harvesting plan was not a judicial process, did not use adversary procedures such as cross examination of witnesses, and thus lacked judicial character, and was essentially a collaborative process in which the water quality boards role was a consultative participation in the approval process [*Pacific Lumber Co. v. State Water Resources Control Bd. (2006) 37 Cal. 4th 921, 935-936, 38 Cal. Rptr. 3d 220, 126 P.3d 1040]* .

The First District, Division 3, California Court of Appeal held that collateral estoppel did not apply in a proceeding (application for compensation benefits) before the victim compensation and government claims board under Penal code § 4900 to give preclusive effect to a determination of factual innocence made in a judicial proceeding under *Penal Code § 851.8* [*Tennison v. California Victim Compensation and Government Claims Board (2007) 152 Cal. App. 4th 1164, 1168, 62 Cal. Rptr. 3d 88]* . Even though the issues were the same [*Tennison v. California Victim Compensation and Government Claims Board (2007) 152 Cal. App. 4th 1164, 1175-1176, 62 Cal. Rptr. 3d 88]* , and even though there was a privity relationship between the district attorney in the *Penal Code § 851.8* proceeding, and the attorney general in the claims board proceedings [*Tennison v. California Victim Compensation and Government Claims Board (2007) 152 Cal. App. 4th 1164, 1174-1175, 62 Cal. Rptr. 3d 88]* , the factual innocence issue was not actually litigated in the *Penal*

Code § 851.8 proceeding because there was a stipulation as to that issue. Thus, collateral estoppel did not apply because the actually litigated requirement was not satisfied [*Tennison v. California Victim Compensation and Government Claims Board (2007) 152 Cal. App. 4th 1164, 1176-1178, 62 Cal. Rptr. 3d 88]* . Furthermore, collateral estoppel did not apply because of public policy reasons having to do with the integrity of the court system. Other public policy reasons to not apply collateral estoppel included not promoting judicial economy as it would not lessen repetitive litigation. Finally, the offensive use of collateral estoppel in this case would not protect against harassment from vexatious litigation because the party seeking to use this doctrine brought both proceedings [*Tennison v. California Victim Compensation and Government Claims Board (2007) 152 Cal. App. 4th 1164, 1178-1180, 62 Cal. Rptr. 3d 88]* .

The First District Division 4 California Court of Appeal held that a health care plan was collaterally estopped from relitigating the coverage issue of whether or not a health care providers diabetes related treatment was experimental (and there not covered by the plan) because the same coverage issue had previously been litigated by the California Public Employees Retirement System (CALPERS) and the health care plan was in privity with CALPERS, and therefore bound by the prior determination under collateral estoppels principles [*California Physicians' Service v. Aoki Diabetes Research Institute (2008) 163 Cal. App. 4th 1506, 1510, 78 Cal. Rptr. 3d 646*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationDecisionsCollateral EstoppelAdministrative LawAgency AdjudicationDecisionsRes JudicataAdministrative LawAgency AdjudicationDecisionsStare Decisis

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B. Rules of Evidence

41A-473F California Forms of Pleading and Practice--Annotated §§ 473F.42-473F.49

[Reserved]

§§ 473F.42[Reserved]

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PART II. LEGAL BACKGROUND
C. Burden of Proof at the Hearing

41A-473F California Forms of Pleading and Practice--Annotated § 473F.50

§ 473F.50 Order of Proof

[1] General Requirements

This part discusses the burden of proof applicable in administrative adjudicatory hearings, including license discipline proceedings, benefit entitlement hearings, civil service matters, hearings concerning liberty interests, and license application controversies. It contrasts the burden of proof with the order of proof, and discusses an adjudicator's authority to set the procedure for the taking of evidence. It examines the "clear and convincing evidence" and "preponderance of evidence" standards used in administrative hearings. Affirmative defenses and other matters that affect the burden of proof are also covered.

The "burden of proof" is the evidentiary standard that the moving party must meet to prevail in the case [*see* definition in § 473F.51[1]]. In contrast, the "order of proof" describes the procedure for taking evidence in the hearing. Because the APA does not set forth the order of proof that must be used in a hearing, the administrative law judge (ALJ) or agency hearing the case establishes the order. The general authority of the ALJ or agency to conduct a hearing includes the authority to establish the order of proof [*see Gov. Code § 11512(a)*; *see also* Part A]. When the ALJ alone hears the case, he or she exercises all powers relating to the conduct of the hearing [*Gov. Code § 11512(b)*; *see Gov. Code § 11511.5(b)(6)* (order of presentation of evidence and cross-examination may be set at the prehearing conference)]. When the agency itself hears the case, the ALJ rules on the admission and exclusion of evidence, but the agency exercises all other powers relating to the conduct of the hearing that it has not delegated to the ALJ [*Gov. Code § 11512(b)*].

[2] Customary Order in Civil Cases

The customary order of proof in a civil case, which is generally followed in administrative hearings, is as follows [*Code Civ. Proc. § 607*]:

- Plaintiff's statement of the issue and his or her case.
- An optional statement of defense by defendant.

- Plaintiff's production of evidence.
- Defendant's opening statement, if deferred previously, and production of defendant's evidence.
- Additional evidence on the original cases if permitted by the court.
- Rebuttal evidence.
- Argument.

When separate multiple plaintiffs or defendants appear by different counsel, the court must determine their relative order in the presentation of evidence and argument [*Code Civ. Proc. § 607(8)*]. The usual order of proof in civil cases may be modified by the assertion of a special defense, such as the statute of limitations; the matter may be tried separately before the other issues [*Code Civ. Proc. § 597*; *see County of Kern v. Superior Court (1972) 82 Cal. App. 3d 396, 147 Cal. Rptr. 248* (absolute requirement in medical malpractice cases that the statute of limitations issue be tried first)].

Similarly, issues or parts of issues, such as questions of liability and damages, may be bifurcated and separately heard [*Code Civ. Proc. § 598*]; and for judicial economy, equitable issues may be heard before legal issues [*Jaffe v. Albertson Co. (1966) 243 Cal. App. 2d 592, 609, 53 Cal. Rptr. 25* ; *Peterson v. Peterson (1946) 74 Cal. App. 2d 312, 321, 168 P.2d 474]* . For additional discussion of the order of proof, see Ch. 551, *Trial* .

[3] Modification of Customary Order in Administrative Hearings

The agency or ALJ may follow the customary order of proof, modify that order, or order issues tried out of order. Modification may be used to assist witnesses, counsel, or a party appearing in propria persona, or for the efficiency and convenience of the forum [*see Ehrlich v. McConnell (1963) 214 Cal. App. 2d 280, 287, 29 Cal. Rptr. 283* (the order of procedure was properly addressed to the discretion of the hearing officer)]. Such changes to the customary order of proof do not shift or otherwise affect the burden of proof.

Nevertheless, not all of the considerations that prompt modifications of the customary order of proof in judicial proceedings pertain in administrative matters. For example, considerations affecting the order of proof in civil or criminal proceedings to assure that a jury will not hear or be influenced by impermissible matters do not apply in an administrative proceeding heard by a panel [*see Gov. Code § 11512(a)* (agency itself may hear case together with ALJ)]; panel members reflect particular expertise and are not treated in the same manner as lay jurors.

Special or equitable defenses, such as the statute of limitations or estoppel, customarily involve a controverted issue of fact [*see, e.g.,* Bus. & Prof. Code § 7119 (last day of work on the job by the contractor alleged to have abandoned a construction project); *Knight v. Board of Administration (1983) 148 Cal. App. 3d 973, 978-979, 196 Cal. Rptr. 423* (communications made by a government official on which a party relied)]. Such issues, and other mixed questions of law and fact, are taken under submission by the ALJ after an evidentiary hearing or the submission of a stipulated statement of facts, and addressed in the proposed decision.

[4] Order in Particular Matters

As the moving party [*see § 473F.51[9]*], an applicant for disability or retirement benefits customarily proceeds with the production of evidence; that order of proof is frequently modified by the ALJ to permit the agency to present evidence on preliminary issues--such as the membership of the applicant in the retirement system, whether requisite filings for benefits were lodged with the agency, and so forth.

In license denial proceedings, the agency generally presents evidence of the application and the information on which the agency determined to deny the application before the applicant's evidentiary presentation. For example, although the burden of proof in protest proceedings of the Department of Alcoholic Beverage Control [*see Bus. & Prof. Code §§ 24013-24016* (protest proceedings)] is on the protesting party [*see Bus. & Prof. Code § 24300(a)* (APA governs procedure); *see also § 473F.51[2]*], the Department customarily presents evidence of the license application file and its investigation prior to the protesting party's presentation of evidence.

The ALJ or agency must resolve at the outset of proceedings the order of proof to be followed in multiple party matters, such as separate applications for a single available permit, or multiple respondents consolidated in a single license discipline accusation. The adjudicator may consider factors of potential prejudice, convenience, and fairness. The order of proof set between multiple parties will not be disturbed on appeal absent a clear abuse of discretion resulting in a miscarriage of justice [*Diamond Springs Lime Co. v. American River Constructors (1971) 16 Cal. App. 3d 581, 602, 94 Cal. Rptr. 200* (contractor unsuccessfully argued that order of proof requiring it to present its defense before another party proceeded was an abuse of discretion)].

[5] Consideration on Appeal

In general, an adjudicator's broad discretion to determine the order of proof will not be disturbed on appeal [*County of San Luis Obispo v. Bailey (1971) 4 Cal. 3d 518, 527, 93 Cal. Rptr. 859, 483 P.2d 27* ; *Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 584, 140 Cal. Rptr. 330* ; *Meyer Koulish Co. v. Cannon (1963) 213 Cal. App. 2d 419, 430, 28 Cal. Rptr. 757]* .

For example, denial of a dismissed teacher's request to present evidence of arbitrary enforcement of district rules before the school district's case in chief was held to be within the discretion of the ALJ to set the order of proof. The court found that there was no denial of due process in denying petitioner's strategic move to show that other teachers had violated district policy before there had been any evidence of violations on her part [*Feist v. Rowe (1970) 3 Cal. App. 3d 404, 412, 83 Cal. Rptr. 465]* .

Such a ruling on the order of proof applies only to when evidence may be presented and should not be construed as a ruling on admissibility [*Feist v. Rowe (1970) 3 Cal. App. 3d 404, 413, 83 Cal. Rptr. 465* ; *Le Cyr v. Dow (1939) 30 Cal. App. 2d 457, 460, 86 P.2d 900]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersDuties & PowersAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewEvidenceTestimonyPresentation of Evidence

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41A-473F California Forms of Pleading and Practice--Annotated § 473F.51

§ 473F.51 Determining Burden of Proof

[1] General Rules

Unlike a criminal proceeding, in which the state has the burden of proof [*Penal Code § 1096*], or a civil proceeding, in which the burden rests on the party asserting a claim or defense [*Evid. Code § 500*], the burden of proof in an administrative proceeding is not as easily fixed. It may be determined by statute [*see* [2], *below*].

Absent a statute or other authority fixing the burden, the moving party or party seeking to change the status quo bears the burden of proof [*Parker v. City of Fountain Valley (1981) 127 Cal. App. 3d 99, 113, 179 Cal. Rptr. 351* (city denied police officer due process in termination hearing by failing to assume the burden of proving charge that he had used excessive force in making arrest); *Martin v. State Personnel Bd. (1972) 26 Cal. App. 3d 573, 582, 103 Cal. Rptr. 306]* .

The burden in particular types of proceedings are discussed in [3]-[10], *below*. The burden is not necessarily on the party who drafts the pleadings or statement of the case [*see, e.g., Bus. & Prof. Code § 24300* (Department of Alcoholic Beverage Control drafts the pleadings in a protest proceeding, but the burden is on the protesting party)], however, or on the party who arranges for the hearing before the ALJ [*see, e.g., Gov. Code § 17555*; *2 Cal. Code Reg. §§ 1187.1, 1187.2* (the Commission on State Mandates provides for a hearing, but is not a real party in interest in disputes concerning state mandated costs)].

For discussion of the burden of proof in trial court proceedings, see Ch. 551, *Trial* .

[2] APA Provisions

The APA (*Gov. Code § 11340 et seq.*) does not identify the party who bears the burden of proof except by implication. With respect to license issuance, the APA provides that a hearing to determine whether a license should be issued or renewed is initiated by a "statement of issues" [*Gov. Code § 11504*].

The statement must specify the statutes and rules with which the respondent must show compliance by producing proof

at the hearing [*Gov. Code § 11504*; *see* Ch. 473A, *Commencing Agency Adjudication*]. This requirement suggests that the burden of proof is on the respondent [*see* [3], *below*].

The California Court of Appeal held that the applicant for a liquor license had the burden of proof under *Gov. Code § 11504* to establish eligibility at a hearing held by the Department of Alcoholic Beverage Control. The decision to grant a conditional license to the applicant did not shift the burden of proof to protestors who were opposing the granting of a liquor license. The court of appeal applied the express language of *Gov. Code § 11504* that the "respondent must show compliance by producing proof at the hearing," and concluded that this language meant that the applicant for the liquor license was the respondent who had the burden of proof at the hearing [*Coffin v. Alcoholic Bev. Control Appeals Bd. (2006) 139 Cal. App. 4th 471, 476-477, 43 Cal. Rptr. 3d 420]* .

With respect to license discipline, the APA provides that a hearing to determine whether a license should be revoked or suspended is initiated by the filing of an "accusation," which must state the charged acts or omissions so that respondent can prepare his or her defense [*Gov. Code § 11503*].

This requirement suggests that the burden is on the accusatory party [*see* [6], *below*]. With respect to default proceedings, used when the respondent fails to file a notice of defense or appear at the hearing, the agency may act without taking evidence in cases in which the burden of proof is on the respondent to establish that he or she is entitled to the agency action sought [*Gov. Code § 11520*].

With respect to a petition for reinstatement or reduction in penalty, which in practice is the elimination or modification of probationary terms, the APA permits a disciplined licensee to petition the agency for that action after a year has elapsed from the effective date of the suspension or revocation [*Gov. Code § 11522*]. The burden of proof is on the petitioner to present either oral or written argument, such as character witnesses, before the agency [*Gov. Code § 11522*; *see* [6], *below*].

[3] License and Permit Applications

The burden of proof is customarily placed on the applicant for a license or permit, unless the relevant ordinance or statute provides to the contrary [*Martin v. Alcoholic Bev. etc. Appeals Bd. (1959) 52 Cal. 2d 259, 265, 341 P.2d 291* (burden of proof is on applicant for license in application proceedings); *So. Cal. Jockey Club v. Cal. etc. Racing Bd. (1950) 36 Cal. 2d 167, 177, 223 P.2d 1]* .

For example, an applicant may be required to prove his or her good moral character [*Martin v. Alcoholic Bev. etc. Appeals Bd. (1959) 52 Cal. 2d 259, 265, 341 P.2d 291* (applicant for liquor license); *Hora v. City and County of San Francisco (1965) 233 Cal. App. 2d 375, 379, 43 Cal. Rptr. 527* (applicant for massage parlor business permit)], or the ability to adequately work with others [*Pick v. Santa Ana-Tustin Community Hospital (1982) 130 Cal. App. 3d 970, 977, 182 Cal. Rptr. 85* (doctor-applicants for county hospital staff membership)].

Placing the burden of proof on all issues in connection with a permit application on the applicant for a development permit within the coastal zone does not violate due process, and allocation of the burden of proof often serves as an effective tool for shaping social policies; the consumer of natural resources should bear the responsibility for justifying his or her actions [*CEEED v. California Coastal Zone Conservation Com. (1974) 43 Cal. App. 3d 306, 330, 118 Cal. Rptr. 315]* .

Similarly, the burden of proof is properly placed on the applicant proposing an airport expansion to establish that the requirements set forth in the relevant statute have been met [*Bakman v. Department of Transportation (1979) 99 Cal. App. 3d 665, 688-689, 160 Cal. Rptr. 583]* .

[4] License Renewal

License renewal is frequently an almost automatic function of the agency on the payment of renewal fees. In those circumstances, the agency generally does not require the licensee to provide additional proof of fitness, or exercise its discretion in renewing the license [*see Hall v. Scudder (1946) 74 Cal. App. 2d 433, 437, 168 P.2d 990* (statutes governing renewal of real estate license imposed no duty on renewal applicant to prove fitness for license, and no power on agency to investigate fitness)].

An agency cannot use the renewal process to effect a license revocation without the procedural protections of an evidentiary hearing. For example, the real estate commissioner was prohibited from refusing to renew the license of a broker convicted of bigamy since the last renewal. The licensee's renewed license could, however, be revoked on the basis of that felony conviction in a subsequent disciplinary proceeding [*Payne v. Real Estate Commissioner (1949) 93 Cal. App. 2d 532, 536, 209 P.2d 419]* .

When completion of continuing education is required for license renewal, the burden of proving compliance with the requirement is on the licensee. For example, the Board of Vocational Nurse and Psychiatric Technician Examiners requires renewing licensees to submit proof of having completed during the preceding two years 30 hours of continuing education acceptable to the Board [*16 Cal. Code Reg. § 2540.1*].

In practice, some agencies provide forms on which the licensee may certify that the education was completed rather than submit the related certificates or transcripts. By various verification programs and "spot-checks," the agencies attempt to assure that the required continuing education has been completed. The submission of a false statement regarding the requirement is itself grounds for license revocation [*Bus. & Prof. § 480*].

[5] License Discipline

[a] Revocation and Suspension

The burden of proof in administrative hearings to revoke or suspend a license is on the party filing the charges against the licensee [*Daniels v. Department of Motor Vehicles (1983) 33 Cal. 3d 532, 536, 189 Cal. Rptr. 512, 658 P.2d 1313* (suspension of driver's license); *Ettinger v. Board of Medical Quality Assurance (1982) 135 Cal. App. 3d 853, 856, 185 Cal. Rptr. 601* (suspension of doctor's license); *Realty Projects, Inc. v. Smith (1973) 32 Cal. App. 3d 204, 212-213, 108 Cal. Rptr. 71* (revocation of real estate license); *De Rasmo v. Smith (1971) 15 Cal. App. 3d 601, 610, 93 Cal. Rptr. 289* (revocation of real estate license)].

The standard of proof applicable at hearings to revoke or suspend a license is higher than that used in other types of administrative hearings [*see § 473F.52[2]*]. The burden of proof, however, shifts to the respondent to provide an affirmative defense [*Anderson v. Board of Dental Examiners (1915) 27 Cal. App. 336, 338, 149 P. 1006* ; *see Whetstone v. Board of Dental Exmrs. (1927) 87 Cal. App. 156, 164, 261 P. 1077]* . For further discussion of the shifting of the burden of proof, see *§ 473F.54[2]*.

[b] Citations

Some licensing agencies use "citation" proceedings as an alternative to disciplinary proceedings to revoke or suspend a license. A license citation is comparable to a traffic ticket to the extent that, for a charged statutory or regulatory violation, the cited licensee is ordered to pay a civil penalty, analogous to a fine, and correct any deficient work. For example, the Contractors' State License Board may issue a citation in lieu of initiating a proceeding to revoke or suspend a contractor's license [*see Bus. & Prof. Code §§ 7099-7099.7*].

A contractor may contest a citation, including the amount of the penalty, the violation cited, and period allowed for corrective action in a hearing in which the burden of proof is on the charging agency [*see Bus. & Prof. Code § 7099.3*].

For a discussion of the standard of proof applicable to citation hearings, see *§ 473F.52*.

[6] License Reinstatement

In general, when a statute does not provide otherwise, the applicant for reinstatement of a license has the burden of proof regarding not only qualification for licensure, but also rehabilitation when the license was revoked for cause [*Maggart v. State Bar (1946) 29 Cal. 2d 439, 443, 175 P.2d 505* ; *Housman v. Board of Medical Examiners (1948) 84 Cal. App. 2d 308, 315, 190 P.2d 653* (burden rests on the petitioner to prove that he or she has been rehabilitated and is entitled to have his or her license restored, and not on the board to prove to the contrary)].

An agency's statute or regulations may identify the elements that the petitioner must prove to merit reinstatement. For example, the Board of Veterinary Medicine requires the petitioner to furnish two verified recommendations from licensees [*Bus. & Prof. Code § 4887*].

In the absence of specific reinstatement criteria, counsel should refer to the provisions of the agency regarding rehabilitation [*Bus. & Prof. Code § 482*]. State licensing agencies and the licensing boards organized within the Department of Consumer Affairs [*Bus. & Prof. Code § 101.6*] are required to develop criteria for evaluating the rehabilitation of (1) an applicant denied a license for conviction of a crime, fraud or dishonesty, or making a false statement in a license application [*Bus. & Prof. Code § 482*; *see Bus. & Prof. Code § 480* (grounds for license denial)]; and (2) a licensee whose license is revoked or suspended for conviction of a crime [*Bus. & Prof. Code § 482*; *see Bus. & Prof. Code § 490* (grounds for suspension or revocation of license)].

The burden of proof is on the party claiming to have been rehabilitated [*Bus. & Prof. Code § 482*]. The rehabilitation criteria are generally found in the regulations adopted by licensing agencies. For example, a Department of Real Estate licensee whose license was revoked or suspended pursuant to *Bus. & Prof. Code § 480* can present evidence of restitution of monetary losses of injured parties, abstinence from alcohol or controlled substances, stability of family life, or community service for purposes of rehabilitation [*10 Cal. Code Reg. § 2912*].

[7] Employee Discipline

[a] Proceedings to Dismiss or Discipline

In a proceeding to discipline or dismiss an employee, the burden of proof is on the agency asserting cause for discipline, absent an ordinance, statute, or union agreement to the contrary [*Parker v. City of Fountain Valley (1981) 127 Cal. App. 3d 99, 113, 179 Cal. Rptr. 351]* .

A statute or other requirement that the employee bear the entire burden of proof to establish that the discharge was improper may violate due process; however, the reviewing court may uphold the dismissal when a review of the entire record establishes that the agency did present evidence to prove the charges [*Pipkin v. Board of Supervisors (1978) 82 Cal. App. 3d 652, 658-659, 147 Cal. Rptr. 502]* .

Due process is not offended when the employer presents evidence of the employee's unauthorized absence, and thereafter the burden shifts to the employee to prove that the absence was justified [*Baker v. Wadsworth (1970) 6 Cal. App. 3d 253, 263, 85 Cal. Rptr. 880]* .

Parker v. City of Fountain Valley (1981) 127 Cal. App. 3d 99, 179 Cal. Rptr. 351 states that it is axiomatic in disciplinary administrative proceedings that the burden of proving the charges rests on the party making the charges; the obligation of a party to sustain the burden of proof requires the production of evidence for that purpose [*Parker v. City of Fountain Valley (1981) 127 Cal. App. 3d 99, 113, 179 Cal. Rptr. 351]* . The *Parker* case is significant for its careful analysis of the preliminary departmental "proceeding" before the police chief. The court rejected the city's argument that

its burden of proof was satisfied at that level and thereafter the burden shifted to the employee. It stated that prior to the administrative hearing before the city manager, there had been no production of evidence or testimony of witnesses. Since the administrative hearing was the first evidentiary inquiry into the facts giving rise to appellant's discharge, the city, not the employee, was required to bear the burden of proof [*Parker v. City of Fountain Valley (1981) 127 Cal. App. 3d 99, 113, 179 Cal. Rptr. 351]* .

A police officer who was reassigned to a lower pay grade by his employer has a significant private interest in continued receipt of his paycheck [*Gilbert v. Homar (1997) 520 U. S. 924, 932,117 S. Ct. 1807, 138 L. Ed. 2d 120]* , and therefore was entitled under due process of law to hearing procedures in which the police department had the burden of proof of showing that the criteria in the department manual for reassignment to a lower pay grade have been established. The agency procedures placed the burden of proof on the police officer, and that violated due process of law [*Brown v. City of Los Angeles (2002) 102 Cal. App. 4th 155, 175-177, 125 Cal. Rptr. 2d 474* ; *Los Angeles Police Protective League v. City of Los Angeles (2002) 102 Cal. App. 4th 85, 92-94, 124 Cal. Rptr. 2d 911]* . Similarly, police officers charged with misconduct were entitled under Police Officers *Bill of Rights* statute [*Gov. Code § 3304*] to administrative appeal with de novo review, and with the burden of proof on the police department, to establish the facts that provide the basis for the charges against the officers [*Caloca v. County of San Diego (2002) 102 Cal. App. 4th 433, 443-445, 126 Cal. Rptr. 2d 3]* .

[b] Civil Service Employees

In *Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 124 Cal. Rptr. 14, 539 P.2d 774* , the California Supreme Court stated that a civil servant's interest in his or her permanent state employment is a property interest that is protected by the due process provisions of both the federal and state constitutions [*Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 206, 124 Cal. Rptr. 14, 539 P.2d 774]* .

Thus, the employee is entitled to notice of termination and the right to respond to the charges, before the termination becomes effective [*Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 215, 124 Cal. Rptr. 14, 539 P.2d 774]* . At the evidentiary hearing to challenge the action taken, the burden of proof is on the employer to establish cause for dismissal by a preponderance of the evidence [*Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 204 n.19, 124 Cal. Rptr. 14, 539 P.2d 774* ; *see § 473F.52*, for a discussion of standards of proof].

Frequently, counsel or union representatives will decide to waive a pre-termination *Shelly* hearing to avoid providing the employer representative with a prior hint of the evidence and defense that the respondent will offer at the evidentiary hearing before the Civil Service Commission or its hearing officer. Whether the tactic is purely strategic or represents a view that a *Shelly* hearing is a meaningless formality is unclear.

[c] Name-Clearing Hearings

The rapidly growing body of case law concerning the pre-termination right to a hearing of an employee dismissed for alleged conduct that would stigmatize the employee's reputation or impair the opportunity for future employment [*Board of Regents v. Roth (1972) 408 U.S. 564, 569-570, 92 S. Ct. 2701, 33 L. Ed. 2d 548* ; *Murden v. County of Sacramento (1984) 160 Cal. App. 3d 302, 310, 206 Cal. Rptr. 699* ; *Williams v. Department of Water & Power (1982) 130 Cal. App. 3d 677, 684-685, 181 Cal. Rptr. 868* ; *Lubey v. City and County of San Francisco (1979) 98 Cal. App. 3d 340, 346, 159 Cal. Rptr. 440]* , commonly termed "name-clearing" hearings [*Codd v. Velger (1977) 429 U.S. 624, 627, 97 S. Ct. 882, 51 L. Ed. 2d 92]* , does not clearly identify which party has the burden of establishing that the dismissal would have that effect.

This burden relates to the employee's right to have a pre-termination hearing to refute the charges and clear his or her name, rather than to refute proof of the charges at a formal termination hearing, which may not be required by law. In several cases, the damage to reputation and future employment was assumed or implied by the court [*see* *Murden v.*

County of Sacramento (1984) 160 Cal. App. 3d 302, 308-309, 206 Cal. Rptr. 699 (charge concerning sexual conversations with other employees); *Lubey v. City and County of San Francisco (1979) 98 Cal. App. 3d 340, 347, 159 Cal. Rptr. 440* (court must assume that when police officers apply for new employment, potential employers will inquire into their prior job experience and reasons for their termination as policemen); *see also Paul v. Davis (1976) 424 U.S. 693, 711-712, 96 S. Ct. 1155, 47 L. Ed. 2d 405* (one of the charges impugned petitioner's character and morality, and, if circulated, would damage his reputation and seriously impair his ability to find employment in his chosen profession)].

The common characteristic of the cases in which the courts assume such consequences to character and future employment is that the termination or dismissal was based on charges of moral turpitude or sexual misconduct [*see Bollow v. Federal Reserve Bank (1981) 650 F.2d 1093, 1101 , cert. denied, 455 U.S. 948, 102 S. Ct. 1449, 71 L. Ed. 2d 662* (an accusation of moral turpitude is sufficiently serious to stigmatize the employee); *Murden v. County of Sacramento (1984) 160 Cal. App. 3d 302, 308, 206 Cal. Rptr. 699* (only the charge concerning sexual conversations with other employees provided grounds for a name-clearing hearing and allegations of incompetence did not)].

A few decisions suggest that the terminated employee has the burden of proving that the termination merits a name-clearing hearing [*see Williams v. Department of Water & Power (1982) 130 Cal. App. 3d 677, 684-685, 181 Cal. Rptr. 868* (appellant must show her dismissal was based on charges of misconduct that stigmatize her reputation or seriously impair her opportunity to earn a living, when termination was merely for excessive absenteeism, and civil service commission advised her that she could be considered for another job)].

When the basis for the termination is not identified, and the dismissal is publicly characterized as a vacation at the request of the employee, the stigmatizing effect of later publicity arising out of litigation will not be imputed to the dismissal [*Hill v. California State University, San Diego (1987) 193 Cal. App. 3d 1081, 1091-1093, 238 Cal. Rptr. 799]* .

Once the right to a name-clearing hearing has been admitted or assumed, the evidentiary hearing on the merits of the termination resembles a traditional civil service dismissal case with the burden of proof on the agency to establish grounds for dismissal by a preponderance of the evidence [*see* discussion of standards of proof in § 473F.52]. The terminated individual is apprised of and given the opportunity to refute the charges [*Murden v. County of Sacramento (1984) 160 Cal. App. 3d 302, 312, 206 Cal. Rptr. 699]* .

[8] Teacher Dismissal or Suspension

The Education Code sets forth a complex statutory scheme identifying the grounds for dismissal or suspension of permanent certificated school employees, the rights and defenses available to those employees, and the hearing procedure used in those matters [*see Educ. Code §§ 44932-44956*]. The burden of proof in those proceedings is on the school district, which must establish cause for dismissal or suspension [*see Educ. Code §§ 44932-44934*]. Like an accusation [*see Gov. Code § 11503*], the written statement of charges must specify instances of behavior and the acts or omissions constituting the charge so that the teacher will be able to prepare his or her defense [*Educ. Code § 44934*].

A unique aspect of the statutory scheme is the required remedial period within which the employee may attempt to remedy unprofessional conduct and/or unsatisfactory performance [*Educ. Code § 44938*]. No reported case law addresses the burden of proof with regard to this provision. In practice, the charging party presents evidence that the opportunity for remediation was provided to the employee, with necessary written notice of the charges, and specific instances of behavior to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge [*Educ. Code § 44938(a), (b)*]. Apparently, the employee who asserts that the required remediation period was not provided, or that such an error operates as a bar to the dismissal or suspension, would have the burden of proof to establish those defenses. For a discussion of the applicable standard of proof in a teacher suspension or dismissal proceeding, see *§ 473F.52*.

[9] Benefit Entitlement

In the absence of a statutory provision to the contrary, the applicant for disability, retirement, or other such benefits has the burden of proof as the moving party to establish a right to the entitlement [*Greatorex v. Board of Administration (1979) 91 Cal. App. 3d 54, 57, 154 Cal. Rptr. 37* (retirement benefits); *Lindsay v. San Diego Ret. Bd. (1964) 231 Cal. App. 2d 156, 161, 41 Cal. Rptr. 737* (disability benefits)].

The legislative purpose of a benefit program may operate to alter the traditional burden on the moving party, or create presumptions affecting the allocation of the burden. For example, the state unemployment insurance program designed to provide benefits to claimants who have paid into the system has a presumption in favor of the applicant for benefits. In consequence, the employer has the burden of proving by a preponderance of the evidence [*see § 473F.52*, for a discussion of standards of proof] that the benefits should be denied because the claimant was discharged for misconduct or quit without cause [*Perales v. Department of Human Resources Dev. (1973) 32 Cal. App. 3d 332, 340-341, 108 Cal. Rptr. 167]* .

The burden of proof in a benefit entitlement matter may shift to the agency when modification or suspension of benefits to current recipients is proposed. For example, the applicant for disability retirement benefits from the Public Employees Retirement System [*see Gov. Code § 21150* (mandatory retirement for disability)] has the burden of proving a substantial inability to perform the usual duties of the job, and that burden is unaffected by the general rule that pension statutes are to be liberally construed [*Mansperger v. Public Employees' Retirement System (1970) 6 Cal. App. 3d 873, 876-877, 86 Cal. Rptr. 450]* .

Once the claimant has been found to be disabled, however, the burden in a hearing to establish cause to cancel those benefits appears to shift to the agency to prove by a preponderance of the evidence that the retiree is sufficiently recovered from the disability to resume the job duties [*Gov. Code §§ 21197, 21198*; *Cansdale v. Board of Administration (1976) 59 Cal. App. 3d 656, 665, 130 Cal. Rptr. 880* ; *see § 473F.52*, for a discussion of standards of proof].

[10] Safety Regulation Enforcement

The enforcement of CAL/OSHA safety regulations and the assessment of civil penalties for violation of those regulations required that the enforcing agency, the Department of Industrial Regulations, Division of Occupational Safety and Health, has the burden of proof to establish a prima facie case but showing a lack of reasonable diligence was not part of the prima facie case. The employer subject to the penalty assessment had the responsibility to show reasonable diligence as an affirmative defense under the controlling statute, *Labor Code § 6432*. [*Overaa Construction v. California Occupational Safety and Health Appeals Board (2007) 147 Cal. App. 4th 235, 246-247, 54 Cal. Rptr. 3d 154* (employer failed to assert reasonable diligence as a defense at the administrative hearing)].

[11] Review on Appeal

In an administrative hearing, the better practice is for the ALJ or agency to clearly state in the decision the party on whom the burden was placed and the standard of proof applied [*see § 473F.52*].

In the absence of such a clear statement, however, the reviewing court will not assume an error. Administrative findings need not be stated with the formality required of judicial findings, and therefore will be liberally construed to support rather than defeat the order under review [*Realty Projects, Inc. v. Smith (1973) 32 Cal. App. 3d 204, 212-213, 108 Cal. Rptr. 71]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 473F.52 Standard of Proof

[1] Preponderance of Evidence Standard

Just as the nature of the proceeding determines who has the burden of proof, it also determines by what standard of proof that burden is satisfied. In general, except in license revocation or suspension proceedings, the "preponderance of evidence" standard applicable in civil proceedings [*see Evid. Code § 115*] is also used in administrative hearings [*Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 204, 124 Cal. Rptr. 14, 539 P.2d 774* ; *Gardner v. Commission on Professional Competence (1985) 164 Cal. App. 3d 1035, 1039, 210 Cal. Rptr. 795]* . The preponderance of evidence standard is also used in proceedings to suspend or revoke food processor's licenses because these licenses are not professional licenses that require substantial education and training prior to applying for the license [*San Benito Foods v. Veneman (1996) 50 Cal. App. 4th 1889, 1894-1895, 58 Cal. Rptr. 2d 571* ; *see* [2][a], *below*, for discussion of burden of proof standard used in professional license suspension or revocation proceedings].

"Preponderance of evidence" is usually defined in terms of probability of truth--that is, when the evidence has more convincing force than the evidence opposed to it [*People v. Superior Court (1971) 18 Cal. App. 3d 316, 319 n.4, 95 Cal. Rptr. 757* ; *see* Witkin, *California Evidence*, § 157 (3d ed. 1986)]. For further discussion of the preponderance of the evidence standard, see Ch. 551, *Trial* .

[2] Clear and Convincing Evidence Standard

[a] Applicable to Revocation of Professional Licenses

In a disciplinary action to revoke or suspend a professional license, which concerns "the totality of professional employment opportunity involving vested interest rights," the standard of proof is "clear and convincing evidence to a reasonable certainty" [*Ettinger v. Board of Medical Quality Assurance (1982) 135 Cal. App. 3d 853, 856, 185 Cal. Rptr. 601* (suspension of doctor's license); *Realty Projects, Inc. v. Smith (1973) 32 Cal. App. 3d 204, 212-213, 108 Cal. Rptr. 71* (revocation of real estate license); *see* *Gardner v. Commission on Professional Competence (1985) 164 Cal. App. 3d 1035, 1040, 210 Cal. Rptr. 795* (because hearing involved only dismissal of teacher, rather than deprivation of his right to pursue his profession, "clear and convincing" standard did not apply)].

[b] Inapplicable to Citations

Courts apparently have not extended the "clear and convincing evidence" standard to any discipline of a professional license, such as public reproval or termination of a particular employment, which is less than revocation or suspension. *The Ettinger v. Board of Medical Quality Assurance (1982) 135 Cal. App. 3d 853, 185 Cal. Rptr. 601* , court's clear identification of license hearings to revoke or suspend a professional license, without listing the lesser forms of discipline against a license, has resulted in the application of the *Ettinger* standard only in revocation or suspension proceedings.

Thus, the preponderance of the evidence standard is used in less severe disciplinary proceedings against a licensee, such as a license citation authorized by the statutes regulating contractors [*see Bus. & Prof. Code §§ 7099-7124.6*], optometrists [*Bus. & Prof. Code § 3095*], and automotive repair facilities [*Health & Safety Code § 44050*].

[c] Inapplicable to Teacher Dismissal Hearings

Counsel in teacher dismissal or suspension proceedings [*see § 473F.51[8]*] frequently assert that the *Ettinger v. Board of Medical Quality Assurance (1982) 135 Cal. App. 3d 853, 185 Cal. Rptr. 601* , standard should apply.

The argument has repeatedly failed because the courts reason that only a particular job with a particular school district is at issue, and not the employee's teaching credential [*see Gardner v. Commission on Professional Competence (1985) 164 Cal. App. 3d 1035, 1039, 210 Cal. Rptr. 795]* .

The Commission for Teacher Preparation and Licensing may, however, revoke a credential in a separate hearing for the same acts or matters charged to dismiss a teacher [*see Educ. Code §§ 44420-44437* (grounds for suspension or revocation of credential)], or for criminal convictions that may be grounds for dismissal [*see Educ. Code §§ 44424, 44426, 44437* (specified criminal offenses constituting grounds for revocation of certificate); *see also Educ. Code §§ 44932(a)(8), (11)* (dismissal upon conviction of felony or any crime involving moral turpitude, or for alcoholism or drug abuse), 44940 (compulsory leave of absence and suspension of credential for teachers charged with sex offenses, specified drug offenses, murder, or attempted murder; notice of dismissal and employee's right to request hearing)].

Like other license revocation hearings under the APA [*see Educ. Code § 44246* (credential revocation hearings must be held pursuant to the APA)], the clear and convincing standard applies to teacher license revocation hearings as well [*see Gardner v. Commission on Professional Competence (1985) 164 Cal. App. 3d 1035, 1039-1040, 210 Cal. Rptr. 795* (court stated that although preponderance of the evidence standard applied to teacher dismissal, higher standard of proof would apply in hearing for revocation of teaching credential); *Carl S. v. Commission for Teacher Preparation & Licensing (1981) 126 Cal. App. 3d 365, 369, 178 Cal. Rptr. 753* (commission had burden of presenting evidence establishing a prima facie case against the teacher for immoral conduct); *see also Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 238, 82 Cal. Rptr. 175, 461 P.2d 375* (court held that teacher's life diplomas could not be revoked for homosexual conduct unrelated to teacher's fitness to teach)].

[d] Instructions Regarding Standard

Board or panel members frequently request further description or explanation of the commonly termed " *Ettinger* standard" [*Ettinger v. Board of Medical Quality Assurance (1982) 135 Cal. App. 3d 853, 185 Cal. Rptr. 601]* .

The ALJ may advise them that the burden is greater than preponderance of the evidence, but less than proof beyond a reasonable doubt [*see* [3], *below*]. For this reason, an explanation of the standard to be applied in the case may be given to the ALJ for use as instructions during the executive session in which the case will be considered [*see Gov. Code § 11517(c)(2)* (decision in case)].

Such proposed instructions should be provided in writing to the opposing counsel and the ALJ prior to the commencement of the hearing to permit consideration and review. Counsel may solicit the stipulation of opposing counsel to the suggested language. Opposing counsel and the ALJ will likely disfavor proposed instructions first presented at the conclusion of the respondent's case. Parties and counsel do not have a right to be present during panel instruction; that activity is considered to be part of the executive session.

[3] Criminal Standard

The courts have rejected arguments that the criminal standard of proof beyond a reasonable doubt should apply in administrative hearings, reasoning that the need to protect the public from incompetence warrants a lower standard of proof than is required to punish a criminal offender [*Emslie v. State Bar (1974) 11 Cal. 3d 210, 225, 113 Cal. Rptr. 175, 520 P.2d 991* ; *Webster v. Board of Dental Examiners (1941) 17 Cal. 2d 534, 537-538, 110 P.2d 992* ; *Realty Projects, Inc. v. Smith (1973) 32 Cal. App. 3d 204, 213, 108 Cal. Rptr. 71]* .

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§ 473F.53 Meeting the Burden of Proof

[1] Admissions

[a] Types of Admissible Evidence

An agency may use a party's admissions to meet the burden of proof in an administrative hearing. For example, the out-of-court admissions of the respondent may alone support the necessary findings, even when the respondent at hearing denies making the admission [*Hansen v. Civil Service Board (1957) 147 Cal. App. 2d 732, 737-738, 305 P.2d 1012* (firefighter made admissions regarding his presence in the firehouse on and off duty in an intoxicated condition)].

In addition, statements contained in a stipulated settlement of a related civil action for fraud and misrepresentation, or in an affidavit of the licensee, are admissible in a discipline hearing as admissions of the licensee [*Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 546, 92 Cal. Rptr. 525* ; *Bohn v. Watson (1954) 130 Cal. App. 2d 24, 26, 33, 278 P.2d 454]* . Furthermore, a default judgment in a civil action may be used as a judicial admission in a subsequent proceeding [*Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 532, 92 Cal. Rptr. 525]* .

[b] Criminal Admissions

A guilty plea to a criminal offense constitutes an admission of every element of the charged offense, and that admission may be used in an administrative discipline proceeding as if the defendant had been tried before a jury and found guilty on evidence covering all material facts [*Arenstein v. California State Bd. of Pharmacy (1968) 265 Cal. App. 2d 179, 190, 71 Cal. Rptr. 357* , citing *People v. Ward (1953) 118 Cal. App. 2d 604, 258 P.2d 86]* .

For example, *Bus. & Prof. Code §§ 480* and *490*, governing contractors, permit license discipline or denial on the ground of conviction of a crime substantially related to the duties, functions, or qualifications of a licensee [*Bus. & Prof. Code §§ 480, 490*]. For those purposes, a "conviction" includes a plea of guilty, a verdict of guilty, and a conviction on a plea of nolo contendere [*Bus. & Prof. Code § 480(a)(1)*; *Hollingsworth v. Board of Medical Examiners (1961) 188 Cal. App. 2d 172, 176, 10 Cal. Rptr. 343]* . A plea of nolo contendere itself is not an admission absent a conviction on that plea [*In re Hallinan (1954) 43 Cal. 2d 243, 247, 272 P.2d 768]* .

A nolo contendere plea can not be admitted into evidence and can not be used at an administrative disciplinary hearing conducted by a county civil service commission [*County of Los Angeles v. Civil Service Com. (1995) 39 Cal. App. 4th 620, 627-628, 46 Cal. Rptr. 2d 256]* .

In practice, to meet the burden of proof to establish conviction of a crime, the agency presents further evidence or argument that the conviction is related to the subject license. Frequently, a convicted licensee or applicant will present evidence that the conviction is unrelated to the scope of a license. However, presentation of evidence of ongoing psychotherapy, indicia of the respondent's remorse, or suggested probationary terms limiting the licensee's activities may be a more effective strategy [*see § 473F.30* et seq., regarding the introduction of mitigating and extenuating evidence].

[2] Hearsay

[a] Need for Objection

Gov. Code § 11513(d) provides that hearsay evidence may be used to supplement or explain other evidence, but over timely objection will not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions [*Gov. Code § 11513(c)*; *Daniels v. Department of Motor Vehicles (1983) 33 Cal. 3d 532, 538, 189 Cal. Rptr. 512, 658 P.2d 1313* ; *Imachi v. Department of Motor Vehicles (1992) 2 Cal. App. 4th 809, 817, 3 Cal. Rptr. 2d 478]* .

As discussed in *§ 473F.30* et seq., under the new act, the APA provides that hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection is not sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The objection is timely if made before submission of the case or on reconsideration [*Gov. Code § 11513(c)* (operative July 1, 1997)].

This statutory amendment expressly requires a timely objection and therefore resolves a split in the courts over whether an objection was required for administrative hearsay to be insufficient to support fact findings other than when it is used to supplement or explain other evidence. This split existed under former Gov. Code. Code § 11513(c), as interpreted by the various districts of the California Court of Appeal regarding whether administrative hearsay that has not been objected to may be used to make a finding of fact [*see Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 546, 92 Cal. Rptr. 525* (court stated that hearsay evidence that has not been objected to serves to shift the burden of producing evidence of the existence or nonexistence of fact disclosed); *Martin v. State Personnel Bd. (1972) 26 Cal. App. 3d 573, 582-583, 103 Cal. Rptr. 306* (court stated that, contrary to *Borror* and other cases, the absence of objection to hearsay will not support a finding of fact)].

The general rule in administrative matters not governed by the APA is that hearsay alone will not sustain a finding [*Walker v. City of San Gabriel (1942) 20 Cal. 2d 879, 881, 129 P.2d 349* ; *Layton v. Merit System Commission (1976) 60 Cal. App. 3d 58, 67, 131 Cal. Rptr. 318]* . Some courts have held that hearsay admitted without objection is sufficient to sustain a finding [*Frudden Enterprises, Inc. v. Agricultural Labor Relations Bd. (1984) 153 Cal. App. 3d 262, 270, 201 Cal. Rptr. 371]* . For further discussion of the use of hearsay in administrative proceedings, see *§ 473F.30* et seq.

[b] Exceptions to Hearsay

In practice, when a quantity of hearsay comes into the administrative record, no identification of particular evidence as an exception to the hearsay rule is made. In a court proceeding, an objection will trigger counsel's argument on the evidence--for example, whether a document is a business record--and the judge's ruling will be made on the record and may be reviewed on appeal. Many ALJs offer an equivalent procedure to permit counsel to argue that ostensible hearsay is civilly admissible and may sustain a finding and to permit a ruling on the record of the characterization of the

evidence. These ALJs advise counsel or the parties that the proponent asserting an exception to the hearsay rule must immediately identify that exception when the evidence comes in; the parties will then argue or agree to the matter and a ruling will be made on the record. In the alternative, an ALJ may take the matter under submission, accept briefs on the issue, and indicate the characterization of the evidence in the proposed decision. Diligent counsel will request that practice or another means of establishing that evidence is admissible over objection when the evidence is essential to the case and should not be considered as mere hearsay.

[3] Res Judicata and Collateral Estoppel

As discussed in *§ 473F.30* et seq., the doctrines of res judicata and collateral estoppel are applicable to administrative hearings in which the agency exercises a quasi-judicial function and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate [*see People v. Sims (1982) 32 Cal. 3d 468, 478-479, 489-490, 186 Cal. Rptr. 77, 651 P.2d 321* (administrative decision collaterally estopped a subsequent criminal prosecution on the same charges); citing *United States v. Utah Constr. Co. (1966) 384 U.S. 394, 422, 86 S. Ct. 1545, 16 L. Ed. 2d 642]* .

Application of these theories is particularly difficult because the status or ranking of the various administrative tribunals that have jurisdiction over related controversies is unclear, and the outcome may well depend on which forum can provide the earliest hearing. Further difficulty results from the conflicts in the reported cases, acknowledged by the Supreme Court to be "probably impossible to distinguish or reconcile" [*People v. Sims (1982) 32 Cal. 3d 468, 477, 186 Cal. Rptr. 77, 651 P.2d 321]* , and the different burdens of proof applied in civil, criminal, and administrative matters [*see § 473F.52*].

[4] Official Notice

[a] Used to Satisfy Burden of Proof

As discussed in *§ 473F.30* et seq., an ALJ or agency may take official notice of any fact that may be judicially noticed by a court [*see Evid. Code §§ 450-460* (judicial notice); *see* California Trial Guide, Unit 20], and of any generally accepted technical or scientific matter within the agency's technical field [*Gov. Code § 11515*].

The burden of proof may be met in whole or in part by official notice [*Arenstein v. California State Bd. of Pharmacy (1968) 265 Cal. App. 2d 179, 194, 71 Cal. Rptr. 357* (court stated that official notice, used by hearing officer to ascertain that certain drugs were "dangerous," provides a shorthand method of proving facts over which there is no dispute)].

Official notice may be used to contradict other evidence, and support findings of fact and a judgment based on those findings [*Mack v. State Board of Education (1964) 224 Cal. App. 2d 370, 373, 36 Cal. Rptr. 677* ; *Del Bosque v. Singh (1937) 19 Cal. App. 2d 487, 489, 65 P.2d 951]* . An agency may officially notice evidence presented in a prior related proceeding; that evidence may rebut proof offered at the pending proceeding [*Brewer v. Railroad Commission (1922) 190 Cal. 60, 78, 210 P. 511]* .

[b] Practical Considerations

Counsel who propose that an ALJ or agency take official notice of a matter should make a timely request, with copies of written materials for opposing counsel and the record as appropriate [*Gov. Code § 11515*; *see § 473F.30* et seq.]. An ALJ will frequently solicit counsel to request official notice of a matter that will aid the trier of fact, such as a technical dictionary to assist in the review of reports in evidence containing technical terms.

Requests for official notice of statutory and decisional law, standard texts such as the Uniform Building Code, or common slang such as street names for drugs, are generally granted; however, sociological or political matters are

problematic [*see* *Mack v. State Board of Education (1964) 224 Cal. App. 2d 370, 374, 36 Cal. Rptr. 677* (fact that the Communist Party advocates the overthrow of U.S. federal and state government by violence or other unlawful means, officially noticed by hearing officer, is not "of common and general knowledge, and certain and indisputable")].

Even "scientific" matters may be inappropriate for official notice, when no clear consensus exists (*e.g.*, the appropriate treatment of allergies), or when technical knowledge is in its infancy (*e.g.*, AIDS research). An ALJ or agency may leave resolution of many contested scientific or technical matters to the merits of the evidence offered by the parties, rather than taking official notice of those matters. Furthermore, an ALJ will be disinclined to take official notice of matters disputed by the parties, even with the opportunity for rebuttal required by *Gov. Code § 11515*. When a dispute exists, the ALJ may attempt to have the parties stipulate to the controverted matter. Such a stipulation, like official notice, is a substitute for formal proof.

When a request for official notice is denied, counsel must be prepared to prove the matter by other evidence. He or she is unlikely to obtain a continuance merely because the denial was not anticipated.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 473F.54 Shifting the Burden of Proof

[1] Equitable Estoppel

[a] Nature of Doctrine

The doctrine of equitable estoppel prevents a party who has intentionally led another by statement or conduct to believe a matter is true and to act on that belief from contradicting that statement or conduct in litigation arising from it [*Evid. Code § 623*]. In order to invoke the doctrine of equitable estoppel to bar the moving party from proceeding with the action, the party seeking to invoke the doctrine must establish the following elements [*Driscoll v. City of Los Angeles (1967) 67 Cal. 2d 297, 305, 61 Cal. Rptr. 661, 431 P.2d 245* ; *Morrison v. California Horse Racing Bd. (1988) 205 Cal. App. 3d 211, 217, 252 Cal. Rptr. 293* ; *Evans v. City of Los Angeles (1983) 145 Cal. App. 3d 142, 148-149, 193 Cal. Rptr. 282]* :

- The party to be estopped must be apprised of the facts.
- The party to be estopped must intend that his or her conduct will be acted on, or must so act that the party asserting the estoppel had a right to believe it was so intended.
- The other party must be ignorant of the true state of the facts.
- The other party must rely on the conduct to his or her injury.

While the existence of estoppel is a question of law, the proponent of the theory has the burden of producing evidence of the elements of estoppel [*see* *Evans v. City of Los Angeles (1983) 145 Cal. App. 3d 142, 150, 193 Cal. Rptr. 282* (appellant failed to show that (1) respondent intended his conduct to be acted on, and (2) appellant relied on the conduct)]. Estoppel will not be recognized when the party asserting estoppel has knowledge of the true facts, and therefore can not prove the 3rd element (ignorance of the true facts) [*In re A.O. (2004) 120 Cal. App. 4th 1054, 1059, 16 Cal. Rptr 3d 117]* .

As a practical matter, the burden then shifts to the party to be estopped (usually the government agency) to establish that despite such elements estoppel should not lie, or that the application of the theory to the subject case should be limited.

[b] Application to Administrative Agencies

Early cases expressed judicial reluctance to apply the doctrine against a governmental entity, based on the traditional concept of sovereign immunity. Ordinarily, estoppel should not be invoked when to do so would be harmful to some specific public policy or public interest, or when it would enlarge the power of a governmental agency or expand the authority of a public official [*Shoban v. Board of Trustees (1969) 276 Cal. App. 2d 534, 544, 81 Cal. Rptr. 112]* .

The court in *Crumpler v. Board of Administration (1973) 32 Cal. App. 3d 567, 108 Cal. Rptr. 293* , after an exhaustive analysis of the history and present application of the theory, found that a city police department was estopped from reclassifying its animal control officers from "safety" to "miscellaneous retirement system" members, retroactively to the date of membership in the system. Nevertheless, the court would not extend estoppel to preclude the board from reclassifying petitioners prospectively from the date of the board's decision. It found that public interest and policy would be adversely affected if petitioners, despite the discovery of the mistaken classification, were required to be continued to be carried as local safety members when all other contract members performing similar duties and functions were classified as miscellaneous members [*Crumpler v. Board of Administration (1973) 32 Cal. App. 3d 567, 584, 108 Cal. Rptr. 293]* .

The California Supreme Court recently recognized the validity of the defense of equitable estoppel to prohibit welfare agencies from enforcing procedural conditions to eligibility of welfare recipients. In so holding, the Court concluded that application of equitable estoppel to administrative agencies does not violate the judicial powers doctrine [*Lentz v. McMahon, 49 Cal. 3d 393, 406-407, 261 Cal. Rptr. 310, 777 P.2d 83 (1989)]* . Equitable estoppel was applied to preclude a county from recouping public assistance payments from a father when the county had knowledge of the father's whereabouts, and failed to notify him. [*County of Orange v. Carl D. (1999) 76 Cal. App. 4th 429, 431-432, 90 Cal. Rptr. 2d 440]* .

The Court of Appeal held that the Franchise Tax Board was estopped from asserting that the taxpayer had failed to exhaust administrative remedies before filing a lawsuit when the Board had offered to deny the taxpayers' refund claim summarily so that the taxpayer could file a lawsuit. The Board claimed that the taxpayer had underpaid state taxes by $97,000. The taxpayer paid the taxes and filed a claim for a refund. The Board conceded that no tax was due, but argued that the tax paid by the taxpayer should be retained by the board because of the taxpayer's failure to exhaust administrative remedies. The Court of Appeal applied the doctrine of equitable estoppel and concluded that the Board was estopped from asserting procedural limits on the taxpayer's claim for a refund [*J.H. McKnight Ranch, Inc. v. Franchise Tax Board (2003) 110 Cal. App. 4th 978, 991-993, 2 Cal. Rptr. 3d 339]* .

However, the party asserting estoppel must have relied to his or her detriment on the misleading governmental policy or the estoppel doctrine will not be applicable [*Robinson v. Fair Employment & Housing Com. (1992) 2 Cal. 4th 226, 244-245, 5 Cal. Rptr. 2d. 782, 825 P. 2d 767* ; *Walsh v. Board of Administration (1992) 4 Cal. App. 4th 682, 710, 6 Cal. Rptr. 2d 118]* .

The First District Division 2 California Court of Appeal rejected the application of equitable estoppel against a city and county and its airport commission that had reduced incentives to taxicab drivers operating clean air taxicabs serving San Francisco Airport. The court of appeal rejected the estoppel defense because the taxicab drivers could not have reasonably relied upon the city incentives resolution as binding the city to make no further changes in the incentives contained in the resolution. The drivers sued the city for breach of contract when incentives for CNG cabs were reduced by action of the city and county. The drivers argued that equitable estoppel should be applied to estop the city from denying liability for breach of contract. The court of appeal rejected the defense because of a lack of reasonable reliance by the drivers, and because the court did not want to limit the city's exercise of the police power through the recognition

of equitable estoppel [*Cotta v. City and County of San Francisco (2007) 157 Cal. App. 4th 1550, 1566-1568, 69 Cal. Rptr. 3d 612*].

The Third District California Court of Appeal applied the principles of equitable estoppel to excuse the filing of an untimely administrative complaint before the Department of Fair Employment and Housing and the failure to exhaust administrative remedies by an employee who brought an employment discrimination action against an employer. Equitable estoppel applied because the employee diligently pursued the administrative remedy and reasonably relied on the conduct of department officials that the limitations period was not something to be concerned about [*Holland v. Union Pacific Railroad Company (2007) 154 Cal. App. 4th 940, 946-948, 65 Cal. Rptr. 3d 145*].

The California Court of Appeal held that the California Coastal Commission did not deprive a developer of the due process right to participate in an appeal hearing based on statements made by the commission staff that the developer probably did not have to attend the appeal hearing. The court rejected an equitable estoppel defense concluding that the developer could not have reasonably relied on staff recommendations not to attend the appeal hearing. The appeal hearing was to consider an appeal of a coastal development permit received by the developer from a local government body. The developer was presumed to know the law, that the commission, not the staff, decides what actions are taken at appeal hearings. Finally, the developer could not show prejudice to his development project from his failure to appear at the appeal hearing, as the developer appeared at a later do novo hearing at which he was given the opportunity to challenge the appeal [*Benson v. Cal. Coastal Comm'n (2006) 139 Cal. App. 4th 348, 355-356, 42 Cal. Rptr. 3d 580]* .

The Court of Appeal held that a city was estopped from arguing that a landowner's failure to bring an administrative mandate action bars thelandowner's right to recover damages for the value of property from the city in a condemnation proceeding. The city was estopped because it had illegally violated a preliminary injunction granted against it prohibiting the very action, building a curb that eliminated a driveway and a parking space, the lawfulness of which could have determined by a writ of administrative mandate. The city was also estopped because it elected to file a condemnation lawsuit against the landowner, and that was a remedy that was inconsistent with the argument that the landowner must file an administrative mandate action to determine whether the city's building action was lawful. Finally, the city was estopped because the landowner, in filing an action for a permanent injunction against the city, was complying with the substance of an administrative mandate action requirement [*Hurwitz v. City of Orange (2004) 122 Cal. App. 4th 835, 843, 845-846, 19 Cal. Rptr. 3d 213]* .

The estoppel doctrine will not be recognized when the party asserting estoppel knew the true facts and, therefore, could not have detrimentally relied on the other party's misleading conduct. Estoppel will also not be recognized when a governmental policy that benefits the public would be invalidated by applying estoppel to the government entity [*Santa Barbara County Flower & Nursery Growers Ass'n v. County of Santa Barbara (2004) 121 Cal. App. 4th 864, 876, 17 Cal. Rptr. 3d 489]* . Estoppel will also not be recognized when applying estoppel will have the effect of rewriting a statutory limitation on a benefit or privilege (time spent by a teacher teaching under an emergency permit is excluded by statute from the time needed to establish permanent status as a teacher) [*Smith v. Governing Bd. of Elk Grove Unified Sch. Dist. (2004) 120 Cal. App. 4th 563, 569-570, 16 Cal. Rptr. 3d 1]* . Estoppel will also not be recognized when the party asserting estoppel has not been misled by the agency. In this case, the school district did not mislead the teacher as to the legal effect of the teacher's employment under an emergency permit [*Smith v. Governing Bd. of Elk Grove Unified Sch. Dist. (2004) 120 Cal. App. 4th 563, 569-570, 16 Cal. Rptr. 3d 1]* .

Some courts will apply waiver as a doctrine that precludes a government agency from taking a position on appeal of a challenge to agency action. The California Court of Appeal rejected a waiver argument and concluded that the County of Santa Barbara did not waive a statutory exemption under the Coastal Commission Act [*Pub. Resources Code §§ 21080.5, 21080.9*] from completing an Environmental Impact Report (EIR) when it unnecessarily prepared an EIR as part of a proposed amendment to its local coastal plan related to greenhouse development [*Santa Barbara County Flower & Nursery Growers Ass'n v. County of Santa Barbara (2004) 121 Cal. App. 4th 864, 868-869, 17 Cal. Rptr. 3d 489]* .

Furthermore, the Court of Appeal held that a taxpayer was estopped from benefitting from a statutory provision [*Rev. & Tax. Code § 1604(c)*] that continued a taxpayer's declared valuation of real property when the assessment board failed to decide an application for tax assessment reduction within two years of the date that the taxpayer filed the application. The Board required the taxpayer to complete a general waiver of the two-year time period for completing the Board decision. The taxpayer filed a limited waiver, which did not comply with the Board requirement, the Board mistakenly accepted the limited waiver, and the taxpayer demanded the benefit of the valuation rule. The Court of Appeal held that the taxpayer was estopped to claim the benefit of the rule because the taxpayer was guilty of a "wrongful misleading silence" in failing to inform the board that it had mistakenly accepted the taxpayer's limited waiver when its policy required a general waiver [*Helene Curtis, Inc. v. Los Angeles County Assessment Appeals Bds. (2004) 121 Cal. App. 4th 29, 41-42, 16 Cal. Rptr. 3d 658]* .

The California Court of Appeal rejected the assertion of equitable estoppel against an employee organization by a school district because the litigation position of the organization was not inconsistent with the terms of a collective bargaining agreement that addressed similar issue. Since there was no inconsistency, there was no change of position by the school district, and no basis for the application of equitable estoppel as a defense [*California School Employees Association v. Tustin Unified School District (2007) 148 Cal. App. 4th 510, 521-522, 55 Cal. Rptr.3d 739* (laches and unclean hands defenses were also rejected)].

Another California Court of Appeal rejected the application of equitable estoppel as a defense to enforcement of a restoration order by the California Coastal Commission against a home owner with a three hole golf course on the homeowner's property [*Feduniak v. California Coastal Commission (2007) 148 Cal. App. 4th 1346, 1381-1382, 56 Cal. Rptr. 3d 591]* . The Court of Appeal rejected this defense against the Coastal Commission because of lack of proof of three elements of estoppel: 1) The Commission lacked knowledge that the golf course violated the easement and permit conditions [*Feduniak v. California Coastal Commission (2007) 148 Cal. App. 4th 1346, 1361-1362, 56 Cal. Rptr. 3d 591]* ; 2) regulatory inaction by the Commission related to the golf course for many years did not satisfy the requirement that the Commission intended that others would take action based upon its failure to enforce the requirements of the law [*Feduniak v. California Coastal Commission (2007) 148 Cal. App. 4th 1346, 1366-1368, 56 Cal. Rptr. 3d 591* (no basis for detrimental reliance by homeowner merely because commission did not enforce the law for a number of years)]; and 3) application of estoppel against a government agency would nullify a strong land use related policy designed to protect the public [*Feduniak v. California Coastal Commission (2007) 148 Cal. App. 4th 1346, 1375-1376, 56 Cal. Rptr. 3d 591]* .

The California Supreme Court held that the City of Goleta was not estopped to deny approval of a developer's subdivision's map because no city official expressly represented that it would give approval. Also, the city's adoption of county ordinances at the time the city incorporated did not create a reasonable expectation on the developer's part that its final subdivision map would receive ministerial approval by the city [City of Goleta v. Superior Court *(2006) 40 Cal. 4th 270, 279-281, 52 Cal. Rptr. 3d 114, 147 P. 3d 1037]* . The California Court of Appeal held that a county was subject to estoppel based on the language used in a claim rejection letter under the procedures required by the California Tort Claims Act. The language of the letter estopped the county for asserting the defense of statutes of limitation under the Tort Claims Act [*Sofranek v. Merced County (2007) 146 Cal. App. 4th 1238, 1250-1252, 53 Cal. Rptr. 3d 426* (claim rejection letter language was reasonably relied upon by claimant who filed his lawsuit consistent with reasonable understanding of six-month limitations language in second claim rejection letter)].

[c] When Estoppel Does Not Apply

Even when the proponent of the doctrine has established all of the elements of estoppel, the doctrine will not bind a governmental agency when the public protection would be endangered or an expansion of the agency's authority would result [*Morrison v. California Horse Racing Bd. (1988) 205 Cal. App. 3d 211, 218-219, 252 Cal. Rptr. 293* ; *Pettitt v. City of Fresno (1973) 34 Cal. App. 3d 813, 823, 110 Cal. Rptr. 262* (city was not estopped from denying the validity

of a building permit issued in violation of a zoning ordinance); *Merco Constr. Engineers, Inc. v. Los Angeles Unified Sch. Dist. (1969) 274 Cal. App. 2d 154, 160, 79 Cal. Rptr. 23* (estoppel cannot be used to enlarge an agency's power, set forth by statute)].

Furthermore, estoppel will not bar a licensing agency from revoking a license erroneously issued or retained in contravention of law [*Jacques, Inc. v. State Board of Equalization (1957) 155 Cal. App. 2d 448, 462, 318 P.2d 6* (liquor license was revoked for lewd shows on premises); *Joseph George, Distributor v. Department of Alcoholic Beverage Control (1957) 149 Cal. App. 2d 702, 712-713, 308 P.2d 773* (liquor license revoked for inactive business)], or compel an agency to employ an individual who does not meet civil service standards [*Patten v. Cal. State Personnel Board (1951) 106 Cal. App. 2d 168, 173, 234 P.2d 987* (temporary employee did not rank on list of eligible persons for permanent position)].

In a case in which a funeral director's license was revoked for violation of statutory trust provisions, even assuming that the licensee established all of the elements of estoppel, the strong public policy and a statute prohibiting the licensee's unauthorized use of funds received in connection with preneed funeral arrangement would prohibit the application of estoppel against the licensing agency [*Mount Vernon Memorial Park v. Board of Funeral Directors & Embalmers (1978) 79 Cal. App. 3d 874, 888, 145 Cal. Rptr. 275]* . Before a litigant can assert estoppel against an administrative agency, the agency must engage in some affirmative misleading conduct [*Elliott v. Contractors' State License Bd. (1990) 224 Cal. App. 3d 1048, 1053, 274 Cal. Rptr. 286]* . Equitable estoppel will not apply against a public agency when application of equitable estoppel would nullify strong rule of public policy or would expand agency's powers in contravention of statutes and constitutional considerations [*Fleice v. Chualar Union Elementary School Dist. (1988) 206 Cal. App. 3d 886, 893-895, 254 Cal. Rptr. 54]* . For example, it did not apply to prevent an agency from revoking an architect's license, as that would violate the public policy of precluding licensure of those found to be unfit to practice that profession [*Hughes v. Board of Architectural Examiners (1998) 17 Cal. 4th 763, 793-794, 72 Cal. Rptr. 2d 624, 952 P. 2d 641]* .

[2] Affirmative Defenses

[a] Burden on Respondent

Although the burden of proof in a disciplinary action is on the party bringing the charges [*Parker v. City of Fountain Valley (1981) 127 Cal. App. 3d 99, 113, 179 Cal. Rptr. 351* (city denied police officer due process in termination hearing by failing to assume the burden of proving charge that he had used excessive force in making arrest); *see § 473F.51[7]*], the burden of proof is on the respondent to establish an affirmative defense [*Anderson v. Board of Dental Examiners (1915) 27 Cal. App. 336, 338, 149 P. 1006]* .

Decisional law, however, does not address whether the standard of proof is identical to the standard by which the moving party must establish its case [*see § 473F.52*, for a discussion of standards of proof]. In a license revocation proceeding in which a dentist was charged with permitting an unlicensed employee to use the paraphernalia of his office to perform dental work, the burden of proof at the outset of the hearing was on the licensing agency; the burden of proof to establish the affirmative defense that the employee was in fact licensed was on the respondent [*Anderson v. Board of Dental Examiners (1915) 27 Cal. App. 336, 338, 149 P. 1006* ; *see Whetstone v. Board of Dental Exmrs. (1927) 87 Cal. App. 156, 164, 261 P. 1077]* .

[b] Claim of Discrimination

Respondents who are the subject of discipline in a variety of civil service, licensing, permit issuance, zoning, and other administrative matters may endeavor to assert as an "affirmative defense" that the proceeding or parties to it are motivated by discriminatory intent or bias. In *Overturf v. California Horse Racing Bd. (1978) 86 Cal. App. 3d 979, 985-986, 150 Cal. Rptr. 657* , discriminatory enforcement was impliedly recognized as a valid defense in an

administrative disciplinary hearing against three pari-mutuel employees, but the evidence did not establish selective enforcement on an invidious basis under the *equal protection clause*.

In consequence, the application of the defense to proven charges was not addressed by the court [*Overturf v. California Horse Racing Bd. (1978) 86 Cal. App. 3d 979, 985-986, 150 Cal. Rptr. 657]* . *Overturf* is significant for the incorporation of an invidious criterion standard. A person alleging that he or she has been discriminatorily picked out must demonstrate that he or she has been deliberately singled out for prosecution on the basis of some invidious criterion. The unlawful administration by state officers of a state statute that is fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless it contains an element of intentional or purposeful discrimination [*Overturf v. California Horse Racing Bd. (1978) 86 Cal. App. 3d 979, 985, 150 Cal. Rptr. 657* , *quoting Murgia v. Municipal Court (1975) 15 Cal. 3d 286, 297, 124 Cal. Rptr. 204, 540 P.2d 44]* .

In practice, ALJs will frequently require the party asserting the defense to make an offer of proof such as that used in a court proceeding to overcome the presumption of good faith prosecution [*see Evid. Code § 664*; *see also* Ch. 551, *Trial*]. The proponent is required to describe the evidence that will be offered to show that the respondent was deliberately singled out for prosecution on the basis of an identified invidious criterion, and that the disciplinary proceeding would not have been pursued except for the discriminatory intent of the moving party [*People v. Smith (1984) 155 Cal. App. 3d 1103, 1133, 203 Cal. Rptr. 196]* .

In order to successfully assert the defense that an agency discriminated against a licensee, it is necessary to show that (1) other violators not only had not been, but would not be proceeded against; and (2) that the failure to proceed against the other violators was not due to laxity of enforcement or some other reason, but was arbitrary, purposeful, and intended to discriminate against that licensee [*Ehrlich v. McConnell (1963) 214 Cal. App. 2d 280, 288, 29 Cal. Rptr. 283]* .

[c] Discrimination in License Testing Procedures

When bias or discrimination in the testing procedures of the licensing agency is admitted or assumed, those errors alone do not entitle the applicant to a license. The court will not assume the discretion of the agency to order licensure of an applicant who has otherwise not established that he or she has passed the licensing examination. Whatever other orders the court may issue to correct improper action by an agency, it does not have the expertise to make the ultimate determination as to the qualifications of a particular applicant [*Bixby v. Pierno (1971) 4 Cal. 3d 130, 146, 93 Cal. Rptr. 234, 481 P.2d 242* ; *Jaffee v. Psychology Examining Com. (1979) 92 Cal. App. 3d 160, 169, 154 Cal. Rptr. 687]* .

Similarly, an ALJ will not order licensure of an applicant who has not passed an allegedly biased examination.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewContracts LawDefensesEquitable EstoppelElementsEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofBurden ShiftingEvidenceProcedural ConsiderationsObjections & Offers of ProofOffers of Proof

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[Reserved]

§§ 473F.55[Reserved]

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§ 473F.60 Federal Constitution

Due process clause. *U.S. Const., amend. XIV, § 1*

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§ 473F.61 State Constitution

Due process clause. *Cal. Const., art. I, § 7(a)*

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§ 473F.62 State Statutes

[1] Administrative Procedure Act

Accusation. *Gov. Code § 11503*

Administrative adjudication *bill of rights*. *Gov. Code §§ 11425.10-11425.60*

Administrative Law Judges. *Gov. Code § 11502*

Affidavits. *Gov. Code § 11514*

Agency decisional authority. *Gov. Code § 11440.10*

Agencies to which act applies. *Gov. Code §§ 11410.10, 11501*

Amendment of pleadings. *Gov. Code §§ 11507, 11516*

Applicability of provisions to statement of issues. *Gov. Code § 11504.5*

Conduct of hearing. *Gov. Code § 11512*

Consolidation of proceedings. *Gov. Code § 11507.3*

Contempt. *Gov. Code §§ 11455.10-11455.30*

Continuances. *Gov. Code § 11524*

Conversion of proceedings. *Gov. Code §§ 11470.10-11470.50*

Decision. *Gov. Code §§ 11516-11520, 11526*

Declaratory decision. *Gov. Code §§ 11465.10-11465.70*

Definitions of terms. *Gov. Code §§ 11405.10-11405.80, 11500*

Depositions. *Gov. Code § 11511*

Discovery. *Gov. Code §§ 11507.5-11507.7*

Disqualification. *Gov. Code §§ 11425.30, 11425.40, 11512*

Emergency decision. *Gov. Code §§ 11460.10-11460.80*

Evidence. *Gov. Code §§ 11435.10, 11440.40, 11513*

Ex parte communications. *Gov. Code §§ 11430.10-11430.80*

Hearings by electronic means. *Gov. Code § 11440.30*

Informal hearings. *Gov. Code §§ 11445.10-11445.60*

Intervention. *Gov. Code § 11440.50*

Language assistance. *Gov. Code §§ 11435.05-11435.65*

Judicial review. *Gov. Code § 11523*

Notice of defense. *Gov. Code § 11506*

Notice of hearing. *Gov. Code § 11509*

Oaths. *Gov. Code § 11528*

Official notice. *Gov. Code § 11515*

Reconsideration. *Gov. Code § 11521*

Reporting proceedings. *Gov. Code § 11512*

Restoration of rights. *Gov. Code § 11522*

Separate hearings. *Gov. Code § 11507.3*

Service and notice. *Gov. Code § 11440.20*

Service of initial pleading. *Gov. Code § 11505*

Settlement conferences. *Gov. Code § 11511.7*

Sexual harassment. *Gov. Code § 11440.40*

Statement of issues. *Gov. Code § 11504*

Subpoenas. *Gov. Code §§ 11450.05-11450.50*

Time and place of hearing. *Gov. Code § 11508*

Waiver of rights. *Gov. Code § 11415.40*

[2] Related Statutes

Affidavit of good cause as required for subpoena duces tecum. *Code Civ. Proc. § 1985*

Witness served with subpoena as entitled to demand one day's fees and mileage allowance. *Code Civ. Proc. § 1987*

Witness fees and mileage allowances. *Gov. Code §§ 11191, 68093, 68097.2*

Right to have subpoena issued. *Gov. Code § 11190*

Office of Administrative Hearings. *Gov. Code §§ 11370.1-11370.5*

Board of supervisors of county as empowered to establish county hearing officer. *Gov. Code §§ 27720, 27721*

Oaths used in civil proceedings. *Code Civ. Proc. §§ 2094-2097*

Evidentiary effect of plea of nolo contendere. *Penal Code § 1016*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewAdministrative LawAgency AdjudicationImpartialityGeneral OverviewAdministrative LawAgency AdjudicationImpartialityEx Parte ContactsAdministrative LawAgency AdjudicationPrehearing Activity

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41A-473F California Forms of Pleading and Practice--Annotated § 473F.63

§ 473F.63 Decisions

[1] General Requirements

Disciplinary action against licensee, finding licensee guilty of gross incompetence, is invalid when administrative record is completely devoid of any statute, rule, regulation, or evidence of an implied standard by which to measure competence of licensee's conduct. *Wheeler v. State Bd. of Forestry (1983) 144 Cal. App. 3d 522, 527-528, 192 Cal. Rptr. 693*

Administrative regulations that violate acts of Legislature are void. *Selby v. Department of Motor Vehicles (1980) 110 Cal. App. 3d 470, 474, 168 Cal. Rptr. 36*

Act in excess of agency's authority under enabling law are void. *Frates v. Burnett (1970) 9 Cal. App. 3d 63, 71, 87 Cal. Rptr. 731*

Subject of administrative proceeding is entitled to have statutory procedures strictly followed and fairly construed. *California Sch. Employees Assn. v. Personnel Commission (1970) 3 Cal. 3d 139, 145, 89 Cal. Rptr. 620, 474 P.2d 436*

Administrative regulation contrary to enabling law is void. *California School Employees Assn. v. Personnel Com. of Pajaro Valley Unified School Dist. (1970) 3 Cal. 3d 139, 144, 89 Cal. Rptr. 620, 474 P.2d 436*

Agency is not free to ignore its own validly established procedures. *Frates v. Burnett (1970) 9 Cal. App. 3d 63, 71, 87 Cal. Rptr. 731*

Reference to Administrative Procedure Act for guidance is proper in case not governed by act or other law. *Rudolph v. Athletic Commission (1960) 177 Cal. App. 2d 1, 12, 1 Cal. Rptr. 898*

Requirements of due process. *Connolly Development, Inc. v. Superior Court of Merced County (1976) 17 Cal. 3d 803, 818, 823, 132 Cal. Rptr. 477, 553 P.2d 637* ; *Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 208-209, 124 Cal. Rptr. 14, 539 P.2d 774* ; *Beaudreau v. Superior Court (1975) 14 Cal. 3d 448, 458, 121 Cal. Rptr. 585, 535 P.2d*

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[2] Conduct of Hearing

Who may or must be party to administrative proceeding depends on purpose and effect of proceeding and particular statute under which proceeding brought; standard set out in *Code Civ. Proc. § 389*, requiring joinder of necessary and indispensible parties in judicial proceedings, is not appropriate for administrative proceedings when joinder of parties would defeat purpose of administrative proceeding. *Nevada County Office of Education v. Riles (1983) 149 Cal. App. 3d 767, 775, 777, 197 Cal. Rptr. 152*

Agency is entitled to allow hearing officer to conduct hearing alone and present proposed decision to agency. *Armistead v. City of Los Angeles (1957) 152 Cal. App. 2d 319, 324, 313 P.2d 127*

Agency is entitled to begin hearing along with hearing officer and then withdraw midway through, leaving hearing officer to conclude hearing alone. *Feist v. Rowe (1970) 3 Cal. App. 3d 404, 421, 83 Cal. Rptr. 465*

[3] Contempt

Persons subject to license revocation proceeding are entitled to petition superior court to seek enforcement of subpoena when administrative agency refuses to seek enforcement of subpoena under *Gov. Code § 11525*. *Gilbert v. Superior Court (1987) 193 Cal. App. 3d 161, 167, 238 Cal. Rptr. 220*

[4] Disqualification of Counsel

In case not governed by APA, county counsel's office that acts as both advocate for county sheriff and adviser to county quasi-independent administrative board in deputy sheriff's hearing before board is not subject to disqualification on due process grounds if deputy county counsel represents sheriff, county counsel advises board, and county counsel's office can assure that adviser for board is screened from inappropriate contact with advocate for sheriff. *Howitt v. Superior Court (1992) 3 Cal. App. 4th 1575, 1586-1587, 5 Cal. Rptr. 2d 196*

[5] Estoppel

Existence of estoppel is largely a question of fact; weighing of policy concerns that must be conducted in case of estoppel against government are, in part, a question of law. *Lentz v. McMahon (1989) 49 Cal. 3d 393, 403, 261 Cal. Rptr. 310, 777 P.2d 83*

Administrative hearing is appropriate forum for determining applicability of equitable estoppel, in absence of statute barring administrative consideration of estoppel. *Lentz v. McMahon (1989) 49 Cal. 3d 393, 402-406, 261 Cal. Rptr. 310, 777 P.2d 83*

Balancing test is used to determine whether equitable estoppel should apply against governmental entity; estoppel is applicable if policy interests against application of estoppel are outweighed by burden on individual that would result if estoppel not applied. *Lentz v. McMahon (1989) 49 Cal. 3d 393, 400-401, 261 Cal. Rptr. 310, 777 P.2d 83*

Estoppel is applicable against government when required by justice and right, but inapplicable when it would result in nullification of strong rule of policy adopted for benefit of public. *Morrison v. California Horse Racing Bd. (1988) 205 Cal. App. 3d 211, 218, 252 Cal. Rptr. 293* (government not estopped from excluding from racetrack person

convicted of crime involving moral turpitude)

[6] Evidence

Administrative board is required to accept intended meaning of uncontradicted and unimpeached evidence as true. *Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal. 3d 721, 728, 175 Cal. Rptr. 626, 631 P.2d 60*

Ex parte observation of evidence by hearing officer is permissible when hearing officer provides parties sufficient notice of, and opportunity to respond to evidence obtained from observation. *Zuniga v. County of San Mateo Dep't of Health Services (1990) 218 Cal. App. 3d 1521, 1531-1532 n.8, 267 Cal. Rptr. 755*

Inapplicability of exclusionary and vicarious exclusionary rules developed in criminal cases in disciplinary proceeding against doctor. *Pating v. Board of Medical Quality Assurance (1982) 130 Cal. App. 3d 608, 616-626, 182 Cal. Rptr. 20*

Split of authority as to whether or not uncorroborated hearsay evidence can be used to support finding when hearsay was admitted without objection. *Carl S. v. Commission for Teacher Preparation & Licensing (1981) 126 Cal. App. 3d 365, 370-371, 178 Cal. Rptr. 753*

Oral evidence is taken only on oath or affirmation, and use of unsworn witnesses is agency violation of procedural due process in hearing on termination of participant in methadone maintenance program. *Marlow v. OrangeCounty Human Services Agency (1980) 110 Cal. App. 3d 290, 292, 167 Cal. Rptr. 776*

Evidence of misdemeanor conviction is admissible at disciplinary hearing if relevant on issue of credibility or as tending to prove or disprove a material fact in issue. *Coburn v. State Personnel Bd. (1978) 83 Cal. App. 3d 801, 809, 148 Cal. Rptr. 134*

Criminal theories of evidence are generally inapplicable in administrative trial. *Schullman v. State Bar (1973) 10 Cal. 3d 526, 536 n.4, 111 Cal. Rptr. 161, 516 P.2d 865* ; *Webster v. Board of Dental Examiners (1941) 17 Cal. 2d 534, 537-538, 110 P.2d 992*

Necessity to treat as evidence only such information as is presented at hearing. *Desert Turf Club v. Board of Supervisors (1956) 141 Cal. App. 2d 446, 455, 296 P.2d 882*

Test for applicability of exclusionary rule. *Emslie v. State Bar (1974) 11 Cal. 3d 210, 226-229, 113 Cal. Rptr. 175, 520 P.2d 991*

Evidence obtained by entrapment is inadmissible. *Patty v. Board of Medical Examiners (1973) 9 Cal. 3d 356, 364, 107 Cal. Rptr. 473, 508 P.2d 1121* ; *Governing Board v. Metcalf (1974) 36 Cal. App. 3d 546, 549, 111 Cal. Rptr. 724*

Evidence obtained by deceit is inadmissible. *Redner v. Workmen's Comp. Appeals Bd. (1971) 5 Cal. 3d 83, 95, 95 Cal. Rptr. 447, 485 P.2d 799*

Rule against use of outside evidence. *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal. 3d 85, 104, 84 Cal. Rptr. 113, 465 P.2d 1* ; *English v. City of Long Beach (1950) 35 Cal. 2d 155, 158-159, 217 P.2d 22* ; *La Prade v. Department of Water & Power (1945) 27 Cal. 2d 47, 51, 162 P.2d 13* ; *Armistead v. City of Los Angeles (1957) 152 Cal. App. 2d 319, 324, 313 P.2d 127*

Hearsay is sufficient to support finding if admitted over objection pursuant to exception to hearsay rule. *Walker v. City of San Gabriel (1942) 20 Cal. 2d 879, 881, 129 P.2d 349* , disapproved on other grounds in *Bixby v. Pierno (1971) 4 Cal. 3d 130, 152, 93 Cal. Rptr. 234, 481 P.2d 242* ; *Layton v. Merit System Commission (1976) 60 Cal. App. 3d 58, 68, 131 Cal. Rptr. 318*

Admissibility of record of conviction based on plea of nolo contendere. *Cartwright v. Board of Chiropractic Examiners (1974) 16 Cal. 3d 762, 768-774, 129 Cal. Rptr. 462, 548 P.2d 1134* ; *Grannis v. Board of Medical Examiners (1971) 19 Cal. App. 3d 551, 557, 96 Cal. Rptr. 863*

Agency is decider of credibility of witnesses. *Mullen v. Department of Real Estate (1988) 204 Cal. App. 3d 295, 301, 251 Cal. Rptr. 12* ; *Campbell v. Board of Dental Examiners (1971) 17 Cal. App. 3d 872, 876, 95 Cal. Rptr. 351*

Respondent is entitled to invoke privilege against compelled self-incrimination if called to testify. *Ex parte Clarke (1894) 103 Cal. 352, 354*

Agency is not entitled to call respondent until respondent has had opportunity to present evidence. *O'Mara v. State Bd. of Pharmacy (1966) 246 Cal. App. 2d 8, 12, 54 Cal. Rptr. 862*

[7] Expert Witnesses

At administrative hearing to revoke license to operate family day care home for children, based on allegations that one of home operators had sexually abused child attending home, administrative law judge committed error in allowing testimony of child's psychiatrist that child had been molested because he viewed her behavior as consistent with "child sexual abuse accommodation syndrome"; syndrome was not shown to be scientific method of proving molestation that was generally accepted in scientific community in which it was developed. *Seering v. Dept. of Social Services (1987) 194 Cal. App. 3d 298, 308-315, 239 Cal. Rptr. 422* (holding error harmless under facts of case)

[8] Presiding Officers

Request for appointment of hearing officer is not necessary; appointment is required under APA. *National Auto. & Cas. Ins. Co. v. Downey (1950) 98 Cal. App. 2d 586, 593, 220 P.2d 962*

Hearing held without hearing officer, where one is required, is in excess of agency's jurisdiction. *Moyer v. State Board of Equalization (1956) 140 Cal. App. 2d 651, 653-654, 295 P.2d 583* ; *National Auto. & Cas. Ins. Co. v. Downey (1950) 98 Cal. App. 2d 586, 592, 220 P.2d 962*

Hearing officer is required to be present during hearing. *National Auto. & Cas. Ins. Co. v. Downey (1950) 98 Cal. App. 2d 586, 592, 220 P.2d 962*

[9] Hearings

Death of hearing officer before whom evidence was presented and issuance of recommended decision by different hearing officer is not denial of procedural due process when party was afforded opportunity to be heard and decision of county retirement board resulted from board's own independent review of testimony and other evidence presented at hearing, even though board adopted hearing officer's findings and conclusions. *Keith v. San Bernardino County Retirement Bd. (1990) 222 Cal. App. 3d 411, 415, 271 Cal. Rptr. 649*

Express constitutional right to confrontation is confined to criminal proceedings, although party in civil proceeding has

due process right under *U.S. Const., amends. V, XIV,* to cross examine and confront witnesses and as afforded same right by statute (*Gov. Code § 11500(f)(2)*) in state agency hearing; but unlike criminal proceeding where express constitutional right to confrontation exists, constitutional right at civil proceeding as involving general notions of procedural due process. *Seering v. Dept. of Social Services (1987) 194 Cal. App. 3d 298, 304, 239 Cal. Rptr. 422*

In proceeding to revoke license to operate family day care home for children, exclusion of operators of home from hearing during testimony of child who allegedly had been sexually assaulted by one of operators does not violate their due process right or their right under *Gov. Code § 11500(f)(2)* to confront and cross examine adversary witnesses when operators viewed child's testimony by live, closed-circuit television and consulted with counsel prior to cross examination. *Seering v. Dept. of Social Services (1987) 194 Cal. App. 3d 298, 304, 239 Cal. Rptr. 422*

[10] Judicial Notice

California Administrative Procedure Act requires notice and opportunity to rebut whenever administrative agency intends to take official notice of any generally accepted technical or scientific matter within agency's special field, or of any fact which may be judicially noticed by California courts. *Franz v. Board of Medical Quality Assurance (1982) 31 Cal. 3d 124, 140, 181 Cal. Rptr. 732, 642 P.2d 792* (citing *Gov. Code § 11515* and *Evid. Code § 450 et seq.*)

[11] Jurisdiction

Writ of mandate under *Code Civ. Proc. § 1085* is proper to challenge agency's authority to proceed with hearing on ground that agency lacked subject matter jurisdiction to hear issues raised in accusation. *Motors Ins. Corp. v. Division of Fair Employment Practices (1981) 118 Cal. App. 3d 209, 215-216, 173 Cal. Rptr. 332*

[12] Nonsuit

Hearing officer is not empowered to grant request in nature of motion for nonsuit. *O'Mara v. State Bd. of Pharmacy (1966) 246 Cal. App. 2d 8, 11, 54 Cal. Rptr. 862*

Presumptions established by Evidence Code are applicable in administrative proceeding. *Samson Market Co. v. Alcoholic Beverage Control Appeals Bd. (1969) 71 Cal. 2d 1215, 1223, 81 Cal. Rptr. 251, 459 P.2d 667*

[13] Official Notice

Agency is entitled to take official notice of facts subject to judicial notice in *California. McAllister v. Workmen's Compensation Appeals Bd. (1968) 69 Cal. 2d 408, 414, 71 Cal. Rptr. 697, 445 P.2d 313* ; *Cantrell v. Board of Supervisors (1948) 87 Cal. App. 2d 471, 477, 197 P.2d 218*

[14] Order and Burden of Proof

Respondent is entitled to have case against him presented first. *English v. City of Long Beach (1950) 35 Cal. 2d 155, 159, 217 P.2d 22* ; *La Prade v. Department of Water & Power (1946) 27 Cal. 2d 47, 51-52, 162 P.2d 13*

Burden of proof in disciplinary proceedings is on party asserting affirmative. *De Rasmo v. Smith (1971) 15 Cal. App. 3d 601, 610, 93 Cal. Rptr. 289*

Respondent has burden of proof in license application case. *Martin v. Alcoholic Bev. etc. Appeals Bd. (1959) 52 Cal.*

2d 259, 265, 341 P.2d 291 ; *CEEED v. California Coastal Zone Conservation Com. (1974) 43 Cal. App.3d 306, 330, 118 Cal. Rptr. 315* ; *Hora v. City and County of San Francisco (1965) 233 Cal. App. 2d 375, 379, 43 Cal. Rptr. 527*

Amount of proof required in disciplinary proceeding. *Furman v. State Bar (1939) 12 Cal. 2d 212, 229, 83 P.2d 12* ; *Realty Projects, Inc. v. Smith (1973) 32 Cal. App. 3d 204, 212, 108 Cal. Rptr. 71* ; *Small v. Smith (1971) 16 Cal. App. 3d 450, 457, 94 Cal. Rptr. 136*

Presumptions established by Evidence Code are applicable in administrative proceeding. *Samson Market Co. v. Alcoholic Beverage Control Appeals Bd. (1969) 71 Cal. 2d 1215, 1223, 81 Cal. Rptr. 251, 459 P.2d 667*

[15] Record of Proceedings

Requirement of record by phonographic reporter refers to literal record of what is said, capable of accurate transcription. *Funke v. Department of Motor Vehicles (1969) 1 Cal. App. 3d 449, 455, 81 Cal. Rptr. 662*

Cost of record obtained by respondent to exhaust administrative remedies is recoverable in proceeding under *Code Civ. Proc. § 1094.5* if respondent prevails. *Ralph's Chrysler-Plymouth v. New Car Dealers Policy & Appeals Bd. (1973) 8 Cal. 3d 792, 796-797, 106 Cal. Rptr. 169, 505 P.2d 1009*

[16] Right to Counsel

Respondent is entitled to be represented by counsel. *Molina v. Munro (1959) 145 Cal. App. 2d 601*

Respondent is not entitled to appointed counsel or to be advised by agency of right to counsel. *Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 543, 92 Cal. Rptr. 525*

Respondent is not entitled to continuance for purpose of obtaining counsel or having counsel present at hearing if adequate opportunity to get counsel and have counsel present was given. *Givens v. Dept. of Alcoholic Bev. Control (1959) 176 Cal. App. 2d 529, 532, 1 Cal. Rptr. 446* ; *Skipitar v. Munro (1959) 175 Cal. App. 2d 1, 345 P.2d 508*

Agency is not required to look after respondent's interests as counsel might, in absence of counsel. *August v. Department of Motor Vehicles (1968) 264 Cal. App. 2d 52, 64, 70 Cal. Rptr. 172* ; *Griswold v. Department of Alcoholic Beverage Control (1956) 141 Cal. App. 2d 807, 810, 297 P.2d 762*

[17] Stay of Execution

Agency is empowered to stay execution of decision until date when respondent will actually feel effect of it. *Medlock Dusters, Inc. v. Christensen (1973) 35 Cal. App. 3d 565, 569-570, 110 Cal. Rptr. 805*

[18] Subpoenas

Administrative subpoenas pursuant to *Gov. Code § 11180 et seq.* *Pating v. Board of Medical Quality Assurance (1982) 130 Cal. App. 3d 608, 616-618, 182 Cal. Rptr. 20*

Court opinion enunciating rule that declaration in support of investigative subpoena duces tecum for production of patient's hospital records must show good cause, including allegations of fact to demonstrate relevance or materiality of patient's medical records to general charges against doctor, and must show that request can be granted without abuse of

third party's constitutionally protected right of privacy (*Cal. Const., art. I, § 1*) is not retroactive. *Pating v. Board of Medical Quality Assurance (1982) 130 Cal. App. 3d 608, 618-620, 182 Cal. Rptr. 20*

Issuance of subpoena under APA is ministerial act before hearing and discretionary act after hearing has begun. *Shively v. Stewart (1966) 65 Cal. 2d 475, 480-481, 55 Cal. Rptr. 217, 421 P.2d 65*

Agency having power to issue subpoena not governed by APA, is required to issue subpoena when requested. *McLeod v. Board of Pension Comm'rs (1970) 14 Cal. App. 3d 23, 28-29, 94 Cal. Rptr. 58*

Witness served with administrative subpoena is entitled to demand one day's fees and mileage allowance. *McLeod v. Board of Pension Comm'rs (1970) 14 Cal. App. 3d 23, 31, 94 Cal. Rptr. 58*

Agency lacks power to enforce its own subpoena. *Crocker v. Conrey (1903) 140 Cal. 213, 217, 73 P. 1006*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceAdmissibilityGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceOfficial NoticeAdministrative LawAgency AdjudicationPresiding OfficersGeneral OverviewAdministrative LawAgency InvestigationsScopeSubpoenasAdministrative LawSeparation of PowersLegislative ControlsScope of Delegated AuthorityConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

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§ 473F.64 Text References

Judicial Council of California, Tenth Biennial Report (1944)

California Administrative Hearing Practice (Cal CEB 2000)

Witkin, California Evidence, Ch. II, *Judicial Notice*, §§ 80-126, Ch. IX, *Witnesses*, §§ 1086-1092; Ch. XI, *Introduction of Evidence at Trial*, §§ 1906-2000 (3rd ed. 1986)

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§ 473F.65 Internet References

Office of Administrative Hearings. This site includes information and location concerning specific OAH offices; an OAH hearing guide; information concerning Administrative Procedure Act statutes, regulations, and proposed regulations; OAH forms; information concerning alternative dispute resolution procedures; and declaratory decisions. http://www.dgs.ca.gov/oah

NOTE:
On and after July 1, 1998, The OAL is required by *Gov. Code § 11340.1(b)* to make the full text of the California Code of Regulations, with reference citations and history notes, available on the Internet free of charge.

Office of Administrative Law. This site includes OAL publications; links to OAL statutes and regulations relating to rulemaking; regulations submitted to the OAL for review, and information for contacting or providing input to the OAL regarding rulemaking. http://www.oal.ca.gov

California Home Page. This site includes links to other sites maintained by numerous state agencies. http://www.ca.gov

Department of Consumer Affairs. This site includes links to sites maintained by many state agencies that are under this department, as well as links to agency sites. http://www.dca.ca.gov

California Courts. This site includes general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most Court of Appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes text of constitution, codes, and statutes (including complete text of APA); and information concerning pending legislation. http://www.leginfo.ca.gov

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Legal Topics:

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

§§ 473F.66[Reserved]

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41A-473F California Forms of Pleading and Practice--Annotated § 473F.70

§ 473F.70 Prehearing Considerations

[1] Exclusion of Witnesses

☐ Prepare request or motion to exclude [*see § 473F.12[3]*].

☐ Make request or motion prior to testimony [*see § 473F.12[3]*].

[2] Interpreters

☐ Request interpreter [*see § 473F.13*].

☐ Pay interpreter cost, if applicable [*Gov. Code § 11435.25(a)*; *see § 473F.13[4]*].

[3] Witness Fees and Mileage

☐ Pay fees, if applicable [*Gov. Code § 11450.40(a)*; (b); *see § 473F.14[1][g]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityEvidenceCompetencyInterpretersEvidenceTestimonySequestration

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41A-473F California Forms of Pleading and Practice--Annotated § 473F.71

§ 473F.71 Preparation for Hearing

[1] Opening Statement

☐ Prepare opening statement, if appropriate [*see § 473F.15[1][a], [b]*].

[2] Hearing Brief

☐ Prepare hearing brief, if appropriate [*see § 473F.15[2]*].

☐ Serve on ALJ and other parties as soon as possible.

[3] Witnesses

☐ Direct examination.

☐ Prepare questions for direct examination [*see Gov. Code § 11513(b)*; *see § 473F.15[4][a], [b]*].

☐ Prepare witness for direct examination [§ 473F.15[4][b], [c]].

[4] Expert Witnesses

☐ Prepare for cross-examination [*Gov. Code § 11513(b)*; *see § 473F.15[5], [6]*].

[5] Bifurcation

☐ Prepare motion to bifurcate, if applicable [*Gov. Code § 11524*; *see § 473F.15[10]*].

☐ Prepare in writing, or

☐ Make orally on the record.

[6] Depositions

☐ Prepare petition for order to take deposition of unavailable witness [*Gov. Code § 11511*; *see § 473F.15[11][b]*].

☐ Prepare order.

☐ Serve notice of hearing and copy of petition at least 10 days prior to hearing [*Gov. Code § 11511*; *see § 473F.15[11][c]*].

[7] Closing Argument

☐ Prepare closing argument [*see § 473F.15[13]*].

☐ Oral, or

☐ Written.

Legal Topics:

For related research and practice materials, see the following legal topics:
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41A-473F California Forms of Pleading and Practice--Annotated § 473F.72

§ 473F.72 Subpoena and Subpoena Duces Tecum

[1] Procedure

☐ Prepare subpoena [*see § 473F.14*; *see also § 473B.51*].

☐ Subpoena duces tecum requires affidavit [*see Code Civ. Proc. § 1985*; § 473F.14[1][c]].

☐ Serve subpoena [*Gov. Code § 11450.20(b)*; *see § 473F.14[1][d]*].

☐ Subpoena alternative.

☐ Prepare written notice alternative to subpoena [*Gov. Code § 11450.50(a)*; *see § 473F.14[1][h]*].

☐ Serve on opposing party's attorney or attorney of person requested to attend.

[2] Party Served With Subpoena

☐ Motion for protective order, including motion to quash [*Gov. Code § 11450.30(a)*; *see § 473F.14[1][f]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceOfficial NoticeAdministrative LawAgency

AdjudicationPrehearing ActivityAdministrative LawAgency InvestigationsScopeSubpoenas

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41A-473F California Forms of Pleading and Practice--Annotated § 473F.73

§ 473F.73 Use of Affidavits at Hearing

[1] Affidavits

☐ Prepare affidavit or declaration [*see § 473F.37*].

☐ Prepare notice of intent to use affidavit or declaration [*Gov. Code § 11514(b)*; for a form, *see § 473F.90*].

☐ Mail or deliver affidavit and notice to opposing party at least 10 days before hearing [*Gov. Code § 11514(a)*; *see § 473F.37*].

[2] Party Receiving Affidavit and Notice

☐ Right to cross-examine affiant.

☐ Mail or deliver request to cross-examine affiant within seven days after proponent of affidavit mailed or delivered affidavit and notice [*Gov. Code § 11514(a)*; *see § 473F.37*].

☐ Subpoena affiant [*see § 473F.37*].

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41A-473F California Forms of Pleading and Practice--Annotated § 473F.74

§ 473F.74 Official Notice

[1] Request

☐ Prepare request for official notice [*Gov. Code § 11515*; § 473F.38[3]; for a form, *see § 473F.91*].

☐ File with agency or ALJ.

☐ Give written or oral notice to other parties.

[2] Refuting Officially Noticed Matter

☐ Prepare request for opportunity to refute [*Gov. Code § 11515*; § 473F.38[3]; for a form, *see § 473F.92*].

☐ File with agency or ALJ.

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41A-473F California Forms of Pleading and Practice--Annotated § 473F.75

§ 473F.75 Default

[1] Failure to File Notice of Defense or to Attend Hearing

☐ Agency files default.

☐ Make request to vacate default [*Gov. Code § 11520(c)*; *see § 473F.17[1][a], [b]*].

☐ Prepare written motion.

☐ Serve on agency within seven days of receiving notice of default [*Gov. Code § 11520(c)*; *see § 473F.17[1][a], [b]*].

☐ Prepare mitigation defense, if appropriate [*see Gov. Code § 11520(b)*; § 473F.17[1][c]].

[2] Respondent Fails to Receive Actual Notice

☐ Agency files default.

☐ Prepare petition to reconsider default [*Gov. Code § 11520(c)(1)*; *see § 473F.14[1][d]*].

☐ File within applicable time limits [*see Gov. Code § 11521(a)*; § 473F.17[1][d]].

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[Reserved]

§§ 473F.76[Reserved]

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41A-473F California Forms of Pleading and Practice--Annotated § 473F.90

§ 473F.90 Notice of Intention to Use Affidavit or Declaration [Gov. Code § 11514]

[1] FORM Notice of Intention to Use Affidavit or Declaration [Gov. Code § 11514]

BEFORE THE _____ [*agency*]

In the Matter of _____ [*name*], Respondent.	)))))))	NO. _____ NOTICE OF INTENTION TO USE _____ [AFFIDAVIT *or* DECLARATION]

The accompanying _____ [affidavit *or* declaration] of _____ [*name of affiant or declarant*] will be introduced as evidence at the hearing in the above-entitled proceeding. _____ [*Name of affiant or declarant*] will not be called to testify orally. You will not be entitled to question him/her unless you notify the undersigned at _____[*address*] that you wish to cross examine him/her. To be effective, your request must be mailed or delivered to the undersigned on or before _____[*specify date seven days after mailing or delivering notice and copy of affidavit or declaration*].

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent

[2] Use of Form

The form set out in [1], *above*, is for use by a respondent who wishes to use a witness's affidavit (or declaration) in evidence at the hearing. The contents of the notice are prescribed by statute [*see Gov. Code § 11514(b)*]. For discussion, see *§ 473F.37*.

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41A-473F California Forms of Pleading and Practice--Annotated § 473F.91

§ 473F.91 Request for Official Notice [Gov. Code § 11515]

[1] FORM Request for Official Notice [Gov. Code § 11515]

BEFORE THE _____ [*agency*]

In the Matter of _____ [*name*], Respondent.	)))))))	NO. _____ REQUEST FOR OFFICIAL NOTICE

Respondent requests that the _____[*agency*] take official notice of, and refer in the record to, _____ [*specify matter*].

Official notice may be taken as requested because the matter _____ [is generally accepted technical or scientific matter within the special field of the _____ (*agency*) *or* may be judicially noticed by the courts of California pursuant to Section _____ of the Evidence Code].

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent

[2] Use of Form

The form set out in [1], *above*, is for use by the respondent who wishes an agency to take official notice of some matter in the hearing [*Gov. Code § 11515*]. For discussion of official notice, see *§ 473F.38*.

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41A-473F California Forms of Pleading and Practice--Annotated § 473F.92

§ 473F.92 Request for Opportunity to Refute Officially Noticed Matter [Gov. Code § 11515]

[1] FORM Request for Opportunity to Refute Officially Noticed Matter [Gov. Code § 11515]

BEFORE THE _____ [agency]

In the Matter of _____ [*name*], Respondent.	)))))))	NO. _____ REQUEST FOR OPPORTUNITY TO REFUTE OFFICIALLY NOTICED MATTER

Respondent requests a reasonable opportunity to refute _____[*matter in question*], which the _____[*agency*] proposes to notice officially under *Section 11515 of the Government Code*.

Respondent further requests that the _____[*agency*] permit refutation to be made by _____ [*specify written or oral presentation of authority, or both*].

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent

[2] Use of Form

The form set out in [1], *above*, is for use by a respondent who wishes to request an opportunity to refute matter that the agency has proposed to notice officially in the hearing [*Gov. Code § 11515*]. For discussion of official notice, see *§ 473F.38*.

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§ 473G.42 State Constitution

§ 473G.43 State Statutes

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§ 473G.45 Text References

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§§ 473G.47-473G.49 [Reserved]

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§ 473G.51 Reconsideration of Agency Decision

§ 473G.52 Reinstatement or Reduction of Penalty

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§ 473G.01 Scope of Chapter

This chapter discusses the procedures for issuing a decision following an agency adjudication under California public administrative law. The legal background discussion in Part II includes the following:

- Subpart A, discussing the procedural requirements for decisions after formal hearings under the Administrative Procedure Act (APA), including nature of decision process, exclusiveness of the record, ex parte communications, the APA decision process, factual and legal bases of decisions, orders, discovering decision process and reasoning, ALJ decision making, and precedent decisions under the APA [*see §§ 473G.10 -473G.18*].

- Subpart B, discussing the effective date and consequences of an agency decision, including stay of execution, rehearing or reconsideration, correcting mistakes or clerical errors in decisions, consequences of decision, and reinstatement of licenses [*see §§ 473G.30 -473G.36*].

Part V includes a form of petition for reconsideration [*see § 473G.70*] and a form of petition for restoration of rights [*see § 473G.71*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationImpartialityEx Parte Contacts

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§ 473G.02 Cross References

[1] Related Coverage of Agency Adjudication

For related discussion and forms providing more detailed coverage of the other stages of an agency adjudication under the formal hearing provisions of the APA, see:

- Ch. 473, *Public Agency Adjudication*.
- Ch. 473A, *Commencing Agency Adjudication*.
- Ch. 473B, *Discovery in Agency Adjudications*.
- Ch. 473C, *Prehearing Procedures in Agency Adjudications*.
- Ch. 473D, *Prehearing Preparations in Agency Adjudications*.
- Ch. 473E, *Public Administrative Law Judges*.
- Ch. 473F, *Agency Adjudication Hearings*.

For related discussion and forms providing more detailed coverage of adjudication methods under the APA other than that of formal hearing, see Ch. 473H, *Alternative Adminstrative Adjudication Procedures* .

For detailed discussion and forms relating generally to licensing agencies, including licensing adjudications, see Ch. 471B, *Licensing by Public Agencies* .

[2] Judicial Review

For detailed discussion and forms relating generally to review by California courts of agency adjudications, see:

- Ch. 474, *Availability of Judicial Review of Agency Decisions*.
- Ch. 474A, *Timing of Judicial Review of Agency Decisions*.
- Ch. 474B, *Standards in Reviewing Agency Decisions*.
- Ch. 474C, Procedures in Reviewing Agency Decisions.

For other related discussion and forms relating to judicial review generally, see:

- Ch. 40 et seq., *Appeal* (discussion and forms relating to civil appeals).
- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to immediate judicial review of orders by extraordinary writ of mandate or prohibition).
- Ch. 492, *Review (Certiorari), Writ of* (discussion and forms relating to immediate judicial review of civil proceedings by extraordinary writ of review).

[3] Public Administrative Law Generally

For related discussion of California public administrative law generally, including discussion of public agency functions and powers (including adjudicative or quasi-judicial powers), and organization generally, see Ch. 470, *Overview of Public Administrative Law* (for general discussion of judicial power, *see § 470.12[5]*). For detailed discussion of the general procedures imposed in agency proceedings by constitutional due process and related statutory requirements, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

For discussion and forms relating to the law governing access to and conduct of meetings by California public agencies, see Ch. 470B, *Public Agency Meetings* .

For detailed discussion and forms relating to the law governing disclosure of public records under the California Public Records Act [*Cal. Gov. Code §§ 6250 et seq.*], see Ch. 470C, *Public Records Act* .

For detailed discussion and forms relating generally to agency investigations and inspections, see:

- Ch. 471, *Investigations by Public Agencies*.
- Ch. 471A, *Inspections by Public Agencies.*

For detailed discussion and forms relating generally to the legislative or rulemaking functions of California public agencies, including judicial review of these functions, see:

- Ch. 472, *Public Agency Rules*.
- Ch. 472A, *Agency Rulemaking Procedures*.
- Ch. 472B, *Review of Agency Rulemaking*.

[4] Other Related Chapters

For related coverage of adjudicative proceedings before particular public agencies, see *Ch. 470, Overview of Public*

Administrative Law, § 470.02[2].

For discussion and forms relating to decisions or judgements in civil actions generally, see Ch. 318, *Judgments* .

For discussion and forms relating to direct or collateral relief from judgments in civil actions generally, see Ch. 489, *Relief From Judgments and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawJudicial ReviewGeneral Overview

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[Reserved]

§§ 473G.03[Reserved]

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§ 473G.10 Nature of Decision Process

This subpart explains the due process rule that requires a decision in an administrative adjudication hearing to be based solely on the record created at that hearing. It covers the administrative decision making process, including proposed and final decisions under the California Administrative Procedure Act (APA; *Gov. Code § 11340 et seq.*), findings of fact, determinations of issues, and orders. The rules regarding ex parte communications with the presiding officer are also examined. This subpart also contains a practical discussion of considerations that influence the decisions of an administrative law judge (ALJ).

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationImpartialityEx Parte ContactsConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of Protection

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§ 473G.11 Exclusiveness of the Record

[1] Due Process Requirement

Due process of law requires that adjudicatory administrative decisions be full and fair and based solely on evidence that is part of the record [*Button v. Board of Administration (1981) 122 Cal. App. 3d 730, 738, 176 Cal. Rptr. 218]* . Fairness and justice demand that those decisions not be based on secret evidence that the parties cannot challenge and rebut [*Carstens v. Pillsbury (1916) 172 Cal. 572, 576-577, 158 P. 218]* . Administrative agencies that exercise quasi-judicial powers and are required to make a determination after a hearing cannot act on their own information [*Franz v. Board of Medical Quality Assurance (1982) 31 Cal. 3d 124, 139-141, 181 Cal. Rptr. 732, 642 P.2d 792* ; *English v. City of Long Beach (1950) 35 Cal. 2d 155, 158, 217 P.2d 22]* . Nothing may be treated as evidence if it has not been introduced as such, because a hearing requires that the party be apprised of the evidence against him or her in order to refute, test, and explain it [*La Prade v. Department of Water & Power (1945) 27 Cal. 2d 47, 51-52, 162 P.2d 13]* .

[2] Purpose of Rule

The exclusiveness of the record rule serves three purposes [*Fairbanks v. Alaska Pub. Utils. Comm'n (Alaska 1980) 611 P.2d 493, 495* ; *see Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 516-517, 113 Cal. Rptr. 836, 522 P.2d 12* (agency granting variance from zoning ordinance must make appropriate findings, so that record enables parties to seek review)]:

- It helps to insure that the agency does not make decisions that have no adequate basis in fact.

- It gives opposing parties the opportunity to challenge the agency's reasoning process and the correctness of the decision.

- It affords reviewing courts the opportunity to evaluate the agency's decision.

It was reversible error for the superior court to decide an administrative mandamus case and to deny the petition without

reviewing the administrative record. In denying the petition before the administrative record had been prepared, the court was unable to weigh the evidence and to decide the sufficiency of the evidence to support the fact findings that provided the basis for the agency decision [*Ocheltree v. Gourley (2002) 102 Cal. App. 4th 1013, 1017-1018, 126 Cal. Rptr. 2d 77]* .

Evidence taken outside the record will not be grounds for reversal of the decision if the circumstances show that no likelihood for prejudice existed [*see Gore v. Board of Medical Quality Assurance (1980) 110 Cal. App. 3d 184, 191-192, 167 Cal. Rptr. 881* (fact that panel member had acted improperly in making agency decision was not grounds for reversal, when panel subsequently made same decision without that member, and no evidence was introduced to show that other members were affected by his improper conduct)].

[3] Application of Rule

The exclusiveness of the record rule has been applied in many settings. It prevents an administrative law judge (ALJ) from deciding an issue that was precluded from the hearing; only the record of what is at issue during the hearing becomes part of the record for decision [*see Button v. Board of Administration (1981) 122 Cal. App. 3d 730, 738-739, 176 Cal. Rptr. 218* (in hearing by retiree to change retirement status from "service" to "disability," ALJ's finding that retiree was not disabled on retirement was improper, because existence of disability was not at issue)].

An expert opinion based on the transcripts of a hearing, which was not received into evidence but was communicated to a board without the knowledge of the affected party, cannot be used by the board to decide the case [*Rogers v. Retirement Board (1952) 109 Cal. App. 2d 751, 757-758, 241 P.2d 611* ; *see Corcoran v. S.F. etc. Retirement System (1952) 114 Cal. App. 2d 738, 745, 251 P.2d 59* (retirement board's use of doctors' reports, received in evidence by board after submission of the case, was improper)].

An agency cannot determine that topless waitresses are contrary to public welfare and morals without evidence in the record regarding the evils alleged to be causally associated with topless waitresses [*Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal. 3d 85, 103-104, 84 Cal. Rptr. 113, 465 P.2d 1]* . The rule was not applied, however, in a case in which a penalty was mitigated after a suggestion to do so was received from the deciding authority's superior. The court concluded that the deciding authority did not change its decision based on any extrinsic evidence or information [*Guilbert v. Regents of University of California (1979) 93 Cal. App. 3d 233, 242-243, 155 Cal. Rptr. 583]* .

[4] APA Requirements

Agencies that are required to follow Chapter 5, the formal hearing provisions of the APA (*Gov. Code § 11500 et seq.*), are required to make a decision on the record of the proceeding [*Gov. Code § 11517(c), (d)*]. The Administrative Adjudication " *Bill of Rights*" (*Gov. Code § 11425.10-11425.60*), requires that an agency decision be based on the record of the proceeding [*Gov. Code §§ 11425(a)(6), 11425.50(c)*].

This *bill of rights* sets forth the minimum due process and public interest requirements that must be satisfied in a hearing that is subject to Chapter 4.5, the general adjudication provisions of the APA (*Gov. Code § 11400 et seq.*). This includes hearings by a state agency in which federal or state constitution provisions, or a federal or state statute, require an evidentiary hearing for determination of facts in order to formulate and issue a decision [*Gov. Code § 11410.20*]. It also includes any hearing subject to Chapter 5, the APA'a formal hearing provisions (*Gov. Code § 11500 et seq.*) [*Gov. Code §§ 11410.50, 11501*; *see Ch. 473, Public Agency Adjudication, § 473.15* (discussion of the scope of application of Chapters 4.5 and 5)].

[5] Office of Administrative Hearings Regulations Governing Hearing Procedures

The Office of Administrative Hearings adopted regulations [*1 Cal. Code Reg. §§ 1000-1440* (1997)] to govern hearing procedures in hearings conducted before OAH administrative law judges[*1 Cal. Code Reg. § 1000* (1998)]. The regulations cover the subjects of general APA hearing procedures [*1 Cal. Code Reg. §§ 1000-1046* (1998)], special hearing procedures [*1 Cal. Code Reg. §§ 1100-1148* (1997)], alternative dispute resolution procedures [*1 Cal. Code Reg. §§ 1200-1292* (1999)], arbitration procedures for state contract act claims [*1 Cal. Code Reg. §§ 1300-1393* (1997)], and protest arbitration procedures *1 Cal. Code Reg. §§ 1000-1440* (1998)]. The basic purpose [*1 Cal. Code Reg. § 1000* (1998)], definitions [*1 Cal. Code Reg. § 1002* (1998)], and principles of interpretation [*1 Cal. Code Reg. § 1004* (1998)], are set forth in specific regulations. The regulations that are applicable to Chapter 473G, Agency Adjudication Decisions, include the following: reporting of hearings, administrative records and ordering the transcript [*1 Cal. Code Reg. § 1038* (1998)]; enforcement of orders and sanctions [*1 Cal. Code Reg. § 1040* (1998)]; agency request for costs of investigation and prosecution of the case [*1 Cal. Code Reg. § 1042* (1998)]; request for expenses after default [*1 Cal. Code Reg. § 1044* (1998)]; and briefs and amicus briefs [*1 Cal. Code Reg. § 1046* (1998)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationDecisionsCollateral EstoppelAdministrative LawJudicial ReviewAdministrative RecordGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of Protection

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§ 473G.12 Ex Parte Communications

[1] General Requirements

Violation of the exclusiveness of the record rule frequently takes the form of an ex parte communication to the adjudicator after a matter has been submitted [*see § 473G.11*]. A good example of how far some courts have gone to prevent the use of ex parte communications in decisionmaking is illustrated by a Texas case, *First Savings & Loan, Etc. v. Vandygriff (Tex. Civ. App. 1980) 605 S.W.2d 740* . In this case, the state savings and loan commissioner denied an application for a new savings and loan at a hearing. After the denial was final, organizers of the savings and loan met with the commissioner to give him a different view of the economic conditions in the area where the savings and loan was to be located than that reflected in the order denying the application. The organizers then refiled the application with the commissioner, another hearing was held, and the commissioner approved the application. The court set aside this approval order because of the ex parte contact with the commissioner, even though it occurred when the first order was final and no application was pending, and even though the commissioner stated on the record of the second hearing that the meeting took place but that his new order was based only on the record of the second hearing [*First Savings & Loan, Etc. v. Vandygriff (Tex. Civ. App. 1980) 605 S.W.2d 740, 743]* . Based on a statute prohibiting ex parte communications, it was presumed that the meeting with the organizers led to the findings that supported the new order. The offended party, another savings and loan, did not have to show that the commissioner was persuaded by secret information [*First Savings & Loan, Etc. v. Vandygriff (Tex. Civ. App. 1980) 605 S.W.2d 740, 742]* .

An ex parte communication by a party or interested individual to an ALJ or agency member during an administrative adjudication is defined to be a communication made while a proceeding is pending to the presiding officer in that proceeding by an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication [*Gov. Code § 11430.10(a)*]. Ex parte communications raise the following significant concerns:

- The message will affect the adjudicator's neutrality and objectivity.
- The information or opinion transmitted will not be reflected in the record or be available for

consideration by a court reviewing the adjudicator's decision.

- A party unaware of the content of the communication will be unaware of the need to rebut the information.

Ex parte communications also raise fairness concerns, that both sides will not be heard in a contested case, or that one side has greater influence because that side can present their argument without being challenged by their opponent.

It is unethical for a lawyer to make an improper ex parte communication to a judge or judicial officer upon the merits of a contested matter pending before the judge [*Cal. Rules Prof. Conduct, Rule 5-300(B)*; *Mathew Zaheri Corp. v. New Motor Vehicle Bd. (1997) 55 Cal. App. 4th 1305, 1316-1318, 64 Cal. Rptr. 2d 705* (ex parte communication by counsel to ALJ held to be misconduct but not reversible error)]. It is also improper for judges to make or receive similar ex parte communications from a lawyer in a pending or impending proceeding [Cal. Rules of Ct., Appen., Div. II, Code of Judicial Ethics, Canon 3C(7)].

Ex parte communications are a greater problem in administrative agencies than in civil or criminal litigation, because agencies frequently communicate with regulated industries, licensees, or both, on an ex parte basis when deciding policy issues in rulemaking. Thus, the agency and interested outsiders will be talking frequently about issues of common interest. However, improper ex parte communications are prohibited in contested adjudicative hearings [*see* [2], *below*].

[2] APA Requirements

[a] Definitions and Basic Prohibitions

Under provisions operative July 1, 1997, ex parte communications are improper in some circumstances but not others [*see Gov. Code §§ 11430.10-11430.80*]. The prohibition on ex parte communications provides that while the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication [*Gov. Code § 11430.10(a)*].

For purposes of this prohibition, a proceeding is pending from the issuance of an agency's initial pleading, or from an application for an agency decision, whichever is earlier [*Gov. Code § 11430.10(c)*]. The term "interested person outside the agency" is based on federal administrative law [25 Cal. L. Rev. Comm. Reports 55, 164 (1995); *see 5 U.S.C. § 557(d)(1)(A)*; *see PATCO v. Federal Labor Relation Authority (1982) 685 F.2d 547, 562, 222 U.S. App. D.C. 97* (interpreting the federal standard to include persons with interest beyond that of members of the general public)]. The pendency of a proceeding includes any period of time between the time an application for a hearing is made and the time the agency's pleading is issued [25 Cal. L. Rev. Comm. Reports 55, 164 (1995)].

Furthermore, if, while the proceeding is pending but before serving as presiding officer, a person receives a communication of a type that would violate the provisions of this law if received while the person was serving as a presiding officer, the person, promptly after starting to serve, shall disclose the content of the communication on the record and give all parties an opportunity to address it in the manner provided in *Gov. Code § 11430.50* [*Gov. Code § 11430.40(c)*; *see* [c], *below*].

[b] Permissible Communications

Ex parte communications that are proper under the act include several categories. The first category, permissible communications, include the following:

- Communications, including a communication from an employee or representative of an agency that is a party, made on the record at the hearing [*Gov. Code § 11430.10(b)*].

- Communications that are required for the disposition of an ex parte matter specifically authorized by statute [*Gov. Code § 11430.20(a)*].

- Communications that concern a matter of procedure or practice, including a request for a continuance, that is not in controversy [*Gov. Code § 11430.20(b)*]. This exception does not preclude communications made to a presiding officer or staff assistant regarding noncontroversial matters of procedure and practice, such as the format of pleadings, number of copies required, manner of service, and calendaring and status discussions. Such topics are not considered to be part of the merits of the proceeding provided they are noncontroversial in the context of the specific case [25 Cal. L. Rev. Comm. Reports 55, 165 (1995)].

The second category of permissable ex parte communications, otherwise prohibited from an employee or representative of an agency that is a party to a presiding officer, include communications in the following circumstances:

- The communication is for the purpose of assistance and advice to the presiding officer from a person who has not served as investigator, prosecutor or advocate in the proceeding or its preadjudicative stage. An assistant or advisor may evaluate the evidence in the record but shall not furnish, augment, diminish, or modify the evidence in the record [*Gov. Code § 11430.30(a)*].

- The communication is for the purpose of advising the presiding officer concerning a settlement proposal advocated by the advisor [*Gov. Code § 11430.30(b)*].

- The communication is for the purpose of advising the presiding officer concerning any of the following matters in an adjudicative proceeding that is nonprosecutorial in character [*Gov. Code § 11430.30(c)*]:

  - The advice involves a technical issue in the proceeding and the advice is necessary for, and is not otherwise reasonably available to, the presiding officer, provided the content of the advice is disclosed on the record and all parties are given an opportunity to address it in the manner provided in *Gov. Code § 11430.50* [*Gov. Code § 11430.30(c)(1)*; *see* [c], *below*].

  - The advice involves an issue in a proceeding of the San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water Resources Control Board, or a regional water quality control board [*Gov. Code § 11430.30(c)(2)*].

The third and final category of permissible ex parte communications are:

- The presiding officer's authority to conduct in camera examination of evidence in a proceeding (*see Gov. Code § 11507.7(d), (e)*) is not limited by the prohibition on ex parte communications [25 Cal. L. Rev. Comm. Reports 55, 164 (1995); *Gov. Code § 11430.10*].

- Presiding officers are not prohibited from communicating with adversaries. Only communications from adversaries to presiding officers are precluded. However, presiding officers should give assistance or advice with caution, since there may be an appearance of unfairness if assistance or advice is given to some parties but not others [25 Cal. L. Rev. Comm. Reports 55, 164 (1995); *Gov. Code § 11430.10*].

- Presiding officers are not prohibited from consulting with other agency personnel when the agency conducting the hearing is not a party to the proceeding [25 Cal. L. Rev. Comm. Reports 55, 164 (1995); *Gov. Code § 11430.10*].

[c] Consequences of Violations

When an improper ex parte communication is made, there are three consequences: disclosure, notice and opportunity to respond, and if necessary, disqualification of the presiding officer. If a presiding officer receives an improper communication, the officer must place in the record of the proceeding the following:

- If the communication is written, the writing and any written response of the presiding officer to the communication [*Gov. Code § 11430.50(a)(1)*].

- If the communication is oral, a memorandum stating the substance of the communication, any response made by the presiding officer, and the identity of each person from whom the presiding officer received the communication [*Gov. Code § 11430.50(a)(2)*].

The presiding officer must also notify all parties that an ex parte communication has been made a part of the record [*Gov. Code § 11430.50(b)*]. If a party requests an opportunity to address the communication within 10 days after receipt of notice of the communication [*Gov. Code § 11430.50(c)*]:

- The party must be permitted to comment on the communication [*Gov. Code § 11430.50(c)(1)*].

- The presiding officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that has been concluded [*Gov. Code § 11430.50(c)(2)*].

If a presiding officer receives an improper ex parte communication, the presiding officer may be disqualified [*Gov. Code § 11430.60*]. Disqualification is permitted if it is necessary to eliminate the effect of the ex parte communication [25 Cal. L. Rev. Comm. Reports 55, 169 (1995)].

If the presiding officer is disqualified, the portion of the record pertaining to the ex parte communication may be sealed by protective order of the disqualified presiding officer [*Gov. Code § 11430.60*]. The purpose of sealing is to remove the improper communication from the view of the successor presiding officer, while preserving it as a sealed part of the record, for purposes of subsequent administrative or judicial review. Granting a protective order is permissive, not mandatory, and is within the discretion of the presiding officer who has knowledge of the improper ex parte communication [25 Cal. L. Rev. Comm. Reports 55, 169 (1995)].

[d] Application to Agency Head

Agency heads who are decisionmakers are subject to the same requirements as to ex parte communications with several qualifications [*see Gov. Code § 11405.40* (definition of agency head)]. The same requirements that govern ex parte communications to presiding officers also govern ex parte communications in an adjudicative proceeding to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated [*Gov. Code § 11430.70(a)*].

There is, however, an exception that applies to individualised ratemaking proceedings. An ex parte communication to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated is permissible in an individualized ratemaking proceeding if the content of the communication is disclosed on the record

and all parties are given an opportunity to address it in the manner provided in *Gov. Code § 11430.50* [*Gov. Code § 11430.70(b)*; *see* [c], *above*].

Furthermore, there is a prohibition on direct or indirect communication, while a proceeding is pending regarding the merits of any issue in the proceeding, between the presiding officer and the agency head or other person or body to which the power to hear or decide in the proceeding is delegated [*Gov. Code § 11430.80(a)*]. This rule does not apply when the agency head or other person to which the power to hear or decide in the proceeding is delegated serves as both presiding officer and agency head, or when the presiding officer does not issue a decision in the proceeding [*Gov. Code § 11430.80(b)*].

[3] Non-APA Requirements

Non-APA proceedings are governed essentially by the general provision of *Cal. Rules Prof. Conduct, Rule 5-300(B)*, which prohibits an attorney who is a member of the California State Bar from communicating with a judicial officer on the merits of a contested matter before that officer, except in open court or under other exceptions [*Cal. Rules Prof. Conduct, Rule 5-300(B)*; other exceptions include consent and ex parte matters, *see Cal. Rules Prof. Conduct, Rule 5-300(B)(1)-(5)*].

This rule has been interpreted to apply to administrative proceedings. [California State Bar Formal Ethics Opinion No. 1984-82; *see* Ch. 72, *Attorney Practice and Ethics*]. Because of the scope of the APA ex parte requirements, non-APA requirements would apply primarily to hearings before local agencies [*see Ch. 473, Public Agency Adjudication, § 473.15*].

The California Court of Appeal held that an ex parte communication by the chief of staff of a hospital to the Board of directors of the hospital that related to the Board's decision to terminate a doctor's staff privileges was not improper (even though the content of the chief of staff's report was not placed in the record of the peer review proceeding) because the doctor failed to raise the issue before the Board, thereby waiving the right to raise the issue on appeal, and because the doctor failed to show actual bias from the giving of the report to the board as such reports were authorized by the constitution of the medical staff [*Weinberg v. Cedars Sinai Med. Ctr. (2004) 119 Cal. App. 4th 1098, 1115, 15 Cal. Rptr. 3d 6]* .

When an agency attorney advises a non-APA agency during the pendency of an administrative proceeding, issues of procedural due process may also arise [*see Midstate Theatres, Inc. v. County of Stanislaus (1976) 55 Cal. App. 3d 864, 875-876, 128 Cal. Rptr. 54* (member of county counsel's office represented county assessor and also advised the board of supervisors holding tax assessment hearing); *Ford v. Civil Service Commission (1958) 161 Cal. App. 2d 692, 697, 327 P.2d 148* (county counsel's office advised civil service commission, which held discharge hearing, and also represented employer); *see also* Ch. 470A, *Due Process Restrictions on Public Agencies* , for further discussion of due process in administrative hearings].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationImpartialityGeneral OverviewAdministrative LawAgency AdjudicationImpartialityEx Parte ContactsGovernmentsLocal GovernmentsAdministrative BoardsLegal EthicsProfessional ConductGeneral Overview

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Chapter 473G AGENCY ADJUDICATION DECISIONS
PART II. LEGAL BACKGROUND
A. Procedural Requirements for Decisions After Formal Hearings

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§ 473G.13 Administrative Decisions Under the APA

[1] Alternative Hearing Procedures

Under the APA, the agency itself may hear a case with an ALJ presiding [*Gov. Code § 11517(a), (b)*; *see* [2], *below*], or the case may be heard by an ALJ alone [*Gov. Code § 11517(c)(1)*; *see* [3], *below*]. The agency determines which hearing option will be used [*Gov. Code §§ 11512(a), 11517(a)*]. For further discussion of these two hearing options, see Ch. 473E, *Public Administrative Law Judges* . As discussed in [2]-[5], *below*, the decisionmaking procedure in a particular case depends on the hearing option used.

[2] Decision When Agency Itself Hears Case

[a] Preparation of Decision

When the agency itself hears the case [*Gov. Code § 11517(b)*], its decision is normally prepared by the ALJ that presides at the hearing and advises the agency [*see Gov. Code § 11512(c)(1)* (duties of presiding ALJ); *see also* Ch. 473E, *Public Administrative Law Judges* (role of ALJs)]. The ALJ is expected to be present during the consideration of the case, and, if requested, shall assist and advise the agency in making its decision [*Gov. Code § 11517(b)(1)*]. No proposed decision is required. The decision is final, and its findings reflect a consensus of the agency members' views of the evidence. It must be issued by the agency within 100 days after the case has been submitted [*Gov. Code § 11517(b)(3)*].

[b] Vote of Members

When a contested case is heard before an agency itself, no member of the agency who did not hear the evidence may vote on the decision [*Gov. Code § 11517(b)(2)*]. The California Supreme Court has held that this provision does not require auditory perception of all the evidence by each board member who votes [*Cooper v. State Bd. of Medical Examiners (1950) 35 Cal. 2d 242, 246, 217 P.2d 630]* . The agency members must be acquainted with the record and exercise their own independent judgment on the case, but need not be physically present when the evidence is produced [*Cooper v. State Bd. of Medical Examiners (1950) 35 Cal. 2d 242, 246, 217 P.2d 630* ; *see* *Old Santa Barbara Pier*

Co. v. State of California (1977) 71 Cal. App. 3d 250, 255-257, 139 Cal. Rptr. 332 (interpreting similar provision applicable to coastal zone conservation commission)].

[3] Proposed Decision When ALJ Hears Case

[a] Time Limit for Decision

In most APA adjudicatory proceedings, an ALJ hears the case alone [*see Gov. Code § 11517(c)(1)*]. He or she must prepare a written proposed decision for the agency within 30 days after the case is submitted, in a form that may be adopted as the decision in the case [*Gov. Code § 11517(c)(1)*; *see* Ch. 473E, *Public Administrative Law Judges* (role of ALJs)]. No penalty is imposed when an ALJ renders a written proposed decision more than 30 days after the case is submitted thereby violating the 30 day time limit (e.g., decision was rendered 120 days late). The time limits are directory, not mandatory, and *Gov. Code § 11517(c)(1)* does not specify any penalty for the ALJ's failure to render a timely decision [*Anserv Insurance Services Inc. v. Kelso (2000) 83 Cal. App. 4th 197, 207-208, 99 Cal. Rptr. 2d 357]* .

Failure of the ALJ to deliver a proposed decision within the time required does not prejudice the rights of the agency in the case. Thirty days after the receipt of the proposed decision, a copy of the proposed decision shall be filed by the agency as a public record and shall be served by the agency on each party and his or her attorney. The filing and service is not an adoption of a proposed decision by the agency [*Gov. Code § 11517(c)(1)*].

[b] Agency's Options on Receiving Decision

On receipt of the proposed decision, the agency will take one of the following actions [*Gov. Code § 11517(c)(2)*]:

- Adopt the proposed decision in its entirety [*Gov. Code § 11517(c)(2)(A)*; *see* [4], *below*].

- Adopt the decision but reduce or otherwise mitigate the proposed penalty [*Gov. Code § 11517(c)(2)(B)*; *see* [4], *below*].

- Make technical or other minor changes in the proposed decision and adopt it as the decision. Action by the agency is limited to a clarifying change or a change of a similar nature that does not affect the factual or legal basis of the proposed decision [*Gov. Code § 11517(c)(2)(C)*; *see* [4], *below*].

- Reject the proposed decision, and decide the case itself on the record created before the ALJ, including the transcript, or an agreed statement of the parties [*Gov. Code § 11517(c)(2)(E)*; *see* [5][a], *below*].

- Reject the proposed decision, and refer (remand) the case to the ALJ who presided, or another ALJ, to take additional evidence [*Gov. Code § 11517(c)(2)(D)*; *see* [5][b], *below*].

In APA proceedings, however, almost all proposed ALJ decisions are adopted by the agency. A similar system applies in non-APA proceedings [*see, e.g., Lab. Code § 5315* (appeals board may accept, modify, or reject decision of workers' compensation judge); *Pub. Util. Code § 311(b)* (commissioner may adopt, modify, or reject proposed decision of ALJ) *Golde v. Fox (1979) 98 Cal. App. 3d 167, 188, 159 Cal. Rptr. 864* (real estate commissioner is not required to accept the ALJ's recommendation)]. In contrast, under the federal administrative system, an initial decision by an ALJ becomes the decision of the agency without further proceedings, unless appealed [*see 5 U.S.C. § 557(b)*].

[c] Deemed Adoption

The ALJ's proposed decision will be deemed adopted by the agency 100 days after delivery to the agency, unless within

that time the agency either notifies the parties that the proposed decision is not adopted and commences proceedings to decide the case on the record [*see Poliak v. Board of Psychology (1997) 55 Cal. App. 4th 342, 348-349, 63 Cal. Rptr. 2d 866* (agency notice of nonadoption following vote not to adopt proposed decision satisfies requirement of commencing proceedings within 100 days); *see also* [5][a], *below*], or remands the case to the ALJ to take additional evidence [*Gov. Code § 11517(c)(2)*; *see Gov. Code § 11517(c)(2)(D)*; *see also* [5][b], *below*].

The California Court of Appeal held that the proposed decision of an administrative law judge was deemed adopted under the provisions of *Gov. Code § 11517(c)(2)* when the Department of Health Services rejected the proposed decision of the ALJ within 100 days, but the Department then failed to issue a final decision within 100 days of the rejection of the ALJ's proposed decision [*St. Francis Medical Center v. Shewry (2005) 134 Cal. App. 4th 1556, 1559-1561, 36 Cal. Rptr. 3d 895]* .

Within 30 days after receiving a proposed decision, however, the agency must file a copy of the decision as a public record, and serve copies on each party and his or her attorney [*Gov. Code § 11517(c)(1)*; *see* Ch. 470C, *Public Records Act*]. The filing and service is not an adoption of a proposed decision by the agency [*Gov. Code § 11517(c)(1)*]. For this reason, agencies usually decide what action to take on the case within 30 days after receiving the proposed decision, rather than waiting up to the 100-day period for automatic adoption to notify the parties of its action [*Gov. Code § 11517(c)(2)*]. However, the 30-day time limit is directory, not jurisdictional, and an agency has 100 days under the statute to decide whether or not to reject the proposed decision, and decide the case itself [*Outdoor Resorts etc. Owners' Assn. v. Alcoholic Beverage Control Appeals Bd. (1990) 224 Cal. App. 3d 696, 703, 273 Cal. Rptr. 748]* .

While the agency is deciding what action to take within this 30-day period, the parties are not entitled to have a copy of the ALJ's proposed decision served on them [*Greer v. Board of Education (1975) 47 Cal. App. 3d 98, 111, 121 Cal. Rptr. 542* ; *American Federation of Teachers v. San Lorenzo Unified School Dist. (1969) 276 Cal. App. 2d 132, 136, 80 Cal. Rptr. 758]* .

[4] Adoption of Proposed ALJ Decision

When the agency adopts the ALJ's proposed decision, the agency does not have to read or familiarize itself with the record [*Hohreiter v. Garrison (1947) 81 Cal. App. 2d 384, 393-399, 184 P.2d 323* ; *see Gov. Code § 11517(c)(2)(A)*]. This rule allows the agency to exercise adjudicatory power, without requiring it to review the record in a case in which an opportunity for a fair hearing has already been afforded before the ALJ [*Hohreiter v. Garrison (1947) 81 Cal. App. 2d 384, 398, 184 P.2d 323]* . This same rule also applies in non-APA proceedings [*see Nat. Auto. & Cas. Co. v. Ind. Acc. Com. (1949) 34 Cal. 2d 20, 30, 206 P.2d 841* (under Labor Code provision, commission could follow referee's recommendation, without reviewing the record, and could make a decision contrary to referee's recommendation after reviewing the record)]. In contrast, if the agency rejects the proposed decision and decides the case itself, the decision must be based on the record [*Gov. Code § 11517(c)(2)(D)*; *see* [5][b], *below*].

However, the ALJ's proposed decision has to be based on the record. Agencies that are required to follow Chapter 5, the formal hearing provisions of the APA (*Gov. Code § 11500 et seq.*), are required to make a decision on the record of the proceeding [*Gov. Code § 11517(c)(1), (2)*]. The Administrative Adjudication *Bill of Rights* (*Gov. Code §§ 11425.10-11425.60*), requires that an agency decision be based on the record of the proceeding [*Gov. Code §§ 11425(a)(6), 11425.50(c)*]. Further, it sets out minimum due process and public interest requirements that must be satisfied in a hearing that is subject to Chapter 4.5, the general administrative adjudication of APA (*Gov. Code § 11400 et seq.*), which includes state agency hearings in which an evidentiary hearing is required by federal or state constitution provisions (due process) or federal or state statutes in order to formulate a decision [*Gov. Code § 11410.20*]. These requirements also apply to agency hearings subject to the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*) [*Gov. Code §§ 11410.50, 11501*; *see Ch. 473, Public Agency Adjudication, § 473.15*].

The agency can make the following changes to a proposed ALJ decision on adoption [*Gov. Code § 11517(c)(2)*]:

- Reduce or otherwise mitigate the proposed penalty [*Gov. Code § 11517(c)(2)(B)*].

- Make technical or other minor changes. Action by the agency is limited to a clarifying change or a change of a similar nature that does not affect the factual or legal basis of the decision [*Gov. Code § 11517(c)(2)(C)*].

In these situations the agency makes the appropriate change and adopts the balance of the proposed decision [*Gov. Code § 11517(c)(2)(B), (C)*].

[5] Rejection of Proposed ALJ Decision

[a] Decision on Record

If the agency rejects the ALJ's proposed decision, it may decide the case on the record, including the transcript, or an agreed statement of the parties, with or without taking additional evidence [*Gov. Code § 11517(c)(2)(E)*].

The record includes the transcript, or an agreed statement of the parties [*Gov. Code § 11517(c)(2)(E)*], any additional evidence taken [*Gov. Code § 11517(c)(2)(E)*], the proposed decision, and all other evidence received [*see Gov. Code § 11523* (complete record for purposes of judicial review)].

A copy of the record must be made available to the parties. The agency may require payment of fees covering direct costs of making the copy [Gov. Code § 11517(c)(2)(E)]. On stipulation of the parties, the agency may decide the case on the record without including the transcript [*Gov. Code § 11517(c)(2)(E)*]. In making any decision on the record, the agency must allow the parties to present either oral or written argument before the agency itself [*Gov. Code § 11517(c)(2)(E)*; *Ventimiglia v. Board of Behavioral Sciences (2008) 168 Cal. App. 4th 296, 299-300, 85 Cal. Rptr. 3d 423* (licensee entitled to present oral or written argument before agency under *Gov. Code § 11517(c)(2)(E)(ii)* on remand to agency following judicial review by petition for writ of administrative mandate. Board's failure to allow argument before board by licensee was an abuse of discretion for failure to follow procedures required by law under *Code Civ. Proc. § 1094.5*)].

The agency elects the form of the argument [*see McGraw v. Department of Motor Vehicles (1985) 165 Cal. App. 3d 490, 493-495, 211 Cal. Rptr. 620* (court held, in interpreting parallel Vehicle Code provision, that the agency has the discretion to determine whether the argument will be oral or written)]. If the agency receives additional oral evidence [*see Compton College Federation of Teachers v. Compton Community College Dist. (1980) 108 Cal. App. 3d 437, 441, 166 Cal. Rptr. 595* (board rejected proposed decision and conducted hearing to receive additional evidence regarding student enrollment as it affected teacher's lay-off)], all members who vote on the decision must hear the oral evidence [*Gov. Code § 11517(c)(2)(E)*].

The agency's decision authority includes the authority to decide some but not all issues in the case [*Gov. Code § 11517(c)(2)(E)*]. When deciding the case itself, the agency can adopt all of the ALJ's proposed decision, except for the proposed penalty. The agency can reject the proposed penalty, and can impose a greater penalty under the provisions of former *Gov. Code § 11517(c)* [*Alford v. Dep't of Motor Vehicles (2000) 79 Cal. App. 4th 560, 562-563, 94 Cal. Rptr. 2d 222]* .

When the agency decides the case itself on the record created before the ALJ, it is necessary that the agency members who vote on the decision be familiar with the record. Although they did not actually hear the evidence and were not physically present when the evidence was produced, deciding agency members must be acquainted with the record and exercise their own independent judgment on the case [*Cooper v. State Bd. of Medical Examiners (1950) 35 Cal. 2d 242, 246, 217 P.2d 630* ; *see* [2][b], *above*].

It is not completely clear whether or not agency members must actually read the entire transcript that is part of the record, but that action probably is not required [*see Allied Compensation Ins. Co. v. Industrial Acci. Com. (1961) 57 Cal. 2d 115, 119-120, 17 Cal. Rptr. 817, 367 P.2d 409* (obligation of panel members is to achieve a substantial understanding of the record by any reasonable means, including the use of the referee's summary); *Moyer v. State Board of Equalization (1956) 140 Cal. App. 2d 651, 655, 295 P.2d 583* (in order to "review" the evidence at reconsideration hearing, the agency members need not read the full transcript); *but see Morgan v. United States (1936) 298 U.S. 468, 481, 56 S. Ct. 906, 80 L. Ed. 1288* (court found that required hearing was denied when secretary of agriculture, who signed rate order, did not hear or read any evidence presented at the hearing)].

The limits of informed judgment have not yet been set; however, one court has stated that when an agency calls for a transcript of a hearing conducted by an ALJ and also receives additional evidence itself [*see Gov. Code § 11517(c)(2)(E)*], the agency must examine the record including the transcript of evidence presented before the hearing officer [*Feist v. Rowe (1970) 3 Cal. App. 3d 404, 418, 83 Cal. Rptr. 465]* . However, the agency decisionmaker is not required by due process of law requirements to be physically present when the evidence is produced. Due process requires that the decisionmaker read and consider the evidence, or a transcript of the evidence [*Bockover v. Perko (1994) 28 Cal. App. 4th 479, 487-488, 34 Cal. Rptr. 2d 423]* . There is no due process violation in agency procedures that allow the agency to reject the administrative law judge's recommendation as to a decision without providing the affected person an additional opportunity to present oral or written argument to the agency [*Boctor v. Los Angeles County Metropolitan Transit Authority (1996) 48 Cal. App. 4th 560, 571-572, 55 Cal. Rptr. 2d 861]* .

When the agency commences proceedings to decide the case upon the record and has ordered a transcript of the proceeding, the agency has 100 days from delivery of the transcript to make its decision [*Gov. Code § 11517(c)(2)(E)*]. If the agency finds that special circumstances require more time, it can issue an order that delays its decision for up to 30 more days and specifies the reasons for delay [*Gov. Code § 11517(c)(2)(E)*]. Although the APA does not expressly provide a decision period when the parties stipulate that a transcript is not required [*see Gov. Code § 11517(c)(2)(E)*], the decision must probably be made 100 days from the date of the stipulation. Since transcripts are usually called for, this issue rarely arises.

When an agency rejects an ALJ's proposed decision and decides a case itself, its decision is prepared by its staff. The APA does not appear to require the agency to have an ALJ preside when it decides a case itself, even though argument is heard and additional evidence may be received [*Gov. Code § 11517(c)(2)(E)*; *Yanke v. State Dep't of Public Health (1958) 162 Cal. App. 2d 600, 603, 328 P.2d 556* ; *Chosick v. Reilly (1954) 125 Cal. App. 2d 334, 336, 270 P.2d 547]* . An ALJ is required to be present during an agency's consideration of a case when the agency originally hears that case [*Gov. Code § 11517(a), (b)(1)*], but this provision does not expressly apply to cases in which the agency makes its own decision after rejecting an ALJ's proposed decision [*see Gov. Code § 11517(c)(2)(E)*].

A community college district that was required to follow APA procedure prior to terminating an instructor validly terminated the instructor even though it issued a pre-termination notice prior to a required hearing before an ALJ. Although this notice violated the provisions of *Gov. Code § 11517*, which does not allow the agency to make a final decision before the ALJ has held the hearing and written a proposed decision, the court construed the notice to be valid. Furthermore, the instructor was given a fair hearing before the ALJ, and the agency's final decision to terminate the instructor was reached by the agency after considering the ALJ's proposed decision. Finally, the agency adopted a timely final decision prior to the effective date of termination [*California Teachers Association v. Butte Community College District Board of Trustees (1996) 48 Cal. App. 4th 1293, 1303-1306, 56 Cal. Rptr. 2d 269]* .

[b] Remand to ALJ

During the 100-day period before a proposed decision is deemed adopted [*Gov. Code § 11517(c)(2)*], the agency may refer the case back, that is, remand the case, to the same ALJ, if reasonably available, otherwise, to another

administrative law judge, to take additional evidence [*Gov. Code § 11517(c)(2)(D)*]. Remands are usually granted when new evidence has become available or the agency sets aside a default to allow a respondent to present evidence [*see Gov. Code § 11520(b), (c)*].

The ALJ hears the additional evidence and prepares another proposed decision on the additional evidence, transcript, and other papers that are part of the record of the prior hearing [*Gov. Code § 11517(c)(2)(D)*; *see* [a], *above*]. Copies of the proposed decision must be provided to each party and his or her attorney, as in an initial proposed decision [*Gov. Code § 11517(c)(1)*; *see* [3], *above*]. The agency can adopt this second proposed decision without being familiar with the record, just as it could adopt the first decision [*Strode v. Board of Medical Examiners (1961) 195 Cal. App. 2d 291, 297-298, 15 Cal. Rptr. 879* ; *see* [4], *above*].

[6] Time Limits for Decision

Most statutory time limits in administrative proceedings are "directory" rather than "mandatory" or jurisdictional in nature, unless a contrary intent is clearly expressed [*see* E dwards v. *Steele (1979) 25 Cal. 3d 406, 410, 158 Cal. Rptr. 662, 599 P.2d 1365* (board's failure to comply with time limitations for decision on appeal did not have effect of invalidating its actions taken after the deadline; intent of ordinance was to ensure that aggrieved party would have reasonably timely hearing and decision on administrative appeal); *Compton College Federation of Teachers v. Compton Community College Dist. (1980) 108 Cal. App. 3d 437, 443, 166 Cal. Rptr. 595* (statute requiring that order of teachers' seniority be determined within specific time period was directory, rather than mandatory; noncompliance did not invalidate action taken by board)].

Time limits are treated as mandatory, however, when a statute setting the limit makes time of the essence and specifies the consequences of noncompliance [*Palmer v. City of Ojai (1986) 178 Cal. App. 3d 280, 293, 223 Cal. Rptr. 542* (provision of Gov. Code requiring agency to take action within specified time after receiving application for development project was mandatory, because penalty was specified); *see City of Coronado v. California Coastal Zone Conservation Com. (1977) 69 Cal. App. 3d 570, 576-577, 138 Cal. Rptr. 241* (decision of coastal commission denying application for permit became final after 60 days; party appealing denial could not waive that statutory period and later obtain permit)]. It is unlikely, therefore, that the automatic adoption period of 100 days after delivery of the proposed decision to the agency is merely directory [*Gov. Code § 11517(c)(2)*; *see* [3][c], *above*].

[7] Service and Effective Date of Decision

A California APA agency's decision in a case, whether it is the agency's own decision or its adoption of an ALJ proposed decision, must be filed immediately on issuance and becomes a public record [*Gov. Code § 11517(d)*]. Copies of the decision must be delivered to the parties personally or sent to them by registered mail [*Gov. Code §§ 11517(d), 11518*]. A copy must also be served on each party's attorney [*Gov. Code § 11517(d)*].

The agency's decision becomes effective 30 days after it is delivered or mailed to the respondent unless one of the following occurs [*Gov. Code § 11519(a)*]:

- A reconsideration is ordered within that time [*Gov. Code § 11521*; *see § 473G.33*].
- The agency orders that the decision become effective sooner.
- A stay of execution is granted [*see Gov. Code § 11519(b)*; *see § 473G.32*].

For further discussion of the effective date, see *§§ 473G.30, 473G.31, below* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawAgency AdjudicationPresiding OfficersGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawAgency AdjudicationPresiding OfficersDuties & PowersConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral Overview

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§ 473G.14 Factual and Legal Basis of Decision

[1] APA Requirement

The APA Administrative Adjudication *Bill of Rights* (*Gov. Code §§ 11425.10-11425.60*) requires that an agency decision be in writing, be based on the record of the proceeding, and include a statement of the factual and legal basis of the decision [*Gov. Code §§ 11425(a)(6), 11425.50(a)*]. *Gov. Code § 11425.10* sets forth the minimum due process and public interest requirements that must be satisfied in a hearing that is subject to Chapter 4.5, the APA's general administrative adjudication provisions (*Gov. Code § 11400 et seq.*), which includes state agency hearings when, under the federal or state constitution or a federal or state statute, an evidentiary hearing for determination of facts is required to formulate and issue a decision [*Gov. Code § 11410.20*]. These requirements also apply to agency hearings that are subject to the Chapter 5, the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*) [*Gov. Code §§ 11410.50, 11501*; *see Ch. 473, Public Agency Adjudication, § 473.15*].

The statement of the factual basis for the decision may be in the language of, or by reference to, the pleadings. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the decision. If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it [*Gov. Code § 11425.50(b)*].

The statement of the factual basis for the decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding. The presiding officer's experience, technical competence, and specialized knowledge may be used in evaluating evidence [*Gov. Code § 11425.50(c)*; *Vinson v. Snyder (1999) 75 Cal. App. 4th 182, 186-188, 89 Cal. Rptr. 2d 44* (presiding officer may use his or her experience, technical competence, and specialized knowledge to evaluate evidence without establishing the officer's basis for expertise in the record)]. The information that may be contained in the decision, including a summary of the evidence relied on, is not limited by the

requirments of this statute [*Gov. Code § 11425.50(d)*].

Finally, a penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule subject to the rulemaking provisions of Chapter 3.5, the administrative regulation and rulemaking provisions of the APA (*Gov. Code § 11340 et seq.*), unless it has been adopted as a regulation pursuant to that chapter [*Gov. Code § 11425.50(e)*; for discussion of the APA rulemaking provisions, *see* Ch. 472, *Public Agency Rules* , et seq.].

Requiring a statement of the factual and legal basis of the decision is consistent with similar requirements in the trial courts [*Gov. Code § 11425.50(a)*; *see Code Civ. Proc. § 632* and Ch. 551, *Trials*]. Under prior law, fact findings were required in administrative adjudicatory proceedings [*Swars v. Council of City of Vallejo (1949) 33 Cal. 2d 867, 871, 206 P.2d 355* ; *Respers v. University of Cal. Retirement System (1985) 171 Cal. App. 3d 864, 873, 217 Cal. Rptr. 594* ; *Farmer v. City of Inglewood (1982) 134 Cal. App. 3d 130, 138 n.7, 185 Cal. Rptr. 9]* when the agency acted in an adjudicatory capacity. Fact findings are not required when an agency acts in a quasi-legislative capacity, unless required by statute [*Stauffer Chemical Co. v. Air Resources Board (1982) 128 Cal. App. 3d 789, 793-795, 180 Cal. Rptr. 550* ; *City of Rancho Palos Verdes v. City Council (1976) 59 Cal. App. 3d 869, 882-891, 129 Cal. Rptr. 173]* .

Under the law operative July 1, 1997, factual and legal basis for the decision are used in place of the terms fact findings and legal conclusions. It is likely that providing a factual basis for a specific agency decision will satisfy fact finding requirements.

[2] Form and Function

[a] Need for Factual Basis Supported by Substantial Evidence

The form of agency factual bases vary, but their common function has been clearly set out in *Topanga Assn. for a Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 113 Cal. Rptr. 836, 522 P.2d 12* , which applies to all agency findings, state and local, APA and non-APA, that are subject to administrative mandate proceedings [*Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 514 n.12, 113 Cal. Rptr. 836, 522 P.2d 12* ; *Code Civ. Proc. § 1094.5* (administrative mandate provision); *see* Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq. (mandate and other forms of judicial review)].

Under *Topanga*, the agency that renders the challenged decision must set forth findings to "bridge the analytic gap between the raw evidence and ultimate decision or order" [*Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 515, 113 Cal. Rptr. 836, 522 P.2d 12*]. The focus is on the findings, not just the ultimate action of an agency. The findings must be supported by substantial evidence, and the ultimate action must be supported by the findings [*Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 515, 113 Cal. Rptr. 836, 522 P.2d 12* ; *see Parkmerced Residents Organization v. San Francisco Residential Rent Stabilization Etc. Bd. (1989) 210 Cal. App. 3d 1235, 1243, 258 Cal. Rptr. 774* (basic findings must be supported by evidence and ultimate findings must flow rationally from basic findings)].

If the agency's ultimate action had to be supported by substantial evidence, court review of agency actions would be almost useless and the purposes for proper findings would not be served. On review, therefore, both the evidence and the agency's ultimate decision are compared to the findings, not to each other [*Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 515, 113 Cal. Rptr. 836, 522 P.2d 12*]. The factual bases for decision under the APA provisons operative July 1, 1997, are equivalent to the findings in the *Topanga* decision.

[b] Use of Factual Bases

The *Topanga* approach to fact finding (discussed in [a], *above*), forces administrative agencies to draw legally relevant

subconclusions supportive of its ultimate decision and action. Findings enable the reviewing court to trace and examine the agency's analysis. Reviewing courts should not have to search through the record to determine whether some creditable evidence supports some line of factual and legal conclusions that support the agency's action [*Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 515, 113 Cal. Rptr. 836, 522 P.2d 12*]. Findings serve other purposes as well. They serve a public relations function by helping to persuade. They enable the parties to determine whether and on what basis they should seek review. They help prevent "shooting from the hip" and encourage open, reasoned decisions. Governmental action should not be secret; when it is, power is misused and arbitrary action results.

[3] Types of Factual Bases

[a] Operative Facts

In keeping with *Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 113 Cal. Rptr. 836, 522 P.2d 12* , discussed in [2][a], *above*, findings should be made honestly and presented convincingly. The facts that are found should be operative facts that have legal significance; they should not be the raw evidentiary facts contained in the record, nor conclusory facts that just parrot statutory language. "Finding" evidentiary facts makes the fact-finder little more than a scrivener preparing evidence summaries [*see* *Morris v. Board of Medical Examiners (1964) 230 Cal. App. 2d 704, 714, 41 Cal. Rptr. 351* (APA does not require ALJ to prepare a summary of *all* the evidence)].

It provides little analysis and is not a bridge. Statutes, however, may require findings of evidentiary facts [*see, e.g., Lab. Code § 5313* (appeals board or workers' compensation judge must make findings on all facts involved in controversy and must provide parties with summary of evidence received and relied on)]. Statutory language can be used in the "determination of issues" or the "ultimate finding" [*see* [6], *below*]. It should not be part of the findings of fact unless the statutory language itself provides the operative facts that need to be found. Fact findings should be limited to those facts that the administrative agency is required to find under the governing statute to support the agency decision [*Bobus v. Department of Motor Vehicles (2004) 125 Cal. App. 4th 680, 686* (DMV hearing officer was not required to make specific finding that driver had consumed alcoholic beverages prior to driving while intoxicated to support suspension of driver's license under *Veh. Code § 23136* because the statute does not require that type of finding with minor drivers, only the requisite blood alcohol level finding)].

[b] Other Facts

Facts other than operative facts should also be included in findings. These additional facts set the stage for the operative facts. They may include jurisdictional facts, background facts, and credibility facts. But they should not be a recitation of testimony or other evidence. Such evidentiary facts should be left in the record and not put into findings. When additional facts are included in findings, they are usually set out in separate paragraphs so that the determination of issues or ultimate finding can clearly refer to operative facts found.

[4] Formality

Courts have often said that findings of fact in administrative proceedings need not be stated with the formality required in judicial proceedings [*Saleeby v. State Bar (1985) 39 Cal. 3d 547, 567, 216 Cal. Rptr. 367, 702 P.2d 525* ; *Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 517 n.16, 113 Cal. Rptr. 836, 522 P.2d 12* ; *McNeil's Inc. v. Contractors' State License Board (1968) 262 Cal. App. 2d 322, 326, 68 Cal. Rptr. 640]* . Trial courts, however, are no longer required to make findings of facts and conclusions of law [*Code Civ. Proc. § 632*; *see* [1], *above*]. Instead, they issue statements of decision [*Code Civ. Proc. § 632*; *see* Ch. 551, *Trial*].

Because ALJs spend much more time writing proposed decisions than civil trial court judges spend writing statements of decision, ALJs' findings are often more formal. Furthermore, the requirements of *Topanga Asso. for Scenic*

Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 113 Cal. Rptr. 836, 522 P.2d 12 also contribute to the relative formality of administrative findings [*see* [2], *above*].

[5] Implied Findings and Liberal Construction

In the past, courts have sometimes presumed the finding of necessary facts from the action of an administrative agency [*Swars v. Council of City of Vallejo (1949) 33 Cal. 2d 867, 872, 206 P.2d 355* ; *Savoy Club v. Board of Supervisors (1970) 12 Cal. App. 3d 1034, 1040-1041, 91 Cal. Rptr. 198]* . The courts also have implied findings [*see, e.g., Consolidated Steel Corp. v. Industrial Acci. Com. (1936) 6 Cal. 2d 368, 370, 57 P.2d 919* (court found that evidence of injured finger sustained implied finding of new and further disability)].

When findings existed, they have been liberally construed to support the resulting order [*Realty Projects, Inc. v. Smith (1973) 32 Cal. App. 3d 204, 213, 108 Cal. Rptr. 71* ; *McNeil's Inc., v. Contractors' State License Board (1968) 262 Cal. App. 2d 322, 326, 68 Cal. Rptr. 640]* . Irregular findings have sometimes been found to be nonprejudicial [*Strode v. Board of Medical Examiners (1961) 195 Cal. App. 2d 291, 303, 15 Cal. Rptr. 879]* .

Since *Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 113 Cal. Rptr. 836, 522 P.2d 12* [*see* [2][a], *above*], courts have been more reluctant to presume or imply findings [*see, e.g., Saleeby v. State Bar (1985) 39 Cal. 3d 547, 567, 216 Cal. Rptr. 367, 702 P.2d 525* (court found that State Bar was required to provide information sufficient to notify parties and the courts of the basis for its administrative action); *Respers v. University of Cal. Retirement System (1985) 171 Cal. App. 3d 864, 872-873, 217 Cal. Rptr. 594* (board was required to make findings supporting its denial of disability benefits to permit meaningful judicial review); *Wheeler v. State Bd. of Forestry (1982) 144 Cal. App. 3d 522, 528-529, 192 Cal. Rptr. 693* (in its decision to revoke forester's license for incompetence, board failed to include in its findings any authority for a standard by which to measure licensee's conduct); *Farmer v. City of Inglewood (1982) 134 Cal. App. 3d 130, 138-139, 185 Cal. Rptr. 9* (notice of final action of employee discharge did not constitute a statement of grounds for the termination); *City of Carmel-by-the-Sea v. Board of Supervisors (1977) 71 Cal. App. 3d 84, 95-96, 139 Cal. Rptr. 214* (zoning administrator's decision to issue a use permit was deficient because its findings did not include consideration of environmental problems)].

It is unlikely, however, that the concepts of implied and presumed findings have been totally eliminated. To eliminate them would make virtually every administrative decision subject to successful attack. These concepts still have a role to play [*see, e.g., Golde v. Fox (1979) 98 Cal. App. 3d 167, 179, 188, 159 Cal. Rptr. 864* (a finding that the illegal conduct of a real estate licensee is substantially related to a licensee's qualifications and duties may be implied); *see also Kateen v. Department of Real Estate (1985) 169 Cal. App. 3d 481, 486, 215 Cal. Rptr. 295* (in its decision to revoke a license, department of real estate was not required to include findings that no mitigation appeared or that no aggravating factors existed)].

A licensing agency was not required under former *Gov. Code § 11518* to make specific fact findings as to the penalty imposed on a license holder. So long as the agency made specific fact findings that supported some sanction for professional misconduct, the agency's decision to revoke a doctor's license did not have to be supported by specific findings showing why a lesser sanction was inappropriate [*Williamson v. Board of Medical Quality Assurance, 217 Cal. App. 3d 1343, 1346-1347, 266 Cal. Rptr. 520 (1990)]* .

Under the provisions operative July, 1, 1997, requiring that the factual and legal bases of a decision be stated [*Gov. Code § 11425.50(a), (b)*; *see* [1], *above*], it is unclear to what extent the case law regarding implied findings remains a valid interpretation of APA requirements.

[6] Legal Bases of Decision

[a] Nature of Determination

The APA expressly requires the written decision to state the legal basis for the decision [*Gov. Code § 11425.50(a)*; *see* [1], *above*].

Non-APA agencies may refer to this procedure as determining the "ultimate fact" or making the "ultimate finding." Like conclusions of law, the determination of issues or ultimate finding is a statement of the legal significance of the operative facts found in the findings of fact. Ultimate findings alone are not sufficient to support an administrative determination; it must be supported by findings of fact [*Parkmerced Residents Organization v. San Francisco Residential Rent Stabilization Etc. Bd. (1989) 210 Cal. App. 3d 1235, 1243, 258 Cal. Rptr. 774]* . It is usually a statement of a mixed question of law and fact that clarifies and determines legal status and uses the language of the applicable law [*see Parkmerced Residents Organization v. San Francisco Residential Rent Stabilization Etc. Bd. (1989) 210 Cal. App. 3d 1235, 1243, 258 Cal. Rptr. 774* (ultimate finding is usually expressed in language of statutory standard; ultimate finding is conclusion of law or determination of mixed question of law and fact)].

The following examples, set out in [b] and [c], *below*, provide an illustration of the determination of issues.

[b] EXAMPLE: Serving Alcoholic Beverages to Minor

LAW: *Bus. & Prof. Code § 25658(a)* makes it illegal to serve a minor alcoholic beverages. *Bus. & Prof. Code § 25660* provides that demanding, being shown, and relying on bona fide evidence of majority is a defense.

EVIDENCE: The evidence presented at the hearing shows that a minor was served beer without a request for an "I.D."

FINDING: The finding of fact on the defense issue should follow the language of *Bus. & Prof. Code § 25660* because it contains the operative facts that must be found. It should read: "Respondent did not demand, was not shown, and did not act in reliance upon bona fide evidence of majority."

DETERMINATION OF ISSUE: The legal consequences of the above lack of defense and other findings on serving the beer, can be stated: cause for discipline of respondent's license was established for violation of *Bus. & Prof. Code § 25658(a)*.

[c] EXAMPLE: Physician's Unprofessional Conduct

LAW: *Bus. & Prof. Code § 2234(b)* permits discipline of a physician who is guilty of "unprofessional conduct," which is defined to include "gross negligence." Gross negligence is not defined in the Code, but courts have defined it to mean "the want of even scant care or an extreme departure from the ordinary standard of conduct" [*Kearl v. Board of Medical Quality Assurance (1986) 189 Cal. App. 3d 1040, 1052, 236 Cal. Rptr. 526]* .

EVIDENCE: The evidence showed that respondent doctor operated on a high-risk patient at a hospital without an intensive care unit. No expert testified regarding the want of even scant care or an extreme departure from the ordinary standard of conduct.

FINDING: The finding of fact should focus on the failure of proof. It should read: "It was not proved that respondent's operation on a high-risk patient at a hospital without an ICU indicated the want of even scant care or was an extreme departure from the ordinary standard of conduct and was gross negligence."

DETERMINATION OF ISSUE: The legal consequences of this failure of proof should be stated as follows: cause for discipline of respondent's license was not established for unprofessional conduct and violation of *Bus. & Prof. Code § 2234(b)* [*see, e.g., Franz v. Board of Medical Quality Assurance (1982) 31 Cal. 3d 124, 181 Cal. Rptr. 732, 642 P.2d 792* (facts of case used in example)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsContentsAdministrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawJudicial ReviewReviewabilityFactual DeterminationsAdministrative LawJudicial ReviewStandards of ReviewSubstantial EvidenceConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of Protection

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§ 473G.15 Orders

The agency's ultimate action or order and the conclusions on which it is based must be supported by findings of fact under the *Topanga* rule [*Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 516, 113 Cal. Rptr. 836, 522 P.2d 12* ; *see § 473G.14[2][a]*]. The kinds of orders an administrative agency can issue depends on its legislative or constitutional authority. In the area of license discipline, this authority usually includes revocation or suspension of a license, with or without stays of execution, and probation with terms and conditions. Some statutes provide for civil penalties and the recoupment of investigation and other costs. Statutes may authorize "cease and desist orders" or "temporary suspension orders." Applications for licenses may be denied or granted with restrictions and conditions. Proceedings may be dismissed, in whole or in part. Under the new act, penalties may not be based on guidelines without the guidelines being properly adopted as regulations [*Gov. Code § 11425.50(e)*; *see § 473G.14[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawSeparation of PowersLegislative ControlsScope of Delegated AuthorityGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsLicenses

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§ 473G.16 Discovering Decision Processes and Reasoning

It is improper for counsel to attempt to discover the processes by which an adjudicative administrative decision was reached, other than through examination of the findings. For example, in *United States v. Morgan (1941) 313 U.S. 409, 61 S. Ct. 999, 85 L. Ed. 1429* , the district court authorized a deposition of the secretary of agriculture, and at a later time the secretary testified at the trial. He explained how he reached his decision on a marketing order, including his study of the record, his consultations with staff, and his conferences with the examiner who heard the evidence. The testimony showed that he dealt with the enormous record in a manner not unlike the practice of judges in similar situations. But the Supreme Court held that he should not have been examined [*United States v. Morgan (1941) 313 U.S. 409, 422, 61 S. Ct. 999, 85 L. Ed. 1429]* . Justice Frankfurter said that just as a judge cannot be subjected to such an examination because it would be destructive of judicial responsibility, the administrative process must be equally respected. Courts and administrative adjudications are collaborative instrumentalities of justice, and the appropriate independence of each should be respected by the other [*United States v. Morgan (1941) 313 U.S. 409, 422, 61 S. Ct. 999, 85 L. Ed. 1429]* .

The *Morgan* rule is followed in California [*State of California v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 257-258, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *Southern California Underground Contractors v. City of San Diego (2003) 108 Cal. App. 4th 533, 541, 548, 133 Cal. Rptr. 2d 527* (appellate court presumed that city council reviewed written briefs as part of making decision); *Hornung v. Superior Court (2000) 81 Cal. App. 4th 1095, 1099-1100, 97 Cal. Rptr. 2d 382* (Morgan rule applied to Commissioners of Board of Prison Terms who decide whether to grant or deny parole to prisoners)]. It precludes inquiry outside the administrative record to determine what evidence was considered and what reasoning was employed by an administrative decision maker [*Fairfield v. Superior Court (1975) 14 Cal. 3d 768, 779, 122 Cal. Rptr. 543, 537 P.2d 375* ; *Department of Alcoholic Bev.Control v. Alcoholic Bev. etc. Appeals Bd. (1981) 118 Cal. App. 3d 720, 728, 173 Cal. Rptr. 582]* . For this reason, counsel must look to the findings to determine the reasoning process of an adjudicative administrative decision. The mind and methods of the decisionmaker cannot otherwise be explored.

In an interesting exception to the *Morgan* rule, a city manager who had final decisional authority over personnel decisions, and who ordered demotion of a city supervisor, testified that he did not listen to audiotapes of the personnel

hearing nor did he read the transcript of the hearing, and there was no statement of fact findings to support the recommendation of the local civil service commission that held the hearing. Rather, he based his decision on information supplied by the personnel director. This information was not placed in the record of the proceedings, and the demoted employee had no notice of this evidence nor any opportunity to controvert the evidence. The appellate court set aside the decision and required the city manager to give the employee a fair independent review. The court noted that a total absence of an independent review is inadequate [*Vollstedt v. City of Stockton, 220 Cal. App. 3d 265, 276-277, 269 Cal. Rptr. 404 (1990)]* . In civil law suits, heads of agencies may not be deposed when they do not have personal knowledge of factual information related to material issues in the lawsuit [*Nagle v. Superior Court (1994) 28 Cal. App. 4th 1465, 1468-1469, 34 Cal. Rptr. 2d 281* ; *Westly v. Superior Court (2004) 125 Cal. App. 4th 907, 910-912, 23 Cal. Rptr. 3d 154* (state Attorney General and state Controller could not be deposed unless significant factual information can only be obtained from those officials. The Court of Appeal vacated the trial court's denial of a request for a protective order prohibiting the depositions of these two officials in a civil lawsuit because there were no factual issues as to which these officials would have personal factual information. The Court of appeal required the superior court to enter protective orders prohibiting those depositions on remand)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewAdministrative LawJudicial ReviewAdministrative RecordGeneral Overview

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§ 473G.17 ALJ Decisionmaking

[1] Role of Judges

The role of judges, including ALJs, is misunderstood by many attorneys, who do not fully appreciate the limits of the decisionmaking process. It is very difficult for a person in the role of an advocate to know how a judge decides a case, without assuming the role of impartial adjudicator. With a better understanding and appreciation of what takes place in a judge's mind when a case is decided, however, many attorneys would present better cases and be more successful. The following comments are offered to improve this understanding and appreciation.

[2] Determination of Facts

Judges decide cases, not "the truth." They try to end controversies by determining, as best they can, what the facts are that gave rise to the controversy. A judge is more confident of some facts and less confident of others and, it is hoped, is never deluded into believing that the "facts" found are necessarily the "truth." This distinction is important to advocates, because their role should be to present evidence of believable facts, not absolute truth. Believable facts are human in scale; they are consistent with human experience and motivation. They get their believability from a worldly theme.

This worldly theme or "theory of the case" is what persuades a judge to find facts consistent with it. It is this theory of the case that attorneys should give more attention to.

[3] Proof of the Case

Judges are skeptics. The law requires them to be, by imposing various evidentiary burdens of proof [*see* Ch. 473F, *Agency Adjudication Hearings* , for a discussion of the burden of proof]. Judges must always demand that the proponent of a proposition prove it. This demand for proof is often silent, and therefore easily slighted. When it is expressed, counsel should never be frustrated by a judge's skepticism, regardless of how awkwardly it may be expressed.

Judges are particularly skeptical when being asked to believe that which is contrary to experience. Good judges are aware that things may not be as they seem or as they were in the past; but to convince a judge to break with reasonable

expectations requires a careful presentation. An advocate must clearly show that the old rules do not apply. He or she must also make a good record. Judges know that their work will be reviewed against the record. They will not be inclined to adopt a novel idea, regardless of sympathies, if the record is not convincing. A reviewing authority may also have to be convinced.

[4] Influence of Experts

Judges are not awed by experts. They know that most controversies have experts for every contention. The influence of an expert, therefore, usually depends on the believability he or she gains by knowing the specific facts under controversy, having first-hand experience with those facts or similar facts in the past, and admitting the limits of expertise regarding the facts.

[5] Role of Pleadings

Pleadings are essential to the administrative decision process [*see* Ch. 473A, *Commencing Agency Adjudication* (discussing pleadings used to initiate an agency hearing)]. Attorneys rarely appreciate the importance of administrative pleadings and how they direct and limit a judge's decision. If the pleadings are drafted properly, they set out what has to be proved for the successful prosecution or defense of a case, particularly in APA cases where the pleadings contain more detailed allegations.

With proper pleadings, an ALJ can look at each allegation and apply the appropriate burden of proof to determine whether the allegation was proved and should be found to be true. Counsel, therefore, should check the sufficiency of the allegations in the pleadings and prepare and present their evidence to specifically meet those allegations. Other evidence should be presented, for example, evidence of background, mitigation, aggravation, damages, or penalty; but evidence on each of the specific allegations of the pleadings must be clearly presented. The only findings that are appropriate for an ALJ to make are those necessary to decide the allegations made and, if true, the consequences that should follow. When an attorney gets caught in other issues, it usually detracts from this decision process and can result in unfavorable findings. Case presentations should be simple, clear, and concise.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawAgency AdjudicationPresiding OfficersDuties & Powers

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§ 473G.18 Precedent Decisions Under the APA

The APA Administrative Adjudication *Bill of Rights* (*Gov. Code §§ 11425.10-11425.60*), requires that an agency decision may not be relied on as precedent unless the agency designates and indexes the decision as precedent [*Gov. Code §§ 11425(a)(7), 11425.60(a)*]. The *bill of rights* sets forth the minimum due process and public interest requirements that must be satisfied in a hearing that is subject to Chapter 4.5, the general provisions of APA's administrative adjudication provisions (*Gov. Code § 11400 et seq.*), which includes state agency hearings when, under the federal or state constitution or a federal or state statute, an evidentiary hearing for determination of facts is required to formulate and issue a decision [*Gov. Code § 11410.20*].

These requirements also apply to agency hearings that are subject to the Chapter 5, the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*), [*Gov. Code §§ 11410.50, 11501*; *see Ch. 473, Pubic Agency Adjudication, § 473.15*].

An agency decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency [*Gov. Code § 11425.60(a)*]. This statute limits the authority of an agency to rely on previous decisions unless the decisions have been publicly announced as precedential [25 Cal. L. Rev Comm. Reports 55, 162 (1997)].

An agency may designate as a precedent decision a decision or part of a decision that contains a significant legal or policy determination of general application that is likely to recur. Designation of a decision or part of a decision as a precedent decision is not rulemaking and need not be done under Chapter 3.5, the APA rulemaking provisions (*Gov. Code § 11340 et seq.*) [*Gov. Code § 11425.60(b)*; *see* Ch. 472, *Public Agency Rules* , et seq. (discussion of rulemaking)].

This provsion provides recognition for the need that agencies have to be able to make law and policy through adjudication as well as through rulemaking. It codified the practice of a number of agencies to designate important decisions as precedential. These agencies include the Fair Employment and Housing Commission [*Gov. Code § 12935(h)*], the State Personnal Board [*Gov. Code § 19582.5*], and the Unemployment Insurance Appeals Board [*Unemp. Ins. Code § 409*].

This statute is intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision. An agency may not by precedent decision revise or amend an existing regulation or adopt a rule that has no adequate legislative basis [25 Cal. L. Rev. Comm. Reports 55, 163 (1995)]. The precedent designation system authorised by this statute is an exception from the requirements of *Gov. Code § 11340.5* [25 Cal. L. Rev. Comm. Reports 55, 163 (1995); *see* 1993 OAL Det. No. 1 (determination by Office of Administrative Law that agency designation of decision as precedential violates former *Gov. Code § 11347.5* (*now Gov. Code § 11340.5*) unless made pursuant to rulemaking procedures)].

Nonetheless, agencies are encouraged to express precedent decisions in the form of regulations, to the extent practicable [25 Cal. L. Rv. Comm. Reports 55, 163 (1995)]. An agency's designation of a decision, or part of a decision, or failure to designate a decision or part of a decision, as a precedent decision is not subject to judicial review [*Gov. Code § 11425.60(b)*].

An agency is required to maintain an index of significant legal and policy determinations made in precedent decisions. The index must be updated at least annually, unless no precedent decision has been designated since the last preceding update. The index shall be made available to the public by subscription, and its availability shall be publicised annually in the California Regulatory Notice Register [*Gov. Code § 11425.60(c)*]. The index is a public record, available for public inspection and copying [25 Cal. L. Rev. Comm. Reports 55, 163 (1995)]. The statutory requirements for designating and indexing precedent decisions applies to decisions issued on or after July 1, 1997. Agencies are not precluded by this law from from designating and indexing as a precedent decision a decision issued before July 1, 1997 [*Gov. Code § 11425.60(d)*]. Making the precedent decision requirements prospective only is designed to minimize the potential burden on agencies [25 Cal. L. Rev. Comm. Reports 55, 163 (1995)].

Precedential decisions of state agencies are often found on the agency's web site. For example, the California Horse Racing Board provides access to its precedential decisions on the agency web site at www.chrb.ca.gov. Nine state agencies maintain precedential decisions under the APA, including the Horse Racing Board. An additional ten agencies maintain precedential decisions under the authority of their own statutes, including the State Personnel Board, whose decisions are posted found on the agency web site at www.spb.ca.gov/spblaw/precedrd.cfm. A complete current list of state agencies with precedential decisions can be found in Henke's California Law Guide (Matthew Bender, 6th ed., 2002), Chapter 8, *California Administrative Law*, § 8.04[2].

Litigants who challenge agency action often will request that the appellate court grant judicial notice of precedential decisions of that agency. The courts will often grant those requests, which obviates proof of the authenticity of an agency precedential decision [*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Comm'n (2004) 121 Cal. App. 4th 1578, 1591, 18 Cal. Rptr. 3d 669* ; *California Dept. of Corrections v. State Personnel Bd. (2004) 121 Cal. App. 4th 1601, 1611, 18 Cal. Rptr. 3d 390]* .

Legal Topics:

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

§§ 473G.19[Reserved]

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41A-473G California Forms of Pleading and Practice--Annotated § 473G.30

§ 473G.30 Effective Date of Decision

[1] Introduction

This subpart discusses the effective date of an agency decision and analyzes the impact that a stay of execution or early effective date has on the decision and the parties; it also discusses the procedure for requesting reconsideration of a decision. In addition, the part lists the consequences of an agency decision to a party, including sanctions, benefits, and remedies. Finally, it covers the reinstatement of a license after a decision revoking or suspending the license.

[2] Effective Date

In APA adjudicatory proceedings, the agency's decision in a case is ordinarily effective 30 days after it is delivered or mailed to the parties [*Gov. Code § 11519(a)*; *see Gov. Code § 11518* (mailing requirements)]. The decision may have a different effective date, however, if the agency takes one of the following actions [*Gov. Code § 11519(a)*]:

- Orders that the decision become effective sooner than 30 days after delivery [*see § 473G.31, below*].
- Grants a stay of execution [*Gov. Code § 11519(b)*; *see § 473G.32, below*].
- Orders a reconsideration within the 30-day period after delivery [*Gov. Code § 11521*; *see § 473G.33, below*].

The agency has the authority to grant an application to correct a mistake or clerical error in the decison [*Gov. Code § 11518.5*]. If the agency grants the application and sets the matter for further proceedings, then the effective date of the decision will be delayed [*Gov. Code § 11518.5(b)*; *see § 473G.34*]. This provides a fourth alternative to the normal effective date of a decision.

When an agency decision becomes effective, the agency is free to enforce its decision, including imposing sanctions such as fines or license revocation [*see § 473G.35*]. Enforcement may be stayed [*see Code Civ. Proc. § 1094.5(g)*], however, when a party seeks judicial review of the decision by filing a petition for writ of administrative mandate [*Gov.*

Code § 11523; *Code Civ. Proc. § 1094.5*]. For a discussion of judicial review, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

The person to which the agency action is directed may not be required to comply with a decision unless the person has been served with the decision [*see Gov. Code § 11505*] or has actual knowledge of the decision [*Gov. Code § 11519(e)*]. A nonparty may not be required to comply with a decision unless the agency has made the decision available for public inspection and copying or the nonparty has actual knowledge of the decision [*Gov. Code § 11519(f)*].

These provisions distinguish between the effective date of the decision and the time when it can be enforced. "Actual knowledge" is intended to include not only knowledge that a decision has been issued, but also knowledge of the general contents of the decision as it relates to the person who is required to comply with it. If a question arises whether a particular person had actual knowledge of a decision, this issue must be determined like other fact questions [25 Cal. L. Rev. Comm. Reports 55, 250 (1995)]. The binding effect of a decision on nonparties who have actual knowledge may be illustrated by a state law that prohibits wholesalers from delivering alcoholic beverages to liquor dealers unless the dealers hold valid licenses from the state beverage agency. If the agency issues a decision revoking the license of a particular dealer, this decision is binding on any wholesaler who has actual knowledge of it, even before the decision is made available for public inspection and copying. The decision binds all wholesalers, including those without actual knowledge, after it has been made available for public inspection and copying [25 Cal. L. Rev. Comm. Reports 55, 250 (1995)]. Finally, agencies are not precluded by these provisions from taking immediate action to protect the public interest under the emergency decision provisions of *Gov. Code § 11460.10 et seq.* [*Gov. Code § 11519(g)*; *see* Ch. 473H, *Alternative Procedures for Agency*].

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§ 473G.31 Early Effective Date

[1] General Rules

An agency may order a decision to become effective sooner than 30 days after it is delivered or mailed to respondent [*Gov. Code § 11519(a)*]. The earliest date on which a decision may become effective is the date on which it is mailed or delivered [*Koons v. Placer Hills Union Sch. Dist. (1976) 61 Cal. App. 3d 484, 490, 132 Cal. Rptr. 243]* . The right of a party to apply to the agency to correct a mistake or clerical error in the decision within 15 days after service of a copy of the decision on the party, but not later than the effective date of the decision [*Gov. Code § 11518.5(a)*; *see § 473G.34*], may impact the ability of an agency to make a decision effective earlier than the 15-day period. Also, as discussed in [2]-[4], *below*, a number of important procedural consequences flow from an agency's order to make a decision effective sooner than 30 days from mailing or delivery to the parties.

[2] Effect on Reconsideration Period

An agency's power to order reconsideration of the decision [*Gov. Code § 11521(a)*; *see § 473G.33*] expires on the effective date of the decision [*Gov. Code § 11521(a)*]. Thus, an early effective date is unfavorable to a respondent to the extent that it shortens the period in which the respondent may petition for reconsideration. If the agency makes the decision effective on delivery, it completely precludes the party from filing a petition for reconsideration. This action, however, does not deprive the responding party of its constitutional or statutory rights [*Moran v. Board of Medical Examiners (1948) 32 Cal. 2d 301, 304, 196 P.2d 20* ; *Kramer v. State Board of Accountancy (1962) 200 Cal. App. 2d 163, 176, 19 Cal. Rptr. 226* ; *Hohreiter v. Garrison (1947) 81 Cal. App. 2d 384, 402-403, 184 P.2d 323]* .

The party may still seek judicial review, regardless of whether or not he or she sought reconsideration [*Gov. Code § 11523*]. Nonetheless, counsel for the respondent should request at the hearing that the effective date of the decision, if unfavorable to the respondent, should be set to allow the filing of a petition for reconsideration.

[3] Effect on Sanctions

An agency sanction, such as license revocation [*see § 473G.35[2]*] generally becomes effective immediately on the

effective date of the decision [*Gov. Code § 11519(a)*; *Kramer v. State Board of Accountancy (1962) 200 Cal. App. 2d 163, 176, 19 Cal. Rptr. 226]* . For example, a licensee is subject to license revocation sooner then the usual 30 days after delivery of the decision if the agency orders the effective date to be earlier than 30 days or immediate on delivery [*Gov. Code § 11519(a)*].

[4] Effect on Appeal

Generally, a party has 30 days from the last day in which reconsideration can be ordered to file a petition for judicial review [*Gov. Code § 11523*; *see* [2], *above*]. Since reconsideration can be ordered for 30 days after delivery or mailing of the decision, unless the agency sets an earlier effective date [*Gov. Code § 11521*], the appealing party could have up to 60 days from the date the decision is rendered to file an appeal. When an agency orders an early effective date, the period for reconsideration is shortened, thereby shortening the period for appeal. Thus, counsel must determine exactly when the decision becomes effective in order to accurately compute the appropriate time period for filing an appeal. See Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq., for discussion of judicial review of agency decisions.

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§ 473G.32 Stay of Execution

The APA provides that a stay of execution may be included in the decision, or granted by the agency at any time before the decision becomes effective [*Gov. Code § 11519(b)*]. The granting of a stay suspends the enforcement of the decision or the carrying out of agency sanctions as a result of the decision [*Gov. Code § 11519(b)*; *see § 473G.35* (enforcement)]. An agency may stay execution of its decision to defer imposition of a penalty until the penalty will actually serve a disciplinary purpose [*Medlock Dusters, Inc. v. Christensen (1973) 35 Cal. App. 3d 565, 569-570, 110 Cal. Rptr. 805* (suspension of crop dusting license was deferred until after the slack season was over)].

If the statutes governing an agency grant it the authority to make a conditional order, the stay of execution may be accompanied by an express condition that the respondent comply with specified terms of probation [*Gov. Code § 11519(b)*]. Those terms must be just and reasonable in light of the findings and decision [*Gov. Code § 11519(b)*]. Specified terms of probation may include an order of restitution. Where restitution is ordered and paid pursuant to this law, the amount paid shall be credited to any later judgment in a civil action [*Gov. Code § 11519(d)*].

The granting of a stay of execution does not change the time for filing an appeal, which is 30 days from the last day to request reconsideration [*Gov. Code § 11523*; *see § 473G.30*; *see also* Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq. (judicial review of agency decisions)]. If the respondent was required to register with any public officer, a notification of any suspension or revocation must be sent to the officer after the decision has become effective [*Gov. Code § 11519(c)*].

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§ 473G.33 Rehearing or Reconsideration

[1] Right Determined by Statute

The California Supreme Court has ruled that, when the legislature specifies by statute that reconsideration or rehearing of an adverse decision of an agency *may* be sought by an affected party, such reconsideration is not *required* before seeking judicial review, at least as to any issues already litigated before and finally decided by the agency. Reconsideration is only necessary to raise new issues that have not previously been presented to the agency [*Sierra Club v. San Joaquin LAFCO (1999) 21 Cal. 4th 489, 493-494, 87 Cal. Rptr. 2d 702, 981 P.2d 543]* .

Rehearings in administrative proceedings are not essential to due process; only a hearing before judgment is required [*Whitley v. Superior Court (1941) 18 Cal. 2d 75, 81, 113 P.2d 449]* . The right to a rehearing or reconsideration of a final administrative order, and any duty to seek either, exists only if a statute provides for later consideration [*Olive Proration etc. Com. v. Agri. etc. Com. (1941) 17 Cal. 2d 204, 209, 109 P.2d 918* ; *SaveOxnard Shores v. California Coastal Com. (1986) 179 Cal. App. 3d 140, 149-150, 224 Cal. Rptr. 425]* . California administrative agencies do not have authority to reopen or reconsider an adjudicative decision, unless a statute permits such action [*Gutierrez v. Board of Ret. (1998) 62 Cal. App. 4th 745, 749, n.3, 72 Cal. Rptr. 2d 837]* . Nevertheless, an agency may rescind a decision that exceeds its jurisdiction. However, the tax assessment appeals board was authorized to reinstate the taxpayer's application under its governing statute [*Rev. & Tax. Code § 1604(c)*], and the Board's later revocation of that reinstatement was improper, as that statue did not limit the board's power of reinstatement in a manner that would authorize revocation [*Helene Curtis, Inc. v. Los Angeles County Assessment Appeals Bds. (2004) 121 Cal. App. 4th 29, 39-40, 16 Cal. Rptr. 3d 658]* . California agencies have no inherent or implied power to rehear or reconsider a final decision [*Heap v. City of Los Angeles (1936) 6 Cal. 2d 405, 407, 57 P.2d 1323]* . The APA, however, expressly provides for reconsideration [*Gov. Code § 11521*; *see* [2], [3], *below*]. Other statutes provide for rehearing applications within relatively short periods of time [*Pub. Util. Code § 1731(c)* (Public Utility Commission decisions in specific case; application for rehearing must be filed within 10 days after date of issuance of order or decision)].

[2] Petition for Reconsideration

When requesting or petitioning for a rehearing or reconsideration, counsel should follow the controlling statute. If the

statute sets forth the grounds for the petition, only those grounds should be used. If no grounds are set forth in the statute, as in the APA [*see Gov. Code § 11521*], all appropriate grounds should be presented. If a ground for the petition is that new evidence has been discovered, counsel should show the nature of the evidence, why it is important, and why it was not introduced at the hearing. An affidavit or declaration can be used for this purpose. Some statutes expressly require a showing of good cause [*see, e.g., Lab. Code § 5803* (Workers' Compensation Appeals Board may rescind, alter, or amend any order, award, or decision for good cause); *see also Merritt-Chapman & Scott Corp. v. Indus. A.C. (1936) 6 Cal. 2d 314, 316, 57 P.2d 501* (Industrial Accident Commission has jurisdiction to rescind a former decision on good cause, but not a mere change of opinion)]. The APA, however, does not require such a showing [*Gov. Code § 11521*].

For an example of a petition for reconsideration under the APA, *see § 473G.70* [*see Code Civ. Proc. § 473* (standards used to vacate or set aside judgments in civil actions); *see also* Ch. 489, *Relief From Judgments and Orders* (discussion and forms relating to setting aside or vacating judgment in civil actions)]. Some of the civil action standards set forth in *Code Civ. Proc. § 473* are analogous to grounds for granting reconsideration under *Gov. Code § 11521*.

Failure to petition for a rehearing may waive the issues for review [*see, e.g., Lab. Code § 5904* (in workers' compensation proceedings, a petitioner for reconsideration is deemed to have waived all objections other than those set forth in the petition for reconsideration); *Alford v. Industrial Acci. Com. (1946) 28 Cal. 2d 198, 206, 169 P.2d 641* (under *Lab. Code § 5904* (issue was waived when petition for rehearing did not raise it)].

Because the APA does not require the petitioner to set out the grounds for reconsideration, it is not clear whether an issue is similarly waived in APA proceedings. With respect to new evidence and arguments based on it, however, the failure to use reasonable diligence to present it to the agency, including requesting reconsideration, is a waiver [*Nicky Blair's Restaurant v. Workers' Comp. Appeals Board (1980) 109 Cal. App. 3d 941, 956-957, 167 Cal. Rptr. 516* ; *Schoenen v. Board of Medical Exrs. (1966) 245 Cal. App. 2d 909, 915, 54 Cal. Rptr. 364]* .

When a statute permits a party to seek reconsideration or rehearing of an adverse decision of an agency, such reconsideration is not required before seeking judicial review as to issues already litigated before and finally decided by an agency. Reconsideration by the agency must be sought only as to new issues not previously presented to the agency [*Sierra Club v. San Joaquin LAFCO (1999) 21 Cal. 4th 489, 493-494, 87 Cal. Rptr. 2d 702, 981 P.2d 543]* .

[3] APA Order for Reconsideration

[a] Power to Order Reconsideration

Under the APA, an agency can order a reconsideration of all or part of the case on the petition of any party, or on its own motion [*Gov. Code § 11521(a)*]. The agency is required to notify the petitioner of the time limits for petitioning for reconsideration [*Gov. Code § 11521(a)*]. The power to order a reconsideration expires as follows [*Gov. Code § 11521(a)*]:

- Thirty days after delivery of a decision to respondent.

- On the effective date of the decision if that date occurs prior to the expiration of the 30-day period [*see § 473G.30* (effective date)].

- At the termination of a stay not to exceed 30 days that the agency may grant to permit filing of a petition for reconsideration.

If the agency needs more time to evaluate a petition for reconsideration filed before expiration of any of these applicable periods, it may grant a stay of the expiration for no more than 10 days, solely for the purpose of considering the petition

[*Gov. Code § 11521(a)*].

The 10-day stay time period authorized by *Gov. Code § 11521(a)* for review by a state agency of a filed petition for reconsideration is the maximum time period that an agency may stay the effective date of the decision while it considers the petition for reconsideration. The Medical Board of California granted a 28-day stay of the decision, and then ordered reconsideration of the Board's previous decision to dismiss accusations of misconduct against a physician. The California Supreme Court held that the Board's order granting reconsideration was void for lack of jurisdiction because the Board only had authority to stay the decision for 10 days, not 28 days [*Bonnell v. Medical Board (2003) 31 Cal. 4th 1255, 1258, 82 P.3d 740]* . The court based the decision on the language of the statute, which was very clear as to the 10-day limit for filed petitions. The Supreme court based its decision on the plain language of the statute, and did not use legislative history, and did not defer to and rejected the contrary agency interpretation that the 30-day stay period could be applied to filed petitions [*Bonnell v. Medical Board (2003) 31 Cal. 4th 1255, 1264-1266, 82 P.3d 740]* .

[b] Denial or Grant of Petition

A petition is deemed denied if not acted on within the required time periods [*Gov. Code § 11521(a)*]. If an agency denies a rehearing or reconsideration, absent an abuse of discretion, the denial will not be set aside [*Clendaniel v. Industrial Acci. Com. (1941) 17 Cal. 2d 659, 662, 111 P.2d 314]* . If reconsideration is granted, the agency itself may reconsider the case on all the pertinent parts of the record and any additional evidence and argument that it permits, or the agency may assign the case to an administrative law judge (ALJ) [*Gov. Code § 11521(a)*]. Ordering reconsideration effectively vacates the agency's original decision. Furthermore, because the first decision is no longer effective, there is no appealable decision and thus the parties must wait for the completion of the reconsideration process for the issuance of a second decision that will be appealable under the APA. If oral evidence is introduced before the agency itself, no agency member may vote unless he or she heard the evidence [*Gov. Code § 11521(b)*].

In practice, the case is ordinarily assigned to the same ALJ that heard it initially. Since the agency itself can reconsider the case on the record created by an ALJ and additional evidence and argument, however, a new ALJ could probably be assigned to prepare a proposed decision from the same record and additional evidence [*see Gov. Code § 11521(b)*]. An ALJ must follow the same procedure for a proposed decision that is required in an initial hearing [*Gov. Code § 11521(b)*; *see Gov. Code § 11517* (procedures); *see also* Pt. A (hearing procedures)].

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§ 473G.34 Correction of Mistakes or Clerical Errors in Decisions

Under an APA provision operative July, 1, 1997, mistakes or clerical errors in decision can be corrected without parties to the decision having to file an action for judicial review [*Gov. Code § 11518.5*]. Within 15 days after service of a copy of the decision on a party, but not later than the effective date of the decision, the party may apply to the agency for correction of a mistake or clerical error in the decision, stating the specific ground on which the application is made. Notice of the application must be given to the other parties to the proceeding. This application is not a prerequisite for seeking judicial review [*Gov. Code § 11518.5(a)*]. The agency may refer the application to the administrative law judge who formulated the proposed decision or may delegate its authority to one or more persons [*Gov. Code § 11518.5(b)*]. The agency may deny the application, grant the application and modify the decision, or grant the application and set the matter for further proceedings. The application is considered denied if the agency does not dispose of it within 15 days after it is made or a longer time that the agency provides by regulation [*Gov. Code § 11518.5(c)*].

Agencies are not prohibited by this statute from modifying a decision to correct a mistake or clerical error, on the motion of the agency or the motion of the ALJ. An agency modification must be made within 15 days after issuance of the decision [*Gov. Code § 11518.5(d)*]. The agency is required to, within 15 days after correction of a mistake or clerical error in the decision, serve a copy of the correction on each party on which a copy of the decision was previously served [*Gov. Code § 11518.5(e)*].

Gov. Code § 11518.5 is intended to provide parties, including the agency that is a party to the proceeding, a limited right to remedy mistakes in the decision without the need for judicial review. This procedure is intended to apply to correction of factual or legal errors in the decision. *Gov. Code § 11518.5* supplements the authority in *Gov. Code § 11517* of the agency head to adopt a proposed decision with technical or other minor changes [25 Cal. L. Rev. Comm. Reports 55, 248 (1995)].

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§ 473G.35 Consequences of Agency Adjudicatory Decisions

[1] Introduction

An agency decision may impose sanctions or impart benefits to a party. Agency sanctions include license revocation and suspension [*see* [2], *below*], and license denial [*see* [3], *below*]. Administrative remedies include award of benefits [*see* [5], *below*], damages [*see* [6], *below*], injunctions, and other orders [*see* [7], *below*].

An agency cannot award administrative remedies or implement administrative sanctions ordered in a decision, however, without statutory authority delegating that power [*see, e.g.,* *Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal. 3d 1379, 1393, 241 Cal. Rptr. 67, 743 P.2d 1323 (Fair Employment and Housing Commission did not have statutory authority to order punitive damages)* ; *American Federation of Labor v. Unemployment Ins. Appeals Bd. (1996) 13 Cal. 4th 1017, 1022-1023, 920 P.2d 1314* (neither administrative law judge nor agency can award interest on retroactive benefits when there is no statutory authority to do so)]. Some agency remedies or sanctions are enforced by the agency following an administrative hearing, and others are enforced through the judicial system [*Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal. 3d 1379, 241 Cal. Rptr. 67, 743 P.2d 1323* (administrative enforcement); *Commodore Home Systems, Inc. v. Superior Court (1982) 32 Cal. 3d 211, 185 Cal. Rptr. 270, 649 P.2d 912* (civil enforcement)].

[2] License Revocation or Suspension

State licensing agencies have the authority to suspend or revoke licenses [*Bus. & Prof. Code § 23.7* ("license" is specifically defined to mean license, certificate, registration, or other means to engage in a business or profession regulated by the Business and Professions Code, which includes most licensed professions and businesses, or referred to in Sections 1000 (governing chiropractors) or 3600 (governing osteopathic physicians and surgeons))] they have issued [*see, e.g., Bus. & Prof. Code § 2227* (revocation of physician's license); *Bus. & Prof. Code § 1670* (Board of Dental Examiners may revoke license of dentist following hearing conducted pursuant to APA)]. License revocation following an administrative hearing does not violate the constitutional due process or statutory rights of licensees [*O'Reilly v. Board of Medical Examiners (1967) 66 Cal. 2d 381, 58 Cal. Rptr. 7, 426 P.2d 167 , cert. denied,* *390 U.S. 944, 88 S. Ct. 1019, 19 L. Ed. 2d 1132* ; *Cooper v. State Board of Equalization (1955) 137 Cal. App. 2d 672, 290 P.2d 914* ;

Marlo v. Board of Medical Examiners (1952) 112 Cal. App. 2d 276, 246 P.2d 69] . License revocation may also be based on improper conduct that occurred before the license was issued [*Hughes v. Board of Architectural Examiners (1998) 17 Cal. 4th 763, 768, 72 Cal. Rptr. 2d 624, 952 P.2d 641]* . A physician could be disciplined for unprofessional conduct under *Bus. & Prof. Code § 2239(a)* when the physician had two or more convictions for misdemeanor alcohol related driving violations [*Griffiths v. Superior Court (2002) 96 Cal. App. 4th 757, 762, 117 Cal. Rptr. 2d 445]* . The physician's constitutional rights to due process of law and equal protection of the law are not violated by discipline based on alcohol consumption related convictions because there is a rational connection between those convictions and a physician's license to practice medicine [*Griffiths v. Superior Court (2002) 96 Cal. App. 4th 757, 770-771, 117 Cal. Rptr. 2d 445]* .

The grounds for revoking or suspending licenses are set forth by statute [*see, e.g., Bus. & Prof. Code § 2234* (unprofessional conduct by physicians); *Bus. & Prof. Code § 2761* (unprofessional conduct by nurses); *Finnerty v. Board of Registered Nursing (2008) 168 Cal. App. 4th 219, 227-229, 85 Cal. Rptr. 3d 364* (court of appeal affirmed gross negligence by nurse finding which supported Board of Registered Nursing's revocation of nurse's license with revocation stayed and nurse placed on probation for three years)], or are contained in agency regulations. The APA authorizes state agencies that have revoked or suspended a person's license to reinstate that license or to reduce the penalty [*Gov. Code § 11522*; *see, e.g., Bus. & Prof. Code § 2307* (reinstatement of physician's licenses); *see § 473G.36*]. Lesser disciplinary sanctions that can be awarded by agencies include placing a licensee on probation [*see, e.g., Bus. & Prof. Code § 2227(a)(3)* (licensed physician can be placed on probation); *Zabetian v. Medical Board of California (2000) 80 Cal. App. 4th 462, 468-469, 94 Cal. Rptr. 2d 917* (two year probation period imposed on physician based on finding of unprofessional conduct due to two acts of repeated negligence)], publicly reprimanding a licensee [*see, e.g., Bus. & Prof. Code § 2227(a)(4)* (public reprimand of licensed physician)], or taking other action against a licensee, such as requiring training or supervision [*see, e.g., Bus. & Prof. Code § 2227(a)(5)* (ALJ or agency may order any other appropriate action against disciplined physician)].

The California Court of Appeal upheld the validity of the Medical Board of California posting on the agency web site information related to disciplinary records of licensees regulated by the Board. The court rejected a challenge by a physician to the board's disclosure on its web site of information relating to the doctor's completion of probation in discipline actions, as well as disclosure of the case numbers under which the doctor was required to complete probation. The court held that public disclosure of discipline information was required by the provisions of *Bus. & Prof. Code §§ 803.1* and *2027*, and this disclosure mandate included probation completion and case number information [*Szold v. Med. Bd. of Cal. (2005) 127 Cal. App. 4th 591, 598-599, 25 Cal. Rptr. 3d 665]* .

The Court of Appeal upheld the authority of a hospital peer review committee to summarily suspend a doctor's hospital clinical privileges to protect the well-being of prospective patients at that hospital. The doctor suffered from depression, mental distress, and severe family and personal stresses, that made it very difficult for her to act professionally toward her patients. The hospital acted under the statutory authority of *Bus. & Prof. Code § 809.5*, which authorized medical peer review bodies to suspend clinical privileges of a doctor immediately when there was imminent danger to the health of any person. The hospital based its suspension decision on the risks to prospective patients at the hospital. The Court of Appeal held that harm to prospective patients was within the scope of the hospital peer review body's authority to summarily suspend a physician, given that the needs of public safety outweigh the doctor's due process rights [*Medical Staff of Sharp Mem'l Hosp. v. Superior Court (2004) 121 Cal. App. 4th 173, 181-183, 16 Cal. Rptr 3d 769]* .

The California Court of Appeal held that the Department of Real Estate did not have authority to revoke the license of a real estate licensee based on a criminal conviction of unlawful intercourse with a minor because the Director relied upon a invalid presumption that minors can not consent to sexual intercourse. The governing law supporting license revocation, section 2910 [*Tit. 10 Cal. Code Regs. § 2910 (a)(5)*] of the real estate department's regulations, required proof that the person was a non-consenting participant in the conduct punished by the criminal law. This requirement was based on governing statutes, *Bus. & Prof. Code §§ 481, 490*, and *10177*, which required the department to show that when licensees are convicted for crimes of moral turpitude, the department must prove that the conviction was

substantially related to the licensee's fitness to engage in the profession in order for the department to suspend or revoke the license of the licensee based on the conviction [*Donaldson v. Department of Real Estate (2005) 134 Cal. App. 4th 948, 950-951, 36 Cal. Rptr. 3d 577]* .

The California Court of Appeal held that the Department of Real Estate (DRE) did not have statutory authority under *Bus. & Prof. Code § 490* to revoke the license of a real estate broker who entered a guilty plea to misdemeanor battery related to a domestic violence incident. *Bus. & Prof. Code § 490* authorized licensing agencies to suspend or to revoke the licenses of licensee's subject to regulatory jurisdiction of those agencies when the licensees were convicted of criminal offenses when the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the license was issued [*Bus. & Prof. Code § 490*]. The Court of Appeal held that section 490 did not authorize the revocation of the real estate broker's license, as that statute limited agency authority and did not independently authorize the license revocation [*Petropoulos v. Dept. of Real Estate (2006) 142 Cal. App. 4th 554, 567-568, 47 Cal. Rptr. 3d 812* (misdemeanor battery conviction did not involve moral turpitude so that DRE could not rely on *Bus. & Prof. Code § 10177(b)* to revoke license)].

A county civil service commission's decision to reduce the penalty awarded (from demotion in rank to a 30-day suspension without back pay) against a sergeant who allegedly made false statements and was found to have acted with insubordination and willful disobedience during the investigation of a gender harassment claim against him brought by a female deputy was reversed by the Sixth District California Court of Appeal, which found that the reduction in penalty was an abuse of discretion given the seriousness of the employee misconduct by the sergeant [*County of Santa Cruz v. Civil Service Commission of Santa Cruz (2009) 171 Cal. App. 4th 1577, 1584-1585]* . While this decision is not a licensing case, similar principles apply to judicial review of civil service penalty determinations with public employees.

For further discussion and forms relating to licensing proceedings, see Ch. 471B, *Licensing by Public Agencies* .

[3] License Denial

California licensing agencies have the statutory authority to deny licenses to applicants who do not meet minimum standards of qualifications for the license [*see, e.g., Bus. & Prof. Code § 2080* (applicant for doctor's license must meet standards for issuance of license)]. These agencies may also deny an applicant's license for violation of statutory standards that would also justify revocation or suspension of the license if the conduct were committed by a license holder [*see, e.g., Bus. & Prof. Code § 2221* (applicant for doctor's license will be denied license if guilty of unprofessional conduct)]. Because license applicants must apply for their license, and must satisfy the agency that they meet the minimum standards of the agency, most agencies make initial decisions whether to grant or deny a license based on examinations [*see, e.g., Bus. & Prof. Code § 1630* (examination for dentist's license)], and a written application file [*see, e.g., Bus. & Prof. Code § 1628* (applicant for dentist's license must file application and provide sufficient evidence of graduation from approved dental college)]. An applicant whose license has been denied has the statutory right to request a hearing under the APA to show that he or she is entitled to be granted the license [*Bus. & Prof. Code § 1628.5* (applicant whose dental license is denied can request hearing under APA); *Gov. Code § 11504*; *see Fascination, Inc. v. Hoover (1952) 39 Cal. 2d 260, 246 P.2d 656]* .

For example, a disbarred attorney applied for a license to sell real estate. His license application was denied. He requested a hearing to challenge the denial. The denial was upheld by the ALJ based on the applicant's prior disbarment. The Court of Appeal upheld that decision and ruled on a number of issues relevant to administrative adjudication. The court held that an accusation satisfied the requirements of *Gov. Code § 11503* when it stated that the applicant for a real estate license had been denied a license on the grounds that he had been disbarred from the practice of law, and the accusation set forth the statutory sections and Rules of Professional Conduct sections that the applicant had violated which provided the basis for disbarment. The accusation was not required to set forth specific acts of dishonesty committed by the applicant [*Berg v. Davi (2005) 130 Cal. App. 4th 223, 228-229, 29 Cal. Rptr. 3d 803]* . The court also held that collateral estoppel principles precluded a challenger to the denial of a real estate license from offering

evidence impeaching prior judgments against the challenger in a civil fraud lawsuit and a state bar disbarment proceeding. These judgments were used as the basis of license denial by the Department of Real Estate. The ALJ ruled at the challenger's hearing that this evidence could not be admitted, as these were final judgments, and collateral estoppel principles prohibited impeachment of those judgments. This ruling was upheld on appeal [*Berg v. Davi (2005) 130 Cal. App. 4th 223, 230-231, 29 Cal. Rptr. 3d 803]* .

[4] Criminal Penalties

The statutes governing an administrative agency frequently include provisions that make certain conduct of its licensees illegal and punishable criminally. For example, a statute may make prohibited conduct a felony [*see, e.g., Bus. & Prof. Code § 585* (individuals who commit fraud related to medical degrees are guilty of a felony punishable by a fine or imprisonment)], a misdemeanor [*see, e.g., Bus. & Prof. Code § 556* (failure to report eye disease case to health department is a misdemeanor punishable by fine)], or an infraction [*Bus. & Prof. Code §§ 146(a), (d), 146.5(a), (d)*]. An agency may also be given statutory authority to adopt administrative regulations that are enforceable criminally [*see, e.g., Bus. & Prof. Code § 556* (persons who violate agency rules adopted under this statute are guilty of a misdemeanor punishable by fine)]. Criminal penalties are enforced through the normal judicial process: the district attorney files charges against the licensee and prosecutes the case.

A licensee can also be sanctioned administratively for the same conduct that is punishable criminally, by having his or her license revoked or suspended [*see, e.g., Bus. & Prof. Code § 652* (paying or accepting fees for patient referrals is a misdemeanor and constitutes grounds for suspension or revocation of the license)]. For a discussion of the doctrine of collateral estoppel, which prevents relitigation of an issue determined in a prior judicial or administrative proceeding in a later proceeding, see *People v. Sims (1982) 32 Cal. 3d 468, 186 Cal. Rptr. 77, 651 P.2d 321* (administrative Department of Social Services decision, which exonerated a welfare recipient of fraud charges, collaterally estopped a subsequent criminal prosecution for the same misconduct) [*see also* Ch. 473F, *Agency Adjudication Hearings*].

[5] Award of Benefits

One of the major functions of administrative agencies is to award or grant benefits to individuals who are eligible for those benefits as a matter ofstatutory entitlement. The major benefit granting agencies in California are the Department of Social Services (welfare benefits), the Employment Development Department (unemployment), and the Workers' Compensation Appeals Board (workers' compensation benefits). A party is entitled to the benefits awarded in an agency decision on the effective date of that decision [*Gov. Code § 11519(a)*; *see § 473B.30*]. Administrative law judges can not award interest on retroactive benefits without statutory authority [*AFL v. Unemployment Ins. Appeals Bd. (1996) 13 Cal. 4th 1017, 1022-1023, 56 Cal. Rptr. 109, 920 P.2d 1314*].

[6] Damages

It is unusual for an administrative agency to be given the power to award damages, as distinct from restitution, in an administrative hearing. Damage awards are an administrative remedy that must be expressly authorized by statute [*Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal. 3d 1379, 241 Cal. Rptr. 67, 743 P.2d 1323* ; *Lance Camper Manufacturing Corp. v. Republic Indemnity Co. (1996) 44 Cal. App. 4th 194, 200-201, 51 Cal. Rptr. 2d 622]* . For example, the ALRB does not have statutory authority to award compensatory damages under *Labor Code § 1160.3* to persons injured in their property or business by unlawful secondary boycott activity [*United Farm Workers v. Agricultural Labor Relations Bd. (1995) 41 Cal. App. 4th 303, 322-323, 48 Cal. Rptr. 2d 696]* .

The California Supreme Court has addressed the issue of whether the Fair Employment and Housing Act (*see Gov. Code § 12900 et seq.*) authorizes the award of punitive damages. In *Commodore Home Systems, Inc. v. Superior Court (1982) 32 Cal. 3d 211, 185 Cal. Rptr 270, 649 P.2d 912* , the litigants received a "right-to-sue" letter when the agency did not initiate a hearing within the statutory deadline [*see Gov. Code § 12965(b)*]. The Court held that the

litigants could receive punitive damages in the civil action, along with other remedies authorized by the Act in *Gov. Code § 12970(a)*. The Court based its holding on a principle of statutory interpretation: when statutes create a new cause of action, all remedies available to other civil claimants are also available to parties filing claims under the statutory cause of action, unless the Legislature expresses a contrary intent [*Commodore Home Systems, Inc. v. Superior Court (1982) 32 Cal. 3d 211, 215, 185 Cal. Rptr. 270, 649 P.2d 912]* .

in *Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal. 3d 1379, 241 Cal. Rptr. 67, 743 P.2d 1323* , however, the Court held that the Fair Employment and Housing Commission itself cannot award punitive damages under *Gov. Code § 12970(a)* when it decides an employment discrimination claim [*Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal. 3d 1379, 1393, 241 Cal. Rptr. 67, 743 P.2d 1323]* . The Legislature usually specifies whether punitive damages, and sometimes compensatory damages, are authorized; an agency cannot devise punitive measures when a statute is essentially remedial [*Dyna-Med, Inc. v. FairEmployment & Housing Com. (1987) 43 Cal. 3d 1379, 1388, 241 Cal. Rptr. 67, 743 P.2d 1323]* . For example, the Fair Employment and Housing Commission is specifically authorized to award actual and punitive damages in housing discrimination cases [*Gov. Code § 12987(a)(3)* (civil penalties), (a)(4) (actual damages)]. Effective January 1, 1993, *Gov. Code § 12970* was amended to authorize the Commission to award administrative fines, civil penalties, and damages for emotional distress [*Gov. Code § 12970(a)(3)* (emotional distress damages), (c) (administrative fines), (d) (standards), and (e) (civil penalties)]. The legislature intended these amendments to be a response to the *Dyna-Med* and *Peralta* decisions of the California Supreme Court [1992 Stats., ch. 911, § 1(c)]. The effect of the legislative amendments is to give clear statutory authority to the Commission to award emotional distress damages [*Gov. Code § 12970(a)(3)*], and a type of punitive damages [*Gov. Code § 12970(c), (d), (e)* (with a maximum of $150,000, including the amount of administrative fines, for each aggrieved person and against each respondent)]. The court decisions in *Dyna-Med* and *Peralta* had concluded that the commision id not have statutory authority to award either type of damages remedy. Because of the legislative amendments, the Commission has clear authority to award both types of damages.

However, the FEHC does not have statutory authority to award compensatory damages for emotional distress suffered in an employment discrimination case that is adjudicated before the agency [*Gov. Code § 12970(a)*; *Peralta Community College Dist v. Fair Employment & Housing Com. (1990) 52 Cal. 3d 40, 57, 276 Cal. Rptr. 114, 801 P.2d 357]* . A litigant who seeks to recover emotional distress damages must file a civil lawsuit in court seeking recovery for common law claims related to employment discrimination. Those common law claims are not pre-empted by the Fair Employment & Housing Act [*Gov. Code §§ 12900-12996*; *Rojo v. Kliger (1990) 52 Cal. 3d 65, 83, 276 Cal. Rptr. 130, 801 P.2d 373]* . Also, litigants may seek judicial relief for common law nonstatutory claims without exhausting administrative remedies before the FEHC [*Rojo v. Kliger (1990) 52 Cal. 3d 65, 89, 276 Cal. Rptr 130, 801 P.2d 373]* .

A local rent control board can not properly award treble damages based on tripling the amount of excess rent awarded because treble damage awards are not reasonably necessary to enforce rent control laws, and because treble damages are likely to lead to arbitrary and disproportionate results. Thus, treble damage awards by this board violate the substantive limitations of the judicial powers doctrine which requires that the administrative remedy be authorized by statute, and be reasonably necessary to carry out the administrative agencies primary legitimate regulatory purposes [*McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 378-379, 261 Cal. Rptr. 318, 777 P.2d 91]* .

The California Supreme Court held that Section 12987 of the Fair Employment and Housing Act [*Gov. Code § 12987*] is invalid under the judicial powers clause insofar as it authorizes general compensatory damages for emotional distress suffered as a result of unlawful housing discrimination [*Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal. 3d 245, 251, 284 Cal. Rptr. 718, 814 P.2d 704]* . The court also interpreted the punitive damages provisions of the same statute to limit such awards to the statutory maximum of $1,000 for a single course of discriminatory conduct against one complaining party [*Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal. 3d 245, 271-273, 284 Cal. Rptr. 718, 814 P.2d 704]* .

The California Supreme Court upheld an award of $10,000 in general compensatory damages for emotional distress and lost housing opportunity [*Gov. Code § 12987(a)(4)*] that was awarded to a successful African American female claimant who sought damages for racial discrimination in housing against a landlord who refused to rent to the claimant. The damages were awarded, along with a $10,000 civil penalty in an administrative proceeding before the Fair Employment and Housing Commission [*Konig v. Fair Employment and Housing Commission (2002) 28 Cal. 4th 743, 745-746, 123 Cal. Rptr. 2d 1, 50 P.3d 718]* . The Supreme Court distinguished the *Walnut Creek Manor* case decision and concluded that the award of damages in this case did not violate the judicial powers clause of the California Constitution [*Cal. Const. Art. VI, § 1*] because legislative amendments to the FEHA statute solve separation of powers problems in the statute. *Gov. Code § 12989* allows claimants the option of bringing their claims in the court system instead of before the administrative agency [*Konig v. Fair Employment and Housing Commission (2002) 28 Cal. 4th 743, 757-758, 123 Cal. Rptr. 2d 1, 50 P.3d 718]* . Finally, the FEHA statute [*Gov. Code § 12955.6*] provides for the same scope of remedies as are available in federal administrative adjudications under the federal Fair Housing law [*42 U.S.C. § 3601*; *Konig v. Fair Employment and Housing Commission (2002) 28 Cal. 4th 743, 750-751, 123 Cal. Rptr. 2d 1, 50 P.3d 718]* .

The judicial powers clause of the California Constitution was similarly violated when an agency attempted to take jurisdiction over claims for compensatory and punitive damages based on statutory and common contract and tort law violations brought by a car dealer against a car manufacturer when the agency did not have statutory authority to determine those claims [*Hardin Oldsmobile v. New Motor Vehicle Board (1997) 52 Cal. App. 4th 585, 597-598, 60 Cal. Rptr. 2d 583]* .

Practitioners who are litigating administrative remedies questions must therefore examine the statute applicable to the particular agency to determine what damages are available. Statutes regarding remedies generally specify both the substantive standards for awarding remedies, and the remedies that are authorized.

An affected private entity, whose due process rights were violated by a state agency when the agency refused to provide notice or a hearing before refusing to recertify the entity as an approved product seller, is not entitledto recover damages for the due process violation based solely on the California Constitution's [Cal. Const. Art. I, *7*] due process provisions [*Carlsbad Aquafarm, Inc. v. State Department of Health Services (2000) 83 Cal. App. 4th 809, 811-812, 100 Cal. Rptr. 2d 87]* .

[7] Equitable Remedies

Administrative agencies are frequently authorized to award equitable remedies when they are the most appropriate remedy for a specific type of harm. For example, the Fair Employment and Housing Act authorizes the Commission to order reinstatement or upgrading of employees, and to award back pay [*Gov. Code § 12970(a)(1)*; International Union etc. v. *Fair Emp. Practice Com. (1969) 276 Cal. App. 2d 504, 81 Cal. Rptr. 47 , cert. denied, 397 U.S. 1037, 90 S. Ct. 1356, 25 L. Ed. 2d 648]* . Injunctive relief must be specifically authorized by statute [*see, e.g., Bus. & Prof. Code §§ 125.7, 125.8* (Department of Consumer Affairs may seek temporary restraining order)]. Furthermore, an agency itself may not issue an injunction. The agency (or district attorney or attorney general, on agency request) [*see, e.g., Bus. & Prof. Code § 651(j)* (attorney general may bring action in appropriate forum to enjoin prohibited advertising by healing arts licensee)] must bring an action in superior court [*see, e.g., Gov. Code §§ 12973, 12974* (Fair Employment and Housing Department may obtain injunction in civil action brought in superior court)], and must satisfy the requirements of both the statute authorizing the action for injunction and of the Code of Civil Procedure [*see Code Civ. Proc. §§ 525-534* (governing injunctions)]. The Superior court may also issue a temporary restraining order to enjoin a licensee from endangering the public health, safety, or welfare while engaging in the business or profession for which he or she is licensed [*Bus. & Prof. Code § 125.7*].

Note, however, that agencies may order administrative remedies, such as cease and desist orders [*Bus. & Prof. Code § 149(a)(1), (c), (d)*], that are similar to judicially ordered injunctions [*see, e.g., Gov. Code § 12970(a)* (Fair Employment

and Housing Commission may order licensee to cease and desist from unlawful practices)].

The Santa Monica Rent control board could properly make excess rent determinations and award restitution of excess rents from a landlord to a tenant [*McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 375, 261 Cal. Rptr. 318, 777 P.2d 91]* , but the Board could not authorize the tenant to immediately withhold excess rent [*Floystrup v. City of Berkeley Rent Stabilization Bd. (1990) 219 Cal. App. 3d 1309, 1315-1317, 268 Cal. Rptr. 898]* , because this denied the landlord the right to judicial review. The board order that permitted immediate withholding of excess rent violates the procedural limitations on the remedial powers of administrative agencies contained in the judicial powers doctrine, which requires judicial review of agency orders before they are enforced, based on the principle of judicial check on administrative agencies [*McHugh v. Santa Monica Rent Control Bd. (1989) 49 Cal. 3d 348, 376-377, 261 Cal. Rptr. 318, 777 P.2d 91]* .

Back pay is an equitable remedy awarded in employment law settings. It is often coupled with reinstatement to a former position when an employee has been wrongfully terminated [*Norton v. San Bernardino Unified School District (2008) 158 Cal. App. 4th 749, 751-753, 69 Cal. Rptr. 3d 917* (reinstatement of school district employee upheld by court of appeal); *Hulings v. State Department of Health Care Services (2008) 159 Cal. App. 4th 1114, 1118, 72 Cal. Rptr. 3d 81* (the court of appeal held that a peace officer employee was entitled by statute to mandatory reinstatement without undergoing new background investigation)]. Former deputy attorney general was terminated for cause without being given *Skelley* hearing to challenge termination, a violation of due process of law, as employee had civil service protection and could only be terminated for cause. Former deputy had resigned from job one month after termination date, and before *Skelley* hearing could be started. The Court of Appeal held that former deputy was entitled to back pay until date that State Personnel Board completed *Skelley* hearing process, and issued decision on the merits of employee's termination. Employee had been denied back pay after date of resignation, and Court of Appeal decision extended back pay rights for almost seven years [*Roe v. State Personnel Bd. (2004) 120 Cal. App. 4th 1029, 1032-1033, 16 Cal. Rptr. 3d 207]* .

The California Court of Appeal upheld the denial of a petition for writ of mandate brought by a former employee of the county office of education. The former employee was injured on the job and was unable to perform the duties of her previous job due to disability. She was discharged, and she sought reinstatement and back pay to her previous position as a para-educator with the county. The Court of Appeal affirmed the decision of the superior court which held that the former employee's status was governed by the Public Employees Retirement System statutes and that under those statutes the former employee was not eligible for reinstatement to her previous job nor for back pay, but she was eligible to be placed on the 39 month re-employment list under the provisions of *Educ. Code § 45192* [*Jones v. Los Angeles County Office of Education (2005) 134 Cal. App. 4th 983, 991-992, 36 Cal. Rptr. 3d 617]* . The Second District, Division 1, California Court of Appeal similarly held that an employee of the Los Angeles Unified School District who was wrongfully demoted was not entitled to reinstatement and full back pay for periods of time in which he was unable to return to work due to a non-work related disability [*Davis v. Los Angeles Unified School District Personnel Commission (2007) 152 Cal. App. 4th 1122, 1126-1127, 62 Cal. Rptr. 3d 69]* .

[8] Civil Penalties

Legislation often delegates to agencies the authority to impose civil penalties for conduct that violates requirements set by statutes or by agency regulations [*see, e.g., Bus. & Prof. Code § 651(k)* (administrative fines awardable with a maximum of $10,000 per event when physicians intentionally violate advertising laws); *Health & Safety Code § 1424*; *Water Code § 13350(d)(1), (2)* (maximum civil liability of $15,000 per day, or $20 per gallon of waste discharged)]. The primary purpose of civil penalties is to ensure compliance with statutory and regulatory standards. Unlike awards of monetary damages, there is no requirement that actual harm be suffered before statutory civil penalties can be assessed. Furthermore, civil penalties can be assessed for negligent conduct without proof of malice, willfulness, or intentional conduct. In contrast to money damages that compensate persons harmed by wrongful conduct, civil penalties help to finance enforcement costs [*Kizer v. County of San Mateo (1991) 53 Cal. 3d 139, 148, 279 Cal. Rptr. 318, 806 P.2d*

1353] . Civil penalties can be imposed against both public and private entities, and these penalties are not punitive damages for purposes of the Government Tort Claims Act (*Gov. Code § 810 et seq.*) [*People ex rel. Younger v. Superior Court (1976) 16 Cal. 3d 30, 39, 127 Cal. Rptr. 122, 544 P.2d 1322* (private entities); *Kizer v. County of San Mateo (1991) 53 Cal. 3d 139, 145, 279 Cal. Rptr. 318, 806 P.2d 1353* (public entities); *see Gov. Code § 818*]. The Court of Appeal held that civil penalties of $25,000 can be imposed against a public entity under the provisions of the Unruh Act, *Civ. Code § 52(b)(2),* without violating the provisions of *Gov. Code § 818*, which prohibits punitive damages awards against public entities under the California Government Tort Claims Act [*Gov. Code §§ 810-818.9*]. This is because civil penalties under the Unruh Act, which protects civil rights, are not punitive damages. Furthermore,civil penalties are designed to provide ample compensation to plaintiff's for civil rights violations so as to encourage plaintiffs to file civil rights lawsuits. These civil penalties are also not solely punitive and are not imposed primarily for punishment, and thus do notviolate the provisions of *Gov. Code § 818* [*Los Angeles County Metro. Transp. Auth. v. Superior Court (2004) 123 Cal. App. 4th 261, 267-269, 20 Cal. Rptr. 3d 92]* . Licensing agencies also have the authority to issue administrative citations to licensees who violate statutory or regulatory requirements applicable to their licensed business or profession. The citation can contain orders of abatement, or orders to pay administrative fines [*Bus. & Prof. Code §§ 125.9(a), 148*]. Civil penalties may be imposed by a city against a public works contractor for violation of the fair practices act [*Pub. Con. Code § 4110*] but the city cannot obtain those penalties by filing a civil lawsuit [*Thompson Pacific Constr., Inc. v. City of Sunnyvale (2007) 155 Cal. App. 4th 525, 539-540, 66 Cal. Rptr. 3d 175]* .

The California Court of Appeal upheld a $100,000 penalty assessment imposed by the Division of Labor Standards Enforcement against an employer that failed to obtain worker's compensation insurance from an authorized insurer. The court held that the penalty assessment which was authorized under *Labor Code § 3722 (a)* could not be withdrawn because the DLSE did not have discretion to withdraw the penalty assessment under *Labor Code § 3727.1* [*Starving Students, Inc. v. Department of Industrial Relations, Division of Labor Standards Enforcement (2005) 125 Cal. App. 4th 1357, 1361, 23 Cal. Rptr. 3d 583]* . The court of appeal also rejected constitutional challenges to the penalty assessment under due process of law holding that the amount of the penalty was reasonable under the circumstances because it was based on the size of the employer and the amount of money saved by paying premiums to an unauthorized insurer [*Starving Students, Inc. v. Department of Industrial Relations, Division of Labor Standards Enforcement (2005) 125 Cal. App. 4th 1357, 1368-1369, 23 Cal. Rptr. 3d 583]* .

Licensing agencies have the authority to assess administrative penalties against licensee's or applicants for licenses in disciplinary proceedings as an additional sanction based on established criteria [*Bus. & Prof. Code § 5116* (Accounting Board)]. Licensing agencies also have the authority to seek award to the agency and against the disciplined licensee of the reasonable costs for investigating and prosecuting the disciplinary proceeding against the licensee, including attorney's fees. The amount of costs awarded is based upon findings made by the Administrative Law Judge that heard and decided the proceeding [*Bus. & Prof. Code § 5107* (Accounting Board)].

Fines authorized by *Bus. & Prof. Code § 12023* (fines based on sale of individual packages), and *Bus. & Prof. Code § 12024* (fines based on sale of entire lot) were imposed by local agency (county sealer of weights and measures) against grocery company for violating laws requiring accurate weighting of seafood. The Court of Appeal upheld the assessment of multiple fines against the grocery company for inaccurately weighted seafood based on the sale of each improperly labeled seafood package, rather than imposing one fine for all the seafood related weight violations. The Court rejected the company's argument that the provisions of *Penal Code § 654* prohibited multiple fines under *Bus. & Prof. Code § 12023*. However, the Court of Appeal held that *Penal Code § 654* prohibited duplicative fines under both *Bus. & Prof. Code § 12024* and under *Bus. & Prof. Code § 12023* for the same mislabeling violation. Thus, the Court of Appeal stayed the fines under the provisions of *Penal Code § 654* [*Ralph's Grocery Co. v. California Department of Food & Agriculture (2003) 110 Cal. App. 4th 694, 700-701, 1 Cal. Rptr. 3d 869]* .

The Court of Appeal upheld the award of $243,000 in mandatory minimum penalties imposed by the Central Valley Reg'l Water Quality Control Board under *Water Code § 13385* against the City of Brentwood for violations related to

the city's waste water discharge permit. In upholding the denial of the city's petition for a writ of administrative mandamus challenging the amount of the penalties, the Court of Appeal held that the city had the burden of proof of showing that a statutory exception applied to avoid mandatory liability for penalties, and that the statutory term defined the relevant time period for penalty purposes referred to the 180-day time period prior to each violation [*City of Brentwood v. Central Valley Regional Water Quality Control Bd. (2004) 123 Cal. App. 4th 714, 717, 20 Cal. Rptr. 3d 322]* .

The California Supreme Court held that provisions of the Federal Cigarette Labeling and Advertising Act which prohibits states from regulating the advertising and promotion of cigarettes [*15 U.S.C. § 1334(b)*] did not preempt a California statute [*Health & Safety Code § 118950*] that regulated the free distribution of cigarettes [*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co. (2005) 37 Cal. 4th 707, 719, 726, 36 Cal. Rptr. 3d 814, 124 P. 3d 408]* . The California Supreme court also held that it was improper for the trial court to have granted summary judgment on the issue of whether $14,826,200 in fines imposed against the company were excessive within the meaning of the U.S. Constitution [*U.S. Const., Amend. 8*] and the California constitution [*Cal. Const. Art. 1, § 17*]. The fines were imposed under statutory authority [*Health & Safety Code § 118950*] that authorized $200, $500, and $1000 fines for the first, second, and any additional violations of the statute at each event [*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co. (2005) 37 Cal. 4th 707, 712-713, 36 Cal. Rptr. 3d 814, 124 P.3d 408]* . The court remanded the lawsuit to the trial court for a hearing on defendant company's good faith belief defense (that it in good faith believed that its conduct complied with the statute), and on the issue of whether the attorney general delayed notifying the company that its conduct violated the statute for the purpose of allowing the penalties to accumulate in amount [*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co. (2005) 37 Cal. 4th 707, 730-732, 36 Cal. Rptr. 3d 814, 124 P.3d 408]* .

The California Medical Board's decision to fine a physician $500 for aiding the unlicensed practice of medicine in violation of *Bus. & Prof. Code § 2264* was upheld by the Court of Appeal. The court concluded that there was substantial evidence in the administrative record before the board that the physician had knowledge that the clinic where he practiced was partially owned by two individuals who were not licensed to practice medicine in California [*Steinsmith v. Medical Board of California (2000) 85 Cal. App. 4th 458, 465-466, 102 Cal. Rptr. 2d 115]* . However, the Medical Board of California did not have statutory authority under *Bus. & Prof. Code § 805(h)* to impose a $5,000 civil penalty against a physician and a facility administrator in an administrative adjudicatory proceeding brought under the Administrative Procedure Act [*Gov. Code §§ 11400-11529*]. This is because the language of the statute requires that the action be brought by the Attorney General in a civil action in a court of law, not by the agency in an administrative proceeding [*Gilliland v. Medical Board of California (2001) 89 Cal. App. 4th 208, 219-220, 106 Cal. Rptr. 2d 863]* .

The California Court of Appeal held that the Public Utilities Commission has statutory authority (jurisdiction) under *Pub. Util. Code § 2107* to impose fines directly on public utilities regulated by the PUC, with litigation in the superior court only necessary to collect unpaid fines [*Pacific Bell Wireless, LLC v. P.U.C. (2006) 140 Cal. App. 4th 718, 735-737, 44 Cal. Rptr. 3d 733]* . The California Court of Appeal denied a petition for a writ of review brought by wireless carriers to challenge a decision of the California Public Utilities Commission that imposed substantial fines against wireless service providers in California for unjust and unreasonable practices, including charging customers early termination fees to cancel contracts without permitting a grace period, for failing to disclose to customers known network problems and misleading customers regarding network coverage and service. The court rejected the carriers preemption argument and held that the provisions of the Federal Communications Act of 1934, as amended by the Omnibus Budget Reconciliation Act of 1993, that preempt state and local regulation of market entry and rates charged by wireless mobile telephone providers [*47 U.S.C. § 332 (c)(3)(A)*] did not preempt decisions by the California Public Utilities Commission. The court also upheld the imposition of substantial fines ($12 million) against the wireless carriers, and rejected due process arguments against the imposition of fines [*Pacific Bell Wireless, LLC v. P.U.C. (2006) 140 Cal. App. 4th 718, 728, 729, 747, 44 Cal. Rptr. 3d 733]* .

The California Court of Appeal affirmed the judgment of the superior court denying a construction company's petition for a writ of administrative mandate that requested reversal of the decision of the California Occupational Safety and

Health Appeals Board, which upheld the decision of the California Department of Industrial Relations, Division of Occupational Safety and Health that cited the company for violation of a safety order, and assessed a $5,000 civil penalty against the company. The company was cited for a violation of General Industry Safety Order 1592 [*Cal. Code Regs., tit. 8, § 1592(e)*] as a result of an accident on the job that led to serious injuries suffered by an employee of the company [*Teichert Const. v. Cal. Occupational Safety and Health Appeals Board (2006) 140 Cal. App. 4th 883, 886-887, 44 Cal. Rptr. 3d 833]* . The regulation was not unconstitutionally vague under due process of law principles applicable to administrative regulations. The constitutional vagueness standards for administrative regulations are less strict than for criminal laws, and the vagueness challenge is assessed based on the complaining party's conduct in the specific facts of the case to which the regulation is being applied. The regulation was upheld because the agency interpretation of the regulations meaning was reasonable under the circumstances [*Teichert Const. v. Cal. Occupational Safety and Health Appeals Board (2006) 140 Cal. App. 4th 883, 890-892, 44 Cal. Rptr. 3d 833]* .

[9] Attorneys Fees

Private litigants can not recover attorneys fees from the agency under *Code Civ. Proc. § 1021.5* (the Private Attorney General statute) when they prevail against an agency at an administrative hearing and thereby resolve the dispute without having to file a lawsuit [*Hospital Systems v. Office of Statewide Health etc. Development (1994) 25 Cal. App. 4th 1686, 1692-1693, 30 Cal. Rptr. 2d 922]* . However, attorneys fees are recoverable from an agency by a prevailing private party when legal services for administrative proceedings are closely linked to judicial proceedings [*Wallace v. Consumers Cooperative of Berkeley, Inc. (1985) 170 Cal. App. 3d 836, 848-849, 216 Cal. Rptr. 649]* . However, when administrative proceedings are unrelated to judicial proceedings, then attorneys fees for legal services in those administrative proceedings are not recoverable from an agency by a prevailing private party [*Californians for Responsible Toxics Management v. Kizer (1989) 211 Cal. App. 3d 961, 971, 259 Cal. Rptr. 599]* . Attorneys fees are recoverable from an agency by a prevailing private party when legal services for related federal judicial proceedings are closely linked to state judicial proceedings in which the fee award is made [*Children's Hospital & Medical Center v. Bonta' (2002) 97 Cal. App. 4th 740, 781-782, 118 Cal. Rptr. 2d 629]* . The amount of a fee award will not be overturned on appeal unless the amount is manifestly excessive [*Children's Hospital & Medical Center v. Bonta' (2002) 97 Cal. App. 4th 740, 756, 782-783, 118 Cal. Rptr. 2d 629* (appellate court affirmed attorneys fee award in amount of $827,145, and held that both rates charged ($380 per hour), and number of hours spent on case were reasonable)]. Attorney's fees are recoverable under *Code Civ. Proc. § 1021.5* for work done by an attorney in opposing an amicus curiae brief filed by the county in a related case [*Ramon v. County of Santa Clara (2009) 173 Cal. App. 4th 915, 917-918, 93 Cal. Rptr. 3d 278]* . A trial court's decision whether or not to award attorneys fees under *Code Civ. Proc. § 1021.5* is reviewable for abuse of discretion [*Draeger v. Reed (1999) 69 Cal. App. 4th 1511, 1525-1526, 82 Cal. Rptr. 2d 378* (trial court's denial of fee award for lack of significant benefit to public held to be properly within its discretion); *Roybal v. Governing Board of the Salinas City Elementary School District (2008) 159 Cal. App. 4th 1143, 1148-1150, 72 Cal. Rptr. 3d 146* (attorneys' fee award under *Code Civ. Proc. § 1021.5* was abuse of discretion because of lack of significant public benefit); *Lyons v. Chinese Hospital Assn. (2006) 136 Cal. App. 4th 1331, 1336, 39 Cal. Rptr. 3d 550* (denial of attorneys' fee award under *Code Civ. Proc. § 1021.5* was abuse of discretion)]. An award of attorneys fees under *Code Civ Proc. § 1021.5* in favor of a county as a prevailing party and against the Department of Fish and Game acting through the California Wildlife Conservation Board was affirmed by the California Court of Appeal. The county had successfully challenged under the Williamson Act the Department's proposal to convert agricultural land into wildlife habitat. The award was upheld, and the court of appeal also held that the catalyst theory did not apply to this case, and did not have to be satisfied by the prevailing party to recover attorney's fees [*County of Colusa v. Cal. Wildlife Conservation Board (2006) 145 Cal. App. 4th 637, 657-659, 52 Cal. Rptr. 3d 1]* .

The California Court of Appeal held that attorneys had standing to intervene in a client's lawsuit for purposes of seeking attorney's fees under *Code Civ. Proc. § 1021.5*. The attorneys had a sufficient interest in the award of attorney's fees to support permissive intervention under *Code Civ. Proc. § 387(a)* [*Lindelli v. Town of San Anselmo (2006) 139 Cal. App. 4th 1499, 1502, 43 Cal. Rptr.3d 707]* . The attorneys were entitled to an award of reasonable attorney's fees under *Code Civ. Proc. § 1021.5* as both clients and attorneys could be prevailing parties for purposes of fee awards [*Lindelli*

v. Town of San Anselmo (2006) 139 Cal. App. 4th 1499, 1516-1517, 43 Cal. Rptr.3d 707] . The Fourth District, Division 2, California Court of Appeal held that a public employees' union that prevailed in a lawsuit under the police officers procedural *bill of rights* act (POBRA) [*Gov. Code §§ 3300 et. seq*] could recover attorneys fees under *Code Civ. Proc. § 1021.5* [*Riverside Sheriffs' Assn. v. County of Riverside (2007) 152 Cal. App. 4th 414, 417, 61 Cal. Rptr. 3d 295]* .

The California court of Appeal held that the California Attorney general could not recover $173,450 in attorneys fees incurred in litigation with county agency defendants to enforce provisions of the subdivision map act even though the attorney general was the prevailing party in that lawsuit because the attorney general could not satisfy the financial burden requirement for recovery of attorneys fees under *Code Civ. Proc. § 1021.5* [*People ex rel Brown v. Tehama County Board of Supervisors (2007) 149 Cal. App. 4th 422, 456* (attorney general has public duty to enforce state laws acting on behalf of the people of the state of California. Attorney general can not properly be awarded attorney fees for performing public duty, and thus can not meet financial burden criteria of statute)].

Another California Court of Appeal upheld the trial court's denial of an award of attorneys fees to a group of citizens that sought a writ of mandate to compel the City and County of San Francisco to investigate an unreported change of ownership of commercial property in downtown San Francisco. The property was eventually reassessed, and the city received a 64 million dollar increase in property tax revenue as a result. However, the plaintiff's could not recover their attorney's fees under *Code Civ. Proc. § 1021.5* because they could not show that they took steps to settle the dispute before filing the lawsuit, an essential element of the catalyst theory necessary to show that the plaintiffs efforts led to the legal change of position in favor of the city notwithstanding that the plaintiffs were not the prevailing parties in the underlying litigation [*Abouab v. City and County of San Francisco (2006) 141 Cal. App. 4th 643, 664-666, 46 Cal. Rptr. 3d 206*]. Further, the plaintiffs could not recover attorneys fees under the common fund and substantial benefit theories because equitable circumstances prohibited their recovery under these theories [*Abouab v. City and County of San Francisco (2006) 141 Cal. App. 4th 643, 672-674, 46 Cal. Rptr. 3d 206*].

The Fourth District Division 1 California Court of Appeal upheld an award of attorney's fees under the private attorney general statute [*Code Civ. Proc. § 1021.5*] against the Community Development Commission of the City of Escondido based upon the application of the catalyst theory adopted by the California Supreme court in *Graham v. Daimler Chrysler Corp. (2004) 34 Cal. 4th 553, 566, 21 Cal. Rptr. 3d 331, 101 P.3d 140]* to the challenger (Hogar). The court of appeal held that the challenger was a prevailing party under the private attorney general statute because the challengers lawsuit was the catalyst for the commission to change its position and provide 20 percent of gross tax receipts to a low cost housing fund [*Hogar v. Community Development Commission of the City of Escondido (2007) 157 Cal. App. 4th 1358, 1365-1368, 69 Cal. Rptr 3d 250*]. The court of appeal also held that the challenger was entitled to a fully compensatory lodestar fee even though the challenger did not prevail on all claims. The court rejected a negative lodestar reduction for partial success by the challenger because of substantial success, long-term impact, and related claims [*Hogar v. Community Development Commission of the City of Escondido (2007) 157 Cal. App. 4th 1358, 1368-1370, 69 Cal. Rptr 3d 250*]. The court of appeal also held that the challenger could recover attorney's fees for work done prior to the filing of the complaint, and for work done in prosecuting the motion for attorney's fees, but the court upheld the trial court's rejection of a multiplier to the lodestar (reasonable hours times a reasonable hourly rate) fee amount [*Hogar v. Community Development Commission of the City of Escondido (2007) 157 Cal. App. 4th 1358, 1370-1372, 69 Cal. Rptr 3d 250*].

The First District Division 3 California Court of Appeal upheld an award of $55,010 in attorney's fees under the private attorney general statute [*Code Civ. Proc. § 1021.5*] against the Director of the Department of Industrial Relations brought by a union enforcing the prevailing wage law for public works projects. The court held that the department was an opposing party against whom an award of fees could be enforced because the department was responsible for making the policy decision that was the subject of the lawsuit [*Plumbers and Steamfitters, Local 290 v. Duncan (2007) 157 Cal. App. 4th 1083, 1094-1096, 69 Cal. Rptr. 3d 184*]. The court also upheld the award on statutory grounds, that the litigation enforced important rights affecting the public interest. This was because the department's policy decision,

which limited the scope of prevailing wage laws, was designated as a precedential decision that would have been likely to impact other public works projects and other unions in the future. [*Plumbers and Steamfitters, Local 290 v. Duncan (2007) 157 Cal. App. 4th 1083, 1096-1098, 69 Cal. Rptr. 3d 184*]. Finally, the court upheld the recovery of attorney's fees for charges incurred by the union for computerized legal research [*Plumbers and Steamfitters, Local 290 v. Duncan (2007) 157 Cal. App. 4th 1083, 1099, 69 Cal. Rptr. 3d 184*].

The Second District Division 3 California Court of Appeal upheld an award of $50,000 in attorney's fees, split equally between the city of Los Angeles and the project developer under the private attorney general statute [*Code Civ. Proc. § 1021.5*] to a challenger based upon a successful challenge to the environmental review process under the California Environmental Quality Act undertaken by the city in approving a residential development project. The court upheld a $25,000 award against the developer and concluded that the developer was an opposing party under the statute against whom attorney's fees could be awarded, even though the city was responsible for the approval and review decisions [*Mejia v. City of Los Angeles (2007) 156 Cal. App. 4th 151, 159-162, 67 Cal. Rptr. 3d 228*]. The court also held that the challenger satisfied the requirements for a statutory private attorney general award in that the financial burden of the litigation was out of proportion to the personal stake of the plaintiff challenger who was a real property owner and resident next to the proposed development [*Mejia v. City of Los Angeles (2007) 156 Cal. App. 4th 151, 158-159, 67 Cal. Rptr. 3d 228*]. Finally, the court held that the fee award did not improperly infringe on the developer's *first amendment* right to petition the government for redress of grievances, including the right of access to the courts [*Mejia v. City of Los Angeles (2007) 156 Cal. App. 4th 151, 162-163, 67 Cal. Rptr. 3d 228*].

The California Court of Appeal upheld an attorney's fee award under *Code Civ. Proc. § 1021.5* of $216,495.34 against the Department of Health Services for legal fees incurred by plaintiffs in defending against DHS efforts to modify an injunction previously granted against DHS notwithstanding that parties waited three years to seek the fee award. The Court of Appeal held that DHS was not prejudiced by the delay in seeking attorney's fees [*Crespin v. Shewry (2004) 125 Cal. App. 4th 259, 271-272, 22 Cal. Rptr. 3d 696]* . Another California Court of Appeal affirmed the superior court's denial of an attorney's fee award under *Code Civ. Proc. § 1021.5* sought by a harness operator against CAL-EXPO. The operator had challenged bidding contract practices used by CAL-EXPO for harness racing. The denial of attorneys fees was based on the financial burden element of the statutory test. The Court of Appeal upheld the fact findings of the trial court that the harness operator had a significant financial interest in the litigation (as a competitor of the successful contractor with CAL-EXPO), and thus the cost of the lawsuit was not disproportionate to the litigants economic interest in the lawsuit [*Arnold v. California Expo. and State Fair (2004) 125 Cal. App. 4th 498, 509-511, 22 Cal. Rptr. 3d 790]* .

The California Court of Appeal upheld an award of $17,314.35 in attorney's fees, and $979.00 in costs under *Code Civ. Proc. § 1021.5* against the City of Berkeley, sought by neighbors of a proposed housing development, for denial of due process hearing rights. The award was partial and did not include all of the approximately $90,000 in legal fees and approximately $6,000 in costs paid by the neighbors to challenge the approval in court. The court of appeal upheld the trial court award applying the abuse of discretion standard of review, and held that the neighbors' partial success in court on the due process claim, that they were deprived of the right to go before the city council to challenge the project at the meeting in which the city council originally approved the project, was sufficient for them to be considered successful parties within the meaning of *Code Civ. Proc. § 1021.5* [*Bowman v. City of Berkeley (2005) 131 Cal. App. 4th 173, 176-178, 31 Cal. Rptr. 3d 447]* . The court also held that the neighbors satisfied the significant public benefit and substantial private burden tests for fee awards under *Code Civ. Proc. § 1021.5* [*Bowman v. City of Berkeley (2005) 131 Cal. App. 4th 173, 180-182, 31 Cal. Rptr. 3d 447]* .

Another California Court of Appeal upheld the trial court's denial of an attorney's fee award under *Code Civ. Proc. § 1021.5* to a group of challengers of a proposed project and against the city of La Habra. The Court of Appeal held that the significant public benefit element of statutory fees was not met, in that the challengers established that there was a minor inadequacy in the city's mitigated negative declaration that did not comply with CEQA, and this was not a sufficient public benefit justifying a fee award. Therefore it was not an abuse of discretion for the superior court to deny

the fee award requested [*Concerned Citizens of La Habra v. City of La Habra (2005) 131 Cal. App. 4th 329, 334-336, 31 Cal. Rptr. 3d 599]* . Another California Court of Appeal reversed the trial court's denial of an attorney's fee award under *Code Civ. Proc. § 1021.5* to a group of challengers of a proposed project and against the County of Merced. Project approval had been reversed and remanded because the administrative record was not adequate for judicial review. Based on this result, the challengers were successful parties within the meaning of the statute, who accomplished a significant public benefit, requiring the county to provide an adequate administrative record for the reviewing court to determine compliance with CEQA requirements. The court of appeal held that it was an abuse of discretion to deny the fee award, and reversed and remanded to determine the amount of the fee award [*Protect Our Water v. County of Merced (2005) 130 Cal. App. 4th 488, 497-498, 30 Cal. Rptr. 3d 202]* .

The First District Division 1 California Court of Appeal held that a taxpayer could recover attorney's fees under *Code Civ. Proc. § 1021.5* as a prevailing party in a tax refund action against the California Franchise Tax Board. The taxpayer was not limited to recovery of attorney's fees under *Rev. & Tax. Code § 19717* [*Ventas Finance I, LLC v. California Franchise Tax Board (2008) 165 Cal. App. 4th 1207, 1211-1213, 81 Cal. Rptr. 3d 823*]. The First District Division Five California Court of Appeal held that a taxpayer could recover attorney's fees under *Code Civ. Proc. § 1021.5* and was not limited to recovery of fees under *Rev. & Tax. Code § 19717*. However, the taxpayer was limited to the lodestar amount and was not entitled to a multiplier [*Northwest Energetic Services, LLC v. California Franchise Tax Bd. (2008) 159 Cal. App. 4th 841, 875-877, 71 Cal. Rptr. 3d 642*]. The Third District California Court of Appeal reversed an order of the superior court denying an award of attorney's fees under *Code Civ. Proc. § 1021.5* to a nonprofit organization. The superior court had denied the fee award based on the necessity for private enforcement criteria, that the nonprofit organizations efforts were unnecessary because a public entity had achieved the same success in the underlying litigation as a private attorney general. The court of appeal held that the necessity criteria were met, and that the nonprofit organization was entitled to attorney's fees. The court noted that it was irrational to provide a fee award to the public entity under *Code Civ. Proc. § 1021.5*, and to deny a fee award to the nonprofit organization when both had contributed to the same successful result [*State Water Resources Control Board Cases (2008) 161 Cal. App. 4th 304, 306-308, 73 Cal. Rptr. 3d 842*].

To determine the amount of the attorney fee award under *Code Civ. Proc. § 1021.5*, the court first determines the "lodestar" amount by compiling the reasonable hourly compensation of the attorneys involved in the case. Then, the court can increase or decrease the amount of the award based on a number of factors. In one case, the court properly applied a 1.5 multiplier to the lodestar amount ($86,671) to award a total fee of $130,006 in favor of the union and against Caltrans. The multiplier was justified by the novelty and difficulty of the issues, the attorney's skill, excellent results, and the importance of the rights enforced in the lawsuit [*Edgerton v. State Personnel Board (2000) 83 Cal. App. 4th 1350, 1362-1363, 100 Cal. Rptr. 2d 491]* .

Code Civ. Proc. § 1028.5 gives the superior court discretion to award reasonable litigation expenses, including attorneys fees, to a small business or licensee, in civil actions between small businesses or licensees that are engaged in civil litigation against a state regulatory agency involving the regulatory functions of that agency as applied to the small business or licensee when the small business or licensee prevails and the court determines that the agency action was undertaken without substantial justification [*Code Civ. Proc. § 1028.5(a)*; *Wang v. Division of Labor Standards Enforcement (1990) 219 Cal. App. 3d 1152, 268 Cal. Rptr. 669]* .

Code Civ. Proc. § 1029.8 authorizes awards of attorneys fees to injured persons when unlicensed individuals cause injury or damage to another person as a result of providing goods or performing services for which a license is required under specified provisions of the Business and Professions Code [*Code Civ. Proc. § 1029.8(a)*].

Under *Bus. & Prof. Code § 125.3*, a licensing agency within the Department of Consumer Affairs may, upon the resolution of a disciplinary proceeding, recover from a licensee found to have violated the licensing requirements the reasonable costs of the agency's investigation and enforcement of the violation. This may include attorneys fees charged by Attorney General's office for representing an agency in a license revocation proceeding [*Angelier v. State Board of*

Pharmacy (1997) 58 Cal. App. 4th 592, 600-601, 68 Cal. Rptr. 2d 213] .

A State Board of Chiropractic Examiners order requiring a disciplined chiropractor to pay $17,500 costs to reimburse the Board for pre hearing investigative and prosecution costs in his case was challenged on grounds that the regulation which authorized payment of pre hearing costs, *16 Cal. Code Reg. § 317.5*, was facially unconstitutional because it violated the due process of law rights of the chiropractor ordered to pay those costs. The due process of law violation alleged was that the prospect of having to pay such costs would discourage chiropractors from requesting hearings when facing discipline charges brought by the Board. The California Supreme court rejected this claim, held that the regulation is not unconstitutional on its face, and did not violate due process of law [*Zuckerman v. State Board of Chiropractic Examiners (2002) 29 Cal. 4th 32, 46-48, 124 Cal. Rptr. 2d 701, 53 P.3d 119]* . The Court analyzed the due process claim based on the three factors set forth in the US Supreme Court decision in *Mathews v. Eldridge (1976) 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18* , and concluded that the discretionary nature of the authority to award costs, and the availability of judicial review to challenge specific costs orders, reduced the risk of error for such orders, and satisfied due process of law requirements [*Zuckerman v. State Board of Chiropractic Examiners (2002) 29 Cal. 4th 32, 44-46, 124 Cal. Rptr. 2d 701, 53 P.3d 119]* . The Supreme Court noted that the provisions of the regulations were similar to *Bus & Prof. Code § 125.3*, and that the Chiropractic Examiners Board had been added to the list of agencies who had the authority to recover similar costs under *Bus. & Prof. Code § 125.3*, but that statutory amendment occurred after the order in the Zuckerman case was entered. Therefore, the decision did not address the constitutionality of *Bus. & Prof. Code § 125.3* [*Zuckerman v. State Board of Chiropractic Examiners (2002) 29 Cal. 4th 32, 37-38, 124 Cal. Rptr. 2d 701, 53 P.3d 119]* .

Gov. Code § 800 authorizes awards of attorneys fees to complaining parties in civil actions to appeal or review awards, findings, or determinations of administrative proceedings when those administrative proceedings determinations were the result of arbitrary or capricious action by public entities or officers acting in their official capacity. The complaining party must prevail in the civil action, and can recover reasonable attorneys fees at the rate of $100 per hour up to $7,500 in total fees [*Gov. Code § 800*; *Halaco Engineering Co. v. South Central Coast Regional Com. (1986) 42 Cal. 3d 52, 227 Cal. Rptr. 667, 720 P.2d 15* ; *Kistler v. Redwoods Community College Dist. (1993) 15 Cal. App. 4th 1326, 19 Cal. Rptr. 2d 417]* . Attorneys fees may not be awarded under *Gov. Code § 800* to a petitioner whose driver's license was suspended, when petitioner challenged a letter from a DMV driver safety officer stating that the petitioner's suspension could not be set aside; such a letter is not a "determination of an administrative proceeding" that is a necessary prerequisite to recovery under that statute [*Gustafson v. Zolin (1997) 57 Cal. App. 4th 1361, 1363, 67 Cal. Rptr. 2d 645]* . Attorneys fees may not be awarded under *Gov. Code § 800* against the Medical Board of California for asserting a position on appeal that raised a question of first impression. Even though the Board lost as to the argument that it made on appeal, the argument was not wholly without merit, and it was not made arbitrarily or in bad faith [*Gilliland v. Medical Board of California (2001) 89 Cal. App. 4th 208, 220-221, 106 Cal. Rptr. 2d 863]* . Attorney's fees may be awarded against a school district under *Gov. Code § 800* when the school district engaged in arbitrary and capricious actions by failing to provide the superior court with any defense or rationale for its actions [*Reis v. Biggs Uni. Sch. Dist. (2005) 126 Cal. App. 4th 809, 822-824, 24 Cal. Rptr. 3d 393* (court upheld $7,500 attorney fees award)].

The California Court of Appeal held that attorneys fees (in the amount of $6,334) were properly awarded under *Gov. Code § 800* to a father of a high school student who successfully challenged the school district's decision that prevented the high school student form participating in high school athletics [*Zuehlsdorf. v. Simi Valley Unified School District (2007) 148 Cal. App. 4th 249, 257-258, 55 Cal. Rptr. 3d 467]* . The daughter was reinstated into the athletics program after the superior court granted a temporary restraining order and a preliminary injunction enjoining the school district from prohibiting the students athletic participation. The superior court found that the denial of athletic participation by the school district was arbitrary and capricious within the meaning of *Gov. Code § 800* [*Zuehlsdorf. v. Simi Valley Unified School District (2007) 148 Cal. App. 4th 249, 254-255, 55 Cal. Rptr. 3d 467]* . The superior court denied an application by the father for a permanent injunction because of mootness in that the student had completed the athletic season, and there was no need to further enjoin the school district. The Court of Appeal upheld the fee award concluding that there was an adequate factual finding that the school district acted arbitrarily and capriciously in

denying athletic participation [*Zuehlsdorf. v. Simi Valley Unified School District (2007) 148 Cal. App. 4th 249, 255-256, 55 Cal. Rptr. 3d 467]* , and that the father was a prevailing party under *Gov. Code Section 800* notwithstanding the denial of the permanent injunction on the grounds of mootness, because the father achieved his litigation objectives, getting his daughter reinstated into the athletic program at her high school [*Zuehlsdorf. v. Simi Valley Unified School District (2007) 148 Cal. App. 4th 249, 256-257, 55 Cal. Rptr. 3d 467]* .

Bus. & Prof. Code § 125.3 authorizes the Medical Board of California to recover investigative costs and attorneys fees incurred in a license revocation proceeding from the physician whose medical license was revoked in that proceeding [*Schneider v. Medical Board of California (1997) 54 Cal. App. 4th 351* ; *see also Oranen v. State Board of Chiropractic Examiners (1999) 77 Cal. App. 4th 258, 261-263, 90 Cal. Rptr. 2d 287* (upholding decision by State Board of Chiropractic Examiners ordering a chiropractor to pay reasonable investigative and enforcement costs of a proceeding which led to revocation of the chiropractor's license)]. The Fair Employment and Housing Commission also has the statutory authority to award to a prevailing party, other than the state, reasonable attorneys fees and costs against any party other than the state, including expert witness fees [*Gov. Code § 12987(a)(3)*].

Attorney's fees under *Labor Code § 98.2* were properly awarded against an employer who appealed an order of the Labor Commissioner to pay wages to an employee and lost the appeal (de novo hearing) in the Superior court. The Supreme Court allowed an award of attorney's fees under the statute notwithstanding that the employee was unable to pay for his own attorney, and the Labor Commissioner represented the employee in the Superior court at the de novo hearing without cost to the employee, because the court interpreted the statutory language "attorneys fees incurred" to include indigents who are not personally obligated to pay fees to their attorneys [*Lolley v. Campbell (2002) 28 Cal. 4th 367, 370-371, 121 Cal. Rptr. 2d 571, 48 P.3d 1128]* . Attorneys fees awarded under *Labor Code § 98.2* are limited to fees incurred in the trial de novo civil proceeding and do not include fees incurred in the administrative proceeding before the labor commissioner to recover overtime wages [*Sampson v. Parking Service 2000 Com, Inc. (2004) 117 Cal. App. 4th 212*]. The Third District California Court of Appeal upheld an award $40,000 in attorneys' fees under *Labor Code 1194* to an employee who prevailed in a civil lawsuit for unpaid overtime compensation. The civil lawsuit was a *Labor Code § 98.2* appeal from an administrative decision. The fees were awarded were for fees incurred in the superior court on the appeal. The court of appeal held that *Labor Code § 1194* authorizes fee awards in these circumstances [*Eicher v. Advanced Business Integrators, Inc. (2007) 151 Cal. App. 4th 1363, 1378-1380, 61 Cal. Rptr. 3d 114]* .

Attorneys fees awarded by PUC under *Pub. Util. Code § 1802*, which authorizes awards to utility customers for fees incurred in participating in judicial review proceedings related to PUC decisions, to consumer intervenors properly included $250,000 in fees incurred by a non-profit consumer advocacy organization (TURN) for participation in federal court lawsuit brought by regulated utilities to overturn PUC decisions in which the organization has participated as a consumer advocate [*Southern California Edison Co. v. Public Utilities Comm'n of the State of California (2004) 117 Cal. App. 4th 1039, 1043-1044, 12 Cal. Rptr. 3d 441]* .

The California Court of Appeal affirmed an order of the California Public Utilities Commission that a nonprofit consumer advocacy organization could not recover attorney's fees under *Pub. Util. § 1802* for a court challenge to a settlement of a lawsuit between a regulated electric utility (Southern California Edison) and the California Public Utilities Commission (PUC). The PUC concluded that the challenge was not successful and did not make a substantial contribution to the PUC proceedings. The court also affirmed an order that TURN was not entitled to a multiplier to increase the amounts of the fees awarded for participating in lawsuits related to electrical deregulation. However, the court reversed the order of the PUC requiring payment of outside counsel's compensation at the same rate as inside counsel. The court held that was an abuse of discretion [*The Utility Reform Network v. Public Utilities Commission (2008) 166 Cal. App. 4th 522, 82 Cal. Rptr. 3d 791*].

The California Supreme Court held that attorneys fees awards against public entities under the provisions of the private attorney general fee award statute [*Code Civ. Proc. § 1021.5*] and under the Fair Employment and Housing Act (FEHA)

fee award statute [*Gov. Code § 12965(b)*] can be authorized under the "catalyst" theory without proof of a judicially recognized change in the legal relationship between the parties, such as a judgment on the merits, a consent decree, or a court ordered settlement [*Tipton-Whittingham v. City of Los Angeles (2004) 34 Cal. 4th 604, 607-608, 21 Cal. Rptr. 3d 371, 101 P.3d 174]* . The question was certified to the California Supreme Court by the 9th Circuit Court of Appeals that was deciding an appeal of a district court opinion that upheld an award of $1.7 million in attorney's fees against the City of Los Angeles based on the two California statutes. The award was made in a class action sex discrimination lawsuit brought by female officers and employees of the Los Angeles Police Department against the department. The plaintiffs sought injunctive relief and damages. The parties conducted settlement negotiations, which lead to a consent decree in federal court that was later revoked. Subsequent settlement discussions led to the LAPD voluntarily making changes in work conditions that responded to the discrimination claims, and that were very similar to the terms of the revoked consent decree. The claims for injunctive relief were dismissed, and later plaintiffs recovered an award of attorneys fees [*Tipton-Whittingham v. City of Los Angeles (2004) 34 Cal. 4th 604, 607-608, 21 Cal. Rptr. 3d 371, 101 P.3d 174]* . In recognizing the catalyst theory with lawsuits against public entities, the Supreme Court noted the limitation that attorneys fees cannot be awarded when the lawsuit has "merely caused the acceleration of the issuance of government regulations or remedial measures" when that process had started prior to the filing of the lawsuit [*Tipton-Whittingham v. City of Los Angeles (2004) 34 Cal. 4th 604*]. The California Court of Appeal reversed an award of attorney's fees under the private attorney general statute [*Code Civ. Proc. § 1021.5*] that had been granted based on application of the "catalyst" theory, and remanded for reconsideration based on the limitations placed on that theory in the California Supreme Court decision in *Graham v. Daimler Chrysler Corp. (2004) 34 Cal. 4th 553, 21 Cal. Rptr. 3d 331, 101 P. 3d 140* , decided at the same time as the California Supreme Court decision in *Tipton-Whittingham v. City of Los Angeles (2004) 34 Cal. 4th 604, 21 Cal. Rptr. 3d 371, 101 P. 3d 174* , both of which accepted the catalyst theory, but set limits on its application [*Godinez v. Schwarzenegger (2005) 132 Cal. App. 4th 73, 77-78, 33 Cal. Rptr. 3d 270* , 33 Cal. Rpt. 3d 270 (1.9 million dollar fee award against the State of California based on catalyst theory)].

The California Court of Appeal held that a nonprofit corporation, the Marine Forests Society, could not recover appellate attorney's fees under *Code Civ. Proc. § 1021.5* because it was not a prevailing party as to the claims for which it sought attorney's fees. The corporation sought injunctive relief against the California Coastal Commission to prohibit the commission from commencing cease and desist proceedings against the corporation's experimental manmade reef on the ocean floor. The corporation was successful in challenging the legislative appointment authority for the Commissioners of the California Coastal Commission. However, its successful litigation related to appointment did not change the behavior of the commission, only the legislature's behavior, and thus neither the judicially sanctioned relief nor the catalyst theory are applicable (citing the Graham decision), and the corporation was not a prevailing party (successful litigant) under *Code Civ. Proc. § 1021.5* [*Marine Forests Society v. California Coastal Commission (2008) 160 Cal. App. 4th 867, 869-871, 74 Cal. Rptr. 3d 32*].

The California Supreme Court held that the catalyst theory requirement that the party seeking attorney's fees under *Code Civ. Proc. § 1021.5* make a reasonable attempt to settle the dispute with defendant prior to litigation did not apply to recovery of fees in cases that did not rely on the catalyst theory. In non-catalyst theory cases, the reasonable attempt factor would be considered as part of the court's equitable discretion in determining whether the necessity and financial burden of private enforcement requirement for fee recovery under *Code Civ. Proc. § 1021.5* was satisfied, but it would not be a requirement for fee recovery [*Vasquez v. State of California (2008) 45 Cal. 4th 243, 247-249, 85 Cal. Rptr. 3d 466, 195 P.3d 1049*].

Attorneys fees that are awarded under *Gov. Code § 12965*, which awards prevailing parties, other than public agencies or officials, reasonable attorneys fees in court litigation under The California Fair Employment and Housing Act (FEHA) [*Gov. Code § 12900 et seq.*], belong to the attorneys who earned those fees when there is no enforceable contractual agreement that decides who is entitled to those attorneys fees [*Flannery v. Prentice (2001) 26 Cal. 4th 572, 575-577, 110 Cal. Rptr. 2d 809, 28 P.3d 860]* .

The California Court of Appeal upheld an award of $39,472.30 in trial related attorney's fees under *Gov. Code § 12965*

in favor of a city and against a former city employee who brought a frivolous lawsuit claiming racial discrimination under the FEHA statute. The court held that while the trial court that ordered the fee award has the responsibility to consider the losing parties' financial status, the losing party in this case did not offer any evidence of financial or income information that would support a lowered fee award. Therefore, the fee order was not an abuse of discretion. The court of appeal denied the city appellate attorney's fees under *Gov. Code § 12965* because the former employee's appeal was not frivolous as to the issue of whether the fee awarding court has to consider the losing parties ability to pay [*Villanueva v. City of Colton (2008) 160 Cal. App. 4th 1188, 1202-1204, 73 Cal. Rptr. 3d 343*].

The California Court of Appeal held that a taxpayer, who successfully challenged the assessment by the State Board of Equalization (SBE) of past sale taxes due plus interest, and received a refund equal to 90 percent of the past due taxes plus interest, was not entitled to recovery of attorney's fees and costs under the provisions of *Rev. and Tax Code § 7156* because the SBE's legal positions related to the assessments had enough reasonable basis so that the taxpayer could not satisfy the requirement that the agency position "was not substantially justified" [*Agnew v. State Bd. of Equalization (2005) 134 Cal. App. 4th 899, 910-911, 36 Cal. Rptr. 3d 464]* . However, the taxpayer was entitled to recover costs and expert witness fees under *Code Civ. Proc §§ 998, 1028*, and *1032*, as the taxpayer substantially prevailed in his challenge to the assessment, and the provisions of *Rev & Tax Code § 7156* are not the exclusive means for a costs recovery by a prevailing litigant [*Agnew v. State Bd. of Equalization (2005) 134 Cal. App. 4th 899, 914-915, 36 Cal. Rptr. 3d 464]* .

The California Supreme Court held that political advocacy groups (e.g., the California Business Council) who unsuccessfully defended the constitutionality of state statutes that granted improper preferences based on race or gender, were not "opposing parties" for purposes of the California private attorney general statute [*Code Civ. Proc. § 1021.5*], and therefore could not be held liable for attorney's fees awarded to the successful prevailing plaintiff. Advocacy groups participated in the litigation initially as amicus curiae, but later intervened as real parties in interest, and defended the statutes constitutionality on the merits. This holding was supported by the advocacy group's political or ideological interest in the litigation, which differentiated that group from the normal defendant in litigation that had a direct interest in litigation, or has duty to defend the underlying statute. Furthermore, a contrary holding would discourage parties from participating in litigation as amicus curiae [*Connerly v. State Personnel Bd. (2006) 37 Cal. 4th 1169, 39 Cal. Rptr. 3d 788, 797-799, 129 P.3d 1]* .

The California Court of Appeal reversed an award of attorney's fees under the Fair Employment and Housing Act (FEHA) fee award statute [*Gov. Code § 12965(b)*] and held that the trial court judge had committed an abuse of discretion in making the fee award [*Horsford v. Board of Trs. of Cal. State Univ. (2005) 132 Cal. App. 4th 359, 366, 33 Cal. Rptr. 3d 644]* . The trial court abused its discretion by completely rejecting the time records submitted by the attorneys seeking fees, in not using the attorney's time records as the initial basis for the lodestar determination (reasonable hours times a reasonable hourly rate), in failing to consider a higher hourly rate for an out of town attorney, in failing to consider relevant factors for awarding enhancement multipliers to the lodestar fee award, in relying on the public entity status of the defendant to deny any enhancement multiplier, and in requiring the attorneys to obtain full compensation form their clients under the terms of the contingency fee agreement [*Horsford v. Board of Trs. of Cal. State Univ. (2005) 132 Cal. App. 4th 359, 397-399, 33 Cal. Rptr. 3d 644]* .

[10] Hearing Costs

The California Supreme Court held that a statutory cost sharing provision [*Educ. Code § 44944*] which required a teacher who lost a suspension or dismissal hearing to pay one half of the costs of the administrative law judge who heard the case violated due process of law [*California Teachers Assn v. State of Cal. (1999) 20 Cal. 4th 327, 337, 84 Cal. Rptr. 2d 425, 975 P. 2d 622]* . The California Court of Appeal held that a provision in a memorandum of understanding agreement (between a city and the public employees association) which required that an employee who sought to challenge their termination from public employment had to share equally in the cost of paying a hearing officer to hear the employee's appeal from a job termination violated the employee's due process of law right to a

hearing, and this right could not be waived [*Florio v. City of Ontario (2005) 130 Cal. App 4th 1462, 1465-1467, 30 Cal. Rptr. 3d 841]* . However, the California Court of Appeal rejected an argument that the financial interest bias rule codified in the *Haas* case was violated by an award of $1.8 million in pre-hearing costs related to disciplinary proceedings against an accounting firm. The Court held that the Board did not have an improper pecuniary interest in the outcome of the discipline proceedings. The award was paid to the Board of Accountancy to reimburse the Board for extensive costs incurred in investigating and preparing for hearing a discipline case against the accounting firm. The Board did not have an improper pecuniary interest because the cost award was authorized and regulated by statute, *Bus. & Prof. Code § 5107*, and this statute protected the Board from improper influences related to the cost award. This is because the cost award was made by the administrative law judge (ALJ) who heard the case, and that ALJ did not have a financial interest in the cost award that he or she assessed. The Board has the authority to decrease or eliminate the award, or to affirm the award, but not to increase the cost award [*McBride v. California Board of Accountancy (2005) 130 Cal. App. 4th 518, 525-527, 30 Cal. Rptr. 3d 287]* .

[11] Restitution Orders

License holders that are regulated by the Department of Motor Vehicles under *Veh. Code § 11703.2* can be required to provide restitution for financial losses or damages suffered by a person as a condition of the issuance of a license. Restitution orders can be issued by administrative law judges as part of an adjudicatory decision. Failure to pay money owed under a restitution order provides separate grounds for the DMV to not issue a license [*Veh. Code § 11703.2*]. Specifically, a decision rendered against a licensee under Article 1 (commencing with Section 11700) of Chapter 4 of Division 5 of the Vehicle Code may include an order of restitution for any financial loss or damage found to have been suffered by a person in the case [*Gov. Code § 11519.1(a)*]. Furthermore, the failure to make the restitution in accordance with the terms of the decision is separate grounds for the Department of Motor Vehicles to refuse to issue a license under Article 1 (commencing with Section 11700) of Chapter 4 of Division 5 of the Vehicle Code, and constitutes a violation of the terms of any applicable probationary order in the decision [*Gov. Code § 11519.1(b)*]. Finally, nothing in this section is intended to limit or restrict actions, remedies, or procedures otherwise available to an aggrieved party pursuant to any other provision of law [*Gov. Code § 11519.1(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationDecisionsGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesHealthcare LawBusiness Administration & OrganizationLicensesRevocation & SuspensionLegal EthicsSanctionsDisbarmentsReal Property LawBrokersDiscipline, Licensing & Regulation

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§ 473G.36 Reinstatement of Licenses

[1] Petition

Under the APA, a person whose license has been suspended or revoked [*see § 473G.35[2]*] may petition the agency for reinstatement or reduction of penalty [*Gov. Code § 11522*]. The APA provisions do not apply, however, if the agency is required by statute to comply with different procedures for reinstatement or reduction of penalty [*Gov. Code § 11522*]. Under the APA, the licensee cannot file the petition until one year has elapsed from either the effective date of the decision revoking or suspending the license, or the denial of a similar petition [*Gov. Code § 11522*]. Although the APA does not prescribe the form and contents of a petition, counsel should check for specific requirements in the statutes governing the particular agencies. For an example of a petition for reinstatement, see *§ 473G.71*.

[2] Proceedings After Petition Is Filed

An agency must notify the attorney general of the filing of a reinstatement or reduction petition [*Gov. Code § 11522*]. Both the petitioner and the attorney general must be given the opportunity to present either oral or written argument before the agency itself [*Gov. Code § 11522*]. The burden is on the petitioner to prove that he or she has been rehabilitated and is entitled to have his or her license restored [*Housman v. Board of Medical Examiners (1948) 84 Cal. App. 2d 308, 312, 190 P.2d 653* ; *see* Ch. 473F, *Agency Adjudication Hearings* , for a discussion of the burden of proof].

[3] Decision

The agency itself must decide the petition. It must state the reasons for its decision granting or denying the petition, and must specify any terms and conditions that it reasonably deems appropriate to impose as a condition of reinstatement [*Gov. Code § 11522*]. A statement of reasons (1) allows a reviewing court to determine why an agency made its decision, and thus to ascertain whether substantial evidence exists to support that decision, and (2) advises the rejected petitioner for reinstatement of his or her deficiencies, so that he or she may correct them [*Crandell v. Fox (1978) 86 Cal. App. 3d 760, 765, 150 Cal. Rptr. 426]* . If the agency fails to specify its reasons for granting or denying a petition, the court will reverse and remand the decision. For example, in *Crandell v. Fox (1978) 86 Cal. App. 3d 760, 150 Cal.*

Rptr. 426 , the Court of Appeal held that the agency's statement that the petitioner had failed to demonstrate to its satisfaction that he had undergone sufficient rehabilitation to warrant reinstatement of his license was insufficient [*Crandell v. Fox (1978) 86 Cal. App. 3d 760, 764, 150 Cal. Rptr. 426* (petition to reinstate real estate license)].

Legal Topics:

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

§§ 473G.37[Reserved]

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§ 473G.40 Related Matthew Bender Publications

For forms for use in drafting memoranda in judicial proceedings to review a public agency decision, see California Points and Authorities, Ch. 195, *Public Administrative Law* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 473G.41 Federal Constitution

Due process clause. *U.S. Const., amend. XIV, § 1*

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§ 473G.42 State Constitution

Due process clause. *Cal. Const., art. I, § 7(a)*

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§ 473G.43 State Statutes

[1] Administrative Procedure Act

Accusation. *Gov. Code § 11503*

Administrative adjudication *bill of rights*. *Gov. Code §§ 11425.10-11425.60*

Administrative Law Judges. *Gov. Code § 11502*

Affidavits. *Gov. Code § 11514*

Agency decisional authority. *Gov. Code § 11440.10*

Agencies to which act applies. *Gov. Code §§ 11410.10, 11501*

Amendment of pleadings. *Gov. Code §§ 11507, 11516*

Applicability of provisions to statement of issues. *Gov. Code § 11504.5*

Conduct of hearing. *Gov. Code § 11512*

Consolidation of proceedings. *Gov. Code § 11507.3*

Contempt. *Gov. Code §§ 11455.10-11455.30*

Continuances. *Gov. Code § 11524*

Conversion of proceedings. *Gov. Code §§ 11470.10-11470.50*

Decision. *Gov. Code §§ 11516-11520, 11526*

Declaratory decision. *Gov. Code §§ 11465.10-11465.70*

Definitions of terms. *Gov. Code §§ 11405.10-11405.80, 11500*

Depositions. *Gov. Code § 11511*

Discovery. *Gov. Code §§ 11507.5-11507.7*

Disqualification. *Gov. Code §§ 11425.30, 11425.40, 11512*

Emergency decision. *Gov. Code §§ 11460.10-11460.80*

Evidence. *Gov. Code §§ 11435.10, 11440.40, 11513*

Ex parte communications. *Gov. Code §§ 11430.10-11430.80*

Hearings by electronic means. *Gov. Code § 11440.30*

Informal hearings. *Gov. Code §§ 11445.10-11445.60*

Intervention. *Gov. Code § 11440.50*

Language assistance. *Gov. Code §§ 11435.05-11435.65*

Judicial review. *Gov. Code § 11523*

Notice of defense. *Gov. Code § 11506*

Notice of hearing. *Gov. Code § 11509*

Oaths. *Gov. Code § 11528*

Official notice. *Gov. Code § 11515*

Reconsideration. *Gov. Code § 11521*

Reporting proceedings. *Gov. Code § 11512*

Restoration of rights. *Gov. Code § 11522*

Separate hearings. *Gov. Code § 11507.3*

Service and notice. *Gov. Code § 11440.20*

Service of initial pleading. *Gov. Code § 11505*

Settlement conferences. *Gov. Code § 11511.7*

Sexual harrassment. *Gov. Code § 11440.40*

Statement of issues. *Gov. Code § 11504*

Subpoenas. *Gov. Code §§ 11450.05-11450.50*

Time and place of hearing. *Gov. Code § 11508*

Waiver of rights. *Gov. Code § 11415.40*

[2] Related Statutes

Affidavit of good cause as required for subpoena duces tecum. *Code Civ. Proc. § 1985*

Witness served with subpoena as entitled to demand one day's fees and mileage allowance. *Code Civ. Proc. § 1987*

Witness fees and mileage allowances. *Gov. Code §§ 11191, 68093, 68097.2*

Right to have subpoena issued. *Gov. Code § 11190*

Office of Administrative Hearings. *Gov. Code §§ 11370.1-11370.5*

Board of supervisors of county as empowered to establish county hearing officer. *Gov. Code §§ 27720, 27721*

Oaths used in civil proceedings. *Code Civ. Proc. §§ 2094-2097*

Evidentiary effect of plea of nolo contendere. *Penal Code § 1016*

Legal Topics:

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§ 473G.44 Decisions

[1] Clerical Mistakes

Agency is empowered to correct clerical mistakes in decision by nunc pro tunc order. *Russ v. Smith (1968) 264 Cal. App. 2d 385, 391, 70 Cal. Rptr. 813*

[2] Contested Cases

Statutory requirement that agency members hear evidence does not mean members must listen to witness testify. *Cooper v. State Bd. of Medical Examiners (1950) 35 Cal. 2d 242, 246, 217 P.2d 630*

Failure to serve copy of proposed decision before adoption of it is not denial of due process. *Stoumen v. Munro (1963) 219 Cal. App. 2d 302, 314, 33 Cal. Rptr. 305*

[3] Law of the Case

Agency is prohibited from acting inconsistently with court order once court has passed on question of law in its review of agency action; decision of reviewing court establishes law of the case and binds agency in all further proceedings. *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd. (1989) 49 Cal. 3d 1279, 1291, 265 Cal. Rptr. 162, 783 P.2d 749*

[4] Reconsideration Under Administrative Procedure Act

Under *Gov. Code § 11521(a)*, agency is deemed to have acted on petition for reconsideration when it issues formal order; when no formal order issued within 30-day statutory period for granting petition, petition is not acted on within meaning of statute and deemed denied even though agency members cast requisite number of votes to grant petition. *Gamm v. Board of Medical Quality Assurance (1982) 129 Cal. App. 3d 34, 35, 181 Cal. Rptr. 23*

OSHA Board has acted on petition for reconsideration within 30-day limit for purpose of retaining jurisdiction when it took petition under submission and stayed administrative law judge's decision. *Newbery Electric Corp. v. Occupational Safety & Health Appeals Bd. (1981) 123 Cal. App. 3d 641, 648, 176 Cal. Rptr. 734*

Agency loses jurisdiction to reconsider if it makes decision effective on delivery. *Moran v. Board of Medical Examiners (1948) 32 Cal. 2d 301, 304, 196 P.2d 20*

Stay of decision to allow reconsideration is required to be actually ordered. *Koehn v. State Board of Equalization (1958) 166 Cal. App. 2d 109, 113, 333 P.2d 125*

[5] Rehearing

Rehearing is not essential to due process. *Whitley v. Superior Court (1941) 18 Cal. 2d 75, 81, 113 P.2d 449*

Agency is authorized to reconsider without rehearing where it has continuing jurisdiction. *Olive Proration etc. Com. v. Agri. etc. Com. (1941) 17 Cal. 2d 204, 209, 109 P.2d 918*

Power to reconsider is distinguishable from power to reopen case. *Lindell Co. v. Board of Permit Appeals (1943) 23 Cal. 2d 303, 316-317, 144 P.2d 4*

Power to hold rehearing is not inherent. *Heap v. City of Los Angeles (1936) 6 Cal. 2d 405, 407, 57 P.2d 1323*

Second hearing is not rehearing but original hearing where first hearing void; power to hold such second hearing is inherent. *Ferdig v. State Personnel Bd. (1969) 71 Cal. 2d 96, 108, 77 Cal. Rptr. 224, 453 P.2d 728* ; Aylward v. State Bd. etc. *(1948) 31 Cal. 2d 833, 839, 192 P.2d 929*

Statement of ground to support request for rehearing is not required in absence of statutory requirement. *Argonaut Ins. Exchange v. Industrial Acci. Com. (1958) 49 Cal. 2d 706, 711, 321 P.2d 460*

Agency is principal judge of cause for hearing where rehearing may be had for good cause. *Clendaniel v. Industrial Acci. Com. (1941) 17 Cal. 2d 659, 661-662, 111 P.2d 314*

Good cause for rehearing is cause, unknown to agency at time of original decision, rendering decision wrong or unfair. *Merritt-Chapman & Scott Corp. v. Ind. A.C. (1936) 6 Cal. 2d 314, 316, 57 P.2d 501*

Agency is not empowered to give rehearing simply because it later concluded original decision was wrong. *Pullman Co. v. Industrial Acci. Com. (1946) 28 Cal. 2d 379, 388, 170 P.2d 10* ; *Merritt-Chapman & Scott Corp. v. Ind. A.C. (1936) 6 Cal. 2d 314, 316, 57 P.2d 501*

Discovery of new evidence is cause for rehearing only if new evidence makes different result likely. *Clendaniel v. Industrial Acci. Com. (1941) 17 Cal. 2d 659, 661-662, 111 P.2d 314* ; *Cahill v. E.B. & A.L. Stone Co. (1914) 167 Cal. 126, 135, 138 P. 712* ; *Daggs v. Personnel Commission (1969) 1 Cal. App. 3d 925, 929, 82 Cal. Rptr. 157*

Necessity to raise all possible grounds for rehearing in order to exhaust administrative remedies. *People v. West Publishing Co. (1950) 35 Cal. 2d 80, 88, 216 P.2d 441* ; *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 295, 109 P.2d 942*

Agency is required to give rehearing on timely application where cause exists. *Helmick v. Industrial Acci. Com.*

(1941) 46 Cal. App. 2d 651, 655-656, 116 P.2d 658

Agency is not required to consider second or subsequent petition for rehearing. *Goodrich v. Industrial Acci. Com. (1943) 22 Cal. 2d 604, 611, 140 P.2d 405* .

Rehearing is required to proceed in manner of original hearing. *Conti v. Board of Civil Service Commissioners (1969) 1 Cal. 3d 351, 363, 82 Cal. Rptr. 337, 461 P.2d 617*

[6] Res Judicata and Collateral Estoppel

Res judicata is not applicable if issue of law or fact essential to adjudication of administrative claim has been reserved for future determination, or if the administrative agency has decided that one party should have relief but the amount of the damages, or the form or scope of other relief, remains to be determined. *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd. (1989) 49 Cal. 3d 1279, 1290-1291, 265 Cal. Rptr. 162, 783 P.2d 749*

Application of res judicata rules is more flexibly applied to administrative orders than to judicial orders. *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd. (1989) 49 Cal. 3d 1279, 1290, 265 Cal. Rptr. 162, 783 P.2d 749*

Collateral estoppel is applicable to final adjudication of administrative agency of statutory creation so as to preclude relitigation of same issues in subsequent case when: (1) administrative agency acted in judicial capacity, (2) it resolved disputed issues properly before it, and (3) all parties were provided with opportunity to fully and fairly litigate their claims. *People v. Sims (1982) 32 Cal. 3d 468, 479, 186 Cal. Rptr. 77, 651 P.2d 321* ; *Carmel Valley Fire Protection Dist. v. State of California (1987) 190 Cal. App. 3d 521, 534-535, 234 Cal. Rptr. 795*

Finality for purposes of administrative collateral estoppel is two-step process in which: (1) decision must be final with respect to action by administrative agency, and (2) decision must have conclusive effect. *Long Beach Unified Sch. Dist. v. State of California (1990) 225 Cal. App. 3d 155, 168-169, 275 Cal. Rptr. 449*

Decision attains requisite administrative finality for collateral estoppel purposes when agency has exhausted its jurisdiction and possesses no further power to reconsider or rehear claim. *Long Beach Unified Sch. Dist. v. State of California (1990) 225 Cal. App. 3d 155, 169, 275 Cal. Rptr. 449*

Decision attains requisite conclusiveness for collateral estoppel purposes when decision is free from direct attack. *Long Beach Unified Witkin Sch. Dist. v. State of California (1990) 225 Cal. App. 3d 155, 169, 275 Cal. Rptr. 449*

Determination of particular issue in administrative proceeding does not preclude relitigation of same issue in subsequent proceeding if, in interim period between two administrative proceedings, decision by appellate court has created new law that would have affected determination of issue in first administrative proceeding. *County of Los Angeles v. Department of Industrial Relations (1989) 214 Cal. App. 3d 1538, 1544, 263 Cal. Rptr. 351*

Administrative adjudication is sometimes accorded collateral estoppel effect in subsequent judicial proceeding; in absence of statutory rule, issue of availability of collateral estoppel as to particular kinds of administrative adjudications is ascertained as matter of common law. *Mahon v. Safeco Title Ins. Co. (1988) 199 Cal. App. 3d 616, 621, 245 Cal. Rptr. 103*

Administrative body's order for license revocation is properly given effect in later proceeding because meaningful judicial review was available by petition for writ of mandate. *Miller v. Board of Medical Quality Assurance (1987) 193 Cal. App. 3d 1371, 1378, 238 Cal. Rptr. 915*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationDecisionsCollateral EstoppelAdministrative LawAgency AdjudicationDecisionsRes JudicataAdministrative LawJudicial ReviewReviewabilityExhaustion of RemediesCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsLaw of the Case

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§ 473G.45 Text References

Judicial Council of California, Tenth Biennial Report (1944)

California Administrative Agency Practice (Cal CEB 1970)

Witkin, California Evidence, ch. II, *Judicial Notice*, §§ 80-126; ch. IX, *Witnesses*, §§ 1806-1892; ch. XI, *Introduction of Evidence at Trial*, §§ 1906-2000 (3d ed. 1986)

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PART III. RESEARCH GUIDE

41A-473G California Forms of Pleading and Practice--Annotated § 473F.46

§ 473F.46 Internet References

Office of Administrative Hearings. This site includes information and location concerning specific OAH offices; an OAH hearing guide; information concerming Administrative Procedure Act statutes, regulations, and proposed regulations; OAH forms; information concerning alternative dispute resolution procedures; and declaratory decisions. http://www.dgs.ca.gov/oah

NOTE:
On and after July 1, 1998, The OAL is required by *Gov. Code § 11340.1(b)* to make the full text of the California Code of Regulations, with reference citations and history notes, available on the Internet free of charge.

Office of Administrative Law. This site includes OAL publications; links to OAL statutes and regulations relating to rulemaking; regulations submitted to the OAL for review, and information for contacting or provding input to the OAL regarding rulemaking. http://www.oal.ca.gov

California Home Page. This site includes links to other sites maintained by numerous state agencies. http://www.ca.gov

Department of Consumer Affairs. This site includes links to sites maintained by many state agencies that are under this department, as well as links to agency sites. http://www.dca.ca.gov

California Courts. This site includes general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most Court of Appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes text of constitution, codes, and statutes (including complete text of APA); and information concerning pending legislation. http://www.leginfo.ca.gov

Matthew Bender. This site includes links to Matthew Bender publications and Shepard's citation service. http://www.bender.com

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationAlternative Dispute ResolutionAdministrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency RulemakingGeneral OverviewGovernmentsCourtsCreation & OrganizationGovernmentsLegislationEnactment

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41A-473G California Forms of Pleading and Practice--Annotated §§ 473G.47-473G.49

[Reserved]

§§ 473G.47[Reserved]

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PART IV. PROCEDURAL CHECKLIST

41A-473G California Forms of Pleading and Practice--Annotated § 473G.50

§ 473G.50 Mistake or Clerical Error in Decision

☐ Prepare application for correction of mistake or clerical error [*Gov. Code § 11518.5(a)*; *see § 473G.34*].

☐ File application within 15 days after service of decision, but not later than effective date of decision [*Gov. Code § 11518.5(a)*; *see §§ 473G.31[1], 473G.34*].

☐ Give notice to other parties in proceeding [*Gov. Code § 11518.5(a)*; *see § 473G.34*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral Overview

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41A-473G California Forms of Pleading and Practice--Annotated § 473G.51

§ 473G.51 Reconsideration of Agency Decision

- ☐ Prepare petition [*Gov. Code § 11521*; *see § 473G.33[2]*, for a form, see *§ 473G.70*].
- ☐ Prepare affidavit or declaration [*Gov. Code § 11521*; *see § 473G.33[2]*].
- ☐ File with agency within applicable time limits [*Gov. Code § 11521(a)*; *see § 473G.33[3][a]*].

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41A-473G California Forms of Pleading and Practice--Annotated § 473G.52

§ 473G.52 Reinstatement or Reduction of Penalty

☐ Prepare petition for reinstatement or reduction of penalty [*Gov. Code § 11522*; *see § 473G.36[1]*].

☐ File one year after effective date of decision or denial of a similar petition [*Gov. Code § 11522*; for a form, *see § 473G.71*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral Overview

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41A-473G California Forms of Pleading and Practice--Annotated § 473G.53

§ 473G.53 Judicial Review

☐ Prepare petition for judicial review whether or not reconsideration was sought [*Gov. Code § 11523*; *see § 473G.31[2]*].

☐ File within 30 days from last day in which reconsideration can be ordered [*Gov. Code § 11523*; *see Gov. Code § 11521* (earlier date); § 473G.31[4]].

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41A-473G California Forms of Pleading and Practice--Annotated §§ 473G.54-473G.69

[Reserved]

§§ 473G.54[Reserved]

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PART V. FORMS

41A-473G California Forms of Pleading and Practice--Annotated § 473G.70

§ 473G.70 Petition for Reconsideration [Gov. Code § 11521]

[1] FORM Petition for Reconsideration [Gov. Code § 11521]

BEFORE THE _____ [*agency*]

	)	
In the Matter of	)	NO. _____
_____ [*name*]	)	PETITION FOR RECONSIDERATION
Respondent.	)	
	)	

_____

Respondent requests that the _____[*agency*] reconsider its decision in this proceeding, and in support of this request respondent represents:

1. _____ [*Here, and in subsequently numbered paragraphs, specify grounds on which reconsideration is sought, e.g.*, The findings set forth in the decision are not supported by the evidence in that _____ (*specify*)].

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent

[2] Use of Form

The form of petition for reconsideration in [1], *above*, is for use by the respondent who wishes the agency to reconsider an adverse decision. For discussion of reconsideration, see *§ 473G.33*.

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PART V. FORMS

41A-473G California Forms of Pleading and Practice--Annotated § 473G.71

§ 473G.71 Petition for Restoration of Rights [Gov. Code § 11522]

[1] FORM Petition for Restoration of Rights [Gov. Code § 11522]

BEFORE THE _____ [*agency*]

	)	
In the Matter of	)	NO. _____
_____ [*name*]	)	PETITION FOR RESTORATION OF RIGHTS
Respondent.	)	
	)	

_____

Respondent requests that the _____[*agency*] _____ [restore respondent's _____ (*e.g.*, license) *or* reduce the penalty imposed against respondent in this proceeding], and in support of this request respondent represents:

1. One year has elapsed from the _____ [effective date of the decision in this proceeding *or* date when respondent's last previous request of this nature was denied], which date was _____.

2. _____ [*Specify grounds on which agency might restore rights or reduce penalty, e.g.,* For the past two years respondent has been an active member of Alcoholics Anonymous, has regularly attended meetings of that organization, and has absolutely refrained from consuming any alcoholic beverages whatever, all with the result that respondent has become rehabilitated from his/her previous condition of addiction to alcohol which was the cause for the original disciplinary action of the _____ (*agency*) against respondent].

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Respondent

[2] Use of Form

The form of petition for restoration of rights in [1], *above*, is for use by the respondent where a cause for discipline has been removed or the respondent has become rehabilitated. At least one year must elapse after the effective date of the decision to suspend or revoke the respondent's license before he or she may petition for restoration of his or her rights [*Gov. Code § 11522*]. For discussion regarding restoration of rights, see *§ 473G.36*.

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41A-473H California Forms of Pleading and Practice--Annotated 473H.syn

§ 473H.syn Synopsis to Chapter 473H: ALTERNATIVE PROCEDURES FOR AGENCY DECISIONS

§ 473H.01 Scope of Chapter

§ 473H.02 Cross References

[1] Related Coverage of Alternative Resolution Procedures

[2] Related Coverage of Agency Adjudication

[3] Judicial Remedies and Review

[4] Public Administrative Law Generally

[5] Specific Public Agencies

[6] Other Chapters Relating to Public Agencies

§§ 473H.03-473H.09 [Reserved]

§ 473H.10 Governing Law

[1] APA Requirements

[2] Office of Administrative Hearings Regulations Governing Hearing Procedures

[3] Alternative Dispute Resolution Procedures

[a] General Regulations

[b] Mediation Regulations

[c] Arbitration Regulations

[d] Declaratory Decision Regulations

§ 473H.11 Definitions

[1] "Adjudicative Proceeding"

[2] "Agency"

[3] "Agency Head"

[4] "Decision"

[5] "Party"

[6] "Person"

[7] "Presiding Officer"

§ 473H.12 Alternative Dispute Resolution Processes

[1] Referral With Party Consent

[2] Model Regulations

[3] Confidentiality of Communications

§ 473H.13 Informal Hearing Procedure

[1] Legislative Findings

[2] Applicable Proceedings

[3] Notice of Hearing and Objection

[4] Authority of Presiding Officer and Applicable Hearing Procedures

[5] Discretion to Deny or Convert Informal Hearing

[6] Presenting Proof as to Material Facts in Dispute

§ 473H.14 Emergency Decision Procedure

[1] Authority for Emergency Decision Procedure

[2] Regulations Authorizing Emergency Decisions for Temporary, Interim Relief

[3] Requirement of Immediate Danger to Public Health, Safety, or Welfare

[4] Notice and Hearing Requirement

[5] Emergency Decision and Adjudicative Proceeding

[6] Agency Record and Judicial Review

§ 473H.15 Declaratory Decision Procedure

[1] Authority for Declaratory Decision

[2] Application and Issuance of Decision

[3] Notice and Applicable Law

[4] Agency Action

[5] Declaratory Decision

[6] Model Regulations

§ 473H.16 Conversion of Agency Proceedings

[1] Authority of Presiding Officer or Other Agency Official

[2] Conversion Procedures

[a] Appointment of Successor

[b] Record of Original Proceeding

[c] Duties of Official Responsible for New Proceeding

[3] Regulations

§§ 473H.17-473H.19 [Reserved]

§ 473H.20 Federal Constitution

§ 473H.21 State Constitution

§ 473H.22 State Statutes

[1] Administrative Procedure Act

[2] Related Statutes

§ 473H.23 Internet References

§§ 473H.24-473H.29 [Reserved]

§ 473H.30 Alternative Dispute Resolution

[1] Options

[2] Procedure

§ 473H.31 Objection to Informal Hearing Procedure

§ 473H.32 Emergency Decision

§ 473H.33 Declaratory Decision

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PART I. SCOPE

41A-473H California Forms of Pleading and Practice--Annotated § 473H.01

§ 473H.01 Scope of Chapter

This chapter discusses provisions of the Administrative Procedure Act (APA), which became operative July 1, 1997, and which introduce a number of alternative decision making procedures that may be utilized in lieu of a formal agency hearing to resolve a public agency adjudication. These procedures are:

- Alternative dispute resolution by mediation or arbitration [*see § 473H.12*].
- Informal hearings [*see § 473H.13*].
- Emergency decisions [*see § 473H.14*].
- Declaratory decisions [*see § 473H.15*].
- Conversion of an agency adjudication from one type of proceeding to another proceeding [*see § 473H.16*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationAlternative Dispute Resolution

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PART I. SCOPE

41A-473H California Forms of Pleading and Practice--Annotated § 473H.02

§ 473H.02 Cross References

[1] Related Coverage of Alternative Resolution Procedures

For discussion and forms relating to the alternative resolution procedures discussed in this chapter, applicable to civil actions generally as distinguished from agency actions, see:

- Ch. 30, *Using Alternative Dispute Resolution* .
- Ch. 31, *Mediation* .
- Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .
- Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding*
- Ch. 34, *Conrtractual Arbitration: Judicial Review* .
- Ch. 35, *Arbitration and Conciliation of International Commercial Disputes* .
- Ch. 36, *Judicial Arbitration* .
- Ch. 37, *Judicially Mandated Civil Action Mediation* .
- Ch. 182, *Declaratory Relief.*

[2] Related Coverage of Agency Adjudication

For general discussion and overview of agency adjudication under the Administrative Procedure Act (APA), see Ch. 473, *Public Agency Adjudication* .

For related discussion and forms providing coverage of the other stages of an agency adjudication under the formal

hearing provisions of the APA, see:

- Ch. 473A, *Commencing Agency Adjudication* .
- Ch. 473B, *Discovery in Agency Adjudications* .
- Ch. 473C, *Prehearing Procedures in Agency Adjudications* .
- Ch. 473D, *Prehearing Preparations in Agency Adjudications* .
- Ch. 473E, *Public Administrative Law Judges* .
- Ch. 473F, *Agency Adjudication Hearings* .
- Ch. 473G, *Agency Adjudication Decisions* .

For detailed discussion and forms relating generally to licensing agencies, including licensing adjudications, see Ch. 471B, *Licensing by Public Agencies* .

[3] Judicial Remedies and Review

For detailed discussion and forms relating generally to review by California courts of agency adjudications, see:

- Ch. 474, *Availability of Judicial Review of Agency Decisions* .
- Ch. 474A, *Timing of Judicial Review of Agency Decisions* .
- Ch. 474B, *Standards in Reviewing Agency Decisions* .
- Ch. 474C, *Procedures in Reviewing Agency Decisions* .

For other related discussion and forms relating to judicial review generally, see:

- Ch. 40, *Appeal: An Overview,* through Ch. 54, *Appeal: California Supreme Court Review* (discussion and forms relating to civil appeals).
- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to immediate judicial review of orders by extraordinary writ of mandate or prohibition).
- Ch. 492, *Review (Certiorari), Writ of* (discussion and forms relating to immediate judicial review of civil proceedings by extraordinary writ of review).

[4] Public Administrative Law Generally

For related discussion of California public administrative law generally, including discussion of public agency functions and powers (including adjudicative or quasi-judicial powers), and organization generally, see Ch. 470, *Overview of Public Administrative Law* (for general discussion of judicial power, *see §§ 470.12[5]*). For detailed discussion of the general procedures imposed in agency proceedings by constitutional due process and related statutory requirements, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

For discussion and forms relating to the law governing access to and conduct of meetings by California public agencies, see Ch. 470B, *Public Agency Meetings* .

For detailed discussion and forms relating to the law governing disclosure of public records under the California Public Records Act [*Cal. Gov. Code §§ 6250 et seq.*], see Ch. 470C, *Public Records Act* .

For detailed discussion and forms relating generally to agency investigations and inspections, see:

- Ch. 471, *Investigations by Public Agencies* .
- Ch. 471A, *Inspections by Public Agencies* .

For detailed discussion and forms relating generally to the legislative or rulemaking functions of California public agencies, including judicial review of these functions, see:

- Ch. 472, *Public Agency Rules* .
- Ch. 472A, *Agency Rulemaking Procedures* .
- Ch. 472B, *Review of Agency Rulemaking* .

[5] Specific Public Agencies

For related coverage of adjudicative proceedings before particular public agencies, see:

- Ch. 18, *Alcoholic Beverage Licenses* (discussion and forms relating to licensing proceedings before the department of Alcoholic Beverage Control).
- Ch. 70, *Attorney Admission* and Ch. 71, *Attorney Discipline* (discussion and forms relating to licensing and discipline of attorneys and proceedings before the State Bar and the State Bar Court).
- Ch. 92 *Automobiles: Drivers' Licenses* (discussion and forms relating to drivers' licensing and proceedings before the Department of Motor Vehicles).
- Ch. 104, *Building Contracts, § 104.70 et seq.* (discussion relating to licensing and discipline of building contractors by the Contractors' State License Board).
- Ch. 118, *Civil Service* (discussion and forms relating to proceedings before the Personnel Board).
- Ch. 209, *Dentists* (discussion and forms relating to licensing and discipline of dentists and proceedings before the Board of Dental Examiners).
- Ch. 214, *Drugs and Pharmacists* (discussion and forms relating to licensing and discipline of pharmacists and proceedings before the State Board of Pharmacy).
- Ch. 414, *Physicians: Licensing and Discipline* (discussion and forms relating to licensing and discipline of physicians and proceedings before the Medical Board of California).
- Ch. 480, *Public Utilities* (discussion and forms relating to proceedings before the Public Utilities Commission).

- Ch. 512, *Schools: Certification, Dismissal, and Related Employment Issues* (discussion and forms relating to teacher certification and dismissal proceedings before the State Board of Education and local boards).

- Ch. 527, *Social Services* (discussion and forms relating to proceedings before the State Department of Social Service or the State Department of Health Services).

- Ch. 564, *Unemployment and Disability Insurance*, §§ 564.30 et seq, 564.100 et seq. (discussion and forms relating to proceedings before the Unemployment Insurance Appeals Board).

- Ch. 575, *Waters* , §§ *575.10 et seq., 575.210 et seq.* (discussion and forms relating to proceedings before the State Water Resources Control Board and local water districts).

- Ch. 577, *Workers' Compensation* (discussion and forms relating to proceedings before the Division of Workers' Compensation and the Workers' Compensation Appeals Board).

For additional cross references to coverage of other particular public agencies, see *Ch. 470, Overview of Public Administrative Law, § 470.02[2]*.

[6] Other Chapters Relating to Public Agencies

For discussion and forms relating to access to records of a state or local agency under the California Public Records Act (Gov. Code. Code. Code *§ 6250 et seq.*), see Ch. 470C, *Public Records Act* .

For discussion and forms relating to claims and actions under the California Tort Claims Act (*Gov. Code § 810 et seq.*), for damages for injuries arising from the tortious conduct of public agencies or their officers and employees, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral Overview

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[Reserved]

§§ 473H.03[Reserved]

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PART II. LEGAL BACKGROUND

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§ 473H.10 Governing Law

[1] APA Requirements

The following two chapters of the Government Code comprise the administrative adjudication provisions of the Administrative Procedure Act (APA) [*Gov. Code §§ 11400.10(a), 11501*]:

- Chapter 4.5, Administrative Adjudication: General Provisions (*Gov. Code § 11400 et seq.*), and
- Chapter 5, Administrative Adjudication: Formal Hearings (*Gov. Code § 11500 et seq.*).

For convenience, they are termed hereafter simply as Chapter 4.5 and Chapter 5. Technically, these chapters are not chapters of the APA itself, but are chapters within Part 1 (State Departments and Agencies) of Division 3 (Executive Department) of Title 2 (California State Government) of the Government Code.

Chapter 5 sets out the APA provisions governing formal hearings. These provisions are discussed in detail in Ch. 473, *Public Agency Adjudication* through Ch. 473G, *Agency Adjudication Decisions* .

Chapter 4.5 sets out provisions which became operative July 1, 1997 [*see Gov. Code § 11400.10(a)*]. It includes a number of general provisions, such as those governing ex parte communications, language assistance, enforcement, and procedural rights in agency adjudication. These general procedural provisions of Chapter 4.5 are discussed in Ch. 473, *Public Agency Adjudication* .

The remaining provisions of Chapter 4.5, relating to alternative adjudication procedures, are the focus of this chapter:

- Alternative dispute resolution (*Gov. Code § 11420.10 et seq.*).
- Informal hearing (*Gov. Code § 11445.10 et seq.*).
- Emergency decision (*Gov. Code § 11460.10 et seq.*).

- Declaratory decision (*Gov. Code § 11465.10 et seq.*).
- Conversion of proceeding (*Gov. Code § 11470.10 et seq.*).

The provisions of Chapter 4.5 generally apply to public agency proceedings in which a evidentiary hearing is required by statute or constitutional provision [*see Gov. Code § 11410.10 et seq.*]. For further discussion of the applicability of Chapter 4.5 provisions, see Ch. 473, *Public Agency Adjudication* .

[2] Office of Administrative Hearings Regulations Governing Hearing Procedures

The Office of Administrative Hearings adopted regulations [*1 Cal. Code Reg. §§ 1000-1440* (1997)] to govern hearing procedures in hearings conducted before OAH administrative law judges [*1 Cal. Code Reg. § 1000* (1998)]. The regulations cover the subjects of general APA hearing procedures [*1 Cal. Code Reg. §§ 1000-1046* (1998)], special hearing procedures [*1 Cal. Code Reg. §§ 1100-1148* (1997)], alternative dispute resolution procedures [*1 Cal. Code Reg. §§ 1200-1292* (1999)], arbitration procedures for state contract act contract claims [*1 Cal. Code Reg. §§ 1300-1393* (1997)], and protest arbitration procedures *1 Cal. Code Reg. §§ 1000-1440* (1998)]. The basic purpose [*1 Cal. Code Reg. § 1000* (1998)], definitions [*1 Cal. Code Reg. § 1002* (1998)], and principles of interpretation [*1 Cal. Code Reg. § 1004* (1998)], are set forth in specific regulations. Specific regulations that are applicable to to Ch. 473H, Alternative Agency Adjudications, include informal hearings [*1 Cal. Code Reg. § 1027* (1998)], and all of the regulations listed above, except for the general hearing procedures regulations.

[3] Alternative Dispute Resolution Procedures

[a] General Regulations

The Office of Administrative Hearings adopted regulations governing alternative dispute resolution procedures in chapter 3, agency alternatives to formal hearings [*1 Cal. Code Reg. §§ 1200-1292* (1997)]. The subjects of the general ADR regulations [*1 Cal. Code Reg. §§ 1200-1210*] include the following:

- Scope of regulations [*1 Cal. Code Reg. § 1200* (1997)];
- Purpose of regulations [*1 Cal. Code Reg. § 1202* (1997)];
- Definitions [*1 Cal. Code Reg. § 1204* (1997)];
- Referral to ADR [*1 Cal. Code Reg. § 1206* (1997)];
- Standards of conduct for neutrals [*1 Cal. Code Reg. § 1208* (1997)]; and
- Resumes for neutrals [*1 Cal. Code Reg. § 1210* (1997)].

[b] Mediation Regulations

The Office of Administrative Hearings adopted regulations governing alternative dispute resolution procedures in chapter 3, agency alternatives to formal hearings [*1 Cal. Code Reg. §§ 1200-1292* (1997)]. The subjects of the mediation regulations [*1 Cal. Code Reg. §§ 1212-1230*] include the following:

- Definitions for Mediation [*1 Cal. Code Reg. § 1212* (1997)];
- Initiating Mediation [*1 Cal. Code Reg. § 1214* (1997)];

- Appointment of Mediator [*1 Cal. Code Reg. § 1216* (1997)];
- Cost of Mediation [*1 Cal. Code Reg. § 1218* (1997)];
- Date, Time, and Place of Mediation [*1 Cal. Code Reg. § 1220* (1997)];
- Attendance at Mediation [*1 Cal. Code Reg. § 1222* (1997)];
- Statements before Mediation [*1 Cal. Code Reg. § 1224* (1997)];
- Confidentiality [*1 Cal. Code Reg. § 1226* (1997)];
- Agreements [*1 Cal. Code Reg. § 1228* (1997)]; and
- Termination of Mediation [*1 Cal. Code Reg. § 1230* (1997)].

[c] Arbitration Regulations

The Office of Administrative Hearings adopted regulations governing alternative dispute resolution procedures in chapter 3, agency alternatives to formal hearings [*1 Cal. Code Reg. §§ 1200-1292* (1997)]. The subjects of the arbitration regulations [*1 Cal. Code Reg. §§ 1232-1258*] include the following:

- Definitions for Arbitration [*1 Cal. Code Reg. § 1232* (1997)];
- Agreement to Arbitrate [*1 Cal. Code Reg. § 1234* (1997)];
- Selection of Arbitrator [*1 Cal. Code Reg. § 1236* (1997)];
- Costs of Arbitration [*1 Cal. Code Reg. § 1238* (1997)];
- Timing and Scheduling the Hearing [*1 Cal. Code Reg. § 1240* (1997)];
- Discovery [*1 Cal. Code Reg. § 1242* (1997)];
- Conference before Arbitration [*1 Cal. Code Reg. § 1244* (1997)];
- Statements before Arbitration [*1 Cal. Code Reg. § 1246* (1997)];
- Attendance at Arbitration [*1 Cal. Code Reg. § 1248* (1997)];
- Authority of Arbitrators [*1 Cal. Code Reg. § 1250* (1997)];
- Procedures at Arbitration [*1 Cal. Code Reg. § 1252* (1997)];
- Defaults [*1 Cal. Code Reg. § 1254* (1997)];
- Decision [*1 Cal. Code Reg. § 1256* (1997)]; and
- Proceeding De Novo [*1 Cal. Code Reg. § 1258* (1997)].

[d] Declaratory Decision Regulations

The Office of Administrative Hearings adopted regulations governing alternative dispute resolution procedures in chapter 3, agency alternatives to formal hearings [*1 Cal. Code Reg. §§ 1200-1292* (1997)]. The subjects of the declaratory decision regulations [*1 Cal. Code Reg. §§ 1260-1292*] include the following:

- Definitions for Declaratory Decisions [*1 Cal. Code Reg. § 1260* (1997)];
- Scope of Declaratory Decisions [*1 Cal. Code Reg. § 1262* (1997)];
- Application for Declaratory Decision [*1 Cal. Code Reg. § 1264* (1997)];
- Initial Agency Review of Application [*1 Cal. Code Reg. § 1266* (1997)];
- Agency Notice of Application for Declaratory Decision [*1 Cal. Code Reg. § 1270* (1997)];
- Initial Decision to Consider Application [*1 Cal. Code Reg. § 1272* (1997)];
- Denial of Application [*1 Cal. Code Reg. § 1274* (1997)];
- Agency Notice of Declaratory Decision [*1 Cal. Code Reg. § 1276* (1997)];
- Requests for Notice of Declaratory Decision Proceedings [*1 Cal. Code Reg. § 1278* (1997)];
- Written Comments to Agency [*1 Cal. Code Reg. § 1280* (1997)];
- Request to Become a Party or Intervenor [*1 Cal. Code Reg. § 1282* (1997)];
- Hearings [*1 Cal. Code Reg. § 1284* (1997)];
- Declaratory Decision Proceeding Record [*1 Cal. Code Reg. § 1286* (1997)];
- Issuance and Service of a Declaratory Decision [*1 Cal. Code Reg. § 1288* (1997)];
- Judicial Review of a Declaratory Decision [*1 Cal. Code Reg. § 1290* (1997)]; and
- Proceeding De Novo [*1 Cal. Code Reg. § 1290* (1997)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationAlternative Dispute ResolutionAdministrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawAgency AdjudicationHearingsRight to HearingStatutory Right

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Volume 41A: Public Agency Adjudications Judicial Review-Chs. 473-479
Chapter 473H ALTERNATIVE PROCEDURES FOR AGENCY DECISIONS
PART II. LEGAL BACKGROUND

41A-473H California Forms of Pleading and Practice--Annotated § 473H.11

§ 473H.11 Definitions

[1] "Adjudicative Proceeding"

"Adjudicative proceeding" is defined to mean an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision [*Gov. Code § 11405.20*].

[2] "Agency"

"Agency" is defined in Chapter 4.5 to mean a board, bureau, commission, department, division, office, officer or other administrative unit, including the agency head, and one or more members of the agency head or agency employees or other persons directly or indirectly purporting to act on behalf of or under the authority of the agency head. To the extent it purports to exercise authority under Chapter 4.5, an administrative unit otherwise qualifying as an agency shall be treated as a separate agency even if the unit is located within or subordinate to another agency [*Gov. Code § 11405.30*].

This definition in *Gov. Code § 11405.30* is drawn from 1981 Model State APA § 1-102(1) and supplements *Gov. Code § 11000* (defining "state agency" generally). The intent of the definition is to subject as many governmental units as possible to this chapter. The definition explicitly includes the agency head and those others who act for an agency, so as to effect the broadest possible coverage. The definition also would include a committee or council. The last sentence of this definition is in part derived from Federal APA § 551(1) (1988), treating as an agency "each authority of the Government of the United States, whether or not it is within or subject to review by another agency." A similar provision in *Gov. Code § 11405.30* is used to avoid difficulty in ascertaining which is the agency in a situation where an administrative unit is within or subject to the jurisdiction of another administrative unit. An administrative unit of an agency that has no authority to issue decisions or take other action on behalf of an agency is not an "agency" within the meaning of this section [25 Cal.L. Rev. Comm. Reports 55, 137-138 (1995)].

[3] "Agency Head"

"Agency head" is defined in Chapter 4.5 to mean a person or body in which the ultimate legal authority of an agency is vested, and includes a person or body to which the power to act is delegated pursuant to authority to delegate the

agency's power to hear and decide [*Gov. Code § 11405.40*]. The first part of this definition is taken from Model State APA § 1-102(3). The definition of agency head is included to differentiate for some purposes between the agency as an organic entity that includes all of its employees, and those particular persons in which the final legal authority over its operations is vested. The last part of the definition is drawn from *Gov. Code § 11500(a)* (defining "agency" for purposes of Chapter 5), relating to use of the term, "agency itself," to refer to a nondelegable power to act. An agency may delegate review authority [25 Cal. L. Rev. Comm. Reports 55, 138 (1995)].

[4] "Decision"

"Decision" is defined in Chapter 4.5 to mean an agency action of specific application that determines a legal right, duty, privilege, immunity or other legal interest of a particular person [*Gov. Code § 11405.50(a)*]. The definition of decision in this statute does not limit the precedential effect of a decision under *Gov. Code § 11425.60* [*Gov. Code § 11405.50(b)(1)*], nor does it limit the authority of an agency to make a declaratory decision under *Gov. Code § 11465.10 et seq.* [*Gov. Code § 11405.50(b)(2)*].

The definition of decision in *Gov. Code § 11405.50(a)* is taken form the 1981 Model State APA § 1-102(5). The definition makes clear that it includes only legal determinations made by an agency that are of specific applicability because they are addressed to particular or named persons. More than one identified person may be the subject of a decision. "Person" includes legal entity and governmental subdivision under *Gov. Code § 11405.70* [25 Cal. L. Rev. Comm. Reports 55, 138-139 (1995)].

A decision includes every agency action that determines any of the legal rights, duties, privileges, or immunities of a specific, identified individual or individuals. In contrast, a regulation, as defined under *Gov. Code § 11342.600*, is an agency action of general application, applicable to all members of a described class. The decision definition statute should not be interpreted to expand the types of cases in which an adjudicative proceeding is required. Under *Gov. Code § 11410.10*, an adjudicative proceeding is required under Chapter 4.5 only when another statute or the constitution requires such a proceeding [25 Cal. L. Rev. Comm. Reports 55, 139 (1995)].

Consistent with the definition of "decision" in this statute, rate making and licensing determinations of specific application, addressed to named or particular parties such as a certain power company or a specific licensee, are decisions subject to Chapter 4.5. However, ratemaking and licensing actions of general application, addressed to all members of a described class of providers or licensees, are regulations as defined in *Gov. Code § 11342* [25 Cal. L. Rev. Comm. Reports 55, 139 (1995)].

Furthermore, some decisions may have precedential effect under *Gov. Code § 11425.60* [25 Cal. L. Rev. Comm. Reports 55, 139 (1995)].

[5] "Party"

"Party" is defined in Chapter 4.5 to include the agency that is taking action, the person to which the agency action is directed, and any other person named as a party or allowed to appear or intervene in the proceeding. If the agency that is taking action and the agency that is conducting the adjudicative proceeding are separate proceedings, the agency that is taking action is a party and the agency that is conducting the adjudicative proceeding is not a party [*Gov. Code § 11405.60*].

The first sentence of the definition of party in *Gov. Code § 11405.60* is taken from *Gov. Code § 11500(b)* (*see below*) and 1981 Model State APA § 1-102(6). The second sentence is new [25 Cal. L. Rev. Comm. Reports 55, 139 (1995)]. Person is defined in *Gov. Code § 11405.70*, *see* [g], *below*, and includes legal entity and governmental subdivisions. Under this definition, if an officer or employee of an agency appears in an official capacity, the agency and not the person is the party. A staff division authorized to act on behalf of the agency may be a party under Chapter 4.5 because

of the definition of agency [*see* [c], *above*] under *Gov Code § 11405.30* [25 Cal. L. Rev. Comm. Reports 55, 139-140 (1995)]. The definition of party in this statute does not address the question of whether a person is entitled to judicial review. Standing to seek judicial review is dealt with in other law [25 Cal. L. Rev. Comm. Reports 55, 140 (1995)].

[6] "Person"

"Person" is defined for purposes of Chapter 4.5 to include an individual, partnership, corporation, governmental subdivision or unit of a governmental subdivision, or public or private organization or entity of any character [*Gov. Code § 11405.70*].

This definition supplements the definition of person in *Gov. Code § 17*. This definition is drawn from 1981 Model State APA, § 1-102(8), and includes the trustee of a trust or other fiduciary. This definition is broader than the *Gov. Code § 17* definition of person in that it also applies to a governmental subdivision or unit. This aspect of the definition would include an agency other than the agency against which rights under this chapter are asserted by the person. Including these agencies and units of government insures, therefore, that other agencies or other governmental bodies can, for example, apply to an agency for a decision, and will be accorded all the other rights that a person has under Chapter 4.5 [25 Cal. L. Rev. Comm. Reports 55, 140 (1995)].

[7] "Presiding Officer"

"Presiding officer" is defined for purposes of Chapter 4.5 to mean the agency head, member of the agency head, administrative law judge, hearing officer, or other person who presides in an adjudicative proceeding [*Gov. Code § 11405.80*]. This section is intended for drafting convenience [25 Cal. L. Rev. Comm. Reports 55, 140 (1995)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationDecisionsStare DecisisAdministrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawAgency AdjudicationHearingsRight to HearingStatutory RightAdministrative LawAgency AdjudicationPresiding OfficersGeneral Overview

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§ 473H.12 Alternative Dispute Resolution Processes

[1] Referral With Party Consent

An agency, with the consent of all the parties, may refer a dispute that is the subject of an adjudicative proceeding for resolution by any of the following means [*Gov. Code § 11420.10(a)*]:

- Mediation by a neutral mediator [*Gov. Code § 11420.10(a)(1)*]. Mediators may use any mediation technique under *Gov. Code § 11420.10(a)* [25 Cal. L. Rev. Comm. Reports 55, 151 (1995)]. For discussion of mediation techniques generally, see Ch. 32, *Mediation* (in vol. 4 on Alternative Dispute Resolution).

- Binding arbitration by a neutral arbitrator. An award in a binding arbitration is subject to judicial review in the same manner as provided under *Code Civ. Proc. §§ 1285-1287.6* [*Gov. Code § 11420.10(a)(2)*]. *Gov. Code § 11420.10(a)(2)* authorizes delegation of the agency's binding authority to decide, with the consent of all parties [25 Cal. L. Rev. Comm. Reports 55, 151 (1995)]. For discussion of binding arbitration and their judicial review generally, see Ch. 33, *Contractual Arbitration* , et seq. (in vol. 4 on Alternative Dispute Resolution).

- Nonbinding arbitration by a neutral arbitrator. The arbitrator's decision in a nonbinding arbitration is final unless, within 30 days after the arbitrator delivers the award to the agency head, a party requests that the agency conduct a de novo adjudicative proceeding. If the decision in the de novo proceeding is not more favorable to the party electing the de novo proceeding, the party shall pay the costs and fees specified in *Code Civ. Proc. § 1141.21* insofar as applicable in the adjudicative proceeding [*Gov. Code § 11420.10(a)(3)*]. *Gov. Code § 11420.10(a)(3)* parallels the procedure applicable to judicial arbitration under *Code Civ. Proc. § 1141.20 et seq.* The costs and fees specified in *Code Civ. Proc. § 1141.21* for a civil proceeding may not all be applicable in an adjudicative proceeding, but *Gov. Code § 11420.10(a)(3)* requires such costs and fees to be assessed to the extent they are applicable [25 Cal. L. Rev. Comm. Reports 55, 151 (1995)]. For discussion of the parallel procedure of judicial arbitration, see Ch. 36, *Judicial Arbitration* (in vol. 4 on Alternative Dispute Resolution).

If another statute requires mediation or arbitration in a particular adjudicative proceeding, that statute prevails over the foregoing provisions of *Gov. Code § 11420.10(a)* [*Gov. Code § 11420.10(b)*]. *Gov. Code § 11420.10(b)* recognizes that other statutes, applicable to specific agencies or specific agency proceedings, may require alternative dispute resolution techniques [25 Cal. L. Rev. Comm. Reports 55, 151 (1995)].

The provisions of *Gov. Code § 11420.10(a)* do not apply to the extent that a particular agency, by regulation, provides it is not applicable in a proceeding of that agency [*Gov. Code § 11420.10(c)*]. In other words, if there is no statute requiring the agency to use mediation or arbitration, this statute applies unless the agency makes it inapplicable by regulation under *Gov. Code § 11420.10(c)* [25 Cal. L. Rev. Comm. Reports 55, 151 (1995)].

[2] Model Regulations

The Office of Administrative Hearings (OAH) is required to adopt and promulgate model regulations for alternative dispute resolution under this law. The model regulations govern alternative dispute resolution by an agency under this law, except to the extent that the agency by regulation provides inconsistent rules or provides that the model regulations are not applicable in a proceeding of the agency [*Gov. Code § 11420.20(a)*]. The model regulations must include provisions for selection and compensation of a mediator or arbitrator, qualifications of a mediator or arbitrator, and confidentiality of the mediation or arbitration proceeding [*Gov. Code § 11420.20(b)*].

Gov. Code § 11420.20 authorizes regulations to govern the details of alternative dispute resolution proceedings. In addition to the matters listed in *Gov. Code § 11420.20(b)*, the regulations may address other issues such as cost allocation, discovery, and enforcement and review of alternative dispute resolution. This statute does not require each agency to adopt regulations. The model regulations developed by the OAH will automatically govern mediation or arbitration for an agency, unless the agency provides otherwise. The agency may choose to preclude mediation or arbitration altogether [25 Cal. L. Rev. Comm. Reports 55, 152 (1995)].

The Office of Administrative Hearings adopted regulations [*1 Cal. Code Reg. §§ 1000-1440* (1997)] to govern hearing procedures in hearings conducted before OAH administrative law judges [*1 Cal. Code Reg. § 1000* (1998)]. The regulations include alternative dispute resolution procedures [*1 Cal. Code Reg. §§ 1200-1292* (1999)]. Specific regulations governing ADR are discussed in *§ 473H.10[3]*.

[3] Confidentiality of Communications

Notwithstanding any other provision of law, a communication made in alternative dispute resolution under this law is protected to the following extent [*Gov. Code § 11420.30*]:

- Anything said, any admission made, and any document prepared in the course of, or pursuant to, mediation under this law is a confidential communication, and a party to the mediation has a privilege to refuse to disclose and to prevent another from disclosing the communication, whether in an adjudicative proceeding, civil action, or other proceeding. This subdivision does not limit the admissibility of evidence if all parties to the proceeding consent [*Gov. Code § 11420.30(a)*]. This provision is analogous to *Evid. Code § 1119(a)* (mediation) [25 Cal. L. Rev. Comm. Reports 55, 153 (1995)].

- No reference to nonbinding arbitration proceedings, a decision of the arbitrator that is rejected by a party's request for a de novo adjudicative proceeding, the evidence produced, or any other aspect of the arbitration may be made in an adjudicative proceeding or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose [*Gov. Code § 11420.30(b)*]. This provision is taken from *Code Civ. Proc. § 1141.25* (arbitration) and former Cal. Rules of Ct., Rule 1616(c) (arbitration) [*now see Cal. Rules of Ct., 3.826*]; it protects confidentiality of a proposed decision in nonbinding

arbitration that is rejected by a party. It does not protect a decision accepted by the parties in a nonbinding arbitration, nor does it protect an award in a binding arbitration [25 Cal. L. Rev. Comm. Reports 55, 153 (1995); *see also Gov. Code § 11425.20* (open hearings)].

- No mediator or arbitrator is competent to testify in a subsequent administrative or civil proceeding as to any statement, conduct, decision, or order occurring at, or in conjunction with, the alternative dispute resolution [*Gov. Code § 11420.30(c)*]. This provision derives from *Evid. Code § 703.5* [25 Cal. L. Rev. Comm. Reports 55, 153 (1995)].

- Evidence otherwise admissible outside of alternative dispute resolution under this law is not inadmissible or protected from disclosure solely by reason of its introduction or use in alternative dispute resolution under thus law [*Gov. Code § 11420.30(d)*].

The policy of *Gov. Code § 11420.30* is not to restrict access to information but to encourage dispute resolution [25 Cal. L. Rev. Comm. Reports 55, 153 (1995)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationAlternative Dispute ResolutionAdministrative LawAgency AdjudicationHearingsEvidenceAdmissibilityGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceAdmissibilityPrivilege

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§ 473H.13 Informal Hearing Procedure

[1] Legislative Findings

An agency may conduct an adjudication under the informal hearing procedures of *Gov. Code §§ 11445.10-11445.60*, subject to any limitations set out in those provisions [*Gov. Code § 11445.10(a)*].

Legislative findings concerning informal hearing are [*Gov. Code § 11445.10(b)*]:

- The informal hearing procedure is intended to satisfy due process and public policy requirements in a manner that is simpler and more expeditious than hearing procedures otherwise required by statute, for use in appropriate circumstances [*Gov. Code § 11445.10(b)(1)*].

- The informal hearing procedure provides a forum in the nature of a conference in which a party has an opportunity to be heard by the presiding officer [*Gov. Code § 11445.10(b)(2)*].

- The informal hearing procedure provides a forum that may accommodate a hearing where by regulation or statute a member of the public may participate without appearing or intervening as a party [*Gov. Code § 11445.10(b)(3)*].

Gov. Code § 11445.10 states the policy that underlies the informal hearing procedure. The circumstances where the simplified procedure is appropriate are provided in *Gov. Code § 11445.20* (when informal hearing may be used). The simplified procedures are outlined in *Gov. Code § 11445.40* (procedure for informal hearing). Basic due process and public policy protections of the administrative adjudication *bill of rights* are preserved in the informal hearing under *Gov. Code §§ 11445.40(a)* (procedure for informal hearing) and 11425.10 (administrative adjudication *bill of rights*) [25 Cal. L. Rev. Comm. Reports 55, 183-184 (1995)].

Thus, for example, the presiding officer must be free of bias, prejudice, and interest; the presiding officer must be neutral, the adjudicative function being separated from the investigative, prosecutorial, and advocacy functions within the agency; the hearing must be open to public observation; the agency must make language assistance available; ex

parte communications are restricted; the decision must be in writing, be based on the record, and include a statement of the factual and legal basis of the decision; and the agency must designate and index significant decisions as precedents [25 Cal. L. Rev. Comm. Reports 55, 184 (1995)].

Reference in *Gov. Code § 11445.10 et seq.* to the "presiding officer" is not intended to imply unnecessary formality in the proceeding. The presiding officer may be the agency head, an agency member, an administrative law judge, or another person who presides over the hearing [25 Cal. L. Rev. Comm. Reports 55, 184 (1995); *see Gov. Code § 11405.80* (presiding officer defined)].

[2] Applicable Proceedings

Subject to the requirements of *Gov. Code § 11445.30* (governing notice of hearing and objections to use of informal hearing procedures), an agency may use an informal hearing procedure in any of the following proceedings, if, in the circumstances, its use does not violate another statute or the federal or state constitution [*Gov. Code § 11445.20*]:

- A proceeding where there is no disputed issue of material fact [*Gov. Code § 11445.20(a)*]. This provision permits the informal hearing to be used, regardless of the type or amount at issue, if no disputes issue of material fact has appeared, for example, a power plant siting proceeding in which the power company and the Energy Commission have agreed on all material facts. However, if consumers intervene and dispute material facts, the proceeding may be subject to conversion from an informal hearing procedure to a formal or other type of hearing procedure consistent with *Gov. Code § 11470.10 et seq.* (conversion of proceeding procedures, discussed in *§ 473H.15*) [25 Cal. L. Rev. Comm. Reports 55, 185 (1995)].

- A proceeding where there is a disputed issue of material fact, if the matter is limited to (1) a monetary amount of not more than $1,000, (2) a disciplinary sanction against a student that does not involve expulsion from an academic institution or suspension for more than 10 days, (3) a disciplinary sanction against an employee that does not involve discharge from employment, demotion, or suspension for more than 5 days, or (4) a disciplinary sanction against a licensee that does not involve an actual revocation of a license or an actual suspension of a license for more than five days (this does not, however, preclude an agency from imposing a stayed revocation or a stayed suspension of a license in an informal hearing) [*Gov. Code § 11445.20(b)(1)-(4)*; *City of Rancho Cucamonga v. Regional Water Quality Control Bd. (2006) 135 Cal. App. 4th 1377, 1384-1385, 38 Cal. Rptr. 3d 450* (informal adjudicative hearing procedures properly used for public hearing related to issuance of NPDES permit, as agency had authorized such hearing procedures by regulations [*23 Cal Code Reg. §§ 648(d)* and *648.5.1*], and the hearing was quasi-judicial, exempt from rulemaking procedures under *Gov. Code § 11352(b)*, and not subject to the formal adjudicative hearing procedures of *Gov. Code §§ 11500-11523*)]. This provision permits an informal hearing to be used, even if a disputed issue of material fact has appeared or if the amount or other stake involved is relatively minor; also, an informal hearing procedure may be used if the if the sanction imposed in the decision falls within its limitations, even though a greater penalty may result if a party fails to comply with the sanction imposed in the decision. The reference to a "licensee" in *Gov. Code § 11445.20(b)(4)* includes a certificate holder [25 Cal. L. Rev. Comm. Reports 55, 185 (1995)].

- A proceeding where, by regulation, the agency has authorized use of an informal hearing [*Gov. Code § 11445.20(c)*; 25 Cal. L. Rev. Comm. Reports 55, 185 (1995)].

- A proceeding where an evidentiary hearing for determination of facts is not required by statute but where the agency determines the federal or state constitution may require a hearing [*Gov. Code § 11445.20(d)*].

Gov. Code § 11445.20(c) imposes no limits on the authority of the agency to adopt the informal hearing by regulation, other than the general limitation that use of the informal hearing procedure is subject to statutory and constitutional due process requirements. Thus, an agency by regulation may authorize use of the informal hearing procedure in a case where the amount in issue or sanction exceeds the amount provided in *Gov. Code § 11445.20(b)*, so long as use of the informal hearing procedure would not contravene other statutes or due process of law [25 Cal. L. Rev. Comm. Reports 55, 185 (1995)].

Each subdivision in *Gov. Code § 11445.20* provides an independent basis for conducting an informal hearing. For example, if there is no issue of material fact, an agency may conduct an informal hearing under *Gov. Code § 11445.20(a)* whether or not a disciplinary sanction that exceeds the limits of *Gov. Code § 11445.20(b)* may result from the hearing [25 Cal. L. Rev. Comm. Reports 55, 185 (1995)].

Nothing in *Gov. Code § 11445.20* implies that this procedure is required in a proceeding in which a hearing is not statutorily or constitutionally required, including an agency's authority in minor disciplinary matters to make an investigation with or without a hearing as it deems necessary [25 Cal. L. Rev. Comm. Reports 55, 185-186 (1995); *see Gov. Code §§ 11410.10* (application to constitutionally and statutorily required hearings), *11415.50* (when adjudicative proceeding not required)].

[3] Notice of Hearing and Objection

The notice of hearing sent by an agency initiating a hearing must state the agency's selection of the informal hearing procedure [*Gov. Code § 11445.30(a)*].

A responding party must, in his or her responsive pleading, raise any objection to use of informal hearing procedures [*Gov. Code § 11445.30(b)*]. The presiding officer is required to resolve an objection to the use of the informal hearing procedure before the hearing on the basis of the pleadings and any written submissions in support of the pleadings. An objection to the use of the informal hearing procedure in a disciplinary proceeding involving an occupational license shall be resolved in favor of the licensee [*Gov. Code § 11445.30(c)*].

A litigant that challenged the administrative record supporting the issuance of an NPDES permit, and also made specific objections to specific documents supporting the permit issuance, waived the right to object to the admission of the documents, by not making the objections before or at the time of the administrative hearing. The litigant was properly notified that the permit hearing would follow informal adjudicative hearing procedures in which liberal rules governing introduction of evidence applied, and it failed to object to evidence introduction until it challenged the permit in court [*City of Rancho Cucamonga v. Regional Water Quality Control Bd. (2006) 135 Cal. App. 4th 1377, 1384-1385, 38 Cal. Rptr. 3d 450* (informal adjudicative hearing procedures properly used for public hearing related to issuance of NPDES permit, as agency had authorized such hearing procedures by regulations [*23 Cal Code Reg. §§ 648(d)* and *648.5.1*], and the hearing was quasi-judicial, exempt from rulemaking procedures under *Gov. Code § 11352(b)*, and not subject to the formal adjudicative hearing procedures of *Gov. Code §§ 11500-11523*)].

Gov. Code § 11445.30 provides a procedure for resolving objections to the use of the informal hearing procedure in advance of the hearing [25 Cal. L. Rev. Comm. Reports 55, 186 (1995); *see also Gov. Code § 11511.5* (prehearing conference)]. However, conversion to a formal hearing or other type of hearing may be appropriate if during the course of the hearing circumstances indicate the need for it [*see Gov. Code §§ 11445.50* (cross-examination), *11445.60* (proposed proof) [25 Cal. L. Rev. Comm. Reports 55, 186 (1995)].

For detailed discussion and forms relating to the pleadings in an agency adjudication, including the notice of hearing and the respondent's notice of defense, see Ch. 473A, *Commencing Agency Adjudication* .

[4] Authority of Presiding Officer and Applicable Hearing Procedures

In an informal hearing, the presiding officer is required to regulate the course of the proceeding. The presiding officer is required to permit the parties, and may permit others, to offer written or oral comments on the issues. The presiding officer may limit the use of witnesses, testimony, evidence, and argument, and may limit or eliminate the use of pleadings, intervention, discovery, prehearing conferences, and rebuttal [*Gov. Code § 11445.40(b)*].

Except as provided in *Gov. Code §§ 11445.10-11445.60*, the hearing procedures otherwise required by statute for an adjudicative proceeding apply to an informal hearing [*Gov. Code § 11445.40(a)*]. For detailed discussion and forms relating to agency hearing procedures generally, see Ch. 473F, *Agency Adjudication Hearings* .

Gov. Code § 11445.40 is taken from 1981 Model State APA § 4-402. This statute indicates that the informal hearing is a simplified version of a formal hearing. The informal hearing need not have a prehearing conference, discovery, or testimony of anyone other than the parties. It is intended to permit agencies to allow public participation when appropriate [25 Cal. L. Rev. Comm. Reports 55, 186-187 (1995); *see Gov. Code § 11445.10*].

[5] Discretion to Deny or Convert Informal Hearing

The presiding officer has discretion to deny use of the informal hearing procedure, or to convert an informal hearing to a formal hearing after an informal hearing is commenced, if it appears to the presiding officer that cross-examination is necessary for proper determination of the matter and that the delay, burden, or complication due to allowing cross-examination in the informal hearing will be more than minimal [*Gov. Code § 11445.50(a)*]. This provision gives the presiding officer discretion to limit availability of the informal hearing in situations when it appears that substantial cross-examination will be necessary [25 Cal. L. Rev. Comm. Reports 55, 187 (1995)]. For discussion of conversion under *Gov. Code §§ 11470.10-11470.50*, see *§ 473H.16*.

Agencies have authority to specify, by regulation, categories of cases in which cross-examination is deemed not necessary for proper determination of the matter under the informal hearing procedure. Nevertheless, the presiding officer may allow cross-examination of witnesses in an informal hearing notwithstanding an agency regulation if it appears to the presiding officer that in the circumstances cross-examination is necessary for proper determination of the matter [*Gov. Code § 11445.50(b)*]. This provision permits an agency to specify types of informal hearings in which cross-examination will be precluded. In recognition of the possibility that occasionally a case may demand cross-examination for proper determination of a matter, the presiding officer has limited authority to depart from the general procedure for cases of that type [25 Cal. L. Rev. Comm. Reports 55, 187 (1995)].

The actions of the presiding officer under *Gov. Code § 11445.50* are not subject to judicial review [*Gov. Code § 11445.50(c)*].

[6] Presenting Proof as to Material Facts in Dispute

If the presiding officer has reason to believe that material facts are in dispute, the presiding officer may require a party to state the identity of the witnesses or other sources through which the party would propose to present proof if the proceeding were converted to a formal or other applicable hearing procedure. If disclosure of a fact, allegation, or source is privileged or expressly prohibited by a regulation, statute, or the federal or state constitution, the presiding officer may require the party to indicate that confidential facts, allegations, or sources are involved, but not to disclose the confidential facts, allegations, or sources [*Gov. Code § 11445.60(a)*].

If a party has reason to believe that essential facts must be obtained in order to permit an adequate presentation of the case, the party may inform the presiding officer regarding the general nature of the facts and the sources from which the party would propose to obtain the facts if the proceeding were converted to a formal or other hearing procedure [*Gov.*

Code § 11445.60(b)].

Gov. Code § 11445.60 is taken from 1981 Model State APA § 4-403 [25 Cal. L. Rev. Comm. Reports 55, 188 (1995)]. For discussion of conversion of proceedings under *Gov. Code §§ 11470.10-11470.50*, see *§ 473H.16*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationImpartialityGeneral OverviewAdministrative LawAgency AdjudicationImpartialityEx Parte ContactsAdministrative LawAgency AdjudicationPresiding OfficersDuties & Powers

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§ 473H.14 Emergency Decision Procedure

[1] Authority for Emergency Decision Procedure

Subject to the limitations set forth in *Gov. Code §§ 11460.10-11460.80*, an agency may conduct an adjudicative proceeding under the emergency decision procedure of those provisions [*Gov. Code § 11460.10*].

This provision makes available an emergency decision procedure for decisions in which an adjudicative proceeding is required [25 Cal. L. Rev. Comm. Reports 55, 193 (1995); *see Gov. Code § 11410.10* (application to constitutionally and statutorily required hearings)]. The emergency decision procedure does not apply to an agency decision to seek injunctive relief [25 Cal. L. Rev. Comm. Reports 55, 193 (1995); *see Gov. Code § 11415.50* (when adjudicative proceeding not required)]. The decision whether to use the emergency decision procedure, if available, is in the discretion of the agency. The provisions of *Gov. Code §§ 11460.10-11460.80* supplement and do not replace other statutes that provide for interim suspension orders or other emergency orders [25 Cal. L. Rev. Comm. Reports 55, 193 (1995); *see Gov. Code § 11415.10* (regarding applicable procedure); *see Ch. 473, Public Agency Adjudication, § 473.16[1][a]*]. For other statutes on interim suspension orders and other emergency orders see the following [25 Cal. L. Rev. Comm. Reports 55, 193-194 (1995)]:

- Order for interim suspension of licensee [*Bus. & Prof. Code § 494*].
- Order for interim suspension of attorney [*Bus. & Prof. Code § 6007(c)*].
- Order for interim suspension of real estate licensee [*Bus. & Prof. Code § 10086(a)*].
- Immediate suspension of disruptive student, teacher, staff member, or administrator [*Educ. Code § 66017*].
- Emergency suspension of approval of private postsecondary institution to operate [*Educ. Code § 94319.12*].

- Immediate removal of officer or employee of savings association [*Fin. Code § 8201(f)*].
- Community care facilities [*Health & Safety Code § 1550.5*].
- Residential care facilities for the elderly [*Health & Safety Code § 1569.50*].
- Child day care facilities [*Health & Safety Code § 1596.886*].
- Trucking license [*Pub. Util. Code § 1070.5*].
- DMV licenses of manufacturers, transporters, and dealers [*Veh. Code § 11706*].

The California Court of Appeal rejected both a facial and an as applied challenge to statutory procedures in the California Education Code [*Educ. Code § 56366.6(a), (b)*; *5* Cal. Code Regs. § 3068] that provided for a post-suspension and post-revocation hearing to private special education schools that had their certifications to operate suspended or revoked by the Superintendent of Public Instruction. The schools argued that they were entitled to a pre-suspension or pre-revocation hearing. The Court of Appeal rejected that argument based upon the application of the three *Mathews v. Eldridge (1976) 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed 2d 18* factors, the private interest, the risk of error with existing procedures, and the governmental interest, as well as California due process of law principles [*Cal. Const., Art. 1, Sect. 7(a)*]. The court held that a post-suspension or post-revocation hearing satisfied due process of law requirements because it provides a reasonably prompt method for determining the validity of a suspension or revocation in circumstance in which there is a strong governmental interest, protecting disabled children [*Cal. Ass'n of PSES v. Cal. Dept. of Educ. (2006) 141 Cal. App. 4th 360, 374-376, 45 Cal. Rptr. 3d 888]* . The Court of Appeal also held that the statutory procedures do not provide for the issuance of emergency decisions, and thus the certification suspension and revocation procedures for nonpublic, nonsectarian schools are not subject to the emergency decision procedures requirements of *Gov. Code §§ 11460.10-11460.80* [*California Ass'n of PSES v. Cal. Dept. of Educ. (2006) 141 Cal. App. 4th 360, 378-379, 45 Cal. Rptr. 3d 888]* .

[2] Regulations Authorizing Emergency Decisions for Temporary, Interim Relief

An agency may issue an emergency decision for temporary, interim relief under the requirements of *Gov. Code §§ 11460.10-11460.80* if the agency has adopted a regulation that provides that the agency may use the procedures set out therein [*Gov. Code § 11460.20(a)*]. An agency regulation is required to elaborate the application of the provisions of *Gov. Code §§ 11460.10-11460.80* to an emergency decision by the agency, including all of the following [*Gov. Code § 11460.20(b)*]:

- Define the specific circumstances in which an emergency decision may be issued under *Gov. Code §§ 11460.10-11460.80* [*Gov. Code § 11460.20(b)(1)*].
- State the nature of the temporary, interim relief that the agency may order [*Gov. Code § 11460.20(b)(2)*].
- Prescribe the procedures that will be available before and after issuance of an emergency decision under *Gov. Code §§ 11460.10-11460.80*. The procedures may be more protective of the person to which the agency action is directed than those provided under *Gov. Code §§ 11460.10-11460.80* [*Gov. Code § 11460.20(b)(3)*].

The emergency decision procedures of *Gov. Code §§ 11460.10-11460.80* do not apply to an emergency decision, including a cease and desist order or an interim or temporary suspension order, issued pursuant to other express statutory authority [*Gov. Code § 11460.20(c)*].

Gov. Code § 11460.20 requires specificity in agency regulations that adopt an emergency decision procedure. Notwithstanding these requirements, a statute on emergency decisions, including cease and desist orders and temporary suspension orders, applicable to a particular agency or proceeding prevails over the provisions of this law governing emergency decision procedures [25 Cal. L. Rev. Comm. Reports 55, 194 (1995); *see Gov. Code § 11415.20* (conflicting or inconsistent statute controls)].

[3] Requirement of Immediate Danger to Public Health, Safety, or Welfare

An agency may only issue an emergency decision under the requirements of *Gov. Code §§ 11460.10-11460.80* in a situation involving an immediate danger to the public health, safety, or welfare that requires immediate agency action [*Gov. Code § 11460.30(a)*]. An agency may only take action under the requirements of *Gov. Code §§ 11460.10-11460.80* that is necessary to prevent or avoid the immediate danger to the public health, safety, or welfare that justifies issuance of an emergency decision [*Gov. Code § 11460.30(b)*]. An emergency decision issued under the requirements of *Gov. Code §§ 11460.10-11460.80* is limited to temporary, interim relief. The temporary, interim relief is subject to judicial review under *Gov. Code § 11460.80*, and the underlying issue giving rise to the temporary, interim relief is subject to an adjudicative proceeding under *Gov. Code § 11460.60* [*Gov. Code § 11460.30(c)*].

Gov. Code § 11460.30 is taken from 1981 Model State APA § 4-501(a)-(b). The emergency decision procedure is applicable only if the agency has adopted an authorizing regulation [*see Gov. Code § 11460.20*]. The authority for an emergency decision to avoid immediate danger to the public health, safety, or welfare includes avoiding adverse effects on the environment, such as to fish and wildlife [25 Cal. L Rev. Comm. Reports 55, 195 (1995)].

[4] Notice and Hearing Requirement

Before issuing an emergency decision under the requirements of *Gov. Code §§ 11460.10-11460.80*, the agency shall, if practicable, give the person to which the agency action is directed notice and opportunity to be heard [*Gov. Code § 11460.40(a)*]. Notice and hearing under *Gov. Code § 11460.40* may be oral or written, including notice and hearing by telephone, facsimile transmission, or other electronic means, as the circumstances permit. The hearing may be conducted in the same manner as an informal hearing [*Gov. Code § 11460.40(b)*; *see Gov. Code § 11445.60* (procedure for informal hearing)].

Gov. Code § 11460.40 applies to the extent practicable in the circumstances of the particular emergency situation. The agency must use its discretion to determine the extent of the practicability, and give appropriate notice and opportunity to be heard accordingly [25 Cal. L. Rev. Comm. Reports 55 (1995)]. By regulation the agency may prescribe the emergency notice and hearing procedure [25 Cal. L. Rev. Comm. Reports 55, 195 (1995); *see, e.g.,* State Bar Rules of Procedure, Transitional Rules 789-798 (proceedings re involuntary transfer to inactive status upon a finding that the attorney's conduct poses a substantial threat of harm to the public or the attorney's clients)]. The regulation may be more protective of the person to which the agency action is directed than the provisions of *Gov. Code §§ 11460.10-11460.80* [25 Cal. L. Rev. Comm. Reports 55, 196 (1995)].

[5] Emergency Decision and Adjudicative Proceeding

The agency is required to issue an emergency decision, including a brief explanation of the factual and legal basis and reasons for the emergency decision, to justify the determination of an immediate danger and the agency's emergency decision to take the specific action [*Gov. Code § 11460.50(a)*]. The agency shall give notice to the extent practicable to the person to which the agency action is directed. The emergency decision is effective when issued or as provided in the decision [*Gov. Code § 11460.50(b)*].

Gov. Code § 11460.50 is taken from 1981 Model State APA § 4-501(c)-(d). Under this provisions the agency has

flexibility to issue its emergency decision orally, if necessary to cope with the emergency [25 Cal. L. Rev. Comm. Reports 55, 196 (1995)].

After issuing an emergency decision under *Gov. Code §§ 11460.10-11460.80* for temporary, interim relief, the agency is required to conduct an adjudicative proceeding under a formal, informal, or other applicable hearing procedure to resolve the underlying issues giving rise to the temporary, interim relief [*Gov. Code § 11460.60(a)*]. The agency is required to commence an adjudicative proceeding under another procedure within 10 days after issuing an emergency decision under the requirements of Gov. Code. Code §§ 11460.10-11460.80, notwithstanding the pendency of proceedings for judicial review of the emergency decision [*Gov. Code § 11460.60(b)*].

Gov. Code § 11460.60 is taken from 1981 Model State APA § 4-501(e). If the emergency proceedings have rendered the matter completely moot, this statue does not direct the agency to conduct useless follow-up proceedings, since these would not be required in the circumstances [25 Cal. L. Rev. Comm. Reports 55, 196 (1995)].

[6] Agency Record and Judicial Review

In an emergency decision procedure, the agency record consists of any documents concerning the matter that were considered or prepared by the agency. The agency is required to maintain these documents as its official record [*Gov. Code § 11460.70*]. This provision is taken from 1981 Model State APA § 4-501(f) [25 Cal. L. Rev. Comm. Reports 55, 197 (1995)].

When an emergency decision is issued under the requirements of *Gov. Code §§ 11460.10-11460.80*, the person to which the agency action is directed may obtain judicial review of the decision in the manner provided in *Gov. Code § 11460.80* without exhaustion of administrative remedies [*Gov. Code § 11460.80(a)*]. Judicial review under *Gov. Code § 11460.80* shall be pursuant to *Code Civ. Proc. § 1094.5* subject to the following provisions [*Gov. Code § 11460.80(b)*]:

- The hearing shall be on the earliest day that the business of the court will admit of, but no later than 15 days after service of the petition on the agency [*Gov. Code § 11460.80(b)(1)*].

- When it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the whole record [*Gov. Code § 11460.80(b)(2)*].

- A party, on written request to another party, before the proceedings for review and within 10 days after issuance of the emergency decision, is entitled to appropriate discovery [*Gov. Code § 11460.80(b)(3)*].

- The relief that may be ordered on judicial review is limited to a stay of the emergency decision [*Gov. Code § 11460.80(b)(4)*].

Gov. Code § 11460.80 is taken from *Gov. Code § 11529(h)* (interim suspension of medical care professional) [25 Cal. L. Rev. Comm Reports 55, 197 (1995)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 473H.15 Declaratory Decision Procedure

[1] Authority for Declaratory Decision

Subject to the limitations set forth in *Gov. Code §§ 11465.10-11465.70*, an agency may conduct an adjudicative proceeding under the declaratory decision procedures set out therein [*Gov. Code § 11465.10*].

Gov. Code § 11465.10 et seq. create, and establish all of the requirements for, a special proceeding to be known as a "declaratory decision" proceeding. The purpose of the proceeding is to provide an inexpensive and generally available means by which a person may obtain fully reliable information as to the applicability of agency administered law to the person's particular circumstances [25 Cal. L. Rev. Comm. Reports 55, 198 (1995)].

An agency not governed by Chapter 4.5, the APA's general adjudication provisions (*Gov. Code § 11400 et seq.*), of which this procedure is a part, nonetheless has general power to issue a declaratory decision. This power is derived from the power to adjudicate [25 Cal. L. Rev. Comm. Reports 55, 198 (1995); *see, e.g.,* M. Asimow, Advice to the Public from Federal Administrative Agencies 121-22 (1973)]. However, the specific declaratory decision procedure provided in *Gov. Code §§ 11465.10-11465.70* applies only to proceedings that are subject to Chapter 4.5, including a proceeding under the APA's formal hearing provisions (*Gov. Code § 11500 et seq.*) [25 Cal. L. Rev. Comm. Reports 55, 198 (1995); *see Gov. Code §§ 11410.50* (application where formal hearing procedure required), *11501* (application of chapter); *see also* Gov. Code. *Code § 11410.10* (application to constitutionally and statutorily required hearings)].

[2] Application and Issuance of Decision

A person may apply to an agency for a declaratory decision as to the applicability to specified circumstances of a statute, regulation, or decision within the primary jurisdiction of the agency [*Gov. Code § 11465.20(a)*]. Under *Gov. Code § 11465.20(a)*, a declaratory decision may determine whether the subject of the proceeding is or is not within the agency's primary jurisdiction [25 Cal. L. Rev. Comm. Reports 55, 199 (1995); *see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 302-303, 109 P. 2d 942* ; *United Insurance Co. v. Maloney (1954) 127 Cal. App. 2d 155, 157-158, 273 P. 2d 579]* .

The agency in its discretion may issue a declaratory decision in response to the application. The agency shall not issue a

declaratory decision if any of the following applies [*Gov. Code § 11465.20(b)*]:

- Issuance of the decision would be contrary to a regulation adopted under the provisions of *Gov. Code §§ 11465.10-11465.70* [*Gov. Code § 11465.20(b)(1)*; *see* Ch. 472, *Public Agency Rules* , et seq., for discussion of the procedure by which an interested person may petition requesting adoption, amendment, or repeal of a regulation under *Gov. Code §§ 11347-11347.1*].

- The decision would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory decision proceeding [*Gov. Code § 11465.20(b)(2)*]. This provision prohibits an agency from issuing a declaratory decision that would substantially prejudice the rights of a person who would be a necessary party, and who does not consent to the determination of the matter by a declaratory decision proceeding. A necessary party is one that is constitutionally entitled to notice and an opportunity to be heard, a flexible concept depending on the nature of the competing interests involved [25 Cal. L. Rev. Comm. Reports 55, 199 (1995); *Horn v. County of Ventura (1979) 24 Cal. 3d. 605, 612, 617, 156 Cal. Rptr. 718, 596 P. 2d 1134]* . Such a person may refuse to give consent because in a declaratory decision proceeding the person might not have all of the same procedural rights the person would have in another type of adjudicative proceeding to which the person would be entitled [25 Cal. L. Rev. Comm. Reports 55, 199 (1995)].

- The decision involves a matter that is the subject of pending administrative or judicial proceedings [*Gov. Code § 11465.20(b)(3)*].

Gov. Code § 11465.20(a), (b) are taken from 1981 Model State APA § 2-103(a). Unlike the model act, issuance of a declaratory decision under this statute is discretionary with the agency, not mandatory [25 Cal. L. Rev. Comm. Reports 55, 199 (1995)].

An application for a declaratory decision is not required for exhaustion of the applicant's administrative remedies for purposes of judicial review [*Gov. Code § 11465.20(c)*]. This provision makes clear that application for a declaratory decision is not a necessary part of the administrative process. A person may seek judicial review of an agency action after other administrative remedies have been exhausted; the person is not required to seek declaratory relief as well. Nothing in this subdivision authorizes judicial review without exhaustion of other applicable administrative remedies [25 Cal. L. Rev. Comm. Reports 55, 199 (1995)].

[3] Notice and Applicable Law

Within 30 days after receipt of an application for a declaratory decision, an agency shall give notice of the application to all persons to which notice of an adjudicative proceeding is otherwise required, and may give notice to any other person [*Gov. Code § 11465.30*].

Gov. Code § 11465.30 is taken from 1981 Model State APA § 2-103(c) [25 Cal. L. Rev. Comm. Reports 55, 200 (1995); *see also Gov. Code § 11440.20* (notice)].

The provisions of a formal, informal, or other applicable hearing procedure do not apply to an agency proceeding for a declaratory decision except to the extent provided in *Gov. Code §§ 11465.10-11465.70*, or to the extent the agency so provides by regulation or order [*Gov. Code § 11465.40*]. This provision is taken from 1981 Model State APA § 2-103(d). It makes clear that the specific procedural requirements for adjudications imposed by the formal hearing procedure or other applicable hearing procedure on an agency when it conducts an adjudicative proceeding are inapplicable to a proceeding for a declaratory decision unless the agency elects to make some or all of them applicable. Regulations specifying precise procedures available in a declaratory proceeding may be adopted under *Gov. Code §*

11465.70. The reason for exempting a declaratory decision from usual procedural requirements for adjudications is to encourage an agency to issue a decision by eliminating requirements it might deem onerous. Moreover, many adjudicative provisions have no applicability. For example, cross-examination is unnecessary since the application establishes the facts on which the agency should rule. Oral argument could also be dispensed with [25 Cal. L. Rev. Comm. Reports 55, 200 (1995)].

Note that there are no contested issues of fact in a declaratory decision proceeding because its function is to declare the applicability of the law in question to facts furnished by the applicant. The actual existence of the facts on which the decision is based will usually become an issue only in a later proceeding in which a party to the declaratory decision proceeding seeks to use the decision as a justification of the party's conduct. Note also that the party requesting a declaratory decision has the choice of refraining from filing such an application and awaiting the ordinary agency adjudicative process. A declaratory decision is, of course, subject to provisions governing judicial review of agency decisions and for public inspection and indexing of agency decisions [25 Cal. L. Rev. Comm. Reports 55, 200 (1995); *see, e.g., Gov. Code §§ 6250-6268* (California Public Records Act), discussed in Ch. 470C, *Public Records Act*]. A declaratory decision may be given precedential effect, subject to the provisions governing precedent decisions [25 Cal. L. Rev. Comm. Reports 55, 201 (1995); *see Gov. Code § 11425.60* (precedent decisions)].

[4] Agency Action

Within 60 days after receipt of an application for a declaratory decision, an agency shall do one of the following, in writing [*Gov. Code § 11465.50(a)*]:

- Issue a decision declaring the applicability of the statute, regulation, or decision in question to the specified circumstances [*Gov. Code § 11465.50(a)(1)*].

- Set the matter for specified proceedings [*Gov. Code § 11465.50(a)(2)*].

- Agree to issue a declaratory decision by a specified time [*Gov. Code § 11465.50(a)(3)*].

- Decline to issue a declaratory decision, stating in writing the reasons for its actions. Agency action under this paragraph is not subject to judicial review [*Gov. Code § 11465.50(a)(4)*]. The decision by an agency not to issue a declaratory decision is within the absolute discretion of the agency and is therefore not reviewable [*Gov. Code § 11465.50(a)(4)*; 25 Cal. L. Rev. Comm. Reports 55, 201-202 (1995); *see also Gov. Code § 11465.20* (declaratory decision permissive)].

Gov. Code § 11465.50(a) is taken from 1981 Model State APA § 2-103(e). The requirement that an agency dispose of an application within 60 days ensures a timely agency response to a declaratory decision application, thereby facilitating planning by affected parties [25 Cal. L. Rev. Comm. Reports 55, 201 (1995)].

A copy of the agency's action under *Gov. Code § 11465.50(a)* must be served promptly on the applicant and any other party [*Gov. Code § 11465.50(b)*]. *Gov. Code § 11465.50(b)* is taken from 1981 Model State APA § 2-103(f). It requires that the agency communicate to the applicant and to any other parties any action it takes in response to an application for a declaratory decision. This includes each of the types of actions listed in paragraphs (1)-(4) of *Gov. Code § 11465.50(a)*. Service is made by personal delivery or mail or other means to the last known address of the person to which the agency action is directed [25 Cal. L. Rev. Comm. Reports 55, 201 (1995); *see Gov. Code § 11440.20*].

If an agency has not taken action under *Gov. Code § 11465.50(a)* within 60 days after receipt of an application for a declaratory decision, the agency is considered to have declined to issue a declaratory decision on the matter [*Gov. Code § 11465.50(c)*].

[5] Declaratory Decision

A declaratory decision shall contain the names of all parties to the proceeding, the particular facts on which it is based, and the reasons for its conclusion [*Gov. Code § 11465.60(a)*]. A declaratory decision has the same status and binding effect as any other decision issued by the agency in an adjudicative proceeding [*Gov. Code § 11465.60(b)*].

Gov. Code § 11465.60 is taken from 1981 Model State APA § 2-103(g). A declaratory decision issued by an agency is judicially reviewable; is binding on the applicant, other parties to that declaratory proceeding, and the agency, unless reversed or modified on judicial review; and has the same precedential effect as other agency adjudications. A declaratory decision, like other decisions, only determines the legal rights of the particular parties to the proceeding in which it was issued. The requirement in *Gov. Code § 11465.60(a)*, that each declaratory decision issued contain the facts on which it is based and the reasons for its conclusion, will facilitate any subsequent judicial review of the decision's legality. It also ensures a clear record of what occurred for the parties and for persons interested in the decision because of its possible precedential effect [25 Cal. L. Rev. Comm. Reports 55, 202 (1995)].

[6] Model Regulations

The Office of Administrative Hearings is required to adopt and promulgate model regulations under *Gov. Code §§ 11465.10-11465.70* that are consistent with the public interest and with the general policy of *Gov. Code §§ 11465.10-11465.70* to facilitate and encourage agency issuance of reliable advice. The model regulations shall provide for all of the following [*Gov. Code § 11465.70(a)*]:

- A description of the classes of circumstances in which an agency will not issue a declaratory decision [*Gov. Code § 11465.70(a)(1)*].

- The form, contents, and filing of an application for a declaratory decision [*Gov. Code § 11465.70(a)(2)*].

- The procedural rights of a person in relation to an application [*Gov. Code § 11465.70(a)(3)*].

- The disposition of an application [*Gov. Code § 11465.70(a)(4)*].

The regulations adopted by the Office of Administrative Hearings under this authority apply in an adjudicative proceeding unless an agency adopts its own regulations to govern declaratory decisions of the agency [*Gov. Code § 11465.70(b)*]. These provisions do not apply in an adjudicative proceeding to the extent an agency by regulation provides inconsistent rules or provides that these provisions are not applicable in a proceeding of the agency [*Gov. Code § 11465.70(c)*].

Gov. Code § 11465.70 is taken from 1981 Model State APA § 2-103(b). An agency may choose to preclude declaratory decision altogether. Regulations should specify all of the details surrounding the declaratory decision process including a specification of the precise form and contents of the application; when, how, and where an application is to be filed; whether an applicant has the right to an oral argument; the circumstances in which the agency will not issue a decision; and the like [25 Cal. L. Rev. Comm. Reports 55, 203 (1995)].

Regulations also should require a clear and precise presentations of facts, so that an agency will not be required to rule on the application of law to unclear or excessively general facts. The regulations should make clear that, if the facts are not sufficiently precise, the agency can require additional facts or a narrowing of the application. Agency regulations on this subject will be valid so long as the requirements they impose are reasonable and are within the scope of agency discretion. To be valid these rules must also be consistent with the public interest, which includes the efficient and effective accomplishment of the agency's mission, and the express general policy of this article to facilitate and

encourage the issuance of reliable agency advice. Within these general limits, therefore, and agency may include in its rules reasonable standing, ripeness, and other requirements for obtaining a declaratory decision [25 Cal. L. Rev. Comm. Reports 55, 203 (1995)].

Legal Topics:

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§ 473H.16 Conversion of Agency Proceedings

[1] Authority of Presiding Officer or Other Agency Official

Subject to applicable regulations adopted under *Gov. Code § 11470.50*, at any point in an agency proceeding, the presiding officer or other agency official responsible for the proceeding [*Gov. Code § 11470.10(a)*]:

- May convert the proceeding to another type of agency proceeding provided for by statute if the conversion is appropriate, is in the public interest, and does not substantially prejudice the rights of a party [*Gov. Code § 11470.10(a)(1)*].

- Must convert the proceeding to another type of agency proceeding provided for by statute, if required by regulation or statute [*Gov. Code § 11470.10(a)(2)*].

A proceeding of one type may be converted to a proceeding of another type only on notice to all parties to the original proceeding [*Gov. Code § 11470.10(b)*].

Gov. Code § 11470.10 is taken from 1981 Model State APA § 1-107(a)-(b). For purposes of this statute, a "party" in the case of an adjudicative proceeding means "party" as defined in *Gov. Code § 11405.60* (*see* definition in *§ 473H.11[5]*); in the case of a rulemaking proceeding, it means an active participant in the proceeding or one primarily interested in its outcome [25 Cal. L. Rev. Comm. Reports 55, 204 (1995)].

Agency proceedings covered by *Gov. Code §§ 11470.10-11470.50* include a rulemaking proceeding as well as an adjudicative proceeding. The conversion provisions may be irrelevant to some types of proceedings by some agencies, and in that case these provisions would be inapplicable. Under *Gov. Code § 11470.10(a)(1)*, a proceeding may not be converted to another type of proceeding that would be inappropriate for the action being taken. For example, if an agency elects to conduct a formal hearing in a case in which it could have elected an informal hearing initially, a subsequent decision to convert to an informal hearing would be appropriate. The further limitation in *Gov. Code § 11470.10(a)(1)*, that the conversion must not substantially prejudice the rights of a party, must also be satisfied. The courts will have to decide on a case-by- case basis what constitutes substantial prejudice. The concept includes both the

right to an appropriate procedure that enables a party to protect its interests, and freedom of the party from great inconvenience caused by the conversion in terms of time, cost, availability of witnesses, necessity of continuances and other delays, and other practical consequences of the conversion. Of course, even if the rights of a party are substantially prejudiced by a conversion, the party may voluntarily waive them [25 Cal. L. Rev. Comm. Reports 55, 204 (1995); *see Gov. Code § 11415.40*].

The limitation on discretionary conversion of an agency proceeding from one type to another, to avoid substantial prejudice to the rights of a party, is not intended to disturb an existing body of law. In certain situations an agency may lawfully deny an individual an adjudicative proceeding to which the individual would otherwise be entitled by conducting a rulemaking proceeding that determines for an entire class an issue that otherwise would be the subject of a necessary adjudicative proceeding [25 Cal. L. Rev. Comm. Reports 55 (1995); *see* Note, *The Use of Agency Rulemaking To Deny Adjudications Apparently Required by Statute, 54 Iowa L. Rev. 1086 (1969)*]. Similarly, the substantial prejudice limitation is not intended to disturb the existing body of law allowing an agency, in certain situations, to make a determination through an adjudicative proceeding that has the effect of denying a person an opportunity the person might otherwise be afforded if a rulemaking proceeding were used instead [25 Cal. L. Rev. Comm. Reports 55, 204-205 (1995)].

Gov. Code § 11470.10(a)(2) makes clear that an agency must convert a proceeding of one type to a proceeding of another type when required by regulation or statute, even if a nonconsenting party is prejudiced thereby. Under this provision, however, both a discretionary and a mandatory conversion must be accompanied by notice to all parties to the original proceeding so that they will have a fully adequate opportunity to protect their interests. Within the limits of this statute, an agency should be authorized to use procedures in a proceeding that are most likely to be effective and efficient under the circumstances [25 Cal. L. Rev. Comm. Reports 55, 205 (1995)]. *Gov. Code § 11470.10(a)* allows an agency this flexibility. For example, an agency that wants to convert a formal hearing into an informal hearing, or an informal hearing to a formal hearing, may do so under this provision if the conversion is appropriate and in the public interest, if adequate notice is given, and if the rights of the parties are not substantially prejudiced [25 Cal. L. Rev. Comm. Reports 55, 205 (1995)].

Similarly, an agency called on to explore a new area of law in a declaratory decision proceeding may prefer to do so by rulemaking. That is, the agency may decide to have full public participation in developing its policy in the area and to declare law of general applicability instead of issuing a determination of only particular applicability at the request of a specific party in a more limited proceeding. So long as all of the standards in this statute are met, this statute would authorize such a conversion from one type of agency proceeding to another. While it is unlikely that a conversion consistent with all of the statutory standards could occur more than once in the course of a proceeding, the possibility of multiple conversions in the course of a particular proceeding is left open by the statutory language. In an adjudication, the prehearing conference could be used to choose the most appropriate form of proceeding at the outset, thereby diminishing the likelihood of a later conversion [25 Cal. L. Rev. Comm. Reports 55, 205 (1995)].

[2] Conversion Procedures

[a] Appointment of Successor

If the presiding officer or other agency official responsible for the original proceeding would not have authority over the new proceeding to which it is to be converted, the agency head shall appoint a successor to preside over or be responsible for the new proceeding [*Gov. Code § 11470.20*]. This statute is taken form 1981 Model State APA § 1-107(c). It deals with the mechanics of transition from one type of proceeding to another [25 Cal. L. Rev. Comm. Reports 55, 206 (1995)].

[b] Record of Original Proceeding

To the extent practicable and consistent with the rights of parties and the requirements of *Gov. Code §§ 11470.10-11470.50*, relating to the new proceeding, the record of the original agency proceeding shall be used in the new agency proceeding [*Gov. Code § 11470.30*].

Gov. Code § 11470.30 is taken from 1981 Model State APA § 1-107(d). It seeks to avoid unnecessary duplication of proceedings by requiring the use of as much of the agency record in the first proceeding as is possible in the second proceeding, consistent with the rights of the parties and the requirements of the applicable statute governing the hearing procedure [25 Cal. L. Rev. Comm. Reports 55, 206 (1995)].

[c] Duties of Official Responsible for New Proceeding

After a proceeding is converted from one type to another, the presiding officer or other agency official responsible for the new proceeding shall do all of the following [*Gov. Code § 11470.40*]:

- Give additional notice to parties or other persons necessary to satisfy the statutory requirements relating to the new proceeding [*Gov. Code § 11470.40(a)*].

- Dispose of the matters involved without further proceedings if sufficient proceedings have already been held to satisfy the statutory requirements relating to the new proceeding [*Gov. Code § 11470.40(b)*].

- Conduct or cause to be conducted any additional proceedings necessary to satisfy the statutory requirements relating to the new proceeding, and allow the parties a reasonable time to prepare for the new proceeding [*Gov. Code § 11470.40(c)*].

Gov. Code § 11470.40 is drawn from the 1981 Model State APA § 1-107(e) [25 Cal. L. Rev. Comm. Reports 55, 207 (1995)].

[3] Regulations

An agency may adopt regulations to govern the conversion of one type of proceeding to another. The regulations may include an enumeration of the factors to be considered in determining whether and under what circumstances one type of proceeding will be converted to another [*Gov. Code § 11470.50*]. *Gov. Code § 11470.50* is taken from 1981 Model State APA § 1-107(f). Adoption of regulations is permissive, rather than mandatory [25 Cal. L. Rev. Comm Reports 55, 207 (1995)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersDuties & PowersAdministrative LawAgency RulemakingGeneral Overview

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41A-473H California Forms of Pleading and Practice--Annotated §§ 473H.17-473H.19

[Reserved]

§§ 473H.17[Reserved]

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41A-473H California Forms of Pleading and Practice--Annotated § 473H.20

§ 473H.20 Federal Constitution

Due process clause. *U.S. Const., amend. XIV, § 1*

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41A-473H California Forms of Pleading and Practice--Annotated § 473H.21

§ 473H.21 State Constitution

Due process clause. *Cal. Const., art. I, § 7(a)*

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41A-473H California Forms of Pleading and Practice--Annotated § 473H.22

§ 473H.22 State Statutes

[1] Administrative Procedure Act

Accusation. *Gov. Code § 11503*

Administrative adjudication *bill of rights*. *Gov. Code §§ 11425.10-11425.60*

Administrative Law Judges. *Gov. Code § 11502*

Affidavits. *Gov. Code § 11514*

Agency decisional authority. *Gov. Code § 11440.10*

Agencies to which act applies. *Gov. Code §§ 11410.10, 11501*

Amendment of pleadings. *Gov. Code §§ 11507, 11516*

Applicability of provisions to statement of issues. *Gov. Code § 11504.5*

Conduct of hearing. *Gov. Code § 11512*

Consolidation of proceedings. *Gov. Code § 11507.3*

Contempt. *Gov. Code §§ 11455.10-11455.30*

Continuances. *Gov. Code § 11524*

Conversion of proceedings. *Gov. Code §§ 11470.10-11470.50*

Decision. *Gov. Code §§ 11516-11520, 11526*

Declaratory decision. *Gov. Code §§ 11465.10-11465.70*

Definitions of terms. *Gov. Code §§ 11405.10-11405.80, 11500*

Depositions. *Gov. Code § 11511*

Discovery. *Gov. Code §§ 11507.5-11507.7*

Disqualification. *Gov. Code §§ 11425.30, 11425.40, 11512*

Emergency decision. *Gov. Code §§ 11460.10-11460.80*

Evidence. *Gov. Code §§ 11435.10, 11440.40, 11513*

Ex parte communications. *Gov. Code. Code §§ 11430.10-11430.80*

Hearings by electronic means. *Gov. Code § 11440.30*

Informal hearings. *Gov. Code §§ 11445.10-11445.60*

Intervention. *Gov. Code § 11440.50*

Language assistance. *Gov. Code §§ 11435.05-11435.65*

Judicial review. *Gov. Code § 11523*

Notice of defense. *Gov. Code § 11506*

Notice of hearing. *Gov. Code § 11509*

Oaths. *Gov. Code § 11528*

Official notice. *Gov. Code § 11515*

Reconsideration. *Gov. Code § 11521*

Reporting proceedings. *Gov. Code § 11512*

Restoration of rights. *Gov. Code § 11522*

Separate hearings. *Gov. Code § 11507.3*

Service and notice. *Gov. Code § 11440.20*

Service of initial pleading. *Gov. Code § 11505*

Settlement conferences. *Gov. Code § 11511.7*

Sexual harassment. *Gov. Code § 11440.40*

Statement of issues. *Gov. Code § 11504*

Subpoenas. *Gov. Code §§ 11450.05-11450.50*

Time and place of hearing. *Gov. Code § 11508*

Waiver of rights. *Gov. Code § 11415.40*

[2] Related Statutes

Affidavit of good cause as required for subpoena duces tecum. *Code Civ. Proc. § 1985*

Witness served with subpoena as entitled to demand one day's fees and mileage allowance. *Code Civ. Proc. § 1987*

Witness fees and mileage allowances. *Gov. Code §§ 11191, 68093, 68097.2*

Right to have subpoena issued. *Gov. Code § 11190*

Office of Administrative Hearings. *Gov. Code §§ 11370.1-11370.5*

Board of supervisors of county as empowered to establish county hearing officer. *Gov. Code §§ 27720, 27721*

Oaths used in civil proceedings. *Code Civ. Proc. §§ 2094-2097*

Evidentiary effect of plea of nolo contendere. *Penal Code § 1016*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationImpartialityGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law Judges

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41A-473H California Forms of Pleading and Practice--Annotated § 473H.23

§ 473H.23 Internet References

Office of Administrative Hearings. This site includes information and location concerning specific OAH offices; an OAH hearing guide; information concerning Administrative Procedure Act statutes, regulations, and proposed regulations; OAH forms; information concerning alternative dispute resolution procedures; and declaratory decisions. http://www.dgs.ca.gov/oah

NOTE:
On and after July 1, 1998, The OAL is required by *Gov. Code § 11340.1(b)* to make the full text of the California Code of Regulations, with reference citations and history notes, available on the Internet free of charge.

Office of Administrative Law. This site includes OAL publications; links to OAL statutes and regulations relating to rulemaking; regulations submitted to the OAL for review, and information for contacting or providing input to the OAL regarding rulemaking. http://www.oal.ca.gov

California Home Page. This site includes links to other sites maintained by numerous state agencies. http://www.ca.gov

Department of Consumer Affairs. This site includes links to sites maintained by many state agencies that are under this department, as well as links to agency sites. http://www.dca.ca.gov

California Courts. This site includes general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most Court of Appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes text of constitution, codes, and statutes (including complete text of APA); and information concerning pending legislation. http://www.leginfo.ca.gov

Matthew Bender. This site includes links to Matthew Bender publications and Shepard's citation service. http://www.bender.com

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationAlternative Dispute ResolutionAdministrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency RulemakingGeneral OverviewGovernmentsCourtsCreation & OrganizationGovernmentsLegislationEnactment

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41A-473H California Forms of Pleading and Practice--Annotated §§ 473H.24-473H.29

[Reserved]

§§ 473H.24[Reserved]

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41A-473H California Forms of Pleading and Practice--Annotated § 473H.30

§ 473H.30 Alternative Dispute Resolution

[1] Options

☐ Mediation [*Gov. Code § 11420.10(a)(1)*; *see Gov. Code § 11420.10(b)*; *§ 473H.12[1]*].

☐ Binding arbitration [*Gov. Code § 11420.10(a)(2)*; *see Gov. Code § 11420.10(b)*; *§ 473H.12[1]*].

☐ Nonbinding arbitration [*Gov. Code § 11420.10(a)(3)*; *see Gov. Code § 11420.10(b)*; *§ 473H.12[1]*].

[2] Procedure

☐ Obtain consent of all parties [*see § 473H.12[1]*].

☐ Obtain agency referral [*see § 473H.12[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewCivil ProcedureAlternative Dispute ResolutionGeneral Overview

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41A-473H California Forms of Pleading and Practice--Annotated § 473H.31

§ 473H.31 Objection to Informal Hearing Procedure

☐ Object in responsive pleading [*Gov. Code § 11445.30(b)*; *see § 473H.13[3]*].

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41A-473H California Forms of Pleading and Practice--Annotated § 473H.32

§ 473H.32 Emergency Decision

☐ Obtain judicial review [*Gov. Code § 11460.80(a), (b)*; *see Code Civ. Proc. § 1094.5*; *§ 473H.14[6]*].

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41A-473H California Forms of Pleading and Practice--Annotated § 473H.33

§ 473H.33 Declaratory Decision

☐ Apply to agency for declaratory decision [*Gov. Code § 11465.20(a)*; *see § 473H.15[2]*].

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Chapter 474 AVAILABILITY OF JUDICIAL REVIEW OF AGENCY DECISIONS

41A-474 California Forms of Pleading and Practice--Annotated 474.syn

§ 474.syn Synopsis to Chapter 474: AVAILABILITY OF JUDICIAL REVIEW OF AGENCY DECISIONS

§ 474.01 Scope of Chapter

§ 474.02 Cross References

[1] Related Coverage of Judicial Review

[2] Agency Adjudication

[3] Public Administrative Law Generally

§§ 474.03-474.09 [Reserved]

§ 474.10 Nature of Mandate Proceedings

[1] General Nature of Remedy

[2] Procedure

[3] Ordinary and Administrative Mandate Distinguished

§ 474.11 Review in Ordinary Mandate Proceedings

[1] Nature of Review

[2] Administrative Officials and Bodies Subject to Ordinary Mandate Proceedings

[3] Actions and Decisions Reviewable in Ordinary Mandate Proceedings

[a] Quasi-Legislative Action or Decision

[b] Refusal to Perform Ministerial Action

[c] Adjudicatory Action or Decision That Is Not Subject to Review in Administrative Mandate Proceedings

[4] Facts and Evidence on Which Review Is Based

[5] Relief Available

§ 474.12 Review in Administrative Mandate Proceedings

[1] Nature of Review

[2] Administrative Officials and Bodies Subject to Administrative Mandate Proceedings

[3] Prerequisites for Review of Administrative Order or Decision in Administrative Mandate Proceeding

[a] Adjudicatory Order or Decision

[b] Final Order or Decision

[c] Order or Decision Resulting From Evidentiary Hearing Required by Law

[d] Improper Petition for Code Civ. Proc. § 1094.5 Relief Not to Be Dismissed if Adequate for Ordinary Mandate

[4] Facts and Evidence on Which Review Is Based

[5] Relief Available

[a] Reversal or Annulment of Order if Agency Acted in Excess of Jurisdiction

[b] No Control or Limitation of Discretion Vested in Agency; Remand Required

[c] When Substantial Evidence Standard Applies

[d] When Independent Judgment Standard Applies

§ 474.13 Requirements Common to All Mandate Proceedings

[1] Beneficially Interested Petitioner

[a] Nature of Requirement

[b] Judicially Recognized Exceptions to Requirement

[c] Effect of Statute Providing for Participation in Administrative Proceeding

[2] Lack of Adequate Remedy at Law

[3] Exhaustion of Administrative Remedies

[4] When Exhaustion of Administrative Remedies Is Not Required

[a] Claim That Administrative Entity Lacks Subject Matter Jurisdiction Under Governing Statutes

[b] Challenge to Constitutionality of Governing Statutes

[c] Administrative Remedy Is Inadequate or Unavailable

[d] Pursuit of Administrative Remedy Is Futile

[e] Petitioner Is Threatened With Irreparable Injury

[f] Application of Rule Is Contrary to Public Interest

[g] Concurrent Primary Jurisdiction

§ 474.14 Defenses Common to All Mandate Proceedings

[1] Statute of Limitations

[2] Equitable Defenses

[a] Laches

[b] Unclean Hands

[c] Waiver

[d] Estoppel

§ 474.15 Res Judicata and the Failure to Seek Judicial Review

§§ 474.16-474.19 [Reserved]

§ 474.20 Review by Other Extraordinary Writs

[1] Prohibition

[2] Certiorari

[3] Extraordinary Writ

§ 474.21 Action for Declaratory Relief

§ 474.22 Action for Injunctive Relief

§ 474.23 Orders and Decisions Reviewable Under Special Constitutional and Statutory Provisions

[1] Decisions of the Public Utilities Commission

[2] Decisions of the State Bar

[3] Orders, Rules, and Decisions of the Workers' Compensation Appeals Board

[4] Orders of the Alcoholic Beverage Control Appeals Board

[5] Orders of the Agricultural Labor Relations Board

[6] Certain Orders and Determinations of the Public Employment Relations Board

§§ 474.24-474.29 [Reserved]

§ 474.30 Related Matthew Bender Publications

§ 474.31 Federal Constitution

§ 474.32 State Constitution

§ 474.33 State Statutes

§ 474.34 Decisions

[1] Generally

[2] Acts Subject to Judicial Review

[3] Finality of Decision

[4] Hearing Required by Law

[5] Evidence Required to Be Taken

[6] Beneficial Interest

[7] Lack of Other Remedies

[8] Res Judicata

[9] Limitation and Laches

[10] Questions Not Presented to Agency

[11] Judicial Review

[a] Right

[b] Scope

[c] Proceedings

§ 474.35 Law Reviews

§ 474.36 Text References

§ 474.37 Internet References

§§ 474.38-474.49 [Reserved]

§ 474.50 Determine Availability of and Procedure for Judicial Review

§ 474.51 Petition for Writ of Mandate

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Chapter 474 AVAILABILITY OF JUDICIAL REVIEW OF AGENCY DECISIONS
PART I. SCOPE

41A-474 California Forms of Pleading and Practice--Annotated § 474.01

§ 474.01 Scope of Chapter

This chapter provides a discussion of the availability of judicial review, including the following in Part II:

- Subpart A discusses availability of judicial review under ordinary mandate and administrative mandate [*see § 474.10* et seq.].

- Subpart B discusses availability of judicial review under other writs, actions, and specialized orders and decisions [*see § 474.20* et seq.].

The terms mandate and mandamus are interchangeable. In the Legal Background in this chapter, the writ is referred to by the term mandate.

A Research Guide [Part III; *see § 474.30* et seq.] and a Procedural Checklist [Part IV; *see § 474.50* et seq.] are also included.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesGeneral OverviewAdministrative LawJudicial ReviewRemediesMandamusCivil ProcedureRemediesWritsCommon Law WritsMandamus

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41A-474 California Forms of Pleading and Practice--Annotated § 474.02

§ 474.02 Cross References

[1] Related Coverage of Judicial Review

For related discussion concerning judicial review by California courts of agency adjudications, see:

- Ch. 474A, *Timing of Judicial Review of Agency Decisions*.
- Ch. 474B, *Standards in Reviewing Agency Decisions*.
- Ch. 474C, *Procedures in Reviewing Agency Decisions*.

For other related discussion and forms relating to judicial review generally, see:

- Ch. 40, *Appeal: An Overview*, et seq. (discussion and forms relating to civil appeals).
- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to immediate judicial review of orders by extraordinary writ of mandate or prohibition).
- Ch. 492, *Review (Certiorari), Writ of* (discussion and forms relating to immediate judicial review of civil proceedings by extraordinary writ of review).

For memoranda of points of points and authorities supporting and opposing petitions for writs of mandate generally, see California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender).

For memoranda of points and authorities supporting and opposing petitions for administrative mandate, see California Points and Authorities, Ch. 195, *Public Administrative Law* (Matthew Bender).

[2] Agency Adjudication

For detailed discussion and forms relating to agency adjudications that are the subject of the judicial review discussed in

this chapter, see:

- Ch. 473, *Public Agency Adjudication*.
- Ch. 473A, *Commencing Agency Adjudication*.
- Ch. 473B, *Discovery in Agency Adjudications*.
- Ch. 473C, *Prehearing Procedures in Agency Adjudications*.
- Ch. 473E, *Public Administrative Law Judges*.
- Ch. 473F, *Agency Adjudication Hearings*.
- Ch. 473G, *Agency Adjudication Decisions*.
- Ch. 473H, *Alternative Administrative Adjudication Procedures*.

For detailed discussion and forms relating generally to licensing agencies, including licensing adjudications, see Ch. 471B, *Licensing by Public Agencies* .

[3] Public Administrative Law Generally

For related discussion of California public administrative law generally, including discussion of public agency functions and powers (including adjudicative or quasi-judicial powers), and organization generally, see Ch. 470, *Overview of Public Administrative Law* (general discussion of judicial power is in § 470.12[5]). For detailed discussion of the general procedures imposed in agency proceedings by constitutional due process and related statutory requirements, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

For discussion and forms relating to the law governing access to and conduct of meetings by California public agencies, see Ch. 470B, *Public Agency Meetings* .

For detailed discussion and forms relating to the law governing disclosure of public records under the California Public Records Act [*Cal. Gov. Code §§ 6250 et seq.*], see Ch. 470C, *Public Records Act* .

For detailed discussion and forms relating generally to agency investigations and inspections, see:

- Ch. 471, *Investigations by Public Agencies*.
- Ch. 471A, *Inspections by Public Agencies*.

For detailed discussion and forms relating generally to the legislative or rulemaking functions of California public agencies, including judicial review of these functions, see:

- Ch. 472, *Public Agency Rules*.
- Ch. 472A, *Agency Rulemaking Procedures*.
- Ch. 472B, *Review of Agency Rulemaking*.

For additional cross references to coverage of particular public agencies, see *Ch. 470, Overview of Public Administrative Law, § 470.02[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityAdministrative LawJudicial ReviewRemediesGeneral OverviewAdministrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewRemediesProhibitionAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamus

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41A-474 California Forms of Pleading and Practice--Annotated §§ 474.03-474.09

[Reserved]

§§ 474.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Review by Writ of Mandate

41A-474 California Forms of Pleading and Practice--Annotated § 474.10

§ 474.10 Nature of Mandate Proceedings

[1] General Nature of Remedy

The proper method for obtaining judicial review of most administrative acts or decisions is by instituting a proceeding for issuance of a writ of mandate [*see Bodinson Mfg. Co. v. California E. Com. (1941) 17 Cal. 2d 321, 328-329, 109 P.2d 935]* .

The writ of mandate is a broad remedy that enables interested persons to compel performance of a legal duty when the law provides no other adequate remedy [*Dowell v. Superior Court (1956) 47 Cal. 2d 483, 486-487, 304 P.2d 1009* ; *Harbach v. El Pueblo de Los Angeles etc. Com. (1971) 14 Cal. App. 3d 828, 837, 92 Cal. Rptr. 757* ; *Potomac Oil Co. v. Dye (1909) 10 Cal. App. 534, 537, 102 P. 677]* . The writ is characterized as an extraordinary legal remedy that performs the equitable function of alleviating deficiencies in traditional legal remedies [*Dowell v. Superior Court (1956) 47 Cal. 2d 483, 486,304 P.2d 1009* ; *Harbach v. El Pueblo de Los Angeles etc. Com. (1971) 14 Cal. App. 3d 828, 837, 92 Cal. Rptr. 757]* .

Issuance of the writ is governed in large part by equitable considerations [*Dowell v. Superior Court (1956) 47 Cal. 2d 483, 486, 304 P.2d 1009* ; *Dare v. Bd. of Medical Examiners (1943) 21 Cal. 2d 790, 795, 136 P.2d 304* ; *Advance Medical Diagnostic Laboratories v. County of Los Angeles (1976) 58 Cal. App. 3d 263, 274, 129 Cal. Rptr. 723]* .

The California Court of Appeal held that it would treat a doctor's petition for a writ of habeas corpus as a request for a writ of mandate requiring the Superior Court to vacate an order prohibiting the doctor from practicing medicine while criminal charges were pending. This was because the issues raised in the petition alleged the trial court exceeded its jurisdiction in making the prohibition order as a bail condition. Also, the issues in the petition were legal not factual, and there was no need for an evidentiary hearing to decide those issues [*Gray v. Superior Ct. (2005) 125 Cal. App. 4th 629, 636, fn. 3, 23 Cal. Rptr. 3d 50* ; *Alfredo A. v. Superior Ct. (1994) 6 Cal. 4th 1212, 1217, 26 Cal. Rptr. 2d 623, 865 P. 2d 56* (habeas corpus petition treated as petition for writ of mandate)].

[2] Procedure

A proceeding for the issuance of a writ of mandate is a special civil proceeding governed by the provisions of Title I of Part Three of the Code of Civil Procedure [*Code Civ. Proc. § 1063 et seq.*]. The California Constitution gives the Supreme Court, the courts of appeal, and the superior courts concurrent original jurisdiction of mandate proceedings [*Cal. Const., art. VI, § 10*]. However, unless a case presents issues of great public importance that require prompt resolution, the Supreme Court and the courts of appeal generally decline, as a matter of judicial policy, to exercise their original jurisdiction [*San Francisco Unified School Dist. v. Johnson (1971) 3 Cal. 3d 937, 944-945, 92 Cal. Rptr. 309, 479 P.2d 669* ; *Roma Macaroni Factory v. Giambastiani (1933) 219 Cal. 435, 436-438, 27 P.2d 371* ; *County of Los Angeles v. Nesvig (1965) 231 Cal. App. 2d 600, 601-602, 41 Cal. Rptr. 916* ; *see also Cal. Rules of Ct., Rule 8.490(a)*; for a discussion of the rules that govern mandate proceedings and other original proceedings in the Supreme Court and the courts of appeal, see Ch. 474C, *Procedures in Reviewing Agency Procedures*].

A mandate proceeding is instituted by filing a petition in a proper court [*Code Civ. Proc. § 1086*; *Cal. Rules of Ct., Rule 8.490(a)*]. The official, board, or agency involved and other interested parties must be served with the petition and may file responsive pleadings [*Code Civ. Proc. §§ 1088, 1089*; Cal. Rules of Ct., Rule 8.49(f), (g)]. Depending on the nature of the administrative action and the issues raised by the parties, the court may determine the petitioner's entitlement to relief on the basis of any of the following:

- The pleadings [*see, e.g., Code Civ. Proc. § 1094*; *Town of Hayward v. Pimental (1895) 107 Cal. 386, 390-391, 40 P. 545* ; *Rodriguez v. Municipal Court (1972) 25 Cal. App. 3d 521, 526-527, 102 Cal. Rptr. 45* ; *Harbach v. El Pueblo de Los Angeles etc. Com. (1971) 14 Cal. App. 3d 828, 835, 92 Cal. Rptr. 757]* .

- An administrative record [*see, e.g., Code Civ. Proc. 1094.5(a)*; *Merz v. Board of Supervisors (1983) 147 Cal. App. 3d 933, 937, 195 Cal. Rptr. 370* ; *Transcentury Properties, Inc. v. State of California (1974) 41 Cal. App. 3d 835, 842, 116 Cal. Rptr. 487* ; *Housman v. Board of Medical Examiners (1948) 84 Cal. App. 2d 308, 313, 190 P.2d 653]* .

- Evidence presented by the parties [*see, e.g., Code Civ. Proc. §§ 1090, 1094.5(e)*; *No Oil, Inc. v. City of Los Angeles (1974) 13 Cal. 3d 68, 79 n. 6, 118 Cal. Rptr. 34, 529 P.2d 66* ; *Bruce v. Gregory (1967) 65 Cal. 2d 666, 670-671, 56 Cal. Rptr. 265, 423 P.2d 193* ; *English v. City of Long Beach (1952) 114 Cal. App. 2d 311, 316-317, 250 P.2d 298]* .

If the court determines that mandate relief is warranted, it issues a peremptory writ of mandate directing the administrative body or officer to take the action that is required by law [*Code Civ. Proc. §§ 1087, 1094.5(f)*]. For a detailed discussion of the procedural aspects of a mandate proceeding, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[3] Ordinary and Administrative Mandate Distinguished

Controlling statutes provide for review of administrative actions and decisions in two types of mandate proceedings: ordinary mandate and administrative mandate [*Code Civ. Proc. §§ 1085, 1094.5*]. The type of mandate applicable in any case is determined by the nature of the administrative action or decision to be reviewed [*Tielsch v. City of Anaheim (1984) 160 Cal. App. 3d 570, 574, 206 Cal. Rptr. 738]* .

Administrative mandate proceedings, the most common type of mandate proceedings, are used to review actions or decisions of an administrative body or officer acting in a judicial capacity [*Code Civ. Proc. § 1094.5*; *Temescal Water Co. v. Dept. of Public Works (1955) 44 Cal. 2d 90, 101, 280 P.2d 1* ; *Neighbors in Support of Appropriate Land Use v. County of Tuolumne (2007) 157 Cal. App. 4th 997, 1004-1005, 68 Cal. Rptr. 3d 882* (issuance of conditional use permit is a quasi-judicial administrative action reviewable under administrative mandate); *Estes v. City of Grover City (1978) 82 Cal. App. 3d 509, 514, 147 Cal. Rptr. 131* ; County of L.A. v. Tax Appeals Bd. No. 2 *(1968) 267 Cal. App. 2d 830,*

833, 73 Cal. Rptr. 469 ; *see § 474.12*, for a more detailed discussion of the types of actions and decisions reviewable in administrative mandate proceedings].

Ordinary mandate proceedings are used to review actions or decisions of an administrative body or officer acting in a legislative or executive capacity [*Code Civ. Proc. § 1085*; *Neighbors in Support of Appropriate Land Use v. County of Tuolumne (2007) 157 Cal. App. 4th 997, 1004-1005, 68 Cal. Rptr. 3d 882* (approval of a development agreement is a legislative act reviewable under ordinary mandate); *Wagner Farms, Inc. v. Modesto Irrigation District (2006) 145 Cal. App. 4th 765, 772-773, 52 Cal. Rptr. 3d 683* (approval of a transmission line project is a quasi-legislative action review able in ordinary mandate); *Environmental Charter High Sch. v. Centinela Valley Union High Sch. Dist. (2004) 122 Cal. App. 4th 139, 145, 18 Cal. Rptr. 3d 417* (school district decision to deny charter school use of district facilities for 2003-2004 school year was reviewed under ordinary mandate); *Karlson v. City of Camarillo (1980) 100 Cal. App. 3d 789, 798, 161 Cal. Rptr. 260* (legislative actions); *Harbach v. El Pueblo de Los Angeles etc. Com. (1971) 14 Cal. App. 3d 828, 833-834, 92 Cal. Rptr. 757* (ministerial actions); *see § 474.11*, for a more detailed discussion of the kinds of actions and decisions reviewable in ordinary mandate proceedings].

The Court of Appeal reversed the denial of writs of ordinary [*Code Civ. Proc. § 1085*] and administrative [*Code Civ. Proc. § 1094.5*] mandate, and held that both types of mandate could appropriately be ordered in an action brought by Medi-Cal beneficiaries that sought reimbursement from the State Department of Health Services of covered expenses paid to providers. The court determined that ordinary mandate could be used to order the agency to adopt procedures providing for timely reimbursement of recipients' expenses, and administrative mandate could be used to review decisions following administrative hearings that denied reimbursement [*Conlan v. Bonta (2002) 102 Cal. App. 4th 745, 751-753, 125 Cal. Rptr. 2d 788* , mod. den. reh.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent JurisdictionCivil ProcedureEquityGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamus

California Forms of Pleading and Practice--Annotated

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PART II. LEGAL BACKGROUND
A. Review by Writ of Mandate

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§ 474.11 Review in Ordinary Mandate Proceedings

[1] Nature of Review

Ordinary mandate proceedings are governed by *Code Civ. Proc. § 1085*. In an ordinary mandate proceeding, the court conducts a limited review and is authorized to determine only two kinds of issues [*Fullerton Joint Union High School Dist. v. State Bd. Of Education (1982) 32 Cal. 3d 779, 187 Cal. Rptr. 398, 654 P.2d 168* , 786, *32 Cal. 3d 779, 187 Cal. Rptr. 398, 654 P.2d 168* ; *Stauffer Chemical Co. v. Air Resources Board (1982) 128 Cal. App. 3d 789, 794, 180 Cal. Rptr. 550* ; *City of Santa Cruz v. Local Agency Formation Com. (1978) 76 Cal. App. 3d 381, 392-393, 142 Cal. Rptr. 873]* :

- Whether the administrative action or decision was arbitrary, capricious, or entirely lacking in evidentiary support; or

- Whether the administrative body or officer gave the notices and followed the procedures required by law [*Mileikowsky v. Tenet Healthsystem (2005) 128 Cal. App. 4th 531, 554-555, 27 Cal. Rptr. 3d 171* , *overruled in part by Mileikowsky v. West Hills Hospital & Medical Center (2009) 45 Cal. 4th 1259, 91 Cal. Rptr. 3d 516, 203 P.3d 1113* (hearing required by law); *DeCuir v. County of Los Angeles (1998) 64 Cal. App. 4th 75, 82, 75 Cal. Rptr. 2d 102]* .

For a discussion of the issues reviewed and the standards of review in ordinary mandate proceedings, see *Ch. 474B, Standards in Reviewing Agency Decisions, § 474B.30* et seq.

[2] Administrative Officials and Bodies Subject to Ordinary Mandate Proceedings

Code Civ. Proc. § 1085 provides that a writ of mandate may be issued by any court "to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station ... ." This broad language clearly means that, in a proper case, ordinary mandate will lie against any administrative officer or body [*Santa Clara County Counsel Atty's Assn. v. Woodside (1994) 7 Cal. 4th 525, 540-542, 28 Cal. Rptr. 2d 617, 869 P.2d 1142* ; *cf. California Housing Finance Agency v. Elliott (1976) 17 Cal.*

3d 575, 579, 131 Cal. Rptr. 361, 551 P.2d 1193 ; *Glendale City Employees' Assn., Inc. v. City of Glendale (1975) 15 Cal. 3d 328, 344 n.24, 124 Cal. Rptr. 513, 540 P.2d 609* ; *People ex rel. Younger v. County of El Dorado (1971) 5 Cal. 3d 480, 491, 96 Cal. Rptr. 553, 487 P.2d 1193* ; *Johnson v. City and County of San Francisco (2006) 137 Cal. App. 4th 7, 19-20, 40 Cal. Rptr. 3d 8* (property owners sought declaratory relief and a writ of mandate to challenge notice provisions of city and county rental ordinance on grounds that provisions were preempted by state law. The California Court of Appeal held that it was proper to grant a writ of mandate under *Code Civ. Proc. §§ 1085* and *1086* against the city and county of San Francisco to prevent the city and county from enforcing an ordinance that was preempted by a state statute); *City of Arcadia v. State Water Resources Control Bd. (2006) 135 Cal. App. 4th 1392, 1409, 38 Cal. Rptr. 3d 373* ; *Klajic v. Castaic Lake Water Agency (2004) 121 Cal. App. 4th 5, 11-12, 16 Cal. Rptr. 3d 746* ; *McLeod v. Board of Pension Commissioners (1970) 14 Cal. App. 3d 23, 27, 94 Cal. Rptr. 58]* . A writ of mandate under *Code Civ. Proc. § 1085* (ordinary mandate) must be brought against the governmental body that took the action challenged in the mandate proceeding [*Sacramento County Alliance of Law Enforcement v. County of Sacramento (2007) 151 Cal. App. 4th 1012, 1020-1021, 60 Cal. Rptr. 3d 202* (denial of petition for writ of mandate affirmed on appeal because petitioners erroneously named county as respondent, and they were required to name county civil service commission as proper party respondent)].

[3] Actions and Decisions Reviewable in Ordinary Mandate Proceedings

[a] Quasi-Legislative Action or Decision

Quasi-legislative actions of an administrative body--actions that it performs in a legislative capacity--are reviewable in ordinary mandate proceedings [*Clean Air Constituency v. California State Air Resources Bd. (1974) 11 Cal. 3d 801, 809, 114 Cal. Rptr. 577, 523 P.2d 617* ; *Environmental Protection & Information Center v. California Dept. of Forestry & Fire Protection (2008) 44 Cal. 4th 459, 521, 80 Cal. Rptr. 3d 28, 187 P.3d 888* (regulatory approvals related to streambed alteration agreement did not require findings, and agreement was not invalid without findings because statutory approval process did not required that a hearing be held by law. Agreement was reviewable under *Code Civ. Proc. § 1085* (ordinary mandate)); *Exxon Mobil Corp. v. Office of Environmental Health Hazard Assessment (2009) 169 Cal. App. 4th 1264, 1275-1277, 87 Cal. Rptr. 2d 580* (agency decision to list chemical under Proposition 65 was quasi-legislative action reviewable under *Code Civ. Proc. § 1085* (ordinary mandate)); *O.W.L. Foundation v. City of Rohnert Park (2008) 168 Cal. App. 4th 568, 585-586, 86 Cal. Rptr. 3d 1* (city adoption of water supply assessment was reviewable under *Code Civ. Proc. § 1085* (ordinary mandate) even though city held public hearing related to adoption because no hearing was required by law); *SN Sands Corporation v. City and County of San Francisco (2008) 167 Cal. App. 4th 185, 191-192, 83 Cal. Rptr. 3d 885* (the award of a contract by a public entity is a quasi-legislative act that is judicially reviewable under *Code Civ. Proc. § 1085* (ordinary mandate)); *Association of Irritated Residents v. San Joaquin Valley Unified Air Pollution Control Dist. (2008) 168 Cal. App. 4th 535, 542-543, 85 Cal. Rptr. 3d 590* (agency decision to adopt rule regulation volatile organic compound emissions was a quasi-legislative action reviewable under *Code Civ. Proc. § 1085* (ordinary mandate)); *Friends of the Sierra Railroad v. Tuolumne Park and Recreation District (2007) 147 Cal. App. 4th 643, 651-652, 54 Cal. Rptr. 3d 500* (County district to sell a piece of district property was quasi-legislative action (nonadjudicatory in character) subject to judicial review under *Code Civ. Proc. § 1085* (ordinary mandate); *Western States Petroleum Ass'n v. South Coast Air Quality Mgmt. Dist. (2006) 136 Cal. App. 4th 1012, 1018-1019, 39 Cal. Rptr. 3d 354* (adoption of emission reduction rule by air quality management district was quasi-legislative action subject to judicial review under *Code Civ Proc. § 1085* (ordinary mandate); *State Water Resources Control Bd. Cases (2006) 136 Cal. App. 4th 674, 726-727, 39 Cal. Rptr. 3d 189* (adoption of water quality control plan is quasi-legislative act); *City of Arcadia v. State Water Resources Control Bd. (2006) 135 Cal. App. 4th 1392, 1409, 38 Cal. Rptr. 3d 373* (decision to adopt trash total maximum daily load standard (TDML plan) as part of regional water quality control plan was quasi-legislative action reviewable under ordinary mandate [*Code Civ. Proc. § 1085*]); *Fed. of Hillside and Canyon Ass'ns v. City of Los Angeles (2004) 126 Cal. App. 4th 1180, 1195, 24 Cal. Rptr. 3d 543* (city's adoption of general plan for land use and development is legislative act reviewable by writ of ordinary mandate under *Code Civ. Proc. § 1085*; *Reclamation District No. 684 v. State Dept. of Indus. Rel. (2005) 125 Cal. App. 4th 1000, 1004-1005, 23 Cal. Rptr. 3d 269* (director of state agency made prevailing wage determination for

particular construction project under authority conferred by administrative regulations. Director's decision is quasi-legislative action that is subject to judicial review by writ of ordinary mandate under *Code Civ. Proc. § 1085*); *Vasquez v. Happy Valley Union School District (2008) 159 Cal. App. 4th 969, 980-981, 72 Cal. Rptr. 3d 15* (ordinary mandamus is the proper remedy to challenge a school district's assignment, classification, or discipline of a teacher); *Marshall v. Pasadena Unified School Dist. (2004) 119 Cal. App. 4th 1241, 1253, 15 Cal. Rptr. 3d 344* (school district decision to award contract to construction company based on emergency resolution which bypassed competitive bidding procedures was a legislative act reviewable under ordinary mandate); *Carrancho v. California Air Resources Board (2003) 111 Cal. App. 4th 1255, 1265-1267, 4 Cal. Rptr. 3d 536* (agencies preparation of diversion plans and progress reports based on statutory requirements are quasi-legislative acts reviewable in ordinary mandate); *Joint Council of Interns & Residents v. Board of Supervisors (1989) 210 Cal. App. 3d 1202, 1209, 258 Cal. Rptr. 762* ; *Carlton Santee Corp. v. Padre Dam Mun. Water Dist. (1981) 120 Cal. App. 3d 14, 18-19, 174 Cal. Rptr. 413* ; *Karlson v. Camarillo (1980) 161 Cal. Rptr. 260]* .

An action may be quasi-legislative even though it:

- Determines the propriety of relief requested in a petition [*Wilson v. Hidden Valley Mun. Water Dist. (1967) 256 Cal. App. 2d 271, 279, 63 Cal. Rptr. 889]* ; or

- Is based on an evaluation of evidence presented at a hearing [*Joint Council of Interns & Residents v. Board of Supervisors (1989) 210 Cal. App. 3d 1202, 1211-1212, 258 Cal. Rptr. 762* ; *Heist v. County of Colusa (1984) 163 Cal. App. 3d 841, 846, 213 Cal. Rptr. 278]* .

The distinction between a quasi-legislative action and an adjudicatory action is that a quasi-legislative action involves the formulation of a rule or policy to be applied to all future cases, while an adjudicatory action involves the actual application of the rule to a specific set of facts [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 34 n.2, 112 Cal. Rptr. 805, 520 P.2d 29* ; *Joint Council of Interns & Residents v. Board of Supervisors (1989) 210 Cal. App. 3d 1202, 1209-1210, 258 Cal. Rptr. 762* ; *Patterson v. Central Coast Regional Com. (1976) 58 Cal. App. 3d 833, 840, 130 Cal. Rptr. 169]* . For example, the enactment of a zoning ordinance for a particular area is a quasi-legislative action because it involves the adoption of a rule to be applied to all landowners within the area [*see Ensign Bickford Realty Corp. v. City Council (1977) 68 Cal. App. 3d 467, 473, 137 Cal. Rptr. 304* , *overruled in part by Hernandez v. City of Hanford (2007) 41 Cal. 4th 279, 297, 59 Cal. Rptr. 3d 442, 159 P.3d 33* ; *see also Toso v. City of Santa Barbara (1980) 101 Cal. App. 3d 934, 942, 162 Cal. Rptr. 210* (denial of application for rezoning is legislative action)]. The determination of an application for a variance from the ordinance is an adjudicatory action because it involves the application of established rules to a specific set of facts applicable to a particular landowner [*see Topanga Assn. for a Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 514, 113 Cal. Rptr. 836, 522 P.2d 12* ; *Allen v. Humboldt County Board of Supervisors (1963) 220 Cal. App. 2d 877, 881-882, 34 Cal. Rptr. 232]* . Similarly, the fixing of employee salaries or benefits by a governmental body is a quasi-legislative action [*Campbell Municipal Employees Assn. v. City of Campbell (1982) 131 Cal. App. 3d 416, 425 n.2, 182 Cal. Rptr. 461]* , while the determination of the salary or benefits to which a particular employee is entitled under a legislative scheme is an adjudicatory function [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 44, 112 Cal. Rptr. 805, 520 P.2d 29]* . A litigant's challenge to adoption of air quality regulations by an agency, which is quasi-legislative action, is properly brought as a petition for traditional mandate [*Western States Petroleum Assn. v. Superior Court (1995) 9 Cal. 4th 559, 567-568, 38 Cal. Rptr. 2d 139, 888 P.2d 1268]* .

The California Building Standards Commission's approval of building standards is a quasi-legislative act of administrative rulemaking that is judicially reviewable in an ordinary mandate proceeding under *Code Civ. Proc. § 1085* [*Plastic Pipe and Fittings Association v. California Building Standards Commission (2004) 124 Cal. App. 4th 1390, 1406-1407, 22 Cal. Rptr. 3d 393* (Commission adopted Uniform Plumbing Code provisions but excluded provisions of Code allowing use of PEX pipes because of concerns about public health. Trade association challenged exclusion by writ of mandate in superior court. Court of appeal reversed superior court grant of petition allowing

challenge)].

[b] Refusal to Perform Ministerial Action

The refusal of an administrative official or body to perform a ministerial action is reviewable in an ordinary mandate proceeding [*City of Dinuba v. County of Tulare (2007) 41 Cal. 4th 859, 868-869, 62 Cal. Rptr. 3d 614, 161 P.3d 1168* (county had ministerial duty to calculate and distribute property tax revenue to city); *Lazan v. County of Riverside (2006) 140 Cal. App. 4th 453, 459-460, 44 Cal. Rptr. 3d 394* (county had ministerial duty to file disability application on behalf of disabled employee); *Great Western Sav. & Loan Assn. v. City of Los Angeles (1973) 31 Cal. App. 3d 403, 414, 107 Cal. Rptr. 359* ; *Harbach v. El Pueblo de Los Angeles etc. Com. (1971) 14 Cal. App. 3d 828, 834, 92 Cal. Rptr. 757]* .

A ministerial action is one that an administrative official or body is required by law to perform at the occurrence of a certain contingency [*Drummey v. State Bd. of Funeral Directors (1939) 13 Cal. 2d 75, 83, 87 P.2d 848* ; *Morris v. Harper (2001) 94 Cal. App. 4th 52, 62, 114 Cal. Rptr. 2d 62* ; *Ridgecrest Charter Sch. v. Sierra Sands Unified Sch. Dist. (2005) 130 Cal. App. 4th 986, 1002-1003, 30 Cal. Rptr. 3d 648* ; *Great Western Sav. & Loan Assn. v. City of Los Angeles (1973) 31 Cal. App. 3d 403, 413, 107 Cal. Rptr. 359* ; *Palmer v. Fox (1953) 118 Cal. App. 2d 453, 458, 258 P.2d 30]* .

In determining whether an action is ministerial, the critical question is whether the official or body is authorized to exercise judgment or discretion. An administrative entity's duty to act is ministerial when the controlling statutes do not vest the entity with discretion to determine whether the prescribed contingency has occurred or what action should be taken at the occurrence of that contingency [*Glendale City Employees' Assn., Inc. v. City of Glendale (1975) 15 Cal. 3d 328, 344, 124 Cal. Rptr. 513, 540 P.2d 609* (computation and payment of salaries in accordance with binding memorandum of understanding is ministerial function); *Jenkins v. Knight (1956) 46 Cal. 2d 220, 223-224, 293 P.2d 6* (governor's duty to call election to fill legislative vacancy is ministerial when controlling constitutional provision does not give governor discretion to determine whether election should be called); *Great Western Sav. & Loan Assn. v. City of Los Angeles (1973) 31 Cal. App. 3d 403, 413-414, 107 Cal. Rptr. 359* (city council's duty to approve final subdivision map on compliance with tentative map conditions was ministerial when it had no discretion under state law to withhold approval or impose additional conditions); *Harbach v. El Pueblo de Los Angeles etc. Com. (1971) 14 Cal. App. 3d 828, 834-835, 92 Cal. Rptr. 757* (duty of public commission to implement resolution requiring restoration of building as a historical monument was ministerial when it had no discretion to rescind or withdraw resolution); *see also Drummey v. State Bd. of Funeral Directors (1939) 13 Cal. 2d 75, 83, 87 P.2d 848* (explaining difference between discretionary and minist erial actions); *V.S. v. Allenby (2008) 169 Cal. App. 4th 665, 669-671, 87 Cal. Rptr. 3d 143* (mandamus is proper to compel the California Department of Social Services to direct county welfare departments to comply with statutory requirements under *Welf. & Inst. Code § 16507.6* within 180 days of foster care placement; department had ministerial duty to direct compliance by county welfare departments)].

Mandamus is proper to compel performance when an agency fails to perform a statutorily mandated obligation to license correctional treatment centers for provision of medical services [*Morris v. Harper (2001) 94 Cal. App. 4th 52, 58-60, 114 Cal. Rptr. 2d 62]* . Ordinary mandate was proper to compel a county to trim or remove trees on county property that exceeded height limits for the clear zone of an airport. County had mandatory ministerial duty under both state statutes [*Pub. Util. Code § 21659(a)*] and county ordinances to trim or remove trees that exceeded obstruction standards impacting navigable airspace [*Rancho Murieta Airport, Inc. v. County of Sacramento (2006) 142 Cal. App. 4th 323, 326-327, 47 Cal. Rptr. 3d 309]* .

Mandamus under *Code Civ. Proc. § 1085* is not proper when there is no ministerial duty for the agency to perform. Mandamus was not proper because the Board of Registered Nursing had discretion as to how it evaluated course work of out of state nursing college graduates who are seeking California nursing licenses under the provisions of *Bus. & Prof. Code § 2376*. A New York college that administered a distance learning nursing degree program challenged the

Board's change in practice where it reviewed the course work completed by individual applicants for nursing licenses in California rather than grant a blanket equivalency recognition for all nursing graduates of that college [*Excelsior College v. Cal. Bd. of Registered Nursing (2006) 136 Cal. App. 4th 1218, 1237-1239, 39 Cal. Rptr. 3d 618]* . Mandamus under *Code Civ. Proc. § 1085* also was not proper due to a lack of a ministerial duty as the Department of Conservation did not have affirmative mandatory duties under the Beverage Container Recycling and Litter Reduction Act to provide convenient, economical, and efficient beverage container redemption opportunities for California consumers [*Shamsian v. Dept. of Conserv. (2006) 136 Cal. App. 4th 621, 640-642, 39 Cal. Rptr.3d 62]* . Mandamus is not proper to enforce a contractual obligation with a public entity [*300 DeHaro Street Investors v. Department of Housing and Community Development (2008) 161 Cal. App. 4th 1240, 1252-1254, 75 Cal. Rptr. 3d 98* (ordinary mandamus not proper when developer challenges denial of rent increase by department when department and developer have a rental contract. Breach of contract action coupled with declaratory relief is the proper way to challenge the denial of a rent increase)]. Mandamus is not proper for a court to order the state legislature to appropriate moneys form future budget acts to reimburse counties because this would violate separations of powers [*County of San Diego v. State of California (2008) 164 Cal. App. 4th 580, 593-595, 79 Cal. Rptr. 3d 489*].

Ordinary mandate was not proper to challenge the Department of Health Services (DHS) failure to implement children's health program for babies because there was no clear present ministerial duty requiring department to include "deemed eligibility" requirements in program that was based on presumptive eligibility requirements. Without a clear specific duty, ordinary mandate was not available to challenge DHS action [*Doe v. Bonta (2004) 124 Cal. App. 4th 13, 16-17, 21 Cal. Rptr. 3d 66* (residents of county who challenged county's approval of residential development project and certification of environmental impact report complied with requirements of governing statute when they requested a hearing, even though they did not request a hearing date)]. When there is no clear ministerial duty owed by DMV to a vehicle owner, ordinary mandate is not available [*Moran v. Cal. Dep't of Motor Vehicles (2006) 139 Cal. App. 4th 688, 690, 693, 43 Cal. Rptr. 3d 116* (vehicle owner challenged DMV refusal to register vehicle because of lack of salvage certificate; Court of Appeal affirmed judgment denying writ of mandate because DMV did not owe owner a ministerial duty, and owner could not show a lack of an adequate remedy at law)]. When there is no clear ministerial duty on the part of a city to provide a subdivision developer with a specific amount of credit for private open space, ordinary mandate is not available [*Branciforte Heights, LLC v. City of Santa Cruz (2006) 138 Cal. App. 4th 914, 939-940, 42 Cal. Rptr. 3d 96]* .

[c] Adjudicatory Action or Decision That Is Not Subject to Review in Administrative Mandate Proceedings

An administrative action or decision is considered to be adjudicatory in nature when the administrative entity applies policies or rules to the facts of a specific case to determine whether an individual is entitled to relief or subject to punitive action [*see* *Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal. 3d 28, 34 n.2, 112 Cal. Rptr. 805, 520 P.2d 29* ; *Estes v. City of Grover City (1978) 82 Cal. App. 3d 509, 514, 147 Cal. Rptr. 131* ; *Patterson v. Central Coast Regional Com. (1976) 58 Cal. App. 3d 833, 840, 130 Cal. Rptr. 169* ; *see § 474.12[3][a]*, for discussion of adjudicatory acts and decisions]. Some administrative adjudicatory actions or decisions are subject to review in ordinary mandate proceedings. Ordinary mandate proceedings are used to review adjudicatory actions or decisions when administrative mandate is not available because the administrative entity is not required by law to hold an evidentiary h earing [*American Board of Cosmetic Surgery v. Medical Board of California (2008) 162 Cal. App. 4th 534, 547-548, 75 Cal. Rptr. 3d 574* (ordinary mandate proper because Medical Board was not required by law to hold a hearing before denying a specialty board equivalency application); *Munroe v. Los Angeles County Civil Service Commission (2009) 173 Cal. App. 4th 1295, 1302-1303, 93 Cal. Rptr. 3d 716* (wit of ordinary mandate proper way to review decision of Commission denying former employee's late filing of an appeal challenging the employee's discharge from county employment. The Commission ruled that the employee failed to establish good cause for a late appeal, and that ruling was not an abuse of discretion); *Blue Cross of California v. Department of Health Services (2007) 153 Cal. App. 4th 322, 329, 62 Cal. Rptr. 3d 772* (ordinary mandate under *Code Civ. Proc. § 1085* is applicable because hearing officer's decision is not based on proceeding in which hearing is required to be given by law); *Decuir v. County of Los Angeles (1998) 64 Cal. App. 4th 75, 83, 75 Cal. Rptr. 2d 102* (applicant for civil service employment

must seek judicial review through ordinary mandate); *Weary v. Civil Service Com. (1983) 140 Cal. App. 3d 189, 194-195, 189 Cal. Rptr. 442* (decision upholding adverse performance rating); *Taylor v. State Personnel Bd. (1980) 101 Cal. App. 3d 498, 505, 161 Cal. Rptr. 677* (decision upholding 10-day suspension); *Shuffer v. Board of Trustees (1977) 67 Cal. App. 3d 208, 218-219, 136 Cal. Rptr. 527* (decision imposing requirements for completion of degree on graduate student)]. This principle is true even when an entity that is not required to hold an evidentiary hearing holds one [*Weary v. Civil Service Com. (1983) 140 Cal. App. 3d 189, 194-195, 189 Cal. Rptr. 442* ; *Court House Plaza Co. v. City of Palo Alto (1981) 117 Cal. App. 3d 871, 879-880, 173 Cal. Rptr. 161* ; *Taylor v. State Personnel Bd. (1980) 101 Cal. App. 3d 498, 505, 161 Cal. Rptr. 677]* . For a discussion on the requirement of an evidentiary hearing as a prerequisite of administrative mandate, see *§ 474.12[3][c]*.

[4] Facts and Evidence on Which Review Is Based

In an ordinary mandate proceeding, the administrative action or decision is reviewed in light of evidence presented by the parties in court, as well as that contained in the official record of the administrative proceedings [*Code Civ. Proc. § 1090*; *No Oil, Inc. v. City of Los Angeles (1974) 13 Cal. 3d 68, 79 n.6, 118 Cal. Rptr. 34, 529 P.2d 66* ; *Bruce v. Gregory (1967) 65 Cal. 2d 666, 670-671, 56 Cal. Rptr. 265, 423 P.2d 193]* . In determining whether an administrative action or decision was arbitrary, capricious, or entirely lacking in evidentiary support, however, the court may only consider evidence that was before the administrative body or officer [*Lewin v. St. Joseph Hospital of Orange (1978) 82 Cal. App. 3d 368, 387 n. 13, 146 Cal. Rptr. 892* ; *Brock v. Superior Court (1952) 109 Cal. App. 2d 594, 607-608, 241 P.2d 283]* .

In determining whether there is substantial evidence to support an agency's quasi-legislative action, such as the adoption of air quality regulations, the reviewing court may generally only consider the administrative record [*Western States Petroleum Assn. v. Superior Court (1995) 9 Cal. 4th 559, 574, 38 Cal. Rptr. 2d 139, 888 P.2d 1268]* . Extra-record evidence cannot be introduced in court in traditional mandate actions reviewing quasi-legislative action to show that the agency has not proceeded in a manner required by law [*Western States Petroleum Assn. v. Superior Court (1995) 9 Cal. 4th 559, 577, 38 Cal. Rptr. 2d 139, 888 P.2d 1268* ; *San Joaquin Local Agency Formation Commission v. Superior Court (2008) 162 Cal. App. 4th 159, 163, 76 Cal. Rptr. 3d 93* (protective order prohibiting taking depositions of LAFCP commissioners and executive officer was justified because extra record evidence was not admissible in ordinary mandate proceeding, and deliberative process privilege would be violated if discovery allowed); *Carrancho v. California Air Resources Board (2003) 111 Cal. App. 4th 1255, 1269, 4 Cal. Rptr. 3d 536*]. The "reasonable diligence" exception to this rule only allows introduction of extra-record evidence when the evidence existed before the agency made its decision and the evidence could not have been presented to the agency before the decision was made in the exercise of reasonable diligence [*Western States Petroleum Assn. v. Superior Court (1995) 9 Cal. 4th 559, 579, 38 Cal. Rptr. 2d 139, 888 P.2d 1268]* .

[5] Relief Available

The principal form of relief available in an ordinary mandate proceeding is a peremptory writ of mandate--a form of court order--compelling the administrative official or entity to take the actions that are mandatory under the law [*Code Civ. Proc. § 1085*; *Forest Lawn Co. v. City Council (1966) 244 Cal. App. 2d 343, 346, 53 Cal. Rptr. 452* ; *Bollotin v. Workman Service Co. (1954) 128 Cal. App. 2d 339, 342-343, 275 P.2d 599]* . When an administrative entity has discretion to determine whether an adequate factual basis exists for a given action or decision, or to determine what type of action or decision is warranted under a set of facts, a peremptory writ issued in an ordinary mandate proceeding cannot compel the entity to exercise its discretion in a particular way or to reach a particular result [*Common Cause v. Board of Supervisors (1989) 49 Cal. 3d 432, 445-446, 261 Cal. Rptr. 574, 777 P.2d 610* ; *Lindell Co. v. Board of Permit Appeals (1943) 23 Cal. 2d 303, 315, 144 P.2d 4* ; *Better Alternatives for Neighborhoods v. Heyman (1989) 212 Cal. App. 3d 663, 672, 260 Cal. Rptr. 758* ; *Riggs v. City of Oxnard (1984) 154 Cal. App. 3d 526, 530, 201 Cal. Rptr. 291]* . When, however, undisputed facts establish that a petitioner is entitled to a particular action or decision as a matter of right, the writ may compel that action or decision [*County of Sacramento v. Loeb (1984) 160 Cal. App. 3d 446,*

449-450, 206 Cal. Rptr. 626 (writ issued to compel State Department of Mental Health to recommend payment of counties' claims for reimbursement under Short-Doyle Act); *Thelander v. City of El Monte(1983) 147 Cal. App. 3d 736, 748, 195 Cal. Rptr. 318* (writ issued to compel city and pension board to award disability pension to petitioner)]. For example, when an agency is required by law to issue regulations, then the issuance of the regulations is a public duty that a citizen has a right to compel by a petition for a writ of mandate [*Newland v. Kizer (1989) 209 Cal. App. 3d 647, 652, 654-656, 257 Cal. Rptr. 450* ; *Madera Community Hospital v. County of Madera (1984) 155 Cal. App. 3d 136, 152, 201 Cal. Rptr. 768]* . The court may not, however, compel the agency to exercise its discretion in a particular manner by mandating the substance and content of the regulations [*Newland v. Kizer (1989) 209 Cal. App. 3d 647, 655, 257 Cal. Rptr. 450* ; *Sklar v. Franchise Tax Board (1986) 185 Cal. App. 3d 616, 625-626, 230 Cal. Rptr. 42]* .

A peremptory writ issued in an ordinary mandate proceeding may also compel an administrative entity to do any of the following:

- Exercise its discretion and make a determination, when it has refused to act [*Ballard v. Anderson (1971) 4 Cal. 3d 873, 884-885, 95 Cal. Rptr. 1, 484 P.2d 1345* (writ issued to compel County Therapeutic Abortion Committee to determine minor's application for abortion without requiring parental consent); *Hollman v. Warren (1948) 32 Cal. 2d 351, 355, 196 P.2d 562* (writ issued to compel governor to exercise discretion concerning appointment of notaries public)].

- Annul its action or decision, when it has exceeded its powers [*Aylward v. State Board etc. Examiners (1948) 31 Cal. 2d 833, 839, 192 P.2d 929* (writ issued to compel State Board of Chiropractic Examiners to annul order canceling chiropractic licenses when order made without notice or hearing); *B.W. v. Board of Medical Quality Assurance (1985) 169 Cal. App. 3d 219, 233-234, 215 Cal. Rptr. 130* (writ issued to compel Medical Board of California to annul order imposing disciplinary action against physician when statute prohibited imposition of disciplinary action under facts of case)].

- Set aside its decision and exercise its discretion in accordance with applicable laws and rules, when it has acted arbitrarily or failed to follow applicable procedural rules [*Anderson v. Phillips (1975) 13 Cal. 3d. 733, 737, 119 Cal. Rptr. 879, 532 P.2d 1247* (writ issued to compel presiding judge to exercise discretion to assign business to duly appointed judge under proper interpretation of applicable law); *see also Clean Air Constituency v. California State Air Resources Bd. (1974) 11 Cal. 3d 801, 819-820, 114 Cal. Rptr. 577, 523 P.2d 617* (writ issued to compel California State Air Resources Board to vacate unauthorized regulation and enforce emission control program according to governing statute); *Fidelity & Cas. Co. of New York v. Workers' Comp. Appeals Bd. (1980) 103 Cal. App. 3d 1001, 1016, 163 Cal. Rptr. 339* (writ issued to compel Workers' Compensation Appeals Board to determine petition for reconsideration according to statutory and constitutionally mandated procedures)].

- Perform a duty that is purely ministerial [*Glendale City Employees' Assn., Inc. v. City of Glendale (1975) 15 Cal. 3d 328, 344, 124 Cal. Rptr. 513, 540 P.2d 609* (writ issued to compel city to pay employee salaries according to binding memorandum of understanding); *Harbach v. El Pueblo de Los Angeles etc. Com. (1971) 14 Cal. App. 3d 828, 834, 92 Cal. Rptr. 757* (writ issued to compel public commission to follow resolution to relocate and restore historical building)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsEmployees & Officials

California Forms of Pleading and Practice--Annotated

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Volume 41A: Public Agency Adjudications Judicial Review-Chs. 473-479
Chapter 474 AVAILABILITY OF JUDICIAL REVIEW OF AGENCY DECISIONS
PART II. LEGAL BACKGROUND
A. Review by Writ of Mandate

41A-474 California Forms of Pleading and Practice--Annotated § 474.12

§ 474.12 Review in Administrative Mandate Proceedings

[1] Nature of Review

Administrative mandate proceedings are governed by *Code Civ. Proc. § 1094.5*. In an administrative mandate proceeding, the court reviews a final adjudicatory order or decision of an administrative entity to determine one or more of the following matters [*Code Civ. Proc. § 1094.5(b)*; *Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 123-124, 109 Cal. Rptr. 799,514 P.2d 111* ; *Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 595, 155 Cal. Rptr. 63]* :

- Whether the entity proceeded without jurisdiction or, alternatively, exceeded its jurisdiction.

- Whether the entity conducted a fair trial [An administrative entity proceeds by conducting a hearing. However, the statutory wording "fair trial" is used here to distinguish these issues from the constitutional issue of "notice and fair hearing."].

- Whether the entity committed a prejudicial abuse of discretion. An abuse of discretion is established only by a showing that [*Code Civ. Proc. § 1094.5(b)*; *Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 123-124, 109 Cal. Rptr. 799, 514 P.2d 111* (complaint sufficiently alleged abuse of discretion); *Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 595, 155 Cal. Rptr. 63* (evidence sufficient to support finding that Unemployment Insurance Appeals Board abused its discretion in allowing unemployment benefits)]:

  - The entity has not proceeded in the manner provided by law;

  - The order or decision is not supported by the findings; or

  - The findings are not supported by the evidence.

Depending on the nature of the order or decision and the administrative entity, the court reviews the sufficiency of the evidence supporting an administrative order or decision under one of two standards established by *Code Civ. Proc. § 1094.5(c)*. These standards are as follows:

- The "independent judgment" standard, which is applied by the court when an order or decision of an administrative entity that is not constitutionally vested with judicial powers affects a fundamental vested right; in this instance, the court reweighs the evidence and makes its own independent findings of fact [*Harlow v. Carleson (1976) 16 Cal. 3d 731, 734-735, 129 Cal. Rptr. 298, 548 P.2d 698* (decision upholding termination of welfare benefits reviewable under independent judgment standard); *Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28* (decision denying death allowance claimed under provisions of county retirement plan reviewable under independent judgment standard); *Los Angeles County Employees' Assn. v. Sanitation Dist. No. 2 (1979) 89 Cal. App. 3d 294* (decision upholding discharge of permanent civil service employee reviewable under independent judgment standard); *Guymon v. Board of Accountancy (1976) 55 Cal. App. 3d 1010, 128 Cal. Rptr. 137* (decision revoking license to practice accountancy reviewable under independent judgment standard); *see also Bixby v. Pierno (1971) 4 Cal. 3d 130, 137-147, 93 Cal. Rptr. 234, 481 P.2d 242* (discussing when independent judgment standard applies)].

- The court applies the "substantial evidence" standard when the administrative entity has exercised judicial powers granted to it by the California Constitution; in this instance, the court reviews the evidence only to determine whether the administrative entity's findings are supported by substantial evidence in light of the whole record [*County of Los Angeles v. Commission on State Mandates (2003) 110 Cal. App. 4th 1176, 1186, 2 Cal. Rptr. 3d 419* (substantial evidence review specified by statute *Gov. Code § 17559(b)* for decision of Commission on State Mandates which is a constitutional agency under *Cal. Const. Art. XIII, § 6*); *Respers v. University of Cal. Retirement System (1985) 171 Cal. App. 3d 864, 873-874, 217 Cal. Rptr. 594* (decision of University of California Retirement System denying retirement benefits reviewable under substantial evidence standard); *Jones v. Superior Court (1981) 114 Cal. App. 3d 725, 727-730, 170 Cal. Rptr. 837* (decision of California Horse Racing Board suspending trainer's license reviewable under substantial evidence standard)]. The court also used this standard when the administrative order or decision does not affect a fundamental vested right [*Turner v. Board of Trustees (1976) 16 Cal. 3d 818, 824, 129 Cal. Rptr. 443, 548 P.2d 1115* (school board's decision not to rehire probationary teacher reviewable under substantial evidence standard); *Bixby v. Pierno (1971) 4 Cal. 3d 130, 147-148, 93 Cal. Rptr. 234, 481 P.2d 242* (decision of commissioner of corporations approving recapitalization plan for closely held corporation reviewable under substantial evidence standard); *Whaler's Village Club v. California Coastal Com. (1985) 173 Cal. App. 3d 240, 251, 220 Cal. Rptr. 2* (decision of California Coastal Commission imposing conditions on development of coastal property reviewable under substantial evidence standard); *Toczauer v. State Bd. of Registration (1971) 20 Cal. App. 3d 1067, 1069-1070, 98 Cal. Rptr. 211 , appeal dismissed, 406 U.S. 913, 92 S. Ct. 1806, 32 L. Ed. 2d 113* (decision of State Board of Registration denying application for registration as industrial engineer under grandfather clause reviewable under substantial evidence standard)]. Decisions of the Commission on State Mandates denying test claims by local agencies are reviewable in court only by administrative mandamus [*County of Los Angeles v. Commission on State Mandates (2003) 110 Cal. App. 4th 1176, 1186, 2 Cal. Rptr. 3d 419* (judicial review under *Code Civ. Proc. § 1094.5* specified by *Gov. Code § 17559(b)* for decision of Commission on State Mandates which is a constitutional agency under *Cal. Const. Art. XIII, § 6*)].

For a more detailed discussion of the applicability of the independent judgment and substantial evidence standards of review in administrative mandate proceedings, see *Ch. 474B, Standards in Reviewing Agency Decisions, § 474B.16*.

[2] Administrative Officials and Bodies Subject to Administrative Mandate Proceedings

Gov. Code § 11523 provides that adjudicatory orders and decisions made under the procedures of the Administrative Procedures Act are reviewable by writ of mandate. However, review by administrative mandate proceedings is not limited to those administrative officials and bodies subject to the Administrative Procedures Act. Under the broader provisions of *Code Civ. Proc. § 1094.5*, administrative mandate lies against any administrative entity issuing a formal adjudicative order or decision meeting the prerequisites specified in section 1094.5 [*Temescal Water Co. v. Dept. of Public Works (1955) 44 Cal. 2d 90, 100-101, 280 P.2d 1* ; *Boren v. State Personnel Board (1951) 37 Cal. 2d 634, 637, 234 P.2d 981* ; *El Dorado Irrigation Dist. v. State Water Resources Control Board (2006) 142 Cal. App. 4th 937, 960, 48 Cal. Rptr. 3d 468* (water resources control board performs adjudicatory functions in allocating water rights; challenges to water rights decisions are reviewed under administrative mandamus statute, *Code Civ. Proc. § 1094.5*); *Bldg Industry Ass'n of San Diego County v. State Water Resources Control Bd (2004) 124 Cal. App. 4th 866, 879, 22 Cal. Rptr. 3d 128* (state water board decision approving municipal storm water sewer permit was subject to judicial review by petition for a writ of mandate under *Water Code § 13330(a)* and *Code Civ Proc. § 1094.5* (administrative mandate); the prerequisites for review under *Code Civ. Proc. § 1094.5* are discussed in [3], *below*]. Decisions of private universities to deny tenure to a professor, or to revoke the tenure of a tenured professor, are subject to challenge by administrative mandate [*Pomona College v. Superior Court (1996) 45 Cal. App. 4th 1716, 1729, 53 Cal. Rptr. 2d 662* (denial of tenure); *Gutkin v. University of So. California (2002) 101 Cal. App. 4th 967, 978-979, 125 Cal. Rptr. 2d 115* (revocation of tenure); *Pollock v. Univ. of S. Cal. (2003) 112 Cal. App. 4th 1416, 1425-1426, 6 Cal. Rptr. 3d 122* (revocation of tenure)]. Decisions of private universities to impose academic discipline on students are subject to challenge by administrative mandate because university disciplinary proceedings provide for a formal evidentiary hearing [*Gupta v. Stanford Univ. (2004) 124 Cal. App. 4th 407, 411-412, 21 Cal. Rptr. 3d 192]* . Administrative mandate is not available to review decisions of arbitrators [*Zazueta v. County of San Benito (1995) 38 Cal. App. 4th 106, 110-111, 44 Cal. Rptr. 2d 678]* .

However, some state agency decisions are not subject to judicial review under a writ of administrative mandate. The State Water Resources Control Board refused to review a decision of a regional water quality control board assessing substantial administrative penalties against a farm property owner for violating provisions of water pollution control laws. The State Board had discretion to review regional board decisions under *Water Code § 13320(a)* but the Board had adopted regulations [*Cal. Code Regs., tit. 23, § 2052 (a)(1)*] limiting review of regional board decisions to those that raise substantial issues. The Court of Appeal held that the decision of the state board refusing to review the regional board decision was not subject to judicial review under administrative mandate [*Johnson v. State Water Resources Control Board (2004) 123 Cal. App. 4th 1107, 1112-1114, 20 Cal. Rptr. 3d 441]* . The Court of Appeal in *Johnson* cited and relied upon the Court of Appeal decision in *People ex rel. Cal. Regional Wat. Quality Control Bd. v. Barry (1987) 194 Cal. App. 3d 158, 176-177* in ruling on the case. The Court of Appeal also noted that the regional board order was subject to judicial review, and the property owner had a pending action in the superior court challenging that regional board order [*Johnson v. State Water Resources Control Bd. (2004) 123 Cal. App. 4th 1107, 1112-1114, 20 Cal. Rptr. 3d 441]* .

[3] Prerequisites for Review of Administrative Order or Decision in Administrative Mandate Proceeding

[a] Adjudicatory Order or Decision

An administrative order or decision is reviewable in an administrative mandate proceeding only if it is adjudicatory in nature [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 34 n.2, 112 Cal. Rptr. 805, 520 P.2d 29* ; *American Canyon Community United for Responsible Growth v. City of American Canyon (2006) 145 Cal. App. 4th 1062, 1069-1071, 52 Cal. Rptr. 3d 312* (city decision concluding that supplemental environmental review was not necessary when project changed was adjudicative decision review able under administrative mandate); *State Water Resources Control Board Cases (2006) 136 Cal. App. 4th 674, 720-722, 39 Cal. Rptr. 3d 189* (board decisions that allocate water rights are adjudicatory decisions that are reviewable by administrative mandate under *Code Civ. Proc. § 1094.5*); *Wilson v. Hidden Valley Mun. Water Dist. (1967) 256 Cal. App. 2d 271, 279, 63 Cal. Rptr. 889* ;

Brock v. Superior Court (1952) 109 Cal. App. 2d 594, 598-601, 241 P.2d 283] . An action or decision is adjudicatory when it involves the application of existing rules and policies to a specific set of facts to reach a conclusion affecting the rights of a specific person [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 34 n. 2, 112 Cal. Rptr. 805, 520 P.2d 29* ; *Estes v. City of Grover City (1978) 82 Cal. App. 3d 509, 514, 147 Cal. Rptr. 131* ; *Patterson v. Central Coast Regional Com. (1976) 58 Cal. App. 3d 833, 840, 130 Cal. Rptr. 169]* . Common types of adjudicatory decisions subject to review in administrative mandate proceedings are those that, on the basis of factual determinations relating to the applicability of controlling laws or regulations, do one or more of the following:

- Grant or deny a land use permit or variance [*Saad v. City of Berkeley (1994) 24 Cal. App. 4th 1206, 1211, 30 Cal. Rptr. 2d 95* (denial of a land use permit to build a residence on a lot); *Eureka Citizens for Responsible Government v. City of Eureka (2007) 147 Cal. App. 4th 357, 366-367, 54 Cal. Rptr. 3d 485* (approval of a zoning variance to expand a school playground)].

- Deny or revoke licenses or permits that are prerequisites to engaging in certain activities [*see, e.g., Selby Realty Co. v. San Buenaventura (1973) 10 Cal. 3d 110, 109 Cal. Rptr. 799, 514 P.2d 111* (denial of application for building permit); *Tringham v. State Board of Education (1958) 50 Cal. 2d 507, 326 P.2d 850* (revocation of teaching credential); *Guymon v. Board of Accountancy (1976) 55 Cal. App. 3d 1010, 128 Cal. Rptr. 137* (revocation of license to practice accountancy)].

- Deny or terminate government benefits [*see, e.g., Frink v. Prod (1982) 31 Cal. 3d 166, 181 Cal. Rptr. 893, 643 P.2d 476* (denial of application for welfare benefits); *Harlow v. Carleson (1976) 16 Cal. 3d 731, 129 Cal. Rptr. 298, 548 P.2d 698* (termination of welfare benefits); *King v. California Unemployment Ins. Appeals Bd. (1972) 25 Cal. App. 3d 199, 101 Cal. Rptr. 660* (denial of application for unemployment insurance benefits)].

- Impose discipline or penalties under a regulatory scheme [*see, e.g., Moran v. Board of Medical Examiners (1948) 32 Cal. 2d 301, 196 P.2d 20* (suspension of medical license); *McConville v. Alexis (1979) 97 Cal. App. 3d 593, 159 Cal. Rptr. 49* (suspension of driver's license); *David Kikkert & Associates, Inc. v. Shine (1970) 6 Cal. App. 3d 112, 86 Cal. Rptr. 161* (suspension of collection agency license)].

- Terminate government employment [*see, e.g., Jabola v. Pasadena Redevelopment Agency (1981) 125 Cal. App. 3d 931, 178 Cal. Rptr. 452* (discharge of employee terminable only for cause); *Los Angeles County Employees' Assn. v. Sanitation Dist. No. 2 (1979) 89 Cal. App. 3d 294, 152 Cal. Rptr. 415* (discharge of permanent civil service employee)].

- Claims for reimbursement by local government entities or school districts for increased costs incurred by local government that are mandated by state statutes. The Commission on State Mandates [*Gov. Code § 17525*] has the responsibility to determine whether claims for reimbursement will be granted. Those decisions are subject to judicial review under a writ of administrative mandamus [*Gov. Code § 17551*]. Increased costs incurred by school districts for providing hearings, including federally required hearing procedures, meet the "higher level of service" requirement of *Cal. Const., Art. XIII B, § 6*, and therefore satisfy the requirements for a reimbursable state mandate for all hearing costs incurred by school districts when state law requires suspension and mandates expulsion of a student found to have committed certain offenses [*Educ. Code § 48915*], but not when state law makes expulsion discretionary [*Educ. Code § 48915*]. Costs related to discretionary expulsions, including costs for hearing procedures that exceed federal law requirements, do not satisfy the higher level of service requirement for reimbursement by the state [*San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal. 4th 859, 866-867, 16 Cal. Rptr. 3d 466, 94 P.3d 589]* .

- Property tax assessment disputes in which the taxpayer applies for a reduction of a tax assessment, requests a hearing after the tax assessment board denies that application, and the assessment board fails to provide a hearing to the taxpayer on his claim. Administrative mandate applies regardless of whether the Board in fact held a hearing [*Helene Curtis, Inc. v. Los Angeles County Assessment Appeals Bds. (2004) 121 Cal. App. 4th 29, 36-37, 16 Cal. Rptr. 3d 658]* .

[b] Final Order or Decision

Under *Code Civ. Proc. § 1094.5*, only a "final order or decision" can be reviewed in an administrative mandate proceeding [*Code Civ. Proc. § 1094.5(a)*; *Prip v. City of Santa Barbara (1963) 214 Cal. App. 2d 626, 630-631, 29 Cal. Rptr. 558]* .

State agency decisions subject to the APA [*see Gov. Code § 11340 et seq.*; *see Ch. 473, Public Agency Adjudication, § 473.15*] are final 30 days after the agency decision is delivered or mailed to the respondent, unless the agency orders a reconsideration within the 30-day period, grants a stay of execution, or orders the decision to be effective at an earlier date [*Gov. Code § 11519(a)*; *Moran v. Board of Medical Examiners (1948) 32 Cal. 2d 301, 304, 196 P.2d 20* ; *Governing Board v. Commission on Professional Competence (1977) 72 Cal. App. 3d 447, 455, 140 Cal. Rptr. 206* ; *Kramer v. State Board of Accountancy (1962) 200 Cal. App. 2d 163, 176, 19 Cal. Rptr. 226]* . For more detailed discussion of the finality of decisions and period of limitations under the APA, see *Ch. 474A, Timing of Judicial Review of Agency Decisions, §§ 474A.10[3][b]* and *474A.20[2][b]*.

Code Civ. Proc. § 1094.6(b) sets forth the rules for determining the finality of certain types of decisions or orders made by a decision or order of a local agency [*Code Civ. Proc. § 1094.6(a), (e)*]. Section 1094.6 applies to decisions suspending, demoting, or dismissing an officer or employee, revoking, or denying an application for a permit, license, or other entitlement, or denying an application for a retirement benefit or allowance [*Code Civ. Proc. § 1094.6(e)*]. Section 1094.6 applies to those agencies, other than school districts, that are defined as local agencies by *Gov. Code § 54951*, which defines a local agency as "a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency. For discussion of the rules for determining finality of a decision and the period of limitations under *Code Civ. Proc. § 1094.6(b)*, see *Ch. 474A, Timing of Judicial Review of Agency Decisions, §§ 474A.10[3][b]* and *474A.20[3][c]*.

The finality of agency adjudicatory decision not subject to the APA is determined by examining provisions of the agency governing statute. For example, decisions of the Agricultural Labor Relations Board are final when issued and the appealing party must file its petition for review within 30 days "of the date of issuance of the Board's order ... " [*Lab. Code § 1160.8*; *United Farm Workers of America v. Agricultural Labor Relations Bd. (1985) 37 Cal. 3d 912, 915, 210 Cal. Rptr. 453, 694 P.2d 138]* .

The rules for determining when other adjudicative decisions or orders are final for the purposes of *Code Civ. Proc. § 1094.5* are not covered by statute and do not appear to have been discussed by California appellate courts. Under decisions arising in other contexts, the finality of administrative orders and decisions is determined by ascertaining the intent of the legislative scheme under which the administrative entity is empowered to act. An order or decision is ordinarily deemed final when, under the applicable legislative scheme, the entity loses its jurisdiction to reconsider the decision and reach a different conclusion [*Lindell Co. v. Board of Permit Appeals (1943) 23 Cal. 2d 303, 323, 144 P.2d 4* ; *In re Fain (1976) 65 Cal. App. 3d 376, 390, 135 Cal. Rptr. 543* ; *McDonald's Systems of California, Inc. v. Board of Permit Appeals (1975) 119 Cal. Rptr. 26]* . *Gov. Code § 11523* appears to confirm, by implication, the applicability of this general rule to decisions governed by the Administrative Procedure Act (APA) [*see Gov. Code § 11340 et seq.*], since it provides that the limitations period for proceedings to review such decisions commences on the termination of the administrative agency's power to order reconsideration.

[c] Order or Decision Resulting From Evidentiary Hearing Required by Law

Code Civ. Proc. § 1094.5 applies only when an administrative order or decision is made as a result of a proceeding in which by law a hearing is required and evidence must be taken [*Code Civ. Proc. § 1094.5(a)*; *Keeler v. Superior Court (1956) 46 Cal. 2d 596, 598-599, 297 P.2d 967* ; *Department of Corrections v. Office of Administrative Hearings (1998) 66 Cal. App. 4th 1100, 1106-1107, 78 Cal. Rptr. 2d 473* (review of decision based on administrative hearing required for renewed petition for involuntary medication of prisoner); *Weary v. Civil Service Com. (1983) 140 Cal. App. 3d 189, 194-195, 189 Cal. Rptr. 442* ; *Taylor v. State Personnel Bd. (1980) 101 Cal. App. 3d 498, 505, 161 Cal. Rptr. 677]* . When the administrative entity is not required to conduct an evidentiary hearing, its order or decision cannot be reviewed in an administrative mandate proceeding, even if the entity has discretion to conduct an evidentiary hearing and does, in fact, base its decision on an evidentiary hearing [*Weary v. Civil Service Com. (1983) 140 Cal. App. 3d 189, 194-195, 189 Cal. Rptr. 442* ; *Court House Plaza Co. v. City of Palo Alto (1981) 117 Cal. App. 3d 871, 879-880, 173 Cal. Rptr. 161* ; *Taylor v. State Personnel Bd. (1980) 101 Cal. App. 3d 498, 505, 161 Cal. Rptr. 677]* . Absent other provisions negating the requirement for an evidentiary hearing, however, a requirement for such a hearing may be implied from provisions in the controlling legislative scheme that either preclude the administrative entity from acting in the absence of cause [*Ratliff v. Lampton (1948) 32 Cal. 2d 226, 230, 195 P.2d 792* ; *Steen v. Board of Civil Service Commrs. (1945) 26 Cal. 2d 716, 723, 160 P.2d 816]* or grant a right of appeal [*Chavez v. Civil Service Com. (1978) 86 Cal. App. 3d 324, 332, 150 Cal. Rptr. 197]* .

Administrative mandamus under *Code Civ. Proc. § 1094.5* is not available when the party seeking a writ of administrative mandamus did not have a right to an evidentiary hearing under the law [*300 DeHaro Street Investors v. Department of Housing and Community Development (2008) 161 Cal. App. 4th 1240, 1250-1252, 75 Cal. Rptr. 3d 98* (no hearing required by law when department denied rent increase sought by developer. Judicial review under *Code Civ. Proc. § 1094.5* was not available)]. Mandamus was sought by a New York college that administered a distance learning nursing degree program. The Court of Appeal held that mandamus was not proper because the college did not have a due process protected property interest in the continued recognition of equivalency for that program by the California Board of Registered Nursing. Thus, the college did not have the right to an evidentiary hearing to challenge the Board's change in practice to review the course work completed by individual applicants for nursing licenses in California rather than grant a blanket equivalency recognition for all nursing graduates of that college [*Excelsior College v. Cal. Bd. of Registered Nursing (2006) 136 Cal. App. 4th 1218, 1237-1239, 39 Cal. Rptr. 3d 618]* .

The California Supreme Court has also inferred a right to a hearing to ensure that the law is consistent with requirements of due process of law [*Traverso v. People ex rel. Dept. of Transportation (1993) 6 Cal. 4th 1152, 1163-1166, 26 Cal. Rptr. 2d 217, 864 P.2d 488]* . The California Court of Appeal held that the child abuse or neglect reporting statutes [*Penal Code §§ 11165.7, 11165.9, 11169*] required an "active investigation" by the social services agency (SSA), and contemplated some form of hearing to a parent responding to a child abuse charge that was reported to the child abuse central index (CACI). Thus, the Superior Court had jurisdiction to review a parent's challenge to the SSA decision to report the parent for suspected child abuse under a writ of administrative mandate authorized by *Code Civ. Proc. § 1094.5* because the decision of the county met the requirement that "by law a hearing is required to be given" [*Burt v. County of Orange (2004) 120 Cal. App. 4th 273, 281-283, 15 Cal. Rptr. 3d 373]* .

However, judicial review is not available for recoupment efforts based on an audit of hospital performance of terms and conditions of a negotiated contract for MediCal services unless there has been a prior administrative review of the recoupment efforts [*Cedars-Sinai Med. Center v. Shewry (2006) 137 Cal. App. 4th 964, 976-978, 41 Cal. Rptr. 3d 48]* .

[d] Improper Petition for Code Civ. Proc. § 1094.5 Relief Not to Be Dismissed if Adequate for Ordinary Mandate

Even when relief under *Code Civ. Proc. § 1094.5* is unavailable because the board or agency was not required to hold

an evidentiary hearing, a court should not dismiss a petition for administrative mandate if the allegations of the petition entitle the petitioner to ordinary mandate under *Code Civ. Proc. § 1085* [*Coelho v. State Personnel Bd. (1989) 209 Cal. App. 3d 968, 971, 257 Cal. Rptr. 557* ; *see* *Woods v. Superior Court (1981) 28 Cal. 3d 668, 673-674, 170 Cal. Rptr. 484, 620 P.2d 1032* (demurrer to petition for extraordinary relief should be overruled when the allegations of the petition entitle the petitioner to ordinary mandate, even though the petition erroneously requests administrative mandate)]. For discussion of ordinary mandate under *Code Civ. Proc. § 1085*, see *§ 474.11*.

[4] Facts and Evidence on Which Review Is Based

Code Civ. Proc. § 1094.5(e) authorizes the court to admit additional relevant evidence if it finds either one of the following: (1) the evidence could not have been produced at the administrative hearing in the exercise of due diligence; or (2) the evidence was improperly excluded at the administrative hearing.

The California Court of Appeal held that a developer had the right to introduce new evidence relating to bias by the decision maker at the superior court level during the mandamus proceeding under *Code Civ. Proc. § 1094.5(e)*. The developer satisfied the statutory test that the evidence could not have been produced at the administrative hearing under the reasonable diligence standard because he did not have the opportunity to take the deposition of the commissioner until the mandamus proceeding was in the superior court. Thus, the new evidence of the commissioner's bias could properly have been introduced at the judicial review stage [*Nasha L.L.C. v. City of Los Angeles (2004) 125 Cal. App. 4th 470, 485-486, 22 Cal. Rptr. 3d 772]* .

The California Court of Appeal held that there was no valid basis to remand a matter to permit the school district a second chance to present authentication evidence so that videotape evidence could be properly admitted into evidence at an administrative hearing [*Ashford v. Culver City Unified Sch. Dist. (2005) 130 Cal. App. 4th 344, 346-347, 29 Cal. Rptr. 3d 728]* . The foundation (authentication evidence) was not improperly excluded from evidence, as it was never offered into evidence by the district, and there was no showing as to why the foundation evidence could not have been presented, with reasonable diligence, at the original hearing. Thus, there was no basis for a remand for new evidence under *Code Civ. Proc. § 1094.5(e)* [*Ashford v. Culver City Unified Sch. Dist. (2005) 130 Cal. App. 4th 344, 350-351, 29 Cal. Rptr. 3d 728]* . The videotape evidence was considered to be hearsay evidence. Videotapes are also considered to be writings that must be authenticated before being admitted into evidence. Unauthenticated videotapes can not be properly admitted into evidence, and without an authenticating foundation these videotapes are considered to be irrelevant and unreliable evidence. Admission of these videotapes was objected to and the videotapes (of a school district employee) were considered to be hearsay evidence offered to prove the truth of the matter asserted [*Ashford v. Culver City Unified Sch. District (2005) 130 Cal. App. 4th 344, 350-351, 29 Cal. Rptr. 3d 728]* .

Except in those cases in which *Code Civ. Proc. § 1094.5(e)* authorizes the admission of additional evidence, the court's review of the administrative order or decision must be based solely on the record of the proceedings before the administrative body [*Pegues v. Civil Service Com. (1998) 67 Cal. App. 4th 95, 103-104, 78 Cal. Rptr. 2d 705* ; *PMI Mortgage Ins. Co. v. City of Pacific Grove (1981) 128 Cal. App. 3d 724, 729, 179 Cal. Rptr. 185* ; *Transcentury Properties, Inc. v. State of California (1974) 41 Cal. App. 3d 835, 842, 116 Cal. Rptr. 487]* .

In cases in which the court is authorized to exercise its independent judgment on the evidence, a court admitting additional evidence under *Code Civ. Proc. § 1094.5* has discretion to either proceed to make its independent assessment of the evidence or to remand the case to the administrative body with directions to reconsider the order or decision in light of the additional evidence [*Code Civ. Proc. § 1094.5(d)*; *Tiholiz v. Northridge Hospital Foundation (1984) 151 Cal. App. 3d 1197, 1204-1205, 199 Cal. Rptr. 338* ; *Hand v. Board of Examiners (1977) 66 Cal. App. 3d 605, 616-617, 136 Cal. Rptr. 187]* .

In instances in which the substantial evidence standard applies, the court must remand the case for reconsideration [*Code Civ. Proc. § 1094.5(d)*].

For discussion of when these different standards apply, see *Ch. 474B, Standards in Reviewing Agency Decisions, § 474B.16*.

[5] Relief Available

[a] Reversal or Annulment of Order if Agency Acted in Excess of Jurisdiction

When the administrative body has acted in excess of its jurisdiction by determining a matter it is not constitutionally or legislatively empowered to determine, the judgment directs the entity to reverse or annul its order or decision, but will not authorize further proceedings [*see BMW of North America, Inc. v. New Motor Vehicle Bd. (1984) 162 Cal. App. 3d 980, 994, 209 Cal. Rptr. 50* ; *Foth v. City of Long Beach (1954) 125 Cal. App. 2d 520, 530-531, 270 P.2d 868]* .

[b] No Control or Limitation of Discretion Vested in Agency; Remand Required

Code Civ. Proc. § 1094.5 governs the relief that may be awarded in an administrative mandate proceeding. Section 1094.5 authorizes the court to set aside the administrative order or decision and to direct the administrative body to reconsider it or to proceed in the manner required by law. However, *Code Civ. Proc. § 1094.5* also provides that the court may not enter a judgment that limits or controls the discretion vested in the administrative body. Thus, when discretion to make particular determinations is vested in the administrative body, the court cannot substitute its decision for that of the administrative body. If the administrative body has abused its discretion, the proper procedure is for the court to remand the case to the administrative body for rehearing or reconsideration, not to decide it on the merits [*Fascination, Inc. v. Hoover (1952) 39 Cal. 2d 260, 265, 246 P.2d 656* ; *Carson Gardens L.L.C. v. City of Carson Mobilehome Park Rental Review Bd. (2006) 135 Cal. App. 4th 856, 858-859, 37 Cal. Rptr. 3d 768* (superior court exceeded judicial authority when it decided what the correct amount of a rent increase would be instead of remanding decision back to rent review board to decide rent increase question); *Walters v. Pine Cove CountyWater Dist. (1960) 177 Cal. App. 2d 498, 500, 2 Cal. Rptr. 253* ; *National Auto. & Cas Ins. Co. v. Downey (1950) 98 Cal. App. 2d 586, 594, 220 P.2d 962]* . Nonetheless, when a court determines that a penalty is so excessive as to constitute an abuse of discretion, the court has the power to direct the agency to set a lesser penalty than the penalty found to be excessive. The precise terms of this lesser penalty remain within the agency's discretion [*Richardson v. Board of Supervisors (1988) 203 Cal. App. 3d 486, 495, 250 Cal. Rptr. 1]* .

A remand to the administrative body for rehearing or further proceedings is ordinarily ordered when the administrative body has acted in one or more of the following ways:

- Failed to follow applicable procedural rules [*Fascination, Inc. v. Hoover (1952) 39 Cal. 2d 260, 268, 246 P.2d 656* ; *National Auto & Cas Ins. Co. v. Downey (1950) 98 Cal. App. 2d 586, 594, 220 P.2d 962]* ;

- Denied the petitioner a fair hearing [*English v. City of Long Beach (1950) 35 Cal. 2d. 155, 159-160, 217 P.2d 22* ; *Walters v. Pine Cove County Water Dist. (1960) 177 Cal. App. 2d 498, 500, 2 Cal. Rptr. 253]* ;

- Made findings that are insufficient to support the decision or to permit adequate review [*Fairfield v. Superior Court (1975) 14 Cal. 3d 768, 779, 122 Cal. Rptr. 543, 537 P.2d 375* ; *American Funeral Concepts v. Board of Funeral Directors & Embalmers (1982) 136 Cal. App. 3d 303, 311 n.7, 186 Cal. Rptr. 196* ; *Hadley v. City of Ontario (1974) 43 Cal. App. 3d 121, 130, 117 Cal. Rptr. 513]* .

- Failed to comply with court ordered methodologies on remand [*Carson Gardens L.L.C. v. City of Carson Mobilehome Park Rental Review Bd. (2006) 135 Cal. App. 4th 856, 858-859, 37 Cal. Rptr. 3d*

768 (rental review board rent increase decision was reversed on judicial review because board failed to include mortgage interest costs in determining fair rate of return calculation. On remand, board again failed to include mortgage interest costs in determining rent increase, and reviewing court overturned board's decision a second time. However, superior court exceeded judicial authority when it decided what the correct amount of a rent increase would be instead of remanding decision back to rent review board a second time to decide rent increase question)].

The Court of Appeal held that the Medical Board of California deprived a physician of due process of law by conducting a fundamentally unfair physician license revocation hearing when the Board disqualified all of the doctor's experts as to standard of care, thereby precluding the doctor from putting on any evidence in his defense to charges that the doctors treatment of several patients was grossly negligent or was an extreme departure from the standard of practice [*Sinaiko v. Superior Court (2004) 122 Cal. App. 4th 1133, 1137, 1141, 19 Cal. Rptr. 3d 371]* . The Court of Appeal also applied the independent judgment test to review the fairness of the administrative hearing as a matter of law [*Sinaiko v. Superior Court (2004) 122 Cal. App. 4th 1133, 1140-1141, 19 Cal. Rptr. 3d 371]* . Finally the Court of Appeal held that this case must be remanded to the Medical Board to consider the evidence presented by the doctor's experts. It was not proper for the reviewing (superior) court to admit the evidence under *Code Civ. Proc. § 1094.5(e)*, and then to reweigh the evidence to support the Medical Board's fact findings because this was an unfair proceeding. It is the agency's responsibility to consider the evidence erroneously excluded and to make an informed decision based on that evidence and agency expertise. Thus, a remand to the agency is required [*Sinaiko v. Superior Court (2004) 122 Cal. App. 4th 1133, 1146-1147, 19 Cal. Rptr. 3d 371]* .

[c] When Substantial Evidence Standard Applies

If the evidence is insufficient to support the findings of the administrative body in a case in which the substantial evidence standard applies, the court will take one of two actions, depending on the nature of the evidence adduced at the administrative hearing:

- If there are material conflicts in the evidence so that it will support more than one decision or order, the court must remand the case for rehearing or further proceedings; it may not make its own findings and decide the matter on the merits [*Fascination, Inc. v. Hoover (1952) 39 Cal. 2d 260, 268, 246 P.2d 656* ; *Walters v. Pine Cove County Water Dist. (1960) 177 Cal. App. 2d 498, 500-501, 2 Cal. Rptr. 253]* .

- If the evidence is such that it will support only one particular order or decision, the court may direct the administrative body to enter that order or decision [*Tripp v. Swoap (1976) 17 Cal. 3d 671, 677, 131 Cal. Rptr. 789, 552 P.2d 749* , overruled on other grounds, *Frink v. Prod (1982) 31 Cal. 3d 166, 180, 181 Cal. Rptr. 893, 643 P.2d 476* ; *Ross Gen. Hosp., Inc. v. Lackner (1978) 83 Cal. App. 3d 346, 354, 147 Cal. Rptr. 801]* .

[d] When Independent Judgment Standard Applies

If the factual findings made by a court reviewing the evidence under the independent judgment standard establish the petitioner's right to a particular order or decision, the judgment may direct the administrative body to enter that order or decision [*see, e.g.,* *Byrnes v. Riles (1984) 157 Cal. App. 3d 1170, 1176, 204 Cal. Rptr. 100* (directing school district to grant handicapped student's claim for private school tuition and transportation); *Anderson v. City of La Mesa (1981) 118 Cal. App. 3d 657, 660-661, 173 Cal. Rptr. 572* (directing city to grant application for variance and use permit); *Quintana v. Board of Administration (1976) 54 Cal. App. 3d 1018, 1021, 127 Cal. Rptr. 11* (directing board to grant disability claim)]. But, when the administrative body has discretion to determine what penalty should be imposed, or what action should be taken as a result of the facts found by the court, the case is remanded for determination of the appropriate penalty or action [*see* *Zink v. City of Sausalito (1977) 70 Cal. App. 3d 662, 666, 139 Cal. Rptr. 59]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewStandards of ReviewAbuse of DiscretionAdministrative LawJudicial ReviewStandards of ReviewDe Novo ReviewAdministrative LawJudicial ReviewStandards of ReviewExceeding Statutory AuthorityAdministrative LawJudicial ReviewStandards of ReviewSubstantial EvidenceGovernmentsState & Territorial GovernmentsEmployees & Officials

California Forms of Pleading and Practice--Annotated

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Volume 41A: Public Agency Adjudications Judicial Review-Chs. 473-479
Chapter 474 AVAILABILITY OF JUDICIAL REVIEW OF AGENCY DECISIONS
PART II. LEGAL BACKGROUND
A. Review by Writ of Mandate

41A-474 California Forms of Pleading and Practice--Annotated § 474.13

§ 474.13 Requirements Common to All Mandate Proceedings

[1] Beneficially Interested Petitioner

[a] Nature of Requirement

Standing to bring a mandate action is governed by *Code Civ. Proc. § 1086*, which requires that the petitioner be "beneficially interested" in the administrative action or decision at issues [*Carsten v. Psychology Examining Com. (1980) 27 Cal. 3d 793, 796, 166 Cal. Rptr. 844, 614 P.2d 276* ; *Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6* ; Santiago County Water Dist. v. County of Orange *(1981) 118 Cal. App. 3d 818, 832, 173 Cal. Rptr. 602]* . The requirement of petitioner's beneficial interest applies in administrative mandate as well as ordinary mandate proceedings [*Employees Service Asso. v. Grady (1966) 243 Cal. App. 2d 817, 826, 52 Cal. Rptr. 831* ; *Grant v. Board of Medical Examiners (1965) 232 Cal. App. 2d 820, 826, 43 Cal. Rptr. 270]* .

The steelworkers union had standing (was beneficially interested) under *Code of Civil Procedure § 1086* as a citizen litigant to challenge regulatory approvals related to a streambed alteration agreement [*Environmental Protection & Information Center v. California Dept. of Forestry & Fire Protection (2008) 44 Cal. 4th 459, 479-481, 80 Cal. Rptr. 3d 28, 187 P.3d 888*]. A nonprofit corporation and a low income plaintiff had standing as citizen litigants to challenge the alleged failure of a city to adopt a low income housing plan [*Urban Habitat Program v. City of Pleasanton (2008) 164 Cal. App. 4th 1561, 1580-1581, 80 Cal. Rptr. 3d 300*]. Counties had standing to challenge the constitutionality of state laws that imposed direct obligation on counties, but counties did not have standing to challenge the constitutionality of state laws that did not impose obligations of counties [*County of San Diego v. San Diego NORML (2008) 165 Cal. App. 4th 798, 817-818, 81 Cal. Rptr. 3d 461*]. Hospitals have standing to challenge a freeze on Medicaid reimbursement rates enacted by the state legislature. Hospitals are beneficially interested under *Code Civ. Proc. § 1086* because they have an interest in the proper administration of the Medicaid laws that is distinct from the interest of the public at large in that they are adversely affected by the reimbursement rate freeze [*Mission Hospital Regional Medical Center v. Shewry (2008) 168 Cal. App. 4th 460, 478-480, 85 Cal. Rptr. 3d 639*].

Members of the public have standing under the public trust doctrine to challenge harm to the public trust related to wildlife including raptors and other birds allegedly harmed by wind turbines [*Center for Biological Diversity v. FPL*

Group, Inc. (2008) 166 Cal. App. 4th 1349, 1364-1366, 83 Cal. Rptr. 3d 588]. However, members of the public seeking to challenge harm to the public trust must file a lawsuit against the responsible public agencies, the County of alameda, and the California Department of Fish and Game, which are charged with enforcing the public trust. They may not file a lawsuit against the operators of the wind turbines that have allegedly caused the harm [*Center for Biological Diversity v. FPL Group, Inc. (2008) 166 Cal. App. 4th 1349, 1366-1368, 83 Cal. Rptr. 3d 588*]. Failure to join the County of Alameda under *Code Civ. Proc. § 389* is grounds for dismissing the action. The county is a necessary party because it issued the wind turbine permits being challenged. Because the limitations period for challenging the issuance of the permits has expired, the county cannot be joined to the lawsuit and the county is an indispensable party [*Center for Biological Diversity v. FPL Group, Inc. (2008) 166 Cal. App. 4th 1349, 1371-1373, 83 Cal. Rptr. 3d 588*].

An academic senate of a community college was determined to have the requisite beneficial interest, and therefore had standing, to challenge a community college board of trustee's adoption of revised hiring policies without giving the academic senate the meaningful opportunity to participate in the adoption process. The academic senate had a beneficial interest because under the law, the senate had a real interest, not merely an advisory role, in that senate members were elected by the faculty, and the senate had the responsibility to agree jointly on faculty hiring policies [*Irvine Valley College Academic Senate v. Board of Trustees of the South Orange County Community College District (2005) 129 Cal. App. 4th 1482, 1487-1489, 29 Cal. Rptr. 3d 336]* .

A pharmaceutical company that manufactured a drug, Oxandin, did not have standing to challenge the contract provisions between the Department of Health Services and an outside vendor, Ramsdell, that administered the AIDS Drug Assistance Program's (ADAP) under the statutory authority of *Health & Safety Code § 120955(a)(2)*. The pharmaceutical company was not a party to the contract [*Savient Pharmaceuticals, Inc. v. Department of Health Services (2007) 146 Cal. App. 4th 1457, 1465-1466, 53 Cal. Rptr. 3d 689]* . An outdoor advertising company that sought writ of mandate to challenge validity of amendment to city zoning ordinance did not have standing to bring challenge based on failure to complete an environmental review under CEQA [Regency Outdoor Advertising, inc. v. *City of West Hollywood (2007) 153 Cal. App. 4th 825, 829-830, 63 Cal. Rptr. 3d 287]* .

Cell phone companies had standing to challenge the constitutionality of city ordinance imposing local government fee on cell phone users to fund city's 911 communication system notwithstanding that the fee was paid by cell phone customers. The companies business operations were closely linked to enforcement of the ordinance, as the companies had to collect and remit the fees to the city, and the companies competitive standing could be affected [*Andal v. City of Stockton (2006) 137 Cal. App. 4th 86, 94-95, 40 Cal. Rptr. 3d 34*].

An apartment owners association had standing to sue to challenge a rent stabilization ordinance on behalf of its members. The association challenged the ordinance through a complaint for declaratory and injunctive relief. The association satisfied a three part test for associational standing: 1) members of the association could have sued to raise the same challenges; 2) the interests to be protected are related to the purpose of the organization; and 3) the association can assert their claim and seek the requested relief without individual owners having to be a part of the lawsuit [*Apt. Ass'n of Los Angeles County, Inc. v. City of Los Angeles (2006) 136 Cal. App. 4th 119, 128-130, 38 Cal. Rptr. 3d 575]* .

However, landowners were not aggrieved parties for purposes of challenging the addition of encroachment lands with required habitat mitigation conditions and, therefore, did not have standing to challenge that decision because they could not show that they would suffer an immediate, pecuniary, and substantial injury, as they would not be required to pay habitat mitigation costs [*State Water Resources Control Board Cases (2006) 136 Cal. App. 4th 674, 829-831, 39 Cal. Rptr. 3d 189]* . An irrigation district did not have standing to challenge a trial court judgment in favor of that district, as the district was not an aggrieved party for purposes of appeal [*El Dorado Irrigation Dist. v. State Water Resources Control Board (2006) 142 Cal. App. 4th 937, 977-978, 48 Cal. Rptr. 3d 468]* .

Under the standing requirement imposed by *Code Civ. Proc. § 1086*, a writ of mandate is issued only when it is necessary to protect some special right of the petitioner, or if the petitioner will suffer some substantial damage if it is

denied [*see, e.g.,* *Ballard v. Anderson (1971) 4 Cal. 3d 873, 876, 95 Cal. Rptr. 1, 484 P.2d 1345* (physician subject to criminal prosecution for performing unapproved abortion had standing to petition for writ compelling Therapeutic Abortion Committee to pass on applications without requiring parental consent); *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo (1985) 172 Cal. App. 3d 151, 159, 217 Cal. Rptr. 893* (petitioners living or working in close proximity to site had standing to petition for writ compelling county board of supervisors to set aside actions enabling construction of proposed shopping center); *Cooperrider v. Civil Service Com. (1979) 97 Cal. App. 3d 495, 499-500, 158 Cal. Rptr. 801* (nonresident applicant for civil service position had standing to petition for writ compelling civil service commission to accept and process application notwithstanding residency requirement); *Taschner v. City Council (1973) 31 Cal. App. 3d 48, 56, 107 Cal. Rptr. 214* (petitioner owning property in affected area had standing to petition for writ invalidating ordinance limiting height of buildings), *disapproved on other grounds, Associated Home Builders, Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 596 n.14, 135 Cal. Rptr. 41, 557 P.2d 473* ; *Jefferson Union Sch. Dist. v. City Council (1954) 129 Cal. App. 2d 264, 267, 277 P.2d 104* (school district had standing to petition for writ terminating proceedings for annexation of territory within its geographical boundaries)].

The California Court of Appeal held that an association of home health care providers, one of those providers and a disability rights advocacy group had associational standing to sue on behalf of recipients of Medi-Cal services to ensure that the department of health services fulfilled its responsibilities to Medi-Cal recipients and made sure that payment rates for providers are sufficient to enlist enough providers to provide adequate care and services to recipients [*California Association for Health Services v. Department of Health Services (2007) 148 Cal. App. 4th 696, 706-707, 56 Cal. Rptr. 3d 102]* .

The writ will not issue in a case in which the petitioner has no direct interest in the legal duty sought to be compelled and will gain no benefit from its performance [*see, e.g.,* *Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6* (labor official who was not city employee, resident, or taxpayer had no standing to bring mandate action to compel city to fix salaries of city employees at prevailing rates); *McDonald v. Stockton Met. Transit Dist. (1973) 36 Cal. App. 3d 436, 442-443, 111 Cal. Rptr. 637* (users of transit system had no standing to bring mandate action to compel transit district to construct bus shelters in accordance with terms of federal grant); *Silva v. City of Cypress (1962) 204 Cal. App. 2d 374, 376-377, 22 Cal. Rptr. 453* (petitioner who had no interest in any property located in the area affected and was not personally affected had no standing to challenge decision granting variance)]. As a rule, the petitioner must have some special interest to be served or some particular right to be protected over and above those common to the public at large [*Carsten v. Psychology Examining Com. (1980) 27 Cal. 3d 793, 796, 166 Cal. Rptr. 844, 614 P.2d 276* ; *Santiago County Water Dist. v. County of Orange (1981) 118 Cal. App. 3d 818, 832, 173 Cal. Rptr. 602* ; *see, e.g., Associated Builders & Contractors, Inc. v. San Francisco Airports Commission (1999) 21 Cal. 4th 352, 361-363, 87 Cal. Rptr. 2d 654, 981 P.2d 499* (association of building contractors had standing to represent interests of its members to challenge project stabilization agreement related to expansion of airport based upon showing that agreement infringed on the associational rights of its members or had anti-competitive impact on those members)]. A special district did not have standing to challenge a county's determination as to the district's allocated share of property tax revenue because the district did not have a property interest in tax increments received. This is because the County had unlimited discretion to decide the tax allocation that the district received [*Embarcadero Mun. Improvement Dist. v. County of Santa Barbara (2001) 88 Cal. App. 4th 781, 787-788]* .

A competitor (Waste Management, Inc.) did not have standing to challenge the Waste Management Board's approval of permitting a solid waste facility by a competing company (Browning-Ferris Co.) without requiring CEQA review. This is because the challenging competitor's interests related to extra costs it incurred through having to complete CEQA review of its own permitting process, and the lower costs that the permitting competitor (Browning Ferris Co.) had because it did not have to complete CEQA review for its permitting process. Commercial and competitive interests are not beneficial interests within the meaning of standing requirements. Also, those interests were not within the zone of interests protected or preserved by CEQA. The challenging competitor cannot use the citizen suit standing alternative because it is not seeking to vindicate environmental interests protected by CEQA, but rather is seeking to vindicate its own economic and competitive interests [*Waste Management of Alameda County, Inc. v. County of Alameda (2000)*

79 Cal. App. 4th 1223, 1229-1230, 94 Cal. Rptr. 2d 740] . However, a competitor (Burtec) trash company did have standing to challenge a city's approval of a conditional use permit granted to another trash company (Taormina) based on the adequacy of the public notice required by CEQA. This is because the challenging company (Burtec) was a taxpayer and a property owner with a close geographic proximity to the site of the solid waste facility receiving the CUP, and the company was seeking to enforce a public duty and a proper express beneficial interest concerning the adequacy of public notice under CEQA [*Burrtec Waste Industries, Inc. v. City of Colton (2002) 97 Cal. App. 4th 1133, 1138-1139, 119 Cal. Rptr. 2d 410]* . Another California Court of Appeal held that an organization had standing to challenge CEQA compliance because one of its members was a homeowner residing near one of the building projects who spoke in opposition to the projects at the public hearing prior to the approval of the projects by the City [*Bakersfield Citizens for Local Control v. City of Bakersfield (2004) 124 Cal. App. 4th 1184, 1202-1204, 22 Cal. Rptr. 3d 203]* . Two litigants who challenged a decision of the State Water Resources Control Board had standing to seek disqualification of the attorney general and to challenge the attorney generals's failure to comply with *Water Code § 186* (which prohibited dual representation by the attorney general of the board and another state agency when both are parties to litigation) because these two litigants who challenged the boards adjudicatory decision have a direct and substantial interest in a neutral decision maker, and both are within the zone of interests protected by *Water Code § 186* [*State Water Resources Control Board v. Superior Court (2002) 97 Cal. App. 4th 907, 915-916, 118 Cal. Rptr. 2d 784]* .

The petitioner's interest must be a present interest. The writ will not issue when it would be of no practical benefit to the petitioner due to events occurring after the administrative action or decision [*Clementine v. Board of Civ. Ser. Commrs. (1941) 47 Cal. App. 2d 112, 114, 117 P.2d 369* (proceeding to compel certification of names on civil service eligible list dismissed when list expired)].

A physician whose license to practice medicine was suspended had standing ("beneficial interest") to challenge the suspension at the time he filed his mandate action. His standing was made moot by the completion of the suspension during the time of judicial review under the provisions of *Code Civ. Proc. § 1094.5(g)* [*Medical Board of California v. Superior Court (2001) 88 Cal. App. 4th 1001, 1008-1009, 106 Cal. Rptr. 2d 381]* . In contrast, a former property owner who sought a writ of mandate to compel a county planning department to issue certificates of compliance of the real property with old subdivision maps did not have a beneficial interest sufficient to be granted administrative mandamus when due to a mortgage foreclosure, he was divested of all interest in the real property in question [*County of San Luis Obispo v. Superior Court (2001) 90 Cal. App. 4th 288, 292-293, 108 Cal. Rptr. 2d 753]* .

The California Supreme Court held that the Director of the Department of Conservation had standing (i.e., a beneficial interest) sufficient to allow the Director to petition for a writ of mandate challenging the reclamation plans and financial assurances approved by the County of El Dorado for surface mining operations regulated under the Surface Mining and Reclamation Act of 1975 [*Pub. Resources Code § 2710 et. seq.*; People ex. *Rel. Dept. of Conservation v. El Dorado County (2005) 36 Cal. 4th 971, 980-981, 32 Cal. Rptr. 3d 109, 116 P. 3d 567* . The California Supreme Court also held that the attorney general did not have standing to file a lawsuit under the California False Claims Act (CFCA) for civil remedies related to the assets of an insolvent insurance company as to which the Insurance Commissioner has acquired title, because those assets are not "state funds" within the meaning of the CFCA. The Court also held that the attorney general has standing to seek civil penalties under the Unfair Competition Law (UCL), but not restitution, and only injunctive relief that serves to protect the public and serve a law enforcement function [*State of Cal. v. Altus Fin. (2005) 36 Cal. 4th 1284, 1303-1305, 32 Cal. Rptr. 3d 498, 116 P.3d 1175]* .

The California Court of Appeal held that a pension plan that sought a refund of property taxes and penalties paid by the trustee of the plan for the plan did not have standing to bring the refund action because the plan had not paid the tax itself, and the tax refund statutes [*Rev. & Tax Code § 5140*] require that only the person who has paid the tax may maintain a refund action. Thus, the plan, which was the real party in interest, did not have standing to bring the refund action for a refund greater than two million dollars [*IBM Pers. Pension Plan v. City and County of San Francisco (2005) 131 Cal. App. 4th 1291, 1294, 32 Cal. Rptr. 3d 656]* .

The Court of Appeal held that taxpayer standing [*Code Civ. Proc. § 526a*] was sufficient to satisfy the beneficial interest standard required for ordinary mandate [*Code Civ. Proc. § 1086*] so that a taxpayer could challenge the awarding of the interim contract by a city as an illegal expenditure of city funds. Furthermore, the competitor who was not chosen for the interim contract also had standing because it met the direct and substantial interest standard, and was within the zone of interests protected by *Election Code § 9241* [*Lindelli v. Town of San Anselmo (2003) 111 Cal. App. 4th 1099, 1106-1107, 4 Cal. Rptr. 3d 453* (mandamus challenge to city award of an interim contract pending the results of a referendum)].

The California Court of Appeal held that a citizen/taxpayer had standing to challenge procedures used by the Department of Social Services to exempt employees of community care facilities from employment prohibitions based on criminal convictions. The court noted that the citizen/taxpayer had shown determination in pursuing the litigation against the department which satisfied the purpose of the standing requirement to ensure an actual controversy between parties with adverse interests [*Gresher v. Anderson (2005) 127 Cal. App. 4th 88, 114, 25 Cal. Rptr. 3d 408* ; *Doe v. Saenz (2006) 140 Cal. App. 4th 960, 999, 45 Cal. Rptr. 3d 126* (plaintiffs that challenged department procedures related to exempt criminal conviction provisions had taxpayer standing to challenge adequacy of statutory procedures)].

The California Court of Appeal held that a graduated student of a private college did not have standing under the California Leonard Law [*Educ. Code § 94367*] to bring tort and statutory violation claims against the college because the statute required that the student be enrolled in the college at the time the lawsuit was filed. The former student filed this lawsuit after he graduated from the college. Thus, the former student was limited to seeking relief under *Code Civ. Proc. § 1094.5* (administrative mandamus) [*Antebi v. Occidental College (2006) 141 Cal. App. 4th 1542, 1544-1545, 47 Cal. Rptr. 3d 277]* .

[b] Judicially Recognized Exceptions to Requirement

California courts have recognized two main exceptions to the general rule requiring that the petitioner have a direct and immediate personal interest in the administrative order or decision.

First, when a case involves a question of public right and seeks to procure the enforcement of a duty owed to the public, as opposed to one owed to an individual applicant or party, the petitioner need not show a direct or special interest in the order or decision at issue. The petitioner's interest as a citizen in having the laws properly enforced is sufficient [*Green v. Obledo (1981) 29 Cal. 3d 126, 144, 172 Cal. Rptr. 206, 624 P.2d 256* (petition for writ requiring Department of Benefit Payments to properly calculate income to be offset against welfare benefits); *Hollman v. Warren (1948) 32 Cal. 2d 351, 357, 196 P.2d 562* (petition for writ to compel governor to appoint notaries public); *Bd. of Soc. Welfare v. County of Los Angeles (1945) 27 Cal. 2d 98, 100-101, 162 P.2d 627* (petition for writ to compel county to refund erroneously collected repayment of old age assistance benefits); *American Friends Service Committee v. Procunier (1973) 33 Cal. App. 3d 252, 256, 109 Cal. Rptr. 22* (petition for writ to require Department of Corrections and Adult Authority to formulate rules and regulations in accordance with Administrative Procedure Act)]. A private citizen who sued to challenge the constitutionality of statutory affirmative action programs under equal protection of the law as well as for violating Proposition 209 [*Cal. Const. Art. I, § 31*] had standing as both a citizen and a taxpayer to maintain the lawsuit [*Connerly v. State Personnel Bd. (2001) 92 Cal. App. 4th 16, 28-31]* . Citizen standing was recognized when a construction company and its president challenged a school district's award of a contract to another construction company when the contract award was made under an emergency resolution that allowed the district to bypass competitive bidding procedures that are normally required. The challenger's sought to protect the public tax dollars by seeking to enforce competitive bidding laws which are designed to facilitate the award to contracts to the lowest responsible bidder [*Marshall v. Pasadena Unified School Dist. (2004) 119 Cal. App. 4th 1241, 1250-1252, 15 Cal. Rptr. 3d 344]* . This exception promotes a policy of ensuring that governmental bodies do not frustrate the purpose of legislation establishing important public rights [*Green v. Obledo (1981) 29 Cal. 3d 126, 144, 172 Cal. Rptr. 206, 624 P.2d 256* ; *Bd. of Soc. Welfare v. County of L.A. (1945) 27 Cal. 2d 98, 100-101, 162 P.2d 627* ; *California Homeless*

and Housing Coalition v. Anderson (1995) 31 Cal. App. 4th 450, 458-459, 37 Cal. Rptr. 2d 639] .

Second, when a case presents issues that are of great public importance and that are likely to recur, a court has inherent discretion to decide it even though the issuance of a writ will not benefit the petitioner [*Ballard v. Anderson (1971) 4 Cal. 3d 873, 876-877, 95 Cal. Rptr. 1, 484 P.2d 1345* (petition for writ compelling Therapeutic Abortion Committee to process minor petitioner's application for approval of abortion without requiring parental consent determined notwithstanding petitioner's ineligibility due to expiration of 20-week statutory period); *City of Garden Grove v. Superior Court (2007) 157 Cal. App. 4th 355, 369-371, 68 Cal. Rptr. 3d 656* (city had standing to seek mandamus review challenge court order requiring return of lawfully seized marijuana); *Kirstowsky v. Superior Court (1956) 143 Cal. App. 2d 745, 749, 300 P.2d 163* (petition for writ compelling vacation of order excluding public from criminal trial determined despite conclusion of trial)].

A public interest group entity that was created after a challenged governmental practice started had standing to challenge legality of housing fund payment calculations in mandamus action against city commission because the public rights exception permits plaintiff to have standing notwithstanding the lack of a beneficial interest in the proceedings [*Hogar v. Community Development Commission of the City of Escondido (2003) 110 Cal. App. 4th 1288, 1294-1296, 2 Cal. Rptr. 3d 497]* .

[c] Effect of Statute Providing for Participation in Administrative Proceeding

A person or entity authorized by statute to participate in an administrative proceeding is deemed to have a sufficient beneficial interest to obtain judicial review of an order or decision made in that proceeding by mandate [*Bodinson Mfg. Co. v. California E. Com. (1941) 17 Cal. 2d 321, 330, 109 P.2d 935* (employer authorized by Unemployment Insurance Act to participate in proceeding to determine claimant's eligibility for unemployment insurance benefits had standing to petition for writ to annul decision awarding benefits); *California School Employees Association v. Tustin Unified School District (2007) 148 Cal. App. 4th 510, 523-524, 55 Cal. Rptr. 3d 739* (*Gov. Code § 3543.8* gives employee organizations standing to sue in court on behalf of members of organization to seek prospective relief for those members); *Yamada Brothers v. Agricultural Labor Relations Bd. (1979) 99 Cal. App. 3d 112, 126, 159 Cal. Rptr. 905* (employer authorized by ALRB regulations to oppose administrative petition for extension of union's certification had standing to seek review of order extending certification in mandate proceeding); *Memorial Hosp. of So. Cal. v. State Health Planning Council (1972) 28 Cal. App. 3d 167, 177-178, 104 Cal. Rptr. 492* (other hospitals authorized by statute and administrative regulations to participate in administrative hearing on convalescent hospital's application to covert to acute care center had standing to petition for writ compelling hearing on application); *see also Covert v. State Board of Equalization (1946) 29 Cal. 2d 125, 130, 173 P.2d 545* (person whose complaint was basis of proceedings for revocation of on-sale liquor license had standing to seek review of State Board of Equalization decision dismissing complaint in mandate proceeding)]. However, a petitioner who is not a person or entity authorized by statute to participate in a particular proceeding may nonetheless be entitled to obtain judicial review of an order or decision made in that proceeding if the person or entity is sufficiently interested in or affected by the order or decision [*cf. Peery v. Superior Court (1981) 29 Cal. 3d 837, 841, 176 Cal. Rptr. 533, 633 P.2d 198* (property owners were aggrieved parties entitled to bring mandate proceeding to review order denying motion to expunge lis pendens even though they were not parties to the underlying lawsuit); *Burlingame v. Justice's Court (1934) 1 Cal. 2d 71, 75, 33 P.2d 669* (petitioner aggrieved by justice court order for substitution of judgment debtor is party beneficially interested within meaning of *Code Civ. Proc. § 1069* and thus may seek writ of certiorari annulling order even though he was not a party to the underlying action)]. This principle does not apply when legislation provides that some other party or entity, such as local government, has the sole and exclusive right to use statutory procedures to enforce statutory or constitutional rights [*Kinlaw v. State (1991) 54 Cal. 3d 326, 334-336, 285 Cal. Rptr. 66, 814 P.2d 1308]* .

The California Court of Appeal interpreted the "interested person" language of *Gov. Code § 54960(a)* and *Gov. Code § 54960.1(a)* very broadly to include all citizens of the state of California; it is not to be limited to residents or taxpayers of the city, county, or district legislative body whose action was being challenged on grounds of Brown Act violations.

This broad interpretation meant that plaintiff, who was a taxpayer and resident of Los Angeles County, had standing to bring a Brown Act action against the Orange Unified School District even though he did not reside within the boundaries of the school district nor did he pay property taxes in that district. The court's rationale was that any citizen of California has the right to enforce the public's right to know what their elected governmental officials are doing and whether they are following the law. Plaintiff is not required to have a personal stake in the lawsuit because he is enforcing public rights [*McKee v. Orange Unified School District (2003) 110 Cal. App. 4th 1310, 1316-1318, 2 Cal. Rptr. 3d 774]* .

[2] Lack of Adequate Remedy at Law

The writ of mandate was created to supply a remedy for cases in which a specific legal right exists with no specific legal remedy with which to enforce it [*Drummey v. State Bd. of Funeral Directors (1939) 13 Cal. 2d 75, 82, 87 P.2d 848* ; *Royal Convalescent Hospital, Inc. v. State Board of Control (1979) 99 Cal. App. 3d 788, 794, 160 Cal. Rptr. 458]* . Thus, *Code Civ. Proc. § 1086* requires that, to establish entitlement to issuance of the writ, a petitioner must show that a plain, speedy, and adequate remedy does not exist in the ordinary course of the law [*Phelan v. Superior Court (1950) 35 Cal. 2d 363, 366, 217 P.2d 951* ; *Barnard v. Municipal Court (1956) 142 Cal. App. 2d 324, 326, 298 P.2d 679* ; *Lohr v. Superior Court (1952) 111 Cal. App. 2d 231, 234, 244 P.2d 5]* . This requirement applies to administrative mandate as well as ordinary mandate proceedings [*Grant v. Board of Medical Examiners (1965) 232 Cal. App. 2d 820, 826, 43 Cal. Rptr. 270]* .

To preclude the use of mandate, the alternative remedy generally must meet the following two qualifications [*Dufton v. Daniels (1923) 190 Cal. 577, 582, 213 P. 949* ; *Robertson v. Library Trustees (1902) 136 Cal. 403, 405, 69 P. 88* ; *Cory v. Poway Unified School Dist. (1983) 147 Cal. App. 3d 1158, 1167, 195 Cal. Rptr. 586* ; *Ross v. Board of Education (1912) 18 Cal. App. 222, 225, 122 P. 967]* :

- The remedy must be equally convenient, beneficial, and effective; and
- It must be capable of directly affording and enforcing the relief sought in the mandate proceeding.

Mandate will not lie when an adequate alternative remedy has been lost due to the petitioner's delay or neglect unless a sufficient showing is made to excuse the petitioner's failure to pursue the remedy [*Phelan v. Superior Court (1950) 35 Cal. 2d 363, 370-371, 217 P.2d 951* ; *Andrews v. Police Court (1943) 21 Cal. 2d 479, 480, 133 P.2d 398* ; *Wadey v. Justice Court (1959) 176 Cal. App. 2d 426, 428-429, 1 Cal. Rptr. 382]* .

The rule requiring a petitioner to show the lack of another legal remedy is not jurisdictional, but rather is a rule of procedure, the application of which is committed to the sound discretion of the court [*McKannay v. Horton (1907) 151 Cal. 711, 716, 91 P. 598* ; *see also Phelan v. Superior Court (1950) 35 Cal. 2d 363, 366, 217 P.2d 951* ; *Running Fence Corp. v. Superior Court (1975) 51 Cal. App. 3d 400, 408, 124 Cal. Rptr. 339]* . The issue of the adequacy of other remedies is a question of fact; thus, its determination is largely within the court's discretion and depends on the particular circumstances of the case [*Barnard v. Municipal Court (1956) 142 Cal. App. 2d 324, 326, 298 P.2d 679* ; *La Mar v. Superior Court (1948) 87 Cal. App. 2d 126, 131-132, 196 P.2d 98* ; *San Francisco v. Superior Court (1928) 94 Cal. App. 318, 320, 271 P. 121]* .

Ordinarily, a writ of mandate is not a proper remedy when the relief sought by the petitioner can be obtained in any of the following ways:

- In an action for damages [*ABI, Inc. v. City of Los Angeles (1984) 153 Cal. App. 3d 669, 687-688, 200 Cal. Rptr. 563* ; *Wenzler v. Municipal Court (1965) 235 Cal. App. 2d 128, 132-133, 45 Cal. Rptr. 54* ; *Johnston v. State Comp. Ins. Fund (1940) 41 Cal. App. 2d 516, 517, 107 P.2d 102* ; *Coombs v. Smith (1936) 17 Cal. App. 2d 454, 455, 62 P.2d 380]* .

- In a special statutory action, proceeding or hearing [*see, e.g., Sherman v. Quinn (1948) 31 Cal. 2d 661, 665, 192 P.2d 17* (action for refund of taxes improperly collected); *Donnellan v. Hite (1956) 139 Cal. App. 2d 43, 45, 293 P.2d 158* (special proceeding for order preventing error in printing of election ballot); *Rhode Island Ins. Co. v. Downey (1949) 95 Cal. App. 2d 220, 247, 212 P.2d 965* (hearing required in proceeding for order authorizing seizure of insolvent insurer)].

- By means of another extraordinary writ [*see, e.g., Klose v. Superior Court (1950) 96 Cal. App. 2d 913, 925-926, 217 P.2d 97* (writ of quo warranto); *Nider v. City Commission (1939) 36 Cal. App. 2d 14, 26, 97 P.2d 293* (writ of review)].

- When another statutory remedy is available [*Barratt American, Inc. v. City of Rancho Cucamonga (2005) 37 Cal. 4th 685, 704-705, 37 Cal. Rptr. 3d 149, 124 P. 3d 719* (Mitigation Fee Act [*Gov. Code §§ 66000-66025*], provided adequate legal remedy under *Gov. Code § 66016* for developer to challenge building permit fees and therefore mandamus was not available for the same challenge)].

- Tax refund litigation (*Little v. Los Angeles County Assessment Appeals Board (2007) 155 Cal. App. 4th 915, 922-924* , 66 Cal. Rtpr. 3d 401 (challenge to assessment of real property could not be brought using ordinary mandamus under *Code Civ. Proc. § 1085* because there is an adequate remedy at law in paying the taxes owed and filing a lawsuit in the superior court for a refund of taxes paid; mandamus can not be used to prevent or enjoin the collection of taxes under *Cal Const. Art. 13, § 32*).

Mandate usually is not precluded, however, simply because the petitioner can obtain a comparable remedy in an action for declaratory or injunctive relief [*California Teachers Assn. v. Nielsen (1978) 87 Cal. App. 3d 25, 28-29, 149 Cal. Rptr. 728* ; *County of Los Angeles v. State Dep't of Public Health (1958) 158 Cal. App. 2d 425, 446, 322 P.2d 968* ; *Brock v. Superior Court (1952) 109 Cal. App. 2d 594, 603, 241 P.2d 283]* .

[3] Exhaustion of Administrative Remedies

Before seeking relief in a mandate proceeding, the petitioner must exhaust available administrative remedies [*Ralph's Chrysler-Plymouth v. New Car Dealers Policy & Appeals Bd. (1973) 8 Cal. 3d 792, 794, 106 Cal. Rptr. 169, 505 P.2d 1009* ; *Temescal Water Co. v. Dept. of Public Works (1955) 44 Cal. 2d 90, 106, 280 P.2d 1* ; *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 292, 109 P.2d 942; Richards v. Dep't of Alcoholic Beverage Control (2006) 139 Cal. App. 4th 304, 309, 42 Cal. Rptr. 3d 782 (restaurant owner's failure to apply for transfer of license or for original license when he purchased restaurant was a failure to exhaust administrative remedies that precludes his lawsuit challenging the department's revocation of an alcoholic beverage license issued to the prior owner)]* . This requirement applies in both administrative mandate proceedings [*Ralph's Chrysler-Plymouth v. New Car Dealers Policy & Appeals Bd. (1973) 8 Cal. 3d 792, 794, 106 Cal. Rptr. 169, 505 P.2d 1009* ; *Temescal Water Co. v. Dept. of Public Works (1955) 44 Cal. 2d 90, 106, 280 P.2d 1]* and ordinary mandate proceedings [*see Horack v. Franchise Tax Board (1971) 18 Cal. App. 3d 363, 368, 95 Cal. Rptr. 717]* .

The California Supreme Court affirmed the dismissal of a lawsuit brought against the Regents of the University of California by a former employee who had been terminated. The employee challenged the termination claiming that it was retaliatory in violation of *Gov. Code § 12653* and *Labor Code § 1102.5*, which provide protection for so called "whistleblowers," that is employees who disclose wrongdoing by their employers and are fired from employment as a result. The court held that the former employee's lawsuit was barred because the employee failed to exhaust administrative remedies before filing her lawsuit. Specifically, the court held that the former employee failed to exhaust required university internal administrative remedies (filing a grievance under UCSF's policies and procedures for reporting improper governmental activities) before filing her lawsuit [*Campbell v. Regents of Univ. of Cal. (2005) 35 Cal. 4th 311, 317-318, 25 Cal. Rptr. 3d 320, 106 P.3d 976]* .

This requirement must be met for the court to have subject matter jurisdiction; it is not merely a procedural rule subject to the discretion of the court [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 292, 109 P.2d 942* ; *Horack v. Franchise Tax Board (1971) 18 Cal. App. 3d 363, 368, 95 Cal. Rptr. 717* ; *People v. Coit Ranch, Inc. (1962) 204 Cal. App. 2d 52, 57, 21 Cal. Rptr. 875* ; *Yamaha Motor Corp. v. Superior Court (1986) 185 Cal. App. 3d 1232, 230 Cal. Rptr. 382* ; *Barnes v. State Farm Mut. Auto. Ins. Co. (1993) 16 Cal. App. 4th 365, 380-381, 20 Cal. Rptr. 2d 87* ; *Wright v. State (2004) 122 Cal. App. 4th 659, 664-665, 19 Cal. Rptr. 3d 92]* and cannot be waived by the parties' stipulation or consent [*Noonan v. Green (1969) 276 Cal. App. 2d 25, 31, 80 Cal. Rptr. 513]* , or by a party's failure to raise it [*People v. Coit Ranch, Inc. (1962) 204 Cal. App. 2d 52, 57, 21 Cal. Rptr. 875* ; *but see* *Doster v. County of San Diego (1988) 203 Cal. App. 3d 257, 260, 251 Cal. Rptr. 507* (exhaustion of administrative remedies is a fundamental rule of procedure, but it is not a condition of jurisdiction); *Green v. City of Oceanside (1987) 194 Cal. App. 3d 212, 220-223, 239 Cal. Rptr. 470* (exhaustion of administrative remedies is merely procedural requirement that may be waived); for discussion of *Green, see* Ch. 474A, *Timing of Judicial Review of Agency Decisions*].

The exhaustion requirement is judicially created [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 292, 109 P.2d 942]* , and applies even if the controlling statutes do not expressly make exhaustion of administrative remedies a condition of judicial relief [*Woodard v. Broadway Fed. S. & L. Assn. (1952) 111 Cal. App. 2d 218, 221, 244 P.2d 467* ; *A. Teichert & Son, Inc. v. State of Cal. (1965) 238 Cal. App. 2d 736, 746, 48 Cal. Rptr. 225]* . The purpose of the rule is to lighten the workload of overburdened courts by requiring litigants to initially resort to administrative proceedings that may afford the remedies sought, thus obviating the need for judicial proceedings [*Bozaich v. State of California (1973) 32 Cal. App. 3d 688, 698, 108 Cal. Rptr. 392* ; *Morton v. Superior Court (1970) 9 Cal. App. 3d 977, 982, 88 Cal. Rptr. 533]* . Exhaustion of administrative remedies requirements for an employee to bring employment discrimination claims against the county employer requires that the employee obtain a right to sue letter from the EEOC as a prerequisite to filing a lawsuit bringing Title VII claims against the county. It is not sufficient for the employee plaintiff to have obtained a right to sue letter from the State Department of Fair Employment and Housing to file a lawsuit that includes Title VII claims [*Roman v. County of Los Angeles (2000) 85 Cal. App. 4th 316, 325-326, 102 Cal. Rptr. 2d 13]* .

Prisoners must exhaust administrative remedies before seeking judicial relief. A prisoner who sued the Department of Corrections for medical malpractice, and failure to furnish medical care, failed to complete the prison administrative review process before filing his lawsuit. As a result, his court claim was barred by failure to exhaust administrative remedies. The court noted a number of policies furthered by the exhaustion requirements including "bolstering administrative autonomy, mitigating damages, giving agencies the opportunity to make factual findings, encouraging settlement, filtering out frivolous claims, fostering better prepared litigation, and promoting judicial economy" [*Wright v. State (2004) 122 Cal. App. 4th 659, 666-667, 19 Cal. Rptr. 3d 92]* . Prison administrative remedies must be exhausted even though the prisoner could not recover damages except by going to court. Substantial compliance is not enough. The prisoner must complete all three levels of prison administrative review of his grievances [*Wright v. State (2004) 122 Cal. App. 4th 659, 667-668, 19 Cal. Rptr. 3d 92]* .

The exhaustion of administrative remedies requirement applies not only to the overall claim for relief made by a petitioner, but to individual contentions and issues raised in support of that claim. In general, a contention or issue that is not raised at the administrative level may not be considered in a subsequent mandate proceeding [*Gilroy Citizens for Responsible Planning v. City of Gilroy (2006) 140 Cal. App. 4th 911, 919-921, 45 Cal. Rptr. 3d 102* (citizens group failed to raise certain issues during public comment period for environmental impact report, and therefore failed to meet issue exhaustion requirements for exhaustion of administrative remedies; citizens group raised other issues in public comment period, and those issues can be raised in court challenge to adequacy of EIR, but not the issues that were not raised in public comment period); *Evans v. City of San Jose (2005) 128 Cal. App. 4th 1123, 1137-1138, 27 Cal. Rptr. 3d 675* (issue exhaustion requirement avoids unnecessary litigation, provides a more complete record for judicial review and ensures that agency expertise is utilized. Citizens who participate in city redevelopment hearings are not held to the same high standard as are lawyers in specific proceedings, but citizens have to be specific enough in raising issues

before the city so that the city has the opportunity to respond to that issue prior to judicial review. A response that is too general will not satisfy the issue exhaustion requirement); *Hobson v. Raychem Corporation (1999) 73 Cal. App. 4th 614, 630-632, 86 Cal. Rptr. 2d 497* (exhaustion of administrative remedies requirement not satisfied when an employee failed to file an administrative charge specifically identifying the alleged discrimination that provided the basis for the later lawsuit); *Pegues v. Civil Service Com. (1998) 67 Cal. App. 4th 95, 103-104, 78 Cal. Rptr. 2d 705* ; *NBS Imaging Systems, Inc. v. State Bd of Control (1997) 60 Cal. App. 4th 328, 336-337, 70 Cal. Rptr. 2d 237* ; *American Alliance Ins. Co. v. State Bd. of Equalization (1982) 134 Cal. App. 3d 601, 609, 184 Cal. Rptr. 674* ; *Griswold v. Mt. Diablo Unified Sch. Dist. (1976) 63 Cal. App. 3d 648, 652-653, 134 Cal. Rptr. 3* ; *Savoy Club v. Boardof Supervisors (1970) 12 Cal. App. 3d 1034, 1042, 91 Cal. Rptr. 198]* . Issue exhaustion requirements also compel the plaintiff to raise issues at successive stages of the administrative process to preserve those issues for later judicial review. Thus, a litigant who raises an issue before the first administrative agency that can consider the issue, but who fails to raise that same issue in an administrative appeal to an administrative agency that has final decision making authority, has not satisfied issue exhaustion requirements and cannot raise that same issue on judicial review [*Tahoe Vista Concerned Citizens v. County of Placer (2000) 81 Cal. App. 4th 577, 589-590, 96 Cal. Rptr. 2d 880]* . However, the exhaustion requirement is met when the allegations in a civil lawsuit are similar to or reasonably related to the charges presented to the agency [*Soldinger v. Northwest Airlines, Inc. (1996) 51 Cal. App. 4th 345, 381-383, 58 Cal. Rptr. 2d 747* (discrimination charges brought by plaintiff employee before DFEH agency that were later the basis of a civil lawsuit)]. Similarly, an appealing party satisfied exhaustion requirements even though it was not a formal applicant in the administrative proceeding, when its business partner did exhaust administrative remedies before the agency as to issues that the appealing party was raising on appeal [*CAT Partnership v. County of Santa Cruz (1998) 63 Cal. App. 4th 1071, 1080-1081, 74 Cal. Rptr. 2d 652]* . Issue exhaustion requirements did not have to be satisfied under *Pub. Res. Code Section 21177(b)* (requiring raising of objection during public comment period or during public hearing as prerequisite to challenging approval in court) to challenge agency approval of sales agreement because the agency decision to give approval was not a project within the requirements of CEQA, and the CEQA process of preparation of an EIR would take place after the date of the approval agreement [*Concerned McCloud Citizens v. McCloud Community Services District (2007) 147 Cal. App. 4th 181, 189-191, 54 Cal. Rptr. 3d 1]* .

An agency's grievance procedures satisfy due process requirements for exhaustion of administrative remedies in that the remedy is constitutionally adequate by providing reasonable notice and opportunity to be heard. Neither the lack of subpoena power nor the advisory nature of the decision of the hearing body make the procedures inadequate in due process terms [*Bockover v. Perko (1994) 28 Cal. App. 4th 479, 487-488, 34 Cal. Rptr. 2d 423]* .

To satisfy the requirement of exhaustion of administrative remedies, a petitioner must not only institute all available administrative proceedings, but must pursue them to completion and receive a final determination on the merits [*McHugh v. County of Santa Cruz (1973) 33 Cal. App. 3d 533, 538-539, 109 Cal. Rptr. 149* ; *Fiscus v. Dept. Alcoholic Bev. Control (1957) 155 Cal. App. 2d 234, 236, 317 P.2d 993]* . When applicable statutes and regulations provide for an interagency or intra-agency appeal of an initial administrative decision, the petitioner must take the appeal [*see, e.g., Lynn v. Duckel (1956) 46 Cal. 2d 845, 849-850, 299 P.2d 236* ; *Vernon & Vernons, Ltd. v. County of Los Angeles (1981) 115 Cal. App. 3d 943, 945-946, 171 Cal. Rptr. 785* ; *Grant v. Superior Court (1978) 80 Cal. App. 3d 606, 609, 145 Cal. Rptr. 699]* .

When a statute specifies that reconsideration or rehearing of an adverse decision of an agency *may* be sought by an affected party, reconsideration is not *required* prior to seeking judicial review, at least with respect to issues litigated before and finally decided by the agency. Reconsideration is required only when raising issues not previously presented to the agency [*Sierra Club v. San Joaquin LAFCO (1999) 21 Cal. 4th 489, 493-494,87 Cal. Rptr. 2d 702, 981 P.2d 543]* . Statutory provisions consistent with this rule include the following:

- *Gov. Code § 11523* expressly provides that failure to seek reconsideration of an administrative decision governed by the Administrative Procedure Act shall not affect the right to petition for mandate.

- Provisions similar to those in *Gov. Code § 11523* exist in a number of statutes specifically applicable to other administrative proceedings [*see, e.g., Gov. Code § 19588* (failure to seek rehearing before State Personnel Board decision shall not affect right to petition for mandate)].

A litigant's contentions need not be presented to the administrative entity in the most precise or effective manner [*Graham v. Bryant (1954) 123 Cal. App. 2d 66, 70, 266 P.2d 44* ; *see also Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo (1985) 172 Cal. App. 3d 151, 163, 217 Cal. Rptr. 893]* . Exhaustion of administrative remedies requirements were satisfied when litigants adequately presented the specific grounds for non-compliance with CEQA issue to the agency before the close of the public hearing [*State Water Resources Control Board Cases (2006) 136 Cal. App. 4th 674, 793-795, 39 Cal. Rptr. 3d 189]* . A litigant's deliberate refusal to participate in a scheduled hearing, however, is deemed a failure to exhaust an administrative remedy and precludes the litigant from obtaining judicial review of a decision made in that hearing [*Doyle v. City of Chino (1981) 117 Cal. App. 3d 673, 681, 172 Cal. Rptr. 844]* .

Gov. Code § 18671.1 specifies that the State Personnel Board must decide appeals from an employee of a departmental disciplinary action within specified time limits (90 days or six months). If the Board fails to reach a decision within the time limits, the statute deems administrative remedies to be exhausted, but the Board does not lose jurisdiction over the appeal because the time limit is directory not mandatory [*California Correctional Peace Officers Assn. v. State Personnel Bd. (1995) 10 Cal. 4th 1133, 1138, 43 Cal. Rptr. 2d 693, 899 P.2d 79]* .

However, when the employee has not waived the time limit for decision, the employee may seek judicial review by writ of mandate against the Board to compel the Board to decide that appeal by a specified date. Alternatively, the employee may seek judicial review by writ of mandate against the employing agency to set aside the adverse action. If the Board reaches a decision while the mandate proceeding against the employing agency is pending, the employee may, but is not required to, dismiss the mandate proceeding and seek review of the Board's decision by petition for a writ of administrative mandate under *Code Civ. Proc. § 1094.5* [*California Correctional Peace Officers Assn. v. State Personnel Bd. (1995) 10 Cal. 4th 1133, 1138-1139, 43 Cal. Rptr. 2d 693, 899 P.2d 79]* . State civil service employees who brought employment discrimination claims under California Fair Employment and Housing Act, *Gov. Code § 12900*, had the choice of whether to exhaust administrative remedies with the State Personnel Board (Board), or of exhausting administrative remedies by filing a claim with the Department of Fair Employment and Housing (DFEH). Employees filed a claim with DFEH, and received a right to sue letter. Employees were held to have exhausted administrative remedies requirements by filing claim with DFEH, and were not required to also pursue administrative remedies with Board [*Ruiz v. California Department of Corrections (2000) 77 Cal. App. 4th 891, 896-898, 92 Cal. Rptr. 2d 139]* .

Plaintiff former employee's lawsuit against the City of Los Angeles asserting FEHA claims of employment discrimination due to physical disability by the city against plaintiff was not barred by the Plaintiff's failure to exhaust internal grievance remedies provided under the Los Angeles city charter. Plaintiff had exhausted FEHA administrative remedies by obtaining a "right to sue" letter from the DFEH, and that was sufficient. Plaintiff was not required to exhaust both sets of administrative remedies as a precondition to filing his FEHA lawsuit in court. The court's rationale for the holding included reasons: 1) FEHA preemption of local government laws, 2) public employees have the same rights under FEHA as private employees, and 3) public employees have a choice between pursuing the internal grievance remedies provided by their governmental employer, or choosing the FEHA remedies, with a right to sue letter, and a civil lawsuit [*Schifando v. City of Los Angeles (2003) 31 Cal. 4th 1074, 1082-1090, 6 Cal. Rptr. 3d 457, 79 P.3d 569]* .

A former employee of Los Angeles County Probation Department brought a disability discrimination claim against her employer. She filed a grievance with the County Civil Service Commission and completed the hearing process, and the hearing officer issued a decision that was adverse to her claims. While she challenged the hearing office recommended findings before the Commission, she did not file a petition for a writ of administrative mandate to overturn the

Commission's final decision. Rather, she filed a complaint for discrimination with the Department of Fair Employment and Housing (DFEH), received a right-to-sue letter, and then filed a civil lawsuit against the Probation Department for disability discrimination in violation of the FEHA [*Gov. Code § 12940(a)*]. Her civil lawsuit was filed before the Commission had issued a final decision in her grievance action. The Court of Appeal held that the employee's FEHA lawsuit was barred because she failed to exhaust administrative and judicial remedies by failing to file a petition for a writ of administrative mandate to challenge the commission's final decision [*Page v. Los Angeles Cty. Probation Dept. (2004) 123 Cal. App. 4th 1135, 1142-1143, 20 Cal. Rptr. 3d 598]* . In so holding, the Court of Appeal cited and relied upon California Supreme Court decisions in *Johnson v. City of Loma Linda (2000) 24 Cal. 4th 61, 72, 5 P.3d 874* and *Schifando v. City of Los Angeles (2003) 31 Cal. 4th 1074, 1088, 6 Cal. Rptr. 3d 457, 79 P.3d 569]* . The Court of Appeal noted that the employee made a choice as to the forum to assert her discrimination claims, the civil service commission, but failed to exhaust the administrative and judicial remedies related to that forum [*Page v. Los Angeles Cty. Probation Dept. (2004) 123 Cal. App. 4th 1135, 1142-1143, 20 Cal. Rptr. 3d 598]* . Rather, the employee entered the "procedural minefield" of pursuing one administrative remedy, the civil service commission process, and then in midstream choosing the other administrative remedy, a FEHA claim, without properly exhausting the administrative and judicial remedies associated with the civil service commission process [*Page v. Los Angeles Cty. Probation Dept. (2004) 123 Cal. App. 4th 1135, 1142-1143, 20 Cal. Rptr. 3d 598]* .

Similarly, an employee of the Housing Authority of the City of Los Angeles (HACLA) who was terminated from employment had the choice of pursuing the internal administrative remedies provided by HACLA, or pursuing the FEHA administrative remedy, before filing a civil lawsuit alleging disability discrimination in violation of the FEHA statute [*Williams v. Housing Auth. of City of Los Angeles (2004) 121 Cal. App. 4th 708, 720-721, 17 Cal. Rptr. 3d 374]* . Furthermore, that employee is not required to exhaust administrative remedies to bring a FEHA-related non-statutory claim (wrongful termination based on public policy) when an agency decision on the FEHA-related claim could have preclusive effect on the FEHA statutory claim [*Williams v. Housing Auth. of City of Los Angeles (2004) 121 Cal. App. 4th 708, 727-728, 17 Cal. Rptr. 3d 374]* .

The California Court of Appeal held that former employees of a private employer had to comply with notice and exhaustion requirements of *Labor Code § 2699.3(a)* before filing civil law suits for civil penalties under *Labor Code § 2698*, but that those employees claims for unpaid wages, and for statutory penalties paid to the employee, could be brought to court in a civil lawsuit without the employees having to comply with the same notice and exhaustion requirements [*Caliber Bodyworks, Inc. v. Superior Court (2005) 134 Cal. App. 4th 365, 371-372, 36 Cal. Rptr. 3d 31]* .

Failure to exhaust administrative remedies is not excused by parties' lack of legal representation nor by incorrect advice as to required procedures by agency officials [*Park Area Neighbors v. Town of Fairfax (1994) 29 Cal. App. 4th 1442, 1450-1451, 35 Cal. Rptr. 2d 334]* . Motorist's failure to request a hearing within ten (10) days to challenge a driver's license suspension under the provisions of *Veh. Code § 13558*, constitutes a failure to exhaust administrative remedies that precludes judicial review of the suspension decision by the DMV [*Marquez v. Gourley (2002) 102 Cal. App. 4th 710, 712-714, 125 Cal. Rptr. 2d 784]* . A physician was not excused from completing a hospital peer review process before filing a tort lawsuit and seeking damages in the Superior Court because the hospital failed to start the hearing within the required 60-day time period. Failure to start on time does not make an administrative remedy inadequate or unavailable. Further, the physician was required to raise the issue of hearing officer bias before the hearing officer first [*Kaiser Foundation Hospitals v. Sacramento Superior Court (2005) 128 Cal. App. 4th 85, 91, 26 Cal. Rptr. 3d 744]* . For further discussion of the rule requiring exhaustion of administrative remedies, see Ch. 474A, *Timing of Judicial Review of Agency Decisions* .

[4] When Exhaustion of Administrative Remedies Is Not Required

[a] Claim That Administrative Entity Lacks Subject Matter Jurisdiction Under Governing Statutes

Judicial relief is not precluded under the exhaustion doctrine by a failure to seek a possible administrative remedy if the constitutional provisions or statutes under which the administrative agency operates do not vest it with subject matter jurisdiction over the type of claim or controversy at issue [*County of Alpine v. County of Tuolumne (1958) 49 Cal. 2d 787, 798, 322 P.2d 449* ; *County of Los Angeles v. Dept. of Social Welfare (1953) 41 Cal. 2d 455, 457, 260 P.2d 41* ; *Residents for Adequate Water v. Redwood Water District (1995) 34 Cal. App. 4th 1801, 1807-1808, 41 Cal. Rptr. 2d 123]* . Compliance with the exhaustion requirement will not be excused, however, because a petitioner claims that the controlling statutes did not empower the agency to act under the facts of a particular case [*United States v. Superior Court (1941) 19 Cal. 2d 189, 194-195, 120 P.2d 26* ; *Metcalf v. County of Los Angeles (1944) 24 Cal. 2d 267, 270-273, 148 P. 2d 645* ; *McAllister v. County of Monterey (2007) 147 Cal. App. 4th 253, 284-286, 54 Cal. Rptr. 3d 116* ; *People v. Sonleitner (1960) 185 Cal. App. 2d 350, 363-365, 8 Cal. Rptr. 528]* .

The administrative jurisdiction exception to exhaustion of administrative remedies was held to be applicable to the issue of the proper limitations period for bringing unfair labor practice claims before the Public Employee Relations Board (PERB). The California Supreme Court excused the District from adjudicating the limitations issue before PERB, and allowed the District to go to court to resolve this issue. In applying the administrative jurisdiction exception, the Supreme Court utilized a three-part test: 1) the injury or burden that exhaustion will impose; 2) the strength of the legal argument that the agency lacks jurisdiction; and 3) the extent to which administrative expertise may aid in resolving the jurisdictional issue. The Court held that as to the first factor, while the district would not be unduly burdened by having to exhaust administrative remedies, there was a strong public interest in definitively resolving the legal issue presented. As to the second factor, the District's legal argument is very strong. As to the third factor, the issue before the court are purely legal, within court expertise, and the court had the benefit of PERB's views on the issues in the case in the appellate briefs it filed with the Court [*Coachella Valley Mosquito & Vector Control Dist. v. Cal. Pub. Emp. Relations Bd. (2005) 35 Cal 4th 1072, 1081-1083, 29 Cal. Rptr. 3d 234, 112 P. 3d 623]* .

The administrative jurisdiction exception to exhaustion of administrative remedies did not apply to excuse failure to exhaust administrative remedies by a challenger to a coastal development permit who failed to appeal to the California Coastal Commission a county decision to grant the permit to a neighboring landowner. The challenger argued that the county action was void and therefore exhaustion was not required, but the court of appeal rejected that argument and held that exhaustion is required for as applied challenges to agency action based on voidness. The Coastal Commission had jurisdiction over this type of dispute at the appellate level [*McAllister v. County of Monterey (2007) 147 Cal. App. 4th 253, 284-286, 54 Cal. Rptr. 3d 116]* .

[b] Challenge to Constitutionality of Governing Statutes

A litigant who claims that a statute under which an administrative agency operates is unconstitutional on its face may raise the claim in a judicial proceeding to review an order or decision of the agency, even if it was not raised at the administrative level [*State of California v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 251, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *Andal v. City of Stockton (2006) 137 Cal. App. 4th 86, 93-94, 40 Cal. Rptr. 3d 34* (constitutional challenge brought by cell phone companies and their customers to challenge constitutionality of city ordinance imposing local government fee on cell phone users to fund city's 911 communication system. Administrative remedies need not be exhausted to raise constitutional challenge in court); Nissan Motor Corp. v. New Motor Vehicle *Bd. (1984) 153 Cal. App. 3d 109, 115, 202 Cal. Rptr. 1* ; *Hand v. Board of Examiners (1977) 66 Cal. App. 3d 605, 617-620, 136 Cal. Rptr. 187]* . However, this exception does not apply to a claim that a governing statute is unconstitutional as applied to the facts of a particular case [*Security First Nat. Bk. v. County of Los Angeles (1950) 35 Cal. 2d 319, 321, 217 P.2d 946* ; *Griswold v. Mt. Diablo Unified Sch. Dist. (1976) 63 Cal. App. 3d 648, 652-653, 134 Cal. Rptr. 3* ; *Savoy Club v. Board of Supervisors (1970) 12 Cal. App. 3d 1034, 1042, 91 Cal. Rptr. 198* ; *but see Anderson v. Department of Real Estate (1979) 93 Cal. App. 3d 696, 701 n.2, 155 Cal. Rptr. 307]* , and is subject to a number of other important qualifications [*see* Ch. 474A, *Timing of Judicial Review of Agency Decisions*].

[c] Administrative Remedy Is Inadequate or Unavailable

Exhaustion of an administrative remedy is not required when the administrative remedy is inadequate or is unavailable to the petitioner [*Ramos v. County of Madera (1971) 4 Cal. 3d 685, 691, 94 Cal. Rptr. 421, 484 P.2d 93* ; *Endangered Habitats League, Inc. v. State Water Resources Control Board (1998) 63 Cal. App. 4th 227, 237-238, 73 Cal. Rptr. 2d 388* ; *Daniels v. Shasta-Tehama-Trinity J. Community College Dist. (1989) 212 Cal. App. 3d 909, 927, 260 Cal. Rptr. 867* ; *Diaz v. Quitoriano (1969) 268 Cal. App. 2d 807, 812, 74 Cal. Rptr. 358* ; *Martino v. Concord Community Hosp. Dist. (1965) 233 Cal. App. 2d 51, 56, 43 Cal. Rptr. 255]* . For example, a petitioner is not required to submit a claim to an administrative body that is unable to directly grant relief because it only has the power to render advisory decisions [*Pearson Candy Co. v. Waits (1946) 27 Cal. 2d 615, 619, 165 P.2d 674* ; *James v. Marinship Corp. (1944) 25 Cal. 2d 721, 744-745, 155 P.2d 329* ; *Pasillas v. Agricultural Labor Relations Bd. (1984) 156 Cal. App. 3d 312, 358-359, 202 Cal. Rptr. 739]* .

The mere possibility that the petitioner may be able to obtain some relief from an administrative entity is not sufficient to require the satisfaction of the exhaustion doctrine; a clearly defined set of procedures must exist under which the petitioner is entitled to submit the claim at issue and have it evaluated and resolved [*Rosenfield v. Malcolm (1967) 65 Cal. 2d 559, 566-567, 55 Cal. Rptr. 505, 421 P.2d 697* ; *City of Coachella v. Riverside County Airport Land Use Com. (1989) 210 Cal. App. 3d 1277, 1287-1288, 258 Cal. Rptr. 795* ; *Diaz v. Quitoriano (1969) 268 Cal. App. 2d 807, 813, 74 Cal. Rptr. 358* ; *see also Martino v. Concord Community Hosp. Dist. (1965) 233 Cal. App. 2d 51, 56-57, 43 Cal. Rptr. 255]* . For example, an insured was not required to exhaust administrative remedies under CAARP (California Automobile Assigned Risk Plan) [*Ins. Code § 11620*] before filing a bad faith lawsuit against an insurer because the CAARP regulatory scheme does not provide a remedy to resolve disputes relating to claims for benefits [*Hightower v. Farmers Ins. Exchange (1995) 38 Cal. App. 4th 853, 860-861, 45 Cal. Rptr. 2d 348]* . Termination of doctor's hospital staff privileges for cause was challenged by doctor because of lack of a pre-termination hearing. The court of appeal concluded that physician had a due process and statutory [*Bus. & Prof. Code § 809*] right to a pre-termination hearing before staff privileges could be terminated [*Sahlolbei v. Providence Healthcare, Inc. (2003) 112 Cal. App. 4th 1137, 1147-1150, 5 Cal. Rptr. 3d 598]* . The Court of Appeal held that physician was entitled to a preliminary injunction reinstating staff privileges until the required hearing procedures were completed [*Sahlolbei v. Providence Healthcare, Inc. (2003) 112 Cal. App. 4th 1137, 1160, 5 Cal. Rptr. 3d 598]* . The court also held that physician did not have to exhaust internal hospital grievance procedures, including a post-termination procedure to assert a claim that the hospital failed to follow hearing procedures required by law (statutory procedures codified under *Bus & Prof. Code § 809*) [*Sahlolbei v. Providence Healthcare, Inc. (2003) 112 Cal. App. 4th 1137, 1154-1155, 5 Cal. Rptr. 3d 598* ; *Payne v. Anaheim Mem'l Med. Ctr. (2005) 130 Cal. App. 4th 729, 739, 30 Cal. Rptr. 3d 230* (hospital bylaws did not provide for an internal grievance hearing to remedy doctor's complaint about discriminatory comments; therefore hospital administrative remedies did not have to be exhausted because there was no such remedy)].

An administrative remedy must have some procedures to be considered adequate. The absence of any internal remedies means that there is not an adequate administrative remedy [*Life Care Ctrs. of Cal. v. CalOptima (2005) 133 Cal. App. 4th 1169, 11771178, 35 Cal. Rptr. 3d 387* ; *Unfair Fire Tax Com. v. City of Oakland (2006) 136 Cal. App. 4th 1424, 1429-1431, 39 Cal. Rptr. 3d 701* (city ordinance did not provide adequate administrative remedy because the ordinance had no procedural mechanisms for submission, evaluation, and resolution of the appeal specified under the ordinance; so, litigant is not required to exhaust that remedy and can file lawsuit)]. This exception is discussed in greater detail in Ch. 474A, *Timing of Judicial Review of Agency Decisions*.

[d] Pursuit of Administrative Remedy Is Futile

A petitioner is not required to pursue an administrative remedy when it is reasonably certain that the decision of the administrative entity will be adverse [*Eldridge v. City of Palo Alto (1976) 57 Cal. App. 3d 613, 633, 129 Cal. Rptr. 575* (when city rezoned geographical area in which petitioner's land was located to change minimum size of parcel required for building from 1 to 10 acres for specific purpose of creating open-space area, petitioners were not required to apply for variance allowing construction on one-acre parcels before seeking review of zoning ordinance); *Ogo*

Associates v. City of Torrance (1974) 37 Cal. App. 3d 830, 834, 112 Cal. Rptr. 761 (when city rezoned petitioner's property to limit it to manufacturing uses for express purpose of preventing petitioner from constructing low-income housing, petitioner not required to apply for variance before commencing mandate action to compel city to set aside); *cf. Gantner & Mattern Co. v. California E. Com. (1941) 17 Cal. 2d 314, 318, 109 P.2d 932* (dicta acknowledging exception)]. Conversely, if the petitioner cannot show that the agency decision is reasonably certain to be adverse, the futility exception does not apply [*Sea & Sage Audubon Society, Inc. Planning Comm. (1983) 34 Cal. 3d 412, 418-419, 194 Cal. Rptr. 357, 668 P.2d 664* ; *Economic Empowerment Foundation v. Quackenbush (1997) 57 Cal. App. 4th 677, 692, 67 Cal. Rptr. 2d 323]* . However, the futility of pursuing a particular claim before an administrative entity cannot be established by merely showing that the entity has ruled adversely on claims or contentions similar to the petitioner's in other cases [*Gantner & Mattern Co. v. California E. Com. (1941) 17 Cal. 2d 314, 318, 109 P.2d 932* ; *Mountain View Chamber of Commerce v. City of Mountain View (1978) 77 Cal. App. 3d 82, 92-93, 143 Cal. Rptr. 441* ; *In re Serna (1978) 76 Cal. App. 3d 1010, 1014, 143 Cal. Rptr. 350]* . The petitioner must make a showing of some declaration or conduct on the part of the entity that positively demonstrates that the entity has taken an adverse position on the particular application or claim asserted by petitioner [*Gantner & Mattern Co. v. California E. Com. (1941) 17 Cal. 2d 314 318, 109 P.2d 932* ; *see also Mountain View Chamber of Commerce v. City of Mountain View (1978) 77 Cal. App. 3d 82, 92-93, 143 Cal. Rptr. 441]* . The futility exception is discussed in greater detail in Ch. 474A, *Timing of Judicial Review of Agency Decisions*.

[e] Petitioner Is Threatened With Irreparable Injury

Failure to exhaust an administrative remedy may be excused when pursuing the administrative remedy would result in irreparable injury to the petitioner [*Greenblatt v. Munro (1958) 161 Cal. App. 2d 596, 606-607, 326 P.2d 929* ; *cf. United States v. Superior Court (1941) 19 Cal. 2d 189, 196, 120 P.2d 26* (dicta acknowledging rule)]. The scope of this exception, however, is severely restricted [*In re Serna (1978) 76 Cal. App. 3d 1010, 1014-1015, 143 Cal. Rptr. 350* (exception is not applicable even if administrative action at issue constitutes direct, immediate, and irremediable infringement on religious beliefs and practices); *Humbert v. Castro Valley County Fire Protection Dist. (1963) 214 Cal. App. 2d 1, 6, 29 Cal. Rptr. 158* (exception applies only to cases in which rate order of regulatory commissions imposes a confiscatory rate on a public utility)]. The irreparable injury exception is discussed in greater detail in Ch. 474A, *Timing of Judicial Review of Agency Decisions*.

[f] Application of Rule Is Contrary to Public Interest

A few California decisions have excused failures to exhaust available administrative remedies on the ground that application of the exhaustion doctrine under the facts presented would be contrary to some important public interest [*Lindeleaf v. Agricultural Labor Relations Bd. (1986) 41 Cal. 3d 861, 870-871, 226 Cal. Rptr. 119, 718 P.2d 106* ; *Hull v. Cason (1981) 114 Cal. App. 3d 344, 358-359, 171 Cal. Rptr. 14* ; *Environmental Law Fund, Inc. v. Town of Corte Madera (1975) 49 Cal. App. 3d 105, 114, 122 Cal. Rptr. 282]* . For further discussion of the "public interest" exception applied in these cases, see Ch. 474A, *Timing of Judicial Review of Agency Decisions* .

[g] Concurrent Primary Jurisdiction

When the legislature has vested concurrent original jurisdiction over a particular type of claim or controversy in the courts and an administrative agency, a litigant need not apply to the administrative agency for relief before utilizing the judicial remedy [*Scripps etc. Hospital v. Cal. Emp. Com. (1944) 24 Cal. 2d 669, 673-674, 151 P.2d 109* ; *Elmore v. Imperial Irrigation Dist. (1984) 159 Cal. App. 3d 185, 192-193, 205 Cal. Rptr. 433* ; *California School Employees Assn. v. Travis Unified School Dist. (1984) 156 Cal. App. 3d 242, 249-250, 202 Cal. Rptr. 699* ; *Muir v. Steinberg (1961) 197 Cal. App. 2d 264, 269, 17 Cal. Rptr. 431]* .

The Public Utilities Commission had primary jurisdiction over issues raised in a civil lawsuit brought by plaintiffs against Pacific Gas & Electric Company for unfair business practices (*Bus & Prof. Code § 17200*, and *Bus. & Prof.*

Code § 17500], and fraud. Primary jurisdiction was not exclusive, and thus dismissal of the civil action was improper. Rather, the civil lawsuit was stayed pending further action before the PUC [*Wise v. Pacific Gas & Electric Company (2000) 77 Cal. App. 4th 287, 299-301, 91 Cal. Rptr. 2d 479]* . In a second appellate decision (Wise II), the California Court of Appeal held that the completion of a Public Utilities Commission (PUC) investigation into fraud charges against a regulated utility, Pacific Gas & Electric Company (PG&E) without the PUC reaching any decision about those charges did not have collateral estoppel effect on a related civil lawsuit claim for fraud damages brought against PG&E by consumers [*Wise v. Pacific Gas & Elec. Co. (2005) 132 Cal. App. 4th 725, 742-743, 34 Cal. Rptr. 3d 222]* . The fraud issues had been referred to the PUC under the doctrine of primary jurisdiction, and the trial court had stayed the civil lawsuit pending PUC resolution of the fraud issues. When the PUC closed its investigation, having taken no action, the trial court lifted the stay, and granted a motion for judgment on the pleadings brought by PG&E. The court of appeal reversed the judgment, and held the PUC decision to close the investigation did not have collateral estoppel effect on the civil lawsuit because there was no PUC ruling or decision on the merits, there were no parties to the proceeding, and the PUC was not acting in an adjudicatory capacity [*Wise v. Pacific Gas & Elec. Co. (2005) 132 Cal. App. 4th 725, 742-743, 34 Cal. Rptr. 3d 222]* . The Superior court properly refused to apply the primary jurisdiction doctrine and submit a lawsuit claim related to the validity of a land use under a conditional use permit to the city planning department because the issues in the lawsuit involved statutory interpretation that is appropriate for judicial resolution, and there were no issues requiring the fact finding expertise of the administrative agency [*Tenderloin Housing Clinic, Inc v. Astoria Hotel, Inc. (2000) 83 Cal. App. 4th 139, 142-143, 98 Cal. Rptr. 2d 924]* .

Primary jurisdiction doctrine did not apply to justify dismissal of lawsuit brought by customers against suppliers of telephones and telephone service suppliers for damages for improper charges assessed for monthly telephone rental service. The damage lawsuit was authorized by *Pub. Util. Code § 2106*, the lawsuit would not adversely affect the commission's decisions or orders, and the issues in the lawsuit did not require application of commission's specialized regulatory expertise to decide claims for damages [*Cundiff v. GTE California, Inc. (2002) 101 Cal. App. 4th 1395, 1412-1414,125 Cal. Rptr. 2d 445]* .

Insured had the right to file a civil lawsuit in Superior Court under the unfair competition law [*Bus. & Prof. Code §§ 17200-17210*] against an insurance company to challenge insurer's use of absence of prior insurance as a rating factor in determining eligibility for good driver discounts, and other purposes, in violation of *Ins. Code § 1861.02* (part of Proposition 103). The court of appeal rejected the argument that the Insurance Commissioner had exclusive primary jurisdiction to decide such issues, concluded that exhaustion of administrative remedies was not applicable, and upheld the right of insureds (under the provisions of *Ins. Code §§ 1861.03* and *1861.10*) to file a civil lawsuit to challenge in court such insurer practices under the UCL law [*Donabedian v. Mercury Insurance Co. (2004) 116 Cal. App. 4th 968, 986-987, 11 Cal. Rptr. 3d 45]* .

The superior court has subject matter jurisdiction under *Pub. Util. Code § 2106* to award intentional tort damages, including exemplary damages, for fraud sought in a civil lawsuit by a customer against a public utility regulated by the Public Utilities Commission (PUC) when that regulated utility engages in willful and unlawful activities. The resolution of the lawsuit and the award of damages would not violate *Pub. Util. Code § 1759* which restricts the authority of the courts, including the superior court, to review decisions or orders of the PUC. The award of damages in this lawsuit by a customer of a regulated utility would not "hinder or frustrate" the PUC's supervisory or regulatory policies [*Pink Dot, Inc. v. Teleport Communications Group (2001) 89 Cal. App. 4th 407, 417-419, 107 Cal. Rptr. 2d 392]* .

The California Court of Appeal held that the Department of Managed Health Care has concurrent jurisdiction over enforcement of the provisions of *Health & Safety Code § 1371.4*, part of the Knox-Keene Health Care Service Plan Act of 1975, and that the provisions of the statute can be privately enforced by emergency room physicians filing civil lawsuits [*Bell v. Blue Cross of Cal. (2005) 131 Cal. App. 4th 211, 216-218, 31 Cal. Rptr. 3d 688]* . The Court of Appeal also gave deference to the Department of Managed Health Care's interpretation of *Health & Safety Code § 1371.4* (that health care providers have the right to privately enforce provisions of the statute through filing lawsuits under the unfair competition law, as well as for breach of contract, and quantum meruit, when a health care plan did not

provide adequate reimbursement for the value of service rendered by emergency room physicians) and concluded that physicians had standing to file a lawsuit against a health care service plan [*Bell v. Blue Cross of Cal. (2005) 131 Cal. App. 4th 211, 217-219, 31 Cal. Rptr. 3d 688]* .

An insured trucking company filed a tort cross-complaint in a court lawsuit for breach of contract to collect disputed premium charges in an action that was brought against the insured by a collection agency as an assignee of the insurer. The tort cross-complaint alleged that the insurer had breached the covenant of good faith and fair dealing owed to its insured, and had also committed fraud, in relation to an insurance premium billing dispute between the insured and the insurer. The insurer was assigned to provide automobile liability insurance to the insured company under the California Automobile Assigned Risk Plan. The insured recovered a substantial jury verdict against the insurer [*Jonathan Neil & Assocs., Inc. v. Jones (2004) 33 Cal. 4th 917, 923-924, 16 Cal. Rptr. 3d 849, 94 P.3d 1055]* . The California Supreme Court upheld the Court of Appeal, which had reversed the trial court judgment for the insured, but disagreed on the rationale for that decision. The California Supreme Court rejected the Court of Appeals holding that exhaustion of administrative remedies requirements were applicable and not satisfied. Rather, the Supreme Court held that exhaustion of administrative remedies was not required, but that the doctrine of primary jurisdiction did apply and required the trial court to stay its decision-making and refer the premium billing dispute issue to the Department of Insurance and the State Insurance Commissioner [*Jonathan Neil & Assocs., Inc. v. Jones (2004) 33 Cal. 4th 917, 923-924, 16 Cal. Rptr. 3d 849, 94 P.3d 1055]* . The Court reasoned that exhaustion of administrative remedies did not apply because the insured's tort claims, and the insurer's breach of contract claims, were within the superior court's jurisdiction, and the Insurance Commissioner had no authority to decide these common law claims. However, primary jurisdiction did apply because one of the issues in this lawsuit, the validity of premium billing by the insurer under the CAARP program, was within the regulatory authority and expertise of the California Insurance Commissioner. The court concluded that the premium dispute issue had to be referred to the Insurance Commissioner for resolution, the referral would promote a uniform application of complex insurance regulations, and that the referral would utilize the insurance agency's expertise in regulating insurer's operating under the CAARP program, thereby helping to ensure a more accurate determination of the premium billing dispute issue in the lawsuit [*Jonathan Neil & Assocs., Inc. v. Jones (2004) 33 Cal. 4th 917, 933-934, 16 Cal. Rptr. 3d 849, 94 P.3d 1055]* .

In a breach of contract lawsuit, defendant's defense (that the contract was void because plaintiff acted as a talent agency, but was unlicensed in violation of the act) based on the Talent Agencies Act, *Labor Code §§ 1700-1700.47*, must first be brought before the Labor Commissioner under *Labor Code § 1700.44(a)*, and the civil lawsuit for breach of contract must be stayed pending resolution by the Labor commissioner of issues related to the Talent Agencies Act defense [*Styne v. Stevens (2001) 26 Cal. 4th 42, 47-48, 109 Cal. Rptr. 2d 14, 26 P.3d 343]* . Furthermore, a defense based on the Talent Agencies Act does not have to be raised within the one year statute of limitations [*Labor Code § 1700.44(a)*] for bringing actions or proceedings under the Act as the one year statute applies only to claims for affirmative relief, not to defenses [*Styne v. Stevens (2001) 26 Cal. 4th 42, 51-54, 109 Cal. Rptr. 2d 14, 26 P.3d 343]* . The Labor Commissioner has exclusive jurisdiction to determine talent agency act related issues that arise in a breach of contract lawsuit in court. The Commissioner has jurisdiction to determine whether the contract involved the services of a talent agency, and if so, to determine that the contract is void and unenforceable. These issues must first be submitted to the Commissioner to be decided, with the opportunity for a do novo appeal to the superior court after the commissioner makes a decision [*Styne v. Stevens (2001) 26 Cal. 4th 42, 55-57, 109 Cal. Rptr. 2d 14, 26 P.3d 343]* . When a Talent Agency Act defense arises in civil lawsuit in court, the superior court proceeding should be stayed, and a "petition to determine controversy" should be filed with the Commissioner. The merits of that defense cannot be considered by the court until the defense has been decided by the commissioner [*Styne v. Stevens (2001) 26 Cal. 4th 42, 58-59, 109 Cal. Rptr. 2d 14, 26 P.3d 343]* . The Labor Commissioner has exclusive original jurisdiction over disputes under the Talent Agencies Act and issues related to the validity of contracts must first be submitted to the Commissioner, notwithstanding that the contract has a mandatory arbitration clause requiring arbitration of those disputes. The arbitration action was properly stayed pending a resolution of the Act issues by the Commissioner [*Ferrer v. Preston (2006) 145 Cal. App. 4th 440, 445-447, 51 Cal. Rptr. 3d 628]* .

The California Public Utilities Commission had exclusive jurisdiction to resolve a dispute between a city and a telephone company over which of the parties was required to pay the costs of compliance with a city ordinance requiring utilities to move overhead facilities underground. The superior court properly granted the telephone company's demurrer without leave to amend because the superior court lacked subject matter jurisdiction over this dispute [*City of Anaheim v. Pacific Bell Tel. Co. (2004) 119 Cal. App. 4th 838, 841-842, 14 Cal. Rptr. 3d 725]* .

The California Supreme Court also held that the attorney general did not have standing to file a lawsuit under the California False Claims Act (CFCA) for civil remedies related to the assets of an insolvent insurance company as to which the Insurance Commissioner has acquired title because those assets are not "state funds" within the meaning of the CFCA [*State of Cal. v. Altus Fin. (2005) 36 Cal. 4th 1284, 1302-1303, 32 Cal. Rptr. 3d 498, 116 P.3d 1175]* . The Court also held that the attorney general has standing to seek civil penalties under the Unfair Competition Law (UCL), but not restitution, and only injunctive relief that serves to protect the public and serve a law enforcement function [*State of Cal. v. Altus Fin. (2005) 36 Cal. 4th 1284, 1303-1304, 32 Cal. Rptr. 3d 498, 116 P.3d 1175]* . In holding that the attorney general could not bring a restitution related claim under the UCL law, the Court based its decision on the exclusive authority granted to the Insurance Commissioner under *Insurance Code § 1037(f)* [*State of Cal. v. Altus Fin. (2005) 36 Cal. 4th 1284, 1304-1306, 32 Cal. Rptr. 3d 498, 116 P.3d 1175]* .

For further discussion of concurrent primary jurisdiction, see *Ch. 474A, Timing of Judicial Review of Agency Decisions, § 474.12[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewReviewabilityExhaustion of RemediesAdministrative LawSeparation of PowersJurisdictionCivil ProcedureJusticiabilityExhaustion of RemediesAdministrative RemediesCivil ProcedureJusticiabilityStandingPersonal StakeCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent JurisdictionCivil ProcedureRemediesWritsCommon Law WritsMandamus

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41A-474 California Forms of Pleading and Practice--Annotated § 474.14

§ 474.14 Defenses Common to All Mandate Proceedings

[1] Statute of Limitations

Mandate proceedings must be commenced within the limitation period prescribed by applicable statutes [*see, e.g., Code Civ. Proc. § 1094.6*; *Gov. Code § 11523*; *Veh. Code § 14401*], or if no applicable statute exists, within the four-year limitation period prescribed by *Code Civ. Proc. § 343* [*Valvo v. University of Southern California (1977) 67 Cal. App. 3d 887, 894, 136 Cal. Rptr. 865]* . A mandate proceeding not commenced within the applicable limitation period is barred [*Barlow v. City Council of Inglewood (1948) 32 Cal. 2d 688, 697, 197 P.2d 721* ; *Sinetos v. Department of Motor Vehicles (1984) 160 Cal. App. 3d 1172, 1175, 207 Cal. Rptr. 207* ; *Kupka v. Board of Administration (1981) 122 Cal. App. 3d 791, 794, 176 Cal. Rptr. 214]* .

The statute of limitations does not start running until the agency has reached a final decision. A petition for writ of mandate is not time barred when the agency decision sought to be challenged is tentative and not final until further steps have been completed by the agency [*Cequel III Communications I, LLC v. Local Agency Formation Commission of Nevada County (2007) 149 Cal. App. 4th 310, 315-316, 57 Cal. Rptr. 3d 32* (cable television provider's challenge to LAFCO determination was not time barred)].

The 90-day time period under *Code Civ. Proc. § 1094.6(b)* does not begin to run until the notice required by *Code Civ. Proc. § 1094.6(f)* is given to the party seeking to petition for judicial review [*Cummings v. City of Vernon (1989) 214 Cal. App. 3d 919, 922, 263 Cal. Rptr. 97* ; *El Dorado Palm Springs, Ltd. v. Rent Review Com. (1991) 230 Cal. App. 3d 335, 344-345, 281 Cal. Rptr. 327]* . When the final day of the 90-day period falls on a Sunday, and the record is silent on when notice of judicial review limitations was given, a petition filed on the following Monday is not barred [*Lowe v. City of Commerce (1997) 59 Cal. App. 4th 1075, 1079-1080, 69 Cal. Rptr. 2d 356]* .

Administrative mandate proceedings are also subject to the general dismissal for delay in prosecution provisions of the Code of Civil Procedure [*Code Civ. Proc. § 583.120* (dismissal for failure to bring case to trial within five years of filing lawsuit); *Binyon v. State (1993) 17 Cal. App. 4th 952, 956-957, 21 Cal. Rptr. 2d 673]* . For a more detailed discussion of statutes of limitation applicable to mandate proceedings, see Ch. 474A, *Timing of Judicial Review of*

Agency Decisions .

[2] Equitable Defenses

[a] Laches

The equitable defense of laches is available in a mandate proceeding [*Conti v. Board of Civil Service Commissioners (1969) 1 Cal. 3d 351, 366, 82 Cal. Rptr. 337, 461 P.2d 617* ; *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist. (2006) 145 Cal. App. 4th 1260, 1273-1275, 52 Cal. Rptr. 3d 486* (temporary employees mandamus remedies not precluded by laches); *People v. Department of Housing & Community Dev. (1975) 45 Cal. App. 3d 185, 195, 119 Cal. Rptr. 266* ; *Audubon Soc. v. City of Moreno Valley (1996) 44 Cal. App. 4th 593, 606, 609, 51 Cal. Rptr. 2d 897* (mandate action barred by laches as a matter of law)]. Laches may apply to bar a proceeding commenced well within the period prescribed by the applicable statute of limitations [*People v. Department of Housing & Community Dev. (1975) 45 Cal. App. 3d 185, 195, 119 Cal. Rptr. 266* ; *Corcoran v. City of Los Angeles (1955) 136 Cal. App. 2d 839* (disapproved to extent it implies that prejudice is assumed or that delay without more is a defense in *Conti v. Board of Civil Service Commissioners (1969) 1 Cal. 3d 351, 362, 82 Cal. Rptr. 337, 461 P.2d 617)]* . To sustain this defense, the evidence must show both of the following [*Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 624, 166 Cal. Rptr. 826, 614 P.2d 258* ; *Conti v. Board of Civil Service Commissioners (1969) 1 Cal. 3d 351, 359, 82 Cal. Rptr. 337, 461 P.2d 617* ; *Green v. Board of Dental Examiners (1996) 47 Cal. App. 4th 786, 793-795, 55 Cal. Rptr. 2d 140]* :

- An unreasonable delay on the part of the petitioner; and
- Either:
  - Acquiescence to the order or decision by petitioner; or
  - Prejudice to adverse parties as a result of the delay [*see, e.g.,* *Lam v. Bureau of Security and Investigative Services (1995) 34 Cal. App. 4th 29, 39-40, 40 Cal. Rptr. 2d 137* (laches not established as defense when affected party fails to make sufficient showing as to prejudice from delay)].

If there is an analogous statute of limitations that may be borrowed for purposes of measuring what time period constitutes reasonable delay and an agency's delay in taking action exceeds that borrowed time period, the burden of proof as to both elements of laches (unreasonable delay and prejudice) shifts to the agency, in the form of a rebuttable presumption. In this situation, the agency must offer evidence showing why laches does *not* bar the agency action [*Fountain Valley Regional Hospital and Medical Center v. Bonta (1999) 75 Cal. App. 4th 316, 324-326, 89 Cal. Rptr. 2d 139]* .

The laches defense barred the filing of a petition for a writ of administrative mandate challenging discharge of an employee when more than three years passed from the date of the agency decision before the superior court ruled on a summary judgment motion brought by the agency on the petition. The delay period included both the time before, and the time after the filing of the petition for administrative mandate. The employee failed to pursue court determination of his petition for more than 18 months after waiting a substantial period of time (another 18 months) to file the petition. The unreasonable delay element was satisfied on these facts. The prejudice element is satisfied because if the former employee wins his lawsuit and is reinstated with back pay, the agency would have to had to make double wage payments as well as having to reorganize its employment structure to include the reinstated employee. The laches defense precluded relief under *Code Civ. Proc. § 1094.6*. It was the only applicable timing defense because the agency failed to notify the employee of the 90 day statutory of limitations under *Code Civ. Proc. § 1094.6*. The granting of a summary judgment by the superior court based on the defense of laches is reviewed de novo. [*Johnson v. City of*

Loma Linda (2000) 24 Cal. 4th 61, 68-70, 99 Cal. Rptr. 2d 316, 5 P.3d 874] . The laches defense was rejected in a Tanner Act lawsuit because the party asserting the defense could not show that prejudice resulted from delay in the administrative proceedings [*Padres Hacia una Vida Mejor v. Davis (2002) 96 Cal. App. 4th 1123, 1134-1135, 117 Cal. Rptr. 2d 727]* .

For a more detailed discussion of the defense of laches, see Ch. 345, *Limitation of Actions* .

[b] Unclean Hands

The equitable defense of unclean hands is also applicable in mandate proceedings; it is used to deny relief to a petitioner who has been guilty of wrongful conduct in connection with the matter that is the subject of the petition [*Allen v. Los Angeles County District Council of Carpenters (1959) 51 Cal. 2d 805, 811-812, 337 P.2d 457* ; *Wallace v. Board of Education (1944) 63 Cal. App. 2d 611, 617, 147 P.2d 8* ; *Dierssen v. Civil Service Commission (1941) 43 Cal. App. 2d 53, 57-58, 110 P.2d 513]* . A showing that the petitioner has been guilty of wrongful conduct in an unrelated matter is not sufficient to establish the defense [*Pepper v. Superior Court (1977) 76 Cal. App. 3d 252, 259, 142 Cal. Rptr. 759* ; *McCarthy v. City of Oakland (1943) 60 Cal. App. 2d 546, 552, 141 P.2d 4]* .

[c] Waiver

The Court of Appeal held that a city did not waive the right to asset statute of limitations defenses to a claim for interest on refunds for sewer service fees when the city made refund payments without asserting limitations defenses as to those payments [*Utility Audit Co., Inc. v. City of Los Angeles (2003) 112 Cal. App. 4th 950, 953, 959, 5 Cal. Rptr. 3d 520]* .

The California Court of Appeal held that a building industry association did not waive the right to make legal arguments challenging the validity of a storm water system water permit on grounds that the permit violated the federal clean water statute by failing to challenge superior court factual findings related to permit requirements [*Bldg. Industry Ass'n of San Diego County v. State Water Resources Control Bd (2004) 124 Cal. App. 4th 866, 880-881, 22 Cal. Rptr. 3d 128]* . Another California Court of Appeal held that a developer did not waive the right to raise the issue of decision maker bias during the mandamus proceeding in the Superior Court because the developer raised the issue before the planning commission by requesting reconsideration of the adverse decision based on new facts of bias [*Nasha L.L.C. v. City of Los Angeles (2004) 125 Cal. App. 4th 470, 484-485, 22 Cal. Rptr. 3d 772]* .

The California Court of Appeal held that a litigant waived the right to assert on appeal an issue that the opposing parties failed to satisfy a statutory time limit for asserting a position in the trial court because the litigant failed to raise this issue before the trial court where fact issues related to the time limit could have been resolved [*San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn. (2004) 125 Cal. App. 4th 343, 350-351, 22 Cal. Rptr. 3d 724]* . Another California Court of Appeal held that an objecting party waived the right to claim that the appealing party failed to exhaust administrative remedies because the objecting party failed to raise this issue in the trial court [*DuFauchard v. U.S. Financial Management, Inc. (2009) 169 Cal. App. 4th 1502, 1511-1513, 87 Cal. Rptr. 3d 615*]. The Court of Appeal also held that a county retirement board's decision to adopt new employer contribution amounts for employees of a county fire protection district was not an act to further the board's right of petition or free speech within the meaning of *Code Civ. Proc. § 425.16* (commonly known as the anti-SLAPP statute), and thus the Board could not seek dismissal of the District's lawsuit against the board based on that statute [*San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn. (2004) 125 Cal. App. 4th 343, 357-358, 22 Cal. Rptr. 3d 724]* .

[d] Estoppel

The Court of Appeal held that the defense of equitable estoppel did not apply to prohibit the County of Los Angeles retirement agency from reclassifying deputy district attorneys as general members for retirement purposes even though

attorneys had previously been employed as deputy sheriffs, and properly had safety member classification at that time. Change in status of employment changed retirement system member status. County lacked authority to continue to classify attorneys as safety members, and thus equitable estoppel defense was not applicable against county [*Medina v. Board of Retirement Los Angeles County Employees Retirement Association (2003) 112 Cal. App. 4th 864, 870-871, 5 Cal. Rptr. 3d 634]* . Another Court of Appeal held that the defense of equitable estoppel did not apply to prohibit the Victim's Compensation and Government Claims Board from asserting the defense of statute of limitations (based on the three-year statute of limitations from the date of the crime) to deny two crime victims compensation from the crime victim restitution fund. The victims' estoppel claim was based on the failure of the law enforcement officers to inform the victims of the availability of restitution claim funds [*Moore v. State Bd. of Control (2003) 112 Cal. App. 4th 371, 384-386]* . Another court of appeal held that the estoppel defense did not apply to prohibit a county board of appeals from raising a statute of limitations defense to a challenge to the granting of a building permit [*Honig v. San Francisco Planning Dept. (2005) 127 Cal. App. 4th 520, 529-530, 25 Cal. Rptr. 3d 649]* . The actions of a subordinate government agency cannot provide the basis for an estoppel defense against the government agency that has the authority to review the subordinate agency [*Independent Roofing Contractors v. California Apprenticeship Council (2003) 114 Cal. App. 4th 1330, 1337-1338, 9 Cal. Rptr. 3d 477]* . Equitable estoppel was not recognized as a defense when the asserting party could not prove injurious reliance [*State Water Resources Control Board Cases (2006) 136 Cal. App. 4th 674, 818-820, 39 Cal. Rptr. 3d 189]* .

The Court of Appeal recognized the defense of equitable estoppel and held that a county employer was equitably estopped from asserting the defense of exhaustion of administrative remedies for a wrongful termination lawsuit brought by a former county employee who alleged unlawful retaliation for disclosing wrongful conduct by other county employees. The court recognized the estoppel defense based on the negligent acts of county employees that led the former employee to conclude that there was no administrative remedy available to her before she filed her lawsuit [*Shuer v. County of San Diego (2004) 117 Cal. App. 4th 476, 486-487, 11 Cal. Rptr. 3d 776]* .

The Court of Appeal held that a city was estopped from arguing that a landowner's failure to bring an administrative mandate action bars the landowner's right to recover damages for the value of property from the city in a condemnation proceeding. The city was estopped because it had illegally violated a preliminary injunction granted against it prohibiting the very action, building a curb that eliminated a driveway and a parking space, the lawfulness of which could have been determined by a writ of administrative mandate. The city was also estopped because it elected to file a condemnation lawsuit against the landowner, and that was a remedy that was inconsistent with the argument that the landowner must file an administrative mandate action to determine whether the city's building action was lawful. Finally, the city was estopped because the landowner, in filing an action for a permanent injunction against the city, was complying with the substance of an administrative mandate action requirement [*Hurwitz v. City of Orange (2004) 122 Cal. App. 4th 835, 843, 845-846,19 Cal. Rptr. 3d 213]* .

The California Court of Appeal held that the California Department of Corrections was not estopped from challenging the jurisdiction of the juvenile court by sending a form letter to a mother telling her that she would have to seek a court order from the juvenile court to enforce visitation rights of her children with their incarcerated father. The rule invoking estoppel against a party that files a lawsuit in a court and later seeks to attack that court's jurisdiction was not applicable because the CDC did not file a lawsuit in this court [*Robin J. v. Superior Court (2004) 124 Cal. App. 4th 414, 422-423, 21 Cal. Rptr. 3d 417]* .

The California Supreme Court held that the City of Goleta was not estopped to deny approval of a developer's subdivision's map because no city official expressly represented that it would give approval. Also, the city's adoption of county ordinances at the time the city incorporated did not create a reasonable expectation on the developer's part that its final subdivision map would receive ministerial approval by the city [City of Goleta v. Superior court *(2006) 40 Cal. 4th 270, 279-281, 52 Cal. Rptr. 3d 114, 147 P. 3d 1037]* . The California Court of Appeal held that a county was subject to estoppel based on the language used in a claim rejection letter under the procedures required by the California Tort Claims Act. The language of the letter estopped the county for asserting the defense of statutes of limitation under

the Tort Claims Act [*Sofranek v. Merced County (2007) 146 Cal. App. 4th 1238, 1250-1252, 53 Cal. Rptr. 3d 426* (claim rejection letter language was reasonably relied upon by claimant who filed his lawsuit consistent with reasonable understanding of six-month limitations language in second claim rejection letter)]. The Second District Division 7 California Court of Appeal held that a litigant who challenged the subject matter jurisdiction of the California Coastal Commission on judicial review was estopped to contest that jurisdiction by participating fully in the administrative proceedings before the commission without contesting the Commission's jurisdiction [*Mt. Holyoke Homes, LP v. California Coastal Commission (2008) 167 Cal. App. 4th 830, 842-843, 84 Cal. Rptr. 3d 452*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusCivil ProcedureEquityMaximsClean Hands PrincipleCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLegislationStatutes of LimitationsEquitable EstoppelGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLegislationStatutes of LimitationsWaivers

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§ 474.15 Res Judicata and the Failure to Seek Judicial Review

A final administrative decision on the merits, like a final judicial decision on the merits, has res judicata effect, and failure to seek judicial review of an agency's decision will prevent any later challenge to the merits of that decision in a collateral proceeding [*Monroe v. Trustees of the California State Colleges (1971) 6 Cal. 3d 399, 405-406, 99 Cal. Rptr. 129, 491 P.2d 1105* ; *Stockton v. Department of Employment (1944) 25 Cal. 2d 264, 267-268, 153 P.2d 741* ; *California Coastal Com. v. Superior Court (1989) 210 Cal. App. 3d 1488, 1493, 258 Cal. Rptr. 567* ; *Knickerbocker v. City of Stockton (1988) 199 Cal. App. 3d 235, 243-244, 244 Cal. Rptr. 764]* . A party adversely affected by an administrative decision should therefore carefully weigh the consequences before deciding not to seek judicial review.

Similarly, the failure of a party to appeal a superior court judgment granting a peremptory writ of mandate to the court of appeal waives the litigant's right to challenge the terms of the judgment in a later appeal in the same matter [*Carson Gardens L.L.C. v. City of Carson Mobilehome Park Rental Review Bd. (2006) 135 Cal. App. 4th 856, 866-867, 37 Cal. Rptr. 3d 768* (rent review board was unable to challenge requirement that it use mortgage interest costs as part of fair rate of return analysis for rent increase because this was required as part of the terms of the judgment)].

Res judicata bars not only those claims actually litigated in a prior proceeding, but also those that could have been litigated as part of that cause of action [*California Coastal Com. v. Superior Court (1989) 210 Cal. App. 3d 1488, 1499, 258 Cal. Rptr. 567]* . A CEQA cause of action that was litigated to a final judgment in a prior administrative proceeding that was then judicially reviewed in court precludes the same challenge to the adequacy of the same EIR in a later administrative and judicial proceeding absent some significant change in material facts. The adequacy of an EIR under CEQA involves the same cause of action and the same primary right when the EIR was prepared by a city as part of the city's general plan adoption [*Federation of Hillside and Canyon Ass'ns v. City of Los Angeles (2004) 126 Cal. App. 4th 1180, 1195, 24 Cal. Rptr. 3d 543* (city's adoption of general plan for land use and development is legislative act reviewable by writ of ordinary mandate under *Code Civ. Proc. § 1085*)]. Claim preclusion did not apply to preclude a police officer's second writ of administrative mandate proceeding against her employer based on the affirmance by the Court of Appeal of the denial of a prior administrative mandate petition. This is because the two petitions did not involve the same primary right [*Pitts v. City of Sacramento (2006) 138 Cal. App. 4th 853, 856-857, 41 Cal. Rptr. 3d 838]* .

A former employee who challenged her dismissal from a private university alleged fraud and breach of contract claims in both her first and second lawsuit. The appellate court ruling in the first lawsuit that the former employee's exclusive remedy to challenge dismissal was by filing an administrative mandamus lawsuit was a final judgment on the merits that precluded her filing a second lawsuit asserting the same claims for fraud and breach of contract. The second lawsuit and those claims were barred under res judicata grounds by the final judgment in the prior lawsuit [*Pollock v. Univ. of S. Cal. (2003) 112 Cal. App. 4th 1416, 1427-1428, 6 Cal. Rptr. 3d 122]* .

A former tenured professor at a private university who challenged his dismissal from his tenured position alleged both tort and breach of contract claims in a civil lawsuit against the university. The Court of Appeal held that the professor's claims were barred by the doctrine of exhaustion of judicial remedies because the professor failed to challenge his dismissal by bringing a writ of administrative mandamus action against the university in superior court [*Gutkin v. University of So. Cal. (2002) 101 Cal. App. 4th 967, 979-980, 125 Cal. Rptr. 2d 115]* . A student at a private university who was suspended for cheating challenged the action of the university by filing a lawsuit against the university alleging both tort and breach of contract claims. The Court of Appeal held that the student's claims were barred by the doctrine of exhaustion of judicial remedies because the student failed to challenge the discipline decision by filing a writ of administrative mandate proceeding against the university in superior court [*Gupta v. Stanford Univ. (2004) 124 Cal. App. 4th 407, 411-412, 21 Cal. Rptr. 3d 192]* .

A former employee of Los Angeles County Probation Department brought a disability discrimination claim against her employer. She filed a grievance with the County Civil Service Commission and completed the hearing process, and the hearing officer issued a decision that was adverse to her claims. While she challenged the hearing office recommended findings before the Commission, she did not file a petition for a writ of administrative mandate to overturn the Commission's final decision. Rather, she filed a complaint for discrimination with the Department of Fair Employment and Housing (DFEH), received a right-to-sue letter, and then filed a civil lawsuit against the Probation Department for disability discrimination in violation of the FEHA [*Gov. Code § 12940(a)*]. Her civil lawsuit was filed before the commission had issued a final decision in her grievance action. The Court of Appeal held that the employee's FEHA lawsuit was barred because she failed to exhaust administrative and judicial remedies by failing to file a petition for a writ of administrative mandate to challenge the commission final decision [*Page v. Los Angeles County Probation Dept. (2004) 123 Cal. App. 4th 1135, 1142-1143, 20 Cal. Rptr. 3d 598]* . In so holding, the Court of Appeal cited and relied upon California Supreme Court decisions in *Johnson v. City of Loma Linda (2000) 24 Cal. 4th 61, 72, 99 Cal. Rptr. 2d 316, 5 P.3d 874* and *Schifando v. City of Los Angeles (2003) 31 Cal. 4th 1074, 1088, 6 Cal. Rptr. 3d 457, 79 P.3d 569* . The Court of Appeal noted that the employee made a choice as to the forum to assert her discrimination claims, the civil service commission, but failed to exhaust the administrative and judicial remedies related to that forum [*Page v. Los Angeles County Probation Dept. (2004) 123 Cal. App. 4th 1135, 1142-1143, 20 Cal. Rptr. 3d 598]* .

The res judicata effects of a final, unappealed administrative decision are not altered by the fact that the judgment was wrong or that it rested on a legal principle later overruled [*California Coastal Com. v. Superior Court (1989) 210 Cal. App. 3d 1488, 1498, 258 Cal. Rptr. 567]* .

An agency decision is not final for purposes of res judicata and collateral estoppel until the statute of limitations for filing judicial challenges to the agency decision has expired [*Long Beach Unified Sch. Dist. v. State of California (1990) 225 Cal. App. 3d 155, 170, 275 Cal. Rptr. 449]* .

A party's failure to challenge adverse findings of a quasi-judicial administrative agency proceeding by means of a mandate action in the superior court means that those findings are binding in a later civil action [*Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 484, 131 Cal. Rptr. 90, 551 P.2d 410]* . When a public employee files discrimination claims against a public employer based on the California Fair Employment and Housing Act (FEHA) [*Gov. Code § 12900*], and based on Title VII of the Federal Civil Rights Act of 1964 (Title VII) [*42 U.S.C. § 2000e*], the employee's failure to have the public employer agency's final adverse findings judicially reviewed and set aside

means that those adverse findings are binding on the public employee in a later civil action as to claims under the California FEHA, but the adverse findings are not binding as to claims under Title VII. [*Johnson v. City of Loma Linda (2000) 24 Cal. 4th 61, 65-66, 99 Cal. Rptr. 2d 316, 5 P.3d 874]* .

A related issue is whether a litigant may challenge by writ of administrative mandate a disciplinary sanction that was negotiated in a settlement to which the litigant agreed in the administrative proceeding. Settlements of administrative discipline proceedings are binding on the employee who agreed to the settlement, absent fraud, mistake, undue influence, or duress [*Zazueta v. County of San Bernadino (1995) 38 Cal. App. 4th 106, 110, 44 Cal. Rptr. 2d 678* (employee's agreement to arbitrate disciplinary proceeding, which led to termination of employee, could not be challenged by writ of mandate); *Stermer v. Board of Dental Examiners (2002) 95 Cal. App. 4th 128, 135-136, 115 Cal. Rptr. 2d 294* (licensee who stipulated to settlement of disciplinary proceedings may not challenge by writ of mandate discipline imposed under settlement even though underlying criminal conviction was later set aside)], particularly in cases in which the employee agreed to a less serious form of discipline in the settlement, and thereby avoided termination from employment [*Alhambra Police Officers Assn. v. City of Alhambra Police Dept. (2003) 113 Cal. App. 4th 1413, 1420-1421, 7 Cal. Rptr. 3d 432]* .

For further discussion of the application of res judicata to administrative proceedings, see *Ch. 473F, Agency Adjudication Hearings, § 473F.41*. For general discussion of the principles governing res judicata and collateral estoppel, see Ch. 491, *Res Judicata* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsCollateral EstoppelAdministrative LawAgency AdjudicationDecisionsRes JudicataCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLegislationStatutes of LimitationsTime Limitations

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A. Review by Writ of Mandate

41A-474 California Forms of Pleading and Practice--Annotated §§ 474.16-474.19

[Reserved]

§§ 474.16[Reserved]

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B. Review in Other Actions and Proceedings

41A-474 California Forms of Pleading and Practice--Annotated § 474.20

§ 474.20 Review by Other Extraordinary Writs

[1] Prohibition

The issuance of a writ of prohibition restrains an official or body exercising judicial powers from acting in excess of its jurisdiction [*Code Civ. Proc. § 1102*; *Bird v. Justice Court (1960) 182 Cal. App. 2d 674, 677, 6 Cal. Rptr. 502]* . Prohibition is no longer available to control the proceedings of local agencies and state agencies of legislative origin [*Aronoff v. Franchise Tax Board (1963) 60 Cal. 2d 177, 181-182, 32 Cal. Rptr. 1, 383 P.2d 409* ; Whitten v. California State Board, etc. *(1937) 8 Cal. 2d 444, 445-446, 65 P.2d 1296]* , because the California Supreme Court has held that these agencies do not possess judicial powers [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 42-44, 112 Cal. Rptr. 805, 520 P.2d 29* ; *Standard Oil Co. v. State Board of Equal. (1936) 6 Cal. 2d 557, 565, 59 P.2d 119]* . Although in theory prohibition may be used to restrain proceedings by an administrative agency that has been constitutionally vested with judicial powers [*see, e.g., Bartosh v. Bd. of Osteopathic Examiners (1947) 82 Cal. App. 2d 486, 488-489, 186 P.2d 984]* , this use of the writ is extremely rare. For a more detailed discussion of the writ of prohibition, see Ch. 358, *Mandate and Prohibition* .

[2] Certiorari

The writ of certiorari, also called the writ of review [*Code Civ. Proc. § 1067*] lies to annul and prevent enforcement of a completed judicial act of an official or body that has exceeded its jurisdiction [*Code Civ. Proc. §§ 1068, 1071, 1074*; *Estrin v. Superior Court (1939) 14 Cal. 2d 670, 674-675, 96 P.2d 340]* . Because it has been held that local agencies and statewide agencies of legislative origin do not possess judicial powers [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 42-44, 112 Cal. Rptr. 805, 520 P.2d 29* ; *Standard Oil Co. v. State Board of Equal. (1936) 6 Cal. 2d 557, 565, 59 P.2d 119]* , certiorari is no longer available to review their actions and decisions [*Standard Oil Co. v. State Board of Equal. (1936) 6 Cal. 2d 557, 565, 59 P.2d 119]* . Although certiorari is still proper in some cases to review orders and decisions of statewide agencies of constitutional origin when it is claimed they have exceeded their jurisdiction [*see Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 7, 95 Cal. Rptr. 329, 485 P.2d 529]* , even this use of the writ has been largely supplanted by the writ of mandate [*cf. Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 7, 95 Cal. Rptr. 329, 485 P.2d 529]* . For a more detailed discussion of the writ of certiorari, see Ch. 492, *Review (Certiorari), Writ of*.

[3] Extraordinary Writ

Bus. & Prof. Code § 2337 authorizes preferential review by the superior court of decisions to revoke, suspend, or restrict physicians' licenses. These cases are given priority in trial or hearing setting, and there is a requirement that the hearing or trial be set within 180 days from the filing of the action. Continuances can only be granted upon good cause. Review of the superior court's decision in the appellate process is by a petition for an extraordinary writ [*Bus. & Prof. Code § 2337*]. *Bus. & Prof. Code § 2337* provides for review of the superior court decision, not by direct appeal, but by a petition for extraordinary writ. *Bus. &Prof. Code § 2337* does not violate the appellate jurisdiction clause of the California Constitution, *Cal. Const., art. VI, § 11*, which provides for appellate jurisdiction by the courts of appeal in cases where the superior courts have original jurisdiction [*Leone v. Medical Board of California (2000) 22 Cal. 4th 660, 664-665, 94 Cal. Rptr. 2d 61, 995 P.2d 191]* . A litigant who seeks appellate review of the superior court's denial of a petition for a writ of mandate to set aside the Medical Board of California's decision to place a physician on two years probation for unprofessional conduct must proceed by petition for an extraordinary writ under *Bus. & Prof. Code § 2337*. When a litigant erroneously files an appeal of the superior court judgment, the appellate court will treat the improper appeal as a proper extraordinary writ when the issue on appeal is a question of law, the issue has been thoroughly briefed by the litigants, and the issue has not been previously decided [*Zabetian v. Medical Board of California (2000) 80 Cal. App. 4th 462, 465-467, 94 Cal. Rptr. 2d 917* ; *Conlan v. Shewry (2005) 131 Cal. App. 4th 1354, 1365-1366, 32 Cal. Rptr. 3d 667* (appeal from nonappealable order treated as petition for extraordinary relief)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesProhibitionCivil ProcedureRemediesWritsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsProhibitionCivil ProcedureAppealsAppellate JurisdictionState Court ReviewGovernmentsLocal GovernmentsEmployees & Officials

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41A-474 California Forms of Pleading and Practice--Annotated § 474.21

§ 474.21 Action for Declaratory Relief

An action for declaratory relief may not be used either:

- To review an adjudicative order or decision [*State of California v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 251, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 126-127, 109 Cal. Rptr. 799, 514 P.2d 111]* ; or

- To adjudicate the rights of a specific party who has an adequate administrative remedy [*Taylor v. Swanson (1982) 137 Cal. App. 3d 416, 418, 187 Cal. Rptr. 111]* .

Declaratory relief is not available to review adjudicatory orders that are reviewable by statute [*Code Civ. Proc. § 1094.5*] under administrative mandamus [*County of Los Angeles v. State Water Resources Control Board (2006) 143 Cal. App. 4th 985, 50 Cal. Rptr. 3d 619, 631-632]* .

An action for declaratory relief may, however, be used to obtain a determination of the constitutionality or validity of statutes, ordinances, or regulations under which an administrative entity operates [*Olszewski v. Scripps Health (2003) 30 Cal. 4th 798, 807-808, 135 Cal. Rptr. 2d 1, 69 P.3d 927* ; *Woods v. Superior Court (1981) 28 Cal. 3d 668, 682, 170 Cal. Rptr. 484, 620 P.2d 1032* ; *State of California v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 251, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *Environmental Defense Project of Sierra County v. County of Sierra (2008) 158 Cal. App. 4th 877, 884-886, 70 Cal. Rptr. 3d 474* (actual controversy requirement met because parties disagreed on proper interpretation of planning and zoning law and whether streamlined zoning process violates provisions of the government code); *Pajaro Valley Water Management Agency v. Amrhein (2007) 150 Cal. App. 4th 1364, 1377-1378, 59 Cal. Rptr. 3d 484* (declaratory relief proceeding available when validation proceeding is not available); *Connerly v. Schwarzenegger (2006) 146 Cal. App. 4th 739, 746-748, 53 Cal. Rptr. 3d 203* (actual controversy required for declaratory relief; challenge mooted by invalidation of statute in another lawsuit); *Levi v. O'Connell (2006) 144 Cal. App. 4th 700, 705-706, 50 Cal. Rptr.3d 691* (declaratory relief requirements satisfied because actual current controversy existed between mother of gifted minor child and California Department of Education over department's constitutional and statutory obligations to fund an appropriate education for child); *Viacom Outdoor, Inc. v. City of Arcata (2006)*

140 Cal. App. 4th 230, 234, 44 Cal. Rptr. 3d 300 (declaratory judgment sought to determine whether city ordinance requiring city permit to rebuild billboards destroyed in windstorm was preempted by state law, Outdoor Advertising Act; Court of Appeal held that city ordinance was not preempted by state law); *Andal v. City of Stockton (2006) 137 Cal. App. 4th 86, 88-89, 40 Cal. Rptr. 3d 34* (declaratory relief action brought by cell phone companies and their customers to challenge constitutionality of city ordinance imposing local government fee on cell phone users to fund city's 911 communication system); *City of Arcadia v. State Water Resources Control Bd. (2006) 135 Cal. App. 4th 1392, 1401-1402, 38 Cal. Rptr. 3d 373* (challenge to validity of trash total maximum daily load (TDML) standard under water pollution control laws); *Martin v. City and County of San Francisco (2005) 135 Cal. App. 4th 392, 408, 37 Cal. Rptr. 3d 470* (challenge to applicability of California Environmental Quality Act (CEQA) review process to interior remodeling of private home that was historic landmark); *Lane v. City of Redondo Beach (1975) 49 Cal. App. 3d 251, 255, 122 Cal. Rptr. 189* ; *see Code Civ. Proc. § 1060* (declaratory relief)]. An action for declaratory relief can properly be brought to challenge the approval of a health care service plan by the Department of Managed Health Care. This challenge provides an actual controversy suitable for resolution by a claim for declaratory relief [*Viola v. Dept. of Managed Health Care (2005) 126 Cal. App. 4th 373, 379, 23 Cal. Rptr. 3d 821* (plaintiffs challenged approval of health plans with mandatory binding arbitration clauses claiming that these clauses violated the right to a civil jury trial)]. *Gov. Code § 11350* expressly provides that any interested person may bring a declaratory relief action to obtain a judicial determination of the validity of any administrative regulation governed by the California Administrative Procedure Act (APA). For discussion of judicial review of rulemaking procedures, see Ch. 472B, *Review of Agency Rulemaking* . The APA is located in *Gov. Code § 11340 et seq.*

In a proper case, an action for declaratory relief may be joined with a petition for mandate [*City of Arcadia v. State Water Resources Control Bd. (2006) 135 Cal. App. 4th 1392, 1409, 1426, 38 Cal. Rptr. 3d 373* (decision to adopt trash total maximum daily load standard (TDML plan) as part of regional water quality control plan was quasi-legislative action reviewable under ordinary mandate, *Code Civ. Proc. § 1085;* cities could also seek declaratory relief challenging validity of plan but scope of declaratory relief was limited to matters as to which there is a present controversy); *Gong v. City of Fremont (1967) 250 Cal. App. 2d 568, 574, 58 Cal. Rptr. 664* (declaratory relief claim asserting constitutional challenge to zoning ordinance that could not be raised in administrative mandate proceeding properly joined with mandate proceeding seeking review of decision on application for land use permit); *Syngenta Crop Protection, Inc v. Helliker (2006) 138 Cal. App. 4th 1135, 1145, 1164, 42 Cal. Rptr. 3d 191* (litigant filed complaint for declaratory and injunctive relief coupled with petition for writ of mandate. The California Court of Appeal upheld a modified declaratory judgment issued by the *Superior Court); Johnson v. City and County of San Francisco (2006) 137 Cal. App. 4th 7, 12-13, 40 Cal. Rptr. 3d 8* (property owners sought declaratory relief and a writ of mandate to challenge notice provisions of city and county rental ordinance on grounds that provisions were preempted by state law)]. Declaratory relief is not available under *Code Civ. Proc. § 1060* when there is no actual controversy. Ripeness is required for declaratory relief [*Stonehouse Homes v. City of Sierra Madre (2008) 167 Cal. App. 4th 531, 539-541, 84 Cal. Rptr. 3d 223* (declaratory relief action was not ripe when developer challenged planning commission decision while developer was also appealing decision to city council; the dispute between the developer and the city council was neither concrete enough for declaratory relief nor was there hardship to the developer from not providing declaratory relief at this time)].

A medical device manufacturer (Baxter) that manufactured prescription medical devices which contained a chemical plasticizer (DEHP) that came into contact with the human body filed an administrative petition with the Office of Environmental Health Hazard Assessment (OEHHA) asking OEHHA to promulgate a regulation determining that DEHP exposure did not pose a significant risk of cancer in humans, and therefore Baxter would be exempt from having to post a warning under the requirements of Proposition 65 [*Health & Safety Code § 25249.10(c)*]. OEHHA denied the petition, and Baxter filed a petition for a writ of mandate, which the trial court denied on grounds that neither Proposition 65 nor OEHHA regulations required the agency to promulgate regulations or make findings that DEHP did not provide a significant risk of cancer in humans. The trial court allowed Baxter to amend its complaint to request declaratory relief under *Code Civ. Proc. § 1060* to seek the same type of relief, essentially a declaration that exposure to DEHP in Baxter's medical device products did not create a significant risk of cancer in humans, and therefore no

warning of such exposure was required under exemptions recognized by the law [*Health & Safety Code § 25249.10(c)*]. The trial court granted that declaratory judgment, and the Court of Appeal affirmed the judgment for declaratory relief [*Baxter Healthcare Corp. v. Denton (2004) 120 Cal. App. 4th 333, 344-345, 15 Cal. Rptr. 3d 430]* .

For discussion and forms relating to actions for declaratory relief, see Ch. 182, *Declaratory Relief* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingRule Application & InterpretationValidityAdministrative LawJudicial ReviewRemediesDeclaratory JudgmentsAdministrative LawJudicial ReviewRemediesMandamusCivil ProcedureDeclaratory Judgment ActionsState JudgmentsScopeCivil ProcedureRemediesWritsCommon Law WritsMandamus

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§ 474.22 Action for Injunctive Relief

When available administrative remedies are inadequate to protect a party from imminent and irreparable injury, injunctive relief may be granted to restrain a threatened administrative action or to restrain the enforcement of an administrative decision [*Associated Cal. Loggers, Inc. v. Kinder (1978) 79 Cal. App. 3d 34, 45, 144 Cal. Rptr. 786* ; *Heyenga v. City of San Diego (1979) 94 Cal. App. 3d 756, 760, 156 Cal. Rptr. 496]* . For a discussion of the use of temporary restraining orders by the attorney general's office, see Ch. 473D, *Prehearing Preparations in Agency Adjudications* . For a more detailed discussion of actions for injunctive relief, see Ch. 303, *Injunctions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPrehearing ActivityAdministrative LawJudicial ReviewRemediesInjunctive ReliefCivil ProcedureRemediesInjunctionsPreliminary & Temporary Injunctions

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41A-474 California Forms of Pleading and Practice--Annotated § 474.23

§ 474.23 Orders and Decisions Reviewable Under Special Constitutional and Statutory Provisions

[1] Decisions of the Public Utilities Commission

Judicial review of decisions of the Public Utilities Commission (PUC) may be obtained in either the California Supreme Court or in the California Courts of Appeal [*Pub. Util. Code §§ 1756-1759*]. An advocacy organization representing utility consumers challenged the Public Utility Commission's (PUC) acceptance of a settlement offer made by San Diego Gas & Electric Company (SDG&E) as a means to resolve a pending federal lawsuit brought by SDG&E against the PUC. The organization filed a petition for a writ of review in the Court of Appeal. The court upheld the acceptance of the settlement by the PUC, and concluded that the agency decision to accept the settlement did not violate controlling statutes [*Pub. Util. Code § 332.1*] nor did it violate California Constitution [*Cal. Const., Art III, §§ 3, 3.5*] provisions [*Utility Consumers Action Network v. Public Utilities Com. (2004) 120 Cal. App. 4th 644, 648-649, 15 Cal. Rptr. 3d 597]* . The City of St. Helena filed a petition for a writ of review in the Court of Appeal to seek annulment of Public Utility Commission (PUC) decisions that had conferred public utility status on the Napa Valley Wine Train, Inc. The California Court of Appeal granted annulment of the decisions, holding that the Wine Train did not qualify as a common carrier providing transportation and therefore was not subject to regulation by the PUC as a public utility [*City of St. Helena v. Public Utilities Comm'n (2004) 119 Cal. App. 4th 793, 796-797, 14 Cal. Rptr. 3d 713]* . The California Court of Appeal granted a writ of review to determine the issue of whether the Public Utilities Commission's (PUC) statutory jurisdiction over railroad crossings under *Pub. Util. Code §§ 1201, 1202* applied to light rail transit crossings built by public transit districts. The court held that this jurisdiction did not apply, and the court annulled contrary PUC decisions [*Santa Clara Valley Trans. Authority v. PUC (2004) 124 Cal. App. 4th 346, 350-351, 21 Cal. Rptr. 3d 270]* . The California Court of Appeal denied a petition for a writ of review brought by wireless carriers to challenge a decision of the California Public Utilities Commission that imposed substantial fines against wireless service providers in California for unjust and unreasonable practices, including charging customers early termination fees to cancel contracts without permitting a grace period, for failing to disclose to customers known network problems and misleading customers regarding network coverage and service. The court rejected the carriers preemption argument and held that the provisions of the Federal Communications Act of 1934, as amended by the Omnibus Budget Reconciliation Act of 1993, that preempt state and local regulation of market entry and rates charged by wireless mobile telephone providers [*47 U.S.C. § 332(c)(3)(A)*] did not preempt decisions by the California Public Utilities Commission.

The California Supreme Court also upheld the imposition of substantial fines against the wireless carriers, and rejected due process arguments against the imposition of fines [*Pacific Bell Wireless, LLC v. P.U.C. (2006) 140 Cal. App. 4th 718, 728, 729, 747, 44 Cal. Rptr. 3d 733]* .

Another California Court of Appeal granted a petition for a writ of review brought by energy utilities regulated by the California Public Utilities Commission. The utilities challenged the PUC decision to require payment of prevailing wages to workers on utility construction projects. The court upheld that challenge based on the PUC's failure to follow its own procedural rules. The PUC failed to raise the prevailing wage issue in the initial scoping memo that identifies the issues to be addressed in the rulemaking proceeding and this failure violated provisions of the PUC's own procedural rules. The PUC's failure to follow its own procedural rules meant that the PUC failed to proceed in the manner required by law [*Cal. Code Regs., tit. 20, § 6.3*; *So. Cal. Edison Co. v. P.U.C. (2006) 140 Cal. App. 4th 1085, 1104-1106, 45 Cal. Rptr. 3d 485]* . The court rejected a federal preemption challenge brought by the companies and held that the provisions of the National Labor Relations Act [*29 U.S.C. §§ 151-160*] did not preempt decisions of the California Public Utilities Commission requiring public utilities to pay prevailing wages to workers on energy utility construction projects. The prevailing wage requirement is a substantive employment term that does not impact collective bargaining or employee organizing efforts [*So. Cal. Edison Co. v. P.U.C. (2006) 140 Cal. App. 4th 1085, 1100-1102*]. For a discussion of review of decisions of the Public Utilities Commission, see Ch. 480, *Public Utilities* .

[2] Decisions of the State Bar

Disciplinary actions taken by the State Bar may be reviewed either by the California Supreme Court or by a California Court of Appeal in accordance with the procedure prescribed by the California Supreme Court [*Bus. & Prof. Code § 6082*]. For a discussion of review of State Bar disciplinary actions, see Ch. 71, *Attorney Discipline* .

[3] Orders, Rules, and Decisions of the Workers' Compensation Appeals Board

Orders, rules, and decisions of the Workers' Compensation Appeals Board (WCAB) are reviewable only in a proceeding for a writ of review in the California Supreme Court or in the California Courts of Appeal [*Lab. Code §§ 5950-5955*]. The legislative history of *Lab. Code § 5955* establishes that the superior courts do not have jurisdiction to review any decisions or order of the Industrial Accident Commission (now WCAB) [*Loustalot v. Superior Court (1947) 30 Cal. 2d 905, 910, 186 P. 2d 673]* . The superior court lacked jurisdiction to issue a writ of administrative mandamus directed to the WCAB whose decisions may only be reviewed by the court of appeal, or the supreme court. The writ was sought by a former public employee who sought disability retirement benefits from PERS, and who challenged in superior court the WCAB's decision that it did not have jurisdiction to decide whether the employee's disability was caused by her job. The court of appeal concluded that the superior court lacked jurisdiction to issue the writ [*Abraham v. Worker's Compensation Appeals Board (2003) 113 Cal. App. 4th 1082, 1087-1088, 6 Cal. Rptr. 3d 820]* . For further discussion of review of decisions of the WCAB, see Ch. 577, *Worker's Compensation* . For extensive coverage of WCAB proceedings and judicial review of them, see Hanna, California Law of Employee Injuries and Worker's Compensation (Matthew Bender).

[4] Orders of the Alcoholic Beverage Control Appeals Board

Orders of the Alcoholic Beverage Control Appeals Board may be reviewed only in a proceeding for a writ of review in the California Supreme Court or in the court of appeal for the district in which the proceeding arose [*Bus. & Prof. Code §§ 23090-23090.5*]. For a discussion of review of orders of the Alcoholic Beverage Controls Appeals Board, see Ch. 18, *Alcoholic Beverage Licenses* .

[5] Orders of the Agricultural Labor Relations Board

Judicial review of an order of the Agricultural Labor Relations Board can be obtained only by filing a petition requesting that the order be modified or set aside in the court of appeal for the appellate district in which the subject

unfair labor practice was alleged to have been committed [*Lab. Code § 1160.8*].

[6] Certain Orders and Determinations of the Public Employment Relations Board

Unit determinations and unfair practice case orders made by the Public Employment Relations Board (PERB) may be reviewed only by way of a petition for an extraordinary writ in the court of appeal for the appellate district in which the unit determination or unfair practice dispute occurred [*Gov. Code §§ 3520(c), 3542(c), 3564(c)*]. For extensive coverage of these proceedings and judicial review of them, see California Public Sector Relations (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsJudicial ReviewGovernmentsState & Territorial GovernmentsLicensesLabor & Employment LawCollective Bargaining & Labor RelationsUnfair Labor PracticesGeneral OverviewLegal EthicsSanctionsDisciplinary ProceedingsAppealsWorkers' Compensation & SSDIAdministrative ProceedingsJudicial ReviewGeneral Overview

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[Reserved]

§§ 474.24[Reserved]

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§ 474.30 Related Matthew Bender Publications

For memoranda of points and authorities relating to forms for judicial review, see California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender)

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§ 474.31 Federal Constitution

Prohibition against unreasonable searches and seizures. *U.S. Const., amend. IV*

Due process clause. *U.S. Const., amend. XIV, § 1*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsSearch & SeizureGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral Overview

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§ 474.32 State Constitution

Due process clause. *Cal. Const., art. I, § 7(a)*

Prohibition against unreasonable searches and seizures. *Cal. Const., art. I, § 13*

Separation of powers doctrine. *Cal. Const., art. III, § 3*

Jurisdiction to give extraordinary relief. *Cal. Const., art. VI, § 10*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawSeparation of PowersConstitutional LawBill of RightsFundamental RightsSearch & SeizureGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral Overview

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§ 474.33 State Statutes

Administrative Procedure Act. *Gov. Code §§ 11500-11528*

Allocation of burden of proof. *Evid. Code § 500*

Amendment of pleadings. *Code Civ. Proc. § 473(a)*

Answers to complaints generally. *Code Civ. Proc. §§ 431.10-431.30*

Appeals in civil actions and proceedings. *Code Civ. Proc. §§ 901-914, 1109-1110b*

Authority of court to adopt suitable procedure where none specifically provided by statute. *Code Civ. Proc. § 187*

Certiorari. *Code Civ. Proc. §§ 1067-1077, 1107-1109*

Civil actions and proceedings generally. *Code Civ. Proc. § 307 et. seq.*

Contempt. *Code Civ. Proc. §§ 1209-1222*

Copies of pleadings are required to be served on adverse parties. *Code Civ. Proc. § 465*

Costs. *Code Civ. Proc. §§ 1021 et. seq.*

Demurrers. *Code Civ. Proc. §§ 430.10-430.80*

Demurrer raises issue of law. *Code Civ. Proc. § 589*

Discovery. *Code Civ. Proc. §§ 2016.010-2036.050*

Effect of notice of motion. *Code Civ. Proc. § 1010*

Effect of summons. *Code Civ. Proc. § 412.20(a)(3)*

Entry of judgment. *Code Civ. Proc. § 664*

Fee for transcribing record. *Gov. Code § 69950*

Filing initial pleading begins proceeding. *Code Civ. Proc. §§ 350, 411.10*

Filing of various papers constitutes appearance. *Code Civ. Proc. § 1014*

Mandate. *Code Civ. Proc. §§ 1084-1097, 1107-1109*

New trials. *Code Civ. Proc. §§ 656-663.2*

Power of court to impanel jury. *Code Civ. Proc. § 592*

Prohibition. *Code Civ. Proc. §§ 1102-1105, 1107-1109*

Recovery of attorney's fees when administrative action arbitrary or capricious. *Gov. Code § 800*

Recovery of litigation expenses, including attorney's fees, by small business or licensee when agency action undertaken without substantial justification. *Code Civ. Proc. § 1028.5*

Review of administrative decision by mandate proceeding. *Code Civ. Proc. § 1094.5*

Review of decisions by Alcoholic Beverage Control Appeals Board (and Director of Alcoholic Beverage Control). *Bus. & Prof. Code §§ 23090-23090.2*

Review of decisions by Board of Governors of State Bar or Committee of Bar Examiners. *Bus. & Prof. Code § 6082*

Review of decision by local housing enforcement agency to abate nuisance; independent judgment test. *Health & Safety Code § 17980.8*

Review of decisions by Public Utilities Commission. *Pub. Util. Code §§ 1756, 1759*

Review of decisions by Workmen's Compensation Appeals Board. *Lab. Code § 5950*

Right to demur to answer. *Code Civ. Proc. § 430.20*

Service of summons. *Code Civ. Proc. §§ 431.10-417.40*

Special proceedings and actions. *Code Civ. Proc. §§ 20-23*

Testimony in subsequent civil proceeding of person presiding at quasi-judicial proceeding. *Evid. Code § 703.5*

Time limitations on review of local agency decision. *Code Civ. Proc. § 1094.6*

Verification of pleadings. *Code Civ. Proc. § 446*

Writ as order in writing issued in name of court. *Code Civ. Proc. § 17*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewRemediesMandamusCivil ProcedureRemediesWritsCommon Law WritsMandamusEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

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Chapter 474 AVAILABILITY OF JUDICIAL REVIEW OF AGENCY DECISIONS
PART III. RESEARCH GUIDE

41A-474 California Forms of Pleading and Practice--Annotated § 474.34

§ 474.34 Decisions

[1] Generally

Scope of court's inquiry extends to whether administrative agency proceeded without or in excess of jurisdiction, whether there was fair trial, and whether there was prejudicial abuse of discretion. *Woods v. Superior Court (1981) 28 Cal. 3d 668, 675, 170 Cal. Rptr. 484* *SaveOxnard Shores v. California Coastal Com. (1986) 179 Cal. App. 3d 140, 148-149, 224 Cal. Rptr. 425*

Unimportance of plaintiff's pleading being in form of petition for mandate when proper basis for issuance of mandamus is alleged. *Woods v. Superior Court (1981) 28 Cal. 3d 668, 673, 170 Cal. Rptr. 484, 620 P.2d 1032*

Administrative mandamus pursuant to *Code Civ. Proc. § 1094.5* is not possessed of separate and distinctive legal personality and is not removed from general law of mandamus or exempted from established principles, requirements, and limitations of general law of mandamus. *Woods v. Superior Court (1981) 28 Cal. 3d 668, 673-674, 170 Cal. Rptr. 484, 620 P.2d 1032*

Administrative mandamus under *Code Civ. Proc. § 1094.5* is appropriate procedure for review of administrative order or decision resulting from adjudicatory proceeding. *Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 849, 171 Cal. Rptr. 619, 623 P.2d 180*

Administrative decision is generally reviewable in proceeding for writ of mandate. *Drummey v. State Bd. of Funeral Directors (1939) 13 Cal. 2d 75, 82-85, 87 P.2d 848* ; Whitten v. California State Board, etc. *(1937) 8 Cal. 2d 444, 445-446, 65 P.2d 1296* (prohibition proceeding as inappropriate); *Standard Oil Co. v. State Bd. of Equalization (1936) 6 Cal. 2d 557, 562-565, 59 P.2d 119* (certiorari proceeding as inappropriate)

Proceeding is occasionally subject to principles generally applied in criminal proceedings. *Bravo v. Cabell (1974) 11 Cal. 3d 834, 838-840, 114 Cal. Rptr. 618, 523 P.2d 658*

Adjudicatory decisions of all agencies, state and local, with few exceptions, are subject to review in mandate

proceeding governed by *Code Civ. Proc. § 1094.5*. *Topanga Ass'n for a Scenic Community v. Los Angeles County (1974) 11 Cal. 3d 506, 514 n. 12, 113 Cal. Rptr. 836, 522 P.2d 12* ; *Temescal Water Co. v. Dept. of Public Works (1955) 44 Cal. 2d 90, 101, 280 P.2d 1* ; *Hohreiter v. Garrison (1947) 81 Cal. App. 2d 384, 397, 184 P.2d 323*

Proceeding is subject to equitable considerations even though generally classified as legal proceeding. *San Diego County Dep't of Public Welfare v. Superior Court of San Diego County (1972) 7 Cal. 3d 1, 9, 101 Cal. Rptr. 541, 496 P.2d 453* ; *Dare v. Bd. of Medical Examiners (1943) 21 Cal. 2d 790, 795, 136 P.2d 304*

Court's inquiry is limited to whether administrative decision was legally wrong; question of propriety, wisdom, or the like, is not proper for judicial inquiry. *Faulkner v. Cal. Toll Bridge Authority (1953) 40 Cal. 2d 317, 329, 253 P.2d 659*

Trial court is without power to cure agency's improper findings or to substitute its discretion for that of agency regarding form of discipline. *American Funeral Concepts v. Board of Funeral Directors & Embalmers (1982) 136 Cal. App. 3d 303, 311, 186 Cal. Rptr. 196*

Administrative mandamus pursuant to *Code Civ. Proc. § 1094.5* is available to provide review whenever agency exercises adjudicatory function in considering facts presented in administrative hearing. *Jabola v. Pasadena Redevelopment Agency (1981) 125 Cal. App. 3d 931, 934, 178 Cal. Rptr. 452*

Mandate proceeding for review of administrative decision is governed by *Code Civ. Proc. §§ 307-1062.3, now see Code Civ. Proc. § 307 et. seq.* as well as *Code Civ. Proc. §§ 1084-1097, 1107,* and *1108*. *Concerned Citizens of Palm Desert, Inc. v. Board of Supervisors (1974) 38 Cal. App. 3d 257, 270, 113 Cal. Rptr. 328*

Writ of mandate is permitted to be issued when there is a clear, present, and usually ministerial duty on defendant's part and clear, present, and beneficial right in plaintiff to performance of that duty. *Goldfarb v. Civil Service Com. (1990) 225 Cal. App. 3d 633, 635, 275 Cal. Rptr. 284*

Mandate is appropriate remedy to compel exercise of discretion by government officer, but is not available to control exercise of discretion unless, under facts of case, discretion can be exercised in only one way. *Pacific Bell v. California State & Consumer Services Agency (1990) 225 Cal. App. 3d 107, 118, 275 Cal. Rptr. 62*

Although court may compel administrative agency to act, court is not permitted to substitute its discretion for discretion properly vested in agency. *Vega v. City of West Hollywood (1990) 223 Cal. App. 3d 1342, 1352, 273 Cal. Rptr. 243*

Courts are recommended to let administrative boards and officers work out their problems with as little judicial interference as possible. *Vega v. City of West Hollywood (1990) 223 Cal. App. 3d 1342, 1352, 273 Cal. Rptr. 243*

Acts in excess of power conferred on agency by Constitution or statute are void and mandate is available to nullify or rescind such acts. *Brooks v. State Personnel Bd. (1990) 222 Cal. App. 3d 1068, 1072, 272 Cal. Rptr. 292*

Administrative mandamus pursuant to *Code Civ. Proc. § 1094.5* is not available to review quasi-legislative determination of governmental body, such as adoption of redevelopment plan. *Leach v. City of San Marcos (1989) 213 Cal. App. 3d 648, 656, 261 Cal. Rptr. 805*

When parties have proceeded under wrong writ of mandate, such as proceeding under *Code Civ. Proc. § 1085* (traditional mandate) when they should have proceeded under *Code Civ. Proc. § 1094.5* (administrative mandate), reviewing court is required to determine whether trial court considered appropriate evidence and applied appropriate standard of review, based on facts of case. *Eureka Teacher's Assn. v. Board of Education (1988) 199 Cal. App. 3d 353, 366, 244 Cal. Rptr. 240*

Administrative mandate procedure of *Code Civ. Proc. § 1094.5* is required to be used in all writ cases challenging validity of any final administrative order or decision made in any proceeding in which by law, expressly or impliedly, (1) hearing is required, (2) evidence is required to be taken, and (3) discretion in determining facts is vested in inferior board. *Eureka Teacher's Assn. v. Board of Education (1988) 199 Cal. App. 3d 353, 361, 362, 244 Cal. Rptr. 240*

Administrative mandate under *Code Civ. Proc. § 1094.5* is not granted when administrative order or decision did not result from proceeding in which, by law, hearing was required at which evidence was required to be taken; review of such order or decision, if any, is by traditional mandate. *TaylorBus Service, Inc. v. San Diego Bd. of Education (1987) 195 Cal. App. 3d 1331, 1339, 241 Cal. Rptr. 379*

Action by real parties in interest for malicious prosecution based on mandate proceedings that resulted in order remanding matter for reconsideration with respect to correctness of standard used to assess evidence is precluded because petitioner prevailed on its procedural challenge, even though its petition was ultimately denied. *Sierra Club v. Superior Court (1985) 168 Cal. App. 3d 1138, 1144-1147, 214 Cal. Rptr. 740*

[2] Acts Subject to Judicial Review

Traditional mandamus under *Code Civ. Proc. § 1085* and not administrative mandamus under *Code Civ. Proc. § 1094.5* is appropriate method of review of denial of claim from Client Security Fund (*see Bus. & Prof. Code § 6140.5*), because of absence of clear statutory requirement for hearing on claim or of record sufficient for *Code Civ. Proc. § 1094.5* review, and because writ petition to Supreme Court was fundamental challenge to Bar's adoption of Rules of Procedure, Rules 670-688 (*now see* State Bar Rules of Procedure, Client Security Fund Matters, Rules 1-25) and thus was challenge to Bar's quasi-legislative actions. *Saleeby v. State Bar (1985) 39 Cal. 3d 547, 561, 216 Cal. Rptr. 367, 702 P.2d 525* ; *Bollengier v. Doctors Medical Center (1990) 222 Cal. App. 3d 1115, 1124, 272 Cal. Rptr. 273*

Traditional mandamus under *Code Civ. Proc. § 1085*, rather than administrative mandamus under *Code Civ. Proc. § 1094.5*, is appropriate method of review of nonadjudicatory administrative actions. *Personnel Com. v. Board of Education (1990) 223 Cal. App. 3d 1463, 1466, 273 Cal. Rptr. 288*

Judicial intervention is warranted in traditional mandamus proceeding under *Code Civ. Proc. § 1085* when public entity adopts rule or makes policy decision of general application that is shown to be arbitrary, capricious, contrary to public policy, unlawful, or procedurally unfair. *Personnel Com. v. Board of Education (1990) 223 Cal. App. 3d 1463, 1466, 273 Cal. Rptr. 288*

Appellate court is authorized to treat traditional mandamus proceeding under *Code Civ. Proc. § 1085* as if it were administrative mandamus proceeding brought under *Code Civ. Proc. § 1094.5* if latter code section applies. *Bollengier v. Doctors Medical Center (1990) 222 Cal. App. 3d 1115, 1125, 272 Cal. Rptr. 273*

Traditional mandate procedure of *Code Civ. Proc. § 1085*, rather than administrative mandate procedure of *Code Civ. Proc. § 1094.5*, is proper method for reviewing quasi-legislative proceeding in which no hearing was required by law. *Joint Council of Interns & Residents v. Board of Supervisors (1989) 210 Cal. App. 3d 1202, 1212, 258 Cal. Rptr. 762*

Administrative mandate procedure of *Code Civ. Proc. § 1094.5*, rather than traditional mandate procedure, is proper to challenge validity of school board's change of student's grade under *Educ. Code §§ 49066, 49067*, and *49070*. *Eureka Teacher's Assn. v. Board of Education (1988) 199 Cal. App. 3d 353, 361, 362, 244 Cal. Rptr. 240*

City's decision to grant or deny development allotment prerequisite to grant of building permit under growth limitation ordinance is quasi-judicial function, despite potential impact on planning decisions, and reviewable in action under

Code Civ. Proc. § 1094.5. *Pacifica Corp. v. City of Camarillo (1983) 149 Cal. App. 3d 168, 176-177, 196 Cal. Rptr. 670*

Administrative mandamus is not appropriate remedy to review quasi-legislative actions of administrative agencies; such acts are reviewable only by action for declaratory relief or traditional mandamus. *Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal. 3d 158, 168-169, 188 Cal. Rptr. 104, 655 P.2d 306*

Existence of ripe controversy is basic prerequisite to judicial review of administrative acts; adoption of guidelines formulating general policy intended to govern future decisions, as opposed to application of rules to peculiar facts of individual case, does not meet ripeness requirement. *Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal. 3d 158, 168-169, 188 Cal. Rptr. 104, 655 P.2d 306*

Writ of mandamus is appropriate for inquiry into validity of any final administrative order or decision made as result of proceeding in which hearing is required to be given, evidence is required to be taken, and discretion in determination of facts is vested in inferior tribunal. *Woods v. Superior Court (1981) 28 Cal. 3d 668, 675, 170 Cal. Rptr. 484, 620 P.2d 1032*

Review governed by *Code Civ. Proc. § 1094.5* is available only where all conditions imposed by that section exist. *Keeler v. Superior Court of Sacramento County (1956) 46 Cal. 2d 596, 599, 297 P.2d 967* ; *Winkelman v. City of Tiburon (1973) 32 Cal. App. 3d 834, 840, 108 Cal. Rptr. 415*

Compliance by State Board of Control with claims procedure used by persons erroneously convicted and imprisoned for felonies is subject to review pursuant to *Code Civ. Proc. § 1094.5* because statutory procedures are quasi-adjudicative and favorable recommendation by board is valuable property right. *Diola v. State Board of Control (1982) 135 Cal. App. 3d 580, 585-586, 185 Cal. Rptr. 511*

Decision by State Board of Control on low bidder's protest of public procurement contract award is reviewable in *Code Civ. Proc. § 1094.5* administrative mandate proceedings. *National Coach Corp. v. State Bd. of Control (1982) 137 Cal. App. 3d 750, 755, 187 Cal. Rptr. 261*

Decision of county board of supervisors not to designate hospital as "tertiary center" for treatment of severe trauma injuries is legislative act not affecting or ascertaining any vested or existing right and reviewable under *Code Civ. Proc. § 1085* rather than *Code Civ. Proc. § 1094.5*. *Santa Ana Tustin Community Hospital v. Board of Supervisors (1982) 127 Cal. App. 3d 644, 653-654, 179 Cal. Rptr. 620*

Administrative mandamus is improper method for review of State Board of Control decision rejecting plaintiff's Medi-Cal claims, since administrative mandamus is only available to correct decisions which impose tax, disciplinary burden, suspension of employment, or denial or revocation of a license or permit. *Royal Convalescent Hospital, Inc. v. State Board of Control (1979) 99 Cal. App. 3d 788, 794, 160 Cal. Rptr. 458*

[3] Finality of Decision

Review governed by *Code Civ. Proc. § 1094.5* is available only when administrative decision is final. *California v. Superior Court (1974) 12 Cal. 3d 237, 245, 115 Cal. Rptr. 497, 524 P.2d 1281*

Conditional terms of administrative decision does not affect question whether it is final. *Ginns v. Savage (1964) 61 Cal. 2d 520, 525, 39 Cal. Rptr. 377, 393 P.2d 689* ; *Negaard v. Department of Aeronautics (1973) 32 Cal. App. 3d 92, 95, 107 Cal. Rptr. 920*

[4] Hearing Required by Law

Review governed by *Code Civ. Proc. § 1094.5* is not available when law did not require hearing before decision, even if hearing held. *No Oil, Inc. v. Los Angeles (1974) 13 Cal. 3d 68, 74-75 n.3, 118 Cal. Rptr. 34, 529 P.2d 66* ; *Keeler v. Superior Court of Sacramento County (1956) 46 Cal. 2d 596, 599, 297 P.2d 967*

Hearing requirement refers to adjudicative hearing, not legislative hearing. *Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 514, 113 Cal. Rptr. 836, 522 P.2d 12*

Hearing is required by law when agency's regulation requires it even though no statute requires it. *Keeler v. Superior Court (1956) 46 Cal. 2d 596, 599, 297 P.2d 967*

Hearing is not required by law when law authorizes administrative action without hearing. *Fascination, Inc. v. Hoover (1952) 39 Cal. 2d 260, 271, 246 P.2d 656* ; *Fuchs v. Los Angeles County Civil Service Com. (1973) 34 Cal. App. 3d 709, 714-715, 110 Cal. Rptr. 311*

Administrative mandamus is not available when regulation governing administrative appeal process contained no express provision requiring agency to hold formal hearing or to take and preserve testimony; implication of requirement of formal adjudication is improper when underlying proceeding is informal administrative action. *Wasko v. Department of Corrections (1989) 211 Cal. App. 3d 996, 1001, 259 Cal. Rptr. 764*

Court did not commit error in assuming that hearing is not required by law when neither party cited statute requiring hearing nor suggested that hearing is required by constitutional principles of due process. *California Ass'n of Highway Patrolmen v. Department of Personnel Admin. (1986) 185 Cal. App. 3d 352, 359, 229 Cal. Rptr. 729*

Administrative mandamus review pursuant to *Code Civ. Proc. § 1094.5* is limited to instances in which agency administrative hearing is required by law; administrative hearing not required by law is reviewable under traditional mandamus pursuant to *Code Civ. Proc. § 1085*. *Marina County Water Dist. v. State Water Resources Control Bd. (1984) 163 Cal. App. 3d 132, 138-139, 209 Cal. Rptr. 212*

Hearing that could be granted at discretion of commission is not "required by law" for purposes of review under *Code Civ. Proc. § 1094.5*. *Weary v. Civil Service Com. (1983) 140 Cal. App. 3d 189, 195, 189 Cal. Rptr. 442*

Requirement for hearing, set out in agency's regulations, is not affected by agency's characterization of such hearing as in no sense a trial. *Poschman v. Dumke (1973) 31 Cal. App. 3d 932, 938, 107 Cal. Rptr. 596*

[5] Evidence Required to Be Taken

Requirement for hearing necessarily implies requirement that evidence be taken. *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal. 3d 85, 104, 84 Cal. Rptr. 113, 465 P.2d 1* ; *English v. City of Long Beach (1950) 35 Cal. 2d 155, 158, 217 P.2d 22* ; *La Prade v. Department of Water & Power (1945) 27 Cal. 2d 47, 52, 162 P.2d 13*

[6] Beneficial Interest

Necessity that applicant for writ of mandate be beneficially interested in issuance of writ. *Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6* ; *Concerned Citizens of Palm Desert, Inc. v. Board of Supervisors (1974) 38 Cal. App. 3d 257, 270, 113 Cal. Rptr. 328*

Person who participated in administrative proceeding is beneficially interested in issuance of writ. *Bodinson Mfg. Co. v. California Employment Comm'n (1941) 17 Cal. 2d 321, 330, 109 P.2d 935* ; *Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Comm'n (1976) 57 Cal. App. 3d 76, 82-83, 129 Cal. Rptr. 57*

Organization is beneficially interested in issuance of writ when member directly affected by administrative decision. *International Asso. of Fire Fighters v. Palo Alto (1963) 60 Cal. 2d 295, 298, 32 Cal. Rptr. 842, 384 P.2d 170* ; *Residents of Beverly Glen, Inc. v. City of Los Angeles (1973) 34 Cal. App. 3d 117, 121-130, 109 Cal. Rptr. 724*

County department of health has standing to bring petition for administrative mandate against county's civil service commission to reexamine penalties imposed on department's employees, because department has beneficial interest in subject matter of proceedings. *Department of Health Services v. Kennedy (1984) 163 Cal. App. 3d 799, 801-802, 209 Cal. Rptr. 595*

[7] Lack of Other Remedies

Mandate proceeding governed by *Code Civ. Proc. § 1094.5* is prescribed remedy for review of most administrative adjudicatory decisions. *Sipper v. Urban (1943) 22 Cal. 2d 138, 144-145, 137 P.2d 425*

[8] Res Judicata

Rule of res judicata. *Price v. Sixth Dist. Agricultural Asso. (1927) 201 Cal. 502, 515, 258 P. 387*

Res judicata is applicable only when earlier decision involved identical issue, final judgment on merits, and same party or party in privity; WCAB finding of service connected disability is not binding on retirement board when board was neither party nor in privity with party to WCAB proceedings. *Kimbrough v. Police & Fire Retirement System (1984) 161 Cal. App. 3d 1143, 1150-1152, 208 Cal. Rptr. 112*

Plea of res judicata is appropriate when judgment has once been given against petitioner on merits. *Ellenberger v. City of Oakland (1955) 136 Cal. App. 2d 6, 7, 288 P.2d 138* ; *Cohn v. Isensee (1920) 45 Cal. App. 509, 510-511, 188 P. 278*

Appellate court has discretion to hear petition for writ following judgment on merits against petitioner in superior court if remedy of appeal would not afford adequate relief. *Farley v. Healey (1967) 67 Cal. 2d 325, 326-327, 62 Cal. Rptr. 26, 431 P.2d 650* (issue related to upcoming election; appeal too slow)

Necessity to raise issue of res judicata; failure to raise issue deemed waiver of objection. *Wolfsen v. Hathaway (1948) 32 Cal. 2d 632, 638, 198 P.2d 1* ; *Vinot Enterprises, Inc. v. City of Pasadena (1972) 23 Cal. App. 3d 246, 251 n.1, 100 Cal. Rptr. 217*

[9] Limitation and Laches

Period within which petition must be filed is period of limitation, not jurisdictional requirement; rules of limitation applied in ordinary civil actions and proceedings are applicable. *Ginns v. Savage (1964) 61 Cal. 2d 520, 524, 39 Cal. Rptr. 377, 393 P.2d 689*

Limitation period is prescribed by either *Code Civ. Proc. § 338* (three years) or *Code Civ. Proc. § 343* (four years) if not otherwise prescribed. *Conti v. Board of Civil Service Commissioners (1969) 1 Cal. 3d 351, 357 n. 3, 82 Cal. Rptr.*

337, 461 P.2d 617 Request to agency for preparation of record [*Gov. Code § 11523*] has statutory effect of extending period of limitation if addressed to official reporter. *Moran v. Board of Medical Examiners (1948) 32 Cal. 2d 301, 305-307, 196 P.2d 20*

In administrative mandate proceeding, respondent agency is estopped to assert statute of limitations for filing petition if its conduct caused petitioner to delay filing petition; some affirmative misleading conduct on agency's part is necessary to support finding of estoppel. *Elliott v. Contractors' State License Bd. (1990) 224 Cal. App. 3d 1048, 1053, 274 Cal. Rptr. 286*

Failure of agency to respond to petitioner's inquiries concerning appeal of agency's decision is insufficient to estop agency from raising defense of statute of limitations on petitioner's late filing of administrative mandate petition when agency neither owed nor assumed duty to advise petitioner of his rights and therefore did not take unfair advantage of petitioner. *Elliott v. Contractors' State License Bd. (1990) 224 Cal. App. 3d 1048, 1053, 274 Cal. Rptr. 286*

Ninety-day period for seeking judicial review of local agency decision (*Code Civ. Proc. § 1094.6(b)*) does not commence to run until agency provides notice pursuant to *Code Civ. Proc. § 1094.6(f).* *Cummings v. City of Vernon (1989) 214 Cal. App. 3d 919, 920, 263 Cal. Rptr. 97*

Statute of limitations for writ of mandate under *Gov. Code § 11523* is inapplicable when agency has not held formal hearing in compliance with *Administrative Procedure Act. Ragan v. City of Hawthorne (1989) 212 Cal. App. 3d 1361, 1365-1366, 261 Cal. Rptr. 219*

Licensee whose untimely petition for writ of mandate to review revocation proceeding failed to survive demurrer based on *Gov. Code § 11523* (30-day statute of limitations) is unable to attack revocation collaterally by later petition challenging conditions on license reinstatement; licensee's claim that underlying revocation hearing was unconstitutional is still barred by *Gov. Code § 11523*, whether or not order sustaining demurrer had res judicata or collateral estoppel effect. *Miller v. Board of Medical Quality Assurance (1987) 193 Cal. App. 3d 1371, 1376-1377, 238 Cal. Rptr. 915*

Statute of limitations for writ of mandate under *Gov. Code § 11523* applies to decision of local representative acting as delegate of board of administration of Public Employees' Retirement System (PERS). *Garner v. City of Riverside (1985) 170 Cal. App. 3d 510, 515516, 216 Cal. Rptr. 486*

Ninety-day filing period prescribed by *Veh. Code § 14401* is strictly enforced statute of limitations precluding avoidance on grounds of good cause. *Sinetos v. Department of Motor Vehicles (1984) 160 Cal. App. 3d 1172, 1175-1176, 207 Cal. Rptr. 207*

Time period within which mandamus petition must be filed is statute of limitations, and rules of law regarding limitations of actions are applicable to mandamus proceedings. *Sinetos v. Department of Motor Vehicles (1984) 160 Cal. App. 3d 1172, 1175, 207 Cal. Rptr. 207*

Whether government agency's action is sufficiently culpable to estop it from asserting statute of limitations is dependent on whether agency acted in unconscionable manner or set out to take unfair advantage of plaintiff in advising plaintiff of his or her rights. *Sinetos v. Department of Motor Vehicles (1984) 160 Cal. App. 3d 1172, 1177, 207 Cal. Rptr. 207*

Ninety-day statute of limitations of *Code Civ. Proc. § 1094.6*, providing time within which review by mandate under *Code Civ. Proc. § 1094.5* may be sought, is not subject to extension of *Code Civ. Proc. § 1013* when agency decision is served by mail. *Tielsch v. City of Anaheim (1984) 160 Cal. App. 3d 570, 578-580, 206 Cal. Rptr. 740*

Statute of limitations for writ of administrative mandate runs from time copy of agency's decision delivered or mailed to claimant; when copy of decision never sent to claimant, his attorney's examination of city's file on case constitutes constructive notice substantially equivalent to delivery of board's decision to claimant. *Collier v. City of Pasadena (1983) 142 Cal. App. 3d 917, 935, 191 Cal. Rptr. 681*

Ninety-day limitation period provided by *Code Civ. Proc. § 1094.6* is retroactively applicable to petition for writ of administrative mandate brought by discharged county employee, when city adopted *Code Civ. Proc. § 1094.6* subsequent to discharge and hearing but notified plaintiff of 90-day limit within which to seek judicial review at time civil service commission adopted hearing officer's findings, thus affording plaintiff a reasonable time to exercise his remedy. *Foster v. Civil Service Com. (1983) 142 Cal. App. 3d 444, 451-452, 190 Cal. Rptr. 893*

Thirty-day filing period prescribed by *Gov. Code § 11523* is strictly enforced statute of limitations precluding avoidance on grounds of good cause, mistake, inadvertence, surprise, or excusable neglect. *Kupka v. Board of Administration (1981) 122 Cal. App. 3d 791, 794-795, 176 Cal. Rptr. 214*

Laches is available defense in appropriate case. *Hadley v. Superior Court (1972) 29 Cal. App. 3d 389, 395, 105 Cal. Rptr. 500*

Nature of laches defense. *Conti v. Board of Civil Serv. Comm'rs (1969) 1 Cal. 3d 351, 356-362, 82 Cal. Rptr. 337, 461 P.2d 617* ; *Vernon Fire Fighters Assn. v. City of Vernon (1986) 178 Cal. App. 3d 710, 719, 223 Cal. Rptr. 871* ; *Pennel v. Pond Union School Dist. (1973) 29 Cal. App. 3d 832, 840, 105 Cal. Rptr. 817*

[10] Questions Not Presented to Agency

Agency is without power to determine constitutionality of act creating it. *Burrey v. Embarcadero Mun. Improvement Dist. (1971) 5 Cal. 3d 671, 676 n. 4, 97 Cal. Rptr. 203, 488 P.2d 395*

Agency is without authority to determine validity of conviction on which discipline based. *Thomas v. Department of Motor Vehicles (1970) 3 Cal. 3d 335, 337-338, 90 Cal. Rptr. 586, 475 P.2d 858* ; *Fitch v. Justice Court (1972) 24 Cal. App. 3d 492, 495, 101 Cal. Rptr. 227*

Administrative remedies are generally not exhausted unless every question, factual and legal, is presented to agency. *People v. West Publishing Co. (1950) 35 Cal. 2d 80, 88, 216 P.2d 441*

Public hearings, rather than appeal from judgment in writ proceeding regarding environmental impact report, is proper forum to raise new environmental concerns. *Save San Francisco Bay Ass'n v. San Francisco Bay Conservation Etc. Com. (1992) 10 Cal. App. 4th 908, 935, 13 Cal. Rptr. 2d 117*

Petitioner is not entitled to raise question on review that was not presented to agency unless omission to present is excusable. *Morris v. Unemployment Ins. Appeals Bd. (1973) 34 Cal. App. 3d 1002, 1008, 110 Cal. Rptr. 630* ; *Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 545, 92 Cal. Rptr. 525*

[11] Judicial Review

[a] Right

Legislature's act in conferring on Supreme Court exclusive jurisdiction to review certain decisions by State Energy Resources Conservation and Development Commission (*see Pub. Res. Code § 25531*) is properly within Legislature's comprehensive powers over Public Utilities Commission matters under *Cal. Const., art. XII, § 5*; *County of Sonoma v.*

State Energy Resources Conservation etc. Com. (1985) 40 Cal. 3d 361, 367-371, 220 Cal. Rptr. 114, 708 P.2d 693

Review in appellate court is generally unavailable for policy reasons except in unusual case. *Clean Air Constituency v. California State Air Resources Bd.(1974) 11 Cal. 3d 801, 808, 114 Cal. Rptr. 577, 523 P.2d 617* ; *Cohen v. Superior Court (1968) 267 Cal. App. 2d 268, 270-271, 72 Cal. Rptr. 814* (explaining policy)

Person wronged, or threatened with being wronged, by action of administrative agency has judicial remedy, even if no statute prescribes remedy. *Bodinson Mfg. Co. v. California Employment Comm'n (1941) 17 Cal. 2d 321, 325, 109 P.2d 935* ; *Mojave River Irrigation Dist. v. Superior Court (1927) 202 Cal. 717, 729, 262 P. 724*

Administrative decision is not appealable to any court in California; statute providing for such appeal actually provides for original proceeding for review. *Collier & Wallis, Ltd. v. Astor (1937) 9 Cal. 2d 202, 204-205, 70 P.2d 171* ; *Mojave River Irrigation Dist. v. Superior Court (1927) 202 Cal. 717, 724, 262 P. 724*

Court is required to consider merits of administrative mandamus petition alleging that administrative agency's decision was not supported by substantial evidence, even though relief through traditional mandate, not administrative mandate, was proper remedy for petitioner under facts of petitioner's case. *Coelho v. State Personnel Bd. (1989) 209 Cal. App. 3d 968, 970-971, 257 Cal. Rptr. 557*

School district has standing under former *Rev. & Tax. Code § 2253.5* (*now see Gov. Code §§ 17500-17524*) to seek judicial review of State Board of Control's denial of district's claim for reimbursement of costs of complying with statutes that created Cal. OSHA and allegedly mandated reimbursement because, notwithstanding board's prior denial of similar claim by another school district in which no judicial review had been sought, whether Cal. OSHA law mandates reimbursable costs is question of law for court to decide. *Los Angeles Unified School Dist. v. State of California (1988) 199 Cal. App. 3d 686, 688-692, 245 Cal. Rptr. 140*

Dismissal of public employee by redevelopment agency is subject to judicial review pursuant to *Code Civ. Proc. § 1094.5*. *Jabola v. Pasadena Redevelopment Agency (1981) 125 Cal. App. 3d 931, 934-935, 178 Cal. Rptr. 452*

[b] Scope

Administrative decision on facts other than those establishing agency's jurisdiction is subject to independent judgment review by court only where decision substantially affects vested fundamental right and agency is not empowered by Constitution to exercise quasi-judicial power. *Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 44-45, 112 Cal. Rptr. 805, 520 P.2d 29* ; *Bixby v. Pierno (1971) 4 Cal. 3d 130, 144-147, 93 Cal. Rptr. 234, 481 P.2d 242*

Technical errors are to be disregarded on judicial review. *Schweiger v. Superior Court (1970) 3 Cal. 3d 507, 517, 90 Cal. Rptr. 729, 476 P.2d 97* ; *Walsh v. Industrial Acci. Com. (1934) 1 Cal. 2d 747, 748, 36 P.2d 1072*

Judicial review of internal agency matters is inappropriate in most cases. *Nelson v. Dean (1946) 27 Cal. 2d 873, 881, 168 P.2d 16*

Judicial review does not extend to question whether administrative decision was correct in sense of being wise, prudent, or good. *Bodinson Mfg. Co. v. California Employment Comm'n (1941) 17 Cal. 2d 321, 331, 109 P.2d 935* ; *McDonough v. Goodcell (1939) 13 Cal. 2d 741, 748, 91 P.2d 1035*

Administrative decision on legal question is subject to independent judgment review by court. *Bodinson Mfg. Co. v. California Employment Comm'n (1941) 17 Cal. 2d 321, 325-327, 109 P.2d 935*

Administrative decision based on incorrect understanding of law is not erroneous for that reason if correct on any legal theory. *Bank of Italy v. Johnson (1926) 200 Cal. 1, 28-29, 251 P. 784* ; *Ward v. Flood (1874) 48 Cal. 36, 47*

Judicial interference with agency's exercise of discretion is inappropriate in absence of evidence of fraud, corruption, improper motives or influences, plain disregard of duty, gross abuse of power, or violation of law. *Doble Steam Motors Corp. v. Daugherty (1924) 195 Cal. 158, 166, 232 P. 140*

Administrative decision on facts establishing agency's jurisdiction is subject to independent judgment review by court. *Allen v. Railroad Comm'n (1918) 179 Cal. 68, 75, 175 P. 466 , cert. denied, 249 U.S. 601, 39 S. Ct. 259, 63 L. Ed. 797 (1919)*

Standard of review for administrative regulation is rational basis test, not strict scrutiny, when regulation has only incidental effect on exercise of political rights. *Oxnard Harbor Dist. v. Local Agency Formation Com. (1993) 16 Cal. App. 4th 259, 269, 19 Cal. Rptr. 2d 819*

Remand to administrative agency is proper when errors in admission of evidence before agency existed or when original hearing before agency was conducted by unauthorized hearing officer; but remand is not proper when administrative agency errs in results reached at hearing. *Newman v. State Personnel Bd. (1992) 10 Cal. App. 4th 41, 49, 12 Cal. Rptr. 2d 601*

Scope of judicial review of legislative-type activity is limited to examination of record before agency decision makers to determine if their actions were arbitrary, capricious, or entirely lacking in evidentiary support. *Morgan v. Community Redevelopment Agency (1991) 231 Cal. App. 3d 243, 258, 284 Cal. Rptr. 745*

Concept of affirmance of trier of fact's conclusions if supported by substantial evidence is fortified in cases of review of administrative board's determinations because of board's presumed expertise. *San Diego Adult Educators v. Public Employment Relations Bd. (1990) 223 Cal. App. 3d 1124, 1130-1131, 273 Cal. Rptr. 53*

Relationship of reviewing court to any agency such as Public Employment Relations Board (PERB), whose primary responsibility is to determine scope of statutory duty to bargain and resolve charges of unfair refusal to bargain, is generally one of deference. *San Diego Adult Educators v. Public Employment Relations Bd. (1990) 223 Cal. App. 3d 1124, 1131, 273 Cal. Rptr. 53*

In terms of construction of law to be utilized by PERB, determinations made within agency's area of expertise are to be accorded deference, and determinations are to be accepted unless found to be clearly erroneous. *San Diego Adult Educators v. Public Employment Relations Bd. (1990) 223 Cal. App. 3d 1124, 1131, 273 Cal. Rptr. 53*

When statewide agency is delegated quasi-judicial power by California Constitution, reviewing court is limited to determining whether there was substantial evidence supporting agency's decision; in making this determination, reviewing court is required to consider all relevant evidence in administrative record, including evidence that fairly detracts from evidence supporting agency's decision. *Apte v. Regents of University of California (1988) 198 Cal. App. 3d 1084, 1091, 1092, 244 Cal. Rptr. 312*

Review of agency resolution of necessity in eminent domain proceeding is accomplished by traditional writ of mandate, not by writ of administrative mandamus; agency is not required to make findings. *Anaheim Redevelopment Agency v Dusek (1987) 193 Cal. App. 3d 249, 258-261, 239 Cal. Rptr. 319*

Writ of mandate is not properly issued to compel public administrative agency possessing discretionary power to act in particular manner. *McClure v. County of San Diego (1987) 191 Cal. App. 3d 807, 812, 236 Cal. Rptr. 653*

Trial court is authorized under *Code Civ. Proc. § 1094.5(e)* to receive evidence of events that transpired after administrative hearing; better practice is to remand action for agency redetermination in light of new evidence. *Curtis v. Board of Retirement (1986) 177 Cal. App. 3d 293, 299, 223 Cal. Rptr. 123*

Scope of judicial inquiry into quasi-legislative actions of state agency (decision of California State Air Resources Board on standards for sulfur dioxide emissions) is restricted to examination of record for procedural compliance and to determine whether action taken was arbitrary, capricious, or entirely lacking in evidentiary support; reasoning or wisdom underlying agency action is beyond scope of inquiry. *Stauffer Chemical Co. v. Air Resources Board (1982) 128 Cal. App. 3d 789, 796, 180 Cal. Rptr. 550*

Judicial review of administrative orders involves evaluation of whether or not agency acted within scope of authority, using fair procedures in reasonable action. *California Mfr. Assn. v. Industrial Welfare Comm'n (1980) 109 Cal. App. 3d 95, 106, 167 Cal. Rptr. 203*

Judicial review in both trial and appellate court is based on substantial evidence test when vested rights are not involved. *City of Walnut Creek v. County of Contra Costa (1980) 101 Cal. App. 3d 1012, 1016, 1017, 162 Cal. Rptr. 224*

Court is not permitted to usurp agency's legislative power during judicial review. *Brock v. Superior Court (1952) 109 Cal. App. 2d 594, 603, 241 P.2d 283*

[c] Proceedings

Judicial review by proceeding for traditional writ of mandate is available in appropriate case (e.g., failure to perform statutory duty, act of ministerial nature). *California v. Superior Court, State of (1974) 12 Cal. 3d 237, 247, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 7, 22, 95 Cal. Rptr. 329, 485 P.2d 529* ; *People ex rel. Fund American Companies v. California Ins. Co. (1974) 43 Cal. App. 3d 423, 431, 117 Cal. Rptr. 623*

Damages are not recoverable in administrative mandate proceeding governed by *Code Civ. Proc. § 1094.5*; *California v. Superior Court, State of (1974) 12 Cal. 3d 237, 245-246, 115 Cal. Rptr. 497, 524 P.2d 1281*

Court is empowered to regard complaint for declaratory judgment as petition for writ of mandate governed by *Code Civ. Proc. § 1094.5* (administrative mandate) if it contains all necessary allegations. *Gilles v. Department of Human Resources Development (1974) 11 Cal. 3d 313, 321, 329, 113 Cal. Rptr. 374, 521 P.2d 110* ; *Hostetter v. Alderson (1952) 38 Cal. 2d 499, 500, 241 P.2d 230*

Judicial review by proceeding for writ of certiorari is unavailable where agency not empowered by Constitution to exercise judicial functions. *Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 42-43, 112 Cal. Rptr. 805, 520 P.2d 29* ; *Standard Oil Co. v. State Bd. of Equalization (1936) 6 Cal. 2d 557, 559-565, 59 P.2d 119*

Agencies and employees are generally immune under Tort Claims Act (*Gov. Code §§ 810-996.6*) from liability for damages based on discretionary acts, including licensing activities in particular. *Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 127, 109 Cal. Rptr. 799, 514 P.2d 111* ; *O'Hagan v. Board of Zoning Adjustment (1973) 38 Cal. App. 3d 722, 728, 730, 113 Cal. Rptr. 501* ; *Burns v. City Council (1973) 31 Cal. App. 3d 999, 1004-1005, 107 Cal. Rptr. 787*

Rules respecting injunction against enforcement of statute are applicable also to enforcement of ordinance.

Crittenden v. Superior Court (1964) 61 Cal. 2d 565, 569, 39 Cal. Rptr. 380, 393 P.2d 692 ; *Mock v. Santa Rosa (1899) 126 Cal. 330, 342-343, 58 P. 826*

Collateral attack on judgment of California court is not to be based on any evidence other than judicial record. *Johnson v. Hayes Cal Builders, Inc. (1963) 60 Cal. 2d 572, 576, 35 Cal. Rptr. 618, 387 P.2d 394*

Administrative decision is subject to collateral attack in same way as judgment. *Aylward v. State Board etc. Examiners (1948) 31 Cal. 2d 833, 839, 192 P.2d 929* ; *Forbes v. Hyde (1866) 31 Cal. 342, 347* (judgment void for lack of jurisdiction as subject to collateral attack wherever and whenever it is invoked) Court lacks power to give relief having effect of enjoining agency from enforcing statute. *Modern Barber Col. v. Cal. Emp. Stab. Com. (1948) 31 Cal. 2d 720, 723, 192 P.2d 916* (writ of mandate)

Judicial review by proceeding for writ of habeas corpus is available in appropriate case. *Loustalot v. Superior Court (1947) 30 Cal. 2d 905, 910, 186 P.2d 673*

Action for declaratory judgment is proper in appropriate case. *California Physicians' Serv. v. Garrison (1946) 28 Cal. 2d 790, 800-801, 172 P.2d 4* ; *Lord v. Garland (1946) 27 Cal. 2d 840, 851-852, 168 P.2d 5* ; *Sandelin v. Collins (1934) 1 Cal. 2d 147, 150-151, 157, 33 P.2d 1009*

Administrative attempt to enforce valid statute in unconstitutional manner is subject to injunction. *Brock v. Superior Court (1939) 12 Cal. 2d 605, 610, 86 P.2d 805*

Judicial review by proceeding for writ of prohibition is unavailable where agency not empowered by Constitution to exercise judicial functions. Whitten v. California State Board, etc. *(1937) 8 Cal. 2d 444, 445-446, 65 P.2d 1296*

Court lacks power to enjoin agency from enforcing statute. *Moore v. Superior Court (1936) 6 Cal. 2d 421, 424, 57 P.2d 1314*

Invalid enactment is not a statute; administrative attempt to enforce invalid enactment as subject to injunction. *Reclamation Dist. v. Superior Court (1916) 171 Cal. 672, 676, 154 P. 845* ; *Wheeler v. Herbert (1908) 152 Cal. 224, 228, 92 P. 353*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsRes JudicataAdministrative LawJudicial ReviewReviewabilityFinal Order RequirementAdministrative LawJudicial ReviewReviewabilityRipenessAdministrative LawJudicial ReviewReviewabilityStandingAdministrative LawJudicial ReviewStandards of ReviewAbuse of DiscretionAdministrative LawJudicial ReviewStandards of ReviewExceeding Statutory AuthorityCivil ProcedureJusticiabilityStandingPersonal StakeCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 474.35 Law Reviews

Maher, *War Stories: The Non-Adversarial Process by Which Veterans Are Awarded Disability Benefits Works Fine Without Lawyers and Judicial Review ... Or Does It?* 5(5) Cal. Law. 38 (1985)

Henke, *Judicial Review of Local Government Administrative Decisions in California, 10 U.S.F. L. Rev. 361 (1976)*

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The Supreme Court of California 1972-1973: Administrative Law, 62 Cal. L. Rev. 408 (1974)

Bogaard, *The Strumsky Case: Expanding Judicial Review of Local Administrative Decisions, 50 Lab. Arb. Rep. (BNA) 65 (1974)*

Forkosch, *Judicial De Novo Review of Administrative Quasi-Judicial Fact Determinations, 25 Hastings L.J. 963 (1974)*

Read, *The Scope of Judicial Review of Probationary Teacher Dismissal in California: Critique and Proposal, 21 UCLA L. Rev. 1257 (1974)*

The Supreme Court of California 1971-1972: Administrative Law, 61 Cal. L. Rev. 289 (1973)

Note, *Procedural Due Process Protection for Probationary Teachers' First Amendment Rights: Bekiaris v. Board of Education*, 24 Hastings L.J. 1227 (1973)

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The Supreme Court of California 1968-1969: Administrative Law, 58 Cal. L. Rev. 135 (1970)

Ehrman, *Administrative Appeal and Judicial Review of Property Tax Assessments in California--The New Look, 22 Hastings L.J. 1 (1970)*

Schwarz, *Exceptions to the Exhaustion of Administrative Remedies Under the Mexican Writ of Amparo: Some Possible Applications to Judicial Review in the United States, 7 Cal. West L. Rev. 331 (1970)*

Lesar, *Timing of Judicial Review Under the Administrative Procedure Act, 56 Cal. L. Rev. 1491 (1968)*

Reed, *Exhaustion of Administrative Remedies in California, 56 Cal. L. Rev. 1061 (1968)*

The Supreme Court of California 1966-1967: Administrative Law, 55 Cal. L. Rev. 1067 (1967)

Comment, *Basic Findings' and Effective Judicial Review of the California Public Utilities Commission, 13 UCLA L. Rev. 313 (1966)*

Kleps, *Certiorarified Mandamus Reviewed: The Courts and California Administrative Decisions 1949-1959, 12 Stan. L. Rev. 554 (1960)*

Netterville, *Agencies and the Courts--Judicial Review: The "Independent Judgment" Anomaly, 44 Cal. L. Rev. 262 (1956)*

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Comment, *Scope of Judicial Review of Local Administrative Agencies in California, 29 So. Cal. L. Rev. 332 (1956)*

Bancroft, *Substantial Evidence Rule: Review of Entire Record, 40 Cal. L. Rev. 119 (1952)*

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Note, *Administrative Law--Judicial Review of Orders of State-Wide Boards Exercising Statutory Jurisdiction, 22 So. Cal. L. Rev. 49 (1948)*

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Administrative Body, *31 Cal. L. Rev. 436 (1943)*

McGovney, *The California Chaos in Court Review of the Decisions of State Administrative Agencies*, *15 So Cal. L. Rev. 391 (1942)*

McGovney, *Court Review of Administrative Decisions in California; The Pending State Constitutional Amendment (Art. IV, Sec. lb)*, *30 Cal. L. Rev. 507 (1942)*

Bufford, *Writ of Mandate Held Available for Reviewing Administrative Agencies*, 16 State BJ 306 (1941)

Holbrook, *Judicial Review of Determinations by County Boards of Equalization*, *14 So Cal. L. Rev. 276 (1941)*

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Turrentine, *Restore Certiorari to Review State-Wide Administrative Bodies in California*, *29 Cal. L. Rev. 279 (1941)*

Note, *Administrative Law: Judicial Review: Exhaustion of Administrative Remedies*, *29 Cal. L. Rev. 515 (1941)*

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Note, *Administrative Law: Method and Scope of Judicial Review of Administrative Findings*, *27 Cal. L. Rev. 738 (1939)*

Radin, *The Courts and Administrative Agencies*, *23 Cal. L. Rev. 469 (1935)*

Comment, *Judicial Review of Administrative Findings on "Fundamental" or "Jurisdictional" Facts*, *21 Cal. L. Rev. 266 (1933)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewReviewabilityExhaustion of RemediesAdministrative LawJudicial ReviewStandards of ReviewDe Novo ReviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of Protection

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§ 474.36 Text References

Judicial Council, Tenth Biennial Report (1944)

California Administrative Mandamus (Cal. C.E.B. 2d ed. 1989)

Witkin, California Procedure, vol. 8, *Extraordinary Writs*, §§ 30, 257 et seq. (4th ed. 1997)

Legal Topics:

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

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§ 474.37 Internet References

Office of Administrative Hearings. This site includes information and location concerning specific OAH offices; an OAH hearing guide; information concerning Administrative Procedure Act statutes, regulations, and proposed regulations; OAH forms; information concerning alternative dispute resolution procedures; and declaratory decisions. http://www.dgs.ca.gov/oah

NOTE:
On and after July 1, 1998, The OAL is required by *Gov. Code § 11340.1(b)* to make the full text of the California Code of Regulations, with reference citations and history notes, available on the Internet free of charge.

Office of Administrative Law. This site includes OAL publications; links to OAL statutes and regulations relating to rulemaking; regulations submitted to the OAL for review, and information for contacting or providing input to the OAL regarding rulemaking. http://www.oal.ca.gov

California Home Page. This site includes links to other sites maintained by numerous state agencies. http://www.ca.gov

Department of Consumer Affairs. This site includes links to sites maintained by many state agencies that are under this department, as well as links to agency sites. http://www.dca.ca.gov

California Courts. This site includes general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most Court of Appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes text of constitution, codes, and statutes (including complete text of APA); and information concerning pending legislation. http://www.leginfo.ca.gov

Matthew Bender. This site includes links to Matthew Bender publications and Shepard's citation service. http://www.bender.com

Legal Topics:

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

§§ 474.38[Reserved]

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§ 474.50 Determine Availability of and Procedure for Judicial Review

- ☐ Ascertain if the prerequisites exist for seeking a writ of mandate [*see § 474.13*]:
  - ☐ Is the potential petitioner beneficially interested [*see § 474.13[1]*]?
  - ☐ Is there a lack of adequate remedy at law [*see § 474.13[2]*]?
  - ☐ Have administrative remedies been:
    - ☐ Exhausted [*see § 474.13[3]*]; or
    - ☐ Excused [*see § 474.13[4]*].
- ☐ Consider defenses that the agency could raise to a mandate proceeding [*see § 474.14*]:
  - ☐ Statute of limitations [*see § 474.14[1]*].
  - ☐ Laches [*see § 474.14[2][a]*].
  - ☐ Unclean hands [*see § 474.14[2][b]*].
- ☐ Determine proper type of judicial review to pursue [*see § 474.10[3]*]:
  - ☐ Ordinary mandate, for quasi-legislative actions [*see Code Civ. Proc. § 1085*; for discussion, *see §*

474.11].

☐ Administrative mandate, for quasi-judicial actions [*see Code Civ. Proc. § 1094.5*; for discussion, *see § 474.12*].

☐ Identify any additional statute or statutes governing review of agency's decision:

☐ Administrative Procedure Act [*see Gov. Code 11410.10 et seq.*; for discussion, *see Ch. 473, Public Agency Adjudication, § 473.15*].

☐ Local agency subject to *Code Civ. Proc. § 1094.6* [*see § 474.12[3][b]*].

☐ Agency governed by particular constitutional provisions or statutes specific to that agency [*see § 474.23*].

☐ Consider other possibly applicable types of relief:

☐ Writ of prohibition (to restrain acts in excess of jurisdiction) [*see § 474.20*].

☐ Writ of certiorari (to prevent enforcement of acts in excess of jurisdiction [*see § 474.20*].

☐ Action for injunctive relief (to restrain threatened administrative action or enforcement of administrative decision) [*see § 474.22*].

☐ Action for declaratory relief (to obtain judicial determination of validity of administrative regulation) [*see § 474.21*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewRemediesProhibitionAdministrative LawJudicial ReviewReviewabilityExhaustion of RemediesCivil ProcedureJusticiabilityExhaustion of RemediesAdministrative RemediesCivil ProcedureEquityMaximsClean Hands PrincipleCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 474.51 Petition for Writ of Mandate

☐ Prepare petition for writ of mandate [*Code Civ. Proc. § 1085*; *see § 474.10[2*]; for a form of petition for writ of ordinary mandate, see *Ch. 471B, Licensing by Public Agencies, § 471B.100*].

☐ All papers must comply with superior court rules [*see Cal. Rules of Ct., Rules 2.100-2.119, 3.1110*].

☐ Verify petition [*Code Civ. Proc. § 1086*].

☐ Prepare memorandum.

☐ Prepare proposed alternative writ [*Code Civ. Proc. § 1087*; for a form, see *Ch. 471B, Licensing by Public Agencies, § 471B.101*].

☐ Serve involved official, board, or agency [*Code Civ. Proc. §§ 1088, 1089*; *Cal. Rules of Ct., Rule 8.490; § 474 .10[2]*].

☐ Serve other interested parties [*Code Civ. Proc. §§ 1088, 1089*; *Cal. Rules of Ct., Rule 8.490; § 474 .10[2]*].

☐ File petition with proof of service in proper court [*Code Civ. Proc. § 1086*; *Cal. Rules of Ct., Rule 8.490; § 474 .10[2]*].

☐ For more detailed procedural checklist for use in ordinary mandate proceedings, see Ch. 358,

Mandate and Prohibition .

☐ For procedural checklist and forms for use in seeking petition for administrative mandate as distinguished from ordinary mandate, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamus

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§ 474A.syn Synopsis to Chapter 474A: TIMING OF JUDICIAL REVIEW OF AGENCY DECISIONS

§ 474A.01 Scope of Chapter

§ 474A.02 Cross References

[1] Related Coverage of Judicial Review

[2] Agency Adjudication

[3] Public Administrative Law Generally

§§ 474A.03-474A.09 [Reserved]

§ 474A.10 Claim Must Be Ripe for Adjudication

[1] Nature of Ripeness Requirement

[2] Ripeness Requirement in Proceeding to Compel Performance of Ministerial Duty

[a] Duty Must Be a Present One

[b] Administrative Entity Must Actually Refuse to Perform

[3] Ripeness Requirement in Proceeding to Review Adjudicative Decision or Order

[a] Order or Decision Must Have Direct and Immediate Effect on Petitioner

[b] Necessity of Final Order or Decision

[i] Requirement of Finality

[ii] Finality of Decision of State Agency Subject to APA

[iii] Finality of Decision of Local Agency Under Code Civ. Proc. § 1094.6

[iv] Finality of Decision Absent Controlling Statute

§ 474A.11 Exhaustion of Administrative Remedies Required

[1] Jurisdictional Nature of Exhaustion Requirement

[2] Applicability of Requirement

[a] Effect of Statutory Provisions

[b] All Individual Claims, Contentions, and Objections Must Be Raised Before Administrative Body

[c] Class Actions

[3] What Constitutes Exhaustion of Administrative Remedy

[a] Completed Proceedings With Final Decision on Merits

[b] Full Presentation of Issues at All Stages

§ 474A.12 Exceptions to Rule: When Exhaustion of Administrative Remedies Not Required

[1] Administrative Remedy Unavailable or Inadequate

[a] Nature of Exception

[b] Administrative Body Cannot Grant Relief Sought

[c] Procedures for Obtaining Relief Are Inadequate

[2] Exhaustion Would Be Futile

[3] Court Vested With Concurrent Primary Jurisdiction

[4] Administrative Entity Lacks Subject Matter Jurisdiction

[5] Statute Under Which Administrative Entity Operates Is Unconstitutional on Its Face

[6] Threat of Irreparable Injury Exists

[7] Public Interest Disserved by Application of Rule

§ 474A.13 Expedited Review of Decisions on Permit or Entitlement Involving Constitutionally Protected Speech

§§ 474A.14-474A.19 [Reserved]

§ 474A.20 Proceeding Not Commenced Within Applicable Statute of Limitations Period Is Barred

[1] Applicability of Statute of Limitations Defenses

[2] Applicable Limitation Periods

[a] General Rules for Determining

[b] Decisions Subject to the APA

[c] Local Agency Decisions Reviewable in Administrative Mandate Proceedings Subject to Code Civ. Proc. § 1094.6

[3] Commencement and Running of Limitation Period

[4] Expedited Judicial Review of First Amendment Related Claims

§ 474A.21 Proceeding May Be Barred by Laches

§ 474A.22 Proceeding May Be Dismissed If Moot

§ 474A.23 Dismissal for Delay in Prosecution

§§ 474A.24-474A.29 [Reserved]

§ 474A.30 Related Matthew Bender Publications

§ 474A.31 Federal Constitution

§ 474A.32 State Constitution

§ 474A.33 State Statutes

§ 474A.34 Decisions

[1] Generally

[2] Moot Questions

[3] Exhaustion of Administrative Remedies

[4] Conditions for Exhaustion

[5] Exceptions to Exhaustion

[6] Compliance With Exhaustion Requirement

[7] Exhaustion and Constitutional Questions

[8] Pleading Exhaustion

§ 474A.35 Law Reviews

§ 474A.36 Text References

§§ 474A.37-474A.49 [Reserved]

§ 474A.50 Determine If Timing Is Proper for a Mandate Proceeding

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PART I. SCOPE

41A-474A California Forms of Pleading and Practice--Annotated § 474A.01

§ 474A.01 Scope of Chapter

This chapter provides a discussion of the timing of judicial review in California public administrative law, including the following in Part II:

- Subpart A discusses ripeness of an action for judicial review and exhaustion of administrative remedies [*see §§ 474A.10 -474A.12*].

- Subpart B discusses statute of limitations, laches, and mootness [*see §§ 474A.20 -474A.22*].

A Research Guide [Part III; *see § 474A.30* et seq.] and Procedural Checklist [Part IV; *see § 474A.50*] are also included.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewReviewabilityExhaustion of RemediesAdministrative LawJudicial ReviewReviewabilityRipenessGovernmentsLegislationStatutes of LimitationsGeneral Overview

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PART I. SCOPE

41A-474A California Forms of Pleading and Practice--Annotated § 474A.02

§ 474A.02 Cross References

[1] Related Coverage of Judicial Review

For related discussion concerning judicial review by California courts of agency adjudications, see

- Ch. 474, *Availability of Judicial Review of Agency Decisions*.
- Ch. 474B, *Standards in Reviewing Agency Decisions*.
- Ch. 474C, *Procedures in Reviewing Agency Decisions*.

For other related discussion and forms relating to judicial review generally, see

- Ch. 40, *Appeal: An Overview*, et seq. (discussion and forms relating to civil appeals).
- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to immediate judicial review of orders by extraordinary writ of mandate or prohibition).
- Ch. 492, *Review (Certiorari), Writ of* (discussion and forms relating to immediate judicial review of civil proceedings by extraordinary writ of review).

For memoranda of points of points and authorities supporting and opposing petitions for writs of mandate generally, see California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender).

For memoranda of points and authorities supporting and opposing petitions for administrative mandate, see California Points and Authorities, Ch. 195, *Public Administrative Law* (Matthew Bender).

[2] Agency Adjudication

For detailed discussion and forms relating to agency adjudications that are the subject of the judicial review discussed in

this chapter, see

- Ch. 473, *Public Agency Adjudication*.
- Ch. 473A, *Commencing Agency Adjudication*.
- Ch. 473B, *Discovery in Agency Adjudications*.
- Ch. 473C, *Prehearing Procedures in Agency Adjudications*.
- Ch. 473E, *Public Administrative Law Judges*.
- Ch. 473F, *Agency Adjudication Hearings*.
- Ch. 473G, *Agency Adjudication Decisions*.
- Ch. 473H, *Alternative Administrative Adjudication Procedures*.

For detailed discussion and forms relating generally to licensing agencies, including licensing adjudications, see Ch. 471B, *Licensing by Public Agencies* .

[3] Public Administrative Law Generally

For related discussion of California public administrative law generally, including discussion of public agency functions and powers (including adjudicative or quasi-judicial powers), and organization generally, see Ch. 470, *Overview of Public Administrative Law* (general discussion of judicial power is in § 470.12[5]). For detailed discussion of the general procedures imposed in agency proceedings by constitutional due process and related statutory requirements, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

For discussion and forms relating to the law governing access to and conduct of meetings by California public agencies, see Ch. 470B, *Public Agency Meetings* .

For detailed discussion and forms relating to the law governing disclosure of public records under the California Public Records Act [*Cal. Gov. Code §§ 6250 et seq.*], see Ch. 470C, *Public Records Act* .

For detailed discussion and forms relating generally to agency investigations and inspections, see

- Ch. 471, *Investigations by Public Agencies*.
- Ch. 471A, *Inspections by Public Agencies*.

For detailed discussion and forms relating generally to the legislative or rulemaking functions of California public agencies, including judicial review of these functions, see

- Ch. 472, *Public Agency Rules*.
- Ch. 472A, *Agency Rulemaking Procedures*.
- Ch. 472B, *Review of Agency Rulemaking*.

For additional cross references to coverage of particular public agencies, see *Ch. 470, Overview of Public Administrative Law, § 470.02[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewStandards of ReviewGeneral Overview

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[Reserved]

§§ 474A.03[Reserved]

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A. When Mandate Proceedings May Be Commenced

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§ 474A.10 Claim Must Be Ripe for Adjudication

[1] Nature of Ripeness Requirement

The requirement of ripeness is essentially a requirement of an actual existing controversy that has reached a stage at which adjudication is appropriate. Ripeness requires that the issues of a case be concrete and specific enough for a court to render a definite judgment upon them, and that there would be hardship to the parties seeking review if the court did not decide them [*Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal. 3d 158, 171, 188 Cal. Rptr. 104, 655 P.2d 306* ; *Urban Habitat Program v. City of Pleasanton (2008) 164 Cal. App. 4th 1561, 1580-1581, 80 Cal. Rptr. 3d 300* (challenge by nonprofit corporation and low income plaintiff to alleged failure of city to adopt low income housing plan was ripe for judicial review even though city had not taken action on any specific permit); *Teachers' Retirement Board v. Genest (2007) 154 Cal. App. 4th 1012, 1040-1041, 65 Cal. Rptr. 3d 326* (declaratory relief action challenging legality of legislative diversion of $500 million in funds allocated to teachers' retirement system was ripe for adjudication because budget reduction was completed at time of declaratory relief lawsuit); *Santa Teresa Citizen Action Group v. City of San Jose (2003) 114 Cal. App. 4th 689, 708-709, 7 Cal. Rptr. 3d 868* (nuisance claim was not ripe for judicial review at this time because the harm alleged was speculative and indefinite); *Hayward Area Planning Association v. Alameda County Transportation Authority, (1999) 72 Cal. App. 4th 95, 102-105, 84 Cal. Rptr. 2d 744* (dispute over legality of highway route alignment that differed from route proposed when tax revenue measure was approved by voters held to be ripe for judicial resolution even though agency had not completed final approval of project)]. Similarly, a dispute is not ripe for purposes of declaratory relief before the agency has exercised its discretion and decided whether to issue a building permit to the building owner seeking declaratory relief [*Martin v. City and County of San Francisco (2005) 135 Cal. App. 4th 392, 407, 37 Cal. Rptr. 3d 470* (challenge to applicability of California Environmental Quality Act (CEQA) review process and to discretion of local government body based on local ordinance conferring discretion on agency to grant or deny remodeling permits to interior remodeling of private home that was historic landmark)]. In mandate proceedings, the requirement has a number of different aspects.

For example the California Court of Appeal held that a landowner's regulatory takings claim was ripe for judicial review under *Code Civ. Proc. § 1094.5* (administrative mandamus) when the county agency made it very clear in denying a subdivision permit that the homeowner could not build a second single family home on his six acre property. In these

circumstances, the homeowner was not required to apply for a permit to build that second family home for his dispute to be ripe for adjudication [*Dunn v. County of Santa Barbara (2006) 135 Cal. App. 4th 1281, 1299-1301, 38 Cal. Rptr. 3d 316]* .

In *PG&E Corp. v. Public Utilities Comm'n (2004) 118 Cal. App. 4th 1174, 1194-1196, 13 Cal. Rptr. 3d 630* , the California Court of Appeal followed the two part test originally applied to ripeness questions by the U.S. Supreme Court in the case of *Abbott Laboratories v. Gardner (1967) 387 U.S. 136, 148-149, 87 S. Ct. 1507, 18 L. Ed. 2d 681* , and incorporated into California law the case of *Pacific Legal Foundation v. California Coastal Comm'n (1983) 33 Cal. 3d 158, 171, 188 Cal. Rptr. 104, 655 P. 2d 306* . The test identified two ripeness questions: 1) the fitness of the issues for judicial decisions; and 2) the hardship to the parties of withholding court consideration. The Court of Appeal held that a PUC interim interpretation of a priority condition (relating to utility holding companies maintaining debt to equity and capital expenditure ratios in the utilities plant and equipment) was not ripe for review because the PUC has not applied its interpretation to a concrete set of facts (thereby failing to satisfy the fitness criteria), and therefore the utility holding companies have not suffered any concrete negative consequences from the interpretation (thereby failing to satisfy the hardship criteria) [*PG & E Corp. v. Public Utilities Com. (2004) 118 Cal. App. 4th 1174, 1217-1219, 13 Cal. Rptr. 3d 630]* .

When the petitioner seeks to compel the performance of a ministerial duty [*see* Ch. 474B, *Standards in Reviewing Agency Decisions* , for discussion of ministerial actions], the action is ripe for adjudication only if:

- The duty is a present one, that is, one that an administrative official or entity is obligated to perform at the time the proceeding is commenced [*see* [2][a], *below*]; and

- The administrative official or entity has actually refused to perform the duty [*see* [2][b], *below*].

When the petitioner seeks judicial review of an adjudicative act or decision, the action is ripe for adjudication only if:

- The act or decision has a direct and immediate effect on the petitioner [*see* [3][a], *below*]; and

- The action or decision is final [*see* [3][b], *below*].

[2] Ripeness Requirement in Proceeding to Compel Performance of Ministerial Duty

[a] Duty Must Be a Present One

Usually, a writ of mandate is issued to compel an administrative official or body to perform a ministerial act only when the petitioner shows that the official or body had a present duty to perform the act--that is, the administrative entity had a duty to perform the act at the time the mandate proceeding was commenced [*Communist Party v. Peek (1942) 20 Cal. 2d 536, 540, 127 P.2d 889* ; *McGinnis v. Mayor and Common Council (1908) 153 Cal. 711, 715, 96 P. 367* ; *Northridge etc. Water Dist. v. McDonell (1958) 158 Cal. App. 2d 123, 127-128, 322 P.2d 25* ; for discussion of what constitutes a ministerial act, *see* Ch. 474B, *Standards in Reviewing Agency Decisions*]. In general, mandate does not lie to compel the performance of future acts [*Communist Party v. Peek (1942) 20 Cal. 2d 536, 540, 127 P.2d 889* ; *Diller v. Flynn (1964) 226 Cal. App. 2d 449, 453, 38 Cal. Rptr. 229]* . To avoid multiple proceedings or to prevent a proceeding from becoming moot before it can be decided, however, the present duty requirement is sometimes relaxed if the conduct or declarations of the administrative entity make it clear that it does not intend to perform the act when the time for performance arrives [*Young v. Gnoss (1972) 7 Cal. 3d 18, 21 n. 4, 101 Cal. Rptr. 533, 496 P.2d 445* (proceeding to compel registrar to register petitioner as voter commenced prior to close of registration period); *King v. Martin (1971) 21 Cal. App. 3d 791, 795-796, 98 Cal. Rptr. 711* (writ compelling director of Department of Social Welfare to render fair hearing decisions within 60-day period fixed by law issued as to administrative proceedings in which period had not expired when mandate proceeding was commenced); *Imperial Mut. Life Ins. Co. v. Caminetti*

(1943) 59 Cal. App. 2d 494, 497-498, 139 P.2d 693 (writ issued to compel insurance commissioner to renew license for fiscal year beginning after commence ment of mandate proceeding when propriety of commissioner's failure to renew for preceding fiscal year was also before the court)].

When the duty of an administrative official or body is conditional, the petitioner must show the occurrence of the required conditions [*see Metropolitan Life Ins. Co. v. Rolph (1920) 184 Cal. 557, 559, 194 P. 1005* ; *Lima v. Woodruff (1930) 107 Cal. App. 285, 287, 290 P. 480* ; *Nelson v. Anderson Etc. Irr. Dist. (1921) 51 Cal. App. 92, 98-99, 196 P. 292]* . Ordinarily, a showing is required that the petitioner has made a demand for performance of the duty at issue [*Nelson v. Anderson Etc. Irr. Dist. (1921) 51 Cal. App. 92, 98, 196 P. 292* ; *see also Jensen v. McCullough (1928) 94 Cal. App. 382, 388-389, 271 P. 568]* . A demand is not required, however, when the petitioner can show either of the following:

- The duty is one that affects the public at large and its performance will confer no immediate benefit on the petitioner [*Jensen v. McCullough (1928) 94 Cal. App. 382, 388-389, 271 P. 568* ; *Thoits v. Byxbee (1917) 34 Cal. App. 226, 235-236, 167 P. 166]* .

- A demand would have been futile [*Briare v. Matthews (1927) 202 Cal. 1, 8-9, 258 P. 939* ; *Bank of America v. Cory (1985) 164 Cal. App. 3d 66, 84, 210 Cal. Rptr. 351]* .

[b] Administrative Entity Must Actually Refuse to Perform

Mandate lies only when there has been an actual refusal, not an anticipated refusal, of an administrative entity to perform a ministerial duty [*Regents of University of California v. State Bd. of Equalization (1977) 73 Cal. App. 3d 660, 669, 140 Cal. Rptr. 857* ; *Northridge etc. Water Dist. v. McDonell (1958) 158 Cal. App. 2d 123, 127-128, 322 P.2d 25* ; *George v. Beaty (1927) 85 Cal. App. 525, 531, 260 P. 386]* . The writ does not issue against an administrative officer or body willing to comply with a prescribed legal duty [*Sutro Heights Land Co. v. Merced Irr. Dist. (1931) 211 Cal. 670, 704, 296 P. 1088* ; *McMullen v. Glenn-Colusa Irr. Dist. (1936) 17 Cal. App. 2d 696, 700-701, 62 P.2d 1083* ; *George v. Beaty (1927) 85 Cal. App. 525, 529, 260 P. 386* ; *but see King v. Martin (1971) 21 Cal. App. 3d 791, 796, 98 Cal. Rptr. 711* (claimed inability to comply due to budgetary restrictions no defense)]. The petitioner is not required, however, to show an express refusal of the officer or body to act; any conduct signifying an unequivocal intention not to act is sufficient [*Palmer v. Fox (1953) 118 Cal. App. 2d 453, 456, 258 P.2d 30]* .

[3] Ripeness Requirement in Proceeding to Review Adjudicative Decision or Order

[a] Order or Decision Must Have Direct and Immediate Effect on Petitioner

Unless review of administrative regulations is authorized by law [*see* Ch. 472B, *Review of Agency Rulemaking*], the courts only review an administrative body's adjudication or determination of a factual or legal question when the decision is the basis for an order or decision that directly and immediately affects a specific person or entity [*Western Surgical Supply Co. v. Affleck (1952) 110 Cal. App. 2d 388, 391, 242 P.2d 929* ; *see also Teed v. State Board of Equalization (1936) 12 Cal. App. 2d 162, 163-164, 55 P.2d 267]* . Mandate is not available to review adoption of a policy that requires a particular legal or factual issue to be resolved in a specific way [*Western Surgical Supply Co. v. Affleck (1952) 110 Cal. App. 2d 388, 391, 242 P.2d 929* (mandamus not available to review regulations and orders of State Pharmacy Board interpreting law to require supervision of certain activities by licensed pharmacist absent showing that they had been enforced against petitioner); *see also Teed v. State Board of Equalization (1936) 12 Cal. App. 2d 162, 163-164, 55 P.2d 267* (SBE's policy of considering certain activities as taxable not reviewable in extraordinary writ proceeding in absence of showing it had been directly applied to petitioner)].

[b] Necessity of Final Order or Decision

[i] Requirement of Finality

An adjudicative order or decision can be reviewed in a mandate proceeding only if it has become final [*Code Civ. Proc. § 1094.5(a)*; *see Peter R. Gadd, Inc. v. Workman (1927) 200 Cal. 384, 388-389, 253 P. 700* ; *Bleeck v. State Board of Optometry (1971) 18 Cal. App. 3d 415, 432, 95 Cal. Rptr. 860* ; *see also Prip v. City of Santa Barbara (1963) 214 Cal. App. 2d 626, 630-631, 29 Cal. Rptr. 558]* .

In most cases, the statutes that govern judicial review of an administrative action or decision expressly or by necessary implication provide when the action or decision becomes final for the purpose of judicial reviews [*see, e.g., Code Civ. Proc. § 1094.6(b)* (certain decisions of local agencies adopting provisions of § 1094.6); *Gov. Code § 11523* (decisions of statewide agencies subject to the APA); *Labor Code § 1160.8* (orders of Agricultural Labor Relations Board); *Unemp. Ins. Code § 410* (decision of Unemployment Insurance Appeals Board); *Veh. Code § 14401(a)* (order refusing, canceling, suspending, or revoking driver's license)].

A State Personnel Board decision that revoked the termination of plaintiff employee by defendant agency employer was final for purposes of plaintiff's filing a writ of mandate petition seeking reinstatement and back pay against defendant agency. The decision was final for appeal purposes even though not final for enforcement purposes because SPB did not have the authority to rehear or reconsider the decision to revoke termination of plaintiff after adopting the decision of an ALJ upon rehearing [*Gov. Code § 18710*; *Lomeli v. Department of Corrections (2003) 108 Cal. App. 4th 788, 797-798, 134 Cal. Rptr. 2d 179]* . The petition was not premature because plaintiff filed within the one-year time period [*Gov. Code § 19630*] within which defendant agency could have filed its own petition for a writ of mandate challenging the SPB decision [*Lomeli v. Department of Corrections (2003) 108 Cal. App. 4th 788, 796-797, 134 Cal. Rptr. 2d 179]* . *Code Civ. Proc §§ 1049, 1109*, and *1110*, which govern civil actions and provide that a judgment is not final until appeals have been completed, or the time for appeal has ended, do not apply to administrative hearings and govern only civil actions [*Lomeli v. Department of Corrections (2003) 108 Cal. App. 4th 788, 796-797, 134 Cal. Rptr. 2d 179]* .

Note that the date on which an administrative order or decision becomes final and the date on which the applicable limitation period begins to run are not necessarily the same [*see, e.g., Cummings v. City of Vernon (1989) 214 Cal. App. 3d 919, 922-924, 263 Cal. Rptr. 97* (90-day limitation period of *Code Civ. Proc. § 1094.6* does not run from date of final decision, but from date of notice of decision), discussed in *§ 474A.20[3]*]. For example, a decision is final when issued in final form by the agency, and an aggrieved party could seek judicial review of that decision at that time. However, the 90-day statute of limitations that commences upon the giving of notice under *Code of Civ. Proc. § 1094.6(f)* is tolled until the notice is given by the agency. Nonetheless, an aggrieved party does not have an unlimited time period to seek judicial review; the doctrine of laches applies to the timeliness of the parties' efforts to obtain judicial review [*El Dorado Palm Springs Ltd. v. Rent Review Com. (1991) 230 Cal. App. 3d 335, 346, 281 Cal. Rptr. 327]* .

For a discussion of the commencement of limitation periods, see *§ 474A.20[3]*. For a discussion of the closely related requirement that a petitioner must exhaust available administrative remedies, see *§§ 474A.11* and *474A.12*.

[ii] Finality of Decision of State Agency Subject to APA

Gov. Code § 11523 provides that a petition to obtain review of a decision of a statewide agency subject to the California Administrative Procedure Act (APA) [*Gov. Code § 11340 et seq.*] "shall be filed within 30 days after the last day on which reconsideration can be ordered." By necessary implication, therefore, a decision governed by the APA becomes final on the expiration of the time for ordering reconsideration. The time for ordering reconsideration expires as follows [*Gov. Code § 11521(a)*]:

- Thirty days after the delivery or mailing of a decision to the petitioner;
- If the agency establishes a date within that 30-day period as the effective date of the decision, on the

effective date; or

- If the agency establishes the date on which a stay that does not exceed 30 days terminates as the effective date, on the effective date.

[iii] Finality of Decision of Local Agency Under Code Civ. Proc. § 1094.6

Code Civ. Proc. § 1094.6(b) sets forth rules for determining the finality of certain decisions of local agencies.

Code Civ. Proc. § 1094.6 applies to decisions subject to review in administrative mandate proceedings suspending, demoting, or dismissing an officer or employee; revoking or denying an application for a permit, license, or other entitlement; or denying an application for a retirement benefit or allowance. *Code Civ. Proc. § 1094.6* applies to local agencies, as defined in *Gov. Code § 54951,* other than school districts. *Gov. Code § 54951,* defines a local agency is "a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission, or agency thereof, or other local public agency."

Under *Code Civ. Proc. § 1094.6*, the following rules apply:

- When no provision exists for reconsideration of the decision, or for a written decision or written findings supporting the decision [*Code Civ. Proc. § 1094.6(b)*], in any applicable statute, regulation, or rule, the decision or order is final on the date it is announced.

- When a provision exists for reconsideration, but reconsideration is not sought, the decision or order is final on the expiration of the period for seeking reconsideration.

- When a provision for reconsideration exists and reconsideration is sought, the decision or order is final on the date that reconsideration is rejected.

- When there is a provision for a written decision or written findings, the decision is final upon the date it is mailed by first-class mail, postage prepaid, including a copy of the affidavit or certificate of mailing, to the party seeking the writ, and *Code Civ. Proc. § 1013(a)* does not apply to extend the time for filing the petition [*Code Civ. Proc. § 1094.6(b)*].

In making a final decision under Section 1094.6, a local agency must provide notice to the party that the time for seeking judicial review is governed by *Code Civ. Proc. § 1094.6* [*Code Civ. Proc. § 1094.6(f)*]. For the purpose of this notice requirement, a "party" is an officer or employee who has been suspended, demoted, or dismissed; a person whose license or permit has been revoked or suspended; a person whose application for a license or permit has been denied; or a person whose application for a retirement benefit or allowance has been denied [*Code Civ. Proc. § 1094.6(f)*].

A court of appeal has held that this scheme is not as simple as it appears to be. In *Cummings v. City of Vernon (1989) 214 Cal. App. 3d 919, 263 Cal. Rptr. 97* , the court held that a local agency's decision is not final for the purpose of determining the limitation period until the notice of decision required by *Code Civ. Proc. § 1094.6(f)* has been given. This means that the 90-day period for filing a petition for review under *Code Civ. Proc. § 1094.6* runs from the date of notice, not the date of decision [*Cummings v. City of Vernon (1989) 214 Cal. App. 3d 919, 922-924, 263 Cal. Rptr. 97]* . However, another court distinguished between finality of agency decisions and timing of the 90-day notice period [*see El Dorado Palm Springs, Ltd. v. Rent Review Com. (1991) 230 Cal. App. 3d 335, 346, 281 Cal. Rptr. 327]* . Under this view, a decision is final when issued in final form by the agency, and an aggrieved party may seek judicial review of the decision at that time. However, the 90-day statute of limitation that commences on the giving of notice under *Code Civ. Proc. § 1094.6(f)* is tolled until the notice is given by the agency. This view does not give an aggrieved party an unlimited time period to seek judicial review should the agency fail to give the 1094.6(f) notice; the doctrine of

laches applies to the timeliness of the parties' efforts to obtain judicial review [*El Dorado Palm Springs, Ltd. v. Rent Review Com. (1991) 230 Cal. App. 3d 335, 346, 281 Cal. Rptr. 327]* .

[iv] Finality of Decision Absent Controlling Statute

In the absence of controlling statutes, the question of when an administrative order or decision becomes final must be determined under California decisional law [*O.W.L. Foundation v. City of Rohnert Park (2008) 168 Cal. App. 4th 568, 584-585, 86 Cal. Rptr. 3d 1* (city adoption of water supply assessment was final agency action for judicial review even though EIR was not adopted at time of challenge to water supply assessment such that dispute was ripe for judicial review under *Code of Civil Procedure Section 1085* (ordinary mandate); *California Water Impact Network v. Newhall County Water Dist (2008) 161 Cal. App. 4th 1464, 1471, 75 Cal. Rptr. 3d 393* (water district adoption of water supply assessment was not final agency action until EIR has been adopted under CEQA requirements)]. California decisions have not yet directly addressed the question of when an administrative order or decision is final for the purposes being ripe for judicial review. Under decisions in other contexts, however, the finality of an administrative order or decision is determined by ascertaining the legislative intent of the statute under which the administrative entity is empowered to act. An order or decision is ordinarily deemed to be final under its statute when the entity loses jurisdiction to reconsider the order or decision and reach a different conclusions [*Lindell Co. v. Board of Permit Appeals (1943) 23 Cal. 2d 303, 323, 144 P.2d 4* ; *In re Fain (1976) 65 Cal. App. 3d 376, 390, 135 Cal. Rptr. 543* ; *McDonald's Systems of California, Inc. v. Board of Permit Appeals (1975) 44 Cal. App. 3d 525, 543-544, 119 Cal. Rptr. 26]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewReviewabilityFinal Order RequirementAdministrative LawJudicial ReviewReviewabilityRipenessCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLocal GovernmentsAdministrative Boards

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§ 474A.11 Exhaustion of Administrative Remedies Required

[1] Jurisdictional Nature of Exhaustion Requirement

Before seeking judicial review of an administrative action or decision, a petitioner must fully use and exhaust all available administrative remedies [*In re Dexter (1979) 25 Cal. 3d 921, 925, 160 Cal. Rptr. 118, 603 P.2d 35* ; *Sheet Metal Workers International Association, Local Union No. 104 v. Rea (2007) 153 Cal. App. 4th 1071, 1074-1075, 1080-1081, 63 Cal. Rptr. 3d 672* (labor union mandamus and declaratory relief action challenging prevailing wage law decision of director of department of industrial relations was barred by union's failure to exhaust administrative remedies in that union failed to file petition with director under *Labor Code § 1773* within 20 days of advertising call for bids to seek agency review of the prevailing wage determination); *Richards v. Dep't of Alcoholic Beverage Control (2006) 139 Cal. App. 4th 304, 309, 42 Cal. Rptr. 3d 782* (restaurant owner's failure to apply for transfer of license or for original license when he purchased restaurant was a failure to exhaust administrative remedies that precludes his lawsuit challenging the department's revocation of an alcoholic beverage license issued to the prior owner); *American Alliance Ins. Co. v. State Bd. of Equalization (1982) 134 Cal. App. 3d 601, 609, 184 Cal. Rptr. 674* ; *Doyle v. Chino, City of (1981) 117 Cal. App. 3d 673, 681, 172 Cal. Rptr. 844]* . Compliance with this basic requirement is a prerequisite to the right to seek review of the action or decision in proceedings for ordinary mandate [*see* *Horack v. Franchise Tax Board (1971) 18 Cal. App. 3d 363, 368, 95 Cal. Rptr. 717]* and administrative mandate [*Ralph's Chrysler-Plymouth v. New Car Dealers Policy & Appeals Bd. (1973) 8 Cal. 3d 792, 794, 106 Cal. Rptr. 169, 505 P.2d 1009* ; *Temescal Water Co. v. Dept. of Public Works (1955) 44 Cal. 2d 90, 106, 280 P.2d 1]* .

The purpose of this requirement is as follows:

- Lighten the burden of overworked courts when effective administrative remedies are available [*Duffy v. State Bd. of Equalization (1984) 152 Cal. App. 3d 1156, 1163, 199 Cal. Rptr. 886* ; *Bozaich v. State of California (1973) 32 Cal. App. 3d 688, 698, 108 Cal. Rptr. 392]* .

- Give administrative tribunals an opportunity to exercise judgment and discretion on matters within their area of expertise without prior judicial interference [*San Bernardino Valley Audubon Society, Inc.*

v. County of San Bernardino (1984) 155 Cal. App. 3d 738, 748, 202 Cal. Rptr. 423 ; *Associated Cal. Loggers, Inc. v. Kinder (1978) 79 Cal. App. 3d 34, 43, 144 Cal. Rptr. 786]* .

- Promote judicial efficiency by facilitating development of a complete record that draws on administrative expertise [*Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 476, 131 Cal. Rptr. 90, 551 P.2d 410* ; *Karlin v. Zalta (1984) 154 Cal. App. 3d 953, 980, 201 Cal. Rptr. 379]* .

The exhaustion requirement is a judicially created rule [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 292, 109 P.2d 942* ; *Karlin v. Zalta (1984) 154 Cal. App. 3d 953, 979, 201 Cal. Rptr. 379]* . This rule has been characterized as flexible, and is subject to a number of judicially created exceptions [*County of Contra Costa v. State of California (1986) 177 Cal. App. 3d 62, 73, 222 Cal. Rptr. 750* ; *Karlin v. Zalta (1984) 154 Cal. App. 3d 953, 979-980, 201 Cal. Rptr. 379* . Exceptions to the rule are discussed in *§ 474A.12, below*]. Application of the rule, however, is not a matter committed to the discretion of the court; unless a recognized exception to the rule is established, the court does not have subject matter jurisdiction over a proceeding initiated by a petitioner who has failed to exhaust available administrative remedies [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 293, 109 P.2d 942* ; *County of Contra Costa v. State of California (1986) 177 Cal. App. 3d 62, 73, 222 Cal. Rptr. 750* ; *Wilkinson v. Norcal Mutual Ins. Co. (1979) 98 Cal. App. 3d 307, 318, 159 Cal. Rptr. 416]* .

A significant consequence of classification of the requirement as a jurisdictional rule is that it cannot be waived by stipulation or consent of an adverse party [*Noonan v. Green (1969) 276 Cal. App. 2d 25, 31, 80 Cal. Rptr. 513* ; *Buchwald v. Superior Court (1967) 254 Cal. App. 2d 347, 359-360, 62 Cal. Rptr. 364]* , or by a party's failure to raise the issue [*People v. Coit Ranch, Inc. (1962) 204 Cal. App. 2d 52, 57, 21 Cal. Rptr. 875* ; *see also Hittle v. Santa Barbara County Employees Retirement Ass'n (1985) 39 Cal. 3d 374, 384, 216 Cal. Rptr. 733, 703 P.2d 73]* . A failure to comply with the rule cannot be cured. Once a failure to exhaust administrative remedies is established, the court must order the matter dismissed; the court may not abate the judicial proceeding pending completion of administrative proceedings [*Miller v. United Airlines, Inc. (1985) 174 Cal. App. 3d 878, 890, 220 Cal. Rptr. 684* ; *Wilkinson v. Norcal Mutual Ins. Co. (1979) 98 Cal. App. 3d 307, 318, 159 Cal. Rptr. 416]* .

Note that in the more recent case of *Green v. City of Oceanside (1987) 194 Cal. App. 3d 212, 239 Cal. Rptr. 470* , an appellate court disagreed with the interpretation of *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 109 P.2d 942* , the seminal case on which the above analysis was based [*Green v. City of Oceanside (1987) 194 Cal. App. 3d 212, 220-223, 239 Cal. Rptr. 470]* . The court in *Green* held that the exhaustion doctrine is merely a procedural rule that can be waived, and thus, that the exhaustion of administrative remedies is not a necessary prerequisite to the court's subject matter jurisdiction [*Green v. City of Oceanside (1987) 194 Cal. App. 3d 212, 222-223, 239 Cal. Rptr. 470]* . The Fourth District, Division 3 California Court of Appeal held that the exhaustion of administrative remedies defense was waived by the county in a retaliatory termination lawsuit brought by a former employee of the county because the county failed to assert the defense in the proceeding before the superior court. The court of appeal rejected the jurisdiction rationale, and held that exhaustion of administrative remedies is a judicially created rule of procedure that can be waived on appeal if not asserted before the superior court [*Mokler v. County of Orange (2007) 157 Cal. App. 4th 121, 133-135, 68 Cal. Rptr. 3d 568*]. In *Doster v. County of San Diego (1988) 203 Cal. App. 3d 257, 260, 251 Cal. Rptr. 507* , the court said that exhaustion of administrative remedies is a fundamental rule of procedure, but it is not a condition of jurisdiction. This case, however, fell within the recognized exception allowed when exhaustion would be futile. For discussion of the futility exception, see *§ 474A.12[2]*. Contractor association's judicial challenge to Department of Industrial Relations's decision to rescind prevailing wage determination was not barred by exhaustion of administrative remedies [*California Slurry Seal Association v. Department of Industrial Relations (2002) 98 Cal. App. 4th 651, 661-662, 121 Cal. Rptr. 2d 38]* .

Exhaustion of administrative remedies requirements were satisfied under Fair Employment and Housing Act statute [*Gov. Code § 12960(b)*] when DFEH complaint was verified by attorney for employee who brought complaint not

employee himself [*Blum v. Superior Court (2006) 141 Cal. App. 4th 418, 428-429, 45 Cal. Rptr. 3d 902]* . A parolee that filed a habeas corpus petition in court to challenge a parole condition exhausted administrative remedies by filing administrative appeal with Department of Adult Parole Operations, notwithstanding that Department failed to decide appeal [*In re Hudson, (2006) 143 Cal. App. 4th 1, 7-8, 49 Cal. Rptr. 3d 74]* . A citizens group that challenged a city's certification of a final environmental impact report by petitioning for a writ of mandate satisfied exhaustion of administrative remedies requirements by having group leaders or legal counsel attend, participate, and object to the approval of the environmental impact report at all planning commission and city council meetings that discussed the development project for which the environmental review was conducted. The citizens group was not required to file an appeal of the planning commission recommendation to trigger city council review of the planning commission decision [*Citizens for Open Government v. City of Lodi (2006) 144 Cal. App. 4th 865, 876-878, 50 Cal. Rptr. 3d 636]* . An environmental group that challenged a county's certification of a final environmental impact report (FEIR) and approval of a mining project was held to have exhausted administrative remedies by sufficiently raising issues about the inadequacy of the FEIR at the county decision making level, as well as at the superior court level, and the group was not required to have raised before the county exactly the same issue as the superior court based its decision on to overturn the certification by the county. The group was not required to be as specific in raising issues from an administrative hearing [*Western Placer Citizens for an Agricultural & Rural Environment v. County of Placer (2006) 144 Cal. App. 4th 890, 897-899, 50 Cal. Rptr. 3d 799*].

Issue exhaustion requirements were satisfied and the baseline issue was adequately raised before the agency when another party (Caltrans) raised the issue in a comment letter. Therefore, exhaustion of administrative remedies requirements were satisfied, and the party challenging the agency decision for lack of compliance with CEQA requirements can raise this issue on judicial review [*Woodward Park Homeowners Association v. City of Fresno (2007) 150 Cal. App. 4th 683, 711-713, 58 Cal. Rptr. 3d 102]* .

[2] Applicability of Requirement

[a] Effect of Statutory Provisions

Previously, the Supreme Court held that a petitioner was required to exhaust an administrative remedy made available by statute, even when the statutory language provided that use of the remedy was permissive rather than mandatory [*Alexander v. State Personnel Bd. (1943) 22 Cal. 2d 198, 200, 137 P.2d 433]* . In *Alexander,* the Court applied this rule specifically in the context of administrative rehearings. The rule in *Alexander* was, however, subsequently overruled [*Sierra Club v. San Joaquin LAFCO (1999) 21 Cal. 4th 489, 510, 87 Cal. Rptr. 2d 702, 981 P.2d 543]* . In *Sierra Club*, the Court held that, when a statute specifies that reconsideration or rehearing of an adverse decision of an agency *may* be sought by an affected party, reconsideration is not necessarily *required* prior to seeking judicial review. It is not necessary to seek reconsideration or rehearing in order to raise for a second time the same evidence and legal arguments previously presented to the agency, solely to exhaust administrative remedies. The general rule requiring exhaustion of remedies remains valid, however: an agency must be given an opportunity to reach a reasoned and final conclusion on all issues over which it has jurisdiction before those issues are raised in a judicial forum. Thus, a request for reconsideration or rehearing remains a necessary prerequisite to judicial review when there is new evidence, changed circumstances, or new legal arguments which the agency did not have the opportunity to consider in original administrative proceeding [*Sierra Club v. San Joaquin LAFCO (1999) 21 Cal. 4th 489, 493-494, 510, 87 Cal. Rptr. 2d 702, 981 P.2d 543]* . Moreover, statutory hearings rights must be requested even if the language of the statutory right to a hearing is permissive, or judicial review is precluded by failure to exhaust administrative remedies. For example, a motorist's failure to request a hearing within 10 days to challenge a driver's license suspension under the provisions of *Veh. Code § 13558*, constitutes a failure to exhaust administrative remedies that precludes judicial review of the suspension decision by the DMV [*Marquez v. Gourley (2002) 102 Cal. App. 4th 710, 712-714, 125 Cal. Rptr. 2d 784* ; *In re Darlene T (2008) 163 Cal. App. 4th 929, 938-940, 78 Cal. Rptr. 3d 119* (failure to challenge denial of benefits by seeking an administrative hearing under *Welf. & Inst. Code § 10950* is a failure to exhaust required administrative remedies)].

The California Supreme Court affirmed the dismissal of a lawsuit brought against the Regents of the University of California by a former employee who had been terminated. The employee challenged the termination, claiming that it was retaliatory in violation of *Gov. Code § 12653* and *Labor Code § 1102.5*, which provide protection for so called "whistle blowers," that is employees who disclose wrongdoing by their employers and are fired from employment as a result. The court held that the former employee's lawsuit was barred because the employee failed to exhaust administrative remedies before filing her lawsuit. Specifically, the court held that the former employee failed to exhaust required university internal administrative remedies (filing a grievance under UCSF's policies and procedures for reporting improper governmental activities) before filing her lawsuit [*Campbell v. Regents of Univ. of Cal. (2005) 35 Cal. 4th 311, 317-318, 25 Cal. Rptr. 3d 320, 106 P.3d 976]* .

The California Court of Appeal held that a state university employee who filed an action for damages for retaliation under the California Whistleblower Protection Act [*Gov. Code § 8547.12*] was required to exhaust administrative and judicial remedies before filing a civil lawsuit. The employee had failed to file a petition for a writ of administrative mandamus to challenge the action of the university in retaliating against him, and was required to seek mandamus relief before bringing the civil lawsuit. The Court of Appeal ordered a remand of the matter to the trial court to give the employee the opportunity to amend the complaint to add a petition for a writ of mandate [*Ohton v. Board of Trustees of the California State University (2007) 148 Cal. App. 4th 749, 769-771, 56 Cal. Rptr. 3d 111]* .

The Court of Appeal held that in a dispute between two local government entities related to payment for mental health services provided to handicapped students under federal law [*20 U.S.C. § 1400 et seq.*], that the two entities had failed to exhaust administrative remedies related to unfunded state mandates [*Gov. Code § 17581*], and to administrative remedies provided under *Cal. Code Regs. tit. 5, §§ 4600-4670*. Thus, the two local entities could not properly file a lawsuit in court to obtain judicial enforcement of one of those agencies responsibilities to fund mental health service for handicapped students under federal law [*Tri-County Special Educ. Local Plan Area v. County of Tuolumne (2004) 123 Cal. App. 4th 563, 569, 574, 19 Cal. Rptr. 3d 884]* .

The California Court of Appeal held that former employees of a private employer had to comply with notice and exhaustion requirements of *Labor Code § 2699.3(a)* before filing civil law suits for civil penalties under *Labor Code § 2698*, but that those employees claims for unpaid wages, and for statutory penalties paid to the employee, could be brought to court in a civil lawsuit without the employees having to comply with the same notice and exhaustion requirements [*Caliber Bodyworks, Inc. v. Superior Court (2005) 134 Cal. App. 4th 365, 371-372, 36 Cal. Rptr. 3d 31]* .

A petitioner is similarly not required to pursue an administrative remedy when a statute does one of the following:

- Grants the court concurrent primary jurisdiction over the type of controversy involved [*see, e.g., Scripps etc. Hospital v. Cal. Emp. Com. (1944) 24 Cal. 2d 669, 673-674, 151 P.2d 109* ; *California School Employees Assn. v. Travis Unified School Dist. (1984) 156 Cal. App. 3d 242, 249-250, 202 Cal. Rptr. 699* ; *Muir v. Steinberg (1961) 197 Cal. App. 2d 264, 269, 17 Cal. Rptr. 431* ; for discussion of concurrent primary jurisdiction, *see § 474A.12[3]*].

- Expressly provides that exhaustion of the remedy is not a prerequisite to seeking judicial relief [*see, e.g., Gov. Code § 11523* (failure to seek reconsideration of decision made under the APA [*Gov. Code § 11340 et seq.*] not a bar to mandate proceeding), *Gov. Code § 19588* (failure to petition State Personnel Board for rehearing not a bar to mandate proceeding or civil action); *Elec. Code § 17* (administrative complaint procedures established by Secretary of State's office under federal law [*42 U.S.C. 15512*] do not have to be exhausted before pursuing other state or federal remedies)].

A plaintiff filing a court lawsuit to enforce civil remedies that are part of a state anti-discrimination statute is not

required to exhaust all administrative remedies when there are two such remedies. Exhaustion of one of the two remedies is sufficient. Plaintiff former employee's lawsuit against the City of Los Angeles asserting FEHA claims of employment discrimination due to physical disability was not barred by the Plaintiff's failure to exhaust internal grievance remedies provided under the Los Angeles city charter. Plaintiff had exhausted FEHA administrative remedies by obtaining a "right to sue" letter from the DFEH, and that was sufficient. Plaintiff was not required to exhaust both sets of administrative remedies as a precondition to filing his FEHA lawsuit in court. The court's rationale for the holding included reasons: 1) FEHA preemption of local government laws, 2) public employees have the same rights under FEHA as private employees, and 3) public employees have a choice between pursuing the internal grievance remedies provided by their governmental employer, or choosing the FEHA remedies, with a right to sue letter, and a civil lawsuit [*Schifando v. City of Los Angeles (2003) 31 Cal. 4th 1074, 1081-1090, 6 Cal. Rptr. 3d 457, 79 P.3d 569* ; *Ahmadi-Kashani v. The Regents of the University of California (2008) 159 Cal. App. 4th 449, 459-461, 71 Cal. Rptr. 3d 556* (citing the *Schifando* case, the court of appeal held that employee claiming sexual harassment and filing claim under FEHA statute was not required to complete internal grievance procedures that did not provide a quasi-judicial hearing but merely provided for an informal opportunity to discuss grievance. The grievance procedure was not an administrative remedy that had to be exhausted before the employee could proceed to litigate her FEHA claim in the court system)].

Plaintiff former employee filed civil lawsuit against former employer asserting FEHA claim. Plaintiff had previously filed administrative complaint with DFEH. DFEH issued a right to sue letter to plaintiff, but later rescinded right to sue letter to provide opportunity for further resolution of claim. DFEH proposed a resolution of claim which was not accepted. Plaintiff then filed lawsuit without obtaining a second right to sue letter. Defendant asserted failure to exhaust administrative remedies as grounds for granting JNOV motion following substantial jury verdict in plaintiff's favor. The Court of Appeal held that "under *Gov. Code § 12965* employee's right to sue arose by operation of law when the DEFEH failed to resolve the matter within one year from the time she filed her administrative complaint." Obtaining a second right to sue letter is not required to exhaust administrative remedies in this case [*Grant v. Comp USA, Inc (2003) 109 Cal. App. 4th 637, 640, 135 Cal. Rptr. 2d 177]* .

[b] All Individual Claims, Contentions, and Objections Must Be Raised Before Administrative Body

An essential aspect of the exhaustion requirement is that before its actions are subjected to judicial review, an administrative entity should be given the opportunity to consider and respond to the articulated contentions of interested parties [*Coalition for Student Action v. City of Fullerton (1984) 153 Cal. App. 3d 1194, 1198, 200 Cal. Rptr. 855* ; *see also Sierra Club v. San Joaquin LAFCO (1999) 21 Cal. 4th 489, 510, 87 Cal. Rptr. 2d 702, 981 P.2d 543]* . Accordingly, all of a party's claims, contentions, and objections must be presented at the administrative level; the court is precluded from considering those that are not [*Friends of Lagoon Valley v. City of Vacaville (2007) 154 Cal. App. 4th 807, 831-832, 65 Cal. Rptr. 3d 251* (exhaustion doctrine precludes raising issues on judicial review that were not raised in administrative proceeding; challenger could not litigate density bonus issue because that issue was not presented to the city in the administrative proceeding); *Central Delta Water Agency v. State Water Resources Control Bd (2004) 124 Cal. App. 4th 245, 250, 20 Cal. Rptr. 3d 898* (challengers of adequacy of environmental impact report (EIR) prepared by State Water Board as part of approval process for water appropriation project waived the right to challenge adequacy of EIR on grounds that there was a failure to describe feasible mitigation measures because parties did not exhaust administrative remedies by failing to present this same argument to the public agency preparing the EIR during the public hearing or the public comment period as required by *Pub. Res. Code § 21177(a)*); *Hobson v. Raychem Corporation (1999) 73 Cal. App. 4th 614, 630-632, 86 Cal. Rptr. 2d 497* (exhaustion of administrative remedies requirement not satisfied when an employee failed to file an administrative charge specifically identifying the alleged discrimination that provided the basis for the later lawsuit); *Pegues v. Civil Service Com. (1998) 67 Cal. App. 4th 95, 103-104, 78 Cal. Rptr. 2d 705* ; *NBS Imaging Systems, Inc. v. State Bd of Control (1997) 60 Cal. App. 4th 328, 336-337, 70 Cal. Rptr. 2d 237* ; *Coalition for Student Action v. City of Fullerton (1984) 153 Cal. App. 3d 1194, 1197, 200 Cal. Rptr. 855* ; *City of Walnut Creek v. County of Contra Costa (1980) 101 Cal. App. 3d 1012, 1019-1020, 162 Cal. Rptr. 224]* . However, the exhaustion requirement is met when the allegations in a civil lawsuit are similar to or

reasonably related to the charges presented to the agency [*Soldinger v. Northwest Airlines, Inc. (1996) 51 Cal. App. 4th 345, 381-383, 58 Cal. Rptr. 2d 747* (discrimination charges brought by plaintiff employee before DFEH agency that were later the basis of a civil lawsuit); *Mani Brothers Real Estate Group v. City of Los Angeles (2007) 153 Cal. App. 4th 1385, 1395-1396, 64 Cal. Rptr. 3d 79* (challengers to modified downtown development project adequately raised objections to use of 2005 addendum at city council meetings and council committee meetings such that exhaustion of administrative remedies requirements were satisfied)]. This rule includes not only factual contentions and issues, but all of the following:

- Individual claims [*People v. West Publishing Co. (1950) 35 Cal. 2d 80, 92, 216 P.2d 441* (counterclaim asserting right to offsets against tax liability); *Coalition for Student Action v. City of Fullerton (1984) 153 Cal. App. 3d 1194, 1197* , *153 Cal. App. 3d 1194, 200 Cal. Rptr. 855* (claim that city's approval of construction plans was in violation of California Environmental Quality Act)].

- Defenses [*Bohn v. Watson (1954) 130 Cal. App. 2d 24, 37, 278 P.2d 454* (statute of limitations defense to disciplinary proceeding)].

- Legal issues and contentions [*People v. West Publishing Co. (1950) 35 Cal. 2d 80, 87-88, 216 P.2d 441* (contention that California Use Tax could not be imposed on mail order sales); *NBS Imaging Systems, Inc. v. State Bd. of Control (1997) 60 Cal. App. 4th 328, 337, 70 Cal. Rptr. 2d 237* ; *City of Walnut Creek v. County of Contra Costa (1980) 101 Cal. App. 3d 1012, 1019-1020, 162 Cal. Rptr. 224* (contention that density of approved project exceeded that allowed by general plan)].

- Procedural objections [*Butte View Farms v. Agricultural Labor Relations Bd. (1979) 95 Cal. App. 3d 961, 971, 157 Cal. Rptr. 476* (judicial review of administrative officer's revocation of subpoena precluded by petitioner's failure to file exception in administrative hearing); *Housing Development Co. v. Hoschler (1978) 85 Cal. App. 3d 379, 390, 149 Cal. Rptr. 400* (petitioner precluded from asserting that administrative proceeding should have been stayed when it failed to make explicit request for stay)].

- All party defendants in FEHA cases [*Medix Ambulance Service, Inc. v. Superior Court (2002) 97 Cal. App. 4th 109, 117-118, 118 Cal. Rptr. 2d 249* (Plaintiff in FEHA litigation could not sue a party defendant who was not named in the administrative complaint filed with DFEH)].

- Default judgments must be set aside [*Gonzalez v. Beck (2007) 158 Cal. App. 4th 598, 605-607, 69 Cal. Rptr. 3d 843* (employer required by *Labor Code Section 98(f)* to move to set aside administrative award before Labor Commissioner prior to seeking judicial review form default in administrative proceeding)].

However, a party challenging the order of a regional water quality control board is not required to request a hearing before that regional board under *Water Code § 13330(b)* so long as that party so long as that party petitions the state water quality control board for review under the provisions of *Water Code § 13320(a)* [*Schutte & Koerting, Inc. v. Regional Water Quality Control Board, San Diego Region (2007) 158 Cal. App. 4th 1373, 1385-1387, 71 Cal. Rptr. 3d 54*].

As an exception, however, a claim that a statute under which an administrative proceeding is being conducted is unconstitutional on its face need not be raised before an administrative body of legislative origin because it does not have the power to determine the constitutionality of statutes [*Cal. Const., art. III, § 3.5*; *State of California v. Superior Court, (1974) 12 Cal. 3d 237, 251, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *Hand v. Board of Examiners (1977) 66 Cal. App. 3d 605, 617-620, 136 Cal. Rptr. 187]* . For discussion of this exception and its scope, see *§ 474A.12[5]*.

Before a taxpayer can file a lawsuit for a refund, the taxpayer has to exhaust administrative remedies by bringing a

claim for a refund to the State Board of Equalization. The refund claim is required to specify the grounds for a refund, and lawsuits against the Board must be based on those grounds. However, a litigant may present a contention in a lawsuit even though the refund claim did not expressly raise that same contention if the contention is intertwined with contentions that were expressly raised in the refund claim. Unstated contentions that are clearly implied from expressly stated contentions in the refund claim can be brought consistent with exhaustion requirements. A litigant sufficiently raised the issue of reliance on federal copyright law in her refund claim when she referred to the "right of reproduction" and otherwise implicitly alleged a nontaxable copyright transfer. Thus, she could assert these contentions in her lawsuit against the Board [*Preston v. State Board of Equalization (2001) 25 Cal. 4th 197, 206-208, 105 Cal. Rptr. 2d 407, 19 P.3d 1148]* .

Plaintiff former employee's common law wrongful termination claim against the University of California was properly the subject of a summary judgment motion granted in favor of the university because plaintiff failed to exhaust internal university grievance procedures available to employees. Plaintiff was required to complete internal grievance procedures before filing her wrongful discharge lawsuit [*Palmer v. Regents of the University of California (2003) 107 Cal. App. 4th 899, 903-905, 132 Cal. Rptr. 2d 567]* . The California Court of Appeal held that a citizens group failed to raise certain issues during the public comment period for an environmental impact report (EIR), and therefore that group failed to meet issue exhaustion requirements for exhaustion of administrative remedies. However, the citizens group raised other issues in the EIR public comment period, and those issues could be raised in a court challenge to the adequacy of the EIR as issue exhaustion requirements were met, but not the issues that were not raised in the EIR public comment period [*Gilroy Citizens for Responsible Planning v. City of Gilroy (2006) 140 Cal. App. 4th 911, 919-921, 45 Cal. Rptr. 3d 102]* .

[c] Class Actions

The exhaustion requirement applies to class actions and operates to bar a class action when the contentions made on behalf of the class have not been presented in an appropriate administrative proceeding [*Karlin v. Zalta (1984) 154 Cal. App. 3d 953, 985-986, 201 Cal. Rptr. 379* (failure to challenge premium rates in administrative proceedings precludes class action seeking recovery of excess medical malpractice insurance premiums); *Mountain View Chamber of Commerce v. City of Mountain View (1978) 77 Cal. App. 3d 82, 96, 143 Cal. Rptr. 441* (class action challenging validity of ordinance regulating commercial signs precluded when named plaintiffs failed to apply for variances); *Morton v. Superior Court (1970) 9 Cal. App. 3d 977, 983-984, 88 Cal. Rptr. 533* (class action seeking to compel city to pay overtime for certain activities of police officers precluded when petitioners failed to use grievance procedure)]. If the named plaintiffs or petitioners have not personally initiated or participated in administrative proceedings, however, they may be able to satisfy the exhaustion requirement by showing that the contentions they are making have been presented in an appropriate administrative forum by other members of the class [*Friends of Mammoth v. Board of Supervisors (1972) 8 Cal. 3d 247, 267-268, 104 Cal. Rptr. 761, 502 P.2d 1049* (exhaustion requirement satisfied when class members other than named petitioners challenged decision to grant use permit in administrative proceedings); *Tarkington v. California Unemployment Insurance Appeals Board (2009) 172 Cal. App. 4th 1494, 1508-1510, 92 Cal. Rptr. 3d 131* (so long as some class members exhausted administrative remedies before filing class action lawsuit, other class members who did not exhaust administrative remedies were not excluded from class member status by their failure to exhaust administrative remedies); *see also Harrison v. Board of Supervisors (1975) 44 Cal. App. 3d 852, 859-861, 118 Cal. Rptr. 828* (exhaustion requirement satisfied despite named plaintiffs' failure to appear or produce evidence at administrative hearing on validity of special assessment when Board knew of their contentions by numerous written protests and oral presentations of other class members)]. When some class members have adequately raised common factual or legal issues justifying relief in administrative proceedings, the relief granted by the court may run to other class members who failed to use or exhaust their individual administrative remedies [*Harrison v. Board of Supervisors (1975) 44 Cal. App. 3d 852, 859-861, 118 Cal. Rptr. 828* (when Board adequately apprised of grounds on which special assessment declared invalid by appeals filed by other property owners, assessment invalidated as to those property owners who failed to use administrative procedure to object to assessment or who failed to raise contentions ultimately upheld by court)].

[3] What Constitutes Exhaustion of Administrative Remedy

[a] Completed Proceedings With Final Decision on Merits

The exhaustion requirement is not satisfied merely by the institution of administrative proceedings; the petitioner must pursue all available administrative proceedings to completion and receive a final decision on the merits [*McHugh v. County of Santa Cruz (1973) 33 Cal. App. 3d 533, 538-539, 109 Cal. Rptr. 149* ; *Thomas v. Shewry (2009) 170 Cal. App. 4th 1480, 1485-1486, 89 Cal. Rptr. 3d 105* (podiatrist failed to timely file administrative appeals of reenrollment application and audit obligations. Podiatrist sought writ of mandamus to overturn denial of reenrollment application and audit obligations; writ denied because of failure to exhaust administrative remedies); *Chase Bank v. City and County of San Francisco (174 Cal. App. 4th 1201, 1209-1211, 94 Cal. Rptr. 3d 906* (bank failed to timely file a tax refund claim with city assessment appeals board; bank's lawsuit for a refund of taxes paid was precluded by bank's failure to exhaust administrative remedies for failure to file a timely refund claim); *Fiscus v. Dept. Alcoholic Bev. Control (1957) 155 Cal. App. 2d 234, 236, 317 P.2d 993]* . When applicable statutes and regulations allow the petitioner to appeal an initial administrative decision to another administrative body or officer, the petitioner must do so [*see, e.g.,* *Lynn v. Duckel (1956) 46 Cal. 2d 845, 849-850, 299 P.2d 236* ; *Vernons & Vernons, Ltd. v. County of Los Angeles (1981) 115 Cal. App. 3d 943, 945-946, 171 Cal. Rptr. 785* ; *Grant v. Superior Court (1978) 80 Cal. App. 3d 606, 609, 145 Cal. Rptr. 699]* .

However, the California Supreme Court held that a state employee pursuing a whistleblower retaliation complaint under *Gov. Code § 8547.8* against agency officials where the state employee worked was only required to pursue a complaint with the State Personnel Board under *Gov. Code § 19683*. The employee was not required to request a hearing before an ALJ working for the State Personnel Board (SPB), nor was the employee required to seek judicial review under administrative mandamus before filing a civil action for damages based on whistleblower retaliation. The employee was only required to receive the findings of the executive officer of the SPB based on review of the complaint. The employee was not required to exhaust administrative or judicial remedies to challenge those findings before filing a civil lawsuit. Furthermore, the executive officer's findings (which were adverse to the employee) were not binding on the employee as a matter of issue preclusion because the executive officer's findings were not a final judgment following an administrative hearing [*State Board of Chiropractic Examiners v. Superior Court (2009) 45 Cal. 4th 963, 968, 973, 89 Cal. Rptr. 3d 576, 201 P.3d 457]* . Furthermore, the Second District Division 3 California Court of Appeal held that a former county employee who filed a whistleblower retaliation complaint against his former employer did not have to exhaust either an internal administrative remedy or the remedy provided by *Labor Code § 98.7* (filing a complaint with the Labor Commissioner) before filing his lawsuit in superior court [*Lloyd v. County of Los Angeles (2009) 172 Cal. App. 4th 320, 323-324, 90 Cal. Rptr. 3d 872]* .

When, however, an applicable statute or regulation provides that a petitioner *may* seek reconsideration or rehearing of an adverse decision of an agency, such reconsideration is not always a prerequisite to seeking judicial review. It is not necessary to seek reconsideration or rehearing in order to raise for a second time the same evidence and legal arguments previously presented to the agency, solely to exhaust administrative remedies [*Sierra Club v. San Joaquin LAFCO (1999) 21 Cal. 4th 489, 510, 87 Cal. Rptr. 2d 702, 981 P.2d 543* (overruling a contrary decision in *Alexander v. State Personnel Board (1943) 22 Cal. 2d 198, 200, 137 P.2d 433*)]. The general rule requiring exhaustion of remedies remains valid, however: in the sense an agency must be given an opportunity to reach a reasoned and final conclusion on all issues over which it has jurisdiction before those issues are raised in a judicial forum. Thus, a request for reconsideration or rehearing remains a necessary prerequisite to judicial review when there is new evidence, changed circumstances, or new legal arguments which the agency did not have the opportunity to consider in original administrative proceeding [*Sierra Club v. San Joaquin LAFCO (1999) 21 Cal. 4th 489, 493-494, 510, 87 Cal. Rptr. 2d 702, 981 P.2d 543]* .

This is consistent with *Gov. Code § 11523*, which provides that a failure to seek reconsideration under of an agency decision governed by the APA does not affect the right to seek judicial review by mandate [*see also, e.g., Gov. Code §*

19588 (failure to seek rehearing before State Personnel Board shall not affect right to petition for mandate)].

State civil service employees who brought employment discrimination claims under the California Fair Employment and Housing Act [*Gov. Code § 12900*] had the choice of whether to exhaust administrative remedies with the State Personnel Board (Board), or of exhausting administrative remedies by filing a claim with the Department of Fair Employment and Housing (DFEH). Employees filed a claim with DFEH, and received a right to sue letter. Employees were held to have exhausted administrative remedies requirements by filing claim with DFEH, and were not required to also pursue administrative remedies with Board [*Ruiz v. California Department of Corrections (2000) 77 Cal. App. 4th 891, 896-898, 92 Cal. Rptr. 2d 139]* . Thus, in this case context, completing all administrative proceedings means completing one of the two available options, but not both. Similarly, an employee of the Housing Authority of the City of Los Angeles (HACLA) who was terminated from employment had the choice of pursuing the internal administrative remedies provided by HACLA, or pursuing the FEHA administrative remedy, before filing a civil lawsuit alleging disability discrimination in violation of the FEHA statute [*Williams v. Housing Auth. of City of Los Angeles (2004) 121 Cal. App. 4th 708, 720-721, 17 Cal. Rptr. 3d 374]* . Furthermore, that employee is not required to exhaust administrative remedies to bring a FEHA-related non-statutory claim (wrongful termination based on public policy) when an agency decision on the FEHA-related claim could have preclusive effect on the FEHA statutory claim [*Williams v. Housing Auth. of City of Los Angeles (2004) 121 Cal. App. 4th 708, 727-728, 17 Cal. Rptr. 3d 374]* . The First District, Division 5, California Court of Appeal held that a former employee of a community college district did not have to exhaust administrative remedies that included an internal grievance procedure before challenging his demotion and termination based on claims of discrimination under the Fair Employment and Housing Act (FEHA). Exhaustion was not required because the internal grievance procedures were established by collective bargaining agreement, not by statute, and arbitration not judicial review by mandamus was the enforcement and review mechanism. Also, the employee did not have to exhaust administrative remedies for his non statutory claims [*Ortega v. Contra Costa Community College District (2007) 156 Cal. App. 4th 1073, 1080-1084, 67 Cal. Rptr. 3d 832*].

Exhaustion of administrative remedies requirements for an employee to bring employment discrimination claims against the county employer requires that the employee obtain a right to sue letter from the EEOC as a prerequisite to filing a lawsuit bringing Title VII claims against the county. It is not sufficient for the employee plaintiff to have obtained a right to sue letter from the State Department of Fair Employment and Housing to file a lawsuit that includes Title VII claims [*Roman v. County of Los Angeles (2000) 85 Cal. App. 4th 316, 325-326, 102 Cal. Rptr. 2d 13]* . Before a litigant can bring a lawsuit to challenge an assessment under the Citrus Pest Control District Law [*Food & Agric. Code § 8401 et seq.*], the litigant must exhaust administrative remedies by challenging the pest control district's budget for the assessment year. This would allow the district to respond to the merits of the objections and to modify the budget based on those objections [*Wallich's Ranch Co. v. Kern County Citrus Pest Control Dist. (2001) 87 Cal. App. 4th 878, 883-885, 104 Cal. Rptr. 2d 875* ; *People ex. rel. Lockyer v. Sun Pacific Farming Co. (2000) 77 Cal. App. 4th 619, 641-642, 92 Cal. Rptr. 2d 115]* .

Prisoners must exhaust administrative remedies before seeking judicial relief. A prisoner who sued the Department of Corrections for medical malpractice, and failure to furnish medical care, failed to complete the prison administrative review process before filing his lawsuit. As a result, his court claim was barred by failure to exhaust administrative remedies. The court noted a number of policies furthered by the exhaustion requirements including "bolstering administrative autonomy, mitigating damages, giving agencies the opportunity to make factual findings, encouraging settlement, filtering out frivolous claims, fostering better prepared litigation, and promoting judicial economy" [*Wright v. State (2004) 122 Cal. App. 4th 659, 666-667, 19 Cal. Rptr. 3d 92]* . Prison administrative remedies must be exhausted even though the prisoner could not recover damages except by going to court. Substantial compliance is not enough. The prisoner must complete all three levels of prison administrative review of his grievances [*Wright v. State (2004) 122 Cal. App. 4th 659, 667-668, 19 Cal. Rptr. 3d 92]* .

The Third District California Court of Appeal held that an employee's discrimination lawsuit against the employer was not barred by failure to exhaust administrative remedies because the court recognized that the employee's failure to file

a timely complaint with the Department of Fair Employment and Housing was equitably excused. Circumstance justifying equitable excuse included facts that the employee relied on the DFEH representative's assurances that he would meet the required deadline, the employee was diligent in pursuing the administrative complaint, the employee raised the timeliness issue with the DFEH, and he was only slightly late in filing the agency complaint [*Holland v. Union Pacific Railroad Company (2007) 154 Cal. App. 4th 940, 946-948, 65 Cal. Rptr. 3d 145]* .

[b] Full Presentation of Issues at All Stages

The exhaustion doctrine requires that a litigant make a full presentation to the administrative entity on all issues at all prescribed stages of the administrative proceedings [*Edgren v. Regents of University of California (1984) 158 Cal. App. 3d 515, 520, 205 Cal. Rptr. 6* ; *Bleeck v. State Board of Optometry (1971) 18 Cal. App. 3d 415, 432, 95 Cal. Rptr. 860]* . Thus, even a litigant who has initiated appropriate administrative proceedings is barred from seeking judicial relief when he or she has failed to participate at some subsequent stage of the proceedings [*Edgren v. Regents of University of California (1984) 158 Cal. App. 3d 515, 520, 205 Cal. Rptr. 6* (after initiating grievance proceedings, plaintiff withdrew from hearing and declined to participate further); *Doyle v. Chino, City of (1981) 117 Cal. App. 3d 673, 681, 172 Cal. Rptr. 844* (after filing administrative appeal, petitioner refused to attend hearing); *Rudolph v. Fulton (1960) 178 Cal. App. 2d 339, 341-343, 2 Cal. Rptr. 807* (after plaintiff's administrative appeal from decision upholding disciplinary action resulted in order remanding case for further hearing, plaintiff withdrew from administrative proceedings)]. However, an appealing party was held to have satisfied the exhaustion requirement, even though it had not been a formal party to the administrative proceeding, when its business partner did exhaust administrative remedies before the agency as to issues that the appealing party raised on appeal [*CAT Partnership v. County of Santa Cruz (1998) 63 Cal. App. 4th 1071, 1080-1081, 74 Cal. Rptr. 2d 652]* .

The issue exhaustion requirement avoids unnecessary litigation, provides a more complete record for judicial review, and ensures that agency expertise is utilized. Citizens who participate in city redevelopment hearings are not held to the same high standard as are lawyers in specific proceedings, but citizens have to be specific enough in raising issues before the city so that the city has the opportunity to respond to that issue prior to judicial review. A response that is too general will not satisfy the issue exhaustion requirement [*Evans v. City of San Jose (2005) 128 Cal. App. 4th 1123, 1137-1138, 27 Cal. Rptr. 3d 675*].

Issue exhaustion requirements also compel the plaintiff to raise issues at successive stages of the administrative process to preserve those issues for later judicial review. Thus, a litigant who raises an issue before the first administrative agency that can consider the issue, but who fails to raise that same issue in an administrative appeal to an administrative agency that has final decision making authority has not satisfied issue exhaustion requirements, and cannot raise that same issue on judicial review [*Tahoe Vista Concerned Citizens v. County of Placer (2000) 81 Cal. App. 4th 577, 589-590, 96 Cal. Rptr. 2d 880]* .

Issue exhaustion requirements also require a litigant to assert issues before the superior court in a mandate proceeding challenging agency action as a precondition to raising those same issues on appeal. This issue is technically exhaustion of judicial remedies, and issue exhaustion applies even though the issue raised is a legal question, not a factual question, i.e., the unconstitutionality of a fine on grounds of excessiveness [*Fair Political Practices Commission v. Californians Against Corruption (2003) 109 Cal. App. 4th 269, 282-284, 134 Cal. Rptr. 2d 659* (defendants were precluded challenging fine on grounds of unconstitutional excessiveness because defendants had failed to assert this issue in mandate proceeding agency decision to impose fine)]. The failure of a party to raise a due process issue before the ALJ meant that this issue could not be brought on appeal; the party waived the right to raise the claim that the agency failure to follow APA procedures violated due process of law [*Niles Freeman Equipment v. Joseph (2008) 161 Cal. App. 4th 765, 787-788, 74 Cal. Rptr. 3d 690*].

Judicial review is also precluded when a litigant has merely objected to some proposed action or decision without articulating any specific factual or legal contentions [*Coalition for Student Action v. City of Fullerton (1984) 153 Cal.*

App. 3d 1194, 1197, 200 Cal. Rptr. 855 (objections to proposed project on general environmental grounds insufficient to exhaust administrative remedies for violations of *California Environmental Quality Act); Barnes v. State Bd. of Equalization (1981) 118 Cal. App. 3d 994, 1001-1002, 173 Cal. Rptr. 742* (plaintiff who failed to present factual documentation in support of tax refund claim did not exhaust administrative remedies)]. Thus, a litigant must ordinarily present a specific factual or legal issue for decision at the administrative level to preserve that issue for subsequent judicial review [*Coalition for Student Action v. City of Fullerton (1984) 153 Cal. App. 3d 1194, 1197, 200 Cal. Rptr. 855* ; *Barnes v. State Bd. of Equalization (1981) 118 Cal. App. 3d 994, 1001-1002, 173 Cal. Rptr. 742]* . The California Court of Appeal held that a local citizens group had satisfied exhaustion of administrative remedies requirements by raising objections to the project approval no later than the close of the public hearing on the project approval as required by the CEQA statute *Pub. Res. Code § 21177(a), (b)* [*Bakersfield Citizens for Local Control v. City of Bakersfield (2004) 124 Cal. App. 4th 1184, 1199-1200, 22 Cal. Rptr. 3d 203]* . In another case, the Fifth District California Court of Appeal held that a local citizens group that challenged the approval by a city of a subdivision development failed to exhaust administrative remedies as to issues related to CEQA violations under state CEQA guidelines [§ 15152(g)], and also as to issues related to General Plan consistency. The citizens group did not raise these issues before the city council and therefore the city council did not have an opportunity to consider these issues. Because they failed to raise these issues before the city council, the challengers could not raise these issues on judicial review [*Porterville Citizens for Responsible Hillside Development v. City of Porterville (2007) 157 Cal. App. 4th 885, 909-911, 69 Cal. Rptr. 3d 105*]. In another case, the Second District, Division 4, California Court of Appeal held that an employers' group that challenged an assessment for unemployment insurance contributions failed to exhaust administrative remedies because it failed to complete the administrative proceeding it started by filing the petition for reassessment [*American Employers Group, Inc. v. Employment Development Department (2007) 154 Cal. App. 4th 836, 843-845, 65 Cal. Rptr. 3d 233*]. On the other hand, because parties to an administrative proceeding are usually not represented by counsel, less specificity is needed to preserve an issue for review in an administrative proceeding than in a judicial proceeding [*East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist. (1989) 210 Cal. App. 3d 155, 176-177, 258 Cal. Rptr. 147* ; *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo (1985) 172 Cal. App. 3d 151, 163, 217 Cal. Rptr. 893* ; *see also Graham v. Bryant (1954) 123 Cal. App. 2d 66, 70, 266 P.2d 44]* .

A citizens group that challenged a town's granting of a permit for a development project satisfied exhaustion of administrative remedies requirements because a member of that group, which was formed after the town approved the project, presented objections to the development project during the public comment period mandated by the California Environmental Quality Act [*Pub. Res. Code § 21177(c)*]. The citizens group's verified petition for writ of mandate identified several members of the group who had presented objections to the project during the comment stage, and that was sufficient to show exhaustion of administrative remedies [*Maintain Our Desert Env't v. Town of Apple Valley (2004) 124 Cal. App. 4th 430, 437-439, 15 Cal. Rptr. 3d 322]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewReviewabilityExhaustion of RemediesAdministrative LawJudicial ReviewReviewabilityFinal Order RequirementAdministrative LawJudicial ReviewReviewabilityJurisdiction & VenueCivil ProcedureJusticiabilityExhaustion of RemediesAdministrative RemediesCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureClass ActionsPrerequisitesGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamus

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Chapter 474A TIMING OF JUDICIAL REVIEW OF AGENCY DECISIONS
PART II. LEGAL BACKGROUND
A. When Mandate Proceedings May Be Commenced

41A-474A California Forms of Pleading and Practice--Annotated § 474A.12

§ 474A.12 Exceptions to Rule: When Exhaustion of Administrative Remedies Not Required

[1] Administrative Remedy Unavailable or Inadequate

[a] Nature of Exception

Under one of the most frequently invoked exceptions to the exhaustion doctrine, exhaustion is not required when the remedy is unavailable or inadequate [*Tiernan v. Trustees of Cal. State University & Colleges (1982) 33 Cal. 3d 211, 217, 188 Cal. Rptr. 115, 655 P.2d 317* ; *Ramos v. County of Madera (1971) 4 Cal. 3d 685, 691, 94 Cal. Rptr. 421, 484 P.2d 93* ; *Endangered Habitats League, Inc. v. State Water Resources Control Board (1998) 63 Cal. App. 4th 227, 237-238, 73 Cal. Rptr. 2d 388* ; *Diaz v. Quitoriano (1969) 268 Cal. App. 2d 807, 812, 74 Cal. Rptr. 358]* . This exception does not apply, however, when an administrative remedy has been lost as a result of a petitioner's failure to assert it in a timely manner, or as a result of some other neglect on the part of petitioner [*Roth v. City of Los Angeles (1975) 53 Cal. App. 3d 679, 686-687, 126 Cal. Rptr. 163]* .

A physician was not excused from completing a hospital peer review process before filing a tort lawsuit and seeking damages in the Superior Court because the hospital failed to start the hearing within the required 60-day time period. Failure to start on time does not make an administrative remedy inadequate or unavailable. Further, the physician was required to raise the issue of hearing officer bias before the hearing officer first [*Kaiser Foundation Hospitals v. Sacramento Superior Court (2005) 128 Cal. App. 4th 85, 91, 26 Cal. Rptr. 3d 744]* .

The California Court of Appeal held that a group of physicians that challenged the refusal of the hospital at which they worked to order a consolidated hearing rather then hold eight individual hearings failed to exhaust administrative remedies because there was an available internal hospital remedy available (appeal of the JRC decision to the hospital board) to challenge the refusal to consolidate the hearing. The California Court of Appeal held that the failure to exhaust administrative remedies required reversal of the petition granting a writ of mandate requiring the consolidation of the hearings [*Eight Unnamed Physicians v. Medical Executive Committee Of Medical Staff of Washington Township Hospital (2007) 150 Cal. App. 4th 503, 512-513, 59 Cal. Rptr. 3d 100]* .

Another California Court of Appeal that an unsuccessful bidder for a state contract failed to exhaust administrative

remedies required to challenge the award of the contract to another bidder [*Imagistics International, Inc. v. Department of General Services (2007) 150 Cal. App. 4th 581, 584, 59 Cal. Rptr.3d 18]* . The protestor challenged the adequacy of the administrative remedies by claiming that the protest arbitration process violated due process of law because the protest coordinator and the Office of Administrative Hearings were too closely aligned with the Department of General Services. The protestor claimed that it violated due process of law to have a small body of OAH hearing officers hear bid protests because DGS is a repeat player in bid protests administrative proceedings. The Court of Appeal rejected this argument and found that due process of law was not violated in these circumstances. Thus, the bid protestor was required to pursue the administrative remedy specified in these circumstances, protest arbitration [*Imagistics International, Inc. v. Department of General Services (2007) 150 Cal. App. 4th 581, 591-592, 59 Cal. Rptr.3d 18]* .

[b] Administrative Body Cannot Grant Relief Sought

An administrative remedy is generally considered unavailable or inadequate when the administrative body cannot grant the relief sought by the petitioner [*Tiernan v. Trustees of Cal. State University & Colleges (1982) 33 Cal. 3d 211, 217, 188 Cal. Rptr. 115, 655 P.2d 317* ; *Pasillas v. Agricultural Labor Relations Bd. (1984) 156 Cal. App. 3d 312, 358-359, 202 Cal.Rptr. 739]* . Thus, a petitioner is not ordinarily required to pursue proceedings before an administrative body in any of the following circumstances:

- It is only authorized to render advisory opinions [*Pearson Candy Co. v. Waits (1946) 27 Cal. 2d 615, 619, 165 P.2d 674* ; *James v. Marinship Corp. (1944) 25 Cal. 2d 721, 744-745, 155 P.2d 329* ; *Pasillas v. Agricultural Labor Relations Bd. (1984) 156 Cal. App. 3d 312, 358-359, 202 Cal. Rptr. 739]* .

- It is not empowered to grant the type of relief sought by the petitioner [*see* *Ramos v. County of Madera (1971) 4 Cal. 3d 685, 691, 94 Cal. Rptr. 421, 484 P.2d 93* (plaintiffs seeking tort damages for injuries sustained doing work that was illegally made a condition of welfare assistance were not required to challenge validity of condition in administrative appeal of decision terminating welfare grant); *Salimi v. State Compensation Insurance Fund (1997) 54 Cal. App. 4th 216, 221-222, 62 Cal. Rptr. 2d 640* (employer who sued worker's compensation insurer for bad faith and breach of contract did not have to exhaust WCAB and Department of Insurance administrative remedies before bringing civil action); *Miller v. Superior Court (1996) 50 Cal. App. 4th 1665, 1676, 58 Cal. Rptr. 2d 584* (auto dealer that sued auto manufacturer seeking damages for fraud related to auto allocation was not required to exhaust administrative remedies with New Motor Vehicle Board before bringing common law fraud claim); *Lance Camper Manufacturing Corp. v. Republic Indemnity Co. (1996) 44 Cal. App. 4th 194, 199-201, 51 Cal. Rptr. 2d 622* (employer suing worker's compensation insurer for breach of contract and bad faith was not required to seek relief from insurance commissioner); *Daniels v. Shasta-Tehama-Trinity J. Community College Dist. (1989) 212 Cal. App. 3d 909, 927, 260 Cal. Rptr. 867* (teachers challenging layoffs were not required to assert rehire rights against employees not on the seniority list and not yet hired); *Shernoff v. Superior Court (1975) 44 Cal. App. 3d 406, 409, 118 Cal. Rptr. 680* (plaintiffs seeking damages for illegal fixing of insurance rates were not required to seek relief from insurance commissioner when commissioner was empowered only to make order enjoining future illegal conduct); *California State Employees' Assn. v. Williams (1970) 7 Cal. App. 3d 390, 394-395, 86 Cal. Rptr. 305* (plaintiffs challenging legality of state contracts with private entities were not required to request hearing before State Personnel Board when Board was empowered only to investigate and remedy violations of law in connection with appointments to civil service positions); *Bernstein v. Smutz (1947) 83 Cal. App. 2d 108, 114-115, 188 P.2d 48* (petitioner seeking writ to compel granting of variance not required to apply to city zoning administrator for variance when administrator was not empowered to grant variance under applicable ordinance)].

- It has no discretion, under the circumstances of the particular case, to grant the relief sought by the

petitioner [*see* *Tiernan v. Trustees of Cal. State University & Colleges (1982) 188 Cal. Rptr. 115, 655 P.2d 317* (temporary employee challenging University's failure to adopt regulations requiring notice of non-reappointment was not required to institute grievance proceeding when grievance committee had no discretion to recommend change in university rules or policies); *Vogulkin v. State Board of Education (1961) 194 Cal. App. 2d 424, 434-435, 15 Cal. Rptr. 335* (petitioner whose teaching credential was revoked for conviction of sex offense was not required to appeal to State Board when statute mandating revocation gave State Board no discretion to reinstate license)].

- The agency's governing statute does not provide a forum for resolving disputes relating to the claim asserted [*Hightower v. Farmers Ins. Exchange (1995) 38 Cal. App. 4th 853, 860-861]* .

Accordingly, a litigant seeking damages is generally not required to pursue proceedings before an administrative body that is not empowered to grant monetary relief [*see, e.g.,* *Ramos v. County of Madera (1971) 4 Cal. 3d 685, 691, 94 Cal. Rptr. 421, 484 P.2d 93* ; *Lance Camper Manufacturing Corp. v. Republic Indemnity Co. (1996) 44 Cal. App. 4th 194, 199-201, 51 Cal. Rptr. 2d 622* ; *Lachman v. Cabrillo Pacific University (1981) 123 Cal. App. 3d 941, 945-946, 177 Cal. Rptr. 21* ; *Shernoff v. Superior Court (1975) 44 Cal. App. 3d 406, 409, 118 Cal. Rptr. 680]* . The exhaustion doctrine may apply to bar a damage claim, however, if an administrative remedy will either

- Enable the litigant to avoid or mitigate damages [*Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 476, 131 Cal. Rptr. 90, 551 P.2d 410* ; *Wilkinson v. Norcal Mutual Ins. Co. (1979) 98 Cal. App. 3d 307, 317, 159 Cal. Rptr. 416]* ; or

- Resolve, or substantially facilitate the resolution of, the basic controversy underlying the damage claim [*Edgren v. Regents of University of California (1984) 158 Cal. App. 3d 515, 521-522, 205 Cal. Rptr. 6* ; *Karlin v. Zalta (1984) 154 Cal. App. 3d 953, 983-987, 201 Cal. Rptr. 379]* .

A teacher was not required to exhaust internal grievance procedures in a collective bargaining agreement between the teacher's union and the school district prior to filing a lawsuit asserting a claim for differential pay benefits under *Education Code § 44977*. The claim for benefits was brought under the statute, and this claim was different from the differential pay benefit provided in the collective bargaining agreement. The arbitration agreement grievance procedure, which ended with binding arbitration, was applicable to the agreement but not to claims for enforcement of statutory rights under the Education Code [*Veguez v. Governing Bd. of the Long Beach Uni. Sch. Dist. (2005) 127 Cal. App. 4th 406, 416-417, 25 Cal. Rptr. 3d 526]* .

[c] Procedures for Obtaining Relief Are Inadequate

Even when an administrative entity is authorized to grant relief through its continuing supervisory or investigatory powers, a possible administrative remedy may be considered inadequate if the procedures for obtaining the remedy are insufficient or defective [*Common Cause v. Board of Supervisors (1989) 49 Cal. 3d 432, 441, 261 Cal. Rptr. 574, 777 P.2d 610* ; *Rosenfield v. Malcolm (1967) 65 Cal. 2d 559, 566-567, 55 Cal. Rptr. 505, 421 P.2d 697* ; *Unnamed Physician v. Board of Trustees of Saint Agnes Medical Center (2001) 93 Cal. App. 4th 607, 619-621, 113 Cal. Rptr 2d 309* ; *Jacobs v. State Bd. of Optometry (1978) 81 Cal. App. 3d 1022, 1029, 147 Cal. Rptr. 225]* . Exhaustion is thus not required if the applicable statutes, rules, and ordinances do not establish a clearly defined set of procedures under which the petitioner is entitled to submit his or her claim to an administrative entity and have it evaluated and resolved [*Common Cause v. Board of Supervisors (1989) 49 Cal. 3d 432, 441, 261 Cal. Rptr. 574, 777 P.2d 610* ; *Rosenfield v. Malcolm (1967) 65 Cal. 2d 559, 566-567, 55 Cal. Rptr. 505, 421 P.2d 697* ; *Unfair Fire Tax Committee v. City of Oakland (2006) 136 Cal. App. 4th 1424, 1429-1431, 39 Cal. Rptr. 3d 701* (city ordinance did not provide adequate administrative remedy because the ordinance had no procedural mechanisms for submission, evaluation, and resolution of the appeal specified under the ordinance; so litigant is not required to exhaust that remedy and can file lawsuit); *City of Coachella v. Riverside County Airport Land Use Com. (1989) 210 Cal. App. 3d 1277, 1287-1288, 258 Cal. Rptr. 795*

; *Jacobs v. State Bd. of Optometry (1978) 81 Cal. App. 3d 1022, 1029, 147 Cal. Rptr. 225* ; *Diaz v. Quitoriano (1969) 268 Cal. App. 2d 807, 813, 74 Cal. Rptr. 358* ; *see also Henry George School of Social Science v. San Diego Unified School Dist. (1960) 183 Cal. App. 2d 82, 85, 6 Cal. Rptr. 661]* .

An administrative remedy may be considered inadequate if the applicable rules fail to provide for notice and the right to a hearing, the taking of testimony, the submission of legal arguments or other procedural protections mandated by due process requirements [*Glendale City Employees' Assn., Inc. v. City of Glendale (1975) 15 Cal. 3d 328, 342-343, 124 Cal. Rptr. 513, 540 P.2d 609* , *cert. denied, 424 U.S. 943, 96 S. Ct. 1411, 47 L. Ed. 2d 349* ; *Bush v. California Conservation Corps (1982) 136 Cal. App. 3d 194, 203-204, 185 Cal. Rptr. 892* ; *Superior Strut & Hanger Co. v. Port of Oakland (1977) 72 Cal. App. 3d 987, 1002, 140 Cal. Rptr. 515* ; *Sunnyvale Public Safety Officers Assn. v. City of Sunnyvale (1976) 55 Cal. App. 3d 732, 736, 127 Cal. Rptr. 863* ; *see also Roth v. City of Los Angeles (1975) 53 Cal. App. 3d 679, 687-691, 126 Cal. Rptr. 163]* .

Termination of doctor's hospital staff privileges for cause was challenged by doctor because of lack of a pre-termination hearing. The court of appeal concluded that physician had a due process and statutory [*Bus. & Prof. Code § 809*] right to a pre-termination hearing before staff privileges could be terminated [*Sahlolbei v. Providence Healthcare, Inc. (2003) 112 Cal. App. 4th 1137, 1147-1150, 5 Cal. Rptr. 3d 598]* . The Court of Appeal held that physician was entitled to a preliminary injunction reinstating staff privileges until the required hearing procedures were completed [*Sahlolbei v. Providence Healthcare, Inc. (2003) 112 Cal. App. 4th 1137, 1160, 5 Cal. Rptr. 3d 598]* . The court also held that physician did not have to exhaust internal hospital grievance procedures, including a post-termination procedure to assert a claim that the hospital failed to follow hearing procedures required by law (statutory procedures codified under *Bus & Prof. Code § 809*) [*Sahlolbei v. Providence Healthcare, Inc. (2003) 112 Cal. App. 4th 1137, 1154-1155, 5 Cal. Rptr. 3d 598* ; *Payne v. Anaheim Mem'l Med. Ctr. (2005) 130 Cal. App. 4th 729, 739, 30 Cal. Rptr. 3d 230* (hospital bylaws did not provide for an internal grievance hearing to remedy doctor's complaint about discriminatory comments; therefore hospital administrative remedies did not have to be exhausted because there was no such remedy)].

Furthermore, a litigant was not required to participate in a public hearing to challenge the award of a contract that was part of a legislative action (city council interim contract public hearing) before challenging the award of the contract in court. There was no available administrative remedy to exhaust by participating in the public hearing, so exhaustion was not required [*Lindelli v. Town of San Anselmo (2003) 111 Cal. App. 4th 1099, 1105-1106, 4 Cal. Rptr. 3d 453* (mandamus challenge to city award of an interim contract pending the results of a referendum)].

Due process does not, however, require any particular form of notice or method of procedure. An agency's grievance procedures satisfy due process requirements for exhaustion of administrative remedies if the procedures provide reasonable notice and a reasonable opportunity to be heard [*Bockover v. Perko (1994) 28 Cal. App. 4th 479, 486, 34 Cal. Rptr.2d 423* (citing *Drummey v. State Bd. of Funeral Directors (1939) 13 Cal. 2d 75, 80-81, 87 P.2d 848*)]. Thus, for example, neither the lack of subpoena power nor the advisory nature of the decision of the hearing body make the procedures inadequate in due process terms [*Bockover v. Perko (1994) 28 Cal. App. 4th 479, 487, 34 Cal. Rptr.2d 423]* .

[2] Exhaustion Would Be Futile

Exhaustion of an administrative remedy is not required when pursuit of the remedy would be futile [*In re Joshua S (2007) 41 Cal. 4th 261, 274-275, 59 Cal. Rptr. 3d 460, 159 P.3d 49* (futility exception recognized based on ineligibility of children for AFDC benefits while under legal guardianship); *Sanchez v. City of Los Angeles (2006) 140 Cal. App. 4th 1069, 1078-1079, 45 Cal. Rptr. 3d 188* (futility exception to exhaustion of administrative remedies requirements applied to arguments not raised by police officer in disciplinary administrative proceedings, arguments later raised on appeal as to lack of timely notice and a challenge to police chief's role in discipline process because police department's position on these issues was unyielding); *Huntington Beach Police Officers' Assn. v. City of Huntington Beach (1976) 58 Cal. App. 3d 492, 498-499, 129 Cal. Rptr. 893* ; *Ogo Associates v. City of Torrance (1974) 37 Cal. App. 3d 830,*

834, 112 Cal. Rptr. 761] . Under this exception, the exhaustion requirement is excused if the petitioner can demonstrate that the decision of the administrative entity is certain to be adverse [*George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd. (1985) 40 Cal. 3d 654, 662, 221 Cal. Rptr. 488, 710 P.2d 288* ; *Collins v. Woods (1984) 158 Cal. App. 3d 439, 442-443, 204 Cal. Rptr. 650]* . Conversely, the futility exception does not apply when the petitioner cannot show that the agency decision is reasonably certain to be adverse [*Sea & Sage Audubon Society, Inc. v. Planning Comm'n. (1983) 34 Cal. 3d 412, 418-419, 194 Cal. Rptr. 357, 668 P.2d 664* ; *Economic Empowerment Foundation v. Quackenbush (1997) 57 Cal. App. 4th 677, 692, 67 Cal. Rptr. 2d 323]* .

The futility exception is a very narrow one; it applies only when the petitioner "can positively state that the [administrative agency] has declared what its ruling will be in a *particular* case" [*Coachella Valley Mosquito & Vector Control Dist. v. Cal. Pub. Emp. Relations Bd. (2005) 35 Cal. 4th 1072, 1081, 29 Cal. Rptr. 3d 234, 112 P. 3d 623* ; *Jonathan Neil & Assoc., Inc. v. Jones (2004) 33 Cal. 4th 917, 936, 16 Cal. Rptr. 3d 849, 94 P.3d 1055* ; *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd. (1985) 40 Cal. 3d 654, 662, 221 Cal. Rptr. 488, 710 P.2d 288* ; *City and County of San Francisco v. International Union of Operating Engineers, Local 39 (2007) 151 Cal. App. 4th 938, 947-948, 60 Cal. Rptr. 3d 516* (city could not satisfy futility exception by showing that agency denied request for an injunction; city had to show and failed to show that agency would inevitably rule against city on administrative claim); *County of Contra Costa v. State of California (1986) 177 Cal. App. 3d 62, 77-78, 222 Cal. Rptr. 750]* . To come within the exception, the petitioner must establish the following elements:

- There must be some declaration or conduct on the part of the administrative entity that demonstrates that it had predetermined its position [*George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd. (1985) 40 Cal. 3d 654, 662-663, 221 Cal. Rptr. 488, 710 P.2d 288* ; *Doyle v. Chino, City of (1981) 117 Cal. App. 3d 673, 683, 172 Cal. Rptr. 844]* . Futility cannot be established by the petitioner's speculation or subjective feelings [*Doyle v. Chino, City of (1981) 117 Cal. App. 3d 673, 683, 172 Cal. Rptr. 844]* .

- The declarations or conduct relied on by the petitioner must be that of the decision making entity itself [*see* *Doyle v. Chino, City of (1981) 117 Cal. App. 3d 673, 681-683, 172 Cal. Rptr. 844* (evidence of city manager's predisposition insufficient to establish futility of appeal to city council); *Call v. Feher (1979) 93 Cal. App. 3d 434, 440, 155 Cal. Rptr. 387* (letter from agency's executive officer expressing opinion that board would not grant relief insufficient to show futility of application to governing board of *California Tahoe Regional Planning Agency); La Costa Beach Homeowners Assn. v. Wayne (1979) 89 Cal. App. 3d 327, 331, 152 Cal. Rptr. 355* (absent evidence that commission mechanically followed staff recommendations, adverse staff recommendation insufficient to establish futility of appeal to California Coastal Zone Conservation Commission)].

- The declarations or conduct relied on by the petitioner must show a predetermined position that necessitates an adverse ruling in petitioner's particular case [*Gantner & Mattern Co. v. California E. Com. (1941) 17 Cal. 2d 314, 318, 109 P.2d 932* ; *County of Contra Costa v. State of California (1986) 177 Cal. App. 3d 62, 77-78, 222 Cal. Rptr. 750* ; *Mountain View Chamber of Commerce v. City of Mountain View (1978) 77 Cal. App. 3d 82, 92-93, 143 Cal. Rptr. 441]* . This element cannot be established merely by showing that the administrative entity has ruled adversely to the contentions made by petitioner in deciding other matters [*Gantner & Mattern Co. v. California E. Com. (1941) 17 Cal. 2d 314, 318, 109 P.2d 932* ; *In re Serna (1978) 76 Cal. App. 3d 1010, 1014, 143 Cal. Rptr. 350]* , or that it is generally hostile toward the type of claim asserted by petitioner [*see* *County of Contra Costa v. State of California (1986) 177 Cal. App. 3d 62, 77-78, 222 Cal. Rptr. 750* ; *Mountain View Chamber of Commerce v. City of Mountain View (1978) 77 Cal. App. 3d 82, 92-93, 143 Cal. Rptr. 441]* .

The futility exception applies when the administrative body from whom relief would be sought has previously taken a position that would require denial of the petitioner's current claim and the past positions were taken in the following

circumstances:

- Related proceedings involving the petitioner [*Collins v. Woods (1984) 158 Cal. App. 3d 439, 442-443, 204 Cal. Rptr. 650* (when hearing officer had approved retroactive application of statute in prior hearing, petitioner was not required to seek another hearing on propriety of continued retroactive application); *Ogo Associates v. City of Torrance (1974) 37 Cal. App. 3d 830, 834, 112 Cal. Rptr. 761* (when board amended zoning ordinance specifically to prevent construction of petitioner's low-income housing project, petitioner was not required to apply for variance)].

- Informal dealings and communications preliminary to the initiation or completion of formal proceedings [*Jacobs v. State Bd. of Optometry (1978) 81 Cal. App. 3d 1022, 1029, 147 Cal. Rptr. 225* (plaintiff not required to formally petition State Board of Optometry to enact regulations when Board's response to letter demanding enactment made it plain that Board would not take requested action); *Huntington Beach Police Officers' Assn. v. City of Huntington Beach (1976) 58 Cal. App. 3d 492, 498-499, 129 Cal. Rptr. 893* (association not required to seek formal hearing before personnel board on change in employees' work schedules when city consistently took the position that it was a nonnegotiable management prerogative throughout extended grievance proceedings)].

[3] Court Vested With Concurrent Primary Jurisdiction

When applicable statutes give concurrent primary jurisdiction over a particular type of controversy to the court and an administrative agency, exhaustion of the administrative remedy is not a prerequisite to use of the judicial remedy [*National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419, 448-452, 189 Cal. Rptr. 346, 658 P.2d 709* ; *Scripps etc. Hospital v. Cal. Emp. Com. (1944) 24 Cal. 2d 669, 673-674, 151 P.2d 109* ; *Southbay Creditors Trust v. General MotorsAcceptance Corp. (1999) 69 Cal. App. 4th 1068, 1080, 82 Cal. Rptr. 2d 1* ; *California School Employees Assn. v. Travis Unified School Dist. (1984) 156 Cal. App. 3d 242, 249-250, 202 Cal. Rptr. 699* ; *Muir v. Steinberg (1961) 197 Cal. App. 2d 264, 269, 17 Cal. Rptr. 431]* . A legislative intent to vest the court with concurrent primary jurisdiction has been found in the following instances:

- The statutes creating the administrative remedy expressly provide that they shall not supersede the statutes creating the judicial remedy [*Wygant v. Victor Valley Joint Union High School Dist. (1985) 168 Cal. App. 3d 319, 322-323, 214 Cal. Rptr. 205* ; *California School Employees Assn. v. Travis Unified School Dist. (1984) 156 Cal. App. 3d 242, 249-250, 202 Cal. Rptr. 699]* .

- A legislative act provides both administrative and judicial remedies and does not expressly condition the availability of the judicial remedy on the exhaustion of the administrative remedy [*Scripps etc. Hospital v. Cal. Emp. Com. (1944) 24 Cal. 2d 669, 673-674, 151 P.2d 109* ; *Syngenta Crop Protection, Inc v. Helliker (2006) 138 Cal. App. 4th 1135, 1159-1161, 42 Cal. Rptr. 3d 191* (litigant filed complaint for declaratory and injunctive relief coupled with petition for writ of mandate). The California Court of Appeal held that litigant, who was pesticide manufacturer regulated by Department of Pesticide Registration was not required to exhaust administrative remedies before filing lawsuit in court, as the California legislature provided for a judicial remedy as an alternative to the administrative remedy); *Muir v. Steinberg (1961) 197 Cal. App. 2d 264, 269, 17 Cal. Rptr. 431]* .

- The statutes governing the judicial proceeding authorize the court to refer cases to the administrative entity for investigation and report [*National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419, 448-452, 189 Cal. Rptr. 346, 658 P.2d 709]* .

- The statutes expressly authorize court jurisdiction over all common law and statutory claims originally cognizable in the courts and provide that a party may commence action to litigate any of those

claims in any court of competent jurisdiction [*Southbay Creditors Trust v. General Motors Acceptance Corp. (1999) 69 Cal. App. 4th 1068, 1079-1080, 82 Cal. Rptr. 2d 1* (construing *Veh. Code § 3050(e)*)].

An intent to grant the court concurrent primary jurisdiction may not be inferred, however, merely from the absence of an express statutory provision making exhaustion of the administrative remedy a prerequisite to the institution of judicial proceedings [*cf. A. Teichert & Son, Inc. v. State of Cal. (1965) 238 Cal. App. 2d 736, 746, 48 Cal. Rptr. 225* ; *Woodard v. Broadway Fed. S. & L. Assn. (1952) 111 Cal. App. 2d 218, 221, 244 P.2d 467]* .

The State of California filed an unfair business practices (under *Bus. & Prof. Code § 17200 et seq.*) lawsuit against mobile home park owners for violating city rent control ordinances. The Court of Appeal held that the Superior Court had primary jurisdiction to adjudicate the unfair business practices claims and to award civil penalties against the defendants for violating the unfair business practices law. The Superior Court properly exercised discretion to adjudicate the claims and to interpret the ordinance an appropriately judicial function [*People v. Beaumont Investment, Ltd (2003) 111 Cal. App. 4th 102, 124-127, 3 Cal. Rptr. 3d 429]* .

When the Legislature has established a scheme under which a court is prohibited from exercising discretion under the primary jurisdiction doctrine, the court must honor the scheme, and may not decline to adjudicate a suit on the basis that available administrative processes should first be invoked and completed. If, however, there is no legislation precluding a court from exercising its discretion under the primary jurisdiction doctrine, then the court may exercise its discretion and decline to hear a lawsuit until the administrative process has been completed [*Farmers Ins. Exchange v. Superior Court (1992) 2 Cal. 4th 377, 394, 6 Cal. Rptr. 2d 487, 826 P.2d 730]* .

An insured trucking company filed a tort cross-complaint in a court lawsuit for breach of contract to collect disputed premium charges, which action was brought against the insured by a collection agency as an assignee of the insurer. The tort cross-complaint alleged that the insurer had breached the covenant of good faith and fair dealing owed to its insured, and had also committed fraud, in relation to an insurance premium billing dispute between the insured and the insurer. The insurer was assigned to provide automobile liability insurance to the insured company under the California Automobile Assigned Risk Plan (CAARP). The insured recovered a substantial jury verdict against the insurer [*Jonathan Neil & Assocs., Inc. v. Jones (2004) 33 Cal. 4th 917, 923-924, 16 Cal. Rptr. 3d 849, 94 P.3d 1055]* . The California Supreme Court upheld the Court of Appeal, which had reversed the trial court judgment for the insured, but disagreed on the rationale for that decision. The California Supreme Court rejected the Court of Appeals holding that exhaustion of administrative remedies requirements were applicable and not satisfied. Rather, the Supreme Court held that exhaustion of administrative remedies was not required, but that the doctrine of primary jurisdiction did apply and required the trial court to stay its decision-making and refer the premium billing dispute issue to the Department of Insurance and the State Insurance Commissioner [*Jonathan Neil & Assocs., Inc. v. Jones (2004) 33 Cal. 4th 917, 923-924, 16 Cal. Rptr. 3d 849, 94 P.3d 1055]* . The Court reasoned that exhaustion of administrative remedies did not apply because the insured's tort claims, and the insurer's breach of contract claims, were within the superior court's jurisdiction, and the Insurance Commissioner had no authority to decide these common law claims. However, primary jurisdiction did apply because one of the issues in this lawsuit, the validity of premium billing by the insurer under the CAARP program, was within the regulatory authority and expertise of the California Insurance Commissioner. The court concluded that the premium dispute issue had to be referred to the Insurance Commissioner for resolution, and that referral would promote a uniform application of complex insurance regulations, the referral would utilize the insurance agency's expertise in regulating insurer's operating under the CAARP program, thereby helping to insure a more accurate determination of the premium billing dispute issue in the lawsuit [*Jonathan Neil & Assocs., Inc. v. Jones (2004) 33 Cal. 4th 917, 933-934, 16 Cal. Rptr. 3d 849, 94 P.3d 1055]* .

The California Public Utilities Commission had exclusive jurisdiction to resolve a dispute between a city and a telephone company over which of the parties was required to pay the costs of compliance with a city ordinance requiring utilities to move overhead facilities underground. The superior court properly granted the telephone company's demurrer without leave to amend because the superior court lacked subject matter jurisdiction over this

dispute [*City of Anaheim v. Pacific Bell Tel. Co. (2004) 119 Cal. App. 4th 838, 841-842, 14 Cal. Rptr. 3d 725]* . The California Public Utility commission has exclusive authority under Pub. Util. Code § 1159 to decide how to allocate revenues received by regulated utilities form leasing or licensing its facilities. However, claims related to easements and other property interests on land rights of way owned by a regulated utility are not barred from court consideration by Pub. Util. Code § 1159 [*Koponen v. Pacific Gas & Electric Company (2008) 165 Cal. App. 4th 345, 357-358, 81 Cal. Rptr. 3d 22*].

The Public Employment Relations Board (PERB) had exclusive jurisdiction to resolve an unfair labor practice dispute between a city employer and a public employee union. The City and County of San Francisco filed a lawsuit seeking to compel the union to participate in arbitration to resolve the labor dispute between the city and the city employees represented by the union. Arbitration was required by the city charter. The First District, Division 5, California Court of Appeal held that *Government Code § 3509* granted PERB exclusive jurisdiction to decide the arbitration dispute [*City and County of San Francisco v. International Union of Operating Engineers, Local 39 (2007) 151 Cal. App. 4th 938, 940-941, 60 Cal. Rptr. 3d 516]* .

The California Supreme Court also held that the attorney general did not have standing to file a lawsuit under the California False Claims Act (CFCA) for civil remedies related to the assets of an insolvent insurance company as to which the Insurance Commissioner has acquired title because those assets are not "state funds" within the meaning of the CFCA [*State of Cal. v. Altus Fin. (2005) 36 Cal. 4th 1284, 1302-1303, 32 Cal. Rptr. 3d 498, 116 P.3d 1175]* . The Court also held that the attorney general has standing to seek civil penalties under the Unfair Competition Law (UCL), but not restitution, and only injunctive relief that serves to protect the public and serve a law enforcement function [*State of Cal. v. Altus Fin. (2005) 36 Cal. 4th 1284, 1303-1304, 32 Cal. Rptr. 3d 498, 116 P.3d 1175]* . In holding that the attorney general could not bring a restitution related claim under the UCL law, the Court based its decision on the exclusive authority granted to the Insurance Commissioner under *Insurance Code § 1037(f)* [*State of Cal. v. Altus Fin. (2005) 36 Cal. 4th 1284, 1304-1306, 32 Cal. Rptr. 3d 498, 116 P.3d 1175]* .

The Public Utilities Commission had primary jurisdiction over issues raised in a civil lawsuit brought by plaintiffs against Pacific Gas & Electric Company for unfair business practices [*Bus. & Prof. Code § 17200*, and *Bus. & Prof. Code § 17500*] and fraud. Primary jurisdiction was not exclusive, and thus dismissal of the civil action was improper. Rather, the civil lawsuit was stayed pending further action before the PUC [*Wise v. Pacific Gas & Electric Company (2000) 77 Cal. App. 4th 287, 299-301, 91 Cal. Rptr. 2d 479]* . In a second appellate decision (Wise II), the California Court of Appeal held that the completion of a Public Utilities Commission (PUC) investigation into fraud charges against a regulated utility, Pacific Gas & Electric Company (PG&E) without the PUC reaching any decision about those charges did not have collateral estoppel effect on a related civil lawsuit claim for fraud damages brought against PG&E by consumers [*Wise v. Pacific Gas & Elec. Co. (2005) 132 Cal. App. 4th 725, 742-743, 34 Cal. Rptr. 3d 222]* . The fraud issues had been referred to the PUC under the doctrine of primary jurisdiction, and the trial court had stayed the civil lawsuit pending PUC resolution of the fraud issues. When the PUC closed its investigation, having taken no action, the trial court lifted the stay, and granted a motion for judgment on the pleadings brought by PG&E. The court of appeal reversed the judgment, and held the PUC decision to close the investigation did not have collateral estoppel effect on the civil lawsuit because there was no PUC ruling or decision on the merits, there were no parties to the proceeding, and the PUC was not acting in an adjudicatory capacity [*Wise v. Pacific Gas & Elec. Co. (2005) 132 Cal. App. 4th 725, 742-743, 34 Cal. Rptr. 3d 222]* .

The superior court properly refused to apply the primary jurisdiction doctrine and submit a lawsuit claim related to the validity of a land use under a conditional use permit to the city planning department because the issues in the lawsuit involved statutory interpretation that is appropriate for judicial resolution, and there were no issues requiring the fact finding expertise of the administrative agency [*Tenderloin Housing Clinic, Inc v. Astoria Hotel, Inc. (2000) 83 Cal. App. 4th 139, 142-143, 98 Cal. Rptr. 2d 924]* .

Pub. Util. Code § 1759, which precludes superior court jurisdiction to review orders of the Public Utilities Commission

(PUC), or to interfere with the PUC in the performance of its official duties, does not prohibit or preempt tort damage claims in superior court lawsuits alleging violations of federal and state drinking water standards brought by water consumers against water providers regulated by the PUC. However, damage actions against those providers for conditions that meet state water quality standards are precluded or preempted because this would interfere with PUC regulation, as are injunctive relief claims against those providers [*Hartwell Corp. v. Superior Court (2002) 27 Cal. 4th 256, 276-279, 115 Cal. Rptr. 2d 874, 38 P.3d 1098]* . Furthermore, all claims, both for damages and for injunctive relief, and whether or not based on violation of water quality standards, brought by water consumers against water providers and industrial defendants that are not regulated by the PUC are not precluded or preempted by *Pub. Util. Code § 1759* [*Hartwell Corp. v. Superior Court (2002) 27 Cal. 4th 256, 282-283, 115 Cal. Rptr. 2d 874, 38 P.3d 1098]* .

Pub Util. Code § 1759, which precludes superior court jurisdiction to review orders of the Public Utilities Commission or to interfere with the PUC in the performance of its official duties, does not prohibit district attorneys from enforcing false advertising and unfair business practice laws, by filing civil lawsuits in the superior court against public utility companies within the regulatory jurisdiction of the PUC. Concurrent civil enforcement actions brought by public prosecutors, and similar administrative enforcement actions brought by the PUC are not precluded by *Pub. Util. Code § 1759*, and parallel administrative and civil enforcement actions can be coordinated by the litigants and the superior court to avoid actual conflicts that would interfere with the PUC's regulatory authority [*People v. Pac. Bell (2003) 31 Cal. 4th 1132, 1137-1139, 7 Cal. Rptr. 3d 315, 80 P.3d 201]* .

The superior court has subject matter jurisdiction under *Pub. Util. Code § 2106* to award intentional tort damages, including exemplary damages, for fraud sought in a civil lawsuit by a customer against a public utility regulated by the Public Utilities Commission (PUC) when that regulated utility engages in willful and unlawful activities. The resolution of the lawsuit and the award of damages would not violate *Pub. Util. Code § 1759* which restricts the authority of the courts, including the superior court, to review decisions or orders of the PUC. The award of damages in this lawsuit by a customer of a regulated utility would not "hinder or frustrate" the PUC's supervisory or regulatory policies [*Pink Dot, Inc. v. Teleport Communications Group (2001) 89 Cal. App. 4th 407, 417-419, 107 Cal. Rptr. 2d 392]* .

The California Court of Appeal held that the Department of Managed Health Care has concurrent jurisdiction over enforcement of the provisions of *Health & Safety Code § 1371.4*, part of the Knox-Keene Health Care service Plan Act of 1975, and that the provisions of the statute can be privately enforced by emergency room physicians filing civil lawsuits [*Bell v. Blue Cross of Cal. (2005) 131 Cal. App. 4th 211, 216-218, 31 Cal. Rptr. 3d 688]* . The Court of Appeal also gave deference to the Department of Managed Health Care's interpretation of *Health & Safety Code § 1371.4* (that health care providers have the right to privately enforce provisions of the statute through filing lawsuits under the unfair competition law, as well as for breach of contract, and quantum meruit, when a health care plan did not provide adequate reimbursement for the value of service rendered by emergency room physicians) and concluded that physicians had standing to file a lawsuit against a health care service plan [*Bell v. Blue Cross of Cal. (2005) 131 Cal. App. 4th 211, 217-219, 31 Cal. Rptr. 3d 688]* .

Insured had the right to file a civil lawsuit in Superior Court under the unfair competition law [*Bus. & Prof. Code §§ 17200-17210*] against an insurance company to challenge insurer's use of absence of prior insurance as a rating factor in determining eligibility for good driver discounts, and other purposes, in violation of *Ins. Code § 1861.02* (part of Proposition 103). The court of appeal, which rejected the argument that the Insurance Commissioner had exclusive primary jurisdiction to decide such issues, concluded that exhaustion of administrative remedies was not applicable and upheld the right of insureds (under the provisions of *Ins. Code §§ 1861.03* and *1861.10*) to file a civil lawsuit to challenge in court such insurer practices under the UCL law [*Donabedian v. Mercury Insurance Co. (2004) 116 Cal. App. 4th 968, 986-987, 11 Cal. Rptr. 3d 45]* .

In a breach of contract lawsuit, defendant's defense (that the contract was void because plaintiff acted as a talent agency, but was unlicensed in violation of the act) based on the Talent Agencies Act, *Labor Code §§ 1700-1700.47*, must first

be brought before the Labor Commissioner under *Labor Code § 1700.44(a)*, and the civil lawsuit for breach of contract must be stayed pending resolution by the Labor commissioner of issues related to the Talent Agencies Act defense [*Styne v. Stevens (2001) 26 Cal. 4th 42, 47-48, 109 Cal. Rptr. 2d 14, 26 P.3d 343]* . Furthermore, a defense based on the Talent Agencies Act does not have to be raised within the one year statute of limitations [Labor code § 1700.44(a)] for bringing actions or proceedings under the act as the one year statute applies only to claims for affirmative relief, not to defenses [*Styne v. Stevens (2001) 26 Cal. 4th 42, 51-54, 109 Cal. Rptr. 2d 14, 26 P.3d 343]* . The Labor Commissioner has exclusive jurisdiction to determine Talent Agency Act related issues that arise in a breach of contract lawsuit in court. The Commissioner has jurisdiction to determine whether the contract involved the services of a talent agency, and if so, to determine that the contract is void and unenforceable. These issues must first be submitted to the Commissioner to be decided, with the opportunity for a do novo appeal to the superior court after the commissioner makes a decision [*Styne v. Stevens (2001) 26 Cal. 4th 42, 55-57, 109 Cal. Rptr. 2d 14, 26 P.3d 343]* . When a Talent Agency Act defense arises in civil lawsuit in court, the superior court proceeding should be stayed, and a "petition to determine controversy" should be filed with the Commissioner. The merits of that defense can not be considered by the court until the defense has been decided by the commissioner [*Styne v. Stevens (2001) 26 Cal. 4th 42, 58-59, 109 Cal. Rptr. 2d 14, 26 P.3d 343]* .

The primary jurisdiction doctrine authorizes a stay of court action not a dismissal of a complaint through the granting of a demurrer. The primary jurisdiction doctrine is not applicable when any relevant administrative proceedings have already been completed at the time that a stay of the civil lawsuit is sought [*AICCO, Inc. v. Insurance Co. of North America (2001) 90 Cal. App. 4th 579, 594-595, 109 Cal. Rptr. 2d 359]* .

Primary jurisdiction doctrine did not apply to justify dismissal of lawsuit brought by customers against suppliers of telephones and telephone service suppliers for damages for improper charges assessed for monthly telephone rental service. The damage lawsuit was authorized by *Pub. Util. Code § 2106*, the lawsuit would not adversely affect the commission's decisions or orders, and the issues in the lawsuit did not require application of commission's specialized regulatory expertise to decide claims for damages [*Cundiff v. GTE California Inc. (2002) 101 Cal. App. 4th 1395, 1412-1414,125 Cal. Rptr. 2d 445]* .

In deciding whether to stay an auto dealer's cross-complaint against an auto manufacturer for fraud until the New Motor Vehicle Board could exercise primary jurisdiction over related issues of automobile allocations among dealers, the trial court was not automatically required to grant a requested stay of the dealer's cross-complaint in the civil action, but rather was expected to exercise discretion and balance the competing interests of the agency's technical expertise on allocation issues against the dealer's right to a jury trial in court on the damages claim based on fraud allegations in the cross-complaint [*Miller v. Superior Court (1996) 50 Cal. App. 4th 1665, 1677-1678, 58 Cal. Rptr. 2d 584]* .

When a trial court applies the doctrine of primary jurisdiction, it is improper for the court to dismiss the action. Rather, it is required to stay the action in court pending resolution of the issues within the administrative agency's expertise [*Southbay Creditors Trust v. General Motors Acceptance Corp. (1999) 69 Cal. App. 4th 1068, 1081, 82 Cal. Rptr. 2d 1]* . It is an abuse of discretion for a trial court to refer a case to an agency under the primary jurisdiction doctrine when the issues in the case consist of common law tort and contract claims that are within the court's jurisdiction and not within the agency's jurisdiction [*Southbay Creditors Trust v. General Motors Acceptance Corp. (1999) 69 Cal. App. 4th 1068, 1083, 82 Cal. Rptr. 2d 1]* . In exercising its discretion related to primary jurisdiction, the trial court should consider agency expertise, the need for uniformity in application of agency regulations, the expense to the affected party of agency proceedings, the adequacy of agency remedies for the affected claims, and the potential for delay in the court case from agency referral under primary jurisdiction [*Southbay Creditors Trust v. General Motors Acceptance Corp. (1999) 69 Cal. App. 4th 1068, 1082-1083, 82 Cal. Rptr. 2d 1]* .

The doctrine of primary jurisdiction provides that a court will abstain from determining an otherwise justiciable claim that requires the determination of issues over which an agency has primary jurisdiction. Whether an agency has primary jurisdiction depends on the extent and amount of regulatory power vested in that agency [*Industrial Commun. Sys.,*

Inc. v. Pacific Tel. & Tel. Co. (9th Cir. 1974) 505 F.2d 152, 156, 1974-2 Trade Cas. (CCH) P75291] . An agency has primary jurisdiction when either of the following applies:

- One or more of the issues in the court action should be referred to the agency to protect the integrity of or achieve the uniformity required by the regulatory scheme [*United States v. Philadelphia Nat. Bank (1963) 374 U.S. 321, 353, 83 S. Ct. 1715, 10 L. Ed. 2d 915* ; *Keogh v. Chicago & N. R. Co. (1922) 260 U.S. 156, 163, 43 S. Ct. 47, 67 L. Ed. 183* ; *Texas & P. R. Co. v. Abilene Cotton Oil Co. (1907) 204 U.S. 426, 439-441, 448, 27 S. Ct. 350, 51 L. Ed. 553* ; 4 Davis, Administrative Law Treatise, ch. 22, *Primary Jurisdiction*, § 22:1 (2d ed. 1978); Fremlin, *Primary Jurisdiction and the Federal Maritime Commission, 18 Hastings L.J. 733, 744, 778*]; or

- The court action would require the determination of issues that are within the special knowledge or expertise of the regulating agency [*United States v. Western P. R. Co. (1956) 352 U.S. 59, 63-64, 77 S. Ct. 161, 1 L. Ed. 2d 126* ; *Industrial Commun. Sys., Inc. v. Pacific Tel. & Tel. Co. (9th Cir. 1974) 505 F.2d 152, 156, 1974-2 Trade Cas. (CCH) P75291* ; 4 Davis, Administrative Law Treatise, ch. 22, *Primary Jurisdiction*, § 22:1 (2d ed. 1978); Fremlin, *Primary Jurisdiction and the Federal Maritime Commission, 18 Hastings L.J. 733, 744, 778*].

Even when an agency has primary jurisdiction, however, judicial consideration of the matter "is not thereby ousted, but only postponed" [*United States v. Philadelphia Nat. Bank (1963) 374 U.S. 321, 353, 83 S. Ct. 1715, 10 L. Ed. 2d 915]* . Primary jurisdiction is not a jurisdictional doctrine in any strict sense [*E. B. Ackerman Importing Co. v. City of Los Angeles (1964) 61 Cal. 2d 595, 600, 39 Cal. Rptr. 726, 394 P.2d 566]* . "It is a doctrine allocating the lawmaking power" by transferring the power of making the initial determination "from court to agency" [*United States v. Western P. R. Co. (1956) 352 U.S. 59, 65, 77 S. Ct. 161, 1 L. Ed. 2d 126* ; 4 Davis, Administrative Law Treatise, ch. 22, *Primary Jurisdiction*, § 22:1 (2d ed. 1978); Jaffe, *Primary Jurisdiction Reconsidered, 102 Univ. Pa. L. Rev. 577, 583, 584 (1954)*].

The primary jurisdiction doctrine did not require a court that decided a civil action for injunctive relief based on statutory violations to defer to an agency as to an issue of statutory interpretation of the statute administered by the agency, because courts have expertise in interpreting statutes [*Hewlett v. Squaw Valley Ski Corporation (1997) 54 Cal. App. 4th 499, 528-529, 63 Cal. Rptr. 2d 118*].

The California Court of Appeal rejected a challenge to denial of a petition to intervene in a civil lawsuit brought by the California Public Employees Relations Board. The lawsuit challenged the constitutionality of legislation changing retirement benefits terms for new state employees. The Board's argument for intervention was that the Board has exclusive initial jurisdiction over claims for violations of state employee collective bargaining rights. The Court of Appeal upheld the denial of the intervention petition because the constitutional issue (whether the statute impaired the obligation of contracts) was not within the exclusive initial jurisdiction of the Board. Therefore, the Board did not have the right to intervene in the lawsuit [*California Assn. of Professional Scientists v. Schwarzenegger (2006) 137 Cal. App. 4th 371, 380-382, 40 Cal. Rptr. 3d 354*].

The State Personnel Board had concurrent jurisdiction with the superior court to decide claims related to the Police Officers Procedural *Bill of Rights* Act [*Gov. Code § 3309.5*]. The Board had jurisdiction to consider a statute of limitations defense asserted by a Department of Corrections (CDC) employee as a bar to adverse employment action brought by the CDC [*Alameida v. State Personnel Bd. (2004) 120 Cal. App. 4th 46, 52-54, 15 Cal. Rptr. 3d 383]* .

[4] Administrative Entity Lacks Subject Matter Jurisdiction

A failure to seek relief that might be available from an administrative entity does not preclude judicial relief if, in fact, the entity is not vested by a constitutional provision or statute with subject matter jurisdiction over the type of

controversy at issue [*County of Alpine v. County of Tuolumne (1958) 49 Cal. 2d 787, 798, 322 P.2d 449* ; *County of L.A. v. Dept. of Social Welfare (1953) 41 Cal. 2d 455, 457, 260 P.2d 41* ; *Mazda Motor of America, Inc v. California New Motor Vehicle Board (2003) 110 Cal. App. 4th 1451, 1460-1461, 2 Cal. Rptr. 3d 866* (Board did not have statutory authority to adjudicate dispute between dealer and distributor, and thus dispute was not within agency's jurisdiction)]. This exception does not apply when it is merely claimed that the administrative entity has no jurisdiction to act in the case of a particular party or under a particular set of facts [*United States v. Superior Court (1941) 19 Cal. 2d 189, 194-195, 120 P.2d 26* ; *People v. Sonleitner (1960) 185 Cal. App. 2d 350, 363-365, 8 Cal. Rptr. 528]* . Administrative remedies do not have to be exhausted when the agency lacks administrative jurisdiction over the challenged action [*Hard v. Cal. State Emples. Ass'n (2002) 96 Cal. App. 4th 708, 711-712, 117 Cal. Rptr. 2d 615* (PERB did not have administrative jurisdiction over internal changes in union structure)]. The administrative jurisdiction exception did not apply to excuse exhaustion of administrative remedies before PERB when the trial court decided that PERB had exclusive jurisdiction over a labor dispute between a city and a public employees union [*City and County of San Francisco v. International Union of Operating Engineers, Local 39 (2007) 151 Cal. App. 4th 938, 949-950, 60 Cal. Rptr. 3d 516]* .

The administrative jurisdiction exception to exhaustion of administrative remedies was held to be applicable to the issue of the proper limitations period for bringing unfair labor practice claims before the Public Employee Relations Board (PERB). The California Supreme Court excused the District from adjudicating the limitations issue before PERB, and allowed the District to go to court to resolve this issue. In applying the administrative jurisdiction exception, the Supreme Court utilized a three-part test: 1) the injury or burden that exhaustion will impose; 2) the strength of the legal argument that the agency lacks jurisdiction; and 3) the extent to which administrative expertise may aid in resolving the jurisdictional issue. The Court held that as to the first factor, while the district would not be unduly burdened by having to exhaust administrative remedies, there was a strong public interest in definitively resolving the legal issue presented. As to the second factor, the District's legal argument is very strong. As to the third factor, the issue before the court are purely legal, within court expertise, and the court had the benefit of PERB's views on the issues in the case in the appellate briefs it filed with the Court [*Coachella Valley Mosquito & Vector Control Dist. v. Cal. Pub. Emp. Relations Bd. (2005) 35 Cal 4th 1072, 1081-1083, 29 Cal. Rptr. 3d 234, 112 P. 3d 623* ; *California- Nevada Annual Conference United Methodist Church v. City and County of San Francisco (First Dist., Div. 3, 2009) 173 Cal. App. 4th 1559, 1569-1570, 94 Cal. Rptr. 3d 64* (administrative jurisdiction exception recognized; *Coachella* case cited; immediate review of resolution to start landmark designation process for church building)]. The administrative jurisdiction exception was recognized and a developer was not required to exhaust administrative remedies with the Commission before challenging the Coastal Commission's statutory authority to designate property as an environmentally sensitive habitat area (ESHA) during the appeal to the Commission of a local government's grant of a coastal development permit (CDP) [*Security National Company, Inc. v. California Coastal Commission (2008) 159 Cal. App. 4th 402, 416-418, 71 Cal. Rptr. 3d 522*].

An employee was not required to plead that she served a copy of an administrative complaint (right to sue letter) upon her employer within 60 days as a jurisdictional prerequisite to going to court to bring a FEHA lawsuit. The employee sought and received the right to sue letter from FEHA, and then filed a civil lawsuit within one year of receiving that right to sue letter. Pleading service on her employer was NOT a requirement of exhaustion of administrative remedies under the FEHA statute [*Gov. Code § 12962*; *Wasti v. Superior Court (2006) 140 Cal. App. 4th 667, 669-670, 44 Cal. Rptr. 3d 625]* .

The administrative jurisdiction exception to exhaustion of administrative remedies did not apply to excuse failure to exhaust administrative remedies by a challenger to a coastal development permit who failed to appeal to the California Coastal Commission a county decision to grant the permit to a neighboring landowner. The challenger argued that the county action was void and therefore exhaustion was not required, but the court of appeal rejected that argument and held that exhaustion is required for as applied challenges to agency action based on voidness. The Coastal Commission had jurisdiction over this type of dispute at the appellate level [*McAllister v. County of Monterey (2007) 147 Cal. App. 4th 253, 284-286, 54 Cal. Rptr. 3d 116]* .

Claims that the administrative entity lacks jurisdiction because the statutes under which it operates are unconstitutional are governed by different rules [*see* [5], *below*].

[5] Statute Under Which Administrative Entity Operates Is Unconstitutional on Its Face

A litigant who claims that a statute under which an administrative entity operates is unconstitutional on its face is not required to raise that constitutional claim before the administrative entity [*State of California v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 251, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *Andal v. City of Stockton (2006) 137 Cal. App. 4th 86, 93-94, 40 Cal. Rptr. 3d 34* (constitutional challenge brought by cell phone companies and their customers to challenge constitutionality of city ordinance imposing local government fee on cell phone users to fund city's 911 communication system. Administrative remedies need not be exhausted to raise constitutional challenge in court); *Nissan Motor Corp. v. New Motor Vehicle Bd. (1984) 153 Cal. App. 3d 109, 115, 202 Cal. Rptr. 1* ; *Hand v. Board of Examiners (1977) 66 Cal. App. 3d 605, 617-620, 136 Cal. Rptr. 187]* . This exception is a narrow one and it is subject to a number of important qualifications:

- The rule has only been applied to administrative agencies of legislative origin and appears to be based on the rationale that these agencies, not being vested with judicial powers, have no power to pass on constitutional claims [*see Cal. Const., art. III, § 3.5*; *State of California v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 251, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *Hand v. Board of Examiners (1977) 66 Cal. App. 3d 605, 617-620, 136 Cal. Rptr. 187]* . A different rule may apply to administrative agencies of constitutional origin, because these agencies are vested with judicial powers, and thus have the power to pass on the constitutionality of the statutes under which they operate [*cf. Hand v. Board of Examiners (1977) 66 Cal. App. 3d 605, 618-619, 136 Cal. Rptr. 187* ; *Walker v. Munro (1960) 178 Cal. App. 2d 67, 73-74, 2 Cal. Rptr. 737]* .

- The exception does not apply to a claim that a controlling statute cannot constitutionally be applied under the facts of a particular case; a claim that a statute is unconstitutional as applied will not be considered by the courts unless it has been raised at the administrative level [*Security-First Nat. Bk. v. County of Los Angeles (1950) 35 Cal. 2d 319, 321, 217 P.2d 946* (application of tax claimed to violate equal protection); *Griswold v. Mt. Diablo Unified Sch. Dist. (1976) 63 Cal. App. 3d 648, 652-653, 134 Cal. Rptr. 3* (disciplinary action claimed to violate petitioner's *First Amendment* rights); *Savoy Club v. Board of Supervisors (1970) 12 Cal. App. 3d 1034, 1042, 91 Cal. Rptr. 198* (application of licensing ordinance); *but see Anderson v. Department of Real Estate (1979) 93 Cal. App. 3d 696, 701 n.2, 155 Cal. Rptr. 307* (claim that application of regulatory statute to activities conducted by petitioner violated petitioner's *First Amendment*rights need not be raised at administrative hearing)].

- The assertion of a constitutional claim does not allow a litigant to bypass the administrative process and present other claims directly to the courts. A litigant who challenges the facial constitutionality of controlling statutes must still raise other claims at the administrative level or they will not be considered in any judicial proceeding [*State of California v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 251-252, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *Flores v. Los Angeles Turf Club (1961) 55 Cal. 2d 736, 745-748, 13 Cal. Rptr. 201, 361 P.2d 921]* .

- When an administrative agency has the power to grant the litigant alternative relief that would make the constitutional claim moot, a failure to apply to the agency for such alternative relief may preclude the litigant from raising the constitutional claim in the courts [*Mountain View Chamber of Commerce v. City of Mountain View (1978) 77 Cal. App. 3d 82, 94-95, 143 Cal. Rptr. 441* (failure to seek variance precludes attack on facial constitutionality of zoning ordinance); *cf. Leek v. Washington Unified School Dist. (1981) 124 Cal. App. 3d 43, 53, 177 Cal. Rptr. 196* (plaintiffs precluded from asserting

constitutional challenges to District practices by failure to pursue statutory administrative remedies that could have obviated need to litigate constitutional issues)].

[6] Threat of Irreparable Injury Exists

Exhaustion of an administrative remedy is not required when it will result in irreparable injury to a litigant [*see, e.g., United States v. Superior Court (1941) 19 Cal. 2d 189, 196-197, 120 P.2d 26* ; *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 296-297, 109 P.2d 942* ; *Mountain View Chamber of Commerce v. City of Mountain View (1978) 77 Cal. App. 3d 82, 89, 143 Cal. Rptr. 441* ; *Ogo Associates v. City of Torrance (1974) 37 Cal. App. 3d 830, 834, 112 Cal. Rptr. 761]* . California decisions have declared that a failure to exhaust an administrative remedy will be excused when irreparable injury will result if an administrative hearing is permitted to proceed and its orders made effective without prior judicial interference [*Hesperia Land Development Co. v. Superior Court (1960) 184 Cal. App. 2d 865, 876, 7 Cal. Rptr. 815* ; *Greenblatt v. Munro (1958) 161 Cal. App. 2d 596, 605-606, 326 P.2d 929]* . Some decisions have stated that the "irreparable injury" necessary to justify application of the exception may be found only in very limited circumstances [*see, e.g., In re Serna (1978) 76 Cal. App. 3d 1010, 1014-1015, 143 Cal. Rptr. 350* ; *Humbert v. Castro Valley County Fire Protection Dist. (1963) 214 Cal. App. 2d 1, 6, 29 Cal. Rptr. 158* ; *Mortgage Finance Corp. v. Watson (1951) 104 Cal. App. 2d 640, 641, 232 P.2d 54]* , and although the exception has frequently been acknowledged, it has rarely been applied [*Department of Personnel Administration v. Superior Court (1992) 5 Cal. App. 4th 155, 170-171, 6 Cal. Rptr. 2d 714* (irreparable injury exception recognized); *City and County of San Francisco v. International Union of Operating Engineers, Local 39 (2007) 151 Cal. App. 4th 938, 948-949, 60 Cal. Rptr. 3d 516* (irreparable injury exception not recognized].

When an administrative action or order becomes effective before the administrative review process is completed and will inflict irreparable injury on a litigant, it is clearly appropriate for the court to apply the irreparable injury exception and to issue a writ or injunction to prevent the administrative action or order from *taking effect* before its validity is determined [*Heyenga v. City of San Diego (1979) 94 Cal. App. 3d 756, 760, 156 Cal. Rptr. 496* ; *see also United States v. Superior Court (1941) 19 Cal. 2d 189, 196-197, 120 P.2d 26* ; *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 296-297, 109 P.2d 942]* . Except in the most extraordinary circumstances, however, the exception may not be applied to allow a litigant to bypass an administrative review process and obtain direct review of an administrative action or decision in court [*cf. Board of Police Commissioners v. Superior Court (1985) 168 Cal. App. 3d 420, 432-434, 214 Cal. Rptr. 493* ; *United Insurance Co. v. Maloney (1954) 127 Cal. App. 2d 155, 156-157, 273 P.2d 579]* .

Neither the adverse publicity that may result from the pendency of administrative proceedings [*Mortgage Finance Corp. v. Watson (1951) 104 Cal. App. 2d 640, 641, 232 P.2d 54]* , nor the potential drastic impact of an adverse decision [*Board of Police Commissioners v. Superior Court (1985) 168 Cal. App. 3d 420, 432-434, 214 Cal. Rptr. 493* ; *Mountain View Chamber of Commerce v. City of Mountain View (1978) 77 Cal. App. 3d 82, 90-91, 143 Cal. Rptr. 441* ; *Wilkinson v. Norcal Mutual Ins. Co. (1979) 98 Cal. App. 3d 307, 316, 159 Cal. Rptr. 416]* constitutes irreparable injury. The irreparable injury exception also may not be used to enable a litigant to avoid completion of an administrative review process [*cf. Board of Police Commissioners v. Superior Court (1985) 168 Cal. App. 3d 420, 432-434, 214 Cal. Rptr. 493* ; *United Insurance Co. v. Maloney (1954) 127 Cal. App. 2d 155, 156-157, 273 P.2d 579* ; for an example of an extraordinary fact situation in which the California Supreme Court might justifiably have relied on the irreparable injury exception in excusing a litigant's failure to complete an administrative review process but declined to do so, *see Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 7, 95 Cal. Rptr. 329, 485 P.2d 529]* .

[7] Public Interest Disserved by Application of Rule

An exception to the exhaustion requirement may be allowed in cases in which application of the rule would disserve an important public interest [*Lindeleaf v. Agricultural Labor Relations Bd. (1986) 41 Cal. 3d 861, 870-871, 226 Cal. Rptr. 119, 718 P.2d 106* ; *Hull v. Cason (1981) 114 Cal. App. 3d 344, 358-359, 171 Cal. Rptr. 14* ; *Environmental Law Fund, Inc. v. Town of Corte Madera (1975) 49 Cal. App. 3d 105, 114, 122 Cal. Rptr. 282]* .

This "public interest" exception has been applied in a number of contexts. For instance, in *Lindeleaf v. Agricultural Labor Relations Bd. (1986) 41 Cal. 3d 861, 226 Cal. Rptr. 119, 718 P.2d 106* , the petitioner challenged the Agricultural Labor Relations Board's practice of delegating the responsibility for conducting hearings on election objections to independent hearing officers. The petitioner claimed that the controlling statutes did not authorize the Board to delegate this duty. Although the petitioner had not raised this objection before the Board, the California Supreme Court elected to invoke its power to hear important questions of public policy and decide this issue. In making this decision, the court observed that it affected not only the litigants, but also the parties to every nonfinal Board decision on an election challenge that was heard by an independent hearing examiner [*Lindeleaf v. Agricultural Labor Relations Bd. (1986) 41 Cal. 3d 861, 870-871, 226 Cal. Rptr. 119, 718 P.2d 106]* .

In *Hull v. Cason (1981) 114 Cal. App. 3d 344, 171 Cal. Rptr. 14* , the plaintiffs challenged the hiring practices of a city fire department as being racially discriminatory. The appellate court decided not to dismiss the case even though the defendants claimed that the plaintiffs failed to exhaust their administrative remedies under California's Fair Employment Practice Act and the Federal Civil Rights Act. The court noted that the action had been litigated for seven years and that its prompt determination would be in the public interest and would end grave uncertainty in the lives and careers of many persons who would be affected by the outcome [*Hull v. Cason (1981) 114 Cal. App. 3d 344, 358-359, 171 Cal. Rptr. 14]* .

In *Environmental Law Fund, Inc. v. Town of Corte Madera (1975) 49 Cal. App. 3d 105, 122 Cal. Rptr. 282* , the petitioners sought to challenge as violative of the California Environmental Quality Act a conditional use permit and a tentative subdivision map allowing development of certain real property. Although they were not titled parties to the administrative proceedings, petitioners were entitled to appear at the public hearings that led to these actions and to appeal them to the town council. Although the petitioners failed to use these administrative remedies, the appellate court refused to apply the exhaustion doctrine to bar their action. The court held that such a result would totally disserve the public interest, and held that a private individual's failure to use an administrative remedy to challenge governmental action taken in a proceeding to which he or she was not a party does not bar him or her from seeking judicial relief to enforce rights held in common with members of the general public [*Environmental Law Fund, Inc. v. Town of Corte Madera (1975) 49 Cal. App. 3d 105, 114, 122 Cal. Rptr. 282]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityExhaustion of RemediesAdministrative LawSeparation of PowersJurisdictionAdministrative LawSeparation of PowersPrimary JurisdictionCivil ProcedureJusticiabilityExhaustion of RemediesAdministrative RemediesCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent JurisdictionConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral Overview

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41A-474A California Forms of Pleading and Practice--Annotated § 474A.13

§ 474A.13 Expedited Review of Decisions on Permit or Entitlement Involving Constitutionally Protected Speech

Once it is final, a decision by a public agency regarding the issuance, revocation, suspension, or denial of a permit or other entitlement "for expressive conduct protected by the *First Amendment*" (*U.S. Const., amend. I*) is subject to expedited judicial review. The petition seeking review, for example, must be filed within 21 calendar days after the decision becomes final, and the court must issue its decision on review within the earlier of 20 days after submission or 50 days after the filing of the petition [*Code Civ. Proc. § 1094.8(d)*]. For a full discussion of the expedited procedures, see *Ch. 474C, Procedures in Reviewing Agency Decisions, § 474C.27*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechExpressive Conduct

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[Reserved]

§§ 474A.14[Reserved]

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B. When Proceedings May Be Barred or Dismissed as Untimely

41A-474A California Forms of Pleading and Practice--Annotated § 474A.20

§ 474A.20 Proceeding Not Commenced Within Applicable Statute of Limitations Period Is Barred

[1] Applicability of Statute of Limitations Defenses

A mandate proceeding is a special civil proceeding and, thus, is subject to the general rules of law on limitation of actions [*Code Civ. Proc. § 1109*; *Ginns v. Savage (1964) 61 Cal. 2d 520, 524, 39 Cal. Rptr. 377, 393 P.2d 689* ; *Jones v. Board of Police Commissioners (1903) 141 Cal. 96, 98, 74 P. 696]* . Consequently, a mandate proceeding is ordinarily barred if it is not commenced within the applicable limitation period [*Barlow v. City Council of Inglewood (1948) 32 Cal. 2d 688, 697, 197 P.2d 721* ; *Westside Hospital v. Belshe (1999) 69 Cal. App. 4th 672, 675, 81 Cal. Rptr. 2d 768* ; *Vo v. Board of Medical Quality Assurance (1991) 235 Cal. App. 3d 820, 825, 1 Cal. Rptr. 2d 127* ; *California Standardbred Sires Stakes Com., Inc. v. California Horse Racing Bd. (1991) 231 Cal. App. 3d 751, 756, 282 Cal. Rptr. 656* ; *Sinetos v. Department of Motor Vehicles (1984) 160 Cal. App. 3d 1172, 1175, 207 Cal. Rptr. 207* ; *Kupka v. Board of Administration (1981) 122 Cal. App. 3d 791, 794, 176 Cal. Rptr. 214]* .

[2] Applicable Limitation Periods

[a] General Rules for Determining

Numerous statutes establish periods of limitation for proceedings to review different types of administrative actions. Two that are widely applicable are *Gov. Code § 11523*, governing decisions subject to the APA *see* [b], *below*], and *Code Civ. Proc. § 1094.6*, governing many decisions of specified local agencies [*see* [c], *below*]. There are also many statutes that are more narrowly directed to specific agencies or specific decisions. For example:

- *Bus. & Prof. Code § 19463* (*Capitol Racing v. California Horse Racing Board (2008) 161 Cal. App. 4th 892, 899-900, 75 Cal. Rptr. 3d 384* (*Bus. & Prof. Code Section 19463* (30-day time limit) for filing petition for administrative mandate was controlling, not *Gov. Code Section 11523* (30-day time limit). The challenge of Capitol Racing to the decision of the board was held to be untimely because it was filed more than 30 days after the date that the decision was issued by the Board.)

- *Educ. Code § 44929.21* (March 15th is the date by which notice must be given to school teacher in

second year of employment that teacher will not be reelected (rehired) for next school year) [*Peoples v. San Diego Unified Sch. Dist. (2006) 138 Cal. App. 4th 463, 465, 41 Cal. Rptr. 3d 383* (school district ordered to reinstate teacher who had been notified on May 27th of school year that she would not be rehired for following school year; Court of Appeal affirmed superior court decision that notice was untimely)].

- *Educ. Code §§ 44939, 44944* (four-year time limit for introduction of evidence related to misconduct of teacher prior to date of notice of intention to dismiss teacher subject to application of equitable estoppel doctrine) [*Atwater Elementary School District v. California Department of General Services (2007) 41 Cal. 4th 227, 231-233, 59 Cal. Rptr. 3d 233, 158 P.3d 794]* .

- *Educ. Code § 87789* (39-month time period from effective date of disability retirement for college professor to seek reinstatement as full-time academic employee of community college) [*Franzosi v. Santa Monica Community College District (2004) 118 Cal. App. 4th 442, 444, 13 Cal. Rptr. 3d 25* (professor's petition for a writ of mandate ordering him reinstated as a full-time academic employee was denied on grounds of lack of timeliness, and denial was affirmed by court of appeal)].

- *Gov. Code § 3304(d)* (one year statute of limitations for charter city to discharge police officer) [*Mays v. City of Los Angeles (2008) 43 Cal. 4th 313, 317-318, 74 Cal. Rptr. 3d 891, 180 P. 3d 935* (notice required by *Gov. Code § 3304(d)* is satisfied when officer is notified within one year statutory period that the employing agency proposed that specific misconduct charges will be adjudicated by a board of rights; n otice of specific proposed discipline is permitted but not required); *Moore v. City of Los Angeles (2007) 156 Cal. App. 4th 373, 376, 67 Cal. Rptr. 3d 218* (former officer's failure to raise one-year statute of limitations issue before departmental board of rights hearing precluded appellate review of that issue); *Parra v. City and County of San Francisco (2006) 144 Cal. App. 4th 977, 988-990, 50 Cal. Rptr. 3d 822* (tolling provisions applied to one-year statute during investigation of incident giving rise to discipline); *Breslin v. City and County of San Francisco (2007) 146 Cal. App. 4th 1064, 1068, 55 Cal. Rptr. 3d 14* (disciplinary charges not timely filed under one-year statute); *Bettencourt v. City and County of San Francisco (2007) 146 Cal. App. 4th 1090, 1098-1100, 53 Cal. Rptr. 3d 402* (disciplinary charges were timely filed because civil litigation tolling provisions applied and tolled running of one-year statute); *Sanchez v. City of Los Angeles (2006) 140 Cal. App. 4th 1069, 1081-1082, 45 Cal. Rptr. 3d 188* (notice of proposed 20-day disciplinary suspension was not sufficient to give officer timely notice of proposed pay grade reduction within one year time period; officer was entitled to reinstatement in pay grade to officer status held before discipline was imposed); *Jackson v. City of Los Angeles (2003) 111 Cal. App. 4th 899, 906-907, 4 Cal. Rptr. 3d 325* ; *Alameida v. State Personnel Bd. (2004) 120 Cal. App. 4th 46, 52-54, 15 Cal. Rptr. 3d 383* (one-year statute barred disciplinary action against correction officer employed by CDC)]. The California Department of Corrections was not required to mail notice of adverse action within one year of discovery of officer's misconduct under provisions of *Gov. Code § 3304(d)* [*Sulier v. State Personnel Bd (2004) 125 Cal. App. 4th 21, 31-32, 22 Cal. Rptr. 3d 615* (The California Department of Corrections did not violate a correction officer's due process rights by informally notifying the officer of the proposed discipline of demotion from corrections sergeant to corrections officer that the CDC might impose for the officer's misconduct. Further, the CDC later served the officer formal notice that satisfied the officer's *Skelly* rights)].

- *Gov. Code § 12960(d)* Administrative complaints must be filed with Department of Fair Employment and Housing (DFEH) within one year of unlawful act [*McDonald v. Antelope Valley Community College District (2008) 45 Cal. 4th 88, 96-97, 84 Cal.Rptr. 3d 734, 194 P.3d 1026* (equitable tolling doctrine applied to include time period in which employee was pursuing a community college's internal grievance procedure such that one-year time period was tolled during time it took to complete

grievance process. Complaint was timely)].

- *Gov. Code § 19635* (three-year statute of limitations for bringing misconduct charges against state employees of California Department of Corrections) [*California Department of Corrections v. State Personnel Board (2007) 147 Cal. App. 4th 797, 799-800, 54 Cal. Rptr. 3d 665* (running of three year statute of limitations on underlying misconduct charges did not prohibit bringing of disciplinary actions against corrections employees based upon dishonest denials of those same charges)].

- *Gov Code § 65009(c)(1)(E)* (90-day statute of limitations for court lawsuit by residential owner to challenge conditions imposed on land development permit pursuant to county ordinance) [*Travis v. County of Santa Cruz (2004) 33 Cal. 4th 757, 762-763, 16 Cal. Rptr. 3d 404, 94 P.3d 538* (landowner who filed writ of mandate action in court within 90 days of final agency decision issuing permit with disputed conditions brought lawsuit on a timely basis); *Arcadia Development Company v. City of Morgan Hill (2008) 169 Cal. App. 4th 253, 256, 86 Cal. Rptr. 3d 598* (developer's challenge to 10-year extension of density restriction by voters in city was timely because developer brought challenge within 90 days after voters approved extension. Extension decision created a new cause of action with a new limitations period); *Honig v. San Francisco Planning Dept. (2005) 127 Cal. App. 4th 520, 529-530, 25 Cal. Rptr. 3d 649* (landowners challenge to building permit was subject to 90-day limitations period applicable to variances under *Gov. Code § 65009(c)(1)(E)*); *Royalty Carpet Mills v. City of Irvine (2005) 125 Cal. App. 4th 1110, 1115, 23 Cal. Rptr. 3d 282* (petition must be served within 90-day time period; failure to timely serve petition within 90 days bars claim on limitations grounds)].

- *Gov. Code § 65009(d)(1)* (90-day limitations period for notifying local land use agency applicable to challenges to local agency decisions related to low income housing [*Urban Habitat Program v. City of Pleasanton (2008) 164 Cal. App. 4th 1561, 1573-1574, 80 Cal. Rptr. 3d 300*].

- *Gov. Code § 66020* (180-day time period under Mitigation Fee Act was the applicable time period for filing petition for writ of mandamus (ordinary mandate writ under *Code Civ. Proc. § 1085*) to challenge park fees imposed by city on developer) [*Branciforte Heights, LLC v. City of Santa Cruz (2006) 138 Cal. App. 4th 914, 928-929, 42 Cal. Rptr. 3d 96* (developer that utilizes fee protest procedures to challenge fees imposed by city has right to file a mandate petition to challenge fees within 180 days)].

- *Gov. Code § 66499.37* (90-day service of summons requirement that governs subdivision map act litigation applied to CEQA challenge to city approval of final tract map for subdivision) [*Friends of Riverside's Hills v. City of Riverside (2008) 168 Cal. App. 4th 743, 746, 85 Cal. Rptr. 3d 695* (dismissal of petition for writ of mandate for lack of timely service affirmed on appeal)].

- *Labor Code § 3725* (45-day statute of limitation to file a petition for a writ of mandate from an order of the Labor commissioner) [*Department of Industrial Relations, Div. of Labor Standards Enforcement v. Atlantic Baking Co., Inc. (2001) 89 Cal. App. 4th 891, 894-895, 108 Cal. Rptr. 2d 44* (45-day statute of limitations which starts from mailing of notice of findings and findings is not extended five days under the provisions of *Code Civ. Proc. § 1013* which authorizes a five-day extension for service by mail so that petition for writ of mandate that was filed 50 days after mailing of notice of findings and findings was not timely filed under *Labor Code § 3725*)].

- *Labor Code § 5410* (five-year time period from date of injury to file petition to reopen worker's compensation case). Fair notice to employers required that claims to reopen benefits be filed within five years of the date of injury. Untimely claims cannot be acted upon by the WCAB, as the Board lacks jurisdiction to recognize a late claim against an employer [*Granite Construction Co. v. Workers'*

Compensation Appeals Board (2003) 112 Cal. App. 4th 1453,1461-1462, 5 Cal. Rptr. 3d 828] .

- *Pub Res. Code § 4601.3* (30-day statute of limitations for filing a petition for writ of administrative mandate to challenge decisions of the Board of Forestry and Fire Protection under Section 4601.3 was controlling over *Gov. Code § 11523* time limits for filing mandate petition) [*Cockshott v. Dept of Forestry and Fire Protection (2004) 125 Cal. App. 4th 235, 238-240, 22 Cal. Rptr.3d 675]* .

- *Pub. Res. Code § 21167(b)* (30-day statute of limitations to file writ of mandamus to challenge notice of determination by agency under *Pub. Res. Code § 21152(a)* [(*Citizens for a Megaplex-Free Alameda v. City of Alameda (2007) 149 Cal. App. 4th 91, 108-110, 56 Cal. Rptr.3d 728* (writ of mandate challenging disposition and development agreement and mitigated negative declaration was untimely because it was not filed within 30 days of the city filing the notice of determination. It was too late to file the writ five months later.)]

- *Pub. Res. Code § 21167(d)* (determination that preparation of environmental impact report not required) [*Stockton Citizens for Sensible Planning v. City of Stockton (2007) 157 Cal. App. 4th 332, 336-338, 68 Cal. Rptr. 3d 632* (letter from director of city department to developer was not approval of project sufficient to start 35-day limitations period running nor was letter a determination by a public agency)].

- *Pub. Res. Code § 21167.4(a)* (90-day statute of limitations for requesting a hearing after filing petition for writ of mandate challenging certification of environmental impact report) [*Leavitt v. County of Madera (2004) 123 Cal. App. 4th 1502, 1507-1508, 22 Cal. Rptr. 3d 101* (residents of county who challenged county's approval of residential development project and certification of environmental impact report complied with requirements of governing statute when they requested a hearing, even though they did not request a hearing date)].

- *Pub. Res. Code § 21167.4(a)* (Court challenger who alleged CEQA violations as to the adequacy of an EIR and who filed a writ of administrative mandate proceeding in Superior Court failed to request hearing on merits of CEQA violations within 90 days of filing mandate action as required by law); [*Fiorentino v. City of Fresno (2007) 150 Cal. App. 4th 596, 598, 59 Cal. Rptr.3d 30* (CEQA petition brought by challengers was properly dismissed because of failure to file request for hearing within 90 days of filing petition. Filing the request for hearing on the 91st day did not cure the failure to meet the deadline for requesting a hearing under the statute)]. Failure to file within 90 days meant that dismissal of mandate action was required. Failure to file was caused by attorney for challenger whose mistake was determined by Court of Appeal to be inexcusable neglect which did not justify relief from dismissal under *Code Civ. Proc. § 473(b)* [*Nacimiento Regional Water Management Advisory Committee v. Monterey County Water Resources Agency (2004) 122 Cal. App. 4th 961, 964-965, 18 Cal. Rptr. 3d 921]* . However, in another case, the Court of Appeal held that another challenger (ASDAN) properly requested a hearing under the same statute within 90 days of filing CEQA petition in court. This is because the challenger filed a request for a hearing with the court within 90 days, and that is all that the law requires [*Association for Sensible Dev. at Northstar, Inc v. Placer County (2004) 122 Cal. App. 4th 1289, 1292, 1295, 19 Cal. Rptr. 3d 440]* . Similarly, another Court of Appeal held that a challenger's request for hearing was timely, notwithstanding that the challenger did not request a hearing date at the time of requesting a hearing. The Court held that *Pub. Res. Code § 21167.4* requires a timely request for a hearing, but does not require that the request set a hearing date [*Leavitt v. County of Madera (2004) 123 Cal. App. 4th 1502, 1507, 22 Cal. Rptr. 3d 101]* .

- *Rev. & Tax Code § 51.5(b)* (four-year statute of limitations for escape assessments seeking to correct effects of under assessment of property by county assessors) [Kuperman v. Assessment Appeals Board

No. 1 *(2006) 137 Cal. App. 4th 918, 929-931, 40 Cal. Rptr. 3d 703* (taxpayer's application for reduction of base year value was not timely filed, and is therefore time barred under four year statute of limitations)].

- *Rev. & Tax. Code §§ 18622, 19059, 19060* (two years) (taxpayer's failure to report adjustment on federal income tax due for a particular year to Franchise Tax Board results in the inapplicability of California statute requiring Board to give notice to taxpayer of state tax deficiency within two years of taxpayer reporting adjustment. Notice of deficiency assessment can be given by Board at any time; four year general statute of limitations for state tax deficiency assessments (*Rev. & Tax. Code § 19057*) is not applicable to this case) [*Ordlock v. Franchise Tax Bd., 38 Cal. 4th 897, 911-912, 44 Cal. Rptr. 3d 212, 135 P.3d 628]* .

- *Pub. Res. Code § 30801* (decision of California Coastal Commission or regional coastal commission); *Serra Canyon Co., Inc. v. Cal. Coastal Comm'n (2004) 120 Cal. App. 4th 663, 668-669, 16 Cal. Rptr. 3d 110* (claim was time barred under 60-day time period to challenge Coastal Commission decision); *Strother v. California Coastal Commission (2009) 173 Cal. App. 4th 873, 877-879, 92 Cal. Rptr. 3d 831* (part of claim challenging decision of Coastal Commission was time barred under 60-day time period, but challenges to Commission rulings on certified regulatory exemption were not time barred under *Pub. Res. Code § 21080.5*).

- *Unemp. Ins. Code § 410* (decision of Unemployment Insurance Appeals Board).

- *Veh. Code § 14401(a)* (order refusing, canceling, suspending, or revoking driver's license).

- *Water Code § 1126(b)* (30-day statute of limitations to challenge final order of State Water Resources Control Board [*North Gualala Water Co. v. State Water Resources Control Board (2006) 139 Cal. App. 4th 1577, 1606-1607, 43 Cal. Rptr. 3d 821* (company challenge to state water resources control board interpretation was untimely); *Phelps. v. State Water Resources Control Board (2007) 157 Cal. App. 4th 89, 100-101, 68 Cal. Rptr. 3d 350* (farmers challenge to Board imposition of water diversion restrictions was untimely)].

- *Welf. & Inst. Code § 10962* (decision affecting application for or receipt of public social services).

- *Welf. & Inst. Code § 14171(j)* (six month statute of limitations) [*see* *Westside Hospital v. Belshe (1999) 69 Cal. App. 4th 672, 674, 81 Cal. Rptr. 2d 768* ; *Florence Western Medical Center v. Bonta (2000) 77 Cal. App. 4th 493, 500-501, 91 Cal. Rptr. 2d 609* (six month time period starts to run from date that affected party receives notice of decision by mailing by certified mail copy of decision to party)].

The Court of Appeal reversed the granting of a demurrer by the trial court on statute of limitations grounds to a complaint filed that challenged the granting of a power plant development application by the California Energy Commission (CEC). The decision of the CEC approving the development project was issued on March 21, 2001. The decision was filed with the CEC docket unit on March 26, 2001. The complaint was filed on May 11, 2001. The applicable limitations statute, *Pub. Resources Code § 25901*, provides that a writ of mandate must be filed within 30 days after the CEC issues its decision. The court held that the decision was final for purposes of judicial review 30 days after the decision was filed with the CEC docket unit, and therefore the administrative mandamus complaint was filed within the limitations period. This was because a CEC regulation, *Cal. Code Reg. Tit. 20, § 1720.4*, provided that the CEC can specify in a decision an effective date different than the date of filing with the docket unit, and that specified date is controlling. In this case, the CEC decision specified that the decision was final for purposes of judicial review 30 days after the date of filing the decision with the docket unit. The court concluded that the finality provision in the

decision was controlling [*Figueroa v. California Energy Resources Conservation and Development Comm'n. (2003) 110 Cal. App. 4th 1115, 1120-1121, 2 Cal. Rptr. 3d 376]* .

An administrative entity may not establish, by ordinance, regulation, or rule, a limitation period that is shorter than the limitation period provided or authorized by statute [*Hittle v. Santa Barbara County Employees Retirement Ass'n (1985) 39 Cal. 3d 374, 385-388, 216 Cal. Rptr. 733, 703 P.2d 73]* .

If no such specific statute governs, then the statute of limitations applicable to an action for a writ of mandate depends on the nature of the right or obligation to be enforced by the action [*Green v. Obledo (1981) 29 Cal. 3d 126, 141 n.10, 172 Cal. Rptr. 206, 624 P.2d 256* ; *Ragan v. City of Hawthorne (1989) 212 Cal. App. 3d 1361, 1367, 261 Cal. Rptr. 219]* . When the action is one based on a statutory liability, the proceeding is governed by the three-year period prescribed by *Code Civ. Proc. § 338(a)* for "an action upon a liability created by statute" [*Urban Habitat Program v. City of Pleasanton (2008) 164 Cal. App. 4th 1561, 1578-1579, 80 Cal. Rptr. 3d 300* ; *Hogar v. Community Development Commission of Escondido (2003) 110 Cal. App. 4th 1288, 1295-1296, 2 Cal. Rptr. 3d 497* (three year time period of *Code Civ. Proc. § 338(a)* applies to claim of plaintiff that city redevelopment agency improperly calculated payments to a redevelopment related housing fund); *Raymond v. Christian (1937) 24 Cal. App. 2d 92, 113-116, 74 P.2d 536* ; *Ragan v. City of Hawthorne (1989) 212 Cal. App. 3d 1361, 1367, 261 Cal. Rptr. 219* ; *see also Hittle v. Santa Barbara County Employees Retirement Ass'n (1985) 39 Cal. 3d 374, 386, 216 Cal. Rptr. 733, 703 P.2d 73* ; *Pacific Coast Medical Enterprises v. Department of Benefit Payments (1983) 140 Cal. App. 3d 197, 215, 189 Cal. Rptr. 558]* . However, claims for and administrative reclassification decisions by PERS are not subject to the three year time period for statutory claims and claims based on mistake under *Code Civ. Proc. § 338(a), (d)* [*City of Oakland v. Public Employees' Retirement System (2002) 95 Cal. App. 4th 29, 47, 51, 115 Cal. Rptr. 2d 151]* . If no other limitation period applies, the action is governed by the four-year period set forth in *Code Civ. Proc. § 343* for "[a]n action for relief not herein before provided for" [*Geneva Towers Limited Partnership v. City and County of San Francisco (2003) 29 Cal. 4th 769, 773-775, 129 Cal. Rptr. 2d 107, 60 P.3d 692* (*Code Civ. Proc. § 343* does not apply to lawsuit against city and county for property tax refund because the specific six month statute of limitations in *Rev. & Tax. Code § 5141* applies to all actions for property tax refunds); *Hittle v. Santa Barbara County Employees Retirement Ass'n (1985) 39 Cal. 3d 374, 386, 216 Cal. Rptr.733, 703 P.2d 73* ; *Valvo v. University of Southern California (1977) 67 Cal. App. 3d 887, 894, 136 Cal. Rptr. 865* ; *Allen v. Humboldt County Board of Supervisors (1963) 220 Cal. App. 2d 877, 884-885, 34 Cal. Rptr. 232]* .

[b] Decisions Subject to the APA

Gov. Code § 11523 establishes the applicable limitation periods for judicial review of decisions subject to provisions of the Administrative Procedure Act (APA) [*see Gov. Code §§ 11400, 11501*; *Fair Employment and Housing Commission v. Superior Court (2004) 115 Cal. App. 4th 629, 633-634, 9 Cal. Rptr. 3d 409* (30-day statute of *Gov. Code § 11523* applies to petitions for writs of administrative mandate under *Code Civ. Proc. § 1094.5* challenging decisions of the Fair Employment and Housing Commission because the FEHC's governing statutes, and regulations, incorporate requirements of the California Administrative Procedure Act, including *Gov. Code § 11523*); *Allen v. Humboldt County Board of Supervisors (1963) 220 Cal. App. 2d 877, 882-883, 34 Cal. Rptr. 232* ; *see also Gov. Code § 11340 et seq.* (APA); for discussion of when the APA applies, *see Ch. 473, Public Agency Adjudication, § 473.15*]. Under *Gov. Code § 11523*, a petition for a writ of mandate to review the decision of an administrative agency must be filed within one of the following periods [*see Ginns v. Savage (1964) 61 Cal. 2d 520, 523, 39 Cal. Rptr. 377, 393 P.2d 689* ; *Kupka v. Board of Administration (1981) 122 Cal. App. 3d 791, 795, 176 Cal. Rptr. 214* ; *DeCordoba v. Governing Board (1977) 71 Cal. App. 3d 155, 159, 139 Cal. Rptr. 312* ; *see also Hittle v. Santa Barbara County Employees Retirement Ass'n (1985) 39 Cal. 3d 374, 379, 216 Cal. Rptr. 733, 703 P.2d 73]* :

- Within 30 days after the last day on which the agency can order reconsideration; or
- Within 30 days after the delivery of the record to petitioner, if, within 10 days after the last day on

which reconsideration can be ordered, the petitioner requests the agency to prepare all or any part of the administrative record.

Appellants are not required to pay for the transcript at the time the request to prepare the transcript is submitted to extend the filing deadline under *Gov. Code § 11523* [*Jahangiri v. Medical Board of California (1995) 40 Cal. App. 4th 1657, 1663-1664, 48 Cal. Rptr. 2d 187]* . Under the new act, *Gov. Code § 11523* (operative July 1, 1997) provides, in relevant part, that upon request of the petitioner for a record of the proceedings, the complete record of the proceedings, or the parts thereof as are designated by the petitioner in the request, shall be prepared by the Office of Administrative Hearings or the agency and shall be delivered to the petitioner within 30 days after the request, which time shall be extended for good cause shown upon payment of the fee specified in *Gov. Code § 69950* for the transcript, the cost of preparation of other portions of the record and for certification thereof [*Gov. Code § 11523*].

Under the APA, an agency's power to order reconsideration expires as follows [*Gov. Code § 11521(a)*; *see* *Ginns v. Savage (1964) 61 Cal. 2d 520, 525, 39 Cal. Rptr. 377, 393 P.2d 689* ; *Moran v. Board of Medical Examiners (1948) 32 Cal. 2d 301, 304-306, 196 P.2d 20]* :

- Thirty days after the delivery or mailing of a decision to the petitioner;

- If the agency establishes a date within that 30-day period as the effective date of the decision, on the effective date; or

- If the agency establishes the date on which a stay that does not exceed 30 days terminates as the effective date, on the effective date.

Notwithstanding the provisions of *Gov. Code § 11521* that allow the agency to terminate the time for ordering reconsideration, the 30-day period allowed by *Gov. Code § 11523* for the filing of a petition and the 10-day period that it allows for requesting the record do not begin to run until a copy of the decision is delivered or mailed to the petitioner [*De Cordoba v. Governing Board (1977) 71 Cal. App. 3d 155, 160, 139 Cal. Rptr. 312* ; *Koons v. Placer Hills Union Sch. Dist. (1976) 61 Cal. App. 3d 484, 490, 132 Cal. Rptr. 243]* . Petitions that are not filed within the applicable time limits are barred because *Gov. Code § 11523* is a statute of limitations [*Vo v. Board of Medical Quality Assurance (1991) 235 Cal. App. 3d 820, 825, 1 Cal. Rptr. 2d 127* ; *California Standardbred Sires Stakes Com., Inc. v. California Horse Racing Bd. (1991) 231 Cal. App. 3d 751, 756-759, 282 Cal. Rptr. 656* ; *Kupka v. Board of Administration (1981) 122 Cal. App. 3d 791, 794, 176 Cal. Rptr. 214]* .

Gov. Code § 11523 applies only when judicial review is sought after an agency has held a formal hearing under the APA [*see Gov. Code § 11400, 11410.10, 11523*; for discussion, *see* Ch. 473, *Public Agency Adjudication*]. Thus, this limitation period does not apply, for example, to a petition for mandate under *Code Civ. Proc. § 1085* seeking to compel an agency to hold such a hearing [*Ragan v. City of Hawthorne (1989) 212 Cal. App. 3d 1361, 1365-1367, 261 Cal. Rptr. 219]* . This limitation period also does not apply when a specific statute applicable to a particular agency is controlling [*Gov. Code § 11523*; *see, e.g., Veh. Code § 14401* (*Department of Motor Vehicles); Sinetos v. Department of Motor Vehicles (1984) 160 Cal. App. 3d 1172, 1175-1176, 207 Cal. Rptr. 207* ; *Bus. & Prof. Code § 19463* (*California Horse Racing Board); California Standardbred Sires Stakes Com. Inc. v. California Horse Racing Bd. (1991) 231 Cal. App. 3d 751, 758-759, 282 Cal. Rptr. 656]* .

[c] Local Agency Decisions Reviewable in Administrative Mandate Proceedings Subject to Code Civ. Proc. § 1094.6

Code Civ. Proc. § 1094.6(b) establishes the applicable limitation period for commencement of administrative mandate proceedings to review adjudicative administrative decisions of local agencies that suspend, demote, or dismiss an officer or employee; revoke or deny an application for a permit, license, or other entitlement; impose a civil or

administrative penalty, fine, charge or cost; or deny an application for a retirement benefit or allowance [*Code Civ. Proc. § 1094.6(e)*; County of San Diego v. Assessment Appeals Bd. No. 2 *(1983) 148 Cal. App. 3d 548, 554, 195 Cal. Rptr. 895*]. Section 1094.6 applies to those agencies, other than school districts, that are defined as local agencies by *Gov. Code § 54951*, which defines a local agency as a county, city, whether general law or chartered, city and county, town, school district, municipal corporation, district, political subdivision, or any board, commission or agency thereof, or other local public agency.

Under *Code Civ. Proc § 1094.6*, an administrative mandate petition to review a local agency decision must be filed no later than the ninetieth day after the date on which the decision becomes final [*see Hittle v. Santa Barbara County Employees Retirement Ass'n (1985) 39 Cal. 3d 374, 385, 216 Cal. Rptr. 733, 703 P.2d 73* ; *Holden v. Los Angeles City Ethics Comm'n (2006) 137 Cal. App. 4th 1274, 1276, 40 Cal. Rptr. 3d 858* (petition for writ of mandate under *Code Civ. Proc. § 1094.6* challenging decision of city ethics commission was time barred because petition was filed more than 90 days after date decision was final; decision was final when Commission adopted findings and an order at a public meeting); *Tielsch v. City of Anaheim (1984) 160 Cal. App. 3d 576, 578, 206 Cal. Rptr. 740* ; for discussion of when a decision becomes final under *Code Civ. Proc. § 1094.6(b), see § 474A.10[3][b]*], unless the petitioner files a sufficient request for preparation of an administrative record within 10 days after the decision becomes final; if a sufficient request is filed within the 10-day period, the 90-day period is extended to no later than the thirtieth day following the date on which the record is mailed or personally delivered to the petitioner or the petitioner's attorney of record [*Code Civ. Proc. § 1094.6(b), (d)*]. The 90-day limitation period starts to run only when the required notice is served on the party; service on the party's attorney does not start this period running [*Herman v. Los Angeles County Metropolitan Transportation Authority (1999) 71 Cal. App. 4th 819, 823, 84 Cal. Rptr. 2d 144]* . A petition was untimely when notice and acknowledgment of service by the agency was not completed (by the city clerk signing the form) until the 91st day after the agency action was final. Service requirements were governed by *Code Civ. Proc. § 415.30* [*Wagner v. City of South Pasadena (2000) 78 Cal. App. 4th 943, 949-950, 93 Cal. Rptr. 2d 91]* .

The 90-day time period under *Code Civ. Proc. § 1094.6(b)* does not begin to run until the notice required by *Code Civ. Proc. § 1094.6(f)* is given to the party seeking to petition for judicial review [*Liang v. San Francisco Residential Rent Stabilization & Arbitration Bd. (2004) 124 Cal. App. 4th 775, 776-777, 21 Cal. Rptr. 3d 715* (tenant who challenged board order filed petition on 91st day after date of mailing notice. The Court of Appeal upheld dismissal of the petition because the petition was untimely and was not properly filed within 90 days); *Cummings v. City of Vernon (1989) 214 Cal. App. 3d 919, 922, 263 Cal. Rptr. 97* ; *El Dorado Palm Springs, Ltd. v. Rent Review Com. (1991) 230 Cal. App. 3d 335, 344-345, 281 Cal. Rptr. 327]* . The agency mailing the notice under *Code Civ. Proc. § 1094.6(f)* must include a written statement verified by oath or affirmation, or a written statement attesting to the date that the decision was mailed to the party by first class mail, postage prepaid. This is what the statutory language "including a copy of the affidavit or certificate of mailing" means for purposes of triggering the 90-day statute of limitations under *Code Civ. Proc. § 1094.6(b)*. Failure to include the written statement with the notice of decision precludes the statute of limitations from starting to run [*Donnellan v. City of Novato (2001) 86 Cal. App. 4th 1097, 1106-1108, 103 Cal. Rptr. 2d 882]* . When the final day of the 90-day period day falls on a Sunday, and the record is silent as to when notice of judicial review limitations was given, a petition filed on the following Monday day is not barred [*Lowe v. City of Commerce (1997) 59 Cal. App. 4th 1075, 1079-1080, 69 Cal. Rptr. 2d 356]* .

A petition for administrative mandamus that challenged a decision of a school district to withhold moneys owed to a contractor for violations of prevailing wage laws following an administrative hearing was timely filed within the 90 day time period of *Code Civ. Proc. § 1094.6*, which was the applicable statute of limitations. The trial court erred in applying the limitations period of *Gov. Code §§ 11521* and *11523*, which do not apply to school district administrative hearings because these sections are limited to administrative proceedings conducted by administrative law judges from the Office of Administrative Hearings [*Mobley v. Los Angeles Unified School Dist. (2001) 90 Cal. App. 4th 1221, 1243-1244]* .

Any conflicting state or federal law that provides a shorter period of limitation applies instead of Section 1094.6 [*Code*

Civ. Proc. § 1094.6(g) (in other respects, Section 1094.6 prevails over any conflicting provision in any otherwise applicable law)].

A court action for declaratory and injunctive relief brought by local business owners to challenge the validity of a zoning ordinance adopted by a city was untimely and barred by the applicable statute of limitations, which requires that a challenge to the ordinance must be brought within 90 days of the adoption of the ordinance by the city. The challenge was brought four years after the ordinance was adopted [*Gov. Code § 65009*; *Buena Park Motel Association v. City of Buena Park (2003) 109 Cal. App. 4th 302, 308-309, 134 Cal. Rptr. 2d 645]* . This specific statute of limitations [*Gov. Code § 65009*] was applicable rather than the 90-day time period of *Code Civ. Proc. § 1094.6(b)* because Section 1094.6 only applies when a local agency makes an administrative adjudicative decision, which was not the case because the city adopted an ordinance.

[3] Commencement and Running of Limitation Period

Most special statutes that establish limitation periods for specific types of proceedings state when the limitation periods begin to run [*see, e.g., Code Civ. Proc. § 1094.6(b), (d)*, discussed under [2][c], *above*; *Gov. Code § 11523*, discussed under [2][b], *above*]. For example, *Welf. & Inst. Code § 14171(j)* provides that the "final decision of the director shall be reviewable in accordance with *Section 1094.5 of the Code of Civil Procedure* within six months of the issuance of the director's final decision." The term "issuance" in this statute refers to the date the decision is adopted, not the date it is mailed [*Westside Hospital v. Belshe (1999) 69 Cal. App. 4th 672, 679, 81 Cal. Rptr. 2d 768* (petition untimely when filed more than six months after date decision was adopted)]. Another court held, however, that the term "issuance" in this same statute refers to the date a decision is mailed rather than the date it is adopted [*HealthSmart Pacific Inc. v. Belshe (1999) 72 Cal. App. 4th 1202, 1207-1208, 85 Cal. Rptr. 2d 685]* .

In the absence of an express statutory provision, the commencement and running of the applicable limitation period is governed by the following rules:

- The applicable limitation period ordinarily starts to run when the underlying right or duty sought to be enforced in the proceeding first arose, and not on completion of the administrative proceedings instituted to enforce an underlying right or secure performance of an underlying duty [*Monroe v. Trustees of the California State Colleges (1971) 6 Cal. 3d 399, 405 n.2, 99 Cal. Rptr. 129, 491 P.2d 1105* ; *Dillon v. Board of Pension Commrs. (1941) 18 Cal. 2d 427, 430-431, 116 P.2d 37* ; *Farmer v. City of Inglewood (1982) 134 Cal. App. 3d 130, 140-141, 185 Cal. Rptr. 9* ; *Union Paving Co. v. City Council (1961) 189 Cal. App. 2d 440, 442, 11 Cal. Rptr. 351]* .

- The applicable statute of limitations will not start to run in cases of employee misconduct until the administrative agency discovers, or in the exercise of reasonable diligence should have discovered, the misconduct even though the misconduct itself happened at an earlier time [*Gov. Code § 3304(d)* (one-year statute of limitation for cases of employee discipline based on public agencies discovery of misconduct); *Haney v. City of Los Angeles (2003) 109 Cal. App. 4th 1, 8-9, 134 Cal. Rptr. 2d 411]* .

- The limitation period is tolled during the time the petitioner is pursuing administrative remedies to secure enforcement of an underlying right or performance of an underlying duty [*Monroe v. Trustees of the California State Colleges (1971) 6 Cal. 3d 399, 405 n.2, 99 Cal. Rptr. 129, 491 P.2d 1105* ; *Dillon v. Board of Pension Commrs. (1941) 18 Cal. 2d 427, 431, 116 P.2d 37* ; *Farmer v. City of Inglewood (1982) 134 Cal. App. 3d 130, 140-141, 185 Cal. Rptr. 9]* .

- The limitations period is tolled for 30 days under *28 U.S.C. Section 1367* when a federal district court dismisses without prejudice a federal civil rights lawsuit under *42 U.S.C. § 1983* that includes a pendent claim for administrative mandamus in federal court. The pendent claim for administrative

mandamus is governed by the tolling provisions of Section 1367 [*Guevara v. Venture County Community College Dist. (2008) 169 Cal. App. 4th 167,169, 87 Cal. Rptr. 3d 50*].

- The limitation period for filing a complaint with the administrative agency is not tolled by filing a lawsuit in court before seeking relief from the agency [*Lab. Code § 1700.44(c)*; *Greenfield v. Superior Court (2003) 106 Cal. App. 4th 743, 748-749, 131 Cal. Rptr. 2d 179* (talent agency act claim must be filed with labor commissioner within one year of occurrence of violation of act. Filing lawsuit in superior court within that one-year time period does not toll statute of limitations for filing administrative claim with labor commissioner)].

- When the underlying duty to be enforced is conditioned on a demand for performance, the petitioner cannot postpone commencement of the limitation period by deferring an appropriate demand. The period starts to run when the petitioner was first entitled to make the demand [*Dillon v. Board of Pension Commrs. (1941) 18 Cal. 2d 427, 430, 116 P.2d 37* ; *Union Paving Co. v. City Council (1961) 189 Cal. App. 2d 440, 442, 11 Cal. Rptr. 351]* .

The Second District Division One California Court of Appeal held that equitable tolling of the applicable statute of limitations [*Unemp. Ins. Code § 410*] for challenging denial of unemployment insurance benefits by filing a petition for a writ of administrative mandate applied and continued after the superior court denied reconsideration of an order sustaining demurrer for misjoinder of parties until filing of new petition for writ of administrative mandate correcting that error [*Tarkington v. California Unemployment Insurance Appeals Board (2009) 172 Cal. App. 4th 1494, 1502-1504, 92 Cal. Rptr. 3d 131]* .

[4] Expedited Judicial Review of First Amendment Related Claims

In 1999 the Legislature enacted *Code Civ. Proc. § 1094.8* in response to the Ninth Circuit's opinion in *Baby Tam & Co., Inc. v. City of Las Vegas (1998 9th Cir.) 154 F.3d 1097* , in which a federal court of appeals panel held that a city ordinance regarding a business license was unconstitutional in that it did not provide for prompt judicial review, including a prompt hearing and a prompt judicial decision, of a business' challenge to enforcement of the ordinance based on claims that the ordinance constituted a prior restraint on constitutionally protected free speech [*see Baby Tam & Co., Inc. v. City of Las Vegas (1998, 9th Cir.) 154 F.3d 1097, 1101-1102* (challenge by adult bookstore)].

Code Civ. Proc. § 1094.8 provides for expedited judicial review of *first amendment* related claims that arise in permit proceedings [see *Code Civ. Proc. § 1094.8(a)*]. It applies to review the issuance, revocation, suspension, or denial of a permit or other entitlement for expressive conduct protected by *U.S. Const., amend. I* [*Code Civ. Proc. § 1094.8(a)*; *see also Code Civ. Proc. § 1094.8(b)* (defining "permit," "entitlement," "permit applicant," and "public agency" for purposes of the statute)]. A public agency has the authority to designate permits subject to review under *Code Civ. Proc. § 1094.8(a)* [*Code Civ. Proc. § 1094.8(c)*].

The expedited judicial review procedure provides for shortened time periods for seeking judicial review [*Code Civ. Proc. § 1094.8(d)*]:

- Within five court days after receipt of written notification from a permit applicant that the permit applicant will seek judicial review of a public agency's action on the permit, the public agency must prepare, certify, and make available the administrative record to the permit applicant.

- Either the public agency or the permit applicant may bring an action in accordance with the procedure set forth in *Code Civ. Proc. § 1094.8*. If the permit applicant brings the action, the action shall be in the form of a petition for writ of mandate under *Code Civ. Proc. § 1085* or *Code Civ. Proc. §*

1094.5, as appropriate.

- The party bringing the action pursuant under *Code Civ. Proc. § 1094.8* must file and serve the petition on the respondent no later than 21 calendar days following the public agency's final decision on the permit. The title page of the petition must contain the following language in 18-point type: "ATTENTION: THIS MATTER IS ENTITLED TO PRIORITY AND SUBJECT TO THE EXPEDITED HEARING AND REVIEW PROCEDURES CONTAINED IN SECTION 1094.8 OF THE CODE OF CIVIL PROCEDURE."

- The clerk of the court must set a hearing for review of the petition no later than 25 calendar days from the date the petition is filed. Moving, opposition, and reply papers shall be filed as provided in the California Rules of Court. The petitioner shall lodge the administrative record with the court no later than 10 calendar days in advance of the hearing date.

- Following the conclusion of the hearing, the court shall render its decision in an expeditious manner consistent with constitutional requirements in view of the particular facts and circumstances. In no event shall the decision be rendered later than 20 calendar days after the matter is submitted or 50 calendar days after the date the petition is filed, whichever is earlier.

Additional provisions of *Code Civ. Proc. § 1094.8* govern the assignment of temporary judges to handle expedited review proceedings [*Code Civ. Proc. § 1094.8(e)*], and the parties' right to waive, by joint stipulation, any of the time limits [*Code Civ. Proc. § 1094.8(f)*].

The 21-day statute of limitations codified in *Code Civ. Proc. § 1094.8 (d)* for actions seeking to review issuance of permits that affect expressive conduct did not apply to a challenge by a third-party resident of a county to a decision of the county board of supervisors to approve 14 conditional use permits requested by a billboard advertiser for billboards to be placed in the desert [*Stearn v. County of San Bernadino (2009) 170 Cal. App. 4th 434, 443-444, 88 Cal. Rptr. 3d 330]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Forms of Pleading and Practice--Annotated

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Volume 41A: Public Agency Adjudications Judicial Review-Chs. 473-479
Chapter 474A TIMING OF JUDICIAL REVIEW OF AGENCY DECISIONS
PART II. LEGAL BACKGROUND
B. When Proceedings May Be Barred or Dismissed as Untimely

41A-474A California Forms of Pleading and Practice--Annotated § 474A.21

§ 474A.21 Proceeding May Be Barred by Laches

The equitable defense of laches may be applied to bar a mandate proceeding even when it has been commenced well within the applicable statute of limitations [*Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 624, 166 Cal. Rptr. 826, 614 P.2d 258* ; *Conti v. Board of Civil ServiceCommissioners (1969) 1 Cal. 3d 351, 366, 82 Cal. Rptr. 337, 461 P.2d 617* ; *Ragan v. City of Hawthorne (1989) 212 Cal. App. 3d 1361, 1368, 261 Cal. Rptr. 219* ; *People v. Department of Housing & Community Dev. (1975) 45 Cal. App. 3d 185, 195, 119 Cal. Rptr. 266* ; *San Bernardino Valley Audubon Society v. City of Moreno Valley (1996) 44 Cal. App. 4th 593, 606, 609, 51 Cal. Rptr. 2d 897* (mandate action barred by laches as a matter of law)]. A defense of laches may be based on a delay in prosecuting a mandate proceeding as well as a delay in instituting it [*Vernon Fire Fighters Assn. v. City of Vernon (1986) 178 Cal. App. 3d 710, 720, 223 Cal. Rptr. 871]* .

In general, applicability of the laches defense is a question of fact to be to be determined in light of all applicable circumstances, and the trial court exercises a wide discretion in deciding whether the defense should be sustained [*Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 624, 166 Cal. Rptr. 826, 614 P.2d 258* ; *Conti v. Board of Civil Service Commissioners (1969) 1 Cal. 3d 351, 366, 82 Cal. Rptr. 337, 461 P.2d 617* ; *Concerned Citizens of Palm Desert, Inc. v. Board of Supervisors (1974) 38 Cal. App. 3d 257, 265, 113 Cal. Rptr. 328]* . A mere lapse of time can never be sufficient, by itself, to establish the defense. The evidence must show that the petitioner (1) delayed unreasonably and (2) acquiesced in the decision or order complained of or that adverse parties were prejudiced by the delay [*Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 624, 166 Cal. Rptr. 826, 614 P.2d 258* ; *Conti v. Board of Civil Service Commissioners (1969) 1 Cal. 3d 351, 366, 82 Cal. Rptr. 337, 461 P.2d 617* ; *Ragan v. City of Hawthorne (1989) 212 Cal. App. 3d 1361, 1368, 261 Cal. Rptr. 219]* . The party asserting the defense has the burden of proving the necessary elements [*Green v. Board of Dental Examiners (1996) 47 Cal. App. 4th 786, 793-795, 55 Cal. Rptr. 2d 140* ; *Pennel v. Pond Union School Dist. (1973) 29 Cal. App. 3d 832, 840, 105 Cal. Rptr. 817]* . Prejudice is not presumed to have resulted from a showing of unreasonable delay, but must be affirmatively demonstrated [*Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 624, 166 Cal. Rptr. 826, 614 P.2d 258* ; *Conti v. Board of Civil Service Commissioners (1969) 1 Cal. 3d 351, 361, 82 Cal. Rptr. 337, 461 P.2d 617* ; *Robert F. Kennedy Medical Center v. Department of Health Services (1998) 61 Cal. App. 4th 1357, 1362, 72 Cal. Rptr. 2d 180* ; *Ragan v. City of Hawthorne (1989) 212 Cal. App. 3d 1361, 1368, 261 Cal. Rptr. 219]* .

If there is an analogous statute of limitations that may be borrowed for purposes of measuring what time period constitutes reasonable delay and an agency's delay in taking action exceeds that period, the burden of proof as to both elements of laches (unreasonable delay and prejudice) shifts to the agency in the form of a rebuttable presumption. In this situation, the agency must offer evidence showing why laches does not bar the agency action [*Fountain Valley Regional Hospital and Medical Center v. Bonta (1999) 75 Cal. App. 4th 316, 324-326, 89 Cal. Rptr. 2d 139]* .

The laches defense barred the filing of a petition for a writ of administrative mandate challenging discharge of an employee when more than three years passed from the date of the agency decision before the superior court ruled on a summary judgment motion brought by the agency on the petition. The delay period included both the time before, and the time after the filing of the petition for administrative mandate. The employee failed to pursue court determination of his petition for more than 18 months after waiting a substantial period of time (another 18 months) to file the petition. The unreasonable delay element was satisfied on these facts. The prejudice element is satisfied because if the former employee wins his lawsuit and is reinstated with back pay, the agency would have to had to make double wage payments as well as having to reorganize its employment structure to include the reinstated employee. The laches defense precluded relief under *Code Civ. Proc. § 1094.6*. It was the only applicable timing defense because the agency failed to notify the employee of the 90-day statutory of limitations under *Code Civ. Proc. § 1094.6*. The granting of a summary judgment by the superior court based on the defense of laches is reviewed de novo [*Johnson v. City of Loma Linda (2000) 24 Cal. 4th 61, 68-70, 99 Cal. Rptr. 2d 316, 5 P.3d 874]* .

When the laches defense is raised on appeal, the litigant raising that defense must normally have raised the laches defense before the agency or the trial court and, if not, the laches defense is waived unless the facts showing the elements of laches are undisputed and shown by the evidence in the case [*City of Oakland v. Public Employees' Retirement System (2002) 95 Cal. App. 4th 29, 51-52, 115 Cal. Rptr. 2d 151]* . The laches defense requires specific fact findings as to delay and prejudice that must first be developed by evidence at an administrative hearing before the legal and equitable issues can be considered by the court on judicial review [*Piscioneri v. City of Ontario (2002) 95 Cal. App. 4th 1037, 1048-1049, 116 Cal. Rptr. 2d 38]* .

The California Court of Appeal rejected the application of the laches defense to a lawsuit brought by the City and County of San Francisco against a property owner to enforce requirements for adequate sprinkler systems in buildings to maintain compliance with fire safety regulations. The court held that laches is not available as a defense when a city's lawsuit concerns a public policy issue, and the issue of fire safety for high rise buildings is such a public policy issue that precludes recognition of the laches defense [*City and County of San Francisco v. Ballard (2006) 136 Cal. App. 4th 381, 394-396, 39 Cal. Rptr. 3d 1]* .

The California Court of Appeal accepted the laches defense and held that it precluded a teacher's lawsuit for reinstatement as a regular employee against the San Francisco Community College District [*Womack v. San Francisco Community College District (2007) 147 Cal. App. 4th 854, 865-866, 54 Cal. Rptr 3d 558]* . The court held that the teacher waited too long to challenge an adverse personnel decision. Public employees who want to challenge adverse personnel decision by their employers must see writ review within a reasonable time after completion of the administrative proceeding. The teacher waited nine years to claim the right to full time employment from the time that the teacher first taught a full time unit load. The teacher filed a writ of mandamus action under *Code Civ. Proc. § 1085*, but then waited three years to prosecute the mandamus action and obtain a hearing on the merits. The court of appeal did not accept the reasons offered by the plaintiff for these delays, specifically ignorance of the law, because the teacher had an experienced attorney to represent him. The court held that the teacher acquiesced in the challenged employment action and that the school district was prejudiced by the substantial delay in making the teacher's challenge in that the district had the potential for increased liability for back pay in the form of a seven year wage differential if the teacher had been misclassified [*Womack v. San Francisco Community College District (2007) 147 Cal. App. 4th 854, 865-866, 54 Cal. Rptr 3d 558]* .

The California court of Appeal rejected the application of a laches defense to a lawsuit brought by a public employee union against a school district to challenge the deduction of pay from classified employees who were on disability leave, The laches defense was rejected by the court of appeal because the school district failed to meet the burden of proof of showing that there was any prejudice to the district from the union's alleged delay in objecting to the deduction practice [*California School Employees Association v. Tustin Unified School District (2007) 148 Cal. App. 4th 510, 521-522, 55 Cal. Rptr.3d 739* (equitable estoppel and unclean hands defenses were also rejected)].

Another California Court of Appeal rejected the application of the laches defense to actions taken by the California Coastal Commission ordering that homeowners who had developed a three hole golf course on their land restore the land to its native state as an area of dunes with vegetation. Laches was rejected as a defense to enforcement of the order by the Commission, because there was no unreasonable delay in the enforcement of the easement, no acquiescence by the commission in the easement violation and the application of the defense would nullify an important public policy [*Feduniak v. California Coastal Commission (2007) 148 Cal. App. 4th 1346, 1381-1382, 56 Cal. Rptr. 3d 591]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 474A.22 Proceeding May Be Dismissed If Moot

A writ of mandate does not issue when it will be useless or ineffective [*Roscoe v. Goodale (1951) 105 Cal. App. 2d 271, 273, 232 P.2d 879]* , or when it will be of no practical benefit to the petitioner [*Clementine v. Board of Civ. Ser. Commrs. (1941) 47 Cal. App. 2d 112, 114, 117 P.2d 369]* . A mandate proceeding is dismissed as moot in these instances [*Roscoe v. Goodale (1951) 105 Cal. App. 2d 271, 274, 232 P.2d 879* ; *Clementine v. Board of Civ. Ser. Commrs. (1941) 47 Cal. App. 2d 112, 114-115, 117 P.2d 369]* . A mandate proceeding is also moot when a public entity has complied with a judgment while challenging its validity in the reviewing court [*MHC Operating Limited Partnership v. City of San Jose (2003) 106 Cal. App. 4th 204, 214, 130 Cal. Rptr. 2d 564* ; *Marshall v. Pasadena Unified School Dist. (2004) 119 Cal. App. 4th 1241, 1258-1259, 15 Cal. Rptr. 3d 344]* .

A mandate proceeding is moot when, as a result of events occurring after the action or decision at issue, (1) the issuance of a writ will no longer benefit the petitioner [*see, e.g.,* *Rogers v. Board of Directors of Pasadena (1933) 218 Cal. 221, 224, 22 P.2d 509* ; *Clementine v. Board of Civ. Ser. Commrs. (1941) 47 Cal. App. 2d 112, 114-115, 117 P.2d 369]* ; or (2) the administrative entity is no longer empowered or able to perform the duty at issue [*see, e.g.,* *Treber v. Superior Court (1968) 68 Cal. 2d 128, 134, 65 Cal. Rptr. 330, 436 P.2d 330* ; *McClatchy v. Matthews (1901) 135 Cal. 274, 276, 67 P. 134]* . The administrative entity's belated performance of a duty sought to be enforced may also render the proceeding moot [*see, e.g.,* *Bollotin v. Workman Service Co. (1954) 128 Cal. App. 2d 339, 342, 275 P.2d 599* , *cert. denied,* *349 U.S. 969, 75 S. Ct. 892, 99 L. Ed. 1290* ; *Mitchell v. Warren (1950) 95 Cal. App. 2d 594, 213 P.2d 413]* . A lawsuit for declaratory and injunctive relief is moot when the defendant voluntarily, and in good faith, discontinued the challenged conduct. That includes circumstances in which a community college district revised policies to eliminate permit requirements (that were challenged in a lawsuit) after the lawsuit was filed [*O'Toole v. Superior Court (2006) 140 Cal. App. 4th 488, 513, 44 Cal. Rptr. 3d 531]* .

A mandate proceeding is not moot when, although the statute or regulation under appeal is repealed or expires of its own force, a material part of the statute or regulation is reenacted [*Montalvo v. Madera Unified Sch. Dist. Bd. of Education (1971) 21 Cal. App. 3d 323, 329, 98 Cal. Rptr. 593* ; *Californians for Political Reform Foundation v. Fair Political Practices Comm'n. (1998) 61 Cal. App. 4th 472, 71 Cal. Rptr. 2d 606* (emergency regulation expired, but agency adopted permanent regulation with similar provisions)]. A litigant's claims for injunctive relief based on

violations of a former statute are not mooted by a current statute changing the law when the current statute does not immunize or excuse the agency from liability for violating previous law [*Syngenta Crop Protection, Inc v. Helliker (2006) 138 Cal. App. 4th 1135, 1158-1159, 42 Cal. Rptr. 3d 191]* .

An action is not moot when the court decision can still have some practical impact [*Simi Corporation v. Garamendi (2003) 109 Cal. App. 4th 1496, 1503-1504, 1 Cal. Rptr. 3d 207* (employer plaintiff's settlement of related civil lawsuit against workers' compensation insurer did not make employer's mandamus action against insurance commissioner moot because employer reserved right to maintain mandamus action, and insurer agreed to comply with results of mandamus action as part of settlement)], or the parties requested remedies are still available and can be granted [*McKee v. Orange Unified School Dist. (2003) 110 Cal. App. 4th 1310, 1315-1316, 2 Cal. Rptr. 3d 774* (litigant sought declaratory and injunctive relief against school district to prevent future violations of the Brown Act (local agency open meeting act). This relief was still available even thought school district sold the property that was the subject of the agenda item)].

An important exception to the general rule requiring dismissal of moot proceedings occurs when a proceeding presents issues of public importance that are likely to recur; a court has inherent discretion to decide these issues even when the proceeding is technically moot [*Atwater Elementary School District v. California Department of General Services (2007) 41 Cal. 4th 227, 230-231, 59 Cal. Rptr. 3d 233, 158 P.3d 794* (moot case will be decided because it is a matter of statewide importance); *State of Cal. ex rel State Lands Com. v. Superior Court (1995) 11 Cal 4th 50, 61, 44 Cal. Rptr. 2d 399, 900 P.2d 648* (moot case will be decided because it is a matter of statewide importance); *Ballard v. Anderson (1971) 4 Cal. 3d 873, 876-877, 95 Cal. Rptr. 1, 484 P.2d 1345* ; *Board of Education v. Watson (1966) 63 Cal. 2d 829, 832, 48 Cal. Rptr. 481, 409 P.2d 481* ; *Corrales v. Bradstreet (2007) 153 Cal. App. 4th 33, 46-47, 62 Cal. Rptr. 3d 440* (moot case will be decided because it is a matter of general public interest that is likely to recur); *Ombudsman Services of Northern California v. Superior Court (2007) 154 Cal. App. 4th 1233, 1240, 65 Cal. Rptr. 3d 456* (case may not be moot because of conditional nature of settlement but also matter to be decided is a matter of general public interest that is likely to recur); *Californians for Alternatives to Toxics v. Cal. Dept. of Pesticide Reg. (2006) 136 Cal. App. 4th 1049, 1069-1070, 39 Cal. Rptr. 3d 393* (challenge to registration renewal on an annual basis was not mooted by agency decision to grant subsequent year renewal because important public policy issue are likely to recur, and the annual nature of renewals makes it likely that a judicial challenge to a prior renewal will not be completed before the next annual renewal happens); *Californians for Fair Representation v. Superior Court (2006) 138 Cal. App. 4th 15, 22-23, 41 Cal. Rptr. 3d 148* (court of appeal decided to resolve technically moot issue that has significant public interest, and was likely to recur); *Environmental Charter High Sch. v. Centinela Valley Union High Sch. Dist. (2004) 122 Cal. App. 4th 139, 144, 18 Cal. Rptr. 3d 417* (the expiration of 2003-2004 school year while an appeal was pending did not moot appeal of trial court order requiring district to provide facilities for charter school for 2003-2004 school year because the dispute between parties whether district was required to provide facilities to charter school was likely to recur in future school years); *Santa Clara Valley Transportation Authority v. PUC (2004) 124 Cal. App. 4th 346, 355-356, 21 Cal. Rptr. 3d 270* (dispute between PUC and light rail transit district over whether PUC has jurisdiction over light rail crossings built by transit districts is matter of public importance that is likely to recur in the future with this or other transit districts); *Bakersfield Citizens for Local Control v. City of Bakersfield (2004) 124 Cal. App. 4th 1184, 1202-1204, 22 Cal. Rptr. 3d 203* (lawsuit challenging CEQA compliance by City was not moot notwithstanding approval and building of part of shopping center subject to EIR requirement because City could require modifications of project as conditions of reapproval); *Arnold v. California Exp. and State Fair (2004) 125 Cal. App. 4th 498, 503-504, 22 Cal. Rptr. 3d 790* (statutory issues and attorneys fees issues between parties not mooted by defendant's replacement of challenged contract during litigation process because these issues still have to be resolved by the courts); *Tracy A. v. Superior Court (2004) 117 Cal. App. 4th 1309, 1313-1315, 12 Cal. Rptr. 3d 684* (continuing public interest in appellate court resolution of moot issue); *Vernon v. State of California (2004) 116 Cal. App. 4th 114, 120-122, 10 Cal. Rptr. 3d 121* (continuing public interest in appellate court resolution of moot issue); *Hernandez v. Gutierrez (2003) 114 Cal. App. 4th 168, 172-173, 176 n.3, 7 Cal. Rptr. 3d 307* (driver's death while appeal was pending did not moot appeal because issues on appeal are broad, likely to recur, and public interest in lawful enforcement of drunk driving laws, support applying mootness exception to this appeal); *Defend the Bay v. City of Irvine (2004) 119 Cal. App. 4th 1261,*

1278, 15 Cal. Rptr. 3d 176 (mandate proceeding to challenge adequacy of environmental impact report settled after oral argument on appeal; court refused to dismiss appeal on mootness grounds because the issues decided on appeal were important matters of continuing public interest); *In re Stevens (2004) 119 Cal. App. 4th 1228, 1232-1233, 15 Cal. Rptr. 3d 168* (parolee challenged parole condition by writ of habeas corpus; challenged condition was voluntarily changed by Board of Prison Terms; Court of Appeal decided issue presented in appeal notwithstanding mootness claim because issue raised novel question of continuing public interest); *Kirstowsky v. Superior Court (1956) 143 Cal. App. 2d 745, 749, 300 P.2d 163]* . Moreover, California courts have adopted the federal mootness standard that allows review of moot issues when those issues are capable of repetition but not easily susceptible of review [*Cal. State Personnel Bd. v. California State Employees Assn (2005) 36 Cal. 4th 758, 763, n.1, 31 Cal. Rptr. 3d 201, 115 P. 3d 506* (constitutional challenge by State Personnel Board to post and bid programs; issue of continuing public interest that is likely to recur but evade review); *Alfredo A. v. Superior Court (1994) 6 Cal. 4th 1212, 1219, 26 Cal. Rptr. 2d 623, 865 P.2d 56* (non-administrative law case); *Department of Corrections v. Office of Administrative Hearings (1998) 66 Cal. App. 4th 1100, 1106, 78 Cal. Rptr. 2d 473* (review of administrative hearing); *Lindelli v. Town of San Anselmo (2003) 111 Cal. App. 4th 1099, 1104, 4 Cal. Rptr. 3d 453* (mandamus challenge to city award of an interim contract pending the results of a referendum)].

A mandate proceeding is not moot when the decision reached by the court on the merits will be binding in a related pending court proceeding between the same parties [*Shafer v. Los Angeles County Sheriff's Department (2003) 106 Cal. App. 4th 1388, 1397-1398, 131 Cal. Rptr. 2d 670]* .

County employee association sought disclosure under California Public Records Act [*Gov. Code § 6250 et seq.*] of county records related to reimbursement of travel expenses for judges and court management employees, which the Court of Appeal ruled were exempt from disclosure under the courts records exemption to the California Public Records Act [*Gov. Code § 6252(a)*]. The Superior Court for Orange County, a party to the lawsuit, sought to dismiss the petition on the grounds of mootness when the employee association conceded that the public records act did not apply, and because the superior court complied with the request under applicable court rules. The Judicial Council had adopted Rule 6.702, which required the trial courts to maintain records related to court budgets and management information, and to disclose these records upon a valid written request [Cal. Ct. Rule 6.702]. The Court of Appeal rejected the mootness arguments, holding that there was still a controversy between the parties as to whether the superior court fully complied with the disclosure request under Rule 6.702, and that the employees association still had a legitimate right to seek disclosure of the documents, even though the association's original reason, to facilitate salary increase negotiations, was no longer relevant because the salary increase had been reinstated. Furthermore, petitions to enforce disclosure of records under the Rule must be filed with the superior court, not the court of appeal [*Orange County Employees Assoc. v. Superior Court (2004) 120 Cal. App. 4th 287, 294-296, 15 Cal. Rptr. 3d 201]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusCivil ProcedureJusticiabilityMootnessGeneral OverviewCivil ProcedureJusticiabilityMootnessEvading Review ExceptionCivil ProcedureJusticiabilityMootnessPublic Interest ExceptionCivil ProcedureRemediesWritsCommon Law WritsMandamus

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§ 474A.23 Dismissal for Delay in Prosecution

Administrative mandate proceedings are subject to dismissal for delay in prosecution under the general provisions of Code of Civil Procedure [*Binyon v. State (1993) 17 Cal. App. 4th 952, 956-957, 21 Cal. Rptr. 2d 673* (upholding dismissal for failure to bring case to trial within five years of filing lawsuit as required by *Code Civ. Proc. § 583.120*); for discussion and forms relating to dismissal for delay, *see* Ch. 212, *Dismissal*].

Legal Topics:

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

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[Reserved]

§§ 474A.24[Reserved]

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§ 474A.30 Related Matthew Bender Publications

For memoranda of points and authorities relating to forms for judicial review, see California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender)

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§ 474A.31 Federal Constitution

Prohibition against unreasonable searches and seizures. *U.S. Const., amend. IV*

Due process clause. *U.S. Const., amend. XIV, § 1*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 474A.32 State Constitution

Due process clause. *Cal. Const., art. I, § 7(a)*

Prohibition against unreasonable searches and seizures. *Cal. Const., art. I, § 13*

Separation of powers doctrine. *Cal. Const., art. III, § 3*

Jurisdiction to give extraordinary relief. *Cal. Const., art. VI, § 10*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 474A.33 State Statutes

Administrative Procedure Act. *Gov. Code §§ 11500-11528*

Allocation of burden of proof. *Evid. Code § 500*

Amendment of pleadings. *Code Civ. Proc. § 473*

Answers to complaints generally. *Code Civ. Proc. §§ 431.10-431.30*

Appeals in civil actions and proceedings. *Code Civ. Proc. §§ 901-914, 1109-1110b*

Authority of court to adopt suitable procedure where none specifically provided by statute. *Code Civ. Proc. § 187*

Certiorari. *Code Civ. Proc. §§ 1067-1077, 1107-1109*

Civil actions and proceedings generally. *Code Civ. Proc. §§ 307 et seq.*

Contempt. *Code Civ. Proc. §§ 1209-1222*

Copies of pleadings are required to be served on adverse parties. *Code Civ. Proc. § 465*

Costs. *Code Civ. Proc. §§ 1021 et seq.*

Demurrers. *Code Civ. Proc. §§ 430.10-430.80*

Demurrer raises issue of law. *Code Civ. Proc. § 589*

Discovery. *Code Civ. Proc. §§ 2016.010-2036.050*

Effect of notice of motion. *Code Civ. Proc. § 1010*

Effect of summons. *Code Civ. Proc. § 412.20(a)(3)*

Entry of judgment. *Code Civ. Proc. § 664*

Fee for transcribing record. *Gov. Code § 69950*

Filing initial pleading begins proceeding. *Code Civ. Proc. §§ 350, 411.10*

Filing of various papers constitutes appearance. *Code Civ. Proc. § 1014*

Mandate. *Code Civ. Proc. §§ 1084-1097, 1107-1109*

New trials. *Code Civ. Proc. §§ 656-663.2*

Power of court to impanel jury. *Code Civ. Proc. § 592*

Prohibition. *Code Civ. Proc. §§ 1102-1105, 1107-1109*

Recovery of attorney's fees when administrative action arbitrary or capricious. *Gov. Code § 800*

Recovery of litigation expenses, including attorney's fees, by small business or licensee when agency action undertaken without substantial justification. *Code Civ. Proc. § 1028.5*

Review of administrative decision by mandate proceeding. *Code Civ. Proc. § 1094.5*

Review of decisions by Alcoholic Beverage Control Appeals Board (and Director of Alcoholic Beverage Control). *Bus. & Prof. Code §§ 23090-23090.2*

Review of decisions by Board of Governors of State Bar or Committee of Bar Examiners. *Bus. & Prof. Code § 6082*

Review of decision by local housing enforcement agency to abate nuisance; independent judgment test. *Health & Safety Code § 17980.8*

Review of decisions by Public Utilities Commission. *Pub. Util. Code §§ 1756, 1759*

Review of decisions by Workmen's Compensation Appeals Board. *Lab. Code § 5950*

Right to demur to answer. *Code Civ. Proc. § 430.20*

Service of summons. *Code Civ. Proc. §§ 431.10-417.40*

Special proceedings and actions. *Code Civ. Proc. §§ 20-23*

Testimony in subsequent civil proceeding of person presiding at quasi-judicial proceeding. *Evid. Code § 703.5*

Time limitations on review of local agency decision. *Code Civ. Proc. § 1094.6(b)*

Verification of pleadings. *Code Civ. Proc. § 446*

Writ is order in writing issued in name of court. *Code Civ. Proc. § 17*

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§ 474A.34 Decisions

[1] Generally

Scope of court's inquiry extends to whether administrative agency proceeded without or in excess of jurisdiction, whether there was fair trial, and whether there was prejudicial abuse of discretion. *Woods v. Superior Court (1981) 28 Cal. 3d 668, 675, 170 Cal. Rptr. 484* *Save Oxnard Shores v. California Coastal Com. (1986) 179 Cal. App. 3d 140, 148-149, 224 Cal. Rptr. 425*

Unimportance of plaintiff's pleading being in form of petition for mandamus when proper basis for issuance of mandamus is alleged. *Woods v. Superior Court (1981) 28 Cal. 3d 668, 673, 170 Cal. Rptr. 484, 620 P.2d 1032*

Administrative mandamus pursuant to *Code Civ. Proc. § 1094.5* is not possessed of separate and distinctive legal personality and is not removed from general law of mandamus or exempted from established principles, requirements, and limitations of general law of mandamus. *Woods v. Superior Court (1981) 28 Cal. 3d 668, 673-674, 170 Cal. Rptr. 484, 620 P.2d 1032*

Administrative mandamus under *Code Civ. Proc. § 1094.5* is appropriate procedure for review of administrative order or decision resulting from adjudicatory proceeding. *Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 849, 171 Cal. Rptr. 619, 623 P.2d 180*

Administrative decision is generally reviewable in proceeding for writ of mandate. *Drummey v. State Bd. of Funeral Directors (1939) 13 Cal. 2d 75, 82-85, 87 P.2d 848* ; Whitten v. California State Board, etc. *(1937) 8 Cal. 2d 444, 445-446, 65 P.2d 1296* (prohibition proceeding as inappropriate); *Standard Oil Co. v. State Bd. of Equalization (1936) 6 Cal. 2d 557, 562-565, 59 P.2d 119* (certiorari proceeding as inappropriate)

Proceeding is occasionally subject to principles generally applied in criminal proceedings. *Bravo v. Cabell (1974) 11 Cal. 3d 834, 838-840, 114 Cal. Rptr. 618, 523 P.2d 658*

Adjudicatory decisions of all agencies, state and local, with few exceptions, are subject to review in mandate

proceeding governed by *Code Civ. Proc. § 1094.5*. *Topanga Ass'n for a Scenic Community v. Los Angeles County (1974) 11 Cal. 3d 506, 514 n. 12, 113 Cal. Rptr. 836, 522 P.2d 12* ; *Temescal Water Co. v. Dept. of Public Works (1955) 44 Cal. 2d 90, 101, 280 P.2d 1* ; *Hohreiter v. Garrison (1947) 81 Cal. App. 2d 384, 397, 184 P.2d 323*

Proceeding is subject to equitable considerations even though generally classified as legal proceeding. *San Diego County Dep't of Public Welfare v. Superior Court of San Diego County (1972) 7 Cal. 3d 1, 9, 101 Cal. Rptr. 541, 496 P.2d 453* ; *Dare v. Bd. of Medical Examiners (1943) 21 Cal. 2d 790, 795, 136 P.2d 304*

Court's inquiry is limited to whether administrative decision was legally wrong; question of propriety, wisdom, or the like, is not proper for judicial inquiry. *Faulkner v. California Toll Bridge Auth. (1953) 40 Cal. 2d 317, 329, 253 P.2d 659*

Trial court is without power to cure agency's improper findings or to substitute its discretion for that of agency regarding form of discipline. *American Funeral Concepts v. Board of Funeral Directors & Embalmers (1982) 136 Cal. App. 3d 303, 311, 186 Cal. Rptr. 196*

Administrative mandamus pursuant to *Code Civ. Proc. § 1094.5* is available to provide review whenever agency exercises adjudicatory function in considering facts presented in administrative hearing. *Jabola v. Pasadena Redevelopment Agency (1981) 125 Cal. App. 3d 931, 934, 178 Cal. Rptr. 452*

Mandate proceeding for review of administrative decision is governed by *Code Civ. Proc. §§ 307-1062a, now see Code Civ. Proc. § 307 et seq.* as well as *Code Civ. Proc. §§ 1084-1097, 1107,* and *1108*. *Concerned Citizens of Palm Desert, Inc. v. Board of Supervisors (1974) 38 Cal. App. 3d 257, 270, 113 Cal. Rptr. 328*

Writ of mandate is permitted to be issued when there is a clear, present, and usually ministerial duty on defendant's part and clear, present, and beneficial right in plaintiff to performance of that duty. *Goldfarb v. Civil Service Com. (1990) 225 Cal. App. 3d 633, 635, 275 Cal. Rptr. 284*

Mandate is appropriate remedy to compel exercise of discretion by government officer, but is not available to control exercise of discretion unless, under facts of case, discretion can be exercised in only one way. *Pacific Bell v. California State & Consumer Services Agency (1990) 225 Cal. App. 3d 107, 118, 275 Cal. Rptr. 62*

Although court may compel administrative agency to act, court is not permitted to substitute its discretion for discretion properly vested in agency. *Vega v. City of West Hollywood (1990) 223 Cal. App. 3d 1342, 1352, 273 Cal. Rptr. 243*

Courts are recommended to let administrative boards and officers work out their problems with as little judicial interference as possible. *Vega v. City of West Hollywood (1990) 223 Cal. App. 3d 1342, 1352, 273 Cal. Rptr. 243*

Acts in excess of power conferred on agency by Constitution or statute are void and mandate is available to nullify or rescind such acts. *Brooks v. State Personnel Bd. (1990) 222 Cal. App. 3d 1068, 1072, 272 Cal. Rptr. 292*

Administrative mandamus pursuant to *Code Civ. Proc. § 1094.5* is not available to review quasi-legislative determination of governmental body, such as adoption of redevelopment plan. *Leach v. City of San Marcos (1989) 213 Cal. App. 3d 648, 656, 261 Cal. Rptr. 805*

When parties have proceeded under wrong writ of mandate, such as proceeding under *Code Civ. Proc. § 1085* (traditional mandate) when they should have proceeded under *Code Civ. Proc. § 1094.5* (administrative mandate), reviewing court is required to determine whether trial court considered appropriate evidence and applied appropriate standard of review, based on facts of case. *Eureka Teachers Assn. v. Board of Education (1988) 199 Cal. App. 3d 353, 366, 244 Cal. Rptr. 240*

Administrative mandate procedure of *Code Civ. Proc. § 1094.5* is required to be used in all writ cases challenging validity of any final administrative order or decision made in any proceeding in which by law, expressly or impliedly, (1) hearing is required, (2) evidence is required to be taken, and (3) discretion in determining facts is vested in inferior board. *Eureka Teachers Assn. v. Board of Education (1988) 199 Cal. App. 3d 353, 361, 362, 244 Cal. Rptr. 240*

Administrative mandate under *Code Civ. Proc. § 1094.5* is not granted when administrative order or decision did not result from proceeding in which, by law, hearing was required at which evidence was required to be taken; review of such order or decision, if any, is by traditional mandate. *TaylorBus Service, Inc. v. San Diego Bd. of Education (1987) 195 Cal. App. 3d 1331, 1339, 241 Cal. Rptr. 379*

Action by real parties in interest for malicious prosecution based on mandate proceedings that resulted in order remanding matter for reconsideration with respect to correctness of standard used to assess evidence is precluded because petitioner prevailed on its procedural challenge, even though its petition was ultimately denied. *Sierra Club v. Superior Court (1985) 168 Cal. App. 3d 1138, 1144-1147, 214 Cal. Rptr. 740*

[2] Moot Questions

Dismissal of proceeding for mootness is proper when administrative decision was set aside by agency before proceeding began. *Crestlawn Memorial Park Asso. v. Sobieski (1962) 210 Cal. App. 2d 43, 47, 26 Cal. Rptr. 421*

Dismissal of proceeding for mootness is proper when agency complies with alternative writ command to set aside decision. *Bruce v. Gregory (1967) 65 Cal. 2d 666, 671, 56 Cal. Rptr. 265, 423 P.2d 193*

[3] Exhaustion of Administrative Remedies

Parties to contract are entitled to make exhaustion of administrative remedies a condition of suing on contract, and condition are enforceable. *A. Teichert & Sons, Inc. v. State, (1965) 238 Cal. App. 2d 736, 746-747, 48 Cal. Rptr. 225*

Plaintiff in any action, but especially in one for review of administrative action or decision, is required to exhaust any available administrative remedy before suit. *Tiernan v. Trustees of Cal. State University & Colleges (1982) 33 Cal. 3d 211, 216 n. 5, 188 Cal. Rptr. 115, 655 P.2d 317* ; *McKee v. Bell-Carter Olive Co. (1986) 186 Cal. App. 3d 1230, 1234, 231 Cal. Rptr. 304* ; *Hayward v. Henderson (1979) 88 Cal. App. 3d 64, 70, 151 Cal. Rptr. 505* ; *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 291, 109 P.2d 942*

Policy considerations underlying exhaustion doctrine do not necessarily justify extension of requirement to related constitutional and common law claims not specifically within agency's jurisdiction. *Rojo v. Kliger (1990) 52 Cal. 3d 65, 85, 87-88, 276 Cal. Rptr. 130, 801 P.2d 373* (as applied to *Gov. Code § 12900 et seq.* (Fair Employment and Housing Act), exhaustion not required before filing civil action for damages alleging nonstatutory cause of action)

Mere possession by some official body of continuing supervisory or investigatory power is not itself sufficient to afford "administrative remedy" unless statute or regulation under which power is exercised establishes clearly defined machinery for submission, evaluation, and resolution of complaints by aggrieved parties. *Common Cause v. Board of Supervisors (1989) 49 Cal. 3d 432, 441, 261 Cal. Rptr. 574, 777 P.2d 610* ; *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn. (1992) 4 Cal. App. 4th 1538, 1552-1554, 6 Cal. Rptr. 2d 698*

When administrative tribunal is created by Legislature, requirement of exhaustion of administrative remedies is jurisdictional. *George Arakelian Farms,Inc. v. Agricultural Labor Relations Bd. (1985) 40 Cal. 3d 654, 661, 221 Cal. Rptr. 488, 710 P.2d 288*

Plaintiff claiming breach of written purse agreement is not required to exhaust administrative remedies before California Horse Racing Board prior to filing complaint in superior court for damages, because board is a regulatory and disciplinary entity only, with no authority to award affirmative monetary relief. *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn. (1992) 4 Cal. App. 4th 1538, 1554, 6 Cal. Rptr. 2d 698*

Administrative remedy is provided only when administrative body is required to actually accept, evaluate, and resolve disputes or complaints; doctrine of exhaustion of administrative remedies is not applicable when no specific administrative remedies are available to plaintiff. *City of Coachella v. Riverside County Airport Land Use Com. (1989) 210 Cal. App. 3d 1277, 1287-1288, 258 Cal. Rptr. 795* (traditional mandate proceeding under *Code Civ. Proc. § 1085*)

Purported failure to pursue administrative remedy is not jurisdictional bar to seeking judicial relief; rather, exhaustion rule is procedural, to which exceptions include when resort to administrative process would be futile because it is clear what administrative decision would be. *Doster v. County of San Diego (1988) 203 Cal. App. 3d 257, 260-261, 251 Cal. Rptr. 507*

Doctrine of exhaustion of administrative remedies is not matter of juridical discretion, but is fundamental rule of procedure; when administrative remedy is provided by statute, relief is required to be sought from administrative body and remedy exhausted before courts will act; when no exception applies, exhaustion of administrative remedy is jurisdictional prerequisite to resort to courts. *White v. State of California (1987) 195 Cal. App. 3d 452, 473, 240 Cal. Rptr. 732*

Requirement of exhaustion of administrative remedies requires exhaustion of remedy of administrative writ of mandate pursuant to *Code Civ. Proc. § 1094.5* before filing action for damages. *City of Fresno v. Superior Court (1987) 188 Cal. App. 3d 1484, 1491, 234 Cal. Rptr. 136* ; *Logan v. Southern Cal. Rapid Transit District (1982) 136 Cal. App. 3d 116, 123-124, 185 Cal. Rptr. 878*

Petition for writ of mandate under *Code Civ. Proc. § 1085* based on theory that city's unilateral transfer of petitioner to newly created position after petitioner's disability arose was abuse of discretion is improper remedy when writ was sought before respondent made decision on petitioner's disability retirement hearing; transfer and denial of retirement is adjudicatory act and proper remedy is petition under *Code Civ. Proc. § 1094.5*. *Tielsch v. City of Anaheim (1984) 160 Cal. App. 3d 570, 573-574, 206 Cal. Rptr. 738*

Exhaustion doctrine is to be applied in particular instance due to extreme utility to courts, or is to be held inapplicable due to alleged inadequacy of administrative remedy, after qualitative analysis on case-by-case basis with concentration on whether paramount need for agency expertise outweighs other factors. *Karlin v. Zalta (1984) 154 Cal. App. 3d 953, 981, 201 Cal. Rptr. 379*

Exhaustion doctrine is applicable in action for declaratory or equitable relief. *Karlin v. Zalta (1984) 154 Cal. App. 3d 953, 986, 201 Cal. Rptr. 379*

Failure to exhaust applicable administrative remedies is incurable jurisdictional defect. *Karlin v. Zalta (1984) 154 Cal. App. 3d 953, 979-987, 201 Cal. Rptr. 379*

Party is not permitted to circumvent exhaustion requirement by bringing action for declaratory relief rather than administrative mandamus. *Walter H. Leimert Co. v. California Coastal Com. (1983) 149 Cal. App. 3d 222, 232, 196 Cal. Rptr. 739*

Petitioners' attempt to circumvent furnishing of information at administrative level by applying to courts for assistance

is failure to exhaust administrative remedies. *United States Steel Corp. v. Franchise Tax Board (1983) 144 Cal. App. 3d 473, 480-481, 192 Cal. Rptr. 677*

When statute creates right that did not exist at common law and provides comprehensive system of administrative enforcement, requirement that administrative remedies be exhausted is perhaps implied; but when statutory remedy provides for enforcement of preexisting common-law right, newer statutory remedy is considered only cumulative. *Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 303, 188 Cal. Rptr. 159*

When statute does not constitute comprehensive system of administrative enforcement, provides for no administrative remedy other than maintenance of suit by agency, and shows no legislative intent to preclude individual from suing on own behalf, statutory remedy is not exclusive and does not destroy individual's common law cause of action. *Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 303, 188 Cal. Rptr. 159*

Trial court did not abuse its discretion by dismissing action on grounds that plaintiffs failed to exhaust their administrative remedies when plaintiffs failed to plead facts showing Insurance Commissioner ruled on their petition, and in light of plaintiffs' prior attempts to state causes of action against defendants without exhausting administrative remedies. *County of Los Angeles v. Farmers Ins. Exchange (1982) 132 Cal. App. 3d 77, 87-88, 182 Cal. Rptr. 879*

Defendant is also subject to exhaustion of remedies requirement in appropriate case. *San Mateo County v. Palomar Holding Co. (1962) 208 Cal. App. 2d 194, 197, 201-202, 24 Cal. Rptr. 905*

Legislative omission to require exhaustion of remedies is not ground for holding administrative remedy merely cumulative; doctrine requiring exhaustion is applicable. *Flores v. Los Angeles Turf Club (1961) 55 Cal. 2d 736, 747, 13 Cal. Rptr. 201, 361 P.2d 921* ; *Alexander v. State Personnel Bd. (1943) 22 Cal. 2d 198, 200, 137 P.2d 433*

Exhaustion requirement is designed for benefit of courts, not to aid litigants. *Bozaich v. State of California (1973) 32 Cal. App. 3d 688, 698, 108 Cal. Rptr. 392* ; *Morton v. Superior Court (1970) 9 Cal. App. 3d 977, 982, 88 Cal. Rptr. 533* ; *Dunham v. City of Westminster (1962) 202 Cal. App. 2d 245, 248, 20 Cal. Rptr. 772*

Requirement to exhaust administrative remedies is jurisdictional. *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 293, 109 P.2d 942*

Defendant is subject to being estopped from asserting plaintiff's failure to exhaust administrative remedies. *Los Angeles Fire & Police Protective League v. Los Angeles (1972) 23 Cal. App. 3d 67, 75, 99 Cal. Rptr. 908*

Parties is entitled to stipulate that exhaustion requirement will be disregarded. *Selby Realty Co. v. O'Bannon (1969) 2 Cal. App. 3d 917, 923, 82 Cal. Rptr. 807*

[4] Conditions for Exhaustion

Requirement that writ of administrative mandate under *Code Civ. Proc. § 1094.5* issue only if decision is final is aspect of exhaustion requirement. *Bollengier v. Doctors Medical Center (1990) 222 Cal. App. 3d 1115, 1125, 272 Cal. Rptr. 273*

When administrative machinery exists for resolution of disputes, courts will not entertain those disputes until administrative procedures fully utilized and exhausted because to do so would be in excess of their jurisdiction. *American Alliance Ins. Co. v. State Bd. of Equalization (1982) 134 Cal. App. 3d 601, 609, 184 Cal. Rptr. 674*

Exhaustion of administrative remedies is not required when administrative agent is not empowered to adjudicate or

award damages remedy provided for by statute. *Lachman v. Cabrillo Pacific University (1981) 123 Cal. App. 3d 941, 944-945, 177 Cal. Rptr. 21*

Necessity that clearly defined machinery exist for submitting, evaluating, and resolving complaints. *Rosenfield v. Malcolm (1967) 65 Cal. 2d 559, 566, 55 Cal. Rptr. 505, 421 P.2d 697* ; *California State Employees' Assn. v. Williams (1970) 7 Cal. App. 3d 390, 394-395, 86 Cal. Rptr. 305* ; *Martino v. Concord Community Hosp. Dist. (1965) 233 Cal. App. 2d 51, 56-57, 43 Cal. Rptr. 255* ; *Henry George School of Social Science v. San Diego Unified School Dist. (1960) 183 Cal. App. 2d 82, 85-87, 6 Cal. Rptr. 661*

Administrative remedy is not provided by agency's invitation to participate in or undertake ad hoc proceeding. *Endler v. Schutzbank (1968) 68 Cal. 2d 162, 168, 65 Cal. Rptr. 297, 436 P.2d 297* ; *Alta-Dena Dairy v. San Diego County (1969) 271 Cal. App. 2d 66, 73-74, 76 Cal. Rptr. 510*

Remedy exists if established by administrative regulation as well as by statute. *Wilson v. Civil Serv. Comm'n (1964) 224 Cal. App. 2d 340, 344-347, 36 Cal. Rptr. 559*

Plaintiff's stipulation at administrative level that proceeding might be conducted administratively is equivalent to establishment of administrative remedy by law. *California v. Superior Court (1971) 16 Cal. App. 3d 87, 95, 93 Cal. Rptr. 663*

Plaintiff is not required to abandon judicial proceeding when administrative remedy, unavailable when judicial proceeding was begun, finally becomes available. *Eye Dog Foundation v. State Bd. of Guide Dogs for the Blind (1967) 67 Cal. 2d 536, 543-544, 63 Cal. Rptr. 21, 432 P.2d 717*

Agency with regulatory power is not necessarily able to give relief administratively. *California Oregon Power Co. v. Superior Court (1955) 45 Cal. 2d 858, 869, 291 P.2d 455*

Administrative remedy is absent where agency has power to give relief and power to establish remedy but has not established remedy. *Concerned Citizens of Palm Desert, Inc. v. Board of Supervisors (1974) 38 Cal. App. 3d 272, 280, 113 Cal. Rptr. 338*

Plaintiff is required to apply first to agency with apparent power to give relief; agency is entitled to decide in first instance whether it can give relief. *United States v. Superior Court (1941) 19 Cal. 2d 189, 195, 120 P.2d 26*

Agency decision giving relief is subject to being set aside where agency erroneously assumed jurisdiction. *County of Alpine v. County of Tuolumne (1958) 49 Cal. 2d 787, 798, 322 P.2d 449*

[5] Exceptions to Exhaustion

Plaintiff is not required to exhaust administrative remedy where statute gives free choice to pursue either judicial or administrative remedy. *City of Susanville v. Lee C. Hess Co. (1955) 45 Cal. 2d 684, 689, 290 P.2d 520* ; *Scripps etc. Hospital Inc. v. Cal. Emp. Com. (1944) 24 Cal. 2d 669, 673* *McKee v. Bell-Carter Olive Co. (1986) 186 Cal. App. 3d 1230, 1234, 231 Cal. Rptr. 304*

Plaintiff is entitled to relief despite failure to exhaust administrative remedy where denial of relief would cause irreparable injury. *United States v. Superior Court (1941) 19 Cal. 2d 189, 196-197, 120 P.2d 26* ; *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 293, 296, 109 P.2d 942* ; *Greenblatt v. Munro (1958) 161 Cal. App. 2d 596, 605-607, 326 P.2d 929*

Plaintiff is entitled to relief despite failure to exhaust administrative remedies where case presents extraordinary circumstances. *Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 6-7, 95 Cal. Rptr. 329, 485 P.2d 529*

Exhaustion is not required when agency has no pervasive and self-contained system of administrative procedure for general regulation to assess or prevent harm that plaintiff seeks to redress and factual issues in case are not so complex or technical as to exhibit paramount need for specialized agency fact-finding expertise. *Rojo v. Kliger (1990) 52 Cal. 3d 65, 87-88, 276 Cal. Rptr. 130, 801 P.2d 373* (as applied to *Gov. Code § 12900 et seq.* (Fair Employment and Housing Act), exhaustion not required before filing civil action for damages alleging nonstatutory cause of action)

Plaintiffs is not excused from requirement of exhausting administrative remedies on ground that they were public interest organization seeking to further public, rather than private, rights when they had notice of administrative proceedings and actively participated at every stage of the hearing process. *Sea & Sage Audubon Society, Inc. v. Planning Com. (1983) 34 Cal. 3d 412, 417-418, 194 Cal. Rptr. 357, 668 P.2d 664*

Although exhaustion of administrative remedies is required unless it can be positively stated that the public entity has already decided its ruling in particular case, plaintiffs are not excused from requirement on ground of futility of further administrative action when city council's actions indicated that it favored proposed community development project, but council never addressed plaintiffs' legal challenge to adequacy of environmental impact report, which formed the basis of plaintiffs' underlying administrative mandamus action. *Sea & Sage Audubon Society, Inc. v. Planning Com. (1983) 34 Cal. 3d 412, 417-418, 194 Cal. Rptr. 357, 668 P.2d 664*

In proceeding to challenge administrative regulation, exhaustion of administrative remedies is unnecessary if agency's prior conduct indicates that administrative challenge to regulation would be futile. *Union of American Physicians & Dentists v. Kizer (1990) 223 Cal. App. 3d 490, 503-504, 272 Cal. Rptr. 886* ; *Grier v. Kizer (1990) 219 Cal. App. 3d 422, 430-431, 268 Cal. Rptr. 244*

When tax is nullity as matter of law, administrative remedies are not required to be exhausted before seeking judicial remedy. *Britt v. City of Pomona (1990) 223 Cal. App. 3d 265, 270 n.2, 272 Cal. Rptr. 724*

Fact that case involves issue of law resolved in appellate courts does not justify exception to exhaustion requirement. *Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento (1990) 220 Cal. App. 3d 280, 287, 269 Cal. Rptr. 6*

Party has standing to challenge ordinance or statute invalid on its face without first exhausting its administrative remedies. *Floystrup v. City of Berkeley Rent Stabilization Bd. (1990)) 219 Cal. App. 3d 1309, 1317, 268 Cal. Rptr. 898*

Individual plaintiff challenging administrative acts is not required to personally exhaust remedies before responsible administrative bodies when coplaintiffs have repeatedly appeared before administrative bodies and asserted objections that form basis of plaintiff's action. *Leff v. City of Monterey Park (1990) 218 Cal. App. 3d 674, 681, 267 Cal. Rptr. 343*

Rule of exhaustion of administrative remedies does not apply when administrative remedy is unavailable or inadequate; corollary of this rule excuses resort to administrative procedure when class relief is sought and administrative procedure affords no remedy for class. *White v. State of California (1987) 195 Cal. App. 3d 452, 464, 240 Cal. Rptr. 732*

Exhaustion doctrine is inapplicable where challenge is to constitutionality of statute and no forum or administrative remedy is provided for issues raised. *Park'N Fly of San Francisco, Inc. v. City of South San Francisco (1987) 188 Cal. App. 3d 1201, 1209, 234 Cal. Rptr. 23*

In action by counties, which sought judicial declaration that legislative bills were invalid because state had failed to

satisfy constitutional requirement that subvention be provided for reimbursement of costs imposed on local government, futility exception was not applicable; fact that some, even if few, of claims submitted to administrative process had been funded precludes plaintiffs from establishing futility exception. *County of Contra Costa v. State of California (1986) 177 Cal. App. 3d 62, 77-78, 222 Cal. Rptr. 750*

Lack of jurisdiction exception is not applicable because agency is limited in damages it may award. *Edgren v. Regents of University of California (1984) 158 Cal. App. 3d 515, 521, 205 Cal. Rptr. 6*

Teacher whose permanent status was disputed by school board is entitled to writ of mandate to direct recognition of status without first having to exhaust administrative remedies when resolution of status was subject to judicial construction of statute. *California Teachers' Assn v. Governing Board (1983) 145 Cal. App. 3d 735, 749, 193 Cal. Rptr. 650*

Plaintiff is not required to exhaust administrative remedies when administrative procedures were nonexistent or constitutionally inadequate in that they failed to satisfy due process requirements. *Bush v. California Conservation Corps (1982) 136 Cal. App. 3d 194, 203-204, 185 Cal. Rptr. 892*

Availability of exception to exhaustion doctrine on grounds that administrative agency lacks subject matter jurisdiction is matter to be determined by agency itself before judicial relief may be obtained. *Alta Loma School Dist. v. San Bernardino County Com. (1981) 124 Cal. App. 3d 542, 555-556, 177 Cal. Rptr. 506*

Failure to exhaust administrative remedies does not bar habeas corpus relief when criminal conviction for violation of zoning ordinance was unsupported by law. *In re Scarpitti (1981) 124 Cal. App. 3d 434, 443, 177 Cal. Rptr. 387*

Exhaustion of administrative remedies is not required when Legislature clearly required judicial rather than merely administrative remedy be available. *Lachman v. Cabrillo Pacific University (1981) 123 Cal. App. 3d 941, 944-945, 177 Cal. Rptr. 21*

Futility is exception to general rule of exhaustion of administrative remedies, but police chief failed to support contention with evidence in case of wrongful discharge where chief willfully did not attend administrative appeal before city council because of alleged bias against him. *Doyle v. Chino (1981) 117 Cal. App. 3d 673, 677-680, 172 Cal. Rptr. 844*

Plaintiff is entitled to relief despite failure to exhaust administrative remedies where he asserts public interest instead of his private interest and relief would not be available if denied in plaintiff's action. *Environmental Law Fund, Inc. v. Town of Corte Madera (1975) 49 Cal. App. 3d 105, 114, 122 Cal. Rptr. 282* ; *Diaz v. Quitoriano (1969) 268 Cal. App. 2d 807, 811, 74 Cal. Rptr. 358*

Plaintiff is entitled to relief despite failure to exhaust administrative remedies where he did not know about remedy, had no means of knowing about it, and could not reasonably have been expected to know about it. *Gaylord v. Pasadena (1917) 175 Cal. 433, 440-441, 166 P. 348* ; *Diaz v. Quitoriano (1969) 268 Cal. App. 2d 807, 811, 74 Cal. Rptr. 358*

Plaintiff is entitled to relief despite failure to exhaust administrative remedies where such failure was due to circumstances beyond plaintiff's control. *Hollon v. Pierce (1967) 257 Cal. App. 2d 468, 476, 64 Cal. Rptr. 808* ; *Ahlstedt v. Board of Educ. (1947) 79 Cal. App. 2d 845, 855, 180 P.2d 949*

Plaintiff is entitled to relief despite failure to exhaust administrative remedies where such failure was due to agency's refusal to entertain proceeding. *In re Faucette (1967) 253 Cal. App. 2d 338, 343, 61 Cal. Rptr. 97*

Plaintiff is entitled to relief despite failure to exhaust administrative remedies where enforcement of exhaustion requirement would be unreasonable. *Kenney v. Wolff (1948) 84 Cal. App. 2d 592, 594-595, 191 P.2d 88* (unreasonably short time period for pursuing administrative remedy)

Plaintiff is not required to exhaust administrative remedies where he seeks judicial relief from administrative act beyond agency's powers. County of Los *Angeles v. Department of Social Welfare (1953) 41 Cal. 2d 455, 457, 260 P.2d 41*

Plaintiff is required to pursue administrative remedy even though facts of case, in light of history of similar cases, make denial of administrative relief virtually certain. *Flores v. Los Angeles Turf Club (1961) 55 Cal. 2d 736, 748, 13 Cal. Rptr. 201, 361 P.2d 921* ; *Contra Ogo Associates v. Torrance (1974) 37 Cal. App. 3d 830, 834-835, 112 Cal. Rptr. 761* ; *In re Faucette (1967) 253 Cal. App. 2d 338, 343, 61 Cal. Rptr. 97*

Failure to pursue available administrative remedy is not excusable merely because remedy is cumbersome or inefficient, or merely because remedy was designed for individual cases whereas plaintiff seeks relief for class. *Morton v. Superior Court (1970) 9 Cal. App. 3d 977, 983-984, 88 Cal. Rptr. 533* ; *Diaz v. Quitoriano (1969) 268 Cal. App. 2d 807, 812, 74 Cal. Rptr. 358*

[6] Compliance With Exhaustion Requirement

Fact that plaintiff had filed petition for writ of mandate, but voluntarily dismissed petition prior to disposition, amounts to failure to exhaust administrative remedies. *City of Fresno v. Superior Court (1987) 188 Cal. App. 3d 1484, 1489, 234 Cal. Rptr. 136*

Necessity that administrative remedies be pursued to conclusion, on merits if possible. *McHugh v. County of Santa Cruz (1973) 33 Cal. App. 3d 533, 538-539, 109 Cal. Rptr. 149* ; *Graham v. Bryant (1954) 123 Cal. App. 2d 66, 70, 266 P.2d 44*

In class action, exhaustion requirement is complied with when some member of class exhausted administrative remedy, even if plaintiff did not. *Friends of Mammoth v. Board of Supervisors (1972) 8 Cal. 3d 247, 268, 104 Cal. Rptr. 761, 502 P.2d 1049*

[7] Exhaustion and Constitutional Questions

Termination of utility service without notice reasonably calculated to apprise respondents of availability of administrative procedure to consider complaint of erroneous billing and without opportunity to present complaint to designated employee empowered to review disputed bills and rectify error is deprivation of property interest without due process of law. *Memphis Light, Gas & Water Div. v. Craft (1978) 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30, 46-47*

Agency does not declare statute unconstitutional nor refuse to enforce it by complying with legislative directive to implement statute to extent it does not conflict with federal law. *Reese v. Kizer (1988) 46 Cal. 3d 996, 998, 1002, 251 Cal. Rptr. 299, 760 P.2d 495*

Agency is without power to declare its enabling law unconstitutional. *State of California v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 250-251, 115 Cal. Rptr. 497, 524 P.2d 1281*

Failure to pursue administrative remedies is not excused by fact that administrative relief would depend on agency's construing statute or determining whether plaintiff's constitutional rights were violated. *Bank of America v. Mundo*

(1951) 37 Cal. 2d 1, 4, 229 P.2d 345 ; *City & County of San Francisco v. San Mateo County (1950) 36 Cal. 2d 196, 201, 222 P.2d 860* ; *Security-First Nat. Bk. v. County of L.A. (1950) 35 Cal. 2d 319, 320-322, 217 P.2d 946* ; *Metcalf v. County of Los Angeles (1944) 24 Cal. 2d 267, 270, 148 P.2d 645* ; *Savoy Club v. Board of Supervisors (1970) 12 Cal. App. 3d 1034, 1042, 91 Cal. Rptr. 198* ; *Morton v. Superior Court (1970) 9 Cal. App. 3d 977, 984-985, 88 Cal. Rptr. 533*

Plaintiff seeking judgment on basis that law is unconstitutional is not entitled to relief if law is constitutional and he could have gotten, but did not seek, administrative relief. *West Publishing Co. v. McColgan (1946) 27 Cal. 2d 705, 711-712, 166 P.2d 861*

Agency is empowered to declare one of its own regulations unconstitutional. *United States v. Superior Court (1941) 19 Cal. 2d 189, 195, 120 P.2d 26*

Agency is bound to accept constitutionality of law it has duty to enforce. *Rubin v. Board of Directors (1940) 16 Cal. 2d 119, 124-125, 104 P.2d 1041*

Requirement of exhaustion is not applicable to action challenging constitutionality of statute establishing administrative agency's status and functions. *Lund v. California State Employees Assn. (1990) 222 Cal. App. 3d 174, 183, 271 Cal. Rptr. 425*

Litigant who seeks to challenge constitutionality of statute under which agency operates is not required to raise issue of constitutionality in proceedings before agency as condition of raising issue in courts; party, after pursuing available administrative procedure, is able to present constitutional claim for first time in courts. *Floystrup v. City of Berkeley Rent Stabilization Bd. (1990) 219 Cal. App. 3d 1309, 1317, 268 Cal. Rptr. 898*

Counties are not excused from exhausting administrative remedies established by Legislature for presenting claims for reimbursement of costs of state-mandated programs, even though self-executing constitutional provision required state to provide subvention for reimbursement of such costs. *County of Contra Costa v. State of California (1986) 177 Cal. App. 3d 62, 75-76, 222 Cal. Rptr. 750*

Constitutional basis for plaintiff's action does not excuse failure to pursue administrative remedy if administrative relief was available on any basis. *Leek v. Washington Unified School Dist. (1981) 124 Cal. App. 3d 43, 52-53, 177 Cal. Rptr. 196* ; *Banville v. Los Angeles County (1960) 180 Cal. App. 2d 563, 571, 4 Cal. Rptr. 458*

Rational relation test, rather than strict scrutiny, is sufficient to uphold regulation prohibiting corporal punishment in private school even though such punishment was permitted in public school; public and private schools are not similarly situated classes so as to trigger strict scrutiny. *Johnson v. Department of Social Services (1981) 123 Cal. App. 3d 878, 886, 177 Cal. Rptr. 49*

[8] Pleading Exhaustion

Exhaustion is required to be specifically pleaded, and allegation is subject to demurrer as contention and legal conclusion when pleaded otherwise. *Kirkpatrick v. City of Oceanside (1991) 232 Cal. App. 3d 267, 277, 283 Cal. Rptr. 191* (permitting plaintiffs to amend complaint to specifically plead exhaustion)

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewReviewabilityExhaustion

of RemediesAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewAdministrative LawJudicial ReviewStandards of ReviewAbuse of DiscretionAdministrative LawJudicial ReviewStandards of ReviewExceeding Statutory AuthorityCivil ProcedureJusticiabilityExhaustion of RemediesAdministrative RemediesCivil ProcedureJusticiabilityMootnessGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral Overview

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41A-474A California Forms of Pleading and Practice--Annotated § 474A.35

§ 474A.35 Law Reviews

See articles listed in Ch. 474, § 474.35

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41A-474A California Forms of Pleading and Practice--Annotated § 474A.36

§ 474A.36 Text References

Judicial Council, Tenth Biennial Report (1944)

California Administrative Mandamus (Cal. CEB 2000)

Witkin, California Procedure, vol. 8, *Extraordinary Writs*, §§ 30, 257-331 (4th ed. 1997)

Legal Topics:

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

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[Reserved]

§§ 474A.37[Reserved]

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PART IV. PROCEDURAL CHECKLIST

41A-474A California Forms of Pleading and Practice--Annotated § 474A.50

§ 474A.50 Determine If Timing Is Proper for a Mandate Proceeding

☐ Ascertain if the case is ripe for adjudication.

☐ In a proceeding to compel performance of a ministerial duty:

☐ The administrative entity or official is obligated to perform when the proceeding is commenced [*see § 474A.10[2][a]*]; and

☐ The administrative entity or official has actually refused to perform the duty [*see § 474A.10[2][b]*].

☐ In a proceeding to review an adjudicative decision or order:

☐ The order or decision has a direct and immediate effect on the petitioner [*see § 474A.10[3][a]*]; and

☐ The order or decision has become final [*see § 474A.10[3][b]*].

☐ Ascertain if administrative remedies have been exhausted.

☐ Petitioner must have pursued all available administrative proceedings to completion and received a final decision on the merits [*see § 474A.11[3][a]*].

☐ Petitioner must have made a full presentation to the administrative entity on all issues at all prescribed stages of the administrative proceedings [*see § 474A.11[3][b]*].

- ☐ Ascertain if the exhaustion requirement has been excused.
  - ☐ The administrative remedy is unavailable or inadequate [*see § 474A.12[1]*].
  - ☐ Exhaustion would be futile [*see § 474A.12[2]*].
  - ☐ Court and agency are vested with concurrent primary jurisdiction [*see § 474A.12[3]*].
  - ☐ Administrative entity lacks subject matter jurisdiction [*see § 474A.12[4]*].
  - ☐ Statute under which administrative entity operates is unconstitutional on its face [*see § 474A.12[5]*].
  - ☐ Exhaustion of remedy will result in irreparable injury [*see § 474A.12[6]*].
  - ☐ Public interest is disserved by application of rule [*see § 474A.12[7]*].
- ☐ Ascertain when proceedings may be barred as untimely.
  - ☐ Proceeding is not commenced within the applicable statute of limitations period [*see § 474A.20*].
  - ☐ Proceeding may be barred by laches if [*see § 474A.21*]:
    - ☐ Petitioner delayed unreasonably; and
    - ☐ Petitioner acquiesced in the decision complained of or adverse parties were prejudiced by delay.
  - ☐ Proceeding may be dismissed as moot if [*see § 474A.22*]:
    - ☐ Writ would be useless or ineffective;
    - ☐ Writ would be of no practical benefit to petitioner;
    - ☐ Writ will no longer benefit petitioner;
    - ☐ The administrative entity is no longer empowered to perform the duty at issue; or
    - ☐ The administrative entity belatedly performed the duty sought to be enforced.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityExhaustion of RemediesAdministrative LawJudicial ReviewReviewabilityFinal Order RequirementAdministrative LawJudicial ReviewReviewabilityRipenessAdministrative LawSeparation of PowersPrimary JurisdictionCivil ProcedureJusticiabilityExhaustion of RemediesAdministrative RemediesCivil ProcedureJusticiabilityRipenessGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent JurisdictionCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLegislationStatutes of LimitationsTime Limitations

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Chapter 474B STANDARDS IN REVIEWING AGENCY DECISIONS

41A-474B California Forms of Pleading and Practice--Annotated 474B.syn

§ 474B.syn Synopsis to Chapter 474B: STANDARDS IN REVIEWING AGENCY DECISIONS

§ 474B.01 Scope of Chapter

§ 474B.02 Cross References

[1] Related Coverage of Judicial Review

[2] Agency Adjudication

[3] Public Administrative Law Generally

§§ 474B.03-474B.09 [Reserved]

§ 474B.10 Judicial Review of Administrative Decisions

[1] The Writ of Mandate and Mandate Proceedings

[2] Ordinary and Administrative Mandate

§ 474B.11 Agency Action Without or in Excess of Jurisdiction

[1] Nature of Jurisdiction Issue

[2] Duration and Extent of Agency's Jurisdiction

[3] Court Remedies for Lack of Agency Jurisdiction

§ 474B.12 Lack of a Fair Hearing

[1] Right to a Hearing

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[a] Nature of Fair Hearing Requirement

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§ 474B.13 Prejudicial Abuse of Discretion

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[3] Prejudice Requirement

§ 474B.14 Agency Action in Manner Required by Law

[1] Agency Procedures Required by Law

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[3] Agency Constructions of Law

[4] Agency Decisions to Admit and Exclude Evidence

[a] Admissibility of Evidence in Administrative Proceedings

[b] Use of Illegally Obtained Evidence

[c] Results of Prior Criminal and Civil Proceedings

[5] Agency Penalty Determinations

[6] Conditioning Administrative Rights on Waiver of Constitutional Rights

[7] Constitutionality of Enabling Act

§ 474B.15 Order or Decision Supported by Findings

[1] Whether Findings Made by Agency

[2] Sufficiency of Agency Findings

[3] Decision Supported by Implied Findings

§ 474B.16 Findings Supported by Evidence

[1] Abuse of Discretion for Lack of Evidence

[2] Burden of Proof

[3] Error in the Record

[a] Nature of Error Requirement

[b] Availability of Discovery to Obtain Information Not in Record

[4] Applicability of Independent Judgment Test

[a] Decision Must Substantially Affect Fundamental, Vested Right

[i] Decisions of State Agency

[ii] Adjudicatory Decisions of Local Agency and Quasi-Judicial Decisions of State Agency

[b] Fundamental Rights

[c] Vested Rights

[d] Limited Trial De Novo

[e] Judicial Review of Penalty Assessments

[5] Applicability of Substantial Evidence Test

[a] Nature and Applicability of Test

[b] Decisions of Constitutional Agencies

[c] Decisions Made Under Statutory Substantial Evidence Test

[d] Decisions of Private Hospital Boards

[e] The Record for Decision

§ 474B.17 Proper Scope of Review in the Appellate Courts

[1] Whether the Trial Court Properly Applied the Independent Judgment Test

[2] Whether the Trial Court Properly Applied the Substantial Evidence Test

§ 474B.18 Issues That Are Not Reviewable by Administrative Mandate

[1] Issues That Were Not Presented to the Agency

[2] Issues That Are Moot

§§ 474B.19-474B.29 [Reserved]

§ 474B.30 Whether Petitioner Has Clear, Present Right to Performance of Clear, Present Ministerial Duty

§ 474B.31 Whether Petitioner Seek Review of Quasi-Legislative Action

§ 474B.32 Whether Agency Was Required by Law to Hold Hearing

§ 474B.33 Whether Agency Action Was Arbitrary, Capricious, or Lacking in Evidentiary Support

[1] Applicability of Substantial Evidence Test

[2] Applicability of Independent Judgment Test

§§ 474B.34-474B.39 [Reserved]

§ 474B.40 Related Matthew Bender Publications

§ 474B.41 Federal Constitution

§ 474B.42 State Constitution

§ 474B.43 State Statutes

§ 474B.44 Decisions

[1] Abuse of Discretion

[a] General Requirements

[b] Failure to Proceed in Manner Required by Law

[c] Decision Not Supported by Agency Findings

[2] Administrative Construction

[3] Administrative Hearings

[4] Appeal

[5] Burden of Proof and Producing Evidence

[6] Findings Not Supported by Evidence

[a] Independent Judgment Review

[b] Substantial Evidence Review

[c] Constitutional Rights Case

[7] Findings of Fact

[8] Jurisdiction and Jurisdictional Review

[9] Penalties

[10] Questions of Law

[11] Review of Fairness of Trial

[a] General Requirements

[b] Constitutional Considerations

[c] Use of Illegally Seized Evidence

[12] Validity of Enabling Act

§ 474B.45 Text References

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PART I. SCOPE

41A-474B California Forms of Pleading and Practice--Annotated § 474B.01

§ 474B.01 Scope of Chapter

This chapter provides a discussion of judicial review standards and issues in California public administrative law, including the following in Part II:

- Subpart A discusses judicial review standards and issues under administrative mandate [§§ 474B.10-474B.18].

- Subpart B discusses judicial review standards under ordinary mandate [§§ 474B.30-474B.33].

A Research Guide is also included as Part III [§ 474B.40 et seq.].

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PART I. SCOPE

41A-474B California Forms of Pleading and Practice--Annotated § 474B.02

§ 474B.02 Cross References

[1] Related Coverage of Judicial Review

For related discussion concerning judicial review by California courts of agency adjudications, see:

- Ch. 474, *Availability of Judicial Review of Agency Decisions*.
- Ch. 474A, *Timing of Judicial Review of Agency Decisions*.
- Ch. 474C, *Procedures in Reviewing Agency Decisions*.

For other related discussion and forms relating to judicial review generally, see:

- Ch. 40, *Appeal* (discussion and forms relating to civil appeals).
- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to immediate judicial review of orders by extraordinary writ of mandate or prohibition).
- Ch. 492, *Review (Certiorari), Writ of* (discussion and forms relating to immediate judicial review of civil proceedings by extraordinary writ of review).

For memoranda of points and authorities supporting and opposing petitions for writs of mandate generally, see s California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender).

For memoranda of points and authorities supporting and opposing petitions for administrative mandate, see s California Points and Authorities, Ch. 195, *Public Administrative Law* (Matthew Bender).

[2] Agency Adjudication

For detailed discussion and forms relating to agency adjudications that are the subject of the judicial review discussed in

this chapter, see:

- Ch. 473, *Public Agency Adjudication*.
- Ch. 473A, *Commencing Agency Adjudication*.
- Ch. 473B, *Discovery in Agency Adjudications*.
- Ch. 473C, *Prehearing Procedures in Agency Adjudications*.
- Ch. 473E, *Public Administrative Law Judges*.
- Ch. 473F, *Agency Adjudication Hearings*.
- Ch. 473G, *Agency Adjudication Decisions*.
- Ch. 473H, *Alternative Administrative Adjudication Procedures*.

For detailed discussion and forms relating generally to licensing agencies, including licensing adjudications, see Ch. 471B, *Licensing by Public Agencies* .

[3] Public Administrative Law Generally

For related discussion of California public administrative law generally, including discussion of public agency functions and powers (including adjudicative or quasi-judicial powers), and organization generally, see Ch. 470, *Overview of Public Administrative Law* (general discussion of judicial power is in § 470.12[5]). For detailed discussion of the general procedures imposed in agency proceedings by constitutional due process and related statutory requirements, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

For discussion and forms relating to the law governing access to and conduct of meetings by California public agencies, see Ch. 470B, *Public Agency Meetings* .

For detailed discussion and forms relating to the law governing disclosure of public records under the California Public Records Act [*Cal. Gov. Code §§ 6250 et seq.*], see Ch. 470C, *Public Records Act* .

For detailed discussion and forms relating generally to agency investigations and inspections, see:

- Ch. 471, *Investigations by Public Agencies*.
- Ch. 471A, *Inspections by Public Agencies*.

For detailed discussion and forms relating generally to the legislative or rulemaking functions of California public agencies, including judicial review of these functions, see:

- Ch. 472, *Public Agency Rules*.
- Ch. 472A, *Agency Rulemaking Procedures*.
- Ch. 472B, *Review of Agency Rulemaking*.

For additional cross references to coverage of particular public agencies, see *Ch. 470, Overview of Public Administrative Law, § 470.02[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamus

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41A-474B California Forms of Pleading and Practice--Annotated §§ 474B.03-474B.09

[Reserved]

§§ 474B.03[Reserved]

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Chapter 474B STANDARDS IN REVIEWING AGENCY DECISIONS
PART II. LEGAL BACKGROUND
A. Administrative Mandate

41A-474B California Forms of Pleading and Practice--Annotated § 474B.10

§ 474B.10 Judicial Review of Administrative Decisions

[1] The Writ of Mandate and Mandate Proceedings

A party who is aggrieved by a decision of an administrative agency may seek judicial relief from the decision by petitioning an appropriate court for a writ of mandate [*Code Civ. Proc. §§ 1085, 1086*]. The writ of mandate is a broad remedy that empowers a court to compel the performance of a legal duty when the law provides no other adequate remedy [*Code Civ. Proc. § 1086*; *Dowell v. Superior Court (1956) 47 Cal. 2d 483, 486-487, 304 P.2d 1009* ; *see* Ch. 474, *Availability of Judicial Review of Agency Decisions* , for a detailed discussion regarding the nature of mandate proceedings].

[2] Ordinary and Administrative Mandate

California law recognizes two principal types of mandate proceedings:

- Traditional, or "ordinary" mandate [*Code Civ. Proc. §§ 1085, 1086*; *see § 474B.30* et seq.].
- Administrative mandate [*Code Civ. Proc. § 1094.5*].

Ordinary mandate, which is governed by *Code Civ. Proc. § 1085*, is available to compel agencies to perform ministerial acts and to correct acts outside the agency's legal powers [*see Code Civ. Proc. § 1085* (mandate will issue to compel performance of act which the law specifically enjoins); *Environmental Protection & Information Center v. California Dept. of Forestry & Fire Protection (2008) 44 Cal. 4th 459, 478-479, 80 Cal. Rptr. 3d 28, 187 P.3d 888* (standard of review for ordinary mandate is abuse of discretion when the issue on appeal is whether an agency failed to proceed in a manner required by law); *Saleeby v. State Bar (1985) 39 Cal. 3d 547, 561-562, 216 Cal. Rptr. 367, 702 P.2d 525* (mandate will lie to correct administrative acts that exceed agency's legal powers); *People ex rel. Younger v. County of El Dorado (1971) 5 Cal. 3d 480, 491, 96 Cal. Rptr. 553, 487 P.2d 1193* (mandate will lie to compel performance of clear duty imposed by law)]. Administrative mandate, which is governed by *Code Civ. Proc. § 1094.5*, is used to review the adjudicatory decisions of an administrative agency [*Code Civ. Proc. § 1094.5*; *Temescal Water Co. v. Dept. of Public Works (1955) 44 Cal. 2d 90, 101, 280 P.2d 1* ; *Estes v. City of Grover City (1978) 82 Cal. App. 3d 509, 514,*

147 Cal. Rptr. 131 ; County of Los Angeles v. Tax Appeals Bd. No. 2 *(1968) 267 Cal. App. 2d 830, 833, 73 Cal. Rptr. 469]* . For this purpose, an adjudicatory decision is an administrative order or decision made as the result of a proceeding in which, by law, a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the agency [*Code Civ. Proc. § 1094.5(a)*].

This chapter covers issues that may be raised in a mandate proceeding and the proper standard for review of an agency decision when the decision is subjected to judicial review, either by a trial or appellate court. Because the distinction between administrative mandate and ordinary mandate vitally affects the issues that may be considered and the proper standards of review for mandate proceedings, the two types of mandate are treated separately. For a detailed consideration of differences between ordinary and administrative mandate, see Ch. 474, *Availability of Judicial Review of Agency Decisions* . For forms of a petition for writ of mandate for use in administrative proceedings, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewAdministrative LawJudicial ReviewStandards of ReviewExceeding Statutory AuthorityCivil ProcedureRemediesWritsCommon Law WritsMandamus

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PART II. LEGAL BACKGROUND
A. Administrative Mandate

41A-474B California Forms of Pleading and Practice--Annotated § 474B.11

§ 474B.11 Agency Action Without or in Excess of Jurisdiction

[1] Nature of Jurisdiction Issue

One of the issues on which review of an administrative agency's adjudicatory decision may be sought is whether the agency acted without, or in excess of, its jurisdiction [*Code Civ. Proc. § 1094.5(b)*]. Few reported cases deal specifically with questions of agency jurisdiction as reviewed by administrative mandate. Principles generally governing the jurisdiction of courts, together with cases dealing with agency jurisdiction in the context of writs of certiorari and prohibition may provide useful analogies in assessing whether a petitioner is entitled to a writ of mandate on the ground that the agency acted without jurisdiction [*see Code Civ. Proc. §§ 1068, 1071, 1074* (writ of review or certiorari), 1102 (prohibition)].

The term "jurisdiction" is used in a variety of situations with different meanings. In its most basic sense, jurisdiction refers to the power of a tribunal to hear and determine a case, with reference to its authority over the parties and the subject matter [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288-290, 109 P.2d 942* ; *Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 845-848, 131 Cal. Rptr. 674]* . The concept of jurisdiction also covers (1) questions of the manner in which the tribunal acts, (2) its compliance with statutory and procedural requirements, and (3) the kind of relief the agency may grant [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288-290, 109 P.2d 942* ; *Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 845-848, 131 Cal. Rptr. 674]* . Indeed, an agency may be said to exceed its jurisdiction whenever it takes action outside its defined power, whether the source of the law providing that definition is constitutional, statutory, or decisional [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288-290, 109 P.2d 942* ; *Miller v. Board of Medical Quality Assurance (1987) 193 Cal. App. 3d 1371, 1379, 238 Cal. Rptr. 915]* .

An agency may lack jurisdiction to review the decision of another agency [*City of Half Moon Bay v. Superior Court (2003) 106 Cal. App. 4th 795, 805-806, 131 Cal. Rptr. 2d 213* (California Coastal Commission lacked appellate jurisdiction to modify a coastal development permit issued by a city under court order)].

When an agency acts pursuant to a statute that is later declared unconstitutional, final proceedings of the agency based

on the statute are immune from collateral attack [*Slater v. Blackwood (1975) 15 Cal. 3d 791, 796-797, 126 Cal. Rptr. 225, 543 P.2d 593* ; *Miller v. Board of Medical Quality Assurance (1987) 193 Cal. App. 3d 1371, 1379, 238 Cal. Rptr. 915]* . Agency action in excess of the agency's jurisdiction should be distinguished from agency action that is contrary to law although within the agency's jurisdiction [*see Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 845-848, 131 Cal. Rptr. 674* (court judgment granting relief prohibited by law must be distinguished from judgment in which relief is simply in excess of amount to which party is entitled under applicable law)]. If a decision or order is erroneous but not beyond the jurisdiction of the agency, it is subject to correction on appeal or other review; but, once it becomes final, it is enforceable and not subject to collateral attack [*see Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 845-848, 131 Cal. Rptr. 674* (judgment of superior court)].

[2] Duration and Extent of Agency's Jurisdiction

Statutes governing the adjudicatory functions of an administrative agency generally limit the time within which the agency has power to act. The statutes may also specify the nature of the relief the agency may grant and other relevant procedural matters. With respect to the decisions of a licensing agency, whether expiration or voluntary surrender of a license divests the agency of jurisdiction to bring disciplinary proceedings against the licensee may become an issue. For example, the statute governing agencies in the Department of Consumer Affairs provides that expiration, suspension, cancellation, or forfeiture of a license by operation of law does not deprive the agency of authority to institute or continue disciplinary proceedings against the licensee during any period when the license may be renewed, reissued, restored, or reinstituted [*Bus. & Prof. Code § 118(b)*; *see Cal. Pacific Collections, Inc. v. Powers (1969) 70 Cal. 2d 135, 140, 74 Cal. Rptr. 289, 449 P.2d 225* (voluntary surrender of license issued under Collection Agency Act); *see also Bus. & Prof. Code § 101* (agencies within Department of Consumer Affairs)]. A similar question may arise on the effect of withdrawal of an application for a license or permit. In the absence of a statute providing that the agency retains authority to institute a disciplinary proceeding or take other adverse action against a party who has withdrawn an application for a license, such proceeding or action is outside the agency's jurisdiction [*McDonald v. State Bar (1943) 22 Cal. 2d 768, 770-771, 141 P.2d 217* (State Bar Act contains no provision permitting Committee of Bar Examiners to proceed with investigation and determine application on merits after request for withdrawal); *Miller v. Board of Police Commissioners (1960) 181 Cal. App. 2d 562, 563-564, 5 Cal. Rptr. 272* (Los Angeles Municipal Code provided that withdrawal of application did not deprive Board of Police Commissioners of jurisdiction to proceed with any investigation of applicant); *see, e.g., Bus. & Prof. Code § 118(a)* (withdrawal of application does not deprive agency under Department of Consumer Affairs of authority to institute or continue disciplinary proceedings unless agency has consented to withdrawal)].

In general, when a decision of an administrative agency becomes final, the agency loses jurisdiction to alter or modify the decision unless authority to do so is conferred by statute [*Guilbert v. Regents of University of California (1979) 93 Cal. App. 3d 233, 243, 155 Cal. Rptr. 583]* . An agency subject to the Administrative Procedure Act (APA) [*see Gov. Code § 11340 et seq.*] retains authority to reconsider its decisions for 30 days after the decisions are delivered or mailed, or until the date set by the agency for termination of the decision if that date is within the 30-day period, or at the termination of a stay granted for the purpose of filing an application for reconsideration [*Gov. Code § 11521(a)*; *see* Ch. 473G, *Agency Adjudication Decisions* , for discussion of reconsideration of agency decisions]. The governing statutes of an agency not subject to the APA must be consulted to determine if the agency's jurisdiction continues after it makes a final decision. If a statute clearly evidences the Legislature's intent that an agency should exercise continuing jurisdiction and have power to alter or modify its decisions, the agency's exercise of such power is within its jurisdiction [*Olive Proration etc. Com. v. Agri. etc. Com. (1941) 17 Cal. 2d 204, 209, 109 P.2d 918]* .

When an agency or a litigant fails to comply with time limits set forth in a governing procedural statute, the question may arise whether the statutory time limitation is mandatory and jurisdictional or merely directory [*see Edwards v. Steele (1979) 25 Cal. 3d 406, 409, 158 Cal. Rptr. 662, 599 P.2d 1365]* . Whether a time limitation is "mandatory" or "directory" does not refer to whether the requirement is "permissive" or "obligatory," but whether failure to comply with the limitation will or will not have the effect of invalidating the action to which the procedural requirement relates [

Edwards v. Steele (1979) 25 Cal. 3d 406, 409, 158 Cal. Rptr. 662, 599 P.2d 1365 ; *Morris v. County of Marin (1977) 18 Cal. 3d 901, 908, 136 Cal. Rptr. 251, 559 P.2d 606]* . Unless a contrary intent is clearly expressed, requirements relating to the time within which acts must be done are usually deemed to be directory rather than mandatory [*Edwards v. Steele (1979) 25 Cal. 3d 406, 409, 158 Cal. Rptr. 662, 599 P.2d 1365]* . The courts have used various tests to determine whether time requirements are mandatory or directory. They consider, for example, whether the statute contains a consequence or penalty for failure to act within the designated time, whether the time provisions relate to matters of substance or are merely of mere convenience, and whether the consequence of holding the time limitation to be mandatory would defeat or promote the purpose of the statute [*Garcia v. Los Angeles County Bd. of Education (1981) 123 Cal. App. 3d 807, 811, 177 Cal. Rptr. 29]* . However, even when a time limitation is deemed to be mandatory, due process may require that it not be applied in a particular case if to do so would deprive a litigant of substantive or procedural rights [*see* *Edwards v. Steele (1979) 25 Cal. 3d 406, 412, 158 Cal. Rptr. 662, 599 P.2d 1365* (15-day time limit for hearing zoning appeal held not to be mandatory when property owner's noncompliance was wholly beyond his control); *Ursino v. Superior Court (1974) 39 Cal. App. 3d 611, 620-622, 114 Cal. Rptr. 404* (application of 40-day time limit for hearing appeal from Board of Permit Appeals would constitute denial of due process when Board unable to act in time due to vacancies)].

The courts have recognized an exception to the general rule that an administrative agency loses jurisdiction when its decision becomes final. When an agency's decision is in excess of its jurisdiction (because it is based on an erroneous conclusion of law) or is otherwise void, the decision is not binding on the agency [*Aylward v. State Board etc. Examiners (1948) 31 Cal. 2d 833, 839, 192 P.2d 929]* . In such a case, the agency still has unexercised power to proceed within its jurisdiction [*Aylward v. State Board etc. Examiners (1948) 31 Cal. 2d 833, 839, 192 P.2d 929]* .

[3] Court Remedies for Lack of Agency Jurisdiction

When a defect in the agency's jurisdiction is asserted in a mandate proceeding, the court's action will depend on the nature of the defect. If the agency clearly acted outside its jurisdiction, the court must set aside the agency's order or action [*Mumaw v. City of Glendale (1969) 270 Cal. App. 2d 454, 460, 76 Cal. Rptr. 245]* . If the agency had jurisdiction to act and the circumstances still permit it to do so, the court should remand the matter to the agency for further consideration [*National Auto. & Cas. Ins. Co. v. Downey (1950) 98 Cal. App. 2d 586, 594, 220 P.2d 962]* . If the agency failed to make necessary findings on jurisdictional facts, the court must remand the matter to the agency with instructions to make such findings [*see Code Civ. Proc. § 1094.5(b)* (abuse of discretion is shown if order or decision not supported by findings); *see § 474B.15* for discussion of the requirement that an agency decision or order be supported by findings]. If the agency made jurisdictional findings, but it is claimed that the findings are not supported by the evidence, the court must review those findings under the appropriate standard of review [for discussion of the requirement that findings be supported by evidence, *see § 474B.16*; for "independent judgment" test, *see §§ 474B.16[4], 474B.33[2]*; for "substantial evidence" test, *see §§ 474B.16[5], 474B.33[1]*].

When an agency conducts an administrative hearing, and rules that it lacks jurisdiction because there was no employer-employee relationship between the plaintiff and the defendant, the agency is required by *Labor Code § 98.1* to file a timely decision after the hearing so that the affected individual can file an appeal under [*Labor Code § 98.2*] which provides forde novo review in the superior court. Although the agency decision whether to accept the claim, or whether to hold a hearing on the claim is not subject to do novo review, the agency is precluded from summarily dismissing the claim for wages for lack of jurisdiction after conducting the hearing, as the affected person has the right to appeal the agency action to challenge the finding that they were not an employee [*Vos Post v. Palo/Haklar & Associates (2000) 23 Cal. 4th 942, 948-949, 98 Cal. Rptr. 2d 671, 4 P.3d 928]* .

However, an employer was precluded from challenging by writ of administrative mandate a decision of the unemployment insurance appeals board (UIAB) concluding that an individual who worked for that employer was an employee rather than an independent contractor. The employer was prohibited by the provisions of the California Constitution [Cal. Const. Art. XIII, § 32, Unemp. Ins. Code § 1851, and *Modern Barber Colleges vs. Cal. Emp.*

Stabilization Comm'n (1948) 31 Cal. 2d 720, 192 P.2d 916] . These principles prohibit the use of administrative mandamus to challenge the board's decision because this would effectively restrain the collection of a tax, and California law requires that the challenger pay the tax and sue for a refund [*First Aid Servs. of San Diego, Inc. v. Cal. Employment Dev. Dep't (2005) 133 Cal. App. 4th 1470, 1473-1474, 35 Cal. Rptr. 3d 663]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewStandards of ReviewExceeding Statutory AuthorityAdministrative LawJudicial ReviewStandards of ReviewSubstantial EvidenceAdministrative LawSeparation of PowersJurisdictionGovernmentsLegislationStatutes of LimitationsTime Limitations

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41A-474B California Forms of Pleading and Practice--Annotated § 474B.12

§ 474B.12 Lack of a Fair Hearing

[1] Right to a Hearing

Another issue on which review of an administrative agency's adjudicatory decision may be sought is whether a "fair trial" occurred [*Code Civ. Proc. § 1094.5(b)*]. The requirement of a "fair trial" applies only to a proceeding in which, by law, a hearing is required to be given [*Code Civ. Proc. § 1094.5(a)*]. In this context, therefore, the words "fair trial" mean a "fair hearing" before an agency that is required to afford a hearing. If the statute governing the agency does not provide for a hearing, or if the statute leaves the grant of a hearing to the agency's discretion, a person aggrieved by the agency's action is precluded from seeking review through administrative mandate [*Mahdavi v. Fair Employment Practice Com. (1977) 67 Cal. App. 3d 326, 333-335, 136 Cal. Rptr. 421* (Fair Employment Practice Act, *Gov. Code §§ 12900-12906*, does not require hearing on filing of complaint by person alleging employment discrimination)]. A hearing requirement need not be expressly set forth in the governing statute; however, such a requirement may be implied if necessary to effectuate the purposes of the statute [*Eureka Teachers Assn. v. Board of Education (1988) 199 Cal. App. 3d 353, 362, 244 Cal. Rptr. 240* ; *Chavez v. Civil Service Com. (1978) 86 Cal. App. 3d 324, 332, 150 Cal. Rptr. 197]* . Deputy sheriff had the right to an evidentiary hearing under *Gov. Code § 3304(b)(3)* to challenge firearm related restrictions imposed on deputy by sheriff. Hearing rights are enforced by the grant of a writ of mandate [*Gordon v. Horsley (2001) 86 Cal. App. 4th 336, 352, 102 Cal. Rptr. 2d 910]* .

New Motor Vehicle Board had implied authority to dismiss dealer's protest of manufacturer's termination of dealer's franchise for a specific type of car when the undisputed facts showed good cause for termination as a matter of law. Thus, there was no need for an evidentiary hearing on termination issues. Dealer's due process rights were not violated because dealer failed to take opportunity to challenge facts asserted by manufacturer which provided good cause for termination [*Duarte & Witting, Inc. v. New Motor Vehicle Board (2002) 104 Cal. App. 4th 626, 637-639, 128 Cal. Rptr. 2d 501]* .

[2] Hearing Provided

If a party is entitled by law to a hearing and none is provided, the party is denied a fair trial [*Fascination, Inc. v. Hoover (1952) 39 Cal. 2d 260, 265,246 P.2d 656]* . In such a case, the reviewing court must remand the matter to the

agency for further proceedings, and may not decide the matter on the merits [*Fascination, Inc. v. Hoover (1952) 39 Cal. 2d 260, 265, 246 P.2d 656]* .

The Court of Appeal held that the Medical Board of California deprived a physician of due process of law by conducting a fundamentally unfair physician license revocation hearing when the Board disqualified all of the doctor's experts as to standard of care, thereby precluding the doctor from putting on any evidence in his defense to charges that the doctor's treatment of several patients was grossly negligent or was an extreme departure from the standard of practice [*Sinaiko v. Superior Court (2004) 122 Cal. App. 4th 1133, 1137, 1141, 19 Cal. Rptr. 3d 371]* . The Court of Appeal also applied the independent judgment test to review the fairness of the administrative hearing as a matter of law [*Sinaiko v. Superior Court (2004) 122 Cal. App. 4th 1133, 1140-1141, 19 Cal. Rptr. 3d 371]* . Finally the Court of Appeal held that this case must be remanded to the Medical Board to consider the evidence presented by the doctor's experts. It was not proper for the reviewing (superior) court to admit the evidence under *Code Civ. Proc. § 1094.5(e)*, and then to reweigh the evidence to support the Medical Board's fact findings because this was an unfair proceeding. It is the agency's responsibility to consider the evidence erroneously excluded and to make an informed decision based on that evidence and agency expertise. Thus, a remand to the agency is required [*Sinaiko v. Superior Ct. (2004) 122 Cal. App. 4th 1133, 1146-1147, 19 Cal. Rptr. 3d 371]* .

[3] Fair Hearing Afforded

[a] Nature of Fair Hearing Requirement

When it exercises adjudicative functions, an administrative agency is a quasi-judicial body [*see* *Horn v. County of Ventura (1979) 24 Cal. 3d 605, 612-613, 156 Cal. Rptr. 718, 596 P.2d 1134* (county acts as quasi-judicial body when it approves subdivision map)]. As such, the agency is bound by the same obligations as a court to insure that all proceedings before it are conducted fairly [*Wood v. City Civil Service Commission (1975) 45 Cal. App. 3d 105, 110, 119 Cal. Rptr. 175* (agency's denial of continuance for absence of party's counsel denied party fair trial)]. Whether a hearing was fair must be determined, first, with reference to the statutes and regulations (if any) that govern the agency. Second, the principles of constitutional due process must be considered, since a fair trial in a fair tribunal is a basic requirement of due process [*Withrow v. Larkin (1975) 421 U.S. 35, 46, 95 S. Ct. 1456, 43 L. Ed. 2d 712* ; *In re Murchison (1954) 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942* ; *see* Ch. 470A, *Due Process Restriction on Public Agencies* , for a discussion of due process issues]. For an agency subject to the APA [*Gov. Code § 11340 et seq.*; *see Gov. Code §§ 11500(a)* ("agency" defined), 11501(b) (enumerated agencies)], the Act itself must be consulted for applicable procedures [*see Gov. Code § 11500 et seq.* (administrative adjudication); *see* Ch. 473, *Public Agency Adjudication* for discussion of adjudication by agencies subject to the APA]. For an agency not subject to the APA, no particular form of notice or hearing is required. If the relevant statute provides for reasonable notice and an opportunity to be heard, and if the agency's decision is based on evidence adduced at the hearing, a fair trial has been provided [*English v. City of Long Beach (1950) 35 Cal. 2d 155, 158, 217 P.2d 22* ; *Drummey v. State Bd. of Funeral Directors (1939) 13 Cal. 2d 75, 80-81, 87 P.2d 848]* . The procedure required varies with the factual context and nature of the action [*see* *Perlman v. Shasta Joint Jr. College Dist. Bd. of Trustees (1970) 9 Cal. App. 3d 873, 880, 88 Cal. Rptr. 563* (suspension and expulsion hearing before college board)]. The method of proceeding is controlled by the hearing officer and generally resembles that employed in civil trials, but the lack of formal procedural rules in the governing statute does not violate due process [*Temple of Inspired Living v. Department of Social Service (1979) 97 Cal. App. 3d 564, 569, 158 Cal. Rptr. 816* ; *see* Ch. 473F, *Agency Adjudication Hearings* , for discussion of general procedural coverage in administrative hearings; *see* Ch. 470A, *Due Process Restrictions on Public Agencies* , for a discussion of due process issues].

[b] Agency Bias or Prejudice

Bias or prejudice on the part of an agency may deprive a party of a fair trial and serve as a basis for relief in mandate proceedings [*see* *Withrow v. Larkin (1975) 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712* (suit for injunction)].

Procedural due process dictates that an agency not act when, under the facts of the case, the probability of bias is too high to be constitutionally tolerable [*Mennig v. City Council (1978) 86 Cal. App. 3d 341, 350, 150 Cal. Rptr. 207* ; *see Withrow v. Larkin (1975) 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712* (suit for injunction)]. Thus, a person who is personally embroiled in a dispute or has a substantial pecuniary interest in its outcome may not properly adjudicate the dispute [*Gibson v. Berryhill (1973) 411 U.S. 564, 579, 93 S. Ct. 1689, 36 L. Ed. 2d 488* ; *Mennig v. City Council (1978) 86 Cal. App. 3d 341, 350-351, 150 Cal. Rptr. 207* ; *see Taylor v. Hayes (1974) 418 U.S. 488, 501-503, 94 S. Ct. 2697, 41 L. Ed. 2d 897* (trial judge became embroiled in running dispute with counsel for defendant); *Doyle v. City of Chino (1981) 117 Cal. App. 3d 673, 682, 172 Cal. Rptr. 844* (writ denied when city official personally embroiled in dispute is not member of adjudicating agency)]. Disqualifying bias may not be inferred solely from the circumstances of an adjudicator's private life; thus, due process is not denied merely because an agency is composed in whole or in part of members of the regulated business or profession [*American Motors Sales Corp. v. New Motor Vehicle Bd. (1977) 69 Cal. App. 3d 983, 991-992, 138 Cal. Rptr. 594]* . Nor will bias or prejudice on the part of one member of a multi-member board disqualify the entire board from acting [*American Motors Sales Corp. v. New Motor Vehicle Bd. (1977) 69 Cal. App. 3d 983, 993, 138 Cal. Rptr. 594* ; *Borders v. Anderson (1962) 204 Cal. App. 2d 401, 417, 22 Cal. Rptr. 243]* . If a majority of the board members voted in favor of a disputed decision, the fact that one member who voted for the decision was biased will not invalidate it [*Thompson v. City of Long Beach (1953) 41 Cal. 2d 235, 243-244, 259 P.2d 649]* . If the membership of a board is slanted in favor of a particular class of litigants, however, due process is denied and decisions by the board must be invalidated [*see American Motors Sales Corp. v. New Motor Vehicle Bd. (1977) 69 Cal. App. 3d 983, 992-993,138 Cal. Rptr. 594* (statute required that four of nine members of board that adjudicated economic disputes between car manufacturers and dealers be car dealers and did not require that any of remaining members be manufacturers)].

A county retirement board did not violate due process of law by both investigating and adjudicating retirement benefits applications. The Board can select unilaterally and compensate hearing officers consistent with due process of law. Due process of law does not require that the applicant participate in the hearing officer selection process Board selection and compensation of hearing officers does not, by itself, establish bias against applicants for retirement benefits on the part of the hearing officers [*McIntyre v. Santa Barbara County Employees' Retirement System (2001) 91 Cal. App. 4th 730, 735-736, 110 Cal. Rptr. 2d 565]* .

The so-called "rule of necessity" significantly limits the usefulness of arguments based on bias or prejudice. Under this rule, when a administrative agency has a duty to act on a matter before it and it is the only entity capable of acting in the matter, the fact that the members may have a personal interest in the result of the action taken does not disqualify them from performing their duty [*Caminetti v. Pac. Mutual L. Ins. Co. (1943) 22 Cal. 2d 344, 366, 139 P.2d 908* ; *Gonsalves v. City of Dairy Valley (1968) 265 Cal. App. 2d 400, 404, 71 Cal. Rptr. 255]* .

A reviewing court may not consider a claim of bias or prejudice unless it was raised at the agency hearing [*see Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 826, 140 Cal. Rptr. 442, 567 P.2d 1162* ; *Thompson v. City of Long Beach (1953) 41 Cal. 2d 235, 242-243, 259 P.2d 649* ; *see also § 474B.16[3]* for discussion of the requirement that error asserted as grounds for issuance of mandate must appear in record], or unless the petitioner shows that the claim could not have been raised in the administrative proceedings [*Barkin v. Board of Optometry (1969) 269 Cal. App. 2d 714, 719, 75 Cal. Rptr. 337]* . Mere assertions of prejudice are insufficient to establish disqualifying bias. A party who claims that a member of an agency hearing board was biased must present specific evidence from which the reviewing court can properly infer the existence of bias [*see Noguchi v. Civil Service Com. (1986) 187 Cal. App. 3d 1521, 1536-1537, 232 Cal. Rptr. 394* (hearing board request of county administrator's office to conduct audit of department headed by petitioner, chief medical examiner of county, did not constitute evidence of prejudice)]. For a more detailed discussion of agency bias and prejudice, see Ch. 473E, *Public Administrative Law Judges* .

Legal Topics:

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

Administrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawAgency AdjudicationHearingsRight to HearingStatutory RightAdministrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewAdministrative RecordGeneral OverviewAdministrative LawJudicial ReviewRemands & RemittitursAdministrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewReviewabilityGeneral Overview

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§ 474B.13 Prejudicial Abuse of Discretion

[1] Nature of Abuse of Discretion

Another issue on which review of an administrative agency's adjudicatory decision may be sought is whether the agency committed "any prejudicial abuse of discretion" [*Code Civ. Proc. § 1094.5(b)*]. Abuse of discretion may be established by showing any of the following [*Code Civ. Proc. § 1094.5(b)*]:

- The agency failed to proceed in the manner required by law [*see § 474B.14*].
- The agency's order or decision is not supported by the findings [*see § 474B.15*].
- The agency's findings are not supported by the evidence [*see § 474B.16*].

[2] Exercise of Discretion

To determine whether an agency has abused its discretion in a specific case, the court must first ascertain that the action taken was in fact anexercise of discretion. The functions, powers, and duties of administrative agencies are classified as either discretionary or ministerial. Discretion in this context refers to powers conferred by law on an agency or officer to perform official acts according to the dictates of the officer's judgment [*People ex rel. Fund American Companies v. California Ins. Co. (1974) 43 Cal. App. 3d 423, 431, 117 Cal. Rptr. 623]* . Ministerial acts, on the other hand, are those that an official is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his or her own judgment or opinion concerning the propriety or impropriety of the act to be performed, when a given state of facts exists [*People ex rel. Fund American Companies v. California Ins. Co. (1974) 43 Cal. App. 3d 423, 431, 117 Cal. Rptr. 623]* . In general, discretionary powers conferred on administrative agencies are in the nature of public trusts and may not be surrendered or delegated in the absence of statutory authorization; conversely, the performance of ministerial tasks, including the investigation and determination of facts preliminary to discretionary agency action, may be delegated [*see California Sch. Employees Assn. v. Personnel Commission (1970) 3 Cal. 3d 139, 144, 89 Cal. Rptr. 620, 474 P.2d 436]* .

The California Department of Corrections prison supervisor staffing policies and practices which included "cross-covering" and "redirecting" were challenged on grounds of risks to employee safety. The court of appeals affirmed the denial of a writ of mandate by the trial court and concluded that the policies were within the discretion of the prison warden who implemented the policies and practices, and there was no abuse of discretion in staffing decisions because the policy required consideration of safety risks and used a target ceiling [*California Corrctional Supervisors Organization, Inc. v. Department of Corrections (2002) 96 Cal. App. 4th 824, 832-833, 117 Cal. Rptr. 2d 595]* . The Department of Industrial Relations did not abuse its discretion in rescinding a prevailing wage determination without conducting a wage survey, which is not required, because the Department considered the appropriate information in the evaluation process [*California Slurry Seal Association v. Department of Industrial Relations (2002) 98 Cal. App. 4th 651, 666-667, 121 Cal. Rptr. 2d 38]* .

The abuse of discretion standard of review applies to writ of mandate proceedings challenging an agency's compliance with CEQA requirements of preparing an environmental impact report under *Pub Res. Code § 21061* [*City of Marina v. Board of Trustees of the Cal. State Univ. (2006) 39 Cal. 4th 341, 355-356, 46 Cal. Rptr. 3d 355, 138 P. 3d 692* (abuse of discretion standard of review applies under CEQA [*Pub. Resources Code § 21168.5*]); *Great Oaks Water Co v. Santa Clara Valley Water Dist. (2009) 170 Cal. App. 4th 956, 966-968, 88 Cal. Rptr. 3d 506* (the agency findings were adequate for making exemption determination, therefore there was no abuse of discretion.); *Riverwatch v. Olivenhain Municipal Water District (2009) 170 Cal. App. 4th 1186, 1199-1201, 88 Cal. Rptr. 3d 625* (agency compliance with CEQA requirements in approving treated waste water supply agreement was subject to abuse of discretion review); *Citizens for Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency (2005) 134 Cal. App. 4th 598, 604-605, 36 Cal. Rptr. 3d 249* ; *Protect the Historic Amador Waterways v. Amador Water Agency (2004) 116 Cal. App. 4th 1099, 1105-1106, 11 Cal. Rptr. 3d 104]* . The abuse of discretion standard of review also applies to writ of mandate proceedings brought under *Code Civ. Proc. § 1094.5* to challenge the Department of Forestry and Fire Protection's approval of timber harvesting plans (THP) under the requirements of the Z'Berg-Nejedly Forest Practices Act of 1973, *Pub. Res. Code § 4582.6* [*Ebbetts Pass Forest Watch v. Department of Forestry and Fire Protection (2004) 123 Cal. App. 4th 1331, 1345-1346, 20 Cal. Rptr. 3d 808]* . The Court of Appeal upheld the approval of the THPby the Department and noted that the THP was the "functional equivalent" of an environmental impact report under CEQA, *Pub. Res. Code § 21000 et seq.* [*Ebbetts Pass Forest Watch v. Department of Forestry and Fire Protection (2004) 123 Cal. App. 4th 1331, 1338-1339, 20 Cal. Rptr. 3d 808]* .

Agency penalty determinations are within the discretion of the agency and are reviewed for abuse of discretion [*Kazensky v. City of Merced (1998) 65 Cal. App. 4th 44, 53, 76 Cal. Rptr. 2d 356* (city terminated employees for misconduct; Superior court issued writ of mandamus reinstating employee, and requiring use of progressive discipline; Court of appeal reversed writ and upheld termination decision based on abuse of discretion standard of review); *Kolender v. San Diego County Civil Service Comm'n (2005) 132 Cal. App. 4th 716, 720-722, 34 Cal. Rptr. 3d 1* (county sheriff terminated sheriff's deputy for lying to cover up physical abuse of an inmate by another deputy; civil service commission reduced sanction to 90-day suspension concluding that termination was excessive; sheriff petitioned for writ of mandate challenging commission decision; superior court denied petition, an court of appeal reversed denial of petition. Holding that it was abuse of discretion for commission to reduce sanction, and that termination was not an excessive sanction in these circumstances)].

An agency can impose more severe discipline than recommended by a hearing officer without reviewing the agency record related to the penalty in circumstances under which the weight of the evidence in the agency record supports the findings of misconduct. The trial court applied the independent judgment test (because public employment is a fundamental vested right) and found that the weight of the evidence supported the fact findings related to misconduct. The trial court standard of review for agency penalty determinations is abuse of discretion, not independent judgment [*Spanner v. Rancho Santiago Community College Dist. (2004) 119 Cal. App. 4th 584, 591-592, 15 Cal. Rptr. 3d 1* (classified employee of school district was permanently demoted by district for misconduct; hearing officer had recommended that employee be warned and given opportunity to change behavior; Court of Appeal upheld denial of employee's mandate petition challenging demotion)].

A county civil service commission's decision to reduce the penalty awarded (from demotion in rank to a 30-day suspension without back pay) against a sergeant who allegedly made false statements and was found to have acted with insubordination and willful disobedience during the investigation of a gender harassment claim against him brought by a female deputy was reversed by the Sixth District California Court of Appeal, which found that the reduction in penalty was an abuse of discretion given the seriousness of the employee misconduct by the sergeant [*County of Santa Cruz v. Civil Service Commission of Santa Cruz (2009) 171 Cal. App. 4th 1577, 1584-1585]* .

[3] Prejudice Requirement

Even if an agency's decision constitutes an abuse of discretion, the decision will not be overturned unless prejudice has resulted to the petitioner from the decision [*see Code Civ. Proc. § 1094.5(b)*; *Bakersfield Citizens for Local Control v. City of Bakersfield (2004) 124 Cal. App. 4th 1184, 1221-1221, 22 Cal. Rptr. 3d 203* (certification of EIR by city without considering urban decay and air quality effects in environmental assessment precluded informed public participation and decision making and was therefore a prejudicial abuse of discretion); *Steele v. L.A. County Civil Service Com. (1958) 166 Cal. App. 2d 129, 137-138, 333 P.2d 171]* . A petitioner is generally prejudiced by a decision only if it has substantially affected his or her rights [*Steele v. L.A. County Civil Service Com. (1958) 166 Cal. App. 2d 129, 137-138, 333 P.2d 171]* . If the agency's decision would have been the same absent its abuse of discretion, the petitioner has not been prejudiced and mandate relief should not be granted [*see Roark v. State Bar (1936) 5 Cal. 2d 665, 668, 55 P.2d 839* (proceedings to disbar attorney)]. For example, if improper or objectionable evidence was introduced in the administrative proceedings, prejudice is not shown if other competent evidence supports the agency's decision [*Roark v. State Bar (1936) 5 Cal. 2d 665, 668, 55 P.2d 839* ; *Cooley v. State Bd. of Funeral Directors (1956) 141 Cal. App. 2d 293, 298-299, 296 P.2d 588* ; *West Coast etc. Co. v. Contractors' etc. Bd. (1945) 72 Cal. App. 2d 287, 299-300, 164 P.2d 811]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewAdministrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewAdministrative LawJudicial ReviewStandards of ReviewAbuse of DiscretionCivil ProcedureRemediesWritsCommon Law WritsMandamus

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§ 474B.14 Agency Action in Manner Required by Law

[1] Agency Procedures Required by Law

One statutory ground for establishing abuse of discretion is a showing that the agency has not proceeded in the manner required by law [*Code Civ. Proc. § 1094.5(b)*; *see § 474B.13[1]*]. A wide variety of procedural defects may establish that the agency failed to proceed in the manner required by law, including:

- Denial of subpoena or discovery rights [for discussion, *see* Ch. 473B, *Discovery in Agency Adjudications*].
- Denial of the right to counsel [*see* [2], *below*].
- Failure of the agency to correctly construe the law [*see* [3], *below*].
- Errors in admitting and excluding evidence [*see* [4], *below*].
- Failure to properly determine penalties [*see* [5], *below*].

Other procedural errors may also establish failure. For example, an agency's use of an erroneous legal standard in making its determinations has been held to constitute a failure to proceed in the manner required by law [*No Oil, Inc. v. City of Los Angeles (1974) 13 Cal. 3d 68, 88, 118 Cal. Rptr. 34, 529 P.2d 66* ; *Department of Corrections v. Office of Administrative Hearings (1998) 66 Cal. App. 4th 1100, 1106-1107, 78 Cal. Rptr. 2d 473* (judicial review of decision based on administrative hearing required for renewed petition for involuntary medication of prisoner)], as has the exercise of agency discretion in a manner that conflicts with the spirit of the law or impedes or defeats the ends of substantial justice [*see* *Walsh v. Kirby (1974) 13 Cal. 3d 95, 103, 118 Cal. Rptr. 1, 529 P.2d 33* (imposition of cumulative penalties on holder of alcoholic beverage license amounted to de facto revocation of license, contrary to provisions of Alcoholic Beverage Control Act); *see also* *Fisher v. Board of Police Commissioners (1965) 236 Cal. App. 2d 298, 301, 45 Cal. Rptr. 859* (action by board members did not constitute effective exercise of discretion as

required by city charter when proceedings did not culminate in order adopted by majority of members)]. Other failures to follow statutory procedures, such as holding a hearing in the absence of an administrative law judge (ALJ) when the statutes require an ALJ to preside [*see Gov. Code §§ 11512(a)* (ALJ must preside over every hearing in a contested case), 11517(a) (ALJ must be present during consideration of contested case); *Usher v. County of Monterey (1998) 65 Cal. App. 4th 210, 218-219, 76 Cal. Rptr. 2d 274]* , and the failure of agency members to familiarize themselves with the evidence in matters heard outside the members' presence [*see Gov. Code § 11517(b)(1)* (when contested case heard before agency itself, no member who did not hear evidence may vote on decision); *Old Santa Barbara Pier Co. v. State of California (1977) 71 Cal. App. 3d 250, 257, 139 Cal. Rptr. 332* (requirement that quorum of State Coastal Zone Conservation Commission "act" on appeal is satisfied even though members not present at first of two meetings had familiarized themselves with presentations at first meeting and with other material relating to appeal)], may also establish failure to proceed in the manner required by law.

In particular cases, facts showing that an agency has not proceeded in the manner required by law may be similar (or even identical) to facts showing that the agency has denied a litigant a "fair trial" [*see § 474B.12* for discussion of denial of "fair trial" as a ground for issuance of mandate]. Thus, under the facts of a given case, a failure to proceed in the manner required by law may also constitute a deprivation of a fair trial, and vice versa.

[2] Right to Counsel for Petitioner

A party to an administrative proceeding is entitled to be represented by retained counsel when the proceeding is such that the party's interest might be prejudiced if the right to representation by counsel were denied [*Steen v. Board of Civil Service Commrs. (1945) 26 Cal. 2d 716, 727, 160 P.2d 816* ; *Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 540, 92 Cal. Rptr. 525]* . Although the right to counsel is not essential to a fair hearing in all types of administrative proceedings [*see Perlman v. Shasta Joint Jr. College Dist. Bd. of Trustees (1970) 9 Cal. App. 3d 873, 879-880, 88 Cal. Rptr. 563* (right to counsel not essential to fair hearing in proceedings for suspension of college student)], in proceedings to revoke or suspend a license or other administrative action of a disciplinary nature the licensee is entitled to have counsel of his or her own choosing [*Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 543-544, 92 Cal. Rptr. 525* ; *see also Gov. Code § 11509* (form for notice of hearing includes statement of parties' right to be represented by counsel at own expense)]. However, due process does not require that counsel be furnished to a licensee when the licensee personally cannot afford to hire counsel [Borror v. Department of Investment *(1971) 15 Cal. App. 3d 531, 543, 92 Cal. Rptr. 525* ; *see Gov. Code § 11509* (form for notice of hearing includes statement that party is not entitled to appointment of attorney at public expense)]. Further, in administrative proceedings no constitutional requirement exists that the hearing officer or the agency advise a party that he or she is entitled to be represented by counsel, although in proceedings subject to the APA [*Gov. Code § 11340 et seq.*], there is a statutory requirement that the agency notify all parties before the hearing of their right to be represented by counsel [*Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 543-544, 92 Cal. Rptr. 525* ; *see Gov. Code § 11509*; *see also Gov. Code §§ 11500(a)* ("agency" defined), 11501(a) (application of *Gov. Code § 11500 et seq.* to agencies as determined by statutes relating to those agencies); *see also* Ch. 473, *Public Agency Adjudication*]. The availability of the *Fifth Amendment*privilege against self-incrimination is deemed sufficient protection against the possibility that criminal charges might arise out of the conduct for which disciplinary proceedings are brought [*Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 541, 92 Cal. Rptr. 525* ; *see In re Groban (1957) 352 U.S. 330, 333, 77 S. Ct. 510, 1 L. Ed. 2d 376, 76 Ohio Law Abs. 368* (witnesses compelled to testify before state fire marshal have no constitutional right to counsel); *but see Szmaciarz v. State Personnel Bd. (1978) 79 Cal. App. 3d 904, 917-919, 145 Cal. Rptr. 396* (privilege against self-incrimination unavailable and adverse inferences from refusal to testify may be drawn in administrative hearing on suspension of correctional officer, unless state seeks to subject officer to some criminal liability)]. The general common law rule that corporations must be represented by counsel (licensed attorneys) in litigation before courts of record (other than small claims courts) does not apply to adjudicative proceedings before administrative tribunals, and the Board's decision to affirm the Department's revocation of a corporation's liquor license was not void for lack of jurisdiction because non attorney president of corporation represented corporation in administrative license revocation hearing [*Camille v. Alcoholic Beverage Control Appeals Board (2002) 99 Cal. App.*

4th 1094, 1101-1103, 121 Cal. Rptr. 2d 758] .

[3] Agency Constructions of Law

Administrative agencies have both the power and the duty to construe the law applicable to cases adjudicated by them, but their constructions of the law are not conclusive on the courts [*California Ass'n of Psychology Providers v. Rank (1990) 51 Cal. 3d 1, 11, 270 Cal. Rptr. 796, 793 P.2d 2* ; *Miller & Lux Inc. v. Industrial Acci. Com. (1919) 179 Cal. 764, 766, 178 P. 960* ; *Godshalk v. City of San Diego (1971) 16 Cal. App. 3d 459, 468, 94 Cal. Rptr. 42]* . A reviewing court has the constitutional power to construe the law applicable to any case and, if convinced that an administrative agency has based a decision on an erroneous interpretation of the law, to overturn the decision [*People ex rel. Fund American Companies v. California Ins. Co. (1974) 43 Cal. App. 3d 423, 431, 117 Cal. Rptr. 623]* . When appropriate, the court may simply ignore an agency's erroneous conclusion of law [*Strode v. Board of Medical Examiners (1961) 195 Cal. App. 2d 291, 303, 15 Cal. Rptr. 879]* . The reviewing court makes an independent determination of the validity of the agency's interpretation and application of its governing statute [*City of Long Beach v. Department of Industrial Relations (2004) 34 Cal. 4th 942, 949, 22 Cal. Rptr. 3d 518, 102 P.3d 904* (reviewing court exercises independent judgment in determining meaning of statutory term "public work" for purposes of Prevailing Wage Law); *North Gualala Water Co. v. State Water Resources Control Board (2006) 139 Cal. App. 4th 1577, 1586-1588, 43 Cal. Rptr. 3d 821* (de novo review standard applied to determination of "subterranean stream" language in water law agency jurisdiction statute); *Pacific Bell Wireless, LLC v. P.U.C. (2006) 140 Cal. App. 4th 718, 729-730, 44 Cal. Rptr. 3d 733* (independent judgment test applied to interpretation of statute related to agency scope of jurisdiction); *Greystone Homes, Inc. v. Cake (2005) 135 Cal. App. 4th 1, 8-9, 37 Cal. Rptr. 3d 183* (independent judgment test applies to determination of "public work" for purposes of prevailing wage law); *Placer County Local Agency Formation Com. v. Nevada County Local Agency Formation Com. (2006) 135 Cal. App. 4th 793, 803-804, 37 Cal. Rptr. 3d 729* (de novo review standard applies to determine meaning of statutory terms related to authority of county local agency formation commissions); *Harroman Co. v. Town of Tiburon (1991) 235 Cal. App. 3d 388, 392-393, 1 Cal. Rptr. 2d 72* ; *City of Coachella v. Riverside County Airport Land Use Com. (1989) 210 Cal. App. 3d 1277, 1289, 258 Cal. Rptr. 795]* .

The court will give some deference to the agency interpretation of its governing statute [*North Gualala Water Co. v. State Water Resources Control Board (2006) 139 Cal. App. 4th 1577, 1589-1590, 43 Cal. Rptr. 3d 821* (court of appeal gave limited deference to agency interpretation of statutory term ("subterranean stream") related to agency water law jurisdiction that was determined by agency in adjudicatory capacity in permitting proceeding)], but ultimately the court will decide the statutory interpretation issue as a question of law subject to the de novo review standard [*Connerly v. State Personnel Bd. (2006) 37 Cal. 4th 1169, 1175-1176, 39 Cal. Rptr. 3d 788, 129 P.3d 1* (interpretation of "opposing parties" language in attorney's fees statute, *Code Civ. Proc. § 1021.5*, was subject to do novo review standard of review, not abuse of discretion, as the meaning of a statute is a question of law when there are no disputed fact issues. Note that there was no agency interpretation in this lawsuit); *Dunn v. County of Santa Barbara (2006) 135 Cal. App. 4th 1281, 1289-1290, 38 Cal. Rptr. 3d 316* (notwithstanding independent judgment test, County interpretation of Coastal Act incorporated into County's local coastal plan (LCP) regulations is entitled to substantial deference ("great weight") because the statewide coastal commission certified the LCP)]. The court also will decide interpretive questions of fact related to the legal issue that are based on stipulated facts as questions of law subject to the de novo review standard [*Automotive Funding Group, Inc. v. Garamendi (2003) 114 Cal. App. 4th 846, 851, 7 Cal. Rptr. 3d 912* (car finance lender that offered loss damage waiver program was not providing insurance subject to regulation by Insurance Commissioner)]. The Court of Appeal rejected the insurance commissioner's interpretation of *Cal. Ins. Code § 22* as covering lender's LDW provision, and concluded that the collision damage waiver program was not insurance subject to the regulatory authority of the Insurance commissioner [*Automotive Funding Group, Inc. v. Garamendi (2003) 114 Cal. App. 4th 846, 855-857, 7 Cal. Rptr. 3d 912]* .

The California Court of Appeal interpreted the meaning of the term "incident" for purposes of determining a challenge to cost reimbursement statutes for costs incurred by CHP officers in stopping and arresting drivers subject to DUI laws. In construing the statute, the court rejected application of the longstanding administrative interpretation principle for

deciding the meaning of the statutory term. The court also considered, but did not give controlling weight to, an opinion letter written by a legislative counsel that supported the interpretation that the court ultimately concluded was the proper meaning of the term [*California Highway Patrol v. Superior Court (2006) 135 Cal. App. 4th 488, 501-503, 38 Cal. Rptr. 3d 16]* .

The State Board of Equalization publishes the Business Tax Law Guide which contains "Annotations," which are summaries of opinions by agency attorneys as to the business tax impact of transactions subject to California business taxes. The annotations are responses to requests for legal opinions by the agency, and by businesses subject to tax jurisdiction by the agency. These annotations contain agency interpretations of the meaning of statutes enforced by the agency [*Yamaha Corp. of America v. State Bd. of Equalization (1998) 19 Cal. 4th 1, 4-5, 78 Cal. Rptr. 2d 1, 960 P.2d 1031]* . However, the annotations are not adopted agency regulations, and therefore there is a different standard of review applicable to these annotations. The standard of review that applies to agency interpretations of statutes enforced by the agency is the independent judgment of the court giving deference to the determination of the agency appropriate to the circumstances of the agency action, with a de novo review of the merits of the legal issue before the court. It was erroneous for the lower court to give controlling weight to the agency interpretation of the statute contained in the agency annotation [*Yamaha Corp. of America v. State Bd. of Equalization (1998) 19 Cal. 4th 1, 7-8, 78 Cal. Rptr. 2d 1, 960 P.2d 1031]* . In the Yamaha decision, the California Supreme Court departed from, and did not follow the "strong deference" approach of federal administrative law [*see* *Chevron U.S.A. Inc. v. NRDC (1984) 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694*]. However, the Court of Appeals followed the *Chevron* case and deferred to a federal agency interpretation contained in a federal regulation as to an issue, post-payment audit of Medi-Cal providers claims, that was governed by federal law [*RCJ Medical Services, Inc. v. Bonta' (2001) 91 Cal. App. 4th 986, 992-993, 111 Cal. Rptr. 2d 223]* .

The California Supreme Court gave no deference to agency interpretations of the governing statute, the Knox-Keene Act provisions contained in *Bus. & Prof. Code § 2556* (prohibiting business and financial relationship between opticians and licensed optometrists), that were contained in two documents: 1) a petition filed by the California Attorney General, representing the California Board of Optometry with the Federal Trade Commission; and 2) internal memoranda from the Medical Board of California's division of licensing and from the Department of Corporations. These agencies had responsibility for administering the Knox Keene Act. The interpretations were entitled to no deference because these documents were not produced at the time of statutory enactment, but rather much later. Also, the documents did not discuss the relevant statutory language, and their content did not contain a careful discussion of the issues before the Supreme Court. The memoranda were advice letters written by agency staff, and those memos are entitled to less deference than a formally adopted agency regulation. Finally, appellate courts are less deferential to agency interpretations of governing statutes because the agency does not have a comparative advantage over the appellate courts in interpreting statutes [*People v. Cole (2006) 38 Cal. 4th 964, 987-988, 44 Cal. Rptr. 3d 261, 135 P.3d 669]* .

The California Supreme Court gave significant weight to interpretations of the State Board of Equalization (SBE) that when changes in federal tax liability are made by the IRS, the four year general tax statute of limitations [*Rev. & Tax. Code § 19057*] for giving notice of deficiency assessments is replaced by the limitations provisions of *Rev. & Tax. Code §§ 19059* (FTB has two years from date taxpayers notify board of IRS deficiency assessment) and 19060 (notice of state tax deficiency assessment can be given at any time when taxpayer fails to give notice to board of federal tax deficiency assessment). While the Supreme Court retained the ultimate responsibility for interpreting those statutory provisions, the Court gave substantial weight to the SBE's longstanding statutory construction of the four year statute's applicability because the SBE is the state agency charged with the enforcement of the statute [*Ordlock v. Franchise Tax Bd. (2006) 38 Cal. 4th 897, 910-911, 44 Cal. Rptr. 3d 212, 135 P.3d 628]* .

The California Supreme Court held that a 2003 legislative amendment to the California Fair Employment and Housing Act provisions [*Gov. Code § 12940(j)(1)*] that provided for employer liability for sexual harassment of employees by third party non-employees (including customers and clients) clarified existing law, and therefore the amended statute could be applied to a lawsuit that was pending before the California courts at the time of the enactment of the legislative

amendment. The Supreme court rejected an argument that the legislative amendment had retroactive effect, and thus could not be applied to pending cases [*Carter v. California Dept. of Veterans Affairs (2006) 38 Cal. 4th 914, 918, 44 Cal. Rptr. 3d 223, 135 P.3d 637]* . The legislature can not declare existing law in a later amendment that is contrary to a definitive interpretation of a California statute by the California Supreme Court, but if the California Supreme Court has not definitively interpreted a statue, the legislature can clarify the meaning by a later amendment. That amendment will be considered to be declaratory of existing law and applicable to pending cases [*Carter v. California Dept. of Veterans Affairs (2006) 38 Cal. 4th 914, 922-923, 44 Cal. Rptr. 3d 223, 135 P.3d 637]* . The California Supreme Court rejected the statutory interpretation advocated by the California Department of Veterans Affairs (VA) because that interpretation was contrary to language in the uncodified portion (section one) of *Gov. Code § 12940*, which portion could be used to determine legislative intent even though the uncodified portion was not enacted as binding law [*Carter v. California Dept. of Veterans Affairs (2006) 38 Cal. 4th 914, 924-925, 44 Cal. Rptr. 3d 223, 135 P.3d 637]* .

The Insurance Commissioner's interpretation of its own administrative regulations is to be respected and given some weight based on the merits of the interpretation by a court that is deciding the issue of how to interpret the regulation. However, the ultimate decision of how to interpret the regulation is a question of law to be decided by the court, and the agency's interpretation is not binding on the court [*State Farm Mutual Automobile Insurance Company v. Quackenbush (1999) 77 Cal. App. 4th 65, 71, 91 Cal. Rptr. 2d 381]* . Thus, a court has rejected the Insurance Commissioner's interpretations of its own regulations that were inconsistent with the terms of the regulations, or with related regulatory provisions of law [*see* *State Farm Mutual Automobile Insurance Company v. Quackenbush (1999) 77 Cal. App. 4th 65, 71-72, 91 Cal. Rptr. 2d 381]* . However, another court gave strong deference to the Insurance Commissioner's interpretation of the weight ordering mandate in Proposition 103 related statutes based on agency technical expertise and the time and effort spent addressing issue [*Spanish Speaking Citizens' Foundation, Inc. v. Low (2001) 85 Cal. App. 4th 1179, 1236-1237, 103 Cal. Rptr. 2d 75]* .

The California Court of Appeal upheld the Department of Social Services agency's interpretation of the meaning of the term "child support" in the maximum family grant statute because the agency interpretation was consistent with the language of the statute and with the legislative intent of the statute [*Sneed v. Saenz (2004) 120 Cal. App. 4th 1220, 1234, 1246, 16 Cal. Rptr. 3d 563]* . In another case, the California Court of Appeal adopted the following approach to assessing the weight of a PUC interpretation of the agencies jurisdiction over utility holding companies. PUC's interpretation of the scope of agency jurisdiction is not controlling, is scrutinized more carefully, and is given the weight justified by the carefulness, thoroughness, and consistency of the agencies reasoning in support of the interpretation [*PG & E Corp. v. Public Utilities Comm'n (2004) 118 Cal. App. 4th 1174, 1194-1196, 13 Cal. Rptr. 3d 630]* . In a third case, the California Court of Appeal upheld an agency interpretation by the Department of Motor Vehicles (DMV) of the requirements of the law related to commercial registration of trucks. The DMV interpretation applied to trucks that had been converted into vehicles with living quarters. The DMV interpreted the commercial vehicle statutory definition [*Cal. Veh. Code § 260*] to refer to the design of the vehicle, and not to whether the vehicle was used in business. The DMV interpretation was contained both in agency policy statements and based on declarations of experienced California Highway Patrol officers who enforced the law [*California Career Schools v. DMV (2004) 120 Cal. App. 4th 10, 14-16, 15 Cal. Rptr. 3d 813]* . On the contrary, when a court decides an issue related to interpreting an agency regulation, it does not defer to agency expertise in interpreting the regulation when the plain language of the regulation compels an interpretation different from the agency, or when the language of the rule does not require administrative expertise to interpret [*Southern California Edison Co. v. Public Utilities Com'n (2000) 85 Cal. App. 4th 1086, 1105-1106, 102 Cal. Rptr. 2d 684]* .

The California Supreme Court deferred to the agency interpretation by the California Department of Social Services (CDSS) of its governing statute, *Fam. Code § 8617*, because of agency expertise and because the interpretation was adopted at "authoritative legal and policymaking levels of the agency." The agency had interpreted the statute to permit second parent adoptions. The CDSS had adopted forms and procedures to "facilitate second parent adoptions." The challenge was based on the argument that CDSS, an executive branch agency, exercised legislative powers by recognizing a type of adoption that was not authorized by the legislature. The Court rejected this challenge and held that

CDSS had reasonably interpreted a statute authorizing independent adoptions to allow the type of adoption for which they had provided forms and procedures [*Sharon S. v. Superior Court (2003) 31 Cal. 4th 417, 436-437, 2 Cal. Rptr. 3d 699, 73 P.3d 554]* .

The Court of Appeal reversed a trial court decision granting a writ of mandate, and held that the Insurance Commissioner's interpretation of its own regulations was entitled to deference by the trial court and should be followed. The interpretive issue related to when a worker's compensation claim is officially closed because of the claimant's failure to prosecute the claim. The Insurance Commissioner interpreted that requirement to mean that the WCAB or a Court had to take official action to dismiss the claim for failure to prosecute. The employer argued that the insurer's closing of a claim file was sufficient. The employer's experience rating was based in part on the number of past meritorious claims. The Court of Appeal held that the Insurance Commissioner's interpretation was entitled to deference because of agency expertise citing *Yamaha Corp. of Am. v. State Bd. of Equalization (1998) 19 Cal. 4th 1, 12, 78 Cal. Rptr 2d 1, 960 P.2d 1031* (deference based on agency expertise, when agency has comparative interpretive advantage over courts, agency interpretation formally adopted and followed consistently), and this expertise driven interpretation is controlling notwithstanding that the language of the regulation could be read another way [*Simi Corporation v. Garamendi (2003) 109 Cal. App. 4th 1496, 1511-1512, 1 Cal. Rptr. 3d 207]* .

When there is no agency interpretation of a relevant statutory provision at issue in judicial review, the court will treat the issue of interpreting the statute as a question of law, and will apply the independent judgment (de novo) standard of review [*McKee v. Orange Unified School Dist. (2003) 110 Cal. App. 4th 1310, 1316, 2 Cal. Rptr. 3d 774]* . When appellate courts interpret statutes and apply the statutes to undisputed facts, the interpretive issue is treated as a question of law that is subject to the do novo review standard. When interpreting the statute, the appellate court will look to the language of the statute, as well as the statutory purpose. The legislative intent of the statute may be determined from the language of the statute if it is clear and unambiguous, but if not, the literal meaning will give way to interpretation based on legislative intent, and harmonizing all related provisions of the statute [*State of California ex rel Nee v. Unumprovident Corp. (2006) 140 Cal. App. 4th 442, 445-446, 44 Cal. Rptr. 3d 491]* . Appellate courts interpret agency regulations using similar principles of construction and interpretation as are sued in interpreting statutes, including looking at the plain meaning of the text, looking at the context of the language, the purpose of the regulation, the history and background of the regulation, and the enforcing agencies interpretation of the regulation [*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2003) 109 Cal. App. 4th 1687, 1695-1696, 1 Cal. Rptr. 3d 339]* .

The Court of Appeal reversed the decision of the ABC (Board) which had reversed the order of the DABC (Department) suspending a liquor licensee's license for 10 days. The suspension was ordered because the licensee sold alcohol to an underage decoy in violation of *Bus. & Prof. Code § 25658(a)*. The Board reversed the suspension because the police officer had the decoy (an underage person purchasing alcohol) make the required face to face identification of the alcohol seller outside the store premises, not inside. The Board interpreted *Cal. Code Reg., tit 4. § 141(b)(5)* to require an inside the premises face to face identification. The Board reversed the suspension because of lack of compliance with the regulation. The Court of Appeal rejected the Board's interpretation, and held that the plain language of the regulation, as well as its history, did not support an inside the store premises identification requirement. The Court of Appeal annulled the Board decision, and remanded the action back to the Board to reinstate the license suspension. The Court of Appeal used similar principles, plain language, and history of the regulation, to decide the regulation interpretation question as would be used to decide a question of statutory interpretation. The court did not defer to the agency interpretation nor did it rely on agency expertise [*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2003) 109 Cal. App. 4th 1687, 1696-1698, 1 Cal. Rptr. 3d 339]* .

Cities must comply with applicable provisions of state law when approving housing development projects. The appellate courts determine whether those provisions of law are applicable to the city's approval process. The courts will interpret the language of the statute to determine the legislative intent. The statutory language is examined in context of the overall statute, and the plain meaning of the words of the statute will be followed in most circumstances. When there

is more than one reasonable interpretation of the language of the statute, the courts will also look at the purpose of the statute, legislative history, and public policy [*Coalition of Concerned Communities, Inc. v. City of Los Angeles (2004) 34 Cal 4th 733, 737-738, 21 Cal. Rptr. 3d 676, 101 P. 3d 563* (Mello Act affordable housing requirements did not apply to City of Los Angeles's approval of housing development project in coastal zone because no housing was to be built within coastal zone); *Elsner v. Uveges (2004) 34 Cal. 4th 915, 929, 938, 22 Cal. Rptr. 3d 530, 102 P. 3d 915* (employee of roofing subcontractor was injured on job while working on scaffolding. Employee filed third-party tort lawsuit against general contractor. Employee sought to offer evidence of Cal-OSHA regulations relating to scaffolding standards to establish a negligence per se standard of care, and shift burden of proof to general contractor defendant. California Supreme Court interpreted the statutory language and held that the statutory change in the law could not be applied retroactively to a pre-amendment accident)]. Similarly, the California Supreme Court held that amendments to *Labor Code Section 1720(a)(1)* which changed the definition of "public works" for purposes of the prevailing wage laws applied prospectively not retroactively [*City of Long Beach v. Dep't of Industrial Relations (2004) 34 Cal. 4th 942, 953, 22 Cal. Rptr. 3d 518, 102 P.3d 904* (statutory amendments are presumed to have prospective application only unless legislation clearly provides for retroactive application)].

The Court of Appeal reversed the trial court decision granting a writ of mandate setting aside the granting of a water quality discharge permit to a refinery. The trial court decision was based on the lack of a numeric water quality based effluent limit for dioxin discharges. The trial court granted the writ of mandate on the grounds that controlling federal regulations required a numeric limit. The court of Appeal reversed the trial court decision, and concluded that the federal regulation did not require a numeric limit in all cases. The Court based this conclusion on a California water quality state agency decision which interpreted federal water quality law to not require numeric limits in permits in all cases. The water quality agencies determined that the challenged permit would be issued without a numeric limit because such a limit was not feasible. Therefore the permit was not invalid for failure to contain a numeric limit on discharges [*Communities for a Better Environment v. State Water Resources Control Board (2003) 109 Cal. App. 4th 1089, 1103-1105, 1 Cal. Rptr. 3d 76]* .

Abuse of discretion by an agency may be shown when the agency fails to act consistently in applying its governing statutes, and the agency's actions result in prejudice to a party [*Sierra Club v. State Bd. of Forestry (1994) 7 Cal. 4th 1215, 1236, 32 Cal. Rptr. 2d 19, 876 P.2d 505* ; *Schoen v. Department of Forestry & Fire Protection (1997) 58 Cal. App. 4th 556, 565, 68 Cal. Rptr. 2d 343]* .

The California Court of Appeal held that the California Coastal Commission abused its discretion in including an ocean boater's right to a view of the coastline as a factor in regulating development in the coastal zone. This has not been recognized by the California legislature as a valid factor to consider, and thus the commission has not been given statutory authority to consider this factor. The court of appeal reversed the denial of a petition for a writ of administrative mandate sought by a landowner who challenged the imposition of special conditions on the owner's coastal development permit to build a residence. The court of appeal ordered the issuance of a peremptory writ of mandate setting aside the commission decision, and requiring the commission to rehear the matter without considering the invalid factor [*Schneider v. Cal. Coastal Comm'n (2006) 140 Cal. App. 4th 1339, 1341-1343, 44 Cal. Rptr. 3d 867]* .

[4] Agency Decisions to Admit and Exclude Evidence

[a] Admissibility of Evidence in Administrative Proceedings

Administrative proceedings are not governed by the technical rules of evidence that apply in civil proceedings [*Jenner v. City Council (1958) 164 Cal. App. 2d 490, 496, 331 P.2d 176* ; *see* Ch. 473F, *Agency Adjudication Hearings* , for discussion of rules of evidence in administrative proceedings]. In proceedings subject to the APA [*Gov. Code § 11340 et seq.*], relevant evidence is admissible, unless privileged, if it is the sort of evidence on which responsible people are accustomed to rely in the conduct of serious affairs [*Gov. Code § 11513(c)*; *see* Ch. 473, *Public Agency Adjudication* ,

for overview of agency adjudication].

Under the new act, hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but over timely objection hearsay standing alone is not sufficient to support a finding unless it would be admissible over objection in civil actions. The objection is timely if made before submission of the case or on reconsideration [*Gov. Code § 11513(d)* (operative July 1, 1997); *see* Stats. 1995, ch. 938, § 40]. This statutory amendment expressly requires a timely objection and therefore resolves a split in the courts over whether an objection was required for administrative hearsay to be insufficient to support fact findings other than when it is used to supplement or explain other evidence. This split existed under former *Gov. Code § 11513(c)*, as interpreted by the various districts of the California Court of Appeal regarding whether administrative hearsay that has not been objected to may be used to support a finding of fact [*see Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 546, 92 Cal. Rptr. 525* (hearsay evidence that has not been objected to serves to shift the burden of producing evidence of the existence or nonexistence of fact disclosed); *Martin v. State Personnel Bd. (1972) 26 Cal. App. 3d 573, 582-583, 103 Cal. Rptr. 306* (contrary to *Borror* and other cases, the absence of objection to hearsay will not support a finding of fact)].

The general rule in administrative matters not governed by the APA is that hearsay alone will not sustain a finding [*Walker v. City of San Gabriel (1942) 20 Cal. 2d 879, 881, 129 P.2d 349* ; *Layton v. Merit System Commission (1976) 60 Cal. App. 3d 58, 67, 131 Cal. Rptr. 318]* . Some courts have held that hearsay admitted without objection is sufficient to sustain a finding [*Frudden Enterprises, Inc. v. Agricultural Labor Relations Bd. (1984) 153 Cal. App. 3d 262, 270, 201 Cal. Rptr. 371]* .

For a general consideration of evidence in administrative hearings and a detailed discussion of the admission of hearsay in administrative proceedings, see Ch. 473F, *Agency Adjudication Hearings* .

[b] Use of Illegally Obtained Evidence

The due process requirements of criminal law apply in administrative proceedings only when the proceedings (1) can result in the deprivation of liberty, property, or property rights, and (2) bear a close resemblance to the aims and objectives of criminal law enforcement [*see Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 539-542, 92 Cal. Rptr. 525* (real estate licensee not entitled to appointed counsel in disciplinary proceedings); *Patty v. Board of Medical Examiners (1973) 9 Cal. 3d 356, 367, 107 Cal. Rptr. 473, 508 P.2d 1121* (defense of entrapment available in license revocation proceeding)]. Nevertheless, in reviewing an administrative decision the court may consider whether evidence used against the petitioner was obtained in violation of state [*see Cal. Const., art. I, § 13*] or federal [*see U.S. Const., amend. IV*] constitutional prohibitions against unreasonable searches and seizures, and, if so, whether use of the evidence deprived the petitioner of due process of law [*see Emslie v. State Bar (1974) 11 Cal. 3d 210, 229-230, 113 Cal. Rptr. 175, 520 P.2d 991* (disbarment of attorney); *Goldin v. Public Utilities Commission (1979) 23 Cal. 3d 638, 669, 153 Cal. Rptr. 802, 592 P.2d 289* (agency not permitted to use illegally seized evidence in proceeding to terminate business telephone service); *Western States Petroleum Association v. State Department of Health Services (2002) 99 Cal. App. 4th 999, 1006-1007, 122 Cal. Rptr. 2d 117]* .

In determining whether the exclusionary rule should apply in administrative proceedings, the courts consider whether the particular proceedings bear a close resemblance to the aims and objectives of criminal law enforcement and whether, in light of its rationale, the rule is necessary to prevent the state from profiting by its own wrong, or to prevent law enforcement officers from violating the constitutional rights of individuals [*Emslie v. State Bar (1974) 11 Cal. 3d 210, 226-227, 113 Cal. Rptr. 175, 520 P.2d 991* ; for discussion of application of the exclusionary rule in administrative hearings, *see* Ch. 473F, *Agency Adjudication Hearings*]. The courts must decide on a case-by-case basis whether to apply the rule [*Emslie v. State Bar (1974) 11 Cal. 3d 210, 229, 113 Cal. Rptr. 175, 520 P.2d 991* (exclusionary rule inapplicable in attorney disciplinary proceedings); *see Pating v. Board of Medical Quality Assurance (1982) 130 Cal. App. 3d 608, 624-625, 182 Cal. Rptr. 20* (physician could not assert exclusionary rule to prevent introduction of medical records obtained by investigator without administrative subpoena in license revocation proceedings)]. If exclusion of

illegally obtained evidence would have no deterrent effect on the state or its officers, due process does not generally require that the evidence be excluded [*Emslie v. State Bar (1974) 11 Cal. 3d 210, 229, 113 Cal. Rptr. 175, 520 P.2d 991* ; for detailed consideration of the exclusionary rule, *see* California Criminal Defense Practice, Ch. 20, *Principles of Search and Seizure* ; Ch. 21, *Search Warrants* ; Ch. 22, *Warrantless Searches* ; and Ch. 23, *Search and Seizure Motions* (Matthew Bender)].

[c] Results of Prior Criminal and Civil Proceedings

Unless a statute provides that a prior criminal conviction is sufficient to support disciplinary action, evidence of such a conviction is admissible in administrative proceedings on the same basis as other hearsay evidence--that is, it may be used only to explain or supplement other evidence in the record [*see* *Manning v. Watson (1952) 108 Cal. App. 2d 705, 711, 239 P.2d 688* (although hearsay, record of conviction admissible because conviction in federal court is kind of evidence on which responsible persons rely)].

A guilty plea in a criminal proceeding may be admissible in a subsequent administrative proceeding (for example, a license revocation hearing) as an admission against interest [*Arenstein v. California State Bd. of Pharmacy (1968) 265 Cal. App. 2d 179, 190-191, 71 Cal. Rptr. 357]* . In mandate proceedings in which the court exercises its independent judgment on the evidence, the court must assess the weight and significance of the guilty plea and any testimony offered to explain the circumstances under which it was given [*Arenstein v. California State Bd. of Pharmacy (1968) 265 Cal. App. 2d 179, 190-191, 71 Cal. Rptr. 357* ; *see § 474B.16[4]* (independent judgment test)].

Whether previous acts committed by a party to a disciplinary proceeding show moral turpitude is a question of law to be decided by an appellate court [*Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 74 n.7, 64 Cal. Rptr. 785, 435 P.2d 553]* . Neither exoneration in a prior civil action nor acquittal in a prior criminal proceeding is res judicata in a subsequent administrative license proceeding [*Lundborg v. Director Dept. Professional etc. Standards (1967) 257 Cal. App. 2d 141, 146, 64 Cal. Rptr. 650]* .

[5] Agency Penalty Determinations

Administrative agencies are usually vested with discretion to fix penalties for infractions within their jurisdiction. When an agency exercises its discretion to fix a penalty, the courts may not disturb the penalty unless the agency has committed a manifest abuse of discretion [*Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 217, 124 Cal. Rptr. 14, 539 P.2d 774* ; *Barber v. State Personnel Bd. (1976) 18 Cal. 3d 395, 404, 134 Cal. Rptr. 206, 556 P.2d 306* ; *Richardson v. Board of Supervisors (1988) 203 Cal. App. 3d 486, 494-495, 250 Cal. Rptr. 1* ; *Zink v. City of Sausalito (1977) 70 Cal. App. 3d 662, 665, 139 Cal. Rptr. 59]* . This holds true even when the court is authorized to exercise its "independent judgment" in reviewing the evidence [*Cadilla v. Board of Medical Examiners (1972) 26 Cal. App. 3d 961, 966-967, 103 Cal. Rptr. 455* ; for discussion of the "independent judgment" test, *see § 474B.16[4]*]. In mandate proceedings, the court is not authorized to substitute its own judgment for that of the agency [*Code Civ. Proc. § 1094.5(f)* (order granting writ shall not limit or control in any way discretion legally vested in agency); *Cadilla v. Board of Medical Examiners (1972) 26 Cal. App. 3d 961, 966-967, 103 Cal. Rptr. 455* ; *Cummings v. Civil Service Commission (1996) 40 Cal. App. 4th 1643, 1653-1654, 47 Cal. Rptr. 2d 775]* . Thus, if reasonable minds might differ as to the propriety of the penalty imposed, the agency did not abuse its discretion [*Harris v. Alcoholic Bev. etc. Appeals Bd. (1965) 62 Cal. 2d 589, 594, 43 Cal. Rptr. 633, 400 P.2d 745]* .

When an appellate court reviews a trial court's judgment granting or refusing to grant a writ of administrative mandate based on a challenge to an agency's exercise of discretion in imposing a penalty, the appellate court uses the same scope of review as the trial court, and must determine whether the administrative agency properly exercised its discretion. The appellate courts review, on a de novo basis, the agency's exercise of discretion in imposing a penalty [*Osburn v. Department of Transportation (1990) 221 Cal. App. 3d 1339, 1344, 270 Cal. Rptr. 761* ; *Talmo v. Civil Service Com. (1991) 231 Cal. App. 3d 210, 227-228, 282 Cal. Rptr. 240]* .

An administrative penalty may not be set aside on the ground that it was determined after consideration of violations not charged in the accusation and not considered on the question of whether discipline should be imposed [*see Ralph Williams Ford v. New Car Dealers Policy & Appeals Bd. (1973) 30 Cal. App. 3d 494, 499-500, 106 Cal. Rptr. 340 , cert. denied, 414 U.S. 974, 94 S. Ct. 283, 38 L. Ed. 2d 217* (once agency found charged violations had taken place, it was entitled to consider related violations to evaluate what administrative penalty and conditions of probation would be suitable)]. Uncharged offenses may be considered for purposes of penalty determination, although those offenses may not be considered on the threshold question of whether discipline should be imposed [*see Ralph Williams Ford v. New Car Dealers Policy & Appeals Bd. (1973) 30 Cal. App. 3d 494, 499-500, 106 Cal. Rptr. 340 , cert. denied, 414 U.S. 974, 94 S. Ct. 283, 38 L. Ed. 2d 217* (related violations considered in determining penalty)].

Although an agency's discretion to determine penalties may be broad, it is never unlimited. Agency discretion must always be guided by fixed legal principles and exercised in such a way as to serve the ends of substantial justice [*Harris v. Alcoholic Bev. etc. Appeals Bd. (1965) 62 Cal. 2d 589, 594-595, 43 Cal. Rptr. 633, 400 P.2d 745]* . If no reasonable person could have determined that the penalty imposed by an agency was appropriate, its imposition constitutes an abuse of discretion [*Wingfield v. Fielder (1972) 29 Cal. App. 3d 209, 221, 105 Cal. Rptr. 619]* . Abuse of discretion may be found, for example, when an agency has imposed the highest allowable penalty despite the existence of mitigating factors [*see Magit v. Board of Medical Examiners (1961) 57 Cal. 2d 74, 87-88, 17 Cal. Rptr. 488, 366 P.2d 816* (abuse of discretion to revoke license of physician whose decision to permit unlicensed physicians to administer anesthetics under his control resulted from good faith reliance on advice of counsel); *Harris v. Alcoholic Bev. etc. Appeals Bd. (1965) 62 Cal. 2d 589, 595, 43 Cal. Rptr. 633, 400 P.2d 745* (abuse of discretion to revoke beer and wine license when agency's own schedule of penalties provided for maximum 75-day suspension for proven offense)].

The overriding consideration in determining whether the penalty imposed on a public employee was so excessive as to constitute an abuse of discretion is the extent to which the employee's conduct resulted in, or if repeated is likely to result in harm, to the public service [*Haney v. City of Los Angeles (2003) 109 Cal. App. 4th 1, 11-12, 134 Cal. Rptr. 2d 411* (police department's discharge of police officer was justified by harm to public interest standard, as police officer showed dishonesty and lack of integrity by holding Memorial Day barbecue during work duty while also falsifying police reports related to officer's duties on day of barbecue); *Deegan v. City of Mountain View (1999) 72 Cal. App. 4th 37, 52, 84 Cal. Rptr. 2d 690]* . Other relevant factors include the circumstances surrounding the misconduct and the likelihood of a recurrence [*Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 218, 124 Cal. Rptr. 14, 539 P.2d 774* ; *Richardson v. Board of Supervisors (1988) 203 Cal. App. 3d 486, 494, 250 Cal. Rptr. 1]* .

If the court concludes that an agency abused its discretion in assessing a penalty, it may remand the matter to the agency with instructions to reconsider the case in light of the court's order and to take such further action as is specially enjoined on it by law [*Code Civ. Proc. § 1094.5(f)*; *Harris v. Alcoholic Bev. etc. Appeals Bd. (1965) 62 Cal. 2d 589, 594, 43 Cal. Rptr. 633, 400 P.2d 745]* . Moreover, if the court determines that one of the agency's finding was unsupported by the evidence, it should ordinarily remand the case for redetermination of the penalty [*see Bonham v. McConnell (1955) 45 Cal. 2d 304, 306, 288 P.2d 502* ; *Neely v. California State Personnel Bd. (1965) 237 Cal. App. 2d 487, 494, 47 Cal. Rptr. 64]* , unless, on the basis of the administrative record, it determines beyond any real doubt that the agency would have imposed the same penalty on the findings approved by the court [*Strode v. Board of Medical Examiners (1961) 195 Cal. App. 2d 291, 304, 15 Cal. Rptr. 879]* .

[6] Conditioning Administrative Rights on Waiver of Constitutional Rights

Administrative agencies may not condition or deny rights and privileges on the basis of a party's exercise of constitutional rights unless a compelling state interest justifies the limitation of those rights and no narrower restriction can be imposed [*see Bekiaris v. Board of Education (1972) 6 Cal. 3d 575, 585-586, 100 Cal. Rptr. 16, 493 P.2d 480* (unconstitutional to condition employment of public school teacher on absention from off-duty political activity); *Fort*

v. Civil Service Commission (1964) 61 Cal. 2d 331, 334-338, 38 Cal. Rptr. 625, 392 P.2d 385 (unconstitutional to condition county employment on absention from off-duty political activity)]. Special scrutiny is required when an administrative decision affects fundamental rights [*Bekiaris v. Board of Education (1972) 6 Cal. 3d 575, 591-592, 100 Cal. Rptr. 16, 493 P.2d 480]* . When an aggrieved party presents evidence tending to show that an agency's decision resulted from official dissatisfaction with his or her exercise of constitutional rights, the trial court in mandate proceedings must make an independent judicial determination of the ultimate question of whether the agency acted for the reasons stated in its findings or because of the aggrieved party's exercise of constitutional rights [*Bekiaris v. Board of Education (1972) 6 Cal. 3d 575, 590, 100 Cal. Rptr. 16, 493 P.2d 480]* . On appeal from the decision of the trial court, the appellate court's scope of review is identical to that of the trial court, except that it must uphold the trial court's determination as to the reason for the dismissal if that determination is supported by substantial evidence in light of the entire record [*Bekiaris v. Board of Education (1972) 6 Cal. 3d 575, 587, 100 Cal. Rptr. 16, 493 P.2d 480]* .

[7] Constitutionality of Enabling Act

The writ of mandate appears to be available in appropriate cases to challenge legislation creating an administrative agency or authorizing an agency to perform certain functions. Such a challenge may be directed to the constitutionality of the enabling act, asserting either that the agency has no jurisdiction to act or that the agency's power was unconstitutionally applied to the aggrieved person [*see* *State of California v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 250-251, 115 Cal. Rptr. 497, 524 P.2d 1281* (land developer challenged constitutionality of California Coastal Commission)]. Alternatively, it may involve a procedural claim that in acting pursuant to the legislative directive the agency abused its discretion by violating due process and thereby failed to proceed as required by law, or denying the petitioner a fair trial [*see Code Civ. Proc. § 1094.5(b)*; for requirement of fair trial, *see § 474B.12*; for a discussion of due process issues, *see* Ch. 470A, *Due Process Restrictions on Public Agencies*]. If a party wishes to mount a general challenge to the constitutionality of a statute, the appropriate action is a declaratory judgment suit, not a petition for a writ of administrative mandate [*State of California v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 251, 115 Cal. Rptr. 497, 524 P.2d 1281* , *12 Cal. 3d 237, 115 Cal. Rptr. 497, 524 P.2d 1281]* . If the party asserts only that the statute is unconstitutional as applied to him or her, however, the issue is properly raised before the agency in mandate proceedings [*State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 251, 524 P.2d 1281* ; *Taylor v. Swanson (1982) 137 Cal. App. 3d 416, 418, 187 Cal. Rptr. 111]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceAdmissibilityHearsayAdministrative LawAgency AdjudicationHearingsEvidenceAdmissibilityPrivilegeAdministrative LawAgency InvestigationsConstitutional RightsSearch & SeizureAdministrative LawJudicial ReviewStandards of ReviewAbuse of DiscretionAdministrative LawJudicial ReviewStandards of ReviewDe Novo ReviewAdministrative LawJudicial ReviewStandards of ReviewRule InterpretationAdministrative LawJudicial ReviewStandards of ReviewStatutory InterpretationConstitutional LawBill of RightsFundamental RightsSearch & SeizureExclusionary RuleConstitutional LawBill of RightsFundamental RightsSearch & SeizureScope of ProtectionConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessSelf-Incrimination Privilege

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Chapter 474B STANDARDS IN REVIEWING AGENCY DECISIONS
PART II. LEGAL BACKGROUND
A. Administrative Mandate

41A-474B California Forms of Pleading and Practice--Annotated § 474B.15

§ 474B.15 Order or Decision Supported by Findings

[1] Whether Findings Made by Agency

An abuse of discretion may be established by showing that the agency's order or decision was not supported by findings [*Code Civ. Proc. § 1094.5(b)*; *see* Ch. 473G, *Agency Adjudication Decisions* (formal and substantive requirements of findings)]. Findings are necessary to bridge the analytic gap between the raw evidence and the ultimate decision so that the grounds on which the agency acted will be clearly disclosed and adequately sustained [*Securities and Exchange Com. v. Chenery Corp., (1942) 318 U.S. 80, 94, 63 S. Ct. 454, 87 L. Ed. 626* ; *Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 515, 113 Cal. Rptr. 836, 522 P.2d 12*]. Findings are required not only by statute [*Code Civ. Proc. § 1094.5(b)*], but also by principles of fundamental fairness, because findings enable the parties to determine whether (and on what basis) they should seek review and, if review is granted, they apprise the court of the basis for the agency's decision [*Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 515-517, 113 Cal. Rptr. 836, 522 P.2d 12* ; *In re Sturm (1974) 11 Cal. 3d 258, 267, 113 Cal. Rptr. 361, 521 P.2d 97* ; *Mahoney v. San Francisco City etc. Employees' Ret. Bd. (1973) 30 Cal. App. 3d 1, 3-6, 106 Cal. Rptr. 94]* .

Further, findings facilitate orderly analysis by the agency itself and foster a public view of the administrative decisionmaking process as careful and reasoned [*Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 516, 113 Cal. Rptr. 836, 522 P.2d 12]* . If a reviewing court determines that the agency has failed to make findings, it should remand the case to the agency for appropriate findings [*see* *Fairfield v. Superior Court (1975) 14 Cal. 3d 768, 779, 122 Cal. Rptr. 543, 537 P.2d 375* (administrators' depositions not adequate substitute for findings); *Glendale Memorial Hosp. & Health Center v. Department of Mental Health (2001) 91 Cal. App. 4th 129, 139-141, 110 Cal. Rptr. 2d 101* (absence of specific findings prevents meaningful judicial review under *Code Civ. Proc. § 1094.5*, and appropriate remedy is to remand to agency to make proper findings)].

[2] Sufficiency of Agency Findings

Although an administrative agency's findings need not be stated with the formality required of judicial proceedings, they must be clear enough to be understandable and complete enough to enable the reviewing court to ascertain the basis for the agency's decision [*Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d*

506, 514, 113 Cal. Rptr. 836, 522 P.2d 12 ; *In re Sturm (1974) 11 Cal. 3d 258, 272, 113 Cal. Rptr. 361, 521 P.2d 97* ; *Eureka Teachers Assn. v. Board of Education (1988) 199 Cal. App. 3d 353, 367-368, 244 Cal. Rptr. 240]* . In the absence of more formal findings, the courts have held the following to be sufficient to constitute required findings:

- A summary of factual data [*Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 514, 113 Cal. Rptr. 836, 522 P.2d 12]* .

- The language of a motion [*Hamilton v. Board of Supervisors (1969) 269 Cal. App. 2d 64, 67-68, 75 Cal. Rptr. 106]* .

- A reference in a motion to a staff report [*McMillan v. American Gen. Fin. Corp. (1976) 60 Cal. App. 3d 175, 184, 131 Cal. Rptr. 462]* .

Oral remarks of agency members preserved in a hearing transcript have been held insufficient, however, since such remarks reflect the views of the individual members rather than the agency's findings [*Pacifica Corp. v. City of Camarillo (1983) 149 Cal. App. 3d 168, 179, 196 Cal. Rptr. 670]* . Also insufficient are findings that merely repeat the language of governing legislation [*see* *Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 517 n.16, 113 Cal. Rptr. 836, 522 P.2d 12]* . To facilitate judicial review, the findings must reveal the agency's analytic processes by setting forth findings of fact on subissues building toward the ultimate statutory conclusions [*City of Rancho Palos Verdes v. City Council (1976) 59 Cal. App. 3d 869, 889, 129 Cal. Rptr. 173]* . The California Court of Appeal held that the Board of Accountancy made adequate fact findings that met the *Topanga* standard of "bridging the analytic gap between the raw evidence and the ultimate decision" and provided an adequate factual basis for the Board's disciplinary decision [*McBride v. California Board of Accountancy (2005) 130 Cal. App. 4th 518, 530-532, 30 Cal. Rptr. 3d 287]* .

[3] Decision Supported by Implied Findings

In appropriate cases, reviewing courts may imply findings if necessary to uphold agency action [*see, e.g.,* *City of Carmel-by-the-Sea v. Board of Supervisors (1977) 71 Cal. App. 3d 84, 91-92, 139 Cal. Rptr. 214* (requirements of findings may be satisfied by something other than written findings so labeled)]. While full findings are required on all material issues, failure to make an express finding on an issue will not compel the reviewing court to overturn the agency's decision if the missing finding would result, by necessary implication, from the express findings that are made [*Golde v. Fox (1979) 98 Cal. App. 3d 167, 179, 159 Cal. Rptr. 864]* . However, it is uncertain how far the courts will go in inferring missing findings in view of the clearly stated rule that findings are required by fundamental fairness [*see* *Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 515-517, 113 Cal. Rptr. 836, 522 P.2d 12* (orderly functioning of process of review requires that grounds on which agency acted be clearly disclosed); *In re Sturm (1974) 11 Cal. 3d 258, 267, 113 Cal. Rptr. 361, 521 P.2d 97* (findings indispensable as basis for review); *see also* [1], *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsContentsAdministrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewReviewabilityFactual DeterminationsAdministrative LawJudicial ReviewStandards of ReviewAbuse of Discretion

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41A-474B California Forms of Pleading and Practice--Annotated § 474B.16

§ 474B.16 Findings Supported by Evidence

[1] Abuse of Discretion for Lack of Evidence

Prejudicial abuse of discretion may be established by showing that the agency's findings are not supported by the evidence [*Code Civ. Proc. § 1094.5(b)*]. When it is claimed that the findings are not supported by the evidence, the court's role in reviewing the agency's action depends on the nature of the case. If the case is one in which the court is authorized by law to exercise its independent judgment on the evidence abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence [*Code Civ. Proc. § 1094.5(c)*; *see* [4], *below* ("independent judgment" test)]. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the whole record [*Code Civ. Proc. § 1094.5(c)*; *see* [5], *below* ("substantial evidence" test)].

When a trial court exercises independent judgment review of agency fact findings, the trial court is required to give a strong presumption of correctness to the agency's fact findings. This means that when the trial court exercises independent judgment review, the trial court is free to substitute its own findings, but only after first giving due respect to the agency's findings. The enactment of *Code Civ. Proc. § 1094.5(c)* by the California legislature indicates legislative acceptance of this approach [*Fukuda v. City of Angels (1999) 20 Cal. 4th 805, 817-819, 85 Cal. Rptr. 2d 696, 977 P.2d 693* ; *Mason v. Office of Administrative Hearings (2001) 89 Cal. App. 4th 1119, 1138-1139, 108 Cal. Rptr. 2d 102]* .

[2] Burden of Proof

When a trial court exercises independent judgment review of agency fact findings, the party seeking to overturn agency action has the burden of proof of showing that agency fact findings are not supported by the weight of the evidence [*Sager v. County of Yuba (2007) 156 Cal. App. 4th 1049, 1053-1054, 68 Cal. Rptr. 3d 1* (former deputy sheriff that challenged county retirement decision had the burden of proof to show that the county's decision was not supported by the evidence)]. The burden of proof standard codified in *Evid. Code § 500* applies to writ proceedings under *Code Civ. Proc. § 1094.5*. The party seeking review has the burden of proof, to persuade, and not merely the burden of production, to come forward with evidence [*Fukuda v. City of Angels (1999) 20 Cal. 4th 805, 819-821, 85 Cal. Rptr. 2d 696, 977*

P.2d 693] .

In administrative proceedings, as in ordinary civil actions, the party asserting the affirmative generally has the burden of proof, including both the initial burden of going forward with the evidence and the burden of persuasion by a preponderance of the evidence [*So. Cal. Jockey Club v. Cal. etc. Racing Bd. (1950) 36 Cal. 2d 167, 177, 223 P.2d 1* (party seeking permit for construction of horse racing track had burden of showing at least that public interest and purposes of horse racing law would not be detrimentally affected by grant of application); *McCoy v. Board of Retirement (1986) 183 Cal. App. 3d 1044, 1051-1052 n.5, 228 Cal. Rptr. 567* (party seeking service-connected disability retirement allowance had burden of proving by preponderance of evidence that his hypertension was service-connected)]. Thus, unless the governing statute provides otherwise [*see, e.g.,* *Fascination, Inc. v. Hoover (1952) 39 Cal. 2d 260, 262, 246 P.2d 656* (ordinance provided that license to operate amusement game would be granted unless appropriate departments of city government determined that business for which permit was sought would not comply with applicable laws and ordinances)], an applicant for a license or permit has the burden of establishing his or her qualifications [*Savelli v. Board of Medical Examiners (1964) 229 Cal. App. 2d 124, 134, 40 Cal. Rptr. 171* , *cert. denied,* *380 U.S. 934, 85 S. Ct. 940, 13 L. Ed. 2d 821 (1965)]* .

Differing standards are used in proceedings concerning dismissal of a party from public employment and those regarding suspension or revocation of a professional license. In proceedings in which a party is contesting his or her dismissal from public employment, the administrative agency has the burden of proving the propriety of its action by a preponderance of the evidence, while the employee may defend against dismissal by establishing that the conduct for which he or she is dismissed was justified [*Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 204 n.19, 124 Cal. Rptr. 14, 539 P.2d 774* ; *see* *21 Ops. Cal. Atty. Gen. 132, 139 (1953)]* .

Unlike dismissal from public employment, which deprives the employee of a particular job, suspension or revocation of a professional license in effect takes away the licensee's right to practice the profession, and a higher standard of proof is required [*Gardner v. Commission on Professional Competence (1985) 164 Cal. App. 3d 1035, 1039-1040, 210 Cal. Rptr. 795* (proceedings for reinstatement of public high school teacher)]. Thus, in proceedings to suspend or revoke a professional license, the applicable standard of proof is clear and convincing proof to a reasonable certainty, and not a mere preponderance of the evidence [*Furman v. State Bar (1938) 12 Cal. 2d 212, 229, 83 P.2d 12* (attorney disbarment); *Ettinger v. Board of Medical Quality Assurance (1982) 135 Cal. App. 3d 853, 856, 185 Cal. Rptr. 601* (medical license suspension or revocation); *Small v. Smith (1971) 16 Cal. App. 3d 450, 457, 94 Cal. Rptr. 136* (real estate broker's license revocation)].

A claim that the agency used an incorrect standard of proof in disciplinary proceedings may not be raised for the first time at the hearing on the petition for a writ of mandate [*Milligan v. Hearing Aid Dispensers Examining Com. (1983) 142 Cal. App. 3d 1002, 1007-1008, 191 Cal. Rptr. 490* ; *see* *Morris v. Unemployment Ins. Appeals Bd. (1973) 34 Cal. App. 3d 1002, 1008, 110 Cal. Rptr. 630* (administrative error cannot be asserted in mandate proceedings unless it was first raised in agency proceedings)]. When the administrative record does not explicitly disclose the standard of proof applied by the hearing officer, the reviewing court presumes that the correct standard was applied [*Milligan v. Hearing Aid Dispensers Examining Com. (1983) 142 Cal. App. 3d 1002, 1007-1008, 191 Cal. Rptr. 490]* .

[3] Error in the Record

[a] Nature of Error Requirement

The court in mandate proceedings may not ordinarily consider evidence outside the administrative record [*Sierra Club v. California Coastal Comm'n (2005) 35 Cal. 4th 839, 863-864, 28 Cal. Rptr. 3d 316, 111 P. 3d 294* (California Supreme Court refused to consider arguments based on evidence that was not part of the administrative record before Commission, without a showing that the reasonable diligence or improper exclusion exceptions [*Code Civ. Proc. § 1094.5(e)*] were applicable, which showing was not made in this appeal)], and administrative error generally cannot be

asserted in mandate proceedings unless it was first raised in the agency proceedings [*Morris v. Unemployment Ins. Appeals Bd. (1973) 34 Cal. App. 3d 1002, 1008, 110 Cal. Rptr. 630* ; *see Code Civ. Proc. § 1094.5(e)* (evidence outside record may be considered only when court finds that in exercise of reasonable diligence evidence could not have been produced, or evidence was improperly excluded)]. The California Court of Appeal held that the superior court was correct in not considering evidence that was submitted for the first time in that court, but that had not been introduced into the administrative record before the Insurance Commissioner, when the trial court was evaluating the merits of the claims presented in the mandate proceeding. The mandate proceeding was brought to challenge the denial by the Insurance Commissioner of claims of former employees of an insurance company that was in conservatorship. The superior court offered to remand the case back to the Insurance Commissioner so that the evidence could be considered by the Commissioner. When that was rejected, the superior court ruled against the parties seeking a writ of mandate concluding that the denial of the claims was not an abuse of discretion based on the evidence presented before the Insurance Commissioner [*Garamendi v. Golden Eagle Ins. Co. (2005) 128 Cal. App. 4th 452, 459, 27 Cal. Rptr. 3d 239]* . Accordingly, a petitioner may have difficulty establishing that the agency committed prejudicial error not appearing in the record. If the court is persuaded that error not appearing in the record has prejudiced the petitioner, however, it can remand to the agency to correct the error or issue a peremptory writ of mandate commanding the agency to remedy its error [*see Code Civ. Proc. § 1094.5(f)*].

[b] Availability of Discovery to Obtain Information Not in Record

Reviewing courts will not grant discovery for the purpose of probing agency members as to their reasoning in taking the complained of action, even when the petitioner contends that he or she was denied a fair hearing [*Fairfield v. Superior Court (1975) 14 Cal. 3d 768, 774, 122 Cal. Rptr. 543, 537 P.2d 375]* . Discovery in mandate proceedings is available only if reasonably calculated to produce evidence admissible under *Code Civ.Proc. § 1094.5(e)* [*Fairfield v. Superior Court (1975) 14 Cal. 3d 768, 774, 122 Cal. Rptr. 543, 537 P.2d 375* ; *see § 474B.14[1]*].

[4] Applicability of Independent Judgment Test

[a] Decision Must Substantially Affect Fundamental, Vested Right

[i] Decisions of State Agency

Whether judicial review of an administrative decision should be restricted to determining whether the decision is supported by "substantial evidence" on the whole record or should be extended to an "independent examination" by the court depends on whether the decision affects a vested, fundamental right of the individual [*Bixby v. Pierno (1971) 4 Cal. 3d 130, 144, 93 Cal. Rptr. 234, 481 P.2d 242* ; *Topanga Assn. for a Scenic Community v. County of Los Angeles (1989) 214 Cal. App. 3d 1348, 1356 n.4, 263 Cal. Rptr. 214* ; *see Code Civ. Proc. § 1094.5(c)* (independent judgment and substantial evidence tests)]. The courts must decide on a case-by-case basis whether an administrative decision substantially affects fundamental, vested rights and thus requires independent judgment review [*Bixby v. Pierno (1971) 4 Cal. 3d 130, 144, 93 Cal. Rptr. 234, 481 P.2d 242* ; *Merrill v. Department of Motor Vehicles (1969) 71 Cal. 2d 907, 915, 80 Cal. Rptr. 89, 458 P.2d 33]* . In determining which test to apply in a given case, the court must first consider whether the right in question is a fundamental and basic right that will suffer substantial interference by the action of the administrative agency [*Bixby v. Pierno (1971) 4 Cal. 3d 130, 144, 93 Cal. Rptr. 234, 481 P.2d 242]* . If it is such a fundamental right, the court must next determine whether the right is possessed by and vested in, or merely sought by, the individual [*Bixby v. Pierno (1971) 4 Cal. 3d 130, 144, 93 Cal. Rptr. 234, 481 P.2d 242]* . If the right is vested and fundamental, it is too important to be relegated exclusively to administrative extinction, and an administrative decision denying or revoking the right must be subjected to full and independent judicial review [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 34, 112 Cal. Rptr. 805, 520 P.2d 29* ; *Bixby v. Pierno (1971) 4 Cal. 3d 130, 144, 93 Cal. Rptr. 234, 481 P.2d 242]* .

The California Supreme has rejected arguments that it reconsider and abandon the rule of independent judgment review, noting that policy considerations for change in the standard of review should acted on by the Legislature rather than the

judiciary [*Fukuda v. City of Angels (1999) 20 Cal. 4th 805, 823-824, 85 Cal. Rptr. 2d 696, 977 P.2d 693]* .

The California Court of Appeal for the Fourth District held that the independent judgment standard of review applied to an appeal by two oil companies that challenged the decision of the director of conservation affirming the decision of the State Oil and Gas Supervisor directing the plugging and abandoning of 28 oil wells owned by the companies that were still in operation. The court held that the right to continue to operate oil wells was a fundamental right "of particular importance in the current economic climate" [*Termo Company v. Luther (2008) 169 Cal. App. 4th 394, 398-399, 86 Cal. Rptr. 3d 687*]. The right to operate oil wells was also vested because these oil wells had been either in operation or in idle status for many years. The order to plug and abandon the wells terminated the right to extract oil and that impacted the fundamental vested right [*Termo Company v. Luther (2008) 169 Cal. App. 4th 394, 398-399, 86 Cal. Rptr. 3d 687*]. When fundamental vested rights are affected, the independent judgment standard of review must be applied by the reviewing court. The statutory exception permitting the substantial evidence standard of review to be applied when the legislature mandates that standard of review does not apply here, because the governing statute, *Public Resources Code Section 3355*, does not clearly express a substantial evidence standard of review, and does not contain required due process procedural safeguards" [*Termo Company v. Luther (2008) 169 Cal. App. 4th 394, 398-399, 86 Cal. Rptr. 3d 687*]. *Public Resources Code Section 3355* did not expressly state that the substantial evidence standard of review applied to decisions of the director [*Termo Company v. Luther (2008) 169 Cal. App. 4th 394, 409-411, 86 Cal. Rptr. 3d 687]* . The statutory procedures contained in *Public Resources Code Sections 3350 to 3359* lacked some fundamentals of due process of law, including no separation of prosecutorial and adjudicatory functions, inadequate notice because no written notice of charges is required, no right to file an answer, no specification of burden of proof, and no right to have a hearing conducted consistent with the evidence code [*Termo Company v. Luther (2008) 169 Cal. App. 4th 394, 411-413, 86 Cal. Rptr. 3d 687*]. Because of the lack of procedural due process safeguards, the independent judgment standard of review must be applied to challenges of the decision of that director. Finally, the statement of decision requested by the appealing parties must be prepared on remand when the reviewing court applies the independent judgment standard of review [*Termo Company v. Luther (2008) 169 Cal. App. 4th 394, 413, 86 Cal. Rptr. 3d 687*].

[ii] Adjudicatory Decisions of Local Agency and Quasi-Judicial Decisions of State Agency

Formerly, adjudicatory decisions of local agencies and statewide agencies of limited territorial jurisdiction (as opposed to statewide agencies invested with judicial power by the California Constitution) were reviewable only under the "substantial evidence" test [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 35, 112 Cal. Rptr. 805, 520 P.2d 29]* . This rule was abrogated by the California Supreme Court in *Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 38, 112 Cal. Rptr. 805, 520 P.2d 29* . The Court held that, for purposes of judicial review, there is no rational or legal basis for distinguishing between these different kinds of agencies [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 32, 112 Cal. Rptr. 805, 520 P.2d 29]* . Thus, like decisions of other administrative agencies, decisions of local agencies must be reviewed under the independent judgment standard if they affect fundamental, vested rights; if they do not affect fundamental, vested rights, they are reviewable under the substantial evidence standard [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 32, 112 Cal. Rptr. 805, 520 P.2d 29]* . However, the rule is otherwise with respect to statewide agencies that are vested with quasi-judicial power by the state constitution [*see* [5][b], *below*].

[b] Fundamental Rights

The California Supreme Court has delineated two kinds of analysis necessary to determine whether a particular right is or is not fundamental. One kind of analysis is necessary to determine whether a right is fundamental for purposes of applying equal protection and due process rights; a second is necessary to determine if the courts must exercise independent judgment when reviewing administrative decisions [*Berlinghieri v. Department of Motor Vehicles (1983) 33 Cal. 3d 392, 394-395, 188 Cal. Rptr. 891, 657 P.2d 383]* . When determining which rights are fundamental for due process purposes, the court must consider whether: (1) the right is specifically guaranteed by the Constitution;

(2) the right affects the integrity of the political process; and (3) denial or limitation of the right would have a disproportionate impact on a discrete and insular minority [*Berlinghieri v. Department of Motor Vehicles (1983) 33 Cal. 3d 392, 397, 188 Cal. Rptr. 891, 657 P.2d 383* , *citing U.S. v. Carolene Products Co. (1938) 304 U.S. 144, 152-153 n.4, 58 S. Ct. 778, 82 L. Ed. 1234]* . When determining whether a right is fundamental for purposes of applying the independent judgment test to administrative decisions, the courts must determine whether the claimed right is important enough to individuals in their life situations to require independent judicial review of the evidence [*Berlinghieri v. Department of Motor Vehicles (1983) 33 Cal. 3d 392, 395, 188 Cal. Rptr. 891, 657 P.2d 383]* .

In applying the independent judgment test, the personal nature of the right is more important than its constitutional basis or its impact on a particular segment of society [*Berlinghieri v. Department of Motor Vehicles (1983) 33 Cal. 3d 392, 395, 188 Cal. Rptr. 891, 657 P.2d 383]* . The courtsmust consider (1) the impact of the right in human terms, (2) its importance to the person who seeks to protect it, as well as (3) its economic importance [*Interstate Brands v. Unemployment Ins. Appeals Bd. (1980) 26 Cal. 3d 770, 779, 163 Cal. Rptr. 619, 608 P.2d 707* ; *Bixby v. Pierno (1971) 4 Cal. 3d 130, 144-145, 93 Cal. Rptr. 234, 481 P.2d 242* ; *Kerrigan v. Fair Employment Practice Com. (1979) 91 Cal. App. 3d 43, 50, 154 Cal. Rptr. 29* , *cert. denied, 444 U.S. 930, 100 S. Ct. 273, 62 L. Ed. 2d 187]* . The crucial question is not how much harm or damage would result from a revocation or denial of the right, but the essential character of the right itself [*Dickey v. Retirement Board. (1976) 16 Cal. 3d 745, 751, 129 Cal. Rptr. 289, 548 P.2d 689* (right to disability benefits is fundamental as it directly affects employee's ability to support family while unable to work)]. Under this application, the following have been deemed fundamental rights:

- The right to unemployment compensation [*Thomas v. California Emp. Stab. Com. (1952) 39 Cal. 2d 501, 504, 247 P.2d 561]* .

- The right to continue to receive welfare and pension benefits [*Harlow v. Carleson (1976) 16 Cal. 3d 731, 734-735, 129 Cal. Rptr. 298, 548 P.2d 698* (welfare benefits); *Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 32, 112 Cal. Rptr. 805, 520 P.2d 29* (pension benefits); *O'Connor v. State Teachers' Retirement System (1996) 43 Cal. App. 4th 1610, 1620, 51 Cal. Rptr. 2d 540* (pension benefits); *see also Frink v. Prod (1982) 31 Cal. 3d 166, 180, 181 Cal. Rptr. 893, 643 P.2d 476* (denial of public assistance); *Cooper v. Kizer (1991) 230 Cal. App. 3d 1291, 1298-1299, 281 Cal. Rptr. 421, 282 Cal. Rptr. 492* (same)].

- The right to practice a trade or profession [*Hughes v. Board of Architectural Examiners (1998) 17 Cal. 4th 763, 788-789, 72 Cal. Rptr. 2d 624, 952 P.2d 641* (licensed architect); *Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 75, 64 Cal. Rptr. 785, 435 P.2d 553* (licensed physician); *Tringham v. State Board of Education (1958) 50 Cal. 2d 507, 508, 326 P.2d 850* (credentialed teacher); *Guymon v. Board of Accountancy (1976) 55 Cal. App. 3d 1010, 1011-1012, 128 Cal. Rptr. 137* (licensed accountant)].

- The right to continued public employment [*Logan v. Southern Cal. Rapid Transit Dist. (1982) 136 Cal. App. 3d 116, 125-126, 185 Cal. Rptr. 878* (bus driver for public transit district); *Pipkin v. Board of Supervisors (1978) 82 Cal. App. 3d 652, 661, 147 Cal. Rptr. 502* (deputy sheriff); *see also Kazensky v. City of Merced (1998) 65 Cal. App. 4th 44, 51-52, 76 Cal. Rptr. 2d 356* (local government position); *Webster v. Trustees of Cal. State University (1993) 19 Cal. App. 4th 1456, 1462-1463, 24 Cal. Rptr. 2d 150* (state university system position)].

- The right to continue to hold a driver's license [*Lake v. Reed (1997) 16 Cal. 4th 448, 456-457, 65 Cal. Rptr 2d 860, 940 P.2d 311* ; *Arburn v. Department of Motor Vehicles (2007) 151 Cal. App. 4th 1480, 1484, 61 Cal. Rptr. 3d 15* ; *Elizabeth D. v. Zolin (1993) 21 Cal. App. 4th 347, 353, 25 Cal. Rptr. 2d 852* ; *Coombs v. Pierce (1991) 1 Cal. App. 4th 568, 575-576, 2 Cal. Rptr. 2d 249* ; *Santos v. Department of Motor Vehicles (1992) 5 Cal. App. 4th 537, 546, 7 Cal. Rptr. 2d 10* ; *Berlinghieri v.*

Department of Motor Vehicles (1983) 33 Cal. 3d 392, 395, 188 Cal. Rptr. 891, 657 P.2d 383] .

- The right to remain at the California Youth Authority [*Mardesich v. California Youthful Offender Parole Bd. (1999) 69 Cal. App. 4th 1361, 1367, 82 Cal. Rptr. 2d 294]* .

- The right to review takings of property by local land use regulations [*Hensler v. City of Glendale (1994) 8 Cal. 4th 1, 16, 32 Cal. Rptr. 2d 244, 876 P.2d 1043]* .

- The right to continue to operate oil wells [*Termo Company v. Luther (2008) 169 Cal. App. 4th 394, 398-399, 86 Cal. Rptr. 3d 687*].

Purely economic rights, on the other hand, have been held entitled to less sensitive judicial scrutiny [*Bixby v. Pierno (1971) 4 Cal. 3d 130, 144-145, 93 Cal. Rptr. 234, 481 P.2d 242* (minority shareholders had no fundamental, vested right to prevent recapitalization of corporation by majority shareholders); *Temescal Water Co. v. Dept. of Public Works (1955) 44 Cal. 2d 90, 103, 280 P.2d 1* (water company had no fundamental, vested right to divert water from river); *Faulkner v. Cal. Toll Bridge Authority (1953) 40 Cal. 2d 317, 328-330, 253 P.2d 659* (owners of Bay Bridge bonds had no fundamental, vested right to prevent construction of second toll bridge); *SP Star Enterprises v. City of Los Angeles (2009) 173 Cal. App. 4th 459, 470-471, 93 Cal. Rptr. 3d 152* (business offering adult nude entertainment did not have a fundamental vested right in an application for a conditional use permit for the sale and on-site consumption of alcohol; the impact of any permitting decision was purely economic); *Jaramillo v. State Board for Geologists and Geophysicists (2006) 136 Cal. App. 4th 880, 889-891, 39 Cal. Rptr. 3d 170* (a small business owner who was not licensed geophysicist was found to have practiced geophysics in violation of the law because he did not have a valid license. The business owner challenged the agency decision, and the court of appeal held that the owner did not have a fundamental vested right to continue to operate his business, and thus the substantial evidence test applied to judicial review of agency fact findings); *Kawasaki Motors Corp. v. Superior Court (2000) 85 Cal. App. 4th 200, 203-204, 101 Cal. Rptr. 2d 863* (motorcycle franchisee that challenged order of New Motor Vehicle Board permitting franchisor to terminate franchise did not have a fundamental vested right to maintain franchise which was a purely economic privilege); *Concord Communities, L.P. v. City of Concord (2001) 91 Cal. App. 4th 1407, 1413-1414, 111 Cal. Rptr. 2d 511* (rent control board's decision to deny mobile home park owner's requested rent increases involved rights that were economic privileges which did not affect fundamental vested rights, and therefore substantial evidence test applied)]. However, an agency decision to suspend the business license of a food processor was subject to the independent judgment standard of review because the plaintiff's business license was determined to be a fundamental, vested right [*San Benito Foods v. Veneman (1996) 50 Cal. App. 4th 1889, 1897, 58 Cal. Rptr. 2d 571]* . Similarly, an agency decision to revoke a conditional use permit, when the holder of the permit had acted in reliance on the permit, is reviewed under the independent judgment standard of review because the conditional use permit was determined to be a fundamental vested right [*Malibu Mountains Recreation, Inc. v. County of Los Angeles (1998) 67 Cal. App. 4th 359, 369-370, 79 Cal. Rptr. 2d 25]* .

However, when the Contractor's State Licensing Board imposed a $350 fine against a licensed contractor for violations of the contractor licensing law, the Court of Appeal held that the independent judgment test did not apply because the contractor was not being deprived of the right to practice his trade, as would be the case if his license were being revoked; he was merely being fined for violating the law. The court noted that the existence of a public discipline record does not prevent the contractor from doing business in that occupation. Therefore, fining a contractor as the result of a discipline proceeding does not implicate a fundamental vested right, and thus the substantial evidence test applied to review the agency's fact findings [*Handyman Connection of Sacramento, Inc. v. Sands (2004) 123 Cal. App. 4th 867, 880-881, 20 Cal. Rptr. 3d 727]* .

[c] Vested Rights

The word "vested" generally refers to a right already possessed or legitimately acquired [*Harlow v. Carleson (1976)*

16 Cal. 3d 731, 735, 129 Cal. Rptr. 298, 548 P.2d 698] . For purposes of determining whether a right is vested in this sense, the courts have generally distinguished between applicants and recipients [*Harlow v. Carleson (1976) 16 Cal. 3d 731, 735, 129 Cal. Rptr. 298, 548 P.2d 698]* . In the licensing area, for example, the courts have held that an applicant for a license does not have vested rights in the license, while a person who already holds a license does [*Harlow v. Carleson (1976) 16 Cal. 3d 731, 735, 129 Cal. Rptr. 298, 548 P.2d 698]* .

Before the Supreme Court rendered its decision in [*Frink v. Prod (1982) 31 Cal. 3d 166, 181 Cal. Rptr. 893, 643 P.2d 476]* , the courts also held that an applicant for welfare benefits had no vested right to the benefits [*Taylor v. Martin (1972) 28 Cal. App. 3d 1057, 1059, 105 Cal. Rptr. 211]* , but that one who had already qualified for benefits and was receiving them did [*Harlow v. Carleson (1976) 16 Cal. 3d 731, 735, 129 Cal. Rptr. 298, 548 P.2d 698]* . In *Frink*, the Court abrogated the earlier distinction between applicants for and recipients of welfare benefits, holding that the right of the needy disabled to public assistance is as fundamental as the right of a recipient to continued benefits and, in both cases, administrative decisions denying benefits should be reviewed under the independent judgment test [*Frink v. Prod (1982) 31 Cal. 3d 166, 178-180, 181 Cal. Rptr. 893, 643 P.2d 476* ; *Cooper v. Kizer (1991) 230 Cal. App. 3d 1291, 1299, 281 Cal. Rptr. 421, 282 Cal. Rptr. 492* (independent judgment test applies to judicial review of agency decision denying claim for Medi-Cal benefits)].

The right to seek employment may, in appropriate cases, be vested, even though the employment itself is not. Equal employment opportunities have, for example, been held to be both fundamental and vested, so that when a job-seeker presents evidence showing a denial of those equal opportunities, an administrative decision unfavorable to the job-seeker must be subjected to the independent judgment of the courts [*Kerrigan v. Fair Employment Practice Com. (1979) 91 Cal. App. 3d 43, 51, 154 Cal. Rptr. 29 , cert. denied, 444 U.S. 930, 100 S. Ct. 273, 62 L. Ed. 2d 187* (statutorily conferred right to be free of age discrimination in seeking employment is vested right)].

In appropriate cases, the doctrine of equitable estoppel may be invoked to establish that a right is vested [*City of Long Beach v. Mansell (1970) 3 Cal. 3d 462, 489, 91 Cal. Rptr. 23, 476 P.2d 423* ; *Stanson v. San Diego Coast Regional Com. (1980) 101 Cal. App. 3d 38, 49, 161 Cal. Rptr. 392]* . An estoppel may be established for this purpose if a person (or agency), knowing the relevant facts, makes representations or engages in conduct that a person seeking a right relies on to his or her detriment [*City of Long Beach v. Mansell (1970) 3 Cal. 3d 462, 489, 91 Cal. Rptr. 23, 476 P.2d 423* ; *Stanson v. San Diego Coast Regional Com. (1980) 101 Cal. App. 3d 38, 49, 161 Cal. Rptr. 392]* . In one case, for example, a property owner sought to open a restaurant in a commercial building within a protected coastal zone. Relying on representations from an agent of the regional coastal commission that a coastal development permit was not necessary, the property owner obtained building permits, expended substantial sums of money for remodeling, and entered into leases with rentals contingent on the opening of the restaurant. The court held that the property owner could proceed without obtaining a coastal permit even though one was, in fact, required, since the commission was estopped to enforce the requirement [*Stanson v. San Diego Coast Regional Com. (1980) 101 Cal. App. 3d 38, 49, 161 Cal. Rptr. 392]* . Once a vested right is acquired through estoppel, it cannot be impaired or destroyed without due process of law [*Stanson v. San Diego Coast Regional Com. (1980) 101 Cal. App. 3d 38, 49, 161 Cal. Rptr. 392]* .

[d] Limited Trial De Novo

When the court is required to exercise its independent judgment in reviewing the decision of an administrative agency, the petitioner is entitled to what has been called a limited trial de novo [*Bixby v. Pierno (1971) 4 Cal. 3d 130, 143 n.10, 93 Cal. Rptr. 234, 481 P.2d 242* ; *Merrill v. Department of Motor Vehicles (1969) 71 Cal. 2d 907, 914, 80 Cal. Rptr. 89, 458 P.2d 33]* . In a limited trial de novo, the court may receive only the following kinds of evidence [*Code Civ. Proc. § 1094.5(e)*; *Bixby v. Pierno (1971) 4 Cal. 3d 130, 143 n.10, 93 Cal. Rptr. 234, 481 P.2d 242]* :

- Evidence produced at the agency hearing.
- Relevant evidence that, in the exercise of reasonable diligence, could not have been produced at the

hearing.

- Evidence that the agency improperly excluded.

When a trial court exercises independent judgment review of agency fact findings, the trial court is required to give a strong presumption of correctness to the agency's fact findings. This means that when the trial court exercises independent judgment review, the trial court is free to substitute its own findings but only after first giving due respect to the agency's findings. The enactment of *Code Civ. Proc. § 1094.5(c)* by the California legislature indicates legislative acceptance of this approach [*Fukuda v. City of Angels (1999) 20 Cal. 4th 805, 817-819, 85 Cal. Rptr. 2d 696, 977 P.2d 693]* . When a trial court exercises independent judgment review of agency fact findings, the party seeking to overturn agency action has the burden of proof of showing that agency fact findings are not supported by the weight of the evidence. The burden of proof standard codified in *Evid. Code § 500* applies to writ proceedings; the party seeking review has the burden of proof, to persuade, and not merely the burden of production, to come forward with evidence [*Fukuda v. City of Angels (1999) 20 Cal. 4th 805, 819-821, 85 Cal. Rptr. 2d 696, 977 P.2d 693]* .

In exercising its independent judgment, the court determines whether the weight of the evidence supports the agency's decision [*Code Civ. Proc. § 1094.5(c)*; *Merrill v. Department of Motor Vehicles (1969) 71 Cal. 2d 907, 914, 80 Cal. Rptr. 89, 458 P.2d 33]* . Although appellate decisions have not been uniform on the point, the better view is that the court's fact-finding responsibility extends to making determinations as to the credibility of the witnesses in the agency proceeding based on the record of their testimony, giving appropriate weight to the fact that the agency or its hearing officer heard and saw the witnesses and had the opportunity to make its own assessment of their credibility [*Pittsburg Unified School Dist. v. Commission on Professional Competence (1983) 146 Cal. App. 3d 964, 977, 194 Cal. Rptr. 672* ; *Guymon v. Board of Accountancy (1976) 55 Cal. App. 3d 1010, 1014-1015, 128 Cal. Rptr. 137]* . Trial courts are required to give great weight to credibility determinations of state agency hearing officers under the provisions of *Gov. Code § 11425.50(b)*, even when the trial court conducts independent judgment review under *Code Civ. Proc. § 1094.5* [*Fukuda v. City of Angels (1999) 20 Cal. 4th 805, 819, 85 Cal. Rptr. 2d 696, 977 P.2d 693]* . However, the trial court's independent judgment does not encompass setting aside an agency decision that is based on uncontradicted evidence [*Ruttenberg v. Department of Motor Vehicles (1987) 194 Cal. App. 3d 1277, 1282, 240 Cal. Rptr. 249]* .

A court's statement of decision in applying the independent judgment standard in this situation has been held to be sufficient, despite a lack of detailed fact findings, when the court stated that the agency's findings were supported by the weight of the evidence, thereby incorporating by reference the agency's detailed findings [*Angelier v. State Board of Pharmacy (1997) 58 Cal. App. 4th 592, 598-599, 68 Cal. Rptr. 2d 213]* .

[e] Judicial Review of Penalty Assessments

Judicial review of an agency assessment of a penalty is very limited and the standard of review is arbitrary, capricious, or abuse of discretion [*Kazensky v. City of Merced (1990 65 Cal. App. 4th 44, 54, 76 Cal. Rptr. 2d 356* ; *Flippin v. Los Angeles City Board of Civil Service Commissioners (2007) 148 Cal. App. 4th 272, 279, 55 Cal. Rptr. 3d 458]* . The reviewing court can not substitute its judgment for that of the agency and can not overturn a penalty assessment that has a reasonable basis of support. The appellate court review of a trial court penalty determination is de novo and without deference to the trial court [*Deegan v. City of Mountain View (1999) 72 Cal. App. 4th 37, 46, 84 Cal. Rptr. 2d 690* ; *Flippin v. Los Angeles City Board of Civil Service Commissioners (2007) 148 Cal. App. 4th 272, 279, 55 Cal. Rptr. 3d 458]* . The California Court of Appeal reversed the superior court decision that overturned a penalty assessment by a city review board of upholding the discharge of a public employee when the employee was found to have committed serious misconduct that reflected adversely on other public employees of the same agency. The discharge penalty had a reasonable basis in the fact record and the agency did not abuse its discretion in sustaining the discharge of the public employee. Therefore it was improper for the superior court to overturn the penalty assessed against the employee [*Flippin v. Los Angeles City Board of Civil Service Commissioners (2007) 148 Cal. App. 4th 272, 283-284, 55 Cal. Rptr. 3d 458]* .

The California Court of Appeal held that it was an abuse of discretion for a county civil service commission to reduce a disciplinary penalty imposed by a county sheriff on a county employee from a permanent demotion to a temporary demotion. The sheriff challenged the change in penalty by petitioning for a writ of administrative mandate under *Code Civ. Proc. § 1094.5* [*Kolender v. San Diego County Civil Service Commission (2007) 149 Cal. App. 4th 464, 466-467, 57 Cal. Rptr. 3d 84* (penalty reduction was abuse of discretion because criteria for penalty assessment in law enforcement employment is harm to public service, and commission erroneously relied upon inaccurate performance evaluation to reduce penalty)].

The Second District California Court of Appeal reversed and remanded the denial of a petition for a writ of mandate brought by a police officer terminated by the Los Angeles Police Department for on-the-job misuse of police department computers. The officer sought reinstatement. The court of appeal concluded that it was an abuse of discretion (specifically, a misapprehension of the law) for the police department to base termination in part on misconduct of the police officer that occurred more than two years before the department filed an administrative complaint against the officer. The court of appeal remanded the matter to the police department to reconsider the appropriate punishment for misconduct within the two-year time period [*Chrisman v. City of Los Angeles (2007) 155 Cal. App. 4th 29, 38-39, 65 Cal. Rptr. 3d 701]* .

[5] Applicability of Substantial Evidence Test

[a] Nature and Applicability of Test

When the independent judgment test does not apply, the court is restricted to determining whether an agency's findings are supported by substantial evidence in light of the whole record [*Code Civ. Proc. § 1094.5(c)*]. Substantial evidence has been defined as evidence of ponderable legal significance, reasonable in nature, credible, and of solid value, or as relevant evidence that a reasonable mind might accept as adequate to support a conclusion [County of San Diego v. Assessment Appeals Bd. No. 2 *(1983) 148 Cal. App. 3d 548, 555, 195 Cal. Rptr. 895]* .

The substantial evidence test does not apply to questions of law [*Apte v. Regents of University of California (1988) 198 Cal. App. 3d 1084, 1092, 244 Cal. Rptr. 312* , *198 Cal. App. 3d 1084, 244 Cal. Rptr. 312]* . Accordingly, a reviewing court must independently determine the application of laws, regulations, and procedures, even when applying the substantial evidence test [*Apte v. Regents of University of California (1988) 198 Cal. App. 3d 1084, 1092, 244 Cal. Rptr. 312]* . The substantial evidence test requires the court to resolve reasonable doubts in favor of the agency decision, and to uphold the decision if there is any substantial evidence to support the findings [*Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 514-515, 113 Cal. Rptr. 836, 522 P.2d 12* ; *Security Environmental Systems, Inc. v. South Coast Air Quality Management Dist. (1991) 229 Cal. App. 3d 110, 132, 280 Cal. Rptr. 108]* . The reviewing court is not permitted to substitute its own judgment for that of the agency [*Common Cause v. Board of Supervisors (1989) 49 Cal. 3d 432, 445, 261 Cal. Rptr. 574, 777 P.2d 610* ; *Security Environmental Systems, Inc. v. South Coast Air Quality Management Dist. (1991) 229 Cal. App. 3d 110, 133, 280 Cal. Rptr. 108]* .

Judicial review of CEQA compliance by local agencies that approve development projects subject to CEQA is de novo review from the standpoint of the agency action. The appellate courts determine the substantive CEQA issues (issues of law) by using the independent judgment test to decide whether the local agency made errors of law as demonstrated in the administrative record before the agency. The local agency factual determinations are reviewed under the substantial evidence test [*Citizens for a Megaplex-Free Alameda v. City of Alameda (2007) 149 Cal. App. 4th 91, 102, 110-111, 56 Cal. Rptr. 3d 728* (substantial evidence supports city decision not to require a supplemental EIR)].

The substantial evidence test applies to judicial review of fact findings related to a claim filed under *Penal Code § 4900* with the California Victim Compensation and Government Claims Board for compensation from the state of California

for damages caused by erroneous conviction and imprisonment [*Tennison v. California Victim Compensation and Government Claims Board (2007) 152 Cal. App. 4th 1164, 1181-1183, 62 Cal. Rptr. 3d 88]* . The substantial evidence test applies to judicial review of fact findings supporting a decision by the California Coastal Commission to deny a landowner a coastal development permit [*LT-WR, L.L.C. v. California Coastal Commission (2007) 152 Cal. App. 4th 770, 780-781, 60 Cal. Rptr. 3d 417]* .

The substantial evidence test applies to judicial review of fact findings supporting business franchise termination decisions [*Kawasaki Motors Corp. v. Superior Court (2000) 85 Cal. App. 4th 200, 203-204, 101 Cal. Rptr. 2d 863* (motorcycle franchisee that challenged order of New Motor Vehicle Board permitting franchisor to terminate franchise did not have a fundamental vested right to maintain franchise which was a purely economic privilege)]. The substantial evidence test applies to judicial review of fact findings supporting a Department of Industrial Relations stop work order and penalty issued against a business to enforce worker's compensation insurance requirement against that business which had erroneously classified employees as independent contractors [*JKH Enterprises, Inc. v. Dept. of Industrial Relations (2006) 142 Cal. App. 4th 1046, 1061-1062, 48 Cal. Rptr. 3d 563* (enforcing requirement that air courier services business purchase and maintain worker's compensation insurance impacts purely economic interests and does not impact fundamental or vested rights)]. Judicial review of facts findings related to the California Medical Board's decision to fine a physician $500 for aiding the unlicensed practice of medicine in violation of *Bus. & Prof. Code § 2264* is based on the substantial evidence test, not the independent judgment test, because there is no licensing sanction imposed by the Board against the physician [*Steinsmith v. Medical Board of California (2000) 85 Cal. App. 4th 458, 464-465, 102 Cal. Rptr. 2d 115]* . The substantial evidence test also applies to judicial review of the adequacy of an Environmental Impact Report prepared by an agency and the validity of a related permit issued by that agency when the appealing party asserts that the permit violates the California Environmental Quality Act [*Pub. Resources Code § 21000*; *California Oak Found. v. City of Santa Clarita (2005) 133 Cal. App. 4th 1219, 1225-1227, 35 Cal. Rptr. 3d 434* ; *Sierra Club v. County of Napa (2004) 121 Cal. App. 4th 1490, 1497-1498, 19 Cal. Rptr. 3d 1]* . The substantial evidence test applied to judicial review of a public agency determination that a decision to close two schools was exempt from the provisions of the California Environmental Quality Act [*Pub. Resources Codes § 21000*; *San Lorenzo Valley Mty. Advocates for Responsible Educ. v. San Lorenzo Valley Unified Sch. Dist. (2006) 139 Cal. App. 4th 1356, 1386-1387, 44 Cal. Rptr. 3d 128]* . The substantial evidence test applied to judicial review of a city's factual determination that a downtown residential project was exempt from environmental review under CEQA as an urban in fill project [*Banker's Hill, Hillcrest, Park W. Cmty. Pres. Group v. City of San Diego (2006) 139 Cal. App. 4th 249, 267-268, 42 Cal. Rptr. 3d 537* (extensive discussion of fair argument versus substantial evidence standard of review for judicial review of CEQA related decisions)]. The substantial evidence fair argument test (that a project may have adverse environmental effects) was not satisfied in a mandamus proceeding challenging a mitigated negative declaration related to a subdivision development approved by a city council. This was because the record before the city council did not support the fair argument test, and extra record evidence may not be considered by the courts to support the fair argument test [*Porterville Citizens for Responsible Hillside Development v. City of Porterville (2007) 157 Cal. App. 4th 885, 889-891, 69 Cal. Rptr. 3d 105*]. The substantial evidence fair argument test was satisfied for a proposed project to convert timberland into a vineyard, and thus significant effects on the environment from the project required that the permitting agency (CDF) prepare an environmental impact report before granting the permit [*Sierra Club v. California Department of Forestry and Fire Protection (2007) 150 Cal. App. 4th 370, 382, 59 Cal. Rptr. 3d 9* (agency adopted mitigated negative declaration, and the court held that the preparation of an environmental impact report was required)]. The substantial evidence test applied to the agency decision upholding the citation of an employer for a serious safety violation that led to the death of an employee, and to the fact findings of the agency. The agency decision and fact findings will be upheld if they have reasonable support in the evidentiary record even though some of the evidence in the record would support opposite fact findings [*Sully-Miller Contracting Co. v. Cal. Occupational Safety & Health Appeals Bd. (2006) 138 Cal. App. 4th 684, 692, 41 Cal. Rptr. 3d 742* (court of appeal held that substantial evidence supported findings related to primary employer and related to failure of contractor injury protection program to meet standards required by agency regulations); *Overaa Construction v. California Occupational Safety and Health Appeals Board (2007) 147 Cal. App. 4th 235, 249-251, 54 Cal. Rptr. 3d 154* (substantial evidence supported fact finding that controlling employer was lacking reasonable diligence in failing to provide a protective system for

excavations in excess of five feet. Failure to provide the system violated Cal/OSHA safety regulations, and justified the assessment of civil penalty against employer)]. The substantial evidence test applied to the denial of a mobile home park owner's petition for a writ of administrative mandate challenging the city's failure to approve the full rent increase sought by the owner [*Los Altos El Granada Investors v. City of Capitola (2006) 139 Cal. App. 4th 629, 648, 43 Cal. Rptr. 3d 434]* . The substantial evidence test applies to a city decision to revoke a permit for a building to be used as an autopsy facility. There was no vested right to the permit because the applicant did not satisfy the good faith reliance test [*Autopsy/Post Services, Inc. v. City of Los Angeles (2005) 129 Cal. App. 4th 521, 526-527, 28 Cal. Rptr. 3d 303]* . The substantial evidence test also applies to the agency decision to adopt a redevelopment plan and to the findings supporting that decision [*Evans v. City of San Jose (2005) 128 Cal. App. 4th 1123, 1145-1146, 27 Cal. Rptr. 3d 675]* .

[b] Decisions of Constitutional Agencies

Decisions and orders of agencies on which the California Constitution confers adjudicative powers are reviewed under the substantial evidencestandard, whether or not a fundamental vested right is involved [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 35-36, 112 Cal. Rptr. 805, 520 P.2d 29]* . For an agency to fit within this category, judicial power must have been directly vested in it by the Constitution [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 35-36, 112 Cal. Rptr. 805, 520 P.2d 29* ; *Covert v. State Board of Equalization (1946) 29 Cal. 2d 125, 131-132, 173 P.2d 545]* .

The substantial evidence test applies to judicial review of decisions of the State Personnel Board because the Board is an agency with constitutional adjudicatory authority [*Pollak v. State Personnel Board (2001) 88 Cal. App. 4th 1394, 1404, 107 Cal. Rptr. 2d 39* ; *State Personnel Bd. v. Department of Personnel Admin. (2005) 37 Cal. 4th 512, 36 Cal. Rptr. 3d 142, 123 P.3d 169* (state personnel board drives adjudicatory authority from state constitution)].

The substantial evidence test applies to decisions of the Commission on State Mandates because the Commission is an agency with constitutional adjudicatory authority [*County of Los Angeles v. Commission on State Mandates (2003) 110 Cal. App. 4th 1176, 1186, 2 Cal. Rptr. 3d 419* (substantial evidence review specified by *Gov. Code § 17559(b)* for decision of Commission on State Mandates which is a constitutional agency under *Cal. Const. Art. XIII, § 6*)].

[c] Decisions Made Under Statutory Substantial Evidence Test

The California Supreme Court has held that the Legislature may provide for review under the substantial evidence standard of decisions of statewide agencies on which the California Constitution does not confer judicial power [*Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd. (1979) 24 Cal. 3d 335, 342-346, 156 Cal. Rptr. 1, 595 P.2d 579* ; *County of Los Angeles v. Commission on State Mandates (1995) 32 Cal. App. 4th 805, 814-815, 38 Cal. Rptr.2d 304]* . If the Legislature provides that findings of an administrative agency may be reviewed only to determine if they are supported by substantial evidence in the light of the whole record, and if the procedures of the agency guarantee administrative due process, judicial review is properly limited to the substantial evidence test [*Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd. (1979) 24 Cal. 3d 335, 344-346, 156 Cal. Rptr. 1, 595 P.2d 579]* .

The FEHC decision following an administrative hearing that found allowing a disabled resident of a condominium association to have a companion dog to be a reasonable accommodation for the resident's depression related disability, notwithstanding that the association prohibited residents from owning dogs, and that the association unlawfully discriminated against the resident by refusing to make this specific reasonable accommodation, was supported by substantial evidence. This finding was a mixed question of law and fact and was subject to substantial evidence review [*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com. (2004) 121 Cal. App. 4th 1578, 1595-1596, 18 Cal. Rptr. 3d 669]* .

[d] Decisions of Private Hospital Boards

Notwithstanding the general rule that reviewing courts must exercise their independent judgment when fundamental, vested rights are at stake, the substantial evidence test applies to decisions of private hospital boards, decisions of boards of directors of districts organized pursuant to the Local Hospital District Law, and decisions of governing bodies of municipal hospitals [*Code Civ. Proc. § 1094.5(d)*; *see Health & Safety Code § 32000 et seq.* (*Local Hospital District Law); Weinberg v. Cedars Sinai Med. Ctr.(2004) 119 Cal. App. 4th 1098, 1106-1107, 15 Cal. Rptr. 3d 6* (substantial evidence test applied to decision of hospital board to terminate staff privileges of physician; court interpreted *Bus. & Prof. Code § 809.05* to provide deferential review of hospital board decision when the board acted within delegated authority); *see* [4], *above* (independent judgment test)]. If the petitioner makes a preliminary showing of substantial evidence of discriminatory actions prohibited by *Health & Safety Code § 1316*, however, the court must exercise its independent judgment on the evidence, and abuse of discretion will be established if the court determines that the findings are not supported by the weight of the evidence [*Code Civ. Proc. § 1094.5(d)*].

[e] The Record for Decision

When the court applies the substantial evidence test, the agency's findings must be supported by substantial evidence in the light of the whole record [*Code Civ. Proc. § 1094.5(c)*]. Accordingly, the reviewing court must consider the entire record [*LeVesque v. Workmen's Comp. App. Bd. (1970) 1 Cal. 3d 627, 638 n.22, 83 Cal. Rptr. 208, 463 P.2d 432]* . It may not isolate evidence that supports the agency's findings and disregard other relevant evidence, but must consider all evidence in the administrative record, including evidence that fairly detracts from the evidence supporting the agency's decision [County of San Diego v. Assessment Appeals Bd. No. 2 *(1983) 148 Cal. App. 3d 548, 554, 195 Cal. Rptr. 895* ; *LeVesque v. Workmen's Comp. App. Bd. (1970) 1 Cal. 3d 627, 638 n.22, 83 Cal. Rptr. 208, 463 P.2d 432]* . The court in mandate proceedings thus engages in a revaluation of the evidence, at least to the extent of comparing the relative value of the testimony of the various witnesses to determine whether the evidence supporting the agency decision or the evidence opposing it has greater weight [*see Greenberg v. Workmen's Comp. Appeals Bd. (1974) 37 Cal. App. 3d 792, 799, 112 Cal. Rptr. 626* (substantial evidence test applied in workers' compensation case)].

The California Court of Appeal held that the reviewing court defers to the trier of fact on issues of witness demeanor and credibility, and that substantial evidence supported the hearing officer's decision to believe a sheriff's deputy explanation that he was sloppy and disorganized in writing a report, but not untruthful [*Kolender v. San Diego County Civil Serv. Comm'n (2005) 132 Cal. App. 4th 1150, 1154-1155, 34 Cal. Rptr. 3d 209* (no abuse of discretion by county civil service commission in reducing sanction of termination imposed by sheriff on sheriff's deputy with rank of sergeant, and replacing that sanction with 90-day suspension, reinstatement, and demotion to rank of deputy sheriff)]. Another California Court of Appeal held that an agency decision to deny a real estate license to a disbarred attorney was supported by substantial evidence, notwithstanding the admission of hearsay evidence, because the hearsay evidence was admitted pursuant to *Gov. Code § 11513(d)* for the purpose of supplementing and explaining other properly admitted evidence [*Berg v. Davi (2005) 130 Cal App. 4th 223, 229-230, 29 Cal. Rptr. 3d 803]* .

The reviewing court applying the substantial evidence test is confined to consideration of evidence in the administrative record [*Gong v. City of Fremont (1967) 250 Cal. App. 2d 568, 572-574, 58 Cal. Rptr. 664]* . However, the court may also determine whether any relevant evidence exists that, in the exercise of reasonable diligence, could not have been produced before the agency, or whether any evidence exists that was improperly excluded by the agency. If such evidence exists, the court may remand the case to the agency for reconsideration [*Code Civ. Proc. § 1094.5(e)*]. A party who attacks the sufficiency of the evidence supporting the agency's decision has the burden of producing the record of the administrative proceedings in the reviewing court [*Eureka Teachers Assn. v. Board of Education (1988) 199 Cal. App. 3d 353, 367, 244 Cal. Rptr. 240]* . For a more detailed discussion of the record for decision, see Ch. 473G, *Agency Adjudication Decisions* .

When the court conducts judicial review of an agency's compliance with CEQA statutory requirements, particularly as to the decision to use a mitigated negative declaration and to not prepare an Environmental Impact Report, the court will

examine the administrative record as a whole, and the court will not consider additional evidence added to the appellate record that was not part of the administrative record [*Architectural Heritage Assn. v. County of Monterey (2004) 122 Cal. App. 4th 1095, 1110-1111, 19 Cal. Rptr. 3d 469]* . The Court of Appeal upheld the superior court's denial of a motion to augment the administrative record in an ordinary mandate [*Code Civ. Proc. § 1085*] proceeding in which the residents of a mobile home park sought to rescind an EIR certification. The court held that judicial review of the adequacy of the EIR had to be based on the administrative record before the agency, and that extrinsic evidence that was not before the agency, or that related to developments after the EIR decision was made, could not be included in the record for judicial review [*El Morro Comty. Ass'n v. California Dep't of Parks & Recreation (2004) 122 Cal. App. 4th 1341, 1358-1359, 19 Cal. Rptr. 3d 445]* . There are differences in the rules for the administrative records in administrative mandate and ordinary mandate, but the policy reasons for a decision on the record is the same in both types of cases.

The Court of Appeal reversed the County of Merced's granting of a conditional use permit, and the county's certifying of a final environmental impact report under the California Environmental Quality Act (CEQA), for a project approval sought by a mining company. The court held that the county failed to provide an adequate and complete administrative record for judicial review making it difficult for the appellate court to determine whether the county make the necessary findings required by CEQA before issuing the permit [*Protect Our Water v. County of Merced (2003) 110 Cal. App. 4th 362, 372-374, 1 Cal. Rptr. 3d 726]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewAdministrative RecordGeneral OverviewAdministrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewReviewabilityFactual DeterminationsAdministrative LawJudicial ReviewStandards of ReviewAbuse of DiscretionAdministrative LawJudicial ReviewStandards of ReviewDe Novo ReviewAdministrative LawJudicial ReviewStandards of ReviewSubstantial EvidenceConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

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41A-474B California Forms of Pleading and Practice--Annotated § 474B.17

§ 474B.17 Proper Scope of Review in the Appellate Courts

[1] Whether the Trial Court Properly Applied the Independent Judgment Test

In cases in which the trial court properly applied the independent judgment test, the appellate court reviews the trial court's decision as it would in an ordinary civil appeal [*Merrill v. Department of Motor Vehicles (1969) 71 Cal. 2d 907, 915, 80 Cal. Rptr. 89, 458 P.2d 33* ; *see § 474B.16[4]* for discussion of the independent judgment test]. Therefore, errors of law are subject to its cognizance, but factual findings may be overturned only when the findings are not supported by substantial evidence (including evidence in the administrative record) [*Bixby v. Pierno (1971) 4 Cal. 3d 130, 143 n.10, 93 Cal. Rptr. 234, 481 P.2d 242* ; *Merrill v. Department of Motor Vehicles (1969) 71 Cal. 2d 907, 915, 80 Cal. Rptr. 89, 458 P.2d 33* ; *Sarka v. Regents of Univ. of Cal. (2006) 146 Cal. App. 4th 261, 270-271, 52 Cal. Rptr. 3d 810* (substantial evidence supported findings that physician was terminated for insubordination and not principally for advocating appropriate medical care for patients); *Smith v. City of Napa (2004) 120 Cal. App. 4th 194, 198-199, 14 Cal. Rptr. 3d 908* ; *California Career Schools v. DMV (2004) 120 Cal. App. 4th 10, 13-14, 15 Cal. Rptr. 3d 813* ; *Dunn v. County of Santa Barbara (2006) 135 Cal. App. 4th 1281, 1288-1289, 38 Cal. Rptr. 3d 316* ; *Schmitt v. City of Rialto (1985) 164 Cal. App. 3d 494, 501, 210 Cal. Rptr. 788]* . The appellate court's function in reviewing the evidence is thus to decide whether credible, competent evidence supports the trial court's judgment [*Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 71, 64 Cal. Rptr. 785, 435 P.2d 553* ; *Arenstein v. California State Bd. of Pharmacy (1968) 265 Cal. App. 2d 179, 184, 71 Cal. Rptr. 357]* . In performing this function, the appellate court must resolveall conflicts in the evidence in favor of the judgment and draw all legitimate and reasonable inferences in its support [*Kerrigan v. Fair Employment Practice Com. (1979) 91 Cal. App. 3d 43, 52, 154 Cal. Rptr. 29* , *cert. denied, 444 U.S. 930, 100 S. Ct. 273, 62 L. Ed. 2d 187]* .

When a trial court makes fundamental errors in applying the independent judgment test, the appellate court should reverse and remand the decision back to the trial court to review the agency decision under independent judgment review, and the appellate court should not automatically affirm the trial court decision, nor automatically reverse, and reinstate the agency decision. This is because the trial court reasonably could decide that the agency fact findings are not supported by the weight of the evidence under a proper independent test [*Fukuda v. City of Angels (1999) 20 Cal. 4th 805, 824-825, 85 Cal. Rptr. 2d 696, 977 P.2d 693* ; *Mason v. Office of Administrative Hearings (2001) 89 Cal.*

App. 4th 1119, 1138-1139, 108 Cal. Rptr. 2d 102] .

[2] Whether the Trial Court Properly Applied the Substantial Evidence Test

In cases in which the trial court properly applied the substantial evidence test, the appellate court must review the entire administrative record to determine whether substantial evidence supports the agency's determination [*Bixby v. Pierno (1971) 4 Cal. 3d 130, 149, 93 Cal. Rptr. 234, 481 P.2d 242* ; *Lincoln Place Tenants Assn. v. City of Los Angeles (2005) 130 Cal. App. 4th 1491, 1503, 1506, 31 Cal. Rptr. 3d 353* (substantial evidence supported agency decision that building was not a significant historical or cultural asset); *Dunn v. County of Santa Barbara (2006) 135 Cal. App. 4th 1281, 1288-1289, 38 Cal. Rptr. 3d 316* ; *Schmitt v. City of Rialto (1985) 164 Cal. App. 3d 494, 501, 210 Cal. Rptr. 788* ; *see § 474B.16[5]* for discussion of the substantial evidence test]. In such cases, the trial court itself exercises an essentially appellate function in that only errors of law appearing on the administrative record are subject to its cognizance [*Merrill v. Department of Motor Vehicles (1969) 71 Cal. 2d 907, 915-916, 80 Cal. Rptr. 89, 458 P.2d 33]* . The trial and appellate courts occupy identical positions with respect to the administrative record, the function of each being to determine whether that record is free from legal error [*Merrill v. Department of Motor Vehicles (1969) 71 Cal. 2d 907, 915-916, 80 Cal. Rptr. 89, 458 P.2d 33* ; *Los Alamitos Gen. Hosp., Inc. v. Lackner (1978) 86 Cal. App. 3d 417, 423, 149 Cal. Rptr. 98]* . In determining whether substantial evidence supports the fact findings of the agency whose decision is being reviewed, the appellate court plays the same role as the trial court [*California Fair Employment & Housing Comm'n v. Gemini Aluminum Corp. (2004) 122 Cal. App. 4th 1004, 1010-1011, 18 Cal. Rptr. 3d 906* (Court of Appeal reversed trial court grant of writ of mandate based on substantial evidence standard for fact finding; trial court had found a lack of substantial evidence for Commission fact findings and court of appeal disagreed, and concluded that there was substantial evidence for Commission fact findings); *Friends of Santa Clara River v. Castaic Lake Water Agency (2004) 123 Cal. App. 4th 1, 8-9, 19 Cal. Rptr. 3d 625* (mandate action to review decision of public water agency to adopt an urban water management plan under *Water Code § 10651*; appellate court plays same role as superior court in examining administrative record to decide whether there was a prejudicial abuse of discretion by agency); *California Dept. of Corrections v. State Personnel Bd. (2004) 121 Cal. App. 4th 1601, 1611-1612, 18 Cal. Rptr. 3d 390* ; *Pasternak v. Boutris (2002) 99 Cal. App. 4th 907, 921-922, 121 Cal. Rptr. 2d 493* (agency fact finding not supported by substantial evidence in whole record; same substantial evidence test used by trial court and appellate court)]. The appellate court may reverse the agency decision only when a reasonable person could not have reached the conclusion reached by the agency. To determine whether there is substantial evidence, the court examines the entire administrative record, and considers all of the evidence, both evidence supporting the decision, and evidence that does not support the decision. The court will weigh the evidence to a limited extent to fairly estimate the worth of the evidence, but it will not weigh the preponderance of the conflicting evidence as that is the role of the agency [*Kirkorowicz v. California Coastal Com. (2000) 83 Cal. App. 4th 980, 986-987, 100 Cal. Rptr. 2d 124]* .

When the court conducts judicial review of an agency's compliance with CEQA statutory requirements, particularly as to the decision to use a mitigated negative declaration and not to prepare an Environmental Impact Report, the court will examine the administrative record as a whole, the court will not consider additional evidence added to the appellate record that was not part of the administrative record, and the court will overturn the agency decision to not prepare an EIS as an abuse of discretion if there is substantial evidence supporting a fair argument that the affected project will have significant environmental impacts. The fair argument standard, which applies to EIS preparation decisions, is far less deferential to administrative agencies fact findings than the normal presumption that agency findings are correct [*Architectural Heritage Assn. v. County of Monterey (2004) 122 Cal. App. 4th 1095, 1109-1111, 19 Cal. Rptr. 3d 469]* .

The California Court of Appeal held that the environmental checklist used by regional water quality control boards to ensure compliance with CEQA while adopting trash total maximum daily load standard plans (TDML plans) was deficient, did not comply with CEQA requirements, and failed the fair argument standard, in that there was sufficient evidence of a fair argument that the project may have a significant impact on the environment thereby necessitating the completion of an environmental impact report (EIR) before the TDML plan was approved [*City of Arcadia v. State Water Resources Control Bd. (2006) 135 Cal. App. 4th 1392, 1420-1422, 38 Cal. Rptr. 3d 373* (decision to adopt trash

total maximum daily load standard (TDML plan) as part of regional water quality control plan was quasi-legislative action reviewable under ordinary mandate, *Code Civ. Proc. § 1085*)].

The California Court of Appeal reversed the denial of a petition for a writ of mandate by the Superior Court and held that the fair argument standard for substantial evidence was satisfied as to city land use policies and potential aesthetic affects thus requiring the City of Sacramento to prepare an environmental impact report before approving a residential housing project. The city had approved the project without preparing an EIR and had rather adopted a Mitigated Negative Declaration (NMD). The Court of Appeal reversed the denial of the petition and remanded the approval decision for preparation of an EIR [*The Pocket Protectors v. City of Sacramento (2004) 124 Cal. App. 4th 903, 908, 21 Cal. Rptr. 3d 791* ; *Lighthouse Field Beach Rescue v. City of Santa Cruz (2005) 131 Cal. App. 4th 1170, 1202-1203, 31 Cal. Rptr. 3d 901* (fair argument standard not satisfied based on administrative record in case); *Mejia v. City of Los Angeles (2005) 130 Cal. App. 4th 322, 326-327, 29 Cal. Rptr. 3d 788* (fair argument standard satisfied thereby requiring preparation of environmental impact report (EIR))].

The California Court of Appeal held that the fair argument standard for judicial review of CEQA-related decisions as to the adequacy of an environmental impact report (EIR) was not applicable to a challenge to an agency decision that a prior program EIR sufficiently analyzed the potential environmental impacts of a city redevelopment project, that the project was within the scope of the previously prepared EIR and that no new EIR was required to be prepared [*Citizens for Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency (2005) 134 Cal. App. 4th 598, 609-611, 36 Cal. Rptr. 3d 249]* . Another California Court of Appeal concluded that there was substantial evidence in the record to support the issuance by the regional water board of a municipal storm sewer permit [*City of Rancho Cucamonga v. Regional Water Quality Control Bd. (2006) 135 Cal. App. 4th 1377, 1387-1388, 38 Cal. Rptr. 3d 450]* . Cities that were regulated by the Board and had to comply with permit conditions challenged the procedures used to issue the permits, as well as the permit conditions, and the expense of complying with the permits. The Court of Appeal rejected the challenge to the evidence supporting the permit conditions, and noted that the Board could rely on staff recommendations for permit conditions, and those recommendations satisfied the substantial evidence in the administrative record requirements for informal administrative adjudicative hearings [*City of Rancho Cucamonga v. Regional Water Quality Control Bd. (2006) 135 Cal. App. 4th 1377, 1387-1388, 38 Cal. Rptr. 3d 450]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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41A-474B California Forms of Pleading and Practice--Annotated § 474B.18

§ 474B.18 Issues That Are Not Reviewable by Administrative Mandate

[1] Issues That Were Not Presented to the Agency

In order to obtain judicial review of a claim of error in an administrative proceeding, the issue generally must have been presented to the agency [*American Alliance Ins. Co. v. State Bd. of Equalization (1982) 134 Cal. App. 3d 601, 609, 184 Cal. Rptr. 674* ; *see* *Fermin v. Department of Employment (1963) 214 Cal. App. 2d 586, 589-590, 29 Cal. Rptr. 642* , *cert. denied,* *375 U.S. 888, 84 S. Ct. 166, 11 L. Ed. 2d 118* (no provision in *Code Civ. Proc. § 1094.5* for hearing and deciding matters not presented to agency)]. This prerequisite is an aspect of the general rule that, when administrative procedures exist to resolve a dispute, the courts will not entertain the dispute until the administrative procedures are fully used and exhausted [Ameri can *Alliance Ins. Co. v. State Bd. of Equalization (1982) 134 Cal. App. 3d 601, 609, 184 Cal. Rptr. 674* ; *see* Ch. 474, *Availability of Judicial Review of Agency Decisions* , for general consideration of the exhaustion of administrative remedies as a prerequisite to judicial review]. This rule does not apply when the claimed error could not have been corrected in the agency proceedings [*Morris v. Unemployment Ins. Appeals Bd. (1973) 34 Cal. App. 3d 1002, 1008, 110 Cal. Rptr. 630]* . For example, when the agency lacks authority to determine the issue, the general rule does not apply [*see* *Burrey v. Embarcadero Mun. Improvement Dist. (1971) 5 Cal. 3d 671, 676 n.4, 97 Cal. Rptr. 203, 488 P.2d 395* ; *Thomas v. Department of Motor Vehicles (1970) 3 Cal. 3d 335, 338, 90 Cal. Rptr. 586, 475 P.2d 858* (DMV had no power to pass on validity of drunk driving convictions during license suspension proceedings)]. Agencies lack authority to determine the constitutional validity of prior criminal convictions that have collateral impact on licensing schemes such as the Department of Motor Vehicles drivers license authority. Therefore, reviewing courts cannot ordinarily grant a petition for a writ of mandate against an agency based on invalidity of a criminal conviction [*Thomas v. Department of Motor Vehicles (1974) 3 Cal. 3d 335, 338, 90 Cal. Rptr. 586, 475 P.2d 858* ; *Romo v. Department of Motor Vehicles (1991) 229 Cal. App. 3d 251, 257, 280 Cal. Rptr. 33* ; *Gaston v. Department of Motor Vehicles (1991) 230 Cal. App. 3d 74, 81, 281 Cal. Rptr. 173* ; *Morris v. Department of Motor Vehicles (1991) 231 Cal. App. 3d 151, 153, 282 Cal. Rptr. 130]* . Additionally, a limited exception applies to the requirement that issues raised on appeal must have been presented to the agency in the administrative hearing. The appellate court has discretion to hear new issues or arguments relating to questions of law when public policy or the public interest is concerned [*Taye v. Coye (1994) 29 Cal. App. 4th 1339, 1345, 35 Cal. Rptr. 2d 27]* .

[2] Issues That Are Moot

When an administrative agency vacates a decision before the court reviews it, the issues asserted in the mandate proceedings are moot and the writ should be denied [*Crestlawn Memorial Park Asso. v. Sobieski (1962) 210 Cal. App. 2d 43, 47, 26 Cal. Rptr. 421]* . Similarly, if the agency complies with the provisions of an alternative writ, or if it demonstrates its willingness to perform the requested act, the issue is moot and a peremptory writ of mandate is improper [*Bruce v. Gregory (1967) 65 Cal. 2d 666, 671, 56 Cal. Rptr. 265, 423 P.2d 193]* . The court hearing a mandate proceeding is required to consider any facts arising after the filing of the pleadings that render the dispute moot or the remedy useless [*Bruce v. Gregory (1967) 65 Cal. 2d 666, 671, 56 Cal. Rptr. 265, 423 P.2d 193]* . However, an issue does not become moot merely because a penalty imposed by the agency in the challenged proceedings has been completed or complied with during the pendency of the mandate proceedings [*Code Civ. Proc. § 1094.5(g)*; *see Goldberg v. Regents of the University of California (1967) 248 Cal. App. 2d 867, 873 n.6, 57 Cal. Rptr. 463* (mandate proceedings challenging suspension of students from university not moot after expiration of suspension; suspensions and dismissals remained on students' academic records)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewReviewabilityGeneral OverviewAdministrative LawJudicial ReviewReviewabilityExhaustion of Remedies

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[Reserved]

§§ 474B.19[Reserved]

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41A-474B California Forms of Pleading and Practice--Annotated § 474B.30

§ 474B.30 Whether Petitioner Has Clear, Present Right to Performance of Clear, Present Ministerial Duty

Ordinary mandate is available to compel agencies to perform ministerial acts and to correct abuses of discretion and acts outside the legal powers of administrative agencies [*Code Civ. Proc. § 1085*; *Saleeby v. State Bar (1985) 39 Cal. 3d 547, 561-562, 216 Cal. Rptr. 367, 702 P.2d 525* ; *People ex rel. Younger v. County of El Dorado (1971) 5 Cal. 3d 480, 491, 96 Cal. Rptr. 553, 487 P.2d 1193* ; *see § 474B.10[2]*]. Two basic requirements must be met before a writ in ordinary mandate proceedings will issue [*Loder v. Municipal Court (1976) 17 Cal. 3d 859, 863, 132 Cal. Rptr. 464, 553 P.2d 624 , cert. denied, 429 U.S. 1109, 97 S. Ct. 1143, 51 L. Ed. 2d 562* ; *Jackson v. Gourley (2003) 105 Cal. App. 4th 966, 977-978, 130 Cal. Rptr. 2d 72* ; *Wasko v. Department of Corrections (1989) 211 Cal. App. 3d 996, 1000, 259 Cal. Rptr. 764* ; *Quirk v. Board of Education (1988) 199 Cal. App. 3d 729, 733, 244 Cal. Rptr. 924]* :

- A clear, present, ministerial duty must exist on the part of the agency or official.
- The petitioner must have a clear, present, beneficial right to the performance of that duty.

Ordinary mandate is available when an agency has clearly abused its discretion [*Ridgecrest Charter Sch. v. Sierra Sands Unified Sch. Dist. (2005) 130 Cal. App. 4th 986, 1002-1003, 30 Cal. Rptr. 3d 648* ; *Thelander v. City of El Monte (1983) 147 Cal. App. 3d 736, 748, 195 Cal. Rptr. 318]* . An agency clearly abuses its discretion by denying a party an important procedural right. For example, under the APA [*Gov. Code § 11340 et seq.*], subpoenas and subpoenas duces tecum must be issued at the request of any party to compel attendance of witnesses or production of documents at hearing [*Gov. Code § 11510(a)*], and a denial of the subpoenas may be redressed by issuance of a writ of ordinary mandate [*see McLeod v. Board of Pension Commissioners (1970) 14 Cal. App. 3d 23, 27, 94 Cal. Rptr. 58* (failure to issue subpoenas reviewable in ordinary rather than administrative mandate proceedings since issuance of subpoenas is a ministerial and not discretionary function); *see also Code Civ. Proc. § 1085* (ordinary mandate)]. Similarly, many administrative litigants have important discovery rights that, in appropriate cases, may be enforced through ordinary mandate proceedings [*Shively v. Stewart (1966) 65 Cal. 2d 475, 479-482, 55 Cal. Rptr. 217, 421 P.2d 65* ; *see* Ch. 473B, *Discovery in Agency Adjudications* for discussion of discovery rights in proceedings subject to the APA and for statutes authorizing discovery in non-APA proceedings].

The party requesting the subpoenas must pay for the witnesses' fees, mileage, and expenses of subsistence [*Gov. Code § 11510(c)*; *see McLeod v. Board of Pension Commissioners (1970) 14 Cal. App. 3d 23, 31, 94 Cal. Rptr. 58* (agency may condition issuance of subpoenas on party's acceptance of obligation to pay witnesses' ordinary fees and travel expenses); *Nick v. Department of Motor Vehicles (1993) 12 Cal. App. 4th 1407, 1413-1414, 16 Cal. Rptr. 2d 305* . (driver's license holder required to pay witness fee to subpoena arresting CHP officer to compel appearance at DMV license suspension hearing)]. The fees and mileage are calculated as prescribed by law for witnesses in civil actions in superior court [*Gov. Code § 11510(c)*]. Witness who must attend hearings at a distant location requiring an overnight stay are entitled to expenses of subsistence [*Gov. Code § 11510(c)*]. For discussion of agency subpoena power, see Ch. 471, *Investigations by Public Agencies* .

Ordinary mandate is also available to challenge the validity of local ordinances on the grounds that these ordinances were adopted without compliance with CEQA [*Pub. Res. Code §§ 21168.5, 21168.6, 21168.9*] requirements [*Friends of Sierra Madre v. City of Sierra Madre (2001) 25 Cal. 4th 165, 194-196, 105 Cal. Rptr. 2d 214, 19 P.3d 567* ; *Western States Petroleum Assn. v. Superior Court (1995) 9 Cal. 4th 559, 568, 38 Cal. Rptr. 2d 139, 888 P.2d 1268]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsScopeSubpoenasAdministrative LawJudicial ReviewStandards of ReviewAbuse of DiscretionCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLocal GovernmentsOrdinances & Regulations

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41A-474B California Forms of Pleading and Practice--Annotated § 474B.31

§ 474B.31 Whether Petitioner Seek Review of Quasi-Legislative Action

Ordinary mandate is available to review actions taken by an agency in its legislative capacity [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 34 n.2, 112 Cal. Rptr. 805, 520 P.2d 29* ; *Joint Council of Interns & Residents v. Board of Supervisors (1989) 210 Cal. App. 3d 1202, 1209, 258 Cal. Rptr. 762]* . Actions taken by agencies in their legislative capacities (often called quasi-legislative action) are aimed at formulating rules to be applied to future cases [*see* *Marina County Water Dist. v. State Water Resources Control Bd. (1984) 163 Cal. App. 3d 132, 139, 209 Cal. Rptr. 212* (State Water Resources Control Board acts quasi-legislatively when it formulates rules planning for future uses of state's water resources)]. In contrast, adjudicatory actions (often called quasi-judicial action) are designed to apply established rules to particular facts [*Pacifica Corp. v. City of Camarillo (1983) 149 Cal. App. 3d 168, 176, 196 Cal. Rptr. 670]* .

Classification of an administrative decision as adjudicatory or legislative does not depend on the nature of the agency, the procedural characteristics of the administrative process, nor the breadth or narrowness of the agency's discretion [*Pacifica Corp. v. City of Camarillo (1983) 149 Cal. App. 3d 168, 176, 196 Cal. Rptr. 670]* . Rather, it depends on the essential characteristics of the action taken. If in taking its action the agency applied established criteria to facts specific to the individual case, the action is adjudicatory rather than legislative [*Horn v. County of Ventura (1979) 24 Cal. 3d 605, 615, 156 Cal. Rptr. 718, 596 P.2d 1134* ; *San Diego Bldg. Contractors Assn. v. City Council (1974) 13 Cal. 3d 205, 212, 118 Cal. Rptr. 146, 529 P.2d 570]* . On the other hand, if the agency adopted a broad, generally applicable rule of conduct, the action is legislative [*Horn v. County of Ventura (1979) 24 Cal. 3d 605, 613, 156 Cal. Rptr. 718, 596 P.2d 1134]* . Applying this distinction, the courts have held that administrative action that zones or rezones property is legislative [*Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal. 3d 511, 514, 516, 169 Cal. Rptr. 904, 620 P.2d 565]* , while administrative action that applies zoning enactments to particular parcels of property, for example, by approving a subdivision map [*Woodland Hills Residents Assn., Inc. v. City Council (1975) 44 Cal. App. 3d 825, 833-834, 118 Cal. Rptr. 856* , *rev'd on other grounds,* *23 Cal. 3d 917, 154 Cal. Rptr. 503, 593 P.2d 200 (1979)]* , granting a zoning variance [*Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 514, 113 Cal. Rptr. 836, 522 P.2d 12*], or granting a development permit [*Pacifica Corp. v. City of Camarillo (1983) 149 Cal. App. 3d 168, 176, 196 Cal. Rptr. 670]* , is adjudicatory. An agency's preparation of a plan conforming to statutory requirements is legislative action reviewable in ordinary mandate [*Carrancho v. California Air Resources*

Board (2003) 111 Cal. App. 4th 1255, 1265-1267, 4 Cal. Rptr. 3d 536 (agency's preparation of diversion plans and progress reports based on statutory requirements are quasi-legislative acts reviewable in ordinary mandate)].

Merger of separate land parcels, which automatically occurred on the effective date of a local ordinance, adopted for that purpose, was a legislative action, and therefore the affected property owners did not have a due process right to notice and an opportunity to be heard before merger took place [*Moores v. Board of Supervisors (2004) 122 Cal. App. 4th 883, 889-890, 19 Cal. Rptr. 3d 206]* .

Legislative action that is judicially reviewable by ordinary mandate [*Code Civ. Proc. § 1085*] includes the following types of actions:

- Adoption or amendment of an ordinance [*Friends of Sierra Madre v. City of Sierra Madre (2001) 25 Cal. 4th 165, 172-174, 105 Cal. Rptr. 2d 214, 19 P.3d 567]* ; and

- Adoption of administrative regulations [*Western States Petroleum Assn. v. Superior Court (1995) 9 Cal. 4th 559, 566-568, 38 Cal. Rptr. 2d 139, 888 P.2d 1268]* .

- Adoption of a statute [*Hess Collection Winery v. Cal. Agricultural Labor Relations Board (2006) 140 Cal. App. 4th 1584, 1598, 1601, 45 Cal. Rptr. 3d 609* (legislature's adoption of mandatory interest arbitration statute governing collective bargaining between employer and agricultural employees was quasi-legislative action with a limited scope of judicial review)].

- Setting of compensation for public employees [*Wirth v. State of Cal. (2006) 142 Cal. App. 4th 131, 137-139, 47 Cal. Rptr. 3d 623* (correctional supervisors organization sought petition for writ of mandate to compel Department of Personnel Administration to provide equal salary increases to supervisors as increases to rank and file employees)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawJudicial ReviewReviewabilityGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLegislationEnactmentGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsOrdinances & RegulationsGovernmentsState & Territorial GovernmentsEmployees & Officials

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41A-474B California Forms of Pleading and Practice--Annotated § 474B.32

§ 474B.32 Whether Agency Was Required by Law to Hold Hearing

Administrative mandate review is limited to those cases in which the administrative agency is required by law to hold a hearing [*Code Civ. Proc. § 1094.5(a)*; *see § 474B.12[1]*]. The fact that a hearing was in fact held, even though not required, does not make administrative mandate available [*Marina County Water Dist. v. State Water Resources Control Bd. (1984) 163 Cal. App. 3d 132, 138, 209 Cal. Rptr. 212]* . Thus, if the agency determines on its own motion to reconsider a previously taken administrative action, administrative mandate will not lie [*Marina County Water Dist. v. State Water Resources Control Bd. (1984) 163 Cal. App. 3d 132, 138-139, 209 Cal. Rptr. 212]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingGeneral Overview

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41A-474B California Forms of Pleading and Practice--Annotated § 474B.33

§ 474B.33 Whether Agency Action Was Arbitrary, Capricious, or Lacking in Evidentiary Support

[1] Applicability of Substantial Evidence Test

In ordinary mandate proceedings, the court's scope of review is comparatively narrow [*Kelly v. County of Los Angeles (2006) 141 Cal. App. 4th 910, 918-920, 46 Cal. Rptr. 3d 335* (substantial evidence standard of review for fact findings in ordinary mandate, and de novo review standard of review for questions of law, including questions of statutory interpretation); *C.V.C. v. Superior Court (1973) 29 Cal. App. 3d 909, 919, 106 Cal. Rptr. 123]* . The agency's action will be upheld unless the court determines that it was arbitrary, capricious, or lacking in evidentiary support [*California Hotel & Motel Assn. v. Industrial Welfare Com. (1979) 25 Cal. 3d 200, 212, 157 Cal. Rptr. 840, 599 P.2d 31* ; *Endangered Habitats League v. County of Orange (2005) 131 Cal. App. 4th 777, 782-783, 32 Cal. Rptr. 3d 177* ; *Better Alternatives for Neighborhoods v. Heyman (1989) 212 Cal. App. 3d 663, 671-673, 260 Cal. Rptr. 758* ; *Joint Council of Interns & Residents v. Board of Supervisors (1989) 210 Cal. App. 3d 1202, 1209, 258 Cal. Rptr. 762* ; *Marina County Water Dist. v. State Water Resources Control Bd. (1984) 163 Cal. App. 3d 132, 139, 209 Cal. Rptr. 212]* , or unless the agency failed to follow proper procedures or failed to give notice as required by law [*Joint Council of Interns & Residents v. Board of Supervisors (1989) 210 Cal. App. 3d 1202, 1209, 258 Cal. Rptr. 762* ; *Taylor Bus Service, Inc. v. San Diego Bd. of Education (1987) 195 Cal. App. 3d 1331, 1340, 241 Cal. Rptr. 379]* . Stated differently, the court is confined to an inquiry whether the administrative agency has abused its discretion and limited by the notion that, if reasonable minds might disagree, the court may not substitute its judgment for that of the agency [*Better Alternatives for Neighborhoods v. Heyman (1989) 212 Cal. App. 3d 663, 672, 260 Cal. Rptr. 758* ; *C.V.C. v. Superior Court (1973) 29 Cal. App. 3d 909, 919, 106 Cal. Rptr. 123]* . The burden is on the petitioner to show that no substantial evidence whatsoever supported the agency's findings [Taylor Bus *Service, Inc. v. San Diego Bd. of Education (1987) 195 Cal. App. 3d 1331, 1340-1341, 241 Cal. Rptr. 379]* .

[2] Applicability of Independent Judgment Test

Notwithstanding the comparatively narrow scope of judicial review generally available in ordinary mandate proceedings, the reviewing court may exercise its independent judgment in ordinary mandate proceedings when constitutional rights are involved [*Manjares v. Newton (1966) 64 Cal. 2d 365, 370-371, 49 Cal. Rptr. 805, 411 P.2d 901* ; *Gilbert v. City of Sunnyvale (2005) 130 Cal. App. 4th 1264, 1274-1275, 31 Cal. Rptr. 3d 297* ; *C.V.C. v.*

Superior Court (1973) 29 Cal. App. 3d 909, 919, 106 Cal. Rptr. 123] . If the agency's decision adversely impacts on a constitutionally protected right or interest, the court must exercise its independent judgment in reviewing the decision, even in ordinary mandate proceedings [*C.V.C. v. Superior Court (1973) 29 Cal. App. 3d 909, 919, 106 Cal. Rptr. 123]* .

The appellate court will also apply the independent judgment test as the standard of review when the appellate court has to decide questions of law on undisputed facts [*Environmental Charter High Sch. v. Centinela Valley Union High Sch. Dist. (2004) 122 Cal. App. 4th 139, 145-146, 18 Cal. Rptr. 3d 417* (school district decision to deny charter school use of district facilities for 2003-2004 school year was reviewed under ordinary mandate)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewStandards of ReviewArbitrary & Capricious ReviewAdministrative LawJudicial ReviewStandards of ReviewConstitutional RightAdministrative LawJudicial ReviewStandards of ReviewDe Novo ReviewAdministrative LawJudicial ReviewStandards of ReviewSubstantial EvidenceCivil ProcedureRemediesWritsCommon Law WritsMandamusEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

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[Reserved]

§§ 474B.34[Reserved]

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41A-474B California Forms of Pleading and Practice--Annotated § 474B.40

§ 474B.40 Related Matthew Bender Publications

For memoranda of points and authorities relating to forms for judicial review, see s California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender)

For memoranda of points and authorities supporting and opposing petitions for administrative mandate, see s California Points and Authorities, Ch. 195, *Public Administrative Law* (Matthew Bender).

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41A-474B California Forms of Pleading and Practice--Annotated § 474B.41

§ 474B.41 Federal Constitution

Prohibition against unreasonable searches and seizures. *U.S. Const., amend. IV*

Due process clause. *U.S. Const., amend. XIV, § 1*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsSearch & SeizureGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral Overview

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§ 474B.42 State Constitution

Due process clause. *Cal. Const., art. I, § 7(a)*

Prohibition against unreasonable searches and seizures. *Cal. Const., art. I, § 13*

Separation of powers doctrine. *Cal. Const., art. III, § 3*

Jurisdiction to give extraordinary relief. *Cal. Const., art. VI, § 10*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawSeparation of PowersConstitutional LawBill of RightsFundamental RightsSearch & SeizureGeneral OverviewConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral Overview

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§ 474B.43 State Statutes

Administrative Procedure Act. *Gov. Code §§ 11500-11528*

Allocation of burden of proof. *Evid. Code § 500*

Amendment of pleadings. *Code Civ. Proc. § 473*

Answers to complaints generally. *Code Civ. Proc. §§ 431.10-431.30*

Appeals in civil actions and proceedings. *Code Civ. Proc. §§ 901-914, 1109-1110b*

Authority of court to adopt suitable procedure where none specifically provided by statute. *Code Civ. Proc. § 187*

Certiorari. *Code Civ. Proc. §§ 1067-1077, 1107-1109*

Civil actions and proceedings generally. *Code Civ. Proc. §§ 307 et. seq.*

Contempt. *Code Civ. Proc. §§ 1209-1222*

Copies of pleadings are required to be served on adverse parties. *Code Civ. Proc. § 465*

Costs. *Code Civ. Proc. §§ 1021 et. seq.*

Demurrers. *Code Civ. Proc. §§ 430.10-430.80*

Demurrer raises issue of law. *Code Civ. Proc. § 589*

Discovery. *Code Civ. Proc. §§ 2016-2036*

Effect of notice of motion. *Code Civ. Proc. § 1010*

Effect of summons. *Code Civ. Proc. § 412.20(a)(3)*

Entry of judgment. *Code Civ. Proc. § 664*

Fee for transcribing record. *Gov. Code § 69950*

Filing initial pleading begins proceeding. *Code Civ. Proc. §§ 350, 411.10*

Filing of various papers constitutes appearance. *Code Civ. Proc. § 1014*

Mandate. *Code Civ. Proc. §§ 1084-1097, 1107-1109*

New trials. *Code Civ. Proc. §§ 655-663.2*

Power of court to impanel jury. *Code Civ. Proc. § 592*

Prohibition. *Code Civ. Proc. §§ 1102-1105, 1107-1109*

Recovery of attorney's fees when administrative action arbitrary or capricious. *Gov. Code § 800*

Recovery of litigation expenses, including attorney's fees, by small business or licensee when agency action undertaken without substantial justification. *Code Civ. Proc. § 1028.5*

Review of administrative decision by mandate proceeding. *Code Civ. Proc. § 1094.5*

Review of decisions by Alcoholic Beverage Control Appeals Board (and Director of Alcoholic Beverage Control). *Bus. & Prof. Code §§ 23090-23090.2*

Review of decisions by Board of Governors of State Bar or Committee of Bar Examiners. *Bus. & Prof. Code § 6082*

Review of decision by local housing enforcement agency to abate nuisance; independent judgment test. *Health & Safety Code § 17980.8*

Review of decisions by Public Utilities Commission. *Pub. Util. Code §§ 1756, 1759*

Review of decisions by Workmen's Compensation Appeals Board. *Lab. Code § 5950*

Right to demur to answer. *Code Civ. Proc. § 430.20*

Service of summons. *Code Civ. Proc. §§ 431.10-417.40*

Special proceedings and actions. *Code Civ. Proc. §§ 20-23*

Testimony in subsequent civil proceeding of person presiding at quasi-judicial proceeding. *Evid. Code § 703.5*

Time limitations on review of local agency decision. *Code Civ. Proc. § 1094.6(b)*

Verification of pleadings. *Code Civ. Proc. § 446*

Writ as order in writing issued in name of court. *Code Civ. Proc. § 17*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewReviewabilityGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamus

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§ 474B.44 Decisions

[1] Abuse of Discretion

[a] General Requirements

In absence of clear abuse of discretion, courts will uphold decision by Department of Alcoholic Beverage Control to suspend license for violation of liquor laws. *Provigo Corp. v. Alcoholic Beverage Control Appeals Board (1994) 7 Cal. 4th 561, 566, 28 Cal. Rptr. 2d 638, 869 P.2d 1163*

Under California administrative law, abuse of discretion occurs when party is denied right to present defense, to present testimony of key witnesses, or to take testimony out of state. *Apte v. Regents of University of California (1988) 198 Cal. App. 3d 1084, 1098, 244 Cal. Rptr. 312*

Administrative body does not abuse its discretion by failing to accept factual findings of administrative law judge who originally heard matter. *Gov. Code § 11517(c)* allows administrative body to refuse to adopt administrative law judge's proposed decision and to decide case itself on record, including transcript, with or without taking additional evidence. *Mixon v. Fair Employment & Housing Com. (1987) 192 Cal. App. 3d 1306, 1310, 1310 n.2, 237 Cal. Rptr. 884*

In mandate proceeding to review administrative order, determination of penalty imposed by administrative body is not disturbed on appeal in absence of manifest abuse of discretion. *Flowers v. State Personnel Bd. (1985) 174 Cal. App. 3d 753, 761, 220 Cal. Rptr. 139*

Discretionary authority is not subject to delegation unless statute provides otherwise. *California School Employees Assn. v. Personnel Com. of Pajaro Valley Unified School Dist. (1970) 3 Cal. 3d 139, 144, 89 Cal. Rptr. 620, 474 P.2d 436* ; *Sacramento Chamber of Commerce v. Stephens (1931) 212 Cal. 607, 610, 299 P. 728* ; *Webster v. Board of Education (1903) 140 Cal. 331, 332, 73 P. 1070*

Ministerial act is subject to delegation; approval or ratification of act after performance is equivalent to delegation. *California School Employees Assn. v. Personnel Com. of Pajaro Valley Unified School Dist. (1970) 3 Cal. 3d 139,*

144-145, 89 Cal. Rptr. 620, 474 P.2d 436 ; *Mott v. Horstmann (1940) 36 Cal. 2d 388, 391, 224 P.2d 11*

Distinction between discretionary and ministerial acts. *Williams v. Stockton (1925) 195 Cal. 743, 748, 235 P. 986* ; *People ex rel. Fund American Companies v. California Ins. Co. (1974) 43 Cal. App. 3d 423, 431-432, 117 Cal. Rptr. 623*

[b] Failure to Proceed in Manner Required by Law

Abuse of discretion by administrative agency as established if agency has not proceeded in manner required by law. *Woods v. Superior Court (1981) 28 Cal. 3d 668, 675, 170 Cal. Rptr. 484, 620 P.2d 1032*

Failure to follow spirit of law even though following letter of law is failure to proceed in manner required by law. *Walsh v. Kirby (1974) 13 Cal. 3d 95, 103-106, 118 Cal. Rptr. 1, 529 P.2d 33*

Failure to recognize and act on implications of law's explicit requirements is failure to proceed in manner required by law. *No Oil, Inc. v. Los Angeles, City of (1974) 13 Cal. 3d 68, 79-89, 118 Cal. Rptr. 34, 529 P.2d 66*

Administrative official are without authority to harmonize statutes. *People ex rel. Fund American Companies v. California Ins. Co. (1974) 43 Cal. App. 3d 423, 432-433, 117 Cal. Rptr. 623*

Necessity of making timely and sufficient objection in administrative proceeding to agency's failure to proceed in manner required by law. *Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 545, 92 Cal. Rptr. 525*

[c] Decision Not Supported by Agency Findings

Necessity for findings to support administrative decision where factual determinations were made. *Topanga Ass'n for a Scenic Community v. Los Angeles County (1974) 11 Cal. 3d 506, 515-517, 113 Cal. Rptr. 836, 522 P.2d 12* ; *In re Sturm (1974) 11 Cal. 3d 258, 267, 113 Cal. Rptr. 361, 521 P.2d 97* ; *Swars v. Council of City of Vallejo (1949) 33 Cal. 2d 867, 871, 206 P.2d 355* ; *William Dal Porto & Sons, Inc. v. Agricultural Labor Relations Bd. (1987) 191 Cal. App. 3d 1195, 1213, 237 Cal. Rptr. 206* ; *County of Los Angeles v. State of California (1985) 183 Cal. App. 3d 566, 579, 215 Cal. Rptr. 139* ; *Mahoney v. San Francisco City etc. Employees' Ret. Bd. (1973) 30 Cal. App. 3d 1, 3-6, 106 Cal. Rptr. 94*

Findings are required to be sufficiently clear to be understandable. *In re Sturm (1974) 11 Cal. 3d 258, 272, 113 Cal. Rptr. 361, 521 P.2d 97*

Findings requirement where application for license denied. *In re Sturm (1974) 11 Cal. 3d 258, 268-270, 113 Cal. Rptr. 361, 521 P.2d 97* (prisoner's application for parole)

Requirement that agency's findings must bridge analytical gap between facts (raw evidence) and ultimate decision is not satisfied when findings are not fact-specific but merely declare general conclusion. *California Aviation Council v. City of Ceres (1992) 9 Cal. App. 4th 1384, 1394-1395, 12 Cal. Rptr. 2d 163*

Hearing officer's findings provide ample basis for determination of agency's reasoning on judicial review when decision included four-page summary of evidence, three-page analysis of evidence explaining decision's reasoning, nine findings of fact, and six conclusions of law. *Getz v. City of West Hollywood (1991) 233 Cal. App. 3d 625, 630, 284 Cal. Rptr. 631*

Findings that bridge analytical gap between raw evidence and ultimate decision or order are sufficient when agency

proceeding involves noncomplex issues. *Zuniga v. County of San Mateo Dep't of Health Services (1990) 218 Cal. App. 3d 1521, 1530, 267 Cal. Rptr. 755*

Findings supporting administrative action, made in language of applicable ordinance, are adequate if ordinance requires that administrative action not be taken unless facts set forth in ordinance have been proved. *Topanga Assn. for a Scenic Community v. County of Los Angeles (1989) 214 Cal. App. 3d 1348, 1363, 263 Cal. Rptr. 214*

Findings made by incorporation by reference are proper; reference in administrative decision to administrative rule (without setting forth rule's language) is sufficient when rule citation, read together with factual findings, makes reasoning for administrative decision clear. *Parkmerced Residents Organization v. San Francisco Rent Stabilization etc. Bd. (1989) 210 Cal. App. 3d 1235, 1244, 258 Cal. Rptr. 774*

Findings are required to be legally relevant. *City and County of San Francisco v. Board of Permit Appeals (1989) 207 Cal. App. 3d 1099, 1109, 255 Cal. Rptr. 307*

Transcript of agency proceedings does not constitute sufficient findings when motion and oral remarks did not disclose basis for agency decision. *Pacifica Corp. v. City of Camarillo (1983) 149 Cal. App. 3d 168, 179-180, 196 Cal. Rptr. 670*

Administrative findings are not required to be stated with same formality required of judicial findings; findings are required to be liberally construed to support rather than defeat order under review. *Horwarth v. Local Agency Formation Com. (1983) 143 Cal. App. 3d 177, 183, 191 Cal. Rptr. 593*

Administrative findings set forth solely in language of applicable statute are insufficient. *American Funeral Concepts v. Board of Funeral Directors & Embalmers (1982) 136 Cal. App. 3d 303, 309, 186 Cal. Rptr. 196*

Findings requirement are met where agency expressly adopts findings prepared by staff or proposed by hearing officer. *Webb v. State Personnel Board (1971) 16 Cal. App. 3d 542, 548, 94 Cal. Rptr. 115*

Failure to make findings is cause for remand where decision might have been based on any of several grounds. *Hadley v. City of Ontario (1974) 43 Cal. App. 3d 121, 128-129, 117 Cal. Rptr. 513*

Lack of findings is not reversible error where evidence clearly shows what findings must have been. *Webb v. State Personnel Board (1971) 16 Cal. App. 3d 542, 548, 94 Cal. Rptr. 115* ; *Lees v. Bay Area Air Pollution Control Dist. (1965) 238 Cal. App. 2d 850, 853-854, 48 Cal. Rptr. 295*

Findings of fact in support of proposed administrative disciplinary decision are required to clearly set forth factual and legal basis for decision. *Medlock Dusters, Inc. v. Dooley (1982) 129 Cal. App. 3d 496, 502, 181 Cal. Rptr. 80*

[2] Administrative Construction

Administrative construction of law is occasionally necessary but never conclusive; final construction is judicial function. *Miller & Lux, Inc. v. Industrial Acci. Com. (1919) 179 Cal. 764, 766, 178 P. 960* ; *Godshalk v. City of San Diego (1971) 16 Cal. App. 3d 459, 468, 94 Cal. Rptr. 42*

Agency guidelines interpreting statute under which agency decision was made are not relevant to court's inquiry on mandate review of agency decision when guidelines were issued after date of agency decision, despite rule that agency interpretation of statute is entitled to great weight. *Georgia-Pacific Corp. v. California Coastal Com. (1982) 132 Cal. App. 3d 678, 694, 183 Cal. Rptr. 395*

Agency's interpretation of regulation is deserving of great weight, but ultimate resolution of interpretation is question of law, resting with courts. *Sangster v. California Horse Racing Bd. (1988) 202 Cal. App. 3d 1033, 1040, 249 Cal. Rptr. 235* ; *Skyline Homes, Inc. v. Occupational Safety & Health Appeals Bd. (1981) 120 Cal. App. 3d 663, 669, 174 Cal. Rptr. 665*

Courts are empowered to set aside administrative decision based on wrong construction of law. *People ex rel. Fund American Companies v. California Ins. Co. (1974) 43 Cal. App. 3d 423, 431, 117 Cal. Rptr. 623*

Agency's first-time construction of 16-year-old statute is not entitled to great weight. *Department of Water & Power v. Energy Resources Conservation & Development Com. (1991) 2 Cal. App. 4th 206, 220, 3 Cal. Rptr. 2d 289*

[3] Administrative Hearings

As in ordinary civil actions, party asserting affirmative at administrative hearing has burden of proof, including both initial burden of going forward and burden of persuasion by a preponderance of the evidence; preponderance of evidence does not mean necessarily preponderance of the number of witnesses; various elements go into determining weight to be given statements of parties on one side or other of a controversy, their opportunities for observation, mental capacity, standing, credibility, and numbers. *McCoy v. Board of Retirement (1986) 183 Cal. App. 3d 1044, 1051 n.5, 228 Cal. Rptr. 567*

[4] Appeal

Petition for review of Agriculture Labor Relations Board order filed three days late is deemed to have been timely filed when petition was submitted to clerk's office on final day for seeking review, but was not verified as required by *Cal. Rules of Ct., Rule 8.498*, and was returned by clerk for verification; even though time limit is jurisdictional, technical noncompliance in form of petition does not bar review. *United Farm Workers of America v. Agricultural Labor Relations Bd. (1985) 37 Cal. 3d 912, 914-916, 210 Cal. Rptr. 453, 694 P.2d 138*

Good cause exists for raising issue for first time on appeal of denial of petition for writ of administrative mandate when case relied on for raising issue was decided after opening brief was filed, court afforded all parties opportunity to respond to the issue, and issue was one of law. *J. L. Thomas, Inc. v. County of Los Angeles (1991) 232 Cal. App. 3d 916, 923 n.6, 283 Cal. Rptr. 815*

When presented with uncontradicted facts on appeal in tax matters, appellate court is free to make its own determinations; appellate review of legal questions is undertaken independently, so appellate court is not bound by trial court's determination. *Rain Bird Sprinkler Mfg. Corp. v. Franchise Tax Bd. (1991) 229 Cal. App. 3d 784, 794, 280 Cal. Rptr. 362*

Appellate court's function, in reviewing determinations made by superior court in its independent judgment review of administrative agency decision, is to apply substantial evidence test to factual findings; appellate court upholds trial court's factual determinations when supported by substantial evidence gleaned from administrative record. *Imperial Irrigation Dist. v. State Wat. Resources Control Bd. (1990) 225 Cal. App. 3d 548, 553, 275 Cal. Rptr. 250*

Even though trial court's determination of issues of fact are reviewable under substantial evidence test, trial court's determination of issues of law are fully reviewable by appellate court, and appellate court is not bound either by agency's preliminary resolution of issues of law or by trial court's subsequent decision. *Imperial Irrigation Dist. v. State Wat. Resources Control Bd. (1990) 225 Cal. App. 3d 548, 553, 275 Cal. Rptr. 250*

When applying substantial evidence test on review of trial court's denial of petition for writ of administrative mandate, appellate court: (1) ascertains whether evidentiary record reveals substantial support, contradicted or uncontradicted, that trial court's determinations are correct; (2) resolves all evidentiary conflicts in respondent's favor; (3) indulges all reasonable inferences to uphold judgment; and (4) defers to trial court on inferences reasonably deduced from facts. *Geoghegan v. Retirement Board (1990) 222 Cal. App. 3d 1525, 1529, 272 Cal. Rptr. 419*

When applying substantial evidence test on review of trial court's denial of petition for writ of administrative mandate, appellate court is bound by trial court's factual interpretation if undisputed facts can support more than one interpretation. *Geoghegan v. Retirement Board (1990) 222 Cal. App. 3d 1525, 1529, 272 Cal. Rptr. 419*

Scope of appellate court's review of administrative mandate is coextensive with that of superior court when superior court employs substantial evidence test, and therefore appellate court is not bound by determinations of superior court. *Brooks v. State Personnel Bd. (1990) 222 Cal. App. 3d 1068, 1071-1072, 272 Cal. Rptr. 292*

Denial of administrative mandate claim is appealable final judgment within meaning of *Code Civ. Proc. § 1064*, notwithstanding fact that additional claims have not yet been resolved by trial court. *Bullock v. City and County of San Francisco (1990) 221 Cal. App. 3d 1072, 1086, 271 Cal. Rptr. 44*

In administrative mandate action, appellate review is limited to issues in record at administrative level; additional evidence is admissible only when it was unavailable at time of administrative hearing, or improperly excluded from record. *Schaeffer Land Trust v. San Jose City Council (1989) 215 Cal. App. 3d 612, 625 n.9, 263 Cal. Rptr. 813*

Duties of appellate and trial courts in determining whether administrative record is free from legal error are identical; appellate court conducts own independent review, and superior court's disposition of issues is not conclusive. *Schaeffer Land Trust v. San Jose City Council (1989) 215 Cal. App. 3d 612, 622, 263 Cal. Rptr. 813*

Determination of whether administrative action was arbitrary or capricious is issue of fact for trial court over which appellate court has no power to weigh or judge effect of evidence or to resolve conflicts in it. *Jones v. Pierce (1988) 199 Cal. App. 3d 736, 747, 245 Cal. Rptr. 149*

To review denial of writ of mandate, determination of whether writ sought was traditional mandate under *Code Civ. Proc. § 1085* or administrative mandate under *Code Civ. Proc. § 1094.5* is necessary; determination is essential because nature of review undertaken by trial court and ultimately by court of appeal is determined by nature of writ. *Taylor Bus Service, Inc. v. San Diego Bd. of Education (1987) 195 Cal. App. 3d 1331, 1339, 241 Cal. Rptr. 379* (determining writ sought was traditional mandate)

Appellate court applies substantial evidence test when trial court applies that test under *Code Civ. Proc. § 1094.5(c)* to review administrative proceeding. *Anne B. v. State Bd. of Control (1984) 165 Cal. App. 3d 279, 284, 209 Cal. Rptr. 83* (reversal of trial court denial of petition for writ of administrative mandate to review decision by State Board of Control)

When findings of trial court are based on its proper exercise of independent judgment, appellate court applies substantial evidence standard to trial court's findings; however, when trial court's appropriate standard of review is substantial evidence or abuse of discretion, appellate court reviews administrative decision, not trial court's decision. *Schmitt v. City of Rialto (1985) 164 Cal. App. 3d 494, 501, 210 Cal. Rptr. 788*

Standard of review on appeal is dependent on appropriate standard of review at trial court level; standard of review at trial court level is dependent on type of rights affected by administrative proceeding. *Kimbrough v. Police & Fire Retirement System (1984) 161 Cal. App. 3d 1143, 1148, 208 Cal. Rptr. 112*

Appellate courts generally do not consider matters presented for first time on appeal. *Franz v. Board of Medical Quality Assurance (1982) 31 Cal. 3d 124, 143, 181 Cal. Rptr. 732, 642 P.2d 792* (appellant-petitioner in administrative writ of mandate proceeding waived right to raise issues of bias of panel member and variance between charges and findings in administrative proceeding by failing to raise them in trial court)

Scope of review on appeal. *Bekiaris v. Board of Education (1972) 6 Cal. 3d 575, 593, 100 Cal. Rptr. 16, 493 P.2d 480* ; *Petrucci v. Board of Medical Examiners (1975) 45 Cal. App. 3d 83, 87, 117 Cal. Rptr. 735*

Nonappealable orders include order sustaining demurrer to petition, order denying motion to reconsider ruling on demurrer and to recall and quash peremptory writ, order denying motion to amend petition, and order denying motion to strike petition. *Rittersbacher v. Board of Supervisors of Los Angeles County (1934) 220 Cal. 535, 539, 32 P.2d 135* , *cert. denied, 293 U.S. 592, 55 S. Ct. 107, 79 L. Ed. 686* ; *Gayle v. Hamm (1972) 25 Cal. App. 3d 250, 252 n.3, 101 Cal. Rptr. 628* ; *Sunseri v. Board of Medical Examiners (1964) 224 Cal. App. 2d 309, 319, 36 Cal. Rptr. 553* ; *McPheeters v. Board of Medical Examiners (1946) 74 Cal. App. 2d 46, 47, 168 P.2d 65*

Appeal is taken from judgment, not writ; appeal from writ is subject to dismissal. *DeMartini v. Department of Alcoholic Beverage Control (1963) 215 Cal. App. 2d 787, 794, 30 Cal. Rptr. 668* ; *Kindig v. Palos Verdes Homes Ass'n (1939) 33 Cal. App. 2d 349, 355, 91 P.2d 645*

When issue of proper standard of proof not raised by appellant at original administrative hearing to revoke appellant's license or in subsequent action for writ of administrative mandate challenging revocation of license, appellant is precluded from raising issue for first time on appeal from trial court's denial of petition for writ. *Milligan v. Hearing Aid Dispensers Examining Com. (1983) 142 Cal. App. 3d 1002, 1008, 191 Cal. Rptr. 490*

Proper standard of appellate review when trial court used substantial evidence test is whether or not findings of agency (not trial court) were supported by substantial evidence. *Pacific Coast Medical Enterprises v. Department of Benefit Payments (1983) 140 Cal. App. 3d 197, 208-209, 189 Cal. Rptr. 558*

County board's return of writ stating compliance with peremptory writ of mandate is waiver of right to appeal regarding validity of trial court's judgment granting writ; however, order following hearing on adequacy of board's return to writ relates to enforcement of judgment and thus is appealable since issue was trial court's assessment of and reaction to adequacy of board's return. *City of Carmel-by-the-Sea v. Board of Supervisors (1982) 137 Cal. App. 3d 964, 971-972, 187 Cal. Rptr. 379*

Court that issues writ of mandate retains continuing jurisdiction to make any order necessary to its enforcement; when writ remands matter to administrative body with directions to proceed in certain manner, and return states that court's mandate has been carried out, petitioner is able to challenge validity of that claim by new petition under *Code Civ. Proc. § 1094.5* or by supplemental petition, or court, on its own motion or that of petitioner, either oral or written, may order respondent to reconsider further. *City of Carmel-by-the-Sea v. Board of Supervisors (1982) 137 Cal. App. 3d 964, 971-972, 187 Cal. Rptr. 379*

Order denying petition out of hand (refusing issuance of alternative writ) is appealable. *Burrus v. Municipal Court (1973) 36 Cal. App. 3d 233, 238, 111 Cal. Rptr. 539*

[5] Burden of Proof and Producing Evidence

Respondent has burden to go forward with evidence where evidence on particular issue peculiarly within respondent's knowledge. *Morris v. Williams (1967) 67 Cal. 2d 733, 760, 63 Cal. Rptr. 689, 433 P.2d 697* ; *Garcia v. Industrial Acci. Com. (1953) 41 Cal. 2d 689, 694, 263 P.2d 8* ; *California Medical Assn. v. Brian (1973) 30 Cal. App. 3d 637, 651*

Person attacking administrative decision has burden of showing trial court that administrative proceedings unfair, in excess of jurisdiction, or show prejudicial abuse of discretion; otherwise, presumption of regularity of proceedings prevails. *Foster v. Civil Service Com. (1983) 142 Cal. App. 3d 444, 453, 190 Cal. Rptr. 893*

Agency has burden of proof where administrative charge was that petitioner made material misrepresentation to obtain license. *De Rasmo v. Smith (1971) 15 Cal. App. 3d 601, 605-606, 93 Cal. Rptr. 289* ; *Jones v. Maloney (1951) 106 Cal. App. 2d 80, 89, 234 P.2d 666*

[6] Findings Not Supported by Evidence

[a] Independent Judgment Review

Right to pursue lawful business or occupation is fundamental. *Truax v. Raich (1915) 239 U.S. 33, 41, 36 S. Ct. 7, 60 L. Ed. 131* ; *Purdy & Fitzpatrick v. California (1969) 71 Cal. 2d 566, 579, 79 Cal. Rptr. 77, 456 P.2d 645*

Tenured state university professor over 70 years of age terminated from employment for substandard performance who timely applied for continuation of tenure had vested right to continued employment and was entitled to independent review of administrative record. *Webster v. Trustees of Cal. State University (1993) 19 Cal. App. 4th 1456, 1462, 24 Cal. Rptr. 2d 150*

Driver's license is fundamental vested right for purpose of selecting standard of judicial review of administrative decision to suspend or renew license; trial court is required to exercise independent judgment in reviewing administrative record. Berlinghieri v. Department of Motor Vehicles (1983) 33 Cal. 3d392, 397-398, *33 Cal. 3d 392, 188 Cal. Rptr. 891, 657 P.2d 383* ; *Webb v. Miller (1986) 187 Cal. App. 3d 619, 624, 625, 232 Cal. Rptr. 50* ; *Lee v. Department of Motor Vehicles (1983) 142 Cal. App. 3d 275, 284, 191 Cal. Rptr. 23*

Substantial evidence rule is standard of review applying to decision denying doctor's initial application for hospital privileges because applicant has no vested or fundamental right to appointment; right of doctor to continue to practice in hospital is fundamental and administrative decision denying reappointment to staff is reviewable under independent judgment rule. *Unterthiner v. Desert Hospital Dist. (1983) 33 Cal. 3d 285, 293, 298, 188 Cal. Rptr. 590, 656 P.2d 554* ; *Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 820-825, 140 Cal. Rptr. 442, 567 P.2d 1162* ; *Smith v. Vallejo General Hospital (1985) 170 Cal. App. 3d 450, 455, 216 Cal. Rptr. 189*

Code Civ. Proc. § 1094.5 leaves to courts establishment of standards for determining which cases require independent judgment review and which cases require substantial evidence review. *Unterthiner v. Desert Hospital Dist. (1983) 33 Cal. 3d 285, 293, 298, 188 Cal. Rptr. 590, 656 P.2d 554* ; *Frink v. Prod (1982) 31 Cal. 3d 166, 173, 174, 181 Cal. Rptr. 893, 643 P.2d 476*

For purposes of determining applicability of independent judgment review, terms "fundamental" and "vested" are not used to establish absolutes, but are used in relative sense; weighing of both fundamental nature and vested nature of right determines whether or not independent judgment review is required. *Frink v. Prod (1982) 31 Cal. 3d 166, 177, 181 Cal. Rptr. 893, 643 P.2d 476*

Even when trial court must exercise its independent judgment on evidence, its findings are sustained on appeal if supported by substantial evidence on whole record. *Franz v. Board of Medical Quality Assurance (1982) 31 Cal. 3d 124, 135, 181 Cal. Rptr. 732, 642 P.2d 792* ; *Milligan v. Hearing Aid Dispensers Examining Com. (1983) 142 Cal. App. 3d 1002, 1005, 191 Cal. Rptr. 490*

Ultimate question in each case in determining whether or not independent judgment standard or substantial evidence standard applies is whether or not affected right is deemed to be of sufficient significance to preclude its extinction or abridgement by body (administrative agency) lacking judicial power. *Frink v. Prod (1982) 31 Cal. 3d 166, 176, 178, 181 Cal. Rptr. 893, 643 P.2d 476*

Nature of right rather than harm or damage involved in interference with it is factor determining whether it is fundamental. *Dickey v. Retirement Board (1976) 16 Cal. 3d 745, 751, 129 Cal. Rptr. 289, 548 P.2d 689* ; *Harlow v. Carleson (1976) 16 Cal. 3d 731, 734, 129 Cal. Rptr. 298, 548 P.2d 698*

Court is authorized to exercise independent judgment to determine whether or not findings are supported by weight of evidence when administrative decision substantially affects vested fundamental right and agency not directly authorized by state constitution to exercise judicial functions. *Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 32, 35, 112 Cal. Rptr. 805, 520 P.2d 29* ; *Bixby v. Pierno (1971) 4 Cal. 3d 130, 143, 93 Cal. Rptr. 234, 481 P.2d 242* ; *see also Los Alamitos General Hosp., Inc. v. Lackner (1978) 149 Cal. Rptr. 98*

Vested rights arise from statutes. *Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 33, 112 Cal. Rptr. 805, 520 P.2d 29*

Measure of fundamental right is effect in human terms and importance to individual in life situation. *Bixby v. Pierno (1971) 4 Cal. 3d 130, 145, 93 Cal. Rptr. 234, 481 P.2d 242*

Vested right is one already possessed. *Bixby v. Pierno (1971) 4 Cal. 3d 130, 146, 93 Cal. Rptr. 234, 481 P.2d 242* ; *Whaler's Village Club v. California Coastal Com. (1985) 173 Cal. App. 3d 240, 251, 220 Cal. Rptr. 2*

Right to receive license applied for is not, but right to keep license already acquired is, vested right. *Bixby v. Pierno (1971) 4 Cal. 3d 130, 146, 93 Cal. Rptr. 234, 481 P.2d 242*

Vested right is one so fixed as not to be subject to divestiture without owner's consent. *Adoption of Graham (1962) 58 Cal. 2d 899, 905, 27 Cal. Rptr. 163, 377 P.2d 275*

Vested right is existing valuable privilege. *Bertch v. Social Welfare Dep't (1955) 45 Cal. 2d 524, 529, 289 P.2d 485*

Vested rights arise from laws of property. *Temescal Water Co. v. Dept. of Public Works (1955) 44 Cal. 2d 90, 105-106, 280 P.2d 1*

In administrative mandate proceeding in which trial court has properly exercised its independent judgment on evidence, trial court's factual determinations are conclusive on appeal if supported by substantial evidence. *Moran v. Board of Medical Examiners (1948) 32 Cal. 2d 301, 308, 196 P.2d 20* ; *Foster v. Civil Service Com. (1983) 142 Cal. App. 3d 444, 452, 190 Cal. Rptr. 893*

Attack in mandate proceeding on credibility of witnesses in administrative proceeding is permissible in appropriate case. *Dare v. Bd. of Medical Examiners (1943) 21 Cal. 2d 790, 799-800, 136 P.2d 304*

Vested rights arise from professional licenses. *Laisne v. State Bd. of Optometry (1942) 19 Cal. 2d 831, 835, 123 P.2d 457*

Nature of hearing de novo. *Collier & Wallis, Ltd. v. Astor (1937) 9 Cal. 2d 202, 205, 70 P.2d 171*

On review of trial court's exercise of independent judgment, appellate court reviews record to determine whether or not trial court's findings supported by substantial evidence. *Lee v. Department of Motor Vehicles (1983) 142 Cal. App. 3d*

275, 284, 191 Cal. Rptr. 23 .

Dismissal of county employee involves fundamental right and thus trial court's determination governed by independent judgment test. *Foster v. Civil Service Com. (1983) 142 Cal. App. 3d 444, 452, 190 Cal. Rptr. 893*

On appeal from judgment denying petition for writ of administrative mandate when trial court required to, and did, exercise independent judgment on evidence and record before board, scope of review of appellate court is limited to determination of whether or not evidence, viewed in light most favorable to respondent, sustains findings of trial court, resolving any reasonable doubts in favor of such findings. *Schrier v. San Mateo County Employees' Retirement Assn. (1983) 142 Cal. App. 3d 957, 961, 191 Cal. Rptr. 421*

Tenured teachers possess vested rights and their discharge is subject to independent judgment review by court in administrative mandate proceeding; less stringent substantial evidence test is applicable in case of probationary employees whose rights are not vested. *Alexander v. Board of Trustees (1983) 139 Cal. App. 3d 567, 572, 188 Cal. Rptr. 705*

Since Unemployment Insurance Act benefits constitute property rights for purposes of judicial review, parties are entitled to independent evaluation of evidence by superior court, including findings on all essential fact questions. *Bilyeu v. Unemployment Ins. Appeals Bd. (1982) 130 Cal. App. 3d 657, 661, 181 Cal. Rptr. 837*

In reviewing decision of Board of Medical Quality Assurance to revoke professional license, independent judgment is standard to be used by trial court except when determining penalty imposed. *Dresser v. Board of Medical Quality Assurance (1982) 130 Cal. App. 3d 506, 510, 181 Cal. Rptr. 797*

Right of probationary teacher to be rehired for next school year is not a vested right requiring independent judgment review. *Mt. San Antonio College Faculty Assn. v. Board of Trustees (1981) 125 Cal. App. 3d 27, 34, 177 Cal. Rptr. 810*

Administrative suspension or revocation of existing license is subject to independent judgment review by court in administrative mandate proceeding. *Brewer v. Department of Motor Vehicles (1979) 93 Cal. App. 3d 358, 362, 155 Cal. Rptr. 643*

Policeman's right to injury leave pay, to retirement benefits, and to reemployment are vested rights and are fundamental in nature; trial court, in reviewing administrative decisions relating to such rights, is required not only to examine administrative record for errors of law but to exercise its independent judgment on evidence as disclosed in limited trial de novo; trial court is required to weigh evidence and exercise its independent judgment on weight of evidence produced. *Roccaforte v. City of San Diego (1979) 89 Cal. App. 3d 877, 886, 152 Cal. Rptr. 558*

Retirement benefit rights in public employees retirement system are fundamental and vested. *Depuy v. Board of Retirement (1978) 87 Cal. App. 3d 392, 396-397, 150 Cal. Rptr. 791*

Absence of record sufficient to permit independent judgment review is ground for remand for new hearing. *Hadley v. City of Ontario (1974) 43 Cal. App. 3d 121, 127, 117 Cal. Rptr. 513*

No person is entitled to conduct business free of governmental control. *Bixby v. Pierno (1971) 4 Cal. 3d 130, 145-146, 93 Cal. Rptr. 234, 481 P.2d 242* ; *Northern Inyo Hosp. v. Fair Employment Practice Com. (1974) 38 Cal. App. 3d 14, 23, 112 Cal. Rptr. 872*

Right to benefit from grandfather clause does not confer any vested right on applicant for license. *Toczauer v. State Bd. of Registration (1971) 20 Cal. App. 3d 1067, 1069-1071, 98 Cal. Rptr. 211*

Court is unable to assess weight of uncontradicted evidence. *David Kikkert & Associates, Inc. v. Shine (1970) 6 Cal. App. 3d 112, 116, 86 Cal. Rptr. 161*

Parties are entitled to reconstruct record for independent judgment review in event record of evidence was not made. *Charles L. Harney, Inc. v. Board of Permit Appeals (1961) 195 Cal. App. 2d 442, 444-445, 15 Cal. Rptr. 870* (record reconstructed by parties)

Vested rights arise from contracts. *Bixby v. Pierno (1971) 4 Cal. 3d 130, 147-148, 93 Cal. Rptr. 234, 481 P.2d 242* ; *Reed v. City Council of Roseville (1943) 60 Cal. App. 2d 628, 636, 141 P.2d 459*

Independent judgment test under *Code Civ. Proc. § 1094.5* is appropriate standard of review of county board decision awarding public employee service-connected disability retirement benefits. *County of Alameda v. Board of Retirement (1988) 46 Cal. 3d 902, 910, 251 Cal. Rptr. 267, 760 P.2d 464*

County's direct pecuniary interest in challenging retirement system award is basis for applying independent judgment standard of review. *County of Alameda v. Board of Retirement (1988) 46 Cal. 3d 902, 908-909, 251 Cal. Rptr. 267, 760 P.2d 464*

Denial of application for conditional use permit does not affect fundamental interests that would warrant independent judgment review. *Smith v. County of Los Angeles (1989) 211 Cal. App. 3d 188, 199-200, 259 Cal. Rptr. 231*

Trial court is required to review administrative agency's adjudicatory decisions de novo if: (1) those decisions affect fundamental vested rights; and (2) administrative agency of legislative origin and Legislature has not provided that substantial evidence test should govern review of its decisions. *Dominey v. Department of Personnel Administration (1988) 205 Cal. App. 3d 729, 740-741, 252 Cal. Rptr. 620*

Public employees' claim for backpay for work performed in higher classification involves fundamental right for purposes of applying independent judgment standard of review because it directly affects employees' ability to continue to support their families; claim involves vested right because employees would be entitled to compensation for work already performed. *Dominey v. Department of Personnel Administration (1988) 205 Cal. App. 3d 729, 742, 252 Cal. Rptr. 620*

Trial court properly applies "independent judgment" test to review administrative record in mandate proceeding brought to compel Department of Social Services to set aside its decision revoking license to operate family day care home for children, because trial court must exercise its independent judgment on evidence if decision of administrative agency substantially affects fundamental vested right, and right to engage in such occupation is such a right. *Seering v. Dept. of Social Services (1987) 194 Cal. App. 3d 298, 302, 302 n.1, 239 Cal. Rptr. 422*

In mandate proceeding involving fundamental or vested rights, such as right to disability retirement benefits, or whenever authorized by law, trial court is required independently to judge administrative record to determine if findings were supported by weight of evidence. *Swehla v. Teachers' Retirement Bd. (1987) 192 Cal. App. 3d 1088, 1092, 237 Cal. Rptr. 789* ; *Gatewood (1985) 175 Cal. App. 3d 311, 322, 220 Cal. Rptr. 724*

When reviewing administrative decision through writ of mandate and decision affects substantially fundamental vested right, trial court is required to exercise its independent judgment to determine whether evidence supports findings; independent review requires trial court to make its own determination based on evidence at administrative hearing; independent review requires appellate court to decide whether credible and competent evidence supports trial court's judgment. *Martinez v. County of Tulare (1987) 190 Cal. App. 3d 1430, 1436-1437, 235 Cal. Rptr. 851*

Revocation of restricted real estate broker's license is fundamental but not vested right and therefore subject to substantial evidence and not independent judgment review, because very nature of restricted license is indication to holder that rights granted from it are neither vested nor permanent. *Apollo Estates, Inc. v. Department of Real Estate (1985) 174 Cal. App. 3d 625, 635-636, 220 Cal. Rptr. 199*

In mandate proceeding to review disciplinary action taken by county civil service commission against sheriff's deputy, trial court is required to apply "substantial evidence" test, even though deputy's fundamental vested right of employment was involved, when petitioner sheriff did not himself possess such right. *Carpenter v. Civil Service Com. (1985) 173 Cal. App. 3d 446, 450-452, 220 Cal. Rptr. 407*

Employer's rights to establish practices and procedures and to impose conditions of employment do not constitute fundamental vested right so as to require judicial review of administrative decision by application of independent judgment test. *Carpenter v. Civil Service Com. (1985) 173 Cal. App. 3d 446, 451, 220 Cal. Rptr. 407*

Independent judgment standard is proper when decision of administrative agency with statewide jurisdiction reviewed in mandate proceeding. *Eisenberg v. Myers (1983) 148 Cal. App. 3d 814, 820, 196 Cal. Rptr. 270*

[b] Substantial Evidence Review

Decisions of agency of constitutional authority are reviewed only to determine whether substantial evidence supports determination, even when vested rights are involved. *Coleman v. Department of Personnel Administration (1991) 52 Cal. 3d 1102, 1125, 278 Cal. Rptr. 346, 805 P.2d 300*

Substantial evidence test requires reviewing court to consider all relevant evidence, including evidence detracting from agency's decision. *Sierra Club v. California Coastal Commission (1993) 12 Cal. App. 4th 602, 610, 15 Cal. Rptr. 2d 779*

Substantial evidence test is proper to review findings and decision by California Fair Employment and Housing Commission concerning whether employer may exclude fertile women from certain types of jobs involving exposure to lead. *Johnson Controls, Inc. v. Fair Employment & Housing Com. (1990) 218 Cal. App. 3d 517, 531, 267 Cal. Rptr. 158*

Case involving abuse of discretion in area of land use regulation does not involve fundamental vested rights; substantial evidence test is appropriate scope of review. *Topanga Assn. for a Scenic Community v. County of Los Angeles (1989) 214 Cal. App. 3d 1348, 1356 n.3, 263 Cal. Rptr. 214*

Substantial evidence test is applicable on judicial review of decision by Department of Rehabilitation that independent care provider owed it reimbursement for prior funding overpayment; speculation that decision would cause care provider to curtail habilitation services to developmentally disabled (and thereby implicate fundamental vested right of disabled to such services) is insufficient to justify independent judgment review because state must fill void if independent care provider cannot provide services. *Hope Rehabilitation Services v. Department of Rehabilitation (1989) 212 Cal. App. 3d 938, 944, 261 Cal. Rptr. 123*

Substantial evidence rule does not apply to questions of law; reviewing court is free to determine independently application of laws, regulations, or procedures; this construction of rule applies to interpretation of policies and procedures of University of California that have status of statutes in its internal governance, and clearly come into play when facts are undisputed. *Apte v. Regents of University of California (1988) 198 Cal. App. 3d 1084, 1092-1093, 244 Cal. Rptr. 312*

Substantial evidence is relevant evidence that reasonable mind might accept as adequate to support conclusion. *Apte v. Regents of University of California (1988) 198 Cal. App. 3d 1084, 1091, 244 Cal. Rptr. 312*

Department of Personnel Administration is authorized to make final factual findings in matters of constructive resignation under *Gov. Code § 19996.2*; review by trial court is limited to substantial evidence test. *Allen v. Dept. of Personnel Administration (1987) 193 Cal. App. 3d 355, 362, 238 Cal. Rptr. 317*

Findings by ALRB are entitled to respect, but are properly set aside when record does not justify decision under substantial evidence test. *J. R. Norton Co. v. Agricultural Labor Relations Bd. (1987) 192 Cal. App. 3d 874, 888, 238 Cal. Rptr. 87*

Employer's right to establish its employment practices and procedures and to impose conditions of employment is not a fundamental vested right; substantial evidence test is applicable on review of administrative complaint that city had engaged in racial discrimination in administration and application of promotional examination. *City and County of San Francisco v. Fair Employment & Housing Com. (1987) 191 Cal. App. 3d 976, 984, 236 Cal. Rptr. 716*

In administrative mandate proceedings, trial court exercises its independent judgment on evidence, and appellate court merely reviews whole record to determine whether trial court's findings are supported by substantial evidence. *Kearl v. Board of Medical Quality Assurance (1986) 189 Cal. App. 3d 1040, 1052, 236 Cal. Rptr. 526*

Evidence is substantial if any reasonable trier of fact could have considered it reasonable, credible, and of solid value; evidence of one credible witness possibly constitutes substantial evidence. *Kearl v. Board of Medical Quality Assurance (1986) 189 Cal. App. 3d 1040, 1052, 236 Cal. Rptr. 526*

When substantial evidence test applies, superior court exercises essentially appellate function in determining whether administrative findings are supported by substantial evidence; scope of appellate review is coextensive with that of superior court. *Division of Occupational Safety & Health v. State Bd. of Control (1987) 189 Cal. App. 3d 794, 800, 234 Cal. Rptr. 661*

County's right to discharge hospital employee is neither fundamental nor vested, therefore trial court properly used substantial evidence test to review personnel board's findings. *County of Santa Clara v. Willis (1986) 179 Cal. App. 3d 1240, 1250, 225 Cal. Rptr. 244*

Although Board of Medical Quality Assurance required to find by clear and convincing evidence, and superior court exercises independent judgment review, appellate court is required only to determine whether superior court's findings are supported by substantial evidence. *Yellen v. Board of Medical Quality Assurance (1985) 174 Cal. App. 3d 1040, 1057-1058, 220 Cal. Rptr. 426*

Even when contradicted by direct testimony, persuasive circumstantial evidence constitutes substantial evidence for inferences based on it. *Norris v. State Personnel Board (1985) 174 Cal. App. 3d 393, 398-399, 219 Cal. Rptr. 895*

In mandate proceeding to review disciplinary action taken by county civil service commission against sheriff's deputy, trial court is required to apply "substantial evidence" test, even though deputy's fundamental vested right of employment was involved, when petitioner sheriff did not himself possess such right. *Carpenter v. Civil Service Com. (1985) 173 Cal. App. 3d 446, 450-452, 220 Cal. Rptr. 407*

When administrative decision neither involves nor substantially affects fundamental vested right, trial court is required to review entire administrative record to determine whether findings are supported by substantial evidence, and if agency committed any errors of law. *Whaler's Village Club v. California Coastal Com. (1985) 173 Cal. App. 3d 240, 251, 220 Cal. Rptr. 2*

Penalty-reducing decision of civil service commission is reviewable in superior court mandate proceeding only for abuse of discretion. *Lowe v. Civil Service Com. (1985) 164 Cal. App. 3d 667, 677, 210 Cal. Rptr. 673*

Independent review by trial court is appropriate when right affected is fundamental vested right; substantial evidence is appropriate scope of review when trial court standard was independent review. *Kimbrough v. Police & Fire Retirement System (1984) 161 Cal. App. 3d 1143, 1149, 208 Cal. Rptr. 112*

Appellate court is required to use substantial evidence test to review trial court's independent review of administrative decision; in such case, however, court of appeal is not merely echoing determination of trial court, which it may reverse when supported only by scintilla of evidence. *Bowman v. Board of Pension Commissioners. (1984) 155 Cal. App. 3d 937, 943-944, 943 n.3, 202 Cal. Rptr. 505*

Review of administrative agency's finding under *Code Civ. Proc. § 1094.5* is limited to determination of whether findings are supported by record (substantial evidence test), even when fundamental vested right is involved, when agency derives its adjudicative powers from *California Constitution. Goggin v. State Personnel Bd. (1984) 156 Cal. App. 3d 96, 102, 202 Cal. Rptr. 587*

Fair procedure requires adequate notice and reasonable opportunity to be heard; rigid adherence to fixed formula of procedure is not required. *Tiholiz v. Northridge Hospital Foundation (1984) 151 Cal. App. 3d 1197, 1202, 199 Cal. Rptr. 338*

Court is limited to determining whether findings are supported by substantial evidence in light of whole record when administrative decision does not substantially affect vested fundamental right or agency directly authorized by Constitution to exercise judicial functions. *Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 35, 44-45, 112 Cal. Rptr. 805, 520 P.2d 29* ; *Bixby v. Pierno (1971) 4 Cal. 3d 130, 144, 93 Cal. Rptr. 234, 481 P.2d 242* ; *see also Alamitos General Hosp., Inc. v. Lackner (1978) 86 Cal. App. 3d 417, 423, 149 Cal. Rptr. 98*

Requirement that entire record, not merely evidence supporting administrative decision, be examined. *LeVesque v. Workmen's Comp. App. Bd. (1970) 1 Cal. 3d 627, 638 n.22, 83 Cal. Rptr. 208, 463 P.2d 432* (construing *Lab. Code § 5952*)

Substantial evidence is evidence of ponderable legal significance, reasonable in nature, credible, and of solid value. *People v. Bassett (1968) 69 Cal. 2d 122, 138-139, 70 Cal. Rptr. 193, 443 P.2d 777* ; *Estate of Bristol (1944) 23 Cal. 2d 221, 223, 143 P.2d 689* ; *Pennel v. Pond Union School Dist. (1973) 29 Cal. App. 3d 832, 837 n.2, 105 Cal. Rptr. 817*

Substantial evidence in light of whole record means substantial evidence as opposed to scintilla of evidence. *Martin v. Alcoholic Beverage Control Appeals Bd. (1959) 52 Cal. 2d 238, 246, 340 P.2d 1*

In action for administrative mandate, trial court is under no duty to prepare findings of fact and conclusions of law in absence of timely request for statement of decision under *Code Civ. Proc. § 632*. *Milligan v. Hearing Aid Dispensers Examining Com. (1983) 142 Cal. App. 3d 1002, 1005, n.3, 191 Cal. Rptr. 490*

Substantial evidence rule requires trial court to start with presumption that record contains evidence to sustain every finding of fact and burden is on appellant to show that there is not substantial evidence whatsoever to support findings. *Pescosolido v. Smith (1983) 142 Cal. App. 3d 964, 970, 191 Cal. Rptr. 415*

Administrative board, as trier of fact, is sole arbiter of all conflicts in evidence, conflicting interpretations thereof, and conflicting inferences reasonably drawn therefrom, and is sole judge of credibility of witnesses. *Pescosolido v. Smith*

(1983) 142 Cal. App. 3d 964, 970-971, 191 Cal. Rptr. 415

Landowner's application for exercise of administrative discretion in area of land use is subject to substantial evidence test, as no fundamental vested rights exist. *Rasmussen v. City Council (1983) 140 Cal. App. 3d 842, 848-849, 190 Cal. Rptr. 1*

Discharge of probationary teachers, whose rights are not vested, is subject to substantial evidence test. *Alexander v. Board of Trustees (1983) 139 Cal. App. 3d 567, 572, 188 Cal. Rptr. 705*

Power of appellate review of sufficiency of evidence begins and ends with determination of whether or not there is any substantial evidence, contradicted or uncontradicted, which will support finding of fact; factual matters are viewed most favorably to prevailing party and conflicts are decided in favor of respondent. *12319 Corporation v. Business License Com. (1982) 137 Cal. App. 3d 54, 64, 186 Cal. Rptr. 726*

Substantial evidence test is applicable standard of review with respect to disciplinary actions taken against state university employee. *Washington v. State Personnel Bd. (1981) 127 Cal. App. 3d 636, 640, 179 Cal. Rptr. 637*

Standard is whether or not entire administrative record discloses substantial evidence (reasonable, credible, and of solid value) such that reasonable trier of fact could have found as it did. *Parker v. State Personnel Bd. (1981) 120 Cal. App. 3d 84, 87, 174 Cal. Rptr. 333*

Court is required to draw all legitimate and reasonable inferences in support of agency's findings, not to reweigh evidence. *Fair Employment Practice Com. v. State Personnel Bd. (1981) 117 Cal. App. 3d 322, 333, 172 Cal. Rptr. 739*

[c] Constitutional Rights Case

Review procedure when petitioner claims administrative decision not actually based on alleged grounds but based on official dissatisfaction with exercise of constitutional rights such as freedom of speech. *Adcock v. Board of Educ. (1973) 10 Cal. 3d 60, 65-66, 109 Cal. Rptr 676, 513 P.2d 900* ; *Bekiaris v. Board of Education (1972) 6 Cal. 3d 575, 591-593, 100 Cal. Rptr. 16, 493 P.2d 480*

Findings requirement in case of alleged official dissatisfaction with exercise of constitutional rights. *Bekiaris v. Board of Education (1972) 6 Cal. 3d 575, 592-593, 100 Cal. Rptr. 16, 493 P.2d 480*

Independent judgment review required when constitutionally protected interest at stake. *Lichter v. United States (1947) 334 U.S. 742, 791-792, 68 S. Ct. 1294, 92 L. Ed. 1694* ; *Bixby v. Pierno (1971) 4 Cal. 3d 130, 148 n.5, 148 n.6, 93 Cal. Rptr. 234, 481 P.2d 242* ; *C.V.C. v. Superior Court (1973) 29 Cal. App. 3d 909, 919, 106 Cal. Rptr. 123*

[7] Findings of Fact

When trial court denied driver's petition for writ of mandate seeking to set aside decision of DMV to suspend driver's license, and findings of fact not requested from or expressly issued by trial court, on appeal findings necessary to support judgment are implied and judgment is affirmed if supported by any substantial evidence. *Lee v. Department of Motor Vehicles (1983) 142 Cal. App. 3d 275, 284, 191 Cal. Rptr. 23* .

When there is no statement of decision to reveal specific findings of trial court, findings of fact and conclusions of law necessary to support judgment are implied, and judgment is affirmed if supported by substantial evidence. *Kearl v. Board of Medical Quality Assurance (1986) 189 Cal. App. 3d 1040, 1052, 236 Cal. Rptr. 526*

[8] Jurisdiction and Jurisdictional Review

Superior court is generally proper court for filing petition for writ of mandate reviewing administrative decision. *Roma Macaroni Factory v. Giambastiani (1933) 219 Cal. 435, 436-437, 27 P.2d 371* ; *Cohen v. Superior Court (1968) 267 Cal. App. 2d 268, 270-271, 72 Cal. Rptr. 814*

Court has discretion to refuse to consider repetitive applications. *Hagan v. Superior Court (1962) 57 Cal. 2d 767, 770-771, 22 Cal. Rptr. 206, 371 P.2d 982*

Meaning of jurisdiction, lack of jurisdiction, and excess of jurisdiction. *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 287-291, 109 P.2d 942*

Meaning of jurisdiction in prohibition and certiorari cases. *Rodman v. Superior Court (1939) 13 Cal. 2d 262, 269-270, 89 P.2d 109*

Administrative agency does not act without fundamental jurisdiction or in excess of its jurisdiction when it acts pursuant to authority of statute later declared unconstitutional. *Miller v. Board of Medical Quality Assurance (1987) 193 Cal. App. 3d 1371, 1379, 238 Cal. Rptr. 915*

[9] Penalties

Abuse of discretion was not shown when an employee was discharged when other employees who had engaged in similar misconduct were not discharged because similar wrongs do not require equal penalties. *Pegues v. Civil Service Com. (1998) 67 Cal. App. 4th 95, 106, 78 Cal. Rptr. 2d 705*

If administrative agency has imposed single discipline for multiple charges, some of which are found not sustained by evidence, and if there is real doubt whether or not same action would have been taken on proper findings, matter is returned to agency for redetermination of penalty. *Franz v. Board of Medical Quality Assurance (1982) 31 Cal. 3d 124, 144, 181 Cal. Rptr. 732, 642 P.2d 792* ; *Vollstedt v. City of Stockton (1990) 220 Cal. App. 3d 265, 277, 269 Cal. Rptr. 404*

In determining abuse of discretion in imposition of penalty in context of public employee discipline, extent to which employee's conduct resulted in, or if repeated conduct is likely to result in, harm to public service is overriding consideration. *Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194, 218, 124 Cal. Rptr. 14, 539 P.2d 774* ; *County of Santa Clara v. Willis (1986) 179 Cal. App. 3d 1240, 1251, 225 Cal. Rptr. 244*

Propriety of penalty imposed by administrative decision is not matter for judicial inquiry except to determine whether agency abused its discretion. *Nightingale v. State Personnel Board (1972) 7 Cal. 3d 507, 515, 102 Cal. Rptr. 758, 498 P.2d 1006* ; *Martin v. Alcoholic Beverage Control Appeals Bd. (1959) 52 Cal. 2d 287, 291, 341 P.2d 296* ; *Martinez v. County of Tulare (1987) 190 Cal. App. 3d 1430, 1438, 235 Cal. Rptr. 851* ; *Fout v. State Personnel Bd. (1982) 136 Cal. App. 3d 817, 821, 186 Cal. Rptr. 452* ; *Marino v. Los Angeles (1973) 34 Cal. App. 3d 461, 464, 110 Cal. Rptr. 45* ; *Wingfield v. Fielder (1972) 29 Cal. App. 3d 209, 221, 105 Cal. Rptr. 619*

Court is empowered to require agency to reconsider penalty where abuse of discretion shown by failure of evidence to support charges or some of them. *O'Reilly v. Board of Medical Examiners (1967) 66 Cal. 2d 381, 389, 58 Cal. Rptr. 7, 426 P.2d 167* ; *Magit v. Board of Medical Examiners (1962) 57 Cal. 2d 74, 87-88, 17 Cal. Rptr 488, 366 P.2d 816* ; *Collins v. Board of Medical Examiners (1972) 29 Cal. App. 3d 439, 445, 105 Cal. Rptr. 634* ; *Wingfield v. Fielder (1972) 29 Cal. App. 3d 209, 223, 105 Cal. Rptr. 619*

Penalty is within limits of agency's discretion if reasonable minds might differ as to whether it is appropriate. *Harris v. Alcoholic Bev. etc. Appeals Bd. (1965) 62 Cal. 2d 589, 594, 43 Cal. Rptr. 633, 400 P.2d 745* ; *Wingfield v. Fielder (1972) 29 Cal. App. 3d 209, 221, 105 Cal. Rptr. 619*

Test of abuse of discretion in imposition of penalty is whether reasonable person would have determined penalty imposed to be appropriate. *MacFarlane v. Department of Alcoholic Beverage Control (1959) 51 Cal. 2d 84, 91, 330 P.2d 769* ; *Weiss v. State Bd. of Equalization (1953) 40 Cal. 2d 772, 775, 256 P.2d 1* ; *Marino v. Los Angeles (1973) 34 Cal. App. 3d 461, 464, 110 Cal. Rptr. 45* ; *Wingfield v. Fielder (1972) 29 Cal. App. 3d 209, 221, 105 Cal. Rptr. 619*

Absent abuse of discretion by administrative agency, neither appellate nor trial court is free to substitute its discretion for that of agency concerning degree of punishment imposed. *Fout v. State Personnel Bd. (1982) 136 Cal. App. 3d 817, 821, 186 Cal. Rptr. 452* ; *Dresser v. Board of Medical Quality Assurance (1982) 130 Cal. App. 3d 506, 518, 181 Cal. Rptr. 797*

In considering whether or not abuse of discretion occurred in discipline of public employee, overriding consideration is extent to which employee's conduct resulted in, or if repeated is likely to result in, harm to public service; other factors include circumstances surrounding misconduct and likelihood of recurrence. *Fout v. State Personnel Bd. (1982) 136 Cal. App. 3d 817, 821, 186 Cal. Rptr. 452*

Agency is entitled to consider evidence outside record when setting penalty. *Ralph Williams Ford v. New Car Dealers Policy & Appeals Bd. (1973) 30 Cal. App. 3d 494, 500, 106 Cal. Rptr. 340 , cert. denied, 414 U.S. 974, 94 S. Ct. 283, 38 L. Ed. 2d 217*

Court is empowered to find abuse of discretion if penalty is grossly disproportionate to cause for discipline. *Turner v. Hatch (1971) 14 Cal. App. 3d 759, 765-766, 92 Cal. Rptr. 643* ; *Carroll v. Kern County Civil Serv. Comm'n (1970) 11 Cal. App. 3d 727, 733, 90 Cal. Rptr. 128*

[10] Questions of Law

When facts before administrative agency are uncontradicted, trial court's determination of their legal effect involves solely question of law. *Apte v. Regents of University of California (1988) 198 Cal. App. 3d 1084, 1093, 244 Cal. Rptr. 312*

[11] Review of Fairness of Trial

[a] General Requirements

Prejudice is not shown by agency member's public expression of views before hearing where issue is one of public interest. *Fairfield v. Superior Court (1975) 14 Cal. 3d 768, 780-782, 122 Cal. Rptr. 543, 537 P.2d 375*

Prejudice on part of agency members is question in review proceeding only if raised in administrative proceeding. *Thompson v. City of Long Beach (1953) 41 Cal. 2d 235, 243, 259 P.2d 649*

Prejudice of fewer than majority of agency members does not affect petitioner's interests. *Thompson v. City of Long Beach (1953) 41 Cal. 2d 235, 243, 259 P.2d 649*

Nature of review on question whether petitioner received fair administrative trial. *English v. City of Long Beach (1950) 35 Cal. 2d 155, 158-160, 217 P.2d 22*

Unlikelihood that challenged agency member would disqualify himself or be found disqualified does not excuse failure to present question of prejudice to agency. *Caminetti v. Pac. Mutual L. Ins. Co. (1943) 22 Cal. 2d 344, 366, 139 P.2d 908* ; *Barkin v. Board of Optometry (1969) 269 Cal. App. 2d 714, 719, 75 Cal. Rptr. 337*

Administrative officer is not subject to removal from case because of prejudice if his absence would render agency unable to function. *Caminetti v. Pac. Mutual L. Ins. Co. (1943) 22 Cal. 2d 344, 366, 139 P.2d 908*

Even if chief of public agency which instituted administrative action had conflict of interest under *Gov. Code §§ 87100* and *87103*, her signing of revised accusation against petitioners is insufficient grounds for disturbing administrative decision. *Citizens Capital Corporation v. Cathcart (1982) 136 Cal. App. 3d 793, 797-799, 801, 186 Cal. Rptr. 515*

Prejudice on part of agency members is question in review proceeding despite failure to raise it in administrative proceeding if question could not be presented to agency as practical matter. *Barkin v. Board of Optometry (1969) 269 Cal. App. 2d 714, 719, 75 Cal. Rptr. 337*

[b] Constitutional Considerations

Right to procedural protection depends on balance between individual's interest in avoiding grievous loss and government's interest in summary adjudication. *Morrissey v. Brewer (1972) 408 U.S. 471, 480, 92 S. Ct. 2593, 33 L. Ed. 2d 484* ; *Bixby v. Pierno (1971) 4 Cal. 3d 130, 144-146, 93 Cal. Rptr. 234, 481 P.2d 242*

Opportunity for hearing is generally required to precede government deprivation of fundamental right instead of following it. *Fuentes v. Shevin (1972) 407 U.S. 67, 80, 92 S. Ct. 1983, 32 L. Ed. 2d 556* ; *Blair v. Pitchess (1971) 96 Cal. Rptr. 42, 486 P.2d 1242*

Procedural requirements for hearing varies according to government function, character of private interest, and nature of later proceedings. *Boddie v. Connecticut (1971) 401 U.S. 371, 378, 91 S. Ct. 780, 28 L. Ed. 2d 113* ; *McCullough v. Terzian (1970) 2 Cal. 3d 647, 653-655, 87 Cal. Rptr. 195, 470 P.2d 4*

Availability of independent judicial review salvages otherwise unconstitutional administrative procedure. *Lichter v. United States (1947) 334 U.S. 742, 791-792, 68 S. Ct. 1294, 92 L. Ed. 1694* ; *Bixby v. Pierno (1971) 4 Cal. 3d 130, 148 n.5, 148 n.6, 93 Cal. Rptr. 234, 481 P.2d 242*

Determination whether right is fundamental depends on its effect in human terms and its importance to individual in life situation. *Bixby v. Pierno (1971) 4 Cal. 3d 130, 144, 93 Cal. Rptr. 234, 481 P.2d 242*

Initiation of disciplinary proceedings two years and nine months after public employee's misconduct is not denial of due process when, by employee's admission, misconduct also amounted to violation of criminal statute which contained three-year limitations period. *Nicolini v. County of Tuolumne (1987) 190 Cal. App. 3d 619, 632-633, 235 Cal. Rptr. 559*

Probationary public employee terminated after hearing was not denied due process when he had been represented by counsel and had opportunity to confront witnesses and present evidence in defense but chose not to, and instead admitted charges of misconduct and only offered evidence in mitigation of penalty. *Lukin v. City and County of San Francisco (1986) 187 Cal. App. 3d 807, 814, 232 Cal. Rptr. 1*

Due process does not entitle assistant professor to full adversary hearing on denial of tenure; nontenured professor has no cognizable property interest in renewal of employment and thus denial of tenure does not deprive him of any liberty

or property interest sufficient to require formal hearing under due process clause. *King v. Regents of University of California (1982) 138 Cal. App. 3d 812, 815, 189 Cal. Rptr. 189*

Statutory omission of prior hearing is no deprivation of due process if person has right to judicial hearing before suffering actual deprivation of fundamental right. *C.V.C. v. Superior Court (1973) 29 Cal. App. 3d 909, 918, 106 Cal. Rptr. 123*

[c] Use of Illegally Seized Evidence

Applicability of exclusionary rule to administrative trials. *Emslie v. State Bar of California (1974) 11 Cal. 3d 210, 226-230, 113 Cal. Rptr. 175, 520 P.2d 991*

Excludability of evidence obtained by entrapment. *Patty v. Board of Medical Examiners (1973) 9 Cal. 3d 356, 367, 107 Cal. Rptr. 473, 508 P.2d 1121*

[12] Validity of Enabling Act

Validity of law authorizing performance of ministerial act is issue in traditional mandate proceeding for writ to compel performance of act. *California Educational Facilities Authority v. Priest (1974) 12 Cal. 3d 593, 598, 116 Cal. Rptr. 361, 526 P.2d 513*

Validity of substantive portions of enabling act is issue in mandate proceeding for review of administrative decision. *H.W. Rohl Co. v. County of San Diego (1963) 212 Cal. App. 2d 707, 711, 28 Cal. Rptr. 196* (not reviewable); *Floresta, Inc. v. City Council of San Leandro (1961) 190 Cal. App. 2d 599, 611-612, 12 Cal. Rptr. 182*

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California Administrative Mandamus (Cal CEB 2d ed. 2000)

Witkin, California Procedure, vol. 8, *Extraordinary Writs*, §§ 30, 257-331 (4th ed. 1997)

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[2] Filing

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§ 474C.82 Petition for Writ of Mandate in Court of Appeal or Supreme Court

§ 474C.83 Petition for Writ of Ordinary Mandate

§ 474C.84 Response to Petition for Writ of Mandate (Return)

[1] Demurrer

[2] Answer

[3] Memorandum

§ 474C.85 Replication

§ 474C.86 Judgment

[1] Prevailing Party

[2] Peremptory Writ of Mandate

§ 474C.87 Appeal

[1] Court of Appeal Review

[2] Supreme Court Review

§§ 474C.88-474C.89 [Reserved]

§ 474C.90 Petition for Administrative Writ of Mandate to Review Administrative Decision

[1] FORM

[2] Use of Form

[3] Verification

[4] Caption and Introduction

[5] Essential Allegations

[6] Alleging Facts Subject to Judicial Notice

[7] Identity of Petitioner

[8] Petitioner's Standing to Sue

[9] Identity of Respondent

[10] Evidentiary Hearing Required

[11] Making of Final Administrative Decision

[12] Invalidity of Decision

[13] Abuse of Discretion

[14] Evidence Not Supporting Findings

[15] Findings Not Supporting Decision

[16] Exhaustion of Administrative Remedies

[17] Lack of Other Remedy

[18] Attorneys' Fees

[19] Prayer for Relief

[20] Service

[21] Cross References

§ 474C.91 Petition for Writ of Mandate in Superior Court to Review Administrative Decision (Alternative Form) [Code Civ. Proc. § 1094.5]

[1] FORM

[2] Use of Form

[3] Verification

§ 474C.92 Petition for Writ of Mandate in Court of Appeal or Supreme Court

[1] FORM

[2] Use of Form

[3] Verification

§ 474C.93 Alternative Writ of Mandate in Superior Court to Review Administrative Decision [Code Civ. Proc. § 1087]

[1] FORM

[2] Use of Form

[3] Signature on Writ

§ 474C.94 Alternative Writ of Mandate (Order Included)--Alternative Form

[1] FORM

[2] Use of Form

§ 474C.95 Separate Order for Issuance of Alternative Writ of Mandate in Superior Court to Review Administrative Decision [Code Civ. Proc. § 1087]

[1] FORM

[2] Use of Form

§ 474C.96 Notice of Motion for Peremptory Writ of Mandate in Superior Court to Review Administrative Decision

[1] FORM

[2] Use of Form

[3] Verification

§ 474C.97 Palma Notice in Appellate Court

[1] FORM

[2] Use of Form

§ 474C.98 Order for Preparing and Filing Administrative Record

[1] FORM

[2] Use of Form

§ 474C.99 Order to Temporarily Stay Administrative Decision and to Show Cause

[1] FORM

[2] Use of Form

§ 474C.100 Order Staying Administrative Decision Pending Judgment

[1] FORM

[2] Use of Form

§ 474C.101 Demurrer to Petition for Writ of Mandate

[1] FORM

[2] Use of Form

§ 474C.102 Notice of Hearing on Demurrer to Petition for Writ of Mandate

[1] FORM

[2] Use of Form

§ 474C.103 Answer to Petition for Writ of Mandate

[1] FORM

[2] Use of Form

[3] Verification

§ 474C.104 Replication to Answer to Petition for Writ of Mandate

[1] FORM

[2] Use of Form

[3] Verification

[4] Filing

[5] Service

[6] Cross References

§ 474C.105 Judgment Granting Relief

[1] FORM

[2] Use of Form

[3] Contents of Judgment

[4] Cross References

§ 474C.106 Judgment Granting Relief (Alternative Form) [Code Civ. Proc. § 1094.5]

[1] Form

[2] Use of Form

§ 474C.107 Judgment Denying Relief

[1] FORM

[2] Use of Form

§ 474C.108 Peremptory Writ of Mandate

[1] FORM

[2] Use of Form

§ 474C.109 Petition for Writ of Ordinary Mandate

[1] FORM

[2] Use of Form

[3] Verification

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.01

§ 474C.01 Scope of Chapter

This chapter provides a discussion of procedures for seeking mandate relief of administrative agency decisions. The legal background discussion in Part II includes:

- Subpart A, addressing the procedural aspects of seeking administrative mandate relief [*see §§ 474C.10 -474C.26*].

- Subpart B discusses procedural aspects of seeking ordinary mandate relief [*see §§ 474C.40 -474C.41*].

- Subpart C briefly sets forth considerations for seeking appellate review of mandate decisions [*see §§ 474C.50 -474C.53*].

Part V includes the following forms:

- Petition for Administrative Mandate in the superior court [*see §§ 474C.90, 474C.91*], or appellate court [*see § 474C.92*].

- Alternative Writ of Administrative Mandate or order directing its issuance [*see §§ 474C.93 -474C.95*].

- Notice of Motion for Peremptory Writ of Administrative Mandate in superior court [*see § 474C.96*], and appellate court [*see § 474C.97*].

- Order for preparing and filing administrative record [*see § 474C.98*].

- Orders concerning stay of administrative decision pending review [*see §§ 474C.99, 474C.100*].

- Demurrer to Petition for Administrative Mandate [*see § 474C.101*], notice of hearing on demurrer [

see § 474C.102], answer to petition [*see § 474C.103*], and replication to answer [*see § 474C.104*].

- Judgment granting or denying relief on Petition for Administrative Mandate [*see §§ 474C.105 -474C.107*].

- Peremptory Writ of Administrative Mandate [*see § 474C.108*].

- Petition for Writ of Ordinary Mandate [*see § 474C.109*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsAppellate JurisdictionState Court Review

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PART I. SCOPE

41A-474C California Forms of Pleading and Practice--Annotated § 474C.02

§ 474C.02 Cross References

[1] Related Coverage of Judicial Review

For related discussion concerning judicial review by California courts of agency adjudications, see:

- Ch. 474, *Availability of Judicial Review of Agency Decisions* .
- Ch. 474A, *Timing of Judicial Review of Agency Decisions* .
- Ch. 474B, *Standards in Reviewing Agency Decisions* .

For other related discussion and forms relating to judicial review generally, see:

- Ch. 40, *Appeal: An Overiew,* through Ch. 54, *Appeal: California Supreme Court Review* (discussion and forms relating to civil appeals).
- Ch. 358, *Mandate and Prohibition* (discussion and forms relating to immediate judicial review of orders by extraordinary writ of mandate or prohibition).
- Ch. 492, *Review (Certiorari), Writ of* (discussion and forms relating to immediate judicial review of civil proceedings by extraordinary writ of review).

For discussion and a form relating to expedited judicial review of public agency's decisions relating to the issuance, revocation, suspension, or denial of a permit involving expressive conduct protected by *U.S. Const., amend. I*, see Ch. 59, *Assemblies, Meetings, and Demonstrations* .

For memoranda of points of points and authorities supporting and opposing petitions for writs of mandate generally, see s California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender).

For memoranda of points and authorities supporting and opposing petitions for administrative mandate, see s California Points and Authorities, Ch. 195, *Public Administrative Law* (Matthew Bender).

[2] Agency Adjudication

For detailed discussion and forms relating to agency adjudications that are the subject of the judicial review discussed in this chapter, see:

- Ch. 473, *Public Agency Adjudication* .
- Ch. 473A, *Commencing Agency Adjudication* .
- Ch. 473B, *Discovery in Agency Adjudications* .
- Ch. 473C, *Prehearing Procedures in Agency Adjudications* .
- Ch. 473E, *Public Administrative Law Judges* .
- Ch. 473F, *Agency Adjudication Hearings* .
- Ch. 473G, *Agency Adjudication Decisions.*
- Ch. 473H, *Alternative Adminstrative Adjudication Procedures* .

For detailed discussion and forms relating generally to licensing agencies, including licensing adjudications, see Ch. 471B, *Licensing by Public Agencies* .

[3] Public Administrative Law Generally

For related discussion of California public administrative law generally, including discussion of public agency functions and powers (including adjudicative or quasi-judicial powers), and organization generally, see Ch. 470, *Overview of Public Administrative Law* (for general discussion of judicial power, *see § 470.12[5]*). For detailed discussion of the general procedures imposed in agency proceedings by constitutional due process and related statutory requirements, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

For discussion and forms relating to the law governing access to and conduct of meetings by California public agencies, see Ch. 470B, *Public Agency Meetings* .

For detailed discussion and forms relating to the law governing disclosure of public records under the California Public Records Act [*Cal. Gov. Code §§ 6250 et seq.*], see Ch. 470C, *Public Records Act* .

For detailed discussion and forms relating generally to agency investigations and inspections, see:

- Ch. 471, *Investigations by Public Agencies* .
- Ch. 471A, *Inspections by Public Agencies* .

For detailed discussion and forms relating generally to the legislative or rulemaking functions of California public agencies, including judicial review of these functions, see:

- Ch. 472, *Public Agency Rules* .
- Ch. 472A, *Agency Rulemaking Procedures* .
- Ch. 472B, *Review of Agency Rulemaking* .

For additional cross references to coverage of particular public agencies, see *Ch. 470, Overview of Public Administrative Law, § 470.02[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationPrehearing ActivityAdministrative LawAgency RulemakingGeneral OverviewAdministrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewStandards of ReviewGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsAppellate JurisdictionState Court ReviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechExpressive Conduct

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[Reserved]

§§ 474C.03[Reserved]

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A. Procedures for Administrative Mandate

41A-474C California Forms of Pleading and Practice--Annotated § 474C.10

§ 474C.10 Governing Law

[1] Petitioner's Choice of Mandate Procedures

Two statutory procedures are used to initiate mandate proceedings: (1) the alternative writ procedure; and (2) the noticed application procedure. The petitioner may choose to follow either procedure. In the alternative writ procedure, the proceedings are initiated by the filing of a petition and the issuance of an alternative writ commanding the party to whom it is directed (the respondent) to either perform a specified act or to show cause before the court at a specified time and place why he or she has not done so [*Code Civ. Proc. § 1087*; *see [2*], *below; see also § 474C.15[1]*]. In the noticed application procedure, the proceedings are initiated by filing a petition for a peremptory writ. No alternative writ is issued, but the petitioner makes a noticed motion for issuance of a peremptory writ [*Code Civ. Proc. §§ 1088, 1088.5*; *see [3], below*]. A peremptory writ is one that commands the performance of a specified act and does not give the respondent the option to show cause why he or she has not done so [*Code Civ. Proc. § 1087*].

[2] Alternative Writ Procedure

The alternative writ procedure is the most commonly used method for initiating mandate proceedings. Under this procedure, the attorney for the petitioner prepares the petition, the alternative writ, and an order for issuance of the alternative writ. Unless the court makes an ex parte order that the writ be issued without service, a copy of the petition must be served on the respondent and proof of service must be filed with the petition [*Code Civ. Proc. § 1107*; *see Code Civ. Proc. § 1107* (for good cause, court may grant writ ex parte); *see also Code Civ. Proc. § 1088* (when application is made without notice to adverse party, court may issue alternative writ only)].

The alternative writ is deposited with the clerk at the time the petition is filed. Typically, the alternative writ remains deposited but not filed for five days after the petition and proof of service of the petition are filed. Within those five days, the respondent may serve on the petitioner, and file with the court, points and authorities in opposition to the granting of the writ [*Code Civ. Proc. § 1107*]. After the five days have expired, the court examines the papers on file and either grants or denies the petition for the alternative writ [*see City of Culver City v. State Bd. of Equalization (1972)29 Cal. App. 3d 404, 412, 105 Cal. Rptr. 602* (failure to wait five days deprives court of jurisdiction to issue alternative writ)].

Except when otherwise ordered by the court, the alternative writ must be served in the same manner as a summons in a civil action [*Code Civ. Proc. § 1096*; *see Code Civ. Proc. § 413.10 et seq.* (service of summons in civil actions)]. The alternative writ may be made returnable (*i.e.*, it may specify that a hearing on the writ will be held) at any time [*Code Civ. Proc. § 1108*]. After the hearing has been held, the court will make an order either granting or denying the alternative writ. For further discussion of the alternative writ procedure, see *§§ 474C.13 -474C.16*. For forms of alternative writs, see *§§ 474C.93 -474C.95*.

[3] Noticed Application Procedure

Under the noticed application procedure, the petitioner seeks a peremptory writ without first seeking an alternative writ [*see Code Civ. Proc. § 1088.5* (procedure when no alternative writ sought)]. Although this procedure is used less frequently than the alternative writ procedure, it is preferred by some trial courts [*see* San Diego Co. Super. Ct. Rules, Div. II, Rule 8.1]. Under the noticed application procedure, the petitioner files a petition with the court [*Code Civ. Proc. § 1088.5*]. At the time the petition is filed (or at any time thereafter), the petitioner gives notice of a motion for a peremptory writ [*see Code Civ. Proc. §§ 1003* (an application for an order is a motion), *1088* (application for peremptory writ on "due notice"), *1094* (noticed motion for judgment on peremptory writ); for noticed motion procedure in civil cases, *see* Ch. 372, *Motions and Orders*]. For further discussion of the noticed application procedure, see *§ 474C.17*. For a form of notice of motion for issuance of a peremptory writ of mandate, see *§ 474C.96*.

Legal Topics:

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

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§ 474C.11 Availability of Administrative Mandate

[1] Finality of Administrative Decision

Decisions or orders of administrative agencies must be final before they can be reviewed in administrative mandate proceedings [*Code Civ. Proc. § 1094.5(a)*; *Peter R. Gadd, Inc. v. Workman (1927) 200 Cal. 384, 388-389, 253 P. 700* ; *Governing Board v. Commission on Professional Competence (1985) 171 Cal. App. 3d 324, 329, 217 Cal. Rptr. 457]* . Finality is generally determined by reference to the statute or regulation governing judicial review of the agency decision. When no statute directly applies, however, finality must be determined under applicable case law. For a general consideration of the requirement of finality, with rules for determining when an administrative decision is final for purposes of seeking judicial review, see Ch. 474A, *Timing of Judicial Review of Agency Decisions* .

[2] Exhaustion of Administrative Remedies

Closely related to the requirement of finality is the requirement that the petitioner exhaust his or her administrative remedies before seeking judicial relief [*see* *Hittle v. Santa Barbara County Employees Retirement Ass'n (1985) 39 Cal. 3d 374, 384, 216 Cal. Rptr. 733, 703 P.2d 73* ; *Ralph's Chrysler-Plymouth v. New Car Dealers Policy & Appeals Bd. (1973) 8 Cal. 3d 792, 794, 106 Cal. Rptr. 169, 505 P.2d 1009]* . Exhaustion of administrative remedies is required except when administrative remedies are unavailable or inadequate [*Tiernan v. Trustees of Cal. State University & Colleges (1982) 33 Cal. 3d 211, 217, 188 Cal. Rptr. 115, 655 P.2d 317* ; *see* *Roth v. City of Los Angeles (1975) 53 Cal. App. 3d 679, 686-687, 126 Cal. Rptr. 163* (failure to attend hearing constituted failure to exhaust administrative remedies)], or when pursuit of those remedies would be futile [*Huntington Beach Police Officers' Assn. v. City of Huntington Beach (1976) 58 Cal. App. 3d 492, 498-499, 129 Cal. Rptr. 893* (exhaustion is not required when agency has made it clear that its ruling would be adverse to petitioner)]. For a general consideration of the requirement that administrative remedies be exhausted before judicial review is sought, see Ch. 474, *Availability of Judicial Review of Agency Decisions* . For a detailed discussion of the exhaustion requirement, and exceptions to it, see Ch. 474A, *Timing of Judicial Review of Agency Decisions* .

[3] Time Limitations

Judicial review of an administrative decision must be sought within the applicable limitations period [*Barlow v. City Council of Inglewood (1948) 32 Cal. 2d 688, 697, 197 P.2d 721* ; *Sinetos v. Department of Motor Vehicles (1984) 160 Cal. App. 3d 1172, 1175, 207 Cal. Rptr. 207]* . Statutes governing review of specific types of administrative actions set forth time periods within which mandate proceedings must be brought. For example, when the action relates to a claim of entitlement to compensation under a statute imposing monetary liability on an administrative entity, the three-year period prescribed by *Code Civ. Proc. § 338(a)* governs the proceeding [*Raymond v. Christian (1937) 24 Cal. App. 2d 92, 113-116, 74 P.2d 536* ; *see Code Civ. Proc. § 338(a)* (action on a liability created by statute, other than a penalty or forfeiture)]. If no other statute applies, the four-year period set forth in *Code Civ. Proc. § 343* governs an action to review an administrative action or decision [*Hittle v. Santa Barbara County Employees Retirement Ass'n (1985) 39 Cal. 3d 374, 386, 216 Cal. Rptr. 733, 703 P.2d 73* ; *Valvo v. University of Southern California (1977) 67 Cal. App. 3d 887, 894, 136 Cal. Rptr. 865* ; *Allen v. Humboldt County Board of Supervisors (1963) 220 Cal. App. 2d 877, 884-885, 34 Cal. Rptr. 232* ; *see Code Civ. Proc. § 343* (action for "relief not hereinbefore provided")].

Mandate proceedings are generally barred if not commenced within the applicable limitations period [*Barlow v. City Council of Inglewood (1948)32 Cal. 2d 688, 697, 197 P.2d 721* ; *Sinetos v. Department of Motor Vehicles (1984) 160 Cal. App. 3d 1172, 1175, 207 Cal. Rptr. 207* ; *Kupka v. Board of Administration (1981) 122 Cal. App. 3d 791, 794, 176 Cal. Rptr. 214]* . For a general consideration of the limitations periods for administrative mandate, together with applicable periods for specific actions and agencies, see Ch. 474A, *Timing of Judicial Review of Agency Decisions* .

[4] Res Judicata

When a superior court has ruled adversely on the merits of a petition for mandate, the rule of res judicata bars a subsequent filing for the same writ in either the superior court or an appellate court [*Ellenberger v. City of Oakland (1955) 136 Cal. App. 2d 6, 7, 288 P.2d 138* ; *Cohn v. Isensee (1920) 45 Cal. App. 509, 510-511, 188 P. 278]* . For example, when a petitioner seeking to set aside an agency decision later voluntarily dismissed the administrative mandamus petition before trial, the dismissal was held to have the legal effect of making the agency decision final for purposes of issue preclusion and precluding a lawsuit for damages based on the agency decision [*Mola Development Corp. v. City of Seal Beach (1997) 57 Cal. App. 4th 405, 407, 67 Cal. Rptr. 2d 103]* .

The defense of res judicata is waived, however, unless raised by the party relying on it [*Vinot Enterprises, Inc. v. City of Pasadena (1972) 23 Cal. App. 3d 246, 251 n.1, 100 Cal. Rptr. 217]* . Thus, a second application may be considered on the merits if the respondent fails to assert a judgment in a prior proceeding [*Vinot Enterprises, Inc. v. City of Pasadena (1972) 23 Cal. App. 3d 246, 251 n.1, 100 Cal. Rptr. 217]* .

Additionally, when the superior court has adversely disposed of a petition on some grounds other than the merits, the rule of res judicata does not preclude a second proceeding either in an appellate court or in another superior court [*Hagan v. Superior Court (1962) 57 Cal. 2d 767, 770, 22 Cal. Rptr. 206, 371 P.2d 982]* .

In the interests of the orderly administration of justice, the court in which a second petition is filed may refuse to consider repetitive applications for mandate in the absence of unusual or changed circumstances [*Hagan v. Superior Court (1962) 57 Cal. 2d 767, 770-771, 22 Cal. Rptr. 206, 371 P.2d 982* ; *People v. Municipal Court (1971) 14 Cal. App. 3d 362, 365, 92 Cal. Rptr. 248* ; *Code Civ. Proc. § 1086* (writ of mandate available when no other plain, speedy, and adequate remedy exists)].

For forms of a petition for writ of mandate in superior court to review administrative decisions, see *§§ 474C.90, 474C.91*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewReviewabilityExhaustion of RemediesAdministrative LawJudicial ReviewReviewabilityFinal Order RequirementCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataGovernmentsLegislationStatutes of LimitationsTime Limitations

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.12

§ 474C.12 Jurisdiction and Venue

[1] Concurrent Jurisdiction of Superior Courts and Appellate Courts

The Supreme Court of California, the California Court of Appeal, and the superior courts all have original jurisdiction in mandate proceedings [Cal. *Const., art. VI, § 10*; *Code Civ. Proc. § 1085*; *Cal. Rules of Ct., Rule 8.490(a)*]. Most petitions for writs of mandate are filed in the superior court, however, because the superior courts are in a better position to determine disputed questions of fact than the appellate courts [*Roma Macaroni Factory v. Giambastiani (1933) 219 Cal. 435, 436-437, 27 P.2d 371* ; *County of Los Angeles v. Nesvig (1965) 231 Cal. App. 2d 600, 602, 41 Cal. Rptr. 916]* , and the appellate courts, as a matter of policy, decline to exercise their original jurisdiction except in extraordinary cases [*Adams v. Department of Motor Vehicles (1974) 11 Cal. 3d 146, 150 n.7, 113 Cal. Rptr. 145, 520 P.2d 961]* .

[2] Exercise or Nonexercise of Original Jurisdiction by Appellate Courts

Although the Court of Appeal and the Supreme Court possess original jurisdiction in mandate proceedings [*see [1], above*], they will grant mandate relief only when the issues presented are of great importance and must be resolved promptly [*Adams v. Department of Motor Vehicles (1974) 11 Cal. 3d 146, 150 n.7, 113 Cal. Rptr. 145, 520 P.2d 961* ; *Mooney v. Pickett (1971) 4 Cal. 3d 669, 674-675, 94 Cal. Rptr. 279, 483 P.2d 1231* ; *County of Sacramento v. Hickman (1967) 66 Cal. 2d 841, 845, 59 Cal. Rptr. 609, 428 P.2d 593]* . Appellate courts typically refuse to entertain mandate proceedings if the proceedings could just as well have been instituted in the superior court [*Cohen v. Superior Court (1968) 267 Cal. App. 2d 268, 270, 72 Cal. Rptr. 814* ; *County of Sacramento v. Hastings (1955) 132 Cal. App. 2d 419, 421, 282 P.2d 100]* . Recognizing that original proceedings in appellate courts are the exception rather than the rule, the California Rules of Court require that if a petition for mandate (or certiorari or prohibition) might lawfully have been made to a lower court in the first instance, the petition must set forth the circumstances that, in the opinion of the petitioner, render it proper that the writ should originally issue from the reviewing court [*Cal. Rules of Ct., Rule 8.490(a)*].

Circumstances in which appellate courts have chosen to exercise their original jurisdiction include the following:

- Cases involving the qualification of ballot initiatives [*Farley v. Healey (1967) 67 Cal. 2d 325, 326-327, 62 Cal. Rptr. 26, 431 P.2d 650* ; *Perry v. Jordan (1949) 34 Cal. 2d 87, 90-91, 207 P.2d 47]* .

- The legality of property assessment procedures [*State Board of Equalization v. Watson (1968) 68 Cal. 2d 307, 310-311, 66 Cal. Rptr. 377, 437 P.2d 761* ; *County of Sacramento v. Hickman (1967) 66 Cal. 2d 841, 845, 59 Cal. Rptr. 609, 428 P.2d 593]* .

- The constitutionality of statutes with widespread and immediate impact on the public [*San Francisco Unified School Dist. v. Johnson (1971) 3 Cal. 3d 937, 944-945, 92 Cal. Rptr. 309, 479 P.2d 669* (anti-busing statute); *Westbrook v. Mihaly (1970) 2 Cal. 3d 765, 773, 87 Cal. Rptr. 839, 471 P.2d 487* (statute requiring two-thirds vote to approve bond issues)].

The appellate courts will not exercise original mandate jurisdiction if another mandate proceeding is pending in the superior court [*People v. County of Tulare (1955) 45 Cal. 2d 317, 320, 289 P.2d 11* ; *W.R. Grace & Co. v. Cal. Emp. Com. (1944) 24 Cal. 2d 720, 727, 151 P.2d 215* ; *Irvine v. Gibson (1941) 19 Cal. 2d 14, 16, 118 P.2d 812]* , although the proceedings in the lower court must be between the same parties and on the same cause of action to bar similar proceedings in the higher court [*Perry v. Jordan (1949) 34 Cal. 2d 87, 90, 207 P.2d 47]* .

If the appellate court declines to exercise mandate jurisdiction, it ordinarily will deny the petition without prejudice to the filing of a subsequent petition in a lower court [*Friends of Mammoth v. Board of Supervisors (1972) 8 Cal. 3d 247, 268, 104 Cal. Rptr. 761, 502 P.2d 1049* ; *County of Sacramento v. Hastings (1955) 132 Cal. App. 2d 419, 421, 282 P.2d 100]* . Denial of a writ of mandate without opinion is not res judicata on the legal issues presented by the application unless the sole possible ground of denial was that the court acted on the merits, or unless it affirmatively appears that the denial was intended to be on the merits [*Friends of Mammoth v. Board of Supervisors (1972) 8 Cal. 3d 247, 268, 104 Cal. Rptr. 761, 502 P.2d 1049* ; *Hagan v. Superior Court (1962) 57 Cal. 2d 767, 770, 22 Cal. Rptr. 206, 371 P.2d 982]* . If the appellate court issues an alternative writ, however, the issuance constitutes a determination that the case is a proper one for exercise of its jurisdiction [*Westbrook v. Mihaly (1970) 2 Cal. 3d 765, 773, 87 Cal. Rptr. 839, 471 P.2d 487* ; *County of Sacramento v. Hickman (1967) 66 Cal. 2d 841, 845, 59 Cal. Rptr. 609, 428 P.2d 593]* .

However, due process of law does not provide litigants a second opportunity for judicial review in the superior court when the California Supreme court has summarily denied a petition for writ of mandate to challenge a decision of the State Energy Resources Conservation and Development Commission [*Santa Teresa Citizen Action Group v. State Energy Resources Conservation and Development Commission (2003) 105 Cal. App. 4th 1441, 1449-1450, 130 Cal. Rptr. 2d 392]* .

For a form of a petition for writ of mandate to file in the Court of Appeal or the Supreme Court, see *§ 474C.92*.

[3] Venue

Unless a more specific venue statute applies, venue in mandamus proceedings against state agencies and public entities is governed by the same venue statutes as other civil actions [*Code Civ. Proc. § 1109* (venue statutes in code of civil procedure apply to mandamus proceedings); *Regents of the University of California v. Superior Court (1970) 3 Cal. 3d 529, 534-535, 91 Cal. Rptr. 57, 476 P. 2d 457* ; *Harris v. Alcoholic Bev. Control Appeals Board (1961) 197 Cal. App.2d 759, 765, 18 Cal. Rptr. 151]* . These venue statutes include *Code Civ. Proc. § 393(a)* (actions to recover statutory penalties or forfeitures), *Code Civ. Proc. § 393(b)* (actions against public officers), and *Code Civ. Proc. § 401* (when proper venue for actions against state agencies is located in Sacramento county, venue is proper in any county in which state attorney general has an office). More specific venue statutes include venue for actions against the board of nursing examiners [*Bus. & Prof. Code § 2714* (venue is proper in counties in which Board has offices including Sacramento, San Francisco, and Los Angeles)], and venue for actions against the board of vocational nurse and

psychiatric technicians examiners [*Bus. & Prof. Code § 2853* (venue is proper in counties in which Board has offices including Sacramento, San Francisco, and Los Angeles)].

The county in which the "cause of action arose" is the proper county for the trial of an administrative mandate action [*Code Civ. Proc. § 393(1)(b)*; *Duval v. Contractors State License Board (1954) 125 Cal. App. 2d 532, 535,271 P.2d 194* ; *Sutter Union High School District v. Superior Court (1983) 140 Cal. App. 3d 795, 797-798, 190 Cal. Rptr. 182* (venue for a teacher's challenge to dismissal from employment was the county in which the employing school district was located)]. The proper venue under *Code Civ. Proc. § 393(b)* (county in which cause of action arose) for a lawsuit challenging the alleged improper expenditure of public tax funds to remove a public university teacher was the county in which the expenditures occurred not the county in which the university had its headquarters [Regents of the University of California v. Superior court *(1970) 3 Cal. 3d 529, 538-539, 91 Cal. Rptr. 57, 476 P. 2d 457]* . The proper venue under *Code Civ. Proc. § 393(b)* (county in which cause of action arose) for a lawsuit challenging the validity of an environmental impact report prepared by a regional transit agency for construction of a toll road was the county in which the toll road would be constructed notwithstanding that the transit agency was located in an adjacent county and that the lawsuit sought to enforce public rights [*California State Parks Foundation v. Superior Court (2007) 150 Cal. App. 4th 826, 832-833, 58 Cal. Rptr. 3d 715]* . The proper venue under *Code Civ. Proc. § 393(b)* (county in which cause of action arose) for a lawsuit challenging proceedings before the New Motor Vehicle Board to revoke a temporary permit to sell new motor vehicles was the county in which the car dealer's business was located [*Tharp v. Superior Court (1982) 32 Cal. 3d 496, 501-503*]. In license revocation cases, the courts have held that the cause of action "arises" in the county in which the licensee carries on his or her business or profession and in which he or she will be hurt by enforcement of the order or revocation [*Duval v. Contractors State License Board (1954) 125 Cal. App. 2d 532, 533-536, 271 P.2d 194* (proper venue for mandate action to set aside revocation of contractor's license is county in which contractor's business was situated); *Cecil v. Superior Court (1943) 59 Cal. App. 2d 793, 799, 140 P.2d 125* (proper venue for mandate proceeding to set aside revocation of milk distributor's license is county in which milk distributor carried on business)]. In cases involving the dismissal of public employees, the proper county for trial is the county in which the dismissal takes place; in other words, the county in which the employee was employed immediately before the dismissal [*Lynch v. Superior Court (1970) 7 Cal. App. 3d 929, 931-933, 86 Cal. Rptr. 925]* .

There is no indication in the cases that venue also attaches to the county in which acts forming the basis for the administrative proceedings (such as the acts constituting grounds for revocation of a license) are performed [*Lynch v. Superior Court (1970) 7 Cal. App. 3d 929, 932, 86 Cal. Rptr. 925]* . In license revocation cases, the courts are solely concerned with the question of the licensee's business address or (if there is more than one address) with the headquarters or center of the licensee's operations [*Lynch v. Superior Court (1970) 7 Cal. App. 3d 929, 932, 86 Cal. Rptr. 925]* . Similarly, in cases of dismissal from public employment, the county in which the dismissal takes place determines the venue of a subsequent mandate action, even if part of the employee's duties were performed in other counties [*Lynch v. Superior Court (1970) 7 Cal. App. 3d 929, 931-933, 86 Cal. Rptr. 925]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent JurisdictionCivil ProcedureVenueIndividual DefendantsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataCivil ProcedureRemediesWritsCommon Law WritsMandamus

California Forms of Pleading and Practice--Annotated

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Volume 41A: Public Agency Adjudications Judicial Review-Chs. 473-479
Chapter 474C PROCEDURES IN REVIEWING AGENCY DECISIONS
PART II. LEGAL BACKGROUND
A. Procedures for Administrative Mandate

41A-474C California Forms of Pleading and Practice--Annotated § 474C.13

§ 474C.13 Petition for Writ of Mandate in Superior Court

[1] General Pleading Rules

Except as otherwise provided in *Code Civ. Proc. § 1063 et seq.*, mandate proceedings are subject to the same rules of pleading that apply in other civil actions [*Code Civ. Proc. § 1109*; *Gong v. City of Fremont (1967) 250 Cal. App. 2d 568, 573, 58 Cal. Rptr. 664]* . Accordingly, a petition for a writ of mandate must allege specific facts showing entitlement to relief [*Gong v. City of Fremont (1967) 250 Cal. App. 2d 568, 573, 58 Cal. Rptr. 664]* . If it does not allege such facts, the petition is subject to general demurrer or summary denial [*Gong v. City of Fremont (1967) 250 Cal. App. 2d 568, 573, 58 Cal. Rptr. 664]* .

All papers filed in mandate proceedings in the superior court must comply with the rules of court for the superior court [*see Cal. Rules of Ct., Rule 2.3* ("papers" includes all documents, excepted exhibits or copies of documents, which are offered for filing in any case in the superior courts)]. Under these rules, the following must be set forth beneath the number of the case:

- The nature of the paper [*Cal. Rules of Ct., Rule 2.111(6)*].
- The character of the action or proceeding [*Cal. Rules of Ct., Rule 2.111(6)*].
- The date, time, and location, if ascertainable, of any scheduled hearing [*Cal. Rules of Ct., Rule 3.1110(b)(1)*].
- The nature or title of any attached document other than an exhibit [*Cal. Rules of Ct., Rule 3.1110(b)(2)*].
- The trial date, if set [*Cal. Rules of Ct., Rule 3.1110(b)(4)*].

For forms of a petition for writ of mandate that may be filed in the superior court, see *§§ 474C.90 -474C.91* and

474C.93 -474C.94.

[2] Parties

The parties to a mandate proceeding are typically referred to as the "petitioner," the "respondent," and the "real party in interest." The "petitioner" is the person who seeks the issuance of the writ. To petition for a writ of mandate, a person must be "beneficially interested" in the outcome of the proceeding [*Code Civ. Proc. § 1086*]. The "respondent" is the administrative agency that made the challenged order or decision and that has authority to set it aside. The agency itself, and not any officer or employee of the agency, should be named as the respondent, even when officers of the agency are required by law to be served [*see Code Civ. Proc. § 1107* (service on presiding officer, secretary, or majority of members); *State of California v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 255, 115 Cal. Rptr. 497, 524 P.2d 1281* (improper to name State of California and employees of California Coastal Zone Conservation Commission as respondents, since only Commission had power to set aside decision)]. Similarly, the particular agency that rendered the decision, and not a department of which the agency is a part, should be named as the respondent [*State of California v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 255, 115 Cal. Rptr. 497, 524 P.2d 1281]* . The petitioner's failure to name the California Coastal Commission as a party to a mandate action brought against a county board of supervisors was a failure to join an indispensable party under *Code Civ. Proc. § 389*. This is because the Commission held a hearing and issued a decision granting the building permit that was challenged in the mandate action for failure to prepare an environmental impact report under CEQA [*Pub. Res. Code § 21000 et seq.*] legislation [*Kaczorowski v. Mendocino County Board of Supervisors (2001) 88 Cal. App. 4th 564, 566-567, 106 Cal. Rptr. 2d 14]* . A writ of mandate under *Code Civ. Proc. § 1085* (ordinary mandate) must be brought against the governmental body that took the action challenged in the mandate proceeding [*Sacramento County Alliance of Law Enforcement v. County of Sacramento (2007) 151 Cal. App. 4th 1012, 1020-1021, 60 Cal. Rptr. 3d 202* (denial of petition for writ of mandate affirmed on appeal because petitioners erroneously named county as respondent, and they were required to name county civil service commission as proper party respondent)].

Members of the public have standing under the public trust doctrine to challenge harm to the public trust related to wildlife including raptors and other birds allegedly harmed by wind turbines [*Center for Biological Diversity v. FPL Group, Inc. (2008) 166 Cal. App. 4th 1349, 1364-1366, 83 Cal. Rptr. 3d 588*]. However, members of the public seeking to challenge harm to the public trust must file a lawsuit against the responsible public agencies, the County of Alameda, and the California Department of Fish and Game, which are charged with enforcing the public trust. They may not file a lawsuit against the operators of the wind turbines that have allegedly caused the harm [*Center for Biological Diversity v. FPL Group, Inc. (2008) 166 Cal. App. 4th 1349, 1366-1368, 83 Cal. Rptr. 3d 588*]. Failure to join the County of Alameda under *Code Civ. Proc. § 389* is grounds for dismissing the action. The county is a necessary party because it issued the wind turbine permits being challenged. Because the limitations period for challenging the issuance of the permits has expired, the county cannot be joined to the lawsuit and the county is considered to be an indispensable party [*Center for Biological Diversity v. FPL Group, Inc. (2008) 166 Cal. App. 4th 1349, 1371-1373, 83 Cal. Rptr. 3d 588*].

The California Court of Appeal held that the State Water Resources Control Board was not a proper defendant in a mandate proceeding brought by the city to challenge the adoption of a municipal storm sewer permit. The permit was adopted by the Regional Board, also a party to the lawsuit, and the state board's dismissal of an administrative appeal by the city meant that the regional board's decision adopting the permit with specified conditions was final for purposes of judicial review [*City of Rancho Cucamonga v. Regional Water Quality Control Bd. (2006) 135 Cal. App. 4th 1377, 1383-1384, 38 Cal. Rptr. 3d 450]* . In another case, a county Department of Environmental Health was not a necessary party under *Code Civ. Proc. § 389* to an administrative mandamus proceeding to challenge an agreement for a municipal water district to provide treated wastewater to a trucking company for delivery to a landfill [*Riverwatch v. Olivenhain Municipal Water District (2009) 170 Cal. App. 4th 1186, 1215-1215, 88 Cal. Rptr. 3d 625]* .

A "real party in interest" is any person (other than a petitioner or a respondent) whose interests would be directly

affected by the outcome of the proceeding [*Cal. Rules of Ct., Rule 8.490(a)*; *see Sierra Club, Inc. v. California Coastal Com. (1979) 95 Cal. App. 3d 495, 501-502, 157 Cal. Rptr. 190* (developer of real estate project was real party in interest when environmental group petitioned for writ of mandate to set aside permit for project)]. When the petition seeks relief that, if granted, would injure or affect the interest of a third person, the third person is an indispensable party to the proceedings and should be named as a real party in interest [*Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 522, 106 P.2d 879* ; *Sierra Club, Inc. v. California Coastal Com. (1979) 95 Cal. App. 3d 495, 501, 157 Cal. Rptr. 190* ; *see Code Civ. Proc. § 389(a)* (compulsory joinder of parties)]. A petition that fails to name the real party in interest may be dismissed [*Sierra Club, Inc. v. California Coastal Com. (1979) 95 Cal. App. 3d 495, 501-502, 157 Cal. Rptr. 190]* , and a judgment rendered without proper joinder of a real party in interest may be vacated or set aside [*Inland Counties Regional Center, Inc. v. Office of Administrative Hearings (1987) 193 Cal. App. 3d 700, 703-704, 238 Cal. Rptr. 422* ; *see Code Civ. Proc. § 663(1)* (judgment or decree may be set aside when incorrect or erroneous legal basis)]. The failure to name a real party in interest cannot be cured by amending the petition to name the party after the statute of limitations has expired [*Sierra Club, Inc. v. California Coastal Com. (1979) 95 Cal. App. 3d 495, 501-502, 157 Cal. Rptr. 190]* .

The petition should not only name the real party in interest but should also set forth his or her capacity--that is, it should identify him or her as the real party in interest [*Inland Counties Regional Center, Inc. v. Office of Administrative Hearings (1987) 193 Cal. App. 3d 700, 703-704, 238 Cal. Rptr. 422]* . A real party in interest who has not been named in the petition may intervene in the proceedings at his or her own option [*Code Civ. Proc. § 387(a)*; *Timberidge Enterprises, Inc. v. City of Santa Rosa (1978) 86 Cal. App. 3d 873, 881, 150 Cal. Rptr. 606* ; *see Code Civ. Proc. § 1109* (unless otherwise provided, *Code Civ. Proc. § 307 et seq.* constitute rules of practice in mandate and other special proceedings)]. For discussion of intervention, see *§ 474C.20*.

The California Court of Appeal held that the Office of Administrative Hearings was neither a necessary nor an indispensable party under *Code Civ. Proc. § 387(a)* in a writ of administrative mandate proceeding brought by a minor (acting through a guardian ad litem) to challenge the decision of an administrative law judge (ALJ) provided by the Department of General Services Office of Administrative Hearings (OAH) [*Hayes v. State Dep't of Developmental Services (2006) 138 Cal. App. 4th 1523, 1529, 42 Cal. Rptr. 3d 363]* . The superior court had dismissed the petition for failure to join OAH as a party before the 90-day statute of limitations had expired. The minor sought to challenge the decision of the ALJ affirming the termination of funding for the educational part of the minor's special education services. The Court of Appeal reasoned that the OAH was a neutral judicial tribunal, that OAH was the representative of the department of developmental services, and that the only interest OAH would have in the court proceedings was in the upholding of the ALJ decision, and that interest could be more strongly presented by the funding agency, Alta. Finally OAH could not have collaterally attacked a court decision overturning an ALJ decision because as the department's representative, it would have been bound by a judgment against the department [*Hayes v. State Dept. of Developmental Services (2006) 138 Cal. App. 4th 1523, 1531-1534, 42 Cal. Rptr. 3d 363]* .

The Fourth District, Division 1, California Court of Appeal held that a hearing officer who heard an administrative appeal that affirmed a denial of a rent increase was not an indispensable party under *Code Civ. Proc. § 389* in an administrative mandate proceeding brought by a mobile home park owner against a city and a city manufactured homes fair practices commission. The court reasoned that the hearing officer was an agent of the city and commission, the city and commission would defend the hearing officer's decision on judicial review, the commission could set aside the hearing officer's decision and require that a new hearing be held, and the ordinance does not require the hearing officer to be named as a respondent in the administrative mandate proceeding [*TG Oceanside v. City of Oceanside (2007) 156 Cal. App. 4th 1355, 1368-1370, 68 Cal. Rptr. 3d 320*].

[3] Essential Allegations

Every petition for a writ of mandate in administrative mandate proceedings must contain allegations showing the petitioner's right to the relief requested:

1. The petition must allege facts showing the petitioner's beneficial interest in the subject matter of the action; in other words, that the petitioner has a right to the relief sought [*Parker v. Bowron (1953) 40 Cal. 2d 344, 351-352, 254 P.2d 6]* . This requirement is generally met by an allegation of the petitioner's status as a party to the administrative proceedings. If the petitioner is not a natural person, the petition should also establish the petitioner's capacity to bring suit as a legal entity [*Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6]* .

2. The petition must allege facts showing the identity of the respondent agency. Counsel should note that the agency, and the members of a multi-member agency, are the proper parties in administrative mandate proceedings, rather than the state or the agency's employees [*State of California v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 255, 115 Cal. Rptr. 497, 524 P.2d 1281]* .

3. The petition must allege facts showing that the case is a proper one for issuance of a writ under *Code Civ. Proc. § 1094.5*. This showing may be established by alleging the following:

(a) That the agency that rendered the decision had discretion to determine the relevant facts [*Code Civ. Proc. § 1094.5(a)*].

(b) That a hearing is required by law to be held for the determination of those facts [*Code Civ. Proc. § 1094.5(a)*].

(c) That evidence is required to be taken at the hearing [*Code Civ. Proc. § 1094.5(a)*].

(d) That the agency rendered a final decision [*Code Civ. Proc. § 1094.5(a)*].

(e) That the decision is invalid. Invalidity of the agency's decision may be shown by any of the following allegations:
(i) That the agency acted without or in excess of its jurisdiction [*Code Civ. Proc. § 1094.5(b)*].

(ii) That the petitioner did not receive a fair trial before the agency [*Code Civ. Proc. § 1094.5(b)*].

(iii) That the agency abused its discretion [*Code Civ. Proc. § 1094.5(b)*]. Abuse of discretion, in turn, may be shown by setting forth facts tending to show any of the following:
(A) That the agency failed to proceed in the manner required by law [*Code Civ. Proc. § 1094.5(b)*].

(B) That the agency's decision is not supported by the agency's findings [*Code Civ. Proc. § 1094.5(b)*].

(C) That the findings are not supported by the evidence [*Code Civ. Proc. § 1094.5(b)*]. When the petitioner asserts that the agency's findings are not supported by the evidence, the petition must either allege the substance of the evidence or be accompanied by a transcript of the evidence, attached as an exhibit and incorporated by reference [*Faulkner v. Cal. Toll Bridge Authority (1953) 40 Cal. 2d 317, 330-331, 253 P.2d 659]* .

4. The petition must allege that the petitioner does not have plain, speedy, and adequate remedy in the ordinary course of law [*Code Civ. Proc. § 1086*].

For a form of a writ of mandate for use in an administrative proceeding and further discussion of the allegations, see *§ 474C.90*. For an alternative form of the petition, see *§ 474C.91*.

[4] Other Allegations of Error

The petition may also contain certain other allegations of administrative error. For example, it may allege that the agency improperly excluded evidence favorable to the petitioner, to his or her prejudice [*see Code Civ. Proc. § 1094.5(e)* (court may remand case to agency when agency improperly excluded evidence)], or that the agency received incompetent evidence over the petitioner's timely and sufficient objection [*Borror v. Department of Investment (1971) 15 Cal. App. 3d 531, 545, 92 Cal. Rptr. 525]* . The petition may also allege that the agency based its decision on evidence not received at the hearing [*English v. City of Long Beach (1950) 35 Cal. 2d 155, 159, 217 P.2d 22]* , or that it incorrectly interpreted applicable law [*Bodinson Mfg. Co. v. California E. Com. (1941) 17 Cal. 2d 321, 325-326, 109 P.2d 935]* .

When appropriate, the petition may allege the existence of evidence that could not, in the exercise of reasonable diligence, have been produced at the hearing [*see Code Civ. Proc. § 1094.5(e)*]. Evidence of this nature may be considered in cases in which the court is authorized to exercise its independent judgment on the evidence. When the substantial evidence test applies, however, the court must remand the case to the agency for reconsideration in light of the new evidence [*Code Civ. Proc. § 1094.5(e)*; for discussion of independent judgment and the substantial evidence test, *see* Ch. 474B, *Standards in Reviewing Agency Decisions*].

For forms and further discussion of these allegations, see *§§ 474C.90, 474C.91*.

[5] Allegations Showing Need for Temporary Stay

If the petitioner wants the court to stay the operation of the agency's decision, the petition should include allegations showing the need for a stay [*see § 474C.90*]. Although the court has discretion to grant or deny a stay, it may not grant a stay if it is satisfied that it would be against the public interest to do so [*Code Civ. Proc. § 1094.5(g), (h)(1)*]. For a general consideration of stays of administrative decisions, see *§ 474C.18*.

[6] Attorney's Fees

Although attorney's fees are not routinely recoverable in mandate proceedings [*see Wilkerson v. City of Placentia (1981) 118 Cal. App. 3d 435, 444, 173 Cal. Rptr. 294* (attorney's fees not recoverable when writ of mandate sought recovery of lost wages and benefits but did not seek review of administrative decision)], some statutory provisions allow their recovery in specified circumstances. *Gov. Code § 800* allows the recovery of fees when the administrative decision resulted from arbitrary or capricious action or conduct and when the complainant is personally obligated to pay the attorney's fees. For example, the dismissal of a deputy sheriff who had six and one-half years of excellent and unblemished service for a minor incident resulting from the deputy's refusal to fix a ticket was an arbitrary act by a public entity [*Richardson v. Board of Supervisors (1988) 203 Cal. App. 3d 486, 496, 250 Cal. Rptr. 1* (affirming finding of arbitrary act, but remanding on issue of whether complainant was personally obligated to pay fees); *see Abshear v. Teachers' Retirement Board (1991) 231 Cal. App. 3d 1629, 1638-1639, 282 Cal. Rptr. 833* (teacher challenged Board's denial of disability allowance and recovered attorney's fees because Board's denial was arbitrary and capricious); *A.B.C. Federation of Teachers v. A.B.C. Unified Sch. Dist. (1977) 75 Cal. App. 3d 332, 342-343, 142 Cal. Rptr. 111* (attorney's fees recoverable in mandate proceedings to review decision of school district); *Redondo Beach Police Officers Assn. v. City of Redondo Beach (1977) 68 Cal. App. 3d 595, 597, 137 Cal. Rptr. 384* (attorney's fees recoverable in mandate proceedings to compel city to recognize bargaining unit); *Olson v. Hickman (1972) 25 Cal.*

App. 3d 920, 922-924, 102 Cal. Rptr. 248 (attorney's fees recoverable in mandate proceedings to review decision of local public agency)]. On the other hand, a denial of an application for disability retirement based on an erroneous interpretation of the law is not an arbitrary or capricious act, and the plaintiff-employee, though entitled to disability, was not entitled to attorney's fees under *Gov. Code § 800* [*Burdick v. Board of Retirement (1988) 200 Cal. App. 3d 1248, 1256, 246 Cal. Rptr. 555]* .

An agency's action is arbitrary and capricious if it encompasses conduct that is not supported by a fair or substantial reason, shows a stubborn insistence on following unauthorized conduct, or amounts to a bad faith legal dispute [*Halaco Engineering Co. v. South Central Coast Regional Com. (1986) 42 Cal. 3d 52, 79, 227 Cal. Rptr. 667, 720 P.2d 15* ; *Abshear v. Teachers' Retirement Board (1991) 231 Cal. App. 3d 1629, 1638, 282 Cal. Rptr. 833* (Board's decision denying disability allowance to teacher was not supported by a fair and substantial reason and therefore was arbitrary and capricious); *Santos v. Department of Motor Vehicles (1992) 5 Cal. App. 4th 537, 551-552, 7 Cal. Rptr. 2d 10* (DMV's suspension of driver's license without sufficient proof of facts justifying suspension coupled with DMV pursuit of case against driver with evidence showing the weakness of DMV proof without DMV's supplying easily obtainable missing information); *but see American President Lines, Ltd. v. Zolin (1995) 38 Cal. App. 4th 910, 933-934, 45 Cal. Rptr. 2d 370* (erroneous decision by agency head was not in bad faith and therefore attorneys fees could not be awarded against agency under arbitrary and capricious standard)]. In such a case, the petitioner may collect reasonable attorney's fees computed at $100 per hour up to a total of $7,500 in addition to any other relief granted or costs awarded, but only if the petitioner is personally obligated to pay the fees [*Gov. Code § 800*; *Richardson v. Board of Supervisors (1988) 203 Cal. App. 3d 486, 496-497, 250 Cal. Rptr. 1* ; *A.B.C. Federation of Teachers v. A.B.C. Unified Sch. Dist. (1977) 75 Cal. App. 3d 332, 342-343, 142 Cal. Rptr. 111]* .

Gov. Code § 800 applies when the administrative action is taken by any public entity under the Government Code or any other provision of state law [*Gov. Code § 800*; *Olson v. Hickman (1972) 25 Cal. App. 3d 920, 923, 102 Cal. Rptr. 248]* . It does not apply to decisions of the State Board of Control [*Gov. Code § 800*]. Fees are recoverable under *Gov. Code § 800* only when there is an appeal of a decision based upon an administrative hearing [*Kistler v. Redwoods Community College Dist. (1993) 15 Cal. App. 4th 1326, 1336-1337, 19 Cal. Rptr. 2d 417]* .

Similarly, *Code Civ. Proc. § 1028.5* grants the court discretion to award certain small businesses and licensees "reasonable litigation expenses" in any civil action between the businesses or licensees and state regulatory agencies when the court determines that the agency's action was undertaken without any substantial justification [*Code Civ. Proc. § 1028.5(a)*; *see Code Civ. Proc. §§ 1028.5(c)* ("small business" defined), *1028.5(d)* ("licensee" defined)]. For purposes of this rule, "reasonable litigation expenses" means any expenses not in excess of $7,500 that the judge finds were reasonably incurred in opposing the agency action, including court costs, expenses incurred in administrative proceedings, attorney's fees, and witness fees [*Code Civ. Proc. § 1028.5(b)*].

If attorney's fees or litigation expenses are recoverable under the facts of the case, the petition should include allegations showing that the petitioner is entitled to those fees or expenses. Failure to do so may result in waiver [*see Rutherford v. Board of Trustees (1974) 37 Cal. App. 3d 775, 782, 112 Cal. Rptr. 560* (no error in denying fees under *Gov. Code § 800* when petition did not allege that agency action was arbitrary or capricious or that petitioners were personally obligated to pay fees)].

For forms and further discussion of petitions for writ of mandate requesting attorney's fees and litigation costs, see *§§ 474C.90, 474C.91*.

[7] Prayer

The prayer should request all of the relief the petitioner seeks. This request will typically include an alternative writ and a peremptory writ. If a stay of the agency's decision is desired, the prayer should also request a temporary stay and an order to show cause why the stay should not be continued pending resolution of the judicial proceedings [*see § 474C.18*

for discu ssion of stay of agency decision]. If attorney's fees are recoverable [*see* [6], *above*], the prayer should also include a request for fees. For forms and further discussion of these prayers for relief, see *§§ 474C.90, 474C.91*.

[8] Verification

The petition must be verified unless the petitioner is a public entity [*Code Civ. Proc. § 1086*; *see Code Civ. Proc. §§ 446, 2015.5* (verification requirements); *see, e.g., Murrieta Valley Unified School Dist. v. County of Riverside (1991) 228 Cal. App. 3d 1212, 1222-1223, 279 Cal. Rptr. 421* (public entity school district exempt from *Code Civ. Proc. § 1086* verification requirement)]. The verification should state that the allegations of the petition are true and correct of the petitioner's own knowledge, since allegations on information and belief are hearsay and furnish no proof of the facts stated [*Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 203-205, 151 Cal. Rptr. 721]* . If the petition is not verified or if the verification is defective, the court may permit the defect to be cured by amendment [*Franchise Tax Bd. v. Municipal Court (1975) 45 Cal. App. 3d 377, 384, 119 Cal. Rptr. 552]* . For forms and further discussion of verification, see *§§ 474C.90, 474C.91*.

[9] Points and Authorities

Although a memorandum of points and authorities must be filed and served with a petition for writ of mandate when the petition is filed in the California Court of Appeal or Supreme Court [*Cal. Rules of Ct., Rule 8.490(b)*; *see § 474C.14[2]*], neither the Code of Civil Procedure nor the California Rules of Court require points and authorities when the petition is filed in the superior court.

Whether or not a memorandum of points and authorities is required, it is advisable to include one. Points and authorities will strengthen the petition by specifying the legal grounds on which the writ is sought and by anticipating legal defenses that may be asserted by the respondent or by the real party in interest. Counsel should also note that the superior court has discretion to summarily deny a petition for a writ of mandate, and that a memorandum of points and authorities may help to avert that outcome [*see Kingston v. Dept. of Motor Vehicles (1969) 271 Cal. App. 2d 549, 552, 76 Cal. Rptr. 614]* . For model points and authorities in support of petitions in administrative mandate cases, see s California Points and Authorities, Ch. 150, *Mandate and Prohibition* , and Ch. 195, *Public Administrative Law* (Matthew Bender).

[10] Service

The petition and the memorandum of points and authorities must be served on the respondent and the real party in interest, if any, by delivering a copy to each person by personal service or by mail [*Code Civ. Proc. § 1107* (*Code Civ. Proc. §§ 1010-1020* apply to service of petition), *Code Civ. Proc. § 1109* (rules relating to civil actions applicable to and constitute rules of practice for special proceedings); *see Code Civ. Proc. §§ 307-1062.10* (civil actions); *see also Code Civ. Proc. §§ 415.10* (personal service), *415.30* (service of summons by mail), *1011* (service on attorney or party), *1013a* (proof of service by mail)]. Personal service is customary, however, and usually preferable to service by mail. First, personal service eliminates doubt as to whether the respondent and the real party in interest have in fact received notice. Second, personal service eliminates the need for waiting 20 days after mailing to determine if the respondent and the real party in interest will acknowledge receipt of service [*see Code Civ. Proc. § 415.30(d)* (if person to whom copy of summons and complaint are mailed does not acknowledge receipt within 20 days, he or she is liable for reasonable expenses incurred thereafter in serving or attempting to serve the party by another method)]. Third, service by mail will extend the prescribed period of notice [*Code Civ. Proc. § 1013(a)* (prescribed period of notice and right or duty to do any act or make any response within any prescribed period is extended 5 days if place of address is within California, 10 days if outside California but within United States, and 20 days if outside United States); *Code Civ. Proc. § 1013(c), (e)* (time is extended by two court days when notice is served by facsimile transmission, express mail, or other overnight delivery service)]. For extended discussion of service of summons and complaint, see Ch. 518, *Service of Summons and Papers* .

When the respondent is a board or commission, service must be made on the presiding officer or secretary, or on a majority of the members [*Code Civ. Proc. § 1107*]. In most cases, proof of service must be filed with the petition [*Code Civ. Proc. § 1107*]. Thus, service must be completed *before* the petition is filed. Proof of service is not required, however, if the court grants the alternative writ ex parte [*see Code Civ. Proc. § 1107* (in its discretion and for good cause, court may grant application ex parte, without notice or service of petition)]. Counsel should ascertain local court rules and practices before seeking a writ ex parte [*see, e.g.*, Los Angeles Co. Super. Ct. Rules, Rule 9.36-9.41 (ex parte procedure)]. Further, proof of service need not be filed with the petition if no alternative writ is sought, although proof of service must be lodged with the court before a hearing or any other action by the court [*Code Civ. Proc. § 1088.5*; for further discussion of the noticed application procedure, *see §§ 474C.10[3], 474C.17*].

[11] New Trial Motion

A motion for a new trial can be made in an administrative mandamus proceeding under *Code Civ. Proc. § 1094.5*. This is because the new trial procedures [*Code Civ. Proc. §§ 655-663.2* are made applicable by law [*Code Civ. Proc. § 1110*] to administrative mandamus proceedings. Further, a litigant can seek a readjudication of factual issues decided against the litigant. The litigant is required to file a motion for new trial in the trial court that adjudicated those factual issues. Failure to file a motion for a new trial precludes the court from readjudicating those factual issues. [*Pollak v. State Personnel Board (2001) 88 Cal. App. 4th 1394, 1405-1406, 107 Cal. Rptr. 2d 39]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewStandards of ReviewArbitrary & Capricious ReviewCivil ProceduresPleading & PracticePleadingsComplaintsRequirementsCivil ProceduresPleading & PracticeService of ProcessSummonsGeneral OverviewCivil ProceduresPartiesJoinderCompulsory JoinderCivil ProceduresPartiesReal Parties in InterestGeneral OverviewCivil ProceduresJudgmentsRelief From JudgmentMotions for New TrialsCivil ProceduresRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProceduresRemediesCosts & Attorney FeesCostsGeneral Overview

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A. Procedures for Administrative Mandate

41A-474C California Forms of Pleading and Practice--Annotated § 474C.14

§ 474C.14 Petition for Writ of Mandate in Court of Appeal or Supreme Court

[1] Essential Allegations

The legal and factual basis for issuance of a writ of mandate in administrative mandate proceedings is the same whether the writ is issued by the superior court or a reviewing court. Thus, a petition for a writ of administrative mandate filed in the California Court of Appeal or the Supreme Court should contain the same allegations as a petition filed in the superior court [for discussion of essential allegations if petition is filed in superior court, *see §§ 474C.13[3], 474C.90[5]*]. However, the appellate courts will grant mandate relief only when the issues presented are of great public importance and must be resolved promptly [*see Adams v. Department of Motor Vehicles (1974) 11 Cal. 3d 146, 150 n.7, 113 Cal. Rptr. 145, 520 P.2d 961* ; *Mooney v. Pickett (1971) 4 Cal. 3d 669, 674-675, 94 Cal. Rptr. 279, 483 P.2d 1231* ; *County of Sacramento v. Hickman (1967) 66 Cal. 2d 841, 845, 59 Cal. Rptr. 609, 428 P.2d 593]* , and will typically refuse to entertain mandate proceedings if the proceedings could just as well have been instituted in the superior court [*Cohen v. Superior Court (1968) 267 Cal. App. 2d 268, 270, 72 Cal. Rptr. 814* ; *County of Sacramento v. Hastings (1955) 132 Cal. App. 2d 419, 421, 282 P.2d 100]* . Recognizing that original proceedings in appellate courts are the exception rather than the rule, the California Rules of Court require that, if a petition for mandate (or certiorari or prohibition) might lawfully have been made to a lower court in the first instance, the petition must set forth the circumstances that, in the opinion of the petitioner, render it proper that the writ should originally issue from the reviewing court [*Cal. Rules of Ct., Rule 8.490(b)(1)*; for rules governing the exercise or nonexercise of original jurisdiction by appellate courts, see *§ 474C.12[2]*]. Additionally, if any board, officer, or tribunal in the discharge of duties of a public character is named as respondent, the petition must disclose the name of the real party in interest, if any, or the party whose interest would be directly affected by the proceeding [*Cal. Rules of Ct., Rule 8.490(b)(2)*; for rules relating to real parties in interest, *see § 474C.13[2]*]. For a form of a petition for a writ of mandate in the Court of Appeal or Supreme Court, see *§ 474C.92*.

[2] Points and Authorities

Although a memorandum of points and authorities is not always required to accompany a petition for writ of mandate filed in superior court [*see § 474C.13[9]*], a memorandum of points and authorities *must* be filed and served with a petition for writ of mandate when the petition is filed in the Court of Appeal or Supreme Court [*Cal. Rules of Ct., Rule*

8.490(b)(5); for model points and authorities in support of petitions in administrative mandate cases, see s California Points and Authorities, Ch. 150, *Mandate and Prohibition*].

[3] Method of Reproduction

A petition for writ of mandate may be reproduced by any process that produces a clear, black image of letter quality [*Cal. Rules of Ct., Rule 8.204(b)(1)*]. The petition must conform, as far as practicable, to the rules for briefs [*Cal. Rules of Ct., Rule 8.40, 8.204*]. Typewritten original copies and carbon copies may not be filed without the permission of the chief justice or the presiding justice, and will ordinarily be permitted only when the petitioner is without counsel and proceeding in forma pauperis, and all other typewritten brief smust be filed as photocopies [*Cal. Rules of Ct., Rules 8.40, 8.204(b)*].

[4] Case Number and Cover

A petition for a writ of mandate filed in the Supreme Court or the Court of Appeal must have a cover. The cover, so far as is practicable, should be colored red [*Cal. Rules of Ct., Rule 8.40(b)*]. In addition to the usual matters set forth in court papers, the cover must contain all of the following [*Cal. Rules of Ct., Rule 8.204(b)*]:

- The title of the case.
- The name, address, and telephone number of counsel for the petitioner.
- The name of the trial judge.
- The number of the case in the trial court, if any.
- The California State Bar membership number of the attorney filing the petition and of every attorney who joins in the petition.

For a model cover for a petition to an appellate court for a writ of mandate, see Ch. 358, *Mandate and Prohibition* , Form 8. For a form of a petition for a writ of mandate in the Court of Appeal or the Supreme Court, see *§ 474C.92*.

[5] Copies

If the petition is filed in the Supreme Court, an original and thirteen copies must be filed [*Cal. Rules of Ct., Rule 8.44(a)(1)*]. If the petition is filed in the Court of Appeal, an original and four copies must be filed [*Cal. Rules of Ct., Rule 8.44(b)(1)*].

[6] Service

The petition and the memorandum of points and authorities must be served on the respondent and the real party in interest, if any, by delivering a copy to each person by personal service or by mail [*Code Civ. Proc. § 1107* (*Code Civ. Proc. § 1010 et seq.* applicable to service of petition), *Code Civ. Proc. § 1109* (rules relating to civil actions applicable to and constitute rules of practice for special proceedings); *see Code Civ. Proc. § 307 et seq.* (rules governing civil actions generally); *see also Code Civ. Proc. §§ 415.10* (personal service), *415.30* (service of summons by mail), *1011* (service on attorney or party), *1013(a)* (extension of time when service is by mail), *(c), (e)* (time extended by two court days when notice is served by facsimile transmission, express mail, or other overnight delivery service), *1013a* (proof of service by mail)]. Personal service is customary, however, and usually preferable to service by mail [*see § 474C.13[10]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedurePleading & PracticeService of ProcessMethodsMailCivil ProcedurePleading & PracticeService of ProcessMethodsPersonal Delivery

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.15

§ 474C.15 Alternative Writ of Mandate

[1] Nature of Alternative Writ

An alternative writ of mandate is a court order commanding the party to whom it is directed (the respondent) to perform a specified act, or to show cause before the court at a specified time and place why he or she has not done so [*Code Civ. Proc. § 1087*; *see § 474C.10[2]*]. When directed to an administrative agency, an alternative writ of mandate typically orders the agency to set aside a disputed order or decision, or to show cause why the order or decision was proper and should be sustained. The court will issue an alternative writ when the petition sufficiently alleges a cause of action that, if proven, could lead to the issuance of a peremptory writ [*Save Oxnard Shores v. California Coastal Com. (1986) 179 Cal. App. 3d 140, 149, 224 Cal. Rptr. 425* ; for discussion of the peremptory writ, *see § 474C.17*]. An alternative writ is not a final judicial determination that the petitioner is entitled to relief, but rather a means for bringing the respondent into court [*McPheeters v. Board of Medical Examiners (1947) 82 Cal. App. 2d 709, 716, 187 P.2d 116]* . Its effect is to place the respondent on notice that the petitioner has made a sufficient showing to cast doubt on the validity of its decision [*Save Oxnard Shores v. California Coastal Com. (1986) 179 Cal. App. 3d 140, 149, 224 Cal. Rptr. 425]* . For a form of a petition for an alternative writ of mandate that may be filed in superior court, see *§ 474C.93*. For a form that includes an order with the alternative writ, see *§ 474C.94*.

The court may deny the alternative writ out of hand, even before notice has been given to the respondent or any opposition to the issuance of the writ has been registered [*Kingston v. Dept. of Motor Vehicles (1969) 271 Cal. App. 2d 549, 552, 76 Cal. Rptr. 614]* . Failure to deny a writ out of hand, however, does not constitute a final determination that the petitioner is entitled to relief. At any time after the alternative writ is issued, the court may determine that the petition is insufficient and that the writ should be denied [*McPheeters v. Board of Medical Examiners (1947) 82 Cal. App. 2d 709, 716, 187 P.2d 116]* . Denial of the writ is improper, however, if the facts alleged in the petition would, if true, entitle the petitioner to the issuance of a peremptory writ [*Kingston v. Dept. of Motor Vehicles (1969) 271 Cal. App. 2d 549, 553-554, 76 Cal. Rptr. 614]* .

[2] Writ Combined With Order Authorizing Issuance of Writ

In most counties, the alternative writ and the court's order authorizing issuance of the alternative writ appear in the same

document [for a form, *see § 474C.94*]. In some counties, however, a separate order for issuance of the alternative writ is required. Local rules and practice should be ascertained before preparing the writ. When a separate order is required, counsel should prepare the alternative writ as set forth below and also prepare the separate order set forth in *§ 474C.95*.

[3] Preparation and Presentation to Court

In the superior court, counsel for the petitioner customarily prepares the alternative writ. The writ should bear the same title, number, and names of the parties as the petition. Immediately below the number, it should specify the date, time, and location, if ascertainable, of any scheduled hearing [*Cal. Rules of Ct., Rule 3.1110(b)(2)*; *see Cal. Rules of Ct., Rule 2.3* ("papers" includes all documents, except exhibits or copies of documents, that are offered for filing in any case in the superior courts); *see also § 474C.13[1]*]. When the writ is sought from an appellate court the writ is generally prepared by the court itself [for jurisdiction of appellate courts to issue writs of mandate, *see § 474C.12*; for petition for writ of mandate in Court of Appeal or Supreme Court, *see § 474C.92*].

When the petition is filed in the superior court, the alternative writ should be presented to the court in chambers at the same time as the petition. Counsel should consult local rules and practice for the particular judge or department to which the writ should be presented. For forms of petitions that may be filed in superior court, see *§§ 474C.93, 474C.94*.

[4] Issuance of Writ

If satisfied that the facts stated in the petition are sufficient, the court is empowered to authorize issuance of the alternative writ ex parte [*Code Civ. Proc. § 1107* (for good cause, court may grant application ex parte, without notice or service of petition)]; however, *Code Civ. Proc. § 1107* permits the respondent and the real party in interest to serve and file points and authorities in opposition to the granting of the writ within five days after service and filing of the petition. Therefore, at least when the petition has been served before it is filed, the court customarily waits five days before granting or denying the writ. Although one division of the Court of Appeal has held that failure to wait five days after the petition is filed deprives the court of discretion to grant the alternative writ [*City of Culver City v. State Bd. of Equalization (1972) 29 Cal. App. 3d 404, 412, 105 Cal. Rptr. 602]* , the California Supreme Court has not ruled on the issue. Whether a particular court will grant the petition ex parte depends largely on local rules and practice, which should be consulted before proceeding.

Although the alternative writ is a judicial order [*Code Civ. Proc. § 17(b)(6)* ("writ" is order issued in name of court or judicial officer); *Painter v. Berglund (1939) 31 Cal. App. 2d 63, 70, 87 P.2d 360]* , the clerk customarily issues it, on order of the court, under the clerk's signature and the court's seal. *Code Civ. Proc. § 1108* provides that the writ may be made returnable (*i.e.*, a date may be set for a hearing on the writ) "at any time." In the usual case, however, the clerk will determine the return date.

[5] Notice

Unless the court, in its discretion and for good cause, grants the alternative writ ex parte [*see Code Civ. Proc. § 1107*; *see also [4], above*], proof of service of the petition must be filed with the petition [*see Code Civ. Proc. § 1107*]. Although the Code of Civil Procedure does not require the court to issue an order granting leave to file the petition without accompanying proof of service when it authorizes issuance of the alternative ex parte, counsel should always determine whether local court rules impose any such requirement.

[6] Service

Unless the court orders otherwise, the alternative writ must be served in the same manner as a summons in a civil action [*Code Civ. Proc. § 1096*; *see Code Civ. Proc. § 413.10 et seq.* (service of summons in civil actions); *see also Code Civ. Proc. § 1109* (*Code Civ. Proc. § 307 et seq.* constitute rules of practice in mandate and other special proceedings)]. Although either personal service or service by mail is permissible [*see Code Civ. Proc. §§ 415.10* (personal service),

415.30 (service by mail)], personal service is usually preferable [*see § 474C.13[10]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusCivil ProcedurePleading & PracticeService of ProcessMethodsMailCivil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessProofGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral OverviewGovernmentsCourtsCourt Personnel

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.16

§ 474C.16 Separate Order for Issuance of Alternative Writ of Mandate

It is the local practice in some counties for the court order authorizing issuance of the alternative writ to be separate from the writ itself. Counsel should ascertain local rules and practice in this respect. If a separate order is required, the form set forth in *§ 474C.95* may be used, and the alternative writ set forth in *§ 474C.93* may be used as the alternative writ, with the appended court order set forth at the end of that form. Although this order is not required to be served on the respondent or the real party in interest, it is good practice to serve a courtesy copy with the petition and the alternative writ [for requirements service of petition and alternative writ, *see §§ 474C.13[10], 474C.14[6], 474C.15[6]*].

Legal Topics:

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

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.17

§ 474C.17 Notice of Motion for Peremptory Writ of Mandate

[1] Noticed Application Procedure

Instead of seeking an alternative writ of mandate as a preliminary step to the issuance of a peremptory writ after notice, the petitioner may move the court for issuance of a peremptory writ [*Code Civ. Proc. § 1088.5*; *see Code Civ. Proc. §§ 1003* (application for an order is a motion), *1088* (application for peremptory writ upon "due notice"), *1094* (noticed motion for judgment on peremptory writ); *see § 474.15* for legal requirements governing alternative writ of mandate, and §§ *474C.93*, *474C.94* for forms; *see also* Ch. 372, *Motions and Orders* for discussion of noticed motion procedure in civil cases generally]. When this procedure is followed, no alternative writ is requested or issued. Although the noticed application procedure is used less frequently than the alternative writ procedure, some courts prefer it [*see, e.g.,* San Diego Co. Super. Ct. Rules, Div. II, Rule 8.1]; however, the appellate courts apparently do not follow this procedure [*see* Ch. 358, *Mandate and Prohibition* , Comments to Form 13]. Although *Code Civ. Proc. § 1088.5* provides that proof of service of the petition need not be filed with the petition when the noticed application procedure is used in a trial court, the California Rules of Court require that proof of service of the petition must be filed in all cases when the writ is sought in a reviewing court [*Cal. Rules of Court, Rule 8.490(b)*]. Thus, the rules are subject to the inference that the noticed application procedure is not to be used in appellate courts.

[2] Notice

The notice of motion may be filed at the same time as or any time after the petition is filed. *Code Civ. Proc. § 1088* provides that the petitioner must give at least 10 days' notice of the motion. *Code Civ. Proc. § 1089.5*, however, gives the respondent 30 days after the petition is filed (or 30 days after a copy of the administrative record is received, if not filed with the petition) to answer or otherwise respond to the petition. Thus, notice should be sufficient to allow the respondent the necessary 30 days. Immediately below the number, the notice of motion should set forth the date, time, and location, if ascertainable, of any scheduled hearing [*Cal. Rules of Ct., Rule 3.1120(b)(2)*; *see Cal. Rules of Ct., Rule 2.3* ("papers" includes all documents, except exhibits or copies of documents, that are offered for filing in any case in the superior courts); *see also § 474C.13 [1]*]. Proof of service of the petition need not be filed with the petition, although it must be lodged with the court before any hearing or other action by the court [*Code Civ. Proc. § 1088.5*].

[3] Points and Authorities

A party filing a notice of motion is required to file and serve a memorandum of points and authorities [*Cal. Rules of Ct., Rule 3.1113(a)*]. The absence of the memorandum may be construed by the court as an admission that the motion is not meritorious, and be cause for its denial [*Cal. Rules of Ct., Rule 3.1113(a)*].

[4] Service

Copies of the notice and petition must be served on the respondent and the real party in interest [*see Code Civ. Proc. §§ 1088* (notice of motion must be served on each person against whom writ is sought), *1107* (petition must be served on respondent and real party in interest); *see also Younger v. Jordan (1954) 42 Cal. 2d 757, 758-759, 269 P.2d 616* (real party in interest is indispensable party and must be served)]. When the noticed application procedure is used, service may be accomplished in the same manner as in an ordinary civil action [*Code Civ. Proc. §§ 1107, 1109* (rules relating to civil actions applicable to and constitute rules of practice for special proceedings); *see Code Civ. Proc. § 307 et seq.* (civil actions generally)]. The rules for service of summons in civil actions permit service to be by personal delivery or by mail [*Code Civ. Proc. §§ 415.10* (personal service), *415.30* (service by mail)]. Personal service is customary, however, and is almost always preferable to service by mail [*see* discussion in *§ 474C.13[10]*].

[5] Issuance of Peremptory Writ Without Alternative Writ in Appellate Court

Under *Code Civ. Proc. § 1088*, the court may issue a peremptory writ without first issuing an alternative writ. *Code Civ. Proc. § 1088* provides that, if the application is on "due notice," the peremptory writ may be issued "in the first instance"--that is, without the issuance of an alternative writ. It further states that "notice of the application, when given, must be at least 10 days" [*Code Civ. Proc. § 1088*]. Pursuant to the authority of *Code Civ. Proc. § 1088*, the appellate courts have developed the practice of issuing peremptory writs without first issuing alternative writs [*Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 178, 203 Cal. Rptr. 626, 681 P.2d 893]* . This procedure was once considered appropriate only when unusual circumstances required that the appellate court take immediate action [*Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 178, 203 Cal. Rptr. 626, 681 P.2d 893]* . In recent years, the courts of appeal have increasingly resorted to issuing a peremptory writ in the first instance when it appears that (1) the petition and opposing papers on file adequately address the issues raised by the petition, (2) no factual dispute exists, and (3) the additional briefing following issuance of an alternative writ is unnecessary to the disposition of the petition [*Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 178, 203 Cal. Rptr. 626, 681 P.2d 893]* .

More recently, the California Supreme Court has limited the circumstances under which a peremptory writ can be issued under Section 1088, stressing that the accelerated *Palma* procedure should be the exception, not the routine [*Ng v. Superior Court (1992) 4 Cal. 4th 29, 35, 13 Cal. Rptr. 2d 856, 840 P.2d 961* ; *Alexander v. Superior Court (1993) 5 Cal. 4th 1218, 1222-1223, 23 Cal. Rptr. 2d 397, 859 P.2d 96]* . The Court stated that generally, the procedure should be used only when the petitioner's right to relief is so obvious that no purpose could reasonably be served by plenary consideration of the issue, such as when the right to relief is conceded or when the record demonstrates a clear error under well-settled principles of law and undisputed facts. Another situation justifying the use of the *Palma* procedure arises when an unusual urgency exists that requires acceleration of the normal process. Otherwise, the normal writ procedure, including issuance of an alternative writ, should be followed [*Ng v. Superior Court (1992) 4 Cal. 4th 29, 35, 13 Cal. Rptr. 2d 856, 840 P.2d 961* ; *Alexander v. Superior Court (1993) 5 Cal. 4th 1218, 1223, 23 Cal. Rptr. 2d 397, 859 P.2d 96]* .

The procedure of issuing a peremptory writ in the first instance differs sharply from the usual procedure of first issuing an alternative writ. When an alternative writ is first issued, the respondent and the real party in interest, if any, have an opportunity to make a return, to file points and authorities, and to appear at the hearing in opposition to the petition. This opportunity is not afforded when the court issues a peremptory writ without first issuing an alternative writ. Recognizing this key difference, the Supreme Court held that a court may properly issue a peremptory writ without first

issuing an alternative writ only when the respondent and/or real party in interest have notice that the petitioner is seeking or the court is considering the issuance of a peremptory writ under those circumstances [*Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 179-180, 203 Cal. Rptr. 626, 681 P.2d 893]* . Adequate notice is not provided by merely serving the petition on the respondent and the real party in interest, since it is rare that a court will issue a peremptory writ without first issuing an alternative writ, even when the petition requests that relief, and the mere possibility that the court may take such action does not provide notice that it is likely to do so [*Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 179-180, 203 Cal. Rptr. 626, 681 P.2d 893]* . Instead, the respondent and the real party in interest must be put on notice that a peremptory writ without an alternative writ is being sought or considered. The Court stated that the notice may be given either by the court or by the petitioner [*Palma v. U.S. Industrial Fasteners, Inc.(1984) 36 Cal. 3d 171, 180, 203 Cal. Rptr. 626, 681 P.2d 893]* . It further stated that an appellate court, absent exceptional circumstances, should not issue a peremptory writ in the first instance without having received, or solicited, opposition from the party or parties adversely affected [*Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 180, 203 Cal. Rptr. 626, 681 P.2d 893]* .

Following the mandate of *Palma*, if the petitioner seeks the issuance of a peremptory writ without an alternative writ, formal notice must be given to the respondent and the real party in interest, if any, that the court is considering such a procedure. A sample form of a *Palma* notice is set forth in *§ 474C.97*. Note that a *Palma* notice must be given only when the respondent and the real party in interest do not have notice that a peremptory writ may issue in the first instance. If the petitioner files a notice of motion for the issuance of a peremptory writ, the requirements of notice are adequately met and an additional *Palma* notice need not be given [*see § 474C.96* for a form of a notice of motion].

Legal Topics:

For related research and practice materials, see the following legal topics:
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41A-474C California Forms of Pleading and Practice--Annotated § 474C.18

§ 474C.18 Stay of Agency Decision

[1] Court Discretion to Issue Stay

The court in which a petition for a writ of mandate is filed may stay the operation of the administrative decision unless it is satisfied that a stay would be against the public interest [*Code Civ. Proc. § 1094.5(g)*]. This decision is discretionary, and there is no due process right to a stay of enforcement of an agency order pending judicial review [*Medical Bd. of California v. Superior Court (1991) 227 Cal. App. 3d 1458, 1462, 278 Cal. Rptr. 247]* . When issued, a stay will be effective pending the court's judgment, or until (1) a notice of appeal has been filed from the judgment or (2) the time for filing a notice of appeal has expired [*Code Civ. Proc. § 1094.5(g)*]. In determining whether a stay would be against the public interest, the court must weigh the public interest in each case [*Sterling v. Santa Monica Rent Control Bd. (1985) 168 Cal. App. 3d 176, 187, 214 Cal. Rptr. 71]* . An order denying a stay is not appealable [*Gibson v. Savings & Loan Commissioner (1970) 6 Cal. App. 3d 269, 271-272, 85 Cal. Rptr. 799]* . For forms of an order to stay the operation of an administrative decision, see *§§ 474C.99, 474C.100*.

[2] Stay of Decisions by Agencies Regulating Health-Related Professions

The court may stay certain administrative orders or decisions of specified agencies regulating health-related professions, and orders or decisions of other agencies under limited circumstances, only if it is satisfied (1) that the public interest will not suffer and (2) that the respondent is unlikely to ultimately prevail on the merits [*Code Civ. Proc. § 1094.5(h)(1)*]. To determine whether the respondent is unlikely to ultimately prevail, the court must make a preliminary assessment of the merits of the petition for the writ and conclude that the petitioner is likely to obtain relief [*Board of Medical Quality Assurance v. Superior Court (1980) 114 Cal. App. 3d 272, 276, 170 Cal. Rptr. 468* ; *Medical Bd. of California v. Superior Court (1991) 227 Cal. App. 3d 1458, 1461-1462, 278 Cal. Rptr. 247* (trial court abused its discretion in staying agency order because respondent could not show that he was likely to prevail on the merits)]. A court that fails to make this determination has no jurisdiction to issue a stay order [*Board of Medical Quality Assurance v. Superior Court (1980) 114 Cal. App. 3d 272, 276, 170 Cal. Rptr. 468]* .

This rule applies to orders or decisions of licensed hospitals and state agencies when a statute requires a hearing to be held under the California Administrative Procedure Act (APA) [*Code Civ. Proc. § 1094.5(h)(1)*; *see Gov. Code § 11340*

et seq. (APA)]. It applies to all decisions of agencies that issue licenses under the healing-arts provisions of the Business and Professions Code [*see Bus. & Prof. Code § 500 et seq.* (healing arts)], the Osteopathic Initiative Act [*see Bus. & Prof. Code § 3600 et seq.* (Osteopathic Initiative Act)], and the Chiropractic Initiative Act [*Code Civ. Proc. § 1094.5(h)(2)*; *see Bus. & Prof. Code § 1000 et seq.* (Chiropractic Initiative Act)]. It applies to decisions of other state agencies only if the agency has adopted the proposed decision of the administrative law judge in its entirety or has adopted the proposed decision but reduced the proposed penalty pursuant to *Gov. Code § 11517(c)(2)* [*Code Civ. Proc. § 1094.5(h)(2)*]. For a discussion of statutory provisions governing stays of administrative mandate proceedings on appeal, see *§ 474C.51[3]*.

[3] Stay Bonds

The statute empowering the court to stay the operation of administrative decisions pending judgment in mandate proceedings does not require the petitioner to file a bond or undertaking as a condition of obtaining a stay order [*Venice Canals Resident Home Owners Assn. v. Superior Court (1977) 72 Cal. App. 3d 675, 679, 140 Cal. Rptr. 361* ; *see Code Civ. Proc. § 1094.5(g)* (stay of administrative decision)]. When necessary to prevent abuses in the use of the stay, however, the court has inherent power to condition a stay on the posting of a bond [*Venice Canals Resident Home Owners Assn. v. Superior Court (1977) 72 Cal. App. 3d 675, 680, 140 Cal. Rptr. 361]* . Thus, the court may require a bond when the rights of third parties would be adversely affected by the stay [*Venice Canals Resident Home Owners Assn. v. Superior Court (1977) 72 Cal. App. 3d 675, 680, 140 Cal. Rptr. 361* (trial court properly required bond to protect persons who had received permits from California Coastal Commission and thereafter started construction in good faith)]. The Bond and Undertaking Law [*Code Civ. Proc. § 995.010 et seq.*], which specifies formal and substantive requirements for bonds and undertakings in civil actions, is applicable in mandate proceedings [*Code Civ. Proc. § 1109* (*Code Civ. Proc. § 307 et seq.* applicable to and constitute rules of practice in mandate and other special proceedings)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewRemediesStays of Proceedings & SupersedeasCivil ProcedureRemediesBondsGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesHealthcare LawBusiness Administration & OrganizationLicensesGeneral Overview

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§ 474C.19 Return

[1] Nature of Return

The response to a petition for a writ of mandate is called a return [*Central Bank v. Superior Court (1978) 81 Cal. App. 3d 592, 600, 146 Cal. Rptr. 503]* . The return may consist of a demurrer, a verified answer, or both [*see Code Civ. Proc. § 1089*]. The general rules of pleading and practice applicable in civil actions apply to returns in mandate proceedings [*Code Civ. Proc. § 1109* (*Code Civ. Proc. § 307 et seq.* apply to and constitute rules of practice in mandate and other special proceedings); *Central Bank v. Superior Court (1978) 81 Cal. App. 3d 592, 600, 146 Cal. Rptr. 503* ; *see Code Civ. Proc. §§ 430.10 et seq., 431.10 et seq.* (governing demurrers and actions in civil actions, respectively)]. All parties (including respondents and real parties in interest) on whom the petition has been served have the right to make a return [*Code Civ. Proc. § 1089*; *Cal. Rules of Ct., Rule 8.490(b)* (when petition is filed in appellate court, respondent or real party in interest or both, jointly or separately, may make return); *Central Bank v. Superior Court (1978) 81 Cal. App. 3d 592, 600, 146 Cal. Rptr. 503]* .

[2] Demurrer

A demurrer in a mandate proceeding, like a demurrer in a civil action, tests the legal sufficiency of the petition [*Larson v. City of Redondo Beach (1972) 27 Cal. App. 3d 332, 337, 103 Cal. Rptr. 592]* . It raises issues of law [*Code Civ. Proc. § 589(a)*] that must be tried by the court [*Code Civ. Proc. § 591*]. When ruling on a demurrer, the court assumes the truth of all material facts that have been properly pleaded [*Rosenfield v. Malcolm (1967) 65 Cal. 2d 559, 563, 55 Cal. Rptr. 505, 421 P.2d 697* ; *Stanton v. Dumke (1966) 64 Cal. 2d 199, 201, 49 Cal. Rptr. 380, 411 P.2d 108]* . If the petition does not plead facts showing that the petitioner is entitled to the relief prayed, however, a demurrer on the ground that the petition fails to state a cause of action should be sustained [*Faulkner v. Cal. Toll Bridge Authority (1953) 40 Cal. 2d 317, 330, 253 P.2d 659* ; *Gong v. City of Fremont (1967) 250 Cal. App. 2d 568, 573, 58 Cal. Rptr. 664]* . The statutory grounds for demurrer appear in *Code Civ. Proc. § 430.10*.

A memorandum of points and authorities should be filed with every demurrer. A "general demurrer" is a demurrer on the ground that the pleading to which the demurrer is directed (*e.g.*, a complaint or a petition) does not state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*]. A demurrer on any other ground [*Code Civ.*

Proc. § 430.10(a)-(d), (f)-(i)] is a "special" demurrer. The court may construe the absence of points and authorities as an admission that a special demurrer is not meritorious and as a waiver of all grounds of demurrer not supported in the memorandum [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Cal. Rules of Ct., Rules 3.1100* (rules applicable to civil law and motion in superior and municipal courts), *3.1113(b)* (contents of memorandum of points and authorities)].

Under the Rules of Court, a demurrer must state on the first page immediately below the number of the case the name of the party filing the demurrer and the name of the party whose pleading is the subject of the demurrer [*Cal. Rules of Ct., Rule 3.1320(c)*; *see Cal. Rules of Ct., Rule 2.3(2)* ("papers" includes all documents, except exhibits or copies of documents, that are offered for filing in any case in the superior courts)]. In the same place, it must set forth the date, the time, and the location, if ascertainable, of any scheduled hearing [*Cal. Rules of Ct., Rule 3.1110(b)(2)*; *see § 474C.13[1]*]. The rules also require that a party filing a demurrer serve and file with the demurrer a notice of hearing specifying a hearing date in accordance with *Code Civ. Proc. § 1005* [*Cal. Rules of Ct., Rule 3.1320(b)*; *see Code Civ. Proc. §§ 1005* (time for notice of motion unless extended because notice is served by mail), *1013(c), (e)* (time is extended by two court days when notice is served by facsimile transmission, express mail, or other overnight delivery service)]. For a form of notice of hearing on a demurrer, see *§ 474C.102*.

Although the respondent may file a demurrer without concurrently filing an answer, the better practice is to file an answer at the same time as the demurrer. If the return is by demurrer alone, the court is not required to permit an answer to be filed [*see Code Civ. Proc. § 1089* (if return is by demurrer alone, court "may allow" answer to be filed)]. In original proceedings in the Supreme Court or the Court of Appeal, if the return is by demurrer alone and the demurrer is not sustained, a peremptory writ of mandate may issue without leave to answer [*Cal. Rules of Ct., Rule 8.490(e)*].

For a general consideration of demurrers in civil actions, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* . For a form of a demurrer to a petition for a writ of mandate, see *§ 474C.101*.

[3] Answer

The answer must be verified [*Code Civ. Proc. § 1089*; *Cal. Rules of Ct., Rule 8.490(b)*]. An unverified answer will be ineffective to deny the allegations of a verified petition and will permit the court to regard the allegations of the petition as true [*Central Bank v. Superior Court (1978) 81 Cal. App. 3d 592, 600, 146 Cal. Rptr. 503]* . Like answers to complaints in civil actions, the answer to a verified petition for a writ of mandate should deny all material allegations of the petition that the answering party does not wish to admit [*see Baumgardner v. City of Hawthorne (1951) 104 Cal. App. 2d 512, 517, 231 P.2d 864* (material allegations of petition not denied are deemed admitted)]. Further, it should allege any affirmative defenses that may be available, such as the petitioner's lack of capacity to sue [*see Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6]* , or failure to exhaust administrative remedies [for further discussion of the requirement that the petitioner exhaust administrative remedies before petitioning for mandate, *see* Ch. 474A, *Timing of Judicial Review*]. For a form of an answer to a petition for writ of mandate, see *§ 474C.103*.

[4] Points and Authorities

Within five days after service of the petition for an alternative writ, the respondent and the real party in interest may file points and authorities in opposition to issuance of the writ [*Code Civ. Proc. § 1107*]. Points and authorities may also be filed in support of any demurrer [*see [2], above*], and in opposition to any motion for issuance of a peremptory writ [for discussion of requirements for a notice of motion for peremptory writ of mandate, *see § 474C.17*; for a notice of motion form, *see § 474C.96*]. A memorandum of points and authorities is a brief of the legal issues governing disposition of the case [*Wilson v. L.A. County Civil Service Com. (1951) 103 Cal. App. 2d 426, 431, 229 P.2d 406]* . It will almost always be useful and, in some cases (e.g., where the sole question to be decided is a question of law), it may be essential to effective opposition to issuance of the writ. Points and authorities, however, cannot serve as a substitute for a return by demurrer or answer when a return is required [for discussion of return, *see [1], above*; for answer, *see [3], above*].

[5] Time Limits

In mandate proceedings in the superior court, the return may be served and filed at any time on or before the return date specified in the alternative writ or the date set for hearing of the petitioner's motion for issuance of a peremptory writ, if any [*Code Civ. Proc. § 1089*; *see § 474C.15* for discussion of the requirements for an alternative writ of mandate; for forms, *see §§ 474C.93*, *474C.94*; for discussion of the requirements for a notice of motion for issuance of peremptory writ, *see § 474C.17*; for a form, *see § 474C.94*]. When the petition seeks a peremptory writ of mandate without also requesting issuance of an alternative writ, the return may be made within 30 days after the petition is filed (if a record of the administrative proceedings is filed with the petition or if no record of the administrative proceedings is required) or within 30 days after the respondent and the real party in interest receive the administrative record (if the record has been requested pursuant to *Gov. Code § 11523*, but is not filed with the petition) [*Code Civ. Proc. § 1089.5*; *see Gov. Code § 11523* (on request and payment of fees, administrative record must be prepared by agency and delivered to petitioner within 30 days)].

In original mandate proceedings in the Court of Appeal or Supreme Court, the return must be made at least five days before the date set for hearing, unless a different return date is specified by the court [*Cal. Rules of Ct., Rule 8.490(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 474C.20 Intervention

[1] Intervention by Real Party in Interest

A "real party in interest" is any person (other than a petitioner or a respondent) whose interests would be directly affected by the outcome of the proceeding [*Cal. Rules of Ct., Rule 8.490(a)*; *see Sierra Club, Inc. v. California Coastal Com. (1979) 95 Cal. App. 3d 495, 501-502, 157 Cal. Rptr. 190* (developer of real estate project was real party in interest when environmental group petitioned for writ of mandate to set aside permit for project)]. When a petition for a writ of mandate seeks relief that, if granted, would injure or affect the interest of a third person, the third person is an indispensable party to the proceedings and must be named as a real party in interest [*Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 522, 106 P.2d 879* ; *see § 474C.13[2]*]. A real party in interest who has not been named in a petition for a writ of mandate may choose to disregard the proceedings and not be bound by them [*Greif v. Dullea (1944) 66 Cal. App. 2d 986, 995, 153 P.2d 581* ; *see Inland Counties Regional Center, Inc. v. Office of Administrative Hearings (1987) 193 Cal. App. 3d 700, 703-704, 238 Cal. Rptr. 422* (judgment rendered without proper joinder of real party in interest may be vacated or set aside); *Sierra Club, Inc. v. California Coastal Com. (1979) 95 Cal. App. 3d 495, 501-502, 157 Cal. Rptr. 190* (petition that fails to name the real party in interest may be dismissed)]. Alternatively, such a party may, at his or her option, move the court for leave to intervene in the proceedings [*Timberidge Enterprises, Inc. v. City of Santa Rosa (1978) 86 Cal. App. 3d 873, 881, 150 Cal. Rptr. 606* ; *see Code Civ. Proc. § 387(a)* (intervention generally)].

Whether a real party in interest should disregard the proceedings or seek to intervene should be decided on a case-by-case basis. A party who chooses to disregard the proceedings need not retain counsel to oppose the petition, of course, but future legal complications may eventually compel the party to retain counsel. In any event, a real party in interest may find it advantageous to give evidence to the court and to make legal arguments. Additionally, a party who has been granted leave to intervene may appeal from an adverse judgment [*Greif v. Dullea (1944) 66 Cal. App. 2d 986, 991-993, 153 P.2d 581]* . An intervenor will, however, be bound by the judgment if it is not reversed.

[2] Requirements for Intervention by Third Party

A party who seeks to intervene must have either an interest in the matter in litigation or in the success of one of the

parties to the action, or an interest against both of them [*Code Civ. Proc. § 387(a)*; *Timberidge Enterprises, Inc. v. City of Santa Rosa (1978) 86 Cal. App. 3d 873, 881, 150 Cal. Rptr. 606]* . The interest must, however, be direct and not consequential--that is, it must be of such a character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment [*Timberidge Enterprises, Inc. v. City of Santa Rosa (1978) 86 Cal. App. 3d 873, 881, 150 Cal. Rptr. 606]* .

[3] Conditional Nature of Right to Intervene

The right to intervene is conditional rather than absolute in most cases [*Code Civ. Proc. § 387(a)* (on timely application, person "may" intervene)]. The court generally has discretion to determine whether a person should be permitted to intervene in pending litigation. In determining whether intervention should be permitted, the courts have traditionally balanced the interests of the original parties against the proposed intervenor's interest, taking into consideration the need to avoid delay in litigation and multiplicity of suits [Note, *Civil Procedure; Intervention, 9 Pac. L.J. 356 (1977)*].

In some circumstances, however, an absolute right to intervene arises. Under *Code Civ. Proc. § 387(b)*, a person who claims an interest relating to the property or transaction that is the subject of the pending action, and who is so situated that the disposition of the action may, as a practical matter, impair or impede that person's ability to protect his or her interest, has an absolute right to intervene, unless his or her interest is adequately represented by existing parties. Other statutes also confer an absolute right to intervention in specified circumstances [*see, e.g., Code Civ. Proc. §§ 1250.230* (person claiming legal or equitable interest in property subject to eminent domain process has right to intervene), 1421 (attorney general has right to intervene in action or special proceeding involving property subject to escheat); *Gov. Code § 12606* (attorney general has right to intervene in environmental action)].

[4] Procedure for Intervention

A party may intervene by moving the court for leave to file a complaint in intervention [*Code Civ. Proc. § 387(a)*]. The statute does not specify when a motion to intervene must be made, except that it must be "timely" [*Code Civ. Proc. § 387(a)*]. A motion for leave to intervene would appear to be timely in the following circumstances [Note, *Civil Procedure; Intervention, 9 Pac. L.J. 356, 357 (1977)*]:

- If the motion is made within a reasonable time after the prospective intervenor learns that the proceedings are in progress.
- If the trial would not be delayed by the intervention.
- If the original parties would not be prejudiced or inconvenienced by the intervention.

After judgment has been entered, a person who has an absolute right to intervene may do so by moving to vacate the judgment [*Simac Design, Inc. v. Alciati (1979) 92 Cal. App. 3d 146, 152, 154 Cal. Rptr. 676* ; *see Code Civ. Proc. § 663(1)* (court may set aside and vacate judgment on grounds of incorrect or erroneous legal basis)]. If the motion to intervene is denied, the moving party must appeal from the denial in order to be able to appeal the judgment in the mandate proceedings [*In re Veterans' Industries, Inc. (1970) 8 Cal. App. 3d 902, 916, 88 Cal. Rptr. 303]* . A real party in interest who was named in the petition can appeal the judgment, however, even if he or she did not move to intervene at the trial level [*Harris v. Alcoholic Bev. Etc. Appeals Bd. (1966) 245 Cal. App. 2d 919, 923, 54 Cal. Rptr. 346]* . For further discussion and forms relating to intervention generally, see Ch. 395, *Parties* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 474C.21 Replication

[1] Countervailing Affirmative Allegations of Answer

When an answer to a petition for a writ of mandate alleges facts constituting an affirmative defense, the petitioner must countervail the allegations, either by offering proof at the trial or by filing a separate pleading denying the allegations [*Lotus Car Ltd. v. Municipal Court (1968) 263 Cal. App. 2d 264, 268, 69 Cal. Rptr. 384* ; *see Code Civ. Proc. § 1091*]. If the allegations of an answer are not adequately countervailed by proof or pleading, they are deemed admitted, and the court may accept them as true [*Hunt v. Mayor & Council of Riverside (1948) 31 Cal. 2d 619, 623, 191 P.2d 426* ; *Steiger v. Board of Supervisors (1956) 143 Cal. App. 2d 352, 359, 300 P.2d 210]* . This rule applies, however, only to matters sufficient to constitute a defense. Thus, if the answer consists of irrelevant assertions or conclusions of law rather than material allegations of ultimate fact, the new matter is not sufficient to constitute a defense, and the petitioner is under no obligation to countervail it [*Most v. First Nat. Bank of San Diego (1966) 246 Cal. App. 2d 425, 432, 54 Cal. Rptr. 669* (petitioner need not countervail return when it consists of irrelevant matters and conclusions of law)]. A pleading that denies affirmative allegations of an answer is called a "replication" [*Lotus Car Ltd. v. Municipal Court (1968) 263 Cal. App. 2d 264, 268, 69 Cal. Rptr. 384]* . Although a pleading is not required when proof will be offered at the hearing, a pleading obviates the need for presenting proof on every issue raised by the affirmative allegations of the answer and thus simplifies the production of evidence at the hearing.

[2] Verification

The Code of Civil Procedure contains no requirement that a replication be verified. It is prudent to verify the replication, however, since both the petition and the answer in mandate proceedings are required to be verified [*see Code Civ. Proc. §§ 1086* (verified petition), *1089* (verified answer)].

[3] Time to File and Serve

The replication should be filed before the return date stated in the alternative writ, or the date set for the hearing on the motion for a peremptory writ if an alternative writ is not sought. If the petitioner lacks sufficient time to prepare the replication because the respondent serves the answer immediately before the hearing [*see Code Civ. Proc. § 1089*

(answer may be filed on date for return of alternative writ or date on which application for peremptory writ is noticed)], a continuance should be sought to permit its filing. The petitioner must serve the replication on the answering party [*see Code Civ. Proc. §§ 1109* (*Code Civ. Proc. § 307 et seq.* constitute rules of practice in mandate and other special proceedings), 1011 et seq. (service of papers in civil actions)]. For further discussion and a form of replication to an answer to a petition for a writ of mandate, see *§ 474C.104*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 474C.22 Discovery

Administrative mandate proceedings are special proceedings to which the discovery provisions of the Code of Civil Procedure apply [*see Code Civ. Proc. §§ 21-23* (defining actions and special proceedings); *see also Code Civ. Proc. § 2016(b)(1)* ("action" includes special proceeding of a civil nature), 2017(a) (unless otherwise limited by court order, discovery available regarding any relevant matter, not privil eged, in pending "action" or any motion made in "action")]. Discovery in mandate proceedings is available on a showing that it is reasonably calculated to lead to admissible evidence [*Fairfield v. Superior Court (1975) 14 Cal. 3d 768, 774, 122 Cal. Rptr. 543, 537 P.2d 375* ; *Mobil Oil Corp. v. Superior Court (1976) 59 Cal. App. 3d 293, 304, 130 Cal. Rptr. 814]* . Admissible evidence in mandate review of agency decisions is limited to the evidence contained in the record of the proceedings before the agency, together with relevant evidence that could not have been produced in the exercise of reasonable diligence, or that was improperly excluded at the hearing [*Code Civ. Proc. § 1094.5(e)*; *State of California v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 257-258, 115 Cal. Rptr. 497, 524 P.2d 1281]* . A petitioner cannot obtain discovery with respect to the matters relied on by agency members in making their determinations or the reasoning process they used in making their decision [*United States v. Morgan (1941) 313 U.S. 409, 422, 61 S. Ct. 999, 85 L. Ed. 1429* ; *State of California v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 257-258, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *Mobil Oil Corp. v. Superior Court (1976) 59 Cal. App. 3d 293, 308, 130 Cal. Rptr. 814]* . This limitation applies even when the petitioner challenges the constitutionality of the statute or regulation under which the agency acted [*Mobil Oil Corp. v. Superior Court (1976) 59 Cal. App. 3d 293, 307, 130 Cal. Rptr. 814]* , or alleges that the agency denied him or her a fair trial [*Fairfield v. Superior Court (1975) 14 Cal. 3d 768, 775-779, 122 Cal. Rptr. 543, 537 P.2d 375]* . When the agency has made findings, inquiry outside the administrative record to determine what evidence the agency considered and the reasoning it employed is precluded [*Fairfield v. Superior Court (1975) 14 Cal. 3d 768, 779, 122 Cal. Rptr. 543, 537 P.2d 375]* . Ifthe agency did not make findings, the petitioner's remedy, depending on the circumstances of the case, is to request that the court annul the administrative action or remand the matter to the agency for findings, not to depose agency members as a substitute for findings [*Fairfield v. Superior Court (1975) 14 Cal. 3d 768, 779, 122 Cal. Rptr. 543, 537 P.2d 375]* .

If the trial court compels discovery and one of the parties wishes to contest the order, the party should seek a writ of prohibition in an appellate court [*Fairfield v. Superior Court (1975) 14 Cal. 3d 768, 782, 122 Cal. Rptr. 543, 537*

P.2d 375] . The appellate court will review the granting of the discovery order under the abuse of discretion standard of review, and will reverse the order when the requirements of *Code Civ. Proc. § 1094.5(e)* have not been satisfied [*Pomona Valley Hospital Medical Center v. Superior Court (1997) 55 Cal. App. 4th 93, 109, 63 Cal. Rptr. 2d 743]* . If the trial court denies discovery and one of the parties wishes to contest the order, the party should, depending on the circumstances of the case, seek a writ of prohibition or mandate in an appellate court [*Mobil Oil Corp. v. Superior Court (1976) 59 Cal. App. 3d 293, 303, 130 Cal. Rptr. 814]* . For discussion and forms relating to the writ of prohibition, see Ch. 358, *Mandate and Prohibition* .

Legal Topics:

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§ 474C.23 Administrative Record

[1] Requirement That Record Be Filed

An administrative order or decision cannot ordinarily be challenged on evidentiary grounds unless the administrative record (or a relevant part of the record) is obtained and filed with the court [*see Alford v. Pierno (1972) 27 Cal. App. 3d 682, 690, 104 Cal. Rptr. 110* (petitioner could not claim that findings were not supported by evidence, since no transcript of evidence received by agency was filed with court)], because an administrative order or decision enjoys a presumption of regularity and will not be disturbed on review unless the petitioner sustains his or her burden of showing that it is invalid [*Foster v. Civil Service Com. (1983) 142 Cal. App. 3d 444, 453, 190 Cal. Rptr. 893* ; *Huntington Park Redevelopment Agency v. Duncan (1983) 142 Cal. App. 3d 17, 25, 190 Cal. Rptr. 744* ; *see Evid. Code § 664* (presumption that official duty has been regularly performed)]. Since evidentiary review of agency decisions is limited to evidence contained in the record of proceedings before the agency, plus (1) evidence that, in the exercise of reasonable diligence, could not have been produced at the hearing, and (2) evidence that the agency improperly excluded [*Code Civ. Proc. § 1094.5(e)*; *No Oil, Inc. v. City of Los Angeles (1974) 13 Cal. 3d 68, 79 n.6, 118 Cal. Rptr. 34, 529 P.2d 66* ; *see § 474C.24[4]*], if the record is not placed before the court, it will be difficult if not impossible for the petitioner to establish what evidence the agency considered or improperly excluded. In the absence of a record, sufficiency of the evidence is not ordinarily open to question, and the court may presume that the findings were supported by substantial evidence [*Weinberg v. Cedars Sinai Med. Ctr. (2004) 119 Cal. App. 4th 1098, 1106-1107, 15 Cal. Rptr. 3d 6* (principle applied to judicial review of hospital decision to terminate staff privileges of physician; physician failed to include evidence in the record on appeal); *Foster v. Civil Service Com. (1983) 142 Cal. App. 3d 444, 453, 190 Cal. Rptr. 893]* .

A mandate petitioner's failure to obtain and file a copy of the administrative record with the superior court before filing its opening brief, and the subsequent failure of that petitioner to file an opening brief, provided a valid reason for the superior court to dismiss the mandate petition, particularly because the petitioner based its failure to obtain the record on its erroneous belief that it was not required to pay for the costs of preparing the record [*Black Historical Society v. City of San Diego (2005) 134 Cal. App. 4th 670, 677-678, 36 Cal. Rptr. 3d 378]* .

A motion to augment the administrative record to include 47 additional documents that the city agency did not include in the certified record was properly denied by the Superior Court because the because the appellants did not provide a transcript of the trial court proceedings related to their motion, nor did they include the trail court order denying their motion. In that circumstance, the Court of Appeal ruled against the appellants for failure to provide an adequate record relating to an issue challenged on appeal [*Eureka Citizens for Responsible Government v. City of Eureka (2007) 147 Cal. App. 4th 357, 366-367, 54 Cal. Rptr. 3d 485]* .

It was reversible error for the superior court to decide an administrative mandamus case and to deny the petition without reviewing the administrative record. In denying the petition before the administrative record had been prepared, the court was unable to weigh the evidence and to decide the sufficiency of the evidence to support the fact findings that provided the basis for the agency decision [*Ocheltree v. Gourley (2002) 102 Cal. App. 4th 1013, 1017-1018, 126 Cal. Rptr. 2d 77]* .

It was reversible error for the superior court to issue terminating sanctions dismissing a mandamus petition that challenged an environmental report under CEQA because the challenging parties failed to prepare the administrative record in a timely manner. Under the circumstances, dismissal (authorized under *Code Civ. Proc. § 128*) was too harsh a sanction when there were lesser sanctions available that would have ensured preparation of the administrative record. The record must be prepared within 60 days of filing the petition under the provisions of *Pub. Res. Code § 21167.6*) [*Leavitt v. County of Madera (2004) 123 Cal. App. 4th 1502, 1526-1527, 22 Cal. Rptr. 3d 101* (residents of county who challenged county's approval of residential development project and certification of environmental impact report failed to timely prepare and file administrative record of proceedings. Dismissal was too severe a sanction, and superior court failed to make adequate finding supporting dismissal as a sanction)].

[2] Time for Filing

The record may be filed with the petition or with the respondent's points and authorities, or filed subsequently pursuant to a court order [*Code Civ. Proc. § 1094.5(a)*]. When the petitioner proceeds by the noticed application procedure, the Code of Civil Procedure requires that the record be filed "as expeditiously as possible" [*Code Civ. Proc. § 1094.5(a)*; for discussion of the noticed application procedure, *see § 474C.17*]. In such a case, the record may be filed by the petitioner with the petition, by the respondent (after payment of the costs by the petitioner, where required), or as otherwise directed by the court [*Code Civ. Proc. § 1094.5(a)*]. If the petitioner proceeds by the noticed application procedure and the record is essential to his or her case (*i.e.*, he or she seeks an evidentiary review of the agency's decision), the respondent has 30 days after service of the petition (if the record is filed with the petition) or 30 days after receipt of a copy of the record (if the record is requested but not filed with the petition) within which to answer or otherwise respond [*Code Civ. Proc. § 1089.5*]. In any event, the Rules of Court require that the party intending to use a part of the administrative record in an administrative mandate case must lodge that part of the record with the court at least five days before the hearing [*Cal. Rules of Ct., Rule 3.1140*].

[3] Request and Preparation

Administrative records are ordinarily prepared at the request of the petitioner. When the decision or order to be reviewed was made by an agency subject to *Gov. Code § 11500 et seq.*, upon request of the petitioner the Office of Administrative Hearings or the agency is required to prepare and deliver the record (or that part of the record designated by the petition) within 30 days after the request and payment of the transcription fee [*Gov. Code § 11523*; *see Gov. Code § 69950* (transcription fee); *see also Gov. Code §§ 11500(a)* ("agency" defined), *11501(a)* (application of Chapter 5 of the APA, *Gov. Code § 11340 et seq.*, to agencies as determined by statutes relating to those agencies)]. When the decision or order was made by any "local agency," other than a school district, as defined in *Gov. Code § 54951*, the record must be prepared by the agency or its decision makerand delivered to the petitioner within 190 days after he or she has filed a written request for it [*Code Civ. Proc. § 1094.6(c)*; *Watts v. Civil Service Board (1997) 59 Cal. App. 4th 939, 943-944, 69 Cal. Rptr. 2d 349* (petitioner must request that agency prepare record; transcript prepared by friend of

petitioner insufficient and no error to exclude it from record); *see Code Civ. Proc. § 1094.6(a)* (with the exception of school district, "local agency" defined by *Gov. Code § 54951*)]. A complete record will include the transcript of proceedings, all pleadings, notices, and orders, any proposed decision by a hearing officer, the final decision, all admitted exhibits, all rejected exhibits in the possession of the agency or its decision maker, all written evidence, and any other papers in the case [*Code Civ. Proc. § 1094.6(c)* (local agency); *Gov. Code § 11523* (agency subject to APA)]. When the record is preserved on electronic tape but has not been transcribed on paper, the court has discretion to order production of the tape or to grant a reasonable continuance for preparing of a written transcript [*Darley v. Ward (1980) 28 Cal. 3d 257, 263, 168 Cal. Rptr. 481, 617 P.2d 1113]* . The tatutes do not specify any particular form of request. A letter addressed to the agency by the petitioner or counsel for the petition will be sufficient. For an application to prepare and file the administrative record, see *§ 474C.98*.

Appellants are not required to pay for the transcript at the time the request to prepare the transcript is submitted to extend the filing deadline under *Gov. Code § 11523* [*Jahangiri v. Medical Board of California (1995) 40 Cal. App. 4th 1657, 1663-1664, 48 Cal. Rptr. 2d 187]* . However, the new *Gov. Code § 11523* which becomes operative July 1, 1997, provides, in relevant part, that upon request of the petitioner for a record of the proceedings, the complete record of the proceedings, or the parts thereof as are designated by the petitioner in the request, shall be prepared by the Office of Administrative Hearings or the agency and shall be delivered to the petitioner, within 30 days after the request, which time shall be extended for good cause shown, upon payment of the fee specified in *Gov. Code § 69950* for the transcript, the cost of preparation of other portions of the record, and for certification thereof [*Gov. Code § 11523*].

[4] Costs

The petitioner bears the initial expense of obtaining the administrative record for purposes of judicial review of the agency proceedings. On conclusion of the mandate proceedings, the costs of preparing the record are taxable as costs [*Code Civ. Proc. §§ 1094.5(a), 1094.6(c)* (local agency); *Gov. Code § 11523* (agency subject to APA)]. The agency can recover its costs for preparation of the record from the petitioner who sought administrative mandate when the agency is a prevailing party on judicial review under the provisions of *Gov. Code § 11523* [*Gamage v. Medical Board (1998) 60 Cal. App. 4th 936, 937-938, 70 Cal. Rptr. 2d 714]* .

Similarly in CEQA proceedings that are reviewable under ordinary mandate [*Code Civ,. Proc. § 1085*] and not reviewable under administrative mandate [*Code Civ,. Proc. § 1094.5*], costs for the preparation of the record of the proceeding under *Pub. Res. Code § 21167.7* can be awarded to the prevailing party. Allowable costs include those costs identified in *Code Civ. Proc. § 1033.5* so long as the costs are reasonable as to amount and are reasonably necessary to the conduct of the litigation. The prevailing party has the responsibility to make both showings [*Wagner Farms, Inc. v. Modesto Irrigation District (2006) 145 Cal. App. 4th 765, 773-775, 52 Cal. Rptr. 3d 683]* .

An indigent petitioner who cannot afford to pay the costs of the transcript may proceed *in forma pauperis* under *Gov. Code § 68511.3* and the Rules of Court implementing that section, if the transcript is necessary to a proper review of the administrative proceedings. The respondent must then pay the cost of the transcript [*Code Civ. Proc. § 1094.5(a)*; *Board of Medical Quality Assurance v. Superior Court (1988) 203 Cal. App. 3d 691, 696-701, 250 Cal. Rptr. 182]* . The petitioner may apply to proceed *in forma pauperis* by using the form prescribed in *Cal. Rules of Ct., Rule 3.51(a)*. To secure a waiver of the transcript costs, the petitioner must also file the Application for Waiver of Additional Court Fees and Costs as prescribed by *Cal. Rules of Ct., Rule 3.62* [*see* Cal. Rules of 3.51(a)], specifically requesting waiver of the cost of the transcript in the application.

[5] Incomplete Record

In many types of administrative hearings, court reporters are not regularly employed to transcribe the proceedings, or are employed only for portions of the proceedings. Some hearings are tape-recorded, with transcription difficulties occasionally arising from inaudible portions of the tape. A petitioner who seeks review of a decision that is supported

by an inadequate record faces the problem of obtaining a record sufficient for the court to exercise its review functions. When a full record of the administrative proceedings was not kept, the parties may be able to reconstruct the record for the reviewing court or produce a summary of the evidence on which the court can exercise its judgment [*see Woodard v. Personnel Commission (1979) 89 Cal. App. 3d 552, 558-561, 152 Cal. Rptr. 658* ; *Andersen v. Regents of University of California (1972) 22 Cal. App. 3d 763, 772-773, 99 Cal. Rptr. 531* (noting parties did not object to use of summaries)]. If the parties are unable to produce a sufficient record, however, the court will remand the case to the agency for a new hearing [*Chavez v. Civil Service Com. (1978) 86 Cal. App. 3d 324, 332, 150 Cal. Rptr. 197* ; *Elizabeth D. v. Zolin (1993) 21 Cal. App. 4th 347, 356-358, 25 Cal. Rptr. 2d 852]* .

The Court of Appeal upheld a judgment setting aside the DMV's suspension of a motorist's driver's license after an administrative per se law suspension hearing which was challenged by the motorist in court. The judgment was set aside because the DMV failed to file with the court a complete administrative record ofthe hearing. The DMV lost a portion of the hearing record because the hearing tape containing the testimony of the motorist and his expert witness was erased. The DMV also refused to pay the cost of reconstructing the missing part of the hearing record, $1,500 for the motorist's attorney and expert witness to appear at a new hearing [*Frase v. Gourley (2000) 85 Cal. App. 4th 762, 764-765, 102 Cal. Rptr. 2d 432]* . The *Frase* case decision was distinguished in the decision in *Leal v. Gourley (2002) 100 Cal. App. 4th 963, 970-972, 123 Cal. Rptr. 2d 220* , based on a failure of the driver to request that DMV improve the transcript or provide assistance in scheduling a new hearing [*Leal v. Gourley (2002) 100 Cal. App. 4th 963, 970-971, 123 Cal. Rptr. 2d 220]* .

The Court of Appeal reversed the County of Merced's granting of a conditional use permit, and the county's certifying of a final environmental impact report under the California Environmental Quality Act (CEQA), for a project approval sought by a mining company. The court held that the county failed to provide an adequate and complete administrative record for judicial review making it difficult for the appellate court to determine whether the county make the necessary findings required by CEQA before issuing the permit [*Protect Our Water v. County of Merced (2003) 110 Cal. App. 4th 362, 372-374, 1 Cal. Rptr. 3d 726]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewAdministrative RecordGeneral OverviewAdministrative LawJudicial ReviewRemediesMandamusCivil ProcedurePleading & PracticePleadingsProceedings in Forma PauperisGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & TranscriptsCivil ProcedureAppealsStandards of ReviewReversible ErrorsEvidenceInferences & PresumptionsPresumption of Regularity

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PART II. LEGAL BACKGROUND
A. Procedures for Administrative Mandate

41A-474C California Forms of Pleading and Practice--Annotated § 474C.24

§ 474C.24 Hearing

[1] Preparation for Hearing

Before the scheduled date of the hearing on the petition, any necessary discovery must be completed, and any appropriate motions for disposition of the case without trial must be made [*see § 474C.22* for discussion of discovery in mandate proceedings]. In addition, a trial memorandum setting forth in detail the relevant factual and legal arguments in support of the party's position, with citations to the administrative record, should be filed with the court. Although the Code of Civil Procedure contains no provisions as to the timing of these pretrial procedures, local court rules must be consulted for specific requirements.

[2] When There Is No Opposition

A peremptory writ may not be granted by default [*Code Civ. Proc. § 1088*]. Thus, a court must hear a petition for administrative mandate even though there is no appearance in opposition to the petition [*Rodriguez v. Municipal Court (1972) 25 Cal. App. 3d 521, 526, 102 Cal. Rptr. 45]* . When neither the respondent nor the real party in interest appears at the hearing, the court must proceed to examine the verified pleadings. If the pleadings establish the material facts, the hearing is not one to try issues of fact but to determine questions of law [*Rodriguez v. Municipal Court (1972) 25 Cal. App. 3d 521, 526, 102 Cal. Rptr. 45* ; *see Code Civ. Proc. § 1094* (if return raises only questions of law, or puts in issue immaterial statements, court must hear argument of the case)], and the case may be resolved on the pleadings [*Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 205, 151 Cal. Rptr. 721]* . If the pleadings raise a factual controversy, however, the court may proceed to hear other evidence. In this situation, the petitioner's right to relief will depend on the evidence adduced at the hearing [*Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 205, 151 Cal. Rptr. 721]* . If the agency has complied with the terms of the alternative writ or taken action in accordance with the prayer of the petition (e.g., set aside its decision or order), the petition is moot and should be dismissed [*Bruce v. Gregory (1967) 65 Cal. 2d 666, 671, 56 Cal. Rptr. 265, 423 P.2d 193* ; *Crestlawn Memorial Park Asso. v. Sobieski (1962) 210 Cal. App. 2d 43, 47, 26 Cal. Rptr. 421* ; *see* Ch. 474B, *Standards in Reviewing Agency Decisions* , for further discussion of actions taken by agencies].

[3] Burden of Proof

The party challenging the administrative decision in the mandate proceeding has the burden of proving that the decision should be set aside, regardless of whether the petitioner or the respondent had the burden of proof in the proceedings before the agency [*Huntington Park Redevelopment Agency v. Duncan (1983) 142 Cal. App. 3d 17, 25, 190 Cal. Rptr. 744 , cert. denied, 464 U.S. 895* ; *Fair v. Fountain Valley School Dist. (1979) 90 Cal. App. 3d 180, 187, 153 Cal. Rptr. 56]* , because an administrative decision enjoys a presumption of regularity when the allegations of the petition have been adequately denied [*Foster v. Civil Service Com. (1983) 142 Cal. App. 3d 444, 453, 190 Cal. Rptr. 893* ; *Alford v. Pierno (1972) 27 Cal. App. 3d 682, 690-691, 104 Cal. Rptr. 110* ; *see Evid. Code § 664* (presumption that official duty has been regularly performed)]. Therefore, the petitioner is responsible for demonstrating in what respect the administrative proceedings were unfair, in excess of jurisdiction, or otherwise invalid [*Alford v. Pierno (1972) 27 Cal. App. 3d 682, 690-691, 104 Cal. Rptr. 110]* .

[4] Evidence

The evidence admissible at the hearing on the petition for the peremptory writ is ordinarily limited to the administrative record [*Eureka Teachers Assn. v. Board of Education (1988) 199 Cal. App. 3d 353, 366-367, 244 Cal. Rptr. 240* ; *Lake v. Civil Service Commission (1975) 47 Cal. App. 3d 224, 227, 120 Cal. Rptr. 452]* . However, the court may determine whether relevant evidence exists that was improperly excluded in the agency proceedings or that, in the exercise of reasonable diligence, could not have been produced [*Code Civ. Proc. § 1094.5(e)*]. If the court determines that there is such evidence, the court may take one of two actions. If the case is one to which the substantial evidence standard of evidentiary review applies, the court may set aside the agency's decision and remand the case to the agency for further consideration in light of the additional evidence [*Code Civ. Proc. § 1094.5(e), (f)*; *Hand v. Board of Examiners (1977) 66 Cal. App. 3d 605, 616-617, 136 Cal. Rptr. 187]* . If the case is one to which the independent judgment standard of review applies, the court may admit the evidence in the mandate proceedings and consider that evidence in addition to the administrative record [*Code Civ. Proc. § 1094.5(e)*; *Hand v. Board of Examiners (1977) 66 Cal. App. 3d 605, 617, 136 Cal. Rptr. 187]* . For discussion of the substantial evidence test and the independent judgment test, see Ch. 474B, *Standards in Reviewing Agency Decisions* .

Evidence of events occurring after the date of the agency hearing may be received by a court employing the independent judgment standard of review [*Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 596-597, 155 Cal. Rptr. 63]* . The court is not obliged to admit such evidence in all cases. In keeping with the general principle that an administrative agency should have the first opportunity to decide the case on the basis of all the evidence, the court may properly decide to remand the case to the agency for redetermination in light of the new evidence, particularly when the evidence would have been crucial to the administrative decision [*Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 597 n.4, 155 Cal. Rptr. 63]* .

A foundation for the court's receipt of evidence not admitted in the agency proceedings may be laid either by oral testimony or by affidavit [*Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 597, 155 Cal. Rptr. 63]* . Affidavits are properly admissible for this purpose, provided that the opposing party is accorded the right of cross-examination and that double hearsay not be admitted [*Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 597-598, 155 Cal. Rptr. 63]* .

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ProofGeneral Overview

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§ 474C.25 Judgment

[1] Granting or Denying Relief

Following the trial of a mandate proceeding, the court must enter judgment either granting the petitioner relief and commanding the agency to set aside its decision or denying the requested relief [*Code Civ. Proc. § 1094.5(f)*]. If there are no triable issues of fact or the matter is decided based solely on the administrative record, then the proper way to proceed is to move for judgment under *Code Civ. Proc. § 1094*. It is not proper to move for summary adjudication under *Code Civ. Proc. § 437c* [*Dunn v. County of Santa Barbara (2006) 135 Cal. App. 4th 1281, 1291-1292, 38 Cal. Rptr. 3d 316]* . If the court grants relief, it will often order the agency to reconsider the case in light of the court's opinion and judgment, and it may order the agency to take other action required by law [*Code Civ. Proc. § 1094.5(f)*; *Horwitz v. City of Los Angeles (2004) 124 Cal. App. 4th 1344, 1347, 22 Cal. Rptr. 3d 295* (neighbors of homeowner challenged owner's remodeling permit, which violated front yard setback requirements of city. Homeowner had erroneously calculated setbacks. Writ of mandate had been granted requiring that permits be revoked, and Court of Appeal affirmed judgment with revocation remedy)]. The court, however, may not limit or control in any way the discretion legally vested in the agency, such as by attempting to alter the agency's penalty determination [*Code Civ. Proc. § 1094.5(f)*; *see Cadilla v. Board of Medical Examiners (1972) 26 Cal. App. 3d 961, 966-967, 103 Cal. Rptr. 455* (propriety of penalty rests in sound discretion of agency and will not be disturbed absent a manifest abuse of discretion)]. The court is also precluded from performing the agency's function; it may only order the agency to perform a duty required by its governing statutes [*Sunrise Retirement Villa v. Dear (1997) 58 Cal. App. 4th 948, 954-955, 68 Cal. Rptr. 2d 416]* . If the court denies the requested relief, it will typically discharge any alternative writ it has previously issued [*see, e.g., Jenkins v. Knight (1956) 46 Cal. 2d 220, 226, 293 P.2d 6* (alternative writs discharged and peremptory writs denied)]. For forms of judgments granting relief, see *§§ 474C.105, 474C.106*. For a form of judgment denying relief, see *§ 474C.107*.

[2] Tentative Decision

The court will announce its tentative decision at the conclusion of the hearing or, if the case is taken under submission, at some later time. When the court's decision is announced in open court, it is entered in the minutes of the court [*Cal. Rules of Ct., Rule 3.1590(a)*]. When the decision is announced later, the clerk must send a copy of the minutes entry or

of the written statement of tentative decision to all parties who appeared at the hearing [*Cal. Rules of Ct., Rule 3.1590(a)*]. The tentative decision is not a judgment and is not binding on the court [*Cal. Rules of Ct., Rule 3.1590(a)*]. If the court later modifies or changes its tentative decision, the clerk must mail a copy of the modification or change to all parties who appeared at the trial [*Cal. Rules of Ct., Rule 3.1590(a)*].

[3] Statement of Decision

The former requirement that findings of fact and conclusions of law be issued "upon the trial of a question of fact by the court" was abolished in 1981. *Code Civ. Proc. § 632* now permits parties appearing at the trial to request that the court issue a statement of decision explaining the factual and legal basis for its decision on each of the principal controverted issues at trial. Although, in its current form, *Code Civ. Proc. § 632* does not explicitly limit the availability of the statement of decision to cases involving "the trial of a question of fact," the courts have so limited it, generally treating the former findings of fact as identical to the present statement of decision.

Before 1981, the courts had held that findings were required when issues of fact were tried by the court [*Hadley v. Superior Court (1972) 29 Cal. App. 3d 389, 394, 105 Cal. Rptr. 500* ; *Delany v. Toomey (1952) 111 Cal. App. 2d 570, 571-572, 245 P.2d 26]* but not when the only issues to be determined by the court were legal issues [*International Asso. of Fire Fighters v. Palo Alto (1963) 60 Cal. 2d 295, 300-301, 32 Cal. Rptr. 842, 384 P.2d 170]* . Since questions of fact were clearly tried when the court reviewed the evidence under the independent judgment test, findings were required in independent judgment cases [*Roccaforte v. City of San Diego (1979) 89 Cal. App. 3d 877, 886-887, 152 Cal. Rptr. 558* ; *Whitlow v. Board of Medical Examiners (1967) 248 Cal. App. 2d 478, 483, 56 Cal. Rptr. 525* ; *Sears, Roebuck & Co. v. Walls (1960) 178 Cal. App. 2d 284, 288-289, 2 Cal. Rptr. 847* ; *see* Ch. 474B, *Standards in Reviewing Agency Decisions,* for discussion of the independent judgment test]. When review was required only under the substantial evidence test, however, findings were not required, since the issue was one of law rather than fact [*Friends of Lake Arrowhead v. Board of Supervisors (1974) 38 Cal. App. 3d 497, 518, 113 Cal. Rptr. 539* ; *Cow Hollow Improvement Club v. Board of Permit Appeals (1966) 245 Cal. App. 2d 160, 171, 53 Cal. Rptr. 610* ; *Savelli v. Board of Medical Examiners (1964) 229 Cal. App. 2d 124, 131, 40 Cal. Rptr. 171* ; *see* Ch. 474B, *Standards in Reviewing Agency Decisions* , for discussion of the substantial evidence test].

Since 1981, the courts have generally analyzed the new requirement of a statement of decision in the same way as they analyzed the former requirement for findings. They have held that a statement of decision is not required when the only contested issue at trial presents a question of law [*Enterprise Ins. Co. v. Mulleague (1987) 196 Cal. App. 3d 528, 531, 539-540, 241 Cal. Rptr. 846]* , and that a statement of decision is required when a court is required to exercise its independent judgment in reviewing the administrative record [*Kazensky v. City of Merced (1998) 65 Cal. App. 4th 44, 67, 76 Cal. Rptr. 2d 356* ; *Bevli v. Brisco (1985) 165 Cal. App. 3d 812, 822, 212 Cal. Rptr. 36]* . In terms of the sufficiency of a statement of decision, one court has held that a statement was sufficient despite a lack of detailed fact findings, since the court did state that the agency's findings were supported by the weight of the evidence and thus incorporated by reference the detailed findings of the agency [*Angelier v. State Board of Pharmacy (1997) 58 Cal. App. 4th 592, 598-599, 68 Cal. Rptr. 2d 213]* .

In any event, a statement of decision is not required unless a timely request is made. In general, a request for a statement of decision must be made within 10 days after the court announces its tentative decision. If the trial is concluded within one calendar day, or in less than eight hours over more than one day, however, the request must be made before the case is submitted for decision [*Code Civ. Proc. § 632*]. The request for a statement of decision must specify the controverted issues on which the party is requesting a statement [*Code Civ. Proc. § 632*].

When the trial is concluded in less than one calendar day, or in less than eight hours over more than one day, the statement of decision may be made orally on the record in the presence of the parties [*Code Civ. Proc. § 632*]. In all other cases, the statement of decision must be in writing, unless the parties appearing at trial agree otherwise [*Code Civ. Proc. § 632*]. The court in its tentative decision may state whether a statement of decision will be prepared by the court

or by a designated party [*Cal. Rules of Ct., Rule 3.1590(a)*]. For forms and discussion relating the statement of decision, see Ch. 529, *Statement of Decision* .

[4] Preparation and Filing of Judgment and Notice of Entry of Judgment

After the court has announced its tentative decision, the court typically requests that the prevailing party prepare a judgment. Counsel for the prevailing party should submit the judgment to the court for signature and entry. Then counsel is required to prepare and mail a copy of the notice of entry of judgment to all parties who have appeared in the action and to file with the court the original notice of entry of judgment accompanied by the proof of service by mail [*Code Civ. Proc. § 664.5(a)*]. When a prevailing party is not represented by counsel, or when the court so orders, the clerk of the court is required to mail notice of entry of judgment to all parties who have appeared in the action [*Code Civ. Proc. § 664.5(b), (c)*]. For forms of judgment granting relief, see *§§ 474C.105, 474C.106*. For a form of judgment denying relief, see *§ 474C.107*.

[5] Preparation of Judgment in Appellate Court

The Court of Appeal and the Supreme Court include the judgment in the opinion embodying the decision. Counsel need not prepare the judgment in those courts.

[6] Costs

Costs of mandate proceedings may be recovered by the prevailing party, as in civil actions generally [*Code Civ. Proc. § 1032(b)* (governing recovery of costs in any action or proceeding); *see Code Civ. Proc. § 1109* (*Code Civ. Proc. § 307 et seq.* constitute rules of practice in mandate and other special proceedings)]. Thus, the following parties are entitled to recovery of costs as a matter of right [*Code Civ. Proc. § 1032(a)(4)*]:

- A party with a net monetary recovery.
- A defendant in whose favor a dismissal is entered.
- A defendant, when neither plaintiff nor defendant obtains any relief.
- A defendant, from those plaintiffs who do not recover any relief against that defendant.

In other situations, the identity of the prevailing party is determined by the court, which may, in its discretion, allow costs and apportion them between the parties [*Code Civ. Proc. § 1032(a)(4)*; *see Code Civ. Proc. § 1034* (authority of Judicial Council to establish rules relating to allowable costs); *see also Cal. Rules of Ct., Rule 3.1700* (prejudgment costs)]. Costs incurred in preparing the administrative record are specifically recoverable by a petitioner who has prevailed in seeking a writ of administrative mandate [*see Code Civ. Proc. § 1094.5(a)*].

[7] Attorney's Fees and Litigation Expenses

In certain cases, attorney's fees and litigation expenses may be recoverable as part of the judgment in an administrative mandate proceeding [*see Code Civ. Proc. § 1028.5* (court may award certain small businesses and licensees "reasonable litigation expenses" when agency's action was undertaken without any substantial justification); *Gov. Code § 800* (attorney's fees recoverable when administrative decision resulted from arbitrary or capricious action); *Santos v. Department of Motor Vehicles (1992) 5 Cal. App. 4th 537, 551-552, 7 Cal. Rptr. 2d 10* ; *Halaco Engineering Co. v. South Central Coast Regional Com. (1986) 42 Cal. 3d 52, 79, 227 Cal. Rptr. 667, 720 P.2d 15]* . For a general consideration of the recoverability of attorney's fees and litigation expenses in mandate proceedings, see *§ 474C.13[6]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewAdministrative RecordGeneral OverviewAdministrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewStandards of ReviewDe Novo ReviewAdministrative LawJudicial ReviewStandards of ReviewSubstantial EvidenceCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

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A. Procedures for Administrative Mandate

41A-474C California Forms of Pleading and Practice--Annotated § 474C.26

§ 474C.26 Peremptory Writ of Mandate

[1] Nature and Function of Peremptory Writ

If judgment is entered for the petitioner, a peremptory writ of mandate must be issued without delay [*Code Civ. Proc. § 1095*]. If counsel for the petitioner prepares the judgment [*see § 474C.25[4]*], he or she should also prepare a peremptory writ and present it to the court with the judgment. The peremptory writ must command the respondent to do the act required to be performed, either immediately after receipt of the writ or at some other specified time [*Code Civ. Proc. § 1087*]. If appropriate to the facts of the case, the writ may order the respondent to reconsider its order or decision in light of the court's opinion [*Code Civ. Proc. § 1094.5(e), (f)*; *Hand v. Board of Examiners (1977) 66 Cal. App. 3d 605, 616-617, 136 Cal. Rptr. 187]* . In every case, the language of the peremptory writ must conform to that of the judgment [*State Bd. of Equalization v. Superior Ct. (1942) 20 Cal. 2d 467, 475, 127 P.2d 4]* . If the judgment and the writ conflict, the judgment controls [*State Bd. of Equalization v. Superior Ct. (1942) 20 Cal. 2d 467, 475, 127 P.2d 4]* .

[2] Enforcement

When a peremptory writ of mandate has been issued and directed to an agency, if it appears to the court that any member of the agency or a person on whom the writ was personally served has, without just excuse, refused or neglected to obey the writ, the court may, on motion, impose a fine not exceeding $1,000 [*Code Civ. Proc. § 1097*; *Carroll v. Civil Service Commission (1970) 11 Cal. App. 3d 727, 733, 90 Cal. Rptr. 128* ; *Carson Gardens L.L.C. v. City of Carson Mobilehome Park Rental Review Bd. (2006) 135 Cal. App. 4th 856, 867-868, 37 Cal. Rptr. 3d 768]* . For a persistent refusal to obey, the court has authority to order imprisonment of the disobedient party until the writ is complied with, and may make any orders necessary and proper for the enforcement of the writ [*Code Civ. Proc. § 1097*]. In addition to this specific mechanism for enforcement of the writ, a refusal to obey the writ may be punished as a contempt of court [*see Code Civ. Proc. § 1209(a)(5)* (disobedience of any lawful judgment, order, or process of the court is contempt); *Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 181, 203 Cal. Rptr. 626, 681 P.2d 893* (dictum; once writ is issued and served, it must be obeyed on pain of fine or contempt); *Housing Authority of Los Angeles v. Los Angeles (1953) 40 Cal. 2d 682, 688, 256 P.2d 4* (respondent in mandate proceedings found not to have violated writ, but court assumed that willful disobedience of writ would be punishable as contempt); *Healdsburg*

Police Officers Assn. v. City of Healdsburg (1976) 57 Cal. App. 3d 444, 457, 129 Cal. Rptr. 216 (judgment issuing writ and orders of contempt issued thereon affirmed)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureSanctionsContemptCivil Contempt

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.27

§ 474C.27 Expedited Procedures Apply to Review of Permit or Entitlement Decision That Involves Constitutionally Protected Speech

[1] When Expedited Review Applies

Expedited procedures for judicial review, by either administrative or ordinary mandate, apply to certain public agency decisions implicating freedom of speech safeguards under *U.S. Const., amend. I*. Specifically, the procedures apply to any decision by a public agency regarding the issuance, revocation, suspension, or denial of a permit or other entitlement "for expressive conduct protected by the *First Amendment*" [*Code Civ. Proc. § 1094.8(a)*].

The decision may be one by a city, county, city and county, a joint powers authority or similar public entity formed pursuant to *Gov. Code § 65850.4*, or any other public entity authorized by law to issue permits for expressive conduct protected by the *First Amendment* [*Code Civ. Proc. § 1094.8(b)(3)* (defining "public agency" for purposes of the expedited procedure provisions)].

One example of the type of agency decision subject to expedited review is the denial by a municipal agency of a permit to operate an adult bookstore. The was the situation presented to the court of appeals in *Baby Tam & Co., Inc. v. City of Las Vegas (1998) 154 F.3d 1097* , the case which prompted the enactment of expedited review procedures under *Code Civ. Proc. § 1094.8* [*see* 1999 Stats., ch. 49, § 2].

A public agency may itself designate the permits or entitlements that it issues which it deems eligible for expedited review, by adopting an ordinance or resolution to that effect, specifically listing the eligible permits or entitlements [*Code Civ. Proc. § 1094.8(c)*].

[2] Expedited Procedures for Judicial Hearing

When applicable, the expedited review procedures described below supersede any requirement or procedure to the contrary that is set forth in *Code Civ. Proc. §§ 1084-1097* that otherwise govern mandate proceedings [*Code Civ. Proc. § 1094.8(d)*].

Either the public agency or the permit holder or applicant may bring an action in accordance with the procedure set forth in *Code Civ. Proc. § 1094.8(d)(1)*. If the permit applicant or permit holder brings the action, it must in the form of a petition for writ of mandate under *Code Civ. Proc. § 1085* or a petition for writ of administrative mandate under *Code Civ. Proc. § 1094.5*, as appropriate [*Code Civ. Proc. § 1094.8(d)(2)*].

Expedited review then has the following features:

- Within five court days after receipt of written notification from a permit applicant that the applicant will seek judicial review of a public agency's action on the permit, the public agency must prepare, certify, and make available the administrative record to the permit applicant [*Code Civ. Proc. § 1094.8(d)(1)*]. "Permit applicant" includes a permit holder, and "permit" means any permit or other entitlement [*Code Civ. Proc. § 1094.8(b)(1), (2)*].

- The party bringing the action must file and serve the petition on the respondent no later than 21 calendar days following the public agency's final decision on the permit [*Code Civ. Proc. § 1094.8(d)(3)*].

- The title page of the petition must contain the following language in 18-point type [*Code Civ. Proc. § 1094.8(d)(3)*]:

"ATTENTION: THIS MATTER IS ENTITLED TO PRIORITY AND SUBJECT TO THE EXPEDITED HEARING AND REVIEW PROCEDURES CONTAINED IN SECTION 1094.8 OF THE CODE OF CIVIL PROCEDURE."

- Moving, opposition, and reply papers are to be filed as otherwise required by the Rules of Court [*Code Civ. Proc. § 1094.8(d)(4)*].

- The clerk of the court must set a hearing for review of the petition no later than 25 calendar days from the date the petition is filed [*Code Civ. Proc. § 1094.8(d)(4)*].

- The petitioner must lodge the administrative record with the court no later than 10 calendar days in advance of the hearing date [*Code Civ. Proc. § 1094.8(d)(4)*].

For a form of petition for expedited mandate review under *Code Civ. Proc. § 1094.8*, see *Ch. 59, Assemblies, Meetings, and Demonstrations, § 59.50A*.

[3] Expedited Procedures for Judicial Decision

Following the conclusion of an expedited hearing under *Code Civ. Proc. § 1094.8*, the court is required to render its decision in an expeditious manner consistent with constitutional requirements in view of the particular facts and circumstances. In no event shall the decision be rendered later than 20 calendar days after the matter is submitted or 50 calendar days after the date the petition is filed, whichever is earlier [*Code Civ. Proc. § 1094.8(d)(5)*].

If the presiding judge of the court in which the action is filed determines that, as a result of either the press of other court business or other factors, the court will be unable to meet any one or more of the deadlines provided under *Code Civ. Proc. § 1094.8*, he or she is required to request the temporary assignment of a judicial officer to hear the petition and render a decision within the requisite time limits, pursuant to *Gov. Code § 68543.8*. Given the short time period involved, such a request is entitled to priority [*Code Civ. Proc. § 1094.8(e)*].

[4] Joint Waiver of Expedited Procedures Permitted

In any action subject to the expedited procedures of *Code Civ. Proc. § 1094.8*, the parties to the action are permitted jointly to waive the time limits provided by that section [*Code Civ. Proc. § 1094.8(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechExpressive ConductGovernmentsLocal GovernmentsLicenses

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[Reserved]

§§ 474C.28[Reserved]

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.40

§ 474C.40 Nature of Ordinary Mandate

Ordinary mandate, or traditional mandate, is a special proceeding that results in the issuance by the court of a writ to compel an inferior tribunal, corporation, board, or person to perform an act specially enjoined by law [*Code Civ. Proc. § 1085*; *see Code Civ. Proc. §§ 21* (actions and special proceedings), 22 ("action" defined), 23 ("special proceeding" defined)]. For this purpose, an act specially enjoined by law may be a duty associated with an office, trust, or station, such as admitting a person to the use and enjoyment of an office to which he or she is entitled and from which he or she is unlawfully precluded by the inferior tribunal, corporation, board, or person [*Code Civ. Proc. § 1085*; *see* Ch. 474, *Availability of Judicial Review of Agency Decisions* , for a discussion of kinds of acts enjoined by law]. Ordinary mandate may also be used to restrain an official from the unlawful performance of a duty, in which case it is referred to as "prohibitory mandate" [*Planned Parenthood Affiliates v. Van de Kamp (1986) 181 Cal. App. 3d 245, 263, 226 Cal. Rptr. 361]* . Note that this "prohibitory mandate" is not the same as the relief sought in a petition for a writ of prohibition.

The writ of mandate in ordinary mandate proceedings is available to compel a public entity or official to perform a clear, present, and usually ministerial duty when the petitioner has a clear, present, and beneficial right to the performance of that duty [*City of Dinuba v. County of Tulare (2007) 41 Cal. 4th 859, 868-869, 62 Cal. Rptr. 3d 614, 161 P.3d 1168* (county had ministerial duty to calculate and distribute property tax revenue to city); *People ex rel. Younger v. County of El Dorado (1971) 5 Cal. 3d 480, 491, 96 Cal. Rptr. 553, 487 P.2d 1193* ; *Quirk v. Board of Education (1988) 199 Cal. App. 3d 729, 733, 244 Cal. Rptr. 924]* . It is also an appropriate remedy to compel government officials to exercise their discretion [Los Angeles County Employees Assn. Local 660 v. *County of Los Angeles (1973) 33 Cal. App. 3d 1, 8, 108 Cal. Rptr. 625]* , or to control an agency's unreasonable and arbitrary action constituting abuse of discretion [*see Sanders v. City of Los Angeles (1970) 3 Cal. 3d 252, 261, 90 Cal. Rptr. 169, 475 P.2d 201* (courts will interfere when action taken by agency is so palpably unreasonable and arbitrary as to indicate an abuse of discretion as a matter of law)]. It is not, however, an appropriate remedy to compel an agency to exercise its discretion in a particular manner [*Lindell Co. v. Board of Permit Appeals (1943) 23 Cal. 2d 303, 315, 144 P.2d 4* ; *Barrett v. Stanislaus County Employees Retirement Assn. (1987) 189 Cal. App. 3d 1593, 1613-1614, 234 Cal. Rptr. 900]* . For a detailed discussion of the availability of ordinary mandate, see Ch. 474, *Availability of Judicial Review of Agency Decisions* .

Before instituting ordinary mandate proceedings in any case involving an administrative decision, counsel should consider carefully whether ordinary mandate or administrative mandate is the correct review mechanism. The administrative mandate procedure of *Code Civ. Proc. § 1094.5* is to be used in all writ cases challenging the validity of any final administrative order or decision made as a result of a proceeding in which by law a hearing is required, evidence must be taken, and discretion in the determination of facts is vested in the agency [*Code Civ. Proc. § 1094.5(a)*; *see § 474C.10* et seq.]. Although a division of authority exists, it has been held that (1) the parties may not waive a choice of the wrong writ procedure, and (2) the reviewing court is charged with determining whether the trial court considered the appropriate evidence and applied the appropriate standard of review based on the case facts [*Eureka Teachers Assn. v. Board of Education (1988) 199 Cal. App. 3d 353, 361-366, 244 Cal. Rptr. 240* ; *see California Teachers Assn. v. Governing Board (1977) 70 Cal. App. 3d 833, 844-845, 139 Cal. Rptr. 155* (presentation of matter as ordinary rather than administrative mandate was harmless error; sufficient evidence existed in record alone to reflect abuse of discretion and petitioner suffered no prejudice by use of wrong review standard); *Mahdavi v. Fair Employment Practice Com. (1977) 67 Cal. App. 3d 326, 336-337, 136 Cal. Rptr. 421* (although filed as administrative mandate proceeding, appellate court reviewed matter as ordinary writ and held that the trial court had duty to issue ordinary writ if warranted by facts when administrative mandate was inapplicable)]. A detailed discussion of the availability of these two mandate procedures is presented in Ch. 474, *Availability of Judicial Review of Agency Decsions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamus

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.41

§ 474C.41 Petition for Writ of Mandate

[1] General Procedure in Ordinary Mandate Proceedings

The judicial procedures in ordinary mandate proceedings are similar to judicial procedures in administrative mandate proceedings. Thus, the rules relating to petitions for the writ, alternative writ and noticed application procedures, jurisdiction and venue, returns, intervention, replications, discovery, preparation and filing of the administrative record, hearings, the preparation and entry of judgment, and the issuance of the peremptory writ are virtually identical whether a writ of administrative mandate or a writ of ordinary mandate is sought. The allegations of the petition in ordinary mandate proceedings differ from the allegations of the petition in administrative mandate proceedings, since different rules govern availability of the writ. Similarly, the provisions of the judgment in ordinary mandate proceedings differ from the judgment in administrative mandate, since the relief that the court may grant in ordinary mandate proceedings differs from the relief that may be granted in administrative mandate proceedings [*see § 474C.40* for general considerations related to the useof ordinary mandate proceedings and the relief that may be granted]. For a detailed discussion of administrative mandate proceedings, see *§ 474C.10* et seq.

[2] Parties

As in administrative mandate proceedings, the parties to an ordinary mandate proceeding are called the "petitioner" and the "respondent." If the petition seeks relief that, if granted, would injure or affect the interest of a third person, the third person is an indispensable party to the proceedings and should be named as the "real party in interest" [*Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 522, 106 P.2d 879* ; *Sierra Club, Inc. v. California Coastal Com. (1979) 95 Cal. App. 3d 495, 501, 157 Cal. Rptr. 190* ; *see Code Civ. Proc. § 389* (compulsory joinder of parties)]. For a discussion of parties to mandate proceedings, including special rules relating to real parties in interest, see *§ 474C.13[2]*.

[3] Essential Allegations

The petition in ordinary mandate proceedings must contain allegations showing all of the following:

- The petitioner's legal capacity to sue.
- The identity and legal capacity of the respondent.
- The identity of the real party in interest and his or her interest in the mandate proceedings.
- That the petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the writ sought by the petition.

If the petitioner seeks a writ to compel the respondent to perform a duty, the petition should allege facts showing that the respondent has a clear, present, and ministerial duty to carry out a particular act, and that the petitioner has a clear, present, and substantial right to the performance of that duty. If the petitioner seeks to compel the respondent to exercise discretion, the petition should allege facts showing that the respondent has discretion under a particular statute but has failed or refused to exercise that discretion. If the petitioner seeks a writ to correct an abuse of discretion, the petition should allege facts showing that the respondent has discretion under a particular statute and has abused that discretion in a particular way.

For a form of a petition for a writ of ordinary mandate that includes all of these allegations, see *§ 474C.109*.

[4] Prayer for Relief

The prayer should request all of the relief the petitioner seeks, including the issuance of an alternative writ of mandate if the alternative writ procedure is employed [*see §§ 474C.10[2], 474C.15* for discussion of thealternative writ procedure]. If an applicable statute provides for recovery of attorney's fees or litigation expenses, the petition should also include an appropriate request, with allegations in the body of the petition that demonstrate the statutory basis for the recovery of fees or expenses [*see Code Civ. Proc. § 1028.5(g)* (recovery of attorney's fees and other reasonable litigation expenses by small business or licensee); *Gov. Code § 800* (recovery of attorney's fees in proceedings resulting from arbitrary or capricious conduct by public agency or officer); *see also § 474C.13[6*] for discussion relating to recovery of attorney's fees and litigation expenses]. As is the case in administrative mandate proceedings, the petition must be verified [*Code Civ. Proc. § 1086*; *see Code Civ. Proc. § 446* (requirements of verification); *see § 474C.13[8]* for discussion of verification].

[5] Points and Authorities

Neither the Code of Civil Procedure nor the California Rules of Court require points and authorities when a petition for a writ of mandate is filed in the superior court. However, a petition originally filed in the Court of Appeal or the Supreme Court must be accompanied by points and authorities [*Cal. Rules of Ct., Rule 8.490(b)*; *see § 474C.14[2]*]. Local rules may also require that points and authorities accompany a petition filed in superior court. Whether they are required or not, it is advisable to include points and authorities with every petition because they will strengthen the petition and may help to anticipate possible defenses. For a general consideration of points and authorities in mandate proceedings, see *§§ 474C.13[9], 474C.14[2]*.

[6] Filing in Appellate Court

The form *set forth in § 474C.109* is designed to be used when the petition is filed in the superior court. A petition for a writ of mandate may, in an extraordinary case, be filed in the Court of Appeal or the Supreme Court in the first instance. When the petition is filed in an appellate court, it must set forth the circumstances that, in the opinion of the petitioner, render it proper that the writ should originally issue from the reviewing court [*Cal. Rules of Ct., Rule 8.490(a)*]. For form of a petition for a writ of mandate in the Court of Appeal or the Supreme Court, see *§ 474C.92*. For a general consideration of petitions for writ of mandate (whether administrative or ordinary) in appellate courts, see *§ 474C.14*.

[7] Service and Filing

The petition and the memorandum of points and authorities must be served on the respondent and the real party in interest, if any, by delivering a copy to each person by personal service or by mail [*Code Civ. Proc. § 1107* (*Code Civ. Proc. § 1010 et seq.* service of papers); *see* Code Civ. Proc. §§ *415.10* (personal service), *415.30* (service of summons by mail), *1011* (service on attorney or party), *1013(a)* (proof of service by mail)]. Personal service is customary and usually preferable to service by mail [*see § 474C.13[10]*]. Service must be made on the presiding officer, the secretary, or a majority of the members of the respondent agency [*Code Civ. Proc. § 1107*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsRequirementsCivil ProceduresPleading & PracticeService of ProcessMethodsMailCivil ProceduresPleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProceduresPleading & PracticeService of ProcessProofGeneral OverviewCivil ProceduresPartiesJoinderCompulsory JoinderCivil ProceduresPartiesJoinderIndispensable PartiesCivil ProceduresPartiesReal Parties in InterestGeneral OverviewCivil ProceduresRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsCivil ProceduresRemediesWritsCommon Law WritsMandamus

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.42

§ 474C.42 Expedited Review of Permit or Entitlement Decision Involving Constitutionally Protected Speech

Expedited procedures for judicial review apply to public agency decisions regarding permits or entitlements that involve speech protected under *U.S. Const., amend. I*. The procedures apply when review is initiated by a petition for ordinary writ of mandate as well as when it is initiated by a petition for writ of administrative mandate [*Code Civ. Proc. § 1094.8(d)*]. For discussion of these expedited procedures, see *§ 474C.27*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusCivil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechGeneral Overview

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[Reserved]

§§ 474C.43[Reserved]

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.50

§ 474C.50 Nature of Appealable Orders

[1] One Final Judgment Rule

Unless expressly authorized by law, an appeal lies only from a final judgment in an action or proceeding [*Knodel v. Knodel (1975) 14 Cal. 3d 752, 760, 122 Cal. Rptr. 521, 537 P.2d 353* ; *Gibson v. Savings & Loan Commissioner (1970) 6 Cal. App. 3d 269, 271, 85 Cal. Rptr. 799* ; *see Code Civ. Proc. §§ 901* (review of judgment or order), 904 (appeal in civil action or proceeding), 904.1(a)(1) (appeal from superior court judgment), 1064 (judgment in special proceeding is the final determination of the rights of the parties therein)]. This rule is often called the "one final judgment" rule [*Degnan v. Morrow (1969) 2 Cal. App. 3d 358, 362, 82 Cal. Rptr. 557]* . The rule finds its basis in the principle that multiple appeals in a single action would be costly and oppressive, and that review of intermediate rulings should await final disposition of the case [*Knodel v. Knodel (1975) 14 Cal. 3d 752, 760, 122 Cal. Rptr. 521, 537 P.2d 353* ; *Degnan v. Morrow (1969) 2 Cal. App. 3d 358, 362, 82 Cal. Rptr. 557]* . For purposes of the "one final judgment" rule, a judgment is final when no issue is left for the future consideration of the court except compliance or noncompliance with the judgment [*Knodel v. Knodel (1975) 14 Cal. 3d 752, 760 n.11, 762, 122 Cal. Rptr. 521, 537 P.2d 353]* . Conversely, a judgment is not final when further judicial action is essential to a final determination of the rights of the parties [*Degnan v. Morrow (1969) 2 Cal. App. 3d 358, 362, 82 Cal. Rptr. 557]* . The appealability of a judgment or order under the "one final judgment" rule is a jurisdictional issue and may be raised by the court sua sponte even when not raised by the parties [*Elmore v. Imperial Irrigation Dist. (1984) 159 Cal. App. 3d 185, 190, 205 Cal. Rptr. 433* ; *Degnan v. Morrow (1969) 2 Cal. App. 3d 358, 362, 82 Cal. Rptr. 557]* .

[2] Judgments in Mandate Proceedings

A judgment granting a petition for a writ of mandate is ordinarily a final judgment and, as such, appealable under the "one final judgment" rule [*Code Civ. Proc. § 1064*; *Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 181-182, 203 Cal. Rptr. 626, 681 P.2d 893]* . Whether a judgment (or order) denying a petition for a writ of mandate is appealable under the rule is sometimes a more difficult question. The appealability of a judgment denying a petition depends on whether further orders in the proceedings are contemplated [*Covina-Azusa Fire Fighters Union v. City of Azusa (1978) 81 Cal. App. 3d 48, 56, 146 Cal. Rptr. 155]* . If the trial court denies a writ petition and contemplates no further action or orders on the petition, an appeal may be taken from the judgment or order denying the writ order [

Bettencourt v. City and County of San Francisco (2007) 146 Cal. App. 4th 1090, 1098-1100, 53 Cal. Rptr. 3d 402 (order denying petition for writ of mandate was final judgment because basis for order, statute of limitations defense, applied to all claims in lawsuit including claims other than mandamus); *Covina-Azusa Fire Fighters Union v. City of Azusa (1978) 81 Cal. App. 3d 48, 56, 146 Cal. Rptr. 155* ; *see Watkins v. City of Santa Ana (1987) 189 Cal. App. 3d 393, 397, 234 Cal. Rptr. 406* (minute order denying petition for writ of mandate appealable; trial court found it had no jurisdiction over matter, clearly contemplating no further action)]. On the other hand, when it is clear that denial of an alternative writ of mandate does not amount to dismissal of the petition and that further action is contemplated, the order denying the writ is not appealable [*Covina-Azusa Fire Fighters Union v. City of Azusa (1978) 81 Cal. App. 3d 48, 56, 146 Cal. Rptr. 155* ; *Gibson v. Savings & Loan Commissioner (1970) 6 Cal. App. 3d 269, 271, 85 Cal. Rptr. 799]* .

A trial court order denying a petition for a writ of administrative mandate is not an appealable order when the mandate petition is joined with other claims that have not been decided at the time of the order. Similarly, this order is not an appealable judgment, as this would not be a final determination of all of the parties rights, and allowing an appeal in this setting would result in multiple appeals and would violate the "one final judgment" rule [*Griset v. Fair Political Practices Com'n (2001) 25 Cal. 4th 688, 696-697, 107 Cal. Rptr. 2d 149, 23 P. 3d 43]* . In contrast, a trial court order that resolves all of a litigant's claims is an appealable judgment, and the order can be amended to convert it into a judgment if it is not so stated [*Griset v. Fair Political Practices Com'n (2001) 25 Cal. 4th 688, 698-700, 107 Cal. Rptr. 2d 149, 23 P. 3d 43]* . Once there is a final judgment in the action, the litigation is ended as to all claims alleged in plaintiff's complaint, and the court of appeal lacks any authority to consider a second appeal of the merits of the plaintiffs claims in that action. Neither the "intervening change in controlling law" exception to the law of the case doctrine nor the res judicata and collateral estoppel doctrine exceptions of the same type are applicable [*Griset v. Fair Political Practices Com'n (2001) 25 Cal. 4th 688, 701-702, 107 Cal. Rptr. 2d 149, 23 P. 3d 43]* .

If a statement of decision was contemplated but not made, the proper procedure is to reverse rather than to dismiss an appeal from a minute order entered below [*Covina-Azusa Fire Fighters Union v. City of Azusa (1978) 81 Cal. App. 3d 48, 57, 146 Cal. Rptr. 155* ; *see Code Civ. Proc. § 632* (statement of decision in lieu of findings of fact and conclusions of law); *see also § 474C.25* for discussion of judgments and statements of decision in administrative mandate proceedings].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataCivil ProcedureAppealsAppellate JurisdictionFinal Judgment RuleCivil ProcedureAppealsAppellate JurisdictionState Court Review

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§ 474C.51 Procedures for Initiating Appeal

[1] Notice of Appeal

Unless special provisions exist, provisions governing appeals in civil actions generally apply in mandate proceedings [*Code Civ. Proc. § 1109*; *see Code Civ. Proc. § 1094.5(g), (h)* (provisions for stays of agency decisions pending appeal); *see also Code Civ. Proc. § 901 et seq.* (appeals in civil actions)]. A party who seeks to appeal from a trial court's grant or denial of a writ of mandate must prepare and file a timely notice of appeal with the clerk of the superior court. Unless otherwise provided by law, notice of appeal is timely if it is filed (1) within 60 days of mailing notice of entry of judgment by the clerk of the court, (2) within 60 days of service of written notice of entry of judgment by any party on the party filing the notice of appeal, or (3) within 180 days after entry of judgment, whichever is earliest [*Cal. Rules of Ct., Rule 8.104(a)*; *see Cal. Rules of Ct., Rule 8.108* (grounds for extending period to file notice of appeal)]. For forms and discussion relating to the notice of appeal, see Ch. 40, *Appeal* .

[2] Transcript and Record on Appeal

If the appellant wishes to present any points that require a consideration of the oral proceedings, he or she must serve on the respondent and file with the clerk of the superior court a notice to prepare a reporter's transcript of the oral proceedings within 10 days after filing the notice of appeal [*Cal. Rules of Ct., Rule 8.130(a)*]. Also within 10 days after the filing of the notice of appeal, the appellant is required to serve on the respondent and file with the clerk of the superior court a notice specifying the items he or she wishes to have included in the record on appeal or copied in the clerk's transcript [*Cal. Rules of Ct., Rule 8.120(a)*], unless an agreed or settled statement is to be used [*Cal. Rules of Ct., Rules 8.134, 8.137*], or unless the parties file a written stipulation specifying the items to be included [*Cal. Rules of Ct., Rule 8.120(b)*]. Alternatively, any party may compile an appendix in lieu of a clerk's transcript, provided he or she serves and files with the clerk of the superior court a notice of an election to do so within 10 days after filing the notice of appeal, and unless the superior court for good cause shown otherwise orders [*see Cal. Rules of Ct., Rule 8.124*]. The notice of election and a copy of any notice to prepare a reporter's transcript must be served on the clerk of the Court of Appeal [*Cal. Rules of Ct., Rule 8.124(a)*]. Counsel must confer and attempt to reach agreement on a possible joint appendix [*Cal. Rules of Ct., Rule 8.124(d)*].

[3] Stays on Appeal

If an appeal is taken from a judgment denying a writ of mandate, any further stay of the agency's order or decision must be requested from the court to which the appeal is taken [*Code Civ. Proc. § 1094.5(g)*]. If a stay is in effect at the time the notice of appeal is filed, however, it will continue by operation of law for 20 days from the filing of the notice [*Code Civ. Proc. § 1094.5(g)*]. If an appeal is taken from a judgment granting a writ of mandate, the agency's order or decision will automatically be stayed pending determination of the appeal, unless the court to which the appeal is taken orders otherwise [*Code Civ. Proc. § 1094.5(g)*]. No stay may be imposed or continued if the court is satisfied that it is against the public interest [*Code Civ. Proc. § 1094.5(g), (h)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsRecords on AppealCivil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsReviewabilityTime Limitations

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§ 474C.52 Supreme Court Review of Judgment of Court of Appeal

When the Court of Appeal issues a judgment granting or denying a writ of mandate, the decision is subject to review in the Supreme Court without the necessity of filing a notice of appeal [*Cal. Const., art. VI, § 12*; *see* Cal. Rules of Ct., Rule 10.1000]. Review in the Supreme Court may be effected by either (1) seeking a transfer of the cause from the Court of Appeal to the Supreme Court before the Court of Appeal has made a final decision [*Cal. Const., Art. VI, § 12(a)*; *Cal. Rules of Ct., Rules 8.552, 10.1000*], or (2) seeking review of the Court of Appeal's decision after it has become final [*Cal. Rules of Ct., Rule 8.504*]. A cause will be transferred to the Supreme Court before final decision only if it presents issues of imperative public importance requiring prompt resolution by the Supreme Court and justifying a departure from normal appellate processes [*Cal. Rules of Ct., Rule 8.552*]. The Supreme Court will review a decision of the Court of Appeal after it has become final only in one or more of the following circumstances [*Cal. Rules of Ct., Rule 8.500*]:

- It appears necessary to secure uniformity of decision or the settlement of important questions of law.
- The Court of Appeal was without jurisdiction of the cause.
- The decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges.

The California Rules of Court set forth rules for petitions and specify time limits within which cases may be transferred to or reviewed by the Supreme Court [*see Cal. Rules of Ct., Rules 8.532* (when decisions become final), 8.552 (transfer before final decision), 8.504 (review by Supreme Court), 8.60 (extending time), 8.68 (shortening time)]. For a detailed consideration of the review of Court of Appeal decisions by the Supreme Court, see Ch. 40, *Appeal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsCase TransfersCivil ProcedureAppealsReviewabilityTime Limitations

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§ 474C.53 Standards of Appellate Review

The standard of review on appeal from the judgment of a trial court in administrative mandate proceedings depends on the standard properly used by the trial court in reviewing the agency's decision. In cases in which the independent judgment standard applies, the appellate court reviews the findings of the trial court to determine whether they are supported by substantial evidence in the whole record [*Bixby v. Pierno (1971) 4 Cal. 3d 130, 143 n.10, 93 Cal. Rptr. 234, 481 P.2d 242* ; *Schmitt v. City of Rialto (1985) 164 Cal. App. 3d 494, 210 Cal. Rptr. 788* ; *see* Ch. 474B, *Standards in Reviewing Agency Decisions* , for discussion of independent judgment test]. In such cases, the function of the appellate court is similar to its function in ordinary civil appeals--that is, it may take cognizance only of errors of law, and a factual finding may be overturned only if the evidence received by the trial court is insufficient as a matter of law to sustain the finding [*Merrill v. Department of Motor Vehicles (1969) 71 Cal. 2d 907, 915, 80 Cal. Rptr. 89, 458 P.2d 33]* . The appellate court must decide whether credible, competent evidence supports the trial court's judgment [*Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 71, 64 Cal. Rptr. 785, 435 P.2d 553* ; *Arenstein v. California State Bd. of Pharmacy (1968) 265 Cal. App. 2d 179, 184, 71 Cal. Rptr. 357]* , and it must resolve all conflicts in the evidence, drawing all legitimate and reasonable inferences in the support of the judgment [*Kerrigan v. Fair Employment Practice Com. (1979) 91 Cal. App. 3d 43, 52, 154 Cal. Rptr. 29]* .

In cases in which the substantial evidence standard applies, the same standard applies on appeal [*see* Ch. 474B, *Standards in Reviewing Agency Decisions* , for discussion of the substantial evidence test]. The appellate court reviews the entire administrative record to determine whether substantial evidence supported the determination of the agency, not that of the trial court [*Bixby v. Pierno (1971) 4 Cal. 3d 130, 149, 93 Cal. Rptr. 234, 481 P.2d 242* ; *Schmitt v. City of Rialto (1985) 164 Cal. App. 3d 494, 501, 210 Cal. Rptr. 788]* . In substantial evidence cases, the trial court itself exercises an appellate function, in that it takes cognizance only of errors of law appearing on the administrative record. The trial and appellate courts thus occupy identical positions with respect to the administrative record, the duty of both being to determine whether that record is free from legal error [*Merrill v. Department of Motor Vehicles (1969) 71 Cal. 2d 907, 915-916, 80 Cal. Rptr. 89, 458 P.2d 33* ; *Los Alamitos Gen. Hosp., Inc. v. Lackner (1978) 86 Cal. App. 3d 417, 423, 149 Cal. Rptr. 98]* .

As to issues of law, the standard of review on appeal is the de novo review standard [*Rosenblit v. Superior Court*

(1991) 231 Cal. App. 3d 1434, 1442, 282 Cal. Rptr. 819] . An appellate court can affirm a trial court judgment on an issue of law for a different reason than the rationale given by the trial court. Even though the trial court may have used an incorrect rationale, if there is any valid legal theory to support affirming the judgment of the trial court, that judgment will be upheld [*Belair v. Riverside County Flood Control Dist. (1988) 47 Cal. 3d 550, 568, 253 Cal. Rptr. 693, 764 P. 2d 1070* ; *Pollak v. State Personnel Board (2001) 88 Cal. App. 4th 1394, 1408, 107 Cal. Rptr. 2d 39]* .

Legal Topics:

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

§§ 474C.54[Reserved]

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§ 474C.60 Federal Constitution

Prohibition against unreasonable searches and seizures. *U.S. Const., amend. IV*

Due process clause. *U.S. Const., amend. XIV, § 1*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 474C.61 State Constitution

Due process clause. *Cal. Const., art. I, § 7(a)*

Prohibition against unreasonable searches and seizures. *Cal. Const., art. I, § 13*

Separation of powers doctrine. *Cal. Const., art. III, § 3*

Jurisdiction to give extraordinary relief. *Cal. Const., art. VI, § 10*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 474C.62 State Statutes

Administrative Procedure Act. *Gov. Code §§ 11500-11528*

Allocation of burden of proof. *Evid. Code § 500*

Amendment of pleadings. *Code Civ. Proc. § 473*

Answers to complaints generally. *Code Civ. Proc. §§ 431.10-431.30*

Appeals in civil actions and proceedings. *Code Civ. Proc. §§ 901-914, 1109-1110b*

Authority of court to adopt suitable procedure where none specifically provided by statute. *Code Civ. Proc. § 187*

Certiorari. *Code Civ. Proc. §§ 1067-1077, 1107-1109*

Civil actions and proceedings generally. *Code Civ. Proc. §§ 307 et. seq.*

Contempt. *Code Civ. Proc. §§ 1209-1222*

Copies of pleadings are required to be served on adverse parties. *Code Civ. Proc. § 465*

Costs. *Code Civ. Proc. §§ 1021 et. seq.*

Demurrers. *Code Civ. Proc. §§ 430.10-430.80*

Demurrer raises issue of law. *Code Civ. Proc. § 589*

Discovery. *Code Civ. Proc. §§ 2016.010-2036.050*

Effect of notice of motion. *Code Civ. Proc. § 1010*

Effect of summons. *Code Civ. Proc. § 412.20(a)(3)*

Entry of judgment. *Code Civ. Proc. § 664*

Fee for transcribing record. *Gov. Code § 69950*

Filing initial pleading begins proceeding. *Code Civ. Proc. §§ 350, 411.10*

Filing of various pape rs constitutes appearance. *Code Civ. Proc. § 1014*

Mandate. *Code Civ. Proc. §§ 1084-1097, 1107-1109*

New trials. *Code Civ. Proc. §§ 656-663.2*

Power of court to impanel jury. *Code Civ. Proc. § 592*

Prohibition. *Code Civ. Proc. §§ 1102-1105, 1107-1109*

Recovery of attorney's fees when administrative action arbitrary or capricious. *Gov. Code § 800*

Recovery of litigation expenses, including attorney's fees, by small business or licensee when agency action undertaken without substantial justification. *Code Civ. Proc. § 1028.5*

Review of administrative decision by mandate proceeding. *Code Civ. Proc. § 1094.5*

Review of decisions by Alcoholic Beverage Control Appeals Board (and Director of Alcoholic Beverage Control). *Bus. & Prof. Code §§ 23090-23090.2*

Review of decisions by Board of Governors of State Bar or Committee of Bar Examiners. *Bus. & Prof. Code § 6082*

Review of decision by local housing enforcement agency to abate nuisance; independent judgment test. *Health & Safety Code § 17980.8*

Review of decisions by Public Utilities Commission. *Pub. Util. Code §§ 1756, 1759*

Review of decisions by Workmen's Compensation Appeals Board. *Lab. Code § 5950*

Right to demur to answer. *Code Civ. Proc. § 430.20*

Service of summons. *Code Civ. Proc. §§ 431.10-417.40*

Special proceedings and actions. *Code Civ. Proc. §§ 20-23*

Testimony in subsequent civil proceeding of person presiding at quasi-judicial proceeding. *Evid. Code § 703.5*

Time limitations on review of local agency decision. *Code Civ. Proc. § 1094.6*

Verification of pleadings. *Code Civ. Proc. § 446*

Writ is order in writing issued in name of court. *Code Civ. Proc. § 17*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewRemediesMandamusCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamus

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§ 474C.63 California Rules of Court

Rules of procedure in superior courts. *Cal. Rules of Ct., Rules 2.1 et seq.*

Civil law and motion rules. *Cal. Rules of Ct., Rule 3.1100 et seq.*

Application of civil law and motion rules to proceedings on petition for writ of mandate. *Cal. Rules of Ct., Rules 3.1100, 3.1103*

Lodging of record in administrative mandate cases. *Cal. Rules of Ct., Rule 3.1140*

Review of decision of State Bar Court, or action of Board of Governors of State Bar, appointed board or committee, or chief executive officer or designee, authorized to make determination under State Bar Act or California Rules of Court. *Cal. Rules of Ct., Rule 9.13*

Appeals. *Cal. Rules of Ct., Rules 8.1 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 474C.64 Local Rules of Court

Los Angeles County

Procedure relating to prerogative writs. Los Angeles Co. Super. Ct. Rules, Rules 9.31

San Diego County

Prerogative writs. San Diego Co. Super. Ct. Rules, Div. II, Rule 8.1

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§ 474C.65 Decisions

[1] Administrative Record

Untranscribed tape recordings of administrative proceedings sometimes provides adequate means of review. *Darley v. Ward (1980) 28 Cal. 3d 257, 261, 168 Cal. Rptr. 481, 617 P.2d 1113*

In administrative mandate action, court reviews administrative record and receives additional evidence only if that evidence was unavailable at time of hearing or improperly excluded from record. *McIntosh v. Aubry (1993) 14 Cal. App. 4th 1576, 1592, 18 Cal. Rptr. 2d 680*

In reviewing decision by San Francisco Bay Conservation and Development Commission under McAteer-Petris Act [*Gov. Code § 66600 et seq.*], appellate court is not authorized to take judicial notice of material outside administrative record. *Save San Francisco Bay Ass'n v. San Francisco Bay Conservation Etc. Com. (1992) 10 Cal. App. 4th 908, 929 n.7, 13 Cal. Rptr. 2d 117*

Granting of writ of mandate is improper in absence of complete administrative record, including tapes or record of agency hearing. *Buckhart v. San Francisco Residential Rent etc., Bd. (1988) 197 Cal. App. 3d 1032, 1035-1036, 243 Cal. Rptr. 298*

Report and transcript of public hearing that was not before city council when it approved environmental impact report is not admissible in administrative mandate action to compel city to set aside its approval since appellate review is limited to issues in record at administrative level unless, pursuant to *Code Civ. Proc. § 1094.5*, additional evidence was unavailable at time of administrative hearing or was improperly excluded from record. *Browning-Ferris Industries v. City Council (1986) 181 Cal. App. 3d 852, 861, 226 Cal. Rptr. 575*

Petitioner for writ of administrative mandate has responsibility to make available to trial court an adequate record of administrative proceeding. *Foster v. Civil Service Com. (1983) 142 Cal. App. 3d 444, 453, 190 Cal. Rptr. 893*

Review is limited to administrative record except as to unavailable or improperly excluded evidence. *No Oil, Inc. v.*

Los Angeles (1974) 13 Cal. 3d 68, 79 n.6, 118 Cal. Rptr. 34, 529 P.2d 66

Request to the agency for preparation of record [*Gov. Code § 11523*] has effect of extending period of limitation if addressed to official reporter. *Moran v. Board of Medical Examiners (1948) 32 Cal. 2d 301, 305-307, 196 P.2d 20*

[2] Agency Scope of Review

In review of administrative findings regarding discipline of policeman, municipal body as properly reading entire transcript of administrative proceeding, pursuant to municipal ordinance allowing review of administrative findings and recommendations in order to affirm, revoke, or modify action taken; request for writ of mandate, on ground that reviewing body exceeded proper scope of review, was properly denied by trial court. *Musquiz v. City of Huntington Park (1986) 180 Cal. App. 3d 876, 880-881, 225 Cal. Rptr. 817*

[3] Alternative Writ of Mandate

Code Civ. Proc. § 1107 provides for respondent's points and authorities in opposition to issuance of alternative writ. *Mooney v. Pickett (1971) 4 Cal. 3d 669, 683 n.16, 94 Cal. Rptr. 279, 483 P.2d 1231*

Agency compliance is among acceptable responses to alternative writ of mandate and as terminating litigation. *Save Oxnard Shores v. California Coastal Com. (1986) 179 Cal. App. 3d 140, 149, 224 Cal. Rptr. 425*

Court is required to withhold issuance of alternative writ until passage of five-day period in *Code Civ. Proc. § 1107* for filing respondent's points and authorities in opposition. *Culver v. State Bd. of Equalization (1972) 29 Cal. App. 3d 404, 412, 105 Cal. Rptr. 602*

Court has discretion to deny issuance of alternative writ if petition fails to allege prima facie case for relief. *Kingston v. Dept. of Motor Vehicles (1969) 271 Cal. App. 2d 549, 552, 76 Cal. Rptr. 614* ; *Black v. State Personnel Board (1955) 136 Cal. App. 2d 904, 909, 289 P.2d 863*

Alternative writ is merely means by which court brings respondent within its jurisdiction. *McPheeters v. Board of Medical Examiners (1947) 82 Cal. App. 2d 709, 716, 187 P.2d 116*

[4] Answer

Allegations not expressly denied in answer are deemed admitted. *Dulaney v. Municipal Court (1974) 11 Cal. 3d 77, 81, 81 n.3, 112 Cal. Rptr. 777, 520 P.2d 1*

Trial court correctly found petitioner lacked clean hands, in light of petitioner's failure to either file replication or submit proof countervailing respondent agency's affirmative defense that he obtained his contractor's license fraudulently. *Elliott v. Contractors' State License Board (1990) 224 Cal. App. 3d 1048, 1054, 274 Cal. Rptr. 286*

Answer filed with points and authorities in opposition to issuance of alternative writ [*Code Civ. Proc. § 1107*] is premature. *Kim v. Chinn (1941) 46 Cal. App. 2d 854, 854, 117 P.2d 368*

Answer by fewer than quorum of members of multimember agency is no answer at all. *People v. Supervisors of City & County of San Francisco (1865) 27 Cal. 655, 668-670*

Necessity for verification of answer by public officer. *Lertora v. Riley (1936) 6 Cal. 2d 171, 176, 57 P.2d 140* (not

required); *City & County of San Francisco v. Itsell (1889) 80 Cal. 57, 60, 22 P. 74* (required); *Seckels v. Department of Indus. Relations (1929) 98 Cal. App. 647, 648, 277 P. 497* (not required)

Lack of verification is defect correctable by amendment. *Security T. & S. Bk. v. Fidelity & D. Co. (1920) 184 Cal. 173, 176, 193 P. 102* ; *Board of Education v. Mulcahy (1942) 50 Cal. App. 2d 418, 423, 123 P.2d 114* ; *Jenssen v. R.K.O. Studios, Inc. (1937) 20 Cal. App. 2d 705, 707, 67 P.2d 757*

Objection to lack of verification is waived if not made at or before filing of responsive pleading. *Greenfield v. Steamer Gunnell (1856) 6 Cal. 67, 68*

Withdrawal of answer after filing is concession that facts alleged in petition are true. *Western States Constr. Co. v. Municipal Court of San Francisco (1951) 38 Cal. 2d 146, 149, 238 P.2d 562*

Answer denying allegations of petition puts burden on petitioner to prove right to relief. *Alford v. Pierno (1972) 27 Cal. App. 3d 682, 690-691, 104 Cal. Rptr. 110*

[5] Continuances

In administrative mandate proceeding, trial court did not abuse its discretion in denying plaintiff's motion for continuance, when plaintiff conceded only purpose for motion was to allow plaintiff time to properly analyze administrative record, and plaintiff had almost one week to conduct analysis prior to hearing. *Foster v. Civil Service Com. (1983) 142 Cal. App. 3d 444, 448-449, 190 Cal. Rptr. 893*

[6] Costs and Attorneys Fees

Right to recover attorney's fees does not extend to further proceedings after judgment in party's favor. *Le Blanc v. Swoap (1976) 16 Cal. 3d 741, 743-744, 129 Cal. Rptr. 304, 548 P.2d 704*

Expense of preparing record for purpose of exhausting administrative remedies is recoverable cost. *Ralph's Chrysler-Plymouth v. New Car Dealers Policy & Appeals Board (1973) 8 Cal. 3d 792, 796, 106 Cal. Rptr. 169, 505 P.2d 1009*

Expense of preparing record is recoverable cost. *Moran v. Board of Medical Examiners (1948) 32 Cal. 2d 301, 315, 196 P.2d 20*

Necessity for costs to be awarded in judgment. *Union Trust Co. v. Superior Court (1939) 13 Cal. 2d 541, 543, 90 P.2d 582* ; *Gould v. Moss (1910) 158 Cal. 548, 549, 111 P. 925*

Costs are recoverable by prevailing party as matter of right. *Power v. May (1898) 123 Cal. 147, 152-153, 55 P. 796*

Award of attorney's fees under *Gov. Code § 800* was reversible error in absence of evidence that complainant was personally obligated to pay fees. *Richardson v. Board of Supervisors (1988) 203 Cal. App. 3d 486, 496-497, 250 Cal. Rptr. 1*

Erroneous interpretation of law does not suggest per se that action of public entity or officer thereof was arbitrary or capricious; attorney's fees under *Gov. Code § 800* are not recoverable when nothing in record justifies conclusion that administrative board's action was arbitrary or capricious. *Indian Springs, Ltd. v. Palm Desert Rent Review Bd. (1987) 193 Cal. App. 3d 127, 137-138, 238 Cal. Rptr. 112*

City council's "eleventh hour" resolution reducing appeals board's authority in violation of meet and confer requirements, and its decision to uphold plaintiff's termination despite board's contrary recommendation, constitutes arbitrary and capricious conduct justifying award of attorney's fees under *Gov. Code § 800*. *Cerini v. City of Cloverdale (1987) 191 Cal. App. 3d 1471, 1481-1482, 237 Cal. Rptr. 116*

"Complainant" entitled to attorney's fees within meaning of *Gov. Code § 800* is person who initiates appellate review of adverse determination in administrative hearing. *Stirling v. Agricultural Labor Relations Bd. (1987) 189 Cal. App. 3d 1305, 1310, 235 Cal. Rptr. 56* (holding that real party in interest in proceeding for extraordinary writ was not "complainant" within meaning of statute)

Proceeding for writ of mandate or prohibition initiated by General Counsel for Agricultural Labor Relations Board, to require Board to adopt standards for reviewing settlements during unfair labor practice proceedings and to apply those standards to specific settlement, was not arbitrary and capricious conduct authorizing attorney's fees under *Gov. Code § 800*. *Stirling v. Agricultural Labor Relations Bd. (1987) 189 Cal. App. 3d 1305, 1313, 235 Cal. Rptr. 56*

Attorney's fees under *Gov. Code § 800* are not recoverable when agency's action was neither arbitrary nor capricious. *Gatewood v. Board of Retirement (1985) 175 Cal. App. 3d 311, 324 n.5, 220 Cal. Rptr. 724*

Right to recover attorney's fees under *Gov. Code § 800* is applicable only if plaintiff is appealing from determination of administrative proceeding and is inapplicable when plaintiff seeks to enforce administrative determination. *Los Angeles Police Protective League v. City of Los Angeles (1985) 166 Cal. App. 3d 55, 65, 212 Cal. Rptr. 251*

In mandate proceeding in which county board of supervisors' decision to abandon county road was upheld, trial court's award to county of costs, including county staff time expended to produce documents for plaintiff at plaintiff's request and by court order, was proper and within sound discretion of trial court. *Heist v. County of Colusa (1984) 163 Cal. App. 3d 841, 851, 213 Cal. Rptr. 278*

Gov. Code § 800 is remedial statute designed to enable employees to seek relief in courts against arbitrary or capricious action by public entities or officers, and is to be liberally construed; *Gov. Code § 800* is not limited to appeal or review from formal administrative hearing and was properly applied when employee's grievance was summarily denied in letter without any formal adminstrative hearing. *Forrest v. Trustees of Cal. State University & Colleges (1984) 160 Cal. App. 3d 357, 366-368, 206 Cal. Rptr. 595*

Trial court's finding that certain administrative findings and determinations were not supported by record does not itself consititute evidence of arbitrary and capricious conduct so as to authorize attorney's fees under *Gov. Code § 800*. *Byrnes v. Riles (1984) 157 Cal. App. 3d 1170, 1182, 204 Cal. Rptr. 100*

Part-time community college instructors who sought and obtained writ of mandate requiring district to grant them status as regular employees and pro rata pay equivalent to full-time instructors were not entitled to attorney's fees under *Gov. Code § 800*; *Gov. Code § 800* is inapplicable when petitioners did not seek review of an award, finding, or other determination of an administrative proceeding. *Ferris v. Los Rios Community College Dist. (1983) 146 Cal. App. 3d 1, 11, 194 Cal. Rptr. 16*

Finding that public entity or officer engaged in "conduct not supported by fair or substantial reason" or "unsubstantiated determinations" is prerequisite to award of attorney's fees under *Gov. Code § 800*, and is not recoverable in case of honest legal dispute. *Seghesio v. County of Napa (1982) 135 Cal. App. 3d 371, 377, 185 Cal. Rptr. 224*

Finding in support of award of attorney's fees under *Gov. Code § 800* that governmental conduct was arbitrary and capricious is sustained on appeal unless abuse of discretion shown. *Ellerbroek v. Saddleback Valley Unified School*

Dist. (1981) 125 Cal. App. 3d 348, 376-377, 177 Cal. Rptr. 910

Public assistance recipient is entitled to attorney's fees on appeal from denial of writ in mandate proceeding to compel county's compliance with fair hearing decision of Department of Benefit Payments because enforcement of appellant's rights confers important benefit on general public. *Blackburn v. Sarsfield (1981) 125 Cal. App. 3d 143, 150-151, 178 Cal. Rptr. 15*

When petitioner had borne costs of preparing trial record in administrative hearing and cost was necessary and reasonable, reimbursement was properly awarded by trial court. *Marlow v. Orange County Human Serv. Agency (1980) 110 Cal. App. 3d 290, 294, 167 Cal. Rptr. 776*

Attorney's fees are not recoverable under *Gov. Code § 800* (public entity's or officer's arbitrary or capricious conduct) unless administrative action was arbitrary or capricious. *Marlow v. Orange County Human Serv. Agency (1980) 110 Cal. App. 3d 290, 295, 167 Cal. Rptr. 776*

City's denial of application for permit to relocate building, based on unconstitutional ordinance prohibiting relocation of certain buildings, was arbitrary and capricious within meaning of *Gov. Code § 800* in light of all circumstances, and applicant was therefore entitled to attorney's fees under that code section. *Reeves v. City of Burbank (1979) 94 Cal. App. 3d 770, 778-780, 156 Cal. Rptr. 667*

Court was without subject matter jurisidiction to order reporter at administrative hearing to prepare transcript of administrative hearing and to fix price for transcript. *Barwis v. Superior Court (1978) 87 Cal. App. 3d 239, 241, 150 Cal. Rptr. 758*

Claim was unwarranted when school board's action denying back salary reflected bona fide dispute concerning interpretation of statute governing back salary. *Von Durjais v. Board of Trustees (1978) 83 Cal. App. 3d 681, 688-689, 148 Cal. Rptr. 192*

Recovery of attorney's fees under *Gov. Code § 800* (capricious and arbitrary administrative conduct). *Midstate Theatres, Inc. v. Board of Supervisors (1975) 46 Cal. App. 3d 204, 211, 119 Cal. Rptr. 894* ; *Madonna v. County of San Luis (1974) 39 Cal. App. 3d 57, 61-62, 113 Cal. Rptr. 916*

[7] Default Cases

Appearance without answer is concession that facts alleged in complaint are true. *Western States Constr. Co. v. Municipal Court of San Francisco (1951) 38 Cal. 2d 146, 149, 238 P.2d 562* ; *Pereria v. Wallace (1900) 129 Cal. 397, 400, 62 P. 61* ; *Jaquith v. Justice's Court (1926) 77 Cal. App. 542, 544-547, 247 P. 224*

Allegations of complaint are not deemed admitted by respondent's failure to appear. *Jackson School Dist. v. Culbert (1901) 134 Cal. 508, 509-510, 66 P. 741* ; *Jaquith v. Justice's Court (1926) 77 Cal. App. 542, 544-547, 247 P. 224*

Respondent appears by answer, demurrer, notice of motion to strike or for change of venue, or written notice of appearance. *Rodriguez v. Municipal Court (1972) 25 Cal. App. 3d 521, 526, 102 Cal. Rptr. 45*

[8] Demurrers

Return by demurrer alone admits allegations of petition. *Kennedy v. Ross (1946) 28 Cal. 2d 569, 571, 170 P.2d 904*

Statutes governing demurrers in civil actions and proceedings are applicable in mandate proceeding. *W.R. Grace &*

Co. v. Cal. Emp. Com. (1944) 24 Cal. 2d 720, 726-727, 151 P.2d 215

Answer raising only questions of law is equivalent of demurrer. *Hayward v. Pimental (1895) 107 Cal. 386, 390, 40 P. 545* ; *Gayle v. Hamm (1972) 25 Cal. App. 3d 250, 252-253 n.3, 101 Cal. Rptr. 628*

Demurrer filed with points and authorities in opposition to issuance of alternative writ [*Code Civ. Proc. § 1107*] is premature. *Kim v. Chinn (1941) 46 Cal. App. 2d 854, 854, 117 P.2d 368*

[9] Discovery

Petitioner is not entitled on discovery to probe mental processes of agency members in reaching decision. *Fairfield v. Superior Court (1975) 14 Cal. 3d 768, 774-775, 777-779, 122 Cal. Rptr. 543, 537 P.2d 375* ; *State of California v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 257-258, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *Board of Dental Examiners v. Superior Court (1975) 55 Cal. App. 3d 811, 814, 127 Cal. Rptr. 865*

Petitioner is entitled to discovery with respect to evidence unavailable at time of administrative trial or evidence improperly excluded. *State of California v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 257, 115 Cal. Rptr. 497, 524 P.2d 1281*

Petitioner seeking administrative review of agency's decision rendered pursuant to *Gov. Code § 11517(c)* is not entitled to discover whether or not agency actually satisfied its statutory duty to review hearing officer's proposed decision; when agency renders findings in quasi-judicial proceeding, petitioner is precluded from inquiry outside administrative record. *Governing Board v. Superior Court (1985) 167 Cal. App. 3d 1158, 1160-1162, 213 Cal. Rptr. 771*

[10] Evidence

In mandate proceeding, trial court's denial of motion to strike respondents' evidence that was not part of administrative record is not abuse of discretion under *Code Civ. Proc. § 1094.5(e)* when evidence pertained to issue first raised by petitioner in mandate petition, respondents had no reason to anticipate petitioner would raise issue, and respondents consequently had no reason to offer evidence on that issue at administrative hearing. *Cranston v. City of Richmond (1985) 40 Cal. 3d 755, 773, 221 Cal. Rptr. 779, 710 P.2d 845*

In administrative mandate action, court reviews administrative record and receives additional evidence only if that evidence was unavailable at time of hearing or improperly excluded from record. *McIntosh v. Aubry (1993) 14 Cal. App. 4th 1576, 1592, 18 Cal. Rptr. 2d 680*

Review of legal theories does not involve receipt of evidence that was not before administrative agency. *Division of Occupational Safety & Health v. State Bd. of Control (1987) 189 Cal. App. 3d 794, 801, 234 Cal. Rptr. 661*

Trial court is authorized under *Code Civ. Proc. § 1094.5(e)* to receive evidence of events which transpired after administrative hearing; better practice to remand action for agency redetermination in light of new evidence. *Curtis v. Board of Retirement (1986) 177 Cal. App. 3d 293, 299, 223 Cal. Rptr. 123*

If trial court employs independent standard of review on issue of procedural fairness of administrative hearing, then trial judge is able to admit evidence on such issue under *Code Civ. Proc. § 1094.5(e)* without remanding case to administrative tribunal. *Tiholiz v. Northridge Hospital Foundation (1984) 151 Cal. App. 3d 1197, 1204-1205, 199 Cal. Rptr. 338*

Court is empowered to receive evidence only where evidence unavailable at administrative trial or unlawfully

excluded. *No Oil, Inc. v. Los Angeles (1974) 13 Cal. 3d 68, 79 n.6, 118 Cal. Rptr. 34, 529 P.2d 66* ; *Hadley v. City of Ontario (1974) 43 Cal. App. 3d 121, 126-127, 117 Cal. Rptr. 513*

Court is not required to receive evidence petitioner merely neglected to present at administrative trial. *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control (1966) 65 Cal. 2d 349, 377, 55 Cal. Rptr. 23, 420 P.2d 735* ; *Dare v. Bd. of Medical Examiners (1943) 21 Cal. 2d 790, 799, 136 P.2d 304*

Code Civ. Proc. § 1094.5(e) as permitting court in mandate proceeding to receive evidence that could not have been produced with reasonable diligence or that was wrongfully excluded at prior administrative hearing. *Curtin v. Department of Motor Vehicles (1981) 123 Cal. App. 3d 481, 484, 176 Cal. Rptr. 690*

Code Civ. Proc. § 1094.5(e) constitutes statutory authority for use of affidavits as direct evidence at administrative mandate hearings in superior court subject to rules governing right of cross examination and to prohibition against double hearsay. *Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 598, 155 Cal. Rptr. 63*

Failure to produce expert witness's testimony is not excusable because of unavailability of expert unless there was no other reasonable source of same evidence. *American Chemical Corp. v. County of Los Angeles (1974) 42 Cal. App. 3d 45, 55, 116 Cal. Rptr. 751*

Trial in superior court is more like appellate review than new trial. *Campbell v. Board of Dental Examiners (1971) 17 Cal. App. 3d 872, 875, 95 Cal. Rptr. 351*

[11] Peremptory Writ of Mandate

Judgment controlls in event of conflict between terms of judgment and terms of peremptory writ. *State Bd. of Equalization v. Superior Court (1942) 20 Cal. 2d 467, 475, 127 P.2d 4*

Peremptory writ can be issued where justice requires, even if terms cannot conform to terms of alternative writ. *Johnson v. Fontana County F.P. Dist. (1940) 15 Cal. 2d 380, 391-392, 101 P.2d 1092*

Notice of motion for enforcement is required. *McDonald v. Severy (1936) 6 Cal. 2d 629, 631, 59 P.2d 98*

Trial court properly refused to remand matter to agency for corrective action when it remanded matter to agency with directions to issue permit without conditions imposed by agency, and further proceedings were unnecessary because agency had already considered matter carefully when it imposed conditions. *Whaler's Village Club v. California Coastal Com. (1985) 173 Cal. App. 3d 240, 263, 220 Cal. Rptr. 2*

Board's failure to make findings supporting its adjudicatory administrative decision is prejudicial and precludes meaningful judicial review; peremptory writ of mandate, which ordered board to vacate its decision subject to its right to review further existing records and make findings adequate to apprise court of reasons for its decision, is appropriate. *Respers v. University of Cal. Retirement System (1985) 171 Cal. App. 3d 864, 870-873, 217 Cal. Rptr. 594*

Enforcement of peremptory writ is matter of compliance with duties rather than punishment. *King v. Martin (1971) 21 Cal. App. 3d 791, 796, 98 Cal. Rptr. 711*

Peremptory writ can be issued before entry of judgment. *Healy v. Stationers Corp. (1964) 228 Cal. App. 2d 601, 604, 39 Cal. Rptr. 679*

Petitioner is not entitled to have errors in trial reviewed in proceeding for enforcement of writ. *Gunn v. Superior*

Court (1946) 76 Cal. App. 2d 203, 206-207, 173 P.2d 328

[12] Points and Authorities in Opposition

Memorandum of points and authorities allowed by *Code Civ. Proc. § 1107* is in nature of brief for court's benefit. *Mercer-Fraser Co. v. Industrial Acci. Com. (1953) 40 Cal. 2d 102, 129, 251 P.2d 955* ; *Peter v. Board of Supervisors (1947) 78 Cal. App. 2d 515, 521, 178 P.2d 73*

Memorandum of points and authorities allowed by *Code Civ. Proc. § 1107* is not substitute for demurrer or answer. *Wilson v. L.A. County Civil Service Com. (1951) 103 Cal. App. 2d 426, 431, 229 P.2d 406*

[13] Remand to Administrative Level

Remand to agency with determinative powers is proper when court finds that hearing was denied. *Johnston v. Trustees of Cal. State University & Colleges (1984) 151 Cal. App. 3d 1003, 1012, 199 Cal. Rptr. 175*

[14] Replication

Factual allegations in answer are deemed true unless controverted by pleading (replication) or proof. *California Portland Cement Co. v. State Bd. of Equalization (1967) 67 Cal. 2d 578, 582 n.5, 63 Cal. Rptr. 5, 432 P.2d 700* ; *Elliott v. Contractors' State License Bd. (1990) 224 Cal. App. 3d 1048, 1054, 274 Cal. Rptr. 286* ; *Antoine v. Department of Public Health (1973) 33 Cal. App. 3d 215, 221-222, 108 Cal. Rptr. 689*

Right of petitioner to file replication to answer. *Scott v. Superior Court (1928) 205 Cal. 525, 526-527, 271 P. 906* ; *McClatchy v. Matthews (1901) 135 Cal. 274, 276, 67 P. 134* ; *Kahn v. East Bay Mun. Util. Dist. (1974) 41 Cal. App. 3d 397, 414, 116 Cal. Rptr. 333*

[15] Service of Petition

Copies of petition and supporting papers should be served before filing [*Code Civ. Proc. § 1107*] unless prior service is excused by court order. *Miller v. Hamm (1970) 9 Cal. App. 3d 860, 866 n.6, 88 Cal. Rptr. 538*

Effect of service requirements in *Code Civ. Proc. § 1107*. *Mercer-Fraser Co. v. Industrial Acci. Com. (1953) 40 Cal. 2d 102, 129, 251 P.2d 955* ; *Peter v. Board of Supervisors of Kern County (1947) 78 Cal. App. 2d 515, 521, 178 P.2d 73*

Service of copy of petition is required to give notice of pending proceeding. *Ursino v. Superior Court (1974) 39 Cal. App. 3d 611, 617, 114 Cal. Rptr. 404*

[16] Summary Disposition

Summary disposition not on merits does not preclude subsequent original proceeding in appellate court. *Goddard v. Security Title Ins. & Guar. Co. (1939) 14 Cal. 2d 47, 51-53, 92 P.2d 804*

Appellate court is not required to entertain subsequent original proceeding following summary disposition in superior court. *People v. Municipal Court (1971) 14 Cal. App. 3d 362, 365, 92 Cal. Rptr. 248* ; *Hartigan v. Pacific Gas & Electric Co. (1918) 38 Cal. App. 763, 764, 177 P. 484*

[17] Venue

Plaintiff suing local agency is unable to institute action in neutral county as of right [*Code Civ. Proc. § 394(a)*]; county in which action arose is proper venue [*Code Civ. Proc. § 393(1)(b)*] *Sutter Union High School Dist. v. Superior Court (1983) 140 Cal. App. 3d 795, 797-798, 190 Cal. Rptr. 182*

Venue of mandate proceeding for review of administrative decision is governed by *Code Civ. Proc. § 393(1)(b)*. *Lynch v. Superior Court (1970) 7 Cal. App. 3d 929, 930-931, 86 Cal. Rptr. 925*

County where the cause, or some part thereof, arose [*Code Civ. Proc. § 393(1)(b)*] is determined by where petitioner most directly or seriously affected by administrative decision in question resides. *Lynch v. Superior Court (1970) 7 Cal. App. 3d 929, 931-933, 86 Cal. Rptr. 925* ; *Duval v. Contractors State License Bd. (1954) 125 Cal. App. 2d 532, 533-536, 271 P.2d 194* ; *Cecil v. Superior Court (1943) 59 Cal. App. 2d 793, 799, 140 P.2d 125*

Parties in mandate proceeding are entitled to seek change of venue. *Bloom v. Oroville-Wyandotte Irrigation Dist. (1939) 34 Cal. App. 2d 102, 103, 93 P.2d 164*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewAdministrative RecordGeneral OverviewAdministrative LawJudicial ReviewAdministrative RecordDisclosure & DiscoveryAdministrative LawJudicial ReviewRemands & RemittitursAdministrative LawJudicial ReviewRemediesMandamusCivil ProcedureVenueIndividual DefendantsCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesStatutory AwardsCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & TranscriptsCivil ProcedureRemediesWritsCommon Law WritsMandamus

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§ 474C.66 Law Reviews

See chapters listed in Ch. 474, *Availability of Judicial Review of Agency Decisions , § 474.35*

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§ 474C.67 Text References

California Administrative Mandate (Cal. C.E.B. 2d ed. 1989)

Witkin, California Procedure, vol. 8, *Extraordinary Writs*, §§ 30, 257-331 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 474C.68 Internet References

Office of Administrative Hearings. This site includes information and location concerning specific OAH offices; an OAH hearing guide; information concerming Administrative Procedure Act statutes, regulations, and proposed regulations; OAH forms; information concerning alternative dispute resolution procedures; and declaratory decisions. http://www.dgs.ca.gov/oah

NOTE:
On and after July 1, 1998, The OAL is required by *Gov. Code § 11340.1(b)* to make the full text of the California Code of Regulations, with reference citations and history notes, available on the Internet free of charge.

Office of Administrative Law. This site includes OAL publications; links to OAL statutes and regulations relating to rulemaking; regulations submitted to the OAL for review, and information for contacting or provding input to the OAL regarding rulemaking. http://www.oal.ca.gov

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Department of Consumer Affairs. This site includes links to sites maintained by many state agencies that are under this department, as well as links to agency sites. http://www.dca.ca.gov

California Courts. This site includes general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most Court of Appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

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[Reserved]

§§ 474C.69[Reserved]

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.80

§ 474C.80 Petition for Writ of Mandate in Superior Court

☐ Verify that administrative record is filed with the court [*see § 474C.23[1]*].

☐ If it is not, prepare and file ex parte application and order for preparation and filing of administrative record [*see § 474C.23*; for a form, *see § 474C.98*].

☐ Prepare petition for writ of mandate [*see Code Civ. Proc. § 1094.5*; *§ 474C.10[2*]; for forms, *see § 474C.90 -474C.91*, *474C.93 -474C.94*].

☐ All papers must comply with superior court rules [*see Cal. Rules of Ct., Rules 2.100-2.119, 3.1110*; *see also § 474C.13[1]*].

☐ Verify petition [*Code Civ. Proc. § 1086*; *see § 474C.13[8]*].

☐ Prepare memorandum, if applicable [*see § 474C.13[9]*].

☐ Prepare alternative writ [*Cal. Rules of Ct., Rule 3.1110*; *see Cal. Rules of Ct., Rule 2.100*; §§ *474C.10[2]*, *474C.13[1]*, *474C.15[1]*, *[3]*, *474C.16*; for forms, *see §§ 474C.93 -474C.94*].

☐ Include order on same document [*see § 474C.15[2*]; for a form, *see § 474C.94*], or

☐ Prepare separate order for issuance of alternative writ [*see § 474C.15[2*], for a form, *see § 474C.95*].

☐ Present to court in chambers at same time as petition [*see § 474C.15[3]*].

☐ Ex parte issuance (notice and service not required) [*Code Civ. Proc. § 1107*; *see § 474C.15[4]*].

☐ Prepare order to stay decision, if applicable [*see § 474C.13[5]*; *§ 474C.18*; for forms, *see §§ 474C.99 -474C.100*].

☐ Serve copy of petition and memorandum on respondent and real party in interest [*Code Civ. Proc. §§ 1107, 1109*; *see §§ 474C.10[2], 474C.13[10]*].

☐ File petition and proof of service with court [*Code Civ. Proc. § 1107*; *see §§ 474C.10[2], 474C.15[5]*; *see also § 474C.12* (jurisdiction and venue)].

☐ Deposit alternative writ with clerk at time petition is filed [*see § 474C.10[2]*].

☐ Writ remains deposited but not filed for five days.

☐ After five days court examines papers on file and either grants or denies petition for alternative writ.

☐ Serve alternative writ [*Code Civ. Proc. § 1096*; *see § 474C.15[6]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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41A-474C California Forms of Pleading and Practice--Annotated § 474C.81

§ 474C.81 Noticed Application Procedure

[1] Papers

☐ Verify that administrative record is filed with the court [*see § 474C.23[1]*].

☐ If it is not, prepare and file ex parte application and order for preparation and filing of administrative record [*see § 474C.23*; for a form, *see § 474C.98*].

☐ Prepare petition for issuance of peremptory writ [*Code Civ. Proc. §§ 1088, 1088.5*; *see § 474C.17[1]*].

☐ Prepare notice of motion [*Cal. Rules of Ct., Rules 2.100, 3.1110*; *see § 474C.17[2*]; for a form, *see § 474C.96*].

☐ Use *Palma* notice if filing in appellate court [*see § 474C.17[5*], for a form, *see § 474C.97*].

☐ Prepare memorandum [*Cal. Rules of Ct., Rule 3.1113*; *see § 474C.17[3]*].

[2] Filing

☐ File petition.

☐ File notice of motion with petition or within applicable time period [*Code Civ. Proc. §§ 1088, 1089.5*; *see § 474C.17[2]*].

☐ File memorandum with notice of motion [Cal. Rules of Ct., Rule 3.113; *see § 474C.17[3]*].

[3] Service

☐ Serve copy of notice and petition on respondent and real party in interest [*see Code Civ. Proc. § 1088, 1107, 1109*; *§ 474C.17[4]*].

☐ Serve memorandum with notice of motion [Cal. Rules of Ct., Rule 3.113; *see § 474C.17[3]*].

☐ Proof of service.

☐ File with petition, or

☐ File before any hearing or other action by the court [*Code Civ. Proc. § 1088.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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41A-474C California Forms of Pleading and Practice--Annotated § 474C.82

§ 474C.82 Petition for Writ of Mandate in Court of Appeal or Supreme Court

- ☐ Prepare petition for writ of mandate [*Code Civ. Proc. § 1094.5*; for a form, *see § 474C.92*].
  - ☐ Verify petition [*Code Civ. Proc. § 1086*; *see § 474C.92[3]*].
  - ☐ Petition must have a red cover [*Cal. Rules of Ct., Rule 8.40*; *see Cal. Rules of Ct., Rule 8.490*; *§ 474C.14[4]*].
- ☐ Prepare memorandum (mandatory) [*Cal. Rules of Ct., Rule 8.490*; *see § 474C.14[2]*].
  - ☐ File and serve with petition [*Cal. Rules of Ct., Rule 8.490*; *see § 474C.14[2]*].
- ☐ Filing.
  - ☐ Supreme Court.
    - ☐ File original and 13 copies of petition [*Cal. Rules of Ct., Rule 8.40*; *see § 474C.14[5*]; *see also § 474C.14[3]*].
  - ☐ Court of Appeal.
    - ☐ File original and four copies of petition [*Cal. Rules of Ct., Rule 8.40*; *see § 474C.14[5*]; *see also § 474C.14[3]*].

☐ Service.

☐ Serve petition and memorandum of points and authorities on respondent and real party in interest.

☐ Serve by mail or personal service [*Code Civ. Proc. §§ 1107, 1109*; *see § 474C.14[6]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsRequirementsCivil ProceduresPartiesReal Parties in InterestGeneral OverviewCivil ProceduresRemediesWritsCommon Law WritsMandamus

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.83

§ 474C.83 Petition for Writ of Ordinary Mandate

- ☐ Prepare petition [*see § 474C.41*; for a form, *see § 474C.109*].
  - ☐ Verify petition [*see § 474C.109[3]*].
- ☐ Prepare memorandum [*see § 474C.41[5]*].
- ☐ Serve petition and memorandum on respondent and real party in interest [*see § 474C.41[7]*].
- ☐ File petition with the court [*see § 474C.41[6]*].
- ☐ For more detailed procedural checklist for use in ordinary mandate proceedings, see Ch. 358, *Mandate and Prohibition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesReal Parties in InterestGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamus

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.84

§ 474C.84 Response to Petition for Writ of Mandate (Return)

[1] Demurrer

☐ Prepare demurrer [*see Code Civ. Proc. § 430.10* (statutory grounds for demurrer); *§ 474C.19[2*]; for a form, *see § 474C.101*].

☐ General demurrer [*Code Civ. Proc. § 430.10(e)*; *see § 474C.19[2]*].

☐ Special demurrer [*Code Civ. Proc. § 430.10(a)-(d), (f)-(i)*; *see § 474C.19[2]*].

☐ Prepare memorandum of points and authorities [*see § 474C.19[4]*].

☐ Prepare notice of hearing [*see § 474C.19[2*]; for a form, *see § 474C.102*].

☐ Serve and file with demurrer [*see § 474C.19[2]*].

☐ Prepare answer (optional) [*see § 474C.19[3*]; for a form, *see § 474C.103*].

☐ Verify answer [*Code Civ. Proc. § 1089*; *Cal. Rules of Ct., Rule 8.490*; *see § 474C.19[3]*].

☐ Serve with demurrer (optional) [*§ 474C.19[3]*].

☐ Serve and file within applicable time limits [*Code Civ. Proc. §§ 1089, 1089.5*; *Cal. Rules of Ct.,*

Rule 8.490; *see Gov. Code § 11523*; *§ 474C.19[5]*].

[2] Answer

☐ Prepare answer [*see § 474C.19[3*]; for a form, *see § 474C.103*].

☐ Verify answer [*Code Civ. Proc. § 1089*; *Cal. Rules of Ct., Rule 8.490*; *see § 474C.19[3]*].

☐ Serve with the demurrer (optional) [*see § 474C.19[3*]; for a form, *see § 474C.103*].

☐ Serve and file within applicable time limits [*Code Civ. Proc. §§ 1089, 1089.5*; *Cal. Rules of Ct., Rule 8.490*; *see Gov. Code § 11523*; *§ 474C.19[5]*].

[3] Memorandum

☐ Within five days, respondent may serve on petitioner, and file with court, memorandum in opposition to writ [*Code Civ. Proc. § 1107*; *see §§ 474C.10[2], 474C.19[4]*].

☐ File alone, or

☐ File with demurrer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsAnswersCivil ProceduresRemediesWritsCommon Law WritsMandamus

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.85

§ 474C.85 Replication

- ☐ Prepare replication [*see § 474C.21*; for a form, *see § 474C.104*].
  - ☐ Verify form [*see Code Civ. Proc. §§ 1086, 1089*; *§ 474C.21[2]*].
- ☐ Filing and service.
  - ☐ Serve on answering party [*see § 474C.21[3]*].
  - ☐ File with proof of service before return date in alternative writ [*see §§ 474C.21[3], 474C.104[5]*], or
  - ☐ File with proof of service before date of hearing for peremptory writ [*see §§ 474C.21[3], 474C.104[5]*].
- ☐ Continuance to file replication.
  - ☐ Prepare if necessary [*see § 474C.21[3]*].

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.86

§ 474C.86 Judgment

[1] Prevailing Party

☐ Prepare judgment [*see § 474C.25[4*]; for forms, *see §§ 474C.105 -474C.106*; *see also § 474C.107* (judgment denying relief)].

☐ Submit judgment to court for signature and entry [*see § 474C.25[4]*].

☐ Prepare and mail copy of notice of entry of judgment to all parties [*see § 474C.25[4]*].

☐ File original notice of entry of judgment and proof of service by mail with court [*Code Civ. Proc. § 664.5(a)*; *see § 474C.25[4]*].

☐ Recover costs [*see § 474C.25[6]*].

[2] Peremptory Writ of Mandate

☐ Prepare peremptory writ [*see § 474C.26[1*]; for a form, *see § 474C.108*].

☐ Present to court along with judgment [*see § 474C.26[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamus

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.87

§ 474C.87 Appeal

[1] Court of Appeal Review

☐ Notice of appeal.

☐ Prepare notice of appeal [*see § 474C.51[1]*].

☐ File with clerk of the superior court within applicable time limits [*Cal. Rules of Ct., Rule 8.104*; *see Cal. Rules of Ct., Rule 8.108*; *§ 474C.51[1]*].

☐ Transcript and record.

☐ Prepare notice to prepare reporter's transcript of oral proceedings [*see § 474C.51[2]*].

☐ Serve on respondent within 10 days after filing notice of appeal [*Cal. Rules of Ct., Rule 8.130*; *see § 474C.51[2]*].

☐ File with clerk of superior court within 10 days after filing notice of appeal [*Cal. Rules of Ct., Rule 8.130*; *see § 474C.51[2]*].

☐ Serve on clerk of the Court of Appeal [*Cal. Rules of Ct., Rule 8.124*].

☐ Prepare notice specifying items to be included in record or copied in clerk's transcript [*see § 474C.51[2]*].

☐ Serve on respondent within 10 days after filing notice of appeal [*Cal. Rules of Ct., Rule 8.120*; *see Cal. Rules of Ct., Rules 8.120, 8.134, 8.137*; *§ 474C.51[2]*].

☐ File with clerk of superior court within 10 days after filing notice of appeal [*Cal. Rules of Ct., Rules 8.120, 8.134, 8.137*; *see § 474C.51[2]*].

☐ Notice of election to compile appendix in lieu of clerk's transcript [*see § 474C.51[2]*].

☐ File with clerk of superior court within 10 days after filing notice of appeal [*see Cal. Rules of Ct., Rule 8.124*; *see § 474C.51[2]*].

☐ Serve on clerk of the Court of Appeal [*Cal. Rules of Ct., Rule 8.124*].

☐ For more detailed procedural checklists for use in appeal to court of appeal, see Ch. 40, *Overview of Civil Appeals* , et seq.

[2] Supreme Court Review

☐ Two methods.

☐ Seek transfer of cause from Court of Appeal to Supreme Court before final decision [*see § 474C.52*].

☐ Seek review after final decision [*see § 474C.52*].

☐ For more detailed procedural checklists for use in review by Supreme Court, see Ch. 53, *Supreme Court Review* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsCase TransfersCivil ProcedureAppealsRecords on AppealCivil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsReviewabilityTime LimitationsGovernmentsCourtsClerks of Court

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41A-474C California Forms of Pleading and Practice--Annotated §§ 474C.88-474C.89

[Reserved]

§§ 474C.88[Reserved]

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PART V. FORMS

41A-474C California Forms of Pleading and Practice--Annotated § 474C.90

§ 474C.90 Petition for Administrative Writ of Mandate to Review Administrative Decision

[1] FORM Petition for Administrative Writ of Mandate to Review Administrative Decision

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION FOR WRIT OF MANDATE
_____ [*name*],	)	Date: _____
Respondents.	)	Time: _____
	)	Location: _____
	)	

_____

Petitioner respectfully represents:

1. _____[*If petitioner is not an individual, state petitioner's identity as corporation, partnership, or other entity*].

2. Respondent _____ [*identify, e.g.,* Medical Board of the State of California] is _____ [*status of respondent in state or local government, e.g.,* an administrative agency in the Department of Consumer Affairs, which is a department in the Agriculture and Services Agency of the state government].

3. _____ [*Authority of respondent to exercise discretion in determining relevant facts, and requirement that hearing be held, e.g.,* Under *Sections 2220 et seq. of the Business and Professions Code*, the Board has discretion to determine whether a ground exists for suspension or revocation of a physician's and surgeon's certificate, and particularly whether _____ (*specify facts constituting ground for action*). Pursuant to *Section 2230*

of the Business and Professions Code and *Sections 11500-11528 of the Government Code*, the Board is required to hold a hearing and take evidence in its proceedings for the determination of those facts].

4. _____ [*Facts regarding holding of hearing, e.g.,* On _____ (*date*), at _____ (*specify meeting place*) a hearing was held to receive evidence on the issue whether a ground exists for suspension or revocation of the physician's and surgeon's certificate which petitioner then held and which was then in full force and effect. Petitioner attended the hearing. On _____ (*date*), petitioner received the Board's decision and order _____ (*effect of decision and order, e.g.,* revoking petitioner's physician's and surgeon's certificate) on the ground that _____ (*specify, if possible*). _____ (*State fact of application for reconsideration, if appropriate, and adverse result*)].

5. _____ [*Reasons for invalidity of decision e.g.,* The Board's decision and order are invalid for the following reasons:

a. The hearing officer found that _____ (*state all findings*). The Board does not have authority to revoke a physician's and surgeon's certificate on any of those grounds.

b. At the hearing, petitioner tried to offer evidence to show that _____ (*facts provable by evidence in question*). This evidence was in the form of _____ (*specify, e.g.,* the testimony of _____ (*name*)). The hearing officer ruled that this evidence was not admissible, and it was not received. The evidence was admissible and should have been received.

c. The hearing officer found that _____ (*state specific findings*). The evidence received at the hearing does not support these findings, as petitioner alleges more particularly hereinafter].

6. _____ [A verbatim transcript of the record of the hearing, containing the evidence received, is attached hereto as Exhibit A and made a part hereof *or* The substance of the evidence received at the hearing is as follows: _____ (*state substance of evidence*)]. [*If petitioner claims that evidence does not support findings, add:* The evidence does not support the findings for the following reasons: _____ (*specify*).] [*If petitioner claims that incompetent evidence was received, add:* Petitioner objected at the hearing to the following evidence, on the grounds indicated, but in each instance petitioner's objection was not sustained, and the evidence was received: _____ (*identify evidence, e.g.,* the testimony of _____ (*name*) which was offered to show _____ (*specify and state ground for objection, e.g.,* which was objected to on the ground that _____ (*specify*)).]

[7. *Add, if appropriate:* Petitioner has the following relevant evidence which was not presented at the hearing: _____ (*describe completely*). This evidence could not be produced at the hearing because _____ (*specify why, in the exercise of reasonable diligence, petitioner could not produce evidence and why, if appropriate, evidence could not be produced on reconsideration.*) This evidence tends to show that _____ (*state what evidence will prove*).]

[8. *If case involves denial of application for license, permit, or the like, add:* Petitioner meets all of the qualifications for _____ (*specify, e.g.,* a physician's and surgeon's certificate) established by law. Petitioner duly applied on _____ (*date*) for a _____ (*specify, e.g.,* physician's and surgeon's certificate), in compliance with all statutes and administrative regulations governing the application.]

[*EITHER, if attorney's fees are claimed under Gov. Code § 800*]

[9. As an incident of bringing and maintaining this proceeding, petitioner has become and is obligated personally to pay

to his/her counsel, _____ (*name*), attorney's fees _____ (exceeding $7,500 *or* in the sum of $_____).]

[*OR, if litigation expenses are claimed under Code Civ. Proc. § 1028.5*]

[9. As an incident of bringing and maintaining this proceeding, petitioner incurred the following litigation expenses in addition to other costs: _____ (*list reasonable expenses, e.g.,*

a. Attorney's fees in the sum of $_____;

b. Costs of the administrative proceedings in the amount of $_____;

c. Witness fees in the amount of $_____).]

WHEREFORE, petitioner prays judgment as follows:

[1. *If alternative writ procedure is used*: For an alternative writ of mandate directing respondent to set aside its order of _____[*date*], _____ (*specify effect of order, e.g.*, revoking petitioner's physician's and surgeon's certificate), (*if application for license, permit, or the like was denied, add*: and to reconsider whether petitioner is entitled to receive a _____ (*specify, e.g.*, physician's and surgeon's certificate) as applied for,) (*if license, permit, or the like was suspended, revoked, or otherwise restricted, add*: and to reinstate petitioner's _____ (*specify, e.g.*, physician's and surgeon's certificate) as it existed before that order was issued,) or in the alternative to show cause why a peremptory writ of mandate to the same effect should not be issued;]

[2. *If petitioner will seek stay of operation of administrative order or decision pending judgment, add*: For an order restraining respondent from giving effect to its order of _____[*date*], _____ (*specify effect of order*), until further order of the court and to show cause why operation of that order should not be stayed pending the judgment in this proceeding;]

3. For a peremptory writ of mandate _____ [to the same effect as the alternative writ except for the order to show cause *or set out terms at length as in Paragraph 1 of this prayer, omitting words relating to order to show cause*;

[4. For reasonable attorney's fees, in addition to any other relief granted or other costs awarded;]

5. For costs of suit herein incurred [and for reasonable litigation expenses]; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition

and know the contents thereof. The same is true of my own knowledge except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in *[1], above*, is a petition for a writ of mandate for use by the person aggrieved to obtain judicial review of an administrative decision (and resulting order, if any) that the petitioner's license application be denied or that a license be suspended or revoked, or that a penalty or probationary conditions be imposed [*see Code Civ. Proc. § 1094.5*].

[3] Verification

A verification is required [*Code Civ. Proc. § 1086*]. The requirements for a verification are set out in *Code Civ. Proc. § 446* [*see Code Civ. Proc. § 1109*; *see also Code Civ. Proc. § 2015.5* (form of declaration under penalty of perjury)]. If the petition was inadvertently not verified, the court may allow an amendment for the purpose of supplying a verification [*Franchise Tax Bd. v. Municipal Court (1975) 45 Cal. App. 3d 377, 384, 119 Cal. Rptr. 552]* .

[4] Caption and Introduction

The petition will be filed in the superior court. The caption will, therefore, reflect that fact and identify the county where the petition is filed [*see Code Civ. Proc. §§ 422.30* (caption of pleading), *1109*]. In setting out the title of the proceeding [*see Code Civ. Proc. §§ 422.30* (caption of pleading), *1109*], counsel should describe the respondent as an administrative agency without using any individual's name. Generally, the petition should name as respondent the decision-making authority of the agency [*Elliott v. Contractors' State License Board. (1990) 224 Cal. App. 3d 1048, 1056, 274 Cal. Rptr. 286]* , particularly since the petitioner may otherwise run the risk of denial of the writ for failure to state a cause of action because the appropriate agency decision-making authority is not named as a party [*see Elliott v. Contractors' State License Bd. (1990) 224 Cal. App. 3d 1048, 1050, 1056* (declining to consider whether petitioner's failure to name appropriate decision-making authority would have been sufficient reason, standing alone, to deny writ)].

The parties are customarily called "petitioner" and "respondent" because the initial pleading is customarily called a "petition" [*see Code Civ. Proc. § 1086*]. The parties may be called "plaintiff" and "defendant" [*Code Civ. Proc. § 1063*], but this is seldom done. If there are two or more petitioners or respondents, all must be identified in the caption of the petition [*Code Civ. Proc. §§ 422.40*, 1109].

The character of the proceeding, which must be briefly stated in the caption [*see Cal. Rules of Ct., Rule 2.111(6)*], is sufficiently described by the phrase "PETITION FOR WRIT OF MANDATE [*Code Civ. Proc. § 1094.5*]." Generally, there is no requirement that the petition expressly refer to *Code Civ. Proc. § 1094.5*. Whether or not a local rule requires it, inclusion of a citation to *Code Civ. Proc. § 1094.5* in the caption is advisable because it will avoid confusion [*see Grimes v. Hoschler (1974) 12 Cal. 3d 305, 308 n.3, 115 Cal. Rptr. 625, 525 P.2d 65]* .

It is customary to begin the petition with an introductory phrase such as "Petitioner respectfully represents" or, more simply, "Petitioner alleges."

[5] Essential Allegations

The petition must state facts tending to show the following:

1. Discretion to determine certain relevant facts is vested in the agency whose decision is the subject of the proceeding (Paragraph 3) [*see Code Civ. Proc. § 1094.5(a)*].

2. By law a hearing is required to be held for the purpose of determining those facts (Paragraph 3) [*see Code Civ. Proc. § 1094.5(a)*].

3. Evidence is required to be taken at the hearing (Paragraph 3) [*see Code Civ. Proc. § 1094.5(a)*].

4. A final administrative decision was made as a result of that hearing and the determination of those facts (Paragraph 4) [*see Code Civ. Proc. § 1094.5(a)*].

5. The decision is invalid [*see Code Civ. Proc. § 1094.5(a)*] because of one or more of the following defects:

a. The agency proceeded without or in excess of authority (Paragraph 5) [*see Code Civ. Proc. § 1094.5(b)*].

b. The petitioner was denied a fair trial (Paragraph 5) [*see Code Civ. Proc. § 1094.5(b)*].

c. The agency abused its discretion (see the first fact above) in one of the following ways:

i. It did not proceed in the manner required by law (Paragraph 5) [*see Code Civ. Proc. § 1094.5(b)*].

ii. The decision is not supported by the findings resulting from the administrative hearing (Paragraph 5) [*see Code Civ. Proc. § 1094.5(b)*].

iii. The findings are not supported by the evidence (Paragraphs 5 and 6) [*see Code Civ. Proc. § 1094.5(b)*].

If it is contended that the findings are not supported by the evidence, the petition must allege the substance of the evidence or, if a record of the evidence is available, must be accompanied by a transcript of the evidence attached as an exhibit and incorporated by reference.

If there is relevant evidence which, in the exercise of reasonable diligence, the petitioner could not have produced at the hearing, the petition should allege the substance of that evidence and facts showing why it could not have been produced in the administrative hearing (Paragraph 7).

In addition to the foregoing, the petition must show the following:

6. The petitioner is beneficially interested in issuance of the writ--that is, he or she has standing to sue (Paragraph 4) [*see Code Civ. Proc. § 1086*].

7. The petitioner has exhausted administrative remedies [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 291-296, 109 P.2d 942]* .

8. The petitioner has no plain and speedy remedy in the ordinary course of law [*see Code Civ. Proc. § 1086*].

[6] Alleging Facts Subject to Judicial Notice

Ultimate facts which are provable by judicial notice [*see Evid. Code § 451* (mandatory judicial notice)], such as that the agency has discretion to determine certain facts, that a hearing is required by law, and that evidence is required to be taken, should be alleged. There is some authority in decisions of the Supreme Court for the proposition that such facts will be noticed whether or not they have been alleged [*see Loranger v. Nadeau (1932) 215 Cal. 362, 365, 10 P.2d 63* , *overruled on different point; Reich v. Purcell (1967) 67 Cal. 2d 551, 555, 63 Cal. Rptr. 31, 432 P.2d 727* ; *see also Stanton v. Dumke (1966) 64 Cal. 2d 199, 201-202, 49 Cal. Rptr. 380, 411 P.2d 108* (court as required when ruling on sufficiency of demurrer to consider facts subject to judicial notice, as though they are alleged in petition)]. However, judicial notice merely does away with the necessity for evidence as to the facts noticed [*Varcoe v. Lee (1919) 180 Cal. 338, 344, 181 P. 223]* . The better practice is to allege such facts.

[7] Identity of Petitioner

If the petitioner is not a natural person, the petition should allege the petitioner's identity as an existing legal entity entitled to sue (*i.e.,* to come into court) [*see Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6]* . This is sometimes referred to as the capacity to sue (Paragraph 1).

[8] Petitioner's Standing to Sue

A petition for writ of mandate will be granted only where it is necessary to protect a substantial right and only when it is shown that some substantial damage will be suffered by the petitioner if the petition is denied. The writ will not be issued except on the verified petition of a person beneficially interested [*see Code Civ. Proc. § 1086*]; it will not be issued where the petitioner fails to show that it will subserve or protect some right or interest of his or hers; it will not be issued where it is apparent that the petitioner has no direct interest in the act sought to be coerced and that no benefit can accrue to him or her from its performance. Therefore, it is necessary for the petitioner to allege facts showing that he or she has some right or interest in the act sought to be coerced. In other words, the petitioner must show in his or her petition that he or she has standing to sue. This is the nature of the requirement concerning beneficial interest [*see Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6* (distinguishing capacity and standing to sue)].

The requirement that the petitioner be beneficially interested in issuance of the writ has been discussed in *Ch. 474, § 474.13*. It is unlikely that a petition could fail to show the petitioner's beneficial interest, if his or her participation in the administrative proceeding is alleged. It is not necessary to use the words "beneficially interested" in the petition (Paragraph 4).

If necessary, the petition may be amended to show the petitioner's beneficial interest [*Temescal Water Co. v. Dept. of Public Works (1955) 44 Cal. 2d 90, 107, 280 P.2d 1]* .

Where the administrative decision complained of is to the effect that an application for a license was denied, it will be necessary for the petitioner to allege facts showing that he or she complied with all lawful requirements for issuance of the license and that issuance of it would be proper [*see Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 123-126, 109 Cal. Rptr. 799, 514 P.2d 111* ; *Mann v. Board of Medical Examiners (1947) 31 Cal. 2d 30, 40, 187 P.2d 1* ; *Hippen v. Ford (1900) 129 Cal. 315, 316, 61 P. 929* (petitioner seeking writ to compel issuance of liquor license as required to prove that all necessary steps to qualify were taken)]. An allegation that the petitioner qualified for the license and that he or she duly applied for it should be sufficient (Paragraph 8) [*see Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 123, 109 Cal. Rptr. 799, 514 P.2d 111* ; *Hippen v. Ford (1900) 129 Cal. 315, 316, 61 P. 929* (conceding sufficiency of allegation that petitioner duly complied with all laws, rules, ordinances, and regulations of municipality and performed all requirements necessary under law for issuance of liquor license); *Babcock v. Goodrich (1874) 47 Cal. 488, 512* (allegation in petition for writ of mandate that certain orders were duly given and made by board of supervisors as sufficient allegation of board's authority to make them)].

[9] Identity of Respondent

Insofar as a party seeks review of a final official administrative action, only the agency (and its members, if a multimember body) would be proper respondents in the mandate proceeding. Neither mere employees of the agency nor the state should be named as respondents; no relief is available against them [*State of California v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 255, 115 Cal. Rptr. 497, 524 P.2d 1281]* .

In several cases decided before it became the practice to review administrative decisions in a mandate proceeding, the rule was stated that a writ of mandate will not be issued against an office but must be directed to the person holding the office and, as a corollary rule, that the successor of an officer who dies, resigns, or is removed from office must be made a party to the proceeding if the proceeding is to be continued [*see George v. Beaty (1927) 85 Cal. App. 525, 532, 260 P. 386* ; *see also Ex parte Tinkum (1880) 54 Cal. 201, 203]* . The rules developed because historically the writ of mandate corrected a personal default by an officer consisting in his or her wrongful refusal to perform a legal duty. It was obviously unfair to pass along to a new office holder the consequences of his or her predecessor's default, such as a liability for paying costs or the possibility of being held in contempt. The use of a mandate proceeding for review of an administrative decision changes the circumstances that gave rise to those rules. If a mandate proceeding is used for that purpose, "[o]fficial and not personal action is the gravamen of the [petition]. Thus, it is the board [or other agency] as such, and not the individual members, that is the actual [respondent]" [*Sperry & Hutchinson Co. v. Cal. State Bd. of Pharmacy (1966) 241 Cal. App. 2d 229, 236, 50 Cal. Rptr. 489* (action for declaratory relief respecting regulation prohibiting pharmacists from giving trading stamps to purchasers of prescription drugs and for injunction; on demurrer by members of Board of Pharmacy, action dismissed as to them individually; judgment for plaintiff modified accordingly and affirmed)]. This reasoning extends to proceedings against officers (*e.g.,* the Director of Motor Vehicles) as well as those against multimember agencies. In practice a mandate proceeding for review of an administrative decision has been brought against an officer or agency sued by official title or name on many occasions, and the propriety of doing so has not been questioned.

[10] Evidentiary Hearing Required

The conditions precedent to maintaining a mandate proceeding for review of an administrative decision include a requirement in the law that a hearing be given and that evidence be taken at that hearing [*see Code Civ. Proc. § 1094.5(a)*]. In alleging the existence of the condition, it should be sufficient to state that for the purpose of determining certain facts which the respondent agency has discretion to determine, the agency is required by certain statutes to hold a hearing and receive evidence (Paragraph 3). It should be noted that the procedural requirements imposed by statute or decision are matters for judicial notice [*see Evid. Code § 451*].

[11] Making of Final Administrative Decision

Since the purpose of review under *Code Civ. Proc. § 1094.5* is to inquire into the validity of a final administrative decision [*see Code Civ. Proc. § 1094.5(a)*], the petition should contain a short narrative of events showing that a final decision was made (Paragraph 4). The essential facts in such a narrative are that a hearing was held, that the purpose of the hearing was to receive evidence relevant to the determination of certain facts, and that the petitioner both attended the hearing and did whatever else was necessary to exhaust his or her administrative remedies (such as seeking a reconsideration).

[12] Invalidity of Decision

The reasons why the decision is invalid may be stated in statutory terms, for the court's convenience in understanding the basis for the petitioner's complaint, but statutory language alone is not sufficient. Facts must be alleged (Paragraph 5) [*see, e.g., Ward v. County of Riverside (1969) 273 Cal. App. 2d 353, 358, 78 Cal. Rptr. 46]* .

Counsel preparing a petition should take care not to make the allegations of invalidity too cryptic. The possible defects in the administrative proceeding are somewhat confusingly described in *Code Civ. Proc. § 1094.5*, and there appears to be some overlap between several of them. If counsel is unsure whether a particular defect is, for example, a denial of a fair hearing or a failure to proceed in the manner required by law, the statutory language should not be used, and only the facts should be alleged.

Commonly alleged defects are the improper exclusion of evidence, the failure of the evidence received to support the findings, and the failure of the findings to support the order or decision. Other grounds for attack include the agency's incorrect interpretation of the law [*see Bodinson Mfg. Co. v. California Employment Comm'n (1941) 17 Cal. 2d 321, 325-326, 109 P.2d 935]* , the lack of credibility of the witnesses who testified at the administrative hearing [*see Dare v. Bd. of Medical Examiners (1943) 21 Cal. 2d 790, 799-800, 136 P.2d 304]* , the receipt of incompetent evidence over a timely and sufficient objection [*see Borror v. Department of Inv. (1971) 15 Cal. App. 3d 531, 545, 92 Cal. Rptr. 525]* , and the agency's consideration of evidence not received at the hearing [*see English v. City of Long Beach (1950) 35 Cal. 2d 155, 159, 217 P.2d 22]* .

[13] Abuse of Discretion

Abuse of discretion is almost always alleged, both because it is a vague charge and also because most petitioners attack the receipt of evidence, consideration of it, and decision making on the basis of findings. Abuse of discretion is established if evidence was not received in the manner required by law, or if the evidence does not support the findings, or if the findings do not support the order or decision [*Code Civ. Proc. § 1094.5(b)*].

In alleging an abuse of discretion, words expressing a legal conclusion to that effect should be avoided. Such words include: arbitrary, capricious, fraudulent, wrongful, and unlawful [*Faulkner v. California Toll Bridge Auth. (1953) 40 Cal. 2d 317, 329, 253 P.2d 659]* . These words do not describe facts, and only facts should be alleged [*see Code Civ. Proc. §§ 425.10, 1109*; *Boren v. State Personnel Board (1951) 37 Cal. 2d 634, 638, 234 P.2d 981]* .

[14] Evidence Not Supporting Findings

When it appears that an administrative decision is within the agency's authority and that in making the decision the agency conducted a hearing, heard the interested parties, and acted on substantial evidence, the court may not conclude that the agency abused its discretion unless a complete transcript of all the evidence on which the agency acted is attached to the petition, or, at least, the substance of all of the evidence which the agency received is alleged. The petition must also state particularly "the elements, aspects and principles wherein such evidence, considered in the light of the [petitioner's] contention, supports the conclusion that the [agency] abused the discretion vested in it. By no other means, since the averment of naked conclusions adds nothing, can the pleading show that the agency in a case such as this did in fact abuse its discretion" [*Faulkner v. California Toll Bridge Auth. (1953) 40 Cal. 2d 317, 330-331, 253 P.2d 659]* .

The party intending to use a part of the administrative record in a case brought under *Code Civ. Proc. § 1094.5* must lodge that part of the record at least five days before the hearing [*Cal. Rules of Ct., Rule 3.1140*].

In the absence of the evidence, an abuse of discretion cannot be shown by mere allegations of what the agency did or did not consider. If the petitioner is to prevail, he or she must attack what the agency actually did on the basis of the evidence before it. For example, only in the light of the evidence before the agency when it acted could the agency's refusal to hear further evidence be shown to be erroneous, or could the inference be drawn that the agency abused its discretion in not doing something other than what it did [*Faulkner v. California Toll Bridge Auth. (1953) 40 Cal. 2d 317, 331, 253 P.2d 659]* .

See Paragraph 6 for an example of the method of pleading a failure of the evidence to support the findings.

[15] Findings Not Supporting Decision

When the decision was not supported by the findings, that will be evident if the findings are recited. Every finding must independently fail to support the decision (Paragraph 5). A failure to negate all legitimate grounds for the administrative action would probably be a ground for demurrer, at least on this one point [*see Peck v. Board of Supervisors (1891) 90 Cal. 384, 385, 27 P. 301* (petition for writ to compel supervisors to repair county road; demurrer sustained when petition did not allege facts showing county did not abandon road); *see also W.R. Grace & Co. v. Cal. Emp. Com. (1944) 24 Cal. 2d 720, 731, 151 P.2d 215* (fact that agency based decision on erroneous ground as not warranting issuance of writ if there was other legal justification for decision; dictum reporting rule)].

[16] Exhaustion of Administrative Remedies

A court of appeal has held that a petition for writ of mandate to review an administrative decision sufficiently shows the exhaustion of administrative remedies if it alleges that petitioner has exhausted his administrative remedies and has no appeal nor any plain, speedy, or adequate remedy at law [*Wong v. Regents of University of California (1971) 15 Cal. App. 3d 823, 827, 829, 93 Cal. Rptr. 502]* . This seems an extreme view, since the petition in the case at bench did not otherwise disclose that available administrative remedies had been exhausted. The statement that petitioner has exhausted his administrative remedies is unquestionably a legal conclusion, and the pleading of legal conclusions cannot be recommended as a substitute for stating the facts. The better practice is to state as facts what actually was done, such as attendance at the hearing and an application for reconsideration with an adverse result (Paragraph 4).

[17] Lack of Other Remedy

The requirement that no other plain and speedy remedy be available to the petitioner in the ordinary course of law [*see Code Civ. Proc. § 1086*] has been discussed in *Ch. 474, Availability of Judicial Review of Agency Decisions, § 474.13[2]*.

The lack of another plain and speedy remedy should appear from the allegations of the petition taken as a whole [*see Ross v. O'Brien (1934) 1 Cal. App. 2d 496, 501, 36 P.2d 1108]* , and it should not be necessary to try to set out facts in a separate allegation tending to show that the condition exists. Attorneys have been accustomed to allege, in so many words, that petitioner has no plain, speedy, and adequate remedy in the ordinary course of law [*see, e.g., Wong v. Regents of University of California (1971) 15 Cal. App. 3d 823, 829, 93 Cal. Rptr. 502]* , but this is unnecessary. If the petition states facts on which the writ may be issued [*see Code Civ. Proc. §§ 1085, 1094.5*], the court should have no difficulty in determining that no plain and speedy remedy exists in the ordinary course of law [*see Rescue Army v. Municipal Court (1946) 28 Cal. 2d 460, 466-467, 171 P.2d 8]* .

[18] Attorneys' Fees

Attorney's fees might be recoverable, pursuant to a statutory provision [*see Gov. Code § 800*]. For a discussion of attorneys' fees, see *§ 474C.13[6]*. In cases involving a small business or licensee (defined in *Code Civ. Proc. § 1028.5(c), (d)*, respectively), attorney fees might be recoverable along with other reasonable litigation expenses under *Code Civ. Proc. § 1028.5*, in which case *Gov. Code § 800* will not apply [*see Code Civ. Proc. § 1028.5(g)*]. For a discussion, see *§ 474C.13[6]*.

[19] Prayer for Relief

The prayer must necessarily be framed in terms of the relief which the court may give in the light of what the petitioner will prove. For a discussion of the contents of the judgment, when it is in favor of the petitioner, see *§ 474C.25*. An alternative writ will be requested unless the notice procedure is used. The petitioner should specify what terms he or she desires in the alternative writ.

If a stay of operation of the administrative decision will be sought, the prayer should include a request for a temporary stay order and an order to show cause why the stay should not be extended until the judicial proceeding has been concluded.

A peremptory writ should be requested, of course. If the notice procedure is used instead of the alternative writ procedure, the desired terms of the peremptory writ should be recited. If an alternative writ is sought, however, it is sufficient to refer to the terms of the alternative writ (except for the language respecting the order to show cause).

Attorney's fees and reasonable litigation expenses should be requested if they can properly be sought, and a request for costs should be included.

A verification is required [*Code Civ. Proc. § 1086*]. The requirements for a verification are set out in *Code Civ. Proc. § 446* [*see Code Civ. Proc. § 1109*; *see also Code Civ. Proc. § 2015.5* (form of declaration under penalty of perjury)]. If the petition was inadvertently not verified, the court may allow an amendment for the purpose of supplying a verification [*Franchise Tax Bd. v. Municipal Court (1975) 45 Cal. App. 3d 377, 384, 119 Cal. Rptr. 552]* .

[20] Service

When a petition for a writ of mandate is filed, it must be accompanied by proof of service of a copy of the petition on the respondent and the real party in interest named in the petition. The petition is served according to the provisions of *Code Civ. Proc. §§ 1010-1020* governing the service of papers generally. However, if a petition is sought pursuant to the provisions of *Code Civ. Proc. § 1088.5* (filed in a trial court and no alternative writ sought), proof of service need not be filed with the petition, and the action may be filed and served in the same manner as an ordinary action. When the real party in respondent's interest is a board or commission, the service must be made on the presiding officer, or on the secretary, or on a majority of the members, of the board or commission [*Code Civ. Proc. § 1107*].

The court in which the petition is filed, in its discretion and for good cause, may grant the petition ex parte without notice or service [*Code Civ. Proc. § 1107*].

[21] Cross References

For other forms for use in mandate proceedings, including writs of mandate, alternative, and peremptory writs, see *§ 474C.91* et seq.

For forms of allegations of petitioner's (or plaintiff's) capacity to sue, see Ch.20, *Allegations Commonly Used*

For alternative forms of captions and introductions, and discussion of the subject, see Ch. 108, *Captions and Introductions*

For discussion and forms of verification, see Ch. 572, *Verification*

For memoranda of points of points and authorities supporting and opposing petitions for writs of mandate generally, see s California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender)

For memoranda of points and authorities supporting and opposing petitions for administrative mandate, see s California Points and Authorities, Ch. 195, *Public Administrative Law* (Matthew Bender)

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PART V. FORMS

41A-474C California Forms of Pleading and Practice--Annotated § 474C.91

§ 474C.91 Petition for Writ of Mandate in Superior Court to Review Administrative Decision (Alternative Form) [Code Civ. Proc. § 1094.5]

[1] FORM Petition for Writ of Mandate in Superior Court to Review Administrative Decision (Alternative Form) [Code Civ. Proc. § 1094.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION FOR WRIT OF MANDATE
_____ [*name*],	)	Date: _____
Respondents.	)	Time: _____
[_____ (*name*),	)	Location: _____
Real Party in Interest.]	)	
	)	
	)	

_____

Petitioner petitions this court for a writ of mandate under *Code of Civil Procedure Section 1094.5* and alleges:

1. At all times mentioned in this petition, petitioner has been and now is _____ [*describe petitioner's legal capacity to sue, if not a natural person, and any license, certificate, or permit held, e.g.:* a corporation duly organized and existing under the laws of the State of California and the holder of a collection agency license duly issued by respondent].

2. At all times mentioned in this petition, respondent has been and now is _____ [*specify nature of agency, e.g.:* an administrative agency within the jurisdiction of the Department of Consumers Affairs of the State of California]. [*If respondent is a board or commission, specify composition, e.g.:* The chairperson of respondent is

_____ (*name*), the secretary is _____ (*name*), and it is composed of _____ (*number*) members.]

3. Under _____[*specify statutory source of agency's authority to exercise discretion in determining relevant facts*], respondent has discretion to determine whether there are grounds to suspend or revoke a _____ [*specify license, certificate, or permit, e.g.:* collection agency license]. [*If appropriate, further specify respondent's discretion, e.g., by stating factual determinations required by statute*.]

4. Under _____[*specify statutes that require respondent to hold hearing*], respondent is required to hold a hearing and to take evidence to enable it to exercise its discretion.

5. _____ [*Provide chronological description of administrative action, e.g.:* On _____ (*date*), a statement of issues was filed with respondent to institute a proceeding to determine whether grounds exist for the suspension of petitioner's _____ (*specify license, certificate, or permit, e.g.:* collection agency license). The statement of issues was served on petitioner on _____ (*date*), and on _____ (*date*), petitioner filed a notice of defense with respondent. On _____ (*date*), a hearing was held at _____ (*location*) before an administrative law judge, who rendered a proposed decision that was adopted by respondent as its own, effective _____ (*date*). A copy of that decision, which is now final, is attached as Exhibit A.]

6. Respondent's decision is invalid for the following reasons: [*Insert one or more of the following allegations, as appropriate to the facts of the case:*]

a. Respondent acted _____ [without *or* in excess of its] jurisdiction, as follows: _____ [*specify facts*].

b. Petitioner did not receive a fair trial before respondent, as follows: _____ [*specify facts*].

c. Respondent committed a prejudicial abuse of discretion by failing to proceed in the manner required by law, as follows: _____ [*specify facts showing failure to proceed in manner required by law*].

d. Respondent committed a prejudicial abuse of discretion, in that the decision is not supported by the findings, as follows: _____[*specify facts showing that decision is not supported by findings*].

e. Respondent committed a prejudicial abuse of discretion, in that the findings are not supported by the evidence. The administrative law judge found that _____[*state particular findings not supported by evidence*].

[*If transcript of evidence is attached to petition, insert following:*]

A verbatim transcript of the record of the hearing, containing the evidence received, is attached as Exhibit _____ and made a part of this petition.

[*Or, if substance of evidence is included in petition, insert following:*]

The substance of the evidence received at the hearing is as follows: _____[*state substance of evidence*].

[*Continue as follows:*]

The evidence does not support the findings, as follows: _____[*specify*].

f. Evidence was improperly received, over petitioner's objection, at the hearing, as follows: _____ [*specify evidence received and grounds upon which objection(s) made*].

g. At the hearing, petitioner offered evidence that _____ [*specify*]. The administrative law judge ruled this evidence inadmissible. The evidence was admissible and should have been received, as follows: _____ [*specify reasons*].

h. Petitioner has the following evidence that was not presented at the hearing: _____ [*specify*]. Petitioner was unable, in the exercise of reasonable diligence, to produce this evidence at the hearing because _____ [*specify reasons*]. This evidence tends to show that _____ [*specify*].

7. Petitioner does not have a plain, speedy, and adequate remedy in the ordinary course of law.

[*If stay of agency decision is sought, insert following:*]

8. If respondent's decision is not stayed pending the judgment of this court, petitioner will be irreparably harmed, in that _____[*specify facts showing irreparable harm*].

[*If petitioner seeks attorney's fees under Gov. Code § 800, include the following:*]

9. As an incident of bringing and maintaining this proceeding, petitioner has become personally obligated to pay to _____[*name*], _____ [his/her/its] counsel, attorney's fees _____ [in the amount of $_____ *or* in excess of $7,500] computed at $100 per hour.

[*If petitioner seeks litigation expenses under Code Civ. Proc. § 1028.5, include the following:*]

10. Petitioner is a _____ ["small business" as defined in *Code Civ. Proc. § 1028.5(c) or* "licensee" as defined in *Code Civ. Proc. § 1028.5(d)*]. As an incident of bringing and maintaining this proceeding, petitioner has incurred the following litigation expenses in addition to other costs: [*list expenses, e.g.:*]

a. Court costs in the amount of $_____.

b. Witness fees in the amount of $_____.

c. Expenses of the administrative proceedings in the amount of $_____.

d. Attorney's fees in the amount of $_____.

WHEREFORE, petitioner prays the court for judgment as follows:

1. For an alternative writ of mandate directing respondent to set aside its decision dated _____, _____ [*describe effect of order, e.g.:* suspending petitioner's _____ (*specify license, certificate, or permit, e.g.:* collection agency license)], or to show cause why a peremptory writ of mandate to the same

effect should not be issued;

[*If petitioner seeks stay of agency decision, include the following:*]

2. For an order restraining respondent from giving effect to its decision dated _____, _____ [*describe effect of order, e.g.:* suspending petitioner's _____ (*specify license, certificate, or permit, e.g.:* collection agency license)] until further order of the court, and to show cause why operation of that decision should not be stayed pending the court's judgment in this proceeding;

3. For a peremptory writ of mandate directing respondent to set aside its decision dated _____, _____ [*describe effect of order, e.g.:* suspending petitioner's _____ (*specify license, certificate, or permit, e.g.:* collection agency license)].

[*If petitioner seeks attorney's fees or litigation expenses, include the following:*]

4. For reasonable _____ [attorney's fees *or* litigation expenses], in addition to any other relief granted or costs awarded;

5. For all costs of suit incurred in this proceeding; and

6. For such other and further relief as the court deems proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know its contents. I declare under penalty of perjury [*if executed outside California, add:* under the laws of the State of California] that the same is true and correct to my own knowledge.

Executed on _____[*date*], at _____[*place*].

_____ [*signature*]
Petitioner

[2] Use of Form

The form in *[1], above*, may be used to petition a superior court for judicial review of an administrative decision. This form is an alternative to the *form in § 474C.90*. It is a generic form readily adaptable to a wide variety of circumstances, whereas the § 474C.90 form is more specific. See *§ 474C.13* for discussion of the requirements for this form.

[3] Verification

A verification is required [*Code Civ. Proc. § 1086*]. The requirements for a verification are set out in *Code Civ. Proc. §*

446 [*see Code Civ. Proc. § 1109*]. If the petition was inadvertently not verified, the court may allow an amendment for the purpose of supplying a verification [*Franchise Tax Bd. v. Municipal Court (1975) 45 Cal. App. 3d 377, 384, 119 Cal. Rptr. 552]* .

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.92

§ 474C.92 Petition for Writ of Mandate in Court of Appeal or Supreme Court

[1] FORM Petition for Writ of Mandate in Court of Appeal or Supreme Court

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

[*OR*]

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]
COUNTY OF _____

_____ [*name*]	)	
Petitioner,	)	
vs.	)	
_____ [*name*],	)	NO. _____
Respondent.	)	PETITION FOR WRIT OF MANDATE
[_____, (*name*)	)	
Real Party in Interest.]	)	
	)	
	)	

_____

Petitioner petitions this court for a writ of mandate under *Code of Civil Procedure Section 1094.5* and alleges:

[*Set forth essential allegations for issuance of writ as set forth in § 474C.91 and continue as follows:*]

1. This petition is made to this Court in the first instance, rather than to the [superior court or the Superior Court of the State of California for the County of _____], for the following reasons: _____[*specify circumstances that render it necessary and proper that writ issue from the appellate court*].

2. The issues presented in this petition are of great public importance and require prompt resolution, as follows: _____[*specify reasons*].

[*Include prayer; see § 474C.91* .]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*name*]

[*For verification, see § 474C.91*]

[2] Use of Form

The form in *[1], above*, should be used when the petition for writ of mandate will be filed in the Court of Appeal, or the California Supreme court. See *§ 474C.14* for discussion of when it is appropriate to file the petition in these courts.

[3] Verification

A verification is required [*Code Civ. Proc. § 1086*]. The requirements for a verification are set out in *Code Civ. Proc. § 446* [*see Code Civ. Proc. § 1109*; *see also Code Civ. Proc. § 2015.5* (form of declaration under penalty of perjury)]. If the petition was inadvertently not verified, the court may allow an amendment for the purpose of supplying a verification [*Franchise Tax Bd. v. Municipal Court (1975) 45 Cal. App. 3d 377, 384, 119 Cal. Rptr. 552]* .

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.93

§ 474C.93 Alternative Writ of Mandate in Superior Court to Review Administrative Decision [Code Civ. Proc. § 1087]

[1] FORM Alternative Writ of Mandate in Superior Court to Review Administrative Decision [Code Civ. Proc. § 1087]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	ALTERNATIVE WRIT OF MANDATE
_____ [*name*],	)	Date: _____
Respondents.	)	Time: _____
[_____ (*name*),	)	Location: _____
Real Party in Interest.]	)	
	)	
	)	

_____

To _____[*respondent*]:

Good cause appearing, you are commanded, immediately after receipt of this writ, to set aside your decision made _____[*date*], in the matter entitled _____[*title of administrative proceeding*]; or, in the alternative, to appear on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in the courtroom of [_____ (Department *or* Division) _____ of] the above-entitled court, located at _____[*name of building and street address*], in _____[*city*], California, and then and there to show cause why you have not done so.
Dated: _____.

_____ [*signature*],
Clerk,
By _____ [*signature*],
Deputy

[2] Use of Form

The form in *[1], above*, is an alternative writ for use by the petitioner in a mandate proceeding for review of an administrative decision. The form does not include an order for issuance of the writ, and should be used in conjuction with the form of order *set forth in § 474C.95* when local court rules require that the order be be separate. See *§ 474C.15* for discussion of requirements for this form.

[3] Signature on Writ

The alternative writ of mandate is a judicial order [*Code Civ. Proc. § 17*; *Painter v. Berglund (1939) 31 Cal. App. 2d 63, 70, 87 P.2d 360* ; *see Code Civ. Proc. § 1087*] which logically may be signed by a judge. However, the practice appears to be that the court signs an order to the clerk commanding the clerk to issue the alternative writ; and the clerk signs the writ and affixes the court's seal. The order for issuance of the writ may be a simple one-line directive to the effect of "Let the writ issue." It may be appended to the petition or to the alternative writ (in which case it usually is in the form of "Let the foregoing writ issue"). Local practice and superior court rules should be consulted on this point.

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.94

§ 474C.94 Alternative Writ of Mandate (Order Included)--Alternative Form

[1] FORM Alternative Writ of Mandate (Order Included)--Alternative Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	ALTERNATIVE WRIT OF MANDATE AND OR-
_____ [*name*],	)	DER DIRECTING ISSUANCE
Respondents.	)	Date: _____
[_____ (*name*),	)	Time: _____
Real Party in Interest.]	)	Location: _____
	)	
	)	

_____

To _____[*name*], Respondent:

Good cause appearing from the verified petition of _____[*name*] for a writ of mandate on file herein,

YOU ARE COMMANDED, _____ [immediately on receipt of this writ *or* on or before _____ (*date*),] to _____ [*specify what respondent is ordered to do, e.g.:* set aside your decision dated _____, in the proceedings entitled _____]; or

IN THE ALTERNATIVE, to show cause before this court at the courtroom thereof at _____[*address*] on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, why you have not done so.

Dated: _____.

_____ [*name*]
Clerk,
By _____ [*signature*]
Deputy

ORDER

Let the foregoing writ issue.

IT IS FURTHER ORDERED that a copy of this alternative writ and a copy of the petition be served on respondent [*add, if there is real party in interest:* and real party in interest] on or before _____[*date*].
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The form in *[1], above*, is an alternative writ for use by a petitioner in administrative mandate proceedings. It includes an order for issuance of the writ, and therefore should not be used if local court rules require that the order be separate. See *§ 474C.15* for discussion of the requirements for this form.

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.95

§ 474C.95 Separate Order for Issuance of Alternative Writ of Mandate in Superior Court to Review Administrative Decision [Code Civ. Proc. § 1087]

[1] FORM Separate Order for Issuance of Alternative Writ of Mandate in Superior Court to Review Administrative Decision [Code Civ. Proc. § 1087]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	ORDER DIRECTING ISSUANCE OF ALTERN-
_____ [*name*],	)	ATIVE WRIT OF MANDATE
Respondents.	)	Date: _____
[_____ (*name*),	)	Time: _____
Real Party in Interest.]	)	Location: _____
	)	
	)	

_____

Good cause appearing from the verified petition of _____[*name*] for a writ of mandate on file herein,

IT IS HEREBY ORDERED that an alternative writ of mandate issue under the seal of this court directed to the above-named respondent commanding _____ [him/her/it], _____ [immediately on receipt of the writ or on or before _____ (*date*)], to _____ [*specify what respondent is ordered to do, e.g.:* set aside _____ (his/her/its) decision dated _____, in the proceedings entitled _____]; or

IN THE ALTERNATIVE, to show cause before this court at the courtroom thereof at _____[*address*]

on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, why _____ [he/she/it] has not done so.

IT IS FURTHER ORDERED that a copy of the alternative writ and a copy of the petition be served on respondent [*add, if there is real party in interest:* and real party in interest] on or before _____[*date*].
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

This form is a separate order for issuance of an alternative writ in administrative mandate proceedings. See *§ 474C.16* for discussion of requirements for this form, and when to use the form.

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.96

§ 474C.96 Notice of Motion for Peremptory Writ of Mandate in Superior Court to Review Administrative Decision

[1] FORM Notice of Motion for Peremptory Writ of Mandate in Superior Court to Review Administrative Decision

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITIONER'S NOTICE OF MOTION FOR AN
_____ [*name*],	)	ORDER AUTHORIZING ISSUANCE OF PEREMP-
Respondents.	)	TORY WRIT OF MANDATE
[_____ (*name*),	)	Date: _____
Real Party in Interest.]	)	Time: _____
	)	Location: _____
	)	

_____

To _____[*names of respondent(s) and real party or parties in interest*]:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in _____ [Department *or* Division] of this court, located at _____[*street address*], _____[*city*], California, petitioner will move the court for a peremptory writ of mandate commanding respondent, _____ [immediately on receipt of the writ *or* on or before _____ (*date*)], to _____ [*specify what respondent is to be ordered to do, e.g.:* set aside _____ (his/her/its) decision dated _____, in the proceedings entitled _____]. The motion will be made on the grounds that _____[*specify legal basis on*

which writ may be granted, as discussed in memorandum of points and authorities].

The motion will be based on this notice, on the verified petition of _____[*name*] on file in this action, a copy of which is served with this notice, on the memorandum of points and authorities served and filed together with this notice, on the papers and records on file in this matter, and on such oral and documentary eviden ce as may be presented at the hearing of the motion.
Dated: _____.

_____ [*name*]
Attorney for Petitioner

[2] Use of Form

The form in *[1], above*, should be used when the petitioner adopts the noticed application procedure to seek a writ of mandate. See *§§ 474C.10[1], [3]* and *474C.17* for discussion of when it is appropriate to use the noticed application procedure.

[3] Verification

A verification is required [*Code Civ. Proc. § 1086*]. The requirements for a verification are set out in *Code Civ. Proc. § 446* [*see Code Civ. Proc. § 1109*; *see also Code Civ. Proc. § 2015.5* (form of declaration under penalty of perjury)]. If the petition was inadvertently not verified, the court may allow an amendment for the purpose of supplying a verification [*Franchise Tax Bd. v. Municipal Court (1975) 45 Cal. App. 3d 377, 384, 119 Cal. Rptr. 552]* .

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.97

§ 474C.97 *Palma* Notice in Appellate Court

[1] FORM *Palma* Notice in Appellate Court

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

[*OR*]

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
_____ APPELLATE DISTRICT
[DIVISION _____]
COUNTY OF _____

_____ [*name*]	)	
Petitioner,	)	
vs.	)	
_____ [*name*],	)	NO. _____ NOTICE OF MOTION FOR PEREMP-
Respondent.	)	TORY WRIT OF MANDATE WITHOUT ALTERN-
[_____, (*name*)	)	ATIVE WRIT
Real Party in Interest.]	)	
	)	
	)	

To [*names of respondent(s) and real party or parties in interest*]:

NOTICE IS HEREBY GIVEN that the above-entitled court has been asked to and is considering the grant of a peremptory writ in this matter without first issuing an alternative writ. Before ruling, however, the court invites a response from respondent [*add, if there is a real party in interest:* and real party in interest] to the petition on or before _____[*date*].
Dated: _____.

_____ [*name*]
Attorney for Petitioner

[2] Use of Form

The form in *[1], above*, may be used to give the respondent and the real party in interest, if any, notice that an appellate court is considering the issuance of a peremptory writ of mandate without first issuing an alternative writ. It is designed to comply with the holding in *Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 180, 203 Cal. Rptr. 626, 681 P.2d 893* . In some courts of appeal, a *Palma* notice is prepared and issued by the court. Counsel should ascertain the particular court's practice in this regard before preparing or submitting this notice. For discussion of the limits on the use of the accelerated *Palma* procedure, see *§ 474C.17[5]*.

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.98

§ 474C.98 Order for Preparing and Filing Administrative Record

[1] FORM Order for Preparing and Filing Administrative Record

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER AND EX PARTE APPLICATION WITH
Respondent.	)	SUPPORTING DECLARATION FOR PREPARING
	)	AND FILING ADMINISTRATIVE RECORD
	)	

_____

ORDER

Good cause appearing from the application and supporting declaration hereinafter set forth,

IT IS ORDERED that [*add if required by court*: upon receipt from the petitioner of the sum of $_____ (*estimated cost of preparing transcript*)], _____[*name of respondent agency or officer*] shall forthwith cause a transcript to be prepared of the _____ [entire *or* following designated parts of the] record of the proceedings before him/her/it in the matter entitled _____[*title of proceeding before agency or officer*], No. _____.

The transcript is to cover _____[*designated parts of record, if only parts of record are to be prepared*].

IT IS FURTHER ORDERED that promptly after the transcript has been prepared, _____[*name of respondent agency or officer*] shall file it in the above-entitled proceeding in this court and shall cause a copy of it to be delivered to the petitioner.
Dated: _____ [*date*].

_____ [*signature*]
Judge of the Superior Court

APPLICATION

Petitioner hereby applies for the foregoing order on the ground that, as more particularly set out in the declaration of _____ [petitioner *or name of declarant*] hereinafter, petitioner's efforts to obtain a transcript of the record of the proceedings before _____[*name of respondent agency or officer*], entitled _____[*title*], No. _____ have not been successful. [*Add, if necessary*: Petitioner is informed by the official reporter that the estimated cost of preparing the transcript is $_____.]
Dated: _____.

_____ [*signature*]
Attorney for Petitioner

DECLARATION

I, _____[*name*], declare:

_____[*Facts as to petitioner's efforts to obtain transcript of record, including dates and what was done, and unsuccessful result*].

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on _____[*date*], at _____[*city*], California.

_____ [*signature*]

[2] Use of Form

The form in *[1], above*, combining an ex parte application with supporting declaration and an order for preparation and filing of the administrative record is for use by the petitioner who has been unable to obtain the record from the agency. The court is empowered by *Code Civ. Proc. § 1094.5(a)* to order the agency to prepare and file the record. For further discussion, see *§ 474C.23*.

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.99

§ 474C.99 Order to Temporarily Stay Administrative Decision and to Show Cause

[1] FORM Order to Temporarily Stay Administrative Decision and to Show Cause

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	ORDER TO SHOW CAUSE AND TEMPORARY
_____ [*name*],	)	STAY ORDER
Respondents.	)	Date: _____
[_____ (*name*),	)	Time: _____
Real Party in Interest.]	)	Location: _____
	)	
	)	

_____

To _____[*name*], Respondent:

Good cause appearing from the verified petition of _____[*name*] for a writ of mandate on file herein,

IT IS HEREBY ORDERED that, pending a hearing on this order, you stay the operation of your _____ [decision *or* order] dated _____, in the proceedings entitled _____];

IT IS HEREBY FURTHER ORDERED that you show cause before this Court at the courtroom thereof at _____[*address*] on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, why the foregoing stay should not be continued pending entry of judgment in this

action.

IT IS FURTHER ORDERED that a copy of this order _____ [*describe other documents to be served, e.g.:* and copies of the petition and of any supporting affidavits, declarations, and points and authorities on file herein] be served on respondent [*add, if there is real party in interest:* and real party in interest] on or before _____[*date*].
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The form in *[1], above*, may be used as an order to show cause and an order temporarily staying the operation of an administrative decision or order. Immediately below the number, the order should set forth the date, the time, and the location, if ascertainable, of any scheduled hearing [*Cal. Rules of Ct., Rule 3.1110*; *see Cal. Rules of Ct., Rule 2.100-2.119* ("papers" includes all documents, except exhibits or copies of documents, which are offered for filing in any case in the superior courts); *see also § 474C.13[5]* for discussion of requirements for temporary stays].

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.100

§ 474C.100 Order Staying Administrative Decision Pending Judgment

[1] FORM Order Staying Administrative Decision Pending Judgment

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	STAY ORDER
_____ [*name*],	)	Date: _____
Respondents.	)	Time: _____
[_____ (*name*),	)	Location: _____
Real Party in Interest.]	)	
	)	
	)	

_____

To _____[*name*], Respondent:

The order to show cause and temporary stay order in the above-entitled matter came on regularly to be heard before the Court on _____[*date*]. _____[*name*] appeared as attorney for petitioner.

[*EITHER*]

_____[*name*] appeared as attorney for respondent.

[*OR*]

_____[*name*] appeared as attorney for real party in interest, _____[*name*].

[*OR*]

There were no appearances for _____ [*name and capacity, e.g.:* respondent].

[*CONTINUE*]

Proof having been made to the satisfaction of the court and good cause appearing,

IT IS HEREBY ORDERED that respondent stay the operation of its _____ [decision *or* order] dated _____, in the administrative proceedings entitled _____ pending judgment in this action.
Dated: _____.

_____[*signature*]
Judge

[2] Use of Form

The form in *[1], above*, may be used for an order staying the operation of an administrative decision pending judgment in a mandate proceeding. See *§ 474C.18* for discussion of requirements for stay orders.

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.101

§ 474C.101 Demurrer to Petition for Writ of Mandate

[1] FORM Demurrer to Petition for Writ of Mandate

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	_____ [RESPONDENT'S *or* REAL
_____ [*name*],	)	PARTY IN INTEREST'S] DEMURRER TO PETI-
Respondents.	)	TIONER'S PETITION FOR WRIT OF MANDATE
[_____ (*name*),	)	Date: _____
Real Party in Interest.]	)	Time: _____
	)	Location: _____
	)	

_____ [Respondent *or* Real party in interest] demurs to the petition for writ of mandate herein on [each of] the following ground(s):

[*Specify grounds for demurrer, as appropriate, stating each ground separately, e.g.:*

1. The court has no jurisdiction of the subject of the cause of action alleged in the petition.

2. The petitioner does not have the legal capacity to sue.

3. The petition fails to state facts sufficient to constitute a cause of action.]

[*Continue with further grounds, as necessary*.]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [Respondent *or* Real Party in Interest]

[2] Use of Form

The form in *[1], above*, is a demurrer for use by the respondent or real party in interest to challenge the petitioner's legal basis for seeking a writ of mandate. See *§ 474C.19* for discussion of requirements for use of this form.

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.102

§ 474C.102 Notice of Hearing on Demurrer to Petition for Writ of Mandate

[1] FORM Notice of Hearing on Demurrer to Petition for Writ of Mandate

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	NOTICE OF HEARING ON _____
_____ [*name*],	)	[RESPONDENT'S *or* REAL PARTY IN IN-
Respondents.	)	TEREST'S] DEMURRER TO PETITIONER'S PETI-
[_____ (*name*),	)	TION FOR WRIT OF MANDATE
Real Party in Interest.]	)	Date: _____
	)	Time: _____
	)	Location: _____

_____

TO THE ABOVE-NAMED PETITIONER AND TO _____ [HIS/HER/ITS] ATTORNEY:

NOTICE IS HEREBY GIVEN that _____ [respondent's *or* real party in interest's] demurrer to the petition for writ of mandate herein, a copy of which is served herewith, has been set for hearing before the above-entitled court at the courtroom thereof at _____[*address*] on _____[*date*]. at _____[*time*], or as soon thereafter as the matter may be heard.
Date: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for _____ [Respondent *or* Real Party in Interest]

[2] Use of Form

The form in *[1], above*, is a notice of demurrer for use by the respondent or real party in interest to serve on the petitioner. See *§ 474C.19* for discussion of requirements for use of this form.

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.103

§ 474C.103 Answer to Petition for Writ of Mandate

[1] FORM Answer to Petition for Writ of Mandate

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	_____ [RESPONDENT'S *or* REAL
_____ [*name*],	)	PARTY IN INTEREST'S] ANSWER TO PETITION-
Respondents.	)	ER'S PETITION FOR WRIT OF MANDATE
[_____ (*name*),	)	Date: _____
Real Party in Interest.]	)	Time: _____
	)	Location: _____
	)	

_____

_____ [Respondent, _____ (*name*) *and/or* Real party in interest, _____ (*name*)], answer[s] the petition for writ of mandate in the above-captioned proceeding as follows:

[*Set forth one or more of the following paragraphs as appropriate*]

1. _____ [Admit *or* Admits] that _____[*specify allegations of petition that are admitted*].

2. _____ [Deny *or* Denies] each and every allegation in the petition not expressly admitted.

FIRST AFFIRMATIVE DEFENSE

[*Allege facts constituting affirmative defense*.]

SECOND AFFIRMATIVE DEFENSE

[*Allege facts constituting affirmative defense, and set out any additional affirmative defenses in a similar manner, then continue with the following:*]

WHEREFORE, _____ [respondent *and/or* real party in interest] pray[s] for judgment as follows:

1. That the petition for writ of mandate herein be denied;

[*Add the following if an alternative writ has been issued:*]

2. That the alternative writ of mandate herein be discharged;

[*Continue with the following:*]

3. That this proceeding be dismissed;

4. That _____ [he/she/it/they] recover all costs in this proceeding;

5. That the court grant such other and further relief as is proper.
Date: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [Respondent *or* Real Party in Interest]

VERIFICATION

I, [*name*] , am the _____ [respondent *or* real party in interest] in the above-entitled proceeding. I have read the foregoing answer and know its contents. I declare under penalty of perjury [*if executed outside California, add:* under the laws of the State of California] that the same is true and correct to my own knowledge.

Executed on _____[*date*], at _____[*place*].

_____ [*signature*]
_____ [Respondent *and/or* Real Party in Interest]

[2] Use of Form

The form in *[1], above*, is an answer for use by the respondent or real party in interest to deny all the material allegations of the petition that the answering party does not wish to admit. See *§ 474C.19* for discussion of requirements for use of this form.

[3] Verification

A verification is required [*Code Civ. Proc. § 1086*]. The requirements for a verification are set out in *Code Civ. Proc. § 446* [*see Code Civ. Proc. § 1109*]. If the petition was inadvertently not verified, the court may allow an amendment for the purpose of supplying a verification [*Franchise Tax Bd. v. Municipal Court (1975) 45 Cal. App. 3d 377, 384, 119 Cal. Rptr. 552]* .

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.104

§ 474C.104 Replication to Answer to Petition for Writ of Mandate

[1] FORM Replication to Answer to Petition for Writ of Mandate

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITIONER'S REPLICATION TO ANSWER TO
_____ [*name*],	)	PETITION FOR WRIT OF MANDATE
Respondents.	)	Date: _____
[_____ (*name*),	)	Time: _____
Real Party in Interest.]	)	Location: _____
	)	
	)	

_____

Petitioner(s) _____ [reply *or* replies] to the answer of _____[*description of party as respondent or real party in interest*] as follows:

[*Set forth one or more of following paragraphs, as appropriate:*]

1. _____ [Admit *or* Admits] that _____[*specify allegations of answer that are admitted*].

2. _____ [Deny *or* Denies] each and every allegation in said answer not heretofore expressly admitted.

3. In Reply to the _____[*specify number of affirmative defense*] affirmative defense, _____ [*specify response such as,* admit, *or* deny] the allegations of that affirmative defense.

[*CONTINUE*]
Date: _____.
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing replication and know its contents. I declare under penalty of perjury [*if executed outside California, add:* under the laws of the State of California] that the same is true and correct my own knowledge.

Executed on _____[*date*], at _____[*place*].

_____ [*signature*]
Petitioner

[2] Use of Form

The form of replication in *[1], above*, is for use by the petitioner to reply to the answer of the respondent or real party in interest, or both, to petitioner's writ petition [*see Code Civ. Proc. § 1091*]. As shown in this form, the replication can consist of denials, affirmative allegations, or both. Allegations in the replication are considered with the same effect as allegations in the writ petition [*see English v. City of Long Beach (1952) 114 Cal. App. 2d 311, 315, 250 P.2d 298]* . A replication is a pleading that denies or controverts the affirmative allegations of an answer [*see Lotus Car Ltd. v. Municipal Court (1968) 263 Cal. App. 2d 264, 268, 69 Cal. Rptr. 384]* . Factual allegations in the answer to a petition for a writ of mandate must be countervailed by proof at trial or by replication, or they are taken as true [*California Portland Cement Co. v. State Bd. of Equalization (1967) 67 Cal. 2d 578, 582 n.5, 63 Cal. Rptr. 5, 432 P.2d 700* ; *Elliott v. Contractors' State License Bd. (1990) 224 Cal. App. 3d 1048, 1054, 274 Cal. Rptr. 286]* . If, however, matters alleged in the answer are not sufficient to constitute a defense, then the court is not required to accept them as true and the petitioner is not required to controvert them [*Most v. First Nat. Bank of San Diego (1966) 246 Cal. App. 2d 425, 432, 54 Cal. Rptr. 669* ; *see Miller v. Eisenhower Medical Center (1980) 27 Cal. 3d 614, 625 n.10, 166 Cal. Rptr. 826, 614 P.2d 258]* . See *§ 474C.21* for discussion of requirements for use of this form.

[3] Verification

A verification is required [*Code Civ. Proc. § 1086*]. The requirements for a verification are set out in *Code Civ. Proc. § 446* [*see Code Civ. Proc. § 1109*]. If the petition was inadvertently not verified, the court may allow an amendment for the purpose of supplying a verification [*Franchise Tax Bd. v. Municipal Court (1975) 45 Cal. App. 3d 377, 384, 119 Cal. Rptr. 552]* .

[4] Filing

If an alternative writ is sought, petitioner can file the replication at any time before the return date set forth in the alternative writ. If an alternative writ is not sought, petitioner can file the replication at any time before the hearing date

on the motion for a peremptory writ. If the respondent or a real party in interest does not serve an answer until at or immediately prior to the hearing [*see Code Civ. Proc. § 1089*], petitioner should request a continuance of the hearing to prepare and file a replication if one is deemed necessary.

[5] Service

Because a replication is not permitted in a civil action [*see Code Civ. Proc. § 422.10*], there is no statute that explicitly provides for service. Nevertheless, *Code Civ. Proc. § 465* provides that all pleadings subsequent to the complaint be filed with the clerk or judge, together with proof of service, unless a summons needs to be issued, and copies thereof served on the adverse party or that party's attorney [*see Code Civ. Proc. § 465*]. Because *Code Civ. Proc. § 465* is applicable to administrative mandate proceedings pursuant to the general incorporating provisions of *Code Civ. Proc. § 1109*, a replication must be served on the attorney for the adverse party [*see Code Civ. Proc. § 1015*]. Either service by mail or personal service would be acceptable [*see generally* Ch. 518, *Service of Summons and Papers*].

[6] Cross References

For a replication form used in ordinary mandate, see Ch. 358, *Mandate and Prohibition*

California Administrative Mandate, Ch. 11 (Cal. C.E.B. 2d ed. 1989)

Witkin, California Procedure, vol. 8, *Extraordinary Writs*, §§ 197, 315 (4th ed. 1997)

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.105

§ 474C.105 Judgment Granting Relief

[1] FORM Judgment Granting Relief

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	JUDGMENT
_____ [*name*],	)	
Respondent.	)	
	)	
	)	

This cause came on regularly for trial on _____[*date*], at _____[*time*], in [_____ (Department *or* Division) _____] of the above-entitled court, the Honorable _____[*name*], Judge, presiding, sitting without a jury. Petitioner appearing by his/her attorney, _____[*name*], and respondent appearing by his/her/its attorney, _____[*name*], _____ [*add, if appropriate:* and evidence having been presented] and the cause having been argued and submitted for decision _____ [*add, if appropriate:*, and the court having made and caused to be filed its written findings of fact and conclusions of law],

IT IS ORDERED, ADJUDGED, AND DECREED as follows:

1. A peremptory writ of mandate shall be issued and directed to respondent, _____[*name*] commanding respondent, _____ [immediately after receiving the writ *or at some other specified time*], to set aside the decision made by respondent on _____[*date*], in the matter entitled

_____[*title of administrative proceeding*];

2. _____ [*Add, if appropriate:* The writ shall further command respondent to reconsider the said matter in the light of this judgment _____ (and the findings of fact and conclusions of law filed in this proceeding)].

3. _____ [*Add, if appropriate:* The writ shall further command respondent to _____ (*specify such further action as respondent is specially enjoined by law to take, e.g.,* modify its examination procedures so as to remove from consideration in the granting of licenses any question or issue relating to the applicant's age [except as to whether the applicant is an adult], sex, or race)].

4. _____ [*Add, if appropriate:* Petitioner shall have and recover from respondent the sum of $_____ as and for attorney's fees pursuant to *Section 800 of the Government Code*].

5. Petitioner shall have and recover from respondent petitioner's costs and disbursements in this proceeding in the sum of $_____.
Dated: _____.

_____ [*signature*],
Judge of the Superior Court

Judgment entered on _____[*date*], in Vol. _____ of the Judgment Book, page _____.

_____ [*signature*],
Clerk
By _____ [*signature*],
Deputy

[2] Use of Form

The form of judgment in *[1], above*, is for use by the petitioner who has successfully petitioned for administrative mandate in the superior court [*see Code Civ. Proc. § 1094.5*]. For a discussion of the requirements for judgments, see *§ 474C.25*.

[3] Contents of Judgment

If a trial was held, the law contemplates that the judicial proceeding will be terminated by a judgment [*see Code Civ. Proc. §§ 577* (judgment defined), 1094.5, 1109; *International Asso. of Fire Fighters v. Palo Alto (1963) 60 Cal. 2d 295, 300-301, 32 Cal. Rptr. 842, 384 P.2d 170* ; *Hadley v. Superior Court (1972) 29 Cal. App. 3d 389, 394, 105 Cal. Rptr. 500]* .

Code Civ. Proc. § 1094.5(e) provides that "[t]he court shall enter judgment either commanding [the] respondent to set aside the ... decision, or denying [the petition for] the writ." In practice the judgment is that a writ of mandate shall issue commanding the respondent (agency) to set aside the decision, either immediately after receipt of the writ or at some other specified time [*e.g., Associated Brewers Distributing Co. v. Superior Court of Los Angeles County (1967) 65 Cal. 2d 583, 589, 55 Cal. Rptr. 772, 422 P.2d 332* ("Let a peremptory writ of mandate issue requiring respondent ... to set aside its order ... "); *see Code Civ. Proc. § 1087* (form of peremptory writ)]. If the judgment is against the petitioner, it is simply that the petition is denied. In such a case the judgment usually also orders that the alternative writ is discharged [*e.g., Jenkins v. Knight (1956) 46 Cal. 2d 220, 226, 293 P.2d 6]* . If the judgment is in favor of the

petitioner, it may also order the respondent to reconsider the case in the light of the court's opinion and judgment; and it may order the respondent to take such further action as is specially enjoined on the respondent by law [*Code Civ. Proc. § 1094.5*]. These further orders may appropriately be included in the writ, which is itself nothing more than a judicial order giving effect to the judgment [*see Painter v. Berglund (1939) 87 P.2d 360* (defining writ as a written order issued by a court)]. The judgment may not limit or control in any way the discretion legally vested in the respondent (agency).

In an appropriate case the judgment will simply remand the case for further administrative proceedings. The trial court has inherent authority to do this [*Keeler v. Superior Court (1956) 46 Cal. 2d 596, 600, 297 P.2d 967]* , but the Code of Civil Procedure also gives the court this authority [*Code Civ. Proc. § 1094.5(e)*]. Remand is particularly appropriate where evidence was improperly excluded or where the petitioner could not, with reasonable diligence, have produced certain relevant evidence at the administrative hearing, and the court has no authority to exercise its independent judgment on the evidence [*see Code Civ. Proc. § 1094.5(d)*].

Where the issue in the trial court is whether the administrative decision is supported by substantial evidence in light of the whole record or whether there has been an abuse of discretion, findings are not essential to effective appellate review of the decision of the trial court. In such cases, the issue being essentially one of law, findings are not required [*Friends of Lake Arrowhead v. Board of Supervisors (1974) 38 Cal. App. 3d 497, 518, 113 Cal. Rptr. 539* ; *Contra Beloin v. Blankenhorn (1950) 97 Cal. App. 2d 662, 664, 218 P.2d 552]* .

A minute order has been held to be inappropriate for disposing of a petition for a writ of mandate and not to constitute a final judgment in the proceeding. However, a minute order could constitute notice of the court's intended decision [*see Code Civ. Proc. § 632*; *Cal. Rules of Ct., Rule 3.1590*], with a consequence that a party wanting written findings of fact would be required to request them within 10 days after announcement of mailing of the minute order [*see Code Civ. Proc. § 632*; *Cal. Rules of Ct., Rule 3.1590*] lest he be held to have waived his right to have them [*Hadley v. Superior Court (1972) 29 Cal. App. 3d 389, 395, 105 Cal. Rptr. 500]* .

In 1981, the California legislature amended *Code Civ. Proc. § 632*, replacing findings of fact and conclusions of law in general civil actions with a statement of decision. *Code Civ. Proc. § 632*, as amended, provides that on request of any party appearing at trial made within 10 days after the court announces its tentative decision, the court must issue a statement of decision explaining the factual and legal basis for its decision as to each principal controverted issue. The procedures provided in *Cal. Rules of Ct., Rule 3.1590*, have been modified accordingly.

[4] Cross References

For discussion and forms relating to costs, see Ch. 174, *Costs and Attorney's Fees*

For discussion and forms relating to trial court findings and conclusions, see Ch. 529, *Statement of Decision*

For discussion and forms of judgments, see Ch. 318, *Judgments*

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Chapter 474C PROCEDURES IN REVIEWING AGENCY DECISIONS
PART V. FORMS

41A-474C California Forms of Pleading and Practice--Annotated § 474C.106

§ 474C.106 Judgment Granting Relief (Alternative Form) [Code Civ. Proc. § 1094.5]

[1] Form Judgment Granting Relief (Alternative Form) [Code Civ. Proc. § 1094.5]

[*For Caption, see § 474C.105* .]

JUDGMENT GRANTING PEREMPTORY WRIT OF MANDATE

The above-entitled matter came on regularly for trial before the above-entitled Court on _____[*date*], at _____[*time*], in _____ [Division *or* Department] _____ thereof, the Honorable _____[*name of judge*] presiding, without a jury. _____[*name*] appeared as attorney for petitioner.

[*Use one or more of following recitals, as appropriate:*]

_____[*name*] appeared as attorney for respondent.

_____[*name*] appeared as attorney for real party in interest, _____[*name*].

There were no appearances for _____ [*name and capacity, e.g.:* respondent].

[*Continue as follows:*]

The record of administrative proceedings having been introduced in evidence and _____ [other *or* no other] evidence having been received by the Court, the matter having been argued [*include if applicable:* and the Court having made and caused to be filed its written statement of decision in this matter],

IT IS ORDERED that:

1. A peremptory writ of mandate shall issue commanding respondent to set aside its decision dated _____, in the proceedings entitled _____[*title of administrative proceedings*] _____ [*describe effect of order, e.g.:* suspending petitioner's _____ (*specify license, certificate, or permit, e.g.:* collection agency license)].

[*Add following if case is to be remanded to agency for further proceedings:*]

2. The writ shall further command respondent to reconsider its decision in the the aforesaid proceedings in light of this judgment (and the Court's statement of decision in this proceeding) and take such further action as is specially enjoined on respondent by law.

[*Continue as follows:*]

3. Petitioner shall recover _____ [his/her/its] costs and disbursements in this action in the amount of $_____.

[*If attorney's fees or litigation expenses are recoverable, add following:*]

4. Petitioner shall recover from respondent _____ [attorney's fees or litigation expenses] in the amount of $_____.
Dated: _____.

_____ [*signature*]
Judge

Judgment entered on _____, in Vol. _____ of the Judgment Book.

_____ [*signature*]
Clerk

[2] Use of Form

The form of judgment granting relief in *[1], above*, may be used by a party who has successfully petitioned for administrative mandate in the superior court. This form is an alternative to *§ 474C.105*. For a discussion of the requirements for this form, see *§ 474C.25*.

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.107

§ 474C.107 Judgment Denying Relief

[1] FORM Judgment Denying Relief

[*For Caption, see § 474C.105* .]

JUDGMENT DENYING PEREMPTORY WRIT OF MANDATE

The above-entitled matter came on regularly for trial before the above-entitled Court on _____[*date*], at _____[*time*], in _____ [Division *or* Department] _____ thereof, the Honorable _____[*name of judge*] presiding, without a jury. _____[*name*] appeared as attorney for petitioner.

[*Use one or more of following recitals, as appropriate:*]

_____[*name*] appeared as attorney for respondent.

_____[*name*] appeared as attorney for real party in interest, _____[*name*].

There were no appearances for _____ [*name and capacity, e.g.*, respondent].

[*Continue as follows:*]

The record of administrative proceedings having been introduced in evidence and _____ [other *or* no other] evidence having been received by the Court, the matter having been argued [*include if applicable:* and the Court having made and caused to be filed its written statement of decision in this matter],

IT IS ORDERED that:

1. The peremptory writ of mandate applied for herein is denied;

[*Add following if alternative writ of mandate was issued:*]

2. The alternative writ of mandate granted herein is discharged;

[*Continue as follows:*]

3. _____ [Respondent (*name*) *and/or* Real party in interest _____ (*name*)] shall recover _____ [his/her/its/their] costs and disbursements in this action in the amount of $_____.
Dated: _____.

_____ [*signature*]
Judge

Judgment entered on _____[*date*], in Vol. _____ of the Judgment Book.

_____ [*signature*]
Clerk

[2] Use of Form

The form of judgment denying relief in *[1], above*, may be used by a party who has successfully defended against a petition for a writ of mandate in the superior court [*see Code Civ. Proc. § 1094.5*]. For a discussion of the requirements for use of this form, see *§ 474C.25*.

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.108

§ 474C.108 Peremptory Writ of Mandate

[1] FORM Peremptory Writ of Mandate

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PEREMPTORY WRIT OF MANDATE
_____ [*name*],	)	Date: _____
Respondents.	)	Time: _____
[_____ (*name*),	)	Location: _____
Real Party in Interest.]	)	
	)	
	)	

_____

To _____[*name*], Respondent:

WHEREAS, on _____[*date*], judgment was entered in this action, ordering that a peremptory writ of mandate be issued from this Court,

THEREFORE, YOU ARE HEREBY COMMANDED, _____ [immediately on receipt of this writ *or specify other date or time, e.g.:* within _____ days from the date that a copy of this writ is served on you] to set aside your decision dated _____, in the proceedings entitled _____[*title of administrative proceedings*], _____ [*describe effect of order, e.g.:* suspending petitioner's _____ (*specify license, certificate, or permit, e.g.:* collection agency license)], and to _____ [*specify what the judgment orders respondent to do, e.g.:* reconsider said decision in the light of

this Court's judgment (*add, if there was a statement of decision:* and statement of decision on file herein) and take further action specially enjoined on you by law].

[*The following paragraph is optional but recommended:*]

YOU ARE FURTHER COMMANDED to make and file a return to this writ _____ [on or before _____ (*date*) *or* within _____ days from the date a copy of this writ is served on you] showing what you have done to comply with this writ.
Dated: _____.

_____ [*name*], Clerk
By: _____ [*signature*]
Deputy

LET THE FOREGOING WRIT ISSUE.
Dated: _____.

_____ [*signature*]
Judge

[2] Use of Form

The form of peremptory writ in *[1], above*, may be used by a party who has successfully petitioned for administrative mandate [*see Code Civ. Proc. §§ 1087, 1094.5*]. For a discussion of the requirements for this form, see *§ 474C.26*.

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41A-474C California Forms of Pleading and Practice--Annotated § 474C.109

§ 474C.109 Petition for Writ of Ordinary Mandate

[1] FORM Petition for Writ of Ordinary Mandate

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION FOR WRIT OF MANDATE
_____ [*name*],	)	Date of Hearing: _____
Respondents.	)	Time of Hearing: _____
	)	Location of Hearing: _____
	)	

_____

Petitioner petitions this court for a writ of mandate under *Code of Civil Procedure Sections 1085* and *1086* and alleges:

1. At all times mentioned in this petition, petitioner has been and now is _____ [*describe petitioner's legal capacity to sue, if not a natural person, and any license, certificate, or permit held, e.g.:* a corporation duly organized and existing under the laws of the State of California and the holder of a collection agency license duly issued by respondent].

2. At all times mentioned in this petition, respondent has been and now is _____ [*specify nature of agency, e.g.:* an administrative agency within the jurisdiction of the Department of Consumers Affairs of the State of California]. [*If respondent is a board or commission, specify composition, e.g.:* The chairperson of respondent is _____ (*name*), the secretary is _____ (*name*), and it is composed of _____ (*number*) members].

3. Real party in interest _____[*name*] has an interest that is directly affected by this proceeding, as

follows: _____[*specify facts*].

[*If respondent has failed to perform ministerial duty, use the following:*]

4. Pursuant to _____[*cite and describe statutory source of agency's duty*], respondent has a clear, present, and ministerial duty to _____[*specify nature of duty*].

[*Or, if respondent has failed or refused to exercise its discretion, use the following:*]

4. Pursuant to _____[*cite and describe statute or regulation conferring discretion on respondent*], respondent has discretion to _____[*specify nature of discretion*]. Respondent has _____ [failed *or* refused] to exercise its discretion, as follows: _____[*specify facts showing way in which respondent has failed or refused to exercise its discretion*].

[*Or, if respondent has abused its discretion, use the following:*]

4. Pursuant to _____[*cite and describe statute or regulation conferring discretion on respondent*], respondent has discretion to _____[*specify nature of discretion*]. Respondent has abused this discretion, as follows: _____[*specify facts showing how respondent has abused discretion*].

[*If petitioner seeks performance of respondent's duty, include the following:*]

5. Petitioner has a clear, present, and substantial right to the performance of respondent's duty, as follows: _____[*specify facts showing petitioner's entitlement to performance of duty, including exhaustion of administrative remedies and the making of any required demand or facts excusing such a demand*]. At all times relevant to this petition, respondent has been able to perform its duty, but has _____ [failed *or* refused] and continues to _____ [fail *or* refuse] to do so.

[*Continue with the following:*]

6. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the writ sought by this petition, as follows: _____[*specify facts showing lack of other legal remedy*].

[*If petitioner seeks attorney's fees under Gov. Code § 800, include the following:*]

7. As an incident of bringing and maintaining this proceeding, petitioner has become personally obligated to pay to _____[*name*], _____ [his/her/its] counsel, attorney's fees _____ [in the amount of $_____ *or* in excess of $7,500] computed at $100 per hour.

[*If petitioner seeks litigation expenses under Code Civ. Proc. § 1028.5, include the following:*]

8. Petitioner is a _____ ["small business" as defined in *Code Civ. Proc. § 1028.5(c) or* "licensee" as defined in *Code Civ. Proc. § 1028.5(d)*]. As an incident of bringing and maintaining this proceeding, petitioner has

incurred the following litigation expenses in addition to other costs:

[*List expenses, e.g.:*]

a. Court costs in the amount of $_____.

b. Witness fees in the amount of $_____.

c. Expenses of the administrative proceedings in the amount of $_____.

d. Attorney's fees in the amount of $_____.

WHEREFORE, petitioner prays the court for judgment as follows:

1. For an alternative writ of mandate directing respondent to _____[*specify act sought to be compelled*], or, alternatively, to show cause why a peremptory writ of mandate to the same effect should not be issued;

2. For a peremptory writ of mandate directing respondent to _____[*specify act sought to be compelled*].

[*If petitioner seeks attorney's fees or litigation expenses, insert the following:*]

3. For reasonable _____ [attorney's fees *or* litigation expenses] in addition to any other relief granted or costs awarded;

4. For all costs of suit incurred in this proceeding; and

5. For such other and further relief as the court deems proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

VERIFICATION

I, _____[*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

The form in *[1], above*, may be used to seek a writ of ordinary mandate in the superior court [*see Code Civ. Proc. §§ 1085, 1086*]. For discussion of requirements for this form, see *§ 474C.41*.

[3] Verification

A verification is required [*Code Civ. Proc. § 1086*]. The requirements for a verification are set out in *Code Civ. Proc. § 446* [*see Code Civ. Proc. § 1109*; *see also Code Civ. Proc. § 2015.5* (form of declaration under penalty of perjury)]. If the petition was inadvertently not verified, the court may allow an amendment for the purpose of supplying a verification [*Franchise Tax Bd. v. Municipal Court (1975) 45 Cal. App. 3d 377, 384, 119 Cal. Rptr. 552]* .

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Volume 42: Public Utilities thru Railroads-Chs. 480-485
Chapter 480 PUBLIC UTILITIES

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§ 480.11 "Public Utility" Defined

§ 480.12 Public Utilities Commission

[1] PUC a Constitutional or "Independent" Agency

[2] Jurisdiction of PUC Over Public Utilities

[3] Regulatory Power

[4] Petition by Interested Persons to Adopt, Amend, Repeal Regulation

[a] In General

[b] Scope of Right to Petition

[i] "Interested Persons" Is Construed Broadly

[ii] "Regulation" Limited to General Applicability and Future Effect

[iii] Not Means of Requesting Reconsideration

[c] Time to Grant or Deny Petition

[i] Six Months From Date of Receipt

[ii] Extension to Allow Public Review and Comment

[d] Statement of Reasons for Denial

§ 480.13 Rates Charged by Public Utility

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[1] When Required

[2] Exceptions for Extension of Existing Service

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§ 480.20 Procedures Established by PUC

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§ 480.22 Complaints Against Public Utilities

[1] Who May File

[2] Service and Filing of Notice of Hearing

[3] Answer

[4] Joinder

[5] Intervention

[a] Generally

[b] Participation Without Intervention

§ 480.23 Categorization Determination by PUC

[1] Preliminary Determination of Category Generally

[a] Determination Required

[b] Categories Defined

[i] "Quasi-Legislative" Defined

[ii] "Adjudication" Defined

[iii] "Ratesetting" Defined

[c] Ex Parte Communication on Categorization Issues

[2] Determination in Proceeding Initiated by Application

[a] Application

[b] Proposed Schedule

[c] Protest or Response

[d] Preliminary Determination of Category and Need for Hearing

[i] Content and Timing of Resolution

[ii] Multiple Category and Other Proceedings

[iii] Preliminary Determination Not Appealable

[e] Appealable Determination of Category and Need for Hearing

[3] Determination in Proceeding Initiated by Complaint

[a] Complaint

[b] Instructions to Answer

[c] Answer

[d] Ruling on Scoping Memo

[4] Determination in Proceeding Initiated by PUC Order Instituting Investigation

[5] Determination in Proceeding Initiated by PUC Order Instituting Rulemaking

[6] Determination in Proceedings Filed Before January 1, 1998

[7] Appeals of Categorization

[a] Appeal Is Prerequisite for Standing to Seek Judicial Review

[b] Time Limit for Request

[c] Content of Appeal

[d] Service of Appeal

[e] Response to Appeal

[f] Decision on Appeal

[8] Approval of Changes to Preliminary Determinations

§ 480.24 Proceedings Without Hearings

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[1] Availability of Compensation

[2] Amount of Compensation

[3] Procedure for Obtaining Compensation

[a] Notice of Intent to Claim Compensation

[b] Preliminary Ruling on Eligibility for Compensation

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[2] Authority

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§ 480.51 Ex Parte Communication on Categorization Issues

[1] In General

[2] Period Between Beginning of Proceeding and Category Determination

[a] Proceeding Initiated by Application

[b] Proceeding Initiated by Complaint

[c] Proceeding Initiated by Order Instituting Investigation

[d] Proceeding Initiated by Order Instituting Rulemaking

[e] Formal Proceedings Filed Before January 1, 1998

[3] Period After Category Determination

[a] Adjudication Hearing

[b] Ratesetting Hearing

[i] Generally Prohibited

[ii] Oral Ex Parte Communications

[iii] Written Ex Parte Communications

[iv] PUC May Establish Periods Without Ex Parte Communication

[c] Quasi-Legislative Hearing

[4] Circumstances Causing Restrictions on Ex Parte Communication to No Longer Apply

§ 480.52 Ex Parte Communication in Enforcement-Related and Other Covered Proceedings

[1] Applicable Proceedings

[a] Enforcement-Related Proceeding

[b] Other Covered Proceedings

[c] Consolidated Proceedings

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[1] Authority for Reassignment

[2] Automatic Reassignment

[a] Petition

[b] Supporting Declaration

[c] Time Limit for Filing Petition

[d] Ruling on Petition

[e] Circumstances Permitting Unlimited Peremptories

[3] Reassignment for Cause

[a] Grounds

[i] Financial Interest

[ii] Bias, Prejudice, or Interest

[b] Circumstances Not Constituting Grounds

[c] Declaration

[d] Filing and Service

[e] Limit on Number of Petitions

[f] Administrative Law Judge's Ability to Request Reassignment

[g] Waiver

[4] Prior Rulings of Reassigned ALJ Not Set Aside

[5] Ban on Ex Parte Communications.

§ 480.63 Ex Parte Communications Prohibited

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[1] Submission for Decision

[2] Content

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[4] When Presiding Officer's Decision Becomes PUC Decision

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[a] Appeal By Interested Party

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[c] Content of Appeal or Request for Review

[d] Service of Appeal or Request for Review

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[3] Consideration of Presiding Officer's Decision in Closed Session

[4] PUC Decision Must Be Based on Record Developed by Presiding Officer

[5] Vote in Public Meeting

[6] Explanation of Changes Required

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§ 480.80 Applicable Procedures

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[1] Prehearing Designation

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§ 480.82 Party's Request for Presence of Commissioner

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[2] Automatic Reassignment

[a] When Available

[b] Second Automatic Reassignment on Petition by Good Faith Declarant

[c] Time Limit for Filing Petition and Declaration

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§ 480.85 Proposed and Alternate Decision

§ 480.86 Oral Argument Before PUC

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[1] Submission for Decision

[2] Proposed Decision

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§ 480.100 Applicable Procedures

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[1] May Adopt, Modify, or Set Aside Proposed Decision

[2] Time Limit for Final Decision

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[1] Must Comply With Code and Rules

[2] Scope of Stay

[3] Notice and Hearing

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[a] Proper Case and Time for Grant

[b] Grounds Allowing Grant

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[d] Hearing of Application Given Precedence

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[1] Time to Petition

[2] Petition Must Be Verified

[3] Proper Court for Petition

[a] Court of Appeal to Review Adjudicatory Proceeding

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[c] Review of Decisions Pertaining Solely to Water Corporations

[3a] Certificate of Interested Entities or Persons

[4] Service of Petition

§ 480.145 Answer and Reply

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[1] Preference for Public Utilities Proceedings Over Other Civil Business

[2] Scope of Review

[a] In General

[b] Adjudicatory Proceedings

[c] Other Than Adjudicatory Proceedings

[3] Appearances and Judgment

[4] Writ Must Be Returnable at Specified Time and Place

[5] Effect of Denial of Writ

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[1] Definitions

[2] Regulation of Public Utilities

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[5] Acquisition or Duplication of Public Utility Property or Service

[6] Regulation of Crossings

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[a] Dedication to Public Service

[b] Nondelegable Duty

[c] Limitations of Liability

[2] PUC Authority Generally

[a] Jurisdiction of PUC

[i] Generally

[ii] Exclusive Jurisdiction

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[b] Limits to PUC Authority

[c] Unconstitutional Practices

[d] Rates

[e] Refunds

[f] Relocation of Public Utility

[g] Transfer of Public Utilities

[3] PUC Authority Over Particular Public Utilities

[a] Grade Crossings

[b] Telephones

[i] Equipment

[ii] Rates

[4] Municipalities

[a] Control by Municipality

[b] Control by PUC

[c] Utility User's Tax

[5] Proceedings Before PUC

[a] Attorney-Client Privilege

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[ii] Financial Statement

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[b] Use of Form

[c] Contents of Application

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[a] FORM

[b] Use of Form

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[ii] Current Rates

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Chapter 480 PUBLIC UTILITIES
PART I. SCOPE

42-480 California Forms of Pleading and Practice--Annotated § 480.01

§ 480.01 Scope of Chapter

This chapter discusses proceedings before and involving the California Public Utilities Commission (hereafter "PUC").

The chapter contains the following forms for use before the PUC:

- Forms for use in complaint proceedings, including forms of complaint, answer, and petition to intervene [*see § 480.190*].

- Forms for use in application proceedings, including forms of application for certificate of public convenience and necessity, rate change approval, stock issuance, and sale of property [*see § 480.191*].

- Forms for use in application proceedings on shortened tariff docket, including forms of application and protest [*see § 480.192*].

- Forms for use in proceedings to review categorization determination, including petition for rehearing of determination [*see § 480.193*].

In addition, the chapter contains the following forms for use in proceedings to review PUC orders or decisions:

- Form of petition for Writ of Certiorari to Review Order or Decision [*see § 480.200[1]*].

- Form of application to Transfer to Single Appellate District [*see § 480.200[2]*].

NOTE:

Deregulation of Electricity Providers. The 1996 legislation concerning deregulation of electric utilities, which was implemented between January 1, 1998 and December 31, 2002 [*see Pub. Util. Code § 330*], is generally beyond the scope of this chapter. This legislation has some indirect impact, in that it establishes "deregulated" methods for ratesetting among electric utilities that differ from the general ratesetting procedures discussed in this chapter. Detailed information concerning implementation of the

law concerning deregulation of electricity providers may be found at the Internet site maintained by the PUC [*see* www.cpuc.ca.gov].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsJudicial ReviewGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewEnergy & Utilities LawGas IndustryNatural Gas ActCertificates of Need

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§ 480.02 Cross References

For additional discussion and forms relating to actions against common carriers and other utilities relating to rates or other matters regulated under the Public Utilities Code, see the following:

- *Ch. 109, Carriers, § 109.60 et seq.*
- Ch. 511, *Sanitation and Sewerage Districts* .

For discussion and forms relating to actions against common carriers and other public utilities for tort or contract liability, see the following:

- Ch. 16, *Airplanes and Airports* .
- Ch. 102, *Bridges* .
- Ch. 106, *Buses and Streetcars* .
- Ch. 109, *Carriers* .
- Ch. 277, *Gas and Electricity* .
- Ch. 484, *Radio and Television* .
- Ch. 485, *Railroads* .
- Ch. 511, *Sanitation and Sewerage Districts* .
- Ch. 522, *Ships and Shipping* .

- Ch. 544, *Taxicab* .
- Ch. 545, *Telephone and Telegraph Communications* .
- Ch. 553, *Trucks* .

For discussion and forms relating to public agency proceedings under the Administrative Procedure Act (*Gov. Code § 11340 et seq.*) and judicial review of those proceedings, see Ch. 470, *Overview of Public Administrative Law* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsTransportation TortsAir TransportationGeneral OverviewTortsTransportation TortsMotor VehiclesMotor CarriersTortsTransportation TortsRail TransportationGeneral OverviewTortsTransportation TortsWatercraftGeneral OverviewTransportation LawCarrier Duties & LiabilitiesRates & Tariffs

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[Reserved]

§§ 480.03[Reserved]

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§ 480.10 Governing Law

The law governing the PUC and public utilities in general is found in Cal. Const., art. XII, and the Public Utilities Code.

The rules and procedures governing proceedings before the Public Utilities Commission are set out in *20 Cal. Code Reg §§ 1-88*, including the PUC's code of ethics, rules of practice, and illustrative forms.

The text of the Public Utilities Code and the PUC rules and procedures, together with other information relating to the PUC and PUC proceedings, are available through the Internet site maintained by the PUC [*see* http://www.cpuc.ca.gov].

NOTE:

Designation of PUC Rules of Practice and Procedure. The rules of practice and procedure established by the PUC are cited throughout this chapter by their "section" designation under the California Code of Regulations. The PUC frequently refers to these provisions by its own "rule" number; the number of both section and rule are the same in many, *but not all*, instances. Where the rule number differs from the section number, that distinction is noted in this chapter as, for example, in the following instance: *20 Cal. Code Reg., § 63.4* (Rule 63.1).

The text of the PUC rules and procedures, also noting the distinction between section and rule numbers, may be found at the Internet site maintained by the PUC [*see* http://www.cpuc.ca.gov]. The text of the Public Utilities Code and other information relating to the PUC may be found at this site.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral Overview

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§ 480.11 "Public Utility" Defined

The term "public utility" includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, and heat corporation through which the service is performed for or the commodity delivered to the public or any portion thereof [*Pub. Util. Code § 216(a)*]. Definitions of the foregoing entities are set out in *Pub. Util. Code §§ 211-242*. See also *§ 480.12[2]* for further definition of public utilities within the jurisdiction of the PUC.

Notwithstanding *Pub. Util. Code § 216*, "public utility" does not include a motor carrier of property [*Pub. Util. Code § 216.5*; *see* Ch. 109, *Carriers*]. It also does not include a holding company that is the parent corporation of a utility [*PG&E Corp. v. Public Utilities Commission (2004) 118 Cal. App. 4th 1174, 1197, 13 Cal. Rptr. 3d 630]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral Overview

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§ 480.12 Public Utilities Commission

[1] PUC a Constitutional or "Independent" Agency

The PUC is created and empowered by the constitutional provisions set out in Cal. Const., art. XII. This constitutional status means, among other things, that the PUC is very much an "independent" agency empowered to establish its own procedures for adjudicatory proceedings [*Cal. Const., art. XII, § 2* (procedures are "subject to statute and due process"); *S. Cal. Edison Co. v. Peevey (2003) 31 Cal. 4th 781, 792, 3 Cal. Rptr. 3d 703, 74 P.3d 795* (determining scope of PUC authority)], and as such is not subject to the Administrative Procedures Act (*Gov. Code § 11340 et seq.*) that governs most other public state agencies [*see also* discussion in *§ 480.20* and in Ch. 470, *Overview of Public Administrative Law , § 470.12[3]*].

The rules established by the PUC under *Cal. Const., art. XII, § 2*, which govern its hearings and other proceedings, are set out in *20 Cal. Code Reg., §§ 1-88*, "subject to statute" as set out in *Pub. Util. Code § 1701 et seq.*

[2] Jurisdiction of PUC Over Public Utilities

Whenever an entity as defined under *Pub. Util. Code § 216(a)* (discussed in *§ 480.11*) performs a service or delivers a commodity to the public or any portion thereof for which any compensation or payment whatsoever is received, that entity is a public utility subject to the jurisdiction, control, and regulation of the PUC and *Pub. Util. Code §§ 201-2115* [*Pub. Util. Code § 216(b)*; *City of Anaheim v. Pacific Bell Telephone Company (2004) 119 Cal. App. 4th 838, 844, 14 Cal. Rptr. 3d 725* (PUC has exclusive jurisdiction to resolve dispute about who must pay for relocation of telephone company's overhead facilities to underground)]. However, the PUC has no jurisdiction over municipally owned utilities unless expressly provided by statute [*Santa Clara Valley Transp. Auth. v. Public Utils. Comm'n (2004) 124 Cal. App. 4th 346, 356, 21 Cal. Rptr. 3d 270* (PUC does not have exclusive railroad crossing jurisdiction over municipally owned light rail crossings pursuant to *Pub. Util. Code §§ 1201, 1202*)].

When any person or corporation performs any service or delivers any commodity to any person, private corporation, municipality or other political subdivision of the state that in turn either directly or indirectly, mediately or immediately, performs that service or delivers that commodity to or for the public or some portion of the public, that person or

corporation is a public utility subject to the jurisdiction, control, and regulation of the PUC and *Pub. Util. Code §§ 201-2115* [*Pub. Util. Code § 216(c)*].

Ownership or operation of a facility that employs cogeneration technology or producing power from other than a conventional power source orthe ownership or operation of a facility that employs landfill gas technology does not make a corporation or person a public utility, within the meaning of *Pub. Util. Code § 216*, solely because of the ownership or operation of that facility [*Pub. Util. Code § 216(d)*; *see also Pub. Util. Code §§ 218, 222, 224, 228* (defining "electrical corporation," "gas corporation," "heat corporation," and "pipeline corporation," respectively), 224.5 (defining "landfill gas technology")]. However, the PUC has limited jurisdiction over holding companies that are the parent corporations of utilities to the extent necessary to regulate the utilities [*PG&E Corp. v. Public Utilities Commission (2004) 118 Cal. App. 4th 1174, 1201, 13 Cal. Rptr. 3d 630* (PUC had jurisdiction to enforce requirement that holding companies give first priority to capital requirements of utility subsidiaries as necessary to meet their obligation to serve)].

No corporation or person constitutes a public utility within the meaning of *Pub. Util. Code § 216* solely by reason of engaging directly or indirectly in developing, producing, transmitting, distributing, delivering, or sellingany form of heat derived from geothermal or solar resources or from cogeneration technology to any privately owned or publicly owned public utility, or to the public or any portion of the public [*Pub. Util. Code § 216(e)*].

Ownership or operation of a facility that sells compressed natural gas at retail to the public for use only as a motor vehicle fuel, and the sale of compressed natural gas at retail from such a facility to the public for use only as a motor vehicle fuel, does not make the corporation or person a public utility within the meaning of *Pub. Util. Code § 216* solely because of that ownership, operation, or sale [*Pub. Util. Code § 216(f)*; *see also Pub. Util. Code § 216(g)*, 218.5 (ownership or operation of exempt wholesale generator, as defined, does not make person public utility)].

A qualifying small power producer, as defined, owning or operating a small power production facility is not a public utility subject to the general jurisdiction of the PUC solely because of the ownership or operation of the facility [*Pub. Util. Code § 218.5*].

The PUC does not have the power to regulate publicly-owned municipal utilities in the absence of a legislative grant of authority [*see Cal. Const., art. XI, § 9*; *Gov. Code § 39732*; *American Microsystems, Inc. v. City of Santa Clara (1982) 137 Cal. App. 3d 1037, 1042, 187 Cal. Rptr. 550]* .

[3] Regulatory Power

The PUC has the general power to regulate public utilities [*Pub. Util. Code § 701*]. This includes regulation of the following matters:

- Rates [*Pub. Util. Code §§ 727-744*].
- Equipment, practices, and facilities [*Pub. Util. Code § 761 et seq.*].
- Books and accounts [*Pub. Util. Code § 791 et seq.*].
- Stocks and security transactions [*Pub. Util. Code § 816 et seq.*].
- Transfer or encumbrance of property [*Pub. Util. Code § 851 et seq.*].

Thus, for example, public utilities may not issue certain stocks, bonds, notes, or other evidence of indebtedness without PUC approval [*Pub. Util. Code § 818*], nor may they sell or encumber any or all of their property that is necessary or

useful in the performance of their duties to the public without approval of the PUC [*Pub. Util. Code § 851*].

However, the PUC may, by order or rule, exempt any public utility or class of public utility from the provisions of *Pub. Util. Code § 851 et seq.* if it finds that the application thereof with respect to the public utility or class of public utility is not necessary in the public interest. The PUC may establish rules or impose requirements necessary to protect the interest of the customers or subscribers of the exempted public utility or class of public utility. These rules or requirements may include, but are not limited to, notification of a proposed sale or transfer of assets or stock, and provision for refunds or credits to customers or subscribers [*Pub. Util. Code § 853(b)*].

The PUC may petition the superior court for the appointment of a receiver to assume possession and operating control over the property of a water or sewer system corporation after notice and hearing determining that the corporation is unable or unwilling to adequately serve its ratepayers, that it has been abandoned by its owners, or that it is unresponsive to rules and orders [*Pub. Util. Code § 855*; *see Code Civ. Proc. § 564(b)(8)* (appointment of receiver at PUC request)].

The PUC also has the power to enter into binding contracts and settle lawsuits brought against it by utility companies [*see Utility Consumers Action Network v. Public Utilities Com. (2004) 120 Cal. App. 4th 644, 654, 15 Cal. Rptr. 3d 597* (acceptance of settlement offer did not contravene *Pub. Util. Code § 332.1(c)* which requires PUC to track and recover shortfall, if any, between emergency rate ceiling and utility's actual electricity costs)].

In addition, one court of appeal has held that the PUC has the authority to directly impose fines on public utilities [*Pacific Bell Wireless, LLC v. Public Utilities Com. (2006) 140 Cal. App. 4th 718, 735-737, 44 Cal. Rptr. 3d 733]* .

[4] Petition by Interested Persons to Adopt, Amend, Repeal Regulation

[a] In General

Interested persons may petition the Commission to adopt, amend, or repeal a regulation [*Pub. Util. Code § 1708.5(a)*]. Within a specified time, discussed under [c], *below*, the Commission must either deny the petition or institute a proceeding to adopt, amend, or repeal legislation [*see Pub. Util. Code § 1708.5(a)*].

The Commission is required to amend its rules of practice and procedure (*20Cal. Code Reg § 1 et seq.*) to provide specific procedures for handling these petitions. Until it does so, the Commission must implement this petition procedure under its existing rules [*see Pub. Util. Code § 1708.5(e)* (amendments to be made prior to July 1, 2001)].

Therefore, pending clarification by the Commission, it appears that a regulation petition would be subject to the rules relating to determination of the need for a hearing and categorization [*see Pub. Util. Code § 1701.1*]. For further discussion of these procedures, see *§ 480.23*.

The petition procedure under *Pub. Util. Code § 1708.5* does not prevent the Commission from conducting any proceeding to adopt, amend, or repeal a regulationusing notice and comment rulemaking procedures, without an evidentiary hearing [*Pub. Util. Code § 1708.5(f)*; *see 20 Cal. Code Reg § 14.1 et seq.* (regulations governing rulemaking)]. An exception applies with regard to a regulation that was adopted after an evidentiary hearing and is subsequently being amended or repealed. In such a case the parties to the original proceeding retain any right to an evidentiaryhearing under *Pub. Util. Code § 1708* [*Pub. Util. Code § 1708.5(f)*]. *Pub. Util. Code § 1708.5(f)* applies to all proceedings, not just those initiated by the petition procedure under *Pub. Util. Code § 1708.5(a)-(e)* [*Southern California Edison Company v. Public Util. Com. (2002) 101 Cal. App. 4th 982, 994, 125 Cal. Rptr. 2d 211]* .

For a form of petition to adopt, amend, or repeal a regulation, see *§ 480.195*.

[b] Scope of Right to Petition

[i] "Interested Persons" Is Construed Broadly

"Interested persons," as used in *Pub. Util. Code § 1708.5(a)*, is to be construed broadly, and not as a bar to standing [*Pub. Util. Code § 1708(a)*].

[ii] "Regulation" Limited to General Applicability and Future Effect

"Regulation," as used in *Pub. Util. Code § 1708.5(a)*, is not to be construed to refer to all orders and decisions of the Commission. Rather, the term is to be construed as a general reference to rules of general applicability and future effect [*Pub. Util. Code § 1708(a)*].

The Commission has authority to more precisely define the term "regulation" for the purpose of *Pub. Util. Code § 1708.5* [*Pub. Util. Code § 1708(b)*; *see Pub. Util. Code § 1708.5(e)* (amendments to rules of practice and procedure providing more specific procedures to be made prior to July 1, 2001)].

[iii] Not Means of Requesting Reconsideration

Petitions under *Pub. Util. Code § 1708.5* are not a vehicle for asking the Commission to reconsider any or all of its decisions, or for asking the Commission to reconsider recently decided matters when there has been no change in circumstances [*Pub. Util. Code § 1708(c)* (Legislature intends that Commission delegate to staff authority to deny in order to provide for efficient administration of section 1708.5)].

[c] Time to Grant or Deny Petition

[i] Six Months From Date of Receipt

Within six months from the date of receipt of the petition, the Commission must either deny the petition or institute a proceeding to adopt, amend, or repeal the regulation [*Pub. Util. Code § 1708.5(b)(1)*].

[ii] Extension to Allow Public Review and Comment

The Commission may extend the six month period for consideration of a petition pursuant to *Pub. Util. Code § 1708.5(b)(1)* to allow public review and comment pursuant to *Pub. Util. Code § 311(g)* [*Pub. Util. Code § 1708.5(b)(2)*].

[d] Statement of Reasons for Denial

If the Commission denies a petition, the order or resolution of the Commission must include a statement of the Commission's reasons for that denial [*Pub. Util. Code § 1708.5(c)*].

If the Commission finds that it is precluded by law from granting a petition, the statement of reasons for denial must identify the relevant provisions of law [*Pub. Util. Code § 1708.5(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingFormal RulemakingAdministrative LawAgency RulemakingInformal RulemakingEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthorityEnergy & Utilities LawAdministrative

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§ 480.13 Rates Charged by Public Utility

All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished for any service rendered or to be rendered must be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful. Every public utility must furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities as defined in *Civ. Code § 54.1*, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public [*Pub. Util. Code § 451*].

Except as provided in *Pub. Util. Code § 455* (hearings on filed schedules not increasing rates or resulting in rate increases), no public utility can change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except on a showing before the PUC and a finding by the PUC that the new rate is justified [*see Pub. Util. Code § 454(a)*; *S. Cal. Edison Co. v. Peevey (2003) 31 Cal. 4th 781, 804-805, 3 Cal. Rptr. 3d 703, 74 P.3d 795* (application, but no public hearing, required for rate change)]. In addition, every common carrier and public utility must publish schedules of its rates and make them available to the public [*Pub. Util. Code §§ 486-489*]. Discrimination in rates is prohibited [*Pub. Util. Code § 453(a)*], and common carriers are prohibited from charging less than established rates [*Pub. Util. Code § 458*].

One way a utility may justify a rate increase is to recover specific costs. As a condition precedent to any increase, petitioners must establish a memorandum account as a mechanism to track expenses they are attempting to recover [*Cal. Pub. Util. Code § 455*; *Southern Cal. Edison Co. v. Public Utilities Com. (2001) 85 Cal. App. 4th 1086, 1104, 102 Cal. Rptr. 2d 684]* . These accounts automatically become effective 40 days after filing of a non-rate advice letter with the PUC, provided the filing does not raise rates and the action is not suspended or modified by the PUC during those 40 days [Cal. Pub. Util. Comm'n. Gen. Order 96-A; *Southern Cal. Edison Co. v. Public Utilities Com. (2001) 85 Cal. App. 4th 1086, 1106, 102 Cal. Rptr. 2d 684]* .

Legal Topics:

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

Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsRatemakingEnergy & Utilities LawUtility CompaniesRatesGeneral Overview

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42-480 California Forms of Pleading and Practice--Annotated § 480.14

§ 480.14 Certificates of Public Convenience and Necessity

[1] When Required

No railroad corporation whose railroad is operated primarily by electric energy, street railroad corporation, gas corporation, electrical corporation, telegraph corporation, telephone corporation, water corporation, or sewer system corporation can begin the construction of a street, railroad, or of a line, plant, or system, or any extension thereof, without obtaining from the PUC a certificate of public convenience and necessity [*Pub. Util. Code § 1001*].

Passenger stage corporations must also obtain a certificate before commencing operations [*Pub. Util. Code § 1031*].

[2] Exceptions for Extension of Existing Service

There are exceptions to the certificate requirement [*see [1], above*] for extensions of lawful (that is, already certificated) existing service within or to territory already served by the public utility, if the extension is necessary in the ordinary course of the public utility's business [*see Pub. Util. Code § 1001*].

In a case of service that cannot physically be confined to the public utility's existing service area (for example, radiotelephone service offeredby a wireline utility in the area presently served by it), an extension of service without new certification would be permissible only if service does not extend more than incidentally outside the existing service area [*Industrial Communciations Systems, Inc. v. Public Utilities Com. (1978) 22 Cal. 3d 572, 577-579, 150 Cal. Rptr. 13, 585 P.2d 863]* .

[3] Exemptions

Unless the PUC determines that the public interest requires that the construction not be exempt from *Pub. Util. Code § 1001* [*see [1], above*], it must exempt from the requirements of *Pub. Util. Code § 1001* the construction of any line, plant, or system, or extension, located outside California if the public utility derives 75 percent or more of its operating revenues from outside the state [*see Pub. Util. Code § 1001.5(a)*].

The public interest determination must be made within 90 days of the date of the utility's application for exemption, or the construction is exempt [*Pub. Util. Code § 1001.5(b)* (subject to extension of up to 60 days on agreement of PUC and utility under *Pub. Util. Code § 1001.5(c)*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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A. Regulation of Public Utilities Generally

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[Reserved]

§§ 480.15[Reserved]

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§ 480.20 Procedures Established by PUC

All hearings, investigations, and proceedings before the PUC are governed by *Pub. Util. Code §§ 201-2115* and by rules of practice and procedure adopted by the PUC set out in *20 Cal. Code Reg., §§ 1-88*. In the conduct these proceedings, the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony may invalidate any order, decision, or rule made, approved, or confirmed by the PUC [*Pub. Util. Code § 1701*].

The rules and procedures of *20 Cal. Code Reg. § 4 et seq.* apply to any formal proceeding, except for a complaint under *20 Cal. Code Reg. § 13.2* (expedited complaint procedure) that is filed after January 1, 1998 [*20 Cal. Code Reg. § 4(a)*]. For a discussion distinguishing between formal and information proceedings generally, see Ch. 470A, *Due Process Restrictions on Public Agencies* .

The rules and procedures in *20 Cal. Code Reg. § 4 et seq.* also apply to formal proceedings filed before January 1, 1998 under specified circumstances [*20 Cal. Code Reg. § 4(b), (e)*]. Any proceeding to which the rules and procedures in *20 Cal. Code Reg. § 4 et seq.* do not apply will be handled under the otherwise applicable PUC rules and procedures contained in 20 Cal. Code Reg. [*20 Cal. Code Reg. § 4(c)*].

When the rules and procedures relating categorization determination (*20 Cal. Code Reg. § 4 et seq.*) apply to a proceeding by virtue of *20 Cal. Code Reg. § 4(b)(2)*, nothing in *20 Cal. Code Reg. § 4 et seq.* may be construed to render invalid, or to require repetition of, procedural steps taken prior to such applicability. However, those procedural steps taken after such applicability must comply with *20 Cal. Code Reg. § 4 et seq.* whenever requiring that compliance would not invalidate or repeat procedural steps taken previously [*20 Cal. Code Reg. § 4(e)*].

In addition, the PUC is required to adopt, and has adopted, procedures on the disqualification of administrative law judges in its proceedings, for bias or prejudice, similar to the procedures governing other hearing officers and superior court judges [*Pub. Util. Code § 309.6(a)*; *see 20 Cal. Code Reg., § 63.1 et seq.*, discussed in *§ 480.62*; for discussion of disqualification of trial court judges and hearings officers generally, see respectively Ch. 317, *Judges* , and Ch. 473E,

Public Administrative Law Judges].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationImpartialityGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawAgency InvestigationsGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral Overview

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42-480 California Forms of Pleading and Practice--Annotated § 480.21

§ 480.21 Application and Complaint Proceedings Compared

A public utility proceeds before the PUC for any type of relief by means of an application [*20 Cal. Code Reg. §§ 15-43, 88*; *see* forms of application in §§ *480.191, 480.192*]. Other entities or persons may proceed by either complaint or petition, as appropriate [*see Pub. Util. Code § 1702*, and discussion and *forms in §§ 480.22, 480.190*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral Overview

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42-480 California Forms of Pleading and Practice--Annotated § 480.22

§ 480.22 Complaints Against Public Utilities

[1] Who May File

Complaints may be made by the any of the following persons or entities by written petition or complaint setting forth any act or thing done or omitted to be done by any public utility [*Pub. Util. Code § 1702*]:

- PUC on its own motion.
- Corporation or person.
- Chamber of commerce.
- Board of trade.
- Labor organization.
- Civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization.
- Body politic or municipal corporation.

A complaint may include any rule or charge established or fixed by or for any public utility, in violation or claimed to be in violation of any provision of law or of any order or rule of the PUC [*Pub. Util. Code § 1702*].

No complaint will be entertained by the PUC, except on its own motion, as to the reasonableness of any rates or charges of any gas, electrical,water, or telephone corporation, unless it is signed by the mayor or the president or chairperson of the board of trustees or a majority of the council, PUC, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 25 actual or prospective consumers or purchasers of the gas,

electrical, water, or telephone service [*Pub. Util. Code § 1702*].

The PUC is not required to dismiss any complaint because of the absence of direct damage to the complainant [*Pub. Util. Code § 1703*].

For forms of complaint before the PUC, see *§ 480.190[1], [2]*.

[2] Service and Filing of Notice of Hearing

On the filing of a complaint, the PUC must cause a copy thereof to be served on the corporation or person complained of [*Pub. Util. Code § 1704*].

Service in all hearings, investigations, and proceedings pending before the PUC may be made on any person on whom a summons may be served in accordance with the provisions of the Code of Civil Procedure and may be made personally or by mailing in a sealed envelope, registered, with postage prepaid [*Pub. Util. Code § 1704*].

The PUC must fix the time when, and place where, a hearing will be had on the complaint and must serve notice thereof, not less than 10 days before the time set for hearing, unless the PUC finds that public necessity requires that the hearing be held at an earlier date [*Pub. Util. Code § 1704*].

For purposes of *20 Cal. Code Reg. § 4 et seq.*, governing formal proceedings before the PUC, a proceeding initiated by an application or complaint is filed as of the date it was tendered for filing in compliance with the rules and procedures of *20 Cal. Code Reg. § 2 et seq.* (filing of documents) [*20 Cal. Code Reg. § 4(d)*].

A proceeding initiated by a PUC order is filed as of the date of issuance of the order [*20 Cal. Code Reg. § 4(d)*].

[3] Answer

Within 30 days after the date of service of the complaint, the defendant must answer the complaint. The PUC, the chief administrative law judge, or the presiding officer may require the filing of an answer within a shorter time [*20 Cal. Code Reg § 13*].

A request for an extension of time to answer may be made in the manner provided by *20 Cal. Code Reg. § 13*. The answer must admit or deny each material allegation in the complaint and must set forth any new matter constituting a defense. Jurisdictional defects are not waived if they are not included in the answer [*20 Cal. Code Reg. § 13.1*].

For a form of answer to a complaint before the PUC, see *§ 480.190[3]*.

[4] Joinder

All matters upon which complaint may be founded may be joined in one hearing, and no motion will be entertained against a complaint for misjoinder of causes of action or grievances or misjoinder or nonjoinder of parties. In any review by the courts of orders or decisions of the PUC, the same rule applies with regard to joinder of causes and parties [*Pub. Util. Code § 1703*].

[5] Intervention

[a] Generally

In a complaint proceeding, petitions to intervene and become a party to the proceeding must be in writing, must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, and whether

petitioner's position is in support of or opposition to the relief sought. Permission to intervene will not be granted except on averments which are reasonably pertinent to the issues already presented, but does not unduly broaden them. If such permission is granted, the petitioner thereby becomes an intervenor and a party to the proceeding to the degree indicated by the order allowing intervention or by the presiding officer at the hearing [*20 Cal. Code Reg. § 53*].

For forms of petition for intervention in a complaint proceeding before the PUC, see *§ 480.190[4]*.

[b] Participation Without Intervention

In an investigation or application proceeding, or in such a proceeding when heard on a consolidated record with a complaint proceeding, an appearance may be entered at the hearing without filing a pleading, if no affirmative relief is sought, if there is full disclosure of the persons or entities on whose behalf the appearance is to be entered, if the interest of such persons or entities in the proceeding and the position intended to be taken are stated fairly, and if the contentions will be reasonably pertinent to the issues already presented and any right to broaden them unduly is disclaimed. A person or entity in whose behalf an appearance is entered in this manner becomes a party to and may participate in the proceeding to the degree indicated by the presiding officer [*20 Cal. Code Reg. § 54*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency InvestigationsGeneral OverviewCivil ProcedureParties InterventionGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsRatemakingEnergy & Utilities LawElectric Power IndustryRatesGeneral OverviewEnergy & Utilities LawElectric Power IndustryState RegulationRate Setting & Tariffs

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42-480 California Forms of Pleading and Practice--Annotated § 480.23

§ 480.23 Categorization Determination by PUC

[1] Preliminary Determination of Category Generally

[a] Determination Required

The PUC is required to determine whether a proceeding requires a hearing. The determination must be consistent with due process, publicpolicy, and statutory requirements [*Pub. Util. Code § 1701.1(a)*; for discussion of due process requirements as they apply generally to public agency proceedings, *see* Ch. 470A, *Due Process Restrictions on Public Agencies*].

If the matter requires a hearing, the PUC must also determine whether the matter requires a quasi-legislative, an adjudication, or a ratesetting hearing [*Pub. Util. Code § 1701.1(a)*]. The terms "category," "categorization," or "categorized" refer to this procedure [*20 Cal. Code Reg. § 5(a)*]. Definitions of each of these classifications are provided in *Pub. Util. Code § 1701.1(c)(1)-(3)*, and are discussed in *[b], below*.

If the PUC under *Pub. Util. Code § 1701.1* has determined that an adjudication case requires a hearing, the procedures prescribed by *Pub. Util. Code § 1701.2* apply. These procedures are discussed in *§ 480.60* et seq.

[b] Categories Defined

[i] "Quasi-Legislative" Defined

Quasi-legislative cases, for purposes of statutory regulation of formal hearings before the PUC [*see Pub. Util. Code § 1701 et seq.*], are cases that establish policy, including, but not limited to, rulemaking and investigations which may establish rules affecting an entire industry or class of entities within the industry [*Pub. Util. Code § 1701.1(c)(2)*; *20 Cal. Code Reg. § 5(d)*].

[ii] "Adjudication" Defined

Adjudication cases, for purposes of statutory regulation of formal hearings before the PUC [*see Pub. Util. Code § 1701 et seq.*], are enforcement cases and complaints except those challenging the reasonableness of any rates or charges as specified in Section 1702 [*Pub. Util. Code § 1701.1(c)(2)*].

"Adjudicatory" proceedings are [*20 Cal. Code Reg. § 5(b)*]:

- Enforcement investigations into possible violations of any provision of statutory law or order or rule of the Commission, and

- Complaints against regulated entities, including those complaints that challenge the accuracy of a bill, but excluding those complaints that challenge the reasonableness of rates or charges, past, present, or future.

[iii] "Ratesetting" Defined

"Ratesetting" proceedings are proceedings in which the PUC sets or investigates rates for a specifically named utility or utilities, or establishes a mechanism that in turn sets the rates for a specifically named utility or utilities. "Ratesetting" proceedings include complaints that challenge the reasonableness of rates or charges, past, present, or future [*20 Cal. Code Reg. § 5(c)*; *see Pub. Util. Code § 1701.1(c)(3)* (ratesetting cases include, but are not limited to, general rate cases, performance-based ratemaking, and other ratesetting mechanisms)].

For purposes of *20 Cal. Code Reg. § 4 et seq.*, governing formal proceedings before the PUC, other proceedings may be categorized as ratesetting, as described in *20 Cal. Code Reg. § 6.1(c)* [*20 Cal. Code Reg. § 5(c)*].

[c] Ex Parte Communication on Categorization Issues

The PUC has established regulations regarding ex parte communication on case categorization issues, as required by statute [*see Pub. Util. Code § 1701.1(a)*]. Those regulations are contained in *20 Cal. Code Reg. §§ 7, 7.1*, and are discussed in § 450.51.

[2] Determination in Proceeding Initiated by Application

[a] Application

Any person that files an application after January 1, 1998, must state in the application all of the following [*20 Cal. Code Reg. § 6(a)(1)*]:

- The proposed category for the proceeding (*see [1][b], above*).

- The need for hearing.

- The issues to be considered.

- A proposed schedule (*see [b], below*).

As described in *20 Cal. Code Reg. § 6.1(a)*, the PUC must issue a resolution that preliminarily categorizes and preliminarily determines the need for hearing in the proceeding [*20 Cal. Code Reg. § 6(a)(1)*].

A proceeding initiated by an application is filed as of the date it was tendered for filing in compliance with the rules and procedures of *20 Cal. Code Reg. § 2 et seq.* [*20 Cal. Code Reg. § 4(d)*].

For forms of application, see *§ 480.191*.

[b] Proposed Schedule

Any party's proposed schedule for purposes of *20 Cal. Code Reg. § 6* must be consistent with the proposed or finally determined category, as appropriate [*20 Cal. Code Reg. § 6(e)*].

If the proposed or finally determined category is an adjudicatory proceeding, the proposed schedule must include a deadline for resolving the proceeding within 12 months or less [*20 Cal. Code Reg. § 6(e)*].

If the proposed or finally determined category is a ratesetting or quasi-legislative proceeding, the proposed schedule must include a deadline for resolving the proceeding within 18 months or less [*20 Cal. Code Reg. § 6(e)*].

The proposed schedule must also take into account all of the following [*20 Cal. Code Reg. § 6(e)*]:

- The number and complexity of issues to be considered.
- The number of parties expected to participate.
- The need for and expected duration of hearings.
- Any other factors that the party wants the assigned commissioner to weigh in ruling on the scoping memorandum (for further discussion relating scoping memoranda, *see § 480.25A*).

[c] Protest or Response

Any person protesting or responding to an application must state in the protest or response [*20 Cal. Code Reg. § 6(a)(2)*]:

- Any comments or objections regarding the applicant's statement on the proposed category.
- Need for hearing.
- Issues to be considered.
- Proposed schedule.

[d] Preliminary Determination of Category and Need for Hearing

[i] Content and Timing of Resolution

By resolution at each PUC business meeting, the PUC must preliminarily determine, for each proceeding initiated by application filed on or after the PUC's prior business meeting, the category of the proceeding and the need for hearing [*20 Cal. Code Reg. § 6.1(a)*].

The preliminary determination may be held for one PUC business meeting if the time of filing did not permit an informed determination [*20 Cal. Code Reg. § 6.1(a)*].

[ii] Multiple Category and Other Proceedings

When a proceeding may fit more than one category as defined in *20 Cal. Code Reg. §§ 5(b), 5(c),* and *5(d)* (discussed under *[1][b], above*), the PUC may determine which category appears most suitable to the proceeding, or may divide the subject matter of the proceeding into different phases or one or more new proceedings [*20 Cal. Code Reg. § 6.1(b)*].

When a proceeding does not clearly fit into any of those categories, the proceeding will be conducted under the rules that apply to the ratesetting category unless and until the PUC determines that the rules that apply to one of the other categories, or some hybrid of the rules, are best suited to the proceeding [*20 Cal. Code Reg. § 6.1(c)*].

In exercising its discretion in these situations, the PUC must so categorize a proceeding and must make such other procedural orders as best to enable the PUC to achieve a full, timely, and effective resolution of the substantive issues presented in the proceeding [*20 Cal. Code Reg. § 6.1(d)*].

[iii] Preliminary Determination Not Appealable

The preliminary determination is not appealable but must be confirmed or changed by assigned commissioner's ruling under *20 Cal. Code Reg. § 6(a)(3),* discussed under *[e], below*. As discussed below, the assigned commissioner's ruling under *20 Cal. Code Reg. § 6(a)(3)* regarding the category is subject to appeal under *20 Cal. Code Reg. § 6.4* [*20 Cal. Code Reg. § 6.1(a)*].

[e] Appealable Determination of Category and Need for Hearing

The assigned commissioner must consider the application, protests, and responses, and the prehearing conference statements (if one is held) [*20 Cal. Code Reg. § 6(a)(3)*].

The assigned commissioner must rule on the category, need for hearing, and scoping memo. The ruling must also designate the principal hearing officer or presiding officer, as appropriate. The assigned commissioner has discretion to rule on any or all of these matters on the record at the prehearing conference [*20 Cal. Code Reg. § 6(a)(3)* (for further discussion relating scoping memoranda, *see § 480.25A*)].

The ruling, only with regard to the category, is appealable under the procedures in *20 Cal. Code Reg. § 6.4* [*20 Cal. Code Reg. § 6(a)(3)*].

[3] Determination in Proceeding Initiated by Complaint

[a] Complaint

Any person who files a complaint after January 1, 1998, must state in the complaint the following [*20 Cal. Code Reg. § 6(b)(1)*]:

- The proposed category for the proceeding.
- The need for hearing.
- The issues to be considered.
- A proposed schedule.

A proceeding initiated by a complaint is filed as of the date it was tendered for filing in compliance with the rules and procedures of *20 Cal. Code Reg. § 2 et seq.* [*20 Cal. Code Reg. § 4(d)*].

[b] Instructions to Answer

The Docket Office must serve instructions to answer on the defendant, with a copy to the complainant, indicating [*20 Cal. Code Reg. § 6(b)(1)*]:

- The date when the defendant's answer must be filed and served, and
- The administrative law judge assigned to the proceeding.

The instructions to answer must also indicate the category of the proceeding and the need for hearing, as determined by the chief administrativelaw judge in consultation with the President of the Commission. The determination regarding the category is appealable under the procedures in *20 Cal. Code Reg. § 6.4* [*20 Cal. Code Reg. § 6(b)(1)*].

[c] Answer

The defendant must state in the answer any comments or objections regarding the complainant's statement on the need for hearing, issues to be considered, and proposed schedule [*20 Cal. Code Reg. § 6(b)(2)*].

[d] Ruling on Scoping Memo

The assigned commissioner must consider the complaint and answer, and the prehearing conference statements (if one is held), and must rule on the scoping memo. The ruling must also designate the principal hearing officer or presiding officer, as appropriate [*20 Cal. Code Reg. § 6(b)(3)* (for further discussion relating scoping memoranda, *see § 480.25A*)].

The assigned commissioner has discretion to rule on any or all of these matters on the record at the prehearing conference [*20 Cal. Code Reg. § 6(b)(3)*].

Effective January 1, 2004, in a ratesetting or quasi-legislative case, the commissioner must resolve the issues raised in the scoping memo within 18 months of the date the scoping memo is issued, unless the commission makes a written determination that the deadline cannot be met, including findings as to the reason, and issues an order extending the deadline. No single order may extend the deadline for more than 60 days [*Pub. Util. Code § 1701.5(a)*]. The commission may specify in a scoping memo a resolution date later than 18 months from the date the scoping memo is issued, if the scoping memo includes specific reasons for the necessity of a later date and the commissioner assigned to the case approves the date [*Pub. Util. Code § 1701.5(b)*].

[4] Determination in Proceeding Initiated by PUC Order Instituting Investigation

A PUC order to show cause or order instituting investigation, issued after January 1, 1998, must determine the category and need for hearing, and must attach a preliminary scoping memo. The order, only with regard to the category, is appealable under the procedures in *20 Cal. Code Reg. § 6.4* [*20 Cal. Code Reg. § 6(c)(1)* (for further discussion relating scoping memoranda, *see § 480.25A*)].

A proceeding initiated by a PUC order is filed as of the date of issuance of the order *20 Cal. Code Reg. § 4(d)*.

Any person filing a response to an order to show cause or order instituting investigation must state in the response any objections to the order regarding the need for hearing, issues to be considered, or schedule, as set forth in the order [*20 Cal. Code Reg. § 6(c)(1)*].

At or after the prehearing conference if one is held, the assigned commissioner must rule on the scoping memo. The ruling must also designate the principal hearing officer or the presiding officer, as appropriate [*20 Cal. Code Reg. §*

6(c)(1)].

Effective January 1, 2004, in a ratesetting or quasi-legislative case, the commissioner must resolve the issues raised in the scoping memo within 18 months of the date the scoping memo is issued, unless the commission makes a written determination that the deadline cannot be met, including findings as to the reason, and issues an order extending the deadline. No single order may extend the deadline for more than 60 days [*Pub. Util. Code § 1701.5(a)*]. The commission may specify in a scoping memo a resolution date later than 18 months from the date the scoping memo is issued, if the scoping memo includes specific reasons for the necessity of a later date and the commissioner assigned to the case approves the date [*Pub. Util. Code § 1701.5(b)*].

[5] Determination in Proceeding Initiated by PUC Order Instituting Rulemaking

A PUC order instituting rulemaking, issued after January 1, 1998, must preliminarily determine the category and need for hearing, and must attach a preliminary scoping memo [*20 Cal. Code Reg. § 6(c)(2)* (for further discussion relating scoping memoranda, *see § 480.25A*)].

Any person filing a response to an order instituting rulemaking must state in the response any objections to the order regarding the category, need for hearing, and preliminary scoping memo [*20 Cal. Code Reg. § 6(c)(2)*].

At or after the prehearing conference if one is held, the assigned commissioner must rule on the category, need for hearing, and scoping memo [*20 Cal. Code Reg. § 6(c)(2)*].

If the proceeding is categorized as ratesetting, the ruling must also designate the principal hearing officer [*20 Cal. Code Reg. § 6(c)(2)*].

The ruling, only with regard to category, is appealable under the procedures in *20 Cal. Code Reg. § 6.4* [*20 Cal. Code Reg. § 6(c)(2)*].

[6] Determination in Proceedings Filed Before January 1, 1998

When the rules and procedures of this Article apply to a proceeding by virtue of *20 Cal. Code Reg. § 4(b)(2)* (relating to proceedings filed before January 1, 1998), the ruling or order that determines a hearing should be held must also preliminarily determine the category for the proceeding, and must set a prehearing conference [*20 Cal. Code Reg. § 6(d)*].

At or after the prehearing conference, the assigned commissioner must rule on the category, need for hearing, and scoping memo. The ruling must also designate the principal hearing officer or presiding officer, as appropriate. The ruling, only with regard to the category, is appealable under the procedures in *20 Cal. Code Reg. § 6.4* [*20 Cal. Code Reg. § 6(d)*].

[7] Appeals of Categorization

[a] Appeal Is Prerequisite for Standing to Seek Judicial Review

If the PUC's decision regarding the nature of the proceeding is not appealed to the PUC within the time period stated in [a], *above*, the decision is not subsequently subject to judicial review [*Pub. Util. Code § 1701.1(a)*].

Only those parties who have requested a rehearing within the time period stated in [b], *below*, subsequently has standing for judicial review. The review is only available at the conclusion of the proceeding [*Pub. Util. Code § 1701.1(a)*].

[b] Time Limit for Request

The PUC's decision regarding the nature of the proceeding is subject to a request for rehearing within 10 days of the date of that decision [*Pub. Util. Code § 1701.1(a)*]. "Appeal of categorization" means a request for rehearing of the determination of the category of a proceeding *20 Cal. Code Reg. § 5(a)*.

More particularly, any party may file and serve an appeal to the Commission, no later than 10 days after the date of any of the following [*20 Cal. Code Reg. § 6.4(a)*]:

- An assigned commissioner's ruling on category pursuant to *20 Cal. Code Reg. § 6(a)(3), (c)(2),* or *6(d)*.
- The instructions to answer pursuant to *20 Cal. Code Reg. § 6(b)(1)*.
- An order to show cause or order instituting investigation pursuant to *20 Cal. Code Reg. § 6(c)(1)*.

[c] Content of Appeal

The appeal must state why the designated category is wrong as a matter of law or policy [*20 Cal. Code Reg. § 6.4(a)*].

For a form of request for rehearing of categorization determination, see *§ 480.193[1]*.

[d] Service of Appeal

The appeal must be served on the Commission's General Counsel, the chief administrative law judge, the President of the PUC, and all persons who were served with the ruling, instructions to answer, or order [*20 Cal. Code Reg. § 6.4(a)*].

[e] Response to Appeal

Any party, no later than 15 days after the date of a categorization from which timely appeal has been taken pursuant to *20 Cal. Code Reg. § 6.4(a),* may file and serve a response to the appeal.

The response must be served on the appellant and on all persons who were served with the ruling, instructions to answer, or order. The PUC is not obligated to withhold a decision on an appeal to allow time for responses. Replies to responses are not permitted [*20 Cal. Code Reg. § 6.4(b)*].

[f] Decision on Appeal

The PUC must render its decision regarding the appeal within 30 days [*Pub. Util. Code § 1701.1(a)*].

[8] Approval of Changes to Preliminary Determinations

If there is no timely appeal under *20 Cal. Code Reg. § 6.4*, but the assigned commissioner, pursuant to *20 Cal. Code Reg. §§ 6(a)(3), (c)(2),* or *6(d),* changes the preliminary determination on category, the assigned commissioner's ruling must be placed on the PUC's Agenda for approval of that change [*20 Cal. Code Reg. § 6.5(a)*].

If the assigned commissioner, pursuant to *20 Cal. Code Reg. §§ 6(a)(3), (c)(2),* or *(d),* changes the preliminary determination on need for hearing, the assigned commissioner's ruling must be placed on the PUC's Consent Agenda for approval of that change [*20 Cal. Code Reg. § 6.5(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingDue ProcessAdministrative LawAgency AdjudicationHearingsRight to HearingStatutory RightAdministrative LawAgency InvestigationsGeneral OverviewAdministrative LawAgency RulemakingFormal RulemakingConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsJudicial ReviewJurisdictional PrerequisitesEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsJudicial ReviewEnergy & Utilities LawAdministrative ProceedingsRatemaking

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§ 480.24 Proceedings Without Hearings

Whenever there is a final determination in a proceeding, pursuant to *20 Cal. Code Reg. § 6-6.5*, that a hearing is not needed in the proceeding, ex parte communications must be permitted, as provided in *20 Cal. Code Reg. § 7(e)*. In all other respects, the rules and procedures in *20 Cal. Code Reg. § 4 et seq.* cease to apply to that proceeding. However, the scoping memo issued for the proceeding will continue to apply to the proceeding as to all matters covered in the memo [*20 Cal. Code Reg. § 6.6*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationImpartialityGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawAgency InvestigationsGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral Overview

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§ 480.25 Prehearing Conference

The PUC on initiating a hearing must assign one or more PUC commissioners to oversee the case and an administrative law judge when appropriate. The assigned commissioner is required to schedule a prehearing conference [*Pub. Util. Code § 1701.1(b)*]. He or she must set the prehearing conference as soon as practicable after the PUC makes the assignment [*20 Cal. Code Reg. § 6.2*].

The ruling setting the prehearing conference may also set a date of filing and serving prehearing conference statements [*20 Cal. Code Reg. § 6.2*]. Such statements may address the schedule, the issues to be considered, any matter related to the applicability of this Article to the proceeding, and any other matter specified in the ruling setting the prehearing conference [*20 Cal. Code Reg. § 6.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.25A

§ 480.25A Ruling on Scoping Memorandum

The assigned commissioner must prepare and issue by order or ruling a "scoping memo" that describes the issues to be considered and the applicable timetable for resolution [*Pub. Util. Code § 1701.1(b)*].

Specifically, at or after the prehearing conference, if one is held, the assigned commissioner must rule on the scoping memo for the proceeding, which must finally determine the schedule (with projected submission date) and issues to be addressed [*20 Cal. Code Reg. § 6.2*]. The PUC fails to proceed in the manner required by law under *Pub. Util. Code § 1757.1(a)* if it considers issues beyond those identified in the scoping memo [*Southern California Edison Co. v. Public Utilities Com. (2006) 140 Cal. App. 4th 1085, 1104-1106, 45 Cal. Rptr. 3d 485]* .

If there is no prehearing conference, the assigned commissioner must rule on the scoping memo for the proceeding as soon as possible after the timely filing of the responsive pleadings. Responsive pleadings for this purpose consist of protests, responses, or answers, as appropriate [*20 Cal. Code Reg. § 6.2*].

Effective January 1, 2004, in a ratesetting or quasi-legislative case, the commissioner must resolve the issues raised in the scoping memo within 18 months of the date the scoping memo is issued, unless the commission makes a written determination that the deadline cannot be met, including findings as to the reason, and issues an order extending the deadline. No single order may extend the deadline for more than 60 days [*Pub. Util. Code § 1701.5(a)*]. The commission may specify in a scoping memo a resolution date later than 18 months from the date the scoping memo is issued, if the scoping memo includes specific reasons for the necessity of a later date and the commissioner assigned to the case approves the date [*Pub. Util. Code § 1701.5(b)*].

In an adjudicatory proceeding, the scoping memo must also designate the presiding officer [*20 Cal. Code Reg. § 6.2*].

Legal Topics:

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

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42-480 California Forms of Pleading and Practice--Annotated § 480.26

§ 480.26 Intervenor's Fees and Expenses

[1] Availability of Compensation

Public utility customers may be entitled to compensation for participating or intervening in PUC proceedings involving electric, gas, water, and telephone utilities [*Pub. Util. Code §§ 1801, 1801.3(a)*].

The PUC is required to award reasonable fees for advocates and expert witnesses together with other reasonable costs of preparing for and participating in a hearing or proceeding to any customer who complies with *Pub.Util. Code § 1804* and satisfies the following requirements [*Pub. Util. Code § 1803*]:

- The customer's presentation makes a substantial contribution to the adoption, in whole or in part, of the PUC's order or decision; and

- Participation or intervention without an award of fees or costs imposes a significant financial hardship.

The PUC also may award compensation to a customer whose participation materially supplements, complements, or contributes to the presentation of another party, including the PUC staff, if the customer's participation makes a substantial contribution to a PUC order or decision, consistent with the legislative intent behind compensation articulated in *Pub. Util. Code § 1801.3* [*Pub. Util. Code § 1802.5*].

Any group or association that represents the interests of small agricultural customers in a proceeding and that would otherwise be eligible for an award of compensation under the financial hardship terms of *Pub. Util. Code § 1804* [discussed in *[3], below*] without the presence of large agricultural customers, as determined by the PUC, may not be deemed ineligible solely because that group or organization also has members that are large agricultural customers [*Pub. Util. Code § 1812*].

The definition of "compensation" is set out under *[2], below*. The definitions of "customer," "party," "proceeding," "significant financial hardship," "small commercial customer," and "substantial contribution" are set out in *Pub. Util. Code § 1802*.

[2] Amount of Compensation

"Compensation" means payment for all or part, as determined by the PUC, of reasonable fees for advocates and expert witnesses as well as other reasonable costs of preparing for and participating in a proceeding [*Pub. Util. Code § 1802(a)*; *see The Utility Reform Network v. Public Utilities Commission (2008) 166 Cal. App. 4th 522, 535, 82 Cal. Rptr. 3d 791* (substantial contribution to PUC decision does not automatically entitle intervener to compensation for all ensuing judicial proceedings without regard to changed circumstances or results achieved)]. "Other reasonable costs" means reasonable out-of-pocket expenses directly incurred by a customer that are directly related to the contentions or recommendations made by the customer that resulted in a substantial contribution [*Pub. Util. Code § 1802(d)*]. "Compensation" includes the fees and costs of obtaining an award and obtaining judicial review, if any [*Pub. Util. Code § 1802(a)*].

The computation of compensation awarded must take into consideration the market rates paid to persons of comparable training and experience who offer similar services. The compensation awarded may not, in any case, exceed the comparable market rate for services paid by the PUC or the public utility, whichever rate is greater, to persons of comparable training and experience who are offering similar services [*Pub. Util. Code § 1806*; *see The Utility Reform Network v. Public Utilities Commission (2008) 166 Cal. App. 4th 522, 535-537, 82 Cal. Rptr. 3d 791* (PUC abused its discretion when it compensated outside counsel at same rate it compensated in-house counsel)].

[3] Procedure for Obtaining Compensation

[a] Notice of Intent to Claim Compensation

A customer who intends to seek an award of compensation must file and serve onall parties to the proceeding a notice of intent to claim compensation within 30 days after the prehearing conference is held [*Pub. Util. Code § 1804(a)(1)*].

In cases in which no prehearing conference is scheduled or where the Commission anticipates that the proceeding will take less than 30 days, the administrative law judge may establish a deadline for the filing of notices of intent [*Pub. Util. Code § 1804(a)(1)*; *20 Cal. Code Reg. § 76.74(a)*].

In cases where parties cannot reasonably identify issues within the time set by statute or by the administrative law judge's ruling under *20 Cal. Code Reg. § 76.74(a)* for the filing of the notice of intent, or when new issues emerge after the time set for filing, the administrative law judge may specify an appropriate procedure for accepting new or revised notices of intent [*Pub. Util. Code § 1804(a)(1)*; *20 Cal. Code Reg. § 76.74(b)*].

The notice of intent to claim compensation must contain both of the following [*Pub. Util. Code § 1804(a)(2)(A)*]:

- A statement of the nature and extent of the customer's planned participation in the proceeding as far as it is possible to set it out when the notice of intent is filed.

- An itemized estimate of the compensation that the customer expects to request, given the likely duration of the proceeding as it appears at the time.

The notice of intent may include a showing by the customer that participation in the hearing or proceeding would pose a significant financial hardship. Alternatively, this showing can be included in the request for award submitted under *Pub. Util. Code § 1804(c)* [*Pub. Util. Code § 1804(a)(2)(B)*; *see* discussion in *[c], below*].

[b] Preliminary Ruling on Eligibility for Compensation

Within 15 days after service of the notice of intent, the administrative law judge may direct the staff, and may permit any other interested party, to file a statement responding to the notice [*Pub. Util. Code § 1804(a)(2)(C)*].

If the notice of intent includes a showing of significant financial hardship, the administrative law judge, in consultation with the assigned commissioner, must issue a preliminary ruling within 30 days after the notice was filed, addressing whether the customer will be eligible for an award of compensation. The ruling must address whether a showing of significant financial hardship has been made. A finding of significant financial hardship in the preliminary ruling creates a rebuttable presumption of eligibility for compensation in other PUC proceedings commencing within one year after the date of that finding [*Pub. Util. Code § 1804(b)(1)*].

Regardless of whether the notice of intent includes a showing of significant financial hardship, the administrative law judge may issue a ruling addressing issues raised by the notice. A finding of significant financial hardship in no way ensures compensation. Similarly, the customer's failure to identify a specific issue in the notice or to precisely estimate potential compensation will not preclude an award of reasonable compensation if a substantial contribution is made [*see Pub. Util. Code § 1804(b)(2)* (aspects of notice that ruling may point out)].

[c] Request for Award of Compensation

After issuance of a final order or decision by the PUC in the hearing or proceeding, a customer who has been found eligible for an award of compensation may, within 60 days, file a request for an award. The request must contain, at a minimum, a detailed description of services and expenditures and a description of the customer's substantial contribution to the hearing or proceeding. The PUC staff, and any other party, may file a response to the request within 30 days after service of the request [*Pub. Util. Code § 1804(c)*].

[d] Verification of Basis for Award

The PUC may audit the customer's records and books to verify the basis for the award. The PUC must preserve the confidentiality of the customer's records in making its audit. Within 20 days after completion of the audit, the PUC must direct an audit report to be prepared and filed. Any other party may file a response to the audit report within 20 days after the report is filed [*Pub. Util. Code § 1804(d)*].

[e] Decision to Grant or Deny Award

Within 75 days after the filing of the request for compensation [*see Pub. Util. Code § 1804(c)*, and discussion in *[c], above*] or within 50 days after the filing of an audit report [*see Pub. Util. Code § 1804(d)*, and discussion in *[d], above*], whichever occurs later, the PUC is required to issue a determination of whether the customer has made a substantial contribution to the final order or decision in the hearing or proceeding. If the PUC finds that the customer requesting compensation has made a substantial contribution, the PUC must describe the contribution and determine the amount of compensation to be paid in accordance with the terms of *Pub. Util. Code § 1806* [*Pub. Util. Code § 1804(e)*; *see* discussion in *[2], above*].

The PUC is required to deny any request for an award to any customer who attempts to delay or obstruct the orderly and timely fulfillment of the PUC's responsibilities [*Pub. Util. Code § 1808*].

[4] Payment of Compensation by Utility

Any award of compensation will be paid by the public utility that is the subject of the hearing, investigation, or proceeding, as determined by the PUC, within 30 days. Notwithstanding any other provision of law, any award paid by a public utility will be allowed by the PUC as an expense for the purpose of establishing rates of the utility [*see Pub.*

Util. Code § 1807].

Legal Topics:

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§ 480.27 Deposit of Funds

Except as provided in *Pub. Util. Code § 1702.2(b)*, any funds entrusted to the PUC by any person or corporation filing a complaint against a public utility shall be deposited in trust by the PUC in the custody of the Treasurer, as specified in *Gov. Code. Code § 16305.3* (deposit of state money in trust) [*Pub. Util. Code § 1702.1(a)*].

If the amount of funds entrusted to the PUC by a person or corporation filing a complaint against a public utility exceeds $20,000, the PUC may deposit the funds in trust in an insured account with a bank or a federal or state savings and loan association, bearing interest at rates up to the maximum permitted by law. The PUC shall pay these funds, together with the interest paid thereon to the party specified in the PUC's order or decision on that complaint [*Pub. Util. Code § 1702.1(b)*].

Legal Topics:

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[Reserved]

§§ 480.28[Reserved]

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§ 480.40 Hearing Procedures Generally Applicable

Pub. Util. Code § 1705, discussed in *§ 480.41* et seq, sets forth procedures that govern hearings before the PUC generally.

For procedures that apply to a particular type of proceeding, see the following:

- Adjudication hearings [*Pub. Util. Code § 1701.2*, discussed in *§ 480.60* et seq.].
- Ratesetting hearings [*Pub. Util. Code § 1701.3*, discussed in *§ 480.80* et seq.].
- Quasi-legislative hearings [*Pub. Util. Code § 1701.4*, discussed in *§ 480.100* et seq.].

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§ 480.40A Role of Presiding Officers

[1] Commissioners or Administrative Law Judge

When evidence is to be taken in a proceeding before the PUC, one or more of the commissioners, or an administrative law judge, may preside at the hearing [*20 Cal. Code Reg. § 62*].

[2] Authority

The presiding officer may do any of the following [*20 Cal. Code Reg. § 63*]:

- Set hearings and control their course.
- Administer oaths.
- Issue subpoenas.
- Receive evidence.
- Hold appropriate conferences before or during hearings.
- Rule on all objections or motions which do not involve final determination of proceedings.
- Receive offers of proof.
- Hear argument.
- Fix the time for the filing of briefs.

The presiding officer may take such other action as may be necessary and appropriate to the discharge of his or her duties, consistent with the statutory or other authorities under which the PUC functions and with the rules and policies of the PUC [*20 Cal. Code Reg. § 63*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.41

§ 480.41 Right to Be Heard and Introduce Evidence

At the time fixed for any hearing before the PUC or a commissioner or the time to which the hearing has been continued, the complainant and the corporation or person complained of are entitled to be heard and to introduce evidence. In addition, whatever corporations or persons that the PUC allows to intervene also are entitled to be heard and introduce evidence [*Pub. Util. Code § 1705*; *see § 480.22[5]*, discussing intervention generally].

The parties are entitled to be heard in person or by an attorney [*Pub. Util. Code § 1705*].

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For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.42

§ 480.42 Attendance of Witnesses

The PUC must issue process to enforce the attendance of all necessary witnesses [*Pub. Util. Code § 1705*].

Legal Topics:

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§ 480.43 Record of Proceedings

A reporter appointed by the PUC must take down a complete record of all proceedings and testimony before the PUC or any Commissioner on any formal hearing [*Pub. Util. Code § 1706*].

In case of an action to review any order or decision of the PUC, the following constitutes the record of the PUC [*Pub. Util. Code § 1706*]:

- A transcript of the testimony.
- All exhibits or copies of the transcript introduced.
- A transcript of the pleadings, record, and proceedings in the cause.

However, if the petitioner and PUC stipulate that certain questions alone and a specified portion only of the evidence must be certified to the Supreme Court and court of appeal for its judgment, the stipulation, and the questions and evidence specified in the stipulation, will constitute the record on review [*Pub. Util. Code § 1706*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.44

§ 480.44 Issuance and Form of Order

After the conclusion of the hearing, the PUC must make and file its order, containing its decision. Except for decisions filed after hearings held under *Pub. Util. Code § 1702.1* (expedited small claims procedure; *see § 480.130*), the decision must separately state findings of fact and conclusions of law by the PUC on all issues material to the order or decision [*Pub. Util. Code § 1705*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 480.45 Service of Order

A copy of the order, certified under the seal of the PUC, must be served on the corporation or person complained of, or the corporation's or person's attorney [*Pub. Util. Code § 1705*].

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42-480 California Forms of Pleading and Practice--Annotated § 480.46

§ 480.46 Operative Date of Order or Decision

The order, of its own force, takes effect and becomes operative 20 days after the service of the order except as otherwise provided by the PUC [*Pub. Util. Code § 1705*]. Note, however, that *Pub. Util. Code § 1731(a)*, as amended, requires the PUC to set an effective date when issuing an order or decision, and also provides that date may be a date prior to the issuance of the order or decision.

An order of the PUC continues in force either for a period designated in the order or until changed or abrogated by the PUC [*Pub. Util. Code § 1705*].

If the PUC believes that an order cannot be complied with within 20 days, it may prescribe such additional time as in its judgment is reasonably necessary to comply with the order, and may on application and for good cause shown, extend the time for compliance fixed in its order. Decisions rendered in response to complaints filed and processed pursuant to *Pub. Util. Code § 1702.1* (expedited small claims procedure; *see § 480.130*), may not be considered as precedent or binding on the PUC or the courts of this state [*Pub. Util. Code § 1705*].

Legal Topics:

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

§§ 480.47[Reserved]

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42-480 California Forms of Pleading and Practice--Annotated § 480.50

§ 480.50 Defined

"Ex parte communication," for purposes of statutory regulation of hearings before the PUC [*see Pub. Util. Code § 1701 et seq.*], means any oral or written communication between a decision maker and a person with an interest in a matter before the PUC concerning substantive, but not procedural issues, that does not occur in a public hearing, workshop, or other public proceeding, or on the official record of the proceeding on the matter [*Pub. Util. Code § 1701.1(c)(4)* (also defining "person with interest"); for various definitions promulgated by PUC, *see 20 Cal. Code Reg., §§ 1.3, 5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.51

§ 480.51 Ex Parte Communication on Categorization Issues

[1] In General

Rules governing ex parte communication in categorization proceedings vary, depending on the following factors:

- The manner in which the proceedings are iniated (for example, by application).
- The relevant stage of the proceedings.
- What category has been determined, whether by preliminary determination or appealable determination.

Ex parte communications that occur during the period between the beginning of a proceeding and the determination of the category of that proceeding, are governed by *20 Cal. Code Reg. § 7(a)* [*20 Cal. Code Reg. § 7(a)*]. These provisions are discussed under *[2]*, et seq., *below*.

Ex parte communications concerning categorization of a given proceeding are permitted, but must be reported under pursuant to *20 Cal. Code Reg. § 7.1* [*20 Cal. Code Reg. § 7(f)*]. The phrase, "ex parte communications concerning categorization," means a written or oral communication on the category of any proceeding, between an interested person and any commissioner, any commissioner's personal advisor, the chief administrative law judge, any assistant chief administrative law judge, or the assigned administrative law judge that does not occur in a public hearing, workshop, or other public setting, or on the record of the proceeding [*20 Cal. Code Reg. § 5(g)*].

For discussion of the rules governing ex parte communication in enforcement-related proceedings or other covered proceedings, see *§ 480.52*.

[2] Period Between Beginning of Proceeding and Category Determination

[a] Proceeding Initiated by Application

In a proceeding initiated by application filed after January 1, 1998, the requirements of *20 Cal. Code Reg. § 7(c)* apply during the period during the filing and the PUC's preliminary determination of category pursuant to *20 Cal. Code Reg. § 6(a)(1)* [*20 Cal. Code Reg. § 7(a)(1)*]. Thus, oral and written ex parte communications are permitted, with specified limitations. These limitations are discussed under [3][b], *below*.

After the PUC makes a preliminary determination of category under *20 Cal. Code Reg. § 6(a)(1)*, the requirements of *20 Cal. Code Reg. § 7(b), (c)*, or *(d)* apply, depending on the preliminary determination [*20 Cal. Code Reg. § 7(a)(1)*]:

- If the preliminary determination is that the matter is an adjudication case, ex parte communications are generally prohibited [*see Pub. Util. Code § 1701.2(b)*; *20 Cal. Code Reg. § 7(b)*; discussed under *[3][a], below*].

- If the preliminary determination is that the matter is a ratesetting case, oral and written ex parte communications are permitted, with specified limitations [*see Pub. Util. Code § 1701.3(c)*; *20 Cal. Code Reg. § 7(c)*; discussed under *[3][b], below*].

- If the preliminary determination is that the matter is a quasi-legislative case, ex parte communications are permitted without limitations [*see Pub. Util. Code § 1701.4(b)*; *20 Cal. Code Reg. § 7(d)*; discussed under *[3][c], below*].

Similarly, after the assigned commissioner's appealable determination of category under *20 Cal. Code Reg. § 6(a)(3)*, the applicable requirements depend on that determination unless and until it is modified by the PUC under *20 Cal. Code Reg. § 6.4* or *6.5(a)* [*20 Cal. Code Reg. § 7(a)(1)*].

[b] Proceeding Initiated by Complaint

In a proceeding initiated by complaint filed after January 1, 1998, regardless of the complainant's proposed category for the proceeding, ex parte communications are prohibited until the date of service of the instructions to answer [*20 Cal. Code Reg. § 7(a)(2)*].

After the date of service of the instructions to answer, the applicable requirements depend on the determination of category in the instructions to answer, unless and until that determination is modified by the PUC under *20 Cal. Code Reg. § 6.4* [*20 Cal. Code Reg. § 7(a)(2)*].

For discussion related to proceedings initiated before January 1, 1998, see *[e], below*. For discussion relating to ex parte communication under a particular category, see *[3], below*.

[c] Proceeding Initiated by Order Instituting Investigation

In a proceeding initiated after January 1, 1998, by order instituting investigation or order to show cause, the requirements of *20 Cal. Code Reg. § 7(b), (c)*, or *(d)* apply, depending on the order's determination of category, unless and until such determination is modified by the PUC under *20 Cal. Code Reg. § 6.4* [*20 Cal. Code Reg. § 7(a)(3)*].

For discussion related to proceedings initiated before January 1, 1998, see *[e], below*. For discussion relating to ex parte communication under a particular category, see *[3], below*.

[d] Proceeding Initiated by Order Instituting Rulemaking

In a proceeding initiated after January 1, 1998, by order instituting rulemaking, the requirements of *20 Cal. Code Reg. § 7(b), (c),* or *(d)* apply, depending on the order's preliminary determination of category [*20 Cal. Code Reg. § 7(a)(4)*]. For discussion related to proceedings initiated before January 1, 1998, see *[e], below*. For discussion relating to ex parte communication under a particular category, see *[3], below*.

After the assigned commissioner's appealable determination of category, the applicable requirements shall depend on such determination unless and until it is modified by the PUC under *20 Cal. Code Reg. § 6.4* or *6.5(a)* [*20 Cal. Code Reg. § 7(a)(4)*].

[e] Formal Proceedings Filed Before January 1, 1998

In formal proceedings filed *before* January 1, 1998, to which the category determination rules apply by virtue of *20 Cal. Code Reg. § 4(b)(2)* (*see* discussion in *§ 480.20*), the requirements of *20 Cal. Code Reg. § 7(b), (c),* or *(d)* apply, depending on the preliminary determination of category under *20 Cal. Code Reg. § 6(d)* [*20 Cal. Code Reg. § 7(a)(5)*]. For discussion relating to ex parte communication under a particular category, see *[3], below*.

After the assigned commissioner's appealable determination of category, the applicable requirements depend on the determination unless and until it is modified by the PUC under *20 Cal. Code Reg. § 6.4* or *6.5(a)* [*20 Cal. Code Reg. § 7(a)(5)*].

[3] Period After Category Determination

[a] Adjudication Hearing

Ex parte communications are prohibited in adjudication cases [*Pub. Util. Code § 1701.2(b)*; *20 Cal. Code Reg. § 7(b)*].

For a discussion of the circumstances in which the prohibition against ex parte communication ceases, see [4], *below*. For discussion relating to adjudication proceedings generally, see *§ 480.60*, et seq.

[b] Ratesetting Hearing

[i] Generally Prohibited

Ex parte communications are generally prohibited in ratesetting cases [*see Pub. Util. Code § 1701.3(c)*]. Ex parte communications are permitted, however, only if they are consistent with the restrictions stated in *20 Cal. Code Reg. § 7(c)* [*20 Cal. Code Reg. § 7(c)*]. These restrictions are discussed under *[ii]*, et seq., *below*.

In addition, ex parte communications are subject to the reporting requirements of *20 Cal. Code Reg. § 7.1* [*see 20 Cal. Code Reg. § 7(c)*, discussed in *§ 480.53*].

For a discussion of the circumstances in which the restrictions to ex parte communication cease, see [4], *below*. For discussion relating to adjudication proceedings generally, see *§ 480.60* et seq.

[ii] Oral Ex Parte Communications

Oral ex parte communications are permitted at any time with a commissioner provided that the commissioner involved does the following [*20 Cal. Code Reg. § 7(c)(1)*; *see Pub. Util. Code § 1701.3(c)*]:

- Invites all parties to attend the meeting or sets up a conference call in which all parties may participate.

- Gives notice of this meeting or call as soon as possible, but no less than three days before the meeting or call.

If an ex parte communication meeting or call is granted by a decisionmaker to any party individually, all other parties must be sent a notice at the time that the request is granted. The notice must be no less than three days before the meeting or call. The other parties must be offered individual meetings of a substantially equal period of time with that decisionmaker [*20 Cal. Code Reg. § 7(c)(2)*; *see Pub. Util. Code § 1701.3(c)*; *see also 20 Cal. Code Reg. § 5(f)* (defining "decisionmaker")].

The party requesting the initial individual meeting must notify the other parties that its request has been granted, at least three days prior to the date when the meeting is to occur. At the meeting, the party requestingthe meeting must produce a certificate of service of the notification on all other parties. If the communication is by telephone, the party requesting the call must provide the decisionmaker with the certificate of service before the start of the call. The certificate may be provided by facsimile transmission [*20 Cal. Code Reg. § 7(c)(2)*; *see Pub. Util. Code § 1701.3(c)*].

[iii] Written Ex Parte Communications

Written ex parte communications are permitted at any time provided that the party making the communication serves copies of the communication on all other parties on the same day the communication is sent to a decisionmaker [*20 Cal. Code Reg. § 7(c)(3)*; *Pub. Util. Code § 1701.3(c)*].

[iv] PUC May Establish Periods Without Ex Parte Communication

In any ratesetting proceeding, the PUC may establish a period during which no oral or written communications on a substantive issue in the proceeding may be permitted between an interested person and a commissioner, a commissioner's personal advisor, the chief administrative law judge, any assistant chief administrative law judge, or the assigned administrative law judge [*20 Cal. Code Reg. § 7(c)(4)*; *Pub. Util. Code § 1701.3(c)*].

The period may begin not more than 14 days before the PUC meeting date on which the decision in the proceeding is scheduled for PUC action. If the decision is held, the PUC may permit oral or written communications on a substantive issue in the proceeding for the first half of the hold period, and may prohibit those communications for the second half of the period. In such a case, however, the period of prohibition must begin not more than 14 days before the PUC meeting date to which the decision is held [*20 Cal. Code Reg. § 7(c)(4)*; *Pub. Util. Code § 1701.3(c)*].

In all ratesetting proceedings in which hearings have been held and a proposed decision has been filed and served, there must be a prohibition on communications as provided in *20 Cal. Code Reg. § 7(c)*. The first day of the prohibition on communications will be the day of the Ratesetting Deliberative Meeting at which the proposed decision is scheduled to be discussed and will continue through the conclusion of the Business Meeting at which a vote of the proposed decision is scheduled. If a proposed decision is held at the Business Meeting, when the hold is announced the PUC will also announce whether and when there will be a further prohibition on communications, consistent with the requirements of *20 Cal. Code Reg. § 7(c)* [*20 Cal. Code Reg. § 7(c)(4)*].

[c] Quasi-Legislative Hearing

Ex parte communications are permitted without any restrictions [*Pub. Util. Code § 1701.4(b)*]. In addition, ex parte communications in any quasi-legislative proceeding are allowed without a reporting requirement [*20 Cal. Code Reg. § 7(d)*].

[4] Circumstances Causing Restrictions on Ex Parte Communication to No Longer Apply

Under certain circumstances, the limitations on ex parte communications in categorization proceedings under *20 Cal.*

Code Reg. §§ 7 (b) and *(c)*, and the reporting requirements under *20 Cal. Code Reg. § 7.1* cease to apply [*20 Cal. Code Reg. § 7(e)*].

The restrictions on ex parte communications cease to apply, and ex parte communications must be permitted in any proceeding in which [*20 Cal. Code Reg. § 7(e)*]:

- No timely answer, response, protest, or request for hearing is filed after the pleading initiating the proceeding,
- All such responsive pleadings are withdrawn, or
- There has been a final determination that a hearing is not needed in the proceeding.

If there has been a request for hearing, however, the requirements continue to apply unless and until the request has been denied [*20 Cal. Code Reg. § 7(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationImpartialityEx Parte ContactsAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawAgency InvestigationsGeneral OverviewAdministrative LawAgency RulemakingFormal RulemakingEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsRatemaking

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42-480 California Forms of Pleading and Practice--Annotated § 480.52

§ 480.52 Ex Parte Communication in Enforcement-Related and Other Covered Proceedings

[1] Applicable Proceedings

[a] Enforcement-Related Proceeding

In any enforcement-related proceeding, no decisionmaker may have any oral or written ex parte communication with any party to the proceeding concerning any substantive issue involved in the proceeding, unless the communication is reported within three working days in accordance with the reporting requirements set forth in *20 Cal. Code Reg. § 1.4*, discussed in *§ 480.53*. Communications limited to the hearing schedule, location, and format, filing dates and identity of parties are procedural inquiries that do not need to be reported [*20 Cal. Code Reg. § 1.3(a)*; *see 20 Cal. Code Reg. § 5(f)* (defining "decisionmaker")].

This rule applies from the commencement of the enforcement-related proceeding to its submission to the PUC. After the proceeding has been submitted to the PUC, and until the date of issuance of a final order in such proceeding, ex parte communications between parties and decisionmakers concerning any substantive issue involved in the proceeding are prohibited [*20 Cal. Code Reg. § 1.3(a)*].

[b] Other Covered Proceedings

In all covered proceedings, other than enforcement-related proceedings, any oral or written ex parte communication between a decisionmaker and any party to the proceeding concerning any substantive issue involved in the proceeding, must be reported within three working days, in accordance with the reporting requirements set forth in *20 Cal. Code Reg. § 1.4*, discussed in *§ 480.53*. These reporting requirements apply from the commencement of the proceeding to the date of issuance of a final order in that proceeding [*20 Cal. Code Reg. § 1.3(b)*].

[c] Consolidated Proceedings

When enforcement-related proceedings, covered by *20 Cal. Code Reg. § 1.3(a)*, and other covered proceedings, covered by *20 Cal. Code Reg. § 1.3(b)*, are consolidated, the ALJ must by ruling prior to the date of submission determine the extent to which the prohibition provisions governing enforcement-related proceedings apply [*20 Cal. Code Reg. § 1.3(c)*].

[2] Augmentation of Ex Parte Communication Provisions

In augmentation of the provisions of *20 Cal. Code Reg. § 1.1 et seq.*, the PUC, or the assigned administrative law judge with the approval of the assigned commissioner, may issue an ex parte communications ruling tailored to the needs of any specific proceeding [*20 Cal. Code Reg. § 1.6(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.53

§ 480.53 Written Report of Ex Parte Communication

Ex parte communications that must be reported under provisions governing categorization proceedings (*see § 480.51*), enforcement-related and other covered proceedings (*see § 480.52[1][a],[b]*), and consolidated proceedings (*see § 480.52[1][c]*) must be reported by the party or interested person [*20 Cal. Code Reg. §§ 1.4(a), 7.1(a)*].

The report must be made whether the communication was initiated by the party, interested person, or the decisionmaker. They must be reported within three working days of the communication by filing (but not serving) the original and 12 copies of a "Notice of Ex Parte Communication" (Notice) with the Commission's San Francisco Docket Office [*20 Cal. Code Reg. §§ 1.4(a), 7.1(a)*; *see Pub. Util. Code § 1701.1(c)(4)*]. In the case of enforcement-related and other covered proceedings, the notice must be provided simultaneously to the assigned ALJ.

The notice must include the following information [*20 Cal. Code Reg. §§ 1.4(a), 7.1(a)*]:

- The date, time and location of the communication, and whether it was oral, written or a combination.

- The identity each of the recipients or decisionmaker involved, the persons initiating the communication, as well as the identity of any persons present during such communication.

- A description of the party's or interested person's, but not the decisionmaker's, communication and its content. In the case of enforcement-related and other covered proceedings, a copy of any written material or text used during the communication must be attached (including audiovisual material, in categorization proceedings).

These reporting requirements apply to ex parte communications in ratesetting proceedings and to ex parte communications concerning categorization. In a ratesetting proceeding, communications with a commissioner's personal advisor must also be reported under the procedures specified in *20 Cal. Code Reg. § 7.1(a)* [*20 Cal. Code Reg.*

§ 7.1(b).

The filing of a notice must be reported promptly thereafter in the PUC's Daily Calendar [*20 Cal. Code Reg. § 1.4(b)*]. Parties may obtain a copy of the Notice and any attachments from the PUC's Central File room or from the filing party, who must provide it to the requesting party without delay [*20 Cal. Code Reg. § 1.4(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.54

§ 480.54 Sanctions for Improper Ex Parte Communication

The PUC may impose such penalties and sanctions, or make any other order, as it seems appropriate to ensure the integrity of the record and to protect the public interest [*see 20 Cal. Code Reg. §§ 1.5(c), 7(g)*].

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[Reserved]

§§ 480.55[Reserved]

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42-480 California Forms of Pleading and Practice--Annotated § 480.60

§ 480.60 Applicable Procedures

If the PUC pursuant to *Pub. Util. Code § 1701.1* has determined that a adjudication case requires a hearing, the procedures prescribed by *Pub. Util. Code § 1701.2* apply [*Pub. Util. Code § 1701.2(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.61

§ 480.61 Scoping Memo Governs Manner of Proceedings

The assigned commissioner or the assigned administrative law judge is required to hear the case in the manner described in the scoping memo [*see Pub. Util. Code § 1701.1(b)* (preparation and issuance of scoping memo; discussed in *§ 480.25A*)]. The scoping memo is an order or ruling describing the issues to be considered in a proceeding and the timetable for resolving the proceeding [*20 Cal. Code Reg. § 5(m)*]. The scoping memo is to designate whether the assignedcommissioner or the assigned administrative law judge is to preside in the case [*Pub. Util. Code § 1701.2(a)*; *20 Cal. Code Reg. § 5(m)*; *see Southern CaliforniaEdison Co. v. Public Utilities Com. (2006) 140 Cal. App. 4th 1085, 1104-1106, 45 Cal. Rptr. 3d 485* (PUC fails to proceed in manner required by law under *Pub. Util. Code § 1757.1(a)* if it considers issues beyond those identified in scoping memo)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.62

§ 480.62 Challenge to Administrative Law Judge

[1] Authority for Reassignment

The provisions of *20 Cal. Code Reg. § 62 et seq.* are the exclusive means available to a party to a PUC proceeding to seek reassignment of that proceeding to another Administrative Law Judge [*20 Cal. Code Reg. § 63.1*]. A party may petition for automatic reassignment (*see [2], below*), or under certain circumstances, may petition for reassignment for cause (*see [3], below*) [*20 Cal. Code Reg. §§ 63.2, 63.5*].

[2] Automatic Reassignment

[a] Petition

A party is entitled to petition, once only, for automatic reassignment of a proceeding to another administrative law judge, when [*20 Cal. Code Reg. § 63.2(a)*]:

- The proceeding is preliminarily determined to be adjudicatory by application [*20 Cal. Code Reg. § 6(a)(1)*; *see § 480.23[2]*], or is a proceeding filed before January 1, 1998 [*20 Cal. Code Reg. § 6(d)*; *see § 480.23[6]*].

- The proceeding is determined to be adjudicatory by complaint [*20 Cal. Code Reg. § 6(b)(1)*; *see § 480.23[3]*], or PUC order instituting investigation [*20 Cal. Code Reg. § 6(c)(1)*; *see § 480.23[4]*].

The petition must be in accordance with the provisions of *20 Cal. Code Reg. § 63.2(a)* [*20 Cal. Code Reg. § 63.2(a)*; *see Pub. Util. Code § 1701.2(a)* (parties entitled to one peremptory challenge of assignment of ALJ)].

Except as provided in *20 Cal. Code Reg. §§ 63.3* and *63.4*, no party in an adjudicatory proceeding will be permitted to make more than one petition for reassignment in the proceeding. In an adjudicatory proceeding when there is more than

one complainant or similar party, or more than one defendant or similar party, only one petition for automatic reassignment for each side may be made [*20 Cal. Code Reg. § 63.2(a)*].

The petition must be filed and served in the proceeding in which reassignment is sought, and on the chief administrative law judge and the president of the PUC [*20 Cal. Code Reg. § 63.2(a)*].

[b] Supporting Declaration

The petition must be supported by declaration under penalty of perjury (or affidavit by an out-of-state person) in substantially the form set forth in the statute [*20 Cal. Code Reg. § 63.2(a)*].

When the party seeking automatic reassignment is one of several parties aligned on the same side in the proceeding, the declaration must include a showing that either [*20 Cal. Code Reg. § 63.2(a)*]:

- No previous petition for automatic reassignment has been filed in the proceeding, or
- The interests of the petitioner are substantially adverse to those of any prior petitioner for automatic reassignment in the proceeding.

[c] Time Limit for Filing Petition

Any petition and supporting declaration filed under *20 Cal. Code Reg. § 63.2(a)*, discussed under *[a]* and *[b]*, *above*, must be filed no later than 10 days after the date of the notice of the assignment or reassignment [*20 Cal. Code Reg. § 63.2(c)*].

[d] Ruling on Petition

On the filing of a petition for automatic reassignment, the chief administrative law judge, subject only to the restrictions in *20 Cal. Code Reg. § 63.2(d)* on the number and timeliness of petitions in a given proceeding, must issue a ruling reassigning the proceeding to another administrative law judge. The chief administrative law judge, in consultation with the president of the PUC, must issue a ruling explaining the basis for denial whenever a petition for automatic reassignment is denied [*20 Cal. Code Reg. § 63.2(d)*].

[e] Circumstances Permitting Unlimited Peremptories

Irrespective of the limits in *20 Cal. Code Reg. § 63.2* on number of petitions for automatic reassignment, any party is entitled to file a petition for reassignment in any adjudicatory proceeding or ratesetting proceeding in which the then-assigned administrative law judge [*Pub. Util. § 1701.2(a)*; *20 Cal. Code Reg. § 63.3*]:

- Has served within the previous 12 months in any capacity in an advocacy position at the PUC or has been employed by a regulated public utility,
- Has served in a representative capacity in the proceeding, or
- Has been a party to the proceeding.

A petition under this subsection must be supported by declaration under penalty of perjury (or affidavit by an out-of-state person) setting forth the factual basis for the petition, and must be filed and served as provided in *20 Cal. Code Reg. § 63.2(a)* (discussed under *[a]* through *[c]*, *above* [*20 Cal. Code Reg. § 63.3*].

Any petition and supporting declaration filed pursuant to this rule must be filed no later than 10 days after the date of

the notice of the assignment or reassignment. The chief administrative law judge, in consultation with the president of the PUC, must issue a ruling explaining the basis for denial whenever a petition for reassignment made pursuant to this rule is denied [*20 Cal. Code Reg. § 63.3(b)*].

[3] Reassignment for Cause

[a] Grounds

[i] Financial Interest

Any party is entitled to file a petition for reassignment in any adjudicatory, ratesetting, or quasi-legislative proceeding when the administrative law judge has a financial interest in the subject matter in a proceeding or in a party to the proceeding [*20 Cal. Code Reg. § 63.4(a)(1)*].

"Financial interest" means ownership of more than a 1 percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value in excess of $1,500, or a relationship as director, advisor or other active participant in the affairs of a party [*20 Cal. Code Reg. § 63.10(a)*].

An administrative law judge is deemed to have a financial interest if:

- A spouse or minor child living in the administrative law judge's household has a financial interest [*20 Cal. Code Reg. § 63.4(a)(1)(A)*], or

- The administrative law judge or his or her spouse is a fiduciary who has a financial interest [*20 Cal. Code Reg. § 63.4(a)(1)(B)*; *see 20 Cal. Code Reg. § 63.10(c)*, defining "fiduciary"].

An administrative law judge has a duty to make reasonable efforts to be informed about his or her personal and fiduciary interests and those of his or her spouse and the personal financial interests of the children living in the household [*20 Cal. Code Reg. § 63.4(a)(1)*].

Each of the following are not considered a "financial interest":

- Ownership in a mutual or common investment fund that holds securities unless the administrative law judge participates in the management of the fund [*see 20 Cal. Code Reg. § 63.10(a)(1)*].

- An office in an educational, religious, charitable, fraternal, or civic organization [*see 20 Cal. Code Reg. § 63.10(a)(2)*].

The proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest [*20 Cal. Code Reg. § 63.10(a)(3)*].

[ii] Bias, Prejudice, or Interest

Any party is entitled to file a petition for reassignment in any adjudicatory, ratesetting, or quasi-legislative proceeding when the administrative law judge has bias, prejudice, or interest in the proceeding [*20 Cal. Code Reg. § 63.4(a)(2)*].

[b] Circumstances Not Constituting Grounds

The following are not grounds for reassignment for cause:

- The administrative law judge is or is not a member of a racial, ethnic, religious, sexual or similar group and the proceeding involves the rights of such a group [*20 Cal. Code Reg. § 63.5(a)*].

- The administrative law judge has experience, technical competence, or specialized knowledge of or has in any capacity expressed a view on a legal, factual or policy issue presented in the proceeding, except as provided in *20 Cal. Code Reg. § 63.3*, relating to automatic reassignment, as discussed under *[a], above* [*20 Cal. Code Reg. § 63.5(b)*].

- The administrative law judge has, as a representative or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding. The exception to this, however, is when the administrative law judge believes that the prior involvement was such as to prevent the administrative law judge from exercising unbiased and impartial judgment in the proceeding [*20 Cal. Code Reg. § 63.5(c)*; *see 20 Cal. Code Reg. § 63.10(b)*, defining "representative"].

[c] Declaration

A petition filed pursuant to this rule must be supported by a declaration under penalty of perjury (or affidavit by an out-of-state person) setting forth the factual basis for the petition [*20 Cal. Code Reg. § 63.4(b)*].

[d] Filing and Service

A petition for reassignment based on cause must be filed and served as provided in *20 Cal. Code Reg. § 63.2(a)* (*see [1][a], above*) [*20 Cal. Code Reg. § 63.4(b)*].

A petition and supporting declaration filed pursuant to this rule must be filed at the earliest practicable opportunity and in any event no later than 10 days after the date the petitioner discovered or should have discovered facts set forth in the declaration filed pursuant to this rule. The chief administrative law judge, in consultation with the president of the PUC, and after considering any response from the assigned administrative law judge, must issue a ruling addressing a petition for reassignment filed under *20 Cal. Code Reg. § 63.4(b)* [*20 Cal. Code Reg. § 63.4(c)*].

[e] Limit on Number of Petitions

A party may file no more than one petition for reassignment of an administrative law judge under *20 Cal. Code Reg. § 63.4* unless facts suggesting new grounds for reassignment are first learned of or arise after the petition was filed [*20 Cal. Code Reg. § 63.4(d)*].

Repetitive petitions for reassignment not alleging facts suggesting new grounds for reassignment must be denied by either the chief administrative law judge or by the administrative law judge against whom they are filed [*20 Cal. Code Reg. § 63.4(d)*].

[f] Administrative Law Judge's Ability to Request Reassignment

The administrative law judge must request reassignment and withdraw from a proceeding in which there are grounds for reassignment for cause unless the parties waive the reassignment under *20 Cal. Code Reg. § 63.7*, discussed under *[g], below* [*20 Cal. Code Reg. § 63.6(a)*].

[g] Waiver

An administrative law judge, after determining that there is basis for his or her reassignment for cause, must disclose the basis on the record, and may ask the parties whether they wish to waive the reassignment. A waiver of reassignment

must recite the basis for reassignment and is effective only when signed by all parties, and included in the record [*20 Cal. Code Reg. § 63.7*].

The administrative law judge may not seek to induce a waiver and must avoid any effort to discover which representatives or parties favored or opposed a waiver of reassignment [*20 Cal. Code Reg. § 63.7*; *see 20 Cal. Code Reg. § 63.10(b)*, defining "representative"].

[4] Prior Rulings of Reassigned ALJ Not Set Aside

If an administrative law judge is reassigned, the rulings he or she has made up to that time may not be set aside in the absence of good cause [*20 Cal. Code Reg. § 63.8*].

[5] Ban on Ex Parte Communications.

Ex parte communications regarding the assignment or reassignment of particular administrative law judges are prohibited. Any written response by the assigned administrative law judge to a petition for reassignment for cause must be filed and served in the proceeding in which the reassignment was requested [*20 Cal. Code Reg. § 63.9*].

"Ex parte communication" includes all communications defined as ex parte communications elsewhere in the PUC rules of practice and procedure (*see, e.g., 480.50* et seq.). The term also includes a communication between an administrative law judge and other decisionmakers about a petition for reassignment of a proceeding to which the administrative law judge is currently assigned [*20 Cal. Code Reg. § 63.10(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 480.63 Ex Parte Communications Prohibited

Ex parte communications are generally prohibited in adjudication cases [*Pub. Util. Code § 1701.2(b)*; *20 Cal. Code Reg. § 7(b)*]. For discussion of regulations governing ex parte communication in categorization proceedings generally, see *§ 480.50*.

For a discussion of the circumstances in which the prohibition against ex parte communication ceases, see *§ 480.50[4]*.

Legal Topics:

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

[1] Submission for Decision

An adjudicatory proceeding stands submitted for decision by the PUC after the taking of evidence, and the filing of briefs or the presentation of oral arguments as prescribed by the PUC or the presiding officer. The PUC's Daily Calendar must include a table of submission dates listing all such dates (with the corresponding proceedings) that occurred during the two weeks preceding the date of the calendar [*20 Cal. Code Reg. § 8.2(a)*].

[2] Content

In an adjudicatory proceeding in which a hearing was held, the presiding officer must prepare a decision setting forth the findings, conclusions, and order [*Pub. Util. Code § 1701.2(a)*; *20 Cal. Code Reg. § 8.2(b)*].

[3] Filing and Service

The decision of the presiding officer must be filed with the PUC and served on all parties without undue delay, not later than 60 days after submission [*Pub. Util. Code § 1701.2(a)*; *20 Cal. Code Reg. § 8.2(b)*].

[4] When Presiding Officer's Decision Becomes PUC Decision

The decision of the presiding officer constitutes the proposed decision when one is required by law, and becomes the decision of the PUC if no appeal or request for review is filed within 30 days after the date the decision is served on the parties in the proceeding [*Pub. Util. Code § 1701.2(a)*; *20 Cal. Code Reg. § 8.2(b)*].

[5] Comments on Draft Decision

The comment procedure in Rules 77.1-77.6 does not apply to a presiding officer's decision. However, the presiding

officer has discretion, at any time before the 30-day appeal period has begun to run, to authorize comments on a draft decision or a portion thereof [*20 Cal. Code Reg. § 8.2(b)*].

[6] Table of Decisions

The PUC's Daily Calendar must include a table that lists, for the two weeks preceding the date of the calendar, each decision of the presiding officer that has become the decision of the PUC. The table must indicatethe proceeding so decided and the date when the presiding officer's decision became the decision of the PUC [*20 Cal. Code Reg. § 8.2(b)*].

Legal Topics:

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42-480 California Forms of Pleading and Practice--Annotated § 480.64A

§ 480.64A Oral Argument on Rehearing

In any adjudicatory proceeding, if an application for rehearing is granted, the parties shall have an opportunity for final oral argument before the assigned administrative law judge (or before the assigned commissioner, if the latter presides at the rehearing) [*20 Cal. Code Reg. § 8(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.65

§ 480.65 Review by PUC

[1] Initiation of Review

[a] Appeal By Interested Party

The complainant, defendant, respondent, or any intervenor in an adjudicatory proceeding may file and serve an appeal of the decision of the presiding officer within 30 days of the date the decision is served on the parties in the proceeding [*20 Cal. Code Reg. § 8.2(c)*; *see Pub. Util. Code § 1701.2(a)* ("any interested party" may appeal)].

[b] Request for Review By PUC

The PUC may itself initiate a review of the proposed decision on any grounds [*Pub. Util. Code § 1701.2(a)*]. Any commissioner may request review of the decision of the presiding officer in an adjudicatory proceeding by filing and serving a request for the review within 30 days of the date the decision is served on the parties in a proceeding [*20 Cal. Code Reg. § 8.2(d)*].

[c] Content of Appeal or Request for Review

Appeals and requests for review must set forth specifically the grounds on which the appellant or requestor believes the decision of the presiding officer to be unlawful or erroneous [*20 Cal. Code Reg. § 8.2(e)*].

The purpose of an appeal or request for review is to alert the PUC to a potential error, so that the error may be corrected expeditiously by the PUC [*20 Cal. Code Reg. § 8.2(e)*]. Vague assertions as to the record or the law, without citation, may be accorded little weight [*20 Cal. Code Reg. § 8.2(e)*].

[d] Service of Appeal or Request for Review

Appeals and requests for review must be served on all parties and accompanied by a certificate of service [*20 Cal. Code Reg. § 8.2(e)*].

The time for filing and serving an appeal or request for review is discussed under *[a]* and *[b]*, respectively, *above*.

[2] Response to Appeal or Request for Review

Any party may file and serve its response no later than 15 days after the date the appeal or request for review was filed. In cases of multiple appeals or requests for review, the response may be to all such filings and may be filed 15 days after the last such appeal or request was filed. Replies to responses are not permitted [*20 Cal. Code Reg. § 8.2(f)*].

The PUC is not obligated to withhold a decision on an appeal or request for review to allow time for responses to be filed [*20 Cal. Code Reg. § 8.2(f)*].

[3] Consideration of Presiding Officer's Decision in Closed Session

In any adjudicatory proceeding in which a hearing is held, the PUC may meet in closed session to consider the decision of the presiding officer that is under appeal pursuant to *20 Cal. Code Reg. § 8.2(c)*, discussed under *[1][a], above* [*Pub. Util. Code § 1701.2(c)*; *20 Cal. Code Reg. § 8.2(g)*].

[4] PUC Decision Must Be Based on Record Developed by Presiding Officer

The PUC decision must be based on the record developed by the assigned commissioner or the administrative law judge [*Pub. Util. Code § 1701.2(a)*; *20 Cal. Code Reg. § 8.2(g)*].

[5] Vote in Public Meeting

The vote on the appeal or a request for review must be in a public meeting and must be accompanied by an explanation of the PUC's decision [*20 Cal. Code Reg. § 8.2(g)*].

[6] Explanation of Changes Required

A decision different from that of the presiding officer must include or be accompanied by a written explanation of each of the changes made to the presiding officer's decision [*Pub. Util. Code § 1701.2(a)*; *20 Cal. Code Reg. § 8.2(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 480.66 Time Limit to Resolve Adjudication Cases

Adjudication cases must be resolved within 12 months of initiation unless the PUC makes findings why that deadline cannot be met and issues an order extending that deadline [*Pub. Util. Code § 1701.2(d)*].

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42-480 California Forms of Pleading and Practice--Annotated § 480.67

§ 480.67 Determination Regarding Ability to Pay Penalties or Fines

The PUC may determine that a respondent lacks, or may lack, the ability to pay potential penalties or fines or to pay restitution that may be ordered by the PUC [*Pub. Util. Code § 1701.2(e)(1)*]. If so, the PUC may order the respondent to demonstrate, to the PUC's satisfaction, sufficient ability to pay. The respondent must demonstrate the ability to pay, or make other financial arrangements satisfactory to the PUC, within seven days of the PUC commencing an adjudication case. The PUC may delegate to the attorney to the PUC the determination of whether a sufficient showing has been made by the respondent of an ability to pay [*Pub. Util. Code § 1701.2(e)(2)*].

Within seven days of the PUC's determination of the respondent's ability to pay, the respondent is entitled to an impartial review by an administrative law judge, of the sufficiency of the showing made by the respondent of the respondent's ability to pay. The review by an administrative law judge becomes part of the record of the adjudication and is subject to the PUC's consideration in its order resolving the adjudication case. The administrative law judge may enter temporary orders modifying any financial requirement made of the respondent pending the review by theadministrative law judge [*Pub. Util. Code § 1701.2(e)(3)*]. A respondent that is a public utility regulated under a rate-of-return or rate-of-margin regulatory structure or that has gross annual revenues of more than $100,000,000 generated within California is presumed to be able to pay potential penalties or fines or to pay restitution that may be ordered by the PUC [*Pub. Util. Code § 1701.2(e)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated §§ 480.68-480.79

[Reserved]

§§ 480.68[Reserved]

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42-480 California Forms of Pleading and Practice--Annotated § 480.80

§ 480.80 Applicable Procedures

If the PUC pursuant to *Pub. Util. Code § 1701.1* has determined that a ratesetting case requires a hearing, the procedures prescribed by *Pub. Util. Code § 1701.3* apply [*Pub. Util. Code § 1701.3(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.81

§ 480.81 Principal Hearing Officer

[1] Prehearing Designation

The assigned Commissioner must determine prior to the first hearing whether the Commissioner or the assigned administrative law judge shall be designated as the principal hearing officer [*Pub. Util. Code § 1701.3(a)*].

[2] Minimum Attendance Requirement

The principal hearing officer must be present for more than one-half of the hearing days [*Pub. Util. Code § 1701.3(a)*]. An assigned commissioner acting as the principal hearing officer is bound by this minimum attendance rule [*see 20 Cal. Code Reg. § 8(b)*].

Whether or not the assigned commissioner is the principal hearing officer, he or she must be present at the closing argument [*see Pub. Util. Code § 1701.3(a)*; *20 Cal. Code Reg. § 8(b)*].

[3] Decision as Proposed Decision

The decision of the principal hearing officer is the proposed decision. An alternate decision may be issued by the assigned Commissioner or the assigned administrative law judge who is not the principal hearing officer [*Pub. Util. Code § 1701.3(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.82

§ 480.82 Party's Request for Presence of Commissioner

A party may request the presence of the assigned commissioner at a formal hearing or specific portion of a formal hearing [*see Pub. Util. Code § 1701.3(a)*; *20 Cal. Code Reg. § 8(b)*]. The term, "formal hearing" generally refers to a hearing at which testimony is offered or comments or argument taken on the record. A workshop is not a formal hearing [*20 Cal. Code Reg. § 8(f)(2)*]. "Present" or "presence" at a hearing or argument means physical attendance in the hearing room, sufficient to familiarize the attending commissioner with the substance of the evidence, testimony, or argument for which the commissioner's presence is required or requested [*20 Cal. Code Reg. § 8(f)(4)*].

The request may be made in a pleading or a prehearing conference statement. Alternatively, the request may be made by filing and serving on all parties a letter to the assigned commissioner, with a copy to the assigned administrative law judge [*20 Cal. Code Reg. § 8(b)*].

The request should be made as far as possible in advance of the formal hearing, and should specify the following [*20 Cal. Code Reg. § 8(b)*]:

- The witnesses and/or issues for which the assigned commissioner's presence is requested.
- The party's best estimate of the dates when such witnesses and subject matter will be heard.
- The reasons why the assigned commissioner's presence is requested.

The assigned commissioner has sole discretion to grant or deny, in whole or in part, any such request. Any request that is filed five or fewer business days before the date when the subject hearing begins may be rejected as untimely [*see 20 Cal. Code Reg. § 8(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.83

§ 480.83 Ex Parte Communication

Ex parte communications are generally prohibited in ratesetting cases [*see Pub. Util. Code § 1701.3(c)*]. Oral and written ex parte communications are permitted, however, when they comply with specified restrictions [*20 Cal. Code Reg. § 7(c)*]. For further discussion, see *§ 480.50[3][b]*.

For discussion of regulations governing ex parte communication in categorization proceedings generally, see *§ 480.50*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.84

§ 480.84 Challenges to Administrative Law Judge

[1] Exclusive Means of Reassignment

The provisions of *20 Cal. Code Reg. § 62 et seq.* are the exclusive means available to a party to a PUC proceeding to seek reassignment of that proceeding to another Administrative Law Judge [*20 Cal. Code Reg. § 63.1*]. A party may petition for automatic reassignment (*see [2], below*), or under certain circumstances, may petition for reassignment for cause (*see [3], below*) [*20 Cal. Code Reg. §§ 63.2, 63.5*].

If an administrative law judge is reassigned, the rulings he or she has made up to that time may not be set aside in the absence of good cause [*20 Cal. Code Reg. § 63.8*].

Ex parte communications regarding the assignment or reassignment of particular administrative law judges are prohibited. Any written response by the assigned administrative law judge to a petition for reassignment for cause must be filed and served in the proceeding in which the reassignment was requested [*20 Cal. Code Reg. § 63.9*].

[2] Automatic Reassignment

[a] When Available

A party to a proceeding is entitled to petition, once only, for automatic reassignment of that proceeding to another Administrative Law Judge, in the following circumstances [*20 Cal. Code Reg. § 63.2(b)*]:

- The proceeding is preliminarily determined to be ratesetting by application [*20 Cal. Code Reg. § 6(a)(1)*; *see § 480.23[2]*], PUC order instituting rulemaking [*20 Cal. Code Reg. § 6(c)(2)*; *see § 480.23[5]*]. or is a proceeding filed before January 1, 1998 [*20 Cal. Code Reg. § 6(d)*; *see § 480.23[6]*].

- The proceeding is determined to be ratesetting by complaint [*20 Cal. Code Reg. § 6(b)(1)*; *see §*

480.23[3]], or PUC order instituting investigation [*20 Cal. Code Reg. § 6(c)(1)*; *see § 480.23[4]*].

A person or entity declaring the intention in good faith to become a party to such proceeding, is also entitled to petition, once only, for automatic reassignment of the above proceedings to another administrative law judge [*20 Cal. Code Reg. § 63.2(b)*].

No more than two automatic reassignments may be permitted in the same proceeding [*20 Cal. Code Reg. § 63.2(b)*].

There are circumstances, however, in which unlimited peremptories are permitted [*see Pub. Util. § 1701.2(a)*; *20 Cal. Code Reg. § 63.3, see § 480.62[2][e]*].

The petition must be in accordance with the provisions of *20 Cal. Code Reg. § 63.2(b)* [*20 Cal. Code Reg. § 63.2(b)*]. The petition must be filed and served as provided in *20 Cal. Code Reg. § 63.2(a)* [*20 Cal. Code Reg. § 63.2(b)*, discussed in *§ 480.62[2][a]*]. The petition must be supported by a declaration similar in form and substance to that set forth in *20 Cal. Code Reg. § 63.2(a)*, discussed in *§ 480.62[2][b]* [*20 Cal. Code Reg. § 63.2(b)*].

[b] Second Automatic Reassignment on Petition by Good Faith Declarant

A party to the proceeding, or a person or entity declaring the intention in good faith to become a party to the proceeding, may petition for another automatic reassignment no later than 10 days following the date of such ruling. The petition must be filed and served as provided in *20 Cal. Code Reg. § 63.2(a)* [*20 Cal. Code Reg. § 63.2(b)*, discussed in *§ 480.62[2][a]*]. The petition must be supported by a declaration similar in form and substance to that set forth in *20 Cal. Code Reg. § 63.2(a)*, discussed in *§ 480.62[2][b]* [*20 Cal. Code Reg. § 63.2(b)*].

The second automatic reassignment of the proceeding is not be subject to further petitions under *20 Cal. Code Reg. § 63.2(b)* [*20 Cal. Code Reg. § 63.2(b)*].

[c] Time Limit for Filing Petition and Declaration

The petition and supporting declaration must be filed no later than 10 days after the date of the notice of the assignment or reassignment [*20 Cal. Code Reg. § 63.2(c)*].

A second petition for automatic reassignment of a ratesetting proceeding must be filed no later than 10 days following the date of the ruling on the first petition for automatic reassignment filed pursuant to *20 Cal. Code Reg. § 63.2(b)* [*20 Cal. Code Reg. § 63.2(c)*].

[d] Ruling on Petition

Whenever a timely petition for automatic reassignment of a ratesetting proceeding is filed, the chief administrative law judge, promptly at the end of the 10-day period specified in *20 Cal. Code Reg. § 63.2(c)*, discussed under *[c], above*, must issue a ruling reassigning the proceeding.

[3] Reassignment for Cause

Any party is entitled to file a petition for reassignment in any adjudicatory, ratesetting, or quasi-legislative proceeding when the administrative law judge has a financial interest in the subject matter in a proceeding or in a party to the proceeding [*20 Cal. Code Reg. § 63.4(a)(1)*]. For further discussion, see *§ 480.62[3]*.

Legal Topics:

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

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§ 480.85 Proposed and Alternate Decision

The principal hearing officer must present the proposed decision to the full PUC in a public meeting. The alternate decision, if any, must also be presented to the full PUC at that public meeting. The alternate decision must be filed with the PUC and must be served on all parties simultaneously with the proposed decision [*Pub. Util. Code § 1701.3(a)*].

The presentation to the full PUC must contain the following [*Pub. Util. Code § 1701.3(a)*]:

- A record of the number of days of the hearing.
- The number of days that each Commissioner was present.
- Whether the decision was completed on time.

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.86

§ 480.86 Oral Argument Before PUC

A party has the right to make a final oral argument before the PUC, if the party so requests within the time and in the manner specified in the scoping memo or later ruling in the proceeding [*20 Cal. Code Reg. § 8(d)*; *see Pub. Util. Code § 1701.3(d)*].

A quorum of the PUC must be present for such final oral argument. To the extent permitted by law, any commissioner who is surplus to thequorum may attend the argument from a remote location linked to the hearing room via audio, visual, and/or textual media establishing real-time, two-way communication [*20 Cal. Code Reg. § 8(d)*; *see Pub. Util. Code § 1701.3(d)*].

Legal Topics:

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42-480 California Forms of Pleading and Practice--Annotated § 480.87

§ 480.87 Final Decision of PUC

[1] Submission for Decision

A ratesetting and quasi-legislative proceeding stands submitted for decision by the PUC after the taking of evidence, and the filing of briefs or the presentation of oral arguments, as ordered in the proceeding [*20 Cal. Code Reg. § 8.1(a)*].

The PUC's Daily Calendar includes a table of submission dates listing all such dates (with the corresponding proceedings) that occurred during the two weeks preceding the date of the calendar [*20 Cal. Code Reg. § 8.1(a)*].

[2] Proposed Decision

In ratesetting and quasi-legislative proceedings, the presiding officer must prepare a proposed decision setting forth recommendations, findings, and conclusions. The proposed decision must be filed with the PUC and served on all parties without undue delay, not later than 90 days after submission [*20 Cal. Code Reg. § 8.1(b)*].

As provided in *20 Cal. Code Reg. §§ 77.1-77.6*, parties may comment on the proposed decision [*20 Cal. Code Reg. § 8.1(b)*]. Applicants in matters involving buses, vessels, public utility sewer systems, or public utility pipelines may make an oral or written motion to waive the filing of comments on the proposed decision. Any party objecting to that waiver will have the burden of demonstrating that filing of comments is in the public interest [*20 Cal. Code Reg. § 8.1(b)*].

[3] Adoption, Modification, or Setting Aside of Proposed Decision

The PUC may, in issuing its decision, adopt, modify, or set aside the proposed decision or any part of the decision based on evidence in the record [*Pub. Util. Code § 1701.3(e)*; *20 Cal. Code Reg. § 8.1(b)*].

[4] Time Limit of Final Decision

The PUC, in issuing its decision in a ratesetting or quasi-legislative proceeding, may adopt, modify, or set aside all or part of the proposed decision, based on the evidence in the record. The decision of the PUC must be issued not later than 60 days after issuance of the proposed decision. The PUC may extend the deadline for a reasonable period under extraordinary circumstances. The 60-day deadline must be extended for 30 days if any alternate decision is proposed [*Pub. Util. Code § 1701.3(e)*; *20 Cal. Code Reg. § 8.1(c)*].

[5] Consideration of Decision in Closed Session

In a ratesetting proceeding in which a hearing was held, the PUC may meet in closed session to consider its decision, provided that the PUC has established a period as described in *20 Cal. Code Reg. § 7(c)(4)* (*see § 480.51[3][b][iv]*, relating to period of no oral or written communications on substantive issue in proceeding) [*20 Cal. Code Reg. § 8.1(d)*].

In no event may the period during which the PUC may meet in closed session exceed the period described in *20 Cal. Code Reg. § 7(c)(4)* [*20 Cal. Code Reg. § 8.1(d)*].

Legal Topics:

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

§§ 480.88[Reserved]

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42-480 California Forms of Pleading and Practice--Annotated § 480.100

§ 480.100 Applicable Procedures

If the PUC pursuant to *Pub. Util. Code § 1701.1* has determined that a quasi-legislative case requires a hearing, the procedures prescribed by *Pub. Util. Code § 1701.4* apply [*Pub. Util. Code § 1701.4(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.101

§ 480.101 Roles of Assigned Commissioner and Administrative Law Judge

The assigned administrative law judge acts as an assistant to the assigned commissioner in quasi-legislative cases [*Pub. Util. Code § 1701.4(a)*].

The assigned commissioner must be present for formal hearings [*Pub. Util. Code § 1701.4(a)*; *20 Cal. Code Reg. § 8(e)*; *see 20 Cal. Code Reg. § 8(f)(4)* (defining "present" for purposes of this rule, discussed in *§ 480.81[2]*)].

The term "formal hearing" generally refers to hearing at which testimony is offered or comments or argument taken on record; workshop is not formal hearing. In a quasi-legislative proceeding, "formal hearing" includes a hearing at which testimony is offered on legislative facts, but does not include a hearing at which testimony is offered on adjudicative facts [*20 Cal. Code Reg. § 8(f)(2)*].

For the purpose of commissioner attendance, "adjudicative facts" answer questions such as who did what, where, when, how, why, with what motive or intent [*20 Cal. Code Reg. § 8(f)(1)*]. "Legislative facts" are the general facts that help the tribunal decide questions of law and policy and discretion [*20 Cal. Code Reg. § 8(f)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.102

§ 480.102 Ex Parte Communication Permitted

Ex parte communications are permitted without any restrictions [*Pub. Util. Code § 1701.4(b)*]. For discussion of regulations governing ex parte communication in categorization proceedings generally, see *§ 480.50*.

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42-480 California Forms of Pleading and Practice--Annotated § 480.103

§ 480.103 Preparation and Presentation of Proposed Rule or Order

The assigned Commissioner must prepare the proposed rule or order with the assistance of the administrative law judge. The assigned Commissioner is required to present the proposed rule or order to the full PUC in a public meeting. The report must include the number of days of hearing and the number of days that the Commissioner was present [*Pub. Util. Code § 1701.4(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawAgency AdjudicationPresiding OfficersDuties & PowersAdministrative LawAgency RulemakingState ProceedingsEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral Overview

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42-480 California Forms of Pleading and Practice--Annotated § 480.104

§ 480.104 Final Oral Argument Before PUC

A party has the right to make a final oral argument before the PUC, if the party so requests within the time and in the manner specified in the scoping memo or later ruling in the proceeding [*20 Cal. Code Reg. § 8(d)*; *see Pub. Util. Code § 1701.4(c)*].

A quorum of the PUC must be present for such final oral argument. To the extent permitted by law, any commissioner who is surplus to the quorum may attend the argument from a remote location linked to the hearing room via audio, visual, and/or textual media establishing real-time, two-way communication [*20 Cal. Code Reg. § 8(d)*; *see Pub. Util. Code § 1701.4(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.105

§ 480.105 Final Rule or Order of PUC

[1] May Adopt, Modify, or Set Aside Proposed Decision

The PUC may, in issuing its rule or order, adopt, modify, or set aside the proposed decision or any part of the rule or order [*Pub. Util. Code § 1701.4(d)*].

For discussion of when a quasi-legislative proceeding stands submitted for decision by the PUC under *20 Cal. Code Reg. § 8.1(a)*, see *§ 480.87[1]*. For discussion relating to preparation, filing, service of proposed decision, and comments the proposed decision, see *§ 480.87[2]*.

[2] Time Limit for Final Decision

The final rule or order of the PUC must be issued not later than 60 days after the issuance of the proposed rule or order. Under extraordinary circumstances the PUC may extend this date for a reasonable period. The 60-day period shall be extended for 30 days if any alternate rule or order is proposed pursuant to Section 311 [*Pub. Util. Code § 1701.4(d)*].

Legal Topics:

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

§§ 480.106[Reserved]

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42-480 California Forms of Pleading and Practice--Annotated § 480.120

§ 480.120 Rescission or Amendment of Order by PUC

The PUC may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision has, when served on the parties, the same effect as an original order or decision [*Pub. Util. Code § 1708*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.121

§ 480.121 Conclusiveness of Orders and Decisions

In all collateral actions or proceedings, the orders and decisions of the PUC which have become final are conclusive [*Pub. Util. Code § 1709*].

When the PUC exercises its judicial power, its orders or decisions have the conclusive effect of res judicata as to the issues involved when they are again brought into question in subsequent proceedings between the same parties [*Camp Meeker Water System, Inc. v. Public Utilities Com. (1990) 51 Cal. 3d 845, 852 n.3, 274 Cal. Rptr. 678, 799 P.2d 758* ; *People v. Western Air Lines, Inc. (1954) 42 Cal. 2d 621, 630, 268 P.2d 723]* .

When the PUC exercises its legislative power, such as when it fixes rates, its orders or decisions do not have the same effect [*see Camp Meeker Water System, Inc. v. Public Utilities Com. (1990) 51 Cal. 3d 845, 851-852, 852 n.3, 274 Cal. Rptr. 678, 799 P.2d 758]* . Therefore, its determination of, for example, property rights in a rate-making proceeding is subject to relitigation in any court of law that is asked to determine those interests [*Camp Meeker Water System, Inc. v. Public Utilities Com. (1990) 51 Cal. 3d 845, 852 n.3, 274 Cal. Rptr. 678, 799 P.2d 758]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.122

§ 480.122 Application for Rehearings

After any order or decision has been made by the PUC, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. The PUC may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. No cause of action arising out of any order or decision of the PUC accrues in any court to any corporation or person unless the corporation or person has filed application to the PUC for a rehearing within 30 days after the date of issuance or within 10 days after the date of issuancein the case of an order issued pursuant to *Pub. Util. Code § 816 et seq.* or *851 et seq.* (relating to security transactions and the transfer or encumbrance of utility property).

"Date of issuance" in this context means the date when the PUC mails the order or decision to the parties to the action or proceeding [*Pub. Util. Code § 1731(b)*]. The application for a rehearing must set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No corporation or person may in any court urge or rely on any ground not so set forth in the application [*Pub. Util. Code § 1732*].

In the event that a rehearing of an adjudication case is granted the parties must have an opportunity for final oral argument [*Pub. Util. Code § 1701.2(d)*].

For a form of petition for rehearing, see *§ 480.194[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsRehearings

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42-480 California Forms of Pleading and Practice--Annotated § 480.123

§ 480.123 Petitions to Reopen Proceedings

After conclusion of hearings, but before issuance of a decision, a party to the proceeding may serve on all other parties and file with the PUC, a petition to set aside submission and reopen the proceeding for the taking of additional evidence, or for consideration of a settlement or stipulation under *20 Cal. Code Reg. § 51 et seq.*

The petition must specify the facts claimed to constitute grounds in justification of the petition, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing. It must contain a brief statement of proposed additional evidence and explain why that evidence was not previously adduced [*20 Cal. Code Reg. § 84*].

When time to petition for a rehearing has passed, a petition to reopen does not lie to serve the purpose of a petition for rehearing [*Northern California Asso. to Preserve Bodega Head & Harbor, Inc. v. Public Utilities Com. (1964) 61 Cal. 2d 126, 134, 37 Cal. Rptr. 432, 390 P.2d 200]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated §§ 480.124-480.129

[Reserved]

§§ 480.124[Reserved]

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42-480 California Forms of Pleading and Practice--Annotated § 480.130

§ 480.130 PUC Authority

The PUC is empowered to hear complaints against any utility company, if the amount of money claimed does not exceed the jurisdictional limit of the small claims court as set forth in *Code Civ. Proc. § 116.220(a)*, by an expedited complaint procedure [*Pub. Util. Code § 1702.1(a)*; *see also Code Civ. Proc. § 116.220(a)* (jurisdictional limit in small claims court as $5,000)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthorityGovernmentsCourtsSmall Claims Courts

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42-480 California Forms of Pleading and Practice--Annotated § 480.131

§ 480.131 No Representation by Attorney

A party to such a hearing may not be represented by an attorney [*see Pub. Util. Code § 1702.1(b)*].

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42-480 California Forms of Pleading and Practice--Annotated § 480.132

§ 480.132 Pleadings Limited to Complaint and Answer

No pleading other than the complaint and answer is necessary [*Pub. Util. Code § 1702.1(c)*].

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42-480 California Forms of Pleading and Practice--Annotated § 480.133

§ 480.133 Hearing

A hearing without a reporter will be held within 30 days after the answer is filed [*Pub. Util. Code § 1702.1(c)*]. Unlike the regular claim procedure, the PUC is not required to make or file a written decision [*Pub. Util. Code § 1705*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.134

§ 480.134 Rehearing

The parties may file applications for rehearing pursuant to *Pub. Util. Code § 1731* [*Pub. Util. Code § 1702.1(d)*]. If a rehearing is granted, the rehearing will be conducted under the PUC's regular hearing procedure [*Pub. Util. Code § 1702.1(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthorityEnergy & Utilities LawAdministrative ProceedingsRehearings

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42-480 California Forms of Pleading and Practice--Annotated §§ 480.135-480.139

[Reserved]

§§ 480.135[Reserved]

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42-480 California Forms of Pleading and Practice--Annotated § 480.140

§ 480.140 Code of Civil Procedure Generally Applies

The provisions of the Code of Civil Procedure relating to writs of review apply to judicial review proceedings instituted in the Supreme Court or court of appeal under *Pub. Util. Code § 1701 et seq.*, so far as they do not conflict with the Public Utilities Act (*Pub. Util. Code § 201 et seq.*) [*Pub. Util. Code § 1758 et seq.*; *see also* discussion in *§§ 480.142, 480.144*].

For discussion and forms relating to proceedings for writ of review generally, see Ch. 492, *Review (Certiorari), Writ of.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.141

§ 480.141 Limited Power of Trial Court in PUC Matters

A trial court is bound to follow an order of the PUC with regard to status of a public utility [*Pratt v. Coast Trucking Inc. (1964) 228 Cal. App. 2d 139, 149-153, 39 Cal. Rptr. 332]* .

An order of the PUC cannot be effectively overruled by action of a superior court [*Anchor Lighting v. Southern California Edison Company (2006) 142 Cal. App. 4th 541, 548, 47 Cal. Rptr. 3d 780* (PUC interpretation of Public UtilitiesCode will not be disturbed even if invalid unless it fails to bear reasonable relation to statute's purposes and language); *Pellandini v. Pacific Limestone Prod. Inc. (1966) 245 Cal. App. 2d 774, 777, 54 Cal. Rptr. 290]* . For example, when the PUC has acted on regulation of advertising in telephone books, it has exclusive jurisdiction over a claim of discrimination in the advertising and an action does not lie in superior court [*Dollar-A-Day Rent-A-Car Sys. Inc. v. Pacific Tel. & Tel. Co. (1972) 26 Cal. App. 3d 454, 457-462, 102 Cal. Rptr. 651]* . Similarly, an injunction in superior court against a water company enjoining it from reversing a stock transfer is improper when the injunction interfered with the jurisdiction of the PUC, which had ordered the transfer [*Hickey v. Roby (1969) 273 Cal. App. 2d 752, 763-769, 77 Cal. Rptr. 486]* . A superior court does have authority to abate a nuisance caused by a public utility [*California Oregon Power Co. v. Superior Court (1955) 45 Cal. 2d 858, 870-871, 291 P.2d 455 , cert. denied, (1956) 352 U.S. 823]* . Moreover, a superior court can decide the public utility status of a mutual water company when the PUC has not determined the issue [*Ventura County Waterworks Dist. v. Susana Knolls Mut. Water Co. (1970) 7 Cal. App. 3d 672, 678-679, 87 Cal. Rptr. 1]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-480 California Forms of Pleading and Practice--Annotated § 480.142

§ 480.142 Jurisdiction of Appellate Courts

No court in California, except the Supreme Court and the court of appeal, to the extent specified in *Pub. Util. Code §§ 1756-1767*, has jurisdiction to review, reverse, correct, or annul any order or decision of the PUC or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the PUC in the performance of its official duties, as provided by law and the rules of court [*Pub. Util. Code § 1759(a)*]. However, courts can hear cases where the claim does not hinder or frustrate PUC's policies or claims against unregulated providers who are not within PUC's purview [*Hartwell Corp. v. Superior Court (1986) 27 Cal. 4th 256, 282, 115 Cal. Rptr. 2d 874, 38 P.3d 1098]* . In addition, where a civil action brought by public prosecutors against a public utility does not usurp any exclusive power of the PUC and is authorized expressly by statute, the California Supreme Court has held that the superior court and the PUC possess concurrent subject matter jurisdiction [*Orloff v. Pac. Bell (2003) 31 Cal. 4th 1132, 1144-1155, 7 Cal. Rptr. 3d 315, 80 P.3d 201* (district attorneys may prosecute civil actions for consumer fraud against public utilities regulated by PUC)].

Under *Pub. Util. Code § 2106* courts may hear claims against public utilities for damages, whereas *Pub. Util. Code § 1759* defines and limits the power of courts to pass judgment on, or interfere with, the PUC's decisions. Both statutes dictate which courts have jurisdiction to engage in these activities. Only appellate courts can review decisions and orders of the PUC and interfere with its actions, whereas suits for damages against utilities can be brought in the trial court [*Anchor Lighting v. Southern California Edison Company (2006) 142 Cal. App. 4th 541, 549-550, 47 Cal. Rptr. 3d 780* ; *Cundiff v. GTE California Inc. (2002) 101 Cal. App. 4th 1395, 1405-1406, 125 Cal. Rptr. 2d 445]* . However, a plaintiff's attempt to obtain relief under *Pub. Util. Code § 2106* may have the effect of interfering with the PUC's regulation of utilities, and thus be barred [*Waters v. Pacific Tel. Co. (1974) 12 Cal. 3d 1, 4* (*Pub. Util. Code § 2106* "must be construed as limited to those situations in which an award of damages would not hinder or frustrate the [PUC's] declared supervisory and regulatory policies"); *Koponen v. Pacific Gas & Electric Company (2008) 165 Cal. App. 4th 345, 350-351, 81 Cal. Rptr. 3d 22* ; *Anchor Lighting v. Southern California Edison Company (2006) 142 Cal. App. 4th 541, 549-550, 47 Cal. Rptr. 3d 780* ; *Cundiff v. GTE California Inc. (2002) 101 Cal. App. 4th 1395, 1405-1406, 125 Cal. Rptr. 2d 445* (suit against telephone company for unnecessary rental charges allowed to go forward)].

For claims under PUC's purview, writ of mandate may be issued by the Supreme Court to the PUC, and, with regard to complaint enforcement or other adjudicatory proceedings, by the court of appeal to the PUC, in all proper cases as prescribed in *Code Civ. Proc. § 1085* [*Pub. Util. Code § 1759(b)*; *cf. Pub. Util. Code § 1756(b)* (writ of review may be made to court of appeal to review adjudicatory matters and to Supreme Court for all other matters), and discussion in *§ 480.144[3]*].

In enacting *Pub. Util. Code § 1759*, the Legislature exercised its plenary power conferred by the California Constitution to confer additional authority and jurisdiction on the Commission, and establish the manner and scope of review of commission action in a court of record [*see Ford v. Pacific Gas & Electric Co. (1997) 60 Cal. App. 4th 696, 707* (discussing former *Pub. Util. Code § 1759*)].

Code Civ. Proc. § 1085 provides in turn that a writ of mandate may be issued to an inferior tribunal, corporation, board or person, to compel performance of an act specially enjoined by law, or to compel the admission of a party to the use and enjoyment of a right or office to which that party is entitled but to which that party has been unlawfully precluded by the tribunal, corporation, board, or person. For detailed discussion and forms relating generally to extraordinary relief by writ of mandate, see Ch. 358, *Mandate and Prohibition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawSeparation of PowersJurisdictionCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsAppellate JurisdictionState Court ReviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthorityEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsJudicial ReviewEnergy & Utilities LawUtility CompaniesLiability

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§ 480.143 Stay

[1] Must Comply With Code and Rules

Any stay or suspension of an order or decision of the PUC may be granted only in accordance with *Pub. Util. Code § 1756 et seq.* and the rules of court [*Pub. Util. Code § 1761(a)*; *see* discussion in *§ 480.144*].

[2] Scope of Stay

A stay may be issued against any order or decision of the PUC, other than anorder or decision increasing or decreasing rates or changing a rate classification [*Pub. Util. Code § 1761(b)*].

[3] Notice and Hearing

No order staying or suspending an order or decision of the PUC may be made by the Supreme Court or court of appeal except on five days' notice and after hearing [*Pub. Util. Code § 1762(a)*]. An exception to the five day notice rule applies in the case of a temporary stay [*see Pub. Util. Code § 1762(c)*, discussed in *[5][a], below*].

[4] Order Suspending Decision of PUC

If the order or decision of the PUC is stayed or suspended, the order suspending it must contain a specific finding, based on evidence submitted to the court and identified by reference [*Pub. Util. Code § 1762(a)*]. The specific finding made under *Pub. Util. Code § 1762(a)* must certify that great or irreparable damage would otherwise result to the petitioner and specify the nature of the damage [*Pub. Util. Code § 1762(b)*].

[5] Temporary Stay

[a] Proper Case and Time for Grant

The Supreme Court or court of appeal may grant a temporary stay restraining the operation of the PUC order or

decision, other than an order or decision authorizing an increase or decrease in rates or changing a rate classification, at any time before the required hearing and determination of the application for a stay. The temporary stay may be granted when, in the opinion of the court, irreparable loss or damage would result to petitioner unless the temporary stay is granted [*Pub. Util. Code § 1762(c)*].

[b] Grounds Allowing Grant

No temporary stay may be granted by the Supreme Court or court of appeal unless it clearly appears from specific facts shown by the verified petition that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and hearing had on a motion for a stay as provided in this chapter [*Pub. Util. Code § 1763(a)*].

[c] Duration of Temporary Stay

The temporary stay must remain in force only until the hearing determination of the application for a stay on notice [*Pub. Util. Code § 1762(c)*].

[d] Hearing of Application Given Precedence

The hearing of the application for a stay must be given precedence and assigned for hearing at the earliest practicable day after the expiration of the notice [*Pub. Util. Code § 1762(c)*].

[e] Endorsement, Filing, and Content of Temporary Stay

Every temporary stay must [*Pub. Util. Code § 1763(b)*]:

- Be endorsed with the date and hour of issuance.
- Be forthwith filed in the clerk's office and entered of record.
- Define the injury and state why it appears to be irreparable and why the order was granted without notice.
- By its terms expire within a time after entry not to exceed 10 days as the court may fix, unless within the time so fixed the order is extended for a like period for good cause shown and the reasons for the extension entered of record.

[f] Temporary Stay Granted Without Notice

In case a temporary stay is granted without notice, the matter of the issuance of a stay must be set down for hearing at the earliest possible time, and when it comes up for hearing the party obtaining the temporary stay must proceed with the application for a stay. If the party does not so proceed, the court shall dissolve the temporary stay [*Pub. Util. Code § 1763(c)*].

[6] Suspending Bond

In case the order or decision of the PUC is stayed or a temporary stay granted, the order of the Supreme Court or court of appeal may not become effective until a suspending bond is executed and filed with and approved by the court [*Pub. Util. Code § 1764*].

The suspending bond must be payable to the people of the State of California and sufficient in amount and security to insure the prompt payment by the party petitioning for the review, of all damages caused by the delay in the

enforcement of the order or decision of the PUC. The suspending bond must also be sufficient to ensure payment for all money which any person or corporation may be compelled to pay pending the review of the proceedings for transportation, transmission, product, commodity, or service in excess of the charges fixed by the order or decision of the PUC, in case the order or decision is sustained [*Pub. Util. Code § 1764*]. For discussion and forms relating to bonds generally, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[7] Stays Relating to Decision Affecting Rate or Classification

[a] Decision Denying Increase in Rate or Classification

In case the Supreme Court or court of appeal stays any order or decisiondenying to the utility an increase in any rate or classification, the court may condition the stay or temporary stay so as to permit petitioner to charge a higher rate pending the determination of the review. The court may attach other reasonable conditions to the stay or temporary stay [*Pub. Util. Code § 1765*].

[b] Decision Authorizing Increase or Decrease

Under no circumstance may the Supreme Court or court of appeal stay or suspend any order or decision by the PUC authorizing an increase or decrease in rates or changing any rate classification [*Pub. Util. Code § 1766(a)*].

If a PUC order or decision authorizing any increase or decrease in rates, or changing any rate classification, is set aside by the Supreme Court or court of appeal, the matter must be referred back to the PUC for further action consistent with the order of the court. The PUC, in taking this further action, may not authorize refunds, and any relief ordered by the PUC that shall have the effect of increasing or decreasing rates shall be prospective only [*Pub. Util. Code § 1766(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesStays of Proceedings & SupersedeasEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsJudicial ReviewEnergy & Utilities LawAdministrative ProceedingsRatemaking

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§ 480.144 Petition for Writ of Review

[1] Time to Petition

Any aggrieved party may petition for a writ of review in the court of appeal or the Supreme Court for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined as follows [*Pub. Util. Code § 1756(a)*]:

- If the application for rehearing was denied, within 30 days after the PUC issues its decision denying the application.
- If the application for rehearing was granted, within 30 days after the PUC issues its decision on rehearing.
- If no decision on rehearing has been issued, at least 120 days after the application is granted.

For purposes of *Pub. Util. Code § 1756*, the issuance of a decision or the granting of an application is construed to have occurred on the date when the PUC mails the decision or grant to the parties to the action or proceeding [*Pub. Util. Code § 1756(d)*].

[2] Petition Must Be Verified

The petition must be verified [*Code Civ. Proc. § 1069*; *Cal. Rules of Ct., Rule 8.496(a)*]. For a form of petition for writ of review, see *§ 480.200[1]*.

[3] Proper Court for Petition

[a] Court of Appeal to Review Adjudicatory Proceeding

When the decision of the PUC was issued in an adjudicatory proceeding, the petition for writ of review may be filed in

the court of appeal [*Pub. Util. Code § 1756(b)*].

PRACTICE TIP:

Construing *Pub. Util. Code § 1756(b)*. Before the enactment of *Pub. Util. Code § 1756*, operative January 1, 1998, petitions for writ of review to review PUC decisions were filed only in the Supreme Court. As noted in *[1], above*, *Pub. Util. Code § 1756(a)* now provides that petitions may generally be filed in either the court of appeal or the Supreme Court. *Pub. Util. Code § 1756(b)* provides, in turn, that the petition "may only be filed with the Supreme Court" to review non-adjudicatory PUC matters (discussed in *[b], below*), whereas the petition "may be filed in the court of appeal" to review adjudicatory PUC decisions.

The clause relating to review of adjudicatory decisions, in using "may" rather than "may only" or "shall," would appear, when read with *Pub. Util. Code § 1756(a)*, to permit petitions for review of adjudicatory decisions to be filed in *either* the court of appeal or the Supreme Court. Because, however, only the "court of appeal" is expressly mentioned in connection with petitions to review adjudicatory provisions, it is also arguable that this language is intended to provide that the filing of such petitions *should* be done only in the court of appeal. Although the language is ambiguous, the latter interpretation, under which petitions to review adjudicatory decisions are to be filed only in the court of appeal, would appear to be more consistent with the apparent intent of the provision (*i.e.*, to lighten the Supreme Court's burden in reviewing PUC matters by sharing that burden with the court of appeal). It is also more consistent with other provisions enacted at the same time, particularly *Pub. Util. Code § 1758(c)*, which establishes a procedure for the Supreme Court's review of court of appeal decisions rendered under *Pub. Util. Code § 1756 et seq.* [*see* discussion in *§ 480.147*]. Finally, this interpretation is more consistent with the rule applicable to writ proceedings generally, that when more than one court has original jurisdiction [*see, e.g., Cal. Const., art. VI, § 10*], a petition for an extraordinary writ is ordinarily to be filed in the lowest court capable of granting relief. If petitions for review of adjudicatory decisions may be filed in either the court of appeal or the Supreme Court, the procedure under *Pub. Util. Code § 1758(c)* could be circumvented by filing initially in the Supreme Court, rendering that provision superfluous.

As a practical matter, the parties will usually prefer in any event to seek review, at least initially, in the court of appeal.

The venue of a petition filed in the court of appeal under *Pub. Util. Code§ 1756* is the judicial district in which the petitioner resides. If the petitioner is a business, venue is in the judicial district in which the petitioner has its principal place of business in California [*Pub. Util. Code § 1756(e)*].

Any party may seek from the Supreme Court, pursuant to California Rules of Court, an order transferring related actions to a single appellate district [*Pub. Util. Code § 1756(e)*; *see Cal. Rules of Court, Rule 10.1000*]. For a form of application to transfer related actions to a single appellate district, see *§ 480.200[2]*.

For discussion of the various court of appeal districts and the counties within each district, and discussion relating to the transfer of causes in the reviewing courts generally, see Ch. 40, *Appeal: An Overview* , and Ch. 51, *Appeal: Hearing and Decision* .

[b] Supreme Court to Review Non-adjudicatory Proceeding

In all matters other than adjudicatory proceedings, the petition for writ of review may only be filed in the Supreme Court [*Pub. Util. Code § 1756(b)*].

[c] Review of Decisions Pertaining Solely to Water Corporations

Generally, review of decisions pertaining solely to water corporations may only be by petition for writ of review in the Supreme Court. Review of complaint or enforcement proceedings, however, may be in the court of appeal or the Supreme Court [*Pub. Util. Code § 1756(f)*].

[3a] Certificate of Interested Entities or Persons

If a party files a motion, application, or opposition to a motion or application in the court of appeal before filing its principal brief, the party must serve and file its Certificate of Interested Entities or Persons at the time it files the first such motion, application, or opposition and must include a copy of this certificate in the party's principal brief. If no motion, application, or opposition to a motion or application is filed before the parties file their principal briefs, each party must include its certificate in its principal brief [*Cal. Rules of Ct., Rule 8.208(d)(1)*]. If the identity of any party or any entity or person subject to disclosure has not been publicly disclosed in the proceedings and a party wants to keep that identity confidential, the party may serve and file an application for permission to file its certificate under seal separately from its principal brief, motion, application, or opposition. If the application is granted, the party must file the certificate under seal and without service within 10 days of the court's order granting the application [*Cal. Rules of Ct., Rule 8.208(d)(2)*].

If a party is an entity, the certificate must list any other entity or person that the party knows has an ownership interest of 10 percent or more in the party [*Cal. Rules of Ct., Rule 8.208(e)(1)*]. All parties must also list any person or entity, other than the parties themselves, that has a financial or other interest in the outcome of the proceeding that the party reasonably believes the justices should consider in determining whether to disqualify themselves under Canon 3E of the Code of Judicial Ethics [*Cal. Rules of Ct., Rule 8.208(e)(2)*]. If the party knows of no entity or person that is required to be disclosed under the rule, he or she must so state in the certificate [*Cal. Rules of Ct., Rule 8.208(e)(3)*]. Furthermore, if a party learns of changed or additional information that must be disclosed under *Cal. Rules of Ct., Rule 8.208,* he or she must promptly serve and file a supplemental certificate [*Cal. Rules of Ct., Rule 8.208(f)*].

The petitioner's certificate must be included in the petition [*Cal. Rules of Ct., Rule 8.496(c)(2)*]. The certificate of the real party in interest must be included in the answer [*Cal. Rules of Ct., Rule 8.496(c)(2)*]. The certificate must appear after the cover and before the tables [*Cal. Rules of Ct., Rule 8.496(c)(2)*]. If a party fails to file a certificate, the clerk must notify the party by mail that the party must file the certificate within 10 days after the clerk's notice is mailed and that failure to comply will result in one of the following sanctions: (A) If the party is the petitioner, the court will strike the petition; (B) If the party is the respondent or the real party in interest, the court will strike the document [*Cal. Rules of Ct., Rule 8.496(c)(3)*].

[4] Service of Petition

The petition for review must be served upon the executive director and general counsel of the PUC either personally or by service at the office of the PUC [*Pub. Util. Code § 1756(c)*; *Cal. Rules of Ct., Rule 8.496(a)*].

The petition must also be served upon any real parties in interest. A real party in interest is one who (1) was a party of record to the action or proceeding before the PUC, and (2) presented before the PUC a position adverse to that taken before the PUC by the petitioner for review [*Cal. Rules of Ct., Rule 8.496(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueIndividual DefendantsCivil ProceduresPartiesReal Parties in InterestGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsJudicial ReviewEnergy & Utilities LawAdministrative ProceedingsRehearings

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§ 480.145 Answer and Reply

Within 35 days after the petition is filed, the PUC or any real party in interest may serve and file an answer. Within 25 days after an answer is filed, the petitioner may serve and file a reply [*Cal. Rules of Ct., Rule 8.496(b)*]. For a form of answer for use in writ of review in an appellate court generally, see Ch. 492, *Review (Certiorari), Writ of.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProceduresPartiesReal Parties in InterestGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsJudicial Review

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§ 480.146 Hearing and Determination

[1] Preference for Public Utilities Proceedings Over Other Civil Business

The reviewing courts must prefer over specified actions and proceedings pertaining to public utilities over other business, irrespective of position on the calendar. The following proceedings must be heard and determined in preference to all other civil business, except election clauses [*Pub. Util. Code § 1767*]:

- All actions and proceedings under *Pub. Util. Code § 201 et seq.*

- All actions or proceedings to which the PUC or the people of the State of California are parties in which any question arises under *Pub. Util. Code § 201 et seq.*

- All actions or proceedings to which the PUC or the people of the State of California are parties in which any question arises under or concerning any order or decision of the PUC.

- Any action or proceeding in which the attorney of the PUC is allowed to intervene, on application of the attorney of the PUC.

- The Supreme Court must grant expedited consideration to any party or PUC petition alleging that the court of appeal has assumed jurisdiction to review a PUC decision over which the court of appeal has no jurisdiction [*Pub. Util. Code § 1758(d)*].

[2] Scope of Review

[a] In General

No new or additional evidence may be introduced in the Supreme Court and the court of appeal, but the cause will be heard on the record of the PUC as certified to by it [*Pub. Util. Code § 1757*].

The findings and conclusions of the PUC on questions of fact are final and are not subject to review except as specified below. Such questions of fact include ultimate facts and the findings and conclusions of the PUC on reasonableness and discrimination [*Pub. Util. Code § 1757*].

In any proceeding in which the validity of an order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court or court of appeal exercises an independent judgment on the law and the facts, and the findings or conclusions of the PUC material to the determination of the constitutional question are not final [*Pub. Util. Code § 1760*].

[b] Adjudicatory Proceedings

In a complaint, enforcement, or other adjudicatory proceeding, the review by the appellate court may not extend further than to determine, on the basis of the entire record which must be certified by the PUC, whether any of the following occurred:

- The order or decision of the commission was an abuse of discretion [*Pub. Util. Code § 1757.1(a)(1)*].
- The commission has not proceeded in the manner required by law [*Pub. Util. Code § 1757.1(a)(2)*].
- The commission acted without, or in excess of, its powers or jurisdiction [*Pub. Util. Code § 1757.1(a)(3)*].
- The decision of the commission is not supported by the findings [*Pub. Util. Code § 1757.1(a)(4)*].
- The order or decision was procured by fraud [*Pub. Util. Code § 1757.1(a)(5)*].
- The order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution [*Pub. Util. Code § 1757.1(a)(6)*].

No new or additional evidence may be introduced upon review by the court. The PUC's findings and conclusions on findings of fact are final and may not be subject to review except as provided in by law. The questions of fact must include ultimate facts and findings and the PUC's conclusions on reasonableness and discrimination [*Pub. Util. Code § 1757.1(c)*]. However, this general rule of deference to interpretations of statutes subject to the PUC's regulatory jurisdiction does not apply when the issue is the scope of the PUC's jurisdiction [*PG&E Corp. v. Public Utilities Commission (2004) 118 Cal. App. 4th 1174, 1194, 13 Cal. Rptr. 3d 630* (determining scope of PUC's jurisdiction with respect to utilities' holding companies)].

[c] Other Than Adjudicatory Proceedings

In a non-adjudicatory review proceeding before the Supreme Court, the review does not extend further than to determine whether the PUC has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or California [*see Pub. Util. Code § 1757*; *Southern California Edison Company v. Public Utilities Commission (2005) 128 Cal. App. 4th 1, 26 Cal. Rptr. 3d 700]* .

The standard of review under *Pub. Util. Code § 1757*, discussed in *[a]* and *[b]*, *above*, does not apply to ratemaking or licensing decisions of specific application addressed solely to water corporations [*Pub. Util. Code § 1757(c)*]. In reviewing decisions pertaining solely to water corporations, the review may not be extended further than to determine whether the PUC has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitutions of the United States or California [*Pub. Util. Code §*

1757.1(b)].

[3] Appearances and Judgment

The PUC and each party to the action or proceeding before the PUC may appear in the review proceeding. Upon the hearing the Supreme Court or court of appeal must enter judgment either affirming or setting aside the order or decision of the PUC [*Pub. Util. Code § 1758(a)*].

[4] Writ Must Be Returnable at Specified Time and Place

If the writ issues, it must be made returnable at a time and place specified by court order and must direct the PUC to certify its record in the case to the court within the time specified [*Pub. Util. Code § 1756(a)*].

[5] Effect of Denial of Writ

Denial of review by the appellate court is a ruling on the merits and constitutes a holding that the PUC regularly pursued its authority [*Union City v. Southern Pac. Co. (1968) 261 Cal. App. 2d 277, 279, 67 Cal. Rptr. 816* (petition denied by Supreme Court; decided before petitions were authorized to be heard by court of appeal as well as Supreme Court)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewAdministrative RecordGeneral OverviewAdministrative LawSeparation of PowersJurisdictionEnergy & Utilities LawAdministrative ProceedingsJudicial ReviewScope & Standards of ReviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsJudicial Review

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§ 480.147 Review in Supreme Court of Court of Appeal Decisions

The Supreme Court may review a decision by the court of appeal rendered under *Pub. Util. Code § 1756 et seq.* in the manner provided for other civil actions [*Pub. Util. Code § 1758(c)*].

The Supreme Court must grant expedited consideration to any party or PUC petition alleging that the court of appeal has assumed jurisdiction to review a PUC decision pertaining solely to water corporations over which the court of appeal has no jurisdiction [*Pub. Util. Code § 1758(d)*].

For discussion and forms relating to proceedings in the Supreme Court to review a decision of the court of appeal, see Ch. 53, *Appeal: California Supreme Court Review* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsJudicial Review

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[Reserved]

§§ 480.148[Reserved]

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§ 480.160 State Constitution

Appointment and removal of members of PUC. *Cal. Const., art. XII, § 1*

Power of PUC to establish own procedures. *Cal. Const., art. XII, § 2*

Definitions of public utilities. *Cal. Const., art. XII, § 3*

Regulation of rates and charges by PUC. *Cal. Const., art. XII, § 4*

Legislative power to increase jurisdiction of PUC. *Cal. Const., art. XII, § 5*

Duties of PUC. *Cal. Const., art. XII, § 6*

Prohibition against free passes and conflicts of interest. *Cal. Const., art. XII, § 7*

Limitation on municipal regulation of public utilities. *Cal. Const., art. XII, § 8*

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthorityEnergy & Utilities LawAdministrative ProceedingsRatemaking

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42-480 California Forms of Pleading and Practice--Annotated § 480.161

§ 480.161 Federal Statutes

Conditions under which federal district court is prohibited from enjoining state rate order. *28 U.S.C. § 1342*

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthorityEnergy & Utilities LawAdministrative ProceedingsRatemaking

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42-480 California Forms of Pleading and Practice--Annotated § 480.162

§ 480.162 State Statutes

[1] Definitions

Persons and corporations. *Pub. Util. Code § 204 et seq.*

Transportation. *Pub. Util. Code § 208 et seq.*

Rates. *Pub. Util. Code § 210*

Common Carriers. *Pub. Util. Code § 211 et seq.*

Procedure for PUC hearings. *Pub. Util. Code § 1701 et seq.*

Small claims procedures. *Pub. Util. Code §§ 1702.1, 1705, 1706, 1731*

Procedure for rehearings. *Pub. Util. Code § 1731 et seq.*

Judicial review. *Pub. Util. Code § 1756 et seq.*

Witnesses. *Pub. Util. Code § 1791 et seq.*

Official documents as evidence and fees therefor. *Pub. Util. Code § 1901 et seq.*

Private energy producers. *Pub. Util. Code § 2802 et seq.*

[2] Regulation of Public Utilities

Application to interstate and foreign commerce. *Pub. Util. Code § 202*

Establishment of expedited procedures for public utilities in presidentially declared emergency. *Pub. Util. Code § 325*

Investigation and resolution of consumer complaints related to activities of entities providing electrical service. Pub. Util. Code § 394.12

Notice to consumer of right to file small claims or other action against electrical corporation for damages to property resulting from curtailment of electricservice due to failure to reasonably provide service within reasonable time after fire, flood, earthquake or other disaster. *Pub. Util. Code § 394.27*

Minimum standards for offering electrical services to residential and small commercial customers. *Pub. Util. Code § 394.4*

Facilities. *Pub. Util. Code § 556 et seq.*

Reports. *Pub. Util. Code § 581 et seq.*

Generally. *Pub. Util. Code § 701 et seq.*

Limitation on investment in diversification ventures. *Pub. Util. Code § 701.5*

Rates. *Pub. Util. Code § 727 et seq.*

Equipment, practices, and facilities. *Pub. Util. Code § 761 et seq.*

Books and accounts. *Pub. Util. Code § 791 et seq.*

Stock and security transactions. *Pub. Util. Code § 816 et seq.*

Transfer and encumbrance of utility property. *Pub. Util. Code § 851 et seq.*

Access to utilities' computer models by PUC. *Pub. Util. Code § 1821 et seq.*

Gas Producers' Cooperative Associations. *Pub. Util. Code § 3001 et seq.*

Decommissioning of nuclear facilities. *Pub. Util. Code § 8321 et seq.*

[3] PUC

Organization. *Pub. Util. Code § 301 et seq.*

Appointment of public adviser to assist public and ratepayers in proceedings before PUC. *Pub. Util. Code § 321*

Annual work plan access guide to scheduled rate-making proceedings and other PUC decisions. *Pub. Util. Code § 321.6*

Remedies and punishment. *Pub. Util. Code § 2100 et seq.*

[4] Certificates of Public Convenience and Necessity

Utilities subject to certification. *Pub. Util. Code § 1001 et seq.*

Passenger stage corporation. *Pub. Util. Code § 1031 et seq.*

Interstate and Foreign Motor Carriers of Household Goods and Passengers Act. *Pub. Util. Code § 3901 et seq.*

Motor Carriers of Property Permit Act. *Veh. Code § 34600 et seq.*

[5] Acquisition or Duplication of Public Utility Property or Service

Valuation of public utility properties. *Pub. Util. Code § 1351 et seq.*

Determination of just compensation for acquisition of public utilities property. *Pub. Util. Code § 1401 et seq.*

Service duplication. *Pub. Util. Code § 1501 et seq.*

[6] Regulation of Crossings

Railroad crossings. *Pub. Util. Code § 1201 et seq.*

Protection of grade crossings. *Pub. Util. Code § 1231 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsJudicial ReviewEnergy & Utilities LawAdministrative ProceedingsRatemakingEnergy & Utilities LawAdministrative ProceedingsRehearingsEnergy & Utilities LawElectric Power IndustryState RegulationGeneral OverviewEnergy & Utilities LawUtility CompaniesRatesGeneral OverviewReal Property LawEminent Domain ProceedingsValuationTransportation LawRail TransportationMaintenance & Safety

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§ 480.163 Administrative Regulations

Code of ethics for practice before PUC. *20 Cal. Code Reg. § 1*

Formal requirements of pleadings and briefs before PUC. 20 Cal. Code Reg. §§ 2-8.01

Computation of Time. *20 Cal. Code Reg. § 3.2*

Filing Fees. *20 Cal. Code Reg. § 3.3*

Inspection of and subscription to daily calendar. *20 Cal. Code Reg. § 3.4*

Case Information System Identification Number. *20 Cal. Code Reg. § 3.5*

Protests; requests for hearings before PUC. *20 Cal. Code Reg. §§ 8.1-8.15*

Complaints and PUC investigations. *20 Cal. Code Reg. §§ 9-14*

PUC rulemaking. *20 Cal. Code Reg. §§ 14.1-14.6*

Applications generally. *20 Cal. Code Reg. §§ 15-17.3*

Applications for authority to increase rates. *20 Cal. Code Reg. §§ 23, 24*

Applications of common carriers to increase rates under shortened-procedure tariff docket. *20 Cal. Code Reg. §§ 25-32*

Applications to issue stock or evidence of indebtedness or to assume liabilities. *20 Cal. Code Reg. §§ 33, 34*

Applications to sell, lease, or encumber utility property or rights; to merge or consolidate facilities; to acquire stock of

another utility; or to acquire or control a utility. *20 Cal. Code Reg. §§ 35-37*

Applications to construct, alter, or abolish railroad crossings. *20 Cal. Code Reg. §§ 38-41*

Other applications and procedures. *20 Cal. Code Reg. §§ 42, 43*

Applications for exemptions from rules regarding underground telephone and electric lines. *20 Cal. Code Reg. §§ 43.1-43.8*

Prehearing procedure and exchange of exhibits. *20 Cal. Code Reg. §§ 49, 50*

Hearings. *20 Cal. Code Reg. §§ 52-58*

Subpoenas to appear before PUC. *20 Cal. Code Reg. §§ 59-61.1*

Presiding officers at proceeding before PUC. *20 Cal. Code Reg. §§ 62, 63.7*

Evidence in hearings before PUC. *20 Cal. Code Reg. §§ 64-74*

Briefs and oral argument in proceedings before Public Utilities PUC. *20 Cal. Code Reg. §§ 75, 76*

Decisions and proposed reports of PUC. *20 Cal. Code Reg. §§ 77-83*

Reopening proceedings before PUC. *20 Cal. Code Reg. § 84*

Rehearings before PUC. *20 Cal. Code Reg. §§ 85-86.2*

Construction and amendment of PUC rules. *20 Cal. Code Reg. § 87*

Illustrative forms for proceedings before PUC. *20 Cal. Code Reg. § 88*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency InvestigationsScopeSubpoenasAdministrative LawAgency RulemakingState ProceedingsEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsRatemakingEnergy & Utilities LawAdministrative ProceedingsRehearings

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42-480 California Forms of Pleading and Practice--Annotated § 480.164

§ 480.164 Decisions

[1] Regulation of Public Utilities Generally

[a] Dedication to Public Service

Bus company has property dedicated to public service of certain communities, and therefore PUC has jurisdiction to order it to extend service over certainroutes in those communities. *Greyhound Lines, Inc. v. Public Utilities Com. (1968) 68 Cal. 2d 406, 410-417, 67 Cal. Rptr. 97, 438 P.2d 801*

Water company is subject to PUC regulation when it had dedicated property to public use by selling water to public. *Yucaipa Water Co. No. 1 v. Public Utilities Com. (1960) 54 Cal. 2d 823, 828-832, 9 Cal. Rptr. 239, 357 P.2d 295*

Gas company not subject to jurisdiction of PUC unless it has dedicated its property to public service. *Richfield Oil Corp. v. Public Util. Comm'n (1960) 54 Cal. 2d 419, 428-433, 6 Cal. Rptr. 548, 354 P.2d 4*

Water company was found not to have dedicated its service to public use in area by entering into contract to supply subdivider with water in future and, thus, is not subject to PUC's regulation of water service in that area. *Cal. Water & Tel. Co. v. Public Util. Com. (1959) 51 Cal. 2d 478, 488-500, 334 P.2d 887*

Private mobile communication service of telephone company is subject to regulation by PUC. *Commercial Communications v. Public Util. Comm'n (1958) 50 Cal. 2d 512, 518-526, 327 P.2d 513*

[b] Nondelegable Duty

Public utility's duty to comply with rules of PUC regarding installation of utility poles is nondelegable to independent contractor. *Snyder v. Southern Cal. Edison Co. (1955) 44 Cal. 2d 793, 797-803, 285 P.2d 912*

[c] Limitations of Liability

PUC rate allowing telephone company to limit liability for inadequate service precludes any award of damages above the credit allowance allowed in rate. *Waters v. Pacific Telephone Co. (1974) 12 Cal. 3d 1, 7-12, 114 Cal. Rptr. 753, 523 P.2d 1161*

Limitations on liability are properly included in tariffs as subject clearly within the PUC's regulatory powers; thus, tariffs limited cellular telephone company's maximum exposure in negligence suit brought by victim who was assaulted after she was unable to summon help on her cellular telephone. *Los Angeles Cellular Telephone Co. v. Superior Court (1998) 65 Cal. App. 4th 1013, 1017-1018, 76 Cal. Rptr. 2d 894*

PUC's rules with regard to gas meter testing does not preclude other methods of proving overcharge by public utility. *Masonite Corp. v. Pacific Gas & Electric Co. (1976) 65 Cal. App. 3d 1, 6-11, 135 Cal. Rptr. 170*

Limitation of liability provisions in telegraph rates limiting liability for nondelivery of telegrams is binding on public, whether or not they have notice of such limitations. *Trammell v. Western Union Tel. Co. (1976) 57 Cal. App. 3d 538, 549-554, 129 Cal. Rptr. 361*

[2] PUC Authority Generally

[a] Jurisdiction of PUC

[i] Generally

In construing deeds to ascertain existing rights of utility for purposes of exercising ratemaking power, PUC acts within its constitutional and statutory jurisdiction by ordering utility to (1) enforce utility's easement for water rights against record titleholders of specified property, and (2) record notice of intent to preserve easements pursuant to *Civ. Code § 887.060*, and by ordering (1) intervention in proceedings before State Water Resources Control Board to prevent record titleholders from obtaining rights inconsistent with those held by utility under easement, and (2) forwarding of copies of instant PUC decision to title insurance companies to ensure that future purchasers of burdened property would have actual notice of easement. *Camp Meeker Water System, Inc. v. Public Utilities Com. (1990) 51 Cal. 3d 845, 851, 862, 274 Cal. Rptr. 678, 799 P.2d 758*

PUC is not empowered under its general powers to implement mandatory program when legislature has provided express authority for permissive program. *Southern Cal. Gas Co. v. Public Utilities Com. (1979) 24 Cal. 3d 653, 657-659, 156 Cal. Rptr. 733, 596 P.2d 1149* (mandatory home insulation financing program was annulled; but note that effect of decision modified by 1979 enactment of *Pub. Util. Code § 2789*, which authorized PUC to permit or require corporation subject to its jurisdiction to institute conservation programs including related financial assistance)

PUC has authority to directly impose fines on public utilities. *Pacific Bell Wireless, LLC v. Public Utilities Com. (2006) 140 Cal. App. 4th 718, 735-737, 44 Cal. Rptr. 3d 733*

PUC has exclusive jurisdiction to resolve dispute about who must pay for relocation of telephone company's overhead facilities to underground because claims concern matter about which PUC authorized to make policy, over which it has assumed jurisdiction, and which it continues to regulate. *City of Anaheim v. Pacific Bell Telephone Company (2004) 119 Cal. App. 4th 838, 844, 14 Cal. Rptr. 3d 725*

PUC has limited jurisdiction over holding companies that are parent corporations of utilities to enforce requirement that holding companies give first priority to capital requirements of utility subsidiaries as necessary to meet their obligation to serve. *PG&E Corp. v. Public Utilities Commission (2004) 118 Cal. App. 4th 1174, 1201, 13 Cal. Rptr. 3d 630*

Despite Cal. Const., art. III, § 3.5, PUC has authority to refuse to enforce statute if the enforcement would violate inconsistent later enacted statute. *The Burlington Northern and Santa Fe Railway Company v. Public Utilities Commission (2003) 112 Cal. App. 4th 881, 887-889, 5 Cal. Rptr. 3d 503*

[ii] Exclusive Jurisdiction

PUC has exclusive jurisdiction over action brought by ratepayer against utility, which allegedly discriminated by charging plaintiff commercial rather than domestic rates, because gravamen of complaint was question of what rate schedule was appropriate for plaintiff's type of facility, a recreational vehicle park. *Schell v. Southern Cal. Edison Co. (1988) 204 Cal. App. 3d 1039, 1045-1046, 251 Cal. Rptr. 667*

PUC has acted on regulation of advertising in telephone books and, therefore, has exclusive jurisdiction over claim of discrimination in regulation of such advertising. *Dollar-A-Day Rent-A-Car Sys. Inc. v. Pacific Tel & Tel. Co. (1972) 26 Cal. App. 3d 454, 457-462, 102 Cal. Rptr. 651*

Order of PUC is only reviewable in Supreme Court; such order is not capable of being effectively overruled by action of superior court. *Pellandini v. Pacific Limestone Prod. Inc. (1966) 245 Cal. App. 2d 774, 777, 54 Cal. Rptr. 290*

Ex parte preliminary injunction against water company enjoining company from reversing stock transfer is improper when the injunction interfered with the jurisdiction of PUC which had ordered the transfer and when the PUC was not a party to proceeding in which the injunction had been issued. *Hickey v. Roby (1969) 273 Cal. App. 2d 752, 763-769, 77 Cal. Rptr. 486*

Trial court is bound to follow order of PUC with regard to status of public utility. *Pratt v. Coast Trucking Inc. (1964) 228 Cal. App. 2d 139, 149-153, 39 Cal. Rptr. 332*

Superior court does not have jurisdiction over declaratory relief action involving telephone billing practice matter that was within jurisdiction of PUC. *Harmon v. Pacific Tel. & Tel. Co. (1960) 183 Cal. App. 2d 1, 3, 6 Cal. Rptr. 542*

[iii] Concurrent Jurisdiction

Pollution control district and PUC have concurrent jurisdiction over permission to construct power plant, and both their requirements are applicable. *Orange County Air Pollution Control Dist. v. Public Util. Com. (1971) 4 Cal. 3d 945, 951-954, 95 Cal. Rptr. 17, 484 P.2d 1361*

Supreme Court has distinguished between situations in which PUC's authority is pitted against authority of local government involving matter of statewide concern (overwhich PUC is normally found to have paramount jurisdiction), and other situations in which PUC jurisdiction conflicts with other than local agency (over which PUC directives have not been given such controlling effect); this authority does not clearly allow for concurrent jurisdiction over utility-related activity at different levels of government, but only for concurrent regulation by equivalent agencies. *San Diego Gas & Electric Co. v. City of Carlsbad (1998) 64 Cal. App. 4th 785, 801, 75 Cal. Rptr. 2d 534* (*citing Orange County Air Pollution Control Dist. v. Public Util. Com. (1971) 4 Cal. 3d 945, 951, 95 Cal. Rptr. 17, 484 P.2d 1361*)

[b] Limits to PUC Authority

PUC does not have authority to regulate wine train because it provides round-trip excursion, rather than picking up passengers at one location and taking them to another location. *City of St. Helena v. Public Utilities Commission (2004) 119 Cal. App. 4th 793, 802, 14 Cal. Rptr. 3d 713*

PUC does not have authority to determine claims alleging that telephone company violated the Unfair Business Practices Act (*Bus. & Prof. Code § 17200 et seq.*), or the False Advertising Act (*Bus. & Prof. Code § 17500 et seq.*) together, the Unfair Competition Law, because claims brought under those statutes must be brought in court. *Greenlining Institute v. Public Util. Com. (2002) 103 Cal. App. 4th 1324, 1328, 1334, 127 Cal. Rptr. 2d 736*

PUC does not have authority to regulate sightseeing boat line that does not take passengers from one place to another. *Golden Gate Scenic Steamship Lines Inc. v. Public Utilities Com. (1962) 57 Cal. 2d 373, 377-380, 19 Cal. Rptr. 657, 369 P.2d 257*

PUC does not have authority to condition transfer of operating authority on priority of payment to certain creditors. *Hempy v. Public Utilities Com. (1961) 56 Cal. 2d 214, 217-218, 14 Cal. Rptr. 436, 363 P.2d 476*

Cable television is not public utility and therefore does not have constitutional right to fair return on investment. *Orange County Cable Communications Co. v. City of San Clemente (1976) 59 Cal. App. 3d 165, 170, 130 Cal. Rptr. 429*

[c] Unconstitutional Practices

Termination of utility service without notice reasonably calculated to apprise respondents of availability of administrative procedure to consider complaint of erroneous billing and without opportunity to present complaint to designated employee empowered to review disputed bills and rectify error is deprivation of property interest without due process of law. *Memphis Light, Gas & Water Div. v. Craft (1978) 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30, 46-47*

Tariff regulation that required that subscribers who transmitted recorded telephone messages to include their names and addresses is unconstitutional violation of freedom of speech. *Huntley v. Public Util. Comm'n (1968) 69 Cal. 2d 67, 71-78, 69 Cal. Rptr. 605, 442 P.2d 685*

Termination of phone service based on unlawful use predicated solely on affidavit of police to that effect is unconstitutional. *Sokol v. Public Utilities Com. (1966) 65 Cal. 2d 247, 251-256, 53 Cal. Rptr. 673, 418 P.2d 265*

[d] Rates

In determining reasonableness of utility rates, rate of return is defined as payment for use of property of another. *Hansen v. City of San Buenaventura (1986) 42 Cal. 3d 1172, 1182, 233 Cal. Rptr. 22, 729 P.2d 186*

Basic principle of rate-making by PUC exists to establish a rate that will permit utility to recover its cost and expenses plus reasonable return on value of property devoted to public use. *City and County of San Francisco v. Public Utilities Com. (1971) 6 Cal. 3d 119, 129, 98 Cal. Rptr. 286, 490 P.2d 798*

Utility company's credit rules are valid and not violative of equal protection when they had reasonable relation to their purpose of reducing bad debt losses. *Wood v. Public Utilities Com. (1971) 4 Cal. 3d 288, 293-296, 93 Cal. Rptr. 455, 481 P.2d 823*

Responsibility for rate setting is with PUC and, unless its action is clearly shown to be confiscatory, courts do not interfere. *Pacific Tel. & Tel. Co. v. Public Utilities Com. (1965) 62 Cal. 2d 634, 647, 44 Cal. Rptr. 1, 401 P.2d 353*

Schedules of rates issued by PUC and limitations of liability therein are part of contract between public utility and

customer. *Hischemoeller v. National Ice & Cold Storage Co. (1956) 46 Cal. 2d 318, 325, 294 P.2d 433*

Rate fixing for publicly owned municipal utility is function within exclusive province of municipality, and courts intrude only in limited cases when rates shown to be unreasonable, unfair, or fraudulently or arbitrarily established; refusal of city to pass through cost savings to rate payers is not unreasonable or arbitrary rate fixing. *American Microsystems, Inc. v. City of Santa Clara (1982) 137 Cal. App. 3d 1037, 1042, 187 Cal. Rptr. 550*

Sewer rates related to burden on system is reasonable and not discriminatory and therefore is valid. *Boynton v. City of Lakeport Mun. Sewer Dist. (1972) 28 Cal. App. 3d 91, 93-96, 104 Cal. Rptr. 409*

Airport is public utility but different charges for same services are justified by lower rates to persons who had long-term lease commitment to airport. *City & County of San Francisco v. Western Air Lines, Inc. (1962) 204 Cal. App. 2d 105, 126-146, 22 Cal. Rptr. 216*

Carrier is bound by published rate. *Transmix Corp. v. Southern Pac. Co. (1960) 187 Cal. App. 2d 257, 262-269, 9 Cal. Rptr. 714*

[e] Refunds

Public utility's refunds to customers are subject to Unclaimed Property Law (*Code Civ. Proc. § 1500 et seq.*). *Cory v. Public Utilities Com. (1983) 33 Cal. 3d 522, 528, 189 Cal. Rptr. 386, 658 P.2d 749*

Disposition of refunds received by utilities from gas suppliers. *California Mfrs. Assn. v. Public Utilities Com. (1979) 24 Cal. 3d 836, 848, 157 Cal. Rptr. 676, 598 P.2d 836*

[f] Relocation of Public Utility

If utilities must be moved or relocated in order to construct or operate a rapid transit system, a new and additional burden on such facilities is created and the district must pay the relocation costs. *Pasadena Metro Blue Line Construction Authority v. Pacific Bell Telephone (2006) 140 Cal. App. 4th 658, 664-666, 44 Cal. Rptr. 3d 556*

Relocation costs of public utility are not compensable pursuant to *Gov. Code § 7262(a)(1)*, which provides compensation for expenses of moving business to persons displaced by written order to vacate real property for public use. *Pacific Tel. & Tel. Co. v. Redevelopment Agency (1978) 87 Cal. App. 3d 296, 301, 151 Cal. Rptr. 68*

Common law rule that franchised utilities must bear cost of relocating equipment moved at request of municipality (codified under *Pub. Util. Code § 6297*) does not apply to dispute between utility and private developer as to who would bear costs of relocating power poles and lines necessitated by road widening by developer that was not a governmental act but a condition imposed on developer by county in approving developer's housing development. *Pacific Gas & Electric Co. v. Dame Construction Co. (1987) 191 Cal. App. 3d 233, 236-241, 236 Cal. Rptr. 351*

When private party, on its own initiative and not that of government, develops parcel of land and thereby creates or aggravates need for public improvement that requires relocation of existing utility equipment, private party is required to bear necessary relocation costs. *Pacific Gas & Electric Co. v. Dame Construction Co. (1987) 191 Cal. App. 3d 233, 241, 236 Cal. Rptr. 351*

Public utility accepting franchise rights in public streets subject to implied obligation to relocate its facilities therein at its own expense when necessary to make way for proper governmental use of streets. *East Bay Muni. UtilityDist. v. Richmond Redevelopment Agency (1975) 51 Cal. App. 3d 789, 793, 124 Cal. Rptr. 606*

[g] Transfer of Public Utilities

Pub. Util. Code § 851, prohibiting public utility from selling or encumbering all of its necessary property without approval by PUC, does not contemplate private enforcement under *Pub. Util. Code § 2106* (damages action for unlawful activities by public utility). *Barnett v. Delta Lines, Inc. (1982) 137 Cal. App. 3d 674, 683-684, 187 Cal. Rptr. 219*

Transfer of ownership of public utility is void without approval of PUC but executory contract to transfer is valid. Transport Clearings-- *Bay Area v. Simmonds (1964) 226 Cal. App. 2d 405, 420, 38 Cal. Rptr. 116*

Sale or transfer of assets of public utility is void unless and until approved by PUC but parties are able to enter into executory contract of sale that is enforceable by courts. *Dillingham v. Schipp (1957) 154 Cal. App. 2d 553, 559, 316 P.2d 1014*

[3] PUC Authority Over Particular Public Utilities

[a] Grade Crossings

Pub. Util. Code § 1202.3, relating to closure or apportionment of costs of improving publically-used railroad crossings, by PUC is constitutional and does not confer on private persons discretion as to whether crossing should be closed. *Southern Pac. Transportation Co. v. Public Utilities Com. (1976) 18 Cal. 3d 308, 313-315, 134 Cal. Rptr. 189, 556 P.2d 289*

Grade crossing is not legally created unless approval of PUC has been obtained. *Breidert v. Southern Pac. Co. (1969) 272 Cal. App. 2d 398, 406, 77 Cal. Rptr. 262*

PUC has exclusive jurisdiction over railroad crossings and authority to order railroad to close crossing of public road over railroad tracks. *City of Union City v. Southern Pac. Co. (1968) 261 Cal. App. 2d 277, 279-281, 67 Cal. Rptr. 816*

[b] Telephones

[i] Equipment

Use of customer-owned telephone equipment is proscribable only if it is shown that instrument would have adverse effect on telephone network as whole. *Phonetele, Inc. v. Public Utilities Com. (1974) 11 Cal. 3d 125, 129, 113 Cal. Rptr. 16, 520 P.2d 400*

[ii] Rates

PUC properly authorized telephone company to raise intrastate rates by $264 million to offset effect of installation costs; in offset proceeding, PUC properly determined whether significant and not reasonably foreseeable change in item of expense or revenue occurred that would seriously affect utility or ratepayers unless taken into account; all other items of expense and revenue are held constant as estimated in utility's most recent general rate proceeding; PUC properly used using more recent data in later offset proceeding to develop estimate of installation costs, without revising estimate of installation revenues in earlier general rate proceedings. *City and County of San Francisco v. Public Utilities Com. (1985) 39 Cal. 3d 523, 528-534, 217 Cal. Rptr. 43, 703 P.2d 381*

PUC has authority to require telephone company to implement competitive bidding practice in purchase of central

office switching equipment. *General Telephone Co. v. Public Utilities Com. (1983) 34 Cal. 3d 817, 822-827, 195 Cal. Rptr. 695, 670 P.2d 349*

Automatic annual adjustment of telephone rates based on income taxes is valid option for *PUC. City of Los Angeles v. Public Utilities Com. (1975) 15 Cal. 3d 680, 693-704, 125 Cal. Rptr. 779, 542 P.2d 1371*

Telephone rate set by PUC overturned. *City of Los Angeles v. Public Utilities Com. (1972) 7 Cal. 3d 331, 337-359, 102 Cal. Rptr. 313, 497 P.2d 785*

Telephone rate is invalid for failure of PUC to consider imputed accounting method of computing depreciation when company's imprudent management prevented it from actually using beneficial computation of depreciation. *City & County of San Francisco v. Public Util. Comm'n (1971) 6 Cal. 3d 119, 126-130, 98 Cal. Rptr. 286, 490 P.2d 798*

PUC's rate for telephone service is proper. *Pacific Tel. & Tel. Co. v. Public Util. Comm'n (1965) 62 Cal. 2d 634, 656-676, 44 Cal. Rptr. 1, 401 P.2d 353*

[4] Municipalities

[a] Control by Municipality

Fact that nonresident users of city-owned water company are subject to higher rate than those customers residing within city limits does not alone prove rate unreasonable and hence invalid; rather, nonresidents are required to show that discrimination is not based on cost of service or some other reasonable basis. *Hansen v. City of San Buenaventura (1987) 42 Cal. 3d 1172, 1181, 233 Cal. Rptr. 22, 729 P.2d 186*

Publicly owned municipal utilities are not regulated by PUC or any other supervising agency in absence of legislative grant of authority, and therefore are not required under PUC rules to pass along savings in operating costs to ratepayers. *American Microsystems, Inc. v. City of Santa Clara (1982) 137 Cal. App. 3d 1037, 1042-1043, 187 Cal. Rptr. 550*

Initiative that required city, operating its own electrical distribution system, to charge its customers same rate is lifeline rate of public utility constitutes unlawful delegation of authority to PUC. *Bock v. City Council (1980) 109 Cal. App. 3d 52, 55, 167 Cal. Rptr. 43*

Control of municipally-owned public airport rests with city and allows it to regulate when jet aircraft may take off. *Stagg v. Municipal Court (1969) 2 Cal. App. 3d 318, 321-323, 82 Cal. Rptr. 578*

City has power to regulate location of overhead utility lines and poles. *Modesto Irr. Dist. v. City Modesto (1962) 210 Cal. App. 2d 652, 655-658, 27 Cal. Rptr. 90*

[b] Control by PUC

City does not have authority to regulate matters over which PUC has been granted regulatory power, specifically its authority to regulate the design or construction of gas pipelines. *Southern Cal. Gas Co. v. City of Vernon (1995) 41 Cal. App. 4th 209, 217, 48 Cal. Rptr. 2d 661*

Publicly owned municipal utilities are not regulated by PUC or any other supervising agency in absence of legislative grant of authority. *American Microsystems, Inc. v. City of Santa Clara (1982) 137 Cal. App. 3d 1037, 1042, 187 Cal. Rptr. 550*

PUC has authority over certain aspects of operations of publically-owned transit district. *Los Angeles Met. Transit Authority v. Public Util. Com. (1963) 59 Cal. 2d 863, 868-870, 31 Cal. Rptr. 463, 382 P.2d 583*

When PUC issued certificate of public convenience and necessity for ferry service to city, city is required to issue use permit for ferry terminal. *Harbor Carriers, Inc. v. Sausalito (1975) 46 Cal. App. 3d 773, 775, 121 Cal. Rptr. 577*

[c] Utility User's Tax

Municipally imposed utility user's tax is valid. *Rivera v. City of Fresno (1971) 6 Cal. 3d 132, 137-139, 98 Cal. Rptr. 281, 490 P.2d 793*

Irrigation districts functioning under state law and selling electricity are required to collect city utility user's tax. *City of Modesto v. Modesto Irrigation Dist. (1973) 34 Cal. App. 3d 504, 506-508, 110 Cal. Rptr. 111*

[5] Proceedings Before PUC

[a] Attorney-Client Privilege

Power of PUC to compel testimony is subject to statutory limitation of attorney-client privilege (Evid. Code. Code § 910) in absence of unambiguous statutory directive to contrary. *Southern Cal. Gas Co. v. Public Utilities Com. (1990) 50 Cal. 3d 31, 38-39, 42, 265 Cal. Rptr. 801, 784 P.2d 1373*

Utility that did nothing to place in issue its privileged attorney-client communications did not impliedly waive its attorney-client privilege. *Southern Cal. Gas Co. v. Public Utilities Com. (1990) 50 Cal. 3d 31, 42, 265 Cal. Rptr. 801, 784 P.2d 1373*

[b] Hearings Before PUC

PUC is required to consider anti-trust implications of contracts involved in application for certificate of public convenience and necessity. *Northern California Power Agency v. Public Util. Comm'n (1971) 5 Cal. 3d 370, 377-381, 96 Cal. Rptr. 18, 486 P.2d 1218*

PUC is required to separately state findings of fact and conclusions of law after hearing. *Southern Pacific Co. v. Public Utilities Com. (1968) 68 Cal. 2d 243, 244, 65 Cal. Rptr. 737, 436 P.2d 889* ; *Greyhound Lines, Inc. v. Public Utilities Com. (1967) 65 Cal. 2d 811, 813, 56 Cal. Rptr. 484, 423 P.2d 556*

Competitor is entitled to present evidence in hearing before PUC that it could provide better service than applicant for certificate of public convenience and necessity. *Ventura County Waterworks Dist. v. Public Util. Com. (1964) 61 Cal. 2d 462, 464, 39 Cal. Rptr. 8, 393 P.2d 168*

Party filing complaint aggrieved by discriminatory rate has right to have PUC make order that resolves issues and fixes fair rate. *Cal. Portland Cement Co. v. Public Util. Com. (1957) 49 Cal. 2d 171, 176, 315 P.2d 709*

[c] Decision of PUC

Property rights determined in PUC rate-making proceeding are subject to relitigation in court, because rate-making is exercise of legislative power of *PUC. Camp Meeker Water System, Inc. v. Public Utilities Com. (1990) 51 Cal. 3d 845, 852 n.3, 274 Cal. Rptr. 678, 799 P.2d 758*

Although decisions of PUC are not binding on California appellate courts, appellate courts are able to look to these rulings for assistance when deciding cases involving issues that also come before *PUC. Pacific Gas & Electric Co. v. Dame Construction Co. (1987) 191 Cal. App. 3d 233, 240, 236 Cal. Rptr. 351*

[d] Petition to Reopen Proceeding

When time to petition for rehearing has passed, petition to reopen proceeding does not lie to serve purpose of petition for rehearing. *Northern California Asso. to Preserve Bodega Head & Harbor, Inc. v. Public Utilities Com. (1964) 61 Cal. 2d 126, 134, 37 Cal. Rptr. 432, 390 P.2d 200*

[e] Costs and Fees

Nonattorney, appearing in representative capacity before PUC in quasi-judicial reparations action is entitled to award by PUC of fees and costs under common fund theory. *Consumers Lobby Against Monopolies v. Public Utilities Com. (1979) 25 Cal. 3d 891, 913-915, 160 Cal. Rptr. 124, 603 P.2d 41*

[6] Intervention by PUC

Pub. Util. Code § 851 (prohibiting public utility from disposing, without PUC authorization, of property necessary and useful in performance of its duties), when read together with *Pub. Util. Code §§ 761* and *762* (authorizing PUC to require that utility ensure its ability to provide adequate service), permits PUC to prevent disposal of property by indirection, such as by failure to exercise or safeguard rights possessed by utility. *Camp Meeker Water System, Inc. v. Public Utilities Com. (1990) 51 Cal. 3d 845, 862, 274 Cal. Rptr. 678, 799 P.2d 758* (upholding authority of PUC to, among other things, order utility to enforce easement for water rights against record titleholders and intervene in specified proceedings to prevent record titleholders from obtaining rights inconsistent with those held by utility under its easement)

PUC has right to intervene in action to overturn stipulated void judgment between parties in undercharge case. *Ryerson v. Riverside Cement Co. (1968) 266 Cal. App. 2d 789, 793-796, 72 Cal. Rptr. 595*

PUC has right to intervene to set aside judgment for extrinsic fraud in undercharge action when judgment is in conflict with PUC's order. *People ex rel. Public Util. Comm'n v. Ryerson (1966) 241 Cal. App. 2d 115, 119-122, 50 Cal. Rptr. 246*

[7] Judicial Review of PUC Decisions

Provision that petition for rehearing may be taken as denied within 20 days after its filing is not starting time to file petition for writ of certiorari. *Sokol v. Public Util. Comm'n (1966) 65 Cal. 2d 247, 251-252, 53 Cal. Rptr. 673, 418 P.2d 265*

Whether wine train is public utility is question of fact, subject to review by the substantial evidence standard. However, interpretation of Public Utilities Code is question of law subject to independent review. *City of St. Helena v. Public Utilities Commission (2004) 119 Cal. App. 4th 793, 802, 14 Cal. Rptr. 3d 713*

General rule of deference to PUC interpretation of statutes subject to its regulatory jurisdiction does not apply when issue is scope of PUC's jurisdiction. *PG&E Corp. v. Public Utilities Commission (2004) 118 Cal. App. 4th 1174,*

1194, 13 Cal. Rptr. 3d 630

Denial of petition for writ of certiorari (review) by Supreme Court is decision on merits that PUC had jurisdiction. *City of Union City v. Southern Pac. Co. (1968) 261 Cal. App. 2d 277, 277-279, 67 Cal. Rptr. 816*

[8] Civil Actions Involving Public Utilities

[a] Jurisdiction of Superior Court

Where civil action brought by public prosecutors against public utility does not usurp exclusive power of PUC and was authorized by statute, superior court and PUC have concurrent subject matter jurisdiction. *Orloff v. Pac. Bell (2003) 31 Cal. 4th 1132, 1144-1155, 7 Cal. Rptr. 3d 315, 80 P.3d 201*

Functions of PUC does not include determination of (1) validity of contracts, (2) whether claims may be asserted under contract, or (3) interests in or title to property, because these are questions for courts. *Camp Meeker Water System, Inc. v. Public Utilities Com. (1990) 51 Cal. 3d 845, 861, 274 Cal. Rptr. 678, 799 P.2d 758*

Claims alleging that telephone company violated the Unfair Business Practices Act (*Bus. & Prof. Code § 17200 et seq.*) or the False Advertising Act (*Bus. & Prof. Code § 17500 et seq.*), together, the Unfair Competition Law, must be brought in superior court. *Greenlining Institute v. Public Util. Com. (2002) 103 Cal. App. 4th 1324, 1328, 1334, 127 Cal. Rptr. 2d 736*

Jurisdiction of superior court is limited to situations in which relief sought would not hinder or frustrate PUC's declared supervisory and regulatory policies. *Brian T. v. Pacific Bell (1989) 210 Cal. App. 3d 894, 900-901, 258 Cal. Rptr. 707*

[b] Effect of PUC Approval on Pending Litigation

Existence of PUC approval as condition precedent to completion of merger of two corporations does not, as matter of law, deprive one corporation of causes of action against third corporation for tortious interference. *SCEcorp v. Superior Court (1992) 3 Cal. App. 4th 673, 678, 4 Cal. Rptr. 2d 372*

[c] Stay Pending Investigation by PUC

In action for damages against public utility, trial court abused its discretion by denying utility's motion for order staying action, when pending investigation by PUC encompasses practices that are central to that litigation. *Pacific Bell v. Superior Court (1986) 187 Cal. App. 3d 137, 140, 231 Cal. Rptr. 574*

[d] Particular Actions

[i] Determination of Public Utility Status

Superior court has jurisdiction to decide status as nonexempt mutual water company when PUC had not yet determined issue. *Ventura County Waterworks Dist. v. Susana Knolls Mut. Water Co. (1970) 7 Cal. App. 3d 672, 678-679, 87 Cal. Rptr. 1*

[ii] Condemnation by Public Utility

Filing of complaint with PUC does not oust superior court of jurisdiction in condemnation by public utility to acquire property for project to which complaint is directed. *Pacific Gas & Elec. Co. v. Parachini (1972) 29 Cal. App. 3d 159, 163, 105 Cal. Rptr. 477*

[iii] Commencement or Disruption of Service

Superior court has jurisdiction over action to force public utility to furnish service in accordance with applicable tariff and rates. *Vila v. Tahoe Southside Water Utility (1965) 233 Cal. App. 2d 469, 477-480, 43 Cal. Rptr. 654*

Discontinuance of service by public utility pursuant to rules filed with PUC is defense to action for such discontinuance. *Morse v. Pacific Gas & Elec. Co. (1957) 152 Cal. App. 2d 854, 859, 314 P.2d 192*

[iv] Unlawful Operation

Limousine service stated cause of action for damages pursuant to *Pub. Util. Code § 2106*, permitting damages for harm resulting from unlawful operation, when rival limousine service operated in same area without certificate of public convenience and necessity. *Golden Sedan Service Inc. v. Airport Limousine Service (1981) 121 Cal. App. 3d 359, 363-367, 175 Cal. Rptr. 317* .

Cause of action is stated against PUC for failure to revoke bus company's operating authority for failure to carry required insurance when plaintiff was injured by bus company's negligence and could not collect judgment. *Elson v. Public Utilities Com. (1975) 51 Cal. App. 3d 577, 581-589, 124 Cal. Rptr. 305*

[v] Inequitable Charges

Cause of action is stated for declaratory and injunctive relief against city charging four times as much for service outside city limits as for servicewithin city limits. *Elliott v. City of Pacific Grove (1975) 54 Cal. App. 3d 53, 57-60, 126 Cal. Rptr. 371*

[vi] Collection of Undercharges

Nonlicensed carrier is not precluded from bringing action to collect its undercharges. *Keller v. Thornton Canning Co. (1967) 66 Cal. 2d 963, 966-969, 59 Cal. Rptr. 836, 429 P.2d 156*

Action to collect undercharges is capable of being brought in superior court. *Gardner v. Rich Mfg. Co. (1945) 68 Cal. App. 2d 725, 729-733, 158 P.2d 23*

[vii] Infringement of Public Utility's Constitutional Right

PUC impermissibly burdens private utility company's *First Amendment* rights when it required company to include in company's billing envelopes speech of a third party with which company disagreed. *Pacific Gas & Elec. Co. v. Public Utilities Comm'n (1986) 475 U.S. 1, 20-21, 106 S. Ct. 903, 89 L. Ed. 2d 1*

[viii] Nuisance

Superior court has authority to abate nuisance caused by public utility. *California Oregon Power Co. v. Superior*

Court (1955) 45 Cal. 2d 858, 870-871, 291 P.2d 455

[ix] Fraud

PUC's tariff did not restrict liability of telecommunications company engaged in fraud. Cal. Civ. Code § 2106 permits an action against a public utility that engages in an activity prohibited or declared unlawful. Additionally, "if [a] court finds that the act or omission was willful, it may, in addition to the actual damages, award exemplary damages." *Pink Dot, Inc. v. Teleport Communications Group (2001) 89 Cal. App. 4th 407, 418, 107 Cal. Rptr. 2d 392* .

Action for damages against gas company for fraudulent misrepresentation as to amount of gas that development would use is not barred by law making rebates illegal. *Empire West v. Southern California Gas Co. (1974) 12 Cal. 3d 805, 809-812, 117 Cal. Rptr. 423, 528 P.2d 31*

[x] Exemplary Damages

Although *Pub. Util. Code § 2106* authorizes exemplary damages to "persons affected," Legislature intends to limit those damages to persons (or their personal representatives or successors in interest) who are themselves direct victims of public utility's willful act or omission; award of exemplary damages to parents of child killed by speeding train is improper under *Pub. Util. Code § 2106*. *Vander Lind v. Superior Court (1983) 146 Cal. App. 3d 358, 367, 194 Cal. Rptr. 209*

[xi] Termination of Public Utility Franchise

Quo warranto action in superior court is proper to oust public utility of franchise for failing to supply proper water unless Public Utilities PUC has assumed jurisdiction over regulation and control of utility. *Citizens Utilities Co. v. Superior Court (1976) 56 Cal. App. 3d 399, 403-410, 128 Cal. Rptr. 582*

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 42: Public Utilities thru Railroads-Chs. 480-485
Chapter 480 PUBLIC UTILITIES
PART III. RESEARCH GUIDE

42-480 California Forms of Pleading and Practice--Annotated § 480.165

§ 480.165 Attorney General Opinions

PUC is authorized to grant to public utility rate increase that fixes different rates for service between different classes of customers provided PUC's decision is supported by its findings of fact based on evidence obtained at hearing held for such purpose and classification is reasonable. *64 Ops. Cal. Att'y Gen. 405 (1981)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthorityEnergy & Utilities LawAdministrative ProceedingsRatemakingEnergy & Utilities LawUtility CompaniesRatesGeneral Overview

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PART III. RESEARCH GUIDE

42-480 California Forms of Pleading and Practice--Annotated § 480.166

§ 480.166 Law Reviews

Lakusta and Renton, *California Supreme Court Review of Decisions of the Public Utilities Commission--Is the Court's Denial of a Writ of Review a Decision on the Merits? 39 Hastings L.J. 1147 (1988)*

Goodrich, *The Limits of Municipal Power, 4 Cal. Law. 26 (1984)*

Note, *Using Market Bidding to Regulate the Transfer Price of Utility Affiliated Coal, 36 Stan. L. Rev. 1215 (1984)*

Colton, *Excess Capacity: Who Gets the Charge From the Power Plant? 34 Hastings L.J. 1133 (1983)*

Lawrence and Minan, *Solar Energy and Public Utility Rate Regulation, 26 UCLA L. Rev. 550 (1979)*

Kuersteiner and Herbach, *The Robin Hood Doctrine: Is It the Official Refund Policy of the California Public Utilities Commission? 12 U.S.F. L. Rev. 655 (1978)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsJudicial ReviewGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsJudicial ReviewEnergy & Utilities LawAdministrative ProceedingsRatemakingEnergy & Utilities LawSolar & Biomass IndustriesEnergy & Utilities LawUtility CompaniesGeneral Overview

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42-480 California Forms of Pleading and Practice--Annotated § 480.167

§ 480.167 Text References

Witkin, Summary of California Law, vol. 8, *Constitutional Law*, §§ 1084-1110 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthorityEnergy & Utilities LawAdministrative ProceedingsRatemaking

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§ 480.168 Internet References

California Public Utilities Commission. This site includes: text of rules of practice and procedure before the PUC (*20 Cal. Code Reg., § 1 et seq.*), PUC calendars and agenda; contact directory; general information about the PUC; PUC news releases; link to text of the Public Utilities Code. http://www.cpuc.ca.gov

California Home Page. This site includes links to other sites maintained by numerous state agencies including the PUC. http://www.ca.gov

California Courts. This site includes: general information about state court organization and specific court; text of recently filed slip opinions; court minutes and calendars; text of California Rules of Court; Judicial Council forms and other information promulgated by the Judicial Council; links to sites of most Court of Appeal districts, with text of local appellate rules, forms, and internal operating procedures; links to other sites maintained by local trial courts, state government agencies and organizations, federal courts and federal organizations, and other sources of legal information. http://www.courtinfo.ca.gov

California Legislative Information. This site includes: text of constitution, codes, and statutes; and information concerning pending legislation. http://www.leginfo.ca.gov

Matthew Bender. This site includes: links to Matthew Bender publications and Shepard's citation service. http://www.bender.com

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewGovernmentsCourtsCreation & OrganizationGovernmentsLegislationEnactment

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42-480 California Forms of Pleading and Practice--Annotated §§ 480.169-480.189

[Reserved]

§§ 480.169[Reserved]

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Chapter 480 PUBLIC UTILITIES
PART IV. FORMS
A. Proceedings Before the PUC

42-480 California Forms of Pleading and Practice--Annotated § 480.190

§ 480.190 Complaint Proceedings Before the PUC

[1] General Form of Complaint

[a] FORM Complaint Proceedings Before the PUC--General Form of Complaint

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

_____ [*name*],	)	
Complainant,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT OF _____ [*name or shortened designation of party tendering document*]
[and DOES I through _____,]	)	[(_____) (*CIS number, if applicable, e.g.,* U1001C)]
Defendant(s).	)	
	)	
	)	

The complaint of_____[*state exact legal name, mailing address, and telephone number of each complainant*] respectfully shows:

1. That Defendant(s) is/are_____[*full name and address of each defendant*].

2. _____[*Here and in succeeding numbered paragraphs, set forth fully and clearly the facts constituting the grounds of the complaint and the injury complained of*].

WHEREFORE, Complainant requests an order_____[*state clearly and concisely the exact relief desired*].

Dated: _____.

_____ [*signature*]

_____ [*typed name*]

Complainant

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Complainant

_____

[*attorney's address, telephone number, facsimile transmission number, and, if attorney consents to e-mail service, e-mail address*]

VERIFICATION

I,_____[*name*], am the complainant in the above-entitled matter. I have read the foregoing document and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[b] Use of Form

The form of complaint set out in *[a], above,* is for use in filing a complaint before the PUC charging a violation by a public utility [*Pub. Util. Code § 1702*]. The complaint is based on the illustrative form of complaint for PUC matters that is set out in *20 Cal. Code Reg. § 88*.

For further discussion relating to complaint proceedings, see *§ 480.22*.

[c] Who May File

A complaint about the reasonableness of rates of a gas, electrical, water, or telephone corporation must be signed by either the mayor, chairman of the board of trustees, or majority of the board of trustees of the legislative body of the city where the violation occurred or at least 25 actual or prospective customers. Other complaints can be made by any person [*Pub. Util. Code § 1702*].

[d] Form and Size

[i] In General

The complaint must be typewritten, printed, or reproduced on paper 81/2 inches wide and 11 inches long. The type must be no smaller than 10 points. The impression must use either one and one-half or double spacing. Footnotes and quotations in excess of a few lines, however, may be single-spaced. Both sides of the paper may be used. A document of more than one page must be bound on the left side or upper left-hand corner [*20 Cal. Code Reg. § 2*].

Any exhibits annexed must be legibly reduced or folded to the same size.

All documents tendered for filing must have a blank space of at least 11/2 inches tall by 21/2 inches wide in the upper right-hand corner for a docket stamp and must show on the first page [*20 Cal. Code Reg. § 2.1(a)*]:

- At the top, the heading "BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA."
- In the upper left below the heading, the caption for the proceeding.
- To the right of the caption, the docket number (if one has been assigned).
- Below the caption and docket number, the title of the document and the name of or shortened designation for the party tendering the document.

The title page may extend to additional pages if these required items cannot be set forth on one page. The name, mailing address, telephone number, and, if available, facsimile transmission number of the person authorized to receive service and other communications on behalf of the party tendering the document must be set forth either on the title page of the document or following the signature at the end of the document, along with (if consenting to service by electronic mail) the signer's electronic mail address [*20 Cal. Code Reg. § 2.1*; *see 20 Cal. Code Reg. § 2.2*]. Documents initiating new proceedings must leave a space to the right of the caption for the docket number [*20 Cal. Code Reg. § 2.1*; *see 20 Cal. Code Reg. § 88*].

Persons and corporations regulated by the PUC must include their assigned Case Information System (CIS) Identification Number in the captions of documents initiating new proceedings and in the titles of other documents filed in existing cases [*20 Cal. Code Reg. § 2.1(c)*].

[ii] Transmittal Letter

If a transmittal letter is submitted, it must not be bound to the tendered document. All copies must be clear and permanently legible [*20 Cal. Code Reg. § 2*, *see 20 Cal. Code Reg. § 2.7(c)* (letter transmitting documents to Docket Office for filing is not required unless acknowledgment of filing pursuant to *20 Cal. Code Reg. § 3.1* is requested)].

[iii] Separate Documents for Unrelated Subjects or Different Types of Action

Separate documents must be used to address unrelated subjects or to ask the PUC or the administrative law judge to take essentially different types of action. For example, a document entitled "Complaint and Motion for Protective Order" would be improper. The filing must be split up into two separate documents [*20 Cal. Code Reg. § 2.1(b)*].

[e] Joinder

All matters on which a complaint may be founded may be joined in one hearing and no motion will be entertained

against a complaint for misjoinder of causes of action or grievances or misjoinder or nonjoinder of parties [*Pub. Util. Code § 1703*].

[f] Contents of Form

[i] General Requirements

Complaints must state the full name, address, and telephone number of each complainant and his or her attorney, if any, and of each defendant. The specific act complained of must be set forth in ordinary and concise language. The complaint must be so drawn as to completely advise the defendant and the PUC of the following [*20 Cal. Code Reg. § 10*]:

- The facts constituting the grounds of the complaint.
- The injury complained of.
- The exact relief which is desired.

Additional requirements must be satisfied when both the complainant and defendant are radio/telephone utilities, and the complaint alleges unlawful or improper actions or intentions by the defendant [*20 Cal. Code Reg. § 10.1*].

[ii] No Direct Damage Required

The PUC is not required to dismiss any complaint because of the absence of direct damage to the complainant [*Pub. Util. Code § 1703*].

[iii] Informal Resolution Allegation

A complaint that does not allege that the matter has first been brought to the staff for informal resolution may be referred to the staff to attempt to resolve the matter informally [*20 Cal. Code Reg. § 10*].

[g] Verification

Complaints or amendments to complaints must be verified by at least one complainant [*20 Cal. Code Reg. § 2.4*]. Alternative forms of verifications are set forth in *20 Cal. Code Reg. § 88*.

[h] Copies

An original plus 12 conformed copies of a complaint or amendment thereto, plus two additional copies for each named defendant, must be presented to the PUC for filing [*20 Cal. Code Reg. § 11*].

[i] Filing

[i] Location

Unless otherwise directed, the complaint must be tendered for filing at either of the following docket offices of the PUC [*20 Cal. Code Reg. § 3(a)*]:

Docket Office
California Public Utility Commission
State Building

505 Van Ness Avenue
San Francisco, California 94102-3298

Docket Office
California Public Utility Commission
320 West 4th Street, Suite 500
Los Angeles, California 90013

Docket Office
State Building
California Public Utility Commission
1350 Front Street
San Diego, CA 92101-3607

All documents sent through the mail must be addressed to the Commission's Docket Office in San Francisco.

Only hand-delivered documents will be accepted by the Los Angeles or San Diego office. First-class postage charges to San Francisco must be paid at the time documents are tendered to the Los Angeles or San Diego office. Payment of postage charges may be made by check or money order [*20 Cal. Code Reg. § 3(a)*].

[ii] Acceptance and Rejection of Documents Tendered for Filing

Tendered documents are not considered filed until they have been reviewed and accepted for filing by the Docket Office in San Francisco [*20 Cal. Code Reg. § 3(b)*].

If a document complies with the PUC rules of practice and procedure (20 Cal. Code Reg.) and is accepted for filing by the Docket Office in San Francisco, the filing will be recorded as of the date it was first tendered for filing at the Commission's San Francisco, Los Angeles, or San Diego office [*20 Cal. Code Reg. § 3(c)*].

Any tendered document that does not comply with applicable rules, PUC orders, or statutes may be rejected. Rejected documents will be returned with a statement of the reasons for the rejection. Documents submitted in response to a rejected document will not be filed [*20 Cal. Code Reg. § 3(d)*].

If a tendered document does not comply with applicable requirements, the Docket Office, with the consent of the party tendering the document, may retitle the document or strike part of the document, and the document as modified may be accepted for filing. The party tendering the document must notify all parties served with the document of the modification or striking [*20 Cal. Code Reg. § 3(e)*].

If a tendered document does not comply with applicable requirements, the party tendering the document may, in the body of the document, request waiver of the requirements to which the document does not conform. The request must state the reasons justifying the waiver. The assigned administrative law judge will decide whether or not to waive the requirements as requested. If the waiver is granted, the document will be filed as of the date it was tendered for filing [*20 Cal. Code Reg. § 3(f)*].

If a tendered document is in substantial, but not complete, compliance with *20 Cal. Code Reg. §§ 2 through 2.6*, the Docket Office may notify the party tendering the document of the defect. If the defect is cured within seven days of the date of this notification, the document will be filed as of the date it was tendered for filing, provided that the document was properly served as required by the PUC rules of practice and procedure on or before the date the document was

tendered for filing [*20 Cal. Code Reg. § 3(g)*].

Acceptance of a document for filing is not a final determination that the document complies with all requirements of the PUC and is not a waiver of such requirements. The Commission, the Executive Director, or the administrative law judge may require amendments to a document, and the PUC or the administrative law judge may entertain appropriate motions concerning the document's deficiencies [*20 Cal. Code Reg. § 3(h)*].

[iii] Assignment of Docket Number

If a document initiates a new proceeding, the proceeding will be assigned a docket number when the document is accepted for filing. The chief administrative law judge is required to maintain a docket of all proceedings [*20 Cal. Code Reg. § 3(i)*].

[iv] Acknowledgement of Filing

The Docket Office will provide an acknowledgment of the filing of any document on request, provided the filing party furnishes, at the time the document is tendered, an extra copy of a letter of transmittal or of the document and a self-addressed envelope with postage fully prepaid. The extra copy of the letter of transmittal or of the document will be stamped with the filing stamp and docket number and returned by mail [*20 Cal. Code Reg. § 3.1*].

[j] Amended Complaint

An amendment may be filed before the hearing, provided it is served on all known interested parties, filed at least five days before the hearing, and contain a certification of service. Thereafter, an amendment may be permitted or directed by the commissioner or presiding officer [*20 Cal. Code Reg. § 2.6*].

[2] Allegation of Discriminatory Rate

[a] FORM Complaint Proceedings Before the PUC--Allegation of Discriminatory Rate

Defendant's published tariff for hauling_____[*specify commodity*] from_____[*specify first place*] to_____[*specify second place*] is $_____ per ton. Defendant's published tariff for hauling_____[*specify commodity*] from_____[*specify third place*] to_____[*specify fourth place*] is $_____ per ton. The distance from_____[*specify first place*] to_____[*specify second place*] is substantially the same as the distance from_____[*specify third place*] to_____[*specify fourth place*]. Defendant is thus charging substantially different rates to haul the same cargo the same distance, which discrimination injures plaintiff, who has to pay the higher rate to ship its_____[*specify commodity*].

[b] Use of Form

The form of allegation set out in *[a], above*, is for use as Paragraph 2 of the form provided in *[1][a], above*, when the complaint is based on a discriminatory rate.

[c] Compensation for Intervention

Pursuant to *Pub. Util. Code § 1801 et seq.*, the PUC may award reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs of participation or intervention in a hearing or proceeding to any customer who complies with *Pub. Util. Code § 1804* and who satisfies the requirements set forth in *Pub. Util. Code § 1803* [*see Pub. Util. Code § 1803*].

For discussion of the procedure and rules involved in obtaining compensation for intervention, see *§ 480.26*.

[3] Answer to Complaint

[a] FORM Complaint Proceedings Before the PUC--Answer to Complaint

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

_____ [*name*],	)	
Complainant,	)	
vs.	)	NO. _____
_____ [*name*],	)	ANSWER OF _____ [*name or*
[and DOES I through _____,]	)	*shortened designation of party tendering document*]
Defendant(s).	)	[(_____) (*CIS number, if applicable, e.g.,* U1001C)]
	)	
	)	

Defendant(s)_____[*state exact legal name, mailing address, and telephone number of each defendant joining in answer*], for answer to the above complaint, respectively show(s):

1. _____[*Here, and in succeeding numbered paragraphs, admit or deny material allegations of the complaint, and set forth any matters constituting a defense*].

WHEREFORE, Defendant(s) request(s) that _____ [the complaint be dismissed *or other appropriate request*].

_____ [*signature*]

_____ [*typed name*]

Defendant(s)

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant(s) _____ [*name*]

_____

[*attorney's address, telephone number, facsimile transmission number, and, if attorney consents to e-mail service, e-mail address*]

VERIFICATION

I,_____[*name*], am the defendant in the above-entitled matter. I have read the foregoing document and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[b] Use of Form

The form of answer set out in *[a], above*, is for use in answering a complaint before the PUC [*Pub. Util. Code § 1702*]. The form is based on the form of answer for PUC matters set forth in *20 Cal. Code Reg. §§ 13, 88*.

For additional comments related to answers in complaint proceedings, see *§ 480.22[3]*. For additional comments pertaining to use of this form in complaint proceedings, see *[1], above*.

Documents for filing are tendered to the appropriate PUC docket office under *20 Cal. Code Reg. § 3*. For discussion relating to acceptance and rejection of tendered documents generally, see *§ 480.190[1][i]*.

[c] Time for Answer

Within 30 days after the date of service of the complaint, the defendant must answer the complaint. The PUC, the chief administrative law judge, or the presiding officer may require the filing of an answer within a shorter time. If an amendment to a complaint is filed before receipt of the answer, the defendant's time to answer the complaint is 30 days from the date of service of the amendment, unless otherwise directed. Amendments to a complaint made subsequent to the filing of an answer need not be answered [*20 Cal. Code Reg. § 13*].

[d] Verification

At least one of the defendants filing an answer must verify it, but if more than one answer is filed in response to a complaint against multiple defendants, each answer must be separately verified [*20 Cal. Code Reg. § 2.4*].

[e] Extension of Time

Requests for an extension of time to answer must be directed to the chief administrative law judge or the presiding officer in writing and a copy served on all parties. The request must indicate complainant's acquiescence to the extension of time or the measures taken by Defendant in his or her unsuccessful effort to obtain acquiescence. The chief administrative law judge or the presiding officer must notify the parts of his or her ruling [*20 Cal. Code Reg. § 13*].

[f] Contents of Answers

The answer must admit or deny each material allegation in the complaint and must set forth any new matter constituting a defense. Its purpose is to fully advise the complainant and the PUC of the nature of the defense. It should also set forth any defects in the complaint which require amendment or clarification. Failure to indicate jurisdictional defects does not waive these defects and does not prevent a motion to dismiss made thereafter. Answers must comply with the format requirements of *20 Cal. Code Reg. §§ 2-2.6* and include the full name, address, and telephone number of defendant and his or her attorney, if any, and indicate service on all complainants [*20 Cal. Code Reg. § 13.1*].

[4] Petition to Intervene

[a] FORM Complaint Proceedings Before the PUC--Petition to Intervene

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

_____ [*name*], Complainant, vs. _____ [*name*], [and DOES I through _____,] Defendant(s).	))))))))	NO. _____ PETITION OF _____ [*name or shortened designation of party tendering document*] [(_____) (*CIS number, if applicable, e.g.,* U1001C)] TO INTERVENE

The petition to intervene of_____[*state exact legal name, mailing address, and telephone number of each petitioner*] respectfully shows:

1. Petitioner is_____[*specify petitioner's status and interest*]. Petitioner _____ [supports *or* opposes] the relief sought in the complaint herein.

2. Petitioner's position is_____[*specify position Petitioner intends to advocate if petition is granted*].

WHEREFORE, Petitioner requests that it be allowed to intervene in this proceeding.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

Petitioner

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

_____

[*attorney's address and telephone number*]

[b] Use of Form

The form of petition to intervene set out in *[a]*, above, is for use to obtain leave to appear in a complaint proceeding.

For additional comments, see *[1], above*. For further discussion regarding intervention, see *§§ 480.22[5], 480.26*.

Documents for filing are tendered to the appropriate PUC docket office under *20 Cal. Code Reg. § 3*. For discussion relating to acceptance and rejection of tendered documents generally, see *§ 480.190[1][i]*.

[c] When Leave Will Be Granted

Leave will not be granted except on averments that are reasonably pertinent to the issues already presented but do not unduly broaden them [*20 Cal. Code Reg. § 53*].

[d] Broadening of Issues

If the petitioner seeks a broadening of the issues and shows that they would not thereby be unduly broadened, the petition must be served and filed by petitioner at least 10 days, and the parties may serve and file replies, at least five days before the matter is called for hearing [*20 Cal. Code Reg. § 53*].

[e] Effect of Granting of Leave

If leave is granted, the petitioner becomes an intervener and a party to the proceeding to the degree indicated by the order allowing intervention or by the presiding officer at the hearing [*20 Cal. Code Reg. § 53*].

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PART IV. FORMS
A. Proceedings Before the PUC

42-480 California Forms of Pleading and Practice--Annotated § 480.191

§ 480.191 Application Proceedings Before the PUC

[1] General Form of Application

[a] FORM Application Proceedings Before the PUC--General Form of Application

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of _____ [*name*], to _____ [*purpose of application*],	))))	Application No. _____ APPLICATION OF _____ [*name or shortened designation of party tendering document*] [(_____) (*CIS number, if applicable, e.g.,* U1001C)]

_____

The application of_____[*state exact legal name, mailing address, and telephone number of each applicant*] respectfully shows:

1. Communications in regard to this application are to be addressed to_____[*name, title, address,, telephone number, facsimile transmission number, and, if applicant consents to e-mail service, e-mail address*].

2. The applicant was, and is, a corporation duly organized and existing under and by virtue of the laws of the State of _____ and authorized to do business, and doing business in the State of California, with its principal place of business in _____ County, California. A copy of applicant's articles of incorporation is attached hereto as Exhibit A and made a part hereof.

3. _____[*Here, and in succeeding numbered paragraphs, set forth the specific facts required by the*

applicable rules, together with additional facts and material]. WHEREFORE, applicant requests an order_____[*state clearly and concisely the specific authorization sought by applicant including appropriate reference to the statutory provision or other authority under which PUC authorization or relief is sought*]. Dated: _____.

_____ [*signature*]

_____ [*typed name*]

Applicant

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Applicant

_____

[*attorney's address, telephone number, facsimile transmission number, and, if attorney consents to e-mail service, e-mail address*]

VERIFICATION

[*EITHER*]

I,_____[*name*], am the applicant in the above-entitled matter. I have read the foregoing document and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[*OR*]

I,_____[*name*], am an officer of the applicant corporation herein and am authorized to make this verification on its behalf. I have read the foregoing document and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*Corporation name*]

By: _____ [*signature*]

_____ [*typed name*]

_____ [*title of corporate officer*]

[b] Use of Form

The general form of application set out in *[a], above*, is for use in making an application to the PUC. This application is based on the form of application for PUC matters set forth in *20 Cal. Code Reg. § 88* with certain additions as required by *20 Cal. Code Reg. § 15*.

For requirements related to form and size of documents filed in PUC proceedings, see *20 Cal. Code Reg. § 2*, discussed in *§ 480.190[1][d]*. For a comparison between complaint proceedings and application proceedings, see *§ 480.21*.

Documents for filing are tendered to the appropriate PUC docket office under *20 Cal. Code Reg. § 3*. For discussion relating to acceptance and rejection of tendered documents generally, see *§ 480.190[1][i]*.

[c] Contents of Application

All applications must state clearly and concisely the authorization or relief sought, cite by appropriate reference the statutory provision or other authority under which PUC authorization or relief is sought, and, in addition to specific requirements for particular applications set forth in *20 Cal. Code Reg. § 18 et seq.*, state the following [*20 Cal. Code Reg. § 15*]:

- The exact legal name of each applicant and the location of principal place of business and, if an applicant is a corporation, trust, association, or other organized group the state under the laws of which that applicant was created or organized.

- The name, title, address,, telephone number, facsimile transmission number, and, if the applicant consents to e-mail service, the e-mail address of the person to whom correspondence or communications in regard to the application are to be addressed. Notice, order, and other papers may be served on the person so named, and such service is deemed to be service on the applicant.

- Any additional information that may be required by the PUC in a particular proceeding.

- Applications for ex parte action must set forth the basis for such request, and those seeking the granting of relief pending full hearing must set forth the necessity for that relief.

In addition to otherwise complying with the rules of practice and procedure of the PUC (*20 Cal. Code Reg. § 1 et seq.*), each application for authority to abandon passenger stage service, or reduce service to less than one trip per day (excluding Saturday and Sunday), must include exhibits specified in *20 Cal. Code Reg. § 15(e)* [*20 Cal. Code Reg. § 15(e)*].

[d] Attachments

[i] Organizational Documents and Authorization to Transact Business

Any applicant other than a natural person must submit with the application a copy of the entity's organizing documents and evidence of the applicant's qualification to transact business in California. If current documentation has previously been filed with the Commission, the application need only make specific reference to that filing [*20 Cal. Code Reg. § 2.2*].

[ii] Financial Statement

Wherever the rules provide that a financial statement must be annexed to the application, such statement, unless otherwise provided, must be prepared as of the latest available date and must show the following information [*20 Cal. Code Reg. § 2.3*]:

- Amount and kinds of stock authorized by articles of incorporation and amount outstanding.

- Terms of preference of preferred stock, whether cumulative or participating, or on dividends or assets, or otherwise.

- Brief description of each security agreement, mortgage and deed of trust on applicant's property, showing date of execution, debtor and secured party, mortgagor and mortgagee and trustor and beneficiary, amount of indebtedness authorized to be secured thereby and amount of indebtedness actually secured together with sinking fund provisions.

- Amount of bonds authorized and issued, giving name of public utility which issued same, describing each class separately, and giving date of issue, par value, rate of interest, date of maturity and how secured, together with amount of interest paid thereon during the last fiscal year.

- Each note outstanding, giving date of issue, amount, date of maturity, rate of interest, in whose favor, together with amount of interest paid thereon during the last fiscal year.

- Other indebtedness, giving same by classes and describing security, if any, with a brief statement of the devolution or assumption of any portion of such indebtedness on or by any person or corporation if the original liability has been transferred, together with amount of interest paid thereon during the last fiscal year.

- Rate and amount of dividends paid during the five previous fiscal years, and the amount of capital stock on which dividends were paid each year.

- A balance sheet as of the latest available date, together with an income statement covering period from close of last year for which an annual report has been filed with the PUC to the date of the balance sheet attached to the application.

[e] Copies

Any person tendering a document for filing must submit an original and seven exact copies of the document. This quantity includes attachments,but does not include the transmittal letter, if any [*20 Cal. Code Reg. § 2.5*; *see 20 Cal. Code Reg. §§ 2.7(c), 3.1* (relating to transmittal letters)].

After an official service list is established in a proceeding (*see* Rule 2.3(e), (f), (g)), any person tendering a document for filing in that proceeding must submit an original and four copies of the document [*20 Cal. Code Reg. § 2.5*].

[f] Environmental Impact Reports

The PUC has adopted extensive rules that discuss when an environmental impact report or negative declaration must be prepared and provide the procedures for the preparation thereof [*20 Cal. Code Reg. § 17.1*].

[g] Amendments

An amendment may be filed before the hearing, provided it is served on all known interested parties, filed at least five days before the hearing, and contains a certification of service. Thereafter, amendments may be permitted or directed by the PUC or presiding officer [*20 Cal. Code Reg. § 2.6*].

[2] Application For Certificate of Public Convenience and Necessity to Operate and Construct or Extend Facilities

[a] FORM Application Proceedings Before the PUC--Application Proceedings Before the PUC

[*Caption. See [1][a], above*.]

The application of _____[*state exact legal name, mailing address, and telephone number of each applicant*] respectfully shows:

1. The applicant was, and is, a corporation duly organized and existing under and by virtue of the laws of the State of _____, and authorized to do business, and doing business in the State of California, with its principal place of business in _____ County, California. A copy of Applicant's articles of incorporation is attached hereto as Exhibit A and made a part hereof.

2. All communications in respect to this application are to be addressed to _____[*name, title, address, and telephone number*].

3. The applicant requests a certificate issued by the Public Utilities Commission under *Public Utilities Code Section 1001* declaring that public convenience and necessity require, and will require, the _____ [construction *or* extension] of the following facilities: _____ [*specify type of construction needed, e.g.,* and electrical plant] to be constructed at _____, for the purpose of _____ [*specify, e.g.,* furnishing electrical power to the City or District of _____].

4. In order to provide the services mentioned above, the applicant proposes to build the following facilities:

(a) _____ [*Describe fully the proposed construction, e.g.,* An electrical plant of the following size and specifications: _____].

(b) _____ [*Describe fully any additional facilities to be constructed in order to furnish the proposed services*].

5. The applicant proposes to render services authorized by the requested certificate in the following localities:_____[*state fully and in detail the area proposed to be covered by applicant's utility*]; the following _____[*public utilities or persons other than public utilities*] are likely to compete with the proposed utility of applicant: _____[*specify names and addresses*]. A certificate of service of this application on each of the possible future competitors of Applicant mentioned above is attached hereto as Exhibit B and made a part hereof.

6. A map showing the location of the proposed construction of applicant and its relation to all other possible future competitors is attached hereto as Exhibit C and made a part hereof.

7. The applicant has been granted a permit by the_____[*specify governmental agency*] to operate as _____ [*specify type of service, e.g.,* electrical company] in _____[*specify location covered by the franchise*]. A copy of the permit is attached hereto as Exhibit D and made a part hereof.

8. Present and future public convenience and necessity require and will require the _____ [construction *or* extension] and operation of these facilities and service because _____ [*state facts indicating that service is required and that public convenience and necessity will be served*].

9. The costs of the construction and operation of the proposed utility are set forth in a schedule attached hereto as Exhibit E and made a part hereof.

10. Applicant has the financial means to construct and operate said proposed utility as shown in the applicant's balance sheet to _____[*date*] attached hereto as Exhibit F. and made a part hereof.

11. The following proposed rates to be charged for the services to be rendered by the utility are set forth in a schedule attached hereto as Exhibit G and made a part hereof.

12. _____[*State any other additional data which may be necessary*].

WHEREFORE, petitioner prays that a certificate be issued declaring that the present public convenience and necessity requires and will require the construction and operation of petitioner's facilities and that petitioner be granted a permit to build, operate, and maintain those facilities.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]
Applicant

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Applicant

_____

[*attorney's address and telephone number*]

[*Verification. See [1][a].*]

[b] Use of Form

CAUTION:
The construction or extension of a thermal energy facility or facility with associated electric transmission

lines must first be certified by the State Energy Resources Conservation and Development Commission, and thereafter must be issued a certificate by the PUC [*see Pub. Res. Code § 25500*; *County of Sonoma v. State Energy Resources Conservation etc. Com. (1985) 40 Cal. 3d 361, 364-365, 220 Cal. Rptr. 114, 708 P.2d 693* ; *Voices of the Wetlands v. California State Water Resources Control Board (2007) 157 Cal. App. 4th 1268, 1293-1294, 69 Cal. Rptr. 3d 487* ; *see also Pub. Res. Code § 25500 et seq.*]. The Supreme Court has exclusive jurisdiction of review over the decision by either commission [*Pub. Res. Code § 25531*; *Pub. Util. Code §§ 1756-1759*; *County of Sonoma v. State Energy Resources Conservation etc. Com. (1985) 40 Cal. 3d 361, 365-366, 220 Cal. Rptr. 114, 708 P.2d 693* ; *Voices of the Wetlands v. California State Water Resources Control Board (2007) 157 Cal. App. 4th 1268, 1295, 69 Cal. Rptr. 3d 487* ; *Santa Teresa Citizen Action Group v. California Energy Commission (2003) 105 Cal. App. 4th 1441, 1446, 130 Cal. Rptr. 2d 392* (suit filed in superior court subject to demurrer without leave to amend)].

The form of application set out in *[a], above*, is for use in applying to the PUC for a certificate of public convenience and necessity for the construction or extension of applicant's facilities. For additional comments, see *[1], above*.

For further discussion related to certificates of public convenience and necessity, see *§ 480.14*.

[c] Contents of Application

There are further requirements related to specific public utilities [*see 20 Cal. Code Reg. § 18*].

[d] Verification

The application must be verified [*20 Cal. Code Reg. § 2.4*].

[3] Application For Approval of Rate Change by Public Utility

[a] FORM Application Proceedings Before the PUC--Application Proceedings Before the PUC

[*Caption. See [1][a].*]

The application of _____ [*state exact legal name, mailing address, and telephone number of each applicant*] respectfully shows:

1. Applicant was, and is, a corporation duly organized and existing under and by virtue of the laws of the State of _____, and authorized to do business, and is doing business in the State of California, with its principal place of business in _____ [*city*], California. A copy of applicant's articles of incorporation is attached hereto as Exhibit A and made a part hereof.

2. All communications in respect to this application are to be addressed to _____ [*name, title, address and telephone number*].

3. Applicant requests approval by the Commission of _____ [*specify requested rate change, e.g.,* an increase of rates] for the services herein described pursuant to *Public Utilities Code Sections 451* and *454* of the based on the evidence and other reasons set forth in this application.

[*ADD, if applicant seeks rate increase*]

4. The following items, in accordance with Rule 23 of the Public Utilities Commission, are attached hereto as Exhibits B through E respectively and made a part hereof:

(a) A balance sheet and an income statement of petitioner up to _____ [*date*];

(b) A statement of the rates, currently in effect, that are proposed to be increased;

(c) A statement of the proposed increases or changes that will result in increase;

(d) A schedule of applicant's property and equipment; a statement of the original cost of the property and equipment, and a statement of the depreciation reserve applied thereto; and

(e) A summary of earnings.

[*Include additional exhibits or statements, as required under Rule 23 (20 Cal. Code Reg. § 23 in specific circumstances*)]

[*CONTINUE*]

5. Applicant will be ready to proceed with its showing on _____[*date*].

WHEREFORE, applicant respectfully requests that the proposed _____ [*specify requested rate change, e.g.,* increase of rates] herein mentioned be found justified and that this Commission approve these rates.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]
Applicant

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Applicant

_____

[*attorney's address and telephone number*]

[*Verification. See [1][a].*]

[b] Use of Form

The form set out in *[a], above*, is for use in applying to the PUC for a rate change or alteration of any classification, contract, practice, or rule resulting in a new rate [*see Pub. Util. Code § 454(a)*; *S. Cal. Edison Co. v. Peevey (2003) 31 Cal. 4th 781, 804-805, 3 Cal. Rptr. 3d 703, 74 P.3d 795* (application, but no public hearing, required for rate change)].

For additional comments, see *[1], above*.

For discussion related ratesetting proceedings, see *§ 480.80* et seq.

[c] Contents of Attachments When Rate Increase Is Sought

[i] Balance Sheet and Income Statement

The balance sheet must be of the latest available date. There must also be an income statement covering the period from the close of the last year for which an annual report was filed with the PUC to the date of the balance sheet [*20 Cal. Code Reg. § 23(a)*].

[ii] Current Rates

The statement of current rates need not be in tariff form [*20 Cal. Code Reg. § 23(b)*].

[iii] Statement of Proposed Increases or Changes

The statement need not be in tariff form but must set forth the proposed rate structure with reasonable clarity. Except as to carriers, the statement must also show the amount of proposed gross revenues together with the percentage of increase, if in excess of one percent, estimated to result from the proposed rates [*20 Cal. Code Reg. § 23(c)*].

In the case of carriers, when a general rate increase application is filed, the statement must include an estimate of the amount of additional annual gross revenue estimated to result from the increase, which must be based on the amount of involved traffic handled for the preceding calendar year and must indicate the percentage by which the estimate exceeds the gross revenues on the involved traffic for the preceding calendar year, if more than one percent [*20 Cal. Code Reg. § 23(c)*].

In the case of gas, electric, telephone, telegraph, water and heat utilities, the proposed revenue increase, if in excess of one percent, must be shown by appropriate rate classifications. If the percentage of increase in revenue is one percent or less, applicant must so state in its application [*20 Cal. Code Reg. § 23(c)*].

[iv] Summary of Earnings

The summary of earnings must be on a depreciated rate base for the test period or periods on which the applicant bases its justification for an increase. If adjusted or estimated results are shown for successive periods, they should be on a consistent basis. Whenever adjusted results are shown, the recorded results for the same periods should also be shown [*20 Cal. Code Reg. § 23(e)*].

[v] Exhibits for Specific Utilities

For requirements for additional exhibits related to specified utilities, *see 20 Cal. Code Reg. § 23*.

[d] Verification

The application must be verified [*20 Cal. Code Reg. § 2.4*].

[e] Notice of Proposed Rate Change

[i] By Mail

If the applicant for an authorization to increase rates is a gas, electric, telephone, telegraph, water, or heat utility, or,

with respect to passenger fares a street railroad corporation, a passenger stage corporation, a railroad corporation, a vessel common carrier or a passenger air carrier, the applicant must name in its application and, within 10 days after filing its application with the PUC, mail a notice to the following, stating in general terms the proposed increases in rates or fares [*20 Cal. Code Reg. § 24*]:

- The state, by mailing to the Attorney General and the Department of General Services, when the state is a customer or subscriber whose rates or fares would be affected by the proposed increase.

- Each county, by mailing to the county counsel (or district attorney if the county has no county counsel) and county clerk, and each city, by mailing to the city attorney and city clerk, listed in the current roster published by the Secretary of State within, from, to, or in which the proposed increase is to be made effective.

- Any other parties whom applicant deems appropriate. The applicant must promptly notify the PUC of the mailing.

The notice must also state that a copy of the application and related exhibits will be furnished by the applicant on written request. The applicant must also mail copies of the application and related exhibits to such parties and within such times as may be required by the PUC [*20 Cal. Code Reg. § 24*].

[ii] By Publication

Gas, electric, telephone, telegraph, water or heat utilities, within 10 days after the filing of the application, must publish at least once in a newspaper of general circulation in the county within, from or to which the increasesare proposed to be made effective a notice, in general terms, of the proposed increases in rates or fares [*20 Cal. Code Reg. § 24*].

The notice must state that a copy of the application and related exhibits may be examined at the offices of the PUC in San Francisco or Los Angeles and in such offices of the applicant as are specified in the notice, and must state the locations of those offices [*20 Cal. Code Reg. § 24*].

Proof of publication must be filed with the PUC at or prior to the opening of such hearing as may be had on the application [*20 Cal. Code Reg. § 24*].

[iii] To Customers

Whenever any electrical, gas, heat, telephone, water, or sewer system corporation files an application to change any rate, other than a change reflecting and passing through to customers only new costs to the corporation that do not result in changes in revenue allocation, for the services or commodities furnished by it, the corporation shall furnish to its customers affected by the proposed rate change notice of its application to the PUC for approval of the new rate [*Pub. Util. Code § 454(a)*; *see 20 Cal. Code Reg. § 24*].

The corporation may include the notice with the regular bill for charges transmitted to the customers within 45 days if the corporation operates on a 30-day billing cycle, or within 75 days if the corporation operates on a 60-day billing cycle. If more than one application to change any rate is filed within a single billing cycle, the corporation may combine the notices into a single notice if the applications are separately identified [*Pub. Util. Code § 454(a)*; *see 20 Cal. Code Reg. § 24*].

The notice must state the amount of the proposed rate change, expressed in both dollar and percentage terms for the entire rate change as well as for each customer classification; a brief statement of the reasons the change is required or sought; and the mailing address of the PUC to which any customer inquiries may be directed regarding how to

participate in, or receive further notices regarding the date, time, or place of, any hearing on the application, and the mailing address of the corporation to which any customer inquiries relative to the proposed rate change may be directed [*Pub. Util. Code § 454(a)*; *see 20 Cal. Code Reg. § 24*].

This notice requirement does not apply to any rate change proposed by a corporation pursuant to an advice letter submitted to the PUC in accordance with PUC procedures for this means of submission. The procedures for advice letters may include provision for notice to customers or subscribers on a case-by-case basis, as determined by the PUC [*Pub. Util. Code § 454(a)*].

[f] Hearing Procedure Before the PUC

The PUC may adopt rules it considers reasonable and proper for each class of public utility providing for the nature of the showing required in support of proposed rate changes, the form and manner of the presentation of the showing, with or without a hearing, and the procedure to be followed in the consideration thereof [*see Pub. Util. Code § 454(b)*].

The PUC must permit individual public utility customers and subscribers affected by a proposed rate change, and organizations formed to represent their interests, to testify at any hearing on the proposed rate change [*see Pub. Util. Code § 454(c)*].

[4] Application By Public Utility to Issue Stock or Evidence of Indebtedness or to Assume Liabilities

[a] FORM Application Proceedings Before the PUC--Application Proceedings Before the PUC

[*Caption. See [1][c].*]

The application of _____[*state exact legal name, mailing address, and telephone number of each applicant*] respectfully shows:

1. Applicant was, and is, a corporation duly organized and existing under and by virtue of the laws of the State of _____, authorized to do business, and doing business, in the State of California, with its principal place of business in_____[*city*], California. A copy of Applicant's articles of incorporation is attached hereto as Exhibit A and made a part hereof.

2. All communications in respect to this application are to be addressed to_____[*name, title, address, and telephone number*].

3. Applicant's balance sheet and income statement as of _____[*date*], are attached hereto as Exhibit B and made a part hereof.

4. Applicant performs the following services _____[*state kind of services in area of performance*].

5. A schedule showing applicant's property and equipment, its original cost, and the depreciation and amortization reserves applicable thereto is attached hereto as Exhibit C and made a part hereof.

6. Applicant requests authority pursuant to Section(s) _____ of the Public Utilities Code to issue_____[*state the amount, kind, and terms of stock, bonds, notes, or other evidences of indebtedness desired to be issued or the amount and description of the indebtedness desired to be assumed*]. Copies of the relevant documents defining the terms of the proposed securities are attached hereto as Exhibit D and made a part hereof. [Copies of the plan for reorganization or retirement of securities are attached hereto as Exhibit E and made a part

hereof.]

[*EITHER*]

7. The purposes for which the above-described securities are to be issued are_____[*state purposes in detail*].

[*OR*]

7. The consideration to be received by the applicant for assuming the above-described indebtedness is $_____ and the reasons for such assumption are_____[*specify reasons*].

8. _____ [*Set forth a statement corresponding to the statement required by Section 2 of General Order 104-A as to all known matters designated by that section for inclusion in the annual report but occurring or proposed subsequent to the period covered by the last annual report filed by the applicant or that no such matters have occurred or attach latest proxy statement filed with the Securities and Exchange Commission (see 20 Cal. Code Reg. § 33(e))*].

WHEREFORE applicant requests that this Commission issue its order authorizing applicant to _____ [sell *or* issue *or* assume] the _____ [stock *or* notes *or* liabilities] described above, in the manner described above, and for the consideration described above.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]
Applicant

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Applicant

_____

[*attorney's address and telephone number*]

[*Verification. See [1][a].*]

[b] Use of Form

The form of application set out in *[a], above*, is for use in applying to the PUC for authorization to sell or issue securities or assume indebtedness. For additional comments, see *[1], above*.

[c] Description of Purposes

The purposes for which the approval is sought must be described as follows [*20 Cal. Code Reg. § 33(c)*]:

- If for property acquisition, a detailed description thereof, the consideration to be paid therefor, and the method of arriving at the amount.

- If for construction, completion, extension, or improvement of facilities, a description thereof in reasonable detail, the cost or estimated cost thereof, and the reason or necessity for the expenditures.

- If for improvement of service, a statement of the character of the improvements proposed, or if for maintenance of service, a statement of the reasons why service should be maintained from capital.

- If for discharge or refunding of obligations, a full description of the obligations to be discharged or refunded, including the character, principal amount, discount, or premium applicable thereto, date of incurrence, date of maturity, rate of interest, and other material facts concerning such obligations, together with a statement showing the purposes for which such obligations had been incurred, or the proceeds expended, and the PUC's decisions, if any, authorizing the incurrence of such obligations.

- If for the financing of the acquisition and installation of electrical and plumbing appliances and agricultural equipment which are sold by other than a public utility, for use within the service area of the public utility, a statement of the reason or necessity for such financing.

- If for reorganization or readjustment of indebtedness or capitalization, or for retirement or exchange of securities, a full description of the indebtedness or capitalization to be readjusted or exchanged; complete terms and conditions of the merger, consolidation, exchange or other reorganization; a pro forma balance sheet, if possible, giving effect to such reorganization, readjustment, or exchange; and a statement of the reason or necessity for the transaction.

- If for reimbursement of moneys actually expended from income, or from any other moneys in the treasury, a general description of the expenditures for which reimbursement is sought, the source of such expenditures, the periods during which such expenditures were made, and the reason or necessity for such reimbursement.

[d] Verification

The application must be verified [*20 Cal. Code Reg. § 2.4*].

[5] Joint Application by Public Utilities to Sell, Lease, or Encumber Utility Property or Rights; Merge or Consolidate Facilities; or Acquire Stock of Another Utility

[a] FORM Application Proceedings Before the PUC--Application Proceedings Before the PUC

[*Caption. See [1][c]*.]

The application of _____[*state exact legal name, mailing address, and telephone number of each applicant*] respectfully shows:

1. Applican t_____[*name of first applicant*] was, and is, a corporation duly organized and existing under and by virtue of the laws of the State of _____ authorized to do business, and doing business, in the State of California, with its principal place of business in _____[*city*], California. A copy of Applicant's articles of incorporation is attached hereto as Exhibit A and made a part hereof.

2. All communications to applicant _____[*name of first applicant*] in respect to this application are to be addressed to_____[*name, title, address, and telephone number*].

3. Applicant _____[*name of second applicant*] was, and is, a corporation duly organized and existing under and by virtue of the laws of the State of _____ and authorized to do business, and is doing business in the State of California, with its principal place of business in _____[*city*], California. A copy of Applicant's articles of incorporation is attached hereto as Exhibit B and made a part hereof.

4. All communications to applicant _____[*name of second applicant*] in respect to this application are to be addressed to_____[*name, title, address, and telephone number*].

5. Applicant _____[*name of first applicant*] is performing the following services: _____[*specify*]. The territory served is _____[*specify*].

6. Applicant _____[*name of second applicant*] is performing the following services:_____[*specify*]. The territory served is _____[*specify*].

7. Applicants _____[*name*] and _____[*name*] request authority from this Commission to _____ [*specify, e.g.,* transfer property of applicant _____ (*name*) to applicant _____ (*name*)] pursuant to Sections _____ of the Public Utilities Code.

[*EITHER*]

8. _____ [*If the application is not for consolidation and merger, add:* The balance sheet and income statements of applicant _____ (*name*) as of _____[*date*], are attached hereto as Exhibit C and made a part hereof. The balance sheet and income statement of applicant _____ (*name*) as of_____[*date*], are attached hereto as Exhibit D and made a part hereof].

[*OR*]

8. _____ [*If the application is for consolidation and merger, add:* The financial statement of applicant _____ (*name*) in accordance with Public Utilities Commission Rule 17 as of _____ (*date*), is attached hereto as Exhibit C and made a part hereof. The financial statement of applicant _____ (*name*) in accordance with Public Utilities Commission Rule 17 as of _____ (*date*), is attached hereto as Exhibit D and made a part hereof. A pro forma balance sheet showing the effect of the merger is attached hereto as Exhibit E and made a part hereof].

[*CONTINUE*]

9. A description of the property involved in the transaction including its book cost and original cost is attached hereto as Exhibit _____ [E *or* F] and made a part hereof.

[*EITHER, if the transaction is for transfer or sale of property*]

[10. The agreed purchase price and the terms for payment are as follows: _____ (*specify*). A copy of

the deed or contract of sale is attached hereto as Exhibit _____ (F *or* G) and made a part hereof.]

[*OR, if the transaction is one for the merger or consolidation*]

[10. A copy of the plan of merger or consolidation is attached hereto as Exhibit _____ (G *or* H) and made a part hereof.]

[*CONTINUE*]

[11. *State the detailed reasons on the part of each applicant for entering into the proposed transaction, and all facts warranting the same.*]

WHEREFORE, Applicants_____[*name*] and_____[*name*] jointly request an order pursuant to *Public Utilities Code Sections 851-853* of the authorizing applicant _____ [*specify, e.g.,* to sell] and applicant _____ [*specify, e.g.,* to buy] the above-described property.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]
Applicant

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Applicant

_____

[*attorney's address and telephone number*]

_____ [*signature*]

_____ [*typed name*]
Applicant

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Applicant

_____

[*attorney's address and telephone number*]

[*Verification. See [1][a]*.]

[b] Use of Form

The form set out in *[a], above*, is for use in applying to the PUC for authorization to transfer property between two public utilities or to consolidate and merge two public utilities. For additional comments, see *[1], above*. PUC Rule 17, referred to in the form, is codified at *20 Cal. Code Reg., § 17*.

[c] Additional Requirements for Carriers

If the transaction involves a certificate or operating right of a common carrier, *20 Cal. Code Reg. § 37* provides for additional requirements for the application.

[d] Verification

The application must be verified [*20 Cal. Code Reg. § 2.4*].

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California Forms of Pleading and Practice--Annotated

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Volume 42: Public Utilities thru Railroads-Chs. 480-485
Chapter 480 PUBLIC UTILITIES
PART IV. FORMS
A. Proceedings Before the PUC

42-480 California Forms of Pleading and Practice--Annotated § 480.192

§ 480.192 Application Proceedings Before the PUC on Shortened Tariff Docket

[1] Application

[a] FORM Application Proceedings Before the PUC on Shortened Tariff Docket--Application

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of _____ [*name*], under the Shortened-Procedure Tariff Docket to _____ [*here state specifically or by reference the increase in rates sought to be made and specify short notice as well as long and short haul authority, if any, sought*].	))))	Application No. _____ APPLICATION OF _____ [*name or shortened designation of party tendering document*] [(_____) (*CIS number, if applicable, e.g.,* U1001C)]--SHORTENED-PROCEDURE TARIFF DOCKET

_____

The application of_____[*state exact legal name, mailing address, and telephone number of each applicant*] respectfully shows:

1. Authorization is requested to_____[*state clearly and concisely the specific authority or authorities sought, together with the current rates, fares, charges, or rules being increased*].

2. This application is based on the following facts and circumstances:_____[*here and in succeeding numbered paragraphs or attached exhibits, set forth the specific facts required by the applicable rules, a statement of or reference to exhibits showing present and proposed rates, fares, charges or rules and the additional facts and circumstances deemed to be material*].

3. The position of the interested parties in this matter is as follows:_____[*here list the position of each interested party insofar as known*].

4. Applicant will furnish a copy of this application to any interested party on written request.

5. In the knowledge and belief of applicant, the increases proposed above do not require a public hearing and would not increase applicant's California intrastate gross revenue by as much as one percent. Applicant's belief is based on_____[*specify facts and circumstances on which the belief is based*].
Dated: _____.

_____ [*signature*]

_____ [*typed name*]
Applicant

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Applicant

_____

[*attorney's address, telephone number, facsimile transmission number, and, if attorney consents to e-mail service, e-mail address*]

[*Verification. See § 480.191[1][a].*]

[b] Use of Form

The form of application set out in *[a], above*, is for use when the shortened-procedure tariff docket is applicable. It can be used only for applications of common carriers to increase any rate or so alter any classification, contract, practice, or rule as to result in any increase in rate [*20 Cal. Code Reg. §§ 25-32*]. The form in *[a], above*, is based on the form of application under shortened-procedure tariff docket set forth in *20 Cal. Code Reg. § 88*, with certain additions required by *20 Cal. Code Reg. § 25*.

[c] Required Allegations

Applications may not be processed under the Shortened-Procedures Tariff Docket unless the application shows that, in the knowledge and belief of the applicant, the proposed increases do not require public hearing and the application contains a statement of the facts and circumstances on which such belief is based and would not increase applicant's California intrastate gross revenue by as much as one percent [*20 Cal. Code Reg. § 25*].

[d] Verification

The application must be verified [*20 Cal. Code Reg. § 26*].

[e] Copy of Application

The applicant must promptly furnish a copy of the application to each interested party making a written request therefor to the applicant [*20 Cal. Code Reg. § 28*].

[f] Application of Rules to Procedure

Applications and protests on the Shortened-Procedure Tariff Docket are subject to *20 Cal. Code Reg. §§ 2*, *2.1* and *2.5*. They are not subject, however, to the other provisions relating to the filing of documents generally (*see 20 Cal. Code Reg. § 2 et seq.*), to the provisions relating to applications generally (*see 20 Cal. Code Reg. § 15 et seq.*), or to the provisions relating to applications for authority to increase rates generally (*see 20 Cal. Code Reg. § 23 et seq.*) [*see 20 Cal. Code Reg. § 25 et seq.* (preamble)].

[2] Protest

[a] FORM Application Proceedings Before the PUC on Shortened Tariff Docket--Protest

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of _____ [*name*], under the Shortened-Procedure Tariff Docket to _____ [*here state specifically or by reference the increase in rates sought to be made and specify short notice as well as long and short haul authority, if any, sought*].	))))	Application No. _____ PROTEST OF _____ [*name or shortened designation of party tendering document*] [(_____) (*CIS number, if applicable, e.g.,* U1001C)]--SHORTENED-PROCEDURE TARIFF DOCKET

_____

The protest of_____[*state exact legal name, mailing address, and telephone number of each protestant*] respectfully shows:

1. _____[*Here and in succeeding numbered paragraphs or attached exhibits, state the facts constituting the grounds for the protest and show how protestant is affected by the proposed increase and indicate in what respects the proposed increase is not justified*].

2. Applicants, as shown on the following list, have been served with a copy of this protest by_____[*state manner of service*]:_____[*list the names and addresses of parties served*].

3. Protestant will furnish a copy of this protest to any other interested party on written request.
Dated: _____.

_____ [*signature*]

_____ [*typed name*]
Protestant

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Protestant

_____

[*attorney's address, telephone number, facsimile transmission number, and, if attorney consents to e-mail service, e-mail address*]

[*Verification. See § 480.191[1][a].*]

[b] Use of Form

The form set out in *[a], above*, is for use in protesting rate increases on the shortened-procedure tariff docket. The form is based on the form of protest set forth in *20 Cal. Code Reg. § 88*.

For additional comments, *see [1], above*, and *§ 480.191[1]*.

[c] Verification

The form of protest in *[a], above*, must be verified [*20 Cal. Code Reg. § 30(d)*].

[d] Time and Address for Mailing

The protest must reach the PUC not later than the 30th day following the listing of the application in the daily calendar [*20 Cal. Code Reg. § 30(f)*]. It must be mailed to the PUC at State Building, San Francisco, CA 94101.

[e] Service

One copy of each protest must simultaneously be served on each applicant or its attorney or agent. Service must be made pursuant to *20 Cal. Code Reg. §§ 2.3* and *2.3.1* [*20 Cal. Code Reg. § 31*].

[f] Copy On Request

Protestant must promptly furnish a copy of the protest to each party making a written request therefore [*20 Cal. Code Reg. § 32*].

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Chapter 480 PUBLIC UTILITIES
PART IV. FORMS
A. Proceedings Before the PUC

42-480 California Forms of Pleading and Practice--Annotated § 480.193

§ 480.193 Proceedings to Review Categorization Determination by the PUC

[1] Request for Rehearing of Determination

[a] FORM Proceedings to Review Categorization Determination by the PUC--Request for Rehearing of Determination

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

[*EITHER, for complaint proceedings*]

_____ [*name*],	)	
Complainant,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION OF _____ [*name or*
[and DOES I through _____,]	)	*shortened designation of party tendering document*]
Defendant(s).	)	[(_____) (*CIS number, if applicable, e.g.,* U1001C)] FOR REHEARING OF CATEGOR-
	)	IZATION DETERMINATION
	)	

_____

[*OR, for application proceedings*]

	)	
Application of _____ [*name*],	)	Application No. _____
to _____ [*purpose of applica-*	)	PETITION OF _____ [*name or*
tion],	)	*shortened designation of party tendering document*]

[(_____) (*CIS number, if applicable, e.g.,* U1001C)] FOR REHEARING OF CATEGORIZATION DETERMINATION

_____

[*CONTINUE*]

Petitioner_____[*name*], respectfully, requests a rehearing before the Commission of its categorization determination, Decision No. _____ rendered on_____[*date*], pursuant to *Public Utilities Code Section 1701.1(a).*

The rehearing is sought on the following grounds: _____ [*state specifically the grounds on which the applicants consider the determination unlawful, e.g.,* the Commission's determination is not consistent with due process, public policy, and statutory requirements].
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

_____ [Applicant *or* Complainant *or* Defendant]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [Applicant *or* Complainant *or* Defendant]

_____

[*attorney's address and telephone number*]

[*Verification. See § 480.191[1][a].*]

[b] Use of Form

The form set out in *[a], above,* is for use in petitioning for a rehearing of a categorization determination before the PUC. The PUC must determine whether [*Pub. Util. Code § 1701.1(a)*]:

- A proceeding requires a hearing.
- The matter requires a quasi-legislative, an adjudication, or a ratesetting hearing.
- For further discussion related to categorization determinations, see *§ 480.23*.

Documents for filing are tendered to the appropriate PUC docket office under *20 Cal. Code Reg. § 3*. For discussion relating to acceptance and rejection of tendered documents generally, see *§ 480.190[1][i]*.

[c] Time for Request

The PUC's decision regarding the nature of the proceeding is subject to a request for rehearing within 10 days of the date of the decision. If the decision is not appealed to the PUC within that time period it is not subsequently subject to judicial review. Only those parties who have requested a rehearing within that time period shall subsequently have standing for judicial review and that review is only be available at the conclusion of the proceeding [*Pub. Util. Code § 1701.1(a)*].

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Chapter 480 PUBLIC UTILITIES
PART IV. FORMS
A. Proceedings Before the PUC

42-480 California Forms of Pleading and Practice--Annotated § 480.194

§ 480.194 Proceedings to Review Order or Decision of the PUC

[1] Petition for Rehearing or Order or Decision

[a] FORM Proceedings to Review Order or Decision of the PUC--Petition for Rehearing or Order or Decision

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

[*EITHER, for complaint proceedings*]

_____ [*name*], Complainant, vs. _____ [*name*], [and DOES I through _____,] Defendant(s).	))))))))	NO. _____ PETITION OF _____ [*name or shortened designation of party tendering document*] [(_____) (*CIS number, if applicable, e.g.,* U1001C)] FOR REHEARING

_____

[*OR, for application proceedings*]

Application of _____ [*name*], to _____ [*purpose of application*],	))))	Application No. _____ PETITION OF _____ [*name or shortened designation of party tendering document*] [(_____) (*CIS number, if applicable,*

e.g., U1001C)] FOR REHEARING

_____

[*OR, for application proceedings under the shortened-procedure tariff docket*]

Application of _____ [*name*], under the Shortened-Procedure Tariff Docket to _____ [*here state specifically or by reference the increase in rates sought to be made and specify short notice as well as long and short haul authority, if any, sought*].	))))	Application No. _____ PETITION OF _____ [*name or shortened designation of party tendering document*] [(_____) (*CIS number, if applicable, e.g.*, U1001C)] FOR REHEARING--SHORTENED-PROCEDURE TARIFF DOCKET

_____

[*CONTINUE*]

Petitioner_____[*name*], respectfully, requests a rehearing before the Commission of Decision No. _____ rendered on_____[*date*], by that Commission, pursuant to *Public Utilities Code Section 1731*.

The rehearing is sought on the following grounds:_____[*state specifically the grounds on which the applicants consider the decision or order unlawful*].
Dated: _____.

_____ [*signature*]

_____ [*typed name*]

_____ [Applicant *or* Complainant *or* Defendant]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [Applicant *or* Complainant *or* Defendant] _____ [*name*]

_____

[*attorney's address and telephone number*]

[*Verification. See § 480.191[1][a]*.]

[b] Use of Form

The form set out in *[a], above*, is for use in petitioning for a rehearing before the PUC. It may be filed by any losing party or any stockholder or bondholder or other party pecuniarily interested in the public utility affected [*Pub. Util. Code § 1731*].

Documents for filing are tendered to the appropriate PUC docket office under *20 Cal. Code Reg. § 3* [*but see 20 Cal. Code Reg. § 25 et seq.* (preamble; provisions do not apply to applications and protests on Shortened-Procedure Tariff Docket)]. For discussion relating to acceptance and rejection of tendered documents generally, see *§ 480.190[1][i]*.

[c] Contents

The application for a rehearing must set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No corporation or person may in any court urge or rely on any ground not so set forth in the application [*Pub. Util. Code § 1732*]. Vague assertions as to the record or the law, without citation, may be accorded little attention [*20 Cal. Code Reg. § 86.1*].

[d] Time for Filing

The application for rehearing must be filed within 30 days after the date of issuance of the PUC's order or decision, or within 10 days after the date of issuance in the case of an order issued pursuant to *Pub. Util. Code §§ 816-830* or *851-856* (relating to security transactions and the transfer or encumbrance of utility property). In this context, "date of issuance" means the date when the PUC mails the order or decision to the parties to the action or proceeding [*Pub. Util. Code § 1731(b)*; *see 20 Cal. Code Reg. § 85*].

[e] Time for Granting or Denying Application

Any application for a rehearing made 10 days or more before the effective date of the order as to which a rehearing is sought must be either granted or denied before the effective date or the order will stand suspended until the application is granted or denied. However, absent further order of the PUC, the order will not stand so suspended for more than 60 days after the date of filing of the application, at which time the suspension will lapse, the order will become effective, and the application may be taken by the party making it to be denied. Any application for a rehearing made within less than 10 days before the effective date of the order as to which a rehearing is sought and not granted within 60 days may be taken by the party making the application to be denied unless the effective date of the order is extended for the period of the pendency of the application [*Pub. Util. Code § 1733*].

[f] Response

A response to an application for rehearing is not necessary. Any response may be filed and served no later than 15 days after the day the application for rehearing was filed. In instances of multiple applications for rehearing, the response may be to all such applications and may be filed 15 days after the last application for rehearing was filed. The PUC is not obligated to withhold a decision on an application for rehearing to allow time for a response to be filed [*20 Cal. Code Reg. § 86.2*].

[g] Effect of Application

An application for rehearing does not excuse any corporation or person from complying with and obeying any order or decision or any requirement of any order or decision of the PUC theretofore made or operate in any manner to stay or postpone the enforcement thereof, except in such cases and on such terms as the PUC by order directs [*Pub. Util. Code § 1735*; *20 Cal. Code Reg. § 86*]. An application for rehearing is a necessary prerequisite to an appeal [*Pub. Util. Code §§ 1731(b), 1756*].

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Chapter 480 PUBLIC UTILITIES
PART IV. FORMS
A. Proceedings Before the PUC

42-480 California Forms of Pleading and Practice--Annotated § 480.195

§ 480.195 Proceedings to Adopt, Amend, Repeal Regulation

[1] Petition by Interested Person

[a] FORM Proceedings to Adopt, Amend, Repeal Regulation--Petition by Interested Person

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Petition of _____ [*name*] [, CIS NO. _____,], an interested person, to _____ [adopt a regulation *or* amend *or* repeal _____ (*identify regulation, e.g., 20 Cal. Code Reg § 14.1*)].

DOCKET NO. _____

PETITION OF_____[*name or shortened designation of party*] TO _____ [ADOPT *or* AMEND *or* REPEAL] REGULATION

Petitioner_____[*name*] ["Petitioner"], an interested person, respectfully, requests that the Commission:

[*EITHER, if petition requests Commission to adopt a regulation*]

1. Adopt the following regulation:_____[*state substance of the proposed regulation*].

[*OR, if petition requests Commission to amend existing regulation*]

1. Amend _____ [identify regulation, e.g., 20 Cal. Code Reg § 100.1] as follows:

_____ [*state clearly and concisely the proposed amendment, e.g.,* delete the existing subdivision [a] and substitute: _____ (*set forth proposed language*)].

[*OR, if petition requests Commission to repeal existing regulation*]

1. Repeal _____ [*identify regulation, e.g.,* 20 Cal. Code Reg § 100.1].

[*CONTINUE*]

2. This request is made pursuant to *Public Utilities Code Sections 1708* and *1708.5*.

3. The regulation that Petitioner proposes for _____ [adoption *or* amendment *or* repeal] is a rule of general applicability and future effect, because _____[*set forth explanation as necessary*].

4._____[*Concisely state any facts and law supporting petition*].
Dated: _____.

_____ [*signature*]

_____ [*typed name*]
Petitioner

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Petitioner

_____

[*attorney's address and telephone number*]

[*If petition contains factual assertions, include appropriate verification. See § 480.191[1][a].*]

[b] Use of Form

The form of petition in *[a], above*, is for using in petitioning the Commission to adopt, amend, or repeal a regulation. For further discussion of the procedures related to this petition, see *§ 480.12[4]*.

[c] Contents

Pleadings relating to matters not specifically mentioned in the Commission's rules of practice and procedure (*20 Cal. Code Reg § 1 et seq.*) must comply with *20 Cal. Code Reg §§ 2 through 2.6, 15* and *16*, relating to format and contents generally [*20 Cal. Code Reg § 42*; *see Pub. Util. Code § 1708.5(e)* (Commission must implement regulation petition procedure under its existing rules and amend its rules with specific procedures prior to July 1, 2001)].

The proposed regulation (or amendment or repeal of an existing regulation) must be a rule of general applicability and

future effect [*see Pub. Util. Code § 1708(a)*] (*see* Paragraph 3).

A petition must concisely state the facts and law supporting the petition the specific relief or ruling requested [*20 Cal. Code Reg §§ 45* and *46* (relating to motions, petitions, and other requests)] (*see* Paragraph 4).

[d] Verification

Pub. Util. Code §§ 1708, 1708.5 do not state whether a verification is required and specific regulations relating to this petition do not currently exist. By analogy, under the Commission's notice and comment rulemaking procedures (*20 Cal. Code Reg § 14.1 et seq.*), all pleadings that contain factual assertions must be verified. Unverified factual assertions are given only the weight of argument [*20 Cal. Code Reg § 14.5*]. Therefore, to be cautious, the petitioner should verify the petition if he or she is supporting the petition with assertions of fact.

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[Reserved]

§§ 480.196[Reserved]

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PART IV. FORMS
B. Judicial Review of PUC Decisions

42-480 California Forms of Pleading and Practice--Annotated § 480.200

§ 480.200 Proceedings to Review PUC Order or Decision

[1] Petition for Writ of Review of Order or Decision

[a] FORM Proceedings to Review PUC Order or Decision--Petition for Writ of Review of Order or Decision

[*EITHER*]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[*OR*]

IN THE COURT OF APPEAL, _____ [*specify number, e.g.,* SECOND] APPELLATE DISTRICT, OF THE STATE OF CALIFORNIA

[*CONTINUE*]

_____ [*name*],	)	
Petitioner,	)	
vs.	)	
THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA	)	CIVIL NO. _____
Respondent,	)	PETITION FOR WRIT OF REVIEW
[_____ (*name*),	)	
Real Party in Interest].	)	
	)	

_____

TO THE HONORABLE _____ [CHIEF *or* PRESIDING] JUSTICE AND ASSOCIATE JUSTICES OF THE _____ [SUPREME COURT *or* COURT OF APPEAL OF THE _____ (*specify number, e.g.,* _____ SECOND) APPELLATE DISTRICT] OF THE STATE OF CALIFORNIA:

Petitioner alleges:

1. Petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of _____ and authorized to do business in the State of California with its principal place of business in_____[*city*], California.

2. Respondent is the Public Utilities Commission of the State of California ("Respondent").

[3. Real party in interest is _____ (*name*) and has an interest which is directly affected by this proceeding in that _____ (*specify reasons which make person real party in interest*)].

4. On_____[*date*], Respondent issued its _____ [order *or* decision] in proceeding number _____ entitled _____ [*specify*].

5. Respondent acted beyond its authority in _____ [making the order *or* rendering the decision] in that_____[*specify how order was beyond authority of PUC*].

6. Enforcement of the _____ [decision *or* order] will require Petitioner to_____[*show effect of decision or order on petitioner's rights*] to the injury and detriment of Petitioner.

WHEREFORE Petitioner prays:

1. That a writ of review issue out of this Court to Respondent commanding it to certify fully to this Court at a specified time and place the record and proceedings in the above-described proceeding so that the same may be inquired into and determined by this Court;

2. That the above-described proceeding be fully heard and considered by this Court and the _____ [order *or* decision] made by Respondent be annulled and set aside;

3. That an order issue from the Court requiring Respondent during the pendency of this proceeding to desist from further proceedings in the above-mentioned cause;

4. For costs of suit herein incurred; and

5. That Petitioner be granted such other and further relief as the Court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled matter. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[b] Use of Form

The form of petition set out in *[a], above,* is for use in seeking a writ of review from the Supreme Court or court of appeal to review an order ordecision of the PUC. For discussion concerning the use of this method for review, see generally *§§ 480.140, 480.142*.

For discussion of time for filing petition, see *§ 480.144[1]*. For discussion of scope of review, see *§ 480.146[2]*. Answer to the petition and reply to the answer are discussed in *§ 480.145*. For discussion of requests to stay enforcement of a PUC order or decision pending disposition of the petition, see *§ 480.143*.

[c] Proper Court for Filing Petition

When the decision of the PUC was issued in an adjudicatory proceeding, the petition for writ of review may be filed in the court of appeal. In all matters other than adjudicatory proceedings, the petition for writ of review may only be filed in the Supreme Court [*Pub. Util. Code § 1756(b)*]. For further discussion concerning the determination of the proper court for filing, see *§ 480.144[3]*.

[d] Verification

The petition must be verified [*Code Civ. Proc. § 1069*; *Cal. Rules of Ct., Rule 8.496*].

[e] Proof of Service

The petition must be accompanied by proof of service of copies on the PUC and on any real parties in interest. A real party in interest is one who [*Cal. Rules of Ct., Rule 8.496(a)*]:

- Was a party of record to the action or proceeding before the PUC, and
- Presented before the PUC a position adverse to that taken before the PUC by the petitioner for review.

[f] Certificate of Interested Entities or Persons

Each party to an appeal must serve and file a Certificate of Interested Entities or Persons at the time it files its first document in the Court of Appeal [*Cal. Rules of Ct., Rule 8.208(d)*] and must include a copy of the certificate in its principal brief [*Cal. Rules of Ct., Rule 8.208(d)*]. If a party is an entity, the certificate must list any person or entity, other than the parties themselves, that the party knows has an ownership interest of 10 percent or more in the party [*Cal. Rules of Ct., Rule 8.208(e)(1)*]. All parties must also list any person or entity, other than the parties themselves, that has a financial or other interest in the outcome of the proceeding that the party reasonably believes the justices should consider in determining whether to disqualify themselves under Canon 3E of the Code of Judicial Ethics [*Cal. Rules of Ct., Rule 8.208(e)(2)*]. If the party knows of no entity or person that is required to be disclosed under the rule, he or she must so state in the certificate [*Cal. Rules of Ct., Rule 8.208(e)(3)*]. Furthermore, if a party learns of changed or additional information that must be disclosed under *Cal. Rules of Ct., Rule 8.208*, he or she must promptly serve and file a supplemental certificate [*Cal. Rules of Ct., Rule 8.208(f)*].

[2] Application to Transfer to Single Appellate District

[a] FORM Proceedings to Review PUC Order or Decision--Application to Transfer to Single Appellate District

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

_____ [*name*],	)	
Petitioner,	)	
vs.	)	
THE PUBLIC UTILITIES COMMISSION OF THE	)	CIVIL NO. _____
STATE OF CALIFORNIA	)	APPLICATION FOR ORDER TRANSFERRING
Respondent,	)	RELATED ACTIONS TO THE
[_____ (*name*),	)	_____ [*specify number, e.g.,*
Real Party in Interest].	)	SECOND] APPELLATE DISTRICT, COURT OF
	)	APPEAL

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

1. _____ [*Identify party seeking transfer, e.g.,* Applicant is a corporation duly organized and existing under and by virtue of the laws of the State of _____ and authorized to do business in the State of California with its principal place of business in _____ (*city*), California].

2. The following actions are pending review in different districts of the Court of Appeal:_____[*identify each related matter on review, by name of parties, case number, appellate district, and date filed*].

3. These actions are related, in that_____[*set forth facts showing that each of the matters identified in paragraph 2 are related*].

4. The _____ [*specify number, e.g.,* Second] Appellate District of the Court of Appeal is the proper district for hearing and determining these actions, because _____[*set forth grounds facts showing that the matters should be transferred to the particular appellate district*].

WHEREFORE Petitioner prays:

1. That an order issue out of this Court transferring_____[*identify each matter to be transferred*] to the _____ [*specify number, e.g.,* Second] Appellate District of the Court of Appeal.

2. That the clerk of the court(s) of the court(s) from which the cause(s) are transferred immediately transmit to the to the _____ [*specify number, e.g.,* Second] Appellate District of the Court of Appeal the original record, briefs, and all original papers and exhibits on file in the cause.

[3. _____ (*If the transfer is made because the matter was taken to the wrong court,* That the petitioner be ordered to pay the clerk of the _____[*specify number of district court to which the cause is transferred, e.g.,* Second] Appellate District of the Court of Appeal the fee required by law for the filing of the record in the first instance.]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Petitioner

[*Verification. See[1], above.*]

[b] Use of Form

The form set out in *[a], above*, is for use in seeking an order from the Supreme Court transferring related actions to a single appellate district [*Pub. Util. Code § 1756(e)*; *see Cal. Rules of Court, Rule 10.1000*].

For discussion of transfer of causes in the reviewing courts generally, see Ch. 40, *Appeal: An Overview* and Ch. 51, *Appeal: Hearing and Decision* .

[c] Any Party May Seek Order

Any party may seek from the Supreme Court, pursuant to California Rules of Court, an order transferring related actions to a single appellate district [*Pub. Util. Code § 1756(e)*].

[d] Transfer Order Sent to Parties by Clerk

The clerk of the court to which the cause is transferred must promptly send each party a copy of the order of transfer showing the new case number [*see Cal. Rules of Court, Rule 10.1000(a)(2)*].

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Chapter 481 PUBLIC WORKS

42-481 California Forms of Pleading and Practice--Annotated 481.syn

§ 481.syn Synopsis to Chapter 481: PUBLIC WORKS

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§ 481.02 Cross References

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§ 481.10 Governing Law

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§ 481.11 Competitive Bidding Requirements

[1] Statutory Schemes

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§ 481.12 Purpose of Competitive Bidding Requirements

§ 481.13 Solicitation of Bids

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§ 481.15 Judicial Exceptions to Bidding Requirements

[1] Failure Generally to Serve Purposes of Bidding Statutes

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[5] Employment of Skilled Professionals

[6] Lack of Advantage in Complying With Bidding Requirements

[7] Contracts Relating to "Municipal Affairs" of Charter Cities

§ 481.16 Failure to Comply With Competitive Bidding Requirements

[1] Contract Is Void

[2] No Estoppel Is Permitted to Be Invoked Against Public Entity

[3] No Recovery in Quantum Meruit Is Permitted

[4] Appellate Court's Duty to Protect Public Entity

§ 481.17 Submission of Bid

§ 481.18 Withdrawal of Bid

§ 481.19 Consideration of Bids by Awarding Authority

[1] Rejection of Bids Not in Best Interests of Public

[2] Relief of Unsuccessful Bidder

[a] Setting Aside of Bid Award, Generally

[b] Successful Bidder's Labor Law Violations

[3] Duty to Award Contract to Lowest Responsible Bidder

[a] General Rule

[b] Bid Deviating From Specifications

[c] Right to Notice of Reasons for Rejection of Local Bidder

[d] Damages Recoverable on Misaward by Public Entity

§ 481.20 Classification of License When Contract Awarded

§ 481.21 Making of Award Gives Rise to Contract

§ 481.22 Relief of Bidders

[1] Governing Law

[2] "Bid" Defined

[3] Notice of Mistake Is Required for Relief From Bid

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[5] Action for Recovery of Amount Forfeited

[a] Complaint

[b] Showing Required for Relief From Forfeiture

§ 481.23 Public Entity's Remedy on Contractor's Wrongful Failure to Enter Into Contract

§ 481.24 Subletting and Subcontracting Fair Practices Act

[1] Purpose of Act

[2] Deadline for Submission of Bids

[3] Listing of Subcontractor in Bid

[4] Permitted Substitutions

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[6] Procedural Prerequisites for Substitution Based on Clerical Error

[a] Two-Day Notice Requirement

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[a] Statutory Penalties

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§ 481.25 Exhaustion of Administrative Remedies

[1] Arbitration

[2] Presentation of Claim to Public Entity

[a] Requirements

[b] Pleading Compliance With Gov. Code § 945.4

[3] Resolution of Claims Between Contractor and Local Agency of $375,000 or Less

[a] Presentment to Local Agency

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§ 481.26 Contractual Waiver of Claims

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§ 481.41 Definitions

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[5] Contract

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§ 481.42 Public Stop Notice Provisions

[1] Construction

[2] Purpose

§ 481.43 Nature of Remedy

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§ 481.45 Person Entitled to Serve Stop Notice

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[2] Use of Form

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[1] FORM

[2] Use of Form

[3] State Statutes

[4] Text References

§ 481.338 Notice of Order Granting Hearing and of Hearing on Determination of Rights to Withheld Funds [Civ. Code § 3201]

[1] FORM

[2] Use of Form

[3] Motion for Hearing

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[1] FORM

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[1] FORM

[2] Use of Form

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[2] Use of Form

[3] State Statutes

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[2] Use of Form

[3] State Statutes

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[2] Use of Form

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§ 481.362 Complaint Against Subcontractor for Damages for Breach of Contract--And Against Surety on Subcontractor's Payment Bond [Civ. Code §§ 3096, 3098, 3227, 3247-3252]--By Subcontractor, Laborer, or Materialman

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[2] Use of Form

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§ 481.01 Scope of Chapter

This chapter discusses and contains forms for use in actions on public works contracts and the subcontracts thereunder. It includes forms of complaints for use in action by prime contractors on public works projects against a public entity [*see §§ 481.310, 481.311*] and against a subcontractor [*see § 481.312*] and a form of complaint by a subcontractor against a prime contractor on a public works project [*see § 481.313*]. It also includes a form of complaint by a contractor against a public entity for relief from an erroneous bid [*see § 481.314*] and a form of complaint by a subcontractor against a contractor [*see § 481.315*] for violation of the Subletting and Subcontracting Fair Practices Act [*Gov. Code § 4100 et seq.*].

This chapter also discusses and contains forms relating to the withholding of payment on public works contracts as well as containing a procedural checklist for enforcement of claims stated in stop notices. It includes the following:

- Forms of notice by a claimant [*see §§ 481.330 -481.332*].
- Forms of releases of stop notices [*see §§ 481.333, 481.334*].
- Forms to contest the amount withheld [*see §§ 481.335 -481.341*].
- Forms for enforcing rights arising from a stop notice [*see §§ 481.342, 481.343*].
- A form for use by a public entity for the purpose of interpleader [*see § 481.344*].

This chapter also discusses payment bonds and contains forms of complaint [*see §§ 481.360, 481.361*] for use in an action on a payment bond.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewGovernmentsPublic ImprovementsGeneral OverviewPublic

Contracts LawBids & FormationSubcontracts & SubcontractorsGeneral OverviewPublic Contracts LawBids & FormationSubcontracts & SubcontractorsSurety BondsPublic Contracts LawDispute ResolutionGeneral OverviewPublic Contracts LawDispute ResolutionSubcontractorsGeneral Overview

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§ 481.02 Cross References

For discussion of building contracts generally and a form of complaint by a contractor against a municipality for breach of a building contract, a form of complaint by a contractor against a public entity for damages for breach of contract, negligence, and fraud and injunctive relief restraining expenditure of moneys from a construction fund, and a form of complaint by a subcontractor against the original contractor for breach of building contract for extras with joinder of a municipality withholding payment from the original contractor, see Ch. 104, *Building Contracts* .

For a discussion, procedures, and forms of claims against public entities, see Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities* .

For a discussion and forms for use in stop notice proceedings involving private works of improvement, see Ch. 361, *Mechanics' Liens* .

For discussion and forms relating to actions on payment bonds for private works, see Ch. 361, *Mechanics' Liens* .

For discussion and forms relating to a surety's right to subrogation, see Ch. 536, *Subrogation* .

For discussion and forms relating to actions against sureties on bonds, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachGeneral OverviewGovernmentsLocal GovernmentsClaims By & AgainstPublic Contracts LawBids & FormationSubcontracts & SubcontractorsSurety BondsPublic Contracts LawDispute ResolutionSubcontractorsGeneral OverviewPublic Contracts LawTerminationsDamagesPublic Contracts LawTypes of ContractsConstruction Contracts

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[Reserved]

§§ 481.03[Reserved]

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§ 481.10 Governing Law

[1] Construction of Public Contracts

Generally, there are no special rules of law governing the interpretation or effect of public contracts simply because a governmental body is a party to the contract [*M.F. Kemper Constr. Co. v. Los Angeles (1951) 37 Cal. 2d 696, 704, 235 P.2d 7]* . Thus, a contract between a governmental body and a private individual is ordinarily subject to the same rules of construction as is a contract between private individuals [*Hawley v. Orange County Flood Control Dist. (1963) 211 Cal. App. 2d 708, 713, 27 Cal. Rptr. 478* ; *Oberg v. Los Angeles (1955) 132 Cal. App. 2d 151, 158, 281 P.2d 591]* . For a discussion of these rules of construction, see generally Ch. 104, *Building Contracts* , and Ch. 140, *Contracts* .

[2] Rules Governing Incorporation of Plans and Specifications

Usually, a contract between a public entity and a private individual incorporates by reference the plans and specifications for the public project to be constructed which were adopted by the public entity. In such a case, the contract will be construed with respect to the plans and specifications incorporated by reference since effect must be given to a writing incorporated into the contract by reference. However, a plan of work is subsidiary to the contract, and the latter is controlling in the case of discrepancy. Where the language of the contract permits, the specifications will be construed so as to uphold the validity of the contract [*Oberg v. Los Angeles (1955) 132 Cal. App. 2d 151, 159, 281 P.2d 591]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract InterpretationGeneral OverviewPublic Contracts LawContract InterpretationSpecificationsPublic Contracts LawTypes of ContractsConstruction Contracts

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§ 481.11 Competitive Bidding Requirements

[1] Statutory Schemes

Although, as discussed in *§ 481.10[1]*, a contract between a governmental body and a private individual is ordinarily subject to the same rules of construction as is a contract between private individuals, the execution or letting of a public works contract is normally subject to statutory or regulatory competitive bidding requirements. A large, separate body of statutory, regulatory, and decisional law governs the application of these requirements.

There are several statutory schemes governing competitive bidding in California, depending on the particular public entity involved in letting the public works contract in question. The State Contract Act [*Pub. Contract Code § 10100 et seq.*] generally governs contracts let by (1) the state Department of Water Resources as to any project under the jurisdiction of that department, (2) the state Department of General Services as to any project under the jurisdiction of that department, (3) the Department of Boating and Waterways as to any project under the jurisdiction of that department pursuant to *Harb. & Nav. Code §§ 65-67.3* (beach erosion control), and (4) the state Department of Transportation as to all other projects [*Pub. Contract Code § 10106 et seq.*].

Statutory competitive bidding requirements for county governments are governed by *Pub. Contract Code § 20121 et seq.* Such requirements for city governments are governed by *Pub. Contract Code § 20160 et seq.*

Competitive bidding requirements for contracts let by the Regents of the University of California are governed by *Pub. Contract Code § 10500 et seq.*, while such requirements for contracts let by the trustees of the California State University are governed by *Pub. Contract Code § 10700 et seq.*

Contracts for the construction of certain public projects let under particular acts or under the authority of particular districts normally must comply with competitive bidding requirements [*see, e.g., Pub. Contract Code §§ 20482* (contract under Municipal Improvement Act of 1913), 20601 (contracts let by county waterworks districts)].

In addition, the Small Business Procurement and Contract Act (*Gov. Code § 14836 et seq.*) establishes a preference for

small businesses in construction work on state facilities or procurement of goods, when responsibility and quality are equal. Civil penalties are provided for specific prohibited acts including making false statements for the purpose of obtaining certification as a small business enterprise [*Gov. Code §§ 14842, 14842.5*]. Similarly the Department of Transportation is charged to develop a program for the awarding of highway construction contracts funded solely by state funds to minority businesses; and civil penalties are provided for specified acts including attempts to obtain certification as a minority business enterprise on the basis of false information [*Sts. & Hy. Code §§ 94.3, 94.4*].

Although there are a number of variations among the statutory schemes concerning the specific requirements for letting public works contracts, for the most part these schemes contain similar provisions with respect to the most important features of the competitive bidding requirements. The discussion of competitive bidding requirements, *below*, is an outline of the general law governing these features. When appropriate, specific reference is made to the State Contract Act for typical provisions that illustrate these features.

A request for public bids must be sufficiently detailed, definite, and precise so as to provide a basis for full and fair competitive bidding on a common standard; in addition, the request must be free of any restrictionstending to stifle competition [*Konica Business Machines v. Regents of University of California (1988) 206 Cal. App. 3d 449, 456, 253 Cal. Rptr. 591]* .

[2] Outreach Programs

Proposition 209, approved by the voters on November 5, 1996, added *§ 31 to article I of the California Constitution* . *Section 31* provides in part: "The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting" [*Cal. Const., art. I, § 31(a)*]. It defines the "State" to include the State itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state [*Cal. Const., art. I, § 31(f)*].

Proposition 209 was held to bar an "outreach program" that required contractors bidding on city projects to use a specified percentage of minority and women subcontractors or to document efforts to include minority and women subcontractors in their bids [*Hi-Voltage Wire Works, Inc. v. City of San Jose (2000) 24 Cal. 4th 537, 562,101 Cal. Rptr. 2d 653, 12 P.3d 1068]* . Because the city rejected any bid that failed to comply with these race and sex based requirements, the essential structure of the program discriminated on an impermissible basis against prime contractors that neither engaged in outreach nor met the evidentiary presumption, and it granted preferential treatment to those that did [*Hi-Voltage Wire Works, Inc. v. City of San Jose (2000) 24 Cal. 4th 537, 562,101 Cal. Rptr. 2d 653, 12 P.3d 1068]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsGeneral OverviewGovernmentsPublic ImprovementsGeneral OverviewPublic Contracts LawBids & FormationSealed BidsGeneral OverviewPublic Contracts LawBusiness Aids & AssistanceMinority, Women-Owned & Disadvantaged BusinessesMinority-Owned BusinessesPublic Contracts LawBusiness Aids & AssistanceSmall BusinessesPublic Contracts LawContract InterpretationGeneral Overview

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§ 481.12 Purpose of Competitive Bidding Requirements

The competitive bidding requirement is founded on the salutary public policy declared by the Legislature to protect the taxpayers from fraud, corruption, and carelessness on the part of public officials and the waste and dissipation of public funds [*Miller v. McKinnon (1942) 20 Cal. 2d 83, 88, 124 P.2d 34]* . Thus, the competitive bidding statutes are intended to be for the benefit and protection of the public and not the bidders [*Universal By-Products, Inc. v. City of Modesto (1974) 43 Cal. App. 3d 145, 152, 117 Cal. Rptr. 525]* .

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§ 481.13 Solicitation of Bids

A public entity must normally solicit bids for a public project in compliance with competitive bidding requirements when the total cost of the project exceeds a certain defined amount and the project itself comes within the terms of the particular statute or provision that defines those public projects subject to the competitive bidding requirements.

Under the State Contract Act, "project" includes the erection, construction, alteration, repair, or improvement of any state structure, building, road, or other state improvement of any kind the total cost of which will exceed a total cost of $250,000 for calendar year 2010, and thereafter be subject to a formula adjustment at two-year intervals [*Pub. Contract Code § 10105*]. If the estimated total cost of any construction project or work exceeds $25,000, the district or agency must solicit bids in writing and award the work to the lowest responsible bidder. Alternatively, work in excess of $25,000 may be carried out by day labor if it is determined that the award of a contract, acceptance of bids, or acceptance of further bids is not in the state's best interests [*Pub. Contract Code § 10108*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsGeneral OverviewPublic Contracts LawBids & FormationOffer & AcceptanceAcceptances & AwardsPublic Contracts LawBids & FormationSealed BidsInvitations for Bids

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§ 481.14 Statutory Exceptions to Bidding Requirements

[1] Interests of Public Entity Not Furthered by Bidding

A public entity usually has the statutory right or reserves the right to have a public project performed by day's labor under the public entity's supervision, or by contract on informal bids, or by a combination thereof [*see Pub. Contract Code § 10122* (State Contract Act)], if compliance with the competitive bidding requirements is not deemed to be in the best interests of the public entity or the public. Although often such a right may be exercised by the public entity only after the public entity has solicited bids for the public project in question [*see Pub. Contract Code § 20167* (municipalities)], under the State Contract Act, such a right may be exercised at any time after the approval of plans, specifications, and estimates of cost [*see Pub. Contract Code § 10122(d)*].

[2] Emergency

Work may be done on a public works project by day labor, by contract on informal bids, or by a combination of both in the case of emergency, such as an act of God (e.g., storm, flood, fire, earthquake), for immediately required work and remedial measures [*see Pub. Contract Code §§ 10122, 20168*; *see also Los Angeles Dredging Co. v. Long Beach (1930) 210 Cal. 348, 356, 291 P. 839* (defining "emergency")].

Notwithstanding the project cost limits of *Pub. Contract Code § 10105* ($250,000 in 2010 and adjusted on a formula in subsequent years), work in excess of $25,000 that would otherwise constitute a project is not permitted to be done by day labor unless the requirements of *Pub. Contract Code § 10122* are met [*Pub. Contract Code § 10122.6*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-481 California Forms of Pleading and Practice--Annotated § 481.15

§ 481.15 Judicial Exceptions to Bidding Requirements

[1] Failure Generally to Serve Purposes of Bidding Statutes

As noted by the cases in *§ 481.91[4]*, ordinarily a public agency must comply with the terms of a statute which requires the letting of certain contracts by a public agency and the advertising for bids with respect to those contracts coming within the terms of the statutes [*Miller v. McKinnon (1942) 20 Cal. 2d 83, 87-88, 124 P.2d 34* ; *see Killeen v. San Bruno (1976) 56 Cal. App. 3d 479, 483, 128 Cal. Rptr. 760]* . However, even though a statute may require competitive bidding in the case of a particular contract, the public agency may make a contract without complying with the statute if there is a necessarily implied exception to the competitive bidding requirements [*see Los Angeles Dredging Co. v. Long Beach (1930) 210 Cal. 348, 354-356, 291 P. 839]* . These exceptions are set forth below. It should be noted that courts appear to construe strictly the right of a public agency to contract for the construction of a public work without complying with competitive bidding requirements in the absence of statutory exception. Generally, the creation of a judicial exception to a competitive bidding requirement is considered improper since it is an infringement on the prerogative of the Legislature, which has created the existing exceptions to such requirements [*Killeen v. San Bruno (1976) 56 Cal. App. 3d 479, 483, 128 Cal. Rptr. 760]* .

An exception to the competitive bidding requirement for a particular contract may arise when the purposes of the requirement are not served by such bidding. Thus, competitive bidding statutes, which are founded on a public policy designed to protect taxpayers from fraud, corruption, and carelessness on the part of public officials and from the waste and dissipation of public funds, are not to have such a construction as to defeat this purpose, to impede the usual and regular progress of the public business, or to deprive the inhabitants, even temporarily, of those things necessary and indispensable to their subsistence, their health, or the security and protection of their persons or property [*Los Angeles Dredging Co. v. Long Beach (1930) 210 Cal. 348, 354, 291 P. 839]* .

[2] No Exception

If to exempt a public agency from statutory competitive bidding requirements would permit possible favoritism, fraud, or corruption in the letting of other public construction contracts, even though the particular contract may appear to come within one of the judicial exceptions to the competitive bidding requirements, the public agency will be required

to comply with such requirements [*see Inglewood-L.A. County Civic Center Auth. v. Superior Court (1972) 7 Cal. 3d 861, 866, 103 Cal. Rptr. 689, 500 P.2d 601]* . For example, a management contractor who is hired to perform services and lend his or her experience and expertise in the preparation of the final plans for a public project, and who in that respect may be likened to an engineer or an architect whose service may be procured without strict compliance with competitive bidding requirements [*see § 481.91[6][b]*], may still be required to be employed through the competitive bidding process if his or her duties and obligations, such as a guarantee of the outside price for the final plans based on subcontract bids, are more closely akin to the traditional lump sum general construction contracting where the contractors enter the project process on the completion of working drawings [*see Inglewood-L.A. County Civic Center Auth. v. Superior Court (1972) 7 Cal. 3d 861, 866, 103 Cal. Rptr. 689, 500 P.2d 601]* .

[3] Undesirability or Impossibility of Advertising for Bids

A public agency is not required to comply with competitive bidding requirements for a particular project if it is undesirable or impossible to advertise for bids for the work. This exception applies if the nature of the contracts to be let require the services of the particular person or company with whom or with which the public agency desires to contract [*see Los Angeles Dredging Co. v. Long Beach (1930) 210 Cal. 348, 355, 291 P. 839* (municipality permitted to contract with general contractor without complying with ordinance requiring competitive bidding if, because of nature of work contractor was already doing, contractor was only one who could enter into agreement with city); *Riverside County v. Whitlock (1972) 22 Cal. App. 3d 863, 877-878, 99 Cal. Rptr. 710* (municipality permitted to contract with utility for construction of gas distribution system without complying with competitive bidding requirements of *Sts. & Hy. Code § 10501* of Municipal Improvement Act of 1913 when utility had been issued certificate to provide natural gas service to area in question)].

[4] Undeveloped State of Art

If the type of work planned by the public agency has not developed sufficiently to enable the agency to have a reasonable basis for comparison between or among the offered contracts in question, the agency is not required to comply with the competitive bidding requirements since under such circumstances advertising for bids would be unnecessary [*Hodgeman v. San Diego (1942) 53 Cal. App. 2d 610, 618, 128 P.2d 412]* .

[5] Employment of Skilled Professionals

A public agency may employ a person who is highly and technically skilled in his or her science or profession without complying with an otherwise applicable competitive bidding statute [*City & County of San Francisco v. Boyd (1941) 17 Cal. 2d 606, 620, 110 P.2d 1036]* . For example, an architect is considered an artist whose work requires taste, skill, and technical learning and ability of a rare kind, and a public agency is not required to advertise and obtain several bids in connection with contracting for theservices of an architect when the lowest bidder might be also the least capable and most inexperienced [*Cobb v. Pasadena City Bd. of Educ. (1955) 134 Cal. App. 2d 93, 95, 285 P.2d 41]* . This exception also applies (1) to a civil engineer who is hired to advise a municipality concerning its traffic and transit problems [*see City & County of San Francisco v. Boyd (1941) 17 Cal. 2d 606, 620, 110 P.2d 1036]* , (2) to a nonprofit corporation that is employed to plan, operate, and maintain a city zoo [*see Hiller v. Los Angeles (1961) 197 Cal. App. 2d 685, 694, 17 Cal. Rptr. 579]* , and (3) to actors and musicians who are employed to present a play in a municipal park [*see Adams v. Ziegler (1937) 22 Cal. App. 2d 135, 137-138, 70 P.2d 537]* .

[6] Lack of Advantage in Complying With Bidding Requirements

When the nature of the improvements to be constructed or services to be provided are such that competitive proposals would not produce an advantage, statutes requiring competitive bidding do not apply [*Riverside County v. Whitlock (1972) 22 Cal. App. 3d 863, 877-878, 99 Cal. Rptr. 710* (contracts based on rates and charges for construction of natural gas service facilities governed by rate schedule approved by Public Utilities Commission do not require city to entertain competitive bids); *California Motor Express, Ltd. v. Chowchilla Union High School Dist. (1962) 202 Cal. App. 2d*

314, 318-319, 20 Cal. Rptr. 768 (competitive bidding requirements of Educ. Code § 18051 for school districts are not applicable to contract whose rates are fixed and made uniform by Interstate Commerce Commission)].

[7] Contracts Relating to "Municipal Affairs" of Charter Cities

When an expenditure by a general law city [*see Gov. Code § 34102*] for a public project, as defined in *Pub. Contract Code § 20161*, exceeds the amount specified in *Pub. Contract Code § 20162*, it must be contracted for and let to the lowest responsible bidder [*Pub. Contract Code § 20162*]. However, a charter city is not subject to this statute with respect to a public project which relates to a matter constituting a "municipal affair" [*Smith v. Riverside (1973) 34 Cal. App. 3d 529, 534-535, 110 Cal. Rptr. 67]* . Whatever may be the subject matter of a municipal contract, the mode in which a city chooses to contract is a municipal affair. Since there is neither a pervasive state policy regarding what contracts must be let by competitive bidding nor any substantial outside pressure with respect to a local decision on this matter, a charter city is not required to comply with competitive bidding requirements in the absence of any restrictions and limitations otherwise contained in its charter [*Smith v. Riverside (1973) 34 Cal. App. 3d 529, 534-537, 110 Cal. Rptr. 67* (holding that whether work for extension or development of city public utilities facilities will be done by contract on competitive bidding or by city forces is municipal affair)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsChartersGovernmentsPublic ImprovementsGeneral OverviewPublic Contracts LawBids & FormationSealed BidsGeneral OverviewPublic Contracts LawTypes of ContractsConstruction ContractsPublic Contracts LawTypes of ContractsLocal Contracts Generally

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§ 481.16 Failure to Comply With Competitive Bidding Requirements

[1] Contract Is Void

Generally, a contract wholly beyond the power of a public entity is void. It cannot be ratified; no estoppel to deny its validity can be invoked against the public entity; and ordinarily no recovery in quasi contract can be had for work performed under it. Moreover, generally the mode of contract for a public entity is the measure of the power to contract. A contract made in disregard of the prescribed mode is unenforceable [*Miller v. McKinnon (1942) 20 Cal. 2d 83, 88, 124 P.2d 34]* . Thus, ordinarily, compliance with the terms of a statute requiring the letting of certain contracts by a public agency, such as a municipal corporation or a county, by competitive bidding and the advertising for bids is mandatory with respect to those contracts coming within the terms of the statute; a contract made without compliance with the statute is void and unenforceable as being in excess of the agency's power [*Miller v. McKinnon (1942) 20 Cal. 2d 83, 87-88, 124 P.2d 34]* . Furthermore, persons dealing with the public agency are presumed to know the law with regard to the requirement of competitive bidding and act at their peril [*Miller v. McKinnon (1942) 20 Cal. 2d 83, 89, 124 P.2d 34]* .

[2] No Estoppel Is Permitted to Be Invoked Against Public Entity

Although it is true that in some exceptional cases or situations where justice and right require it, a governmental body may be bound by estoppel, neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of the competitive bidding statutes which were adopted to protect the public [*Paterson v. Board of Trustees (1958) 321 P.2d 825]* . Thus, a court may not, by the application of the doctrine of estoppel, abrogate a bidding statute and make a new contract between the parties where in effect the court would create and enforce an illegal contract. For example, a subsequent promise by a public entity to pay more than the contract price that was not awarded in compliance with competitive bidding requirements may not be enforced, even though the elements of estoppel may be otherwise present, since to permit enforcement of the promise would completely disregard the salutary provisions of the bidding statutes and would afford a method by which the public entity and persons dealing with it could evade the law [*Paterson v. Board of Trustees (1958) 157 Cal. App. 2d 811, 820, 321 P.2d 825]* .

[3] No Recovery in Quantum Meruit Is Permitted

The fact that a public district or body has received the benefit of labor and materials furnished under a contract that is void by reason of the failure of the district or body to comply with applicable competitive biddingstatutes, does not entitle a contractor who has furnished the labor and materials to recover their reasonable value in an action in quantum meruit [*Reams v. Cooley (1915) 171 Cal. 150, 151-157, 152 P. 293]* . Although this may work a hardship on the contractor, the contractor is bound no less than the public entity to be sure that the competitive bidding requirements are complied with. When the contractor neglects this or chooses to take the hazard, the contractor is considered to be a mere volunteer and suffers only what he or she ought to have anticipated [*Reams v. Cooley (1915) 171 Cal. 150, 157, 152 P. 293]* .

Moreover, not only may the contractor not recover the reasonable value of labor and materials furnished to a public entity under a void contract, but a right of action exists to recover any funds paid to the contractor for labor and materials furnished the entity in contravention of a statute requiring competitive bidding. Such an action may be prosecuted by the public entity or by a taxpayer since the taxpayer would otherwise be helpless to compel observance of the law if the public agency could have the work done and pay the charges therefor in violation of the competitive bidding requirement [*Miller v. McKinnon (1942) 20 Cal. 2d 83, 89, 124 P.2d 34]* .

[4] Appellate Court's Duty to Protect Public Entity

The fact that neither the public entity nor the contractor argued the propriety of the public entity having paid anything to the contractor in violation of a competitive bidding requirement does not preclude an appellate court from raising the issue on its own motion. The principle that precludes recovery for work done without compliance with the competitive bidding requirement and requires return to the public entity of payments made on an invalid contract also requires an appellate court to exercise its duty, on its own, if necessary, to protect the public entity [*Greer v. Hitchcock (1969) 271 Cal. App. 2d 334, 337, 76 Cal. Rptr. 376* (requesting parties to brief right of contractor to retain payments made by public entity, but holding that such payments were made pursuant to valid contract)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesEquitable EstoppelGeneral OverviewContracts LawDefensesIllegal BargainsContracts LawRemediesEquitable ReliefQuantum MeruitPublic Contracts LawBids & FormationAgency & Authority of Government OfficersActual AuthorityPublic Contracts LawBids & FormationImplied ContractsImplied-in-Law ContractsPublic Contracts LawBids & FormationSealed BidsBid Responsiveness

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§ 481.17 Submission of Bid

The procedure for submitting bids to a public entity is usually governed by statute or regulation. Under the State Contract Act, the contractor must use a standard proposal form as his or her bid. Otherwise the bid is disregarded [*Pub. Contract Code § 10166*]. Most public entities require that the bid be accompanied by some form of bidder's security. Under the State Contract Act, such security may be cash, a cashier's check, a certified check, or a bidder's bond [*Pub. Contract Code § 10167*]. Bidder's security must also be provided for local agency projects under the Local Agency Public Construction Act [*see, e.g., Pub. Contract Code §§ 20107, 20192(b), 20201.5*].

The bidder is also required to submit a noncollusion affidavit with his or her bid. The affidavit, which must be in the form set forth by *Pub. Contract Code § 7106*, generally provides (1) that the bidder is not making the bid in the interest or on behalf of any undisclosed person; (2) that the bid is genuine and not a sham; (3) that the bidder has not induced or conspired with another person to put in a false or sham bid or that anyone would refrain from submitting a bid; (4) that the bidder has not sought with anyone to fix a bid price or to secure any advantage against the public body awarding the contract of anyone interested in the proposed contract; (5) that all statements in the bid are true; and (6) that the bidder has not submitted his or her bid to effectuate a collusive or sham bid [*see Pub. Contract Code § 7106*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationSealed BidsGeneral Overview

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§ 481.18 Withdrawal of Bid

In the absence of any applicable statute or regulation, a bid may be withdrawn at any time before it is opened and declared. Once opened and declared, the contractor's bid is in the nature of an irrevocable option giving the public entity a contract right [*M.F. Kemper Constr. Co. v. City of Los Angeles (1951) 37 Cal. 2d 696, 700, 235 P.2d 7]* . Under the State Contract Act, any bid may be withdrawn at any time before the time fixed in the public notice for the opening of bids only by written request for the withdrawal of the bid made in the manner provided in *Pub. Contract Code § 10169* [*see Pub. Contract Code § 10169*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusContracts LawBreachGeneral OverviewPublic Contracts LawBids & FormationAgency & Authority of Government OfficersActual AuthorityPublic Contracts LawBids & FormationSealed BidsCancellationPublic Contracts LawTypes of ContractsConstruction Contracts

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§ 481.19 Consideration of Bids by Awarding Authority

[1] Rejection of Bids Not in Best Interests of Public

The competitive bidding statutes are not intended to be for the benefit of bidders, but for the benefit and protection of the public [*Universal By-Products, Inc. v. City of Modesto (1974) 43 Cal. App. 3d 145, 152, 117 Cal. Rptr. 525* ; *Rubino v. Lolli (1970) 10 Cal. App. 3d 1059, 1062, 89 Cal. Rptr. 320]* .

Hence, the call for bids and the law confer on the awarding authority the duty of exercising its judgment as to whether it is in the best interests of the public entity to award the contract in question to the lowest bidder [*Baldwin-Lima-Hamilton Corp. v. Superior Court (1962) 208 Cal. App. 2d 803, 816-817, 25 Cal. Rptr. 798* ; *Judson Pac.-Murphy Corp. v. Durkee (1956) 144 Cal. App. 2d 377, 381-382, 301 P.2d 97]* . In this respect, the State Contract Act provides that, if the director deems the acceptance of the lowest responsible bid or bids is not in the best interests of the state, after stating his or her reasons for rejecting the bid or bids, he or she may reject all bids and proceed by day's labor or advertise for other bids in the manner required by the Act [*Pub. Contract Code § 10185*].

Consequently, the lowest qualified bidder generally has no legal right to compel acceptance of his or her bid [*Baldwin-Lima-Hamilton Corp. v. Superior Court (1962) 208 Cal. App. 2d 803, 816-817, 25 Cal. Rptr. 798* ; *Judson Pac.-Murphy Corp. v. Durkee (1956) 144 Cal. App. 2d 377, 381-382, 301 P.2d 97]* . By reserving authority to reject any and all proposals by virtue of a statute or bid proposal, the public entity's exercise of discretion is absolute. Even if it errs in the exercise of its discretion, the unsuccessful bidder has no legally cognizable cause for complaint [*Old Town Dev. Corp. v. Urban Renewal Agency (1967) 249 Cal. App. 2d 313, 331, 57 Cal. Rptr. 426]* . Stated differently, a court may not interfere with the public entity's discretionary authority by substituting its judgment for that of the public entity. The public entity is the final arbiter of the public interest and its decision, however capricious or erroneous, cannot be set aside [*Stanley-Taylor Co. v. Supervisors (1902) 135 Cal. 486, 488, 67 P. 783* (holding that mandamus does not lie to force award of contract to lowest bidder for printing forms under advertisement for bids where advertisement stated that board reserved right to reject any and all bids if the public good so required)].

[2] Relief of Unsuccessful Bidder

[a] Setting Aside of Bid Award, Generally

Although generally the lowest qualified bidder has no legal right to compel the acceptance of his or her bid and the awarding authority's decision is not subject to review, when an award is made in violation of the law, such as when an award is made to a bidder who is not properly qualified or licensed, or made pursuant to specifications that are illegal and invalid and that fail to provide for full and fair competitive bidding, the public entity has abused its discretion and the bidding procedure may be set aside [*Konica Business Machines v. Regents of University of California (1988) 206 Cal. App. 3d 449, 453-457, 253 Cal. Rptr. 591* (setting aside contract that had been awarded to bidder who did not comply with specifications in public entity's request for bids); *Baldwin-Lima-Hamilton Corp. v. Superior Court (1962) 208 Cal. App. 2d 803, 823, 25 Cal. Rptr. 798* (under *Gov. Code § 4303*, contracts for construction of public works or purchase of materials for public use must be let to persons who use raw and manufactured products of the United States as superseded by treaty agreements with foreign governments); *Judson Pac.-Murphy Corp. v. Durkee (1956) 144 Cal. App. 2d 377, 382-383, 301 P.2d 97* (not upsetting awarding authority's decision when lack of license was deemed in particular case to be technical violation)]. A court has the power to determine whether an abuse of discretion exists in such a case in a mandate proceeding. The unsuccessful bidder is entitled to apply for a writ of mandate as a party beneficially interested when, as a result of the issuance of the writ, a new bid call must be made and the unsuccessful bidder would have the opportunity to bid on the new bid invitation [*Baldwin-Lima-Hamilton Corp. v. Superior Court (1962) 208 Cal. App. 2d 803, 824, 25 Cal. Rptr. 798]* .

However, if the award is set aside but the unsuccessful bidder would have no greater opportunity to bid on a competitive basis than he or she had in bidding on the original proposal, mandamus will not lie to correct any abuse of discretion by the awarding authority. For example, if, when the award is set aside, the awarding authority either is under no legal compulsion to award a new contract in compliance with competitive bidding requirements or may alter its specifications in such a manner as to insure that the contract will be awarded to the original successful bidder, the unsuccessful bidder may not have the original award set aside [*Old Town Dev. Corp. v. Urban Renewal Agency (1967) 249 Cal. App. 2d 313, 331-332, 57 Cal. Rptr. 426* ; *see Universal By-Products, Inc. v. City of Modesto (1974) 43 Cal. App. 3d 145, 151-157, 117 Cal. Rptr. 525]* .

Similarly, an unsuccessful bidder may not sue the public entity for damages either for fraud or for breach of contract arising out of an award of a contract allegedly illegally made to one other than the lowest qualified bidder when the public entity is under no compulsion to award the contract to any particular bidder. Although an unsuccessful bidder in such a case may have a cause of action for fraud if he or she alleges that the awarding authority impliedly represented in its bid invitation that it would consider the bids in good faith and not merely to gain the benefit of such bidder's research and expertise, which representation was false in that the authority never intended to consider the bids in determining whether the contract in question should be awarded, the public entity is immune from any liability since it is not liable for an injury caused by any misrepresentation by an employee of the public entity [*see Gov. Code § 818.8*; *Universal By-Products, Inc. v. City of Modesto (1974) 43 Cal. App. 3d 145, 151-155, 117 Cal. Rptr. 525* (holding that under *Gov. Code § 818.8*, public entity is immune from liability for alleged misrepresentations by its employees)]. With respect to an action for damages arising out of breach of contract, because there is no contractural relationship between the bidder and the entity until a bid is accepted, no action may be predicated on the proposition that the arbitrary exercise of the entity's discretion breached an implied covenant of good faith and fair dealing since such a covenant exists only if there is an express contract [*Universal By-Products, Inc. v. City of Modesto (1974) 43 Cal. App. 3d 145, 155-156, 117 Cal. Rptr. 525]* . Finally, no contract action may be predicated on liability based on promissory estoppel. Although the public entity may impliedly represent an existing intent to consider the bids in good faith, this representation does not constitute a promise that thereafter it would consider the bids before rejecting them. Such a promise, necessary for any liability based on promissory estoppel, is inconsistent with the public entity's express right to reject any and all bids [*Universal By-Products, Inc. v. City of Modesto (1974) 43 Cal. App. 3d 145, 156-157, 117 Cal. Rptr. 525]* .

[b] Successful Bidder's Labor Law Violations

In certain circumstances, the second lowest qualified and responsible bidder on a public works contract (or any person that entered into a contract with the second lowest bidder before the letting of the bids on the public works contract) may have a right of action against the successful bidder, pursuant to both the Labor Code [*see Lab. Code § 1750*] and the Public Contract Code [*see Pub. Contract Code §§ 19102, 20104.70*]. If the successful bidder has been convicted of a violation of the workers' compensation law [*see Lab. Code § 3200 et seq.*] or the Unemployment Insurance Code, there is a rebuttable presumption that the accepted bid was lower than the second lowest bid because of such a violation [*Lab. Code § 1750(a)(2)*; *Pub. Contract Code §§ 19102(a)(2), 20104.70(a)(2)*]. The second lowest bidder (or a contractor with the second lowest bidder) may bring an action for damages based on that presumption [*see Lab. Code § 1750(a)(1)*; *Pub. Contract Code §§ 19102(a)(1), 20104.70(a)(1)*]. If the second lowest bidder was convicted of a violation of either or both of those laws within one year before submission of the second lowest bid, however, the second lowest bidder has no such right of action unless affirmative steps were taken to correct the violation [*Lab. Code § 1750(f)*; *Pub. Contract Code §§ 19102(d), 20104.70(d)*].

The court may award costs and attorney's fees to the prevailing party in the action [*Lab. Code § 1750(c)*; *Pub. Contract Code §§ 19102(b), 20104.70(b)*].

[3] Duty to Award Contract to Lowest Responsible Bidder

[a] General Rule

Although the public entity normally reserves the right to reject any and all bids if the public interest so requires, when the entity makes an award, it must normally make the award to the lowest responsible bidder [*Inglewood-L.A. County Civic Center Auth. v. Superior Court (1972) 7 Cal. 3d 861, 867, 103 Cal. Rptr. 689, 500 P.2d 601* ; *see Pub. Contract Code § 10180* (requiring department under State Contract Act to award contract to lowest responsible bidder)]. Thus, under a statute or other applicable provision requiring the contract to be awarded to the lowest responsible bidder, the contract must be awarded to the lowest bidder unless it is found that he or she is not responsible, that is, is not qualified to do the particular work under consideration. The awarding authority does not make this finding if it determines that a bidder other than the lowest bidder was superior to the lowest bidder in its ability to perform the contract and yet does not determine whether the lowest bidder was also qualified to perform the contract. In such a case, an award to a bidder other than the lowest bidder may be set aside [*Inglewood-L.A. County Civic Center Auth. v. Superior Court (1972) 7 Cal. 3d 861, 867-870, 103 Cal. Rptr. 689, 500 P.2d 601]* . In making the determination of whether the lowest bidder is responsible, the awarding authority is not limited to determining whether the bidder is trustworthy. Rather, while that term "responsible" includes the attribute of trustworthiness, it also has reference to the quality, fitness, and capacity of the low bidder to perform the proposed work satisfactorily [*Inglewood-L.A. County Civic Center Auth. v. Superior Court (1972) 7 Cal. 3d 861, 867, 103 Cal. Rptr. 689, 500 P.2d 601* (based on wording of former *Gov. Code § 25454, now see Pub. Contract Code § 20128*, requiring county board of supervisors to award contract to lowest responsible bidder); *see Pub. Contract Code § 2000* (local agency may require that contract be awarded to lowest responsible bidder engaging in minority hiring)].

The duty to award a contract to the lowest responsible bidder imposed by a city charter did not conflict with a subcontractor outreach program that required prime contractors to provide minority, women's, and other business enterprises an equal opportunity to compete for and participate in the performance of city contracts. Noting that competitive bidding requirements necessarily imply equal opportunities to all whose interests or inclinations may impel them to compete at the bidding, the California Supreme Court found that, in fact, a major purpose of the subcontractor outreach program being challenged was to guard against favoritism and improvidence by prime contractors thereby advancing a primary goal of competitive bidding [*Domar Electric, Inc. v. City of Los Angeles (1994) 9 Cal. 4th 161, 173-174, 36 Cal. Rptr. 2d 521, 885 P.2d 934]* .

However, minimum bidding laws must be strictly construed, and may not be extended beyond the specific provisions enacted by the Legislature [*Domar Electric, Inc. v. City of Los Angeles (1994) 9 Cal. 4th 161, 173, 36 Cal. Rptr. 2d*

521, 885 P.2d 934] . For example, because the Legislature has not enacted an explicit requirement that public funds raised through the sale of revenue bonds under the authority of the Revenue Bond Law of 1941 [*Gov. Code § 54300 et seq.*], and entrusted to county water districts, are subject to a lowest bidder requirement, the courts are precluded from imposing such a requirement [*Associated Builders & Contractors v. Contra Costa Water Dist. (1995) 37 Cal. App. 4th 466, 469-471, 43 Cal. Rptr. 2d 600]* .

[b] Bid Deviating From Specifications

When a public entity's request for bids states that the requested goods or services are required to meet certain specifications, the public entity may not award the contract to a bidder whose bid deviates from the specifications if other bids do conform to the specifications [*see Konica Business Machines v. Regents of University ofCalifornia (1988) 206 Cal. App. 3d 449, 454-457, 253 Cal. Rptr. 591* (setting aside contract that was awarded on nonconforming bid)]. A bid substantially complying with specifications, however, may be acceptable when the variance could not have affected the amount of the bid or given the bidder a benefit or advantage not allowed to other bidders [Konica Business Machines v. Regents of University ofCalifornia *(1988) 206 Cal. App. 3d 449, 454, 253 Cal. Rptr. 591* ; *see Ghilotti Construction Co. v. City of Richmond (1996) 45 Cal. App. 4th 897, 904-909, 53 Cal. Rptr. 2d 389]* .

[c] Right to Notice of Reasons for Rejection of Local Bidder

Before awarding a public works contract to one other than the lowest bidder, a public entity must (1) notify the low monetary bidder of any evidence reflecting on his or her responsibility received from others or adduced as a result of independent investigation, (2) afford the bidder an opportunity to rebut the adverse evidence, and (3) permit him or her to present evidence that he or she is qualified to perform the contract. The lowest bidder does not, however, have a right to a full evidentiary hearing in the form of a quasi-judicial proceeding before his or her rejection as a nonresponsible bidder [*Inglewood-L.A. County Civic Center Auth. v. Superior Court (1972) 7 Cal. 3d 861, 870-871, 103 Cal. Rptr. 689, 500 P.2d 601]* .

[d] Damages Recoverable on Misaward by Public Entity

The misaward by a public entity of a public works contract to one other than the lowest responsible bidder does not give the latter a cause of action in tort for monetary damages against the public entity. Since the competitive bidding requirements are imposed solely for the benefit and protection of the public rather than for the benefit of the bidders, the misaward constitutes only an abuse of discretion by the awarding entity in determining the identity of the bidder, and therefore the making of the misaward comes within the discretionary immunity to tort liability established by *Gov. Code §§ 815, 815.2(b)*, and *820.2* [*Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center Auth. (1974) 40 Cal. App. 3d 98, 101, 114 Cal. Rptr. 834]* .

However, the unsuccessful bidder does have a cause of action in contract based on promissory estoppel since the public entity in its solicitation of bids promises to award the contract to the lowest responsible bidder and the lowest bidder has reasonably relied on this promise by expending sums in the preparation of its bid to its detriment. The fact that the lowest bidder could not have compelled the public entity to award the contract to him or her because of a provision in the notice soliciting bids that any and all bids might be rejected does not affect the reasonableness of the bidder's reliance since otherwise the public entity's promise to award the contract to the lowest responsible bidder would be an illusory one and would render the whole competitive bidding promise nugatory [*Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center Auth. (1974) 40 Cal. App. 3d 98, 104, 114 Cal. Rptr. 834]* . Allowing recovery of some measure of damages once injunctive relief is no longer effectively available furthers the purposes of the competitive bidding laws by encouraging proper challenges to misawarded public contracts by the most interested parties, and deterring government misconduct [*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Auth. (2000) 23 Cal. 4th 305, 314, 96 Cal. Rptr. 2d 747, 1 P.3d 63]* .

An unsuccessful lowest responsible bidder may recover bid preparation costs under a theory of promissory estoppel but may not recover lost profits [*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Auth. (2000) 23 Cal. 4th 305, 314, 317-318, 96 Cal. Rptr. 2d 747, 1 P.3d 63]* . A bidder reasonably incurs bid preparation costs in reliance on the representation that if the contract is awarded, it will be awarded to the lowest responsible bidder. However, when a bid is submitted, the bidder does not know whether the contract will even be awarded or whether it will be the lowest responsible bidder. Furthermore, the lowest bid may be an unprofitable one. Given these uncertainties, bid preparation costs, not lost profits, are the only costs reasonably incurred [*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Auth. (2000) 23 Cal. 4th 305, 315-316, 96 Cal. Rptr. 2d 747, 1 P.3d 63]* .

Legal Topics:

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§ 481.20 Classification of License When Contract Awarded

Any public entity, as defined in *Pub. Contract Code § 1100*, the University of California, and the California State University must specify the classification of the contractor's license that a contractor must possess at the time a contract is awarded. The specification must be included in any plans prepared for a public project and in any notice inviting bids required by the Public Contract Code. The requirement applies only to contractors who contract directly with the public entity [*Pub. Contract Code § 3300(a)*]. A contractor who is not awarded a public contract because of the failure of any entity to comply with *Pub. Contract Code § 3300(a)* may not receive damages for the loss of the contract [*Pub. Contract Code § 3300(b)*].

Bus. & Prof. Code § 7059(b), which provides that "in public works contracts, ... the awarding authority shall determine the license classification necessary to bid and perform the project," allows agencies to specify that only designated license categories will be permitted to bid on a project. This allows an agency to make a pre-bid determination that the public would be better served in terms of quality and economy by letting the project only to licensees with the most appropriate experience, while minimizing the need for subcontractors [*M&B Construction v. Yuba County Water Agency (1999) 68 Cal. App. 4th 1353, 1361, 81 Cal. Rptr. 2d 231]* .

Prior to awarding a contract for work to be performed by a contractor, the state entity must verify with the Contractors' State License Board that the person seeking the contract is licensed in a classification appropriate to the work to be undertaken [*Pub. Contract Code § 6100(a)*]. In lieu of verification, the entity may require the person seeking the contract topresent his or her pocket license or certificate of licensure and provide a signed statement that swears, under penalty of perjury, that the license or certificate of licensure presented belongs to the person seeking the contract, and is in a classification appropriate to the work to be undertaken [*Pub. Contract Code § 6100(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-481 California Forms of Pleading and Practice--Annotated § 481.21

§ 481.21 Making of Award Gives Rise to Contract

Normally, the provisions governing competitive bidding require that the public entity provide detailed and exhaustive plans and specifications of the work being bid on in the proposal for bids, in the information and instructions to bidders, in the notice inviting bids, and in the required bid forms. Although these provisions usually also require that, after an award has been made, a formal written contract must be executed and appropriate bonds furnished for faithful performance of the work and for the payment of subcontractors, laborers, and materialmen, the contract itself is a brief document referring to the writings that detail the plans and specifications for a statement of the obligation of the parties. Hence, in the letting of contracts for the doing of public works where the legislative body or the administrative officer is required by statute to call for bids and must under competitive bidding conditions let the contract to the lowest responsible bidder, the making of the award gives rise to a contract between the public body or agent and the successful bidder [*City of Susanville v. Lee C. Hess Co. (1955) 45 Cal. 2d 684, 694, 290 P.2d 520* ; *see Greer v. Hitchcock (1969) 271 Cal. App. 2d 334, 337, 76 Cal. Rptr. 376]* .

Because a contract does arise on the making of the award, the successful contractor may not be relieved of his or her bid except either in the manner provided by statute, or if no statute is applicable, by satisfying the requirements for rescission [*see M.F. Kemper Constr. Co. v. City of Los Angeles (1951) 37 Cal. 2d 696, 700, 235 P.2d 7* ; *A & A Elec., Inc. v. King (1976) 54 Cal. App. 3d 457, 463-464]* . Similarly, because the public entity has exercised its discretion with respect to the time and manner of making public improvements and the purchasing of supplies, the legislative function is exhausted, its duty becomes purely ministerial, and the contract awarded in compliance with the competitive bidding requirements cannot be impaired at the option of the public entity. Hence, when a bid has been accepted by the proper authorities, such acceptance cannot be revoked [*City of Susanville v. Lee C. Hess Co. (1955) 45 Cal. 2d 684, 695, 290 P.2d 520]* .

Legal Topics:

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§ 481.22 Relief of Bidders

[1] Governing Law

The right of a contractor to relief from a bid mistake after the bid has been opened and declared or the time prescribed by statute or regulation for withdrawal of the bid has passed is generally governed by *Pub. Contract Code § 5100 et seq.* in the case of any bid submitted to a public entity for a public work described in *Pub. Contract Code § 5100(b)* if the public entity is the state, the Regents of the University of California, a county, a city and county, a city, a district, a public authority, a public agency, or any other political subdivision or public corporation of the state [*Pub. Contract Code § 5100(a)*; *A & A Elec., Inc. v. King (1976) 54 Cal. App. 3d 457, 462-464, 126 Cal. Rptr. 585]* .

The Legislature enacted *Pub. Contract Code § 5100 et seq.* in 1971 to establish a comprehensive statutory procedure in connection with public contracts to enable a contractor to claim relief from a bid mistake by following the procedures set forth in these provisions [*see A & A Elec., Inc. v. King (1976) 54 Cal. App. 3d 457, 462, 126 Cal. Rptr. 585]* . Prior to 1971, if the bid was not for a contract to be awarded under the State Contract Act or the California State University and Colleges Contract Law [*Pub. Contract Code § 10700 et seq.*], a contractor was entitled to relief from a bid mistake when the bid was subject to rescission on proper equitable grounds [*see M.F. Kemper Constr. Co. v. Los Angeles (1951) 37 Cal. 2d 696, 700-703, 235 P.2d 7]* since, once the bid is opened and declared, it is in the nature of an irrevocable option constituting a contract right of which the public entity cannot be deprived without its consent unless the requirements for rescission are satisfied. Such requirements were satisfied (1) if the public entity knew or had reason to know of the contractor's error, such as when the contractor notified the public entity of a bid mistake before the public entity attempted to accept the bid, (2) if the mistake was material to the contractor and was not the result of neglect of a legal duty, (3) if enforcement of the contract would be unconscionable, (4) if the public entity could be placed in status quo, and (5) if the contractor gave prompt notice of the election to rescind and restored or offered to restore to the other public entity everything of value received under the contract [*see M.F. Kemper Constr. Co. v. Los Angeles (1951) 37 Cal. 2d 696, 700-701, 235 P.2d 7]* .

However, with the enactment of *Pub. Contract Code § 5100 et seq.*, a contractor has a statutory remedy and is not required to rely on the equitable doctrine of rescission. *Pub. Contract Code § 5100 et seq.* establishes the exclusive

procedure for relieving a bidder from a mistake in a bid submitted to a public entity in *Pub. Contract Code § 5100(a)*, and a failure to comply with the procedure may be deemed a waiver of the right to relief [*A & A Elec., Inc. v. King (1976) 54 Cal. App. 3d 457, 463-464, 126 Cal. Rptr. 585]* .

[2] "Bid" Defined

For the purposes of *Pub. Contract Code § 5100 et seq.*, a bid means any proposal submitted to a public entity in competitive bidding for theconstruction, alteration, repair, or improvement of any structure, building, road, or other improvement of any kind [*Pub. Contract Code § 5100(b)*].

[3] Notice of Mistake Is Required for Relief From Bid

To be relieved of his or her bid, the contractor must first give five working days' notice to the public entity after the opening of the bids, specifying in the notice in detail how the mistake occurred [*Pub. Contract Code § 5103(b)*; *A & A Elec., Inc. v. King (1976) 54 Cal. App. 3d 457, 465, 126 Cal. Rptr. 585]* . Other than the notice to the public entity, no claim is required before bringing an action for relief from the bid [*Pub. Contract Code § 5104*].

The notice requirement of *Pub. Contract Code § 5103(b)* is intended to provide the public entity with definite and specific information about the nature of the mistake so that the public entity can make an informed decision as to whether or not to consent to grant relief from the bid. Although strict compliance with *Pub. Contract Code § 5103(b)* is not required if the contractor has otherwise substantially complied with the section, a contractor has neither strictly nor substantially complied with *Pub. Contract Code § 5103(b)* if he or she merely informs the public entity that a clerical or mathematical mistake was made in filling out the bid [*A & A Elec., Inc. v. King (1976) 54 Cal. App. 3d 457, 464, 126 Cal. Rptr. 585]* .

[4] Consent by State to Relief From Bid

If an awarding authority for the state consents to relieve a bidder of a bid because of mistake, the authority must prepare a report in writing to document the facts establishing the existence of each element required by *Pub. Contract Code § 5103* [*see § 481.22[5]]*. The report must be available for inspection as a public record. In the case of the University of California or a California State University, the report must be filed with the regents and the trustees, respectively [*Pub. Contract Code § 5101(b)*].

[5] Action for Recovery of Amount Forfeited

[a] Complaint

A contractor claiming relief from a bid mistake may not be relieved of the bid unless by consent of the awarding authority, nor may the contractor make any change in the bid because of the mistake [*Pub. Contract Code § 5101(a)*]. Instead, the contractor may bring an action against the public entity in a court of competent jurisdiction in the county in which the bids were opened for the recovery of the amount forfeited, without interest or costs [*Pub. Contract Code § 5101(a)*].

The complaint must be filed, and a summons served on the director of the department or chief of the division or other head of the public entity under which the work is to be performed, or an appearance made, within 90 days after the opening of the bid. Otherwise, the action must be dismissed [*Pub. Contract Code § 5102*].

If plaintiff fails to recover judgment, he or she must pay all costs incurred by the public entity, including reasonable attorney's fees to be fixed by the court [*Pub. Contract Code § 5101(a)*].

[b] Showing Required for Relief From Forfeiture

Under *Pub. Contract Code § 5103*, the bidder must establish the following, to the satisfaction of the court:

(1) A mistake was made;

(2) The bidder gave the public entity written notice within five working days after the opening of the bids of the mistake, specifying in the notice in detail how the mistake occurred;

(3) The mistake made the bid materially different than the bid the bidder intended [*see Elsinore Union Unified School Dist. v. Kastorff (1960) 54 Cal. 2d 380, 389, 6 Cal. Rptr. 1, 353 P.2d 713* (holding, in action to rescind mistaken bid, that mistaken bid of $89,994 was materially different from bid of $96,494, which sum would have been actual bid if omitted item had been included)]; and

(4) The mistake was made in filling out the bid and not due to an error in judgment or to carelessness in inspecting the site of the work, or in reading the plans or specifications.

The distinction drawn in *Pub. Contract Code § 5103(d)* between a mistake made in filling out the bid and an error in judgment is similar to the distinction drawn in cases involving rescission of mistaken bids. A mistake made in a bid that would entitle a contractor to rescission was one due to clerical error, such as in mathematical computation or in the transposition of figures from work sheets to final bid forms, whereas an error in judgment involved, for example, underestimating the cost of labor or materials [*see White v. Berrenda Mesa Water Dist. (1970) 7 Cal. App. 3d 894, 902, 87 Cal. Rptr. 338]* . Similarly, a mistake in an action for the rescission of a mistaken bid was an error which did not arise out of the neglect of a legal duty. A contractor would not be considered to have made an error involving a neglect of legal duty if the error made sometimes occurred in the conduct of the reasonable and cautious business person [*see M.F. Kemper Constr. Co. v. Los Angeles (1951) 37 Cal. 2d 696, 702, 235 P.2d 7]* . It should also be noted that in an action to rescind a mistaken bid, if the mistake in question involved both a clerical error and an error in judgment, a court would permit rescission of the mistaken bid if to do otherwise would be grossly unjust and set a harsh and unnecessary precedent [*White v. Berrenda Mesa Water Dist. (1970) 7 Cal. App. 3d 894, 902, 905-906, 87 Cal. Rptr. 338]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-481 California Forms of Pleading and Practice--Annotated § 481.23

§ 481.23 Public Entity's Remedy on Contractor's Wrongful Failure to Enter Into Contract

If a bidder has not substantially complied with the provisions governing the right to relief from a mistaken bid or the contractor has otherwise refused to enter into a contract with the public entity after being awarded the contract, the public entity, depending on the wording of the bid invitation and the executed bid, on the terms of the security deposited and on the language of any other applicable statute or contract [*see Petrovich v. Arcadia (1950) 36 Cal. 2d 78, 85, 222 P.2d 231]* may be (1) limited to the recovery of the amount of security deposited, either as a penalty or as liquidated damages [*see A & A Elec., Inc. v. King (1976) 54 Cal. App. 3d 457, 466, 126 Cal. Rptr. 585]* , (2) limited to the recovery of the amount of actual damages suffered by the public entity up to the amount stated in the security [*see Petrovich v. Arcadia (1950) 36 Cal. 2d 78, 80-86, 222 P.2d 231]* , or (3) permitted to recover both the amount of security deposited and, in addition, the amount of damages suffered for breach of contract [*see A & A Elec., Inc. v. King (1976) 54 Cal. App. 3d 457, 466, 126 Cal. Rptr. 585]* .

The general rule that forfeitures in the nature of a penalty are not favored and that language must be so construed so as to avoid a forfeiture, if that is possible, applies to the construction of the various types of security the public entity may require the bidder to deposit in submitting his or her bid for a public project. In the absence of statutory or contract language providing otherwise or words indicating that the full sum of the security is to be forfeited or treated as liquidated damages, the security may be construed as a guarantee which measures the public entity's compensatory right to the extent of the actual damage only. In such a case, the sum stated in the security, such as the liability of the surety on a bid bond, would be deemed to be established for the actual damage resulting from the bidder's breach, but limited by the sum stated in the security [*see Petrovich v. Arcadia (1950) 36 Cal. 2d 78, 85, 222 P.2d 231]* .

However, although provisions for forfeitures in the nature of a penalty are generally not favored, the public entity does have the right to require guarantee deposits to accompany bids, and to forfeit them in the event of the failure or refusal of the successful bidder to enter into a contract. Provisions requiring a deposit accompanying a bid for a public contract, or for forfeiture thereof, as necessary as a matter of public policy [*A & A Elec., Inc. v. King (1976) 54 Cal. App. 3d 457, 466, 126 Cal. Rptr. 585]* . Hence, the public entity has the power to enforce full recovery of the sum stated in the security, regardless of the actual damages suffered, where the statute or contract declares a forfeiture [*Petrovich v. Arcadia (1950) 36 Cal. 2d 78, 83, 222 P.2d 231* ; *A & A Elec., Inc. v. King (1976) 54 Cal. App. 3d 457, 466, 126 Cal.*

Rptr. 585] . It should be noted that where, by the terms of the bid invitation or instructions, the obligation of the bidder is clearly limited to the amount of the security, the public entity is limited to recovery of the amount of the security as a penalty or liquidated damages [*A & A Elec., Inc. v. King (1976) 54 Cal. App. 3d 457, 466, 126 Cal. Rptr. 585]* .

In the absence of any provisions specifying that the amount of the security must be forfeited as liquidated damages on the failure of the successful bidder to enter into a contract with the public entity, the entity is also not precluded from seeking any additional damages for breach of contract for the difference between the contract's lowest bid and the next lowest bid [*see* *A & A Elec., Inc. v. King (1976) 54 Cal. App. 3d 457, 466-467, 126 Cal. Rptr. 585]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-481 California Forms of Pleading and Practice--Annotated § 481.24

§ 481.24 Subletting and Subcontracting Fair Practices Act

[1] Purpose of Act

The Subletting and Subcontracting Fair Practices Act [*Pub. Contract Code § 4100 et seq.*] is designed to prevent the practices of bid shopping and bid peddling in connection with public works projects. Bid shopping is the use of the lowest bid already received by the general or prime contractor to pressure other subcontractors into submitting even lower bids [*Southern Cal. Acoustics Co. v. C.V. Holder, Inc. (1969) 71 Cal. 2d 719, 726 n.7, 79 Cal. Rptr. 319, 456 P.2d 975* ; *Bay Cities Paving & Grading, Inc. v. Hensel Phelps Constr. Co. (1976) 128 Cal. Rptr. 632]* .

Because the practices of bid shopping and bid peddling in connection with the construction, alteration, and repair of public improvements often result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among prime contractors and subcontractors, and lead to insolvencies and loss of wages to employees [*see Pub. Contract Code § 4101*], bid shopping is prohibited by the Subletting and Subcontracting Fair Practices Act after the award of the prime contract [*Bay Cities Paving & Grading, Inc. v. Hensel Phelps Constr. Co. (1976) 56 Cal. App. 3d 361, 365, 128 Cal. Rptr. 632* (interpreting former *Gov. Code § 4107*; *now see Pub. Contract Code § 4107*)]. Although bid shopping and peddling prior to the award of the prime contract foster the same evils, they are not prohibited because they have the effect of passing the reduced costs onto the public in the form of lower prime contract bids [*see Southern Cal. Acoustics Co. v. C.V. Holder, Inc. (1969) 71 Cal. 2d 719, 726 n.7, 79 Cal. Rptr. 319, 456 P.2d 975]* .

[2] Deadline for Submission of Bids

The bid invitation and the public notice must specify the place the bids are to be received and the date and time by which they must be received.The specified date and time must be extended by no less than 72 hours if the officer, department, board, or commission taking bids issues any material changes, additions, or deletions to the invitation later than 72 hours before the bid closing [*Pub. Contract Code § 4104.5(a)*]. In this context, "material change" means a change with a substantial cost impact on the total bid as determined by the awarding agency [*Pub. Contract Code § 4104.5(b)*]; and "bid invitation" includes any documents issued to prime contractors that contain descriptions of the work to be bid or the content, form, or manner of submission of bids to bidders [*Pub. Contract Code § 4104.5(c)*].

[3] Listing of Subcontractor in Bid

To protect the original subcontractor against replacement by either another subcontractor or by the prime contractor, the Act requires that any officer, department, board, or commission taking bids for the construction of any public work or improvement provide in the specifications prepared for the work or improvement, or in the general conditions under which the bid will be received for the doing of the work incident to the public work or improvement, that any person making a bid or offer to perform the work must, in his or her bid or offer, set forth the name and the location of the place of business of each subcontractor who will perform work or labor or render service to the prime contractor in or about the construction of the work or improvement, or a subcontractor licensed by the state who, under subcontract to the prime contractor, specially fabricates and installs a portion of the work or improvement according to detailed drawings contained in the plans and specifications, in an amount in excess of one-half of one percent of the prime contractor's total bid [*Pub. Contract Code § 4104(a)(1)*]. In the case of bids or offers for the construction of streets or highways, including bridges, the foregoing information regarding the subcontractor is required when the construction is in excess of one half of 1 percent or $10,000, whichever is greater [*Pub. Contract Code § 4104(a)(1)*]. At the option of a state or local agency, the prime contractor may be allowed to submit any information requested by the entity taking bids concerning a subcontractor, other than the subcontractor's name and business location, up to 24 hours after the deadline established for receipt of bids [*Pub. Contract Code § 4104(a)(2)*].

The bid or offer must also state the portion of the work that will be done by each subcontractor under the Subletting and Subcontracting Fair Practices Act. The prime contractor shall list only one subcontractor for each portion as is defined by the prime contractor in the bid [*Pub. Contract Code § 4104(b)*]. Because the Act permits the prime contractor to define the "portion" of work to be done by each subcontractor, there is no statutory requirement that the subcontractor's work be stated as a percentage of the contract. Whether the Act requires the prime contractor to express a subcontractor's portion as any more than the type of work the subcontractor will perform, for example, "paving and excavation" or "carpentry, millwork, and interior woodwork," is not clear [*see Valley Crest Landscape v. City Council and City of Davis (1996) 41 Cal. App. 4th 1432, 1438-1440, 49 Cal. Rptr. 2d 184]* .

Once the prime contractor's bid is accepted, he or she is forbidden to make any substitution for the subcontractor designated in the original bid except with the consent of the contracting agency as provided in *Pub. Contract Code § 4104* [*see Coast Pump Associates v. Stephen Tyler Corp. (1976) 62 Cal. App. 3d 421, 424-426, 133 Cal. Rptr. 88* (interpreting former *Gov. Code § 4104, now see Pub. Contract Code § 4104*)]. A general contractor who practices circumvention in bidding as a prime contractor pursuant to *Pub. Contract Code § 4104* (requirement to list subcontractors) by listing another contractor who will in turn sublet portions constituting the majority of the work covered by the prime contract, violates the Subletting and Subcontracting Fair Practices Act, and is subject to the penalties set forth in *Pub. Contract Code §§ 4110* and *4111* [*Pub. Contract Code § 4105*].

A prime contractor who fails to specify a subcontractor or who specifies more than one subcontractor for the same portion of work to be performed under the contract in excess of one-half of one percent of the prime contractor's total bid agrees that he or she is fully qualified to perform that portion himself or herself and must perform that portion. If after the contract is awarded the prime contractor subcontracts any portion of the work, the prime contractor is subject to the penalties named in *Pub. Contract Code § 4111*, unless he or she complies with *Pub. Contract Code § 4107* or *4109* [*Pub. Contract Code § 4106*].

However, the prime contractor may sublet or subcontract any portion of the work in excess of one-half of one percent of the prime contractor's total bid for which no subcontractor was designated in the original bid in a case of public emergency or necessity if a finding is made, which is reduced to writing as public record of the awarding authority, setting forth the facts constituting the emergency or necessity [*Pub. Contract Code § 4109*]. The prime contractor may also sublet or subcontract any portion of the work in excess of one-half of one percent of the prime contractor's total bid for which his or her original bid did not designate a subcontractor if such work is done in the performance of "change orders" causing changes or deviations from the original contract [*Pub. Contract Code § 4107(c)*].

[4] Permitted Substitutions

To protect the original subcontractor against replacement by either another subcontractor or by the prime contractor, the right of the prime contractor to make substitution and the discretion of the awarding authority to consent to substitution is limited to those situations enumerated in *Pub. Contract Code § 4107(a)*, all of which are keyed to the unwillingnessor inability of the listed subcontractor to perform properly [*see Southern Cal. Acoustics Co. v. C.V. Holder, Inc. (1969) 71 Cal. 2d 719, 726, 79 Cal. Rptr. 319, 456 P.2d 975* (interpreting former *Gov. Code § 4107(a), now see Pub. Contract Code § 4107(a)*); *Bay Cities Paving & Grading, Inc. v. Hensel Phelps Constr. Co. (1976) 56 Cal. App. 3d 361, 128 Cal. Rptr. 632* (interpreting former *Gov. Code § 4107(a), now see Pub. Contract Code § 4107(a)*)].

Pub. Contract Code § 4107(a) provides that the prime contractor whose bid is accepted may not substitute any person as subcontractor in place of the subcontractor listed in the original bid, except that the awarding authority, or its duly authorized officer, may, except as otherwise provided in *Pub. Contract Code § 4107.5*, consent to the substitution of another person as a subcontractor when the following apply:

- The subcontractor listed in the bid, after having had a reasonable opportunity to do so, fails or refuses to execute a written contract for the scope of work and price specified in the subcontractor's bid, when the contract, based on the general terms, conditions, plans, and specifications for the project involved or the terms of that subcontractor's written bid, is presented to him or her by the prime contractor.

- The listed subcontractor becomes insolvent or the subject of an order for relief in bankruptcy.

- The listed subcontractor fails or refuses to perform his or her subcontract.

- The listed subcontractor fails or refuses to meet the bond requirements of the prime contractor [*see Pub. Contract Code § 4108*].

- The prime contractor demonstrates to the awarding authority, or its duly authorized officer, subject to the further provisions of *Pub. Contract Code § 4107.5*, that the name of the subcontractor was listed as the result of an inadvertent clerical error.

- The listed subcontractor is not licensed pursuant to the Contractors' State License Law [*Bus. & Prof. Code § 7000 et seq.*].

- The awarding authority, or its duly authorized officer, determines that the work performed by the listed subcontractor is substantially unsatisfactory and not in substantial accordance with the plans and specifications, or that the subcontractor is substantially delaying or disrupting the progress of the work.

- The listed subcontractor is ineligible to work on a public works project pursuant to *Lab. Code § 1777.1* or *1777.7*.

- The awarding authority determines that a listed subcontractor is not a responsible contractor [*see Pub. Contract Code § 1103*].

[5] Hearing on Requested Substitution

Before the approval of the prime contractor's request for a substitution of a listed subcontractor as provided in *Pub. Contract Code § 4107(a)*, the awarding authority or its duly authorized officer must give written notice of the prime contractor's request and the reasons therefor to the listed subcontractor. The notice must be served by certified or

registered mail to the last known address of the subcontractor. If the listed subcontractor who has been notified does not submit written objections to the awarding authority within five working days, he or she is deemed to have consented to the substitution. If written objections are filed, the awarding authority must give written notice of at least five working days to the listed subcontractor of a hearing by the awarding authority on the request for substitution [*Pub. Contract Code § 4107(a)*].

The agency must give the notice, and the contractor is not liable for failure to give it [*W.J. Lewis v. C. Harper Constr. Co. (1981) 116 Cal. App. 3d 27, 30, 171 Cal. Rptr. 806* (interpreting former *Gov. Code § 4107(a)*; *now see Pub. Contract Code § 4107(a)*)].

[6] Procedural Prerequisites for Substitution Based on Clerical Error

[a] Two-Day Notice Requirement

The awarding authority may authorize a substitution if the name of the subcontractor was listed as the result of an inadvertent clerical error [*Pub. Contract Code § 4107(a)(5)*]. *Pub. Contract Code § 4107.5* specifies the procedures to be followed when a contractor asserts a claim of clerical error. A substitution that is based on inadvertent clerical error but which is not effected in compliance with *Pub. Contract Code § 4107.5* may not be sustained, and the prime contractor in such a case is in violation of the Subletting and Subcontracting Fair Practices Act [*see Coast Pump Associates v. Stephen Tyler Corp. (1976) 62 Cal. App. 3d 421, 427, 133 Cal. Rptr. 88* (interpreting former *Gov. Code § 4107.5*; *now see Pub. Contract Code § 4107.5*)].

Pub. Contract Code § 4107.5 requires that the prime contractor, as a condition to the assertion of a claim of inadvertent clerical error in the listing of a subcontractor, give written notice, within two working days after the time of the prime bid opening by the awarding authority, to the awarding authority and copies of the notice to both the listed subcontractor and the intended subcontractor who had bid to the prime contractor prior to the bid opening. While this two-day notice requirement is obligatory, rather than permissive, it can be satisfied through substantial compliance. For example, a prime contractor substantially complied with the notice requirement when it gave the awarding authority the required written notice but orally notified the erroneously-listed subcontractor by phone the day after prime bids were opened. The prime contractor then sent written notice to the erroneously-listed subcontractor on the fourth working day after the bid opening [*see Cal-Air v. Auburn Union School Dist. (1993) 21 Cal. App. 4th 655, 667-671, 26 Cal. Rptr. 2d 703]* .

Any listed subcontractor who has been notified by the prime contractor in accordance with *Pub. Contract Code § 4107.5* as to an inadvertent clerical error must be allowed six working days from the time of the prime bid opening within which to submit to the awarding authority and to the prime contractor a written objection to the prime contractor's claim of inadvertent clerical error. Failure of the listed subcontractor to file the written notice within the six working days is primary evidence of his or her agreement that an inadvertent clerical error was made [*Pub. Contract Code § 4107.5*].

[b] Determination by Awarding Authority

If, within six working days of the time the prime bids were opened, the listed subcontractor submits a written objection, the awarding authority must investigate the claims of the parties and hold a public hearing to determine the validity of the claims [*Pub. Contract Code §§ 4107, 4107.5*].

The awarding authority must, after a public hearing as provided in *Pub. Contract Code § 4107* and in the absence of compelling reasons to the contrary, consent to the substitution of the intended subcontractor (1) if (a) the prime contractor, (b) the subcontractor listed in error, and (c) the intended subcontractor each submit an affidavit (or declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) to the awarding authority along with additional

evidence as parties may wish to submit that an inadvertent clerical error was in fact made, provided that the affidavits from each of the three parties are filed within eight working days from the time of the prime bid opening; or (2) if the affidavits are filed by both the prime contractor and intended subcontractor within the specified time but the listed subcontractor does not submit within six working days, to the awarding authority and to the prime contractor, written objection to the prime contractor's claim of inadvertent clerical error as provided in *Pub. Contract Code § 4107.5* [*Pub. Contract Code § 4107.5*].

Any determination made must be based on the facts contained in the declarations submitted under penalty of perjury by all three parties and supported by testimony under oath and subject to cross examination. The awarding authority may, on its own motion or that of any other party, admit testimony of other contractors, any bid registries or depositories, or any other party in possession of facts which may have a bearing on the decision of the awarding authority [*Pub. Contract Code § 4107.5*].

To justify what was clearly a proper result, one court held that the affidavit requirements of *Pub. Contract Code § 4107.5* are not essential and should be construed as directory rather than mandatory. The court upheld the awarding authority's consent to substitution of subcontractors based on an inadvertent clerical error despite the facts that no party submitted an affidavit or a declaration under penalty of perjury and no testimony was taken at the noticed hearing [*see Cal-Air v. Auburn Union School Dist. (1993) 21 Cal. App. 4th 655, 671-675, 26 Cal. Rptr. 2d 703]* .

[7] Violation of Act

[a] Statutory Penalties

A prime contractor violating any of the provisions of the Subletting and Subcontracting Fair Practices Act violates his or her own contract and the awarding authority may exercise the option, in its own discretion, of (1) canceling the contractor or (2) assessing the prime contractor a penalty in an amount of not more than 10 percent of the amount of the subcontract involved to be deposited in the fund out of which the prime contract is awarded. The prime contractor is entitled to a public hearing and five days' notice thereof in any proceeding pursuant to *Pub. Contract Code § 4110* [*Pub. Contract Code § 4110*].

The courts lack jurisdiction to impose penalties under the Subletting and Subcontracting Fair Practices Act [*Pub. Contract Code § 4110*; *Thompson Pacific Construction, Inc. v. City of Sunnyvale (2007) 155 Cal. App. 4th 525, 539, 66 Cal. Rptr. 3d 175]* . Rather, penalties may be imposed only by the awarding authority [*Thompson Pacific Construction, Inc. v. City of Sunnyvale (2007) 155 Cal. App. 4th 525, 539, 66 Cal. Rptr. 3d 175]* . *Public Contract Code Section 4110* plainly gives the awarding authority discretion to impose monetary penalties for violation of the Act, but there is no provision anywhere in the Act that allows the awarding authority to pursue a civil action for monetary penalties. Although the trial courts have a range of inherent powers that they may exercise in order to accomplish complete justice between parties, a court has no power to award civil monetary penalties in the absence of explicit statutory authorization [*Thompson Pacific Construction, Inc. v. City of Sunnyvale (2007) 155 Cal. App. 4th 525, 539, 66 Cal. Rptr. 3d 175]* .

In addition, violation of the Subletting and Subcontracting Fair Practices Act by a licensee under the Contractors' State License Law [*Bus. & Prof. Code § 7000 et seq.*] constitutes grounds for disciplinary action by the Contractors' State License Board [*Pub. Contract Code § 4111*].

[b] Remedy of Listed Subcontractor

The listed subcontractor who has been replaced by the prime contractor in violation of the Subletting and Subcontracting Fair Practices Act has no contractual right against the prime contractor based on the fact that he or she was listed in the prime contractor's bid. The listing by the general contractor of the subcontractor that the general

contractor intends to retain is in response to statutory command under the Subletting and Subcontracting Fair Practices Act [*see Pub. Contract Code § 4104*] and cannot reasonably be construed as an expression of acceptance [*Southern Cal. Acoustics Co. v. C.V. Holder, Inc. (1969)71 Cal. 2d 719, 723, 79 Cal. Rptr. 319, 456 P.2d 975* (interpreting former *Gov. Code § 4104*; *now see Pub. Contract Code § 4104*)]. Moreover, there is no acceptance of the subcontractor's bid by operation of law under the doctrine of promissory estoppel, since the prime contractor has made no promise or offer to the subcontractor by listing the subcontractor in compliance with the Subletting and Subcontracting Fair Practices Act, which is intended to induce action or forbearance of a definite and substantial character [*see Southern Cal. Acoustics Co. v. C.V. Holder, Inc. (1969) 71 Cal. 2d 719, 723-724, 79 Cal. Rptr. 319, 456 P.2d 975* (interpreting former *Gov. Code § 4104*; *now see Pub. Contract Code § 4104*)].

However, since the purpose of the Subletting and Subcontracting Fair Practices Act is to protect both the public and subcontractors from the evils of the proscribed unfair bid shopping and bid peddling, it confers the right on the listed subcontractor to perform the subcontract unless statutory grounds for a valid substitution exist. This right may be enforced by an action for damages against the prime contractor to recover the benefit of the bargain the listed subcontractor would have realized had he or she notwrongfully been deprived of the subcontract [*Southern Cal. Acoustics Co. v. C.V. Holder, Inc. (1969) 71 Cal. 2d 719, 727, 79 Cal. Rptr. 319, 456 P.2d 975* (interpreting former *Gov. Code §§ 4100, 4101*; *now see Pub. Contract Code §§ 4100, 4101*, respectively); *see Bay Cities Paving & Grading, Inc. v. Hensel Phelps Constr. Co. (1976) 56 Cal. App. 3d 361, 366-367, 128 Cal. Rptr. 632* (interpreting former *Gov. Code § 4107*; *now see Pub. Contract Code § 4107*)].

However, the listed subcontractor has no remedy against the public entity. The public entity is not liable for a violation of the Subletting and Subcontracting Fair Practices Act, since there is no statutory provision for the recovery of damages against a public entity for its consenting to a substitution of subcontractors in violation of *Pub. Contract Code § 4107*. Moreover, the listed subcontractor is not a third-party beneficiary of the contract between the prime contractor and the public entity that would give rise to a cause of action against the public entity for breach of contract, since the listed subcontractor is at most an incidental beneficiary, having been listed in the prime contractor's bid in response to a statutory command and not because the contracting parties' purpose was expressly to benefit the subcontractor [*Southern Cal. Acoustics Co. v. C.V. Holder, Inc. (1969) 71 Cal. 2d 719, 727-728, 79 Cal. Rptr. 319, 456 P.2d 975* (interpreting former *Gov. Code §§ 4100, 4101*; *now see Pub. Contract Code §§ 4100, 4101*, respectively)].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsBridges & RoadsPublic Contracts LawBids & FormationOffer & AcceptanceAcceptances & AwardsPublic Contracts LawBids & FormationSealed BidsInvitations for BidsPublic Contracts LawBids & FormationSubcontracts & SubcontractorsGeneral Overview

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§ 481.25 Exhaustion of Administrative Remedies

[1] Arbitration

If a public works contract provides for arbitration of disputes arising under it, the parties are bound by the contract to proceed with arbitration before turning to the courts. By general law, a written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable, and irrevocable, save on such grounds as exist for the revocation of any contract [*Code Civ. Proc. § 1281*]. For discussion and forms, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

It has been the practice of public agencies to provide in a public works contract for resolution by some representative of the agency of disputes arising under the contract. The courts have generally upheld the provision and enforced them against contractors [*see Wiechmann Eng'rs v. California ex rel. Dep't of Public Works (1973) 31 Cal. App. 3d 741, 107 Cal. Rptr. 529* ; *People ex rel. Dep't of Public Works v. McNamara Corp. Ltd. (1972) 28 Cal. App. 3d 641, 104 Cal. Rptr. 822* ; *Clack v. State of California ex rel. Dept. of Public Works (1969) 275 Cal. App. 2d 743, 80 Cal. Rptr. 274* ; *Macomber v. State (1967) 250 Cal. App. 2d 391, 58 Cal. Rptr. 393* . The law was changed in 1978, however, by a statute that apparently repudiated those decisions. As a result, any dispute arising from a construction contract with a public agency that contains a provision that one party to the contract, or one party's agent or employee, must decide any disputes arising under that contract, must be resolved by submitting the dispute to independent arbitration, if mutually agreeable, or by litigation in a court of competent jurisdiction [*Civ. Code § 1670*].

[2] Presentation of Claim to Public Entity

[a] Requirements

Presentation of a claim pursuant to *Gov. Code §§ 900-935.7* is not required to commence a legal action or arbitration proceeding for money or damages on a contract with the state, but any action or proceeding must be commenced no later than six months after either of the following [*Pub. Contract Code § 19100(a)*]:

- The contracting agency's final written decision under claim provisions; or

- The accrual of the cause of action, if there are no contract claim provisions.

Except as provided in *Gov. Code §§ 946.4* (inadequate statement concerning public agency on file with Roster of Public Agencies during 70 days following accrual of cause of action) and 946.6 (petition for relief from *Gov. Code § 945.4* where public entity rejects late claim), no suit for money or damages may be brought against the public entity on a cause of action for which a claim is required to be presented until a written claim therefor has been presented to the public entity and has been acted on by the public entity, or has been deemed to have been rejected by the public entity [*Gov. Code § 945.4*].

[b] Pleading Compliance With Gov. Code § 945.4

Satisfaction of the procedural prerequisite of filing a claim for damages against the public entity before bringing an action on the claim is an element of a contractor's cause of action against the public entity. The absence from a complaint of any allegation of the presentation of a written claim against the public entity forecloses that complaint from setting forth a cause of action against the public entity on any theory [*see Wilson v. People ex rel. Dept. of Public Works (1969) 271 Cal. App. 2d 665, 668, 76 Cal. Rptr. 906]* .

[3] Resolution of Claims Between Contractor and Local Agency of $375,000 or Less

[a] Presentment to Local Agency

Public works claims between a contractor and a local agency of $375,000 or less that arise from contracts entered into on or after January 1, 1991,must first be presented to the agency in writing, along with documentation necessary to substantiate the claim, on or before the final payment date [*Pub. Contract Code §§ 20104(a)(1), (d), 20104.2(a)*]. This procedure should be followed before the claimant files a claim under the general claim provisions [*see Pub. Contract Code § 20104.2(e)*; *see also Gov. Code §§ 900-935.7*].

For these purposes, a "claim" is a separate demand by a contractor for any of the following: (1) a time extension; (2) payment of money or damages arising from work done by, or on behalf of, the contractor pursuant to the contract and payment of which is not otherwise expressly provided for, or the claimant is not otherwise entitled to; or (3) an amount the payment of which is disputed by the local agency [*Pub. Contract Code § 20104(b)(2)*]. This claim procedure does not apply to tort claims [*Pub. Contract Code § 20104.2(f)*], or when the agency has elected to resolve disputes by arbitration [*Pub. Contract Code § 20104(a)(2)*; *see Pub. Contract Code § 10240 et seq.* (arbitration statutes)].

Once the claim has been presented in writing, the local agency must respond to the claim, or may request additional documentation supporting the claim or relating to any defenses the agency may have against the contractor. The response or request must be in writing and made within a specified period of time, the length of which depends on whether the claim is greater or less than $50,000 [*see Pub. Contract Code § 20104.2(b), (c)*]. If the claim remains unresolved after this exchange, or if the agency fails to respond to the contractor's written claim, the contractor may notify the agency in writing to demand an informal conference to meet and confer to settle the disputed issues [*Pub. Contract Code § 20104.2(d)*]. If the claim, or any portion, remains in dispute after the meet and confer conference, the claimant may file a claim under the general claim provisions of the Government Code [*Pub. Contract Code § 20104.2(e)*; *see Gov. Code §§ 900-935.7*].

[b] Procedure Once Suit Is Filed

If a public works claim of $375,000 or less remains unresolved and a suit is filed, the court must submit the matter to nonbinding mediation within 60 days, but no earlier than 30 days, following the filing or responsive pleadings, unless both parties mutually stipulate to waive mediation [*Pub. Contract Code § 20104.4(a)*]. If the dispute remains unresolved after nonbinding mediation, the case must be submitted to judicial arbitration [*Pub. Contract Code §*

20104.4(b); *see Code Civ. Proc. § 1141.10 et seq.*; for complete discussion of judicial arbitration, *see* Ch. 36, *Judicial Arbitration*]. At the request of either party, the court may order any witnesses to participate in the mediation or arbitration process [*Pub. Contract Code § 20104.4(c)*].

Once the judicial arbitration is concluded, either party may request a trial de novo [*Code Civ. Proc. § 1141.20*]. However, if the requesting party does not obtain a more favorable judgment at trial, that party must pay the other party's attorney's fees arising from the trial [*Pub. Contract Code § 20104.4(b)(3)*] as well as costs and fees incurred after election of the trial de novo [*see Code Civ. Proc. § 1141.21*].

If the contractor receives an arbitration award or judgment, the local agency must also pay interest on the award or judgment at the legal rate from the date the suit was filed [*Pub. Contract Code § 20104.6(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityExhaustion of RemediesCivil ProcedureJusticiabilityExhaustion of RemediesGeneral OverviewCivil ProcedureJusticiabilityExhaustion of RemediesAdministrative RemediesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesJudgment InterestGeneral OverviewGovernmentsState & Territorial GovernmentsClaims By & AgainstPublic Contracts LawDispute ResolutionGeneral OverviewPublic Contracts LawDispute ResolutionArbitration & Mediation

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§ 481.26 Contractual Waiver of Claims

Provisions in public works contracts with public entities that provide that acceptance of a payment otherwise due a contractor is a waiver of all claims against the public entity arising out of the work performed under the contract, or provisions that condition the right to payment on submission of a release by the contractor of all such claims, are against public policy, and are null and void. However, public entities are not prohibited from including and enforcing a contract provision which provides that the payment of undisputed contract amounts is contingent on the contractor furnishing the public entity with a release of all claims against the public entity arising by virtue of the public works contract related to those amounts. Disputed contract claims in stated amounts may be specifically excluded by the contractor from the operation of the release [*Pub. Contract Code § 7100*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsReleasesGovernmentsPublic ImprovementsGeneral OverviewGovernmentsState & Territorial GovernmentsClaims By & AgainstPublic Contracts LawContract ProvisionsGeneral OverviewPublic Contracts LawTerminationsWaiver

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42-481 California Forms of Pleading and Practice--Annotated § 481.27

§ 481.27 Liability of Public Entity for Fraudulent Concealment on Claims of Extra Work

If a contracting agency furnishes inaccurate project information, such as soil reports, as a basis for bids, it may be liable for damages on a breach of warranty theory. Generally, fraudulent concealment gives rise to an action in tort; however, such an action for misrepresentation against public agencies is barred by *Gov. Code § 818.8*. However, an action in contract for breach of warranty is proper. Thus, a public entity may be liable for a misrepresentation which constitutes such a breach of contract as to make the contractor unable to perform according to the contract provisions, or may be liable for furnishing misleading plans and specifications under the concept of a breach of an implied warranty of their correctness [*E. H. Morrill Co. v. State of California (1967) 65 Cal. 2d 787, 793, 56 Cal. Rptr. 479, 423 P.2d 551* ; *Salinas v. Souza & McCue Constr. Co. (1967) 66 Cal. 2d 217, 222, 57 Cal. Rptr. 337, 424 P.2d 921]* .

Generally, a cause of action for nondisclosure of material facts arises in at least three instances: (1) the defendant makes representations but does not disclose facts that materially qualify the facts disclosed, or that render the disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; and (3) the defendant actively conceals discovery from the plaintiff [*Warner Constr. Corp. v. City of Los Angeles (1970) 2 Cal. 3d 285, 294, 85 Cal. Rptr. 444, 466 P.2d 996]* .

A public entity is not liable for an imprudent or careless investigation on the part of the contractor, and a careless contractor cannot convert his or her own lack of diligence into a case of fraudulent concealment against the entity, on the theory that it was guilty of fraudulent concealment in not furnishing him or her with information that he or she made no effort to secure for himself or herself [*Weichmann Eng'rs v. California ex rel. Dep't of Public Works (1973) 31 Cal. App. 3d 741, 753, 107 Cal. Rptr. 529]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionBreach of WarrantyPublic Contracts LawBids & FormationGeneral OverviewReal Property LawNonmortgage LiensMechanics' LiensTortsBusiness TortsFraud & MisrepresentationNondisclosureGeneral Overview

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[Reserved]

§§ 481.28[Reserved]

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42-B California Forms of Pleading and Practice--Annotated Scope

Scope

NOTE:

SB 189, which was introduced in February 2009 as a two-year bill, would comprehensively revise, reorganize, and consolidate the law governing stop notices and payment bonds on public works projects in the Public Contract Code. The proposed legislation is the product of a recommendation of the California Law Revision Commission, which may be consulted at http://www.clrc.ca.gov/pub/Printed-Reports/REC-H821.pdf. The legislation would be operative January 1, 2011. If SB 189 is enacted, this chapter will be updated in a future release.

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42-481 California Forms of Pleading and Practice--Annotated § 481.40

§ 481.40 Governing Statutes

[1] In General

Stop notices for public works of improvement are governed by *Civ. Code §§ 3179-3214*. Definitions of terms used in these code provisions are contained in *Civ. Code §§ 3082-3106*. Except as otherwise provided in these provisions, the provisions of *Code Civ. Proc. § 307 et seq.* governing procedure in civil actions are applicable to, and constitute the rules of practice in, the proceedings mentioned in *Civ. Code §§ 3179-3214* governing stop notices for public works. The provisions of *Code Civ. Proc. §§ 307-1062a*, relative to new trials and appeals, except insofar as they are inconsistent with the provisions governing stop notices for public works or with rules adopted by the Judicial Council, apply to the proceedings mentioned in *Civ. Code §§ 3179-3214* governing stop notices for public works of improvement [*see Civ. Code § 3259*].

Although the statutes governing mechanics' liens do not apply to any public work [*see Gov. Code § 3109*], the mechanics' lien law, that is, that law governing the right to a mechanics' lien or stop notice in connection with a private work of improvement and the right to a stop notice in connection with a public work of improvement, is an integrated and harmonious scheme and applicable code sections must be construed together. In the absence of a specific, contrary legislative mandate, all rules applicable to statutory provisions governing both private and public works of improvement apply with equal effect to both [*Sunlight Elec. Supply Co.v. McKee (1964) 226 Cal. App. 2d 47, 50, 37 Cal. Rptr. 782* ; *see Hendrickson v. Bertelson (1934) 1 Cal. 2d 430, 432, 35 P.2d 318]* .

[2] Statutory Stop Notice Provisions Is Sole Remedy

The rights of all persons furnishing labor, services, equipment, or materials for any public work of improvement, with respect to any fund for payment of construction costs, are governed exclusively by *Civ. Code §§ 3179-3214* [*Civ. Code § 3264*]. No person may assert any legal or equitable right with respect to such fund, other than a right created by direct written contract between such person and the person holding the fund, except pursuant to the provisions of *Civ. Code §§ 3179-3214* [*Civ. Code § 3264*; *see Boyd & Losvesee Lumber Co. v. Western Pacific Financial Corp. (1975) 44 Cal. App. 3d 460, 465, 118 Cal. Rptr. 699]* .

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§ 481.41 Definitions

The definitions set forth below govern the construction of the stop notice provisions for public works of improvement unless the context otherwise requires a different construction [*Civ. Code § 3082*].

[1] Claimant

A claimant is any person entitled to record a claim of lien, to give a stop notice in connection with any work of improvement, or to recover on any payment bond, or any combination of the foregoing [*Civ. Code § 3085*].

[2] Public Work

A public work is any work of improvement contracted for by a public entity [*Civ. Code § 3100*].

[3] Public Entity

A public entity includes the state, Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state [*Civ. Code § 3099*].

[4] Work of Improvement

A work of improvement includes, but is not restricted to, the construction, alteration, addition to, or repair, in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, or road, the seeding, sodding, or planting of any lot or tract of land for landscaping purposes, the filling, leveling, or grading of any lot or tract of land, the demolition of buildings, and the removal of buildings. Except as otherwise provided, a work of improvement includes the entire structure or scheme of improvement as a whole [*Civ. Code § 3106*].

[5] Contract

A contract is an agreement between an owner (public entity) and any original contractor providing for the work of

improvement or any part thereof [*Civ. Code § 3088*].

[6] Original Contractor

An original contractor is any contractor who has a direct contractual relationship with the owner [*Civ. Code § 3095*].

[7] Laborer

A laborer is any person who, acting as an employee, performs labor or bestows skill or other necessary services on any work of improvement [*Civ. Code § 3089(a)*].

"Laborer" also includes any person or entity, including an express trust fund [*see Civ. Code § 3111*], to whom a portion of the compensation of a laborer, as defined in *Civ. Code § 3089(a)*, is paid by agreement with that laborer or the laborer's collective bargaining agent. To the extent that such a person or entity has standing to maintain a direct legal action to collect any portion of compensation owed for a laborer, that person or entity has standing to enforce any rights under the mechanics' lien law to the same extent as the laborer. The intent of this statutory provision is to give effect to the public policy in favor of protecting laborers' entire compensation on works of improvement, regardless of the form in which that compensation is to be paid [*Civ. Code § 3089(b)*].

[8] Materialman

A materialman is any person who furnishes materials or supplies to be used or consumed in any work of improvement [*Civ. Code § 3090*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsGeneral OverviewPublic Contracts LawBids & FormationSubcontracts & SubcontractorsSurety BondsReal Property LawNonmortgage LiensMechanics' Liens

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42-481 California Forms of Pleading and Practice--Annotated § 481.42

§ 481.42 Public Stop Notice Provisions

[1] Construction

The provisions governing the mechanics' lien law, including the provisions governing stop notice for public works of improvement, are remedial in character, and are to be liberally construed in their entirety with a view to effect their objects and to promote justice [*Sunlight Elec. Supply Co. v. McKee (1964) 226 Cal. App. 2d 47, 50, 37 Cal. Rptr. 782* ; *see Hendrickson v. Bertelson (1934) 1 Cal. 2d 430, 432, 35 P.2d 318]* .

[2] Purpose

There can be no mechanics' or materialmen's lien for labor or supplies on property belonging to the public and used for public purposes [*SunlightElec. Supply Co. v. McKee (1964) 226 Cal. App. 2d 47, 50, 37 Cal. Rptr. 782* ; *see Civ. Code § 3109*]. That is, a claimant who would otherwise be entitled to a charge on a work of improvement to which the claimant has supplied labor or materials as security for the obligation owed to him or her by the prime or original contractor does not have such security in the case of labor or materials furnished to a public work of improvement [*see Mercantile Collection Bureau v. Roach (1961) 195 Cal. App. 2d 355, 357, 15 Cal. Rptr. 710]* . Accordingly, in addition to other procedures generally available for the enforcement of contracts, the Legislature has provided the special remedy of the stop notice procedure without lien rights for intercepting funds due from a public agency to a contractor both to protect the interest of those to whom the prime or original contractor may incur debts in connection with a public works project and to protect both the public and the public property from the serious, adverse effects which would result from permiting liens on such property [*see Pacific Employers Ins. Co. v. California (1970) 91 Cal. Rptr. 273, 477 P.2d 129* ; *Jasper Constr., Inc. v. University Casework Sys., Inc. (1974) 39 Cal. App. 3d 582, 584, 114 Cal. Rptr. 143* ; *Sunlight Elec. Supply Co. v. McKee (1964) 226 Cal. App. 2d 47, 50, 37 Cal. Rptr. 782]* .

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§ 481.43 Nature of Remedy

Instead of being a charge on a public work of improvement, the stop notice for public works constitutes a lien on the property or earnings of the contractor held by the public agency [*United States Fid. & Guar. Co. v. Oak Grove Union School Dist. (1962) 205 Cal. App. 2d 226, 231, 22 Cal. Rptr. 907]* . Accordingly, on the receipt of a stop notice in connection with a public works project, the public entity must withhold from the original contractor, or from any person acting under his or her authority, money or bonds (if bonds are to be issued in payment for the work of improvement) due or to become due to the contractor in an amount sufficient to answer the claim stated in the stop notice and to provide for the entity's reasonable cost of any resulting litigation [*Civ. Code § 3186*]. Thus, when the notice is filed, the claimant immediately has a right against the earnings of the contractor held by the public agency, and thereby, in effect, imposes a trust obligation on the public agency [*United States Fid. & Guar. Co. v. Oak Grove Union School Dist. (1962) 205 Cal. App. 2d 226, 231, 22 Cal. Rptr. 907]* .

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§ 481.44 Stop Notice Remedy Is Cumulative

The right of a claimant to the use of the stop notice procedure for public works is cumulative both to the remedies generally available for the enforcement of contracts and to other remedies provided by the Legislature to ensure the payment of claims of laborers and materialmen on public works projects [*see Jasper Constr., Inc. v. University Casework Sys., Inc.(1974) 39 Cal. App. 3d 582, 584, 114 Cal. Rptr. 143* ; *George F. Kennedy, Inc. v. Miles & Sons Constr. Div. (1970) 5 Cal. App. 3d 516, 522, 85 Cal. Rptr. 298]* . Thus, in his or her action to enforce a stop notice, the claimant may, simultaneously with or independently of the action, seek a personal judgment against the contractor or subcontractor with whom the claimant contracted for the work performed on the public project [*see George F. Kennedy, Inc. v. Miles & Sons Constr. Div. (1970) 5 Cal. App. 3d 516, 522, 85 Cal. Rptr. 298]* , and, in addition, may seek to enforce the obligation under the public works contractor's payment bond under *Civ. Code §§ 3247-3252* and *Pub. Contract Code § 7103* [*see Consolidated Elec. Distributors, Inc. v. Kirkham, Chaon & Kirkham, Inc. (1971) 18 Cal. App. 3d 54, 61, 95 Cal. Rptr. 673* ; for discussion and forms for use in an action on a contractor's payment bond, see *§§ 481.70 et seq., 481.360* et seq.].

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§ 481.45 Person Entitled to Serve Stop Notice

[1] In General

Except for an original contractor, that is, any contractor who has a direct contractual relationship with the public agency [*see Civ. Code § 3095*], any person mentioned in *Civ. Code § 3110* or *3112* (persons entitled to mechanics' liens), or mentioned in *Pub. Contract Code § 4107.7* (hazardous waste hauler), or furnishing provisions, provender, or other supplies, may serve a stop notice on the public entity responsible for the public work in accordance with the provision of *Civ. Code § 3179 et seq.* governing stop notices [*Civ. Code § 3181*]. Statutory and decisional authority that prescribe the prerequisites for entitlement to a mechanics' lien on a private work of improvement generally govern the right to a stop notice in connection with public works of improvement [*see George F. Kennedy, Inc. v. Miles & Sons Constr. Div. (1970) 5 Cal. App. 3d 516, 520-522, 85 Cal. Rptr. 298]* . For a complete discussion of these requirements, see Ch. 361, *Mechanics' Liens* .

[2] Works of Improvement

Generally, the persons who may avail themselves of the stop notice procedure for public works of improvement include mechanics, materialmen, contractors, subcontractors, lessors of equipment, artisans, architects, registered engineers, licensed land surveyors, machinists, builders, teamsters, draymen, and all persons and laborers of every class performing labor or bestowing skill or other necessary services on, or furnishing materials or leasing equipment to be used or consumed in, or furnishing appliances, teams, or power contributing to the work of improvement [*Civ. Code §§ 3110, 3181*].

[3] Site Improvements

Any stop notice claimant who, at the instance or request of the public agency (or any person acting by the agency's authority or under the agency, as contractor or otherwise), has made any site improvement may serve a stop notice as provided in *Civ. Code § 3181* [*see Civ. Code §§ 3112, 3181*]. A site improvement includes the demolishing or removing of improvements, trees, or other vegetation located thereon, drilling test holes, grading, filling, or otherwise improving of any lot or tract of land or the street, highway, or sidewalk in front of or adjoining any lot or tract of land, constructing

or installing sewers or other public utilities therein, constructing any areas, vaults, cellars, or rooms under such sidewalks, or making any improvements thereon [*Civ. Code § 3102*].

[4] Union Trust Fund Liens

For purposes of the mechanics' lien law, an express trust fund to which a portion of a laborer's total compensation is to be paid pursuant to an applicable employment agreement or a collective bargaining agreement for the provision of benefits (including, but not limited to, employer payments for health and welfare, pension, vacation, travel time, subsistence pay, apprenticeship or other training programs, specified worker protection and assistance programs or committees, industry advancement and collective bargaining agreement administrative fees, and similar purposes [*see Lab. Code § 1773.1*]) is entitled to assert the same rights and claims as laborers performing labor on, or bestowing skill or other necessary services on, a work of improvement, to the extent of the compensation agreed to be paid to that express trust fund for labor on that improvement only [*Civ. Code § 3111*]. As amended in 1999 [*see* Stats. 1999, ch. 795, § 7], *Civ. Code § 3111* is intended to reinstate the ability of laborers and employee trust funds to use mechanics' liens and creditor priorities to obtain payment of unpaid wages and fringe benefits. The amendment was drafted in an attempt to avoid having state remedies for collection of those wages and fringe benefits be preempted by the federal Employee Retirement Income Security Act of 1974 (ERISA) [24 U.S.C. § 1001 et seq.]. Prior to this amendment, the California Supreme Court held that *Civ. Code § 3111* was preempted by ERISA [*see Carpenters So. Cal. Admin. Corp. v. El Capitan Development Co. (1991) 53 Cal. 3d 1041, 1049-1054, 282 Cal. Rptr. 277, 811 P.2d 296]* .

[5] Hazardous Waste Removal

A subcontractor registered as a hazardous waste hauler pursuant to *Health & Safety Code § 25163* is entitled to serve a stop notice on a public entity as provided in *Civ. Code § 3181* when the contractor who contracted with the public entity for the investigation, removal or remedial action, or disposal of hazardous waste fails to pay the subcontractor within 10 days after the investigation, removal or remedial action, or disposal is completed [*Civ. Code § 3181*; *see Pub. Contract Code § 4107.7*].

[6] Furnisher of Labor or Materials

[a] In General

A person furnishing labor or materials used in, on, or about the performance of public work may avail himself or herself of the stop notice procedure, providing the work or material is furnished at the instance of the prime or original contractor or a subcontractor having charge, in whole or in part, of the project [*Theisen v. Los Angeles County (1960) 54 Cal. 2d 170, 177, 5 Cal. Rptr. 161, 352 P.2d 529* ; *George F. Kennedy, Inc. v. Miles & Sons Constr. Div. (1970) 5 Cal. App. 3d 516, 520, 85 Cal. Rptr. 298* (relying on language contained in former Code Civ. Proc. § 1192.1, *now see Civ. Code § 3110*].

Thus, when materials furnished to a subcontractor become a part of the subcontractor's general equipment and are of such a nature that, in the usual course of events, they will not be entirely used and consumed on the job for which they were purchased, a claim therefor is not subject to the statutory stop notice procedure. Similarly, when only a part of the material furnished to a subcontractor is used in the performance of the latter's contract, the remainder being diverted to other uses, and it is impossible to estimate what part was used in performance of the contract, a claim therefor is not within the scope of the statutory stop notice procedure [*George F. Kennedy, Inc. v. Miles & Sons Constr. Div. (1970) 5 Cal. App. 3d 516, 521, 85 Cal. Rptr. 298* (insufficient evidence that tires and tire services furnished by plaintiff were used up in highway project required reversal of judgment for plaintiff in action on stop notice)].

[b] Contractor and Materialman Distinguished

No stop notice rights may be conferred on a person furnishing labor or materials for a public project unless the labor or

materials is furnished at the instance of a contractor or subcontractor having charge, in whole or in part, of the project. Thus, the stop notice procedure applicable to public work is not available to those whose relationship to the work is only that of vendor of materials to a materialman [*Theisen v. Los Angeles County (1960) 54 Cal. 2d 170, 177, 5 Cal. Rptr. 161, 352 P.2d 529]* .

The essential feature that establishes one as a subcontractor rather than as a materialman and that the materialman must show to be entitled to enforce a stop notice [*see George F. Kennedy, Inc. v. Miles & Sons Constr. Div. (1970) 5 Cal. App. 3d 516, 520-521, 85 Cal. Rptr. 298]* , is that in the course of performance of the prime or original contract the person to whom the materials were furnished constructed at the job site or elsewhere, a definite, substantial part of the work of improvement in accordance with the plans and specifications of the contract [*Theisen v. Los Angeles County (1960) 54 Cal. 2d 170, 183, 5 Cal. Rptr. 161, 352 P.2d 529]* . Under this definition, it is sufficient that a person perform an important or material part of the total work of improvement in order to perform a substantial part of the work [*George F. Kennedy, Inc. v. Miles & Sons Constr. Div. (1970) 5 Cal. App. 3d 516, 520, 85 Cal. Rptr. 298* ; *see Piping Specialties Co. v. Kentile, Inc. (1964) 229 Cal. App. 2d 586, 588-589, 40 Cal. Rptr. 537]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawHazardous Wastes & Toxic SubstancesHazardous Materials Transportation Safety & Security Reauthorization ActGeneral OverviewGovernmentsPublic ImprovementsGeneral OverviewLabor & Employment LawCollective Bargaining & Labor RelationsGeneral OverviewPublic Contracts LawBids & FormationSubcontracts & SubcontractorsGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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§ 481.46 Duty to Withhold Money or Bonds Due or to Become Due

[1] Duty Measured by Extent of Liability of Public Entity

On receipt of the stop notice, the public entity must withhold money or bonds, as provided in *Civ. Code § 3186*, either that are due or that are to become due [*see Civ. Code § 3186*]. The provisions governing stop notices for public works do not prohibit the payment of any money or bonds to the original contractor or to his or her assignee unless a stop notice is on file before the disbursing officer has actually surrendered possession of the warrant, check, bonds, or money [*Civ. Code § 3187(a)*].

Because the public entity must withhold money or bonds that are due or to become due, the extent of the public entity's liability to the stop notice claimant after a stop notice has been served is measured by the extent of the public entity's liability to the original contractor [*Dorris v. Alturas School Dist. (1914) 25 Cal. App. 30, 33, 142 P. 795* (decided under former Code Civ. Proc. § 1184; *now see Civ. Code § 3186*)]. That liability may be measured either by the terms of the contract between the public entity and the original contractor or by the terms of the various statutes governing public works contracts [*see Harsco Corp. v. Department of Public Works (1971) 21 Cal. App. 3d 272, 276-278, 98 Cal. Rptr. 337* ; *Dorris v. Alturas School Dist. (1914) 25 Cal. App. 30, 30-33, 142 P. 795]* . For example, when the original contractor abandons the project in breach of its contract with the public entity, the entity, by the terms of the contract, is obligated to pay the full contract price only on completion of the contract; and when the cost of completion is greater than the amount owing from the entity to the contractor, a stop notice claimant has no rights to those remaining funds in the hands of the public entity [*see Dorris v. Alturas School Dist. (1914) 25 Cal. App. 30, 33, 142 P. 795]* . Similarly, moneys withheld by a public entity pursuant to Pub. Contract Code § 1026 (mandatory retention by public entity of at least 10 percent of contract price until final acceptance and completion of project) are not subject to the claims of stop notices when the contractor has abandoned the project and the cost of completion exceeds the original contract price and consumes all of the retained funds [*Harsco Corp. v. Department of Public Works (1971) 21 Cal. App. 3d 272, 276-280, 98 Cal. Rptr. 337]* .

[2] Breach of Duty to Withhold

When a proper and timely stop notice has been served on a public entity, the entity is not permitted to exercise any

discretion concerning theamount to be withheld in response to the notice. Even when the original contractor in good faith contests the validity or amount of a stop notice claim, the full amount of the claim is withheld, subject to the provisions governing the amount that must be withheld (*see* cases in § 481.111[1]) and pending the filing of a surety bond under *Civ. Code § 3196* (*see § 481.50*) or the commencement of summary proceedings to determine the validity of the stop notice or the amount of claim stated in the stop notice (*see § 481.51*) [*see Jasper Constr., Inc. v. University Casework Sys., Inc. (1974) 39 Cal. App. 3d 582, 585, 114 Cal. Rptr. 143]* .

When the public entity ignores the stop notice, or fails to withhold the amount that is required to be withheld, an action in equity lies by stop notice claimants injured thereby against the public entity [*see United States Fid. & Guar. Co. v. Oak Grove Union School Dist. (1962) 205 Cal. App. 2d 226, 231, 22 Cal. Rptr. 907]* . Moreover, when the public individuals served with the stop notice willfully disregard their duty to withhold sufficient funds, they are personally liable to the stop notice claimants injured thereby [*see United States Fid. & Guar. Co. v. Oak Grove Union School Dist. (1962) 205 Cal. App. 2d 226, 230, 22 Cal. Rptr. 907* ; *L. W. Blinn Co. v. Pioneer Drainage Dist. (1920) 50 Cal. App. 364, 370-371, 195 P. 750* (decided under former Code Civ. Proc. § 1184, which required "owner" to withhold money in action involving drainage district)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityGeneral OverviewGovernmentsPublic ImprovementsFinancingPublic Contracts LawPerformanceInspection & Acceptance of Goods & ServicesReal Property LawNonmortgage LiensMechanics' Liens

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42-481 California Forms of Pleading and Practice--Annotated § 481.47

§ 481.47 Amount Required to Be Withheld

[1] Claim and Costs

The amount the public entity must withhold on receipt of a stop notice is an amount sufficient to answer the claim stated in the stop notice and to provide for the reasonable cost incurred by the entity in any resulting litigation [*Civ. Code § 3186*]. The public entity is permitted to pay the original contractor or his or her assignee any money due the contractor or assignee in excess of an amount sufficient to answer the total amount of the claims stated in stop notices on file at the time of the payment plus such interest and court costs as might be reasonably anticipated in connection with the claims [*Civ. Code § 3187*].

[2] Amount Permitted to Be Claimed in Stop Notice

Although no statute expressly defines the amount that may be claimed in a stop notice, that amount may be determined by analogy to *Civ. Code § 3123* regulating similar protection afforded to suppliers under the mechanics' lien law [*University Casework Sys., Inc. v. Superior Court (1974) 41 Cal. App. 3d 263, 266, 115 Cal. Rptr. 836* ; *see Sunlight Elec. Supply Co. v. McKee (1964) 226 Cal. App. 2d 47, 50, 37 Cal. Rptr. 782]* . *Civ. Code § 3123* provides that the amount of lien that may be claimed by a mechanics' lien claimant may be either (1) the reasonable value of the labor, services, equipment, or materials furnished or (2) for the price agreed on by the claimant and the person with whom the claimant contracted, whichever is less. Thus, it would seem that the stop notice claimant is similarly limited to claiming in his or her stop notice either the reasonable value of the labor, services, equipment, or materials furnished or the contract price, whichever is less [*see University Casework Sys., Inc. v. Superior Court (1974) 41 Cal. App. 3d 263, 266, 115 Cal. Rptr. 836]* . When the labor, services, equipment, or materials furnished by the claimant is less than that specified in the contract, the reasonable value of the labor, service, equipment, or materials furnished is limited to a proportion of the contract price reflecting the amount of progress made toward the completion of the work [*University Casework Sys., Inc. v. Superior Court (1974) 41 Cal. App. 3d 263, 266-267, 115 Cal. Rptr. 836]* .

Legal Topics:

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

Civil ProcedureEquityGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewGovernmentsPublic ImprovementsFinancingReal Property LawNonmortgage LiensMechanics' Liens

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§ 481.48 Priorities of Claims to Withheld Funds or Garnishment

[1] Assignment of Contract

No assignment by the original contractor of any of the money due or to become due to him or her under the contract, or for "extras" in connection therewith, whether made before or after the service of a stop notice, takes priority over a stop notice for public works of improvement and such assignment has no effect on the rights of the stop notice claimants [*Civ. Code § 3193*]. Any garnishment of the money by any creditor of the original contract pursuant to *Code Civ. Proc. § 708.710 et seq.*, and any statutory liens thereon, are subordinate to the rights of all stop notice claimants [*Civ. Code § 3193*].

[2] Insufficient Funds to Satisfy Claims

[a] Distribution

If the money withheld pursuant to stop notices is insufficient to pay in full all of the valid claims stated in such notices, the money must be distributed among the stop notice claimants in the same ratio that their respective claims bear to the aggregate of such valid claims, without regard to the order of time in which their respective notices may have been served or their respective actions, if any have been commenced [*Civ. Code § 3190*].

However, the stop notice claimant may recover from the contractor or his or her sureties any deficit that may remain unpaid after the pro rata distribution in an action on the contractor's payment bond for public work as provided in *Civ. Code §§ 3247-3252* [*Pub. Contract Code § 7103*; *see Civ. Code § 3191*].

[b] Forfeiture of Right to Pro Rata Distribution

Any person who willfully gives a false stop notice to the public entity or who willfully includes in his or her notice labor, services, equipment, ormaterials not furnished for the work of improvement with respect to which the notice is given, forfeits all right to participate in the pro rata distribution of money or bonds withheld [*Civ. Code § 3192*].

A public entity is liable for interest on the amount withheld, commencing 60 days after the notice of claim, if the entity admits that the amount is owed [*Westinghouse Electric Corp. v. County of Los Angeles (1982) 129 Cal. App. 3d 771, 777-780, 181 Cal. Rptr. 332* ; *see Gov. Code § 980*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsFinancingGovernmentsState & Territorial GovernmentsClaims By & AgainstPublic Contracts LawPerformanceAssignment & NovationReal Property LawNonmortgage LiensMechanics' Liens

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§ 481.49 Enforcement of Stop Notice Rights

[1] Prerequisites to Entitlement to Enforcement

A claimant is entitled to enforce a stop notice only if he or she has complied with each of the following conditions: (1) the claimant has given the preliminary 20-day notice (public work) in accordance with *Civ. Code § 3098* if required by that section (for an outline of the requirements for serving a preliminary 20-day notice (public work) and when the notice must be served, *see* the Procedural Checklists in §§ *481.170-481.174*); and (2) the claimant has filed his or her stop notice as defined in *Civ. Code § 3103* and in accordance with *Civ. Code § 3184* specifying the time limit for effective service of a stop notice (for an outline of the requirements relating to the preparation and service of a stop notice, *see* the Procedural Checklists in §§ *481.190, 481.191*) [*Civ. Code § 3183*].

[2] Action to Enforce Stop Notice

An action against the original contractor and the public entity to enforce payment of the claim stated in the stop notice may be commenced at any time after 10 days from the date of the service of the stop notice on the public entity and must be commenced not later than 90 days following the expiration of the period within which stop notices must be filed as provided in *Civ. Code § 3184* [*Civ. Code § 3210*]. For an outline of the procedures that must be followed in an action to enforce a stop notice claim, see the Procedural Checklists in §§ *481.270-481.277*. There is a split in authority as to whether the public agency may be estopped to rely on the statute of limitation. One court has held that a public agency could not be estopped [*A.J. Setting Co. v. Trustees of Cal. State University and Colleges (1981) 119 Cal. App. 3d 374, 382-384, 174 Cal. Rptr. 43]* . Another court has held that estoppel may be raised when the subcontractor filed a claim with the city, the city represented that it was looking into the claim, and the subcontractor could not recover from the contractor [*Structural Steel Fabricators, Inc. v. City of Orange (1991) 234 Cal. App. 3d 1206, 1211-1212, 286 Cal. Rptr. 24]* . This case was remanded to the trial court, which ruled that the subcontractor failed to prove estoppel; however, the trial court held that the subcontractor's stop notice enforcement action was timely filed nonetheless because the statute of limitations was equitably tolled while the subcontractor pursued its claim against the general contractor and a bonding company. The court of appeal affirmed, holding that the doctrine of equitable tolling can be applied to defeat a statute of limitations defense [*Structural Steel Fabricators, Inc. v. City of Orange (1995) 40 Cal. App. 4th 459, 464-467, 46 Cal. Rptr. 2d 867]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsEquitable EstoppelGovernmentsLegislationStatutes of LimitationsGovernmental EntitiesGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsPublic ImprovementsGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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§ 481.50 Bond to Release Withheld Funds

If the original contractor or subcontractor disputes the correctness, validity, or enforceability of any stop notice, the public entity may, in its discretion, permit the original contractor to file a bond, as provided in *Civ. Code § 3196*, with the public entity. On the filing of such a bond, the public entity may not withhold any money or bonds (if bonds are to be issued in payment for the work of improvement) from the original contractor on account of the stop notice. The surety or sureties on such bond are jointly and severally liable to the stop notice claimant with the surety or sureties on any original contractor's payment bond furnished pursuant to *Civ. Code §§ 3247-3252* [*Civ. Code § 3196*; for a discussion of such payment bonds, *see §§ 481.70 -481.76*]. For an outline of the procedures and other requirements for obtaining a bond for release of withheld funds, see the Procedural Checklists in §§ *481.210-481.216*.

A stop notice release bond is considered to be "given in an action or proceeding" for purposes of *Code Civ. Proc § 996.440(a)* (motion to enforce liability on bond without need for independent action) and thus may be enforced by the summary procedures set forth in the Bond and Undertaking Law [*Grade-Way Contruction Co. v. Golden Eagle Ins. Co. (1993) 13 Cal. App. 4th 826, 830-835, 16 Cal. Rptr. 2d 649* ; *see Code Civ. Proc. § 995.010 et seq.*]. The summary enforcement procedure provides for a motion made after entry of final judgment in the action in which the bond is given. Judgment must be entered against the surety unless the surety files affidavits showing a triable issue of fact [*see Code Civ. Proc. § 996.440*].

For a discussion and forms regarding the summary procedure, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityReal Property LawNonmortgage LiensMechanics' Liens

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§ 481.51 Summary Proceedings by Original Contractor for Determination of Stop Notice Rights

[1] Commencement of Proceedings

If the original contractor asserts that (1) the claim on which the stop notice is based is not included within the types or classifications of claims referred to in *Civ. Code §§ 3196-3205* (release of stop notice), (2) the claimant is not one of the persons named in *Civ. Code § 3181* [*see § 481.45*], (3) the amount of the claim as specified in the stop notice is excessive, or (4) there is no basis in law for the claim as referred to andset out in the stop notice, he or she may have the question determined in a summary proceedings in accordance with the provisions of *Civ. Code §§ 3198-3205* [*Civ. Code § 3197*]. The original contractor may also commence such proceedings to decrease the amount of the bond after it has filed a surety bond with the public entity, as provided in *Civ. Code § 3196*, and obtained the release of money withheld pursuant to the claimant's stop notice [*see Jasper Constr., Inc. v. University Casework Sys., Inc. (1974) 39 Cal. App. 3d 582, 584, 114 Cal. Rptr. 143]* .

[2] Service of Affidavit on Public Entity

To contest the validity or amount of the claim, as provided in *Civ. Code § 3197*, the original contractor must serve an affidavit and a copy thereof on the public entity, as provided in *Civ. Code § 3198*, alleging the legal grounds on which he or she bases his or her claim and the facts in support thereof, and demanding the release of all or such portion of the money or bonds as is allegedly withheld improperly or in an excessive amount [*Civ. Code § 3198*].

[3] Service of Affidavit on Claimant

On receipt of the general contractor's affidavit, the public entity must serve on the claimant, as provided in *Civ. Code § 3199*, a copy of the affidavit and the demand for release together with a written notice stating that the public entity will release such money or bonds, or such portion of either as has been demanded, unless the claimant files with the public entity a counteraffidavit on or before the time designated in the notice [*Civ. Code § 3199*].

[4] Counteraffidavit by Claimant

If the claimant desires to contest the original contractor's affidavit and demand for release, he or she must, within the time allowed under *Civ. Code § 3198*, serve on the public entity a counteraffidavit alleging the details of his or her claim and rebutting the allegations of the original contractor's affidavit as provided in *Civ. Code § 3200*. If no such counteraffidavit is served on the public entity within the time allowed, then the public entity must forthwith release the money or bonds, or such portion thereof as has been demanded by such affidavit, without further notice to the claimant [*Civ. Code § 3200*]. For a more detailed outline of the procedures an original contractor must follow to obtain a release of withheld funds under *Civ. Code § 3200*, see the Procedural Checklists in §§ *481.230-481.233*.

The public entity is neither responsible for the validity of the affidavit or counteraffidavit nor liable in any manner for making such release [*Civ. Code § 3200*].

[5] Action for Declaration of Rights of Respective Parties

[a] Commencement of Action

If the claimant has served a counteraffidavit on the public entity, as provided in *Civ. Code § 3200*, together with proof of service, either the original contractor or the claimant may file an action in the appropriate superior court for a declaration of the respective rights of the parties [*Civ. Code § 3201*].

The Civil Code does not specify in what manner the action must be commenced. Although the manner in which an original contractor may dispute a stop notice under *Civ. Code §§ 3197-3205* is termed a "summary proceeding" in *Civ. Code § 3197* and, in addition *Civ. Code § 3202* (as discussed below) provides that the affidavit and counteraffidavit constitute the pleadings for the purpose of hearing the matter after either party has moved the court for such a hearing following the filing of the action, it would appear that *Civ. Code § 3201* nevertheless contemplates that the original contractor or claimant file a complaint, or perhaps a petition [*see § 481.337*], for a declaration of the rights of the respective parties. However, in lieu of a complaint or petition, local court practice has permitted counsel to file an order to show cause why a hearing should not be granted and why the court should not determine the respective rights of the parties to the funds withheld by the public agency pursuant to the claimant's stop notice.

An order to show cause, or even a noticed motion, is a possible alternative for counsel if an action has already been commenced by the claimant to enforce payment of the claim stated in the stop notice since, in such a case, the court would already have had jurisdiction over the parties to the summary proceeding. However, particularly if no action has been filed to enforce the claim stated in the stop notice, the filing of an order to show cause is not recommended since *Civ. Code § 3201* clearly requires an action be filed by the original contractor or claimant before either party may request a hearing on the matter. In any case, counsel should determine whether there is any particular local court practice before proceeding to file an action for declaration of the rights of the respective parties under *Civ. Code § 3201*.

[b] Hearing to Determine Rights of Respective Parties

After filing an action for a declaration of the respective rights of the parties under *Civ. Code § 3201*, either the original contractor or the claimant is entitled to a hearing by the court for the purpose of determining his or her rights under the affidavit and demand for release and the counteraffidavit. Such hearing must be granted by the court within 15 days from the date of making such motion, unless continued by the court for good cause. The party making the motion for hearing must give not less than five days'notice in writing of such hearing to the public entity and to the other party [*Civ. Code § 3201*].

At the hearing the original contractor has the burden of proof. The affidavit and counteraffidavit are filed with the court by the public entity and constitute the pleadings, subject to the power of the court to permit an amendment in the interest of justice. The affidavit of the original contractor is deemed controverted by the counteraffidavit, and both are received in evidence [*Civ. Code § 3202*].

[6] Right to Jury Trial

[a] Determination of Rights

Nothing contained in *Civ. Code §§ 3197-3205* governing summary proceedings for a declaration of rights of the respective parties concerning a claim stated in a stop notice may be construed to deprive any party of the right to a trial by jury in any case where such right is given by the California Constitution. However, a jury trial may be waived in the same manner as in the trial of an action [*Civ. Code § 3204*].

When the hearing is before the court sitting without a jury and no evidence other than the affidavit and counteraffidavit is offered, if the court is satisfied that sufficient facts are shown thereby, it may make its determination thereon [*Civ. Code § 3203*]. However, the manner in which the court makes it determination is not restricted in the same manner as it would be at the hearing on a motion for summary judgment. That is, the court is not foreclosed from making a conclusive determination of the rights of the parties when the allegations of the counteraffidavit effectively controvert the allegations of the affidavit of the original contractor. Instead, the court may order the hearing continued for the production of other evidence, oral or documentary, or the filing of other affidavits and counteraffidavits [*Civ. Code § 3203*]. In addition, local court practice may permit such evidence to be produced without requiring the matter be continued.

At the conclusion of the hearing, the court must make and enter its order determining whether or not the demand for release should be allowed. No findings are required [*Civ. Code § 3203*]. When the original contractor's affidavit asserts that the amount of the claim specified in the stop notice is excessive, the court may enter its order releasing such portion of the money or bonds withheld pursuant to the stop notice as it determines was withheld improperly or in an excessive amount [*see University Casework Sys., Inc. v. Superior Court (1974) 41 Cal. App. 3d 263, 265-267, 115 Cal. Rptr. 836]* .

[b] Appeal From Order

The statutes governing the summary proceedings to release or decrease the amount of claim demanded in the stop notice make no provision for appellate review of an order entered in such a summary proceeding, and such review is not permitted both because the order is not a judgment and because of the delays which necessarily accompany the prosecution of such an appeal [*see Jasper Constr., Inc. v. University Casework Sys., Inc. (1974) 39 Cal. App. 3d 582, 584, 586-587, 114 Cal. Rptr. 143]* . However, a writ of review, as provided in *Code Civ. Proc. §§ 1067-1077*, is an appropriate means to review such an order [*University Casework Sys., Inc. v. Superior Court (1974) 41 Cal. App. 3d 263, 265, 115 Cal. Rptr. 836]* .

[c] Effect of Order

An order determining whether or not the demand for release should be allowed, as provided in *Civ. Code § 3203*, also determines the right of the claimant to have the money or bonds further withheld by the public entity [*Civ. Code § 3203*]. However, no determination in the summary proceeding is res judicata with regard to any right of action by the claimant against either the principal or surety on any labor or material bond or with regard to any right of action against any party personally liable to the claimant [*Civ. Code § 3205*].

For a detailed outline of the summary proceedings to determine the rights of the parties to withheld funds, see the Procedural Checklists in §§ *481.250-481.253*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewEvidenceProcedural

ConsiderationsBurdens of ProofGeneral OverviewGovernmentsPublic ImprovementsFinancingGovernmentsState & Territorial GovernmentsClaims By & AgainstPublic Contracts LawBids & FormationSubcontracts & SubcontractorsSurety BondsReal Property LawNonmortgage LiensMechanics' Liens

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[Reserved]

§§ 481.52[Reserved]

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42-C California Forms of Pleading and Practice--Annotated Scope

Scope

NOTE:

SB 189, which was introduced in February 2009 as a two-year bill, would comprehensively revise, reorganize, and consolidate the law governing stop notices and payment bonds on public works projects in the Public Contract Code. The proposed legislation is the product of a recommendation of the California Law Revision Commission, which may be consulted at http://www.clrc.ca.gov/pub/Printed-Reports/REC-H821.pdf. The legislation would be operative January 1, 2011. If SB 189 is enacted, this chapter will be updated in a future release.

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42-481 California Forms of Pleading and Practice--Annotated § 481.70

§ 481.70 Governing Statutes

Payment bonds are defined in *Civ. Code § 3096*. Provisions relating to bonds in general are contained in *Civ. Code §§ 3225-3228*. Actions on payment bonds which are required from an original contractor on certain public works are governed by *Civ. Code §§ 3247-3252* and *Pub. Contract Code § 7103*.

These code provisions are expressly made applicable to the Municipal Improvement Act of 1913 set forth in *Sts. & Hy. Code § 10000 et seq.* [*see Pub. Contract Code § 20496*]. However, these sections are expressly made inapplicable to the Improvement Act of 1911 set forth in *Pub. Contract Code § 20457 et seq.* [*see Pub. Contract Code § 20461*]. The provisions of the Improvement Act of 1911 for a labor and material bond are contained in the Public Contracts Code [*see Pub. Contract Code §§ 20457-20464*]. This chapter does not cover these bond provisions and counsel is referred to *Pub. Contract Code § 20457 et seq.* for the statutory provisions for a labor and material bond under the Improvement Act of 1911.

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42-481 California Forms of Pleading and Practice--Annotated § 481.71

§ 481.71 Payment Bonds

[1] Defined

A payment bond is a bond with good and sufficient sureties that is conditioned for the payment in full of any claimant and which also by its terms is made to inure to the benefit of all such claimants so as to give these persons a right of action to recover on the bond [*Civ. Code § 3096*].

[2] Performance Bond Distinguished

A performance bond is an undertaking furnished by a contractor for the faithful performance of the contract by the contractor guaranteeing that the work undertaken will be done according to the terms of the contract [*see Gordy v. United Pacific Ins. Group (1966) 243 Cal. App. 2d 445, 448, 52 Cal. Rptr. 438]* . In contrast, the payment bond guarantees the satisfaction of the obligations of all claimants who have furnished labor or materials to a work of improvement [*see Civ. Code § 3096*; *Gordy v. United Pacific Ins. Group (1966) 243 Cal. App. 2d 445, 448-449, 52 Cal. Rptr. 438]* . If the bond by its terms guarantees performance by the contractor and payment by the contractor of all obligations for material, equipment, and labor required in the work contracted for, the bond is both a performance and a payment bond [*Gordy v. United Pacific Ins. Group (1966) 243 Cal. App. 2d 445, 448-449, 52 Cal. Rptr. 438]* .

[3] Construction

Any payment bond is construed most strongly against the surety and in favor of all persons for whose benefit the bond is given [*Civ. Code § 3226*].

[4] Sole Condition of Recovery

The sole condition of recovery on any payment bond for any claimant is that the claimant has not been paid the full amount of his or her claim [*Civ. Code § 3226*]. In substance, the surety on a payment bond guarantees the integrity and solvency of the contractor. The inefficiency of the claimant, such as the failure to require a contractor to authorize the claimant to retain an owner's check in payment of the contractor's indebtedness to him or her, is considered a risk

incident to the surety's undertaking and does not relieve him or her of liability [*Ferry v. Ohio Farmers Ins. Co. (1963) 211 Cal. App. 2d 651, 659, 27 Cal. Rptr. 471]* . Under no circumstances is a surety released from liability to a claimant by reason of a breach of contract between the owner and original contractor [*Civ. Code § 3226*].

[5] Exoneration or Release of Sureties

The surety or sureties on any payment bond may not be exonerated or released from the obligation of the bond by any of the following: (1) changes, alterations, or modifications in or of any contract, plans, specifications, or agreement pertaining or relating to the furnishing of labor, materials, or equipment therefor; (2) changes or modifications of any terms of payment or extension of the time for any payment pertaining or relating to any scheme or work of improvement; (3) a rescission or attempted rescission of any contract, agreement, or bond; (4) conditions precedent or subsequent in the bond attempting to limit the right of recovery of claimants otherwise entitled to recover under any contract, agreement, or bond; and (5) any fraud practiced by any person other than the claimant seeking to recover on the bond where the bond is given for the benefit of the claimants [*Civ. Code § 3225*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsFinancingPublic Contracts LawBids & FormationSubcontracts & SubcontractorsSurety Bonds

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42-481 California Forms of Pleading and Practice--Annotated § 481.72

§ 481.72 When Payment Bond Required

Every original contractor to whom a public works contract in excess of $25,000 is awarded by a public entity, except as provided in *Pub. Contract Code § 7103(d)* (discussed *below*), must file a bond with the officer or public entity by whom the contract was awarded [*Civ. Code § 3247(a)*]. The bond must be in a sum not less than 100 percent of the total amount payable under the terms of the contract [*Civ. Code § 3248(a)*]. The bond must be executed by an admitted surety insurer [*Code Civ. Proc. § 995.311(a)*]. The public agency approving the bond has a duty to verify the admitted surety status of the party executing the bond. The agency may fulfill this duty by either [*Code Civ. Proc. § 995.311(b)*]:

- Printing out information from the Department of Insurance website confirming that the surety is an admitted surety insurer and attaching that information to the bond; or

- Obtaining a certificate from the county clerk confirming that the surety is an admitted insurer and attaching the certificate to the bond.

The bond must provide that if the contractor or his or her subcontractor fails to pay any of the persons named in *Civ. Code § 3181* (persons entitled to serve stop notices) or amounts due under the Unemployment Insurance Code with respect to work or labor performed under the contract, the sureties will pay for the same to the extent specified in the bond and, if suit is brought on the bond, a reasonable attorney's fee to be fixed by the court [*Civ. Code § 3248(b)*].

Every original contractor to whom a public works contract in excess of $25,000 is awarded by a state entity is also required to file a bond with the officer or public entity by whom the contract was awarded. The bond must be in a sum not less than 100 percent of the total amount payable by the terms of the contract [*Pub. Contract Code § 7103(a)*]. In this context, "state entity" means every state office, department, division, bureau, board, or commission, but does not include the Legislature, the courts, any agency in the judicial branch of government, or the University of California. All other public entities are governed by *Civ. Code § 3247* [*Pub. Contract Code § 7103(d)*].

The bond must be approved by the officer or body or state entity by whom the contract was awarded. Before approving the bond, the public entity must determine that the surety is a sufficient admitted surety insurer; a public entity that fails

to investigate may be liable for breach of a mandatory duty [*Walt Rankin & Associates, Inc. v. City of Murietta (2000) 84 Cal. App. 4th 605, 624, 101 Cal. Rptr. 2d 48* ; *see Code Civ. Proc. § 995.311(a)*]. Additionally, the public or the state entity must state, in its call for bids for a contract, that a payment bond is required in the case of expenditures in excess of $25,000 [*Civ. Code § 3247(a)*; *Pub. Contract Code § 7103(a)*]. A payment bond filed and approved in accordance with *Civ. Code § 3247* or *Pub. Contract Code § 7103* is sufficient to enter on the performance of work undera duly authorized contract that supplements the contract for which the bond was filed, if the requirement of a new bond is waived by the public or the state entity [*Civ. Code § 3247(b)*; *Pub. Contract Code § 7103(b)*].

Approval of a payment bond must be carried out in conjunction with the provisions of the Bond and Undertaking Law [*Code Civ. Proc. § 995.010 et seq.*], which imposes a mandatory duty on the public entity to investigate the sufficiency of a proposed surety [*see Walt Rankin & Associates, Inc. v. City of Murrieta (2000) 84 Cal. App. 4th 605-622, 101 Cal. Rptr. 2d 48* (city was liable to unpaid subcontractor when city failed to investigate bogus surety that defaulted on payment bond); *see also Code Civ. Proc. § 995.311*].

Providers of architectural, engineering, and land surveying services pursuant to a contract with a public or a state entity for any public work are not original contractors within the meaning of *Civ. Code § 3247* and *Pub. Contract Code § 7103*, and are not required to post or file the payment bond required thereunder [*Civ. Code § 3247(c)*; *Pub. Contract Code § 7103(c)*]. Public utilities are not public entities within the meaning of *Civ. Code § 3247*, and therefore a contractor contracting with a public utility also is not required to post a public works bond [*Automatic Sprinkler Corp. v. Southern Cal. Edison (1989) 216 Cal. App. 3d 627, 631-633, 266 Cal. Rptr. 662]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsGeneral OverviewPublic Contracts LawBids & FormationSubcontracts & SubcontractorsSurety Bonds

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42-481 California Forms of Pleading and Practice--Annotated § 481.73

§ 481.73 Purpose of Requiring Payment Bond

The purpose of a public works contractor's payment bond is to give materialmen and laborers who furnish materials for and render services on public works an additional means of receiving compensation [*Consolidated Elec. Distributors, Inc. v. Kirkham, Chaon & Kirkham, Inc. (1971) 18 Cal. App. 3d 54, 60, 95 Cal. Rptr. 673]* . The provisions governing payment bonds for public works thus create a fund in lieu of the building or other work of improvement itself against which such materialmen and laborers might proceed as an additional and contemporaneous remedy to actions on their contracts or on claims stated in stop notices [*Powers Regulator Co. v. Seaboard Surety Co. (1962) 204 Cal. App. 2d 338, 345,22 Cal. Rptr. 373* ; *Pneucrete Corp. v. U.S. Fid. & G. Co. (1935) 7 Cal. App. 2d 733, 737, 46 P.2d 1000* ; *see Civ. Code § 3250*].

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42-481 California Forms of Pleading and Practice--Annotated § 481.74

§ 481.74 Action on Payment Bond

[1] In General

An action against the sureties on the payment bond may be brought by any claimant, or his or her assignee, at any time after the claimant has ceased his or her performance, and before the expiration of six months after the period in which stop notices may be filed under *Civ. Code § 3184* [*Civ. Code § 3249*]. Under *Civ. Code § 3184*, a stop notice must be served before the expiration of (1) 30 days after the recording of a notice of completion or notice of cessation, if such a notice is recorded, or (2) 90 days after completion or cessation, if no notice of completion or notice of cessation is recorded [*Civ. Code § 3184*; *see W.F. Hayward Co. v. Transamerica Ins. Co. (1993) 16 Cal. App. 4th 1101, 1106-1110, 20 Cal. Rptr. 2d 468* (30-day cessation of labor on public work of improvement constituted "completion" of project under *Civ. Code §§ 3086, 3184*, and commenced running of 90-day stop notice period)].

It should be noted, however, that the filing of a stop notice with the public entity is not a condition precedent to the maintenance of an action against the sureties on the payment bond [*Civ. Code § 3250*]. Moreover, the action on the payment bond is not in any sense based on the personal liability of the contractor. The bond creates a direct obligation and affords a right of action against the principal and the surety. Hence, because the action is based on the obligation of the bond, the bond provides a separate and distinct and statutory remedy which is enforceable without reference to any contract between the contractor and materialman or laborer [*Powers Regulator Co. v. Seaboard Surety Co. (1962) 204 Cal. App. 2d 338, 345, 22 Cal. Rptr. 373* ; *Pneucrete Corp. v. U.S. Fid. & G. Co. (1935) 7 Cal. App. 2d 733, 738, 46 P.2d 1000]* .

The prevailing party in the action on the payment bond may be awarded a reasonable attorney's fee to be taxed as costs [*Civ. Code § 3250*]. Costs may be awarded even if the prevailing party prevails on technical grounds, rather than on the merits [*Winick Corp. v. Safeco Insurance Co. (1986) 187 Cal. App. 3d 1502, 1507-1508, 232 Cal. Rptr. 479]* .

[2] Giving of Notice Is Prerequisite

To enforce a claim on any payment bond given in connection with a public work, a claimant who is not exempted by *Civ. Code § 3098(a)* must give either a 20-day preliminary notice as provided in *Civ. Code § 3098* or a post-completion

bond notice as provided in *Civ. Code § 3252(b)* [*Civ. Code § 3252*]. For a form and outline of requirements for giving a 20-day preliminary notice, see *§§ 481.170 -481.174* (checklist), 481.330 (form).For an outline of the requirements for giving a post-completion bond notice and other procedural requirements for bringing an action on a contractor's payment bond, see *§§ 481.290 -481.294*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewPublic Contracts LawBids & FormationSubcontracts & SubcontractorsSurety Bonds

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42-481 California Forms of Pleading and Practice--Annotated § 481.75

§ 481.75 Indemnification Agreement

When an original contractor obtains a payment bond, the bonding company generally requires him or her to sign an agreement providing that the contractor will indemnify the bonding company against any loss it might suffer. In many situations a bonding company will have to pay claims only if the original contractor is liable to the claimant. However, a material and labor bond is a primary and direct obligation to materialmen and laborers without regard to the original contract. Even though an original contractor owes nothing to suppliers of his or her subcontractor, the bonding company is obligated under the statutorily required bond to pay the claims of unpaid suppliers to a subcontractor. A release by a supplier to a subcontractor of any claims against the original contractor is not effective to release the bonding company [*see Bonded Prod. Co. v. R.C. Gallyon Constr. Co., Inc. (1964) 228 Cal. App. 2d 186, 190-191, 39 Cal. Rptr. 347* ; *Powers Regulator Co. v. Seaboard Surety Co. (1962) 204 Cal. App. 2d 338, 345-347, 22 Cal. Rptr. 373]* .

For the above reasons, an original contractor will assume, in practice, the obligation of paying claims of suppliers to his or her subcontractors unless these suppliers release all obligations of the bonding company to them before progress payments are made by the original contractor to his or her subcontractors.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsIndemnityPublic Contracts LawBids & FormationSubcontracts & SubcontractorsSurety Bonds

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42-481 California Forms of Pleading and Practice--Annotated § 481.76

§ 481.76 Right of Original Contractor to Require Subcontractor's Bond

The original contractor may require a subcontractor to furnish a bond to indemnify the original contractor for any loss he or she might sustain as a result of a subcontractor's default under *Civ. Code § 3248* [*Civ. Code § 3248(b)*]. If the prime contractor requests that the subcontractor furnish a bond or bonds issued by an admitted surety at the prime contractor's expense, with the prime contractor as obligee, and the subcontractor fails to do so, the prime contractor may reject the bid and substitute another subcontractor subject to *Pub. Contract Code § 4107* (substitution restrictions). The subcontractor must obtain a bond at its own expense only if the prime contractor in the written or published request for subbids specifies that the subcontractor must bear the expense, and clearly specifies the amount and requirements of the bond or bonds [*Pub. Contract Code § 4108*].

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42-481 California Forms of Pleading and Practice--Annotated §§ 481.77-481.89

[Reserved]

§§ 481.77[Reserved]

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A. Actions on Public Works Contracts

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§ 481.90 State Statutes

[1] Arbitration of Public Works Contracts

Arbitration of public works contract claims. *Pub. Contract Code §§ 22200, 22201*

[2] Competitive Bidding Requirements for Public Entities

Community college districts. Educ. Code § 20084

Exceptions to competitive bidding requirements for contracts let by trustees of California State University. *Pub. Contract Code § 10722*

City government. *Pub. Contract Code § 20163*

Reclamation districts. Pub. Contract Code § 20920 et seq., Water Code § 50907

[3] Contract Clauses

Provisions purporting to indemnify public agency by design professional against liability for claims against public agency are unenforceable, except for claims arising from design professional's negligence, recklessness, or willful misconduct. *Civ. Code § 2782.8(a)*

Provisions governing acceptance of payment due contractor as waiver of claims against public entity. *Pub. Contract Code § 7100*

Provision for payment of extra compensation to contractor for cost reduction changes in specifications for public

project. *Pub. Contract Code § 7101*

Provisions limiting contractee's liability for delay to extension of time do not preclude recovery of damages when contractee is responsible for delay and when delay is unreasonable under circumstances. *Pub. Contract Code § 7102*

Provisions required when contract of local public entity involves digging trenches or other excavations deeper than four feet below surface. *Pub. Contract Code § 7104*

Submission of noncollusion affidavit required in any bid for public works contract. *Pub. Contract Code § 7106*

[4] County Government

Bridges. *Pub. Contract Code § 20404*; *Sts. & Hy. Code §§ 1320, 1331*

Building construction. *Pub. Contract Code § 20125*

Highways. *Pub. Contract Code § 20392*

Harbor districts. Harb. & Nav. Code § 6680

Port districts. *Pub. Contract Code §§ 20750-20758*

River port districts. *Pub. Contract Code §§ 20760-20769*

Regional park districts. *Pub. Res. Code § 5594*

Sewerage districts. *Health & Safety Code § 5010*

State of *California. Pub. Contract Code § 10122*

Waterworks districts. *Pub. Contract Code § 20601*

[5] License Verification

Verification of licensure prior to award of contract by state agency or department. *Pub. Contract Code § 6100*

[6] Minority Business Enterprises

Actions to enjoin issuance of bonds or enforcement of contracts for professional bond services based on awarding department's failure to meet minority and women's business goals specified in *Gov. Code §§ 16850-16856* are prohibited. *Gov. Code § 16856*

Local agency may require minority hiring by lowest responsible bidder before awarding contract. *Pub. Contract Code § 2000*

Certification of minority and women business enterprises for purposes of awarding public contracts. *Pub. Contract Code § 2050 et seq.*

Department of Transportation is charged to develop program to regulate awarding of highway construction contracts funded solely by state funds to minority enterprises. *Sts. & Hy. Code § 94.3*

Civil penalties for acts relating to fraudulent procurement of certification as minority business enterprise. *Sts. & Hy. Code § 94.4*

[7] Payment

Maximum time, from receipt of undisputed invoice, for state agency to issue warrant for payment for performance under contract and avoid late payment penalties. *Gov. Code § 927.4*

[8] Relief From Active Negligence Void

Clause in construction contract with public agency that relieves agency from liability for its active negligence is void. *Civ. Code § 2782(b)*

[9] Relief of Bidders

Second lowest bidder is entitled to right of action against successful bidder convicted of violations for failure to provide workers' compensation unemployment insurance. *Lab. Code § 1750*, Pub. Contract Code §§ *19102, 20104.70*

Relief of bidders in case of bid submitted to state, Regents of University of California, county, city and county, city, district, public authority, public agency, or other political subdivision or public corporation of state. *Pub. Contract Code §§ 5100-5107*

[10] Resolution of Claims

General claims provisions. *Gov. Code § 900 et seq.*

Construction claims of $375,000 or less between contractor and local agency. *Pub. Contract Code §§ 20104-20104.6*

[11] Small Business Procurement and Contract Act

Preference for small businesses in certain construction and procurement contracts. *Gov. Code §§ 14836-14843*

Preference for small businesses owned by disabled veterans. *Gov. Code §§ 14838(f), 14838.6*

Penalty provisions. *Gov. Code §§ 14842, 14842.5*

[12] State Contract Act

Preparation of plans and specifications by the Department of Transportation before entering into contract. *Pub. Contract Code §§ 10120-10127*

Notices to bidders. *Pub. Contract Code §§ 10140-10141*

Requirements for bids in public works contracts. *Pub. Contract Code §§ 10160-10169*

Awards of public works contracts to bidders. *Pub. Contract Code §§ 10180-10185*

Requirements for contracts for public works. *Pub. Contract Code §§ 10220-10227*

Performance of public works contracts. *Pub. Contract Code §§ 10250-10264*

Penalties for willful violations of contract for public works. *Pub. Contract Code §§ 10280-10284*

[13] Subletting and Subcontracting Fair Practices Act

Purpose of Act. *Gov. Code § 4101*

Legal or equitable rights or remedies of original or substituted contract against prime contractor and of state against prime contractor are not limited or diminished by Act. *Gov. Code § 4103*

Requirement of listing of subcontractor in prime contractor's bid for work in amount in excess of one-half of one percent of total bid. *Gov. Code § 4104*

Extension of deadline for bid submission in case of material change to bid invitation later than 72 hours prior to bid closing. *Pub. Contract Code § 4104.5*

Consequences of failure to specify subcontractor. *Gov. Code §§ 4106, 4107(b), 4109*

Procedure by which public entity may consent to substitution of subcontractors. *Gov. Code §§ 4107, 4107.5*

Statutory penalties for violation of Act. *Gov. Code §§ 4110, 4111*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsIndemnityGovernmentsPublic ImprovementsBridges & RoadsPublic Contracts LawBids & FormationCompetitive ProposalsPublic Contracts LawBusiness Aids & AssistanceSmall BusinessesPublic Contracts LawDispute ResolutionArbitration & Mediation

California Forms of Pleading and Practice--Annotated

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Chapter 481 PUBLIC WORKS
PART III. RESEARCH GUIDE
A. Actions on Public Works Contracts

42-481 California Forms of Pleading and Practice--Annotated § 481.91

§ 481.91 Decisions

[1] Classification of License

Bus. & Prof. Code § 7059(b) allows agencies to specify that only designated license categories will be permitted to bid on project. *M&B Construction v. Yuba County Water Agency (1999) 68 Cal. App. 4th 1353, 1361, 81 Cal. Rptr. 2d 231*

[2] Compliance With Bidding Requirements

Project stabilization agreement entered into between airports commission and union trade council for airport expansion project, under which contractors were required to use union hiring hall for any new hires needed beyond their own core workforce and to pay union wages and benefits, was consistent with state and local competitive bidding law. *Associated Builders & Contractors, Inc. v. San Francisco Airports Com. (1999) 21 Cal. 4th 352, 365, 981 P.2d 499*

Competitive bidding required even though cost of public work is not to be paid out of public funds but rather from funds collected by person or company with whom or which public entity contracted for work performed. *East Bay Garbage Co. v. Washington Township Sanitation Co. (1959) 52 Cal. 2d 708, 713, 344 P.2d 289*

Lease of public land requires compliance with bidding requirements. *Boydston v. Napa Sanitation Dist. (1990) 222 Cal. App. 3d 1362, 1366-1368, 272 Cal. Rptr. 458*

Fact that no contract was involved in city public project did not permit city to avoid competitive bidding requirements when project otherwise met conditions of former *Gov. Code § 37902* (*now see Pub. Contract Code § 20162*). *Killeen v. San Bruno (1976) 56 Cal. App. 3d 479, 482, 128 Cal. Rptr. 760*

[3] Consideration of Bids by Awarding Authority

[a] Duty to Award Contract to Lowest Responsible Bidder

Pub. Contract Code § 10115 et seq., requiring state departments to award contracts to "lowest responsible bidder meeting or making good faith efforts to meet" minority, women, and disabled business enterprise goals, is invalid as unconstitutional violation of equal protection principles. *Monterey Mechanical Co. v. Wilson (9th Cir. 1997) 125 F.3d 702, 714-715* ; *Barlow v. Davis (1999) 72 Cal. App. 4th 1258, 1267, 85 Cal. Rptr. 2d 752*

Duty to award contract to lowest responsible bidder imposed by city charter not in conflict with subcontractor outreach program that required prime contractors to provide minority, women's, and other business enterprises equal opportunity to compete for and participate in performance of city contracts. *Domar Electric, Inc. v. City of Los Angeles (1994) 9 Cal. 4th 161, 173-174, 36 Cal. Rptr. 2d 521, 885 P.2d 934*

Contract must be awarded to lowest bidder unless it is found that he or she is not responsible, i.e., not qualified to do particular work under consideration. *Inglewood-L.A. County Civic Center Auth. v. Superior Court (1972) 7 Cal. 3d 861, 867, 103 Cal. Rptr. 689, 500 P.2d 601*

When public entity does not comply with requirement that contract be awarded to lowest responsible bidder, award must be set aside. *Inglewood-L.A. County Civic Center Auth. v. Superior Court (1972) 7 Cal. 3d 861, 870, 103 Cal. Rptr. 689, 500 P.2d 601*

Word "responsible" in context of statute requiring award to lowest responsible bidder does not refer solely to attribute of trustworthiness, but also refers to quality, fitness, and capacity of low bidder to perform proposed work satisfactorily. *Inglewood-L.A. County Civic Center Auth. v. Superior Court (1972) 7 Cal. 3d 861, 867, 103 Cal. Rptr. 689, 500 P.2d 601*

Although due process did require quasi-judicial proceeding prior to rejection of low monetary bidder as nonresponsible bidder, public entity was required to notify that bidder of any evidence reflecting on his or her responsibility received from others or adduced as result of independent investigation, afford him or her opportunity to rebut any adverse evidence, and permit him or her to present evidence that he or she was qualified to perform contract. *City of Inglewood-L.A. County Civic Center Auth. v. Superior Court (1972) 7 Cal. 3d 861, 871, 103 Cal. Rptr. 689, 500 P.2d 601*

City's subcontractor outreach program, which required evaluation of bidders' good faith in conducting outreach efforts with regard to minority and women-owned businesses, did not violate equal protection even though program referred to expected level of minority and women-owned business participation. *Domar Electric, Inc. v. City of Los Angeles (1995) 41 Cal. App. 4th 810, 825-827, 48 Cal. Rptr. 2d 822*

Failure of Legislature to enact explicit lowest bidder requirement in connection with construction projects of county water districts funded by authority of Revenue Bond Law of 1941, *Gov. Code § 54300 et seq.*, precludes courts from imposing such requirement. *Associated Builders & Contractors v. Contra Costa Water Dist. (1995) 37 Cal. App. 4th 466, 469-471, 43 Cal. Rptr. 2d 600*

Fact that bid was not signed on signature line did not preclude award of contract when bid was signed elsewhere and bond was signed. *Menefee v. County of Fresno (1985) 163 Cal. App. 3d 1175, 1178-1180, 210 Cal. Rptr. 99*

Public entity's promise in its solicitation of bids to award contract to lowest responsible bidder and bidder's reasonable and detrimental reliance on this promise permit bidder to bring action for breach of contract based on promissory estoppel when public entity did not award contract to lowest responsible bidder. *Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center Auth. (1974) 40 Cal. App. 3d 98, 104-105, 114 Cal. Rptr. 834*

Misaward of public works contract to one other than lowest responsible bidder constituted only abuse of discretion by awarding entity in determining identity of such bidder and therefore making of misaward came within discretionary immunity to tort liability established by *Gov. Code §§ 815, 815.2(b)*, and *820.2*. *Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center Auth. (1974) 40 Cal. App. 3d 98, 101, 114 Cal. Rptr. 834* ; *Rubino v. Lolli (1970) 10 Cal. App. 3d 1059, 1063-1064, 89 Cal. Rptr. 320*

Allegations in cause of action to effect that successful bidder and public entity conspired to make misaward of contract in question to one other than lowest responsible bidder was sufficient to constitute cause of action for conspiracy by unsuccessful bidder. *Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center Auth. (1974) 40 Cal. App. 3d 98, 106, 114 Cal. Rptr. 834*

[b] Rejection of Bids Not in Best Interest of Public

Mandamus was not permitted to lie to force award of contract to lowest bidder for printing form under advertisement for bids when advertisement statedthat board reserved right to reject any and all bids if public good so required. *Stanley-Taylor Co. v. Supervisors (1902) 135 Cal. 486, 488, 67 P. 783*

State's request for prototype did not create implied promise that it would award contract to lowest bidder because such implication would render right of rejection meaningless when prototype is found not to be in best interests of state. *Pacific Architects Collaborative v. State of California (1979) 100 Cal. App. 3d 110, 124, 166 Cal. Rptr. 184*

Competitive bidding statutes were not passed for benefit of bidders but for benefit and protection of public. *Universal By-Products, Inc. v. City of Modesto (1974) 43 Cal. App. 3d 145, 152, 117 Cal. Rptr. 525* ; *Rubino v. Lolli (1970) 10 Cal. App. 3d 1059, 1062, 89 Cal. Rptr. 320*

Until such time as bid is accepted, no contractual relationship exists between bidder and entity. *Universal By-Products, Inc. v. City of Modesto (1974) 43 Cal. App. 3d 145, 155, 117 Cal. Rptr. 525*

Public entity's implied representation of existing intent to consider bids in good faith does not imply promise that thereafter it would consider bids before rejecting them when public entity is permitted to reject any and all bids. *Universal By-Products, Inc. v. City of Modesto (1974) 43 Cal. App. 3d 145, 156, 117 Cal. Rptr. 525*

[c] Relief of Unsuccessful Bidder

Unsuccessful lowest responsible bidder may recover bid preparation costs, but may not recover lost profits, under theory of promissory estoppel. *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Auth. (2000) 23 Cal. 4th 305, 316, 96 Cal. Rptr. 2d 747, 1 P.3d 63*

Unsuccessful bidder who seeks to compel public agency to set aside award of contract to successful bidder on ground that agency had abused its discretion in making award has no legally cognizable cause or complaint, even if agency did err in exercising its discretion, if, after setting aside award, bidders would have no necessary right to rebid on competitive basis. *Old Town Dev. Corp. v. Urban Renewal Agency (1967) 249 Cal. App. 2d 313, 331-332, 57 Cal. Rptr. 426*

Awarding of contract by public official pursuant to specifications that are illegal and invalid and that fail to provide for full and fair competitive bidding, is abuse of discretion that may be corrected by mandamus. *Baldwin-Lima-Hamilton Corp. v. Superior Court (1962) 208 Cal. App. 2d 803, 823, 25 Cal. Rptr. 798*

[4] Failure to Comply With Competitive Bidding Requirements

Ordinarily, compliance with terms of statute requiring letting of certain contract by public agency such as municipal corporation or county by competitive bidding and advertising for bids is mandatory with respect to those contracts coming within terms of statute; contract made without compliance with statute is void and unenforceable because it is in excess of agency's power. *Miller v. Mckinnon (1942) 20 Cal. 2d 83, 87-88, 124 P.2d 34*

Persons dealing with public agency are presumed to know law with respect to requirement of competitive bidding and to act at their peril. *Miller v. McKinnon (1942) 20 Cal. 2d 83, 89, 124 P.2d 34*

Right of action exists to recover moneys paid to contractor for work and materials furnished public agency when they were furnished in contravention of statute requiring competitive bidding. *Miller v. McKinnon (1942) 20 Cal. 2d 83, 89, 124 P.2d 34*

Fact that public district or body has received benefit of labor and materials furnished under contract void by reason of failure of district or body to comply with competitive bidding statutes does not entitle contractor to recover on an action in quantum meruit. *Reams v. Cooley (1915) 171 Cal. 150, 151-157, 152 P. 293*

Because enabling legislation was silent as to competitive bidding requirements, local service authority for freeway emergencies authorized by *Sts. & Hy. Code § 2550* was not required to apply competitive bidding principles in awarding contract for emergency call box system; legislature's failure to specifically exempt service authorities from competitive bidding requirements did not indicate intent to subject them to these requirements. *San Diego Service Authority for Freeway Emergencies v. Superior Court (1988) 198 Cal. App. 3d 1466, 1468-1470, 244 Cal. Rptr. 440*

Neither doctrine of estoppel nor any other equitable principle may be invoked against governmental body when it would operate to defeat effective operation of policy adopted to protect public. *Paterson v. Board of Trustees (1958) 157 Cal. App. 2d 811, 819, 321 P.2d 825*

[5] Fair Practices Act

Fair Practices Act (*Pub. Contract Code § 4100 et seq.*) as addressed to efficient and economical supervision of public works projects and is not solely, or even primarily, for protection of private interests; purpose of act is to ensure that contracting authority has opportunity to investigate and approve any subcontractor who is proposed to work on project. *R.M. Sherman Co. v. W.R. Thomason, Inc. (1987) 191 Cal. App. 3d 559, 566, 236 Cal. Rptr. 577*

[6] Judicial Exceptions to Bidding Requirement

Use of own employees by municipality is not necessarily implied exception to competitive bidding requirements of former *Gov. Code § 37902* (*now see Pub. Contract Code § 20162*) (requirement of competitive bidding by city). *Killeen v. San Bruno (1976) 56 Cal. App. 3d 479, 483, 128 Cal. Rptr. 760*

[a] Contracts Relating to "Municipal Affairs"

State general bidding procedures does not bind chartered cities when subject matter of bid constitutes municipal affair; thus, award of contract for refreshment stands in city park, which is matter of municipal concern, is controlled by local rather than state legislation. *R & A Vending Services, Inc. v. City of Los Angeles (1985) 172 Cal. App. 3d 1188, 1192, 218 Cal. Rptr. 667*

Contract by city for repairs is "municipal affair" and thus is not subject to state law bidding requirements. *Piledrivers' Local Union v. City of Santa Monica (1984) 151 Cal. App. 3d 509, 512-514, 198 Cal. Rptr. 731*

Decision whether work for extension or development of city public utilities must be done by contract on competitive bidding or by city forces is municipal affair. *Smith v. Riverside (1973) 34 Cal. App. 3d 529, 537, 110 Cal. Rptr. 67*

Whether work for extension or development of city public utilities must be done by contract on competitive bidding or by city forces is municipal affair when municipal activity at issue is not distribution of electricity and water but mode chosen to build and extend distribution facilities. *Smith v. Riverside (1973) 34 Cal. App. 3d 529, 536-537, 110 Cal. Rptr. 67*

[b] Employment of Skilled Professionals

Management contractor who performs services and lends his or her experience and expertise in preparation of final plans, and who in this respect may be likened to engineer or architect, is permitted to perform these services procured without strict compliance with competitive bidding requirements. *Inglewood-L.A. County Civic Center Auth. v. Superior Court (1972) 7 Cal. 3d 861, 866, 103 Cal. Rptr. 689, 500 P.2d 601*

Employment of person who is highly and technically skilled in his or her science or profession is one that may properly be made without competitive bidding. *City & County of San Francisco v. Boyd (1941) 17 Cal. 2d 606, 620, 110 P.2d 1036* (civil engineer); *Cobb v. Pasadena City Bd. of Educ. (1955) 134 Cal. App. 2d 93, 95, 285 P.2d 41* (architect)

[c] Failure Generally to Serve Purposes of Bidding Statutes

County must comply with competitive bidding requirements when obligations of management contractor, who differs from traditional contractor in fact that he or she lends his or her experience and expertise in preparation of working drawings for public project, is sufficiently similar to obligations of contractor bidding on final working drawings. *Inglewood-L.A. County Civic Center Auth. v. Superior Court (1972) 7 Cal. 3d 861, 866, 103 Cal. Rptr. 689, 500 P.2d 601*

[d] Undesirability or Impossibility of Advertising for Bids

Exception to requirement of competitive bidding is founded on undesirability or impossibility of advertising for bids for particular work, such as when contractor who is awarded contract is only party capable of entering into particular agreement. *Kennedy v. Ross (1946) 28 Cal. 2d 569, 581, 170 P.2d 904* ; *Los Angeles Dredging Co. v. Long Beach (1930) 210 Cal. 348, 354, 355, 291 P. 839* ; *Riverside County v. Whitlock (1972) 22 Cal. App. 3d 863, 878, 99 Cal. Rptr. 710*

[7] Law Governing Construction of Public Contracts

[a] Interpretation Generally

No special rules govern interpretation of public contract simply because governmental body is party to contract. *M.F. Kemper Constr. Co. v. Los Angeles (1951) 37 Cal. 2d 696, 704, 235 P.2d 7*

Contract includes implied provisions necessary to effectuate intention of parties. *Tonkin Construction Co. v. County of Humboldt (1987) 188 Cal. App. 3d 828, 831, 233 Cal. Rptr. 587*

Contract between governmental body and private individual is ordinarily subject to same rules of construction as contract between private individuals. *Tonkin Construction Co. v. County of Humboldt (1987) 188 Cal. App. 3d 828, 831, 233 Cal. Rptr. 587* ; *Trimont Land Co. v. Truckee Sanitary District (1983) 145 Cal. App. 3d 330, 355, 193 Cal. Rptr. 568* ; *Hawley v. Orange County Flood Control Dist. (1963) 211 Cal. App. 2d 708, 713, 27 Cal. Rptr. 478* ; *Oberg v. Los Angeles (1955) 132 Cal. App. 2d 151, 158, 281 P.2d 591*

[b] Rules Governing Incorporation of Plans and Specifications

Absent contract provision explicitly disclaiming responsibility of public body for accuracy of contested information, general disclaimer of warranty was insufficient to absolve public body of responsibility for positive and material misrepresentations in plans, on which contractor had right to rely. *Tonkin Construction Co. v. County of Humboldt (1987) 188 Cal. App. 3d 828, 834, 233 Cal. Rptr. 587* ; *Wunderlich v. State of California (1967) 65 Cal. 2d 777, 783, 56 Cal. Rptr. 473, 423 P.2d 545*

Although contract must be construed with respect to plans and specifications incorporated by reference, plan of work is subsidiary to contract and latter is controlling in case of discrepancy; when language thereof will permit, specifications are to be construed so as to uphold validity of contract. *Oberg v. Los Angeles (1955) 132 Cal. App. 2d 151, 159, 281 P.2d 591*

When municipal contracts are required to be let on public bidding, proposals and specifications inviting such bids must be sufficiently detailed, definite, and precise so as to provide basis for full and fair competitive bidding on common standard and, in addition, must be free of any restrictions tending to stifle competition. *Baldwin-Lima-Hamilton Corp. v. Superior Court (1962) 208 Cal. App. 2d 803, 821, 25 Cal. Rptr. 798*

[8] Making of Award Gives Rise to Contract

When legislative body or administrative officer is required by statute to call for bids in letting of contracts for doing of public works and must let contract to lowest responsible bidder, making of award gives rise to contract between public body or agent and successful bidder. *Susanville v. Lee C. Hess Co. (1955) 45 Cal. 2d 684, 694, 290 P.2d 520* ; *M.F. Kemper Constr. Co. v. Los Angeles (1951) 37 Cal. 2d 696, 700, 235 P.2d 7*

Although municipal corporation has discretion as to time and manner of making corporate improvements and purchase of supplies, when this discretion has been exercised, and contract made relative thereto, legislativefunction has been exhausted, and contract so made is not permitted to be impaired at option of municipality. *Susanville v. Lee C. Hess Co. (1955) 45 Cal. 2d 684, 695, 290 P.2d 520*

Contract was awarded when San Francisco Public Utilities Commission approved bid and awarded contract by resolution; municipal code section requiring department head's signature on contract and instructing department head to "let" contracts for public works in excess of $50,000 to "lowest reliable and responsible bidder" did not give PUC department head discretionary authority to rescind contract. *Transdyn/Cresci, JV v. City and County of San Francisco (1999) 72 Cal. App. 4th 746, 757, 85 Cal. Rptr. 2d 512*

Although failure to let contract in mode prescribed by statute would not defeat claim for restitution by public entity against successful bidder for payments received under contract, where any other action is taken by entity to award contract in manner prescribed by statute, award gives rise to contract between entity and bidder. *Greer v. Hitchcock (1969) 271 Cal. App. 2d 334, 337, 76 Cal. Rptr. 376*

[9] Miscellaneous Contractual Provisions

General contractor could recover damages arising out of delays attributable to municipality's failure to disclose known restrictions on project performance, to obtain necessary permits, and to provide timely access to project site, notwithstanding clause in contract precluding award of delay damages. *Howard Contracting, Inc. v. G.A. MacDonald Construction Co. (1999) 71 Cal. App. 4th 38, 44, 83 Cal. Rptr. 2d 590*

Fact that public entity occupied unfinished building did not preclude award of liquidated damages for delay in completing construction. *Vrgora v. Los Angeles Unified School Dist. (1984) 152 Cal. App. 3d 1178, 1186-1188, 200 Cal. Rptr. 130*

Liquidated damages for delay clause in public works was valid because damage to public from delay was unascertainable. *Westinghouse Electric Corp. v. County of Los Angeles (1982) 129 Cal. App. 3d 771, 780-783, 181 Cal. Rptr. 332*

Former *Gov. Code § 14376* (*now see Pub. Contract Code § 10226*), requiring state contracts to include provisions for forfeiture of specified sum to state for delays in completion, is, in effect, legislative determination that late charges imposed on construction company by state contract are valid liquidated damages; late charge is not covered by contractual property damage liability provisions of liability insurance policy. *Silva & Hill Constr. Co., Inc. v. Employers Mut. Liab. Ins. Co. (1971) 19 Cal. App. 3d 914, 920-926, 97 Cal. Rptr. 498*

School districts have power to include in construction contracts executed by them clauses usual in that industry, including arbitration clauses. *Viola, Inc. v. Santa Barbara High Sch. Dist. (1969) 276 Cal. App. 2d 425, 428, 80 Cal. Rptr. 784*

Highway construction contract that incorporated standard specifications of State Division of Highways, § 9(f) thereof, providing for administrative settlement of disputed contract items by state highway engineer whose determination was declared to be conclusive and binding except in case of gross error, established nonjudicial remedy for settlement of disputed contract claims that had to be pursued to completion before recourse to courts and had impact on scope of judicial inquiry. *Clack v. State of California ex rel. Dept. of Public Works (1969) 275 Cal. App. 2d 743, 745-748, 80 Cal. Rptr. 274*

Under public works contract delay attributable to the public entity did not deprive it of liquidated damages for delays occasioned by contractor when contract contained completion date provision that specified liquidated damages to be deducted from payments due contractor in event of late completion; in such a case, no apportionment or damages, but rather apportionment of the quantum of delay in terms of time. *Nomellini Constr. Co. v. State of California ex rel. Dept. of Wat. Resources (1971) 19 Cal. App. 3d 240, 246, 96 Cal. Rptr. 682*

[10] Preparation Costs

Absent intent to defraud bidder, preparation costs for bid are not recoverable because bids are normal part of cost of doing business and are considered voluntary activity of contractor designed to secure additional business. *Pacific Architects Collaborative v. State of California (1979) 100 Cal. App. 3d 110, 125, 166 Cal. Rptr. 184*

[11] Public Entity's Remedy on Contractor's Wrongful Failure to Enter Into Contract

Public entity has power to enforce full recovery when statute or contract declares forfeiture, usually as liquidated damages. *Petrovich v. Arcadia (1950) 36 Cal. 2d 78, 83, 222 P.2d 231*

[12] Purpose of Competitive Bidding Requirements

Manifest policy of law under former Pol. Code § 4041.18 (*now see Pub. Contract Code § 20128*) requires competitive bidding when county engages in construction or repair of improvements costing more than named amount in statute; and in this respect statute is not required to be given restricted meaning or be limited to places where public assembles. *Miller v. McKinnon (1942) 20 Cal. 2d 83, 93-94, 124 P.2d 34* (structures and buildings attached to rock quarry as public buildings)

Competitive offers or bids have no other object but to insure economy and exclude favoritism and corruption in furnishing labor, services, property, and materials for use of public entity. *Los Angeles Dredging Co. v. Long Beach (1930) 210 Cal. 348, 353, 291 P. 839* (involving competitive bidding requirement of municipal corporation)

[13] Relief of Bidders

Municipality is without power, in absence of fraud, mutual mistake, or some other ground of rescission, to rescind contract awarded to lowest responsible bidder. *Susanville v. Lee C. Hess Co. (1955) 45 Cal. 2d 684, 695, 290 P.2d 520*

Relief for clerical error available only for errors in general contractor's bid, not subcontractor's bid; general contractor therefore is not required to request relief from bid as condition of holding responsible subcontractor who made clerical error in bid for subcontract. *Diede Constr., Inc. v. Monterey Mech. Co. (2004) 125 Cal. App. 4th 380, 387-388, 22 Cal. Rptr. 3d 763*

School district that deliberately failed to provide contractor information as to how to properly withdraw mistaken bid and then awarded bid to contractor was estopped from enforcing contract. *Emma Corp. v. Inglewood Unified School Dist. (2003) 114 Cal. App. 4th 1018, 1031, 8 Cal. Rptr. 3d 213*

Bidder who made mistake was precluded from rebidding on project under Pub. Contract Code § 4205 when rebid was on substantially same construction even though certain deferments were not in rebid. *Colombo Construction Co. v. Panama Union School Dist. (1982) 136 Cal. App. 3d 868, 875-877, 186 Cal. Rptr. 463*

Former *Gov. Code §§ 4200-4208* (*now see Pub. Contract Code § 5100 et seq.*), governing relief from bid mistakes, were enacted to establish comprehensive statutory procedure in connection with public contracts so as to enable contractor to claim relief from bid mistake by following statutory procedures. *A & A Elec., Inc. v. King (1976) 54 Cal. App. 3d 457, 462, 126 Cal. Rptr. 585*

Former *Gov. Code §§ 4200-4208* (*now see Pub. Contract Code § 5100 et seq.*) established exclusive procedure for relieving bidder from mistake in bid submitted to public entity listed in former *Gov. Code § 4200(a)* (*now see Pub. Contract Code § 5100(a)*); failure to comply with procedure is waiver of right to relief. *A & A Elec., Inc. v. King (1976) 54 Cal. App. 3d 457, 463-464, 126 Cal. Rptr. 585*

[14] Subletting and Subcontracting Fair Practices Act

Subcontractor listed in contractor's bid on public work had right conferred by former *Gov. Code § 4107* (*now see Pub. Contract Code § 4107*) to perform subcontract unless statutory grounds for valid substitution existed; this right was enforceable by action for damages against prime contractor to recover benefit of bargain listed subcontractor would have realized had he or she not wrongfully been deprived of subcontract. *Southern Cal. Acoustics Co. v. C.V. Holder, Inc. (1969) 71 Cal. 2d 719, 727, 79 Cal. Rptr. 319, 456 P.2d 975*

Public entity's consenting to substitution of subcontractors by general contractor in violation of former *Gov. Code §*

4107 (*now see Pub. Contract Code § 4107*) gave rise to no liability on part of entity to subcontractor because there was no statute authorizing recovery of damages from it in such case. *Southern Cal. Acoustics Co. v. C.V. Holder, Inc. (1969) 71 Cal. 2d 719, 727, 79 Cal. Rptr. 319, 456 P.2d 975*

Subcontractor had cause of action for breach of statutory duty [*Pub. Contract Code § 4107*] when prime contractor listed subcontractor on bid with respect to "concrete masonry units" and "glass pavers" but did not award it the "glass paver" work; although factors raised by prime contractor indicated its intention was to list second subcontractor as subcontractor for glass pavers, those factors did not appear on face of submitted bid, and prime contractor did not correct its error within statutory time limit. *R.J. Land and Associates Construction Co. v. Kiewit-Shea (1999) 69 Cal. App. 4th 416, 426-427, 81 Cal. Rptr. 2d 615*

Legislature has power to provide for administrative sanctions with respect to licensee who violates regulation deemed to be in public interest. *Merco Constr. Engineers, Inc. v. Los Angeles Unified Sch. Dist. (1969) 274 Cal. App. 2d 154, 159, 79 Cal. Rptr. 23*

Prime contractor is forbidden to make substitutions in place of subcontractor designated in original bid except with consent of contracting agency after contractor's bid has been accepted; when wrongful substitution is made, substituted subcontractor is entitled to recover as damages benefit of the bargain it would have realized had it not wrongfully been deprived of subcontract. *Coast Pump Associates v. Stephen Tyler Corp. (1976) 62 Cal. App. 3d 421, 424-426, 133 Cal. Rptr. 88*

Although act does not specifically provide for private right of action in violation of any of its provisions, injured member of public for whose benefit act was enacted may bring action. *Bay Cities Paving & Grading Inc. v. Hensel Phelps Constr. Co. (1976) 56 Cal. App. 3d 361, 366-367, 128 Cal. Rptr. 632*

Action brought on ground that prime contractor on public construction project had violated Subletting and Subcontracting Fair Practices Act by refusing to honor bid submitted by plaintiff as subcontractor. *Coast Pump Associates v. Stephen Tyler Corp. (1976) 62 Cal. App. 3d 421, 423-424, 133 Cal. Rptr. 88*

Doctrine of substantial compliance is applicable to requirement of *Pub. Contract Code § 4107.5* that prime contractor give written notice to listed subcontractor within two days of opening of prime bid that subcontractor was listed due to inadvertent clerical error. *Cal-Air v. Auburn Union School Dist. (1993) 21 Cal. App. 4th 655, 667-671, 26 Cal. Rptr. 2d 703*

[15] Void Contracts

Subcontract between prime contractor and subcontractor for work on public improvement project was void under both *Civ. Code §§ 1598* and *1608* because subcontractor was not identified in prime bid and had been assigned work without city's consent, in violation of *Pub. Contract Code §§ 4106, 4107*. *R.M. Sherman Co. v. W.R. Thomason Inc. (1987) 191 Cal. App. 3d 559, 563, 236 Cal. Rptr. 577* (acknowledging that *Civ. Code §§ 1598* and *1608* are not always applied literally and, in many cases, have simply been overlooked or ignored)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesEquitable EstoppelGeneral OverviewContracts LawDefensesIllegal BargainsPublic Contracts LawBids & FormationOffer & AcceptanceAcceptances & AwardsPublic Contracts LawBids & FormationSealed BidsGeneral OverviewPublic Contracts LawContract InterpretationGeneral OverviewPublic Contracts LawContract InterpretationGeneral Overview

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42-481 California Forms of Pleading and Practice--Annotated § 481.92

§ 481.92 Attorney General Opinions

California law provides no basis for exempting local public works projects financed with federal funds under Title X of the Public Works and Economic Development Act of 1965 from statutory competitive bidding requirements that are otherwise applicable. *59 Ops. Cal. Att'y Gen. 242, 242-252 (1976)*

Construction manager who acts in nature of overall project coordinator among various prime contractors rather than as general contractor on project and who performs no contstruction work on project may be hired without public bidding. *57 Ops. Cal. Att'y Gen. 417, 417-421 (1974)*

Contractor who has failed to file labor and material bond as required by former *Gov. Code § 4200* (*now see Pub. Contract Code § 5100*) is not permitted to recover reasonable value of labor and materials furnished for public project. 38 Ops. Cal. Att'y Gen. 143, 143-148 (1961)

Provisions in public works contract in event of change of plans or for doing of extra work are properly included in such contract. *11 Ops. Cal. Att'y Gen. 33, 34 (1948)*

County was not permitted to pay for painting of memorial building when competitive bidding requirements were not complied with. *10 Ops. Cal. Att'y Gen. 187, 187-189 (1947)*

Cost-plus contracts for construction of school district buildings are not permitted unless bid fixes maximum cost to district. *8 Ops. Cal. Att'y Gen. 226, 226-228 (1946)*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsGeneral OverviewPublic Contracts LawBids & FormationCompetitive ProposalsPublic Contracts LawBids & FormationSealed BidsGeneral OverviewPublic Contracts LawTypes of

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A. Actions on Public Works Contracts

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§ 481.93 Law Reviews

Moss, Hunt, and Sandler, *Public Works: Bidding Disputes, the Contract With the Public Body, Performance Disputes, Claims on California State and Local Projects and Federal Claims Under the Miller Act,* 16 Bev. Hills B.J. 145 (1982)

Comments, *Due Process in Public Contracts; Pre-Award Hearings to Determine Responsibility of Bidders, 5 Pacific L.J. 142 (1974)*

Penne, *Legal Remedies of the Government Subcontractor, 32 So. Cal. L. Rev 1 (1958)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 481.94 Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 503, 505, 510, 515, 537, 647 (10th ed. 2005)

Acret, Attorney's Guide to California Construction Contracts and Disputes (Cal. CEB 1976), Ch. 4, *Public Contract Disputes*

Acret, California Construction Law Manual, Ch. 10, *Public Contracts*

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[Reserved]

§§ 481.95[Reserved]

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B. Withholding Payment on Public Works

42-481 California Forms of Pleading and Practice--Annotated § 481.110

§ 481.110 State Statutes

[1] Amount Required to Be Withheld

Public entity is required to withhold amount sufficient to answer claim and provide for entity's reasonable cost of litigation. *Civ. Code §§ 3186, 3187*

[2] Bond to Release Withheld Funds

Bond to release funds withheld pursuant to stop notice when contractor or subcontractor disputes validity of stop notice. *Civ. Code § 3196*

[3] Duty to Withhold Money or Bonds Due or to Become Due

Duty of public entity. *Civ. Code § 3186*

Duty of public entity when possession of funds has been surrendered. *Civ. Code § 3187*

[4] Enforcement of Stop Notice Rights

[a] Action to Enforce Stop Notice

Time for commencement of action to enforce stop notice. *Civ. Code § 3210*

Expiration of period within which action to enforce stop notice must be commenced. *Civ. Code § 3210*

Effect of action not commenced within statutory time period. *Civ. Code § 3210*

Notice of commencement of stop notice action. *Civ. Code § 3211*

Dismissal of action for failure to prosecute. *Civ. Code § 3212*

Joinder of claimants and consolidation of separate actions. *Civ. Code § 3214*

Effect of dismissal of any stop notice action. *Civ. Code § 3123*

[b] Prerequisites to Entitlement to Enforcement

Requirement that 20-day preliminary notice (public work) be given, if required. *Civ. Code § 3183(a)*

Requirement that proper and timely stop notice be filed. *Civ. Code § 3183(b)*

[5] Persons Entitled to Serve

Persons entitled to serve stop notice. *Civ. Code § 3181*

[6] Priorities of Claims to Withheld Funds

Insufficient funds to satisfy claims. *Civ. Code § 3191*

Deficit may be recovered in payment bond action. *Civ. Code § 3191*

Forfeiture of right to pro rata distribution. *Civ. Code § 3192*

Assignment or garnishment of contract. *Civ. Code § 3193*

[7] Stop Notice Is Sole Remedy

Statutory stop notice remedy is sole remedy for claims against funds held for payment of construction costs. *Civ. Code § 3264*

[8] Summary Proceedings for Determination of Stop Notice Rights

Right of original contractor to summary proceeding to determine validity of stop notice or amount claimed in stop notice. *Civ. Code § 3197*

Service of affidavit by original contractor on public entity. *Civ. Code § 3198*

Service of affidavit by public entity on claimant. *Civ. Code § 3199*

Counteraffidavit by claimant. *Civ. Code § 3200*

Effect of failure to serve counteraffidavit. *Civ. Code § 3200*

Action for declaration of rights of respective parties. *Civ. Code § 3201*

Hearing to determine rights of respective parties. *Civ. Code §§ 3201-3203*

Effect of court order determining validity of stop notice or amount stated in stop notice. *Civ. Code §§ 3203, 3205*

Right to jury trial. *Civ. Code § 3204*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstReal Property LawNonmortgage LiensLien PrioritiesReal Property LawNonmortgage LiensMechanics' Liens

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§ 481.111 Decisions

[1] Amount Required to Be Withheld

Amount that may be claimed in stop notice and that is required to be withheld may be determined by analogy to *Civ. Code § 3123* regulating similar protection afforded to suppliers under mechanics' lien law. *Sunlight Elec. Supply Co. v. McKee (1964) 226 Cal. App. 2d 47, 50, 37 Cal. Rptr. 782*

When labor or materials furnished by stop notice claimant are less than that specified in contract due to fault of original contractor, reasonable value of such labor or materials is limited to proportion of contract price reflecting amount of progress made toward completion of work. *University Casework Sys., Inc. v. Superior Court (1974) 41 Cal. App. 3d 263, 266-267, 115 Cal. Rptr. 836*

[2] Construction of Public Stop Notice Provisions

Transmittal and notice requirements of *Civ. Code §§ 3098* and *3091* are strictly construed. *San Joaquin Blocklite, Inc. v. Willden (1986) 184 Cal. App. 3d 361, 366, 368, 228 Cal. Rptr. 842*

Provisions governing mechanics' lien law, including provisions governing stop notices for public works of improvement, are remedial in character and must be construed with view to effect their objects and to promote justice. *Sunlight Elec. Supply Co. v. McKee (1964) 226 Cal. App. 2d 47, 50, 37 Cal. Rptr. 782*

Mechanics' lien law including stop notice provisions for public works of improvement [*Civ. Code §§ 3179-3214*] is integrated and harmonious scheme and applicable code sections of that law must be construed together. *Sunlight Elec. Supply Co. v. McKee (1964) 226 Cal. App. 2d 47, 50, 37 Cal. Rptr. 782*

[3] Duty to Withhold Money or Bonds Due or to Become Due

[a] In General

Once stop notices were filed, city was prohibited by *Civ. Code §§ 3186* and *3193* from paying amount sufficient to satisfy stop notice claims to contractor's assignee, and contractor did not retain any interest in assigned contract that would enable contractor to recover these funds from city. *Stanislaus Pump, Machinery & Construction Corp. v. City of Modesto (1988) 200 Cal. App. 3d 1442, 1447, 246 Cal. Rptr. 601*

Extent of liability of public entity to stop notice claimant after stop notice has been served is measured by extent of liability of public entity to original contractor. *Dorris v. Alturas School Dist. (1914) 25 Cal. App. 30, 33, 142 P. 795* (decided under former Code Civ. Proc. § 1184, now *Civ. Code § 3186*)

When (1) original contractor abandons project in breach of contract with public entity, (2) entity, by terms of contract, is obligated to pay full contract price only on completion of project, and (3) cost of completion is greater than amount owing from entity to contractor, stop notice claimant has no rights to remaining funds in hands of public entity. *Dorris v. Alturas School Dist. (1914) 25 Cal. App. 30, 33, 142 P. 795*

Money withheld by public entity pursuant to former *Gov. Code § 14402* (*now see Pub. Contract Code § 10261*), requiring retention of 10 percent of contract price until acceptance and completion of project, is not subject to claims of stop notices when contractor has abandoned project and cost of completion exceeds contract price. *Harsco Corp. v. Department of Public Works (1971) 21 Cal. App. 3d 272, 276-280, 98 Cal. Rptr. 337*

[b] Breach of Duty to Withhold

Action in entity is permitted by laborers and materialmen against public entity who disregards their properly filed stop notices. *United States Fid. & Guar. Co. v. Oak Grove Union School Dist. (1962) 205 Cal. App. 2d 226, 231, 22 Cal. Rptr. 907*

Individuals responsible for withholding funds subject to stop notice are personally liable to claimants injured by failure to withhold such funds. *L.W. Blinn Co. v. Pioneer Drainage Dist. (1920) 50 Cal. App. 364, 370-371, 195 P. 750*

[4] Nature of Remedy

Filing of stop notice, in effect, imposes trust obligation on public entity by creating equitable assignment or garnishment pro tanto in favor of stop notice claimant. *United States Fid. & Guar. Co. v. Oak Grove Union School Dist. (1962) 205 Cal. App. 2d 226, 231, 22 Cal. Rptr. 907*

[5] Persons Entitled to Serve Stop Notice

Person furnishing labor or materials used in, on, for, or about the performance of a public work is able to avail himself or herself of stop notice procedure provided he or she furnished work or materials at instance of prime contractor or subcontractor having charge, in whole or in part, of project. *George F. Kennedy, Inc. v. Miles & Sons Constr. Div. (1970) 5 Cal. App. 3d 516, 520, 85 Cal. Rptr. 298*

Stop notice procedure is not available to person furnishing materials or services to subcontractor under a state work project unless materials and services are used in, on, for, or about the performance of the work. *George F. Kennedy, Inc. v. Miles & Sons Constr. Div. (1970) 5 Cal. App. 3d 516, 521, 85 Cal. Rptr. 298*

When materials furnished to subcontractor become part of subcontractor's general equipment and are of such a nature that, in usual course of events, they will not be entirely used or consumed on job for which they were purchased, a claim therefor is not subject to statutory stop notice procedure. *George F. Kennedy, Inc. v. Miles & Sons Constr. Div. (1970) 5 Cal. App. 3d 516, 521, 85 Cal. Rptr. 298*

When only part of material furnished to subcontractor was used in performance of latter's contract, remainder being diverted to other uses, and it is impossible to estimate what part was used in performance of contract, a claim therefor is not subject to stop notice procedure. *George F. Kennedy, Inc. v. Miles & Sons Constr. Div. (1970) 5 Cal. App. 3d 516, 521, 85 Cal. Rptr. 298*

Stop notice procedure is not available to one whose relationship to work is only that of vendor of materials to materialman rather than that of contractor or subcontractor. *Theisen v. Los Angeles County (1960) 54 Cal. 2d 170, 177, 5 Cal. Rptr. 161, 352 P.2d 529*

One who agrees with original contractor to perform substantial, specified portion of work of construction that is subject of original contract in accordance with plans and specifications by which original contractor is bound as subcontractor capable of conferring stop notice rights, even though he or she does not undertake to incorporate such portion of project structure into work of improvement. *Theisen v. Los Angeles County (1960) 54 Cal. 2d 170, 183, 5 Cal. Rptr. 161, 352 P.2d 529*

[6] Purpose of Public Stop Notice Provisions

Statutory scheme of *Civ. Code §§ 3186* and *3193* gives maximum protection to stop notice claimants, whose interests statutory arrangement is designed to protect. *Stanislaus Pump, Machinery & Construction Corp. v. City of Modesto (1988) 200 Cal. App. 3d 1442, 1447, 246 Cal. Rptr. 601*

In addition to other procedures generally available for enforcement of contracts, Legislature has provided by statute special remedies to protect interests of those to whom prime contractor may incur debts in connection with public works project. *Jasper Constr., Inc. v. University Casework Sys., Inc. (1974) 39 Cal. App. 3d 582, 584, 114 Cal. Rptr. 143*

In order to give protection to materialmen and labor claimants and yet protect both public and public property, Legislature has provided stop notice procedure without lien rights for intercepting funds due from public agency to contractor on public works projects. *Sunlight Elec. Supply Co. v. McKee (1964) 226 Cal. App. 2d 47, 50, 37 Cal. Rptr. 782*

Effect of stop notice is to assure to claimant preference over general creditors of prime contractor in distribution of proceeds of contract. *Jasper Constr., Inc. v. University Casework Sys., Inc. (1974) 39 Cal. App. 3d 582, 584, 114 Cal. Rptr. 143*

[7] Release Bond

Bond and Undertaking Law (*Code Civ. Proc. § 995.010 et seq.*) is applicable to stop notice release bonds provided under *Civ. Code § 3196*. *Milo Equipment Corp. v. Elsinore Valley Mun. Water Dist. (1988) 205 Cal. App. 3d 1282, 1288, 253 Cal. Rptr. 126*

Former *Code Civ. Proc. § 338(1)* (three-year period for liability created by statute; *now see Code Civ. Proc. § 338(a)*) was applicable statute of limitations in action against surety on stop notice release bond because these bonds are essential part of statutory scheme conferring stop notice rights on subcontractors. *Winick Corp. v. General Insurance Co. (1986) 187 Cal. App. 3d 142, 148, 231 Cal. Rptr. 606* (dictum)

Public entity that honors *Civ. Code § 3196* surety bond by releasing to general contractor funds withheld by reason of dispute over stop notice filed with entity by supplier of materials to subcontractor is relieved of any liability resulting from stop notice. *Cal-Pacific Materials Co. v. Redondo Beach City School Dist. (1979) 94 Cal. App. 3d 652, 654, 156 Cal. Rptr. 590*

Alternative procedure for release of funds held pursuant to stop notice claim provided by former Code Civ. Proc. § 1190.1 [*now see Civ. Code § 3103*] is not obligatory; filing of stop notice, and filing of release bond followed by filing of action are so related that it can be said that release bond is obtained in connection with action within meaning of former *Code Civ. Proc. § 1035* (*now see Code Civ. Proc. § 995.250*), allowing premiums paid on such bonds to be recoverable costs. *Acoustics, Inc. v. Trepte Constr. Co. (1971) 14 Cal. App. 3d 887, 916, 92 Cal. Rptr. 723*

City was liable to subcontractor when city permitted release bond to be written by same bonding company as wrote labor and material bond. *Azusa Western, Inc. v. West Covina (1975) 45 Cal. App. 3d 259, 263-264, 119 Cal. Rptr. 434*

[8] Stop Notice Remedy as Cumulative

Stop notice remedy is cumulative to other remedies claimant might have and, thus, is not barred by fact that claimant obtains personal judgment against prime contractor. *George F. Kennedy, Inc. v. Miles & Sons Constr. Div. (1970) 5 Cal. App. 3d 516, 522, 85 Cal. Rptr. 298*

Action on stop notice is capable of being joined with action on labor and material bond, but the two actions are independent and one is cumulative to the other. *Consolidated Elec. Distributors, Inc. v. Kirkham, Chaon & Kirkham, Inc. (1971) 18 Cal. App. 3d 54, 61, 95 Cal. Rptr. 673*

[9] Summary Proceeding to Determine Rights

Trial court's order resolving a summary proceeding is not appealable. *Jasper Constr., Inc. v. University Casework Sys., Inc. (1974) 39 Cal. App. 3d 582, 114 Cal. Rptr. 143*

Trial court's order may be tested by appellate court on writ of review. *University Casework Sys., Inc. v. Superior Court (1974) 41 Cal. App. 3d 263, 265, 115 Cal. Rptr. 836*

[10] Time to File

Completion of work on contract is not "cessation of labor" referred to in *Civ. Code § 3086*; date of acceptance of work triggers 90-day period to file stop notice under *Civ. Code § 3184*. *Krueger Brothers Builders, Inc. v. San Francisco Housing Authority (1988) 198 Cal. App. 3d 1, 6-7, 243 Cal. Rptr. 585*

Filing of stop notice before contractor had right to be paid was proper. *Central Indus. Eng'r Co. v. Strauss Constr. Co. (1979) 98 Cal. App. 3d 460, 464-466, 159 Cal. Rptr. 564*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesProceduresContracts LawBreachGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLegislationStatutory Remedies & RightsGovernmentsPublic ImprovementsGeneral OverviewPublic Contracts LawBids & FormationSubcontracts &

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§ 481.112 Law Reviews

Miller, *Validity of the Stop Notice as a Summary Remedy*, 48 State BJ 44 (1973)

Moss, *The Stop Notice Remedy in California--Updated, 47 LA Bar B 299 (1972)*

Finch, *Public Contracts--Stop Notices in Calfornia, 2 Lincoln L Rev 1 (1966)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Real Estate Law and Practice, Ch. 452, *Stop Notices* (Matthew Bender)

California Mechanics' Liens and Other Remedies (Cal CEB 1972), Ch. 4, *Claims on Public Works*, §§ 4.2-4.35; Ch. 5, *Foreclosure of Mechanics' Lien*, §§ 5.24-5.33; Ch. 11, *Government*, §§ 11.1-11.58

Acret, California Construction Law Manual (3d ed 1975) Ch. 11, *Claims of Subcontractors and Suppliers on Public Jobs*

Marsh, California Mechanics' Lien Law and Construction Industry Practice, Ch. 6, *Representing a Stop Notice and Payment Bond Claimant on California Public Works* (Parker 5th ed. 1994)

53 Cal. Jur. 3d, *Public Works and Contracts*, §§ 55-86 (1979)

Legal Topics:

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§ 481.130 California Legal Forms

For a form of a public work payment bond, see California Legal Forms, Ch. 31, *Mechanics' Liens* (Matthew Bender)

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42-481 California Forms of Pleading and Practice--Annotated § 481.131

§ 481.131 State Statutes

[1] Actions on Payment Bonds

Either 20-day preliminary notice or post-completion bond notice is prerequisite to bond action. *Civ. Code §§ 3098, 3252*

Filing of stop notice not necessary. *Civ. Code § 3250*

Labor or materials must be furnished before claimant entitled to action on contractor's bond. *Civ. Code § 3267*

Certified copy of bond is admissible. *Code Civ. Proc. § 995.260*

[2] General Bond Provisions

Exoneration or release of sureties on obligations in bonds. *Civ. Code § 3225*

Sole condition of recovery on bond. *Civ. Code § 3226*

Good and sufficient bond. *Code Civ. Proc. § 995.610*

[3] Payment Bonds

Payment bond defined. *Civ. Code § 3096*

Where payment bond required. *Civ. Code § 3247*; *Pub. Contract Code § 7103*

Requirements for payment bond approval. *Civ. Code § 3248*

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§ 481.132 Decisions

[1] Attorneys' Fees

Subcontractor who is claimant on stop notice release bond entitled to recover attorneys' fees from surety based on attorneys' fee clause in subcontract, so long as total recovery against surety does not exceed penal sum of bond. *National Technical Systems v. Superior Court (2002) 97 Cal. App. 4th 415, 424-425, 118 Cal. Rptr. 2d 465*

When subcontractor required to arbitrate claim against contractor, subcontractor is entitled to recover attorneys' fees in arbitration in action against surety to recover on payment bond. *Liton Gen. Engineering Contractor, Inc. v. United Pacific Insurance (1993) 16 Cal. App. 4th 577, 585-593, 20 Cal. Rptr. 2d 200*

[2] Limitation of Actions

Resolution under facts of case of issue whether action on labor and material bond was barred by statute of limitations [*Civ. Code § 3249*] required consideration of provisions of *Civ. Code §§ 3086* (defining "completion"), 3093 (recordation of completion of work), and 3184 (stop notices). *Fidelity Sound Systems, Inc. v. American Bonding Co. (1978) 85 Cal. App. 3d Supp. 13, 17-19 , 149 Cal. Rptr. 674* (holding action was not barred)

[3] Payment Bonds

[a] Actions Thereon

Subcontractor who is claimant on stop notice release bond entitled to recover attorneys' fees from surety based on attorneys' fee clause in subcontract, so long as total recovery against surety does not exceed penal sum of bond. *National Technical Systems v. Superior Court (2002) 97 Cal. App. 4th 415, 424-425, 118 Cal. Rptr. 2d 465*

Surety on payment bond was liable for penalties imposed on contractor pursuant to *Pub. Contract Code § 10262.5* for

failure to make progress payments to subcontractor. *Washington Internat. Ins. Co. v. Superior Court (1998) 62 Cal. App. 4th 981, 989, 73 Cal. Rptr. 2d 282*

Liability of surety on contractor's bond in public works contract. *Bonded Prod. Co. v. R.C. Gallyon Constr. Co., Inc. (1964) 228 Cal. App. 2d 186, 190-191, 39 Cal. Rptr. 347*

Right of surety on contractor's bond to be subrogated to right to foreclose stop notice liens after payment of claims. *United States Fid. & Guar. Co. v. Oak Grove Union School Dist. (1962) 205 Cal. App. 2d 226, 231, 22 Cal. Rptr. 907*

Joinder of contractor and sureties in action on bond. *Sunset Lumber Co. v. Smith (1928) 95 Cal. App. 307, 312, 272 P. 1068*

Action for labor or materials against surety without joining contractor and without having first filed notice of verified claim with public agency that entered into public works contract. *Adams v. Christopher (1931) 119 Cal. App. 40, 45, 5 P.2d 948*

[b] Purpose

Bond provisions enacted to create fund in lieu of the building or work itself against which materialmen and laborers can proceed are additional or cumulative remedy to public works stop notice procedure. *Pneucrete Corp. v. U.S. Fid. & G. Co. (1935) 7 Cal. App. 2d 733, 736-737, 46 P.2d 1000*

Purpose of public works contractor's bond is to give materialmen and laborers who furnish materials for and render services on public works an additional means of receiving compensation. *Consolidated Elec. Distributors, Inc. v. Kirkham, Chaon & Kirkham, Inc. (1971) 18 Cal. App. 3d 54, 60, 95 Cal. Rptr. 673*

[4] Persons Entitled to Payment

Entity that contracted to furnish its employees to contractor for work on construction project was entitled to mechanics' lien and thus to recover on payment bond, and was not required to have contractor's license. *Contractors Labor Pool, Inc. v. Westway Contractors, Inc. (1997) 53 Cal. App. 4th 152, 163, 61 Cal. Rptr. 2d 715*

Person who provides personnel services and advances funds to cover payroll but does not employ workers is not entitled to recover in capacity of person who furnishes labor to project. *Primo Team, Inc. v. Blake Construction Co. (1992) 3 Cal. App. 4th 801, 807-810, 4 Cal. Rptr. 2d 701*

[5] Sufficiency of Notice of Claim

Partial compliance with *Civ. Code § 3098* notice requirements does not bar relief under *Civ. Code § 3252(b)* (allowing claim when 20-day notice "was not given as provided in *Section 3098*) provided written notice is given to surety and bond principal within 15 days after recordation of notice of completion for amount of any claim for which *§ 3098* notice was not timely given. *American Buildings Co. v. Bay Commercial Construction, Inc. (2002) 99 Cal. App. 4th 1193, 1201, 121 Cal. Rptr. 2d 539*

Designation as "stop notice" of instrument intended as required notice under payment bond statute does not preclude instrument's consideration for other purposes. *General Elec. Co. v. Central Surety & Ins. Corp. (1965) 232 Cal. App. 2d 590, 594, 43 Cal. Rptr. 48*

In action on contractor's bond for public work, notice preceding action on bond and addressed to superintendent of public agency concerned, reciting copies for contractors, bonding company, and subcontractor, and mailed to contractors and received by registered or certified mail within 90 days from date on which supplier last furnished materials for which claim was made constituted substantial compliance with statute. *General Elec. Co. v. Central Surety & Ins. Corp. (1965) 232 Cal. App. 2d 590, 596, 43 Cal. Rptr. 48*

General contractor had sufficient notice of nature and state of debt owed plaintiff for materials supplied to subcontractor by schedule showing amounts due from subcontractor to materialmen so as to comply with statutory notice provision when schedule had been personally handed to general contractor's agent and read by president and general manager, who admitted he could correlate plaintiff's job number to his contract. *California Elec. Supply Co. v. United Pac. Life Ins. Co. (1964) 227 Cal. App. 2d 138, 146, 38 Cal. Rptr. 479*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 481.133 Attorney General Opinions

Municipal water district was not barred, by virtue of contractor's failure to post payment bond under *Civ. Code § 3247*, from making payments under architectural or engineering contracts entered into after January 1, 1971. *63 Ops. Cal. Att'y Gen. 633 (1980)*

If services contracted for consist of conducting investigations and surveys to determine whether or not construction of, work of improvement should be undertaken, one contracting with public entity to provide these services does not need to post payment bonds required by *Civ. Code § 3247* (payment bonds on public works); however, if services contracted for consist of designing and supervising work of improvement, payment bond must be posted prior to time these services commence. *62 Ops. Cal. Att'y Gen. 753 (1979)*

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§ 481.134 Law Reviews

Moss, *Bond Practices*, 44 Cal. St. B.J. 537 (1969) (relating to performance bonds)

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42-481 California Forms of Pleading and Practice--Annotated § 481.135

§ 481.135 Text References

California Real Estate Law and Practice, Ch. 453, *Payment Bonds* , pt. C (Matthew Bender)

Marsh, California Mechanics' Lien Law and Construction Industry Practice, Ch. 6, *Representing a Stop Notice and Payment Bond Claimant on California Public Works* (LexisNexis 6th ed. 1998)

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42-481 California Forms of Pleading and Practice--Annotated §§ 481.136-481.149

[Reserved]

§§ 481.136[Reserved]

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A. Withholding Payment on Public Works

42-A California Forms of Pleading and Practice--Annotated Scope

Scope

NOTE:

SB 189, which was introduced in February 2009 as a two-year bill, would comprehensively revise, reorganize, and consolidate the law governing stop notices and payment bonds on public works projects in the Public Contract Code. The proposed legislation is the product of a recommendation of the California Law Revision Commission, which may be consulted at: http://www.clrc.ca.gov/pub/Printed-Reports/REC-H821.pdf. The legislation would be operative January 1, 2011. If SB 189 is enacted, this chapter will be updated in a future release.

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42-481 California Forms of Pleading and Practice--Annotated § 481.150

§ 481.150 Scope of Checklist

NOTE:

The following are checklists of procedures required in enforcing stop notices for public works. These checklists are not exhaustive and other procedures may be required [*see Civ. Code § 3259* (except as otherwise provided, procedures governing civil trials, new trials, and appeals therefrom under *Code Civ. Proc. § 307 et seq.* are applicable to mechanics' lien law provisions)]. These checklists do, however, attempt to set forth those procedures most commonly utilized.

Counsel should also note that the various steps and time requirements as to filing and service of notice are for the purpose of providing protective measures and a necessary warning to those to whom notice is being given or on whom service is being made. Strict compliance with the provisions governing the enforcement of stop notice rights is required if the failure to comply with one or more of these provisions results in injury to the public entity. However, if no right of the public entity is adversely affected by a failure to comply with a procedural requirement, such as a failure to comply with a time for service requirement, then the requirement, unless made so by specific mandate, is not a jurisdictional factor requiring the collapse of any remedy of which the procedural requirement forms a part [*see* Sunlight Elec. Supply Co. v. McKee (1964) *226 Cal. App. 2d, 47, 50* , *37 Cal. Rptr. 782]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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42-481 California Forms of Pleading and Practice--Annotated §§ 481.151-481.169

[Reserved]

§§ 481.151[Reserved]

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42-481 California Forms of Pleading and Practice--Annotated § 481.170

§ 481.170 When Notice Is Required

1. Actual laborers for wages are not required to give a preliminary notice [*Civ. Code § 3098(a)*].

2. Any person having a direct contractual relationship with the original contractor is not required to give a preliminary notice [*Civ. Code § 3098(a)*].

3. Any person not described in Paragraphs 1-2, *above*, who furnishes labor or materials for a public work, who has not been paid therefor, and who intends to file a stop notice, must file a written preliminary notice with the contractor and the public agency concerned [*Civ. Code § 3098(a)*].

NOTE:
The failure of a subcontractor who is licensed under *Bus. & Prof. Code § 7000 et seq.* to give a preliminary notice constitutes grounds for disciplinary action by the Registrar of Contractors if the contract price to be paid to the subcontractor exceeds $400 [*Civ. Code § 3098(b)*].

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42-481 California Forms of Pleading and Practice--Annotated § 481.171

§ 481.171 Preparation of Notice

1. Contents.

See *§ 481.330* [*Civ. Code § 3098(a)*].

2. Execution.

Although there is no express requirement that the notice be signed and dated, both are recommended to show that the claimant has given the notice within the required time period [*see Civ. Code § 3098(a)*].

NOTE:
It is recommended that the notice be signed by the employee of the claimant with which the public entity would correspond and be dated as of the date of mailing by registered or certified mail.

3. Verification.

Neither required nor recommended.

4. Copies.

a. One for service on public entity;

b. One for service on original contractor;

c. If served by a materialman to a subcontractor, one courtesy copy to be mailed to subcontractor;

d. Three or more additional copies if notice is to be used as an exhibit to an affidavit under *Civ. Code § 3200* or to a complaint to enforce a stop notice claim under *Civ. Code § 3210*; and

e. One office copy.

Legal Topics:

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42-481 California Forms of Pleading and Practice--Annotated § 481.172

§ 481.172 Time of Service

Service of the preliminary notice must be made not later than 20 days after a claimant has first furnished labor, services, equipment, or materials to the job site [*Civ. Code § 3098(a)*].

NOTE:

Preliminary notice must be served not later than 20 days after first furnishing labor, services, equipment, or materials for a claimant to be entitled to enforce a stop notice for all that he or she has or will furnish to the jobsite. A notice given at any later time entitles the claimant only to enforcement of a stop notice for that labor, equipment, services, or materials furnished within 20 days before the service of the notice and at any time thereafter [*see Civ. Code § 3098(a), (d)*].

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42-481 California Forms of Pleading and Practice--Annotated § 481.173

§ 481.173 Place and Manner of Service

1. Personal delivery.

Personal service may be effected on the contractor and the public agency concerned [*Civ. Code § 3098(a)*].

NOTE:
If the public work is contracted by the Department of Transportation or the Department of General Services, personal service is to be made on the Department's disbursing officer [*Civ. Code § 3098(a)*].

2. Delivery by mail.

Service may be made by mail on either the original contractor or the public entity by first-class mail, registered mail, or certified mail, postage prepaid [*Civ. Code § 3098(a)*].

a. With regard to the original contractor, and any subcontractor contracted with, delivery may be made to any place he or she maintains an office or conducts his or her business, or to his or her residence [*Civ. Code § 3098(a)*].

b. In case of any public works constructed by the Department of Transportation or the Department of General Services, such notice is to be mailed to the office of the disbursing officer of the department.

NOTE:
Service by registered or certified mail is recommended since such service is complete at the time of deposit [*Civ. Code § 3098(a)*].

3. Affidavit of service by mail [*Code Civ. Proc. § 1013a*].

Neither required nor recommended.

NOTE:

A preliminary 20-day notice is not effective to serve as a basis for withholding funds under a stop notice unless the public entity, any subcontractors contracted with, and the original contractor are served. For this reason, it is recommended that the preliminary notice [*see § 481.330*] be addressed to all parties served, thereby indicating to each party that the other party was served. If this is done, there is no need to attach an affidavit of service on the contractor to the notice served on the public entity. An affidavit of proof of service would make the notice too formidable in appearance. When service on all parties is by registered or certified mail, sufficient proof of service would exist if the fact of service would become an issue.

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42-481 California Forms of Pleading and Practice--Annotated § 481.174

§ 481.174 Effect of Giving Preliminary Notice

1. When required under *Civ. Code § 3098*.

a. Entitles claimant to enforce a stop notice [*Civ. Code § 3183(a)*].

NOTE:
***Civ. Code § 3183* is not specifically to the effect that a preliminary notice is a necessary condition precedent to filing a stop notice but only a necessary condition precedent to its enforcement. At the same time, *Civ. Code § 3098* provides that a person without a direct contractual relationship with the contractor may file such a notice, but that no payment may be withheld from any such contractor unless the preliminary notice is given.**

The nature of the statutory language may have definite legal and practical consequences, depending on the meaning of the word "enforce." For example, a claimant who did not serve a preliminary notice but did serve a stop notice for which a preliminary notice is required both as a basis for the withholding of funds due the contractor by the public entity and for its enforcement by action under *Civ. Code § 3210* perhaps may still qualify as a stop notice claimant under *Civ. Code § 3190* if the withheld funds being distributed among claimants are insufficient to pay all the claims in full.

b. Entitles claimant to enforce a claim on a payment bond [*Civ. Code § 3252(a)*; *see Civ. Code §§ 3227, 3252(b), 3253(b)* for timing and form of alternative post-completion bond notice that may be given instead of a 20-day preliminary notice to entitle claimant to enforce a claim on a payment bond; *see also §§ 481.291, 481.360*].

2. When not required under *Civ. Code § 3098*.

Even though a subcontractor who has a direct contractual relationship with the original contractor probably does not need to file a preliminary notice, it is recommended that a licensed contractor file a preliminary notice because of the uncertainty, discussed in the Note, *above*, of when disciplinary action is permitted for failure of a subcontractor who is a licensed contractor to file a preliminary notice.

NOTE:

Although a stop notice [*Civ. Code § 3103*] is similar in content to a preliminary notice [*Civ. Code § 3098*], the difference is that the preliminary notice need not be signed or verified and is filed within 20 days after the claimant first commenced work or furnished materials, and that a stop notice must be signed and verified and must mention the amount in value of that work already done or materials furnished and of the whole agreed to be done or furnished. Thus, if a preliminary notice is not required, a notice intended as a preliminary notice may be treated by the public entity as a legally enforceable stop notice if the notice happened to be signed and verified and to have included all data necessary for a legally enforceable stop notice. For this reason, a preliminary 20-day notice should never be verified.

Legal Topics:

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

§§ 481.175[Reserved]

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42-481 California Forms of Pleading and Practice--Annotated § 481.190

§ 481.190 Preparation

1. Contents.

See *§ 481.331* [*Civ. Code § 3103*].

2. Execution.

Must be signed by the claimant or his or her agent [*Civ. Code § 3103*].

3. Verification.

Must be verified by the claimant or his or her agent [*Civ. Code § 3103*].

4. Copies.

a. One for service on the public entity [*Civ. Code § 3181*]; and

b. One courtesy copy to be mailed to original contractor, if desired.

NOTE:
Although the original contractor must be served with the preliminary 20-day notice to have a stop notice serve as a basis for the withholding of funds [*Civ. Code § 3098*], he or she need not be served with the actual stop notice. The reason for this is that the contractor has already been notified of those materialmen and suppliers to his or her subcontractors who have filed the preliminary 20-day notice.

c. If served by a materialman to a subcontractor, one courtesy copy to be mailed to subcontractor and to

the subcontractor's bonding company, if desired.

d. Three or more additional copies if notice is to be used as an exhibit to an affidavit under *Civ. Code § 3200* or to a complaint under *Civ. Code § 3210*.

NOTE:

The original contractor may require a subcontractor to furnish a bond to indemnify the original contractor for any loss he or she might sustain as a result of a subcontractor's default under *Civ. Code § 3248* [*Civ. Code § 3248(b)*].

Funds withheld may be inadequate to meet in full the claim of the claimant, and both the bonding company of the original contractor and the original contractor could become judgment proof. By notifying both the subcontractor and his or her bonding company, the claimant could protect all possible methods of having his or her claim paid in full.

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-481 California Forms of Pleading and Practice--Annotated § 481.191

§ 481.191 Service

1. Prerequisite for effective service.

A stop notice claimant must have given a preliminary 20-day notice (public work) when required by *Civ. Code § 3098(a)* [*Civ. Code § 3183(a)*]. For requirements relating to service of the preliminary notice, see procedures in §§ *481.170-481.174*.

2. Place of Service.

a. For a public work for the state, notice must be filed with the director of the department which let the contract [*Civ. Code § 3103*].

NOTE:
Unlike service of the preliminary 20-day notice (public work), which may be served generally on the public agency with the exception of any public work constructed by the Department of Public Works or the Department of General Services of the state, in which case the preliminary 20-day notice must be served on the disbursing officer, the stop notice may only be effectively served on the state by filing the notice with the director of the department that let the contract. In the case of a stop notice served in connection with a contract let by either the Department of Transportation or the Department of Water Resources, the difference in the manner in which the preliminary 20-day notice and the stop notice is served is resolved in those two department's official forms [*see* *§ 481.332*] by serving the stop notice on the directors of the departments, in care of the disbursing officer in the case of the Department of Transportation, and in care of the comptroller in the case of the Department of Water Resources. Counsel should consult counsel of other departments of the state if in doubt as to which officer on whom service of a stop notice is considered effective. It should be

noted, however, that, particularly in the absence of any prejudice suffered by the state [***see*** *Sunlight Elec. Supply Co. v. McKee (1964) 226 Cal. App. 2d 47, 50, 37 Cal. Rptr. 782]* , the code provisions governing the service of a stop notice are interpreted liberally, and actual or even constructive knowledge of the receipt of a stop notice may be effective to give the claimant a right against the earnings held by the state agency [***see*** *United States Fid. & Guar. Co. v. Oak Grove Union School Dist. (1962) 205 Cal. App. 2d 226, 236-238, 22 Cal. Rptr. 907]* .

b. For any other public work, the stop notice must be filed in the office of the controller, auditor, or other public disbursing officer, whose duty is to make payments under the contract or with the commissioners, managers, trustees, officers, board of supervisors, board of trustees, common council, or other body by whom the contract was awarded [*Civ. Code § 3103*].

3. Manner of service.

A stop notice may be served either personally or by registered or certified mail with the same effect as personal service [*Civ. Code § 3103*].

NOTE:
Although service by first-class mail is permissible (but not recommended) for a preliminary 20-day notice, a stop notice, if by mail, can be only by registered or certified mail.

4. Who may file.

Any person furnishing labor or materials for a public work [*Civ. Code §§ 3110, 3112*], other than an original contractor or any person mentioned in *Pub. Contract Code § 4107.7* (hazardous waste hauler), may file a stop notice [*Civ. Code § 3181*].

5. Time limit.

a. If notice of completion or cessation has been recorded: 30 days after recording of a notice of completion (sometimes referredto in public works as a notice of acceptance) or notice of cessation, if such a notice is recorded [*Civ. Code § 3184(a)*].

NOTE:
A notice of completion that may be recorded by a public agency is not provided for in the mechanics' lien law. Presumably, however, the contents of the notice of completion must be substantially the same as that which must be contained in a notice of completion that an owner may record for the purpose of shortening the time period in which a mechanics' lien claimant must record his or her claim of lien [*see* *Civ. Code §§ 3093, 3115, 3116*]. Thus, to be effective the notice must contain, among other things that would not be applicable to a public work, all of the following [*Civ. Code § 3093*]:

- **The date of completion, other than a cessation of labor (see discussion later in this note of cessation) [*but see*** *Civ. Code § 3093(a)* (recital of erroneous date of completion does not affect validity of notice if true date of completion is within 10 days preceding date of recording of notice)].

- **A description of the site sufficient for identification containing the street address of the site, if any [*see* *Civ. Code § 3093(d)*** (if sufficient legal description of site is given, validity of notice is not affected by fact that street address recited is erroneous or omitted)].

- **The name of the original contractor.**

The notice must be recorded in the office of the county recorder of the county in which the site is located, within 10 days after the completion. A notice of completion in otherwise proper form, verified and containing the information required by *Civ. Code § 3093,* must be accepted by the recorder for recording and must be deemed duly recorded without acknowledgment [*Civ. Code § 3093*].

***Civ. Code § 3086* provides that in the case of any work of improvement that is subject to acceptance by any public entity (this presumably includes all public works as defined in *Civ. Code § 3100,* because a public work is any work of improvement contracted for by a public entity), the completion of the work of improvement is deemed to be the date of the acceptance. However, except as to contracts awarded under the State Contract Act [*Pub. Contract Code § 10100 et seq.*], a cessation of labor on any public work for a continuous period of 30 days is a completion thereof [*Civ. Code § 3086*].**

A notice of cessation that may be recorded by a public agency is also not provided for in the mechanics' lien law. However, by analogy to the requirements for a notice of cessation for a private work, the notice should contain at least (1) the approximate date when the cessation of labor commenced; (2) a statement that the cessation has continued until the recording of the notice of cessation; (3) a description of the site sufficient for identification, containing the street address, if any (if a sufficient legal description of the site is given, the validity of the notice is not, however, affected by the fact that the street address is erroneous or omitted); and (4) the name of the original contractor [*see Civ. Code § 3092*]. The notice must be recorded in the office of the county recorder of the county in which the site is located and is effective only if there has been a continuous cessation of labor for at least 30 days prior to the recording [*Civ. Code § 3092*].

b. If no notice of completion (acceptance) or cessation has been recorded: 90 days after completion or cessation [*Civ. Code § 3184(b)*].

NOTE:

As noted above, completion of a public work is the date of the acceptance of the work or, except for contracts let pursuant to the State Contract Act [*Pub. Contract Code § 10100 et seq.*], a cessation of labor for a continuous period of 30 days [*see* *Civ. Code § 3086*; ***see also* *Krueger Brothers Builders, Inc. v. San Francisco Housing Authority (1988) 198 Cal. App. 3d 1, 6, 243 Cal. Rptr. 585* (completion of work on contract is not "cessation of labor" referred to in *Civ. Code § 3086*; date of acceptance of work is triggering 90-day period)]. Thus, it is unclear whether, in the case of a completion brought about by a cessation of labor for 30 days on a public work, a stop notice claimant must serve his or her stop notice within 90 days after the cessation of labor or 120 days after such cessation.**

c. If contract is for investigation, removal, or remedial action, or disposal of hazardous waste: 10 days after completion, if the conditions of *Pub. Contract Code § 4107.7* have been met [*Civ. Code § 3181*].

6. Affidavit of service by mail.

Not required or recommended.

NOTE:
Service by registered or certified mail is sufficient proof of service if the fact of service should become an issue.

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawPerformanceGeneral OverviewPublic Contracts LawPerformanceInspection & Acceptance of Goods & ServicesReal Property LawNonmortgage LiensMechanics' Liens

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42-481 California Forms of Pleading and Practice--Annotated § 481.192

§ 481.192 Effect

1. Duty to withhold imposed on public entity.

On receipt of a stop notice, the public entity must withhold from the original contractor, or any person acting under his or her authority, money or bonds due or to become due to the contractor in an amount sufficient to answer the stop notice claim and to pay the entity's reasonable costs of litigation [*Civ. Code § 3186*].

2. Prerequisite of duty to withhold.

Stop notice must be on file before the disbursing officer has actually surrendered possession of the warrant, check, bonds, or money [*Civ. Code § 3187*].

3. Extent of duty to withhold.

Amount in excess of the claim and interest and court costs to be reasonably anticipated may be released to the contractor [*Civ. Code § 3187*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-481 California Forms of Pleading and Practice--Annotated §§ 481.193-481.209

[Reserved]

§§ 481.193[Reserved]

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42-481 California Forms of Pleading and Practice--Annotated § 481.210

§ 481.210 When Bond May Be Filed

When original contractor or subcontractor disputes the validity or enforceability of a stop notice and when the public entity grants permission to file the bond [*Civ. Code § 3196*].

NOTE:

The term "subcontractor" in *Civ. Code § 3196* probably includes subcontractors with or without a direct contractual relationship with the original contractor [*see* *Civ. Code § 3104* defining subcontractor]. The former law (former Code Civ. Proc. § 1192.1(f)) allowed the contractor, subcontractor, or other person against whom a claim was filed to dispute its validity or enforceability. As a result of the legislative intention [1969 Stats., ch. 1362, § 10] not to change preexisting law, *Civ. Code § 3196* probably will be construed consistent with the prior law.

Legal Topics:

For related research and practice materials, see the following legal topics:
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42-481 California Forms of Pleading and Practice--Annotated § 481.211

§ 481.211 Who May File

The original contractor [*Civ. Code § 3196*].

NOTE:

The bond may be filed by the original contractor and not the subcontractor because it is the original contractor who has a direct contractual relationship with the public entity. To protect itself, however, the original contractor may require its subcontractors to furnish a bond to indemnify the original contractor for any loss he or she might sustain as a result of a subcontractor's default under *Civ. Code § 3248* [*Civ. Code § 3248(b)*]. However, the original contractor's right to require a bond of a subcontractor includes only those contractors with a direct contractual relationship with the original contractor or those required to be listed under the Subletting and Subcontracting Fair Practices Act [*Pub. Contract Code § 4100 et seq.*]. Thus, an original contractor may not be able to release funds withheld as a result of a breach by a sub-subcontractor without filing a bond under *Civ. Code § 3196*, even though he or she had no right to require the sub-subcontractor to furnish a bond to indemnify him or her for losses sustained.

To protect himself or herself, the original contractor could, in subcontracts with his or her subcontractors, require approval by him or her or, at least, notification of all sub-subcontractors by his or her subcontractors. Although the preliminary 20-day notice notifies the original contractor of potential claimants, a person performing actual labor for wages need not file a preliminary notice. By requiring approval or notification of all sub-subcontractors, the subcontractor who fails to obtain this approval or to provide this notification would breach his or her subcontract, thereby, perhaps, allowing indemnification of the original contract under a subcontractor's bond if one is required by the original contractor.

Until future legislative amendments or judicial decisions, the interplay between the merchanics'

liens and stop notice code sections and the Subletting and Subcontracting Fair Practices Act [*Pub. Contract Code § 4100 et seq.*] will remain uncertain.

Legal Topics:

For related research and practice materials, see the following legal topics:
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A. Withholding Payment on Public Works
4. Bond for Release of Withheld Funds

42-481 California Forms of Pleading and Practice--Annotated § 481.212

§ 481.212 Amount of Bond

One hundred twenty-five percent of the stop notice claim [*Civ. Code § 3196*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationSubcontracts & SubcontractorsSurety BondsReal Property LawNonmortgage LiensMechanics' Liens

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42-481 California Forms of Pleading and Practice--Annotated § 481.213

§ 481.213 Condition of Bond

The bond is conditioned on payment to the claimant of his or her claim together with his or her costs of suit in the action if he or she recovers in the action [*Civ. Code § 3196*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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42-481 California Forms of Pleading and Practice--Annotated § 481.214

§ 481.214 With Whom Filed

The public entity [*Civ. Code § 3196*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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42-481 California Forms of Pleading and Practice--Annotated § 481.215

§ 481.215 Release of Withheld Funds

The public entity, on the filing of the bond, releases the withheld funds to the original contractor [*Civ. Code § 3196*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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42-481 California Forms of Pleading and Practice--Annotated § 481.216

§ 481.216 Liability Under Bond

The liability of the bonding company is a joint and several one with the surety or sureties under the payment bond [*Civ. Code § 3196*].

NOTE:

The payment bond must be executed by an admitted surety insurer [*Code Civ. Proc. § 995.311(a)*]. The public agency approving the bond has a duty to verify the admitted insurer status of the party executing the bond [*Code Civ. Proc. § 995.311(b)*]. The release bond, however, must be executed by a corporate surety [*Civ. Code § 3196*]. Although *Civ. Code § 3196* provides that the surety or sureties on the release bond are jointly and severally liable to the stop notice claimant with the surety or sureties on any payment bond, it would appear that ordinarily there can be only one surety on the release bond, even though there may be several sureties on the payment bond.

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationSubcontracts & SubcontractorsSurety BondsReal Property LawNonmortgage LiensMechanics' Liens

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42-481 California Forms of Pleading and Practice--Annotated §§ 481.217-481.229

[Reserved]

§§ 481.217[Reserved]

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42-481 California Forms of Pleading and Practice--Annotated § 481.230

§ 481.230 Preparation of Affidavit

1. Contents.

See *§ 481.335*.

2. Execution.

Must be signed by the original contractor [*Civ. Code § 3198*].

3. Verification.

Required by implication of law.

NOTE:
An affidavit is a written declaration under oath, made without notice to the adverse party [*Code Civ. Proc. § 2003*]. The legislative intent is clear to use the word affidavit as defined in *Code Civ. Proc. § 2003*. Moreover, becuase the affidavit can be treated both as a pleading and as evidence [*Civ. Code § 3202*], it clearly must be under oath.

4. Copies.

a. Two for service on public entity [*Civ. Code § 3198*];

b. Three or more copies if claim is to be used as an exhibit to a complaint; and

c. One office copy.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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42-481 California Forms of Pleading and Practice--Annotated § 481.231

§ 481.231 Service of Affidavit on Public Entity

1. Place of service.

Not specified in statutory law, but apparently the office of the public entity involved in the public work.

2. Manner of service.

Not specified in statutory law, but apparently service could be personal or by registered or certified mail.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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42-481 California Forms of Pleading and Practice--Annotated § 481.232

§ 481.232 Service of Affidavit and Notice on Claimant

1. Who may serve.

Service on the claimant is made by the public entity [*Civ. Code § 3199*].

NOTE:
Because the original contractor serves two copies on the public entity, one of these two copies is used by the public entity for service by it on the claimant.

2. Place of service.

The address of the claimant as shown on his or her stop notice claim or his or her last known address [*Civ. Code § 3199*].

3. Manner of service.

Either personally or by registered or certified mail [*Civ. Code § 3199*].

4. Papers served.

a. Affidavit and demand for release [*see § 481.335*]; and

b. Notice [*see § 481.336*] that public entity will release money or bonds withheld unless the claimant files a counteraffidavit with the public entity on or before a time designated in the notice, which must be not less than 10 days nor more than 20 days after service on the claimant of a copy of the affidavit [*Civ. Code § 3199*].

5. Proof of service.

By affidavit prepared by the public entity and executed by the person responsible for mailing the affidavit and notice or responsible for personal service. The affidavit should be verified [*Civ. Code § 3199*].

NOTE:

If the claimant files a counteraffidavit, he or she should do so on or before the time designated in the notice, alleging the details of his or her claim, and setting forth in detail the specific basis on which he or she rebuts the allegations of the original contractor's affidavit, together with proof of service of a copy of the counteraffidavit on the original contractor [*Civ. Code § 3200*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsFinancingReal Property LawNonmortgage LiensMechanics' Liens

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42-481 California Forms of Pleading and Practice--Annotated § 481.233

§ 481.233 Release of Money or Bonds Withheld

If the claimant does not file a counteraffidavit with proof of service on the original contractor within the time allowed, the public entity must immediately release the money or bonds [*Civ. Code § 3200*].

NOTE:

Under *Civ. Code § 3200*, the public entity is not responsible for the validity of the affidavit and counteraffidavit, and under *Civ. Code § 3200*, is not liable for making the release.

Under *Civ. Code § 3200*, the money or bonds must be released if the counteraffidavit is not filed "within the time allowed." The quoted language probably refers to the time designated in the notice [*see § 481.336*] served on the claimant. However, the time designated could be prior in time to the maximum time that could have been allowed, which would be not more than 20 days after service of a copy of the affidavit on the claimant. To be on the safe side, the public entity would probably not release the funds until 20 days have passed from service of a copy of the affidavit on the claimant and, in so doing, would probably not be violating its obligation to release the funds.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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42-481 California Forms of Pleading and Practice--Annotated §§ 481.234-481.249

[Reserved]

§§ 481.234[Reserved]

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42-481 California Forms of Pleading and Practice--Annotated § 481.250

§ 481.250 Preparation of Complaint or Petition

1. Contents.

See *§ 481.337*.

2. Execution.

By the party bringing the proceedings or by his or her attorney [*Civ. Code § 3201*].

NOTE:
The party bringing the proceeding may be either the original contractor or the claimant [*Civ. Code § 3201*]. The proceedings areinitiated by a pleading, and Code of Civil Procedure sections on pleadings, such as *Code Civ. Proc. § 446*, would be applicable when appropriate and not inconsistent with the procedure set forth in *Civ. Code §§ 3201-3205*.

3. Verification.

Recommended.

NOTE:
***Civ. Code § 3201* does not require verification. Under *Civ. Code § 3202*, the affidavit and counteraffidavit constitute the pleadings, and, of course, the affidavit and counteraffidavit must be verified. Insofar as the complaint or petition that initiates the proceedings is also a pleading, it could also be verified. Under *Civ. Code § 3203*, a determination may be reached on no evidence except the affidavit and counteraffidavit. Insofar as a determination could be based on facts set forth in the complaint or petition, an additional reason would exist for its verification.**

4. Copies.

a. One for service on the defendant or respondent;

b. One for service on the public entity;

c. One for filing with the appropriate superior court, together with proof of service on both the defendant or respondent and the public entity; and

d. One office copy.

NOTE:
Procedures set forth in the Code of Civil Procedure for both actions and summary proceedings are not appropriate for the actual filing of the complaint to determine rights to withheld funds. Under *Civ. Code §§ 3201-3202*, both the defendant or respondent and the public entity must receive notice of the filing of the complaint or petition. In addition, because the affidavit and counteraffidavit constitute the pleadings, a summons need not be served on the parties. It is recommended that service on the defendant or respondent and the public entity be either by personal service or by registered or certified mail, with an affidavit of proof of service attached to the original complaint or petition filed with the court.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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42-481 California Forms of Pleading and Practice--Annotated § 481.251

§ 481.251 Filing of Complaint or Petition

1. Venue (county)

Proceedings should be filed in the appropriate superior court for a declaration of the respective rights of the parties [*Civ. Code § 3201*]. Proper counties for filing would be the county where the contract was to be performed, or in which the contract in fact was entered into, or the county of the proceedings [*Code Civ. Proc. § 395*].

2. Jurisdiction.

Jurisdiction to hear the proceedings is in the superior court only [*Civ. Code § 3201*].

NOTE:

Venue relates to the proper county for trial of an action, and jursidiction relates to the power of a court to adjudicate the matter.

If the proceedings are brought in a superior court other than one in a proper county, the action may be transferred under *Code Civ. Proc. § 397* .

3. Fees.

Plaintiff pays the filing fee when the first paper is filed in the action or proceeding. The total amount required may vary from court to court, and from county to county. Generally, filing fees are fixed by statute [*see Gov. Code §§ 70611-70613*]. If payment of filing fees is made by check that is later returned without payment, the court will notify the party who tendered the check that (1) the check has been returned without payment; (2) an administrative charge [*see Code Civ. Proc. § 411.20(g)*] has been imposed to reimburse the court for the costs of processing the returned check and providing notice that

the check has been returned; and (3) the party has 20 days from the date the notice was mailed to pay the filing fee and administrative charge in cash, by certified check, or by any other means specified by the court but not by traveler's or personal check. If the person who tendered the check is only acting on behalf of a party, the clerk must notify not only the person who tendered the check, but also the party or that party's attorney if the party is represented [*Code Civ. Proc. § 411.20(a)*]. If a trial or other hearing is scheduled to begin before the 20-day period expires, the fee must be paid before the trial or hearing [*Code Civ. Proc. § 411.20(e)*]. The clerk will void the filing if the party who tendered a returned check or on whose behalf a returned check was tendered, or the party who paid less than the required fee or on whose behalf the fee was paid, has not paid the full amount of the fee and administrative charge within the 20-day period, or before the date set for trial or hearing, as applicable [*Code Civ. Proc. § 411.20(b), (e)*]. If an adverse party files a responsive pleading, together with a filing fee, in response to a pleading that is voided due to a returned check, the adverse party's filing is not required and will be voided. The court will mail to the parties or their attorneys notice that the initial paper and response have been voided. The responding party's filing fee will be refunded on request provided the request is made within 20 days from the date on which the notice was mailed. No administrative charge will be imposed on the responding party. The refund is available if the adverse party has filed only a responsive pleading, but not if he or she has also filed a cross-complaint or other first paper seeking affirmative relief for which there is a filing fee [*Code Civ. Proc. § 411.20(c)*]. If in doubtas to local practice, counsel should check with the local court clerk to determine theamount of fees payable before filing his or her complaint or petition.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsExclusive JurisdictionCivil ProcedureVenueIndividual DefendantsCivil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsFiling FeesCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral Overview

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42-481 California Forms of Pleading and Practice--Annotated § 481.252

§ 481.252 Service of Complaint or Petition

1. Persons to be served.

a. The defendant or respondent [*Civ. Code § 3201*]; and

b. The public entity [*Civ. Code § 3201*].

NOTE:
***Civ. Code § 3201* does not require service of the complaint on the defendant or respondent and the public entity. However, because either the original contractor or the claimant is entitled to obtain a hearing on the complaint or petition, it is apparent that the defendant should be notified of the filing of the complaint. At the hearing, the public entity must file the affidavit and counteraffidavit with the court [*Civ. Code § 3202*], and for this reason should receive notice of the filing of the complaint or petition. However, even if service of the complaint on the public entity is not required by implication of law, the public entity, along with the defendant or respondent, must receive five days' notice in writing of the hearing [*Civ. Code § 3202*].**

If counsel should decide to obtain an ex parte order for the hearing date [*see § 481.338*], he or she could serve the complaint and ex parte order at the same time, filing with the complaint and ex parte order an affidavit of service of both the complaint or petition and the ex parte order, which constitutes notice of the hearing on the defendant or respondent and the public entity.

2. Place of service.

The address of the defendant or respondent as shown on papers previously filed with the public entity or his or her last known address, and the address of the public entity to which previous notices and affidavits have been filed.

3. Manner of service.

Personal service or service by registered or certified mail is recommended.

NOTE:

***Civ. Code § 3201* does not mention the manner of service that should be used. Service by summons [*Code Civ. Proc. §§ 412.10-417.40*] would not seem appropriate to proceedings under *Civ. Code § 3201*. A summons under *Code Civ. Proc. § 412.20* must contain a direction that the defendant file with the court a written pleading in response to the complaint within 30 days after the summons is served on him or her. However, a responsive pleading is not necessary to a complaint or petition for a declaration of rights to withheld funds, because, under *Civ. Code § 3202*, the affidavit and counteraffidavit constitute the pleadings, and, under *Civ. Code § 3201*, only notice of the hearing on the complaint is legally required. Although service of the complaint or petition on both the public entity and defendant or respondent is recommended, this service is thus apparently not legally required. Because the complaint or petition, if verified, can be used as evidence at the hearing, it should be served on the parties who may appear at the hearing.**

4. Affidavit of service by mail [*Code Civ. Proc. §§ 1013, 1013a*].

To the extent appropriate, proof of service by affidavit is recommended.

NOTE:

***Civ. Code § 3201* does not specify the method of service. Service by first-class mail is not recommended, but, instead, should be either personal service or service by registered or certified mail. Thus, proof of service could be shown by either the records of certification or registration or by the affidavit.**

5. Time limits.

The hearing must be within 15 days from the making of motion for a hearing and five days' notice must be given of the hearing [*Civ. Code § 3201*].

NOTE:

No time limit is specified for the service of the complaint or petition, partly for the reason that service of the complaint or petition, independent of service of a notice for a hearing, is probably not legally required.

Although *Civ. Code § 3201* is not clear on this point, notice of a motion for a hearing is apparently not legally required and only a written notice of the hearing is required. Thus, an ex parte application for the granting of a hearing date would seem appropriate [*see* *§ 481.338* for ex parte order]. However, where an ex parte order is not obtained, the written notice could be of the hearing [***see*** *§ 481.339*]. If counsel desires to give a written notice of the motion for a hearing, he or she should use § *481.340*, which is for use when the court would go through the formality of granting the motion on the date set for the hearing and then proceed to conduct the hearing itself. In any event, counsel should check local court practice before deciding which of §§ *481.338-481.340* he or she should use.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsMailCivil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessProofGeneral Overview

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42-481 California Forms of Pleading and Practice--Annotated § 481.253

§ 481.253 Hearing

1. Burden of proof.

The original contractor has the burden of proof at the hearing [*Civ. Code § 3202*].

NOTE:
***Civ. Code § 3197* gives the following four grounds for the original contractor's affidavit:**

- **Claim is not of the type or classification for which a stop notice can be filed;**
- **The claimant is not qualified to file a stop notice;**
- **The amount of the claim is excessive; and**
- **There is no basis in law for the claim set out in the stop notice.**

***Civ. Code § 3202*, which provides that at the hearing the original contractor has the burden of proof, is based on statutory language in former Code Civ. Proc. § 1190.1(c) enacted before the Evidence Code, which was effective January 1, 1967. Under *Evid. Code § 502*, a party with the burden of proof is required to meet one of the following burdens: (1) to raise a reasonable doubt as to the existence or nonexistence of a fact; (2) to establish the existence or nonexistence of a fact by a preponderance of the evidence; (3) to establish the existence or nonexistence of a fact by clear and convincing proof; or (4) to establish the existence of a fact beyond a reasonable doubt.**

The legislative intent was probably to impose on the original contractor the burden of proving the nonexistence of a factual ground for a stop notice by a preponderance of the evidence.

2. Nature of presumption established.

The presumption established by *Civ. Code § 3202* is probably a presumption affecting the burden of producing evidence [*see Evid. Code §§ 550(b), 601, 603-604*] and not a presumption affecting the burden of proof [*see Evid. Code §§ 605, 606*].

NOTE:

To state that a party has the burden of proof as to the nonexistence of a fact is another way of stating that the other party is entitled to either a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof as to the existence of a particular fact. A presumption affecting the burden of producing evidence is established to facilitate the determination of an action [*Evid. Code § 603*], while a presumption affecting the burden of proof is established to implement some public policy other than to facilitate the determination of an action [*Evid. Code § 605*].

The legislative intent was probably to impose on the original contractor the burden of producing evidence. Once this burden is met, the claimant clearly would not be entitled to a presumption in his or her favor. Under *Evid. Code § 550(b)*, the burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact. The legislative intent was most likely to impose on the original contractor such a burden and not to entitle the claimant to a presumption affecting the burden of proof. Thus, even though the original contractor must establish his or her defense to the stop notice claim by a preponderance of the evidence, once the burden of producing evidence has been met, the claimant would not be entitled to a presumption as to the existence of a particular fact. Because at the hearing both the affidavit and counteraffidavit may be treated as evidence [*Civ. Code § 3203*], both parties would have introduced evidence and no presumption would operate unless the original contractor's affidavit did not fulfill the burden of producing evidence that resulted from the filing of a stop notice by the claimant.

3. Jury trial.

The stop notice procedure is not to be construed as to deprive any party of the right to a jury trial when this right is given by the California Constitution [*Civ. Code § 3204*].

NOTE:

Ordinarily, a demand for a jury trial is made in the Case Management Statement (Judicial Council Form CM-110) [*see* *Cal. Rules of Ct., Rules 3.725, 3.727(13)*]. However, a case management statement is not the appropriate way to obtain a hearing date on the complaint or petition to determine the rights of the parties. It would seem that if the claimant desires a jury trial, he or she should demand a jury trial prior to or at the start of the hearing. If a motion for a hearing is heard before the actual start of the hearing, a demand for a jury trial would not seem appropriate until the court has granted the motion.

4. When hearing is ordered continued.

a. Demand for jury trial: If a demand for a jury trial is made at the time and place set for a hearing, the court should apparently order the hearing continued for the production of other evidence.

b. Hearing before court sitting without a jury: If no evidence other than the affidavit and counteraffidavit is offered, and the court is dissatisfied with the sufficiency of the facts shown thereby, it must order the hearing continued for the production of other evidence, oral or documentary, or the filing of other affidavits and counteraffidavits [*Civ. Code § 3203*].

5. Court order.

a. Contents.

See *§ 481.341*.

b. Findings.

Not required [*Civ. Code § 3203*].

c. Nature of order.

A determination of whether or not the demand for release of money or bonds will be allowed.

d. Service.

The original contractor must serve a copy of the order on the public entity [*Civ. Code § 3203*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury DemandsCivil ProcedureTrialsJury TrialsRight to Jury TrialEvidenceInferences & PresumptionsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofClear & Convincing ProofEvidenceProcedural ConsiderationsBurdens of ProofPreponderance of EvidenceEvidenceProcedural ConsiderationsBurdens of ProofProof Beyond Reasonable DoubtReal Property LawNonmortgage LiensMechanics' Liens

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42-481 California Forms of Pleading and Practice--Annotated §§ 481.254-481.269

[Reserved]

§§ 481.254[Reserved]

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7. Enforcement of Rights Arising From Stop Notice

42-481 California Forms of Pleading and Practice--Annotated § 481.270

§ 481.270 Commencement of Time to File Action to Enforce

An action against the original contractor and the public entity to enforcepayment of the claim stated in the stop notice may be commenced at any time after 10 days from the date of service of the stop notice on the public entity [*Civ. Code § 3210*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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42-481 California Forms of Pleading and Practice--Annotated § 481.271

§ 481.271 Expiration of Time to File Action to Enforce

An action cannot be commenced more than 90 days following the expiration of the period within which stop notices must be filed as provided in *Civ. Code § 3184* [*see § 481.191*, Paragraph 5]. No such action may be brought to trial and no judgment may be entered until the expiration of the 90-day period. No money or bond can be withheld by reason of any such notice longer than the expiration of the 90-day period unless proceedings are commenced by the claimant in a proper court within that time to enforce his or her claim. If the proceedings have not been commenced, the stop notice ceases to be effective and the moneys or bonds withheld are required to be paid or delivered to the contractor or other person to whom they are due [*Civ. Code § 3210*].

NOTE:

To give notice to a stop notice claimant of the commencement of the time period in which an action to enforce payment of the claim stated in the stop notice must be brought, *Civ. Code § 3185* provides that no later than 10 days after the filing of a notice of completion or after the cessation of labor has been deemed a completion of the public work or after the acceptance of completion, whichever is later, the public entity must give notice of the expiration of that period to each stop notice claimant by personal service, or registered or certified mail, if the claimant has paid to the public entity the sum of $2 at the time of filing the stop notice. When service is by registered or certified mail, service is complete at the time of the deposit of the registered or certified mail in the United States post office, addressed to the claimant at the address shown on the stop notice claim [*Civ. Code § 3185*]. If the public agency fails to give the notice of expiration, it may be estopped to rely on the statute of limitation. If the amount withheld is paid to the contractor because an action was not filed within the limitation period, the contractor also may be estopped to rely on the statute of limitation [*J. H. Thompson Corp. v. DC Construction (1992) 4 Cal. App. 4th 1355, 1359-1361* ,] . Under appropriate circumstances, the statute of limitations may also be equitably tolled [*see Structural Steel Fabricators, Inc. v. City of Orange (1995) 40 Cal. App. 4th 459, 464-467 , 46 Cal. Rptr. 2d 871]* . For further discussion of estoppel and equitable tolling, see *§ 481.49[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsEquitable EstoppelGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLegislationStatutes of LimitationsTollingReal Property LawNonmortgage LiensMechanics' Liens

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42-481 California Forms of Pleading and Practice--Annotated § 481.272

§ 481.272 Jurisdiction

In the absence of a contrary, specific legislative mandate, the jurisdictional rules that apply under the mechanics' lien law also apply to an action to enforce a stop notice claim [*Sunlight Elec. Supply Co. v. McKee (1964) 226 Cal. App. 2d 47, 50 37 Cal. Rptr. 782]* .

Thus, the superior court has jurisdiction of a stop notice enforcement action, which will be classified as an unlimited civil case unless it is a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(6)*]. An action to enforce and foreclose a mechanics' lien (and, presumably an action to enforce a stop notice claim) is a limited civil action if the amount of the lien, exclusive of interest, is $25,000 or less [*Code Civ. Proc. §§ 85, 86(a)(6)*]. When an action to enforce the lien affects property that is also affected by a similar pending action that is not a limited civil case, or when the total amount of the liens sought to be foreclosed against the same property exceeds $25,000, the action is not a limited civil case [*Code Civ. Proc. § 86(a)(6)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsExclusive JurisdictionReal Property LawNonmortgage LiensMechanics' Liens

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42-481 California Forms of Pleading and Practice--Annotated § 481.273

§ 481.273 Venue

The action is to be filed in a proper court [*see Civ. Code § 3210*], and a proper county would be where the contract is to be performed, or in which it was entered into, or the county in which a defendant resides [*Code Civ. Proc. § 395*].

Legal Topics:

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

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42-481 California Forms of Pleading and Practice--Annotated § 481.274

§ 481.274 Notice

1. Contents.

See *§ 481.343*.

2. Notice of the commencement of the action must be given to the public entity within five days and in the same manner as provided for a stop notice under *Civ. Code § 3103* [*Civ. Code § 3211*].

3. Personal service or service by registered or certified mail is recommended.

NOTE:
In *Sunlight Elec. Supply Co. v. McKee (1964) 226 Cal. App. 2d 47, 37 Cal. Rptr. 782* , a notice filed 14 days after the commencement of an action was held to be substantial compliance with former Code Civ. Proc. § 1197.1(b) if no detriment was shown resulting from failure to serve the notice within five days.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsMailCivil ProcedurePleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral Overview

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42-481 California Forms of Pleading and Practice--Annotated § 481.275

§ 481.275 Claimants' Right to Join in Pending Action

Stop notice claimants may join in a pending action to enforce a stop notice [*Civ. Code § 3214*].

NOTE:

The law is unclear as to whether a party can qualify as a stop notice claimant under *Civ. Code § 3214* when he or she has served a stop notice but has not served a required preliminary 20-day notice. Since the preliminary notice is intended to notify the original contractor and the public entity of the potential claim, the better rule would be that a stop notice claimant who has not filed a valid preliminary 20-day notice should be treated as a claimant for purposes of *Civ. Code § 3214*. Neither the original contractor nor public entity would be prejudiced by such treatment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsImpleaderCivil ProcedureParties JoinderPermissive JoinderCivil ProcedurePretrial MattersConsolidation of ActionsReal Property LawNonmortgage LiensMechanics' Liens

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42-481 California Forms of Pleading and Practice--Annotated § 481.276

§ 481.276 Consolidation of Actions

1. By court first acquiring jurisdiction: When separate actions are commenced, the court first acquiring jurisdiction may consolidate them [*Civ. Code § 3214*].

2. On request of public entity: The court must require all claimants to moneys withheld pursuant to stop notices to be impleaded in one action [*Civ. Code § 3214, see § 481.344*].

NOTE:

A claimant may have filed an unenforceable stop notice. A stop notice might be effective as a notice in the sense that the requirements of *Civ. Code § 3184* have been fulfilled, but the notice might not be enforceable under *Civ. Code § 3183* for failure to give a required preliminary 20-day notice. The law is unclear as to whether the claimant under an unenforceable stop notice can qualify as a claimant under *Civ. Code § 3214*. Under *Civ. Code § 3214*, such a claimant would not be enforcing the stop notice in the sense of requiring the public entity to withhold funds, and he or she would only be sharing in funds withheld as a result of enforceable stop notices filed by other claimants. The claimant would also be sharing in the funds not because he or she is enforcing the stop notice but only because the public entity has requested the court to implead him or her in an action involving the respective rights of claimants to funds withheld by a public entity.

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42-481 California Forms of Pleading and Practice--Annotated § 481.277

§ 481.277 Dismissal

If an action is not brought to trial within two years after its commencement, the court may, in its discretion, dismiss the action for want of prosecution [*Civ. Code § 3212*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to Prosecute

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42-481 California Forms of Pleading and Practice--Annotated §§ 481.278-481.289

[Reserved]

§§ 481.278[Reserved]

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42-B California Forms of Pleading and Practice--Annotated Scope

Scope

NOTE:

SB 189, which was introduced in February 2009 as a two-year bill, would comprehensively revise, reorganize, and consolidate the law governing stop notices and payment bonds on public works projects in the Public Contract Code. The proposed legislation is the product of a recommendation of the California Law Revision Commission, which may be consulted at http://www.clrc.ca.gov/pub/Printed-Reports/REC-H821.pdf. The legislation would be operative January 1, 2011. If SB 189 is enacted, this chapter will be updated in a future release.

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42-481 California Forms of Pleading and Practice--Annotated § 481.290

§ 481.290 Scope of Checklist

NOTE:

The following checklists are illustrative of the procedures commonly utilized by counsel in actions on contractor's payment bonds. Other procedures may be required. In addition, the provisions of *Code Civ. Proc. § 307 et seq.*, except as otherwise provided, are applicable to, and constitute the rules of practice in, the proceedings relating to stop notices and payment bonds [*Civ. Code § 3259*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationSubcontracts & SubcontractorsSurety BondsReal Property LawNonmortgage LiensMechanics' Liens

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42-481 California Forms of Pleading and Practice--Annotated § 481.291

§ 481.291 Service of Post-Completion Bond Notice (Public Works)

NOTE:

Service of either a 20-day preliminary notice (public work) or a post-completion bond notice will allow a claimant to enforce a claim against a payment bond [*Civ. Code § 3252*]. Claimants not required to serve a 20-day preliminary bond notice are also not required to serve a post-completion bond notice [*see Civ. Code §§ 3098(a), 3252(a)*]. For a form and outline of requirements for giving a 20-day preliminary notice, see *§§ 481.170 -481.174*, and see *§ 481.330*.

The post-completion notice requirement, which is seemingly inconsistent with the 20-day preliminary notice alternative, was enacted, effective January 1, 1995 [*see* 1994 Stats., ch 974 § 7], to protect the rights of "unsophisticated" laborers and materialmen who may not be aware of the 20-day preliminary notice requirement.

1. Contents of notice.

See *§ 481.360*.

2. Manner of service.

The post-completion bond notice may be served by personal delivery, or by depositing the notice in the mail, postage prepaid, certified or registered, and addressed in accordance with any of the following that may be applicable [*Civ. Code § 3227(a)*]:

a. If to an individual surety, at his or her residence or place of business, if known. If to an individual surety whose residence is unknown, then in care of the clerk of the county in which the bond has been recorded.

b. If to a corporate surety, at the office of or in care of the agent designated by the surety in the bond as the address to which notice must be sent.

c. At the office of or in care of any officer of the surety in California.

d. At the office of or in care of the statutory agent of the surety in California.

e. To the bond principal at the last known address.

f. By service in the manner provided by law for the service of a summons in a civil action.

The preliminary bond notice must be served by mailing the same by registered or certified mail, postage prepaid, in an envelope addressed to the original contractor at any place he or she maintains an office, or

3. Time limitation.

The post-completion bond notice must be given within 15 days after recording of a notice of completion. If no notice of completion has been recorded, the time for giving written notice to the surety is extended to 75 days after completing the work of improvement [*Civ. Code § 3252(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsFinancingPublic Contracts LawBids & FormationSubcontracts & SubcontractorsSurety Bonds

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42-481 California Forms of Pleading and Practice--Annotated § 481.292

§ 481.292 Time Limitations

1. Commencement of period within which suit may be brought.

Suit against surety on payment bond may be brought after the claimant has furnished the last of the labor or materials, or both [*Civ. Code § 3249*].

2. Expiration of period within which suit may be brought.

Suit must be commenced before the expiration of six months after the period in which stop notices may be filed as provided in *Civ. Code § 3184* [*Civ. Code § 3249*].

NOTE:

However, the filing of a stop notice is not a condition precedent to the maintenance of an action against the surety on the payment bond [*Civ. Code § 3250*].

If the suit on the payment bond is going to be combined with enforcement of the stop notice action, which must be commenced within 90 days after the period for filing stop notices has expired [*Civ. Code § 3210*], then an action joining these two causes of action should be instituted during such 90-day period.

For a discussion of the above code sections and the determination of the commencement of various periods involved, see *Fidelity Sound Systems, Inc. v. American Bonding Co. (1978) 149 Cal. Rptr. 674* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsPublic ImprovementsFinancingPublic Contracts LawBids & FormationSubcontracts & SubcontractorsSurety BondsReal Property LawNonmortgage LiensMechanics' Liens

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42-481 California Forms of Pleading and Practice--Annotated § 481.293

§ 481.293 Preparation of Complaint

The essential allegations for a complaint for recovery on a contractor's payment bond are:

1. Capacity or residence of plaintiff (generally optional unless plaintiff is suing in a representative capacity or it is necessary to establish plaintiff's right to maintain the action);

2. Name and capacity (and residence, where venue is to be based thereon) of defendant or each defendant if there is more than one;

3. Agency allegations, if appropriate. See Ch. 20, *Allegations Commonly Used ;* and

4. Facts establishing the right of plaintiff to bring an action on a contractor's payment bond. See *§ 481.361*, Paragraphs 6-12 of the Second Cause of Action:

a. If plaintiff is a contractor, that he or she is licensed as such;

b. That the plaintiff performed labor or furnished materials for and actually used in or consumed in a public work;

c. That the labor performed or materials furnished were at the instance of the original contractor;

d. Dates on which labor or materials were furnished;

e. Full performance of the contract (or, if not entirely performed, the excuse therefor accorded in the contract);

f. Amount due plaintiff on contract; and

g. That the original contractor, as principal, and a surety or sureties executed a bond which, by its terms was made to inure to the benefit of the plaintiff, as a claimant, and gave him or her right to recover on the bond.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsGovernmentsPublic ImprovementsFinancingPublic Contracts LawBids & FormationSubcontracts & SubcontractorsSurety Bonds

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42-481 California Forms of Pleading and Practice--Annotated § 481.294

§ 481.294 Venue

A defendant surety corporation may be sued in the county where the contract is made or is to be performed or where the obligation or liability arises or the breach occurs; it may also be used in the county where the principal place of business of the corporation is situated [*Code Civ. Proc. §§ 395, 395.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueCorporationsPublic Contracts LawBids & FormationSubcontracts & SubcontractorsSurety Bonds

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42-481 California Forms of Pleading and Practice--Annotated §§ 481.295-481.309

[Reserved]

§§ 481.295[Reserved]

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PART V. FORMS
A. Actions on Public Works Contracts

42-481 California Forms of Pleading and Practice--Annotated § 481.310

§ 481.310 Complaint by Contractor Against Public Entity for Damages for Breach of Contract on Public Work

[1] FORM Complaint by Contractor Against Public Entity for Damages for Breach of Contract on Public Work

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES (Breach of Con-
_____ [*names*], Defendants.	)	tract)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, a duly licensed _____ [general *or* painting *or specify other type of contractor*] contractor under the laws of the State of California and engaged in business as such in the _____ [City *or* City and County] of _____, [County of _____,] California.

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

3. At all times herein mentioned, defendant _____ [*name of public entity*] was, and now is, a _____ [*specify capacity of defendant public entity, e.g.*, municipal corporation, duly organized and

existing under the laws of the State of California, and situated in the County of _____ *or* a chartered city, existing as such under the laws of the State of California, and situated in the County of _____].

4. On or about _____ [*date*], defendant _____ [*name of public entity*] acting through _____ [*specify public department, board, or agency, e.g.*, the Board of Public Works], and by virtue of the authority granted _____ [*specify statute, charter, e.g.*, by the charter of the defendant city], entered into a contract in writing with plaintiff for the construction of _____ [*describe construction project*]. A true and correct copy of the contract is attached to this complaint as Exhibit A and made a part of this complaint.

5. By the terms of the contract, all of the work was to be performed in accordance with the plans and the specifications _____ [more fully described in the contract *or* which are attached to this complaint as Exhibit B and made a part of this complaint].

6. Thereafter, plaintiff in all respects complied with the conditions and provisions of the contract, and all of the work was performed by plaintiff in the presence of inspectors of defendant in accordance with the plans and specifications _____ [contained in *or* attached to and forming a part of] the contract; all of the work was accepted by the inspectors as having been performed in accordance with the plans and specifications.

7. On _____ [*date*], plaintiff notified defendant _____ [*name of public entity*] that plaintiff had completed all of the work to be performed by him/her under the provisions of the contract, and plaintiff requested final inspection of the work so that plaintiff could receive payment therefor.

8. On _____ [*date*], defendant _____ [*name of public entity*] notified plaintiff that the work would not be accepted until certain additional work had been performed, namely: _____ [*describe additional work*]. Plaintiff refused to perform such additional work [unless additional compensation was paid] on the ground that plaintiff had fulfilled all of his/her contractual obligations with defendant. By reason of the refusal of defendant to accept the work performed by plaintiff or to pay plaintiff therefor, [or to recognize plaintiff's right to additional compensation,] plaintiff, pursuant to a reserved right to claim additional compensation for such additional work [, as specified in a notice delivered to defendant on _____ (*date*), a copy of which is attached to this complaint as Exhibit C and made a part of this complaint], completed all of the [required] additional work. All of the construction work performed by plaintiff was accepted by the defendant on _____ [*date*].

9. All of the additional work directed by defendant was performed by plaintiff at a cost of $_____, all to the damage of plaintiff in this amount, and work and services performed and materials supplied by plaintiff were reasonably worth this amount.

10. Under the provisions of the contract between plaintiff and defendant, plaintiff could not receive compensation for the work performed by him/her until such time as the project had been accepted as complete by defendant.

11. Prior to the commencement of this action, and on or about _____ [*date*], plaintiff presented to defendant _____ [*name of public entity*] a claim for damages in the sum of $_____ for breach of contract whichare sought in this action. A true and correct copy of the claim is attached to this complaint as Exhibit D and made a part of this complaint.

12. On or about _____ [*date*], defendant _____ [*name of public entity*] _____ [rejected this claim in its entirety *or* allowed this claim in the amount of $_____ and rejected it as to the remainder].

WHEREFORE, plaintiff prays judgment [against defendants, and each of them,] as follows:

1. For compensatory damages in the sum of $_____;

2. For interest on the sum of $_____ from and after _____ [*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of complaint for damages for breach of contract is for use by a general contractor against a public entity that wrongfully refused to accept the work performed by the contractor and required the contractor to perform certain additional work that the contractor did perform but for which he or she was not fully compensated under the terms of the general contract.

[3] Verifications

A public entity need not verify its answer even though the complaint is verified [*see Code Civ. Proc. § 446*]. The verification of a complaint against a public entity does, however, preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*].

[4] Jurisdiction

Superior courts have original jurisdiction in all cases except those given by statute to other trial courts [*Cal. Const., art. VI, § 10*]. If the demand, exclusive of interest, or the value of the property amounts to $25,000 or less, except in certain

cases (not relevant here), the case will be classified as a limited civil case [*Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases the first page of the first paper filed must state whether the demand exceeds or does not exceed $10,000. The first page of the first paper filed must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 72055*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[5] Venue

In a breach of contract action, proper venue is in the county where the defendant resides, where the contract was to be performed, or where the contract was entered into. The county in which the obligation was incurred will be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary [*see Code Civ. Proc. § 395(a)*]. If the defendant in the contract action is a corporation, the action may also be brought in the county in which the corporation has its principal place of business [*see Code Civ. Proc. § 395.5*].

[6] Pleading Presentation of Claim to Public Entity

A claim for compensation arising out of a contract between a contractor and a public entity must be presented to the public entity in accordance with the provisions of *Gov. Code §§ 900-915.4* [*see Gov. Code § 905* (local public entities), *Gov. Code § 905.2* (state)]. The claim must be presented to the public entity as provided in *Gov. Code §§ 915-915.4* not later than one year after the accrual of the cause of action [*see Gov. Code § 911.2(a)*], which is the date on which the cause of action would be deemed to have accrued within the meaning of the statute of limitations which would be applicable thereto if there were no requirement that a claim be presented to and be acted on by the public entity before an action could be commenced thereon [*Gov. Code § 901*].

Except as provided in *Gov. Code §§ 946.4* (inadequate statement concerning public agency on file with Roster of Public Agencies during 70 days following accrual of cause of action) and 946.6 (petition for relief from *Gov. Code § 945.4* where public entity rejects late claim), no suit for money or damages may bebrought against the public entity on a cause of action for which a claim is required to be presented until a written claim therefor has been presented to the public entity and has been acted on by the board, or has been deemed to have been rejected by the board [*Gov. Code § 945.4*]. Satisfaction of this procedural prerequisite is an element of a contractor's cause of action against a public entity. A complaint must allege thepresentation of a written claim against the public entity (*see* Paragraph 11); otherwise, it does not set forth a cause of action against the public entity on any theory [*see Wilson v. People ex rel. Dept. of Public Works (1969) 271 Cal. App. 2d 665, 668, 76 Cal. Rptr. 906]* .

[7] Statute of Limitations

Except as provided in *Gov. Code §§ 946.4* (inadequate statement concerning public agency on file with Roster of Public Agencies during 70 days following accrual of cause of action) and 946.6 (relief from requirement of *Gov. Code § 945.4*), any suit brought against a public entity on a cause of action for which a claim is required to be presented must be commenced: (1) if written notice is given in accordance with *Gov. Code § 913* by the public entity, not later than six months after the date such notice is personally delivered or deposited in the mail, or (2) if such written notice is not given by the public entity, within two years after the accrual of the cause of action [*Gov. Code § 945.6(a)*]. This two-year period may be extended if the claimant and the board extend the period within which the board is required to act on the claim presented by the claimant [*see Gov. Code §§ 912.4(b), 945.6(a)(2)*].

[8] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to Fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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PART V. FORMS
A. Actions on Public Works Contracts

42-481 California Forms of Pleading and Practice--Annotated § 481.311

§ 481.311 Complaint by Contractor Against Public Entity for Damages for Breach of Contract for Construction of Retaining Wall--Breach of Warranty and Fraudulent Concealment

[1] FORM Complaint by Contractor Against Public Entity for Damages for Breach of Contract for Construction of Retaining Wall--Breach of Warranty and Fraudulent Concealment

[*Caption. See § 481.310.*]

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California.

[2. *Allegation of plaintiff's contractor's license. See § 481.310, Paragraph 1.*]

[3. *Allegation of capacity of defendant as public entity. See § 481.310, Paragraph 3.*]

4. On or about _____ [*date*], plaintiff and defendant entered into a written contract for the construction of _____ [*describe work to be performed under contract, e.g.*, a retaining wall of a type known as a sidehill bridge], which contract consisted of the following documents: (1) contract dated _____; (2) plans and specifications; (3) instructions to bidders; (4) bid proposal, and (5) standard specification No. _____ of the Department of Public Works, City of _____.

5. The contract, in part, provides as follows: _____ [*set forth contract provisions, e.g.*,

a. Contractor agrees to furnish all material, equipment, and labor necessary for the construction of and to construct the retaining wall for the lump sum of $_____.

b. Contractor agrees to furnish said material, equipment, and labor, and to perform said work strictly in accordance with the plans, and any specifications therefor, and instructions to bidders and bid proposal therefor, which were duly approved and adopted by the _____ (*name of public agency, e.g.*, Board of Public Works) of _____ (*name of public entity*) at its meeting of _____ [*date*].

c. It is expressly understood and agreed that the instructions to bidders, the notice inviting bids, the contractor's proposal, and said plans and specifications, all of which are on file in the office of _____ (*name of public agency, e.g.*, Board of Public Works) constitute a part of this contract, and each of the parties hereto does hereby expressly convenant and agree to carry out and fully perform each and all of the provisions of the documents on his/her/its part to be performed.

d. That in constructing _____ (*specify work to be done under contract, e.g.*, the retaining wall), plaintiff was to _____ (*describe work to be done leading to unforeseen condition, e.g.*, install anchorcaissons and soldier beams detailed in the plans and specifications, through the specified procedure of drilling unsupported holes in the ground of some 12 to 34 feet in depth, which drilling procedure did not contemplate use of rotary mud).

e. Contractor agrees to begin work within _____ (*number*) days after execution of the contract, to complete the work within _____ (*number*) calendar days, and to pay a penalty of $_____ for each unexcused calendar day over these _____ (*number*) days as liquidated damages.

f. The _____ (*name of public entity*) agrees to pay the contractor for the performance of this work, as mentioned above, the sum hereinabove set forth, at the time and in the manner provided in the specifications, namely, the lump sum of $_____, to be paid within _____ (*number*) days after job acceptance by defendant _____ (*name of public entity*).]

6. Standard specification No. _____, forming a part of the contract, provides in part as follows: _____ [*set forth pertinent specifications, e.g.*,

2-1. These specifications, the plans, the project specifications, the instructions to bidders, and the notice inviting bids are all essential parts of the contract.

No deviations from the plans and specifications will be permitted except such as are authorized by the engineer to meet exigencies of construction. Section 2-1 is set forth in full in Exhibit A, which is attached hereto and made a part hereof.

2-8. CHANGED OR UNFORESEEN CONDITIONS. During the progress of the work, if the contractor should encounter subsurface or latent conditions materially different from those shown on the plans or indicated in the project specifications, or unknown conditions of a nature differing materially from those ordinarily encountered and generally recognized as being inherent in work of the character being performed, he/she must, before proceeding further with work affecting or affected by such conditions, immediately notify the engineer who will promptly make an investigation. If conditions do materially differ and the contractor could not reasonably have been expected to ascertain, in advance, the true nature of the existing conditions, a change order will be issued to provide for any increase or decrease in cost and difference in contract time resulting from any such condition. Section 2-8 is set forth in full in Exhibit B, which is attached hereto and made a part hereof.

3-3. BOARD OF PUBLIC WORKS. The Board of Public Works of _____ (*name of public entity*) has the final authority in all matters affecting the work covered by these specifications.

THE ENGINEER. Within the scope of the contract, the engineer is authorized to decide matters with respect to the

interpretation of the plans and specifications, to approve necessary changes in plans up to $_____ in cost, and to initiate changes in plans or the scope of the work, irrespective of cost, for submission to the board for final action.

THE INSPECTOR. Within the scope of the contract, the inspector is authorized to enforce compliance with plans and specifications, to determine the acceptability of materials and workmanship, and to prepare and process progress payment estimates on cash contracts. In the event of dispute between the contractor and the inspector, the latter is authorized to reject materials or suspend the work until any questions at issue can be referred to and decided by the board, or, in cases affecting the engineering features of the work, the engineer. Section 3-3 is set forth in full in Exhibit C, which is attached hereto and made a part hereof.

3-6. METHODS AND APPLIANCES. The methods, labor, equipment, and other facilities used by the contractor must be such as will assure performance of the work in accordance with the plans and specifications, within the time specified for completion.

5-1. TIME FOR STARTING WORK. Unless otherwise provided, the contractor must begin work within _____ (*number*) calendar days of the date of execution of the contract by the board. After commencement of the work, the contractor must prosecute the work diligently to completion within the prescribed time limit. Section 5-1 is set forth in full in Exhibit D, which attached hereto and made a part hereof.

5-2. If, through the fault of the city, the contractor must suspend operations and incurs expenses or sustains losses which could not have been avoided by the judicious handling of forces and equipment, and if by a diligent prosecution of the work he/she could not have completed the work before such suspension, the contractor will be paid such amounts as may be agreed on between the contractor and the board to be a fair and reasonable comprehension and a commensurate extension of contract time will be granted. Section 5-2 is set forth in full in Exhibits E and F, which are attached hereto and made a part hereof.

6-7. PROTECTION AND RESTORATION OF PROPERTY. The contractor will protect all public and private prop erty insofar as it may be endangered by his/her operations and he/she will take every reasonable precaution to avoid damage to such property. Section 6-7 is set forth in part in Exhibit G, which is attached hereto and made a part hereof.

7-3. PAYMENT SCHEDULES FOR LUMP SUM BIDS OR BID ITEMS. When required by the project specifications, the contractor will submit to the Bureau of Contract Administration within _____ (*number*) days after award of contract, a detailed schedule, in triplicate, to be used as the basis for determining progress payments on a lump sum bid or any designated lump sum bid item. Such a schedule will equal in total the lump sum price and will be in such form and detail and supported byevidence sufficient to satisfy the Bureau of Contract Administration that it correctly represents a reasonable apportionment of the lump sum, and will further be of a form and nature that will readily enable the inspector to determine the amounts of progress payments. Section 7-3 is set forth in full in Exhibit H, which is attached hereto and made a part hereof.

7-5. PAYMENTS ON CASH CONTRACTS. At the expiration of _____ (*number*) days from the date of acceptance of the work by the board, the amount deducted from the final estimate and retained by the city will be paid to the contractor, with the exception of such amounts as are required by law to be further retained. Section 7-5 is set forth in part in Exhibit I, which is attached hereto and made a part hereof.

110-1.4. CAST-IN-PLACE CONCRETE PILES. Cast-in-place concrete piles must have steel casings or shells driven to the required bearing, the shells being left permanently in place and filled with concrete. Section 110-1.4 is set forth in part in Exhibit J, which is attached hereto and made a part hereof.]

7. _____ [*Set forth other pertinent provisions of plans and specifications, e.g.*, the plans and

specifications contain 16 general notes. Note 7 provides that holes for the soldier beams and anchor caissons must be made by boring and/or drilling. Note 8 states that soldier beams and anchor caissons must be cast in place within unsupported holes, except that where, in the opinion of the engineer, the holes are subject to caving or sloughing, or are in any way unstable, the walls must be temporarily supported by steel casings or shells. Before placing the steel casing or shells, as much of the loose soil as is practical must be removed from the holes. The general notes are set forth in Exhibit K, which is attached hereto and made a part hereof].

8. Defendant issued these plans and specifications to plaintiff for the purpose and with the intention that plaintiff (1) believe the recitals contained therein; (2) rely on them; and (3) act on them, including _____ [*specify any particular plans, specifications, or test reports on which plaintiff detrimentally relied, e.g.*, the log of test borings, included therein, which reported that the soil was coarse sand with clay binder.]

9. Defendant represented and impliedly warranted to plaintiff that these plans and specifications were engineeringly possible to execute, that it was engineeringly possible to construct _____ [*describe work to be performed under contract, e.g.*, the retaining wall] according to the terms of the contract, and, in particular _____ [*specify particular item either represented on which plaintiff relied or warranted which defendant breached, e.g.*, that the wall depicted on the plans would actually reach the ground level, and that it was engineeringly possible to drill the caisson and soldier beam holes without support, except for casing, as specified in the contract].

10. Defendant further represented and warranted that defendant had made full disclosure to plaintiff of all information and knowledge in its possession as to the _____ [*describe, e.g.*, subsoil conditions prevailing at the construction site essential to the proper bidding of the contract by plaintiff; and, in addition, defendant represented and warranted to plaintiff that defendant had not misrepresented or concealed any pertinent knowledge relating to the subsurface soil conditions prevailing at the job site, and that, instead, defendant had made a full disclosure of such conditions].

11. The plans and specifications were incorrect and misleading in that: _____ [*specify, e.g.*,

a. The wall as depicted did not extend to the actual ground level;

b. Contrary to the implied representations and warranties therein, it was engineeringly impossible to drill the holes for the caissons and soldier beams by the unsupported and casing drilling procedures therein specified because of the unstable soil conditions;

c. Contrary to the requirements of the contract, it was engineeringly impossible to drill the holes and at the same time cast the caissons in place in unsupported holes or in holes supported by steel casings;

d. Defendant misrepresented soil conditions in the test holes as being coarse sand with clay binder when in fact it was coarse sand with minute binder; and

e. Defendant concealed the fact that two preliminary test holes made by defendant at the job site had in fact caved in at eight feet and 21 feet, that these tests holes had indicated cohesionless and flowing sand, and that subsurface caving would likely occur if holes were bored in the area for piles or caissons].

12. Defendant, at all times herein mentioned, had full knowledge and information in its possession of the true _____ [*specify, e.g.*, subsoil] conditions at the job site and intentionally concealed and withheld the knowledge and information from plaintiff, who was ignorant thereof at all times prior to, and at the time of, entering into the contract.

13. Plaintiff believed and reasonably relied on the plans and specifications and on defendant's implied representations and warranties as herein alleged in making its bid in the amount of $_____, and entered into the contract by reason of this belief and reliance.

14. By reason of its misrepresentations and concealment, as herein alleged, defendant breached its implied warranty that the plans and specifications were correct and plaintiff, as a result, was unable to perform according to the contract provisions.

15. _____ [*Describe detriment incurred as a result of defendant's misrepresentation and concealment, e.g.*, After commencement of work under the contract, plaintiff, for the first time, learned the true condition of the subsoil and, after experiencing continual caving in of the unsupported holes, requested a change order from defendant to permit it to drillthe holes with rotary mud and for a concomitant increase in the contract price. On or about _____ [*date*], defendant, in breach of Section 2-8 of the standard specification No. _____, set forth hereinabove, refused to issue a change order on the ground that the plans required only the drilling of the holes, leaving the method to plaintiff's discretion, and hence no change order was needed. Defendant directed plaintiff to continue with the work. To avoid collapse of the entire work area and the concomitant costs of repair and potential liability to third persons who might have been injured in such collapse, and to avoid possible imposition of penalties imposed by the contract for failure to timely complete construction, plaintiff, as directed by defendant, proceeded with the project using rotary mud].

16. Had the plans and specifications correctly set forth the true conditions of the _____ [*specify, e.g.*, subsoil], plaintiff's bid for the job would have been in the sum of $_____, instead of the sum of $_____ which it bid.

17. As a result of defendant's breach of warranty and concealment and its failure to issue a change order as herein alleged, plaintiff has been damaged in the sum of $_____, as the additional cost of construction attributable to defendant's misrepresentations, plus the sum of $_____ as a reasonable profit on the additional work.

[18. As a further result of defendant's breach of warranty and concealment and its failure to issue the change order as herein alleged, plaintiff was compelled to bear the additional cost of construction out of its own resources, which in turn forced a curtailment in its construction operations, damaging plaintiff in the sum of $_____, and a curtailment of its research, damaging plaintiff in the sum of $_____, which in turn led to a reduction of bonding capacity, damaging plaintiff in the sum of $_____, and destroyed plaintiff's former advantageous competitive position in the industry, thereby damaging plaintiff in the sum of $_____.]

19. On _____ [*date*], plaintiff presented to defendant a claim for damages for breach of contract in the amount of $_____. A copy of this claim is attached hereto as Exhibit I and made a part hereof.

20. On _____ [*date*], defendant rejected the claim in its entirety. A copy of said rejection is attached hereto as Exhibit J and made a part hereof.

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____ as additional costs of construction;

2. For the sum of $_____ as a reasonable profit on the additional work;

3. For the sum of $_____ for loss of profits resulting from the impairment of plaintiff's capital;

4. For the sum of $_____ for losses resulting from curtailment by plaintiff of its research;

5. For the sum of $_____ for reduction of plaintiff's bonding capacity;

6. For the sum of $_____ for destruction of plaintiff's former advantageous competitive position;

7. For costs of suit herein incurred; and

8. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 481.310.*]

[2] Use of Form

This form of complaint for damages for breach of contract is for use by a contractor against a public entity when the public entity, by the terms of the contract or in its plans and specifications, has misrepresented the conditions that defendant would encounter in performing the required work under the contract [*see Warner Constr. Corp. v. City of Los Angeles (1970) 2 Cal. 3d 285, 293-294, 85 Cal. Rptr. 444, 466 P.2d 996]* .

The illustrative fact situation set forth in this form is adapted from the third and fourth causes of action set forth in plaintiff's complaint in *Warner Constr. Corp. v. City of Los Angeles (1970) 2 Cal. 3d 285, 289-290, 293, 85 Cal. Rptr. 444, 466 P.2d 996* , in which the Supreme Court reversed judgment for plaintiff on the issue of damages only.

[3] Contract Liability for Fraudulent Concealment

Although fraudulent concealment often composes the basis for an action in tort, tort actions for misrepresentation aganst public agencies are barred by *Gov. Code § 818.8*. However, the contractor retains a cause of action in contract against the public entity based on the theory that the furnishing of misleading plans and specifications by the public body constitutes a breach of an implied warranty of their correctness. The fact that the breach was fraudulent or misleading does not make the rule inapplicable [*see Warner Constr. Corp. v. City of Los Angeles (1970) 2 Cal. 3d 285, 293-294, 85 Cal. Rptr. 444, 466 P.2d 996]* .

A contractor's cause of action for breach of contract based on the nondisclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts that materially qualify the facts disclosed, or that render his or her disclosure likely to mislead (*see* Paragraphs 8, 9); (2) the facts are known or accessible only to the defendant, and the defendant knows they are not known to or reasonably discoverable by the plaintiff (*see* Paragraph 10); and (3) the defendant actively conceals discovery from the plaintiff (*see* Paragraph 12) [*Warner Constr. Corp. v. City of Los Angeles (1970) 2 Cal. 3d 285, 294, 85 Cal. Rptr. 444, 466 P.2d 996]* .

[4] Decisions

Availability of dredge was implied term of contract for construction of seawall based on explicit provisions regarding time within which work had to be performed and requirement that contractor coordinate with contractor hired by Army Corps of Engineers, who was to provide dredge necessary for backfill; contractor was entitled to recover costs of protecting and repairing wall during seven months prior to arrival of dredge. *Tonkin Construction Co. v. County of Humboldt (1987) 188 Cal. App. 3d 828, 832-834, 233 Cal. Rptr. 587*

State was liable for failure to inform contractor of tidal difficulties on prior repair of identical part of bridge 200 feet from part being bid. *Welch v. State of California (1983) 139 Cal. App. 3d 546, 555-556, 188 Cal. Rptr. 726*

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Volume 42: Public Utilities thru Railroads-Chs. 480-485
Chapter 481 PUBLIC WORKS
PART V. FORMS
A. Actions on Public Works Contracts

42-481 California Forms of Pleading and Practice--Annotated § 481.312

§ 481.312 Complaint by Contractor Against Subcontractor for Damages for Breach of Contract on Public Work

[1] FORM Complaint by Contractor Against Subcontractor for Damages for Breach of Contract on Public Work

[*Caption. See § 481.310.*]

[1. *Allegation of plaintiff's contractor's license. See § 481.310, Paragraph 1.*]

2. _____ [*Allege capacity and residence of defendant, e.g.*, Defendant _____ (*name*) is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California, with its principal place of business in _____ County, California.

[3. *Fictitious name allegation. See § 481.310, Paragraph 2.*]

4. On or about _____ [*date*], plaintiff was engaged in his/her business as a general contractor and submitted a bid for a construction job known as _____ [*name of construction*] in _____ [*city*], California, for _____ [*name of public agency, e.g.*, the Department of Public Works of the State of California]. In accordance with bidding instructions, the bid had to be submitted in writing to the _____ [*specify, e.g.*, Department of Public Works] in _____ [*city*], California, not later than _____ [*time*], on _____ [*date*].

5. Prior to the submission of plaintiff's bid for the construction of the _____ [*state the particular improvement subject of the plaintiff's bid*], plaintiff received from defendant at his/her office at _____ [*street address*], _____ [*city*], California, a verbal promise that defendant would perform, furnish, and install all of the _____ [*specify portion of improvement, e.g.*, chalk, tack, and bulletin boards] in accordance with the plans and specifications for the _____ [*name of construction*] for the sum of $_____.

6. Plaintiff relied on the verbal promise of defendant and used the bid of defendant in computing his/her bid for submission to the _____ [*name of public agency, e.g.*, Department of Public Works of the State of California] for the _____ [*state improvement*].

7. In reliance on defendant's promise as stated above, plaintiff, in submitting his/her final bid for the construction of the _____ [*state improvement*], did name defendant as a subcontractor to be employed to furnish and install the _____ [*specify work to be performed by the subcontractor*] on the _____ [*state improvement*] at the sum of $_____ agreed by defendant.

8. Plaintiff's bid for the general construction of the _____ [*state improvement*] was accepted and approved by the _____ [*name of public agency, e.g.*, Department of Public Works of the State of California] on _____ [*date*].

9. Although plaintiff has made repeated requests and demands on defendant to perform the work as he/she agreed, defendant has failed, neglected, and refused to perform, furnish, and install the _____ [*specify work to be performed by the subcontractor*] in accordance with his/her promise, and continues to refuse and neglect to perform this work.

10. To fulfill his/her commitment pursuant to his/her contract with _____ [*name of public agency, e.g.*, the Department of Public Works] for the construction of _____ [*state improvement*], plaintiff was compelled to, and did, obtain and install the _____ [*specify work to be performed by the subcontractor*] at a cost to plaintiff of $_____.

11. By reason of the foregoing, plaintiff has been damaged in the sum of $_____, the difference between the cost to plaintiff of obtaining the _____ [*specify work to be performed by the subcontractor*] in the amount of $_____ and the promise and bid of defendant to furnish and install the _____ [*specify work to be performed by the subcontractor*] in the amount of $_____; although plaintiff has demanded payment of these damages, defendant has failed, refused, and neglected, and continues to fail, refuse, and neglect, to pay this sum, or any other sum.

[*Prayer. See § 481.310.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 481.310.*]

[2] Use of Form

This form of complaint is for use by a contractor in an action for breach of contract against a subcontractor when the subcontractor has failed to perform the contract and the contractor has had to hire another subcontractor to perform the work at a cost over and above the defendant subcontractor's bid.

[3] Cross References

For a form of complaint for damages for breach of a building contract by a contractor against a subcontractor in which a surety is joined, and a form of complaint for declaratory relief and damages for breach of contract by a contractor against a subcontractor for the subcontractor's delay, see Ch. 104, *Building Contracts*

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42-481 California Forms of Pleading and Practice--Annotated § 481.313

§ 481.313 Complaint by Subcontractor Against General Contractor for Damages for Breach of Contract on Public Work

[1] FORM Complaint by Subcontractor Against General Contractor for Damages for Breach of Contract on Public Work

[*Caption. See § 481.310.*]

[1. *Allegation of plaintiff's contractor's license. See § 481.310, Paragraph 1.*]

[2. *Capacity and residence of plaintiff, if appropriate. See § 481.311, Paragraph 1.*]

[3. *Capacity and residence of defendant. See § 481.312, Paragraph 2.*]

[4. *Fictitious name allegation. See § 481.310, Paragraph 2.*]

5. On _____ [*date*], the _____ [*name of public entity, e.g.*, State of California], by and through the _____ [*name of public agency, e.g.*, Department of Public Works], entered into a written contract, which is attached hereto as Exhibit A and made a part hereof, with defendant whereby defendant as general contractor and in consideration of the payment of the sum of $_____ agreed to perform the following work: _____ [*specify work to be performed by general contractor*].

6. On _____ [*date*], defendant entered into a written subcontract with plaintiff under which plaintiff as the subcontractor, in consideration of the payment of the sum of $_____, agreed to do certain _____ [*describe, e.g.*, electrical *or* painting *or* plumbing, *etc.*] work, the _____ [*describe*] work being a portion of that work to be performed by defendant for _____ [*name of public entity*]. The _____ [*describe*] work was to be performed in accordance with the terms of the contract between defendant and _____ [*name of public agency, e.g.*, Department of Public Works]. A copy of

the written subcontract between plaintiff and defendant is attached hereto as Exhibit B and made a part hereof.

7. Pursuant to the subcontract between plaintiff and defendant, plaintiff commenced work, and continued his/her work under the subcontract until on or about _____ [*date*], at which time defendant repudiated the subcontract and gave plaintiff written notice canceling the subcontract and requested that plaintiff cease and desist from all further work on the project; on or about the same time, defendant did request bids from other subcontractors for a portion of the _____ [*describe*] work which was covered by the subcontract plaintiff had with defendant, and which was to be done by plaintiff in accordance with the terms of the subcontract, and did sublet a portion of this work to other subcontractors, all in violation of the terms of the subcontract between plaintiff and defendant.

8. Plaintiff was in no way in default of the subcontract, and to mitigate any damages caused by defendant's repudiation and breach of his/her subcontract with plaintiff immediately canceled preparations to continue with the performance of the subcontract with defendant.

9. Plaintiff has been at all times herein mentioned, and now is, ready, willing, and able to carry out the subcontract and to perform all things provided by the subcontract on his/her part to be performed; plaintiff has demanded of defendant that he/she be allowed to proceed to carry out the subcontract, and to furnish the materials and labor provided thereby, but defendant wrongfully refused, and continues to refuse, to allow plaintiff to continue to carry out the subcontract, or any part thereof.

10. By reason of the facts herein alleged, defendant has wrongfully repudiated and breached the subcontract to the damage of plaintiff in the sum of $_____ on account of work performed and materials purchased, and $_____ on account of profit lost, or a total of $_____ by reason of the repudiation and breach of the subcontract by defendant, as herein alleged.

11. Plaintiff has demanded that defendant pay the sum of $_____, but defendant has failed and refused, and continues to fail and refuse, to pay this sum, or any other sum.

[*Prayer. See § 481.310.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 481.310.*]

[2] Use of Form

This form of complaint for damages for breach of contract on a public work is for use by a subcontractor against a general contractor who has repudiated the subcontract.

[3] Cross References

For a form of complaint for damages for breach of a building contract for "extras" by a subcontractor against the prime contractor in which a municipality is joined based on a cause of action for withholding payment from the prime contractor pursuant to the subcontractor's stop notice, see Ch. 104, *Building Contracts*

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A. Actions on Public Works Contracts

42-481 California Forms of Pleading and Practice--Annotated § 481.314

§ 481.314 Complaint Against Public Entity for Cancellation of Erroneous Bid and Forfeiture of a Bid Bond [Pub. Contract Code § 5101(a)]--By Contractor

[1] FORM Complaint Against Public Entity for Cancellation of Erroneous Bid and Forfeiture of a Bid Bond [Pub. Contract Code § 5101(a)]--By Contractor
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR CANCELLATION OF BID
vs.	)	AND RELIEF FROM FORFEITURE OF BID BOND
_____ [*names*],	)	[Amount demanded _____
Defendants.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

[1. *Allegation of plaintiff's contractor's license. See § 481.310, Paragraph 1.*]

[2. *Capacity and residence of plaintiff, if appropriate. See § 481.311, Paragraph 1.*]

[3. *Capacity and residence of defendant as public entity. See § 481.310, Paragraph 3.*]

4. On or about _____ [*date*], defendant called for competitive bidding for the _____ [construction *or* performance] of a public project consisting of _____ [*set forth nature of project*].

5. Plaintiff submitted its bid of $_____ to defendant pursuant to defendant's solicitation for competitive bidding, accompanying its bid with a bidder's bond, executed by an admitted surety insurer, made payable to the _____ [director *or specify other head of public agency*] of the _____ [*name of public agency, e.g.*, Department of Transportation of the State of California] under which the above-described project was to be performed. This bond was in an amount equal to _____ percent of the amount bid. A copy of this bond is attached hereto as Exhibit A and made a part hereof.

6. On or about _____ [*date*], the bids were opened and plaintiff's bid was approximately $_____ lower than the next bid.

7. After the bids were opened, plaintiff realized that it had made a mistake in filling out the bid due to a _____ [clerical *or* mathematical *or specify other error other than one due to error in judgment or to carelessness in inspecting site of work or in reading plans and specifications*] error in that _____ [*describe*]. This mistake made plaintiff's bid materially different than plaintiff intended it to be in that plaintiff intended its bid to be in the amount of $_____.

8. Within five days after the opening of the bids, namely on _____ [*date*], plaintiff gave written notice to defendant that it had made a mistake in filling out the bid, specifying in detail how the mistake was made, namely: _____ [*specify how mistake was made*].

9. Plaintiff requested that defendant cancel plaintiff's bid and relieve plaintiff from a forfeiture of the amount of the bidder's bond.

10. On or about _____ [*date*], the defendant, through _____ [*specify defendant's agent, e.g.*, the city attorney], sent a formal contract to plaintiff with plaintiff's bid figure of $_____ unchanged.

11. Plaintiff immediately informed defendant that it would not perform the work for $_____, whereafter defendant notified plaintiff that unless the work was performed, it would take action to forfeit the $_____ bid bond posted by plaintiff.

WHEREFORE, plaintiff prays judgment as follows:

1. That plaintiff be permitted to cancel its bid;

2. That plaintiff be granted relief from forfeiture of its bid bond;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 481.310.*]

[2] Use of Form

This form of complaint is for use by a general contractor in an action against a public entity to cancel an erroneous bid and recover the forfeiture of the bid security bond. This complaint must be filed and the summons served on the director of the department of the chief of the division or other head of the public entity under which the work is to be performed or an appearance made within 90 days after the opening of the bid [*Pub. Contract Code § 5102*]. Although the usual claim that is required to be made to a public entity before bringing an action is not necessary [*Pub. Contract Code § 5104*], written notice of the mistake must be given the public entity within five working days after the opening of the bids [*Pub. Contract Code § 5103*].

[3] Decisions

Former *Gov. Code §§ 4200-4208* (*now see Pub. Contract Code § 5100 et seq.*), establishing procedure whereby contractor making erroneous bid to a public entity can claim relief without necessity of filing action in rescission, is exclusive procedure for relieving bidder from mistaken bid. *A & A Elec., Inc. v. King (1976) 54 Cal. App. 3d 457, 464, 126 Cal. Rptr. 585*

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A. Actions on Public Works Contracts

42-481 California Forms of Pleading and Practice--Annotated § 481.315

§ 481.315 Complaint for Damages--By Subcontractor Listed in General Contractor's Original Bid Against General Contractor--Original Contractor's Breach of Duty Not to Substitute Another Subcontractor for Listed Subcontractor Without Proper Consent of Public Entity [Pub. Contract Code § 4107]

[1] FORM Complaint for Damages--By Subcontractor Listed in General Contractor's Original Bid Against General Contractor--Original Contractor's Breach of Duty Not to Substitute Another Subcontractor for Listed Subcontractor Without Proper Consent of Public Entity [Pub. Contract Code § 4107]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES FOR BREACH OF
vs.	)	DUTY NOT TO SUBSTITUTE SUBCONTRACT-
_____ [*names*],	)	OR FOR LISTED SUBCONTRACTOR WITHOUT
Defendants.	)	PROPER CONSENT
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Allegation of plaintiff's contractor's license. See § 481.310, Paragraph 1.*]

[2. *Capacity and residence of plaintiff, if appropriate. See § 481.311, Paragraph 1.*]

[3. *Capacity and residence of defendant. See § 481.312, Paragraph 2.*]

4. On or about _____ [*date*], _____ [*name of public entity*] through _____ [*name of particular public authority*] called for competitive bidding for the _____ [construction *or* performance] of a public project consisting of _____ [*set forth nature of project*].

5. On _____ [*date*], plaintiff submitted a subcontract bid for _____ [*specify subcontract work bid on*] for use by defendant in the _____ [*specify public project, e.g.*, construction of a sewage collection system] for _____ [*name of public entity*].

6. Defendant, preparatory to bidding on the prime contract, listed plaintiff as a subcontractor for _____ [*specify subcontract work*] on an authorized bid form in compliance with the requirements of *Section 4104 of the Public Contract Code*.

7. On _____ [*date*], defendant's bid was accepted by _____ [*name of public entity*] and a written contract for the _____ [construction *or* performance] of _____ [*specify public project*] was executed on _____ [*date*].

8. After the execution of the above-mentioned contract, on or about _____ [*date*], defendant requested permission of _____ [*name of public entity*] to substitute another subcontractor for plaintiff.

9. On or about _____ [*date*], _____ [*name of public entity*] consented to the request of defendant in violation of *Section 4104 of the Public Contract Code* in that there was no statutory ground under which _____ [*name of public entity*] was authorized to permit the substitution of another subcontractor for plaintiff.

10. Before and after the substitution of another subcontractor for plaintiff for the _____ [construction *or* performance] of _____ [*specify subcontract work*], plaintiff had and has been at all times herein mentioned ready, willing, and able to carry out the subcontract for which it bid; plaintiff has demanded of defendant that it be allowed to proceed to carry out the work required under the subcontract, but defendant has wrongfully refused, and continues to refuse, to permit plaintiff to carry out such work.

11. By reason of the facts herein alleged, plaintiff has incurred damages in the sum of $_____ on account of the profit lost from wrongfully being deprived of the subcontract.

12. Between the time plaintiff learned that it had been listed as a subcontractor in the prime contract awarded to defendant and the time it was notified of the intended substitution, it incurred expenses in the amount of $_____ in preparation for the performance of the subcontract.

13. Plaintiff has demanded that defendant pay the sum of $_____, but defendant has failed and refused, and continues to fail and refuse, to pay this sum, or any other sum.

[*Prayer. See § 481.310.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 481.310.*]

[2] Use of Form

This form of complaint is for use by a subcontractor against the prime contractor on a public works contract when the prime contractor had listed the subcontractor in its bid or offer to perform the prime contract, but following the award of the contract substituted another subcontractor for the listed subcontractor without the lawful consent of the public entity [*see Pub. Contract Code §§ 4104, 4107*].

[3] Action for Damages Against Prime Contractor

Although the Subletting and Subcontracting Fair Practices Act [*Pub. Contract Code § 4100 et seq.*] does not specifically provide a remedy for the subcontractor who has been unlawfully denied the right to perform the subcontract for which he or she was listed in the prime contractor's bid to the public entity, since the purpose of the Act is to protect both the public and subcontractors from the evils of the proscribed unfair bid shopping and bid peddling, the Act confers the right on the listed subcontractor to perform the subcontract unless statutory grounds for a valid substitution exist. That right may be enforced by an action for damages against the prime contractor to recover the benefit of the bargain the listed subcontractor would have realized had he or she not been wrongfully deprived of the subcontract. Such a cause of action is based on the prime contractor's breach of the obligation contained in *Pub. Contract Code § 4107* not to substitute any person as subcontractor in place of the listed subcontractor except with the consent of the awarding authority when a statutory ground for this consent exists as enumerated in *Pub. Contract Code § 4107(a)* [*Southern Cal. Acoustics Co. v. C.V. Holder, Inc. (1969) 71 Cal. 2d 719, 727, 79 Cal. Rptr. 319, 456 P.2d 975* (interpreting former *Gov. Code § 4107*; *now see Pub. Contract Code § 4107*)].

[4] Decisions

Contractor was not liable for substitution of contractor on bid when there was substitution hearing at which public entity determined that there were adequate grounds for substitution and subcontractor did not seek review of that decision but commenced separate action. *Interior Systems, Inc. v. Del W. Webb Corp. (1981) 121 Cal. App. 3d 312, 316-320, 175 Cal. Rptr. 301*

To foster purpose of preventing practices of bid shopping and bid peddling, the Subletting and Subcontracting Fair Practices Act [former *Gov. Code §§ 4100-4113* (*now see Pub. Contract Code § 4100 et seq.*)] requires any prime contractor bidding on public works to designate what portion of work will be done by each subcontractor and to list only one subcontractor for each portion as defined by prime contractor in his or her bid. *Bay Cities Paving & Grading, Inc. v. Hensel Phelps Constr. Co. (1976) 56 Cal. App. 3d 361, 365, 128 Cal. Rptr. 632*

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[Reserved]

§§ 481.316[Reserved]

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42-B California Forms of Pleading and Practice--Annotated Scope

Scope

NOTE:

SB 189, which was introduced in February 2009 as a two-year bill, would comprehensively revise, reorganize, and consolidate the law governing stop notices and payment bonds on public works projects in the Public Contract Code. The proposed legislation is the product of a recommendation of the California Law Revision Commission, which may be consulted at http://www.clrc.ca.gov/pub/Printed-Reports/REC-H821.pdf. The legislation would be operative January 1, 2011. If SB 189 is enacted, this chapter will be updated in a future release.

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42-481 California Forms of Pleading and Practice--Annotated § 481.330

§ 481.330 Preliminary 20-Day Notice (Public Work) [Civ. Code § 3098]

[1] FORM Preliminary 20-Day Notice (Public Work) [Civ. Code § 3098]

To _____ [*public agency*], _____ [*address*] and to _____ [*original contractor*], _____ [*address*]:

NOTICE IS HEREBY GIVEN that the undersigned [has performed (and will perform) *or* has furnished (and will furnish)] _____ [labor *or* services *or* equipment *or* materials] to the construction project located at _____ [*describe job site sufficiently for identification*].

The following information is given as required by *Civil Code Section 3098*:

1. The _____ [labor *or* services *or* equipment *or* materials] _____ [performed (and to be performed) *or* furnished (and to be furnished)] _____ [is *or* are] _____;

2. _____ [Labor *or* Services *or* Equipment *or* Materials] _____ [was *or* were] _____ [performed *or* furnished] _____ [on _____ (*date*), *or* from _____ (*date*), *or* from _____ (*date*), to _____ (*date*), *or* to date]; and

The _____ [labor *or* services *or* equipment *or* materials] _____ [was *or* were] [and will be] _____ [performed *or* furnished] to _____ [*name of party who contracted for their purchase*].
Dated: _____.

_____ [*signature of claimant*]

[2] Use of Form

This form of preliminary 20-day notice (public work) must be given when required by *Civ. Code § 3098* before a claimant is entitled to enforce a stop notice [*see Civ. Code § 3183(a)*]. In addition, no payment in connection with a public work project may be withheld from the original contractor unless a claimant who is required to serve this notice has caused the notice to be given to the contractor and the public agency concerned [*see Civ. Code § 3098(a)*]. The above notice also may be given when required by *Civ. Code § 3098* before a claimant asserts a claim against a payment bond [*Civ. Code § 3252(a)*; *see Civ. Code §§ 3227, 3252(b)* setting forth form and timing of alternative post-completion bond notice that may be given instead of a 20-day preliminary notice before asserting a claim against a payment bond; *see also § 481.360*].

For a complete outline describing when this notice must be given, by and to whom the notice is served, and the place and manner of service, see *§ 481.170* et seq.

[3] Contents of Notice

A preliminary 20-day notice (public work) is a written notice from a claimant that is given before the filing of a stop notice or the assertion of a claim against a payment bond on public work and must state with substantial accuracy a general description of labor, service, equipment, or materials furnished or to be furnished and the name of the party to whom the same was furnished [*Civ. Code § 3098*].

[4] Disciplinary Action Against Licensed Contractor Failing to Give Notice

When the contract price to be paid to any subcontractor on a particular work of improvement exceeds $400, the failure of that contractor, who is licensed pursuant to *Bus. & Prof. Code § 7000 et seq.*, to give the preliminary 20-day notice (public work) constitutes grounds for disciplinary action by the Registrar of Contractors [*Civ. Code § 3098(b)*].

[5] State Statutes

Service of notice personally or by first-class, registered, or certified mail. *Civ. Code § 3098(a)*

Who must give and be given preliminary notice. *Civ. Code § 3098(a)*

Disciplinary action by Registrar of Contractors for failure of subcontractor to serve a preliminary notice when contract is over $400. *Civ. Code § 3098(b)*

Notice requirements not applicable to express trust fund. *Civ. Code § 3098(c)*

When notice must be furnished. *Civ. Code § 3098(a), (d)*

Service of preliminary notice is necessary prerequisite to enforcement of stop notice. *Civ. Code § 3183(a)*

[6] Decisions

Transmittal and notice requirements of *Civ. Code § 3098* are strictly construed; compliance with transmittal and notice requirements of statute is required even when general contractor has actual notice of existence and identity of material supplier. *San Joaquin Blocklite, Inc. v. Willden (1986) 184 Cal. App. 3d 361, 364-366, 228 Cal. Rptr. 842*

[7] Text References

California Real Estate Law and Practice, Ch. 452, Stop Notices, § 452.33 (Matthew Bender)

[8] Cross References

For a form of a preliminary 20-day notice (private work), see Ch. 361, *Mechanics' Liens*

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42-481 California Forms of Pleading and Practice--Annotated § 481.331

§ 481.331 Stop Notice [Civ. Code §§ 3103, 3181-3187]

[1] FORM Stop Notice [Civ. Code §§ 3103, 3181-3187]

To _____ [*name and address of public entity; specify subdivision thereof, if appropriate*]:

PLEASE TAKE NOTICE that _____ [*name of claimant*], the undersigned, whose address is _____ [*specify*], _____ [performed *or* agreed to perform *or* furnished *or* agreed to furnish] _____ [labor *or* materials *or* services *or* equipment] _____ [for *or* to] _____ [*name of contractor or subcontractor for or to whom the labor, materials, services, or equipment was performed or furnished*] _____ [to be used in *or* used in] the public work of improvement consisting of the _____ [performance *or* construction] of _____ [*give location and general description of public work*]. This public work is being _____ [performed *or* constructed] pursuant to the original contract entered into between you and _____ [*name*], the original contractor for the work of improvement.

The following _____ [labor *or* materials *or* services *or* equipment] has/have been _____ [performed *or* furnished] _____ [on _____ (*date*), *or* between the dates of _____, and _____]: _____ [*state in general terms*].

The _____ [contract price *or* reasonable value] of the _____ [labor *or* services *or* equipment *or* materials], being the whole of the amount in value agreed to be _____ [performed *or* furnished], is $_____, of which sum $_____ plus interest at the rate of _____ percent per year from _____ [*date*], has not been paid after deduction of all just credits and offsets. The amount of the _____ [labor *or* materials *or* services *or* equipment] already _____ [performed *or* furnished] is $_____.

Therefore, the undersigned hereby requests and demands that you withhold sufficient funds to satisfy this claim as

required under *Civil Code Section 3186* relating to stop notices for public works.
Dated: _____.

_____ [*signature of claimant*]

I, _____ [*name*], declare that:

I am the person named as claimant in the foregoing stop notice.

I have read it and know the contents thereof. It is true and contains, among other things, a correct statement of my demand. I declare under the penalty of perjury that the foregoing is true and correct and that this declaration was executed on _____ [*date*], at _____ [*city*], California.

_____ [*signature of claimant*]

[2] Use of Form

This form must be given by a stop notice claimant to a public entity responsible for the public work for which the claim is made. On receipt of the stop notice, it is the duty of the public entity to withhold from the original contractor, or from any person acting under his or her authority, money or bonds (when bonds are to be issued in payment for the work of improvement) due or to become due to the contractor in an amount sufficient to answer the claim stated in the stop notice and to provide for the entity's reasonable cost of any litigation incurred [*Civ. Code § 3186*]. For a form of a stop notice used by the Department of Transportation, see *§ 481.332[1]*. For an outline relating to service of the stop notice, see *§§ 481.170 -481.174*.

[3] Contents of Notice

Under *Civ. Code § 3103*, a stop notice is a written notice, signed and verified by the claimant. It must state in general terms the following:

- The kind of labor, materials, services, or equipment furnished or agreed to be furnished by such claimant;

- The name of the person for or to whom the same was done or furnished; and

- The amount in value, as near as may be, of that already done or furnished and of the whole agreed to be done or furnished.

[4] Claims Covered

A stop notice on a public job clearly covers labor or materials agreed to be furnished by the claimant. The duty of the public entity to withhold from the original contractor money or bonds sufficient to answer the claim stated in the stop notice would apparently also cover the claim for labor, materials, services, or equipment that had not been furnished at the time of service of the stop notice. Thus, even though stop notice claimants share in funds withheld without regard to the order of time in which their respective notices may have been served [*Civ. Code § 3190*], a potential stop notice claimant would have an advantage in filing his or her notice before furnishing labor, materials, services, or equipment.

When the public entity is making progress payments to the original contractor, the public entity is probably required to

withhold from the first money that becomes due to the contractor sufficient money to cover the claim of a stop notice claimant who files his or her notice before furnishing labor or materials [*see Diamond Match Co. v. Silberstein (1913) 165 Cal. 282, 286, 131 P. 874* (holding that owner has duty to withhold funds from first money that may become due to contractor)]. When the funds withheld are not in an amount sufficient to meet the demands of all stop notice claimants, the stop notice claimant who filed before furnishing labor, materials, services, or equipment could recover from the public entity the whole amount of his or her claim if the public entity did not honor the stop notice by withholding from the amount of the first money to become due to the original contractor money sufficient to cover the claim [*see United States Fid. & Guar. Co. v. Oak Grove Union School Dist. (1962) 205 Cal. App. 2d 226, 231, 22 Cal. Rptr. 907* (stating that laborer or materialman has cause of action in equity against public entity who disregards properly filed stop notice)]. Usually, the claimant would recover from the bonding company and the bonding company would, in turn, be subrogated to the claimant's cause of action against the public entity [*see United States Fid. & Guar. Co. v. Oak Grove Union School Dist. (1962) 205 Cal. App. 2d 226, 231, 22 Cal. Rptr. 907]* .

[5] State Statutes

Stop notice; contents, verification, and service. *Civ. Code § 3103*

Right of laborers and materialmen to recover their claims against general contractor by filing stop notice. *Civ. Code § 3181*

Conditions to service of stop notice. *Civ. Code § 3183*

Time to file stop notices. *Civ. Code § 3184*

[6] Decisions

Stop notice may be filed even before due date of payment; *Civ. Code § 3184* (time to file stop notice) does not require otherwise. *Central Indus. Eng'r Co. v. Strauss Constr. Co. (1979) 98 Cal. App. 3d 460, 464, 465, 159 Cal. Rptr. 564*

[7] Text References

California Real Estate Law and Practice, Ch. 452, Stop Notices, §§ 452.31 -452.35 (Matthew Bender)

[8] Cross References

For a form of stop notice for a private work, see Ch. 361, *Mechanics' Liens*

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42-481 California Forms of Pleading and Practice--Annotated § 481.332

§ 481.332 Stop Notice [Civ. Code §§ 3103, 3181-3187]--California Department of Transportation Form

[1] FORM Stop Notice [Civ. Code §§ 3103, 3181-3187]--California Department of Transportation Form

Click here to view image.

[2] Use of Form

This form of stop notice may be used in connection with a public work of improvement the original contract for which has been let by authority of the Department of Transportation of the State of California. The department does not require a stop notice claimant to use this form, but recommends its use because the claimant would be assured of complying with the requirements for the format of the stop notice.

[3] Cross References

For a related form, see *§ 481.331*.

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42-481 California Forms of Pleading and Practice--Annotated § 481.333

§ 481.333 Release of Stop Notice

[1] FORM Release of Stop Notice

To _____ [*name and address of public entity; specify subdivision thereof, if appropriate*]:

The undersigned hereby withdraws and releases the stop notice filed on _____ [*date*], with the above-named public entity against _____ [*name of original contractor*] in the amount of $_____ for _____ [labor *or* services *or* equipment *or* materials] _____ [performed *or* furnished] in connection with the original contract [, numbered _____], for the _____ [performance *or* construction] of the public work of improvement consisting of _____ [*give location and general description of public work*].

The undersigned also hereby releases _____ [*name of public entity*], and its subdivisions and agents, from any further duty under *Section 3186 of the Civil Code* to withhold money or bonds in response to the stop notice, and waives any right of action against them that might accrue thereunder.
Dated: _____.

_____ [*signature of notice claimant*]

_____ [*name of firm, if appropriate*]

_____ [*address*]

[2] Use of Form

This form of release of stop notice should be supplied by the original contractor or subcontractor to a stop notice claimant after the claimant has been paid the sum claimed in the stop notice. The original contractor should be certain that the claimant prepares this form and files it with the appropriate public entity so that the amount withheld can be

released to the original contractor. For a form of release of stop notice used by the Department of Transportation, see *§ 481.334*.

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§ 481.334 Release of Stop Notice--California Department of Transportation Form

[1] FORM Release of Stop Notice--California Department of Transportation Form

Click here to view image.

[2] Use of Form

This form of release of stop notice is for use when the claimant has released his or her stop notice, which had been filed in connection with a public work of improvement let by authority of the Department of Transportation of the State of California. The form is recommended to be used by the contractor obtaining the release, but the department does not require that it be used.

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42-481 California Forms of Pleading and Practice--Annotated § 481.335

§ 481.335 Declaration [or Certificate] Under Penalty of Perjury by Original Contractor That Amount Withheld Under Stop Notice Is Improperly Withheld--And Demand for Release [Civ. Code § 3198]

[1] FORM Declaration [or Certificate] Under Penalty of Perjury by Original Contractor That Amount Withheld Under Stop Notice Is Improperly Withheld--And Demand for Release[Civ. Code § 3198]

To _____ [*name and address of public entity, and subdivision thereof, if appropriate*]:

I, _____, the undersigned, _____ [declare *or* certify] that:

I am a general contractor duly authorized and licensed to do business as such in _____ County, California.

As such licensed contractor, I am engaged in the construction of a _____ [*name of public work project, e.g.*, bridge] at _____ [*location of project*] under a contract entered into with _____ [*name of public entity*] on _____ [*date*].

On or about _____ [*date*], _____ [*name of stop notice claimant*] filed with _____ [*name of public entity*] a stop notice demanding a withholding of $_____ from the funds due to the undersigned by _____ [*name of public entity*], on the ground that _____ [*name of claimant*] has a right to the amount so requested to be withheld for labor and materials furnished to the undersigned during the construction of the above-described project.

The undersigned is rightfully entitled to the amount of $_____ which is improperly withheld by _____ [*name of public entity*] in that _____ [*specify grounds, e.g.*, the claimant is not within the group of persons authorized by Sections 3110-3112 and *3181 of the Civil Code*].

WHEREFORE, the undersigned demands the release of the _____ [sum of $_____ *or* bonds] withheld by _____ [*name of public entity*].

The address of the undersigned, for purposes of service, is _____ [*street*], _____ [*city*], California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of declaration or certificate is for use by an original contractor to obtain the release of a stop notice that the contractor asserts is not valid or enforceable because (1) the claim on which the notice is based is not included within the types or classifications of claims referred to in the provisions governing stop notices, (2) the claimant is not a person named in *Civ. Code §§ 3110-3112* and *3181, (3)* the amount of the claim is excessive, or (4) there is no basis in law for the claim referred to [*see Civ. Code § 3197*].

The public entity must be served with the above declaration or certificate and one copy thereof. Although *Civ. Code § 3198* does not so specify, it is recommended that both copies be signed originals because the public entity would want a signed original; and if the public entity later files a copy with the court under *Civ. Code § 3202*, that copy should be a signed original. For a discussion relating to the service of and actions on a stop notice, see *§§ 481.190 -481.192, 481.270 -481.277*.

[3] State Statutes

Declaration under penalty of perjury as substitute for affidavit. *Code Civ. Proc. § 2015.5*

[4] Text References

California Real Estate Law and Practice, Ch. 452, *Stop Notices* (Matthew Bender)

[5] Cross References

For discussion and forms relating to stop notices on public works, see Ch. 361, *Mechanics' Liens*

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42-481 California Forms of Pleading and Practice--Annotated § 481.336

§ 481.336 Notice to Claimant of Filing of Contractor's Affidavit [Civ. Code § 3199]

[1] FORM Notice to Claimant of Filing of Contractor's Affidavit [Civ. Code § 3199]

To _____ [*claimant who filed the stop notice*]:

Please take notice that on _____ [*date*], _____ [*name*] the original contractor engaged by _____ [*name of public entity*] to build a _____ [*name of public work project, e.g.,* dam] at _____ [*location of project*] has filed an affidavit and demand for release with this _____ [*name of public entity*] disputing your claim under your stop notice filed on _____ [*date*], and demanding the release of the funds claimed by you. A copy of the affidavit and demand is attached to this notice and served herewith.

You are further notified that the amount of $_____ will be released to the original contractor by this _____ [*name of public entity*] unless you file with us a counteraffidavit on or before _____ [*date*].
Dated: _____.

_____ [*signature of authorized*

agent of public entity]

[2] Use of Form

This form, notifying the claimant that the public entity will release the money claimed unless the claimant files a counteraffidavit on or before the time designated in the notice, must be served, along with a copy of the affidavit and the demand for release, on the claimant by the public entity [*Civ. Code § 3199*]. Service may be either personal or by registered or certified mail [*Civ. Code § 3199*].

[3] Text References

California Real Estate Law and Practice, Ch. 452, *Stop Notices* (Matthew Bender)

[4] Cross References

For a related form, see *§ 481.335*.

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42-481 California Forms of Pleading and Practice--Annotated § 481.337

§ 481.337 Complaint [or Petition] by Original Contractor for Declaration of Rights to Withheld Funds [Civ. Code § 3201]

[1] FORM Complaint [or Petition] by Original Contractor for Declaration of Rights to Withheld Funds [Civ. Code § 3201]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*EITHER*]

	)	
_____ [*name*] Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DECLARATION OF RIGHTS
_____ [*name*(*s*)], Defend-	)	TO
ant(s)],	)	WITHHELD FUNDS
	)	[*Civ. Code § 3201*]

_____

[*OR*]

	)	
	)	NO. _____

In the Matter of the Dispute Between _____, Petitioner and Original Contractor, and _____, Respondent and _____ [Subcontractor *or* Claimant] as to Rights to Funds Withheld by _____ [*name of public entity*], Public Entity.	))))	PETITION FOR DECLARATION OF RIGHTS TO WITHHELD FUNDS [*Civ. Code § 3201*]

[1. *Allegation of license if plaintiff is original contractor. See § 481.310, Paragraph 1.*]

[2. *Capacity and residence of plaintiff. See § 481.310, Paragraph 1.*]

[3. *Capacity and residence of defendant. See § 481.312, Paragraph 2.*]

4. On or about _____ [*date*], _____ [plaintiff *or* petitioner *or* original contractor] entered into a written contract with [defendant] _____ [*name of public entity*] for the erection and construction of _____ [*name of public work project*], at _____ [*city*], California, and on or about _____ [*date*], pursuant to the contract, _____ [plaintiff *or* petitioner *or* original contractor] commenced the construction of the _____ [*name of public work project*].

5. On or about _____ [*date*], _____ [plaintiff *or* petitioner *or* original contractor] entered into a written contract with [defendant *or* respondent *or* claimant] _____ [*name*] under the terms of which the latter agreed to _____ [*describe, e.g.*, install doors and windows on the project], for the sum of $_____. A copy of the contract is attached hereto as Exhibit A and made a part hereof.

6. On or about _____ [*date*], _____ [defendant *or* claimant] _____ [*name*] _____ [furnished *or* was to furnish] _____ [labor *or* materials] for use in the project as specified in _____ [plaintiff's *or* petitioner's *or* original contractor's] affidavit filed with [defendant] _____ [*name of public entity*] on or about _____ [*date*]. A copy of the affidavit is attached hereto as Exhibit B and made a part hereof.

7. On or about _____ [*date*], _____ [defendant *or* respondent *or* claimant] _____ [*name*] filed with [defendant] _____ [*name of public entity*] a stop notice requesting that the _____ [*name of public entity*] withhold from funds due to _____ [plaintiff *or* petitioner *or* original contractor] the amount of $_____ claimed by _____ [defendant *or* respondent *or* claimant] _____ [*name*], as the value of the _____ [labor *or* materials] furnished by _____ [defendant *or* respondent *or* claimant] _____ [*name*] to _____ [plaintiff *or* petitioner *or* original contractor] under the contract mentioned above.

8. Thereafter, and after notice of _____ [defendant's *or* respondent's *or* claimant's] claim, _____ [plaintiff *or* petitioner *or* original contractor] filed his/her affidavit with [defendant] _____ [*name of public entity*] on _____ [*date*], disputing the _____ [defendant's *or* respondent's *or* claimant's] claim and demanding a release of the funds withheld by _____ [*name of public entity*] under the stop notice filed by _____ [defendant *or* respondent *or* claimant].

9. On or about _____ [*date*], _____ [defendant *or* respondent *or* claimant] filed with [defendant] _____ [*name of public entity*] a counteraffidavit contesting _____ [*plaintiff's or* petitioner's *or* contractor's] affidavit. A copy of the counteraffidavit is attached hereto as Exhibit C and made a part hereof.

10. _____ [Plaintiff *or* Petitioner *or* Original contractor] has demanded from [defendant] _____ [*name of public entity*] that the funds withheld be released, but _____ [*name of public entity*] has refused, and continues to refuse, to release the funds, or any part thereof, to _____ [plaintiff *or* petitioner *or* original contractor].

WHEREFORE, _____ [plaintiff *or* petitioner *or* original contractor] prays:

1. For a declaration that he/she is entitled to have the money withheld by [defendant] _____ [*name of public entity*] released to him/her;

2. For a declaration that _____ [defendant *or* respondent *or* claimant] is _____ [not entitled to any part of the money *or* is entitled to only _____ (*specify portion*)];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[*Verification, if desired. See § 481.310.*]

[2] Use of Form

This form of complaint or petition is for use by an original contractor in an action for a declaration of the respective rights of a stop notice claimant and original contractor to the funds which had been withheld by the public entity pursuant to the claimant's stop notice. The form may be used either as a petition or complaint. Although either form (petition or complaint) should be sufficient to satisfy the statutory requirement for commencing an "action" under *Civ. Code § 3201*, neither form is recommended as the better or more appropriate means for commencing the action since, insofar as the procedure by which the original contractor may contest the validity or enforceability of, or amount of claim in, the stop notice, is termed a "summary proceeding," a petition would seem more appropriate, while, insofar as the means by which the claimant or original contractor may have a hearing on the affidavit and counteraffidavit is termed "action," a complaint would seem more appropriate. In any case, counsel should determine whether there is a local court practice before commencing an action for a declaration of the respective rights of the parties. For an outline of the procedures and other requirements involved in an action for a declaration of rights to withheld funds, see *§§ 481.250 -481.253*.

[3] State Statutes

When counteraffidavit by claimant has been filed as provided in *Civ. Code § 3200*, either claimant or original contractor is permitted to file action in appropriate superior court for declaration of respective rights of parties to funds withheld pursuant to claimant's stop notice. *Civ. Code § 3201*

[4] Text References

California Real Estate Law and Practice, Ch. 452, *Stop Notices* (Matthew Bender)

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42-481 California Forms of Pleading and Practice--Annotated § 481.338

§ 481.338 Notice of Order Granting Hearing and of Hearing on Determination of Rights to Withheld Funds [Civ. Code § 3201]

[1] FORM Notice of Order Granting Hearing and of Hearing on Determination of Rights to Withheld Funds [Civ. Code § 3201]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	NOTICE OF ORDER
_____ [*name*(*s*)],	)	GRANTING
_____ Defendant(s)].	)	HEARING
[*OR*]	)	AND OF HEARING
In the Matter of the Dispute Between	)	Date: _____
_____, Petitioner and Original Con-	)	Time: _____
tractor, and _____, Respondent and	)	Location: _____
_____ [Subcontractor *or* Claimant]	)	Judge: _____
as to Rights to Funds Withheld by	)	Date Action Filed: _____
_____ [*name of public entity*], Pub-	)	Trial Date: _____
lic Entity.	)	
_____		

To _____ [*name of claimant and his/her designation as defendant, respondent, or claimant*] and _____ [*name of department head, board, commission, or officer of the public entity*]:

PLEASE TAKE NOTICE that on _____ [*date*], upon ex parte motion of the undersigned, the above-entitled court entered an order for a hearing on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in the courtroom of [_____ (Department or Division) _____ of] the above-entitled court, located at _____ [*name of building and street address*], in _____ [*city*], California. The hearing will be for the purpose of determining the rights of the above-entitled parties to _____ [moneys *or* bonds] being withheld by _____ [*name of public entity*]. The affidavit and counteraffidavit filed with _____ [*name of public entity*] will constitute the pleadings in the above-entitled proceeding, subject to the power of the above-entitled court to permit an amendment in the interest of justice [, and subject to the right of the _____ (defendant *or* respondent *or* claimant) to demand a jury trial at the time and place set for the above-mentioned hearing]. [Upon demand of the _____ (plaintiff *or* petitioner *or* original contractor), the hearing will be before a jury.]

_____[*Name of department head, board, commission, or officer of the public entity*] was ordered as a part of the above-mentioned order to file the affidavit and counteraffidavit now in his/her/its possession with the above-entitled court on or before _____ [*date*].

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Use of Form

This form of notice must be given to the public entity and to the opposing party by the party making the motion, which may be either the claimant or the original contractor, for a hearing for the purpose of determining his or her rights under the affidavit and demand for release and the counteraffidavit [*Civ. Code § 3201*].

[3] Motion for Hearing

Although the procedure of obtaining a hearing for a determination of the rights to funds being withheld is not clearly set forth under *Civ. Code § 3201*, the section does not require a written notice of the motion for a hearing. Specifically, *Civ. Code § 3201* provides that the hearing must be granted by the court. Thus, an ex parte application or motion would seem to be an appropriate way of obtaining a hearing date to determine the rights of the parties. *Civ. Code § 3201* does require a notice in writing of the hearing, which must be given not less than five days before the hearing. Therefore, a written notice of the hearing on determining the rights of the parties to the funds would fulfill statutory requirements. The motion for a hearing apparently can be made and granted before notice is given on the hearing.

However, two other procedures are also possible. First, counsel can give notice of the hearing, without previously having obtained a court order for a hearing, and then move at the time set for the hearing that the court should order the hearing; immediately thereafter the court would proceed to hear the matter [*see § 481.339*]. Secondly, it would be possible to treat the notice as a notice of motion to be made at the time and place designated without actually giving notice of the hearing determining the rights of the parties [*see § 481.340*].

Nevertheless, the better practice would be to file the complaint or petition, immediately thereafter making an ex parte application for the hearing. The complaint or petition and the court order would then be served on the claimant and the public entity, along with proof of service made under *Code Civ. Proc. § 1013a*. A summons need not be served because

an answer by the party served is not required. *Civ. Code § 3202* (formerly Code Civ. Proc. § 1090.1(c)) specifically provides that the affidavit and counteraffidavitconstitute the pleadings and that the affidavit of the original contractor is deemed controverted by the counteraffidavit.

Because of the alternative procedures allowable under *Civ. Code § 3201*, counsel should check local court practice before preparing the complaint or petition, or any application for a court order for a hearing, or the notice of the motion or the hearing.

When counsel believes that his or her client is constitutionally entitled to a trial by jury and has decided to demand one, he or she should probably present to the court a written demand for jury trial along with the application for an ex parte order for a hearing. If he or she decides against a jury trial, but believes that a constitutional right to a jury trial does exist, the opposing party should be notified of his or her right to a jury trial in the notice that is served on him or her.

[4] Text References

California Real Estate Law and Practice, Ch. 452, *Stop Notices* (Matthew Bender)

[5] Cross References

For a related form, see *§ 481.337*.

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42-481 California Forms of Pleading and Practice--Annotated § 481.339

§ 481.339 Notice of Hearing on Determination of Rights to Withheld Funds [Civ. Code § 3201]

[1] FORM Notice of Hearing on Determination of Rights to Withheld Funds [Civ. Code § 3201]

[*Caption, introduction. See § 481.338.*]

PLEASE TAKE NOTICE that the above-captioned matter has been set for hearing _____ [before the court *or* before a jury] on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in the courtroom of [_____ (Department *or* Division) _____ of] the above-entitled court, located at _____ [*name of building and street address*], in _____ [*city*], California. The hearing will be held pursuant to *Section 3201 of the Civil Code* and will be for the purpose of determining the rights of the above-entitled parties to funds being withheld by _____ [*name of public entity*], which must, pursuant to the above-mentioned code section, file the affidavit and counteraffidavit by the parties to this proceeding with the above-entitled court.

[The above matter has been set for a hearing subject to the right of the above-named _____ (defendant *or* respondent *or* claimant) to demand a jury trial by a written demand therefor served prior to or at the time and place set for the above-mentioned hearing.]
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Use of Form

This form of notice may be used when an ex parte application has not previously been granted by the court. At the time of the hearing, counsel for the party setting the matter for hearing should move that the court grant the hearing, and after the application is granted, the hearing would then be conducted. No written notice is given of the actual application or motion for the hearing under the above form since *Civ. Code § 3201* does not require a written notice of motion. However, if one is desired, see *§ 481.340*.

[3] Cross References

For related forms, see *§§ 481.337, 481.338*.

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42-481 California Forms of Pleading and Practice--Annotated § 481.340

§ 481.340 Notice of Motion and Motion for Order for Hearing to Determine Rights Under Complaint for Declaration of Rights to Withheld Funds [Civ. Code § 3201]

[1] FORM Notice of Motion and Motion for Order for Hearing to Determine Rights Under Complaint for Declaration of Rights to Withheld Funds [Civ. Code § 3201]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER FOR HEARING TO DETERMINE RIGHTS TO WITHHELD FUNDS [, SUPPORTING DECLARATION OF _____ (*name*), AND MEMORANDUM OF POINTS AND AUTHORITIES]
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.*, plaintiff _____ (*name*)] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.*, defendant] _____ [*name*] will, and hereby does, move for an order for a hearing [and will demand a trial by jury] on the above complaint for a declaratin of rights to funds withheld pursuant to _____ [plaintiff's *or* defendant's *or* petitioner's *or* respondent's] stop notice. The motion will be made on the grounds that such a hearing must be granted by the court pursuant to *Section 3201 of the Civil Code*.

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name*(*s*)] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[2] Use of Form

This form of notice of motion should be used only when local court practice is such that the motion for a hearing or a court order is treated as a noticed motion. In this event, a memorandum of points and authorities should accompany the notice of motion. *Civ. Code § 3201* does not specifically require a notice of a motion for a hearing or a notice of motion for a determination of rights but only that a notice of the hearing be given.

[3] Cross References

For related forms, see *§§ 481.337, 481.338*.

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42-481 California Forms of Pleading and Practice--Annotated § 481.341

§ 481.341 Order Determining Rights to Withheld Funds [Civ. Code § 3203]

[1] FORM Order Determining Rights to Withheld Funds [Civ. Code § 3203]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	ORDER
_____ [*name*], Defendant.	)	DETERMINING RIGHTS TO
	)	WITHHELD FUNDS
	)	

_____

The motion of _____ [*name of moving party*] for an order for a hearing on the complaint for _____ [a declaration of rights *or* an order declaring that he/she/it is entitled to the sum of $_____ withheld by _____ (*name of public entity*) pursuant to a stop notice filed by _____ [*name*] on _____ [*date*], and for an order to have this sum of $_____ released to him/her/it] came on regularly for hearing by this court this date on notice duly and regularly served. _____ [Plaintiff appeared by counsel _____ (*name*) and defendant appeared by counsel _____ (*name*) *or* No appearance was made on behalf of _____ (plaintiff *or* defendant)].

The matter having been fully submitted and argued and proof having been made to the satisfaction of this court, and good cause appearing therefor,

IT IS HEREBY ORDERED that plaintiff is [not] entitled to have released to him/her/it the sum of $_____ withheld by _____ [*name of public entity*] [and that this sum of money be

released by the _____ (*name of public entity*) to the _____ (plaintiff *or* petitioner *or* original contractor)].
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form of order is for use in a summary proceeding to determine whether or not a demand for release will be allowed.

At the hearing, the original contractor has the burden of proof [*Civ. Code § 3202*]. The purpose of the hearing is to determine whether the funds withheld should be further withheld or released to the contractor. The actual payment of the claim would be by action filed under *Civ. Code § 3210-3214*.

[3] Right to Jury Trial

When the right to a jury trial is given by the state constitution [*Cal. Const., art. I, § 7*], the procedure on release of a stop notice is not to be construed as depriving any party of the right to a jury trial [*Civ. Code § 3204*]. Whether a jury trial is constitutionally required would depend, in part, on the grounds given in the affidavit filed by the contractor for the release of withheld funds to him or her. If the ground given is that there is no basis in law for the claim set forth in the stop notice, a jury trial would not ordinarily be constitutionally required. However, if the ground given is that the amount of the claim as set forth in the stop notice is excessive, a question of fact requiring a jury trial might constitutionally be present.

When the hearing is before the court sitting without a jury, the court may make its determination on the affidavit and counteraffidavit if they contain sufficient facts. However, the court may order the hearing continued from the production of other evidence [*Civ. Code § 3203*].

[4] Res Judicata

The court determination resulting from the proceedings is not res judicata as to any right of action that the claimant has against either the principal or surety on or under the payment bond coming under *Civ. Code § 3247 et seq.* or *Pub. Contract Code § 7103* or as to any right of action against any party personally liable to the claimant [*Civ. Code § 3205*]. The effect of this provision is that the court determination is not res judicata as to any action brought by the claimant for breach of contract or under the payment bond. However, the court determination would apparently be res judicata as to an action brought by the claimant under *Civ. Code §§ 3210-3214* against the public agency to enforce payment of his or her claim.

[5] Service of Order on Public Entity

The original contractor is required by statute [*Civ. Code § 3203*] to serve a copy of the court order on the public entity.

[6] Text References

California Real Estate Law and Practice, Ch. 452, *Stop Notices* (Matthew Bender)

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42-481 California Forms of Pleading and Practice--Annotated § 481.342

§ 481.342 Complaint for Damages for Breach of Written Contract--And to Enforce Payment of Claim in Stop Notice [Civ. Code § 3210]

[1] FORM Complaint for Damages for Breach of Written Contract--And to Enforce Payment of Claim in Stop Notice [Civ. Code § 3210]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES AND TO EN-
_____ [*names*],	)	FORCE PAYMENT OF CLAIM IN STOP NOTICE
Defendants.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Breach of Contract)

[1. *Allegation of license if plaintiff is subcontractor. See § 481.310, Paragraph 1.*]

[2. *Capacity and residence of plaintiff. See § 481.311, Paragraph 1.*]

[3. *Capacity and residence of defendant contractor. See § 481.312, Paragraph 2.*]

[4. *Fictitious name allegation. See § 481.310, Paragraph 2.*]

5. Defendant _____ [*name of public entity*] is, and at all times herein mentioned was, a _____ [*describe, e.g.*, municipal corporation, duly organized and existing under the laws of the State of California, and situated in the County of _____ *or* chartered city, existing as such under the laws of the State of California, and situated in the County of _____ *or give other capacity of defendant public entity*].

6. On or about _____ [*date*], defendant _____ [*name of public entity*] acting through _____ [*specify, e.g.*, the Board of Public Works], and by virtue of the authority granted _____ [*describe source of authority, e.g.*, by the charter of the defendant city], entered into a contract with defendant _____ [*name of original contractor*] for the construction of a certain public work of improvement consisting of _____ [*describe construction project*].

[*EITHER*]

[7. *If plaintiff is subcontractor, allege:* On or about _____ (*date*), plaintiff entered into a contract with defendant _____ (*name of original contractor*) as original contractor, whereby plaintiff agreed to perform a certain, specified portion of the original contract, namely _____ (*specify work agreed to be performed*). Defendant _____ (*name of original contractor*) agreed to pay plaintiff the contract price of $_____ on the completion of the contract. Pursuant thereto, on or about _____ (*date*), plaintiff performed all conditions, covenants, and promises under the contract which he/she agreed to perform and furnished all necessary services, materials, and equipment to be used, and which were actually used, on or in the construction of the public work.]

[*OR*]

[7. *If plaintiff is materialman, allege:* Between _____ (*date*), and _____ (*date*), inclusive, at the special instance and request of defendant _____ (*name of original contractor*), plaintiff furnished certain _____ (labor *or* services *or* materials *or* equipment) to be used, and which were actually used, on or in the public works construction project identified above.]

8. The _____ [total contract price *or* reasonable value] of the _____ [labor *or* services *or* materials *or* equipment] so _____ [performed *or* furnished and used as mentioned above] [, which price was the reasonable value of the same], amounts to the sum of $_____; although demand therefor has been made, no part of this sum has been paid, except the sum of $_____, and the sum of $_____ remains due, owing, and unpaid over and above all credit and offsets.

SECOND CAUSE OF ACTION
(Enforcement of Stop Notice)

9. Plaintiff refers to and incorporates, as though fully set forth herein, Paragraphs 1-8, inclusive, of the First Cause of Action.

[10. *If plaintiff was required to serve preliminary 20-day notice (public work) under Civ. Code § 3098, allege:* Plaintiff filed his/her/its preliminary 20-day notice (public work), a true and correct copy of which is attached hereto as Exhibit

A and made a part hereof, with defendant _____ (*name of public entity*), defendant _____ (*name of original contractor*) [*add if any subcontractors contracted with* and _____ (*name of subcontractors*)] on _____ (*date*), pursuant to *Section 3098 of the Civil Code*.]

11. On _____ [*date*], plaintiff filed his/her/its stop notice, a true and correct copy of which is attached hereto as Exhibit B and made a part hereof, with defendant _____ [*name of public entity*] pursuant to Sections 3103 and 3181 through 3184 of the Civil Code.

12. In this stop notice plaintiff demanded that defendant _____ [*name of public entity*] withhold sufficient funds to answer the plaintiff'sclaim contained in the stop notice, which claim was for the sum of $_____, the sum that remains unpaid _____ [by *or* under plaintiff's contract with] defendant _____ [*name of original contractor*], as alleged above.

13. Plaintiff is informed and believes and thereon alleges that on the date that defendant _____ [*name of public entity*] received the stop notice as alleged above, it had in its possession sufficient funds due or to become due to defendant _____ [*name of original contractor*] to answer the plaintiff's claim stated in such stop notice.

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____ as principal, together with interest at the rate of _____ percent per day from _____ [*date*], to the date of judgment against defendant _____ [*name of original contractor*];

2. That the funds withheld by defendant _____ [*name of public entity*] in accordance with the demand made in the stop notice be paid to the plaintiff on account of this judgment;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 481.310.*]

[2] Use of Form

This form of complaint is for use in an action to enforce the payment of the claim stated in a stop notice that has been timely filed when the public entity or original contractor has not paid the claim.

[3] Time of Commencement

The action must be filed no sooner than 10 days after the stop notice has been served on the public entity and no later than 90 days following the expiration of the period within which stop notices must be filed [*Civ. Code § 3210*].

[4] Notice of Action

The plaintiff must give notice to the public entity of the action within five days after commencement of the action by registered or certified mail [*Civ. Code § 3211*; *see § 481.343*].

[5] Joinder With Other Actions

The different causes of action arising out of a public works construction project are often united. Thus, a cause of action on the contract [*see § 481.313*] and/or an action on the payment bond [*see § 481.361*] may be joined with an action to enforce the payment of the claim stated on a stop notice.

[6] Prior Claims Against Public Entity Not Required

Because the action is against the funds withheld and the public entity is a mere custodian of the funds, the claimant is not required to comply with the claims procedure of *Gov. Code § 900 et seq.* [*Civ. Code § 3265*].

[7] State Statutes

Service of notice. *Civ. Code § 3103*

Enforcement of rights arising from stop notice. *Civ. Code §§ 3210-3214*

[8] Decisions

If action to enforce stop notice is not timely filed, action to enforce stop notice against public entity is barred. *A. J. Setting Co. v. Trustees of Cal. State Univ. & Colleges (1981) 119 Cal. App. 3d 374, 380-385, 174 Cal. Rptr. 43*

[9] Text References

California Real Estate Law and Practice, Ch. 452, *Stop Notices* (Matthew Bender)

California Mechanics' Liens and Other Remedies (Cal. CEB 1972), Ch. 4, *Claims on Public Works*, §§ 4.30-4.34; Ch. 5, *Foreclosure of Mechanics' Lien*, §§ 5.24-5.33

Marsh, California Mechanics' Lien Law Handbook (2d ed.), §§ 6.18-6.37

[10] Cross References

For discussion and forms relating to an action to enforce a stop notice on private works, see Ch. 361, *Mechanics' Liens*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms of prayers and verification, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively

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42-481 California Forms of Pleading and Practice--Annotated § 481.343

§ 481.343 Notice of Commencement of Action on Stop Notice Claim [Civ. Code § 3211]

[1] FORM Notice of Commencement of Action on Stop Notice Claim [Civ. Code § 3211]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	NOTICE OF COMMENCEMENT OF ACTION
_____ [*names*], Defendants.	)	ON STOP NOTICE CLAIM
	)	[LIMITED CIVIL CASE]
	)	

To _____ [*name of director of department of public entity, in case of state entity, or name of controller, auditor, or other public disbursing officer, in case of public entity other than state*]:

YOU ARE HEREBY NOTIFIED that the above-named plaintiff has commenced an action [, as alleged in the complaint attached hereto,] against the above-named defendants to enforce a stop notice filed by the above-named plaintiff with you on _____ [*date*].

The action is to enforce the payment of a claim in the amount of $_____ for _____ [*describe labor or materials furnished*] _____ [performed *or* furnished] to _____ [*name of person for or to whom labor or materials was/were performed or furnished*] for _____ [*describe work of improvement*] being constructed by a contract between you and _____ [*name of original contractor*], dated _____ [*date*].

You are also referred to the preliminary 20-day notice filed with you on _____ [*date*], and the

above-mentioned stop notice, filed with you on _____ [*date*], for further particulars of plaintiff's claim which is the subject of the above entitled action.
Dated: _____.

_____ [*signature of plaintiff*]

[2] Use of Form

This form of notice is to be used to fulfill the requirements of *Civ. Code § 3211* that provide that notice of the commencement of an action to enforce rights arising from a stop notice be given to the public entity within five days of the commencement of the action.

[3] State Statutes

Five days' notice of action required. *Civ. Code § 3211*

[4] Text References

California Real Estate Law and Practice, Ch. 452, *Stop Notices* (Matthew Bender)

[5] Cross References

For a related form, see *§ 481.342*.

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42-481 California Forms of Pleading and Practice--Annotated § 481.344

§ 481.344 Complaint in Interpleader--By Public Entity When Total Amount Claimed in Stop Notices Exceeds Amount Withheld

[1] FORM Complaint in Interpleader--By Public Entity When Total Amount Claimed in Stop Notices Exceeds Amount Withheld

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT IN INTERPLEADER
_____ [*names*],	)	[Amount demanded _____
Defendants.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. At all times herein mentioned, plaintiff was, and now is, _____ [*state capacity of plaintiff public entity, e.g.*, a public corporation organized and existing under and by virtue of the laws of the State of California for the following purposes: _____ (*specify purposes*)].

[2. *Capacity and residence of defendants. See § 481.312, Paragraph 2.*]

[3. *Fictitious name allegation. See § 481.310, Paragraph 2.*]

4. [Plaintiff] _____ [*name*] is the duly appointed, qualified, and acting _____ [*name*

of controller, auditor, or other public disbursing officer] of _____ [*name of public entity*].

[5. Defendant _____ (*name*) is the trustee in bankruptcy for the estate of _____ (*name of original contractor*).]

6. On or about _____ [*date*], plaintiff _____ [*name of public entity*] acting through _____ [*name of department or other public body, e.g.*, the Board of Public Works], and by virtue of the authority granted _____ [*describe, e.g.*, by the charter of plaintiff city], entered into a contract in writing with [defendant] _____ [*name of original contractor*] for the _____ [construction *or* performance] of _____ [*describe work of improvement*]. A copy of the contract is attached to this complaint as Exhibit A and made a part of this complaint.

7. There remains due and owing to _____ [*name of original contractor*] from plaintiff [_____ (*name of public entity*)] for work performed under the contract, the sum of $_____. The sum of $_____ represents the full and complete indebtedness of plaintiff [_____ (*name of public entity*)] to [*defendant*] _____ [*name of original contractor*] or to any other person or persons, whether individual or corporate, arising out of the contract.

8. Defendants _____ [*names of stop notice claimants*] served plaintiff(s) [_____ (*name of public entity*) and] _____ [*name*] as _____ [*name of controller, auditor, or other public disbursing officer*] with written stop notices pursuant to *Section 3181 through 3186 of the Civil Code*, in the amounts and on the dates shown therein. The notices were verified, properly served, and contained the statement required by law. Copies of these notices are attached to this complaint as Exhibits B through _____ and made a part of this complaint. Plaintiff(s) have released no funds whatsoever held to the account of _____ [*name of original contractor*] under the above-described original contract since the date on which the first of these notices was filed with plaintiff(s).

9. The total sum represented by the stop notices is $_____. This sum greatly exceeds the sum withheld by _____ [*name of public entity*] under the original contract described herein. As between and among the parties who filed stop notices, plaintiff(s) is/are in doubt as to whom it/they should pay the withheld funds, or whether any of the parties are entitled to any of the funds withheld, or whether the parties are entitled under *Section 3190 of the Civil Code* to only a pro rata portion of the funds withheld.

[10. On or about _____ (*date*), plaintiff(s) (_____ (*name of public entity*) and) _____ (*name*) received notification from _____ (*name*), that _____ (*name of original contractor*) had assigned the accounts receivable under the contract to _____ [*name of controller, auditor, or other public disbursing officer*] on _____ (*date*). A copy of the notification of assignment is attached to this complaint as Exhibit _____ and made a part of this complaint.]

11. On _____ [*date*], _____ [*names of sureties*] entered into an agreement with, and executed and delivered to plaintiff [_____ (*name of public entity*)] their bond for faithful performance of the work to be constructed, guaranteeing that no expense whatsoever, other than the stipulated contract price, should fall on plaintiff and guaranteeing payment in full, of all claims of persons performing labor on or furnishing material to be used in construction of the project, if the general contractor failed to pay the same. Pursuant to the provisions of the bond, _____, [*names of sureties*] notified plaintiff(s) on _____ [*date*], that it was entitled to all funds held to the account of _____ [*name of original contractor*] by plaintiff(s). A copy of the bond is attached to this complaint as Exhibit _____ and made a part of this complaint.

[12. _____ (*Name of original contractor*) is in bankruptcy. The number of the bankruptcy is _____. On _____ (*date*), demand was made on the plaintiff(s) (_____ (*name of public entity*) and) _____ (*name of controller, auditor, or other public disbursing officer*) by the attorneys for _____ (*name*), the trustee in bankruptcy for the estate of _____ (*name of original contractor*), for the payment to the trusteeof the sum of $_____. A copy of the demand is attached to this complaint as Exhibit _____ and made a part of this complaint.]

[13. _____ (*Name*(*s*) of stop notice claimant(s)) has/have brought suit against plaintiff(s) in the Superior Court of the County of _____ to enforce payment of a stop notice claim filed with plaintiff in connection with labor and materials to be furnished pursuant to the original contract described herein. The above-named suit bears the number _____.]

[14. _____ (*Name of surety company*) has brought suit against plaintiff(s) in the Superior Court of the County of _____ to enforce the demand made by it on plaintiff (_____ (*name of public entity*)). This suit bears the number _____.]

15. Plaintiff(s) is/are holding the sum of $_____ under the contract with _____. Plaintiff(s) is/are required to withhold this sum pursuant to law. Plaintiff(s) do/does not know which defendants, if any, are entitled to the funds withheld and cannot safely determine which claims are right and lawful or entitled to priority. _____ [Plaintiff(s) is/are ready and willing to deposit *or* Upon filing this complaint, plaintiff(s) has/have deposited] with the clerk of this court the funds withheld in the amount of $_____.

16. This action is brought by plaintiff(s) without any collusion with any of the defendants.

WHEREFORE, plaintiff(s) pray(s) judgment against defendants, and each of them, as follows:

1. That defendants, and each of them, be required to interplead and litigate between and among themselves their respective claims to the funds withheld by plaintiff(s);

2. That the court adjudge and declare the mutual and legal rights and liabilities of the parties with reference to the funds in question;

3. That defendants, and each of them, be joined from bringing or pursuing any action under *Section 3210 of the Civil Code*;

4. That plaintiff(s) be discharged from all liability to defendants, and each of them;

5. That plaintiff(s) be awarded its/their costs and reasonable attorney's fees; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 481.310.*]

[2] Use of Form

This form of complaint is for use by a public entity in an action to interplead the claims of stop notice claimants who have served valid stop notices. The form may be used either before any actions have been filed by the stop notice claimants to enforce payment of their claims or after such actions have been filed [*see Code Civ. Proc. § 386(a), (b)*]. With appropriate modifications, the form may also be used by the public entity in a cross action [*see* Ch. 314, *Interpleader*].

Accompanying this complaint, the public entity should serve on the defendants notice of motions for a court order consolidating actions already filed, if appropriate, and for an interlocutory order in interpleader and for an injunction, together with supporting memoranda of points and authorities and affidavits.

[3] State Statutes

Procedure when funds withheld is insufficient to pay all valid claims. *Civ. Code § 3190*

Right to consolidate actions or to implead various claims. *Civ. Code § 3214*

Interpleader. *Code Civ. Proc. §§ 386, 386.5*

[4] Text References

Acret, California Construction Law Manual, Ch. 11, *Claims of Contractors and Suppliers on Public Jobs*

Marsh, California Mechanics' Lien Law, Ch. 9, *California Public Works*

[5] Cross References

See generally Ch. 314, *Interpleader*

For a form of complaint of interpleader brought by a construction lender, see Ch. 361, *Mechanics' Liens*

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Volume 42: Public Utilities thru Railroads-Chs. 480-485
Chapter 481 PUBLIC WORKS
PART V. FORMS
B. Withholding Payment on Public Works

42-481 California Forms of Pleading and Practice--Annotated §§ 481.345-481.359

[Reserved]

§§ 481.345[Reserved]

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C. Payment Bonds

42-C California Forms of Pleading and Practice--Annotated Scope

Scope

NOTE:

SB 189, which was introduced in February 2009 as a two-year bill, would comprehensively revise, reorganize, and consolidate the law governing stop notices and payment bonds on public works projects in the Public Contract Code. The proposed legislation is the product of a recommendation of the California Law Revision Commission, which may be consulted at http://www.clrc.ca.gov/pub/Printed-Reports/REC-H821.pdf. The legislation would be operative January 1, 2011. If SB 189 is enacted, this chapter will be updated in a future release.

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Volume 42: Public Utilities thru Railroads-Chs. 480-485
Chapter 481 PUBLIC WORKS
PART V. FORMS
C. Payment Bonds

42-481 California Forms of Pleading and Practice--Annotated § 481.360

§ 481.360 Post-Completion Bond Notice (Public Works)
[Civ. Code §§ 3227, 3252(b)]

[1] FORM Post-Completion Bond Notice (Public Works)
[Civ. Code §§ 3227, 3252(b)]

To: _____ [*name of surety*] and _____ [*name of bond principal*]

YOU ARE HEREBY NOTIFIED that _____ [on _____ (*date*), *or* between the dates of _____ (*date*) and _____ (*date*)], I, _____ [*name*], the undersigned, _____ [performed *or* agreed to perform *or* furnished *or* agreed to furnish] _____ [to *or* for] _____ [*name of subcontractor to or for whom the labor, services, materials, or equipment was done or furnished*] in connection with the _____ [performance *or* construction] of _____ [*describe public work of improvement*].

The following _____ [labor *or* materials *or* services *or* equipment] _____ [has *or* have] been _____ [performed *or* furnished]: _____ [*describe*].

The amount in value of the [labor *or* material *or* services *or* equipment] already furnished is $_____.
The amount in value of the [labor *or* materials *or* services *or* equipment] to be furnished is $_____
Dated: .

_____ [*signature of claimant*]

[2] Use of Form

Either this form of post-completion bond notice or a 20-day preliminary notice must be given by a claimant, other than a claimant specifically exempted from giving a 20-day preliminary notice under *Civ. Code § 3098(a)*, as a prerequisite to enforcement of a claim on a payment bond [*Civ. Code §§ 3098, 3252*; for a form of 20-day preliminary notice, *see §*

481.330]. This post-completion notice must be given to the surety and the bond principal within 15 days after recording a notice of completion, or if no notice of completion has been recorded, within 75 days after completing the work of improvement [*Civ. Code § 3252(b)*]. For further details of who must give this notice and the time, place, and manner of service, see *§§ 481.290 -481.294*.

[3] Contents of Form

This notice must be in writing and contain all of the following [*Civ. Code § 3227(b)*]:

(1) The kind of labor, services, equipment, or materials furnished or agreed to be furnished by the claimant.

(2) The name of the person for whom the labor, services, equipment, or materials were furnished.

(3) The amount in value, as near as may be determined, of any labor, services, equipment, or materials already furnished or to be furnished.

[4] State Statutes

Written notices required to be given to enforce claim on payment bond (public work). *Civ. Code § 3252*

Contents of post-completion bond notice to be given to surety and bond principal in accordance with *Civ. Code § 3252(b). Civ. Code § 3227(b)*

Service of post-completion bond notice. *Civ. Code § 3227(a)*

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Chapter 481 PUBLIC WORKS
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42-481 California Forms of Pleading and Practice--Annotated § 481.361

§ 481.361 Complaint Against Original Contractor for Damages for Breach of Contract--And Against Surety on Payment Bond [Civ. Code §§ 3096, 3098, 3227, 3247-3252]--By Subcontractor, Laborer, or Materialman

[1] FORM Complaint Against Original Contractor for Damages for Breach of Contract--And Against Surety on Payment Bond [Civ. Code §§ 3096, 3098, 3227, 3247-3252]--By Subcontractor, Laborer, or Materialman

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR BREACH OF
_____ [*names*],	)	CONTRACT AND FOR RECOVERY ON CON-
Defendants.	)	TRACTOR'S PAYMENT BOND
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Breach of Contract)

[1. *Allegation of license if plaintiff is a subcontractor. See § 481.310, Paragraph 1.*]

[2. *Capacity and residence of plaintiff. See § 481.311, Paragraph 1.*]

[3. *Capacity and residence of defendant original contractor. See § 481.312, Paragraph 2.*]

4. On or about _____ [*date*], _____ [*name of public entity*], hereinafter referred to as the "public entity," made and entered into a contract in writing with defendant, _____ [*name of original contractor*], under the terms of which this defendant covenanted and agreed to do all of the work and furnish all of the materials necessary to _____ [perform *or* construct] a work of improvement consisting of _____ [*describe work of improvement*], in _____ County, California, and described specifically as follows: _____ [*give legal description*]. [A copy of this contract is attached to this complaint as Exhibit A and made a part of this complaint.]

5. Between _____ [*date*] and _____ [*date*], plaintiff _____ [performed for *or* furnished to] defendant _____ [*name of original contractor*] the following _____ [*state and describe labor, materials, services, or equipment performed or furnished; if materials, services, or equipment were furnished, add* : to be used, and which were actually used, in the _____ (performance *or* construction) of the work of improvement contracted to be done as mentioned above]. The total contract value of the _____ [labor *or* materials *or* services *or* equipment] so _____ [performed *or* furnished] [and used], which sum is the reasonable value of the _____ [labor *or* materials *or* services *or* equipment], amounts to the sum of $_____. No part of this sum has been paid and the whole amount remains due, owing, and unpaid, over and above all just credits and offsets.

SECOND CAUSE OF ACTION
(On Public Works Payment Bond)

6. Plaintiff refers to and incorporates, as though fully set forth herein, Paragraphs 1-5, inclusive, of the First Cause of Action.

7. At all times herein mentioned, defendant _____ [*name of surety*], hereinafter referred to as the "surety," was, and now is, an admitted surety insurer, as that term is defined in *Code of Civil Procedure Section 995.120*.

8. Contemporaneously with the execution of the aforesaid contract, defendant original contractor, as principal, and defendant surety executed a payment bond for the purpose of complying with Sections 3096 and 3247 through 3252 of the Civil Code, which was thereafter, on _____ [*date*], filed with and approved by the public entity. This bond was in the sum of $_____, was conditioned, and provided that if the original contractor or any of his/her subcontractors failed to pay for any materials, provisions, provender, or other supplies, used in, on, for, or about the _____ [construction *or* performance] of the work of improvement, or for any work or labor done thereon of any kind, that the surety on the bond would pay the same. [A copy of the payment bond is attached to this complaint as Exhibit B and made a part of this complaint.]

[*If materials were furnished by one not under direct contractual relationship with original contractor allege:*]

[*EITHER*]

9. On or about _____ [*date*], plaintiff gave to defendant _____ [*name of surety*] and _____ [*name of bond principal*] _____ [in person *or* by United States certified (registered) mail, postage prepaid, addressed to this defendant at _____ (*address*) and bond principal at _____ (*address*)] as provided in *Civil Code Section 3227(a)*, the written notice as required by *Civil*

Code Section 3252(b), in the form prescribed by *Civil Code Section 3227(b)*. [A copy of this notice is attached to this complaint as Exhibit _____ and made a part of this complaint.]

[*OR*]

9. On or about _____ [*date*], within 20 days after plaintiff first furnished _____ [labor *or* materials *or* services *or* equipment *or combination thereof*], plaintiff served a preliminary 20-day notice (public work) ondefendant _____ [*contractor*] and on _____ [*the public agency concerned*] in accordance with the provisions of *Civil Code Section 3098*. [A copy of this notice is attached to this complaint, marked as Exhibit _____, and made a part of this complaint.]

[10. As a further condition of the payment bond, the principal and surety promised and agreed to pay reasonable attorney's fees to be fixed by the court in case suit was brought on the bond and undertaking. The sum of $_____ constitutes reasonable attorney's fees to be allowed for plaintiff's attorney's fees herein.]

11. A balance of the amount claimed, in the sum of $_____, is past due, owing, and unpaid. Plaintiff has made demand on defendant _____ [*name of surety*] for payment of the balance, but it has failed and refused, and continues to fail and refuse, to pay the same, or any part thereof.

12. The statutory provisions, incorporated into the attached payment bond, require the payment by defendants, and each of them, of reasonable attorney's fees, to be fixed by the court.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For the sum of $_____, together with interest at the rate of _____ percent from _____ [*date*], until paid;

2. For reasonable attorney's fees [in the sum of $_____];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 481.310.*]

[2] Use of Form

This form of complaint is for use in an action brought by a subcontractor, materialman, or laborer against the original contractor on a public works project and the surety on a payment bond in situations where the original contractor, as principal, and the surety have made and executed a payment bond pursuant to *Civ. Code § 3247*.

[3] Joinder of Contractor and Surety

A claimant may maintain a direct suit against the surety without having to first bring a suit against the principal, the original contractor [*Civ. Code § 3248*]. The obligation of the surety is primary and direct and is enforceable without relation to the original contract. Moreover, it would appear under *Code Civ. Proc. § 389* not to be compulsory to join the contractor as a party in an action against the surety. Nevertheless, it is a matter of common practice to include a separate action on the contract against the contractor with the suit against the surety on the payment bond. When the claimant is in privity of contract with the contractor, the action is on the contract. When there is no such privity, the general contractor owes the claimant nothing and the surety is directly liable along with the subcontractor who does have contractual privity with the claimant [*see Powers Regulator Co. v. Seaboard Surety Co. (1962) 204 Cal. App. 2d 338, 345, 22 Cal. Rptr. 373]* .

[4] Joinder of Stop Notice Action

The suit on the payment bond is a separate remedy distinct from any stop notice rights that the claimant might have. The filing of a stop notice is not a condition precedent to the maintenance of a payment bond action. There is no requirement that the public entity be brought into the suit in order for the plaintiff to enforce his or her rights under the payment bond [*Civ. Code § 3250*]. However, in the event that a stop notice has been filed, the actions on the payment bond and the stop notice may be combined into one lawsuit. Counsel need only combine the above complaint with the allegations *set forth in § 481.342* and by including the public entity as a defendant.

[5] State Statutes

Contractor's bond for public work. *Civ. Code § 3247*

Approval of bond by officer or body awarding contract. *Civ. Code § 3247*

Amount of bond. *Civ. Code § 3248(a)*

Condition of bond; attorney's fees in case of suit. *Civ. Code § 3248(b)*

Beneficiaries of bond. *Civ. Code § 3248(c)*

Time for suit against sureties. *Civ. Code § 3249*

Maintenance of action without filing stop notice or suing public officer or body. *Civ. Code § 3250*

Right to attorney's fees in bond action. *Civ. Code § 3250*

Sureties. *Code Civ. Proc. § 995.311*

[6] Text References

California Real Estate Law and Practice, Ch. 453, Payment Bonds, §§ 453.33 -453.35 (Matthew Bender)

[7] Cross References

For a related form, see *§ 481.360*.

For a form of complaint on a private works payment bond, see Ch. 361, *Mechanics' Liens* , and Ch. 538, *Suretyship, Bonds, and Undertakings* , respectively

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Chapter 481 PUBLIC WORKS
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42-481 California Forms of Pleading and Practice--Annotated § 481.362

§ 481.362 Complaint Against Subcontractor for Damages for Breach of Contract--And Against Surety on Subcontractor's Payment Bond [Civ. Code §§ 3096, 3098, 3227, 3247-3252]--By Subcontractor, Laborer, or Materialman

[1] FORM Complaint Against Subcontractor for Damages for Breach of Contract--And Against Surety on Subcontractor's Payment Bond [Civ. Code §§ 3096, 3098, 3227, 3247-3252]--By Subcontractor, Laborer, or Materialman

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR BREACH OF
_____ [*names*],	)	CONTRACT AND FOR RECOVERY ON SUB-
Defendants.	)	CONTRACTOR'S PAYMENT BOND
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Breach of Contract)

[1. *Allegation of license if plaintiff is a subcontractor. See § 481.310, Paragraph 1.*]

[2. *Capacity and residence of plaintiff. See § 481.311, Paragraph 1.*]

[3. *Capacity and residence of defendant subcontractor. See § 481.312, Paragraph 2.*]

4. On or about _____ [*date*], _____ [*name of original contractor*] and defendant, _____ [*name*], made and entered into a contract in writing under the terms of which the defendant, referred to below as subcontractor, agreed to provide _____ [*describe labor, materials, services, and/or equipment*].

5. After executing the contract referred to above, the subcontractor then entered into a contract with the plaintiff for the _____ [*describe work or materials to be furnished*].

6. Between _____ [*date*], and _____ [*date*], plaintiff _____ [furnished to *or* performed for] the subcontractor the following _____ [*state and describe labor, materials, supplies, and/or equipment performed or furnished; if materials, supplies, or equipment were furnished, add* to be used, and that were actually used, in the provision of _____ (*labor, materials, services, and/or equipment*) contracted for as stated above]. The total contract value of the _____ [labor *or* materials *or* supplies *or* equipment *or any combination*] so provided as stated above, which sum is the reasonable value of the [labor *or* materials *or* supplies *or* equipment *or any combination*] amounts to the sum of $_____. No part of this sum has been paid and the whole amount remains due, owing, and unpaid over and above all just credits and offsets.

SECOND CAUSE OF ACTION
(On Contractor's Payment Bond)

7. Plaintiff refers to and incorporates, as though fully set forth herein, Paragraphs 1-6, inclusive.

[8. *Capacity of defendant surety, See § 481.361, Paragraph 7*]

9. Contemporaneously with making the above contract between the original contractor and the subcontractor, in accordance with the terms of the contract, and before the subcontractor entered into the performance of the provision of _____ [*labor, materials, services, and/or equipment*], the subcontractor, as principal and defendant _____ [*name*], as surety, made and executed their bond and undertaking designated as payment bond for the purpose of complying with *Civil Code Sections 3096, 3098, 3227,* and *3247 through 3252*. This bond was in the sum of $_____, was conditioned, and provided that if the subcontractor failed to pay for any materials, provisions, provender, or other supplies, used in, on, for, or about the provision of _____ [*labor, materials, services, and/or equipment*] that the surety on the bond would pay the same. [A copy of the payment bond is attached to this complaint, marked as Exhibit _____, and made a part of this complaint.]

[10. *Allegation of agreement to pay attorney's fees. See § 481.361, Paragraph 10.*]

[*EITHER*]

[11. *Allegation of service of post-completion bond notice. See § 481.361, Paragraph 9 (first alternative).*]

[*OR*]

[11. On or about _____ [*date*], within 20 days after plaintiff first furnished _____ [labor *or* materials *or* services *or* equipment *or combination thereof*], plaintiff served a preliminary 20-day notice (public work) on _____ [*original contractor*], [on _____ *any other subcontractors contracted with*], and on _____ [*the public agency concerned*] in accordance with the provisions of *Civil Code Section 3098*. [A copy of this notice is attached to this complaint, marked Exhibit _____, and made a part of this complaint.]

[*CONTINUE*]

WHEREFORE, plaintiff prays judgment against the defendants, and each of them, as follows:

1. The sum of $_____, together with interest at the rate of _____ percent from _____ [*date*], until paid;

2. Plaintiff's cost of suit, including reasonable attorney fees;

3. Such other and further relief as the court deems proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

[*Verification. See § 481.310.*]

[2] Use of Form

This form of complaint is for use in an action brought by a subcontractor, materialman, or laborer against a subcontractor on a public works project and the surety on a payment bond in situations when the subcontractor, as principal, and the surety have made and executed the payment bond in accordance with the subcontractor's promise in his or her contract with the original contractor [*see Civ. Code § 3096*].

[3] Allegations

This complaint alleges as part of the plaintiff's cause of action against the surety on the subcontractor's payment bond: (1) the execution of a payment bond, pursuant to the original contract (*see* Paragraph 4), designed to inure to the benefit of the plaintiff (Paragraph 9) [*see Civ. Code § 3096* (subcontractor is permitted to be principal on payment bond)]; (2) the contract between the subcontractor and the plaintiff (Paragraph 5); and (3) its performance (Paragraph 6).

[4] State Statutes

Subcontractor may be principal of payment bond. *Civ. Code § 3096*

[5] Cross References

For a related form, see *§ 481.361*.

For a form of complaint on a private works payment bond, see Ch. 361, *Mechanics' Liens* , and Ch. 538, *Suretyship, Bonds, and Undertakings* , respectively

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Volume 42: Public Utilities thru Railroads-Chs. 480-485
Chapter 482 QUIETING TITLE

42-482 California Forms of Pleading and Practice--Annotated 482.syn

§ 482.syn Synopsis to Chapter 482: QUIETING TITLE

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§ 482.02 Cross References

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§ 482.10 Governing Statutes

§ 482.11 Gist of Quiet Title Action

§ 482.12 Objectives of Action; Related Actions

§ 482.13 Title Report Requirement

§ 482.14 Asserting Equitable Interest Against Legal Title

§ 482.15 Action as Equitable Remedy; Jury Trial

[1] When Jury Trial is Available

[2] Necessity to "Do Equity"

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[1] Status of Property

[2] Right of Redemption

[3] Notice That Property is Subject to Sale for Nonpayment of Taxes

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§ 482.17 Action Respecting Property Tax Lien

§ 482.18 Action Respecting Improvement Assessment Lien

§ 482.19 Action Respecting Tidelands and Navigable Waters

§ 482.20 Boundary Line Agreements

§ 482.21 Action Respecting in Situ Oil or Gas

§ 482.22 Private Assertion of Public Interest

§ 482.23 Hearing and Proof

[1] Presumptions

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§ 482.24 Effect of Judgment

§§ 482.25-482.39 [Reserved]

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[3] Presumptions

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[9] Joinder of Causes of Action

[10] Jury Trial

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[12] Parties

[13] Plaintiff's Right to Bring Action

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§ 482.43 Law Reviews

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§§ 482.45-482.59 [Reserved]

§ 482.60 Plaintiff's Checklist

[1] Facts to Be Ascertained

[2] Documents to Be Obtained

[3] Preliminary Investigation and Determinations

[4] Essential Allegations of Complaint

[5] Lis Pendens

[6] Service of Summons

§ 482.61 Defendant's Checklist

[1] Facts to Be Ascertained

[2] Documents to Be Obtained

[3] Essential Allegations of Answer and Cross Complaint

§§ 482.62-482.79 [Reserved]

§ 482.80 Complaint to Quiet Title [Code Civ. Proc. §§ 760.020(a), 761.020]--General Form

[1] FORM

[2] Use of Form

[3] Limitation of Action

[4] Jurisdiction and Venue

[5] Caption

[6] Plaintiff

[a] Identity and Capacity

[b] When Property Belongs to Decedent's Estate

[7] Defendants

[a] Defendants Determine Scope of Action

[b] Particular Capacity of Defendant

[c] Dissolved Corporation

[d] State or State Agency

[e] Heirs; Representative of Decedent's Estate; Affidavit

[f] When Required Defendant Is Believed to Be Deceased

[g] Unknown Defendants

[h] Fictitious Defendants

[i] Defendants Required by Court to Be Joined

[8] Appointment of Guardian ad Litem

[9] Required Allegations

[a] Property and Adverse Claims

[b] Plaintiff's Seisin or Possession Within Five Years

[c] Water Rights

[d] Equitable Right to Relief

[i] In General

[ii] Action Based on Breach of Sale Contract

[10] Prayer

[11] Verification

[12] Process

[13] Lis Pendens

[14] Costs

[15] Recovery of Expenses

[16] State Statutes

[17] Decisions

[a] Allegations

[b] Limitation of Action

[c] Parties

[d] Prayer

[18] Text References

[19] Cross References

§ 482.81 Complaint [Code Civ. Proc. § 425.10] to Quiet Title [Code Civ. Proc. §§ 760.020(a), 761.020]--By Purchaser of Tax-Defaulted Property Sold at Tax Sale [Rev. & Tax. Code § 3950]

[1] FORM

[2] Use of Form

[3] Defendants

[a] Who Must Be Named

[b] State of California

[c] Unknown Claimants

[d] Personal Representative

[e] Heirs; Devisees; Persons Believed Dead

[f] Owners of Special Assessments

[4] Allegations

[5] Verification

[6] Notice of Pendency of Action

[7] Process

[a] Form of Summons

[b] Posting of Summons

[c] Service of Summons

[d] Service by Publication on Unknown Defendants

[e] When County Is Defendant

[8] Defaults

[9] Judgment

[10] Cancellation of Special Assessments

[11] Cumulation of Remedies

[12] State Statutes

[13] California Rules of Court

[14] Cross References

§ 482.82 Answer [Code Civ. Proc. §§ 431.30, 761.030]--Disclaiming Any Interest [Code Civ. Proc. § 761.030(b)]

[1] FORM

[2] Use of Form

[3] Verification

[4] Cross Reference

§ 482.83 Answer [Code Civ. Proc. §§ 431.30, 761.030(a)]--By Defendant Claiming Interest

[1] FORM

[2] Use of Form

[3] Allegations in Answer

[4] Cross Complaint

[a] Affirmative Relief

[b] Allegations in Cross Complaint

[5] Appearance by Unnamed Person With Interest in Property

[6] Equitable Defenses

[7] Limitation of Action

[8] Laches as Defense

[9] Propriety of Demurrer Based on Laches

[10] Verification

[11] State Statutes

[12] Decisions

[13] Cross References

§ 482.84 Notice of Motion and Motion for Order Permitting Party to Make Survey of Real Property [Code Civ. Proc. § 742]

[1] FORM

[2] Use of Form

[3] Right to Judicial Order

[4] Notice

[5] Grounds

[6] Points and Authorities

[7] State Statutes

[8] California Rules of Court

[9] Cross References

§ 482.85 Order Permitting Party to Make Survey of Real Property [Code Civ. Proc. §§ 742, 743]

[1] FORM

[2] Use of Form

[3] Contents; Service

[4] Liability for Injury

§ 482.86 Judgment [Code Civ. Proc. § 632] for Plaintiff--General Form

[1] FORM

[2] Use of Form

[3] Scope of Judgment

[a] In General

[b] When Any Interest Is Part of Decedent's Estate

[c] Prohibitive Relief

[4] Interlocutory (Conditional) Judgment

[5] Persons Bound by Judgment

[6] Statement of Decision

[7] Description of Property and Interests

[8] Costs

[9] Motion for New Trial or to Vacate Judgment

[10] Appeal

[11] Recording of Judgment

[12] California Rules of Court

[13] Decisions

[14] Cross References

§ 482.87 Complaint [Fed. R. Civ. P., Rule 8] to Quiet Title Against United States of America [28 U.S.C. §§ 1346(f), 2409a]

[1] FORM

[2] Source of Form

[3] Use of Form

[4] Jurisdiction and Venue

[5] Limitation

[6] Parties

[7] Allegations

[a] Jurisdiction

[b] Nature of Plaintiff's Interest

[c] Derivation of Plaintiff's Interest

[d] Nature of Government's Interest

[e] Facts Negating Limitation of Action

[8] Prayer; Signature; Verification

[9] Government's Disclaimer of Interest

[10] Government's Election to Retain Possession

[11] Adverse Possession

[12] Lis Pendens

[13] Costs

[14] Actions Unaffected by 28 U.S.C. § 2409a

[15] State Statutes

[16] Cross References

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§ 482.01 Scope of Chapter

This chapter discusses the resolution of conflicting claims of ownership to property through use of an action to quiet title. It includes a procedural checklist and the following forms:

- A complaint in general form [*see § 482.80*].
- A complaint for use by a purchaser of tax-deeded property [*see § 482.81*].
- An answer disclaiming any interest in the subject property [*see § 482.82*].
- An answer asserting the defendant's interest [*see § 482.83*].
- A notice of motion [*see § 482.84*] for an order [*see § 482.85*] permitting a party to make a survey of real property.
- A judgment in general form for use by the plaintiff and adaptable for use by the defendant [*see § 482.86*].
- A complaint in general form for use in a federal court action to quiet title to real property against the United States [*see § 482.87*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdverse PossessionClaims By & Against Governmental EntitiesReal Property LawAdverse PossessionProcedureReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 482.02 Cross References

For discussion and forms for use in an action to determine adverse claims of adjoining landowners, see Ch. 11, *Adjoining Possession* .

For discussion and forms for use in an action to determine a claim of title based on adverse possession, see Ch. 13, *Adverse Possession* .

For discussion and forms for use in an action to determine adverse claims to animals, see *Ch. 23, Animals: Civil Liability, § 23.128,* and Ch. 24, *Animals: Liens* .

For discussion and forms for use in an action to determine adverse claims to works of art, see Ch. 57, *Art* .

For discussion and forms for use in an action to determine adverse claims based on an assignment, see Ch. 60, *Assignments* .

For discussion and forms for use in a proceeding for attachment, see Ch. 62, *Attachment* .

For discussion and forms for use in an action to determine adverse claims based on a bailment, see Ch. 93, *Bailments* .

For discussion and forms for use in a proceeding to determine adverse claims to the property of a bankrupt, see Ch. 94, *Bankruptcy* .

For discussion and forms for use in an action to determine adverse claims to deposits in financial institutions, see Ch. 95, *Banks, Deposits, and Checks* .

For discussion and forms for use in an action by an executor for restoration by the maker of a lost note made payable to the decedent, see Ch. 385, *Negotiable Instruments* .

For discussion and forms for use in an action to determine adverse claims based on the location of a boundary, see Ch.

101, *Boundaries* .

For discussion and forms for use in an action to determine adverse claims where a real estate broker acquired property adversely to the client, see Ch. 103, *Brokers* .

For discussion and forms for use in an action for invalidation and cancellation of an instrument which supports an adverse claim, see Ch. 107, *Cancellation of Instruments* .

For discussion and forms for use in an action to determine adverse claims to personal property, as well as a proceeding for provisional relief, see Ch. 119, *Claim and Delivery* .

For discussion and forms for use in an action to determine adverse claims to community property, see Ch. 122, *Community Property* .

For discussion and forms for use in an action to determine adverse claims to personal property by way of compensatory relief (damages), see Ch. 150, *Conversion* .

For discussion and forms for use in an action to determine adverse claims to shares of stock and stock certificates, see Ch. 163, *Corporations: Transfers of Shares* .

For discussion and forms for use in an action to determine adverse claims when the conditions described in *Code Civ. Proc. § 1060* exist, see Ch. 182, *Declaratory Relief* .

For discussion and forms for use in an action to determine adverse claims to real property dedicated or purportedly dedicated to public use, see Ch. 183, *Dedication* .

For discussion and forms for use in an action to determine adverse claims and cancel or reform a deed, see Ch. 184, *Deeds* .

For discussion and forms for use in the provisional remedy of deposit in court, see Ch. 211, *Deposit in Court* .

For discussion and forms for use in a proceeding for dissolution of a marriage, in which adverse claims to property may be determined, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

For discussion and forms for use in an action to determine adverse claims to an easement, see Ch. 240, *Easements* .

For discussion and forms for use in an action to determine adverse claims involving possession of real property, other than claims based on a landlord-tenant relationship, see Ch. 241, *Ejectment* .

For discussion and forms for use in an action to determine adverse claims when the government takes property by condemnation for public use, see Ch. 247, *Eminent Domain* .

For discussion and forms for use in an action to determine adverse claims to unclaimed property when escheat is involved, see Ch. 252, *Escheat (Unclaimed Property).*

For discussion and forms for use in an action to determine adverse claims when an escrow is involved, see Ch. 253, *Escrows* .

For discussion and forms for use in asserting a third-party claim to personal property under levy of execution, see *Ch. 254, Executions and Enforcement of Judgments, § 254.310* et seq.

For discussion and forms for use in an action to determine adverse claims when a fence is involved, see Ch. 266, *Fences* .

For discussion and forms for use in an action to determine adverse claims based on a fraudulent or purportedly fraudulent conveyance, see Ch. 270, *Fraudulent Conveyances* .

For discussion and forms for use in an action to determine adverse claims to property transferred in satisfaction of a gambling debt, see Ch. 272, *Gambling* .

For discussion and forms for use in an action to determine adverse claims involving a garageman's lien, see Ch. 274, *Garages and Gas Stations* .

For discussion and forms for use in an action to determine adverse claims to a gift or purported gift, see Ch. 278, *Gifts* .

For discussion and forms for use in a guardianship or conservatorship proceeding, with respect to determining adverse claims to property, see Ch. 290C, *Guardianship and Conservatorship: Actions and Disputed Claims* .

For discussion and forms for use in a proceeding to determine adverse claims when a homestead or purported homestead is involved, see Ch. 295, *Homesteads* .

For discussion and forms for use in a proceeding to determine adverse claims by establishing the identity of a grantor who used different names in acquiring and transferring property, see Ch. 299, *Identity, Establishment of.*

For discussion and forms for use in an action to determine adverse claims by way of preventive relief, see Ch. 303, *Injunctions* .

For discussion and forms for use in an action to determine adverse claims when insurance is involved, see Ch. 308, *Insurance* .

For discussion and forms for use in an action to determine adverse claims of third parties, when the plaintiff asserts no interest in the property, see Ch. 314, *Interpleader* .

For discussion and forms for use in an action to determine adverse claims involving irrigation water, see Ch. 315, *Irrigation* .

For discussion and forms for use in an action to determine adverse claims of joint tenants or tenants in common, see Ch. 316, *Joint Tenancy and Tenancy in Comon* .

For discussion and forms for use in an action to determine adverse claims to real property on the theory of unlawful detainer or forcible entry and detainer, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

For discussion and forms for use in an action to determine adverse claims to fixtures or to demised premises when an option to purchase is involved, see Ch. 334, *Landlord and Tenant: Claims for Damages* .

For discussion and forms for use in an action to determine adverse claims of secured parties, see Ch. 342, *Liens and Wage Preferences* .

For discussion and forms for use in an action to determine adverse claims when a life estate is involved, see Ch. 344, *Life Estates and Remainders* .

For discussion and forms for use in recording a notice of the pendency of an action (lis pendens) affecting real property, see Ch. 348, *Lis Pendens* .

For discussion and forms for use in an action to determine adverse claims to literary property, see Ch. 349, *Literary Property and Copyright* .

For discussion and forms for use in an action to determine adverse claims to felled timber (logs), see Ch. 350, *Logs and Timber* .

For discussion and forms for use in an action to determine adverse claims to lost or unclaimed property, when escheat is not involved, see Ch. 355, *Lost and Unclaimed Property* .

For discussion and forms for use in an action to reestablish lost public records affecting title, see Ch. 356, *Lost Papers* .

For discussion and forms for use in an action to determine adverse claims when mechanics' liens are involved, see Ch. 361, *Mechanics' Liens* .

For discussion and forms for use in an action to determine adverse claims respecting mining property, see Ch. 363, *Mining* .

For discussion and forms for use in an action to determine adverse claims to motion picture film (print), see Ch. 370, *Motion Pictures* .

For discussion and forms for use in an action to determine adverse claims respecting in situ deposits of oil or gas, see Ch. 393, *Oil and Gas* .

For discussion and forms for use in intervening in a civil action, see Ch. 395, *Parties* .

For discussion and forms for use in an action to determine adverse claims by partition, see Ch. 397, *Partition* .

For discussion and forms for use in an action to determine adverse claims respecting inventions, see Ch. 411, *Patents and Inventions* .

For discussion and forms for use in an action to determine adverse claims between principal and agent, see Ch. 427, *Principal and Agent* .

For discussion and forms for use in an action to determine adverse claims to corporate franchises and public offices, see Ch. 483, *Quo Warranto* .

For discussion and forms for use in a proceeding for appointment of a receiver, see Ch. 486, *Receivers* .

For discussion and forms for use in an action to determine adverse claims by reformation of an instrument, see Ch. 488, *Reformation of Instruments* .

For discussion and forms for use in an action to determine adverse claims to chattel paper or inventory subject to a security interest, see Ch. 500, *Sales and Secured Transactions* .

For discussion and forms for use in an action to determine adverse claims to real property which is the site of a public school, see Ch. 514, *Schools: Injuries to Students* .

For discussion and forms for use in an action to determine adverse claims by way of ordering specific performance of a contract, see Ch. 528, *Specific Performance* .

For discussion and forms for use in a proceeding to establish the termination of a tenancy or an estate by reason of a person's death, see Ch. 441, *Probate: Disposition Without Administration* .

For discussion and forms for use in an action to determine adverse claims to real property when title insurance is involved, see Ch. 548, *Title Insurance* .

For discussion and forms for use in an action to determine adverse claims to a trademark or trade name, see Ch. 549, *Trademarks and Trade Names* .

For discussion and forms for use in an action to determine adverse claims to real property on the theory of trespass, see Ch. 550, *Trespass* .

For discussion and forms for use in an action to determine adverse claims to real property when a trust deed or mortgage is involved, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

For discussion and forms for use in an action to determine adverse claims to property subject to a trust, see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

For discussion and forms for use in an action to determine adverse claims to real property arising under a sale agreement, see Ch. 569, *Vendor and Purchaser* .

For discussion and forms for use in an action to determine adverse claims to water, see Ch. 575, *Waters* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsContracts LawTypes of ContractsBailmentsReal Property LawPurchase & SaleFraudulent TransfersReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsTortsIntentional TortsConversionGeneral Overview

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[Reserved]

§§ 482.03[Reserved]

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§ 482.10 Governing Statutes

The action discussed in this chapter is governed by *Code Civ. Proc. § 760.010 et seq.* (state court action) and by *28 U.S.C. §§ 1346(f), 2409a* (federal court action against United States involving title to real property). The state statute was enacted in 1980, effective January 1, 1981. It made the quiet title judgment in rem, that is, effective against both named and unknown defendants [*Code Civ. Proc. § 764.030*; *see § 482.42*]. Prior to its enactment, ordinary quiet title actions were only effective against named defendants [former *Code Civ. Proc. § 738*]. The state statutes and rules governing practice in civil actions in general apply to quiet title actions except where they are inconsistent with the provisions of *Code Civ. Proc. § 760.010 et seq.* [*Code Civ. Proc. § 760.060*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsTrue in Rem ActionsReal Property LawAdverse PossessionClaims By & Against Governmental EntitiesReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 482.11 Gist of Quiet Title Action

If one person claims to be the owner of an interest in property, and another person claims to be the owner of an interest in the same property, and the two claims conflict, either may sue the other for a judgment resolving that conflict. The judgment will declare who owns what interest and may give other specific or preventive relief to the extent required under the circumstances. The cause of action is explicitly authorized by *Code Civ. Proc. § 760.010*, which provides that an action may be brought to establish title against adverse claims to real or personal property or any interest therein. "Claim" is defined as including a legal or equitable right, title, estate, lien, or interest in property or cloud on title [*Code Civ. Proc. § 760.010(a)*]. "Property," to use the term in its broadest possible sense [15 Calif. L. Rev. Comm'n 1194 (1979)], is defined as including real property and, to the extent applicable, personal property [*Code Civ. Proc. § 760.010(b)*].

These provisions do not limit the interests that may be determined or the persons against whom they may be quieted; they are intended to provide the broadest possible forum for clearing title to the fee or any other interest in property [15 Calif. L. Rev. Comm'n 1194 (1979)].

The action is called an action to quiet title because the effect of the judgment is to quiet adverse claimants to the rightful owner's title (claim of ownership). By the doctrine of res judicata, the judgment precludes further litigation and thereby tends to make the rightful owner's title secure.

The action is, in effect, a foreclosure action not unlike that which a secured lender might bring to collect the debt by foreclosing the borrower's interest in the security (property) [*see Jones v. Sacramento Sav. & L. Ass'n (1967) 248 Cal. App. 2d 522, 530, 56 Cal. Rptr. 741]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataReal Property LawTitle QualityAdverse Claim ActionsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 482.12 Objectives of Action; Related Actions

Most quiet title actions involve ownership of some interest in real property, and they usually are brought for the purpose of foreclosing adverse claims of the sort that show up as exceptions on title reports. The plaintiff's objective, generally, is to make his or her title marketable, although he or she may not contemplate transferring it in the near future. A quiet title action is also appropriate to establish that the plaintiff has acquired title by adverse possession [*see* Ch. 13, *Adverse Possession*]. An action for this purpose, which merely declares who owns what interests in the property, is the kind of action that commonly is called a quiet title action, and the kind that is the subject of this chapter. If in any action or proceeding, establishing or quieting title to property is at issue, the court in its discretion may, upon motion of any party, require that the issue be resolved pursuant to the provisions of the quiet title statute to the extent practicable [*Code Civ. Proc. § 760.030(b)*].

The remedy provided by the quiet title statute is cumulative and not exclusive of any other remedy, form, or right of action or proceeding provided by law for establishing or quieting title to property [*Code Civ. Proc. § 760.030(a)*].

When a mere declaration of ownership will not suffice to make the plaintiff's title whole (subject to legitimate and unobjectionable interests such as utility company easements), plaintiff may desire to pursue various forms of additional relief. This additional relief might include reforming the plaintiff's deed [*see* Ch. 488, *Reformation of Instruments*], establishing a boundary [*see* Ch. 101, *Boundaries* , and Ch. 266, *Fences*], cancelling another deed, a deed of trust, or a mortgage [*see* Ch. 107, *Cancellation of Instruments* , Ch. 184, *Deeds* , and Ch. 555, *Trust Deeds and Real Property Mortgages*], and restoring the public record of the plaintiff's title after it has been lost or destroyed [*see* Ch. 356, *Lost Papers*].

In some cases the plaintiff will not have record or legal title but will have an equitable claim to that title. The type of action discussed in this article is not appropriate in such a case [*see § 482.14*]. If the claim is based on the defendant's acquisition of title through fraud, through acting as the plaintiff's agent, or through some other manner not entitling the defendant to keep it, the plaintiff may sue to establish a resulting or constructive trust [*see* Ch. 561, *Trusts: Constructive Trusts* and Ch. 562, *Trusts: Resulting Trusts*].

When the plaintiff wants to establish title for the purpose of enjoying some right of ownership, the issue of title is

secondary. The ultimate purpose of the lawsuit determines the character of the action. Usually that purpose is to recover possession of the property [*see* Ch. 93, *Bailments* , Ch. 119, *Claim and Delivery* , Ch. 241, *Ejectment* , and Ch. 333, *Landlord and Tenant: Eviction Actions*].

There is a special proceeding for use in the case where the plaintiff's title is rendered doubtful because a predecessor took title by one name and conveyed by another [*see* Ch. 299, *Identity, Establishment of*].

If no specific action is appropriate, an action for declaratory relief may be the proper method of proceeding [*see* Ch. 182, *Declaratory Relief*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsConstructive TrustsEstate, Gift & Trust LawTrustsResulting TrustsReal Property LawAdverse PossessionGeneral OverviewReal Property LawDeedsProperty DescriptionsReal Property LawDeedsRemediesReformationReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsReal Property LawTitle QualityMarketable TitleGeneral Overview

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§ 482.13 Title Report Requirement

The court on its own motion may, and on motion of any party must, make such orders as appear appropriate requiring the plaintiff to procure a title report and designate a place where it shall be kept for inspection, use, and copying by the parties [*Code Civ. Proc. § 762.040(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 482.14 Asserting Equitable Interest Against Legal Title

When a dispute arises as to ownership of the present interest, and one claimant (usually the defendant) has, while the other claimant (usually the plaintiff) lacks, record title, a quiet title action is inappropriate. The outcome is ordained by the simple fact that one party has record title and is, therefore, the owner. Assuming, as is the usual case, that the plaintiff asserts an equitable interest against the holder of the legal title, the gist of his or her complaint is that while the defendant admittedly owns the present interest, he or she ought not to own it, but, instead, ought to transfer ownership to the plaintiff for whatever reason (e.g., the defendant took title as the plaintiff's agent, for convenience). The plaintiff should sue for a judgment declaring the defendant to be the owner as a resulting or a constructive trustee only, and directing the defendant to transfer ownership to the plaintiff [*see, e.g., Nevarez v. Nevarez (1962) 202 Cal. App. 2d 596, 21 Cal. Rptr. 70]* .

Although such an action may be described generally as a quiet title action, it is not the sort of action that courts commonly have in mind when they use that label. Therefore, it has been held that the owner of an equitable interest may not maintain a quiet title action against the holder of legal title [*see Santoro v. Carbone (1972) 22 Cal. App. 3d 721, 732, 99 Cal. Rptr. 488]* . One of the reasons for this rule is that if the plaintiff were allowed to prove some basis for an equitable interest (e.g., fraud) under a general allegation of ownership, the defendant might be taken by surprise unfairly [*O'Keefe v. Aptos Land & Water Co. (1955) 134 Cal. App. 2d 772, 781, 286 P.2d 417]* .

When the plaintiff asserts an equitable interest against the holder of legal title, the complaint is demurrable if it alleges merely that the plaintiff owns the present interest in the property. What the plaintiff contends is that he or she has a right to own it, but that the defendant actually owns it; thus, the plaintiff's allegation of ownership is improper. It is necessary that the complaint show the basis for the claim that the plaintiff has a right to own the present interest. For instance, if the defendant induced the plaintiff to convey the present interest by a fraudulent agreement, the complaint must so allege. Moreover, if the plaintiff's right depends on his or her having taken some preliminary step (e.g., rescinding a fraudulent agreement),the complaint must show that he or she has taken it or that there is an excuse for his or her not having taken it [*see Leeper v. Beltrami (1959) 53 Cal. 2d 195, 214-217, 1 Cal. Rptr. 12, 347 P.2d 12]* .

Thus, there may be two fundamentally different cases. In the one that is the subject of this chapter the plaintiff appropriately may allege, prove, and have a judgment that he or she is the owner of a specified interest in particular

property. In the other case, the plaintiff can only allege, prove, and have a judgment that the defendant is the owner, but wrongly, and must transfer ownership to the plaintiff. Forms appropriate for use in the latter case are included in Ch. 560, *Trusts*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsConstructive TrustsReal Property LawOwnership & TransferEquitable Interests

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§ 482.15 Action as Equitable Remedy; Jury Trial

[1] When Jury Trial is Available

A declaration of the nature and extent of the parties' interests in particular property is equitable relief as distinguished from legal relief; therefore, the action is governed by equitable principles [*see Santoro v. Carbone (1972) 22 Cal. App. 3d 721, 731, 99 Cal. Rptr. 488]* . This means, among other consequences, that trial by jury is not a matter of right [*see Code Civ. Proc. § 592*; *Hartman v. Burford (1966) 242 Cal. App. 2d 268, 270, 51 Cal. Rptr. 309* (reporting rule)].

Nothing in the quiet title statute limits any authority the court may have to grant such equitable relief as may be proper under the circumstances of the case [Code Civ. Pro. § 760.040(c)].

When the plaintiff seeks not only a declaration of his or her rights but also recovery of possession, the rule is different because *Code Civ. Proc. § 592* provides: "In actions for the recovery of specific, real, or personal property, with or without damages, ... an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this code." An action for the recovery of property is regarded as a legal, as distinguished from an equitable, remedy. Therefore, when the plaintiff seeks both a declaration of rights and recovery of possession, the action is partly equitable and partly legal. In such a case, trial by jury is a matter of right with respect to the legal issues (i.e., the right to recover possession) but not with respect to the equitable issues (i.e., ownership) [*see, e.g., Robinson v. Puls (1946) 28 Cal. 2d 664, 665-666, 171 P.2d 430* (reporting rule)].

Regarding the question of a jury trial, the courts have distinguished three kinds of quiet title actions:

- When the plaintiff is out of possession and seeks to establish his or her title primarily for the purpose of recovering possession, the action is regarded as a legal action for the recovery of property, and a jury trial is a matter of right [*see, e.g., Medeiros v. Medeiros (1960) 177 Cal. App. 2d 69, 73, 1 Cal. Rptr. 696]* .

- When the plaintiff is in possession and the defendant seeks to recover possession, the action is partly equitable (on the plaintiff's side) and partly legal (on the defendant's side), and a jury trial is a matter of

right for the defendant if he or she alleges that he or she was recently dispossessed [*see, e.g., Donahue v. Meister (1891) 88 Cal. 121, 128-129, 25 P. 1096]* .

- When the plaintiff is in possession and the defendant does not seek to recover possession, the action is purely equitable, and a jury trial is not a matter of right, even if the plaintiff alleges a right to possession. If the defendant does seek to recover possession but cannot allege that he or she was recently dispossessed, the action remains equitable, and there is no right to a jury trial unless the equitable issues (ownership) are resolved against the plaintiff [*Thomson v. Thomson (1936) 7 Cal. 2d 671, 681-683, 62 P.2d 358]* .

Whether the action is equitable, legal, or partly legal and partly equitable, determines not only the question of a jury trial, but other matters as well. For example, when there are equitable issues, equitable defenses such as laches, unclean hands, and fraud are available.

[2] Necessity to "Do Equity"

"He who seeks equity must do equity" is a well-recognized principle in equity jurisprudence. It means that a court will not give equitable relief to a party unless he or she has acknowledged or conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adverse party and growing out of, or necessarily involved in, the subject matter of the controversy. This principle of equity is applicable to an action to quiet title. A familiar instance of its application is when the court precludes a mortgagor from quieting his or her title against an outlawed mortgage payment of the mortgage debt. In such a case, when the debt is not paid or not required to be paid, the court does not decree that the plaintiff has no interest in the property, but dismisses the action for want of equity in the plaintiff's cause [*O'Brien v. O'Brien (1925) 197 Cal. 577, 584-585, 241 P. 861]* .

A person does not have to be a bona fide purchaser to quiet title. Therefore, a purchaser of land with knowledge of mortgages barred by the statute of limitations can quiet title to the land [*Mix v. Sodd (1981) 126 Cal. App. 3d 386, 389-392, 178 Cal. Rptr. 736]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityMaximsDo Equity PrincipleCivil ProcedureEquityReliefCivil ProcedureTrialsJury TrialsActions in EquityCivil ProcedureTrialsJury TrialsRight to Jury TrialReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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42-482 California Forms of Pleading and Practice--Annotated § 482.16

§ 482.16 Action Respecting Tax-Defaulted Property

[1] Status of Property

Property on which property taxes are delinquent becomes "tax-defaulted," by operation of law and declaration of the tax collector [*Rev. & Tax. Code §§ 126, 3436*].

[2] Right of Redemption

The property remains subject to the original owner's redemption rights until those rights are terminated [*Rev. & Tax. Code § 4101*; *see Rev. & Tax. Code § 3707*]. If not redeemed within five years (or three years if the property is nonresidential commercial property, or is not an owner-occupied residence and would be suitable as low-income housing, or is subject to a nuisance-abatement lien) after it becomes tax-defaulted, the property is subject to sale by the tax collector [*Rev. & Tax. Code § 3691(a)(1)(A), (b)(1)(A)*]. Redemption may be made until the close of business on the last day prior to the date the sale begins and requires payment of all taxes, penalties, and costs due [*Rev. & Tax. Code §§ 3707(a)(1), 4101, 4102*]. The right of redemption revives if the property is not sold [*Rev. & Tax. Code § 3707(d)*]. If the tax collector approves a sale as a deferred-payment transaction and does not receive full payment on or before the date the tax collector requires payment pursuant to *Rev. & Tax. Code § 3693.1*, the right of redemption is revived on the next business day following that date [*Rev. & Tax. Code § 3707(a)(2)*]. On redemption of property subject to a power of sale, the tax collector must execute and record a rescission of any notice of power of sale [*Rev. & Tax. Code §§ 3691.4, 4112(c)*]. After redemption, the redemptioner or any person claiming through the redemptioner may bring a quiet title action [*Rev. & Tax. Code § 4113*]. Tax-defaulted property that remains unredeemed may be sold [*Rev. & Tax. Code §§ 3691, 3692(a)*]. The purchaser or anyone claiming through him or her may bring a quiet title action [*Rev. & Tax. Code §§ 3727, 3950*; *see § 482.81* and its Comments].

[3] Notice That Property is Subject to Sale for Nonpayment of Taxes

The tax collector must execute a notice whenever a parcel becomes subject to the power of sale, and the county clerk must take acknowledgment of the notice without charge [*Rev. & Tax. Code § 3691.1*]. The notice must specify [*Rev. & Tax. Code § 3691.2*]:

- That five years or more have elapsed since the taxes or assessments on the parcel were declared in default.

- That the property was duly assessed for taxation and the tax legally levied.

- That the property is subject to sale for nonpayment of taxes.

- The amount of taxes originally declared to be in default, unless there has been a partial cancellation of taxes, a redemption from a portion of taxes, or a correction under *Rev. & Tax. Code §§ 4831.5* and *4876.5*, in which case the amount must be the balance remaining.

- A metes and bounds or lot-block-tract description of the property.

The notice must be recorded with the county recorder, who may not charge for the recording. After recordation, the notice must be forwarded to the tax collector [*Rev. & Tax. Code § 3691.4*]. The tax collector must file the notice in his or her office and keep a record to show the subsequent disposition of the property [*Rev. & Tax. Code § 3691.5*]. On request of the Controller, the tax collector must report the disposition of all tax-defaulted parcels subject to tax collections power to sell in his or her county [*Rev. & Tax. Code § 3691.6*].

[4] Sale of Tax Certificates

A county may sell tax certificates if the sale is approved by the board of supervisors and authorized in writing by the controller [*Rev. & Tax. Code §§ 3691, 3694, 4511*; *see Rev. & Tax. Code § 4505* (definition); *see also Rev. & Tax. Code § 4501 et seq.*].

A certificate represents an intangible property right to receive all amounts due with respect to a delinquency in connection with secured roll property or property on the supplemental roll. A certificate may be issued for a separately assessed parcel, or for multiple parcels with separate assessments, that is delinquent or defaulted at the time of the offer of sale of the certificate. A certificate may not be issued for any subsequent year taxes or assessments [*Rev. & Tax. Code § 4505(a)*].

The certificate must contain information specified by statute [*see Rev. & Tax. Code § 4505(a)*], and may be in the form of a physical certificate or in book-entry form, including an electronic medium, in the discretion of the county [*Rev. & Tax. Code § 4505(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesTax DeedsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsTax LawState & Local TaxesReal Property TaxCollectionTax Deeds & Tax Sales

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§ 482.17 Action Respecting Property Tax Lien

An action may be brought at any time against the state or any county or city to quiet title against the lien of any taxes that have been canceled [*Rev. & Tax. Code § 4990.3*; *see Rev. & Tax. Code §§ 4986-5073* (cancellation of assessments and tax liens)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral OverviewTax LawState & Local TaxesReal Property TaxCollectionTax Liens

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§ 482.18 Action Respecting Improvement Assessment Lien

An action may be brought to determine adverse interests in, or liens or clouds on the title to, real property arising out of any public improvement assessment or any bond issued to represent such an assessment, when the lien of the assessment or bond is presumed to have been extinguished under *Civ. Code § 2911*; or to determine adverse interests in, or liens or clouds on the title to, real property by reason of any certificate issued on a sale made to satisfy any public improvement assessment or bond, when the sale was made more than four years before the action is begun and no deed pursuant thereto was issued before the action is begun or before January 1, 1951, whichever is the later [*Code Civ. Proc. § 801.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsPublic ImprovementsAssessmentsReal Property LawTitle QualityAdverse Claim ActionsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 482.19 Action Respecting Tidelands and Navigable Waters

A person claiming an interest in real property that the state claims is situated in the former bed of a navigable river or stream may bring a quiettitle action against the state to determine the adverse claims [*Pub. Res. Code § 6461*; *see Pub. Res. Code §§ 6462, 6465*]. The state is the owner of all land below the water of a navigable stream [*Civ. Code § 670*]. Except when the grant under which the land is held indicates a different intent, the owner of land bordering on a navigable stream takes to the edge of the stream at low-water mark [*Civ. Code § 830*]. When, from natural causes, land forms by imperceptible degrees on the bank of a river or stream, navigable or not navigable, either by accumulation of material or by recession of the stream, the land belongs to the owner of the bank, subject to any existing right-of-way over the bank [*Civ. Code § 1014*].

A person claiming title to tideland under a state patent may bring a quiet title action against the state, or against the state and other persons, to determine the validity of the patent or establish the boundaries of the land granted by it [*Pub. Res. Code § 6463*; *see Pub. Res. Code §§ 6462, 6465*]. The state is the owner of all land below tidewater and below the ordinary high-water mark bordering on tidewater within the state [*Civ. Code § 670*]. Except when the grant under which the land is held indicates a different intent, the owner of land bordering on tidewater takes to the ordinary high-water mark [*Civ. Code § 830*].

A person claiming title to land adjoining tideland or submerged land under a patent issued by the United States or by the state may bring an action against the state, or against the state and other persons, to fix and determine the boundary between the adjoining land and the tideland or the submerged land that it adjoins [*Pub. Res. Code § 6464*; *see Pub. Res. Code §§ 6462, 6465*].

The State Lands Commission has power to bring a quiet title action for the purpose of establishing the ordinary high-water mark or the ordinary low-water mark of any of the swamp, overflowed, marsh, tide, or submerged lands of the state, whenever it is deemed expedient or necessary [*Pub. Res. Code § 6357*].

The grantee of any interest in land that the State Lands Commission conveyed in an exchange for filled or reclaimed tideland or submerged land or the bed of a navigable waterway pursuant to *Pub. Res. Code § 6307* may bring a quiet title action [*Code Civ. Proc. § 760.020(b)*; *Pub. Res. Code § 6307(e)*] to obtain a judgment pursuant to *Code Civ. Proc.*

§ 764.080 [*see § 482.20* for discussion of *Code Civ. Proc. § 764.080*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsPropertyReal Property LawTitle QualityAdverse Claim ActionsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsReal Property LawWater RightsAccretion, Avulsion & RelictionReal Property LawWater RightsBoundaries

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§ 482.20 Boundary Line Agreements

An action to quiet title may be brought to confirm the validity of a boundary line agreement entered into between the state and the owner of shoreline property pursuant to *Pub. Res. Code § 6357* [*Code Civ. Proc. § 760.020(b)*]. In such an action, the court must receive evidence on the nature of the agreement. After receiving the evidence, the court must render a statement of decision, including a recitation of the facts and a determination that the agreement meets the statutory criteria. If the court finds the agreement to be valid, the judgment must quiet title in the parties named in the agreement in accordance with the agreement. All such actions must be set on the trial calendar within one year from the filing of the memorandum to set, unless the court extends the time for good cause. No such action may be brought until the State Lands Commission has approved the agreement following a public hearing [*Code Civ. Proc. § 764.080(a)*]. These provisions cannot be construed to limit the rights of the public in bringing or participating in such actions [*Code Civ. Proc. §§ 760.020(c), 764.080(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsEvidenceHearsayExceptionsPublic RecordsGeneral OverviewEvidenceHearsayExceptionsRecords of Documents Affecting Property InterestsEvidenceInferences & PresumptionsPresumptionsEvidenceInferences & PresumptionsRebuttal of PresumptionsReal Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedureReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 482.21 Action Respecting in Situ Oil or Gas

A person claiming an interest in in situ oil or gas may bring, or intervene in, a quiet title action against the state, or against the state and other persons, or may intervene in a quiet title action brought by the state, to determine adverse claims to the deposit [*Pub. Res. Code § 6814*].

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§ 482.22 Private Assertion of Public Interest

A private person may sue or defend in his or her capacity as a member of the public, to establish public ownership of an interest in property. For example, he or she may assert a public easement against someone claiming unqualified ownership of the present interest in real property [*see Marks v. Whitney (1971) 6 Cal. 3d 251, 261-262, 98 Cal. Rptr. 790, 491 P.2d 374]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewReal Property LawLimited Use RightsEasementsPublic Easements

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§ 482.23 Hearing and Proof

The court must examine into and determine the plaintiff's title against the claims of all the defendants. The court must not enter judgment by default but must in all cases require evidence of plaintiff's title and hear such evidence as may be offered respecting the claims of any of the defendants, other than claims the validity of which is admitted by the plaintiff in the complaint. The court must render judgment in accordance with the evidence and the law [*Code Civ. Proc. § 764.010*].

Although *Code Civ. Proc. § 764.010* has been referred to as a prohibition against default judgments, it does not preclude entry of a defendant's default. Rather, it simply provides that a plaintiff does not have a right to entry of judgment in his or her favor as a matter of course following entry of the defendant's default in a quiet title action. Thus, a judgment may be entered in a quiet title action following default, provided the evidentiary requirements of § 764.010, including a hearing, live testimony, and authentication of the underlying real property records, are met [*Yeung v. Soos (2004) 119 Cal. App. 4th576, 580-581, 14 Cal. Rptr. 3d 502* ; *Winter v. Rice (1986) 176 Cal. App. 3d 679, 683, 222 Cal. Rptr. 340]* .

The plaintiff will prevail, if at all, only by proving that he or she owns the interest claimed or at least some interest. He or she cannot prevail merely by showing that the defendant does not own the interest the defendant claims, or appears to have, or by showing that the defendantowns no interest. The usual expression of this rule is that the plaintiff can prevail only on the strength of his or her own title and not on the weakness of his or her adversary's [*see, e.g.,* Gerhard v. Stephens *(1968) 68 Cal. 2d 864, 918, 69 Cal. Rptr. 612, 442 P.2d 692* ; *Kunza v. Gaskell (1979) 91 Cal. App. 3d 201, 207, 154 Cal. Rptr. 101* ; *Valle v. Ingram (1941) 18 Cal. 2d 761, 767, 117 P.2d 869]* . The rule also applies to the defendant when he or she claims an interest and seeks affirmative relief. It is possible, therefore, that neither party will be able to prevail [*see, e.g., Harmon Enterprises, Inc. v. Vroman (1959) 167 Cal. App. 2d 517, 334 P.2d 628* (relief sought, on opposing claims, by both plaintiff and defendant; judgment against each party on his claim affirmed)].

In making his or her proof, the plaintiff may rely on any presumptions in his or her favor [*see, e.g., Pilkington v. Fausone (1970) 11 Cal. App. 3d 349, 351-352, 90 Cal. Rptr. 38]* . Since documentary evidence will often be involved, one of the more important presumptions is that facts recited in a written instrument (except a recital of consideration) are conclusively presumed to be true as between the parties to the instrument and their successors in interest [*Evid.*

Code § 622]. This presumption, being conclusive, can be a powerful aid [*see, e.g., Carpenter v. Smallpage (1934) 220 Cal. 129, 133, 29 P.2d 841* (presumption relied on in finding evidence sufficient to support judgment)].

A person is presumed to own property which he or she possesses or over which he or she exercises acts of ownership [*Evid. Code §§ 637, 638*]. If the plaintiff proves possession, he or she has made a prima facie case, but the presumption of ownership based on possession may be rebutted [*Evid. Code § 630*; *see, e.g., Bond v. Aickley (1914) 168 Cal. 161, 163, 141 P. 1188]* . Mere possession is not sufficient when real property is involved, however. The plaintiff also must meet the test for adverse possession [*see Civ. Code §§ 1006, 1007*].

A plaintiff not in possession must establish that he or she has record or paper title by tracing the chain of title to any of four sources [*Ernie v. Trinity Lutheran Church (1959) 51 Cal. 2d 702, 706, 336 P.2d 525* ; *San Diego Improvement Co. v. Brodie (1932) 215 Cal. 97, 100-101, 8 P.2d 1027]* :

- The government;
- A grantor in possession;
- A grantor common to both plaintiff and defendant; or
- A grantor who himself or herself obtained a quiet title judgment.

If the plaintiff claims title as an heir or as a legatee or devisee, he or she must trace his or her decedent's title in this manner, since the probate court's decree of distribution establishes only that the plaintiff takes whatever title his or her decedent had [*Rockey v. Vieux (1919) 179 Cal. 681, 682-683, 178 P. 712]* . The only exception to this rule requiring the tracing of title is that when the defendant rests his or her claim on title derived from the plaintiff, it is unnecessary for the plaintiff to trace his or her title [*Thiele v. Security Trust & Sav. Bank (1927) 202 Cal. 758, 760, 262 P. 308]* .

A judgment in a quiet title action establishing a party's ownership is no less a document of title than is a deed or a bill of sale. This means, among other consequences, that the party in whose favor the judgment was given may offer the judgment in evidence in any subsequent lawsuit concerning that title, without having referred to it in his or her pleading [*see, e.g., Kipp v. Reed (1920) 183 Cal. 49, 51, 190 P. 363]* .

When in an action to quiet title, or to determine adverse claims, to real or personal property, the validity or interpretation of any gift, devise, bequest, or trust, under any will or instrument purporting to be a will, whether or not it has been admitted to probate, is involved, the will or instrument purporting to be a will is admissible in evidence. All questions concerning the validity of any gift, devise, bequest, or trust must be finally determined in the action. However, if the will has been admitted to probate and the gift, devise, bequest, or trust has been interpreted by a final decree of the probate court, the interpretation is conclusive as to the proper construction thereof. Nothing set forth in this paragraph deprives a party of the right to a jury trial in any case in which by law, the right is given [*Code Civ. Proc. § 764.020*].

[1] Presumptions

Among the various presumptions established by statutes, the following will often be helpful in quiet title actions (two others--that recitals in written instruments, except as to consideration, are presumptively true as between the parties [*Evid. Code § 622*], and that a person presumptively owns the property he or she possesses or over which he or she exercises acts of ownership [*Evid. Code §§ 637, 638*]--have already been discussed):

- **Landlord's Title.** A tenant is not permitted to deny the title of his or her landlord at the time of the

commencement of the relationship [*Evid. Code § 624*].

- **Date of Writing.** A writing is presumed to have been truly dated [*Evid. Code § 640*].

- **Performance of Duty to Convey.** A trustee or any other person, whose duty it was to convey real property to a particular person, is presumed to have actually conveyed to him or her when such presumption is necessary to perfect the title of such person or his or her successor in interest [*Evid. Code § 642*].

- **Authenticity of Ancient Document.** A deed, a will, or any other writing purporting to create, terminate, or affect an interest in real or personal property is presumed to be authentic if (a) it is at least 30 years old, (b) it is in such condition as to create no suspicion concerning its authenticity, (c) it was kept or (if found) was found in a placewhere such writing, if authentic, would be likely to be kept or found, and (d) it has been generally acted on as authentic by persons having an interest in the matter [*Evid. Code § 643*].

- **Ownership of Beneficial Title.** The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof [*Evid. Code § 662*].

- **Acknowledgment.** A certificate of the acknowledgment of a writing other than a will, or a certificate of the proof of such a writing, is prima facie evidence of the facts recited in the certificate and the genuineness of the signature of each person by whom the writing purports to have been signed if the certificate meets the requirements of *Civ. Code §§ 1180-1207* [*Evid. Code § 1451*].

- **Official or Notary Signature.** A signature is presumed to be genuine and authorized if it purports to be the signature, affixed in his or her official capacity, of (a) a public employee of the United States, (b) a public employee of any public entity in the United States, or (c) a notary public within any state of the United States [*Evid. Code § 1453*; *see Evid. Code § 1454* (signature of foreign official)].

- **Recorded Documents.** The record of an instrument or any other document purporting to establish or affect an interest in property is prima facie evidence of the existence and content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed if (a) the record is in fact a record of an office of a public entity and (b) a statute authorized such a document to be recorded in that office [*Evid. Code § 1600*; *see Evid. Code § 1601* (lost or destroyed public records); *see also Evid. Code §§ 1603* (deeds executed pursuant to legal process), 1604 (certificate of purchase or location of lands), 1605 (copies of Spanish title papers)].

- **Nonacceptance of Dedication for Public Improvement.** If a proposal is heretofore or hereafter made to dedicate real property for public improvement, there is a conclusive presumption that the proposed dedication was not accepted if all of the following conditions are satisfied [*Code Civ. Proc. § 771.010*]:

  - The proposal was made by filing a map only;

  - No acceptance of the dedication was made and recorded within 25 years after the map was filed;

  - The real property was not used for the purpose for which the dedication was proposed within 25 years after the map was filed; and

- The real property was sold to a third person after the map was filed.

An action is authorized to clear title of a proposal to dedicate property for public improvement if there is such a conclusive presumption. The action must be pursuant to *Code Civ. Proc. §§ 760.010-764.070*, as described in this article. The public entity to which the dedication was proposed must be named as a defendant and the judgment in the action clears the title of the proposed dedication and removes the cloud created by the proposed dedication [*Code Civ. Proc. § 771.020*].

[2] Overcoming Ancient Gaps in Title

A plaintiff who relies on record title might be confronted with an ancient gap in his or her chain of title which he or she cannot close. For example, he or she might trace his or her title back to an early date when an unrecorded transfer was made, the deed being now lost and all witnesses being dead. In such a case, when it is impossible to close the gap in the chain of title, the only practical means of foreclosing the interests which might be claimed by the successors of the title holder on the far side of the gap is to proceed on a theory of adverse possession. Success in that case will depend on proving all of the various elements prescribed by statute [*see* Code Civ. Proc. §§ 332-335]. For discussion and forms, see Ch. 13, *Adverse Possession* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsEvidenceHearsayExceptionsAncient DocumentsEvidenceHearsayExceptionsRecords of Documents Affecting Property InterestsEvidenceInferences & PresumptionsGeneral OverviewEvidenceInferences & PresumptionsRebuttal of PresumptionsReal Property LawOwnership & TransferTransfer Not By DeedDedicationElementsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 482.24 Effect of Judgment

The judgment in a quiet title action entered in a proceeding commenced after January 1, 1981 is in rem. It is binding and conclusive on all of the following persons, regardless of any legal disability [*Code Civ. Proc. § 764.030*]:

(1) All persons known and unknown who were parties to the action and who have any claim to the property, whether present or future, vested or contingent, legal or equitable, several or undivided; and

(2) Except as provided in *Code Civ. Proc. § 764.045*, all persons who were not parties to the action and who have any claim to the property which was not of record at the time the lis pendens was filed or, if none was filed, at the time the judgment was recorded.

Except to the extent provided in *Code Civ. Proc. § 1908(a)(2)*, the judgment does not affect a claim in the property or a part of the property of any person who was not a party to the action if either of the following conditions is satisfied [*Code Civ. Proc. § 764.045*]:

(1) The claim was of record at the time the lis pendens was filed or, if none was filed, at the time the judgment was recorded; or

(2) The claim was actually known to the plaintiff or would have been reasonably apparent from an inspection of the property at the time the lis pendens was filed, or, if none was filed, at the time the judgment was entered.

However, a claimant may be bound by the proceeding if the claim was acquired from a party after commencement of the proceeding and withactual knowledge of the proceeding [*Code Civ. Proc. §§ 764.045* and Law Revision Commission Comments, 1908(a)(2)].

Nothing in *Code Civ. Proc. § 764.045(b)*shall be construed to impair the rights of a bona fide purchaser or encumbrancer for value dealing with the plaintiff or the plaintiff's successors in interest [*Code Civ. Proc. § 764.045(b)*].

The relief granted in an action or proceeding directly or collaterally attacking the judgment in the action, whether based on lack of actual notice to a party or otherwise, shall not impair the rights of a purchaser or encumbrancer for value of the property acting in reliance on the judgment without knowledge of any defects or irregularities in the judgment or proceedings [*Code Civ. Proc. § 764.060*]. This provision is intended to enhance the marketability of property as to which an in rem quiet title decree has been rendered. When the rights of such a bona fide purchaser have intervened, the person who successfully collaterally attacks the quiet title judgment will only have a cause of action for damages [15 Cal. L. Rev. *Comm. 1208* (1979)].

Notwithstanding the above, the judgment in the action is not binding or conclusive on the following [*Code Civ. Proc. § 764.070*]: (1) the state, unless individually joined as a party to the action; and (2) the United States, unless the United States is individually joined as a party to the action, and federal law authorizes judgment in the action to be binding or conclusive as to its interests. *28 U.S.C. § 2410* authorizes an action against the United States in state court to quiet title to real or personal property on which the United States has or claims a mortgage or other lien. Thus, this type of judgment against the United States would be conclusive.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral OverviewReal Property LawPriorities & RecordingBona Fide PurchasersReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsReal Property LawTitle QualityMarketable TitleGeneral Overview

California Forms of Pleading and Practice--Annotated

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PART II. LEGAL BACKGROUND

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[Reserved]

§§ 482.25[Reserved]

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PART III. RESEARCH GUIDE

42-482 California Forms of Pleading and Practice--Annotated § 482.40

§ 482.40 State Statutes

[1] Generally

Right to sue to reestablish public record of title after loss or destruction of record. *Code Civ. Proc. § 751.02*

Right to sue to reestablish boundaries and quiet title after dislocation of boundaries by natural or man-made earth movement. *Code Civ. Proc. § 751.50*

Procedure for quieting title and effect of judgment. *Code Civ. Proc. § 760.010 et seq.*

Recordation of notice of intention to preserve interest that will otherwise be unenforceable by statute creates liability for damages, including attorney's fees, if done for purpose of slandering title to real property, and damages are recoverable in action to quiet title. *Civ. Code § 880.360*

Right to damages including attorney's fees in action to clear title when buyer on recorded contract of sale refuses to execute release of contract after failing to satisfy conditions specified in contract. *Civ. Code § 886.020*

Right to sue to determine adverse claim for money or property on alleged obligation. *Code Civ. Proc. § 1050*

Right to bring quiet title action against shareholders of dissolved corporation. *Corp. Code § 2011*

Governing board of school or community college district as empowered to clear title to adjacent property by quitclaim deed. *Educ. Code §§ 39291, 81301*

[2] Oil or Gas Deposit

Right to sue to quiet title to in situ oil or gas, or to intervene in such suit. *Pub. Res. Code § 6814*

[3] Presumptions

Possession alone as not sufficient to maintain quiet title action involving real property. *Civ. Code §§ 1006, 1007*

Probate court's interpretation of will, when will involved, as conclusive if such interpretation has become final. *Code Civ. Proc. § 764.020*

Nonacceptance of proposed dedication by map only after 25 years as conclusively presumed where land has been sold to third person and used as if free of dedication, and acceptance has not been recorded. *Code Civ. Proc. § 771.010 et seq.*

Purpose and effect of presumptions affecting burden of producing evidence. *Evid. Code §§ 603, 604*

Facts recited in written instrument (except recital of consideration) conclusively presumed true as between parties to instrument and successors. *Evid. Code § 622*

Tenant is not permitted to deny landlord's title at beginning of landlord-tenant relationship. *Evid. Code § 624*

Presumption of ownership based on possession is rebuttable. *Evid. Code § 630*

Person presumed to own property he or she possesses or over which he or she exercises acts of ownership. *Evid. Code §§ 637, 638*

Writing is presumed truly dated. *Evid. Code § 640*

Trustee or other person having duty to convey real property presumed to have conveyed when presumption necessary to perfect obligee's title. *Evid. Code § 642*

Ancient document meeting certain tests is presumed authentic. *Evid. Code § 643*

Owner of legal title is presumed owner of beneficial title. *Evid. Code § 662*

Acknowledgment meeting statutory requirements [*Civ. Code § 1180 et seq.*] is prima facie evidence of facts therein recited and genuineness of signatures. *Evid. Code § 1451*

When signature of public official, notary public, or foreign official presumed genuine and authorized. *Evid. Code §§ 1453, 1454*

Presumptions concerning documents affecting title to property. *Evid. Code §§ 1600-1605*

[4] Procedure

Party to action concerning real property or affecting title or right of possession is entitled to record notice of pendency of action (lis pendens). *Code Civ. Proc. § 405.20*

Right to jury trial in action for recovery of property. *Code Civ. Proc. § 592*

Declaratory relief procedure. *Code Civ. Proc. §§ 1060-1062a*

Transfer of quiet title action on formation of new county. *Gov. Code § 23382*

[5] Tax-Defaulted Property

Action by defaulting owner against taxing agency to determine validity of deed to agency based on tax delinquency must be brought within one year after date of execution of deed. *Rev. & Tax. Code § 175*

Judgment quieting state's title to tax-deeded property cuts off right of redemption. *Rev. & Tax. Code § 3614.5*

Action by original owner alleging invalidity of or irregularity in proceedings for sale of tax-defaulted property by taxing agency to private party must be brought within one year after date of execution of tax collector's deed. *Rev. & Tax. Code § 3725*

Purchaser of tax-deeded property is entitled to sue to quiet title. *Rev. & Tax. Code §§ 3727, 3950*

Action based on alleged invalidity or irregularity in sale of tax-deeded property by taxing agency to itself or other public entity must be brought within one year after date of execution of instrument on which claim of invalidity or irregularity is based. *Rev. & Tax. Code § 3809*

Former owner (delinquent taxpayer) is entitled to redeem tax-defaulted property. *Rev. & Tax. Code § 4101*

Right to rescission of notice of power of sale deed on redemption. *Rev. & Tax. Code § 4112*

Redemptioner is entitled to sue to quiet title after redemption. *Rev. & Tax. Code § 4113*

[6] Tax or Assessment Lien

Right to sue to quiet title against public improvement assessment lien. *Code Civ. Proc. § 801.1*

Right to sue to quiet title against tax lien that has been canceled. *Rev. & Tax. Code § 4990.3*

Cancellation of assessments and tax liens. *Rev. & Tax. Code §§ 4986-5073*

[7] Sale of Tax Certificates

Power of tax collector to sell tax certificates on tax-defaulted property. *Rev. & Tax. Code §§ 3691, 4511*

Approval of board of supervisors. *Rev. & Tax. Code § 3694*

General definitions relating to tax certificates. *Rev. & Tax. Code §§ 4501-4505*

Authorization and administration of tax certificate sales. *Rev. & Tax. Code §§ 4511-4513*

Procedures and requirements relating to tax certificate sales. *Rev. & Tax. Code §§ 4521-4531*

Rights of holders of tax certificates with regard to redemptioner, taxpayer, county, or any other persons. *Rev. & Tax. Code § 4920(c)*

[8] Tidelands and Navigable Waters

State is owner of land below water in navigable stream and below tidewater. *Civ. Code § 670*

Ownership of land bordering on navigable stream or tidewater. *Civ. Code § 830*

Ownership of land formed by accumulation at stream bank or recession of stream. *Civ. Code § 1014*

Action by state to establish boundary (high-water mark or low-water mark) of tideland, swamp, or submerged land. *Pub. Res. Code § 6357*

Right to sue to quiet title to former bed of navigable river or stream. *Pub. Res. Code § 6461*

Service of process in suit under *Pub. Res. Code §§ 6461, 6463,* and *6464*. *Pub. Res. Code § 6462*

Right to sue to quiet title to tideland under state patent. *Pub. Res. Code § 6463*

Right to sue to establish boundary between tideland or submerged land and adjoining land. *Pub. Res. Code § 6464*

Plat [map] may be exhibit to complaint in suit under *Pub. Res. Code §§ 6461, 6463,* and *6464*. *Pub. Res. Code § 6465*

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceHearsayExceptionsPublic RecordsGeneral OverviewEvidenceInferences & PresumptionsPresumptionsEvidenceInferences & PresumptionsRebuttal of PresumptionsReal Property LawDeedsTypesTax DeedsReal Property LawNonmortgage LiensTax LiensReal Property LawOwnership & TransferTransfer Not By DeedDedicationProcedureReal Property LawPriorities & RecordingLis PendensReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsReal Property LawWater RightsBoundariesTax LawState & Local TaxesReal Property TaxCollectionTax Deeds & Tax Sales

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§ 482.41 Decisions

[1] Actions to Quiet Title (Examples)

To establish leasehold. *German-American Sav. Bank v. Gollmer (1909) 155 Cal. 683, 102 P. 932*

To establish right of reentry for breach of condition. *Thornton v. Middletown Educ. Corp. (1937) 21 Cal. App. 2d 707, 70 P.2d 234*

To clear adverse claims. *Castro v. Barry (1889) 79 Cal. 443, 21 P. 946* ; *Akley v. Bassett (1924) 68 Cal. App. 270, 228 P. 1057*

By vendor against defaulting purchaser. *Keele v. Clouser (1928) 92 Cal. App. 526, 268 P. 682*

To establish equitable interest. *Bacon v. Bacon (1937) 21 Cal. App. 2d 540, 69 P.2d 884*

To clear record of tenant's interest. *Black v. Arnold Best Co. (1954) 124 Cal. App. 2d 378, 268 P.2d 513*

To invalidate zoning ordinance clouding title by illegally restricting use, thus depreciating value. *Bank of America v. Atherton (1943) 60 Cal. App. 2d 268, 140 P.2d 678*

[2] Costs

Plaintiff is not allowed to recover costs in quiet title action when defendant allows default judgment to be taken against

defendant. *Thorson v. Western Development Corp. (1967) 251 Cal. App. 2d 206, 212, 59 Cal. Rptr. 299*

[3] Defenses

Statute of limitations does not commence to run against plaintiff seeking to quiet title to real property while plaintiff is in possession of property. *Muktarian v. Barmby (1965) 63 Cal. 2d 558, 560-561, 47 Cal. Rptr. 483, 407 P.2d 659*

Action by former husband to quiet title in family residence previously awarded to now deceased former wife in dissolution proceeding was estopped by default divorce judgment because residence had been listed in former wife's petition for dissolution, and husband failed to appeal disposition of property. *Badillo v. Badillo (1981) 123 Cal. App. 3d 1009, 1010-1012, 177 Cal. Rptr. 56*

When evidence supports findings of agreed boundary line with prior uncertainty as to its location, doctrine of estoppel may apply. *Roman v. Ries (1968) 259 Cal. App. 2d 65, 68, 66 Cal. Rptr. 120*

No statute of limitations runs against plaintiff seeking to quiet title while plaintiff is in possession of property. *Oates v. Nelson (1969) 269 Cal. App. 2d 18, 22, 74 Cal. Rptr. 475*

Fraud, even if properly pleaded, does not constitute a defense or counterclaim to action to quiet title; counterclaim for damages is properly subject to demurrer when prayer would not tend to diminish or defeat plaintiff's recovery, that is, to quiet title. *California Trust Co. v. Gustason (1940) 15 Cal. 2d 268, 273, 101 P.2d 74*

Judgment in a prior quiet title action will bind representative of same real party in interest in subsequent action. *Walker v. Hansen (1933) 218 Cal. 619, 621, 24 P.2d 764*

When prior quiet title action is pending between same parties to determine title to same property, defendant may move for dismissal on that ground. *Chapman v. Moore (1907) 151 Cal. 509, 511, 91 P. 324*

[4] Effect of Judgment

Judgment against one or more of several defendants in quiet title action is proper whenever severable judgment is proper. *Thorson v. Western Development Corp. (1967) 251 Cal. App. 2d 206, 215, 59 Cal. Rptr. 299*

Applied to judgments, rule is that description in judgment affecting real property should be certain and specific, and that an impossible, wrong, or uncertain description, or no description at all, renders judgment erroneous and void. *Newman v. Cornelius (1970) 3 Cal. App. 3d 279, 284, 83 Cal. Rptr. 435*

[5] Effect of Taxes on Void Conveyance

Payment of taxes pursuant to county assessment does not breath life into void conveyance. *People ex rel. Cal. v. Drinkhouse (1970) 4 Cal. App. 3d 931, 939, 84 Cal. Rptr. 773*

[6] Asserting Equitable Interest Against Legal Title

Person claiming only equitable interest is not allowed to bring "quiet title" action against holder of legal title. *Santoro v. Carbone (1972) 22 Cal. App. 3d 721, 732, 99 Cal. Rptr. 488* (overruled on other grounds in *Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 30, 216 Cal. Rptr. 130, 702 P. 2d 212*); *O'Keefe v. Aptos Land & Water Co. (1955) 134 Cal. App. 2d 772, 781, 286 P.2d 417* (giving reason for rule)

Claimant of equitable interest is entitled to sue holder of legal title to establish resulting or constructive trust. *Nevarez v. Nevarez (1962) 202 Cal. App. 2d 596, 600, 21 Cal. Rptr. 70*

Plaintiff asserting equitable interest is required to allege specific facts supporting claim and to show in complaint that any preliminary steps (e.g., rescission of fraudulent transaction) have been taken. *Leeper v. Beltrami (1959) 53 Cal. 2d 195, 214-217, 1 Cal. Rptr. 12, 347 P.2d 12*

[7] Evidence and Proof

Tracing title to government, grantor in possession at the time of the conveyance to the plaintiff, or to source common to chains of title of plaintiff and defendant. *Hohn v. Riverside County Flood Control etc. Dist. (1964) 228 Cal. App. 2d 605, 610, 39 Cal. Rptr. 647*

Type of evidence admissible in action to quiet title. *Holloman v. Richmond (1964) 228 Cal. App. 2d 501, 502-505, 39 Cal. Rptr. 614*

Evidence tracing title to source from which all parties to action claim to derive title is sufficient in action for quiet title. *Walley v. P.M.C. Inv. Co. (1968) 262 Cal. App. 2d 218, 219-220, 68 Cal. Rptr. 711*

Burden is on plaintiff in quiet title action to show superior title in plaintiff; action must prevail on strength of plaintiff's title and not on weakness of defendant. *Potter v. Los Angeles County (1967) 251 Cal. App. 2d 280, 284, 285, 59 Cal. Rptr. 335*

Weight and sufficiency of evidence in quiet title action. *Devereaux v. Frazier Mountain Park & Fisheries Co. (1967) 248 Cal. App. 2d 323, 331-333, 56 Cal. Rptr. 345*

In action to quiet title based on adverse possession burden is on claimant to prove every necessary element: (1) possession must be by actual occupation under such circumstances as to constitute reasonable notice to the owner; (2) it must be hostile to the owner's title; (3) holder must claim the property as his or her own, under either color of title or claim of right; (4) possession must be continuous and uninterrupted for five years; and (5) holder must pay all taxes levied and assessed upon property during period. *Dimmick v. Dimmick (1962) 58 Cal. 2d 417, 421, 24 Cal. Rptr. 856, 374 P.2d 824*

Presumption of ownership based on possession [*see Evid. Code §§ 637, 638*] is rebuttable. *Bond v. Aickley (1914) 168 Cal. 161, 163, 141 P. 1188*

Plaintiff relying on record or "paper" title is required to trace title to government, or to grantor in possession, or to common grantor, or to grantor who obtained quiet title judgment. *Ernie v. Trinity Lutheran Church (1959) 51 Cal. 2d 702, 706, 336 P.2d 525* ; *San Diego Improvement Co. v. Brodie (1932) 215 Cal. 97, 100-101, 8 P.2d 1027*

Plaintiff claiming title as heir or as legatee or devisee is required to trace decedent's title; probate court's decree of distribution does not establish more than plaintiff's right to whatever title decedent had. *Rockey v. Vieux (1919) 179 Cal. 681, 682-683, 178 P. 712*

Plaintiff is not required to trace plaintiff's title when defendant's claim rests on title derived from plaintiff. *Thiele v. Security Trust & Sav. Bank (1927) 202 Cal. 758, 760, 262 P. 308*

Judgment quieting title is document of title and admissible as such without reference to it in offering party's pleading. *Kipp v. Reed (1920) 183 Cal. 49, 51, 190 P. 363*

Plaintiff, in quiet title action, is required to prove title in himself or herself superior to that of defendant, rather than prevailing only by establishing plaintiff's own title and not by relying on weakness in defendant's title. *Gerhard v. Stephens (1968) 68 Cal. 2d 864, 918, 69 Cal. Rptr. 612, 442 P.2d 692* ; *Valle v. Ingram (1941) 18 Cal. 2d 761, 767, 117 P.2d 869*

Plaintiff in quiet title action is required to prevail on strength of his or her own title and not on weakness of defendant's title. *Millyard v. Faus (1968) 268 Cal. App. 2d 76, 82, 73 Cal. Rptr. 697*

Defense of laches does not bar the quieting of title when party asserting defense fails to demonstrate that he or she was in adverse possession of contested property during period of delay. *Gerhard v. Stephens (1968) 68 Cal. 2d 864, 904-905, 69 Cal. Rptr. 612, 442 P.2d 692*

In action to quiet title to certain tidelands in San Diego County, trial court's holding that property in question constituted sovereign tide and submerged lands of state held in trust for public uses and purposes of commerce, navigation, and fisheries by district, affirmed. *Dillon v. San Diego Unified Port Dist. (1972) 27 Cal. App. 3d 296, 299-300, 103 Cal. Rptr. 765*

Mistaken belief of ownership and payment of taxes does not prove adverse possession when there was no substantial enclosure and no usual cultivation or improvement. *Safwenberg v. Marquez (1975) 50 Cal. App. 3d 301, 310, 123 Cal. Rptr. 405*

[8] Invalid Tax Deeds

Conveyance of property under tax sale in which tax collector is financially interested is void. *People ex rel. Cal. v. Drinkhouse (1970) 4 Cal. App. 3d 931, 935, 84 Cal. Rptr. 773* (summary judgment for state against grantee in action to quiet title affirmed)

Although deed made in violation of *Gov. Code § 1090*, forbidding county officers to be financially interested in any

contract made by them in their official capacity or to be purchasers at any sale made by them in such capacity ab initio carries no title, judicial decision is required to effectuate nullification against nominal title. *People ex rel. Cal. v. Drinkhouse (1970) 4 Cal. App. 3d 931, 936, 84 Cal. Rptr. 773*

[9] Joinder of Causes of Action

Demands for relief by way of ejectment and for damages arising out of withholding of property is incident to cause of action to quiet title and properly joined with it. *South Shore Land Co. v. Petersen (1964) 226 Cal. App. 2d 725, 741, 38 Cal. Rptr. 392*

When relief sought in cross complaint was for decree quieting defendant's title and damages, award of damages sought was being incidental and ancillary to prayer for decree reforming written contract and declaring plaintiff to hold property in trust for defendant, and was proper. *California Trust Co. v. Cohn (1932) 214 Cal. 619, 628-629, 7 P.2d 297*

[10] Jury Trial

Action is governed by equitable principles. *Santoro v. Carbone (1972) 22 Cal. App. 3d 721, 731, 99 Cal. Rptr. 488* (overruled on other grounds in *Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 30, 216 Cal. Rptr. 130, 702 P. 2d 212*)

Jury trial is not matter of right in equitable action. *Hartman v. Burford (1966) 242 Cal. App. 2d 268, 270, 51 Cal. Rptr. 309* (reporting rule)

In action involving recovery of possession, jury trial is matter of right on legal issue (possession) but not on equitable issue (ownership). *Robinson v. Puls (1946) 28 Cal. 2d 664, 665-666, 171 P.2d 430* (reporting rule); *Donahue v. Meister (1891) 88 Cal. 121, 128-129, 25 P. 1096*

Jury trial is matter of right in legal action for recovery of property. *Medeiros v. Medeiros (1960) 177 Cal. App. 2d 69, 73, 1 Cal. Rptr. 696*

In action where defendant seeks recovery of possession after long-standing ouster, jury trial on legal issue (possession) is not matter of right unless equitable issue (ownership) resolved against plaintiff. *Thomson v. Thomson (1936) 7 Cal. 2d 671, 681-683, 62 P.2d 358*

[11] Other Actions Compared

Distinctions between modern statutory form and old equitable proceeding to quiet title. *Castro v. Barry (1889) 79 Cal. 443, 446, 21 P. 946* ; *Donahue v. Meister (1891) 88 Cal. 121, 124-125, 25 P. 1096*

Ejectment and quiet title distinguished. *Medeiros v. Medeiros (1960) 177 Cal. App. 2d 69, 73, 1 Cal. Rptr. 696* ; *Landregan v. Peppin (1892) 94 Cal. 465, 469-470, 29 P. 771* ; *Keele v. Clouser (1928) 92 Cal. App. 526, 531, 268 P. 682*

Dedication, easement, and quiet title discussed. *Burlingame v. Norberg (1930) 210 Cal. 105, 107-108, 290 P. 587*

Action to remove cloud on title and quiet title distinguished. *Castro v. Barry (1889) 79 Cal. 443, 445, 21 P. 946* ; *Hughes v. Beekley (1927) 85 Cal. App. 313, 316, 259 P. 337* ; *Kroeker v. Hurlbert (1940) 38 Cal. App. 2d 261, 265, 101 P.2d 101*

Declaratory relief and quiet title discussed. *Marra v. Aetna Constr. Co. (1940) 15 Cal. 2d 375, 377, 101 P.2d 490* ; *Ephraim v. Metropolitan Trust Co. (1946) 28 Cal. 2d 824, 833, 172 P.2d 501*

In action to quiet title and to enjoin sale under deed of trust by debtor's (trustor's) buyer against creditor (beneficiary), when there was single debt secured by both real and personal property and creditor elected to judicially foreclose only on personal property, creditor thereby lost its security interest in real property as against all parties even though debtor did not raise one-form-of-action rule [*Code Civ. Proc. § 726*] as affirmative defense in judicial foreclosure proceedings. *Walker v. Community Bank (1974) 10 Cal. 3d 729, 741, 111 Cal. Rptr. 897, 518 P.2d 329*

[12] Parties

Heirs are represented in gross by administrator-plaintiff, and in quiet title action, such heirs, although they may be joined as parties, are neither necessary nor indispensable parties. *Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1031, 84 Cal. Rptr. 538*

In quiet title action, executor or administrator in an undistributed estate is party against whom action required to be brought. *Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1031, 84 Cal. Rptr. 538*

[13] Plaintiff's Right to Bring Action

Third party grantee who took property by quitclaim deed from bankruptcy trustee had no standing to bring quiet title action to attack tax conveyance or sale on ground that it was null and void because it was made in violation of bankruptcy automatic stay when neither debtor nor trustee took any action to discharge tax lien, redeem property, or set aside conveyance to state or subsequent sale. *Campbell v. Lauigan (1988) 202 Cal. App. 3d 651, 659, 248 Cal. Rptr. 747*

Holder of equitable interest in real property is not entitled to maintain quiet title action against owner of legal title. *Stafford v. Ballinger (1962) 199 Cal. App. 2d 289, 294-295, 18 Cal. Rptr. 568*

Court may not quiet vendor's title when vendor has accepted part payment of the purchase price unless vendor refunds the excess of the part payments over the damage caused by vendee's breach; rule is applicable when vendee has willfully defaulted. *Behrendt v. Abraham (1966) 64 Cal. 2d 182, 187, 49 Cal. Rptr. 292, 410 P.2d 828*

Owner of fee interest in real property subject to servitude is entitled to have extent and burdens of servitude defined and determined; complaint in quiet title action does not need to specifically allege nature of defendant's claim, nor attack its validity. *Warren v. Atchison, Topeka, & Santa Fe Ry. Co. (1971) 19 Cal. App. 3d 24, 32-33, 96 Cal. Rptr. 317*

Private person is entitled to assert public claim, as member of public. *Marks v. Whitney (1971) 6 Cal. 3d 251, 261-262, 98 Cal. Rptr. 790, 491 P.2d 374*

[14] Pleading

Defendant in quiet title action claiming fraudulent conduct on part of plaintiff is required to allege specific facts constituting fraud, not rely on general allegations asserting defendant's ownership and denying that of plaintiff. *Moss Estate Co. v. Adler (1953) 41 Cal. 2d 581, 584, 261 P.2d 732* ; *Strong v. Strong (1943) 22 Cal. 2d 540, 545-546, 140 P.2d 386*

Defendant was not entitled to amend answer so as to allege fraud of plaintiff, when such answer was sought to be filed on the eve of trial, and defendant was aware of facts at the time original answer was filed. *Moss Estate Co. v. Adler (1953) 41 Cal. 2d 581, 586, 261 P.2d 732*

In quiet title action, answer denying plaintiff's title and right to possession is sufficient to permit defendant to raise issues of estoppel and agreed boundary. *Roman v. Ries (1968) 259 Cal. App. 2d 65, 69, 66 Cal. Rptr. 120*

Defendant claiming title in himself or herself to the property described in plaintiff's complaint pleads defendant's own title in the answer, and, without filing counterclaim or cross complaint, is asking for affirmative relief quieting own title against plaintiff. *Furnivall v. Groves (1957) 154 Cal. App. 2d 846, 847-848, 317 P.2d 117*

When cross complaint in quiet title action is unnecessary since full relief may be granted defendant pursuant to his or her answer, omission of plaintiff to answer cross complaint filed by defendant does not confer on clerk of court authority to enter plaintiff's default. *Furnivall v. Groves (1957) 154 Cal. App. 2d 846, 848, 317 P.2d 117*

Pleading in quiet title action is sufficient against general demurrer if it contains allegations essential to statement of one cause of action, even though unsuccessful attempt is made to state facts calling for other or different relief. *South Shore Land Co. v. Petersen (1964) 226 Cal. App. 2d 725, 740, 38 Cal. Rptr. 392*

Fact that facts pleaded in complaint might also show a cause of action in unlawful detainer or quiet title is of no significance when relief granted is in ejectment, and averments of complaint are sufficient to state a cause of action in ejectment, and prayer is for relief that can be granted in the action. *Chinese Hosp. Foundation Fund v. Patterson (1969) 1 Cal. App. 3d 627, 632, 81 Cal. Rptr. 795*

Under title peculiar to quiet title actions, defendant is required to seek affirmative relief in cross complaint; if plaintiff fails to establish title, defendant is entitled to affirmative judgment declaring rights asserted in answer. *Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1031, 84 Cal. Rptr. 538*

[15] Purpose of Action

Purpose of quiet title action is being to finally settle and determine, as between parties, all conflicting claims to property in controversy and to decree to each interest or estate therein as the parties may be entitled to. *Yuba Inv. Co.*

v. Yuba Consol. Gold Fields (1926) 199 Cal. 203, 209, 248 P. 672 ; *Newman v. Cornelius (1970) 3 Cal. App. 3d 279, 284, 83 Cal. Rptr. 435*

Action is type of foreclosure action. *Jones v. Sacramento Sav. & L. Ass'n (1967) 248 Cal. App. 2d 522, 530, 56 Cal. Rptr. 741*

Action embraces every type of claim whereby plaintiff might be deprived of property or have title clouded or value depreciated. *Castro v. Barry (1889) 79 Cal. 443, 447, 21 P. 946* ("to determine any adverse claim whatever"); *Head v. Fordyce (1860) 17 Cal. 149, 151*

[16] Restitution

State is not bound to make or to offer reimbursement to grantees of consideration given by them for void deed pursuant to tax sale in which tax collector was interested as condition to maintaining action to quiet title to property. *People ex rel. Cal. v. Drinkhouse (1970) 4 Cal. App. 3d 931, 939, 84 Cal. Rptr. 773*

[17] Statute of Limitations

Quiet title action by homeowners' association with respect to parking spaces that property management company transferred to its president rather than association in violation of CC&Rs was timely; statute of limitations for action to quiet title did not begin to run until adverse claim was asserted against person holding the property, and homeowners' association had exclusive and undisputed possession of spaces. *Crestmar Owners Assn. v. Stapakis (2007) 157 Cal. App. 4th 1223, 1228-1230, 69 Cal. Rptr. 3d 231*

Conveyance to railroad in 1901 providing that right-of-way would revert to grantors or their assigns if railroad operations ceased for six months conveyed fee interest subject to condition subsequent; successor in interest's failure to record intent to preserve future interest as required by Marketable Record Title Act [*Civ. Code § 880.020 et seq.*] barred owner's quiet title action. *Severns v. Union Pacific Railroad (2002) 101 Cal. App. 4th 1209, 1220-1221, 125 Cal. Rptr. 2d 100*

Application of statute of limitations in quiet title action depends on underlying theory of relief; when theory is based on fraud or mistake, *Code Civ. Proc. § 338(d)* is applicable, with period beginning when plaintiff discovered or should have discovered facts constituting fraud or mistake. *Ankoanda v. Walker-Smith (1996) 44 Cal. App. 4th 610, 612, 615, 52 Cal. Rptr. 2d 39*

Since there is no statute of limitations governing quiet title actions as such, reference is ordinarily made to underlying theory of relief to determine which statute applies. *Oates v. Nelson (1969) 269 Cal. App. 2d 18, 21, 74 Cal. Rptr. 475*

Party in possession of property runs risk that doctrine of laches will bar party's action to quiet title if his or her delay in bringing action prejudices claimant. *Oates v. Nelson (1969) 269 Cal. App. 2d 18, 22, 74 Cal. Rptr. 475*

Action to quiet title that is dependent on cancellation or reformation of written contract or deed on ground of fraud or mistake is subject to three-year statute of limitations. *Welsher v. Glickman (1969) 272 Cal. App. 2d 134, 140-141, 77 Cal. Rptr. 141* (decided under former *Code Civ. Proc. § 338(4)*; *now see Code Civ. Proc. § 338(d)*)

[18] Unclean Hands

Undisputable equitable principle is that those who seek aid of equity must sue in good faith, and any unconscionable conduct that relates to transaction may give rise to defense of unclean hands and bar relief. *Samuelson v. Ingraham (1969) 272 Cal. App. 2d 804, 806, 77 Cal. Rptr. 750*

Rule that person who comes into equity must come with clean hands is not applied when to do so would create an injustice, it being neither proper nor necessary to sacrifice justice in order to vindicate honor of court. *Hill v. Younkin (1969) 274 Cal. App. 2d 880, 883, 79 Cal. Rptr. 509*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsActions in EquityGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawAdverse PossessionElements of Adverse ClaimsReal Property LawOwnership & TransferEquitable InterestsReal Property LawOwnership & TransferEquitable InterestsReal Property LawTitle QualityAdverse Claim ActionsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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42-482 California Forms of Pleading and Practice--Annotated § 482.42

§ 482.42 Attorney General Opinions

Subdivision Map Act (*Gov. Code § 66410 et seq.*) and county subdivision ordinances enacted pursuant thereto are not applicable to tax collector's sale of portion of tax-deeded parcel pursuant to *Rev. & Tax. Code § 3691*; under *Gov. Code § 66499.35*, purchaser of portion of tax-deeded parcel at tax sale is entitled to certificate of compliance with Subdivision Map Act. 64 Ops. Cal. Att'y Gen. 814 (1981)

County is entitled to maintain quiet title action to determine nature of public claim on real property in unincorporated area. *4 Ops. Cal. Att'y Gen. 249 (1944)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSubdivisionsState RegulationReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 482.43 Law Reviews

Willemsen, *Improving California's Quiet Title Laws, 21 Hastings L.J. 835 (1970)*

Comment, *The Case for an In Rem Quiet Title Decree, 38 So. Cal. L. Rev. 608 (1965)*

Comment, *California Procedures for Obtaining Judicial Decrees Binding on Unborn or Unascertained Persons, 5 Hastings L.J. 199 (1954)*

Note, *Code Pleading: Nature of a 'Cause of Action': Count Quieting Title to Realty and Personalty States But One Cause of Action, 12 Cal. L. Rev. 303 (1924)*

Note, *Constitutional Law: Constitutionality of the Declaratory Judgment, 11 Cal. L. Rev. 289 (1923)*; *10 Cal. L. Rev. 158 (1922)*

Harrison, *California Legislation of 1921 Providing for Declaratory Relief, 9 Cal. L. Rev. 362 (1921)*

Note, *Mortgages: Bar of the Statute of Limitations as Ground for Quieting Title, 5 Cal. L. Rev. 258 (1917)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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42-482 California Forms of Pleading and Practice--Annotated § 482.44

§ 482.44 Text References

California Real Estate Law & Practice, Ch. 370, *Quieting Title and Determining Adverse Claims* (Matthew Bender)

Ogden's Revised California Real Property Law (Cal CEB 1975), Vol. 2, Ch. 17, *Mortgages and Deeds of Trust*, §§ 17.46, 17.60; Ch. 21, *Real Property Taxes*, § 21.19; Ch. 23, *Covenants, Conditions, and Restrictions*, §§ 23.18, 23.29; Ch. 27, *Title Litigation*, §§ 27.9, 27.10, 27.31, 27.52-27.56, 27.60, 27.61, 27.66, 27.67, 27.69, 27.71, 27.77; Ch. 28, *Bankruptcy and Its Impact on Title*, § 28.18

Witkin, California Procedure (2d ed), Vol. 1, *Jurisdiction*, § 154; Vol. 2, *Actions*, §§ 78-80, 261, 432, 599; Vol. 3, *Pleading*, §§ 105, 210, 522-534, 569, 710, 901, 935, 936; Vol. 4, *Judgment*, §§ 14, 19, 91

Witkin, Summary of California Law, vol. 12, *Real Property*, §§ 208, 743; vol. 7,*Constitutional Law*, § 100; vol. 9, *Taxation*, §§ 259, 267, 288, 289 (10th ed. 2005)

41 Cal. Jur. 2d, *Quieting Title and Determining Adverse Claims*

74 C.J.S., *Quieting Title*

65 Am. Jur. 2d, *Quieting Title and Determination of Adverse Claims*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawRestrictive CovenantsGeneral OverviewReal Property LawTitle QualityAdverse Claim

ActionsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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42-482 California Forms of Pleading and Practice--Annotated §§ 482.45-482.59

[Reserved]

§§ 482.45[Reserved]

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PART IV. PROCEDURAL CHECKLIST

42-482 California Forms of Pleading and Practice--Annotated § 482.60

§ 482.60 Plaintiff's Checklist

NOTE:
The following checklist is illustrative only of the basic points which counsel for a plaintiff in a quiet title action should cover.

[1] Facts to Be Ascertained

NOTE:
Not all of the following facts will be ascertainable from the client in the initial interview. Subsequent interviews may be required, or it may be necessary to ascertain the facts from other persons, including the potential defendant(s), by use of discovery proceedings.

1. Facts relating to plaintiff:

a. Name, address, and telephone number of plaintiff.

b. Capacity of plaintiff (such as minor, adult, corporation, unincorporated association, partner in partnership, public employee, etc.)

c. Additional facts, as desired, relating to plaintiff's stability and financial solvency (such as employ ment status, prior residences, credit, bank, and personal references).

2. Facts relating to defendant(s):

a. Name and address of each potential defendant.

NOTE:
In a quiet title action, potential defendants are (1) all persons having a record interest in the property, whether or not in possession, (2) all persons in possession of

the property, whether or not they have record title, (3) all persons having a claim on the property whose names can be ascertained by plaintiff through the exercise of reasonable diligence, and (4) other persons unknown to plaintiff claiming any right, title, estate, lien, or interest in the property adverse to plaintiff's ownership. If real property is involved, a preliminary title report from a title insurance company will be helpful in discovering potential defendants.

b. Capacity of each potential defendant (such as corporation, unincorporated association, agent, employee, or public entity).

3. Facts relating to potential cause of action.

a. Nature of plaintiff's title.

b. If tax-deeded property is involved, the following:

(1) Date property was deeded by county tax collector to state.

(2) Date state, through county tax collector, sold property to plaintiff.

(3) Date plaintiff's deed was recorded, and book-and-page reference to recording.

(4) Whether or not plaintiff has paid all taxes after the date of his or her purchase of the property.

c. Whether or not plaintiff is in possession of the property, and the duration of plaintiff's possession.

d. If plaintiff claims title by virtue of an instrument, the nature of the instrument, its date of execution, and the date of recordation (if recorded).

e. Facts available relating to plaintiff's predecessor in interest.

f. If plaintiff's title depends on the validity or interpretation of a gift, bequest, or trust under a will, or an instrument purporting to be a will, facts on whether or not the will has been probated; if probated, the date of the final decree of distribution and the construction given in that decree to the gift, bequest, or trust.

[2] Documents to Be Obtained

NOTE:
Not all of the following documents will be obtainable from the client in the initial interview. Subsequent interviews may be required, or, when circumstances will permit it, they may be mailed to the attorney. It may, however, be necessary to obtain documents from someone other than the client. Notes following the documents listed indicate sources from which such documents may be obtained. If the contents of any such document must be proved at trial, the document itself must be presented [*Evid. Code § 1520*] unless secondary evidence is admissible [*see* *Evid. Code §§ 1521-1523*].

1. When real property is involved, a preliminary title report, which will show matters of record

pertaining to the property, but not matters outside the record, such as possession.

NOTE:
A preliminary title report is obtainable from a title insurance company that issues policies for properties in the area where the subject property is situated. Counsel may want to consider getting a litigation guarantee instead of a title report.

2. When adverse claims to the property involve the boundary between it and adjacent property, a surveyor's report giving a metes and bounds description of the property may be necessary.

NOTE:
When the property is legally described in a subdivision map that has been recorded, a metes and bounds description of the property will not be necessary. Its lot and block number of a subdivision map of record ordinarily will be a sufficient description. When the property is not described in a subdivision map, a grant deed to the property ordinarily will give a metes and bounds description. However, when the action will be on a parcel of property that has not been previously legally described by metes and bounds or as a part of a subdivision map, a surveyor's report probably will be necessary to obtain a legally sufficient description of the property. In some situations, a title insurance company may be willing to write up a legal description of the property as an incidental service during the preparation of a preliminary title report or a litigation guarantee.

3. The original of the deed, instrument, or other document by which plaintiff claims title to the property.

NOTE:
If the original is unavailable, and the document is a matter of record, a certified copy of the document should be obtained from the recorder of the county where the property is situated.

4. If tax-deeded property is involved, tax receipts showing the payment of all taxes levied after plaintiff's purchase of the property.

NOTE:
The client will either have a tax receipt showing of taxes or, in some counties, his or her cancelled check will serve as proof of payment.

[3] Preliminary Investigation and Determinations

1. Investigation and interviews.
If the facts or documents obtained indicate that a possible cause of action exists, counsel will want to interview witnesses and conduct whatever preliminary investigation the facts require.

2. Actions and relief (among others):

a. Quiet title action to determine adverse claims [*Code Civ. Proc. § 760.010 et seq.*; *see § 482.80*].

b. Action for declaratory relief to determine adverse claims [*Civ. Code § 3367*; *Code Civ. Proc. §§ 1060-1062a*].

c. Action to determine adverse claims to tax-deeded property [*see Rev. & Tax. Code § 3950*; *see § 482.81*].

d. Action for cancellation of an instrument [*see Civ. Code § 3412*; *see also* Ch. 107, *Cancellation of Instruments*].

e. Action to recover possession of real property [*see Civ. Code § 3375*] or for ejectment [*see* Ch. 241, *Ejectment*].

f. Action to reestablish destroyed land records [*see Code Civ. Proc. §§ 751.01-751.28*; *see also* Ch. 356, *Lost Papers*].

g. Action to reform a deed [*see Civ. Code § 3399*; *see also* Ch. 488, *Reformation of Instruments*].

h. Proceeding to determine grantor's identity [*see Code Civ. Proc. §§ 771.010-771.020*; *see also* Ch. 299, *Identity, Establishment of*].

i. Action by creditor [*see Civ. Code § 3439.01(c)*] to set aside a fraudulent conveyance [*see Civ. Code § 3439.07*; *see also* Ch. 270, *Fraudulent Conveyances*].

j. Action to determine adverse claims when a lien for taxes has been cancelled [*see Rev. & Tax. Code § 4990.3*; *see also* Ch. 540, *Taxes and Assessments*].

k. Action to determine adverse claims to the former bed of a navigable river or stream [*see Pub. Res. Code §§ 6461-6462*].

l. Intervention in condemnation proceeding [*see Code Civ. Proc. §§ 387, 1250.230*; *see also* Ch. 247, *Eminent Domain*].

m. Third-party claim to property under levy of execution [*see Code Civ. Proc. § 720.110, 720.210*; *see also Ch. 254, Executions and Enforcement of Judgments, § 254.310* et seq.].

[4] Essential Allegations of Complaint

1. A description of the property that is the subject of the action. In the case of tangible personal property, the description must include its usual location. In the case of real property, the description must include both its legal description and its street address or common designation, if any.

2. The title of the plaintiff as to which a determination is sought and the basis of the title. If the title is based on adverse possession, the complaint must allege the specific facts constituting the adverse possession.

3. The adverse claims to the title of the plaintiff against which a determination is sought.

4. The date as of which the determination is sought. If the determination is sought as of a date other than the date the complaint is filed, the complaint must include a statement of the reasons why a determination as of that date is sought.

5. A prayer for the determination of the title of the plaintiff against the adverse claims [*Code Civ. Proc. §*

761.020].

For form, see *§ 482.20*.

[5] Lis Pendens

Immediately on the commencement of the action, the plaintiff must file a lis pendens in each county in which any real property described in the complaint is located [*Code Civ. Proc. § 761.010(b)*; *see* Ch. 348, *Lis Pendens*].

[6] Service of Summons

1. Serve all the named defendants [*see* Ch. 518, *Service of Summons and Papers*].

2. Obtain an order for service of process on unknown defendants and serve them by publication [*Code Civ. Proc. §§ 763.010-763.030*; *see § 482.80*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsComplaintsRequirementsCivil ProceduresPleading & PracticeService of ProcessMethodsPublicationCivil ProceduresPleading & PracticeService of ProcessSummonsGeneral OverviewReal Property LawAdjoining LandownersBoundariesReal Property LawPriorities & RecordingLis PendensReal Property LawTitle QualityAdverse Claim ActionsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 482.61 Defendant's Checklist

NOTE:
The following checklist is illustrative only of the basic points which counsel for a defendant in a quiet title action should cover.

[1] Facts to Be Ascertained

1. General facts.

Ascertain the same general facts as when representing plaintiff [*see § 482.60*].

2. Facts required for the answer.

NOTE:
Counsel should advise the client not to discuss the case with any other person without counsel's approval.

a. Allegations of complaint.

Ascertain which of the facts alleged in the complaint are true, which are false, and which the defendant can neither confirm nor deny.

NOTE:
If the defendant disclaims all interest in the property, or suffers judgment to be had against him or her without an answer, the plaintiff cannot recover costs [*Code Civ. Proc. § 760.030(b)*].

b. Defenses.

(1) Bar of limitation or laches [*see §§ 482.80* and *482.83*; *see also* Ch. 345, *Limitation of Actions*].

(2) Res judicata [*see* Ch. 491, *Res Judicata*].

(3) Pendency of prior action [*see* Ch. 3, *Abatement of Actions*].

(4) Estoppel [*see, e.g., Burrow v. Carley (1930) 210 Cal. 95, 104, 290 P. 577* ; *Baillarge v. Clark (1904) 145 Cal. 589, 593, 79 P. 268* ; *but see Dooley's Hardware Mart v. Trigg (1969) 270 Cal. App. 2d 337, 339, 75 Cal. Rptr. 745]* .

[2] Documents to Be Obtained

Obtain the same documents as when representing plaintiff [*see § 482.60*].

[3] Essential Allegations of Answer and Cross Complaint

1. Any claim the defendant has;

2. Any facts tending to controvert such material allegations of the complaint as the defendant does not wish to be taken as true;

3. A statement of any new matter constituting a defense; and

4. If defendant seeks affirmative relief such as quieting title in himself or herself, allegations in a cross complaint seeking suchrelief similar to those in a complaint to quiet title [*Code Civ. Proc. §§ 761.020, 761.040*; *see § 482.60[4]*].

For forms, see *§§ 482.81 -482.83*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsCross-ClaimsGeneral OverviewGovernmentsLegislationStatutes of LimitationsEquitable EstoppelGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawTitle QualityAdverse Claim ActionsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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42-482 California Forms of Pleading and Practice--Annotated §§ 482.62-482.79

[Reserved]

§§ 482.62[Reserved]

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PART V. FORMS

42-482 California Forms of Pleading and Practice--Annotated § 482.80

§ 482.80 Complaint to Quiet Title [Code Civ. Proc. §§ 760.020(a), 761.020]--General Form

[1] FORM Complaint to Quiet Title [Code Civ. Proc. §§ 760.020(a), 761.020]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*], Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name(s) of known defendant(s)*], [*if person required to be named as defendant is dead, and plaintiff knows identity of personal representative, add:*; _____ (*name*), as _____ (*description, e.g.,* Executor *or* Administrator (With Will Annexed)) of the Estate of _____ (*name*), Deceased(, and as devisee)] [*if person required to be named as defendant is believed by plaintiff to be dead but plaintiff does not know identity of personal representative, and/or if plaintiff wishes to include unknown successors of known decedent, add:*; the testate and intestate successors of _____ (*name of decedent*), _____ (deceased *or* believed to be deceased), and all persons claiming by, through, or under such _____ (decedent *or* person)] [*if unknown defendants are included, add:*; all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to Plaintiff's title, or any cloud on Plaintiff's title thereto] [; and DOES I-_____, inclusive],	)	COMPLAINT TO QUIET TITLE

Defendant(s).

_____

Plaintiff(s) alleges/allege:

[1. *Allege each plaintiff's identity and capacity, if necessary*.]

[2. *Allege each known defendant's identity and capacity, if necessary, including, if known to plaintiff(s), the personal representative of a deceasedperson required to be named as a defendant (see Code Civ. Proc. § 762.030(a)), and/or a person required to be named as a defendant who plaintiff(s) believe(s) to be deceased (see Code Civ. Proc. § 762.030(b)(3)).*]

[3. *If heirs and devisees of a defendant who is deceased, or believed to be deceased, are sued as defendants but their names are not known to plaintiff(s), allege:* (Plaintiff(s) is/are informed and believe(s) and thereon allege(s) that) _____ (*name*) is deceased; plaintiff(s) does/do not know the names of decedent's heirs and devisees(, except for _____ (*state names of any known heirs and devisees, who should be included above as named defendant(s)*)),) and therefore denominate(s) these defendants herein as "the testate and intestate successors of _____ (*name of deceased person*), (believed to be) deceased, and all persons claiming by, through, or under such _____ (decedent *or* person)" (hereinafter sometimes referred to as "the successor defendants"). These successor defendants, and each of them, claim some right, title, estate, lien, or interest in the hereinafter-described property adverse to plaintiff's/plaintiffs' title; and their claims, and each of them, constitute a cloud on plaintiff's/plaintiffs' title to that property.]

[4. *If "all persons unknown" are named as defendants, allege:* The defendants herein named as "all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud on plaintiff's title thereto" (hereinafter sometimes referred to as "the unknown defendants") are unknown to plaintiff(s). These unknown defendants, and each of them, claim some right, title, estate, lien, or interest in the hereinafter-described property adverse to plaintiff's/plaintiffs' title; and their claims, and each of them, constitute a cloud on plaintiff's/plaintiffs' title to that property.]

[5. Plaintiff(s) is/are ignorant of the true names and capacities of defendants sued herein as DOES I through _____, and therefore sue(s) these defendants by such fictitious names. Plaintiff(s) will amend this complaint to allege their true names and capacities when ascertained. Plaintiff(s) is/are informed and believe(s) and thereon allege(s) that each of these fictitiously named defendants claim some right, title, estate, lien, or interest in the hereinafter-described property adverse to plaintiff's/plaintiffs' title and their claims, and each of them, constitute a cloud on plaintiff's/plaintiffs' title to that property.]

6. _____ [Plaintiff is the sole owner *or* Plaintiffs are the owners concurrently, as _____ (joint tenants *or* tenants in common *or* partners *or* husband and wife), of _____ (*specify interest, e.g.,* the fee simple title) _____ (of *or* in *or* to) certain _____ (real *or* personal) property, namely _____ (*set forth particular description; in the case of personal property, description must include usual location; in the case of real property, description must include both legal description and street address or common designation, if any*].

7. The basis of plaintiff's/plaintiffs' title is _____ [*describe basis of plaintiff's/plaintiffs' title, e.g.,* a deed from _____ (*name of grantor*) granting the above-described property in fee simple to plaintiff(s) dated _____, and recorded in the Official Records of the County of _____, Book/Reel _____, page/image _____].

[8. *If any of the plaintiff's claim ownership of the present interest in real property, allege:* Plaintiff(s) was/were _____ (seized *or* possessed) of the above-described property within five years of the commencement of this action.]

[*Unless there are few enough adverse claims against title that they can all be described in Paragraph 10, continue with as many separate paragraphs as are necessary, describing one known adverse claim per paragraph, e.g.:*]

9. [Plaintiff(s) is/are informed and believe(s) and on such information and belief allege(s) that] [D]efendant _____ [*name*] claims an interest adverse to plaintiff(s) in the above-described property as _____[*describe adverse interest, e.g.,* the holder of a lien representing an unsatisfied judgment against _____ (*name of judgment debtor*), a former owner of the property that is the subject of this action. The abstract of judgment was recorded on _____ (*date*), in the Official Records of the County of _____, Book/Reel _____, page/image _____ (and appears as exception number _____ on the title report issued by _____ (*name of title insurance company or abstractor*) on _____ (*date*), a copy of which is attached hereto marked Exhibit "A" and made a part hereof)]. Some of the unknown defendants[, specifically those additionally designated as DOES _____ through _____,] claim interests in the property adverse to plaintiff's/plaintiffs' as assignees and successors of defendant _____ [*name*].

[*CONTINUE*]

10. Plaintiff(s) is/are seeking to quiet title against the claims of defendant(s) as follows: _____ [*describe claim held by each named defendant, e.g.,* a quitclaim deed from _____ (*name of grantor*) granting the above-described property to _____ (*name of defendant*) dated _____ (date), and recorded in the Official Records of the County of _____, Book/Reel _____, page/image _____ (*continue with whichever are applicable:*; the claims of the successor defendants described in Paragraph 3; the claims of all unknown defendants described in Paragraph 4, whether or not the claim or cloud is known to plaintiff(s); and the unknown, uncertain, or contingent claim, if any, of _____ (*name*) more fully described in Paragraph 11)]. The claims of defendant(s) are without any right whatever and such defendant(s) _____ [has *or* have] no right, title, estate, lien, or interest whatever in the above-described property or any part thereof [except the following: _____ (*set forth any adverse claims of which plaintiff(s) admits/admit the validity, e.g.,* the utility easement held by Pacific Gas and Electric Company)].

[11. *If the claim of a named defendant is unknown, uncertain, or contingent, allege:* The claim of _____ (*name of defendant*) is _____ (unknown *or* uncertain *or* contingent). (*If the lack of knowledge, uncertainty, or contingency is caused by a transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, allege:* _____ (*Name*), age _____, is the person who would be entitled to an adverse claim if _____ (*describe contingency*) had occurred prior to the commencement of this action.) (*If such person is subject to a legal disability, allege:* Such person is subject to _____ (*specify legal disability*).)]

12. Plaintiff(s) seek(s) to quiet title as of _____ [*date*]. [*If the date is a date other than the date the complaint is filed, allege why a determination as of that date is sought.*]

WHEREFORE, plaintiff(s) prays/pray as follows:

1. For a judgment that plaintiff(s) is/are _____ [*specify interest claimed, e.g.*, the owner(s) in fee simple] of the property and that defendant(s) has/have no interest in the property adverse to the plaintiff(s);

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff(s)

VERIFICATION

I, _____ [*name*], am [one of] the plaintiff(s) in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

CAUTION:
If a person required to be named as a defendant is dead, or is believed by plaintiff to be dead, and the plaintiff knows of no personal representative, plaintiff must file an affidavit with the complaint stating these facts [*Code Civ. Proc. § 762.030(b)(1)*; *see generally* Ch. 15, ***Affidavits, Certificates, and Declarations see also*** *§§ 482.80[7][e], [f]*].

[2] Use of Form

The foregoing form of complaint is a general form for use by a person claiming ownership of an interest in real or personal property who wishes to quiet title to that interest, thereby invalidating any adverse claims alleged in the complaint [*Code Civ. Proc. §§ 760.020(a), 761.020*; *see §§ 482.11, 482.12*].

Plaintiff may wish to obtain a title report before commencing the action. If plaintiff intends to add unknown persons as defendants, an examination of the record title and an inspection of the property will be necessary [*see Code Civ. Proc. § 762.060(b)*]. Also, the court may order plaintiff to obtain a title report and keep it available for inspection and copying by the parties [*Code Civ. Proc. § 762.040(b)*].

For an appropriate form to use when the plaintiff asserts title to property as a purchaser of tax-defaulted property, see *§ 482.81*.

Forms appropriate to use in a variety of factual situations are included in other chapters in this set. For a list of these chapters, see *§ 482.02*.

[3] Limitation of Action

If the plaintiff is in possession of the property, his or her right of action is not subject to limitation, but if he or she is out of possession, there is a limitation period, depending on the theory of relief [*see Muktarian v. Barmby (1965) 63 Cal. 2d 558, 560-561, 47 Cal. Rptr. 483, 407 P.2d 659* , and § 482.83].

The rule of nonlimitation when the plaintiff is in possession does not apply, however, when the plaintiff sues to clear his or her title of the cloud cast by a tax collector's deed to the state because of tax delinquency. In such a case, there is a special statutory limitation of one year [*Rev. & Tax. Code § 175*], and the general rule does not apply [*Sears v. County of Calaveras (1955) 45 Cal. 2d 518, 521, 289 P.2d 425* ; *see also* Ch. 540, *Taxes and Assessments*].

[4] Jurisdiction and Venue

The superior court has jurisdiction of a quiet title action [*Code Civ. Proc. § 760.040(a)*], and the action is not a limited civil case [*see Code Civ. Proc. §§ 85, 86(b), 580(b)(3)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*]. The court has complete jurisdiction over the parties to the action and the property described in the complaint and is deemed to have obtained possession and control of the property for the purposes of the action with complete jurisdiction to render the quiet title judgment [*Code Civ. Proc. § 760.040(b)*].

Subject to the power of the court to transfer actions, the proper county for the trial of a quiet title action is one of the following [*Code Civ. Proc. § 760.050*]:

- When the subject of the actions is real property or real and personal property, the county in which the real property, or some part thereof, is located; or

- When the subject of the action is personal property, the county in which the personal property is principally located at the commencement of the action or in which the defendants, or any of them, reside at the commencement of the action.

[5] Caption

The caption must include the names of all parties [*Code Civ. Proc. § 422.40*]. Plaintiff must name as defendants the persons having adverse claims to the title of plaintiff against which a determination is sought [*Code Civ. Proc. § 762.010*], including a person required to be named as a defendant who plaintiff believes is deceased [*see Code Civ. Proc. § 762.030(b)(3)* (*§ 482.80[7][f]*); *see also § 482.81*], or, if known to plaintiff, the personal representative of a decedent [*see Code Civ. Proc. § 762.030(a)* (*§ 482.80[7][e]*)].

Three categories of defendants that may be necessary or appropriate in a particular case are denominated by specific language set forth in the statutes: (1) unknown defendants [*Code Civ. Proc. §§ 762.020(a), 762.060(a)*; *see discussion under § 482.80[7][g]*]; (2) unknown heirs and devisees of a deceased adverse claimant [*Code Civ. Proc. § 762.030(b)(2)*; *see discussion under§ 482.80[7][e]*]; and (3) unknown heirs and devisees of a person required to be named as a defendant and whom plaintiff believes is deceased [*Code Civ. Proc. § 762.030(b)(3)*; *see discussion under§ 482.80[7][f]*]. Some people also additionally designate testate and intestate successors and "all persons unknown" as DOES. That is not recommended because it differs from the statutory language of *Code Civ. Proc. §§ 762.030(b)(2), (3), 762.060*, by which those defendants are to be designated, and because it may limit the in rem effect of the judgment by limiting the number of adverse claimants in those classes [*see Code Civ. Proc. § 763.030(b)* (discussed under Process, *below*); Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 761.020(c)* (*see § 482.80[7][a]*)].

The caption may also include fictitious defendants pursuant to *Code Civ. Proc. § 474* because the rules governing civil actions generally are applicable in quiet title actions unless they are inconsistent with quiet title provisions [*Code Civ. Proc. § 760.060*; *see also* discussion § 482.80[7][h]].

[6] Plaintiff

[a] Identity and Capacity

If the plaintiff is not a natural person, the complaint should allege the plaintiff's identity as an existing legal entity entitled to come into court; if the plaintiff sues in a special capacity, the complaint should allege this capacity to show that the plaintiff is entitled to relief, if other facts alleged are true (Paragraph 1) [*see Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6* (distinguishing standing and capacity to sue)].

[b] When Property Belongs to Decedent's Estate

Ordinarily, an action with respect to property belonging to a decedent's estate will be brought by the personal representative. *Prob. Code § 9654* provides, however, that the heirs or devisees may themselves, or jointly with the personal representative, maintain an action for possession of property or to quiet title to property against any person except the personal representative. Unlike former Prob. Code § 581 (repealed operative July 1, 1988), *Prob. Code § 9654* applies to real as well as personal property [*see* Cal. L. Rev. Comm. Comment to 1987 repeal of Prob. Code § 581].

It appears that an action may be maintained by any one or more of the heirs or devisees; it is not required that they all join as plaintiffs [*see Bank of America v. Atherton (1943) 60 Cal. App. 2d 268, 274, 140 P.2d 678]* .

[7] Defendants

[a] Defendants Determine Scope of Action

The plaintiff must name as defendants the persons having adverse claims to the title of the plaintiff against which a determination is sought [*Code Civ. Proc. § 762.010*]. If the name of a person required to be named as a defendant is not known to plaintiff, the plaintiff must so state in the complaint and must name as parties all persons unknown in the manner described in *§ 482.80[7][g]* [*Code Civ. Proc. § 762.020(a)*]. By naming unknown defendants in accordance with *Code Civ. Proc. § 762.060*, plaintiff essentially gives the action an in rem effect [*see* Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 761.020(c)*].

[b] Particular Capacity of Defendant

If the defendant is not a natural person, the complaint should allege the defendant's identity as an existing entity against which the court's judgment will operate, such as a corporation (Paragraph 2) [*see Tanner v. Best (1940) 40 Cal. App. 2d 442, 445, 104 P.2d 1084]* .

If the defendant is sued in a particular capacity (e.g., as executor of a will, as trustee, and so forth), the complaint should allege that capacity (Paragraph 2) [*see, e.g., Katleman v. First Nat'l Bank (1963) 212 Cal. App. 2d 520, 524, 28 Cal. Rptr. 135* (discharged executor as not subject to suit in representative capacity); *see also* discussion *§ 482.80[5]*].

[c] Dissolved Corporation

When a corporation has been dissolved, the former shareholders may be sued in the corporate name on any cause of action arising against thecorporation before dissolution [*Corp. Code § 2011(a)*]. In particular, a quiet title action may be brought against the former shareholders in the corporate name. Any judgment in such an action will bind each and all of the former shareholders or other persons having any equity or other interest in the dissolved corporation, to the extent of their interests, and will have the same force and effect as a judgment in an action governed by *Code Civ. Proc. § 410.50* (jurisdiction over party as extending from service of summons through subsequent proceedings) and *Code Civ. Proc. § 410.60* (jurisdiction over trustees and shareholders of corporation that forfeited charter as existing from service of

summons on any trustee) [*Corp. Code § 2011(c)*; *see Code Civ. Proc. §§ 413.10-417.40, Corp. Code § 2011(b)* (service of summons)].

[d] State or State Agency

The state may be joined as a party to a quiet title action [*Code Civ. Proc. § 762.090(a)*]. With respect to a quiet title action, it appears that the state or a state agency is subject to suit except when a statute specially gives immunity [*see Tehachapi-Cummings County Water Dist. v. Armstrong (1975) 49 Cal. App. 3d 992, 999-1000, 122 Cal. Rptr. 918* (action to quiet title to water rights)].

[e] Heirs; Representative of Decedent's Estate; Affidavit

If a person required to be named as a defendant is dead and the plaintiff knows of a personal representative, the plaintiff must join the personal representative [*Code Civ. Proc. § 762.030(a)*]. If a person required to be named as a defendant is dead, or is believed by the plaintiff to be dead, and the plaintiff knows of no personal representative, the plaintiff must state these facts in an affidavit filed with the court [*Code Civ. Proc. § 762.030(b)(1)*]. For discussion of the formalities required in an affidavit and a general form of affidavit, see Ch. 15, *Affidavits, Certificates, and Declarations* .

When it is stated in the affidavit that such person is dead, the plaintiff may join as defendants "the testate and intestate successors of _____ (*name of deceased person*), deceased, and all persons claiming by, through, or under such decedent," naming them in that manner [*Code Civ. Proc. § 762.030(b)*]. A judgment rendered against the personal representative is binding on all of the heirs even if they are not parties, and a judgment in favor of the heirs' claims should be rendered in the name of the personal representative, not in the names of the heirs (Paragraph 3) [*Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1031, 84 Cal. Rptr. 538* ; *see Prob. Code § 573(a)* (cause of action as not lost by death but maintainable by, or against, personal representative)].

Since the personal representative of a decedent's estate represents all of the heirs, he or she may not maintain a quiet title action against some of them [*Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1031, 84 Cal. Rptr. 538]* .

[f] When Required Defendant Is Believed to Be Deceased

If a person required to be named as a defendant is believed by plaintiff to be deceased, plaintiff knows of no personal representative, and plaintiff so states in the affidavit required to be filed with the complaint in such a case [*see Code Civ. Proc. § 762.030(b)(1)* (requirement of affidavit); *see generally* Ch. 15, *Affidavits, Certificates, and Declarations*], the person believed to be deceased may still be named as a defendant. Plaintiff may also join that person's successors by naming them in the complaint as "the testate and intestate successors of _____ (*name of person believed to be deceased*), believed to be deceased, and all persons claiming by, through, or under such person" (Paragraph 3) [*Code Civ. Proc. § 762.030(b)(3)*].

[g] Unknown Defendants

In addition to the persons required to be named as defendants in the action, the plaintiff may name as defendants "all person unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud upon plaintiff's title thereto," naming them in that manner (Paragraph 4) [*Code Civ. Proc. § 762.060(a)*]. For discussion of whether or not to additionally designate the unknown defendants as DOES, see discussion § 482.80[5].

If unknown defendants are named, the plaintiff must name as defendants the persons having adverse claims that are of record or known to the plaintiff or reasonably apparent from an inspection of the property (Paragraphs 2, 4, 9, 10) [*Code Civ. Proc. § 762.060(b)*]. Apparently the holder of a claim of record is required to be a named, or "known" defendant, though he or she may still be served by publication if his or her location and identity cannot be determined after

reasonable diligence [*see* Cal. L. Rev. Comm. Comments to *Code Civ. Proc. § 763.010(a), (b)*].

Naming unknown defendants and serving them by publication [*see discussion under§ 482.81[7]*)] will entitle plaintiff to a judgment that is essentially an in rem judgment against the whole world [*see* Cal. L. Rev. Comm. Comment to *Code Civ. Proc. § 761.020(c)*; *see also Code Civ. Proc. §§ 764.030, 764.045* (discussed in the Introduction *§ 482.41[4]*)]. A person who is in open and actual possession of the property cannot be named as an unknown defendant [*see Code Civ. Proc. § 763.010(c)* (discussed *§ 482.81[7]*)].

[h] Fictitious Defendants

The plaintiff may also name unknown defendants as DOES pursuant to *Code Civ. Proc. § 474* (Paragraph 5) [*see Code Civ. Proc. § 760.060* (rulesgoverning civil actions generally as applicable in quiet title actions unless they are inconsistent with quiet title provisions)]. For discussion of whether or not to additionally designate the unknown defendants as DOES, see discussion under Caption, *above.* For additional examples of DOE allegations, see Ch. 20, *Allegations Commonly Used* .

[i] Defendants Required by Court to Be Joined

The court on its own motion may, and on the motion of any party must, make such orders as appear appropriate for joinder of such additional parties as are necessary or proper [*Code Civ. Proc. § 762.040(a)*]. For discussion and forms relating to joinder of parties generally, see Ch. 395, *Parties* .

[8] Appointment of Guardian ad Litem

The court on its own motion may, and on motion of any party must, make such orders for appointment of guardians ad litem as appear necessary to protect the interest of any party [*Code Civ. Proc. § 762.080*]. Appointment of guardians ad litem is discussed in Ch. 291, *Guardians ad Litem* .

[9] Required Allegations

[a] Property and Adverse Claims

By statute, the complaint must include the following allegations:

(1) A description of the property that is the subject of the action. In the case of tangible personal property, the description must include its usual location. In the case of real property, the description must include both its legal description and its street address or common designation, if any (Paragraph 6) [*Code Civ. Proc. § 761.020(a)*]. This requirement does not preclude the joinder of several properties or of real and personal property, if appropriate [15 Cal. L. Rev. Comm. 1198 (1979)].

(2) The title of the plaintiff as to which a determination is sought and the basis of the title. If the title is based on adverse possession, the complaint must allege the specific facts constituting the adverse possession (Paragraphs 6, 7) [*Code Civ. Proc. § 761.020(b)*; *see generally* Ch. 13, *Adverse Possession*].

(3) The adverse claims to the title of the plaintiff against which a determination is sought (Paragraphs 9-11) [*Code Civ. Proc. § 761.020(c)*]. If the plaintiff admits the validity of any adverse claim, the complaint must so state (Paragraph 10) [*Code Civ. Proc. § 762.060(c)*]. If the claim or the share or quantity of the claim of a person required to be named as a defendant is unknown, uncertain, or contingent, the plaintiff must so state in the complaint. If the lack of knowledge, uncertainty, or contingency is caused by a transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, the plaintiff must also state in the complaint, so far as is known to the plaintiff, the name, age, and legal

disability, if any, of the person in being who would be entitled to the claim had the contingency on which the claim depends occurred prior to the commencement of the action (Paragraph 11) [*Code Civ. Proc. § 762.020(b)*].

(4) The date as of which the determination is sought. If the determination is sought as of a date other than the date the complaint is filed, the complaint must include a statement of reasons why a determination as of that date is sought (Paragraph 12) [*Code Civ. Proc. § 761.020(d)*].

(5) A prayer for the determination of the title of the plaintiff against the adverse claims [*Code Civ. Proc. § 761.020(d)*].

[b] Plaintiff's Seisin or Possession Within Five Years

When the plaintiff claims a present interest in real property (i.e., the interest entitling the owner to immediate possession [*Civ. Code § 689*]), whether or not he or she actually seeks to recover possession, he or she is deemed to sue for the recovery of real property within the meaning of *Code Civ. Proc. § 318*, a statute of limitations implicitly requiring the plaintiff to prove (and, therefore, allege) that "the plaintiff, his/her ancestor, predecessor, or grantor, was seised or possessed of the [real] property in question, within five years before the commencement of the action" (Paragraph 8) [*see Safwenberg v. Marquez (1975) 50 Cal. App. 3d 301, 311, 123 Cal. Rptr. 405]* .

The statute requires either seisin--that is, the right of possession--or actual possession. If the plaintiff shows that he or she has legal title, he or she shows seisin, even when someone else is in actual possession [*Tobin v. Stevens (1988) 204 Cal. App. 3d 945, 949-951, 251 Cal. Rptr. 587* ; *Schoenfeld v. Pritzker (1967) 257 Cal. App. 2d 117, 121, 64 Cal. Rptr. 592]* . Moreover, it is apparent that if the plaintiff relies on possession (because someone else holds legal title), he or she must meet the test of adverse possession.

Obviously, when the plaintiff claims a future interest, *Code Civ. Proc. § 318* does not apply. One reason is that the plaintiff's action cannot be characterized as one for the recovery of the property, but a more compelling reason is that in many cases it would be impossible to show seisin or possession in himself or herself or a predecessor within five years before commencement of the action.

[c] Water Rights

Water rights are deemed to be real property, and a quiet title action may be maintained to determine adverse claims to water rights [*see Tehachapi-Cummings County Water Dist. v. Armstrong (1975) 49 Cal. App. 3d 992, 999 n.5, 122 Cal. Rptr. 918]* .

There are special pleading rules when the plaintiff claims ownership of a riparian right [*see Hudson v. West (1957) 47 Cal. 2d 823, 828-829, 306 P.2d 807* ; for discussion and appropriate forms, see *Ch. 575, Waters, § 565.10* et seq.].

[d] Equitable Right to Relief

[i] In General

Since the plaintiff seeks equitable relief, he or she is required to establish an equitable right to relief. If equity demands that the plaintiff restore the defendant to a prior position, the complaint should include allegations showing that the plaintiff has done, or offered to do, whatever equity demands [*see, e.g., Behrendt v. Abraham (1966) 64 Cal. 2d 182, 187, 49 Cal. Rptr. 292, 410 P.2d 828* (plaintiff seller, defendant buyer, under real property sale contract; plaintiff as required to restore payments, less damages)].

[ii] Action Based on Breach of Sale Contract

When the purpose of the action is to foreclose a conditional purchaser's interest following default and cancellation of the

agreement, the plaintiff (seller) need not refund any part of the amount paid toward the price if that amount is less than the "benefit of his bargain" [*Barkis v. Scott (1949) 34 Cal. 2d 116, 120-121, 208 P.2d 367]* . However, if that amount exceeds the benefit of the bargain, the plaintiff is not entitled to a judgment quieting title unless he or she refunds the excess [*Baffa v. Johnson (1950) 35 Cal. 2d 36, 39, 216 P.2d 13]* .

[10] Prayer

The complaint must include a prayer for the determination of the title against adverse claims [*Code Civ. Proc. § 761.020(e)*].

The plaintiff may, if he or she wishes, add to the prayer a request for prohibitive relief, such as, "That defendant[s] be enjoined from making any further claim to the property adverse to plaintiff, by legal action or otherwise." A judgment including such an injunction is proper [*Wolf v. Gall (1916) 174 Cal. 140, 145, 162 P. 115]* .

[11] Verification

The complaint must be verified [*Code Civ. Proc. § 761.020*].

[12] Process

The form, content, and manner of the service of summons is the same as in civil actions generally [*Code Civ. Proc. § 763.010(a)*]. The procedure to be followed if the names of all the defendants will not fit in the box on the Judicial Council form of summons is *set forth in § 482.81*.

If, on affidavit, it appears to the satisfaction of the court that the plaintiff has used reasonable diligence to ascertain the identity and residence of and to serve summons on the persons named as unknown defendants and persons joined as testate or intestate successors of a person known or believed to be dead, the court must order service by publication pursuant to *Code Civ. Proc. § 415.50*. The court may, in its discretion, appoint a referee to investigate whether or not the plaintiff has used reasonable diligence to ascertain the identity and residence of persons sought to be served by publication, and the court may rely on the report of the referee instead of the affidavit of the plaintiff in making the order for service by publication. Service is not authorized by publication on any person named as an unknown defendant who is in open and actual possession of the property [*Code Civ. Proc. § 763.010(b), (c)*]. As a condition of establishing that the party to be served pursuant to publication under *Code Civ. Proc. § 415.50* cannot with reasonable diligence be served in another manner, the court may not require that a search be conducted of public databases where access by a registered process server to residential addresses is prohibited by law or by published policy of the agency providing the database. These databases include, but are not limited to, voter registration rolls and records of the Department of Motor Vehicles [*Code Civ. Proc. § 415.50(e)*].

Whenever the court orders service by publication, the order is subject to the following conditions [*Code Civ. Proc. § 763.020*]:

- The plaintiff must post, not later than 10 days after the date the order is made, a copy of the summons and complaint in a conspicuous place on the real property that is the subject of the action.

- The plaintiff must record, if not already recorded, a lis pendens.

- The publication must describe the property that is the subject of the action. In addition to particularly describing the property, the publication must describe the property by giving its street address, if any, or other common designation. However, if a legal description of the property is given, the validity of the publication is not affected by the fact that the street address or other common designation recited is

erroneous or omitted.

Whenever the court orders service by publication, the publication may [*Code Civ. Proc. § 763.030(a)*]:

- Name only the defendants to be served by publication.
- Describe only the property in which the defendants to be served thereby claim interests.

Judgment against a defendant who fails to appear and answer following service by publication is conclusive against the defendant named in respect only to property described in the publication [*Code Civ. Proc. § 763.030(b)*].

Whenever the court orders service by publication, the court before hearing the case must require proof that the summons has been served, posted, and published as required and that the lis pendens has been filed [*Code Civ. Proc. § 763.040*].

Service of summons is fully discussed in Ch. 518, *Service of Summons and Papers* .

[13] Lis Pendens

Immediately on the commencement of a quiet title action by filing the complaint, the plaintiff must file a lis pendens in the office of the county recorder of each county in which any real property described in the complaint is located [*Code Civ. Proc. § 761.010*].

Before recording the notice, the plaintiff must cause a copy of the notice to be mailed, by registered or certified mail, return receipt requested, to all known addresses of the parties to whom the plaintiff's claim is adverse and to all owners of record of the real property affected by the plaintiff's claim as shown by the latest county assessment roll. If there is no known address for service on an adverse party or owner, then as to that party or owner a declaration under penalty of perjury to that effect may be recorded in lieu of a filed proof of service, and service on that party is not required. Immediately after recording the notice, the plaintiff must file a copy of the notice in the court in which the action is pending. Upon an adverse party's being joined in the action, the notice must be served on that party [*Code Civ. Proc. § 405.22*].

Any notice of pendency of action is void and invalid as to any adverse party or owner of record unless mailing requirements have been met for that party or owner and a proof of service in the form and content specified in *Code Civ. Proc. § 1013a* has been recorded with the notice of pendency of action [*Code Civ. Proc. § 405.23*] (or an in-lieu declaration has been recorded as described above).

From the time of recording of the notice of pendency of action, any purchaser, encumbrancer, or other transferee of the real property described in the notice is deemed to have notice of the pendency of the action as it relates to the real property, but only insofar as the action is pending against parties not fictitiously named. The plaintiff's rights and interest in the property, as ultimately determined in the pending noticed action, relate back to the date of recording of the notice [*Code Civ. Proc. § 405.24*].

[14] Costs

If the defendant disclaims, in the answer, any interest or estate in the property, or suffers judgment to be taken against him or her without answering, the plaintiff is not entitled to recover costs [*Code Civ. Proc. § 761.030(b)*].

[15] Recovery of Expenses

If the plaintiff sues on account of the defendant's breach of an agreement to convey title to real property by quitclaim

deed, the plaintiff's expenses in quieting his or her title, including not only litigation costs but also reasonable attorney's fees and the expenses, if any, incurred in entering the property, are recoverable as damages [*see Civ. Code § 3306a*]. A count alleging appropriate facts in support of a plea for damages may be included in the complaint [*see Code Civ. Proc. § 427.10(a)*]. The proper trial procedure in such a case would be first to try the issue of title and then to impanel a jury for trial of the damages issue [*see, e.g., Connell v. Bowes (1942) 19 Cal. 2d 870, 872, 123 P.2d 456]* .

[16] State Statutes

Procedure for making state agency defendant when it has nonproperty-tax lien on property. *Civ. Code § 2931a*

Measure of damages for breach of promise to give quitclaim deed as expenses of quiet title action and entry on property plus attorney's fees. *Civ. Code § 3306a*

Specific relief as including declaring and determining parties' rights other than by award of damages. *Civ. Code § 3367*

Necessity that plaintiff or predecessor, in action involving "recovery of real property," be seised or possessed of property within five years before action begun. *Code Civ. Proc. § 318*

Lis pendens. *Code Civ. Proc. § 405 et seq.*

Necessity, in action for recovery of real property, to describe property with such certainty that officer levying execution can identify it. *Code Civ. Proc. § 455*

Procedure for quieting title and effect of judgment. *Code Civ. Proc. § 760.010-764.080*

Cause of action as not lost by death but maintainable by or against personal representative. *Code Civ. Proc. §§ 377.20, 377.30, 377.40*

Action by heirs or devisees without joining personal representative. *Prob. Code § 9654*

[17] Decisions

[a] Allegations

Necessity to plead facts showing equitable right to relief, when equity demands plaintiff take preliminary step. *Barkis v. Scott (1949) 34 Cal. 2d 116, 120, 208 P.2d 367*

Pleading requirements when suit involves riparian water rights. *Hudson v. West (1957) 47 Cal. 2d 823, 828-829, 306 P.2d 807*

Seller suing conditional purchaser after default is required to refund excess of amount paid toward price over "benefit

of his bargain," but is not required to refund any part of amount paid if that amount is less than benefit of thebargain. *Baffa v. Johnson (1950) 35 Cal. 2d 36, 39, 216 P.2d 13* ; *Barkis v. Scott (1949) 34 Cal. 2d 116, 120-121, 208 P.2d 367*

Plaintiff claiming equitable interest is entitled to sue defendant who also claims equitable interest, to determine whose claim is superior. *Tuffree v. Polhemus (1895) 108 Cal. 670, 676-677, 41 P. 806* ; *O'Keefe v. Aptos Land & Water Co. (1955) 134 Cal. App. 2d 772, 781-782, 286 P.2d 417*

Necessity to allege, in action involving real property, that plaintiff or predecessor was seized or possessed of property within five years before action begun. *Safwenberg v. Marquez (1975) 50 Cal. App. 3d 301, 311, 123 Cal. Rptr. 405*

Showing of legal title shows seisin, even if someone else is in possession. *Schoenfeld v. Pritzker (1967) 257 Cal. App. 2d 117, 121, 64 Cal. Rptr. 592*

In action by surviving joint tenant to quiet title to certain moneys, complaint need not allege how joint tenancy was created. *Daniels v. Harney (1952) 111 Cal. App. 2d 400, 401, 244 P.2d 773*

In action to quiet title to corporate stock, it was sufficient to allege ownership in plaintiffs, and was not necessary to make allegations relating to chain of title through which plaintiffs derived ownership. *Hardison v. Corbett (1942) 55 Cal. App. 2d 310, 320-321, 130 P.2d 226*

Necessity to identify claimed interest; complaint is demurrable if alleging only "some interest." *Peck v. Martinez (1941) 46 Cal. App. 2d 855, 855-856, 117 P.2d 7*

Description of property is required to be specific. *Rapaport v. Forer (1937) 20 Cal. App. 2d 271, 275, 66 P.2d 1242* (description of money as "funds on deposit" insufficient)

Plaintiff is entitled to judgment quieting title to whatever interest he or she proves. *Hurt v. Pico Inv. Co. (1932) 127 Cal. App. 106, 113-114, 15 P.2d 203*

[b] Limitation of Action

Action by plaintiff in possession is not subject to limitation; action by plaintiff out of possession is subject to some statute of limitation, depending on underlying theory of relief. *Muktarian v. Barmby (1965) 63 Cal. 2d 558, 560-561, 47 Cal. Rptr. 483, 407 P.2d 659*

Action by plaintiff in possession to invalidate tax collector's deed is subject to one-year limitation under *Rev. & Tax. Code §§ 175* and *3521*. *Sears v. County of Calaveras (1955) 45 Cal. 2d 518, 521, 289 P.2d 425*

Application of statute of limitations in quiet title action depends on underlying theory of relief; when theory is based on fraud or mistake, *Code Civ. Proc. § 338(d)* applies, with period beginning when plaintiff discovers or should have discovered facts constituting fraud or mistake. *Ankoanda v. Walker-Smith (1996) 44 Cal. App. 4th 610, 612, 615, 52*

Cal. Rptr. 2d 39

[c] Parties

Distinction between standing and capacity to sue. *Parker v. Bowron (1953) 40 Cal. 2d 344, 351, 254 P.2d 6*

Statutes permitting suit against all unknown persons with constructive service by publication or posting is constitutional. *Title & Document Restoration Co. v. Kerrigan (1906) 150 Cal. 289, 307-314, 88 P. 356*

Vendor of real property is entitled to bring quiet title action even though no longer owner in order to perform warranty that title free from encumbrances. *Mitchell v. American Reserve Ins. Co. (1980) 110 Cal. App. 3d 220, 224, 167 Cal. Rptr. 760 , disapproved on other grounds in Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 36-39, 283 Cal. Rptr. 584, 812 P.2d 931*

State or state agency is subject to suit in quiet title action unless statute specifically gives immunity. *Tehachapi-Cummings County Water Dist. v. Armstrong (1975) 49 Cal. App. 3d 992, 999-1000, 122 Cal. Rptr. 918*

Personal representative of decedent's estate is proper party when claim made by, on behalf of, or against heirs; personal representative is not entitled to bring quiet title action against heirs. *Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1031, 84 Cal. Rptr. 538 , disapproved on other grounds in Morris v. Thogmartin (1973) 29 Cal. App. 3d 922, 930, 105 Cal. Rptr. 919*

Successors in interest of party are bound by judgment. *Lake Merced Golf & Country Club v. Ocean Shore R. Co. (1962) 206 Cal. App. 2d 421, 433, 23 Cal. Rptr. 881*

Heirs or devisees, or any one of them, are entitled to bring quiet title action under former Prob. Code § 581 (*now see Prob. Code § 9654*) without personal representative. *Bank of America v. Town of Atherton (1943) 60 Cal. App. 2d 268, 274, 140 P.2d 678*

Necessity to identify defendant, if not individual, as entity against which court's judgment can operate. *Tanner v. Best (1940) 40 Cal. App. 2d 442, 445, 104 P.2d 1084*

[d] Prayer

Judgment giving prohibitive relief against further assertion of adverse claim is proper. *Wolf v. Gall (1916) 174 Cal. 140, 145, 162 P. 115*

[18] Text References

Witkin, California Procedure, vol. 5, *Pleading*, §§ 613-629 (4th ed. 1997)

[19] Cross References

For discussion and forms relating to an action based on adverse possession, see Ch. 13, *Adverse Possession*

For discussion and forms relating to lis pendens, see Ch. 348, *Lis Pendens*

For discussion and forms relating to joinder and intervention, see Ch. 395, *Parties*

For discussion and forms relating to an action to invalidate a tax collector's deed, see Ch. 540, *Taxes and Assessments*

For discussion and forms relating to an action involving water rights, see Ch. 575, *Waters*

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Volume 42: Public Utilities thru Railroads-Chs. 480-485
Chapter 482 QUIETING TITLE
PART V. FORMS

42-482 California Forms of Pleading and Practice--Annotated § 482.81

§ 482.81 Complaint [Code Civ. Proc. § 425.10] to Quiet Title [Code Civ. Proc. §§ 760.020(a), 761.020]--By Purchaser of Tax-Defaulted Property Sold at Tax Sale [Rev. & Tax. Code § 3950]

[1] FORM Complaint [Code Civ. Proc. § 425.10] to Quiet Title [Code Civ. Proc. §§ 760.020(a), 761.020]--By Purchaser of Tax-Defaulted Property Sold at Tax Sale [Rev. & Tax. Code § 3950]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*], Plaintiff(s),	)	
vs.	)	NO. _____
[The State of California;]	)	COMPLAINT TO QUIET TITLE
_____[*name(s) of known defendant(s)*] [; the heirs and devisees of _____(*name*), deceased] [; _____ (*name of personal representative*), as _____ (*description, e.g.,* Executor *or* Administrator (With Will Annexed)) of the Estate of _____ (*name*), Deceased(, and as devisee)] [; _____ (*name*), believed to be deceased, and his/her heirs and devisees] [; the owner or any person claiming an interest in a special assessment lien _____ (*describe lien as described in bond or assessment records of district in which it was issued*); _____ (*name(s) of payee(s) as shown on bonds representing special assessment*); _____(*name*), as Treasurer of _____ (*governmental entity*) and collecting agent and trustee of funds collected for the unknown owners] [; and also all other persons unknown, claiming any right, title, estate, lien, or in-	)	[*Code Civ. Proc. §§ 760.020(a), 761.020*; *Rev. & Tax. Code § 3950*]

terest in the real property described in the complaint,
adverse to Plaintiff's ownership or any cloud on
Plaintiff's title thereto] [; and DOES I-
_____, inclusive],
Defendants.

Plaintiff(s) alleges/allege:

[1. *Allege each plaintiff's identity and capacity, if necessary.*]

[2. *Allege identity and capacity of each known defendant, if necessary, including, the personal representative of a deceased person who appears to have an interest in the land or any claim or cloud on plaintiff's title (seeProb. Code § 573(a)), and/or a person who has an interest, claim, or cloud and who plaintiff believes to be deceased (see Rev. & Tax. Code § 3952).*]

[3. *If heirs and devisees of a defendant who is deceased, or believed to be deceased, are sued as defendants but their names are not known to plaintiff(s), allege:* (Plaintiff(s) is/are informed and believe(s) and thereon allege(s) that) _____ (*name*) is deceased; plaintiff(s) does/do not know the names of decedent's heirs and devisees(, except for _____ (*state names of any known heirs and devisees, who should be included above as named defendant(s)*)),) and therefore denominate(s) these defendants as "the heirs and devisees of _____ (*name of deceased person*), (believed to be) deceased," (hereinafter sometimes referred to as "the successor defendants,") pursuant to *Section 3952 of the Revenue and Taxation Code*. These successor defendants, and each of them, claim some right, title, estate, lien, or interest in the hereinafter-described property adverse to plaintiff's/plaintiffs' title; and their claims, and each of them, constitute a cloud on plaintiff's/plaintiffs' title to that property.]

[4. *If "all persons unknown" are named as defendants, allege:* The defendants herein named as "all other persons unknown, claiming any right, title, estate, lien, or interest in the real property described in the complaint, adverse to plaintiff's ownership or any cloud on plaintiff's title thereto" (hereinafter sometimes referred to as "the unknown defendants") are unknown to plaintiff(s). These unknown defendants, and each of them, claim some right, title, estate, lien, or interest in the hereinafter-described property adverse to plaintiff's/plaintiffs' title; and their claims, and each of them, constitute a cloud on plaintiff's/plaintiffs' title to that property.]

[5. *Fictitious defendants, if appropriate. See § 482.80, Paragraph 5.*]

[6. *If unknown persons owning or claiming an interest in a special assessment lien are made defendants, allege:* Plaintiff(s) does/do not know the names of the owner(s) and persons claiming an interest in the special assessment lien _____ (*describe assessment lien as it is described in the bond or assessment records of the district in which it was issued*), except _____ (*state names of any known owners of claimants, who should be included above as named defendant(s)*), who is/are named herein as defendant(s) because he/she/they is/are shown on the records of the Treasurer as the owner(s) and person(s) claiming an interest in the above-described special assessment lien, and therefore plaintiff(s) name(s) this/these unknown defendant(s) herein as "the owner or any person claiming an interest in a special assessment lien" described above. Defendant _____ (*name*) is the Treasurer of _____ (*government entity*) and is sued as collecting agent and trustee of the funds collected for unknown owners of the special assessment lien hereinafter referred to or for persons claiming an interest therein. The Treasurer's records show the following persons to be the owners thereof or claimants of an interest therein: _____ (*names*). (*If the special assessment is represented by a bond, add:* The payee on the bond

representing the special assessment is _____ (*name*). All of the persons named in this paragraph are made defendants pursuant to *Revenue and Taxation Code Section 3955*.)]

7. _____ [Plaintiff is the sole owner *or* Plaintiffs are the owners concurrently, as _____ (joint tenants *or* tenants in common *or* partners *or* husband and wife),] of _____ [*specify interest, e.g.,* the fee simple title] _____ [in *or* to] certain real property that was subject to a power of sale for nonpayment of taxes, namely: _____ [*set forth legal description of property and street address or common designation, if any*].

8. On _____ [*date*], a declaration of default with respect to the above-described real property was recorded in the Official Records of the County of _____, Book/Reel _____, page/image _____. On or about _____[*date*], the above-described real property became subject to a power of sale for nonpayment of taxes. Plaintiff(s) [claim ownership through _____ (*name(s)*) who] purchased the property from the tax collector of _____ County, California. The deed from the tax collector to plaintiff(s) dated _____ was recorded in the Official Records of the County of _____, Book/Reel _____, page/image _____. All subsequent taxes [and assessments] levied and payable have been paid.

[*Unless there are few enough adverse claims against title that they can all be described in Paragraph 10, continue with as many separate paragraphs as are necessary, describing one known adverse claim per paragraph, e.g., as appears below in Paragraph 9. Add allegations concerning defendants whose claims are of record and/or unknown, uncertain, or contingent, if appropriate; see § 482.80, Paragraphs 9 and/or 11.*]

9. The defendants named above in Paragraph 6, both those who are named and those who are unknown to plaintiff, claim a special assessment lien on the property that is the subject of this action for assessments claimed to be owing and unsatisfied arising from _____ [*describe bond or assessment as it is described in assessment records of district in which it was issued*].

[*CONTINUE*]

10. [*Claims against which plaintiff(s) seek(s) to have title quieted. See § 482.80, Paragraph 10.*]

11. [*Date on which plaintiff(s) seek(s) to quiet title. See § 482.80, Paragraph 11.*]

WHEREFORE, plaintiff(s) prays/pray as follows:

1. For a judgment that plaintiff(s) is/are _____[*specify interest claimed, e.g.,* the owner(s) in fee simple] of the property and that defendant(s) has/have no interest in the property adverse to plaintiff(s);

[2. *If a determination of the interests of the owners of special assessment liens is sought:* For a determination of the interests of the holders of special assessment liens];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____[*signature*]
Attorney for Plaintiff(s)

[*Verification. See § 482.80.*]

[2] Use of Form

The foregoing form of complaint is for use by a person who has purchased tax-defaulted property, including purchases made from other taxing agencies under *Rev. & Tax. Code §§ 3771-3841*, or a person claiming through him or her, to obtain a judgment quieting his or her title [*see Rev. & Tax. Code §§ 3727, 3950*]. For further discussion, see the Introduction under Actions Respecting Tax-Defaulted Property, *above.* The process of tax default, redemption, and sale by the local tax collector is discussed in more detail in *Ch. 540, Taxes and Assessments, § 540.30* et seq.

[3] Defendants

[a] Who Must Be Named

The complaint must name as defendants all persons who are known to the plaintiff, or who appear of record, to have some interest in, or claim on, the land described in the complaint, if the interest or claim arose before the date of the tax deed, other than persons owning a special assessment, unless plaintiff seeks to determine the interest or claim of those persons [*Rev. & Tax. Code § 3951*].

[b] State of California

The state may be made a party defendant if the property was sold prior to September 14, 1984 [*Rev. & Tax. Code § 3951*]. Under the system in effect since September 14, 1984, the state is not a party to the process of tax default, redemption, and sale. Under the transition rule, sales or deeds to the state that occurred before September 14, 1984, and with respect to which a right of redemption still existed on that date, were cancelled as of September 14, 1984; and the property was deemed to be tax-defaulted as of the date of its sale to the state and became subject to a power of sale for nonpayment of taxes [Stats. 1984, ch. 988, § 74(a)]. The local tax collector was required to record a release of equity or quitclaim deed for and on behalf of the state [Stats. 1984, ch. 988, § 74(b)].

[c] Unknown Claimants

The complaint may name as defendants persons unknown to the plaintiff who claim any right, interest, lien, or claim on the land, or any cloud onplaintiff's title thereto, arising before the date of the tax deed from the state [*Rev. & Tax. Code § 3952*].

All unknown claimants, except two categories of unknown claimants [*see* the *discussions under §§ 482.81[3][e], [f]*], are required to be described in the complaint as follows: "Also all other persons unknown, claiming any right, title, estate, lien or interest in the real property described in the complaint, adverse to plaintiff's ownership or any cloud upon plaintiff's title thereto" [*Rev. & Tax. Code § 3953*].

[d] Personal Representative

Generally, an action does not abate by the death of a person, but may be maintained against his or her personal representative [*Prob. Code § 573(a)*; *see also § 482.80*].

[e] Heirs; Devisees; Persons Believed Dead

In any case in which any person who appears to have had an interest in the land described in the complaint, or any claim or cloud on the plaintiff's title, is known to be dead, the heirs and devisees of the person may be sued as "the heirs and devisees" of the person, naming him or her. If the person is only believed to be dead, and that belief is alleged in the complaint on information and belief, the heirs and devisees of the person may also be sued as "the heirs and devisees" of the person, naming him or her, provided that he or she is also named as a defendant [*Rev. & Tax. Code § 3952*].

[f] Owners of Special Assessments

Owners of special assessments need not be made defendants unless the plaintiff seeks to determine the interests or claims of those persons [*Rev. & Tax. Code § 3951*]. Generally a deed from a county tax collector will be subject to special assessment liens for (1) installments of special assessments that will become payable after the time of the sale; (2) special assessments of any taxing agency that did not consent to the sale; (3) special assessments that were not included in the amount necessary to redeem the tax-defaulted property; and (4) unpaid assessments under the Improvement Bond Act of 1915 [*Sts. & Hy. Code § 8500 et seq.*] and unpaid special taxes under the Mello-Roos Community Facilities Act of 1982 [*Gov. Code § 53311 et seq.*] that are not satisfied as a result of the sale proceeds being applied pursuant to *Rev. & Tax. Code § 4671 et seq.* or that are being collected through a foreclosure action [*Rev. & Tax. Code § 3712(a)-(c), (f), (h)*].

Unknown defendants owning or claiming an interest in a special assessment are required to be described in the complaint as follows: "The owner or any person claiming an interest in a special assessment lien _____ [*description of lien as described in bond or assessment records of district in which it was issued*]" [*Rev. & Tax. Code § 3954*].

Whenever unknown defendants owning or claiming an interest in special assessments are made defendants, the following persons are also required to be made defendants: (1) the payee, as shown by the bond representing the special assessment, if any; (2) the owner of the special assessment, or any person claiming an interest therein, as shown by the treasurer's records; and (3) the treasurer, as the collecting agent and trustee of the funds collected for the unknown owners of a special assessment or persons claiming an interest therein [*Rev. & Tax. Code § 3955*]. A "treasurer" does not actually have to have the official title "Treasurer," but is any person who is the custodian of the funds collected on special assessments and/or who has the duty to cancel the assessments when they are paid [*Rev. & Tax. Code § 3971*].

"Special assessment" means any assessment levied pursuant to any of the improvement acts of the state, whether or not represented by a bond, which are liens on a specific parcel of real property [*Rev. & Tax. Code § 3972*].

[4] Allegations

The complaint is required to allege that (1) tax-defaulted property was purchased at a tax sale, and (2) all subsequent taxes levied and payable have been paid (Paragraph 8) [*Rev. & Tax. Code § 3950*].

In other respects, the complaint is the same as in an ordinary action [*see § 482.80*].

[5] Verification

The complaint must be verified [*Code Civ. Proc. § 761.020*; *Rev. & Tax. Code § 3950*].

[6] Notice of Pendency of Action

Within 10 days after the filing of the complaint, the plaintiff is required to file, or cause to be filed, in the office of the county recorder of the county where the property is situated, a notice of the pendency of the action as prescribed by *Code Civ. Proc. § 405.20* (lis pendens generally) [*Rev. & Tax. Code § 3956*]. For discussion of such notices generally, and suitable general forms, see Ch. 348, *Lis Pendens* .

[7] Process

[a] Form of Summons

The summons is required to contain, in addition to the matter prescribed by *Code Civ. Proc. § 412.20* (contents of summons generally), a description of theproperty and a statement of the object of the action. In the summons, unknown defendants are required to be designated as they are designated in the complaint [*Rev. & Tax. Code § 3957*].

That form can be adapted as follows:

(1) If the block for listing defendants is not large enough to accommodate the designation of defendants as in the complaint, either a facing page containing a complete caption or a following page on which the caption is continued may be attached. Local rules should be consulted. If a facing page is used, it should reproduce the caption which appears on the complaint, but the title of the paper would, of course, be "SUMMONS" instead of "COMPLAINT." If a following page is used, it should be referred to in the block for listing defendants on the Judicial Council form. A reference such as "(continued on attached page)" should be satisfactory. The names of known defendants other than the first-listed name should not be indicated by the abbreviation "et al." because *Code Civ. Proc. § 412.20* requires that the summons contain the "names of the parties to the action" [*Code Civ. Proc. § 412.20*].

(2) Because the printed Judicial Council form of summons does not provide enough space for typing a description of the property and a statement of the object of the action, another page should be attached. It should conform to the requirements in *Cal. Rules of Ct., Rule 2.100 et seq.* (format of papers generally). The description of the real property may be single-spaced [*Cal. Rules of Ct., Rule 2.108(2)*]. On the face of the Judicial Council form, in the block containing the word "SUMMONS" there should appear a reference to the additional page, such as "WITH [or AND] ATTACHMENT." (It is also advisable to include such a reference when the designation of defendants is continued on an additional page.)

If the designation of defendants is continued on an additional page, it should be separate from the additional page containing the description of the property and the statement of the object of the action.

If any pages are attached to the Judicial Council form, the proof of service on the reverse side of that form should refer to the attachment. For example, the balance of the first line following "I served the summons" can be stricken and replaced with "with [or and] attachment and complaint as follows:". If more than one additional page is attached, the reference should be to "attachments."

[b] Posting of Summons

Within 30 days after the issuance of the summons, the plaintiff must post, or cause to be posted, in a conspicuous place on the property, a copy of the summons [*Rev. & Tax. Code § 3958*].

[c] Service of Summons

All known defendants are required to be served in the manner required by law for service of summons in a civil action [*Rev. & Tax. Code § 3959*; *see Code Civ. Proc. § 413.10 et seq.* (service of summons in civil action)].

[d] Service by Publication on Unknown Defendants

All unknown defendants must be served by publication as provided in *Code Civ. Proc. § 415.50*, but it must appear by affidavit (or declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) that the plaintiff used reasonable diligence to ascertain the identities of unknown defendants, including persons sued as "heirs and devisees" [*Rev. & Tax. Code § 3960*]. As a condition of establishing that the party to be served pursuant to publication under *Code Civ. Proc. §*

415.50 cannot with reasonable diligence be served in another manner, the court may not require that a search be conducted of public databases where access by a registered process server to residential addresses is prohibited by law or by published policy of the agency providing the database. These databases include, but are not limited to, voter registration rolls and records of the Department of Motor Vehicles [*Code Civ. Proc. § 415.50(e)*].

All unknown defendants served by publication must have the same rights as are provided by law for other defendants on whom personal service or service by publication is made. The action must proceed against the unknown defendants in the same manner as against the other defendants who are served personally or by publication. Regardless of any legal disability, any unknown defendant who has been served, and anyone claiming under him or her, who has or claims to have any right, title, estate, lien, or interest in the property, or cloud on the title thereto, or who owns or claims to own an interest in a special assessment lien adverse to the plaintiff when the action is begun, must be concluded by a judgment in the action as if the action were brought against, and personal service were made on, that person by his or her name. Service must be deemed complete on the completion of the publication [*Rev. & Tax. Code § 3961*; *see Rev. & Tax. Code § 3972* ("special assessment" defined)].

[e] When County Is Defendant

If the county is named as a defendant, service of process must be made on the tax collector of the county in which the property is situated [*Rev. & Tax. Code § 160*].

[8] Defaults

No judgment establishing the rights of any of the defendants as to the property shall be rendered on the default of a defendant unless the court requires proof of the facts alleged [*Rev. & Tax. Code § 3962*].

[9] Judgment

On the trial of the action, the court must determine the rights of all the parties [*Rev. & Tax. Code § 3963*].

If the court orders a sale of the property or the partition of it, that must be done in accordance with the provisions of *Code Civ. Proc. § 872.010 et seq.* (governing partition actions), except that the proceeds of sale belonging to unknown special assessment owners, or persons claiming an interest in these special assessments, must be paid to the "treasurer," to be held by him or her as in like instances of collections by the treasurer of special assessments [*Rev. & Tax. Code § 3965*; *see Rev. & Tax. Code § 3971* (defining "treasurer," and *discussed under § 482.81[3][f]*)].

If the right, title, interest, lien, or estate of a known or an unknown defendant established by the judgment is based on a special assessment or arises from a special assessment, the judgment must direct the treasurer to cancel the special assessments on his or her records [*Rev. & Tax. Code § 3966*].

If the court determines that none of the defendants have any right, title, interest, lien, or estate in the property, the court shall render judgment for the plaintiff under the tax deed; and if any of the defendants claims to be the owner of, or to have an interest in, a special assessment, and the court determines the special assessment to be invalid or inferior to the plaintiff's title, the judgment must direct that the treasurer cancel the assessment on his or her records [*Rev. & Tax. Code § 3967*].

The judgment, after becoming final, is conclusive against all of the persons named in the complaint who have been served, and against all unknown persons, and all heirs and devisees of any named defendant served as provided in *Rev. & Tax. Code § 3960* [*Rev. & Tax. Code § 3968*; *§ 482.81[7][d]*].

[10] Cancellation of Special Assessments

After the judgment becomes final, a certified copy of it must be delivered to the treasurer [*see Rev. & Tax. Code § 3971* (definition)]. On receipt of the copy, he or she must cause to be canceled the special assessment [*see Rev. & Tax. Code § 3972* (definition)] described in the judgment. The treasurer must, on his or her records, mark the special assessment as follows: "Canceled by judgment of court, superior court case number _____ [*number*]" [*Rev. & Tax. Code § 3969*].

[11] Cumulation of Remedies

The remedy provided by *Rev. & Tax. Code § 3950 et seq.* shall be construed as cumulative and not exclusive of any other remedy, form, or right of action, or proceeding now allowed by law [*Rev. & Tax. Code § 3970*].

[12] State Statutes

Lis pendens generally. *Code Civ. Proc. § 405 et seq.*

Contents of summons generally. *Code Civ. Proc. § 412.20*

Service of summons. *Code Civ. Proc. § 413.10 et seq.*; *Rev. & Tax. Code §§ 160, 3959, 3960*

Partition generally. *Code Civ. Proc. § 872.010 et seq.*

Purchaser of tax-defaulted property is entitled to bring quiet title action. *Rev. & Tax. Code §§ 3727, 3950*

Defendants; state is permissible defendant if property was sold prior to September 11, 1984. *Rev. & Tax. Code §§ 3727, 3951-3955*

Contents of complaint; verification is required. *Rev. & Tax. Code § 3950*

Unknown defendants; heirs and devisees; unknown owners of special assessment liens. *Rev. & Tax. Code §§ 3952-3955*

Notice of pendency of action is required. *Rev. & Tax. Code § 3956*

Summons; additional contents required. *Rev. & Tax. Code § 3957*

Posting of summons is required. *Rev. & Tax. Code § 3958*

Conclusiveness of judgment on unknown defendants. *Rev. & Tax. Code § 3961*

Default judgment without proof is prohibited. *Rev. & Tax. Code § 3962*

Trial and judgment; partition or sale of property; cancellation of special assessments. *Rev. & Tax. Code §§ 3963-3966*

Contents of judgment; conclusiveness on defendants. *Rev. & Tax. Code §§ 3967, 3968*

Treasurer as required to cancel special assessment in appropriate case. *Rev. & Tax. Code § 3969*

Remedy under *Rev. & Tax. Code § 3950 et seq.* is cumulative. *Rev. & Tax. Code § 3970*

Definitions: "special assessment"; "treasurer." *Rev. & Tax. Code §§ 3971, 3972*

[13] California Rules of Court

Form of papers generally. *Cal. Rules of Ct., Rule 2.100 et seq.*

Descriptions of real property may be single-spaced. *Cal. Rules of Ct., Rule 2.108(2)*

[14] Cross References

For discussion and forms relating to lis pendens, see Ch. 348, *Lis Pendens*

For discussion and forms relating to partition, see Ch. 397, *Partition*

For discussion of service of summons, and forms of summons and proof of service, as well as forms for use in connection with publication of summons, see Ch. 518, *Service of Summons and Papers*

For a related form, see *§ 482.80*

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42-482 California Forms of Pleading and Practice--Annotated § 482.82

§ 482.82 Answer [Code Civ. Proc. §§ 431.30, 761.030]--Disclaiming Any Interest [Code Civ. Proc. § 761.030(b)]

[1] FORM Answer [Code Civ. Proc. §§ 431.30, 761.030]--Disclaiming Any Interest [Code Civ. Proc. § 761.030(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	ANSWER (Disclaimer of Interest)
Defendants.	)	
	)	
	)	

Defendant [_____ (*name, if there are several defendants*)], answering the complaint, disclaims any interest or estate in the property described in the complaint and prays that the action be dismissed as to him/her/it.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

VERIFICATION

I, _____ [*name*], am the defendant in the above-entitled action. I have read the foregoing answer and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged

on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of answer is for use by a defendant who disclaims any interest or estate in the property described in the complaint in a quiet title action. The defendant may either file an answer or suffer judgment to be taken against him, her, or it without filing an answer, and in either case, the plaintiff will thereby be precluded from recovering costs from that defendant [*Code Civ. Proc. § 761.030(b)*]. Dismissal of the action against any disclaiming defendant is proper [*Jeffords v. Young (1925) 197 Cal. 224, 226, 239 P. 1054]* .

[3] Verification

The answer must be verified [*Code Civ. Proc. § 761.030(a)*].

[4] Cross Reference

For a related form, *see § 482.83*.

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42-482 California Forms of Pleading and Practice--Annotated § 482.83

§ 482.83 Answer [Code Civ. Proc. §§ 431.30, 761.030(a)]--By Defendant Claiming Interest

[1] FORM Answer [Code Civ. Proc. §§ 431.30, 761.030(a)]--By Defendant Claiming Interest

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	ANSWER
Defendants.	)	
	)	
	)	

_____

Defendant [_____ (*name, if there are several defendants*)] answers the complaint as follows:

1. _____ [*Set forth any claim that defendant has to the property, e.g.*, Defendant is a contingent remainderman to the property under a declaration of trust made by _____ [*name*] on _____ [*date*] and recorded in the Official Records of the County of _____, Book _____, page _____].

[2. _____ (*Set forth any facts tending to controvert such material allegations of the complaint as the defendant does not wish to be taken as true, e.g.*, Plaintiff did not take title to the property by the deed from _____(*name of grantor*) dated _____because _____ (*name of grantor*) was incompetent when he/she executed the deed.)]

[3. *Set forth affirmative defenses, as appropriate, e.g., limitation of action, laches, res judicata, another action pending, etc.; see Ch. 3, Abatement of Actions ; Ch. 345, Limitation of Actions ; Ch. 491, Res Judicata ; and other appropriate*

articles.]

WHEREFORE, defendant prays judgment as follows:

1. That plaintiff(s) take nothing by his/her/their complaint;

2. That defendant be awarded his/her costs herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant _____ [*name*]

[*Verification. See § 482.82.*]

[2] Use of Form

This form of answer is for use by a defendant who claims an interest in the property adverse to that of the plaintiff. A defendant may seek a decree quieting title in the interest by a cross complaint. *§ 482.80* may be adapted for use as a cross complaint [*see Code Civ. Proc. § 761.040*; *discussion under § 482.83[4]*]. In most situations, the defendant should seek to quiet title to his or her interest because such a judgment can quiet title against all named and unknown cross defendants [*Code Civ. Proc. § 764.030*; *see § 482.24*].

[3] Allegations in Answer

The answer must set forth [*Code Civ. Proc. § 761.030*]:

(1) Any claim defendant has.

(2) Any facts tending to controvert any material allegations of the complaint that the defendant does not wish to be taken as true.

(3) A statement of any new matter constituting a defense.

It should be noted that the quiet title statutes require more in an answer than in an ordinary civil action. The defendant must set forth his or her own claim and must plead facts that controvert plaintiff's allegations. Denials of plaintiff's allegations are not sufficient.

[4] Cross Complaint

[a] Affirmative Relief

A defendant may, by cross complaint, seek affirmative relief in a quiet title action [*Code Civ. Proc. § 761.040*]. If affirmative relief is sought, a cross complaint must be filed; affirmative relief may not be claimed in the answer [*Code Civ. Proc. § 431.30(c)*]. The cross complaint is required to be a separate document [*Code Civ. Proc. § 428.40*]. The cross complainant may seek affirmative relief against the plaintiff or plaintiffs, against other defendants, or against third parties [*Code Civ. Proc. § 428.10*; *see* Ch. 123, *Complaints and Cross Complaints*]. However, a defendant who claims an adverse interest does not have to assert any affirmative relief as against the plaintiff. A simple judgment in a quiet

title action in favor of the defendant, that the plaintiff take nothing by the complaint and that the defendant recover costs, operates as an estoppel on the plaintiff, determining title as between the parties, and protects the defendant against any further claim of the plaintiff as fully as would an affirmative judgment in the defendant's favor [*Hudson v. West (1957) 47 Cal. 2d 823, 830-831, 306 P.2d 807* ; *Warden v. Stoll (1930) 210 Cal. 374, 377, 291 P. 835* ; *Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1031, 84 Cal. Rptr. 538]* .

[b] Allegations in Cross Complaint

A cross complaint to quiet title must contain the same allegations as a complaint to quiet title [*see § 482.80*]. If the defendant seeks a determination of title as of a date other than the date specified in the complaint, the cross complaint must include the date and a statement of the reason why a determination as of that date is sought [*Code Civ. Proc. § 761.040(b)*].

[5] Appearance by Unnamed Person With Interest in Property

Any person who has a claim to the property described in the complaint may appear in the proceeding. Whether or not the person is named as a defendant in the complaint, the person must appear as a defendant [*Code Civ. Proc. § 762.050*]. The appearance by an unnamed defendant ordinarily will be made by filing a motion to intervene and then, with the court's permission, a complaint in intervenor [*Code Civ. Proc. § 387*; *see* Ch. 395, *Parties*]. If a party wants to appear and file an answer without filing a complaint in intervenor, the statute appears to authorize a motion to appear by an unnamed defendant.

[6] Equitable Defenses

If the plaintiff's title is not defective and cannot be proved to be inferior but is subject to being defeated on an equitable ground (e.g., fraud, mistake, unclean hands, etc.), the defendant may assert his or her equitable defense if he or she supports it with appropriate factual allegations [*see, e.g., Strong v. Strong (1943) 22 Cal. 2d 540, 546, 140 P.2d 386]* . Although the plaintiff is precluded from asserting, in a quiet title action, an equitable interest adverse to the defendant's legal title [*see* the discussion in the Introduction under Asserting Equitable Interest Against Legal Title, *above*], the defendant may assert an equitable interest in defense against the plaintiff's legal title [*see, e.g., Baucum v. Le Baron (1955) 136 Cal. App. 2d 593, 595, 289 P.2d 266* ; *Wade v. Howe (1934) 2 Cal. App. 2d 435, 439, 38 P.2d 439]* .

When the defendant asserts an equitable defense, if the defense is good, he or she may be required to do equity as a condition of receiving a final judgment. For instance, if the defendant alleges and proves that the deed he or she gave to the plaintiff, and on which the plaintiff's complaint for quiet title is based, was intended to be a mortgage, the court may, and should, require the defendant to pay the underlying debt before the court renders judgment against the plaintiff [*see Bloom v. Bloom (1929) 207 Cal. 70, 72-73, 276 P. 568* ; *see also § 482.86*]. Therefore, when pleading an equitable defense, the defendant should allege that he or she has done, or offered to do, whatever equity demands that he or she do.

[7] Limitation of Action

Because there is no statute of limitations governing quiet title actions as such, it is ordinarily necessary to refer to the underlying theory of relief to determine which statute applies. When the plaintiff is in possession of the property, however, this analysis is unnecessary because no limitation applies. The reasoning is that the person in possession will not necessarily know of dormant adverse claims of persons not in possession, and even if he or she does know of a potential adverse claimant, he or she is not obliged to take any action until an adverse claim is asserted against him or her. However, the question of limitation notwithstanding, a person in possession runs the risk that laches will bar his or her right to relief if he or she delays bringing a lawsuit and thus prejudices the defendant [*Muktarian v. Barmby (1965) 63 Cal. 2d 558, 560-561, 47 Cal. Rptr. 483, 407 P.2d 659]* .

[8] Laches as Defense

It has been held that in a quiet title action concerning real property, laches is not a defense if the defendant "fails to demonstrate that he was in adverse possession of the contested property during the period of delay" [*Gerhard v. Stephens (1968) 68 Cal. 2d 864, 904, 69 Cal. Rptr. 612, 442 P.2d 692]* . As an example of the kind of case in which laches may be asserted successfully, see *Lundgren v. Lundgren (1966) 245 Cal. App. 2d 582, 54 Cal. Rptr. 30* .

[9] Propriety of Demurrer Based on Laches

A demurrer asserting laches could not be sustained unless the complaint shows on its face an unexplained, unreasonable delay and some prejudicial effect on the defendant. Even if the complaint showed such a defect, however, the court should not sustain a general demurrer but should proceed to a judgment (in favor of the defendant) so as to achieve the purpose of finally disposing of conflicting claims to the property [*Warren v. Atchison, T. & S.F. Ry. Co. (1971) 19 Cal. App. 3d 24, 36, 36 n. 4, 96 Cal. Rptr. 317]* .

[10] Verification

The answer and cross complaint must be verified [*Code Civ. Proc. §§ 761.020, 761.030*].

[11] State Statutes

Procedure for intervention. *Code Civ. Proc. § 387*

Persons against whom cross complaint may be brought. *Code Civ. Proc. § 428.10*

Content of answer. *Code Civ. Proc. § 761.030*

Content of cross complaint. *Code Civ. Proc. § 761.040*

[12] Decisions

Defendant is entitled to assert equitable defense, even against plaintiff's apparent legal title, if defense is specifically alleged. *Strong v. Strong (1943)22 Cal. 2d 540, 546, 140 P.2d 386* ; *Baucum v. Le Baron (1955) 136 Cal. App. 2d 593, 595, 289 P.2d 266* ; *Wade v. Howe (1934) 2 Cal. App. 2d 435, 439, 38 P.2d 439*

Action by plaintiff in possession is not subject to limitation. *Muktarian v. Barmby (1965) 63 Cal. 2d 558, 560-561, 47 Cal. Rptr. 483, 407 P.2d 659*

Defendant is entitled to assert laches in defense, if in adverse possession. *Gerhard v. Stephens (1968) 68 Cal. 2d 864, 904, 69 Cal. Rptr. 612, 442 P.2d 692* ; *Lundgren v. Lundgren (1966) 245 Cal. App. 2d 582, 54 Cal. Rptr. 30* (laches asserted successfully)

Demurrer based on laches is not sustainable unless defect appears on face of complaint; judgment finally disposing of conflicting claims (in defendant's favor) is better procedure than sustaining demurrer on basis of laches. *Warren v.*

Atchison, T. & S.F. Ry. Co. (1971) 19 Cal. App. 3d 24, 36, 36 n. 4, 96 Cal. Rptr. 317

Simple judgment in defendant's favor, that plaintiff take nothing and defendant recover costs, protects defendant against future claims by plaintiff as fully as would an affirmative judgment in defendant's favor. *Hudson v. West (1957) 47 Cal. 2d 823, 830-831, 306 P.2d 807* ; *Warden v. Stoll (1930) 210 Cal. 374, 377, 291 P. 835* ; *Jay v. Dollarhide (1970) 3 Cal. App. 3d 1001, 1031, 84 Cal. Rptr. 538*

[13] Cross References

For discussion of various affirmative defenses generally and appropriate forms of alleging them, see Ch. 3, *Abatement of Actions* ; and Ch. 345, *Limitation of Actions*

For discussion of answers generally and appropriate forms of denials and affirmative defenses, see Ch. 26, *Answers*

For alternative forms of captions of complaints and cross complaints, see Ch. 108, *Captions and Introductions*

For discussion of cross complaints and appropriate forms, see Ch. 123, *Complaints and Cross Complaints*

For discussion of demurrers generally and appropriate forms, see Ch. 206, *Demurrers, Motions for Nonsuit and Judgment*

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Volume 42: Public Utilities thru Railroads-Chs. 480-485
Chapter 482 QUIETING TITLE
PART V. FORMS

42-482 California Forms of Pleading and Practice--Annotated § 482.84

§ 482.84 Notice of Motion and Motion for Order Permitting Party to Make Survey of Real Property [Code Civ. Proc. § 742]

[1] FORM Notice of Motion and Motion for Order Permitting Party to Make Survey of Real Property [Code Civ. Proc. § 742]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER PERMITTING SURVEY
vs.	)	[Telephone Appearance]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To each _____ [*identify party, e.g.*, plaintiff] named above, and to the attorney of record for each such party:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.*, defendant] _____ [*name*] will, and hereby does, move for an order permitting entry on the property described in the complaint for the purpose of making a survey or surveys and other measurements

for use in this action. The motion will be made on the ground that _____ [*specify legal grounds, e.g.,* without a survey fixing the eastern boundary of the parcel known as Smith's Addition No. 4, interpretation of the grant from John Smith to Richard and Mary Roe, dated March 19, 1989, will be impossible].

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s)*] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Use of Form

This form is a notice of motion, and with the accompanying form of order [*see § 482.85*], it may be used by either party, in an appropriate case, to gain entry to real property for the purpose of making a survey, when a survey is necessary for adjudication.

[3] Right to Judicial Order

In an action "for the recovery of real property" the court may make an order permitting a party "to enter upon the property and make survey and measurement thereof, and of any tunnels, shafts, or drifts therein, for the purpose of the action, even though entry for such purpose has to be made through other lands belonging to parties to the action" [*Code Civ. Proc. § 742*].

The above statute, apparently, has not been construed, applied, or even mentioned, in any appellate case. But it probably can be applied in any quiet title action that amounts to an action "for the recovery of real property," such as one where ownership of the present interest [*see Civ. Code § 689*] is at issue.

[4] Notice

The order may not be made except on noticed motion [*Code Civ. Proc. § 742*]. For discussion of the usual procedure for making a noticed motion, see Ch. 372, *Motions and Orders* .

[5] Grounds

The order may not be made except for good cause [*Code Civ. Proc. § 742*]. Any showing of the need, as a practical matter, for a survey or other measurements of the property would probably establish cause.

[6] Points and Authorities

A supporting memorandum must accompany the notice [*see Cal. Rules of Ct., Rule 3.1113(a)*; *see also Cal. Rules of Ct., Rule 3.1114(a)* (motions for which memorandum is not required)]. It may be included on the same paper, after counsel's signature. A sufficient memorandum, in most cases, would need nothing more than the text of *Code Civ. Proc. § 742*.

For additional discussion and forms, see Ch. 417, *Points and Authorities* .

[7] State Statutes

Court, in action for recovery of real property, is empowered to make order, on noticed motion and for good cause, allowing party to make survey or measurements for purpose of action. *Code Civ. Proc. § 742*

[8] California Rules of Court

"Papers" includes all documents, except exhibits or copies of documents, offered in support of motion. *Cal. Rules of Ct., Rule 2.3(2)*

Papers not to be filed accompanying motion. *Cal. Rules of Ct., Rule 3.250(a)*

[9] Cross References

For discussion of motions and orders generally and appropriate forms, see Ch. 372, *Motions and Orders*

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42-482 California Forms of Pleading and Practice--Annotated § 482.85

§ 482.85 Order Permitting Party to Make Survey of Real Property [Code Civ. Proc. §§ 742, 743]

[1] FORM Order Permitting Party to Make Survey of Real Property [Code Civ. Proc. §§ 742, 743]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER PERMITTING SURVEY
Plaintiff,	)	[Telephone Appearance]
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*name of moving party*] came on regularly for hearing this date. Plaintiff(s) appeared by _____ [*name*(*s*)], counsel; and defendant(s) appeared by _____ [*name*(*s*)], counsel.

On proof of good cause made to the satisfaction of the court that the motion ought to be granted,

IT IS HEREBY ORDERED that _____ [*specify, e.g.*, Straight & Narrow, Inc., licensed surveyors, and persons under their direction, shall be permitted to enter on the property commonly known as Smith's Addition No. 4 to the City of Goldland in Mountain County, and adjacent parcels held of record by parties to this action, for the purpose of making a survey fixing the eastern boundary of Smith's Addition No. 4. This entry shall be permitted at such times,

and as often, as Straight & Narrow, Inc., deems necessary for making the survey as expeditiously as possible, but in no event shall the making of the survey be undertaken in a manner that unduly interferes with the present and customary uses of any party or other person in possession. On completion of the survey, Straight & Narrow, Inc., shall furnish to the court and to each party a map, conforming to current standards of land surveying, illustrating the survey. _____ (*Name of moving party*) shall make all necessary arrangements with Straight & Narrow, Inc., concerning the making of the survey and shall be liable, pending the judgment in this action, for all costs, charges, and fees attending the making of the survey].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is an order for use by the party who moves for an order permitting a survey of real property in connection with a quiet title action.

[3] Contents; Service

The order must describe the property--a metes and bounds description probably is not necessary--and a copy must be served on the owner or occupant [*Code Civ. Proc. § 743*].

[4] Liability for Injury

If any unnecessary injury is done to the property in the course of making the survey, the party who obtained the order permitting the survey is liable [*Code Civ. Proc. § 743*].

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PART V. FORMS

42-482 California Forms of Pleading and Practice--Annotated § 482.86

§ 482.86 Judgment [Code Civ. Proc. § 632] for Plaintiff--General Form

[1] FORM Judgment [Code Civ. Proc. § 632] for Plaintiff--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*], Plaintiff(s),	)	
vs.	)	
_____ [*name(s) of known defendant(s)*]	)	NO. _____
	)	JUDGMENT
[*if person required to be named as defendant is dead, and plaintiff named the personal representative, add:*; _____(*name*), as _____ (*description, e.g.,* Executor *or* Administrator (With Will Annexed)) of the Estate of _____(*name*), Deceased(, and as devisee)] [*if person required to be named as defendant was believed by plaintiff to be dead but plaintiff did not know identity of personal representative, and/or if plaintiff included unknown successors of known decedent, add:*; the testate and intestate successors of _____ (*name of decedent*), _____ (deceased *or* believed to be deceased), and all persons claiming by, through, or under such person] [*if unknown defendants were included, add:*; and all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to Plaintiff's title, or any cloud on Plaintiff's title thereto],	)	
Defendant(s).		

_____

This cause came on regularly for trial on _____ [*date*], in [_____ (Department *or* Division) _____ of] the above-entitled court, the Honorable _____ [*name of judge*], Judge, presiding, sitting without a jury. Plaintiff(s) appeared by _____[*name(s)*], counsel; and defendant(s) appeared by _____ [*name(s)*], counsel. Oral and documentary evidence was presented by _____ [both *or* all] parties. The cause was argued and submitted for decision. A statement of decision _____ [has been made and filed *or* was not requested].

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED that:

1. As of _____ [*date*], _____ [*name(s)*], plaintiff(s) herein, _____ [was the sole owner *or* were the owners concurrently, as _____ (joint tenants *or* tenants in common *or* partners *or* husband and wife),] of _____ [*specify interest, e.g.,* the title in fee simple] [in *or* to] the following _____ [real *or* personal] property, to wit: _____ [*set forth particular description, as in a deed (if real property) or a bill of sale (if personal property) or other document of title*].

[2. *If necessary, in case of concurrent ownership of unequal shares, state* : Such persons own undivided interests in these property as follows: _____ (*specify names and interests, e.g.,* John Smith, 29/167th undivided interest; Mary Jones, 111/167th undivided interest; Richard Roe, 27/167th undivided interest).]

[3. _____ (*If appropriate, identify encumbrances, e.g.,* The title is subject to the easement of Sunshine Power & Light Company shown at Book 587, page 56, of the records of the recorder of Mountain County).]

4. _____ [*Name(s)*], defendant(s) herein, owns/own _____ [*specify interest of defendant, if any, e.g.,* no right, title, estate, interest, or lien, whatever, in the property].

5. Plaintiff(s) do/does have and recover his/her/their costs from defendant(s).
Dated: _____.

_____[*signature*]
Judge of the Superior Court

[2] Use of Form

This form of judgment is for use by the plaintiff in a quiet title action. The form does not include any relief other than a declaration of the parties' interests in the property in question. Commonly, however, and particularly when the property in question is real property, additional relief is given for the sake of making the declarative part of the judgment effective. Injunctive relief is often given [*see Mansfield v. Kaiser (1959) 176 Cal. App. 2d 632, 637, 1 Cal. Rptr. 555]* .

The caption on the judgment should be complete, as on the complaint. The parties should not be identified by the abbreviation "et al." but should all be named, because the judgment is a "document of title" [*see Welch v. Kai (1970) 4 Cal. App. 3d 374, 381, 84 Cal. Rptr. 619* ; *see also Behrendt v. Abraham (1966) 64 Cal. 2d 182, 186, 49 Cal. Rptr. 292, 410 P.2d 828* (judgment described as "muniment of title and prima facie evidence of ownership")].

Regarding preparation and entry of judgment and service of notice of entry, see Ch. 318, *Judgments* .

This form of judgment may be adapted for use by a defendant who seeks and obtains affirmative relief.

[3] Scope of Judgment

[a] In General

A quiet title action is brought, as authorized by the statute, for the purpose of determining any adverse claim that may be asserted therein by a defendant to the property in controversy. This does not mean that the court is simply to ascertain, as against a plaintiff shown to have a legal interest, whether or not such defendant has *some interest*, but also that the court shall declare and define the interest held by the defendant, if any, so that the plaintiff may have a judgment finally adjudicating the extent of his or her own interest in the property in controversy. The object of the action is to finally settle and determine, as between the parties, all conflicting claims to the property in controversy, and to decree to each party such interest or estate therein as he or she may be entitled to [*Peterson v. Gibbs (1905) 147 Cal. 1, 5, 81 P. 121]* .

[b] When Any Interest Is Part of Decedent's Estate

When it appears that some party has an interest derived from an estate and the estate has not been administered, the court may not determine the nature and extent of that interest. Jurisdiction to make such a determination is given exclusively to the probate court [*Marsh v. Edelstein (1970) 9 Cal. App. 3d 132, 142-143, 88 Cal. Rptr. 26]* .

[c] Prohibitive Relief

A judgment including an injunction against the defendant's further assertion of any claim to the property adverse to the plaintiff's is proper [*Wolf v. Gall (1916) 174 Cal. 140, 145, 162 P. 115]* . Such an injunction may be included if the plaintiff requests it. An appropriate form is, "The defendant(s) is/are enjoined to make no further claim to said property adverse to plaintiff(s), by legal action or otherwise, on the basis of any fact or facts which were proved, or which might have been proved, in this action." The qualification is advisable in order not to enjoin the defendant from asserting in a future action some claim that arises after the judgment.

[4] Interlocutory (Conditional) Judgment

When the plaintiff is entitled to relief if he or she does some act that equity demands (e.g., restores money paid by the defendant toward the purchase price of the property), it is proper for the court to render an interlocutory judgment stating the conditions that must be fulfilled before a final judgment will be rendered. Similarly, when the plaintiff is entitled to relief on the basis of the defendant's failure to do some act which equity demands he or she be given a chance to do, the court should render an interlocutory judgment. If the conditions specified in the interlocutory judgment are subsequently fulfilled (in the one case) or remain unfulfilled (in the other case), a final judgment may be rendered in the plaintiff's favor, but otherwise, judgment should be rendered against the plaintiff [*see Bloom v. Bloom (1929) 207 Cal. 70, 73, 276 P. 568* ; *see also Stein v. Simpson (1951) 37 Cal. 2d 79, 87, 230 P.2d 816* ; *Perry v. West Coast Bond etc. Co. (1934) 136 Cal. App. 557, 559, 29 P.2d 279]* .

[5] Persons Bound by Judgment

The judgment is binding and conclusive on all of the following persons, regardless of any legal disability [*Code Civ. Proc. § 764.030*]:

- All persons known and unknown who were parties to the action and who have any claim to the property, whether present or future, vested or contingent, legal or equitable, several or undivided; and

- Except as provided in *Code Civ. Proc. § 764.045*, all persons who were not parties to the action and

who have any claim to the property that was not of record at the time the lis pendens was filed or, if none was filed, at the time the judgment was recorded. *Code Civ. Proc. § 764.045* is discussed in *§ 482.24*.

[6] Statement of Decision

On request of any party appearing at trial, the court shall issue a statement of decision explaining the factual and legal basis for its decision regarding each principal controverted issue. The request is to be made within 10 days after the court announces a tentative decision or, if the trial has lasted less than one calendar day or less than eight hours over more than one day, prior to submission of the matter for decision. After a statement of decision is requested, any party may make proposals regarding its content. The statement will be in writing unless the parties agree otherwise; however, if trial is completed within one calendar day or within eight hours over more than one day, the statement of decision may be made orally on the record in the presence of the parties [*Code Civ. Proc. § 632*]. For further discussion, see Ch. 529, *Statement of Decision* .

[7] Description of Property and Interests

The judgment is a kind of document of title; therefore, it should describe the property and the owners' interests as precisely, and in the same manner, as does a deed, or a bill of sale, or any other document of title [*see Dalusio v. Boone (1969) 269 Cal. App. 2d 253, 260-262, 75 Cal. Rptr. 287]* . An impossible, wrong, or uncertain description, or no description at all, renders a quiet title judgment erroneous and void [*Newport v. Hatton (1924) 195 Cal. 132, 156, 231 P. 987* ; *Newman v. Cornelius (1970) 3 Cal. App. 3d 279, 284, 83 Cal. Rptr. 435]* . Some practitioners believe that typographical and other errors are minimized by using the legal description copied from a title insurance policy as an exhibit to the judgment.

[8] Costs

If the defendant disclaims in his or her answer any interest or estate in the property or suffers judgment to be taken against him or her without an answer, the plaintiff cannot recover costs [*Code Civ. Proc. § 761.030(b)*]. The foregoing form of judgment is not appropriate for use in case of a default. Regarding default cases, see Ch. 205, *Defaults and Default Judgments* .

[9] Motion for New Trial or to Vacate Judgment

If any of certain irregularities exist [*see Code Civ. Proc. § 657*], counsel may move for a new trial [*Code Civ. Proc. § 659*], or if the judgment is based on incorrect or erroneous conclusions of law not consistent with, or supported by, findings of fact, counsel may move to vacate the judgment [*Code Civ. Proc. § 663*]. For discussion and forms, see Ch. 371, *Motions After Trial* .

[10] Appeal

Any party aggrieved by the judgment may appeal [*Code Civ. Proc. § 902*]. For discussion and forms, see Ch. 40, *Appeal: An Overview* , et seq.

A judgment that leaves any issue for later determination is an interlocutory judgment and, therefore, is generally not appealable, although certain types of interlocutory judgments (not relevant here) are appealable [*Code Civ. Proc. § 904.1*; *see Code Civ. Proc. § 904.1(a)(1), (8), (9), (11)*; *Pomper v. Superior Court (1923) 191 Cal. 494, 495-496, 216 P. 577]* .

[11] Recording of Judgment

If real property is involved, a certified copy of the judgment should be recorded in the county where the real property is

situated. From the time of filing with the recorder, the certified copy is notice to all persons of its contents, and any subsequent purchaser, mortgagee, or lienholder is charged with having the same notice that he or she would have had if the judgment were a duly recorded deed or other instrument of transfer [*Gov. Code § 27326*; *Civ. Code § 1213*].

[12] California Rules of Court

Statement of decision. *Cal. Rules of Ct., Rule 3.1590*

[13] Decisions

Judgment in quiet title action is document of title and prima facie evidence of ownership. *Behrendt v. Abraham (1966) 64 Cal. 2d 182, 186, 49 Cal. Rptr. 292, 410 P.2d 828*

Interlocutory judgment is appropriate when party entitled to judgment should do equity first. *Stein v. Simpson (1951) 37 Cal. 2d 79, 87, 230 P.2d 816* ; *Bloom v. Bloom (1929) 207 Cal. 70, 73, 276 P. 568* ; *Perry v. West Coast Bond etc. Co. (1934) 136 Cal. App. 557, 559, 29 P.2d 279*

Judgment leaving any issue for later determination is interlocutory and, therefore, not appealable. *Pomper v. Superior Court (1923) 191 Cal. 494, 495-496, 216 P. 577*

Judgment is conclusive not only on parties but also on persons claiming through them. *Estate of Clark (1923) 190 Cal. 354, 360, 212 P. 622* ; *Holman v. Toten (1942) 54 Cal. App. 2d 309, 314, 128 P.2d 808*

Judgment enjoining defendant from making further adverse claims to property is proper. *Wolf v. Gall (1916) 174 Cal. 140, 145, 162 P. 115*

Court is without jurisdiction to determine nature and extent of interest derived from estate still in administration, except to find that party has such interest as may be determined by probate decree. *Marsh v. Edelstein (1970) 9 Cal. App. 3d 132, 142-143, 88 Cal. Rptr. 26*

Caption of judgment is improper if merely referring to first-named party on each side and others as "et al." *Welch v. Kai (1970) 4 Cal. App. 3d 374, 381, 84 Cal. Rptr. 619*

Description of property in judgment must be same as description in deed or other document of title. *Dalusio v. Boone (1969) 269 Cal. App. 2d 253, 260-262, 75 Cal. Rptr. 287*

Injunctive relief is incidental relief in quiet title action. *Mansfield v. Kaiser (1959) 176 Cal. App. 2d 632, 637, 1 Cal. Rptr. 555*

[14] Cross References

For discussion of, and forms relating to, appeal, see Ch. 40, *Appeal: An Overview* , et seq.

For discussion of default cases and appropriate forms for use in such a case, see Ch. 205, *Defaults and Default Judgments*

For discussion of judgments generally and appropriate forms, see Ch. 318, *Judgments*

For discussion and forms of motions for a new trial or to vacate a judgment, see Ch. 371, *Motions After Trial*

For discussion and forms relating to statements of decision, see Ch. 529, *Statement of Decision*

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California Forms of Pleading and Practice--Annotated

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Volume 42: Public Utilities thru Railroads-Chs. 480-485
Chapter 482 QUIETING TITLE
PART V. FORMS

42-482 California Forms of Pleading and Practice--Annotated § 482.87

§ 482.87 Complaint [Fed. R. Civ. P., Rule 8] to Quiet Title Against United States of America [28 U.S.C. §§ 1346(f), 2409a]

[1] FORM Complaint [Fed. R. Civ. P., Rule 8] to Quiet Title Against United States of America [28 U.S.C. §§ 1346(f), 2409a]

UNITED STATES DISTRICT COURT
_____ District of California
[_____ Division]

_____ [*name*], Plaintiff,	)	
vs.	)	Civil Action
THE UNITED STATES OF AMERICA,	)	No. _____
Defendant.	)	COMPLAINT
	)	
	)	

Plaintiff alleges:

1. This is an action under *Section 2409a of Title 28 of the United States Code* for adjudication of a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. Jurisdiction is based on *Section 1346(f) of Title 28 of the United States Code*.

2. Plaintiff is, and at all times herein mentioned was, the owner _____ [*specify ownership, e.g.*, in fee simple of *or* as joint tenant of an undivided interest in *or* of a reversionary interest in *or the like*] that certain parcel of

real property [*if improved property, and if appropriate, add:* and all improvements situated thereon], located in _____ County, California, and more particularly described as follows: _____[*set forth metes and bounds or other satisfactory description*].

3. The circumstances under which plaintiff acquired the aforementioned interest are as follows: _____ [*set out chain of title, with names and dates and descriptions of interests transferred*].

4. The United States of America claims _____[*specify interest which government claims or might claim, e.g.,* a reversionary interest in the real property hereinabove described, pursuant to the Act of _____ (*specify date, e.g.,* July 1, 1862), _____ (*set forth citation to statutes*)].

5. Plaintiff first learned of the claim of the United States on _____, 19_____. Plaintiff could not have learned of the claim of the United States before _____ 19_____, because _____ [*specify*].

WHEREFORE, plaintiff prays:

1. That this court determine and adjudge that the United States has no interest adverse to the plaintiff's interest in the real property hereinabove described; and

2. That plaintiff is the owner _____ [*specify ownership asserted by plaintiff*].

_____[*signature*]
Attorney for Plaintiff
_____ [*address*]

[2] Source of Form

The foregoing form is based on the facts of *Buchler v. United States (E.D. Cal. 1974) 384 F. Supp. 709* .

[3] Use of Form

The foregoing form of complaint is for use by any person claiming an interest in, and wishing an adjudication of title to, real property in California in which the United States claims an interest, other than a security interest [*see 28 U.S.C. § 2410*] or water rights [*see 43 U.S.C. § 666*]. A quiet title action against the United States in such a case is authorized by *28 U.S.C. § 2409a*.

A judgment for the plaintiff will not necessarily mean that the plaintiff may take possession of the property even if the plaintiff has a present interest [*see § 482.87[10]*].

Until the enactment of *28 U.S.C. § 2409a* in 1972, the federal government asserted sovereign immunity against being sued in quiet title actions generally. That section is a waiver of sovereign immunity and a consent to be sued in any quiet title action [*Buchler v. United States (E.D. Cal. 1974) 384 F. Supp. 709, 710]* , although the section does not apply to or affect certain actions [*see 28 U.S.C. § 2409a(a)*; *see also* the References *§ 482.87[15]*].

When the United States has or claims a mortgage lien or any other lien with respect to real or personal property, a quiet title action is authorized by *28 U.S.C. § 2410*.

[4] Jurisdiction and Venue

The United States district courts have exclusive jurisdiction of actions under *28 U.S.C. § 2409a* to quiet title [*28 U.S.C.*

§ 1346(f)].

The action must be brought in the district where the property is located, and if the property is located in two or more districts, the action may be brought in any of them [*28 U.S.C. § 1402*].

[5] Limitation

An action under *28 U.S.C. § 2409a* may be barred if it is not begun within 12 years after the date when the plaintiff, or the plaintiff's predecessor in interest, knew, or should have known, of the claim of the United States [*28 U.S.C. § 2409a(f)*]. Thus it is possible that the plaintiff's right to sue may be foreclosed through no default on his or her part, because his or her predecessor in interest may have known of the government's claim many years earlier [*see, e.g., Gendron v. United States (E.D. Cal. 1974) 402 F. Supp. 46, 47-48 , aff'd, 524 F.2d 1154 (1975)* (plaintiff's predecessor in interest knew of government's claim 75 years before plaintiff filed suit)].

Despite the fact that no quiet title action could be brought against the United States (except under *28 U.S.C. § 2410* where the government claimed only a security interest) before October 25, 1972, when *28 U.S.C. § 2409a* became law, the 12-year period of limitation did not begin on that date. If the limitation period had begun on that date, then until October 26, 1984, every person with a colorable claim of interest in real property adverse to the United States could sue to quiet title, regardless of how stale the claim was. But Congress rejected a proposal to make the waiver of immunity embodied in *28 U.S.C. § 2409a* fully retroactive (to the virtual beginning of the republic, if not earlier) in favor of the 12-year limitation period [*Hatter v. United States (E.D. Cal. 1975) 402 F. Supp. 1192, 1194]* .

The period begins to run on actual or constructive knowledge by the plaintiff, or a predecessor in interest of, any claim, or possible claim, of interest on the part of the government, whether or not the government's interest is to be characterized as "legal" or "merely equitable" [*Hatter v. United States (E.D. Cal. 1975) 402 F. Supp. 1192, 1194-1195]* .

[6] Parties

The United States "may be named as a party defendant" pursuant to *28 U.S.C. § 2409a(a),* but the United States will not necessarily be the only defendant. The government may claim only a partial interest in the real property. If the plaintiff and the government are not the only claimants, all other persons claiming an interest in the property should be joined as defendants, or as plaintiffs, depending on how the interests align [*Fed. R. Civ. P., Rule 19* (necessary joinder of parties)]. When a person who should join as plaintiff refuses to do so, he or she may be made a defendant or, in proper cases, an involuntary plaintiff [*Fed. R. Civ. P., Rule 19(a)*].

The title of the action in the complaint, but not in other pleadings, must contain the names of all parties [*Fed. R. Civ. P., Rule 10(a)*].

[7] Allegations

[a] Jurisdiction

The plaintiff is required to state the grounds on which the court's jurisdiction depends [*Fed. R. Civ. P., Rule 8(a)(1)*; for discussion and illustrative jurisdictional allegations, see Ch. 265, *Federal Courts: Jurisdiction and Removal*]. It is customary to make the jurisdictional allegation in the first paragraph.

[b] Nature of Plaintiff's Interest

The complaint must set forth with particularity, but in a "short and plain statement" [*Fed. R. Civ. P., Rule 8(a)(1)*], the nature of the right, title, or interest which the plaintiff claims in the real property [*28 U.S.C. § 2409a(c)*]. This allegation

will necessarily include a description of the property [*see Buchler v. United States (E.D. Cal. 1974) 384 F. Supp. 709, 711]* . Paragraph 2 of this form illustrates a sufficient form of this allegation.

[c] Derivation of Plaintiff's Interest

The complaint must set forth with particularity, but in a "short and plain statement" [*Fed. R. Civ. P., Rule 8(a)(1)*], the circumstances under which the plaintiff acquired the claimed right, title, or interest (Paragraph 3) [*28 U.S.C. § 2409a(c)*]. The plaintiff's failure to set out this information is a defect in pleading which may be attacked by a motion for a more definite statement [*Fed. R. Civ. P., Rule 12(e)*] or by a motion to dismiss [*Fed. R. Civ. P., Rule 12(b)*; *Buchler v. United States (E.D. Cal. 1974) 384 F. Supp. 709, 711]* .

The allegation must trace the plaintiff's chain of title. The evident purpose of this requirement, which is not imposed on the plaintiff in a state action in California, is to ease the government's burden in responding to quiet title complaints. The derivation of plaintiff's interest is a matter of evidence ordinarily, but the plaintiff in an action under *28 U.S.C. § 2409a* must plead his or her chain of title so that, if there is a gap, the government can obtain a prompt disposition by moving to dismiss [*see Gendron v. United States (E.D. Cal. 1974) 402 F. Supp. 46, 47 , aff'd, 524 F.2d 1154 (1975)* (complaint, with exhibited deeds, revealed gap in plaintiff's chain of title; action dismissed); *Buchler v. United States (E.D. Cal. 1974) 384 F. Supp. 709, 711* (evident purpose of requirement to plead chain of title)]. The government is an extensive landowner. This pleading requirement enables the government to avoid going to trial on quiet title complaints that lack merit.

[d] Nature of Government's Interest

The complaint must set forth with particularity, but in a "short and plain statement" [*Fed. R. Civ. P., Rule 8(a)(1)*], the right, title, or interest claimedby the United States (Paragraph 4) [*28 U.S.C. § 2409a(c)*]. It is not sufficient to allege that the government claims no right, title, or interest whatsoever even if in fact the plaintiff has received official assurance (e.g., from the Secretary of the Interior or his or her staff) that this is the case. Presumably there is some interest that the government might claim; otherwise, there is no reason to sue. The plaintiff is required to allege that the government claims the interest that it might claim, whether or not the plaintiff knows that the facts are otherwise [*Buchler v. United States (E.D. Cal. 1974) 384 F. Supp. 709, 712* ; regarding the effect of the government's disclaimer of interest when filed in the action, *see § 482.87[9]*].

[e] Facts Negating Limitation of Action

The action is subject to a 12-year limitation period [*see 28 U.S.C. § 2409a(f)*; *see also* the discussion *§ 482.87[5]*]. On the basis of apparent legislative intent behind the limitation provision in *28 U.S.C. § 2409a(f)*, it has been held that the plaintiff must allege the date on which the plaintiff, or the plaintiff's predecessor in interest, knew, or should have known, of the claim of the United States [*Buchler v. United States (E.D. Cal. 1974) 384 F. Supp. 709, 713]* . This allegation may be contained in the paragraph alleging the plaintiff's chain of title [*see, e.g., Gendron v. United States (E.D. Cal. 1974) 402 F. Supp. 46, 48 , aff'd, 524 F.2d 1154 (1975)]* . If, in complying with the pleading requirements, the plaintiff is forced to reveal in the complaint that the action is apparently barred because either the plaintiff or a predecessor in interest knew, or should have known, of the government's claim more than 12 years before the action was begun, the plaintiff will be obliged to allege facts negating the limitation, if he or she can (Paragraph 5).

[8] Prayer; Signature; Verification

The complaint must contain a demand for judgment for the relief to which the plaintiff deems himself or herself entitled [*Fed. R. Civ. P., Rule 8(a)(1)*]. The form of prayer in the foregoing complaint is the one customarily used.

The complaint must be signed by the plaintiff's attorney, or by the plaintiff if he or she is not represented by an attorney; and the signer's address must be stated. The signature of an attorney or party constitutes a certificate by him or her that [

Fed. R. Civ. P., Rule 11(b)]:

- He or she has read the complaint;

- To the best of his or her knowledge, information, and belief formed after reasonable inquiry, it is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

- The factual contentions have, or are likely (after reasonable investigation) to have, evidentiary support; and

- It is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If a court determines that a party has violated any of the provisions of *Fed. R. Civ. P., Rule 11(b)*, it may impose on the party, attorney, or law firm responsible for the violation sanctions limited to measures sufficient to deter the same or similar conduct, consisting of nonmonetary directives or penalties to be paid to the court [*Fed. R. Civ. P., Rule 11(c)*].

Except when otherwise specifically provided by rule or statute, a complaint need not be verified [*Fed. R. Civ. P., Rule 11(a)*]. No rule or statute requires that a complaint under *28 U.S.C. § 2409a* be verified.

[9] Government's Disclaimer of Interest

If the government makes an extrajudicial disclaimer of interest in the real property, that fact is inconsequential [*§ 482.87[7][d]*].

If the United States disclaims all interest in the real property or any interest in it adverse to the plaintiff at any time prior to the actual commencement of the trial, and this disclaimer is confirmed by court order, the jurisdiction of the district court will cease unless it has jurisdiction of the civil action or suit on a ground other than and independent of the authority conferred by *28 U.S.C. § 1346(f)* [*28 U.S.C. § 2409a(d)*]. *Section 1346(f)* gives the district courts exclusive jurisdiction of actions under *28 U.S.C. § 2409a*.

Because it has been held that the government's disclaimer before the action has been begun does not relieve the plaintiff of the burden of pleading the government's interest [*Buchler v. United States (E.D. Cal. 1974) 384 F. Supp. 709, 712* ; *§ 482.87[7][d]*], it seems that the disclaimer referred to in *28 U.S.C. § 2409a(d)* must come not only at any time prior to the actual commencement of the trial but also after the commencement of the action. Moreover, if it is to be confirmed by order of the court, the disclaimer must necessarily be made in the action. The court would have no knowledge of an extrajudicial disclaimer.

[10] Government's Election to Retain Possession

The main objection to waiving sovereign immunity against being sued in a quiet title action was that if a plaintiff were successful, he or she might be able to dispossess the government and thereby interfere with the operation of the government. Therefore, *28 U.S.C. § 2409a(b)* provides that in a quiet title action, if the judgment is adverse to the United States, the government may elect to retain possession or control of the real property or any part of it on payment to the plaintiff of an amount that the district court in the same action determines is just compensation for this possession or control" [*28 U.S.C. § 2409a(b)*; *see Buchler v. United States (E.D. Cal. 1974) 384 F. Supp. 709, 710-711]* .

[11] Adverse Possession

Nothing in Title *28 of the United States Code, Section 2409a*, authorizing quiet title actions generally against the United States, is to be construed as permitting suits against the United States based on adverse possession [*28 U.S.C. § 2409a(g)*]. It is a general rule that no person can gain title to property by possession adverse to the government.

[12] Lis Pendens

A notice of an action pending in any United States district court that concerns real property may be recorded in the office of the recorder of the county in which the property is situated [*Code Civ. Proc. § 405.5*], and the requirements of California lis pendens statutes [*Code Civ. Proc. § 405 et seq.*] must be complied with in order to give constructive notice of the United States district court action as it relates to real property in California [*see* 28 U.S.C. § 1968 (notice of pendency of action of any United States district court action concerning real property as recordable under state statutes)]. For further discussion and appropriate forms, see Ch. 348, *Lis Pendens* .

[13] Costs

Except as otherwise specifically provided by statute, a judgment for costs (as enumerated in *28 U.S.C. § 1920*, but not including the fees and expenses of attorneys) may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his or her official capacity in any court having jurisdiction of the action. A judgment for costs when taxed against the United States must, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by the party in the litigation [*28 U.S.C. § 2412(a)(1)*; *see 28 U.S.C. § 2412(a)(2)*]. In addition to awarding these costs, and unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his or her official capacity in any court having jurisdiction of the action. The United States is liable for the fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute that specifically provides for an award [*28 U.S.C. § 2412(b)*; *see 28 U.S.C. § 2412(c)-(f)*].

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Miscellaneous actions in which United States is sued. *28 U.S.C. § 1346*

Partition action in which United States is joint tenant. *28 U.S.C. § 1347*

Actions against United States in Court of Federal Claims. *28 U.S.C. § 1491*

Quiet title action in which United States claims only security interest. *28 U.S.C. § 2410*

Actions to adjudicate water rights in which United States has, or claims, an interest. *43 U.S.C. § 666*

[15] State Statutes

Notice of pendency of action in United States district court concerning real property in California as recordable in county where property situated. *Code Civ. Proc. § 405.20*

[16] Cross References

For discussion of pleading jurisdiction and illustrative forms of jurisdictional allegations, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

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Chapter 483 QUO WARRANTO

42-483 California Forms of Pleading and Practice--Annotated 483.syn

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Chapter 483 QUO WARRANTO
PART I. SCOPE

42-483 California Forms of Pleading and Practice--Annotated § 483.01

§ 483.01 Scope of Chapter

This chapter discusses the statutory action of quo warranto [*see 483.10* et seq.] and provides a Research Guide [*see 483.40* et seq.], Procedural Checklist [*see 483.50* et seq.], and forms for use by a private party in bringing an action in quo warranto.

The forms are:

- Notice of a pending quo warranto application [*see § 483.70*].
- Application to the Attorney General for leave to sue in quo warranto [*see § 483.71*].
- Complaint for use in ousting a usurping public officer [*see § 483.72*] with allegations for use when another is rightfully entitled to the usurped office [*see § 483.73*].
- Complaint for use in determining the validity of annexation proceedings by a municipality [*see § 483.74*].
- Complaint for use in determining the validity of municipal charter amendments [*see § 483.75*].
- Complaint for use in seeking the forfeiture of a corporation's charter for wrongful exercise of its franchise [*see § 483.76*].
- Statement of facts in support of an application to sue in quo warranto [*see § 483.77*].
- Declaration of personal service [*see § 483.78*].
- Undertaking for use when leave to sue in quo warranto has been granted by the Attorney General [*see § 483.79*].

- Judgment for use in quo warranto actions [*see § 483.80*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsQuo WarrantoGovernmentsLocal GovernmentsBoundariesGovernmentsLocal GovernmentsCharters

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42-483 California Forms of Pleading and Practice--Annotated § 483.02

§ 483.02 Cross References

Related chapters in this publication include:

- For discussion and forms relating to staying enforcement on judgment and commencing appeal, see Ch. 42, *Appeal: Notice of Appeal* , and Ch. 43, *Appeal: Stay of Proceedings*

- For discussion, procedural checklist, and forms for use in winding up and dissolving corporations, see Ch. 170, *Corporations: Dissolution and Winding Up*

- For discussion, procedural checklists, and forms relating to seeking declaratory relief, see Ch. 182, *Declaratory Relief*

- For discussion, procedural checklist, and forms relating to bringing an action to contest an election, see Ch. 243, *Elections*

- For discussion, procedural checklists, and forms for use in seeking writs of mandate and prohibition, see Ch. 358, *Mandate and Prohibition*

- For discussion, procedural checklists, and forms for use in seeking a writ of certiorari, see Ch. 492, *Review (Certiorari), Writ of*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDissolution & ReceivershipTermination & Winding UpGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionCivil ProcedureRemediesWritsCommon Law WritsQuo WarrantoCivil ProcedureAppealsReviewabilityNotice of Appeal

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[Reserved]

§§ 483.03[Reserved]

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§ 483.10 Governing Statutes and Regulations

Quo warranto is a statutory civil action in California governed by *Code Civ. Proc. §§ 803-811, 11* Cal. Code Reg. §§ 1-11, 28.1, and all of the pertinent procedural and practice provisions of *Code Civ. Proc. § 307 et seq.* [*People v. Richmond (1956) 141 Cal. App. 2d 107, 117, 296 P.2d 351* (annexation challenged in superior court as trial de novo and not mere review of prior decision by city council on that issue)].

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§ 483.11 Definitions

[1] Relator

A relator is a private party who brings a quo warranto action in the name of the people or in the name of the Attorney General after securing the permission of the Attorney General [*11 Cal. Code Reg § 1*; *Brown v. Memorial Nat. Home Foundation (1958) 162 Cal. App. 2d 513, 538, 329 P.2d 118* (implied consent of Attorney General to prosecution of cross complaint by private party)]. The action is said to be brought by relation of that party [*People v. Milk Producers Asso. (1923) 60 Cal. App. 439, 442, 212 P. 957* (proceeding brought on complaint of private person); *People v. California Protective Corp. (1926) 76 Cal. App. 354, 361, 244 P. 1089* (proceeding brought on complaint of bar association)].

A relator need not be entitled to a contested office in order to bring the action [*People v. Bingham (1889) 82 Cal. 238, 242-243, 22 P. 1039]* .

[2] Franchise

A franchise is a special privilege to perform certain acts or exercise certain functions. It is conferred on a corporation or individual by a government duly empowered legally to grant the privilege. If the privilege is one that any individual may enjoy without a permit from the government or if it is a right which one individual may grant to another without approval of a government, then it is not a franchise [*City of Oakland v. Hogan (1940) 41 Cal. App. 2d 333, 346, 106 P.2d 987]* . For example, the right to practice law is in the nature of a franchise from the state [*People v. California Protective Corp. (1926) 76 Cal. App. 354, 361, 244 P. 1089]* . The right to operate a public utility, such as a private wharfinger out of business on public lands [*City of Oakland v. Hogan (1940) 41 Cal. App. 2d 333, 358, 106 P.2d 987]* or the exclusive distribution of water within the territorial limits of a municipality [*San Ysidro Irr. Dist. v. Superior Court (1961) 56 Cal. 2d 708, 717, 16 Cal. Rptr. 609, 365 P.2d 753]* , are examples of franchises conferred by local governments.

[3] Public Officer

An individual holding a public office is a public officer. A public office is the right, authority, and duty created and

conferred by law by which, for a given period, an individual is invested with power to perform a public function for the public benefit. The term public office includes the positions of city attorney [*People ex rel. Chapman v. Rapsey (1940) 16 Cal. 2d 636, 640, 107 P.2d 388]* , clerk of the court [*Bennett v. Superior Court (1955) 131 Cal. App. 2d 841, 845, 281 P.2d 285]* , and police officer [*Estrada v. Indemnity Ins. Co. (1958) 158 Cal. App. 2d 129, 134-135, 322 P.2d 294]* . But a person exercising no independent powers conferred by the state or operating under the direct control and supervision of a local body is not considered a public officer [*Stout v. Democratic County Cent. Comm. (1952) 40 Cal. 2d 91, 94, 251 P.2d 321* (party committeman held not public officer because performing duties and exercising powers for particular political party and not for government); *Main v. Claremont Unified School Dist. (1958) 161 Cal. App. 2d 189, 205, 326 P.2d 573* (city or district superintendent of schools held not public officer because under direct control of local school board)]. It is unclear if quo warranto may be brought against an "acting" officer appointed to fill the role of an ousted official temporarily [*Nicolopulos v. City of Lawndale (2001) 91 Cal. App. 4th 1221, 1226, 111 Cal. Rptr. 2d 420]* .

[4] Usurpation of Franchise or Office

The "usurpation of franchise or office" is defined as the "unjust intrusion on or exercise of any office, franchise, or liberty belonging to another" [Black's Law Dictionary]. It occurs for example, where a corporation exercises a power which it has no right to exercise [*People v. Rosenstein-Cohn Cigar Co. (1900) 131 Cal. 153, 157, 63 P. 163]* or where a person occupies a public office as a result of an invalid election *[27 Ops. Cal. Att'y Gen. 249, 252 (1956)]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsQuo WarrantoGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsEmployees & Officials

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§ 483.12 Nature and Purpose of Quo Warranto

[1] Determine Right to Office or Franchise

A quo warranto action may be brought to determine the right of a defendant to exercise an office or franchise [*Code Civ. Proc. § 805*] and to exclude a usurper from the office or franchise usurped [*Code Civ. Proc. § 809*]. The remedy is addressed to preventing a continued exercise of an unlawfully asserted authority rather than to correcting what has already been done under that authority. For instance, a quo warranto action may be brought to forfeit a franchise held by a privately owned public utility but not to seek sanctions for failure of the utility to furnish pure or palatable water to its customers [*Citizens Utilities Co. v. Superior Court (1976) 56 Cal. App. 3d 399, 406, 128 Cal. Rptr. 582]* .

[2] Parties Defendant

The Attorney-General may bring a quo warranto action, either upon his or her own information or upon the complaint of a private party, as follows [*Code Civ. Proc. § 803*]:

- Against a person who usurps, intrudes into, or unlawfully holds or exercise any public office, either civil or military.

- Against a person who usurps, intrudes into, or unlawfully holds or exercises any franchise.

- Against a corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises a franchise.

[3] Quo Warranto an Exclusive Remedy

Quo warranto affords the exclusive remedy as to matters coming within its scope [*Wilson v. City of San Bernardino (1960) 186 Cal. App. 2d 603, 611, 9 Cal. Rptr. 431* ; *see Visnich v. Sacramento County Bd. of Education (1974) 37 Cal. App. 3d 684, 690, 112 Cal. Rptr. 469* (quo warranto is the exclusive remedy for trying title to public office)] in the absence of constitutional or statutory regulations providing otherwise [*Cooper v. Leslie Salt Co. (1969) 70 Cal. 2d 627, 633, 75 Cal. Rptr. 766, 451 P.2d 406* ; *International Assn. of Firefighters v. City of Oakland (1985) 174 Cal. App.*

3d 687, 694, 220 Cal. Rptr. 256] . For example, the validity of an annexation could not be determined in action to recover taxes while a quo warranto action challenging the annexation was pending [*Southwest Exploration Co. v. County of Orange (1955) 44 Cal. 2d 549, 556, 283 P.2d 257* (not reaching question whether validity could be challenged in tax action if quo warranto action were not pending)].

A municipal corporation authorized to bring a quo warranto action without the approval of the attorney general may, however, bring an action for declaratory relief to determine the validity of the existence of another political subdivision [*San Ysidro Irr. Dist. v. Superior Court (1961) 56 Cal. 2d 708, 716, 16 Cal. Rptr. 609, 365 P.2d 753]* .

Corp. Code § 1801 makes available a remedy concurrent with the remedy provided by quo warranto [*Citizens Utilities Co. v. Superior Court (1976) 56 Cal. App. 3d 399, 128 Cal. Rptr. 582]* . For discussion of when *Corp. Code § 1801* and quo warranto are both available, see the discussion *§ 483.23*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsQuo Warranto

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§ 483.13 Distinguished From Mandate

Mandate [*see Code Civ. Proc. §§ 1084-1097*] may be brought in any court except a municipal court. It may be issued to compel the performance of an act which the law specifically enjoins such as a duty resulting from an office, trust, or station [*Code Civ. Proc. § 1085*]. For example, mandate to compel the performance of a legal duty is the proper remedy for attacking the validity of annexation proceedings prior to the completion of the proceedings [*Colton v. Rialto (1964) 230 Cal. App. 2d 174, 181-182, 40 Cal. Rptr. 766* ; *Cothran v. Town Council (1962) 209 Cal. App. 2d 647, 650, 26 Cal. Rptr. 319* (mandate to compel termination of annexation proceedings)]. However, once annexation proceedings are complete, quo warranto is the only remedy by which their validity may be attacked [*Los Angeles County v. City Council (1962) 202 Cal. App. 2d 20, 26, 20 Cal. Rptr. 363* ; *People ex rel. Mosk v. City of Santa Barbara (1961) 192 Cal. App. 2d 342, 356, 13 Cal. Rptr. 423]* .

It should be observed, however, that a writ of mandate will issue only to enforce the performance of a clear legal duty and not to compel an action involving discretion [*Nider v. City Commission (1939) 36 Cal. App. 2d 14, 26, 97 P.2d 293]* . Thus, the Attorney General may be compelled to institute a quo warranto action by a writ of mandate where an abuse of discretion is shown in the Attorney General's refusal to bring the action on application of a relator [*Oakland Mun. Improvement League v. City of Oakland (1972) 23 Cal. App. 3d 165, 173, 100 Cal. Rptr. 29* (court of appeal holding that mandate proper to compel Attorney General to institute quo warranto action where abuse of discretion shown but finding no abuse of discretion in Attorney General's refusal of the application for leave to sue involved in the particular situation presented to the court); *see also International Assn. of Firefighters v. City of Oakland (1985) 174 Cal. App. 3d 687, 698, 220 Cal. Rptr. 256* (declaratory relief actions dismissed as quo warranto action is exclusive remedy; leave to file action presumed forthcoming, however if leave not extended by Attorney General, reasons for denial are judicially reviewable by mandamus)].

Mandate may also issue to compel the admission of a party to the use and enjoyment of an office to which he or she is entitled, and from which he or she is being unlawfully precluded by an inferior tribunal, corporation, board, or person [*Code Civ. Proc. § 1085*]. However, mandate may not be used to try title to an office [*Stout v. Democratic County Cent. Comm. (1952) 40 Cal. 2d 91, 94,251 P.2d 321]* or to compel payment of a salary to a person out of office but rightfully entitled to it [*Nider v. City Com. of Fresno (1939) 36 Cal. App. 2d 14, 26, 97 P.2d 293]* . Nevertheless, title to public office may be determined incidentally to a mandate proceeding. Thus, it is proper to determine by way of

mandate whether the public office claimed by a person legally exists [*Stout v. Democratic County Cent. Comm. (1952) 40 Cal. 2d 91, 93-94, 251 P.2d 321* (party committeeman not a public officer)] or whether a vacancy in an office exists [*Klose v. Superior Court (1950) 96 Cal. App. 2d 913, 918, 217 P.2d 97* (vacancy created when councilman became nonresident of district governed)]. In addition, quo warranto is the proper remedy to challenge title to a public office [*Visnich v. Sacramento County Bd. of Education (1974) 37 Cal. App. 3d 684, 690, 112 Cal. Rptr. 469]* .

For additional discussion of the timeliness of a quo warranto action, see the discussion in *§ 483.22[5]*. And for discussion, procedural checklists,and forms for use in bringing mandate proceedings, see Ch. 358, *Mandate and Prohibition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsQuo WarrantoGovernmentsLocal GovernmentsBoundaries

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§ 483.14 Distinguished From Declaratory Relief

Declaratory relief may be sought in an original superior court action or in a cross complaint in a pending superior court action [*see Code Civ. Proc. § 1060 et seq.*]. The proceeding asks for a declaration of rights and duties with respect to a written instrument, property, or the respective interests of the party bringing the action and another in a written instrument or property [*Code Civ. Proc. § 1060*]. Declaratory relief may be prayed for alone or with other relief [*Code Civ. Proc. § 1060*] and is cumulative with any other forms of relief prayed for [*Code Civ. Proc. § 1062*]. When invoked to remedy the abuse, misuse, or nonuse of a franchise, an action in quo warranto partakes of the essentials of a proceeding for declaratory relief [*Oakland v. Key Sys. (1944) 64 Cal. App. 2d 427, 441-442, 149 P.2d 195* (action in quo warranto by city port commission to determine right of defendant to exercise franchise for wharfing and docking on tideland area within territorial limits of municipality)]. However, quo warranto seeks the exclusion of the defendant from a wrongfully exercised office or franchise [*see Code Civ. Proc. § 809*] rather than a declaration of the respective rights of contesting parties to exercise the office or franchise [*see Code Civ. Proc. § 1060*]. For discussion, procedural checklists, and forms for use in bringing a proceeding for declaratory relief, see Ch. 182, *Declaratory Relief* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsQuo Warranto

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§ 483.15 Jurisdiction

Quo warranto falls into the residual category of causes of action within the original jurisdiction of the superior court [*see Cal. Const., art. VI, § 10*; *Citizens Utilities Co. v. Superior Court (1976) 56 Cal. App. 3d 399, 407, 128 Cal. Rptr. 582* (superior court's jurisdiction to cancel franchise)]. The superior court has jurisdiction in quo warranto as an unlimited civil case since jurisdiction in quo warranto has not been specifically included in the matters that may be classified as limited civil cases [*see Code Civ. Proc. §§ 85, 86*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsQuo Warranto

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§ 483.16 Time to Commence Action

[1] Three Months to Attack Annexations

An action to contest the validity of proceedings for the incorporation of a municipal corporation, the annexation of territory to a municipal corporation, or for the consolidation of municipal corporations must be brought within three months after the completion of the proceedings [*Code Civ. Proc. § 349*1/2]. Although *Code Civ. Proc. § 349*1/2 does not refer specifically to quo warranto actions, the three-month limitation imposed by the statute has consistently been applied to quo warranto actions [*see 23 Ops. Cal. Att'y Gen. 300, 304 (1954)* ; *People v. Los Angeles (1928) 93 Cal. App. 532, 536, 538, 269 P. 934* (quo warranto action to contest validity of annexation); *see People v. Town of Corte Madera (1952) 115 Cal. App. 2d 32, 37-38, 251 P.2d 988* (section 3491/2 not applicable to contest subsequent void proceedings which follow completed proceedings to annex same territory)].

[2] Six Months to Attack Certain Acts

An action to contest the validity of acts or proceedings taken under color of law to form, organize, incorporate, dissolve, consolidate, change organization or reorganize, or to change the territorial boundaries of, a city, county, city and county, special district, public corporation or other public entity, or an improvement district within any of the foregoing, must be brought within six months from the date of completion of the acts or proceedings contested [*Code Civ. Proc. § 349.1*].

If no action is commenced within six months to contest the acts or proceedings, they are held valid, legal, and incontestable. These code sections do not supercede any existing statute prescribing a shorter period of limitation [*Code Civ. Proc. § 349.1*].

[3] Sixty Days to Attack Attempted Validation

The legislative body of a city, county, city and county, special district, public corporation or other public entity, or an improvement district, annexed area, or zone within any of the foregoing, may seek to confirm, validate, and declare legally effective certain acts or proceedings undertaken by the entity under color of law provided the legislative body of the entity instructs its clerk or secretary to mail a notice to all owners of property within the entity, as their names and

addresses appear on the last equalized assessment roll or are known to the clerk or secretary [*Code Civ. Proc. § 349.4*]. The notices to property owners must include the following [*Code Civ. Proc. § 349.4*]:

- The name of the entity.
- The date the entity, or zone or improvement district within the entity, was ordered formed or its territory changed by annexation or otherwise.
- The amount of bonds authorized, if any.
- A statement that there are 60 calendar days in which any property owner may file an action contesting the validity of the formation of the entity, improvement district, or zone, the change of boundaries by annexation or otherwise, or the validity of any bond authorization.
- Any additional information the legislative body of the entity deems pertinent.

The clerk or secretary mailing the notices must also make and file a certificate of mailing with the legislative body of the entity [*Code Civ. Proc. § 349.4*].

Therefore, a property owner has 60 calendar days from the date the notices are mailed in which to contest the validity of the following acts or proceedings taken under color of law [*Code Civ. Proc. § 349.4*]:

- The formation, organization, incorporation, or any change in the territorial boundaries of a city, county, city and county, special district, public corporation or other public entity, or an improvement district, annexed area, or zone within any of the foregoing; or
- The authorization, issuance, sale, or exchange of bonds of the entity or territory.

If no action is commenced by any property owner within the 60-day period to contest the acts or proceedings described, the formation of the entity, improvement district, zone, the change of boundaries by annexation or otherwise, or the bond authorization become valid and uncontestable [*Code Civ. Proc. § 349.4*].

[4] Where No Time Limit

Lapse of time is not a bar to bringing a quo warranto action to oust a usurping public officer. Although laches could bar relief, it is assumed that the Attorney General will not permit the institution of a quo warranto action where the claim is stale or the state has ceased to have a present interest in the claim [*People v. Bailey (1916) 30 Cal. App. 581, 585, 158 P. 1036* (no staleness found in claim of ousted police captain where he asserts rights to office at all times and undertakes various legal proceedings to have title, salary, and position restored to him)]. Action may require the election of a new official, since it is unclear if quo warranto may be brought against an "acting" officer appointed to fill the role of an ousted official temporarily [*Nicolopulos v. City of Lawndale (2001) 91 Cal. App. 4th 1221, 1226, 111 Cal. Rptr. 2d 420]* . Moreover, lapse of time is not a bar in bringing a quo warranto action against a corporation illegally exercising a franchise. The continued wrongful exercise of the franchise is considered a continuously renewed usurpation on which a new cause of action arises each day [*People v. Jefferds (1899) 126 Cal. 296, 302, 58 P. 704]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsQuo WarrantoGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLocal GovernmentsBoundariesGovernmentsLocal GovernmentsFinance

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§ 483.17 Joinder of Defendants

Where several persons claim to be entitled to the same office or franchise, an action in quo warranto may be brought against all of them in order to try their respective rights to the office or franchise [*Code Civ. Proc. § 808*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureParties Joinder General OverviewCivil ProcedureRemediesWritsCommon Law WritsQuo Warranto

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§ 483.18 Who May Bring Action

[1] In General

A quo warranto action may be brought:

- By the Attorney General on the complaint of a private party as a relator [*Code Civ. Proc. § 803*; *11 Cal. Code Reg § 1*].
- By the Attorney General on his or her own information [*Code Civ. Proc. § 803*].
- By the Attorney General at the direction of the governor [*Code Civ. Proc. § 803*].
- By the board of supervisors of a county or city and county [*Code Civ. Proc. § 811*].
- By the legislative body of a municipal corporation [*Code Civ. Proc. § 811*].

[2] On Complaint of Private Party as Relator

[a] Presented to Attorney General

A proposed complaint and application for leave to sue may be presented to the Attorney General by a private party, called a relator [*see 11 Cal. Code Reg §§ 1-2*]. For discussion of the procedural requirements for presenting a proposed complaint and application for leave to sue to the Attorney General, see the discussion in *§ 483.19*.

A relator has no right to sue if Attorney General refuses to act on the relator's application or takes a position contrary to the relator [*In re Veterans' Industries Inc. (1970) 8 Cal. App. 3d 902, 925, 88 Cal. Rptr. 303]* .

When the Attorney General has reason to believe a franchise is being usurped and brings a quo warranto action against the alleged usurper, he or she is not estopped by the acts or conduct of the relator in other actions between the relator and the defendant [*People ex rel. Downey v. Downey County Water Dist. (1962) 202 Cal. App. 2d 786, 803, 21 Cal.*

Rptr. 370 (contract between relator and defendant not an estoppel against Attorney General for public policy reasons)].

[b] Attorney General's Discretion in Acting on Relator's Application

The Attorney General has some discretion in passing on the complaints brought before him or her alleging a public wrong to be remedied by a quo warranto action [*People v. Milk Producers Ass'n (1923) 60 Cal. App. 439, 444, 212 P. 957]* . In acting on a relator's application, the Attorney General considers initially whether there exists a substantial question of law or fact that requires judicial resolution, and if so, whether the proposed quo warranto action would serve the overall public interest [83 Ops. Cal. Att'yGen. 63, 64, 69 (2000) (leave to sue denied after finding no substantial question of law or fact sufficient to require judicial resolution on issue whether defendant refused or neglected to timely file oath of office); *see, e.g.,* [*Campbell v. Mosk (1961) 197 Cal. App. 2d 640, 648, 17 Cal. Rptr. 584* (refusal of leave to sue proper where suit would involve three governmental agencies in expensive litigation, no legalprotests were filed at the appropriate time to object to the annexation in question, the bulk of voters in the annexed territory favored annexation, and the proposed relator's interest presented a private rather than public question)].

The Attorney General does not abuse his or her discretion by refusing to permit suit in quo warranto unless he or she acts in an arbitrary manner, denying without good cause a well-founded case presented by a relator. For instance, no abuse of discretion is found where the process of examining the relator's application is shown to have been thorough [*Oakland Mun. Improvement League v. City of Oakland (1972) 23 Cal. App. 3d 165, 172, 100 Cal. Rptr. 29* (letter from Attorney General refusing relator's application and indicating conclusions and giving reasons for them)]. However, where the abuse of discretion by the Attorney General in refusing leave to sue is extreme and clearly indefensible [*Lamb v. Webb (1907) 151 Cal. 451, 454, 91 P. 102, 91 P. 646]* , the Attorney General may be compelled to institute suit by a writ of mandate [*Visnich v. Sacramento County Bd. of Education (1974) 37 Cal. App. 3d 684, 690, 112 Cal. Rptr. 469]* instructing him or her to proceed in the name of the people [*Oakland Mun. Improvement League v. City of Oakland (1972) 23 Cal. App. 3d 165, 173, 100 Cal. Rptr. 29]* .

[3] On Attorney General's Own Information

An Attorney General may bring a quo warranto action on his or her own information and is required to bring the action whenever he or she has reason to believe the grounds for bringing it exist [*Code Civ. Proc. § 803*]. However, it should be observed that the Attorney General rarely files a quo warranto action on his or her own information under this provision.

[4] At Direction of Governor

An Attorney General is required to bring a quo warranto action when directed to do so by the governor [*Code Civ. Proc. § 803*].

[5] By Board of Supervisors or by Legislative Body of Municipal Corporation

[a] Regarding Franchise Within Jurisdiction of Board or Legislative Body

A quo warranto action may be maintained by a board of supervisors or by the legislative body of a municipal corporation where the board or body has jurisdiction to grant or withhold the franchise alleged to be usurped [*Code Civ. Proc. § 811*; *see City of Oakland v. Hogan (1940) 41 Cal. App. 2d 333, 358, 106 P.2d 987* (where legislative body had jurisdiction to grant or withhold franchise to operate private wharf on public lands, legislative body could maintain quo warranto action against alleged usurpers of franchise)]. *Code Civ. Proc. § 811* thus enables boards of supervisors and municipal corporations to initiate their own action without going through or waiting for the Attorney General to commence the action [*Olson v. Sacramento County (1969) 274 Cal. App. 2d 316, 326, 79 Cal. Rptr. 140]* .

[b] Limitation

Under the provisions of *Code Civ. Proc. § 811*, a board of supervisors or legislative body may bring quo warranto actions against persons usurping franchises but not against persons usurping public office [*San Ysidro Irr. Dist. v. Superior Court (1960) 56 Cal. 2d 708, 716, 16 Cal. Rptr. 609, 365 P.2d 753]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsQuo WarrantoCivil ProcedureRemediesWritsCommon Law WritsQuo WarrantoGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsBoundariesGovernmentsState & Territorial GovernmentsEmployees & Officials

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§ 483.19 Procedure by Which Relator Brings Action

[1] Form and Contents of Application for Leave to Sue

The relator commences an action in quo warranto by preparing an application for leave to sue [for the form of application, *see § 483.71*]. In addition to the application itself, the application consists of the following:

- A verified proposed complaint prepared for the signatures of the Attorney General, a Deputy Attorney General, and the attorney for the relator [*11 Cal. Code Reg § 2(a)*; for forms, *see §§ 483.72 -483.76*].

- A verified statement of facts [*11 Cal. Code Reg § 2(a)*; for a forms, *see § 483.77*].

- A memorandum of points and authorities showing why the action should be brought in the name of the people and supporting the relator's contention that a public office or franchise is being usurped, intruded into, or unlawfully held or exercised by the proposed defendant [*11 Cal. Code Reg § 2(b)*].

- A notice informing the proposed defendant that the relator is about to apply to the Attorney General for leave to sue in quo warranto and that he or she may show cause, if any, why leave to sue should not be granted in accordance with the relator's application [*11 Cal. Code Reg § 2(c)*; for a form, *see § 483.70*].

After service of these documents on the proposed defendant, the relator will add the proof of service [*see § 483.78*] to the application for leave to sue [*see 11 Cal. Code Reg § 2(d)*].

[2] Service on Proposed Defendant

The relator must serve the application for leave to sue on the proposed defendant [*11 Cal. Code Reg §§ 1, 2(d)*].

[3] Submission of Application to Attorney General

The relator must file the application for leave to sue with the Attorney General within five days after service of the application on the proposeddefendant [*11 Cal. Code Reg § 1*]. The application submitted must include proof of service of the application [*see § 483.78*] on the proposed defendant [*11 Cal. Code Reg § 2(d)*].

[4] Appearance by Proposed Defendant

[a] Statement of Facts

The proposed defendant may appear and show cause why leave to sue should not be granted by the Attorney General in accordance with the relator's application [*11 Cal. Code Reg § 2(c)*].

The proposed defendant may file a verified statement of facts [*see § 483.77*] in response to that filed by the relator [*11 Cal. Code Reg § 3*] together with proof or admission of service [*11 Cal. Code Reg § 5*].

[b] Time to Appear

The proposed defendant is allowed 15 days, after service on him or her of the application, in which to appear and show cause where the service on the proposed defendant occurs in the county where the proceeding is brought. Where the service on the proposed defendant takes place outside the county in which the proceeding is brought, he or she is allowed 20 days in which to appear. A shorter time may be prescribed by the Attorney General in special cases or on a showing of good cause. In addition, an extension of time may be granted by (1) the Attorney General on a showing of good cause or (2) a stipulation between the relator and proposed defendant filed with the Attorney General [*11 Cal. Code Reg § 3*].

[5] Provisional Leave to Sue Where Urgency Shown

The Attorney General may issue leave to sue provisionally where the relator files an application for leave to sue [*see 11 Cal. Code Reg § 2*] stating the reasons therefor and an undertaking [*see Code Civ. Proc. § 810*; *11 Cal. Code Reg § 6*] with approved sureties. Provisional leave to sue may issue only in special cases and on a sufficient showing of urgent necessity by the relator [*11 Cal. Code Reg § 10*]. For example, the Attorney General may find a special case to exist where it appears that it is necessary to preserve the status quo pending a decision on the application by the Attorney General. And the Attorney General may find urgent necessity where it appears that the statute of limitations may bar the filing of the complaint at a later time.

The relator must file the provisional leave to sue issued by the Attorney General with the complaint in quo warranto [*see 11 Cal. Code Reg § 6*]. However, the relator may take no action beyond filing the complaint and having summons issued until the Attorney General rules on the application for leave to sue. Furthermore, the defendant may appear before the Attorney General and show cause why leave to sue should not be granted. The Attorney General may then determine the relator's right to maintain and prosecute the action in quo warranto [*11 Cal. Code Reg § 10*].

[6] Reply by Relator

The relator may reply within 10 days to any showing by the proposed defendant why the application should not be granted. Further time may be granted on a showing of good cause or on the relator and proposed defendant filing a stipulation with the Attorney General [*11 Cal. Code Reg § 4*]. Proof or admission of service must accompany the relator's reply [*11 Cal. Code Reg § 5*].

[7] Undertaking as Condition of Issuance

When a quo warranto action is to be brought on the information or application of a relator, the Attorney General requires the relator to enter into an undertaking, with sureties to be approved by the Attorney General [*Code Civ. Proc.*

§ 810; *People v. Petroleum Rectifying Co. (1937) 21 Cal. App. 2d 289, 290, 68 P.2d 984]* . It should be noted that sureties meeting the approval of the Attorney General are corporate sureties.

The regulations promulgated by the Attorney General require the relator to present an undertaking [*see § 483.79*] executed to the State of California in the sum of $500 within 10 days of receiving notice that the application for leave to sue is approved unless further time is granted [*11 Cal. Code Reg § 6*]. The undertaking must state that the relator or sureties will pay any judgment for costs or damages recovered against the plaintiff and all costs and expenses incurred in the prosecution of the quo warranto action [*Code Civ. Proc. § 810*; *11 Cal. Code Reg § 6*; *see* 11 Cal. Code Reg § 28].

[8] Issuance of Leave to Sue

The Attorney General transmits leave to sue in the name of the people, in writing, to the relator on receipt and approval of the undertaking [*11 Cal. Code Reg § 6*].

[9] Approval of Complaint

[a] Filed With Leave to Sue

The attorney general may suggest or direct changes in or amendments to the proposed complaint [*11 Cal. Code Reg § 2(a)*] submitted by the relator. The approved complaint [*see §§ 483.72 -483.76*] and leave to sue are filed simultaneously with the clerk of the court. Thereafter, the relator may not change, amend, or alter the complaint without the approval of the Attorney General [*11 Cal. Code Reg § 6*].

[b] Notice of Filing to Attorney General

The relator must immediately inform the Attorney General of (1) the date on which the complaint is filed and (2) the court number of the filed complaint [*11 Cal. Code Reg § 9*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsQuo Warranto

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42-483 California Forms of Pleading and Practice--Annotated § 483.20

§ 483.20 Attorney General Controls Prosecution of Action

[1] Withdrawal or Dismissal of Action

Whether a quo warranto action is brought on the Attorney General's own information or on the complaint of a relator, the Attorney General has control of the action at all times [*People v. Huntington Beach (1954) 128 Cal. App. 2d 452, 455, 275 P.2d 601]* .

For this reason, the Attorney General may, at any and every stage of the quo warranto action, withdraw, discontinue, or dismiss the action as seems fit and proper to him or her and may, at his or her option, assume the management of the quo warranto action at any time [*11 Cal. Code Reg § 8*]. However, no statutory provision points out the exact manner in which the Attorney General's control over quo warranto actions is to be exercised. Likewise, no statutory provision prevents the Attorney General from acting with or through the relator [*People v. Huntington Beach (1954) 128 Cal. App. 2d 452, 456, 275 P.2d 601* (motion for new trial as brought at direction of Attorney General even where notice of intention to move for new trial signed by attorney for relator)].

[2] Notices to Attorney General

The relator must notify the Attorney General without delay of every proceeding had, motion made, paper filed, or thing done with respect to a quo warranto action. Furthermore, the relator must promptly send the Attorney General a copy of every paper or document filed by any of the parties to the action, including the judgment. And, when the relator is served with any paper by the opposing party, the relator must forward an additional copy of that paper to the Attorney General at once [*11 Cal. Code Reg § 9*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsQuo WarrantoGovernmentsState & Territorial GovernmentsEmployees & Officials

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42-483 California Forms of Pleading and Practice--Annotated § 483.21

§ 483.21 Remedying Usurpation of Public or Corporate Office

[1] Challenging Title to Office

Quo warranto actions may be brought to remedy the usurpation of a public office [*Code Civ. Proc. § 803*] by challenging title to the office [*Visnich v. Sacramento County Bd. of Education (1974) 37 Cal. App. 3d 684, 690, 112 Cal. Rptr. 469]* .

The usurpation may be in the nature of one person holding two incompatible offices, thus creating a vacancy in one of them [*People ex rel. Chapman v. Rapsey (1940) 16 Cal. 2d 636, 644, 107 P.2d 388* (positions of municipal judge and city attorney held by one individual); *People v. Garrett (1925) 72 Cal. App. 452, 458, 237 P. 829* (justice of the peace named police judge in same jurisdiction)]. Such usurpation also may be in the nature of two persons holding certificates of election declaring them entitled to exercise the same office [*People v. Davidson (1905) 2 Cal. App. 100, 103, 83 P. 161]* .

In addition, usurpation may be in the nature of a person holding office on the board of directors of a private corporation as the result of an invalid election [*Guaranty Loan Co. v. Fontanel (1920) 183 Cal. 1, 8-9, 190 P. 177* (applied against directors of loan company); *Stesel v. Santa Ana R. Water Co. (1939) 35 Cal. App. 2d 117, 124, 94 P.2d 1052* (applied against directors of private water company)].

[2] Incumbent's Salary Withheld Pending Outcome

When the title of an incumbent of a public office is contested, no warrant is thereafter drawn or paid for his or her salary until title to the office is finally determined [*Gov. Code § 1130*] unless he or she holds the certificate of election or commission and discharges the duties of the office [*Gov. Code § 1132*]. When an action is instituted to try title, the clerk of the court in which the action is pending certifies the facts to the officers whose duty it would otherwise be to draw the warrant or pay the salary [*Gov. Code § 1131*].

[3] Abatement of Action

A quo warranto action is abated where the defendant voluntarily surrenders the challenged office [*People v. Muehe*

(1931) 114 Cal. App. 739, 740, 300 P. 829] or is validly appointed to the office *[25 Ops. Cal. Att'y Gen. 223, 224-225 (1955)* (leave to sue denied where second valid appointment of proposed defendant to seat on city council supercedes first invalid appointment)]. Ouster of the defendant from office thus becomes an unnecessary act unless the prosecution of the action is required for some purpose beyond the ouster of the defendant for the benefit of the plaintiff [*People v. Muehe (1931) 114 Cal. App. 739, 740, 300 P. 829* ; *25 Ops. Cal. Att'y Gen. 223, 225 (1955)]* , such as determining another claimant's right to the office [*People v. Bailey (1916) 30 Cal. App. 581, 586, 158 P. 1036]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersTerms in OfficeElectionsCivil ProcedureRemediesWritsCommon Law WritsQuo Warranto

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42-483 California Forms of Pleading and Practice--Annotated § 483.22

§ 483.22 Remedying Usurpation of Franchise by Person

[1] In General

Quo warranto actions may be brought to remedy the usurpation of a franchise by a person [*Code Civ. Proc. §§ 803* (by or with consent of Attorney General), *811* (by board of supervisors or legislative body of municipal corporation)].

[2] Statutes as Applicable to Public Corporations

A municipal corporation is a "person" within the meaning of *Code Civ. Proc. § 803 [20 Ops. Cal. Att'y Gen. 93, 94 (1952)]* and, while *Code Civ. Proc. § 811* refers only to persons usurping a franchise, it is also applied against public corporations and governmental bodies [*San Ysidro Irr. Dist. v. Superior Court (1961) 56 Cal. 2d 708, 716, 717, 16 Cal. Rptr. 609, 365 P.2d 753* (applied against irrigation district)].

[3] Remedy Against Public Corporation

A quo warranto action may be brought to challenge the validity of incorporation or to attack the regularity of organization of municipal or other public corporations, such as reclamation or irrigation districts [*Wilson v. City of San Bernardino (1960) 186 Cal. App. 2d 603, 611, 9 Cal. Rptr. 431]* and county water districts [*Alden v. Superior Court (1963) 212 Cal. App. 2d 764, 768, 28 Cal. Rptr. 387]* . This is true whether their jurisdiction is de jure or de facto [*Bray v. Payne (1930) 210 Cal. 465, 469, 292 P. 478]* . Such an action may also be brought to challenge the validity of a county charter [*Santa Clara County v. Hayes Co. (1954) 43 Cal. 2d 615, 618, 275 P.2d 456]* .

Quo Warranto is also, for example, a proper remedy to challenge county's consolidation of corrections department and probation office on grounds that corrections and probation are incompatible offices and it was improper to subordinate corrections to probation [*People ex rel. Deputy Sheriffs' Assn. (1996) 49 Cal. App. 4th 1471, 1476, 1491, 57 Cal. Rptr. 2d 322]* .

[4] Validity of Annexation of Territory

[a] Determined by Compliance With Enabling Statute

In annexing territory, a municipal or other public corporation is subject to the statute which authorizes the annexation. That statute constitutes the measure of power to be exercised by the municipality [*City of Port Hueneme v. City of Oxnard (1959) 52 Cal. 2d 385, 393, 341 P.2d 318]* . The annexation proceeding is subject to court interference in quo warranto for usurpation of a franchise only to the extent the attempted annexation goes beyond the enabling statute in a basic and fundamental respect [*Olson v. City of Hawthorne (1965) 235 Cal. App. 2d 51, 53, 45 Cal. Rptr. 48* (courts will interfere with annexation proceeding in case of fraudulent abuse of powers conferred by statute; cancellation of voters' registrations of residents so territory could be annexed as "uninhabited" found not fraudulent where voters relinquished registrations voluntarily and with full knowledge of effect of their act); *People v. Town of Corte Madera (1950) 97 Cal. App. 2d 726, 732, 218 P.2d 810* (contiguity requirement of annexation statute violated)] or amounts to a fraudulent abuse of the powers conferred by the enabling statute.

[b] Time at Which Validity of Annexation Tested

The validity of an act of annexation is determined as of the date it purportedly took place. For instance, where a water district merges with a city by operation of law, subsequent acts by the water district to annex territory outside the city limits are void from their inception for want of a legally existing entity with jurisdiction to effect an annexation [*People ex rel. Downey v. Downey County Water Dist. (1962) 202 Cal. App. 2d 786, 802-803, 21 Cal. Rptr. 370]* .

[5] Completeness of Proceedings Required

Except as provided in *Code Civ. Proc. § 349.4* (60 days to challenge territorial change or bond authorization after date notice sent by public entity), a quo warranto action to challenge an annexation cannot be brought until the annexation proceedings are complete [*People ex rel. Mosk v. City of Santa Barbara (1961) 192 Cal. App. 2d 342, 356, 13 Cal. Rptr. 423]* and the annexing municipal corporation or district is exercising control over the territory allegedly annexed [*Amer. Distl. Co. v. City Council, Sausalito (1950) 34 Cal. 2d 660, 667, 213 P.2d 704* ; *City of Colton v. City of Rialto (1964) 230 Cal. App. 2d 174, 181-182, 40 Cal. Rptr. 766]* . Prior to the time at which proceedings are complete and the right to bring a quo warranto action matures, the proper remedy to test the validity of the proceedings is certiorari and the proper remedy to compel termination of the proceedings is mandate [*San Mateo County v. City Council (1959) 168 Cal. App. 2d 220, 221, 335 P.2d 1013* (proceeding in certiorari and mandate questioning legality of a city council's resolution giving notice of the proposed annexation of territory situated in another county)]. Likewise, a quo warranto action to challenge the validity of a charter is possible only after the charter is put into effect [*Santa Clara County v. Hayes Co. (1954) 43 Cal. 2d 615, 618, 275 P.2d 456* ; *Oakland Mun. Improvement League v. City of Oakland (1972) 23 Cal. App. 3d 165, 169, 100 Cal. Rptr. 29]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsQuo WarrantoGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsBoundaries

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42-483 California Forms of Pleading and Practice--Annotated § 483.23

§ 483.23 Remedying Usurpation of Franchise by Corporation

[1] Unlawful Exercise of Privilege by Corporation

A quo warranto action may be brought to remedy the usurpation of a franchise by a corporation [*Code Civ. Proc. § 803*]. A corporation usurps a franchise when:

- It exercises a privilege unlawful for it to exercise [*People v. Merchants Protective Corp. (1922) 189 Cal. 531, 539-540, 209 P. 363* (practice of law); *People v. California Protective Corp. (1926) 76 Cal. App. 354, 361, 244 P. 1089* (unlawful privilege exercised where corporationengages in practice of law by employing attorneys to provide legal services for its members and clients)].

- Performs acts either not authorized or forbidden to it [*People v. Milk Producers Ass'n (1923) 60 Cal. App. 439, 441, 212 P. 957* (nonprofit corporation operating for profit and violating statutes prohibiting trusts in restraint of trade)].

- Misuses and abandons its franchise [*People ex rel. Boole v. Northwestern P. R. Co. (1937) 20 Cal. App. 2d 120, 122-123, 66 P.2d 697* (no cause of action shown for cancellation of franchise for nonuse and abandonment when complaint shows some services actually rendered)].

However, quo warranto is not a means by which censorship is imposed on a corporation for abuse of the franchise granted to it. For instance, a court will not forfeit an insurance company's franchise to underwrite automobile liability policies for having published advertisements on the subject of excessive jury verdicts in several national magazines [*People v. American Auto. Ins. Co. (1955) 132 Cal. App. 2d 317, 326, 282 P.2d 559]* .

[2] Corp. Code § 1801 as Concurrent Remedy

The remedy in quo warranto is concurrent with that provided by *Corp. Code § 1801* [*Citizens Utilities Co. v. Superior Court (1976) 56 Cal. App. 3d 399, 405, 128 Cal. Rptr. 582* ; *Brown v. Memorial Nat. Home Foundation (1958) 162 Cal. App. 2d 513, 540, 329 P.2d 118]* . Under the provisions of *Corp. Code § 1801*, the Attorney General is authorized to bring an action for the involuntary dissolution of a domestic or purportedly domestic corporation which has seriously

offended against a provision of the statutes regulating corporations [*Corp. Code § 1801(a)(1)*], has fraudulently abused or usurped corporate privileges or powers [*Corp. Code § 1801(a)(2)*], has violated any provision of law by act or default that is a ground for forfeiture of corporate existence [*Corp. Code § 1801(a)(3)*; *Citizens Utilities Co. v. Superior Court (1976) 56 Cal. App. 3d 399, 405, 128 Cal. Rptr. 582]* , or has failed to pay taxes as required by the Bank and Corporation Tax Law to the Franchise Tax Board for five years [*Corp. Code § 1801(a)(4)*]. *Corp. Code § 1801* gives the corporation an opportunity to cure its derelictions by charter amendment or other corporate action [*Corp. Code § 1801(b)*; *Brown v. Memorial Nat'l Home Foundation (1958) 162 Cal. App. 2d 513, 540, 329 P.2d 118]* before an action to dissolve the corporation is brought [*Corp. Code § 1801(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDissolution & ReceivershipInvoluntary DissolutionCivil ProcedureRemediesWritsCommon Law WritsQuo WarrantoTax LawState & Local TaxesFranchise TaxFailure to Pay Tax

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§ 483.24 Judgment

Judgment [*see § 483.80*] may be rendered in every case on the right of the defendant to exercise an office or franchise. And, judgment may also be rendered on the right of the person alleged to be entitled to an office, as justice requires [*Code Civ. Proc. § 805*].

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§ 483.25 Effect of Judgment

[1] Exclusion of Usurper

When a defendant, against whom a quo warranto action is brought, is adjudged guilty of usurping, intruding into, or unlawfully holding an office, franchise, or privilege, judgment is rendered to the effect that the defendant is excluded from the office, franchise, or privilege [*Code Civ. Proc. § 809*]. A judgment ousting or excluding a usurper is self-executing [*People v. West Side County Water Dist. (1952) 112 Cal. App. 2d 228, 233, 246 P.2d 119]* and requires no process for its enforcement [*People v. Westmoreland (1933) 135 Cal. App. 517, 519, 27 P.2d 394]* . For instance, a judgment in quo warranto finding that a water district did not form as a result of failing to meet basic statutory requirements is fatal to the existence of the purported district without additional proceedings by the court [*People v. West Side County Water Dist. (1952) 112 Cal. App. 2d 228, 233, 246 P.2d 119]* .

[2] Costs and Fine Levied on Defendant

The defendant must pay the costs of the action if found guilty of usurpation of an office or franchise. In addition, the court may, in its discretion, impose on the defendant a fine not exceeding $5,000. Although quo warranto is a civil action, the imposition of the fine permitted by *Code Civ. Proc. § 809* is clearly penal in nature and is not for the purpose of compensating the state or returning to the state anything belonging to it. For this reason the imposition of the fine rests solely within the discretion of the court and is not based on evidence of loss or damage [*People v. Sutter St. Ry. Co. (1900) 129 Cal. 545, 547, 62 P. 104]* . Thus, where usurpation of a franchise is shown to have been purposeful and willful, a fine may be imposed on the corporate usurper as a punishment [*People v. California Protective Corp. (1926) 76 Cal. App. 354, 363, 244 P. 1089]* . And, where the usurpation of a public office is shown, the fine may be imposed on the defendant whether or not the relator is found rightfully entitled to the office [*People v. Bingham (1889) 82 Cal. 238, 243, 22 P. 1039]* . When collected, the fine is paid into the treasury of the state [*Code Civ. Proc. § 809*].

[3] Right to Assume Office

[a] Assumption of Office

If judgment is rendered in favor of the right of a person alleged to be entitled to an office, that person is entitled to take

and execute the office after taking the oath of office and executing an official bond as required by law [*Code Civ. Proc. § 806*] and is then entitled to draw his or her salary as an officer de jure [*see Bledsoe v. Colgan (1902) 138 Cal. 34, 36-37, 70 P. 924]* .

[b] Damages Awarded

If judgment is made in favor of the person alleged to be entitled to the office, he or she may recover the damages sustained as a result of the usurpation of office by the defendant [*Code Civ. Proc. § 807*]. In the absence of a statute providing otherwise, the measure of damages recoverable by a party rightfully entitled to an office is the salary and fees payable to the usurper during his or her incumbency in the office [*Chubbuck v. Wilson (1907) 151 Cal. 162, 164, 90 P. 524]* . However, *Code Civ. Proc. § 807* does not authorize as the recovery of damages the amount of salary or compensation of which the rightfully entitled party was deprived when the defendant received that salary or compensation by virtue of holding a certificate of election or commission and exercising the office [*Chubbuck v. Wilson (1907) 151 Cal. 162, 168-169, 90 P. 524* (sheriff holding certificate of election and discharging duties of county sheriff protected by *Gov. Code § 1132* during pendency of action contesting title to office)].

[4] Judgment Not Retroactive

A judgment of exclusion is not retroactive. For instance, a judgment of ouster, or exclusion, has no legal effect on the exercise of a defendant municipal corporation's franchise prior to the entry of judgment [*Bray v. Payne (1930) 210 Cal. 465, 471, 292 P. 478* (court questioning consolidation as unable to rule on status of de facto municipal corporation to attempt consolidation)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsQuo Warranto

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42-483 California Forms of Pleading and Practice--Annotated § 483.26

§ 483.26 Appeal

[1] Who May Appeal

The relator may appeal from an adverse judgment only after first securing the approval of the Attorney General [*11 Cal. Code Reg § 11*; *People v. Huntington Beach (1954) 128 Cal. App. 2d 452, 455, 275 P.2d 601]* . The approval may be informal, as where the Attorney General transmits a timely dated letter consenting to an appeal by the relator [*People ex rel. Bellflower v. Bellflower County Water Dist. (1966) 247 Cal. App. 2d 344, 347, 55 Cal. Rptr. 584]* .

[2] When Appeal Moot

An appeal by a defendant found guilty of usurping an office, and thus excluded from the office, becomes moot if that defendant resigns from the disputed office [*People v. Craig (1937) 9 Cal. 2d 615, 616-617, 72 P.2d 135* (appeal dismissed where associate justice of court of appeals resigns after judgment of ouster)].

[3] No Stay of Enforcement Pending Appeal

The perfecting of an appeal does not stay proceedings, in the absence of an order of the trial court providing otherwise or of a writ of supersedas, where a party to the proceeding is adjudged guilty of usurping, intruding into, or unlawfully holding a public office, civil or military, in California [*Code Civ. Proc. § 917.8*; *Day v. Gunning (1899) 125 Cal. 527, 528-529, 58 P. 172* (applicable to public officer ousted by judgment in quo warranto action but not by judgment in election contest)]. Because the operation of a judgment ousting a usurping defendant is not stayed by an appeal, the relator, in qualifying for the office, may properly enter into the duties of the office during the pendency of the appeal [*People v. Campbell (1902) 138 Cal. 11, 18, 70 P. 918* (relator assuming office of superior court judge where appeal taken by intervener)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsQuo Warranto

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[Reserved]

§§ 483.27[Reserved]

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§ 483.40 Related Texts From LEXIS Publishing

For forms of memoranda for use in quo warranto proceedings, see California Points and Authorities, Ch. 199, *Quo Warranto* (Matthew Bender)

For further discussion of quo warranto actions involving corporations, see Ballantine and Sterling,California Corporation Laws (4th ed.), Ch. 15, *Dissolution and Winding Up*, § 320.06

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 483.41 State Constitution

Residual jurisdiction of superior court. *Cal. Const., art. VI, § 10*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionJurisdictional SourcesConstitutional Sources

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§ 483.42 State Statutes

[1] Appeal

In absence of trial court's order or writ of supersedas, no stay of enforcement is permitted for party found guilty of usurpation. *Code Civ. Proc. § 917.8*

[2] Distinguished From Declaratory Relief

Quo warranto excludes defendant from wrongfully exercised office or franchise. *Code Civ. Proc. § 809*

Statutes governing declaratory relief, generally. *Code Civ. Proc. §§ 1060 et seq.*

Declaratory relief seeks declaration of rights and duties. *Code Civ. Proc. § 1060*

Declaratory relief is cumulative with any other relief prayed for. *Code Civ. Proc. § 1062.3*

[3] Distinguished From Mandate

Statutes governing mandate, generally. *Code Civ. Proc. §§ 1084-1097*

Mandate compels act enjoined by law and resulting from office, trust, or station. *Code Civ. Proc. § 1085*

Mandate compels admission of party to use and enjoyment of office to which he or she entitled and precluded unlawfully. *Code Civ. Proc. § 1085*

[4] Effect of Judgment

Judgment in favor of person alleged to be entitled to office entitles that person to take office on taking oath and executing any required bond. *Code Civ. Proc. § 806*

Judgment in favor of person alleged to be entitled to office entitles that person to recover damages sustained as result of usurpation. *Code Civ. Proc. § 807*

Defendant found guilty of usurpation is required to pay costs of action; court has discretion to impose fine not exceeding $5,000. *Code Civ. Proc. § 809*

Judgment excludes defendant found guilty of usurpation from office, franchise, or privilege. *Code Civ. Proc. § 809*

[5] Joinder of Defendants

Joinder of defendants is permitted where several persons claim to be entitled to same office or franchise. *Code Civ. Proc. § 808*

[6] Judgment

Judgment is rendered on right of defendant to exercise office or franchise and may be rendered on right of person alleged to be entitled to office. *Code Civ. Proc. § 805*

[7] Nature and Purpose of Quo Warranto

Parties against whom quo warranto may be brought; grounds for action. *Code Civ. Proc. § 803*

Quo warranto as action to determine right of defendant to exercise office or franchise. *Code Civ. Proc. § 805*

Quo warranto as action to exclude usurper from office or franchise usurped. *Code Civ. Proc. § 809*

[8] Procedure by Which Relator Brings Action

Attorney General as requiring undertaking as condition of issuing leave to sue in quo warranto; contents of undertaking. *Code Civ. Proc. § 810*

[9] Time to Commence Action

Three months in which to attack validity of annexations, incorporations, or consolidations of municipal corporations. *Code Civ. Proc. § 349*1/2

Six months from completion of acts or proceedings under color of law to contest validity. *Code Civ. Proc. § 349.1*

Acts or proceedings deemed valid after six months; six months as not superceding any other statute's imposition of shorter or longer period of limitation. *Code Civ. Proc. § 349.1*

Acts or proceedings deemed valid 60 days after notice to property owners; 60 days in which property owners may contest change in boundaries or bond authorization. *Code Civ. Proc. § 349.4*

[10] Usurpation of Franchise by Corporation

Quo warranto as brought to remedy usurpation of franchise by corporation. *Code Civ. Proc. § 803*

Grounds for dissolving corporation or forfeiting charter of corporation. *Corp. Code § 1801(a)*

Opportunity for corporation to cure its derelictions by charter amendment or other corporate action. *Corp. Code § 1801(b)*

[11] Usurpation of Franchise by Person

Quo warranto as brought to remedy usurpation of franchise by person. *Code Civ. Proc. §§ 803, 811*

[12] Usurpation of Public Office

Quo warranto as brought to remedy usurpation of public office. *Code Civ. Proc. § 803*

When incumbent's title to office contested, no warrant of payment as issued until title determined. *Gov. Code § 1130*

Certification of fact of contest of title from clerk of court to officer whose duty is to draw warranto or pay salary. *Gov. Code § 1131*

Warrants of payment as issued to incumbent whose title contested where incumbent holds certificate of election or commission and exercises duties of office. *Gov. Code § 1132*

[13] Who May Bring Action

Who may bring action in quo warranto. *Code Civ. Proc. §§ 803, 811*

Attorney General as bringing quo warranto action on own information where reason to believe grounds for bringing it exist. *Code Civ. Proc. § 803*

Attorney General as required to bring action at direction of governor. *Code Civ. Proc. § 803*

Quo warranto action as brought by board of supervisors or legislative body of municipal corporation against usurper of franchise. *Code Civ. Proc. § 811*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureParties Joinder General OverviewCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsQuo WarrantoGovernmentsLegislationStatutes of LimitationsTime Limitations

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42-483 California Forms of Pleading and Practice--Annotated § 483.43

§ 483.43 Administrative Regulations

Relator as private party bringing quo warranto action after securing permission of Attorney General. *11 Cal. Code Reg § 1*

Submission of application to Attorney General within five days after service on proposed defendant. *11 Cal. Code Reg § 1*

Relator as presenting Attorney General with proposed complaint and application for leave to sue in quo warranto. *11 Cal. Code Reg §§ 1-2*

Application for leave to sue as served on proposed defendant. *11 Cal. Code Reg §§ 1, 2(d)*

Form and contents of application for leave to sue. *11 Cal. Code Reg § 2(a)-(c)*

Proposed defendant's appearance to show cause why leave to sue should not be granted. *11 Cal. Code Reg § 2(c)*

Application as submitted to Attorney General required to include proof of service on proposed defendant. *11 Cal. Code Reg § 2(d)*

Verified statement of facts by proposed defendant in response to relator's statement of facts. *11 Cal. Code Reg § 3*

Time in which proposed defendant may appear; shortening of time; extensions of time. *11 Cal. Code Reg § 3*

Time in which relator may reply to proposed defendant's showing. *11 Cal. Code Reg § 4*

Proof or admission of service as required. *11 Cal. Code Reg § 5*

Amount of undertaking; time in which to present to attorney general; contents of undertaking. *11 Cal. Code Reg § 6*

Leave to sue transmitted in writing to relator on receipt of undertaking. *11 Cal. Code Reg § 6*

Changes in proposed complaint at Attorney General's direction; complaint and leave to sue filed simultaneously; no changes in complaint without Attorney General's approval. *11 Cal. Code Reg § 6*

Attorney General's power to withdraw, discontinue, dismiss, or assume management of quo warranto action at any time. *11 Cal. Code Reg § 8*

Relator as required to inform Attorney General of filing of complaint. *11 Cal. Code Reg § 9*

Relator as required to notify Attorney General of all developments, including all papers served by or to relator. *11 Cal. Code Reg § 9*

When provisional leave to sue will issue. *11 Cal. Code Reg § 10*

Approval of Attorney General required for appeal by relator from adverse judgment. *11 Cal. Code Reg § 11*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessProofGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsQuo WarrantoGovernmentsLocal GovernmentsEmployees & Officials

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§ 483.44 Decisions

[1] Appeal

[a] No Stay of Enforcement Pending Appeal

Because no stay of appeal, relator as properly entering into duties of office on qualifying for office. *People v. Campbell (1902) 138 Cal. 11, 18, 70 P. 918*

No stay of appeal as to public officer ousted by judgment in quo warranto but stay of appeal permitted as to public officer in election contest. *Day v. Gunning (1899) 125 Cal. 527, 528-529, 58 P. 172*

[b] When Appeal Moot

Appeal by defendant found guilty of usurping public office as moot when defendant resigns from disputed office. *People v. Craig (1937) 9 Cal. 2d 615, 616-617, 72 P.2d 135*

[c] Who May Appeal

Approval of Attorney General required for appeal by relator from adverse judgment. *People v. Huntington Beach (1954) 128 Cal. App. 2d 452, 455, 275 P.2d 601*

Attorney General's approval as permitted to be informal, such as a timely dated letter to relator. *People ex rel. Bellflower v. Bellflower County Water Dist. (1966) 247 Cal. App. 2d 344, 347, 55 Cal. Rptr. 584*

[d] Attorney General as Controlling Prosecution of Action

Attorney General as having control of quo warranto action at all times. *People v. Huntington Beach (1954) 128 Cal.*

App. 2d 452, 455, 275 P.2d 601

No statutory provisions as pointing out manner in which Attorney General's control exercised or preventing Attorney General from acting through relator. *People v. Huntington Beach (1954) 128 Cal. App. 2d 452, 456, 275 P.2d 601*

[2] Definitions

[a] Franchise

Right to operate public utility as a franchise. *San Ysidro Irr. Dist. v. Superior Court (1961) 56 Cal. 2d 708, 717, 16 Cal. Rptr. 609, 365 P.2d 753* (exclusive distribution of water within territorial limits of municipality)

Right to operate a public utility as a franchise. *City of Oakland v. Hogan (1940) 41 Cal. App. 2d 333, 358, 106 P.2d 987* (private wharfinger out of business on public lands)

Franchise as special privilege to perform certain functions conferred by government on person or corporation. *City of Oakland v. Hogan (1940) 41 Cal. App. 2d 333, 346, 106 P.2d 987*

Right to practice law as a franchise. *People v. California Protective Corp. (1926) 76 Cal. App. 354, 361, 244 P. 1089*

[b] Public Officer

Person as not a public officer if no exercise of independent powers conferred by state. *Stout v. Democratic County Cent. Comm. (1952) 40 Cal. 2d 91, 94, 251 P.2d 321*

Public officer as conferred by law with right to perform public function for specified period of time for public benefit. *People ex rel. Chapman v. Rapsey (1940) 16 Cal. 2d 636, 640, 107 P.2d 388*

Person as not a public officer if under direct control and supervision of local body. *Main v. Claremont Unified School Dist. (1958) 161 Cal. App. 2d 189, 205, 326 P.2d 573*

Police officer as public officer. *Estrada v. Indemnity Ins. Co. (1958) 158 Cal. App. 2d 129, 134-135, 322 P.2d 294*

Clerk of court as public officer. *Bennett v. Superior Court (1955) 131 Cal. App. 2d 841, 845, 281 P.2d 285*

[c] Relator

Relator is not required to be person entitled to contested office. *People v. Bingham (1889) 82 Cal. 238, 242-243, 22 P. 1039*

Relator as private party bringing quo warranto action after securing permission of *Attorney General. Brown v. Memorial Nat'l Home Foundation (1958) 162 Cal. App. 2d 513, 538, 329 P.2d 118*

When action brought by relation of a party. *People v. California Protective Corp. (1926) 76 Cal. App. 354, 361, 244 P. 1089* ; *People v. Milk Producers Ass'n (1923) 60 Cal. App. 439, 442, 212 P. 957*

Usurpation of franchise as occurring where corporation exercises power it has no right to exercise. *People v. Rosenstein-Cohn Cigar Co. (1900) 131 Cal. 153, 157, 63 P. 163*

[3] Distinguished From Declaratory Relief

Action in quo warranto to remedy abuse, misuse, or nonuse of franchise as having essential of proceeding in declaratory relief. *Oakland v. Key Sys. (1944) 64 Cal. App. 2d 427, 441-442, 149 P.2d 195*

[4] Distinguished From Mandate

Mandate as incapable of trying title to office. *Stout v. Democratic County Cent. Comm. (1952) 40 Cal. 2d 91, 94, 251 P.2d 321*

Title to public office as properly determined incidental to mandate proceeding. *Stout v. Democratic County Cent. Comm. (1952) 40 Cal. 2d 91, 93-94, 251 P.2d 321*

Challenge to title to public office as proper in quo warranto. *Visnich v. Sacramento County Bd. of Education (1974) 37 Cal. App. 3d 684, 690, 112 Cal. Rptr. 469*

Mandate issues only to enforce performance of clear legal duty and not to control action involving discretion. *Oakland Mun. Improvement League v. City of Oakland (1972) 23 Cal. App. 3d 165, 173, 100 Cal. Rptr. 29* ; *Nider v. City Commission (1939) 36 Cal. App. 2d 14, 26, 97 P.2d 293*

Mandate as proper remedy to attack validity of annexation proceedings prior to completion. *City of Colton v. City of Rialto (1964) 230 Cal. App. 2d 174, 181-182, 40 Cal. Rptr. 766* ; *Cothran v. Town Council (1962) 209 Cal. App. 2d 647, 650, 26 Cal. Rptr. 319*

Quo warranto as only proper remedy to attack completed annexation proceedings. *Los Angeles County v. City Council (1962) 202 Cal. App. 2d 20, 26, 20 Cal. Rptr. 363* ; *People ex rel. Mosk v. City of Santa Barbara (1961) 192 Cal. App. 2d 342, 356, 13 Cal. Rptr. 423*

Whether vacancy exists in public office as properly determined in mandate. *Klose v. Superior Court (1950) 96 Cal. App. 2d 913, 918, 217 P.2d 97*

Mandate as incapable of compelling payment of salary to person wrongfully excluded from public office to which entitled. *Nider v. City Commission (1939) 36 Cal. App. 2d 14, 26, 97 P.2d 293*

[5] Effect of Judgment

[a] Cost; Fine

Fine authorized by *Code Civ. Proc. § 809* as penal in nature and not for purpose of compensating state or returning to state anything belonging to it. *People v. Sutter St. Ry. Co. (1900) 129 Cal. 545, 547, 62 P. 104*

Fine to be imposed on defendant as not dependent on whether or not relator found rightfully entitled to office. *People v. Bingham (1889) 82 Cal. 238, 243, 22 P. 1039*

Corporation as fined under *Code Civ. Proc. § 809* when usurpation found to be purposeful and willful. *People v. California Protective Corp. (1926) 76 Cal. App. 354, 363, 244 P. 1089*

[b] Exclusion of Usurper

Judgment ousting or excluding defendant as self-executing. *People v. West Side County Water Dist. (1952) 112 Cal. App. 2d 228, 233, 246 P.2d 119* ; *People v. Westmoreland (1933) 135 Cal. App. 517, 519, 27 P.2d 394*

[c] Judgment as Not Retroactive

Judgment of exclusion as not retroactive. *Bray v. Payne (1930) 210 Cal. 465, 471, 292 P. 478*

[d] Right to Assume Office

[i] Right to Salary

Once person entitled to office takes office, he or she as entitled to draw salary as officer de jure. *Bledsoe v. Colgan (1902) 138 Cal. 34, 36-37, 70 P. 924*

[ii] Damages Awarded

Measure of damages for person found rightfully entitled to office. *Chubbuck v. Wilson (1907) 151 Cal. 162, 164, 168-169, 90 P. 524*

[6] Governing Statutes

Quo warranto as civil action governed by pertinent procedural and practice provisions of *Code of Civ. Proc. § 307 et seq.*). *People v. Richmond (1956) 141 Cal. App. 2d 107, 117, 296 P.2d 351*

[7] Jurisdiction

Quo warranto as falling within original jurisdiction of superior court. *Citizens Utilities Co. v. Superior Court (1976) 56 Cal. App. 3d 399, 407, 128 Cal. Rptr. 582*

[8] Nature and Purpose of Quo Warranto

Declaratory relief actions brought by firefighters union and individuals as not maintainable to determine validity of local propositions adopted by city electorate that amended city charter, because exclusive method of attack on city charter amendments lies in quo warranto action that may only be brought by *Attorney General. International Assn. of Firefighters v. City of Oakland (1985) 174 Cal. App. 3d 687, 694-698, 220 Cal. Rptr. 256*

Remedy of quo warranto as addressed to preventing continued exercise of unlawfully asserted authority. *Citizens Utilities Co. v. Superior Court (1976) 56 Cal. App. 3d 399, 406, 128 Cal. Rptr. 582*

Quo warranto as exclusive remedy to test validity of existence of irrigation district in absence of constitutional or statutory regulations providing otherwise. *Cooper v. Leslie Salt Co. (1969) 70 Cal. 2d 627, 633, 75 Cal. Rptr. 766, 451 P.2d 406*

Remedy provided by *Corp. Code § 1801* as concurrent with remedy provided by quo warranto. *Citizens Utilities Co. v. Superior Court (1976) 56 Cal. App. 3d 399, 405, 128 Cal. Rptr. 582*

Quo warranto an exclusive remedy as to matters within its scope. *Wilson v. City of San Bernardino (1960) 186 Cal. App. 2d 603, 611, 9 Cal. Rptr. 431*

[9] Procedure by Which Relator Brings Action

Attorney General as requiring undertaking as condition of issuing leave to sue in quo warranto. *People v. Petroleum Rectifying Co. (1937) 21 Cal. App. 2d 289, 290, 68 P.2d 984*

[10] Time to Commence Action

[a] Three Months to Attack Annexations

Three-month limitation of *Code Civ. Proc. § 349*1/2 as inapplicable to contest of subsequent void proceedings which follow completed proceedings to annex same territory. *People v. Town of Corte Madera (1952) 115 Cal. App. 2d 32, 37-38, 251 P.2d 988*

[b] Where No Time Limit

Lapse of time as not a bar to bringing quo warranto action against corporation illegally exercising franchise. *People v. Jefferds (1899) 126 Cal. 296, 302, 58 P. 704*

Lapse of time as not a bar to bringing quo warranto action to oust usurping public officer. *People v. Bailey (1916) 30 Cal. App. 581, 585, 158 P. 1036*

[11] Usurpation of Franchise by Corporation

[a] What Constitutes Usurpation

Quo warranto as not a means by which censorship imposed on corporation for abuse of franchise granted to it. *People v. American Auto. Ins. Co. (1955) 132 Cal. App. 2d 317, 326, 282 P.2d 559*

Corporation usurps franchise when misusing and abandoning its franchise. *People v. Northwestern Pac. R.R. Co. (1937) 20 Cal. App. 2d 120, 122-123, 66 P.2d 697*

Corporation usurps franchise when exercising privilege unlawful for it to exercise. *People v. California Protective Corp. (1926) 76 Cal. App. 354, 361, 244 P. 1089* (unauthorized practice of law)

Corporation usurps franchise when doing acts not authorized or forbidden to it. *People v. Milk Producers Ass'n (1923) 60 Cal. App. 439, 441, 212 P. 957* (violation of statutes prohibiting trusts in restraint of trade)

[b] Corp. Code § 1801 as Concurrent Remedy

Remedy provided by *Corp. Code § 1801* concurrent with remedy in quo warranto. *Citizens Utilities Co. v. Superior Court (1976) 56 Cal. App. 3d 399,128 Cal. Rptr. 582* ; *Brown v. Memorial Nat. Home Foundation (1958) 162 Cal. App. 2d 513, 540, 329 P.2d 118*

Grounds for action taken under *Corp. Code § 1801*. *Citizens Utilities Co. v. Superior Court (1976) 56 Cal. App. 3d 399, 405, 128 Cal. Rptr. 582*

Corp. Code § 1801 gives corporation an opportunity to cure its derelictions by charter amendment or other corporate action. *Brown v. Memorial Nat'l Home Foundation (1958) 162 Cal. App. 2d 513, 540, 329 P.2d 118*

[12] Usurpation of Franchise by Person

[a] Completeness of Proceedings Required

Action to challenge validity of charter is possible only after charter put into effect. *Santa Clara County v. Hayes Co. (1954) 43 Cal. 2d 615, 618, 275 P.2d 456* ; *Oakland Mun. Improvement League v. City of Oakland (1972) 23 Cal. App. 3d 165, 169, 100 Cal. Rptr. 29*

Action in quo warranto may not be brought until annexing municipality exercises control over territory alleged to be annexed. *Amer. Distl. Co. v. City Council, Sausalito (1950) 34 Cal. 2d 660, 667, 213 P.2d 704* ; *City of Colton v. City of Rialto (1964) 230 Cal. App. 2d 174, 181-182, 40 Cal. Rptr. 766*

Action in quo warranto can not be brought until annexation proceedings completed. *People ex rel. Mosk v. City of Santa Barbara (1961) 192 Cal. App. 2d 342, 356, 13 Cal. Rptr. 423*

Prior to completion of proceedings, proper remedy to test validity of proceedings as certiorari and proper remedy to terminate proceedings as mandate. *San Mateo County v. City Council (1959) 168 Cal. App. 2d 220, 221, 335 P.2d 1013*

[b] Remedy Against Public Corporation

Quo warranto action as brought to challenge validity of county charter. *Santa Clara County v. Hayes Co. (1954) 43 Cal. 2d 615, 618, 275 P.2d 456*

Quo warranto as applicable against public corporation whether its jurisdiction is de jure or de facto. *Bray v. Payne (1930) 210 Cal. 465, 469, 292 P. 478*

Quo warranto may be used to question legal existence of county water district. *Alden v. Superior Court (1963) 212 Cal. App. 2d 764, 768, 28 Cal. Rptr. 387*

Quo warranto as applicable against county water districts. *Alden v. Superior Court (1963) 212 Cal. App. 2d 764, 768, 28 Cal. Rptr. 387*

Quo warranto action as brought to challenge validity of incorporation or to attack regularity of organization of municipal or other public corporation. *Wilson v. City of San Bernardino (1960) 186 Cal. App. 2d 603, 611, 9 Cal. Rptr. 431*

[c] Statutes Applicable to Public Corporations

Code Civ. Proc. § 811 as applicable against public corporations and governmental bodies. *San Ysidro Irr. Dist. v. Superior Court (1961) 56 Cal. 2d 708, 716, 16 Cal. Rptr. 609, 365 P.2d 753*

[d] Validity of Annexation of Territory

[i] Determining Validity

Statute authorizing annexation of territory by municipality as measure of power to be exercised. *City of Port Hueneme v. City of Oxnard (1959) 52 Cal. 2d 385, 393, 341 P.2d 318*

Challenge to annexation of unincorporated territory to city as required to be made by quo warranto, or by action pursuant to validating statute, but not by mandamus. *Hills for Everyone v. Local Agency Formation Comm'n (1980) 105 Cal. App. 3d 461, 466, 164 Cal. Rptr. 420*

Annexation proceedings as subject to quo warranto action to extent annexation amounts to fraudulent abuse of powers conferred by enabling statute. *Olson v. City of Hawthorne (1965) 235 Cal. App. 2d 51, 53, 45 Cal. Rptr. 48*

Annexation proceedings as subject to quo warranto action to extent they go beyond enabling statute in basic and fundamental respect. *People v. Town of Corte Madera (1950) 97 Cal. App. 2d 726, 732, 218 P.2d 810*

[ii] Time at Which Validity of Annexation Tested

Validity of annexation as determined as of date it purportedly took place. *People ex rel. Downey v. Downey County Water Dist. (1962) 202 Cal. App. 2d 786, 802-803, 21 Cal. Rptr. 370*

[13] Usurpation of Public Office

[a] What Constitutes Usurpation

Usurpation as occurring where one person holds two incompatible offices. *People ex rel. Chapman v. Rapsey (1940) 16 Cal. 2d 636, 644, 107 P.2d 388* ; *People v. Garrett (1925) 72 Cal. App. 452, 458, 237 P. 829*

Usurpation as occurring where persons hold offices on boards of directors of private corporations as result of invalid elections. *Guaranty Loan Co. v. Fontanel (1920) 183 Cal. 1, 8-9, 190 P. 177* ; *Stesel v. Santa Ana R. Water Co. (1939) 35 Cal. App. 2d 117, 124, 94 P.2d 1052*

Quo warranto as brought to challenge title to public office. *Visnich v. Sacramento County Bd. of Education (1974) 37 Cal. App. 3d 684, 690, 112 Cal. Rptr. 469*

Usurpation as occuring where two persons hold certificates of election to same office. *People v. Davidson (1905) 2 Cal. App. 100, 103, 83 P. 161*

[b] Abatement of Action

Quo warranto action as abated by voluntary surrender of challenged office by defendant. *People v. Muehe (1931) 114 Cal. App. 739, 740, 300 P. 829*

Ouster of defendant as unnecessary unless some other purpose would be served. *People v. Muehe (1931) 114 Cal. App. 739, 740, 300 P. 829*

Action as permitted to determine another claimant's right to office. *People v. Bailey (1916) 30 Cal. App. 581, 586,*

158 P. 1036

[14] Who May Bring Action

[a] Board of Supervisors or Legislative Body of Municipal Corporation

Code Civ. Proc. § 811 as enabling boards of supervisors and municipal corporations to initiate own actions without going through or waiting for *Attorney General. Olson v. Sacramento County (1969) 274 Cal. App. 2d 316, 326, 79 Cal. Rptr. 140*

Boards of supervisors and municipal corporations as permitted to bring quo warranto actions only against persons usurping franchises and not against persons usurping public offices. *San Ysidro Irrigation Dist. v. Superior Court (1960) 56 Cal. 2d 708, 716, 16 Cal. Rptr. 609, 365 P.2d 753*

[b] On Complaint of Private Party

[i] Attorney General's Discretion in Acting on Relator's Application

Abuse of discretion found where Attorney General's refusal of leave to sue extreme and clearly indefensible. *Lamb v. Webb (1907) 151 Cal. 451, 454, 91 P. 102, 91 P. 646*

Attorney General as compelled to institute suit where abuse of discretion shown. *Visnich v. Sacramento County Bd. of Education (1974) 37 Cal. App. 3d 684, 690, 112 Cal. Rptr. 469*

Attorney General compelled to sue in quo warranto by writ of mandate instructing him or her to do so. *Oakland Mun. Improvement League v. City of Oakland (1972) 23 Cal. App. 3d 165, 173, 100 Cal. Rptr. 29*

No abuse of discretion by Attorney General unless he or she acts arbitrarily in denying relator's application. *Oakland Mun. Improvement League v. City of Oakland (1972) 23 Cal. App. 3d 165, 172, 100 Cal. Rptr. 29*

In passing on application, Attorney General as determining whether public interest would be served by institution of suit. *Campbell v. Mosk (1961) 197 Cal. App. 2d 640, 648, 17 Cal. Rptr. 584*

Attorney General as having discretion in passing on complaints brought before him or her. *People v. Milk Producers Ass'n (1923) 60 Cal. App. 439, 444, 212 P. 957*

[ii] Attorney General Not Estopped by Relator's Actions

Attorney General as not estopped in bringing action by acts or conduct of relator in other actions between relator and alleged usurper. *People ex rel. Downey v. Downey County Water Dist. (1962) 202 Cal. App. 2d 786, 803, 21 Cal. Rptr. 370*

Legal Topics:

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§ 483.45 Attorney General Opinions

Leave to sue denied as to question whether de facto annexation of an area by a water district after merger by district with water company previously serving area without approval of local county LAFCO, and without issuance of PUC certificate of public convenience and necessity violated state law because same issues have been raised in pending judicial and administrative proceedings and adequate remedy is available to challenge lack of certificate without starting a quo warranto proceeding. *80 Ops. Cal. Att'y Gen. 279 (1997)* (No. 97-801)

Leave to sue granted to test whether mayor forfeited office under *Cal. Const., art. XII, § 7*, by accepting two first-class upgraded tickets without payment therefor at time of receipt. *76 Ops. Cal. Att'y Gen. 1, 4 (1993)*

Leave to sue granted to test right of individual to hold concurrently offices of chief of fire protection district, director of fire protection district, and city council member. *76 Ops. Cal. Att'y Gen. 38, 44 (1993)*

Leave to sue granted to test right of individual to hold incompatible offices of school district trustee and community services district director. *75 Ops. Cal. Att'y Gen. 112, 117 (1992)*

Leave to sue denied when no substantial issue of fact or law is presented as to defendant's compliance with residence requirement for holding position on county board of supervisors; action in quo warranto as not serving public interest. *75 Ops. Cal. Att'y Gen. 287, 289, 290 (1992)*

Quo warranto as inappropriate remedy for testing validity of proposed statewide initiative. *75 Ops. Cal. Att'y Gen. 70 (1992)*

Leave to sue denied because service on governmental board by attorney employed in local nonelected position does not violate doctrine of incompatible public offices. *74 Ops. Cal. Att'y Gen. 86 (1991)*

Leave to sue denied because position in question was not a public office and therefore no substantial issue of law was presented as to whether that position was incompatible with membership on city council. *74 Ops. Cal. Att'y Gen. 82*

(1991)

Leave to sue denied when resolution of dispute regarding public official's residence would not serve public interest. *72 Ops. Cal. Att'y Gen. 15 (1989)*

Leave to sue denied when resolution of dispute regarding public official's residence would not serve public interest. *72 Ops. Cal. Att'y Gen. 8 (1989)*

Leave to sue granted to resolve dispute between right to hold public office and right of the electorate to determine how their public officers shall be chosen. *72 Ops. Cal. Att'y Gen. 1 (1989)*

Circumstances under which private party may sue in quo warranto. *67 Ops. Cal. Att'y Gen. 151, 153-154 (1984)*

Attorney General's standards in passing on relator's application. *35 Ops. Cal. Att'y Gen. 214, 216 (1960)*

Attorney general determines whether state of facts or questions of law exist to justify submission of matter to court in quo warranto action in passing on application for leave to sue. *35 Ops. Cal. Att'y Gen. 214, 216 (1960)* ; *28 Ops. Cal. Att'y Gen. 369, 373 (1956)* ; *22 Ops. Cal. Att'y Gen. 113, 121 (1953)*

Quo warranto as proper remedy to test validity of incorporation once city has attained de facto existence. *28 Ops. Cal. Att'y Gen. 369, 372 (1956)*

Usurpation of office occurs where person occupies public office as result of invalid election. *27 Ops. Cal. Att'y Gen. 249, 252 (1956)*

Ouster of defendant as unnecessary unless some other purpose would be served. *25 Ops. Cal. Att'y Gen. 223, 225 (1955)*

Quo warranto action is abated where defendant validly appointed to office. *25 Ops. Cal. Att'y Gen. 223, 224-225 (1955)*

Validity of emergency ordinance in annexation proceeding as substantial question to be decided in quo warranto. *24 Ops. Cal. Att'y Gen. 146, 151 (1954)*

Three-month limitation of *Code Civ. Proc. § 349*1/2 applies to quo warranto actions. *23 Ops. Cal. Att'y Gen. 300, 304 (1954)*

Question of whether private corporation abused its franchise in publishing controversial advertisements influencing potential jurors as properly brought in quo warranto. *22 Ops. Cal. Att'y Gen. 113, 121-122 (1953)*

Quo warranto as proper remedy to challenge validity of annexation proceedings. *20 Ops. Cal. Att'y Gen. 93, 95 (1952)*

Municipal corporation is "person" within meaning of *Code Civ. Proc. § 803*. *20 Ops. Cal. Att'y Gen. 93, 94 (1952)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsQuo WarrantoGovernmentsLegislationInitiative & ReferendumGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLocal GovernmentsBoundaries

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42-483 California Forms of Pleading and Practice--Annotated § 483.46

§ 483.46 Law Reviews

Comment, "Quo Warranto to Enforce a Corporate Duty Not to Pollute the Environment," 1 Ecol. L.Q. 653 (1971)

Note, "Quo Warranto," *15 Hastings L.J. 222 (1963)*

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42-483 California Forms of Pleading and Practice--Annotated § 483.47

§ 483.47 Text References

Witkin, California Procedure, Vol. 4, *Pleading*, § 139; Vol. 8, *Extraordinary Writs*, §§ 7-10; Vol. 9, *Appeal*, § 255, 284 (4th ed., 1997)

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[Reserved]

§§ 483.48[Reserved]

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PART IV. PROCEDURAL CHECKLIST

42-483 California Forms of Pleading and Practice--Annotated § 483.50

§ 483.50 Relator's Checklist

[1] Facts to Be Ascertained

NOTE:
The following checklist is for use by a relator in bringing an action in quo warranto. It is illustrative of procedures commonly used and is not intended to be exhaustive. Procedures not mentioned in this checklist may be required in a given action. A publication on quo warranto is available from the Attorney General's Office. Counsel may wish to obtain this publication for additional insight on the procedures to follow and the Attorney General's considerations in granting or refusing leave to sue in quo warranto.

NOTE:
Not all of the following facts will be ascertainable from the client in the initial interview. Subsequent interviews may be required, or it may be necessary to ascertain the facts from others, including the potential defendant, by use of discovery proceedings.

1. Facts concerning the relator.

a. Name, address, and telephone number of the relator.

b. Capacity of the relator, such as adult, trustee, conservator, guardian, executor, partnership, or domestic or foreign corporation.

c. Additional facts, as desired, related to relator's stability, financial solvency, employment status, prior residences, credit, banks, and personal references.

2. Facts concerning potential defendants.

a. Name, address, and telephone number of each potential defendant, including:.

(1) . A person usurping, intruding into, or unlawfully holding or exercising a public office, civil or military, in California [*Code Civ. Proc. § 803*].

(2) A person usurping, intruding into, or unlawfully holding or exercising a franchise in California [*Code Civ. Proc. §§ 803, 811*].

(3) A corporation, de jure or de facto, usurping, intruding into, or unlawfully holding or exercising a franchise in California [*Code Civ. Proc. § 803*].

b. Capacity of each potential defendant, such as individual, partnership, municipal corporation, or private domestic or private foreign corporation.

3. Facts concerning the potential cause of action.

a. Office or franchise being usurped, intruded into, or unlawfully held or exercised.

b. Nature of usurpation:

(1) Whether an individual is holding a public office to which he or she is not entitled.

(2) Whether an individual is holding two incompatible offices.

(3) Whether a municipal corporation is purporting to annex territory by means of prohibited procedures.

(4) Whether a municipal corporation is attempting to alter its charter by means of invalid submission to the electorate.

(5) Whether a private corporation is acting in violation of its charter by doing acts prohibited to it.

(6) Whether individuals are claiming to act as a corporation which has no existence.

c. Name of the person, if any, rightfully entitled to hold the usurped office or franchise.

d. Damages, if any, sustained by the relator as a result of the usurpation.

e. Conduct by the defendant sufficient to justify a request that the court impose a fine.

[2] Documents to Be Obtained

Obtain copies of all documentary evidence suggested by the facts relating to the potential cause of action. Documents to be obtained might include the following:

1. Certificates of election or appointment in an action to try title to office.

2. Maps indicating purportedly annexed territory in an action against a municipal corporation.

3. Corporate charters or bylaws in an action against a corporation allegedly usurping its franchise.

[3] Preliminary Determinations

1. If an office is alleged to be usurped, whether the relator, or any other person, is rightfully entitled to the office.

2. If the action is to contest the validity of an annexation by a public entity, whether the complaint can be brought within the statutory period of limitation.

NOTE:

***Code Civ. Proc. § 349*1/2 places a three-months' time limitation on all actions, including quo warranto, concerning the validity of annexation and consolidation proceedings. This section binds the State. It prohibits any contest of those proceedings after three months have elapsed after the filing in the office of the Secretary of State of the certified copy of the ordinance of the city to which the territory is annexed [*People v. Los Angeles (1928) 93 Cal. App. 532, 535-538, 269 P. 934]* .**

***Code Civ. Proc. § 349* 1/2 does not, however, permit a municipal corporation to annex territory within the boundaries of a second municipality, even though the latter does not contest the proceedings within the three-month period [*People v. Town of Corte Madera (1952) 115 Cal. App. 2d 32, 37-41, 251 P.2d 988]* .**

3. If the action is to contest the validity of other acts by a public entity, whether the complaint can be brought within the statutory period of limitation.

NOTE:

***Code Civ. Proc. § 349.1* provides a six-month limitation from the date of completion for the filing of an action to contest the validity of any acts or proceedings taken under color of law for the formation, organization, incorporation, dissolution, consolidation, change of organization or reorganization of, or for any change in the territorial boundaries of any city, county, city and county, special district, public corporation, or other public entity, or improvement district within any of the foregoing.**

***Code Civ. Proc. § 349.1* states that it does not amend or repeal any existing statute prescribing a shorter period of limitation.**

Since *Code Civ. Proc. § 349*1/2 preexisted *Code Civ. Proc. § 349.1* and prescribes a limitation of three months from the date of completion for the filing of an action concerning the validity of annexation and consolidation proceedings, it would appear that *Code Civ. Proc. § 349*1/2 would control in most situations in which quo warranto is available to contest municipal activity.

4. If the action is to contest the validity of other acts by a public entity giving notice to its property owners, whether the complaint can be brought within the statutory period of limitation.

NOTE:

***Code Civ. Proc. § 349.4* provides a 60-day limitation from the date notice is mailed to all property owners within an entity for the filing of an action by any of the property owners to contest the validity of the acts or proceedings taken under color**

of law to (1) form, organize, incorporate, or change the territorial boundaries of any city, county, city and county, special district, public corporation or other public entity, or an improvement district, annexed area, or zone within any of the foregoing, or (2) authorize, issue, sell, or exchange the bonds of the entity or territory [*Code Civ. Proc. § 349.4*].

5. Whether another remedy, such as mandate, declaratory relief, or certiorari, would be more appropriate than quo warranto (*i.e.*, whether the right to sue in quo warranto has matured).

[4] Preparation of Application for Leave to Sue

1. Prepare proposed complaint by:

a. Reviewing essential allegations [*see §§ 483.72 -483.76*].

b. Drafting complaint.

c. Including places in the proposed complaint for the signature of the Attorney General, a Deputy Attorney General, and the attorney for the relator as attorneys for the plaintiff [*11 Cal. Code Reg § 2(a)*].

d. Having the proposed complaint verified [*11 Cal. Code Reg § 2(a)*].

2. Prepare a statement of facts by:

a. Drafting a statement of facts [*see § 483.77*] underlying the proposed complaint [*11 Cal. Code Reg § 2(a)*].

NOTE:
The statement of facts may present a chronology of events giving rise to the cause of action in quo warranto and may be accompanied by relevant supporting exhibits.

b. Having the statement of facts verified [*11 Cal. Code Reg § 2(a)*].

3. Draft a memorandum of points and authorities showing why the proposed action should be brought in the name of the people and supporting the contention of the relator that a public office or franchise is being usurped, intruded into, or unlawfully held or exercised by the proposed defendant [*11 Cal. Code Reg § 2(b)*].

4. Draft a notice to the proposed defendant [*see § 483.70*] informing him or her or it of the following:

a. That the relator is about to apply to the Attorney General for leave to sue in quo warranto, and

b. That the proposed defendant may appear and show cause, if he or she or it has any, why leave to sue should not be granted in accordance with the relator's application [*11 Cal. Code Reg § 2(c)*].

5. Prepare the application for leave to sue [*see § 483.71*].

6. Print originals and copies:

a. Original of each paper, except Notice to Proposed Defendant, to be submitted to the Attorney General

[*11 Cal. Code Reg § 2*].

b. Original or originals of Notice to Proposed Defendant to be served on each proposed defendant [*11 Cal. Code Reg §§ 1, 2(c)*].

c. Copies of each paper, except Notice to Proposed Defendant, for each proposed defendant [*11 Cal. Code Reg § 1*].

d. Copy of Notice to Proposed Defendant to submit to Attorney General.

e. Copy of proposed complaint to submit with the original to Attorney General [*11 Cal. Code Reg § 2*].

f. Copy of each paper for office file.

g. Copy for each paper client, if desired.

h. Any additional copies desired.

[5] Service on Proposed Defendant

Serve the proposed defendant with [*11 Cal. Code Reg § 1*]:

1. A copy of the application for leave to sue.

2. A copy of the complaint.

3. . A copy of the statement of facts.

4. A copy of the memorandum of points and authorities.

5. The original notice to the proposed defendant.

[6] Proof of Service

Prepare proof of service [*see § 483.78*] of the application on the proposed defendant [*11 Cal. Code Reg § 2(d)*].

[7] Submission to Attorney General

File the following with the Attorney General within five days after service of the application for leave to sue on the proposed defendant [*11 Cal. Code Reg § 1*]:

1. Original and one copy of the verified proposed complaint [*11 Cal. Code Reg § 2(a)*].

2. A verified statement of facts supporting the proposed complaint [*11 Cal. Code Reg § 2(a)*].

3. A memorandum of points and authorities [*11 Cal. Code Reg § 2(b)*].

4. A copy of the notice to the proposed defendant [*11 Cal. Code Reg § 2(c)*].

5. Proof of service of the application on the proposed defendant [*11 Cal. Code Reg § 2(d)*].

NOTE:

The documents should be mailed or taken to the Office of the Attorney General nearest in location to the county in which the action is proposed to be brought. The Attorney General has offices in Sacramento, San Francisco, Los Angeles, and San Diego. On receipt of the application for leave to sue from the proposed relator, the Attorney General acknowledges the receipt of these papers by means of a letter to the proposed relator with a copy to the proposed defendant.

[8] Provisional Leave to Sue Where Urgency Shown

The Attorney General may grant provisional leave to sue where the relator shows a special case and an urgent necessity that leave to sue issue [*11 Cal. Code Reg § 10*].

NOTE:

Provisional leave to sue is often granted if it appears that the statute of limitations may bar the filing of the complaint at a later time or if it appears that special steps are necessary in order to preserve the status quo pending a decision on the relator's application by the Attorney General.

1. Prepare the application for leave to sue. See *[4], above*. State in the application the reasons why provisional leave to sue should issue [*see 11 Cal. Code Reg § 10*].

2. Serve the proposed defendant. See *[5], above*.

3. Prepare an undertaking with approved sureties [*Code Civ. Proc. § 810*; *11 Cal. Code Reg §§ 6*, 28]. See *[10], below*.

4. Submit the application for leave to sue to the Attorney General [*11 Cal. Code Reg § 2*] together with the undertaking with sureties [*11 Cal. Code Reg §§ 6, 10*]. See [7], *above*.

[9] Relator's Reply to Showing by Proposed Defendant

1. Reply, if desired, to any showing by the proposed defendant why the application should not be granted [*11 Cal. Code Reg § 4*].

2. Submit any such reply with the Attorney General within 10 days following the proposed defendant's showing [*11 Cal. Code Reg § 4*].

3. Extensions of time to reply may be granted by:

a. The Attorney General on a showing of good cause, or

b. A stipulation between the relator and proposed defendant filed with the Attorney General [*11 Cal. Code Reg § 4*].

4. File any reply with proof or admission of service [*11 Cal. Code Reg § 5*].

[10] Relator's Undertaking

NOTE:

Leave to sue is granted or denied by the Attorney General in the form of an opinion letter to the

relator. Where leave to sue is granted, the relator must then present an undertaking to the Attorney General before he or she will issue leave to sue [*Code Civ. Proc. § 810*; *People v. Petroleum Rectifying Co. (1937) 21 Cal. App. 2d 289, 290, 68 P.2d 984]* .

1. Present an undertaking [*see § 483.79*] executed to the State of California in the sum of $500 [*11 Cal. Code Reg § 6*] and stating that the relator or sureties will pay:

a. Any judgment for costs or damages recovered against the plaintiff, and

b. All costs and expenses incurred in the prosecution of the quo warranto action [*11 Cal. Code Reg §§ 6*, 28].

2. Be certain that the sureties are approved by the Attorney General [*Code Civ. Proc. § 810*].

NOTE:
In practice, the Attorney General most often requires a corporate, rather than individual, surety.

3. Present the undertaking within 10 days after receiving notice that the application for leave to sue is granted, unless further time is granted [*11 Cal. Code Reg § 6*].

[11] Obtain Leave to Sue From Attorney General

The Attorney General transmits leave to sue in the name of the people, in writing, to the relator on receipt and approval of the undertaking [*11 Cal. Code Reg § 6*].

[12] Conform Complaint to Attorney General's Directions

Make any changes in or amendments to the proposed complaint as suggested or directed by the Attorney General [*11 Cal. Code Reg § 6*].

[13] File Complaint

File the approved complaint [*see §§ 483.72 -483.76*], together with the leave to sue, with the clerk [*11 Cal. Code Reg § 6*] of the superior court [*see Cal. Const., art. VI, § 10* (residual jurisdiction of superior court)] for the proper county.

NOTE:
The proper county in which to bring a quo warranto action is: the county in which the defendant, or if several, some of the defendants, reside [*Code Civ. Proc. § 395(a)*]; the county, city and county, or county in which the city or local agency is situated when the defendant is a county, city and county, city or local agency [*see* *Code Civ. Proc. § 394*]; or the county in which a corporation has its principal place of business [*Code Civ. Proc. § 395.5*].

[14] Inform Attorney General of Filing

Immediately inform the Attorney General of:

1. The date on which the complaint is filed; and

2. The court number of the filed complaint [*11 Cal. Code Reg § 9*].

[15] No Changes in Complaint Without Approval

Make no changes, amendments, or alterations in the complaint after its filing without the approval of the Attorney General [*11 Cal. Code Reg § 7*].

[16] Notices to Attorney General

NOTE:

The Attorney General has control of the quo warranto action at all times [*People v. Huntington Beach (1954) 128 Cal. App. 2d 452, 455, 275 P.2d 601]* . For this reason, the Attorney General may, at any and every stage of the quo warranto action, withdraw, discontinue, or dismiss the action as seems fit and proper to him or her.In addition, the Attorney General may, at his or her option, assume the management of the quo warranto action at any time [*11 Cal. Code Reg § 8*].

No statutory provisions point out the exact manner in which the Attorney General's control over the quo warranto action is exercised. Likewise, no statutory provisions prevent the Attorney General from acting with or through the relator [*People v. Huntington Beach (1954) 128 Cal. App. 2d 452, 456, 275 P.2d 601]* . Generally, the actual burden of discovery, trial and appeal, is borne by the attorney for the relator. Only rarely does the Attorney General actively participate in the court proceedings. Nevertheless, the name of the Attorney General and his or her deputies must appear on all pleadings and briefs filed by the relator.

Notify the Attorney General without delay of every proceeding had, motion made, paper filed, or thing done with respect to a quo warranto action [*11 Cal. Code Reg § 9*].

1. Send a copy of every paper or document filed by any of the parties to the action, including the judgment, promptly to the Attorney General [*11 Cal. Code Reg § 9*].

2. Forward an additional copy of any paper served on the relator by the opposing party to the Attorney General at once [*11 Cal. Code Reg § 9*].

NOTE:

In sending or forwarding the foregoing information to the Attorney General, the relator need not follow formal noticing procedures. Instead, the relator may indicate the documents or other information sent to the Attorney General by means of a cover letter or explanatory note.

[17] Discovery and Trial

NOTE:

After filing of the complaint, a quo warranto action proceeds in the same manner as any other civil action [*see* *People v. Richmond (1956) 141 Cal. App. 2d 107, 117, 296 P.2d 351* (quo warranto action governed by all the pertinent procedural and practice provisions of *Code Civ. Proc. § 307 et seq.*). Hence, this guide offers no specific suggestions for discovery and trial.

For discussion, procedural checklists, and forms for use in discovery and trial in a quo warranto action, see Ch. 190-200: *Discovery* Ch. 372, ***Motions and Orders*** and Ch. 551, ***Trial*** .

[18] Motions After Trial

Secure the Attorney General's consent before making motions after trial [*People v. Huntington Beach (1954) 128 Cal.*

App. 2d 452, 457, 275 P.2d 601 (motion for new trial as proper when filed at express direction of Attorney General but signed by relator's attorney)].

NOTE:

For discussion, procedural checklists, and forms for use in moving for judgment notwithstanding the verdict, for a new trial, and to set aside and vacate judgment and enter another and different judgment, see Ch. 371, *Motions After Trial* .

[19] Appeal

Secure the Attorney General's approval before appealing from any adverse judgment by the trial court [*11 Cal. Code Reg § 11*].

NOTE:

Because a quo warranto action is under the control of the Attorney General at all times [*People v. Huntington Beach (1954) 128 Cal. App. 2d 452, 455, 275 P.2d 601]* , any attempt by the relator alone to appeal from an adverse judgment without first securing the permission of the Attorney General is ineffectual for any purpose [*People v. Petroleum Rectifying Co. (1937) 21 Cal. App. 2d 289, 291, 68 P.2d 984]* .

The approval by the Attorney General may be informal, as where the Attorney General transmits a timely dated letter consenting to an appeal by the relator [*People ex rel. Bellflower v. Bellflower County Water Dist. (1966) 247 Cal. App. 2d 344, 347, 55 Cal. Rptr. 584]* .

It should also be noted that the perfecting of an appeal does not stay proceedings, in the absence of an order of the trial court providing otherwise or of a writ of supersedas, where a party to the proceeding is adjudged guilty of usurping, intruding into, or unlawfully holding a public office, civil or military [*Code Civ. Proc. § 917.8*].

For discussion, procedural checklist, and forms for use in instituting an appeal and staying enforcement of a judgment pending appeal, see Ch. 42, *Appeal: Notice of Appeal* , and Ch. 43, ***Appeal: Stay of Proceedings*** .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessProofGeneral OverviewCivil ProcedureRemediesBondsSuretiesGeneral OverviewCivil ProcedureRemediesBondsSuretiesProceduresCivil ProcedureRemediesWritsCommon Law WritsQuo WarrantoCivil ProcedureAppealsReviewabilityGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 483.51 Defendant's Checklist

[1] Appearance by Proposed Defendant in Response to Application

NOTE:
The following checklist is for use by a proposed defendant in opposing an action in quo warranto. It is illustrative of procedures commonly used. It is not intended to be exhaustive. Procedures not mentioned in this checklist may be required in a given action.

1. Prepare and file with the Attorney General a verified statement of facts [*11 Cal. Code Reg § 3*] in response to that submitted by the proposed relator [*11 Cal. Code Reg § 2(a)*]. For a form of statement of facts which can be adapted by a proposed defendant for use in opposing the proposed relator's application, see *§ 483.77*.

NOTE:
The proposed defendant's appearance to oppose the granting of leave to sue may be in person or in writing. At the present time, conferences are rarely held, and the Attorney General prefers to base his or her decision on the pleadings submitted by the proposed relator and the proposed defendant. Nevertheless, the Attorney General may require a conference at which both the proposed relator and proposed defendant assert their respective positions. The appearance, where in person or in writing, should set forth the reasonswhy leave to sue should not be granted in accordance with the proposed relator's application.

2. Have the statement of facts verified [*11 Cal. Code Reg § 3*].

3. Serve the statement of facts on the proposed relator.

4. Prepare a declaration of service [*see § 483.78*] on the proposed relator.

5. Submit the statement of facts to the Attorney General with proof or admission of service on the proposed relator [*11 Cal. Code Reg § 5*].

6. File any statement of facts, or other appearance with the Attorney General within the following times after service of the application for leave to sue:

a. Within 15 days, if service occurs in the county where the action is brought, or

b. Within 20 days, if service occurs outside the county where the action is brought [*11 Cal. Code Reg § 3*].

NOTE:
The Attorney General may prescribe a shorter period of time in which to appear in special cases or on a showing of good cause [*11 Cal. Code Reg § 3*].

7. Extensions of time to appear may be granted by:

a. The Attorney General on a showing of good cause, or

b. A stipulation between the relator and proposed defendant filed with the Attorney General [*11 Cal. Code Reg § 3*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsQuo Warranto

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[Reserved]

§§ 483.52[Reserved]

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42-483 California Forms of Pleading and Practice--Annotated § 483.70

§ 483.70 Notice to Proposed Defendant [11 Cal. Code Reg § 2(c)] for Use by Relator [11 Cal. Code Reg § 1]

[1] FORM Notice to Proposed Defendant [11 Cal. Code Reg § 2(c)] for Use by Relator [11 Cal. Code Reg § 1]

BEFORE THE ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA

The People of the State of California on the Relation of _____ [*name*], Plaintiff, vs. _____ [*name(s)*], Defendant(s).	))))))	NOTICE OF APPLICATION FOR LEAVE TO SUE

To _____ [*name(s)*], proposed defendant(s):

NOTICE IS HEREBY GIVEN that _____ [*name*], the proposed relator, is about to apply to the Attorney General of the State of California for leave to sue in quo warranto.

In accordance with Title 11, Sections 1 and 2, of the California Code of Regulations, the following documents are enclosed:

(1) A copy of the relator's application for leave to sue in quo waranto;

(2) A copy of the proposed verified complaint;

(3) A copy of the verified statement of facts in support of the application for leave to sue; and

(4) A copy of the memorandum of points and authorities in support of the application for leave to sue.

FURTHER NOTICE IS HEREBY GIVEN that you have _____ [15 *or* 20] days after service of this notice to appear and show cause, if you have any, why leave to sue should not be granted in accordance with the relator's application.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for the Proposed Relator

[2] Use of Form

The notice in *[1], above,* for use by the proposed relator, as required by the Attorney General. It informs the proposed defendant of the pendency of an application for leave to sue in quo warranto by the proposed relator and gives the proposed defendant time in which to object to the application [*11 Cal. Code Reg § 2(c)*].

The service of the original of this notice and its accompanying documents on the proposed defendant is necessary before a proposed relator may file the application for leave to sue with the attorney general [*see 11 Cal. Code Reg § 1*; *see also 11 Cal. Code Reg § 2(d)* (proof of service)].

[3] Time for Response by Proposed Defendant

Where the proposed defendant is served in the county in which the quo warranto action is to be brought, the time given for response to the notice is 15 days. And where the proposed defendant is served in a county other than the one where the action is to be brought, the time given for response to the notice is 20 days [*11 Cal. Code Reg § 3*].

[4] Number of Copies

Prepare the following copies of the notice to the proposed defendant:

- Original to be served on each proposed defendant [*11 Cal. Code Reg §§ 1, 2(c)*].
- Copy to be submitted to the Attorney General [*11 Cal. Code Reg § 2(c)*].
- Copy for office file.
- Copy for client, if desired.
- Any additional copies desired.

[5] Accompanying Papers

The original of the notice to the proposed defendant must be accompanied by:

- A copy of the application [*see § 483.71*] for leave to sue [*11 Cal. Code Reg § 1*].

- A copy of the proposed verified complaint [*see §§ 483.72 -483.76*; *11 Cal. Code Reg § 2(a)*].

- A copy of the verified statement of facts [*see § 483.77*] in support of the application [*11 Cal. Code Reg § 2(a)*].

- A copy of the memorandum of points and authorities in support of the application [*11 Cal. Code Reg § 2(b)*].

[6] Cross References

For discussion, procedural checklist, and forms for preparing papers for service and for preparing proof of service, see Ch. 518, *Service of Summons and Papers*

Witkin, California Procedure, Vol. 4, *Pleading*, § 139; Vol. 8, *Extraordinary Writs*, §§ 8, 9 (4th ed., 1997)

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§ 483.71 Application for Leave to Sue [11 Cal. Code Reg § 2] in Quo Warranto [Code Civ. Proc. § 803] by Relator [11 Cal. Code Reg § 1]

[1] FORM Application for Leave to Sue [11 Cal. Code Reg § 2] in Quo Warranto [Code Civ. Proc. § 803] by Relator [11 Cal. Code Reg § 1]

BEFORE THE ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA

The People of the State of California on the Relation of	)	
_____ [*name*], Plaintiff,	)	APPLICATION FOR LEAVE TO SUE
vs.	)	
_____ [*name(s)*], Defendant(s).	)	
	)	

TO THE ATTORNEY GENERAL OF THE STATE OF CALIFORNIA:

In accordance with *Section 803 of the Code of Civil Procedure*, application is hereby made by _____ [*name of relator*] for leave to sue in quo warranto in the name of the People of the State of California.

In accordance with *Title 11, Section 2, of the California Code of Regulations*, the following documents are enclosed:

(1) An original and one copy of the proposed verified complaint prepared for the signatures of the Attorney General, a Deputy Attorney General, and the attorney for the relator;

(2) A verified statement of facts in support of this application;

(3) A memorandum of points and authorities in support of this application;

(4) A copy of the notice directed to the proposed defendant advising him/her/it of this application and giving him/her/it _____ [15 *or* 20] days in which to appear and show cause why leave to sue should not be granted; and

(5) Proof of service of the foregoing documents on the proposed defendant.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for the Proposed Relator

[2] Use of Form

The form in *[1], above*, is for use by a proposed relator in applying to the Attorney General for leave to sue in quo warranto under *Code Civ. Proc. § 803*. For discussion, see *§§ 483.18[2]* and *483.19*.

The contents of the documents to accompany the application are prescribed by *11 Cal. Code Reg § 2*.

The application, together with the accompanying documents prescribed by *11 Cal. Code Reg § 2* [*see [4], below*], must be presented to the Attorney General within five days after service on the proposed defendant of copies of the accompanying documents [*11 Cal. Code Reg § 1*].

[3] Number of Copies

Prepare the following copies of the application for leave to sue:

- Original to be submitted to the Attorney General [*11 Cal. Code Reg § 2*].
- Copy for each proposed defendant [*11 Cal. Code Reg § 1*].
- Copy for office file.
- Copy for client, if desired.
- Any additional copies desired.

[4] Accompanying Papers

The original of the application must be accompanied by:

- An original and one copy of the proposed verified complaint [*see §§ 483.72 -483.76*] prepared for the signatures of the Attorney General, a deputy attorney general, and the attorney for the relator as plaintiff's attorney [*11 Cal. Code Reg § 2(a)*].

- A verified statement of facts [*see § 483.77*] in support of the application [*11 Cal. Code Reg § 2(a)*].

- A memorandum of points and authorities in support of the application [*11 Cal. Code Reg § 2(b)*].

- A copy of the notice [*see § 483.70*] to the proposed defendant [*11 Cal. Code Reg § 2(c)*].

- Proof of service [*see § 483.78*] of these documents on the proposed defendant [*11 Cal. Code Reg §§ 2(d), 5*].

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42-483 California Forms of Pleading and Practice--Annotated § 483.72

§ 483.72 Complaint in Quo Warranto [Code Civ. Proc. § 803; 11 Cal. Code Reg § 2(a)]--To Oust Usurping Public Officer--For Use Where Officer Holds Two Incompatible Offices

[1] FORM Complaint in Quo Warranto [Code Civ. Proc. § 803; 11 Cal. Code Reg § 2(a)]--To Oust Usurping Public Officer--For Use Where Officer Holds Two Incompatible Offices

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

The People of the State of California on the Relation of _____ [*name*], Plaintiff, vs. _____ [*name(s)*], Defendant(s).	))))))	NO. _____ COMPLAINT IN QUO WARRANTO

The People of the State of California, on the Relation of _____ [*name of relator*], complain of defendant(s) [, and each of them], and for cause of action allege:

1. This action is brought pursuant to *Section 803 of the Code of Civil Procedure.*

2. At all times herein mentioned, _____ [*name*], the defendant, was a resident of _____ County, California.

3. The position of _____ [*state public office alleged to be usurped*] is an _____ [elective *or* appointive] office of the _____ [*governmental unit, e.g.,* City of _____], State of California.

4. Commencing on or about _____[*date*], _____ [*name*], the defendant, has usurped,

intruded into, and unlawfully held and exercised the office of _____ [*state position alleged to be usurped*].

5. _____ [*Allege specific facts, if desired, giving rise to the grounds or defects in defendant's title to the office, e.g.*, On or about _____[*date*], the defendant was _____ (elected *or* appointed) to the office of _____ (*describe position, e.g.*, attorney) for the City of _____, _____ County, California. The defendant entered into possession of the office and has exercised the duties thereof to the present time].

6. _____ [*Allege additional facts, if desired, giving rise to the grounds or defects in defendant's title to office, e.g.*, Thereafter, on or about _____[*date*], the defendant was (elected *or* appointed) to the office of _____ (*describe position, e.g.*, city attorney) for the City of _____,_____ County, California. The defendant entered into possession of the office and has exercised the duties thereof to the present time].

7. _____ [*Allege grounds of defects of usurpation as created by the facts presented in preceedings paragraphs, e.g.*, The positions of _____ (*specify*) and _____ (*specify*) are incompatible in that _____ (*specify the basis of incompatibility, e.g.*, the office of _____ (*specify*) is superior to the office of _____ (*specify*) and a clash of duties is likely to arise in the exercise of both offices simultaneously)].

WHEREFORE, plaintiff prays judgment as follows:

1. For judgment determining that the defendant is not entitled to hold or exercise the office of _____ [*specify position alleged to be usurped*] and ordering him/her ousted from the office;

[2. For the defendant to be fined pursuant to *Section 809 of the Code of Civil Procedure*;]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*name*],

Attorney General for the State

of California

By: _____ [*signature*]

Deputy Attorney General for

the State of California

By: _____ [*signature*]

Attorney for the Relator

Attorneys for the People of the

State of California

VERIFICATION

I, _____ [*name*], am the relator in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form of complaint in *[1], above,* is for use by the relator in a quo warranto action to oust a public officer from a position which he or she is usurping.

The form is based on a situation in which the defendant attempts to occupy and perform the duties of two incompatible offices [*see People ex rel. Chapman v. Rapsey (1940) 16 Cal. 2d 636, 107 P.2d 388* (defendant purporting to hold positions of city judge and city attorney); *People v. Garrett (1925) 72 Cal. App. 452, 237 P. 829* (defendant purporting to hold positions of justice of the peace and police judge); 76 Ops. Cal. Att'y Gen. 38, 44 (1993) (leave to sue granted to test right of individual to hold concurrently offices of chief of fire protection district, director of fire protection district, and city council member); 75 Ops. Cal. Att'y Gen. 112, 117 (1992) (leave to sue granted to test right of individual to hold incompatible offices of school district trustee and community services district director); for discussion, *see § 483.21*].

[3] Allegations

The complaint in *[1], above,* alleges:

- That the action is brought under *Code Civ. Proc. § 803* (Paragraph 1).
- The defendant's residence to establish venue under *Code Civ. Proc. § 395(a)* (Paragraph 2).
- The position alleged to be usurped (Paragraph 3).
- The usurpation of that position by the defendant (Paragraph IV) [*People v. Hayden (1935) 9 Cal. App. 2d 312, 313, 49 P.2d 314]* .
- Specific facts giving the grounds or defects in defendant's title (Paragraphs 5-7) [*People ex rel. Paganini v. Corte Madera (1950) 97 Cal. App. 2d 726, 218 P.2d 810]* .

[4] Jurisdiction

A quo warranto action must be brought in the superior court as an unlimited civil case [*see Cal. Const., art. VI, § 10* (residual jurisdiction of superior court)].

[5] Venue

A quo warranto action may be brought against an individual defendant in the county in which that defendant resides at the commencement of the action. If there is more than one defendant, the proper county is the county in which some of the defendants reside [*see Code Civ. Proc. § 395(a)*].

[6] Parties

The person holding a contested office is a necessary party to the action in quo warranto [*Susanville v. Long (1904) 144 Cal. 362, 365, 77 P. 987]* . However, the relator bringing the action need not be the person rightfully entitled to the office [*People v. Bingham (1889) 82 Cal. 238, 243, 22 P. 1039]* .

In a case in which quo warranto is the proper remedy, the cause of action is vested in the People, and not in any individual or group, no matter how affected they may be, or how much more the subject matter may touch their interests than it does other members of the citizenry. A complaint by an individual or group for quo warranto is subject to demurrer for failure to state a cause of action, and the defect may be raised at any time during proceedings [*Oakland Mun. Improvement League v. City of Oakland (1972) 23 Cal. App. 3d 165, 170-171, 100 Cal. Rptr. 29]* .

[7] No Statute of Limitations

Although laches could bar relief, lapse of time is not a bar to bringing a quo warranto action to oust a public officer. It is assumed that the attorney general will not permit the institution of a quo warranto action if the claim is stale or the state has ceased to have a present interest in the claim [*People v. Bailey (1916) 30 Cal. App. 581, 585, 158 P. 1036]* .

[8] Sufficiency of Complaint

A complaint in a quo warranto action is sufficient if it pleads the ultimate fact of usurpation in general terms. When the complaint is couched in general terms, the defendant bears the burden of proof with respect to the alleged usurpation, being required to move for example, the right to lawfully hold a challenged office [*People v. Hayden (1935) 9 Cal. App. 2d 312, 313, 49 P.2d 314]* or the validity of annexation proceedings [*People ex rel. Smith v. San Jose (1950) 100 Cal. App. 2d 57, 59, 222 P.2d 947]* .

A complaint in quo warranto is also sufficient if it pleads specific grounds or defects to show an alleged usurpation [*People ex rel. Paganini v. Corte Madera (1950) 97 Cal. App. 2d 726, 218 P.2d 810]* . When specific facts are relied on to show usurpation, the pleader assumes the burden of allegation and proof. In addition, where specific allegations are made, the complaint is subject to a general demurrer by the defendant if the facts stated do not constitute a cause of action [*People v. City of Palm Springs (1958) 51 Cal. 2d 38, 41, 331 P.2d 4]* . For example, a complaint is sufficient which pleads specific facts that two persons were declared elected to one office, that they received certificates, qualified, and were performing the duties of the office, and that they were usurpers and intruders [*People v. Davidson (1905) 2 Cal. App. 100, 103, 83 P. 161]* .

It should be noted, however, that in practice the Attorney General requires the relator to set forth specific, detailed, and certain allegationsof all the facts relating to the cause of action in considering the application for leave to sue. Moreover, the attorney general requires that the facts presented by the relator be by direct allegation and not on information and belief *[27 Ops. Cal. Att'y Gen. 249, 253 (1956)]* .

[9] Verification Required

A complaint brought by a relator in quo warranto under *Code Civ. Proc. § 803* must be verified [*11 Cal. Code Reg § 2(a)*; *see Code Civ. Proc. § 2015.5* (form of declaration)]. Verification of the complaint requires that the defendant file a verified answer [*Code Civ. Proc. § 446*] and also precludes a general denial [*Code Civ. Proc. § 431.30(d)*].

[10] Number of Copies

Prepare the following copies of the proposed complaint:

- Original and one copy to be submitted to the Attorney General [*11 Cal. Code Reg § 2(a)*].
- Copy for each proposed defendant [*11 Cal. Code Reg § 1*].
- Copy for office file.
- Copy for client, if desired.
- Any additional copies desired.

[11] Cross References

For discussion, procedural checklist, and forms related to proceedings to contest elections, see Ch. 243, *Elections*

Witkin, California Procedure, Vol. 8, *Extraordinary Writs*, § 7 (4th ed., 1997)

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42-483 California Forms of Pleading and Practice--Annotated § 483.73

§ 483.73 Allegations for Use Where Another Person Is Rightfully Entitled to Public Office [Code Civ. Proc. § 804]

[1] FORM Allegations for Use Where Another Person Is Rightfully Entitled to Public Office [Code Civ. Proc. § 804]

1. At all times herein mentioned, _____ [*name of person rightfully entitled to office*] was a resident of _____ County, California.

2. _____ [*Name*] is the person rightfully entitled to hold and exercise the position of _____ [*position being usurped*] _____ [*allege specific facts, if desired, showing person entitled to assume office usurped by defendant, e.g.*, by reason of the fact that _____ (*name*) holds a valid certificate of _____ (election *or* appointment) to the position].

[2] Use of Form

The allegations in *[1], above,* are for use by a relator in a complaint in quo warranto to oust a usurping public officer. The allegations state the name of the person rightfully entitled to the office as permitted by *Code Civ. Proc. § 804*. Thus, the right of another person to occupy the office may be determined in the same action which tries the defendant's right to the office [*Code Civ. Proc. § 805*; *People v. Bailey (1916) 30 Cal. App. 581, 586, 158 P. 1036]* . These allegations are for use in addition to those allegations in the complaint in *§ 483.72*.

[3] Prayer to Include Restoration of Claimant

When these allegations are used in a complaint to oust a public officer, the prayer should include a request for an order determining the claimant entitled to the usurped office and putting the claimant in possession of the office [*see Code Civ. Proc. § 806*].

Although ouster of the defendant from the usurped office is independent of determination of relator's right to the office [*People v. Fleming (1893) 100 Cal. 537, 541, 35 P. 163* ; *see People v. Bingham (1889) 82 Cal. 238, 243, 22 P. 1039* (relator in quo warranto need not be person claiming to be entitled to contested office)], the right of one thought to be

holding office unlawfully and the right of one claiming to be entitled to it are properly adjudicated in the same action [*People v. Bailey (1916) 30 Cal. App. 581, 586, 158 P. 1036]* .

[4] Damages

If the judgment decrees that a person alleged to be entitled to an office is so entitled, the person may recover, by action, the damages he or she may have sustained by reason of the defendant's usurpation of the office [*Code Civ. Proc. § 807*].

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42-483 California Forms of Pleading and Practice--Annotated § 483.74

§ 483.74 Complaint in Quo Warranto Against Municipal Corporation [Code Civ. Proc. § 803]--To Determine Validity of Annexation Proceedings

[1] FORM Complaint in Quo Warranto Against Municipal Corporation [Code Civ. Proc. § 803]--To Determine Validity of Annexation Proceedings

[*Caption. See § 483.72.*]

The People of the State of California, on the Relation of _____ [*name of relator*], complain of defendant(s) [, and each of them], and for cause of action allege:

1. This action is brought pursuant to *Section 803 of the Code of Civil Procedure.*

2. At all times herein mentioned, _____ [*name*], the defendant, was a municipal corporation existing, qualifying, and acting under a charter granted by the Legislature of the State of California and adopted pursuant to the Constitution and laws of the State of California.

3. The annexation of property by a municipal corporation is governed by _____ [*indicate statutes related to the allegedly invalid annexation, e.g., Government Code § 56000 et seq.*] _____ [commonly known as _____ (*indicate name by which the statutes known, if applicable, e.g.,* the Cortese Local Government Reorganization Act of 1985)].

4. On or about _____[*date*], the defendant commenced proceedings to annex the real property situated as follows: _____ [*describe location of property sought to be annexed, e.g.,* the _____ (*name*) Tract located on the _____ (*specify direction, e.g.,* northern) boundary of the town of _____ (*name*) and consisting of _____ (*number*) acres. A map of the area sought to be annexed is attached hereto as Exhibit A and made a part hereof.]

5. The proceedings to annex the territory described above were defective and violative of _____ [

specify code section violated, e.g., Section _____ (*number*) of the Government Code] in that _____ [*specify, e.g.*, the territory alleged to be annexed was not contiguous to the defendant *or* a majority of the inhabitants of the territory sought to be annexed did not agree to the annexation *or any other requirement not satisfied by the purported annexation*].

6. Commencing on or about _____[*date*], defendant has exercised its control and dominion in the form of municipal jurisdiction and powers over the described territory.

7. In defectively and invalidly commencing and completing the foregoing annexation proceedings, the defendant, _____ [*name*], usurped, intruded into, and unlawfully held and exercised a franchise within the meaning of *Section 803 of the Code of Civil Procedure.*

[8. On or about _____ (*date*), defendant mailed notification to plaintiff of defendant's purpose of confirming, validating, and making legally effective the _____ (acts *or* proceedings) complained of herein. (A copy of defendant's notice is attached hereto as Exhibit B and made a part hereof.)]

WHEREFORE, plaintiff prays judgment as follows;

1. For judgment determining that the annexation proceedings were improper, that the defendant is without any control or dominion over the described territory, and that the described territory is not a part of the defendant in any manner;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*name*]

Attorney General for the State

of California

By: _____ [*signature*]

Deputy Attorney General for

the State of California

By: _____ [*signature*]

Attorney for the Relator

Attorneys for the People of the

State of California

[*Verification. See § 483.72*]

[2] Use of Form

The form of complaint in *[1], above,* is for use by the relator in a quo warranto action to challenge the validity of a purported annexation by a municipal corporation. The form is based on a situation in which the defendant municipality claims to have annexed uninhabited contiguous territory and is exercising its jurisdiction over the territory [*see Code Civ. Proc. § 803*; *People v. City of Palm Springs (1958) 51 Cal. 2d 38, 41-42, 331 P.2d 4* ; *see also Gov. Code § 56100 et seq.* (requirements for valid territorial annexation); for discussion, *see § 483.22*[4,[5]].

[3] Adaptation for Use by Municipality Under Code Civ. Proc. § 811

The form of complaint in *[1], above,* may be adapted for use by a board of supervisors of a county, or city and county, or by the legislative body of a municipal corporation in bringing a quo warranto action [*see Code Civ. Proc. § 811*; *San Ysidro Irr. Dist. v. Superior Court (1961) 56 Cal. 2d 708, 716-717, 16 Cal. Rptr. 609, 365 P.2d 753* (*Code Civ. Proc. § 811* as applicable against either persons or governmental bodies usurping franchise)]. Counsel will want to add a paragraph to the form alleging the plaintiff's capacity to bring the action under *Code Civ. Proc. § 811*. In addition,counsel should adapt the caption and introductions to reflect the party bringing the action. For additional forms for use as captions and introductions, see Ch. 108, *Captions and Introductions* .

When brought by a board of supervisors of a county, or city and county, or by the legislative body of a municipal corporation, the complaint in quo warranto need not be verified [*see Code Civ. Proc. § 446*]. However, the defendant must file a verified answer unless it would subject him or her to criminal prosecution or unless the defendant is also a county, city, or other public corporation [*Code Civ. Proc. § 446*].

[4] Allegations

The complaint alleges:

- That the action is brought under *Code Civ. Proc. § 803* (Paragraph 1).
- The defendant's capacity (Paragraph 2).
- The statutes regulating annexation attempts by defendant (Paragraph 3).
- The commencement of proceedings to annex specific described property (Paragraph 4).
- The defective nature of the annexation proceedings (Paragraph 5) [*see People v. City of Palm Springs (1958) 51 Cal. 2d 38, 331 P.2d 4]* .
- The exercise of control by the defendant over the area claimed to be annexed in the proceedings (Paragraph 6) [*Amer. Distl. Co. v. City Council, Sausalito (1950) 34 Cal. 2d 660, 667, 213 P.2d 704]* .
- The facts enumerated above as constituting a usurpation by the defendant (Paragraph 7).
- If action brought in response to notification of attempted validation, the assertion that the defendant mailed the notification (Paragraph 8) [*Code Civ. Proc. § 349.4*].

[5] Venue

A quo warranto action against a county, city and county, city or local agency may be brought in that county, city and county, or the county in which the city or local agency is situated unless the action is brought by the county, city and county, city or local agency, in which case the action may be brought in any county, or city and county, not a party to the action and in which the city or local agency is not situated. When brought in the same county, or city and county, an

action, on the motion of either party, must be transferred to another county, or city and county [*see Code Civ. Proc. § 394*].

[6] Statutes of Limitation

An action to contest the validity of proceedings for the incorporation of a municipal corporation, the annexation of territory by a municipal corporation, or for the consolidation of municipal corporations must be brought within three months after the commencement of the proceedings [*Code Civ. Proc. § 349*1/2]. The three-month limitation of *Code Civ. Proc. § 349*1/2 is consistently applied to quo warranto actions *[23 Ops. Cal. Att'y Gen. 300, 304 (1954)* ; *People v. Los Angeles (1928) 93 Cal. App. 532, 536, 538, 269 P. 934]* . *Code Civ. Proc. § 349*1/2 does not, however, apply to contests of subsequent void proceedings which follow completed proceedings to annex territory [*People v. Town of Corte Madera (1952) 115 Cal. App. 2d 32, 38, 251 P.2d 988]* .

An action to contest the validity of acts or proceedings taken under color of law to form, organize, incorporate, dissolve, consolidate, change organization or reorganize, or to change the territorial boundaries of a city, county, city and county, special district, public corporation or other public entity, or an improvement district within any of the foregoing, must be brought within six months from the date of completion of the acts or proceedings contested [*Code Civ. Proc. § 349.1*]. The limitation prescribed by *Code Civ. Proc. §§ 349.1* does not supercede the shorter limitation prescribed by any other statute [*see Code Civ. Proc. § 349.1*].

An action to contest acts or proceedings taken under color of law for the formation, organization, incorporation, or any change in the territorial boundaries of a city, county, city and county, special district, public corporation or other public entity, or an improvement district, annexed area, or zone within any of the foregoing, or to contest the authorization, issuance, sale, or exchange of bonds of the entity or territory, must be brought within 60 calendar days of the mailing of a notice to all property owners in the entity or territory of the entity's attempted validation of such acts or proceedings [*Code Civ. Proc. § 349.4*].

[7] Cross References

For discussion, procedural guide, and forms related to proceedings to challenge a purported annexation prior to completion of annexation proceedings, see Ch. 182, *Declaratory Relief* ; and Ch. 358, *Mandate and Prohibition* , respectively

Witkin, California Procedure, Vol. 8, *Extraordinary Writs*, §§ 7, 10 (4th ed., 1997)

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42-483 California Forms of Pleading and Practice--Annotated § 483.75

§ 483.75 Complaint in Quo Warranto Against Municipal Corporation [Code Civ. Proc. § 803]--To Determine Validity of Charter Amendment Proceedings

[1] FORM Complaint in Quo Warranto Against Municipal Corporation [Code Civ. Proc. § 803]--To Determine Validity of Charter Amendment Proceedings

[*Caption. See § 483.72.*]

The People of the State of California, on the Relation of _____ [*name of relator*], complain of defendant(s) [, and each of them], and for cause of action allege:

1. This action is brought pursuant to *Section 803 of the Code of Civil Procedure.*

2. At all times herein mentioned, _____ [*name*], the defendant, was a municipal corporation existing, qualifying, and acting under a charter granted by the Legislature of the State of California and adopted pursuant to the Constitution and laws of the State of California.

3. _____ [*Allege capacity of relator, if desired, e.g.*, The relator in this action is _____ (*specify, e.g*, a labor organization within the meaning of Section _____ of the Labor Code and a recognized public employee organization within the meaning of Section _____ of the Government Code. As one of its functions, the relator represents public employees on matters related to their employment conditions, including wages and hours)].

4. The process of _____ [*specify, e.g.*, bargaining between public employees unions and local governments, including the defendant] is governed by _____ [*indicate statutes related to the allegedly invalid charter amendment, e.g., Sections 3500 to 3510 of the Government Code*] _____ [commonly known as the _____ (*indicate name by which statutes known, if applicable, e.g.*, Meyers-Milias-Brown Act)].

5. On or about _____[*date*], the defendant submitted to the electorate of _____ [city *or* county] a resolution to amend its charter to provide for the following: _____ [*specify purpose and subject of resolution, e.g.*, disciplinary actions against any public employees participating in a strike or job action against the defendant].

6. On or about _____[*date*], a majority of the electorate approved the foregoing resolution. The charter amendment thus approved was thereafter filed with the Secretary of State.

7. The proceedings described above which were taken by the defendant to amend its charter were defective and violative of _____ [*specify code section, or sections, violated, e.g.*, Section(s) _____ (*number*) of the Government Code] in that _____ [*specify, e.g.*, no reasonable written notice was given to public employees unions regarding a resolution directly related to matters within the scope of their representation *or* defendant failed to meet and confer in good faith with public employees unions regarding wages, hours, or conditions of employment prior to arriving at policy governing wages, hours, or conditions *or any other requirement not satisfied by the defendant in presenting the foregoing resolution to the electorate*].

8. Commencing on or about _____[*date*], defendant has undertaken to act under color of the defective and invalid charter amendment and, in doing so, has usurped, intruded into, and unlawfully held and exercised powers not belonging to it.

WHEREFORE, plaintiff prays judgment as follows:

1. For judgment determining that the charter amendment is null and void and of no legal effect and that the defendant has unlawfully usurped the powers of the state of California in undertaking to act under color of the amendment;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*name*]

Attorney General for the

State of California

By: _____

[*signature*]

Deputy Attorney General for

the State of California

By: _____

[*signature*]

Attorney for the Relator

Attorneys for the People of

the State of California

[*Verification. See § 483.72*]

[2] Use of Form

The form of complaint in *[1], above,* is for use by the relator in bringing a quo warranto action to challenge the validity of a charter amendment purportedly adopted by a municipal corporation. The form is based on a situation in which the defendant municipality is acting under color of law in attempting to give the purported amendment legal effect [*see Oakland Mun. Improvement League v. City of Oakland (1972) 23 Cal. App. 3d 165, 100 Cal. Rptr. 29* (proceeding in mandate and prohibition by labor unions to test validity of process of enacting city charter improper; action properly brought in quo warranto)].

Quo warranto is the exclusive remedy to challenge the validity of a city charter once it is put into effect [*Santa Clara County v. Hayes Co. (1954)43 Cal. 2d 615, 618, 275 P.2d 456* ; *Oakland Mun. Improvement League v. City of Oakland (1972) 23 Cal. App. 3d 165, 168-169, 100 Cal. Rptr. 29]* . Declaratory relief actions brought by firefighters union and individuals are not available to determine the validity of local propositions adopted by the city electorate that amended a city charter, because the exclusive method of attack on city charter amendments lies in a quo warranto action that may only be brought by the Attorney General [*International Assn. of Firefighters v. City of Oakland (1985) 174 Cal. App. 3d 687, 694-698, 220 Cal. Rptr. 256]* .

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42-483 California Forms of Pleading and Practice--Annotated § 483.76

§ 483.76 Complaint in Quo Warranto [Code Civ. Proc. § 803; Corp. Code § 1801; 11 Cal. Code Reg § 2(a)]--To Exclude Corporation From Wrongful Exercise of Franchise and to Forfeit Its Corporate Charter

[1] FORM Complaint in Quo Warranto [Code Civ. Proc. § 803; Corp. Code § 1801; 11 Cal. Code Reg § 2(a)]--To Exclude Corporation From Wrongful Exercise of Franchise and to Forfeit Its Corporate Charter

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

The People of the State of California on the Relation of _____ [*name*], Plaintiff, vs. _____ [*name(s)*], Defendant(s).	))))))	NO. _____ COMPLAINT IN QUO WARRANTO

The People of the State of California, on the Relation of _____ [*name of relator*], complain against defendant(s) [, and each of them], and for cause of action allege:

1. This action is brought pursuant to *Section 803 of the Code of Civil Procedure* and *Section 1801 of the Corporations Code*.

2. At all times herein mentioned, _____ [*name*], the defendant was a private corporation organized, existing, and doing business under the laws of the State of California with its principal place of business in _____ County.

3. Defendant has _____ [*allege conduct by defendant evidencing serious offenses against statutes regulating corporations or fraudulent abuse or usurpation of corporate powers, e.g.*, provided its customer with water that is impure, unwholesome, unpalatable, and a danger to the lives of human beings and, in doing so, failed to comply

with the standards established in this state with respect to the supplying of water for use by human beings _____ (as provided by Section(s) _____ of the Health and Safety Code)].

4. By reason of the foregoing _____ [acts *or* omissions] defendant has been guilty of unlawful conduct for which it should suffer the forfeiture of its corporate _____ [existence *or* franchise].

[*EITHER*]

5. _____ [*Allege facts showing the requisite notice by the attorney general to defendant to remedy the violations complained of, e.g.*, On orabout _____[*date*], and at least 30 days prior to the institution of this action, the Attorney General gave the defendant written notice of the conduct complained of. A copy of the written notice is attached hereto as Exhibit A and made a part hereof. Since that time, defendant has failed to institute proceedings to correct the violations complained of].

[*OR*]

5. _____ [*Allege that defendant's conduct is uncorrectable, e.g.*, The defendant cannot correct the conduct complained of by amending its articles of incorporation or by any other corporate action].

WHEREFORE, plaintiff prays judgment as follows:

1. For judgment _____ [dissolving and forfeiting defendant's corporate existence *or* appointing a receiver for winding up defendant's affairs *or* compelling defendant's board of directors to wind up defendant's affairs subject to the supervision of this court;

[2. For the defendant to be fined pursuant to *Section 809 of the Code of Civil Procedure*;]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated:_____.

_____ [*name*]

Attorney General for the

State of California

By: _____

[*signature*]

Deputy Attorney General for

the State of California

By: _____

[*signature*]

Attorney for Relator

Attorneys for the People of

the State of California

[*Verification. See § 483.72*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by the relator in bringing a quo warranto action against a private corporation under *Code Civ. Proc. § 803* and *Corp. Code § 1801*. The form is based on a situation in which a corporation in exercising its franchise is seriously offending the statutes which regulate it [*see Citizens Utilities Co. v. Superior Court (1976) 56 Cal. App. 3d 399, 403-407, 128 Cal. Rptr. 582* (remedy in quo warranto and under *Corp. Code § 1801* concurrent)]. For discussion, see *§ 483.23*.

[3] Parties Where Corporate Franchise Questioned

If the legal existence of a corporation is questioned, the quo warranto action must be brought against the individuals wrongfully exercising the franchise to act as a corporation. On the other hand, where a legally existing corporation usurps privileges or powers not granted to it by its charter, the quo warranto action is brought against the corporation [*People v. Stanford (1888) 77 Cal. 360, 363, 18 P. 85, 19 P. 693]* . Whenever a corporation is made a party defendant, its legal existence cannot then be attacked in quo warranto [*People v. Stanford (1888) 77 Cal. 360, 364, 18 P. 85, 19 P. 693* (complaint alleging nonexistence of corporation concedes its existence by naming it as party to action); *but see People v. Montecito Water Co. (1893) 97 Cal. 276, 278, 32 P. 236* (corporation a necessary party where substantial compliance with incorporation statutes creates de facto corporation)].

[4] Venue

Venue of an action against a corporation is governed by *Code Civ. Proc. § 395.5*. For discussion, see Ch. 571, *Venue* .

[5] Cross References

For discussion and forms for use in winding up or dissolving a corporation, see Ch. 170, *Corporations: Dissolution and Winding Up*

Ballantine and Sterling,California Corporation Laws, Ch. 15, *Dissolution and Winding Up*, § 320.06 (4th ed. Matthew Bender)

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Chapter 483 QUO WARRANTO
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42-483 California Forms of Pleading and Practice--Annotated § 483.77

§ 483.77 Statement of Facts [11 Cal. Code Reg § 2(a)] by Relator in Support of Application for Leave to Sue in Quo Warranto [11 Cal. Code Reg §§ 1, 2]

[1] FORM Statement of Facts [11 Cal. Code Reg § 2(a)] by Relator in Support of Application for Leave to Sue in Quo Warranto [11 Cal. Code Reg §§ 1, 2]

BEFORE THE ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA

The People of the State of California on the Relation of	)	
_____ [*name*], Plaintiff,	)	STATEMENT OF FACTS
vs.	)	
_____ [*name(s)*], Defendant(s).	)	
	)	

_____

I, _____ [*name*], declare:

_____ [*Allege facts such as identity and capacity of relator, e.g.,* I am the President of the _____ (*name of public employees union*) and I have been authorized to make this statement on its behalf. _____ (*Name of public employees union*) is a recognized employee organization employed by _____ (*specify city or county*)].

_____ [*Allege specific facts giving rise to cause of action alleged in proposed complaint, e.g.,* On or about _____[*date*], the proposed defendant, _____ (*name*), met and adopted a resolution for submission to the electorate of _____ (*specify city or county*). The resolution adopted for submission provided for an amendment to the proposed defendant's charter as follows: _____ (

specify purpose and subject of resolution, e.g., for disciplinary actions against any public employees participating in a strike or job action against the proposed defendant)].

_____ [*Allege specific facts, if any, showing attempts by relator to resolve actions by proposed defendant, e.g.*, Upon being notified of the proposed defendant's action in adopting the foregoing resolution, I requested by letter that the proposed defendant meet and confer with _____ (*name of public employees union*) pursuant to _____ (*statutes governing bargaining between public employees union and proposed defendant*) prior to submitting the foregoing resolution to the electorate. A copy of my letter is attached hereto as Exhibit A and made a part hereof. No response has been received from the proposed defendant to the date of this action].

_____ [*Allege facts showing action taken by proposed defendant and amounting to usurpation complained of, e.g.*, On or about _____[*date*], a majority of the electorate approved the foregoing resolution. The charter amendment approved by this resolution was thereafter filed with the Secretary of State. The proposed defendant mailed a copy of the charter amendment thus approved to each employee of its _____ (*name of public employees union*) and indicated its intention to enforce the provisions of the charter amendment against _____ (*name of public employees union*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form of statement of facts in *[1], above*, is for use in the relator's application for leave to sue in quo warranto [*11 Cal. Code Reg §§ 1, 2*]. It accompanies the proposed complaint, memorandum of points and authorities, notice to the proposed defendant, and proof of service [*11 Cal. Code Reg § 2*].

The statement of facts submitted by the relator must be verified [*11 Cal. Code Reg § 2(a)*].

The factual situation described in the statement of facts could be used in conjunction with the complaint *outlined in § 483.75*. The statement of facts should be altered and modified by the relator, as appropriate, to accomodate the nature of the usurpation complained of.

In addition, it should be noted that this form of statement of facts may be altered and adapted by the proposed defendant for use in opposing the relator's application for leave to sue.

[3] Number of Copies

Prepare the following copies of the statement of facts:

- Original to be submitted to the Attorney General [*11 Cal. Code Reg § 2(a)*].
- Copy for each proposed defendant [*11 Cal. Code Reg § 1*].
- Copy for office file.

- Copy for client, if desired.
- Any additional copies desired.

[4] Cross References

For discussion and forms for use in making declarations under penalty of perjury, see Ch. 15, *Affidavits, Certificates, and Declarations*

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42-483 California Forms of Pleading and Practice--Annotated § 483.78

§ 483.78 Declaration of Personal Service of Papers in Quo Warranto [11 Cal. Code Reg §§ 2(d), 5]

[1] FORM Declaration of Personal Service of Papers in Quo Warranto [11 Cal. Code Reg §§ 2(d), 5]

BEFORE THE ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA

The People of the State of California on the Relation of _____ [*name*], Plaintiff, vs. _____ [*name(s)*], Defendant(s).	))))))	DECLARATION OF SERVICE

_____

I, _____ [*name*], declare:

I am, and was at the time of the service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action. My _____ [residence *or* business] address is _____, California. I am a citizen of the United States and _____ [a resident of *or* employed in] _____ County, California.

I served the _____ [*nature of papers served, e.g.*, Notice of Application for Leave to Sue, Application for Leave to Sue, Complaint in Quo Warranto, Statement of Facts, and Memorandum of Points and Authorities] by _____ [*state, e.g.*, delivering to and leaving with the following person(s) the foregoing documents] at the time and place indicated below:

Name of	Name of Person	Street	Date and

Defendant Served Relationship to Defendant	With Whom Left Title or	Address and City	Time of Service
_____	_____	_____	_____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The declaration of service in *[1], above,* is for use by the proposed relator where personally serving the proposed defendant with documents other than a summons and complaint [*see Code Civ. Proc. §§ 465, 1010, 1013a, 1016*; *see also Code Civ. Proc. §§ 1010.5-1013, 1020* (manner of service), 2015.5 (form of declaration)]. The Attorney General prefers personal service on the proposed defendant pursuant to *11 Cal. Code Reg §§ 1* and *2(d)* rather than service by mail.

This form of declaration may be adapted by the proposed defendant for use where personal service of the opposing statement of facts, or other showing, is effected on the proposed relator [*11 Cal. Code Reg §§ 2(c), 3, 5*]. Likewise, this form of declaration may be adapted by the proposed relator for use where personal service of any reply to the statement of facts, or other showing, is effected on the proposed defendant [*11 Cal. Code Reg §§ 4, 5*]. Where either the proposed defendant or the proposed relator serve papers by mail, the foregoing form of declaration may be adapted to indicate the date and place of deposit in the mail, the name and address of the person served as shown on the envelope, and that the envelope was sealed and deposited in the mail with the postage thereon fully prepaid [*see Code Civ. Proc. § 1013a(1)*]. For additional forms of declaration where service is by substitution or by mail, see Ch. 518, *Service of Summons and Papers* .

[3] When Proof of Service Required

The proposed relator is required to present proof of service of the notice of application for leave to sue, application for leave to sue, complaint in quo warranto, statement of facts, and memorandum of points and authorities on the defendant to the attorney general when permission to sue in quo warranto is sought [*11 Cal. Code Reg § 2(d)*]. Likewise, the proposed relator must present proof of service to the attorney general of any reply to the proposed defendant's showing in opposition to the application [*11 Cal. Code Reg §§ 4, 5*]. In addition, proof of service is required of the proposed defendant with respect to service of the statement of facts, or other showing, in opposition to the proposed relator's application [*11 Cal. Code Reg §§ 2(c), 3, 5*].

[4] Cross References

For discussion, procedural checklist, and alternative forms for use in serving parties with papers, see Ch. 518, *Service of Summons and Papers*

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42-483 California Forms of Pleading and Practice--Annotated § 483.79

§ 483.79 Undertaking for Leave to Sue [Code Civ. Proc. § 810; 11 Cal. Code Reg §§ 6, 28]

[1] FORM Undertaking for Leave to Sue [Code Civ. Proc. § 810; 11 Cal. Code Reg §§ 6, 28]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

The People of the State of California on the Relation of _____ [*name*], Plaintiff, vs. _____ [*name(s)*], Defendant(s).	)))))))	NO. _____ UNDERTAKING FOR LEAVE TO SUE IN QUO WARRANTO

WHEREAS, the above-named Relator desires to commence an action in the Superior Court of _____ County, against the above-named defendant(s);

NOW, THEREFORE, We the undersigned, in consideration of the premises, and of the granting by the Attorney General of the State of California leave to bring suit in the name of the People of the State of California, _____ [*name and address of relator*] as Principals, and _____ [*name and address of corporate surety approved by attorney general*] as Surety, do jointly and severally undertake and promise that the Relator will pay any judgment for costs and damages that may be recovered against the plaintiff herein, and all costs and expenses incurred in the prosecution of this action not exceeding $500, in which amount we acknowledge ourselves jointly and severally bound to the State of California.

WITNESS our hands and seals, _____[*date*].

_____ [*seal*]

_____ [*seal*]

_____ [*seal*]

_____ [*seal*]

STATE OF CALIFORNIA)
_____ COUNTY) ss.
)

_____ [*Name of surety*], Surety in the above undertaking, being severally duly sworn, each for itself, says that it is worth the amount specified in this undertaking over and above all its just debts and liabilities, and that it is _____ [*specify activity, e.g., doing business*] within the State of California.

_____ [*signature*

of surety or surety's representative]

Subscribed and sworn to before me
Dated: _____.

_____ [*signature*]

[2] Source of Form

The form of undertaking in *[1], above,* is based on 11 Cal. Code Reg. § 28.1. It does not conform to the content requirements of the Bond and Undertaking Law (*Code Civ. Proc. § 995.010 et seq.*), which generally governs undertakings. For example, in addition to information contained in this form, an undertaking must state addresses at which principal and sureties may be served with notices, papers, and other documents [*see Code Civ. Proc. § 995.320*] and state that the sureties are jointly and severally liable on the obligations of the bond, on the provision of the Bond and Undertaking Law, and on the statute providing for the bond [*see Code Civ. Proc. § 995.320(b)*]. However, the Bond and Undertaking Law also states that its provisions apply to an undertaking executed pursuant to any California statute, except to the extent that the statute prescribes a different rule or is inconsistent [*see Code Civ. Proc. § 995.020(a)*]. It further provides that the term "statute" includes an administrative regulation promulgated pursuant to a statute [*see Code Civ. Proc. § 995.180(a)*]. Since this form is based on an administrative code section promulgated pursuant to a statute [*see Code Civ. Proc. § 810*], the provisions of the Bond and Undertaking Law may not apply to the extent that the administrative code section sets forth an inconsistent form of undertaking.

For a form of undertaking that is sufficient under the Bond and Undertaking Law, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[3] Use of Form

The form of undertaking in *[1], above,* is for use by the relator to satisfy the Attorney General's requirement than an undertaking be furnished as a condition for issuance of leave to sue in quo warranto [*Code Civ. Proc. § 810*; *11 Cal. Code Reg § 6*]. The relator must file the undertaking for $500 with the Attorney General within 10 days of receiving

notice that leave to sue is granted, unless further time is allowed [*11 Cal. Code Reg § 6*; *see People v. Petroleum Rectifying Co. (1937) 21 Cal. App. 2d 289, 290, 68 P.2d 984 (Attorney General may require relator to give security for costs)]* .

The sureties must be approved by the Attorney General [*Code Civ. Proc. § 810*; *11 Cal. Code Reg § 6*]. The Attorney General usually requires that the undertaking be by a corporate surety because the Attorney General's Office prefers not to maintain actions against personal sureties for the amount of the undertaking. In addition, the Attorney General requires that the relator sign the undertaking as principal.

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42-483 California Forms of Pleading and Practice--Annotated § 483.80

§ 483.80 Judgment in Quo Warranto [Code Civ. Proc. §§ 805, 809]--General Form

[1] FORM Judgment in Quo Warranto [Code Civ. Proc. §§ 805, 809]--General Form

[*Caption. See §§ 483.72, 483.74*]

The above-entitled cause came on for trial in [_____ (Department *or* Division) _____ of] this court. Plaintiff appeared by _____ [*name*], Attorney General of the State of California, _____ [*name*], Deputy Attorney General of the State of California, and _____ [*name*], Attorney for the Relator, _____ [*name of relator*]. Defendant appeared by _____ [*name*], his/her/its attorney. Evidence, both oral and documentary, was presented and considered. The matter was argued and submitted. The court was fully informed and advised in the premises of both parties, _____ [and the court (,on request of _____ (plaintiff *or* defendant),) caused its written statement of decision to be made and filed herein *or*; no statement of decision was requested].

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That the defendant is guilty of usurping, intruding into, and unlawfully holding and exercising _____ [*specify, e.g.*, the office of _____ (*specify position usurped, e.g.*, city attorney) *or* control over invalidly annexed territory *or* a corporate franchise to _____ (*specify rights under corporate charter, e.g.*, the franchise to practice law)].

2. That the defendant is, therefore, excluded from the _____ [*specify, e.g.*, office *or* privilege *or* franchise] described above.

3. _____ [*If another person is found rightfully entitled to a usurped office:* That _____ (*name*) is rightfully entitled to hold and exercise the office of _____ (*specify position, e.g.*, city attorney)].

4. _____ [*If another person is found rightfully entitled to a usurped office:* That the defendant pay to _____ (*name*) the sum of $_____ as damages for the usurpation of the office of _____ (*specify position usurped*)].

[5. That the defendant pay a fine in the sum of $_____.]

6. That the defendant pay the costs of suit herein, assessed at $_____.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The general form of judgment in *[1], above,* is for use when the relator prevails in a quo warranto proceeding.

The judgment may rule both on the defendant's right to the office or franchise and on the right of another party alleged to be entitled to the office [*Code Civ. Proc. § 805*]. The person found entitled to office may execute the office after taking oath and posting bond, as required [*Code Civ. Proc. § 806*].

The judgment may award damages to the person found rightfully entitled to the office that was usurped [*Code Civ. Proc. § 807*; *see Chubbuck v. Wilson (1907) 151 Cal. 162, 164, 168-169, 90 P. 524* (measure of damages)].

In addition, the defendant ousted from an office or franchise by the judgment must pay the costs of the action, and is subject to a fine [*Code Civ. Proc. § 809*; *see. People v. Bingham (1889) 82 Cal. 238, 243, 22 P. 1039* (fine imposed on defendant is not dependent on whether relator is found entitled to office)].

The judgment is self-executing [*People v. West Side County Water Dist. (1952) 112 Cal. App. 2d 228, 233, 246 P.2d 119* ; *People v. Westmoreland (1933) 135 Cal. App. 517, 519, 27 P.2d 394]* .

In the case of a corporation, the court may order dissolution or other or partial relief it deems just and expedient. The court may also appoint a receiver to wind up the corporation's affairs or order the wind up of the corporation's affairs by its board subject to court supervision [*Corp. Code § 1801(c)*].

[3] Cross References

For futher discussion of the judgment and appeal, see *§ 483.24 -483.26*

For discussion and forms for use in preparing judgments, see Ch. 318, *Judgments*

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Chapter 484 RADIO AND TELEVISION

42-484 California Forms of Pleading and Practice--Annotated 484.syn

§ 484.syn Synopsis to Chapter 484: RADIO AND TELEVISION

§ 484.01 Scope of Chapter

§ 484.02 Cross References

§§ 484.03-484.09 [Reserved]

§ 484.10 Governing Statutes

§ 484.11 Federal Regulation of Radio and Television

[1] In General

[2] Restrictions on Antennas

§ 484.12 Contracts for Sale of Advertising Time

[1] Enforcement

[2] Unilateral Cancellation of Advertising Contracts

§ 484.13 Breach of Employment Contract

§ 484.14 Remedies for Breach of Employment Contract

[1] Right to Accounting

[2] Compensation After Wrongful Discharge

[3] Restoration to Position From Which Discharged

§ 484.15 Restrictions on Employment of Minors

§ 484.16 Electronic and Appliance Repair Dealer Registration Law

[1] In General

[2] Regulation of "Service Dealers"

[3] Regulation of "Service Contractors"

[a] In General

[b] Contract Sellers

[c] Reimbursement Insurance

[d] Contract Administrators

[4] Remedies Under Law

§ 484.17 Customer Service Standards of Cable Television Operators and Other Video Providers

[1] Adoption

[2] Installation, Disconnection, Service, and Repair

[a] In General

[a1] Access to Property Owned by Party Other Than Occupant

[b] Employee Identification

[c] Telephone Availability

[d] Complaints

[e] Billing

[f] Refunds

[g] Rate Increases and Channel or Programming Changes or Deletions

[h] Termination of Service

[i] Disclosure of Customer Information

[3] Annual Notice Describing Standards

[a] To Employees, Customers, and Local Governments

[b] To New Customers

[4] Annual Report on Meeting Standards

[5] Effect of Standards on Franchise or License Provisions

[6] Dispute Resolution

[7] Cumulative Remedies for Violation

[8] Civil Penalty

[a] Failure to Distribute Notice Annually

[b] Failure to Meet Standards

[i] Assessment Procedure

[ii] Payment

§ 484.18 Liability of Cable Television Company for Service Delay

[1] Subscriber Notification Requirements

[2] Small Claims Action for Damages

[3] Defenses

[4] Waiver Void

§ 484.19 Liability for Unauthorized Reception of Subscription Television Signals

§ 484.20 Liability for Damaging Cable Television Corporation Property

§§ 484.21-484.39 [Reserved]

§ 484.40 Federal Statutes

§ 484.41 State Statutes

§ 484.42 Administrative Regulations

§ 484.43 Decisions

[1] Breach of Employment Contract

[2] Contracts for Sale of Advertising Time

[3] Covenants Against Antennas

[4] Electronic Repair Dealer Registration Law

[5] Federal Regulation of Radio and Television Channels

[6] Remedies for Breach of Employment Contract

[7] Satellite Antennas

[8] Subscription Television

[a] In General

[b] Taxation

[c] Unauthorized Reception of Signals

§ 484.44 Attorney General Opinions

§ 484.45 Law Reviews

§§ 484.46-484.59 [Reserved]

§ 484.60 Complaint for Damages [Civ. Code § 3300] and Interest [Civ. Code § 3302] by Radio or Television Station for Breach of Contract by Advertising Sponsor

[1] FORM

[2] Source of Form

[3] Use of Form

[4] Allegations

[5] Jurisdiction

[6] Verification

[7] California Constitution

[8] State Statutes

[9] Decisions

[10] Text References

[11] Cross References

§ 484.61 Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527], and Permanent [Civ. Code § 3422; Code Civ. Proc. § 526] Injunction--By Advertising Sponsor Against Radio or Television Station--To Terminate Commercial Announcements for Sponsor

[1] FORM

[2] Source of Form

[3] Use of Form

[4] Allegations

[5] Verification

[6] State Statutes

[7] Decisions

[8] Text References

[9] Cross References

§ 484.62 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] and Interest [Civ. Code § 3302]--By Television Actor Against Television Producer for Breach of Contract

[1] FORM

[2] Use of Form

[3] Allegations

[4] Decisions

[5] Text References

[6] Cross References

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PART I SCOPE

42-484 California Forms of Pleading and Practice--Annotated § 484.01

§ 484.01 Scope of Chapter

This chapter discusses the governmental regulation of radio and television, contracts for sale of advertising time on radio and television, and employment contracts involving workers in radio and television. It discusses special employment problems of minors in radio and television and the regulation of radio and television repair work. It also discusses causes of action relating to cable television, including small claims liability to a subscriber for delay of service and liability to a cable television corporation for property damage. In addition, liability for unauthorized reception under both California and federal law is discussed.

The chapter includes a form of complaint for damages for breach of contract by a radio or television station against an advertising sponsor [*see § 484.60*], a form of complaint for injunctive relief by an advertising sponsor against a radio or television station refusing to terminate commercials after cancellation of contract by the advertising sponsor [*see § 484.61*], and a form of complaint for damages for breach of an employment contract by a television actor against a producer refusing to compensate the actor [*see § 484.62*].

For discussion, procedures, and forms for use in bringing or defending a defamation action against a radio or television broadcaster, see Ch. 340, *Libel and Slander* .

For discussion, procedures, and forms for use in bringing an action concerning public disclosure of a person's private life, and for discussion, procedures, and forms for use in defending the public disclosure of private facts, see Ch. 429, *Privacy* .

In addition, for other chapters relating to this chapter, see Ch. 7, *Accounting, Action for*; Ch. 8, *Accounts Stated and Open Accounts* ; Ch. 14, *Advertising* ; Ch. 121, *Common Counts* ; Ch. 127, *Consumer Contracts and Loans* ; Ch. 140, *Contracts* ; Ch. 303, *Injunctions* ; Ch. 349, *Literary Property and Copyright* ; Ch. 249, *Employment Law: Termination and Discipline* ; Ch. 365, *Minors: Contract Actions* ; and Ch. 427, *Principal and Agent* .

Legal Topics:

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

Communications LawBroadcastingGeneral OverviewCommunications LawCable SystemsGeneral OverviewCommunications LawPrivacyGeneral OverviewCommunications LawRelated Legal IssuesDefamationLabor & Employment LawEmployment RelationshipsEmployment ContractsBreachLabor & Employment LawWage & Hour LawsChild LaborTortsIntentional TortsDefamationProcedureTortsIntentional TortsInvasion of PrivacyPublic Disclosure of Private FactsGeneral Overview

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42-484 California Forms of Pleading and Practice--Annotated § 484.02

§ 484.02 Cross References

For discussion, procedures, and forms for use in an accounting action, see Ch. 7, *Accounting, Action for*.

For discussion, procedures, and forms for use in an action to recover money, see Ch. 7, *Accounting, Action for*; Ch. 8, *Accounts Stated and Open Accounts* ; Ch. 121, *Common Counts* ; and Ch. 140, *Contracts* .

For discussion and forms concerning advertising regulations, see Ch. 14, *Advertising* .

For discussion and forms for use when goods are unsolicited or services not performed, see Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* .

For discussion, procedures, and forms for use in an action for breach of contract, see Ch. 140, *Contracts* .

For discussion, procedures, and forms for use in obtaining injunctive relief, see Ch. 303, *Injunctions* .

For discussion, procedures, and forms for use in bringing or defending a defamation action against a radio or television broadcaster, see Ch. 340, *Libel and Slander* .

For discussion and forms for use in enjoining plagiarism, see Ch. 349, *Literary Property and Copyright* .

For discussion and forms for use in an action for breach of an employment contract, see Ch. 249, *Employment Law: Termination and Discipline* .

For discussion and forms for use in petitioning for approval of a minor's employment contract for artistic services, see Ch. 365, *Minors: Contract Actions* .

For discussion and forms for use by a third party against principals and their agents, see Ch. 427, *Principal and Agent* .

For discussion, procedures, and forms for use when facts concerning a person's private life are publicly disclosed, and

for discussion, procedures, and forms for use in defending the public disclosure of private facts, see Ch. 429, *Privacy* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCommunications LawContent RegulationAdvertisingCommunications LawPrivacyGeneral OverviewCommunications LawRelated Legal IssuesCopyrightCommunications LawRelated Legal IssuesDefamationContracts LawBreachCauses of ActionGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsBreachTortsIntentional TortsInvasion of PrivacyPublic Disclosure of Private FactsGeneral Overview

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Chapter 484 RADIO AND TELEVISION
PART I SCOPE

42-484 California Forms of Pleading and Practice--Annotated §§ 484.03-484.09

[Reserved]

§§ 484.03[Reserved]

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42-484 California Forms of Pleading and Practice--Annotated § 484.10

§ 484.10 Governing Statutes

The repair of radios, televisions, and other electronic equipment is governed by *Bus. & Prof. Code § 9800 et seq.* (Electronic and Appliance Repair Dealer Registration Law).

California law governing the cable industry includes:

- *Civ. Code § 1722(b)* (small claims action for delay of service by cable television company).
- *Corp. Code § 14400* (treble damages for injury to cable television corporation property).
- *Gov. Code § 53066 et seq.* (franchise or license to construct community antenna television systems).
- *Gov. Code § 53066.4* (lockbox made available to cable television system subscribers).
- *Gov. Code § 53088.5 et seq.* (cable system delinquent payment fees).
- *Penal Code § 593d* (unauthorized connection with cable system as punishable by fine and/or imprisonment and creating liability for civil damages).
- *Penal Code § 593e* (unauthorized manufacture, distribution, sale, possession, attachment, or other provision of device for decoding or intercepting transmission of subscription television service as punishable by fine and/or imprisonment and as creating liability for civil damages).
- *Pub. Util. Code § 215.5* (cable television corporation defined).

The provision of channels of video services to residences is subject to *Gov. Code § 53054 et seq.* (Cable Television and Video Provider Customer Service and Information Act), and *Gov. Code § 53088 et seq.* (Video Customer Service Act).

A variety of California statutes governs the business of producing radio and television programs, including:

- *Bus. & Prof. Code § 7319(c)* (persons employed in radio and television production exempt from cosmetology licensing requirements).

- *Bus. & Prof. Code § 14700* (filing of affidavit of authorship of radio script, radio program, or motion picture scenario with Secretary of State).

- *Gov. Code § 14671* (leasing of state property for radio or television purposes when in state's best interest).

- *Gov. Code § 26155* (conditions under which boards of supervisors may authorize contributions to nonprofit educational radio and television stations).

- *Lab. Code § 271* (deposit of funds sufficient to pay wages of individuals employed in radio or television broadcasting enterprise).

- *Lab. Code § 1308.5* (consent of Labor Commissioner required for employment of certain minors in radio broadcasting or television studio).

- *Pub. Util. Code § 768.5* (authority of Public Utilities Commission to require health and safety measures of cable television corporations).

Statutes relating to defamation in broadcasts include *Civ. Code § 48.5* (defamation by means of visual or sound radio broadcasts) and *Civ. Code § 3425.3* (single publication of libel or slander in broadcast over radio or television).

Miscellaneous statutes relating to radio and television include:

- *Bus. & Prof. Code §§ 17531.6-17531.9* (injunctive relief by state against manufacturer, processor, or distributor of falsely labeled television picture tubes).

- *Educ. Code §§ 33120, 41920, 51870-51879.5, 62000, 71035, 78311* (use of instructional television broadcasts or closed-circuit television programs in schools).

- *Veh. Code § 27602* (no television sets permitted in motor vehicles forward of back of driver's seat or visible to driver when operating vehicle).

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawBroadcastingGeneral OverviewCommunications LawCable SystemsGeneral OverviewCommunications LawVideo TechnologiesSubscription TelevisionEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthorityGovernmentsCourtsSmall Claims Courts

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42-484 California Forms of Pleading and Practice--Annotated § 484.11

§ 484.11 Federal Regulation of Radio and Television

[1] In General

The federal government controls all channels of interstate and foreign radio transmissions. In addition, the federal government may grant licenses to individuals to use these channels to transmit radio communications for limited periods of time. The licenses granted to these persons do not create in them ownership rights in the radio channel. Rather, a license provides only for the use and operation of the channel by the licensee under the terms and conditions of the license [*47 U.S.C. § 301*]. Although not referring specifically to television, the federal regulation of radio applies equally to television [*Standard Radio & Television Co. v. Chronicle Pub. Co. (1960) 182 Cal. App. 2d 293, 296, 6 Cal. Rptr. 246]* .

The federal statute controlling radio and television evidences a comprehensive federal scheme of regulation of the communications industry [*R.E. Spriggs Co. v. Adolph Coors Co. (1974) 37 Cal. App. 3d 653, 663, 112 Cal. Rptr. 585]* . Insofar as the federal government fully occupies the field of radio and television regulation, that field is no longer open to the states [*see City of Rancho Palos Verdes v. Abrams (2002) 101 Cal. App. 4th 367, 370, 376 124 Cal. Rptr. 2d 80* (FCC license to amateur radio operator preempted injunction obtained by city to prohibit use of frequency); *Standard Radio & Television Co. v. Chronicle Pub. Co. (1960) 182 Cal. App. 2d 293, 300, 6 Cal. Rptr. 246]* . Similarly, because a state may not do indirectly by judicial decree what it cannot do directly by legislation [*Standard Radio & Television Co. v. Chronicle Pub. Co. (1960) 182 Cal. App. 2d 293, 300, 6 Cal. Rptr. 246]* and because the federal scheme of radio and television regulation necessitates uniform enforcement across thecountry [*R.E. Spriggs Co. v. Adolph Coors Co. (1974) 37 Cal. App. 3d 653, 663, 112 Cal. Rptr. 585]* , a state court cannot enjoin television advertisements originating in, and transmitted from, another state but containing information contrary to local restrictions on advertisements [*People v. Eller Telecasting Co. (1970) 13 Cal. App. 3d 296, 302-303, 91 Cal. Rptr. 468* (overturning injunction that restrained Arizona television station from broadcasting advertisements giving prices for optical work contrary to California law prohibiting quotation of optical prices)].

A state antitrust law claim based on the Cartwright Act (*Bus. & Prof. Code § 16720 et seq.*, prohibiting "anticompetitive 'tying' practices"), which is brought by a customer of a cable television service against the cable television operator, is not preempted by provisions of federal statutes (*47 U.S.C. §§ 521 et. seq., 541* et. seq.) regulating the cable television

industry [*Morrison v. Viacom, Inc. (1997) 52 Cal. App. 4th 1514, 1517-1518, 61 Cal. Rptr. 2d 544]* .

[2] Restrictions on Antennas

Federal regulation preempts state and local restrictions, including zoning, land-use, or building regulations, to the extent they are unreasonable (as defined), that impair the installation, maintenance, or use of an antenna designed to receive any of the following [*47 C.F.R. § 1.4000(a)*]:

- Direct broadcast satellite service (if one meter or less in diameter).
- Video programming services via multipoint distribution services (if one meter or less in diameter).
- Broadcast television.

This preemption extends to private covenants, contract provisions, lease provisions, homeowners' association rules, or similar restrictions on property within the exclusive use or control of the antenna user if the antenna user has a direct or indirect ownership or leasehold interest in the property [*47 C.F.R. § 1.4000(a)*].

Narrowly drawn exceptions to the preemption allow some regulation for safety and in the case of prehistoric or historic districts, buildings, sites, structures, or objects included on or eligible for inclusion on the National Register of Historic Places [*see 47 C.F.R. § 1.4000(b)*].

A similar, somewhat less expansive, preemption applies to state or local zoning, land-use, building, or similar regulations that materially limit the transmission or reception by satellite earth station antennas [*see 47 C.F.R. § 25.104*; *see also Hunter v. City of Whittier (1989) 209 Cal. App. 3d 588, 598-599, 257 Cal. Rptr. 559* (ordinance held invalid)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawBroadcastingGeneral OverviewCommunications LawBroadcastingLicensingGeneral OverviewCommunications LawBroadcastingLicensingAllocation MethodsGeneral OverviewCommunications LawFederal ActsCommunications ActFederal PreemptionCommunications LawSatellite ServicesDirect Broadcast Satellites

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42-484 California Forms of Pleading and Practice--Annotated § 484.12

§ 484.12 Contracts for Sale of Advertising Time

[1] Enforcement

Advertising time on radio and television is ordinarily an object of sale [*see Barron v. Board of Dental Examiners (1930) 109 Cal. App. 382, 384-385, 293 P. 144* (radio advertisements by dentist not prohibited so long as advertisements not untrue)]. Because advertising time is an object of sale, actions may be brought by buyers and sellers of advertising time to recover money due under contracts for advertising time [*see R.H. Macy & Co. v. Robinson (1960) 183 Cal. App. 2d 182, 184-188, 6 Cal. Rptr. 703* (action brought by seller of advertising time against sponsors and sponsor's advertising agent)]. For example, an owner of television and radio stations may recover the money due for the broadcast of advertising on his or her stations based on a modified written agreement with the sponsor's agent where the owner and the sponsor's agent had discussed each purchase of radio or television time and the sponsor had taken an active role in obtaining the advertisements [*R.H. Macy & Co. v. Robinson (1960) 183 Cal. App. 2d 182, 189, 6 Cal. Rptr. 703]* . For discussion, procedures, and forms for use in an action to recover money, see Ch. 7, *Accounting, Action for*; Ch. 8, *Accounts Stated and Open Accounts* ; Ch. 121, *Common Counts* ; and Ch. 140, *Contracts* .

[2] Unilateral Cancellation of Advertising Contracts

By canceling an advertising contract, a buyer or seller of advertising time subjects himself or herself to the damages that will compensate the other party for the breach [*see Richardson v. Davis (1931) 116 Cal. App. 388, 390, 2 P.2d 860]* . Furthermore, when an advertising contract has been unilaterally canceled, a radio or television station cannot continue to run the advertisement and thus increase the damages [*see Early v. Santa Clara Broadcasting Co. (1962) 211 Cal. App. 2d 367, 371, 27 Cal. Rptr. 212* (finding, however, that buyer had not unilaterally canceled)]. In addition a buyer of advertising time may bring an action to restrain the broadcast of advertisements after having unilaterally canceled the contract [*see Early v. Santa Clara Broadcasting Co. (1962) 211 Cal. App. 2d 367, 369, 27 Cal. Rptr. 212* (action by advertising agency to restrain radio and television stations from broadcasting advertisements under purportedly canceled contract between advertising agency and owner of stations)].

Legal Topics:

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

Communications LawBroadcastingGeneral Overview

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42-484 California Forms of Pleading and Practice--Annotated § 484.13

§ 484.13 Breach of Employment Contract

Employment contracts providing for fees or commissions have been found to be breached when an employer fails to pay a performer for reuse of videotape recordings [*Bupp v. Great W. Broadcasting Corp. (1962) 201 Cal. App. 2d 580, 584, 20 Cal. Rptr. 106* (reuse of commercial advertisements and announcements by staff television announcer) or televisionfilms [*Brecher v. Gleason (1972) 27 Cal. App. 3d 496, 502-503, 103 Cal. Rptr. 831* (reuse of television series featuring comedian)]. A breach of employment contract is also found where an employer fails to pay its authorized agents any commissions or fees for services rendered [*Brea v. McGlashan (1934) 3 Cal. App. 2d 454, 461-467, 39 P.2d 877* (refusal of radio station to pay commissions on advertising contracts that sales representative secured pursuant to oral agreement between the sales representative and the station's advertising manager); *see Taylor v. Educational Broadcasting Corp. (1939) 34 Cal. App. 2d 680, 682-683, 94 P.2d 377* (no breach of agreement to pay commissions to radio advertising sales agent when agreement for commissions terminates and employer fails to renew based on agent's unsatisfactory performance)]. In addition, an employment contract is breached when an employer wrongfully discharges an employee [*Mason v. Lyl Prod. (1968) 69 Cal. 2d 79, 83-84, 69 Cal. Rptr. 769, 443 P.2d 193* (child actress wrongfully discharged when employer terminated employment after child disobeyed unreasonable order to remain on set of television series during lunch hour)].

For discussion, procedures, and forms for use in an action for breach of contract, see Ch. 140, *Contracts* . For discussion and forms for use in an action for breach of an employment contract, see Ch. 249, *Employment Law: Termination and Discipline* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsEmployment ContractsBreachLabor & Employment LawWrongful TerminationBreach of ContractGeneral Overview

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42-484 California Forms of Pleading and Practice--Annotated § 484.14

§ 484.14 Remedies for Breach of Employment Contract

[1] Right to Accounting

Ordinarily, an accounting is unnecessary between an employer and an employee. However, where the agreed payment to the employee consists of certain percentages of money that the employer receives and the employee does not know what moneys the employer has been paid as a result of the employee's efforts, an action for accounting is proper [*Brea v. McGlashan (1934) 3 Cal. App. 2d 454, 460, 39 P.2d 877* (action for accounting to determine commissions due radio advertising sales agent for radio advertising contracts she procured)]. On the other hand, an action for accounting is improper when the amount sought by an employee is certain to his or her knowledge [*Tostevin v. Douglas (1958) 160 Cal. App. 2d 321, 329-330, 325 P.2d 130* (contract to solicit and procure personnel and material for travelog television shows at fixed salary)].

For discussion, procedures, and forms for use in an accounting action, see Ch. 7, *Accounting, Action for*.

[2] Compensation After Wrongful Discharge

If an employee is wrongfully discharged, his or her remedy is an action for damages [*Warner Bros. Pictures, Inc. v. Bumgarner (1961) 197 Cal. App. 2d 331, 351, 17 Cal. Rptr. 171* ; *see Mason v. Lyl Prod. (1968) 69 Cal. 2d 79, 84-85, 69 Cal. Rptr. 769, 443 P.2d 193* (wrongful discharge of child actress compensated for in monetary damages)]. However, when an employer has not discharged an employee but merely has prevented the employee from working, the employee need not treat the employment contract as broken. Rather, he or she may sue on the contract and recover the agreed compensation, provided he or she stands ready, able, and willing to perform under the contract [*Warner Bros. Pictures, Inc. v. Bumgarner (1961) 197 Cal. App. 2d 331, 351, 17 Cal. Rptr. 171]* . Thus, when an employer breaches a contract of employment, the employee has the right to declare the contract terminated but may not recover damages accruing after declaring the contract terminated [*Warner Bros. Pictures, Inc. v. Bumgarner (1961) 197 Cal. App. 2d 331, 351, 17 Cal. Rptr. 171* (actor quitting employment on television series after receiving notice of suspension of salary entitled to no more than salary due at time of his quitting)].

[3] Restoration to Position From Which Discharged

Ordinarily, an employer does not have the duty to provide work for his or her employee but is free to utilize the employee's services when and however he or she chooses so long as he or she pays the employee's salary. However, this rule does not apply where the employee's reputation will suffer if the employee is not allowed to practice his or her profession. In the latter situation, the parties to the employment contract are deemed to have contracted with the assumption that the employee would be given opportunities to exercise his or her abilities during a reasonable portion of the period of the contract [*Colvig v. RKO General, Inc. (1965) 232 Cal. App. 2d 56, 66-67, 42 Cal. Rptr. 473]* . For example, a radio announcer is considered, under his or her contract, to have bargained for the acquisition of a reputation in the public eye, a reputation that appearing through the medium of radio would enhance and failing to appear would diminish [*Colvig v. RKO General, Inc. (1965) 232 Cal. App. 2d 56, 68, 42 Cal. Rptr. 473]* . For this reason, a radio announcer wrongfully discharged is not only entitled to restoration of his or her position at the renumeration provided for that position but also is entitled to restoration of the duties and functions of the position of radio announcer [*Colvig v. RKO General, Inc. (1965) 232 Cal. App. 2d 56, 65, 42 Cal. Rptr. 473]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesCompensatory DamagesLabor & Employment LawEmployment RelationshipsEmployment ContractsBreachLabor & Employment LawWrongful TerminationBreach of ContractGeneral OverviewLabor & Employment LawWrongful TerminationRemediesGeneral OverviewLabor & Employment LawWrongful TerminationRemediesCompensatory Damages

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§ 484.15 Restrictions on Employment of Minors

The Labor Commissioner must consent in writing to the employment of any minor under 16 years of age in any radio broadcasting or television studio [*Lab. Code § 1308.5(a)(1)*]. In addition, the Labor Commissioner must give written consent for any minor between the ages of eight and 18, already permitted employment by any state law as an actor, actress, or performer in a presentation in a radio broadcasting or television studio before 10:00 P.M., to continue his or her part in the presentation betweenthe hours of 10:00 and 12:00 P.M. [*Lab. Code § 1308.5(a)(4)*]. Any person, his or her agent, manager, superintendent, or officer, or any parent or guardian of a minor who employs, or permits the employment of, a minor in violation of the consent requirements outlined above is guilty of a misdemeanor. Failure to produce the written consent of the Labor Commissioner [*see Lab. Code § 1308.6* (prerequisites for Labor Commissioner's consent)] is prima facie evidence of the illegal employment of any minor [*Lab. Code § 1308.5(b)*]. For discussion and forms for use in petitioning for approval of a minor's employment contract for artistic services, see Ch. 365, *Minors: Contract Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewLabor & Employment LawWage & Hour LawsChild Labor

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42-484 California Forms of Pleading and Practice--Annotated § 484.16

§ 484.16 Electronic and Appliance Repair Dealer Registration Law

[1] In General

The Electronic and Appliance Repair Dealer Registration Law [*Bus. & Prof. Code §§ 9800-9874*] is designed to protect the public from fraudulent, incompetent, and elusive service dealers who in the past, by unprincipled operations, have imposed upon and swindled the public [*see Packard-Bell Electronics Corp. v. Department of Professional & Vocational Standards (1966) 242 Cal. App. 2d 387, 389, 51 Cal. Rptr. 432]* . The Law generally empowers the Director of Consumer Affairs to investigate, regulate, and discipline "service dealers" through the Bureau of Electronic and Appliance Repair, Home Furnishings, and Thermal Insulation, a bureau within the Department of Consumer Affairs, and the Chief of the bureau [*see Bus. & Prof. Code §§ 9801(b)-(e), 9810*; *Packard-Bell Electronics Corp. v. Department of Professional & Vocational Standards (1966) 242 Cal. App. 2d 387, 389-390, 51 Cal. Rptr. 432* ; *see also Civ. Code § 1793.03* (manufacturer's duty to supply replacement parts)].

[2] Regulation of "Service Dealers"

Insofar as the Electronic and Appliance Repair Dealer Registration Law (*Bus. & Prof. Code § 9800 et seq.*) affects television and radio repair dealers, "service dealers" are persons who, for compensation, engage in, or hold themselves out to the public as offering services in, the following businesses:

(1) Repairing, servicing, or maintaining an electronic set normally used or sold for personal, family, household, or home office use [*see Bus. & Prof. Code § 9801(f)(1)*; *see also Bus. & Prof. Code § 9801(g), (n)* ("equipment" and "video game" defined)];

(2) Installing, repairing, servicing, or maintaining equipment or a burglar alarm system for use in private motor vehicles [*see Bus. & Prof. Code § 9801(f)(2)*];

(3) Installing, repairing, servicing, or maintaining television or radio receiver antennas, rotators, and accessories or direct satellite signal receiving equipment located on or adjacent to a residence and not involving a function that is subject to and regulated under *Bus. & Prof. Code § 7000 et seq.* [*see Bus. & Prof. Code § 9801(f)(3)*; *see also Bus. & Prof. Code § 9801(j), (k), (l), (o)* ("antenna," "rotator,"

"accessories" and "direct satellite signal receiving equipment" defined)]; or

(4) Repairing, servicing, or maintaining major appliances [*see Bus. & Prof. Code § 9801(f)(4)*].

These dealers are required, with certain specific exceptions [*see Bus. & Prof. Code §§ 9802-9805*], to register with the Bureau of Electronic and Appliance Repair and to pay the required fee for each place of business [*16 Cal. Code Reg. § 2710*] operated by them in the state [*Bus. & Prof. Code § 9830*]. Thus, it is unlawful for a person to act as an electronic repair dealer without being first registered and in possession of a currently valid registration [*Bus. & Prof. Code § 9840*]. Electronic repair dealers also are required to do the following:

(1) Record invoices describing all the work they do [*Bus. & Prof. Code § 9842*; *16 Cal. Code Reg. §§ 2723-2725*];

(2) Return replaced parts to their customers [*Bus. & Prof. Code § 9843*; *see People v. Regan (1979) 95 Cal. App. 3d Supp. 1, 5-6, 157 Cal. Rptr. 62* (strict liability as imposed by *Bus. & Prof. Code § 9843*)];

(3) Prepare written estimates of work required for a specific job [*Bus. & Prof. Code § 9844*; *16 Cal. Code Reg. § 2722*];

(4) Advise their customers in writing of the amount of the fee for determining the nature of the malfunction prior to a repair made in the residence, before removal of the consumer goods from the customer's residence, or on acceptance of the goods at the repair facility or registered location [*Bus. & Prof. Code § 9844*]; and

(5) Maintain records open to inspection by the Director of the Department of Consumer Affairs or other law enforcement officers [*Bus. & Prof. Code § 9847*].

The charge for installation of any equipment subject to the requirements of the Repair Dealer Law must be given to the customer in writing prior to making the installation. Whenever the installation charge is included in the sale price of the item and is not separately stated or whenever the charge for installation is reduced as an incentive to effectuate the purchase and sale, the Bureau of Electronic and Appliance Repair may determine the reasonable charge attributable to the installation, for purposes of enforcement [*Bus. & Prof. Code § 9844.1*].

In addition, the Director of the Department of Consumer Affairs may refuse to validate, or may invalidate, the registration of any dealer for the following acts or omissions of the dealer or of any employee, partner, officer, or member of the service dealer and related to the conduct of the dealer's business [*Bus. & Prof. Code § 9841*]:

(1) Making or authorizing an untrue or misleading statement or advertising [*see 16 Cal. Code Reg. § 2720*];

(2) Making a false promise likely to induce a customer to authorize repair, installation, service, or maintenance of a television or radio;

(3) Fraudulent or dishonest conduct;

(4) Incompetent or negligent conduct;

(5) Failure to comply with the Electronic Repair Dealer Registration Law;

(6) Willful departure from, or disregard of, accepted trade standards for good and workmanlike

installation or repair;

(7) Conviction of a crime that has a substantial relationship to the qualifications, functions, and duties of the registrant;

(8) Commission of acts or crimes constituting grounds for denial of licensure under *Bus. & Prof. Code § 480*; and

(9) Holding, currently or in future, registration for the benefit of a former registrant whose registration has been suspended or revoked and who will continue to have some involvement in the business.

The Bureau of Electronic and Appliance Repair is instructed to design a sign which all service dealers must place conspicuously in their places of business. The sign must give notice to the public of mandated service standards and provide the telephone number of the bureau for inquiries or complaints [*Bus. & Prof. Code § 9854*].

[3] Regulation of "Service Contractors"

[a] In General

In 1993, the legislature adopted provisions that extended the Electronic and Appliance Repair Dealers Registration Law to service contractors as well as to service dealers [*see* Stats. 1993, ch. 1265, § 7]. These provisions were subject to repeal on January 1, 2003, but the legislature extended that date to January 1, 2008 [*see Bus. & Prof. Code § 9855.9*; *see also Bus. & Prof. Code §§ 9830.5, 9832.5(f), 9847.5, 9849, 9851* (related sections subject to repeal on January 1, 2008)]. It is unlawful for any person to act as a service contractor in California unless that person first registers with the Bureau of Repair Services in accordance with the provisions of the Repair Dealer Law and maintains a valid registration [*Bus. & Prof. Code § 9855.1*]. The service contract form to be issued by the service contractor must be filed with the Director of the Department of Consumer Affairs by the service contractor before its use [*Bus. & Prof. Code § 9855.3(a)*].

"Service contractor" means either a service contract administrator or a service contract seller [*Bus. & Prof. Code § 9855(e)*].

"Service contract seller" means a person who sells or offers to sell a service contract to a service contract holder [*Bus. & Prof. Code § 9855(c)*; *see* discussion in *§ 48.16[b]*].

"Service contract" means a contract in writing to perform, over a fixed period or for a specified duration, services relating to the maintenance or repair of a set or appliance as defined by the Repair Dealer Law [*Bus. & Prof. Code § 9855(a)*].

"Service contract holder" means a person who purchases or receives a service contract from a service contract seller [*Bus. & Prof. Code § 9855(d)*].

"Service contract administrator" means a person, other than a service contract seller or an insurer admitted to do business in California, who performs or arranges, or has an affiliate who performs or arranges, the collection, maintenance, or disbursement of money to compensate any party for claims or repairs pursuant to a service contract and who also performs or arranges, or has an affiliate who performs or arranges, any of the following activities on behalf of service contract sellers [*Bus. & Prof. Code § 9855(b)*; *see discussion under § 484.16[2][d]*]:

(1) Providing service contract sellers with service contract forms;

(2) Participating in the adjustment of claims arising from service contracts; or

(3) Arranging on behalf of service contract sellers the insurance required by law [*see Bus. & Prof. Code § 9855.2*; discussion under *§ 484.16[2][c]*].

Each service contractor must maintain records as required by the regulations adopted to carry out the provisions of the Repair Dealer Law for at least three years. The records must be open for reasonable inspection by the Director of the Department of Consumer Affairs or other law enforcement officials [*Bus. & Prof. Code § 9847.5*].

A service contractor must comply with the provisions of the Civil Code governing (1) the making of a service contract in addition to or in lieu of an express warranty and (2) the requirements for home appliance or home electronic product service contracts [*Bus. & Prof. Code § 9855.5*; *see Civ. Code §§ 1794.4, 1794.41*]. For discussion of those provisions, see Ch. 500, *Sales and Secured Transactions* , Pt. III. When a service contract holder cancels a service contract in accordance with the provisions of the Civil Code governing the requirements for home appliance or home electronic product service contracts [*see Civ. Code § 1794.41*], and the refund due is not paid to the service contract holder or credited to his or her account within 30 days after the service contractor receives written notice of cancellation, the amount of the required refund or credit must bear interest, payable to the service contract holder, at the rate of 10 percent a year for each additional 30-day period or part of a 30-day period [*Bus. & Prof. Code § 9855.6*].

The Director of the Department of Consumer Affairs may refuse to validate, or may temporarily or permanently invalidate, the registration of a service contractor for any act, omission, or crime by the service contractoror any employee, partner, officer, or agent of the service contractor for any of the following reasons [*Bus. & Prof. Code § 9855.7*]:

(1) Any conduct that constitutes fraud or dishonest dealing;

(2) Conviction of a crime that has a substantial relationship to the qualifications, functions, and duties of a registrant under the Repair Dealer Law, in which event the record of conviction is conclusive evidence of it; or

(3) Assisting in or abetting the violation of, or conspiring to violate, any provision of, or any regulation adopted under, the service contractors law [*Bus. & Prof. Code § 9855.7*; *see Bus. & Prof. Code § 9855 et seq.*].

The Director of the Department of Consumer Affairs may issue a citation to the service contractor for any of the following reasons [*Bus. & Prof. Code § 9855.8(a)*]:

(1) Failure to file a service contract form with the Director of the Department of Consumer Affairs before its use [*see Bus. & Prof. Code § 9855.3(a)*] or failure to comply with applicable provisions of the Civil Code concerning service contracts [*see Bus. & Prof. Code § 9855.5*; *Civ. Code §§ 1794.4, 1794.41*].

(2) On a determination by the Director of the Department of Consumer Affairs that the service contractor has committed a violation by either (a) making or authorizing statements or advertisements that are untrue or misleading or (b) making false promises of a character likely to influence, persuade, or induce a customer to purchase a service contract as provided by the Repair Dealer Law. A violation consists of a single publication or single course of conduct that is determined by the Director of the Department of Consumer Affairs to be untrue or misleading.

The citation may contain an order of abatement and an order to pay an administrative fine assessed by the Director of the Department of Consumer Affairs [*Bus. & Prof. Code § 9855.8(b)*].

Each citation must be in writing and must describe with particularity the nature of the violation, including a specific reference to the provision of law determined to have been violated [*Bus. & Prof. Code § 9855.8(b)(1)*]. When appropriate, the citation must contain an order of abatement fixing a reasonable time for abatement of the violation [*Bus. & Prof. Code § 9855.8(b)(2)*].

A citation or fine assessment issued pursuant to a citation must inform the service contractor that if he or she desires a hearing to contest the finding of a violation, that hearing must be requested by written notice to the Bureau of Repair Services within 30 days after the date of issuance of the citation or assessment. If a hearing is not duly requested, payment of any fine does not constitute an admission of the violation charged. Hearings must be held pursuant to the Administrative Procedure Act [*Bus. & Prof. Code § 9855.8(b)(3)*; *see Gov. Code § 11500 et seq.*]. For discussion of applicable hearing procedures, see Ch. 473, *Public Agency Adjudication* et seq.

In addition to requesting a hearing, the service contractor may request a citation review conference with the Director of the Department of Consumer Affairs or his or her designee regarding the acts charged in the citation. A citation review conference must be requested by written notice to the Bureau of Repair Services within 20 days after the date of the issuance of the citation or assessment [*Bus. & Prof. Code § 9855.8(b)(4)(A)*].

The Director of the Department of Consumer Affairs or his or her designee must hold a citation review conference within 60 days from the receipt of the request. At the conclusion of the citation review conference, the Director of the Department of Consumer Affairs or his or her designee must state, in writing, the reasons for his or her action and transmit a copy of his or her findings and decision to the service contractor [*Bus. & Prof. Code § 9855.8(b)(4)(B)*].

The failure of a service contractor to pay a fine within 30 days after the date of assessment, unless the citation is being appealed, may result in disciplinary action being taken by the Director of the Department of Consumer Affairs. When a citation is not contested and a fine is not paid, the full amount of the assessed fine must be added to the fee for renewal of the registration. A registration may not be renewed without payment of the renewal fee and fine [*Bus. & Prof. Code § 9855.8(b)(5)*].

When a citation includes an administrative fine, it must be issued in accordance with the following procedures. For the first, second, or third citation, the Director of the Department of Consumer Affairs may assess an administrative fine [*Bus. & Prof. Code § 9855.8(c)(1)-(3)*]. For the fourth failure to file a service contract form with the Director of the Department of Consumer Affairs before its use [*see Bus. & Prof. Code § 9855.3(a)*] or failure to comply with applicable provisions of the Civil Code concerning service contracts [*see Bus. & Prof. Code § 9855.5*; *Civ. Code §§ 1794.4, 1794.41*], during any two-year period, the Director of the Department of Consumer Affairs may either assess an administrative fine or invalidate temporarily or permanently the registration of the service contractor [*Bus. & Prof. Code § 9855.8(c)(4)*].

The expiration of a valid registration does not deprive the Director of the Department of Consumer Affairs of jurisdiction to proceed with any investigation or hearing on a cease and desist order against a service dealer or service contractor or to render a decision invalidating a registration temporarily or permanently [*Bus. & Prof. Code § 9849*].

[b] Contract Sellers

Every service contract seller must file with his or her application for registration, and thereafter with his or her application for registration renewal, one of the following [*Bus. & Prof. Code § 9855.3(c)*]:

(1) A service contract reimbursement insurance policy [*see discussion under § 484.16[2][c]*];

(2) Evidence that his or her service contracts are administered by a service contract administrator who

has obtained a service contract reimbursement insurance policy covering the seller's service contracts;

(3) Evidence of a funded account held in escrow equal to a minimum of 25 percent of the deferred revenues from the service contracts in force; or

(4) The most recent annual report on Form 10-K required by the Securities and Exchange Commission, reflecting a net worth greater than the sum of the deferred revenues from service contracts in force. (If the service contractor is a foreign corporation that files a comparable audited financial statement with its home government, the Director of the Department of Consumer Affairs may deem that statement an acceptable substitute for Form 10-K.)

A service contract seller must not issue, sell, or offer for sale a service contract unless he or she complies with one of the following requirements [*Bus. & Prof. Code § 9855.2(a)*]:

(1) Obtains a service contract reimbursement insurance policy [*see discussion under § 484.16[2][c]*];

(2) Sells service contracts that are administered by a service contract administrator who has obtained a service contract reimbursement insurance policy covering the seller's service contracts;

(3) Maintains and annually verifies to the Director of the Department of Consumer Affairs a funded account held in escrow equal to a minimum of 25 percent of the deferred revenues from the service contracts in force; or

(4) Files with the Director of the Department of Consumer Affairs either: (A) The most recent annual report on Form 10-K required by the Securities and Exchange Commission, reflecting a net worth greater than the sum of the deferred revenues from service contracts in force. (If the service contractor is a foreign corporation that files a comparable audited financial statement with its home government or with the United States government, the director may deem that statement an acceptable substitute for Form 10-K); or (B) The most recent audited financial statement reflecting a net worth of not less than $100,000,000. The financial statement must be certified by a certified public accountant who is licensed in the state where the service contract seller maintains its principal place of business or the seller's state of domestic incorporation.

Nothing in the California Public Records Act requires disclosure of either (a) financial data contained in applications for registration, or registration renewal, as a service contractor filed with the Director of the Department of Consumer Affairs for the purpose of establishing the service contractor's net worth or (b) financial data regarding the funded accounts held in escrow for service contracts held in force in California by a service contractor [*Gov. Code § 6254(x)*; *but see Gov. Code § 6254.7* (general exceptions)].

[c] Reimbursement Insurance

"Service contract reimbursement insurance policy" means a policy of insurance issued by an insurer admitted to do business in California providing coverage for all obligations and liabilities incurred by a service contract seller under the terms of the service contracts sold in California by the service contract seller to a service contract holder [*Bus. & Prof. Code § 9855(f)*].

The policy must cover the obligations of the service contract seller under the service contracts sold during the period the policy is in force [*Bus. & Prof. Code § 9855.4(a)*]. The policy must either cover all service contracts sold or specifically cover all contracts sold to residents of California [*Bus. & Prof. Code §§ 9855(f), 9855.4(a)*].

The policy must contain a provision under which the insurer must notify the Bureau of Repair Services in writing of the termination or nonrenewal of the policy [*Bus. & Prof. Code § 9855.4(b)*].

On the effective date of the termination or cancellation of a service contractor's policy, the registrations of the service contractors whose service contracts are covered by the policy are automatically suspended, unless the affected service contractors, before the date of the termination or cancellation of the policy, have either filed a new policy with the Director of the Department of Consumer Affairs or otherwise met one of the requirements for dealing in service contracts [*see Bus. & Prof. Code § 9855.2*; *discussion under § 484.16[2][b]*]. On receipt of a written request from the service contractor, the Director of the Department of Consumer Affairs may delay the suspension of registration for no more than 60 days. Following the automatic suspension, an administrative hearing must be provided on written request to the Director of the Department of Consumer Affairs in accordance with the Administrative Procedure Act [*Bus. & Prof. Code § 9855.4(c)*; *see Gov. Code § 11500 et seq.*]. For discussion of applicable hearing procedures, see Ch. 473, *Public Agency Adjudication* et seq.

[d] Contract Administrators

Every service contract administrator must file with the application for registration, and thereafter, with the application for registration renewal, a service contract reimbursement insurance policy [*Bus. & Prof. Code § 9855.3(b)*].

A service contract administrator must not administer service contracts sold in California unless a service contract reimbursement insurancepolicy covering the service contracts has been obtained [*Bus. & Prof. Code § 9855.2(b)*].

A service contract administrator must not be an obligor on a service contract [*Bus. & Prof. Code § 9855(b)*].

[4] Remedies Under Law

On the application of the Director of the Department of Consumer Affairs, a superior court in the county in which a service dealer or contractor carries on business may issue an injunction or other order restraining the dealer or contractor's conduct that is in violation of the Electronic and Appliance Repair Dealer Registration Law [*Bus. & Prof. Code § 9851*]. Furthermore, the Director accepts complaints from consumers [*Bus. & Prof. Code § 9860*] and either disposes of a complaint as not stating any violations by the dealer or contractor [*Bus. & Prof. Code § 9861*] or advises the dealer or contractor of the complaint, allowing the dealer or contractor a reasonable opportunity to reply to the complaint before investigating the facts [*Bus. & Prof. Code §§ 9862, 9862.5*]. If the Director, after investigating the facts, determines that a violation is likely to have occurred, he or she may suggest measures to compensate the complainant for the damages suffered as a result of the violation. If the dealer or contractor is unwilling to abide by the Director's suggestion, the Director may investigate further and may institute disciplinary proceedings against the dealer or contractor [*Bus. & Prof. Code § 9863*]. Finally, any person who fails to comply with these provisions is guilty of a misdemeanor and punishable by a statutory fine or by imprisonment not exceeding six months, or both [*Bus. & Prof. Code § 9850*].

For discussion and forms for use when goods are unsolicited or services not performed, see Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency InvestigationsGeneral OverviewAntitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationAntitrust & Trade LawConsumer ProtectionFalse AdvertisingState RegulationAntitrust & Trade LawConsumer ProtectionMagnuson-Moss Warranty ActGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary &

Temporary InjunctionsInsurance LawBusiness InsuranceGeneral Overview

California Forms of Pleading and Practice--Annotated

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§ 484.17 Customer Service Standards of Cable Television Operators and Other Video Providers

[1] Adoption

The Cable Television and Video Provider Customer Service and Information Act (*Gov. Code § 53054 et seq.*) governs the establishment of customer service standards by cable television and video providers. Under the act, each cable television operator or video provider in the state is required to establish customer service standards [*see Gov. Code § 53055*].

The Video Customer Service Act (*Gov. Code § 53088 et seq.*) statutorily establishes customer service standards that cable television operators and other video providers are required to adopt [*see Gov. Code § 53088.2*]. Nevertheless, nothing in that act limits any power of a city, county, city and county, or video provider to adopt and enforce service standards andconsumer protection standards that exceed those established by the act [*Gov. Code § 53088.2(q)*].

The view of the Legislature in enacting customer service standards legislation is that the establishment and dissemination of customer service standards is one way to ensure that, in an unregulated environment, customers of cable and video providers get their money's worth for the services to which they subscribe [*Gov. Code § 53054.1(a)*].

For the purposes of *Gov. Code § 53054 et seq.*, a "cable television operator" is the person or entity providing cable television services through a cable television system [*Gov. Code § 53054.2(a)*]. A "cable television system" is a community antenna television system, under common ownership and control, serving a franchise area or two or more contiguous or electronically connected franchise areas [*Gov. Code § 53054.2(b)*].

For the purposes of both *Gov. Code §§ 53054 et seq.* and *53088 et seq.*, a "video provider" is, with two exceptions, any person, company, or service that provides one or more channels of video programming to a residence, including a home, condominium, apartment, or mobilehome, when some fee is paid, either directly or as included in dues or rental charges, for that service, whether or not public rights-of-way are used in the delivery of the programming. A "video provider" includes, but is not limited to, a provider of cable television, master antenna television, satellite master antenna television, direct broadcast satellite, multipoint distribution service, and any other provider of video programming, whatever its technology [*Gov. Code §§ 53054.2(c), 53088.1(a)*]. The first exception is that, under the

Video Customer Service Act, a mobilehome is not expressly listed as a residence to which a video provider provides channels of programming [*see Gov. Code § 53088.1(a)*]. The second exception is that, under the Video Customer Service Act, a video provider does not include a landlord providing only broadcast video programming to a single-family home or other residential dwelling consisting of four units or less [*Gov. Code § 53088.1(a)*].

[2] Installation, Disconnection, Service, and Repair

[a] In General

Each cable television operator or video provider must establish customer service standards regarding installation, disconnection, service, and repair obligations, as well as service call response time and scheduling [*Gov. Code § 53055(a)*].

Every video provider is required to render reasonably efficient service, to make repairs promptly, and to interrupt service only as necessary [*Gov. Code § 53088.2(a)*].

In the event of a complete outage in a customer's service, the provider isrequired to respond promptly. The response must occur within 24 hours of the reporting of the outage to the provider, except in situations beyondthe provider's reasonable control. The provider is deemed to have responded to a complete outage when a company representative arrives at the outage location with 24 hours and begins to resolve the problem [*Gov. Code § 53088.2(g)*].

[a1] Access to Property Owned by Party Other Than Occupant

Cable television companies do not have a *First Amendment* right to deliver their product to customers residing in property owned by third parties, because delivery is so intrusive as to constitute permanent physical trespass. Accordingly, connection of cable equipment amounts to a private taking in violation of the *Fifth Amendment*, for which a private entity has no power of eminent domain [*Cox Cable San Diego, Inc. v. Bookspan (1987) 195 Cal. App. 3d 22, 26-32, 240 Cal. Rptr. 407* (preliminary injunction requiring access to property denied)]. There are no statutes granting cable companies a power of eminent domain nor can such a grant be implied from the statutes regulating cable television systems [*Cox Cable San Diego, Inc. v. Bookspan (1987) 195 Cal. App. 3d 22, 27, 240 Cal. Rptr. 407]* .

The legislative bodies of cities and counties (not cable television companies) are authorized to require developers, as a condition of a *new* subdivision map approval, to provide one or more appropriate cable television systems an opportunity to construct, install, and maintain equipment necessary to extend cable television services to each residential parcel in the subdivision [*Gov. Code § 66473.3*].

[b] Employee Identification

Each cable television operator or video provider must establish customer service standards regarding employee identification [*Gov. Code § 53055(a)*].

All video provider personnel contacting subscribers or potential subscribers outside the office of the provider are to be clearly identified as associated with the video provider [*Gov. Code § 53088.2(b)*].

[c] Telephone Availability

Each cable television operator or video provider must establish customer service standards regarding customer telephone and office hours [*Gov. Code § 53055(b)*].

All video providers are required to have knowledgeable, qualified company representatives available to respond to customer telephone inquiries Monday through Friday, excluding holidays, during normal business hours [*Gov. Code §*

53088.2(d)]. Additionally, all video providers must provide to customers a toll-free or local telephone number for installation, service, and complaint calls. These calls must be answered promptly by the video providers. The city, county, or city and county may establish standards for what constitutes promptness [*Gov. Code § 53088.2(e)*].

[d] Complaints

Each cable television operator or video provider must establish customer service standards regarding complaint procedures [*Gov. Code § 53055(e)*; *see Gov. Code § 53088.2(e)* (phone numbers for complaint calls), discussed in *§ 484.17[2][b]*].

[e] Billing

Each cable television operator or video provider must establish customer service standards regarding procedures for billings, charges, and credits, together with procedures for resolving billing disputes [*Gov. Code § 53055(b),(e)*].

All video providers must render bills that are accurate and understandable [*Gov. Code § 53088.2(f)*].

Every video provider must allow every residential customer who pays his or her bill directly to the video provider at least 15 days from the date the bill for services is mailed to the customer to pay the listed charges, unless otherwise agreed to under a residential rental agreement establishingtenancy. Customer payments are to be posted promptly [*Gov. Code § 53088.2(i)*].

In order to be able to charge fees for delinquent payment, a cable television operator must provide the consumer with written notice at or before the time the consumer enters into the initial agreement for services stating that it is the policy of the seller to impose a fee on delinquent accounts [*Gov. Code § 53088.6(a)*]. At least 10 days prior to the date a fee is imposed, the consumer must be warned on the face of a written notice of the late fee that will be imposed if a consumer's delinquency is not paid by a specified date certain [*Gov. Code § 53088.6(b)*]. The consumer's invoice must specify a due date that is not earlier than the tenth day of the service period for which the invoice is issued [*Gov. Code § 53088.6(c)*]. A fee may only be assessed no earlier than 27 days after the due date specified in the invoice [*Gov. Code § 53088.6(d)*] and on a balance due of at least $10 [*Gov. Code § 53088.6(e)*].

A delinquent account fee charged by a cable television operator generally may not exceed $4.75 [*Gov. Code § 53088.7*]. A fee to which the limitation applies is one "imposed upon a consumer's failure to make full and timely payment of periodic charges for those services," which must include any franchise fee paid by the operator on the delinquent account fee [*Manibog v. MediaOne of Los Angeles, Inc. (2000) 81 Cal. App. 4th 1366, 1372, 98 Cal. Rptr. 2d 297* (operator's billing of $4.75 delinquent account fee and $0.24 franchise fee added to it to be paid to municipality violated delinquent account fee cap)].

[f] Refunds

Each cable television operator or video provider must establish customer service standards regarding refund procedures [*Gov. Code § 53055(b)*].

All video providers must issue requested refund checks promptly, but no later than 45 days following the resolution of any dispute and following the return of the equipment supplied by the provider, if service is terminated [*Gov. Code § 53088.2(m)*].

[g] Rate Increases and Channel or Programming Changes or Deletions

Each cable television operator or video provider must establish customer service standards regarding notice of the deletion of a programming service, the changing of channel assignments, or an increase in rates [*Gov. Code § 53055(d)*

].

All video providers must provide a minimum of 30 days' written notice before increasing rates or deleting channels. All providers must make every reasonable effort to submit the notice to the city, county, or city and county in advance of distribution of the notice to customers. The 30 days' notice is waived if the rate increases or channel deletions are outside the provider's control. In those cases, however, the provider must make reasonable efforts to provide customers with as much notice as possible [*Gov. Code § 53088.2(h)*].

[h] Termination of Service

Each cable television operator or video provider must establish customer service standards regarding procedures for termination of service [*Gov. Code § 53055(c)*].

No provider may terminate residential service for nonpayment of a delinquent account unless the provider furnishes notice of the delinquency and impending termination at least 15 days prior to the proposed termination. The notice must be mailed, postage prepaid, to the customer to whom the service is billed. Notice shall not be mailed until the sixteenth day after the date the bill for services was mailed to the customer. The notice of delinquency and impending termination may be part of a billing statement [*Gov. Code § 53088.2(i)*].

Every notice of termination of residential service for nonpayment of a delinquent account must include all of the following information [*Gov. Code § 53088.2(j)*]:

(1) The name and address of the customer whose account is delinquent;

(2) The amount of the delinquency;

(3) The date by which payment is required in order to avoid termination of service; and

(4) The telephone number of a representative of the provider who can provide additional information and handle complaints or initiate an investigation concerning the service and charges in question.

Service can only be terminated on days when the customer can reach a representative of the provider either in person or by telephone [*Gov. Code § 53088.2(j)*].

Any service terminated without good cause must be restored without charge for the service restoration. Good cause includes, but is not limited to, failure to pay, payment by check for which there are insufficient funds, theft of service, abuse of equipment or system personnel, or other similar subscriber actions [*Gov. Code § 53088.2(k)*].

[i] Disclosure of Customer Information

Video providers may not disclose the name or address of a subscriber for commercial purposes unrelated to the conduct of the business of the video provider (such as a commercial mailing list), without first notifying the customer. The notice, which may be separate or included in any other customer mailing, must clearly describe the customer's right to prohibit disclosure of personal information and the procedure for doing so [*Gov. Code § 53088.2(o)*].

[3] Annual Notice Describing Standards

[a] To Employees, Customers, and Local Governments

Each cable television operator or video provider must annually distribute to employees, to each customer, and to the city, county, or city and county in which the operator or provider furnishes service to customers a notice describing the

customer service standards adopted under *Gov. Code § 53054 et seq.* New customers are required to be provided with this notice when service is initiated [*Gov. Code § 53055.1(a)*].

Additionally, at the time of installation, and annually thereafter, all video providers must provide to all customers a written notice of the programming offered; the prices for that programming; the provider's installation and customer service policies; and the name, address, and telephone number of the local franchising authority [*Gov. Code § 53088.2(c)*].

[b] To New Customers

The notice given to new customers under *Gov. Code § 53055.1(a)* must include, first, the operator's or provider's customer standards as adopted under *Gov. Code § 53054 et seq.* Second, the notice must include a listing of the services offered by the operator or provider that clearly describes all levels of service, including the rates for each level of service. Nevertheless, if this information is otherwise distributed to new customers on installation by the operator or provider, the information need not be included in the notice [*Gov. Code § 53055.1(b)(1)*]. Third, the notice must include the telephone number(s) through which customers may subscribe to, change, or terminate service; request customer service; or seek general or billing information [*Gov. Code § 53055.1(b)(2)*]. Finally, the notice must include a description of the rights and remedies that the operator or provider may make available to its customers if the operator or provider does not materially meet its customer service standards [*Gov. Code § 53055.1(b)(3)*].

[4] Annual Report on Meeting Standards

After the standards established under *Gov. Code § 53054* have been in effect for one year, each cable television operator and video provider must report annually on its performance in meeting its customer service standards. This report must be included in the operator's or provider's annual notice distributed to employees, customers, and local governments [*Gov. Code § 53055.2*].

[5] Effect of Standards on Franchise or License Provisions

Nothing in *Gov. Code § 53054 et seq.* is to be construed to preempt the prerogative of a city, county, or city and county to enforce customer protection standards contained in a franchise or license granted to a cable television operator or video provider under *Gov. Code § 53066.1* or that are otherwise authorized by law for other cable television operators or video providers [*Gov. Code § 53055.3*].

[6] Dispute Resolution

Disputes concerning the provisions of *Gov. Code § 53088 et seq.* are to be resolved by the city, county, or city and county in which the customer resides. For video providers under *Gov. Code § 53066* (cable television systems to whom a franchise or license has been awarded by a city, county, or city and county), the franchising authority (that is, the city, county, or city and county that has awarded the franchise or license to the provider) must resolve disputes. All other video providers must register with the city in which they provide service or, if the customers reside in an unincorporated area, in the county in which they provide service. The registration must include the name of the company and its address, officers, telephone numbers, and customer service and complaint procedures. Counties and cities may charge these other providers operating in the state a fee to cover the reasonable cost of administering *Gov. Code § 53088 et seq.* [*Gov. Code § 53088.2(p)*].There appears to be no statutorily specified method that acity, county, or city and county must use in resolving disputes.

[7] Cumulative Remedies for Violation

Regardless of the availability of a dispute resolution mechanism on the part of the franchising authority for video providers governed by *Gov. Code § 53066*, or on the part of the city or county of service for video providers governed

by *Gov. Code § 53088.2(p)*, or of any other provision of law, *Gov. Code § 53088.2* does not preclude a party affected by the statute from using any judicial remedy available to that party without regard to *Gov. Code § 53088.2*. Actions taken by a local legislative body, including a franchising authority, under *Gov. Code § 53088.2* are not binding on a court of law. For this purpose, a court may conduct de novo review of any issues presented [*Gov. Code § 53088.2(t)*].

[8] Civil Penalty

[a] Failure to Distribute Notice Annually

The legislative body of the city, county, or city and county in which the cable television operator or video provider furnishes service to customers may, by ordinance, provide a schedule of penalties for the failure of the operator or provider annually to distribute notice describing its customer service standards to employees, customers, and local governments. The penalty is not to exceed $500 for each year in which the notice is not distributed to all customers [*Gov. Code § 53056(a)*].

The city, county, or city and county must give the operator or provider written notice of any alleged failure to distribute to all customers the annual notice before imposing any penalty. If the operator or provider distributes the notice to all customers within 60 days after receipt of notice from the local government, no penalty is to be imposed [*Gov. Code § 53056(b)*].

[b] Failure to Meet Standards

[i] Assessment Procedure

The legislative body of the city, county, or city and county may, by ordinance, provide a schedule of penalties for a video provider's material breach of any of the customer service requirements of *Gov. Code § 53088.2* [*Gov. Code § 53088.2(r)*; *see Gov. Code § 53088.2(a)-(o)* (customer service requirements, all discussed in foregoing sections)]. Nevertheless, no monetary penalties can be assessed for a material breach when the breach is out of the reasonable control of the provider [*Gov. Code § 53088.2(r)*]. A "material breach" is any substantial and repeated failure to comply with the consumer service requirements of *Gov. Code § 53088.2* [*Gov. Code § 53088.1(b)*].

If the legislative body adopts a schedule of monetary penalties, prior to imposing a penalty, the city, county, or city and county must give the video provider written notice of any alleged material breaches of the consumer service requirements and allow the provider at least 30 days from receipt of the notice to remedy the specified breach [*Gov. Code § 53088.2(s)(1)*]. A material breach for the purposes of assessing penalties is deemed to have occurred for each day, following expiration of the time granted the provider in which to remedy the breach, that any material breach has not been remedied by the provider, irrespective of the number of customers affected [*Gov. Code § 53088.2(s)(2)*].

[ii] Payment

The penalty schedule is set forth in *Gov. Code § 53088.2(r)*.

With respect to video providers subject to a franchise or license, any monetary penalties assessed will be reduced dollar for dollar to the extent any liquidated damage or penalty provision of a current cable television ordinance, franchise contract, or license agreement imposes a monetary obligation on the provider for the same customer service failures. In these cases, no other monetary damages can be assessed. Nevertheless, *Gov. Code § 53088.2(r)* does not affect the right of franchising authorities concerning assessment or renewal of a cable television franchise under the provisions of the Cable Communications Policy Act of 1984 (*47 U.S.C. § 521 et seq.*) [*Gov. Code § 53088.2(r)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawCable SystemsGeneral OverviewCommunications LawCable SystemsFranchisesAuthoritiesCommunications LawCable SystemsRate RegulationCommunications LawIntrastate CommunicationsState RegulationGovernmentsLocal GovernmentsLicenses

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§ 484.18 Liability of Cable Television Company for Service Delay

[1] Subscriber Notification Requirements

Cable television companies are required to inform their subscribers of the right to service connection or repair within a four-hour period if the presence of the subscriber is required. The company must inform the subscribers of this right by offering the four-hour period at the time the subscriber calls for service connection or repair. Whenever a subscriber contracts with a cable television company for a service connection or repair which is to take place at a later date, and the parties have agreed that the subscriber's presence is required, the cable company and the subscriber are required to agree, prior to the date of service connection or repair, on the time for the commencement of the four-hour period for the service connection or repair [*Civ. Code § 1722(b)(1)*].

[2] Small Claims Action for Damages

If the service connection or repair is not commenced within the specified four-hour period, except for delays caused by unforeseen or unavoidable occurrences beyond the control of the company, the subscriber may bring an action in small claims court against the company for lost wages,expenses actually incurred, or other actual damages not exceeding a total of $600 [*Civ. Code § 1722(b)(2)*].

Prima facie evidence of the time period specified for the commencement of the service connection or repair, as well as the time that the company or its agents attempted to make the service connection or repair, consists of logs and other business records maintained by the company or its agents in the ordinary course of business. These records are also prima facie evidence of a diligent attempt by the company to notify the subscriber in person or by telephone of a delay caused by unforeseen or unavoidable occurrences [*Civ. Code § 1722(b)(4)*].

[3] Defenses

No action will be considered valid if the subscriber was not present at the time, within the specified period, that the company attempted to make the service connection or repair or made a diligent attempt to notify the subscriber by telephone or in person of its inability to do so because of unforeseen or unavoidable occurrences beyond its control. If notification is by telephone, the cable television company or its agent must leave a telephone number for a return

telephone call by the subscriber to the company or its agent, to enable the consumer to arrange a new two-hour period for service connection or repair [*Civ. Code § 1722(b)(3)*].

Other defenses to liability are as follows: (1) a diligent attempt was made to notify the subscriber of delay caused by unforeseen or unavoidable occurrences beyond the control of the company or its agents, and the company commenced service or repairs within a newly agreed upon two-hour period; or (2) the company or its agents was unable to notify the subscriber because of the subscriber's absence or unavailability during the four-hour period, and the company commenced service or repairs within a newly agreed upon two-hour period [*Civ. Code § 1722(b)(5)*].

Finally, no action will be considered valid against a cable television company pursuant to *Civ. Code § 1722* if the franchise or any local ordinance provides the subscriber with a remedy for a delay in commencement of a service connection or repair and the subscriber has elected to pursue that remedy. If a subscriber elects to pursue his or her remedies against a cable television company under *Civ. Code § 1722*, the franchising, state, or local licensing authority will be barred from imposing any fine, penalty, or other sanction against the company, arising out of the same incident [*Civ. Code § 1722(b)(6)*].

[4] Waiver Void

Any provision of a delivery, service, or repair contract in which the consumer or subscriber agrees to modify or waive any of the rights afforded under *Civ. Code § 1722* is void as contrary to public policy [*Civ. Code § 1722(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawCable SystemsGeneral OverviewContracts LawDefensesPublic Policy ViolationsGovernmentsCourtsSmall Claims Courts

California Forms of Pleading and Practice--Annotated

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Volume 42: Public Utilities thru Railroads-Chs. 480-485
Chapter 484 RADIO AND TELEVISION
PART II LEGAL BACKGROUND

42-484 California Forms of Pleading and Practice--Annotated § 484.19

§ 484.19 Liability for Unauthorized Reception of Subscription Television Signals

Both state and federal law create civil and criminal liability for unauthorized interception of subscription television signals and for manufacturing, selling, or distributing devices to assist, or otherwise assisting, in unauthorized interception [*47 U.S.C. § 605*; *Penal Code § 593e*]. In the case of importation, manufacture and sale of devices, California law specifies that only products designed to decode, to descramble, to intercept, or otherwise to make intelligible any encoded, scrambled, or nonstandard signal are within the statutory prohibition [*Penal Code § 593e(b),(g)*]. Both California and federal law provide for injunctive relief [*47 U.S.C. § 605(e)(3)(B)*; *Penal Code § 593e(e)*]. The civil remedies created by the federal statute may be enforced in California state courts [*47 U.S.C. § 605(e)(3)(A)*; *California Satellite Systems, Inc. v. Nichols (1985) 170 Cal. App. 3d 56, 66, 216 Cal. Rptr. 180* ; *see California Satellite Systems, Inc. v. Benvenuti (9th Cir. 1985) 767 F.2d 1364, 1365* ; *People v. Babylon (1985) 39 Cal. 3d 719, 723-724, 216 Cal. Rptr. 123, 702 P.2d 205* (describing method of transmitting subscription television programming)].

The California provisions do not apply to interception, or devices to aid in the interception, of unscrambled or unencoded microwave transmissions from a multipoint distribution service (hereinafter MDS) [*People v. Babylon (1985) 39 Cal. 3d 719, 725-727, 216 Cal. Rptr. 123, 702 P.2d 205]* . Civil liability for unauthorized use is the amount of the value of the connection and subscription service fees actually charged by the subscription television system for the period of unauthorized use [*Penal Code § 593e(c)*]. One of two statutory formulas may be elected by the subscription television system in an action for civil liability for importation, manufacture, sale, and distribution of decoding and descrambling devices; the damages may be increased by the court if the manufacturer's, importer's, or seller's violations were committed knowingly and willingly for the purpose of commercial advantage or private financial gain [*see Penal Code § 593e(c)*]. In addition, the prevailing party is entitled to costs and attorney's fees [*Penal Code § 593e(d)*].

47 U.S.C. § 605 protects unscrambled and uncoded MDS transmissions [*California Satellite Systems, Inc. v Benvenuti (9th Cir. 1985) 767 F.2d 1364, 1367* ; *California Satellite Systems, Inc. v. Nichols (1985) 170 Cal. App. 3d 56, 65-69, 216 Cal. Rptr. 180* (1984 federal amendment did not delete this protection)]. Nevertheless, an exception to liability exists for interception or assisting with interception of satellite cable programming for private viewing if the programming is not encrypted and no marketing system is established under which agents have been lawfully designated to authorize private viewing by individuals and under which authorization is available to the individual

involved, or the individual involved has obtained authorization [*47 U.S.C. § 605(b)*; *see 47 U.S.C. § 605(d)(1),(3)*].Alternative formulas for calculating civil liability are provided in the federal provisions; the formulas are the same for the importer, distributor, manufacturer, or seller as for the individual user [*see 47 U.S.C. § 605(e)(3)(C)(i),(4)*]. If the violation was committed willingly and for purposes of commercial advantage or private financial gain, the court may increase the award of damages to a specified maximum [*47 U.S.C. § 605(e)(3)(C)(ii)*]. If the violator was not aware and had no reason to believe his or her acts constituted a violation, damages may be reduced by the court [*47 U.S.C. § 605(e)(3)(C)(iii)*]. In addition, the prevailing party is entitled to costs and attorney's fees [*47 U.S.C. § 605(e)(3)(B)(iii)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCommunications LawTheft of ServicesCable ServicesGeneral OverviewCommunications LawTheft of ServicesCable ServicesCivil RemediesCommunications LawTheft of ServicesCable ServicesCriminal SanctionsCommunications LawVideo TechnologiesMultipoint Distribution Service

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42-484 California Forms of Pleading and Practice--Annotated § 484.20

§ 484.20 Liability for Damaging Cable Television Corporation Property

Any person who willfully and maliciously injures any property of a cable television corporation is liable to the corporation for three times the amount of actual damages sutained thereby, to be recovered in any court of competent jurisdiction [*Corp. Code § 14400*; *Pub. Util. Code § 215.5* (defining "cable television corporation")]. The property damage giving rise to a cause of action on the part of the corporation may also subject the defendant to criminal penalties [*see Penal Code § 591*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesPunitive DamagesCommunications LawCable SystemsGeneral Overview

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[Reserved]

§§ 484.21[Reserved]

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42-484 California Forms of Pleading and Practice--Annotated § 484.40

§ 484.40 Federal Statutes

Federal regulation and control of all radio channels; licensing of individuals to use radio channels. *47 U.S.C. § 301*

Cable television regulation and consumer protection. *47 U.S.C. § 531 et seq.*

Limitation on liability of cable franchising authority under federal, state, or local law. *47 U.S.C. § 555A*

Civil and criminal liability for unauthorized interception of subscription television signal; civil remedies as enforceable in state or federal court. *47 U.S.C. § 605*

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawBroadcastingLicensingGeneral OverviewCommunications LawCable SystemsGeneral OverviewCommunications LawCable SystemsFranchisesGeneral OverviewCommunications LawTheft of ServicesCable ServicesCivil RemediesCommunications LawTheft of ServicesCable ServicesCriminal Sanctions

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42-484 California Forms of Pleading and Practice--Annotated § 484.41

§ 484.41 State Statutes

Licensing provisions of *Bus. & Prof. Code § 7000 et seq.* (Contractors State License Law) as inapplicable to person licensed under *Bus. & Prof. Code § 9800 et seq.* (Electronic & Appliance Repair Dealers) if that person's activities consist only of installing satellite antenna systems on residential structures or property. *Bus. & Prof. Code § 7054.5*

Persons employed to render specified services in radio and television production as exempt from barbering and cosmetology licensing requirements. *Bus. & Prof. Code § 7319*

Electronic and Appliance Repair Dealer Registration Law. *Bus. & Prof. Code § 9800 et seq.*

Filing of affidavit of authorship of radio script, radio program, or motion picture scenario with Secretary of State. *Bus. & Prof. Code § 14700*

Injunctive relief by state against manufacturer, processor, or distributor of falsely labeled television picture tubes. *Bus. & Prof. Code § 17531.6 et seq.*

Radio and television repair. *Bus. & Prof. Code § 22250 et seq.*

Defamation by means of visual or sound radio broadcasts. *Civ. Code § 48.5*

Single publication of libel or slander in broadcast over radio or television. *Civ. Code § 3425.3*

Treble damages for injury to cable television corporation's property. *Corp. Code § 14400*

Use of instructional television broadcasts or closed-circuit television programs in schools. *Educ. Code §§ 33120, 41920, 71035, 78310, 78311*

Leasing of state property for radio or television purposes when in state's best interest. *Gov. Code § 14671*

Conditions under which boards of supervisors may authorize contributions to nonprofit educational radio and television stations. *Gov. Code § 26155*

Cable Television and Video Provider Customer Service and Information Act. *Gov. Code § 53054 et seq.*

Franchise or license to construct community antenna television systems. *Gov. Code § 53066 et seq.*

Lockbox available to cable television system subscribers. *Gov. Code § 53066.4*

Video Customer Service Act. *Gov. Code § 53088 et seq.*

Deposit of funds sufficient to pay wages of individuals employed in radio or television broadcasting enterprise. *Lab. Code § 271*

Consent of Labor Commissioner as required for employment of certain minors in radio broadcasting or television studio. *Lab. Code § 1308.5*

Prerequisites for Labor Commissioner's consent to employment of minor. *Lab. Code § 1308.6*

Limited volunteer appearance of minor in radio or television exhibition. *Lab. Code § 1310(c)*

False report of planting of bomb to radio or television station as punishable by imprisonment not exceeding one year. *Penal Code § 148.1(a)*

Criminal penalties for damage to cable television corporation's property. *Penal Code § 591*

Unauthorized connection to franchise cable television system or television set as punishable by fine and/or imprisonment and as creating liability for civil damages. *Penal Code § 593d*

Unauthorized manufacture, distribution, sale, possession, attachment, or other provision of device for decoding or intercepting transmission and unauthorized interception of subscription television service as punishable by fine and/or

imprisonment and as creating liability for civil damages. *Penal Code § 593e*

Cable television corporation defined. *Pub. Util. Code § 215.5*

Authority of Public Utilities Commission to require health and safety mesures of cable television corporations. *Pub. Util. Code § 768.5*

Television sets and video monitors as prohibited in motor vehicles forward of back of driver's seat or operating and visible to driver when operating vehicle. *Veh. Code § 27602*

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawCable SystemsFranchisesAuthoritiesCommunications LawRelated Legal IssuesCopyrightCommunications LawRelated Legal IssuesDefamationCommunications LawRelated Legal IssuesLibelCommunications LawTheft of ServicesRadio CommunicationsCommunications LawVideo TechnologiesSatellite Master Antenna TelevisionGovernmentsState & Territorial GovernmentsLicenses

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§ 484.42 Administrative Regulations

Regulation implementing Electronic and Appliance Repair Dealers Registration Law (*Bus. & Prof. Code § 9800 et seq.*). *16 Cal. Code Reg. § 2700 et seq.*

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42-484 California Forms of Pleading and Practice--Annotated § 484.43

§ 484.43 Decisions

[1] Breach of Employment Contract

Employment contract as breached when employer wrongfully discharges employee. *Mason v. Lyl Prod. (1968) 69 Cal. 2d 79, 83-84, 69 Cal. Rptr. 769, 443 P.2d 193*

Employment contract for fees or commissions as breached when employer fails to pay performer for reuse of television films. *Brecher v. Gleason (1972) 27 Cal. App. 3d 496, 502-503, 103 Cal. Rptr. 831*

Employment contract for fees or commissions as breached when employer fails to pay performer for reuse of videotape recordings. *Bupp v. Great W. Broadcasting Corp. (1962) 201 Cal. App. 2d 580, 584, 20 Cal. Rptr. 106*

No breach of agreement to pay commissions to radio advertising sales agent as found when agreement for commissions terminates and employer fails to renew based on agent's unsatisfactory performance. *Taylor v. Educational Broadcasting Corp. (1939) 34 Cal. App. 2d 680, 682-683, 94 P.2d 377*

Breach of employment contract as found when employer fails to pay its authorized agents any commissions or fees for services rendered. *Brea v. McGlashan (1934) 3 Cal. App. 2d 454, 461-467, 39 P.2d 877*

[2] Contracts for Sale of Advertising Time

Action brought by buyer of advertising time to restrain broadcast of advertisements after buyer's unilateral cancellation of contract. *Early v. Santa Clara Broadcasting Co. (1962) 211 Cal. App. 2d 367, 369, 27 Cal. Rptr. 212*

When advertising contract unilaterally canceled, radio or television station as not permitted to increase damages by continuing to run advertisements. *Early v. Santa Clara Broadcasting Co. (1962) 211 Cal. App. 2d 367, 371, 27 Cal. Rptr. 212*

Action brought by seller of advertising time against sponsors and sponsor's advertising agent. *R.H. Macy & Co. v. Robinson (1960) 183 Cal. App. 2d 182, 184-188, 6 Cal. Rptr. 703*

Owner of television and radio stations as recovering money due for broadcast of advertising on stations based on modified written agreement with sponsor's agent when owner and sponsor's agent had discussed each purchase of radio or television time and sponsor had taken active role in obtaining advertisements. *R.H. Macy & Co. v. Robinson (1960) 183 Cal. App. 2d 182, 189, 6 Cal. Rptr. 703*

In canceling advertising contract, buyer or seller of advertising time as subject to damages compensating other party for breach. *Richardson v. Davis (1931) 116 Cal. App. 388, 390, 2 P.2d 860*

Advertising time on radio and television as an object of sale. *Barron v. Board of Dental Examiners (1930) 109 Cal. App. 382, 384-385, 293 P. 144*

[3] Covenants Against Antennas

FCC regulation preempting local regulation of amateur radio antennas, *47 C.F.R. § 97.15* does not preempt judicial enforcement of private restrictive covenant forbidding construction of antenna. *Hotz v. Rich (1992) 4 Cal. App. 4th 1048, 1052-1056, 6 Cal. Rptr. 2d 219* (remanding for further equitable proceedings in which trial court could find covenant so unreasonable as to render it unenforceable)

Deed restriction in real estate subdivision prohibiting installation of outside television or radio antennas or other device for transmission or reception of television or radio signals does not unconstitutionally limit freedom of speech and is enforceable with respect to Citizens' Band Radio (CB) antenna. *Conrad v. Dunn (1979) 92 Cal. App. 3d 236, 237-238, 154 Cal. Rptr. 726*

[4] Electronic Repair Dealer Registration Law

Purpose of Electronic Repair Dealer Registration Law as protection of public from fraudulent, incompetent, and elusive service dealers and theirunprincipled operations. *Packard-Bell Electronics Corp. v. Department of Professional & Vocational Standards (1966) 242 Cal. App. 2d 387, 389, 51 Cal. Rptr. 432*

[5] Federal Regulation of Radio and Television Channels

Penal Code § 593e (regulating interception of over-the-air transmission by subscription television system made pursuant to authority granted by FCC, as does *47 U.S.C.S. § 605*) held constitutional because it does not conflict with or stand as obstacle to accomplishment and execution of full purposes and objectives of Congress but merely prohibits same activity. *People v. Patton (1983) 147 Cal. App. 3d Supp. 1, 8 , 147 Cal. App. 3d Supp. 1, 194 Cal. Rptr. 759*

Federal statute controlling radio and television as evidencing comprehensive federal scheme of regulation of communications industry. *R.E. Spriggs Co. v. Adolph Coors Co. (1974) 37 Cal. App. 3d 653, 663, 112 Cal. Rptr. 585*

Federal scheme of radio and television regulation as necessitating uniform enforcement across country. *R.E. Spriggs Co. v. Adolph Coors Co. (1974) 37 Cal. App. 3d 653, 663, 112 Cal. Rptr. 585*

State court as acting improperly in enjoining television advertisements originating in, and transmitted from, another state but containing information contrary to local restrictions on advertisements. *People v. Eller Telecasting Co. (1970) 13 Cal. App. 3d 296, 302-303, 91 Cal. Rptr. 468*

Federal regulation of radio as equally applicable to television. *Standard Radio & Television Co. v. Chronicle Pub. Co. (1960) 182 Cal. App. 2d 293, 296, 6 Cal. Rptr. 246*

Field of radio and television regulation as no longer open to states as result of federal government fully occupying field. *Standard Radio & Television Co. v. Chronicle Pub. Co. (1960) 182 Cal. App. 2d 293, 300, 6 Cal. Rptr. 246*

State as unable to do indirectly by judicial decree what it cannot do directly by legislation. *Standard Radio & Television Co. v. Chronicle Pub. Co. (1960) 182 Cal. App. 2d 293, 300, 6 Cal. Rptr. 246*

[6] Remedies for Breach of Employment Contract

Wrongful discharge of child actress as compensated for in damages. *Mason v. Lyl Prod. (1968) 69 Cal. 2d 79, 84-85, 69 Cal. Rptr. 769, 443 P.2d 193*

Accounting as unnecessary between employer and employee except where agreed payment to employee consists of certain percentages of money employer received and employee is without knowledge of what moneys employer has been paid as result of employee's efforts. *Brea v. McGlashan (1934) 3 Cal. App. 2d 454, 460, 39 P.2d 877*

Where employee's reputation is likely to suffer if employee is not allowed to practice profession, employment contract as deemed to be formed with assumption that employee to be given opportunities to exercise abilities during reasonable portion of contract period. *Colvig v. RKO General, Inc. (1965) 232 Cal. App. 2d 56, 66-67, 42 Cal. Rptr. 473*

Radio announcer as deemed to have bargained for acquisition of reputation in public eye in employment contract with radio station. *Colvig v. RKO General, Inc. (1965) 232 Cal. App. 2d 56, 68, 42 Cal. Rptr. 473*

Wrongfully discharged radio announcer as entitled to restoration of position at renumeration provided for position and restoration of duties and functions of position of radio announcer. *Colvig v. RKO General, Inc. (1965) 232 Cal. App. 2d 56, 65, 42 Cal. Rptr. 473*

Wrongfully discharged employee as having remedy in action for damages. *Warner Bros. Pictures, Inc. v. Bumgarner (1961) 197 Cal. App. 2d 331, 351, 17 Cal. Rptr. 171*

Employee prevented from working as able to sue on contract and recover agreed compensation if employee stands ready, able, and willing to perform under contract. *Warner Bros. Pictures, Inc. v. Bumgarner (1961) 197 Cal. App. 2d 331, 351, 17 Cal. Rptr. 171*

When employment contract breached by employer, employee as having right to declare contract terminated but as unable to then recover damages accruing after declaring contract ter minated. *Warner Bros. Pictures, Inc. v. Bumgarner (1961) 197 Cal. App. 2d 331, 351, 17 Cal. Rptr. 171*

Action for accounting as improper when amount employee seeks is certain to that employee's knowledge. *Tostevin v. Douglas (1958) 160 Cal. App. 2d 321, 329-330, 325 P.2d 130*

[7] Satellite Antennas

FCC regulation, *47 C.F.R. § 25.104*, preempts local regulation of satellite television receiving antennas; local ordinance that did not take into account owner's rights to receive signals and did not enact specific screening or placement requirements for antennas, gives unduly broad discretion to local administrative officials. *Hunter v. City of Whittier (1989) 209 Cal. App. 3d 588, 598-599, 257 Cal. Rptr. 559*

[8] Subscription Television

[a] In General

Cable Communications Policy Act of 1984 (*47 U.S.C.S. § 521 et seq.*) authorizes Federal Communications Commission to preempt state regulation of quality of cable television signals by prohibiting enactment of local regulations that would establish complementary or additional technical standards, even when it is clearly possible for cable operator to comply with these standards in addition to federal standards. *City of New York v. FCC (1988) 486 U.S. 57, 64-69, 108 S. Ct. 1637, 100 L. Ed. 2d 48*

Cable television company denied franchise by city for lease of space on utility poles stated cause of action for violation of *First Amendment* rights if refusal to grant franchise to more than one cable company occurred when space on poles and economics of market demand would support more than one cable company in city. *Los Angeles v. Preferred Communications, Inc. (1986) 476 U.S. 488, 106 S. Ct. 2034, 90 L. Ed. 2d 480, 487-488*

New York statute requiring property owners to allow cable television hookups provided for taking of property without compensation and thus violated *Fifth* and *Fourteenth Amendment* rights when cable connection was permanent trespass. *Loretto v. Teleprompter Manhattan CATV Corp. (1982) 458 U.S.419, 425-426, 435-436 , 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868* (remand to determine if fee payable by cable company to owner equaled value of property taken)

City and county are not required to grant cable franchise to every cable television company that applies. *Pacific West Cable Co. v. City of Sacramento, Cal. (9th Cir. 1986) 798 F.2d 353, 355 on remand (E.D. Cal. 1987) 672 F. Supp. 1322*

Penal Code § 593e as not applicable to unscrambled or unencoded microwave transmissions from multipoint distribution service. *People v. Babylon (1985) 39 Cal. 3d 719, 725-727, 216 Cal. Rptr. 123, 702 P.2d 205*

Gov. Code § 53088.7 prevents cable television operator from charging delinquency fee in excess of $4.75, irrespective of whether cable television operator designates part of that sum delinquency fee and part franchise fee. *Manibog v. MediaOne of Los Angeles, Inc. (2000) 81 Cal. App. 4th 1366, 1372, 98 Cal. Rptr. 2d 297*

A phrase in *Penal Code § 593d* (unauthorized connection to cable television system), stating "person who violates," may not be construed to presuppose criminal conviction; civil liability is not conditioned on criminal liability. *Heritage Cablevision of Cal., Inc. v. Pusateri (1995) 38 Cal. App. 4th 517, 522-523, 45 Cal. Rptr. 2d 191*

Cable television company has no *First Amendment* right to deliver its product to customers because delivery is so intrusive, requiring permanent physical trespass; connection of equipment amounts to private taking, for which private entity has no power of eminent domain. *Cox Cable San Diego, Inc. v. Bookspan (1987) 195 Cal. App. 3d 22, 26-32, 240 Cal. Rptr. 407*

Denial of preliminary injunction to cable television company to allow it to reconnect subscribers at apartment complex, who had been disconnected by complex owner in breach of contract, was proper when money damages would be adequate, cable company had no *First Amendment* right to connect equipment, and intrusion would be more harmful to owner and competing cable company than exclusion would be to plaintiff. *Cox Cable San Diego, Inc. v. Bookspan (1987) 195 Cal. App. 3d 22, 25-32, 240 Cal. Rptr. 407*

Landowner's consent was not required before cable company installs equipment on telephone pole under lease from telephone company of portion of its easement; cable company's use was within scope of phone company's easement, which was apportionable. *Salvaty v. Falcon Cable Television (1985) 165 Cal. App. 3d 798, 799, 212 Cal. Rptr. 31*

[b] Taxation

Disseminators and subscribers of cable television service are engaged in protected *First Amendment* "speech" and therefore are entitled to protection, but tax that is not differentially burdensome is permissible. *Leathers v. Medlock (1991) 499 U.S. 439, 111 S. Ct. 1438, 113 L. Ed. 2d 494, 502, 506-508* (upholding gross receipts tax on cable television even though satellite broadcast services were exempted); *Sacramento Cable Television v. City of Sacramento (1991) 234 Cal. App. 3d 232, 237, 286 Cal. Rptr. 470* (upholding city utility users tax on cable television transmissions taxed in same category as telephone, gas, and electric utilities, even though other television and cable systems were not taxed)

[c] Unauthorized Reception of Signals

Injunction preventing members of general public from using microwave antennas and related equipment (which equipment can be used to unlawfully receive subscription television signals) must be tailored, if possible, so as not to infringe on legitimate uses of equipment. *Premier Communications Network, Inc. v. Fuentes (9th Cir. 1989) 880 F.2d 1096, 1101*

Unauthorized reception of unscrambled multipoint distribution service transmissions of subscription home television entertainment violated *47 U.S.C.S. § 605*. *Premier Communications Network, Inc. v. Fuentes (9th Cir. 1989) 880 F.2d*

1096, 1099-1100

Prior to 1984 amendments, former *47 U.S.C.S. § 605* protected unscrambled and uncoded transmissions from multipoint distribution service. *California Satellite Systems, Inc. v. Benvenuti (9th Cir. 1985) 767 F.2d 1364, 1367*

Civil remedies created by *47 U.S.C.S. § 605* are enforceable in California state court. *California Satellite Systems, Inc. v. Nichols (1985) 170 Cal. App. 3d 56, 66, 216 Cal. Rptr. 180*

1984 amendments to *47 U.S.C.S. § 605* continue protection for unscrambled and uncoded multipoint distribution service transmissions. *California Satellite Systems, Inc. v. Nichols (1985) 170 Cal. App. 3d 56, 65-69, 216 Cal. Rptr. 180*

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationCommunications LawContent RegulationAdvertisingCommunications LawFederal ActsCommunications ActGeneral OverviewCommunications LawFederal ActsCommunications ActFederal PreemptionCommunications LawVideo TechnologiesSubscription TelevisionLabor & Employment LawWrongful TerminationBreach of ContractGeneral OverviewLabor & Employment LawWrongful TerminationRemediesCompensatory DamagesLabor & Employment LawWrongful TerminationRemediesReinstatementReal Property LawRestrictive CovenantsEnforcement

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§ 484.44 Attorney General Opinions

Use of satellite dish to receive regularly broadcast television programs for viewing by Youth Authority wards and employees residing in state-owned housing on Youth Authority institution grounds does not violate law. *71 Ops. Cal. Att'y Gen. 16 (1988)*

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§ 484.45 Law Reviews

Public Use or Public Abuse, 68 U.M.K.C. L. Rev. 49 (1999)

A City Guide to Developing, Using, and Regulating Regional Telecommunication Networks Under the Telecommunications Act of 1996, 21 Nova L. Rev. 515 (1997)

Note: *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers, 105 Yale L.J. 761 (1995)*

Note, *To Air or Not to Err: The Threat of Conditioned Federal Funds for Indecent Programming on Public Broadcasting, 42 Hastings L.J. 635 (1991)*

Comment, *Alcoholic Beverage Advertising on the Airwaves: Alternatives to a Ban or Counteradvertising, 34 UCLA L. Rev. 1139 (1987)*

Comment, *The Constitutionality of Pole Attachments Legislation: Not a Taking, But a Valid Regulation of Cable Television, 17 Sw. U.L. Rev. 321 (1987)*

Sylvester, *How the States Govern the News Media--A Survey of Selected Jurisdictions, 16 Sw. U.L. Rev. 723 (1986)*

Comment, *Who Owns the Air? Unscrambling the Satellite Viewing Rights Dilemma, 20 Loy. L.A. L. Rev. 145 (1986)*

Note, *Quincy Cable TV, Inc. v. Federal Communications Commission: Should the FCC Revive Cable Television's Must Carry Requirement? 19 Loy. L.A. L. Rev. 1369 (1986)*

Note, *The Sun Sets on Must Carry: Quincy Cable TV Inc. v. FCC, 20 U.S.F. L. Rev. 757 (1986)*

Note, *The Supreme Court Strikes Down the Public Broadcasting Editorial Ban: Federal Communications Commission v. League of Women Voters, 12 Pepperdine L. Rev. 699 (1985)*

Mininberg, *Circumstances Within Our Control: Promoting Freedom of Expression Through Cable Television, 11 Hastings Const. L.Q. 551 (1984)*

Trice, *Cable Wars*, 4(7) Cal. Law. 54 (1984)

Warner, *SMATV (Satellite Master Antenna Television-- Private Cable*), 18 Bev. Hills B.J. 254 (1984)

Comment, *Cable Television: The Constitutional Limitations of Local Government Control, 15 Sw. U.L. Rev. 181 (1984)*

Comment, *Low Power Television and the Doctrine of Localism: The Need to Reconcile a Medium With Its Message, 18 U.S.F. L. Rev. 505 (1984)*

Comment, *New Wave Policy: Protection of Direct Broadcast Satellite Transmissions Under Section 605, 14 Sw. U.L. Rev. 590 (1984)*

Drysdale, *Indecency and the First Amendment: Special Problems of the Broadcast Industry, 13 Lincoln L. Rev. 101 (1982)*

Comment, *Access to Cable Television: A Critique of the Affirmative Duty Theory of the First Amendment , 70 Cal. L. Rev. 1393 (1982)*

Comment, *Public Access to Cable Television, 33 Hastings L.J. 1009 (1982)*

Comment, *Subscription Television Decoders: Can California Prohibit Their Manufacture and Sale? 22 Santa Clara L. Rev. 839 (1982)*

Comment, *Subscription Television: Should the Government Prohibit Unauthorized Reception, 18 Cal. W.L. Rev. 291 (1982)*

Note, *The End of the Format Doctrine--Public Hearings on Changes in Entertainment Formats Need Be Held in Conjunction With Applications to Transfer or Renew Radio Broadcast Licenses-- FCC v WNCN Listeners Guild, 450 U.S. 582, 101 S. Ct. 1266, 67 L. Ed. 2d 521 (1981) , 22 Santa Clara L. Rev. 569 (1982)*

Kreiss, *Deregulation of Cable Television and the Problem of Access Under the First Amendment* , *54 S. Cal. L. Rev. 1001 (1981)*

Schuessler, *Structural Barriers to the Entry of Additional Television Networks: The Federal Communications Commission's Spectrum Management Policies*, *54 S. Cal. L. Rev. 875 (1981)*

Student Symposium, *Communications Regulations*, *69 Cal. L. Rev. 442 (1981)*

Kelso, *The Personal Attack Rule and Professional Occupations: Consistency in FCC Decision-Making*, *16 Cal. W.L. Rev. 399 (1980)*

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Note, "The FCC's Proposed CATV Regulations," *21 Stan. L. Rev. 1685 (1969)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawCable SystemsPole AttachmentsCommunications LawCable SystemsPublic AccessCommunications LawContent RegulationGeneral OverviewCommunications LawRelated Legal IssuesIndecency & ObscenityCommunications LawSatellite ServicesDirect Broadcast SatellitesCommunications LawU.S. Federal Communications CommissionGeneral OverviewCommunications LawVideo TechnologiesSatellite Master Antenna TelevisionConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechCommercial SpeechAdvertising

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42-484 California Forms of Pleading and Practice--Annotated §§ 484.46-484.59

[Reserved]

§§ 484.46[Reserved]

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Volume 42: Public Utilities thru Railroads-Chs. 480-485
Chapter 484 RADIO AND TELEVISION
PART IV FORMS

42-484 California Forms of Pleading and Practice--Annotated § 484.60

§ 484.60 Complaint for Damages [Civ. Code § 3300] and Interest [Civ. Code § 3302] by Radio or Television Station for Breach of Contract by Advertising Sponsor

[1] FORM Complaint for Damages [Civ. Code § 3300] and Interest [Civ. Code § 3302] by Radio or Television Station for Breach of Contract by Advertising Sponsor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
[a corporation,]	)	NO. _____
Plaintiff,	)	COMPLAINT FOR
vs.	)	DAMAGES
_____ [*name(s)*],	)	(Breach of Contract)
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:
1. Defendant is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California with its principal place of business in _____ [*city*], _____ County, California [, in the _____ (*name*) _____ (Municipal Court *or* Judicial) District] [*or allege other capacity and residence*].
2. [Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]
3. [At all times herein mentioned each of the defendants, named as DOES I- _____ inclusive agent and employee of defendant _____ (*name*) and in doing the things hereinafter alleged, was acting within the scope of such agency.]

4. At all times herein mentioned, plaintiff was, and now is, doing business as a _____ [radio *or* television] broadcaster and was, and now is, broadcasting _____ [radio *or* television] programs in _____ [*city*], _____ County, California. The programs are broadcast over _____ [station _____ (*letter designation e.g.*, KMEL) at _____ (*number*) _____ (AM *or* FM) *or* Channel _____ (*number*)].
5. On or about _____ [*date*], at _____ [*city*], California, plaintiff and defendant _____ [*name*] entered into a written agreement by which plaintiff agreed to _____ [broadcast *or* telecast] the following: _____ [*describe material to be broadcast or telecast, e.g.*, 60-second commercial announcements advertising _____ (*specify name of defendant's product*) for defendant commencing _____ (*date*), and ending _____ (*date*)]. In return, defendant agreed to pay plaintiff $ _____ for advertising time on plaintiff's _____ [station *or* channel]. A copy of the agreement is attached hereto as Exhibit A and made a part hereof.
6. [_____ (*Describe any modifications of advertising contract, e.g.*, On or about _____ (*date*), plaintiff and defendant modified the agreement of _____ (*date*), as to the periods of time to be covered by the _____ (radio *or* television) advertisements and as to the schedules and amounts to be paid to the advertisements. A copy of the modification is attached hereto as Exhibit B and made a part hereof.)]
7. By _____ [*date*], plaintiff had rendered all the _____ [radio *or* television] services for defendant which it had agreed to render under the agreement of _____ [*date*] [, or under the modifications thereto of _____ (*date*)].
8. The standard charges for the advertisements _____ [broadcast *or* telecast] by plaintiff pursuant to the written contract [and the modifications thereto] amount to a total of $_____.
9. Neither the whole nor any part of the above sum has been paid [, except the sum of $_____,] and there is now due and unpaid from defendant to plaintiff the sum of $_____, together with interest thereon at the rate of _____ percent per annum from _____ [*date*].

WHEREFORE, plaintiff prays judgment as follows:
1. For damages in the sum of $_____;
2. For interest on the sum of $_____ at _____ percent per annum from and after _____ [*date*].

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Source of Form

This form of complaint is based on the findings in *R.H. Macy & Co. v. Robinson (1960) 183 Cal. App. 2d 182, 187-188, 6 Cal. Rptr. 703* . In an action for damages for breach of written contract, the court found that a radio and television station owner had contracted with an advertising sponsor for commercial announcements on radio and television programs, that the contract had been modified in writing by both parties, that the radio and television station owner had rendered the service bargained for, and that the advertising sponsor had failed to pay the money due under the contract and modified contract [*R.H. Macy & Co. v. Robinson (1960) 183 Cal. App. 2d 182, 184-188, 6 Cal. Rptr. 703]* .

[3] Use of Form

This form of complaint is for use by a radio or television broadcaster in attempting to recover money due from an advertising sponsor for commercial announcements broadcast for the sponsor pursuant to a written contract. The complaint prays for monetary damages [*Civ. Code § 3300*] with interest [*Civ. Code § 3302*].

[4] Allegations

The complaint alleges:

- Capacities, residence, fictitious names, and agency of defendants (Paragraphs 1-3).
- Capacity of plaintiff as radio or television broadcaster (Paragraph 4).
- Formation of written contract for advertisements between plaintiff and defendant (Paragraph 5) [*R.H. Macy & Co. v. Robinson (1960) 183 Cal. App. 2d 182, 187-188, 6 Cal. Rptr. 703]* .
- An optional allegation of subsequent modification of contract by plaintiff and defendant (Paragraph 6) [*R.H. Macy & Co. v. Robinson (1960) 183 Cal. App. 2d 182, 188, 6 Cal. Rptr. 703]* .
- Plaintiff's full performance of its obligations under the contract and any modifications to the contract (Paragraph 7) [*R.H. Macy & Co. v. Robinson (1960) 183 Cal. App. 2d 182, 188, 6 Cal. Rptr. 703]* .
- The total amount due under the contract and any modifications to the contract (Paragraph 8).
- The amount due and unpaid by defendant with interest (Paragraph 9) [*Civ. Code §§ 3300, 3302*].

[5] Jurisdiction

The superior court has jurisdiction of the action unless it is a limited civil case (amount in controversy, exclusive of interest, is $25,000 or less) and there is a municipal court in the county in which the action is brought [*Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases the caption must state whether the demand exceeds or does not exceed $10,000. When a limited civil case is brought in the superior court, the caption must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(8), (9)*].

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (section repealed January 1, 2006, unless a later-enacted statute deletes or extends repeal date)], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[7] California Constitution

Residual jurisdiction of superior courts. *Cal. Const., art VI, § 10*

[8] State Statutes

Measure of damages in contract action. *Civ. Code § 3300*

Interest as damages in contract action. *Civ. Code § 3302*

Jurisdictional classification of cases demanding monetary damages. *Code Civ. Proc. §§ 32.5, 86(a)(1)*

Required contents of complaint. *Code Civ. Proc. § 425.10*

[9] Decisions

Judgment for recovery of money due on written contracts between owner-operator of radio and television stations and advertising sponsor for advertising time. *R.H. Macy & Co. v. Robinson (1960) 183 Cal. App. 2d 182, 184, 188, 6 Cal. Rptr. 703*

[10] Text References

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 476-482, 488-501 (4th ed, 1997)

Witkin, Summary of California Law, vol. 1, *Contracts* (10th ed. 2005)

[11] Cross References

For discussion, procedures, and forms for seeking an accounting, see Ch. 7, *Accounting, Action for*

For discussion and forms for seeking recovery of money due on a stated account, see Ch. 8, *Accounts Stated and Open Accounts*

For discussion and forms concerning advertising regulations, see Ch. 14, *Advertising*

For alternative forms of fictitious name allegations and alternative forms of capacity, residence, and agency of parties allegations, see Ch. 20, *Allegations Commonly Used*

For discussion and forms for use in seeking recovery of money on an open book account, see Ch. 121, *Common Counts*

For discussion, procedure, and forms for use in an action for breach of contract, see Ch. 140, *Contracts*

For alternative forms for use as prayers and verifcations, see Ch. 420, *Prayers* ; and Ch. 572, *Verification* , respectively

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Chapter 484 RADIO AND TELEVISION
PART IV FORMS

42-484 California Forms of Pleading and Practice--Annotated § 484.61

§ 484.61 Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527], and Permanent [Civ. Code § 3422; Code Civ. Proc. § 526] Injunction--By Advertising Sponsor Against Radio or Television Station--To Terminate Commercial Announcements for Sponsor

[1] FORM Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527], and Permanent [Civ. Code § 3422; Code Civ. Proc. § 526] Injunction--By Advertising Sponsor Against Radio or Television Station--To Terminate Commercial Announcements for Sponsor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
	)	COMPLAINT FOR TEMPORARY RESTRAINING
vs.	)	ORDER, PRE
	)	LIMINARY INJUNCTION, AND PERMANENT
_____ [*name*],	)	INJUNCTION
Defendant.	)	[*Civ. Code § 3422*; *Code Civ. Proc.§§ 526, 527*]
	)	
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 484.60, Paragraph 1.*]
2. [*Fictitious name allegation, if appropriate. See § 484.60, Paragraph 2.*
]

3. [*Agency allegation, if appropriate. See § 484.60, Paragraph 3.*]

4. At all times herein mentioned, defendant was, and now is, doing business as a _____ [radio *or* television] broadcaster and was, and now is, broadcasting _____ [radio *or* television] programs in _____ [*city*], _____ County, California. The programs are broadcast over _____ [station _____ (*letter designation, e.g.*, KMEL) at _____ (*number*) _____ (AM *or* FM) *or* Channel _____ (*number*)].
5. At all times herein mentioned, plaintiff was, and now is, an advertising sponsor of _____ [*name of product*] placing orders for commercial announcements for _____ [*name of product*] to be _____ [broadcast *or* telecast].
6. On or about _____ [*date*], plaintiff placed an order with defendant for _____ [*describe material to be broadcast or telecast at plaintiff's request, e.g.*, 60-second commercial announcements advertising _____ (*name of plaintiff's product*) for plaintiff, _____ (*number*) of commercial announcements to be _____ (broadcast *or* telecast) each _____ (*indicate time period, e.g.*, week), at the rate of $_____ per commercial announcement].
7. [_____ (*Describe any modifications of advertising contract, e.g.*, on or about _____ (*date*), plaintiff advised defendant to modify the order as follows: _____ (*describe changes requested by plaintiff, e.g.*, to reduce the number of commercial announcements advertising _____ (*name of plaintiff's product*) from _____ (*number*) to _____ (*number*) for the _____ (*indicate time period, e.g.*, month of August) after which the original schedule to resume). Defendant accepted the terms of plaintiff's modification.)]
8. On or about _____ [*date*], plaintiff advised defendant that the order placed on _____ [*date*] [, and modified on _____ (*date*)] was canceled by plaintiff and that this cancellation was complete and effective immediately.
9. After _____ [*date*], defendant continued to _____ [broadcast *or* telecast] commercial announcements advertising _____ [*name of plaintiff's product*] and so continues to the date of this complaint.
10. After _____ [*date*], defendant continued to charge plaintiff for each commercial announcement advertising _____ [*name of plaintiff's product*] _____ [broadcast *or* telecast] by defendant and so continues to the date of this complaint.
11. On or about _____ [*date*], plaintiff again requested defendant to cease _____ [broadcasting *or* telecasting] commercial announcements advertising _____ [*name of plaintiff's product*] and to cease charging plaintiff for any announcements made after plaintiff's cancellation of the order.
12. The defendant threatens to, and will, unless enjoined and restrained by order of this court, continue to _____ [broadcast *or* telecast] these commercial announcements advertising _____ [*name of plaintiff's product*] and to charge plaintiff for each commercial announcement _____ [broadcast *or* telecast].

13. Plaintiff has no adequate and available remedy at law because the continuing nature of defendant's conduct would require plaintiff to file numerous civil actions, leading to a multiplicity of judicial proceedings.

WHEREFORE, plaintiff prays judgment as follows:

1. For an order requiring defendant to show cause, if any why it should not be enjoined as hereinafter set forth during the pendency of the action;
2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant from continuing to _____ [broadcast *or* telecast] commercial announcements advertising _____ [*name of plaintiff's product*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

CAUTION:
Verification [Code Civ. Proc. *§ 446 Code Civ. Proc. § 2015.5 Code Civ. Proc.* § 527

[2] Source of Form

This form of complaint is based on the factual situation presented in *Early v. Santa Clara Broadcasting Co. (1962) 211 Cal. App. 2d 367, 369-370, 27 Cal. Rptr. 212* . In that case, an advertising business entered into a contract with a radio station for commercials to be broadcast on the station over a specified period of time. When the advertising business canceled this contract, the radio station continued to broadcast the commercials and to charge the advertising business for the commercials broadcast in spite of the advertising business's requests that the broadcasts cease [*Early v. Santa Clara Broadcasting Co. (1962) 211 Cal. App. 2d 367, 369-370, 27 Cal. Rptr. 212]* . The trial court granted a preliminary injunction to the advertising business and the radio station immediately ceased broadcasting the commercials. Because it thought the radio station unlikely to recommence the broadcasts enjoined, the trial court denied the advertising business a permanent injunction [*Early v. Santa Clara Broadcasting Co. (1962) 211 Cal. App. 2d 367, 372-373, 27 Cal. Rptr. 212]* .

[3] Use of Form

This form of complaint is for use by an advertising sponsor to enjoin a radio or television station from continuing to broadcast or televise commercial announcements for the sponsor after the sponsor cancels its order for advertising. The complaint prays for a temporary restraining order [*Code Civ. Proc. § 527*], a preliminary injunction [*Code Civ. Proc. § 527*], and a permanent injunction [*Civ. Code § 3422*; *Code Civ. Proc. § 526*].

[4] Allegations

The complaint alleges:

- Capacities, residence, fictitious names, and agency of defendants (Paragraphs 1-3).

- Capacity of defendant as radio or television broadcaster and plaintiff as advertising sponsor (Paragraphs 4, 5).

- An order plaintiff placed with defendant for commercials to be run on defendant's radio or television programs (Paragraph 6) [*Early v. Santa Clara Broadcasting Co. (1962) 211 Cal. App. 2d 367, 369, 27 Cal. Rptr. 212]* .

- Optional allegation of a modification in the order that plaintiff placed and defendant's acceptance of the modification (Paragraph 7) [*Early v. Santa Clara Broadcasting Co. (1962) 211 Cal. App. 2d 367, 369-370, 27 Cal. Rptr. 212]* .

- Plaintiff's notification to defendant of complete and immediate cancellation of plaintiff's order (Paragraph 8) [*Early v. Santa Clara Broadcasting Co. (1962) 211 Cal. App. 2d 367, 370, 27 Cal. Rptr. 212]* .

- Defendant's continuing to broadcast or telecast plaintiff's commercials and to charge plaintiff for

such broadcasts or telecasts (Paragraphs 9, 10) [*Early v. Santa Clara Broadcasting Co. (1962) 211 Cal. App. 2d 367, 370, 27 Cal. Rptr. 212]* .

- Plaintiff's request that defendant cease broadcasting or telecasting the commercials and cease charging plaintiff for the broadcasts or telecasts after the date of cancellation of the order (Paragraph 11) [*Early v. Santa Clara Broadcasting Co. (1962) 211 Cal. App. 2d 367, 370, 27 Cal. Rptr. 212]* .

- Defendant's refusal to cease broadcasting or telecasting of plaintiff's commercials unless enjoined (Paragraph 12) [*see Civ. Code § 3422*; *Code Civ. Proc. § 527*].

- Plaintiff's lack of an adequate or available legal remedy (Paragraph 13) [*see Civ. Code § 3422*; *Code Civ. Proc. § 527*].

[5] Verification

Verification [*see Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or preliminary injunction on a complaint instead of on affidavits (or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*]) [*see Code Civ. Proc. § 527*].

If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. § 92(b), 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*].For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[6] State Statutes

Preventative relief by means of injunction. *Civ. Code § 3420*

Provisional injunctions as regulated by Code of Civil Procedure. *Civ. Code § 3421*

Grounds for issuance of injunction. *Civ. Code § 3422*; *Code Civ. Proc. § 526*

When an injunction cannot be granted. *Civ. Code § 3423*; *Code Civ. Proc. § 526*

Jurisdiction of municipal court to issue temporary restraining order and preliminary injunction. *Code Civ. Proc. § 86(a)(8)*

Injunction defined. *Code Civ. Proc. § 526*

Procedure by which to obtain temporary restraining order and preliminary injunction. *Code Civ. Proc. § 527*

[7] Decisions

Action to enjoin commercial announcements broadcast after notification of cancellation of contract for such announcements. *Early v. Santa Clara Broadcasting Co. (1962) 211 Cal. App. 2d 367, 369-370, 27 Cal. Rptr. 212*

On notice of cancellation of contract, party as not permitted to continue performance and recover damages for full performance. *Early v. Santa Clara Broadcasting Co. (1962) 211 Cal. App. 2d 367, 371, 27 Cal. Rptr. 212*

Permanent injunction as not granted where no reasonable probability that party ceasing acts complained of under preliminary injunction will resume performing such acts. *Early v. Santa Clara Broadcasting Co. (1962) 211 Cal. App. 2d 367, 372-373, 27 Cal. Rptr. 212*

In canceling advertising contract, buyer of advertising time as subjecting himself or herself to damages that will compensate other party for breach. *Richardson v. Davis (1931) 116 Cal. App. 388, 390, 2 P.2d 860*

[8] Text References

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 778-788 (4th ed, 1997)

[9] Cross References

For discussion, procedures, and forms for use in obtaining injunctive relief generally, see Ch. 303, *Injunctions*

For discussion and forms for use in enjoining plagiarism, see Ch. 349, *Literary Property and Copyright*

For discussion and forms for use by a third party against principals and their agents, see Ch. 427, *Principal and Agent* , Pt. III

See also Comments and References to § 484.60

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42-484 California Forms of Pleading and Practice--Annotated § 484.62

§ 484.62 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] and Interest [Civ. Code § 3302]--By Television Actor Against Television Producer for Breach of Contract

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3300] and Interest [Civ. Code § 3302]--By Television Actor Against Television Producer for Breach of Contract
[*Caption. See § 484.60.*]
1. Defendant is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence*].

2. [*Fictitious name allegation, if appropriate. See § 484.60, Paragraph 2.*]

3. [*Agency allegation, if appropriate. See § 484.60, Paragraph 3.*]

4. Defendant is, and at all times herein mentioned was, a producer of television films.
5. On or about _____ [*date*], plaintiff and defendant entered into a[n] _____ [written *or* oral] agreement for defendant's employment of plaintiff as _____ [*describe position for which plaintiff hired, e.g.*, an actor on defendant's television series _____ (*name of series*)]. The terms of the agreement were as follows: _____ [*set out terms of agreement, e.g.*, defendant agreed to pay plaintiff the sum of $_____ per _____ (*indicate time period, e.g.*, week) for his/her services as an actor on defendant's television series _____ (*name of series*), defendant to suspend payment of such salary to plaintiff in the event that causes beyond the control of defendant materially hampered, interrupted, or prevented production of the television series]. [A copy of the agreement between plaintiff and defendant is attached hereto as Exhibit A and made a part hereof.]

6. Plaintiff entered upon the employment and duly performed all of the conditions of the agreement to be performed on his/her part until defendant notified plaintiff of the suspension of his/her salary. At all times herein mentioned, plaintiff has been ready, willing, and able to perform, and has offered to perform, all of the conditions of the agreement to be performed on his/her part.
7. On or about _____ [*date*], defendant notified plaintiff of the suspension of plaintiff's salary for the reason that _____ [*describe cause alleged by defendant, e.g.*, a strike by television script writers

producing television scripts for defendant] materially hampered, interrupted, or prevented production of defendant's television series _____ [*name of series*]. In fact, _____ [*decribe cause alleged by defendant, e.g.*, the strike by television script writers] did not materially hamper, interrupt, or prevent production of defendant's television series.
8. Thereafter, defendant failed to pay plaintiff the amount of $_____ per _____ [*indicate time period, e.g.*, week] as required by the agreement between defendant and plaintiff.
9. Defendant has paid plaintiff a total sum of $_____ and has not paid any part of the balance of the total sum due under the agreement, to plaintiff's damage in the sum of $_____.

[2] Use of Form

The foregoing form of complaint is for use by a television actor against a television producer for breach of the employment contract between them. The complaint prays for damages for the agreed compensation under the agreement [*see Warner Bros. Pictures, Inc. v. Bumgarner (1961) 197 Cal. App. 2d 331, 351, 17 Cal. Rptr. 171* (television actor as unable to recover agreed compensation under agreement with producer as a result of declaring the contract terminated after the producer's breach)].

[3] Allegations

The foregoing complaint alleges: (1) capacity and residence, fictitious name, and agency of defendant (Paragraphs I-III); (2) capacity of defendant as producer of television films (Paragraph IV); (3) formation of contract between producer and actor for actor to work in television series (Paragraph V) [*Warner Bros. Pictures, Inc. v. Bumgarner (1961) 197 Cal. App. 2d 331, 334, 17 Cal. Rptr. 171]* ; (4) actor's performance of all terms under agreement and willingness to stand ready to perform under agreement (Paragraph VI) [*see Warner Bros. Pictures, Inc. v. Bumgarner (1961) 197 Cal. App. 2d 331, 351, 17 Cal. Rptr. 171]* ; (5) suspension of agreed compensation under agreement without good reason (Paragraph VII) [*Warner Bros. Pictures, Inc. v. Bumgarner (1961) 197 Cal. App. 2d 331, 344, 17 Cal. Rptr. 171* ; see *Mason v. Lyl Productions (1968) 69 Cal. 2d 79, 84-85, 69 Cal. Rptr. 769, 443 P.2d 193]* ; and (6) amount due actor as a result of producer's breach (Paragraphs VIII, IX) [*see Warner Bros. Pictures, Inc. v. Bumgarner (1961) 197 Cal. App. 2d 331, 351, 17 Cal. Rptr. 171]* .

[4] Decisions

Wrongful discharge of child actress by production company of television series as found when child actress's employment terminated as result of her disobedience of producer's unreason able demand that she remain on set. *Mason v. Lyl Productions (1968) 69 Cal. 2d 79, 84-85, 69 Cal. Rptr. 769, 443 P.2d 193*

Breach of employment contract with television actor by producer suspending payment of salary when production on series in which actor regularly appeared not materially hampered, interrupted, or prevented. *Warner Bros. Pictures Inc. v. Bumgarner (1961) 197 Cal. App. 2d 331, 344, 17 Cal. Rptr. 171*

Where television actor treated employment contract as terminated after producer's suspension of salary to actor, actor as unable to sue on contract to recover agreed compensation; in order to recover agreed compensation, actor as required to be ready, able and willing to perform. *Warner Bros. Pictures, Inc. v. Bumgarner (1961) 197 Cal. App. 2d 331, 351, 17 Cal. Rptr. 171*

[5] Text References

2 Cal. Jur. 3d, *Actors*, §§ 5-10

32 Cal. Jur. 2d, *Master and Servant*, §§ 14-80

[6] Cross References

For discussion, procedures, and forms of allegation for use in complaints for breach of employment contract, see Ch. 140, *Contracts*

For discussion and forms for use by an employee in actions for wrongful discharge, for unpaid compensation, or for an accounting, see Ch. 249, *Employment Law: Termination and Discipline* and Ch. 250, *Employment Law: Wage and Hour Disputes*

For other discussions and forms related to actions arising from, based on, or concerning the relationship of employer and employee, see Ch. 7, *Accounting, Action for*; Ch. 118, *Civil Service* ; Ch. 270, *Fraudulent Conveyances* ; Ch. 276, *Garnishment* ; Ch. 303, *Injunctions* ; Ch. 307, *Insolvency* ; Ch. 427, *Principal and Agent* ; Ch. 528, *Specific Performance* ; Ch. 564, *Unemployment and Disability Insurance* ; Ch. 565, *Unfair Competition* ; and Ch. 577, *Workers' Compensation*

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[1] FORM

[2] Use of Form

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[2] Use of Form

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§ 485.126 Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Allegation in Complaint Based on Negligence and Violation of Safety Appliance Act (49 U.S.C.S. § 20301 et seq.) [45 U.S.C.S. § 51]--Conductor Injured on Sudden Release of Brake [49 U.S.C.S. § 20302(a)(1)(B)]

[1] FORM

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[1] FORM

[2] Use of Form

[3] Federal Statutes

[4] Decisions

[5] Cross References

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[1] FORM

[2] Use of Form

[3] Federal Statutes

[4] Decisions

[5] Cross References

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[1] FORM

[2] Use of Form

[3] Negligence and Contributory Negligence

§ 485.130 Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Preemption by Longshore and Harbor Workers' Compensation Act (33 U.S.C.S. § 901 et seq.)

[1] FORM

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[4] Cross References

§§ 485.131-485.149 [Reserved]

§ 485.150 Action for Damages [Civ. Code § 3333] Against Railroad [Civ. Code § 2338] and Employees [Civ. Code § 2343]--Complaint by Passenger for Personal Injury [Civ. Code §§ 1714(a), 2100]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction and Venue

[5] Specification of Damages

[6] Cross References

[7] State Statutes

[8] Decisions

[9] Text References

§ 485.151 Action for Damages [Civ. Code § 3333] Against Railroad [Civ. Code § 2338] and Employees [Civ. Code § 2343]--Complaint by Automobile Driver for Personal Injury and Property Damage [Civ. Code § 1714(a); Pub. Util. Code § 2106]--Failure to Install Signal or Sound Warning at Grade Crossing

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

[5] State Statutes

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§ 485.152 Action for Damages [Civ. Code § 3333] Against Railroad [Civ. Code § 2338] and Employees [Civ. Code § 2343]--Complaint for Wrongful Death of Automobile Driver by Entitled Person(s) [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a)]--Failure to Install Signal or Sound Warning at Grade Crossing

[1] FORM

[2] Use of Form

[3] Allegations

[4] Wrongful Death Actions

[5] Venue

[6] Cross References

[7] State Statutes

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§ 485.153 Action for Damages [Civ. Code § 3333] Against Railroad [Civ. Code § 2338] and Employees [Civ. Code § 2343]--Allegation in Complaint by Automobile Driver--Failure to Repair Signal or Sound Warning at Grade Crossing

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 485.154 Action for Damages [Civ. Code § 3333] Against Railroad [Civ. Code § 2338] and Employees [Civ. Code § 2343]--Allegation in Complaint by Automobile Driver--Use of Excessive Speed at Grade Crossing

[1] FORM

[2] Use of Form

[3] Allegations

[4] Decisions

[5] Cross References

§ 485.155 Action for Damages [Civ. Code § 3333] Against Railroad [Civ. Code § 2338] and Employees [Civ. Code § 2343]--Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Comparative Negligence [Civ. Code § 1714(a)] of Automobile Driver

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

[5] Text References

§ 485.156 Action for Damages [Civ. Code § 3333] Against Railroad [Civ. Code § 2338] and Employees [Civ. Code § 2343]--Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Trespasser Injured While Riding or Getting on or off Moving Train [Civ. Code § 1714.7]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Text References

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42-485 California Forms of Pleading and Practice--Annotated § 485.01

§ 485.01 Scope of Chapter

This chapter discusses actions for damages for the personal injury or death of a railroad worker under the Federal Employers' Liability Act, and includes a form of complaint for use in a United States District Court [*see § 485.120*], forms of complaints for use in a California state court [§§ *485.121*, *485.122*], forms of allegations for use in conjunction with the complaints [*see §§ 485.123 -485.128*], and forms of affirmative defenses for use in an answer to the complaint [§§ *485.129*, *485.130*].

This chapter also discusses actions arising under state law against railroads for injuries to passengers and other persons, such as automobile occupants and railroad trespassers, who are not railroad employees. It includes a form of complaint for use by a passenger to recover for injuries suffered in boarding or alighting from a train [*see § 485.150*], a form of complaint and forms of complaint allegations for use by an automobile driver in an action arising from a collision with a train [§§ *485.151*, *485.153*-34], and a form of complaint for use by entitled persons in a wrongful death action involving a driver killed in a crossing collision [*see § 485.152*]. This part also includes forms of affirmative defense allegations based on comparative negligence [*see § 485.155*] and the plaintiff's status as a trespasser [*see § 485.156*].

For discussion and forms relating to actions against carriage of persons and freight generally, see Ch. 109, *Carriers* . For discussion and forms relating to actions against other types of particular carriers, see Ch. 16, *Airplanes and Airports* ; Ch. 106, *Buses and Streetcars* ; Ch. 522, *Ships and Shipping* ; Ch. 544, *Taxicabs* ; and Ch. 553, *Trucks* . For discussion and forms relating to actions based on general premises liability, see Ch. 421, *Premises Liability* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsTransportation TortsRail TransportationGeneral OverviewTortsTransportation TortsRail TransportationFederal Employers' Liability ActTortsTransportation TortsRail TransportationRailroad CrossingsTortsTransportation TortsRail TransportationTrespassers

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§ 485.02 Cross References

For a form of complaint for use by an owner whose cattle have been injured or killed by a railroad's failure to maintain a proper fence, see Ch. 23, *Animals: Civil Liability*

For a form of complaint to bring an action by a passenger for assault and battery against a carrier of persons for reward, see Ch. 58, *Assault and Battery*

For a form of complaint to bring an action by a passenger for assault and battery against an agent of a common carrier, see Ch. 109, *Carriers*

For discussion of common carriers generally, see *Ch. 109, Carriers, § 109.10 et seq. and § 109.30* et seq.

For discussion and forms relating to the capacity of foreign corporations to be sued, see Ch. 160, *Corporations: Capacity*

For discussion and forms relating to federal diversity jurisdiction and removal of state actions to federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For discussion and forms relating to state court jurisdiction over foreign corporations, see Ch. 324, *Jurisdiction: Subject Matter*

For discussion and forms relating to negligence generally, see Ch. 380, *Negligence* .

For discussion and forms relating to the Public Utilities Commission, see Ch. 480, *Public Utilities*

For discussion and forms relating to service of summons on foreign corporations, see Ch. 518, *Service of Summons and Papers*

For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsAssault & BatteryGeneral OverviewTortsNegligenceGeneral OverviewTortsProcedureCommencement & ProsecutionSubject Matter JurisdictionTortsTransportation TortsRail TransportationGeneral Overview

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[Reserved]

§§ 485.03[Reserved]

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A. In General

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§ 485.10 Regulation of Railroads

Railroads are extensively regulated under federal and state law. Under federal law, the Surface Transportation Board [*see 49 U.S.C.S. § 701 et seq.* (provisions of the Interstate Commerce Act establishing the Surface Transportation Board); *see also 49 U.S.C.S. §§ 10101-10102* (general provisions of the Interstate Commerce Act)] has exclusive jurisdiction over interstate rail transportation, as well as rail transportation between a state and a territory or possession or foreign country [*49 U.S.C.S. § 10501(a)*]. The Board has jurisdiction over intrastate transportation by rail when transportation is between two points in the same state, but part of the interstate rail network [*49 U.S.C.S. § 10501(a)(2)(A)*] and limited jurisdiction over intrastate rail transportation by common carriers [*49 U.S.C.S. § 10501(b)*]. Railroads are further regulated by railroad safety provisions of Title 49 [*49 U.S.C.S. § 20101 et seq.*].

Under state law, railroads that provide transportation of people or property and that are owned, operated, controlled, or managed by private corporations and persons, are public utilities subject to regulation by the Public Utilities Commission [*Cal. Const. art. XII, §§ 1, 3, 4, 6*; *see, e.g., Pub. Util. Code §§ 451-632* (rights and obligations of public utilities), 701-880 (regulation of public utilities), 1201-1220 (railroad crossings), 2115 (violations regarding safety or condition of railroad cars or tracks), 7501-7705 (railroad corporations), 7801-7818 (street railroads)]. For discussion of public utilities in general and forms for use in proceedings before the Public Utilities Commission, see Ch. 480, *Public Utilities* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewTransportation LawInterstate CommerceFederal PowersTransportation LawInterstate CommerceState PowersTransportation LawIntrastate CommerceTransportation LawRail TransportationState & Local Regulation

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[Reserved]

§§ 485.11[Reserved]

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42-485 California Forms of Pleading and Practice--Annotated § 485.30

§ 485.30 Governing Law

The liability of a railroad employer engaged in interstate or foreign commerce for injuries sustained by its employees employed in that commerce is governed by the Federal Employers' Liability Act (FELA) (*45 U.S.C.S. §§ 51-60*). Specific duties are imposed on these railroads by the Safety Appliance Act [*49 U.S.C.S. §§ 20301-20306*], the Boiler Inspection Act [*49 U.S.C.S. §§ 20701-20703*], and the Hours of Service Act [*49 U.S.C.S. §§ 21101-21108*; *see also Temple v. Southern Pac. Transp. Co. (1980) 105 Cal. App. 3d 988, 990-991, 164 Cal. Rptr. 780]* . Railroad workers' duties that are categorized as "maritime employment" for purposes of application of the exclusive remedies of the Longshoremen's and Harbor Workers' Compensation Act are governed by *33 U.S.C.S. § 901 et seq.* and *Chesapeake & Ohio Ry. Co. v. Schwalb (1989) 493 U.S. 40, 45-48, 110 S. Ct. 381, 107 L. Ed. 2d 278* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPersonal InjuriesMaritime Workers' ClaimsLongshore & Harbor Workers' Compensation ActTortsTransportation TortsRail TransportationFederal Employers' Liability ActTortsTransportation TortsRail TransportationFederal Employers' Liability ActTransportation LawRail TransportationMaintenance & Safety

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B. Injuries to Employees

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§ 485.31 California Law

California has enacted a number of statutes relating to employee injuries establishing various rights and obligations between employers and employees. The two major laws relating to such matters are the Workers' Compensation Law [*Lab. Code §§ 3200-6002*], and the Safety in Employment Law [*Lab. Code §§ 6300-9061*]. *Lab. Code §§ 6800-7000* specifically regulate the working conditions and safety devices in state railway operations [*see Lab. Code §§ 6302(d), 6800* (administration of safety laws enacted for protection of railroad employees delegated to Division of Occupational Safety and Health, Department of Industrial Relations)]. Other state regulation includes *Lab. Code §§ 600-607* (work hours of train workers) and *Pub. Util. Code §§ 7676-7681* (acts with respect to railroad operations constituting crimes).

The Workers' Compensation Law and the Safety in Employment Law do not apply, however, to employers or employments that are so engaged in interstate commerce as not to be subject to the legislative power of California, or to employees injured while they are so engaged, except insofar as they are permitted to apply under the Constitution or laws of the United States [*Lab. Code § 3203*]. Rather, the rights and obligations of these employers and employees are governed by the Federal Employers' Liability Act [*45 U.S.C.S. §§ 51-60*] and related statutes. To the extent the federal laws apply, they provide the exclusive remedy for the injury or death of a railroad employee [*see § 485.83[2][j]*]. In such cases, California's workers' compensation law does not apply, and the Workers' Compensation Appeals Board has no jurisdiction over a claim against the employer arising from the injury or death of the employee. This is so, even though the railroad is engaged in both interstate and intrastate commerce, because, if interstate business is clearly a part of the subject to be legislated, the fact that intrastate commerce may be interwoven with it does not prevent Congress from exercising its powers [*see Southern Pac. Co. v. Industrial Accident Comm'n (1942) 19 Cal. 2d 271, 279-281, 120 P.2d 880* ; *Northwestern Pac. R.R. Co. v. Industrial Accident Comm'n (1946) 73 Cal. App. 2d 367, 370-377, 166 P.2d 334]* .

To the extent the federal laws do not apply, as for example if the railroad is wholly intrastate, the rights of railroad employees or their dependents for injury or death arising out of and in the course of the employment are governed by the California Workers' Compensation Law [*see Lab. Code §§ 3200-6002*]. For procedure and forms for use by an injured worker or by a deceased worker's dependents in claiming compensation benefits under California's Workers'Compensation Law, see Ch. 577, *Workers' Compensation* . Insofar as an employee of an interstate railroad is

concerned, however, the situations in which the Federal Employers' Liability Act would not apply are rare [*see § 485.33*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawOccupational Safety & HealthDuties & RightsTortsTransportation TortsRail TransportationFederal Employers' Liability ActTransportation LawInterstate CommerceFederal PowersTransportation LawIntrastate CommerceTransportation LawRail TransportationState & Local RegulationWorkers' Compensation & SSDIAdministrative ProceedingsClaimsGeneral OverviewWorkers' Compensation & SSDICompensabilityInjuriesGeneral OverviewWorkers' Compensation & SSDIRemedies Under Other LawsFederal Employers' Liability Act

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§ 485.32 Federal Employers' Liability Act (FELA)

[1] Basis of Liability

The Federal Employers' Liability Act (FELA) [*45 U.S.C.S. §§ 51-60*] provides that a common carrier by railroad engaged in interstate or foreign commerce is liable in damages for an employee injured or killed while employed by the carrier in such commerce as a result in whole or in part of the negligence of the railroad or its employees or by reason of any defect or insufficiency in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment due to its negligence [*45 U.S.C.S. § 51*]. The term "common carrier by railroad" means one who operates a railroad as a means of carrying persons or property for the public, that is, a railroad company acting as a common carrier [*Wells Fargo & Co. v. Taylor (1920) 254 U.S. 175, 187, 41 S. Ct. 93, 65 L. Ed. 205* ; *Aguirre v. Southern Pac. Co. (1965) 232 Cal. App. 2d 636, 644, 43 Cal. Rptr. 73]* . The term "common carrier," as used in the FELA, includes a receiver or other person or corporation charged with the management and operation of the carrier's business [*45 U.S.C.S. § 57*; *see Eddings v. Collins Pine Co. (N.D. Cal. 1956) 140 F. Supp. 622, 626]* .

Under the FELA, liability for negligence attaches if the railroad knew or by the exercise of due care should have known of the danger or risk to an employee [*Urie v. Thompson (1949) 337 U.S. 163, 178, 69 S. Ct. 1018, 93 L. Ed. 1282* ; *Erskine v. Consolidated Rail Corp. (6th Cir. 1987) 814 F.2d 266, 273]* . The employer's liability is determined in a civil action filed in a trial court [*see 45 U.S.C.S. § 56*; *see also §§ 485.37, 485.39, 485.120 -485.122*]. The FELA contains no provision subrogating a railroad employer to the employee's rights as against any allegedly negligent third party. An employer found liable under the FELA and the third party are joint tortfeasors [*Southern Pac. Transp. Co. v. Ohbayashi Am. Corp. (1983) 147 Cal. App. 3d 233, 237, 195 Cal. Rptr. 63* ; *see § 485.47*].

[2] Enactment and Purpose

The FELA was enacted in 1906 to create a tort remedy for railroad workers injured on the job. Its main purpose was to enable injured railroad workers to overcome a number of traditional defenses to tort liability that had previously operated to bar their actions, including contributory negligence, contractual waiver of liability, the fellow-servant rule, and assumption of the risk [*Lewy v. Southern Pac. Transp. Co. (9th Cir. 1986) 799 F.2d 1281, 1287* ; *see § 485.42*; *see also Atchison, Topeka & Santa Fe Ry. Co. v. Buell (1987) 480 U.S. 557, 561, 107 S. Ct. 1410, 94 L. Ed. 2d 563]* . The

act "was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations" [*Wilkerson v. McCarthy (1949) 336 U.S. 53, 68, 69 S. Ct. 413, 93 L. Ed. 497* (Douglas, J., concurring); *see Eckert v. Aliquippa & S. R.R. Co. (3d Cir. 1987) 828 F.2d 183, 186]* .

[3] Rule of Liberal Construction

The FELA was passed in response to the special needs of railroad workers and must be construed liberally for their protection [*Lewy v. Southern Pac. Transp. Co. (9th Cir. 1986) 799 F.2d 1281, 1287-1288* ; *see Urie v. Thompson (1949) 337 U.S. 163, 182 n. 20, 69 S. Ct. 1018, 93 L. Ed. 1282*); *Temple v. Southern Pac. Transp. Co. (1980) 105 Cal. App. 3d 988, 992, 164 Cal. Rptr. 780]* . Thus, to read into the all-inclusive wording of the act a restriction as to the kinds of employees covered, the degree of negligence required, or the particular sorts of harms inflicted, would contradict the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the act followed by the Supreme Court of the United States [*Urie v. Thompson (1949) 337 U.S. 163, 181-182, 69 S. Ct. 1018, 93 L. Ed. 1282* ; *see Lewy v. Southern Pac. Transp. Co. (9th Cir. 1986) 799 F.2d 1281, 1288* ; *McMillan v. Western Pac. R.R. Co. (1960) 54 Cal. 2d 841, 843-844, 9 Cal. Rptr. 361, 357 P.2d 449]* .

[4] Exclusivity of Remedy

The FELA provides a uniform rule of liability throughout all the states and supersedes state law relating to the liability of carriers by rail engaged in interstate or foreign commerce [*Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan (1926) 271 U.S. 472, 474, 46 S. Ct. 564, 70 L. Ed. 1041* ; *Davee v. Southern Pac. Co. (1962) 58 Cal. 2d 572, 576, 25 Cal. Rptr. 445, 375 P.2d 293]* . When a railroad employee [*see § 485.33*] is injured or killed in such commerce, the FELA provides the only remedy for that employee, or, in the event of the employee's death, for his or her personal representative, and this is true even though the employer may not be liable under the FELA because the injury or death did not result from the employer's negligence [*New York Cent. R.R. Co. v. Winfield (1917) 244 U.S. 147, 148-154, 37 S. Ct. 546, 61 L. Ed. 1045* ; *see Erie R.R. Co. v. Winfield (1917) 244 U.S. 170, 172-174, 37 S. Ct. 556, 61 L. Ed. 1057]* .

[5] California's Workers' Compensation Law Compared

Under state workers' compensation law [*see § 485.31*], an injured employee, or the employee's dependents in the event of the employee's death, is entitled to recover workers' compensation benefits for a work-related injury without regard to the negligence of any person [*see Lab. Code § 3600*]; hence, fault is not an issue in the determination of the employer's liability. There is no right to a trial by jury, and proceedings to establish rights to benefits are within the exclusive jurisdiction of the Workers' Compensation Appeals Board, a tribunal established for that purpose, subject to judicial review [*see Lab. Code §§ 111, 3600,5300*-5305, 5950]. Moreover, an employer who pays compensation benefits is subrogated to the employee's cause of action against any third-party tortfeasor to the extent of the payment made, subject to the rules of comparative negligence [*see Lab. Code §§ 3850-3864*]. For further discussion and forms, see Ch. 577, *Workers' Compensation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProcedureMultiple DefendantsJoint & Several LiabilityTortsTransportation TortsRail TransportationFederal Employers' Liability ActWorkers' Compensation & SSDIAdministrative ProceedingsClaimsJurisdictionWorkers' Compensation & SSDICompensabilityCourse of EmploymentGeneral OverviewWorkers' Compensation & SSDICompensabilityInjuriesGeneral OverviewWorkers' Compensation & SSDIRemedies Under Other LawsFederal Employers' Liability ActWorkers' Compensation & SSDIThird Party ActionsSubrogation

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42-485 California Forms of Pleading and Practice--Annotated § 485.33

§ 485.33 Determining Employer-Employee Status

Liability under the FELA is premised on the injured person's status as one who is an "employee" of a railroad engaged in interstate commerce and who is injured while "employed" in such commerce [*see 45 U.S.C.S. § 51 see also §§ 485.32[1], 485.35*]. The words "employee" and "employed" are used in *45 U.S.C.S. § 51* in their natural sense and are intended to describe the conventional relation of employer and employee, and do not include, for example, everyone who may work on or around a train. At the time the FELA was enacted, it was well known that on interstate trains there were persons engaged in various services for employers other than the railroad, and Congress, familiar with this situation, did not use any appropriate expression which could be taken to indicate a purpose to include such persons among those to whom the railroad company was to be liable under the act [*Robinson v. Baltimore & Ohio R.R. Co. (1915) 237 U.S. 84, 94, 35 S. Ct. 491, 59 L. Ed. 849* ; *Aguirre v. Southern Pac. Co. (1965) 232 Cal. App. 2d 636, 644, 43 Cal. Rptr. 73]* .

Thus, the question of employment is to be determined by reference to common law principles [*Kelley v. Southern Pac. Co. (1974) 419 U.S. 318, 323, 95 S. Ct. 472, 42 L. Ed. 2d 498]* . In this connection, Restatement (Second) of Agency §§ 5(2), 220, 226, and 227, concerning the general master-servant relationship and the borrowed-servant doctrine, have been used as a guideline for analysis and proper jury instructions [*Kelley v. Southern Pac. Co. (1974) 419 U.S. 318, 323-324, 95 S. Ct. 472, 42 L. Ed. 2d 498]* .

In the case of a three-way relationship between two employers, one of which is a railroad, and a worker, there are, under common law principles, basically three ways a worker can establish "employment" with a rail carrier for FELA purposes even while nominally employed by the other employer. In such a case, the worker may show that he or she was (1) serving as the borrowed servant of the railroad at the time of injury [*see* Restatement (Second) of Agency § 227]; (2) acting for the two employers simultaneously [*see* Restatement (Second) of Agency § 226)]; or (3) acting as a subservant of a company that was in turn a servant of the railroad [*Kelley v. Southern Pac. Co. (1974) 419 U.S. 318, 324, 95 S. Ct. 472, 42 L. Ed. 2d 498* ; *see also* Restatement (Second) of Agency § 5(2)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAgents DistinguishedGeneral OverviewBusiness & Corporate LawAgency RelationshipsAgents DistinguishedIndependent Contractors, Masters & ServantsMasters & ServantsCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewLabor & Employment LawEmployment RelationshipsGeneral OverviewTortsTransportation TortsRail TransportationFederal Employers' Liability ActWorkers' Compensation & SSDICoverageEmployment RelationshipsBorrowed EmployeesWorkers' Compensation & SSDICoverageEmployment RelationshipsDual Employees

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§ 485.34 Duty of Care Under FELA

[1] Employee

An employee subject to the FELA has a duty to use reasonable care in the workplace [*Ackley v. Chicago & N. W. Transp. Co. (8th Cir. 1987) 820 F.2d 263, 267]* .

[2] Employer

The FELA does not contain any specific standards of care. Nevertheless, certain employer duties have become integral parts of the act. For example, a railroad has a duty to use reasonable care in furnishing its employees with a safe place to work [*Atchison, Topeka & Santa Fe Ry. Co. v. Buell (1987) 480 U.S. 557, 568, 107 S. Ct. 1410, 94 L. Ed. 2d 563* ; *Ackley v. Chicago & N. W. Transp. Co. (8th Cir. 1987) 820 F.2d 263, 266 n. 5*]. Other duties include (1) the duty to provide reasonably safe tools and equipment, (2) the duty to promulgate and enforce safety rules, (3) the duty to assign workers to jobs for which they are qualified and to avoid placing workers in jobs beyond their physical capacity, (4) the duty to warn employees of unsafe working conditions, (5) the duty to protect an employee from intentional torts committed by another employee, and (6) the duty to guard against conditions in the workplace that cause emotional harm [*Ackley v. Chicago & N. W. Transp. Co. (8th Cir. 1987) 820 F.2d 263, 266 n. 5*]. The duties are nondelegable and become more imperative as the risk to the employee increases [*Ackley v. Chicago & N. W. Transp. Co. (8th Cir. 1987) 820 F.2d 263, 267]* . Thus negligence may be proved by showing that the railroad's act violated, for example, its duty to use reasonable care in furnishing its employees with a safe place to work and safe tools and appliances with which to work [*Spencer v. Atchison, Topeka & Santa Fe Ry. Co. (1949) 92 Cal. App. 2d 490, 494, 207 P.2d 126]* .

An employer's duty of care in a FELA action turns in a general sense on the reasonable foreseeability of harm. The employer's conduct is measured by the degree of care that persons of ordinary, reasonable prudence would use under similar circumstances and by what these same persons would anticipate as resulting from a particular condition. The continuous duty to provide a reasonably safe place to work, however, while measured by foreseeability standards, is broader under the FELA than a general duty of due care [*Ackley v. Chicago & N. W. Transp. Co. (8th Cir. 1987) 820 F.2d 263, 267]* .

[3] Assumption That Employees Will Exercise Care

The right to assume that others will exercise ordinary care derives from the corresponding duty of care imposed by law on every person. Thus, as a general proposition, one may assume that others will act lawfully and carefully. But the right to assume another's lawful or careful behavior sometimes reflects neither reality nor the facts in a case. It does not, for example, when the facts in a specificcase would show to a reasonable person in the actor's position that another person will probably disobey the law this time. Moreover, because the assumption has often been applied rather mechanically, without any real regard to the factual probabilities of the situation, the trend has been the increasing liberalization in allowing the wrongs of other persons to be regarded as foreseeable. As the risk of harm to such other persons becomes more foreseeable, the duty to foresee that risk increases and the right to assume that the other persons will exercise due care correspondingly decreases [*Ackley v. Chicago & N. W. Transp. Co. (8th Cir. 1987) 820 F.2d 263, 267-268]* . For example, a railroad has the duty to promulgate and enforce safety rules, and evidence of its failure to do so may be considered by the jury in assessing the employer's negligence; conversely, an employee's failure to obey safety rules may be considered by the jury in assessing contributory negligence. Consequently, a jury instruction in a FELA case that defendant railroad "has a right to assume that its employees will exercise reasonable care for their own safety and that they will not disobey safety rules and practices" is prejudicial error when it negates the railroad's duty reasonably to foresee that an employee would perform his or her work under unsafe conditions. This is particularly true when the railroad has knowledge that its employees are violating a safety regulation, does nothing to remedy a potentially unsafe working condition, and could reasonably foresee that the regulation would continue to be violated by the employee who was injured by the violation [*Ackley v. Chicago & N. W. Transp. Co. (8th Cir. 1987) 820 F.2d 263, 268-269* (reversing judgment for the railroad because of the prejudicially erroneous instruction and remanding the cause for a new trial)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDutyForeseeability of InjuryTortsNegligenceDutyForeseeability of InjuryTortsNegligenceProofGeneral OverviewTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsTransportation TortsRail TransportationFederal Employers' Liability ActTransportation LawRail TransportationMaintenance & Safety

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§ 485.35 Requirements for Recovery in FELA Action

[1] Employment in Interstate Commerce

Under the FELA, any employee of a carrier engaged in interstate or foreign commerce is considered to be employed by the carrier and entitled to the benefits of the act if any part of the employee's duties is the furtherance of that commerce or in any way directly or closely and substantially affects that commerce [*45 U.S.C.S. § 51*; *see Aranda v. Southern Pac. Co. (1955) 44 Cal. 2d 543, 544-545, 282 P.2d 875 , aff'd, 351 U.S. 493, 76 S. Ct. 952 (1956)]* . Hence, the claimant will need to show that at least a part of the employee's duties was in the furtherance of that commerce or that the employee's duties directly or closely and substantially affected that commerce. When more than one inference can be drawn from the evidence, the question whether an employee was engaged in interstate commerce at the time of the injury sued for is a question for the jury [*Sullivan v. Matt (1955) 130 Cal. App. 2d 134, 139, 278 P.2d 499]* .

[2] Negligence (Breach of Duty)

Under the FELA, the employer is liable for the injury or death of an employee resulting in whole or in part from the employer's negligence, and proof of this negligence is essential to recovery [*Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan (1926) 271 U.S. 472, 474, 46 S. Ct. 564, 70 L. Ed. 1041* ; *Davee v. Southern Pac. Co. (1962) 58 Cal. 2d 572, 576, 25 Cal. Rptr. 445, 375 P.2d 293]* . The employer is not an insurer of the employee's welfare; in an action under the FELA, the claimant has the burden of proving the employer's negligence and the railroad is not required to produce evidence to show that it was free from negligence [*see Lewis v. Union Pac. R.R. Co. (1954) 127 Cal. App. 2d 280, 283, 273 P.2d 706* ; *Spencer v. Atchison, Topeka & Santa Fe Ry. Co. (1949) 92 Cal. App. 2d 490, 494, 207 P.2d 126]* . In order to recover, the claimant must prove that the employee's injury was caused at least in part as a result of the employer's negligence, although that degree of negligence may be slight [*see 45 U.S.C.S. § 51*; *Southern Pac. Transp. Co. v. Ohbayashi Am. Corp. (1983) 147 Cal. App. 3d 233, 237, 195 Cal. Rptr. 63* ; *Baez v. Southern Pac. Co. (1962) 210 Cal. App. 2d 714, 717, 26 Cal. Rptr. 899]* .

The fact that a third person's negligence was a contributing cause is immaterial so long as the injury was caused in part by the railroad's negligence [*see Farnsworth v. Western Pac. R.R. Co. (1966) 241 Cal. App. 2d 476, 482, 50 Cal. Rptr. 646]* . The test of the employer's liability is whether the employer used ordinary care in regard to the risk to the

employee [*Baez v. Southern Pac. Co. (1962) 210 Cal. App. 2d 714, 717, 26 Cal. Rptr. 899]* . In the absence of negligence, there is no liability [*Baez v. Southern Pac. Co. (1962) 210 Cal. App. 2d 714, 717, 26 Cal. Rptr. 899]* .

Notwithstanding these rules, an employer may be liable apart from negligence when the injury resulted from its breach of a statutory duty. That is, under federal decisional law, negligence under the FELA has been equated with "fault," which may consist of a breach of either the duty of care (negligence), analogous but by no means identical to the general common-law duty, or of a statutory duty (resulting in absolute liability) [*see Kernan v. American Dredging Co. (1958) 355 U.S. 426, 432, 78 S. Ct. 394, 2 L. Ed. 2d 382* ; *see also § 485.45*].

Moreover, the FELA has been construed to cover at least some intentional torts as well as negligent acts [*see Atchison, Topeka & Santa Fe Ry. Co. v. Buell (1987) 480 U.S. 557, 562 n.8, 107 S. Ct. 1410, 94 L. Ed. 2d 563* , citing cases; *Lewy v. Southern Pac. Transp. Co. (9th Cir. 1986) 799 F.2d 1281, 1288]* .

Whether an act was performed, or tort committed in the scope of one's employment will depend on all the facts and circumstances of the case and on the reasonable inferences that may be drawn from them [*Temple v. Southern Pac. Transp. Co. (1980) 105 Cal. App. 3d 988, 995, 164 Cal. Rptr. 780]* . Whether theact was or was not within the employment's scope is ordinarily a question of fact for the jury's determination [*Temple v. Southern Pac. Transp. Co. (1980) 105 Cal. App. 3d 988, 995, 164 Cal. Rptr. 780* ; *Sullivan v. Matt (1955) 130 Cal. App. 2d 134, 139, 278 P.2d 499]* .

[3] Injuries Covered

When the FELA was enacted, Congress's attention was focused primarily on injuries and death resulting from accidents on interstate railroads [*see §§ 485.120, 485.121*]. Nevertheless, the FELA, on its face, is not limited to accidents, but covers every injury suffered by an employee while employed by reason of the carrier's negligence [*Urie v. Thompson (1949) 337 U.S. 163, 181, 69 S. Ct. 1018, 93 L. Ed. 1282* ; *see Lewy v. Southern Pac. Transp. Co. (9th Cir. 1986) 799 F.2d 1281, 1288* ; *McMillan v. Western Pac. R.R. Co. (1960) 54 Cal. 2d 841, 843, 9 Cal. Rptr. 361, 357 P.2d 449]* . Thus, the concept of "injury" under the FELA is extremely broad and encompasses all reasonably foreseeable injuries that result from a railroad's failure to exercise due care with respect to its employees [*Buell v. Atchison, Topeka & Santa Fe Ry. Co. (9th Cir. 1985) 771 F.2d 1320, 1322* , vacated on another point in *Atchison, Topeka & Santa Fe Ry. Co. v. Buell (1987) 480 U.S. 557, 107 S. Ct. 1410, 94 L. Ed. 2d 563* ; *see §§ 485.122, 485.123 -485.126*].

In *Urie*, the Supreme Court held that the FELA covered industrial, or occupational, disease (silicosis) as well as accidental injuries [*Urie v. Thompson (1949) 337 U.S. 163, 180, 69 S. Ct. 1018, 93 L. Ed. 1282* ; *see § 485.124* (skin infection)]. In *McMillan*, coverage was extended to a worker's nervous breakdown caused by the employer's negligently requiring him to work under conditions (of severe stress) likely to bring about harmful consequences [*McMillan v. Western Pac. R.R. Co. (1960) 54 Cal. 2d 841, 844, 9 Cal. Rptr. 361, 357 P.2d 449* ; *see § 485.123*].

The United States Supreme Court has not yet ruled, however, on the question of whether the FELA imposes liability on a railroad for purely mental or emotional injuries to a worker. In *Buell v. Atchison, Topeka & Santa Fe Ry. Co. (9th Cir. 1985) 771 F.2d 1320, 1322-1323* , relying in part on *McMillan v. Western P. R. Co. (1960) 54 Cal. 2d 841, 9 Cal. Rptr. 361, 357 P.2d 449* , the Ninth Circuit answered this question in the affirmative, but the Supreme Court vacated the *Buell* decision on this point on the ground that the record was insufficient to express an opinion on the worker's ultimate chance of recovery under the FELA on his emotional injury claim. The Supreme Court did suggest that the question whether one can recover for emotional injury may not be susceptible to an all-inclusive yes or no answer and that broad pronouncements in this area may have to bow to the precise application of developing legal principles to particular fact situations [*see Atchison, Topeka & Santa Fe Ry. Co. v. Buell (1987) 480 U.S. 557, 568-570, 107 S. Ct. 1410, 94 L. Ed. 2d 563]* .

[4] Causation

The claimant has the burden of proving that the employer's negligence was the proximate cause of the employee's injury or death [*Spencer v. Atchison, Topeka & Santa Fe Ry. Co. (1949) 92 Cal. App. 2d 490, 494, 207 P.2d 126]* . However, the employee need not prove that the employer's negligence was the sole proximate cause; the railroad is liable for an injury to an employee even though its negligence was only a contributing proximate cause [*Lewis v. Union Pac. R.R. Co. (1954) 127 Cal. App. 2d 280, 283-284, 273 P.2d 706]* . Thus, liability under the FELA does not depend on the common law concept of proximate cause, that is, a cause that produces injury in a natural and continuous sequence unbroken by any efficient intervening cause, without which the result would not have occurred. In FELA cases, causation exists even if there is a plurality of causes, including the negligence of the defendant or of a third person. The negligence of the employer need not be the sole cause or even a substantial cause of the ensuing injury [*Parker v. Atchison, Topeka & Santa Fe Ry. Co. (1968) 263 Cal. App. 2d 675, 678, 70 Cal. Rptr. 8* (involving proper jury instruction on proximate causation in FELA case); *see Torres v. Southern Pac. Co. (1968) 260 Cal. App. 2d 757, 764, 67 Cal. Rptr. 428]* . With respect to causation, the test of a jury case under the FELA is simply whether the proofs justify with reason the conclusion that employer negligence played even the slightest part in producing the injury or death for which damages are sought [*Atchison, Topeka & Santa Fe Ry. Co. v. Buell (1987) 480 U.S. 557, 562 n.8, 107 S. Ct. 1410, 94 L. Ed. 2d 563* ; *Rogers v. Missouri Pac. R.R.Co. (1957) 352 U.S. 500, 506, 77 S. Ct. 443, 1 L. Ed. 2d 493]* . If they do, the judge must find that a jury case exists despite the possibility that from the evidence the jury may also reasonably attribute the results to other causes on grounds of probability, including the employee's contributory negligence [*Rogers v. Missouri Pac. R.R.Co. (1957) 352 U.S. 500, 507, 77 S. Ct. 443, 1 L. Ed. 2d 493* ; *see Parker v. Atchison, Topeka & Santa Fe Ry. Co. (1968) 263 Cal. App. 2d 675, 677, 70 Cal. Rptr. 8* ; *Waller v. Southern Pac. Co. (1967) 66 Cal. 2d 201, 212-213, 57 Cal. Rptr. 353, 424 P.2d 937]* .

The question as to whether the railroad's negligence was the proximate cause of the injuries sustained is for the jury's determination [*Qualls v. Atchison, Topeka & Santa Fe Ry. Co. (1931) 112 Cal. App. 7, 13, 296 P. 645]* . The trier of fact may not, however, resort to conjecture as to what might have happened. If the accident might have been caused by one of two or more causes and the employer is responsible for only one, the burden is on the employee to show the accident was produced, at least in part, by the cause for which the employer was responsible [*see Lewis v. Union Pac. R.R. Co. (1954) 127 Cal. App. 2d 280, 283-284, 273 P.2d 706]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsProvince of Court & JuryTortsNegligenceCausationProximate CauseGeneral OverviewTortsNegligenceDefensesContributory NegligenceGeneral OverviewTortsNegligenceDutyGeneral OverviewTortsNegligenceProofBurdens of ProofTortsNegligenceStandards of CareGeneral Overview

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§ 485.36 Survival of FELA Action

An action under the FELA survives the injured employee's death and passes to the employee's personal representative for the benefit of the employee's surviving spouse and children and, if none, the employee's parents and, if none, the employee's next of kin who were dependent on the employee. However, there can be only one recovery for the same injury [*45 U.S.C.S. §§ 51, 59*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawProbatePersonal RepresentativesClaims By & AgainstTortsTransportation TortsRail TransportationFederal Employers' Liability Act

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§ 485.37 Concurrent Jurisdiction of Federal and State Courts Over FELA Actions

The jurisdiction of the federal courts and of the state courts over FELA actions is concurrent [*45 U.S.C.S. § 56*]. Hence, an action under the FELA may be brought in either a federal district court or a state trial court [*see 28 U.S.C.S. § 1331* (United States District Courts have original jurisdiction over all civil actions arising under laws of United States); *see also § 485.121[6]* regarding subject matter jurisdiction in state trial courts].

Nevertheless, because Congress has not expressed in FELA in unmistakably clear language an intent that federal courts shall have jurisdiction over FELA actions by railroad employees against state-owned or state-operated railroads, federal courts lack such jurisdiction [*see Welch v. Department of Highways & Public Transp. (1987) 483 U.S. 468, 472-478, 107 S. Ct. 2941, 97 L. Ed. 2d 389* (involving Jones Act, former *46 U.S.C.S. § 688* (now *46 U.S.C.S. § 30104*), which incorporates remedial provisions of FELA; four justices found that action was barred by *U.S. Const. amend. XI*, with fifth justice stating that regardless of whether states are immune under *U.S. Const. amend. XI*, FELA does not apply to states); overruling *Parden v. Terminal Ry. of Ala. State Docks Dep't (1964) 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233* , to extent that *Parden* is inconsistent with requirement that abrogation by Congress of states' *Eleventh Amendment* immunity must be expressed in unmistakably clear language]. Following *Welch*, the U.S. District Court for the District of New Jersey ruled that because Congress has not in unmistakably clear language authorized suits under the FELA against the states, federal courts lack subject matter jurisdiction of FELA actions against a state-owned railroad if the state has not waived its immunity under *U.S. Const. amend. XI* [*Rockwell v. New Jersey Transit Rail Operations (D.N.J. 1988) 682 F. Supp. 280, 282-285]* . Although *U.S. Const. amend. XI*, expressly provides only that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State," it has been construed also as barring actions in federal court against a state by its own citizens [*Welch v. Department of Highways & Pub. Transp. (1987) 483 U.S. 468, 472, 107 S. Ct. 2941, 97 L. Ed. 2d 389* ; *Rockwell v. New Jersey Transit Rail Operations (D.N.J. 1988) 682 F. Supp. 280, 281]* .

In a subsequent case in which an injured employee of a state-owned railroad brought suit in a state court alleging negligence by his employer, the U.S. Supreme Court placed great emphasis on the strong considerations favoring adherence to stare decisis and decided that FELA does create a cause of action enforceable in state court against a

state-owned railroad [*Hilton v. South Carolina Pub. Rys. Comm'n (1991) 502 U.S. 197, 112 S. Ct. 560, 116 L. Ed. 2d 560, 567* (reaffirming, in part, *Parden v. Terminal Ry. of Ala. State Docks Dep't (1964) 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233*)]. Furthermore, the statutory construction holding of *Parden*, which held that FELA authorizes suits for damages against state-owned railroads, was undisturbed by *Welch* [*see* *Welch v. Department of Highways & Pub. Transp. (1987) 483 U.S. 468, 472, 107 S. Ct. 2941, 97 L. Ed. 2d 389* ; *Parden v. Terminal Ry. of Ala. State Docks Dep't (1964) 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed. 2d 233]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent JurisdictionConstitutional LawState AutonomyGeneral OverviewConstitutional LawState AutonomyWaiverInterstate CommerceTortsPublic Entity LiabilityImmunityGeneral OverviewTortsTransportation TortsRail TransportationFederal Employers' Liability ActTransportation LawIntrastate Commerce

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42-485 California Forms of Pleading and Practice--Annotated § 485.38

§ 485.38 Law Applicable in State Court Actions

The United States Supreme Court's interpretation of the FELA is the supreme law to be applied by all courts, federal and state [*Chesapeake & Ohio R.R. Co. v. Kuhn (1931) 284 U.S. 44, 47, 52 S. Ct. 45, 76 L. Ed. 157* ; *Morse v. Southern Pac. Transp. Co. (1976) 63 Cal. App. 3d 128, 135, 133 Cal. Rptr. 577]* . FELA cases adjudicated in state courts are as a general matter subject to state procedural rules, but the substantive law governing the cases is federal [*St. Louis Sw. Ry. Co. v. Dickerson (1985) 470 U.S. 409, 411, 105 S. Ct. 1347, 84 L. Ed. 2d 303* ; *Najera v. Southern Pac. Co. (1961) 191 Cal. App. 2d 634, 641, 13 Cal. Rptr. 146]* . Thus, when an action is properly brought in a state court, the law of the state, in the absence of contrary provisions in the federal statute, is controlling in all matters of practice and procedure [*Bohme v. Southern Pac. Co. (1970) 8 Cal. App. 3d 291, 297, 87 Cal. Rptr. 286]* .

The terms "practice" and "procedure" include the mode of procedure by which a legal right is enforced, as distinguished from the substantive law that gives or declares the right [*Bohme v. Southern Pac. Co. (1970) 8 Cal. App. 3d 291, 298, 87 Cal. Rptr. 286]* . Hence, the process of determining on appeal from a California trial court whether the trial court committed error during the trial of the cause and, if so, whether the error was prejudicial and therefore constitutes a ground for reversal, is a matter of state practice and procedure [*Bohme v. Southern Pac. Co. (1970) 8 Cal. App. 3d 291, 297-298, 87 Cal. Rptr. 286]* . Discovery in FELA actions brought in state court is also governed by state discovery statutes [*see, e.g., Pratt v. Union Pacific Railroad Co. (2008) 168 Cal. App. 4th 165, 180, 85 Cal. Rptr. 3d 321*].

On the other hand, state laws are not controlling in determining the incidents of an employee's right to recover damages under the FELA or in determining the validity of releases and other defenses designed to liquidate or defeat employees' claims. If the rule were otherwise, federal rights affording relief to injured railroad employees under a federally declared standard could be defeated by state law, andthe FELA would not be given that uniform application throughout the country essential to effect its purposes [*Morse v. Southern Pac. Transp. Co. (1976) 63 Cal. App. 3d 128, 135-136, 133 Cal. Rptr. 577]* .

Any matter of state procedural law that would alter the substantive rights of the parties under federal law is inapplicable to cases under the FELA. Otherwise, the FELA would be frustrated by state substantive limitations that are couched in procedural language. For example, although the admissibility of evidence is normally considered a procedural question,

federal, not state, law governs the admissibility of evidence relating to payments from collateral sources in an FELA case in a state court [*Morse v. Southern Pac. Transp. Co. (1976) 63 Cal. App. 3d 128, 136-137, 133 Cal. Rptr. 577* (admissibility of disability payments under Railroad Retirement Act); *see also* *Lund v. San Joaquin Valley R.R. (2003) 31 Cal. 4th 1, 7-11, 1 Cal. Rptr. 3d 412, 71 P.3d 770* (without ruling on whether state or federal law controls, under either law, if FELA action is brought in state court, jury should not generally be told that employee is ineligible for state workers' compensation benefits or other collateral benefits)]. Under federal law, this evidence is inadmissible [*Eichel v. New York Cent. R.R. Co. (1963) 375 U.S. 253, 254-256, 84 S. Ct. 316, 11 L. Ed. 2d 307* (evidence proffered to impeach worker's testimony as to his motive for not returning to work and as to permanency of his injuries); *Morse v. Southern Pac. Transp. Co. (1976) 63 Cal. App. 3d 128, 137, 133 Cal. Rptr. 577]* .

The sufficiency of the evidence in a state court action under the FELA is also governed by federal law [*Waller v. Southern Pac. Co. (1967) 66 Cal. 2d 201, 206, 57 Cal. Rptr. 353, 424 P.2d 937]* . For example, whether the evidence is sufficient to go to the jury or whether a nonsuit should be granted is clearly a matter of substance and governed by federal rather than state law [*McGuigan v. Southern Pac. Co. (1952) 112 Cal. App. 2d 704, 714, 247 P.2d 415]* . Issues relating to the measure of damages are also matters of substance and governed by federal law [*Chesapeake & Ohio R.R. Co. v. Kelly (1916) 241 U.S. 485, 491, 36 S. Ct. 630, 60 L. Ed. 1117* ; *Morse v. Southern Pac. Transp. Co. (1976) 63 Cal. App. 3d 128, 137, 133 Cal. Rptr. 577]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsGeneral OverviewCivil ProcedureAppealsStandards of ReviewSubstantial EvidenceSufficiency of EvidenceConstitutional LawSupremacy ClauseSupreme Law of the LandGovernmentsCourtsJudicial PrecedentsTortsDamagesGeneral OverviewTortsTransportation TortsRail TransportationFederal Employers' Liability Act

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§ 485.39 Proper Court for Trial (Venue) of FELA Actions

An action under the FELA may be brought in a United States District Court in the district of the defendant's residence or in which the cause of action arose or in which the defendant is doing business at the time the action is commenced [*45 U.S.C.S. § 56*]. Change of venue from one federal district court to another federal district court in which the action might have been brought is provided for in *28 U.S.C.S. § 1404*.

The venue of a state court action is dependent on state law. The provisions applicable to actions for personal injury or wrongful death are set forth in *Code Civ. Proc. § 395*, and those applicable to actions against corporations in *Code Civ. Proc. § 395.5*. Change of venue is covered in *Code Civ. Proc. §§ 397* and *398-400*. For further discussion and forms relating to venue in actions brought in a state court, see Ch. 571, *Venue* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueFederal Venue TransfersGeneral OverviewCivil ProcedureVenueMotions to TransferGeneral OverviewTortsProcedureCommencement & ProsecutionVenueTortsTransportation TortsRail TransportationFederal Employers' Liability Act

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§ 485.40 Applicability of Doctrine of Forum Non Conveniens (Inconvenient Forum) in State Court Actions

California courts accept jurisdiction of FELA cases both as to causes of action that arise in California and as to those that arise outside California in favor of nonresident, noncitizen plaintiffs against a foreign corporation doing business in California [*Price v. Atchison, Topeka & Santa Fe Ry. Co. (1954) 42 Cal. 2d 577, 583, 268 P.2d 457]* . However, the doctrine of forum non conveniens (inconvenient forum) applies in California [*see Code Civ. Proc. §§ 410.30, 418.10(a)(2)*], and, in a proper case, will apply in an action under the FELA [*Price v. Atchison, Topeka & Santa Fe Ry. Co. (1954) 42 Cal. 2d 577, 579, 268 P.2d 457* ; *Great N. Ry. Co. v. Superior Court (1970) 12 Cal. App. 3d 105, 109-110, 90 Cal. Rptr. 461* ; *see Missouri v. Mayfield (1950) 340 U.S. 1, 2-5, 71 S. Ct. 1, 95 L. Ed. 3* (disclaiming any intent to deny states right to apply doctrine in FELA cases)].

The basis of the doctrine is that although the court in which the action was filed has jurisdiction of the subject matter and of the parties and although that venue has been properly laid, the court is nevertheless an inconvenient forum and the action should, therefore, be tried in the court of some other state or country [*Great N. Ry. Co. v. Superior Court (1970) 12 Cal. App. 3d 105, 108-109, 90 Cal. Rptr. 461]* . For further discussion and forms, see Ch. 323, *Jurisdiction: Personal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueForum Non ConveniensTortsProcedureCommencement & ProsecutionVenueTortsTransportation TortsRail TransportationFederal Employers' Liability Act

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§ 485.41 Statute of Limitations on FELA Actions

An action under the FELA must be commenced within three years from the day the cause of action accrued [*45 U.S.C.S. § 56*; *see Great N. Ry. Co. v. Superior Court (1970) 12 Cal. App. 3d 105, 108, 90 Cal. Rptr. 461]* , that is, from the date of injury. In the case of an occupational disease contracted as a result of the employer's negligence, the "injury" occurs when the accumulated effects of the deleterious substance causing the illness manifest themselves [*Urie v. Thompson (1949) 337 U.S. 163, 170, 69 S. Ct. 1018, 93 L. Ed. 1282* (involving silicosis and case in which manifestation of disease and disability were almost simultaneous); *see Coots v. Southern Pac. Co. (1958) 49 Cal. 2d 805, 810, 322 P.2d 460* (under facts of case, statute of limitations held not to commence running until date disease (dermatitis caused by continuous exposure to silver cyanide solution) produced substantial harm or disability)]. That is, the statute of limitations on a claim based on occupational illness begins to run when the employee possesses sufficient critical facts to put him or her on notice that a wrong has been committed and that he or she needs to investigate to determine whether he or sheis entitled to redress [*Kichline v. Consolidated Rail Corp. (3d Cir. 1986) 800 F.2d 356, 359]* . Should the worker delay suing until three years after that time, the cause of action on the primary illness would be barred and the worker's recovery for any aggravation caused by continued exposure to the deleterious substance would be limited to that occurring within three years immediately prior to the filing of the lawsuit. The fact that the worker was aware of the harmful effects of the exposure to pollutants would go to the issue of his or her contributory negligence under *45 U.S.C.S. § 53* [*see § 485.83[2][e]*], but might not bar the claim for aggravation during that period [*Kichline v. Consolidated Rail Corp. (3d Cir. 1986) 800 F.2d 356, 361* (worker failed to file suit within three years after learning his pulmonary disease had been aggravated by exposure to diesel fumes at his work place, and he continued to work even though he was aware of harmful effects of fumes)].

In FELA cases the running of the statute of limitations affects not only the remedy but eliminates the cause of action itself [*Kichline v. Consolidated Rail Corp. (3d Cir. 1986) 800 F.2d 356, 360-361]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsProcedureStatutes of LimitationsAccrual of ActionsGeneral OverviewTortsProcedureStatutes of

LimitationsAccrual of ActionsDiscovery RuleTortsTransportation TortsRail TransportationFederal Employers' Liability Act

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§ 485.42 Defenses to FELA Action

[1] Disclaimer of Liability and Setoff

Any contract, rule, regulation, or device whatsoever, intended to enable the carrier to exempt itself from the liability created by the FELA, is to that extent void [*45 U.S.C.S. § 55*; *see Atchison, Topeka & Santa Fe Ry. Co. v. Buell (1987) 480 U.S. 557, 561, 107 S. Ct. 1410, 94 L. Ed. 2d 563* ; *Aguirre v. Southern Pac. Co. (1965) 232 Cal. App. 2d 636, 643, 43 Cal. Rptr. 73]* . For *45 U.S.C.S. § 55* to apply, the contract or device exempting the employer from liability must be with a person who is an employee of the carrier within the meaning of the FELA [*Robinson v. Baltimore & Ohio R.R. Co. (1915) 237 U.S. 84, 91, 35 S. Ct. 491, 59 L. Ed. 849]* .

The carrier may, however, in an action against it under the provisions of the act, set off against any recovery the sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or person entitled to it on account of the injury or death for which the action was brought [*45 U.S.C.S. § 55*; *see Folkestad v. Burlington N., Inc. (9th Cir. 1987) 813 F.2d 1377, 1379-1384* (setoff allowed of amounts received by injured employee through railroad industry's health and welfare plan to which railroad was party, when under collective bargaining agreement parties so agreed)].

[2] Contributory Negligence

The fact that the employee may have been guilty of contributory negligence does not bar recovery, but the damages are diminished in proportion to the amount of negligence attributable to the employee [*45 U.S.C.S. § 53*]. Thus, any contributory negligence on the worker's part would mitigate, not eliminate, the worker's damages [*Ackley v. Chicago & N. W. Transp. Co. (8th Cir. 1987) 820 F.2d 263, 265]* . The burden of proving the worker's contributory negligence is on the railroad [*Torres v. Southern Pac. Co. (1968) 260 Cal. App. 2d 757, 763, 67 Cal. Rptr. 428]* . The same standard of causation applies to the employee's contributory negligence as applies to the railroad's negligence [*Norfolk Southern Railway Co. v. Sorrell (2007) 549 U.S.158, 127 S. Ct. 799, 166 L. Ed. 2d 638, 650-651* ; *see § 485.35[4]*]. For the manner of pleading the contributory negligence of the worker as an affirmative defense, *see § 485.129*.

Both the employer's negligence and the worker's contributory negligence are matters to be determined by the jury [

Carter v. Atlanta & St. Andrews Bay Ry. Co. (1949) 338 U.S. 430, 436-437, 70 S. Ct. 226, 94 L. Ed. 236] . The apportionment of damages under the comparative negligence rule is also a matter to be determined by the jury, subject to review if it is excessive as a matter of law [*Bohme v. Southern Pac. Co. (1970) 8 Cal. App. 3d 291, 299, 87 Cal. Rptr. 286]* .

The doctrine of assumption of risk has been abolished under the FELA [*see § 485.83[2][d]*], and an act of alleged contributory negligence does not constitute a defense if it is but the practical counterpart of assumption of risk. When an employee carries out a supervisor's direct order to perform a task in a specific manner, although knowing and appreciating that to do so involves risk, the employee ordinarily is not contributorily negligent. However, when an employee is given a general order to perform a task, but not in a particular manner, leaving to the employee the manner of carrying out the task, the employee must use ordinary care in its execution, and may be held to have been contributorily negligent for failing to do so [*Jenkins v. Union Pac. R.R. Co. (9th Cir. 1994) 22 F.3d 206, 210-212]* .

No employee can be held contributorily negligent if the employer's violation of any statute enacted or regulation adopted for the safety of employees contributed to the employee's injury or death [*45 U.S.C.S. §§ 53, 54a*; *see Qualls v. Atchison, Topeka & Santa Fe Ry. Co. (1931) 112 Cal. App. 7, 14-15, 296 P. 645* ; *see also § 485.45*].

[3] Assumption of Risk

In any action under FELA, the employee shall not be held to have assumed the risks of his or her employment in any case in which the injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of the carrier or in any case in which the railroad's violation of any statute enacted or regulation adopted for the safety of employees contributed to the employee's injury or death [*45 U.S.C.S. §§ 54, 54a*; *see also 49 U.S.C.S. § 20304*]. *45 U.S.C.S. § 54* has in effect abolished the doctrine of assumption of the risk by the employee as a defense in FELA cases [*see Tiller v. Atlantic Coast Line R.R. Co.(1943) 318 U.S. 54, 58, 63 S. Ct. 444, 87 L. Ed. 610* ; *Texas & Pac. Ry. Co. v. Buckles (5th Cir. 1956) 232 F.2d 257, 261]* .

[4] Preemption Regarding "Maritime Employment"

The Longshore and Harbor Workers' Compensation Act (LHWCA) (*33U.S.C.S. § 901 et seq.*) provides the exclusive remedy of a railroad employee against the railroad if (1) he or she was injured in the course of employment; (2) the employer has employees who are employed in maritime employment; (3) the injury occurred on the navigable waters of the United States (including specified adjoining areas, such as piers or other adjoining areas used for loading or unloading); and (4) he or she is engaged in maritime employment [*Chesapeake & Ohio Ry. Co. v. Schwalb (1989) 493 U.S. 40, 110 S. Ct. 381, 107 L. Ed. 2d 278, 286-288* ; *see 33 U.S.C.S. §§ 902(2)* (defining "injury" under act), *(3)* (defining "employee"), *(4)* (defining "employer"), *903* (limiting remedies under the act to injuries occurring on navigable waters, including specified adjoining areas)]. Consequently, a railroad employee who suffers an employment-related injury governed by the LHWCA is precluded from bringing a cause of action in negligence against the employer, a remedy that would be available under the FELA [*Chesapeake & Ohio Ry. Co. v. Schwalb (1989) 493 U.S. 40, 110 S. Ct. 381, 107 L. Ed. 2d 278, 284-288]* .

Although LHWCA lists categories of employees engaged in maritime employment, additional occupations have been included pursuant to case law. The United States Supreme Court has held that "employees engaged in maritime employment" include those injured while performing a task integral to loading a ship, such as a railroad worker whose job includes removing fallen coal from beneath conveyor belts used for loading, despite the fact that the employee may have additional duties not integrally connected with the loading or unloading process. LHWCA also covers employees who are injured while maintaining or repairing equipment essential to the maritime loading or unloading process, such as a railroad machinist injured while repairing an aparatus integral to the loading process [*Chesapeake & Ohio Ry. Co. v. Schwalb (1989) 493 U.S. 40, 110 S. Ct. 381, 107 L. Ed. 2d 278, 287* (railroad machinist injured while repairing mechanical "retarder" used in connection with loading coal onto ship)]. In determining whether a position constitutes

"maritime employment," it is irrelevant that the particular function performed might be considered traditional railroad work, or might be done by railroad employees wherever railroad cars are unloaded. The determinative consideration is whether the function is crucial to the performance of the maritime task [*Chesapeake & Ohio Ry. Co. v. Schwalb (1989) 493 U.S. 40, 110 S. Ct. 381, 107 L. Ed. 2d 278, 287-288]* . For a form of affirmative defense to a complaint against a railroad seeking relief under the FELA, based on preemption under LHWCA, *see § 485.130*.

For discussion and forms relating to LHWCA generally, see *Ch. 522, Ships and Shipping, § 522.30* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPersonal InjuriesMaritime Workers' ClaimsLongshore & Harbor Workers' Compensation ActTortsDamagesCollateral Source RuleGovernment BenefitsTortsDamagesCollateral Source RuleInsurance PaymentsTortsNegligenceDefensesAssumption of RiskGeneral OverviewTortsNegligenceDefensesComparative NegligenceProcedureTortsNegligenceDefensesContributory NegligenceGeneral OverviewTortsNegligenceDefensesContributory NegligenceProcedureProvince of Court & JuryTortsNegligenceDefensesExculpatory ClausesGeneral OverviewTortsTransportation TortsRail TransportationFederal Employers' Liability Act

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§ 485.43 Damages Recoverable

The damages recoverable in an action under FELA (*45 U.S.C.S. §§ 51-60*) are limited to compensatory damages. Punitive damages are not recoverable [*Wildman v. Burlington N. R.R. Co. (9th Cir. 1987) 825 F.2d 1392, 1395* ; *Kozar v. Chesapeake & Ohio Ry. Co. (6th Cir. 1971) 449 F.2d 1238, 1240]* .

A railroad's liability under the FELA is joint and several. Therefore, once the railroad is found liable for an injury, the injured employee may recover all damages stemming from the compensable injury from the railroad, and it is up to the railroad to seek contribution from other alleged tortfeasors [*Norfolk & W. Ry. Co. v. Ayers (2003) 538 U.S. 135, 149-156, 123 S. Ct. 1210, 155 L. Ed. 2d 261]* .

An employee may recover for negligently-inflicted emotional distress if the employee was within the "zone of danger" of physical impact. Therefore, an employee may recover for physical or emotional injuries caused by employer negligence that threatens the employee with imminent physical impact [*Consolidated Rail Corp. v. Gottshall (1994) 512 U.S. 532, 556, 114 S. Ct. 2396, 129 L. Ed. 2d 427]* . However, employers are not the insurers of the emotional well-being and mental health of their employees, and therefore they are not liable for emotional distress caused by ordinary work-related stress, such as that caused by having been given too much work [*Consolidated Rail Corp. v. Gottshall (1994) 512 U.S. 532, 544, 114 S. Ct. 2396, 129 L. Ed. 2d 427]* .

An employee who has been exposed to asbestos at work, but has not yet contracted any disease because of this exposure, is not entitled to recover for emotional distress caused by the fear of contracting cancer, because exposure to asbestos alone is insufficient to meet the "zone of danger" test [*Metro-N. Commuter R.R. Co. v. Buckley (1997) 521 U.S. 424, 430, 117 S. Ct. 2113, 138 L. Ed. 2d 560]* . However, an employee exposed to asbestos at work who has already contracted asbestosis, an actionable injury, may recover as an element of his or damages for the mental anguish resulting from the fear of developing cancer, so long as the alleged fear is shown to be genuine and serious [*Norfolk & W. Ry. Co. v. Ayers (2003) 538 U.S. 135, 157, 123 S. Ct. 1210, 155 L. Ed. 2d 261, 271]* . Claims for pain and suffering are generally compensable if they stem from an actual physical injury and if there is an undisputed relationship between exposure to asbestos sufficient to cause asbestosis and asbestos-related cancer [*Norfolk & W. Ry. Co. v. Ayers (2003) 538 U.S. 135, 149-153, 123 S. Ct. 1210, 155 L. Ed. 2d 261]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesCompensatory DamagesGeneral OverviewTortsDamagesCompensatory DamagesPain & SufferingGeneral OverviewTortsNegligenceActionsNegligent Infliction of Emotional DistressGeneral OverviewTortsProcedureMultiple DefendantsJoint & Several LiabilityTortsTransportation TortsRail TransportationFederal Employers' Liability Act

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§ 485.44 Measure of Damages

The measure of damages in a FELA action is an issue of "substance" to be determined by federal law [*St. Louis Sw. Ry. Co. v. Dickerson (1985) 470 U.S. 409, 411-412, 105 S. Ct. 1347, 84 L. Ed. 2d 303* (discussing propriety of jury instructions on this issue); *see also § 485.38*]. That is, the proper measure of damages under the FELA is inseparably connected with the right of action, and therefore is an issue of substance that must be settled according to generalprinciples of law as administered in the federal courts [*Monessen Sw. Ry. Co. v. Morgan (1988) 486 U.S. 330, 335, 108 S. Ct. 1837, 100 L. Ed. 2d 349]* . For example, prejudgment interest is not available pursuant to federal law in actions under the FELA and therefore may not properly be awarded by a state court even though such an award would be proper under state law [*Monessen Sw. Ry. Co. v. Morgan (1988) 486 U.S. 330, 335-336, 108 S. Ct. 1837, 100 L. Ed. 2d 349* , applying Pennsylvania law; *Lund v. San Joaquin Valley R.R. (2003) 31 Cal. 4th 1, 13-15, 1 Cal. Rptr. 3d 412, 71 P.3d 770* (prejudgment interest under *Civ. Code § 3291* not proper in FELA action brought in state court)]. For similar reasons, expert witness fees cannot be awarded under *Code Civ. Proc. § 998* when a plaintiff receives a more favorable outcome at trial than the amount of a rejected settlement offer, as such fees are not recoverable under federal law [*Miller v. Union Pac. R.R. Co. (2007) 147 Cal. App. 4th 451, 458-459, 53 Cal. Rptr. 3d 893]* . Federal law also provides no authority for an award of postjudgment costs, including expert witness fees, to a prevailing defendant whose offer to settle was rejected by the plaintiff [*Kinsey v. Union Pacific Railroad Co. (2009) 178 Cal. App. 4th 201, 207, 100 Cal. Rptr. 3d 253]* .

Under federal law, if future payments or other pecuniary benefits are anticipated, the verdict should be made up on the basis of their present value only. Although no single method for determining present value is mandated under federal law, the method of calculating present value should take into account inflation and other sources of wage increases as well as the rate of interest [*St. Louis Sw. Ry. Co. v. Dickerson (1985) 470 U.S. 409, 411-412, 105 S. Ct. 1347, 84 L. Ed. 2d 303]* . The jury has the task of making the present value determination. The judge may, however, recommend to the jury one or more methods of calculating present value so long as the judge does not in effect preempt the jury's function. A trial judge's instructions to the jury with regard to discount methods, provided they do not subject the jury's estimate to rigid mathematical limitation, are entitled to substantial deference on appellate review [*Monessen Sw. Ry. Co. v. Morgan (1988) 486 U.S. 330, 341-342, 108 S. Ct. 1837, 100 L. Ed. 2d 349, 361-362]* . On the other hand, it is error to instruct the jury that, under the state law, future inflation would be conclusively presumed to equal future

interest rates, that is, that a zero discount rate was to be applied as a matter of law to future damages [*Monessen Sw. Ry. Co. v. Morgan (1988) 486 U.S. 330, 339-342, 108 S. Ct. 1837, 100 L. Ed. 2d 349* (trial court had based the instruction on state law under which awards of future damages were not to be discounted)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewTortsDamagesCompensatory DamagesAward CalculationsTortsDamagesInterestPrejudgment InterestTortsTransportation TortsRail TransportationFederal Employers' Liability Act

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§ 485.45 Safety Provisions Supplementing FELA

[1] Safety Appliance Act

The Safety Appliances Act [*49 U.S.C.S. §§ 20301-20306*] requires the installation of various safety appliances on locomotives and cars and provides for penalties to be imposed for noncompliance [*49 U.S.C.S. § 21302*].

Specifically, the Act requires that cars in use on railroad lines have the following:

- Couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of persons going between the ends of the cars [*49 U.S.C.S. § 20302(a)(1)(A)*; *see O'Donnell v. Elgin, Joliet & E. Ry. Co. (1949) 338 U.S. 384, 389, 70 S. Ct. 200, 94 L. Ed. 187* (the Act also requires couplers that, after a secure coupling is effected, will remain coupled until set free by some purposeful act of control)];

- Secure sill steps and efficient hand brakes [*49 U.S.C.S. § 20301(a)(1)(B)*];

- Secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder [*49 U.S.C.S. § 20301(a)(1)(C)*]; and

- Except as otherwise ordered by the Secretary of Transportation, secure grab irons or handholds in the ends and sides of each car for greater security to persons in coupling and uncoupling cars [*49 U.S.C.S. § 20302(a)(2)*].

Further, cars must comply with the standard height of drawbars required by regulations prescribed by the Secretary of Transportation [*49 U.S.C.S. § 20302(a)(3)*].

The Act requires that locomotive engines have a power-driving wheel brake and appliances for operating the train-brake

system [*49 U.S.C.S. § 20302(a)(4)*]. Further, sufficient cars in trains must have power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose [*49 U.S.C.S. § 20302(a)(5)(A)*]. At least 50 percent of the cars in a train must be equipped with power or train brakes and the engineer must be using the power ortrain brakes on those cars and on all other cars equipped with them that are associated with those cars in the train [*49 U.S.C.S. § 20302(a)(5)(B)*].

The Safety Appliances Act occupies the field of safety devices for freight cars and preempts state products liability actions for design defects related to those safety devices, or to the lack of those devices if the particular device is not expressly required by the Act [*Carrillo v. ACF Indus., Inc. (1999) 20 Cal. 4th 1158, 1165, 1168, 86 Cal. Rptr. 2d 832, 980 P.2d 386* (preempting state action for failure to incorporate guardrail)].

[2] Boiler Inspection Act

The Boiler Inspection Act requires railroads in interstate commerce to maintain the entire locomotive in a safe condition. It also provides for periodic inspection, and specifies the penalty to be imposed for noncompliance [*49 U.S.C.S. § 20701 et seq.*].

Specifically, the Boiler Inspection Act makes it unlawful for any railroad to use or permit the use on its line of any locomotive unless the locomotive, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which they are put. They must be in a condition such that they may be employed in active service of the railroad without unnecessary danger of personal injury, and the locomotive, tender, and all parts and appurtenances thereof must be inspected from time to time in accordance with the provisions of *49 U.S.C.S. § 20702* and must be able to withstand the test or tests as may be prescribed in the rules and regulations provided for by the act [*49 U.S.C.S. § 20701*; *see Urie v. Thompson (1949) 337 U.S. 163, 189-191, 69 S. Ct. 1018, 93 L. Ed. 1282]* .

The Boiler Inspection Act preempts state law causes of action against locomotive manufacturers for defective design of their products, because Congress intended to occupy the field of locomotive equipment and safety [*Scheiding v. General Motors Corp. (2000) 22 Cal. 4th 471, 474, 93 Cal. Rptr. 2d 342, 993 P.2d 996]* . Therefore, the Act preempts state tort claims brought by railway workers based on injuries caused by exposure to asbestos used in the manufacture of locomotives [*Scheiding v. General Motors Corp. (2000) 22 Cal. 4th 471, 476-477, 93 Cal. Rptr. 2d 342, 993 P.2d 996]* . These claims against a locomotive manufacturer for defective design are preempted regardless of whether the relevant locomotive is in use on the railroad line or off line in a roundhouse or repair shop during the period of exposure [*Frastaci v. Vapor Corp. (2008) 158 Cal. App. 4th 1389, 1393, 70 Cal. Rptr. 3d 402*].

[3] "Railroad" Defined

As used in the Safety Appliance Act and the Boiler Inspection Act, the term "railroad" has the same meaning as when used in the Federal Railroad Safety Act of 1970 (*49 U.S.C.S. § 20103*) [*49 U.S.C.S. § 20102*]. The Federal Railroad Safety Act defines railroad as meaning all forms of nonhighway ground transportation that run on rails or electro-magnetic guideways, including (1) commuter or other short-haul rail passenger service in a metropolitan or suburban area, as well as any commuter rail service that was operated by the Consolidated Rail Corporation as of January 1, 1979, and (2) high speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads, but that the term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation [*49 U.S.C.S. § 20102(1)(A), (B)*].

[4] Employer's Absolute Liability for Violation of Safety Provision

The Safety Appliance Act [*49 U.S.C.S. § 20301 et seq.*] and the Boiler Inspection Act [*49 U.S.C.S. § 20701 et seq.*] have been construed to impose absolute liability without regard to negligence on railroads for the injury or death of an

employee caused by the railroad's failure to comply with the requirements of either act [*see* *Carter v. Atlanta & St. Andrews Bay Ry. Co. (1949) 338 U.S. 430, 433-434, 70 S. Ct. 226, 94 L. Ed. 236 (Safety Appliance Act)* ; *O'Donnell v. Elgin, Joliet & E. Ry. Co. (1949) 338 U.S. 384, 390-394, 70 S. Ct. 200, 94 L. Ed. 187* (same); *Finley v. Southern Pac. Co. (1960) 179 Cal. App. 2d 424, 428-429, 3 Cal. Rptr. 895* (same); *Lilly v. Grand Trunk W. R.R. Co. (1943) 317 U.S. 481, 485, 63 S. Ct. 347, 87 L. Ed. 411* (Boiler Inspection Act); *see also* *Kernan v. American Dredging Co. (1958) 355 U.S. 426, 430-431, 78 S. Ct. 394, 2 L. Ed. 2d 382* (action under Jones Act that, by reason of former *46 U.S.C.S. § 688* (now *46 U.S.C.S. § 30104*), incorporates FELA)]. Neither contributory negligence [*see 45 U.S.C.S. § 53*; *Eckert v. Aliquippa & S. R.R. Co. (3d Cir. 1987) 828 F.2d 183, 186 (Safety Appliance Act)]* , nor assumption of the risk is a defense to a Boiler Inspection Act violation that has contributed to the cause of an injury [*Fontaine v. National R.R. Passenger Corp. (1997) 54 Cal. App. 4th 1519, 1525, 63 Cal. Rptr. 2d 644]* .

The acts apply whether or not the injury involved was of a type that the particular act or statute was designed to prevent [*Kernan v. American Dredging Co. (1958) 355 U.S. 426, 432-433, 438, 78 S. Ct. 394, 2 L. Ed. 2d 382]* . Liability is imposed whenever a violation of either act is the proximate cause of injury to a railroad employee when engaged in the discharge of his or her duties [*Louisville & Nashville R.R. Co. v. Layton (1917) 243 U.S. 617, 621, 37 S. Ct. 456, 61 L. Ed. 931* (violation of *45 U.S.C.S. § 2*, relating to couplers); *see* *Coray v. Southern Pac. Co. (1948) 335 U.S. 520, 522-523, 69 S. Ct. 275, 93 L. Ed. 208* (faulty brakes)]. However, the worker is not obliged to prove common-law proximate causation, but only that the injury resulted in whole or in part from the violation [*Eckert v. Aliquippa & S. R.R. Co. (3d Cir. 1987) 828 F.2d 183, 186* ; *see 45 U.S.C.S. § 51*; *see also § 485.35[4]*].

An employer is also liable for the violation of a rule or regulation that either implements standards of safety required under *49 U.S.C.S. § 20302(a)* (Safety Appliance Act) or *49 U.S.C.S. § 20701* (Boiler Inspection Act), or implements standards of railroad safety under *49 U.S.C.S. § 20103* [*see* 49 C.F.R. pts. 212-236 (setting forth rules and standards adopted by Secretary of Transportation)]. These rules acquire the force of law and become an integral part of the act under which they are adopted; hence a violation of a rule constitutes a violation of the statute [*see* *Urie v. Thompson (1949) 337 U.S. 163, 191, 69 S. Ct. 1018, 93 L. Ed. 1282* (rule adopted under Boiler Inspection Act); *Lilly v. Grand Trunk W. R.R. Co. (1943) 317 U.S. 481, 488, 63 S. Ct. 347, 87 L. Ed. 411* (same); *Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett (1937) 300 U.S. 471, 474, 57 S. Ct. 541, 81 L. Ed. 748* (rule adopted under Safety Appliance Act); *Eckert v. Aliquippa & S. R.R. Co. (3d Cir. 1987) 828 F.2d 183, 186-187* (rule regulating switch positions (*49 C.F.R. § 213.135(g)*) adopted under *45 U.S.C.S. § 431*); *see also* 42 U.S.C.S. § 54a (regulations and rules deemed statutes for purposes of 42 U.S.C.S. §§ 53, 54)].

[5] Violation of Safety Provision as Basis for FELA Claim

The Safety Appliance Act [*49 U.S.C.S. § 20301 et seq.*] and the Boiler Inspection Act [*49 U.S.C.S. § 20701 et seq.*] have been construed to be in pari materia with the FELA [*see* *Urie v. Thompson (1949) 337 U.S. 163, 188-189, 69 S. Ct. 1018, 93 L. Ed. 1282]* . Neither act purports to confer any right of action on injured employees. They merely make violation of their requirements unlawful. Nevertheless, they supplement the FELA by imposing on interstate railroads an absolute and continuing duty to provide safe equipment. This conclusion stems not from any express language in the statutes but by implication from *45 U.S.C.S. §§ 53* and *54*, which bar pleading of contributory negligence and assumption of risk in any FELA case in which the common carrier's violation of any statute enacted or regulation or rule adopted for the safety of employees contributed to the employee's injury or death [*Urie v. Thompson (1949) 337 U.S. 163, 188, 69 S. Ct. 1018, 93 L. Ed. 1282* ; *see also 45 U.S.C.S. § 54*].

However, it is *45 U.S.C.S. § 51* [*see § 485.32[1]*], and not *45 U.S.C.S. §§ 53* and *54*, which expressly creates a cause of action and, by the same token, is the basis of an employee's suit for violation of either the Safety Appliance or the Boiler Inspection Act [*Urie v. Thompson (1949) 337 U.S. 163, 188-189, 69 S. Ct. 1018, 93 L. Ed. 1282* ; see *Kernan v. American Dredging Co. (1958) 355 U.S. 426, 437, 78 S. Ct. 394, 2 L. Ed. 2d 382]* . *45 U.S.C.S. § 51* imposes liability on the employer for injury or death resulting in whole or in part "by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." The

cases hold that under this clause a defect resulting from a violation of either act that causes the injury or death of an employee creates liability without regard to negligence [*Kernan v. American Dredging Co. (1958) 355 U.S. 426, 430-431, 78 S. Ct. 394, 2 L. Ed. 2d 382]* . The FELA imposes on the employer the duty of paying damages when injury to the worker is caused in whole or in part by the employer's fault. This fault may consist of a breach of the duty of care (negligence) or a statutory duty, such as that imposed by the Safety Appliance and Boiler Inspection Acts (absolute liability) [*see Kernan v. American Dredging Co. (1958) 355 U.S. 426, 432, 78 S. Ct. 394, 2 L. Ed. 2d 382]* .

Thus, the Safety Appliance Act and the Boiler Inspection Act are substantively, if not in form, amendments to the FELA. They dispense, for the purposes of an employee's suit, with the necessity of proving that violations of the safety statutes constituted negligence, making proof of such violations effective to show negligence as a matter of law. Thus taken, the Safety Appliance Act and the Boiler Inspection Act cannot be regarded as statutes wholly separate from and independent of the FELA. They are rather supplemental to it, having the purpose and effect of facilitating employee recovery [*Urie v. Thompson (1949) 337 U.S. 163, 189, 69 S. Ct. 1018, 93 L. Ed. 1282* ; *see Finley v. Southern Pac. Co. (1960) 179 Cal. App. 2d 424, 428-429, 3 Cal. Rptr. 895* (holding that failure of equipment to perform as required by Safety Appliance Act is in itself actionable, in no way dependent on negligence, and for which there is liability that clearly cannot be escaped by proof of care or diligence); *Qualls v. Atchison, Topeka & Santa Fe Ry. Co. (1931) 112 Cal. App. 7, 13-14, 296 P. 645* (when negligence consists of failure to comply with Safety Appliance Act, violation of act as not required to be sole efficient cause of injury in order for action under FELA to lie)].

In short, the Safety Appliance Act and the Boiler Inspection Act provide the basis for a claim, but the FELA provides the remedy [*see Eckert v. Aliquippa & Southern R. Co. (3d Cir. 1987) 828 F.2d 183, 187* ; *Beissel v. Pittsburgh & Lake Erie R.R. Co. (3d Cir. 1986) 801 F.2d 143, 145]* .

[6] Liberal Construction of Safety Provisions

Both the Safety Appliance Act and the Boiler Inspection Act are to be liberally construed in the light of their prime purpose, the protection of employees and others by the use of safe equipment [*see Lilly v. Grand Trunk W. R.R. Co. (1943) 317 U.S. 481, 486, 63 S. Ct. 347, 87 L. Ed. 411* ; *Urie v. Thompson (1949) 337 U.S. 163, 182 n. 20, 69 S. Ct. 1018, 93 L. Ed. 1282]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceCausationProximate CauseGeneral OverviewTortsNegligenceDefensesAssumption of RiskGeneral OverviewTortsNegligenceDefensesContributory NegligenceGeneral OverviewTortsNegligenceProofViolations of LawStatutesTortsTransportation TortsRail TransportationFederal Employers' Liability ActTransportation LawRail TransportationMaintenance & Safety

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§ 485.46 Railway Labor Act (RLA)

The Railway Labor Act (RLA) [*45 U.S.C.S. §§ 151-188*] provides a comprehensive framework for the resolution of labor disputes in the railroad industry and establishes elaborate administrative procedures for the resolution of both "major" and "minor" disputes [*see 45 U.S.C.S. § 153*]. The RLA was intended to promote stability in labor-management relations by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective bargaining agreements. Under the RLA, minor disputes, defined in the act as those concerning rates of pay, rules, or working conditions, are intended to be kept within the National Railroad Adjustment Board or a Public Law Board and out of the courts [Atchison, Topeka & Santa Fe Ry. Co.v. *Buell (1987) 480 U.S. 557, 563-564, 563 n.9, 107 S. Ct. 1410, 94 L. Ed. 2d 563]* . The remedy of binding arbitration under the RLA for the resolution of minor disputes is exclusive in at least some situations [*Atchison, Topeka & Santa Fe Ry. Co. v. Buell (1987) 480 U.S. 557, 558-559, 565-566, 107 S. Ct. 1410, 94 L. Ed. 2d 563]* .

However, the fact that an injury otherwise compensable under the FELA was caused by conduct that may have been subject to arbitration under the RLA does not deprive an employee of the opportunity to bring a FELA action for damages. Presumably a host of personal injuries suffered by railroad employees are caused by negligent practices and conditions that might have been cured or avoided by the timely invocation of the grievance machinery of the RLA, but the Supreme Court of the United States has never considered that possibility a bar to an employee's bringing a claim for personal injuries under other federal statutes and has declined to do so in FELA cases [*Atchison, Topeka & Santa Fe Ry. Co. v. Buell (1987) 480 U.S. 557, 558-559, 564-565, 107 S. Ct. 1410, 94 L. Ed. 2d 563* ; see *Welby v. Consolidated Rail Corp. (M.D. Pa. 1987) 671 F. Supp. 1015, 1017* (if employee can establish physical injury caused by railroad's negligence, employee is entitled to damages under FELA)].

For a form relating to preemption by the RLA of a railroad employee's common law wrongful discharge action against an employer, see *Ch. 249, Employment Law: Termination and Discipline, § 249.68*.

Legal Topics:

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

Labor & Employment LawCollective Bargaining & Labor RelationsArbitrationGeneral OverviewLabor & Employment LawCollective Bargaining & Labor RelationsInterpretation of AgreementsTortsTransportation TortsRail TransportationFederal Employers' Liability ActTransportation LawRail TransportationGeneral Overview

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§ 485.47 Railroad's Right to Indemnity From Third-Party Tortfeasor

[1] Applicable Law

A railroad's right to indemnity in whole or in part from a third party for liability incurred under the FELA depends entirely on state law [*Brenham v. Southern Pac. Co. (W.D. La. 1971) 328 F. Supp. 119, 123 , aff'd, 469 F.2d 1095 (5th Cir. 1972)* ; *Southern Pac. Transp. Co. v. Ohbayashi Am. Corp. (1983) 147 Cal. App. 3d 233, 236, 195 Cal. Rptr. 63]* . A right to indemnity can arise from, among other things, an express contract, an implied contract, some special relationship legally sufficient to raise an obligation to indemnify, or, as between two tortfeasors, when the fault of one is active and the other passive [*Southern Pac. Transp. Co. v. Ohbayashi Am. Corp. (1983) 147 Cal. App. 3d 233, 238, 195 Cal. Rptr. 63]* .

[2] Contractual Indemnity

A railroad that pays a FELA claim may be entitled to recover from a third party the amount paid pursuant to a written contract of indemnity, even if the worker's injury resulted from the railroad's negligence, provided the indemnity contract so provides and the provision is not in violation of state law [*see Illinois Cent. Gulf R. Co.v International Paper Co. (5th Cir. 1987) 824 F.2d 403, 404-408* ; *see also Ch. 300, Indemnity and Contribution, § 300.30* et seq. regarding California law governing express and implied contractual indemnity].

[3] Implied Equitable Indemnity

California has adopted the rule that allows a railroad employer to seek implied indemnification from a third party tortfeasor for amounts paid to an injured employee under the FELA when the railroad's negligence is secondary to the third party's primary negligence [*see Southern Pac. Transp. Co. v. Ohbayashi Am. Corp. (1983) 147 Cal. App. 3d 233, 238, 195 Cal. Rptr. 63]* . For a discussion and forms relating to California law governing implied equitable indemnity and comparative equitable indemnity, the effect of the comparative equitable indemnity doctrine on the concept of primary and secondary negligence, and the effect of the Fair Responsibility Act of 1986 (Proposition 51 [*Civ. Code §§ 1431, 1432*]) on the doctrine of joint and several liability of tortfeasors as they affect the liability of joint tortfeasors among themselves, see *Ch. 300, Indemnity and Contribution, § 300.150* et seq.

[4] Statute of Limitations on Indemnity Actions

The statutory period limiting an action by a railroad for indemnity against a third party is that which would apply under the law of the state where the accident occurred, and is not the statutory period applicable to FELA actions [*Southern Pac. Transp. Co. v. Ohbayashi Am. Corp. (1983) 147 Cal. App. 3d 233, 236, 195 Cal. Rptr. 63* ; *see 45 U.S.C.S. § 56*; *see also § 485.41*]. The state statutory period limiting a particular indemnity action depends on the basis for the claim [*Southern Pac. Transp. Co. v. Ohbayashi Am. Corp. (1983) 147 Cal. App. 3d 233, 238, 195 Cal. Rptr. 63]* . Thus, for example, a claim based on an express contract would be subject to the state limitation periods applicable to actions on a contract [*see Code Civ. Proc. §§ 337(1)* (four-year period applicable to action on written contract), *339(1)* (two-year period applicable to actions on oral contract)].

Under California law, an action for damages for personal injury or wrongful death must normally be brought within two years (one year, prior to January 1, 2003) after the date that the cause of action accrues [*Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)*; Ch. 345, *Limitation of Actions, § 345.14*]. Usually this period runs from the date of injury. In an action for indemnity based on tort, however, the cause of action accrues not on the date of injury, but on the date the indemnity claimant suffers loss or damage by paying the underlying claim. Thus, when the basis of a complaint for equitable indemnity was liability for personal injury, and when the complaint was filed within one year from the time the personal injury claim was paid, it was timely even though it was filed more than one year after the date of injury [*Southern Pac. Transp. Co. v. Ohbayashi Am. Corp. (1983) 147 Cal. App. 3d 233, 238-239, 195 Cal. Rptr. 63* (distinguishing *County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 140 Cal. Rptr. 638, 568 P.2d 363* , which held that employer who had paid workers'compensation benefits had one year after date of employee's injury, and not after date it paid benefits, in which to sue third-party tortfeasor for indemnity, on grounds that railroad's liability under FELA is fundamentally different from employer's liability for workers' compensation and that employer's statutory rights to subrogation under *Lab. Code §§ 3850-3864* have no parallels under FELA)].

For further discussion relating to the limitations periods applicable in actions for express or implied contractual indemnity, and for equitable or comparative equitable indemnity, see *Ch. 300, Indemnity and Contribution, § 300.30 et seq. and § 300.150* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsExpress ContractsContracts LawTypes of ContractsOral AgreementsGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsProcedureMultiple DefendantsIndemnityGeneral OverviewTortsProcedureMultiple DefendantsIndemnityContractual IndemnityTortsProcedureMultiple DefendantsIndemnityNoncontractual IndemnityTortsTransportation TortsRail TransportationFederal Employers' Liability ActTortsVicarious LiabilityEmployersIndemnityTortsWrongful Death & Survival ActionsDefensesStatutes of Limitations

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§ 485.48 Penalty for Suppression of Voluntary Information Relating to FELA Claim

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which is to prevent a carrier's employees from voluntarily furnishing information to a person in interest as to the facts incident to the injury or death of any employee, is void [*45 U.S.C.S. § 60*].

Moreover, anyone who by threat, intimidation, order, rule, contract, regulation, or any device whatsoever, attempts to prevent any persons from voluntarily furnishing such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for voluntarily furnishing such information to a person in interest, is subject to a fine of up to a $1,000, imprisonment for not more than one year, or both, on conviction of each offense [*45 U.S.C.S. § 60*]. This applies, however, only to railroad employees discharged or disciplined for furnishing information to others and does not encompass employees who are discharged or disciplined because they themselves initiate FELA actions. Consequently, a claim for emotional distress damages caused by the asserted wrongful discharge of an employee who had sustained physical and emotional distress injuries in a railroad collision is not cognizable under the FELA [*Lewy v. Southern Pac. Transp. Co. (9th Cir. 1986) 799 F.2d 1281, 1293* (employee's remedy, if any, was under Railway Labor Act, *45 U.S.C.S. §§ 151-188*)].

45 U.S.C.S. § 60 is not to be construed as voiding any contract, rule, or regulation with respect to any information contained in the carrier's files, or other privileged or confidential reports [*45 U.S.C.S. § 60*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesIllegal BargainsCriminal Law & ProcedureSentencingFinesCriminal Law & ProcedurePostconviction ProceedingsImprisonmentTortsTransportation TortsRail TransportationFederal Employers' Liability Act

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[Reserved]

§§ 485.49[Reserved]

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42-485 California Forms of Pleading and Practice--Annotated § 485.60

§ 485.60 Governing Law

The regulation of public utilities generally is governed by *Cal. Const. art. XII, §§ 1-9*. The duties of common carriers are set out in *Civ. Code §§ 2100-2104*. A railroad's qualified immunities from liability are set out in *Civ. Code § 1714.7* (trespassers) and *Pub. Util. Code § 7654* (passengers). A common carrier's liability for losses and injuries resulting from violation of a statute or Public Utilities Commission decision or order is governed by *Pub. Util. Code § 2106*. Safety requirements for railroad signal devices and warnings are set out in *Pub. Util. Code §§ 7601-7614*, and rules concerning operation of railroad trains are set out in *Pub. Util. Code §§ 7653-7660*. *Pub. Util. Code §§ 7626-7627* governs a railroad's liability for injury to animals on tracks caused by failure to maintain fences. Duties of motorists in approaching railroad crossings are governed by *Veh. Code §§ 22450-22452*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceProofViolations of LawStatutesTortsTransportation TortsRail TransportationRailroad CrossingsTortsTransportation TortsRail TransportationTrespassersTransportation LawRail TransportationMaintenance & SafetyTransportation LawRail TransportationState & Local Regulation

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§ 485.60A Scope of Federal Preemption

Under federal law, a state may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation, with respect to railroad safety matters, or the Secretary of Homeland Security, with respect to railroad security matters, prescribes a regulation or issues an order covering the subject matter of the state requirement [*49 U.S.C.S. § 20106(a)(2)*]. In order for a federal regulation to "cover" the same subject matter as a state law, the regulation must do more than "touch upon" or "relate to" the subject matter. Preemption is appropriate only if the federal regulation substantially subsumes the subject matter of the relevant state law [*CSX Transp. Inc. v. Easterwood (1993) 507 U.S. 658, 664, 113 S. Ct. 1732, 123 L. Ed. 2d 387*].

In one case, for example, plaintiffs brought a common-law negligence suit against a commuter railroad after a derailing that occurred when a man intentionally drove his sports utility vehicle in front of a train that was operating in push mode, that is, with the locomotive at the back of the train and an occupied cab car in the lead. Plaintiffs argued that the railway company was negligent by running in push mode without using a converted locomotive car with baggage or other ballast in the lead position, or an unoccupied cab car, or using a scout vehicle or track surveillance. Agreeing that federal regulations addressed the construction and design of cab cars used in the lead position of a commuter train, plaintiffs argued nonetheless that the regulations did not address the operation of a cab car. However, the California court of appeal held that the negligence claim was preempted, after concluding that the regulations addressed not just the design, but also the actual use, of cab cars in the lead position. The court noted that the regulations contemplated the use of an occupied cab car in the lead position if the cab satisfied increased strength requirements for collision posts, and the regulations specifically took into account the operating environment in which rail passenger service occurs. As such, plaintiffs' claims based on safety concerns with this use of cab cars were preempted [*Southern California Regional Rail Authority v. Superior Court (2008) 163 Cal. App. 4th 712, 732-733, 77 Cal. Rptr. 3d 765*].

The court of appeal in that case also concluded that the absence of a specific federal regulation on push mode was not determinative, but was only one factor to consider when determining whether the matter has been substantially subsumed. In concluding that the issue had been substantially subsumed, the court noted that Congress had directed the Federal Railroad Administration to issue rules and regulations addressing passenger safety, and in response the FRA conducted extensive regulatory proceedings and promulgated regulations related to the operation of a cab car in push

mode, albeit in the form of design requirements [*Southern California Regional Rail Authority v. Superior Court (2008) 163 Cal. App. 4th 712, 734-735, 77 Cal. Rptr. 3d 765*].

A state may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security if the law, regulation, or order(1) is necessary to eliminate or reduce an essentially local safety or security hazard, (2) is not incompatible with a federal law, regulation, or order, and (3) does not unreasonably burden interstate commerce [*49 U.S.C.S. § 20106(a)(2)*].

For all state law causes of action arising from events or activities occurring on or after January 18, 2002, a state law cause of action seeking damages for personal injury, death, or property damage is not preempted by federal law if the cause of action alleges that a party has done any of the following [*49 U.S.C.S. § 20106(b)*]:

- Failed to comply with the federal standard of care established by a regulation or order on railroad safety issued by the Secretary of Transportation, or a regulation or order on railroad security issued by the Secretary of Homeland Security, covering the subject matter as provided in *49 U.S.C.S. § 20106(a)*;

- Failed to comply with its own plan, rule, or standard created pursuant to a regulation or order issued by either of the federal Secretaries; or

- Failed to comply with a state law, regulation, or order that is not incompatible with *49 U.S.C.S. § 20106(a)(2)*.

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§ 485.61 Negligence Action Against Railroad

Most commonly, a cause of action against a railroad for damages for injuries to person or property will be based on common law negligence, as codified under *Civ. Code § 1714(a)*. The elements of an action for negligence are essentially (1) a legal duty to use due care, (2) the breach of that duty, and (3) the breach as a proximate cause of plaintiff's injury and damages [*see United States Liab. Ins. Co. v. Haidinger-Hayes, Inc. (1970) 1 Cal. 3d 586, 594, 83 Cal. Rptr. 418, 463 P.2d 770* ; *see also Civ. Code §§ 3281, 3282, 3333*].

For discussion relating to negligence actions generally, including discussion of legal duty, breach of duty, proximate cause, and injury, see Ch. 380, *Negligence* . For discussion of particular duties imposed on railroads, see *§ 485.62*. For discussion relating to a railroad's violation of a statutory duty as negligence per se, see *§ 485.64*. For discussion relating to a separate action for damages under *Pub. Util. Code § 2106*, for violation of a safety statute or regulation, see *§ 485.68*.

For forms of complaint for use in a negligence action against a railroad, *see §§ 485.150 -485.152*. For additional forms of complaint for use in a negligence action generally, see Ch. 380, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesGeneral OverviewTortsNegligenceCausationProximate CauseGeneral OverviewTortsNegligenceDutyGeneral OverviewTortsNegligenceProofElementsTortsNegligenceProofViolations of LawStatutesTortsTransportation TortsRail TransportationGeneral Overview

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§ 485.62 Railroad's Duty of Care

[1] Duty to Passengers as Common Carrier

[a] Generally

Every "railroad corporation" is a common carrier [*Pub. Util. Code § 211(a)*; *Civ. Code § 2168*; *see* Ch. 109, *Carriers*]. The term "railroad corporation" includes every corporation or person owning, controlling, operating, or managing any railroad for compensation within California [*Pub. Util. Code § 230*].

As a carrier of persons for reward, a railroad must use the utmost care and diligence for the safe carriage of its passengers [*Civ. Code § 2100*]. The duty to exercise the utmost care and diligence to prevent injuries begins when the relationship of carrier and passenger is established [*Lagomarsino v. Market St. Ry. Co. (1945) 69 Cal. App. 2d 388, 395-396, 158 P.2d 982]* . The relation of passenger and carrier commences when the intending passenger enters the station premises [*MacGregor v. Pacific Elec. Ry. Co. (1936) 6 Cal. 2d 596, 600, 59 P.2d 123]* . If a person intends to board a train as a passenger and so indicates by the act of standing alongside, and the person in charge of the train indicates an intention to receive the prospective passenger, and stops the car and prepares to receive the person immediately, the relationship of passenger to the carrier is established, even if no fare has yet been paid [*Lagomarsino v. Market St. Ry. Co. (1945) 69 Cal. App. 2d 388, 395, 397, 158 P.2d 982]* .

The carrier is under a duty to provide adequate safeguards to prevent injuries to passengers when boarding or alighting from a train [*see* *MacGregor v. Pacific Elec. Ry. Co. (1936) 6 Cal. 2d 596, 600, 59 P.2d 123]* . This includes the duty to prevent sudden jarring or jolting when starting or stopping [*Dempsey v. Market St. Ry. Co. (1943) 23 Cal. 2d 110, 112, 142 P.2d 929]* . For a form of complaint for use by a passenger to recover for injuries suffered in boarding or alighting from a train, see *§ 485.150*.

A railroad owes a duty to its passengers to deliver them safely to their destinations [*Miller v. Pacific Elec. Ry. Co. (1915) 169 Cal. 107, 110, 145 P. 1023]* . The relationship of the railroad to its passengers does not terminate until the passenger has had a reasonable opportunity to leave the carrier's premises [*Miller v. Pacific Elec. Ry. Co. (1915) 169 Cal. 107, 110, 145 P. 1023]* . Thus, when a passenger is carried beyond his or her station and is directed by the

conductor to alight, the railroad owes that person a duty to provide him or her a safe means of return to the station [*Miller v. Pacific Elec. Ry. Co. (1915) 169 Cal. 107, 110, 145 P. 1023]* .

A railroad is also under a contractual duty to transport passengers safely, and has the duty to protect them against acts of personal violence by agents or employees of the railroad [*see Berger v. Southern Pac. Co. (1956) 144 Cal. App. 2d 1, 6-7, 300 P.2d 170]* . While some litigants in carrier-passenger cases have attempted to state causes of action for breach of contract as well as in tort, it appears that when the complaint sets out a breach of duty and consequent injury as the gravamen of the action, the carrier's violation of its obligation safely to carry arises out of tort and not contract [*see Basler v. Sacramento Elec., Gas & Ry. Co. (1913) 166 Cal. 33, 36, 134 P. 993]* .

For discussion of the duties of common carriers to passengers generally and a form of complaint for damages for assault and battery for use by a passenger against an agent of a common carrier, see *Ch. 109, Carriers, § 109.30* et seq.

[b] At Railroad Stations

Because a railroad that maintains stations or regular stopping places along its line thereby invites the public to patronize its line, the railroad must, in the exercise of ordinary care, afford protection to the public commensurate with the risk involved [*Wilkinson v. United R.Rs. (1924) 195 Cal. 185, 198, 232 P. 131]* . Thus, for the safety of intended passengers, railroads have a duty to use a greater degree of care to maintain their property at stations or regular stopping places along the line than at other places along the line [*Aydlott v. Key Sys. Transit Co. (1930) 104 Cal. App. 621, 626, 286 P. 456]* . It makes no difference whether the stopping place is patronized by a few or by many passengers [*Wilkinson v. United R.Rs. (1924) 195 Cal. 185, 198, 232 P. 131]* . A railroad is not, however, an insurer of the safety of its station premises [*Robson v. Union Pac. R.R. Co. (1945) 70 Cal.App. 2d 759, 761, 161 P.2d 821]* . The care required of the railroad involves the duty to exercise reasonable care to construct and maintain safe and adequate stations, platforms, walks, steps, and landings [*Robson v. Union Pac. R.R. Co. (1945) 70 Cal. App. 2d 759, 761, 161 P.2d 821]* . The railroad also has a duty to keep the portion of its tracks that is near the station in a safe condition for intended passengers [*Aydlott v. Key Sys. Transit Co. (1930) 104 Cal. App. 621, 626-627, 286 P. 456]* .

The railroad's duty to provide safe approaches to its stations extends to the duty to take care that any trains that are moving on intervening tracks will not injure passengers who must cross those tracks to board or alight from a train [*Wilkinson v. United R.Rs. (1924) 195 Cal. 185, 199-200, 232 P. 131]* . The passenger has the right to presume that the intervening tracks he or she must cross will be kept safe while he or she is crossing [*Wilkinson v. United R.Rs. (1924) 195 Cal. 185, 200, 232 P. 131]* . The passenger has no duty to look and listen before crossing those tracks [*Wilkinson v. United R.Rs. (1924) 195 Cal. 185, 199-200, 232 P. 131]* . However, the intending passenger is not absolved from the exercise of any care; whether or not the passenger has exercised ordinary care under the circumstances and whether or not the railroad has fulfilled its duty are questions for the jury [*Ferran v. Southern Pac. Co. (1935) 3 Cal. 2d 350, 355, 44 P.2d 533]* .

Railroads have a duty to provide sufficient lighting at stations to aid passengers transported at night in alighting at stations [*Teale v. Southern Pac. Co. (1912) 20 Cal. App. 570, 575-576, 129 P. 949]* . Railroads also owe a duty, at least, to make a reasonable inspection of waiting rooms at stations [*Hamilton v. Pacific Elec. Ry. Co. (1939) 12 Cal. 2d 598, 600, 86 P.2d 829]* .

For discussion of the liability of carriers generally for injuries at stations, see. For general discussion of the liability of owners and occupiers of premises, see Ch. 421, *Premises Liability* .

[c] Additional Statutory Duties to Passengers

Private corporations and persons that own, operate, control, or manage a line plant, or system for the transportation of people or property, directly or indirectly to or for the public, and common carriers, are public utilities subject to control

by the legislature [*Cal. Const. art. XII, § 3*].

In addition to the duties of care generally owed by carriers to passengers, the Public Utilities Code imposes additional duties on railroads [*see Pub. Util. Code §§ 7653-7657*]. Every railroad must provide sufficient room and accommodations for all passengers to whom tickets are sold for any one trip and for all persons presenting tickets for that trip [*Pub. Util. Code § 7653*]. Railroads are also required to post in a conspicuous place on the inside of their passenger cars rules and regulations regarding fares and the conduct of passengers [*Pub. Util. Code § 7654*].

If a passenger is injured on or from the platform of a car or on any baggage, wood, gravel, or freight car while violating either the written rules or verbal instructions by an employee of a railroad, the carrier is relieved of liability for the injuries, unless the railroad has failed to provide adequate accommodations for all passengers as required in *Pub. Util. Code § 7653* [*Pub. Util. Code § 7654*].

[2] Duty to Nonpassengers

[a] Generally

A railroad company has a very wide discretion in the proper operation of its business and the movement and management of its trains [*Matoza v. Southern Pac. Co. (1922) 59 Cal. App. 636, 640, 211 P. 252]* . However, when a court finds from the evidence that that discretion has been abused, the railroad company may properly be called on to respond in damages to a person suffering from its arbitrary action [*Matoza v. Southern Pac. Co. (1922) 59 Cal. App. 636, 638, 640-641, 211 P. 252* (obstruction of crossing by stationary train prevented farmer from removing cows overgrazing in alfalfa field)].

The same standard of care is applied to railroads as to other defendants [*Morgan v. Southern Pac. Trans. Co. (1974) 37 Cal. App. 3d 1006, 1012, 112 Cal. Rptr. 695]* . The fact that carelessness in the handling of a train wreaks a far greater quantum of havoc than carelessness in doing other things does not change a railroad's negligence into recklessness [*Morgan v. Southern Pac. Trans. Co. (1974) 37 Cal. App. 3d 1006, 1012, 112 Cal. Rptr. 695]* . The law imposes on a railroad company and its train crew the duty to use reasonable care, corresponding to the circumstances constituting the probable danger, to avoid injury to persons traveling on the public highway crossed by the company's tracks [*Romo v. Southern Pac. Transp. Co. (1977) 71 Cal. App. 3d 909, 916, 139 Cal. Rptr. 787* ; for discussion of railroad's liability for negligent operation of trains at crossings, see *§ 485.02[5][a]*]. The duty to use reasonable care applies both to the manner of operating the train and to the maintenance of the crossing [*Peri v. Los Angeles Junction Ry. (1943) 22 Cal. 2d 111, 120, 137 P.2d 441* ; *see § 485.105[3]* regarding railroad's liability for negligent maintenance of crossings].

[b] Trespassers

Generally, an injured person's status as a trespasser or invitee on a defendant's premises is not determinative of liability, and liability will be imposed on those whose want of ordinary care occasions injury to a person regardless of that person's status [*see Rowland v. Christian (1968) 69 Cal. 2d 108, 113-114, 70 Cal. Rptr. 97, 443 P.2d 561]* . Therefore, the distinction between the status of a person injured by a train as a trespasser or as an invitee is not determinative of the duty owed by the railroad to that person [*Beard v. Atchison, Topeka & Santa Fe Ry. Co. (1970) 4 Cal. App. 3d 129, 136, 84 Cal. Rptr. 449* ; *see generally* Ch. 421, *Premises Liability*].

Civ. Code § 1714.7, however, creates a valid exception to the general rule of liability for injuries to trespassers [*see Durham v. City of Los Angeles (1979) 91 Cal. App. 3d 567, 572-574, 154 Cal. Rptr. 243]* . Under the statute, a person who is injured while getting on, or attempting to get on, a moving locomotive or railroad car, without authority from the operator of the railroad, or who, having gotten on, is injured while riding on or getting off of a locomotive or railroad car while in motion without such authority, cannot recover any damages from the owner or operator for those injuries

unless they are proximately caused by an intentional act of the owner or operator, with knowledge that serious injury will probably result from the act, or with a wanton and reckless disregard of the probable result of the act [*Civ. Code § 1714.7*].

One court has noted that the statute was apparently enacted as a direct response to the general rules of premises liability established by case law [*Perez v. Southern Pac. Transp. Co. (1990) 218 Cal. App. 3d 462, 467, 267 Cal. Rptr. 100* ; *see Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* ; *see also* Ch. 421, *Premises Liability*]. Consequently, a train-jumper may recover damages from a railroad only if the railroad expressly authorized the conduct or the railway committed willful misconduct. The statute therefore provides immunity to a railroad for an alleged "implied invitation" to engage in train-jumping by reason of the railroad's failure to erect barriers at locations where that activity is common [*Perez v. Southern Pac. Transp. Co. (1990) 218 Cal. App. 3d 462, 467-469, 267 Cal. Rptr. 100]* . *Civ. Code § 1714.7* does not provide immunity to the railroad if the train was stationary when the person climbed onto it [*Wiley v. Southern Pac. Transp. Co. (1990) 220 Cal. App. 3d 177, 191, 269 Cal. Rptr. 240]* .

For a form of affirmative defense for use in an answer to a complaint based on negligence when plaintiff was a trespasser injured while getting on, riding on, or getting off a moving train, see *§ 485.156*.

Even in cases not covered by *Civ. Code § 1714.7*, a plaintiff's status as a trespasser may have a bearing on the question of liability when, for example, it is evidence that plaintiff's conduct was negligent under the circumstances [*Jarvis v. Southern Pac. Transp. Co. (1983) 142 Cal. App. 3d 246, 253, 191 Cal. Rptr. 29* ; *see Wiley v. Southern Pac. Transp. Co. (1990) 220 Cal. App. 3d 177, 269 Cal. Rptr. 240* (*Civ. Code § 1714.7* inapplicable, and plaintiff trespasser found to be 75 percent at fault, but defendant's motion for new trial granted on ground of jury misconduct); *see also § 485.67[1]*].

[3] Duty to Construct and Maintain Safe Premises

[a] Tracks

A railroad has a duty to keep the portion of its tracks ordinarily crossed by intending passengers in a safe condition [*Aydlott v. Key Sys. Transit Co. (1930) 104 Cal. App. 621, 627, 286 P. 456]* . For example, a railroad may be liable for injuries to a person who falls under a train due to the failure of the railroad to keep the ground beneath its tracks paved and free of holes and depressions [*see Aydlott v. Key Sys. Transit Co. (1930) 104 Cal. App. 621, 626-627, 286 P. 456* ; *see also § 485.62[1][a]* regarding the duty of care owed to passengers].

An unsafe condition of the rails alone is not enough to support a cause of action against the railroad, however. The plaintiff must prove that the condition was a cause of the accident [*Dull v. Atchison, Topeka & Santa Fe Ry. Co. (1938) 27 Cal. App. 2d 473, 476, 81 P.2d 158]* . For example, evidence that rails of a track protruded over the fill-in between the rails, which was rough and broken near both rails, has been held insufficient as a matter of law to prove that the condition of the rails had proximately contributed to the accident in which a person was struck by a train while attempting to drive over a crossing [*Dull v. Atchison, Topeka & Santa Fe Ry. Co. (1938) 27 Cal. App. 2d 473, 475-476, 81 P.2d 158]* . For discussion of a railroad's duty to construct and maintain crossings over tracks generally, see *§ 485.105[3]*. For discussion of negligence in the operation of a railroad at a crossing generally, see *§ 485.62[5]*.

[b] Crossings

Every railroad company has the duty to construct and maintain crossings in good condition and to keep that part of its right-of-way at a public crossing reasonably safe for use by members of the general public [*City of Oakland v. Schenck (1925) 197 Cal. 456, 463, 241 P. 545* ; *Pitcher v. Atchison, Topeka & Santa Fe Ry. Co. (1963) 221 Cal. App. 2d 712, 716, 34 Cal. Rptr. 614]* . The crossing may include not only that part within the intersecting roadway, but also that part within an adjoining sidewalk [*Pitcher v. Atchison, Topeka & Santa Fe Ry. Co. (1963) 221 Cal. App. 2d 712,*

716, 34 Cal. Rptr. 614] . The rule applies to crossings laid out after construction of the railway as well as to those in existence at the time of the construction of the railway [*City of Oakland v. Schenck (1925) 197 Cal. 456, 463, 241 P. 545]* . The duty of a railroad company to maintain safely the crossing over its tracks where they occupy a portion of the highway rests not only on the corporation that originally constructed the tracks, but also on whatever railroad company thereafter exercises the franchise [*County of Alameda v. Southern Pac. Co. (1961) 55 Cal. 2d 479, 484, 11 Cal. Rptr. 751, 360 P.2d 327]* . The duty of the railroad company is to exercise reasonable or ordinary care with regard to the maintenance of the crossing [*Peri v. Los Angeles Junction Ry. (1943) 22 Cal. 2d 111, 120, 137 P.2d 441]* . A railroad company may be liable for failing to maintain crossing in safe condition when ruts, holes, and depressions immediately adjacent to track cause a driver's truck to be thrown out of control and damaged [*see* *County of Alameda v. Southern Pac. Co. (1961) 55 Cal. 2d 479, 485, 11 Cal. Rptr. 751, 360 P.2d 327]* .

No railroad crossing may be constructed without first obtaining the permission of the Public Utilities Commission [*see Pub. Util. Code § 1201*]. The PublicUtilities Commission has the power to prescribe the manner and terms of operation, and the maintenance, use, and protection of public railroad crossings [*Pub. Util. Code § 1202*]. When the Commission imposes an obligation on a railroad company to maintain its crossing in a certain way, the obligation is for the benefit, protection, and safety of the members of the public who use the crossing [*see* *Pitcher v. Atchison, Topeka & Santa Fe Ry. Co. (1963) 221 Cal. App. 2d 712, 716, 34 Cal. Rptr. 614]* . For discussion of violation of Commission regulations as negligence per se, see *§ 485.64[1]*. For discussion of a railroad's negligent operation at a crossing, see *§ 485.62[4][a]*.

[c] Signalling Devices and Warnings

A railroad company has a duty to install crossing signals, or to upgrade existing signals, when the peculiar characteristics of a crossing call for such protection [*Romo v. Southern Pac. Transp. Co. (1977) 71 Cal. App. 3d 909, 916, 139 Cal. Rptr. 787]* . When, for example, a driver's view of approaching trains is obstructed by buildings near to a well-traveled crossing, a jury may find that the lack of a wigwag or warning bell at the crossing constitutes a failure to use reasonable care in warning traffic of the danger [*Downey v. Santa Fe Transp. Co. (1955) 134 Cal. App. 2d 720, 726-727, 286 P.2d 40]* . Evidence of custom or business practice of furnishing warning devices under circumstances similar to the case at bar is admissible for the consideration of the jury as it relates to the feasibility of installing and maintain gates at crossings such as the one in the case [*Jensen v. Southern Pac. Co. (1954) 129 Cal. App. 2d 67, 74, 276 P.2d 703* , *disapproved on other grounds,* *Alarid v. Vanier (1958) 50 Cal. 2d 617, 623-624, 327 P.2d 897]* . Evidence of the use by the defendant railroad company of gates at other grade crossings is admissible as long as all the crossings are substantially similar, taking into account the amount of vehicular and pedestrian traffic going over the crossings [*Jensen v. Southern Pac. Co. (1954) 129 Cal. App. 2d 67, 74, 276 P.2d 703* , *disapproved on other grounds, Alarid v. Vanier (1958) 50 Cal. 2d 617, 623-624, 327 P.2d 897]* . For a form of complaint for use in an action to recover for personal injury and property damage caused by a railroad's failure to install a signal or sound warning at a grade crossing, *see § 485.151*. For a form of complaint for use in a wrongful death action based on a railroad's failure to install a signal or sound warning at a grade crossing, *see § 485.152*.

A railroad company has a duty to keep signalling devices at crossings in proper condition and repair, if the railroad had actual or constructive notice of the failure of the device to operate properly [*Will v. Southern Pac. Co. (1941) 18 Cal. 2d 468, 476, 116 P.2d 44]* . The degree of care required of the railroad in this regard is the degree of care that a prudent person would use under like circumstances [*Will v. Southern Pac. Co. (1941) 18 Cal. 2d 468, 476, 116 P.2d 44]* . When a crossing is equipped with a signal that does not operate uniformly and causes a person to rely on the fact that the signal will operate if it is dangerous to cross, the failure of the signal to operate creates a trap that lures travelers into a dangerous situation, and the railroad may be liable for the injuries caused by this situation [*Startup v. Pacific Elec. Ry. Co. (1947) 29 Cal. 2d 866, 869, 180 P.2d 896* ; *Mallett v. Southern Pac. Co. (1937) 20 Cal. App. 2d 500, 507, 510, 68 P.2d 281]* . If a railroad maintains signals at a crossing, even if it is not required by law to install them, the public has a right to rely on the exercise of reasonable care on the part of the railroad company to keep them in good repair and efficient working condition [*Mallett v. Southern Pac. Co. (1937) 20 Cal. App. 2d 500, 507, 510, 68 P.2d 281]* .

The fact that a warning bell does not ring when a train approaches does not necessarily give rise to an inference that the railroad company was negligent in maintaining the bell [*Vaca v. Southern Pac. Co. (1928) 91 Cal. App. 470, 480-481, 267 P. 346]* . The plaintiff has the burden of submitting evidence to show that the bell did not ring, and that the failure to ring was due to the railroad's negligence [*Vaca v. Southern Pac. Co. (1928) 91 Cal. App. 470, 480, 267 P. 346]* . The mere fact that the plaintiff proves that the bell did not ring does not permit the inference that its failure to do so was caused by defendant's negligence because it may have been due, instead, to some cause for which the defendant was not responsible [*Vaca v. Southern Pac. Co. (1928) 91 Cal. App. 470, 480-481, 267 P. 346]* . If there is no evidence that the defendant railroad had actual or constructive notice of the malfunction of the bell, that the railroad had failed to inspect the bell, or that in the exercise of ordinary care the railroad should have done anything more than it did to insure that the bell would ring when trains approached, the railroad cannot be found liable for negligence [*Vaca v. Southern Pac. Co. (1928) 91 Cal. App. 470, 481, 267 P. 346]* .

The continuous operation of a wigwag signal at a crossing when no train is in the vicinity has been held to create a dangerous situation in which motorists crossing the tracks would assume that no train is approaching [*Rice v. Southern Pac. Co. (1967) 247 Cal. App. 2d 701, 706-708, 55 Cal. Rptr. 840* (for over an hour at a time)]. The operation of a wigwag system that allows the wigwag signal to cease operating when a train clears the crossing, even if it is immediately followed by another train, will support a finding of negligence on the part of the railroad [*Startup v. Pacific Elec. Ry. Co. (1947) 29 Cal. 2d 866, 869, 870, 180 P.2d 896]* .

At points along a railroad track other than a road crossing or a train station, a railroad is under no duty to warn of the hazards of walking along a track while a train is passing. Recognizing that the danger of standing next to a moving train is common knowledge, the courts have concluded that the presence of railroad tracks themselves serve as a warning of an open and obvious danger that requires no further warning sign [*Christoff v. Union Pac. R.R. Co. (2005) 134 Cal. App. 4th 118, 126-127, 36 Cal. Rptr. 3d 6]* .

Gov. Code § 14036.8 provides that, as part of a railroad public safetyawareness program, the Department of Transportation must provide appropriate warning signs to be posted on or adjacent to railroad property within 1,000 feet of schools where upgrading of railroad lines has resulted in an increase of operating speeds of passenger trains on those lines by 20 mph or more on or after December 1, 1991 [*Gov. Code § 14036.8(a), (b)*]. For the purposes of *Gov. Code § 14036.8*, a "school" is any public school that maintains classes in kindergarten or of grades 1 to 12, inclusive [*Gov. Code § 14036.8(c)*]. The signs must be posted on the school side of the railroad property at a site to be determined by school officials and railroad representatives. At the request of the department, a railroad that owns the property involved must install and maintain the signs. The signs must be designed to communicate both in words in pictures, using internationally recognized symbols, to warn of train-related hazards [*Gov. Code § 14036.8(b)*]. The installation and maintenance of these warning signs does not in any way affect the liability of the state or any of its agencies, officers, or employees, or of the owner of the railroad right-of-way, on account of personal injury or property damage alleged to have been caused, in whole or in part, by a sign, or the installation or maintenance of a sign, installed and maintained pursuant to *Gov. Code § 14036.8* [*Gov. Code § 14036.8(d)*].

For a discussion of a railroad's negligence in operation at crossings generally, see *§ 485.62[4][a]*. For a discussion of the award of punitive damages for failure to provide sufficient signals and warnings at a crossing, see *§ 485.66*. For a form of allegation for use in a personal injury or wrongful death action based on a railroad's failure to repair a signal or sound warning at a grade crossing, see *§ 485.153*.

[d] Cattle Guards and Fences

Every railroad must make and maintain good and sufficient fences on both sides of its tracks and property [*Pub. Util. Code § 7626*]. If the railroad does not do so, and if its engine or cars kill or maim any cattle or other domestic animal on its line of road, except where the road runs through or on public land, the railroad must pay a fair market price for the animal to the animal's owner, unless the killing or maiming occurred through the fault or neglect of the animal's owner [

Pub. Util. Code § 7626; *see Pub. Util. Code § 7631*]. For a form of complaint for use by an owner whose cattle have been injured or killed by a railroad's failure to maintain a proper fence, see Ch. 23, *Animals: Civil Liability* .

Pub. Util. Code § 7626 may also raise a jury question as to whether or not a fence was required in an area where it was known that children played on and around the railroad tracks. Although there is no provision made for a small child to recover for his or her personal injuries for the railroad's failure to provide a fence, there is nothing in the statute that limits the railroad's responsibility for such injuries, as long as a jury determines that ordinary care required the railroad to fence its right-of-way and that the absence of a fence, either alone or in connection with other negligence of the railroad, proximately caused injuries to a child [*see Staggs v. Atchison, Topeka & Santa Fe Ry. Co. (1955) 135 Cal. App. 2d 492, 505, 287 P.2d 817]* .

A railroad company is bound to use reasonable diligence in keeping its right-of-way fences in repair, but it need not resort to extraordinary means, such as the maintenance of a special patrol, to insure that its fences will not be broken or that they are promptly repaired if they are broken [*Jesus Maria Rancho v. Southern Pac. Co. (1918) 36 Cal. App. 375, 379, 172 P. 183]* .

If a railroad enters into an agreement with the owner of land over which the the railway is located by which the owner agrees, for an agreed price, to construct and maintain a good and sufficient fence, and if the owner fails to construct and maintain the fence, the railroad is relieved and exonerated from all claims for damages arising out of the killing or maiming of any animals belonging to the owner [*Pub. Util. Code § 7627*]. In such a case, the owners of the animals are responsible for any damages or loss that may accrue to the railroad corporation from the animals being on the track because of the fence not being constructed, unless it is shown that the loss or damage occurred through the negligence or fault of the corporation, its officers, agents, or employees [*Pub. Util. Code § 7627*].

[4] Duty to Operate Trains Safely

[a] Approaching Crossings

A railroad grade crossing is a place of danger, and a train has the right of way at the crossing [*Akers v. City of Palo Alto (1961) 194 Cal. App. 2d 109, 120-121, 14 Cal. Rptr. 767* ; *Nemer v. Atchison, Topeka & Santa Fe Ry. Co. (1957) 156 Cal. App. 2d 445, 451, 319 P.2d 770]* . However, the operator of a railroad train has the duty to exercise reasonable or ordinary care at crossings towards persons traveling on the highway and over the crossing [*Peri v. Los Angeles Junction Ry. (1943) 22 Cal. 2d 111, 120, 137 P.2d 441* ; *Romo v. Southern Pac. Transp. Co. (1977) 71 Cal. App. 3d 909, 916, 139 Cal. Rptr. 787]* . A train crew cannot assume that a highway in the middle of a city will be clear. They must keep a reasonable lookout for the presence of intersecting traffic [*Herrera v. Southern Pac. Co. (1957) 155 Cal. App. 2d 781, 785, 318 P.2d 784]* . The railroad is not relieved of the duty to maintain such a lookout by the installation of automatic signals at a crossing [*Herrera v. Southern Pac. Co. (1957) 155 Cal. App. 2d 781, 786, 318 P.2d 784]* . The duty to keep a lookout for traffic at a crossing implies as a corollary the further obligation to have the train under such control as may be reasonably necessary to deal with situations that an ordinarily prudent operator would anticipate [*Herrera v. Southern Pac. Co. (1957) 155 Cal. App. 2d 781, 785, 318 P.2d 784]* .

The standard of care imposed on the railroad operator at a crossing is that of an ordinarily prudent person under the circumstances [*Peri v. Los Angeles Junction Ry. (1943) 22 Cal. 2d 111, 120, 137 P.2d 441]* . The question of the negligence ofthe railroad operator is ordinarily one of fact in crossing cases, as it is in other negligence cases [*Peri v. Los Angeles Junction Ry. (1943) 22 Cal. 2d 111, 120, 137 P.2d 441]* . Trains must also take special care at dangerous crossings to pass at a slower rate of speed in proportion to the dangerous character of the crossing [*Young v. Pacific Elec. Ry. Co. (1929) 208 Cal. 568, 572-573, 283 P. 61]* .

For discussion of railroad's liability with regard to excessive speed of train, see *§ 485.62[4][f]*. For a form of allegation for use in a personal injury or wrongful death action based on a railroad's use of excessive speed at a grade crossing, see

§ 485.154. For discussion of a railroad's duty to maintain adequate warnings and signals at railroad crossings, see *§ 485.62[3][b]*.

[b] Blocking Crossing

The unexplained blockading of a street crossing by a railroad train mayconstitute negligence on the part of the railroad company [*Hanlon Drydock & Shipbuilding Co. v. Southern Pac. Co. (1928) 92 Cal. App. 230, 234, 268 P. 385]* . A railroad cannot unnecessarily and arbitrarily block a railroad crossing without incurring liability for damage proximately resulting from the obstruction [*Matoza v. Southern Pac. Co. (1922) 59 Cal. App. 636, 640, 211 P. 252]* . A railroad company may be liable for injuries to animals caused by their overgrazing in a field from which their removal was blocked by a train [*see Matoza v. Southern Pac. Co. (1922) 59 Cal. App. 636, 641, 211 P. 252]* . Plaintiffs can make out a prima facie case of negligence when their property burns to the ground because defendant's train blocked the access of the fire department to the fire [*Hanlon Drydock & Shipbuilding Co. v. Southern Pac. Co. (1928) 92 Cal. App. 230, 234, 268 P. 385]* .

[c] Avoidance of Persons or Objects on Track

A railroad has a duty to exercise ordinary care towards persons whom the company should expect may be on or near the right-of-way [*Smithwick v. Pacific Elec. Ry. Co. (1929) 206 Cal. 291, 303-304, 274 P. 980]* . The railroad has a duty to keep a lookout for and discover persons on the tracks if it has knowledge that people walk on or cross the tracks regularly in a certain area [*Smithwick v. Pacific Elec. Ry. Co. (1929) 206 Cal. 291, 303-304, 274 P. 980* ; *see Essick v. Union Pac. R.R. Co. (1960) 182 Cal. App. 2d 456, 461, 6 Cal. Rptr. 208]* . When a 21-month old child was struck by a train on a railroad right-of-way, for example, and the railroad's employees were aware that members of the public, including both adults and children, were likely to be on the railroad's right-of-way, it was a proper question for a jury whether the exercise of ordinary care or skill included a watchfulness for children in places of danger on or near the tracks [*see Staggs v. Atchison, Topeka & Santa Fe Ry. Co. (1955) 135 Cal. App. 2d 492, 501-502, 287 P.2d 817]* . For discussion of the duty to keep a lookout in the area of urban crossings, see *§ 485.62[5]*.

[d] Backing Up of Train

A railroad may be liable for injuries caused by improper backing procedures. The backing up of a train engine increases the possibility of danger to the public and thereby increases the burden on the train crew to proceed with an awareness of the special dangers involved [*Morgan v. Southern Pac. Trans. Co. (1974) 37 Cal. App. 3d 1006, 1012, 112 Cal. Rptr. 695]* . A backing up maneuver by which the engine pushes a boxcar and caboose, conducted at night outside of the railroad yard limits, has been recognized as potentially dangerous [*Morgan v. Southern Pac. Trans. Co. (1974) 37 Cal. App. 3d 1006, 1013, 112 Cal. Rptr. 695]* . Factors such as the speed of the maneuver, use of required lights, bells, or whistles, and knowledge on the part of the train crew that pedestrians frequented the area will all be taken into account in determining whether a backing up maneuver was negligently conducted [*see Morgan v. Southern Pac. Trans. Co. (1974) 37 Cal. App. 3d 1006, 1014-1015, 112 Cal. Rptr. 695]* . Sufficient evidence of negligence has been found when a train, after switching tracks and picking up empty cars, propelled the cars ahead of the engine, without giving warning by bell or whistle, when the engineer had known or should have had known that workers were on the track and would thereby be endangered [*see Barboza v. Pacific Portland Cement Co. (1912) 162 Cal. 36, 39-40, 120 P. 767]* . The sounding of warning bells is not sufficient to relieve a railroad of liability for a backing up maneuver if the evidence is not clear as to whether or not the person struck by the train was then in a position to have heard the signal, or whether or not the person would have known what the signal meant, if he or she had heard it [*Miller v. Pacific Elec. Ry. Co. (1915) 169 Cal. 107, 111, 145 P. 1023]* .

[e] Failure to Sound Train Whistle or Signal

Those in charge of a train have the duty to give notice of the approach of the engine when the train is approaching and traveling over a roadway by all warnings reasonably necessary under the conditions existing at the time and place of the

accident [*Downey v. Santa Fe Transp. Co. (1955) 134 Cal. App. 2d 720, 727, 286 P.2d 40]* . Whether the railroad has complied with that requirement is a question of fact for the jury [*Downey v. Santa Fe Transp. Co. (1955) 134 Cal. App. 2d 720, 727, 286 P.2d 40]* .

A railroad must sound a bell, siren, horn, whistle, or similar audible warning device at any public railroad crossing in accordance with federal regulations, except in those areas established as quiet zones [*Pub. Util. Code § 7604(a)(1)-(3)*]. Under applicable federal regulations, the locomotive horn on the lead locomotive of a train, lite locomotive consist, individual locomotive or lead cab car must be sounded when that locomotive or lead cab car is approaching a public highway-rail grade crossing. Sounding of the locomotive horn with two long blasts, one short blast, and one long blast, must be initiated at a location in accordance with *49 C.F.R. § 222.21(b)* and must be repeated or prolonged untilthe locomotive occupies the crossing. This pattern may be varied as necessary if crossings are spaced closely together [*49 C.F.R. § 222.21(a)*].

Generally, the locomotive horn must begin to be sounded at least 15 seconds, but not more than 20 seconds, before the locomotive enters the crossing, although this requirement does not apply if the horn is defective and the locomotive is being moved for repairs. In addition, if the engineer in good faith is unable to precisely estimate the time of arrival at the crossing, the horn may begin sounding up to 25 seconds before the locomotive enters the crossing [*49 C.F.R. § 222.21(b)(2)*]. Trains, locomotive consists, and individual locomotives traveling at speeds in excess of 60 miles per hour must not begin sounding the horn more than one-quarter mile in advance of the nearest public highway-rail grade crossing, even if the advance warning provided by the locomotive horn will beless than 15 seconds in duration [*49 C.F.R. § 222.21(b)(3)*].

Trains, locomotive consists, and individual locomotives that have stopped in close proximity to a public highway-rail grade crossing may approach the crossing and sound the locomotive horn for less than 15 seconds before the locomotive enters the crossing, if the locomotive engineer is able to determine that the crossing is not obstructed and either [*49 C.F.R. § 222.21(d)*]:

- The crossing is equipped with automatic flashing lights and gates and the gates are fully lowered; or
- There are no conflicting highway movements approaching the crossing.

These rules do not restrict the use of a bell, siren, horn, whistle, or similar audible warning device during an emergency or other similar situation authorized in *49 C.F.R. § 222.23* [*Pub. Util. Code § 7604(a)(4)*].

For a discussion of when the violation of a railroad safety statute constitutes negligence per se, see *§ 485.64[1]*.

In order for liability to attach to the railroad for failure to comply with the whistle blowing requirements of *Pub. Util. Code § 7604*, the failure to comply must have been the proximate cause of the accident [*DeArmond v. Southern Pac. Co. (1967) 253 Cal. App. 2d 648, 655, 61 Cal. Rptr. 844* ; for general discussion of proximate cause, *see* Ch. 380, *Negligence*]. Evidence that a plaintiff was in a position to hear a whistle, if it had been sounded, justifies a finding that if such warning would have been given, a collision would have been avoided [*Peri v. Los Angeles Junction Ry. (1943) 22 Cal. 2d 111, 126, 137 P.2d 441]* . Generally, the absence of a signal from an approaching train becomes inconsequential when its approach is seen, but if a warning could have been given soon enough for a driver crossing the tracks to avoid the collision, the jury is justified in concluding that the railroad was negligent [*Marquis v. St. Louis-San Francisco Ry. Co. (1965) 234 Cal. App. 2d 335, 345, 44 Cal. Rptr. 367]* .

For forms of complaint and complaint allegations including allegations of negligence based on a failure to sound a proper warning at a railroad crossing, see *§§ 485.151 -485.153*.

[f] Excessive Speed

A railroad operator is free, in the exercise of reasonable care, to travel at high speeds, especially when traveling through sparsely settled areas, and to assume that cars approaching the tracks will exercise reasonable care to stop or cross safely, unless the driver's conduct reasonably alerts the engineer to the fact that the driver is not exercising or will not exercise ordinary care [*Marquis v. St. Louis-San Francisco Ry. Co. (1965) 234 Cal. App. 2d 335, 346-347, 44 Cal. Rptr. 367]* . However, in cities and towns and other well-populated areas, trains may not be run at any rate of speed that the railroad desires [*Herrera v. Southern Pac. Co. (1957) 155 Cal. App. 2d 781, 787, 318 P.2d 784]* . While no particular rate of speed is negligence per se in the absence of a statute or ordinance, a railroad cannot run its trains under all conditions at any rate of speed it chooses. It must regulate its speed with regard for the safety of people and property, and a rate of speed that may be allowable in a thinly settled part of the country where few people cross the tracks may be so dangerous as to constitute negligence on the part of the railroad when driving a train through a city or village where many people are likely to cross the tracks [*Young v. Pacific Elec. Ry. Co. (1929) 208 Cal. 568, 573, 283 P. 61* ; *see also § 485.64[1]*]. As the standard of duty shifts with the circumstances developed in a case, the question whether or not a rate of speed is excessive is one of fact for the jury [*Young v. Pacific Elec. Ry. Co. (1929) 208 Cal. 568, 572-574, 283 P. 61]* .

One of the circumstances to be considered in determining whether or not the rate of speed of the train at that time and place was negligent is the visibility of the train to the person crossing the tracks. It may be negligent to propel a train through a crossing if the view of one approaching it is obstructed [*Stout v. Southern Pac. R.R. Co. (1954) 127 Cal. App. 2d 491, 502, 274 P.2d 194]* . When the view of the track is obstructed, for example, by another set of tracks where two trains may pass at the same time, and the noise of one train may obscure the warning noise made by the other train, the situation would call for a reduced speed commensurate with the danger of the situation [*see Stout v. Southern Pac. R.R. Co. (1954) 127 Cal. App. 2d 491, 502, 274 P.2d 194]* .

Although a rate of speed imposed by the railroad itself does not have the force of law, it is an admission on the part of the railroad that a higher speed would be improper in that locality [*Herrera v. Southern Pac. Co. (1957) 155 Cal. App. 2d 781, 788, 318 P.2d 784* ; *see § 485.64[3]*]. It is also a question for the jury whether or not the company-imposed maximum rate of speed is appropriate at the particular place at which the accident occurred [*Herrera v. Southern Pac. Co. (1957) 155 Cal. App. 2d 781, 788, 318 P.2d 784]* . Sometimes the issue of thespeed of the train is combined with other factors, such as the failure to sound a train whistle or obstruction of the view of the train, and all the combined factors must be examined to determine whether under the circumstances the speed of the train was reasonable [*see Rice v. Southern Pac. Co. (1967) 247 Cal. App. 2d 701, 708-709, 55 Cal. Rptr. 840]* .

A railroad company's violation of a speed ordinance raises a rebuttable presumption of negligence [*see Evid. Code § 669(a)*; *see also Lininger v. San Francisco, Vallejo & Napa Valley R.R. Co. (1912) 18 Cal. App. 411, 418, 123 P. 235* ; *see generally § 485.64[1]* regarding the presumption of negligence arising from a railroad's violation of safety statutes generally]. The speed violation alone does not, however, create liability [*Whinery v. Southern Pac. Co. (1970) 6 Cal. App. 3d 126, 128, 85 Cal. Rptr. 649]* . For a plaintiff to recover, the negligence must also have been a proximate cause of the accident and the injuries to plaintiff [*Whinery v. Southern Pac. Co. (1970) 6 Cal. App. 3d 126, 128, 85 Cal. Rptr. 649* ; *see Evid. Code § 669(a)(2)*]. If, however, the uncontroverted facts establish that the violation of the ordinance was the proximate cause of the accident, and no other deduction or inference may reasonably be drawn from these facts, then the violation of the ordinance is a proximate cause as a matter of law [*Whinery v. Southern Pac. Co. (1970) 6 Cal. App. 3d 126, 128, 85 Cal Rptr 649]* . The issue ofproximate cause becomes a question of law, not fact, when the jury cannot reasonably find that the collision would have occurred without the violation of the speed ordinance [*Whinery v. Southern Pac. Co. (1970) 6 Cal. App. 3d 126, 128-129, 85 Cal. Rptr. 649]* .

For a form of allegation for use in a personal injury or wrongful death action based on a railroad's use of excessive speed at a grade crossing, see *§ 485.154*. For a form of complaint containing a count for use in recovering damages under *Pub. Util. Code § 2106* if the defendant railroad violated a Public Utilities Commission order, see *§ 485.151*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDutyGeneral OverviewTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityGeneral OverviewTortsTransportation TortsRail TransportationGeneral OverviewTortsTransportation TortsRail TransportationRailroad CrossingsTortsTransportation TortsRail TransportationTrespassersTransportation LawRail TransportationMaintenance & SafetyTransportation LawRail TransportationRates & Tariffs

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Volume 42: Public Utilities thru Railroads-Chs. 480-485
Chapter 485 RAILROADS
PART II. LEGAL BACKGROUND
C. Injuries to Passengers and Other Persons

42-485 California Forms of Pleading and Practice--Annotated § 485.63

§ 485.63 Vicarious Liability of Railroad Owners

[1] Negligence of Employees

If the employees of the railroad are found to be negligent in their operation of a train, the company is responsible for the negligence under the doctrine of respondeat superior [*McNulty v. Southern Pac. Co. (1950) 96 Cal. App. 2d 841, 852, 216 P.2d 534]* . If the charge of negligence against the railroad company rests solely on respondeat superior and not on the company's own independent tort, exoneration of the train crew will exonerate the company [*Jensen v. Southern Pac. Co. (1954) 129 Cal. App. 2d 67, 69, 276 P.2d 703* , disapproved on other grounds in *Alarid v. Vanier (1958) 50 Cal. 2d 617, 623-624, 327 P.2d 897]* . However, if concurrent negligence of the train crew and the company is charged, or if the company has been negligent independently of its employees, then exoneration of the employees will not exonerate the company [*Jensen v. Southern Pac. Co. (1954) 129 Cal. App. 2d 67, 69-70, 276 P.2d 703* , disapproved on other grounds in *Alarid v. Vanier (1958) 50 Cal. 2d 617, 623-624, 327 P.2d 897]* . If the negligent act is done without the express direction of the railroad company, then its negligence will be predicated on respondeat superior only. If, however, the negligent act was predicated on the express direction of the company, for example, by directing the maintenance of a certain speed, the liability of the company and the employee is joint [*Benson v. Southern Pac. Co. (1918) 177 Cal. 777, 779, 171 P. 948* ; *Jensen v. Southern Pac. Co. (1954) 129 Cal. App. 2d 67, 69-70, 276 P.2d 703* , disapproved on other grounds in *Alarid v. Vanier (1958) 50 Cal. 2d 617, 623-624, 327 P.2d 897]* . When the liability of the railroad company and an employee is joint, the company is not prejudiced by a failure to find against the employee [*Jensen v. Southern Pac. Co. (1954) 129 Cal. App. 2d 67, 70, 276 P.2d 703* , disapproved on other grounds in *Alarid v. Vanier (1958) 50 Cal. 2d 617, 623-624, 327 P.2d 897]* . For a general discussion of employer's liability based on respondeat superior, see Ch. 248, *Employer's Liability for Employee's Torts* .

[2] Negligence of Lessee

A corporation that is the owner of a railroad is presumed to be controlling and in possession of the operation of it [*Johnson v. Southern Pac. R.R. Co. (1908) 154 Cal. 285, 289, 97 P. 520]* . That presumption is not rebutted by proof that some other company was operating cars over the railroad at the time of the accident [*Johnson v. Southern Pac. R.R. Co. (1908) 154 Cal. 285, 293-294, 97 P. 520]* . Under the presumption, the burden is on the owner to show, when the question of liability for injury by moving cars arises, that the cars that inflicted the injury were under the control and

operation of another company because of a lease of the railroad [*Johnson v. Southern Pac. R.R. Co. (1908) 154 Cal. 285, 293-294, 97 P. 520]* . However, when it is shown that a lease was executed under which the lessee agreed to maintain the property and operate the railroad with suitable protection to the public, the lessee is liable as if it were operating the road as owner [*Barrett v. Southern Pac. Co. (1929) 207 Cal. 154, 161-162, 277 P. 481]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligenceGeneral OverviewTortsPremises Liability & PropertyLessees & LessorsLiability of LesseesTortsTransportation TortsRail TransportationGeneral OverviewTortsVicarious LiabilityEmployersGeneral OverviewTortsVicarious LiabilityEmployersActivities & ConditionsGeneral Overview

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42-485 California Forms of Pleading and Practice--Annotated § 485.64

§ 485.64 Effect of Safety Statute, Ordinance, or Regulation

[1] Violation Creates Presumption of Negligence

It is presumed that a person has failed to exercise due care if he or she has violated a statute, ordinance, or regulation, the violation proximately caused death or injury to person or property, the death or injury resulted from an occurrence of the nature that the statute or regulation was designed to prevent, and the plaintiff was one of a class of persons that the statute was meant to protect [*Evid. Code § 669(a)*]. The presumption may be rebutted by proof that the one who violated the statute did what an ordinarily prudent person, who desired to comply with the law, would have done under the circumstances [*Evid. Code § 669(b)(1)*]. If the presumption is not rebutted, a plaintiff is entitled to have the jury instructed that the railroad is negligent [*see Wilcox v. Southern Pac. Co. (1961) 190 Cal. App. 2d 548, 551, 12 Cal. Rptr. 207]* . For a general discussion of the presumption of negligence arising from a statutory violation, see Ch. 380, *Negligence* .

A statutory violation alone creates no liability unless the negligence was also the proximate cause of the accident and plaintiff's injuries [*Whinery v. Southern Pac. Co. (1970) 6 Cal. App. 3d 126, 128, 85 Cal. Rptr. 649* ; see *Evid. Code § 669(a)(2)*]. However, the question of proximate cause becomes one of law when the facts are uncontroverted and only one deduction or inference may reasonably be drawn therefrom [*Whinery v. Southern Pac. Co. (1970) 6 Cal. App. 3d 126, 128, 85 Cal. Rptr. 649]* . The negligence of a railroad in violating a speed ordinance, for example, is the proximate cause of a collision as a matter of law when the collision that was meant to be prevented by the ordinance was the very thing that did occur, and when the accident would not have occurred but for the violation of the ordinance [*see Whinery v. Southern Pac. Co. (1970) 6 Cal. App. 3d 126, 128-132, 85 Cal. Rptr. 649]* .

For a discussion of a separate theory of recovery based on Civ. Code § 2106, which provides that a public utility is liable for damages caused by a violation ofa Constitutional provision, a statute, or an order or decision of the Public Utilities Commission, see *§ 485.68*.

[2] Compliance Does Not Per Se Negate Negligence

Statutory regulations constitute only the minimum measure of care required by a railroad, and it is usually a matter for

the jury to determine whether or not something more than the minimum was required under the circumstances of the case [*Hogue v. Southern Pac. Co. (1969) 1 Cal. 3d 253, 258, 81 Cal. Rptr. 765, 460 P.2d 965* ; *Dragash v. Western Pac. R.R. Co. (1958) 161 Cal. App. 2d 233, 241, 326 P.2d 649]* . In prescribing safety regulations, whether by legislative enactment expressed in a statute or by action of the Public Utilities Commission expressed in an order, the state has never stated that compliance with those statutes or regulations constitutes a complete discharge of the railroad's duties toward the public [*Jensen v. Southern Pac. Co. (1954) 129 Cal. App. 2d 67, 72, 276 P.2d 703* , disapproved on other grounds in *Alarid v. Vanier (1958) 50 Cal. 2d 617, 623-624, 327 P.2d 897]* . Therefore, a railroad company will not necessarily be held free from negligence even though it may have literally complied with safety statutes or rules. The circumstances may require it to do more [*Hogue v. Southern Pac. Co. (1969) 1 Cal. 3d 253, 258, 81 Cal. Rptr. 765, 460 P.2d 965* ; *Peri v. Los Angeles Junction Ry. (1943) 22 Cal. 2d 111, 126, 137 P2d 441]* . If, for example, the peculiar characteristics of a crossing call for the installation of automatic protection or the upgrading of existing automatic protection, the railroad may be guilty of negligence in failing to provide such protection even if it has complied with existing safety regulations [*Hinkle v. Southern Pac. Co. (1939) 12 Cal. 2d 691, 701-702, 87 P.2d 349* ; see *Romo v. Southern Pac. Transp. Co. (1977) 71 Cal. App. 3d 909, 916, 139 Cal. Rptr. 787* ; *see generally §§ 485.62[3][c]* and *485.62[4][e]* regarding arailroad's failure properly to maintain and construct signals and the negligent operation of signals].

It is error to deny a jury instruction stating that compliance with Public Utilities Commission regulations regarding protective devices at railroad crossings is merely the minimum measure of care [*Dragash v. Western Pac. R.R. Co. (1958) 161 Cal. App. 2d 233, 241-242, 326 P.2d 649]* . A jury instruction is proper if it states that if an ordinarily prudent person in the exercise of ordinary care would have supplied additional warning and safety devices over those that were present at the time of the accident, the defendant railroad would have been required to supply them and would have been negligent for failing to do so [*Lloyd v. Southern Pac. Co. (1952) 111 Cal. App. 2d 626, 637-638, 245 P.2d 583]* .

[3] Violation of Company Rule Compared

The violation of a railroad's own internal operating rule is not negligence per se, but it is a circumstance for the jury to consider on the issue of the railroad's negligence [*Powell v. Pacific Elec. Ry. Co. (1950) 35 Cal. 2d 40, 46, 216 P.2d 448]* . For example, a railroad's rule requiring a reduction in speed well in advance of a highway crossing is admissible in evidence as bearing on the standard of care the railroad thought appropriate to insure the safety of others at its track crossings, but it does not establish plaintiff's right to recover [*see* *Powell v. Pacific Elec. Ry. Co. (1950) 35 Cal. 2d 40, 46, 216 P.2d 448]* .

Company rules do not establish the standard of care of the railroad. That standard is always that of the person of ordinary prudence under the circumstances [*Davis v. Johnson (1954) 128 Cal. App. 2d 466, 473, 275 P.2d 563]* . Thus, although an instruction is proper that states that the violation of the railroad's rule is not negligence per se but is a circumstance that the jury may consider in determining the question of negligence, the failure to give it is merely an omission of an instruction on the evidence rather than an omission of an instruction on matter of law [*Davis v. Johnson (1954) 128 Cal. App. 2d 466, 472-473, 275 P.2d 563]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceInferences & PresumptionsPresumptionsEvidenceInferences & PresumptionsRebuttal of PresumptionsTortsNegligenceCausationProximate CauseGeneral OverviewTortsNegligenceProofEvidenceInferences & PresumptionsTortsNegligenceProofEvidenceProvince of Court & JuryTortsNegligenceProofViolations of LawOrdinancesTortsNegligenceProofViolations of LawRules & RegulationsTortsNegligenceProofViolations of LawStatutesTransportation LawRail TransportationMaintenance & Safety

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§ 485.65 Evidence of Prior Accidents or Safeguards

Evidence of a prior railroad accident that occurred under substantially the same general circumstances as the accident in question, and that is not too remote in time, is admissible to prove the existence of a dangerous condition and notice thereof to the railroad [*Dragash v. Western Pac. R.R. Co. (1958) 161 Cal. App. 2d 233, 242, 326 P.2d 649]* . Evidence of collisions at other crossings can be excluded, however, if the plaintiff fails to establish that the conditions of traffic, the types of signals, and other physical characteristics were similar at the other crossings [*Nemer v. Atchison, Topeka & Santa Fe Ry. Co. (1957) 156 Cal. App. 2d 445, 454, 319 P.2d 770]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral OverviewTransportation LawRail TransportationMaintenance & Safety

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§ 485.66 Punitive Damages

Three essential elements must be present to raise a negligent act to the level of willful misconduct: (1) actual or constructive knowledge of the peril to be apprehended; (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger; and (3) conscious failure to act to avoid the peril [*Morgan v. Southern Pac. Trans. Co. (1974) 37 Cal. App. 3d 1006, 1012, 112 Cal. Rptr. 695]* . Punitive damages may be awarded if the defendant railroad's actions show a state of mind of conscious disregard for the safety of others [*Seimon v. Southern Pac. Transp. Co. (1977) 67 Cal. App. 3d 600, 608-609, 136 Cal. Rptr. 787* ; see *Civ. Code § 3294(a), (c)(1)* (definition of "malice" for purposes of awarding punitive damages as including willful and conscious disregard for rights or safety of others].

A railroad company acts with "conscious disregard of safety" if it is aware of a highly dangerous condition and, in spite of that knowledge, fails to take any corrective action [*Seimon v. Southern Pac. Transp. Co. (1977)136 Cal. Rptr. 787]* . For example, the failure to provide warning signs or lights at a dangerous blind crossing has been held to show a conscious and callous indifference to or disregard of probable harm to motorists, rather than merely benign neglect on the part of the railroad, and so constitute a basis for an award of punitive damages [*see Seimon v. Southern Pac. Transp. Co. (1977) 67 Cal. App. 3d 600, 608-609, 136 Cal. Rptr. 787]* . If, however, there is nothing suggesting that the crossing itself was particularly unusual or that vision of oncoming trains was obstructed, the failure to place warning lights or barriers on the crossing is not sufficient to constitute malice [*see Schreefel v. Okuly (1983) 143 Cal. App. 3d 818, 828, 192 Cal. Rptr. 402]* .

A railroad company's procedure of not applying brakes unless a collision appeared imminent, as opposed to unavoidable, is not by itself a basis for a finding of willful misconduct [*Bains v. Western Pac. R.R. Co. (1976) 56 Cal. App. 3d 902, 906-907, 128 Cal. Rptr. 778]* . The fact that the railroad installed an automatic gate after the accident and had been aware of automobile-train collisions at other railroad crossings in the area is germane to the question of negligence but does not itself show wilful misconduct [*Bains v. Western Pac. R.R. Co. (1976) 56 Cal. App. 3d 902, 907, 128 Cal. Rptr. 778]* .

For general discussion and forms relating to punitive damages under *Civ. Code § 3294*, see Ch. 177, *Damages* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesPunitive DamagesGeneral OverviewTortsNegligenceDutyForeseeability of InjuryTortsTransportation TortsRail TransportationGeneral OverviewTortsTransportation TortsRail TransportationRailroad CrossingsTransportation LawRail TransportationMaintenance & Safety

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§ 485.67 Affirmative Defense of Comparative Negligence

[1] Generally

When, in an action for negligence, the plaintiff's injuries resulted from negligence on his or her own part as well as on the defendant's part, the plaintiff's total recovery is reduced by an amount proportionate to his or her own fault [*see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226]* . For general discussion and forms relating to the defense of comparative negligence, see Ch. 380, *Negligence* . For a form of affirmative defense based on the comparative negligence of the plaintiff in action against a railroad, see *§ 485.155*.

In a negligence action against a railroad, it is ordinarily a question of fact whether the plaintiff took reasonable and sufficient precautions for his or her safety under the circumstances [*Will v. Southern Pac. Co. (1941) 18 Cal. 2d 468, 475, 116 P.2d 44]* , as is the question whether the plaintiff's comparative negligence, if any, was a proximate cause of the claimed injuries [*see Toschi v. Christian (1944) 24 Cal. 2d 354, 362, 149 P.2d 848]* .

If a plaintiff was a passenger, and incurred his or her injury violating either the railroad's written rules or verbal instructions, his or her conduct may, in addition to constituting comparative negligence, relieve the railroad from all liability under *Pub. Util. Code § 7654* [*see § 485.62[2][a]*]. If a plaintiff was a trespasser, his or her conduct on a moving train may similarly relieve relieve the railroad from all liability under Civ. Code § 1715.7 [*see § 485.105[7]*]. A plaintiff's status as a trespasser on railroad property may also be relevant to the issue of his or her comparative negligence [*Jarvis v. Southern Pac. Transp. Co. (1983) 142 Cal. App. 3d 246, 253, 191 Cal. Rptr. 29* ; *see also § 485.62[b]*].

[2] Stop, Look, and Listen Rule

Because railroad tracks themselves are a warning of danger, a person must take precautions for his or her own safety when attempting to cross them, even if the railroad has installed some system to warn of approaching trains [*Startup v. Pacific Elec. Ry. Co. (1947) 29 Cal. 2d 866, 871, 180 P.2d 896]* . A plaintiff's duty in approaching railroad tracks is to use every reasonable opportunity, depending on all the surrounding circumstances, to look and listen for the approach of the train in order to avoid hazard [*see Anello v. Southern Pac. Co. (1959) 174 Cal. App. 2d 317, 321-322, 344 P.2d*

843 .

Under the "stop, look, and listen" rule, a driver whose view of the tracks is obstructed is not required as a matter of law to stop before crossing the tracks [*Pokora v. Wabash Ry. Co. (1934) 292 U.S. 98, 104-106, 54 S. Ct. 580, 78 L. Ed. 1149* ; *see Marquis v. St. Louis-San Francisco Ry. Co. (1965) 234 Cal. App. 2d 335, 345, 44 Cal. Rptr. 367]* . A driver's failure to stop when his or her view is obstructed does not constitute negligence as a matter of law, although it may constitute negligence in fact if a reasonably prudent person would not have acted as plaintiff did under the circumstances [*Lucas v. Southern Pac. Co. (1971) 19 Cal. App. 3d 124, 139, 96 Cal. Rptr. 356]* . For example, a driver might not be negligent for failure to stop, look, and listen, if he or she reasonably relied on the absence of a signal or flagman at the crossing to assume that it would be safe to cross [*see Crawford v. Southern Pac. Co. (1935) 3 Cal. 2d 427, 434, 439-440, 45 P.2d 183* ; *Green v. Key Sys. Transit Lines (1953) 116 Cal. App. 2d 512, 519, 253 P.2d 780]* . For further discussion of a driver's duty of care at a railroad crossing, see, *§ 485.62[5]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 485.68 Statutory Action Against Public Utility

A railroad, as a public utility, is liable for all loss, damages, or injury that is caused or that results when the railroad does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful or that omits to do any act, matter, or thing required to be done by the Constitution, a state law, or an order or decision of the Public Utilities Commission [*Pub. Util. Code § 2106*; *see Cal. Const. art. XII, § 3* (public utility defined)]. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person [*Pub. Util. Code § 2106*]. For example, a cause of action for monetary damages is stated under *Pub. Util. Code § 2106* when the plaintiffalleges he or she was injured by defendant's violation of an explicit statutory provision of the Public Utilities Code [*see Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal. 3d 458, 475, 486, 156 Cal. Rptr. 14, 595 P.2d 592* (violation of *Pub. Util. Code § 453*).

Pub. Util. Code § 2106 appears to authorize a separate theory of recovery of damages, in addition to negligence, when the defendant railroad has violated a constitutional provision, statute, or Commission order or decision. Therefore, the basis for an action under *Pub. Util. Code § 2106*, such as defendant's violation of a safety statute, should be distinguished from the evidentiary presumption of negligence that may arise under *Evid. Code 669* in a negligence action when plaintiff can show at trial that an applicable statute created a duty of care [*see § 485.64*]. When a cause of action is predicated on defendant's negligence only, plaintiff need not plead or refer to a statute even if relied on as creating a duty. The statute is merely evidentiary, and may be introduced at trial without being pleaded [*Jackson v. Hardy (1945) 70 Cal. App. 2d 6, 12, 160 P.2d 161* (statute)].

If the court finds in an action brought under *Pub. Util. Code § 2106* that the defendant's unlawful act or omission was wilful, it may, in addition to actual damages, award exemplary damages [*Pub. Util. Code § 2106*]. One court has stated in dictum that punitive damages are available under *Pub. Util. Code § 2106* for violation of a safety statute only if the violation was authorized by the railroad [*Seimon v. Southern Pac. Transp. Co. (1977) 67 Cal. App. 3d 600, 609, n. 3, 136 Cal. Rptr. 787* (dictum)]. For a comparison with a court's award of punitive damages in a negligence action, see *§ 485.66*.

For a discussion of the procedures regarding orders and decisions of the Public Utilities Commission, see Ch. 480,

Public Utilities . For a form of complaint containing a count based on *Pub. Util. Code § 2106* for use by persons injured in an automobile-train collision, see *§ 485.151*.

Legal Topics:

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

§§ 485.69[Reserved]

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§ 485.80 Federal Statutes

Longshore and Harbor Workers' Compensation Act (LHWCA). *33 U.S.C.S. § 901 et seq.*

Liability of railroads engaged in interstate commerce for injury or death of employees (Federal Employers' Liability Act). *45 U.S.C.S. § 51 et seq.*

Working hours for employees of trains used in interstate commerce. *45 U.S.C.S. § 61 et seq.*

Definition of "railroad," as used in Safety Appliance Act and Boiler Inspection Act. *49 U.S.C.S. §§ 20102, 20103*

Rules to be adopted by Secretary of Transportation. *49 U.S.C.S. § 20103*

Safety Appliance Act. *49 U.S.C.S. § 20301 et seq.*

Safety appliances and equipment to be used by railroads in interstate commerce. *49 U.S.C.S. § 20701 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPersonal InjuriesMaritime Workers' ClaimsLongshore & Harbor Workers' Compensation ActTortsTransportation TortsRail TransportationFederal Employers' Liability ActTransportation LawRail TransportationMaintenance & Safety

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§ 485.81 State Statutes

Working hours for train workers. *Lab. Code §§ 600-607*

Employer's duty to furnish safe and healthful employment and place of employment. *Lab. Code §§ 6400-6413.5*

Safeguards on railroads. *Lab. Code §§ 6800-7000*

Acts with respect to railroads constituting crimes. *Pub. Util. Code §§ 7676-7681*

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawRail TransportationMaintenance & Safety

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§ 485.82 Federal Administrative Regulations

Regulations relating to railroad safety. 49 C.F.R. Parts 212-236

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§ 485.83 Decisions

[1] Boiler Inspection Act

Boiler Inspection Act (*49 U.S.C.S. § 20701 et seq.*) imposes absolute liability on employer without regard to negligence when violation of act results in injury to worker. *Lilly v. Grand Trunk W. R.R. Co. (1943) 317 U.S. 481, 485, 63 S. Ct. 347, 87 L. Ed. 411* .

Jury instructions on Boiler Inspection Act (BIA) (*49 U.S.C.S. § 20701 et seq.*) were reversible error for allowing jury to find violation merely because engineer's seat was not in proper condition, rather than requiring showing that seat defect created safety hazard; evidence of failure to furnish proper and safe seat and evidence ofinjury due to attempt to replace seat was sufficient evidence of causation on BIA claim for denial of motion for directed verdict; refusal to instruct jury that BIA violation was proximate or direct cause of injury was not prejudicial error. *Oglesby v. Southern Pac. Transp. Co. (9th Cir. 1993) 6 F.3d 603, 606-610*

Under former *45 U.S.C.S. § 23* [*now see 49 U.S.C.S. § 20701*], carrier by railroad is charged with absolute duty not to use any locomotive in improper or unsafe condition for use in service to which it was assigned. *Minehart v. Southern Pac. Co. (1955) 136 Cal. App. 2d 486, 488, 288 P.2d 999*

[2] Federal Employers' Liability Act (FELA)

[a] Generally

In most FELA (*45 U.S.C.S. §§ 51-60*) cases, finding of nonemployment as doing no more than depriving plaintiff of various procedural and proof advantages of FELA, since common-law negligence action against nonemployer is generally available in alternative. *Kelley v. Southern Pac. Co. (1974) 419 U.S. 318, 321 n.3, 95 S. Ct. 472, 42 L. Ed. 2d 498*

Railroad employee's claim for aggravation of emotional condition and anxiety resulting from discharge, when condition originated from railroad collision, as not cognizable under FELA but only under Railway Labor Act (*45 U.S.C.S. §§ 151-188*) and, hence, evidence relating to discharge as properly excluded in employee's action under *FELA. Lewy v. Southern Pac. Transp. Co. (9th Cir. 1986) 799 F.2d 1281, 1283-1286, 1289-1292*

FELA's reference to "negligence" in its main liability provision (*45 U.S.C.S. § 51*) as not to be read so restrictively as to exclude all intentional torts from coverage. *Lewy v. Southern Pac. Transp. Co. (9th Cir. 1986) 799 F.2d 1281, 1288*

[b] Appellate Review

On appeal of FELA case, Court of Appeals as examining (1) de novo any question relating to district court's subject matter jurisdiction under FELA or relating to statutory interpretation of that act; (2) trial court's rulings under *Federal Rules of Evidence, Rule 403,* which provides basis for excluding relevant evidence, for abuse of discretion; and (3) jury instructions as a whole, in context of entire case, to determine whether they were misleading or inadequate to guide jury's deliberations. *Lewy v. Southern Pac. Transp. Co. (9th Cir. 1986) 799 F.2d 1281, 1286-1287*

[c] Arising out of and in Course of Employment

Employee as general rule as deemed to be in course of employment while following only practicable route of immediate ingress and egress from employer's premises. *Sullivan v. Matt (1955) 130 Cal. App. 2d 134, 139, 278 P.2d 499*

Both federal and California courts as applying rule that if employer furnishes transportation under control of employer to employee, not as independent act of courtesy, but as actual incident appertaining to employment, and if injury is sustained during transportation, injury arises out of and in course of employment. *Northwestern Pac. R.R. Co. v. Industrial Accident Comm'n (1946) 73 Cal. App. 2d 367, 369, 166 P.2d 334*

[d] Assumption of Risk

Common law doctrine of assumption of risk as abolished in FELA actions by *45 U.S.C.S. § 54*. *Minehart v. Southern Pac. Co. (1955) 136 Cal. App. 2d 486, 489, 288 P.2d 999* ; *McGuigan v. Southern Pac. Co. (1952) 112 Cal. App. 2d 704, 714, 247 P.2d 415*

[e] Contributory Negligence

When there is some employer negligence proximately causing accident, violation of rule or instruction by employee as constituting only contributory negligence, to be evaluated on comparative negligence basis under FELA (*45 U.S.C.S. §§ 51-60*). *Cordova v. Atchison, Topeka & Santa Fe Ry. Co. (1961) 198 Cal. App. 2d 161, 170, 18 Cal. Rptr. 144*

Contributory negligence as no defense to liability but as considered in mitigation of damages on comparative negligence basis. *Cordova v. Atchison, Topeka & Santa Fe Ry. Co. (1961) 198 Cal. App. 2d 161, 170, 18 Cal. Rptr. 144*

[f] Damages

Although jury has task of determining present value of future damages, trial judge may recommend to jury one or more methods of calculating present value so long as judge does not in effect preempt jury's function; trial judge's instructions

to jury with regard to discount methods, provided they do not subject jury's estimate to rigid mathematical limitation, are entitled to substantial deference on appellate review. *Monessen Sw. Ry. Co. v. Morgan (1988) 486 U.S. 330, 341-342, 108 S. Ct. 1837, 100 L. Ed. 2d 349*

In FELA cases, award of future damages as to be based on present value. *St. Louis Sw. Ry. Co. v. Dickerson (1985) 470 U.S. 409, 412, 105 S. Ct. 1347, 84 L. Ed. 2d 303*

In action for injuries sustained by 50-year-old switchman as result of fall from top of freight car during switching operation, trier of fact as able to find that in view of worker's age and impaired performance and agility, he was reasonably certain to have suffered loss of future earnings as result of inability to continue work in future for as long as he might have done had he not sustained injury. *Robison v. Atchison, Topeka & Santa Fe Ry. Co. (1962) 211 Cal. App. 2d 280, 287-288, 27 Cal. Rptr. 260*

In wrongful death action under FELA for benefit of decedent's widow and children, plantiff as entitled to recover for loss of decedent's care, attention, instruction, training, advice, and guidance of children, and evidence of decedent's ability and interest in training and guiding children as proper and significant to show value of that loss. *Miller v. Southern Pac. Co. (1953) 117 Cal. App. 2d 492, 508, 256 P.2d 603*

[g] Employee Status

In FELA action, finding that plaintiff was agent of defendant employer as not tantamount to finding that plaintiff was defendant's employee and as not sufficientto meet "employed" requirement of FELA (*45 U.S.C.S. §§ 51-60*). *Kelley v. Southern Pac. Co. (1974) 419 U.S. 318, 325, 95 S. Ct. 472, 42 L. Ed. 2d 498*

Railroad employee working on train engaged in interstate commerce at time of death as engaged in interstate commerce within purview of *FELA. McGuigan v. Southern Pac. Co. (1952) 112 Cal. App. 2d 704, 714-716, 247 P.2d 415*

[h] Employer's Duties

Under FELA, railroad as having duty to use reasonable care in furnishing its employees with safe place to work. *Atchison, Topeka & Santa Fe Ry. Co. v. Buell (1987) 480 U.S. 557, 558, 107 S. Ct. 1410, 94 L. Ed. 2d 563* ; *Cordova v. Atchison, Topeka & Santa Fe Ry. Co. (1961) 198 Cal. App. 2d 161, 170, 18 Cal. Rptr. 144*

Degree of care required under FELA as that which person of ordinary prudence would have exercised under similar circumstances. *Aranda v. Southern Pac. Co. (1955) 44 Cal. 2d 543, 546, 282 P.2d 875 , aff'd, 351 U.S. 493, 76 S. Ct. 952, 100 L. Ed. 1357 (1956)*

Duty of employer to warn employee of any dangers connected with work of which employer knew, or which employer might have discovered with proper care, and of which employee might reasonably be expected to remain in ignorance. *Baez v. Southern Pac. Co. (1962) 210 Cal. App. 2d 714, 717, 26 Cal. Rptr. 899*

Under FELA, duty resting on railroad as same as at common law, namely, to use reasonable care in furnishing its employees with safe place to work and safe tools and appliances. *Cordova v. Atchison, Topeka & Santa Fe Ry. Co. (1961) 198 Cal. App. 2d 161, 170, 18 Cal. Rptr. 144*

Railroad company as owing substantially same duty with regard to cars of another company used on its road as it does to its own cars. *Lewis v. Union Pac. R.R. Co. (1954) 127 Cal. App. 2d 280, 283, 273 P.2d 706*

[i] Evidence

Evidence that plaintiff worker was receiving monthly disability pension payments under Railroad Retirement Act as inadmissible as matter of law, either in mitigation of damages or as bearing on question of malingering. *Morse v. Southern Pac. Transp. Co. (1976) 63 Cal. App. 3d 128, 133, 135, 133 Cal. Rptr. 577*

[j] Exclusivity of Remedy

FELA as providing uniform rule of liability throughout all the states and as superseding state law relating to liability of carriers by rail engaged in interstate or foreign commerce. *Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan (1926) 271 U.S. 472, 474, 46 S. Ct. 564, 70 L. Ed. 1041* ; *Davee v. Southern Pac. Co. (1962) 58 Cal. 2d 572, 576, 25 Cal. Rptr. 445, 375 P.2d 293]*

FELA as only remedy railroad employee, or in event of worker's death, worker's personal representative, has against employer for injury or death sustained in interstate commerce. *New York Cent. R.R. Co. v. Winfield (1917) 244 U.S. 147, 148-154, 37 S. Ct. 546, 61 L. Ed. 1045* ; *Wildman v. Burlington N. R.R. Co. (9th Cir. 1987) 825 F.2d 1392, 1395*

FELA preempted action under state law brought by injured railroad employee for fraudulent concealment. *Monarch v. Southern Pac. Transp. Co. (1999) 70 Cal. App. 4th 1197, 1211, 83 Cal. Rptr. 2d 247*

When FELA applies, federal remedies provided as exclusive. *McGuigan v. Southern Pac. Co. (1952) 112 Cal. App. 2d 704, 714, 247 P.2d 415*

[k] Forum Non Conveniens

Doctrine of forum non conveniens applies in action under *FELA. Price v. Atchison, Topeka & Santa Fe Ry. Co. (1954) 42 Cal. 2d 577, 579, 268 P.2d 457* ; *Great N. Ry. Co. v. Superior Court (1970) 12 Cal. App. 3d 105, 109-110, 90 Cal. Rptr. 461*

[l] Indemnity Action by Railroad

Railroad employer as allowed to seek indemnification from third party tortfeasor for amounts paid to injured employee under FELA when railroad's negligence was secondary to third party's primary negligence; cause of action for indemnity as accruing when payment to injured employee is made. *Southern Pac. Transp. Co. v. Ohbayashi Am. Corp. (1983) 147 Cal. App. 3d 233, 237-239, 195 Cal. Rptr. 63*

[m] Injury

Allegation by railroad employee that he suffered myocardial infraction resulting from improper and unsafe working conditions in violation of FELA and Hours of Service Act (*45 U.S.C.S. § 61-66*) as alleging sufficient injury to take claim from under mandatory provisions of Railway Labor Act (*45 U.S.C.S. §§ 151-163*) and to support action under *FELA. Welby v. Consolidated Rail Corp. (M.D. Pa. 1987) 671 F. Supp. 1015, 1016-1021*

[n] Interest

Prejudgment interest is not available in actions under FELA and was not properly awarded by state court even if it would be proper under state's rules of civil procedure. *Monessen Sw. Ry. Co. v. Morgan (1988) 486 U.S. 330, 335-336, 108 S. Ct. 1837, 100 L. Ed. 2d 349*

Award of interest in action arising under federal statute as governed by federal law and not by law of forum state. *Poleto v. Consolidated Rail Corp. (3d Cir. 1987) 826 F.2d 1270, 1274*

[o] Negligence of Employer

Negligence, as used in FELA, as act of employer in violation of its duty to use reasonable care in furnishing its employees with safe place to work and safe tools and appliances. *Cordova v. Atchison, Topeka & Santa Fe Ry. Co. (1961) 198 Cal. App. 2d 161, 170, 18 Cal. Rptr. 144*

Employee as not required to prove negligence of employer or of its servants was sole proximate cause of injury, since railroad is liable for injury to employee even though its negligence was only a contributing proximate cause. *Torres v. Southern Pac. Co. (1968) 260 Cal. App. 2d 757, 764, 67 Cal. Rptr. 428*

[p] Preemption Regarding Maritime Employment

Railroad employee who suffers injury governed by Longshore and Harbor Workers' Compensation Act (LHWCA) [*33 U.S.C.S. §§ 901-950*], regarding duties constituting "maritime employment," was limited to exclusive remedies of LHWCA, to exclusion of *FELA. Chesapeake & Ohio Ry. Co. v. Schwalb (1989) 493 U.S. 40, 110 S. Ct. 381, 107 L. Ed. 2d 278, 284-288*

[q] Res Ipsa Loquitur

Applicability of res ipsa loquitur doctrine in FELA cases. *Jesionowski v. Boston & Me. R.R. (1947) 329 U.S. 452, 456, 67 S. Ct. 401, 91 L. Ed. 416* ; *Beissel v. Pittsburgh & Lake Erie R.R. Co. (3d Cir. 1986) 801 F.2d 143, 149-150*

[r] Scope of Employment

Whether employee was injured in scope of employment as triable issue of fact when brakeman was injured while returning to work in private car of fellow employee who was on compulsory standby and return to work was in response to work call following layover period. *Temple v. Southern Pac. Transp. Co. (1980) 105 Cal. App. 3d 988, 994, 995, 164 Cal. Rptr. 780*

[s] Status of Particular Companies

[i] Pullman Company

Pullman Company, which operates sleeping cars for common carriers by railroad, as not itself a common carrier by railroad under FELA and its employees on pullman cars as not accorded relationship of employees of railroad to whose train Pullman cars are attached in absence of coownership of cars by railroad. *Robinson v. Baltimore & Ohio R.R. Co. (1915) 237 U.S. 84, 91-94, 35 S. Ct. 491, 59 L. Ed. 849*

When pullman car is jointly owned by railroad company and Pullman Company, employee of latter on Pullman car as also employee of railroad company. *Oliver v. Northern Pac. Ry. Co. (E.D. Wash. 1912) 196 F. 432, 435-436 , aff'd, 301 F.2d 305*

[ii] Railway Express Agency

Railway Express Agency, Inc., organized to carry express transportation business of numerous railroad companies as a common carrier but not a common carrier by railroad under provisions of *FELA or Safety Appliance Act. Jones v. New York Cent. R.R. Co. (6th Cir. 1950), 182 F.2d 326, 327-328* ; *Norfolk & W. Ry. Co. v. Hall (4th Cir. 1931) 49 F.2d 692, 696*

Where cars of Railway Express Agency, Inc. were attached to train of railroad company, employee of express agency as employee of railroad company for purposes of FELA where express agency had no supervision over its cars or work being done. *Norfolk & W Ry. Co. v. Hall (4th Cir. 1931) 49 F.2d 692, 696-697*

[iii] Refrigerator Car Companies

Company engaged in renting refrigerator cars to railroads or shippers for transportation of perishable commodities and servicing them as not a common carrier by railroad within *FELA. Gaulden v. Southern Pac. Co. (N.D. Cal. 1948) 78 F. Supp. 651, 654 , aff'd, 174 F.2d 1022 (9th Cir. 1949)* ; *Aguirre v. Southern Pac. Co. (1965) 232 Cal. App. 2d 636, 643-648, 43 Cal. Rptr. 73*

[t] Statute of Limitations

Railroad brakeman's action for injuries not filed within statutory period was barred when brakeman was fully aware of fact of injury when he fell and landed on his elbow, knew cause of injury, and failed timely to file because he was not aware of extent of injury due to poor medical advice from doctors who were not agents of railroad; when railroad may be estopped to plead statute. *Gregory v. Union Pac. R.R. Co. (D. Nev. 1987) 673 F. Supp. 1544, 1547*

In FELA action, "definite knowledge" that injury is work-related was not necessary to begin running of statute of limitations; duty to investigate is imposed once plaintiff believes or suspects that potential cause of injury is work-related. *Monarch v. Southern Pac. Transp. Co. (1999) 70 Cal. App. 4th 1197, 1203, 83 Cal. Rptr. 2d 247*

Provision under FELA as to time when action under act may be commenced as affecting substantive right and as prevailing over limitations provision of state. *Hosman v. Southern Pac. Co. (1938) 28 Cal. App. 2d 621, 635, 83 P.2d 88 , cert. denied, 306 U.S. 656, 59 S. Ct. 645, 83 L. Ed. 1054 (1939)*

[u] Summary Judgment

Summary judgment, in appropriate case, as available in action under *FELA. Aguirre v. Southern Pac. Co. (1965) 232 Cal. App. 2d 636, 639, 642, 43 Cal. Rptr. 73*

[v] Tortious Conduct of Fellow Employee

Railroad employer as liable under FELA to injured employee for injuries proximately caused by employer's negligent employment and retention in employment of person of violent and dangerous propensities. *Najera v. Southern Pac. Co. (1961) 191 Cal. App. 2d 634, 635, 13 Cal. Rptr. 146*

[3] Juries and Verdicts

One of Congress's primary concerns in adopting FELA as being that issues of whether there was employer fault and whether fault played any part in injury or death of employee should be decided by jury; jury's right to pass on questions

of fault and causation as liberally viewed and its power to engage in inferences as significantly broader than in common law negligence actions. *Pierce v. Southern Pac. Transp. Co. (9th Cir. 1987) 823 F.2d 1366, 1370*

Jury's special verdict awarding damages to worker's dependents under FELA as not internally inconsistent in having found that employer was not negligent with respect to accident causing employee's injuries but that employer was negligent in its post-accident treatment of worker with respect to making him fill out accident report, falsely accusing him of having been drinking prior to accident, and temporarily suspending him from his job, all of which caused worker to suffer severe mental anguish leading to his death two days later from heart attack broughton by stress-related aggravation of congenital heart disease of which worker was unaware. *Pierce v. Southern Pac. Transp. Co. (9th Cir. 1987) 823 F.2d 1366, 1368-1370*

[4] Jury Instructions

Propriety of jury instructions concerning measure of damages in action under FELA as issue of "substance" to be determined by federal law; under federal law, defendant as entitled to have jury instructed that when future payments or other pecuniary benefits are to be anticipated, verdict is to be made up on basis of present value only. *St. Louis Sw. Ry. Co. v. Dickerson (1985) 470 U.S. 409, 411-412, 105 S. Ct. 1347, 84 L. Ed. 2d 303*

In action based on Safety Appliance Act, plaintiff as entitled to peremptory instruction that to equip car with coupler which broke in course of switching operations is violation of Safety Appliance Act, rendering defendant railroad liable for injuries proximately resulting therefrom and that neither evidence of negligence nor evidence of diligence and care are to be considered on question of this liability. *O'Donnell v. Elgin, Joliet & E. Ry. Co. (1949) 338 U.S. 384, 394, 70 S. Ct. 200, 94 L. Ed. 187*

Trial court's instruction as proper under FELA in stating that "injury" may include sickness and that it is negligence for railroad to assign sick employee, of whose illness it knew or should have known, to tasks for which employee is, by reason of employee's condition, unfitted, and that employee may recover damages from railroad if assignment played any part in proximately worsening or aggravating worker's condition. *Waller v. Southern Pac. Co. (1967) 66 Cal. 2d 201, 214, 57 Cal. Rptr. 353, 424 P.2d 937*

Trial court's instruction to jury in FELA action as nonprejudicial in stating that employee is not protected by California's Workers' Compensation Act, that he receives no benefit under state law, and that his sole remedy for damages, when his injury is sustained in course of his employment in interstate transportation by rail, lies in action brought in court of law as distinguished from claim made against employer and adjudicated before Industrial Accident Commission [now Workers' Compensation Appeals Board]. *Bohme v. Southern Pac. Co. (1970) 8 Cal. App. 3d 291, 298-299, 87 Cal. Rptr. 286*

[5] Safety Appliance Act

Safety Appliance Act [*49 U.S.C.S. § 20301 et seq.*] as not creating federal cause of action for either employees or nonemployees seeking damages for injuries resulting from railroad's violation of act, although subsequently enacted FELA [*45 U.S.C.S. §§ 51-60*] provides cause of action for employees and embraces claims of employee based on violations of Safety Appliance Act in which employee is required to prove only statutory violation and that injury resulted in whole or in part from violation; worker's contributory negligence as no defense to employer. *Crane v. Cedar Rapids & Iowa City Ry. Co. (1969) 395 U.S. 164, 166, 89 S. Ct. 1706, 23 L. Ed. 2d 176*

Nonemployee injured by railroad's violation of *49 U.S.C.S. § 20302(a)(1)(A)* (failure to maintain cars with couplers coupling automatically by impact) as required to look to his or her remedy to common law action in tort, which is to say he or she must sue in state court in absence of diversity to implement state cause of action. *Crane v. Cedar Rapids &*

Iowa City Ry. Co. (1969) 395 U.S. 164, 166, 89 S. Ct. 1706, 23 L. Ed. 2d 176

State as permitted to make defense of contributory negligence available to railroad sued by nonemployee for damages for personal injuries caused by railroad's failure to maintain its freight cars with couplers coupling automatically by impact, as required by *49 U.S.C.S. § 20302(a)(1)(A)*. *Crane v. Cedar Rapids & Iowa City Ry. Co. (1969) 395 U.S. 164, 165-167, 89 S. Ct. 1706, 23 L. Ed. 2d 176*

Duty imposed on railroad engaged in interstate commerce by to equip cars with couplers coupling automatically by impact, as not based on negligence of carrier, but as absolute duty requiring performance, and normal efficiency of coupler in question at other times as immaterial. *Affolder v. New York, Chicago & St. Louis R.R. Co. (1950) 339 U.S. 96, 98, 70 S. Ct. 509, 94 L. Ed. 683*

Railroad sued under FELA for violation of Safety Appliance Act by failing to use cars equipped with safe couplers as not escaping liability for coupler's inadequacy by showing that too much was demanded of it, or that while coupler broke it had been properly manufactured, diligently inspected, and showed no visible defects, or merely by showing that railroad was not guilty of negligence. *O'Donnell v. Elgin, Joliet & E. Ry. Co. (1949) 338 U.S. 384, 393-394, 70 S. Ct. 200, 94 L. Ed. 187*

Failure of equipment to perform as required by Safety Appliance Act as in itself actionable wrong, in no way dependent on negligence, and for proximate results of which there is liability that cannot be escaped by proof of care or diligence. *O'Donnell v. Elgin, Joliet & E. Ry. Co. (1949) 338 U.S. 384, 390, 70 S. Ct. 200, 94 L. Ed. 187*

Duty imposed by Safety Appliance Act as not based on negligence on part of railroad but as absolute duty; equipment failure as constituting actionable wrong and negligence as not in issue. *Eckert v. Aliquippa & S. R.R. Co. (3d Cir. 1987) 828 F.2d 183, 185*

Railroad as strictly liable under FELA for injury caused by violation of *Safety Appliance Act. Illinois Cent. Gulf R.R. Co. v. International Paper Co. (5th Cir. 1987) 824 F.2d 403, 405*

Air brake provisions of Safety Appliance Act are designed to cover defects that prevent brakes from effectively controlling movement of train over main line tracks and are inapplicable to switching operations. *Erskine v. Consolidated Rail Corp. (6th Cir. 1987) 814 F.2d 266, 270-271*

Plaintiff worker as entitled to recover damages if violation of Safety Appliance Act was contributory proximate cause of plaintiff's injury. *Erskine v. Consolidated Rail Corp. (6th Cir. 1987) 814 F.2d 266, 269*

Safety Appliance Act [*see 49 U.S.C.S. § 20301 et seq.*] and pertinent regulations [*49 C.F.R. §§ 231.18, 231.25(c)*] requiring that uncoupled high/rail vehicle be equipped with secure sill steps as applying to motor van that had been converted for use on both highway and rails when injury occurred when van was in use on highway. *Beissel v. Pittsburgh & Lake Erie R.R. Co. (3d Cir. 1986) 801 F.2d 143, 145-148*

One of few defenses available to railroad in action involving application of Automatic Couplers Act arises out of failure of device to couple on impact because it had not been properly opened. *Finley v. Southern Pac. Co. (1960) 179 Cal. App. 2d 424, 429, 3 Cal. Rptr. 895*

Failure of equipment to perform as required by Safety Appliance Act is itself an actionable wrong, in no way dependent on negligence, and for proximate results of which there is liability that cannot be escaped by proof of care or diligence. *Finley v. Southern Pac. Co. (1960) 179 Cal. App. 2d 424, 428-429, 3 Cal. Rptr. 895*

Under Safety Appliance Act [*see 49 U.S.C.S. § 20301 et seq.*], interstate railroad company as having absolute duty to

equip and maintain efficient brakes on cars so as to securely hold them under ordinary circumstances. *Qualls v. Atchison, Topeka & Santa Fe Ry. Co. (1931) 112 Cal. App. 7, 12, 296 P. 645*

When plaintiff argued that injury was caused by presence of vertical handholds on railcar, directed verdict in favor of railroad upheld when implementing regulations of Safety Appliance Act did not prohibit use of vertical handholds in conjunction with horizontal handholds on type of railcar on which plaintiff was injured. *Woods v. Union Pacific Railroad Co. (2008) 162 Cal. App. 4th 571, 579-580, 75 Cal. Rptr. 3d 748*

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§ 485.84 Law Reviews

Comment, *DeTomaso v. Pan American World Airways, Inc.: Preemption of State Tort Claims By The Railway Labor Act, 19 Pac. L.J. 905 (1988)*

Note, *Tort Liability--The Safety Appliance Act and the Non-FELA Plaintiff. Crane v. Cedar Rapids & Iowa City Railway Co. (U.S. 1969), 58 Cal. L. Rev. 730 (1970)*

Note, *Acts of Fellow Servants: Employers' Liability Under the FELA, 35 S. Cal. L. Rev. 368 (1962)*

Notes and Recent Decisions, *Torts: Statutory Violation by the Employer and a FELA Law of Torts, 46 Cal. L. Rev. 847 (1958)*

Ennis, *The Federal Employers' Liability Act, 4 Hastings L.J. 23 (1952)*

Comment, *Master and Servant--Railroad's Liability to Servant--Federal Safety Appliance Act and Federal Employers' Liability Act, 23 S. Cal. L. Rev. 363 (1950)*

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Moore's Federal Practice, Ch. 7, Pleadings Allowed; Form of Motions, § 7.02; *Ch. 8, General Rules of Pleading, §§ 8.02, 8.03, 8.05, 8.07, 8.08*; *Ch. 9, Pleading Special Matters, § 9.08*; *Ch. 10, Form of Pleadings, §§ 10.02*, 10.06; *Ch. 11, Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions, § 11.02*; *Ch. 12, Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings, §§ 12.02 -12.03*; Ch. 17, *Parties Plaintiff and Defendant; Capacity*, §§ 17.14, 17.19 (Matthew Bender 3d ed.)

Personal Injury: Actions, Defenses, Damages, Vol. 13, *Federal Employers' Liability Act*, (Matthew Bender)

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§ 485.100 California Points and Authorities

For memoranda of points and authorities for use in actions involving carriers generally, see California Points and Authorities, Ch. 33, *Carriers* (Matthew Bender)

For memoranda of points and authorities for use in negligence actions generally, see California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender)

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§ 485.101 Forms of Discovery

For forms of interrogatories for use in actions involving carriers generally, see Bender's Forms of Discovery, Ch. 34, *Carriers* (Matthew Bender)

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§ 485.102 California Torts

For discussion of tort actions against railroads, see California Torts, Ch. 23 (Matthew Bender)

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§ 485.103 State Constitution

Regulation of public utilities generally. *Cal. Const. art. XII, §§ 1-9*

Classification of public utilities subject to control by legislature. *Cal. Const. art. XII, § 3*

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§ 485.104 State Statutes

[1] Animals

Railroad's liability for injury to animals on tracks caused by failure to maintain fences. *Pub. Util. Code §§ 7626, 7627*; *see Pub. Util. Code § 7631*

[2] Crossings

Regulation of public railroad crossings by Public Utilities Commission. *Pub. Util. Code §§ 1201, 1202*; *see Pub. Util. Code § 768*

Railroad's liability for failure to sound signal at crossing. *Pub. Util. Code § 7604*

Failure to sound signal at specified distance from crossing as misdemeanor. *Pub. Util. Code § 7678*

Duty of local authorities to erect crossing warning signs. *Veh. Code § 21362*

Duty of motorists in approaching railroad crossings. *Veh. Code §§ 22450-22452*

[3] Equipment

Derail sign requirements. *Pub. Util. Code §§ 7601-7603*

Steam locomotives as required to be equipped with automatic bellringers. *Pub. Util. Code § 7605*

Headlight requirements. *Pub. Util. Code § 7607*

[4] Liability

Qualified immunity of railroad for injuries to trespassers riding or jumping on or off moving train. *Civ. Code § 1714.7*

Carrier's duty of care towards passengers. *Civ. Code § 2100*

Criminal liability for gross negligence in placing obstruction on or near railroad track that results in damage or derailment. *Penal Code § 218.1*

Public utility's liability for injuries resulting from violation of constitution, state statute, or Public Utilities Commission order or decision. *Pub. Util. Code § 2106*

Railroad's liability for failure to sound signal at crossing. *Pub. Util. Code § 7604*

[5] Passengers

Requirement that paying passengers be accommodated. *Pub. Util. Code §§ 7653*

Immunity of railroad from liability for injury incurred by passenger while disobeying verbal or printed rules. *Pub. Util. Code § 7654*

Liability for refusal to give baggage check. *Pub. Util. Code § 7655*

Railroad's authority to eject passenger who refuses to pay fare. *Pub. Util. Code § 7656*

[6] Schools

Requirement for railroad warning signs on or adjacent to railroad property within 1,000 feet of schools where upgrading of railroad lines has resulted in specified increase in passenger train speeds. *Gov. Code § 14036.8*

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§ 485.105 Decisions

[1] Automobile Passengers

Negligence of automobile driver in collision with train as not properly imputed to plaintiffs who were guest passengers in automobile. *Peri v. Los Angeles Junction Ry. (1943) 22 Cal. 2d 111, 127, 137 P.2d 441*

Concurrent liability to passenger as imposed on railroad and automobile driver involved in collision if both defendants are at fault. *Deshotel v. Atchison, Topeka & Santa Fe Ry. Co. (1956) 144 Cal. App. 2d 224, 226, 231, 300 P.2d 910*

[2] Comparative Negligence

Failure in operation of automatic signal as not absolving driver from the duty to exercise ordinary care for his or her own protection, and to that end, looking and listening for approach of train. *Lucas v. Southern Pac. Co. (1971) 19 Cal. App. 3d 124, 142 n. 7, 96 Cal. Rptr. 356*

Driver's failure to stop when his or her vision is somewhat obstructed as not constituting contributory negligence as matter of law unless jury determines that reasonably prudent person would not have acted as plaintiff did. *Lucas v. Southern Pac. Co. (1971) 19 Cal. App. 3d 124, 139, 96 Cal. Rptr. 356*

Plaintiff in wrongful death action as entitled to presumption that decedent exercised due care when no one witnessed decedent being struck and killed by train. *Greene v. Atchison, Topeka & Santa Fe Ry. Co. (1953) 120 Cal. App. 2d 135, 139, 260 P.2d 834*

[3] Crossings

Duty to safely maintain crossing over tracks where railroad occupies portion of highway as resting not only with

corporation that originally constructed tracks but with whatever railroad company later exercises franchise. *County of Alameda v. Southern Pac. Co. (1961) 55 Cal. 2d 479, 484, 11 Cal. Rptr. 751, 360 P.2d 327*

Railroad as under duty to use reasonable care in maintaining wigwag signal so that appearance of safety does not trap person relying on signal for their protection. *Startup v. Pacific Elec. Ry. Co. (1947) 29 Cal. 2d 866, 869, 180 P.2d 896*

Operator of railroad as required to exercise care commensurate with circumstances when conditions existing at crossing create unusual hazard or danger. *Peri v. Los Angeles Junction Ry. (1943) 22 Cal. 2d 111, 120, 123, 137 P.2d 441*

[4] Fences

Nothing in *Pub. Util. Code § 7626* as limiting railroad's responsibility for injuries to small child when jury determines that ordinary care requires railroad to fence right-of-way and that absence of fence proximately caused injuries to small child. *Staggs v. Atchison, Topeka & Santa Fe Ry. Co. (1955) 135 Cal. App. 2d 492, 505, 287 P.2d 817*

[5] Passengers

Quantum of care required of plaintiff who is on railroad tracks with intention of becoming passenger as less than that required of nonpassengers; intending passenger as entitled to assume railroad company will regulate movement of its trains so that he or she can cross in safety. *Ferran v. Southern Pac. Co. (1935) 3 Cal. 2d 350, 355, 44 P.2d 533*

When complaint alleges breach of carrier's duty to carry passenger safely and consequent injury as gravamen of action, action arises out of tort and not contract and is subject to one-year statute of limitations. *Basler v. Sacramento Elec., Gas & Ry. Co. (1913) 166 Cal. 33, 36, 134 P. 993*

[6] Presumption of Negligence

[a] Presumption Is Rebuttable

Presumption of negligence arising from violation of statute as rebuttable by evidence that defendant did what might reasonably be expected of person of ordinary prudence acting under similar circumstances who desired to comply with statute. *Alarid v. Vanier (1958) 50 Cal. 2d 617, 621-622, 327 P.2d 897*

[b] Violation of Company Rule

Company-imposed maximum speed as admission on part of defendant that any higher speed would be improper at locality; whether company maximum was too high under circumstances, whether obstructions at crossing demanded substantial reduction below maximum, and whether accident would not have occurred if train had traveled at lower speed as questions for jury. *Herrera v. Southern Pac. Co. (1957) 155 Cal. App. 2d 781, 788, 318 P.2d 784*

[c] Violation of PUC Regulation or Order

PUC regulation as only constituting minimum measure of care required by railroad. *Hogue v. Southern Pac. Co. (1969) 1 Cal. 3d 253, 258, 81 Cal. Rptr. 765, 460 P.2d 965*

[d] Violation of Statute or Ordinance

Although plaintiff's violation of traffic law is negligence per se, whether violation was proximate cause of collision as question of fact for jury. *Toschi v. Christian (1944) 24 Cal. 2d 354, 362, 149 P.2d 848*

Former Civ. Code § 5486, which only required that bell or whistle be sounded until engine crossed highway, as minimum of care required; jury as justified in concluding that railroad was negligent for failing to sound bell or whistle continuously while crossing. *Peri v. Los Angeles Junction Ry. (1943) 22 Cal. 2d 111, 125-126, 137 P.2d 441*

While no rate of speed is negligence per se in absence of statute or ordinance, railroad company as having duty to run its train over dangerous crossings at rate of speed proportionate to danger. *Young v. Pacific Elec. Ry. Co. (1929) 208 Cal. 568, 572, 283 P. 61*

[7] Trespassers

Civ. Code § 1714.7 barred action for personal injuries brought against railroad by person who surreptitiously climbed onto railroad car that momentarily stopped while slowing to switch tracks. *Rivera v. Southern Pac. Transp. Co. (1990) 217 Cal. App. 3d 294, 300-301, 266 Cal. Rptr. 11*

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§ 485.106 Attorney General Opinions

Pub. Util. Code § 7604 as preempting city from adopting ordinance that prohibits sounding of train whistles at city street crossings. *69 Ops. Cal. Att'y Gen. 203 (1986)*

County Board of Supervisors as authorized to regulate by ordinance the blocking of crossings by railroad trains and cars, when Public Utilities Commission has not chosen to act. *18 Ops. Cal. Att'y Gen. 125 (1951)*

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§ 485.107 Text References

Witkin, Summary of California Law, Vol. 6, *Torts*, §§ 907, 922-929 (10th ed. 2005)

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Volume 42: Public Utilities thru Railroads-Chs. 480-485
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PART III. RESEARCH GUIDE
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42-485 California Forms of Pleading and Practice--Annotated §§ 485.108-485.119

[Reserved]

§§ 485.108[Reserved]

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Volume 42: Public Utilities thru Railroads-Chs. 480-485
Chapter 485 RAILROADS
PART IV. FORMS
A. Injuries To Employees

42-485 California Forms of Pleading and Practice--Annotated § 485.120

§ 485.120 Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Complaint [Fed. R. Civ. P., Rules 7-11] Filed in United States District Court [45 U.S.C.S. § 56] for Damages for Personal Injuries Based on Negligence [45 U.S.C.S. § 51]--Official Fed. R. Civ. P. Form No. 14

[1] FORM Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Complaint [Fed. R. Civ. P., Rules 7-11] Filed in United States District Court [45 U.S.C.S. § 56] for Damages for Personal Injuries Based on Negligence [45 U.S.C.S. § 51]--Official Fed. R. Civ. P. Form No. 14

IN THE UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
[_____ DIVISION]

Civil Action File No. _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	
_____ [*name*],	)	COMPLAINT FOR DAMAGES
a corporation,	)	
Defendant.	)	
	)	
	)	

1. This action arises under the Federal Employers' Liability Act, *United States Code, Title 45, Sections 51*-60.

2. During all the times herein mentioned defendant owned and operated in interstate commerce a railroad that passed through a tunnel located at _____, and known as Tunnel No. _____.

3. On or about _____ [*date*], defendant was repairing and enlarging the tunnel in order to protect interstate trains and passengers and freight from injury and in order to make the tunnel more conveniently usable for interstate commerce.

4. In the course of thus repairing and enlarging the tunnel on that day, defendant employed plaintiff as one of its workers and negligently put plaintiff to work in a portion of the tunnel that defendant had left unprotected and unsupported.

5. By reason of defendant's negligence in thus putting plaintiff to work in that portion of the tunnel, plaintiff was, while so working pursuant to defendant's orders, struck and crushed by a rock, which fell from the unsupported portion of the tunnel, and was _____ [*describe plaintiff's injuries*].

6. Prior to these injuries, plaintiff was a strong, able-bodied person, capable of earning and actually earning $ _____ per day. By these injuries plaintiff has been made incapable of any gainful activity, has suffered great physical and mental pain, and has incurred expense in the amount of $ _____ for medicine, medical attendance, and hospitalization.

Wherefore plaintiff demands judgment against defendant in the sum of $ _____ and costs.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[2] Use of Form

This form of complaint is for use by an injured employee of an interstate railroad to sue the railroad under the Federal Employers' Liability Act (*45 U.S.C.S. §§ 51-60*) in a United States District Court for damages for injuries sustained in the course and scope of the employment as a result of the railroad's negligence. For forms of complaint for use in a California state court, see *§§ 485.121* and *485.122*.

This form is adapted from Fed. R. Civ. P., Appendix of Forms, Form 14. It is a verbatim reproduction of that form, except for several nonsubstantive format changes and a modification of Paragraph 1, which in this form specifies FELA as the basis for jurisdiction [*see 28 U.S.C.S. § 1331* (federal question jurisdiction)]. Official Fed. R. Civ. P. Form 14 is sufficient under the Fed. R. Civ. P. and is intended to indicate the simplicity and brevity of statement that these rules contemplate [*see Fed. R. Civ. P., Rule 84*].

With appropriate modifications, this form may also be used when the action is by a deceased worker's personal representative [*see 45 U.S.C.S. §§ 51, 59*; *Fed. R. Civ. P., Rules 9(a), 17*]. For discussion concerning modification of this form for use when the action is based on the violation of a safety provision, as distinguished from negligence, see *§ 485.120[7]*.

For discussion relating to venue, see *§ 485.39*.

[3] Content and Format of Complaint in Federal Court

A complaint in federal court must contain the following [*Fed. R. Civ. P., Rule 8(a)*]:

- A short and plain statement of the grounds on which the court'sjurisdiction depends.
- A short and plain statement of the claim showing that the plaintiff is entitled to relief.
- A demand for judgment for the relief the plaintiff seeks.

For the required caption and format of a pleading, see *Fed. R. Civ. P., Rules 8(e)* and *10*.

[4] Allegations

This complaint contains the following:

- A jurisdictional allegation--that is, a statement of the court's jurisdiction over the subject matter of the action (Paragraph 1) [*see 28 U.S.C.S. § 1331* (federal question jurisdiction); *45 U.S.C.S. § 56* (concurrent federal jurisdiction in FELA actions); *see also § 485.37*];
- Defendant's ownership and operation of a railroad engaged in interstate commerce (Paragraph 2) [*see 45 U.S.C.S. § 51*];
- The location where the accident subsequently occurred (Paragraph 2);
- Defendant's activity at the place where the accident subsequently occurred and how it affected interstate commerce (Paragraph 3);
- Plaintiff's employment by defendant to do work affecting that commerce, giving rise to the employer's duties to its employees imposed by federal statutes, rules, and regulations (Paragraph 4) [*see 45 U.S.C.S. § 51*];
- Defendant's creation of an unsafe work place and its negligent assignment of plaintiff to work there, that is, defendant's breach of duty (Paragraph 4);
- The accidental event and plaintiff's involvement in it (Paragraph 5);
- A description of plaintiff's injuries, that is, plaintiff's detriment (Paragraph 5); and
- The damages sustained by plaintiff as a result of his or her injuries (Paragraph 6).

[5] Prayer

This complaint also contains a demand for judgment (prayer) in a specified dollar amount plus costs [*see Fed. R. Civ. P., Rule 8(a)*].

[6] Signature and Verification

Every pleading of a party represented by an attorney must be signed by at least one attorney of record in his or her own name, and must state the attorney's address. If unrepresented, the party must sign the pleading and state his or her

address [*Fed. R. Civ. P., Rule 11(a)*].

Except when otherwise specifically provided by rule or statute, pleadings in federal courts need not be verified [*Fed. R. Civ. P., Rule 11(a)*]. There is no rule or statute requiring that a complaint for damages under the FELA be verified.

[7] Violation of Safety Acts

If the accident was caused by the employer's violation of the Safety Appliance Act [*49 U.S.C.S. § 20301 et seq.*; *see § 485.45[1]*]or the Boiler Inspection Act [*49 U.S.C.S. § 20701 et seq.*; *see § 485.45[2]*], counsel should add allegations to that effect and omit the allegations of negligence. The liability of the employer in such case is absolute and negligence is not an issue [*see Carter v. Atlanta & St. Andrews Bay Ry. Co. (1949) 338 U.S. 430, 433-434, 70 S. Ct. 226, 94 L. Ed. 236 (Safety Appliance Act)* ; *Lilly v. Grand Trunk W. R.R. Co. (1943) 317 U.S. 481, 485, 63 S. Ct. 347, 87 L. Ed. 411* (Boiler Inspection Act); *see also §§ 485.45[4], 485.121*].

Even if the action is based on the railroad's negligence, however, if there is a possibility that the accident may have been the result of the employer's violation of a safety provision in either of the above acts, counsel should include allegations to that effect. The importance of this is that while the amount of any damages awarded the employee for the employer's negligence is diminished by the amount of the employee's contributory negligence, neither negligence nor contributory negligence is in issue when the basis of the claim is a violation of a safety act or adopted regulation or rule, and there is thus no offset against the damages awarded [*see* 42 U.S.C.S. § 54a; *45 U.S.C.S. § 53*; *see also § 485.45[4]*].

[8] Pleading Separate Theories

While it is not legally necessary to allege violation of the safety acts separately from the allegations of negligence under the FELA when both theories of liability are alleged in the same complaint, the better practice would be to set them forth in a separate count in order to keep the issues of negligence and absolute liability separate [*see § 485.121*]. Thus, it has been said that in an action under the FELA in which liability is also predicated on a violation by the employer of the Safety Appliance Act[(*49 U.S.C.S. § 20301 et seq.*], pleadings will serve the purpose of sharpening and limiting the issues only if the claims based on negligence are set forth separately from those based on violation of the appliance acts [*O'Donnell v. Elgin, Joliet & E. Ry. Co. (1949) 338 U.S. 384, 392, 70 S. Ct. 200, 94 L. Ed. 187]* .

Nevertheless, even though violation of the Safety Appliance or Boiler Inspection Act may provide the basis of the claim, it is the FELA that provides the remedy [*Eckert v. Aliquippa & S. R. Co. (3d Cir. 1987) 828 F.2d 183, 187* ; *Beissel v. Pittsburgh & Lake Erie R.R. Co. (3d Cir. 1986) 801 F.2d 143, 145]* .

[9] Joinder of Parties and Actions

The FELA makes no mention of parties other than the railroad and its employees or the employees' personal representatives. However, the Federal Rules of Civil Procedure authorize the joinder of parties as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action [*Fed. R. Civ. P., Rule 20*]. The rules further provide that misjoinder is not a ground for dismissal, and that parties may be dropped or added by order of the court at any stage of the action [*Fed. R. Civ. P., Rule 21*]. The rules also authorize the filing of counterclaims and cross claims among the original parties or to bring in new parties [*Fed. R. Civ. P., Rule 13*]. Under these rules, the joinder of parties and claims in an FELA action is authorized [*see Blair v. Cleveland Twist Drill Co. (7th Cir. 1952) 197 F.2d 842* (action by railroad employee against railroad under FELA and third-party supplier of defective tool for negligence in which railroad cross claimed against tool company)].

Nevertheless, it is only the employee's claim against the employer that is determined under the FELA, and any action

the injured employee may have against a third-party tortfeasor arising out of the same occurrence that gave rise to the FELA claim and whatever claim the railroad may have against a third-party tortfeasor for contribution or indemnity, or vice versa, depends on state law. If such actions are permitted under the law of the state in which the accident occurred, such claims may be joined with the FELA claim in the same lawsuit or filed as a separate action [*see Alabama Great S. R.R. Co. v. Chicago & N. W. Ry. Co. (8th Cir. 1974) 493 F.2d 979, 983* ; *Missouri Pac. R.R. Co. v. Star City Gravel Co. (E.D. Ark. 1978) 452 F. Supp. 480, 482 , aff'd, 592 F.2d 455 (8th Cir. 1979)* ; *Brenham v. Southern Pac. Co. (W.D. La. 1971) 328 F. Supp. 119, 123 , aff'd, 469 F.2d 1095 (5th Cir. 1972)* ; *see generally* Personal Injury: Actions, Defenses, Damages, Vol. 13, *Federal Employers' Liability Act*].

[10] Federal Statutes

Jurisdiction of federal district courts over civil actions arising under federal law. *28 U.S.C.S. § 1331*

Change of venue from one federal district court to another. *28 U.S.C.S. § 1404*

Federal Employers' Liability Act. *45 U.S.C.S. §§ 51-60*

Federal court venue of FELA action. *45 U.S.C.S. § 56*

Safety Appliance Act. *49 U.S.C.S. § 20301 et seq.*

Boiler Inspection Act. *49 U.S.C.S. § 20701 et seq.*

[11] Federal Rules of Civil Procedure

Form and content of complaints. *Fed. R. Civ. P., Rules 8-11*

[12] Text References

Moore's Federal Practice, Ch. 8, *General Rules of Pleading* ; Ch. 10, *Form of Pleadings* ; Ch. 11, *Signing of Pleadings, Motions, and Other Papers Representations to Court; Sanctions , § 11.02*; Ch. 17, *Parties Plaintiff and Defendant* , §§ *17.20- 17.28* (Matthew Bender 3d ed.)

13 Personal Injury: Actions, Defenses, Damages, Vol. 13, *Federal Employers' Liability Act (Matthew Bender)*

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Chapter 485 RAILROADS
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A. Injuries To Employees

42-485 California Forms of Pleading and Practice--Annotated § 485.121

§ 485.121 Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Complaint Filed in California State Court [45 U.S.C.S. § 56]--For Damages for Personal Injuries Based on Negligence [45 U.S.C.S. § 51]

[1] FORM Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Complaint Filed in California State Court [45 U.S.C.S. § 56]--For Damages for Personal Injuries Based on Negligence or Breach of Statutory Duty [45 U.S.C.S. § 51]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Federal Employers' Liability Act [*45 U.S.C.S. § 51*])
a corporation,	)	[LIMITED CIVIL CASE]
Defendant.	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	

_____

Plaintiff alleges:

FIRST COUNT
(Negligence)

1. This action arises, and is brought, under and pursuant to the provisions of the Federal Employers' Liability Act, *United States Code, Title 45, Sections 51*-60.

2. Defendant is, and at all times herein mentioned was, a corporation organized and existing under the laws of _____, authorized to transact, and transacting, business in the State of California, and having its principal place of business in this State in _____ County.

3. Defendant is, and at all times herein mentioned was, a common carrier by railroad engaged in interstate commerce, doing business as such in California and other states.

4. At all times herein mentioned, defendant _____ [*specify place where accident occurred, e.g.,* owned and operated a switchyard (hereinafter "the switchyard"), consisting of numerous tracks, at _____ California through which interstate trains moved and where interstate trains were put together].

5. At all times herein mentioned, plaintiff was employed by defendant as a _____ [*e.g.,* switchman at the switchyard], and at the time of the accident hereinafter alleged was engaged in work that _____ [was in furtherance of *or* closely and substantially affected] interstate commerce.

6. On or about _____ [*date of accident*] at about _____ [*time*], plaintiff was working _____ [*e.g.,* at the switchyard on a cut of cars in connection with a switching operation] in the regular course and scope of plaintiff's duties.

7. At that time and place, defendant, in breach of its duty to provide plaintiff with a reasonably safe place to work, so negligently _____ [*specify, e.g.,* managed, controlled, maintained, and operated a railroad locomotive and certain railroad cars as to cause the locomotive and cars to strike the cut of cars on which plaintiff was working].

8. As a proximate result of defendant's negligence and of _____ [*specify, e.g.,* the locomotive and cars hitting the cut of cars on which plaintiff was working, plaintiff was thrown to the ground] and sustained the injuries hereinafter alleged.

9. As a proximate result of defendant's negligence and of plaintiff's _____ [*e.g.,* being thrown to the ground], plaintiff sustained _____ [*describe injuries, e.g.,* severe physical injuries (hereinafter "the injuries"), both internal and external, consisting in part of abrasions, contusions, lacerations, a dislocated shoulder, a fractured right arm and leg, a fractured pelvis, and internal hemorrhaging, and has endured severe pain and suffering], all to plaintiff's general damage.

10. As a proximate result of defendant's negligence and plaintiff's injuries, plaintiff _____ [*specify any medical treatment received, e.g.,* was hospitalized for a period of _____ (*number*) _____ (days *or* weeks *or* months) (, and continues to be hospitalized,) and was (and continues to be) required to employ physicians and surgeons to treat the injuries, as a result of which plaintiff has incurred (and is incurring) hospital, doctor, and related medical expenses, and will be compelled to incur further hospital, doctor, and medical expenses for the continued treatment of the injuries], all to plaintiff's special damage.

11. At the time of the accident, plaintiff was _____ [*specify, e.g.,* a well and able-bodied person]. As a proximate result of the injuries herein described, plaintiff _____ [was unable to work for a period of _____ (*number*) _____ (days *or* weeks *or* months) *or* has been unable to work since the date of the accident] and has lost wages as a result thereof[; plaintiff is informed and believes and thereon alleges that plaintiff has sustained a permanent loss of earning capacity], all to plaintiff's further damage.

SECOND COUNT
(Violation of Safety Statute)

12. Plaintiff repeats and realleges Paragraphs 1 through 6 and Paragraph 11 of his/her First Count.

13. At all times herein mentioned there was in full force and effect _____ [*specify statute breached, e.g.,* the statute commonly known as United States Code Service, Title 49, Section 20302, which provides as follows:

(A) railroad carrier may use or allow to be used on any of its railroad lines ... a vehicle only if it is equipped with ... couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of [workers] going between the ends of the vehicles].

14. At the time and place mentioned in Paragraph 6, the _____ [railroad cars involved in the switching operation were not equipped with couplers coupling automatically on impact and did not couple on impact].

15. As a proximate result of defendant's violation of _____ [*specify statute breached, e.g.,* United States Code Service, Title 49, Section 20302] _____ [the locomotive and cars struck the cut of cars on which plaintiff was working without coupling, causing plaintiff to be, and plaintiff was, thrown to the ground], suffering the injuries hereinafter alleged.

16. As a proximate result of defendant's violation of _____ [*specify statute breached, e.g.,* United States Code Service, Title 49, Section 20302] and of plaintiff's _____ [*e.g.,* being thrown to the ground], plaintiff sustained _____ [*describe injuries, e.g.,* severe physical injuries (hereinafter " 'the injuries' "), both internal and external, consisting in part of abrasions, contusions, lacerations, a dislocated shoulder, a fractured right arm and leg, a fractured pelvis, and internal hemorrhaging, and has endured severe pain and suffering], all to plaintiff's general damage.

17. As a proximate result of defendant's violation of _____ [*specify statute breached, e.g.,* United States Code Service, Title 49, Section 20302] and plaintiff's injuries, plaintiff _____ [*specify any medical treatment, e.g.,* was hospitalized for a period of _____ (*number*) _____ (days *or* weeks *or* months) (, and continues to be hospitalized,) and was (and continues to be) required to employ physicians and surgeons to treat the injuries, as a result of which plaintiff has incurred (and is incurring) hospital, doctor, and related medical expenses, and will be compelled to incur further hospital, doctor, and medical expenses for the continued treatment of the injuries], all to plaintiff's special damage.

WHEREFORE, plaintiff prays judgment against defendant for:

1. General damages according to proof.

2. Special damages for hospital, physician and surgeon, and related medical expenses according to proof.

3. Loss of income and earnings and impairment of earning capacity according to proof.

4. Costs of suit herein incurred.

5. For such other and further relief as the Court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of complaint is for use by an injured employee of an interstate railroad to sue the railroad under the Federal Employers' Liability Act (*45 U.S.C.S. §§ 51-60*) in a California state court for damages for injuries sustained in the course and scope of the employment as a result of the railroad's negligence. With appropriate modifications, this form may also be used when the action is brought by a deceased worker's personal representative [*see 45 U.S.C.S. §§ 51, 59*; *see also § 485.122*].

The jurisdiction of the federal district courts and the California state courts over FELA actions is concurrent [*45 U.S.C.S. § 56*]. For a form of complaint for use in a federal district court, see *§ 485.120*.

[3] Allegations

This complaint alleges the following:

- The jurisdiction of the court to entertain the federally created action (Paragraphs 1, 3, 4, 5, 12) [*see 45 U.S.C.S. §§ 51, 56*];

- Defendant's corporate capacity and principal place of business (Paragraph 2) [*see Code Civ. Proc. § 395.5*];

- That the activity involved was interstate commerce (Paragraphs 3, 12) [*see 45 U.S.C.S. § 51*];

- Plaintiff's employment by defendant, thus giving rise to the employer's duty to provide plaintiff with a reasonably safe workplace and duty to comply with the federal safety acts (Paragraphs 5, 12, 13) [*see 45 U.S.C.S. § 51*; *Civ. Code § 3333*];

- The plaintiff's presence at the time of the accident at the work place to carry out his or her duties (Paragraphs 5, 6, 12);

- Defendant's breach of duty (Paragraphs 7, 14) [*see 45 U.S.C.S. § 51*; *Civ. Code § 3333*];

- The breach as the proximate cause of the accident (Paragraphs 8, 15) [*see Civ. Code § 3333*];

- The detriment, or harm, sustained by plaintiff (Paragraphs 9, 10, 11, 12, 16, 17) [*see Civ. Code §§ 3282, 3333*]; and

- Plaintiff's damages (Paragraphs 9, 10, 11, 12, 16, 17) [*see Civ. Code §§ 3281, 3333*].

The complaint alleges the five essential elements of every cause of action for tort damages as identified in *Civ. Code § 3333*: (1) duty or obligation, (2) breach of duty, (3) proximate cause, (4) detriment (harm or injury), and (5) damages (money claimed) [*see Civ. Code §§ 3281* (detriment), *3282* (money claimed)].

[4] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see *Ch. 177, Damages, § 177.40* et seq., and Ch. 205, *Defaults and Default Judgments* .

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 72055*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

The proper county for trial of an action for personal injuries or wrongful death is the county in which the injury or injury causing death occurred or the county in which the defendant's principal office or place of business is situated [*see Code Civ. Proc. §§ 395(a), (c), 395.2, 395.5*]. This complaint includes an allegation laying venue in the county of the defendant's principal place of business (Paragraph 2) if that county is other than the one in which the accident occurred (Paragraph 4) and counsel wishes to sue in the county of the defendant's principal office or place of business, rather than

in the county where the accident occurred.

[7] Inconvenient Forum

Although the form of complaint alleges that the accident giving rise to the cause of action occurred in California, a cause of action for damages for personal injuries is transitory and may be maintained in a California state court even though the accident happened elsewhere. However, a complaint based on an out-of-state accident may be subject to dismissal on the ground of inconvenient forum [*see § 485.40*].

[8] Alternative Theories of Recovery

The complaint sets forth two counts--that is, two separate theories of liability. The first theory of liability is based on the employer's negligent failure to provide the employee with a reasonably safe place to work [*see 45 U.S.C.S. § 51*]. The second theory of recovery is absolute liability imposed on a railroad if the injury is caused by the employer's failure to comply with a federal safety statute [*see, e.g., 49 U.S.C.S. § 20302*], or to comply with a rule or regulation adoptedpursuant to that statute. If recovery is obtained on the first theory (negligence),then the damages are diminished by the jury in proportion to the amount of negligence attributable to the employee [*45 U.S.C.S. § 53*]. If recovery is obtained on the second theory (violation of a safety statute or rule), neither the employer's negligence nor the employee's contributory negligence is an issue, the employer's liability is absolute, and there is thus no setoff because of any contributory negligence on the part of the employee [*see § 485.45[4]*]. Although the statute alleged to have been violated is in the Safety Appliance Act and not in the Federal Employers' Liability Act (FELA), the Safety Appliance Act provides the basis of the claim, but the FELA provides the remedy [*Eckert v. Aliquippa & S. R. Co. (3d Cir. 1987) 828 F.2d 183, 187* ; *Beissel v. Pittsburgh & Lake Erie R.R. Co. (3d Cir. 1986) 801 F.2d 143, 145]* .

[9] Compared With Federal Complaint

The rules of pleading in federal court are generally different from the rules of pleading in California state courts, because the Federal Rules of Civil Procedure (see *Fed. R. Civ. P. Rules 8-11*) recognize a form of "notice pleading," usually designed simply to put a defendant on notice of the nature of the claim, whereas California requires the pleading of facts pursuant to its system of "code pleading" [*Bach v. County of Butte (1983) 147 Cal. App. 3d 554, 561, 195 Cal. Rptr. 268* ; *see Code Civ. Proc. § 425.10(a)*].

The general assumption is that California pleading law is applied to test the adequacy of a complaint brought under the FELA in a California state court. However, this assumption may not be entirely correct [*Bach v. County of Butte (1983) 147 Cal. App. 3d 554, 561, 195 Cal. Rptr. 268]* . For example, a state court may not, under its own rules of practice and procedure, properly dismiss a complaint under the FELA on the ground that it fails to state a cause of action under state law when the same complaint would be held sufficient under the federal rules of pleading were it filed in a federal court [*see Brown v. Western Ry. of Ala. (1949) 338 U.S. 294, 295-297, 70 S. Ct. 105, 94 L. Ed. 100]* .

[10] Cross References

For a related form, see *§ 485.120*

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages generally, see *Ch. 177, Damages, § 177.40* et seq.

For discussion and forms relating to removal of an action from state to federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For discussion and alternative forms of complaints for damages for negligence, see Ch. 380, *Negligence*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions*

[11] Federal Statutes

Federal Employers' Liability Act. *45 U.S.C.S. §§ 51-60*

Safety Appliance Act. *49 U.S.C.S. § 20301 et seq.*

Boiler Inspection Act. *49 U.S.C.S. § 20701 et seq.*

[12] Decisions

Violation of Safety Appliance Act (*49 U.S.C.S. § 20301 et seq.*) or Boiler Inspection Act (*49 U.S.C.S. § 20701 et seq.*) as imposing absolute liability on railroads for injury or death of employee caused by railroad's failure to comply with act. *Carter v. Atlanta & St. Andrews Bay Ry. Co. (1949) 338 U.S. 430, 433-434, 70 S. Ct. 226, 94 L. Ed. 236 (Safety Appliance Act)* ; *Lilly v. Grand Trunk W. R.R. Co. (1943) 317 U.S. 481, 485, 63 S. Ct. 347, 87 L. Ed. 411* (Boiler Inspection Act)

Jury instructions on Boiler Inspection Act (BIA) were reversible error because they allowed jury to find violation merely because engineer's seat was not in proper condition, rather than requiring showing that seat defect created safety hazard; evidence of failure to furnish proper and safe seat and evidence of injury due to attempt to replace seat was sufficient evidence of causation on BIA claim for denial of motion for directed verdict; refusal to instruct jury that BIA violation was proximate or direct cause of injury was not prejudicial error. *Oglesby v. Southern Pac. Transp. Co. (9th Cir. 1993) 6 F.3d 603, 606-610*

Liability as imposed against railroad when violation was of rule adopted by Secretary of Transportation pursuant to statute. *Urie v. Thompson (1949) 337 U.S. 163, 191, 69 S. Ct. 1018, 93 L. Ed. 1282* (rule adopted under *Boiler Inspection Act); Atchison, Topeka & Santa Fe Ry. Co. v. Scarlett (1937) 300 U.S. 471, 474, 57 S. Ct. 541, 81 L. Ed. 748* (rule adopted under *Safety Appliance Act); Eckert v. Aliquippa & S. R.R. Co. (3d Cir. 1987) 828 F.2d 183, 186-187* (rule regulating switch positions adopted under *45 U.S.C.S. § 431*)

Liability as imposed whether or not injury involved was of type particular act orstatute was designed to prevent. *Davis v. Wolfe (1923) 263 U.S. 239, 243, 44 S. Ct. 64, 68 L. Ed. 284* (violation of Safety Appliance Act); *see also Kernan v. American Dredging Co. (1958) 355 U.S. 426, 432-433, 438, 78 S. Ct. 394, 2 L. Ed. 2d 382* (action on behalf of dependents of deceased seaman under Jones Act, which incorporates FELA)

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42-485 California Forms of Pleading and Practice--Annotated § 485.122

§ 485.122 Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Complaint Filed in California State Court [45 U.S.C.S. § 56]--For Damages for Wrongful Death Based on Negligence [45 U.S.C.S. § 51]--Death Caused by Exacerbation of Existing Illness or Condition

[1] FORM Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Complaint Filed in California State Court [45 U.S.C.S. § 56]--For Damages for Wrongful Death Based on Negligence [45 U.S.C.S. § 51]--Death Caused by Exacerbation of Existing Illness or Condition

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
as _____ [*specify capacity, e.g.,*	)	NO. _____
Administrator of the Estate] of	)	COMPLAINT FOR WRONGFUL DEATH
_____ [*name*],	)	(Federal Employers' Liability
Deceased, Plaintiff,	)	Act [*45 U.S.C.S. § 51*])
vs.	)	
_____ [*name*],	)	
Defendant.	)	

Plaintiff alleges:

1. This action arises, and is brought, under and pursuant to the provisions of the Federal Employers' Liability Act, *United States Code, Title 45, Sections 51*-60.

2. Plaintiff is the duly appointed, qualified, and acting _____ [*specify capacity, e.g.*, administrator of the estate of] _____ [*name*], deceased, who died on _____ [*date*] as the result of the injuries sustained as herein alleged.

[3. *Defendant's capacity and principal place of business in California. See § 485.121, Paragraph 2.*]

4. At all times herein mentioned, defendant was the owner and operator of certain railroad lines on and over which it owned, operated, and maintained railroad beds, ties, rails, switches, locomotives, cars, and trains in transporting passengers, freight, and mail through the State of California and other states in the United States of America as a common carrier by railroad engaged in interstate commerce.

5. At the time of his/her injuries and death, decedent was in the defendant's employ as _____ [*specify, e.g.,* a switchman] _____ [*specify location, e.g.,* in its railroad yards] at _____, California, engaged in his/her duties as such, and aiding and assisting the defendant in carrying on its business of interstate commerce by railroad. [The switch engine, cars, tracks, railroad yards, and switches with which decedent was working in performinghis/her duties as a switchman in the course of his/her employment at the time of his/her injuries and death, as hereinafter alleged, were then being, had been, and were to be used by the defendant in carrying on its business of interstate commerce by railroad.]

6. On _____ [*date*], and prior thereto, decedent was suffering from _____ [*specify illness or condition, e.g.,* a cardiovascular disease], which fact defendant, its officers, agents, employees, and physicians well knew, or were duty bound to know, in that _____ [*specify, e.g.,* from on or about _____ (*date*), decedent, with defendant's knowledge, had been and was being treated for the _____ (*e.g.,* illness) by defendant's physicians at defendant's hospital department in _____, California, as both an in and an outpatient, and, further, that decedent, with defendant's knowledge and consent, was then and thereafter on sick leave from his/her employment from _____ (*date*) to _____ (*date*). The decedent was at no time made aware of the seriousness and extent of his/her condition, and the defendant, its agents, officers, employees, and physicians knew of decedent's ignorance in that regard and carelessly and negligently failed to warn him/her of the seriousness and extent of his/her condition or of any limitations he/she should put on his/her physical activities because of it.]

7. On or about _____ [*date*], defendant, its officers, agents, servants, employees, and physicians carelessly and negligently advised, encouraged, induced, and permitted decedent to accept employment as _____ [*e.g.,* a switchman] _____ [*specify location, e.g.,* in its railroad yards at _____, California], then and there knowing and being bound to know that decedent, because of his/her _____ [*e.g.,* damaged heart], was not in physical condition to engage in that employment and for him/her to do so would be to place decedent in a very dangerous, hazardous, and unsafe situation for which he/she was physically unsuited and incapable, in that the activities required of a _____ [*e.g.,* switchman] _____ [*e.g.,* including the uncovering and throwing of "cellar type" switches and riding on, climbing on, and jumping off moving equipment] would greatly endanger his/her life and impair his/her physical health.

8. Pursuant to the instructions of the defendant, its agents, and employees, decedent, on _____ [*date of death*], _____ [*specify activities, e.g.,* engaged in switching activities in defendant's yards at _____, California, including uncoupling a locomotive from cars, opening the cover of, and throwing, a "celler type" switch, and climbing on, riding, and jumping off moving equipment].

9. As a proximate result of the negligence of the defendant and its agents, employees, and physicians in failing to warn decedent of the seriousness of his/her condition, and in advising, encouraging, inducing, and permitting him/her to undertake the duties as _____ [*e.g.,* a switchman], as herein alleged, decedent at that time and place suffered _____ [*e.g.,* an acute coronary thrombosis] and died.

10. At the time of his/her death, the decedent was _____ years of age and left surviving him/her at the time of death _____ [*specify, e.g.,* a _____ (wife *or* husband) *and/or* _____

child(ren) of the age of _____ (and _____, respectively)][, who _____ (were *or* was) dependent on the deceased and his/her earnings for support].

11. As a proximate result of defendant's negligence, and the decedent's death, _____ [*specify, e.g.,* the _____ (husband *or* wife) and child(ren)] have suffered and sustained pecuniary loss, all to their damage.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages.

2. For costs of suit herein incurred.

3. For such other and further relief as the Court may seem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 485.121.*]

[2] Use of Form

This form of complaint is for use by the personal representative of a deceased worker, on behalf of the worker's surviving spouse and children [*see § 485.122[3]*], to sue the worker's interstate railroad employer for having negligently caused the decedent's death by exacerbating an existing illness or condition. For forms of complaint based on negligently caused accidental injury, which may be modified to state a cause of action for wrongful death, see *§§ 485.120, 485.121*.

[3] Liability of Railroad for Worker's Death

A common carrier by railroad engaged in interstate or foreign commerce is, in the event of the worker's death, liable in damages to the deceased worker's personal representative for the benefit of the worker's surviving widow or husband and children, and, if none, the worker's parents, and, if none, the next of kin dependent on the employee, for death resulting in whole or in part from the negligence of the carrier's agents, officers, or employees, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, and similar items [*45 U.S.C.S. § 51*; *see also 45 U.S.C.S. § 59*].

[4] Allegations

This complaint alleges the following: (1) plaintiff's capacity to maintain theaction as the deceased worker's personal representative (Paragraph 2) [*see 45 U.S.C.S. § 51*]; (2) defendant's capacity as a carrier by railroad engaged in interstate commerce (Paragraph 4) [*see 45 U.S.C.S. § 51*]; (3) the decedent's employment by defendant (Paragraph 5) [*see 45 U.S.C.S. § 51*]; (4) the condition that rendered the decedent unsuited to arduous work and defendant's knowledge of that condition (Paragraph 6); (5) defendant's assigning the deceased to a job requiring extreme physical exertion (Paragraph 7); (6) the decedent's performance of the work (Paragraph 8); (7) the decedent's death as a result of the work (Paragraph 9); (8) the identity of the worker's surviving spouse and children (or other dependents) (Paragraph 10); and (9) the damages sustained by them as a result of the worker's death (Paragraph 11).

[5] Cross References

For a related form, see *§ 485.121*.

For alternative paragraphs for death actions brought in California state courts, see Ch. 181, *Death and Survival Actions*

[6] Decisions

Liability of railroad for death of worker assigned duties too strenuous for his heart. *McGuigan v. Southern Pac. Co. (1952) 112 Cal. App. 2d 704, 716-717, 247 P.2d 415*

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42-485 California Forms of Pleading and Practice--Annotated § 485.123

§ 485.123 Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Allegation in Complaint Based on Negligence [45 U.S.C.S. § 51]--Train Dispatcher Suffered Nervous Breakdown Caused by Unusually Stressful Working Conditions

[1] FORM Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Allegation in Complaint Based on Negligence [45 U.S.C.S. § 51]--Train Dispatcher Suffered Nervous Breakdown Caused by Unusually Stressful Working Conditions

1. From on or about _____ [*date*] to _____ [*date*], plaintiff was employed by defendant as a train dispatcher at its _____ [*e.g.*, switchyard].

2. During all of this time, defendant negligently and carelessly required plaintiff to be subjected, as train dispatcher, to working conditions of unusual responsibility, stress, and tension in order for plaintiff to perform his/her duties as a train dispatcher, in that plaintiff was required to operate a system of central traffic control of defendant's railroad, which system involved multitudinous and complex mechanical factors and mental decisions, extreme responsibility, constant but shifting attention, and numerous clerical functions which altogether, under the circumstances, imposed an unusual stress and burden on plaintiff's physical and nervous systems.

3. As a proximate result of that negligence and carelessness, plaintiff was caused to, and did, suffer a severe nervous collapse and the injuries hereinafter described.

[2] Use of Form

These allegations are for use for insertion in a complaint by an injured employee against an interstate railroad employer under the FELA (*45 U.S.C.S. §§ 51-60*) for damages for personal injuries when the basis of the claim is a nervous breakdown caused by severe job stress as a result of the employer's negligence. The allegations may be inserted in the *form in § 485.121* in lieu of Paragraphs 5-9 of that form. If so used, the second count of that form should be deleted. For the kinds of injuries covered by FELA, see *§ 485.35[3]*.

[3] Decisions

Effect of working conditions that subject employee to unusual stress and tension as stating cause of action under FELA [*45 U.S.C.S. §§ 51-60*]. *McMillan v. Western Pac. R.R. Co. (1960) 54 Cal. 2d 841, 843, 9 Cal. Rptr. 361, 357 P.2d 449*

[4] Cross References

For a related form, see *§ 485.121*

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42-485 California Forms of Pleading and Practice--Annotated § 485.124

§ 485.124 Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Allegation in Complaint Based on Negligence [45 U.S.C.S. § 51]--Plater Contracted Skin Infection From Plating Solution

[1] FORM Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Allegation in Complaint Based on Negligence [45 U.S.C.S. § 51]--Plater Contracted Skin Infection From Plating Solution

1. At all times herein mentioned, defendant owned and operated a plating department in [conjunction with its _____ (*e.g.*, switchyard) in] _____, California where metal parts used on its locomotives and cars in interstate commerce were replated.

2. From _____ [*date*] to _____ [*date*], plaintiff was employed as a plater by defendant in its plating department. Plaintiff's duties required him/her to work with a solution of _____ [*specify*, *e.g.*, silver cyanide], a harmful solution that the defendant negligently provided without any precautionary measures to protect plaintiff from its harm, and in the course of which use the solution would get on plaintiff's hands.

3. As a proximate result of defendant's negligence in assigning plaintiff to work in this solution, plaintiff was caused to sustain a skin infection on his/her hands, which condition on or about _____ [*date*], was diagnosed at defendant's hospital as dermatitis, attributed to _____ [*e.g.*, filtering a cyanide solution that gets on hands] and treated with a lotion. A copy of the hospital's report was furnished to the defendant. At no time prior to the date ofplaintiff's total disability was plaintiff advised that he/she should not work with the plating solution or that it would produce any serious or lasting results. The affliction nevertheless continued to worsen, got really bad on or about _____ [*date*], spread to other parts of plaintiff's body, and on or about _____ [*date*], resulted in plaintiff's total inability to work.

[*ADD, if first treatment referred to above was more than three years before action was filed*]

4. Although plaintiff first became aware of the cause of the skin condition on _____ [*date beyond*

three-year period] when it was first diagnosed and treated at defendant employer's hospital, it was not until _____ [*date within three-year period*] that the first manifestation of substantial harm to the plaintiff occurred when the affliction got really bad, began spreading to other parts of plaintiff's body, and subsequently resulted in plaintiff's total disability.

[2] Use of Form

This form of allegations is for insertion in a complaint by an injured employee against an interstate railroad employer under the FELA (*45 U.S.C.S. §§ 51-60*) for damages for personal injury (a skin affliction) that was caused by a plating solution with which the plaintiff was required to work as a result of the railroad's breach of its duty to provide plaintiff with a reasonably safe place to work. The allegations may be inserted in the *form in § 485.121* in lieu of Paragraphs 4-9 of that form. If so used, the second count of that form should be deleted. For the kinds of injuries covered by FELA, see *§ 485.35[3]*. For discussion relating to when an action based on occupational disease accrues for purposes of triggering the statutory limitations period, see *§ 485.41*.

[3] Cross References

For a related form, see *§ 485.121*

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42-485 California Forms of Pleading and Practice--Annotated § 485.125

§ 485.125 Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Allegation in Complaint Based on Negligence [45 U.S.C.S. § 51]--Oiler Injured by Strain of Lifting Barrels Because of Defendant's Failure to Provide Sufficient Equipment and Assistance

[1] FORM Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Allegation in Complaint Based on Negligence [45 U.S.C.S. § 51]--Oiler Injured by Strain of Lifting Barrels Because of Defendant's Failure to Provide Sufficient Equipment and Assistance

1. At all times herein mentioned, plaintiff was employed by defendant as an oiler, and at the time of the accident hereinafter alleged was engaged in work that _____ [was in furtherance of *or* closely and substantially affected] interstate commerce.

2. On or about _____ [*date of accident*], plaintiff, acting in the regular course and scope of his/her duties, was required to be and was engaged in moving barrels of oil from a flat car onto the oil dispensing rack in the railroad yards.

3. In breach of its duty to exercise ordinary care to provide plaintiff with reasonably safe equipment with which to work and a reasonably sufficient force of assistants to do the work, including _____ [*specify, e.g.,* skids or other mechanical devices to assist plaintiff, and at least two workers, in addition to plaintiff, to assist in lifting the barrels], defendant negligently failed to provide _____ [*specify, e.g.,* any skids or other mechanical devices and further required plaintiff to move the barrels with only one other employee].

4. As a proximate result of defendant's negligence, plaintiff [and his/her fellow worker] _____ [was *or* were] required to exert great and unusual force to move one of the barrels, as a proximate result of which plaintiff was caused to receive a severe strain to his/her body and to suffer the injuries hereinafter alleged.

5. As a proximate result of defendant's negligence and of the severe strain placed on plaintiff's body, plaintiff sustained _____ [*specify injuries, e.g.,* severe strain and injury to the muscles, tissues, nerves, and ligaments of his/her back, spine, neck, and head; plaintiff's back, spine, neck, and head movement have been seriously impaired and

injured and his/her muscles, nerves, and ligaments seriously scarred; plaintiff suffers headaches, dizzy spells, sleeplessness, extreme nervousness and irritability, and traumatic neuritis].

[2] Use of Form

This form of allegations is for use for insertion in a complaint by an injured employee against an interstate railroad employer under the FELA (*45 U.S.C.S. §§ 51-60*) for damages for personal injuries caused by the railroad's failure to provide plaintiff with reasonably safe equipment with which to work and a reasonably sufficient force of assistants to do the work. The allegations may be inserted in the *form in § 485.121* in lieu of Paragraphs 5-9 of that form. If so used, the second count of that form should be deleted. For the kinds of injuries covered by FELA, see *§ 485.35[3]*.

[3] Decisions

Liability of railroad for failure to furnish adequate number of helpers to do heavy work. *Masiglowa v. New York, Chicago & St. Louis R.R. Co. (N.D. Ohio 1955) 135 F. Supp. 816, 816-817 , aff'd, 237 F.2d 917 (6th Cir. 1956)*

[4] Cross References

For a related form, see *§ 485.121*

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42-485 California Forms of Pleading and Practice--Annotated § 485.126

§ 485.126 Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Allegation in Complaint Based on Negligence and Violation of Safety Appliance Act (49 U.S.C.S. § 20301 et seq.) [45 U.S.C.S. § 51]--Conductor Injured on Sudden Release of Brake [49 U.S.C.S. § 20302(a)(1)(B)]

[1] FORM Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Allegation in Complaint Based on Negligence and Violation of Safety Appliance Act (49 U.S.C.S. § 20301 et seq.) [45 U.S.C.S. § 51]--Conductor Injured on Sudden Release of Brake [49 U.S.C.S. § 20302(a)(1)(B)]

1. At all times herein mentioned, plaintiff was employed by defendant as a conductor and was engaged in work that was in furtherance of interstate commerce.

2. On or about _____ [*date*], at about _____ [*time*], defendant was working as a conductor on one of defendant's _____ [*e.g.,* freight] trains traveling from _____ [*point of origin*] to _____ [*point of destination*] and was _____ [*specify location, e.g.,* passing through defendant's freight yards located at _____, California].

3. At that time and place, plaintiff, in the course of his/her employment, was applying a hand brake on a _____ [*e.g.,* flat] car, which brake had been so negligently inspected, maintained, and repaired by the defendant and its employees other than plaintiff that it became stuck or caught. While plaintiff was using extra force to move the brake, the brake suddenly released.

4. As a proximate result of defendant's negligence as herein alleged, the sticking or catching of the brake, and its sudden release, plaintiff was thrown to the ground, thereby receiving the injuries hereinafter described.

5. At all times herein mentioned there was in full force and effect certain federal statutes commonly known as the Safety Appliance Act and, particularly, there was in full force and effect the safety provision set forth in formerUnited States Code, Title 49, Section 20302, which provides in part as follows:

[A] railroad carrier may use or allow to be used on any of its railroad lines ... a vehicle only if it is equipped with ...

efficient hand brakes.

6. At the time and place mentioned in Paragraph 2, the _____ [*e.g.*, flat] car was not equipped with an efficient hand brake.

7. As a proximate result of defendant's violation of the Safety Appliance Act in failing to have the _____ [*e.g.*, flat] car equipped with efficient hand brakes, the hand brake became stuck or caught while plaintiff was applying it and, while plaintiff was using extra force to move the brake, it suddenly released.

8. As a proximate result of the defective brake and its sudden release, plaintiff was thrown to the ground, thereby receiving the injuries hereinafter described.

[2] Use of Form

This form of allegations is for use for insertion in a complaint by an injured employee against an interstate railroad employer under the FELA (*45 U.S.C.S. §§ 51-60*) for damages for personal injuries resulting from a fall from a train caused by the railroad's failure to have the car on which plaintiff was working equipped with an efficient hand brake.

The allegations of Paragraphs 1-4 may be inserted in the *form in § 485.121* in lieu of Paragraphs 4-9 of the first count of that form, and the allegations of Paragraphs 5-8 may be inserted in lieu of Paragraphs 13-15 of the second count of that form. For the kinds of injuries covered by FELA, see *§ 485.35[3]*. A violation of the Safety Appliance Act [*49 U.S.C.S. § 20301 et seq.*] results in the railroad's absolute liability, and neither the negligence of the railroad nor the contributory negligence of the employee is an issue in the case [*see § 485.45[4]*].

[3] Federal Statutes

Requirement that railroad equip its cars with efficient hand brakes. Former *49 U.S.C.S. § 20302(a)(1)(B)*

[4] Decisions

Duty owed to employee by railroad engaged in interstate commerce to maintain cars with efficient hand brakes. *Hosman v. Southern Pac. Co. (1938) 28 Cal. App. 2d 621, 626-629, 83 P.2d 88*

[5] Cross References

For a related form, see *§ 485.121*

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42-485 California Forms of Pleading and Practice--Annotated § 485.127

§ 485.127 Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Allegation in Complaint Based on Negligence and Violation of Safety Appliance Act (49 U.S.C.S. § 20301 et seq.) [45 U.S.C.S. § 51]--Switchman Injured in Fall From Car Caused by Car's Being Negligently Jerked With Unusual Force and by Loose Grab Iron [45 U.S.C.S. § 51; 49 U.S.C.S. § 20302(a)(2)]

[1] FORM Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Allegation in Complaint Based on Negligence and Violation of Safety Appliance Act (49 U.S.C.S. § 20301 et seq.) [45 U.S.C.S. § 51]--Switchman Injured in Fall From Car Caused by Car's Being Negligently Jerked With Unusual Force and by Loose Grab Iron [45 U.S.C.S. § 51; 49 U.S.C.S. § 20302(a)(2)]

1. At that time and place, plaintiff, in the regular course and scope of his/her employment by defendant as a switchman, was required to, and did, climb _____ [*e.g.*, to the top] of a certain _____ [*specify type, e.g.*, box] car, and to hold on to a certain grab iron attached to it, for the purpose of putting himself/herself in position to give stop signals to the engineer of the switch engine.

2. At that time and place, defendant, acting by and through its agents, servants, and employees, other than plaintiff, so carelessly and negligently operated and controlled the switch engine as to cause the car on which plaintiff was working tobe suddenly, violently, and unusually jerked.

3. As a proximate result of defendant's negligence as herein alleged, plaintiff was caused to be, and was, thrown with such force and violence that the grab iron pl aintiff was holding came loose from the car, thereby causing plaintiff to be thrown to the ground and to sustain the injuries hereinafter described.

4. At all times herein mentioned there was in full force and effect certain federal statutes commonly known as the Safety Appliance Act and particularly there was in full force and effect the safety provision set forth in *United States Code, Title 49, Section 20302(a)(2)*, which provides as follows:

Except as otherwise ordered by the Secretary, a vehicle [may be used on railroad lines] only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles.

5. At the time and place mentioned in Paragraph 6, the _____ [*e.g.* box] car was not equipped with secure grabirons.

6. As a proximate result of defendant's violation of the Safety Appliance Act in failing to have the _____ [*e.g.,* box] car equipped with secure grabirons, the grabiron to which plaintiff was holding came loose with such suddenness when the switch engine was suddenly, violently, and unusually jerked that plaintiff was caused to be thrown to the ground and to sustain the injuries hereinafter described.

[2] Use of Form

This form of allegations is for use for insertion in a complaint by an injured employee against an interstate railroad employer under the FELA [*45 U.S.C.S. §§ 51-60*] for damages for personal injuries resulting from a fall from a train caused by a combination of the employer's negligence in causing the car on which plaintiff was working to be jerked with unusual force and an insecure grab iron that came loose. Both theories of liability may be pleaded, but if they are they should be clearly distinguished [*see § 485.121*]. The allegations of Paragraphs 1-3 may be inserted in the *form in § 485.121* in lieu of Paragraphs 7 and 8 of the first count of that form, and the allegations of Paragraphs 4-6 may be inserted in lieu of Paragraphs 13-15 of the second count of that form.

For the kinds of injuries covered by FELA, see *§ 485.35[3]*. A violation of the Safety Appliance Act [*49 U.S.C.S. § 20301 et seq.*] results in the railroad's absolute liability, and neither the negligence of the railroad nor the contributory negligence of the employee is an issue in the case [*see § 485.45[4]*].

[3] Federal Statutes

Requirements for safe grab irons and hand holds on railway cars. *49 U.S.C.S. § 20302(a)(2)*

[4] Decisions

Liability of railroad to employee injured in fall from freight car insufficiently equipped and shunted with unusual force. *Phillips v. Southern Pac. Co. (1936) 14 Cal. App. 2d 454, 455-456, 58 P.2d 688*

[5] Cross References

For a related form, see *§ 485.121*

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42-485 California Forms of Pleading and Practice--Annotated § 485.128

§ 485.128 Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Allegation in Complaint Based on Negligence and Violation of Boiler Inspection Act (49 U.S.C.S. § 20701 et seq.) [45 U.S.C.S. § 51]--Engineer Injured in Fall From Greasy Ladder on Side of Locomotive [45 U.S.C.S. § 51; 49 U.S.C.S. § 20701]

[1] FORM Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Allegation in Complaint Based on Negligence and Violation of Boiler Inspection Act (49 U.S.C.S. § 20701 et seq.) [45 U.S.C.S. § 51]--Engineer Injured in Fall From Greasy Ladder on Side of Locomotive [45 U.S.C.S. § 51; 49 U.S.C.S. § 20701]

1. At all times herein mentioned, plaintiff was employed by defendant as a locomotive engineer and at the time of the accident hereinafter alleged was engaged in work that was in furtherance of interstate commerce.

2. On or about _____ [*date of accident*], plaintiff had reported to work in response to a call to duty to take a _____ [*e.g.*, freight] train from _____, California to _____ [*city and state*].

3. At that time and place, plaintiff, in the regular course and scope of his/her employment, was required, at night, to inspect the locomotive, which involved descending the tank ladder of the locomotive while it was on the turn-out track of the roundhouse.

4. The locomotive was not in proper condition or safe for operation in that defendant's roundhouse employees had negligently permitted large quantities of grease to remain on the steps and grab irons of the ladder where plaintiff was required to step in descending the ladder.

5. As a proximate result of defendant's negligence in permitting large quantities of grease to remain on the steps and grab irons of the ladder, plaintiff, in attempting to descend, was caused to, and did, slip on the grease and fall to the ground, and thereby received the personal injuries hereinafter alleged.

6. At all times herein mentioned there was in full force and effect certain statutes commonly known as the Boiler Inspection Act, and particularly there was in full force and effect the safety provision set forth in *United States Code,*

Title 49, Section 20701, which provides in relevant part as follows:

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenancesare in proper condition and safe to operate without unnecessary danger of personal injury ...

7. At the time and place mentioned in Paragraph 2, the locomotive was not in proper condition and safe to operate in the service to which it was put so as to be em ployed in active service without unnecessary peril to life or limb, in that defendant's roundhouse employees had permitted large quantities of grease to remain on the steps and grab irons of the tank ladder on the side of the locomotive where plaintiff was required to step in descending the ladder.

8. As a proximate result of defendant's permitting large quantities of grease to remain on the steps and grab irons of the ladder and the unsafe and defective condition of the ladder and grab irons, plaintiff, in attempting to descend, was caused to, and he/she did, slip on the grease and fall to the ground and thereby received the personal injuries hereinafter alleged.

[2] Use of Form

This form of allegations is for use for insertion in a complaint by an injured railroad employee against his or her interstate railroad employer under the FELA (*45 U.S.C.S. §§ 51-60*) for damages for personal injuries resulting from a fall from a locomotive ladder caused by an accumulation of grease on the steps of the ladder which the roundhouse employees had failed to remove before returning the locomotive to service.

The allegations of Paragraphs 1-5 may be inserted in the *form in § 485.121* in lieu of Paragraphs 5 and 8 of the first count of that form, and Paragraphs 6-8 may be inserted in lieu of Paragraphs 13-15 of the second count of that form.

For the kinds of injuries covered by FELA, see *§ 485.35[3]*.

If the locomotive was "in service" within the meaning of the Boiler Inspection Act [*see 49 U.S.C.S. § 20701*], then the employer's liability would be absolute and negligence would not be in issue. If the locomotive was not in service, and hence not within the provisions of the Boiler Inspection Act, plaintiff's cause of action would be based on negligence and any contributory negligence of the engineer would be set off against the judgment [*see 45 U.S.C.S. § 53*]. Both theories of liability may be pleaded, but if they are they should be clearly distinguished [*see § 485.121*].

[3] Federal Statutes

Requirement that locomotive or tender and its parts and appurtenances be in proper condition and safe to operate without unnecessary danger of personal injury. *49 U.S.C.S. § 20701*

[4] Decisions

Duty of carrier to not place in service locomotive in improper or unsafe condition. *Minehart v. Southern Pac. Co. (1955) 136 Cal. App. 2d 486, 488, 288 P.2d 999*

[5] Cross References

For a related form, *see § 485.121*.

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Chapter 485 RAILROADS
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A. Injuries To Employees

42-485 California Forms of Pleading and Practice--Annotated § 485.129

§ 485.129 Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Affirmative Defenses [Code Civ. Proc. § 431.30(b)(2)]--Accident Caused by Plaintiff's Sole Negligence, Plaintiff's Contributory Negligence, Sole Negligence of Third Person, or Combined Negligence of Plaintiff and Third Person [45 U.S.C.S. §§ 51, 53]

[1] FORM Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Affirmative Defenses [Code Civ. Proc. § 431.30(b)(2)]--Accident Caused by Plaintiff's Sole Negligence, Plaintiff's Contributory Negligence, Sole Negligence of Third Person, or Combined Negligence of Plaintiff and Third Person [45 U.S.C.S. §§ 51, 53]

[*EITHER, if accident was caused by plaintiff's sole negligence*]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one count or cause of action alleged, state* TO THE _____ (*specify, e.g.,* FIRST) _____ (COUNT *or* CAUSE OF ACTION)], DEFENDANT ALLEGES that if the plaintiff was injured in the manner set forth in the complaint, defendant is informed and believes and thereon alleges that the injuries and damages were proximately caused by the sole negligence of the plaintiff.

[*AND/OR if plaintiff's negligence contributed to accident*]

AS A [_____ (*if more than one, specify number, e.g.,* SECOND)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one count or cause of action alleged, state* TO THE _____ (*specify, e.g.,* FIRST) _____ (COUNT *or* CAUSE OF ACTION)], DEFENDANT ALLEGES that if the plaintiff was injured in the manner set forth in the complaint, defendant is informed and believes and thereon alleges, that plaintiff was himself/herself negligent with respect to the occurrence alleged in the complaint and that plaintiff's negligence proximately contributed to plaintiff's injuries and damages.

[*AND/OR if accident solely caused by negligence of third person or by combined negligence of third person and plaintiff*]

AS A [_____ (*if more than one, specify number, e.g.,* THIRD)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one count or cause of action alleged, state* TO THE _____ (*specify, e.g.,* FIRST) _____ (COUNT *or* CAUSE OF ACTION)], DEFENDANT ALLEGES that if the plaintiff was injured in the manner set forth in the complaint, defendant is informed and believes and thereon alleges that the plaintiff's injuries and damages were caused by the sole negligence of _____ [*name of third party*] [and by the negligence of the plaintiff] in that _____ [*specify actscausing plaintiff's injury and that they were negligently done*].

[2] Use of Form

This form is for use by an interstate railroad employer, sued under the FELA (*45 U.S.C.S. §§ 51-60*) by an employee for damages for personal injuries sustained as a result of the employer's alleged negligence, to plead the negligence of the employee and/or third person and the employee's contributory negligence as the cause of the accident [*see 45 U.S.C.S. §§ 51, 53*]. The defenses are for inclusion in the railroad's answer to the employee's complaint.

For a discussion of answers generally, including general forms into which these affirmative defenses may be inserted, see Ch. 26, *Answers* .

Each of the affirmative defenses set forth in the form may be used separately or in any combination with the others, inasmuch as pleading inconsistent defenses is allowed under both federal and state law [*see Fed. R. Civ. P., Rule 8(e)(2)* (federal action); *Oppenheimer v. Deutchman (1953) 119 Cal. App. 2d 450, 453, 259 P.2d 457 (California action)]* .

The defenses based on negligence would not, however, be used in an answer to a complaint, count, or cause of action in which liability is predicated on the employer's alleged violation of a safety provision [*see* 42 U.S.C.S. §§ 53, 54a; *see also § 485.129[3]*]. In such a case, the employer's liability is absolute and negligence is not in issue [*see § 485.45[4]*].

[3] Negligence and Contributory Negligence

The employer's liability under the FELA [*45 U.S.C.S. §§ 51-60*] is predicated on the employer's negligence [*see 45 U.S.C.S. § 51*; *see also § 485.35[2]*].

The contributory negligence of the employee in an action under the FELA does not bar recovery, but the damages are diminished by the jury in proportion to the amount of negligence attributable to the employee. However, no employee can be found guilty of contributory negligence in any case in which the employee's injury or death was contributed to in any part by the railroad's violation of a statute enacted or regulation or rule adopted for the safety of employees [*49 U.S.C.S. §§ 53,* 54a; *see § 485.45[4]*].

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A. Injuries To Employees

42-485 California Forms of Pleading and Practice--Annotated § 485.130

§ 485.130 Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Preemption by Longshore and Harbor Workers' Compensation Act (33 U.S.C.S. § 901 et seq.)

[1] FORM Action Under Federal Employers' Liability Act (45 U.S.C.S. §§ 51-60)--Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Preemption by Longshore and Harbor Workers' Compensation Act (33 U.S.C.S. § 901 et seq.)

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one count or cause of action alleged, state* TO THE _____ (*specify, e.g.,* FIRST) _____ (COUNT *or* CAUSE OF ACTION)], defendant alleges that the action is governed by the exclusive remedies provided under the Longshore and Harbor Workers' Compensation Act, pursuant to Title *33 of the United States Code, sections 901*-950, because plaintiff was engaged in maritime employment within the meaning of those statutes at the time that the alleged incident occurred, in that plaintiff _____ [*specify, e.g.,* was operating a conveyor belt used in the loading of coal onto a ship].

[2] Use of Form

This form is for use by a railroad employer sued under the FELA [*45 U.S.C.S. §§ 51-60*] by an employee for damages for personal injuries sustained as a result of the employer's negligence, to plead application of the exclusive remedies under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) [*33 U.S.C.S. § 901 et seq.*], on the ground that, at the time the alleged incident occurred, the employee was engaged in "maritime employment" within the meaning of LHWCA [*see Chesapeake & Ohio Ry. Co. v. Schwalb (1989) 493 U.S. 40, 110 S. Ct. 381, 107 L. Ed. 2d 278, 286-288]* .

[3] "Maritime Employment"

The United States Supreme Court has defined "maritime employment" as used in the LHWCA to encompass certain railroad workers engaged in maritime-related activities, such as the loading and unloading of cargo between a ship and railroad car, regardless whether the railroad employee's job also includes nonmaritime-related activities [*see*

Chesapeake & Ohio Ry. Co. v. Schwalb (1989) 493 U.S. 40, 110 S. Ct. 381, 107 L. Ed. 2d 278, 286-288] . For discussion of the LHWCA generally, see *Ch. 522, Ships and Shipping, § 522.30* et seq.

[4] Cross References

For a related form, see *§ 485.129*

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[Reserved]

§§ 485.131[Reserved]

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B. Injuries to Passengers and Other Persons

42-485 California Forms of Pleading and Practice--Annotated § 485.150

§ 485.150 Action for Damages [Civ. Code § 3333] Against Railroad [Civ. Code § 2338] and Employees [Civ. Code § 2343]--Complaint by Passenger for Personal Injury [Civ. Code §§ 1714(a), 2100]

[1] FORM Action for Damages [Civ. Code § 3333] Against Railroad [Civ. Code § 2338] and Employees [Civ. Code § 2343]--Complaint by Passenger for Personal Injury [Civ. Code §§ 1714(a), 2100]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Negligence of Carrier)
[and DOES 1 through _____,]	)	[LIMITED CIVIL CASE]
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	

_____

Plaintiff alleges:

1. _____ [*Allege identity and capacity of defendant railroad company, e.g.,* Defendant _____ (*name of railroad*) is, and at all times herein mentioned was, a corporation duly incorporated and existing under the laws of the state of California, with its principal place of business in _____ (*city*), _____County, California].

[2. _____ [*Allege identity, capacity, and/or residence of defendant railroad employees, e.g.,* Defendant _____ (*name*) is, and at all times herein mentioned was, a resident of _____ (*city*), _____ County, California.]

[3. Defendants DOES 1 through _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by such defendants].

4. At all times herein mentioned, defendants _____ [*names of railroad employees*] were the agents and employees of defendant _____ [*name of railroad*] and, and in doing the things herein alleged, were acting within the scope of their authority as agents and employees, and with the consent and permission of _____ [*name of railroad*].

5. Defendant _____ [*name of railroad*] is, and at all times herein mentioned was, a common carrier of passengers for reward, and as such offered the use of railroad cars owned by defendant, with operators employed by defendant, to the public for hire in and between various points in _____ County and _____ County, California. Defendant owned, operated, and maintained a depot or station in _____ [*city*], _____ County, California, for the use of its passengers in boarding or alighting from trains operated by defendant.

6. On or about _____ [*date*], at or about _____ [*time*], defendants received plaintiff as a fare-paying passenger on a certain train known as _____ [*specify*] for the purpose of transporting plaintiff from _____ [*city*], California to _____ [*city*], California.

7. _____ [*Allege negligent act of defendant(s) proximately causing plaintiff's injury, e.g.,* On or about _____ (*date*), at or about _____ (*time*), the train on which plaintiff was a passenger arrived at the station maintained by defendant _____ (*name of railroad*), at _____ (*city*), California. At that time and place, plaintiff proceeded to the platform of the passenger car on which he/she had been riding and prepared to alight. Defendants negligently and carelessly operated, repaired, maintained, and controlled the train so as to cause it to violently jerk and move forward as plaintiff was descending the steps of the car, thereby precipitating plaintiff off the passenger car and injuring plaintiff as hereinafter alleged].

8. As a proximate result of the acts and omissions of defendant[(s), and each of them], plaintiff was injured as follows: _____ [*specify injuries incurred by plaintiff*]. [Plaintiff is informed and believes and thereon alleges that these injuries will result in some permanent disability to him/her.] As a result of these injuries, plaintiff has suffered general damages.

9. As a further proximate result of the acts and omissions of defendant[(s), and each of them], plaintiff has sustained [and will continue to sustain] special damages, consisting of reasonable hospital and medical and related expenses.

10. As a further proximate result of the acts and omissions of defendant[(s), and each of them], plaintiff's earning capacity has been greatly impaired, both in the past and in the present.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For damages for loss of income and earnings and impairment of earning ability according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 485.121.*]

[2] Use of Form

This form of complaint is for use by a passenger against a railroad company and its employees for injuries caused by the operators' negligence while the passenger was boarding, riding, or alighting from a train [*see Civ. Code §§ 1714(a), 2100*].

For general forms of complaint for use by a passenger for wrongful ejection by a common carrier, and for assault and battery by a carrier's agent, see Ch. 109, *Carriers* . For general forms of complaint for use by persons injured by dangerous conditions on property, see Ch. 421, *Premises Liability* .

[3] Allegations

This complaint first alleges the corporate capacity of the defendant railroad (Paragraph 1) and includes initial, optional paragraphs that state the identity and residence of any defendant railroad employees (Paragraph 2), and that add fictitiously named defendants (Paragraph 3). It then alleges (1) that the employee operators of the train named as defendants were agents of the railroad company, acting within the course of their employment, for purposes of applying vicarious liability to the railroad company (Paragraph 4) [*see* Ch. 380, *Negligence*]; (2) the status of defendant railroad as common carrier in order to establish the highest duty of care (Paragraph 5) [*Civ. Code §§ 2100, 2168*; (3) the status of plaintiff as a person carried for reward (paying passenger) at the time of injury (Paragraph 6) [*see Civ. Code § 2100*; *Lagomarsino v. Market St. Ry. Co. (1945) 69 Cal. App. 2d 388, 395-396, 158 P.2d 982]* ; (4) that defendant railroad and its employees breached their duty to plaintiff by negligently operating or maintaining the train, proximately causing injury to plaintiff (Paragraph 7) [*see McNulty v. Southern Pac. Co. (1950) 96 Cal. App. 2d 841, 855-856, 216 P.2d 534]* ; and (5) that defendant's negligence was the proximate cause of injuries suffered by plaintiff (Paragraphs 8-10) [*see Civ. Code §§ 1714(a), 3333*].

[4] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

In an action for injury to person or personal property, either the county in which the injury occurs or the county in

which the defendants, or some of them, reside at the commencement of the action is a proper county for the trial of the action (see Paragraphs 1 and 2) [*Code Civ. Proc. § 395(a)*].

[5] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[6] Cross References

For a related form, see *§ 485.121*

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For a form of complaint to bring an action by a passenger for assault and battery against a carrier of persons for reward, see Ch. 58, *Assault and Battery*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For a form of complaint to bring an action by a passenger for assault and battery against an agent of a common carrier, see Ch. 109, *Carriers*

For discussion of common carriers generally, see Ch. 109, *Carriers*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to the capacity of foreign corporations to be sued, see Ch. 160, *Corporations: Capacity*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, § 177.40* et seq.

For discussion and forms relating to federal diversity jurisdiction and removal of state actions to federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For discussion and forms relating to state court jurisdiction over foreign corporations, see Ch. 324, *Jurisdiction: Subject Matter*

For discussion and forms relating to negligence generally, see Ch. 380, *Negligence* .

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to premises liability generally, see Ch. 421, *Premises Liability*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions*

[7] State Statutes

Persons as liable for negligent injury to another except so far as injured party brings injury on himself or herself. *Civ. Code § 1714(a)*

Carriers of passengers for reward as owing highest degree of care to passengers. *Civ. Code § 2100*

Everyone who offers to public to carry persons, property, or messages except for telegraphic messages as common carrier. *Civ. Code § 2168*

Principal as responsible for agent's negligence. *Civ. Code § 2338*

Agent as personally liable for own wrongful acts. *Civ. Code § 2343*

Measure of damages for tort. *Civ. Code § 3333*

Two-year statute of limitations for action to recover damages for personal injury or wrongful death. *Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)* (one-year period prior to 2003)

[8] Decisions

When complaint alleges breach of carrier's duty to safely carry passenger and consequent injury as gravamen of action, action arises out of tort and not contract and is subject to one-year statute of limitations. *Basler v. Sacramento Elec., Gas & Ry. Co. (1913) 166 Cal. 33, 36, 134 P. 993*

[9] Text References

Witkin, Summary of California Law, (9th ed. 1988), Vol. 6, *Torts*, §§ 922-929

53 Cal. Jur. 3d, *Railroads*, § 106

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42-485 California Forms of Pleading and Practice--Annotated § 485.151

§ 485.151 Action for Damages [Civ. Code § 3333] Against Railroad [Civ. Code § 2338] and Employees [Civ. Code § 2343]--Complaint by Automobile Driver for Personal Injury and Property Damage [Civ. Code § 1714(a); Pub. Util. Code § 2106]--Failure to Install Signal or Sound Warning at Grade Crossing

[1] FORM Action for Damages [Civ. Code § 3333] Against Railroad [Civ. Code § 2338] and Employees [Civ. Code § 2343]--Complaint by Automobile Driver for Personal Injury and Property Damage [Civ. Code § 1714(a); Pub. Util. Code § 2106]--Failure to Install Signal or Sound Warning at Grade Crossing

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Negligence)
[and DOES 1 through _____,]	)	[*Civ. Code §§ 1714(a), 3333*; *Pub. Util. Code § 2106*]
Defendant(s).	)	
	)	
	)	

_____

Plaintiff alleges:

FIRST COUNT
(Negligence)

[1. *Identity and capacity of defendant railroad company. See § 485.150, Paragraph 1.*]

[2. *Identity, capacity, and/or residence of defendant railroad employees. See § 485.150, Paragraph 2.*]

[3. *Fictitious name allegation. See § 485.150, Paragraph 3.*]

[4. *Agency allegation. See § 485.150, Paragraph 4* .]

5. At all times herein mentioned, defendant _____ [*name of railroad company*] owned, managed, operated, and controlled a railroad, and a portion of the tracks and right-of-way of the railroad extended in a general _____ [*specify, e.g.,* north-south] direction over, on, and across _____ [*street*], which is a duly dedicated street and public highway extending in a general _____ [*specify, e.g.,* east-west] direction in _____ [*city*], _____ County, California.

6. On or about _____ [*date*], at approximately _____ [*time*], plaintiff was driving a _____ [*describe vehicle, e.g.,* 1988 Dodge pick-up truck] _____ [*specify direction, e.g.,* westbound] on _____ [*street*]. At that same time, defendants were operating a _____ [*specify, e.g.,* train consisting of one locomotive, five flatcars, and a caboose] _____ [*specify direction, e.g.,* northbound] along the railroad track described above. On or about the time alleged above, at the grade crossing described above, defendants negligently and carelessly operated, repaired, maintained, and controlled the train, so that it ran into and against plaintiff's vehicle, inflicting personal injury [and property damage] as hereinafter alleged.

7. At the time and place referred to herein, defendant _____ [*name of railroad*] negligently and carelessly failed to maintain a person with a flag or lantern, to furnish an automatic signaling device, or to require its employees to sound a horn or other device at or near the crossing, to warn motorists of the approach of the train to the crossing. Defendant _____ [*name of railroad*], through its agents and employees acting in the discharge of their duties and within the scope of their authority, did not furnish and maintain these and, as a result, plaintiff was injured.

8. At the time and place referred to herein, defendant(s) _____ [*name of railroad employee(s*)], negligently and careless operated the _____ [locomotive *or* railroad car] in that he/she/they failed to sound a horn or other device at or near the crossing, to warn motorists of the approach of the train to the crossing and, as a result, plaintiff was injured.

[9. At all times herein mentioned, defendant _____ (*name of railroad*) knew of the existence of a highly dangerous condition in that _____ (*allege knowledge by defendant of danger to plaintiff, e.g.,* at the crossing described herein traffic was normally heavy, no visual warning of oncoming trains was provided, vision was obstructed in two directions by buildings, and the angle of the train's approach to the intersection made it difficult to assess the speed of an oncoming train). Notwithstanding this knowledge, defendant _____ (*specify action or omission, e.g.,* failed to install crossing gates, flashing lights, or any other effective warning signal). (Defendant's failure to take corrective action displayed a conscious and callous indifference to, or disregard of, probable harm to _____ (*describe persons in plaintiff's position, e.g.,* motorists using the crossing described herein], including plaintiff.)]

[10. At all times herein mentioned, defendant(s) _____ (*railroad employee(s*)) knew of the existence of a highly dangerous condition in that _____ (*specify*). Notwithstanding this knowledge, defendant(s) _____ (*specify action or omission, e.g.,* failed to sound a horn or other device at or near the crossing, to warn plaintiff of the approach of the train). (Defendants' failure to warn plaintiff displayed a conscious and callous indifference to, or disregard of, probable harm to plaintiff.)]

[11. *Allegation of personal injuries. See § 485.150, Paragraphs 8- 10* .]

[12. As a further proximate result of the acts and omissions of defendant[(s), and each of them], plaintiff's _____ (*describe personal property, e.g.,* 1988 Dodge pick-up truck) was _____ (damaged *or* destroyed), all to plaintiff's damages in the sum of $ _____.]

SECOND COUNT
(Liability under *Pub. Util. Code § 2106*)

13. Plaintiff refers to and herein incorporates Paragraphs 1-12, inclusive, of the First Count.

14. At the times herein mentioned, defendant _____ [*name of railroad*] was a public utility owning, operating, controlling, or managing a railroad line and system for the transportation of people or property, directly or indirectly to or for the public.

15. At the times herein mentioned, defendant _____ [*name of railroad*] _____ [did, caused to be done, or permitted an act, matter, or thing prohibited or declared unlawful *or* omitted to do an act, matter, or thing required to be done] by the Constitution, a state law, or an order or decision of the Public Utilities Commission, in that: _____ [*specify acts or omissions in violation of Constitution, state statute, or order or decision of the Public Utilities Commission, e.g.,* defendant failed to locate its crossing signals in a conspicuous position at both corners of the crossing intersection on the right-hand side of highway traffic flow and in advance of the railroad track and arranged to face the highway travel].

16. The foregoing _____ [act(s) *or* omission(s)] committed by defendant constituted a violation of _____ [*specify constitutional provision, statute, or Public Utilities Commission order or decision*]. [This Public Utilities Commission _____ (order *or* decision), a copy of which is attached as Exhibit A and is incorporated herein, was at all times herein in full force and effect.]

[17. Plaintiff requests that judicial notice be taken of the _____ (order *or* decision) of the California Public Utilities Commission herein described and incorporated.]

18. As a proximate result of the foregoing _____ [act(s) *or* omission(s)] committed by defendant, plaintiff suffered the injury described above.

[19. Defendant's _____ (act *or* omission) was wilful and resulted in the loss, damages, and injury to plaintiff described above.]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For damages for loss of income and earnings and impairment of earning ability according to proof;

[4. For damage to personal property (according to proof *or* in the sum of $ _____),]

[5. For punitive damages,]

6. For costs of suit herein incurred, and

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 485.121.*]

[2] Use of Form

This form of complaint is for use by an automobile driver to bring an action for personal injuries and, if appropriate, property damage against a railroad company and its train operators for injuries sustained in a collision between the automobile and a train. The complaint includes two counts: the first count is for general use when recovery is based on negligence [*see Civ. Code § 1714(a)*; *see also § 485.61*]; the second count should be used only when recovery may also be based on liability under *Pub. Util. Code § 2106*, which provides that a public utility is liable for all loss, damage, or injury caused by its violation of a Constitutional provision, a statute, or an order or decision of the Public Utilities Commission [*see § 485.68*].

The form may be modified for use by an motor vehicle passenger injured in a crossing collision to allege a cause of action against the railroad and its employees. A passenger may also have separate causes of action against the driver and owner of the vehicle [*see Deshotel v. Atchison, Topeka & Santa Fe Ry. Co. (1956) 144 Cal. App. 2d 224, 226, 231, 300 P.2d 910]* . For further discussion and forms relating to an action by an motor vehicle passenger against the driver or owner generally, see Ch. 83, *Automobiles: Bringing the Action* .

[3] Allegations

The first count of the form alleges the corporate capacity of the defendant railroad (Paragraph 1) and includes initial, optional paragraphs that state the identity and residence of any defendant railroad employees (Paragraph 2), and that add fictitiously named defendants (Paragraph 3). It then alleges that (1) the train involved was in the possession of defendant railroad and operated by it at time ofaccident (Paragraph 5) [*see Johnson v. Southern Pac. R.R. Co. (1908) 154 Cal. 285, 288-289, 97 P. 520]* ; (2) defendant railroad company had a duty to maintain signals or warnings at the crossing under the circumstances (Paragraph 7) [*see Downey v. Santa Fe Transp. Co. (1955) 134 Cal. App. 2d 720, 726-727, 286 P.2d 40]* ; (3) defendant operators had a duty to sound a warning at the crossing under the circumstances (Paragraph 8) [*see Downey v. Santa Fe Transp. Co. (1955) 134 Cal. App. 2d 720, 727, 286 P.2d 40]* ; (4) defendants breached their duty to plaintiff by failing to maintain signals or sound warnings and, as a result, defendants' train collided with plaintiff's automobile (Paragraphs 6-8); and (5) defendant's negligence was the proximate cause of personal injuries suffered by plaintiff (Paragraph 11) [*Civ. Code §§ 1714(a), 3333*]. The first count also includes optional paragraphs alleging that defendant's negligence was the proximate cause of property damage incurred by plaintiff (Paragraph 12) [*Civ. Code §§ 1714(a), 3333*], and that defendants' conduct constitutes a willful and conscious disregard of probable harm to plaintiff sufficient to support an award of punitive damages (Paragraphs 9, 10) [*Civ. Code § 3294*; *see Seimon v. Southern Pac. Transp. Co. (1977) 67 Cal. App. 3d 600, 608-609, 136 Cal. Rptr. 787]* .

The second count of this form, based on liability under *Pub. Util. Code § 2106*, alleges that (1) defendant railroad company was a public utility (Paragraph 14) [*see Cal. Const. art. XII, § 3*; *Pub. Util. Code § 216*; (2) defendant railroad

company violated a provision of the Constitution, a statute, or an order or decision of the Public Utilities Commission (Paragraphs 15, 16) [*see Pub. Util. Code § 2106*]; and (3) defendant railroad's violation was a proximate cause of loss, damages, or injury to plaintiff (Paragraph 18) [*see Pub. Util. Code § 2106*]. The second count includes an optional paragraph alleging that defendant railroad's acts or omissions were wilful and thus are sufficient to support an award of exemplary damages (Paragraph 19) [*see Pub. Util. Code § 2106*]. It also includes an optional paragraph requesting that judicial notice be taken of an order or decision of the Public Utilities Commission order or decision, for use when a violation of that order or decision is the basis for liability (Paragraph 17) [*Pub. Util. Code § 2106*; *see Evid. Code § 453* (court shall take judicial notice of matters subject to permissive judicial notice under *Evid. Code § 452* if party so requests, gives adverse party sufficient notice of that request through pleadings or otherwise, and furnishes court with sufficient information to take judicial notice)].

[4] Cross References

For related forms, see *§§ 485.121, 485.150*

For discussion and forms relating to actions by automobile drivers and passengers generally, see Ch. 83, *Automobiles: Bringing the Action*

[5] State Statutes

Persons as liable for negligent injury to another except so far as injured party brings injury on himself or herself. *Civ. Code § 1714(a)*

Principal as responsible for agent's negligence. *Civ. Code § 2338*

Agent as personally liable for own wrongful acts. *Civ. Code § 2343*

Measure of damages for tort. *Civ. Code § 3333*

Public utility as liable for violation of statute or PUC order; exemplary damages. *Pub. Util. Code § 2106*

Action to recover for damages under *Pub. Util. Code § 2106* as permitted to be brought in any court of competent jurisdiction by any corporation or person. *Pub. Util. Code § 2106*

[6] Text References

Witkin, Summary of California Law, Vol. 2, *Insurance, §§ 113*, 242, 312, 314; , Vol. 6, *Torts*, §§ 831-870, 897-907, 910-929, 1545-1677 (10th ed. 2005)

37 Cal. Jur. 3d, *Railroads*, §§ 96-98, 113, 132-133

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Chapter 485 RAILROADS
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B. Injuries to Passengers and Other Persons

42-485 California Forms of Pleading and Practice--Annotated § 485.152

§ 485.152 Action for Damages [Civ. Code § 3333] Against Railroad [Civ. Code § 2338] and Employees [Civ. Code § 2343]--Complaint for Wrongful Death of Automobile Driver by Entitled Person(s) [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a)]--Failure to Install Signal or Sound Warning at Grade Crossing

[1] FORM Action for Damages [Civ. Code § 3333] Against Railroad [Civ. Code § 2338] and Employees [Civ. Code § 2343]--Complaint for Wrongful Death of Automobile Driver by Entitled Person(s) [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code § 1714(a)]--Failure to Install Signal or Sound Warning at Grade Crossing

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DAMAGES
[and DOES 1 through _____,]	)	(Wrongful Death)
Defendant(s).	)	
	)	
	)	

_____

Plaintiff alleges:

1. _____ [Plaintiff(s) *or* The person(s) listed below] is/are entitled to bring an action for the wrongful death of _____ [*name of decedent*] (hereinafter "decedent") pursuant to *Code of Civil Procedure Section 377.60*, based on his/her/their relationship to decedent, as follows:

Name(s)	Relationship(s) to Decedent
_____	_____

_____
_____ _____
_____
_____ _____
_____

[_____ (*If one or more persons are required to establish additional facts, such as that there is no surviving spouse, domestic partner, child, or issue of deceased child, or that the person was dependent on decedent, in order to be entitled to bring a wrongful death action under Code Civ. Proc. § 377.60, specify facts that satisfy applicable requirement*).]

[*ADD, if decedent's personal representative is maintaining action on behalf of one or more entitled persons*]

Plaintiff _____ [*name*] is the duly appointed, qualified, and acting personal representative of the estate of decedent, and brings this action on behalf of _____ [all of the above-listed persons entitled to bring a cause of action for the wrongful death of decedent *or* the following person(s) entitled to bring an action for the wrongful death of decedent: _____ (*specify person(s) on whose behalf personal representative is maintaining action*)].

[*CONTINUE*]

[2. *Identity and capacity of defendant railroad company. See § 485.150, Paragraph 1.*]

[3. *Identity, capacity, and/or residence of defendant railroad employees. See § 485.150, Paragraph 2.*]

[4. *Fictitious name allegation. See § 485.150, Paragraph 3.*]

[5. *Agency allegation for individual defendants. See § 485.150, Paragraph 4.*]

[6. *Allegation of railroad company's ownership of train. See § 485.150, Paragraph 5.*]

7. On or about _____ [*date*], at approximately _____ [*time*], decedent was driving a _____ [*describe vehicle, e.g,* 1988 Dodge pick-up truck] _____ [*specify direction, e.g.,* westbound] on _____ [*street*]. At that same time, defendants were operating a _____ [*specify, e.g.,* train consisting of one locomotive, five flatcars, and a caboose] _____ [*specify direction, e.g.,* northbound] along the railroad track described above. On or about the time alleged above, at the grade crossing described above, defendants ran the train into and against decedent's vehicle, and decedent sustained severe injuries from which he/she thereafter died.

[8. *Allegations of defendants' negligent acts or omissions. See § 485.151, Paragraphs 7, 8.*]

[9. *Allegation of basis for award of punitive damages, if appropriate. See § 485.151, Paragraphs 9, 10.*]

10. As a proximate result of the negligence [and conscious disregard] of defendant[(s), and each of them], decedent died on _____ [*date*].

11. As a proximate result of the negligence [and conscious disregard] of defendant((s), and each of them,) and the death of decedent, _____ [plaintiff(s) *or* the person(s) specified in Paragraph 1] has/have sustained loss resulting from the loss of the society, comfort, attention, services, and support of decedent.

12. As a further proximate result of the negligence [and conscious disregard] of defendant((s), and each of them,) and the death of decedent, plaintiff _____ [*name of plaintiff who incurred expenses*] has incurred funeral and burial expenses.

WHEREFORE, plaintiff(s) pray(s) judgment against defendants, and each of them, as follows:

1. For general damages according to proof;

2. For funeral and burial expenses for according to proof;

3. For loss of earnings according to proof;

[4. For punitive damages;]

5. For costs of suit herein incurred; and

6. For such other and further relief as the Court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 485.121.*]

[2] Use of Form

This form of complaint is for use by the person(s) entitled by statute to bring a wrongful death action based on the death of a decedent who had been the driver in an automobile against a railroad company and its employees for the wrongful death of the decedent caused by a collision between the train and the automobile [*see Code Civ. Proc. § 377.60*].

For a general form of complaint and allegations to establish plaintiffs' entitlement to bring a wrongful death action, see Ch. 181, *Death and Survival Actions* .

[3] Allegations

This form of complaint alleges the following:

- The identity of persons entitled under the statute to bring a wrongful death cause of action and their

relationship to the decedent and, if the action is brought by the personal representative of the decedent's estate on behalf of these entitled persons, the capacity of the personal representative to do so (Paragraph 1) [*see Code Civ. Proc. § 377.60*].

- That defendants proximately caused the death of decedent by their negligence (Paragraphs 7, 8, 10) [*Civ. Code § 1714(a)*].

- That plaintiff(s) sustained a loss of the society, comfort, attention, services, and support of decedent (Paragraph 11) [*Krouse v. Graham (1977) 19 Cal. 3d 59, 67, 137 Cal. Rptr. 863, 562 P.2d 1022]* .

- That plaintiff(s) incurred expenses for decedent's burial (Paragraph 12) [*Francis v. Sauve (1963) 222 Cal. App. 2d 102, 124, 34 Cal. Rptr. 754]* . If the plaintiff is a minor, a guardian ad litem must be appointed for the purposes of the action, unless the minor already has a guardian [*see Code Civ. Proc. § 372*].

[4] Wrongful Death Actions

When the death of a person is caused by the wrongful act or negligence of another, certain persons, or the decedent's personal representative on their behalf, may bring an action for damages against the person causing the death and any other person responsible (or against personal representatives of such persons) [*Code Civ. Proc. § 377.60*]. *Code Civ. Proc. § 377.60* permits decedent's surviving spouse, domestic partner, children, and issue of deceased children to bring a wrongful death action without qualification, and permits others to bring an action under specified circumstances. For forms of allegations establishing that specific classes of persons are entitled to bring a wrongful death action, including allegations that are required of plaintiffs who are not the decedent's surviving spouse, domestic partner, children, or issue of deceased children, see Ch. 181, *Death and Survival Actions* . If a plaintiff is a minor, a guardian ad litem must be appointed for the purposes of the action, unless the minor already has a guardian [*see Code Civ. Proc. § 372*]. For discussion and forms relating to appointment of a guardian ad litem generally, see Ch. 291, *Guardians ad Litem* .

In a wrongful death action, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under *Code Civ. Proc. § 377.34* (survival actions). The court must determine the respective rights in an award of the persons entitled to assert the cause of action [*Code Civ. Proc. § 377.61*]. An action under *Code Civ. Proc § 377.30* (survival actions) may be joined with a wrongful death action arising out of the same wrongful act or neglect [*Code Civ. Proc. § 377.62(a)*]. In addition, a wrongful death action and a survival action under *Code Civ. Proc § 377.31* (survival of pending action) arising out of the same wrongful act or neglect may be consolidated for trial as provided in *Code Civ. Proc. § 1048* (consolidation of actions) [*Code Civ. Proc. § 377.62(b)*].

For further discussion of actions for wrongful death and survival actions generally, see Ch. 181, *Death and Survival Actions* .

[5] Venue

In an action for death from a wrongful act or negligence, either the county in which the injury occurs or the county in which the defendants, or some of them, reside at the commencement of the action is a proper county for the trial of the action [*Code Civ. Proc. § 395(a)*].

[6] Cross References

For related forms, see *§§ 485.121*, *485.150*, and *485.151*.

For alternative complaints and allegations for use in wrongful death actions, see Ch. 181, *Death and Survival Actions*

For discussion and forms relating to appointment of a guardian ad litem generally, see Ch. 291, *Guardians ad Litem*

[7] State Statutes

Two-year statute of limitations for action to recover damages for personal injury or wrongful death. *Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)* (one-year period prior to 2003)

Who may bring wrongful death action. Code Civ. Proc. § 337.60

[8] Decisions

Plaintiff in wrongful death action as entitled to presumption that decedent exercised due care when no one witnessed decedent being struck and killed by train. *Greene v. Atchison, Topeka & Santa Fe Ry. Co. (1953) 120 Cal. App. 2d 135, 139, 260 P.2d 834*

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42-485 California Forms of Pleading and Practice--Annotated § 485.153

§ 485.153 Action for Damages [Civ. Code § 3333] Against Railroad [Civ. Code § 2338] and Employees [Civ. Code § 2343]--Allegation in Complaint by Automobile Driver--Failure to Repair Signal or Sound Warning at Grade Crossing

[1] FORM Action for Damages [Civ. Code § 3333] Against Railroad [Civ. Code § 2338] and Employees [Civ. Code § 2343]--Allegation in Complaint by Automobile Driver--Failure to Repair Signal or Sound Warning at Grade Crossing

1. At all times herein mentioned, defendant _____ [*name of railroad*] _____ [*allege facts showing defendant's possession and control of location at which the accident occurred, e.g.,* owned, maintained, controlled, managed, and operated a crossing where its railroad tracks intersect and occupy a portion of _____ (*street name*) in _____ (*city*), California]. On or about _____ [*date*], defendant _____ [*name of railroad*] installed _____ [*specify defective warning device, e.g.,* a wigwag signal at the southwest corner of the crossing], the purpose of which was to warn motorists of the approach of its trains, and on which the public was thereby encouraged to rely.

2. At the times and place herein mentioned, defendant _____ [*name of railroad*] negligently and carelessly failed to inspect and to maintain _____ [*specify defective warning device, e.g.,* the wigwag signal]. By reason of defendant's lack of inspection and maintenance, _____ [*specify defective warning device, e.g.,* the wigwag signal] failed to operate properly, in that _____ [*specify, e.g.,* it did not activate on the approach and passing of trains traveling on the northbound track].

3. Defendant _____ [*name of railroad*] had actual or constructive notice that _____ [*specify defective warning device, e.g.,* the wigwag signal] failed to operate properly in that _____ [*allege facts indicating actual or constructive notice, e.g.,* several motorists had reported the signal's malfunction to defendant's regional office at _____ (*address*), in the month preceding the accident described below]. Notwithstanding this notice, defendant _____ [*railroad company*], through its agents and employees acting in the discharge of their duties and within the scope of their authority, negligently and carelessly failed to make necessary repairs.

4. Defendants _____ [*names of railroad employees*] had actual or constructive notice that _____ [*specify defective warning device, e.g.*, the wigwag signal] failed to operate properly in that _____ [*allege facts indicating actual or constructive notice, e.g.*, during the month preceding the accident described below, defendants passed through the crossing many times and observed or should have observed the signal's malfunction]. Notwithstanding this notice, defendants _____ [*names of railroad employees*] _____ negligently and carelessly failed to ring a bell, or sound a whistle, or either one or more thereof, at or near the crossing, to warn plaintiff of the approach of the train.

5. _____ [*Describe accident caused by defective warning device, e.g.*, On _____ (*date*), at approximately _____ (*time*), plaintiff, as the driver of a motor vehicle, approached the crossing and signal described above, driving eastbound on _____ (*street*). Plaintiff heard no horn or other sound warning of an approaching train, and, in further reliance on the fact that the wigwag signal was not activated, proceeded to drive his/her motor vehicle through the crossing. There it was struck by a passing northbound train, resulting in plaintiff's injuries described below].

[2] Use of Form

These allegations are for use in a complaint by an automobile driver who has been injured in a collision as a result of a railroad company's failure to inspect and repair defective signal equipment at a crossing [*see § 485.62[3][b]*]. They may be inserted in lieu of Paragraphs 6-8 in the *form in § 485.151*. In an action involving wrongful death, the allegations may be adapted for insertion in lieu of Paragraphs 7 and 8 of the *form in § 485.152*.

[3] Allegations

This form alleges that (1) defendant occupied and controlled the crossing (Paragraph 1) [*see County of Alameda v. Southern Pac. Co. (1961) 55 Cal. 2d 479, 484, 11 Cal. Rptr. 751, 360 P.2d 327* ; *see also* Ch. 421, *Premises Liability*]; (2) defendant installed a signal on which the public was encouraged to rely (Paragraph 1) [*see Will v. Southern Pac. Co. (1941) 18 Cal. 2d 468, 473-474, 116 P.2d 44]* ; and (3) defendants breached their respective duties to plaintiff, despite actual or constructive notice of the danger, to inspect and maintain the signal andto sound a warning on approaching the crossing, resulting in the collision that caused plaintiff's injuries (Paragraphs 2-5) [*Civ. Code § 1714(a)*; *see Peri v. Los Angeles Junction Ry. (1943) 22 Cal. 2d 111, 128, 130-131, 137 P.2d 441* ; *Vaca v. Southern Pac. Co. (1928) 91 Cal. App. 470, 481, 267 P. 346]* .

[4] Cross References

For a related form, see *§ 485.151*

For discussion and forms relating to liability for dangerous conditions on land, see Ch. 421, *Premises Liability*

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42-485 California Forms of Pleading and Practice--Annotated § 485.154

§ 485.154 Action for Damages [Civ. Code § 3333] Against Railroad [Civ. Code § 2338] and Employees [Civ. Code § 2343]--Allegation in Complaint by Automobile Driver--Use of Excessive Speed at Grade Crossing

[1] FORM Action for Damages [Civ. Code § 3333] Against Railroad [Civ. Code § 2338] and Employees [Civ. Code § 2343]--Allegation in Complaint by Automobile Driver--Use of Excessive Speed at Grade Crossing

[*EITHER*]

1. At the time and place referred to herein, defendants _____ [*names*], as agents or employees of defendant _____ [*name of railroad*] acting in the discharge of their duties and within the scope of their authority, negligently and carelessly controlled, maintained, and operated the _____ [locomotive *or* railroad car] by causing the train to be propelled at an excessive and dangerous rate of speed, above that which would have been safe or prudent under the circumstances existing at the time and place referred to herein, including the fact that _____ [*specify, e.g.*, parked vehicles, adjacent to the crossing, obscured the vision and view of the engineer and the plaintiff at the crossing].

[*AND/OR*]

2. At the time and place referred to herein, defendant _____ [*name of railroad*] negligently and carelessly directed its employees to operate the [locomotive *or* railroad car] at an excessive and dangerous rate of speed, which rate of speed was maintained by defendant employees _____ [*names*] at the express direction of defendant _____ [*name of railroad*].

[2] Use of Form

These allegations are for use in a complaint by an automobile driver who has been injured in a collision caused by the failure of train operators to drive a train at a reasonable speed under the circumstances [*see § 485.02[5][f]*]. Liability may be based on excessive speed whether or not signals were provided at the crossing [*see Peri v. Los Angeles*

Junction Ry. (1943) 22 Cal. 2d 111, 126, 137 P.2d 441] . The allegations may be inserted either in addition to or in lieu of Paragraphs 6-8 in the *form in § 485.151*. In a wrongful death action, they may be adapted for insertion in Paragraphs 7 and 8 of the *form in § 485.152*.

[3] Allegations

This form alleges that the railroad operators were negligent in using excessive speed in operating the train, given the circumstances existing at the crossing (Paragraph 1) [*see Stout v. Southern Pac. R.R. Co. (1954) 127 Cal. App. 2d 491, 502, 274 P.2d 194]* . An alternate or additional paragraph alleges that the railroad company was negligent in directing its employees to maintain an excessive rate of speed, for use when there is an independent basis for liability on the part of the company (Paragraph 2) [*see Benson v. Southern Pacific Co. (1918) 177 Cal. 777, 779-880, 171 P. 948]* .

[4] Decisions

Evidence that railroad company regulated speed of trains at crossing, through use of "speed boards" and prescribed time schedule, as supporting jury finding that company was independently negligent, apart from respondeat superior. *Jensen v. Southern Pac. Co. (1954) 129 Cal. App. 2d 67, 69-71, 276 P.2d 703* , disapproved on other grounds in *Alarid v. Vanier (1958) 50 Cal. 2d 617, 623-624, 327 P.2d 897*

[5] Cross References

For a related form, see *§ 485.150*

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42-485 California Forms of Pleading and Practice--Annotated § 485.155

§ 485.155 Action for Damages [Civ. Code § 3333] Against Railroad [Civ. Code § 2338] and Employees [Civ. Code § 2343]--Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Comparative Negligence [Civ. Code § 1714(a)] of Automobile Driver

[1] FORM Action for Damages [Civ. Code § 3333] Against Railroad [Civ. Code § 2338] and Employees [Civ. Code § 2343]--Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Comparative Negligence [Civ. Code § 1714(a)] of Automobile Driver

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

1. Plaintiff failed to exercise reasonable and ordinary care, caution, or prudence for his/her own safety in order to avoid the alleged accident in that _____ [*set out acts or omissions of plaintiff constituting negligence, e.g.,* plaintiff could not obtain a reasonably safe view of the tracks in both directions before entering the dangerous track area unless plaintiff stopped his/her automobile. Nevertheless, plaintiff negligently and carelessly failed to stop, to look, and to listen for the approach of defendant's train and instead proceeded without stopping onto the tracks into the path of the oncoming train].

2. The resulting injuries and damages, if any, sustained by plaintiff wereproximately caused by the negligence of plaintiff.

[2] Use of Form

This affirmative defense allegation is for insertion in an answer to a complaint based on negligence brought against a railroad by an automobile driver injured in a collision. The defense alleges that plaintiff's own negligent conduct was the sole or contributing cause of the alleged injury. For discussion of the defense of comparative negligence in negligence actions against railroads, see *§ 485.67*. For more general discussion, additional forms of affirmative defense allegation, and a form of Judicial Council answer into which this affirmative defense allegation may be inserted, see Ch. 380, *Negligence* . For discussion relating to answers generally, including general forms of answer into which this

affirmative defense allegation may also be inserted, see Ch. 26, *Answers* .

[3] Cross References

For discussion and forms relating to the format of affirmative defense allegations and answers generally, see Ch. 26, *Answers* .

[4] State Statutes

Persons as liable for negligent injury to another except so far as injured party brings injury on himself or herself. *Civ. Code § 1714(a)*

Duty of motorist in approaching railroad crossing. *Veh. Code §§ 22450-22452*

[5] Text References

Witkin, Summary of California Law, Vol. 6, *Torts*, § 1280 et seq. (10th ed. 2005)

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42-485 California Forms of Pleading and Practice--Annotated § 485.156

§ 485.156 Action for Damages [Civ. Code § 3333] Against Railroad [Civ. Code § 2338] and Employees [Civ. Code § 2343]--Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Trespasser Injured While Riding or Getting on or off Moving Train [Civ. Code § 1714.7]

[1] FORM Action for Damages [Civ. Code § 3333] Against Railroad [Civ. Code § 2338] and Employees [Civ. Code § 2343]--Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Trespasser Injured While Riding or Getting on or off Moving Train [Civ. Code § 1714.7]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that plaintiff was injured, if at all, while _____ [getting on *or* attempting to get on *or* riding on *or* getting off of] a moving locomotive or railroad car, without authority from the operator of the railroad. Plaintiff's injuries and damages, if any, were not proximately caused by any intentional act of the owner or operator of the railroad, done either with knowledge that serious injury would probably result from the act, or with a wanton and reckless disregard of the probable result of the act.

[2] Use of Form

This affirmative defense allegation is for insertion in an answer to a complaint based on negligence brought against a railroad by a plaintiff injured while gettingon, riding on, or getting off a moving train. The defense alleges that plaintiff's injury occurred as a result of his or her unauthorized act as a trespasser [*Civ. Code § 1714.7*; *see § 485.62[2][b]*]. For a form of Judicial Council answer into which this affirmative defense allegation may be inserted, see Ch. 380, *Negligence* . For discussion relating to answers generally, including general forms of answer into which this affirmative defense allegation may also be inserted, see Ch. 26, *Answers* .

[3] State Statutes

Qualified immunity of railroad for injuries to trespassers riding on or jumping on or off moving train. *Civ. Code § 1714.7*

[4] Decisions

Defendant did not waive right to rely on immunity under *Civ. Code § 1714.7* in summary judgment motion by failing to raise it as affirmative defense in its answer, because plaintiff was aware of potential applicability of statute some four years prior to motion in five-year-old case. *Perez v. Southern Pac. Transp. Co. (1990) 218 Cal. App. 3d 462, 471, 267 Cal. Rptr. 100*

[5] Text References

Witkin, Summary of California Law, vol. 6, *Torts*, § 1097, 1098 (10th ed. 2005)

California Forms of Pleading and Practice--Annotated

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Volume 43: Receivers thru Rewards-Chs. 486-499
Chapter 486 RECEIVERS

43-486 California Forms of Pleading and Practice--Annotated 486.syn

AUTHOR: Robert B. Kaplan Editorial Consultant

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[5] Verification

[6] Cross References

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[1] FORM

[2] Use of Form

[3] Ex Parte Appointment of Receiver

[4] Verification

[5] Cross Reference

§ 486.132 Allegations and Prayer of Complaint to Enforce Assignment of Leases, Rents, Issues, or Profits [Code Civ. Proc. § 564(b)(11)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Ex Parte Appointment of Receiver

[5] Verification

[6] Cross References

§ 486.133 Allegations and Prayer of Complaint for Appointment of Receiver in Aid of Arbitration [Code Civ. Proc. § 1218.8]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Ex Parte Appointment of Receiver

[5] Verification

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[1] FORM

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[1] FORM

[2] Use of Form

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[1] FORM

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[1] FORM

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[1] FORM

[2] Use of Form

[3] Notice to Opposing Party

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[b] Unknown Matters

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[6] Cross References

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§ 486.141 Proceedings for Appointment of Receiver Pendente Lite--Order Appointing Receiver and Fixing Amounts of Undertakings [Code Civ. Proc. §§ 566(b), 567(b)], and Order to Show Cause Why Appointment of Receiver Should Not Be Confirmed [Cal. Rules of Ct., Rule 3.1176(a)]

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[1] FORM

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[1] FORM

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[1] FORM

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§ 486.161 Motion for Order Excusing Turnover in a Bankruptcy Case [11 U.S.C. § 543(d)].

[1] FORM

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[1] FORM

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[1] FORM

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[1] FORM

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FOOTNOTES:
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Volume 43: Receivers thru Rewards-Chs. 486-499
Chapter 486 RECEIVERS
PART I. SCOPE

43-486 California Forms of Pleading and Practice--Annotated § 486.01

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.01 Scope of Chapter

This chapter discusses the remedy of receivership both pendente lite and after judgment. The Legal Background and Forms are subdivided into three subparts. Subpart A discusses the appointment of receivers [*see § 486.10* et seq.] and contains the following forms:

- Forms of allegations and prayers for the appointment of a receiver for inclusion in complaints [*see §§ 486.130 -486.138*].
- A form of declaration and ex parte application for appointment of a receiver [*see § 486.139*].
- A form of order fixing the amount of the ex parte applicant's bond [*see § 486.140*].
- A combined form of order on ex parte application appointing a receiver, fixing the amount of the applicant's and the receiver's bonds, and order to show cause why the appointment should not be confirmed [*see § 486.141*].
- A form of order confirming the appointment [*see § 486.142*].
- A form of notice of motion for an order appointing a receiver, a form of supporting declaration, and a form of order granting the motion [*see §§ 486.143 -486.145*].

Subpart B discusses the administration and termination of a receivership [*see § 486.30* et seq.] and contains the following forms:

- A skeletal form of inventory [*see § 486.150*].
- A general form of application by the receiver for an order [*see § 486.151*].

- A form of petition for leave to employ an attorney [*see § 486.152*].

- Forms of notice of unclaimed funds in the hands of a receiver [*see § 486.153*] and of order directing their payment into the California State Treasury [*see § 486.154*].

- A form of application by the receiver for authority to issue receivership certificates [*see § 486.155*] and a form of receivership certificate [*see § 486.156*].

- Forms of the receiver's final account, notice of hearing, and order approving account [*see §§ 486.157 -486.159*].

- A form of stipulation to approve the receiver's final account and report [*see § 486.60*].

- A form of motion for an order excusing turnover in a bankruptcy case [*see § 486.61*].

Subpart C discusses civil actions by and against receivers [*see § 486.50* et seq.] and contains the following forms:

- A form of petition by a receiver for permission to sue a third party [*see § 486.170*].

- A form of order granting the petition [*see § 486.171*].

- A form of allegations of the receiver's authority to sue for inclusion in the complaint subsequently filed [*see § 486.172*].

- A form of petition by a third party for leave to sue the receiver in the receiver's official capacity [*see § 486.173*].

- A form of order granting the motion [*see § 486.174*].

- A form of allegations of the receiver's status and of the appointing court's permission to sue for inclusion in the complaint filed by the third party [*see § 486.175*].

The Research Guide [*see § 486.60* et seq.] is similarly divided.

Procedural Checklists are provided for seeking [*see § 486.90*] and opposing [*see § 486.91*] appointment of a receiver, for administering and terminating a receivership [*see § 486.100* et seq.], and for actions by [*see § 486.120*] and against [*see § 486.121*] a receiver.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureRemediesReceivershipsReceiversPowersCivil ProcedureRemediesReceivershipsTerminations

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Volume 43: Receivers thru Rewards-Chs. 486-499
Chapter 486 RECEIVERS
PART I. SCOPE

43-486 California Forms of Pleading and Practice--Annotated § 486.02

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.02 Cross References

- For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions* .

- For procedure and forms for use in actions involving unclaimed property, see Ch. 252, *Escheat (Unclaimed Property).*

- For discussion of receivership as a basis for quasi-in-rem jurisdiction, see Ch. 323, *Jurisdiction: Personal* .

- For procedural checklist and forms for use in ex parte applications, see Ch. 372, *Motions and Orders* .

- For discussion and forms for use in intervening in an existing action, see Ch. 395, *Parties* .

- For discussion and forms for use in enforcing liability on a bond or undertaking, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsQuasi in Rem ActionsCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversGeneral Overview

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Chapter 486 RECEIVERS
PART I. SCOPE

43-486 California Forms of Pleading and Practice--Annotated §§ 486.03-486.09

AUTHOR: Robert B. Kaplan Editorial Consultant

[Reserved]

§§ 486.03[Reserved]

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Volume 43: Receivers thru Rewards-Chs. 486-499
Chapter 486 RECEIVERS
PART II. LEGAL BACKGROUND
A. Appointment of Receivers

43-486 California Forms of Pleading and Practice--Annotated § 486.10

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.10 Nature of Receivership

Receivership is a provisional remedy authorized by statute [*see Code Civ. Proc. §§ 564-570*; *Kreling v. Kreling (1897) 118 Cal. 421, 422, 50 P. 549* ; *Steinberg v. Goldstein (1956) 145 Cal. App. 2d 692, 698, 303 P.2d 80]* . Thus, the appointment of a receiver is ancillary to or in aid of the action brought [*La Societe Francaise d'Epargnes et de Prevoyance Mutuelle v. District Court of Fifteenth Judicial Dist. (1879) 53 Cal. 495, 553]* . Because it is a remedy incidental to the main objects of the complaint, there is no such thing as an action brought for the mere appointment of a receiver [*La Societe Francaise d'Epargnes et de Prevoyance Mutuelle v. District Court of Fifteenth Judicial Dist. (1879) 53 Cal. 495, 553* ; *Starbird v. Lane (1962) 203 Cal. App. 2d 247, 261, 21 Cal. Rptr. 280]* .

Receivership is, however, an extraordinary remedy, to be applied with caution, and only in cases of apparent necessity, and when other remedies would be inadequate [*Rogers v. Smith (1946) 76 Cal. App. 2d 16, 21, 172 P.2d 365* ; *see Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 351, 113 Cal. Rptr. 281]* . It is not a substitute for attachment and may not be resorted to for the reason that an attachment would be more expensive [*Rogers v. Smith (1946) 76 Cal. App. 2d 16, 21, 172 P.2d 365]* .

Legal Topics:

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

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Chapter 486 RECEIVERS
PART II. LEGAL BACKGROUND
A. Appointment of Receivers

43-486 California Forms of Pleading and Practice--Annotated § 486.11

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.11 Nature of Receiver

[1] Classes

There are two classes of receivers: (1) those appointed before judgment during the course of the litigation (pendente lite) and (2) those appointed after judgment [*see Code Civ. Proc. § 564*; *see also Code Civ. Proc. § 86(a)(8)* (appointment of receiver in limited civil case); *see also North v. Cecil B. DeMille Productions, Inc. (1934) 2 Cal. 2d 55, 57-58, 39 P.2d 199* (appointment pendente lite); *Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 349-350, 113 Cal. Rptr. 281* (appointment after judgment)].

The receiver is the agent of the court and not of any party, and as such [*Cal. Rules of Ct., Rule 3.1179(a)*]:

- Is neutral,
- Acts for the benefit of all who may have an interest in the receivership property, and
- Holds assets for the court and not for the plaintiff or the defendant.

[2] Receiver Pendente Lite

A receiver pendente lite is a person appointed by the court to take the charge and management of property that is the subject of the litigationbefore the court to preserve and ultimately dispose of it according to the final judgment in the case [*Kreling v. Kreling (1897) 118 Cal. 421, 422, 50 P. 549* ; *Neider v. Dardi (1955) 130 Cal. App. 2d 646, 650, 279 P.2d 598* ; *see North v. Cecil B. DeMille Productions, Inc. (1934) 2 Cal. 2d 55, 57-58, 39 P.2d 199* (receiver pendente lite is person appointed to take charge of fund or property while case remains undecided)].

A receiver neither occupies the status of an assignee [*Wright v. Standard Engineering Corp. (1972) 28 Cal. App. 3d 244, 248, 104 Cal. Rptr. 539* ; *H.D. Roosen Co. v. Pacific Radio Pub. Co. (1932) 123 Cal. App. 525, 534, 11 P.2d 873]*

nor is an agent of any party to the action or proceeding [*Maggiora v. Palo Alto Inn, Inc. (1967) 249 Cal. App. 2d 706, 712, 57 Cal. Rptr. 787]* . Rather, a receiver is an officer or representative of the court [*City of Santa Monica v. Gonzalez (2008) 43 Cal. 4th 905, 930, 76 Cal. Rptr. 3d 483, 182 P.3d 1027* ; *North v. Cecil B. DeMille Productions, Inc. (1934) 2 Cal. 2d 55, 58, 39 P.2d 199* ; *Kreling v. Kreling (1897) 118 Cal. 421, 422, 50 P. 549]* and a custodian of the property committed to his or her charge [*Neider v. Dardi (1955) 130 Cal. App. 2d 646, 650, 279 P.2d 598]* . Being an officer or representative of the court, the receiver is subject to the court's direction [*Highland Secur. Co. v. Superior Court (1931) 119 Cal. App. 107, 112, 6 P.2d 116]* , and the property in receivership is under the control and continuous supervision of the court [*McClenny v. Superior Court (1964) 60 Cal. 2d 677, 688 n.21, 36 Cal. Rptr. 459, 388 P.2d 691* ; *Steinberg v. Goldstein (1956) 145 Cal. App. 2d 692, 699, 303 P.2d 80]* .

Trial courts have broad discretion in the appointment of the receiver to take over the operation of a business. [*Barber v. Lewis & Kaufman, Inc. (1954) 125 Cal. App. 2d 95, 99, 269 P.2d 929]* . The receiver can be utilized to preserve property of an ongoing business [*Sachs v. Killeen (1958) 165 Cal. App. 2d 205, 215, 331 P.2d 735]* . If the receiver is authorized to operate a business, the receiver is normally given the power to incur obligations for supplies and materials incident to the business. In the event a receiver is operating a business and determines that the business is operating at a loss, the receiver should request instructions from the court as to whether or not the operation of the business should be continued [*United States v. Johnson (8th Cir. 1938) 98 F.2d 462]* . If a creditor wishes to take action against receivership property, it is required to obtain leave of court to do so [*Robbins v. Bueno (1968) 262 Cal. App. 2d 79, 68 Cal. Rptr. 347, 351]* .

[3] Receiver After Judgment

A receiver may be appointed after judgment to preserve the property during the pendency of an appeal [*Code Civ. Proc. § 564(b)(4)*]. Because the judgment is not final and the lawsuit is continuing, the receiver is a receiver pendente lite [*see Code Civ. Proc. § 917.5*; for discussion of the nature of such a receiver, *see* [2], *above*].

A receiver may also be appointed after judgment to take charge of property for specified purposes with respect to the enforcement of the judgment whether or not the case is a limited civil case [*see Code Civ. Proc. §§ 86(a)(8), 564(b)(3),(4), 699.070, 708.610-708.630, 712.060*, discussed in *§§ 486.13[2][l], [3], 486.19*]. When the purpose of the receivership is to reach property of a judgment debtor which cannot be reached by the ordinary levy of execution, that is, when the receivership is supplementary to or in aid of execution, the receivership is a statutory creation and not an equitable remedy; in this situation, the receiver is not, except in a technical sense, an officer of the court, but, rather, represents and is an agent of the judgment debtor, the judgment creditor at whose instance he or she was appointed, and such other judgment creditors as may have caused the receivership to be extended to their claims. The receiver is nevertheless subject to the continued direction and control of the court [*Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 349-350, 113 Cal. Rptr. 281]* .

The functions of a receiver appointed after judgment, either for the purpose of carrying the judgment into effect, or for its preservation until the judgment is executed, are limited to the property described in the judgment [*Kreling v. Kreling (1897) 118 Cal. 421, 423, 50 P. 549]* . Moreover, unlike a receiver appointed pendente lite, the functions of a receiver appointed after judgment for the purpose of carrying the judgment into effect (*Code Civ. Proc. § 564(b)(3)*) or of otherwise enforcing a judgment (*Code Civ. Proc. § 564(b)(4)*) are suspended by an appeal on which an undertaking is given in a sum fixed by the trial court to stay proceedings on the judgment, and a receiver cannot be appointed to carry the judgment into effect after a stay bond has been given [*see Code Civ. Proc. § 917.5*; *Havemeyer v. Superior Court (1890) 84 Cal. 327, 380-384, 24 P. 121]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil

ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureRemediesReceivershipsReceiversDutiesCivil ProcedureRemediesReceivershipsReceiversPowers

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Volume 43: Receivers thru Rewards-Chs. 486-499
Chapter 486 RECEIVERS
PART II. LEGAL BACKGROUND
A. Appointment of Receivers

43-486 California Forms of Pleading and Practice--Annotated § 486.12

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.12 Limitations on Appointment of Receiver

[1] Statutory Ground Required

A receiver may be appointed only in the classes of cases expressly set forth in the statutes [*Turner v. Superior Court (1977) 72 Cal. App. 3d 804, 811, 140 Cal. Rptr. 475* ; *see In re Stein (1936) 14 Cal. App. 2d 303, 305-306, 58 P.2d 175]* . The basic statute governing the appointment of receivers is *Code Civ. Proc. § 564*, discussed in *§ 486.13[1], [2]*. The requirements of this statute are jurisdictional, and without a showing bringing the receiver within one of the subdivisions of that section the court's order appointing a receiver is void [*Turner v. Superior Court (1977) 72 Cal. App. 3d 804, 811, 140 Cal. Rptr. 475* ; *Rondos v. Superior Court (1957) 151 Cal. App. 2d 190, 195, 311 P.2d 113* ; *contra, John H. Spohn Co. v. Bender (1937) 18 Cal. App. 2d 447, 451, 64 P.2d 152* (party who procured appointment of receiver in improper case was estopped from relying on invalidity to recover fees paid to receiver because erroneous appointment is not jurisdictional)].

Code Civ. Proc. § 564 is, in effect, augmented by a variety of special statutes throughout the codes specifying precise actions or situations in which a receiver may be appointed [*see Turner v. Superior Court (1977) 72 Cal. App. 3d 804, 811, 140 Cal. Rptr. 475]* . Many of these statutes are cited in § 486.61.

The appointment of receivers in limited civil cases pursuant to *Code Civ. Proc. § 564* is authorized by *Code Civ. Proc. § 86(a)(8)*, discussed in *§ 486.13[3]*.

[2] Effect of Existence of Alternative Remedies

A receiver should not be appointed when a remedy less drastic in its nature and scope is available and which will insure to the litigants adequate protection [*A.G. Col Co. v. Superior Court (1925) 196 Cal. 604, 613, 238 P. 926* (involving receivership of going corporation); *Golden State Glass Corp. v. Superior Ct. (1939) 13 Cal. 2d 384, 393, 90 P.2d 75* (same)]. For example, a receiver pendente lite should not be appointed when the rights of the applicant may be as well secured by injunction or other statutory remedies [*A. G. Col Co. v. Superior Court (1925) 196 Cal. 604, 613, 238 P.*

926] . However, receivership will not be denied when other available remedies have been pursued to no avail [*see Alderson v. Alderson (1986) 180 Cal. App. 3d 450, 468, 225 Cal. Rptr. 610]* . Moreover, the mere possession of other remedies does not preclude the appointment of a receiver in a proper case [*Neider v. Dardi (1955) 130 Cal. App. 2d 646, 651, 279 P.2d 598* ; *see City and County of San Francisco v. Daley (1993) 16 Cal. App. 4th 734, 745, 20 Cal. Rptr. 2d 256* (receiver appointed following judgment to abate public nuisance)]. Query whether the change in *Code Civ. Proc. § 564(b)(9)* [formerly *Code Civ. Proc. § 564(b)(8)*], by Stats. 2001, ch. 44, replacing the language "[i]n all other cases where receivers have heretofore been appointed by the usages of courts of equity," with "where necessary to preserve the property or rights of any party" will decrease the availability of receiverships when other remedies are available. Under the former broad language, a court's determination that under detailed circumstances injunctive relief would be inadequate, and that resort should be made to receivership, was not disturbed on appeal in the absence of a clear showing of abuse of discretion [*McNeil v. Graner (1949) 92 Cal. App. 2d 371, 374, 206 P.2d 1120]* .

Available alternative remedies might, in any given case, include, among others, one or more of the other provisional remedies, that is: pendente lite injunctive relief (*Code Civ. Proc. §§ 525-534*), attachment (*Code Civ. Proc. §§ 481.010-493.060*), claim and delivery (*Code Civ. Proc. §§ 511.010-516.050*), and deposit in court (*Code Civ. Proc. §§ 572-574*). See Ch. 303, *Injunctions* , Ch. 62, *Attachment* , 119, *Claim and Delivery* , and Ch. 211, *Deposit in Court* , respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesReceivershipsReceiversAppointments

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§ 486.13 Grounds for Appointment

[1] Generally

A receiver may be appointed by the court in which the action or proceeding is pending in any case in which the court is empowered by law to appoint a receiver [*Code Civ. Proc. § 564(a)*]. *Code Civ. Proc. §§ 564* and *565* (discussed under [2], *below*) are the most important of the statutes with respect to grounds for appointment of a receiver. Other commonly used statutes for appointment of a receiver are *Code Civ. Proc. § 1422* (escheat proceedings) and *Fam. Code § 290* (enforcement of family law judgments and orders).

[2] Statutory Grounds Enumerated

[a] Property in Danger of Being Lost, Removed, or Materially Injured

The court may appoint a receiver in an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to the creditor's claim, or between partners or others jointly owning or interested in any property or fund, on application of the plaintiff, or of any party whose right to or interest in the property or fund, or its proceeds, is probable, and when it is shown that the property or fund is in danger of being lost, removed, or materially injured [*Code Civ. Proc. § 564(b)(1)*; *see Republic of China v. Chang (1955) 134 Cal. App. 2d 124, 130-131, 285 P.2d 351* ; *Snidow v. Hill (1948) 84 Cal. App. 2d 702, 705-706, 191 P.2d 513* ; *Armbrust v. Armbrust (1946) 75 Cal. App. 2d 272, 275-276, 171 P.2d 75]* . On a motion for receivership under this provision, the trial court is not required to determine the ultimate issues involving the precise relationship of the parties; rather, at this stage of the proceedings, nothing more than a probable joint or common interest in the property concerned need be shown [*Maggiora v. Palo Alto Inn, Inc. (1967) 249 Cal. App. 2d 706, 711, 57 Cal. Rptr. 787]* .

The court may also appoint a receiver in an action by a secured lender for the foreclosure of the deed of trust or mortgage and sale of the property on which there is a lien under a deed of trust or mortgage, when it appears that the property is in danger of loss, removal, or material injury, or that the condition of the deed of trust or mortgage has not

been performed and that the property is probably insufficient to discharge the deed of trust or mortgage debt [*Code Civ. Proc. § 564(b)(2)*; *see Title etc. Trust Co. v. California Dev. Co. (1912) 164 Cal. 58, 61-62, 127 P. 502* ; *Bank of Woodland v. Stephens (1904) 144 Cal. 659, 660-661, 79 P. 379* ; *see also Turner v. Superior Court (1977) 72 Cal. App. 3d 804, 811, 813-816, 140 Cal. Rptr. 475]* .

For discussion of the appointment of a receiver under *Code Civ. Proc. § 564(b)(11)* in connection with specific performance of an assignment of rents provision of a deed of trust, mortgage, or separate assignment document and thereafer pending nonjudicial foreclosure, see [i], *below*.

For a discussion of ex parte motions and the filing fee required in superior court cases, see Ch. 372, *Motions and Orders* .

[b] Inspection of Property for Hazardous Substances

The superior court, other than in a limited civil case, may appoint a receiver in an action brought under *Civ. Code § 2929.5* by a secured lender, including a mortgagee or a beneficiary under a deed of trust, to enable the lender to enter and inspect the real property security for the purpose of determining the existence, location, nature, and magnitude of any past or present release or threatened release of any hazardous substance into, onto, beneath, or from the real property security [*Code Civ. Proc. § 564(c)*; *see Code Civ. Proc. § 564(e)(5)* (secured lender defined)]. For discussion relating to an action under *Civ. Code § 2929.5*, see Ch. 555, *Trust Deeds and Real Property Mortgages* . For a form of allegations for appointment of a receiver for this purpose, see *§ 486.138*.

[c] Dissolution, Insolvency, or Mismanagement of Corporation

[i] Appointment of Receiver

The court may appoint a receiver in cases when a corporation has been dissolved, as provided in *Code Civ. Proc. § 565*, discussed at [iii], *below* [*Code Civ. Proc. § 564(b)(5)*].

The court may also appoint a receiver when a corporation is insolvent, is in imminent danger of insolvency, or has forfeited its corporate rights [*Code Civ. Proc. § 564(b)(6)*]. Under this provision, a receiver may be appointed to take charge and preserve the property of a corporation that is insolvent or in imminent danger of insolvency [*see A.G. Col Co. v. Superior Court (1925) 196 Cal. 604, 614, 238 P. 926* (showing required on ex parte application for appointment of receiver on ground corporation is in imminent danger of insolvency)].

[ii] Action by Private Person

Code Civ. Proc. § 564(b)(6) does not authorize an action by a private person, either as a stockholder or creditor, to dissolve a corporation on the ground that it is insolvent or to obtain relief by seizing the corporation's property out of the hands of its constituted management and placing it in a receiver's hands [*Sunset Farms, Inc. v. Superior Court (1935) 9 Cal. App. 2d 389, 401, 50 P.2d 106* (applying exception to rule when corporate entity is used by individual debtor to defraud creditor)]. Under the express provisions of *Code Civ. Proc. § 564(b)(6)*, a receiver may be appointed to take charge and preserve the property of a corporation that has forfeited its corporate rights [*see Havemeyer v. Superior Court (1890) 84 Cal. 327, 374, 24 P. 121]* .

[iii] Application of Creditor or Stockholder

In addition, on the dissolution of any corporation, the superior court of the county in which the corporation carries on its business or has its principal place of business may, on the application of any creditor or of any stockholder or member of the corporation, appoint one or more persons to be receivers or trustees of the corporation to do the following [*Code Civ. Proc. § 565*; *see Havemeyer v. Superior Court (1890) 84 Cal. 327, 365-366, 369, 24 P. 121]* :

- Take charge of the corporation's estate and effects.
- Collect the debts and property due and belonging to the corporation.
- Pay the corporation's outstanding debts.
- Divide the remaining moneys and other property among its stockholders or members.

[iv] Application of Minority Shareholder

A receiver may also be appointed on the application of a minority shareholder or director to take charge of a going corporation on the ground that the corporation is being injured by fraud or mismanagement. The appointment of a receiver on this ground is made pursuant to *Code Civ. Proc. § 564(b)(9)*, discussed under [k], *below*. The proceeding is not directed toward closing the affairs of the corporation or toward an attempt to dissolve it, but merely to place the assets of the corporation in safe hands [*Boyle v. Superior Court (1917) 176 Cal. 671, 673-674, 170 P. 1140* (action for removal of directors and appointment of receiver to take charge of corporation's assets and property); *see Misita v. Distillers Corp., Ltd. (1942) 54 Cal. App. 2d 244, 252, 128 P.2d 888]* .

[d] In Connection With an Arbitrable Controversy

A receiver may also be appointed on the application of a party to an arbitration agreement on the ground that any arbitration award to which the applicant may be entitled may be rendered ineffectual without the appointment of a receiver. The appointment of a receiver on this ground is made pursuant to *Code Civ. Proc. § 1281.8(b)* [*Jordan-Lyon Productions, Ltd. v. Cineplex Odeon Corp. (1994) 29 Cal. App. 4th 1459, 35 Cal. Rptr. 2d 200* ; *see also Baron v. Fire Insurance Exchange (2007) 154 Cal. App. 4th 1184, 1191, 65 Cal. Rptr. 3d 502]* . This provisional remedy only may be made by the court, and appointment of a receiver by an arbitrator is void [*Marsch v. Williams (1994) 23 Cal. App. 4th 238, 246, 28 Cal. Rptr. 2d 402]* .

Any application to appoint a receiver on this ground must be accompanied by a complaint or by copies of the demand for arbitration and any response thereto. If accompanied by a complaint, the application should also be accompanied by a statement stating whether the party is or is not reserving that party's right to arbitration. Since many commercial contracts contain arbitration clauses, utilizing a receiver as a provisional remedy in connection with an arbitrable controversy should always be considered. In the event any application is filed to appoint a receiver in connection with an arbitrable controversy, the applicant must also present to the court an application to stay all other proceedings pending the arbitration of any issue, question, or dispute which is claimed to be arbitrable under the agreement and which is relevant to the action pursuant to which the provisional remedy is sought to avoid waiving the right to arbitration [*Code Civ. Proc. § 1281.8(d)*].

[e] Water or Sewer System Corporation

The court may appoint a receiver at the request of the Public Utilities Commission pursuant to *Pub. Util. Code § 855* (receivership of water or sewer system corporation that is unable or unwilling to adequately serve its ratepayers, or has been abandoned by its owners, or is unresponsive to rules or orders of Public Utilities Commission) [*Code Civ. Proc. § 564(b)(8)*].

[f] Household Goods Carrier

The court may appoint a receiver at the request of the Public Utilities Commission pursuant to *Pub. Util. Code § 5259.5* (appointment of a receiver whenever the commission determines that any household goods carrier or any officer, director, or agent of a household goods carrier has abandoned, or is abandoning stored household goods or property of

any shippers under contract with the carrier or carriers) [*Code Civ. Proc. § 564(b)(8)*].

[g] Unlawful Detainer

The court may appoint a receiver in an unlawful detainer proceeding [*Code Civ. Proc. § 564(b)(7)*; *see Code Civ. Proc. § 1159 et seq.*]. For discussion of unlawful detainer proceedings, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

[h] Potential Default Under Health Facilities Loan Program

The court may appoint a receiver at the request of the Office of Statewide Health Planning and Development ("Office"), or the Attorney General, pursuant to *Health & Safety Code § 129173* [*Code Civ. Proc. § 564(b)(10)*]. Section 129173 is a part of the California Health Facility Construction Loan Insurance Law [*Health & Safety Code § 129000 et seq.*], which provides an insurance program for health facility construction, improvement, and expansion loans [*Health & Safety Code § 129005*; *see Health & Safety Code § 129015* (program is administered by the Office)].

Under *Health & Safety Code § 129173*, upon making a determination that a borrower may be unable to fulfill its obligations under an insured loan transaction, the Office may assume or direct managerial or financial control of the borrower by, among other things, instituting (or requesting the Attorney General to institute) an action or proceeding to obtain injunctive or other equitable relief, including the appointment of a receiver for the borrower or the borrower's assets. The action or proceeding must be brought in the superior court in and for the county in which all or a substantial portion of the borrower's assets are located. On a proper showing, the court must grant the relief provided by law and requested by the Office or the Attorney General. The receiver may be appointed pursuant to *Code Civ. Proc. §§ 564-570* and must be approved by the Office. The receiver may, with the court's approval, exercise all of the powers of the officers and directors of the borrower, including the filing of a petition for bankruptcy. No action at law or in equity may be maintained against the Office, the Attorney General, or the receiver because of the exercise by any of them of the powers of the borrower's officers and directors pursuant to the order of, or with the approval of, the superior court [*Health & Safety Code § 129173(a)(4)*].

[i] Action for Specified Performance of Assignment of Rents Provision

The court may appoint a receiver in an action by a secured lender for specified performance of an assignment of rents provision in a trust deed or mortgage, or in a separate assignment document [*Code Civ. Proc. § 564(b)(11)*]. The appointment may be continued after entry of a judgment for specific performance, if it is appropriate in order to protect, operate, or maintain real property encumbered by trust deed or mortgage, or in order to collect rents, pending the completion of a nonjudicial foreclosure under the power of sale in trust deed or mortgage [*Code Civ. Proc. § 564(b)(11)*; *see also* [k], *below*; for detailed discussion and forms relating to an action to enforce an assignment of rents provisions in trust deed or mortgage, *see* Ch. 555, *Trust Deeds and Real Property Mortgages*].

[j] Action By Assignee Under Assignment of Leases, Rents, Issues, or Profits

The court may appoint a receiver in a case brought by an assignee under an assignment of leases, rents, issues, or profits pursuant to *Civ. Code § 2938(g)* [*Code Civ. Proc. § 564(b)(12)*]. The appointment of a receiver is one of the steps which a real property secured creditor may take in order to enforce an assignment of rents clause which appears in a deed of trust. [*Civ. Code § 2938(c)*].

PRACTICE TIP:

Because of issues which may arise under the California one-action rule set forth in *Code Civ. Proc. § 726*, it is normally prudent to have any order appointing a receiver to enforce an assignment of rents clause which appears in a mortgage or deed of trust to hold any rents collected until the real property secured creditor who obtained appointment of the receiver has completed its foreclosure. Although *Code Civ. Proc. § 564(d)* provides that any action by a secured lender to appoint a receiver pursuant to *Code*

Civ. Proc. § 564 does not constitute an action within the meaning of *Code Civ. Proc. § 726(a)*, having such a provision in an order appointing a receiver will avoid litigation about whether the receiver's payment of rents to the real property secured creditor prior to the foreclosure sale is a violation of the one-action rule.

[k] Equity

A court may appoint a receiver when necessary to preserve the property or rights of any party [*Code Civ. Proc. § 564(b)(9)*]. This provision, formerly *Code Civ. Proc. § 564(b)(8)*, was amended by Stats. 2001, ch. 44, by deleting the language "[i]n all other cases where receivers have heretofore been appointed by the usages of courts of equity," and substituting "where necessary to preserve the property or rights of any party." It is not clear whether this change will decrease the availability of receiverships, especially when other remedies are available. Under the former broad language, appointment of a receiver has been approved to preserve the community estate of spouses in a proceeding under the Family Code, even though *Fam. Code § 290* expressly authorizes the appointment of a receiver only for the purposes of enforcing a judgment, order, or decree made in a proceeding under that code [*see Nichols v. Superior Court (1934) 1 Cal. 2d 589, 596-597, 36 P.2d 380* (discussing former *Civ. Code § 140*, the predecessor to *Fam. Code § 290*); *Rosenthal v. Rosenthal (1966) 240 Cal. App. 2d 927, 934, 50 Cal. Rptr. 385]* . Even under the former *Code Civ. Proc. § 564(b)(8)*, receivership under that subdivision could not be invoked when the facts alleged brought the case within one of the other subdivisions of *Code Civ. Proc. § 564* [*Dabney Oil Co. v. Providence Oil Co. (1913) 22 Cal. App. 233, 237, 133 P. 1155]* .

[l] After Judgment

The court may appoint a receiver after judgment, to carry the judgment into effect [*Code Civ. Proc. § 564(b)(3)*]. For example, the trial court has the discretion under *Code Civ. Proc. § 564(b)(3)* to appoint a receiver to carry into effect a judgment to abate a public nuisance [*City and County of San Francisco v. Daley (1993) 16 Cal. App. 4th 734, 742-744, 20 Cal. Rptr. 2d 256]* . However, the functions of a receiver appointed after judgment for the purpose of carrying the judgment into effect are suspended by an appeal on which a sufficient undertaking is given to stay the proceedings on the judgment; moreover, a receiver cannot be appointed under *Code Civ. Proc. § 564(b)(3)* after a stay bond has been given [*Havemeyer v. Superior Court (1890) 84 Cal. 327, 380-384, 24 P. 121]* .

The court may also appoint a receiver after judgment (a) to dispose of the property according to the judgment, or (b) to preserve it during the pendency of an appeal, or (c) pursuant to *Code Civ. Proc. § 680.010 et seq.* (enforcement of judgments, *discussed under § 486.19*), or (d) after sale of real property pursuant to a decree of foreclosure, during the redemption period, to collect, expend, and disburse rents as directed by the court or otherwise provided by law [*Code Civ. Proc. § 564(b)(4)*].

A receiver may also be appointed after judgment in aid of execution in order to collect a judgment [*Olsan v. Comora (1977) 73 Cal. App. 3d 642, 140 Cal. Rptr. 835]* . This remedy should be especially considered in a circumstance where a judgment creditor has obtained a judgment against an individual who is employed by his or her own professional corporation and is receiving payments of salary and other earnings from the professional corporation. In this circumstance, a receiver may be appointed to prevent the judgment debtor from taking his or her earnings out of the corporation for his or her own benefit without applying them to the judgment [*Crocker National Bank v. O'Donnell (1981) 115 Cal. App. 3d 264, 171 Cal. Rptr. 225]* .

[3] In Limited Civil Case

In limited civil cases, the court has jurisdiction to appoint receivers pursuant to *Code Civ. Proc. § 564* [*Code Civ. Proc. § 86(a)(8)*; for grounds for appointment, *see* [2], *above*]. The actions and proceedings that constitute limited civil cases are primarily set forth in *Code Civ. Proc. §§ 85* and *86*. For discussion of what cases are limited civil cases, see Ch.

323, *Jurisdiction: Personal* .

The court in a limited civil case also has jurisdiction to make any order or perform any act pursuant to *Code Civ. Proc. § 680.010 et seq.* (enforcement of judgments, *discussed under § 486.19*) [*Code Civ. Proc. § 86(a)(8)*].

[4] Cases Involving Attachment

Any court in which an action is pending in which property has been or is sought to be attached may appoint a receiver in specified circumstances to take any action the court orders that is necessary to preserve the value of the property, including its sale [*see Code Civ. Proc. § 488.700*]. A receiver can be appointed in this situation to, among other things, sell the property, if the court determines that the property is perishable or will greatly deteriorate or depreciate in value or for some other reason the interest of plaintiff will be best served by the appointment of a receiver. Thus, the appointment of a receiver should be considered where the property attached is, for example, inventory which consists of food products which will greatly depreciate in value unless it is sold immediately.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDissolution & ReceivershipReceivershipsAppointment of ReceiversBusiness & Corporate LawCorporationsDissolution & ReceivershipTermination & Winding UpDistribution of AssetsShareholder RightsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.14 Who May or May Not Be Appointed

No party, attorney of a party, or person interested in the action or related to any judge of the court by consanguinity or affinity within the third degree, can be appointed receiver without the written consent of the parties filed with the court clerk [*Code Civ. Proc. § 566(a)*; *see A.G. Col Co. v. Superior Court (1925) 196 Cal. 604, 618-621, 238 P. 926]* . The party seeking the appointment of the receiver may not, directly or indirectly, require any contract, agreement, arrangement, or understanding with any receiver whom it intends to nominate or recommend to the court, nor may the receiver enter into any such contract, arrangement, agreement, or understanding concerning the following [*Cal. Rules of Ct., Rule 3.1179(b)*]:

- The receiver's role with respect to the property following a trustee's sale or termination of a receivership, without specific court permission;

- How the receiver will administer the receivership or how much the receiver will charge for services or pay for services to appropriate or approved third parties hired to provide services;

- Who the receiver will hire, or seek approval to hire, to perform necessary services; or

- What capital expenditures will be made on the property.

Except as so limited, any person may serve as receiver, subject to being challenged if unqualified.

In certain cases in which the appointment of a receiver is necessary to enable the court to discharge its equitable duties, for example, to compel execution of a charitable trust, and no one can be found who is willing to serve as trustee or as receiver, the court may select a public officer or court official, such as the court administrator, the court investigator, or the public administrator to act as receiver [*McCarthy v. Poulsen (1985) 173 Cal. App. 3d 1212, 1220 n.3, 219 Cal. Rptr. 375]* .

Legal Topics:

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

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Chapter 486 RECEIVERS
PART II. LEGAL BACKGROUND
A. Appointment of Receivers

43-486 California Forms of Pleading and Practice--Annotated § 486.15

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.15 Appointment Procedures

[1] Manners of Seeking

There are three ways of securing the pendente lite appointment of a receiver on application [*see generally Code Civ. Proc. § 566(b)*; *Cal. Rules of Ct., Rules 3.1175-3.1177*]. They are as follows:

- By ex parte application, appointment on the ex parte application, and order to show cause why the appointment should not be confirmed [*see Cal. Rules of Ct., Rules 3.1175, 3.1176*; *Republic of China v. Chang (1955) 134 Cal. App. 2d 124, 132, 285 P.2d 351* ; *People v. Christ's Church (1947) 79 Cal. App. 2d 858, 859, 181 P.2d 49]* .

- By ex parte application for an order to show cause why a receiver should not be appointed and appointment following a hearing on the order to show cause [*see Nichols v. Superior Court (1934) 1 Cal. 2d 589, 592, 36 P.2d 380* ; *see also Olsan v. Comora (1977) 73 Cal. App. 3d 642, 644, 140 Cal. Rptr. 835* (involving application for appointment of receiver in aid of execution on judgment)].

- By noticed motion for appointment of a receiver and appointment after hearing on the motion [*see Cal. Rules of Ct., Rule 3.1176(a)*; *see also, e.g., Armbrust v. Armbrust (1946) 75 Cal. App. 2d 272, 274-275, 171 P.2d 75]* .

The first procedure is used to obtain the appointment of a receiver pendente lite when the facts presented establish an emergency justifying the appointment [*see Cal. Rules of Ct., Rule 3.1175*]. The second procedure is an alternative to the third procedure and is normally used when the opposing party has not yet appeared in the case [*see Code Civ. Proc. § 1014* (appearance)]. In the first and second procedures, the order to show cause substitutes for a notice of motion and operates both as notice and as a citation to appear [*see, e.g., Sarracino v. Superior Court (1974) 13 Cal. 3d 1, 8 n. 6, 118 Cal. Rptr. 21, 529 P.2d 53* ; *Difani v. Riverside County Oil Co. (1927) 201 Cal. 210, 213-214, 256 P. 210* ; and

discussion in Ch. 372, *Motions and Orders*]. The third procedure (notice of motion), which is the most common way of applying for the appointment of a receiver, is for use when the opposing party has appeared in the action or proceeding and the facts do not justify, or counsel does not wish to obtain, the immediate appointment of a receiver before hearing.

[2] Supporting Papers and Evidence

An application for the appointment of a receiver, either ex parte or by noticed motion, may be supported by facts alleged in a verified complaint or declaration [*see Cal. Rules of Ct., Rules 3.1175(a), 3.1176(b)*; *Bank of Woodland v. Stephens (1904) 144 Cal. 659, 660-661, 79 P. 379]* . The application or motion must also be supported by a memorandum [*see Code Civ. Proc. § 1005*; *Cal. Rules of Ct., Rules 3.1113(a), 3.1176(b)*] and may be supported by testimony produced at the hearing [*see Republic of China v. Chang (1955) 134 Cal. App. 2d 124, 132, 285 P.2d 351* ; *Armbrust v. Armbrust (1946) 75 Cal. App. 2d 272, 274, 171 P.2d 75]* . For restrictions on the use of oral testimony at law and motion hearings, see *Cal. Rules of Ct., Rule 3.1306*, discussed in [5][a], *below*.

[3] Ex Parte Application

[a] Additional Showing Required

The procedure for appointment of a receiver on ex parte application and order to show cause confirming the appointment is a drastic remedy andseldom warranted [*see, e.g., Golden State Glass Corp. v. Superior Ct. (1939) 13 Cal. 2d 384, 393, 90 P.2d 75* (involving appointment of receiver under former *Code Civ. Proc. § 564(7)* (*now see Code Civ. Proc. § 564(b)(9)*, where necessary to preserve property or rights of party))]. From the standpoint of the business welfare of a defendant corporation, the appointment of a receiver on ex parte application is so dangerous an expedient that it should be done only in cases of the greatest emergency and when, without the appointment, irreparable injury will unquestionably result [*Golden State Glass Corp. v. Superior Court (1939) 13 Cal. 2d 384, 393, 90 P.2d 75* ; *A.G. Col Co. v. Superior Ct. (1925) 196 Cal. 604, 613, 238 P. 926]* . Appointment of a receiver will be made on ex parte application and without notice, however, when imperative necessity or emergency is shown in the application or supporting declarations [*People v. Christ's Church (1947) 79 Cal. App. 2d 858, 862, 181 P.2d 49]* .

Thus, in addition to the matters establishing the ground for the appointment of a receiver, an ex parte applicant for the immediate appointment of a receiver must show in detail by verified complaint or declaration the matters specified in *Cal. Rules of Ct., Rule 3.1175* (discussed in *§ 486.139[5]*), including the nature of the emergency. The application must also include a declaration of affidavit detailing notice given to the adverse parties or attempts to notify them, a memorandum of points and authorities, and other papers required by *Cal. Rules of Ct., Rule 3.1204*, discussed at *§ 486.137[3]*. For a procedural checklist and additional forms, see Ch. 372, *Motions and Orders* .

[b] Undertaking or Bond

If a receiver is appointed on ex parte application, the court, before making the order, must require from the applicant an undertaking in an amount to be fixed by the court, to the effect that the applicant will pay to the defendant all damages that the defendant may sustain by reason of the appointment and the entry by the receiver on his or her duties, in case the applicant shall have procured the appointment wrongfully, maliciously, or without sufficient cause [*Code Civ. Proc. § 566(b)*; *see also Code Civ. Proc. §§ 995.140, 995.190* (defining "bond" and "undertaking")]. In the case of two or more defendants, the undertaking should run in favor of each defendant in the action and should be in such form that any defendant would have a right of action on it if he or she is damaged by the appointment [*Title etc. Trust Co. v. California Dev. Co. (1912) 164 Cal. 58, 65, 127 P. 502]* . Liability on the bond, being contractual, is limited to the amount of the bond [*Smith v. Hill (1965) 237 Cal. App. 2d 374, 385, 47 Cal. Rptr. 49]* .

The provisions of *Code Civ. Proc. § 566(b), above*, are mandatory and an order appointing the receiver is void if the applicant's bond is not fixed and filed [*Sweins v. Superior Court (1936) 16 Cal. App. 2d 336, 336, 60 P.2d 313]* . Consequently, the court or courtroom clerk may hold the signedorder appointing receiver and the order to show cause

until the applicant's undertaking or bond, the receiver's undertaking or bond, and the receiver's oath are filed.

At the hearing to appoint a receiver, the applicant must, and other parties may, propose and state the reasons for the specific amounts of the undertakings required from the applicant for any injunction that is ordered in or with the order appointing a receiver [*Cal. Rules of Ct., Rule 3.1178*].

A right of action against a party who wrongfully procures the appointment of a receiver accrues on the adjudication that the appointment was improper [*Smith v. Hill (1965) 237 Cal. App. 2d 374, 386, 47 Cal. Rptr. 49]* .

[c] Order to Show Cause

Whenever a receiver is appointed without notice, the matter must be made returnable on an order to show cause why the appointment should not be confirmed. The order to show cause must be made returnable on the earliest date that the business of the court will admit, but not later than 15 days from the date of the order or, if good cause appears to the court, 22 days from the date the order is issued [*Cal. Rules of Ct., Rule 3.1176(a)*].

[d] Service of Papers

After the order to show cause has been issued, the applicant must serve the following on each of the adverse parties [*Cal. Rules of Ct., Rule 3.1176(b)*]:

- A copy of the complaint if not previously served;
- The order to show cause stating the date, time, and place of the hearing;
- Any declarations supporting the application; and
- A memorandum supporting the application.

Service must be made as soon as reasonably practical, but no later than 5 days after the date on which the order to show cause is issued, unless the court orders another time for service [*Cal. Rules of Ct., Rule 3.1176(b)*].

[e] Failure to Proceed or Serve Adverse Party

When the matter first comes on for hearing, the party who obtained the appointment must be ready to proceed. If that party is not ready to proceed or has failed to exercise diligence to effect service on the adverse parties as provided in *Cal. Rules of Ct., Rule 3.1176(b), above*, the court may discharge the receiver [*Cal. Rules of Ct., Rule 3.1176(c)*].

[f] Continuances

The adverse parties are entitled to one continuance to enable them to oppose the confirmation [*Cal. Rules of Ct., Rule 3.1176(d)*]. If a continuanceis granted under Rule 3.1176(d), the order to show cause remains in effect until the date of the continued hearing [*Cal. Rules of Ct., Rule 3.1176(d)*].

[4] Noticed Motion

[a] Generally

The usual procedure for obtaining appointment of a receiver is by noticed motion [*see Cal. Rules of Ct., Rule 3.1177*; for a form of notice of motion, *see § 486.143*], supported by an affidavit [*see Code Civ. Proc. § 2009*] (or declaration under *Code Civ. Proc. § 2015.5*) [for a form of declaration, *see § 486.144*], and by points and authorities [*Cal. Rules of*

Ct., Rules 3.1100, 3.1103(a), 3.113(a)], followed by a hearing of the motion [*see Cal. Rules of Ct., Rules 3.1304-3.1306*; *Armbrust v. Armbrust (1946) 75 Cal. App. 2d 272, 274-275, 171 P.2d 75]* . For general discussion of noticed motions, see Ch. 372, *Motions and Orders* .

The noticed motion procedure eliminates the necessity of plaintiff's filing an indemnity bond in favor of the defendant as is required when a receiver is appointed on an ex parte application [*see Code Civ. Proc. § 566(b)*] and must be used unless the delay occasioned by notice will result in irreparable injury [*see Cal. Rules of Ct., Rule 3.1175*; *A.G. Col Co. v. Superior Court (1925) 196 Cal. 604, 613, 238 P. 926]* .

[b] Service of Notice of Motion and Papers

Unless otherwise ordered by the court, the notice of motion accompanied by all the supporting points and authorities, declarations, and other supporting material must be served and filed at least 16 court days before the hearing. The copy served must be a copy of the papers filed or to be filed with the court. Time is extended for a specified number of days, depending on the place of address or place of mailing, or both, when service is by mail. Time is extended two calendar days if service is by facsimile transmission or by express mail or another method of overnight delivery [*Code Civ. Proc. § 1005(b)*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service that may apply in that section 1005(b) does not expressly excludes extensions under section 1010.6)].

[c] Service and Filing of Opposing Papers

All papers opposing a noticed motion must be filed with the court and a copy served on each party at least 9 court days before the time appointed for the hearing [*Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(a)*; *cf. Code Civ. Proc. § 1010.6(a)(6)* (two court day extension in case of electronic service that may apply in that section 1005(b) does not expressly excludes extensions under section 1010.6)].

[d] Local Court Rules

In the large metropolitan courts, application for appointment of a receiver pendente lite is commonly made in the law and motion, or writs and receivers, department of the court [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 2.5(i) (writs and receivers departments); San Francisco Uniform Local Ct. Rules, Rule 8.12 (writs and receivers department)].

[5] Hearing

[a] Evidence

The Civil Law and Motion Rules (*Cal. Rules of Ct., Rules 3.1110 et seq.*) expressly apply to applications for an order regarding the appointment of a receiver [*Cal. Rules of Ct., Rule 3.1103(a)(2)*]. Consequently, whether the hearing is on an order to show cause or a noticed motion, evidence received at the hearing must be by declaration or request for judicial notice without testimony or cross examination, unless the court orders otherwise for good cause shown [*Cal. Rules of Ct., Rule 3.1306(a)*].

Procedure which must be followed before the hearing in order to seek permission to introduce oral testimony at the hearing is set forth in *Cal. Rules of Ct., Rule 3.1306(a)*. Matters of which the court must or may take judicial notice are set forth in *Evid. Code §§ 451* and *452*. Procedure for requesting the court to take judicial notice of matter is specified in *Evid. Code § 453* and *Cal. Rules of Ct., Rule 3.1306(b)* and matters that may be considered by the court in determining the propriety of taking judicial notice is specified in *Evid. Code § 454*.

[b] Nomination of Receiver

On the hearing of an application for appointment of a receiver on notice or on the hearing for confirmation of an

appointment on ex parte application, each party appearing may, at the time of the hearing, suggest in writing one or more persons for appointment or substitution as receiver, stating the reasons [*Cal. Rules of Ct., Rule 3.1177*]. The written suggestion should set forth the nominee's qualifications, business experience, financial rating, and other relevant matters, and show that the nominee is not disqualified under *Code Civ. Proc. § 566(a), discussed under § 486.14*. Some courts or departments maintain lists of qualified receivers from which appointments are normally made.

The suggestion is without prejudice to any objections the party may make to the appointment or confirmation of the receiver [*Cal. Rules of Ct., Rule 3.1177*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureRemediesReceivershipsReceiversLiabilities

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43-486 California Forms of Pleading and Practice--Annotated § 486.16

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.16 Receiver's Oath and Bond

Before entering on the duties of a receiver, the receiver must be sworn to perform the duties faithfully [*Code Civ. Proc. § 567(a)*].

The receiver shall give an undertaking to the State of California in such sum as the court or judge may direct to the effect that the receiver will faithfully discharge the duties of receiver in the action and obey the orders of the court therein [*Code Civ. Proc. § 567(b)*; *see Code Civ. Proc. §§ 995.810-995.850*]. The receiver shall be allowed the cost of the undertaking [*Code Civ. Proc. § 567(b)*]. Any party for whose benefit the bond or undertaking is given may object to it [*Code Civ. Proc. § 995.840(b)*; *see also Code Civ. Proc. §§ 995.140, 995.190*, defining "bond" and "undertaking"]. Objections to bonds are governed by *Code Civ. Proc. §§ 995.910-995.960*, discussed in Ch. 538, *Suretyship, Bonds, and Undertakings* .

At the hearing to appoint a receiver, the applicant must, and other parties may, propose and state the reasons for the specific amounts of the undertakings required from the applicant for any injunction that is ordered in or with the order appointing a receiver [*Cal. Rules of Ct., Rule 3.1178*].

Because a receiver may not enter on the duties of receiver until he or she has taken and filed the required oath and undertaking (*see Code Civ. Proc. § 567*), some courts will hold the signed order of appointment until the oath and undertaking are filed and then endorse on the order the fact of filing.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureRemediesReceivershipsReceiversDuties

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43-486 California Forms of Pleading and Practice--Annotated § 486.17

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.17 Appellate Review

[1] Order or Judgment Appointing Receiver

An order or judgment appointing a receiver is appealable [*Code Civ. Proc. §§ 904.1(a)(7)* (appeal other than in limited civil case), 904.2(h) (appeal in limited civil case)]. However, if the appointment is made on ex parte application, the order appointing the receiver is not appealable; the appeal, if any, is taken from the subsequent order confirming the appointment [*Republic of China v. Chang (1955) 134 Cal. App. 2d 124, 133, 285 P.2d 351* ; *People v. Christ's Church (1947) 79 Cal. App. 2d 858, 861-862, 181 P.2d 49]* .

The perfecting of an appeal does not stay enforcement of the order or judgment unless an undertaking in a sum fixed by the trial court is given on condition that if the order or judgment is affirmed or the appeal is withdrawn or dismissed, the appellant will pay all damages which the respondent may sustain by reason of the stay [*Code Civ. Proc. § 917.5*].

[2] Order Denying Appointment of Receiver

An order denying appointment of a receiver may, however, be reviewed on a writ of mandate [*Conklin v. Superior Court (1934) 1 Cal. 2d 601, 603-604, 36 P.2d 386* ; *see Barclays Bank of California v. Superior Court (1977) 69 Cal. App. 3d 593, 597, 602, 137 Cal. Rptr. 743* (writ of mandate issued directing superior court to set aside order denying application for appointment of receiver and take further proceedings not inconsistent with the court of appeal's opinion); *see also City and County of San Francisco v. Shers (1995) 38 Cal. App. 4th 1831, 1836, 46 Cal. Rptr. 2d 57* (dicta that order denying appointment is not appealable)]. However, because the appointment of a receiver is a matter largely within the trial court's discretion, the appellate court will not compel the trial court to act in a particular manner unless the case is one in which the court can exerciseits discretion in only one way [*Conklin v. Superior Court (1934) 1 Cal. 2d 601, 603-604, 36 P.2d 386* (trial court erred in refusing to make appointment on ground that it lacked jurisdiction to do so; remanded with direction to assume jurisdiction and to rule on the matter as may seem just and proper)].

[3] Order Granting or Denying Motion to Vacate Appointment of Receiver

An order setting aside and vacating an order appointing a receiver that in effect amounts to a discharge of the receiver is of such finality as to be appealable as a final judgment [*Hibernia S. & L. Soc. v. Ellis Estate Co. (1932) 216 Cal. 280, 281-282, 13 P.2d 929* ; *see City and County of San Francisco v. Shers (1995) 38 Cal. App. 4th 1831, 1836, 46 Cal. Rptr. 2d 57]* .

An order denying a request to vacate appointment of a receiver ordinarily is not appealable [*Title Ins. & Trust Co. v. Calif. etc. Co. (1911) 159 Cal. 484, 486-487, 114 P. 838* ; *see City and County of San Francisco v. Shers (1995) 38 Cal. App. 4th 1831, 1836, 46 Cal. Rptr. 2d 57* (quoting Witkin, Cal. Procedure, vol. 9. Appeal, § 99, p. 119 (3d ed. 1985))].

[4] Order Appointing Successor Receiver

An order appointing a successor receiver has been held not to be appealable under *Code Civ. Proc. § 904.1(a)(7)* [*City and County of San Francisco v. Shers (1995) 38 Cal. App. 4th 1831, 1839, 46 Cal. Rptr. 2d 57* (case of first impression)]. However, an order appointing a successor receiver is appealable under *Code Civ. Proc. § 904.1(a)(2)*, if the order was made after an appealable judgment and meets the following two requirements [*City and County of San Francisco v. Shers (1995) 38 Cal. App. 4th 1831, 1836, 1838-1839, 46 Cal. Rptr. 2d 57]* :

- The issues raised by the appeal from the order must be different from those arising from an appeal from the judgment.

- The order must either affect the judgment or relate to it by enforcing it or staying its execution.

Thus, for example, when property owners had municipal code violations on their property, three judgments against them had been obtained ordering compliance, the superior court granted the city's motion to appoint a receiver to complete the necessary work, the order appointing the receiver was affirmed on appeal, the receiver then resigned, and thereafter the city's motion to appoint a successor receiver was granted, an appeal from the order appointing the successor receiver to bring the property into compliance with the municipal code met the above two requirements and was appealable under *Code Civ. Proc. § 904.1(a)(2)*. The first requirement was met in that the trial court's decision to appoint the successor receiver doesnot raise the same issues as the underlying judgment in that the underlying judgment concerns the property's condition in relation to the municipal code whereas the order appointing a successor receiver is merely concerned with the person's identity who enforces the judgment. The second requirement, that the order either affect the judgment or relate to its enforcement, was also met in that the order appointing a successor receiver relates to the enforcement of the underlying judgment by deciding who will administer the receivership [*City and County of San Francisco v. Shers (1995) 38 Cal. App. 4th 1831, 1838-1839, 46 Cal. Rptr. 2d 57]* .

Appealability of an order appointing a successor receiver under *Code Civ. Proc. § 904.1(a)(2)* is limited to those issues that the order being appealed from specifically encompasses and does not extend to anything entirely subsumed in earlier orders [*City and County of San Francisco v. Shers (1995) 38 Cal. App. 4th 1831, 1839-1840, 46 Cal. Rptr. 2d 57* (earlier order appointing receiver subsumed issues of appropriateness of receivership or anything related thereto; substantive issue that may be raised on appeal limited to question of successor receiver's qualifications)]. Moreover, appealability of an order appointing a successor receiver under *Code Civ. Proc. § 904.1(a)(2)* is limited to those cases in which the order being appealed from is postjudgment [*City and County of San Francisco v. Shers (1995) 38 Cal. App. 4th 1831, 1840, 46 Cal. Rptr. 2d 57]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureJudgmentsEntry of JudgmentsStays Pending

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43-486 California Forms of Pleading and Practice--Annotated § 486.18

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.18 Collateral Attack on Order of Appointment

If the appointment of a receiver is made in a case that does not come within the class of cases in which appointment of a receiver is authorized, or if the trial court's order is for any other reason in excess of jurisdiction, the order is void and subject to collateral attack [*see, e.g., Baker v. Varney (1900) 129 Cal. 564, 565, 62 P. 100* (defense that appointment of receiver in mortgage foreclosure action was void sustained in action by receiver to recover possession of cattle claimed to be rents and profits of mortgaged property); *In re Stein (1936) 14 Cal. App. 2d 303, 305-306, 58 P.2d 175* (person convicted of conducting sale in violation of statute as unable, in seeking release from incarceration by habeas corpus, to rely on court order appointing him receiver to conduct sale when order of appointment was void); *In re Carroll (1933) 135 Cal. App. 672, 676-677, 28 P.2d 84* (order of appointment of receiver held void in habeas corpus proceeding by contemnor to secure release from commitment for disobedience of order not to interfere with receiver in selling property)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsCivil ProcedureRemediesReceivershipsReceiversAppointments

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43-486 California Forms of Pleading and Practice--Annotated § 486.19

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.19 Appointment of Receiver in Enforcement of Judgment Proceedings

[1] In General

A receiver may be appointed in enforcement of judgment proceedings either to enforce a judgment [*Code Civ. Proc. §§ 708.620, 712.060*] or to preserve the value of property levied on [*Code Civ. Proc. § 699.070*].

Appointment of a receiver to enforce a court order applying a franchise to the satisfaction of a money judgment is authorized by *Code Civ. Proc. § 708.920(b)* [for discussion and forms, *see* Ch. 254, *Executions and Enforcement of Judgments*]. Appointment of a receiver to enforce a judgment, order, or decree made in a proceeding under the Family Code is authorized by *Fam. Code § 290* [for discussion, *see* Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies*].

[2] To Enforce Judgment

[a] Showing Required

The court may appoint a receiver to enforce a money judgment when the judgment creditor shows that, considering the interests of both the judgment creditor and the judgment debtor, the appointment of a receiver is a reasonable method to obtain the fair and orderly satisfaction of the judgment [*Code Civ. Proc. § 708.620*].

The California Law Revision Commission has pointed out that under Code Civ. Proc. § 708.620, *above* , a receiver may be appointed in the following situations [15 Cal. L. Revision Comm'n Reports 2525-2526 (1980); 16 Cal. L. Revision Comm'n Reports 2100 (1982) (Assembly Report); *see Evans v. Galardi (1979) 93 Cal. App. 3d 291, 294, 155 Cal. Rptr. 505]* :

- When a writ of execution would not reach certain property and other remedies appear inadequate.

- In examination proceedings under *Code Civ. Proc. §§ 708.110-708.205* when the requisite showing is made under *Code Civ. Proc. § 708.620*.

- To enforce a charging order (*see Code Civ. Proc. § 708.310*) against a partnership under former *Corp. Code § 15028* (*now see Corp. Code § 16504*, which replaced former *Corp. Code § 15028* on Jan. 1, 1999) or against a limited partnership under *Corp. Code § 15522* (*now see Corp. Code § 15907.03*, [charging order under Uniform Limited Partnership Act of 2008]).

The application of a debtor's interest in an alcoholic beverage license to the satisfaction of a money judgment, including the appointment of a receiver to transfer the judgment debtor's interest in a transferable license, is governed by *Code Civ. Proc. § 708.630*. Pursuant to Code Civ. Proc. §§ 708.620 and 708.630, *above* , and Code Civ. Proc. § 708.610, *below* , the court may also appoint a receiver to enforce a judgment for possession or sale of property [*Code Civ. Proc. § 712.060*].

The appointment, qualifications, powers, rights, and duties of a receiver appointed under *Code Civ. Proc. § 708.620* are governed by *Code Civ. Proc. §§ 564-570* (receivers) and by *Code Civ. Proc. § 571* (undertaking required of a court referee or commissioner whose duties will involve custody of personal property or receipt or disbursement of money) [*Code Civ. Proc. § 708.610*].

[b] Discretion and Control of Court

The appointment of a receiver in aid of execution rests wholly within the discretion of the court and, on appointment, the receiver is subject to the continued direction and control of the court. However, the power to appoint a receiver is a delicate one that is exercised sparingly and with caution, and only in an extreme case under such circumstances as demand or require summary relief, and never in a doubtful case or when there is no necessity or occasion for the appointment [*Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 350, 113 Cal. Rptr. 281]* . The appointment may be made when there are reasonable grounds to believe that the judgment debtor, or third parties, have control of property which rightfully should be subject to execution. However, the receiver has no greater rights against others than the judgment creditor would have [*Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 350, 113 Cal. Rptr. 281]* . For example, a judgment creditor seeking to sell an occupied dwelling to collect on a money judgment may not bypass *Code Civ. Proc. § 704.740* (regarding homestead exemptions) when the sale is conducted by a receiver rather than by a sheriff [*Wells Fargo Financial Leasing, Inc. v. D & M Cabinets, 177 Cal. App. 4th 59, 67-69, 99 Cal. Rptr. 3d 97]* .

[c] Notice Motion

Although the appointment of a receiver to enforce a money judgment is normally made in conjunction with statutory proceedings supplemental to execution [former *Code Civ. Proc. §§ 714-723*], now referred to as examination proceedings and covered in *Code Civ. Proc. §§ 708.110-708.205*, the court may, in a proper case, appoint a receiver on noticed motion under *Code Civ. Proc. § 564(b)(4)* [or *Code Civ. Proc. § 86(a)(8)*] without the necessity of supplemental, or examination, proceedings [*Olsan v. Comora (1977) 73 Cal. App. 3d 642, 647-649, 140 Cal. Rptr. 835]* .

[3] To Preserve Value of Property Levied on

On the application of the judgment creditor, the judgment debtor, or a person who has filed a third-party claim pursuant to *Code Civ. Proc. §§ 720.010-720.800* (third-party claims and related procedures), a receiver may be appointed by the court to take any action necessary to preserve the value of property levied on, including without limitation the selling of the property if the court determines that the property is perishable or will greatly deteriorate or greatly depreciate in value or that for some other reason the interests of the parties will be best served by the order. The application for appointment of a receiver must be by noticed motion if the court so directs or a court rule so provides; otherwise it may

be made ex parte [*Code Civ. Proc. § 699.070(a)*].

The appointment, qualifications, powers, rights, and duties of the receiver are, except as otherwise provided in *Code Civ. Proc. § 699.070*, governed by *Code Civ. Proc. §§ 564-570* (receivers) and *Code Civ. Proc. § 571* (undertaking required of a court referee or commissioner whose duties will involve custody of personal property or receipt or disbursement of money) [*Code Civ. Proc. § 699.070(d)*].

The daily fee of the receiver is fixed by the court, which may order the judgment creditor to pay the receiver's fees and expenses in advance or may direct that the whole or any part of the fees and expenses be paid from the proceeds of any sale of the property [*Code Civ. Proc. § 699.070(d)*].

Except as otherwise provided by order of the court, any sale of the property must be made in the manner provided by *Code Civ. Proc. §§ 701.510-701.680* and the proceeds applied to the satisfaction of the judgment in the manner provided by *Code Civ. Proc. §§ 701.810-701.830* [*Code Civ. Proc. § 699.070(c)*]. Notice of sale must be posted and served at a reasonable time before the sale, considering the character and condition of the property [*Code Civ. Proc. § 699.070(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureRemediesReceivershipsReceiversDutiesCivil ProcedureRemediesReceivershipsReceiversPowers

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43-486 California Forms of Pleading and Practice--Annotated §§ 486.20-486.29

AUTHOR: Robert B. Kaplan Editorial Consultant

[Reserved]

§§ 486.20[Reserved]

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Chapter 486 RECEIVERS
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B. Administration and Termination of Receivership

43-486 California Forms of Pleading and Practice--Annotated § 486.30

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.30 Powers of Receivers

[1] Generally

A receiver is an officer of the court subject to its continuing control, and has only those powers granted by statute, by the order of appointment, and by subsequent court orders [*see Code Civ. Proc. § 568*; *City of Santa Monica v. Gonzalez (2008) 43 Cal. 4th 905, 930, 76 Cal. Rptr. 3d 483, 182 P.3d 1027* ; *Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 273, 187 Cal. Rptr. 703* ; *Robbins v. Bueno (1968) 262 Cal. App. 2d 79, 84, 68 Cal. Rptr. 347]* . After appointment a receiver may petition for additional authority or instructions as the need arises [*see Steinberg v. Goldstein (1956) 145 Cal. App. 2d 692, 696, 699-700, 303 P.2d 80* ; *Free Gold Mining Co. v. Spiers (1901) 135 Cal. 130, 131-132, 67 P. 61* ; *In re Executive Life Ins. Co. (1995) 32 Cal. App. 4th 344, 399-400, 38 Cal. Rptr. 2d 453]* .

[2] To Take Possession of and Manage Property

A receiver has power, under the control of the court, to take and keep possession of the property, to receive rents, collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the court may authorize [*Code Civ. Proc. § 568*].

The receiver acquires no title to the property, however, but only the right of possession as the officer of the court. Title remains in those in whom it was vested when the appointment was made [*North v. Cecil B. DeMille Productions, Inc. (1934) 2 Cal. 2d 55, 58, 39 P.2d 199]* . The receiver also takes the property in the condition in which it exists and subject to all liens and equities of others in it [*H.D. Roosen Co. v. Pacific Radio Pub. Co. (1932) 123 Cal. App. 525, 534, 11 P.2d 873]* . Because a receiver acquires no greater interest in an estate than the one from whom he or she takes, it follows that choses in action pass to the receiver subject to any right of setoff existing at the time of the receiver's appointment [*People v. California etc. Trust Co. (1914) 168 Cal. 241, 246, 141 P. 1181* ; *Downey v. Humphreys (1951) 102 Cal. App. 2d 323, 336, 227 P.2d 484]* . In sum, the receiver, as a custodian of the property subject to the orders of the court, becomes clothed with the title of the debtor and takes the property cum onere, that is, in the plight

and condition existing at the time of his or her appointment, subject to all liens and equities, including the right of set-off, and impressed with the legal and equitable rights and claims of creditors, and no lien or contract is disturbed or altered by the court's intervention [*Wright v. Standard Engineering Corp. (1972) 28 Cal. App. 3d 244, 248, 104 Cal. Rptr. 539]* .

In the event a party to an action refuses to comply with the demand made by receiver for turnover of property which is part of the receivership estate or a party interferes with the receiver's rights to take possession of that property, the receiver has a right to seek to have that party to be found in contempt of the receivership order, by initiating contempt proceedings before the court that appointed the receiver [*Crouse v. Superior Court of Los Angeles County (1915) 28 Cal. App. 625, 153 P. 723]* .

[3] To Bring and Defend Actions

Under the control of the court, a receiver has power to bring and defend actions in his or her own name, as receiver [*Code Civ. Proc. § 568*; for further discussion, *see § 486.50* et seq.].

[4] To Employ Attorney

A receiver must not employ an attorney without the approval of the court. The application for approval must be in writing and state the necessity for the employment, the name of the attorney whom the receiver proposes to employ, and that the attorney is not attorney for, associated with, nor employed by an attorney for any party [*Cal. Rules of Ct., Rule 3.1180*; *see also § 486.152*, (form of petition)].

If a receiver retains an attorney to assist in the discharge of his or her duties, the attorney-client privilege applies to communications between the receiver and the attorney [*Shannon v. Superior Court (1990) 217 Cal. App. 3d 986, 993-994, 266 Cal. Rptr. 242]* . The court cannot compel disclosure of the communications, even if disclosure is in the best interests of the proceeding or the parties, unless there is evidence of a waiver, lack of confidential intent, or some exception to the privilege [*Shannon v. Superior Court (1990) 217 Cal. App. 3d 986, 994-995, 996-997, 266 Cal. Rptr. 242]* . For discussion of the attorney-client privilege generally, see Ch. 190, *Depositions and Discovery* .

[5] To Deposit Securities

Under the control of the court, a receiver may deposit any securities he or she holds in a securities depository, as defined in *Fin. Code § 30004*, which is licensed under *Fin. Code § 30200* or exempted from licensing by *Fin. Code § 30005* or *30006*, and such securities may be held by the securities depository in the manner authorized by *Fin. Code § 775* [*Code Civ. Proc. § 568.1*].

[6] To Deposit Receivership Funds

Funds in the hands of a receiver may be deposited in one or more interest bearing accounts in the name and for the benefit of the receivership estate with one or more financial institutions, provided that all of the following conditions are satisfied [*Code Civ. Proc. § 569*]:

- The deposits are fully guaranteed or insured under federal law.

- The financial institution in which the funds are deposited is not a party to the action in which the receiver is appointed.

- The receiver does not own 1 percent or more in value of the outstanding stock of the financial institution, is not an officer, director, or employee of the financial institution, and is not a sibling, whether by the whole or half-blood, spouse, aunt, uncle, nephew, niece, ancestor, or lineal descendant of

an owner, officer, employee, or director.

[7] To Sell Receivership Property

A receiver may sell real or personal property in receivership pursuant to court order [*see Code Civ. Proc. § 568.5*; for further discussion, *see § 486.32*].

[8] To Borrow Money

In the event a receivership estate is insolvent, a receiver has the power to borrow money and, as security for loans made to the receiver, to issue receivership certificates which become first liens on the property which is the subject of the receivership estate when issued under the direction and control of the court that appointed the receiver [*see Title Insurance etc. Co. v. California Dev. Co. (1915) 171 Cal. 173, 152 P. 542]* .

[9] Assumption and Rejection of Contracts

Once a receiver is appointed, a receiver has a reasonable opportunity to either affirm and assume pre-receivership contracts or to reject those contracts. A receiver is normally allowed a reasonable time to decide whether or not to assume or reject a pre-receivership contract [*Ross Lumber & Mill Co. v. Muscupiabe Land & Water Co. (1898) 120 Cal. 521, 52 P. 995* ; *H.D. Roosen Co. v. Pacific Radio Publishing Co. (1932) 123 Cal. App. 525* , *11 P.2d 873]* . Once a pre-receivership contract is assumed, it becomes a liability of the receivership estate. Therefore, a receiver should exercise caution before assuming or rejecting such contracts and should determine whether or not the receivership estate will have sufficient assets to make it possible to pay the assumed contract.

[10] Impact of Bankruptcy Filing

Normally if a receiver is appointed over property in an action and the defendant files bankruptcy, the provisions of the automatic stay set forth in *11 U.S.C. § 362* will require the receiver to turn over possession of the property over which he or she has been appointed back to the defendant. However, under *11 U.S.C. § 543(d)* the creditor who is responsible for appointment of the receiver can file a motion in the Bankruptcy Court requesting an order that the receiver be excused from turning over the assets over which he or she was appointed to the Chapter 11 debtor. In considering this motion, the Bankruptcy Court must determine whether or not it would be in the "interest of creditors" for the receiver to remain in possession of the property over which he or she was appointed [*11 U.S.C. § 543(d)*]. A motion of this type should be made promptly after any bankruptcy filing by a defendant, so as to avoid any contention which may be made by the defendant that the receiver's maintaining possession of the property over which he or she was appointed violates the automatic stay.

For further discussion of the stay, see *Ch. 94, Bankruptcy, § 94.30* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewCivil ProcedureRemediesDeposits in CourtCivil ProcedureRemediesReceivershipsReceiversPowersEvidencePrivilegesAttorney-Client PrivilegeGeneral Overview

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43-486 California Forms of Pleading and Practice--Annotated § 486.31

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.31 Duties of Receiver

[1] To Act Faithfully

A receiver takes an oath to perform his or her duties faithfully and gives a bond to the effect that he or she will faithfully discharge the duties of receiver in the action and obey the orders of the court [*Code Civ. Proc. § 567*; *see § 486.10* et seq.]. A receiver stands in the position of a court-appointed fiduciary [*see Stewart v. State of California (1969) 272 Cal. App. 2d 345, 348, 77 Cal. Rptr. 418* ; *see also Seccombe v. Dionne (1935) 3 Cal. App. 2d 731, 734, 40 P.2d 299]* and must refrain from entering into any of the contracts, arrangements, agreements, or understandings prohibited by *Cal. Rules of Ct., Rule 3.1179(b)*, discussed at *§ 486.14*.

[2] To File Inventories

A receiver must, within 30 days after appointment, or within such other time as the court may order, file an inventory containing a complete and detailed list of all property of which the receiver has taken possession by virtue of the appointment [*Cal. Rules of Ct., Rule 3.1181*]. The receiver must promptly file a supplementary inventory of all subsequently obtained property [*Cal. Rules of Ct., Rule 3.1181*]. For a form of inventory, see *§ 486.150*.

[3] To Publish Notice of Unclaimed Funds and Report to Court

A receiver having any funds belonging to a person whose whereabouts are unknown, shall, before receiving his or her discharge as receiver, publish a notice in one or more newspapers published in the county, at least once a week for four consecutive weeks, setting forth the owner's name, last known place of residence or post office address, and the amount of the unclaimed funds [*Code Civ. Proc. § 570*; *see § 486.153* (form of notice)].

Any funds unclaimed for 30 days after the date of the last publication shall be reported to the court and, on order of the court, paid into the State Treasury accompanied by a copy of the order, which must set forth the facts required in the notice [*Code Civ. Proc. § 570*; *see § 486.154* (form of order)]. The funds shall be deemed to have been received by the

State under *Code Civ. Proc. §§ 1500-1582*, the Unclaimed Property Law, and may be recovered in the manner prescribed in those sections [*Code Civ. Proc. § 570*; *see* Ch. 252, *Escheat (Unclaimed Funds)*].

[4] To File Reports and Accounts

The receiver must provide monthly reports to the parties and, if requested, to nonparty client lien holders. These reports must include [*Cal. Rules of Ct., Rule 3.1182(a)*]:

- A narrative report of events;
- A financial report; and
- A statement of all fees paid to the receiver, employees, and professionals showing:
  - Itemized services;
  - A breakdown of the services by 1/10 hour increments;
  - If the fees are hourly, the hourly fees; and
  - If the fees are on another basis, that basis.

The monthly reports are not to be filed with the court unless the court so orders [*Cal. Rules of Ct., Rule 3.1182(a)*]. Interim fees are subject to final review and approval by the court. The court retains jurisdiction to award a greater or lesser amount as the full, fair, and final value of the services received [*Cal. Rules of Ct., Rule 3.1183(b)*].

A party may object to a receiver's interim report. Unless good cause is shown, objections to a receiver's interim report and accounting must be made within 10 days of notice of the report and accounting. The objections must be specific and must be delivered to the receiver and all partiesentitled to service of the interim report and accounting [*Cal. Rules of Ct., Rule 3.1183(b)*; *see also* discussion at *§ 486.36*].

Before a receiver may be discharged, he or she must file a final report and account [*see Cal. Rules of Ct., Rule 3.1184*; *see also, e.g., Aviation Brake Systems, Ltd. v. Voorhis (1982) 133 Cal. App. 3d 230, 232-233, 183 Cal. Rptr. 766* ; for further discussion, *see § 486.35*].

[5] To Petition For Instructions

Since a receiver is an officer of the court, he or she is subject to its continuing control and instructions. Therefore, in the event a receiver is uncertain about how to proceed in a case with respect to taking or not taking a particular action, he or she may apply to the court for instructions [*Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 273, 187 Cal. Rptr. 703]* .

[6] To Notify Court Regarding Substandard Rental Property

A receiver of real property containing rental housing must notify the court of the existence of any order or notice to correct any substandard or unsafe condition, as defined in *Health and Safety Code § 17920.3* or § 17920.10, with which the receiver cannot comply within the time provided by the order or notice [*Code Civ. Proc. § 568.2(a)*]. The notice must be filed within 30 days after the receiver's appointment or, if the substandard condition occurs subsequently, within 15 days of its occurrence [*Code Civ. Proc. § 568.2(b)*]. The notice must inform the court of all of the following [*Code Civ. Proc. § 568.2(c)*]:

- The substandard conditions that exist.

- The threat or danger that the substandard conditions pose to any occupant of the property or the public.

- The approximate cost and time involved in abating the conditions. If more time is needed to approximate the cost, then the notice must provide the date on which the approximate cost will be filed with the court and that date must be within 10 days of the filing.

- Whether the receivership estate is likely to contain sufficient funds to abate the conditions.

If the receivership estate does not contain sufficient funds to abate the conditions, the receiver must request further instructions or orders from the court [*Code Civ. Proc. § 568.2(d)*]. The court, on receiving notice pursuant to *Code Civ. Proc. § 568.2(d)*, must consider appropriate orders or instructions to enable the receiver to correct the substandard conditions or to terminate or limit the period of receivership [*Code Civ. Proc. § 568.2(e)*].

If, with respect to real property subject to a receivership, (a) substandard conditions exist, as defined by *Health and Safety Code § 17920.10*, or *(b)*a dispute or controversy exists concerning the powers or duties of the receiver affecting a tenant or the public, any of the following may file a motion in a receivership action for the purpose of seeking further instructions or orders from the court [*Code Civ. Proc. § 568.3*]:

- Any tenant of real property that is subject to receivership,

- A tenant association or organization, or

- Any federal, state, or local enforcement agency.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsReceiversDutiesReal Property LawLandlord & TenantDuty to Repair

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43-486 California Forms of Pleading and Practice--Annotated § 486.32

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.32 Sale of Receivership Property

[1] Statutory Authority

Pursuant to a court order, a receiver may sell real or personal property in his or her possession on the notice and in the manner prescribed by *Code Civ. Proc. §§ 701.510-701.680* (relating to sale of property levied on). The sale is not final, however, until confirmed by the court [*Code Civ. Proc. § 568.5*]. In a proper case, the action of a receiver in equity in selling receivership property, though taken without prior court authorization, may be ratified by subsequent court approval. Thus, when a receiver has acted in good faith and when what the receiver has done has been beneficial to the interested parties, his or her acts, though taken without court authorization, should be subsequently approved [*People v. Riverside University (1973) 35 Cal. App. 3d 572, 582, 111 Cal. Rptr. 68]* .

[2] Nature of Receiver's Sale

A receiver's sale is a judicial sale as distinguished from a sale under execution, and in the absence of a statute otherwise providing, the court may authorize a receiver to sell property at either a private or public sale [*People v. Riverside University (1973) 35 Cal. App. 3d 572, 583, 111 Cal. Rptr. 68]* . *Code Civ. Proc. § 568.5*, providing that the receiver may sell property on the notice and in the manner prescribed by *Code Civ. Proc. §§ 701.510-701.680* (relating to sale of property levied on in enforcing a judgment), does not compel a different result; it means merely that unless the court prescribes a different mode of sale, a receiver, when authorized, must sell property in the manner provided for sales on execution. When the receiver sells receivership property in a private sale made without prior court authorization, the court, having had power to authorize a private sale in the first instance, possesses the power to subsequently approve the sale [*People v. Riverside University (1973) 35 Cal. App. 3d 572, 585, 111 Cal. Rptr. 68]* .

[3] Analysis Required of Court in Ordering Sale

In determining whether to order a sale, a court must engage in a two-level analysis, first deciding whether a sale is required and then determining when the sale should take place. In some cases the court may decide asale is necessary

but leave time for the receiver to obtain a favorable price rather than accede to a single offer discounted to reflect the alleged emergency nature of the transaction. Naturally, a court will focus on the same factors at both analytical stages, but it will likely allocate different weights to these factors at each step. For example, evidence that improved real property is not generating capital and could in the future suffer a substantial deficit or be subject to an adverse judgment or foreclosure might be adequate to order a sale but might not be sufficient to order an immediate sale. On the other hand, evidence the property is faced with imminent destruction or substantial devaluation could justify an immediate sale to any available purchaser [*Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 275 n.7, 187 Cal. Rptr. 703]* .

[4] Selling Price

If a court orders the sale of receivership property, the receiver has the affirmative duty to endeavor to realize the largest amount from the sale. A court confirming the sale of property should also attempt to obtain the best bargain possible under the circumstances [*Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 276 n.8, 187 Cal. Rptr. 703]* .

[5] Court's Considerations in Confirming Sale

Judicial confirmation of a receiver's sale rests on the appointing court's sound discretion exercised in view of all the surrounding facts and circumstances and in the interest of fairness, justice, and the rights of the respective parties. The proper exercise of discretion requires the court to consider all material facts and evidence and to apply legal principles essential to an informed, intelligent, and just decision [*Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 274, 187 Cal. Rptr. 703]* . The status of the litigation and the effect a sale would have on the parties are both facts and circumstances the court must consider before confirming a sale [*Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 276, 187 Cal. Rptr. 703]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.33 Termination of Receivership

The functions of a receiver appointed pendente lite terminate on entry of judgment. Completion of the duties for which the receiver was appointed also terminates the receiver's functions. In addition, the receiver's functions may be terminated by a prior order of court, such as an order to deliver possession of property held to a designated person or firm. The order may be made on ex parte application on a sworn showing that thepurpose of the receivership has ceased. The order may direct the receiver to file an account within a specified number of days.

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.34 Prior Removal of Receiver

The power of a court of equity to remove or discharge a receiver is a necessary adjunct of the power of appointment and may be exercised at any stage of the litigation [*Hozz v. Varga (1958) 166 Cal. App. 2d 539, 544, 333 P.2d 113]* . Hence, a receiver may be removed by the court prior to the termination of the receivership, in which event the receiver will be directed to file an account with the court [*see, e.g., Aviation Brake Systems, Ltd. v. Voorhis (1982) 133 Cal. App. 3d 230, 232, 183 Cal. Rptr. 766* (receiver relieved on motion of party and substitute receiver appointed); *see also Hanno v. Superior Court (1939) 30 Cal. App. 2d 639, 641, 87 P.2d 50]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.35 Wages Owed to Pre-Receivership Employees

Normally, when a receiver is appointed, the receiver is under no obligation to pay the defendant or any of its employees wages or vacation pay for amounts which are owed prior to the time the receiver was appointed, unless the receiver has specifically affirmed and assumed the pre-receivership contracts of the defendant. [*Pacific Western Oil Co. v. McDuffie (9th Cir. 1934) 69 F.2d 208]* . Therefore, to avoid liability for such claims, the receiver should not assume pre-petition contracts of this type unless there are funds available in the receivership estate to pay for wages and vacation pay which are owed to the defendant's employees for pre-receivership services.

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.36 Receiver's Accounts and Reports

[1] Generally

A receiver's monthly reports need not to be filed with the court unless the court so orders [*Cal. Rules of Ct., Rule 3.1182(a)*; *see § 486.31[4]*], but a party may object to a receiver's interim report [*see Cal. Rules of Ct., Rule 3.1183(b)*, discussed at [2], *below*, and at § 486.31[4]].

A receiver must present a final account and report by noticed motion or stipulation of all parties [*Cal. Rules of Ct., Rule 3.1184(a)*]. If any allowance of compensation for the receiver or for an attorney employed by the receiver is claimed in an account, it must state in detail what services have been performed by the receiver or the attorney, and whether previous allowances have been made to the receiver or attorney and the amounts [*Cal. Rules of Ct., Rule 3.1184(d)*]. For forms of final report and account and notice of final account and report, see 486.147, *486.158*.

[2] Objections and Claims

Any party may file objections to the account or claims against the receivership estate [*see Aviation Brake Systems, Ltd. v. Voorhis (1982) 133 Cal. App. 3d 230, 232, 183 Cal. Rptr. 766* ; *Smith v. Hill (1965) 237 Cal. App. 2d 374, 388, 47 Cal. Rptr. 49]* . This applies also to nonparties who are creditors of the receivership estate [*Kirk v. Kirk (1966) 243 Cal. App. 2d 580, 582, 52 Cal. Rptr. 725* (involving objections to account by and claims of United States Government and State of California for taxes and unemployment insurance contributions)]. A party may object to a receiver's interim report, and unless good cause is shown, objections to a receiver's interim report and accounting must be made within 10 days of notice of the report and accounting, must be specific, and must be delivered to the receiver and all parties entitled to service of the interim report and accounting [*Cal. Rules of Ct., Rule 3.1183(b)*]. Any objections filed or claims made against the receivership will be determined by the court on the hearing of the receiver's report [*see, e.g., Aviation Brake Systems, Ltd. v. Voorhis (1982) 133 Cal. App. 3d 230, 232, 183 Cal. Rptr. 766]* .

[3] Surcharge for Losses

The receiver may, on the final account and report, be personally surcharged for any losses to the receivership estate based on his or her misconduct or mismanagement [*Aviation Brake Systems, Ltd. v. Voorhis (1982) 133 Cal. App. 3d 230, 233-234, 183 Cal. Rptr. 766]* .

[4] Claim for Fees

If any allowance of compensation for the receiver or for an attorney or other professional employed by the receiver is claimed on a report, the report must itemize the services, break the services down into 1/10 of an hour increments, if the fees are hourly, state the hourly fees, and if the fees are on another basis, state that basis [*Cal. Rules of Ct., Rule 3.1182(a)*]. Interim fees are subject to final review and approval by the court. The court retains jurisdiction to award a greater or lesser amount as the full, fair, and final value of the services received [*Cal. Rules of Ct., Rule 3.1183(b)*; *see § 486.157* (form)].

The amount of the receiver's fee or compensation and expenses and attorney fees properly chargeable against the receivership property is within the sound discretion of the trial court [*see Melikian v. Aquila, Ltd. (1998) 63 Cal. App. 4th 1364, 1368, 74 Cal. Rptr. 2d 739* ; *People v. Riverside University (1973) 35 Cal. App. 3d 572, 587, 111 Cal. Rptr. 68* ; *Maggiora v. Palo Alto Inn, Inc. (1967) 249 Cal. App. 2d 706, 713, 57 Cal. Rptr. 787]* .

[5] Real Property Taxes

Receivers are obligated to pay all taxes on real property in their possession which fall due during the time they are in possession as receiverswithout any prorating based on the proportion between the period of possession and the period covered by the taxes. Taxes falling due during the period of receivership are regarded as ordinary expenses of operating the property, and the full amount of such taxes paid are properly allowed as an operating expense of the receivership [*Schreiber v. Ditch Road Investors (1980) 105 Cal. App. 3d 675, 680-681, 164 Cal. Rptr. 633]* . The rule is different, however, if the taxes accrued before the receiver took possession. For example, a receiver is not entitled to credits for taxes paid to redeem from a tax sale the real property subject to receivership when such taxes are paid for the benefit of the owner of the trust deed on the property [*Schreiber v. Ditch Road Investors (1980) 105 Cal. App. 3d 675, 680 n. 3, 164 Cal. Rptr. 633* , citing *United States v. Giragossiantz (9th Cir. 1973) 488 F.2d 358*)].

[6] Lien Claims

Expenditures incurred by a receiver with the consent of lienholders may be paid ahead of the lien. Accordingly, when a receiver is lawfully appointed at the instance and for the benefit of lien creditors, all proper charges, expenses, and liabilities incurred as incident to duly conferred receivership powers and duties are a charge on the earnings and corpus of the property superior to the lien creditors who take part in, or expressly or impliedly consent to or acquiesce in, the receivership proceedings. Similarly, the expenses of the operation of a business are prior to the claims of lienors who have acquiesced in, agreed to, and consented to, the appointment of a receiver and operation of the business by the receiver, although they have not actively procured the appointment, or who, while not the applicants on whose petition the receiver was appointed, are privy to the action which results in the appointment [*Schreiber v. Ditch Road Investors (1980) 105 Cal. App. 3d 675, 679, 164 Cal. Rptr. 633]* .

[7] Effect of Approval of Account

The court's approval of the receiver's final report and account is res judicata not only as to the matters actually litigated at the time the account was settled but as to matters that could or should have been litigated at that time [*Aviation Brake Systems, Ltd. v. Voorhis (1982) 133 Cal. App. 3d 230, 234, 183 Cal. Rptr. 766]* . Because the receiver in his or her personal capacity may be surcharged for losses to the receivership estate based on his or her misconduct or mismanagement, such matters include any claim for damages resulting from the receiver's failure to have properly discharged the duties of receiver [*Aviation Brake Systems, Ltd. v. Voorhis (1982) 133 Cal. App. 3d 230, 234, 183 Cal.*

Rptr. 766] .

PRACTICE TIP:

Because of the res judicata effect of the court's approval of the receiver's final accounting, it is normally good practice for the receiverand/or his or her counsel to serve a motion to approve of the receiver's final report and account on all parties who may have claims against the receiver and/or the receivership estate. In the event that a party having a potential claim against the receivership estate receives a copy of the receiver's final report and account and does not object to the report, that party has probably waived any claims it may have against the receiver and/or the receivership estate because of the res judicata effect of the final report and account.

[8] Discharge of Receiver

The court has power to discharge the receiver at any time before termination of the receivership [*see Aviation Brake Systems, Ltd. v. Voorhis (1982) 133 Cal. App. 3d 230, 232, 183 Cal. Rptr. 766* ; *see also §§ 486.33, 486.34*].

The termination of a lawsuit gives cause for the discharge of a receiver, but it does not in and of itself effect the discharge. A receiver can be discharged only by order of the court after the receiver has had the time and opportunity to prepare and present his or her account. This is true even if the plaintiff dismisses the action before any appearance is made in the case by the defendant [*Hanno v. Superior Court (1939) 30 Cal. App. 2d 639, 641, 87 P.2d 50]* .

On approval of the receiver's report and account, the receiver will be ordered discharged and the bond exonerated on completion of the disbursements and other requirements in accordance with the order settling and approving the receiver's final report and account [*see Aviation Brake Systems, Ltd. v. Voorhis (1982) 133 Cal. App. 3d 230, 232, 183 Cal. Rptr. 766* ; *see § 486.159* (form of order)].

In the event the receivership estate is insolvent upon discharge of a receiver, the mere fact that a party was responsible for appointing receiver does not mean that party is responsible for payment of all fees and expenses of the receivership estate [*see* 2 Clark, A Treatise on the Law and Practice of Receivers, § 641(i) (1959 3d Ed.)].

[9] Appeal

The order settling the account of the receiver is a final appealable order [*Aviation Brake Systems, Ltd. v. Voorhis (1982) 133 Cal. App. 3d 230, 233, 183 Cal. Rptr. 766* ; *Schreiber v. Ditch Road Investors (1980) 105 Cal. App. 3d 675, 677 n.1, 164 Cal. Rptr. 633]* .

For discussion of when an order setting aside and vacating an order appointing a receiver may be appealable, see discussion under *§ 486.17*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataCivil ProcedureRemediesReceivershipsReceiversDutiesCivil ProcedureRemediesReceivershipsReceiversLiabilitiesCivil ProcedureRemediesReceivershipsTerminationsCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

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43-486 California Forms of Pleading and Practice--Annotated § 486.37

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.37 Foreign Receiverships

Normally, a receiver appointed by a court in a state outside of California has no authority to exercise its powers over property in California [*Melvin v. Carl (1931) 118 Cal. App. 249, 4 P.2d 954]* . Moreover, where a creditor in California and a receiver appointed outside of California both claim an interest in property located in California, the foreign receiver will normally not be permitted to prevail on his or claim to the property located in California. [*Lackmann v. Supreme Council of Order of Chosen Friends (1904) 142 Cal. 22, 75 P. 583]* .

Legal Topics:

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

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43-486 California Forms of Pleading and Practice--Annotated §§ 486.38-486.49

AUTHOR: Robert B. Kaplan Editorial Consultant

[Reserved]

§§ 486.38[Reserved]

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43-486 California Forms of Pleading and Practice--Annotated § 486.50

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.50 Actions by Receiver

A receiver has, under the control of the court, power to bring actions in his or her own name, as receiver [*Code Civ. Proc. § 568*; *see Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 350, 352-353, 113 Cal. Rptr. 281* (special or express permission required as to whether and against whom to commence action)]. However, a distinction may be made between an action by a receiver to recover funds which have come into his or her possession and an action to recover funds which were never in his or her possession, or which were in his or her possession, subject to a prior lien. In such cases the general authority conferred on the receiver by the order of appointment may not be sufficient to enable him or her to bring the action and specific authority must be obtained from the appointing court [*Bishop v. McKillican (1899) 124 Cal. 321, 325-327, 57 P. 76]* . Thus, on leave of the appointing court, a receiver for a corporation which does not own funds but has an assertable interest in the funds as conditional or contingent owner, has the right to bring an action for the recovery of the funds [*Holzman v. United California Bank (1967) 248 Cal. App. 2d 833, 835, 839, 57 Cal. Rptr. 33]* .

Legal Topics:

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

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43-486 California Forms of Pleading and Practice--Annotated § 486.51

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.51 Actions Against Receiver

[1] Court Permission Required

A receiver has, under the control of the court, power to defend actions in his or her own name, as receiver [*Code Civ. Proc. § 568*]. However, a receiver is a court appointed official and may not be sued without the permission of the appointing court [*McCarthy v. Poulsen (1985) 173 Cal. App. 3d 1212, 1219, 219 Cal. Rptr. 375* ; *Ostrowski v. Miller (1964) 226 Cal. App. 2d 79, 84, 37 Cal. Rptr. 790]* . The rule was established to protect receivers from unnecessary litigation [*Ostrowski v. Miller (1964) 226 Cal. App. 2d 79, 83, 84, 37 Cal. Rptr. 790]* . The rule does not apply, however, to proceedings to enforce a judgment lien against property in receivership inasmuch as a receiver takes property subject to all prior liens and encumbrances against it. Because creditors' rights are conferred by statuteand cannot be denied by the court appointing a receiver, that court's permission to enforce the lien is not required [*Petaluma S. Bank v. Superior Court (1896) 111 Cal. 488, 495-496, 502, 44 P. 177]* .

The failure to secure prior court permission is not jurisdictional but a mere irregularity, a plea in abatement, which can be raised by demurrer or answer to the third party's complaint; the defect can be cured by securing subsequent court approval and is waived by the receiver's failure to object [*Ostrowski v. Miller (1964) 226 Cal. App. 2d 79, 82-84, 86, 37 Cal. Rptr. 790]* . Should a person sue the receiver without having obtained prior leave of court to do so, and the court appointing the receiver subsequently refuses to give its consent, the receiver's demurrer to the complaint should be sustained without leave to amend, but not "with prejudice" [*see* *Ostrowski v. Miller (1964) 226 Cal. App. 2d 79, 85-87, 37 Cal. Rptr. 790]* .

A motion to sue and a motion to intervene are timely even if the primary action has been dismissed, as long as they are made before the receiver's final accounting and discharge [*Jun v. Myers (2001) 88 Cal. App. 4th 117, 124, 105 Cal. Rptr. 2d 537]* . If the receiver has already been discharged, a plaintiff who has an action pending against the receiver may still obtain the court's permission to sue if the plaintiff was not a party to the receivership and had no notice of the discharge, and if the receiver was aware of the plaintiff's claim and should have included it in the receiver's final

account to the court before obtaining the discharge [*Vitug v. Griffin (1989) 214 Cal. App. 3d 488, 495-497, 262 Cal. Rptr. 588]* .

[2] Independent Suit or Intervention

On application for leave to sue, the appointing court may grant leave to sue the receiver in an independent action, or it may deny leave and require the claimant to assert its claim by intervening in the receivership proceedings [*Ostrowski v. Miller (1964) 226 Cal. App. 2d 79, 84, 37 Cal. Rptr. 790* ; *Garris v. Mitchell (1935) 7 Cal. App. 2d 430, 433-434, 46 P.2d 225]* .

Although in a proper case leave to sue the receiver in another court will not be denied, and under some situations the denial of leave may amount to an abuse of discretion, ordinarily the court has a wide discretion in the matter. It may not properly refuse leave to sue when it cannot afford the same relief in intervention as the applicant is entitled to in an independent action or when, by virtue of a statute or constitutional provision, a particular kind of action must be brought in a jurisdiction other than that in which the receivership proceeding is pending. But permission may be denied when full relief can be granted by intervention in the receivership proceeding. The more common practice, and the one generally recommended, is to hear and determine all right of action and demands against a receiver by petition in the cause in which he or she was appointed [*Ostrowski v. Miller (1964) 226 Cal. App. 2d 79, 84, 37 Cal. Rptr. 790* ; *see De Forrest v. Coffey (1908) 154 Cal. 444, 449-453, 98 P. 27]* . The trial court does not have discretionto assess the merits of the proposed lawsuit or action in intervention. Denial of both the motion to intervene and the motion to file a separate action implicates due process. Thus, it is improper for a trial court to deny both the request to intervene and the request for leave to file a separate action [*Jun v. Myers (2001) 88 Cal. App. 4th 117, 125, 105 Cal. Rptr. 2d 537]* .

Should the court deny a petition to sue the receiver in an independent action when the petition discloses a case where it should be granted, mandate will lie to compel the court to grant the petition [*De Forrest v. Coffey (1908) 154 Cal. 444, 454, 98 P. 27* ; *see Chiesur v. Superior Court (1946) 76 Cal. App. 2d 198, 199, 172 P.2d 763]* .

[3] Tort Liability

A receiver is not personally liable for torts committed in the performance of his or her receivership duties; liability is in the receiver's official capacity only to be satisfied from the receivership estate [*McCarthy v. Poulsen (1985) 173 Cal. App. 3d 1212, 1219, 219 Cal. Rptr. 375* (quoting Witkin, California Procedure, vol. 6, Provisional Remedies, § 364 (3d ed.)); *see Chiesur v. Superior Court (1946) 76 Cal. App. 2d 198, 201,172 P.2d 763]* . Hence, an application for permission to sue a receiver for damages for personal injuries resulting from the receiver's negligent maintenance and management of the property in receivership should be granted when the proposed complaint states a cause of action against the receiver in the receiver's official capacity and shows no duty owed to the injured person by the receiver in his or her individual capacity [*Chiesur v. Superior Court (1946) 76 Cal. App. 2d 198, 200, 202, 172 P.2d 763* (involving receivership of apartment house)].

[4] Garnishment and Attachment

Property in the custody of a receiver is generally not subject to garnishment or attachment without the court's consent. Because the receiver is appointed by the court, he or she becomes an officer of the court; thus the receiver's custody is actually the custody of the court. But when there has been a final determination that a party has a right to a certain share of the funds held by a receiver, the receiver is subject to garnishment by a creditor of the party so entitled after the court has ordered the receiver to pay it [*Robbins v. Bueno (1968) 262 Cal. App. 2d 79, 84-85, 68 Cal. Rptr. 347]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil

ProcedurePartiesInterventionMotions to InterveneCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesGarnishmentsCivil ProcedureRemediesReceivershipsReceiversLiabilitiesCivil ProcedureRemediesReceivershipsReceiversPowers

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AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.52 Employment of Attorney

A receiver may not employ an attorney without the approval of the court [*Cal. Rules of Ct., Rule 3.1180*; *discussed under § 486.30* et seq.]. Consequently, whether the receiver sues or is sued, application for leave to employ an attorney may be necessary [*see § 486.152* (petition)].

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AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.53 Actions on Receiver's Bond

A receiver's undertaking must be given to the State of California [*see Code Civ. Proc. §§ 567(b), 995.810-995.850*]. An undertaking given to the State of California may be enforced by or for the benefit of, and in the name of, any and all persons for whose benefit the bond was given who are damaged by breach of the condition of the bond [*Code Civ. Proc. § 995.850(a)*]. Any such person may, in addition to any other remedy he or she has, enforce the liability on the bond in his or her own name, without assignment of the bond [*Code Civ. Proc. § 995.850(b)*]. The manner of enforcing liability is governed generally by *Code Civ. Proc. §§ 996.410-996.495*. For further discussion and forms for use in actions to enforce the liability on a bond, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

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AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.60 Related Matthew Bender Publications

For memoranda of points and authorities relating to forms in this chapter, see California Points and Authorities, Ch. 200, *Receivers* (Matthew Bender)

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43-486 California Forms of Pleading and Practice--Annotated § 486.61

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.61 State Statutes

[1] Appeal

Order appointing receiver as appealable. *Code Civ. Proc. §§ 904.1(a)(7)* (in other than limited civil case), 904.2(h) (in limited civil case)

Undertaking required to stay on appeal judgment or order appointing receiver. *Code Civ. Proc. § 917.5*

[2] Appointment

Authority for appointment in limited civil case. *Code Civ. Proc. § 86(a)(8)*

Grounds for appointment. *Code Civ. Proc. § 564*

[3] Attachment

Appointment of receiver of attached property. *Code Civ. Proc. § 488.700*

[4] Attorneys

Appointment of receiver to take possession and control of bank accounts relating to attorney's law practice after attorney has stopped practicing law. *Bus. & Prof. Code § 6180.5(g)*

[5] Bonds and Undertakings

Undertaking required of applicant when receiver is appointed on ex parte application. *Code Civ. Proc. § 566(b)*

Undertaking required of receiver. *Code Civ. Proc. § 567(b)*

Undertaking required to stay on appeal judgment appointing receiver. *Code Civ. Proc. § 917.5*

Bond and Undertaking Law. *Code Civ. Proc. § 995.010 et seq.*

Bond required of receiver as inapplicable to specified public officers and entities. *Code Civ. Proc. § 995.220*

Appointment of receiver at request of Office of Statewide Health Planning and Development, or Attorney General, pursuant to *Health & Safety Code § 129173* (receiver for borrower or borrower's assets when borrower may be unable to fulfill its obligations under insured loan transaction subjectto California Health Facility Construction Loan Insurance Law). *Code Civ. Proc. § 564(b)(10)*

[6] Continuances and Extensions of Time

Continuances under *Code Civ. Proc. § 595* (when party, attorney of record, or principal witness is member of California State Legislature) as not to be granted if continuance would defeat or abridge right to invoke remedy of receivership of failing business. *Code Civ. Proc. § 595*

Extensions of time under *Code Civ. Proc. § 1054.1(a)* (when attorney for moving party is member of California State Legislature) as not to be granted if extension would defeat or abridge right to invoke remedy of receivership of failing business. *Code Civ. Proc. § 1054.1(b)*

[7] Corporations

Appointment of receiver when corporation has been dissolved, as provided in *Code Civ. Proc. § 565*. *Code Civ. Proc. § 564(b)(5)*

Appointment of receiver when corporation is insolvent, is in imminent danger of insolvency, or has forfeited its corporate rights. *Code Civ. Proc. § 564(b)(6)*

Appointment of receiver at request of Public Utilities Commissioner pursuant to *Pub. Util. Code § 855* (receivership of water or sewer system corporation). *Code Civ. Proc. § 564(b)(8)*

Appointment of receiver by superior court on dissolution of corporation. *Code Civ. Proc. § 565*

Appointment of receiver in action for involuntary dissolution of corporation. *Corp. Code § 1803*

[8] Escheat Proceedings

Appointment of receiver to take charge of estate pending settlement of title. *Code Civ. Proc. § 1422*

[9] Execution and Enforcement of Judgments

Judgment or order to sell real property as enforceable by appointment of receiver. *Fam. Code § 290*

Judgment, order, or decree made or entered under Family Code as enforceable by appointment of receiver. Fam. Code § 90

Appointment of receiver after judgment to carry judgment into effect. *Code Civ. Proc. § 564(b)(3)*

Appointment of receiver after judgment to dispose of property according to judgment, or to preserve it during pendency of appeal, or pursuant to *Code Civ. Proc. § 680.010 et seq.* (enforcement of judgments), or after sale of real property pursuant to decree of foreclosure, during redemption period, to collect, expend, and disburse rents as directed by court or otherwise provided by law. *Code Civ. Proc. § 564(b)(4)*

Code Civ. Proc. §§ 564-570 (receivers) and *Code Civ. Proc. § 571* (court commissioners and referees) as law applicable to appointment, qualifications,powers, rights, and duties of receiver appointed to enforce judgment. *Code Civ. Proc. § 708.610*

Appointment of receiver to preserve value of property levied on. *Code Civ. Proc. § 699.070*

Appointment of receiver as authorized when it is shown that appointment is reasonable method to obtain fair and orderly satisfaction of judgment. *Code Civ. Proc. § 708.620*

Appointment of receiver to transfer judgment debtor's interest in transferable alcoholic beverage license to be applied to satisfaction of money judgment. *Code Civ. Proc. § 708.630*

Appointment of receiver to enforce judgment for possession or sale of property. *Code Civ. Proc. § 712.060*

Enforcement of support orders in guardianship, conservatorship, and other protective proceedings by appointment of receiver. *Prob. Code § 3090*

[10] Foreclosure Actions

Appointment of receiver in action by secured lender for foreclosure of deed of trust or mortgage. *Code Civ. Proc. § 564(b)(2)*

[11] Fraudulent Transactions

Appointment of receiver to take charge of fraudulently transferred asset or its proceeds. *Civ. Code § 3439.07(a)(3)(B)*

Appointment of receiver in action by vendor to vacate fraudulent purchase of property. *Code Civ. Proc. § 564(b)(1)*

[12] Hazardous Substance Inspection

Appointment of receiver in action by secured lender to inspect real property for past, present, or threatened release of hazardous substances. *Code Civ. Proc. § 564(c)*

Appointment of receiver at request of Public Utilities Commission pursuant to *Pub. Util. Code § 5259.5* (appointment whenever Commission determines that household goods carrier or its officer, director, or agent has abandoned, or is abandoning stored property). *Code Civ. Proc. § 564(b)(8)*

[13] Interest in Property or Fund

Appointment of receiver in action by creditor to subject any property or fund to creditor's claim, or between partners or others jointly owning or interested in property or fund, or of any party whose right to or interest in property or fund, or its proceeds, is probable, and when it is shown that property or fund is in danger of being lost, removed, or materially injured. *Code Civ. Proc. § 564(b)(1)*

[14] Jurisdiction of Courts

Jurisdiction of superior court in limited civil case to appoint receiver. *Code Civ. Proc. §§ 85, 86(a)(8)*

Jurisdiction of court to appoint receiver. *Code Civ. Proc. §§ 564, 565*

[15] Leases

Appointment of receiver in case other than limited civil case brought by assignee of leases pursuant to *Civ. Code § 2938(g). Code Civ. Proc. § 564(b)(12)*

Appointment of receiver on lessor's initiative to protect lessor's interest under lease as not constituting termination of lessee's right to possession of real property abandoned by lessee when lease provides for continuation of lease so long as lessor does not terminate lessee's right to possession. *Civ. Code § 1951.4(c)(2)*

[16] Public Utilities

Receivership of water or sewer system corporation. *Pub. Util. Code § 855*

[17] Receivers

Qualifications. *Code Civ. Proc. § 566*

Bond or undertaking requirement. *Code Civ. Proc. §§ 566(b), 567(b)*

Oath requirement. *Code Civ. Proc. § 567(a)*

Duty of receiver of real property containing rental units to inform court of order or notice to correct substandard or unsafe condition. *Code Civ. Proc. § 568.2*

[18] Rents, Issues, or Profits

Appointment of receiver in action other than limited civil case by secured lender for specified performance of an assignment of rents provision in deed of trust, mortgage, or separate assignment document. *Code Civ. Proc. § 564(b)(11)*

Appointment of receiver in case other than limited civil case brought by assignee of leases, rents, issues, or profits pursuant to *Civ. Code § 2938(g). Code. Civ. Proc. § 564(b)(12)*

[19] Unlawful Detainer

Appointment of receiver in unlawful detainer proceeding. *Code Civ. Proc. § 564(b)(7)*

Service of copy of receiver's deed on tenant in unlawful detainer proceedings. *Code Civ. Proc. § 1162a*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDissolution & ReceivershipReceivershipsAppointment of ReceiversCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesReceivershipsJurisdictionGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionInterlocutory OrdersCivil ProcedureEminent Domain ProceedingsCommissionersAppointmentsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawPurchase & SaleFraudulent Transfers

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§ 486.62 California Rules of Court

Applicability of Civil Law and Motions Rules (*Cal. Rule of Ct., Rules 3.1100 et seq.*) to appointment of receiver proceeding. *Cal. Rules of Ct., Rule 3.1103(a)(2)*

California Rules of Court preempt local rules with respect to provisional remedies. *Cal. Rules of Ct., Rule 3.20*

Requirements of ex parte application for appointment of receiver. *Cal. Rules of Ct., Rule 3.1175*

Confirmation of appointment of receiver on ex parte application. *Cal. Rules of Ct., Rule 3.1176*

Nomination of person to serve as receiver. *Cal. Rules of Ct., Rule 3.1177*

Amount of undertaking. *Cal. Rules of Ct., Rule 3.1178*

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.63 Local Court Rules

[1] Alameda County

Appointment of Receivers. Alameda Co. Super. Ct. Rules, Rule 5.11

[2] Contra Costa County

Appointment of Receivers. Contra Costa Co. Super. Ct. Rules, Rule 17

[3] Los Angeles County

Departments to which applications for appointment of receiver are assigned. Los Angeles Co. Super. Ct. Rules, Rule 2.5(i)

[4] San Bernardino County

Ex parte application for appointment of receiver to be presented to law and motion judge to whom case is assigned. San Bernardino Co. Super. Ct. Rules, Rule 540

[5] San Diego County

Appointment of receiver. San Diego Co. Super. Ct. Rules, Div. II, Rule 2.47

[6] San Francisco County

Departments to which applications for appointment of receiver are assigned. San Francisco Uniform Trial Ct. Rules, Rules 8.1, 8.12

Legal Topics:

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

California Forms of Pleading and Practice--Annotated

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Volume 43: Receivers thru Rewards-Chs. 486-499
Chapter 486 RECEIVERS
PART III. RESEARCH GUIDE
A. Appointment of Receivers

43-486 California Forms of Pleading and Practice--Annotated § 486.64

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.64 Decisions

[1] Affidavits and Declarations

Facts allegedly supporting conclusions of affiant in affidavit in support of motion for appointment of receiver as required to be based on affiant's knowledge. *McCaslin v. Kenney (1950) 100 Cal. App. 2d 87, 94, 223 P.2d 94*

[2] Abuse of Process

Cause of action for abuse of process in having receiver appointed as not stated when request for appointment of receiver was proper. *Spira v. Superior Court (1974) 41 Cal. App. 3d 536, 539-540, 116 Cal. Rptr. 93*

[3] Appeal

Order denying motion to vacate order appointing receiver and terminate receivership as nonappealable. *Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 273 n.4, 187 Cal. Rptr. 703*

Order appointing receiver to disburse funds from defendant's paycheck in accordance with court order as appealable. *Sheridan v. Sheridan (1972) 33 Cal. App. 3d 917, 918, 918 n.1, 109 Cal. Rptr. 466*

Order appointing receiver as appealable. *Hillman v. Stults (1968) 263 Cal. App. 2d 848, 875, 70 Cal. Rptr. 295*

Order appointing receiver on ex parte application as not appealable; order confirming appointment as appealable. *Republic of China v. Chang (1955) 134 Cal. App. 2d 124, 133, 285 P.2d 351*

[4] Appellate Review

An order authorizing a receiver to contract for demolition rests upon the court's sound discretion exercised in view of all the surrounding facts and circumstances and in the interest of fairness, justice and the rights of the respective parties. The proper exercise of discretion requires the court to consider all material facts and evidence and to apply legal principles essential to an informed, intelligent, and just decision. An appellate court's view of the facts must be in the light most favorable to the order and the court must refrain from exercising its judgment retrospectively. *City of Santa Monica v. Gonzalez (2008) 43 Cal. 4th 905, 931, 76 Cal. Rptr. 3d 483, 182 P.3d 1027*

Trial court's order based on facts as to which reasonable minds might differ with respect to necessity for receivership as not reversed on appeal; conclusion of appellate court as not substituted for that of trial court made on sufficient evidence; to justify appellate interference, showing that order was arbitrary exercise of power as required. *Armbrust v. Armbrust (1946) 75 Cal. App. 2d 272, 275-276, 171 P.2d 75*

[5] Appointment of Receivers

[a] In General

Appointment of receiver as drastic remedy; courts as carefully weighing propriety of appointment in exercising discretion to appoint receiver, particularly if there is alternative remedy. *Hoover v. Galbraith (1972) 7 Cal. 3d 519, 528, 102 Cal. Rptr. 733, 498 P.2d 981* ; *Barclays Bank of California v. Superior Court (1977) 69 Cal. App. 3d 593, 597, 137 Cal. Rptr. 743*

Party forfeited its challenge to the validity of receiver's appointment during arbitration by failing to raise it below. *Baron v. Fire Insurance Exchange (2007) 154 Cal. App. 4th 1184, 1191, 65 Cal. Rptr. 3d 502*

Effect of receivership on going business. *In re Jamison Steel Corp. (1958) 158 Cal. App. 2d 27, 35, 322 P.2d 246*

If there is any other remedy less severe in its results than receivership that will adequately protect rights of parties, court as ordinarily not taking property out of hands of its owners by appointing receiver. *Golden State Glass Corp. v. Superior Ct. (1939) 13 Cal. 2d 384, 393, 90 P.2d 75*

Rule as well established that receiver should not be appointed if remedy less drastic in its nature and scope is available that will insure to litigants adequate protection. *A.G. Col Co. v. Superior Court (1925) 196 Cal. 604, 613, 238 P. 926*

Receiver as not appointed when writ of injunction or other statutory remedies will protect all rights of party applying for appointment of receiver. *A. G. Col Co. v. Superior Court (1925) 196 Cal. 604, 614, 238 P. 926*

Party to action as not, against his or her will, to be subjected to onerous expense of receiver, except when one may be lawfully appointed and appointment is obviously necessary to protection of opposite party. *DeLeonis v. Walsh (1905) 148 Cal. 254, 255, 82 P. 1047* ; *Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 351, 113 Cal. Rptr. 281*

Appointment of conservator as not precluding appointment of receiver. *Hillman v. Stults (1968) 263 Cal. App. 2d 848, 875-876, 70 Cal. Rptr. 295*

Receivers as often legal luxuries, frequently representing extravagant cost to losing litigant; when it appears that no reasonably certain benefit will result to one litigant and distinct disadvantage will result to another, courts as weighing carefully propriety of appointing receiver. *Elson v. Nyhan (1941) 45 Cal. App. 2d 1, 5, 113 P.2d 474*

Arbitration panel as exceeding its powers when it appointed receiver without benefit of any statutory authority

empowering it to make such an appointment. *Marsch v. Williams (1994) 23 Cal. App. 4th 238, 245-247, 28 Cal. Rptr. 2d 402*

[b] Crops, Cases Involving

Appointment of receiver under *Code Civ. Proc. § 564(b)(1)* as authorized in appropriate proceeding when crops are planted by trespasser who wrongfully assumes to hold possession and threatens to harvest and market crops for his or her own benefit. *Barnes v. Morrison (1929) 102 Cal. App. 152, 159, 282 P. 986*

[c] Dissolution of Partnership Cases

Appointment of receiver in action for dissolution of partnership. *Galich v. Brkich (1951) 103 Cal. App. 2d 187, 190-191, 229 P.2d 89*

[d] Equitable Cases

Party could not invoke provisions of former *Code Civ. Proc. § 564(b)(8)* when facts alleged would bring situation within another subdivision of *Code Civ. Proc. § 564*. *Alhambra-Shumway Mines. Inc. v. Alhambra Gold Mine Corp. (1953) 116 Cal. App. 2d 869, 874, 254 P.2d 599* ; *Dabney Oil Co. v. Providence Oil Co. (1913) 22 Cal. App. 233, 237, 133 P. 1155*

Broad provision granting court power, under former *Code Civ. Proc. § 564(b)(8)*, to appoint receiver in all cases in which receivers had been appointed by usages of courts of equity, gave court all discretion formerly utilized by chancellor in equity, and exercise of that discretion would not be disturbed on appeal absent clear showing of abuse of discretion. *McNeil v. Graner (1949) 92 Cal. App. 2d 371, 374, 206 P.2d 1120*

[e] Execution, in Aid of

Order reinstating receiver to collect attorney's fees and sanctions against party to settlement agreement is not void with respect to party merely because there is superior competing claim to party's income; assertion by superior claim holder does not excuse payment of undisputed income to receiver or obligation to supply financial information. *Alioto Fish Co. v. Alioto (1994) 27 Cal. App. 4th 1669, 1688, 34 Cal. Rptr. 2d 244*

Order appointing receiver in aid of execution against doctor and medical corporation of which doctor was sole shareholder as not giving overly broad powers to receiver by permitting him to take possession of all records of corporation when receivership was not to take assets of corporation and apply them to doctor's debt but rather was simply to prevent doctor from effectively withdrawing his earnings from corporation without applying them to judgment. *Crocker National Bank v. O'Donnell (1981) 115 Cal. App. 3d 264, 267-268, 171 Cal. Rptr. 225*

Charging order receivership as not strictly speaking in aid of execution but as serving same function as writ of execution. *Evans v. Galardi (1979) 93 Cal. App. 3d 291, 294, 155 Cal. Rptr. 505*

Appointment of receiver to collect simple money judgment as proper in appropriate circumstances. *Olsan v. Comora (1977) 73 Cal. App. 3d 642, 646-647, 140 Cal. Rptr. 835* (involving former statutes relating to proceedings supplemental to execution and former *Code Civ. Proc. § 564(4)* (*now see Code Civ. Proc. § 564(b)(4)*) prior to its 1982 amendment to conform with Enforcement of Judgments Law (*Code Civ. Proc. §§ 680.010-724.260*))

Appointment of receiver in aid of execution as resting wholly within judicial discretion, but power to appoint receiver as delicate one that is exercised sparingly and with caution, and only in extreme cases under circumstances as demand or require summary relief, and never in doubtful case or when there is no necessity or occasion for appointment; appointment as properly made when there are reasonable grounds to believe that judgment debtor, or third parties, have control of property that rightfully should be subject to execution. *Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 350-351, 113 Cal. Rptr. 281* (involving former *Code Civ. Proc. § 564(4)* (*now see Code Civ. Proc. § 564(b)(4)*) prior to its 1982 amendment to conform with Enforcement of Judgments Law (*Code Civ. Proc. §§ 680.010-724.260*))

California court as properly ordering defendant federal government employee to endorse and deliver federal wages to receiver to enforce judgment; although sovereign immunity precludes ordering federal government or agency to pay directly to receiver, that immunity as not extending to employee once federal funds are in his or her possession. *Sheridan v. Sheridan (1972) 33 Cal. App. 3d 917, 919-922, 109 Cal. Rptr. 466*

[f] Foreclosure Cases

Stipulation in mortgage that, on filing of complaint to foreclose, mortgagee would be entitled to have receiver appointed to take possession of premises as not conferring jurisdiction on court to appoint receiver in absence of showing that property is insufficient to pay debt (*Code Civ. Proc. § 564(b)(2)*). *Bank of Woodland v. Stephens (1904) 144 Cal. 659, 661-662, 79 P. 379*

When one's entitlement to receiver is not otherwise established, mortgagee or beneficiary of trust deed as unable by stipulation or consent, however manifested, to confer jurisdiction on superior court to appoint receiver. *Turner v. Superior Court (1977) 72 Cal. App. 3d 804, 812, 140 Cal. Rptr. 475*

In California, receiver as appointed only as permitted by *Code Civ. Proc. § 564*; when entitlement of mortgagee or beneficiary of trust deed on default of mortgagor or trustor is not established pursuant to that statute, stipulation or consent of parties to appointment of receiver as not conferring jurisdiction on superior court to appoint receiver. *Barclays Bank of California v. Superior Court (1977) 69 Cal. App. 3d 593, 597, 600, 137 Cal. Rptr. 743*

Discretion of court to appoint receiver in foreclosure proceeding. *Reidy v. Young (1931) 119 Cal. App. 322, 325, 6 P.2d 112*

[g] Fraud Cases

Appointment of receivers in actions by creditors to set aside property transferred with intent to defraud creditors. *Burrows v. Jorgensen (1958) 158 Cal. App. 2d 644, 647-652, 323 P.2d 150* (involving transfer of leasehold interests)

When basis of action is alleged fraudulent misappropriation of money belonging to plaintiff, addition of another cause of action for money had and received as not changing nature of action or depriving plaintiff of right to have receiver appointed to protect its interest in property that was allegedly purchased with misappropriated funds. *Republic of China v. Chang (1955) 134 Cal. App. 2d 124, 131, 285 P.2d 351*

In action to set aside transfer of property as fraudulent, trial court as properly appointing receiver to preserve property under former *Code Civ. Proc. § 564(1),(7)* (*now see Code Civ. Proc. § 564(b)(1), (9)*) and *Civ. Code § 3439.11* (*now see Civ. Code §§ 3439.07(a)(3)(B), 3439.10*). *Heffernan v. Bennett & Armour (1952) 110 Cal. App. 2d 564, 588-589, 243 P.2d 846*

[h] On Court's Own Motion

Court as able to appoint receiver whenever proper case is made even though neither party has asked for it. *Neider v. Dardi (1955) 130 Cal. App. 2d 646, 650, 279 P.2d 598* ; *Venza v. Venza (1949) 94 Cal. App. 2d 878, 884, 211 P.2d 913* (stressing, however, that parties had consented to appointment)

[i] On Ex Parte Application

From standpoint of business welfare of defendant corporation, appointment of receiver on ex parte application as so dangerous an expedient that it should be done only in cases of greatest emergency and when, without such appointment, irreparable injury will unquestionably result. *Golden State Glass Corp. v. Superior Ct. (1939) 13 Cal. 2d 384, 393, 90 P.2d 75* ; *A.G. Col Co. v. Superior Court (1925) 196 Cal. 604, 614-615, 238 P. 926*

Appointment of receiver on ex parte application as resting in sound discretion of trial court, in exercise of which it must be governed necessarily by situation as it is presented and appears to court at time order is made. *People v. Christ's Church (1947) 79 Cal. App. 2d 858, 861, 181 P.2d 49*

[j] Attachment

Use of provisional remedy of attachment in lieu of receivership. *Samuels v. Superior Court (1969) 276 Cal. App. 2d 264, 270, 81 Cal. Rptr. 216* (allowed but criticized)

Receivership as not a substitute for attachment and as not to be resorted to for reason that attachment would have been more expensive. *Rogers v. Smith (1946) 76 Cal. App. 2d 16, 21, 172 P.2d 365*

[k] Complaint

Complaint based largely on generalities and conclusions of plaintiff and on information and belief as insufficient basis on which to appoint receiver. *Golden State Glass Corp. v. Superior Ct. (1939) 13 Cal. 2d 384, 396, 90 P.2d 75*

Allegation in complaint to impose trust and for accounting that defendant corporation is in imminent danger of insolvency (*see Code Civ. Proc. § 564(b)(6)*) without alleging facts on which conclusion is based as insufficient to justify appointment of receiver. *A.G. Col Co. v. Superior Court (1925) 196 Cal. 604, 613, 238 P. 926*

Allegation in complaint to foreclose mortgage that security is insufficient (*see Code Civ. Proc. § 564(b)(2)*) without stating facts on which such allegation is based as insufficient to justify appointment of receiver of mortgaged property. *Title etc. Trust Co. v. California Dev. Co. (1912) 164 Cal. 58, 60-61, 127 P. 502* ; *Bank of Woodland v. Stephens (1904) 144 Cal. 659, 660-661, 79 P. 379*

When order appointing receiver on ex parte application was based entirely on verified complaint, that pleading as properly examined by reviewing court in prohibition proceeding to determine whether trial court exceeded its jurisdiction in making order. *Sunset Farms, Inc. v. Superior Court (1935) 9 Cal. App. 2d 389, 396, 50 P.2d 106*

[l] Corporations

Court of equity as having power to appoint receiver of going corporation on showing that there are such dissensions in its governing body as to create virtual suspension of its business; but even if there is dissension in corporate management receiver should not be appointed when no actual or threatened cessation or diminution of business

operations is shown. *Golden State Glass Corp. v. Superior Ct. (1939) 13 Cal. 2d 384, 393-394, 90 P.2d 75*

In action for involuntary dissolution of corporation, intervenor, whether shareholder or creditor, as able to seek any relief court has jurisdiction to grant that affects or protects his or her underlying interest in corporation or its assets during pendency of proceeding, and court as having power to appoint receiver. *Hagan v. Superior Court (1960) 53 Cal. 2d 498, 504, 2 Cal. Rptr. 288, 348 P.2d 896* (citing former Corp. Code § 4656; now *Corp. Code § 1803*).

Power to appoint receiver for going corporation as exercised sparingly; receivership as drastic remedy which should not be invoked unless there is threatened injury to corporation of serious nature. *Starbird v. Lane (1962) 203 Cal. App. 2d 247, 261, 21 Cal. Rptr. 280*

In action for involuntary dissolution of corporation, trial court as having discretion to appoint receiver under former Civ. Code § 404(E) (*now see Corp. Code §§ 1800(b)(3), 1803*) when complaint alleged that plaintiffs and defendants, husbands and wives, each owned 50 percent of stock, that two families constituted two factions, that defendants on board of directors perpetuated themselves in office by refusing to call an election, that there was internal dissension, deadlock, and inability to agree on board of three directors and to conduct business with advantage to shareholders, that unless receiver was appointed interest of corporation and plaintiff faction would suffer and be damaged pending hearing and determination of action, and answer and affidavit denying foregoing were general and did not attempt to set forth actual situation with respect to affairs of corporation. *Merlino v. Fesno Macaroni Mfg. Co. (1944) 64 Cal. App. 2d 462, 466-467, 148 P.2d 884*

[m] Discretion of Court

Appointment of receiver as resting largely in discretion of trial court whose action in appointing or refusing to appoint receiver will not be disturbed on appeal absent showing that discretion was abused. *Alderson v. Alderson (1986) 180 Cal. App. 3d 450, 467, 225 Cal. Rptr. 610*

Appointment of receiver in aid of execution as resting wholly within judicial discretion. *Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 350, 113 Cal. Rptr. 281*

Appointment of receiver as resting largely in discretion of trial court; discretion of trial court as so broad that order based on facts as to which reasonable minds might differ with respect to necessity for receiver as not reversed on appeal. *Maggiora v. Palo Alto Inn, Inc. (1967) 249 Cal. App. 2d 706, 710-711, 57 Cal. Rptr. 787*

In absence of clear showing of abuse of discretion, trial court's order either appointing or refusing to appoint receiver as upheld on appeal. *Starbird v. Lane (1962) 203 Cal. App. 2d 247, 261, 21 Cal. Rptr. 280*

Appointment of receiver as resting largely in discretion of trial court whose order will not be disturbed on appeal absent showing of abuse of discretion. *Venza v. Venza (1949) 94 Cal. App. 2d 878, 883, 211 P.2d 913*

Appointment of receiver as matter within sound discretion of trial court. *Galich v. Brkich (1951) 103 Cal. App. 2d 187, 191-192, 229 P.2d 89* ; *Armbrust v. Armbrust (1946) 75 Cal. App. 2d 272, 276, 171 P.2d 75*

[n] Enforcement of Judgments and Orders

Trial court as not abusing its discretion under facts of case in appointing receiver under former *Civ. Code § 4380* (*now see Fam. Code § 290*), relating to enforcement of family law orders, to enforce judgment awarding child support to woman who had custody of parties' three children born during 12-year period of unmarried cohabitation in which parties held themselves out as being husband and wife. *Alderson v. Alderson (1986) 180 Cal. App. 3d 450, 467, 225*

Cal. Rptr. 610

[o] Hearing

So serious a matter as appointment of receiver as not made without full and complete hearing unless due administration of justice clearly requires it. *Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 273 n.3, 187 Cal. Rptr. 703*

[p] Jurisdiction

Requirements of *Code Civ. Proc. § 564*, setting forth when receiver may be appointed in superior court case, as jurisdictional, and without showing bringing receiver within one of subdivisions of that section, court's order appointing receiver as void. *Turner v. Superior Court (1977) 72 Cal. App. 3d 804, 811, 140 Cal. Rptr. 475*

Courts of equity as having inherent power to appoint receivers in exercise of their equity jurisdiction. *Hillman v. Stults (1968) 263 Cal. App. 2d 848, 875, 70 Cal. Rptr. 295*

Superior court's appointment of receiver in improper case as mere error in exercise of jurisdiction. *John H. Spohn Co. v. Bender (1937) 18 Cal. App. 2d 447, 450-451, 64 P.2d 152*

[q] Order

To preserve property that is subject of litigation, pending its disposition according to judgment entered, court as permitted to direct receiver to take and keep possession of it. *Steinberg v. Goldstein (1956) 145 Cal. App. 2d 692, 698, 303 P.2d 80*

Court as able to direct delivery to receiver of specific property which is involved in litigation. *Steinberg v. Goldstein (1954) 129 Cal. App. 2d 682, 686, 278 P.2d 22*

[r] Prohibition and Mandate

Prohibition as appropriate remedy to restrain enforcement of trial court's order appointing receiver when, under circumstances of case, appeal from order would be inadequate remedy. *Golden State Glass Corp. v. Superior Ct. (1939) 13 Cal. 2d 384, 388-389, 90 P.2d 75* ; *A.G. Col Co. v. Superior Court (1925) 196 Cal. 604, 621-622, 238 P. 926*

Prohibition as appropriate remedy to prohibit receiver from attempting to enforce order seizing and holding property in hands of person who is not a party to action and who claims to be bona fide purchaser of it. *Havemeyer v. Superior Court (1890) 84 Cal. 327, 389-408, 24 P. 121*

[s] Property Subject to Receivership

Receiver as taking property subject to all prior liens and encumbrances. *Petaluma S. Bank v. Superior Court (1896) 111 Cal. 488, 495-496, 44 P. 177*

Court as without power to authorize receiver to reach out and latch onto appropriate property to use of receivership which is not properly part of receivership estate. *Turner v. Superior Court (1977) 72 Cal. App. 3d 804, 813, 140 Cal.*

Rptr. 475

Interest of plaintiff partner in property being clear and danger of removal or loss at hands of defendant partner as presenting typical case for receivership. *Spira v. Superior Court (1974) 41 Cal. App. 3d 536, 540, 116 Cal. Rptr. 93*

[t] Rents, Issues, and Profits

If rents, issues, and profits are not part of security for mortgage debt, not having been contractually assigned for that purpose, court as having no power under *Code Civ. Proc. § 564* in foreclosure action to authorize receiver to take possession of rents, issues, and profits and apply them to mortgage debt. *Turner v. Superior Court (1977) 72 Cal. App. 3d 804, 812, 815, 140 Cal. Rptr. 475*

Trial court as exceeding its jurisdiction insofar as it may purport to authorize rents and profits receiver to take into his or her possession, without consent of those entitled to give or withhold consent, property which is not hypothecated in deed of trust. *Turner v. Superior Court (1977) 72 Cal. App. 3d 804, 816, 140 Cal. Rptr. 475*

Authority of receiver to collect rent as vested by *Code Civ. Proc. § 568*; whether authority should be exercised as discretionary matter with court. *Steinberg v. Goldstein (1956) 145 Cal. App. 2d 692, 699, 303 P.2d 80*

Main purpose of receivership as being to receive rents, issues, and profits of land or other thing pending suit when it does not seem reasonable to court to entrust either party with such right. *Neider v. Dardi (1955) 130 Cal. App. 2d 646, 649-650, 279 P.2d 598*

[u] Wrongful Procurement of Receivership

Liability of applicant for appointment of receiver on bond given under *Code Civ. Proc. § 566(b)* as arising when applicant procured appointment of receiver wrongfully, maliciously, or without probable cause, but such liability, being contractual, as limited to amount of bond. *Smith v. Hill (1965) 237 Cal. App. 2d 374, 385, 47 Cal. Rptr. 49*

Person who secures appointment of receiver maliciously and without probable cause as liable for malicious prosecution independent of statutory liability under *Code Civ. Proc. § 566(b)*. *Smith v. Hill (1965) 237 Cal. App. 2d 374, 386, 47 Cal. Rptr. 49*

Cause of action on bond under *Code Civ. Proc. § 566(b)* or for malicious prosecution as not accruing until determination of action in which receiver was appointed. *Smith v. Hill (1965) 237 Cal. App. 2d 374, 386, 47 Cal. Rptr. 49*

Under certain circumstances, receiver may be held to be agent of one or more parties to action; and under proper circumstances, vicarious liability for conduct of receiver might be placed on party who secured appointment of receiver as cause of action distinct from action on applicant's bond under *Code Civ. Proc. § 566(b)* or for malicious prosecution. *Smith v. Hill (1965) 237 Cal. App. 2d 374, 386, 47 Cal. Rptr. 49*

[6] Nature of Receiver

Receiver as officer of court. *North v. Cecil B. DeMille Productions, Inc. (1934) 2 Cal. 2d 55, 58, 39 P.2d 199* ; *McCarthy v. Poulsen (1985) 173 Cal. App. 3d 1212, 1219, 219 Cal. Rptr. 375* ; *H.D. Roosen Co. v. Pacific Radio Pub. Co. (1932) 123 Cal. App. 525, 534, 11 P.2d 873*

Receiver as officer or representative of court appointed on behalf of all parties who may establish rights in cause to take charge and management of property which is subject of litigation before it, for purpose of its preservation and ultimate disposition according to final judgment entered. *Kreling v. Kreling (1897) 118 Cal. 421, 422, 50 P. 549* ; *Neider v. Dardi (1955) 130 Cal. App. 2d 646, 650, 279 P.2d 598* ; *Highland Secur. Co. v. Superior Court (1931) 119 Cal. App. 107, 112, 6 P.2d 116* .

As an officer of the court, a receiver is not an agent of any particular party to the action, but represents all persons interested in the property. *City of Santa Monica v. Gonzalez (2008) 43 Cal. 4th 905, 930, 76 Cal. Rptr. 3d 483, 182 P.3d 1027*

Receiver as agent of court, not of parties, and receivership estate consisting of property which is properly in receiver's hands as under control and continuous supervision of court. *Turner v. Superior Court (1977) 72 Cal. App. 3d 804, 813, 140 Cal. Rptr. 475*

Receiver as not occupying status of assignee; receiver's function as being that of minister of court in possession of property to end of conserving rights of everybody having any interest. *Wright v. Standard Engineering Corp. (1972) 28 Cal. App. 3d 244, 248, 104 Cal. Rptr. 539* ; *Burrows v. Jorgensen (1958) 158 Cal. App. 2d 644, 649, 323 P.2d 150*

Receiver as neutral court official. *Hillman v. Stults (1968) 263 Cal. App. 2d 848, 875, 70 Cal. Rptr. 295*

Receiver as not an agent of either party to action but as representing all persons interested in property involved. *Maggiora v. Palo Alto Inn, Inc. (1967) 249 Cal. App. 2d 706, 712, 57 Cal. Rptr. 787*

Receiver as custodian of property committed to his or her charge. *Neider v. Dardi (1955) 130 Cal. App. 2d 646, 650, 279 P.2d 598*

Receiver as holding property as representative of, and under control of court, but for benefit of its owners, their creditors, and others in whose favor claims might exist or arise against estate in receivership. *Chiesur v. Superior Court (1946) 76 Cal. App. 2d 198, 200-201, 172 P.2d 763*

[7] Nature of Receivership

Purpose of receivership as being to preserve property which is subject of litigation pending its disposition according to judgment subsequently entered. *Kreling v. Kreling (1897) 118 Cal. 421, 422, 50 P. 549* ; *La Societe Francaise d'Epargnes et de Prevoyance Mutuelle v. District Court of Fifteenth Judicial Dist. (1879) 53 Cal. 495, 553* ; *Steinberg v. Goldstein (1956) 145 Cal. App. 2d 692, 698, 303 P.2d 80*

Appointment of receiver as ancillary proceeding concerned with preservation of property subject to litigation pending its ultimate disposition pursuant to final judgment. *Maggiora v. Palo Alto Inn, Inc. (1967) 249 Cal. App. 2d 706, 711-712, 57 Cal. Rptr. 787*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDissolution & ReceivershipInvoluntary DissolutionBusiness & Corporate LawCorporationsDissolution & ReceivershipReceivershipsAppointment of ReceiversBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpDissolutionGeneral OverviewCivil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil

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§ 486.65 Text References

California Civil Procedure Before Trial, vol. 1, ch. 40, Receivership (Cal. C.E.B. 3d ed. 1990)

Witkin, California Procedure, vol. 6, Provisional Remedies, §§ 416-456 (4th ed. 1997)

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Chapter 486 RECEIVERS
PART III. RESEARCH GUIDE
B. Administration and Termination of Receivership

43-486 California Forms of Pleading and Practice--Annotated § 486.70

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.70 Related Matthew Bender Publications

For memorandum of points and authorities supporting and opposing contentions that receivership is being properly administered, see California Points and Authorities , Ch. 200, *Receivers* (Matthew Bender)

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B. Administration and Termination of Receivership

43-486 California Forms of Pleading and Practice--Annotated § 486.71

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.71 State Statutes

[1] Powers and Duties of Receiver

Power to bring and defend actions under control of court. *Code Civ. Proc. § 568*

Power to take and keep possession of property, receive rents, collect debts, to compound for and compromise same, to make transfers, and generally to do such acts respecting property as court may authorize. *Code Civ. Proc. § 568*

Duty of receiver of real property containing rental housing in substandard or unsafe condition, to report to court if receiver cannot comply with orders to correct conditions within time provided by order or notice. *Code Civ. Proc. § 568.2*

Power to sell property pursuant to court order. *Code Civ. Proc. § 568.5*

Power to deposit funds. *Code Civ. Proc. § 569*

Duty to publish notice of unclaimed funds when whereabouts of owner are unknown. *Code Civ. Proc. § 570*

[2] Preferences

Preference as given to wage salary, or commission claims when receiver is appointed for benefit of creditors. *Code Civ. Proc. § 1204*

[3] Real Estate Law

Receiver as not subject to licensing provision of real estate law. *Bus. & Prof. Code § 10133(a)(4)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsReceiversAppointmentsCivil ProcedureRemediesReceivershipsReceiversDutiesCivil ProcedureRemediesReceivershipsReceiversPowers

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43-486 California Forms of Pleading and Practice--Annotated § 486.72

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.72 California Rules of Court

Contracts, arrangements, agreements, and understandings which receiver may not enter. *Cal. Rules of Ct., Rule 3.1179*

Employment of attorney by receiver. *Cal. Rules of Ct., Rule 3.1180*

Receiver's duty to file inventory. *Cal. Rules of Ct., Rule 3.1181*

California Rules of Court preempt local rules with respect to provisional remedies. *Cal. Rules of Ct., Rule 3.20*

Receiver's monthly reports. *Cal. Rules of Ct., Rule 3.1182*

Interim fees and objections. *Cal. Rules of Ct., Rule 3.1183*

Receiver's final account. *Cal. Rules of Ct., Rule 3.1184*

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43-486 California Forms of Pleading and Practice--Annotated § 486.73

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§ 486.73 Decisions

[1] Appeal

Order denying motion to terminate receivership as nonappealable. *Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 273 n.4, 187 Cal. Rptr. 703*

Order confirming sale of property in receivership as appealable. *Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 273-274, 273 n.4, 187 Cal. Rptr. 703*

Approval of final report and accounting as final appealable order fixing personal liability of receiver. *Aviation Brake Systems, Ltd. v. Voorhis (1982) 133 Cal. App. 3d 230, 234-235, 183 Cal. Rptr. 766* ; *Schreiber v. Ditch Road Investors (1980) 105 Cal. App. 3d 675, 677 n.1, 164 Cal. Rptr. 633*

Order awarding surplus receivership funds on deposit with court made subsequent to discharge of receiver as appealable as order on collateral matter made subsequent to judgment. *United Sav. & Loan Assn. v. Hoffman (1973) 30 Cal. App. 3d 306, 308, 106 Cal. Rptr. 275* (citing former *Code Civ. Proc. § 904.1(b)* (*now see Code Civ. Proc. § 904.1(a)(2)*)

Orders on requests relating to preserving or managing property are not appealable except on review of final judgment. *Free Gold Mining Co. v. Spiers (1901) 135 Cal. 130, 131-132, 67 P. 61* ; *see In re Executive Life Ins. Co. (1995) 32 Cal. App. 4th 344, 399-400, 38 Cal. Rptr. 2d 453* (applying *Free Gold Mining Co.* by analogy to orders for payment of professional fees in proceedings for settlement of claims against insolvent insurer)

[2] Contempt of Court

Interference with receiver in carrying out his or her duties as contempt of appointing court. *Petaluma S. Bank v. Superior Court (1896) 111 Cal. 488, 494, 44 P. 177*

[3] Costs of Receivership

Compensation of receiver as normally payable out of receivership estate or funds. *Andrade v. Andrade (1932) 216 Cal. 108, 110, 13 P.2d 676*

Under *Code Civ. Proc. § 1032(a)* (repealed, *now see Code Civ. Proc. § 1032(b)*), allowing costs to prevailing party in action to recover money or damages, *Code Civ. Proc. § 1032.6* (repealed), providing judgment creditor is entitled to costs in aid of execution on any judgments, and *Code Civ. Proc. § 1033.7(f)* (repealed), providing for inclusion by judgment creditor in bill of costs incurred in connection with proceedings supplementary to execution, costs of charging order receivership as allowable "of course" to prevailing plaintiff. *Evans v. Galardi (1979) 93 Cal. App. 3d 291, 295, 155 Cal. Rptr. 505*

Cost of defending against unfounded challenge to receiver's account as regarded as necessary expense incurred in course of receiver's official duties for which receiver is entitled to reimbursement out of receivership estate. *People v. Riverside University (1973) 35 Cal. App. 3d 572, 587, 111 Cal. Rptr. 68*

Liability for expenses and fees of receivership as properly placed on one of parties to litigation, although not on plaintiff who has properly obtained appointment of receiver and has established his or her cause of action; conversely, costs of receivership and any compensation for receiver as required to be borne by plaintiff who trial court finds wrongfully obtained unnecessary receivership. *Smith v. Hill (1965) 237 Cal. App. 2d 374, 387, 47 Cal. Rptr. 49*

Discretionary power to make allowance for compensation of receiver. *Murphy v. Cosentino (1962) 204 Cal. App. 2d 614, 615-616, 22 Cal. Rptr. 441*

Court as having power to order reimbursement of receiver for expenditures if proper and approved by court; proper expenditures as including those made for necessary repairs on property in receivership and for purchase of furniture necessary for conducting business on property, when receiver was directed by order of appointment to take charge of, use, operate, manage, and control property and to conduct business thereof, to collect rents, issues, profits, and income thereof, and to apply same to payment of all usual and necessary expenses of the property, including taxes, mortgage payments, management costs, and all other regular and necessary costs of operation of business operated on premises. *Hozz v. Varga (1958) 166 Cal. App. 2d 539, 542-543, 333 P.2d 113*

Costs of receivership as properly assessed against defendant in equitable action between joint venturers for accounting when trial court was justified in finding that defendant was guilty of reprehensible conduct. *Neider v. Dardi (1957) 152 Cal. App. 2d 156, 165, 313 P.2d 72*

Court as having power to assess costs of receivership against fund or property in receivership or against applicant for receivership, or to apportion costs among parties, depending on circumstances. *Baldwin v. Baldwin (1947) 82 Cal. App. 2d 851, 856, 187 P.2d 429*

Trial court as having power to determine value of receiver's services without aid of expert testimony. *John H. Spohn Co. v. Bender (1937) 18 Cal. App. 2d 447, 450, 64 P.2d 152*

[4] Court Control of Receiver and Property

Receiver as under control of court, as is property of which receiver is custodian. *De Forrest v. Coffey (1908) 154 Cal.*

444, 449, 98 P. 27

Receiver as officer of court possessing property for court. *McCarthy v. Poulsen (1985) 173 Cal. App. 3d 1212, 1219, 219 Cal. Rptr. 375* ;

Receivership estate consisting of property properly in receiver's hands as under control and continuous supervision of court. *Turner v. Superior Court (1977) 72 Cal. App. 3d 804, 813, 140 Cal. Rptr. 475*

Receiver appointed in aid of execution as subject to continued direction and control of court. *Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 350, 113 Cal. Rptr. 281*

Receiver appointed by court as officer of court and property in receiver's custody as in custody of court. *Robbins v. Bueno (1968) 262 Cal. App. 2d 79, 84, 68 Cal. Rptr. 347*

Property subjected to receivership as under control and continuous supervision of court. *Steinberg v. Goldstein (1956) 145 Cal. App. 2d 692, 699, 303 P.2d 80*

[5] Dismissal of Action, Effect on Receivership

Entry of final judgment or abatement of action as not in itself effecting discharge of receiver, and receiver as remaining subject to court's orders in relation to receivership property until discharged by court; hence, entry of judgment of dismissal by clerk at plaintiff's request before summons is issued or appearance of any defendant as not depriving court of jurisdiction to settle account of receiver appointed at plaintiff's request to take possession of property described in complaint. *Pacific Bank v. Madera Fruit etc. Co. (1899) 124 Cal. 525, 526, 57 P. 462*

Court as not losing jurisdiction of receivership on filing of written notice of dismissal of action by plaintiff, but as having jurisdiction to settle receiver's accounts, to direct disposition of assets in receiver's hands, and to provide for payment of receivership costs and expenses. *Hanno v. Superior Court (1939) 30 Cal. App. 2d 639, 640-641, 87 P.2d 50*

[6] Fees and Expenses

Fees are awarded to receiver in sound discretion of trial court and appellate court is not justified in setting aside order setting fees in absence of clear showing of abuse; award of hourly fee plus 4 per cent commission on sale of property in partition action upheld when parties had previously agreed to method for calculating fees and receiver had earned through efforts to sell property; although appellate court may award fees for services of receiver's counsel rendered on appeal, court declined to do so because receiver had already been awarded total fee substantially in excess of ordinary fee. *Melikian v. Aquila, Ltd. (1998) 63 Cal. App. 4th 1364, 1368, 74 Cal. Rptr. 2d 739*

Appellate court as having power to award fees for services of receiver's counsel rendered on appeal. *Schreiber v. Ditch Road Investors (1980) 105 Cal. App. 3d 675, 681, 164 Cal. Rptr. 633* (declining to award fees under circumstances of case)

Fees as awarded to receivers in sound discretion of trial court and appellate court as not justified in setting aside order setting fees in absence of clear showing of abuse of discretion. *People v. Riverside University (1973) 35 Cal. App. 3d 572, 587, 111 Cal. Rptr. 68*

Cost of defending against unfounded challenge to receiver's account as regarded as necessary expense incurred in course of receiver's official duties for which receiver is entitled to reimbursement out of receivership estate. *People v.*

Riverside University (1973) 35 Cal. App. 3d 572, 587, 111 Cal. Rptr. 68

Party procuring improper appointment of receiver as estopped to recover fees paid receiver pursuant to court order settling receiver's account. *John H. Spohn Co. v. Bender (1937) 18 Cal. App. 2d 447, 451-452, 64 P.2d 152*

[7] Final Account and Discharge

Approval of receiver's final report and accounting as res judicata to future actions against receiver for mismanagement or misconduct of receivership estate. *Aviation Brake Systems, Ltd. v. Voorhis (1982) 133 Cal. App. 3d 230, 234, 183 Cal. Rptr. 766*

When loss has been sustained through receiver's misconduct in connection with sale of receivership property and it is impracticable for court to set aside sale, proper procedure as being to confirm sale and surcharge receiver rather than to grant receiver conditional discharge. *People v. Riverside University (1973) 35 Cal. App. 3d 572, 583 n. 6, 111 Cal. Rptr. 68*

[8] Hearings

Criticism of unnecessary limitation on oral argument at hearing to confirm receiver's sale of property in receivership. *Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 273 n.3, 187 Cal. Rptr. 703* (trial court at first limited each party to 60 seconds and relented to allow five minutes; property involved was multi-million dollar shopping center and office complex)

[9] Orders

[a] Generally

In action for foreclosure of trust deed, trial court's order purporting to imbue rents and profits receiver with authority to take possession of property not hypothecated under deed of trust without consent of those entitled to give or withhold consent as beyond its power. *Turner v. Superior Court (1977) 72 Cal. App. 3d 804, 815-816, 140 Cal. Rptr. 475*

In action for foreclosure of trust deed, trial court as without power to authorize receiver to sell property that is not part of security without consent of all persons having an interest in it. *Turner v. Superior Court (1977) 72 Cal. App. 3d 804, 816-819, 140 Cal. Rptr. 475*

Court order requiring return of equipment in defendant partner's possession to receiver appointed in action for dissolution of partnership as legal exercise of court's discretion when over six years had transpired since defendant was given permission to use property and no rental had been paid to receiver during that time; depreciation of property while in use as factor to be considered by those charged with its preservation. *Steinberg v. Goldstein (1956) 145 Cal. App. 2d 692, 698, 303 P.2d 80*

On hearing of petition by receiver, appointed in action for dissolution of partnership and accounting, for instructions with respect to equipment, supplies, and rental collected by defendant partner from subtenant, and lease of defendant's office, order requiring defendant to pay receiver rental due on equipment and market value of supplies consumed was supported by protracted trend of litigation, depreciating nature of equipment, ever-present hazard of individual's insolvency, and allegations in defendant's answer that partnership funds were used to pay for equipment and expenses of his office; fact that order gave defendant option of paying market value of equipment in lieu of returning property and paying rental found due was something about which defendant could not complain. *Steinberg v. Goldstein (1956) 145*

Cal. App. 2d 692, 696-699, 303 P.2d 80

[b] Shortening Time

Professional courtesy and basic fairness militate against use of orders shortening time or similar techniques which create unnecessary handicap for lawyer representing adverse party; whether couched in terms of professional courtesy, the golden rule, or due process, cases should be decided on merits and not on strategy of paper war which denies party reasonable time within which to respond. *Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 272 n.2, 187 Cal. Rptr. 703*

[10] Powers and Duties of Receiver

[a] Generally

Receiver's functions and powers are controlled by statute, by order appointing receiver, and by court's subsequent orders. *Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 273, 187 Cal. Rptr. 703* ; *Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 351, 113 Cal. Rptr. 281* ; *Robbins v. Bueno (1968) 262 Cal. App. 2d 79, 84, 68 Cal. Rptr. 347* ; *Nulaid Farmers Assn. v. LaTorre (1967) 252 Cal. App. 2d 788, 791, 60 Cal. Rptr. 821*

Receiver in aid of execution have no powers beyond those conferred. *Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 351, 113 Cal. Rptr. 281*

In ordinary receivership over private business concerns, receiver, in absence of specific authority, has only very limited powers and in doubtful or important matters is required to apply to court for instruction and advice; however, when receiver is appointed to take possession of and operate quasi-public corporation obligated to render continued service to public (such as public utility), receiver is in first instance vested with broad authority to "do anything the corporation might have done to make the most out of the assets in his hands." *People v. Riverside University (1973) 35 Cal. App. 3d 572, 580, 111 Cal. Rptr. 68*

Trial court has broad discretion in its directions and approvals given to receiver in respect to management of property. *Hillman v. Stults (1968) 263 Cal. App. 2d 848, 876, 70 Cal. Rptr. 295*

Receiver's powers and duties not directly prescribed by statute depends on court's order of appointment. *Nulaid Farmers Assn. v. LaTorre (1967) 252 Cal. App. 2d 788, 791, 60 Cal. Rptr. 821*

[b] Power to Contract

General rule is that receiver has no power to make contract binding property or fund in his or her custody without authority or approval of court; unauthorized agreement of receiver is not binding court in charge of receivership, is not recognized as contract of receivership, and is treated as receiver's own contract. *Nulaid Farmers Assn. v. LaTorre (1967) 252 Cal. App. 2d 788, 793, 60 Cal. Rptr. 821*

Order appointing receiver and investing him with usual powers to manage, preserve, and repair property, which is subject of receivership, under control and subject to order of court does not authorize receiver to enter into contracts. *Nulaid Farmers Assn. v. LaTorre (1967) 252 Cal. App. 2d 788, 793, 60 Cal. Rptr. 821*

[11] Ratification of Receiver's Acts by Subsequent Court Order

Action of receiver in equity, though taken without prior court authorization, is in proper case subject to ratification by subsequent court approval. *People v. Riverside University (1973) 35 Cal. App. 3d 572, 582, 111 Cal. Rptr. 68*

[12] Receivership Estate

In action for dissolution of partnership and accounting in which receiver was appointed, rentals collected by partner from subtenant before receiver took possession of property were not proceeds from receivership property, but were subject of accounting between partners. *Steinberg v. Goldstein (1956) 145 Cal. App. 2d 692, 700, 303 P.2d 80*

[13] Res Judicata

Demurrer to complaint against receiver seeking damages from receiver and insurer who provided receiver's bond for receiver's alleged mismanagement of receivership estate was properly sustained without leave to amend on ground of res judicata when matters sought to be litigated could or should have been litigated at hearing on receiver's final report and account which was approved. *Aviation Brake Systems, Ltd. v. Voorhis (1982) 133 Cal. App. 3d 230, 234, 183 Cal. Rptr. 766*

[14] Sale of Property

Secured party was exempted from requirement of giving notice of sale under former *Com. Code § 9504(3)* (*now see Com. Code §§ 9611-9614*) if sale of collateral was conducted by court-appointed receiver, because receiver, not secured party, controlled time and place of sale; creditor was required to account to debtor for any proceeds of sale received by it after discharge of receiver. *Security Pacific National Bank v. Geernaert (1988) 199 Cal. App. 3d 1425, 1431, 1431, 245 Cal. Rptr. 712* (noting that same rule would apply to sale by trustee in bankruptcy)

Receiver appointed under *Code Civ. Proc. §§ 564-576* is required to give notice of sale of collateral under *Code Civ. Proc. § 568.5*, and debtor is entitled to seek to surcharge receiver and to make objections regarding appointment of receiver, defects in receiver's notice of sale, receiver's mismanagement of property, or receiver's final accounting; debtor is not entitled to attack sale if he or she fails to object. *Security Pacific National Bank v. Geernaert (1988) 199 Cal. App. 3d 1425, 1431-1433, 245 Cal. Rptr. 712*

Judicial confirmation of receiver's sale rests on appointing court's sound discretion exercised in view of all surrounding facts and circumstances and in interest of fairness, justice, and rights of respective parties; proper exercise of discretion requires court to consider all material facts and evidence and to apply legal principles essential to an informed, intelligent, and just decision; reversal is warranted only if appellate court concludes that trial court abused its discretion by confirming fraudulent, unfair, or oppressive sale. *Cal-American Income Property Fund VII v. Brown Development Corp. (1982) 138 Cal. App. 3d 268, 274, 187 Cal. Rptr. 703*

Absent statute providing otherwise, court is empowered to authorize receiver to sell property at either private or public sale. *People v. Riverside University (1973) 35 Cal. App. 3d 572, 583, 111 Cal. Rptr. 68*

Trial court is not precluded by *Code Civ. Proc. § 568.5* from confirming sale of receivership property made in mode different from that provided for execution sales; *Code Civ. Proc. § 568.5* means that unless court prescribes different mode of sale, receiver, when authorized, must sell property in manner provided for sales on execution; trial court is empowered to prescribe or ratify unconditionally different mode of sale than that provided for execution sales; receiver's sale and sale under execution distinguished. *People v. Riverside University (1973) 35 Cal. App. 3d 572, 583-585, 111 Cal. Rptr. 68*

Having power to authorize private sales of receivership property in first instance, trial court possesses power to approve private sales made without prior authorization *People v. Riverside University (1973) 35 Cal. App. 3d 572, 585, 111 Cal. Rptr. 68*

Effect of judicial confirmation of receiver's sale of property in receivership. *People v. Riverside University (1973) 35 Cal. App. 3d 572, 582, 111 Cal. Rptr. 68*

Order of appointment of receiver of educational institution with instructions to keep it operating and to do all things and incur risks and obligations ordinarily incurred by owners, managers, and operators of similar educational institutions and providing that no risk or obligation so incurred shall be personal risk or obligation of receiver, but risk and obligation of receivership estate, implicitly authorized receiver to sell unneeded furniture and equipment in order to provide funds for current operating expenses. *People v. Riverside University (1973) 35 Cal. App. 3d 572, 580-581, 111 Cal. Rptr. 68*

Court, in action for dissolution of partnership, accounting, appointment of receiver, and damages, as having authority to direct receiver to sell assets of partnership, including lease, if such action is necessary to preserve assets for disposition under judgment on merits. *Steinberg v. Goldstein (1956) 145 Cal. App. 2d 692, 700, 303 P.2d 80*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsReceiversDutiesCivil ProcedureRemediesReceivershipsReceiversPowersCivil ProcedureRemediesReceivershipsTerminationsCivil ProcedureSanctionsContemptGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionInterlocutory Orders

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Witkin, California Procedure, vol. 6, Provisional Remedies, §§ 447-456 (4th ed. 1997)

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43-486 California Forms of Pleading and Practice--Annotated §§ 486.75-486.79

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§§ 486.75[Reserved]

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C. Actions By and Against Receivers

43-486 California Forms of Pleading and Practice--Annotated § 486.80

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.80 State Statutes

Power of receiver to bring and defend actions in receiver's own name. *Code Civ. Proc. § 568*

Enforcement of liability on bond. *Code Civ. Proc. §§ 995.850, 996.410-996.495*

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AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.81 Decisions

[1] Attachment or Garnishment of Property in Receivership

When property in receiver's custody may be subject to garnishment or attachment. *Robbins v. Bueno (1968) 262 Cal. App. 2d 79, 84-85, 68 Cal. Rptr. 347*

[2] Court Permission for Receiver to Sue

When receiver must obtain leave of court before instituting action to recover property. *Bishop v. McKillican (1899) 124 Cal. 321, 325-326, 57 P. 76*

Receiver in aid of execution as permitted to maintain action to effect purpose of receivership only by authority of statute or special or express permission of appointing court. *Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 350, 351, 113 Cal. Rptr. 281*

Court order authorizing receiver to sue one person as not authorizing receiver to sue others. *Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 350, 352-353, 113 Cal. Rptr. 281*

Scant reasons as existing for trial court in exercise of its judicial discretion, to authorize receiver in aid of execution to commence action which could and should have been brought by judgment creditor under *Code Civ. Proc. § 720* (repealed, *now see Code Civ. Proc. § 708.210*). *Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 352, 113 Cal. Rptr. 281*

PRACTICE TIP:
Frequently, when a third party files a motion to obtain leave of court to sue a receiver, the third party

seeks to obtain consent to sue the receiver in a court other than the one in which the receiver has been appointed. Any efforts made by the third party to sue the receiver in a forum other than the one in which the receiver has been appointed should be opposed by the receiver. While any litigation brought against the receiver will compel the receiver to expend assets of the receivership estate to defend against the action, it is normally in the receiver's best interest to have any action which is filed against him or her to be venued in the court which originally appointed the receiver, so that this court can minimize the litigation expenses which will be incurred by the receivership estate in defending against such third party litigation and can exercise ultimate control over all aspects of the receivership estate. Any application made by third party to sue the receiver in a court other than the one in which the receiver was appointed should be opposed on this ground.

[3] Attorney Fees

Trial court as properly denying to receiver attorney fees incurred or paid by receiver for services rendered after receiver's appointment when attorney was also attorney for party procuring appointment, although allowance of fees to such attorney for services rendered in obtaining appointment of receiver is proper. *Smith v. Hill (1965) 237 Cal. App. 2d 374, 387, 47 Cal. Rptr. 49* ; *Hozz v. Varga (1958) 166 Cal. App. 2d 539, 543, 333 P.2d 113*

[4] Court Permission to Sue Receiver

Discretion of court that appointed receiver to grant or refuse leave to other parties to sue receiver in another court. *Petaluma S. Bank v. Superior Court (1896) 111 Cal. 488, 497, 44 P. 177*

Demurrer as proper method of raising issue of failure to obtain leave of court to sue receiver. *Ostrowski v. Miller (1964) 226 Cal. App. 2d 79, 85-86, 37 Cal. Rptr. 790*

[5] Encumbrances, Liens, and Other Priority Interests

Intervenor bank, which had acquiesced in appointment of receiver, as not entitled to sue receiver for disregarding priority of bank's security interest; consent to appointment of receiver as implied consent that operating expenses thereof be given priority over security interests of party giving consent. *Schreiber v. Ditch Road Investors (1980) 105 Cal. App. 3d 675, 680, 164 Cal. Rptr. 633*

Right of successor of second trust deed beneficiaries to rents previously collected by receiver to extent of deficiency. *United Sav. & Loan Assn. v. Hoffman (1973) 30 Cal. App. 3d 306, 311-314, 106 Cal. Rptr. 275*

[6] Liability of Receivers

Receiver as liable for torts committed in performance of receiver's duties solely in official and not personal capacity and liability as to be satisfied from receivership funds. *McCarthy v. Poulsen (1985) 173 Cal. App. 3d 1212, 1219, 219 Cal. Rptr. 375*

Receiver who undertakes to carry on business of apartment operation as liable, in capacity as receiver, to all persons employed by him or her in conduct of apartment house operation as their employer. *Pacific Indem. Co. v. Workmen's Comp. App. Bd. (1968) 258 Cal. App. 2d 35, 41, 65 Cal. Rptr. 429*

Under federal law (former *31 U.S.C. §§ 191*, 192; *now see 31 U.S.C. § 3713(b)*), receiver as personally liable to United

States to extent receiver pays other creditors when there are debts owing to United States or fails to give priority to federal tax liens. *Kirk v. Kirk (1966) 243 Cal. App. 2d 580, 582-583, 52 Cal. Rptr. 725*

Receiver as liable to persons not beneficially interested in receivership in receiver's official capacity only. *Sealite, Inc. v. Finster (1957) 149 Cal. App. 2d 612, 618, 309 P.2d 51*

Receiver as liable for negligence in performance of his or her authorized duties to those not interested in receivership estate only in his or her official capacity; any recovery as charge against estate in receivership. *Chiesur v. Superior Court (1946) 76 Cal. App. 2d 198, 201-202, 172 P.2d 763*

Deposit of receivership funds by receiver in bank of receiver's choice without prior court authorization as constituting breach of duty to take and keep possession of receivership property and as rendering receiver liable on his or her bond if bank subsequently fails and refuses to repay deposit even though receiver was not negligent in selecting bank. *Miller v. Fidelity etc. Co. of Maryland (1935) 3 Cal. App. 2d 580, 582-586, 40 P.2d 951*

Receiver, such as commissioner of banks, building and loan commissioner, or insurance commissioner, who is guilty of fraud, as not above law but as amenable to process of law and subject to suit by stockholder or creditor to conserve or repossess assets of receivership; receiver liquidating business of bank as amenable to law and subject to suit by creditors if he or she exceeds powers, or wastes estate, or fails to act to recover property of receivership. *Garris v. Mitchell (1935) 7 Cal. App. 2d 430, 434, 46 P.2d 225*

[7] Liability of Surety

Surety on receiver's bond as liable for receiver's breach of duty during period bond was in effect; thus, action against surety to recover money on bond as not barred by order exonerating surety made in action in which receiver was appointed when plaintiff had obtained judgment antedating order of exoneration in independent action finding that receiver had failed to faithfully execute his duties. *Administrative Management Services, Inc. v. Fidelity & Deposit Co. (1979) 89 Cal. App. 3d 532, 535-536, 152 Cal. Rptr. 620* (quoting former *Gov. Code § 1612*; repealed, *now see Code Civ. Proc. §§ 996.410-996.495*)

[8] Setoffs

Right of setoff against receiver. *People v. California etc. Trust Co. (1914) 168 Cal. 241, 245-251, 141 P. 1181* ; *Downey v. Humphreys (1951) 102 Cal. App. 2d 323, 331-332, 227 P.2d 484*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesGarnishmentsCivil ProcedureRemediesReceivershipsReceiversLiabilitiesCivil ProcedureRemediesReceivershipsReceiversPowers

California Forms of Pleading and Practice--Annotated

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Volume 43: Receivers thru Rewards-Chs. 486-499
Chapter 486 RECEIVERS
PART III. RESEARCH GUIDE
C. Actions By and Against Receivers

43-486 California Forms of Pleading and Practice--Annotated §§ 486.82-486.89

AUTHOR: Robert B. Kaplan Editorial Consultant

[Reserved]

§§ 486.82[Reserved]

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Volume 43: Receivers thru Rewards-Chs. 486-499
Chapter 486 RECEIVERS
PART IV. PROCEDURAL CHECKLIST
A. Appointment of Receivers

43-486 California Forms of Pleading and Practice--Annotated § 486.90

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.90 Applicant's Checklist

[1] Preliminary Determinations

☐ Availability of receivership.

☐ Is the nature of the action or proceeding one in which a receiver might be appointed?

☐ If so, do grounds for appointment exist? [*see* discussion in *§ 486.13*].

☐ Alternative remedies.

☐ Do alternative remedies exist that would be less drastic than receivership.

☐ If so, consider using them [*see § 486.12[2]*].

☐ Costs of receivership.

☐ What are the costs of a receivership (which at a minimum would include the receiver's fee and the cost of the receiver's bond or undertaking [*see Code Civ. Proc. § 567(b)*])?

☐ Does the amount in controversy would justify the expense?

☐ Procedure.

☐ Determine whether to proceed by noticed motion or by ex parte application for order to show cause why a receiver should not be appointed (*e.g.*, if the appointment is sought by plaintiff and defendant has not yet appeared in the case).

☐ Do facts exist which establish the kind of emergency that would necessitate the immediate appointment on ex parte application and order to show cause why the appointment should not be confirmed [*see* discussion in *§ 486.15*].

☐ Weigh the additional costs involved against the amount in controversy and what might be lost by delaying the appointment until after hearing on a notice of motion or order to show cause why a receiver should not be appointed.

☐ The additional costs would include at a minimum the cost of the undertaking which the applicant would be required to post [*see Code Civ. Proc. § 566(b)*].

☐ Local Court Rules.

☐ Check any local rules and practices of the court in which the action or proceeding is pending or will be filed that apply to receivers and receiverships [*see § 486.15[4][d]*].

[2] Ex Parte Application for Appointment of Receiver and Order to Show Cause Why Appointment Should Not Be Confirmed

☐ Draft the declaration and ex parte application for appointment of a receiver [*see form in § 486.139*], in the following number of copies:

☐ Original for filing.

☐ One copy for the adverse party.

☐ One copy for client, if desired.

☐ Office copy.

☐ Such additional copies as may be desired.

☐ Draft any additional affidavits or declarations setting forth any facts in addition to those set forth in the Declaration and Ex Parte Application that are required to be shown in order to support the appointment and which are not within the personal knowledge of the person signing the Declaration and

Ex Parte Application but which are within the personal knowledge of the person who will sign the affidavit or declaration.

☐ Set forth the following facts in a verified complaint, affidavit, or declaration under penalty of perjury, or any combination of these:

☐ The action is one in which a receiver may be appointed.

☐ The facts justifying the appointment of a receiver.

☐ The additional facts required by *Cal. Rules of Ct., Rule 3.1175* [*see § 486.139[2]* et seq.].

☐ Draft a memorandum showing that the appointment of the receiver is authorized and should be confirmed in the same number of copies for the same distribution as the Declaration and Ex Parte Application [*see Cal. Rules of Ct., Rule 3.1176(b)*]. For memoranda of points and authorities that may be used for this purpose, *see* California Points and Authorities , Ch. 200, *Receivers* (Matthew Bender).

☐ Draft the order fixing the amount of the applicant's undertaking (*see Code Civ. Proc. § 566(b)*) [*see form in § 486.140*].

☐ If desired, combine the order fixing the undertaking with the order appointing the receiver and fixing the amount of the receiver's undertaking and order to show cause why the appointment should not be confirmed.

☐ Draft the order appointing the receiver and fixing the amount of the receiver's undertaking and the order to show cause [§ 486.141] in the same number of copies for the same distribution as the Declaration and Ex Parte Application.

☐ Sign the Declaration and Ex Parte Application.

☐ Have any additional declarations signed by the person making the declaration.

☐ Notify the adverse party when and where the application will be presented, unless excused from doing so.

☐ Draft the affidavit or declaration of notification or excuse from notification in the same number of copies and for the same distribution as the ex parte application for appointment of receiver [*see Cal. Rules of Ct., Rule 3.1204*, discussed at *§ 486.137[3]* and in Ch. 372, *Motions and Orders*].

☐ If not already done, present the complaint to the court clerk for filing [*see Code Civ. Proc. § 411.10*] together with the summons for issuance [*see Code Civ. Proc. §§ 412.10, 412.20(a)*].

☐ Present the following to the proper judge for consideration and signing of the orders:

☐ Declaration and Ex Parte Application, with any additional affidavits or declarations.

☐ Points and authorities.

☐ The court's file containing the verified complaint.

☐ The court orders.

☐ If not known, ascertain from the court clerk the procedure to be followed in presenting the ex parte application, papers, and orders to a judge for reading, ex parte hearing if required, and signature [*see also § 486.90[1]*].

☐ Draft the applicant's undertaking in the amount fixed by the court in the same number of copies and for the same distribution as the Declaration and Ex Parte Application.

☐ Have it executed by the surety or sureties or secure a bond in the amount fixed from an admitted surety insurer [*see Code Civ. Proc. §§ 566(b), 995.120, 995.210, 995.330*; *see also* discussion in *§ 486.15[3][b]*].

☐ If the orders are signed, notify the receiver that the appointment has been made.

☐ Draft the receiver's undertaking in the same number of copies and for the same distribution as the Declaration and Ex Parte Application or secure a bond from an admitted surety insurer [*see Code Civ. Proc. §§ 567(b), 995.120, 995.210, 995.330*; *see also* discussion in *§ 486.16*].

☐ Draft the receiver's oath and have the receiver take the oath [*see Code Civ. Proc. § 567(a)*] before a person authorized to administer oaths [*see Code Civ. Proc. § 2093* (authorized persons)]. For discussion and a form of oath, *see* Ch. 392, *Oath and Affirmation* .

☐ Present the oath, the applicant's undertaking or bond and the receiver's undertaking or bond, with proof of service attached, to the court clerk for filing.

☐ Serve a copy of the order appointing receiver and order to show cause on the adverse party.

☐ Draft a proof of service.

☐ File the proof of service with the court.

☐ If not served with the order appointing receiver and order to show cause, do the following [*see Cal. Rules of Ct., Rule 3.1176(b)*]:

☐ Serve a copy of the Declaration and Ex Parte Application, a copy of each additional declaration if any, and a copy of the supporting memorandum, as well as a copy of the complaint if not already served,

on the attorney for the adverse party or on the adverse party if he or she has no attorney. For a procedural guide for use in serving papers, *see* Ch. 518, *Service Of Summons and Papers* .

☐ Prepare the proof of service of the papers served and file the original of the proof of service with the court clerk.

☐ If the adverse party's response is not timely served and time is needed to prepare to respond to it, seek a continuance by stipulation or by court order.

☐ Examine any affidavits or declarations submitted by the adverse party to determine whether they controvert any of the facts set forth in the supporting papers or state additional facts that counsel was unaware of it.

☐ Check the adverse party's points and authorities to determine whether they are correct and, if correct, whether they apply to the facts of the case.

☐ Be prepared to respond to the matter presented in these papers by the adverse party at the hearing.

☐ Nominate a substitute receiver, if desired, by securing the name, address, phone number, and qualifications of any person counsel desires to have substituted for the receiver appointed.

☐ Draft a suggestion that that person be substituted, stating the reasons [*see § 486.15[5][b]*].

☐ Attend the hearing on the order to show cause.

☐ At the hearing, submit the written suggestion, if any, for substitution of receiver.

☐ Present any new evidence that has surfaced since the filing and service of the papers or new case law handed down in the interim.

☐ Be prepared to answer any questions posed by the judge and argue the case.

☐ Draft the order confirming the appointment of the receiver [*see form in § 486.142*], or discharging the receiver, in the same number of copies and for the same distribution as the order appointing receiver set forth *above*.

☐ Give notice of the court's ruling [*see Code Civ. Proc. § 1019.5*].

☐ Prepare the notice of the court's ruling, one copy for the adverse party, an office copy, and such additional copies as may be desired.

☐ Serve a copy, with a conformed copy of the order, on the adverse party's attorney or, if none, the adverse party.

☐ Prepare the proof of service in an original and one copy.

☐ File with the court the original of the notice of ruling with the original of the proof of service attached.

[3] Ex Parte Application for Order to Show Cause and Order to Show Cause Why Receiver Should Not Be Appointed

☐ Draft the ex parte application for an order to show cause why a receiver should not be appointed and the order to show cause in the following number of copies:

☐ Original for filing.

☐ One copy for the adverse party.

☐ One copy for client, if desired.

☐ One office copy.

☐ Such additional copies as may be desired.

☐ Draft in the same number of copies for the same distribution as the ex parte application any affidavits or declarations under penalty of perjury necessary to present the facts required to establish the ground or grounds for the appointment that are not contained in the ex parte application or verified complaint.

☐ Draft the supporting memorandum in the same number of copies for the same distribution as the ex parte application and order to show cause [*see Cal. Rules of Ct., Rule 3.1113*]. For points and authorities that may be used in support of an application for appointment of a receiver, *see* California Points and Authorities, Ch. 200, *Receivers* (Matthew Bender).

☐ Notify the adverse party when and where the application will be presented, unless excused from doing so.

For a general discussion of notice, *see § 486.90[2]*.

☐ Present the following to the proper judge:

☐ The ex parte application.

☐ Any affidavits or declarations.

- ☐ The memorandum of points and authorities.
- ☐ The court's file containing the verified complaint.
- ☐ The court orders.

☐ If the judge signs the order to show cause, leave the original with the courtroom clerk for filing and have the copies conformed.

☐ Serve the following on the adverse party:

- ☐ A conformed copy of the order to show cause.
- ☐ Ex parte application.
- ☐ Supporting affidavits or declarations, if any.
- ☐ Points and authorities.

☐ Prepare a proof of service and have it signed by the person who made service.

- ☐ File the original of the proof of service with the court. Proof of service of the moving papers must be filed no later than five court days before the time appointed for the hearing [*Cal. Rules of Ct., Rule 3.1300(c)*]. For a procedural guide for use in serving papers, *see* Ch. 518, *Service of Summons and Papers* .

☐ On receipt of the adverse party's opposition papers, examine any affidavits or declarations submitted by the adverse party to determine whether they controvert any of the facts set forth in the supporting papers or state additional facts that counsel was unaware of.

☐ Check the adverse party's points and authorities to determine whether they are correct and, if correct, whether they apply to the facts of the case.

☐ Be prepared to respond to the matter presented in these papers by the adverse party at the hearing.

☐ Nominate a person to serve as receiver, if desired, by doing the following:

- ☐ Securing the name, address, phone number, and qualifications of any person counsel desires to have appointed as receiver.
- ☐ Draft a suggestion that such person be appointed, stating the reasons [*see §*

486.142[2]].

☐ Attend the hearing on the order to show cause.

For further discussion, *see § 486.90[2]*.

☐ If the court appoints a receiver, draft the order of appointment in the same number of copies and for the same distribution as the ex parte application and order to show cause as set forth *above*.

☐ Prepare notice of the court's ruling on the motion [*see Code Civ. Proc. § 1019.5*].

For further discussion of notice, *see § 486.90[2]*.

☐ If the order appoints a receiver, notify the receiver that the appointment has been made.

☐ Draft receiver's undertaking.

For further discussion, *see § 486.90[2]*.

☐ Draft receiver's oath.

For further discussion, *see § 486.90[2]*.

☐ File oath and undertaking.

For further discussion, *see § 486.90[2]*.

[4] Notice of Motion for Appointment of Receiver

☐ Draft moving papers [*see forms in §§ 486.143* and *486.144*]. For the procedure to follow in preparing, serving, and filing a notice of motion and supporting papers, and the filing fee required in superior court cases, see Ch. 372, *Motions and Orders* , and Ch. 518, *Service of Summons and Papers* .

☐ Nominate a person to serve as receiver, if desired.

For further discussion, *see § 486.90[3]*.

☐ Attend the hearing on the motion.

For further discussion, *see § 486.90[2]*.

☐ Draft the order granting the motion appointing a receiver, and fixing the amount of the receiver's undertaking or bond [*see form in § 486.145*] in the following number of copies:

☐ Original for filing.

- ☐ One copy for the adverse party's attorney or, if none, for the adverse party.
- ☐ One copy for receiver.
- ☐ One copy for client, if desired.
- ☐ One office copy.
- ☐ Such additional copies as may be desired.

☐ Present the original and copies of the orders to the judge who granted the motion, or to the judge's courtroom clerk to present to the judge, for signature, and conform, or have the clerk conform, the copies.

☐ Prepare the notice of the court's ruling on the motion.

For further discussion, *see § 486.90[2]*.

☐ If the order appoints a receiver, notify the receiver that the appointment has been made.

☐ Draft receiver's undertaking.

For further discussion, *see § 486.90[2]*.

☐ Draft receiver's oath.

For further discussion, *see § 486.90[2]*.

☐ File oath and undertaking.

For further discussion, *see § 486.90[2]*.

PRACTICE TIP:

To increase the possibility that your application to appoint a receiver will be granted, it is important to demonstrate to the court that theproperty over which the appointment of a receiver is sought is subject to being harmed in some manner and that the appointment of a receiver is the *only* remedy available to prevent harm from occurring to the property. In many instances, the court will not appoint a receiver on an ex parte basis, but will instead issue injunctive relief pending a hearing on the appointment of a receiver. Therefore, it is normally good practice to have an alternative proposed form of temporary restraining order prepared in connection with any ex parte application made to appoint a receiver, so that in the event that a receiver is not appointed, the court will issue a temporary restraining order.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversAppointments

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Chapter 486 RECEIVERS
PART IV. PROCEDURAL CHECKLIST
A. Appointment of Receivers

43-486 California Forms of Pleading and Practice--Annotated § 486.91

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.91 Opposing Party's Checklist

[1] Ex Parte Hearing

☐ If notified in advance of the place and time when the ex parte application for appointment of a receiver and order to show cause why the appointment should not be confirmed or when the ex parte application for an order to show cause why a receiver should not be appointed will be presented to a judge, the opposing party's counsel or, if none, the opposing party, may appear if he or she wishes to oppose the appointment at that time [*see Cal. Rules of Ct., Rule 3.1207*].

[2] Continuance of Confirmation Hearing

☐ If a receiver is appointed on ex parte application and a continuance is required to prepare a response showing that the appointment should not be confirmed, then, on receipt of the applicant's papers, apply for a continuance.

☐ By stipulation of counsel.

☐ Secure the consent of the attorney of the ex parte applicant or, if none, of the ex parte applicant, to a continuance.

☐ Draft the stipulation for a continuance with an order granting the continuance appended.

☐ Have the stipulation for a continuance signed by the ex parte applicant's attorney

or, if none, the ex parte applicant.

☐ Present the stipulation to the judge for signing, or

☐ By ex parte application.

☐ Prepare an ex parte application for a continuance with an order granting the continuance appended in an original, one copy for the adverse party's attorney or, if none, the adverse party, an office copy, and such additional copies as may be desired;

☐ Notify the adverse party's attorney or, if none, the adverse party when and where the application will be presented to the court for signature and draft and sign the declaration of notification [*see Cal. Rules of Ct., Rule 3.1204*];

☐ Present the original and copies of the application for a continuance and order and of the declaration of notification to the courtroom clerk of the judge who signed the order to show cause for delivery to the judge for signature;

☐ Leave the signed original of the application and order with the courtroom clerk for filing and have the clerk conform the copies;

☐ Serve a conformed copy of the application and order on the adverse party's attorney [*see Code Civ. Proc. § 1015*] or, if none, on the adverse party; and

☐ Prepare and file a proof of service.

[3] Preliminary Determinations

☐ Examine the complaint to determine whether the case is one in which a receiver may be appointed.

☐ Examine the supporting affidavits or declarations, as well as the complaint if verified to determine whether the facts relied on by the applicant support the appointment of a receiver.

☐ If they do, check out the facts stated to ascertain whether they are in fact true.

☐ Ascertain whether any additional facts exist which would militate against confirmation of the appointment.

[4] Response to Order to Show Cause or Notice of Motion

For general discussion and forms, *see* Ch. 417, *Points and Authorities* .

☐ Draft any affidavits or declarations under penalty of perjury denying the existence of any facts

stated by the applicant which are not true and stating the true facts and/or stating other facts that would militate against confirmation of the appointment of a receiver.

☐ Have each affidavit made or declaration executed by a person having personal knowledge of the facts stated in it.

☐ Check the applicant's points and authorities to determine whether the points are correctly stated and the authorities cited support them, and, if they do, whether they apply to the facts of the case.

☐ Draft the points and authorities in opposition to the confirmation or appointment.

☐ Serve the opposing papers on the applicant's counsel or, if none, the applicant [*see Code Civ. Proc. § 1015*].

☐ File the originals.

☐ Prepare and file a proof of service. For procedure, *see* Ch. 518, *Service of Summons and Papers* .

☐ Secure the name, address, and phone number of any person desired to be nominated to serve as a substitute receiver (appointment made on ex parte application) or as receiver (order to show cause why receiver should not be appointed or notice of motion for appointment of receiver).

☐ Draft suggestion that that person be appointed or substituted, stating the reasons.

[5] Hearing

☐ Attend the hearing.

☐ Submit the written suggestion, if any, nominating a person to act as receiver or as a substitute receiver.

☐ Present any new evidence that has surfaced since the filing and service of the papers or new case law handed down in the interim.

☐ Be prepared to answer any questions posed by the judge and argue the case.

[6] Sufficiency of Undertaking or Surety

☐ Counsel may wish to object to the sufficiency of the undertakings filed by the applicant or receiver or to the sufficiency of the sureties [*see Code Civ. Proc. § 995.920*].

☐ Objection is made by noticed motion [*Code Civ. Proc. § 995.930(a)*] and the proceeding is

governed by *Code Civ. Proc. §§ 995.910-995.960*. For procedure and forms for use in objecting to bonds and undertakings, *see Ch. 538, Suretyship, Bonds, and Undertakings, § 538.40* et seq.

PRACTICE TIP:

In attempting to defeat the appointment of the receiver, defendant should argue that there is equity in the property over which the appointment of a receiver is sought. In addition, defendant should also argue that the appointment of receiver is expensive, will disrupt defendant's operation of its business and/or management of the property in question and that there are alternative equitable remedies available to the plaintiff such as injunctive relief, rather than the drastic remedy of the appointment of a receiver. Defendant's counsel should also carefully review declarations filedby the plaintiff in support of the application to appointment of a receiver and should file evidentiary objections to those declarations to the extent that they contain hearsay or other inadmissible evidence. The defendant can also argue the receiver is not qualified. Finally, defendant should attempt to present evidence to the court that defendant has attempted to work with plaintiff regarding the problems which have given rise to plaintiff's request for the appointment of a receiver and therefore a receiver is not necessary.

[7] Notice of Court's Ruling

☐ If the opposing party prevails at the hearing, prepare the notice of the court's ruling in an original for filing, one copy for the moving party, an office copy, and such additional copies as may be desired.

☐ Serve a copy on the moving party's attorney or, if none, the moving party, prepare the proof of service in an original and one copy, and file the original of the notice of ruling with the original of the proof of service attached with the court.

☐ The notice of ruling may be served with a conformed copy of the court's order [*see § 486.90[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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A. Appointment of Receivers

43-486 California Forms of Pleading and Practice--Annotated §§ 486.92-486.99

AUTHOR: Robert B. Kaplan Editorial Consultant

[Reserved]

§§ 486.92[Reserved]

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B. Administration and Termination of Receivership

43-486 California Forms of Pleading and Practice--Annotated § 486.100

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.100 General Matters

[1] Determine Duties and Powers

☐ Carefully read order of appointment to determine what duties have been imposed and what powers have been granted [*see § 486.30*].

[2] Keep Records

☐ Keep detailed record of services performed as receiver and of each expenditure made on behalf of receivership in anticipation of obtaining court approval of payment for them [*see § 486.157*].

[3] Take Possession of Property

☐ Take possession of the real and/or personal property described in the order of appointment [*see Code Civ. Proc. § 568*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsReceiversDutiesCivil ProcedureRemediesReceivershipsReceiversPowersCivil ProcedureRemediesReceivershipsTerminations

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43-486 California Forms of Pleading and Practice--Annotated § 486.101

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.101 Inventory Property

[1] Extension of Time

☐ If more than 30 days is required to prepare the inventory [*see Cal. Rules of Ct., Rule 3.1181*].

☐ Draft an application, or petition, for an order extending time with the order appended in an original and one copy for the receiver and such additional copies as may be desired.

☐ Present the original of the application and order and copies to the courtroom clerk of the judge supervising the receivership.

☐ If the order is signed, the receiver will have the additional time allowed to file the inventory.

[2] Draft Inventory

☐ Make a list of all property received and draft the inventory [*see form in § 486.150*] in the following number of copies, then sign the original and conform the copies:

☐ Original for filing.

☐ One copy for each attorney of record and for each party appearing without an attorney.

☐ One copy for receiver.

☐ Such additional copies as may be desired.

[3] Serve Copies on Parties

☐ Serve a copy of the inventory on the attorney for each party or if none on the party [*see Code Civ. Proc. § 1015*].

☐ Prepare and execute a proof of service.

☐ Present the original of the inventory and proof of service to the court clerk for filing.

[4] Supplementary Inventory

☐ If the receiver subsequently takes possession of any additional property, draft the supplementary inventory [§ 486.150] and follow the same procedure as for the initial inventory ([1]-[3], *above*).

Legal Topics:

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

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43-486 California Forms of Pleading and Practice--Annotated § 486.102

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.102 Notices to Public Entities

[1] Employment Development Department

☐ If the property consists of an insolvent employing unit, draft the notice to be sent to the California Employment Development Department in an original and a file copy.

☐ Sign the original, and mail it to the department.

[2] Licensing Agencies

☐ If the receivership property consists of a licensed business, notify the agency that issued the license and determine whether the business may be operated under the existing license or whether the receiver must secure a temporary license.

☐ If a temporary license is required, apply for it.

[3] Taxing Agencies

☐ Draft, sign, and deliver any appropriate notices to the applicable taxing agencies.

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43-486 California Forms of Pleading and Practice--Annotated § 486.103

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.103 Order Naming Bank Depository

[1] Procedure

☐ If the receivership will involve the receipt of money and the order of appointment does not designate a bank into which money coming into the receiver's hands may be deposited:

☐ Prepare an application, or petition, for such order, specifying the money that the receiver has received or will receive and its source, with the order of approval, or designation, appended in an original for filing and at least one copy for the receiver and one copy for the designated bank [*see form in § 486.151*].

☐ The receiver should sign the application and present it to the courtroom clerk of the judge supervising the receivership.

☐ If the order is signed, the original will be retained for filing and the copies will be conformed and returned to the receiver.

Legal Topics:

For related research and practice materials, see the following legal topics:
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43-486 California Forms of Pleading and Practice--Annotated § 486.104

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.104 Employment of Attorney

[1] Draft Petition for Authority to Employ Attorney

☐ If the receiver requires legal counsel in carrying out his or her duties as receiver [*see Cal. Rules of Ct., Rule 3.1180*]:

☐ Draft the petition for authority to employ attorney with an order granting the petition appended [*see form in § 486.152*], or:

☐ If the court requires, draft a separate formal order, in an original for filing, one copy for each party's attorney of record and for each party who is unrepresented by counsel, one copy for the attorney nominated for employment, one copy for the receiver, and such additional copies as may be desired.

☐ Sign the original and conform the copies.

[2] Present Petition and Order to Court

☐ Present the original and copies of the petition and order to the courtroom clerk of the judge supervising the receivership.

☐ If the order is signed, the original will be retained for filing and the copies will be conformed and returned to the receiver.

[3] Serve Papers

☐ Serve a copy of the petition and order on each party's attorney or, if none, on the party [*see Code Civ. Proc. § 1015*].

☐ Prepare a proof of service in an original and at least one office copy.

☐ File the original of the proof of service with the court clerk.

☐ Have the copy conformed.

☐ Deliver a conformed copy of the petition and order to the attorney to be employed. For manners of serving papers and a form of proof of service by mail, *see* Ch. 518, *Service of Summons and Papers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsMailCivil ProcedurePleading & PracticeService of ProcessProofGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversPowers

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B. Administration and Termination of Receivership

43-486 California Forms of Pleading and Practice--Annotated § 486.105

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.105 Petition for Authorization to Perform Specific Act Not Otherwise Authorized by Statute or by Court's Order of Appointment

[1] Draft Petition for Authority

☐ Draft the petition for authority to do the particular act, explaining the need for it, with an order approving, or granting, the petition, appended, or a separate formal order if the court requires it, in an original for filing and the following copies:

☐ One copy for each party's attorney of record and for each party who is unrepresented by counsel.

☐ One copy for the receiver.

☐ Such additional copies as may be desired.

☐ Sign the original of the petition.

☐ Conform the copies.

[2] Present Papers to Court

☐ Present the original and copies of the petition and order to the courtroom clerk of the judge supervising the receivership.

☐ If the order is signed, the original will be retained for filing and the copies will be conformed and returned to the receiver.

[3] Serve Papers

☐ Serve a copy of the petition and order on each party's attorney or, if none, on the party [*see Code Civ. Proc. § 1015*].

☐ Prepare a proof of service in an original and at least one office copy.

☐ File the original of the proof of service with the court clerk.

☐ Have the copy conformed. For manners of serving papers and a form of proof of service by mail, *see* Ch. 518, *Service of Summons and Papers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessMethodsMailCivil ProceduresPleading & PracticeService of ProcessProofGeneral OverviewCivil ProceduresRemediesReceivershipsReceiversPowers

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43-486 California Forms of Pleading and Practice--Annotated § 486.106

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.106 Petition for Instructions

[1] Draft Petition for Instructions

☐ If the receiver is uncertain with respect to any aspect of his or her duties, prepare a petition for instructions.

☐ Set forth the facts and request instructions from the court in an original for filing, one copy for each party's attorney of record and for each party who is unrepresented, one copy for the receiver, and such additional copies as may be desired.

☐ Sign the original and conform the copies.

[2] File Petition and Secure Hearing Date

☐ File the original of the petition with the court.

☐ Have the copies conformed.

☐ Secure a hearing date, if a hearing is required [*see, e.g., Steinberg v. Goldstein (1956) 145 Cal. App. 2d 692, 696-697, 303 P.2d 80]* .

[3] Draft Notice of Hearing

☐ If a hearing is required, secure a hearing date from the court.

☐ Draft a notice of hearing in an original and the same number of copies as the petition, sign the original, and conform the copies.

[4] Service of Papers

☐ Serve a copy of the notice of hearing with a copy of the petition attached on each party's attorney of record or, if none, on the party [*see Code Civ. Proc. § 1015*].

☐ Draft a proof of service in an original and at least one copy.

☐ File the original of the proof of service with the court and have the copy conformed.

[5] Hearing

☐ Attend the hearing [*see Steinberg v. Goldstein (1956) 145 Cal. App. 2d 692, 696-697, 303 P.2d 80* (who may attend the hearing)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessProofGeneral OverviewCivil ProcedureRemediesReceivershipsReceiversDuties

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43-486 California Forms of Pleading and Practice--Annotated § 486.107

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.107 Unclaimed Funds in Possession of Receiver

[1] Draft Notice of Unclaimed Funds

☐ Draft the notice of unclaimed funds [*see form in § 486.153*] in the following number of copies [*see Code Civ. Proc. § 570*; *see also* discussion in *§ 486.31[3]*]:

☐ Original and one copy for delivery to the newspaper publisher.

☐ Copy for receiver.

☐ Such additional copies as may be desired.

☐ Sign the original and conform the copies

[2] Delivery to Newspaper

☐ Deliver original and one copy of the notice to the newspaper with the request that the notice be published [*see Code Civ. Proc. § 570* (publication requirements)].

[3] Proof of Publication

☐ At the same time notice is delivered to the newspaper, request that on completion of publication the newspaper execute a proof of publication and file it with the court clerk [*see Code Civ. Proc. § 2010*].

[4] Payment

☐ Pay the publisher, or secure an order from the court supervising the receivership authorizing the receiver to pay the publisher, the cost of the publication [*see Code Civ. Proc. § 570* (payment of funds)].

☐ The order may be contained in the court's order directing payment of the funds into the state treasury [*see § 486.154*].

[5] Report to Court

☐ Report to the court any funds remaining in the receiver's hands for 30 days after the date of the last publication of the notice [*see Code Civ. Proc. § 570* (report requirement)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessMethodsPublicationCivil ProcedureRemediesReceivershipsReceiversDuties

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43-486 California Forms of Pleading and Practice--Annotated § 486.108

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.108 Receiver's Final Account and Report

[1] Draft Final Account and Report

☐ Draft the receiver's final account and report [*see form in § 486.157*; *see* discussion in *§§ 486.33 -486.34*] in the following number of copies:

☐ Original for filing.

☐ One copy for attorney of record of each party and for each party unrepresented by counsel.

☐ One copy for receiver.

☐ Office copy.

☐ Such additional copies as may be desired.

☐ Sign the original and conform the copies

[2] Draft Notice of Presentation of Account and Report

☐ Draft a notice of presentation of the account and report for settlement in the same number of copies

and for the same distribution as the account and report.

[3] Service on Parties

☐ Serve a copy of the notice of presentation with a copy of the account and report attached on each party's attorney of record or, if none, on the party.

☐ Draft the proof of service in an original and at least one office copy.

☐ File the original of the proof of service with the court clerk, and have the copy conformed. For manners of serving papers and a form of proof of service by mail, *see* Ch. 518, *Service of Summons and Papers* .

[4] Hearing

☐ Attend the hearing.

☐ File objections to the account and report, if desired [*see, e.g.,* *Aviation Brake Systems, Ltd. v. Voorhis (1982) 133 Cal. App. 3d 230, 232, 183 Cal. Rptr. 766]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessMethodsMailCivil ProceduresPleading & PracticeService of ProcessProofGeneral OverviewCivil ProceduresRemediesReceivershipsReceiversDuties

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43-486 California Forms of Pleading and Practice--Annotated §§ 486.109-486.119

AUTHOR: Robert B. Kaplan Editorial Consultant

[Reserved]

§§ 486.109[Reserved]

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43-486 California Forms of Pleading and Practice--Annotated § 486.120

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.120 Lawsuits By Receiver

[1] Petition to Sue Third Party

☐ If it becomes necessary for the receiver to file suit against a third party and leave of court is required, draft the petition for permission to sue [*see form in § 486.170*], specifying the nature of the action to be brought, facts justifying its need, and its probable outcome, in the following number of copies:

☐ Original for filing.

☐ One copy for each party's attorney or party if unrepresented by counsel.

☐ Copy for receiver.

☐ Office copy.

☐ Such additional copies as may be desired.

☐ Sign the petition and conform the copies.

☐ The petition to sue may be combined with the petition for authority to employ an attorney to prosecute the lawsuit [*see § 486.104* (employment of attorney)].

[2] Order Granting Petition

☐ Draft the order authorizing the receiver to file suit [*see form in § 486.171*] in the same number of copies as the petition.

[3] Present Petition and Order to Court

☐ Present the originals and copies of the petition and order to the courtroom clerk of the judge supervising the receivership for consideration and signature.

☐ If the order is signed, have the copies of the order conformed.

[4] Service of Order

☐ Serve a copy of the petition and a conformed copy of the order on the attorney for each party, and on any nonrepresented parties, in the receivership action [*see Code Civ. Proc. § 1015*].

[5] Complaint Against Third Party

☐ Allege in the complaint against the third party that court permission to sue has been obtained [*see form in § 486.172*].

Legal Topics:

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

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43-486 California Forms of Pleading and Practice--Annotated § 486.121

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.121 Lawsuits Against Receiver

[1] Preliminary Determinations

☐ Determine nature of action against receiver and whether receiver's liability is based on an act or omission of the receiver in his or her official capacity which will be satisfied, if at all, from receivership funds [*see McCarthy v. Poulsen (1985) 173 Cal. App. 3d 1212, 1219, 219 Cal. Rptr. 375]* or arises from the receiver's failure to faithfully discharge the duties of receiver in the action or obey the orders of the court in which event the receiver's liability is on his or her official bond [*see Code Civ. Proc. § 567(b)*].

☐ If the action is based on a liability imposed on the receiver in his or her official capacity, determine whether relief should and can be sought by intervention in the same action or proceeding in which the receiver was appointed or a separate action should be filed.

[2] Application for Leave to Sue Receiver

☐ Draft application or petition for leave to sue receiver [*see form in § 486.173*] in an original for filing, one copy for the receiver, one copy for client if desired, office copy, and such additional copies as may be desired.

☐ Sign the original.

☐ Conform the copies.

☐ Draft complaint against receiver [*see form in § 486.175* for allegations of authority to sue to be

included in the complaint] which will be filed if permission to sue is granted.

☐ Attach to the application or petition a copy of the proposed complaint [*see Chiesur v. Superior Court (1946) 76 Cal. App. 2d 198, 199, 172 P.2d 763]* .

☐ Draft order granting leave to sue [§ 486.174] in the same number of copies and for the same distribution as the application.

☐ Give receiver advance notification of when and where application or petition will be presented to judge.

☐ Present original and copies of application and order to courtroom clerk of judge supervising receivership.

☐ If the receiver receives advance notification that a person will apply at a specified time and place for an order granting leave to sue, the receiver may wish to do the following:

☐ File a written response or pleading and/or:

☐ Appear at the time and place specified to present any opposition he or she may have to the granting of the application or to respond to any questions the court may want to ask.

☐ If the receiver is sued as receiver, the receiver should apply to the court for permission to employ an attorney to represent the receiver in the lawsuit. For procedure, see *§ 486.104*.

Legal Topics:

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

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43-486 California Forms of Pleading and Practice--Annotated §§ 486.122-486.129

AUTHOR: Robert B. Kaplan Editorial Consultant

[Reserved]

§§ 486.122[Reserved]

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A. Appointment of Receivers

43-486 California Forms of Pleading and Practice--Annotated § 486.130

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.130 Allegations and Prayer of Complaint for Appointment of Receiver--To Take Possession of Property or Fund in Which Parties Have Joint Interest [Code Civ. Proc. § 564(b)(1)]

[1] FORM Allegations and Prayer of Complaint for Appointment of Receiver--To Take Possession of Property or Fund in Which Parties Have Joint Interest [Code Civ. Proc. § 564(b)(1)]

1. _____ [*Allege parties' joint interest in property or fund, e.g.,* Plaintiff and defendant are the sole co-owners of an apartment house, located at _____ (*address*)], hereinafter "the property"].

2. At all times herein mentioned, defendant was, and is, in complete control and management of the _____[property *or* fund].

[*EITHER, if fund is in danger of loss or removal*]

3. _____ [*Allege facts showing fund is in danger of loss or removal, e.g.,* Contrary to _____ (*specify law or contract governing parties' relationship, e.g.,* the agreement between plaintiff and defendant has excluded plaintiff from participating in the management of the property or sharing in its proceeds and was, and is, using the rents, issues, and profits of the property for his/her own exclusive benefit in that _____ (*specify facts showing that defendant has been using proceeds of property and partnership funds for his or her own exclusive benefit*)].

[*AND/OR, if property is in danger of being materially injured*]

3. _____ [*Allege facts showing that property is in danger of being materially injured, e.g.,* The property is in immediate need of substantial repair in that, as shown by the reports of _____ (*names*), who are duly licensed termite exterminators and building con tractors, which are attached hereto as Exhibits

"_____" and "_____," respectively, and made a part hereof, the apartment building is infested with dry rot and termites requiring immediate correction to avoid extensive and permanent structural damage to the building; in addition, the roof leaks, which condition, if not immediately repaired, will allow water to enter the building when it rains; the reports further show the repairs that must be made forthwith if substantial and permanent damage to the apartment building is to be avoided].

[4. _____ (*Allege any efforts made by plaintiff to have defendant protect the property from material injury, e.g.,* On numerous occasions, plaintiff has requested defendant to apply the proceeds of the property to the repair of the foregoing conditions, but defendant has failed and refused and continues to fail and refuse to do so or to apply any part of the proceeds, or any other moneys, to the repair and maintenance of the building or to take any other steps to properly repair or maintain the building).]

[*CONTINUE*]

[5. Unless a receiver is appointed and instructed to take possession of the _____ (property *or* fund) and to _____ (*specify duties to be given to receiver, e.g.,* receive rents as they fall due, and immediately apply the rents to the repair of the property), the _____ (property or fund) will be _____ (materially injured or lost or removed), as herein alleged (and, in addition, the parties hereto may be subjected to serious personal civil liability to third parties for any injury or damage sustained by them as a result of the defects, as well as to liability for maintaining a habitation in an uninhabitable condition).]

WHEREFORE, plaintiff prays:

1. That a receiver be appointed to take possession of the _____[*specify property or fund, e.g.,* apartment house], to _____ [*specify general powers to be given to receiver, e.g.,* manage, control, care for, preserve, maintain, and incur the expenses necessary for the management, control, care, preservation, and maintenance of, the _____ (*specify property or fund, e.g.,* apartment house and personalty located in it), and, specifically, to _____ (*state specific powers, e.g.,* collect the rents, issues, and profits therefrom and apply the same to the immediate repair of the aforementioned infestations and dilapidations and thereafter to maintain the property in a good and habitable condition pending the determination of this lawsuit, to pay any taxes or assessments falling due during the period of receivership, and to otherwise employ labor as may be necessary, purchase supplies, and incur the risks and obligations ordinarily incurred by owners, managers, and operators of similar apartment houses)].

[2] Use of Form

The allegations and prayer in [1], *above,* are for insertion in a verified complaint in an action by a person jointly owning or interested in any property or fund involved in the lawsuit to show that appointment of a receiver is justified because the property or fund is in danger of being lost, removed, or materially injured [*see Code Civ. Proc. § 564(b)(1)*]. If the complaint alleges facts sufficient to establish the above ground, it may be used to support in whole or in part either a noticed motion or an ex parte application for appointment of a receiver pending the hearing and determination of the complaint [*see Cal. Rules of Ct., Rule 3.1175, 3.1176*; for forms, *see §§ 486.139, 486.143*]. For the additional showing required when the application for appointment of a receiver is made ex parte, *see § 486.139[5]*.

The allegations in [1], *above,* with appropriate modifications, may be incorporated in an ex parte application and declaration for appointment of a receiver [*see Code Civ. Proc. § 566(b)*; *Cal. Rules of Ct., Rule 3.1175*].Alternatively, they may be incorporated in an affidavit [*see Code Civ. Proc. §§ 2002(1), 2003*] or declaration under penalty of perjury in support of a noticed motion for appointment of a receiver [*see § 486.144*] or in support of an ex parte application for an order to show cause why a receiver should not be appointed [*see Code Civ. Proc. §§ 2009, 2015.5*; *Cal. Rules of Ct.,*

Rules 3.1177 (referring to appointment of receiver "on notice," which would include both notice of motion and order to show cause why receiver should not be appointed)].

[3] Allegations

The form in [1], *above,* alleges the existence of a joint interest in property, showing that the action is one in which a receiver may be appointed (Paragraph 1) [*Code Civ. Proc. § 564(b)(1)*], and that the property is in danger of being lost, removed, or materially injured, showing the ground for the appointment (alternative Paragraphs 3 or 3 and 4) [*Code Civ. Proc. § 564(b)(1)*]. It also includes an allegation of what will happen if a receiver is not appointed for use when the complaint will be used to support an ex parte application for an immediate order appointing a receiver or for an order to show cause why a receiver should not be appointed (Paragraph 5).

[4] Ex Parte Appointment of Receiver

If ex parte appointment of a receiver is sought, additional facts must be shown in the verified complaint or declaration [*Cal. Rules of Ct., Rule 3.1175*; *see § 486.139[5]*].

[5] Verification

If the application for appointment of the receiver is be to based in any part on the complaint, then the complaint must be verified [*see Code Civ. Proc. §§ 2002, 2015.5*; *Evid. Code §§ 702, 710*].

[6] Cross References

For other forms of complaints for use in actions in which a receiver might be appointed under *Code Civ. Proc. § 564(b)(1),* see the appropriate chapter, e.g., Ch. 7, *Accounting, Action for;* Ch. 170 *Corporations: Dissolution and Winding Up*; Ch. 303, *Injunctions;* Ch. 333, *Landlord and Tenant: Eviction Actions;* and Ch. 482, *Quieting Title*

For an overview of the procedure in a civil action, see Ch. 2, *Procedural Guide for Civil Actions*

For forms of captions for use in pleadings, see Ch. 108, *Captions and Introductions*

For discussion of the general requirements and skeletal forms of complaints, see Ch. 123, *Complaints and Cross Complaints*

For a form of complaint for dissolution of a partnership, accounting, and appointment of receiver and a form of complaint for appointment of areceiver to wind up partnership affairs and for an accounting, see Ch. 406, *Partnerships: Dissolution*

For discussion of service of the summons and complaint and proof of service, see Ch. 518, *Service of Summons and Papers*

For discussion and alternative forms of verifications, see Ch. 572, *Verification*

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A. Appointment of Receivers

43-486 California Forms of Pleading and Practice--Annotated § 486.131

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.131 Allegations and Prayer of Complaint For Appointment of Receiver--Action to Foreclose Mortgage or Trust Deed [Code Civ. Proc. § 564(b)(2)]

[1] FORM Allegations and Prayer of Complaint For Appointment of Receiver--Action to Foreclose Mortgage or Trust Deed [Code Civ. Proc. § 564(b)(2)]

[*EITHER*]

1. The condition of the _____[deed of trust *or* mortgage] has not been performed, in that _____ [*specify facts showing breach of obligation for which deed of trust or mortgage is security, e.g.,* defendant has failed, and continues to fail, to make timely installment payments of principal and interest due for the months of _____ through _____ (*dates*)].

[*AND/OR*]

1. The _____[mortgaged *or* trust] property is in danger of being _____[lost *or* removed *or* materially injured] in that _____[*specify facts showing danger of loss, removal or material injury, e.g.,* defendant has abandoned the property and there is no one now on the property to occupy, care for, or maintain it].

[*AND*]

2. The _____[mortgaged *or* trust] property is insufficient to discharge the debt secured by the _____[mortgage or trust deed] in that the unpaid balance due on the note so secured is $_____, whereas the fair market value of the property is $_____.

[*CONTINUE*]

WHEREFORE, plaintiff prays:

1. That a receiver be appointed to take possession of the _____[mortgaged *or* trust] property and to care for, control, manage, and preserve it pending further order of the court.

[2] Use of Form

The allegations and prayer in [1], *above*, are for insertion in a complaint for foreclosure and sale by the mortgagee named in a mortgage or the trustee or beneficiary under a trust deed [*see Code Civ. Proc. §§ 725a-730.5* (foreclosure)] as a basis for securing the appointment of a receiver to take charge of the mortgaged or trust property when the property is in danger of being lost, removed, or materially injured, or the condition of the mortgage or trust deed has not been performed, and the property is probably insufficient to discharge the mortgage or trust debt [*see Code Civ. Proc. § 564(b)(2)*]. A complaint alleging facts sufficient to establish either of the grounds in this form in whole or in part may be used to support in whole or in part either a noticed motion or an ex parte application for appointment of a receiver pending the hearing and determination of thecomplaint for dissolution [*see Code Civ. Proc. §§ 1003, 1005*; Cal. Rules of Ct., Rules 8.1175, 8.1177; for forms, *see §§ 486.139, 486.140*]. For the additional showing required when the application is made ex parte, see *§ 486.139[5]*. The allegations and prayer, when inserted in a complaint for foreclosure and sale, should be renumbered as appropriate.

The allegations, with appropriate modifications, may be incorporated in an ex parte application and declaration for appointment of receiver [*see Code Civ. Proc. § 566(b)*; Cal. Rules of Ct., Rule 8.1175; for a form, *see § 486.139*]. Alternatively, they may be incorporated in an affidavit (*see Code Civ. Proc. §§ 2002(1), 2003*) or declaration under penalty of perjury in support of a noticed motion for appointment of a receiver or in support of an ex parte application for an order to show cause why a receiver should not be appointed [*see Code Civ. Proc. §§ 2009, 2015.5*; Cal. Rules of Ct., Rule 8.1177].

For a form of allegations relating to appointment of a receiver under *Code Civ. Proc. § 564(b)(11)* in connection with specific performance of an assignment of rents provision of a deed of trust, mortgage, or separate assignment document and thereafer pending nonjudicial foreclosure, see *§ 486.132*.

[3] Ex Parte Appointment of Receiver

If ex parte appointment of a receiver is sought, additional facts must be shown in the verified complaint or declaration [Cal. Rules of Ct., Rule 8.1175; *see § 486.139[5]*].

[4] Verification

If the application for appointment of the receiver is be to based in any part on the complaint, then the complaint must be verified [*see Code Civ. Proc. §§ 2002, 2015.5*; *Evid. Code §§ 702, 710*].

[5] Cross Reference

For discussion and forms of complaints for use in foreclosure actions, see Ch. 555, *Trust Deeds and Real Property Mortgages*

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A. Appointment of Receivers

43-486 California Forms of Pleading and Practice--Annotated § 486.132

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.132 Allegations and Prayer of Complaint to Enforce Assignment of Leases, Rents, Issues, or Profits [Code Civ. Proc. § 564(b)(11)]

[1] FORM Allegations and Prayer of Complaint to Enforce Assignment of Leases, Rents, Issues, or Profits [Code Civ. Proc. § 564(b)(11)]

1. _____[*Allege that defendant executed a deed of trust or mortgage in favor of plaintiff on certain property containing an assignment of leases, rents, issues, and profits*].

2. On _____[*date*], the _____[*specify mortgage or deed of trust containing an assignment of lease, rents, issues, and profits*] was duly recorded in the Official Records of the Office of the County Recorder of _____[*specify county of recording*] County, State of California.

3. _____[*Allege defaults that have occurred under the terms of the mortgage or deed of trust containing an assignment of leases, rents, issues, or profits*].

4. Prior to the filing of this action, plaintiff notified the defendant of its default under the terms of the _____[*specify mortgage or deed of trust that is in default*]; however, the defendant has failed and refused to take any steps to remedy that default.

5. In accordance with the terms of the _____[*specify mortgage or deed of trust that is in default*], plaintiff has declared the following sums to be delinquent, and they are now due and payable to plaintiff from the defendant:

(a) _____[*Specify amounts owed to plaintiff as a result of default in mortgage or deed of trust*];

6. Plaintiff has duly performed all of the conditions precedent on its part required to be performed.

7. There is no adequate remedy at law to enforce the provisions of the _____[*specify mortgage or deed of trust that is in default*], and it is necessary that a receiver be appointed to take possession and charge of the property and to conserve and manage it pending the sale under the terms of the _____[*specify mortgage or deed of trust that is in default*], and to collect any and all rents, issues, income, interests, and leases, and/or profits thereof pending the sale.

8. As a result of the default by defendant under the _____[*specify mortgage or deed of trust that is in default*], plaintiff is entitled to enter upon and take possession of the property to collect the rents, issues and profits thereof, as provided for therein.

9. Unless a receiver is appointed by this Court to take possession of, care for, and manage and operate the property, plaintiff will be materially prejudiced.

10. By reason of these facts, plaintiff prays that this Court appoint a receiver in accordance with the law to take control of and manage the property.

11. For the foregoing reasons, and in aid of the receiver, plaintiff seeks a temporary restraining order and preliminary and permanent injunctions, restraining and enjoining the defendants and Does 1 through 30, inclusive (sometimes collectively referred to as "defendants"), and their agents, servants and employees, and all those acting in concert with them, and each of them, from engaging in or performing, directly or indirectly, any of the following acts:

(a) Demanding, collecting, receiving, or in any other way diverting or using any of the profits, income, issues, rents, or lease payments emanating from the property, including, without limitation, rents or lease payments due or hereafter to become due under any rental or lease agreements;

(b) Interfering with or hindering, in any way whatsoever, the receiver in the performance of the receiver's duties herein described and in the performance of any duties incident thereto;

(c) Interfering in any manner with the property or its possessions;

(d) Transferring, concealing, destroying, defacing, or altering any of the instruments, documents, ledger cards, books, records, printouts, or other writings relating to the property, or any portion thereof; and

(e) Transferring, conveying, assigning, pledging, deeding, selling, renting, leasing, encumbering, changing ownership, vesting of title to, or otherwise disposing of, the property.

WHEREFORE, plaintiff prays:

1. That a receiver be appointed to take possession and charge of the property, and to conserve and manage the property pending sale under the terms of the _____[*specify mortgage or deed of trust which is in default*];

2. That the defendants, and anyone holding under said defendants, be ordered to deliver possession of the property to the receiver forthwith;

3. That the receiver, after taking possession of the property, be permitted to do the following:

(a) Exclude the defendants, or anyone claiming under or through said defendants who does not have a valid lease or rental agreement for possession of the property, or any portion thereof, from possession of the property, or any portion thereof;

(b) Use, operate, manage, and control the property;

(c) Care for, preserve, and maintain the property;

(d) Incur all expenses necessary for the care, preservation, and maintenance of the property;

(e) Demand, collect and receive any rents, issues, income, profits and lease payments due from the date of defendants' default or hereafter coming due from tenants or lessees of the property, or any portion thereof;

(f) To rent or lease from time to time any part of the property and to keep the buildings thereon insured and in good repair, and to pay the taxes and assessments on the property incurred during the receivership;

(g) Bring and prosecute all proper actions for collection of rent or lease payments due on the property, as well as all necessary actions and proceedings for the removal of tenants or lessees in default of any rental or lease agreement, or any other persons, from the property, and to bring and prosecute all proper actions for the protection of the property or to recover possession thereof;

(h) To employ agents or employees to collect said rents, manage the property, and keep the same insured and in good repair, if the receiver shall deem the same necessary, and to pay the reasonable value of said services out of the rent receipts;

(i) To open up bank accounts as deemed necessary by the receiver in connection with the above-referenced duties; and

(j) All other powers and duties referred to in this complaint, together with all other powers reasonably necessary to carry out the receiver's duties and responsibilities.

4. For a temporary restraining order and for preliminary and permanent injunctions restraining and enjoining the defendants, and their servants, agents and employees, and all those acting in concert with them, and each of them, from engaging in, or performing, directly or indirectly, any or all of the following acts:

(a) Interfering with or hindering, in any manner whatsoever, the receiver in the performance of the receiver's duties;

(b) Demanding, collecting, receiving or in any other way diverting and using any of the profits, income, issues, rents, payments, and/or lease payments emanating from the property, including, without limitation, rents or lease payments due or hereafter to become due under any rental or lease agreements;

(c) Interfering in any manner with the property or its possessions;

(d) Transferring, concealing, destroying, defacing or altering any of the instruments, documents, ledger cards, books, records, printouts, or other writings relating to the property or any portion thereof; or

(e) Transferring, conveying, assigning, pledging, deeding, selling, renting, leasing, encumbering, changing ownership, vesting of title to, or otherwise disposing of, the property.

5. For costs and expenses incurred by the receiver in the performance of the receiver's duties, and including without limitation, receiver's fees and charges and attorneys' fees.

[2] Use of Form

The allegations and prayer in [1], *above,* are for insertion in a verified complaint to enforce the assignment of leases, rents, issues, or profits clause in a mortgage or deed of trust in the lawsuit to seek appointment of a receiver [*see Code Civ. Proc. § 564(b)(10)*]. If the complaint alleges facts sufficient to establish the above grounds, it may be used to support in whole or in part either a noticed motion or an ex parte application for appointment of a receiver pending the hearing and determination of the complaint [*see Cal. Rules of Ct., Rule 3.1175(a), 3.1177(a)*; for forms, *see §§ 486.139, 486.143*]. For discussion of the additional showing required when the application for appointment of a receiver is made ex parte, see *§ 486.139[5]*.

The allegations in [1], *above,* with appropriate modifications, may be incorporated in an ex parte application and declaration for appointment of a receiver [*see Code Civ. Proc. § 566(b)*; *Cal. Rules of Ct., Rule 3.1175(a)*; for a form, *see § 486.139*]. Alternatively, they may be incorporated in an affidavit (*see Code Civ. Proc. §§ 2002(1), 2003*) or declaration under penalty of perjury in support of a noticed motion for appointment of a receiver [for a form, *see § 486.144*] or in support of an ex parte application for an order to show cause why a receiver should not be appointed [*see Code Civ. Proc. §§ 2009, 2015.5*; *Cal. Rules of Ct., Rules 3.1177(a)* (referring to appointment of receiver "on notice," which would include both notice of motion and order to show cause why receiver should not be appointed)].

For forms of notice of motion, declaration, and order appointing a receiver under *Code Civ. Proc. § 564(b)(11)*, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

[3] Allegations

The form in [1], *above,* alleges that the defendant has executed a deed of trust or mortgage on certain real property containing an assignment of leases, rents, issues or profits (Paragraphs 1 and 3) [*see Code Civ. Proc. § 564(b)(10)*], and that a default has occurred under the terms of that mortgage or deed of trust (Paragraph 3). It also includes an allegation of what will happen if a receiver is not appointed when the complaint will be used to support an ex parte application for an immediate order appointing a receiver or for an order to show cause why a receiver should not be appointed (Paragraph 9).

[4] Ex Parte Appointment of Receiver

If ex parte appointment of a receiver is sought, additional facts must be shown in the verified complaint or an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*Cal. Rules of Ct., Rule 3.1175*; *see § 486.139[5]*].

[5] Verification

If the application for appointment of the receiver is to be based in any part on the complaint, then the complaint must be verified [*see Code Civ. Proc. §§ 2002, 2015.5*; *Evid. Code §§ 702, 710*].

[6] Cross References

For other forms of complaints for use in actions in which a receiver might be appointed under *Code Civ. Proc. § 564(b)(1)*, see the appropriate chapter, e.g., Ch. 7, *Accounting, Action for*, Ch. 160, *Corporations*, Ch. 303, *Injunctions*, Ch. 333, *Landlord and Tenant: Eviction Actions*, and Ch. 482, *Quieting Title*

For an overview of the procedure in a civil action, see Ch. 2, *Procedural Guide for Civil Actions*

For forms of captions for use in pleadings, see Ch. 108, *Captions and Introductions*

For discussion of the general requirements and skeletal forms of complaints, see Ch. 123, *Complaints and Cross Complaints*

For a form of complaint for dissolution of a partnership, accounting, and appointment of receiver and a form of complaint for appointment of a receiver to wind up partnership affairs and for an accounting, see Ch. 406, *Partnerships: Dissolution*

For discussion of service of the summons and complaint and proof of service, see Ch. 518, *Service of Summons and Papers*

For discussion and alternative forms of verifications, see Ch. 572, *Verification*

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43-486 California Forms of Pleading and Practice--Annotated § 486.133

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.133 Allegations and Prayer of Complaint for Appointment of Receiver in Aid of Arbitration [Code Civ. Proc. § 1218.8]

[1] FORM Allegations and Prayer of Complaint for Appointment of Receiver in Aid of Arbitration [Code Civ. Proc. § 1218.8]

1. On or about _____[*date*], plaintiff and defendant entered into a written agreement in which _____ [*allege terms of arbitration clause, e.g.,* at Paragraph _____, the parties agreed that any controversy or claim arising out of the agreement between or among the parties thereto shall be determined by arbitration. The agreement further provides that no provision of the arbitration agreement shall limit the right of any party to exercise or obtain any provisional or ancillary remedies during or after the pendency of any arbitration and that the institution and maintenance of an action for judicial relief or a provisional remedy shall not constitute a waiver of the right of any party to submit the controversy to arbitration].

2. _____[*Allege existence of dispute and whether a complaint has been filed and/or arbitration demanded or pending*]

3. This complaint is being filed against the defendants pursuant to the provisions of Code of Civil Procedure Section 1218.8 on the grounds that any award which the plaintiff may obtain pursuant to the mandatory arbitration provisions contained in the agreement may be rendered ineffectual without provisional relief in the form of the appointment of a receiver. The plaintiff reserves its right to arbitration of the claims under the agreement.

WHEREFORE, plaintiff prays for entry of orders granting the provisional relief requested by the plaintiff in the applications and pleadings accompanying this complaint against defendants as follows:

1. That a receiver be appointed to take possession of the _____[specify property *or* fund] to _____[*list powers to be given to receiver to insure that any arbitration award which may be obtained*

will not be rendered ineffectual].

[2] Use of Form

The allegations and prayer in [1], *above*, are for insertion in application for a provisional remedy in connection with an arbitrable controversy which is filed on the ground that the arbitration award to which the applicant may be entitled may be rendered ineffectual without provisional relief [*Code Civ. Proc. § 1281.8(b)*]. The application must be accompanied by a complaint or by copies of the demand for arbitration and any response thereto. If the application is accompanied by a complaint, the application must also be accompanied by a statement stating whether the party is or is not reserving the party's right to arbitration [*Code Civ. Proc. § 1281.8(b)*].

An application for a provisional remedy under *Code Civ. Proc. § 1281.8(b)* does not operate to waive any right of arbitration which the applicant may have if, at the same time as the application for provisional remedy is presented, the applicant also presents to the court an application that all other proceedings in the action shall be stayed pending the arbitration of any issue, question, or dispute which is claimed to be arbitrable under the agreement and which is relevant to the action pursuant to which the provisional remedy is sought [*Code Civ. Proc. § 1281.8(d)*].

[3] Allegations

The form in [1], *above*, alleges the existence of an arbitration agreement (Paragraph 1) and of an arbitrable dispute (Paragraph 2), the current status of the dispute with respect to pending litigation or arbitration (Paragraph 2), and that a receiver should be appointed pursuant to *Code Civ. Proc. § 564* in connection with the arbitrable controversy on the ground that the award to which the applicant may be entitled may be rendered ineffectual without provisional relief [*see Code Civ. Proc. § 1281.8(a)(4), (b)*].

The form also includes a statement that the plaintiff is or is not reserving the right to arbitration. This statement is mandatory if the application is accompanied by a complaint (Paragraph 3) [*Code Civ. Proc. § 1281.8(d)*].

[4] Ex Parte Appointment of Receiver

If ex parte appointment of a receiver is sought, additional facts must be shown in the verified complaint or an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*Cal. Rules of Ct., Rule 3.1175*; *see § 486.139[5]*].

[5] Verification

If the application for appointment of the receiver is to be based in any part on the complaint, then the complaint must be verified [*see Code Civ. Proc. §§ 2002, 2015.5*; *Evid. Code §§ 702, 710*].

[6] Cross References

For discussion and forms relating to arbitration, including the availability of provisional remedies, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*

For additional cross references relating to complaints generally and to actions in which receivers might be appointed, see *§ 486.130[6]*

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43-486 California Forms of Pleading and Practice--Annotated § 486.134

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.134 Allegations and Prayer of Complaint for Appointment of Receiver--Action for Involuntary Dissolution of Corporation [Corp. Code § 1803]

[1] FORM Allegations and Prayer of Complaint for Appointment of Receiver--Action for Involuntary Dissolution of Corporation [Corp. Code § 1803]

1. Unless a receiver is appointed to take over and manage the business and affairs of the corporation and to preserve its property during the pendency of this action, the interests of both the corporation and its shareholders will suffer in that _____ [*specify facts showing that unless a receiver is appointed the interests of the corporation and its shareholders will suffer pending the determination of the action, e.g.,* because the corporation has an even number of directors equally divided who cannot agree as to the management of its affairs, the entire management of the corporation, as shown by the declaration of _____ (*name*) attached hereto as Exhibit "_____" and made a part hereof, has broken down with the following results]:

[*LIST corporate problems in successive subparagraphs as in the example below*]

a. Key middle managers and supervisors have terminated their employment with the corporation because of the prevailing chaos and lack of direction.

b. Morale of remaining employees is low and deteriorating.

c. No records are being maintained of employee attendance.

d. Records of accounts receivable have been misfiled, destroyed, or lost and cannot be found.

e. Records of current accounts payable were inadvertently mixed with the retired files (files more than 10 years old) and all of them shredded.

f. Inventories of corporate property have disappeared.

g. Office equipment and supplies have also disappeared.

WHEREFORE, plaintiff prays:

1. That a receiver be appointed to take over and manage the business and affairs of the corporation and to preserve its property pending the hearing and determination of this complaint for dissolution of the corporation.

[2] Use of Form

The allegations and prayer in [1], *above*, are for insertion in a verified complaint for involuntary dissolution of a corporation [*see Corp. Code § 1800* (specifying who may bring action, grounds for involuntary dissolution, and corporations to which statute does not apply)] as a basis for securing the appointment of a receiver to take over and manage the business and affairs of the corporation and to preserve its property when the interests of the corporation and its shareholders will suffer pending the hearing and determination of the complaint [*see Corp. Code § 1803*, discussed under [3], *below*]. If the complaint alleges facts sufficient to establish the ground for appointment, the complaint may be used to support either a noticed motion or an ex parte application for appointment of a receiver [*see Code Civ. Proc. §§ 1003, 1005*; *Cal. Rules of Ct., Rules 3.1175, 3.1177(a)*]. For discussion of the additional showing required when the application is made ex parte, see *§ 486.139[5]*. The allegations and prayer when inserted in a complaint for involuntary dissolution should be renumbered as appropriate.

Alternatively, the declarations attached to the complaint may be attached to a notice of motion for appointment of a receiver [*see Code Civ. Proc. §§ 2009, 2015.5*; *Cal. Rules of Ct., Rule 3.1177(a)*; for a form, *see § 486.143*] or to an ex parte application for appointment of a receiver [*see Code Civ. Proc. § 566(b)*; *Cal. Rules of Ct., Rule 3.1175*; for a form, *see § 486.139*].

Other grounds for appointing a receiver of a corporation are discussed in *§ 486.13[2]*.

[3] Grounds and Procedure

If, at the time the complaint for involuntary dissolution is filed or at any time thereafter, the court has reasonable grounds to believe that unless a receiver of the corporation is appointed the interests of the corporation and its shareholders will suffer pending the hearing and determination of the complaint, the court may, on the application of the plaintiff and after a hearing on such notice to the corporation as the court may direct and on the giving of security pursuant to *Code Civ. Proc. §§ 566* and *567*, appoint a receiver to take over and manage the business and affairs of the corporation and to preserve its property pending the hearing and determination of the complaint for dissolution [*Corp. Code § 1803*].

However, subject to any contrary provision in the corporation's articles, in any suit for involuntary dissolution initiated by the vote of shareholders representing only 50 percent of the voting power, the corporation, or, if it does not elect to do so, the holders of 50 percent or more of the voting power of the corporation, may avoid the dissolution and the appointment of a receiver by purchasing for cash the shares owned by the plaintiffs or by the shareholders initiating the proceedings at their fair value [*Corp. Code § 2000(a)*]. If the parties can't agree on the fair value and the parties electing to purchase give a bond to protect the plaintiffs or shareholders initiating the proceeding, the court on application of the purchasing parties must stay the action and proceed to ascertain and fix the fair value of the shares [*Corp. Code § 2000(b)*]. These provisions are mandatory and when the prescribed conditions are met the court must stay the proceedings and proceed to ascertain and fix the value of the shares owned by plaintiffs [*Merlino v. Fesno Macaroni Mfg. Co. (1944) 64 Cal. App. 2d 462, 464, 148 P.2d 884* (construing predecessor statute)].

[4] Ex Parte Appointment of Receiver

If ex parte appointment of a receiver is sought, additional facts must be shown in the verified complaint or an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*Cal. Rules of Ct., Rule 3.1175*; *see § 486.139[5]*].

[5] Verification

If the application for appointment of the receiver is be to based in any part on the complaint, then the complaint must be verified [*see Code Civ. Proc. §§ 2002, 2015.5*; *Evid. Code §§ 702, 710*].

[6] Cross Reference

For a form of complaint for involuntary dissolution of a corporation under *Corp. Code § 1800*, see Ch. 170, *Corporations: Dissolution and Winding Up*

For additional cross references relating to complaints generally and to actions in which receivers might be appointed, see *§ 486.130[6]*

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43-486 California Forms of Pleading and Practice--Annotated § 486.135

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.135 Allegations and Prayer of Complaint for Appointment of Receiver--Action by Creditor Against Insolvent Debtor and Debtor's Transferee to Set Aside Transfer of Property in Fraud of Creditors [Civ. Code § 3439.07(a)(3)(B); Code Civ. Proc. § 564(b)(1)]

[1] FORM Allegations and Prayer of Complaint for Appointment of Receiver--Action by Creditor Against Insolvent Debtor and Debtor's Transferee to Set Aside Transfer of Property in Fraud of Creditors [Civ. Code § 3439.07(a)(3)(B); Code Civ. Proc. § 564(b)(1)]

1. Defendant _____[*name*], ever since the transfer of the property as herein alleged, has been, and is now, in the receipt of and appropriating to his/her own use the income and profits of the property without the consent and against the will of plaintiff, and has failed, refused, and neglected, and continues to fail, refuse, and neglect, to account for them.

2. To prevent defendant _____[*name*] from continuing to misuse and misappropriate the profits and income of the property, it is necessary that a receiver be appointed to take possession of the property and to receive the profits and income therefrom pending the outcome of this action.

WHEREFORE, plaintiff prays:

1. That a receiver be appointed to take possession of the property, together with its profits and income, and to preserve the same during the pendency of this action.

[2] Use of Form

The allegation and prayer in [1], *above*, are for insertion in a verified complaint by a creditor against a debtor and the debtor's transferee to set aside a transfer of property made in fraud of creditors [*see Civ. Code § 3439.07*] as a basis for securing the appointment of a receiver to take charge of the asset transferred or its proceeds pending the outcome of the litigation [*see Civ. Code § 3439.07(a)(3)(B)*; *Code Civ. Proc. § 564(b)(1)*]. If the complaint alleges facts sufficient to

establish the fraudulent transfer and the ground for appointment, the complaint may be used to support either a noticed motion or an ex parte application for appointment of a receiver [*see Code Civ. Proc. §§ 1003, 1005*; *Cal. Rules of Ct., Rules 3.1175, 3.1177*]. For the additional showing required when the application is made ex parte, see *§ 486.139[5]*. The allegations and prayer when inserted in a complaint to set aside the fraudulent transfer should be renumbered as appropriate.

The above allegations, with appropriate modifications, may be incorporated in an ex parte application and declaration for appointment of a receiver [*see Code Civ. Proc. § 566(b)*; *Cal. Rules of Ct., Rule 3.1175*; for a form, *see § 486.139*]. Alternatively, they may be incorporated in an affidavit [*see Code Civ. Proc. §§ 2002(1), 2003*] or declaration under penalty of perjury in support of a noticed motion for appointment of a receiver or in support of an ex parte application for an order to show cause why a receiver should not be appointed [*see Code Civ. Proc. §§ 2009, 2015.5*; *Cal. Rules of Ct., Rule 3.1177*].

[3] Ex Parte Appointment of Receiver

If ex parte appointment of a receiver is sought, additional facts must be shown in the verified complaint or declaration [*Cal. Rules of Ct., Rule 3.1175*; *see § 486.139[5]*].

[4] Verification

If the application for appointment of the receiver is be to based in any part on the complaint, then the complaint must be verified [*see Code Civ. Proc. §§ 2002, 2015.5*; *Evid. Code §§ 702, 710*].

[5] Cross References

For forms of complaints for use in actions to set aside a fraudulent transfer, see Ch. 270, *Fraudulent Conveyances*

For additional cross references relating to complaints generally and to actions in which receivers might be appointed, see *§ 486.130[6]*

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43-486 California Forms of Pleading and Practice--Annotated § 486.136

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.136 Allegations and Prayer of Complaint for Appointment of Receiver--Action by Secured Creditor to Enforce Personal Property Security Agreement [Code Civ. Proc. § 564(b)(1)]

[1] FORM Allegations and Prayer of Complaint for Appointment of Receiver--Action by Secured Creditor to Enforce Personal Property Security Agreement [Code Civ. Proc. § 564(b)(1)]

1. On or about _____[*date*], defendant executed _____[*describe contract containing a personal property security agreement in favor of plaintiff with description of property in which plaintiff was granted a security interest*].

2. _____[*Allege facts showing that defendant breached the terms of the personal property security agreement*].

3. _____[*Allege facts showing that property in which plaintiff was granted a security interest is in danger of being lost, removed, or materially injured and that defendant is taking actions to deprive and deny plaintiff of the property in which it holds a security interest*].

4. Although plaintiff has demanded possession from defendant of the property in which it holds a security interest, and the proceeds thereof, defendant has failed and refused, and continues to fail and refuse to affirmatively respond to such demands, preferring instead to engage in the conduct herein alleged.

5. It is critical that a receiver be appointed at this time to marshal and safeguard the remaining property in which plaintiff holds a security interest to realize the remaining proceeds thereof, to open mail and recover all payments and sums for the benefit of plaintiff, and do all the acts necessary to protect the property.

6. Unless a receiver is appointed, defendant will continue to misappropriate, secrete, and wrongfully liquidate property in which plaintiff holds a security interest, all to the detriment and irreparable loss of the plaintiff.

7. Plaintiff has no speedy or adequate remedy at law and will suffer irreparable damage, injury and harm unless appropriate equitable relief is granted.

8. In accordance with the _____[*specify personal property security agreement*] plaintiff is entitled to enter the business premises of defendant and take possession of the property in which plaintiff holds a security interest and the records pertaining thereto and exercise all remedies under the California Code of Civil Procedure and California Commercial Code. Such remedies are consistent with plaintiff's request for a receiver, who in the natural course of carrying out his or her duties would protect the plaintiff from further injury while making certain that defendant receives credit to which it might be entitled.

9. For all the foregoing reasons, and in aid of the receiver, plaintiff also seeks a temporary restraining order, and preliminary and permanentinjunction, restraining and enjoining defendant from engaging in, or performing, directly or indirectly, any or all of the following acts:

a. Demanding, collecting, receiving, spending or in any other way converting or using any of the proceeds of the property in which plaintiff holds a security interest; and

b. Hiding, secreting, transferring, selling, pledging, granting a security interest in, or in any other manner disposing or hypothecating any of that property; and

c. Transferring, concealing, destroying, defacing or altering any of the instruments, documents, ledger cards, books, records, printouts or any other writings relating to the business of defendant; and

d. Transferring directly or indirectly any interest by sale, shipment of goods, pledge or grant of security interest, assignment, invoice or encumbering in any manner the property in which plaintiff holds a security interest more specifically described in the documents attached hereto and incorporated herein by this reference, and any and all proceeds or products thereof.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as to all causes of action, as follows:

A. By reason of plaintiff's cause of action for appointment of receiver:

1. For an appointment of a receiver *pendente lite* to manage, receive and collect the property in which plaintiff holds a security interest to the extent that the same is not in plaintiff's possession, including, without limitation, the proceeds therefrom; and

2. For the receiver to apply the same to the payment of principal and interest owing from defendant to plaintiff in accordance with orders of this Court and the parties' agreements; and

3. To uphold and carry into effect the terms of plaintiff's security interest; and

4. That the receiver have all other powers and duties referred to in the complaint, together with all other powers reasonably necessary to carry out his other duties and responsibilities, including, without limitation, authority, pursuant to orders of this Court, to sell the assets of defendant as a going concern or otherwise; and

5. For a temporary restraining order, and preliminary and permanent injunctions restraining and enjoining defendants from engaging in, or performing directly or indirectly, any or all of the following acts:

a. Demanding, collecting, receiving, spending or in any other way converting or using any of the property;

b. Transferring, selling, pledging, granting a security interest in or in any other manner disposing or hypothecating any of the property;

c. Transferring, concealing, destroying, defacing or altering any of the instruments, documents, ledger cards, books, records, printouts or any other writings relating to the business of defendant;

d. Transferring directly or indirectly any interest by sale, shipment of goods, pledge or grant of security interest, assignment, invoice or encumbering in any manner the property in which plaintiff holds a security interest specifically described in the documents attached hereto and incorporated herein by this reference, and any and all proceeds or products thereof.

[2] Use of Form

The allegations and prayer in [1], *above*, are for insertion in a complaint to appoint a receiver to enforce a personal property security interest. The complaint alleges that the plaintiff has an interest in certain personal property by virtue of the defendant having executed a security agreement and that the plaintiff's security is in danger of being lost, removed or materially injured (Paragraph 3) [*Code Civ. Proc. § 564(b)(1)*].

[3] Ex Parte Appointment of Receiver

If ex parte appointment of a receiver is sought, additional facts must be shown in the verified complaint or declaration [*Cal. Rules of Ct., Rule 3.1175*; for a form, *see § 486.139[5]*].

[4] Verification

If the application for appointment of the receiver is be to based in any part on the complaint, then the complaint must be verified [*see Code Civ. Proc. §§ 2002, 2015.5*; *Evid. Code §§ 702, 710*].

[5] Cross References

For forms of complaints for use in litigation involving a security interest in personal property, see Ch. 503, *Sales: Secured Transactions*

For additional cross references relating to complaints generally and to actions in which receivers might be appointed, see *§ 486.130[6]*

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43-486 California Forms of Pleading and Practice--Annotated § 486.137

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.137 Proceedings for Appointment of Receiver--Declaration Under Penalty of Perjury in Support of Motion for Order Appointing Receiver to Enforce Personal Property Security Agreement

[1] FORM Proceedings for Appointment of Receiver--Declaration Under Penalty of Perjury in Support of Motion for Order Appointing Receiver to Enforce Personal Property Security Agreement

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	DECLARATION AND EX PARTE APPLICATION
Plaintiff,	)	FOR ORDER APPOINTING RECEIVER AND OR-
vs.	)	DER TO SHOW CAUSE WHY APPOINTMENT
_____ [*name*],	)	SHOULD NOT BE CONFIRMED
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____[*name*], declare:

1. I am _____[*identify declarant, e.g.,* employed as an account manager by the plaintiff in the above-entitled action].

2. I am one of the custodians of the books, records, files and credit records of plaintiff as those books, records, files and credit records pertain to loans or extensions of credit made by plaintiff to defendant. I personally have worked on those books, records, files and credit records and, as to the following facts, I know them to be true of my own knowledge or have gained knowledge of them from the business records of plaintiff, records which are maintained in the ordinary course of plaintiff's business. I could and would testify competently to the facts set forth in this declaration if called as a witness since those facts are personally known by me to be true.

3. The records of plaintiff as they pertain to the loans and extensions of credit which are the subject of this case are kept in the regular course of plaintiff's business, and the records are carefully prepared to reflect all acts, conditions and events at or near the time those acts, conditions and events occurred. Based upon my personal knowledge and experience with plaintiff, I know that these records are accurate and trustworthy.

4. I have personally reviewed the complaint filed in this case, verified the same, and hereby adopt that verified complaint, which is incorporated herein by this reference, as though set forth in full.

5. _____[*Describe general nature of defendant's business and its operations and set forth the principal place of business of defendant*].

6. _____[*Set forth facts showing defendant's execution of a personal property security agreement in favor of plaintiff and property in which plaintiff was granted a security interest*].

7. _____[*Set forth facts showing defaults that have occurred under the terms of the personal property security agreement*].

8. Plaintiff will be irreparably harmed unless a receiver is immediately appointed to take possession of the property of defendant in which plaintiff holds a security interest. Unless an ex parte receiver is appointed immediately, defendant will continue to utilize and unlawfully dispose of property in which plaintiff holds a security interest. Once this property is disposed of, it will be forever lost and available to plaintiff as a source of repayment of the obligations owed by defendant to plaintiff.

9. _____[*Set forth additional dangers to property in which plaintiff holds a security interest, e.g.,* the immediate appointment of a receiver is necessary to protect the personal property of defendant in which plaintiff holds a security interest because the property is small in size, and can be easily disposed of and/or secreted].

10. In view of all the foregoing circumstances, plaintiff contends that it is appropriate that a receiver be appointed over defendant on an ex parte basis. Alternatively, in the event that the Court is not inclined to appoint a receiver immediately, it should issue a restraining order prohibiting defendant from disposing of any property of defendant in which plaintiff holds a security interest pending a hearing on an order to show cause re appointment of receiver.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

The form of declaration and ex parte application in [1], *above,* is for use to obtain an order appointing a receiver to take immediate possession of property in which the plaintiff has a security interest and order to show cause why appointment should not be confirmed [*see Code Civ. Proc. § 566(b)*; *Cal. Rules of Ct., Rule 3.1175*; *see also* discussion in *§ 486.15*;

for the number of copies to prepare and procedures to follow, *see § 486.90[2]*]. The form must be accompanied by a declaration regardingnotice to the other parties [*Cal. Rules of Ct., Rule 3.1204*] and by a supporting memorandum [*see Cal. Rules of Ct., Rules 3.1112(a), 3.1113(a)*].

[3] Notice to Opposing Party

The application must be accompanied by an affidavit or declaration showing one of the following [*Cal. Rules of Ct., Rule 3.1204(b)*]:

- Within a reasonable time before the application the party informed the opposing party or the opposing party's attorney when and where the application would be made, including the date, time, manner, and name of the party informed, any response, and whether any opposition is expected.

- The party in good faith attempted to inform the opposing party and the opposing party's attorney but was unable to do so, specifying the efforts made to inform them.

- For reasons specified the party should not be required to inform the opposing party or the opposing party's attorney.

The declaration or affidavit must also state the name, address, and telephone number of any attorney known to the applicant to be an attorney for any party or, if no such attorney is known, the name, address, and telephone number of such party if known to the applicant [*Cal. Rules of Ct., Rule 3.1202(b)*]. The party seeking the ex parte order must notify all parties no later than 10:00 a.m. the court day before the ex parte appearance, absent a showing of exceptional circumstances [*Cal. Rules of Ct., Rule 3.1203*; *see also Cal. Rules of Ct., Rule 3.1204* (contents of notice)].

Cal. Rules of Ct., Rule 3.1204 does not require that the notification be given in writing, and, therefore, it would appear that the notification may be written or oral.

For further discussion, a procedural checklist of other documents that must accompany the application, and forms of declaration in support of ex parte applications, see Ch. 372, *Motions and Orders* .

[4] Nature of Ex Parte Appointment

The appointment of a receiver on ex parte application is a drastic remedy and is seldom warranted [*see Golden State Glass Corp. v. Superior Ct. (1939) 13 Cal. 2d 384, 393, 90 P.2d 75]* . Such an order should be made only in cases of emergency which make it imperatively necessary to act at once without notice [*Turner v. Superior Court (1977) 72 Cal. App. 3d 804, 810 n.2, 140 Cal. Rptr. 475]* . On the other hand, when such necessity or emergency is shown, a receiver may be appointed [*see People v. Christ's Church (1947) 79 Cal. App. 2d 858, 862, 181 P.2d 49* ; *Misita v. Distillers Corp., Ltd. (1942) 54 Cal. App. 2d 244, 250, 128 P.2d 888]* . But even in an extreme case, the appointment of a receiver on ex parte application willbe made only if less onerous remedies would be inadequate or are unavailable [*see § 486.12[2]*].

[5] Showing Required

[a] Mandatory Requirements

In addition to showing that the action or proceeding is one in which a receiver may properly be appointed and the facts establishing the ground of the motion (*see generally Code Civ. Proc. § 564*, and discussion in *§ 486.13*), an ex parte applicant for appointment of a receiver must show in detail the following [*Cal. Rules of Ct., Rule 3.1175(a)*]:

- The nature of the emergency and the reasons irreparable injury would be suffered by the applicant

during the time necessary for a hearing.

- The names, addresses, and phone numbers of the persons in actual possession of the property for which a receiver is requested, or of the president, manager, or principal agent of any corporation in possession of the property.

- The use being made of the property by the persons in possession.

- If the property is a part of the plant, equipment, or stock in trade of any business, the nature and approximate size or extent of the business, and facts sufficient to show whether the taking of the property by a receiver would stop or seriously interfere with the operation of the business.

The requirements of *Cal. Rules of Ct., Rule 3.1175* are mandatory and must be met before a receiver is appointed on ex parte application [*see Turner v. Superior Court (1977) 72 Cal. App. 3d 804, 810 n.2, 140 Cal. Rptr. 475* (citing former Cal. Rules of Ct, Rule 238, the predecessor of *Cal. Rules of Ct., Rule 3.1175*)].

[b] Unknown Matters

If any of these matters are unknown to the applicant and cannot be ascertained by the exercise of due diligence, the applicant's declaration or verified complaint must fully state the matters unknown and the efforts made to acquire the information [*Cal. Rules of Ct., Rule 3.1175*].

[c] Verification

The showing required to have a receiver appointed on ex parte application may be made by verified complaint or declaration [*Cal. Rules of Ct., Rule 3.1175*]. For sample forms of allegations and prayers that may be included in a complaint alleging the ground or grounds for the appointment, see *§§ 486.130 -486.133*.

[6] Cross References

For discussion and forms of noticed and ex parte motions and orders on a motion, see Ch. 372, *Motions and Orders*

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Chapter 486 RECEIVERS
PART V. FORMS
A. Appointment of Receivers

43-486 California Forms of Pleading and Practice--Annotated § 486.138

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.138 Allegations and Prayer of Complaint for Appointment of Receiver--Action by Secured Creditor to Appoint Receiver to Inspect for Hazardous Substances [Code Civ. Proc. § 564(c)]

[1] FORM Allegations and Prayer of Complaint for Appointment of Receiver--Action by Secured Creditor to Appoint Receiver to Inspect for Hazardous Substances [Code Civ. Proc. § 564(c)]

1. On or about _____[*date*] _____[*allege that defendant executed a deed of trust or mortgage in favor of plaintiff granting plaintiff a security interest in real property*].

[*EITHER*]

2. On or about _____[*date*] plaintiff commenced _____[judicial *or* non-judicial] foreclosure proceedings against the real property security.

[*OR*]

2. On or about _____[*date*] plaintiff became aware that _____[*allege facts showing that plaintiff has a reasonable belief as to the existence of a past or present release or threatened release of a hazardous substance into, onto, beneath, or from the real property* S]. This _____[release *or* threatened release] was not previously disclosed in writing to the plaintiff in conjunction with the _____[making *or* renewal *or* modification *or* any combination of these] of the loan alleged above.

[*CONTINUE*]

3. On or about _____[*date*] plaintiff _____[*allege plaintiff's attempts to inspect the*

real property]. Defendant, in contravention of plaintiff's rights as a secured lender in *Civ. Code § 2929.5*, refused plaintiff the right to inspect the real property which is the subject of the _____[deed of trust *or* mortgage].

4. _____[*Allege that receiver should be appointed to enable plaintiff as the secured lender to enter and inspect the real property which is the subject of the deed of trust or mortgage for the purpose of determining the existence, location, nature and magnitude of any past or present release or threatened release of any hazardous substance into, onto, beneath or from the real property security*].

WHEREFORE, plaintiff prays:

1. That a receiver be appointed, enter upon and inspect the real property for the purpose of determining the existence, location, nature and magnitude of any past or present release or threatened release of any hazardous substance into, onto, beneath or from the real property security.

[2] Use of Form

The allegation and prayer in [1], *above*, are for insertion in a verified complaint to enforce inspection rights given to a real property securedlender set forth in *Civ. Code § 2929.5*. A complaint to appoint a receiver may be filed in the event the defendant refuses the secured lender its right to inspect its real property security to determine the existence, location, nature and magnitude of any past or present release or threatened release of hazardous substances into, onto, beneath or from the real property security. The real property secured lender's inspection demand may be made after the commencement of non-judicial or judicial foreclosure proceedings on the real property security or upon the real property secured lender having a reasonable belief as to the existence of a past or present release or threatened release of a hazardous substance into, onto, beneath or from the real property security not previously disclosed in writing to the secured lender in conjunction with the making, renewal or modification of a loan involving the defendant borrower [*Civ. Code § 2929.5(a)*].

If the complaint alleges facts sufficient to establish the above grounds, it may be used to support in whole or in part either a noticed motion or an ex parte application for appointment of a receiver pending the hearing and determination of the complaint [*see Cal. Rules of Ct., Rules 3.1175(a), 3.1177*; for forms, *see §§ 486.139, 486.143*]. For discussion of the additional showing required when the application for appointment of a receiver is made ex parte, see *§ 486.139[5]*.

The allegations in [1] *above*, with appropriate modifications, may be incorporated in an ex parte application and declaration for appointment of a receiver [*see Code Civ. Proc. § 566(b)*; *Cal. Rules of Ct., Rule 3.1175*]. Alternatively, they may be incorporated in an affidavit (*see Code Civ. Proc. §§ 2002(1), 2003*) or declaration under penalty of perjury in support of a noticed motion for appointment of a receiver [*see § 486.144*] or in support of an ex parte application for an order to show cause why a receiver should not be appointed [*see Code Civ. Proc. §§ 2009, 2015.5*; *Cal. Rules of Ct., Rule 3.1177* (referring to appointment of receiver "on notice," which would include both notice of motion and order to show cause why receiver should not be appointed)].

[3] Allegations

The form in [1], *above*, alleges that the defendant has executed a real property security instrument in favor of the plaintiff (Paragraph 1), and that the real property secured lender has previously commenced non-judicial or judicial foreclosure proceedings or has a reasonable belief as to the existence of a past or present release or threatened release of hazardous substance into, onto, beneath or from the real property security not previously disclosed in writing to the real property secured lender in connection with the making, renewal or modification of a loan, letter of credit, guaranty or other obligation involving the defendant (alternative Paragraphs 2). It then alleges that the plaintiff has sought to inspect the property for the purpose of determining the existence, location, nature and magnitude or any past or present release

or threatened release of anyhazardous substance into, onto, beneath or from the real property security as authorized by *Civ. Code § 2929.5*, but that the defendant has refused the plaintiff access to inspect the real property security (Paragraph 3).

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Chapter 486 RECEIVERS
PART V. FORMS
A. Appointment of Receivers

43-486 California Forms of Pleading and Practice--Annotated § 486.139

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.139 Proceedings for Appointment of Receiver Pendente Lite--Declaration and Ex Parte Application for Order Appointing Receiver and Order to Show Cause Why Appointment Should Not Be Confirmed [Code Civ. Proc. §§ 566(b), 2009, 2015.5; Cal. Rules of Ct., Rules 3.1175, 3.1176(a)]

[1] FORM Proceedings for Appointment of Receiver Pendente Lite--Declaration and Ex Parte Application for Order Appointing Receiver and Order to Show Cause Why Appointment Should Not Be Confirmed [Code Civ. Proc. §§ 566(b), 2009, 2015.5; Cal. Rules of Ct., Rules 3.1175, 3.1176(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION AND EX PARTE APPLICATION
vs.	)	FOR ORDER APPOINTING RECEIVER AND OR-
_____ [*name*],	)	DER TO SHOW CAUSE WHY APPOINTMENT
Defendant.	)	SHOULD NOT BE CONFIRMED [AND DECLAR-
	)	ATION(S) OF _____ (name(s))]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date:_____

_____

I, _____[*name*], declare:

1. I am the [attorney of record for the] _____[*identify party, e.g.,* plaintiff] herein.

2. _____ [*Specify facts showing that action is one in which appointment of a receiver is authorized, e.g.,* As shown by the verified complaint herein, this is an action to dissolve a partnership and for an accounting. As further shown by that complaint, (a) the partnership was formed by written agreement between the parties on _____ (*date*) to own and operate a business known as _____ (*name*) to buy and market gold and silver bullion; (b) defendant was the managing partner and he/she alone was authorized to draw checks on partnership accounts; (c) the business was enormously successful grossing in excess of $_____ for the fiscal year _____; and (d) since on or about _____ (*date*), defendant has excluded plaintiff from in any way participating in the management or conduct of the business and has failed and refused, and continues to fail and refuse, to account to plaintiff for either any or all of the profits)].

3. _____[*State nature of emergency, e.g.,* As further shown by the verified complaint, defendant, contrary to his/her agreement with, and without any notice to, plaintiff, has left the country and has expressed an intent not to return; before leaving, he/she ceased operating the business and withdrew all balances from the accounts held by him/her in both his/her personal name and under the firm's name; the remaining assets of the partnership consist of specified personal property, including art objects purchased with partnership funds, and of a stock of gold and silver bullion, all of which is in immediate danger of being removed from the jurisdiction of this court and will be removed if a receiver is not immediately appointed to take possession of them].

4. _____[*State reasons why irreparable injury would be suffered by applicant during time necessary for hearing on notice, e.g.,* If the appointment of a receiver is delayed until after defendant is given notice, defendant will accelerate his/her plans for removal of the property out of the country where it will be dispersed and difficult, if not impossible, to trace and recover, and plaintiff will thereby be deprived of any source from which to receive payment of his/her share of the partnership profits as subsequently determined by the judgment of this court, all to plaintiff's irreparable injury].

5. _____ [*State name(s), address(es), and phone number(s) of person(s) in actual possession of property for which receiver is requested, or of president, manager, or principal agent of any corporation in possession of property, e.g.,* As shown by the declaration of _____ (*name*), attached hereto, the specified personal property, including the art objects, and gold and silver bullion, are in that declarant's possession under instructions from the defendant to make all arrangements for their shipment to _____ (him/her *or other designated consignee*) on further notice from defendant but no later than _____ (*date*). The address and telephone number of _____ (*name of declarant in possession*) are _____].

6. _____ [*Specify use being made of property by person(s) in possession, e.g.,* As shown by the declaration of _____ (*name*), attached hereto, _____ (*name of declarant in possession*) is making no use of the property; he/she has had the property and bullion boxed and crated and is holding it until arrangements are completed for their shipment out of the country].

[7. _____ (*If property is part of the plant, equipment, or stock in trade of any business, specify the nature and approximate size or extent of the business and facts sufficient to show whether receiver's taking of property would stop or seriously interfere with operation of the business, e.g.,* Although the specified items of personal property, other than the art objects, described in the verified complaint are part of the equipment of the partnership business and the gold and silver bullion are its stock in trade, the partnership has ceased doing any business and will be dissolved onthe judgment of this court; consequently, the taking of the property by a receiver would in no way stop or seriously interfere with the operation of the business.]

[8. _____ (*If any of the matters enumerated in paragraphs 3-7, above, are unknown to the applicant*

and cannot be ascertained with due diligence, state fully matters unknown and efforts made to acquire information).]

WHEREFORE, _____[*specify party, e.g.,* plaintiff] _____[*name*] requests an order appointing a receiver to take immediate possession of _____ [*describe property, e.g.,* the gold and silver bullion and all other property placed by _____ (*name of partner*) in the custody of _____ (*name*) for shipment abroad] and to _____[*specify powers to be given to receiver, e.g.,* preserve and care for the property] pending further order of this Court and for an order to show cause why the appointment should not be confirmed.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form of declaration and ex parte application in [1], *above,* is for use to obtain an order appointing a receiver to take immediate possession or charge of property involved in litigation and for an order to show cause why the appointment should not be confirmed [*see Code Civ. Proc. § 566(b)*; *Cal. Rules of Ct., Rule 3.1175*; *see also* discussion in *§ 486.15*].

The form must be accompanied by a declaration regarding notice to the other parties [*Cal. Rules of Ct., Rule 3.1204(b)*] and by a supporting memorandum [*see Cal. Rules of Ct., Rules 3.1112(a), 3.1113(a), 3.1176(b)*].

For the number of copies to prepare and procedure to follow, see *§ 486.90[2]*.

[3] Notice to Opposing Party

An application for ex parte relief must be accompanied by an affidavit or declaration showing that notice has been given, attempted to be given, or stating reasons why notice should not be required [*Cal. Rules of Ct., Rule 3.1204*]. For discussion, see *§ 486.137[3]*.

[4] Nature of Ex Parte Appointment

The appointment of a receiver on ex parte application is a drastic remedy and is seldom warranted [*see Golden State Glass Corp. v. Superior Ct. (1939) 13 Cal. 2d 384, 393, 90 P.2d 75]* . Such an order should be made only in cases of emergency which make it imperatively necessary to act at once without notice [*Turner v. Superior Court (1977) 72 Cal. App. 3d 804, 810 n.2, 140 Cal. Rptr. 475]* . On the other hand, when necessity or emergency is shown, a receiver may be appointed [*see People v. Christ's Church (1947) 79 Cal. App. 2d 858, 862, 181 P.2d 49* ; *Misita v. Distillers Corp., Ltd. (1942) 54 Cal. App. 2d 244, 250, 128 P.2d 888]* . But even in an extreme case, the appointment of a receiver on ex parte application will be made only if less onerous remedies would be inadequate or are unavailable [*see § 486.12[2]*].

[5] Showing Required

[a] Mandatory Requirements

In addition to showing that the action or proceeding is one in which a receiver may properly be appointed and the facts establishing the ground of the motion (*see, generally, Code Civ. Proc. § 564*, and discussion in *§ 486.13*), an ex parte applicant for appointment of a receiver must show in detail the following [*Cal. Rules of Ct., Rule 3.1175(a)*]:

- The nature of the emergency and the reasons irreparable injury would be suffered by the applicant during the time necessary for a hearing.

- The names, addresses, and phone numbers of the persons in actual possession of the property for which a receiver is requested, or of the president, manager, or principal agent of any corporation in possession of the property.

- The use being made of the property by the persons in possession.

- If the property is a part of the plant, equipment, or stock in trade of any business, the nature and approximate size or extent of the business, and facts sufficient to show whether the taking of the property by a receiver would stop or seriously interfere with the operation of the business.

The requirements of *Cal. Rules of Ct., Rule 3.1175* are mandatory and must be met before a receiver is appointed on ex parte application [*see Turner v. Superior Court (1977) 72 Cal. App. 3d 804, 810 n.2, 140 Cal. Rptr. 475* (citing former Cal. Rules of Ct, Rule 238, the predecessor of *Cal. Rules of Ct., Rule 3.1175*)].

[b] Unknown Matters

If any of these matters are unknown to the applicant and cannot be ascertained by the exercise of due diligence, the applicant's declaration or verified complaint must fully state the matters unknown and the efforts made to acquire the information [*Cal. Rules of Ct., Rule 3.1175*].

[c] Verification

The showing required to have a receiver appointed on ex parte application may be made by verified complaint or declaration [*Cal. Rules of Ct., Rule 3.1175(a)*]. For sample forms of allegations and prayers that may be included in a complaint alleging the ground or grounds for the appointment, see *§§ 486.130 -486.133*.

[6] Cross References

For discussion and forms of noticed and ex parte motions and orders on a motion, see Ch. 372, *Motions and Orders*

For points and authorities supporting and opposing the appointment or confirmation of a receiver, see California Points and Authorities, Ch. 200, *Receivers* (Matthew Bender)

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A. Appointment of Receivers

43-486 California Forms of Pleading and Practice--Annotated § 486.140

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.140 Proceedings for Appointment of Receiver Pendente Lite--Order Fixing Amount of Undertaking to Be Filed by Ex Parte Applicant for Appointment of Receiver [Code Civ. Proc. § 566(b)]

[1] FORM Proceedings for Appointment of Receiver Pendente Lite--Order Fixing Amount of Undertaking to Be Filed by Ex Parte Applicant for Appointment of Receiver [Code Civ. Proc. § 566(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

WHEREAS *Section 566(b) of the Code of Civil Procedure* provides that before a receiver is appointed on ex parte application the Court must require from the applicant an undertaking in an amount fixed by the Court for the defendant's protection,

IT IS ORDERED that plaintiff file an undertaking, or bond, in the amount of $_____.
Dated: _____

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The order in [1], *above*, is for use to fix the amount of the undertaking required to be filed by the ex parte applicant for the appointment of a receiver before the court makes the order of appointment. An order appointing a receiver on ex parte application is void unless the applicant's undertaking is fixed and filed [*Sweins v. Superior Court (1936) 16 Cal. App. 2d 336, 60 P.2d 313* ; *Westphal v. Superior Court (1932) 120 Cal. App. 263, 264, 7 P.2d 711* ; *Ryan v. Murphy (1919) 39 Cal. App. 640, 643, 179 P. 517]* . For a combined form of order appointing a receiver, orders setting the amounts of the applicant's and the receiver's undertakings, and order to show cause why the appointment should not be confirmed, see *§ 486.141*.

In the case of a receivership to take charge of rents, issues, and profits under *Code Civ. Proc. § 564(b)(11)*, counsel may prefer to use optionalJudicial Council Form RC-200, which provides for plaintiff's ex parte bond at Item 8. RC-200 is illustrated in Ch. 555, *Trust Deeds and Real Property Mortgages*.

[3] Form and Content of Undertaking

The undertaking must be to the effect that the applicant will pay to the defendant all damages the defendant may sustain by reason of the appointment of the receiver and the entry by the receiver on his or her duties, in case the applicant shall have procured the appointment wrongfully, maliciously, or without sufficient cause [*Code Civ. Proc. § 566(b)*; *see Havemeyer v. Superior Court (1890) 84 Cal. 327, 366, 24 P. 121]* . In the case of multiple defendants, the undertaking should run in favor of each defendant in the action and should be in such form that any defendant would have a right of action on it if he or she is damaged by the appointment [*Title etc. Trust Co. v. California Dev. Co. (1912) 164 Cal. 58, 65, 127 P. 502]* .

The undertaking may be in the form of an undertaking given by personal sureties or of a bond issued by an admitted surety insurer [*see Code Civ. Proc. §§ 995.210(b), 995.310, 995.610(a)*]. A form of bond or undertaking is set forth in *Code Civ. Proc. § 995.330*. The bond or undertaking must be filed with the court, preserved in the office of the clerk of the court, and appropriate entries made in the court's register of actions [*Code Civ. Proc. §§ 995.340, 995.350*].

[4] Amount of Undertaking

The amount of the undertaking would normally be the amount that would cover the value of transferable personal property and cash which the receiver may possess at any point in time during the expected period of the receivership.

At the hearing to appoint a receiver, the applicant must, and other parties may, propose and state the reasons for the specific amounts of the undertakings required from the applicant for any injunction that is ordered in or with the order appointing a receiver [*Cal. Rules of Ct., Rule 3.1178*].

[5] Cross References

For discussion and forms of bonds and undertakings, see Ch. 538, *Suretyship, Bonds, and Undertakings*

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A. Appointment of Receivers

43-486 California Forms of Pleading and Practice--Annotated § 486.141

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.141 Proceedings for Appointment of Receiver Pendente Lite--Order Appointing Receiver and Fixing Amounts of Undertakings [Code Civ. Proc. §§ 566(b), 567(b)], and Order to Show Cause Why Appointment of Receiver Should Not Be Confirmed [Cal. Rules of Ct., Rule 3.1176(a)]

[1] FORM Proceedings for Appointment of Receiver Pendente Lite--Order Appointing Receiver and Fixing Amounts of Undertakings [Code Civ. Proc. §§ 566(b), 567(b)], and Order to Show Cause Why Appointment of Receiver Should Not Be Confirmed [Cal. Rules of Ct., Rule 3.1176(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

Having considered the declaration and ex parte application of _____[*identify moving party, e.g.,* plaintiff] _____[*name*] for an order appointing a receiver [and the verified complaint herein *or* the affidavit(s) of _____ (*name(s)*) *or* the declaration(s) of _____ (*name(s)*) *or any combination of the foregoing*], and the Court having determined that (1) good cause exists for the appointment of a

receiver; (2) _____[*identify moving party, e.g.,* plaintiff] would suffer irreparable injury during the time necessary for a hearing on notice; (3) _____[*identify moving party, e.g.,* plaintiff] must execute and file an undertaking in the amount of $_____ to the effect that the _____[*identify moving party, e.g.,* plaintiff] will pay to the _____[*identify opposing party, e.g.,* defendant] all damages the _____[*identify opposing party, e.g.,* defendant] may sustain by reason of the appointment of the receiver and the entry by the receiver on his/her duties, in case the _____[*identify moving party, e.g.,* plaintiff] shall have procured the appointment wrongfully, maliciously, or without sufficient cause; and (4) _____[*name of proposed receiver*] is qualified to act as a receiver in this case,

IT IS ORDERED that:

1. _____[*Name of proposed receiver*] is appointed receiver in this _____[*action or proceeding*].

2. On qualifying to act as receiver herein by the taking and filing of an oath to perform his/her duties as receiver faithfully and securing and filing an undertaking or bond to the State of California in the amount of$_____ to the effect that _____[*name of receiver*] will faithfully discharge the duties of receiver in the action and obey the orders of the Court, _____[*name of receiver*], as receiver, shall take possession of _____[*describe property*] and _____[manage *or* operate *or* preserve *or* maintain *or other or any combination of the foregoing*] the property pending further order of this Court [and, in exercising the foregoing functions, the receiver shall have the following powers in addition to those specified by law: _____ (*specify*)].

3. The receiver shall take possession of all the books and records pertaining to the property of the defendant, wherever located, as the receiver deems necessary for the proper administration, management and/or control of the estate, but the books and records shall be made available to defendant as is reasonably necessary;

4. To execute and prepare all documents and to perform all acts, either in the name of the defendant or in the receiver's own name, which are necessary or incidental to preserving, protecting, managing and/or controlling the property of the receivership estate;

5. To employ agents, servants, employees, guards, clerks, accountants, on-site managers and management consultants to administer the receivership estate, manage the property and keep the same insured and in good repair, if the receiver shall deem the same necessary, and to pay the reasonable value of those services out of the rents received;

6. The defendant shall notify the receiver upon the receiver's taking possession of the property whether or not there is sufficient insurance coverage on the property. If sufficient insurance coverage does exist, the defendant shall be responsible for naming, and is hereby ordered to name, the receiver as an additional insured on the insurance policy or policies for the period that the receiver shall be in possession of the property. If there is insufficient insurance coverage, it is hereby ordered that the receiver shall have thirty (30) working days to procure insurance on the property, providing that the receiver has funds available to do so, and during that period the receiver shall not be personally responsible for claims arising or for the procurement of insurance;

7. The monies coming into possession of the receiver pursuant to his or her operation of the business thereto, and not expended for any of the purposes herein authorized, shall be held by the receiver for the payment of the Defendants' obligation to plaintiff sued upon in the complaint, subject to such orders as this Court may hereinafter issue as to their disposition;

8. To establish bank accounts for the deposit of monies and funds collected and received in connection with his or her administration of the receivership estate, at any financial institution the receiver deems appropriate, provided that any

funds on deposit at the financial institution are fully insured by an agency of the United States government;

9. To institute ancillary proceedings in this state or other states and countries as are necessary to preserve and protect the receivership estate, and the receiver may engage the services of legal counsel, if necessary, upon further application to the Court. The receiver may pay for such services from the funds of the receivership estate;

10. To the extent feasible, the receiver shall, within thirty (30) days of his or her qualification hereunder, file in this action an inventory of all property of which he shall have taken possession pursuant to this order and shall conduct periodic accountings thereafter;

11. To prepare periodic interim statements reflecting the receiver's fees and administrative costs and expenses incurred for that interim period in the operation and administration of the receivership estate. Upon completion of an interim statement, and the mailing of the statement to the parties' respective attorneys of record, or any other designated person or agent, the receiver shall pay from the estate funds, if any, the amount of that statement based upon the fee schedule set forth in the declaration of the receiver filed in support of plaintiff's motion for appointment of a receiver. Despite the periodic statement of receiver's fees and administrative expenses, such fees and expenses shall be submitted to the Court for its approval and confirmation, in the form of a notice of an interim request for fees, an agreement among the parties, or the receiver's final accounting and report;

12. The receiver shall take possession of all the books and records of defendant wherever located, as the receiver deems necessary for the proper administration, management, and/or control of the estate;

13. The receiver, or any party to this action, may, from time to time and on due notice to all parties, make application to this Court for further orders instructing the receiver.

IT IS FURTHER ORDERED that the defendant, and all persons and entities now in possession of any part of the Subject Property and not holding under valid leases or rental agreements, shall forthwith surrender their possession thereof to the receiver, and that all tenants or lessees in possession of any part of the Subject Property, and any other persons or entities as may be lawfully in possession thereof, are hereby directed, until further order of this Court, to pay over to the receiver all rents of the Subject Property now due and unpaid or that may hereafter become due, and all persons and entities liable for such rents are hereby enjoined and restrained from paying any rents for the Subject Property to the defendant, its agents, servants or attorneys.

IT IS FURTHER ORDERED that _____[*identify opposing party, e.g.,* defendant] _____[*name*] appear in [_____ (Department *or* Division) _____ (*number*) of] this Court, located at _____[*street address and city*], California, on _____[*date*] at _____[*time*] and show cause, if any he/she has, why the appointment of the receiver should not be confirmed.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form in [1], *above,* is for use when the court grants an ex parte application for the appointment of a receiver and an order to show cause. The order to show cause must be made returnable on the earliest date that the business of the court will admit, but not later than 15 days from the date of the order or, if good cause appears to the court, 22 days from the date the order is issued [*Cal. Rules of Ct., Rule 3.1176(a)*].

In the case of a receivership to take charge of rents, issues, and profits under *Code Civ. Proc. § 564(b)(11)*, counsel may prefer to use Judicial Council Form RC-200, an ex parte order appointing receiver and order to show cause. RC-200 is illustrated in Ch. 555, *Trust Deeds and Real Property Mortgages*.

[3] Order Appointing Receiver

An order appointing a receiver is erroneous if it fails to define the scope of the receivership or to describe the property to be affected by it. The property must be sufficiently described so that the receiver can take possession of it [*Ryan v. Murphy (1919) 39 Cal. App. 640, 642, 179 P. 517]* . Thus, the order must describe the property of which the receiver is to take possession with sufficient certainty, although in certain cases the order may require the receiver to take possession of "all the property" of the party affected [*Havemeyer v. Superior Court (1890) 84 Cal. 327, 387, 24 P. 121]* .

The court may order not only the party, but the party's agents and employees, to deliver property to the receiver, but the fact that the order describes specific property does not give the receiver a right to take the property from the possession of a stranger to the action who claims to be a good-faith purchaser of it [*Havemeyer v. Superior Court (1890) 84 Cal. 327, 387, 24 P. 121]* .

For a discussion of the receiver's duties, see *§ 486.30* et seq.

[4] Undertakings

The order of appointment is not effective until the applicant's undertaking in the amount specified by the court is filed [*see Code Civ. Proc. § 566(b)*] and the receiver cannot embark on his or her duties until he or she has taken the required oath and filed the required undertaking in the sum specified by the court [*Code Civ. Proc. § 567*].

At the hearing to appoint a receiver, the applicant must, and other parties may, propose and state the reasons for the specific amounts of theundertakings required from the applicant for any injunction that is ordered in or with the order appointing a receiver [*Cal. Rules of Ct., Rule 3.1178*].

[5] Service of Papers

As soon as reasonably practical, but no later than 5 days after the date on which the order to show cause is issued, unless the court orders another time for service, the applicant must serve the following on each of the adverse parties [*Cal. Rules of Ct., Rule 3.1176(b)*]:

- A copy of the complaint if not previously served;
- The order to show cause stating the date, time, and place of the hearing;
- Any declarations supporting the application; and
- A memorandum supporting the application.

For further discussion, see *§ 486.90[2]*.

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Chapter 486 RECEIVERS
PART V. FORMS
A. Appointment of Receivers

43-486 California Forms of Pleading and Practice--Annotated § 486.142

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.142 Proceedings for Appointment of Receiver Pendente Lite--Order Confirming Appointment of Receiver [Cal. Rules of Ct., Rule 3.1176(a)]

[1] FORM Proceedings for Appointment of Receiver Pendente Lite--Order Confirming Appointment of Receiver [Cal. Rules of Ct., Rule 3.1176(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

On _____[*date*], this Court, on the ex parte application of _____[*identify party, e.g.,* plaintiff] _____[*name*], appointed _____[*name*] as receiver of _____[*describe property*] and ordered _____[*identify opposing party, e.g.,* defendant] to appear and show cause if any he/she had why the appointment should not be confirmed.

The matter on the order to show cause came on for hearing before this Court, the Honorable _____[

name] presiding, on _____[*date*] at _____[*time*]. Plaintiff appeared by counsel _____[*name*]. Defendant appeared by counsel _____[*name*].

On proof made to the satisfaction of the Court that the appointment should be confirmed,

IT IS ORDERED that the appointment by this Court of _____[*name of receiver*] as receiver be and is hereby confirmed.

[IT IS FURTHER ORDERED that the undertakings filed by _____ (*identify moving party, e.g.,* plaintiff) and the receiver in the amounts of $_____ and $_____, respectively, remain in effect.]

[2] Use of Form

The form in [1], *above,* is for use when the court, on the hearing of an order to show cause, confirms its earlier order appointing a receiver on ex parte application. At the hearing each party may suggest in writing one or more persons for substitution as receiver, stating the reasons [*Cal. Rules of Ct., Rule 3.1177*]. If the court orders a substitution, the order relieving the original receiver, and the order appointing the new receiver and fixingthe amount of his or her undertaking, should be included in the order, as well as any orders as to when the original receiver's final report and account [for procedural checklist, *see § 486.91*] should be filed.

In the case of a receivership to take charge of rents, issues, and profits under *Code Civ. Proc. § 564(b)(11)*, counsel may prefer to use Judicial Council Form RC-210, an order confirming appointment of receiver and preliminary injunction. RC-210 is illustrated in Ch. 555, *Trust Deeds and Real Property Mortgages*.

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A. Appointment of Receivers

43-486 California Forms of Pleading and Practice--Annotated § 486.143

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.143 Proceedings for Appointment of Receiver Pendente Lite--Notice of Motion for Order Appointing Receiver

[1] FORM Proceedings for Appointment of Receiver Pendente Lite--Notice of Motion for Order Appointing Receiver

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR AP-
Plaintiff,	)	POINTMENT OF RECEIVER [AND MEMOR-
vs.	)	ANDUM]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____[*identify party, e.g.*, defendant] _____[*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____

of] this Court, located at _____[*street address*], _____[*city*], _____[*identify party, e.g.,* plaintiff] will, and hereby does, move for an order pursuant to *Code of Civil Procedure Section 564* appointing a receiver to take possession of _____[*describe property*] (hereinafter "the property") and, pending the determination of this action, to _____[*specify what receiver is to do with property, e.g.,* manage, control, care for, preserve, maintain, and incur the expenses necessary for the management, control, care, preservation, and maintenance of, the property, and, specifically, to collect the rents, issues, and profits therefrom, to pay any taxes or assessments falling due during the period of receivership, and to otherwise employ labor as may be necessary, purchase supplies, and incur the risks and obligations ordinarily incurred by owners, managers, and operators of similar businesses]. The motion will be made on the grounds that _____[*specify grounds, e.g.,* the property which is the subject to this action is in danger of being lost or materially injured and that the appointment of a receiver is necessary to preserve it pending determination of this lawsuit].

The motion will be based on this notice of motion, on the declaration(s) of _____[*name(s)*] and the memorandum of points and authorities served and filed herewith, [and] on the records and file herein [, and on such evidence as may be presented at the hearing of the motion].
Dated: _____.

_____ [*signature*]
Attorney for _____ [*moving party*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion.*]

[2] Use of Form

The form of notice of motion in [1], *above,* is for use to apply for an order appointing a receiver. The form assumes that the motion will be made on one of the grounds specified in *Code Civ. Proc. § 564,* which apply whether or not the action is a limited civil case [*Code Civ. Proc. § 86(a)(8)* (in limited civil cases, receiver may be appointed pursuant to *Code Civ. Proc. § 564*)]. The form may, however, be used to apply for appointment of a receiver in other cases. If the motion is made on a ground provided by some statute other than *Code Civ. Proc. § 564,* citation to that other statute should be substituted for *Code Civ. Proc. § 564* in this form.

Motions for the appointment of a receiver without notice are authorized in limited situations and subject to a number of conditions to meet procedural due process requirements [*see Code Civ. Proc. § 566(b)*; for a form of ex parte application, *see § 486.139*].

[3] Noticed Motion Procedure

Neither *Code Civ. Proc. § 564* nor any other statute authorizing the appointment of a receiver specifies the procedure to be followed to secure the appointment [*see, e.g., Neider v. Dardi (1955) 130 Cal. App. 2d 646, 650, 279 P.2d 598]* . Consequently, the general provisions of the Code of Civil Procedure apply. Under those provisions, an "order" is a direction of a court or judge, made or entered in writing, and not included in a judgment, and an application for an order is a motion [*Code Civ. Proc. § 1003*]. Thus, the court's appointment of a receiver is an "order" and the application for the order is a "motion." For an outline of the procedure, *see § 486.90[1]*. For further discussion and general forms of motions and orders, see Ch. 372, *Motions and Orders* .

[4] Memorandum of Points and Authorities

A memorandum of points and authorities must be served and filed with this notice of motion [*Cal. Rules of Ct., Rules 3.1103(a)(2), 3.1112(a),* 3.1113(a); *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and general forms, see Ch. 417, *Points and Authorities* .

[5] Cross References

For full discussion of noticed motions, see Ch. 372, *Motions and Orders*

For discussion of the service of notices of motion and supporting papers and proof of service, see Ch. 518, *Service of Summons and Papers*

For points and authorities for use on a motion for appointment of a receiver, see California Points and Authorities , Ch. 200, *Receivers* (Matthew Bender)

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Chapter 486 RECEIVERS
PART V. FORMS
A. Appointment of Receivers

43-486 California Forms of Pleading and Practice--Annotated § 486.144

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.144 Proceedings for Appointment of Receiver Pendente Lite--Declaration Under Penalty of Perjury in Support of Motion for Order Appointing Receiver

[1] FORM Proceedings for Appointment of Receiver Pendente Lite--Declaration Under Penalty of Perjury in Support of Motion for Order Appointing Receiver

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	DECLARATION OF _____
Plaintiff,	)	[*name*] IN SUPPORT OF MOTION FOR APPOINT-
vs.	)	MENT OF RECEIVER
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____[*name*], declare:

1. I am the _____[*identify declarant, e.g.,* plaintiff in the above-entitled action].

2. _____ [*Specify nature of action, showing that it is one in which appointment of receiver is*

authorized, e.g., As shown by the verified complaint herein, this is an action to foreclose a mortgage on a 10-unit apartment house located at _____ (*street address and city*), California, after defendant's default in making installment payments on the mortgage note and for the sale of the property].

3. _____ [*Set forth conditions justifying the appointment of a receiver pendente lite, e.g.,* The apartment building has been cited several times in the past year for building code violations, none of which has been corrected either in whole or in part. The costs of correcting these violations and bringing the building up to code are in excess of $_____. As shown by the Current Income/Expense Sheet attached hereto and made a part hereof, only four of the units are rented, producing a total monthly income of $_____, and the current operating expenses of the building amount to $_____ per month. It is unlikely, because of the building code violations, that any or all of the remaining six units will be rented within the foreseeable future. The total amount of the balance due on the mortgage debt is $_____. As shown by the declaration of _____ (*name*), a licensed real estate appraiser, attached hereto and made a part hereof, the property's present value is $_____. This is insufficient to discharge the mortgage debt].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

The declaration in [1], *above,* is for use to support a motion for the appointment of a receiver to take possession of property during the pendency of the action. In the fact situation illustrated, the motion is by the plaintiff mortgagee in an action to foreclose the mortgage and for the sale of the property because the mortgagor has defaulted in his or her installment payments and the present value of the property is probably insufficient to discharge the mortgage debt [*see Code Civ. Proc. § 564(b)(2)*].

For further discussion, see also *§ 486.131[2] et seq. and § 486.143[2]* et seq.

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43-486 California Forms of Pleading and Practice--Annotated § 486.145

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.145 Proceedings for Appointment of Receiver Pendente Lite--Order Granting Motion and Appointing Receiver

[1] FORM Proceedings for Appointment of Receiver Pendente Lite--Order Granting Motion and Appointing Receiver

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____[*identify party, e.g.*, plaintiff] _____[*name*] for the appointment of a receiver in the above-entitled action came on regularly for hearing before the Court, the Honorable _____[*name*] presiding, on _____[*date*], at _____[*time*]. Plaintiff appeared by counsel _____[*name*]. _____ [Defendant appeared by counsel _____ (*name*) or No appearance was made by defendant or by anyone on his/her behalf].

On proof made to the satisfaction of the Court that the motion ought to be granted,

IT IS ORDERED that:

1. The motion be and is granted;

2. _____[*Name*], whose address is _____[*specify*], is appointed receiver;

3. Before entering on his/her duties as receiver, _____[*name*] take an oath to perform the duties of receiver faithfully, that he/she execute an undertaking, or secure a bond, in the amount of $_____ to the State of California for the faithful performance of those duties subject to the orders of this Court, and that the oath and undertaking, or bond, be filed with the Clerk of the Court;

4. On the filing of the executed oath and undertaking, or bond, _____[*name*], as receiver, shall take possession of the following described property (hereinafter "the property"): _____[*description*]; [and]

5. Pending further order of this Court, _____[*name*], as receiver, is instructed to _____[*specify receiver's duties, e.g.,* manage, control,care for, preserve, maintain, and incur the expenses necessary for the management, control, care, preservation, and maintenance of, the property, and, specifically, to collect the rents, issues, and profits therefrom, to pay any taxes or assessments falling due during the period of receivership, and to otherwise employ labor as may be necessary, purchase supplies, and incur the risks and obligations ordinarily incurred by owners, managers, and operators of similar businesses] [; and]

[6. _____ (*Name*), as receiver, is further instructed to _____ (*specify any further instructions*).]

IT IS FURTHER ORDERED THAT _____[*party, e.g.,* defendant] _____[*name*] [and any of his/her agents or employees], on request and exhibition of a conformed copy of this order, immediately deliver possession of any property herein described to _____[*name of receiver*].
Dated: _____

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above,* is for use in granting a motion for the appointment of a receiver, appointing a receiver, fixing the amount of the receiver's undertaking, and specifying the receiver's duties and powers. The specific duties and powers given must, of course, be responsive to the precise situation involved. With appropriate modifications, the foregoing form may also be used to appoint a receiver after judgment [*see Code Civ. Proc. § 564(b)(3),(4)*].

For some examples of orders appointing a receiver and specifying their duties in specific actions, see *Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 351, 113 Cal. Rptr. 281* (receiver appointed in aid of execution; authority held not to extend to certain litigation); *People v. Riverside University (1973) 35 Cal. App. 3d 572, 577-581, 111 Cal. Rptr. 68* (receiver appointed in action by attorney general to operate university; receiver of quasi-public corporation impliedly had power to sell unneeded furniture and equipment to obtain funds for current operating expenses); *Venza v. Venza (1949) 94 Cal. App. 2d 878, 881-882, 211 P.2d 913* (receiver appointed to take charge of going business in action to set aside property settlement agreement).

For general discussion and additional cross references, see *§ 486.141[2] et seq. and § 486.143[2]* et seq.

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43-486 California Forms of Pleading and Practice--Annotated §§ 486.146-486.149

AUTHOR: Robert B. Kaplan Editorial Consultant

[Reserved]

§§ 486.146[Reserved]

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B. Administration and Termination of Receivership

43-486 California Forms of Pleading and Practice--Annotated § 486.150

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.150 Receiver's Original or Supplementary Inventory of Property [Cal. Rules of Ct., Rule 3.1181]

[1] FORM Receiver's Original or Supplementary Inventory of Property [Cal. Rules of Ct., Rule 3.1181]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	RECEIVER'S [SUPPLEMENTARY] INVENTORY
Defendant.	)	OF PROPERTY
	)	
	)	

_____

[*EITHER, if original inventory*]

The undersigned, as receiver, renders the following inventory of property and assets which have come into his/her possession since his/her appointment herein on _____[*date*]:

[*OR, if supplementary inventory*]

The undersigned, as receiver, has, since the filing of the original inventory herein on _____[*date*], obtained possession of the following described property as a part of the receiver's inventory:

[*CONTINUE*]

1. _____[*Set forth in this and subsequent paragraphs a detailed list of all property of which the receiver has taken possession by virtue of the appointment either from the date of appointment, if an original inventory, or from the date of the prior inventory, if a supplementary inventory*].
Dated: _____

_____ [*signature*]
_____ [*typed name*]
Receiver

[2] Use of Form

The skeletal form in [1], *above*, is for use by a receiver to render his or her original or supplementary inventory of property taken into receivership. To complete the form, a complete and detailed list of the property must be compiled below the introductory paragraph [*see Cal. Rules of Ct., Rule 3.1181*]. If any of the property consists of money and the court has notdesignated a bank in which it may be deposited, the receiver may wish concurrently to apply for an order designating a depository bank [*see § 486.103*; *see § 486.151* (form of application for order)].

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B. Administration and Termination of Receivership

43-486 California Forms of Pleading and Practice--Annotated § 486.151

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.151 Application by Receiver for Court Order and Order--General Form

[1] FORM Application by Receiver for Court Order and Order--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	APPLICATION FOR _____ [*specify order sought*]
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

Applicant hereby requests an order _____[*specify order sought, e.g.,* specifying a bank into which receivership funds should be deposited], and in support of this application represents:

1. Applicant was appointed receiver herein by order of this Court made and entered on _____[*date*] and thereafter qualified by filing the required bond and oath.

2. Under the order of appointment, applicant was granted the following powers [and no others]: _____[*specify*, to receive, preserve, care for, and maintain the receivership property].

3. _____ [*State facts necessitating order, e.g.,* Applicant has come into possession of certain moneys, totalling the sum of $_____, as part of the receivership estate and wishes to deposit this sum, and any other moneys received, in a bank account pending further order of the Court. The receivership estate has no existing bank account].

WHEREFORE, applicant prays that this Court make and enter its order _____[*specify, e.g.,* designating a bank into which the moneys may be deposited].
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

ORDER

_____ [So ordered *or if all terms of the order do not appear above* It is hereby ordered that _____ (*specify terms of order, e.g.,* the moneys referred to and any other sums received by the applicant as part of the receivership estate be deposited in the _____ (*name of bank*))].
Dated: _____

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of application in [1], *above,* is for use by a receiver to apply without prior notice to the parties to the action for an order permitting him or her to do an act or exercise a power that is not expressly authorized by the order of appointment. With appropriate modifications, the form may also be used by a receiver to petition the court for instructions, in which event the title of the paper should be changed to "PETITION FOR INSTRUCTIONS" and the applicant referred to as "Petitioner." In addition, the matters giving rise to the need for instructions should be clearly and fully stated.

If the order sought is one that will affect the rights or liabilities of any party to the action, then notice to that party or to all parties would normally be required to meet the procedural due process requirements of notice and opportunity to be heard of *U.S. Const., amend. XIV* and *Cal. Const., art. I, § 7*. In that event, the receiver should seek the order by petition filed with the court with a copy of the petition and a notice of hearing served on all parties to the action or by noticed motion to the parties, supported by an affidavit or declaration under penalty of perjury setting forth the facts necessitating the order. For a form of petition, see *§ 486.152*. For an example of the format for a notice of motion, supporting declaration, and order granting a noticed motion, see *§§ 486.143 -486.145*.

[3] Terminology

Applications by a receiver for a court order have been variously referred to in the cases as an "application," a "motion,"or a "petition" [*see Code Civ. Proc. § 1003* (defining an "application" for an order as a "motion")]. The term "application" is, however, normally used in connection with an oral or written motion made without notice to the adverse party, usually referred to as an ex parte application or motion. The application of a receiver is not technically speaking an ex parte application even if made without notice to the parties to the action, however, because the receiver is not a party to the action, but, rather, an officer of the court [*see Miller v. Fidelity etc. Co. of Maryland (1935) 3 Cal. App. 2d 580, 584, 40 P.2d 951* ; *see* discussion in *§ 486.11[2]*]. Hence, if the word "application" is used it should not be

called an "ex parte" application.

Use of the term petition also finds support in the codes when a hearing on the application is or may be required. The term "petition" is frequently used to mean a written motion which is filed with the court with a conformed copy of the petition, together with a notice of the time and place of the hearing, served on each party to the action. For a form of notice of hearing that may be adapted for use in such case, see Ch. 372, *Motions and Orders* .

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B. Administration and Termination of Receivership

43-486 California Forms of Pleading and Practice--Annotated § 486.152

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.152 Petition by Receiver for Leave to Employ Attorney [Cal. Rules of Ct., Rule 3.1180] and Order

[1] FORM Petition by Receiver for Leave to Employ Attorney [Cal. Rules of Ct., Rule 3.1180] and Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	PETITION FOR LEAVE TO EMPLOY ATTOR-
Plaintiff,	)	NEY
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

Petitioner alleges:

1. Petitioner was appointed receiver herein by order of this Court made and entered on _____[*date*].

2. Petitioner requires the aid of legal counsel to _____[*specify nature of legal services to be performed, e.g.,* advise petitioner with respect to the terms and conditions of contracts authorized by the Court to be entered into by the receiver on behalf of the receivership estate].

3. _____[*Name*] is an attorney, duly licensed to practice law in California, with offices at _____[*address*], and is not attorney for, or associated with or employed by an attorney for, any party to this _____[action *or* proceeding].

WHEREFORE, petitioner prays that this Court make and enter its order authorizing petitioner to employ _____[*name*], as attorney for the purposes herein set forth.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

ORDER

So ordered.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The petition in [1], *above*, is for use by a receiver to apply for an order permitting him or her to employ an attorney on behalf of the receivership estate with a short form of order appended [*see Cal. Rules of Ct., Rule 3.1180*; for discussion, *see § 486.30[4]*, for a procedural checklist, *see § 486.104*]. Local practice may require a separate order. For a general form of order, see Ch. 372, *Motions and Orders* .

[3] Time of Application

Application for leave to employ an attorney should normally be made and approval secured before the attorney is employed [*see Cal. Rules of Ct., Rule 3.1180*]. However, because the court has power to approve the receiver's employment of an attorney beforehand, it may subsequently ratify an employment made without prior court authorization. This rule has been said to be one of common sense necessitated by the fact that often a receiver is required to act in an emergency when no prior approval is possible [*Maggiora v. Palo Alto Inn, Inc. (1967) 249 Cal. App. 2d 706, 713, 57 Cal. Rptr. 787* ; *see People v. Riverside University (1973) 35 Cal. App. 3d 572, 582, 111 Cal. Rptr. 68]* . But if prior court approval is not obtained, the receiver may be personally liable for the attorney's fee if the court does not subsequently ratify the employment.

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B. Administration and Termination of Receivership

43-486 California Forms of Pleading and Practice--Annotated § 486.153

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.153 Notice of Unclaimed Funds [Code Civ. Proc. § 570]

[1] FORM Notice of Unclaimed Funds [Code Civ. Proc. § 570]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF UNCLAIMED FUNDS
Defendant.	)	
	)	
	)	

NOTICE IS HEREBY GIVEN that the undersigned, as receiver appointed by the Court in the above-entitled action, has taken possession of funds in the amount of $_____ belonging to _____[*name*] whose whereabouts are unknown to the undersigned.

The last known _____[place of residence *or* post office address] of _____[*name of owner*] is _____[*address*].

NOTICE IS ALSO GIVEN that if the funds are not claimed within 30 days from _____[*date of last publication of notice*], the undersigned will report them to the Court and, on its order, the funds will be paid into the State Treasury. Any claim on the funds should be made to the undersigned at _____[*address*].
Dated: _____.

_____ [*signature*]
_____ [*typed name*]
Receiver

[2] Use of Form

The form in [1], *above*, is for use by a receiver having funds belonging to a person whose whereabouts are unknown to give public notice of the unclaimed funds in his or her possession. Publication of the notice is required before the receiver may receive his or her discharge as receiver [*see Code Civ. Proc. § 570*; for a procedural checklist, *see § 486.107*].

[3] Contents of Notice

The notice must set forth the name of the owner of the unclaimed funds, the last known place of residence or post office address of the owner, and the amount of the unclaimed funds [*Code Civ. Proc. § 570*]. By implication, the notice should also specify the receiver's address at which any claim to the funds may be made.

[4] Period of Publication

The notice must be published in one or more newspapers published in the county at least once a week for four consecutive weeks [*Code Civ. Proc. § 570*].

[5] Costs of Publication

All costs and expenses connected with the advertising are to be paid out of the unclaimed funds of the owner whose whereabouts are unknown [*Code Civ. Proc. § 570*].

[6] Cross References

For a form of order directing payment of the funds to the state treasury, see *§ 486.154*

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43-486 California Forms of Pleading and Practice--Annotated § 486.154

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.154 Order Directing Payment of Unclaimed Funds Into State Treasury [Code Civ. Proc. § 570]

[1] FORM Order Directing Payment of Unclaimed Funds Into State Treasury [Code Civ. Proc. § 570]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

_____

_____[*Name*], as receiver in the above-entitled action, having in his/her possession funds in the amount of $_____, belonging to _____[*name*] whose whereabouts are unknown to him/her, and having caused notice of such fact and of the name of the owner of the funds, the owner's last known _____[place of residence *or* post office address], which is _____[*specify*], and the amount of the unclaimed funds to be published for at least four consecutive weeks in the _____[*name of newspaper*], which is published in this county, and 30 days having passed since the last publication without the owner or anyone on his/her behalf having appeared to claim the funds,

IT IS ORDERED that the receiver first pay out of the unclaimed funds the costs of the publication in the amount of $_____ and then pay the balance of those funds in the amount of $_____ into the State Treasury.

IT IS FURTHER ORDERED that a copy of this order accompany the payment of the funds into the State Treasury.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, is for use to direct the receiver to pay into the State Treasury the unclaimed funds of an owner whose whereabouts are unknown and who has not responded to a published notice within 30 days after the final publication [*Code Civ. Proc. § 570*]. The order must set forth the facts required in the notice [*see § 486.153*], and a copy of the order must accompany the payment of the funds into the State Treasury [*Code Civ. Proc. § 570*].

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43-486 California Forms of Pleading and Practice--Annotated § 486.155

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.155 Application by Receiver for Authority to Borrow Money and to Issue Receivership Certificate

[1] FORM Application by Receiver for Authority to Borrow Money and to Issue Receivership Certificate
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	APPLICATION FOR ORDER GRANTING RE-
Plaintiff,	)	CEIVER AUTHORITY TO BORROW MONEY
vs.	)	AND ISSUE RECEIVERSHIP CERTIFICATE
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

Applicant hereby requests an order _____[*specify order sought, e.g.,* authorizing him/her as receiver the authority to borrow money and to issue a receivership certificate], and in support of this application represents:

1. Applicant was appointed receiver herein by order of this Court made and entered on _____ [*date*], and thereafter qualified by filing the required bond and oath.

2. Under the order of appointment, applicant was granted the following powers [and no others]:

_____[*specify*, to receive, preserve, care for, and maintain the receivership property].

3. _____[*State facts which make it necessary for receiver to apply for an order enabling the receivership estate to borrow money, e.g.*, Applicant needs to borrow money to cover the cost of the administration of the receivership estate since the receivership estate is insolvent.]

4. _____[*State name of party who is going to lend money to receivership estate, amount of money to be lent, and terms of repayment*].

5. Receiver requests authority from the Court to execute a loan agreement and to issue a receiver's certificate of indebtedness to the proposed lender which certificate of indebtedness shall constitute a first priority lien on the assets of the receivership estate.

WHEREFORE, applicant requests that this Court make and enter itsorder allowing the receiver to borrow money from _____[*specify name of lender*] and that the Court grant the receiver authority to issue a receiver's certificate of indebtedness.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

ORDER

_____ [So ordered, *or if all terms of the order do not appear above*, It is hereby ordered that _____ (*specify terms of order, e.g.*, receiver may issue a receivership certificate which certificate shall constitute a first priority lien on assets of the receivership estate)].
Dated: _____

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The petition in [1], *above*, is for use for receiver to apply for an order permitting him or her to obtain a receivership certificate on behalf of the receivership estate in order to borrow money to fund the operations of the receivership estate with a short form of order appended [*see Title Ins. & Trust Co. v. California Dev. Co. (1915) 171 Cal. 173, 152 P. 542* ; for discussion, *see § 486.30[8]*]. Local practice may require a separate order. For a general form of order, see Ch. 372, *Motions and Orders* . For a form of certificate, see *§ 486.156*.

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43-486 California Forms of Pleading and Practice--Annotated § 486.156

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.156 Receivership Certificate

[1] FORM Receivership Certificate

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	RECEIVERSHIP CERTIFICATE
Defendant.	)	
	)	
	)	

_____

CERTIFICATE OF INDEBTEDNESS OF THE RECEIVER

Certificate No. _____

Issue of _____ Dollars

1. This certificate of indebtedness is issued by _____[*name*] ("the Receiver"), not individually, but in his/her other capacity as Receiver of the real property, personal property, fixtures, and other materials located on the

real property and located elsewhere if designated for the real property commonly known as _____[*address*] (the "Property"). A legal description of the real property is attached hereto as Exhibit 1.

2. This certifies that there is due to _____[*name of lender*] from the Receiver the principal sum of $_____, together with interest thereon as provided in Paragraph 3 below, payable (a) upon the sale (by foreclosure or otherwise) or refinance of the Property, from the proceeds thereof, or (b) upon the date of the final distribution of the receivership's assets, from liquid assets over and above those necessary to pay debts incurred by the Receiver by reason of his appointment. If the indebtedness evidenced hereby has not been paid in full before or pursuant to final distribution of the receivership's assets, this certificate shall continue to be a lien on all property, real and personal, of the receivership estate distributed in the final distribution of the Receiver's assets, with such priority as provided in Paragraph 4, below, and the indebtedness evidenced hereby shall be payable from any proceeds generated (a) upon the sale or refinance of the Property, from the proceeds thereof, or (b) upon collection of rental or other income from the Property, from the monies collected thereby, until such indebtedness is paid in full. All payments hereunder shall be applied first to the payment of any accrued and unpaid interest, fees, and costs, and then to the payment of principal. Payment due hereunder shall be made at such place as the holder shall direct and upon such payment, the holder hereof shall surrender this certificate to the person making such payment,marking the same "paid in full," and shall deliver to the person making such payment an instrument in recordable form executed by the obligee hereof, such obligee's successor in interest or such obligee's assign (in which case written assignment hereof in recordable form shall also be delivered), releasing the lien of this certificate on all property encumbered hereby. In addition to and not in derogation of the foregoing provisions of this Paragraph 2, the obligee hereof (or such obligee's successor in interest or assign) shall have the right at any time following the recordation hereof in the Official Records of _____[*name of county*], to release the lien of this certificate on all property encumbered hereby by executing an instrument in recordable form releasing such lien, and such lien shall be released upon the recordation of such instrument in the Official Records of _____[*name of county*].

3. Interest on the principal sum of this certificate shall accrue from the date hereof at the rate of _____[*specify interest rate*]. Interest will be computed on a three hundred sixty-five (365) day basis and the actual number of days elapsed, and shall be compounded annually.

4. This certificate shall constitute a lien on all of the Property, have priority over all other liens encumbering the Property, whether previously existing or hereafter created; provided, however, that with respect to the certificates of indebtedness issued by the Receiver, this certificate shall have priority all other certificates of indebtedness of a larger certificate number which will be executed subsequent to the time hereof and shall be subordinated to all certificates of indebtedness of a smaller certificate number which were executed prior to the time hereof.

5. This certificate is issued under the authority of, and in accordance with, the orders of this Court in the receivership proceeding.

6. This certificate is declared to be a debt of the Receiver, and his/her successors as Receiver, and the Receiver shall have no personal liability with respect to any of the obligations referred to herein.

7. This certificate shall not be obligatory for any purpose until signed by the Receiver.

In witness whereof, the Receiver, has executed this certificate as Receiver, but not personally, on _____[*date*], at _____[*city*], California.

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The receivership certificate in [1], *above,* is for use when a receiver appointed over real property obtains an order from a court permitting him or her to issue a receivership certificate on behalf of the receivership estate in order to borrow money to fund the operations of the receivership estate. For discussion, see *§ 486.14*. For a form of application for authority to issue a receivership certificate, see *§ 486.155*.

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43-486 California Forms of Pleading and Practice--Annotated § 486.157

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.157 Proceedings on Receiver's Final Account and Report [Cal. Rules of Ct., Rule 3.1184]--Final Account and Report and Petition for Discharge

[1] FORM Proceedings on Receiver's Final Account and Report [Cal. Rules of Ct., Rule 3.1184]--Final Account and Report and Petition for Discharge

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	RECEIVER'S FINAL ACCOUNT AND REPORT
Defendant.	)	
	)	
	)	

_____

_____[*Name*], the duly appointed, qualified, and acting receiver herein, renders his/her final account and report of his/her administration as follows:

CHARGES

The receiver charges himself/herself as follows:

1.	Assets as per inventory [and supplementary inventory] heretofore filed	$_____ _____

2.	Income from _____ [*specify source of income, e.g.,* rentals *or* operation of business] as per Schedule "A"	$_____
3.	Other cash received as per Schedule "B"	$_____
	Total cash received	$_____
	Total charges	$_____

CREDITS

The receiver takes credit for the following:

Date	Expenditure	Voucher No.	Amount
_____	_____	_____	$_____
_____	_____	_____	$_____
Property remaining in hands of receiver			$_____
Cash remaining in hands of receiver			$_____
	Total Credits		$_____

REPORT OF ADMINISTRATION

_____[*Name*] was appointed receiver herein by an order of this Court duly made and entered on _____[*date*]. Immediately thereafter,he/she qualified to act as receiver by executing the oath required by law and filing a bond in the amount of $_____ as fixed by the Court.

_____ [*Continue recitals of acts performed by receiver in the course of his/her duties, e.g.,* Pursuant to the Court's order receiver took over the business known as _____ and operated and ran the business from _____ (*date*) until _____ (*date*), on which date the business was _____ (sold *or* liquidated). Receiver actively managed the business and was present during all business hours and has been paid the sum of $_____ per _____ (*e.g.,* week) for such services for a total of $_____].

In addition to the services mentioned above, receiver performed additional services consisting of _____[*describe services*] and the sum of $_____ is a reasonable and fair amount to be allowed him/her as additional compensation for his/her services as receiver.

Pursuant to the order of this Court, receiver employed _____[*name*] of _____[*address*] as his/her attorney to represent him/her in matters pertaining to the administration of the receivership estate; the attorney performed the services and has submitted to receiver an itemized statement, a copy of which is attached hereto, for services rendered in the amount of $_____; receiver is informed and believes that the amount stated represents the reasonable value of the services rendered; _____ [no previous payments or allowances for attorney fees have been made *or* the attorney has previously been allowed and paid the sum of $_____].

WHEREFORE, receiver prays as follows:

1. After due notice is given and proceedings had, this Court make its order settling and approving this Final Account and Report;

2. Receiver be authorized and directed to pay the sum of $_____ to attorney _____[*name*];

3. Receiver be allowed the further sum of $_____ as additional compensation for his/her services as receiver;

4. This Court order and direct the manner in which the funds and assets remaining in receiver's hands are to be distributed; and

5. On distribution of the funds and assets in accordance with the Court's order, receiver be discharged and that his/her bond be exonerated.

[2] Use of Form

The form in [1], *above*, is for use by a receiver to render a final account and report. The form is illustrative only, and the actual contents will depend on the nature of the receivership property, the services performed by the receiver with respect to it, whether income was received or expenditures made, whether the receiver had to employ an attorney to counsel him or her on the receivership property or to prosecute or defend a lawsuit,and the nature of the receivership property remaining in his or her possession.

The form is for use either when the receiver's functions have been terminated by termination of the lawsuit or in response to a court order to file the report and account. For a form of notice of hearing on the final account and report, see *§ 486.158*. As an alternative procedure, the receiver may serve and file a notice of motion for termination of the receivership, approval of the final account (which would be attached to the notice of motion), and an award of attorney fees (if incurred), receiver's fee, and costs [*see, e.g., Administrative Management Services, Inc. v. Fidelity & Deposit Co. (1979) 89 Cal. App. 3d 532, 534, 152 Cal. Rptr. 620]* . For a form of notice of motion which may be adapted for such use, see *§ 486.143*.

[3] Duty to Keep and File Accounts

A receiver, like any other fiduciary, has the duty to keep accurate accounts and may in a proper case be held liable for failure to do so [*Seccombe v. Dionne (1935) 3 Cal. App. 2d 731, 734, 40 P.2d 299]* . A receiver must make monthly reports to the parties, and if requested to nonparty client lien holders, as discussed at *§ 486.31[4]*. However, these

reports need not be filed with the court unless the court so orders [*Cal. Rules of Ct., Rule 3.1182*]. A receiver has the further duty to file his or her accounts when required by the court. If the receiver fails to do so, the court, on its own motion or on the motion of a party in interest, may order the receiver to do so [*Adams v. Woods (1857) 8 Cal. 306, 316]* . The filing and approval of the receiver's account is necessary for the receiver to be discharged and his or her bond exonerated [*see Seccombe v. Dionne (1935) 3 Cal. App. 2d 731, 733, 40 P.2d 299]* .

[4] Contents of Account and Report

The account and report should contain the following:

- A description of the property received by the receiver (generally stated by reference to the inventory and any supplementary inventories filed).
- A statement of the income, if any, received from the property or business taken over by the receiver.
- A description of other property and income received.
- A statement of the disposition of any property by sale [*see Code Civ. Proc. § 568.5*] or otherwise and the amounts received.
- A statement of the expenditures made by the receiver.
- A statement or description of the property and cash remaining in the hands of the receiver.
- If any allowance of compensation for the receiver is claimed, a detailed statement of the services performed by the receiver [*Cal. Rules of Ct., Rule 3.1184(d)*].
- If any allowance of compensation for an attorney employed by the receiver is claimed, a detailed statement of the services performed by the attorney [*Cal. Rules of Ct., Rule 3.1184(d)*].
- A statement as to whether previous allowances have been made to the receiver or attorney and, if so, the amounts [*Cal. Rules of Ct., Rule 3.1184(d)*].

[5] Verification

There is no express statutory requirement that the receiver's account and report must be verified. However, the factual contents of the account and report must be presented to the court; this may be accomplished by calling the receiver to testify, having him or her sworn, and asking him or her if the contents of the report and account are true, or it may be accomplished by verifying the account and report [*see, e.g., People v. Riverside University (1973) 35 Cal. App. 3d 572, 586, 111 Cal. Rptr. 68]* .

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43-486 California Forms of Pleading and Practice--Annotated § 486.158

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.158 Proceedings on Receiver's Final Account and Report [Cal. Rules of Ct., Rule 3.1184]--Notice of Hearing

[1] FORM Proceedings on Receiver's Final Account and Report [Cal. Rules of Ct., Rule 3.1184]--Notice of Hearing

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	
Plaintiff,	)	NOTICE OF HEARING ON RECEIVER'S FINAL
vs.	)	ACCOUNT AND REPORT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To all parties herein and their attorneys of record:

NOTICE IS HEREBY GIVEN, that _____[*name*], has filed his/her Final Account and Report of the administration of his/her receivership with the Clerk of the above-entitled Court and that _____[*date*], at _____[*time*] has been set as the time for hearing the Account and Report. The hearing will be held

in _____ [_____ (Department *or* Division *or* Room) No. _____ *or* the courtroom] of the above-entitled Court located in _____[*name of building*] at _____[*street address and city*], California, at which time and place the receiver will move the Court for an order settling and approving the Final Account and Report, discharging the receiver from any further duties or liabilities herein, and exonerating the receiver's bond.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]
Receiver

[2] Use of Form

The form in [1], *above,* is for use by a receiver to give the parties notice of the hearing on his or her final account and report [*see Cal. Rules of Ct., Rule 3.1184*].

For a form of account and report and further discussion, see *§ 486.157*.

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43-486 California Forms of Pleading and Practice--Annotated § 486.159

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.159 Proceedings on Receiver's Final Account and Report [Cal. Rules of Ct., Rule 3.1184]--Order Settling and Approving Final Account and Report, Discharging Receiver, and Exonerating Bond

[1] FORM Proceedings on Receiver's Final Account and Report [Cal. Rules of Ct., Rule 3.1184]--Order Settling and Approving Final Account and Report, Discharging Receiver, and Exonerating Bond

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The Final Account and Report of _____[*name*], receiver, having been filed with the Court and notice of hearing having been served on all parties who have appeared in this _____[action *or* proceeding], the Account and Report came on regularly for hearing before the Court on _____[*date*]. _____[*Name*] appeared as attorney for plaintiff; _____[*name*] appeared as attorney for defendant; and [_____ (*name*) appeared as attorney for the receiver and] the receiver appeared in

person. Having read and considered the Account and Report[, the objections filed by _____ (*identify any objecting party or parties, e.g.,* defendant) _____ (*name(s)*), and the points and authorities filed by _____ (*specify, e.g,* both parties),] having heard the argument of counsel, and being fully advised in the premises, the Court finds that _____[*specify findings as to accuracy and completeness of report, e.g.,* the Account and Report is true and correct and that the receiver has duly accounted for all moneys and other property coming into his/her hands].

IT IS THEREFORE ORDERED that:

[1. The objections to the report are overruled.]

2. The Final Account and Report be and is approved.

3. The receiver be and is allowed the [further] sum of $_____ as and for his/her compensation for services rendered as receiver herein and that such sum be paid

[4. The receiver pay the sum of $_____ to _____ (*name*), whose address is _____, for legal services rendered herein on behalf of the receiver.]

5. After payment of the foregoing amounts, the receiver pay the balance of the funds remaining in his/her hands [and deliver _____ (*describe assets remaining in receiver's possession*)] to _____ [*identify party or parties to receive assets, e.g.,* plaintiff, _____ (*name*)].

6. On receipt of the funds [and property], _____[*identify party, e.g.,* plaintiff] _____[*name*] file with this Court an acknowledgment of receipt.

[*EITHER*]

7. On the filing of the acknowledgment of receipt, _____[*name of receiver*] is discharged from all further duties, liabilities, and responsibilities as receiver herein and his/her bond is exonerated.

[*OR*]

7. On the filing of the acknowledgment of receipt, the Court will, by further order, order the receiver discharged and the bond of _____[*name of receiver*] exonerated.

[*CONTINUE*]

Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form in [1], *above,* is for use when the court grants an order settling and approving the receiver's final account and report. In the situation illustrated, any objections to the account are overruled, the account is approved, and the receiver is not surcharged for any loss. With appropriate modifications it may be used when objections are sustained or the receiver is surcharged.

[3] Costs of Receivership

Normally, the costs of a receivership are payable out of the estate or funds of the receivership [*Andrade v. Andrade (1932) 216 Cal. 108, 110, 13 P.2d 676* ; *McCarthy v. Poulsen (1985) 173 Cal. App. 3d 1212, 1219 n.3, 219 Cal. Rptr. 375]* . However, if the appointment of the receiver was void or wrongfully obtained on a false or unsubstantiated showing, the party who obtained the appointment may be personally liable [*see Smith v. Hill (1965) 237 Cal. App. 2d 374, 387, 47 Cal. Rptr. 49* ; *Baldwin v. Baldwin (1947) 82 Cal. App. 2d 851, 854-856, 187 P.2d 429]* . It has also been held that the costs of receivership were properly assessed against the defendant in an equitable action between joint venturers for an accounting when the trial court was justified in finding that the defendant was guilty of reprehensible conduct [*Neider v. Dardi (1957) 152 Cal. App. 2d 156, 165, 313 P.2d 72]* .

[4] Approval of Account and Report

On approval of the account and report, the receiver will be ordered discharged and the bond exonerated on completion of disbursements and other requirements in accordance with the order settling and approving the final account and report [*see, e.g., Aviation Brake Systems, Ltd. v. Voorhis (1982) 133 Cal. App. 3d 230, 232, 183 Cal. Rptr. 766]* .

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43-486 California Forms of Pleading and Practice--Annotated § 486.160

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.160 Stipulation to Approve Receiver's Final Account and Report [Cal. Rules of Ct., Rule 3.1184]

[1] FORM Stipulation to Approve Receiver's Final Account and Report [Cal. Rules of Ct., Rule 3.1184]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	STIPULATION TO APPROVE RECEIVER'S FI-
Defendant.	)	NAL ACCOUNT AND REPORT AND ORDER
	)	THEREON
	)	

Plaintiff _____[*name*] ("Plaintiff") and Defendant _____[*name*] ("Defendant") hereby stipulate and agree as follows:

1. On _____[*date*], this Court entered its order appointing _____[*name*] as receiver ("Receiver") over the Subject Property. The Receiver took possession of the Subject Property pursuant to the Court's Order, and filed an undertaking in the amount of $_____. On or about _____[*date*], Plaintiff's undertaking in the amount of $_____ was filed in the above-entitled action.

2. On or about _____[*date*], in compliance with the terms of the order of appointment, the Receiver carried out his duties by taking possession of the Subject Property.

3. On or about _____[*date*], this Court entered its order confirming the appointment of the Receiver.

4. Pursuant to the request of Plaintiff and the Defendant, the Receiver has prepared and submitted his/her final accounting for the receivership estate. A true and correct copy of the Receiver's final accounting is attached hereto as Exhibit 1 and incorporated herein by this reference.

5. As set forth in the final accounting, the Receiver represents that $_____ were collected during the course of the receivership. The Receiver incurred operating expenses in the amount of $_____, leaving a cash balance in the receivership account of $_____.

6. The parties hereto wish to terminate the receivership estate. Accordingly, the parties hereto agree and stipulate that:

A. The final accounting, attached as Exhibit 1 hereto, be approved;

B. The Receiver's fees and costs are approved;

C. The Court ratify all actions taken by the Receiver during the course of the receivership;

D. _____[*Name*] be discharged as Receiver;

E. The undertaking filed by the Receiver be exonerated;

F. The undertaking filed by Plaintiff be exonerated; and

G. The remaining balance of monies in the receivership estate of $_____ shall be paid to Plaintiff.

7. This Stipulation may be executed in one or more counterparts, but all of the counterparts together shall constitute one agreement.

8. All parties to this Stipulation, at all times material hereto, have had the opportunity to consult with legal counsel of their own choosing concerning the rights affected by this Stipulation, the form and content of this Stipulation, and the advisability of executing it.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

Dated: _____.

_____ [*signature*]
_____ [*typed name*]

ORDER

Good cause appearing therefor:

IT IS SO ORDERED.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form in [1], *above*, is for use when the parties to an action have agreed to stipulate to enter into an order settling and approving the receiver's final account and report [*Cal. Rules of Ct., Rule 3.1184(a)*]. In this situation, the party should obtain a court order approving of the stipulation since, in part, any undertakings filed by the receiver and/or the plaintiff in the action should be discharged through a court order.

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Volume 43: Receivers thru Rewards-Chs. 486-499
Chapter 486 RECEIVERS
PART V. FORMS
B. Administration and Termination of Receivership

43-486 California Forms of Pleading and Practice--Annotated § 486.161

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.161 Motion for Order Excusing Turnover in a Bankruptcy Case [11 U.S.C. § 543(d)].

[1] FORM Motion for Order Excusing Turnover in a Bankruptcy Case [11 U.S.C. § 543(d)].

UNITED STATES BANKRUPTCY COURT
FOR THE _____ DISTRICT OF _____

	)	
	)	Bk. No. _____ [*case number*]
In re	)	[Chapter 11]
_____	)	NOTICE OF MOTION AND MOTION FOR OR-
[*Name of Chapter 11 debtor*],	)	DER EXCUSING TURNOVER OF PROPERTY BY
Debtor.	)	RECEIVER
	)	Date: _____
	)	Time: _____
		Place: _____

_____

TO: DEBTOR HEREIN AND TO ALL OTHER INTERESTED PARTIES:

PLEASE TAKE NOTICE that at the above-stated time and place a hearing will be held on the motion of secured creditor _____[*name of secured creditor*] for an order excusing turnover of the _____[*describe property*] (the "Property") by the state court appointed Receiver, pursuant to the provisions of *11 U.S.C. section 543(d)*.

This motion will be made on the grounds that the interests of creditors would be better served, within the meaning and application of *Bankruptcy Code section 543(d)(1)*, by permitting the receiver, _____[*name*] ("Receiver"), to remain in possession, custody and control of the Property over which the Receiver was appointed because _____[*state reasons why it would be in the best interest of creditors to have the receiver remain in possession of the property over which the receiver was appointed, e.g.,* because the Chapter 11 Debtor improperly diverted property in which the secured creditor held a security interest prior to the filing of its Chapter 11 bankruptcy case].

This motion will be based on this notice, on the memorandum of points and authorities, on the Declarations of _____[*names of declarants*], and the exhibits attached thereto, submitted pursuant to requests for judicial notice; all served and filed herewith, as well as on all papers and files herein, matters of which this Court is also requested to take judicial notice, and on the oral argument of counsel to be presented at the time of hearing.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is for use when a receiver has previously been appointed and when the party who has appointed a receiver wishes the receiver to remain in possession of the assets over which the receiver was appointed after the defendant has filed a voluntary Chapter 11 petition under the Bankruptcy Code. The moving party must demonstrate under *11 U.S.C. Section 543(d)* that it would be in the "interest of creditors" for the receiver to remain in possession over the property over which he or she was appointed. The motion should be supported by a memorandum of points and authorities and by declarations of the receiver and/or the appointing secured creditor to attempt to convince the Bankruptcy Court that the "interest of creditors" test set forth in section 543(d) has been satisfied.

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B. Administration and Termination of Receivership

43-486 California Forms of Pleading and Practice--Annotated §§ 486.162-486.169

AUTHOR: Robert B. Kaplan Editorial Consultant

[Reserved]

§§ 486.162[Reserved]

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Chapter 486 RECEIVERS
PART V. FORMS
C. Actions By and Against Receivers

43-486 California Forms of Pleading and Practice--Annotated § 486.170

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.170 Proceedings by Receiver for Permission to Sue [Code Civ. Proc. § 568]--Petition for Leave to Sue Third Party

[1] FORM Proceedings by Receiver for Permission to Sue [Code Civ. Proc. § 568]--Petition for Leave to Sue Third Party

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	RECEIVER'S PETITION FOR LEAVE TO SUE
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

Petitioner _____[*name*] alleges:

1. By order of this Court duly made and entered on _____[*date*], petitioner was appointed receiver of the _____ [property which is the subject of the this litigation *or describe receivership property related to action, e.g.*, the apartment house at _____ (*address*)].

2. Petitioner is entitled, as receiver, to possession of the following described property which is now in the possession of _____[*name of third party*]: _____[*describe property*].

3. Petitioner's claim to the property is based on the following: _____[*specify facts on which receiver bases claim*].

4. Petitioner has several times, both orally and in writing, requested _____[*name of third party*] to deliver possession of the above-described property to the receiver, but _____[*name of third party*] has failed and refused, and continues to fail and refuse, to do so.

5. Petitioner is informed and believes and thereon alleges that _____[*name of third party*] is at the present time solvent and that the probabilities of recovering the property or its value are favorable.

6. Petitioner, as receiver, has the financial ability to prosecute this lawsuit.
Dated: _____

_____ [*signature*]
_____ [*typed name*]
Receiver

[2] Use of Form

The form of petition in [1], *above*, is for use by a receiver to request permission to sue a third party [*see Code Civ. Proc. § 568*]. A receiver must obtain leave of court before instituting action to recover property of which he or she was never in possession [*Bishop v. McKillican (1899) 124 Cal. 321, 325-326, 57 P. 76* ; *see Morand v. Superior Court (1974) 38 Cal. App. 3d 347, 350, 353, 113 Cal. Rptr. 281* ; for discussion, *see § 486.50*]. Under the fact situation illustrated, the purpose of the lawsuit is to recover property belonging to the receivership estate. If the employment of an attorney will be necessary to prosecute the lawsuit, a request for leave to employ an attorney [for a form, *see § 486.152*] may be combined with the foregoing petition for leave to file suit.

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43-486 California Forms of Pleading and Practice--Annotated § 486.171

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.171 Proceedings by Receiver for Permission to Sue [Code Civ. Proc. § 568]--Order Granting Petition to Sue Third Party

[1] FORM Proceedings by Receiver for Permission to Sue [Code Civ. Proc. § 568]--Order Granting Petition to Sue Third Party

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

Having read and considered the petition of _____[*name*], as receiver herein, for an order granting leave to sue _____[*name*] to recover property belonging to the receivership estate which is in the possession of _____[*name*] who refuses to deliver it to receiver, and good cause appearing therefor,

IT IS ORDERED that _____[*name*], as receiver, is hereby authorized to sue _____[

name] to recover the following described property and that the action may be maintained by the receiver in his/her own name: _____[*describe property*].
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, is for use when the court grants the receiver's petition for leave to sue [*see Code Civ. Proc. § 568*; for a form of petition, *see § 486.170*]. For a procedural checklist, *see § 486.120[2]*.

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Chapter 486 RECEIVERS
PART V. FORMS
C. Actions By and Against Receivers

43-486 California Forms of Pleading and Practice--Annotated § 486.172

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.172 Allegations in Receiver's Complaint Against Third Party of Capacity and Authorization to Sue [Code Civ. Proc. § 568]

[1] FORM Allegations in Receiver's Complaint Against Third Party of Capacity and Authorization to Sue [Code Civ. Proc. § 568]

1. By order of the above-entitled Court made and entered on _____[*date*], plaintiff was duly appointed receiver of the _____[*specify, e.g.*, property, funds, rents, and profits] of _____[*name of business or party for whose property receiver was appointed*] [located at _____ (*street address and city*), California].

2. By further order of the above-entitled Court made and entered on _____[*date*], plaintiff, as receiver, was authorized to sue _____[*name*], defendant, for the recovery of the following described property (hereinafter "the property") now in the defendant's possession and which, as herein shown, rightfully belongs to the receivership estate: _____[*describe property*].

[2] Use of Form

The allegations in [1], *above*, are for inclusion in a complaint by a receiver against a third party who has possession of receivership property and refuses to deliver it to the receiver.

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43-486 California Forms of Pleading and Practice--Annotated § 486.173

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.173 Proceedings to Secure Court Permission to Sue Receiver [Code Civ. Proc. § 568]--Petition for Leave to Sue Receiver

[1] FORM Proceedings to Secure Court Permission to Sue Receiver [Code Civ. Proc. § 568]--Petition for Leave to Sue Receiver

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	
Plaintiff,	)	PETITION FOR LEAVE TO SUE RECEIVER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

Petitioner _____[*name*] hereby applies for an order permitting him/her to sue _____[*name*], as receiver, [by filing the proposed complaint attached hereto and made a part hereof,] and in support of this request declares:

1. By order of this Court dated _____[*date*], _____[*name*] was duly appointed

receiver in the above-entitled action to _____ [*specify, e.g.,* take full charge and possession of a ten-unit apartment house (hereinafter "the apartment house"), located at _____ (*street address and city*), California, and to manage, control, operate, and maintain it and to collect the rents therefrom] until further order of the Court; _____[*name*] thereafter duly qualified to act as receiver and on or about _____[*date*], entered on his/her duties by taking possession and control of _____[*specify, e.g.,* the apartment house and thereafter managing and collecting the rents therefrom].

2. On or about _____[*date*], _____[*name*], as receiver, _____[*specify act or omission, e.g.,* by personal notice requested the tenants of the apartment house to enter and leave by the rear door because the front of the apartment house was being treated for termites, notwithstanding the fact that he/she had both actual and constructive knowledge that the rear door was defective in that its hinges had been damaged and were loose].

3. Petitioner is _____[*specify relationship to property in receivership, e.g.,* is, and at all times herein mentioned was, a tenant of the apartment house].

4. On or about _____[*date*], _____ [*specify injury, e.g.,* while petitioner in compliance with the foregoing notice was attempting to leave the apartment house by the rear door, the door came off its hinges and fell on petitioner as a proximate result of which petitioner sustained damages in excess of $_____].

WHEREFORE, petitioner prays leave of Court to sue _____[*name*], as receiver, for _____[*specify, e.g.,* damages] [as alleged in the attached proposed complaint].
Dated: _____

_____ [*signature*]
_____ [*typed name*]
Petitioner

[2] Use of Form

The form of petition in [1], *above,* is for use by a third party to seek permission to sue a receiver in the receiver's official capacity [*see McCarthy v. Poulsen (1985) 173 Cal. App. 3d 1212, 1219, 219 Cal. Rptr. 375* ; *Ostrowski v. Miller (1964) 226 Cal. App. 2d 79, 84, 37 Cal. Rptr. 790]* . The petition is filed in the court that appointed the receiver. For further discussion, see *§ 486.51[1]* and for a procedural checklist, see *§ 486.121[2]*. For the related form of order, see *§ 486.173*

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Chapter 486 RECEIVERS
PART V. FORMS
C. Actions By and Against Receivers

43-486 California Forms of Pleading and Practice--Annotated § 486.174

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.174 Proceedings to Secure Court Permission to Sue Receiver [Code Civ. Proc. § 568]--Order Granting Petition to Sue Receiver

[1] FORM Proceedings to Secure Court Permission to Sue Receiver [Code Civ. Proc. § 568]--Order Granting Petition to Sue Receiver

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

Having read and considered the petition of _____[*name of applicant*] for an order granting him/her leave to sue _____[*name*], as receiver, heretofore duly appointed herein, and good cause appearing therefore,

IT IS ORDERED that _____[*name of petitioner*] be, and is, granted leave to sue _____[*name*], as receiver, for _____[*specify, e.g.,* damages for injuries sustained on

the premises of the apartment house under receivership].
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, is for use when the court grants permission to sue the receiver in an independent action [for discussion, *see § 486.51*, for a procedural checklist, *see § 486.121[2]*, and for the related form of petition, *see § 486.173*].

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Chapter 486 RECEIVERS
PART V. FORMS
C. Actions By and Against Receivers

43-486 California Forms of Pleading and Practice--Annotated § 486.175

AUTHOR: Robert B. Kaplan Editorial Consultant

§ 486.175 Allegations in Third Party's Complaint Against Receiver of Authorization to Sue

[1] FORM Allegations in Third Party's Complaint Against Receiver of Authorization to Sue

1. By order of the _____ [above-entitled court *or* Court of _____] made and entered on _____[*date*], defendant was duly appointed receiver of the _____[*specify, e.g.,* property, funds, rents, and profits] (hereinafter "the property") of _____[*name of business or party for whose property receiver was appointed*] [located at _____ (*street address and city*), California], thereafter duly qualified to undertake the duties of receiver, and, at all times hereinafter mentioned, was in possession of the property as receiver.

2. By further order of the _____ [above-entitled court *or* _____ Court of _____] made and entered on _____[*date*], plaintiff _____[*name*] was authorized to sue _____[*name of defendant*], as receiver, in his/her official capacity for _____[*specify relief sought, e.g.,* damages] as hereinafter alleged.

[2] Use of Form

The form of allegation in [1], *above,* is for inclusion in the third party's complaint to allege the third party's authority to sue the receiver. The balance of the complaint will allege the ultimate facts establishing plaintiff's cause of action against the receiver. The matters alleged will depend on the nature of the tort involved. For forms of complaints which may be adapted for use in an action against a receiver, see the appropriate chapter, for example, Ch. 150, *Conversion,* Ch. 380, *Negligence,* and Ch. 421, *Premises Liability.*

[3] Form and Contents of Complaint

The caption of a complaint against a receiver in his or her official capacity should identify the defendant, "as Receiver"; the body of the complaint should allege the due appointment of the defendant as receiver, that permission to sue the

receiver has been granted, and that the receiver is being sued in his or her official capacity [*see Sealite, Inc. v. Finster (1957) 149 Cal. App. 2d 612, 615-618, 309 P.2d 51]* . However, the objection of one sued individually that he or she should have been sued in a representative capacity or also in a representative capacity can be waived; furthermore, if one is sued in an individual capacity when the true liability, if any, is in a representative capacity, amendment of the complaint to that effect may be permitted [*see Sealite, Inc. v. Finster (1957) 149 Cal. App. 2d 612, 618, 309 P.2d 51]* .

[4] Cross Reference

For a form describing a receiver for use in a caption, see Ch. 108, *Captions and Introductions*

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Chapter 487 [Reserved]

43-487 California Forms of Pleading and Practice--Annotated 487.syn

§ 487.syn Synopsis to Chapter 487: [Reserved]

§ 0 Scope

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Volume 43: Receivers thru Rewards-Chs. 486-499
Chapter 487 [Reserved]
PART 0.

43-487 California Forms of Pleading and Practice--Annotated § 0

§ 0

NOTE:

Ch. 487, *Reference*, has been completely revised and moved to the alternative dispute resolution volume, which covers reference and other forms of alternative dispute resolution. The subject matter formerly covered here now appears in Ch. 38, ***Reference***.

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Volume 43: Receivers thru Rewards-Chs. 486-499
Chapter 488 REFORMATION OF INSTRUMENTS

43-488 California Forms of Pleading and Practice--Annotated 488.syn

§ 488.syn Synopsis to Chapter 488: REFORMATION OF INSTRUMENTS

§ 488.01 Scope of Chapter

§ 488.02 Cross References

§§ 488.03through 488.09 [Reserved]

§ 488.10 Governing Statutes

§ 488.11 Reformation Defined

§ 488.12 Nature and Purpose of Reformation

§ 488.13 Scope of Reformation

[1] In General

[2] Rights of Bona Fide Purchaser Protected

[3] Agreement Must Be Valid

[4] Standing to Seek Reformation

[5] Effect of Statute of Frauds

[6] Effect of Parol Evidence Rule

[7] Particular Instruments Subject to Reformation

[a] In General

[b] Contracts

[c] Other Instruments

§ 488.14 Establishing Entitlement to Reformation

[1] In General

[2] Burden of Proof

[3] Underlying Cause of Defect

[a] Mutual Mistake of Fact

[b] Unilateral Mistake of Fact

[c] Mistake of Law

[d] Fraud

[e] Unconscionable Conduct

§ 488.15 Defenses to Reformation Action

[1] In General

[2] Lapse of Statutory Limitation Period

[3] Res Judicata

[4] Unclean Hands

[5] Waiver and Ratification

[6] Laches

[7] Negligence

§ 488.16 Right to Jury Trial

§ 488.17 Presumption of Parties' Intent to Make Equitable Agreement

§ 488.18 Scope of Court's Inquiry Into True Intent

§ 488.19 Specific Performance of Reformed Instrument and Other Additional Relief

§§ 488.20through 488.39 [Reserved]

§ 488.40 State Statutes

§ 488.41 Decisions

[1] Action for Reformation

[a] Establishing Elements of Action

[b] Grounds for Relief

[i] Fraud

[ii] Mistake of Law

[iii] Mutual Mistake of Fact

[iv] Unilateral Mistake of Fact

[c] Valid Instrument Required

[2] Defenses

[a] Equitable Estoppel

[b] Illegality or Statutory Noncompliance

[c] Lapse of Statutory Limitation Period and Laches

[d] Negligence

[e] Res Judicata

[f] Unclean Hands

[g] Waiver or Ratification

[3] Nature and Scope of Reformation

[4] Reformable Instruments

[5] Rights of Third Parties

§ 488.42 Text References

§§ 488.43through 488.59 [Reserved]

§ 488.60 Reformation of Written Instrument [Civ. Code § 3399]--Complaint Based on Unilateral Mistake of Fact [Civ. Code §§ 1577, 1640]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Pleading With Particularity Required

[5] Anticipating Defenses Based on Lapse of Time

[6] Verification

[7] Jurisdiction

[8] Venue

[9] Cross References

[10] State Constitution

[11] State Statutes

[12] Decisions

[13] Text References

§ 488.61 Reformation of Written Instrument [Civ. Code § 3399]--Allegation of Ground for Reformation--Based on Mistake of Law [Civ. Code §§ 1578, 1640]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

§ 488.62 Reformation of Written Instrument [Civ. Code § 3399]--Allegation of Ground for Reformation--Based on Fraud [Civ. Code §§ 1571-1573, 1640]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

§ 488.63 Reformation of Written Instrument [Civ. Code § 3399]--Allegation of Ground for Reformation--Based on Mutual Mistake of Fact [Civ. Code §§ 1577, 1640]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

§ 488.64 Reformation of Written Instrument [Civ. Code § 3399]--Affirmative Defense Allegation--Waiver and Ratification of Mistake by Plaintiff

[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

§ 488.65 Reformation of Written Instrument [Civ. Code § 3399]--Affirmative Defense Allegation--Laches

[1] FORM

[2] Use of Form

[3] Alternative Use of Demurrer

[4] Decisions

[5] Cross References

§ 488.66 Reformation of Written Instrument [Civ. Code § 3399]--Affirmative Defense Allegation--Lapse of Statutory Limitation Period [Code Civ. Proc. § 338(d)]

[1] FORM

[2] Use of Form

[3] Alternative Use of Demurrer

[4] State Statutes

[5] Decisions

[6] Cross References

§ 488.67 Reformation of Written Instrument [Civ. Code § 3399]--Affirmative Defense Allegation--Intervening Rights of Bona Fide Purchaser

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Cross References

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Chapter 488 REFORMATION OF INSTRUMENTS
PART I. SCOPE

43-488 California Forms of Pleading and Practice--Annotated § 488.01

§ 488.01 Scope of Chapter

This chapter discusses the equitable remedy of reformation. It includes forms of complaints for reformation of a written instrument on the grounds of the following:

- Unilateral mistake of fact [*see § 488.60*].
- Mistake of law [*see § 488.61*].
- Fraud [*see § 488.62*].
- Mutual mistake of fact [*see § 488.63*].

It also includes forms for affirmative defenses based on the following:

- Waiver and ratification [*see § 488.64*].
- Laches [*see § 488.65*].
- Lapse of the statute of limitations [*see § 488.66*].
- Intervening rights of a bona fide purchaser [*see § 488.67*].

For a discussion and forms regarding related remedies, see Ch. 107, *Cancellation of Instruments* , Ch. 490, *Rescission and Restitution* , and Ch. 528, *Specific Performance* . For a discussion concerning reformation as an alternative to a cause of action for breach of contract, see Ch. 140, *Contracts* . For a discussion of reformation of a contract for the sale of real property by a broker, see Ch. 103, *Brokers* . For discussion and a form of complaint for use in reforming a deed to correct boundary descriptions, see Ch. 101, *Boundaries* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesStatutes of LimitationsContracts LawRemediesRatificationContracts LawRemediesReformationInsurance LawClaims & ContractsContract FormationReformationReal Property LawDeedsRemediesReformation

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PART I. SCOPE

43-488 California Forms of Pleading and Practice--Annotated § 488.02

§ 488.02 Cross References

For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions* .

For discussion and form of complaint relating to reformation of a deed to correct property descriptions, see Ch. 101, *Boundaries* .

For discussion relating to the reformation of a real estate contract by a broker, see Ch. 103, *Brokers* .

For discussion and forms relating to the cancellation of written instruments, see Ch. 107, *Cancellation of Instruments* .

For discussion and forms relating to contract remedies generally, including reformation, see Ch. 140, *Contracts* .

For discussion and general form of complaint to cancel a deed and to quiet title to real property, see Ch. 184, *Deeds* .

For discussion and forms for defenses to contract actions based on mistake or fraud, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

For discussion and forms relating to tort actions for fraud and deceit generally, see Ch. 269, *Fraud and Deceit* .

For discussion relating to reformation of insurance contracts, see Ch. 308, *Insurance* .

For discussion and forms relating to the amendment, correction and modification of judgments, see Ch. 318, *Judgments* .

For discussion and forms relating to quieting title, see Ch. 482, *Quieting Title* .

For discussion and forms relating to rescission and restitution, see Ch. 490, *Rescission and Restitution* .

For discussion and forms relating to deeds of trust and mortgages generally, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

For discussion and forms of complaint relating to the establishment of constructive trusts over real property acquired through fraud, mistake, or undue influence, see Ch. 561, *Trusts: Constructive Trusts* .

For discussion and forms for use in actions to recover usurious interest payments, see Ch. 568, *Usury* .

For discussion of the availability of reformation to vendors and purchasers of real property, see Ch. 569, *Vendor and Purchaser* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral OverviewReal Property LawDeedsProperty DescriptionsReal Property LawDeedsRemediesReformation

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[Reserved]

§§ 488.03[Reserved]

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43-488 California Forms of Pleading and Practice--Annotated § 488.10

§ 488.10 Governing Statutes

The codified equitable principles governing the reformation of instruments are set out in *Civ. Code §§ 3399-3402*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesAmbiguity & MistakeMutual MistakeContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawFormationAmbiguity & MistakeMutual MistakeContracts LawFormationAmbiguity & MistakeUnilateral MistakeContracts LawRemediesReformation

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43-488 California Forms of Pleading and Practice--Annotated § 488.11

§ 488.11 Reformation Defined

Reformation is an equitable remedy used to reframe a written instrument to express accurately the parties' true agreement when, through fraud, mutual mistake, or unilateral mistake in limited instances, the writing does not embody their agreement [*see* Black's Law Dictionary 1281 (6th ed.); *see also Civ. Code § 3399*; *Bailard v. Marden (1951) 36 Cal. 2d 703, 708, 227 P.2d 10]* . This remedy has been codified under *Civ. Code § 3399*, which provides that a written contract may be revised to reflect the true intent of the parties. Because of the use of the word "revised" in *Civ. Code § 3399*, the terms "reformation" and "revision" are used interchangeably in this chapter.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesAmbiguity & MistakeMutual MistakeContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawFormationAmbiguity & MistakeMutual MistakeContracts LawFormationAmbiguity & MistakeUnilateral MistakeContracts LawRemediesReformation

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43-488 California Forms of Pleading and Practice--Annotated § 488.12

§ 488.12 Nature and Purpose of Reformation

Civ. Code § 3399 codifies the equitable remedy of reformation of written instruments. This section provides that a written contract may be revised on application of the party aggrieved, when, through fraud, mutual mistake, or mistake of one party that the other party knew of or suspected at the time, a written contract does not express the true intention of the parties. A written contract may be revised so as to express the intention of the aggrieved party, so far as is possible without prejudice to the rights acquired by third persons, in good faith, and for value [*Civ. Code § 3399*]. In determining the propriety of granting reformation, a court of equity exercises broad powers [*Jones v. First American Title Insurance Company (2003) 107 Cal. App. 4th 381, 383, 388-390, 131 Cal. Rptr. 2d 859* (reformation may validate foreclosure sale when former trustee mistakenly conducts sale after new trustee has been substituted); *Cardoza v. Millington (1956) 142 Cal. App. 2d 26, 32, 297 P.2d 778* (preincorporation agreement reformed to provide for equal control of corporation and distribution of stock)].

The purpose of reformation is to effectuate the common intention of the parties, when that intention was incorrectly reduced to writing [*Bailard v. Marden (1951) 36 Cal. 2d 703, 708, 227 P.2d 10]* . The "intention of the parties" under *Civ. Code § 3399* refers to a single intention that is entertained by both of the parties [*Bailard v. Marden (1951) 36 Cal. 2d 703, 708, 227 P.2d 10* (judgment reforming deed to include residential use restriction reversed because buyer, though intending to use property for residential purposes only, never expressly agreed to that limitation)].

Although reformation is sometimes referred to as a "cause of action," it is actually a remedy, usually sought in conjunction with other remedies appropriate for that particular cause of action [*Landis v. Superior Court (1965) 232 Cal. App. 2d 548, 555, 42 Cal. Rptr. 893* ; *see § 488.19*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityGeneral OverviewContracts LawDefensesAmbiguity & MistakeMutual MistakeContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawFormationAmbiguity & MistakeMutual MistakeContracts LawRemediesReformation

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43-488 California Forms of Pleading and Practice--Annotated § 488.13

§ 488.13 Scope of Reformation

[1] In General

Reformation requires that the parties to the transaction share a complete and mutual understanding on all essential terms. In the absence of a common understanding among the parties, the written instrument would have no standard to which it could be reformed [*Bailard v. Marden (1951) 36 Cal. 2d 703, 708, 227 P.2d 10]* .

Conversely, a written instrument that already accurately reflects the common understanding of the parties is not subject to reformation. Even if the understanding of the parties is based on a mistaken assumption of fact, a court cannot, through reformation of the written instrument, improve the parties' understanding. To do so would be to create a new contract, based on terms to which the parties never agreed [*Lemoge Electric v. County of San Mateo (1956) 46 Cal. 2d 659, 663-664, 297 P.2d 638* (contract arising out of contractor's bid not subject to reformation even though bid contained a clerical error, because party accepting bid never agreed to pay more than that sum designated in bid); *Getty v. Getty (1986) 187 Cal. App. 3d 1159, 1178, 232 Cal. Rptr. 603* (trust not subject to reformation when it accurately reflected trustor's intent, even though that intent was based on mistaken assumption that one beneficiary would receive a separate inheritance)]. In sum, the remedy of reformation arises on failure to reduce accurately to writing a definite understanding of the parties [*Bailard v. Marden (1951) 36 Cal. 2d 703, 708, 227 P.2d 10]* .

Although a written instrument that accurately reflects a common intent based on a mistake of fact cannot be reformed, the mistake may be ground for rescission [*White v. Berrenda Mesa Water Dist. (1970) 7 Cal. App. 3d 894, 900-908, 87 Cal. Rptr. 338* (contractor entitled to rescind construction contract for a mistake in calculating the bid)]. For further discussion and forms relating to rescission, see Ch. 490, *Rescission and Restitution* .

Reformation may also be raised as a defense to enforcement of a contract [*Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 18 n.8, 262 Cal. Rptr. 716* (considering reformation claim apparently first raised by plaintiff in products liability action in response to defendants' motion for summary judgment seeking to enforce disclaimer and hold harmless clauses in written contract); *see also California Packing Corp. v. Larsen (1921) 187 Cal. 610, 612, 203 P. 102]* .

[2] Rights of Bona Fide Purchaser Protected

Reformation is permitted only to the extent that it can be done without prejudice to the "rights acquired by third persons in good faith and for value" [*Civ. Code § 3399*]. These rights have been defined as those acquired, after execution of the written instrument, by a bona fide purchaser for value, from a party to the instrument [*Baines v. Zuieback (1948) 84 Cal. App. 2d 483, 491, 191 P.2d 67]* .

Rights acquired bona fide or in good faith are those acquired without notice of the defect in the instrument sought to be reformed [*Arp v. Ferguson (1917) 175 Cal. 646, 648, 166 P. 803]* . Thus, "third persons" protected under *Civ. Code § 3399* do not include those who acquire their rights with either actual or constructive notice of the rights of other persons whose interests are defectively described in the instrument [*Shupe v. Nelson (1967) 254 Cal. App. 2d 693, 698, 62 Cal. Rptr. 352]* .

Third parties include corporate entities. The surviving entity of a corporate merger, however, cannot claim third-party status in an action for reformation of a written instrument to which it has succeeded [*Treadaway v. Camellia Convalescent Hospitals, Inc. (1974) 43 Cal. App. 3d 189, 199, 118 Cal. Rptr. 341]* . This is because, in the context of a corporate merger, the surviving corporation is charged with constructive notice of the claims of the extinct corporation's creditors, and is therefore not a "good faith" purchaser within the meaning of *Civ. Code § 3399* [*Treadaway v. Camellia Convalescent Hospitals, Inc. (1974) 43 Cal. App. 3d 189, 199, 118 Cal. Rptr. 341* ; *see also Corp. Code § 1107* (pertaining to the rights and liabilities of a surviving corporation in a merger or consolidation)]. Additionally, in a merger, the acquisition is not "for value" if the only consideration given to the shareholders of the extinct corporation is shares of stock in the surviving corporate entity and its parent company [*Treadaway v. Camellia Convalescent Hospitals, Inc. (1974) 43 Cal. App. 3d 189, 200, 118 Cal. Rptr. 341]* .

For an affirmative defense based on the intervening rights of bona fide purchasers, see *§ 488.67*.

[3] Agreement Must Be Valid

A void agreement has no standing in the law and cannot be reformed [*see, e.g.,* *Ainsworth v. Morrill (1916) 31 Cal. App. 509, 511, 160 P. 1089* (reformation denied when agreement sought to be reformed violated statute)]. In other words, a court will not make a new contract from a void one, at least when it appears that the parties never intended to make a legal and valid agreement. Reformation is available, however, to reform an otherwise valid instrument by removing an illegal term that was never intended by the parties but was erroneously included [*see* *First American Title Ins. & Trust Co. v. Cook (1970) 12 Cal. App. 3d 592, 597-598* (note reformed to delete unintended and inadvertently included usurious provision)]. For discussion of reformation of an agreement that is void for an erroneous noncompliance with the statute of frauds, see *§ 488.13[5]*.

[4] Standing to Seek Reformation

A written instrument may be revised on application of a party aggrieved [*Civ. Code § 3399*]. A "party aggrieved" includes not only those who are the original parties to the transaction that is memorialized by the instrument, but also any third party who has suffered prejudice or pecuniary loss [*Orcutt v. Ferranini (1965) 237 Cal. App. 2d 216, 224, 46 Cal. Rptr. 715* (third-party beneficiary deemed aggrieved party entitled to seek reformation of insurance contract)].

If reformation is sought by a party to the written instrument for a mistake that is material to the parties' agreement, that party is entitled to reformation despite the absence of actual injury [*Siem v. Cooper (1926) 79 Cal. App. 748, 755, 250 P. 1106]* .

[5] Effect of Statute of Frauds

Under *Civ Code § 1624(a)*, the general statute of frauds, certain categories of contracts are required to be in writing or

evidenced by a written note or memorandum and subscribed by the party to be charged or by the party's agent in order to be valid [*see also Civ. Code § 2309* (agent's authorization to enter into contract subject to "equal dignities rule"); *Fam. Code § 1611* (premarital agreement)]. An agreement or contract that is valid in other respects and is otherwise enforceable, however, is not invalid for lack of a writing if it is a "qualified financial contract" and there is sufficient evidence to show that a contract has been made or the parties have agreed to be bound by the terms of the contract [*see Civ. Code § 1624(b)*; *see also* Ch. 530, *Statute of Frauds*]. The statute of frauds is designed to prevent the commission of fraud and perjury with respect to certain agreements by ensuring that they are reliably evidenced in writing [*Sherwood v. Lowell (1917) 34 Cal. App. 365, 375, 167 P. 554* ; *see also Lockwood v. Smigel (1971) 18 Cal. App. 3d 800, 803, 96 Cal. Rptr. 289* ; for discussion and forms relating to the statute of frauds generally, *see* Ch. 530, *Statute of Frauds*].

Whether a contract that is void under the statute of frauds may be reformed depends on the manner in which it fails to satisfy the statute. If, for example, an essential term has been omitted because the parties never in fact came to any agreement on that term, the intended contract is void and cannot be reformed. On the other hand, a court will reform a contract that is void only because of a technical failure to satisfy the requirements of the statute due to a mistake in the preparation of the instrument. In the latter situation, the true agreement of the parties is validexcept for the error in writing [*see Oatman v. Niemeyer (1929) 207 Cal. 424, 426-427, 278 P. 1043* (deed reformed to supply omitted property description); *Merkle v. Merkle (1927) 85 Cal. App. 87, 111, 258 P. 969]* . For discussion of reformation of void agreements generally,*§ 488.13[3]*.

The statute of frauds does not bar an action seeking reformation brought on the ground of fraud. Barring relief on this ground would only undermine a primary object of the statute, that is, the prevention of fraud [*see Merkle v. Merkle (1927) 85 Cal. App. 87, 110-111, 258 P. 969]* .

[6] Effect of Parol Evidence Rule

The parol evidence rule prohibits the introduction of extrinsic evidence, oral or written, to contradict the terms of a writing intended by the parties as a final expression of their agreement [*see Code Civ. Proc. § 1856*]. Reformation actions, however, fall within a major exception to the application of this rule. Extrinsic evidence is admissible to show that the writing does not express the true intention of the parties in an action to reform a written instrument on the ground of mistake or fraud [*Berendsen v. McIver (1954) 126 Cal. App. 2d 347, 356, 272 P.2d 76]* .

A court will not admit extrinsic evidence to reform the written instrument in the absence of clear and convincing proof that the language sought to be reformed resulted from fraud, mutual mistake, or a unilateral mistake when the other party knew of the mistake or suspected it [*Moore v. Vandermast, Inc. (1941) 19 Cal. 2d 94, 96-97, 119 P.2d 129]* .

[7] Particular Instruments Subject to Reformation

[a] In General

Although *Civ. Code § 3401*, pertaining to the scope of judicial inquiry in an action for reformation, refers to the reformation of a "written instrument," the remaining code provisions relating to the law of reformation (*Civ. Code §§ 3399, 3400*, and *3402*) appear solely to address reformation of a "contract." Despite the limiting language employed in the code sections, courts have uniformly granted reformation of written instruments, other than contracts, which are designed to create legal rights and obligations in the parties. An exception to this broad judicial outlook concerns wills, which are not reformable [*Estate of Callaghan (1898) 119 Cal. 571, 575, 51 P. 860* ; *Kobus v. San Diego Trust & Savings Bank (1959) 172 Cal. App. 2d 574, 580, 342 P.2d 468* (invalid will, claimed to have been executed to carry out oral agreement to leave property to plaintiff in return for services rendered but containing no reference to agreement, as not reformable under reformation statutes)].

[b] Contracts

Contracts generally are subject to the remedy of reformation [*Lemoge Electric v. County of San Mateo (1956) 46 Cal. 2d 659, 663, 297 P.2d 638* (contract arising out of electrical contractor's bid); *Meyerstein v. Burke (1924) 193 Cal. 105, 108-109, 222 P. 810* (executory contract for purchase and sale of house and lot); *McClure v. Cerati (1948) 86 Cal. App. 2d 74, 82-83, 194 P.2d 46* (written employment contract)]. An executed contract, however, may not be reformed if the aggrieved party, with knowledge of the facts, accepts performance in accordance with the terms of the contract as written [*Vantress Farms, Inc. v. Sydenstricker (1970) 11 Cal. App. 3d 943, 950, 90 Cal. Rptr. 251* (reformation of land sale contract by grantee to include specific assignment of oil and gas rights disallowed because grantee accepted delivery of deed and payment of purchase price with knowledge that grantor was relying on contract as written); *see also* discussion in *§ 488.15[5]*].

Contracts subject to reformation include contracts for insurance coverage, which generally may be reformed to show, among other things: (1) the premises to be covered [*Maier Brewing Co. v. Pacific Nat. Fire Ins. Co. (1963) 218 Cal. App. 2d 869, 874, 33 Cal. Rptr. 67]* ; (2) the persons to be covered [*Eagle Indem. Co. v. Industrial Acci. Com. (1949) 92 Cal. App. 2d 222, 224-225, 206 P.2d 877]* ; (3) the name and capacity of the insured [*Bankers Indem. Ins. Co. v. Industrial Acci. Com. (1935) 4 Cal. 2d 89, 93-94, 47 P.2d 719]* ; (4) the nature of the coverage [*Cantlay v. Olds & Stoller Inter-Exch. (1932) 119 Cal. App. 605, 614, 7 P.2d 395]* ; and (5) the amount payable under the policy [*Modica v. Hartford Acc. & Indem. Co. (1965) 236 Cal. App. 2d 588, 595-596, 46 Cal. Rptr. 158]* .

An insurance policy may be reformed, in accordance with the parties' common intention, to limit or exclude coverage even if the rights of third-party claimants under the policy are adversely affected [*Truck Ins. Exch. v. Wilshire Ins. Co. (1970) 8 Cal. App. 3d 553, 559, 87 Cal. Rptr. 604* (car dealer permitted to reform insurance policy to limit coverage as to permissive users of loaner cars after occurrence of accident in which innocent third party was killed by permissive user)].

Other types of reformable contracts include (1) leases [*Moore v. Vandermast, Inc. (1941) 19 Cal. 2d 94, 96-97, 119 P.2d 129* ; *Treadaway v. Camellia Convalescent Hospitals, Inc. (1974) 43 Cal. App. 3d 189, 196-197, 118 Cal. Rptr. 341]* , (2) property settlement agreements [*Stare v. Tate (1971) 21 Cal. App. 3d 432, 436-437, 98 Cal. Rptr. 264]* , and (3) promissory notes [*First American Title Ins. & Trust Co. v. Cook (1970) 12 Cal. App. 3d 592, 597-598, 90 Cal. Rptr. 645* (action to delete inadvertently included usurious interest provision from promissory note)].

[c] Other Instruments

In addition to contracts, courts have permitted reformation of the following types of written instruments:

- Deeds [*Bailard v. Marden (1951) 36 Cal. 2d 703, 708-709, 227 P.2d 10* ; *MacFarlane v. Peters (1980) 103 Cal. App. 3d 627, 631, 163 Cal. Rptr. 655]* .

- Trusts [*Getty v. Getty (1986) 187 Cal. App. 3d 1159, 1172-1175, 232 Cal. Rptr. 603]* ; and substitutions of trustees [*Jones v. First American Title Insurance Company (2003) 107 Cal. App. 4th 381, 390, 131 Cal. Rptr. 2d 859* (trial court abused its discretion by denying reformation of defective substitution of trustee)].

- Trust deeds and mortgages [*San Jose Ranch Co. v. San Jose L. & W. Co. (1901) 132 Cal. 582, 583-584, 64 P. 1097* (reformation of mortgage); *San Fernando Valley C. of C. v. Thomas (1954) 123 Cal. App. 2d 348, 350-351, 266 P.2d 891* (reformation of trust deed)].

Some courts have also stated that the remedy of reformation is available to correct mistakes in judgments [*Voge, Inc. v. Rose (1962) 205 Cal. App. 2d 534, 538, 23 Cal. Rptr. 87* ; *Douglass v. Dahm (1950) 101 Cal. App. 2d 125, 128, 224 P.2d 914]* . More commonly, however, a party seeking correction of a clerical error after entry of final judgment may

simply invoke the inherent power of the court to correct its own mistakes [*Zisk v. Roseville (1976) 56 Cal. App. 3d 41, 47, 127 Cal. Rptr. 896]* . For further discussion and forms relating to the correction or modification of judgments under *Code Civ. Proc. § 473* or under a court's inherent powers, see Ch. 318, *Judgments* . For discussion and forms relating to a separate action in equity to set aside or modify a judgment that has been obtained through extrinsic fraud or mistake, see Ch. 489, *Relief From Judgments and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract InterpretationParol EvidenceGeneral OverviewContracts LawDefensesAmbiguity & MistakeMutual MistakeContracts LawNegotiable InstrumentsGeneral OverviewContracts LawRemediesReformationContracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawStatutes of FraudsRequirementsWritingsContracts LawTypes of ContractsBona Fide PurchasersContracts LawTypes of ContractsLease AgreementsGeneral OverviewInsurance LawClaims & ContractsContract FormationReformationReal Property LawDeedsRemediesReformation

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§ 488.14 Establishing Entitlement to Reformation

[1] In General

To obtain reformation of a written instrument, a party must generally allege and show the following:

- The true intention of the parties [*see Civ. Code § 3399*; *American Home Ins. Co. v. Travelers Indemnity Co. (1981) 122 Cal. App. 3d 951, 961, 175 Cal. Rptr. 826]* . The party seeking relief must show the instrument as it was truly intended to be [*Auerbach v. Healy (1916) 174 Cal. 60, 62, 161 P. 1157* ; *Totten v. Underwriters At Lloyd's London (1959) 176 Cal. App. 2d 440, 448, 1 Cal. Rptr. 520* ; *see Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 20-21, 262 Cal. Rptr. 716* (fact that parties intended to comply with interparty waivers that would be required in related services agreement with others not sufficient to establish intent to limit scope of waiver in their contract to that in related agreement)]. The parties' agreement must be shown to have been valid prior to its erroneous reduction to writing [*see Paterson v. Board of Trustees (1958) 157 Cal. App. 2d 811, 815, 321 P.2d 825* ; *see also* discussion in *§ 488.13[3]*].

- The agreement as it was, in fact, written [*see Civ. Code § 3399*; *Holmes v. Anderson (1928) 90 Cal. App. 276, 282, 265 P. 1010* (agreement as executed incorporated into complaint); *Johnson v. Sun Realty Co. (1934) 138 Cal. App. 296, 299-301, 32 P.2d 393* (agreement as executed set forth according to its legal effect)].

- That the failure of the writing to reflect the true agreement resulted from (1) mutual mistake of fact, (2) unilateral mistake of fact when the other party knew of the mistake or suspected it at the time, or (3) fraud [*Civ. Code § 3399*]. Unconscionable conduct may also be proper cause for which a court may grant reformation, although it is not so enumerated under *Civ. Code § 3399* [*see MacFarlane v. Peters (1980) 103 Cal. App. 3d 627, 631, 163 Cal. Rptr. 655]* . For further discussion,*§ 488.14[3]*.

The party seeking reformation must also show his or her standing as an aggrieved party [*see Civ. Code § 3399*; *American Home Ins. Co. v. Travelers Indemnity Co. (1981) 122 Cal. App. 3d 951, 961, 175 Cal. Rptr. 826]* . For further

discussion, see *§ 488.13[4]*.

If there has been considerable delay between the occurrence of the fraud or mistake justifying reformation and the filing of the action, defenses based on lapse of time may be raised. The party seeking reformation may anticipate these defenses by alleging recent discovery of the underlying fraud or mistake and diligence sufficient to excuse the long delay [*see Miller v. Lantz (1937) 9 Cal. 2d 544, 548, 71 P.2d 585* ; *see also Code Civ. Proc. § 338(d)*; *Wilson v. Wilson (1962) 199 Cal. App. 2d 542, 545, 18 Cal. Rptr. 768]* . For further discussion, see *§ 488.15[2], [3], below*.

For a complaint for reformation of a written instrument based on unilateral mistake of fact, see *§ 488.60*. For allegations of additional grounds for reformation, see *§§ 488.61 -488.63*.

[2] Burden of Proof

To reform a written instrument, the party seeking relief must establish by clear and convincing evidence the true intent of the parties and the fact that the defect in the writing resulted from fraud or mistake [*see Shupe v. Nelson (1967) 254 Cal. App. 2d 693, 700, 62 Cal. Rptr. 352* ; *Perry v. Bedford (1965) 238 Cal. App. 2d 6, 11, 47 Cal. Rptr. 461]* . For further discussion, see *§ 488.13[6]*.

[3] Underlying Cause of Defect

[a] Mutual Mistake of Fact

When the failure of the written instrument to express the true intention of the parties is due to the inadvertence of both of them, the mistake is mutual and the instrument may be reformed on application of the party aggrieved [*Shupe v. Nelson (1967) 254 Cal. App. 2d 693, 700, 62 Cal. Rptr. 352]* . It makes no difference who wrote the instrument to be reformed so long as both parties were in common mistake concerning the instrument's contents [*Renshaw v. Happy Valley Water Co. (1952) 114 Cal. App. 2d 521, 524-525, 250 P.2d 612]* . For discussion and forms relating to mutual mistake of fact as a defense to a contract action, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

Reformation on the ground of mutual mistake presupposes (1) actual agreement among the parties concerning their true intention, and (2) a mutual but mistaken belief that the written instrument reflects that intention [*Treadaway v. Camellia Convalescent Hospitals, Inc. (1974) 43 Cal. App. 3d 189, 197, 118 Cal. Rptr. 341]* .

Commonly, the mistake of a third person, acting on behalf of the parties, accounts for the failure of a written instrument to express the true intent of the parties. Courts uniformly hold that a mistake attributable to a third person in reducing the commmon intent of the parties to writing is a ground for reformation [*Breen v. Donnelly (1887) 74 Cal. 301, 304, 15 P. 845* (mistake of surveyor in running a boundary line); *First American Title Ins. & Trust Co. v. Cook (1970) 12 Cal. App. 3d 592, 598, 90 Cal. Rptr. 645* (mistake of scrivener); *Mills v. Schulba (1950) 95 Cal. App. 2d 559, 561-562, 213 P.2d 408* (mistake of attorney jointly employed to effect transfer of title)].

For a form for an allegation of mutual mistake of fact as a basis for reformation, see *§ 488.63*.

[b] Unilateral Mistake of Fact

Reformation is available when, through the unilateral mistake of one party, known to or suspected by the other party, the written instrument does not express accurately the true intention of the parties [*City of Cypress v. New Amsterdam Cas. Co. (1968) 259 Cal. App. 2d 219, 225, 66 Cal. Rptr. 357]* . The innocent party is led to believe, by the other party's failure to identify the mistake, that the parties share a common intent. A court of equity will not make a new contract, for example, when the parties' intent has been accurately recorded but is based on a mutual misunderstanding [*see* discussion § 488.13]. In the context of a unilateral mistake, however, equity precludes the nonmistaken party from capitalizing on his or her own inequitable conduct by claiming an intent different from that which he or she has led the

innocent party to believe [*Stare v. Tate (1971) 21 Cal. App. 3d 432, 438-439, 98 Cal. Rptr. 264* (reformation of property settlement agreement on ground of unilateral mistake allowed because husband's attorney knew that wife's proposal reflected a $100,000 undervaluation of which she was unaware at time of execution)].

Because the nonmistaken party is barred from asserting a different intent, the instrument that was intended by the party acting under the unilateral mistake becomes, as a matter of law, the binding agreement of the parties. Accordingly, in an action for reformation on the ground of unilateral mistake, the court reframes the written instrument to reflect the innocent party's view [*Eagle Indem. Co. v. Industrial Acc. Com. (1949) 206 P.2d 877]* . This position is supported by the presumption that all parties to a transaction intend an equitable and conscientious agreement [*Civ. Code § 3400*; *see* discussion in *§ 488.17*].

A unilateral mistake is ground for reformation only when the other party knows of or suspects the mistake [*Civ. Code § 3399*]. Constructive notice of a unilateral mistake is not equivalent to knowledge or suspicion. In the context of a unilateral mistake, the non-mistaken party's inequitable conduct invokes an estoppel to bar that party's assertion of a contrary intent. In the absence of actual knowledge or suspicion, there is no blameworthy conduct on which to base an estoppel. Constructive notice of a unilateral mistake, therefore, is insufficient ground for reformation [*La Mancha Dev. Corp. v. Sheegog (1978) 78 Cal. App. 3d 9, 16-17, 144 Cal. Rptr. 59* (reformation of deed to insert land use restriction on ground of unilateral mistake improper because defendant grantees had no actual knowledge or suspicion of the mistake, only constructive notice, at best)].

Notwithstanding the general rule that constructive notice of a unilateral mistake is insufficient to justify reformation, a court may permit reformation when a duly authorized agent of the non-mistaken party knows of or suspects the mistake. The knowledge or suspicion of a duly authorized agent is imputed to the party against whom reformation is sought [*Eagle Indem. Co. v. Industrial Acci. Com. (1949) 92 Cal. App. 2d 222, 225-226, 206 P.2d 877* (knowledge of insurance agent concerning insured's mistake concerning coverage of worker's compensation insurance policy imputed to insurer even though knowledge was acquired before that agent was appointed to execute policy); *see Stare v. Tate (1971) 21 Cal. App. 3d 432, 436, 436, n. 5, 98 Cal. Rptr. 264* (in action to reform property settlement agreement, knowledge of husband's attorney concerning wife's mistaken undervaluation of certain real property imputed to husband)].

For a form for a complaint for reformation based on a unilateral mistake of fact, see *§ 488.60*. For discussion and forms relating to unilateral mistake of fact as a defense in a contract action, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

[c] Mistake of Law

Equity will reform a written instrument that fails to express the parties' true intention on account of a mistake of law [*Tyler v. Larson (1951) 106 Cal. App. 2d 317, 319-320, 235 P.2d 39* (reformation of voluntary conveyance to describe grantee's interest as tenancy in common, instead of joint tenancy, proper because grantor only intended to give grantee undivided half interest and mistakenly believed that joint tenancy designation effectuated transfer as intended); *see Civ. Code § 1578* (mistake of law in contract cases)]. For discussion and forms relating to mistake of law as a defense to an action for breach of contract, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

Parties to a transaction may execute an instrument with the intention that it produce a certain legal effect. If, by mistake, the instrument, as written, fails to honor the parties' intention, the instrument may be reformed to accord with its intended effect [*Stafford v. California C.P. Growers (1938) 11 Cal. 2d 212, 218-219, 78 P.2d 1150* (peach growers and marketing association signed contract calling for payment to growers at certain price, intending, however, that legal effect of contract would be to entitle growers to a different price contained in resolution of association that parties mistakenly believed was incorporated in contract; mistake regarding legal effect of instrument constituted mistake of law, entitling aggrieved party to reformation)].

For a form for an allegation of mutual mistake of law as a basis for reformation, see *§ 488.61*.

[d] Fraud

Fraud, as a basis for reformation, consists of (1) a false representation by one party and (2) justifiable reliance on the false representation by the other party. Specifically, when one party justifiably relies on the other party's false representation that the written instrument either already conforms or will conform to the parties' true intent, reformation or rescission is appropriate [*Security-First Nat. Bank v. Earp (1942) 19 Cal. 2d 774, 777-778, 122 P.2d 900* (upholding rescission of trust deed on showing that defendants justifiably relied on false representation that it was renewal of prior mortgage); *Lane v. Davis (1959) 172 Cal. App. 2d 302, 307, 342 P.2d 267]* . For discussion and forms relating to fraud as a defense in a contract action, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* . For discussion and forms relating to a cause of action in tort for fraud, see Ch. 269, *Fraud and Deceit* .

If the aggrieved party is justified in relying on the fraudulent misrepresentations of the other party, negligence in failing to read the instrument is no bar to reformation [*Security-First Nat. Bank v. Earp (1942) 19 Cal. 2d 774, 777, 122 P.2d 900* ; *see also* discussion in *§ 488.41[2][d]*].

The misrepresentation must be fraudulent and not merely an inaccurate statement of opinion [*Kneer v. Baruch Corp. (1941) 47 Cal. App. 2d 601, 603-604, 118 P.2d 488* (subcontracter who executed building contract in reliance on general contractor's erroneous estimate held not entitled to reformation on ground of fraud)].

Fraud as a basis for reformation is limited to misrepresentations regarding the contents of the writing; the instrument is revised to conform with the intent of the defrauded party or parties. Fraudulent inducement to enter into a written agreement is not a proper basis for reformation, because in this situation the writing, though fraudulently induced, does in fact reflect the intent of the parties [*Lane v. Davis (1959) 172 Cal. App. 2d 302, 307-308, 342 P.2d 267* ; *see also* discussion in *§ 488.13*].

For a form of allegation of fraud as a basis for reformation, see *§ 488.62*.

[e] Unconscionable Conduct

Civ. Code § 3399 provides that reformation is available to correct a defect based on fraud, mutual mistake, or the mistake of one party that is known or suspected by the other. Nevertheless, one appellate court has stated that reformation is also available to correct a defect in a deed resulting from the unconscionable conduct of one party that is neither fraudulent nor illegal [*MacFarlane v. Peters (1980) 103 Cal. App. 3d 627, 631, 163 Cal. Rptr. 655]* . In that case, a quiet title action involving multiple interests in the same parcel of land, plaintiff had obtained his interest at an improvement bond assessment delinquency sale, at which time the majority property owner had been legally incompetent. The deed conveyed to plaintiff a divided interest in the form of narrow strips running completely around and through the parcel, and plaintiff admitted that his design in the execution of this deed had been to deny the majority owner access to the property. The court of appeal affirmed reformation of the deed to grant plaintiff an undivided interest in the same amount, stating that such unconscionable advantage over a legally incompetent landowner falls within the area to which a court may address its equitable powers [*MacFarlane v. Peters (1980) 103 Cal. App. 3d 627, 631-633, 163 Cal. Rptr. 655]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewContracts LawDefensesAmbiguity & MistakeMutual MistakeContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesUnconscionabilityGeneral OverviewContracts

LawFormationAmbiguity & MistakeMutual MistakeContracts LawFormationAmbiguity & MistakeUnilateral MistakeContracts LawRemediesReformationEvidenceProcedural ConsiderationsBurdens of ProofClear & Convincing Proof

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§ 488.15 Defenses to Reformation Action

[1] In General

The party against whom reformation is sought may, in addition to raising affirmative defenses, simply rebut one or more of the essential elements that must be proven. For example, the defending party may show that the writing does reflect the true intent of the parties [*see Getty v. Getty (1986) 187 Cal. App. 3d 1159, 1178, 232 Cal. Rptr. 603* (trust reflected trustors' intent, even though intent was based on mistaken understanding); *see* discussion *§ 488.13*], or that she or he did not know of or suspect the other party's mistake [*see La Mancha Dev. Corp. v. Sheegog (1978) 78 Cal. App. 3d 9, 16-17, 144 Cal. Rptr. 59* (constructive knowledge is not equivalent to knowledge or suspicion and therefore does not support reformation on ground of unilateral mistake); *see* discussion *§ 488.41[1][b][iv]*]. Similarly, a defense to reformation may be based on prejudice to the legitimate rights of a bona fide third-party purchaser for value [*see Baines v. Zuieback (1948) 84 Cal. App. 2d 483, 491, 191 P.2d 67* ; *see also* discussion in *§ 488.13[2]*], or the invalidity of the parties' agreement [*Ainsworth v. Morrill (1916) 31 Cal. App. 509, 511, 160 P. 1089* ; *see* discussion in *§ 488.13[3]*].

For further discussion relating to each essential element, see *§ 488.14*. For general forms denying allegations of a complaint, see Ch. 26, *Answers* .

[2] Lapse of Statutory Limitation Period

An action for relief on the ground of fraud or mistake is generally required to be brought within three years of the time the cause of action arises [*see Code Civ. Proc. 338(d)*].

A cause of action for reformation based on fraud or mistake is not deemed to accrue until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake [*see Code Civ. Proc. 338(d)*; *Welsher v. Glickman (1969) 272 Cal. App. 2d 134, 140, 77 Cal. Rptr. 141]* .

When there has been considerable delay between the occurrence of fraud or mistake and its discovery by the aggrieved party, the court uses a reasonable diligence standard to determine the point at which the aggrieved party should be charged with constructive notice of the facts [*Laing v. Occidental Life Ins. Co. (1966) 244 Cal. App. 2d 811, 820, 53*

Cal. Rptr. 681 ; *Western Title Guar. Co. v. Sacramento & San Joaquin Drainage Dist. (1965) 235 Cal. App. 2d 815, 825, 45 Cal. Rptr. 578]* .

In an action to reform a deed, the inclusion of a cause of action to quiet title does not necessarily extend the limitations period. If, in order to quiet title, a deed must first be reformed, the three-year limitation period for actions based on fraud or mistake applies [*Welsher v. Glickman (1969) 272 Cal. App. 2d 134, 139-140, 77 Cal. Rptr. 141* (limitations period governing actions quieting title not applicable to action seeking reformation of deed and quiet title because court could not quiet title before first striking reservations of easement and surface entry; three-year period applicable); *see* Ch. 482, *Quieting Title*].

For a form for an affirmative defense based on lapse of statutory limitation period, see *§ 488.66*. For discussion and forms relating to limitation periods generally, see Ch. 345, *Limitation of Actions* . For discussion of the equitable defense of laches, see *§ 488.15[6]*.

[3] Res Judicata

An action for reformation may be barred by the doctrine of res judicata. For example, a court's prior approval of a trustee's accounting is a bar to a subsequent action for reformation seeking to alter the income distribution provisions of the trust [*Getty v. Getty (1986) 187 Cal. App. 3d 1159, 1174-1175, 232 Cal. Rptr. 603]* . Res judicata, however, will not bar reformation of a judgment itself [*see* *Douglass v. Dahm (1950) 101 Cal. App. 2d 125, 128, 224 P.2d 914]* .

[4] Unclean Hands

Reformation, an equitable remedy, is subject to the equitable defense of unclean hands. Under this maxim of equitable jurisprudence, a party who has acted wrongfully, dishonestly, or unfairly in bringing an action to court is precluded from obtaining equitable relief [*Seymour v. Cariker (1963) 220 Cal. App. 2d 300, 305, 33 Cal. Rptr. 727]* .

The party asserting the defense of unclean hands must plead it or otherwise call it to the attention of the trial court. Only in cases involving "flagrantly unconscionable" conduct will the court, on its own initiative, apply the doctrine of unclean hands even though it was not raised initially by the parties [*Behm v. Fireside Thrift Co. (1969) 272 Cal. App. 2d 15, 21, 76 Cal. Rptr. 849]* .

[5] Waiver and Ratification

Reformation is subject to the equitable defenses of waiver and ratification. These defenses must be pleaded affirmatively in order to be considered by the court [*San Fernando Valley C. of C. v. Thomas (1954) 123 Cal. App. 2d 348, 350-351, 266 P.2d 891]* . For a form for an affirmative defense based on waiver, see *§ 488.64*.

[6] Laches

Reformation is subject to the equitable defense of laches [*Getty v. Getty (1986) 187 Cal. App. 3d 1159, 1170-171, 232 Cal. Rptr. 603* (39-year delay between time trust beneficiary could be charged with knowledge of facts on which reformation action was based and time action was brought and prejudice resulting from death of important witnesses as constituting laches)]. The essential elements of laches are the following [*Stafford v. Ballinger (1962) 199 Cal. App. 2d 289, 296, 18 Cal. Rptr. 568]* :

- An omission to assert a right.
- A delay in the assertion of the right for some appreciable period.
- Circumstances that would cause prejudice to an adverse party if assertion of the right is permitted.

Courts decide what period of time constitutes a bar to reformation on the ground of laches on a case-by-case basis [*Voge, Inc. v. Rose (1962) 205 Cal. App. 2d 534, 542, 23 Cal. Rptr. 87]* .

Laches is an affirmative defense. The party asserting the defense of laches must show both delay and prejudice proximately caused thereby [*Laing v. Occidental Life Ins. Co. (1966) 244 Cal. App. 2d 811, 821, 53 Cal. Rptr. 681]* . Unless laches is disclosed on the face of the complaint, the party asserting laches bears the burden of pleading and proving it [*Utica Mut. Ins. Co. v. Monarch Ins. Co. (1967) 250 Cal. App. 2d 538, 543, 58 Cal. Rptr. 639* (laches no defense when complaint bore no evidence of prejudice and delay was less than the analogous statutory limitation period)]. If laches does appear on the face of the complaint, it is susceptible to a general demurrer [*Kleinclaus v. Dutard (1905) 147 Cal. 245, 250, 81 P. 516]* .

For a form for an affirmative defense based on laches, see *§ 488.65*. For discussion of related defense of lapse of statutory limitation period, see *§ 488.15[2]*.

[7] Negligence

As a general equitable rule, inexcusable negligence in failing to discover the mistake for which a remedy is sought bars the granting of equitable relief [*Voge, Inc. v. Rose (1962) 205 Cal. App. 2d 534, 539, 23 Cal. Rptr. 87]* . Negligence is not, however, a blanket bar to reformation. Instead, the court analyzes the circumstances of the individual case and determines the extent to which the aggrieved party has been negligent. Courts will excuse that negligence of which a person of ordinary prudence might have been guilty [*Voge, Inc. v. Rose (1962) 205 Cal. App. 2d 534, 539, 23 Cal. Rptr. 87]* . Conversely, negligence that is so gross as to constitute a neglect of legal duty will bar the granting of relief [*Los Angeles & Redondo R.R. Co. v. New Liverpool Salt Co. (1906) 150 Cal. 21, 28, 87 P. 1029* ; see also *Civ. Code § 1577*(regarding neglect of legal duty in context of a mistake of fact)].

Negligence in failing to read a written instrument sought to be reformed is not necessarily a bar to relief [*see Baines v. Zuieback (1948) 84 Cal. App. 2d 483, 491, 191 P.2d 67* (negligence in failing to read instrument before signing it as not bar to reformation)]. Whether a court will grant reformation turns on the underlying cause of the party's failure to read the instrument. Reformation will be denied when the party seeking reformation fails to read the contents of the writing and this failure is due solely to the party's own carelessness or negligence [*Miller v. Lantz (1937) 9 Cal. 2d 544, 548, 71 P.2d 585]* . On the other hand, failure to read the instrument will not bar an action for reformation when the failure is attributable to fraud and false representations by the other party concerning the contents of the writing [*California Trust Co. v. Cohn (1932) 214 Cal. 619, 627, 7 P.2d 297]* . Also, if the other party knows of or suspects the mistake of the aggrieved party, negligence in failing to read the written instrument is no defense [*Ramseier v. Oakley Sanitary Dist. (1961) 197 Cal. App. 2d 722, 726-727, 17 Cal. Rptr. 464* (failure to read final version of contract held not to bar reformation when plaintiff knew of or suspected defendant's mistake in omitting a term of their agreement)].

Conversely, a party who has read the instrument but fails to detect an error in its contents is nevertheless entitled to bring an action for reformation [*Mills v. Schulba (1950) 95 Cal. App. 2d 559, 565, 213 P.2d 408* (reformation of deed not barred by failure of ordinary businessperson to detect a defect in the property description)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataContracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawDefensesEquitable EstoppelStatutes of LimitationsContracts LawRemediesEquitable ReliefUnclean HandsContracts LawRemediesRatificationContracts LawRemediesReformationContracts LawTypes of ContractsBona Fide PurchasersGovernmentsLegislationStatutes of

LimitationsTime Limitations

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§ 488.16 Right to Jury Trial

An action seeking the reformation of a written instrument is a proceeding in equity [*Martinez v. Martinez (1950) 99 Cal. App. 2d 425, 428*], and therefore there is generally no right to a jury trial [*Loftus v. Fischer (1896) 113 Cal. 286, 288, 45 P. 328]* . When legal and equitable issues are joined in the same action, however, as when a party seeks reformation of contract and damages for breach of the contract as reformed, the parties may demand a jury trial on the legal issues [*Abbott v. City of Los Angeles (1958) 50 Cal. 2d 438, 462, 326 P.2d 484* ; *Robinson v. Puls (1946) 28 Cal. 2d 664, 665-666, 171 P.2d 430]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsActions in EquityCivil ProcedureTrialsJury TrialsJury DemandsContracts LawRemediesReformation

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§ 488.17 Presumption of Parties' Intent to Make Equitable Agreement

The law presumes that all parties to a transaction intend to make an equitable and conscientious agreement [*Civ. Code § 3400*].

Legal Topics:

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

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§ 488.18 Scope of Court's Inquiry Into True Intent

In reforming a written instrument, the court must ascertain the true intent of the parties [*First American Title Ins. & Trust Co. v. Cook (1970) 12 Cal. App. 3d 592, 598, 90 Cal. Rptr. 645]* . To this end, the court may inquire into (1) the intended meaning of the instrument, (2) the intended legal consequences of the instrument, as well as (3) the intended language of the instrument [*Civ. Code § 3401*].

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§ 488.19 Specific Performance of Reformed Instrument and Other Additional Relief

Although sometimes referred to as a "cause of action," reformation is merely one of several remedies for a single wrong. When the cause of action is based on failure to perform the intended agreement, the plaintiff may seek reformation and other forms of relief [*Landis v. Superior Court (1965) 232 Cal. App. 2d 548, 555, 42 Cal. Rptr. 893]* . For example, *Civ. Code § 3402* expressly provides for specific enforcement of a written instrument once it has been reformed. Reformation and specific enforcement can be sought in the same action [*Tomas v. Vaughn (1944) 63 Cal. App. 2d 188, 192, 146 P.2d 499]* . For discussion and forms relating to specific enforcement generally, see Ch. 528, *Specific Performance* .

A general equitable principle dictates that a court of equity administer a full measure of relief, so as to avoid circuity of action and to promote the ends of justice [*Voge, Inc. v. Rose (1962) 205 Cal. App. 2d 534, 538, 23 Cal. Rptr. 87]* . Accordingly, a court, having first obtained equitable jurisdiction over the subject matter, may award any additional relief incidental to the equitable relief being sought [*Tomas v. Vaughn (1944) 63 Cal. App. 2d 188, 192, 146 P.2d 499]* . For example, a court of equity may award damages if they are purely incidental to the relief of reformation. The award of monetary relief does not change the equitable nature of the action into an action at law. It merely enables a court of equity to settle all disputesbetween the parties in one action [*Tomas v. Vaughn (1944) 63 Cal. App. 2d 188, 192, 146 P.2d 499]* .

For discussion and forms relating to contract remedies generally, including reformation, see Ch. 140, *Contracts* . For discussion and forms relating to the cancellation of written instruments as an alternative remedy to reformation, see Ch. 107, *Cancellation of Instruments* . For discussion and forms relating to the alternative remedies of rescission and restitution, see Ch. 490, *Rescission and Restitution* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureEquityReliefContracts LawRemediesReformationContracts LawRemediesSpecific Performance

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[Reserved]

§§ 488.20[Reserved]

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§ 488.40 State Statutes

Action to correct defective certificate of execution of instrument. *Civ. Code §§ 1202, 1204*

Fraud defined. *Civ. Code §§ 1571-1573*

Mistake defined. *Civ. Code §§ 1576-1579*

General statute of frauds. *Civ. Code § 1624*

Effect of fraud or mistake on contract. *Civ. Code § 1640*

Statute of frauds regarding agent's authority to contract. *Civ. Code § 2309*

Reformation available after mistake or fraud. *Civ. Code § 3399*

Presumption of parties' equitable intentions for purpose of revision of contract. *Civ. Code § 3400*

Scope of inquiry in reformation action. *Civ. Code § 3401*

Specific enforcement of reformed contract. *Civ. Code § 3402*

Statute of limitations in an action for relief on the ground of fraud or mistake. *Code Civ. Proc. § 338(d)*

Parol evidence rule. *Code Civ. Proc. § 1856*

Statute of frauds regarding premarital agreement. *Fam. Code § 1611*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract InterpretationParol EvidenceGeneral OverviewContracts LawDefensesAmbiguity & MistakeMutual MistakeContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawDefensesEquitable EstoppelStatutes of FraudsContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesReformationContracts LawRemediesSpecific Performance

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§ 488.41 Decisions

[1] Action for Reformation

[a] Establishing Elements of Action

Reformation of insurance policy to cover additional party requires objective manifestation of mutual intent to so cover. *American Home Ins. Co. v. Travelers Indemnity Co. (1981) 122 Cal. App. 3d 951, 965, 175 Cal. Rptr. 826*

Court correctly admitted evidence of parties' lack of intent to violate usury law in action to reform note by deleting usurious provision. *First American Title Ins. & Trust Co. v. Cook (1970) 12 Cal. App. 3d 592, 597-598, 90 Cal. Rptr. 645*

Clear and convincing proof is proper evidentiary standard in action seeking reformation. *Baines v. Zuieback (1948) 84 Cal. App. 2d 483, 488, 191 P.2d 67*

[b] Grounds for Relief

[i] Fraud

Reformation on ground of fraud is proper to remedy fraud in execution. *Lane v. Davis (1959) 172 Cal. App. 2d 302, 307-308, 342 P.2d 267*

[ii] Mistake of Law

Reformation on ground of mistake of law is proper to delete joint tenancy designation from voluntary conveyance because grantor mistakenly believed it meant she would retain undivided one half interest. *Tyler v. Larson (1951) 106*

Cal. App. 2d 317, 319-320, 235 P.2d 39

[iii] Mutual Mistake of Fact

Reformation on ground of mutual mistake presupposes actual agreement among parties as to their true intention, and the parties' mutual yet mistaken belief that written instrument reflects that intention. *Treadaway v. Camellia Convalescent Hospitals, Inc. (1974) 43 Cal. App. 3d 189, 197, 118 Cal. Rptr. 341*

Mistake by insurer and insured employer in writing group disability policy that is not known to or suspected by employee covered under policy is not ground for reformation. *Insurance Co. of North America v. Bechtel (1973) 36 Cal. App. 3d 310, 316-318, 111 Cal. Rptr. 507*

Mistake of scrivener in reducing the commmon intent of the parties to writing is ground for reformation. *First American Title Ins. & Trust Co. v. Cook (1970) 12 Cal. App. 3d 592, 598, 90 Cal. Rptr. 645*

Mutual mistake is failure of written instrument to express true intent of parties due to inadvertence of both of them. *Shupe v. Nelson (1967) 254 Cal. App. 2d 693, 700, 62 Cal. Rptr. 352*

[iv] Unilateral Mistake of Fact

No mistake of fact or failure of consideration, only error in judgment, was established when contract became unprofitable for party who knew that its value could be affected by particular future event and made no provision in contract with respect to that risk; risk is borne by that party, who is not entitled to avoid, rescind, or reform contract. *Mosher v. Mayacamas Corp. (1989) 215 Cal. App. 3d 1, 5-6, 263 Cal. Rptr. 373*

Constructive notice of unilateral mistake is insufficient ground for reformation. *La Mancha Dev. Corp. v. Sheegog (1978) 78 Cal. App. 3d 9, 16-17, 144 Cal. Rptr. 59*

Operation of estoppel in context of unilateral mistake prevents non-mistaken party from claiming different intent. *Stare v. Tate (1971) 21 Cal. App. 3d 432, 438-439, 98 Cal. Rptr. 264*

Agreement was intended by party acting under unilateral mistake as contract of parties. *Eagle Indem. Co. v. Industrial Acc. Com. (1949) 92 Cal. App. 2d 222, 229, 206 P.2d 877*

Knowledge or suspicion of duly authorized agent is sufficient to support reformation on ground of unilateral mistake. *Eagle Indem. Co. v. Industrial Acci. Com. (1949) 92 Cal. App. 2d 222, 225-226, 206 P.2d 877*

[c] Valid Instrument Required

Valid agreement between the parties is prerequisite to granting of reformation. *Paterson v. Board of Trustees (1958) 157 Cal. App. 2d 811, 815, 321 P.2d 825*

Written contract for employment alleged by employee to be "illegal, void, false and erroneous" was void agreement not subject to reformation. *McClure v. Cerati (1948) 86 Cal. App. 2d 74, 85, 194 P.2d 46*

Agreement void for illegality is not subject to reformation. *Ainsworth v. Morrill (1916) 31 Cal. App. 509, 511, 160 P. 1089*

[2] Defenses

[a] Equitable Estoppel

Equitable estoppel is not to be applied against one who is blameless; trust beneficiaries as not in privity with alleged promisor for purpose of avoiding general rule of inapplicability. *Getty v. Getty (1986) 187 Cal. App. 3d 1159, 1185, 232 Cal. Rptr. 603*

[b] Illegality or Statutory Noncompliance

Attempted reformation of insurance policy to reflect mutual intent of parties was void when policy as reformed would not comply with statute relating to retained limit of self insurance. *Alderson v. Insurance Co. of North America (1990) 223 Cal. App. 3d 397, 411-413, 273 Cal. Rptr. 7*

[c] Lapse of Statutory Limitation Period and Laches

Representation is estoppel effecting bar to laches only when made by party against whom reformation is sought. *Getty v. Getty (1986) 187 Cal. App. 3d 1159, 1171-1172, 232 Cal. Rptr. 603* (upholding trial court's refusal to reform trust)

Limitation period for reformation based on fraud and mistake is three years from date fraud or mistake was or should have been discovered. *Getty v. Getty (1986) 187 Cal. App. 3d 1159, 1168, 232 Cal. Rptr. 603*

Thirty-nine-year delay between time trust beneficiary could be charged with knowledge of facts on which reformation action was based and time action was brought, and prejudice resulting from death of important witnesses, was laches. *Getty v. Getty (1986) 187 Cal. App. 3d 1159, 1170-1171, 232 Cal. Rptr. 603*

Three-year statute of limitations (former *Code Civ. Proc. 338(4)* (*now Code Civ. Proc. 338(d)*) is applicable to action for reformation of deed or contract on ground of fraud or mistake. *Welsher v. Glickman (1969) 272 Cal. App. 2d 134, 140, 77 Cal. Rptr. 141*

Action on cross complaint for reformation of automobile insurance contract is not barred by laches because not barred by applicable limitations period and, also, cross defendant failed to show how it suffered prejudice by delay. *Utica Mut. Ins. Co. v. Monarch Ins. Co. (1967) 250 Cal. App. 2d 538, 543-544, 58 Cal. Rptr. 639*

Defense of laches in action to reform insurance contract requires showing of delay and prejudice proximately caused thereby. *Laing v. Occidental Life Ins. Co. (1966) 244 Cal. App. 2d 811, 821, 53 Cal. Rptr. 681*

Laches appearing on face of complaint is susceptible to general demurrer. *Kleinclaus v. Dutard (1905) 147 Cal. 245, 249-250, 81 P. 516*

[d] Negligence

Negligence of attorney in evaluating worth of equity in real property is no bar to reformation of property settlement agreement. *Stare v. Tate (1971) 21 Cal. App. 3d 432, 437, 98 Cal. Rptr. 264*

Failure to read insurance policy is no absolute bar to reformation. *Laing v. Occidental Life Ins. Co. (1966) 244 Cal. App. 2d 811, 819, 53 Cal. Rptr. 681*

Negligence in not reading instrument before signing is no bar to reformation. *Baines v. Zuieback (1948) 84 Cal. App. 2d 483, 491, 191 P.2d 67*

Failure to read instrument with sufficient attention to detect error is no bar to reformation. *Strauss v. Bruce (1934) 139 Cal. App. 62, 66, 33 P.2d 71*

[e] Res Judicata

Res judicata is defense to action for reformation; action seeking to reform income distribution provisions of trust is barred by prior judgments that affirmed validity of trust's terms and approved trustees' accountings. *Getty v. Getty (1986) 187 Cal. App. 3d 1159, 1172-1175, 232 Cal. Rptr. 603*

[f] Unclean Hands

Doctrine of unclean hands is defense to action for reformation of subordination agreement of chattel mortgage. *Behm v. Fireside Thrift Co. (1969) 272 Cal. App. 2d 15, 21-22, 76 Cal. Rptr. 849* .

[g] Waiver or Ratification

Defenses of waiver and ratification is required to be raised affirmatively. *San Fernando Valley C. of C. v. Thomas (1954) 123 Cal. App. 2d 348, 350-351, 266 P.2d 891*

[3] Nature and Scope of Reformation

Court is not permitted to create new contract for the parties. *Lemoge Electric v. County of San Mateo (1956) 46 Cal. 2d 659, 663-664, 297 P.2d 638*

Purpose of reformation is to correct written instrument in order to effectuate common intention of parties which was incorrectly reduced to writing. *Bailard v. Marden (1951) 36 Cal. 2d 703, 708, 227 P.2d 10*

Intention of parties is defined as single intention entertained by both parties. *Bailard v. Marden (1951) 36 Cal. 2d*

703, 708, 227 P.2d 10

Action seeking reformation is equitable proceeding with no right to trial by jury. *Loftus v. Fischer (1896) 113 Cal. 286, 288, 45 P. 328*

Sole purpose of reformation is to correct written instrument to conform to underlying agreement of parties which was incorrectly reduced to writing; when instrument reflects agreement based on mutual mistake of fact, reformation as unavailable. *Getty v. Getty (1986) 187 Cal. App. 3d 1159, 1178, 232 Cal. Rptr. 603*

Purpose of reformation is to permit court to do equity. *Getty v. Getty (1986) 187 Cal. App. 3d 1159, 1180, 232 Cal. Rptr. 603*

Reformation is based on some underlying agreement of parties; if alleged mistake was failure of parties to agree what to do in event of certain contingency, which did in fact occur, reformation is unavailable. *Getty v. Getty (1986) 187 Cal. App. 3d 1159, 1178-1180, 1181-1182, 232 Cal. Rptr. 603*

Executed contract is not subject to reformation if aggrieved party, with knowledge of facts, accepts performance in accordance with terms of contract as written. *Vantress Farms, Inc. v. Sydenstricker (1970) 11 Cal. App. 3d 943, 950, 90 Cal. Rptr. 251*

Reformation requires prior agreement among the parties on all essential terms. *Shupe v. Nelson (1967) 254 Cal. App. 2d 693, 699-700, 62 Cal. Rptr. 352*

Reformation is merely one of several remedies for single wrong. *Landis v. Superior Court (1965) 232 Cal. App. 2d 548, 555, 42 Cal. Rptr. 893*

Reformation of judgments and decrees is proper given equitable nature of remedy. *Voge, Inc. v. Rose (1962) 205 Cal. App. 2d 534, 538-539, 23 Cal. Rptr. 87*

[4] Reformable Instruments

Reformation of promissory note to delete usurious provision is proper when inclusion of provision contravened parties' true intent to execute note with legal interest rate. *First American Title Ins. & Trust Co. v. Cook (1970) 12 Cal. App. 3d 592, 598, 90 Cal. Rptr. 645* *Strauss v. Bruce (1934) 139 Cal. App. 62, 66, 33 P.2d 71*

Reformation of major medical expense insurance policy to delete exclusionary provisions is proper. *Laing v. Occidental Life Ins. Co. (1966) 244 Cal. App. 2d 811, 817-821, 53 Cal. Rptr. 681*

[5] Rights of Third Parties

Reformation is not limited to parties to original transaction but as available to one who has suffered prejudice or

pecuniary loss, such as trust beneficiary; aggrieved party as not required to have paid consideration in order to obtain reformation. *Getty v. Getty (1986) 187 Cal. App. 3d 1159, 1180-1181, 232 Cal. Rptr. 603*

General principles of third-party beneficiary law are applicable to insurance contracts and therefore bar incidental beneficiary from reforming policy to expand coverage. *American Home Ins. Co. v. Travelers Indemnity Co. (1981) 122 Cal. App. 3d 951, 967-968, 175 Cal. Rptr. 826*

Surviving entity of corporate merger is not bona fide purchaser for value in action to reform lease to which it has succeeded. *Treadaway v. Camellia Convalescent Hospitals, Inc. (1974) 43 Cal. App. 3d 189, 199-200, 118 Cal. Rptr. 341*

Insurance policy is reformable to limit or exclude coverage if that was parties' intention, even when rights of third-party claimants, not parties to the insurance contract, are adversely affected. *Truck Ins. Exch. v. Wilshire Ins. Co. (1970) 8 Cal. App. 3d 553, 559, 87 Cal. Rptr. 604*

Party "aggrieved," and therefore entitled to seek reformation, is one who has suffered prejudice or pecuniary loss as well as original parties to transaction. *Shupe v. Nelson (1967) 254 Cal. App. 2d 693, 698, 62 Cal. Rptr. 352*

Landowner is not bona fide purchaser for value in action by adjoining landowner to reform misdescription in landowner's deed because had landowner made thorough examination of property before purchase, she would have noticed defect in deed. *Saxon v. Du Bois (1962) 209 Cal. App. 2d 713, 717-718, 26 Cal. Rptr. 196*

Original lessor is not bona fide purchaser for value in action between lessee and sublessee. *Baines v. Zuieback (1948) 84 Cal. App. 2d 483, 491-492, 191 P.2d 67*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataContracts LawDefensesAmbiguity & MistakeMutual MistakeContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawDefensesEquitable EstoppelStatutes of LimitationsContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesEquitable ReliefUnclean HandsContracts LawRemediesRatificationContracts LawRemediesReformationGovernmentsLegislationStatutes of LimitationsTime LimitationsInsurance LawClaims & ContractsContract FormationReformation

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43-488 California Forms of Pleading and Practice--Annotated § 488.42

§ 488.42 Text References

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 762-774 (4th ed. 1997)

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 276-284, 298; vol. 2 *Insurance*, §§ 216, 217 (10th ed. 2005)

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[Reserved]

§§ 488.43[Reserved]

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Chapter 488 REFORMATION OF INSTRUMENTS
PART IV. FORMS

43-488 California Forms of Pleading and Practice--Annotated § 488.60

§ 488.60 Reformation of Written Instrument [Civ. Code § 3399]--Complaint Based on Unilateral Mistake of Fact [Civ. Code §§ 1577, 1640]

[1] FORM Reformation of Written Instrument [Civ. Code § 3399]--Complaint Based on Unilateral Mistake of Fact [Civ. Code §§ 1577, 1640]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*] Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR REFORMATION
_____ [*name(s)*] [and DOES I through _____,] Defendant(s).	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

[1. _____ (*Allege identity and capacity of plaintiff, e.g.,* Plaintiff _____ (*name*) is, and at all times herein mentioned was, a partnership with its principal place of business in _____ (*city*), _____ County, California, and it has filed and published the fictitious name statement required under *Business and Professions Code Sections 17910 through 17917*).]

[2. _____ (*Allege identity, capacity, and residence of defendant(s), e.g.,* Defendant _____(*name*) is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), California).]

[3. Defendants DOES I through _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants has, or claims to have, an interest in the _____ (*specify written instrument, e.g.,* lease agreement) herein described, the exact nature of which is unknown to plaintiff.)]

[4. (Plaintiff is informed and believes and thereon alleges that) (A)t all times herein mentioned each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafteralleged, was acting within the course and scope of that agency and employment.]

5. _____ [*Allege facts leading to the formation of a valid agreement, e.g.,* On or about _____(*date*), in _____ (*city*), _____ County, California, plaintiff _____ (*name*) and defendant _____(*name*) negotiated for and mutually agreed to the lease, by plaintiff from defendant, of commercial property located at _____ (*address*). The purpose of this agreement was to enable plaintiff to open and operate a second business location].

6. _____ [*Allege the terms of the agreement reflecting the true intent of the parties, e.g.,* The oral agreement of plaintiff and defendant consisted, in pertinent part, of the following terms. Defendant agreed to lease the premises to plaintiff for a fixed term of five years, commencing on _____ (*date*). Plaintiff agreed to pay defendant, as the monthly rent for the premises, a sum equal to 10 percent of the gross income for that month from plaintiff's second place of business located on the leased premises].

7. _____ [*Allege the terms of the agreement as they were actually reduced to writing, e.g.,* On _____(*date*), in _____ (*city*), _____ County, California, plaintiff and defendant executed a written lease to carry out their intended agreement, a true copy of which is attached as Exhibit "A" and is incorporated by reference].

8. The above-described written _____ [*specify instrument, e.g.,* lease agreement], fails to reflect the true intent of the parties in that _____ [*specify, e.g.,* it provides that the monthly rent equal 10 percent of the gross income for that month from plaintiff's principal place of business and plaintiff's second place of business]. To reflect the true intent of the parties, it should instead provide that _____ [*specify, e.g.,* the monthly rent shall be a sum equal to 10 percent of the gross income for that month from plaintiff's second place of business only, that is, the place of business located on the premises].

9. The above-described failure of the written _____[*specify written instrument, e.g.,* lease agreement] to reflect the true intent of the parties resulted from a unilateral mistake on the part of _____ [*specify party to agreement, e.g.,* plaintiff], in that _____ [*specify nature of mistake, e.g.,* plaintiff made a clerical error in drafting the rental clause of the lease agreement, but mistakenly believed, in presenting the lease agreement to defendant for execution, that the clause correctly expressed the terms for rental intended by the parties].

10. Defendant _____ [knew of *or* suspected] the above-described mistake at the time of execution of the written _____ [*specify instrument, e.g.,* lease agreement], in that _____ [*specify, e.g.,* defendant, prior to signing the agreement, specifically asked to review the rental clause of the agreement, in view of the parties' extensive negotiations with respect to the calculation of rent].

[11. Plaintiff, although not a named party to the above-described written _____ (*specify instrument, e.g.,* lease agreement) may nonetheless suffer _____ [prejudice *and/or* pecuniary loss unless the _____ (*specify instrument, e.g.,* lease agreement) is reformed, in that _____ (*specify*)].

12. On or about _____ (*date*), plaintiff discovered the error in the written _____ [*specify instrument, e.g.,* lease agreement] when _____ [*allege manner in which plaintiff discovered the mistake*].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the reformation of the written _____[*specify instrument, e.g.,* lease agreement] to reflect the true intent of the parties, as follows: _____ [*specify the revision sought*];

2. For costs of suit herein incurred; and

3. For such other and further relief as the Court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This complaint is for use by a plaintiff to seek reformation of a written instrument on the ground of plaintiff's unilateral mistake of fact if the other party knew of the mistake or suspected it [*see Civ. Code § 3399*].

This form may be combined with other causes for relief when additional or alternative relief is requested. For further discussion, see the Introduction § 488.19.

[3] Allegations

This complaint includes initial, optional paragraphs that allege the following:

- The identity and capacity of the plaintiff (Paragraph 1).
- The identity, capacity, and residence of the defendant (Paragraph 2).
- Fictitiously named defendants (Paragraph 3).

- Agency of the defendants (Paragraph 4).

- Facts describing the formation of a valid agreement (Paragraph 5) [*see Civ. Code §§ 3399* (reformation after fraud or mistake), 3400 (presumption of equitable and conscientious agreement)].

- The terms of the agreement as they were intended by the parties (Paragraph 6).

- The terms of the agreement as they were reduced to writing (Paragraph 7) [*see Civ. Code §§ 3399, 3400*; *see also Auerbach v. Healy (1916) 174 Cal. 60, 62-63, 161 P. 1157]* .

- The manner in which the written instrument should be corrected to express the true intent of the parties (Paragraph 8) [*see Civ. Code §§ 3399, 3401*].

- The existence of a unilateral mistake causing failure of the written instrument to embody the true intent of the parties and nature of that mistake (Paragraph 9) [*see Civ. Code §§ 1577* (mistake of fact defined), *3399* (reformation after fraud or mistake)].

- Facts describing defendant's knowledge or suspicion of the mistake (Paragraph 10) [*see Miller v. Lantz (1937) 9 Cal. 2d 544, 548, 71 P.2d 585]* .

- The date and manner of plaintiff's discovery of the mistake (Paragraph 12) [*see Auerbach v. Healy (1916) 174 Cal. 60, 62-63, 161 P. 1157]* .

Optional Paragraph 11 alleges plaintiff's status as an aggrieved party, for use when plaintiff is not a named party and his or her status is not otherwise apparent from the preceding allegations [*see Civ. Code § 3399* (standing in reformation action); *see also Orcutt v. Ferranini (1965) 237 Cal. App. 2d 216, 224, 46 Cal. Rptr. 715]* .

[4] Pleading With Particularity Required

The party seeking reformation of a written instrument should take great care in pleading the ultimate facts constituting the basis for the action. Lack of particularity in pleading could result in the sustaining of an interposed demurrer [*Girard v. Miller (1963) 214 Cal. App. 2d 266, 273, 29 Cal. Rptr. 359]* .

[5] Anticipating Defenses Based on Lapse of Time

The three-year statute of limitations under *Code Civ. Proc. § 338(d)* does not commence to run against an action for reformation until discovery of the underlying fraud or mistake. Although the party against whom reformation is sought has the burden of raising the statute of limitations defense, the complaint, nonetheless, must allege facts showing the date and manner in which the fraud or mistake was discovered [*see Wilson v. Wilson (1962) 199 Cal. App. 2d 542, 545, 18 Cal. Rptr. 768]* .

If there has been considerable delay between the occurrence of the fraud or mistake on which the action for reformation is based and the filing of the action, defenses based on lapse of time may be raised. The party seeking reformation should anticipate the raising of these defenses by alleging recent discovery of the underlying fraud or mistake and diligence sufficient to excuse the long delay [*see Miller v. Lantz (1937) 9 Cal. 2d 544, 548, 71 P.2d 585]* . For further discussion, see *§§ 488.15[2], [6], 488.65, 488.66.*

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any

answer to be verified also, if the action is an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

For alternative forms for verification, see Ch. 572, *Verification* .

[7] Jurisdiction

The superior court has jurisdiction of the action. Because relief under *Civ. Code § 3399* is equitable, actions for reformation of an instrument will be classified as unlimited civil cases unless they fall within one of the specific categories of actions in equity that are designated as limited civil cases [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(3),(b), 88*].

Actions to revise a contract are limited civil cases when the relief is sought in an action upon the contract if the action otherwise is a limited civil case [*Code Civ. Proc. § 86(a)(3)*]. In this connection, an action normally is classified as a limited civil case if the amount in controversy, exclusive of interest, is $25,000 or less [*see Code Civ. Proc. §§ 85(a), 86(a)(1)*].

In addition, the following cases in equity are designated as limited civil cases, and an action seeking reformation of an instrument presumably would be a limited civil case if it came within one of these categories [*Code Civ. Proc. § 86(b)*]:

- Cases to try title to personal property when the amount involved is not more than $25,000.
- Cases when equity is pleaded as a defensive matter in any case that is otherwise a limited civil case.
- Cases to vacate a judgment or order of the court obtained in a limited civil case through extrinsic fraud, mistake, inadvertence, or excusable neglect.

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[8] Venue

In an action for reformation, the proper county for the trial of the action depends on the nature of the instrument sought to be reformed. An action to reform a contract may generally be brought in the county in which any defendant resides at the commencement of the action [*Code Civ. Proc. § 395(a)*; *see also Code Civ. Proc. § 395.5* (action against corporation or association properly brought in county of defendant's principal place of business)]. *Code Civ. Proc. § 395(a)*, which allows an action founded on a contractual obligation to be brought in the county where the obligation is to be performed or in the county in which the contract in fact was entered into, as well as in the county of defendant's residence, does not apply to an action for reformation of contract. An action to reform a contract is not considered to be an action on the obligation itself. It is essentially a personal action in equity [*Mettler v. Hedley (1959) 170 Cal. App. 2d 277, 280-281, 338 P.2d 489]* .

The proper venue of an action for the reformation of a deed or other instrument that would affect a right or interest in real property is the county in which all or part of the subject property is located [*Code Civ. Proc. § 392(a)(1)*; *see also Franklin v. Dutton (1889) 79 Cal. 605, 606, 21 P. 964* ; *Massae v. Superior Court (1981) 118 Cal. App. 3d 527, 535-539, 173 Cal. Rptr. 527* (action to reform deed of trust to delete power of sale was properly brought in county in

which real property was situated because action had direct impact on real property right or interest)].

[9] Cross References

For alternative allegations with respect to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For discussion and forms relating to cancellation of written instruments as an alternative to reformation, see Ch. 107, *Cancellation of Instruments*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to remedies for breach of contract, see Ch. 140, *Contracts*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and a general form for a complaint to cancel a deed and to quiet title, see Ch. 184, *Deeds*

For discussion and forms relating to the amendment, correction, and modification of judgments, see Ch. 318, *Judgments*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to rescission and restitution as an alternative to reformation, see Ch. 490, *Rescission and Restitution*

For discussion and forms relating to the remedy of specific performance that may be sought in conjunction with reformation, see Ch. 528, *Specific Performance*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For discussion and forms relating to actions to establish an equitable mortgage, when an instrument, intended as real property security, is invalid, see Ch. 555, *Trust Deeds and Real Property Mortgages*

For discussion and complaints relating to actions to establish a constructive trust over real property acquired through fraud, mistake, or undue influence, see Ch. 561, *Trusts: Constructive Trusts*

For allegations showing proper venue, see Ch. 571, *Venue*

For alternative verification forms, see Ch. 572, *Verification*

[10] State Constitution

Jurisdiction of superior court. *Cal. Const., art. VI, § 10*

[11] State Statutes

Mistake defined. *Civ. Code §§ 1576-1579*

Effect of fraud or mistake on contract. *Civ. Code § 1640*

Reformation of written instruments. *Civ. Code § 3399 et seq.*

Jurisdiction in "limited civil cases." *Code Civ. Proc. § 85 et seq.*

Jurisdiction of small claims courts. *Code Civ. Proc. § 116.220(b)*

Venue. *Code Civ. Proc. §§ 392, 395, 395.5*

[12] Decisions

Reformation on ground of unilateral mistake requires allegation that nonmistaken party knew of or suspected mistake at time of execution of the instrument. *Miller v. Lantz (1937) 9 Cal. 2d 544, 548, 71 P.2d 585* ; *City of Cypress v. New Amsterdam Cas. Co. (1968) 259 Cal. App. 2d 219, 225, 66 Cal. Rptr. 357*

Necessary allegations to action for reformation include real agreement; agreement reduced to writing; how writing fails to embody agreement; and facts showing how mistake was made, whose mistake it was, and how it came about. *Auerbach v. Healy (1916) 174 Cal. 60, 62-63, 161 P. 1157* ; *Landis v. Superior Court (1965) 232 Cal. App. 2d 548, 555, 42 Cal. Rptr. 893* ; *Johnson v. Sun Realty Co. (1934) 138 Cal. App. 296, 300, 32 P.2d 393*

Party who seeks reformation of instrument if drafted is required to show some excuse for its mistake. *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 21, 262 Cal. Rptr. 716*

Constructive notice of unilateral mistake is insufficient ground for reformation. *La Mancha Dev. Corp. v. Sheegog (1978) 78 Cal. App. 3d 9, 16-17, 144 Cal. Rptr. 59*

Knowledge or suspicion of duly authorized agent is sufficient ground for reformation. *Eagle Indem. Co. v. Industrial Acci. Com. (1949) 92 Cal. App. 2d 222, 225-226, 206 P.2d 877*

Failure to plead ultimate facts constituting mutual or unilateral mistake results in sustaining of general and special demurrer. *McClure v. Cerati (1948) 86 Cal. App. 2d 74, 83, 194 P.2d 46*

Allegation of consideration in action to reform deed is not required because burden to allege insufficient consideraton rests on party against whom reformation is sought. *Belletich v. Belletich (1940) 40 Cal. App. 2d 732, 735, 105 P.2d 954*

[13] Text References

Witkin, California Procedure, vol. 5, *Pleading*, §§ 762-774 (4th ed. 1997)

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 276-284; vol. 2, *Insurance*, §§ 216, 217 (10th ed. 2005)

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43-488 California Forms of Pleading and Practice--Annotated § 488.61

§ 488.61 Reformation of Written Instrument [Civ. Code § 3399]--Allegation of Ground for Reformation--Based on Mistake of Law [Civ. Code §§ 1578, 1640]

[1] FORM Reformation of Written Instrument [Civ. Code § 3399]--Allegation of Ground for Reformation--Based on Mistake of Law [Civ. Code §§ 1578, 1640]

[*EITHER, if alleging mutual mistake of law*]

The above-described failure of the written _____ [*specify written instrument, e.g.,* conveyance contract] to reflect the true intent of the parties resulted from a mutual mistake of law by plaintiff and defendant in that _____ [*specify nature of mistake, e.g.,* both parties believed that the effect of describing their interest in the conveyance contract as a joint tenancy was to allow each party to retain an undivided one-half interest in the property].

[*OR, if alleging unilateral mistake of law by one party known or suspected by other*]

The above-described failure of the written _____ [*specify written instrument, e.g.,* conveyance contract] to reflect the true intent of the parties resulted from a mistake of law on the part of _____ [*specify party to agreement, e.g.,* plaintiff], which _____ [*specify party to agreement, e.g.,* defendant] knew or suspected at the time of execution of the agreement in that _____ [*specify nature of mistake, e.g.,* plaintiff believed that the effect of holding title in joint tenancy was to allow each party to retain an undivided one-half interest in the property. After completion of the transaction and execution of the contract, defendant told plaintiff that he knew that in order for each party to retain an undivided one-half interest in the property, they would have had to describe their interest as a tenancy in common and not as a joint tenancy, in the conveyance contract].

[2] Use of Form

This allegation is for use by a plaintiff to seek reformation of a written instrument on the ground of mistake of law [*Civ. Code § 3399*]. The first alternative paragraph alleges facts describing a mutual mistake in law [*see Civ. Code § 1578(1)*

(defining mutual mistake of law)], whereas the second alternative paragraph alleges facts describing a unilateral mistake in law by the plaintiff, known or suspected by the defendant [*see Civ. Code § 1578(2)* (defining unilateral mistake of law)]. Either allegation may be inserted in § 488.60 in place of Paragraphs 9 and 10 of that form.

[3] State Statutes

Mistake of law defined. *Civ. Code § 1578*

Effect of fraud or mistake on contract. *Civ. Code § 1640*

Reformation of written instruments. *Civ. Code §§ 3399-3402*

[4] Decisions

Mistake as to legal effect of instrument is subject to reformation. *Stafford v. California C.P. Growers (1938) 11 Cal. 2d 212, 219, 78 P.2d 1150*

Reformation on ground of mistake of law is proper for deleting joint tenancy designation from voluntary conveyance because grantor mistakenly believed it meant she would retain undivided one half interest. *Tyler v. Larson (1951) 106 Cal. App. 2d 317, 319-320, 235 P.2d 39*

[5] Cross References

See also Comments and References to § 488.60

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43-488 California Forms of Pleading and Practice--Annotated § 488.62

§ 488.62 Reformation of Written Instrument [Civ. Code § 3399]--Allegation of Ground for Reformation--Based on Fraud [Civ. Code §§ 1571-1573, 1640]

[1] FORM Reformation of Written Instrument [Civ. Code § 3399]--Allegation of Ground for Reformation--Based on Fraud [Civ. Code §§ 1571-1573, 1640]

1. The above-described failure of the written _____ [*specify instrument, e.g.,* conditional sales contract] to reflect the true intent of the parties resulted from defendant's false representation to plaintiff that the above-mentioned written instrument embodied their real agreement.

2. Without knowledge of the true facts and in reliance on defendant's false representations, plaintiff was deceived and misled into signing a writing that differed materially from the prior oral understanding of the parties. Plaintiff's reliance on defendant's false representations that the written _____ [*identify instrument, e.g.,* conditional sales contract] conformed to the parties' intended agreement was reasonable and justified in that _____ [*specify, e.g.,* defendant had previously shown plaintiff a writing that contained the parties' intended agreement and plaintiff believed that it was this writing that she was asked to sign and did, in fact, sign].

[2] Use of Form

This allegation is for use by a plaintiff to seek reformation of a written instrument on the ground of fraud [*see Civ. Code § 3399*]. It alleges (1) the fact that the defendant's false representation resulted in the failure of the instrument to embody the intent of the parties (Paragraph 1); and (2) the fact that the instrument was materially altered due to defendant's fraud, and justifiable reliance by plaintiff (Paragraph 2) [*see Civ. Code § 1572* (actual fraud defined); *see also Vasquez v. Superior Court of San Joaquin County (1971) 4 Cal. 3d 800, 811, 94 Cal. Rptr. 796, 484 P.2d 964* (elements of fraud)]. The allegation may be inserted in *see § 488.60* in place of Paragraphs 9 and 10.

[3] State Statutes

Fraud defined. *Civ. Code §§ 1571-1573*

Effect of fraud or mistake on contract. *Civ. Code § 1640*

Reformation of written instruments. *Civ. Code §§ 3399-3402*

[4] Decisions

Negligence in not reading instrument is no bar to reformation if party aggrieved is justified in relying on fraudulent misrepresentations of other party. *Security-First Nat. Bank v. Earp (1942) 19 Cal. 2d 774, 777, 122 P.2d 900*

Reformation on ground of fraud is proper to remedy fraud in execution of written instrument. *Lane v. Davis (1959) 172 Cal. App. 2d 302, 307-308, 342 P.2d 267*

[5] Cross References

See also Comments and References to § 488.60

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43-488 California Forms of Pleading and Practice--Annotated § 488.63

§ 488.63 Reformation of Written Instrument [Civ. Code § 3399]--Allegation of Ground for Reformation--Based on Mutual Mistake of Fact [Civ. Code §§ 1577, 1640]

[1] FORM Reformation of Written Instrument [Civ. Code § 3399]--Allegation of Ground for Reformation--Based on Mutual Mistake of Fact [Civ. Code §§ 1577, 1640]

1. The above-described failure of the written _____ [*specify written instrument, e.g.,* promissory note] to reflect the true intent of the parties resulted from a mutual mistake of both parties in that _____[*specify nature of mistake, e.g.,* the escrow agent employed by the parties to arrange the loan inadvertently used a standard printed form of note containing a provision that in the event the note was not paid when due, interest would be compounded; the parties did not request inclusion of the compound interest provision, which had the effect of rendering the note usurious on its face, and did not believe that the written instrument that they signed contained such a provision].

[2] Use of Form

This allegation is for use by a plaintiff to seek reformation of a written instrument on the ground of mutual mistake of fact [*Civ. Code § 3399*; *see also Civ. Code § 1577* (mistake of fact)]. The allegation may be inserted in *see § 488.60* in place of Paragraphs 9 and 10 of that form.

[3] State Statutes

Mistake defined. *Civ. Code §§ 1576-1579*

Effect of fraud or mistake on contract. *Civ. Code § 1640*

Reformation of written instruments. *Civ. Code §§ 3399-3402*

[4] Decisions

Mistake of surveyor in running boundary line is subject to reformation. *Breen v. Donnelly (1887) 74 Cal. 301, 304, 15 P. 845*

Reformation on ground of mutual mistake presupposes actual agreement among parties as to their true intention, and the parties' mutual yet mistaken belief that written instrument reflects that intention. *Treadaway v. Camellia Convalescent Hospitals, Inc. (1974) 43 Cal. App. 3d 189, 197, 118 Cal. Rptr. 341*

Mutual mistake is failure of written instrument to express true intent of parties due to inadvertence of both of them. *Shupe v. Nelson (1967) 254 Cal. App. 2d 693, 700, 62 Cal. Rptr. 352*

Mistake of attorney jointly employed to effect transfer of title is subject to reformation. *Mills v. Schulba (1950) 95 Cal. App. 2d 559, 561-562, 213 P.2d 408*

[5] Cross References

See also Comments and References to § 488.60

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43-488 California Forms of Pleading and Practice--Annotated § 488.64

§ 488.64 Reformation of Written Instrument [Civ. Code § 3399]--Affirmative Defense Allegation--Waiver and Ratification of Mistake by Plaintiff

[1] FORM Reformation of Written Instrument [Civ. Code § 3399]--Affirmative Defense Allegation--Waiver and Ratification of Mistake by Plaintiff

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

1. On or about _____ [*date*], plaintiff discovered the _____ [mistake *or* fraud] and communicated his/her discovery to defendant. At that time, plaintiff informed defendant that he/she would abide by the instrument "as is," notwithstanding the _____ [mistake *or* fraud] and that the instrument as written was satisfactory.

2. Plaintiff's communication to defendant of his/her discovery of the _____ [mistake *or* fraud] constituted a waiver of plaintiff's right to reformation and a ratification of the instrument as written.

[2] Use of Form

This affirmative defense may be used in an answer to a complaint for reformation of a written instrument [*Civ. Code § 3399*]. The affirmative defense alleged is that the plaintiff has waived his or her right to relief by acts or statements that, in effect, ratify the written instrument as is. For further discussion of this defense, see the Introduction § 488.41[2][g]. For discussion relating to answers generally, including general forms into which the foregoing affirmative defense allegation may be inserted, see Ch. 26, *Answers* .

[3] Decisions

Waiver and ratification as affirmative defense that must be raised in pleading. *San Fernando Valley C. of C. v. Thomas (1954) 123 Cal. App. 2d 348, 350-351, 266 P.2d 891*

[4] Cross References

See also References to § 488.60

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43-488 California Forms of Pleading and Practice--Annotated § 488.65

§ 488.65 Reformation of Written Instrument [Civ. Code § 3399]--Affirmative Defense Allegation--Laches

[1] FORM Reformation of Written Instrument [Civ. Code § 3399]--Affirmative Defense Allegation--Laches

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

1. Plaintiff has delayed an unreasonable period of time in bringing this action in that _____ [*specify length of delay, indicating when the mistake/fraud occurred and when plaintiff brought suit*].

2. Plaintiff's delay in bringing this action has prejudiced defendant in that _____ [*describe how the delay has prejudiced the defendant*].

[2] Use of Form

This affirmative defense may be used in an answer to a complaint for reformation of a written instrument [*Civ. Code § 3399*]. The affirmative defense alleged is that the plaintiff is barred from asserting his or her claim for reformation by operation of the equitable doctrine of laches. For further discussion of this defense, see the Introduction *§ 488.15[6]*. For discussion relating to answers generally, including general forms into which this affirmative defense allegation may be inserted, see Ch. 26, *Answers* .

[3] Alternative Use of Demurrer

Laches is an affirmative defense that usually must be raised by way of allegation in the answer. It may be considered as a ground for demurrer only when it is apparent on the face of the complaint [*Kleinclaus v. Dutard (1905) 147 Cal. 245, 250, 81 P. 516]* . For further discussion and forms relating to demurrers generally, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[4] Decisions

Reformation is subject to the equitable defense of laches. *Getty v. Getty (1986) 187 Cal. App. 3d 1159, 1170-1171, 232 Cal. Rptr. 603*

Thirty-nine-year delay in bringing action and undue prejudice caused by death of important witnesses constitutes laches. *Getty v. Getty (1986) 187 Cal. App. 3d 1159, 1170-1171, 232 Cal. Rptr. 603*

Delay without prejudice caused thereby is insufficient to support defense of laches. *Utica Mut. Ins. Co. v. Monarch Ins. Co. (1967) 250 Cal. App. 2d 538, 543-544, 58 Cal. Rptr. 639* ; *Laing v. Occidental Life Ins. Co. (1966) 244 Cal. App. 2d 811, 821, 53 Cal. Rptr. 681*

Laches is decided by court on case-by-case bases. *Voge, Inc. v. Rose (1962) 205 Cal. App. 2d 534, 542, 23 Cal. Rptr. 87*

Essential elements of laches are omission to assert right, delay in assertion of right for some appreciable period, and circumstances that would cause prejudice to an adverse party if assertion of right is permitted. *Stafford v. Ballinger (1962) 199 Cal. App. 2d 289, 296, 18 Cal. Rptr. 568*

[5] Cross References

See also Comments and References to §§ 488.60 and 488.64

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43-488 California Forms of Pleading and Practice--Annotated § 488.66

§ 488.66 Reformation of Written Instrument [Civ. Code § 3399]--Affirmative Defense Allegation--Lapse of Statutory Limitation Period [Code Civ. Proc. § 338(d)]

[1] FORM Reformation of Written Instrument [Civ. Code § 3399]--Affirmative Defense Allegation--Lapse of Statutory Limitation Period [Code Civ. Proc. § 338(d)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that the action is barred by the provisions of *Code of Civil Procedure Section 338(d).*

[2] Use of Form

This form is for use by defendant in an action for reformation to raise the bar of the statute of limitations by way of an affirmative defense allegation in her or his answer [*Code Civ. Proc. § 338(d)*]. For further discussion, see Introduction *§ 488.15[2]*. For discussion relating to answers generally, including general forms into which this affirmative defense allegation may be inserted, see Ch. 26, *Answers* .

[3] Alternative Use of Demurrer

If the defense of the statute of limitations is apparent from the face of the complaint or from matter of which the court may take judicial notice, the objection may be raised by general demurrer [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*; *see Evid. Code §§ 451, 452* (judicial notice)]. The specific grounds must be pleaded (an exception to the general rule that general demurrers need only state that the complaint fails to state a cause of action). The defense of the statute of limitations, however, is not waived for failure to demur, and may be asserted as an affirmative defense in the answer [*California Safe etc. Co. v. Sierra etc. Co. (1910) 158 Cal. 690, 697-698, 112 P. 274]* . For further discussion and forms relating to demurrers generally, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[4] State Statutes

Statute of Limitations in an action for relief on the ground of fraud or mistake. *Code Civ. Proc. § 338(d)*

[5] Decisions

Cause of action for reformation accrues on discovery of actual conflict between written terms of agreement and alleged mutual intent of parties; when contract became ambiguous because of change in law, party seeking reformation, who was familiar with copyright law, was charged with discovery of conflict on date new law came into effect. *Hal Roach Studios v. Richard Feiner and Co. (9th Cir. 1990) 896 F.2d 1542, 1547-1550* (applying California law)

Three-year statute of limitations (former *Code Civ. Proc. § 338(4)*; *now see Code Civ. Proc. § 338(d)*) is applicable to action for reformation of deed or contract on ground of fraud or mistake. *Welsher v. Glickman (1969) 272 Cal. App. 2d 134, 140, 77 Cal. Rptr. 141*

Cause of action for reformation is not deemed to accrue until discovery, by aggrieved party, of facts constituting underlying fraud or mistake. *Welsher v. Glickman (1969) 272 Cal. App. 2d 134, 140, 77 Cal. Rptr. 141*

Action on cross complaint for reformation of automobile insurance contract was not barred by laches because action was not barred by applicable limitations period and cross defendant also failed to show how it suffered prejudice by delay. *Utica Mut. Ins. Co. v. Monarch Ins. Co. (1967) 250 Cal. App. 2d 538, 543-544, 58 Cal. Rptr. 639*

Reasonable diligence standard is used to determine point at which aggrieved party should be charged with constructive notice of facts constituting fraud or mistake for purposes of calculating when statutory limitation period commences to run. *Laing v. Occidental Life Ins. Co. (1966) 244 Cal. App. 2d 811, 820, 53 Cal. Rptr. 681*

[6] Cross References

See also Comments and References to §§ 488.60 and 488.64

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43-488 California Forms of Pleading and Practice--Annotated § 488.67

§ 488.67 Reformation of Written Instrument [Civ. Code § 3399]--Affirmative Defense Allegation--Intervening Rights of Bona Fide Purchaser

[1] FORM Reformation of Written Instrument [Civ. Code § 3399]--Affirmative Defense Allegation--Intervening Rights of Bona Fide Purchaser

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

1. On _____ [*date*], after execution of the _____ [*specify instrument, e.g.,* deed], _____ [*name of bona fide third-party purchaser*] acquired rights under the _____ [*specify instrument, e.g.,* deed] from _____ [*name*], a party to the agreement, as follows: _____ [*specify rights acquired and manner of their acquisition*].

2. _____ [*Name of bona fide third-party purchaser*] acquired his/her rights under the _____[*specify instrument, e.g.,* deed] in good faith, without notice of the rights of plaintiff _____ [*name*], whose interests have been described defectively in the instrument.

3. The above-described rights of _____ [*name of bona fide third-party purchaser*] were acquired for valuable consideration, to wit, $_____.

[2] Use of Form

This form is for use by defendant in an action for reformation to raise the defense of the intervening rights of a bona fide purchaser by way of an affirmative defense allegation in her or his answer [*Civ. Code § 3399*]. For further discussion, see Introduction *§ 488.13[2]*. For discussion relating to answers generally, including general forms into which the foregoing affirmative defense allegation may be inserted, see Ch. 26, *Answers* .

[3] State Statutes

Intervening rights of bona fide purchasers under reformation statute. *Civ. Code § 3399*

[4] Decisions

Rights acquired bona fide or in good faith are those acquired without notice of defect in instrument sought to be reformed. *Arp v. Ferguson (1917) 175 Cal. 646, 648, 166 P. 803*

Surviving entity of corporate merger is not bona fide purchaser for value in action to reform lease to which it has succeeded. *Treadaway v. Camellia Convalescent Hospitals, Inc. (1974) 43 Cal. App. 3d 189, 199-200, 118 Cal. Rptr. 341*

Insurance policy is reformable to limit or exclude coverage if that was parties' intention, even when rights of third-party claimants, not parties to theinsurance contract, are adversely affected. *Truck Ins. Exch. v. Wilshire Ins. Co. (1970) 8 Cal. App. 3d 553, 559, 87 Cal. Rptr. 604*

Protected third parties do not include those who acquire rights with actual or constructive notice of rights of others whose interests have been described defectively in instrument sought to be reformed. *Shupe v. Nelson (1967) 254 Cal. App. 2d 693, 698, 62 Cal. Rptr. 352*

Landowner was not a bona fide purchaser for value in action by adjoining landowner to reform misdescription in landowner's deed because, had landowner made thorough examination of property before purchase, she would have noticed defect in deed. *Saxon v. Du Bois (1962) 209 Cal. App. 2d 713, 717-718, 26 Cal. Rptr. 196*

Original lessor is not bona fide purchaser for value in action between lessee and sublessee. *Baines v. Zuieback (1948) 84 Cal. App. 2d 483, 491-492, 191 P.2d 67*

Rights of third party are those acquired, after execution of written instrument, by bona fide purchaser for value from party to agreement. *Baines v. Zuieback (1948) 84 Cal. App. 2d 483, 491, 191 P.2d 67*

[5] Cross References

See also Comments and References to §§ *488.60* and *488.64*

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[a] In General

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[e] Six-Month Limitation

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[13] Hearing on Motion

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[h] Discovery Proceedings

[i] Judgment Entered by Court Clerk

[j] Premature Default Judgments

[k] Judgment Exceeds Demand or Gives Unrequested Relief

[l] Damages

[m] Review on Appeal

[9] Void Orders

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[5] Insufficient Grounds

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[b] Attorney's Act or Omission

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[a] In General

[b] Delay in Seeking Relief

[11] Discretion of Court

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§ 489.330 Planning and Procedures

[1] Ascertain Facts

[2] Make Preliminary Determinations

[3] Review Time Limits

[4] Consider Combining Motions

[5] Prepare Notice of Motion

[6] Serve and File Papers

[7] Prepare for Hearing

[8] Call for Tentative Ruling

[9] Attend Hearing

[10] Prepare and Serve Order

§ 489.331 Consideration of Alternative Remedies for Relief: Valid Judgment and Order

[1] Relief Under Code Civ. Proc. § 473(b) Based on Mistake, Inadvertence, Surprise, or Excusable Neglect

[a] Is Client Proper Party?

[b] Is Judgment or Order Proper Target of Relief?

[c] Does Basis for Relief Exist?

[d] Is Relief Appropriate to Client's Case?

[e] Has Time to File Motion for Relief Expired?

[f] If Time Has Expired, Is Alternative Remedy Available?

[g] What Is Proper Court for Motion?

[h] Prepare Moving Papers

[2] Relief From Default, Default and Default Judgment, or Dismissal Under Code Civ. Proc. § 473(b) Based on Attorney's Affidavit or Declaration of Fault

[a] Is Client Proper Party?

[b] Is Judgment or Order Proper Target of Relief?

[c] Does Basis for Relief Exist?

[d] Is Relief Appropriate to Client's Case?

[e] Has Time to File Motion for Relief Expired?

[f] If Time Has Expired, Is Alternative Remedy Available?

[g] What Is Proper Court for Motion?

[h] Prepare Moving Papers

[3] Relief From Default or Default and Default Judgment Under Code Civ. Proc. § 473.5 Based on Lack of Notice in Time to Defend

[a] Is Client Proper Party?

[b] Is Judgment or Order Proper Target of Relief?

[c] Does Basis for Relief Exist?

[d] Is Relief Appropriate to Client's Case?

[e] Has Time to File Motion for Relief Expired?

[f] If Time Has Expired, Is Alternative Remedy Available?

[g] What Is Proper Court for Motion?

[h] Prepare Moving Papers

[4] Relief From Default or Default and Default Judgment in Certain Consumer Actions Under Code Civ. Proc. § 585.5 Based on Filing of Action in Wrong Court

[a] Is Client Proper Party?

[b] Is Judgment or Order Proper Target of Relief?

[c] Does Basis for Relief Exist?

[d] Is Relief Appropriate to Client's Case?

[e] Has Time to File Motion for Relief Expired?

[f] If Time Has Expired, Is Alternative Remedy Available?

[g] What Is Proper Court for Motion?

[h] Prepare Moving Papers

[5] Relief Under Code Civ. Proc. § 473.1 Based on California Court's Having Assumed Jurisdiction Over Attorney's Law Practice

[a] Is Client Proper Party?

[b] Is Judgment or Order Proper Target of Relief?

[c] Does Basis for Relief Exist?

[d] Is Relief Appropriate to Client's Case?

[e] Has Time to File Motion for Relief Expired?

[f] If Time Has Expired, Is Alternative Remedy Available?

[g] What Is Proper Court for Motion?

[h] Prepare Moving Papers

[6] Relief From Default or Default and Default Judgment Based on Servicemembers' Civil Relief Act

[a] Is Client Proper Party?

[b] Is Judgment or Order Proper Target of Relief?

[c] Does Basis for Relief Exist?

[d] Is Relief Appropriate to Client's Case?

[e] Consider Effect of Other Limitations

[f] Has Time to File Motion Expired?

[g] If Time Has Expired, Is Alternative Remedy Available?

[h] What Is Proper Court for Motion?

[i] Prepare Moving Papers

[7] Relief From Judgment Under State Law Based on Military Service

[a] Is Client Proper Party?

[b] Is Judgment or Order Proper Target of Relief?

[c] Does Basis for Relief Exist?

[d] Is Relief Appropriate to Client's Case?

[e] Consider Effect of Other Limitations

[f] Has Time to File Motion Expired?

[g] If Time Has Expired, Is Alternative Remedy Available?

[h] What Is Proper Court for Motion?

[i] Prepare Moving Papers

§ 489.332 Consideration of Alternative Remedies for Relief: Void Judgment and Order

[1] Relief Under Code Civ. Proc. § 473(d) From Judgment or Order that Is Void on Its Face

[a] Is Client Proper Party?

[b] Is Judgment or Order Proper Target of Relief?

[c] Does Basis for Relief Exist?

[d] Is Relief Appropriate to Client's Case?

[e] No Time Limits Apply

[f] What Manner of Attack Is Preferred?

[g] Prepare Papers

[2] Relief Under Code Civ. Proc. § 473(d) From Judgment or Order That Is Void in Fact Although Not Void on Its Face

[a] Is Client Proper Party?

[b] Is Judgment or Order Proper Target of Relief?

[c] Does Basis for Relief Exist?

[d] Is Relief Appropriate to Client's Case?

[e] Has Time to File Motion for Relief Expired?

[f] If Time Has Expired, Is Alternative Remedy Available?

[g] What Is Proper Court for Motion?

[h] Prepare Moving Papers

§ 489.333 Consideration of Alternative Remedies for Relief: Equitable Relief From Valid or Void Judgment, Dismissal, or Order

[1] Is Client Proper Party?

[2] Is Judgment or Order Proper Target of Relief?

[3] Does Basis for Relief Exist?

[4] Is Relief Appropriate to Client's Case?

[5] Which Proceedings Are Preferred?

[6] Which Court Is Proper Court to Seek Relief?

[7] Motion for Equitable Relief

[8] Independent Action in Equity

§§ 489.334-489.339 [Reserved]

§ 489.340 Response to Request for Relief From Judgment, Dismissal, or Order

[1] Make Preliminary Determinations

[2] Prepare Papers

[3] Serve and File Papers

[4] Prepare for Hearing

[5] Attend Hearing

[6] Prepare and Serve Order, if Required

[7] Prepare Notice of Order

§ 489.341 Defenses to Relief From Valid Judgment and Order From Judgment, Dismissal, or Order

[1] Relief Based on Mistake, Inadvertence, Surprise, or Excusable Neglect

[2] Relief From Default, Default and Default Judgment, or Dismissal Based on Attorney's Affidavit or Declaration of Fault

[3] Relief From Default or Default and Default Judgment Based on Lack of Notice in Time to Defend

[4] Relief From Default or Default and Default Judgment in Certain Consumer Actions Based on Filing of Action in Wrong Court

[5] Relief Based on California Court's Having Assumed Jurisdiction Over Attorney's Law Practice

[6] Relief From Default or Default and Default Judgment Based on Servicemembers' Civil Relief Act

§ 489.342 Defenses to Relief From Void Judgment and Order

[1] Relief From Judgment or Order That Is Void on Its Face

[2] Relief From Judgment or Order That Is Void in Fact Although Not Void on Its Face

§ 489.343 Defenses to Relief From Valid or Void Judgment, Dismissal, or Order In Equity

[1] Motion for Equitable Relief:

[2] Independent Action in Equity Filed in Superior Court

§§ 489.344-489.359 [Reserved]

§ 489.360 Relief From Judgment, Dismissal, Order, or Other Proceeding Taken Through Mistake, Inadvertence, Surprise, or Excusable Neglect or Based on Attorney's Affidavit (Declaration) of Fault [Code Civ. Proc. § 473(b)]

[1] Notice of Motion and Motion and Supporting Declaration--General Form

[a] FORM

[b] Use of Form

[c] Judgment, Dismissal, Order, or Proceeding Taken by Party

[d] Relief From Default Judgment

[e] Notice Requirement

[f] Amount of Notice Required

[g] Supporting Declaration

[i] Requirement

[ii] Content and Form

[h] Other Accompanying Papers

[i] Supporting Memorandum

[ii] Pleading Proposed to Be Filed

[i] Affidavit of Merits

[j] Service of Notice of Motion

[k] Parties to Be Served

[l] Cross References

[2] Order Granting Motion

[a] FORM

[b] Use of Form

[c] Findings

[d] Conditions of Relief

[i] On Any Terms That May Be Just

[ii] Relief Based on Attorney's Affidavit or Declaration of Fault

[iii] Penalties

[e] Statement of Reasons

[f] Cross References

§ 489.361 Relief From Judgment, Dismissal, Order, or Other Proceeding Taken Through Mistake, Inadvertence, Surprise, or Excusable Neglect or Based on Attorney's Affidavit (Declaration) of Fault [Code Civ. Proc. § 473(b)]--Supporting Declaration--Statement in Supporting Declaration

[1] Default Was Due to Defendant's Excusable Mistake of Fact

[a] FORM

[b] Use of Form

[2] Default Was Due to Defendant's Excusable Neglect in Reasonably Relying on Promise of Codefendant or Employer to Defend

[a] FORM

[b] Use of Form

[c] Reliance on Third Party to Defend

[d] Reliance on Insurer to Defend

[3] Default Was Due to Attorney's Excusable Neglect Resulting From Press of Business Coupled With Unusual Circumstances

[a] FORM

[b] Use of Form

[4] Default Resulted From Attorney Abandonment

[a] FORM

[b] Use of Form

[5] Dismissal of Action Resulted From Defendant's Reliance on Erroneous Information Given by Court Officer

[a] FORM

[b] Use of Form

§ 489.362 Relief From Default, Resulting Default Judgment, or Dismissal Based on Attorney's Affidavit (Declaration) of Fault--Supporting Declaration [Code Civ. Proc. § 473(b)] Attesting to Attorney's Mistake, Inadvertence, Surprise, or Neglect--General Form

[1] FORM

[2] Use of Form

[3] Effect of Affidavit or Declaration

[4] Cross References

§§ 489.363-489.369 [Reserved]

§ 489.370 Relief From Judgment, Dismissal, Order, or Other Proceeding Taken Through Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--Opposing Declaration--General Form

[1] FORM

[2] Use of Form

[3] Contents of Counterdeclaration

[4] Legal Argument

[5] Service of Opposing Papers

§ 489.371 Relief From Judgment, Dismissal, Order, or Other Proceeding Taken Through Mistake, Inadvertence, Surprise, or Excusable Neglect--Order Denying Motion

[1] FORM

[2] Use of Form

[3] Motion Based on Attorney's Affidavit of Fault

[4] Cross References

§§ 489.372-489.379 [Reserved]

§ 489.380 Motion to Set Aside Default and Default Judgment When Service of Summons Did Not Result in Actual Notice to Defendant in Time to Defend [Code Civ. Proc. § 473.5]

[1] Notice of Motion and Motion and Supporting Declaration

[a] FORM

[b] Use of Form

[c] Supporting Memorandum

[2] Order Granting Motion

[a] FORM

[b] Use of Form

[c] Findings

[d] Terms on Granting Relief

[e] Sanctions

§§ 489.381-489.389 [Reserved]

§ 489.390 Motion for Relief From Default and Default Judgment for Improper Venue Under Civ. Code § 1812.10 or 2984.4 or Code Civ. Proc. § 395(b)][Code Civ. Proc. § 585.5]

[1] Notice of Motion and Motion and Supporting Declaration

[a] FORM

[b] Use of Form

[c] Declaration Required

[d] Cross References

[2] Order Granting Motion

[a] FORM

[b] Use of Form

[c] Findings

[d] Award of Damages, Costs, and Attorney's Fee

§§ 489.391-489.399 [Reserved]

§ 489.400 Motion for Relief From Judgment, Order, or Other Proceeding Taken Against Party When California Court Has Assumed Jurisdiction Over Law Practice of Party's Attorney Pursuant to Bus. & Prof. Code § 6180 or 6190 [Code Civ. Proc. § 473.1]

[1] Notice of Motion and Motion and Supporting Declaration

[a] FORM

[b] Use of Form

[c] Supporting Memorandum

[2] Order Granting Motion

[a] FORM

[b] Use of Form

[c] Terms

§§ 489.401-489.409 [Reserved]

§ 489.410 Motion for Relief From Default and Default Judgment Under Servicemembers' Civil Relief Act (50 U.S.C. App. § 501 et seq.) [50 U.S.C. App. § 521]

[1] Notice of Motion and Motion and Supporting Declaration

[a] FORM

[b] Use of Form

[c] Contents of Declaration

[d] Supporting Memorandum

[e] Cross References

[2] Order Granting Motion

[a] FORM

[b] Use of Form

§ 489.411 Motion for Relief From Judgment Taken Against Party During Period of Military Service [Mil. & Vet. Code § 402(d)]

[1] Notice of Motion and Motion and Supporting Declaration

[a] FORM

[b] Use of Form

[c] Supporting Memorandum

[2] Order Granting Motion

[a] FORM

[b] Use of Form

§§ 489.412-489.419 [Reserved]

§ 489.420 Motion to Set Aside Void Judgment or Order [Code Civ. Proc. § 473(d)]

[1] Notice of Motion and Motion and Supporting Declaration

[a] FORM

[b] Use of Form

[c] Alternative Use for Judgment or Order Void on Its Face

[d] Extrinsic Evidence

[e] Alternative Remedies

[f] Nonservice or Defective Service of Summons and Motion to Quash

[g] Supporting Memorandum

[2] Order Granting Motion

[a] FORM

[b] Use of Form

§§ 489.421-489.429 [Reserved]

§ 489.430 Motion in Equity to Set Aside Judgment or Order Procured by Extrinsic Fraud or Mistake

[1] Notice of Motion and Motion and Supporting Declaration

[a] FORM

[b] Use of Form

[c] Determining Whether Grounds for Relief Exist

[d] Alternative Remedies

[e] Showing Required

[f] Supporting Memorandum

[g] Action in Equity

[2] Order Granting Motion

[a] FORM

[b] Use of Form

[c] Ruling on Motion for Relief

[d] Discretion of Trial Court

[e] Findings

[f] Award of Costs

§ 489.431 Motion in Equity to Set Aside Judgment or Order Procured by Extrinsic Fraud or Mistake--Supporting Declaration

[1] Default Due to Disability of Party

[a] FORM

[b] Use of Form

[c] Examples of Party Disability

[d] Plaintiff's Concealment Is Extrinsic Fraud

[e] Related Uses

[f] Alternative Statutory Relief

[2] Default Due to Disability of Defendant's Attorney

[a] FORM

[b] Use of Form

[c] Related Use

[d] Alternative Statutory Relief

[3] Default Due to Defendant's Reliance on Representations of Adverse Party's Attorney

[a] FORM

[b] Use of Form

[c] Related Use

[d] Alternative Statutory Relief

§§ 489.432-489.439 [Reserved]

§ 489.440 Complaint in Equity to Set Aside Judgment or Order Obtained by Extrinsic Fraud or Mistake--General Form

[1] FORM

[2] Use of Form

[3] Venue

[4] Allegations

[5] Prayer

[6] No Jury Trial

[7] Cross References

§ 489.441 Complaint in Equity to Set Aside Judgment or Order Obtained by Extrinsic Fraud or Mistake--Default and Default Judgment Rendered by Court Lacking Jurisdiction Over Defendant

[1] FORM

[2] Use of Form

[3] Motion at Law

[4] Judgment Void on Its Face for Lack of Jurisdiction

[5] Meritorious Defense

§ 489.442 Judgment Setting Aside Judgment--General Form

[1] FORM

[2] Use of Form

California Forms of Pleading and Practice--Annotated

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Chapter 489 RELIEF FROM JUDGMENTS AND ORDERS
I. SCOPE

43-489 California Forms of Pleading and Practice--Annotated § 489.01

§ 489.01 Scope of Chapter

This chapter covers direct attacks on valid and void judgments, dismissals, orders, and proceedings in the trial court by various statutory motions at law and by motions and actions in equity. It begins by comparing the methods of relief from judgments, including the distinction between direct and collateral attacks, and which of the orders dealt with in the chapter are appealable as well as the considerations on appeal [*see § 489.10* et seq.].

The chapter discusses and provides forms [for discussion, *see § 489.30* et seq.; for forms, *see § 489.360* et seq.] relating to *Code Civ. Proc. § 473(b)* relief from a judgment, dismissal, order, or other proceeding, including a default judgment, taken through a party's mistake, inadvertence, surprise, or excusable neglect. It also discusses and includes forms relating to motions for relief from defaults and default judgments on other statutory grounds:

- California court has assumed jurisdiction over the party's attorney's law practice [*Code Civ. Proc. § 473.1*; for discussion, *see § 489.100* et seq.; for forms, *see § 489.400*];

- Service of summons did not result in actual notice to the defendant in time to defend [*Code Civ. Proc. § 473.5*; for discussion, *see § 489.70* et seq.; for forms, *see § 489.380*];

- Default or default judgment was entered without compliance with certain consumer venue statutes [*Code Civ. Proc. § 585.5*; for discussion, *see § 489.90* et seq.; for forms, *see § 489.390*]; and

- Servicemembers' Civil Relief Act [*50 U.S.C. App. § 501 et seq.*; for discussion, *see § 489.110* et seq.; for forms, *see § 489.410*].

The chapter also discusses and includes forms relating to direct and collateral attacks on void judgments and orders, including motions for relief from void judgments and orders under *Code Civ. Proc. § 473(d)*, and the court's inherent jurisdiction at law [for discussion, *see § 489.130* et seq.; for forms, *see § 489.420* et seq.].

In addition, the chapter discusses and provides forms relating to direct attacks in equity on judgments and orders. It includes discussion of motions and actions in equity for relief from valid and void judgments and orders, including

defaults and default judgments, on the equitable grounds of extrinsic fraud or mistake [for discussion, *see § 489.220* et seq.; for forms, *see § 489.430* et seq.].

The chapter also includes a Research Guide [*see § 489.280* et seq.] of related Matthew Bender publications, federal and state statutes, decisions, and text references relating to relief from judgments.

The chapter also provides Procedural Checklists for moving [*see § 489.330* et seq.] and opposing [*see § 489.340* et seq.] parties in proceedings for relief from judgment, dismissal, or order.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments

California Forms of Pleading and Practice--Annotated

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§ 489.02 Cross References

For discussion and the form of declaration re military status that must be submitted with a request to enter default [*see 50 U.S.C. App. § 521*], see Ch. 205, *Defaults and Default Judgments* .

For discussion of the procedure on appeal and forms for use in filing an appeal, see Ch. 40, *Appeal: An Overview* , through Ch. 54, *Appeal: California Supreme Court Review* , and Ch. 345A, *Limited Civil Cases* .

For discussion of other manners of directly attacking judgments in the trial court, such as motion for judgment notwithstanding the verdict, a motion for new trial, and a motion to vacate and enter a different judgment, see Ch. 371, *Motions After Trial* .

For discussion of relief from a judgment of dissolution of marriage, see Ch. 221, *Dissolution of Marriage: Procedure* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureTrialsJudgment as Matter of LawJudgments Notwithstanding VerdictsCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureAppealsGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 43: Receivers thru Rewards-Chs. 486-499
Chapter 489 RELIEF FROM JUDGMENTS AND ORDERS
I. SCOPE

43-489 California Forms of Pleading and Practice--Annotated § 489.03

§ 489.03 Governing Law

The manners of attacking judgments and orders are governed by statutory and case law, the California Rules of Court, and local court rules.

Statutory motions for relief from judgments, dismissals, orders, or other proceedings taken by or against a party through his or her mistake, inadvertence, surprise or excusable neglect are governed by *Code Civ. Proc. § 473(b), (c)* (discussed in *§ 489.30* et seq.).

Statutory motions for relief from a judgment, order, or other proceeding, including the dismissal of an action for failure to prosecute, taken against a party when a California court has assumed jurisdiction over the law practice of the party's attorney pursuant to *Bus. & Prof. Code § 6180* or *6190* are governed by *Code Civ. Proc. § 473.1* (discussed in *§ 489.100* et seq.).

Statutory motions for relief from a default and default judgment when service of the summons did not result in actual notice to the party in time to defend are governed by *Code Civ. Proc. § 473.5* (discussed in *§ 489.70* et seq.) and statutory motions for relief from a default or default judgment entered without full compliance with certain consumer statutes are governed by *Code Civ. Proc. § 585.5* (discussed in *§ 489.90* et seq.).

Motions for relief from a default or default judgment against a defendant whose active military service prejudiced his or her ability to defend the action are authorized by *50 U.S.C. App. § 521* (discussed in *§ 489.110* et seq.).

Motions for relief from judgment under the protections provided to military service members under state law are authorized by *Mil. & Vet. Code § 402(d)* (discussed in *§ 489.118*).

Motions for relief from judgment of dissolution of marriage are governed by *Fam. Code § 2120 et seq.*, discussed in Ch. 221, *Dissolution of Marriage: Procedure* .

Motions to reconsider and renewed motions are governed by *Code Civ. Proc. § 1008*, which is discussed in Ch. 374, *Motions to Reconsider and Renewed Motions* .

Relief from void judgments and orders is governed by case law and by *Code Civ. Proc. § 473(d)*. Relief in equity in unlimited civil cases to set aside a void judgment is governed by case law, and relief by a motion in equity in limited civil cases is governed by *Code Civ. Proc. § 86(b)(3)*.

Relief in equity is governed primarily by case law. The general jurisdiction of superior courts is set forth in *Cal. Const., art. VI, § 10*. The power of the state Legislature to prescribe the jurisdiction of the municipal courts is set forth in *Cal. Const., art. VI, § 5(a)*. The equitable jurisdiction of unlimited and limited civil cases prescribed by the Legislature is set forth in *Code Civ. Proc. §§ 85, 86*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsNunc Pro Tunc ReliefCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments

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43-489 California Forms of Pleading and Practice--Annotated §§ 489.04-489.09

[Reserved]

§§ 489.04[Reserved]

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43-489 California Forms of Pleading and Practice--Annotated § 489.10

§ 489.10 Inherent and Statutory Powers of Courts

Apart from statutory authority, all courts have inherent power to correct their records to make them accurate, and under this power courts have frequently corrected their final judgments when, because of clerical errors or omissions, the judgments actually rendered were not the judgments intended to be rendered [*Olivera v. Grace (1942) 19 Cal. 2d 570, 574, 122 P.2d 564*]. Thus, a trial court has inherent power to set aside a judgment entered through its own inadvertence or improvidence, such as a judgment that does not express the court's true intention or when the court acted in ignorance of some material fact of record [*Don v. Cruz (1982) 131 Cal. App. 3d 695, 703, 182 Cal. Rptr. 581*]. However, when the error is inherently judicial rather than clerical or inadvertent, the court does not have power to amend its decision [*Don v. Cruz (1982) 131 Cal. App. 3d 695, 703, 182 Cal. Rptr. 581*].

Similarly, a court has inherent power, apart from statute, to correct its records by vacating a judgment that is void on its face, for the judgment is a nullity and may be ignored [*Olivera v. Grace (1942) 19 Cal. 2d 570, 574, 122 P.2d 564*].

The inherent power to correct clerical errors and to set aside void judgments and orders is confirmed in *Code Civ. Proc. § 473(d)* (*see § 489.130* et seq.). In addition, superior courts have inherent equitable jurisdiction in unlimited civil cases to relieve a party from a judgment or order resulting from extrinsic fraud or mistake, and statutory jurisdiction under *Code Civ. Proc. § 86(b)(3)* to do the same in limited civil cases (*see § 489.227*).

In addition to the court's inherent and statutory powers discussed above, courts have statutory power to relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding under a variety of circumstances, the most common of which is when the judgment, order, or proceeding was taken through a party's mistake, inadvertence, surprise, or excusable neglect [*Code Civ. Proc. § 473(b)* (discussed in *§ 489.30* et seq.]. Other statutory grounds for relief are discussed in *§ 489.70* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From

JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments

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43-489 California Forms of Pleading and Practice--Annotated § 489.11

§ 489.11 Manners of Attacking Judgments and Orders

A judgment or order may be attacked directly or, depending on its nature and the specific ground relied on, collaterally [*see, e.g., Parsons v. Weis (1904) 144 Cal. 410, 415, 77 P. 1007* ; *People ex rel. Mosk v. City of SantaBarbara (1961) 192 Cal. App. 2d 342, 356, 13 Cal. Rptr. 423*]. Although not all judgments and orders subject to direct attack are subject to collateral attack, all judgments and orders subject to collateral attack are subject to a direct attack if the direct attack is timely made [*see, e.g., Parsons v. Weis (1904) 144 Cal. 410, 415, 77 P. 1007*].

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43-489 California Forms of Pleading and Practice--Annotated § 489.12

§ 489.12 When Extrinsic Evidence Is Admissible

On a direct attack extrinsic evidence may normally be introduced to establish the ground or grounds for relief from the order, judgment, or proceeding. On a collateral attack extrinsic evidence may not be introduced and the court is confined to an inspection of the judgment roll (discussed in *§ 489.136*), or record, that is conclusively presumed to be correct [*see, e.g., Milstein v. Turner (1948) 89 Cal. App. 2d 296, 298, 200 P.2d 799* ; *County of Fresno v. Roberson, M. & Co. (1954) 269 P.2d 252*]. However, if a direct attack on a judgment, order, or proceeding that is void in fact, but not on its face, is not timely made (*see* discussion in *§ 489.15[2][a]*), it is subject to the rules of collateral attack, and extrinsic evidence may not be introduced to show the true facts [*see Wells Fargo & Co. v. San Francisco (1944) 25 Cal. 2d 37, 40, 152 P.2d 625* ; *see also* discussions in *§§ 489.17* and *489.138*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsGovernmentsCourtsCourt Records

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43-489 California Forms of Pleading and Practice--Annotated § 489.13

§ 489.13 Direct Attack

[1] Defined

A direct attack on a judgment or order is normally made by motion in the trial court to vacate it or to set it aside or for a new trial, or by an appeal from the judgment or order to a higher court [*Parsons v. Weis (1904) 144 Cal. 410, 415, 77 P. 1007* ; *Palmquist v. Palmquist (1963) 212 Cal. App. 2d 340, 344, 27 Cal. Rptr. 756* ; *Rico v. Nasser Bros. Realty Co. (1943) 58 Cal. App. 2d 878, 882, 137 P.2d 861* ; *County of Fresno v. Roberson, M. & Co. (1954) 124 Cal. App. 2d Supp. 888, 891* , *269 P.2d 252*].

Direct attacks may also be made in other ways. For example, a direct attack on a prior judgment or order may be made by an action in quo warranto or by certiorari and other writs [*People ex rel. Mosk v. City of Santa Barbara (1961) 192 Cal. App. 2d 342, 356, 13 Cal. Rptr. 423* (direct attack by action in quo warranto to test validity of annexation of uninhabited territory to city)]. In a direct attack, the proceeding is brought specifically to nullify the judgment or order as it pertains to the immediate issue under consideration [*People ex rel. Mosk v. City of Santa Barbara (1961) 192 Cal. App. 2d 342, 356, 13 Cal. Rptr. 423*]. Thus, an action in equity to vacate a judgment on the grounds of extrinsic fraud or mistake is a direct attack (*see* discussion in *§ 489.220*).

Direct attacks discussed in this chapter are as follows:

- Motions under *Code Civ. Proc. § 473(b)*, for relief from a judgment, dismissal, order, or proceeding taken through mistake, inadvertence, surprise, or excusable neglect, or based on an attorney's affidavit of fault (discussed in *§ 489.30* et seq.);

- Motions under *Code Civ. Proc. § 473.1*, for relief from a judgment, order, or proceeding when a court has assumed jurisdiction over the law practice of the party's attorney; and motions for relief from default under *Code Civ. Proc. §§ 473.5, 585.5*, and *50 U.S.C. App. § 501 et seq.* (discussed in *§ 489.70* et seq.);

- Motions under *Code Civ. Proc. § 473(d)*, or directed to a court's inherent power at law, to set aside a void judgment or order (discussed in *§ 489.130* et seq.); and

- Motions and actions in equity for relief from a judgment or order (discussed in *§ 489.220* et seq.).

Although any one or more of these direct attacks may be proper to attack a particular judgment or order, each attack is subject to its own rules and requirements, that are discussed in this chapter. For discussion and forms for use in other types of procedures that may be used for direct attacks of judgments or orders, see the chapter dealing with that procedure, such as:

- Ch. 358, *Mandate and Prohibition,*

- Ch. 371, *Motions after Trial,*

- Ch. 483, *Quo Warranto,* or

- Ch. 492, *Review (Certiorari), Writ of.*

[2] Grounds for Direct Attack

A direct attack may generally be used with respect to any type of material error that is properly preserved [*see, e.g., Code Civ. Proc. §§ 657* (grounds for new trial), *906* (power of reviewing court on appeal)]. This includes attacks based on the judgment or order being in excess of jurisdiction [*People ex rel. Public Util. Com. v. Ryerson (1966) 241 Cal. App. 2d 115, 122-123, 50 Cal. Rptr. 246* ; for discussion of the limited collateral attack available on this ground, *see § 489.14[2][b*]]. Direct attack may also address lack of jurisdiction [*see Unruh v. Truck Insurance Exchange (1972) 7 Cal. 3d 616, 622, 102 Cal. Rptr. 815, 498 P.2d 1063* (lack of jurisdiction is not waived and may be asserted for first time on appeal); for discussion of lack of jurisdiction as a basis of collateral attack, *see § 489.14[2][a*]].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsCivil ProcedureRemediesWritsCommon Law WritsQuo WarrantoCivil ProcedureAppealsAppellate JurisdictionState Court Review

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§ 489.14 Collateral Attack

[1] Defined

Any procedural challenge that does not constitute a direct attack is collateral [*People ex rel. Mosk v. City of Santa Barbara (1961) 192 Cal. App. 2d 342, 356, 13 Cal. Rptr. 423*]. Thus, a collateral attack on a judgment or order is an indirect attack [*People ex rel. Mosk v. City of Santa Barbara (1961) 192 Cal. App. 2d 342, 356, 13 Cal. Rptr. 423*]. A collateral attack attempts to avoid the effect of a judgment or order made in some other proceeding, and for the attack to succeed, the invalidity of the former judgment or order must appear on the face of the record [*see* discussion under [2], *below*; *see also § 489.139[1]*].

[2] Grounds for Collateral Attack

[a] Lack of Jurisdiction

Collateral attack is proper to contest lack of personal or subject matter jurisdiction [*Armstrong v. Armstrong (1976) 15 Cal. 3d 942, 950, 126 Cal. Rptr. 805, 544 P.2d 941*]. That is, a collateral attack is proper when the court that rendered the judgment or made the order lacked either jurisdiction of the subject matter of the action or personal jurisdiction over the parties. In these cases, the court is said to lack jurisdiction in the fundamental sense [*see* *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288, 109 P.2d 942* ; *§ 489.130 et seq.*]. For a discussion and forms relating to subject matter jurisdiction and personal jurisdiction, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter* .

There is a difference between lack of jurisdiction in the fundamental sense, which ordinarily is essential for collateral attack, and the broader meaning of the term "lack of jurisdiction" (discussed under [b], *below*) when used in determining the availability of restraint by prohibition or review by certiorari (direct attacks) of an order or judgment [*see* *Pacific Mut. Life Ins. Co. v. McConnell (1955) 44 Cal. 2d 715, 725, 285 P.2d 636* (noting that some cases involving collateral attacks have unfortunately failed to recognize this distinction); *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288, 109 P.2d 942*].

[b] Excess of Jurisdiction

Excess of jurisdiction exists when the court, though having jurisdiction over the subject matter and the parties in the fundamental sense, has no jurisdiction, or power, to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites. Speaking generally, any acts that exceed the defined power of a court in any instance, whether that power is defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, insofar as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 290-291, 109 P.2d 942* ; *see also* *Barquis v. Merchants Collection Asso. (1972) 7 Cal. 3d 94, 120, 101 Cal. Rptr. 745, 496 P.2d 817*].

A final judgment or order of a court having jurisdiction in the fundamental sense, that is, jurisdiction over the subject matter of the action and the parties, is, as a general rule, res judicata, even though contrary to statute [*Pacific Mut. Life Ins. Co. v. McConnell (1955) 44 Cal. 2d 715, 725, 285 P.2d 636* ; *Frank v. Frank (1969) 275 Cal. App. 2d 717, 722, 80 Cal. Rptr. 141*].

In such a case, the one who complains of an act is normally before the court and has an opportunity to object, or to have the judgment or order reviewed by the usual methods of direct attack, such as by a motion for new trial or appeal [*see* discussion in *§ 489.13*]. Hence, acts in excess of jurisdiction by a court having jurisdiction of the subject matter and the parties are not normally subject to collateral attack [*Frank v. Frank (1969) 275 Cal. App. 2d 717, 722, 80 Cal. Rptr. 141* ; *see also* *Armstrong v. Armstrong (1976) 15 Cal. 3d 942, 951, 126 Cal. Rptr. 805, 544 P.2d 941* ; *Farley v. Farley (1964) 227 Cal. App. 2d 1, 8, 38 Cal. Rptr. 357*].

When unusual or exceptional circumstances prevented an earlier and more appropriate attack, however, a judgment or order in excess of jurisdiction may be subject to collateral attack [*Pacific Mut. Life Ins. Co. v. McConnell (1955) 44 Cal. 2d 715, 727, 285 P.2d 636*]. For example, a collateral attack might be made when a judgment or order granted relief that the court had no *power*, that is, jurisdiction, to grant [*see* *Armstrong v. Armstrong (1976) 15 Cal. 3d 942, 950-951, 126 Cal. Rptr. 805, 544 P.2d 941*]. An example is a judgment or order that grants relief in violation of a statute [*see, e.g.,* *Burtnett v. King (1949) 33 Cal. 2d 805, 807-809, 205 P.2d 657* (default judgment granting relief exceeding that demanded in complaint in violation of *Code Civ. Proc. § 580*); *311 South Spring Street Co. v. Department of General Services (2009) 178 Cal. App. 4th 1009, 1015-1018, 101 Cal. Rptr. 3d 176* (collateral attack permitted when court granted excess interest); *Vershbow v. Reiner (1991) 231 Cal. App. 3d 879, 883, 282 Cal. Rptr. 684* (writ of attachment issued by court clerk prior to posting of an undertaking by the creditor in violation of *Code Civ. Proc. § 489.210*)].

Excess of jurisdiction must be distinguished from mere errors in the exercise of jurisdiction, which are not subject to collateral attack [*see* discussion in *§ 489.139[6]*].

[c] Judgment or Order Within Jurisdiction

A judgment rendered within the court's jurisdiction can be reviewed and corrected only by one of the established methods of direct attack [*see* *Estate of Wemyss (1975) 49 Cal. App. 3d 53, 58, 122 Cal. Rptr. 134*].

[d] Default Judgment

A default judgment that awards relief in excess of that requested in the complaint or, if it is a superior court personal injury action, in excess of that set forth in the statement of damages, is in excess of jurisdiction [*Swycaffer v. Swycaffer (1955) 44 Cal. 2d 689, 693, 285 P.2d 1* ; *see Code Civ. Proc. § 580* (relief on default limited to amount demanded in complaint, *Code Civ. Proc. § 425.11* statement or *Code Civ. Proc. § 425.115* statement)], and may be attacked directly [*see* *Don v. Cruz (1982) 131 Cal. App. 3d 695, 703, 182 Cal. Rptr. 581*]. The judgment may also be

attacked collaterally because it is void on its face to the extent of the excess [*see Armstrong v. Armstrong (1976) 15 Cal. 3d 942, 950, 126 Cal. Rptr. 805, 544 P.2d 941* ; and discussion under [2], *above*; *see also § 489.191*].

However, a default judgment that merely awards damages that are excessive as a matter of law in that they are not supported by the evidence, but that do not exceed the amount claimed in the complaint, is not a jurisdictional error, but a judicial error, which the trial court may not amend. The defendant's remedy in that case is to move for a new trial under *Code Civ. Proc. § 657(5)*, that is, for a new judgment hearing, or to raise the issue on appeal from the default judgment [*Don v. Cruz (1982) 131 Cal. App. 3d 695, 703-704, 182 Cal. Rptr. 581*], that is, by direct attack [*see § 489.13[1]*].

[3] How Collateral Attack Is Made

A collateral attack on a final judgment or order may be made in a variety of ways. Examples of collateral attack include the following:

- If an action has been dismissed with prejudice and judgment entered, bringing a second action on the same grounds is a collateral attack on the judgment [*Palmquist v. Palmquist (1963) 212 Cal. App. 2d 340, 343-344, 27 Cal. Rptr. 756*].

- An action to quiet title to property awarded to another by a partially void judgment is a collateral attack on the judgment [*Vasquez v. Vasquez (1952) 109 Cal. App. 2d 280, 282-283, 285, 240 P.2d 319*].

- A proceeding in prohibition to prevent a threatened punishment for contempt for violating an order appointing a receiver in an accounting action is a collateral attack on the order appointing the receiver [*Lieberman v. Superior Court (1925) 72 Cal. App. 18, 35, 236 P. 570*].

- An action brought on a claim previously settled with court approval on petition to the court constitutes a collateral attack on that settlement [*Rico v. Nasser Bros. Realty Co. (1943) 58 Cal. App. 2d 878, 881-882, 137 P.2d 861*].

- An action to quiet title to land that has been sold under execution is a collateral attack on the prior judgment [*Milstein v. Turner (1948) 89 Cal. App. 2d 296, 298, 200 P.2d 799*].

- A proceeding in mandate to compel a trial court to strike from its records a portion of an appealable order that reduced the judgment is a collateral attack on the order [*Phelan v. Superior Court (1950) 35 Cal. 2d 363, 372, 217 P.2d 951*].

- In an action on a judgment, an attack on the judgment is a collateral attack [*Cradduck v. Financial Indem. Co. (1966) 242 Cal. App. 2d 850, 852, 855, 52 Cal. Rptr. 90*].

- When orders are independently appealable and become final by lapse of time, a subsequent attack on them in an appeal from a later order or judgment is collateral [*Estate of Wemyss (1975) 49 Cal. App. 3d 53, 58, 122 Cal. Rptr. 134*].

However, the courts have not always been precise in their classification or terminology. For example, in *Swain v. Swain (1967) 250 Cal. App. 2d 1, 10, 58 Cal. Rptr. 83* , the appellate court referred to a motion to vacate a portion of a decree on the ground the decree was in excess of jurisdiction as a collateral attack on the decree, which had been entered more than two years earlier. More accurately, the motion was a direct attack that, because it was untimely, was subject to the rules of collateral attack [*see discussion under § 489.12*].

[4] Presumption of Jurisdiction on Collateral Attack

[a] Rule

The judgment or order of any California court, United States court, or court of general jurisdiction in any other state or nation, is presumed on collateral attack to have been made in the lawful exercise of the court's jurisdiction [*Evid. Code § 666*; *see also Evid. Code § 664* (official duty is presumed to have been regularly performed); *Thomas v. Department of Motor Vehicles (1970) 3 Cal. 3d 335, 337, 90 Cal. Rptr. 586, 475 P.2d 858* (ordinarily a judgment is presumed valid if collaterally attacked, unless it is void on its face); *Phelan v. Superior Court (1950) 35 Cal. 2d 363, 373-374, 217 P.2d 951* ; *In re Marriage of Steiner (1979) 89 Cal. App. 3d 363, 370, 152 Cal. Rptr. 612* ; *Frazier v. Wasserman (1968) 263 Cal. App. 2d 120, 124, 69 Cal. Rptr. 510*]. Thus, on collateral attack every presumption is in favor of the validity of the judgment or order of a court of general jurisdiction, and any condition of facts consistent with its validity and notaffirmatively contradicted by the judgment roll will be presumed to have existed, and, under this rule, it will be presumed when necessary that the parties consented to the court's action or waived objection to it [*Gagnon Co., Inc. v. Nevada Desert Inn (1955) 45 Cal. 2d 448, 456, 289 P.2d 466* ; *Phelan v. Superior Court (1950) 35 Cal. 2d 363, 373-374, 217 P.2d 951*].

For example, if the record is silent, it will be presumed that process and pleadings were properly served and that due proof of service was presented to the court. Similarly, notice, or facts rendering it unnecessary, are presumed unless the record shows the contrary, and, when the court may shorten time or dispense with notice, it will be presumed that the court did so if the order is silent on the point [*Phelan v. Superior Court (1950) 35 Cal. 2d 363, 373-374, 217 P.2d 951* , citing additional examples].

The presumption of jurisdiction is overcome, however, when the defects that make the judgment void may be shown without going outside the record, or judgment roll, that is, when the judgment is void on its face [*see* *Swain v. Swain (1967) 250 Cal. App. 2d 1, 10, 58 Cal. Rptr. 83* ; *see also § 489.130* et seq.].

[b] Exception for Criminal Judgment

An exception to the foregoing rule applies to a judgment of prior conviction of a crime; such a judgment, even though valid on its face, may be attacked at any time on constitutional grounds in a proceeding in which by reason of the prior conviction increased sanctions may be imposed against the person suffering it [*Thomas v. Department of Motor Vehicles (1970) 3 Cal. 3d 335, 337-338, 90 Cal. Rptr. 586, 475 P.2d 858* (but holding that the invalidity of the prior judgment must be raised in the subsequent action in which increased sanctions may be imposed and that the judgment in the second action, in which the issue as to the invalidity of the prior judgment was neither raised nor adjudicated, could not be collaterally attacked in a mandate proceeding against the DMV to cause it to set aside its administrative act of suspending the defendant's driver's license based on the two convictions); *De Rasmo v. Smith (1971) 15 Cal. App. 3d 601, 607, 93 Cal. Rptr. 289* (collateral attack permitted in proceeding in which real estate salesman's license was revoked for failure to reveal constitutionally void prior conviction in license application)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionJurisdictional SourcesConstitutional SourcesCivil ProcedureJurisdictionJurisdictional SourcesStatutory SourcesCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentExtraordinary CircumstancesCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsCivil ProcedureRemediesWritsCommon Law WritsProhibitionEvidenceInferences & PresumptionsPresumptions

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§ 489.15 Time Limitations

[1] Depends on Ground for Relief

The time within which a party may seek relief from a judgment, including a default judgment, depends on the particular ground or grounds on which the party relies. In any given case, relief from a judgment, order, or other proceeding may be available on alternative grounds, each having its own limitation period. Consequently, if counsel discovers that relief is time barred on a particular ground, he or she should examine alternative grounds that may not be barred.

[2] Time Limits for Relief at Law

[a] Mistake, Inadvertence, Surprise, or Excusable Neglect

A motion under *Code Civ. Proc. § 473(b)*, for relief from a judgment, dismissal, order, or other proceeding on the ground of mistake, inadvertence, surprise, or excusable neglect must be filed within a reasonable time not exceeding six months after the judgment, order, or proceeding was taken, or, if relief is sought from a default judgment based on an attorney's affidavit (declaration) of fault, within six months from the date the judgment was entered (without the reasonable time limitation) [*Code Civ. Proc. § 473(b)* (discussed in *§ 489.30* et seq.)].

[b] Court Assumed Jurisdiction Over Party's Attorney's Practice

A motion for relief from a judgment, order, or other proceeding, including a dismissal, taken against a party when a court has assumed jurisdiction over the law practice of the party's attorney, must be made within a reasonable period of time, in no case exceeding six months after the court took jurisdiction over the attorney's practice [*Code Civ. Proc. § 473.1* (discussed in *§ 489.100* et seq.)].

[c] Service of Summons Did Not Give Actual Notice in Time to Defend

A motion for relief under *Code Civ. Proc. § 473.5* from a default judgment entered when the service of the summons did not result in actual notice to the party in time to defend must be made within a reasonable time not exceeding the

earlier of two years after entry of the default judgment or 180 days after service on the party of a written notice that the default or default judgment was entered [*Code Civ. Proc. § 473.5(a)* (discussed in *§ 489.70* et seq.)].

[d] Default Taken After Violation of Consumer Protection Venue Statutes

A motion for relief from a default judgment entered without full compliance with certain venue statutes and for leave to defend the action must be made within 60 days after the defendant received notice of a levy under a writ of execution or notice of any other procedure for enforcing the judgment. The venue statutes, designed for consumer protection, are Civ.Code §§ *1812.10* (Unruh Act) and *2984.4* (Rees-Levering Motor Vehicle Sales and Finance Act) and *Code Civ. Proc. § 395(b)* (actions arising from offer or provision of goods, services, loans, or credit for personal, household, or family use) [*Code Civ. Proc. § 585.5(b)* (discussed in *§ 489.90* et seq.)].

[e] Relief Based on Military Service

A motion for relief under the federal Servicemembers' Civil Relief Act by a defendant who did not appear and who was prejudiced in making a defense by reason of his or her military service may be filed at any time the person is in active military service or not later than 90 days thereafter [*50 U.S.C. App. § 521(g)(2)* (discussed in *§ 489.110* et seq.)].

A motion to vacate or set aside a judgment entered during a period of protected military service by a defendant who was prejudiced in making defense and who can assert a meritorious or legal defense to all or part of the action must be made not later than 90 days after termination of the service [*Mil. & Vet. Code § 402(d)*; for discussion, *see § 489.117* et seq.].

[f] Judgments Void in Fact But Not on Face

The time limitations set forth in *Code Civ. Proc. §§ 473(b)* and *473.5, above,* apply by analogy to motions under *Code Civ. Proc. § 473(d),* and to motions directed to the court's inherent jurisdiction at law, for relief from judgments that are void in fact but not void on their face [*see, e.g., Estate of Estrem (1940) 16 Cal. 2d 563, 571-572, 107 P.2d 36* (applying six-month limitation in *Code Civ. Proc. § 473(b)*); *Johnson v. E-Z Ins. Brokerage, Inc. (2009) 175 Cal. App. 4th 86, 98-99, 95 Cal. Rptr. 3d 782* ; *Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1120-1126, 265 Cal. Rptr. 286* (applying time limitation set forth in *Code Civ. Proc. § 473.5*); *see also § 489.142[6*]].

[g] Judgment Void on Its Face

There is no time limitation on seeking relief from a judgment that is void on its face for lack of subject matter or personal jurisdiction [*see, e.g., Forbes v. Hyde (1866) 31 Cal. 342, 347* ; *Code Civ. Proc. § 473(d)*; and *§ 489.141*].

[3] Time Limits for Relief at Equity

There is no time limit per se on a motion in equity for relief from a judgment or order, but the motion must be made within a reasonable time after the moving party discovered the facts and, after discovering the facts, the moving party must have acted diligently in seeking relief [*see §§ 489.39[6]* and *489.262[1]*].

On the other hand, an action in equity for relief from a judgment or order is subject to the applicable statute of limitations and to the defense of laches [*see § 489.261[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief

From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsGovernmentsLegislationStatutes of LimitationsTime Limitations

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II. LEGAL BACKGROUND
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§ 489.16 Seeking Relief on Multiple Grounds

[1] In General

Occasionally, a party will seek relief on multiple grounds in one motion. For example, a party may seek relief on the ground of mistake, inadvertence, surprise, or excusable neglect [*Code Civ. Proc. § 473(b)*], on the ground that the judgment is void [*see Code Civ. Proc. § 473(d)*], and on the further equitable ground that the judgment was obtained by extrinsic fraud or mistake [*see, e.g., Don v. Cruz (1982) 131 Cal. App. 3d 695, 698-699, 182 Cal. Rptr. 581*].

[2] When Attack Is Based on Lack of Jurisdiction Over Defendant

When the motion for relief from a judgment is made on the ground that the judgment is void for lack of jurisdiction over the person of the moving defendant, counsel should be careful in mixing the grounds of relief. This is important to avoid inadvertently making a general appearance and, in so doing, waiving the lack of jurisdiction objection by voluntarily submitting to the in personam jurisdiction of the court [*see Code Civ. Proc. § 410.50(a)*]. A motion for relief under *Code Civ. Proc. § 473* or *473.5*, if joined with a motion to quash service of summons for lack of personal jurisdiction (*see Code Civ. Proc. § 418.10(a)(1)*) or to dismiss an action for inconvenient forum (*Code Civ. Proc. § 418.10(a)(2)*), or a motion to dismiss for delay in prosecution (*Code Civ. Proc. § 418.10(a)(3)*), does not constitute a general appearance [*Code Civ. Proc. § 418.10(d)*].

A motion that incorporates any other ground, particularly if it seeks relief that may be granted only on the ground that the court has jurisdiction over the defendant, may be deemed a general appearance and subject the defendant to the court's in personam jurisdiction in subsequent proceedings [*see Code Civ. Proc. § 410.50*].

For further discussion of personal jurisdiction, see Ch. 323, *Jurisdiction: Personal* . For discussion of motions to dismiss for delay in prosecution without making a general appearance under *Code Civ. Proc. § 418.10(a)(3)*, see Ch. 212, *Dismissal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsChallengesCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsInvoluntary DismissalsMotionsCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments

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§ 489.17 Affidavits and Declarations

[1] When Authorized

Affidavits [*see Code Civ. Proc. § 2002*] and/or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*] may normally be submitted in support of and in opposition to a timely filed motion attacking a judgment or order [*see Code Civ. Proc. § 2009*], that is, on a direct attack. A motion not made within the time prescribed in the applicable statute is untimely and subject to the rules of collateral attack. Under these rules, extrinsic evidence is not admissible, and, therefore, the use of affidavits or declarations on those motions is forbidden [*see § 489.12*].

[2] Effect on Appeal of Trial on Motion by Affidavits or Declarations

When a motion for relief is tried on affidavits (or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*]), the rule on appeal is that those affidavits (or declarations) favoring the prevailing party's contention establish not only the facts stated in them but also all facts that reasonably may be inferred from them, and if there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed [*Lynch v. Spilman (1967) 67 Cal. 2d 251, 259, 62 Cal. Rptr. 12, 431 P.2d 636* ; *Outdoor Imports, Inc. v. Stanoff (1970) 7 Cal. App. 3d 518, 522, 86 Cal. Rptr 593* ; *Baratti v. Baratti (1952) 109 Cal. App. 2d 917, 922, 242 P.2d 22* ; *see also Stevens v. Stevens (1968) 268 Cal. App. 2d 426, 429, 74 Cal. Rptr. 54* ; *Kooper v. King (1961) 195 Cal. App. 2d 621, 626, 15 Cal. Rptr. 848*]. The rule applies to orders made on motions for relief from a judgment, order, or proceeding at law [*see, e.g., Lynch v. Spilman (1967) 67 Cal. 2d 251, 259, 62 Cal. Rptr. 12, 431 P.2d 636* (affirming order granting motion to vacate summary judgment for plaintiff on grounds of inadvertence and excusable neglect); *Outdoor Imports, Inc. v. Stanoff (1970) 7 Cal. App. 3d 518, 522, 86 Cal. Rptr 593* (affirming order granting motion to vacate default and default judgment on ground of excusable neglect)], and on motions for relief in equity [*In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 149-150, 133 Cal. Rptr. 583* (affirming order vacating and setting aside for extrinsic fraud or mistake portion of judgment relating to distribution of community property, rendered after uncontested hearing on default of wife)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureAppealsStandards of ReviewGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesPerjuryGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 489.18 Appeal

[1] Who Can Appeal

Only an aggrieved party can appeal, and a party cannot normally appeal from a judgment or order in his or her favor [*Hensley v. Hensley (1987) 190 Cal. App. 3d 895, 898, 235 Cal. Rptr. 684*]. Subject to limited qualifications, an aggrieved party is one whose rights or interests are injuriously affected by the judgment or order [*Hensley v. Hensley (1987) 190 Cal. App. 3d 895, 899, 235 Cal. Rptr. 684*].

[2] From Void Judgment or Order

When the law allows an appeal from a judgment or order, it is appealable even though void, and a special order after final judgment is appealable regardless of whether it is void and regardless of whether it is provided for by any of the prescribed methods of procedure [*Phelan v. Superior Court (1950) 35 Cal. 2d 363, 366, 370-371, 217 P.2d 951* (overruling *Stanton v. Superior Court (1927) 202 Cal. 478, 261 P. 1001* , and the cases following it, as well as *Kahn v. Smith (1943) 23 Cal. 2d 12, 142 P.2d 13* ; *Payne v. Hunt (1932) 214 Cal. 605, 7 P.2d 302* ; and *Kraft v. Lampton (1936) 13 Cal. App. 2d 596, 57 P.2d 171*); *see also* *Hensley v. Hensley (1987) 190 Cal. App. 3d 895, 898, 235 Cal. Rptr. 684* (order setting aside final judgment is appealable and rule is the same if the order after final judgment is void)].

[3] From Order Granting or Denying Motion to Vacate Default and Motion to Reconsider

An order granting a motion to vacate the entry of a default on which no judgment has been entered is not appealable, although the propriety of the order may be raised on appeal from a judgment adverse to the party resisting the motion [*see* *Leo v. Dunlap (1968) 260 Cal. App. 2d 24, 25, 66 Cal. Rptr. 888*]. On the other hand, an order vacating default and default judgment pursuant to *Code Civ. Proc. § 473* is appealable as an order after final judgment [*see* [5], *below*].

Likewise, an order denying a motion to vacate the entry of default is not appealable, although the propriety of the order can be reviewed on appeal from the subsequent default judgment (discussed under [4], *below*) [*see* *Gudarov v. Hadjieff (1952) 38 Cal. 2d 412, 418, 240 P.2d 621* ; *Lopez v. Fancelli (1990) 221 Cal. App. 3d 1305, 1307 n.2, 271 Cal. Rptr. 87* ; *Don v. Cruz (1982) 131 Cal. App. 3d 695, 699, 182 Cal. Rptr. 581* ; *Stevenson v. Turner (1979) 94 Cal. App. 3d*

315, 317, 156 Cal. Rptr. 499 ; *Uva v. Evans (1978) 83 Cal. App. 3d 356, 360, 147 Cal. Rptr. 795*]. However, an appeal from an order denying relief from default may be construed as an appeal from the default judgment if one has been entered [*see Don v. Cruz (1982) 131 Cal. App. 3d 695, 699, 182 Cal. Rptr. 581*].

Moreover, because an order denying a motion to vacate a default is not an appealable order, an order denying reconsideration of the order under *Code Civ. Proc. § 1008* is, likewise, not appealable [*Jade K. v. Viguri (1989) 210 Cal. App. 3d 1459, 1466, 258 Cal. Rptr. 907* (criticized in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1608 n.5, 275 Cal. Rptr. 887* , for its apparent approval of postjudgment motions for reconsideration)].

[4] From Default Judgment

A default judgment, being a final judgment, is appealable under *Code Civ. Proc. §§ 904.1(a)(1), 904.2(a)* [*see Luz v. Lopes (1960) 55 Cal. 2d 54, 59 n.2, 10 Cal. Rptr. 161, 358 P.2d 289*]. Hence, a defendant has a right to appeal from a default judgment, although the scope of the appeal is limited to jurisdictional considerations and fundamental pleading defects [*Aheroni v. Maxwell (1988) 205 Cal. App. 3d 284, 294, 252 Cal. Rptr. 369* ; *see also Ludka v. Memory Magnetics International (1972) 25 Cal. App. 3d 316, 323, 101 Cal. Rptr. 615* ; *Bristol Convalescent Hosp. v. Stone (1968) 258 Cal. App. 2d 848, 858-859, 66 Cal. Rptr. 404*]. That is, if the defaulting party has taken no step in the trial court to set aside the default judgment, an appeal from the judgment presents for review only the questions of jurisdiction and the sufficiency of the pleadings [*Corona v. Lundigan (1984) 158 Cal. App. 3d 764, 766-767, 204 Cal. Rptr. 846*]. Thus, on appeal, an objection that the complaint failed to state facts sufficient to constitute a cause of action may be considered, as well as the question as to whether or not the default was properly entered [*Bristol Convalescent Hosp. v. Stone (1968) 258 Cal. App. 2d 848, 859, 66 Cal. Rptr. 404* ; *Gore v. Witt (1957) 149 Cal. App. 2d 681, 686, 308 P.2d 770* ; *see also Martin v. Lawrence (1909) 156 Cal. 191, 193, 103 P. 913* ; *see* Ch. 205, *Defaults and Default Judgments*].

Moreover, on a timely appeal from a default judgment, the court may determine the propriety of the trial court's order denying defendant's motion to set aside and vacate a default and default judgment (*see* [5][c], *below*), even though the order was appealable itself as an order after judgment, and the time for appeal from it had passed [*see Ludka v. Memory Magnetics International (1972) 25 Cal. App. 3d 316, 319, 101 Cal. Rptr. 615*].

[5] From Order Granting Relief From Judgment or Order

[a] Appealability Generally

An order granting relief from an appealable judgment or order is normally appealable as a special order made after a final judgment [*see Code Civ. Proc. §§ 904.1(a)(2), 904.2(b)*; for exceptions, *see* [b], *below*]. Thus, an order vacating a default and setting aside a default judgment is appealable [*see, e.g., Moghaddam v. Bone (2006) 142 Cal. App. 4th 283, 287, 47 Cal. Rptr. 3d 602* ; *Jones v. Interstate Recovery Service (1984) 160 Cal. App. 3d 925, 928, 206 Cal. Rptr. 924*], as is an order granting relief from a void judgment [*Zirbes v. Stratton (1986) 187 Cal. App. 3d 1407, 1411, 232 Cal. Rptr. 653* (court lacked jurisdiction to render judgment against defendant who was never served with summons and whose appearance in action was solely by an attorney not authorized to represent her)].

[b] Conditional vs. Unconditional Orders

To be appealable, the order granting relief must be unconditional or, if it is conditional, it must be self-executing. If the order is conditional and not self-executing, that is, it requires a second order setting aside the judgment, it is interlocutory and nonappealable [*Yarbrough v. Yarbrough (1956) 144 Cal. App. 2d 610, 613-614, 301 P.2d 426* (involving conditional self-executing order granting relief from default and judgment); *see also Jacuzzi v. Jacuzzi Bros., Inc. (1966) 243 Cal. App. 2d 1, 25-26, 52 Cal. Rptr. 147*].

[c] Relief Granted on Ground of Mistake, Inadvertence, Surprise, or Excusable Neglect

An order granting relief from an order or judgment under *Code Civ. Proc. § 473(b)* (mistake, inadvertence, surprise, or excusable neglect) is an appealable order [*see, e.g., Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal. 3d 892, 895, 187 Cal. Rptr. 592, 654 P.2d 775* (order vacating and setting aside judgment of dismissal entered on failure to comply with discovery orders); *Lynch v. Spilman (1967) 67 Cal. 2d 251, 256, 62 Cal. Rptr. 12, 431 P.2d 636* (order vacating summary judgment for plaintiff on grounds of inadvertence and excusable neglect); *Benjamin v. Dalmo Mfg. Co. (1948) 31 Cal. 2d 523, 524, 190 P.2d 593* (order setting aside default and default judgment based on defendant's mistake, inadvertence, surprise, and excusable neglect); *Billings v. Health Plan of America (1990) 225 Cal. App. 3d 250, 253 n.1, 275 Cal. Rptr. 80* (order granting relief from dismissal for failure to file amended pleading after demurrer was sustained)].

In addition, such an order may, in unusual circumstances, be reviewed by a petition for a writ of mandate [*see Gardner v. Superior Court (1986) 182 Cal. App. 3d 335, 336, 227 Cal. Rptr. 78* (discussed in *§ 489.22[1*]].

[d] Relief Granted on Other Grounds

The following orders are also appealable:

- An order granting relief, based on an attorney's affidavit of fault, from an involuntary dismissal following plaintiff's failure to amend the complaint after a demurrer to it was sustained [*Billings v. Health Plan of America (1990) 225 Cal. App. 3d 250, 253 n.1, 275 Cal. Rptr. 80*] (the further holding of *Billings* that the affidavit of fault provision does not apply to dismissal, but to defaults and default judgments only, was abrogated by 1992 amendment of *Code Civ. Proc. § 473* to expressly include dismissal);

- An order granting relief from a default and default judgment under *Code Civ. Proc. § 473.5* (service of summons did not result in actual notice to defendant in time to defend) [*see Olvera v. Olvera (1991) 232 Cal. App. 3d 32, 34 n.1, 283 Cal. Rptr. 271* ; *Rosenthal v. Garner (1983) 142 Cal. App. 3d 891, 894, 191 Cal. Rptr. 300*];

- An order granting relief from a default judgment for plaintiffs' failure to have served the defendant with the statement of damages required by *Code Civ. Proc. § 425.11* [*see Jones v. Interstate Recovery Service (1984) 160 Cal. App. 3d 925, 928, 206 Cal. Rptr. 924*]; and

- An order granting relief from a judgment obtained by extrinsic fraud or mistake [*see Weitz v. Yankosky (1966) 63 Cal. 2d 849, 851, 855, 48 Cal. Rptr. 620, 409 P.2d 700* (order granting relief from default, based on excusable extrinsic mistake); *In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 73, 260 Cal. Rptr. 403* (order granting motion to set aside property and support provisions of dissolution of marriage judgment on grounds of duress and extrinsic fraud or mistake); *Aheroni v. Maxwell (1988) 205 Cal. App. 3d 284, 289 n.1, 252 Cal. Rptr. 369* (order granting relief from default and default judgment, based on extrinsic fraud); *Slusher v. Durrer (1977) 69 Cal. App. 3d 747, 750, 138 Cal. Rptr. 265* (order granting relief from default and default judgment, based on extrinsic fraud or excusable mistake)].

[e] Effect of Appeal on Judgment

An appeal from an order vacating a judgment reinstates the judgment for the limited purpose of allowing the party against whom the judgment was entered to cross appeal from the judgment [*Aheroni v. Maxwell (1988) 205 Cal. App. 3d 284, 289 n.1, 252 Cal. Rptr. 369* ; *Conrad v. Superior Court (1988) 201 Cal. App. 3d 1362, 1365, 247 Cal. Rptr. 712* ; *see also, e.g., Lynch v. Spilman (1967) 67 Cal. 2d 251, 256, 62 Cal. Rptr. 12, 431 P.2d 636* (appeal from order

vacating summary judgment on ground of inadvertence or excusable neglect of attorneys and cross appeal from summary judgment); *§ 489.19*]. However, any postjudgment orders that affect the judgment by enforcing it are not reviewable on the cross appeal. Those orders are directly appealable [*Aheroni v. Maxwell (1988) 205 Cal. App. 3d 284, 295, 252 Cal. Rptr. 369*].

[6] From Order Denying Relief From Judgment or Order

[a] Relief Sought on Ground of Mistake, Inadvertence, Surprise, or Excusable Neglect

Although an order denying a motion to vacate an appealable judgment or order is not ordinarily appealable because it would merely take the place of an appeal from the original judgment or order [*see Spellens v. Spellens (1957) 49 Cal. 2d 210, 228-229, 317 P.2d 613* ; *Martin v. Johnson (1979) 88 Cal. App. 3d 595, 603, 151 Cal. Rptr. 816* ; *see also Daley v. County of Butte (1964) 227 Cal. App. 2d 380, 388-389, 38 Cal. Rptr. 693*], a motion for relief on the ground of mistake, inadvertence, surprise, or excusable neglect is expressly authorized by *Code Civ. Proc. § 473(b)*, and an order denying relief is, therefore, treated as a special order made after final judgment and is appealable under *Code Civ. Proc. §§ 904.1(a)(2)* and 904.2(b) [*Spellens v. Spellens (1957) 49 Cal. 2d 210, 229, 317 P.2d 613* (appeal from order denying relief, based on mistake of fact, from an order taxing costs); *Brown v. Williams (2000) 78 Cal. App. 4th 182, 185 n.2, 92 Cal. Rptr. 2d 634* (appeal from order denying relief from judgment on arbitration award based on attorney's failure to timely request trial de novo); *Sunseri v. Camperos Del Valle Stables, Inc. (1986) 185 Cal. App. 3d 559, 561 n.2, 230 Cal. Rptr. 23* (appeal from order denying insurer's motion for relief from stipulated judgment between third-party plaintiff and defendant insured); *Cochran v. Linn (1984) 159 Cal. App. 3d 245, 249, 205 Cal. Rptr. 550* (appeal by plaintiff from order denying relief, based on excusable neglect, from a summary judgment)].

In the case of a dismissal for delay in prosecution (*see Code Civ. Proc. § 583.110 et seq.*, discussed in Ch. 212, *Dismissal*), the order of dismissal is directly appealable. But a plaintiff whose case has been dismissed may also, in an appropriate case, seek redress through a motion to vacate pursuant to *Code Civ. Proc. § 473(b)* (*see* discussion in *§ 489.41*). However, the denial of the motion to vacate is as a general rule not appealable unless a direct appeal from the dismissal order would be relatively ineffectual. An appeal from a dismissal order would be ineffectual when the plaintiff has failed to present any opposition, when hitherto unknown facts have come to light, or when due to other unforeseen circumstances the record of the dismissal hearing is deficient in that it presents an inadequate factual record for appeal purposes. In such a situation, when subsequent information has been brought forth during the motion to vacate, the denial of that motion is appealable [*City of Los Angeles v. Gleneagle Dev. Co. (1976) 62 Cal. App. 3d 543, 553, 133 Cal. Rptr. 212* (treating motion to reconsider motion to dismiss as motion for relief under *Code Civ. Proc. § 473(b)*, and allowing appeal from denial of motion)].

[b] Relief Sought on Other Grounds

The following orders are also appealable:

- An order denying a motion for relief under *Code Civ. Proc. § 473.5* on the ground that the service of summons did not result in actual notice to the defendant in time to defend [*Tunis v. Barrow (1986) 184 Cal. App. 3d 1069, 1074-1075, 229 Cal. Rptr. 389* ; *Rosenthal v. Garner (1983) 142 Cal. App. 3d 891, 894, 191 Cal. Rptr. 300*];

- An order denying a motion for relief on the ground that the judgment or order is void [*Sanford v. Smith (1970) 11 Cal. App. 3d 991, 998, 90 Cal. Rptr. 256* (appeal from order denying motion to set aside void default and default judgment); *see also Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1116, 265 Cal. Rptr. 286* (appeal from trial court's order vacating its previous order granting relief from void default judgment, and reinstating default and default judgment)]; and

- An order denying a motion for relief on the ground of extrinsic fraud or mistake *Orange Empire Nat. Bank v. Kirk (1968) 66 Cal. Rptr. 240* (reversing order denying motion to vacate default and set aside default judgment, directed to court's inherent equitable power to grant relief in case of extrinsic fraud or mistake)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsReviewabilityAdverse Determinations

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§ 489.19 Effect of Appeal on Jurisdiction of Trial Court

An appeal removes from the trial court's jurisdiction the subject matter of the judgment or order appealed from, including all issues going to the validity orcorrectness of the judgment or order. The trial court has no power thereafter to amend or correct its judgment or order, or to vacate or set it aside. That power cannot be reinvested in the trial court even by consent of the parties [*Davis v. Thayer (1980) 113 Cal. App. 3d 892, 912, 170 Cal. Rptr. 328*]. The purpose of the rule is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided. The rule prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it [*Elsea v. Saberi (1992) 4 Cal. App. 4th 625, 629*]. For further discussion of stay of proceedings in the trial court pending appeal, see Ch. 43, *Appeal: Stay of Proceedings* .

However, when the trial court grants a motion to vacate and set aside a default judgment, and plaintiff appeals, the trial court retains jurisdiction, on motion, to order the return of property collected by the plaintiff in partial satisfaction of the judgment during the pendency of the judgment, unless the plaintiff posts a bond to secure a stay pending the appeal of the order granting relief from the judgment [*Conrad v. Superior Court (1988) 201 Cal. App. 3d 1362, 1365, 247 Cal. Rptr. 712*].

The trial court also retains jurisdiction over ancillary or collateral matters that do not affect the judgment on appeal [*Code Civ. Proc. § 916(a)*; *Hennessy v. Superior Court (1924) 194 Cal. 368, 371-372, 228 P. 862* (motion to tax costs); *Silver v. Gold (1989) 211 Cal. App. 3d 17, 26, 259 Cal. Rptr. 185* (imposition of sanctions for frivolous motion); *see also Betz v. Pankow (1993) 16 Cal. App. 4th 931, 938, 20 Cal. Rptr. 2d 841* (dicta)].

The general rule that a pending appeal deprives the trial court of jurisdiction of the cause does not apply to a judgment or order that is void on its face because a court may set it aside at any time [*Andrisani v. Saugus Colony Limited (1992) 8 Cal. App. 4th 517, 523* ; *see Morgan v. Clapp (1927) 207 Cal. 221, 224, 277 P. 490*].

Legal Topics:

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

Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsCivil ProcedureAppealsAppellate JurisdictionGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionLower Court Jurisdiction

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§ 489.20 General Policies

[1] Policy Favoring Trial on Merits

The policy of the law is to have every litigated case tried on its merits, and disfavors a party who, regardless of the merits of the case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his or her adversary [*Weitz v. Yankosky (1966) 63 Cal. 2d 849, 855, 48 Cal. Rptr. 620, 409 P.2d 700* (affirming order setting aside default judgment on ground of excusable extrinsic mistake); *Berri v. Rogero (1914) 168 Cal. 736, 740, 145 P. 95*] (affirming order setting aside default and vacating judgment based on inadvertence, surprise, and excusable neglect); *see also Laguna Village, Inc. v. Laborers' Internat. Union of North America (1983) 35 Cal. 3d 174, 178, 181-182, 197 Cal. Rptr. 99, 672 P.2d 882* (reversing order denying relief from default, holding that clerk's entry of default was "voidable" under former *Code Civ. Proc. § 473* [*now see Code Civ. Proc. § 473(d)*] on ground of defendant's motion to dismiss in federal court before remand to state court was equivalent to demurrer in state court and prevented entry of default)].

When the trial court denies a motion for relief from default, the strong policy in favor of trial on the merits conflicts with the general rule of deference to the trial court's exercise of discretion (discussed under in § 489.21[3]). Unless inexcusable neglect is clear, the policy favoring trial on the merits prevails [*Elston v. City of Turlock (1985) 38 Cal. 3d 227, 235, 211 Cal. Rptr. 416, 695 P.2d 713* (reversing summary judgment for defendants entered after plaintiffs' motion to set aside admissions, which were deemed admitted for failure to respond, on the ground of excusable neglect had been denied by trial court); *Jade K. v. Viguri (1989) 210 Cal. App. 3d 1459, 1473, 258 Cal. Rptr. 907* (dismissing as untimely defendant's appeal from default judgment and, finding insurer intervener's appeal timely, reversing order denying intervener's motion to vacate default judgment against defendant; criticized on other grounds in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1608 n.5, 275 Cal. Rptr. 887*)]. That is, the policy behind the statutes relating to time limits and other procedural matters is less powerful than the policy that seeks to dispose of litigation on the merits rather than on procedural grounds [*Credit Managers Ass'n v. National Indep. Bus. Alliance (1984) 162 Cal. App. 3d 1166, 1172, 209 Cal. Rptr. 119*].

[2] Countervailing Policies

Although the policy of the law favors deciding cases on their merits, other policies favor getting cases to trial on time,

avoiding unnecessary and prejudicial delay, and preventing litigants from playing fast and loose with the pertinent legal rules and procedures [*Gardner v. Superior Court (1986)182 Cal. App. 3d 335, 339, 227 Cal. Rptr. 78]* . Thus, the policy favoring trying all cases and controversies on their merits should not be prostituted to permit the slovenly practice of law or to relieve courts of the duty of scrutinizing carefully the affidavits or declarations filed in support of motions for relief to ascertain whether they set forth, with adequate particularity, grounds for relief. When inexcusable neglect is condoned even tacitly by the courts, they themselves unwittingly become instruments undermining the orderly process of the law [*Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal. 3d 892, 900, 187 Cal. Rptr. 592, 654 P.2d 775* (quoting *Transit Ads, Inc. v. Tanner Motor Livery, Ltd. (1969) 270 Cal. App. 2d 275, 282, 75 Cal. Rptr. 848*); *see also* *Barragan v. Banco BCH (1986) 188 Cal. App. 3d 283, 301, 232 Cal. Rptr. 758* (quoting *Carroll*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurprise

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§ 489.21 Considerations on Appeal

[1] Disposition of Appellate Courts

It has been said that appellate courts are much more disposed to affirm an order when the result is to compel a trial on the merits than they are when a judgment by default is allowed to stand and it appears that a substantial defense could have been made in the action [*see, e.g.,* *Weitz v. Yankosky (1966) 63 Cal. 2d 849, 854, 48 Cal. Rptr. 620, 409 P.2d 700* (affirming order setting aside default judgment); *Lovato v. Santa Fe Internat. Corp. (1984) 151 Cal. App. 3d 549, 555-556, 198 Cal. Rptr. 838* (reversing order denying motion to set aside default judgment)]. Default judgments that include punitive damages are looked on with special disfavor [*Nicholson v. Rose (1980) 106 Cal. App. 3d 457, 462-463, 165 Cal. Rptr. 156* (conditionally reversing order denying defendants' motion under *Code Civ. Proc. § 473(b)*, based on excusable neglect of defendants' counsel, to vacate judgment, awarding both compensatory and punitive damages, that had been entered on defendants' failure to appear at trial)].

Consequently, an order denying relief from default is subject to closer appellatescrutiny than one granting relief, and doubts will be resolved in favor of the party attempting to get to trial [*Fasuyi v. Permatex, Inc. (2008) 167 Cal. App. 4th 681, 696, 84 Cal. Rptr. 3d 351* ; *Jade K. v. Viguri (1989) 210 Cal. App. 3d 1459, 1473, 258 Cal. Rptr. 907* (criticized on other grounds in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1608 n.5, 275 Cal. Rptr. 887*)]. Reversal is particularly appropriate when relieving the default will not seriously prejudice the opposing party [*Elston v. City of Turlock (1985) 38 Cal. 3d 227, 235, 211 Cal. Rptr. 416, 695 P.2d 713*].

[2] Conflicts in Evidence

Any conflicts in the testimony or affidavits or declarations on the motion for relief are for the trial court to determine, and, if there is a conflict, the trial court's determination is conclusive on appeal [*Luz v. Lopes (1960) 55 Cal. 2d 54, 62, 10 Cal. Rptr. 161, 358 P.2d 289*].

[3] Abuse of Discretion

[a] As Required for Reversal

Absent an abuse of discretion, the ruling of the trial court on a motion for relief from a judgment, dismissal, order, or other proceeding taken against a party through his or her mistake, inadvertence, surprise, or excusable neglect will not be disturbed on appeal [*Elston v. City of Turlock (1985) 38 Cal. 3d 227, 232-233, 211 Cal. Rptr. 416, 695 P.2d 713* ; *see Lynch v. Spilman (1967) 67 Cal. 2d 251, 257, 62 Cal. Rptr. 12, 431 P.2d 636* (affirming order granting relief from summary judgment for plaintiff on grounds of inadvertence and excusable neglect); *Gudarov v. Hadjieff (1952) 38 Cal. 2d 412, 418, 240 P.2d 621* (modifying default judgment and affirming it as modified); *Coyne v. Krempels (1950) 36 Cal. 2d 257, 263, 223 P.2d 244* (affirming summary judgment for plaintiff and order denying defendant's motion to vacate it under *Code Civ. Proc. § 473(b)*); *Cochran v. Linn (1984) 159 Cal. App. 3d 245, 249, 251, 205 Cal. Rptr. 550* (affirming summary judgment for defendant and order denying motion to set it aside under *Code Civ. Proc. § 473(b)*); *Martin v. Johnson (1979) 88 Cal. App. 3d 595, 604, 151 Cal. Rptr. 816* (affirming order denying plaintiff's motion under *Code Civ. Proc. § 473(b)*, to set aside summary judgment)].

Conversely stated, if the trial court abused its discretion, its order on a motion for relief will be reversed [*see Elston v. City of Turlock (1985) 38 Cal. 3d 227, 238, 211 Cal. Rptr. 416, 695 P.2d 713* (reversing summary judgment for defendants entered after trial court denied plaintiffs' motion to set aside deemed admissions on ground of excusable neglect); *Martin v. Cook (1977) 68 Cal. App. 3d 799, 809-810, 137 Cal. Rptr. 434* (reversing order granting relief)]. Abuse of discretion is established, for example, if the moving party's affidavit or declaration fails to set forth facts sufficient to constitute grounds for relief, or, when the motion must be made within a reasonable time, if the supporting affidavit or declaration is devoid of any explanation for a failure to move for relief within a reasonable time [*Transit Ads, Inc. v. Tanner Motor Livery, Ltd. (1969) 270 Cal. App. 2d 275, 280, 281, 75 Cal. Rptr. 848* ; *see also Aheroni v. Maxwell (1988) 205 Cal. App. 3d 284, 292, 252 Cal. Rptr. 369* ; and discussion in *§ 489.39[5*]].

[b] Applicability to Motions for Relief From Default Judgments

The same rules apply to a motion for relief from a default and/or default judgment, whether relief is sought under *Code Civ. Proc. § 473(b)*, or on the equitable grounds of extrinsic fraud or mistake; the trial court's ruling on a motion for relief will not be disturbed on appeal absent a clear showing of abuse of discretion [*Monsan Homes, Inc. v. Pogrebneak (1989) 210 Cal. App. 3d 826, 829, 258 Cal. Rptr. 676* (affirming order denying motion under *Code Civ. Proc. § 473(b)*, for relief from default and default judgment on ground of attorney abandonment; criticized on other grounds in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1608 n.5, 275 Cal. Rptr. 887*); *Barragan v. Banco BCH (1986) 188 Cal. App. 3d 283, 301, 232 Cal. Rptr. 758* (appeal from default judgment after trial court had denied defendant's motion to set aside default under *Code Civ. Proc. § 473(b)*; appellate court modified judgment in part, reversed in part, and remanded for trial court to redetermine specified issue); *Ford v. Herndon (1976) 62 Cal. App. 3d 492, 494-495, 133 Cal. Rptr. 111* , *rev'd on other grounds, Salas v. Cortez (1979) 24 Cal. 3d 22, 34 n.10, 154 Cal. Rptr. 529, 593 P.2d 226* (affirming order denying motion under *Code Civ. Proc. § 473(b)*, to vacate and set aside default and default judgment on ground of excusable neglect or mistake); *Outdoor Imports, Inc. v. Stanoff (1970) 7 Cal. App. 3d 518, 522, 86 Cal. Rptr. 593* (affirming order granting motion under *Code Civ. Proc. § 473(b)*, to vacate default and default judgment on ground of excusable neglect); *Palmer v. Moore (1968) 266 Cal. App. 2d 134, 142, 71 Cal. Rptr. 801* (affirming order setting aside, on ground of extrinsic fraud or mistake, default and default judgment entered on defendant's failure to answer interrogatories)].

[c] Discretion Is That of Trial Court

The discretion to be exercised is that of the trial court and not that of the reviewing court. Thus, even if the reviewing court might have ruled otherwise in the first instance, the trial court's order will not be reversed unless, as a matter of law, it is not supported by the record [*Cochran v. Linn (1984) 159 Cal. App. 3d 245, 251, 205 Cal. Rptr. 550* ; *Guenter v. Lomas & Nettleton Co. (1983) 140 Cal. App. 3d 460, 467, 189 Cal. Rptr. 470* ; *Martin v. Johnson (1979) 88 Cal. App. 3d 595, 604, 151 Cal. Rptr. 816* ; for restrictions on the trial court's exercise of discretion, *see § 489.38[4*]].

[d] Burden of Proof

All presumptions on appeal will be made in favor of the correctness of the order appealed from, and the burden of showing abuse of discretion rests with the party seeking appellate relief [*Lint v. Chisholm (1981) 121 Cal. App. 3d 615, 620, 177 Cal. Rptr. 314* (burden is on defendant on appeal from order denying motion under *Code Civ. Proc. § 473(b)*, to vacate default judgment); *see also Transit Ads, Inc. v. Tanner Motor Livery, Ltd. (1969) 270 Cal. App. 2d 275, 278, 75 Cal. Rptr. 848* (burden is on plaintiff on appeal from order granting motion under *Code Civ. Proc. § 473(b)*, to set aside entry of default and default judgment)].

[e] Ruling on Appeal

If there is any reasonable ground on which the lower court's action may be upheld, the reviewing court must uphold it [*A & S Air Conditioning v. John J. Moore Co.(1960) 184 Cal. App. 2d 617, 619-620, 7 Cal. Rptr. 592*]. Thus, if there is any doubt as to whether the excuse offered is or is not sufficient to justify relief, or whether, in the case of a default judgment, the defense set up is with or without merit when examined under those rules of law by which judges are guided to a conclusion, the judgment of the trial court will not be disturbed. If, however, the appellate court is satisfied beyond a reasonable doubt that the trial court has come to an erroneous conclusion, the order will be reversed [*see Benjamin v. Dalmo Mfg. Co. (1948) 31 Cal. 2d 523, 526, 190 P.2d 593* (quoting *Bailey v. Taaffe (1866) 29 Cal. 422, 424* , and reversing order setting aside default and default judgment on grounds of mistake, inadvertence, surprise, and excusable neglect); *Martin v. Cook (1977) 68 Cal. App. 3d 799, 807, 137 Cal. Rptr. 434* (also quoting *Bailey*; reversing order granting relief, on grounds of inadvertence and mistake, from mandatory dismissal for failure to bring action to trial within five years [*see Code Civ. Proc. §§ 583.310, 583.360*])].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

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§ 489.22 Review by Mandate

[1] Order Granting Relief

Mandate has been used to review an order granting relief from a default judgment under *Code Civ. Proc. § 473(b)*, when the trial court, in ruling on the motion for relief, failed to exercise its discretion, deferring to what it conceived to be the appellate courts' predisposition in such matters [*Gardner v. Superior Court (1986) 182 Cal. App. 3d 335, 336, 227 Cal. Rptr. 78*]. In *Gardner*, the court of appeal issued a writ of mandate directing the superior court (1) to vacate its order setting aside the default judgment entered on defendants' failure to appear at a trial setting conference or at trial, and (2) to exercise its informed discretion in deciding the matter.

[2] Order Denying Relief

Despite the availability of an appeal (*see § 489.18[6]*), mandate has been used in unusual circumstances to review an order denying relief. Thus, in *Brown v. Superior Court (1966) 242 Cal. App. 2d 519, 51 Cal. Rptr. 633* , the court of appeal allowed use of a petition for mandate to review an order denying motion to set aside default and default judgment on the ground that the default was void on the face of the record when both the petitioner and real party in interest had assumed the order was not appealable. In *Brown*, the petition was filed and an alternative writ of mandate issued less than a month after the trial court denied the motion to vacate. If the court had rejected the petition, a notice of appeal could have been filed forthwith, and would have involved questions identical to those fully debated in the mandate proceeding. Under these circumstances the court held it appropriate to grant relief by mandate if relief were otherwise warranted [*Brown v. Superior Court (1966) 242 Cal. App. 2d 519, 522, 51 Cal. Rptr. 633*].

In equally unusual circumstances, an appeal from an order denying relief under *Code Civ. Proc. § 473(b)*, has been treated as a petition for writ of mandate [*In re Marriage of Fuller (1985) 163 Cal. App. 3d 1070, 210 Cal. Rptr. 73*]. In this case, the trial court imposed a monetary sanction against both a client and her attorney for failing to comply with discovery orders. The attorney moved for relief under *Code Civ. Proc. § 473(b)*, on the grounds of mistake, inadvertence, and excusable neglect, and appealed from the trial court's denial of his motion. After ruling that the appeal was authorized but declining to disturb the trial court's ruling, the court of appeal pointed out that the many contentions raised by the attorney on appeal included his contention, made for the first time, that he'd received no prior notice that

the trial court intended to impose sanctions against him as well as against the client. The court said this argument could not be considered on appeal from the order denying relief under *Code Civ. Proc. § 473(b)*, but that, under the circumstances, it would treat the appeal as a petition for writ of mandate to consider the notice issue, that had been briefed by both parties [*In re Marriage of Fuller (1985) 163 Cal. App. 3d 1070, 1072 n.1, 1076, 210 Cal. Rptr. 73*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureRemediesWritsCommon Law WritsMandamus

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[Reserved]

§§ 489.23[Reserved]

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43-489 California Forms of Pleading and Practice--Annotated § 489.30

§ 489.30 Default Defined

"Default" is most commonly used to describe the entry made in the court's records by the clerk when the defendant fails to file a responsive pleading or other authorized paper in response to a complaint [*see Code Civ. Proc. § 585*]. The term is also used to describe a party's failure to respond to certain discovery proceedings [*see, e.g., Janetsky v. Avis (1986) 176 Cal. App. 3d 799, 803, 804, 222 Cal. Rptr. 342* (affirming order denying relief under former statute from notice of default for failure to respond to request for admissions, and the subsequent summary judgment); *Palmer v. Moore (1968) 266 Cal. App. 2d 134, 137, 71 Cal. Rptr. 801* (affirming order granting relief when defendant failed to answer interrogatories)]. A default judgment entered by the court after striking the defendant's answer as a terminating sanction is a "default judgment" within the meaning of *Code Civ. Proc. § 473(b)* [*Matera v. McLeod (2006) 145 Cal. App. 4th 44, 62-68, 51 Cal. Rptr. 3d 331]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault Judgments

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§ 489.31 Default Judgment and Related Judgments Distinguished

Strictly speaking, a default judgment is one rendered against a party who has failed to file a responsive pleading to a complaint or cross complaint [*see Code Civ. Proc. § 585*; *see also Mosler v. Parrington (1972) 25 Cal. App. 3d 354, 356, 101 Cal. Rptr. 829* ; *Wilson v Goldman (1969) 274 Cal. App. 2d 573, 576, 79 Cal. Rptr. 309*]. However, the judgment entered when a defendant's answer is stricken for failure to respond to discovery motions is also referred to as a default judgment [*see, e.g., Palmer v. Moore (1968) 266 Cal. App. 2d 134, 137, 71 Cal. Rptr. 801*]. Moreover, it has been held that an order of dismissal entered for failure to comply with an order compelling answers to interrogatories (although the judgment is entered against a plaintiff rather than a defendant) is the practical equivalent of a default judgment [*Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 736, 216 Cal. Rptr. 300*].

On the other hand, a judgment rendered for plaintiff when the defendant failed to appear at trial after proper notice [*see Code Civ. Proc. § 594(a)*] is not a defaultjudgment, but rather a judgment entered after an uncontested trial or hearing [*see, e.g., Merrifield v. Edmonds (1983) 146 Cal. App. 3d 336, 341, 194 Cal. Rptr. 104* ; *Wilson v. Goldman (1969) 274 Cal. App. 2d 573, 577, 79 Cal. Rptr. 309*]. Nevertheless, courts sometimes refer to a judgment rendered after any uncontested proceeding as a default judgment [*see, e.g., In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 87, 260 Cal. Rptr. 403* (uncontested hearing on petition for dissolution of marriage)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault Judgments

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§ 489.32 Relief Grounded on Mistake, Inadvertence, Surprise, or Excusable Neglect

A court, on any terms as may be just (*see* discussions in *§ 489.33* and *§ 489.42*), may, on application, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against the party through his or her mistake, inadvertence, surprise, or excusable neglect [*Code Civ. Proc. § 473(b)*]. Each of these grounds is separately discussed in *§ 489.44*. Although "excusable" appears only before the word "neglect," relief on the other stated grounds can be granted only when the mistake, inadvertence, or surprise is excusable [*Conway v. Municipal Court (1980) 107 Cal. App. 3d 1009, 1017, 166 Cal. Rptr. 246* ; *see also, e.g.,* *Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal. 3d 892, 898, 187 Cal. Rptr. 592, 654 P.2d 775* (mistake, inadvertence, or general neglect); *Beeman v. Burling (1990) 216 Cal. App. 3d 1586, 1602, 265 Cal. Rptr. 719* (same); *Credit Managers Ass'n v. National Indep. Bus. Alliance (1984) 162 Cal. App. 3d 1166, 1173, 209 Cal. Rptr. 119* (surprise)]. Code *Civ. Proc. § 473(b)* is directed to setting aside valid judgments [*People v. One 1941 Chrysler 6 Touring Sedan, 81 Cal. App. 2d 18, 183 P.2d 368*].

On its face, *Code Civ. Proc. § 473(b)*, provides for relief taken "against" a party. However, relief is also available under the statute to a party in whose favor the judgment, dismissal, order, or other proceeding was taken [*see § 489.47*].

The existence of a defense is irrelevant to the critical question of whether the moving party showed his or her failure to act was caused by mistake, inadvertence, surprise, or excusable neglect [*Lipson v. Jordache Enterprises, Inc. (1992) 9 Cal. App. 4th 151, 161, 11 Cal. Rptr. 2d 271* ; *Uva v. Evans (1978) 83 Cal. App. 3d 356, 362, 147 Cal. Rptr. 795*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurprise

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43-489 California Forms of Pleading and Practice--Annotated § 489.33

§ 489.33 Equitable Relief

The purpose of *Code Civ. Proc. § 473(b)* is to enable courts to relieve a party from the consequences of enforcing the strict and technical rules of procedure, by applying equitable rules in any individual case so as to do justice between the litigants [*Melde v. Reynolds (1900) 129 Cal. 308, 312, 61 P. 932*]. Thus, it has been said that in empowering courts to grant relief upon any terms as may be just, *Code Civ. Proc. § 473(b)* authorizes courts to exercise their equitable powers in considering applications for relief under that statute [*see Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 736, 216 Cal. Rptr. 300*].

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§ 489.34 Relief on Other Grounds

[1] Additional Grounds Available

In an appropriate case, when *Code Civ. Proc. § 473(b)* relief is available for mistake, inadvertence, surprise or excusable neglect, relief may also be available on other grounds. Relief from a judgment, dismissal, order, or other proceeding also may be available under *Code Civ. Proc. § 473.1* (California court has assumed jurisdiction over party's attorney's law practice), or from a default judgment under *Code Civ. Proc. § 473.5* (service of summons did not result in actual notice in sufficient time to defend), or 585.5 (default taken after failure to comply with certain consumer venue statutes), or *50 U.S.C. App. § 521(g)* (default judgment against defendant who was prejudiced in making a defense by reason of his or her military service), all discussed in *§ 489.70* et seq.

Relief from an order or judgment, including a default judgment may be available on the ground that the judgment or order is void [*see Code Civ. Proc. § 473(d)*; *§ 489.130 et seq.*] or that it was obtained by extrinsic fraud or mistake (*see* [2], *below*, and *§ 489.220 et seq.*).

[2] Combining Relief in Case of Extrinsic Fraud or Mistake

If the mistake, inadvertence, surprise, or excusable neglect on which a *Code Civ. Proc. § 473(b)* motion for relief is based may have resulted from extrinsic fraud or mistake, relief also may be available in equity. In that event, counsel may wish to combine motions for equitable and statutory relief in one notice of motion. While such a motion would be proper, counsel should keep in mind the separate requirements and limitations that apply to each motion. For discussion of the requirements and limitations applicable to motions for equitable relief, see *§ 489.260* et seq; see also *§ 489.39[8]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable

Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments

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§ 489.35 Imputation of Attorney's Fault to Client

The mistake, inadvertence, surprise, or excusable neglect of the party's attorney is normally imputed to the party [*see, e.g., Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal. 3d 892, 898, 187 Cal. Rptr. 592, 654 P.2d 775* ; *Kendall v. Barker (1988) 197 Cal. App. 3d 619, 626, 243 Cal. Rptr. 42*]. However, two situations exist in which the attorney's conduct is not ascribed to the client and relief may be granted when the mistake, inadvertence, surprise, or neglect is that of the attorney and is inexcusable.

The first exception is when the motion is supported by the errant attorney's affidavit or declaration of fault [*see Code Civ. Proc. § 473(b)*, discussed in *§ 489.40[1*]].

The second exception is when the attorney's neglect is so extreme that it amounts to positive misconduct by which the moving party was effectually and unknowingly deprived of representation, and is relatively free from negligence. This exception was first announced in *Daley v. County of Butte (1964) 227 Cal. App. 2d 380, 391, 38 Cal. Rptr. 693* (reversing order denying relief from discretionary dismissal of case for failure to prosecute and directing trial court to vacate order of dismissal), and the cases following it are referred to as the "*Daley* line of cases" [*see e.g., Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal. 3d 892, 898, 187 Cal. Rptr. 592, 654 P.2d 775*].

Relief on this ground may be given in the action in which the judgment was entered either under the authority statutorily conferred by *Code Civ. Proc. § 473(b)*, or in the exercise of the court's equitable jurisdiction [*Buckert v. Briggs (1971) 15 Cal. App. 3d296, 301, 93 Cal. Rptr. 61* ; *see § 489.46[1*]].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityGeneral OverviewCivil ProcedureCounselGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable

Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurprise

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43-489 California Forms of Pleading and Practice--Annotated § 489.36

§ 489.36 Nature of Application for Relief

A motion for relief under *Code Civ. Proc. § 473(b)*, is a direct attack on the judgment, dismissal, order, or other proceeding from which relief is sought [*Palmquist v. Palmquist (1963) 212 Cal. App. 2d 340, 344, 27 Cal. Rptr. 756* ; *see § 489.11*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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§ 489.37 Rule of Liberal Construction

Code Civ. Proc. § 473(b), is remedial and is to be liberally construed to bring about a trial on the merits whenever possible [*Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 894, 102 Cal. Rptr. 3d 140* ; *Davis v. Thayer (1980) 113 Cal. App. 3d 892, 904, 170 Cal. Rptr. 328* ; *A & S Air Conditioning v. John J. Moore Co. (1960) 184 Cal. App. 2d 617, 619, 7 Cal. Rptr. 592*]. Thus, the statute is often applied liberally in the case of default when the defaulting party moves promptly to seek relief, and the party opposing the motion will not suffer prejudice if relief is granted. In these situations, very slight evidence will be required to justify a court in setting aside a default. Moreover, because the law strongly favors trial and disposition on the merits, any doubts in applying *Code Civ. Proc. § 473(b)*, must be resolved in favor of the party seeking relief from default [*Elston v. City of Turlock (1985) 38 Cal. 3d 227, 233, 211 Cal. Rptr. 416, 695 P.2d 713* ; *Fasuyi v. Permatex, Inc. (2008) 167 Cal. App. 4th 681, 696, 84 Cal. Rptr. 3d 351* ; *see also § 489.50*].

Despite the rule of liberal construction, relief under *Code Civ. Proc. § 473* cannot be granted for failure to take a jurisdictional step, such as filing a timely notice of motion for new trial [*Advanced Building Maintenance v. State Comp. Ins. Fund (1996) 49 Cal. App. 4th 1388, 1393, 57 Cal. Rptr. 2d 310* (section does not apply to untimely motion to vacate judgment under *Code Civ. Proc. §§ 663, 663a*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsGovernmentsLegislationInterpretation

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43-489 California Forms of Pleading and Practice--Annotated § 489.38

§ 489.38 Discretion of Trial Court

[1] Ruling on Motion for Relief

A motion for relief under *Code Civ. Proc. § 473(b)*, is addressed to the trial court's sound discretion [*Elston v. City of Turlock (1985) 38 Cal. 3d 227, 233, 211 Cal. Rptr. 416, 695 P.2d 713* (trial court abused its discretion in denying motion to set aside deemed admissions on ground of excusable neglect); *Lynch v. Spilman (1967) 67 Cal. 2d 251, 257, 62 Cal. Rptr. 12, 431 P.2d 636* (affirming order vacating summary judgment on grounds of inadvertence or excusable neglect of attorneys)]. Thus, the task of whether to grant relief is committed in the first instance to the trial court's discretion; it is the trial judge's responsibility to consider and weigh all the evidence and argument and make a reasoned choice [*Gardner v. Superior Court (1986) 182 Cal. App. 3d 335, 338-339, 227 Cal. Rptr. 78* ; for the effect of the court's exercise of discretion on the issues on appeal, *see § 489.21[3*]].

[2] When Exercise of Discretion Is Required

In a plain case discretion plays no part. Rather, its exercise is limited to doubtful cases, when an impartial mind hesitates [*Benjamin v. Dalmo Mfg. Co. (1948) 31 Cal. 2d 523, 526, 190 P.2d 593* (quoting *Bailey v. Taaffe (1866) 29 Cal. 422, 424)*]. Consequently, it has been said that *Code Civ. Proc. § 473(b)*, both grants and circumscribes trial court discretion. If a party shows that a judgment has been taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect the court may grant relief or not, in its discretion. However, if a party fails to show that a judgment has been taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect, the court has no discretion and may not grant relief [*Iott v. Franklin (1988) 206 Cal. App. 3d 521, 528, 253 Cal. Rptr. 635*].

[3] Default Judgments

The same rules apply to defaults and default judgments. A motion to set aside and vacate a default and default judgment, under *Code Civ. Proc. § 473(b)*, is addressed to the sound discretion of the trial court [*Monsan Homes, Inc. v. Pogrebneak (1989) 210 Cal. App. 3d 826, 829, 258 Cal. Rptr. 676* (affirming order denying motion to set aside

default and default judgment on ground that neglect of attorney who had not abandoned client was imputed to client; criticized on other grounds in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1608 n.5, 275 Cal. Rptr. 887*); *Ford v. Herndon (1976) 62 Cal. App. 3d 492, 494, 133 Cal. Rptr. 111 , rev'd on other grounds, Salas v. Cortez (1979) 24 Cal. 3d 22, 34 n.10, 154 Cal. Rptr. 529, 593 P.2d 226* (affirming order denying motion to vacate entry of default and to set aside default judgment on ground that defendant failed to demonstrate excusable neglect or mistake that would warrant relief); *Outdoor Imports, Inc. v. Stanoff (1970) 7 Cal. App. 3d 518, 522, 86 Cal. Rptr. 593* (affirming order granting motion to vacate default and default judgment on ground of excusable neglect)]. For the limited exception to this rule when relief is sought based on an attorney's affidavit of fault, see discussion in *§ 489.40[1]*.

[4] Limitations on Court's Discretion

The trial court's discretion under *Code Civ. Proc. § 473(b)*, is not unlimited and must be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice [*Elston v. City of Turlock (1985) 38 Cal. 3d 227, 233, 211 Cal. Rptr. 416, 695 P.2d 713* ; McCormick v. Board of Supervisors (1988) 198 Cal. App. 3d 352, 359-360, 243 Cal. Rptr. 617]. Otherwise stated, the discretion intended under the statute is not capricious or arbitrary, but an impartial discretion, guided and controlled by fixed legal principles. It is not a mental discretion, to be exercised as a favor or indulgence, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice [*Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal. 3d 892, 898, 187 Cal. Rptr. 592, 654 P.2d 775* (reversing order granting relief from judgment of dismissal entered on failure to comply with discovery orders); *Benjamin v. Dalmo Mfg. Co. (1948) 31 Cal. 2d 523, 526, 190 P.2d 593* (reversing order setting aside default and default judgment); *Fasuyi v. Permatex, Inc. (2008) 167 Cal. App. 4th 681, 695-696, 84 Cal. Rptr. 3d 351* (court abused discretion by failing to grant relief from default)].

Thus, while a large amount of discretion is vested in the trial court, the ensuing decision must rest on sound considerations consistent with the showing made for the relief sought [*Benjamin v. Dalmo Mfg. Co. (1948) 31 Cal. 2d 523, 525-526, 190 P.2d 593*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurprise

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§ 489.39 Limitations on When Relief Must Be Sought

[1] Six-Month Limitation

An application for relief under *Code Civ. Proc. § 473(b)*, must be made within a reasonable time [discussed under [2], *below*], in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken [*Code Civ. Proc. § 473(b)*]. The six-month period is jurisdictional, and the court may not consider any motion made after expiration of that period [*Manson, Iver & York v. Black (2009) 176 Cal. App. 4th 36, 42, 97 Cal. Rptr. 3d 522* ; *Arambula v. Union Carbide Corp. (2005) 128 Cal. App. 4th 333, 344-345, 26 Cal. Rptr. 3d 854* ; *Puryear v. Stanley (1985) 172 Cal. App. 3d 291, 293, 218 Cal. Rptr. 196* ; *Stevenson v. Turner (1979) 94 Cal. App. 3d 315, 318, 156 Cal. Rptr. 499* ; *see also Jackson v. Bank of America (1983) 141 Cal. App. 3d 55, 59, 190 Cal. Rptr. 78* (in the absence of extrinsic fraud [discussed in *§ 489.243*], the six-month limitation of *Code Civ. Proc. § 473(b)*, is jurisdictional); *De Mello v. Souza (1973) 36 Cal. App. 3d 79, 84, 111 Cal. Rptr. 274* (reversing judgment correcting and confirming arbitration award)].

However, after relief is no longer available under *Code Civ. Proc. § 473(b)*, for mistake, inadvertence, surprise, or excusable neglect, relief might still be available under some other statute (*see, e.g., Code Civ. Proc. § 473.5*, discussed in *§ 489.70*) or on the ground that the judgment or order is void (*see § 489.130* et seq.). Equitable relief from an otherwise valid judgment also may still be available if the judgment was obtained through extrinsic fraud or mistake [*see, e.g., In re Marriage of Alexander (1989) 212 Cal. App. 3d 677, 684, 261 Cal. Rptr. 9* ; *Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 737, 216 Cal. Rptr. 300* ; *see also § 489.220* et seq.].

[2] Six Months Defined

As used in *Code Civ. Proc. § 473(b)*, "six months" is the equivalent of half a year, that, under *Gov. Code § 6803* (defining "half year"), is the equivalent of 182 days [*Davis v. Thayer (1980) 113 Cal. App. 3d 892, 903, 170 Cal. Rptr. 328*].

[3] When Time Commences to Run

The time commences to run when the judgment, dismissal, or order was entered or the proceeding taken. If a default was entered and relief is sought from both the default and the default judgment, the six-month period runs from the date the default was entered, rather than from the date the default judgment was entered, because, for relief to be effective, the default must normally be set aside as well as the judgment [*Rutan v. Summit Sports, Inc. (1985) 173 Cal. App. 3d 965, 970, 219 Cal. Rptr. 381* (criticized on another ground in *Canadian Commercial Bank v. Ascher Findley Co. (1991) 229 Cal. App. 3d 1139, 1152, 280 Cal. Rptr. 521*); *Weiss v. Blumencranc (1976) 61 Cal. App. 3d 536, 541, 131 Cal. Rptr. 298* ; *Northridge Financial Corp. v. Hamblin (1975) 48 Cal. App. 3d 819, 825, 122 Cal. Rptr. 109* ; *see also Howard Greer etc. Originals v. Capritti (1950) 35 Cal. 2d 886, 888-889, 221 P.2d 937* ; exceptions are discussed in *§§ 489.39[9]* and *489.40*].

However, the default and default judgment are separate procedures. The latter does not necessarily have any bearing on, and may be set aside without disturbing, the former [*Rutan v. Summit Sports, Inc. (1985) 173 Cal. App. 3d 965, 970, 219 Cal. Rptr. 381* (criticized on another ground in *Canadian Commercial Bank v. Ascher Findley Co. (1991) 229 Cal. App. 3d 1139, 1152, 280 Cal. Rptr. 521*)]. Thus, if it is merely the default judgment that the moving party wants corrected, for example, it awards relief not requested in the complaint, a motion to vacate the default judgment would be sufficient and it would be unnecessary to move to set aside the default as well (*see* discussion in *§ 489.191*).

When relief is sought from a judgment other than a default judgment, for example, when the defendant, after answering, failed to appear at trial and the matter proceeded as an uncontested hearing, the period commences to run from the date the judgment was entered [*Berman v. Klassman (1971) 17 Cal. App. 3d 900, 908, 95 Cal. Rptr. 417* (period started running from date the court's formal written judgment was entered, rather than from date of the minute order, because the minute order directed counsel to prepare the judgment in accordance with the minute order's terms for the judge's signature and therefore was not appealable)].

[4] When Motion Is Deemed Made

A motion is deemed to have been made and to be pending before the court when the notice of motion has been duly served and filed [*Code Civ. Proc. § 1005.5*; *see also Arambula v. Union Carbide Corp. (2005) 128 Cal. App. 4th 333, 340-342, 26 Cal. Rptr. 3d 854* ; *Puryear v. Stanley (1985) 172 Cal. App. 3d 291, 294, 218 Cal. Rptr. 196* ; *First Small Business Inv. Co. v. Sistim, Inc. (1970) 12 Cal. App. 3d 645, 648, 90 Cal. Rptr. 798* ; *Estate of Parks (1962) 206 Cal. App. 2d 623, 629, 24 Cal. Rptr. 250*], and continuance of the hearing to a date beyond the six-month limit specified in *Code Civ. Proc. § 473(b)*, does not affect the motion's timeliness [*Estate of Parks (1962) 206 Cal. App. 2d 623, 629, 24 Cal. Rptr. 250*].

[5] Reasonable Time Requirement

The statutory six-month limitation in *Code Civ. Proc. § 473(b)*, is a limitation on the power of the court to grant any relief under the statute. However, *Code Civ. Proc. § 473(b)*, also requires that the application for relief be made within a reasonable time within that six-month period [*Benjamin v. Dalmo Mfg. Co. (1948) 31 Cal. 2d 523, 528, 530, 190 P.2d 593* ; *see also Northridge Financial Corp. v. Hamblin (1975) 48 Cal. App. 3d 819, 824, 122 Cal. Rptr. 109* ; *Hodge Sheet Metal Products v. Palm Springs Riviera Hotel (1961) 189 Cal. App. 2d 653, 657, 11 Cal. Rptr. 435* ; *Baratti v. Baratti (1952) 109 Cal. App. 2d 917, 921, 242 P.2d 22* ; for exception when motion is for relief from a default and default judgment based on an attorney's affidavit of fault, *see* discussion in *§ 489.40*].

Thus, the "reasonable time" requirement is an independent consideration, whether or not the other party suffered any prejudice from the delay, although if the plaintiff makes no showing of prejudice or that injustice will result from trying the case on its merits, very slight evidence will be required to justify the court in setting aside a default [*Benjamin v. Dalmo Mfg. Co. (1948) 31 Cal. 2d 523, 530, 530-531, 190 P.2d 593* ; *see also Elston v. City of Turlock (1985) 38 Cal. 3d 227, 233, 211 Cal. Rptr. 416, 695 P.2d 713* (trial court abused its discretion in denying motion to set aside deemed

admissions on ground of excusable neglect); *Weitz v. Yankosky (1966) 63 Cal. 2d 849, 856-857, 48 Cal. Rptr. 620, 409 P.2d 700* (equitable motion in which court discussed *Benjamin*, discussed *above*)].

The trial court's determination as to what constitutes a reasonable time in any given situation, within the maximum six-month period, depends on the circumstances of the particular case [*Benjamin v. Dalmo Mfg. Co. (1948) 31 Cal. 2d 523, 530, 190 P.2d 593*]. That is, what constitutes "a reasonable time" under *Code Civ. Proc. § 473(b)*, is a question of fact for the trial court to determine unless the circumstances demonstrate unreasonable delay as a matter of law [*Outdoor Imports, Inc. v. Stanoff (1970) 7 Cal. App. 3d 518, 523, 86 Cal. Rptr. 593* ; *see also Berman v. Klassman (1971) 17 Cal. App. 3d 900, 909, 95 Cal. Rptr. 417*]. However, the "busy attorney" reason for delay ("press of business" or "unusual press of business") has been almost uniformly rejected by the courts as a ground for failure to seek relief from a default within a reasonable time [*Martin v. Taylor (1968) 267 Cal. App. 2d 112, 117, 72 Cal. Rptr. 847*].

In determining whether relief under *Code Civ. Proc. § 473* from an order denying the original relief because of untimeliness was sought within a reasonable time, the court may take into account the fact that a valid untimeliness argument was raised in opposition papers. When the law governing a deadline is clear, a party would be "well advised" to withdraw the belated motion and move immediately for *Code Civ. Proc. § 473* relief or seek to combine the request for relief from missing a deadline under *Code Civ. Proc. § 473* relief with the hearing on the belated motion [*Lee v. Wells Fargo Bank (2001) 88 Cal. App. 4th 1187, 1200, 106 Cal. Rptr. 2d 726*].

The determination of whether a moving party filed for *Code Civ. Proc. § 473* relief with reasonable alacrity is addressed to the sound discretion of the trial court, whose discretion will not be overturned on appeal absent a clear showing of abuse of discretion [*Lee v. Wells Fargo Bank (2001) 88 Cal. App. 4th 1187, 1200, 106 Cal. Rptr. 2d 726*].

[6] Diligence Requirement

Because the motion for relief must be made within a reasonable time within the six-month period (*see* discussion under [5], *above*), diligence is an essential ingredient of a motion for relief [*Caldwell v. Methodist Hospital (1994) 24 Cal. App. 4th 1521, 1524-1525, 29 Cal. Rptr. 2d 894* ; *Billings v. Health Plan of America (1990) 225 Cal. App. 3d 250, 255, 275 Cal. Rptr. 80* (both involving motion for relief based on attorney's affidavit of fault; for discussion of application of the diligence requirement to such motions, *see § 489.40[2]*); *Ludka v. Memory Magnetics International (1972) 25 Cal. App. 3d 316, 321, 101 Cal. Rptr. 615* ; *Outdoor Imports, Inc. v. Stanoff (1970) 7 Cal. App. 3d 518, 523, 86 Cal. Rptr. 593* ; *Gore v. Witt (1957) 149 Cal. App. 2d 681, 685, 308 P.2d 770*].

Thus, a party seeking relief under *Code Civ. Proc. § 473(b)*, ordinarily has the double burden of showing [*Billings v. Health Plan of America (1990) 225 Cal. App. 3d 250, 255, 275 Cal. Rptr. 80* (mistake or inadvertence); *Kendall v. Barker (1988) 197 Cal. App. 3d 619, 625, 243 Cal. Rptr. 42* (neglect)]:

- Diligence in making the motion after discovering its own mistake, and
- A satisfactory excuse for the occurrence of that mistake.

The court must generally consider the facts and circumstances of the case to determine whether the party was diligent in seeking relief, and whether the reasons given for the party's mistake are satisfactory [*Billings v. Health Plan of America (1990) 225 Cal. App. 3d 250, 255, 275 Cal. Rptr. 80*]. As a result, even if a proper ground for relief might be made out, a motion for relief may still be denied if the moving party failed to exercise diligence in seeking relief [*see Benjamin v. Dalmo Mfg. Co. (1948) 31 Cal. 2d 523, 528, 190 P.2d 593* ; *Gore v. Witt (1957) 149 Cal. App. 2d 681, 685, 308 P.2d 770*].

In the case of a default judgment, the diligence requirement applies to the defendant taking timely and adequate steps to

retain counsel or to personally act to avoid an undesirable judgment. Unless the defendant shows that, in arranging for a defense, he or she has exercised the reasonable diligence that a person of ordinary prudence usually bestows on important business, the court will deny a motion for relief under *Code Civ. Proc. § 473(b)* [*Davis v. Thayer (1980) 113 Cal. App. 3d 892, 907, 170 Cal. Rptr. 328* ; *see also Gore v. Witt (1957) 149 Cal. App. 2d 681, 685,308 P.2d 770* ; for exception when motion is based on an attorney's affidavit of fault, *see* discussion in *§ 489.40[1*]].

Although diligence is an essential ingredient of a motion for relief, it is just an ingredient and its existence does not compel relief [*Uva v. Evans (1978) 83 Cal. App. 3d 356, 362, 147 Cal. Rptr. 795*].

[7] Effect of Unexplained Delay in Applying for Relief

An unexplained delay within the six-month period may result in denial of relief [*see Benjamin v. Dalmo Mfg. Co. (1948) 31 Cal. 2d 523, 528-533, 190 P.2d 593* (reversing order setting aside default and default judgment because of unexplained 104-day delay in seeking relief, even though motion for relief was served and filed approximately three and one-half months after the default and default judgment were entered and no counteraffidavit was filed in opposition to the motion); *Billings v. Health Plan of America (1990) 225 Cal. App. 3d 250, 254-255, 275 Cal. Rptr. 80* (in reversing order setting aside dismissal of complaint for failure to file amended pleading, court pointed out that plaintiff failed to explain five-month delay in filing the motion for relief; involving motion for relief based on attorney's affidavit of fault; for discussion of application of the diligence requirement to such motions, *see § 489.40[2]*); *A & B Metal Products v. MacArthur Properties, Inc. (1970) 11 Cal. App. 3d 642, 649, 89 Cal. Rptr. 873* (affirming order denying relief from default and default judgment on ground that motion for relief was not made within reasonable time when default was entered December 26, 1967, judgment was filed January 9, 1968, notice of motion for relief was filed May 7, 1968, and no explanation for delay was given); *see also Ludka v. Memory Magnetics International (1972) 25 Cal. App. 3d 316, 321-322, 101 Cal. Rptr. 615* (three-month unexplained delay in making motion as precluding relief on two of three causes of action; judgment on third cause of action reversed for violation of *Code Civ. Proc. § 580* limitation of relief on default to amount demanded in complaint, discussed in *§ 489.191*)].

On the other hand, an unexplained delay in moving for relief within the six-month period may not result in a denial of relief if the denial would result in the enforcement of a judgment that is against public policy [*see Berman v. Klassman (1971) 17 Cal. App. 3d 900, 909-910, 95 Cal. Rptr. 417* (affirming order granting relief from a default judgment, despite 93-day unexplained delay, when to allow the judgment to stand might result in usury law violation)].

[8] Effect of Six-Month Period on Equitable Relief

The six-month period specified in *Code Civ. Proc. § 473(b)*, does not act as a statute of limitations as to the grounds of mistake, inadvertence, surprise, or excusable neglect [*Desper v. King (1967) 251 Cal. App. 2d 659, 663, 59 Cal. Rptr. 657*]. Thus, after the six-month period has passed, a defendant may still be able to obtain equitable relief based on extrinsic fraud or mistake from a default judgment [*see, e.g., Rappleyea v. Campbell (1994) 8 Cal. 4th 975, 981, 35 Cal. Rptr. 2d 669, 884 P.2d 126* ; *Weitz v. Yankosky (1966) 63 Cal. 2d 849, 855, 48 Cal. Rptr. 620, 409 P.2d 700* ; *Olivera v. Grace (1942) 19 Cal. 2d 570, 578, 122 P.2d 564*]. Although the grounds on which equitable relief may be granted are somewhat narrower, the procedure is essentially the same [*In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 148-149, 133 Cal. Rptr. 583*].

Hence, it has been held that a motion in a superior court action for relief from a default judgment made more than six months after the default was entered is not directed to the court's statutory power to grant relief for mistake or excusable neglect under *Code Civ. Proc. § 473(b)*, but rather to the court's inherent equity power under which the court has the power to grant relief from a default judgment when there has been extrinsic fraud or mistake [*Weitz v. Yankosky (1966) 63 Cal. 2d 849, 855, 48 Cal. Rptr. 620, 409 P.2d 700* ; *see also Slusher v. Durrer (1977) 69 Cal. App. 3d 747, 754, 138 Cal. Rptr. 265* ; *see § 489.227* (equitable jurisdiction)]. This is true even though the party seeking relief from default, for example, bases his or her motion solely on *Code Civ. Proc. § 473(b)* [*Davis v. Thayer (1980) 113 Cal.*

App. 3d 892, 910, 170 Cal. Rptr. 328 (nevertheless finding equitable relief singularly inappropriate because of defendants' negligence in failing to take any meaningful action to protect themselves after being served with summons and complaint and notice requesting entry of their default)].

In addition, when relief under *Code Civ. Proc. § 473(b)*, is denied on procedural or jurisdictional grounds, for example, on the ground it was made more than six months after the judgment, order, or proceeding was taken, the order denying relief is not res judicata, and a subsequent action in equity, or motion filed in the same case, based on equitable grounds, may lie [*Sternbeck v. Buck (1957) 148 Cal. App. 2d 829, 831, 307 P.2d 970* ; *see also Desper v. King (1967) 251 Cal. App. 2d 659, 663, 59 Cal. Rptr. 657*]. But to the extent that the grounds were litigated on the merits in the *Code Civ. Proc. § 473(b)*, motion, the ruling is res judicata in the subsequent equity proceeding [*Darlington v. Basalt Rock Co. (1961) 188 Cal. App. 2d 706, 709-710, 10 Cal. Rptr. 556* (involving denial of motion under *Code Civ. Proc. § 473(b)*, to vacate and set aside order approving compromise of minor's claim for damages for personal injuries)]. For further discussion of equitable relief and the relationship between the statutory motion under *Code Civ. Proc. § 473(b)*, and equitable motions, see *§ 489.263[2]*.

[9] Judgment, Dismissal, Order, or Proceeding Determining Ownership or Right to Possession of Property

A shorter period than six months may apply in the case of a judgment, dismissal, order, or other proceeding determining the ownership or rightto possession of real or personal property. Without extending the six-month period, if a written notice is personally served in California on both the party against whom the judgment, dismissal, order, or other proceeding was taken, and on the party's attorney of record, if any, notifying the party and the attorney that the order, judgment, or other proceeding was taken against the party and that any rights the party has to apply for relief under *Code Civ. Proc. § 473* expires 90 days after service of the notice, then the application for relief must be made within 90 days after service of the notice on the defaulting party or the party's attorney of record, whichever is later [*Code Civ. Proc. § 473(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 489.40 Relief Based on Attorney's Affidavit of Fault

[1] When Relief Is Authorized

[a] Relief Is Mandatory on Proper Application and Affidavit

Notwithstanding any other requirements of *Code Civ. Proc. § 473*, if an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, the court must vacate the following [*Code Civ. Proc. § 473(b)*]:

- Any resulting default entered by the clerk against the attorney's client that will result in entry of a default judgment, or

- Any resulting default judgment or dismissal entered against the client.

Relief under the mandatory provision of *Code Civ. Proc. § 473(b)* is available only if the application is accompanied by an attorney's sworn affidavit of mistake, inadvertence, surprise or neglect, which resulted in dismissal or default being taken against the client. Admission by counsel that his or her error resulted in the entry of default or dismissal from which relief is sought is indispensable and is commonly referred to as an "attorney affidavit of fault" [*State Farm Fire & Casualty Co. v. Pietak (2001) 90 Cal. App. 4th 600, 608-609, 109 Cal. Rptr. 2d 256* (trial court not required to grant relief where no such affidavit filed by counsel)].

Code Civ. Proc. § 473 does not require California licensure on the part of the affiant in order to invoke the mandatory provisions of *Code Civ. Proc. § 473(b)*. An affidavit attesting that the default was the product of the attorney's mistake, inadvertence, surprise, or neglect entitles the defaulting party to mandatory relief if it is executed by an attorney not licensed to practice in California, but licensed in another jurisdiction [*Rodrigues v. Superior Court (2005) 127 Cal. App. 4th 1027, 1033-1037, 26 Cal. Rptr. 3d 194* (attorney licensed in Portugal)].

An attorney affidavit of fault is competent if signed by an attorney representing the client in another action. Thus, for

example, an affidavit of fault signed by an attorney who represents a party in a bankruptcy proceeding but not in the civil action is competent to support a party's motion in the civil action for mandatory relief under *Code of Civil Procedure § 473(b)* [*see SJP Limited Partnership v. City of Los Angeles (2006) 136 Cal. App. 4th 511, 516-520, 39 Cal. Rptr. 3d 55]* .

Code Civ. Proc. § 473 is mandatory and requires the court to grant relief whether the attorney's neglect is excusable or not [*Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 896, 102 Cal. Rptr. 3d 140* ; *Metropolitan Service Corp. v. Casa De Palms, Ltd. (1995) 31 Cal. App. 4th 1481, 1488, 37 Cal.Rptr. 2d 575* (reversing order denying relief); *Beeman v. Burling (1990) 216 Cal. App. 3d 1586, 1604-1606, 265 Cal. Rptr. 719* (involving provision prior to its 1991 amendment, but involving identical language)]. Thus, the rule requiring relief based on an attorney's affidavit or declaration of fault is a limited exception to the court's discretionary powers (discussed in *§ 489.38*) [*Billings v. Health Plan of America (1990) 225 Cal. App. 3d 250, 255, 275 Cal. Rptr. 80*].

Despite the express language of the statute permitting relief from a default "entered by the clerk," relief may be extended to defaults entered by a *court* when entry of the default does not involve the exercise of discretion [*Lorenz v. Commercial Acceptance Ins. Co. (1995) 40 Cal. App. 4th 981, 990, 995, 47 Cal. Rptr. 2d 362* (term "clerk" is word of description rather than word of limitation)].

For discussion regarding relief from a judgment or order *other* than a default, default judgment, or dismissal, when that judgment or order is the functional equivalent of a default, see [b], *below*.

For a form for a statement that may be used in a declaration fault that may be used in support of a motion for "mandatory" relief based on an attorney's affidavit of fault, see *§ 489.362*.

[b] Proceedings in Which Relief Is Not Authorized

The "mandatory" provision of *Code Civ. Proc. § 473(b)* permits relief only from a "default," "default judgment," or "dismissal" entered "against the client" [*see* discussion in [a], *above*].

With respect to dismissals, the mandatory provision affords relief only from those dismissals that are functionally equivalent to a default. That is, mandatory relief is generally limited to set aside only those dismissals in which the client's attorney's has failed, excusably or inexcusably, to respond to a motion to dismiss, and the resulting dismissal therefore deprives the client of his or her "day in court" to adjudicate the matter on the merits [*see Huens v. Tatum (1997) 60 Cal. Rptr. 2d 438*]. For example, relief is not available to set aside the following types of dismissals:

- A dismissal entered after a motion to dismiss, pursuant to an order granting the motion after it was fully litigated by the parties. In particular,relief is not available to set aside a discretionary dismissal under *Code Civ. Proc. § 583.410 et seq.* for delay in prosecution, since all such motions are generally the result of attorney neglect and the court, in hearing the motion to dismiss, has already considered and rejected any mitigating reasons for the delay [*Peltier v. McCloud River R.R. Co. (1995) 34 Cal. App. 4th 1809, 1824, 41 Cal. Rptr. 2d 182* ; *Graham v. Beers (1994) 30 Cal. App. 4th 1656, 1661, 36 Cal. Rptr. 2d 765*]. It is similarly not available to set aside a mandatory dismissal for delay in prosecution [*Bernasconi Commercial Real Estate v. St.Joseph's Regional Healthcare System (1997) 57 Cal. App. 4th 1078, 1080, 67 Cal. Rptr. 2d 475* (dismissal for failure to serve complaint within three years under *Code Civ. Proc. § 583.210*)]. For further discussion of the relationship of *Code Civ. Proc. § 473* relief and involuntary dismissal, see *§ 489.41*.

- A dismissal based on a failure to file within the applicable statute of limitations. This, too, usually involves inexcusable neglect either by the client or counsel, and neither the mandatory nor discretionary provisions of *Code Civ. Proc. § 473(b)* were intended to allow circumvention of the policy

considerations that require rigid enforcement of the limitations statutes [*Castro v. Sacramento County Fire Protection Dist. (1996) 47 Cal. App. 4th 927, 929, 934, 55 Cal. Rptr. 2d 193* ; *see Huens v. Tatum (1997) 60 Cal. Rptr. 2d 438*].

- A dismissal based on failure to serve process within a statutorily required period [*Sprague v. County of San Diego (2003) 106 Cal. App. 4th 119, 133-135, 130 Cal. Rptr. 2d 517* (failure to serve summons within 90-day period required by *Gov. Code § 66499.37*)].

- A voluntary dismissal (that is, a dismissal that is not even "against the client" within the meaning of *Code Civ. Proc. § 473(b)*) entered pursuant to a settlement between the parties, that was reached after full negotiation proceedings had been conducted [*Huens v. Tatum (1997) 60 Cal. Rptr. 2d 438* (party was simply attempting to cure counsel's inexcusable neglect in failing to ascertain correct amount of insurance coverage during settlement negotiations)].

- A dismissal after the granting of terminating sanctions for failure to respond to discovery requests or oppose motions to compel discovery, based on an intentional strategic decision [*Jerry's Shell v. Equilon Enterprises, LLC (2005) 134 Cal. App. 4th 1058, 1069-1074, 36 Cal. Rptr. 3d 637]* .

The mandatory provision of *Code Civ. Proc. § 473(b)* has thus been construed to be limited to defaults, default judgment, and dismissals that are equivalent to a default [*see, e.g.,* *Vandermoon v. Sanwong (2006) 142 Cal. App. 4th 315, 47 Cal. Rptr. 3d 772* (mandatory provision of *Code Civ. Proc. § 473(b)* does not apply to judgment entered after uncontested trial in defendant's absence because judgment is not "default," "default judgment," or "dismissal" within meaning of *Code Civ. Proc. § 473(b)*); *English v. IKON Business Solutions, Inc. (2001) 94 Cal. App. 4th 130, 136-149, 114 Cal. Rptr. 2d 93* (mandatory provision of *§ 473(b)* inapplicable to granting of summary judgment)].

Note that some courts have applied the mandatory relief provision in other proceedings in which the functional equivalent of a default has occurred, depriving the client of any opportunity to litigate on the merits. For example, in one case the appellate court held that the mandatory provision was available to set aside a summary adjudication, when it had resulted from a failure of the opposing party's counsel to file any timely response to the motion. This court deemed this situation to be equivalent to a default because the trial court, as a result, determined the summary adjudication motion solely on the basis of the moving party's papers and there was no litigation on the merits [*Avila v. Chua (1997) 57 Cal. App. 4th 860, 868, 67 Cal. Rptr. 2d 373* ; *see also* *In re Marriage of Hock & Gordon-Hock (2000) 80 Cal. App. 4th 1438, 1443-1444, 96 Cal. Rptr. 2d 546* (failure of attorney formally retained a week prior to appear at trial because he was not advised of trial date by former counsel); *Yeap v Leake (1997) 60 Cal. App. 4th 591, 600-601, 70 Cal. Rptr. 2d 680* (mandatory relief applied to plaintiff whose opportunity to participate in arbitration was lost due to negligence of counsel and award became final due to attorney misfeasance)]. Other courts have taken issue with these decisions and construe the word "dismissal" in the mandatory provision of *Code Civ. Proc. § 473(b)* not to encompass a judgment to which a court had determined the defendant is entitled as a matter of law based on undisputed facts before the court, so that a summary judgment is not a "dismissal" within the meaning of section *473(b)* [*English v. IKON Business Solutions, Inc. (2001) 94 Cal. App. 4th 130, 136-149, 114 Cal. Rptr. 2d 93* (mandatory provision of *Code Civ. Proc. § 473(b)* inapplicable to granting of summary judgment; expressly disagreeing with *Avila, Yeap,* and *In re Marriage of Hock & Gordon-Hock*)]. The same court also held that the mandatory provision of *Code Civ. Proc. § 473(b)* does not apply to a judgment entered after an uncontested trial in a defendant's absence, because the judgment is not a "default," "default judgment," or "dismissal" within the meaning of *Code Civ. Proc. § 473(b)* [*Vandermoon v. Sanwong (2006) 142 Cal. App. 4th 315, 319-321, 47 Cal. Rptr. 3d 772* (defendants whose attorney did not inform them of trial date were not entitled to have amended judgment issued after uncontested trial set aside under *Code Civ. Proc. § 473(b)*; expressing disagreeing with *In re Marriage of Hock & Gordon-Hock*)].

Otherwise, the mandatory provision of *Code Civ. Proc. § 473(b)* does not apply to set aside other types of judgments or orders. In particular, the mandatory provision is not intended to be used as an "escape hatch," by which a party

maycorrect inexcusably negligent acts or mistakes made by his or her counsel in the course of litigating a matter on the merits. The client's remedy is these situations is an action against his or her counsel for malpractice. Neither mandatory nor discretionary relief under *Code Civ. Proc. § 473(b)* is available, for example, to set aside a summary judgment that was entered after the opposing party's counsel did in fact oppose the motion, but the opposition papers submitted were inexcusably insufficient. This is "not a default but rather a motion lost, on its merits, after opposition was filed" [*Garcia v. Hejmadi (1997) 58 Cal. App. 4th 674, 681-685, 68 Cal. Rptr. 2d 228* ; *see also In re Marriage of Hock & Gordon-Hock (2000) 80 Cal. App. 4th 1438, 1444, 96 Cal. Rptr. 2d 546* ; *see Brown v. Williams (2000) 78 Cal. App. 4th 182, 189, 92 Cal. Rptr. 2d 634* (plaintiff's counsel failed to timely request trial de novo after plaintiff appeared and participated in arbitration hearing); *Bernasconi Commercial Real Estate v. St. Joseph's Regional Healthcare System (1997) 57 Cal. App. 4th 1078, 1080, 67 Cal. Rptr. 2d 475* (dismissal for delay in service of summons); *Huens v. Tatum (1997) 60 Cal. Rptr. 2d 438* (mandatory provision does not apply to set aside a summary judgment or a judgment after trial)]. Similarly, the mandatory provision of *Code Civ. Proc. § 473(b)* does not apply to a judgment entered after an uncontested trial in a defendant's absence because such a judgment is not a "default," "default judgment," or "dismissal" within the meaning of *Code Civ. Proc. § 473(b)* [*Vandermoon v. Sanwong (2006) 142 Cal. App. 4th 315, 319-321, 47 Cal. Rptr. 3d 772* (defendants whose attorney did not inform them of trial date were not entitled to have amended judgment issued after uncontested trial set aside under *Code Civ. Proc. § 473(b)*)].

The mandatory provision of *Code Civ. Proc. § 473(b)* also does not apply to an attorney's failure to timely file opposition and a cross-motion to a motion to enforce a settlement [*Hossain v. Hossain (2007) 157 Cal. App. 4th 454, 457-459, 69 Cal. Rptr. 3d 356*].

For forms statements that may be used in declarations opposing a motion for relief under *Code Civ. Proc. § 473(b)* based on an attorney's affidavit of fault, see *§ 489.370*.

[c] Causation in Fact Required

Code Civ. Proc. § 473(b), which mandates the court to grant relief unless it finds that the default was not in fact caused by lawyer error, is not only a credibility testing device but also "a causation testing device" [*Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 900-901, 102 Cal. Rptr. 3d 140* ; *Milton v. Perceptual Development Corp. (1997) 53 Cal. App. 4th 861, 867, 62 Cal. Rptr. 2d 98*]. Therefore, the court is not required to vacate the default, default judgment, or dismissal if it finds that the default was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect [*Code Civ. Proc. § 473(b)*; *see, e.g., Cisneros v. Vueve (1995) 37 Cal. App. 4th 906, 909, 44 Cal. Rptr. 2d 682* (section does not afford relief to client who, after inexcusably allowing his or default to be entered, hires attorney whose neglect results in default judgment)]. However, mandatory relief under *Code Civ. Proc. § 473(b)* does not require that the attorney be solely responsible for the entry of default; relief can be granted when default is entered as a result of a combination of attorney and client fault. *Code Civ. Proc. § 473(b)* merely requires that the attorney's conduct be a cause in fact of the entry of default when the client's conduct contributing to entry of default is not intentional [*Benedict v. Danner Press (2001) 87 Cal. App. 4th 923, 923-932, 104 Cal. Rptr. 2d 896*].

The appellate court will affirm the trial court's finding on the causation issue so long as it is supported by substantial evidence [*Benedict v. Danner Press (2001) 87 Cal. App. 4th 923, 928, 104 Cal. Rptr. 2d 896*].

A lawyer's negligence need not be the only proximate cause of a client's injury so long as there is causation in fact [*Milton v. Perceptual Development Corp. (1997) 53 Cal. App. 4th 861, 867* & n.5, *62 Cal. Rptr. 2d 98* (applying rule from legal malpractice context; rejecting contention that client represented by more than one lawyer cannot obtain relief unless all counsel submit affidavit of fault)].

[2] Time Limitation

Prior to the 1991 amendment of former *Code Civ. Proc. § 473* [*now see Code Civ. Proc. § 473(b)*], which added a specific six-month limitation, the provision required that the motion be "timely." Under the former language, it was held that the "reasonable time" requirement, as well as the "in no case exceeding six months" requirement set forth earlier in *Code Civ. Proc. § 473(b)*, applied to a motion based on an attorney's affidavit of fault, and, therefore, did not alter the diligence requirement applied to other *Code Civ. Proc. § 473(b)* motions. Thus, the court could still refuse to entertain the matter if the motion itself was not "timely," that is, not diligently made within the six-month period [*Billings v. Health Plan of America (1990) 225 Cal. App. 3d 250, 258, 275 Cal. Rptr. 80* ; *see § 489.39[6*]].

In 1991, after *Billings* was decided, the legislature amended *Code Civ. Proc. § 473* to replace the word "timely" with the phrase "made no more than six months after entry of judgment" in the sentence dealing with relief based on an attorney affidavit. The argument might be made that the Legislature intended to override *Billings* and to eliminate the diligence requirement by adding this phrase without using the "reasonable time" phrase that appears earlier in the same paragraph. However, the court in *Caldwell v. Methodist Hospital (1994) 24 Cal. App. 4th 1521, 1524-1525, 29 Cal. Rptr. 2d 894* , relied on *Billings* in rejecting a motion for relief based on an attorney's affidavit of fault filed three months after the action was dismissed. The *Caldwell* opinion did not address this change in the language of *Code Civ. Proc. § 473*.

The six-month period starts to run when the judgment is entered. If that time limit is met and the court grants relief based on the attorney's affidavit of fault, *Code Civ. Proc. § 473* requires the court to set aside the default as well as the default judgment [*Sugasawara v. Newland (1994) 27 Cal. App. 4th 294, 297, 32 Cal. Rptr. 2d 484*].

[3] Award of Fees and Costs to Opposing Counsel or Parties

Whenever relief is granted on an attorney's affidavit (or declaration) of fault, the court must direct the attorney to pay reasonable compensatory legal fees and costs to the opposing counsel or parties [*Code Civ. Proc. § 473(b)*; *see also* discussion in *§ 489.42*].

[4] Relief to Be Nonconditional

When a court grants relief from a default or default judgment pursuant to *Code Civ.Proc. § 473(b)*, based on the affidavit (or declaration) of the defaulting party's attorney attesting to the attorney's mistake, inadvertence, surprise, or neglect, the relief is not to be made conditional on the attorney's payment of compensatory legal fees or costs or monetary penalties imposed by the court or on compliance with other sanctions ordered by the court [*Code Civ. Proc. § 473(c)(2)*].

[5] Attorney Acting in Pro Per

The mandatory relief provision of *Code Civ. Proc. § 473(b)*, requiring a court to vacate a default when an application for relief is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, applies only in the case of an attorney representing a client. The discretionary provision applies to a party, including a party appearing in propria persona, and an attorney representing a party, whereas the mandatory provision applies only to an attorney representing a party. An attorney who brings an action both on the attorney's own behalf and on behalf of others, such as a taxpayer in a representative capacity, similarly is not entitled to mandatory relief under *Code Civ. Proc. § 473(b)*. In this case, if the attorney binds other taxpayers by the action, the attorney does so as a fellow taxpayer, not as an attorney for the taxpayers [*Esther B. v. City of Los Angeles (2008) 158 Cal. App. 4th 1093, 1099-1100, 70 Cal. Rptr. 3d 596*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedureCounselGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil

ProceduresPretrial JudgmentsDefaultRelief From DefaultCivil ProceduresJudgmentsRelief From JudgmentGeneral OverviewCivil ProceduresJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProceduresJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProceduresJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProceduresJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseGovernmentsLegislationStatutes of LimitationsTime Limitations

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43-489 California Forms of Pleading and Practice--Annotated § 489.41

§ 489.41 Relief From Involuntary Dismissals

With respect to involuntary dismissals for failure to prosecute (*see Code Civ. Proc. §§ 581, 583.110 et seq.*), *Code Civ. Proc. § 473(b)* enables a plaintiff to file belated opposition to the motion to dismiss after having failed, through mistake, inadvertence, surprise, or excusable neglect, to oppose the motion to dismiss, or failed to make the showing he or she could have made at the hearing on the motion. *Code Civ. Proc. § 473(b)* does not provide grounds to oppose a motion to dismiss for failure to prosecute; it merely allows the belated contest on the dismissal motion on its merits [*Peltier v. McCloud River R.R. Co. (1995) 34 Cal. App. 4th 1809, 1821, 41 Cal. Rptr. 2d 182* (dismissal under *Code Civ. Proc. § 583.410*); *Graham v. Beers (1994) 30 Cal. App. 4th 1656, 1661, 36 Cal. Rptr. 2d 765* (dismissal under *Code Civ. Proc. § 583.410*); *Tustin Plaza Partnership v. Wehage (1994) 27 Cal. App. 4th 1557, 1565-1566* , 33 Cal. Rtpr. 2d 366; *Billings v. Health Plan of America (1990) 225 Cal. App. 3d 250, 253, 256, 275 Cal. Rptr. 80* (dismissal under *Code Civ. Proc. § 583(f)(2)*); *Wilcox v. Ford (1988) 206 Cal. App. 3d 1170, 1176-1178, 254 Cal. Rptr. 138* (dismissal under *Code Civ. Proc. § 583.310*)].

This result is not changed by the 1992 amendment of *Code Civ. Proc. § 473(b)*, adding the word "dismissal" to the list of matters from which relief is available [*Peltier v. McCloud River R.R. Co. (1995) 34 Cal. App. 4th 1809, 1824, 41 Cal. Rptr. 2d 182* ; *Graham v. Beers (1994) 30 Cal. App. 4th 1656, 1661, 36 Cal. Rptr. 2d 765* ; *see Tustin Plaza Partnership v. Wehage (1994) 27 Cal. App. 4th 1557, 1564* , 33 Cal. Rtpr. 2d 366 (dicta)].

Code Civ. Proc. § 473, as amended, does not lengthen the time, however, within which an action may be brought to trial pursuant to *Code Civ. Proc. § 583.310* (mandatory dismissal for failure to bring action to trial within five years) [*Code Civ. Proc. § 473(b)*].

Although the Court of Appeal of the Third Appellate District has said that a motion for relief under *Code Civ. Proc. § 473(b)* may be filed in opposition to a motion to dismiss for lack of prosecution and may be heard and considered contemporaneously with it [*Martin v. Cook (1977) 68 Cal. App. 3d 799, 804 n.3, 137 Cal. Rptr. 434*], this statement was characterized in *Wilcox* as dictum and rejected as an erroneous statement of the law [*Wilcox v. Ford (1988) 206 Cal. App. 3d 1170, 1178-1179, 254 Cal. Rptr. 138* (Court of Appeal, Second Appellate District, Division Four)].

For procedure and forms for use on a motion to dismiss for lack of prosecution, see Ch. 212, *Dismissal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteGovernmentsLegislationStatutes of LimitationsTime Limitations

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43-489 California Forms of Pleading and Practice--Annotated § 489.42

§ 489.42 Terms and Penalties Imposed When Relief Is Granted

[1] Costs, Attorney's Fees, and Nonmonetary Conditions

Code Civ. Proc. § 473(b), permits the court to grant relief "upon any terms as may be just." This phrase has been construed to allow an award of costs or attorney's fees to the adverse party to compensate that party for any losses or expenses occasioned by the motion [*Jade K. v. Viguri (1989) 210 Cal. App. 3d 1459, 1474, 258 Cal. Rptr. 907* (holding that as a condition to relief from default, intervener was to pay plaintiff reasonable costs and attorney's fees in an amount to be determined by superior court; criticized on other grounds in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1608 n.5, 275 Cal. Rptr. 887*); *Hearst v. Ferrante (1987) 189 Cal. App. 3d 201, 204, 234 Cal. Rptr. 385*]. For discussion of when a written statement of reasons is required, see [4], *below*. For the effect of conditions on the appealability of the order, see *§ 489.18[5][b]*. For the award of fees and costs that may be imposed on granting relief from a default or default judgment based on an attorney's affidavit of fault, see *§ 489.40[3]*.

Nonmonetary conditions on the granting of relief may also be imposed when dictated by fairness [*see, e.g., In re Marriage of Helsel (1988) 198 Cal. App. 3d 332, 340-341 n.7, 243 Cal. Rptr 657* (on setting aside stipulated order under *Code Civ. Proc. § 473(b)*, trial court as properly considering whether fairness required relieving opposing party from other parts of stipulation)].

[2] Penalty on Relief From Default Judgment

Whenever the court grants relief from a default, default judgment, or dismissal based on any of the provisions of *Code Civ. Proc. § 473*, the court may also do any of the following [*Code Civ. Proc. § 473(c)(1)*; *see also* discussion under [4], *below*]:

- Impose a penalty of no greater than $1,000 on an offending attorney or party.

- Direct that the offending attorney pay an amount no greater than $1,000 to the State Bar Client Security Fund.

- Grant any other appropriate relief.

[3] Penalty for Bad Faith Actions or Tactics

Apart from *Code Civ. Proc. § 473(c)(1)*, a trial court may order a party, the party'sattorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay [*Code Civ. Proc. § 128.5(a)*; *see Hearst v. Ferrante (1987) 189 Cal. App. 3d 201, 204, 234 Cal. Rptr. 385*]. The term "actions or tactics" includes the making or opposing of motions [*Code Civ. Proc. § 128.5(b)(1)*].

Sanctions under *Code Civ. Proc. § 128.5* apply only to actions or proceedings pending as of December 31, 1994. Actions or proceedings filed after that date are subject to sanctions under *Code Civ. Proc. § 128.7* [*Code Civ. Proc. §§ 128.5(b)(1), 128.7(i)*]. For discussion of *Section 128.5* and *128.7* sanctions, see Ch. 510, *Sanctions* .

[4] Court's Statement of Reasons

Although *Code Civ. Proc. § 473(b)*, empowers the trial court to award attorney's fees, due process requires that the court provide a written statement of reasons for the award when the fees are imposed as sanctions. This requirement affords a safeguard against an abuse of the trial court's discretion and permits appellate review of that decision [*Hearst v. Ferrante (1987) 189 Cal. App. 3d 201, 204, 234 Cal. Rptr. 385*].

By statute, an order imposing expenses under *Code Civ. Proc. § 128.5* (*see* [3], *above*) must be in writing and recite in detail the conduct or circumstances justifying the order [*Code Civ. Proc. § 128.5(c)*]. An order lacking this statement cannot stand [*Hearst v. Ferrante (1987) 189 Cal. App. 3d 201, 204, 234 Cal. Rptr. 385* ; *see also County of Imperial v. Farmer (1988) 205 Cal. App. 3d 479, 486, 252 Cal. Rptr. 382*].

When imposing *Code Civ. Proc. § 128.7* sanctions, the court is required to describe the conduct determined to have violated *Code Civ. Proc. § 128.7* and explain the basis for the sanction imposed [*Code Civ. Proc. § 128.7(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsBad Faith Motions

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§ 489.43 Treating Motion for Relief as Motion for New Trial

An order setting aside a default judgment may, in an appropriate case, be treated as a proper exercise of the trial court's authority to grant a newtrial (or more precisely, in the context of a default judgment, a new judgment hearing) if the damages awarded are excessive as a matter of law [*see Don v. Cruz (1982) 131 Cal. App. 3d 695, 699, 702-706, 182 Cal. Rptr. 581*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentMotions for New TrialsCivil ProcedureRemediesDamagesGeneral Overview

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§ 489.44 Grounds for Relief

[1] Mistake

[a] Kinds of Mistakes

Mistakes are of two kinds: mistakes of fact and mistakes of law.

A mistake of fact occurs when a person understands the facts to be other than they are. A mistake of law occurs when a person knows the facts as they really are but has a mistaken belief as to the legal consequences of those facts [*Hodge Sheet Metal Products v. Palm Springs Riviera Hotel (1961) 189 Cal. App. 2d 653, 656, 11 Cal. Rptr. 435* ; *Baratti v. Baratti (1952) 109 Cal. App. 2d 917, 921, 242 P.2d 22*].

Mere mistake does not warrant relief unless, on a consideration of all the evidence, it is found to be excusable [*Martin v. Taylor (1968) 267 Cal. App. 2d 112, 113, 72 Cal. Rptr. 847*]. Thus, a party who seeks relief under *Code Civ. Proc. § 473(b)*, on the basis of mistake must generally demonstrate that the mistake was excusable [*Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal. 3d 892, 898, 187 Cal. Rptr. 592, 654 P.2d 775*].

Frequently, a motion for relief will be based both on mistake and on one or more of the other grounds listed in *Code Civ. Proc. § 473(b)*, that is, inadvertence, surprise, or excusable neglect [*see, e.g.,* *Billings v. Health Plan of America (1990) 225 Cal. App. 3d 250, 253, 275 Cal. Rptr. 80* (mistake or inadvertence); *Martin v. Johnson (1979) 88 Cal. App. 3d 595, 605, 151 Cal. Rptr. 816* (mistake and inadvertence); *Buckert v. Briggs (1971) 15 Cal. App. 3d 296, 300-302, 93 Cal. Rptr. 61* (mistake and surprise); *Martin v. Taylor (1968) 267 Cal. App. 2d 112, 115, 72 Cal. Rptr. 847* (mistake and excusable neglect)].

[b] Mistake of Fact

[i] General Examples

Generally, relief may be had from a judgment, dismissal, order, or other proceeding resulting from reasonable mistakes of fact [*see Code Civ. Proc. § 473(b)*].

ILLUSTRATION:

Vacation of Order Striking Cost From Plaintiff's Cost Bill. A trial court issued an order striking the cost of a transcript from the plaintiff's cost bill on the ground that the item was not allowable because the transcript had not been ordered by the court. The plaintiff moved to vacate the order after it was later discovered that the court did order the transcript. May the plaintiff's motion be granted? Yes. A *Code Civ. Proc. § 473(b)* motion is proper to vacate an order striking a cost when the court's order results from a reasonable mistake of fact [*see Spellens v. Spellens (1957) 49 Cal. 2d 210, 226* (reversing order denying motion to vacate)].

ILLUSTRATION: Vacation of Voluntary Dismissal. Plaintiff dismissed her lawsuit regarding a portion of real property, intending to forclose on a deed of trust that she held. She later learned, however, that a prior trust deed on the property had foreclosed, rendering the security valueless. Plaintiff moved to vacate the judgment, should her motion be granted? Yes. The trial court granted the motion to vacate the judgment of dismissal for mistake of fact, and the court of appeal affirmed [*see Salazar v. Steelman (1937) 22 Cal. App. 2d 402, 409-410, 71 P.2d 79*].

For a statement that may be used in a declaration supporting a motion for relief under Section 473(b), based on excusable mistake of fact, see *§ 489.361[1]*.

[ii] Examples Regarding Defaults and Default Judgments

In the case of default, relief based on mistake of fact has been granted when the defendant or his or her attorney was reasonably mistaken as to:

- The fact of service [*see Riskin v. Towers (1944) 24 Cal. 2d 274, 278-279, 148 P.2d 611* (reversing order denying relief)], or

- The date of service [*see, e.g., Miller v. Carr (1897) 116 Cal. 378, 381, 48 P. 324* ; *Gore v. Witt (1957) 149 Cal. App. 2d 681, 684-687, 308 P.2d 770*].

ILLUSTRATION:

Default Entered Because of Client's Mistake Regarding Date Summons Was Served. Defendant's counsel filed a demurrer on what the attorney believed was the last day to file the demurrer. Counsel discovered, however, that defendant mistakenly wrote the wrong date on the summons. The summons was served on June 24th instead of June 25th. A default was entered and defendant's counsel moved for relief. The court denied the motion. Was the court's order denying relief proper? No. Relief from default is proper when an attorney's mistake as to date of service is result of "inadvertence or negligence" on his or her client's part as to the date of service [*see Miller v. Carr (1897) 116 Cal. 378, 381, 48 P. 324* ; *see also Gore v. Witt (1957) 149 Cal. App. 2d 681, 684-687, 308 P.2d 770* (actual date was May 7 instead of May 17, and complaint failed to state facts sufficient to constitute cause of action)].

Other examples of cases in which relief from a default or default judgment has been granted for mistake of fact include the following:

- Because of a misunderstanding between the defendant and his or her secretary [*see Benjamin v. Dalmo Mfg. Co. (1948) 31 Cal. 2d 523, 526-528, 190 P.2d 593* (order granting relief reversed on because moving party lacked diligence)];

ILLUSTRATION:

Defendant's Secretary Filed Papers in Office File Instead of Forwarding Them to Counsel. A summons and a complaint was served on defendant's secretary. The secretary placed the documents in defendant's office file instead of forwarding them defendant's attorney. After a default was entered, defendant sought relief from the default. Should relief be granted? Yes. The court ordered that the default be set aside based on defendant's mistake of fact permitting relief [*see* *Benjamin v. Dalmo Mfg. Co. (1948) 31 Cal. 2d 523, 526-528, 190 P.2d 593* (although mistake was established, order granting relief was reversed for lack of diligence in seeking relief [*see* discussion in *§ 489.39[6]*])].

- The defendant mistakenly believed that the papers served on him related to a lien claim not requiring immediate attention, put them away for later attention, and then misplaced them [*Hodge Sheet Metal Products v. Palm Springs Riviera Hotel (1961) 189 Cal. App. 2d 653, 657-658, 11 Cal. Rptr. 435* (affirming order setting aside default and default judgment)]; and

- The defendants did not realize they had a meritorious defense to the action because the complaint was misleading [*Brill v. Fox (1931) 211 Cal. 739, 743, 297 P. 25* (reversing order denying relief from default in mortgage foreclosure action)].

For discussion of the client's mistake in relying on an attorney who has abandoned him or her, see *§ 489.46*.

[c] Attorney's Mistake of Fact

When the mistake is not that of the party but that of his or her attorney, it appears that there is greater tolerance in granting relief, as the courts are somewhat loath to penalize a litigant on account of some omission on the attorney's part, particularly if the party has acted promptly and has relied on the attorney to protect his or her rights [*Dingwall v. Vangas, Inc. (1963) 218 Cal. App. 2d 108, 113, 32 Cal. Rptr. 351* (order granting relief from default and default judgment affirmed when failure to answer complaint was principally due to failure of liaison between attorney fully familiar with case in turning it over to another attorney, and mistake was of type that reasonably prudent attorneys make); *see also* *Martin v. Johnson (1979) 88 Cal. App. 3d 595, 604, 151 Cal. Rptr. 816* (nevertheless finding attorney's mistake in filing affidavits containing hearsay in opposition to summary judgment motion not excusable)].

However, the client is charged with the acts of his or her attorney, and thus, to secure relief, the client must show that the attorney's mistake or neglect was excusable [*Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal. 3d 892, 898, 187 Cal. Rptr. 592, 654 P.2d 775* (reversing order setting aside dismissal for failure to comply with discovery order); *Martin v. Cook (1977) 68 Cal. App. 3d 799, 809, 137 Cal. Rptr. 434* (criticized on another ground in *Wilcox v. Ford (1988) 206 Cal. App. 3d 1170, 1178, 254 Cal. Rptr. 138*)]. In *Martin* the court of appeal held that counsel's mistake in believing that a stipulation waiving the provisions of former *Code Civ. Proc. § 583(a)* (providing for dismissal when action is not brought to trial within two years [*now see Code Civ. Proc. §§ 583.410, 583.420(a)(2)(B)*]) waived the provisions of former *Code Civ. Proc. § 583(b)* (providing for mandatory dismissal when action is not brought to trial within five years [*now see Code Civ. Proc. §§ 583.310, 583.360*]) was inexcusable and, hence, no ground for relief under *Code Civ. Proc. § 473(b)*, for failure to bring the action to trial within five years [*Martin v. Cook (1979) 68 Cal. App. 3d 799, 810, 137 Cal. Rptr. 434* (reversing order granting relief on grounds of inadvertence and mistake)].

The mistake of a paralegal who is on the attorney's staff is attributable to the attorney for purposes of relief from a default judgment [*Hu v. Fang (2002) 104 Cal. App. 4th 61, 64-66, 127 Cal. Rptr. 2d 756* (paralegal's calendaring mistake was attributable to attorney)].

For discussion of relief from a default judgment that may be granted when the attorney files an affidavit or declaration

under *Code Civ. Proc. § 2015.5* attesting to his or her mistake [*Code Civ. Proc. § 473(b)*], see *§ 489.40[1]*.

[d] Mistake of Law

Relief may be had from a judgment, dismissal, order, or other proceeding resulting from reasonable mistakes of law [*see Code Civ. Proc. § 473(b)*], but they present a more difficult issue than mistakes of fact. Although mistakes of law may warrant relief in proper cases, a mistake as to the law does not require relief as a matter of law [*City of Ontario v. Superior Court (1970) 2 Cal. 3d 335, 346, 85 Cal. Rptr. 149, 466 P.2d 693* ; *A & S Air Conditioning v. John J. Moore Co. (1960) 184 Cal. App. 2d 617, 620, 7 Cal. Rptr. 592*].

The line between a mistake of law and ignorance of the law is somewhat tenuous [*Security Truck Line v. Monterey (1953) 117 Cal. App. 2d 441, 445, 257 P.2d 755*]. Mere ignorance of the law coupled with negligence in ascertaining it will not justify relief, and will sustain an order denying relief [*Martin v. Johnson (1979) 88 Cal. App. 3d 595, 605, 151 Cal. Rptr. 816* (affirming order denying motion to set aside summary judgment on grounds of inadvertence and mistake in filing affidavits based on hearsay in response to summary judgment motion); *A & S Air Conditioning v. John J. Moore Co. (1960) 184 Cal. App. 2d 617, 620, 7 Cal. Rptr.592* (affirming order denying relief from a default judgment on the ground that defendants' attorney believed that the award of attorney's fees in default matters were the same in county in which action was filed as in county in which defendants and attorney lived, when in fact they were higher); *Security Truck Line v. Monterey (1953) 117 Cal. App. 2d 441, 445, 257 P.2d 755* (affirming order denying relief from default based on city attorney's mistaken belief that an appeal from an order granting a preliminary injunction operated as a stay of all proceedings in the main action)].

To warrant relief under *Code Civ. Proc. § 473(b)*, the attorney's mistake of law must be of a type that prevented a party from presenting his or her case in court [*see Guenter v. Lomas & Nettleton Co. (1983) 140 Cal. App. 3d 460, 466, 189 Cal. Rptr. 470* (trial court did not err in denying relief from order striking unauthorized pleading)], or resulted from an honest and reasonable mistake of law on a complex and debatable issue that resulted in the judgment, order, or proceeding against the client [*see City of Ontario v. Superior Court (1970) 2 Cal. 3d 335, 346, 85 Cal. Rptr. 149, 466 P.2d 693*] (trial court did not abuse its discretion in relieving plaintiffs from their mistake of law resulting in failure to comply with certain statutory requirements for publication of summons in action against city); *State Farm Fire & Casualty Co. v. Pietak (2001) 90 Cal. App. 4th 600, 611-615, 109 Cal. Rptr. 2d 256* (complexity of whether to assert cross claims in interpleader action [*see Code Civ. Proc. §§ 386, 426.30(a)* or separate action); *Miller v. City of Hermosa Beach (1993) 13 Cal. App. 4th 1118, 1136, 17 Cal. Rptr. 2d 408* ; McCormick v. Board of Supervisors (1988) 198 Cal. App. 3d 352, 360, 362, 243 Cal. Rptr. 617] (in mandate proceeding under California Environmental Quality Act [*Pub. Res. Code § 21000 et seq.*] reversing order denying relief from dismissal for noncompliance with *Pub. Res. Code § 21167.4* [failure to request hearing within 90 days of filing petition] resulting from attorney's reasonable mistake of law); *Brochtrup v. INTEP (1987) 190 Cal. App. 3d 323, 329, 235 Cal. Rptr. 390* (reversing summary judgment for plaintiff, based primarily on matters deemed admitted arising from improper response to plaintiff's request for admissions, with directions to trial court to vacate its order denying motion forrelief under *Code Civ. Proc. § 473(b)*, based on mistake of law, from default resulting from improper response, to grant motion, and to file defendants' responses that were attached to motion for reconsideration, subsequently filed by substituted attorney, and properly verified)].

The issue as to whether a mistake of law is excusable presents a fact question, the determining factors of which are the reasonableness of the misconception and the justifiability of the attorney's failure to determine the correct law [*City of Ontario v. Superior Court (1970) 2 Cal. 3d 335, 346, 85 Cal. Rptr. 149, 466 P.2d 693* ; *Miller v. City of Hermosa Beach (1993) 13 Cal. App. 4th 1118, 1136, 17 Cal. Rptr. 2d 408* ; McCormick v. Board of Supervisors (1988) 198 Cal. App. 3d 352, 360, 243 Cal. Rptr. 617 ; *A & S Air Conditioning v. John J. Moore Co. (1960) 184 Cal. App. 2d 617, 620, 7 Cal. Rptr. 592* (affirming order denying relief)].

There is, of course, no requirement that the mistake of law be mutual [*A & S Air Conditioning v. John J. Moore Co.*

(1960) 184 Cal. App. 2d 617, 620, 7 Cal. Rptr. 592]. Moreover, a mistake of law may be excusable when made by a layperson but not when made by an attorney [*Tammen v. County of San Diego (1967) 66 Cal. 2d 468, 479, 58 Cal. Rptr. 249, 426 P.2d 753*].

For discussion of relief from a default judgment that may be granted when the attorney files an affidavit or declaration under *Code Civ. Proc. § 2015.5* attesting to his or her mistake [*Code Civ. Proc. § 473(b)*], see *§ 489.40[1]*.

[e] Mistake of Court

Relief cannot be granted under *Code Civ. Proc. § 473(b)*, for mistakes of the court, or of the court and the adverse party, in issuing erroneous orders [*Consolidated Const. Co. v. Pacific E. Ry. Co. (1920) 184 Cal. 244, 247, 193 P. 238*]. That is, *Code Civ. Proc. § 473(b)*, has no application to judicial mistakes, but only to mistake, inadvertence, surprise, or excusable neglect of the moving party [*Don v. Cruz (1982) 131 Cal. App. 3d 695, 702, 182 Cal. Rptr. 581*].

Nevertheless, a court has power, independently of statute, to set aside a judgment entered through the court's mistake or inadvertence; that is, when the court is deceived or is laboring under a mistake or misapprehension as to the state of the record or as to the existence of extrinsic facts on which it is predicated, it has inherent power to vacate a judgment that would not otherwise have been rendered [*Key System Transit Lines v. Superior Court (1950) 36 Cal. 2d 184, 187-188, 222 P.2d 867* ; *see* *Badella v. Miller (1955) 44 Cal. 2d 81, 87, 279 P.2d 729* (discussing when notice and hearing are necessary); *see also* discussion in *§ 489.10*].

[2] Inadvertence

Relief may be had from a judgment, dismissal, order, or other proceeding resulting from inadvertence [*Code Civ. Proc. § 473(b)*]. Inadvertence is a lack of heedfulness or attentiveness, inattention, or fault from negligence [*Dingwall v. Vangas, Inc. (1963) 218 Cal. App. 2d 108, 113, 32 Cal. Rptr. 351* ; *Kooper v. King (1961) 195 Cal. App. 2d 621, 626, 15 Cal. Rptr. 848* ; *Hodge Sheet Metal Products v. Palm Springs Riviera Hotel (1961) 189 Cal. App. 2d 653, 656, 11 Cal. Rptr. 435* ; *Baratti v. Baratti (1952) 109 Cal. App. 2d 917, 921, 242 P.2d 22*]. Mere inadvertence does not warrant relief, however, unless, on a consideration of all the evidence, it is found to be excusable [*Martin v. Taylor (1968) 267 Cal. App. 2d 112, 113, 72 Cal. Rptr. 847*]. Thus, the reasons, the causes, and the excuses for the inadvertence are matters that concern the court. Inadvertence in the abstract is no plea on which to set aside a default. The moving party must acquaint the court with the reasons for the inadvertence and, if satisfactory, the court will act on them and relieve the party from the burdens caused by them. If the inadvertence is wholly inexcusable, however, as when it arises from gross negligence, the court will not look on it kindly, and will have none of it [*Kendall v. Barker (1988) 197 Cal. App. 3d 619, 624, 243 Cal. Rptr. 42* (quoting *Davis v. Thayer (1980) 113 Cal. App. 3d 892, 905, 170 Cal. Rptr. 328* , which in turn was quoting *Shearman v. Jorgensen (1895) 106 Cal. 483, 485, 39 P. 863*)].

Rather than treating inadvertence as a distinct ground for relief, courts most often consider it in conjunction with the grounds of excusable neglect [*see, e.g.,* *Lynch v. Spilman (1967) 67 Cal. 2d 251, 258, 62 Cal. Rptr. 12, 431 P.2d 636* ; *Kooper v. King (1961) 195 Cal. App. 2d 621, 626, 15 Cal. Rptr. 848* ; *Gore v. Witt (1957) 149 Cal. App. 2d 681, 685, 308 P.2d 770*], mistake [*see. e.g.,* *Martin v. Johnson (1979) 88 Cal. App. 3d 595, 605, 151 Cal. Rptr. 816* (mistake of law); *Martin v. Cook (1977) 68 Cal. App. 3d 799, 802, 137 Cal. Rptr. 434* (mistake of fact)], or surprise [*see, e.g.,* *Yarbrough v. Yarbrough (1956) 144 Cal. App. 2d 610, 613, 301 P.2d 426* (inadvertence, surprise, and excusable neglect)]. Thus, unless it is shown that there were circumstances that would render the mistake, surprise, or negligence excusable, relief will be denied. For example, mere forgetfulness, such as misfiling or mislaying of plaintiff's complaint and summons, is not a sufficient ground for relief under *Code Civ. Proc. § 473(b)* [*Kooper v. King (1961) 195 Cal. App. 2d 621, 627, 15 Cal. Rptr. 848*].

For discussion of relief from a default judgment that may be granted when the attorney files an affidavit or declaration attesting to his or her inadvertence [*Code Civ. Proc. § 473(b)*], see *§ 489.40[1]*.

[3] Surprise

[a] In General

Relief may be had from a judgment, dismissal, order, or other proceeding resulting from surprise [*Code Civ. Proc. § 473(b)*]. Surprise is often coupled with excusable neglect as grounds for relief [*see, e.g., Lint v. Chisholm (1981) 121 Cal. App. 3d 615, 620, 177 Cal. Rptr. 314* (surprise and excusable neglect); *Yarbrough v. Yarbrough (1956) 144 Cal. App. 2d 610, 612-613, 301 P.2d 426* (inadvertence, surprise, and excusable neglect)] or with mistake [*see Buckert v. Briggs (1971) 15 Cal. App. 3d 296, 302, 93 Cal. Rptr. 61*].

For discussion of relief from a default judgment that may be granted when the attorney files an affidavit or declaration attesting to his or her surprise [*Code Civ. Proc. § 473(b)*], see *§ 489.40[1]*.

[b] Surprise Defined

"Surprise" means some condition or situation in which a party is unexpectedly placed to his or her injury, without any fault or negligence of his or her own, that ordinary prudence could not have guarded against [*see Credit Managers Ass'n v. National Indep. Bus. Alliance (1984) 162 Cal. App. 3d 1166, 1173, 209 Cal. Rptr. 119* ; *Lint v. Chisholm (1981) 121 Cal. App. 3d 615, 620, 177 Cal. Rptr. 314*].

[c] Examples of Surprise

Examples of surprise include the following:

- In an action by an assignee for the benefit of creditors for breach of contract between the defendant and the assignor, the assignee was taken by surprise when the defendant filed a cross complaint against the assignor and took the assignor's default with no notice to the assignee [*Credit Managers Ass'n v. National Indep. Bus. Alliance (1984) 162 Cal. App. 3d 1166, 1172-1173, 209 Cal. Rptr. 119* (reversing orders denying plaintiff's motion for relief from the default and default judgment and to be substituted in place of the assignor and to defend against the cross complaint)].

- When settlement negotiations are pending between counsel and there is an oral or implied understanding that notice would be given before a default would be taken, the plaintiff's taking of a default without prior notice to the defaulting party or to his or her attorney may constitute excusable neglect or surprise that will support relief under *Code Civ. Proc. § 473(b)* [*see Yarbrough v. Yarbrough (1956) 144 Cal. App. 2d 610, 616, 301 P.2d 426* ; *see also Code Civ. Proc. § 587* (regarding notice of request for entry of default, but also providing that nonreceipt of notice does not invalidate or constitute ground for setting aside any judgment)].

Failure to receive a notice will not always constitute surprise from which relief will be available. For example, neither surprise nor excusable neglect was established when the defendant's failure to receive notice of trial, which resulted in a judgment for plaintiff, was caused by the defendant's failure to notify the court of a change of address or otherwise arrange for the forwarding of mail [*Lint v. Chisholm (1981) 121 Cal. App. 3d 615, 620, 177 Cal. Rptr. 314* (trial court did not abuse its discretion in denying motion to vacate default and set aside default judgment entered on defendant's failure to appear at trial)].

[4] Excusable Neglect

[a] In General

Relief may be had from a judgment, dismissal, order, or other proceeding resulting from "excusable neglect" [*Code*

Civ. Proc. § 473(b)]. The statute itself expressly requires that the person who seeks relief on this ground show that the neglect was "excusable" [*Transit Ads, Inc. v. Tanner Motor Livery, Ltd. (1969) 270 Cal. App. 2d 275, 279, 75 Cal. Rptr. 848*]. Thus, mere neglect does not warrant relief unless, on a consideration of all the evidence, it is found to be excusable [*Martin v. Taylor (1968) 267 Cal. App. 2d 112, 113, 72 Cal. Rptr. 847*]. In seeking relief, counsel will often couple excusable neglect with one or more of the other grounds set forth in *Code Civ. Proc. § 473(b)*, as a basis for granting relief (that is, mistake, inadvertence, or surprise, discussed under [1] through [3], *above*).

In considering whether attorney error constitutes excusable neglect, the court must consider the attorney's overall diligence in prosecuting the case [McCormick v. Board of Supervisors (1988) 198 Cal. App. 3d 352, 361, 243 Cal. Rptr. 617 (citing *Bettencourt v. Los Rios Community College Dist. (1986) 42 Cal. 3d 270, 278, 228 Cal. Rptr. 190, 721 P.2d 71*); *see also Cabamongan v. City of Long Beach (1989) 208 Cal. App. 3d 946, 950-951, 256 Cal. Rptr. 621*].

For discussion of relief that may be granted a party based on attorney abandonment, see *§ 489.46[1]*. For discussion of relief from a default judgment that may be granted when the attorney files an affidavit or declaration under *Code Civ. Proc. § 2015.5* attesting to his or her "neglect" [*Code Civ. Proc. § 473(b)*], see *§ 489.40[1]*.

For statements that may be used in a declaration supporting a motion for relief under *Section 473(b)*, based on excusable neglect, see *§ 489.361[2], [5]*.

[b] What Constitutes Excusable Neglect

To be excusable, the neglect must have been the act or omission of a reasonably prudent person under the same circumstances [*Beeman v. Burling (1990) 216 Cal. App. 3d 1586, 1602-1603, 265 Cal. Rptr. 719* (quoting *Transit Ads, Inc. v. Tanner Motor Livery, Ltd. (1969) 270 Cal. App. 2d 275, 279, 75 Cal. Rptr. 848*); *see also Lint v. Chisholm (1981) 121 Cal. App. 3d 615, 620, 177 Cal. Rptr. 314* (omitting "or omission" from the statement of the rule)].

[c] Examples of Excusable Neglect

[i] Attorney Illness

Illness of the attorney that actually disables him or her from timely compliance with the statutory rules of procedure constitutes excusable neglect if he or she moves promptly for relief as soon as the disability terminates or attenuates to the extent that a reasonable person under similar conditions would take action for relief [*Transit Ads, Inc. v. Tanner Motor Livery, Ltd. (1969) 270 Cal. App. 2d 275, 280, 75 Cal. Rptr. 848* (reversing order setting aside default and default judgment)]. In such case, the court will examine the nature of the illness as described and then consider if the illness was so disabling that the neglect consisted only of acts or omissions of a kind that a reasonably prudent practitioner in similar circumstances would commit. If the neglect consisted of both excusable and inexcusable acts or omissions, the court will consider which part caused the default [*Transit Ads, Inc. v. Tanner Motor Livery, Ltd. (1969) 270 Cal. App. 2d 275, 286-287, 75 Cal. Rptr. 848*].

[ii] Reliance on Third Party

Generally, neglect to act to prevent entry of a default or to seek relief from a default judgment, may constitute excusable neglect when it was due to the defendant's reasonable reliance on a third party to defend [*see, e.g., Weitz v. Yankosky (1966) 63 Cal. 2d 849, 855, 48 Cal. Rptr. 620, 409 P.2d 700* (involving relief in equity on ground of extrinsic mistake; *see § 489.220* et seq. for further discussion of relief in equity); *Fasuyi v. Permatex, Inc. (2008) 167 Cal. App. 4th 681, 696-701, 84 Cal. Rptr. 3d 351* (relief granted when insurer failed to act to prevent default); *see also § 489.361[2]* (form of statement in supporting declaration that default was due to defendant's excusable neglect in reasonably relying on promise of codefendant or employer to defend)]. Thus, a defendant who relied on a codefendant or employer to defend the action need show only that his or her reliance was reasonable without inquiring into the conduct of the codefendant

or employer [*Don v. Cruz (1982) 131 Cal. App. 3d 695, 700, 182 Cal. Rptr. 581*].

However, the neglect of the defendant's insurer to defend after the defendant notified the insurer of the action and service of process is imputed to the defendant who must show not only reasonable reliance on the carrier to defend, but justification for the carrier's inaction as well, that is, that the insurer's failure was excusable [*see Don v. Cruz (1982) 131 Cal. App. 3d 695, 701, 182 Cal. Rptr. 581*].

[iii] Misinformation

Neglect to act to prevent entry of a default or to seek relief from a default judgment may constitute excusable neglect when it was due to the defendant's reasonable reliance on misrepresentations made by the opposing party or his or her attorney [*see Nelson v. Southerland (1960) 187 Cal. App. 2d 140, 141-142, 9 Cal. Rptr. 735* (affirming order granting relief from default judgment under *Code Civ. Proc. § 473(b)*, without specifying ground for relief)].

Relief may also be granted on the ground of excusable neglect when a party's failure to appear at trial was due to reliance on misinformation provided by a court officer [*see* Lynch v. de *Boom (1915) 26 Cal. App. 311, 314, 146 P. 908* (reversing order denying motion to vacate judgment of dismissal on ground that plaintiff's failure to appear at trial resulted from excusable neglect in relying on misinformation given to him by courtroom clerk); *see also § 489.361[5]*].

[iv] Multiple Factors

Excusable neglect may result from a combination of several factors. For example, in a case involving multiple plaintiffs, numerous causes of action, and a complex and developing field of law, plaintiffs' attorney submitted a detailed declaration, in support of a motion for relief from dismissal for failure to have timely filed an amended complaint, listing the following factors which the court held sufficient to establish excusable neglect [*see Contreras v. Blue Cross of California (1988) 199 Cal. App. 3d 945, 951, 245 Cal. Rptr. 258* (rejecting defendant's claim that defendant should have been allowed to depose plaintiffs' counsel and subpoena her files to impeach her claim of workload)]:

- Counsel was the sole counsel from her firm assigned to the case.
- Fifty-eight individual plaintiffs remained active members of the lawsuit;
- Her firm broke up the month before the amended complaint was due, leaving three attorneys with the work of five.
- In the same month, she received an appellate opinion that required her to prepare a petition for hearing to the Supreme Court.
- She conferred with 40 of the plaintiffs to prepare answers to interrogatories due the same day the amended complaint was due.
- The issues raised by the case and the prior demurrer were very complex.
- 10 days before the amended complaint was due, she fractured her right elbow and wrist, leaving her in a sling and substantially impairing her mobility and writing ability.
- On the day the amended complaint was due she tried to obtain an extension of time from a court commissioner but he refused to entertain it.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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1. Mistake, Inadvertence, Surprise, or Excusable Neglect

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§ 489.45 Inexcusable Neglect

[1] As Preventing Relief

Inexcusable neglect prevents relief under *Code Civ. Proc. § 473(b)*, based on excusable neglect, and, as a general rule, an attorney's inexcusable neglect is chargeable to the client, whose remedy is an action against the attorney for malpractice[*Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal. 3d 892, 895, 898, 187 Cal. Rptr. 592, 654 P.2d 775* ; *Beeman v. Burling (1990) 216 Cal. App. 3d 1586, 1602, 265 Cal. Rptr. 719* ; *Don v. Cruz (1982) 131 Cal. App. 3d 695, 700, 182 Cal. Rptr. 581*]. For discussion of relief based on neglect, whether excusable or inexcusable, when the party's attorney files an affidavit or declaration attesting to his or her fault, see *§ 489.40[1]*. For discussion of relief on the ground of attorney abandonment, see *§ 489.46[1]*.

If the neglect is inexcusable, a judgment may not be set aside under *Code Civ. Proc. § 473(b)* on the ground that the other side has not been prejudiced [*Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal. 3d 892, 900, 187 Cal. Rptr. 592, 654 P.2d 775*].

[2] Examples of Inexcusable Neglect

[a] In General

Examples of inexcusable neglect include the following:

- A mere showing, in an effort to set aside a summary judgment, that the opposing party's attorney had negligently failed to present a particular argument in the papers which the attorney filed in opposition to the motion for summary judgment. The advancement of arguments by counsel is the very essence of the attorney's professional responsibilities and the failure to do so appropriately is not excusable [*Garcia v. Hejmadi (1997) 58 Cal. App. 4th 674, 684-685, 68 Cal. Rptr. 2d 228*].

- A mere showing that defendant, after being served, mislaid the summons and complaint and did not

find them until after default had been entered, at which time he consulted an attorney [*Yarbrough v. Yarbrough (1956) 144 Cal. App. 2d 610, 615, 301 P.2d 426* (reversing order granting relief; noting that a trial court does not have legal power to set aside a default simply because the defendant did not realize the legal effect of failing to file an answer); additional facts may make the case eligible for relief as a mistake (*see, e.g.,* *Benjamin v. Dalmo Mfg. Co. (1948) 31 Cal. 2d 523, 526-528, 190 P.2d 593* , and other cases discussed in *§ 489.44[1][b][ii]*)].

- Defendant's attorney assumed opposing counsel had granted extensions of time to file an answer because, in an effort to request such extensions, the attorney had placed telephone calls to, but did not speak with, and had written letters to, but did not receive any answers from, opposing counsel [*Iott v. Franklin (1988) 206 Cal. App. 3d 521, 531, 253 Cal. Rptr. 635* (reversing order granting relief)].

- Failure to file an answer because of an erroneous assumption that the case was moot [*Jackson v. Bank of America (1983) 141 Cal. App. 3d 55, 58, 190 Cal. Rptr. 78* (reversing order granting relief from default on grounds that no excusable neglect was shown and that motion was untimely)].

- After having been given an extension of time to file, failure to file an answer because the attorney's office was disrupted by his having to seek new offices and the defendants had decided not to file the answer as they were considering filing a petition for bankruptcy [*Northridge Financial Corp. v. Hamblin (1975) 48 Cal. App. 3d 819, 823-824, 122 Cal. Rptr. 109* (affirming order denying relief)].

- Defendant's declaration that, after he was served with the summons and complaint, he forgot about the matter because of Christmas season business pressures, the serious illness of his father, who subsequently died, and the recent death of his mother [*Bellm v. Bellia (1984) 150 Cal. App. 3d 1036, 1038, 198 Cal. Rptr. 389*].

[b] Clerical Errors

The courts may show a willingness to excuse an attorney's neglect caused by clerical errors of the attorney's office staff. However, the existence of other factors may result in the denial of relief. Thus, in *Davis v. Kay (1973) 34 Cal. App. 3d 680, 682-684, 110 Cal. Rptr. 198* , the appellate court reversed an order granting a motion to vacate a summary judgment for plaintiff based on the neglect of defendants' attorney's secretary to calendar the date of the hearing on the summary judgment motion, because [*Davis v. Kay (1973) 34 Cal. App. 3d 680, 682-684, 110 Cal. Rptr. 198* (noting that the "tactics of counsel for respondents was to proceed with all deliberate delay" and that the court would "not tolerate such tactics")]:

- A default judgment in the same action had been set aside for excusable neglect attributable to the same secretary's mistake in recording the date for the answer to be filed;

- The secretary's declaration supporting the motion to vacate the summary judgment implicitly admitted that the attorney handling the case had examined the summary judgment motion and its contents whenit was received, knew or could have known without effort that it was to be heard in just 10 days, and that the points and authorities and exhaustive declarations with extensive exhibits attached to the motion would require substantial time for preparation of answers; and

- Defendants' attorneys were notified of the court's adverse ruling on the summary judgment motion two days after it was made and took no action to vacate it for another 23 days.

[c] Press of Business

Generally, the attorney's neglect caused merely by the press of other business or similar procrastination will not support the client's motion for relief based on excusable neglect under *Code Civ. Proc. § 473(b)*, absent some further showing of excuse [*Bellm v. Bellia (1984) 150 Cal. App. 3d 1036, 1038, 198 Cal. Rptr. 389* (affirming default judgment and order denying motion to set it aside); *Martin v. Taylor (1968) 267 Cal. App. 2d 112, 117, 72 Cal. Rptr. 847* (affirming order denying motion to set aside default and default judgment on grounds of excusable neglect and mistake)]. Conversely, press of business coupled with unusual circumstances may justify relief [*see § 489.361[3]* (form of statement in supporting declaration that default ws due to attorney's excusable neglect resulting from press of business coupled with unusual circumstances)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExtraordinary CircumstancesTortsMalpractice & Professional LiabilityAttorneys

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§ 489.46 Attorney Abandonment

[1] Rule

As a general rule, the mistake authorizing relief may not be predicated on the neglect of a party's attorney unless shown to be excusable, because the attorney's negligence is imputed to the client and may not be offered by the latter as a basis for relief [*Buckert v. Briggs (1971) 15 Cal. App. 3d 296, 301, 93 Cal. Rptr. 61* ; *see also Freedman v. Pacific Gas & Electric Co. (1987) 196 Cal. App. 3d 696, 705, 242 Cal. Rptr. 8* ; *Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 738, 216 Cal. Rptr. 300*]. However, as an exception to that rule, relief is available if the attorney's neglect is of that extreme degree amounting to positive misconduct by which the moving party was effectually and unknowingly deprived of representation, and the person seeking relief is relatively free from negligence [*see Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal. 3d 892, 898, 187 Cal. Rptr. 592, 654 P.2d 775* (reversing order granting relief under *Code Civ. Proc. § 473(b)*); *Tunis v. Barrow (1986) 184 Cal. App. 3d 1069, 1078, 229 Cal. Rptr. 389* (reversing order denying *Code Civ. Proc. § 473.5* relief [discussed in *§ 489.70* et seq.] and equitable grounds [discussed in *§ 489.220* et seq.] from default and default judgment); *see also People v. One Parcel of Land (1991) 235 Cal. App. 3d 579, 584, 286 Cal. Rptr. 739* (affirming order granting equitable relief on ground of attorney abandonment)].

This exception to the normal rule that the attorney's conduct is imputed to the client was first announced in *Daley v. County of Butte (1964) 227 Cal. App. 2d 380, 391, 38 Cal. Rptr. 693* , and the cases following it are referred to as the "Daley line of cases" [*see Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal. 3d 892, 898, 187 Cal. Rptr. 592, 654 P.2d 775*]. The exception is premised on the concept that the attorney's conduct, in effect, obliterates the existence of the attorney-client relationship, and for this reason the attorney's negligence should not be imputed to the client [*Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal. 3d 892, 898, 187 Cal. Rptr. 592, 654 P.2d 775* ; *Monsan Homes, Inc. v. Pogrebneak (1989) 210 Cal. App. 3d 826, 829, 258 Cal. Rptr. 676*) (criticized on other grounds in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1608 n.5, 275 Cal. Rptr. 887*)].

Positive misconduct is found if there is a total failure on the part of counsel to represent his or her client [*Aldrich v.*

San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 739, 216 Cal. Rptr. 300 (affirming order granting relief from dismissal on equitable grounds)]. However, the client's own negligence in following up and pursuing his or her case is scrutinized [*see Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 738, 216 Cal. Rptr. 300*].

This exception is to be narrowly applied to guard against negligent attorneys finding that the simplest way to rescue clients from defaults and themselves from malpractice liability is to rise to ever greater heights of incompetence and professional irresponsibility while, nonetheless, maintaining a beatific attorney-client relationship [*Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal. 3d 892, 900, 187 Cal. Rptr. 592, 654 P.2d 775*].

[2] Example

As an example, a motion for relief from a judgment against plaintiffs and cross defendants entered after they failed to appear at trial has been held to have been properly set aside on the grounds of mistake and surprise when it was shown that the attorney failed to notify the plaintiffs of the trial date, did not himself appear, regarded the attorney-client relationship as nonexistent, was not representing plaintiffs as their attorney, although he purported to do so, and plaintiffs had no reason to believe he would not represent them, believed he was representing them, were free from any negligence in failing to appear, and acted diligently to have the judgment vacated after learning from the defendant and cross complainant that it had been entered [*Buckert v. Briggs (1971) 15 Cal. App. 3d 296, 301-302, 93 Cal. Rptr. 61*]. In such a case, the fact that the attorney's neglect in failing to notify plaintiffs of the trial date was inexcusable is irrelevant tothe issue [*Buckert v. Briggs (1971) 15 Cal. App. 3d 296, 302, 93 Cal. Rptr. 61*].

[3] Motion for Relief

Relief from the client's mistake in believing the attorney was properly representing the client may be had either by a timely motion under *Code Civ. Proc. § 473(b)*, or by a court in the exercise of its equitable jurisdiction (discussed in *§ 489.220* et seq.) [*Buckert v. Briggs (1971) 15 Cal. App. 3d 296, 301, 93 Cal. Rptr. 61* (equitable grounds of extrinsic surprise or mistake); *see also Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 738, 216 Cal. Rptr. 300* (equitable ground of extrinsic mistake); *Orange Empire Nat. Bank v. Kirk (1968) 259 Cal. App. 2d 347, 352-353, 66 Cal. Rptr. 240* (reversing order denying motion to vacate default and set aside default judgment; noting that motion made more than six months after entry of default was not directed to court's power to grant relief for mistake or excusable neglect under *Code Civ. Proc. § 473(b)*, but to court's inherent equitable power to grant relief); *Daley v. County of Butte (1964) 227 Cal. App. 2d 380, 391, 38 Cal. Rptr. 693* (*Code Civ. Proc. § 473(b)* motion)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityGeneral OverviewCivil ProcedureCounselGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistake

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§ 489.47 Who May Seek Relief

[1] Party to Action or Legal Representative

Code Civ. Proc. § 473(b), by its express terms, is intended to benefit the party against whom a judgment, dismissal, order, or proceeding was taken and his or her legal representative. However, a party in whose favor an order or judgment was taken, as well as the party against whom it was taken, is entitled under *Code Civ. Proc. § 473(b)*, to seek relief from it in an appropriate case [*Olson v. Olson (1957) 148 Cal. App. 2d 479, 482-483, 306 P.2d 1036* ; *see also Stevens v. Stevens (1968) 268 Cal. App. 2d 426, 429, 74 Cal. Rptr. 54*].

The term "legal representative," has been interpreted with considerable liberality to permit one who would not normally be considered a "representative" of a party but has a sufficient interest in the action to bring a motion for relief [*Clemmer v. Hartford Insurance Co. (1978) 22 Cal. 3d 865, 885, 151 Cal. Rptr. 285, 587 P.2d 1098*]. *Clemmer*, which involved the defendant's liability insurer, cited cases permitting the following persons to bring a motion [*Clemmer v. Hartford Insurance Co. (1978) 22 Cal. 3d 865, 885, 151 Cal. Rptr. 285, 587 P.2d 1098*]:

- A trustee in bankruptcy as successor of the bankrupt party;
- A successor in interest to property;
- A person who obtained a bond to release an attachment of defendant's property in which he had contractual rights; and
- A person contesting the appointment of another as guardian and seeking appointment himself.

The term includes, for example, the assignee or grantee of a defaulting party in regard to the thing assigned or granted [*see Credit Managers Ass'n v. National Indep. Bus. Alliance (1984) 162 Cal. App. 3d 1166, 1171-1172, 209 Cal. Rptr. 119* (in a breach of contract action, plaintiff, an assignee for the benefit of creditors, had standing to move for relief

from default and default judgment taken against the assignor, without notice to the plaintiff, on a cross complaint filed by the defendant after the assignment had become effective)].

[2] Nonparty to Action

An interested nonparty may intervene [*Code Civ. Proc. § 387*] in an action after judgment and move for relief from the judgment under *Code Civ. Proc. § 473(b)* when the judgment was taken through mistake, inadvertence, surprise, or excusable neglect [*see, e.g., Jade K. v. Viguri (1989) 210 Cal. App. 3d 1459, 1468, 1470, 1473-1474, 258 Cal. Rptr. 907* (intervention by defendant's insurer to move to vacate default judgment against defendant; criticized on other grounds in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1608 n.5, 275 Cal. Rptr. 887*)].

Though preferable, moving to intervene may not be essential. Prior to its 1977 amendment to allow intervention on "timely application," *Code Civ. Proc. § 387* allowed intervention only before trial. Nonetheless, some cases allowed a nonparty adversely affected by a judgment to become a party to an action by moving to vacate the judgment without first moving to intervene [*see Elliott v. Superior Court (1904) 144 Cal. 501, 509, 77 P. 1109* ; *Skolsky v. Electronovision Productions, Inc. (1967) 254 Cal. App. 2d 246, 249-250, 62 Cal. Rptr. 91* ; *but see Drinnon v. Oliver (1972) 24 Cal. App. 3d 571, 585, 101 Cal. Rptr. 120* , disapproved on other grounds in *Johnson & Johnson v. Superior Court (1985) 38 Cal. 3d 243, 255 n.7, 211 Cal. Rptr. 517* (intervention not proper after trial had been concluded and judgment rendered)]. Both the trial and appellate courts in at least one more recent reported case reached the merits of a *Code Civ. Proc. § 473(b)*, motion to vacate a judgment made by a nonparty who did not move to intervene [*see Sunseri v. Camperos Del Valle Stables, Inc. (1986) 185 Cal. App. 3d 559, 561, 230 Cal. Rptr. 23* (appellate court pointed out that the trial court had not ruled on standing to set aside the judgment, but had rejected the motion on its merits; appellate court, likewise, did not rule on standing and affirmed the order on the merits)]. Formally moving to intervene under Section 387 would appear to be the prudent procedure, however.

For further discussion of intervention and forms for use to seek intervention, see Ch. 395, *Parties* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesRepresentativesCivil ProcedurePartiesInterventionMotions to InterveneCivil ProcedurePartiesInterventionPermissive InterventionsCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurprise

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§ 489.48 Relief on Court's Own Motion Prohibited

A court cannot of its own motion grant relief under *Code Civ. Proc. § 473(b)*, because its jurisdiction to do so depends on the filing of an application for such relief, and a showing made of mistake, inadvertence, surprise, or excusable neglect [*Remainders, Inc. v. Superior Court (1961) 192 Cal. App. 2d 411, 412, 13 Cal. Rptr. 221*].

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§ 489.49 Showing Required on Motion for Relief

[1] Basis for Relief

To secure relief from a default, default judgment, or dismissal based on an attorney's affidavit of fault, the moving party must show that the default judgment or dismissal resulted from the attorney's mistake, inadvertence, surprise, or neglect [*Code Civ. Proc. § 473(b)*; *see § 489.40[1*]].

To secure relief from a default, default judgment, or dismissal not based on an attorney's affidavit of fault, or from any other judgment, order, or proceeding, the party must present to the court a reasonable excuse, based on mistake, inadvertence, surprise, or excusable neglect [*see § 489.44*], that prevented the party from presenting his or her case to the court or from making the showing he or she could have made [*see Wilcox v. Ford (1988) 206 Cal. App. 3d 1170, 1176, 254 Cal. Rptr. 138* ; *Guenter v. Lomas & Nettleton Co. (1983) 140 Cal. App. 3d 460, 466, 189 Cal. Rptr. 470*]. If relief is sought from a default or default judgment the moving party must show that the mistake, inadvertence, surprise, or excusable neglect was the actual cause of the party's failure to appear [*Hodge Sheet Metal Products v. Palm Springs Riviera Hotel (1961) 189 Cal. App. 2d 653, 657, 11 Cal. Rptr. 435* ; *Baratti v. Baratti (1952) 109 Cal. App. 2d 917, 921-922, 242 P.2d 22*]; that is, the party must show good cause for the default [*see Lynch v. Spilman (1967) 67 Cal. 2d 251, 256, 62 Cal. Rptr. 12, 431 P.2d 636* ; *see also Elston v. City of Turlock (1985) 38 Cal. 3d 227, 234, 211 Cal. Rptr. 416, 695 P.2d 713* (moving party must submit affidavits or testimony demonstrating a reasonable cause for default)].

The moving party must also show that if granted relief, he or she has a meritorious defense to the plaintiff's cause of action on the merits (*see* discussion in *§ 489.53*) or to the other proceeding leading to the judgment, order, or proceeding from which relief is sought [*see Lynch v. Spilman (1967) 67 Cal. 2d 251, 256, 62 Cal. Rptr. 12, 431 P.2d 636*].

[2] Timeliness of Motion

The moving party must show that the motion for relief is timely, that is, the motion was not only made within the

six-month period, but also that it was made within a reasonable time within that period [*see* discussion in *§ 489.39[5]*; *see also* *Elston v. City of Turlock (1985) 38 Cal. 3d 227, 233, 211 Cal. Rptr. 416, 695 P.2d 713]* . For discussion of the time requirement regarding motions for relief from a default or default judgment based on an attorney's affidavit of fault, see *§ 489.40[1]*.

[3] Diligence in Seeking Relief

For the motion to be filed within a reasonable time within the six-month period, the moving party must have acted diligently in seeking the relief (*see* discussion in *§ 489.39[6]*). Thus, the circumstances of any delay in applying for relief after receiving notice of the entry of the order or judgment should be explained in an affidavit [*Code Civ. Proc. §§ 2002, 2003, 2009*] or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*] supporting the motion for relief or by testimony presented at the hearing, if allowed [*see* *Benjamin v. Dalmo Mfg. Co. (1948) 31 Cal. 2d 523, 529, 190 P.2d 593* ; *A & B Metal Products v. MacArthur Properties, Inc. (1970) 11 Cal. App. 3d 642, 649, 89 Cal. Rptr. 873* ; *see Cal. Rules of Ct., Rules 3.1100, 3.1306*]. However, this rule apparently does not apply to motions for relief from a default, default judgment, or dismissal based on an attorney's affidavit of fault (*see § 489.40[1]*).

[4] Effect of Absence of Prejudice to Adverse Party

On a motion for relief from a default judgment, when there is no showing that the party opposing the motion will suffer any prejudice if relief is granted, very slight evidence will be required to justify a court in setting aside the default [*Elston v. City of Turlock (1985) 38 Cal. 3d 227, 233, 211 Cal. Rptr. 416, 695 P.2d 713* (holding trial court abused its discretion in denying motion to set aside deemed admissions on ground of excusable neglect); *Berri v. Rogero (1914) 168 Cal. 736, 740, 145 P. 95* (affirming order setting aside default and vacating judgment based on inadvertence, surprise, and excusable neglect); *see also* *Jade K. v. Viguri (1989) 210 Cal. App. 3d 1459, 1473, 258 Cal. Rptr. 907* (reversing order denying intervener's motion for relief, based on excusable neglect, from default judgment against defendant; *Viguri* was criticized on other grounds in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1608 n.5, 275 Cal. Rptr. 887*); *Buckert v. Briggs (1971) 15 Cal. App. 3d 296, 302-303, 93 Cal. Rptr. 61* (affirming order setting aside judgment on ground of attorney abandonment)]. However, the required showing of compliance with the reasonable time requirement (discussed under [2], *above*) is not obviated by the rule that very slight evidence is required to justify a court's granting relief from a default judgment when the plaintiff files no counteraffidavits or counterdeclarations and makes no showing that he or she has suffered any prejudice or that injustice will result fromthe trial of the case on its merits [*Benjamin v. Dalmo Mfg. Co. (1948) 31 Cal. 2d 523, 531, 190 P.2d 593*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 489.50 Burden of Proof

Although *Code Civ. Proc. § 473(b)*, is remedial and liberally construed (*see* discussion in *§ 489.37*), the moving party has the burden of showing that the judgment, dismissal, or order was entered through the party's mistake, inadvertence, surprise, or excusable neglect, as the case may be [*see* *Luz v. Lopes (1960) 55 Cal. 2d 54, 62, 10 Cal. Rptr. 161, 358 P.2d 289* ; *Iott v. Franklin (1988) 206 Cal. App. 3d 521, 528, 253 Cal. Rptr. 635* ; *Davis v. Thayer (1980) 113 Cal. App. 3d 892, 904, 170 Cal. Rptr. 328*]. That is, the moving party must affirmatively show that the situation clearly falls within one of the foregoing categories [*Kendall v. Barker (1988) 197 Cal. App. 3d 619, 623-624, 243 Cal. Rptr. 42*]. The moving party's burden is to establish his or her position by a preponderance of the evidence [*Luz v. Lopes (1960) 55 Cal. 2d 54, 62, 10 Cal. Rptr. 161, 358 P.2d 289* ; *Transit Ads, Inc. v. Tanner Motor Livery, Ltd. (1969) 270 Cal. App. 2d 275, 279, 75 Cal. Rptr. 848*]. This applies to the party moving for relief from a default and default judgment taken against the party through his or her mistake, inadvertence, surprise, or excusable neglect under *Code Civ. Proc. § 473(b)* [*Kendall v. Barker (1988) 197 Cal. App. 3d 619, 624, 243 Cal. Rptr. 42* (initial burden is on moving party to prove excusable neglect by a preponderance of the evidence); *Barragan v. Banco BCH (1986) 188 Cal. App. 3d 283, 300, 232 Cal. Rptr. 758* (burden is on moving party to show good cause for relief)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseEvidenceProcedural ConsiderationsBurdens of ProofInitial Burden of PersuasionEvidenceProcedural ConsiderationsBurdens of ProofPreponderance of EvidenceGovernmentsLegislationInterpretation

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§ 489.51 Application for Relief

[1] Procedure

Relief is obtained by application [*Code Civ. Proc. § 473(b)*; *see § 489.360[1]* (form of notice of motion and supporting declaration in proceedings for relief based on mistake, inadvertence, surprise, or excusable neglect or attorney's affidavit of fault)], that is, by the service and filing of a noticed motion [*see Code Civ. Proc. §§ 1003, 1005(a)(12), (13), 1010*]. Thus, the party seeking relief must cause to be served on the adverse party's attorney, or on the adverse party if he or she has no attorney, and file with the court, a notice of motion stating the order sought, the grounds for its issuance, and the papers on which the motion is based [*see Code Civ. Proc. §§ 1005(b), 1010-1013, 1015*; *Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(2), 3.1113(a), 3.1300*; *see also, e.g., Outdoor Imports, Inc. v. Stanoff (1970)7 Cal. App. 3d 518, 522, 86 Cal. Rptr. 593*]. For the requirements of a motion for relief from a default judgment based on an attorney's affidavit of fault, see the discussion in *§ 489.40[1]*.

[2] Specification of Grounds

Although relief may be granted on any one of the four grounds set forth in *Code Civ. Proc. § 473(b)*, the grounds often overlap (*see* discussion in *§ 489.44[1]*). Consequently, it is not uncommon for a party, in applying for relief under that statute, to base his or her motion on two or more of the grounds [*see, e.g., Kooper v. King (1961) 195 Cal. App. 2d 621, 625, 15 Cal. Rptr. 848* (inadvertence and excusable neglect); *Yarbrough v. Yarbrough (1956) 144 Cal. App. 2d 610, 613, 301 P.2d 426* (inadvertence, surprise, and excusable neglect); *see also discussion under § 489.44*], or on all of the listed grounds [*see, e.g., Riskin v. Towers (1944) 24 Cal. 2d 274, 275, 148 P.2d 611* ; *Brill v. Fox (1931) 211 Cal. 739, 740, 297 P. 25* ; *Northridge Financial Corp. v. Hamblin (1975) 48 Cal. App. 3d 819, 822, 122 Cal. Rptr. 109* ; *Dingwall v. Vangas, Inc. (1963) 218 Cal. App. 2d 108, 110, 32 Cal. Rptr. 351* ; *A & S Air Conditioning v. John J. Moore Co. (1960) 184 Cal. App. 2d 617, 619, 7 Cal. Rptr. 592* ; *Gore v. Witt (1957) 149 Cal. App. 2d 681, 683, 308 P.2d 770* ; *Security Truck Line v. Monterey (1953) 117 Cal. App. 2d 441, 444, 257 P.2d 755*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurprise

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§ 489.52 Supporting Papers

[1] Affidavits, Declarations, and Points and Authorities

The notice of motion must be accompanied by affidavits [*see Code Civ. Proc. §§ 2002, 2003, 2009*] or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*] or both setting forth the facts necessary to establish the grounds of the motion and showing that the motion is timely [*see Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(2), 3.1115, 3.1306*; *see, e.g., Benjamin v. Dalmo Mfg. Co. (1948) 31 Cal. 2d 523, 526-528, 190 P.2d 593*]. If subject to the civil law and motion rules [*see Cal. Rules of Ct., Rules 3.1100, 3.1103(a)*] or if required by local court rule, it must also be accompanied by a memorandum [*Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(2), 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*; *see also, e.g., Outdoor Imports, Inc. v. Stanoff (1970) 7 Cal. App. 3d 518, 522, 86 Cal. Rptr. 593* ; *Skolsky v. Electronovision Productions, Inc. (1967) 254 Cal. App. 2d 246, 251, 62 Cal. Rptr. 91*]. For discussion and forms relating to memoranda generally, see Ch. 417, *Points and Authorities* .

[2] Attorney's Affidavit of Fault

If the motion is for relief from a default or a default and a default judgment and is based on an attorney's affidavit of fault (*see Code Civ. Proc.§ 473(b)*, and discussion in *§ 489.40[1]*), the affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) of fault must accompany the notice of motion [*see Billings v. Health Plan of America (1990) 225 Cal. App. 3d 250, 256, 275 Cal. Rptr. 80*].

[3] No Affidavit of Merits Required

No affidavit, or declaration, of merits is to be required of the moving party [*Code Civ. Proc. § 473(b)*]. Case law long held that the motion must be accompanied by an affidavit, or declaration, of merits [*see Woodward v. Backus (1862) 20 Cal. 137, 140-141* ; *see also First Small Business Inv. Co. v. Sistim, Inc. (1970) 12 Cal. App. 3d 645, 649, 90 Cal. Rptr. 798*], but with respect to motions under *Code Civ. Proc. § 473(b)*, this requirement was abrogated by a 1981 amendment (Stats. 1981, ch. 122) of Section 473 expressly to provide that no affidavit or declaration of merits shall be required of the moving party.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedureCounselGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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§ 489.53 Pleading Proposed to Be Filed

[1] When Pleading Is at Issue

Code Civ. Proc. § 473(b), requires that the application for relief be accompanied by a copy of the answer or other pleading proposed to be filed (*but see* discussion under [4], *below*) or the application will not be granted [*Code Civ. Proc. § 473(b)*]. However, at the hearing on the motion for relief the court's inquiry is limited to whether the pleading contains a statement of facts sufficient to constitute a meritorious case, that is, a meritorious claim or defense, and the truth concerning the meritorious case is not at issue [*Ludka v. Memory Magnetics International (1972) 25 Cal. App. 3d 316, 323, 101 Cal. Rptr. 615*].

[2] When Pleading Is Not at Issue

Code Civ. Proc. § 473(b), on its face, authorizes relief from a judgment, dismissal, order, or other proceeding. Thus, it has been held that:

- A motion under *Code Civ. Proc. § 473(b)*, is not limited to cases in which a pleading is the issue, but authorizes relief from other matters as well, such as the effect of a delay in taking procedural steps that do not involve pleadings, for example, to relieve a party from a failure to file a timely cost bill or to relieve a party from an order taxing costs [*Spellens v. Spellens (1957) 49 Cal. 2d 210, 227-228, 317 P.2d 613*]; and

- When the judgment resulted from the failure to file a paper other than a pleading, or the filing of a defective paper, a copy of the paper or corrected paper must accompany the notice of motion [*see, e.g., Brochtrup v. INTEP (1987) 190 Cal App. 3d 323, 333, 235 Cal. Rptr. 390* (properly verified responses to request for admissions); *Estate of Parks (1962) 206 Cal App. 2d 623, 632, 24 Cal. Rptr. 250* (order granting relief in probate case affirmed, although proposed objection to report of inheritance tax appraiser was not filed until after trial court had granted relief but was specified in verified application for relief and in supporting declaration)].

[3] Purpose of Requirement

The plain object of the *Code Civ. Proc. § 473(b)*, requirement that a copy of the pleading accompany the application for relief is simply to require the delinquent party seeking leave to contest on the merits, to show his or her good faith and readiness to file the answer at once if leave is granted by producing a copy of the proposed answer for the adversary and the court to inspect [*Job v. Farrington (1989) 209 Cal. App. 3d 338, 341, 257 Cal. Rptr. 210* , quoting *County of Los Angeles v. Lewis (1918) 179 Cal. 398, 400, 177 P. 154*].

[4] When Proposed Pleading Must Be Filed

The courts of appeal appear to agree that the proposed pleading need not be filed with the notice of motion for relief, but are in conflict as to whether the pleading must be filed within the six-month period.

Thus, the Court of Appeal of the Third Appellate District has ruled that, although a motion for relief from default and a default judgment is timely filed, the trial court is without jurisdiction to grant relief when the defendant fails to serve and file the proposed answer or other responsive pleading with the motion for relief or within the six-month period prescribed by the statute [*Puryear v. Stanley (1985) 172 Cal. App. 3d 291, 293-295, 218 Cal. Rptr. 196* (distinguishing *County of Los Angeles v. Lewis (1918) 179 Cal. 398, 399, 177 P. 154* , and *Sousa v. Capital Co. (1963) 220 Cal. App. 2d 744, 759-761, 34 Cal. Rptr. 71* (both involving substantial compliance with the statute)]. In *Puryear*, the court affirmed the order denying relief from default and default judgment on the ground that, although the motion was timely filed, the proposed answer was not filed until after the six-month limitation period had passed.

However, the Court of Appeal of the Second Appellate District, Division Six, relying on the cases distinguished by *Puryear*, rejected *Puryear* and ruled to the contrary in a case involving substantially similar circumstances [*Job v. Farrington (1989) 209 Cal. App. 3d 338, 340-341, 257 Cal. Rptr. 210*]. In *Job v. Farrington*, the court reversed the order denying relief from default and default judgment when the motion for relief was timely filed within six months of entry of the default, but the proposed answerwas not filed until after the six-month period had passed, although it was filed before the scheduled hearing on motion [*Job v. Farrington (1989) 209 Cal. App. 3d 338, 340-341, 257 Cal. Rptr. 210*].

Citing *Job*, the Fifth District held that a party substantially complies with the "accompanied by" requirement by filing the proposed answer sufficiently in advance of the hearing to permit the other party to prepare for the hearing [*County of Stanislaus v. Johnson (1996) 43 Cal. App. 4th 832, 838, 51 Cal. Rptr. 2d 73*]

[5] Possible Constitutional Exception to Requirement

It has been held that to require showing a meritorious defense on a defendant's motion for relief from a default judgment in an action in which the trial court never acquired personal jurisdiction over the defendant, that is, when the judgment is void for lack of personal jurisdiction, would violate procedural due process and cannot constitutionally be required [*see* *Peralta v. Heights Medical Center, Inc. (1988) 485 U.S. 80, 86, 108 S. Ct. 896, 99 L. Ed. 2d 75*]. Although a motion for relief from such a judgment, which although void in fact is not void on its face, would more appropriately be made under *Code Civ. Proc. § 473(d)*, that does not require the submission of a proposed answer or other pleading, or by a motion directed to the court's equity jurisdiction based on extrinsic fraud or mistake [for a discussion of attacks on void judgments and orders, *see § 489.130* et seq., and for discussion of attacks in equity, *see § 489.220* et seq.], it would nevertheless appear that such a motion could also be made under *Code Civ. Proc. § 473(b)*, based on surprise or excusable neglect.

Legal Topics:

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

Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 489.54 Order Granting or Denying Relief

The judge may grant or deny relief by minute order [*see, e.g., Don v. Cruz (1982) 131 Cal. App. 3d 695, 699, 182 Cal. Rptr. 581* (order denying relief from default and granting relief from default judgment)] or may require that a formal written order be prepared [*see, e.g., Berman v. Klassman (1971) 17 Cal. App. 3d 900, 908, 95 Cal. Rptr. 417* (order granting relief from judgment entered on defendant's failure to appear at trial)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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43-489 California Forms of Pleading and Practice--Annotated § 489.55

§ 489.55 Motions to Reconsider

Motions to reconsider are authorized by *Code Civ. Proc. § 1008*. Section 1008 provides that when an application for an order has been refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after knowledge of the order and based on an alleged new or different state of facts, circumstances, or law, apply to the same judge who made the order to reconsider the matter and modify, amend, or revoke the prior order [*Code Civ. Proc. § 1008(a)*]. The motion must be supported by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) showing what application was made before, when and to what judge, what order or decision was made on it, and what new or different facts, circumstances or law are claimed to be shown [*Code Civ. Proc. § 1008(a)*]. It would appear that if the conditions of the statute are met a party could move to reconsider an order granting or denying relief under *Code Civ. Proc. § 473(b)*, although it would also appear that the motion would have to be made within the six-month limitation specified in Section 473(b) as well as within the 10-day limitation of *Section 1008(a)* [*see discussion under § 489.56*]. For further discussion and a form of motion to reconsider, see Ch. 374, *Motions to Reconsider and Renewed Motions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions to Alter & AmendGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 489.56 Renewed Motions

When a motion for relief under *Code Civ. Proc. § 473(b)*, is denied and a different state of facts, circumstances, or law exists that would support the granting of the motion, a party may renew his or her motion for relief under *Code Civ. Proc. § 1008(b)*. Section 1008(b) provides that, when the party who originally applied for an order that was refused in whole or in part, or granted conditionally or on terms, makes a subsequent application for the same order on an alleged different state of facts, circumstances, or law, it shall be shown by affidavit (or declaration under *Code Civ. Proc. § 2015.5*) what application was made before, when and to what judge, what order or decision was made on it, and what new facts, circumstances, or law are claimed to be shown [*Code Civ. Proc. § 1008(b)*].

This provision for renewal of an earlier motion is not subject to the 10-day limitation governing motions to reconsider under *Code Civ. Proc. § 1008(a)*, discussed in *§ 489.55* [*Monsan Homes, Inc. v. Pogrebneak (1989) 210 Cal. App. 3d 826, 831, 258 Cal. Rptr. 676* (criticized on other grounds in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1608 n.5, 275 Cal. Rptr. 887*)]. However, the renewed motion is subject to the six-month limitation provided in *Code Civ. Proc. § 473(b)* and hence must be made within that period [*Northridge Financial Corp. v. Hamblin (1975) 48 Cal. App. 3d 819, 825, 122 Cal. Rptr. 109* (treating motion to reconsider as renewed motion)].

For further discussion and forms relating to renewed motions under *Code Civ. Proc. § 1008(b)*, see Ch. 374, *Motions to Reconsider and Renewed Motions* .

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[Reserved]

§§ 489.57[Reserved]

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43-489 California Forms of Pleading and Practice--Annotated § 489.70

§ 489.70 Relief From Default or Default Judgment if Summons Did Not Result in Actual Notice in Time to Defend

When service of the summons did not result in "actual notice" to a party in time to defend, and a default or default judgment was entered against the party, the party may move to set aside the default and any resulting default judgment and for leave to defend the action [*Code Civ. Proc. § 473.5(a)*; *see § 489.380[1]* (form of notice of motion for use in proceedings to set aside default and default judgment when service of summons did not result in actual notice to defendant in time to defend)]. A noticed motion is expressly required [*see Code Civ. Proc. § 473.5(a), (b)*]. Notice of the motion must be served and filed at least 16 court days before the time appointed for the hearing, but if service is by mail, the required 16-day period of notice is increased by five calendar days if the place of mailing and place of address are in California, 10 calendar days if either the place of mailing or place of address is outside California but in the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States. If notice is served by fax, express mail, or other overnight delivery method, the 16-day period is extended by two calendar days [*Code Civ. Proc. § 1005(a)(10), (b)*].

Code Civ. Proc. § 473.5 is directed to setting aside valid judgments [*People v. One 1941 Chrysler Sedan (1947) 81 Cal. App. 2d 18, 21, 183 P.2d 368* (involving former *Code Civ. Proc. § 473a*, predecessor to *Code Civ. Proc. § 473.5*)]. It does not apply to a motion to set aside a default founded on a fraudulent return of service [*In re Marriage of Smith (1982) 135 Cal. App. 3d 543, 545, 555, 185 Cal. Rptr. 411*], that is void in fact but not on its face. Such a judgment may, however, be attacked under *Code Civ. Proc. § 473(d)* (discussed in *§ 489.130* et seq.), in which case the time limitation imposed by *Code Civ. Proc. § 473.5* would apply by analogy (*see* discussion in *§ 489.142[2], [6]*). Such a judgment may also be attacked by a motion or action in equity (discussed in *§ 489.220* et seq.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentVoid

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43-489 California Forms of Pleading and Practice--Annotated § 489.71

§ 489.71 "Actual Notice" Defined

"Actual notice," as used in the statute, does not mean constructive notice, but, rather, genuine knowledge of a party litigant. Thus, "actual notice" does not include imputed notice, such as the notice imputed to a client from his or her attorney's actual notice [*Rosenthal v. Garner (1983) 142 Cal. App. 3d 891, 895, 191 Cal. Rptr. 300* ; *see also Tunis v. Barrow (1986) 184 Cal. App. 3d 1069, 1077, 229 Cal. Rptr. 389*]. Moreover, it has been held that if a court has acquired jurisdiction, that is, summons has been served, but service of summons has not resulted in actual notice to a defendant, the fact that the defendant has acquired actual knowledge of the lawsuit from another source does not necessarily preclude the defendant from seeking relief under *Code Civ. Proc. § 473.5* [*Olvera v. Olvera (1991) 232 Cal. App. 3d 32, 40, 283 Cal. Rptr. 271*]. On the other hand, knowledge from a source other than service of summons does not require the trial court to grant relief under all circumstances. Thus, for example, if the trial court can reasonably conclude the defendant had actual notice in time to defend, the court need not grant relief [*see, e.g., Ellard v. Conway (2001) 94 Cal. App. 4th 540, 547-548, 114 Cal. Rptr. 2d 399*].

Obvious examples of a kind of service that may not result in actual notice to the defendant in time to defend would include the following:

- Service of summons by publication [*see, e.g., Olvera v. Olvera (1991) 232 Cal. App. 3d 32, 35-36, 283 Cal. Rptr. 271* ; *Tunis v. Barrow (1986) 184 Cal. App. 3d 1069, 1074, 229 Cal. Rptr. 389* ; *Rosenthal v. Garner (1983) 142 Cal. App. 3d 891, 894, 191 Cal. Rptr. 300*];

- Service on a domestic corporation, whose designated agent for service cannot be found, by delivery of the summons to the California Secretary of State pursuant to *Corp. Code § 1702* [*see, e.g., Tunis v. Barrow (1986) 184 Cal. App. 3d 1069, 1073, 229 Cal. Rptr. 389*];

- Service on an out-of-state motorist involved in an vehicular accident in California by delivery of the summons to the California Director of Motor Vehicles [*see Veh. Code §§ 17450-17456*]; or

- Misdirected combined substituted and mail service pursuant to *Code Civ. Proc. § 415.20* [*see, e.g., Kodiak Films, Inc. v. Jensen (1991) 230 Cal. App. 3d 1260, 1261-1262, 281 Cal. Rptr. 728*].

For additional examples of service on a defendant by delivery of the summons to a state official, *see* Ch. 518, *Service of Summons and Papers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 489.72 Burden of Proof

The party moving for relief under *Code Civ. Proc. § 473.5* has the burden of showing good cause for relief from the default or default judgment [*Tunis v. Barrow (1986) 184 Cal. App. 3d 1069, 1080, 229 Cal. Rptr. 389*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 489.73 Accompanying Papers

The notice of motion must be accompanied by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) showing under oath that the party's lack of actual notice in time to defend was not caused by his or her avoidance of service or inexcusable neglect [*Code Civ. Proc. § 473.5(b)*; *see § 489.380[1]* (form of supporting declaration)]. A copy of the answer, motion, or other pleading proposed to be filed is required to be served and filed with the notice of motion [*Code Civ. Proc. § 473.5(b)* ; *see Sakaguchi v. Sakaguchi (2009) 173 Cal. App. 4th 852, 861-862, 92 Cal. Rptr. 3d 717* (motion failed to include answer, motion, or other pleading)].

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§ 489.74 Showing Meritorious Defense

[1] Requirement

In addition to the statutory requirements, it has been held that the defendant must also show that he or she has a meritorious defense and that this may be shown by a verified answer denying essential allegations of the complaint [*see, e.g., Goya v. P.E.R.U. Enterprises (1978) 87 Cal. App. 3d 886, 890-891, 151 Cal. Rptr. 258* ; *Brockman v. Wagenbach (1957) 152 Cal. App. 2d 603, 612, 313 P.2d 659* (decided under former *Code Civ. Proc. § 473a*); *Thompson v. Sutton (1942) 50 Cal. App. 2d 272, 277-279, 122 P.2d 975* (same); *see also Rosenthal v. Garner (1983) 142 Cal. App. 3d 891, 898, 191 Cal. Rptr. 300* (a proposed verified answer denying each cause of action and an affirmative defense as sufficient to show a meritorious defense)]. However, *Code Civ. Proc. § 473.5* does not by its terms require that the proposed answer be verified, although, if the complaint is verified, or is filed by a specified public entity, the answer would have to be verified under *Code Civ. Proc. § 446*.

Moreover, in at least one case relief was granted without the defendant's showing a meritorious defense or submitting an answer, motion, or other pleading proposed to be filed [*see Olvera v. Olvera (1991) 232 Cal. App. 3d 32, 41, 283 Cal. Rptr. 271*]. In *Olvera*, the summons was served by publication, the defendant did not answer, a default and default judgment were entered, and the defendant moved for relief on the ground that the judgment was void because of improper service and that it was obtained through extrinsic fraud. She did not submit a proposed answer or other proposed pleading with her motion. The trial court granted the motion as one falling squarely within the provisions of *Code Civ. Proc. § 473.5*. The appellate court affirmed on alternative grounds that (1) the motion was properly granted under *Code Civ. Proc. § 473.5*; and (2) the affidavit for publication was deficient on its face and materially misleading, and the judgment based on service by publication was therefore void and subject to direct or collateral attack [*Olvera v. Olvera (1991) 232 Cal. App. 3d 32, 37-42, 283 Cal. Rptr. 271*].

Nevertheless, prudent counsel would be well advised to have the proposed answer verified until an appellate court might categorically state that the requirement is not necessary in a motion for relief under *Code Civ. Proc. § 473.5*.

[2] Due Process Limitation

The United States Supreme Court, in a case arising under Texas law, has held that to require the showing of a meritorious defense on a defendant's motion for relief from a default judgment in an action in which the trial court never acquired personal jurisdiction over the defendant (service was effected but under Texas law was untimely and did not constitute service), violates procedural due process and cannot constitutionally be required [*see Peralta v. Heights Medical Center, Inc. (1988) 485 U.S. 80, 84-87, 108 S. Ct. 896, 99 L. Ed. 2d 75*].

The applicability of *Peralta* to a motion for relief under *Code Civ. Proc. § 473.5* is unclear: *Peralta* involved a void judgment, whereas the default judgment involved in a *Code Civ. Proc. § 473.5* motion is a valid judgment, and what the statute authorizes is an order vacating and setting aside the default and default judgment *and* granting leave to defend. Nevertheless, in *Peralta* the defendant did have notice that an action had been filed by service of the citation, that, because of its untimeliness, was ineffective to confer jurisdiction over him; whereas, in the situation contemplated by *Code Civ. Proc. § 473.5*, the service is valid but of a kind that in fact gives the defendant no notice of the action before it is too late to defend.

Until an appellate court rules on the applicability of *Peralta* to a *Code Civ. Proc. § 473.5* motion, if the defendant has a meritorious defense, the better practice would be to present it to avoid the costs of an appeal and possibly an adverse appellate decision. A defendant who has no meritorious defense may wish to consider the resemblances, if any, between his or her case and the U.S. Supreme Court case, and, if they are substantial, argue that *Peralta* should apply.

For further discussion of *Peralta*, see *§ 489.264[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of Protection

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§ 489.75 When Motion Must Be Filed

The notice of motion must be served and filed within a reasonable time, but in no event exceeding the earlier of [*Code Civ. Proc. § 473.5(a)*]:

- Two years after entry of the default judgment, or

- One hundred eighty days after service on the defaulting party of a written notice that the default or default judgment has been entered.

A purported service of the written notice on the defendant at an address at which the defendant did not reside and at which plaintiff knew the defendant did not reside, however, does not constitute notice sufficient to trigger the shorter period [*Olvera v. Olvera (1991) 232 Cal. App. 3d 32, 39 n.8, 283 Cal. Rptr. 271*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 489.76 Limited Inquiry as to Proposed Pleading

The hearing on the motion for relief is not the occasion to try the merits of the action. Hence, the court's inquiry at the hearing with respect to the pleading proposed to be filed is limited to whether the pleading contains a statement of facts sufficient to constitute a meritorious case, and the truth concerning the meritorious defense is not at issue [*Tunis v. Barrow (1986) 184 Cal. App. 3d 1069, 1080, 229 Cal. Rptr. 389*].

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a. Service of Summons Did Not Result in Actual Notice in Time to Defend

43-489 California Forms of Pleading and Practice--Annotated § 489.77

§ 489.77 Ruling on Motion

The court may set aside the default or default judgment on any just terms and allow the party to defend the action, if it finds that [*Code Civ. Proc. § 473.5(c)*]:

- The motion was timely made, and

- The lack of actual notice in time to defend was not caused by the party's avoidance of service or inexcusable neglect.

For a form of order granting a *Section 473.5* motion, see *§ 489.380[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessSummonsGeneral OverviewCivil ProceduresPretrial JudgmentsDefaultRelief From DefaultGovernmentsLegislationStatutes of LimitationsTime Limitations

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43-489 California Forms of Pleading and Practice--Annotated §§ 489.78-489.89

[Reserved]

§§ 489.78[Reserved]

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b. Relief for Failure to Comply With Consumer Venue Statutes

43-489 California Forms of Pleading and Practice--Annotated § 489.90

§ 489.90 Relief From Default or Default Judgment for Failure to Comply With Consumer Venue Statutes

Relief from a default or default judgment is authorized when it is subject to, but entered without full compliance with the following venue statutes [*Code Civ. Proc. § 585.5(b)*]:

- *Civ. Code § 1812.10*, governing venue under the Unruh Retail Installment Sales Act (*Civ. Code § 1801 et seq.*);

- *Civ. Code § 2984.4*, governing venue under Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*); or

- *Code Civ. Proc. § 395(b)*, governing venue of actions arising from the offer or provision of goods, services, loans, or extensions of credit intended primarily for personal, family, or household use, other than an obligation described in *Civ. Code § 1812.10* or *2984.4*, or actions arising from transaction consummated as proximate result of unsolicited telephone calls made by sellers engaged in the business of consummating transactions of that kind.

When a default or default judgment has been taken without compliance with these statutes, the defendant may serve and file a notice of motion to set aside the default or default judgment and for leave to defend the action in the proper court [*Code Civ. Proc. § 585.5(b)*; *see § 489.390[1]* (form of notice of motion for relief under improper venue statute)]. A noticed motion is expressly required [*see Code Civ. Proc. § 585.5(b)*]. Notice must be served and filed at least 16 court days before the time appointed for the hearing, but if service is by mail, the required 16-day period of notice is increased by five calendar days if the place of mailing and place of address are in California, 10 calendar days if either the place of mailing or place of address is outside California but in the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States. If notice is served by fax, Express Mail, or other overnight delivery method, the 16-day period is extended by two calendar days [*Code Civ. Proc. § 1005(a)(12), (b)*; *see also Cal. Rules of Ct., Rule 3.1300(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueIndividual DefendantsCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProceduresPretrial JudgmentsDefaultRelief From Default

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43-489 California Forms of Pleading and Practice--Annotated § 489.91

§ 489.91 Accompanying Papers

The notice of motion must be accompanied by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) showing under oath that the action was not commenced in the proper court according to *Civ. Code § 1812* or *2984.4* or *Code Civ. Proc. § 395(b)*, as the case may be [*Code Civ. Proc. § 585.5(c)*; *see § 489.390[1]* (form of supporting declaration for relief under improper venue statute)]. A copy of the answer, motion, or other pleading proposed to be filed must accompany the notice of motion [*Code Civ. Proc. § 585.5(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultRelief From Default

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43-489 California Forms of Pleading and Practice--Annotated § 489.92

§ 489.92 When Motion Must Be Filed

The notice of motion must be served and filed within 60 days after the defendant first receives notice of levy under a writ of execution, or notice of any other procedure for enforcing, the default judgment [*Code Civ. Proc. § 585.5(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeTime LimitationsCivil ProceduresPretrial JudgmentsDefaultRelief From DefaultCivil ProceduresJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProceduresJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionGovernmentsLegislationStatutes of LimitationsTime Limitations

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43-489 California Forms of Pleading and Practice--Annotated § 489.93

§ 489.93 Ruling on Motion

The court is required to set aside the default or default judgment on such terms as may be just and allow the party to defend the action, if it finds that [*Code Civ. Proc. § 585.5(d)*]:

- The motion was timely; and
- The action was not commenced in the proper court.

For a form of order granting a motion under *Section 585.5*, see *§ 489.390[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueIndividual DefendantsCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesReasonable FeesCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

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43-489 California Forms of Pleading and Practice--Annotated § 489.94

§ 489.94 Damages, Costs, and Attorney's Fees

The court, on finding that the action was commenced in an improper court, is required to award the defendant actual damages and costs, including reasonable attorney's fees, unless the plaintiff can show that he or she used reasonable diligence to avoid filing the action in the improper court, [*Code Civ. Proc. § 585.5(e)*].

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43-489 California Forms of Pleading and Practice--Annotated §§ 489.95-489.99

[Reserved]

§§ 489.95[Reserved]

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43-489 California Forms of Pleading and Practice--Annotated § 489.100

§ 489.100 Relief From Judgment, Order, or Other Proceeding if Court Assumes Jurisdiction Over Practice of Party's Attorney

A California state court may assume jurisdiction over an attorney's practice when the attorney ceases practice [*Bus. & Prof. Code § 6180*] or is unable to practice [*Bus. & Prof. Code § 6190*]. If this happens to a party's attorney's practice, a court, on such terms as may be just, may relieve the party from a judgment, order, or other proceeding, including dismissal of an action pursuant to *Code Civ. Proc. §§ 581, 581a*, or *583* [*sic*, repealed; *now see Code Civ. Proc. §§ 581, 583.110 et seq.*], taken against the party after the application for the court to assume jurisdiction over the practice was filed [*Code Civ. Proc. § 473.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDismissalsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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43-489 California Forms of Pleading and Practice--Annotated § 489.101

§ 489.101 When Application Must Be Filed

Except as noted below, the application for relief [*see § 489.400[1]* (form of notice of motion and supporting declaration for relief when court assumes jurisdiction over attorney's law practice)] must be made within a reasonable period of time, in no case exceeding six months, after the court took jurisdiction over the attorney's practice [*Code Civ. Proc. § 473.1*].

However, the application for relief from a judgment, order, or other proceeding determining the ownership or right to possession of real or personal property, must, without extending the six-month period, be made within 90 days after personal service in California of a written notice on both the party against whom the judgment, order, or other proceeding was taken, and on the attorney appointed pursuant to *Bus. & Prof. Code § 6180.5* to act under the court's direction, whichever service is later, notifying them that the order, judgment or other proceeding was taken and that any rights the party has to apply for relief under *Bus. & Prof. Code § 6180.5* shall expire 90 days after service of the notice [*Code Civ. Proc. § 473.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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43-489 California Forms of Pleading and Practice--Annotated § 489.102

§ 489.102 Affidavit of Merits Not Required

No affidavit or declaration of merits shall be required of the moving party [*Code Civ. Proc. § 473.1*].

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43-489 California Forms of Pleading and Practice--Annotated §§ 489.103-489.109

[Reserved]

§§ 489.103[Reserved]

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43-489 California Forms of Pleading and Practice--Annotated § 489.110

§ 489.110 Protection From Judgments When Defendant Is Prejudiced by Military Service

Relief from a judgment when the defendant failed to appear and was prejudiced in making a defense by reason of his or her military service is governed by the Servicemembers' Civil Relief Act of 1940 (*50 U.S.C. App. § 501 et seq.*) [*see 50 U.S.C. App. § 501*].

Federal statute, *50 U.S.C. App. § 521(b)(1)*, requires a plaintiff to file an affidavit of a defendant's military status before a person's default can be entered [for discussion, *see* Ch. 205, *Defaults and Default Judgments*]. Under *50 U.S.C. App. § 521(b)(2)*, the court in which an action or proceeding is pending may appoint an attorney to represent a party in military service who does not personally appear in the action or proceeding. In an action covered by the Act, if it appears the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant [*50 U.S.C. App. § 521(b)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewGovernmentsLegislationInterpretationMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act

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43-489 California Forms of Pleading and Practice--Annotated § 489.111

§ 489.111 Servicemembers' Civil Relief Act to Be Liberally Construed

The Servicemembers' Civil Relief Act is to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation. The discretion that is vested in trial courts to that end is not to be withheld on nice calculations as to whether the prejudice suffered results from the absence (discussed in *§ 489.113*), or whether the absence results from the service. Absence when one's rights or liabilities are being adjudged is usually prima facie prejudicial. But in some few cases absence may be a policy, instead of the result of military service, and discretion is vested in the courts to see that the immunities of the act are not put to such an unworthy use [*Boone v. Lightner (1943) 319 U.S. 561, 575, 63 S. Ct. 1223, 87 L. Ed. 1587* ; *In re Marriage of Lopez (1981) 115 Cal. App. 3d 776, 783, 173 Cal. Rptr. 718*].

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43-489 California Forms of Pleading and Practice--Annotated § 489.112

§ 489.112 Persons Protected by Act

The Servicemembers' Civil Relief Act protects members of the uniformed services, as "uniformed services" is defined in *10 U.S.C. § 101(a)(5)* [*50 U.S.C. App. § 511(1)*]. *10 U.S.C. § 101(a)(5)* defines "uniformed services" to include the following:

(A) The armed forces.

(B) The commissioned corps of the National Oceanic and Atmospheric Administration.

(C) The commissioned corps of the Public Health Service.

The Act provides protection to a servicemember for the period beginning on the date on which a servicemember enters military service and ending on the date on which the servicemember is released from military service or dies while in military service [*50 U.S.C. App. § 511(3)*; *see also 50 U.S.C. App. §§ 515* (notice of benefits to military persons), 516 (extension of benefits to persons ordered to report for induction or military service); *Syzemore v. County of Sacramento (1976) 55 Cal. App. 3d 517, 521, 127 Cal. Rptr. 741* (citing former *50 U.S.C. App. § 464*; *50 U.S.C. App. § 466(c)* [Military Selective Service Act of 1967])]. United States citizens serving with the forces of war allies may also be protected [*see 50 U.S.C. App. § 514*].

If a judgment is vacated or set aside as to a service member, the court has discretion to set it aside or vacate it as to other persons who may be primarily or secondarily liable on the contract or liability of the person in the military service [*see 50 U.S.C. App. § 513(2)*].

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43-489 California Forms of Pleading and Practice--Annotated § 489.113

§ 489.113 Grounds and Application for Relief

If a default judgment is entered in an action covered by *50 U.S.C. App. § 521* against a servicemember during the servicemember's period of military service, or within 60 days after termination of or release from such military service, the court entering the judgment must, on application by or on behalf of the servicemember, reopen the judgment for the purpose of allowing the servicemember to defend the action if both of the following appear [*50 U.S.C. App. § 521(g)(1)*; *see In re Marriage of Lopez (1981) 115 Cal. App. 3d 776, 781-782, 783, 173 Cal. Rptr. 718* ; *see also § 489.410[1]* (form of notice of motion and supporting declaration for relief under Servicemembers' Civil Relief Act), and discussion in *§ 489.74[2*]]:

> (A) The servicemember was materially affected by reason of the military service in making a defense to the action.
>
> (B) The servicemember has a meritorious or legal defense to the action or some part of it.

The vacating, setting aside, or reversing of any judgment does not impair any right or title acquired by a bona fide purchaser for value under the judgment [*50 U.S.C. App. § 521(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act

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43-489 California Forms of Pleading and Practice--Annotated § 489.114

§ 489.114 Applicability of Act to Orders and to "Interested Persons"

The protection of the Act extends to persons in the military service who are "interested parties" in relation to orders and decrees in probate and equity matters [*Winslow v. Harold G. Ferguson Corp. (1944) 25 Cal. 2d 274, 280-281, 153 P.2d 714* (attorney's objection to an order made during his absence in military service, subordinating his previous allowance of counsel fees for preserving a trust fund to the claims of creditors, comes within the statute)]. This is also true of special proceedings. Thus, the act has been held to apply to a judgment changing the name of a minor child on the mother's petition while the father was in the military and absent from the country. Although not a necessary party to the proceeding, the father was "an interested party" with the status of "defendant" under the federal statute, and entitled to attack the validity of the proceedings *In re Larson (1947) 81 Cal. App. 2d 258, 261-262, 183 P.2d 688* (disapproved in *In re Marriage of Schiffman (1980) 28 Cal. 3d 640, 647, 169 Cal. Rptr. 918, 620 P.2d 579* , to the extent it gave father, as against mother, a primary right to have a child bear his surname)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultEstate, Gift & Trust LawProbateGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act

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43-489 California Forms of Pleading and Practice--Annotated § 489.115

§ 489.115 Time Limitation on Relief

The party against whom the judgment was rendered, or his or her personal representative, must apply to open the default not later than 90 days after the military service terminates [*50 U.S.C. App. § 521(g)(2)*]. Consequently, relief may be available under *50 U.S.C. App. § 521(g)* even though relief under *Code Civ. Proc. § 473(b)* (discussed in *§ 489.30* et seq.), would be barred [*see In re Marriage of Lopez (1981) 115 Cal. App. 3d 776, 783-784, 173 Cal. Rptr. 718*].

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43-489 California Forms of Pleading and Practice--Annotated § 489.116

§ 489.116 Stay of Proceedings

In an action for which the Servicemembers' Civil Relief Act provides protection of servicemembers against default judgments [*see 50 U.S.C. App. § 521*], the court must grant a stay of proceedings for a minimum period of 90 days upon application of counsel, or on the court's own motion, if the court determines either of the following [*50 U.S.C. App. § 521(d)*; *see also 50 U.S.C. App. §§ 522* (stay or proceedings when servicemember has notice), 524 (stay or vacation of execution of judgments, attachments and garnishments), 531(b) (stay of execution of eviction), 532(c)(2) (stay of proceedings based on breach of contract for purchase or real or personal property or for lease or bailment of such property), 537(b) (stay of proceedings to enforce or foreclose storage lien)]:

> (1) There may be a defense to the action and a defense cannot be presented without the presence of the defendant.
>
> (2) After due diligence, counsel has been unable to contact the defendant or otherwise determine if a meritorious defense exists.

A stay of proceedings under these provisions is not be controlled by procedures or requirements under *50 U.S.C. App. § 522* [*50 U.S.C. App. § 521(e)*], which governs a stay of proceedings when the servicemember has notice of the action or proceeding. If a servicemember who is a defendant in an action covered by *50 U.S.C. App. § 521* receives actual notice of the action, the servicemember may request a stay of proceeding under 50 U.S.C. App. § 50 *U.S.C. App. § 522* [*50 U.S.C. App. § 521(f)*].

If a court stays an action for compliance with a contract under the Act, no fine or penalty may accrue during the stay [*see 50 U.S.C. App. § 523(a)*].

A court may also vacate or stay any prejudgment or postjudgment attachment or garnishment of property, money, or

debts in the hands of another when the military defendant's ability to comply with the judgment entered or order sought is materially affected by reason of his or her military service [*see 50 U.S.C. App. § 524*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureRemediesProvisional RemediesAttachmentsCivil ProcedureRemediesProvisional RemediesGarnishmentsContracts LawBreachCauses of ActionGeneral OverviewMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act

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43-489 California Forms of Pleading and Practice--Annotated § 489.117

§ 489.117 State Protections

Effective June 21, 2002, if any judgment is rendered in any action or proceeding against a service member during the period of his or her service or within 30 days thereafter, and it appears that the service member was prejudiced by reason of the military service in making a defense to the judgment, on application by the service member or his or her legal representative, the judgment may be opened by the court rendering it and the defendant or his or her legal representative allowed to defend. Application to reopen must be made by the service member or his or her legal representative not later than 90 days after termination of military service and must state a meritorious or legal defense to the action or some part of it [*Mil. & Vet. Code § 402(d)*]. However, the vacating, setting aside or reversal of a judgment for this reason will not impair any right or title acquired by a bona fide purchaser for value under the judgment [*Mil. & Vet. Code § 402(d)*].

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43-489 California Forms of Pleading and Practice--Annotated § 489.118

§ 489.118 Definitions

A "service member" is defined for these purposes as either of the following [*Mil. & Vet. Code § 400(a)*]:

- Officers and enlisted members of the National Guard called or ordered into active state service by the Governor pursuant to *Mil. & Vet. Code §§ 143* or *146* or into active federal service by the President pursuant to Title 10 or 32 of the United States Code.

- Reservists of the United States Military Reserve who have been called to full-time active duty.

"Military service" means full-time active state or federal service as defined in *Mil. & Vet. Code § 400(a)(1)* or full-time active of a reservist as defined in *Mil. & Vet. Code § 400(a)(2)*, for a period in excess of seven days in any 14-day period. Days of service for a service member called to active service or duty since September 11, 2001, to engage in homeland defense against terrorism are credited toward the seven-day period [*Mil. & Vet. Code § 400(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief ActMilitary & Veterans LawServicemembersU.S. National Guard

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43-489 California Forms of Pleading and Practice--Annotated § 489.119

§ 489.119 Certificate Evidencing Service

A certificate signed by an appropriately authorized officer of the military department, branch, or unit in which a service member is serving is prima facie evidence as to any of the following facts as stated in the certificate [*Mil. & Vet. Code § 409.8(a)*]:

- That a person named has not been, or is, or has been in the military service.
- The time when and the place where the person entered military service.
- The person's residence at that time, and the rank, branch, and unit of the service the person entered.
- The dates within which the person was in the military service.
- The monthly pay received by the person at the date of issuing the certificate.
- The time when and the place where the person died in or was discharged from the service.

The authorized officer must furnish the certificate on application. Any certificate purporting to be signed by an officer purporting on the face of the certificate to have been authorized to sign it, is prima facie evidence of its contents and of the authority of the signer to issue it [*Mil. & Vet. Code § 409.8(b)*].

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[Reserved]

§§ 489.120[Reserved]

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§ 489.130 Terminology

Terminology in court opinions regarding judgments is sometimes confusing. For example, a judgment is either void or it is valid. A judgment is void, for example, when the court that rendered it lacked jurisdiction of thedefendant's person or of the subject matter of the action. A void judgment may be either void on its face or void in fact but valid on its face [*see* discussion in *§ 489.134*]. In dealing with void judgments, courts have used the terms "void," "invalid," "in excess of jurisdiction," and "without authority" somewhat interchangeably [*see Phelan v. Superior Court (1950) 35 Cal. 2d 363, 366 n. 2, 217 P.2d 951*] to mean void.

However, some courts have used the term "voidable" to describe a judgment that is valid on its face but void in fact [*see, e.g., Laguna Village, Inc. v. Laborers' Internat. Union of North America (1983) 35 Cal. 3d 174, 182, 197 Cal. Rptr. 99, 672 P.2d 882* ; *Lee v. An (2008) 168 Cal. App. 4th 558, 565, 85 Cal. Rptr. 3d 620* (if court lacks fundamental authority, judgment is void; if court acts in excess of jurisdiction or defined power, judgment is voidable); *Brown v. Superior Court (1966) 242 Cal. App. 2d 519, 526, 51 Cal. Rptr. 633*]. The term "voidable" has also been applied to certain void-in-fact judgments whose invalidity resulted from some defect in the proceedings, for example, to a judgment rendered by a judge who was disqualified from acting in the case by reason of a concealed financial interest in one of the parties [*see Cadenasso v. Bank of Italy (1932) 214 Cal. 562, 568, 6 P.2d 944* (discussed in *§ 489.166*)].

Nevertheless, the term "voidable" is a contract term and is not normally applied to judgments. With respect to judgments, a judgment that is not void on its face is, more accurately, described as a judgment that is valid on its face but void in fact. It is simply a judgment that will be enforced as a valid judgment unless its invalidity is properly made to appear in a manner authorized by law [*see, e.g., Thompson v. Cook (1942) 20 Cal. 2d 564, 570, 127 P.2d 909*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsFinancial InterestsCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments

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43-489 California Forms of Pleading and Practice--Annotated § 489.131

§ 489.131 Statutory and Inherent Powers of Courts

Under *Code Civ. Proc. § 473(d)*, a court may, on motion of either party, after notice to the other party, set aside any void judgment or order. This provision applies in all courts [*see People v. One 1941 Chrysler Sedan (1947) 81 Cal. App. 2d 18, 22, 183 P.2d 368*].

Apart from *Code Civ. Proc. § 473*, courts of record (which today include all California state courts [*see Cal. Const., art. VI, § 1*]) historically have inherent power at law to set aside a void judgment on the motion of a party, whether or not it is void on its face [*People v. One 1941 Chrysler Sedan (1947) 81 Cal. App. 2d 18, 21, 25, 183 P.2d 368*]. Hence, it has been said that *Code Civ. Proc. § 473(d)*, is merely a legislative recognition of the inherent power of the courts to set aside void judgments and orders [*see, e.g., Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1121-1122, 265 Cal. Rptr. 286* ; *People v. One 1941 Chrysler Sedan (1947) 81 Cal. App. 2d 18, 22, 183 P.2d 368* ; *see also Estate of Estrem (1940) 16 Cal. 2d 563, 571-572, 107 P.2d 36*].

It has also been said that the language that is now the *Code Civ. Proc. § 473(d)* codified the court's inherent power to set aside an order or judgment void on its face at any time [*National Diversified Services, Inc. v. Bernstein (1985) 168 Cal. App. 3d 410, 414, 214 Cal. Rptr. 113*]. However, a judgment that is void on its face is not necessarily governed by that statute, inasmuch as the judgment may be vacated by the court on its own motion, as well as on a motion of a party [*see Eveleth v. American Brass & Iron Foundry (1962) 203 Cal. App. 2d 41, 47, 21 Cal. Rptr. 95* ; *Montgomery v. Norman (1953) 120 Cal. App. 2d 855, 858, 262 P.2d 360*]. Moreover, in dealing with relief from a judgment that is void on its face, many courts continue to point out that a trial court has the inherent power to set aside such a judgment at any time [*see, e.g., Connelly v. Castillo (1987) 190 Cal. App. 3d 1583, 1588, 236 Cal. Rptr. 112* ; *see also* discussion in *§ 489.201[1*]].

The superior court also has inherent power in equity to vacate void judgments obtained through extrinsic fraud or mistake. This power may be exercised either by a motion made in the original action or by an independent action in equity [*Olivera v. Grace (1942) 19 Cal. 2d 570, 574, 122 P.2d 564* ; *Lovato v. Santa Fe Internat. Corp. (1984) 151 Cal. App. 3d 549, 554, 198 Cal. Rptr. 838* ; *see also Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 558, 305 P.2d 20*

; *Estate of Estrem (1940) 16 Cal. 2d 563, 571-572, 107 P.2d 36* ; *In re Marriage of Mansell (1989) 217 Cal. App. 3d. 219, 225, 265 Cal. Rptr. 227* , *cert. denied, (1990), 498 U.S. 806*]. In limited civil cases, courts, by statute, have equitable power to vacate judgments or orders rendered or made by the court from which relief is sought [*Code Civ. Proc. § 86(b)(3)*]. For a discussion of motions and actions in equity, see *§ 489.220* et seq.

Because courts have power both at law and in equity to vacate and set aside void judgments, although the rules applicable to relief at law and relief in equity differ, cases in equity may be cited in cases at law, and vice versa, to the extent that they identify or define what constitutes a void judgment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsGovernmentsCourtsAuthority to Adjudicate

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§ 489.132 Void Judgment Defined

To render a valid judgment, a court must be lawfully organized, it must have jurisdiction over the subject matter and the parties, and it must have the power to grant the judgment [*Vasquez v. Vasquez (1952) 109 Cal. App. 2d 280, 283, 240 P.2d 319* ; *see also Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288, 109 P.2d 942* ; *Code Civ. Proc. § 1917*]. Thus, a judgment rendered by a court that lacked jurisdiction over the subject matter of the action or the person of the defendant or that granted relief the court had no power to grant is void [*Fireman's Fund Ins. Co. v. Workers' Comp. Appeals Bd. (2010) 181 Cal. App. 4th 752, 766-767, 104 Cal. Rptr. 3d 641* ; *311 South Spring Street Co. v. Department of General Services (2009) 178 Cal. App. 4th 1009, 1015-1018, 101 Cal. Rptr. 3d 176* (judgment granting excess interest deemed void); *Lee v. An (2008) 168 Cal. App. 4th 558, 565, 85 Cal. Rptr. 3d 620* (if court lacks fundamental authority, judgment is void; if court acts in excess of jurisdiction or defined power, judgment is voidable); *Connelly v. Castillo (1987) 190 Cal. App. 3d 1583, 1588, 236 Cal. Rptr. 112* ; *see also Becker v. S.P.V. Construction Co. (1980) 27 Cal. 3d 489, 493, 165 Cal. Rptr. 825, 612 P.2d 915* , quoting *Armstrong v. Armstrong (1976) 15 Cal. 3d 942, 950, 126 Cal. Rptr. 805, 544 P.2d 941* (collateral attack is proper to contest judgment void on its face for lack of personal or subject matter jurisdiction or granting of relief that court has no power to grant)]. A judgment may also be void if it was rendered in violation of a party's due process rights [*see County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 112, 183 Cal. Rptr. 741*].

Conversely, a mere erroneous decision on a question of law, even though the error appears on the face of the record, does not make the judgment void, if the court had jurisdiction of the subject matter and of the person of the defendant [*Wells Fargo & Co. v. San Francisco (1944) 25 Cal. 2d 37, 40, 152 P.2d 625* ; *Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 844, 131 Cal. Rptr. 674*]. Nor does the failure of the complaint to state a cause of action render a subsequent default judgment void so long as the court had jurisdiction of the parties and the subject matter and the complaint was sufficient to apprise the defendant of the nature of plaintiff's demand [*Thorson v. Western Development Corp. (1967) 251 Cal. App. 2d 206, 215, 59 Cal. Rptr. 299* , quoting *Trans-Pacific Trading Co. v. Patsy Frock & Romper Co. (1922) 189 Cal. 509, 513-514, 209 P. 357*].

Nevertheless, a judgment may be partially void and subject to direct or collateral attack (*see* discussions in *§§ 489.138*

and *489.139*) as to the invalid portion, even when the court does have jurisdiction of the subject matter and the parties [*see, e.g., Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 844-848, 131 Cal. Rptr. 674* ; *Vasquez v. Vasquez (1952) 109 Cal. App. 2d 280, 283, 240 P.2d 319* ; *see also* discussion in *§ 489.139[4*]].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 489.133 Judgment Procured by Fraud

A judgment may be void because it was procured by fraud. Thus, it has been said that fraud practiced on the court is always ground for voiding the judgment, as when the court is deceived or misled as to material circumstances, or its process is abused, resulting in the rendition of a judgment that would not have been given if the whole conduct of the case had been fair [*Swallow v. Tungsten Products Co. (1928) 205 Cal. 207, 211-212, 270 P. 366* ; *see also Steiner v. Flournoy (1972) 23 Cal. App. 3d 1051, 1055, 100 Cal. Rptr. 680* (every court may treat as a nullity any judgment that can be shown to have been obtained by manifest fraud); *Batchelor v. Finn (1959) 169 Cal. App. 2d 410, 417, 346 P.2d 795*]. If the motion for relief from such a judgment is timely (*see* discussion in *§ 489.142*), it is immaterial whether the fraud was intrinsic or extrinsic [*see Batchelor v. Finn (1959) 169 Cal. App. 2d 410, 417, 346 P.2d 795*] (declining to rule on whether the six-month period in *Code Civ. Proc. § 473(b)*, or the one-year period in former *Code Civ. Proc. § 473a* [*now see Code Civ. Proc. § 473.5(a)* (discussed under in *§ 489.142[6]*) applied by analogy, as the motion was made within the shorter period)]. If the motion is not timely, relief may still be had in equity if the fraud was extrinsic (*see* discussion and *forms in § 489.220* et seq.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeTime LimitationsCivil ProceduresJudgmentsRelief From JudgmentFraudCivil ProceduresJudgmentsRelief From JudgmentVoid Judgments

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§ 489.134 Void on Face and Void in Fact Distinguished

A judgment is void on its face when its invalidity appears from:

- Inspection of the judgment roll [*see, e.g., Morgan v. Clapp (1929) 207 Cal. 221, 224, 277 P. 490* ; *Parsons v. Weis (1904) 144 Cal. 410, 414-415, 77 P. 1007*] as defined in the statute in force at the time the judgment was entered [*People v. Davis (1904) 143 Cal. 673, 677, 77 P. 651*], or

- Inspection of certain other papers on file in the case [*see, e.g., Swain v. Swain (1967) 250 Cal. App. 2d 1, 10-11, 58 Cal. Rptr. 83* (facts stated in domestic relations officer's report that had been filed in case)].

For what constitutes the judgment roll in a civil action, see *Code Civ. Proc. § 670* (discussed in *§ 489.136*). Because the invalidity must appear from the face of the record, no extrinsic evidence is required or permitted to show its invalidity.

Conversely, a judgment that is void in fact but not void on its face requires the presentation of extrinsic evidence to show that it is void. Such evidence is normally set out in one or more affidavits (*see Code Civ. Proc. §§ 2002(1), 2003, 2009*) or declarations under penalty of perjury (*see Code Civ. Proc. § 2015.5*) submitted with the notice of motion for relief [*see, e.g., People v. One 1941 Chrysler Sedan (1947) 81 Cal. App. 2d 18, 25-27, 183 P.2d 368* ; *see also* discussion in *§ 489.138*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 489.135 Impeachment of Judicial Record

Code Civ. Proc.§ 1916 provides that "[a]ny judicial record may be impeached by evidence of a want of jurisdiction in the court or judicial officer... in respect to the proceedings." This simply means, however, that evidence is admissible to impeach a judgment in the cases allowed by law and not in all cases whatsoever. This rule does not mean that a void judgment will be enforced as though valid. It does mean that a judgment may only be shown to be void in certain ways [*Hill v. City Cab etc. Co. (1889) 79 Cal. 188, 191, 21 P. 728*].

Legal Topics:

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§ 489.136 Judgment Roll in Civil Actions

If no defendant filed an answer, the judgment roll in a civil action consists of the following [*Code Civ. Proc. § 670(a)*]:

- The summons, with the affidavit (or declaration) of proof of service;
- The complaint;
- The request for entry of default with a memorandum endorsed on it that the defendant's default was entered, and a copy of the judgment;
- If the defendant appeared by a demurrer that was overruled, the notice of the overruling served on defendant's attorney, together with proof of service; and
- If service was by publication, the affidavit (or declaration) for publication of summons, and the order directing publication of summons.

In all other cases, the judgment roll in a civil action consists of the following [*Code Civ. Proc. § 670(b)*]:

- The pleadings;
- All orders striking out any pleading in whole or in part;
- A copy of the jury verdict;
- The court's statement of decision or referee's finding;
- A copy of any order made on demurrer, or relating to a change of parties;

- A copy of the judgment;

- If there are multiple defendants in the action, and any one of them has allowed judgment against him or her by default, the summons, with proof of its service, on the defendant, and if the service on the defaulting defendant was by publication, the affidavit (or declaration) for publication, and the order directing the publication of summons.

Thus, motions, notices of motions, and affidavits of service of notices of motion are not part of the judgment roll [*see Johnson v. Hayes Cal Builders, Inc. (1963) 60 Cal. 2d 572, 576-577, 35 Cal. Rptr. 618, 387 P.2d 394*].

Legal Topics:

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§ 489.137 Attacking Void Judgment or Order

An order or judgment that is void on its face is a nullity and may be attacked directly or collaterally [*see, e.g., Traub Co. v. Coffee Break Service, Inc. (1967) 66 Cal. 2d 368, 370, 57 Cal. Rptr. 846, 425 P.2d 790* ; *Andrews v. Superior Court (1946) 29 Cal. 2d 208, 214-215, 174 P.2d 313* ; *People v. Davis (1904) 143 Cal. 673, 675, 77 P. 651* ; *see also Becker v. S.P.V. Construction Co. (1980) 27 Cal. 3d 489, 493, 165 Cal. Rptr. 825, 612 P.2d 915*]. In granting relief from the order or judgment, the court is exercising its jurisdiction at law (*see* discussion in *§ 489.131*).

A judgment that is not void on its face but is void in fact may be attacked only by one of the established methods of direct attack [*see, e.g., Estate of Wemyss (1975) 49 Cal. App. 3d 53, 58, 122 Cal. Rptr. 134*]. Thus, it may be attacked by a motion at law or by a motion or action in equity (for a discussion of relief in equity, *see § 489.220* et seq.).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentVoid Judgments

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§ 489.138 Direct Attack

A direct attack on a judgment or order is usually one made in the same action or proceeding, as by appeal or by a motion to vacate the judgment. However, a motion in equity or a separate suit in equity to set aside a judgment or order on equitable grounds is also a direct attack [*Rico v. Nasser Bros. Realty Co. (1943) 58 Cal. App. 2d 878, 882, 137 P.2d 861* ; *see also* discussion in *§ 489.13[1]*; for direct attacks in equity, *see § 489.220* et seq.].

Thus, a motion at law to vacate a judgment or order on the ground that it is void on its face or that it is void in fact although not void on its face is a direct attack. A judgment or order that is void on its face, as already pointed out, requires no extrinsic evidence to show the invalidity (*see* discussion § 489.134). If the judgment or order is not void on its face but is void in fact, and the motion is timely (*see* discussion in *§ 489.142*), any facts showing the invalidity of the judgment or order may be presented, including facts outside the record as well as facts appearing on the face of the judgment roll or record [*Norton v. Atchison, T., & S. F. R. Co. (1893) 97 Cal. 388, 392-393, 32 P. 452* ; *In re Dahnke (1923) 64 Cal. App. 555, 561, 222 P. 381* (criticized on another point in *Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1122-1123, 265 Cal. Rptr. 286*); *see also* *Sousa v. Freitas (1970) 10 Cal. App. 3d 660, 667, 89 Cal. Rptr. 485*].

Nevertheless, an untimely, and therefore impermissible, direct attack by motion (*see* discussion in *§ 489.142*) is often referred to as a collateral attack [*see, e.g.,* *Connelly v. Castillo (1987) 190 Cal. App. 3d 1583, 1588, 236 Cal. Rptr. 112* ; *National Diversified Services, Inc. v. Bernstein (1985) 168 Cal. App. 3d 410, 416, 214 Cal. Rptr. 113* ; *Swain v. Swain (1967) 250 Cal. App. 2d 1, 10, 58 Cal. Rptr. 83*]. More precisely, the motion is a direct attack [*see* *Norton v. Atchison, T., & S. F. R. Co. (1893) 97 Cal. 388, 392, 32 P. 452* (a motion to vacate a judgment is a direct and not a collateral attack)] but, because of its untimeliness, it is subject to the rules that apply to collateral attacks (discussed in *§ 489.139*) [*Wells Fargo & Co. v. San Francisco (1944) 25 Cal. 2d 37, 40, 152 P.2d 625* ; *see also* *Becker v. S.P.V. Construction Co. (1980) 27 Cal. 3d 489, 492-493, 165 Cal. Rptr. 825, 612 P.2d 915* (applying to rules that govern collateral attacks on judgments because motion to vacate was not timely)]. This means that extrinsic evidence cannot be presented on an untimely motion to show the invalidity of the judgment. Thus, a judgment so attacked cannot be set aside at law unless it is void on its face [*Wells Fargo & Co. v. San Francisco (1944) 25 Cal. 2d 37, 40, 152 P.2d 625*

]. However, reliefmay still be available in equity after the time for relief at law has expired (*see § 489.220* et seq.).

Legal Topics:

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§ 489.139 Collateral Attack

[1] Defined

A collateral attack is an attempt to avoid the effect of a judgment or order made in some other proceeding. For the attack to succeed, the invalidity of the former judgment or order must appear on the face of the record [*Palmquist v. Palmquist (1963) 212 Cal. App. 2d 340, 344, 27 Cal. Rptr. 756* ; *Milstein v. Turner (1948) 89 Cal. App. 2d 296, 298, 200 P.2d 799* ; *Rico v. Nasser Bros. Realty Co. (1943) 58 Cal. App. 2d 878, 882, 137 P.2d 861* ; *County of Fresno v. Roberson, M. & Co. (1954) 269 P.2d 252* ; *see also People ex rel. Mosk v. Santa Barbara (1961) 192 Cal. App. 2d 342, 356, 13 Cal. Rptr. 423* ; and discussion in *§ 489.14*]. Collateral attack is proper to contest lack of personal or subject matter jurisdiction or the granting of relief that the court has no power to grant [*Armstrong v. Armstrong (1976) 15 Cal. 3d 942, 950, 126 Cal. Rptr. 805, 544 P.2d 941* ; *In re Marriage of Maxfield (1983) 142 Cal. App. 3d 755, 761*]. However, absent unusual circumstances, a collateral attack will not be allowed when there was fundamental jurisdiction, that is, jurisdiction of the party and the subject matter, even though the judgment is contrary to statute [*Armstrong v. Armstrong (1976) 15 Cal. 3d 942, 951, 126 Cal. Rptr. 805, 544 P.2d 941* ; *In re Marriage of Maxfield (1983) 142 Cal. App. 3d 755, 761*].

[2] On Domestic Judgment

When a California judgment is collaterally attacked, the court may review only matters that appear in the judgment roll or that are admitted by the parties [*Phelan v. Superior Court (1950) 35 Cal. 2d 363, 372-373, 217 P.2d 951* ; for discussion of the judgment roll, *see § 489.136*; for discussion of the effect of admissions by the parties, *see § 489.142[6][b*]], or that appear from certain other papers filed in the case [*see Swain v. Swain (1967) 250 Cal. App. 2d 1, 10, 58 Cal. Rptr. 83* (untimely postjudgment motion treated as collateral attack; trial court relied on domestic relations officer's report filed in case in vacating portion of judgment); *see also Lopez v. Fancelli (1990) 221 Cal. App. 3d 1305, 1310, 271 Cal. Rptr. 87* ; and *Plotitsa v. Superior Court (1983) 140 Cal. App. 3d 755, 760* (both holding void on the face of the record a default entered without defendant's having been personally served with a statement of damages as required by *Code Civ. Proc. § 425.11*; for discussion of statement of damages, *see* discussion in *§ 489.189*)].

[3] On Foreign Judgment

When the judgment is one of either a sister state or a foreign nation, extrinsic evidence is normally admissible to show lack of jurisdiction [*De Rasmo v. Smith (1971) 15 Cal. App. 3d 601, 607 n.6, 93 Cal. Rptr. 289*], provided the foreign court did not find that the facts necessary to establish personal or subject matter jurisdiction existed [*see Estate of Estrem (1940) 16 Cal. 2d 563, 570, 107 P.2d 36*]. That is, the judgment of the court of a sister state need not be given full faith and credit in California as to parties or property not subject to the jurisdiction of that court, unless the jurisdiction issue was fully and fairly litigated in, and finally decided by, the sister-state court. Thus, a defendant or unnamed party who was never served with summons and who never appeared in the proceedings in the sister state (the laws of which, like California, requires the service of summons and the complaint, or a voluntary appearance, for the court to acquire jurisdiction over a defendant), but whose rights were directly adjudicated therein, may attack the judgment either directly or collaterally as void for failure to obtain jurisdiction over his or her person [*St. Sava Mission Corp. v. Serbian Eastern Orthodox Diocese (1990) 223 Cal. App. 3d 1354, 1364, 1374, 273 Cal. Rptr. 340* ; *see also Estate of Pusey (1919) 180 Cal. 368, 374, 181 P. 648* (neither the doctrine of laches nor the statute of limitations applies to a collateral attack on a foreign judgment that is void for lack of jurisdiction over the defendant)]. Moreover, a foreign judgment that is void on its face is subject to collateral attack in California, as well as elsewhere, regardless of the participation of the parties in the foreign action [*Airlines Reporting Corp. v. Renda (2009) 177 Cal. App. 4th 14, 20-21, 99 Cal. Rptr. 3d 66* (sister state judgment void when state did not have jurisdiction over defendant); *Aldabe v. Aldabe (1962) 209 Cal. App. 2d 453, 470-471, 26 Cal. Rptr. 208* (involving invalid Nevada divorce decree obtained while California divorce action was pending)].

For discussion of additional rules applicable to collateral attacks, see *§ 489.14*. For further discussion of attacks on foreign judgments, see Ch. 318, *Judgments* .

[4] Partial Invalidity

A judgment granting relief that the court under no circumstances had any authority to grant is to that extent void [*Vasquez v. Vasquez (1952) 109 Cal. App. 2d 280, 284, 240 P.2d 319*]. A judgment that appears on its face to be partially void may be properly challenged collaterally with respect to the void portion only when it can be readily severed from the valid portion as surplusage [*Harwell v. Harwell (1938) 26 Cal. App. 2d 143, 144-145, 78 P.2d 1167*]. When a default judgment is partially void for being excessive (*see* discussion in *§ 489.191*), the appellate court may strike the excess and affirm the valid portion [*National Diversified Services, Inc. v. Bernstein (1985) 168 Cal. App. 3d 410, 419, 214 Cal. Rptr. 113*]. An example of a partially void judgment is a judgment based on the stipulationof the parties that awards interest in excess of that agreed to in the stipulation, although the remainder of the judgment is valid [*see Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 844-848, 131 Cal. Rptr. 674*]. For other examples, see discussion in *§ 489.160*.

[5] Denial of Collateral Attack for Change of Position

When some parties have relied on, or changed their position in accordance with, a former judgment granting relief the court was without power to grant, a court may deny a collateral attack on the judgment [*Armstrong v. Armstrong (1976) 15 Cal. 3d 942, 951, 126 Cal. Rptr. 805, 544 P.2d 941* (action by children of divorced parents against father for past child support and misappropriation of income from testamentary trust established by paternal grandfather); *In re Marriage of Maxfield (1983) 142 Cal. App. 3d 755, 761, 191 Cal. Rptr. 267* (contempt proceeding arising out of modification of spousal support proceeding)]. The reasoning is that if the court has jurisdiction of the subject matter and the parties, one who complains of the act is usually before the court and has the opportunity to object, or to have the judgment or order reviewed by the usual manners of direct attack. Because these methods of direct attack, such as a motion for new trial or appeal, are adequate, the aggrieved party who fails to seek them and later raises the objection by collateral attack is almost presumed to have been negligent [*Frank v. Frank (1969) 275 Cal. App. 2d 717, 722, 80 Cal. Rptr. 141* ; *see also Moffat v. Moffat (1980) 27 Cal. 3d 645, 657-658, 165 Cal. Rptr. 877, 612 P.2d 967*].

[6] Nonjurisdictional Errors

Nonjurisdictional errors are not subject to collateral attack. Thus, failure to state a cause of action, insufficiency of evidence, abuse of discretion, and mistake, or misapplication, of law are nonjurisdictional errors for which a collateral attack will not lie [*Armstrong v. Armstrong (1976) 15 Cal. 3d 942, 950-951, 126 Cal. Rptr. 805, 544 P.2d 941*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsGovernmentsCourtsCourt RecordsGovernmentsLegislationStatutes of LimitationsGeneral Overview

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§ 489.140 Who May Attack Judgment

A judgment that is void on its face may be attacked either by the parties or strangers [*Forbes v. Hyde (1866) 31 Cal. 342, 347* ; *see also Ivory v. Superior Court (1938) 12 Cal. 2d 455, 461, 85 P.2d 894* ; *People v. Davis (1904) 143 Cal. 673, 675, 77 P. 651* ; *Nagel v. P & M Distributors, Inc. (1969) 273 Cal. App. 2d 176, 180, 78 Cal. Rptr. 65*]. It can be attacked by the parties without any showing of prejudice and by strangers to the record when the judgment, if given full effect, would injuriously affect their rights [*Mitchell v. Automobile Owners Indem. Underwriters (1941) 19 Cal. 2d 1, 7, 118 P.2d 815* ; *see also Ryerson v. Riverside Cement Co. (1968) 266 Cal.App. 2d 789, 795, 72 Cal. Rptr. 595* ; *Mumma v. Mumma (1948) 86 Cal. App. 2d 133, 136, 194 P.2d 24*].

Moreover, an aggrieved person may intervene (*see Code Civ. Proc. § 387*) after judgment for the purpose of vacating a void default judgment [*Johnson v. Hayes Cal Builders, Inc., 60 Cal. 2d 572, 575-576, 35 Cal. Rptr. 618, 387 P.2d 394* ; *Morton Regent Enterprises, Inc. v. Leadtec California, Inc. (1977) 74 Cal. App. 3d 842, 846-847, 141 Cal. Rptr. 706*]. For a discussion and forms for use in seeking intervention, see Ch. 395, *Parties* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterventionPermissive InterventionsCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments

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43-489 California Forms of Pleading and Practice--Annotated § 489.141

§ 489.141 Time Limitations When Judgment or Order Is Facially Void

A judgment that is void on its face may be attacked at any time it presents itself. It is simply a nullity, and can be neither the basis nor evidence of any right whatever [*Andrews v. Superior Court (1946) 29 Cal. 2d 208, 214-215, 174 P.2d 313* ; *Forbes v. Hyde (1866) 31 Cal. 342, 347* ; *see Manson, Iver & York v. Black (2009) 176 Cal. App. 4th 36, 43, 97 Cal. Rptr. 3d 522* (judgment naming incorrect defendant void on its face and subject to attack at any time); *see also Wettstein v. Cameto (1964) 61 Cal. 2d 838, 840, 40 Cal. Rptr. 705, 395 P.2d 665* (judgment void on its face is subject to collateral attack at any time); *Ivory v. Superior Court (1938) 12 Cal. 2d 455, 461, 85 P.2d 894* (order void on its face is a nullity, assailable wherever and whenever it may be produced, and whether attack on it is direct or collateral); *Parsons v. Weis (1904) 144 Cal. 410, 415, 77 P. 1007* (if it affirmatively appears on the face of the record that the court did not have jurisdiction of the defendant, its judgment is at all times open to either a direct or a collateral attack); *People v. Davis (1904) 143 Cal. 673, 675, 77 P. 651* (holding rule also applies to void orders); *see also* discussion in *§ 489.10*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsGovernmentsCourtsCourt Records

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§ 489.142 Time Limitations When Void Judgment Is Not Facially Void

[1] Reasonable Time

Although *Code Civ. Proc. § 473(d)*, imposes no time limit on when a motion for relief from a void judgment or order must be made, an attack on a judgment that is void in fact, but not on its face, must be made within a reasonable time, whether the attack is made under the statute or pursuant to the court's inherent power at law to set aside void judgments and orders [*see, e.g.,* *Estate of Estrem (1940) 16 Cal. 2d 563, 569, 571, 107 P.2d 36* ; *Morgan v. Clapp (1929) 207 Cal. 221, 224, 277 P. 490* ; *Smith v. Jones (1917) 174 Cal. 513, 515-516, 163 P. 890* ; *People v. One 1941 Chrysler Sedan (1947) 81 Cal. App. 2d 18, 21, 183 P.2d 368* ; *Washko v. Stewart (1941) 44 Cal. App. 2d 311, 317, 112 P.2d 306*].

A motion for relief not made within a reasonable time (and not coming within the exception discussed [6][b], *below*) is subject to the rules applicable to collateral attack, which means that extrinsic evidence cannot beintroduced to show the invalidity (*see* discussion under in §§ *489.134*, and *489.14*; *see also § 489.420[1]* (form)). Any order vacating such a judgment on motion made after a reasonable time has expired is itself void on its face and is assailable wherever and whenever it may be produced, whether the attack on it is direct or collateral; and it may be set aside by the court that rendered it of its own motion at any time [*People v. Davis (1904) 143 Cal. 673, 675-676, 77 P. 651*]. For discussion of what constitutes a reasonable time, *see* discussion under [2] and [6], *below*.

[2] Statutory Periods That Apply by Analogy

A "reasonable time" is the statutory periods set forth in *Code Civ. Proc. §§ 473* and *473.5*, which apply by analogy (*see* discussion under [6], *below*).

[3] Statutory Periods

[a] Code Civ. Proc. § 473

Code Civ. Proc. § 473(d), provides for correction of clerical errors and relief from void judgments and orders. No time limitation is contained in *Code Civ. Proc. § 473(d)*. The only time period mentioned in the statute is the six-month limitation set forth in *Code Civ. Proc. § 473(b)*, relating to relief from judgments, orders, and proceedings taken against a person through his or her mistake, inadvertence, surprise, or excusable neglect and to relief based on an attorney's affidavit of fault. That subdivision deals with valid judgments, orders, and proceedings [*see People v. One 1941 Chrysler Sedan (1947) 81 Cal. App. 2d 18, 21, 183 P.2d 368*] and is discussed in *§ 489.30* et seq. When this limitation applies by analogy, the motion for relief must be made within six months from the date the judgment or order was entered (*see* discussion under [6], *below*).

[b] Code Civ. Proc. § 473.5

Code Civ. Proc. § 473.5 (discussed in *§ 489.70* et seq.) provides for relief from a default or default judgment entered against a party when the service of summons did not result in actual notice to the party in time to defend. This statute, like *Code Civ. Proc. § 473(b)*, deals with valid judgments [*see People v. One 1941 Chrysler Sedan (1947) 81 Cal. App. 2d 18, 21, 183 P.2d 368* (involving former *Code Civ. Proc. § 473a*); *see also In re Marriage of Smith (1982) 135 Cal. App. 3d 543, 546, 185 Cal. Rptr. 411* (*Code Civ. Proc. § 473.5* does not govern a default or default judgment obtained through fraudulent return of service of summons)].

The time limitation specified in *Code Civ. Proc. § 473.5* is "a reasonable time, but in no event exceeding the earlier of [*Code Civ. Proc. § 473.5(a)*]:

- Two years after entry of a default judgment against him or her; or

- One hundred eighty days after service on him or her of a written notice that the default or default judgment has been entered."

Thus, when this period applies by analogy, the motion must be made within the earlier of two years or 180 days after defendant was served with notice of default or, if a default judgment has been entered, notice of the default judgment [*see* discussion under [6], *below*].

[4] Failure of Cases to Consider Interim Statutory Amendments

Since 1872, literally hundreds of cases have applied by analogy the time limitations of *Code Civ. Proc. § 473*, and its statutory spinoffs, to proceedings seeking relief from void judgments and orders. However, the statute has been amended numerous times, and the cases have not always kept abreast of the changes. To avoid the confusion that has plagued the profession in the determining the applicable time limitations, counsel should be alert, in reading a case, to the wording of the statute as it existed at the time the case was decided, keeping in mind that often an appellate court, in applying the statute, cites prior case authority as support for its holding without discussing interim changes in the statutes. Moreover, from its inception and through its version as amended in 1917, courts often failed to specify which of the two periods then contained in the statute was being applied by analogy to void judgments, particularly in cases in which relief was sought more than one year after the judgment was entered.

[5] Summary of Amendments of Time Limitations

The following summary of the amendments of the time limitations imposed in *Code Civ. Proc. §§ 473* and *473.5* is provided to assist counsel in determining what time periods older case law is referring to when applying these statutes by analogy.

The original statute was derived from Section 68 of the Practice Act (Stats. 1851, ch. 5), that was codified in 1872 [*see First Small Business Inv. Co. v. Sistim, Inc. (1970) 12 Cal. App. 3d 645, 649, 90 Cal. Rptr. 798*]. As codified in 1872,

Code Civ. Proc. § 473 contained two time provisions:

- A reasonable time not exceeding five months after adjournment of the term for relief from mistake, inadvertence, surprise, or excusable neglect; and

- Six months after the rendition of any judgment for relief when the summons and complaint were not "personally served on the defendant."

Subsequent amendments affecting time limits stated in Section 473 are as follows:

- In 1873-1874 legislation the five-month period relating to relief for mistake, etc. was extended to six months, and the six-month period relating to relief for lack of personal service was extended to one year.

- In 1880, the six-month period for relief for mistake, etc. was amended to be six months following the judgment, order, or proceeding, instead of six months after the adjournment of the court's term.

- As amended in 1933, and since then, *Code Civ. Proc. § 473* has contained only one time limitation, the six-month limitation governing relief from mistake, inadvertence, surprise, and excusable neglect. The one-year limitation relating to relief for failure to have personally served the defendant was moved to *Code Civ. Proc. § 473a* (*now see Code Civ. Proc. § 473.5*). Nevertheless, some courts continued to cite the time limitation in *Section 473*, whether applying the six-month or the one-year limitation.

- In 1969, former *Code Civ. Proc. § 473a* was repealed and replaced by *Code Civ. Proc. § 473.5*, which contains a single time limitation (the shorter of two periods, discussed under [3][b], *above*).

[6] Application of Statutory Periods That Apply by Analogy

[a] Rule

What constitutes a reasonable time for seeking relief at law from an order or judgment void in fact but not void on its face is either:

- The time limitation specified in *Code Civ. Proc. § 473.5*, which applies by analogy when the invalidity of the judgment or order resulted from the improper service or nonservice of summons, or other required notice [*Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1123-1124, 265 Cal. Rptr. 286* ; *People v. One 1941 Chrysler Sedan (1947) 81 Cal. App. 2d 18, 21, 183 P.2d 368* (involving former *Code Civ. Proc. § 473a*, the predecessor to *Code Civ. Proc. § 473.5*); *Washko v. Stewart (1941) 44 Cal. App. 2d 311, 317, 112 P.2d 306* (same); *see also, e.g.,* *Estate of Estrem (1940) 16 Cal. 2d 563, 571, 107 P.2d 36* (involving predecessor statute); *Morgan v. Clapp (1929) 207 Cal. 221, 224, 277 P. 490* (same); *Smith v. Jones (1917) 174 Cal. 513, 516, 163 P. 890* (same)]. The period specified is a reasonable time not exceeding the earlier of two years after entry of the default judgment or 180 days after the defendant was served with a written notice that the default or default judgment has been entered [*Code Civ. Proc. § 473.5(a)*]. The period starts running from the date the judgment, rather than the default, was entered [*Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1126, 265 Cal. Rptr. 286* ; *see also, e.g.,* *Morgan v. Clapp (1929) 207 Cal. 221, 224, 277 P. 490* (involving predecessor statute)]. The "reasonable time" requirement is separate from the two-year limit set forth in Code*Civ. Proc. § 473.5*, and thus, although the court has jurisdiction to set aside the judgment within the two year period, a party bringing the motion within that period must demonstrate a satisfactory excuse for the default and diligence in making the motion after discovery of the default [*see* *Schenkel v. Resnik (1994) 33 Cal. Rptr. 2d 60*]. Neither the actual notice provision in *Code Civ. Proc. § 473.5(a)* nor the affidavit

requirement set forth in *Code Civ. Proc. § 473.5(b)* applies to a motion for relief from a void judgment [*see In re Marriage of Smith (1982) 135 Cal. App. 3d 543, 546, 554-555, 185 Cal. Rptr. 411* and *Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1124, 265 Cal. Rptr. 286* , respectively]; or,

- In all other cases, the six-month limitation set forth in *Code Civ. Proc. § 473(b)*, which applies by analogy [*see, e.g., Thompson v. Cook (1942) 20 Cal. 2d 564, 569, 127 P.2d 909* ; *Estate of Estrem (1940) 16 Cal. 2d 563, 571, 107 P.2d 36* ; *Consolidated Const. Co. v. Pacific E. Ry. Co. (1920) 184 Cal. 244, 247-248, 193 P. 238* ; *see also, e.g., Wells Fargo & Co. v. San Francisco (1944) 25 Cal. 2d 37, 40, 152 P.2d 625* (default judgment claimed to have been entered by trial court in excess of its jurisdiction)]. The six-month period, that is, the 182 days allowed, in the case of a default judgment, is calculated from the time the default, and not the judgment, was entered [*National Diversified Services, Inc. v. Bernstein (1985) 168 Cal. App. 3d 410, 416, 214 Cal. Rptr. 113*], unless, of course, the attack is limited simply to vacating the default judgment.

[b] Exception to Rule

The rule that relief must be sought within a reasonable time does not apply to an untimely motion when the party in whose favor the judgment or order runs admits facts showing the invalidity of the judgment or order, or, without objection on his or her part, evidence is admitted that clearly shows the existence of those facts. The situation is the same as when the judgment is void on its face, and it is the duty of the court to declare the judgment or order void [*Thompson v. Cook (1942) 20 Cal. 2d 564, 569-570, 127 P.2d 909* ; *see also Phelan v. Superior Court (1950) 35 Cal. 2d 363, 372-373, 217 P.2d 951*].

For example, a judgment that is valid on its face cannot be impeached on an untimely motion by evidence showing that the summons was not served if the evidence is objected to, but if evidence to that effect is admitted without objection, or the parties stipulate or admit that in fact summons was not served, it is the court's duty to declare the judgment void as a matter of law on the admitted facts [*Thompson v. Cook (1942) 20 Cal. 2d 564, 570, 127 P.2d 909*].

[7] Effect of Motion Not Made Within Reasonable Time

A motion made after expiration of a reasonable time is governed by the rules applicable to collateral attack, which means that the motion must be determined on the judgment roll alone; extrinsic evidence cannot be produced to show the invalidity, and without extrinsic evidence, the invalidity cannot be shown [*see Wells Fargo & Co. v. San Francisco (1944) 25 Cal. 2d 37, 40, 152 P.2d 625* ; *Borenstein v. Borenstein (1942) 20 Cal. 2d 379, 381, 125 P.2d 465* ; *see also Connelly v. Castillo (1987) 190 Cal. App. 3d 1583, 1588, 236 Cal. Rptr. 112*]. The rule is not that a void judgment will be enforced as though valid, but, rather, that it cannot be shown to be void except in certain ways [*Thompson v. Cook (1942) 20 Cal. 2d 564, 570, 127 P.2d 909*].

[8] Alternative Relief in Equity

Although relief from a void judgment that is not void on its face may be barred at law because not timely sought within the specified periods, relief might still be available either by an equitable motion in the same action or by an independent action in equity to have the judgment or order declared void on the ground of extrinsic fraud or mistake if those grounds exist [*see Smith v. Jones (1917) 174 Cal. 513, 517-518, 163 P. 890* ; *People v. Davis (1904) 143 Cal. 673, 675, 77 P. 651* ; *Munoz v. Lopez (1969) 275 Cal. App. 2d 178, 180-181, 79 Cal. Rptr. 563* ; *Olivia v. Suglio (1956) 139 Cal. App. 2d 7, 9, 293 P.2d 63* ; *see also People v. One 1941 Chrysler Sedan (1947) 81 Cal. App. 2d 18, 21-22, 183 P.2d 368* (when motion is not made within reasonable time, party is relegated to action in equity)]. Resort to equity requires that the moving party establish a meritorious defense to the action in which the allegedly void judgment was entered [*see, e.g., Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 554, 305 P.2d 20* ; *Cromwell v. Heward (1959) 169 Cal. App. 2d 88, 90, 337 P.2d 151*]. For further discussion of equitable relief, see *§ 489.220* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsGovernmentsCourtsAuthority to AdjudicateGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 489.143 Affidavit of Merits Not Required

No affidavit or declaration of merits is required to support a motion for relief at law from a judgment on the ground that it is void on its face [*Montgomery v. Norman (1953) 120 Cal. App. 2d 855, 858, 262 P.2d 360*] or from a judgment that is void in fact, although not void on its face [*Norton v. Atchison, T., & S. F. R. Co. (1893) 97 Cal. 388, 390-392, 32 P. 452* (false return of service filed); *see also County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 112 . 183 Cal. Rptr. 741* (if judgment is void, it must be set aside and no affidavit of merits or other showing of a defense is required); *Mattison v. Lichlyter (1958) 162 Cal. App. 2d 60, 62, 327 P.2d 599* (no affidavit of merits required on motion for relief from default judgment rendered in action in which defendant was immune to service when summons was served); *Shelley v. Casa De Oro, Ltd. (1933) 133 Cal. App. 720, 722, 24 P.2d 900* (no affidavit of merits required on motion for relief from default judgment when defendant was never served with process and purported appearance on its behalf by attorney was unauthorized); *Steuri v. Junkin (1931) 113 Cal. App. 553, 556, 298 P. 828* (default prematurely entered after defendant had been granted extension of time to plead)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeContent & FormCivil ProceduresPretrial JudgmentsDefaultRelief From DefaultCivil ProceduresJudgmentsRelief From JudgmentVoid Judgments

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43-489 California Forms of Pleading and Practice--Annotated § 489.144

§ 489.144 Showing of Meritorious Defense or Case

If the judgment is void on its face, no showing of a meritorious case, that is, a good claim or defense, by the party moving for relief is required because the judgment may be attacked collaterally [*see Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 554, 305 P.2d 20*], and may be set aside by the court on its own motion [*see, e.g., Montgomery v. Norman (1953) 120 Cal. App. 2d 855, 858, 262 P.2d 360*]. Nor is a meritorious defense required to be shown on a motion to set aside a judgment that is valid on its face but void in fact [*see County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 112, 183 Cal. Rptr. 741* ; *Mattison v. Lichlyter (1958) 162 Cal. App. 2d 60, 65, 327 P.2d 599* ; *see also Code Civ. Proc. § 473(d)* (authorizing relief from void judgments and orders and, unlike *Code Civ. Proc. § 473(b),* imposing no requirement that a proposed pleading accompany the motion)].

Moreover, the United States Supreme Court has held that to require the showing of a meritorious defense on a defendant's motion for relief from a default judgment in an action in which the trial court never acquired personal jurisdiction over the defendant, that is, when the judgment is void for lack of personal jurisdiction, would violate procedural due process and cannot constitutionally be required [*see Peralta v. Heights Medical Center, Inc. (1988) 485 U.S. 80, 84-87, 108 S. Ct. 896, 99 L. Ed. 2d 75*].

For discussion of the rule that applies when relief is sought in equity and the impact of *Peralta* on that rule, see *§ 489.264*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of Protection

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[Reserved]

§§ 489.145[Reserved]

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§ 489.160 Types of Void Judgments and Orders Generally

Examples of void judgments are listed below. The defects illustrated may apply to any type of judgment, including defaults and default judgments. Defects unique to defaults and default judgments are illustrated under *§ 489.180 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments

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43-489 California Forms of Pleading and Practice--Annotated § 489.161

§ 489.161 No Subject Matter Jurisdiction

A judgment of a court lacking subject matter jurisdiction of the action is void (*see discussion under § 489.132*). A court is without subject matter jurisdiction when it lacks power to adjudicate the matter in question. For discussion of the subject matter jurisdiction of the California courts, see Ch. 324, *Jurisdiction: Subject Matter*

However, a court may not, after the time for appeal has passed, set aside a judgment or order on the ground that the court lacked jurisdiction, when the facts establishing such jurisdiction were found by the court in the original proceedings, and all adverse parties were properly served with notice and had the opportunity to present their objections [*Estate of Estrem (1940) 16 Cal. 2d 563, 569-570, 572, 107 P.2d 36* (probate court had found that facts establishing subject matter jurisdiction existed)]. Thus, a determination of subject matter jurisdiction by the trial court may become res judicata [*Perry v. Farley Bros. Moving & Storage, Inc. (1970) 6 Cal. App. 3d 884, 888, 86 Cal. Rptr. 397*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments

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43-489 California Forms of Pleading and Practice--Annotated § 489.162

§ 489.162 No Personal Jurisdiction

[1] Improper Service of Summons

Unless the defendant makes a general appearance [*see Code Civ. Proc. § 410.50(a)*], proper service of the summons is a requirement for a court's exercise of personal jurisdiction over the defendant [*Caldwell v. Coppola (1990) 219 Cal. App. 3d 859, 863, 268 Cal. Rptr. 453* ; *Slaughter v. Legal Process & Courier Service (1984) 162 Cal. App. 3d 1236, 1251, 209 Cal. Rptr. 189*]. Absent such jurisdiction, a court's judgment is void [*see Sousa v. Freitas (1970) 10 Cal. App. 3d 660, 667-668, 89 Cal. Rptr. 485* (judgment rendered without legal service of process or legal notice to defendant is properly challenged in equity, and divorce secured some 46 years prior to husband's death through husband's extrinsic fraud was void for lack of notice to wife); *Sternbeck v. Buck (1957) 148 Cal. App. 2d 829, 832, 834, 307 P.2d 970* (involving attack on judgment by independent action in equity); *see also In re Abrams (1980) 108 Cal. App. 3d 685, 693, 166 Cal. Rptr. 749*]. Thus, a judgment rendered in a case in which the summons was served by plaintiff, in violation of *Code Civ. Proc. § 414.10*, and a false return of service was filed, is void [*see In re Marriage of Smith (1982) 135 Cal. App. 3d 543, 545-546, 185 Cal. Rptr. 411*]. The same is true of an order directed against a defendant over whom the court has not acquired jurisdiction [*Caldwell v. Coppola (1990) 219 Cal. App. 3d 859, 863, 268 Cal. Rptr. 453* (noting that under *Code Civ. Proc. § 414.10*, a party to an action is prohibited from personally serving the defendant)].

Moreover, service of a substantially defective summons does not confer jurisdiction over a party and will not support a default judgment [*MJS Enterprises, Inc. v. Superior Court (1984) 153 Cal. App. 3d 555, 557, 200 Cal. Rptr. 286* , citing *Code Civ. Proc. § 412.30*, which prohibits entry of default when statutorily required notices are not contained in summons served)].

[2] Nonresident Defendant

Personal jurisdiction is lacking with respect to a nonresident defendant who does not appear in the case and lacks sufficient contacts with California to permit the state's exercise of in personam jurisdiction over him or her, even if a summons was properly served on him or her [*see, e.g., In re Marriage of Merideth (1982) 129 Cal. App. 3d 356,*

361-363, 180 Cal. Rptr. 909 ; *see also Great-West Life Assurance Co. v. Guarantee Co. of North America (1988) 205 Cal. App. 3d 199, 205, 252 Cal. Rptr. 363* ; for a discussion of the bases for in personam jurisdiction over a nonresident defendant, *see* Ch. 323, *Jurisdiction: Personal*].

[3] Effect of Failure to File Summons and Proof of Service

The summons, together with its proof of service (*Code Civ. Proc. §§ 417.10, 417.20, 417.40*), must be returned to the court (that is, returned for filing) [*Code Civ. Proc. § 417.30(a)*], and they form a part of the judgment roll [*Code Civ. Proc. § 670*, discussed in *§ 489.136*]. Historically, the absence from the judgment roll of the summons with its proof of service rendered the judgment void on its face [*see, e.g., Pearson v. Superior Court (1932) 122 Cal. App. 571, 574-575, 10 P.2d 489*].

However, a default judgment, at least one entered by the court (as opposed to the clerk) under *Code Civ. Proc. § 585(b)*, is valid if based on actual service of summons on the defendant, even though no proof of service is filed prior to the entry of judgment. The modern rule is that a judgment based on a late return of summons is irregular, but is not void [*National Diversified Services, Inc. v. Bernstein (1985) 168 Cal. App. 3d 410, 416, 214 Cal. Rptr. 113* ; *see also Connelly v. Castillo (1987) 190 Cal. App. 3d 1583, 1589, 236 Cal. Rptr. 112*]. Thus, contrary to former case law, a default judgment is not void on its face when the judgment roll contains no proof of service of summons and, consequently, is not subject to collateral attack [*National Diversified Services, Inc. v. Bernstein (1985) 168 Cal. App. 3d 410, 415-416, 214 Cal. Rptr. 113*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsLegal EthicsSanctionsSuspensions

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43-489 California Forms of Pleading and Practice--Annotated § 489.163

§ 489.163 Service of Papers on Suspended Attorney

The service of interrogatories or discovery motions on a party's attorney who has been suspended from practice may render any subsequent dismissal or default judgment entered for failure to respond void. For example,it has been held that the dismissal of an action because plaintiff failed to answer interrogatories is void, and may be set aside under *Code Civ. Proc. § 473(d)*, when, unknown to plaintiff, plaintiff's attorney had been suspended from practice and no longer represented plaintiff at the time the interrogatories were mailed to him, the attorney failed to notify the client of them, and defendants failed, before moving for dismissal, to give plaintiff written notice to appoint another attorney or to appear in person, as required by *Code Civ. Proc. § 286* [*Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 742, 216 Cal. Rptr. 300*].

Likewise, it has been held that a default judgment taken against a defendant for failure to respond to interrogatories and discovery motions, of which defendant had neither actual nor constructive notice, is void under the due process clause of the federal constitution (*U.S. Const., amend. XIV*) when the interrogatories and discovery motions were served on defendant's attorney after he had been suspended from the practice of law and the attorney failed to notify defendant of them [*Lovato v. Santa Fe Internat. Corp. (1984) 151 Cal. App. 3d 549, 553-554, 198 Cal. Rptr. 838*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsLegal EthicsSanctionsSuspensions

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43-489 California Forms of Pleading and Practice--Annotated § 489.164

§ 489.164 Judgment After Trial Without Notice to Nonappearing Party

A judgment made after a trial held without giving the five-day (now 15-day) notice prescribed by *Code Civ. Proc. § 594(1)* [*now see Code Civ. Proc. § 594(a)*], is not merely error, it is an act in excess of the court's jurisdiction (*see* discussion in *§ 489.130*), and is not only subject to attack under *Code Civ. Proc. § 473(d)*, but is subject to collateral attack at any time [*Wilson v. Goldman (1969) 274 Cal. App. 2d 573, 577-578, 79 Cal. Rptr. 309* (referring to what was then fourth paragraph of Section 473)].

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43-489 California Forms of Pleading and Practice--Annotated § 489.165

§ 489.165 Judgment Against Dissolved Corporation

A judgment rendered against a corporation that was dissolved before the action was filed is void [*Traub Co. v. Coffee Break Service, Inc. (1967) 66 Cal. 2d 368, 370, 57 Cal. Rptr. 846, 425 P.2d 790*].

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43-489 California Forms of Pleading and Practice--Annotated § 489.166

§ 489.166 Judgment by Disqualified Judge

[1] For Financial Interest or Bias

A judgment rendered by a judge in a case in which he or she is disqualified under *Code Civ. Proc. § 170.1 et seq.* (relating to disqualification of judges, court commissioners, and referees, generally on the ground of a financial interest in the case or bias) from sitting is absolutely void, whether or not it correctly decided the case [*Cadenasso v. Bank of Italy (1932) 6 P.2d 944* (equitable action attacking judgment; decided under former *Code Civ. Proc. § 170*); *see also Giometti v. Etienne (1934) 219 Cal. 687, 689, 28 P.2d 913* (order granting hearing in Supreme Court signed by four of seven justices held void when one of the justices signing the order was related to petitioners' counsel and thereby disqualified); *Lindsay-Strathmore I. Dist. v. Superior Court (1920) 182 Cal. 315, 333-336, 187 P. 1056* (issuing writ of prohibition to restrain judge who had slight interest in matter in litigation from proceeding to try matter)].

Although courts applying the former disqualification statutes generally held that a judgment or order rendered by a disqualified judge is void whenever brought into question, it has been said that the theory on which the rule rests is not clearly stated in the decisions and that the proposition itself is not uniformly accepted in its broadest form by all of them [*Urias v. Harris Farms, Inc. (1991) 234 Cal. App. 3d 415, 423-424, 285 Cal. Rptr. 659* (citing Witkin, California Procedure, vol. 2, *Courts*, § 74 (3d ed. 1985))]. In *Urias*, the court said the problem was really one of excess of jurisdiction and that the actions of a disqualified judge are not void in any fundamental sense but at most voidable if properly raised by an interested party [*Urias v. Harris Farms, Inc. (1991) 234 Cal. App. 3d 415, 424, 285 Cal. Rptr. 659* (citing Witkin, California Procedure, vol. 2, *Courts*, §§ 75, 76 (3d ed. 1985))].

For discussion and forms for use in having a judge disqualified for cause from hearing a case, see Ch. 317, *Judges* .

[2] Showing Required

A party seeking to have a judgment declared void on the ground that the judge was disqualified must allege and prove facts that clearly show that the disqualification existed [*Urias v. Harris Farms, Inc. (1991) 234 Cal. App. 3d 415, 424, 285 Cal. Rptr. 659* (citing *Wickoff v. James (1958) 159 Cal. App. 2d 664, 670, 324 P.2d 661* , and holding that a

summary judgment granted by a disqualified judge before the judge's disqualification was discovered by the affected party is "voidable" if the unsuccessful party properly raises the disqualification issue and alleges facts that show the judge was disqualified to hear the case)].

[3] Time Limitation

The time within which a judgment rendered by a judge in a case in which he or she is disqualified may be challenged is not clear under the case law.

In *Cadenasso v. Bank of Italy (1932) 214 Cal. 562, 6 P.2d 944* , the Supreme Court said the objection to the disqualification of a trial judge by reason of his or her interest in the subject matter of the suit may be made at any time before the judgment becomes final [*Cadenasso v. Bank of Italy (1932) 214 Cal. 562, 569, 6 P.2d 944* ; *see also Caminetti v. Pac.Mutual L. Ins. Co. (1943) 22 Cal. 2d 386, 390-392, 139 P.2d 930* (requirement that disqualification be raised at earliest practicable opportunity after discovery lest it be deemed waived)]. The Court expressed no opinion, however, as to whether an action to vacate the judgment would lie after judgment became final [*Cadenasso v. Bank of Italy (1932) 214 Cal. 562, 569, 6 P.2d 944*]. In *T.P.B. v. Superior Court (1977) 66 Cal. App. 3d 881, 136 Cal. Rptr. 311* , a prohibition proceeding in which a juvenile unsuccessfully attempted to prevent a new trial on the ground of double jeopardy after the trial judge had declared a mistrial because of the judge's bias in the case, the appellate court, citing *Cadenasso* among other cases, said, in support of its conclusion that declaring the mistrial was a matter of legal necessity and therefore did not prevent a new trial, that any act of a disqualified judge in violation of *Code Civ. Proc. § 170* (repealed; *now see Code Civ. Proc. §§ 170-170.8*) is absolutely void whenever brought into question and a judgment rendered by such a judge is open to attack at any time [*T.P.B. v. Superior Court (1977) 66 Cal. App. 3d 881, 885-886, 136 Cal. Rptr. 311* ; *see also Lindsay-Strathmore I. Dist. v. Superior Court (1920) 182 Cal. 315, 333, 187 P. 1056*].

However, in *Urias v. Harris Farms, Inc. (1991) 234 Cal. App. 3d 415, 285 Cal. Rptr. 659* , an action for wrongful termination in which the newly appointed judge who granted the defendant's motion for summary judgment had been a member of the law firm that for many years had handled the defendant employer's legal business (*see Code Civ. Proc. § 170.1(a)(2)(A)*), which fact the plaintiff did not discover until after the judgment was entered, the appellate court, in reversing the summary judgment, said: (1) the rule that applies when the facts constituting disqualification are discovered before a case is submitted for decision is that the matter of disqualification should be raised when the facts constituting the grounds for disqualification are first discovered and, in any event, before the matter involved is submitted for decision; and (2) when the grounds for disqualification are not discovered until after judgment is entered, a statement of the disqualification is timely if submitted at the earliest practicable opportunity after the disqualifying facts are discovered [*Urias v. Harris Farms, Inc. (1991) 234 Cal. App. 3d 415, 424-425, 285 Cal. Rptr. 659*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsFinancial InterestsCivil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsPersonal BiasCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments

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43-489 California Forms of Pleading and Practice--Annotated § 489.167

§ 489.167 Judgment Rendered by Commissioner Acting as Temporary Judge Without Stipulation of Parties

The order or judgment of a commissioner acting as a temporary judge is void when the defendant refused to stipulate to the commissioner's deciding the matter [*Reisman v. Shahverdian (1984) 153 Cal. App. 3d 1074, 1087, 1094-1097, 201 Cal. Rptr. 194* ; *see also* *Rooney v. Vermont Investment Corp. (1973) 10 Cal. 3d 351, 359-360, 372, 110 Cal. Rptr. 353, 515 P.2d 297*]. In *Reisman*, the appellate court upheld the commissioner's judgment for the plaintiff when the plaintiff had stipulated to the commissioner's acting as a temporary judge on the plaintiff's petition for confirmation of an arbitration award. The defendant failed to file any response to the petition or to appear at the hearing. Consequently, the commissioner could properly hear the matter as an uncontested one (*see* former *Code Civ. Proc. § 259(7)*) even though the defendant did not stipulate to the commissioner's hearing the matter. However, the court held that the subsequent order by the commissioner denying the defendant's motion under what is now *Code Civ. Proc. § 473(d)*, to vacate that allegedly void judgment, although not an ancillary proceeding, was void because the defendant refused to stipulate to the commissioner's hearing the motion and had not stipulated to his hearing the petition for confirmation of the arbitration award [*Reisman v. Shahverdian (1984) 153 Cal. App. 3d 1074, 1097, 201 Cal. Rptr. 194*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsGovernmentsCourtsSpecial Judges

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43-489 California Forms of Pleading and Practice--Annotated §§ 489.168-489.179

[Reserved]

§§ 489.168[Reserved]

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43-489 California Forms of Pleading and Practice--Annotated § 489.180

§ 489.180 Types of Void Defaults and Default Judgments Generally

The defects noted above *in § 489.160* et seq. can apply to any type of judgment, including defaults and default judgments. Some defects are unique to defaults and default judgments, however, and these are discussed below.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments

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43-489 California Forms of Pleading and Practice--Annotated § 489.181

§ 489.181 Premature Entry

A court clerk is not authorized to enter a default or a default judgment (*see Code Civ. Proc. § 585(a)*) until the time for appearance has expired, and if the clerk enters such a judgment prematurely, the judgment is void [*Bristol Convalescent Hosp. v. Stone (1968) 258 Cal. App. 2d 848, 862, 66 Cal. Rptr. 404* ; *Montgomery v. Norman (1953) 120 Cal. App. 2d 855, 858, 262 P.2d 360*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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43-489 California Forms of Pleading and Practice--Annotated § 489.182

§ 489.182 Unauthorized Entry of Default Judgment by Clerk

Code Civ. Proc. § 585(a) authorizes the clerk to enter a default judgment only in an action based on a contract or judgment for money or damages in which the amount appears in or may be mathematically calculated from the contract or judgment [*Code Civ. Proc. § 585(a)* (may also deduct admitted credits, and add attorney's fees according to court schedule); *Brown v. Superior Court (1966) 242 Cal. App. 2d 519, 524, 51 Cal. Rptr. 633*]. The clerk has no power to enter the judgment if the determinationof damages involves any discretion or the taking of any evidence [*Brown v. Superior Court (1966) 242 Cal. App. 2d 519, 524, 526, 51 Cal. Rptr. 633*]. A default judgment entered by a court clerk who lacks power under *Code Civ. Proc. § 585(a)* to enter the judgment is void on the face of the record and subject to being set aside at any time, although the invalidity of the judgment does not affect the preceding default [*Brown v. Superior Court (1966) 242 Cal. App. 2d 519, 524, 526, 51 Cal. Rptr. 633* (applying former *Code Civ. Proc. § 585(1)*; clerk-entered judgment void when action required determination of reasonable value of services)].

While a default judgment will not normally be set aside when the default cannot be set aside because the plaintiff could immediately have a judgment of like effect entered, this does not apply to a default judgment that is void on the face of the record because of its unauthorized entry by the clerk; in that case, when the judgment is set aside, the plaintiff must apply to the court for a judgment under *Code Civ. Proc. § 585(b)* in the amount justified by the complaint [*Brown v. Superior Court (1966) 242 Cal. App. 2d 519, 526, 51 Cal. Rptr. 633*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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43-489 California Forms of Pleading and Practice--Annotated § 489.183

§ 489.183 Responsive Pleading on File

A default judgment entered when an answer or demurrer is on file is void [*Johns v. Mongan (1961) 190 Cal. App. 2d 94, 97, 11 Cal. Rptr. 673* ; *see also* *Stevens v. Torregano (1961) 192 Cal. App. 2d 105, 112, 13 Cal. Rptr. 604* ; *Baske v. Burke (1981) 125 Cal. App. 3d 38, 45, 177 Cal. Rptr. 794* (judgment void when clerk entered default despite presence of letters to court in file that were, in substance, an answer to plaintiff's petition)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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43-489 California Forms of Pleading and Practice--Annotated § 489.184

§ 489.184 Defendant's Failure to Appear at Trial

When a defendant has filed an answer, neither the clerk nor the court has the power to enter a default based on the defendant's failure to appear at trial. A default entered under those circumstances is void and is subject to expungement at any time either by motion made pursuant to *Code Civ. Proc. § 473(d)*, or by virtue of the court's inherent power to vacate a judgment or order void on its face [*Wilson v. Goldman (1969) 274 Cal. App. 2d 573, 577, 79 Cal. Rptr. 309*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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43-489 California Forms of Pleading and Practice--Annotated § 489.185

§ 489.185 Removal and Remand of Case

The entry of a defendant's default by a court clerk for failure to file a responsive pleading is "voidable" under *Code Civ. Proc. § 473(d)*, if, after the action was removed to federal court, the defendant filed a motion to dismiss, and the federal court remanded the case to the state court. Entry of default is improper because a motion to dismiss in federal court is equivalent to a demurrer in state court, and a demurrer is a pleading that prevents the clerk's entry of default under *Code Civ. Proc. § 585* [*Laguna Village, Inc. v. Laborers' Internat. Union of North America (1983) 35 Cal. 3d 174, 182, 197 Cal. Rptr. 99, 672 P.2d 882* (applying former Section 473)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemovalPostremoval RemandsGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProcedurePretrial JudgmentsDefaultEntry of Default JudgmentsGovernmentsCourtsClerks of Court

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43-489 California Forms of Pleading and Practice--Annotated § 489.186

§ 489.186 Judgment Based on Void Order for Publication of Summons or Substituted Service

When an order for publication of the summons is void because the affidavit on which it is based is insufficient, the default and default judgment entered and rendered on the basis of the service made pursuant to that order are likewise void on their face, are subject to direct or collateral attack, and should be set aside [*see Olvera v. Olvera (1991) 232 Cal. App. 3d 32, 41, 283 Cal. Rptr. 271* ; *Sanford v. Smith (1970) 11 Cal. App. 3d 991, 999, 90 Cal. Rptr. 256*]. The same rule applies to a default and default judgment based on substituted service made pursuant to an insufficient affidavit and a void order for substituted service [*Sanford v. Smith (1970) 11 Cal. App. 3d 991, 999, 90 Cal. Rptr. 256*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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43-489 California Forms of Pleading and Practice--Annotated § 489.187

§ 489.187 Failure to Serve Amended Complaint Increasing Damages or Relief Sought

When a defendant has failed to appear in an action, service of an amended complaint to increase the amount of damages or relief sought, in the manner provided for service of summons, while not necessarily a requirement for personal jurisdiction, is an essential prerequisite to a valid default judgment for the increased amount [*Engebretson & Co. v. Harrison (1981) 125 Cal. App. 3d 436, 443, 178 Cal. Rptr. 77* (involving attack on default and default judgment by independent action in equity in which appellate court affirmed judgment setting aside default judgment but not default); *see also Leo v. Dunlap (1968) 260 Cal. App. 2d 24, 27, 66 Cal. Rptr. 888*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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43-489 California Forms of Pleading and Practice--Annotated § 489.188

§ 489.188 Failure to Respond to Amended Complaint

A default judgment entered for failure to answer an amended complaint when an answer to the original complaint was filed, is void if the amendment was in regard to mere formal or immaterial matters and did not change the cause of action [*Gray v. Hall (1928) 203 Cal. 306, 310-311, 265 P. 246* (nevertheless holding default judgment before it was not void on its face and not subject to collateral attack in mandate proceeding brought to enforce compliance with judgment); *see also Carrasco v. Craft (1985) 164 Cal. App. 3d 796, 808-811, 210 Cal. Rptr. 599*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProceduresPleading & PracticePleadingsAnswersCivil ProceduresPretrial JudgmentsDefaultDefault JudgmentsCivil ProceduresJudgmentsRelief From JudgmentVoid Judgments

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43-489 California Forms of Pleading and Practice--Annotated § 489.189

§ 489.189 Failure to Give Notice of Damages Claimed

[1] Statement of Damages

A complaint brought in superior court to recover actual or punitive damages for personal injury or wrongful death is not to state the amount of damages sought [*Code Civ. Proc. § 425.10(b)*]. Before taking default, the plaintiff must serve a statement of damages on the defendant [*Code Civ. Proc. § 425.11(c)*; *see also Code Civ. Proc. § 580* (if there is no answer, relief is limited to that demanded in complaint, Section 425.11 statement of damages, or *Code Civ. Proc. § 425.115* statement regarding punitive damages)].

Any default or subsequent default judgment entered without the statement of damages having been given is in excess of the court's jurisdiction [*see Petty v. Manpower, Inc. (1979) 94 Cal. App. 3d 794, 797-798, 156 Cal. Rptr. 622* ; *see also Jones v. Interstate Recovery Service (1984) 160 Cal. App. 3d 925, 929-930, 206 Cal. Rptr. 924*] and void [*Barragan v. Banco BCH (1986) 188 Cal. App. 3d 283, 303, 232 Cal. Rptr. 758* ; *see also Stevenson v. Turner (1979) 94 Cal. App. 3d 315, 318-320, 156 Cal. Rptr. 499* ; and discussion in *§ 489.130*].

For discussion of the sufficiency of a *Code Civ. Proc. § 425.11* statement of damages and service of the statement prior to taking a default, see Ch. 205, *Defaults and Default Judgments* . For the procedure and a form of statement, see Ch. 177, *Damages* .

[2] Punitive Damages

No claim for exemplary, or punitive, damages may state the amount [*Civ. Code § 3295(e)*]. Under *Section 3295(e)*, neither the body nor the prayer of a complaint for damages may state the amount of punitive damages claimed in any action in any court [*Wiley v. Rhodes (1990) 223 Cal. App. 3d 1470, 1472, 273 Cal. Rptr. 279*]. However, a default judgment greater than the amount specifically demanded is void as beyond the court's jurisdiction [*see Greenup v. Rodman (1986) 42 Cal. 3d 822, 826, 231 Cal. Rptr. 220, 726 P.2d 1295* ; *see also Code Civ. Proc. § 580* (if there is no answer, relief is limited to that demanded in complaint, Section 425.11 statement of damages, or Section 425.115 statement regarding punitive damages); for further discussion, *see § 489.191*]. A general allegation of entitlement to

punitive damages in a complaint does not apprise the defendant of his or her potential financial liability for those damages if judgment is taken by default, and an award of punitive damages without prior notice of the amount claimed contravenes due process and is, in effect, void [*Wiley v. Rhodes (1990) 223 Cal. App. 3d 1470, 1472, 273 Cal. Rptr. 279* (reversing judgment to extent it awarded punitive damages)].

If the plaintiff wishes to obtain punitive damages as part of a default judgment, the plaintiff, before taking the default, must serve a statement preserving the right to seek punitive damages in a stated amount [*Code Civ. Proc. § 425.115*]. For discussion and a form of statement, see Ch. 177, *Damages* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsCivil ProcedureRemediesDamagesCompensatory DamagesCivil ProcedureRemediesDamagesPunitive DamagesTortsWrongful Death & Survival ActionsRemediesAward CalculationsTortsWrongful Death & Survival ActionsRemediesCompensatory DamagesGeneral OverviewTortsWrongful Death & Survival ActionsRemediesPunitive Damages

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43-489 California Forms of Pleading and Practice--Annotated § 489.190

[Reserved]

§ 489.190[Reserved]

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43-489 California Forms of Pleading and Practice--Annotated § 489.191

§ 489.191 Award in Excess of Demand or For Relief Not Requested

[1] When No Answer Was Filed

The relief granted to a plaintiff when the defendant does not answer cannot exceed the relief the plaintiff demanded in the complaint, in the *Code Civ. Proc. § 425.11* statement of damages, or in the *Code Civ. Proc. § 425.115* statement preserving the right to punitive damages [*Code Civ. Proc. § 580*]. *Code Civ. Proc. § 580* deprives a trial court of jurisdiction to enter a judgment against a defaulting defendant that awards greater relief than that sought in the plaintiff's complaint [*In re Marriage of Lippel (1990) 51 Cal. 3d 1160, 1167, 276 Cal. Rptr. 290, 801 P.2d 1041* ; for discussionof the statement of damages, *see § 489.189*; *see also Damele v. Mack Trucks, Inc. (1990) 219 Cal. App. 3d 29, 39-41, 267 Cal. Rptr. 197*].

A default judgment in excess of the amount prayed for is void [*Ludka v. Memory Magnetics International (1972) 25 Cal. App. 3d 316, 322, 101 Cal. Rptr. 615* ; *see also Ely v. Gray (1990) 224 Cal. App. 3d 1257, 1260, 274 Cal. Rptr. 536* (noting that issue may be raised for first time on appeal from judgment)]. The judgment is subject to collateral, as well as to direct, attack [*see Becker v. S.P.V. Construction Co. (1980) 27 Cal. 3d 489, 492-493, 165 Cal. Rptr. 825, 612 P.2d 915* ; *In re Marriage of Lippel (1990) 51 Cal. 3d 1160, 1163, 276 Cal. Rptr. 290, 801 P.2d 1041*]. The same is true with respect to a default judgment on a cross complaint [*see Swycaffer v. Swycaffer (1955) 44 Cal. 2d 689, 692-693, 285 P.2d 1*].

A default judgment is in excess of the court's jurisdiction and void if it grants relief of a kind essentially different from that which a defaulting defendant would reasonably anticipate from reading the complaint [*Gudarov v. Hadjieff (1952) 38 Cal. 2d 412, 417, 240 P.2d 621*], or that exceeds the demand of the complaint (or the statement of damages when the amount of damages cannot be alleged), or gives relief when no demand for it was made [*Burtnett v. King (1949) 33 Cal. 2d 805, 807, 205 P.2d 657* ; *Morton Regent Enterprises, Inc. v. Leadtec California, Inc. (1977) 74 Cal. App. 3d 842, 848, 141 Cal. Rptr. 706*].

The judgment is void only as to the excess amount or relief granted [*see Becker v. S.P.V. Construction Co. (1980) 27*

Cal. 3d 489, 495, 165 Cal. Rptr. 825, 612 P.2d 915 (default judgment awarding damages void only to extent of amount in excess of that stated in prayer); *see also Greenup v. Rodman (1986) 42 Cal. 3d 822, 829-830, 231 Cal. Rptr. 220, 726 P.2d 1295* (default judgment reduced to amount claimed in complaint); *Wiley v. Rhodes (1990) 223 Cal. App. 3d 1470, 1473-1475, 273 Cal. Rptr. 279* (reversing portions of default judgment awarding punitive damages when defendant was not given notice of amount claimed and awarding attorney's fees as costs when complaint did not demand those costs and complaint did not allege any contract authorizing them); *Brown v. McAdoo (1987) 242 Cal. Rptr. 473* (default judgment proper in municipal court action when prayer sought damages according to proof but remitted sums exceeding court's jurisdiction)].

A default judgment that exceeds the demand for compensatory damages cannot be justified by a demand for punitive damages that remains unexhausted [*Becker v. S.P.V. Construction Co. (1980) 27 Cal. 3d 489, 494-495, 165 Cal. Rptr. 825, 612 P.2d 915* ; *see also Olvera v. Olvera (1991) 232 Cal. App. 3d 32, 36 n.4, 283 Cal. Rptr. 271*]. A prayer for compensatory damages in an amount less than that alleged in the body of the complaint will control [*Barragan v. Banco BCH (1986) 188 Cal. App. 3d 283, 305,232 Cal. Rptr. 758* (reducing amount awarded in default judgment for compensatory damages to amount claimed in the prayer although the amount of general damages alleged in the body of the complaint far exceeded that amount)].

[2] Applicability to Cases in Which Amount Claimed Is Not Normally Alleged in Complaint

The restriction of relief granted to that demanded in the complaint applies even to cases in which an amount claimed is not normally, by the nature of the action, specified in the complaint. For example, in an action for dissolution of partnerships and an accounting when the amount due is unliquidated and unascertained, it has been held that a default judgment awarding a sum of money of which no prior notice as to the amount was given to the defendant was in excess of the trial court's jurisdiction [*Ely v. Gray (1990) 224 Cal. App. 3d 1257, 1260-1261, 274 Cal. Rptr. 536*]. By analogy to personal injury or wrongful death cases in which the amount claimed cannot be stated in the complaint but must be stated in a statement of damages served personally on the defendant before his or her default can be entered, the court held that the plaintiff who seeks an accounting has the solution of a postcomplaint and predefault notice to the defendant of the amount plaintiff will seek to prove due if the defendant defaults, and that, as with the statement of damages required by *Code Civ. Proc. § 425.11*, the notice must be given with adequate time for the defendant to respond before a default is entered [*Ely v. Gray (1990) 224 Cal. App. 3d 1257, 1263-1264, 274 Cal. Rptr. 536* (affirming portion of judgment dissolving partnerships and reversing that portion awarding a specified sum on the accounting); decided before *Section 425.11* was amended by Stats. 1993, ch. 456, to provide specific notice period); for discussion of *Section 425.11, see § 489.189*].

[3] Applicability to Default After Answer Filed

The restriction of relief granted to that demanded in the complaint applies whether the default occurred before or after an answer is filed [*see Greenup v. Rodman (1986) 42 Cal. 3d 822, 826-829, 231 Cal. Rptr. 220, 726 P.2d 1295* (answer stricken for refusal to comply with discovery orders and matter continued as default proceeding); *see also Morton Regent Enterprises, Inc. v. Leadtec California, Inc. (1977) 74 Cal. App. 3d 842, 847-848, 141 Cal. Rptr. 706* (involving motion by plaintiff's and cross defendant's surety to intervene after judgment to vacate judgment when plaintiff failed to appear at trial and judgment was entered against it on complaint and cross complaint)]. That is, the principles apply to defaultsand uncontested proceedings other than to those consisting of the failure of a defendant to file a responsive pleading.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsAnswersCivil ProceduresPretrial JudgmentsDefaultDefault JudgmentsCivil ProceduresPretrial JudgmentsDefaultRelief From DefaultCivil ProceduresJudgmentsRelief From JudgmentVoid

JudgmentsCivil ProcedureRemediesDamagesPunitive DamagesCivil ProcedureRemediesDamagesPunitive Damages

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[Reserved]

§§ 489.192[Reserved]

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4. Motion for Relief From Void Judgment or Order

43-489 California Forms of Pleading and Practice--Annotated § 489.200

§ 489.200 Motion for Relief

[1] From Judgment or Order Void on Its Face

A judgment that is void on its face may be attacked anywhere, anytime, in any action or proceeding (*see* discussions in *§§ 489.137* and *489.141*). Hence, such a judgment may be attacked directly, as by motion in the court that rendered the judgment, or collaterally in any court. The actions and proceedings in which collateral attacks have been made are varied and not susceptible to being reduced to a standard form. For examples of actions and proceedings in which collateral attacks have been made, see discussion in *§ 489.14[3]*.

[2] From Judgment Void in Fact But Not on Face

A judgment or order that is void in fact but not on its face may be attacked directly only (*see* discussion in *§ 489.137*). Relief may thus be obtained by a motion in the court that rendered the judgment pursuant either to the court's inherent power at law, or pursuant to *Code Civ. Proc. § 473(d)* (*see* discussion in *§ 489.131*).

If a judgment or order is void in fact but not on its face because it was obtained by extrinsic fraud or mistake, it may also be attacked by an equitable motion or independent action in equity. For relief in equity, *see § 489.220* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments

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43-489 California Forms of Pleading and Practice--Annotated § 489.201

§ 489.201 Notice of Motion

[1] Judgment or Order Void on Its Face

The power of a court to vacate a judgment or order void on its face is not extinguished by a lapse of time, but may be exercised whenever the matter is brought to the court's attention [*see Manson, Iver & York v. Black (2009) 176 Cal. App. 4th 36, 43-47, 97 Cal. Rptr. 3d 522* (judgment naming incorrect defendant void on its face and subject to attack at any time)]. While a motion to vacate is entirely appropriate, neither a motion nor notice to an adverse party is essential. The court has full power to take such action on its own motion and without any application having been made on the part of anyone [*People v. Davis (1904) 143 Cal. 673, 675-676, 77 P. 651* (affirming order, made apparently on ex parte application, vacating prior void-on-its-face order made on untimely motion that vacated and set aside default and default judgment that were not void on their face); *see also People v. Glimps (1979) 92 Cal. App. 3d 315, 325, 155 Cal. Rptr. 230* (quoting *Davis, above*)]. *Glimps* involved appeals from denial of the People's motions, notice of which was served on one but not the other of two defendants, to vacate orders sealing records on the ground the court lacked jurisdiction to make the orders and that the orders were therefore void. The appellate court said that a sealing order made without legislative authority is in excess of the court's jurisdiction. When this fact appears from the record, it is void (on its face) and the court that made the order must set it aside on motion at any time after its entry. Therefore, the order denying the motion (with respect to the defendant who was served with a notice of the motion) must be reversed. The same result must be reached (as to the defendant who was not served with notice) since, though a motion with notice is appropriate in the case of a void judgment, notice to the adverse party is not essential; the court has full power to vacate a void order without any application on the part of anyone [*People v. Glimps (1979) 92 Cal. App. 3d 315, 321, 155 Cal. Rptr. 230* ; *see also* discussion in *§ 489.131*].

[2] Judgment or Order Not Void on Its Face

A motion to set aside a void judgment or order under *Code Civ. Proc. § 473(d)*, is expressly required by that statute to be noticed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsGovernmentsCourtsAuthority to Adjudicate

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43-489 California Forms of Pleading and Practice--Annotated § 489.202

§ 489.202 Supporting Papers

[1] Affidavits or Declarations

The invalidity of a judgment or order that is void on its face must appear from the judgment roll or from some other document filed or of record in the case, and, hence, extrinsic evidence is not required, or permitted, to show its invalidity (*see* discussion in *§ 489.134*). If extrinsic evidence is required, then the judgment or order is not void on its face. Therefore, on a motion to set aside or vacate a judgment or order that is void on its face, no supporting affidavit or declaration is prepared. However, counsel should request that the court take judicial notice of the judgment or order and the judgment roll, or, if the invalidity is disclosed by some other paper or report filed in the action, that particular paper or report. For matters subject to judicial notice and the manner of requesting it, *see Evid. Code §§ 452(d), 453*.

If the judgment or order is not void on its face but is void in fact, extrinsic evidence is required to show the invalidity. This evidence is normally set out in one or more supporting affidavits (*see Code Civ. Proc. § 2009* (affidavits authorized on motions)) or declarations under penalty of perjury (*see Code Civ. Proc. § 2015.5*) swearing to or signed by the person having personal knowledge of the particular facts [*see § 489.420[1]* (form ofdeclaration supporting motion to set aside void judgment or order); *see also* discussions in *§ 489.360[1]* (form of declaration in support of motion for relief based on mistake, inadvertence, surprise, or excusable nelgect) and in §§ *489.134*, *489.138*, and *489.139*].

[2] Supporting Memorandum

Whether the judgment or order is void on its face or void in fact but not on its face, a memorandum should be prepared. It must be prepared and submitted if the motion is subject to the Civil Law and Motions Rules [*Cal. Rules of Ct., 3.1100 et seq.*], as is a motion, for example, to set aside a default judgment [*see Cal. Rules of Ct., Rule 3.1103(a)(2)*], or if local court rule so requires.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsGovernmentsCourtsCourt Records

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43-489 California Forms of Pleading and Practice--Annotated § 489.203

§ 489.203 Service and Filing of Moving Papers

On a motion under *Code Civ. Proc. § 473(d)*, all moving and supporting papers must be served and filed at least 16 court days before the time appointed for the hearing, but if service is by mail, the required 16-day period of notice is increased by five calendar days if the place of mailing and place of address are in California, 10 calendar days if either the place of mailing or place of address is outside California but in the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States. If notice is served by fax, Express Mail, or other overnight delivery method, the 16-day period is extended by two calendar days [*Code Civ. Proc. § 1005(a)(13), (b)*; *see also Cal. Rules of Ct., Rule 3.1300(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral Overview

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43-489 California Forms of Pleading and Practice--Annotated § 489.204

§ 489.204 Service and Filing of Opposing and Reply Papers

Opposing papers must be filed and served at least 9 court days, and all reply papers at least five court days, before the hearing [*Code Civ. Proc. § 1005(a)(13), (b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral Overview

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43-489 California Forms of Pleading and Practice--Annotated § 489.205

§ 489.205 Who Must Be Served

Code Civ. Proc. § 473(d), requires that notice be given to "the other party," that is, to the adverse party. This includes all persons who may be affected by the order sought, including any codefendants [*Washko v. Stewart (1941) 44 Cal. App. 2d 311, 319, 112 P.2d 306*]. Hence, the notice of motion and its supporting papers must be served on all parties who may be adversely affected by the granting of the relief sought. The failure to serve any such party will render void as to that party any order granting the relief sought [*see Washko v. Stewart (1941) 44 Cal. App. 2d 311, 319, 112 P.2d 306*].

Service of papers must be made on the party's attorney in the action, if any, or, if none, on the party [*Code Civ. Proc. §§ 1011, 1012, 1015*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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43-489 California Forms of Pleading and Practice--Annotated §§ 489.206-489.219

[Reserved]

§§ 489.206[Reserved]

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1. Attack in Equity in General

43-489 California Forms of Pleading and Practice--Annotated § 489.220

§ 489.220 Nature of Attack in Equity

An equitable attack on a judgment or order, whether by motion in the same action or by a separate action in equity, is a direct attack on the judgment or order [*see Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 558, 305 P.2d 20* (action in equity); *Olivera v. Grace (1942) 19 Cal. 2d 570, 575, 122 P.2d 564* (same); *Munoz v. Lopez (1969) 275 Cal App. 2d 178, 183, 79 Cal. Rptr. 563* (equitable motion); *see also Parsons v. Weis (1904) 144 Cal. 410, 415, 77 P. 1007* (action in equity to quiet nonresident plaintiff's title to real property as against resident defendant and to set aside former judgment in favor of defendant quieting his title against, among others, plaintiff, in which it was shown that judgment rendered in prior action was fraudulently procured as to plaintiff); *People ex rel. Public Util. Com. v. Ryerson (1966) 241 Cal. App. 2d 115, 123, 50 Cal. Rptr. 246* (action in equity to vacate collusive judgment); and *§ 489.11*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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43-489 California Forms of Pleading and Practice--Annotated § 489.221

§ 489.221 Judgments Subject to Equitable Attack

In the exercise of its equity jurisdiction, a court can in a proper case set aside or modify any otherwise valid final judgment on the ground of extrinsic fraud or extrinsic mistake (*defined in § 489.241* et seq.), or a void judgment [*see Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 470-471, 82 Cal. Rptr. 489, 462 P.2d 17* ; *In re Marriage of Melone (1987) 193 Cal. App. 3d 757, 762, 238 Cal. Rptr. 510* ; *Stiles v. Wallis (1983) 147 Cal. App. 3d 1143, 1147, 195 Cal. Rptr. 377*]. A court may also grant relief from a default judgment forfeiting real property on which drug trafficking had occurred [*People v. One Parcel of Land (1991) 235 Cal. App. 3d 579, 582-583, 286 Cal. Rptr. 739* ; *see § 489.263[3*]]. For discussion and examples of void judgments, see *§ 489.130* et seq.

In addition, a court always retains the inherent power at law or in equity to vacate a judgment obtained through fraud [*In re Olivia A. (1986) 181 Cal. App. 3d 237, 242-243, 226 Cal. Rptr. 382* ; *Holt v. Parmer (1951) 106 Cal. App. 2d 329, 331, 235 P.2d 43*]. For when a judgment procured by a fraud on the court may be attacked, see discussion in *§§ 489.133* and *489.223*. Because courts have power both at law and in equity to vacateand set aside void judgments, cases in equity may be cited in cases at law, and vice versa, to the extent that they identify or define what constitutes a void judgment, even though the rules applicable to relief in law and equity differ.

Extrinsic fraud may also be used as a defense against the enforcement of a judgment of a sister state [*see Holt v. Parmer (1951) 106 Cal. App. 2d 329, 330-331, 235 P.2d 43*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsGovernmentsCourtsAuthority to Adjudicate

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43-489 California Forms of Pleading and Practice--Annotated § 489.222

§ 489.222 Partial Invalidity

When a showing of extrinsic fraud or mistake relates solely to a portion of the judgment, only that portion will be set aside and the remainder of the judgment left intact [*see In re Marriage of Modnick (1983) 33 Cal. 3d 897, 910, 191 Cal. Rptr. 629, 663 P.2d 187* (relief granted from only property division and spousal support provisions of divorce decree)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentFraud

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43-489 California Forms of Pleading and Practice--Annotated § 489.223

§ 489.223 Doctrine of Res Judicata

Res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction [*see Jorgensen v. Jorgensen (1948) 32 Cal. 2d 13, 18, 193 P.2d 728* ; *Henn v. Henn (1980) 26 Cal. 3d 323, 329, 161 Cal. Rptr. 502, 605 P.2d 10* ; *see also* Ch. 491, *Res Judicata*]. Under the doctrine, a judgment on the merits that is not void on its face (discussed in *§ 489.130* et seq.) is normally conclusive after the time for appeal has expired [*see Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 470-471, 82 Cal. Rptr. 489, 462 P.2d 17*]. However, under certain circumstances involving extrinsic fraud or mistake that prevented a fair adversary hearing, the doctrine of res judicata may be suspended and the judgment modified or nullified by a court of equity [*see Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 470, 82 Cal. Rptr. 489, 462 P.2d 17* ; *In re Marriage of Melone (1987) 193 Cal. App. 3d 757, 762, 238 Cal. Rptr. 510* ; *see also* discussion in *§ 489.228*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsCivil ProcedureAppealsReviewabilityTime Limitations

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43-489 California Forms of Pleading and Practice--Annotated § 489.224

§ 489.224 Scope of Relief

Relief normally consists of the setting aside or vacating of the judgment under attack, or modifying it, but relief is not limited to that. Any appropriate, and otherwise proper, relief may be given. For example, a court may impose a constructive trust [*see Caldwell v. Taylor (1933) 218 Cal. 471, 475, 23 P.2d 758* (action in equity)]. However, relief will not be granted against a bona fide purchaser [*Marlenee v. Brown (1943) 21 Cal. 2d 668, 675, 134 P.2d 770* (action to set aside order confirming executrix's sale of real property, to have conveyances declared void, and to quiet title)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewContracts LawTypes of ContractsBona Fide PurchasersEstate, Gift & Trust LawTrustsConstructive TrustsReal Property LawPriorities & RecordingBona Fide PurchasersReal Property LawTrustsConstructive Trusts

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43-489 California Forms of Pleading and Practice--Annotated § 489.225

§ 489.225 Who May Seek Relief and Manner in Which Relief May Be Sought

A party or one in privity with a party who has been prevented from obtaining a fair adversary hearing through extrinsic fraud or mistake (defined below) may bring an equitable action to vacate the judgment [*Morton Regent Enterprises, Inc. v. Leadtec California, Inc. (1977) 74 Cal. App. 3d 842, 847, 141 Cal. Rptr. 706* ; *People ex rel. Public Util. Com. v. Ryerson (1966) 241 Cal. App. 2d 115, 119, 50 Cal. Rptr. 246*]. Relief is available either by a motion in the action in which the judgment was rendered or in an independent action in equity [*see* *Morton Regent Enterprises, Inc. v. Leadtec California, Inc. (1977) 74 Cal. App. 3d 842, 847, 141 Cal. Rptr. 706* ; *Villarruel v. Arreola (1977) 66 Cal. App. 3d 309, 318, 136 Cal. Rptr. 19* ; *see also* *Swallow v. Tungsten Products Co. (1928) 205 Cal. 207, 214-220, 270 P. 366* ; *In re Olivia A. (1986) 181 Cal. App. 3d 237, 243, 226 Cal. Rptr. 382* ; *People ex rel. Public Util. Com. v. Ryerson (1966) 241 Cal. App. 2d 115, 119, 50 Cal. Rptr. 246*].

A stranger to the proceedings may maintain such an action if his or her interests have been adversely affected by the judgment [*Morton Regent Enterprises, Inc. v. Leadtec California, Inc. (1977) 74 Cal. App. 3d 842, 847, 141 Cal. Rptr. 706* ; *People ex rel. Public Util. Com. v. Ryerson (1966) 241 Cal. App. 2d 115, 119, 50 Cal. Rptr. 246* ; *see also Villarruel v. Arreola (1977) 66 Cal. App. 3d 309, 318, 136 Cal. Rptr. 19*]. The right of a third party to set aside a judgment may depend on extrinsic mistake as well as extrinsic fraud [*Villarruel v. Arreola (1977) 66 Cal. App. 3d 309, 318, 136 Cal. Rptr. 19*].

Relief by a stranger to the proceedings may also be sought by intervention [*Villarruel v. Arreola (1977) 66 Cal. App. 3d 309, 318, 136 Cal. Rptr. 19*]. The interest necessary for intervention must involve such an immediate and direct claim on the very subject matter of the litigation that the intervener will either gain or lose by the direct operation of the judgment that may be rendered [*People ex rel. Public Util. Com. v. Ryerson (1966) 241 Cal. App. 2d 115, 119, 50 Cal. Rptr. 246*]. While the interest of the intervener is normally pecuniary, that is not an indispensable element [*People ex rel. Public Util. Com. v. Ryerson (1966) 241 Cal. App. 2d 115, 119, 50 Cal. Rptr. 246*]. For the procedure for seeking to intervene, see *Code Civ. Proc. § 387*. For further discussion and forms for use in seeking to intervene, *see* Ch. 395, *Parties* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingThird Party StandingCivil ProcedurePartiesInterventionGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsCivil ProcedureJudgmentsRelief From JudgmentMotions to Vacate

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43-489 California Forms of Pleading and Practice--Annotated § 489.226

§ 489.226 Admissibility of Extrinsic Evidence

Extrinsic evidence is admissible on a direct attack in equity to set aside a judgment on the ground of extrinsic fraud or mistake (defined in §§ *489.243[1]* and *489.244[1]*) [*Sousa v. Freitas (1970) 10 Cal. App. 3d 660,667, 89 Cal. Rptr. 485* ; *Munoz v. Lopez (1969) 275 Cal. App. 2d 178, 183-184, 79 Cal. Rptr. 563]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentFraudEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral Overview

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43-489 California Forms of Pleading and Practice--Annotated § 489.227

§ 489.227 Equitable Jurisdiction

Superior courts are courts of general jurisdiction [*see Cal. Const., art. VI, § 10*]. As such, in unlimited civil cases, they have general jurisdiction to grant equitable relief from a judgment entered through extrinsic fraud or mistake (*defined in §§ 489.243[1]* and *489.244[1]*). This authority to grant equitable relief does not derive from statute but is a power inherent in those courts [*see Baske v. Burke (1981) 125 Cal. App. 3d 38, 43-44, 177 Cal. Rptr. 794* ; *see also In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 149, 133 Cal. Rptr. 583*]. The equitable power of a superior court may be invoked by either a motion in the original action or by a separate independent action [*see, e.g., Weitz v. Yankosky (1966) 63 Cal. 2d 849, 855, 48 Cal. Rptr. 620, 409 P.2d 700* ; *Olivera v. Grace (1942) 19 Cal. 2d 570, 576, 122 P.2d 564* ; *In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 81, 260 Cal. Rptr. 403* ; *In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 149, 133 Cal. Rptr. 583* ; *Neubrand v. Superior Court (1970) 9 Cal. App. 3d 311, 318-319, 88 Cal. Rptr. 586*].

In limited civil cases, courts are granted equitable jurisdiction to vacate a judgment or order rendered by the court from which relief is sought if the judgment or order was obtained through *extrinsic fraud, mistake, inadvertence, or excusable neglect* [*Code Civ. Proc. § 86(b)(3)*; for the meaning of the italicized words, *see* discussion in *§§ 489.243[1]* and *489.244[1*]]. Thus, this jurisdiction is invoked by a motion for relief addressed to the court that rendered the judgment or made the order.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral JurisdictionCivil ProcedureEquityGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent

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43-489 California Forms of Pleading and Practice--Annotated § 489.228

§ 489.228 Competing Public Policies

The public policy underlying the principle of res judicata (discussed in *§ 489.223*), which requires that the issues involved in a case be set at rest by a final judgment, even when a party has persuaded the court or the jury by false allegations supported by perjured testimony, must be considered together with the policy that a party shall not be deprived of a fair adversary proceeding in which fully to present his or her case [*Jorgensen v. Jorgensen (1948) 32 Cal. 2d 13, 18, 193 P.2d 728*].

The terms "intrinsic" and "extrinsic" fraud or mistake are used to describe the two different categories of cases to which these polices of law apply. They do not, however, constitute a simple and infallible formula to determine whether in a given case the facts surrounding the fraud or mistake warrant equitable relief from a judgment [*Jorgensen v. Jorgensen (1948) 32 Cal. 2d 13, 19, 193 P.2d 728* ; *Kachig v. Boothe (1971) 22 Cal. App. 3d 626, 632-634, 99 Cal. Rptr. 393* ; *see also* discussion in *§ 489.246*].

In accord with the competing public policies, a final judgment may be set aside by a court if it is established that extrinsic factors prevented one party to the litigation from presenting his or her case [*In re Marriage of Park (1980) 27 Cal. 3d 337, 342, 165 Cal. Rptr. 792, 612 P.2d 882*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent Actions

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43-489 California Forms of Pleading and Practice--Annotated § 489.229

§ 489.229 Basis of Equity Jurisdiction

The basis of equitable relief is that a party has been deprived of his or her day in court, that is, of a hearing or trial, through no fault of his or her own or of any person whose fault will be attributed to the party, such as his or her attorney or insurance carrier. A condition or event that caused such a deprivation is referred to as extrinsic fraud or mistake (*defined in §§ 489.243[1]* and *489.244[1]*). Conversely, if the deprivation resulted from, for example, the party's negligence, a court will not find extrinsic fraud or mistake, but at most intrinsic fraud or mistake, and will deny relief.

Thus, it has been said that the basis of equitable jurisdiction to interfere with final judgments is the absence of a fair adversary hearing or trial in the original action [*Olivera v. Grace (1942) 19 Cal. 2d 570, 575, 577, 122 P.2d 564* ; *Humes v. MarGil Ventures, Inc. (1985) 174 Cal. App. 3d 486, 499, 220 Cal. Rptr. 186* ; *Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 737, 216 Cal. Rptr. 300*].

Typical of the situations in which equity has interfered with final judgments are the cases in which the lack of a fair adversary hearing in the original action is attributable to matters outside the issues adjudicated that prevented one party from presenting his or her case to the court because of extrinsic fraud or extrinsic mistake [*Olivera v. Grace (1942) 19 Cal. 2d 570, 575, 577-578, 122 P.2d 564* ; *see also De Mello v. Souza (1973) 36 Cal. App. 3d 79, 85, 111 Cal. Rptr. 274*]. Thus, a court may grant equitable relief from a judgment only if, due to the fraud of the opponent or the aggrieved party's own mistake, the aggrieved party was deprived of a fair adversary hearing and was prevented from presenting his or her claim or defense to the court [*De Mello v. Souza (1973) 36 Cal. App. 3d 79, 85, 111 Cal. Rptr. 274*]. The mistake, however, need not be that of the aggrieved party [*see Jorgensen v. Jorgensen (1948) 32 Cal. 2d 13, 18, 193 P.2d 728* (fraud or mistake of the other party); *Baske v. Burke (1981) 125 Cal. App. 3d 38, 44, 177 Cal. Rptr. 794* (mistake of court clerk)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect &

MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent Actions

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43-489 California Forms of Pleading and Practice--Annotated §§ 489.230-489.239

[Reserved]

§§ 489.230[Reserved]

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43-489 California Forms of Pleading and Practice--Annotated § 489.240

§ 489.240 Grounds for Relief

In unlimited civil cases, courts may grant equitable relief from a judgment or order on the grounds of extrinsic fraud or extrinsic mistake(*defined in §§ 489.243[1]* and *489.244[1]*) [*see, e.g., Weitz v. Yankosky (1966) 63 Cal. 2d 849, 855, 48 Cal. Rptr. 620, 409 P.2d 700* ; *Olivera v. Grace (1942) 19 Cal. 2d 570, 578, 122 P.2d 564* ; *Desper v. King (1967) 251 Cal. App. 2d 659, 662-663, 59 Cal. Rptr. 657*].

It has also been said that this relief may be granted on the ground of duress (defined in *§ 489.245*) [*In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 83-84, 260 Cal. Rptr. 403*]. In *Marriage of Baltins*, the appellate court acknowledged, however, that it had found no case stating that it was granting relief solely on the ground of duress, "but this is probably because duress is often characterized as fraud" [*In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 83, 260 Cal. Rptr. 403*]. Moreover, the court affirmed the trial court's order setting aside the property and support provisions of the interlocutory and final judgments of dissolution of marriage on the grounds of duress *and* extrinsic fraud or mistake.

Other grounds mentioned in conjunction with extrinsic fraud or mistake include:

- Excusable neglect [*see, e.g., Davis v. Thayer (1980) 113 Cal. App. 3d 892, 911, 170 Cal. Rptr. 328* ; *see also* definition in *§ 489.44[4*]];

- Accident or extrinsic accident [*see, e.g., Hallett v. Slaughter (1943) 22 Cal. 2d 552, 557, 140 P.2d 3* (*see Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 472 n.2, 82 Cal. Rptr. 489, 462 P.2d 17* , noting that *Hallett* has been criticized by Witkin on other grounds); *Olivera v. Grace (1942) 19 Cal. 2d 570, 575, 122 P.2d 564* ; *In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 80, 260 Cal. Rptr. 403* ; *Baske v. Burke (1981) 125 Cal. App. 3d 38, 43, 177 Cal. Rptr. 794* ; *In re Marriage of Guardino (1979) 95 Cal. App. 3d 77, 87, 156 Cal. Rptr. 883* ; *Turner v. Allen (1961) 189 Cal. App. 2d 753, 757, 11 Cal. Rptr. 630*]; and

- Extrinsic surprise [*Buckert v. Briggs (1971) 15 Cal. App. 3d 296, 300, 302, 93 Cal. Rptr. 61*].

Although *Code Civ. Proc. § 86(b)(3)* (discussed in *§ 489.227[2]*) grants courts jurisdiction in limited civil cases, to vacate judgments or orders obtained "through extrinsic fraud, mistake, inadvertence, or excusable neglect," this jurisdiction to grant equitable relief is coextensive with, and no greater, than that of courts in unlimited civil cases. That is, the jurisdiction is to grant relief in equity on the grounds of extrinsic fraud or mistake only [*Marianos v. Tutunjian (1977) 70 Cal. App. 3d 61, 65, 138 Cal. Rptr. 529*].

The sufficiency of the grounds on which equitable relief is sought is determined according to the same standard, regardless of whether equity is invoked by motion or by an independent action. Therefore, in determining whether a complaint or motion states adequate grounds for equitable relief, the court may properly consider those cases in which equitable relief was sought, either by motion or by independent action [*Olivera v. Grace (1942) 19 Cal. 2d 570, 576, 122 P.2d 564*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent Actions

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43-489 California Forms of Pleading and Practice--Annotated § 489.241

§ 489.241 Extrinsic Defined

The term "extrinsic" refers to matters outside the issues framed by the pleadings, or the issues adjudicated [*Olivera v. Grace (1942) 19 Cal. 2d 570, 575, 577-578, 122 P.2d 564* ; *Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 738, 216 Cal. Rptr. 300*].

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43-489 California Forms of Pleading and Practice--Annotated § 489.242

§ 489.242 Extrinsic Fraud or Mistake Generally

Equity will grant relief against a judgment when extrinsic fraud or mistake deprived the unsuccessful party of an opportunity to fully present his or her case or prevented a fair adversary hearing [*Larrabee v. Tracy (1943) 21 Cal. 2d 645, 649, 134 P.2d 265* ; *see also Harkins v. Fielder (1957) 150 Cal. App. 2d 528, 535-536, 310 P.2d 423*], that is, when because of the fraud or mistake, the aggrieved party was prevented from presenting his or her claim or defense to the court [*see Aheroni v. Maxwell (1988) 205 Cal. App. 3d 284, 291, 252 Cal. Rptr. 369* ; *De Mello v. Souza (1973) 36 Cal. App. 3d 79, 85, 111 Cal. Rptr. 274*].

The terms "extrinsic fraud" and "extrinsic mistake" are given a broad meaning and tend to encompass almost any set of extrinsic circumstances that deprive a party of a fair adversary hearing, and it does not matter if the particular circumstances qualify as fraudulent or mistaken in the strict sense [*In re Marriage of Park (1980) 27 Cal. 3d 337, 342, 165 Cal. Rptr. 792, 612 P.2d 882* ; *see also, e.g., Estate of Sanders (1985) 40 Cal. 3d 607,614, 221 Cal. Rptr. 432, 710 P.2d 232* ; *In re Marriage of Modnick (1983) 33 Cal. 3d 897, 905, 191 Cal. Rptr. 629, 663 P.2d 187* ; *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 558-559, 305 P.2d 20*].

It has been said that in a classic case in equity that seeks to set aside a judgment, two essential conditions are found [*Aheroni v. Maxwell (1988) 205 Cal. App. 3d 284, 291, 252 Cal. Rptr. 369* (quoting *Otani v. Kisling (1963) 219 Cal. App. 2d 438, 442, 33 Cal. Rptr. 239*)]:

- The judgment is one entered against a party by default under circumstances that prevented him or her from presenting his or her case, and

- These circumstances result from extrinsic fraud practiced by the other party or the other party's attorney.

The vital question in such a case is whether the successful party by inequitable conduct, either direct or insidious in nature, lulled the other party into a state of false security, thus causing the latter to refrain from appearing in court or

asserting legal rights [*Aheroni v. Maxwell (1988) 205 Cal. App. 3d 284, 291, 252 Cal. Rptr. 369* (citing *Colich v. United Concrete Pipe Corp. (1956) 145 Cal. App. 2d 102, 107, 302 P.2d 445*)]. However, relief is not limited to those cases. Whether or not the aggrieved party has shown grounds such that equity ought to afford relief must depend on all the facts in each case [*Larrabee v. Tracy (1943) 21 Cal. 2d 645, 649, 134 P.2d 265*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent Actions

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43-489 California Forms of Pleading and Practice--Annotated § 489.243

§ 489.243 Extrinsic Fraud

[1] Defined

Extrinsic fraud as a ground for vacating a judgment is a broad concept that tends to encompass almost any set of extrinsic circumstances that deprive a party of a fair adversary hearing [*In re Marriage of Modnick (1983) 33 Cal. 3d 897, 905, 191 Cal. Rptr. 629, 663 P.2d 187* ; *In re Marriage of Park (1980) 27 Cal. 3d 337, 342, 165 Cal. Rptr. 792, 612 P.2d 882*]. Thus, fraud is extrinsic when it deprives the unsuccessful party of an opportunity to present his or her claim or defense to the court, as, for example, if he or she was kept in ignorance of the action or was fraudulently prevented from fully participating in the proceeding in some manner, other than by his or her own negligence or other fault [*see* *In re Marriage of Modnick (1983) 33 Cal. 3d 897, 905, 191 Cal. Rptr. 629, 663 P.2d 187* ; *Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 471, 82 Cal. Rptr. 489, 462 P.2d 17* ; *see also* *Lopez v. Lopez (1965) 63 Cal. 2d 735, 738, 48 Cal. Rptr. 136, 408 P.2d 744* ; *Olivera v. Grace (1942) 19 Cal. 2d 570, 575, 577, 122 P.2d 564*].

However, actual fraud is not required. Extrinsic fraud that deprives the adversary of a fair hearing may exist though only the result of mistake [*Sousa v. Freitas (1970) 10 Cal. App. 3d 660, 667, 89 Cal. Rptr. 485*]. Moreover, when the fraud consists of misrepresentations, there is no requirement that the misrepresentations be made to the party defrauded [*Harkins v. Fielder (1957) 150 Cal. App. 2d 528, 537, 310 P.2d 423*].

On the other hand, extrinsic fraud or mistake is not established, for example, by the inclusion of patently ambiguous language for division of property in a dissolution judgment, that was based on a marital termination agreement drafted by the attorney for the party claiming equitable relief [*In re Marriage of Dorris (1984) 160 Cal. App. 3d 1208, 1213, 207 Cal. Rptr. 160* (provision that each party will receive "a share" of personal property)].

For when fraud is intrinsic and not a ground for equitable relief, see discussion in *§ 489.246*.

[2] Examples of Extrinsic Fraud

[a] In General

Examples of extrinsic fraud include:

- The opponent's preventing the unsuccessful party by fraud or deception from exhibiting fully his or her case, as by keeping the party away from court, or by a false promise of a compromise; or

- When the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or

- When an attorney fraudulently or without authority assumes to represent a party and connives at the party's defeat; or

- When the attorney regularly employed by a party corruptly sells out the client's interest to the other side.

These and similar cases show that there has never really been a real contest in the trial or hearing of the case and are reasons for which a new suit may be sustained to set aside and annul the former judgment and open the case for a new and fair hearing [*United States v. Throckmorton (1878) 98 U.S. 61, 65-66, 25 L. Ed. 93* ; *Estate of Sanders (1985) 40 Cal. 3d 607, 614, 221 Cal. Rptr. 432, 710 P.2d 232* ; *Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 471, 82 Cal. Rptr. 489, 462 P.2d 17* ; *see also Estudillo v. Security Loan etc. Co. (1906) 149 Cal. 556, 563-564, 87 P. 19* ; *Pico v. Cohn (1891) 91 Cal. 129, 133-134, 27 P. 537* ; *Lovato v. Santa Fe Internat. Corp. (1984) 151 Cal. App. 3d 549, 554-555, 198 Cal. Rptr. 838* ; *Kachig v. Boothe (1971) 22 Cal. App. 3d 626, 633, 99 Cal. Rptr. 393* (quoting *Pico v. Cohn (1891) 91 Cal. 129, 133-134, 27 P. 537*)].

[b] Fraudulent or Negligent Failure to Give Notice

An equitable attack on a final judgment may be made on the ground of extrinsic fraud when it appears that there was a willful failure to give therequired service or that willfully false affidavits of service were filed. Similarly, an independent suit in equity has been allowed when there has been a failure to exercise the degree of diligence required by law in connection with personal service and when false recitals of service were the result of fraud, negligence, or mistake [*Carney v. Simmonds (1957) 49 Cal. 2d 84, 94, 315 P.2d 305* ; *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 558, 305 P.2d 20* ; *see also Sousa v. Freitas (1970) 10 Cal. App. 3d 660, 667, 89 Cal. Rptr. 485* (judgment rendered without legal service of process or legal notice); *Sternbeck v. Buck (1957) 148 Cal. App. 2d 829, 834, 307 P.2d 970* (false return of service filed; improper service of summons renders judgment void)].

With respect to a false return, the rule is the same whether the false return of service resulted from fraud or mistake, because, in either event, the court never acquires jurisdiction over the person of the defendant, who, not being present in court, is not able to combat any intrinsic fraud that may be practiced against him or her [*Swallow v. Tungsten Products Co. (1928) 205 Cal. 207, 212, 219-220, 270 P. 366*].

In cases involving a false return of service, the judgment rendered is void in fact but not void on its face, and relief may be obtained by a timely motion at law directed to the court's inherent power or under *Code Civ. Proc. § 473(d)*. If relief at law is not timely sought, the defendant's only remedy is in equity. For further discussion and examples of void judgments, *see § 489.130* et seq.

[c] Reliance on Fraudulent Representations of Other Party

When one party has willfully misled the other with respect to the other party's need to appear and protect his or her rights and the other party has reasonably relied on that representation, equitable relief from the subsequent judgment will be granted if the other conditions for equitable relief exist [*see Davi v. Belfiore (1957) 153 Cal. App. 2d 325, 327,*

314 P.2d 596 (equitable action for relief from a default judgment)].

[d] Fraudulent Change in Property Settlement Agreement

In some cases, a court will grant equitable relief from a property settlement incorporated in a dissolution of marriage judgment when it is shown that one party fraudulently changed the terms of the oral agreement in reducing it to a written document under circumstances that would excuse the other party from recognizing and contesting the change. For example, when after having agreed orally to pay a particular sum for alimony and child support for an indeterminate period of time, the husband changed the written settlement to provide for the termination of those payments on his remarriage, the court set aside the property settlement on grounds of extrinsic fraud when the evidence revealed that the wife, relying on her attorney and not fully understanding the terms of the agreement, did not have notice of the change in the written document prior to its incorporation in the divorce judgment [*Lopez v. Lopez (1965) 63 Cal. 2d 735, 736-737, 48 Cal. Rptr. 136, 408 P.2d 744*].

[e] Concealment From Party by Fiduciary or Person in Confidential Relationship

When a relationship of trust and confidence exists, the one in whom confidence is reposed is under a duty to make full disclosure of all material facts within his or her knowledge relating to the transaction in question. The disclosure must be full and complete. Any material concealment or misrepresentation will amount to fraud sufficient to entitle the party injured by it to an action [*Estate of Sanders (1985) 40 Cal. 3d 607, 616, 221 Cal. Rptr. 432, 710 P.2d 232*].

For example, the personal representative of an estate is an officer of the court and occupies a fiduciary relationship toward all parties having an interest in the estate [*Estate of Sanders (1985) 40 Cal. 3d 607, 616, 221 Cal. Rptr. 432, 710 P.2d 232*]. A personal representative who is also a residuary legatee has a clear duty to refrain from taking unfair advantage of those with whom he or she deals in the administration of the estate. Thus, if the personal representative leads a beneficiary to believe that a particular distribution will be made in his or her behalf and later changes the proposed distribution, failure to inform the beneficiary of that change in a manner that will allow the beneficiary to appear and contest it constitutes extrinsic fraud that would allow the court to vacate the subsequent distribution decree. Even though notice of the proceedings was properly posted, the personal representative's action would constitute extrinsic fraud, when the personal representative knew that the notice would not alert the beneficiary to the actual need to appear and contest the issue [*Larrabee v. Tracy (1943) 21 Cal. 2d 645, 646-652, 134 P.2d 265*].

The same is true of a party standing in a confidential relationship [*Estate of Sanders (1985) 40 Cal. 3d 607, 615 n.7, 221 Cal. Rptr. 432, 710 P.2d 232*]. A confidential relationship exists when one party gains the confidence of the other and purports to act or advise with the other's interests in mind; it may exist although there is no fiduciary relationship, and is particularly likely to exist when there is a family relationship or one of friendship. Or, put another way, a confidential relationship exists when trust and confidence are reposed by one person in the integrity and fidelity of another. It is not necessary that there be an extended period of business or accommodation transactions or dealings between persons for a confidential relationship to be established between them [*Estate of Sanders (1985) 40 Cal. 3d 607, 615, 221 Cal. Rptr. 432, 710 P.2d 232*].

Thus, the policy permitting a party to seek relief from a judgment applies when the party's adversary, in violation of a duty arising from a trust or confidential relationship, concealed from the party facts essential to the protection of the party's rights. This is so even though such facts concerned issues involved in the case in which the judgment was entered [*Jorgensen v. Jorgensen (1948) 32 Cal. 2d 13, 19, 193 P.2d 728*]. The failure to speak or make disclosures that rests on one because of the trust or confidential relationship is obviously a fraud for which equity may afford relief from a judgment thereby obtained, even though the breach of duty occurs during a judicial proceeding and involves false testimony. This is true whether the fraud is regarded as extrinsic or as an exception to the extrinsic fraud rule [*Estate of Sanders (1985) 40 Cal. 3d 607, 615 n.7, 221 Cal. Rptr. 432, 710 P.2d 232* (reversing order denying motion to set aside court's previous orders admitting will to probate and ordering final distribution); *see also Jorgensen v.*

Jorgensen (1948) 32 Cal. 2d 13, 19, 193 P.2d 728].

Thus, equitable relief has been granted from final judgments settling the accounts of guardians, administrators, or executors who withheld information that would have enabled the beneficiaries to attack the accounts and to decrees distributing a decedent's estate adversely to the rights of beneficiaries who have been precluded from pursuing their rights by the fiduciary's concealment of facts [*Jorgensen v. Jorgensen (1948) 32 Cal. 2d 13, 19-20, 193 P.2d 728* (holding rule inapplicable to case before it); *see also Kachig v. Boothe (1971) 22 Cal. App. 3d 626, 634, 99 Cal. Rptr. 393*].

However, when in a probate proceeding there is no allegation or showing that the complaining party did not receive notice of the proceeding or that some attempt was made to prevent his or her full participation in it, the concealment of the complaining party's interest in the estate to be distributed will not serve as a basis for equitable relief. In that case, the complaining party has every opportunity to present his or her case, and it follows that there is no extrinsic fraud or mistake sufficient to constitute the basis for an attack on the decree in equity [*Westphal v. Westphal (1942) 20 Cal. 2d 393, 397, 126 P.2d 105*].

[f] Concealment From Court or Party of Party's Rights

In some instances, equitable relief from a judgment has been granted when the evidence establishes that the rights and interests of certain parties have been concealed from the court and from the interested party. For example, the invocation of equity on the ground of extrinsic fraud is warranted when an heir or legatee fails to notify the court of the existence of other heirs of whom he or she has knowledge and files false petitions with the court representing that there are no such heirs [*Harkins v. Fielder (1957) 150 Cal. App. 2d 528, 535, 310 P.2d 423*]. Actual or positive fraud, however, is not required, because a mistake made by the distributee that keeps a legatee in ignorance of the true facts or deprives him or her of fair notice of the probate proceedings constitutes a type of extrinsic fraud [*Harkins v. Fielder (1957) 150 Cal. App. 2d 528, 535, 310 P.2d 423*].

Similarly, a final divorce decree may properly be vacated in equity if one spouse proves that the other had secretly obtained the decree after reconciliation and resumption of marital relations [*McGuinness v. Superior Court (1925) 196 Cal. 222, 228-229, 237 P. 42* (parties were cohabiting when decree, which made no division of community property, was entered and continued to cohabit until death of spouse who procured decree); *see also Gale v. Witt (1948) 31 Cal. 2d 362, 365, 188 P.2d 755*]. Moreover, when the parties to a lawsuit fraudulently conceal the existence of an indispensable party in an attempt to obtain a judgment that cuts off the legal rights of that party, the judgment may be vacated [*In re Olivia A. (1986) 181 Cal. App. 3d 237, 241-243, 226 Cal. Rptr. 382* (relief in equity)].

However, when the loss of rights results from the party's failure to investigate and pursue them rather than from the adverse party's active concealment, the courts will deny relief. For example, although a spouse may secure relief from a property settlement agreement obtained through the other spouse's concealment of assets in violation of his or her duty to disclose them, when the ground for relief is merely the mistaken reliance on the other spouse's classification of the fully disclosed assets as either community or separate property, the complaining spouse is barred from obtaining equitable relief by an admission that he or she and his or her attorney did not investigate the facts having had full opportunity to do so [*Jorgensen v. Jorgensen (1948) 32 Cal. 2d 13, 22-23, 193 P.2d 728*].

[g] Concealment From Court of Defendant's Incompetency

Incompetency that is alleged to render a defendant wholly devoid of understanding and incapable of transacting business of any nature is a condition that exists independently of a judicial determination of that fact. When the defendant is under such a legal disability and the plaintiff has knowledge of that condition, a duty rests on the plaintiff to disclose those matters to the court and to have a guardian appointed for the purpose of the proceeding. If the plaintiff knows of the defendant's incompetency, conceals the information from the court, and, to prevent a true adversary

hearing, proceeds to a default judgment by taking advantage of the defendant's condition, that conduct constitutes a fraud on the court as well as on the incompetent defendant. Because the direct effect of the concealment is to prevent the incompetent from presenting whatever defense he or she has to the court, the fraud is extrinsic in nature. If other requirements for equitable relief are present, allegation of such facts is sufficient to state a cause of action in equity to set aside the judgment on behalf of theincompetent [*Olivera v. Grace (1942) 19 Cal. 2d 570, 577, 122 P.2d 564* (equitable action to set aside default judgment)]. In *Olivera*, the Court added that fraud on the plaintiff's part in the former action is not essential in such cases, and that when an adversary hearing has in fact been held, a cause of action for relief in equity can be stated on the ground that extrinsic fraud prevented a fair adversary proceeding [*Olivera v. Grace (1942) 19 Cal. 2d 570, 577, 122 P.2d 564*]. If the plaintiff was not aware of the incompetency and no adversary hearing was had, relief from the judgment might still be had based on extrinsic mistake (*see* discussion in *§ 489.244[3][b]*).

[h] Concealment From Court of Reason for Party's Absence

When a defendant is prevented by forces beyond his or her control from appearing in the action, coupled with the plaintiff's concealment from the court of the facts causing the absence and/or the misrepresentation of those facts to the court, relief in equity may be obtained from the subsequent judgment whether the fraud is characterized as extrinsic or a fraud on the court, if the court's action might have been different had the true facts been properly disclosed.

For example, relief from a divorce judgment was granted to a husband who was unable to appear in his wife's divorce action because he was, while on a business trip, taken prisoner by the Japanese when war broke out between Japan and the United States. The wife, knowing what had happened to her husband, concealed those facts from the court and made positive misstatements of fact in an affidavit to the court concerning the reason for her husband's absence [*Landon v. Landon (1946) 74 Cal. App. 2d 954, 955-958, 169 P.2d 980* (wife's concealment of facts and positive misrepresentations constituted extrinsic fraud on the trial court and a ground for relief from the judgment)].

Similarly, in *In re Marriage of Park (1980) 27 Cal. 3d 337, 165 Cal. Rptr. 792, 612 P.2d 882* , the Supreme Court reversed an order denying the wife's motion to vacate a judgment granting the husband a dissolution of marriage and awarding him substantially all of the community property and custody of the children when it was shown that, after an earlier show cause hearing in which the wife was awarded custody of the children, child support, and exclusive possession of the family home, the wife was arrested and summarily deported to Korea, the husband was well aware of the facts and of the wife's inability to be present but concealed this information from the trial court. The Supreme Court held that the husband had a duty to inform the court of the extrinsic facts that prevented his wife's attendance, and that by concealing those facts, the husband breached his duty of disclosure and perpetrated a fraud on the court as well as on the wife [*In re Marriage of Park (1980) 27 Cal. 3d 337, 343, 165 Cal. Rptr. 792, 612 P.2d 882]* .

Although not entirely clear, it would appear that relief in equity might also be available in the same circumstances based on extrinsic mistake on the ground that the defendant was denied a fair hearing when plaintiff was ignorant of the reason for the defendant's absence and did not make any misrepresentations to the court [*see* *Olivera v. Grace (1942) 19 Cal. 2d 570, 577-578, 122 P.2d 564* ; *see also* *In re Marriage of Park (1980) 27 Cal. 3d 337, 343 n.4, 165 Cal. Rptr. 792, 612 P.2d 882* , *above*, stating that equitable relief could also be given based solely on the wife's deportation and her attorney's appointment as a court commissioner, but that it was not necessary to address this alternative theory for relief in light of the clear presence of extrinsic fraud)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessProofGeneral OverviewCivil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect &

MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral Overview

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43-489 California Forms of Pleading and Practice--Annotated § 489.244

§ 489.244 Extrinsic Mistake

[1] Defined

Like extrinsic fraud, extrinsic mistake deprives the unsuccessful party of an opportunity to present his or her case to the court [*Westphal v. Westphal (1942) 20 Cal. 2d 393, 397, 126 P.2d 105* ; *Lopez v. Superior Court (1986) 178 Cal. App. 3d 925, 934, 223 Cal. Rptr. 798* ; *McCreadie v. Arques (1967) 248 Cal. App. 2d 39, 44 n.3, 56 Cal. Rptr. 188*]. The extrinsic mistake may be that of any of the following:

- The aggrieved party [*see, e.g., Lopez v. Superior Court (1986) 178 Cal. App. 3d 925, 934-935, 223 Cal. Rptr. 798*],

- The adverse party [*see, e.g., Jorgensen v. Jorgensen (1948) 32 Cal. 2d 13, 18, 193 P.2d 728* ; *Olivera v. Grace (1942) 19 Cal. 2d 570, 577-578, 122 P.2d 564*], or

- A third person [*see, e.g., Baske v. Burke (1981) 125 Cal. App. 3d 38, 44, 177 Cal. Rptr. 794*].

"Mistake" has been defined as the doing of an act under an erroneous conviction, which act, but for such conviction, would not have been done. The same reasoning applies to a failure to act, that is, to an omission [*Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 738, 216 Cal. Rptr. 300*].

For when mistake is intrinsic and not a ground for equitable relief, see discussions in *§ 489.246*.

[2] Test to Qualify for Relief

The following stringent three-part test applies to determine whether the court should grant a request for equitable relief from a default judgmenton the grounds of extrinsic mistake [*Rappleyea v. Campbell (1994) 8 Cal. 4th 975, 982, 35 Cal. Rptr. 2d 669, 884 P.2d 126* ; *see Lee v. An (2008) 168 Cal. App. 4th 558, 566, 85 Cal. Rptr. 3d 620* (delay of several years in seeking relief did not demonstrate diligence)]:

- First, the defaulting party must demonstrate that it has a meritorious case.

- Second, it must articulate a satisfactory excuse for not presenting a defense to the original action.

- Third, it must demonstrate diligence in seeking to set aside the default once discovered [*see also* discussion in *§ 489.262*].

For example, in *Rappleyea v. Campbell*, the California Supreme Court reversed a default judgment, finding that the out-of-state in propria persona defendants reasonably relied on the mistake of the court clerk regarding the amount of the filing fee, which ultimately resulted in a default judgment, their defense had merit, and plaintiff's counsel misinformed defendants regarding the law so that it would not be prejudiced by the judgment being set aside [*Rappleyea v. Campbell (1994) 8 Cal. 4th 975, 983-984, 35 Cal. Rptr. 2d 669, 884 P.2d 126*]. The court stressed that its decision was narrowly drawn, based on the clerk's error and the plaintiff's incorrect statement of the law, and not on defendants' self-representation.

It also left open the question of the appropriate test applicable to requests for equitable relief when a default judgment has not been entered.

[3] Examples of Extrinsic Mistake

[a] In General

Extrinsic mistake has been found in the following situations:

- When a party becomes incompetent but no guardian ad litem is appointed (*see* discussion in [b], *below*).

- When one party relies on another to defend (*see §§ 489.361[2]* and *489.430[1]* (form for notice of motion to set aside judgment or order and supporting declaration).

- When there is reliance on an attorney who becomes incapacitated to act (*see* discussion in [c], *below*).

- When a mistake led a court to do what it never intended.

- When a mistaken belief of one party prevented proper notice of the action.

- When the complaining party was disabled at the time the judgment was entered [*Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 471-472, 82 Cal. Rptr. 489, 462 P.2d 17* (citing cases for each example); *see also Stiles v. Wallis (1983) 147 Cal. App. 3d 1143, 1147, 195 Cal. Rptr. 377*].

- When the defendant was incarcerated and unable to attend or to secure an attorney and so notified the court and asked for a continuance [*see Humes v. MarGil Ventures, Inc. (1985) 174 Cal. App. 3d 486, 499-500, 220 Cal. Rptr. 186*].

Other examples include the apparent loss in the mail of an answer on its way to court; the act of the defendant's secretary in placing the summons and complaint in defendant's file, having misunderstood his instruction to send them to his attorney; and the inadvertent failure of an attorney, representing both an individual and a corporation and intending to answer for both, to put the corporation's name on the answer [*see Weitz v. Yankosky (1966) 63 Cal. 2d*

849, 856, 48 Cal. Rptr. 620, 409 P.2d 700 (citing cases for each example); *see also* [d], *below*].

In addition, relief in equity on the ground of extrinsic mistake might be obtained when the mistake is that of the court clerk [*Baske v. Burke (1981) 125 Cal. App. 3d 38, 44, 177 Cal. Rptr. 794* (clerk failed to file letters from elderly defendant as responsive pleading and entered defendant's default for failure to answer)].

Extrinsic mistake may entail an aggrieved party's *excusable neglect* in failing to present his or her claim or defense, thereby resulting in an unjust judgment against him or her without a fair adversary hearing [*Lopez v. Superior Court (1986) 178 Cal. App. 3d 925, 934-935, 223 Cal. Rptr. 798* ; *see also* *Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 471, 82 Cal. Rptr. 489, 462 P.2d 17* ; *In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 83, 260 Cal. Rptr. 403* ; *Jackson v. Bank of America (1986) 188 Cal. App. 3d 375, 386, 233 Cal. Rptr. 162*].

For discussion of when a party may secure relief, based on mistake or extrinsic mistake, from a judgment entered as a result of attorney abandonment, *see § 489.46*.

[b] Disability of Aggrieved Defendant

When the defendant is an unadjudicated mentally incompetent person and there has been no adversary proceeding at all, the right of the incompetent to equitable relief from a default judgment may be established when the plaintiff's ignorance of defendant's legal disability prevented a true adversary hearing as well as when the plaintiff's fraud prevented such a hearing (*see § 489.243[2][g]*). In that case, the ground for relief is extrinsic mistake [*Olivera v. Grace (1942) 19 Cal. 2d 570, 577-578, 122 P.2d 564*].

Relief is not limited, however, to cases in which the aggrieved party is actually incompetent. Relief from a default and default judgment may be available when they resulted from a party's inexperience with the legal system and inability to understand the nature of the documents served[*Berri v. Rogero (1914) 168 Cal. 736, 739, 145 P. 95*]. For example, when the defendant in an equitable motion to set aside a default and interlocutory judgment in a divorce action was a newly arrived immigrant with few friends or relatives and with little or no command of English, the court found extrinsic mistake sufficient to set aside the judgment when these factors resulted in the defendant's having been taken advantage of insofar as the she had not fully understood the legal effect of the summons in the previous action, and thereby forfeited valuable property rights in the default judgment [*Watson v. Watson (1958) 161 Cal. App. 2d 35, 36-39, 325 P.2d 1011*].

The disability of imprisonment has also been found to constitute extrinsic mistake [*Humes v. MarGil Ventures, Inc. (1985) 174 Cal. App. 3d 486, 499, 500, 220 Cal. Rptr. 186*].

[c] Death or Illness of Counsel

The general rule is to charge the client with his or her attorney's negligence. However, if, without the client's knowledge or fault, the attorney becomes physically or mentally incapacitated leading to a damaging result in pending litigation, equity may intervene to set aside the judgment, at least in a situation in which the circumstances could not reasonably have been anticipated or avoided by the exercise of due diligence [*McCreadie v. Arques (1967) 248 Cal. App. 2d 39, 45, 56 Cal. Rptr. 188* (equitable relief from default judgment denied); *Smith v. Busniewski (1952) 115 Cal. App. 2d 124, 127, 251 P.2d 697*].

[d] Attorney's Excusable Mistake or Neglect

The principle that an attorney's neglect is usually not grounds for equitable relief from a judgment applies rigidly to a matter heard on the merits [*Tuck v. Tuck (1968) 264 Cal. App. 2d 743, 746, 70 Cal. Rptr. 822*]. Equity will not grant relief against a judgment at law, when the judgment was obtained in consequence of the attorney's neglect, inattention,

mistake, or incompetency, unless caused by the opposite party [*Tuck v. Tuck (1968) 264 Cal. App. 2d 743, 746, 70 Cal. Rptr. 822* , quoting *Lennefelt v. Cranston (1964) 231 Cal. App. 2d 171, 175, 41 Cal. Rptr. 598*]. Similarly, an attorney's negligence in failing to timely file for new trial or appeal does not constitute extrinsic fraud or mistake that would allow a final judgment rendered after a full adversarial hearing to be set aside in equity [*Tuck v. Tuck (1968) 264 Cal. App. 2d 743, 745, 70 Cal. Rptr. 822*].

Relief may be granted when a default is the result of excusable mistake or neglect on the part of the party's attorney or the attorney's total failure to represent the client, but relief will not be granted when the attorney has not totally failed to represent the client and has been guilty of inexcusable neglect [*Lopez v. Superior Court (1986) 178 Cal. App. 3d 925, 935, 223 Cal. Rptr. 798*]. Likewise, relief should not be granted when the aggrieved party was guilty of inexcusable neglect [*Aheroni v. Maxwell (1988) 205 Cal. App. 3d 284, 293, 252 Cal. Rptr. 369*].

When a clerical or ministerial mistake on the part of the attorney or the attorney's staff has resulted in a default judgment being entered, equity may set the judgment aside if the circumstances surrounding the mistake are deemed excusable. For example, if a default judgment was entered because a properly mailed document failed to reach the clerk's office, the party may be entitled to equitable relief from the judgment [*Hallett v. Slaughter (1943) 22 Cal. 2d 552, 557, 140 P.2d 3* (equitable relief from default judgment; *see* *Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 472 n.2, 82 Cal. Rptr. 489, 462 P.2d 17* , noting that *Hallett* has been criticized by Witkin); *see also* *Turner v. Allen (1961) 189 Cal. App. 2d 753, 759, 11 Cal. Rptr. 630* (equitable relief from default judgment)].

[e] Acts Not Amounting to Actual Fraud

Acts of a party that do not amount to actual or intentional fraud may constitute extrinsic mistake. It is well established that in cases in which the aggrieved party is unable to make out a case of intentional fraud, the courts will extend a liberal interpretation to relieve him or her from a judgment taken without a fair adversary hearing. The basis for equitable relief in these cases, whether referred to as "extrinsic fraud" or "extrinsic mistake," is a situation that has resulted in a judgment taken under circumstances of unfairness and injustice without affording a party the opportunity to participate in the proceedings [*Aldabe v. Aldabe (1962) 209 Cal. App. 2d 453, 475, 26 Cal. Rptr. 208* (collateral attack on foreign divorce judgment in which notices were served on wife's discharged attorney who failed to notify wife, husband's attorney knew of discharge, and both husband and his attorney knew where wife was)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedureCounselGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentFraudFamily LawMarital Termination & Spousal SupportGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral Overview

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43-489 California Forms of Pleading and Practice--Annotated § 489.245

§ 489.245 Duress Defined

Duress includes whatever destroys one's free agency and constrains a person to do what is against the person's will. Duress may be exercised by threat, importunity, or any species of mental coercion. It is shown when a party intentionally used threats or pressure to induce action or inaction to the other party's detriment. The coercion must induce the assent of the coerced party, who has no reasonable alternative to succumbing [*In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 84, 260 Cal. Rptr. 403*].

To determine whether a default judgment, for example, was the product of duress, the courts look not so much to the nature of the threats, but to their effect on the threatened person's state of mind [In re Marriage ofBaltins *(1989) 212 Cal. App. 3d 66, 84, 260 Cal. Rptr. 403* (wife, through extrinsic factor of duress, had been denied fair adversary hearing in dissolution of marriage proceeding by husband's causing her to sign papers providing cause could be tried as uncontested matter without notice)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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43-489 California Forms of Pleading and Practice--Annotated § 489.246

§ 489.246 Intrinsic Fraud or Mistake

[1] Statement of Rule

Courts distinguish between extrinsic and intrinsic fraud or mistake, and the general rule is that only extrinsic fraud or mistake provides a basis for equitable relief [*see Buesa v. City of Los Angeles (2009) 177 Cal. App. 4th 1537, 1545-1547, 100 Cal. Rptr. 3d 86* ; *In re Marriage of Guardino (1979) 95 Cal. App. 3d 77, 88, 156 Cal. Rptr. 883* ; *De Mello v. Souza (1973) 36 Cal. App. 3d 79, 85, 111 Cal. Rptr. 274*]. Hence, equitable relief is normally denied when the fraud or mistake is intrinsic [*see, e.g., Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 472-473, 82 Cal. Rptr. 489, 462 P.2d 17* ; for discussion of relief from a judgment procured by fraud, *see § 489.133*].

[2] Public Policy

The principles of res judicata (discussed in *§ 489.223*) demand that the parties present their entire case in one proceeding. Public policy requires that pressure be brought on litigants to use great care in preparing cases for trial and in ascertaining all the facts. A rule that would permit previously decided cases to be reopened because of error or ignorance during the progress of the trial would in large measure vitiate the effects of the rules of res judicata. Courts deny relief, therefore, when the fraud or mistake is intrinsic, that is, when it goes to the merits of the prior proceedings, that should have been guarded against by the party at that time [*Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 472-473, 82 Cal. Rptr. 489, 462 P.2d 17*].

[3] Reason for Rule

The reason for denying relief when fraud is intrinsic is classically stated as follows [*Kachig v. Boothe (1971) 22 Cal. App. 3d 626, 633, 99 Cal. Rptr. 393* , quoting *Pico v. Cohn (1891) 91 Cal. 129, 133-134, 27 P. 537*]:

> That a former judgment or decree may be set aside, and annulled for some frauds there can be no question; but it must be a fraud extrinsic or collateral to the question examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it

was obtained by forged documents or perjured testimony. The reason of this rule is, that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy...

In all such instances the unsuccessful party is really prevented, by the fraudulent contrivance of his adversary, from having a trial; but when he has a trial, he must be prepared to meet and expose perjury then and there. He knows that a false claim or defense can be supported in no other way; that the very object of the trial is, if possible, to ascertain the truth from the conflict of the evidence, and that, necessarily, the truth or falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear. If, unfortunately, he fails, being overborne by perjured testimony, and if he likewise fails to show the injustice that has been done him on motion for a new trial, and the judgment is affirmed on appeal, he is without remedy. The wrong in such case, is of course a most grievous one, and no doubt the legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied. Endless litigation in which nothing was ever finally determined, would be worse than occasional miscarriages of justice; and so the rule is, that a final judgment cannot be annulled merely because it can be shown to have been based on perjured testimony; for if this could be done once, it could be done again and again *ad infinitum*.

[4] Application of Rule

Application of the rule, however, is not always clear, particularly when the fraud may be classified as either intrinsic or extrinsic, depending on how it is viewed. For example, a false return of service may be considered as intrinsic fraud on the court in that it is a misrepresentation made directly to the court, but extrinsic fraud on the defendant in that it prevents the defendant's participation in the action [*see, e.g., Swallow v. Tungsten Products Co. (1928) 205 Cal. 207, 211-212, 270 P. 366* (suggesting it would be extrinsic); *see also Carney v. Simmonds (1957) 49 Cal. 2d 84, 92-95, 315 P.2d 305* (action for equitable relief from probate decree in which plaintiff was not given special notice, as requested, and did not appear, and administrator represented to court that notice had been given; would be extrinsic fraud)]. Furthermore, the concealment of facts from the court may be both a fraud on the court and a fraud on a nonappearing party [*see,e.g., Harkins v. Fielder (1957) 150 Cal. App. 2d 528, 536, 310 P.2d 423* ; *see also* discussion in *§ 489.243[2][h*]].

[5] Determining Nature of Fraud or Mistake

Whether a case involves intrinsic or extrinsic fraud or mistake is not determined abstractly. Rather, it is necessary to examine the facts in the light of the policy that a party who failed to assemble all his or her evidence at the trial should not be privileged to relitigate a case, as well as the policy permitting a party to seek relief from a judgment entered in a proceeding in which he or she was deprived of a fair opportunity fully to present his or her case [*Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 473, 82 Cal. Rptr. 489, 462 P.2d 17* ; *In re Marriage of Guardino (1979) 95 Cal. App. 3d 77, 89, 156 Cal. Rptr. 883*].

[6] What Constitutes Intrinsic Fraud or Mistake

Fraud or mistake is intrinsic and not a ground for relief if a party has been given notice of the action and has not been prevented from participating in it; that is, if he or she had the opportunity to present his or her case and to protect himself or herself from any mistake or fraud of his or her adversary, but unreasonably neglected to do so [*Westphal v. Westphal (1942) 20 Cal. 2d 393, 397, 126 P.2d 105* ; *In re Marriage of Baltins (1989) 212 Cal. App. 3d 66, 81-82, 260 Cal. Rptr. 403* ; *In re Marriage of Melone (1987) 193 Cal. App. 3d 757, 762, 238 Cal. Rptr. 510* ; *McCreadie v.*

Arques (1967) 248 Cal. App. 2d 39, 44 n.3, 56 Cal. Rptr. 188 ; *see also Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 472, 82 Cal. Rptr. 489, 462 P.2d 17* ; *In re Marriage of Umphrey (1990) 218 Cal. App. 3d 647, 656, 267 Cal. Rptr. 218*].

Having had an opportunity to protect his or her interest, that party cannot attack the judgment once the time for appeal or other direct attack at law has passed [*see Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 472, 82 Cal. Rptr. 489, 462 P.2d 17* ; *Gale v. Witt (1948) 31 Cal. 2d 362, 367, 188 P.2d 755*]. Thus, a judgment normally will not be set aside because of perjured evidence, whether the judgment was obtained by default or after a contested trial [*Buesa v. City of Los Angeles (2009) 177 Cal. App. 4th 1537, 1545-1548, 100 Cal. Rptr. 3d 86* ; *In re Marriage of Guardino (1979) 95 Cal. App. 3d 77, 89, 156 Cal. Rptr. 883*] or because of the use of forged documents [*Jorgensen v. Jorgensen (1948) 32 Cal. 2d 13, 19-20, 193 P.2d 728* ; *Gale v. Witt (1948) 31 Cal. 2d 362, 366, 188 P.2d 755*]. Equitable relief will also be denied when it is sought to relitigate an issue involved in a former action on the ground that allegations or proof of either party was fraudulent or based on mistake. Equitable relief may be granted, however, if the party seeking it was precluded by fraud or the mistake of the other party from participating in the proceeding or from fully presenting his or her case [*Jorgensen v. Jorgensen (1948) 32 Cal. 2d 13, 18, 193 P.2d 728*].

[7] Mutual Mistake

A mutual mistake that might be sufficient to set aside a contract is not sufficient to set aside a final judgment [*Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 472-473, 82 Cal. Rptr. 489, 462 P.2d 17*]. For example, in an equitable motion by the husband to modify a divorce decree on the ground of extrinsic fraud or mistake to relieve him of any liability for certain taxes on the assertion that both spouses were unaware of the repercussions of tax liability with respect to certain properties, the trial court committed reversible error in granting relief when it was established by the evidence that both parties were aware of the assets, full disclosure of the assets had been made during the proceedings, but the complaining party chose not to investigate the taxability of the assets [*Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 472-473, 82 Cal. Rptr. 489, 462 P.2d 17*].

[8] Attorney's Mistake of Law

When a party's attorney knows the facts but mistakenly interprets their legal significance, the mistake is intrinsic and will not warrant relief. An attorney's mistake will not provide the basis for relief unless it was caused by the party's adversary [*Janetsky v. Avis (1986) 176 Cal. App. 3d 799, 811, 222 Cal. Rptr. 342*].

Thus, mistaken legal advice from one's own attorney constitutes intrinsic, rather than extrinsic, mistake and does not justify setting aside a final judgment [*see In re Marriage of Guardino (1979) 95 Cal. App. 3d 77, 93-94, 156 Cal. Rptr. 883* ; *Westinghouse Credit Corp. v. Wolfer (1970) 10 Cal. App. 3d 63, 70, 88 Cal. Rptr. 654* ; *see also Lennefelt v. Cranston (1964) 231 Cal. App. 2d 171, 175, 41 Cal. Rptr. 598* (equitable proceeding to set aside order fixing inheritance tax)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityGeneral OverviewCivil ProcedureCounselGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent Actions

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[Reserved]

§§ 489.247[Reserved]

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43-489 California Forms of Pleading and Practice--Annotated § 489.260

§ 489.260 Time Limitations on Relief From Void Judgments or Orders

No statute of limitations, or any other time limitation, applies to attacks on judgments or orders that are void on their face; they may be attacked anywhere, anytime, directly or collaterally (*see* discussion in *§ 489.141*). Hence, relief is fully available at law and there is no need to resort to equity for relief from such judgments or orders.

Equitable relief is available, however, from a judgment or order that is void in fact but not void on its face. The time within which relief must be sought depends on whether it is sought by an independent action in equity or by equitable motion, as discussed in *§ 489.261*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentIndependent ActionsCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsGovernmentsLegislationStatutes of LimitationsGeneral Overview

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43-489 California Forms of Pleading and Practice--Annotated § 489.261

§ 489.261 Time Limitations on Actions in Equity

[1] Three-Year Statute of Limitations

[a] Fraud or Mistake

When extrinsic fraud or mistake is the gravamen of a suit in equity to vacate, or to secure relief from, a judgment that is not void on its face, the action is governed by the three-year period of limitation set forth in *Code Civ. Proc. § 338(d)*, governing actions for fraud or mistake [*see Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 560, 305 P.2d 20* (action timely); *Estudillo v. Security Loan etc. Co. (1906) 149 Cal. 556, 565, 87 P. 19* (action timely); *Harkins v. Fielder (1957) 150 Cal. App. 2d 528, 538, 310 P.2d 423* (action timely); *see also Zastrow v. Zastrow (1976) 61 Cal. App. 3d 710, 714, 132 Cal. Rptr. 536* (stating rule but holding case governed by four-year statute, discussed under [2], *below*)].

[b] When Action Accrues

Code Civ. Proc. § 338(d) further states that the cause of action is not deemed to have accrued until the aggrieved party discovers the facts constituting the fraud or mistake [*see Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 560, 305 P.2d 20*]. However, the courts have construed this provision to mean that the cause of action accrues when the aggrieved party discovers, or in the exercise of reasonable diligence should have discovered, the facts constituting the fraud or mistake [*see Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 559, 305 P.2d 20*].

[c] Duty to Investigate

As indicated [b], *above*, the aggrieved party must exercise reasonable diligence in discovering the facts constituting the fraud or mistake. However, a party's right to proceed on the theory of fraud is not destroyed merely because opportunities for examination or means of knowledge were open to him or her when no legal duty devolved on the party to employ those means of knowledge. When there is an improper concealment of facts at the time of the transaction and thereafter that causes a party to forego an investigation, the statute of limitations does not commence to run until the party discovers the fraud thereby worked on him or her. In addition, when by reason of representations made to a

defrauded party, the party is dissuaded from making inquiry, he or she is not charged with constructive notice of the contents of public records [*Harkins v. Fielder (1957) 150 Cal. App. 2d 528, 538, 310 P.2d 423* (involving attack on prior probate decree distributing estate)].

Moreover, the existence of a fiduciary relationship between the parties may lessen the plaintiff's duty to make an earlier discovery of the facts [*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 559-563, 305 P.2d 20* (action timely)]. The same is true when there is a confidential relationship between the parties [*Estate of Sanders (1985) 40 Cal. 3d 607, 615, 221 Cal. Rptr. 432, 710 P.2d 232* (involving motion, rather than action, in equity); *see also* discussion in *§ 489.243[2][e*]].

But even absent a fiduciary or confidential relationship, one who speaks is not only obligated to tell the truth but is equally bound not to suppress or conceal any facts within his or her knowledge that materially qualify those stated [*Harkins v. Fielder (1957) 150 Cal. App. 2d 528, 537, 310 P.2d 423*].

In the final analysis, it is a question for the trier of fact to determine whether the delay in the investigation and discovery of the true facts was reasonable and excusable, as the acts of a person of ordinary care and prudence, under the same circumstances [*Harkins v. Fielder (1957) 150 Cal. App. 2d 528, 539, 310 P.2d 423*].

[2] Four-Year Statute of Limitations

When the vacation of a judgment is sought in equity on grounds distinct from fraud or mistake, for example, when it seeks to set aside a marital dissolution judgment and a property settlement agreement incorporated in it on the ground that the defaulting wife was mentally incompetent when she signed the agreement and the appearance, stipulation, and waiver filed in her husband's marital dissolution action, it is subject to *Code Civ. Proc. § 343*, which provides that an action for relief not otherwise provided for must be commenced within four years after the cause of action accrues [*Zastrow v. Zastrow (1976) 61 Cal. App. 3d 710, 714-717, 132 Cal. Rptr. 536* (reversing trial court's ruling that action was barred by three-year statute, and holding that four-year statute applied, and fact that wife delayed suit for almost three and one-half years after regaining her competency did not bar action)].

In holding that mental incompetence was a ground for relief separate from fraud or mistake, the court in *Zastrow* relied on *Olivera v. Grace (1942) 19 Cal. 2d 570, 122 P.2d 564* . *Olivera* distinguished three situations in which relief in equity from a judgment might be granted to an unadjudicated incompetent defendant:

- On the ground of extrinsic fraud when the plaintiff in the prior case knew the defendant was an unadjudicated mentally incompetent person, concealed that information from the court, and, to prevent a true adversary hearing, took a default judgment [*Olivera v. Grace (1942) 19 Cal. 2d 570, 577, 122 P.2d 564* (discussed in *§ 489.243[2][g]*)];

- On the ground of extrinsic fraud, when, under the same facts, an unfair adversary hearing was held [*Olivera v. Grace (1942) 19 Cal. 2d 570, 577, 122 P.2d 564* (discussed in *§ 489.243[2][g]*)]; and

- To the point involved in *Zastrow*, on the ground of extrinsic mistake when there has been no adversary proceeding at all, as in the case before it, and it was plaintiff's ignorance of defendant's legal disability that prevented a true adversary hearing [*Olivera v. Grace (1942) 19 Cal. 2d 570, 577-578, 122 P.2d 564* (discussed in *§ 489.244[3][b]*)].

The court in *Zastrow* failed to explain how this "mistake" is different from the mistake referred to in *Code Civ. Proc. § 338(d)*, discussed in *§ 489.261[1][a]*. Consequently, it is not clear whether, or to what extent, the four-year statute will be held to apply to cases based on extrinsic mistake, arising from some fact other than mental incompetency.

In addition, it should be noted that, unlike *Code Civ. Proc. § 338(d), Code Civ. Proc. § 343* does not contain a delayed discovery rule. Nevertheless, *Zastrow* apparently applied a similar rule by pointing out that the parties agreed that the four-year period commenced to run not from the date the judgment was entered but, rather, from the date the wife regained her competency some two years after the final judgment was entered, and so treating the case. Although the court did not mention it, incompetency that amounts to insanity does toll the statute of limitations [*see Code Civ. Proc. §§ 328, 352*; for a discussion of the several meanings of the term "insanity," *see* Ch. 304, *Insane and Other Incompetent Persons*].

[3] Inapplicability of Reasonable Time Requirement

In *In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 149, 133 Cal. Rptr 583* , the appellate court, quoting *Munoz v. Lopez (1969) 275 Cal. App. 2d 178, 181, 79 Cal. Rptr. 563* , said: "The time limit for the filing of such a motion [equitable motion] or separate suit [in equity] is a reasonable time from discovery of the default judgment irrespective of when it may actually have been entered" (*citing Weitz v. Yankosky (1966) 63 Cal. 2d 849, 48 Cal. Rptr. 620, 409 P.2d 700]* ; *Bennett v. Hibernia Bank 47 Cal. 2d 540, 305 P.2d 20* ; *Hayes v. Risk 255 Cal. App. 2d 613, 64 Cal. Rptr. 36* ; *Fidelity Bank v. Kettler 264 Cal. App. 2d 481, 70 Cal. Rptr. 500]* .

Neither *Coffin* nor *Munoz* discussed the statutes of limitation applicable to equitable actions and both involved equitable motions. The rule quoted is a correct statement insofar as equitable motions are concerned (*see* discussion in *§ 489.262*), but to the extent that it includes equitable actions, it is dictum at most, and its applicability to equitable actions, which are governed by statutes of limitations, is questionable at best [*see, e.g., Zastrow v. Zastrow (1976) 61 Cal. App. 3d 710, 714, 132 Cal. Rptr. 536* (action for equitable relief from marital dissolution decree incorporating property settlement agreement based on mental incompetency held timely when filed almost three and one-half years after plaintiff had been restored to mental competency, during which period there is nothing in the decision to indicate that she did anything to seek relief from the judgment)].

Moreover, the cases cited in *Munoz* and quoted in *Coffin* do not support the rule insofar as it would apply to equitable actions. Both the first and fourth cases cited, *Weitz* and *Fidelity Bank*, involved motions. In *Weitz*, the Court said that "One moving in equity to set aside a default judgment must act diligently in making his motion after he learns of the default judgment" [*Weitz v. Yankosky (1966) 63 Cal. 2d 849, 856-857, 48 Cal. Rptr. 620, 409 P.2d 700*]. *Fidelity Bank* involved a motion to quash an order for appearance of a judgment debtor for lack of service; the court treated the motion as one attacking a void order, and, by applying by analogy the time limitation in *Code Civ. Proc. § 473(b)*, found the motion untimely [*Fidelity Bank v. Kettler (1968) 264 Cal. App. 2d 481, 486, 70 Cal. Rptr. 500* (criticized in *Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1122, 265 Cal. Rptr. 286* , on the ground that it improperly applied the six-month period in *Code Civ. Proc. § 473(b)*], instead of the time limitation in former *Code Civ. Proc. § 473a* [*now Code Civ. Proc. § 473.5(a)*]); for discussion of attacks on void judgments and orders, *see § 489.130* et seq.]. In summarily dismissing equity as a ground for relief, the *Fidelity* court said that the mere use of an affidavit of personal service not in fact true, through some honest mistake of identity or for some reason compatible with good faith, is not extrinsic fraud, nor fraud at all, and that the 13-month delay in seeking relief was "a distinct badge of laches" and barred defendant's right to have the order quashed [*Fidelity Bank v. Kettler (1968) 264 Cal. App. 2d 481, 486-487, 70 Cal. Rptr. 500*]. With respect to a false return of service, the court, apparently, was thinking only of intentional fraud, since a negligently false return of service, insofar as equity is concerned, also constitutes extrinsic fraud or mistake [*see Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 558, 305 P.2d 20* (stating that a direct attack on a judgment is allowed in an independent action in equity when false recitals of service were the result of fraud, negligence, or mistake); *Munoz v. Lopez (1969) 275 Cal. App. 2d 178, 181, 79 Cal. Rptr. 563* (stating that a false recital of service, although not deliberate, is treated as extrinsic fraud or mistake); with respect to the court's use of the term "laches" for diligence, *see* discussion in *§ 489.262[3*]].

The third case cited in *Munoz and Coffin, Hayes v. Risk (1967) 255 Cal. App. 2d 613, 64 Cal. Rptr. 36* , which was an action in equity to vacate and set aside a default judgment and for other relief in a prior action in which summons on a

first amended complaint had been served by publication, does not discuss at all the issue of when an action for equitable relief must be filed, other than to state that the default judgment was entered on July 2, 1963 [*Hayes v. Risk (1967) 255 Cal. App. 2d 613, 620, 64 Cal. Rptr. 36*], the complaint in equity was filed March 19, 1965 [*Hayes v. Risk (1967)255 Cal. App. 2d 613, 621, 64 Cal. Rptr. 36]* , and the complaint alleged that plaintiff first had knowledge that summons on the first amended complaint had been served by publication and the entry of the default judgment on February 19, 1965 [*Hayes v. Risk (1967) 255 Cal. App. 2d 613, 620, 621, 64 Cal. Rptr. 36*].

The second case cited in *Munoz and Coffin, Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 305 P.2d 20* , was a declaratory relief action involving an attack on a prior judgment, in which the Supreme Court reversed the judgment of dismissal entered after the trial court sustained a general demurrer to the complaint. The Court held that equitable relief from the prior judgment was available and that the action, which had been timely filed, was not barred by the three-year statute of limitations [*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 559-560, 305 P.2d 20*]. Neither *Coffin* nor *Munoz* gave point pages for the cases they cited. Nevertheless, there appears to be no discussion in *Bennett* (a 26-page opinion) to the effect that an equitable action for relief must be filed within a reasonable time from discovery of the judgment or that the aggrieved party must act diligently in filing an action for equitable relief. The case merely states, as already pointed out (*see § 489.261[1][a]*), that the statute of limitation for fraud or mistake commences to run when the aggrieved party discovers he or she has a cause of action, or in the exercise of reasonable diligence should have discovered it, and discusses when the aggrieved party is and is not under a duty to make inquiry [*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 559, 563-564, 305 P.2d 20* (holding at p. 561 that the same delayed discovery rule applies to an action for fraudulent conversion)]. *Bennett* mentions diligence in two other situations: (1) relating to the duty imposed on a fiduciary (bank corporation) to discover the identity of a beneficiary (successor in interest to deceased member of bank corporation) [*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 556, 557, 559, 305 P.2d 20*]; and (2) relating to when a direct attack in equity may be made; the Court said: "A direct attck has also been allowed in an independent action in equity when there has been a failure to exercise the degree of diligence required by law in connection with personal service" [*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 558, 305 P.2d 20*]. In support of this statement, the Court cited *Stern v. Judson (1912) 163 Cal. 726, 728* et seq., *127 P. 38* , and a Washington case. *Stern* was talking about the diligence required of a plaintiff to locate the defendant before having summons served by publication, the lack of which diligence could render a judgment void, and it is clear that *Bennett* understood it as such. Consequently, *Bennett* does not support the proposition that an action in equity must be filed within a reasonable time after the fraud or mistake is discovered or that the aggrieved party must act diligently in seeking relief after discovering the judgment.

Notwithstanding that the reasonable time and diligence requirements may not apply to an action in equity, the aggrieved party should nevertheless act diligently in seeking relief once he or she discovers the judgment to avoid the possible defense of laches, discussed under [4], *below.*

[4] Defense of Laches

Laches is prejudice to the adverse party resulting from any delay in seeking relief, and it may be a valid defense to an action for equitable relief. However, one is not barred by alleged laches in failing to discover sooner that his or her rights have been injured by the fraud of another [*Sousa v. Freitas (1970) 10 Cal. App. 3d 660, 667-669, 89 Cal. Rptr. 485* (vacating divorce judgment entered some 46 years before on the ground that it was void for lack of valid service of the summons and complaint on the wife)]. Nor is a plaintiff seeking equitable relief barred by laches when, on learning the facts leading him or her to suspect the fraud or mistake, plaintiff exercised reasonable diligence in the commencement and prosecution of the action [*see In re Marriage of Modnick (1983) 33 Cal. 3d 897, 908-910, 191 Cal. Rptr. 629, 663 P.2d 187* ; *Sullivan v. Lumsden (1897) 118 Cal. 664, 670, 50 P. 777*].

Moreover, it has been held that a plaintiff was not guilty of neglect, laches, and want of diligence precluding relief from a default judgment, although some degree of negligence might be charged to her attorney in failing to discover that an answer had not been filed in the prior action, when her delay in discovering the entry of default was due in part to

defendants' apparently designed and deliberate failure to take earlier action to enforce their judgment, the suit was commenced within a few weeks after plaintiff learned of the extrinsic mistake and was diligently prosecuted by her, and defendants failed to show that they had suffered injury as a result of the delay before plaintiff knew of the mistake [*Hallett v. Slaughter (1943) 22 Cal. 2d 552, 557, 140 P.2d 3* (*see* *Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 472 n.2, 82 Cal. Rptr. 489, 462 P.2d 17* , noting that *Hallett* has been criticized by Witkin)]. *Hallett* has been construed to mean that if the aggrieved party makes a strong showing of diligence in seeking relief after discovery of the facts, and the other party is unable to show prejudice from the delay, the original negligence in allowing the default to be taken will be excused on a weak showing [*Turner v. Allen (1961) 189 Cal. App. 2d 753, 759, 11 Cal. Rptr. 630*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsIncorporation in JudgmentsCivil ProcedureTrialsJury TrialsProvince of Court & JuryCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsGovernmentsLegislationStatutes of LimitationsTime LimitationsTortsProcedureStatutes of LimitationsAccrual of ActionsDiscovery Rule

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43-489 California Forms of Pleading and Practice--Annotated § 489.262

§ 489.262 Time Limitations on Motions in Equity

[1] Reasonable Time Requirement

A motion for relief in equity must be filed within a reasonable time from the date the judgment, or the extrinsic fraud or mistake, was discovered,irrespective of when the judgment was entered [*Rappleyea v. Campbell (1994) 8 Cal. 4th 975, 981, 35 Cal. Rptr. 2d 669, 884 P.2d 126* (equitable motion granted when filed one year from date of default judgment but two months from date defendants discovered correct legal consequences of default); *see also In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 149, 133 Cal. Rptr. 583* (equitable motion granted when it was filed approximately two months after entry of final judgment of dissolution and about eight and one-half months after interlocutory judgment was entered); *Munoz v. Lopez (1969) 275 Cal. App. 2d 178, 181, 79 Cal. Rptr. 563* (equitable motion to vacate default and default judgment for lack of jurisdiction over defendant granted when service of summons was by publication and motion was made more than four years after entry of judgment)]. The same rule applies to statutory motions for equitable relief filed in a municipal court [*Marianos v. Tutunjian (1977) 70 Cal. App. 3d 61, 65, 138 Cal. Rptr. 529*].

Consequently, a judgment is not entitled to the usual conclusive effect when statutory time periods for direct attack have expired. Equitable relief is allowed long after the time for appeal, new trial, or other statutory means of review have expired if the judgment was obtained under circumstances of fraud or mistake that prevented a fair adversary hearing, and the aggrieved party did not have a reasonable opportunity to litigate his or her claim or defense [*Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 737, 216 Cal. Rptr. 300* (equitable motion to vacate order setting aside previous order of dismissal for failure to answer interrogatories when motion was filed almost three years after order was entered); *see also In re Marriage of Guardino (1979) 95 Cal. App. 3d 77, 88, 156 Cal. Rptr. 883*].

[2] Diligence Requirement

The granting of equitable relief on a motion requires not only a showing of the aggrieved party's satisfactory excuse for not having made his or her claim or defense in the original action, but also a showing of his or her diligence in seeking relief after discovery of the facts [*Manson, Iver & York v. Black (2009) 176 Cal. App. 4th 36, 48, 97 Cal. Rptr. 3d 522*

(incorrectly named defendant acted diligently in setting aside void judgment); *Aheroni v. Maxwell (1988) 205 Cal. App. 3d 284, 294, 252 Cal. Rptr. 369*]. Thus, one moving in equity for relief from a judgment or order must act diligently in making the motion after learning of the judgment or order [*Rappleyea v. Campbell (1994) 8 Cal. 4th 975, 981, 35 Cal. Rptr. 2d 669, 884 P.2d 126* ; *Weitz v. Yankosky (1966) 63 Cal. 2d 849, 856-857, 48 Cal. Rptr. 620, 409 P.2d 700* ; *Lee v. An (2008) 168 Cal. App. 4th 558, 566, 85 Cal. Rptr. 3d 620* (delay of several years in seeking relief did not demonstrate diligence)]. The same rule applies to a party seeking equitable relief from an arbitrator's award by opposing the proceeding to confirm the award [*see Humes v. MarGil Ventures, Inc. (1985) 174 Cal. App. 3d 486, 500* (award by Labor Commissioner); *De Mello v. Souza (1973) 36 Cal. App. 3d 79, 85-86, 111 Cal. Rptr. 274* (arbitrator's award)].

In determining whether due diligence has been exercised a court must examine both the time factor and the possible prejudice that might result from setting aside the judgment [*McCreadie v. Arques (1967) 248 Cal. App. 2d 39, 47, 56 Cal. Rptr. 188* ; *see* discussion in [3], *below*].

The failure to show due diligence after discovery of the fraud or mistake, by itself, is fatal and constitutes a bar to the granting of equitable relief [*De Mello v. Souza (1973) 36 Cal. App. 3d 79, 86, 111 Cal. Rptr. 274* (reversing judgment correcting and confirming arbitration award that had been made a year earlier and was claimed, in response to petition for confirmation, to have been erroneously determined and contrary to the stipulation of the parties); *see also Washko v. Stewart (1941) 44 Cal. App. 2d 311, 318, 112 P.2d 306* (party seeking equitable relief by motion as not permitted to wait until more than a year after he admittedly had actual notice of judgment before attacking it)].

However, the primary requirement for granting equitable relief is a satisfactory excuse for not presenting a defense in the original action; diligence is merely a further requirement, not an alternative to the first requirement. If the moving party fails to show extrinsic fraud or mistake, relief will be denied on that ground, and the fact he or she acted diligently in seeking the relief is irrelevant [*see Aheroni v. Maxwell (1988) 205 Cal. App. 3d 284, 294, 252 Cal. Rptr. 369*].

[3] Effect of Prejudice to Opposing Party

Although the requirement that a party act diligently in moving for relief from a judgment or order is sometimes put in terms of laches [*see, e.g., In re Marriage of Modnick (1983) 33 Cal. 3d 897, 908, 191 Cal. Rptr. 629, 663 P.2d 187* ; *In re Marriage of Park (1980) 27 Cal. 3d 337, 345, 165 Cal. Rptr. 792, 612 P.2d 882*], this is not the appropriate doctrine. Laches requires a finding of prejudice to the adverse party caused by the delay, whereas the failure to act diligently in seeking relief is an independent consideration that may defeat the motion for equitable relief, whether or not the other party was prejudiced by any delay [*see Weitz v. Yankosky (1966) 63 Cal. 2d 849, 856-857, 48 Cal. Rptr. 620, 409 P.2d 700*].

Thus, just as lack of prejudice to the other party will not automatically enable one to succeed when moving for relief under *Code Civ. Proc. § 473(b)*, which includes a reasonable time requirement (*see § 489.39[5]*), lack of prejudice will not automatically enable one who failed to timely move for relief under the statute to have the judgment set aside by appealing to the equity powers of the court [*Weitz v. Yankosky (1966) 63 Cal. 2d 849, 857, 48 Cal. Rptr. 620, 409 P.2d 700* ; *Gribin Von Dyl & Associates, Inc. v. Kovalsky (1986) 185 Cal. App. 3d 653, 660-661, 230 Cal. Rptr. 50*]. Accordingly, the adverse party' failure to show any prejudice resulting from the moving party's claimed lack of diligence, although important, is not decisive.

Lack of prejudice is one of the factors the trial court may properly consider in determining whether defendant acted diligently [*Rappleyea v. Campbell (1994) 8 Cal. 4th 975, 983-984, 35 Cal. Rptr. 2d 669, 884 P.2d 126* ; *Weitz v. Yankosky (1966) 63 Cal. 2d 849, 857, 48 Cal. Rptr. 620, 409 P.2d 700* ; *see also Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 740, 216 Cal. Rptr. 300*]. That is, in determining whether the moving party exercised diligence in seeking relief, the court must look to the extent of prejudice to the opposing party and to the reasonableness of the moving party in not filing the motion to vacate earlier [*Rappleyea v. Campbell (1994) 8 Cal.*

4th 975, 983-984, 35 Cal. Rptr. 2d 669, 884 P.2d 126 ; *In re Marriage of Modnick (1983) 33 Cal. 3d 897, 908, 191 Cal. Rptr. 629, 663 P.2d 187* ; *In re Marriage of Park (1980) 27 Cal. 3d 337, 345, 165 Cal. Rptr. 792, 612 P.2d 882*]. The greater the prejudice, the more timely must be the relief sought [*In re Marriage of Modnick (1983) 33 Cal. 3d 897, 908, 191 Cal. Rptr. 629, 663 P.2d 187* ; *McCreadie v. Arques (1967) 248 Cal. App. 2d 39, 47, 56 Cal. Rptr. 188*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataCivil ProcedureJudgmentsRelief From JudgmentFraud

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43-489 California Forms of Pleading and Practice--Annotated § 489.263

§ 489.263 Relationship to Code Civ. Proc. § 473(b) and (d)

[1] Distinct and Cumulative to Proceeding in Equity

Remedies under *Code Civ. Proc. § 473(b)* (discussed in *§ 489.30* et seq.), based on mistake, inadvertence, surprise, or excusable neglect, and a proceeding in equity for relief based on extrinsic fraud or extrinsic mistake are entirely distinct and cumulative [*Otani v. Kisling (1963) 219 Cal. App. 2d 438, 442, 33 Cal. Rptr. 239* (action in equity); *Rose v. Fuqua (1962) 200 Cal. App. 2d 719, 724, 19 Cal. Rptr. 634* (action in equity); *Wilson v. Wilson (1942) 55 Cal. App. 2d 421, 426, 130 P.2d 782* (action in equity)].

However, the mistake, inadvertence, surprise, or excusable neglect that provides a ground for relief under the statute might also constitute, or have been the result of, extrinsic fraud or extrinsic mistake, which would provide a ground for relief in equity. Thus, in discussing motions to vacate defaults and default judgments, for example, the courts often speak of cases under *Code Civ. Proc. § 473(b)*, and those in equity interchangeably, distinguishing between the two primarily on the ground of the six-month time limitation under the statute [*see, e.g.,* *Buckert v. Briggs (1971) 15 Cal. App. 3d 296, 301, 93 Cal. Rptr. 61*]. The primary difference in the grounds for the two motions is that equitable relief is not as a rule available for mistakes of law (*see* discussion in *§ 489.246[8]*).

In addition, a party who seeks relief in equity must normally make a stronger showing than is necessary for relief under *Code Civ. Proc. § 473(b)*. During the period when the statutory relief is available, there is a strong public policy in favor of granting relief and allowing the requesting party his or her day in court. Beyond this period, there is a strong public policy in favor of the finality of judgments and only in exceptional circumstance should relief be granted [*Aheroni v. Maxwell (1988) 205 Cal. App. 3d 284, 291, 252 Cal. Rptr. 369*].

[2] Limitation on Equitable Relief

To the extent that the court's equity power to grant relief differs from its power under *Code Civ. Proc. § 473(b)* (discussed in *§ 489.33*), the court's equity power is narrower than its power under the statute [*Weitz v. Yankosky (1966) 63 Cal. 2d 849, 857, 48 Cal. Rptr. 620, 409 P.2d 700* ; *Jackson v. Bank of America (1986) 188 Cal. App. 3d*

375, 386, 233 Cal. Rptr. 162 ; *Gribin Von Dyl & Associates, Inc. v. Kovalsky (1986) 185 Cal. App. 3d 653, 660, 230 Cal. Rptr. 50*].

[3] Relief From Forfeiture

The superior court has inherent equitable jurisdiction to set aside a default judgment taken under *Health & Safety Code § 11470 et seq.*, forfeiting real property at which drug trafficking had occurred [*see People v. One Parcel of Land (1991) 235 Cal. App. 3d 579, 582, 286 Cal. Rptr. 739* (so holding even though the forfeiture law then included a provision, since removed, that *Code Civ. Proc. § 473* did not apply to it)].

[4] Six-Month or Other Statutory Limitation as Not Barring Equitable Relief That Overlaps Statutory Relief

The six-month limitation set out in *Code Civ. Proc. § 473(b)* (discussed in *§ 489.30* et seq.), does not bar a subsequent equitable motion for relief on the ground of extrinsic fraud or mistake merely because that fraud or mistake might also constitute mistake, inadvertence, surprise, or excusable neglect within the meaning of the statute [*see Desper v. King (1967) 251 Cal. App. 2d 659, 662-663, 59 Cal. Rptr. 657*]. Thus, equitable relief may be available when a defendant fails to seek relief from a judgment, dismissal, order, or other proceeding under *Code Civ. Proc. § 473(b)*, and the six-month period prescribed by that statute has expired [*see, e.g., Rappleyea v. Campbell (1994) 8 Cal. 4th 975, 981, 35 Cal. Rptr. 2d 669, 884 P.2d 126* ; *Weitz v. Yankosky (1966) 63 Cal. 2d 849, 855, 48 Cal. Rptr. 620, 409 P.2d 700* ; *Olivera v. Grace (1942) 19 Cal. 2d 570, 578, 122 P.2d 564* ; *see also* discussion in *§ 489.39[8*]].

This is also true when the time that applies by analogy to a motion under *Code Civ. Proc. § 473(d)*, or to a nonstatutory motion directed to the court'sinherent power at law, to set aside a judgment or order that is void in fact but not void on its face, has expired. That is, equitable relief may still be available (*see* discussion in *§ 489.142[8]*).

[5] Treating Statutory Motion as Equitable Motion

When a party moves for relief solely on the basis of *Code Civ. Proc. § 473(b)*, a court may treat the motion as one for equitable relief [*Billings v. Edwards (1981) 120 Cal. App. 3d 238, 245, 174 Cal. Rptr. 722* ; *Davis v. Thayer (1980) 113 Cal. App. 3d 892, 910, 170 Cal. Rptr. 328* ; *see also People v. One Parcel of Land (1991) 235 Cal. App. 3d 579, 582-583, 286 Cal. Rptr. 739* (motion made under statute but counsel urged court's inherent equitable authority as alternative ground in written reply to People's opposition and at hearing on motion, and trial court granted relief on ground that it was required by "both justice and equity")].

Moreover, a motion for relief under the statute that was not filed within the prescribed six-month period may be treated as a motion addressed to the court's equitable powers when there has been extrinsic fraud or mistake [*see, e.g., Aheroni v. Maxwell (1988) 205 Cal. App. 3d 284, 290, 252 Cal. Rptr. 369* ; *Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 736, 216 Cal. Rptr. 300* ; *Don v. Cruz (1982) 131 Cal. App. 3d 695, 698-699, 182 Cal. Rptr. 581* ; *see also Weitz v. Yankosky (1966) 63 Cal. 2d 849, 856, 48 Cal. Rptr. 620, 409 P.2d 700*]. This is also true of motions for relief filed in a municipal court [*see Marianos v. Tutunjian (1977) 70 Cal. App. 3d 61, 64, 138 Cal. Rptr. 529* (motion to vacate default judgment made approximately seven months after judgment was entered)].

[6] Effect on Equitable Remedy of Denial of Relief Under Statute

When relief under *Code Civ. Proc. § 473(b)*, is denied on procedural or jurisdictional grounds, for example, on the ground that the motion was made more than six months after the judgment, order, or proceeding was entered, made, or taken, the order denying relief is not res judicata, and a subsequent action in equity, or motion for equitable relief filed in the same case, may lie [*Sternbeck v. Buck (1957), 148 Cal. App. 2d 829, 831, 307 P.2d 970* ; *see also Desper v. King (1967) 251 Cal. App. 2d 659, 663, 59 Cal. Rptr. 657*]. This is also true when the aggrieved party at the hearing on the statutory motion did not make a detailed presentation of the issues and oral testimony was not taken [*Rose v.*

Fuqua (1962) 200 Cal. App. 2d 719, 724, 19 Cal. Rptr. 634].

However, to the extent that the grounds were litigated on the merits in the statutory motion, the ruling is res judicata in the subsequent equity proceeding [*Darlington v. Basalt Rock Co. (1961) 188 Cal. App. 2d 706, 10 Cal. Rptr. 556* (involving denial of motion under *Code Civ. Proc. § 473(b)*, to vacate order approving compromise of minor's claim for damages for personal injuries)]. For example, in an action in which the defendant moved for relief from a default judgment on equitable grounds after the court of appeal had already reversed an order granting relief from the judgment, the holding of the appellate court on the prior appeal that the defendant was inexcusably negligent under *Code Civ. Proc. § 473(b)*, was determinative of the negligence issue and thus precluded equitable relief on the ground of extrinsic fraud or mistake [*Jackson v. Bank of America (1986) 188 Cal. App. 3d 375, 386, 233 Cal. Rptr. 162*].

[7] Authority in Equity of Cases Decided Under Statute

Because *Code Civ. Proc. § 473(b)*, empowers courts to grant relief under that statute on such terms as may be just, thereby authorizing the courts to exercise their equitable powers in considering applications for relief under the statute, the reasoning of appellate courts in determining causes based on the statute may be considered, when germane, in determining causes addressed to the court's inherent equity power to vacate or set aside a judgment or order entered because of extrinsic fraud or mistake [*Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 736, 216 Cal. Rptr. 300*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionJurisdictional SourcesStatutory SourcesCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsGovernmentsLegislationStatutes of LimitationsTime Limitations

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43-489 California Forms of Pleading and Practice--Annotated § 489.264

§ 489.264 Meritorious Case Requirement

[1] Equitable Action or Motion for Relief

As a general rule, equity will not interfere with a judgment that is unjust unless it appears that the one whose interests were infringed can present a meritorious case; that is, a good claim or defense, as the case may be. Thus, in an action for equitable relief the plaintiff must plead and prove facts from which it appears, at least prima facie, that if the judgment were set aside and the proceedings reopened, a different result would probably follow [*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 554, 305 P.2d 20* ; *Olivera v. Grace (1942) 19 Cal. 2d 570, 579, 122 P.2d 564* ; *New York Higher Education Assistance Corp. v. Siegel (1979) 91 Cal. App. 3d 684, 688-689, 154 Cal. Rptr. 200*].

The same rule applies to a party seeking equitable relief from a judgment by a motion [*see* *Bailey v. Roberts (1969) 271 Cal. App. 2d 282, 286, 76 Cal. Rptr. 572*] or by opposing a proceeding to confirm an arbitrator's award [*see* *Humes v. MarGil Ventures, Inc. (1985) 174 Cal. App. 3d 486, 500, 220 Cal. Rptr. 186* (involving award by Labor Commissioner)].

For an exception from the meritorious case requirement when the judgment was rendered by a judge who was disqualified from hearing inthe case by reason of a financial interest in it or bias (*Code Civ. Proc. §§ 170.1-170.5*), see discussion in *§ 489.166*. For discussion of the rules that apply when the aggrieved defendant was never served with summons or the service was defective, see [3], *below*.

[2] Showing Required

The requirement of presenting a meritorious case does not require an absolute guarantee of victory. For example, in an action for equitable relief it is enough if the complaint presents facts from which it can be ascertained that the plaintiff has a sufficiently meritorious claim to entitle him or her to a trial of the issue at a proper adversary proceeding [*Olivera v. Grace (1942) 19 Cal. 2d 570, 578-579, 122 P.2d 564*]. For example, if the judgment from which relief is sought is a default judgment entered against an incompetent, the requirement of showing a meritorious defense is satisfied when the complaint for equitable relief alleges that but for the conduct of the present defendant the court in the

former action would have considered testimony of additional witnesses concerning the matter in litigation and would have reached a different conclusion [*Olivera v. Grace (1942) 19 Cal. 2d 570, 580, 122 P.2d 564*].

By the same token, on a motion for equitable relief from a judgment, the moving party does not have to demonstrate with a certainty that a different result would obtain on retrial, but must merely show facts indicating a sufficiently meritorious claim or defense to entitle him or her to a fair adversary hearing [*In re Marriage of Park (1980) 27 Cal. 3d 337, 346, 165 Cal. Rptr. 792, 612 P.2d 882* ; *Crane v. Kampe (1964) 225 Cal. App. 2d 200, 208, 37 Cal. Rptr. 220*]. If the motion seeks relief from a default judgment, a meritorious defense may be shown by either filing with the notice of motion a proposed verified answer negating essential allegations of the complaint or alleging valid affirmative defenses [*see* *Stiles v. Wallis (1983) 147 Cal. App. 3d 1143, 1148, 195 Cal. Rptr. 377*], or by filing a proposed unverified answer and supporting declarations under penalty of perjury showing a meritorious defense [*see* *Bailey v. Roberts (1969) 271 Cal. App. 2d 282, 285-287, 76 Cal. Rptr. 572*], or simply by filing one or more supporting declarations under penalty of perjury showing a meritorious defense [*see* *People v. One Parcel of Land (1991) 235 Cal. App. 3d 579, 582, 286 Cal. Rptr. 739*].

If relief is sought from some other kind of default, for example, one resulting from a failure to answer discovery proceedings, one might show a meritorious claim or defense by completing and submitting with the notice of motion a verified copy of the response to the discovery motion showing that a good cause of action or defense, as the case may be, exists.

[3] Defective Service or Nonservice of Summons

The requirement of showing a meritorious defense as a condition for equitable relief has been held to apply to cases in which the court never acquired jurisdiction over the defendant's person by reason of a defective service of summons or failure to serve the summons at all [*see* *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 554-555, 305 P.2d 20* (and cases there cited); *see also* *New York Higher Education Assistance Corp. v. Siegel (1979) 91 Cal. App. 3d 684, 689, 154 Cal. Rptr. 200*].

However, the United States Supreme Court has held that to require the showing of a meritorious defense on a defendant's motion for relief from a default judgment in an action in which the trial court never acquired personal jurisdiction over the defendant, that is, when the judgment is void for lack of personal jurisdiction, violates procedural due process and cannot constitutionally be required [*see* *Peralta v. Heights Medical Center, Inc. (1988) 485 U.S. 80, 84-87, 108 S. Ct. 896, 99 L. Ed. 2d 75*].

Peralta arose out of a Texas action to recover a sum allegedly due under the defendant's guarantee of a hospital debt incurred by one of his employees, in which a default judgment was rendered for the amount claimed and attorney's fees. Because defendant had not been timely served with summons, the judgment was void under Texas law. The defendant alleged that an abstract of the judgment had been recorded creating a cloud on the title of his real property, and that, unknown to him, a writ of attachment was issued and his real property sold for much less than its true value to satisfy the judgment. Relief was denied in the state court because defendant did not plead a meritorious defense, and he admittedly had none. The Supreme Court explained that an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections, and that failure to give notice violates the most rudimentary demands of due process of law [*Peralta v. Heights Medical Center, Inc. (1988) 485 U.S. 80, 84, 108 S. Ct. 896, 99 L. Ed. 2d 75*]. The Supreme Court found untenable the claim that without a defense the same judgment would again be entered on retrial. The Court said that, as defendant asserts, had he notice of the suit he might have impleaded the employee whose debt had been guaranteed, worked out a settlement, or paid the debt, and that he would have preferred to sell his property himself in order to raise funds rather than to suffer it sold at a constable's auction on execution of the judgment [*Peralta v. Heights Medical Center, Inc. (1988) 485 U.S. 80, 85-87, 108 S. Ct. 896, 99 L. Ed. 2d 75*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 489.265 Burden of Proof

The aggrieved party has the burden of showing good cause for relief from the judgment or order [*see, e.g., Aheroni v. Maxwell (1988) 205 Cal. App. 3d 284, 293, 252 Cal. Rptr. 369* (burden not sustained)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 489.266 Action for Equitable Relief

[1] In General

To maintain an independent action in equity to set aside a judgment, it is not necessary to have first made a motion for that relief in the action in which the judgment was rendered, under either *Code Civ. Proc. § 473(b)* or *(d)* or by an equitable motion; rather, the aggrieved party may seek relief directly by an independent action in equity [*Baker v. Baker (1933) 217 Cal. 216, 217, 18 P.2d 61*]. Sound reasons may exist for filing an action rather than a motion. For example, a party proceeding by motion may be limited to the ex parte affidavits of voluntary witnesses in support of the motion, whereas in a separate action the same party would be entitled to bring unwilling witnesses to court by subpoena and to take their depositions. In light of these differences, the courts have ruled that equity must allow the separate action regardless of any earlier opportunity to move for the same relief in the action in which the judgment was rendered [*Estudillo v. Security Loan etc. Co. (1906) 149 Cal. 556, 564, 87 P. 19*]. If relief in addition to vacating the prior judgment is sought, for example, the imposition of a constructive trust, an action, rather than a motion, would be necessary. An action would also be necessary whenever relief is sought from a court other than that which rendered the judgment.

For forms of complaint in equity to set aside a judgment or order, see *§§ 489.440* and *489.441*.

[2] When Motion May Preclude Independent Action

Moreover, the making of a prior motion for relief may not bar a subsequent action in equity. The mere fact that issues might have been raised on a prior motion to set aside a judgment does not bar presentation of those issues in a later action if, in fact, they were not presented on the motion. But a detailed presentation of the issues of fraud and mistake on a motion to vacate, with full opportunity at the hearing to develop the issues by oral testimony, may bar a subsequent action to set aside the order attacked by the earlier motion [*Darlington v. Basalt Rock Co. (1961) 188 Cal. App. 2d 706, 709-710, 10 Cal. Rptr. 556* (adding that such a bar would not apply when the opportunity to present evidence was withheld in the discretion of the trial court)]. Conversely, there is no bar to an independent action when the motion is heard on affidavits only, thus precluding a full opportunity to develop the issue by oral testimony [*Huff v. Mendoza*

(1980) 109 Cal. App. 3d 677, 681, 167 Cal. Rptr. 348].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 489.267 Denial of Relief

Equitable relief will ordinarily be denied if the court determines that the fraud or mistake is intrinsic and not extrinsic (*see* discussions in *§ 489.246*; *see also* discussion in *§ 489.133*). Relief will also be denied if the complaining party contributed to the fraud or mistake giving rise to the judgment, that is, if the party seeking relief was guilty of negligence in permitting the fraud to be practiced or the mistake to occur [*Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 473, 82 Cal. Rptr. 489, 462 P.2d 17* ; *see also* *Davis v. Thayer (1980) 113 Cal. App. 3d 892, 911, 170 Cal. Rptr. 328* (equitable relief as inappropriate when defaulting defendants were negligent in failing to take any meaningful action to protect themselves after being served with summons and complaint and notice requesting entry of default)].

Relief will also be denied if the aggrieved party fails to present a meritorious case (*see* discussion in *§ 489.264*). In the case of an equitable motion, relief will be denied if the aggrieved party failed to exercise diligence in seeking relief after discovery of the judgment (*see* discussion in *§ 489.262[2]*), and in the case of an equitable action, the action may be barred by the statute of limitations or under the doctrine of laches (*see* in § 489.261), both being affirmative defenses.

Legal Topics:

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

§§ 489.268[Reserved]

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§ 489.280 Related Matthew Bender Publications

For memoranda of points and authorities supporting and opposing proceedings discussed in this chapter, see California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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Servicemembers' Civil Relief Act. *50 U.S.C. App. § 501 et seq.*

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III. RESEARCH GUIDE
A. General Considerations

43-489 California Forms of Pleading and Practice--Annotated § 489.282

§ 489.282 State Statutes

Relief from judgments, dismissals, orders, or other proceedings on ground of mistake, inadvertence, surprise, or excusable neglect. *Code Civ. Proc. § 473(b)*

Relief from void judgments and orders. *Code Civ. Proc. § 473(d)*

Relief from judgment, order, or other proceeding taken against party when court has assumed jurisdiction over law practice of party's attorney. *Code Civ. Proc. § 473.1*

Relief from default or default judgment when service of summons did not result in actual notice to party in time to defend. *Code Civ. Proc. § 473.5*

Relief from a default or default judgment entered without full compliance with certain consumer venue statutes. *Code Civ. Proc. § 585.5*

Appealable judgments and orders. *Code Civ. Proc. §§ 904.1, 904.2*

Relief from judgments entered during period of military service. *Mil. & Vet. Code § 402(d)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsMilitary & Veterans LawServicemembersSoldiers & Sailors

Civil Relief Act

California Forms of Pleading and Practice--Annotated

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43-489 California Forms of Pleading and Practice--Annotated § 489.283

§ 489.283 Decisions

[1] Policy Favoring Trial on Merits

Policy of law favoring finality of judgments does not control when judgment or order set aside was in exercise of discretionary power of court not based on merits of action; recognized policy in such cases requires trial on merits whenever possible, and this policy is basis for enactment of *Code Civ. Proc. § 473*; in giving effect to that policy, appellate courts generally refrain from interfering on jurisdictional grounds with court's reconsideration of discretionary order not based on merits of litigation. *Key System Transit Lines v. Superior Court (1950) 36 Cal. 2d 184, 187, 222 P.2d 867*

When trial court denies motion for relief from default, strong policy in favor of trial on merits conflicts with general rule of deference to trial court's exercise of discretion; unless inexcusable neglect is clear, policy favoring trial on merits prevails; doubts are resolved in favor of application for relief from default, and reversal of order denying relief results. *Tunis v. Barrow (1986) 184 Cal. App. 3d 1069, 1079, 229 Cal. Rptr. 389*

Policy of law is to have every litigated case tried on its merits and looks with disfavor on party who, regardless of merits of his or her case, attempts to take advantage of mistake, surprise, inadvertence, or neglect of his or her adversary; appellate courts are much more disposed to affirm order when result is to compel trial on merits than it is when judgment by default is allowed to stand, and it appears that substantial defense can be made. *Palmer v. Moore (1968) 266 Cal. App. 2d 134, 142, 71 Cal. Rptr. 801*

[2] Discretion of Trial Court

[a] In General

Right to set aside default judgment within six months of entry for inadvertence, mistake, and excusable neglect under *Code Civ. Proc. § 473(b)*, is matter largely within trial court's discretion and is not disturbed on appeal absent clear

showing that discretion has been abused. *Beard v. Beard (1940) 16 Cal. 2d 645, 647, 107 P.2d 385* ; *Monsan Homes, Inc. v. Pogrebneak (1989) 210 Cal. App. 3d 826, 829, 258 Cal. Rptr. 676* (criticized on other grounds in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1608 n.5, 275 Cal. Rptr. 887*)

Trial court's ruling on motion to vacate judgment will only be disturbed on appeal where there is clear showing of abuse of discretion and manifest miscarriage of justice. *Gamet v. Blanchard (2001) 91 Cal. App. 4th 1276, 1283, 111 Cal. Rptr. 2d 439*

Standard of review on appeal of denial of motion for relief from judgment under *Code Civ. Proc. § 473* is abuse of discretion, and court of appeal will not reverse in absence of clear showing of abuse of discretion resulting in injury sufficiently grave as to amount to manifest miscarriage of justice; when two or more inferences can reasonably be deduced from facts, reviewing court has no authority to substitute its decision for that of trial court; burden is on complaining party to establish abuse of discretion, and showing on appeal is insufficient if it presents state of facts which simply affords opportunity for difference of opinion. *In re Marriage of Eben-King & King (2000) 80 Cal. App. 4th 92, 118, 95 Cal. Rptr. 2d 113*

Motion seeking relief under *Code Civ. Proc. § 473(b)* lies within sound discretion of trial court, whose decision will not be overturned absent abuse of discretion. *Khourie, Crew & Jaeger v. Sabek, Inc. (1990) 220 Cal. App. 3d 1009, 1012, 269 Cal. Rptr. 687* ; McCormick v. Board of Supervisors (1988) 198 Cal. App. 3d 352, 359, 243 Cal. Rptr. 617 ; *Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 736, 216 Cal. Rptr. 300*

Use of equitable powers to provide relief from default is within trial court's sound discretion and burden on review rests heavily on appellant to show abuse of discretion or error. *Janetsky v. Avis (1986) 176 Cal. App. 3d 799, 811, 222 Cal. Rptr. 342*

Motion (in equity) to set aside default judgment is addressed to sound discretion of trial court and is not disturbed on appeal absent clear showing of abuse of discretion. *In re Marriage of Guardino (1979) 95 Cal. App. 3d 77, 87, 156 Cal. Rptr. 883* ; *Palmer v. Moore (1968) 266 Cal. App. 2d 134, 142, 71 Cal. Rptr. 801*

[b] Abuse of Discretion

Granting relief under *Code Civ. Proc. § 473(b)*, from dismissal of case is abuse of discretion when trial court characterized attorney's continuous failure to provide court-ordered discovery is grossly negligent and attorney's conduct was not within inexcusable negligence exception, which requires attorney's conduct to be of such extreme degree it amounts to positive misconduct so as to obliterate existence of attorney client relationship. *Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal. 3d 892, 898, 187 Cal. Rptr. 592, 654 P.2d 775*

Trial court abuses discretion in denying relief from default judgment when defendant failed to answer complaint because he believed he had not legally been served with summons, he diligently attacked service by motion to quash it and set aside entry of default, and, being unsuccessful on that motion, diligently sought relief from default judgment by motion under *Code Civ. Proc. § 473(b)*. *Riskin v. Towers (1944) 24 Cal. 2d 274, 277, 148 P.2d 611*

Trial court's exercise of discretion in denying motion to vacate judgment is subject to reversal on appeal where no reasonable basis for trial court's action is shown. *Gamet v. Blanchard (2001) 91 Cal. App. 4th 1276, 1283, 111 Cal. Rptr. 2d 439*

Motion to set aside judgment is addressed to trial court's discretion and is not reversed without clear showing of abuse of that discretion. *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian (1990) 218 Cal. App. 3d 1058, 1077, 267 Cal. Rptr. 457*

On appeal from denial of motion for relief under *Code Civ. Proc. § 473(b)*, on ground of mistake, abuse of discretion is not established in absence of clear showing that injury resulted from wrong sufficiently grave is to amount to manifest miscarriage of justice. *Berris & Seaton v. Meyers (1984) 210 Cal. Rptr. 444*

Burden of proof on appeal of showing abuse of discretion in denying motion for equitable relief from default judgment is on appellant. *McCreadie v. Arques (1967) 248 Cal. App. 2d 39, 48, 56 Cal. Rptr. 188*

[3] Collateral Attack on Judgments and Orders

Proceedings to prohibit or annul judgments of contempt for violation of injunctions and other equitable orders made contrary to statute constitutes permissible forms of collateral attack. *Pacific Mut. Life Ins. Co. v. McConnell (1955) 44 Cal. 2d 715, 727, 285 P.2d 636*

[4] Appeal

[a] In General

On judgment roll appeal, validity of default judgment is determined only by consideration of matters constituting part of judgment roll. *Johnson v. Hayes Cal Builders, Inc. (1963) 60 Cal. 2d 572, 576, 35 Cal. Rptr. 618, 387 P.2d 394*

When notice of motion to set aside default, though ambiguous, was treated in trial court applies both to entry of default and to entry of judgment, Supreme Court does same on appeal. *Luz v. Lopes (1960) 55 Cal. 2d 54, 61, 10 Cal. Rptr. 161, 358 P.2d 289*

[b] Appealable Judgments and Orders

Appeal from order refusing to vacate judgment lies when record available to appellate court on appeal raises issues that are not disclosed or could not be disposed of on appeal from judgment itself. *Rooney v. Vermont Investment Corp. (1973) 10 Cal. 3d 351, 359, 110 Cal. Rptr. 353, 515 P.2d 297*

When law allows appeal from judgment or order, judgment or order is appealable even though void; special order after final judgment is appealable regardless of whether it is void and regardless of whether it is provided for by any of prescribed methods of procedure. *Phelan v. Superior Court (1950) 35 Cal. 2d 363, 366, 370-371, 217 P.2d 951* (overruling *Stanton v. Superior Court (1927) 202 Cal. 478, 261 P. 1001* , cases following it, and *Kahn v. Smith (1943) 23 Cal. 2d 12, 142 P.2d 13* ; *Payne v. Hunt (1932) 214 Cal. 605, 7 P.2d 302*); *see also* *Hensley v. Hensley (1987) 190 Cal. App. 3d 895, 898, 235 Cal. Rptr. 684*

Order denying relief from judgment on arbitration award pursuant to *Code Civ. Proc. § 473*, based on attorney's failure to timely request trial de novo, is appealable. *Brown v. Williams (2000) 78 Cal. App. 4th 182, 185 n.2, 92 Cal. Rptr. 2d 634*

Order denying motion to vacate void judgment is itself void and appealable because it gives effect to void judgment. *Carlson v. Eassa (1997) 54 Cal. App. 4th 684, 691, 62 Cal. Rptr. 2d 884*

Order setting aside void judgment is appealable order. *Jones v. Interstate Recovery Service (1984) 160 Cal. App. 3d 925, 928, 206 Cal. Rptr. 924*

Order granting or denying motion to vacate or set aside void judgment is special order made after entry of judgment and directly appealable. *County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 110, 183 Cal. Rptr. 741*

Order vacating judgment and setting aside default is special order after judgment and appealable. *Baske v. Burke (1981) 125 Cal. App. 3d 38, 43, 177 Cal. Rptr. 794* (motion in equity); *Berman v. Klassman (1971) 17 Cal. App. 3d 900, 902 n.1, 95 Cal. Rptr. 417* (involving judgment entered after noncontested hearing when defendant failed to appear for trial)

Under principle that postjudgment order that affects judgment in some manner or its enforcement, whether it favors judgment creditor or debtor, is appealable, order denying defendant's motion made after judgment to vacate and quash levy of execution and to vacate judgment on ground itwas void is appealable order. *Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 839, 131 Cal. Rptr. 674*

Order denying relief under *Code Civ. Proc. § 473(b)*, from default and default judgment is appealable. *First Small Business Inv. Co. v. Sistim, Inc. (1970) 12 Cal. App. 3d 645, 648, 90 Cal. Rptr. 798*

Order denying relief from judgment on ground of extrinsic fraud or mistake is appealable. *Cope v. Cope (1964) 230 Cal. App. 2d 218, 228-229, 40 Cal. Rptr. 917*

Order vacating defendants' default before any judgment had been rendered against them is not separately appealable, since it is neither final judgment nor order made after final judgment, but is reviewable on appeal from judgment subsequently entered. *Smith v. Los Angeles Bookbinders Union (1955) 133 Cal. App. 2d 486, 498, 284 P.2d 194* , disapproved on other grounds in *Macleod v. Tribune Publishing Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36*

[c] Nonappealable Judgments and Orders

Order denying motion to vacate appealable judgment is generally not appealable if appeal raises only matters reviewable on appeal from judgment. *Rooney v. Vermont Investment Corp. (1973) 10 Cal. 3d 351, 358, 110 Cal. Rptr. 353, 515 P.2d 297*

Order amending order vacating default judgment by striking provision in vacating order setting date for determining value of condemned property is not appealable as special order after final judgment because there is no longer any final judgment in action, and amending order does not affect default judgment but merely recognizes its vacation. *City of San Diego v. Superior Court (1950) 36 Cal. 2d 483, 486, 224 P.2d 685*

Order denying reconsideration of order setting aside default judgment is nonappealable when issues are same as on original motion. *Berman v. Klassman (1971) 17 Cal. App. 3d 900, 902 n.1, 95 Cal. Rptr. 417*

[d] Untimely Appeal

Person who failed to file timely notice of appeal is not always without remedy; for example, when, after rendition of judgment, person entitled to take proceeding looking to reversal or modification of judgment is prevented from doing so by fraud or duress of other party until it is too late, or who is prevented from taking appeal by circumstances over which person has no control is entitled to equitable relief from judgment; such relief is invoked in unusual case of fraud or hardship without interfering with rules governing jurisdiction of appeal. *Hollister Convalescent Hosp., Inc. v. Rico (1975) 15 Cal. 3d 660, 675, 125 Cal. Rptr. 757, 542 P.2d 1349*

[e] Considerations on Appeal

Policy of law favors hearing on merits whenever possible; appellate court is much more disposed to affirm order that compels trial on merits than to allow default judgment to stand. *Weitz v. Yankosky (1966) 63 Cal. 2d 849, 854, 48 Cal. Rptr. 620, 409 P.2d 700* (equitable proceeding); *Aldrich v. SanFernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 737, 216 Cal. Rptr. 300* (same); *Palmer v. Moore (1968) 266 Cal. App. 2d 134, 142, 71 Cal. Rptr. 801* (same)

Standard of review of trial court order refusing to vacate judgment is if any applicable ground will sustain order, ruling will not be disturbed on appeal; any factual conflicts in evidence are resolved in favor of party who prevailed in trial court. *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian (1990) 218 Cal. App. 3d 1058, 1076-1077, 267 Cal. Rptr. 457*

Lower court decision is not overturned merely because it was given for wrong reason; if right on any theory of law applicable to case, lower court decision is required to be sustained regardless of considerations that may have moved trial court to its conclusion. *Aheroni v. Maxwell (1988) 205 Cal. App. 3d 284, 292, 252 Cal. Rptr. 369*

In reviewing evidence in support of motion for relief from default and default judgment under *Code Civ. Proc. § 473(b)*, appellate court extends all legitimate and reasonable inferences to uphold judgment; disposition of motion is largely within trial court's discretion, and is not disturbed on appeal absent abuse of discretion; appropriate test of abuse of discretion, although precise definition is difficult, is whether trial court exceeded bounds of reason, all circumstances before it being considered. *Carrasco v. Craft (1985) 164 Cal. App. 3d 796, 803, 210 Cal. Rptr. 599*

Order denying relief from default is subject to closer appellate scrutiny than one granting relief, and doubts are resolved in favor of party attempting to get to trial; policy of law favors hearing on merits and law looks with disfavor on party who, regardless of merits of case, attempts to take advantage of mistake, surprise, inadvertence, or neglect of adversary. *Lovato v. Santa Fe Internat. Corp. (1984) 151 Cal. App. 3d 549, 554, 555-556, 198 Cal. Rptr. 838*

Appellate courts are favorably disposed toward orders excusing defaults and permitting controversies to be adjudicated on their merits; such orders are rarely reversed and never unless abuse of discretion clearly appears. *In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 148, 133 Cal. Rptr. 583*

[f] Trial on Affidavits (Declarations)

Trial court's resolution of disputed fact issues on basis of affidavits of parties has same standing on appeal is findings based on oral testimony; if affidavits conflict, those favoring prevailing party are accepted as true; because all intendments are in favor of action taken by trial court, affidavits in behalf of successful party are deemed not only to establish facts directly stated therein but all facts reasonably to be inferred from those stated. *In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 149-150, 133 Cal. Rptr. 583*

Rule on appeal when issue is tried on affidavits is that those affidavits favoring contention of prevailing party establish not only facts stated in them but also facts that reasonably may be inferred from them, and if stated facts are in substantial conflict, determination of controverted facts by trial court is not disturbed on appeal. *Wilson v. Eddy (1969) 2 Cal. App. 3d 613, 617-618, 82 Cal. Rptr. 826*

[g] Power of Trial Court After Appeal

Appeal removes from trial court's jurisdiction subject matter of judgment or order appealed from; trial court has no power thereafter to amend or correct its judgment or order, or to vacate it or set it aside. *Takahashi v. Fish and Game Com. (1947) 30 Cal. 2d 719, 725, 185 P.2d 805*

[5] Cross Appeal

Plaintiff's appeal from order vacating default judgment permits defendant to cross appeal from judgment under former Cal. Rules of Ct., Rule 3(c) [*now see Cal. Rules of Ct., Rule 8.108(f)*]; order in which appeals are heard. *Don v. Cruz (1982) 131 Cal. App. 3d 695, 699-700, 182 Cal. Rptr. 581*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionGovernmentsLegislationStatutes of LimitationsTime Limitations

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[Reserved]

§§ 489.284[Reserved]

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1. Mistake, Inadvertence, Surprise, or Excusable Neglect

43-489 California Forms of Pleading and Practice--Annotated § 489.290

§ 489.290 Related Matthew Bender Publications

For memoranda supporting and opposing motions for relief on the ground of mistake, inadvertence, surprise, or excusable neglect, see California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProceduresJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProceduresJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProceduresJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurprise

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43-489 California Forms of Pleading and Practice--Annotated § 489.291

§ 489.291 State Statutes

Relief from judgments, dismissals, orders, or other proceedings on ground of mistake, inadvertence, surprise, or excusable neglect. *Code Civ. Proc. § 473(b)*

Relief from default or default, default judgment, or dismissal based on attorney's affidavit of fault. *Code Civ. Proc. § 473(b), (c)*

Penalties and conditions that may be imposed on granting relief from default or default judgment based on any provisions of *Code Civ. Proc. § 473*. *Code Civ. Proc. § 473(c)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurprise

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43-489 California Forms of Pleading and Practice--Annotated § 489.292

§ 489.292 Decisions

[1] Liberal Construction

Code Civ. Proc. § 473(b) is a remedial statute and is to be construed liberally to favor its object that cases be adjudicated on the merits rather than determined by default. *Standard Microsystems Corp. v. Winbond Electronics Corp. (2009) 179 Cal. App. 4th 868, 894, 102 Cal. Rptr. 3d 140*

Because the law favors disposing of cases on their merits, any doubts in applying *Code Civ. Proc. § 473* must be resolved in favor of the party seeking relief from default. *Fasuyi v. Permatex, Inc. (2008) 167 Cal. App. 4th 681, 696, 84 Cal. Rptr. 3d 351*

Code Civ. Proc. § 473(b), is liberally construed because law strongly favors trial and disposition on merits; any doubts in applying statute are required to be resolved in favor of party seeking relief. *Brochtrup v. INTEP (1987) 190 Cal. App. 3d 323, 329, 235 Cal. Rptr. 390*

[2] Default

[a] In General

Plaintiff's quiet speed in having default entered, though perhaps constituting breach of professional courtesy, does not take away trial court's discretion to grant or deny motion for relief from default, but as merely factor to be considered by trial court in ruling on motion. *Carrasco v. Craft (1985) 164 Cal. App. 3d 796, 807, 210 Cal. Rptr. 599*

Taking default quietly on beginning of first day on which defendant's answer was delinquent without prior notice to defendant's counsel is professional discourtesy that justifies vacating default. *Robinson v. Varela (1977) 67 Cal. App. 3d 611, 616, 136 Cal. Rptr. 783*

[b] Default Judgments

In personal injury action, trial court properly denied defendant's motion under *Code Civ. Proc. § 473(b)* to vacate default judgment because defendant made no showing that default or judgment was taken against it through its mistake, inadvertence, surprise, or excusable neglect. Defendant's insurers were unable to retain counsel to defend it until *Rev. & Tax. Code § 19719*, prohibiting any person from attempting or purporting to exercise powers, rights, and privileges of corporation suspended pursuant to *Rev. & Tax. Code § 23301*, was ruled to provide defense for suspended corporation in civil action was amended. Defendant failed to explain why its insurers waited over two and one-half years to retain counsel to defend it or why its insurers never intervened in action. Evidence showed that defendant and its insurers were aware of claims but neither appeared until the trial court was about to enter default judgments against defendant. *Schwab v. So. Calif. Gas Co. (2004) 114 Cal. App. 4th 1308, 1319-1320, 8 Cal. Rptr. 3d 627*

Code Civ. Proc. § 473(b) did not bar cross-defendants' motion to vacate default judgment entered on cross-complaint for failure to seek relief within six months of entry of judgment, when entry of default was not based on cross-defendants' mistake, but because plaintiff neglected to inform cross-defendants of trial date, court improperly ordered their default for failing to appear at trial apparently without confirming they were notified; plaintiff sought type and amount of damages not specified in their cross-complaint, and court granted request. Motion was governed by *Code Civ. Proc. § 473(d)*, which allows court to set aside void judgment at any time. *Heidary v. Yadollahi, 99 Cal. App. 4th 857, 862, 121 Cal. Rptr. 2d 695*

Trial court abused its discretion under facts of case in striking defendants' pleading and entering default judgment against them for general and compensatory damages for their failure to attend court-ordered deposition pertaining to inquiry into their financial condition pursuant to *Civ. Code § 3295*. *McArthur v. Bockman (1989) 208 Cal. App. 3d 1076, 1080-1081, 256 Cal. Rptr. 522*

Judgment rendered for failure to appear at trial after notice (*see Code Civ. Proc. § 594(a)*) is not default judgment but rather a judgment entered after uncontested trial. *Merrifield v. Edmonds (1983) 146 Cal. App. 3d 336, 341, 194 Cal. Rptr. 104*

When defendant has filed answer, neither clerk nor court has power to enter default based on defendant's failure to appear at trial. *Wilson v. Goldman (1969) 274 Cal. App. 2d 573, 577, 79 Cal. Rptr. 309*

[3] Dismissal of Action

Order granting unopposed motion for summary judgment did not come within mandatory provisions of *Code Civ. Proc. § 473(b)*; mandatory provision applies only to relief sought in response to defaults, default judgments or dismissals, and summary judgments thus are not within purview of mandatory relief provision. *Huh v. Wang (2007) 158 Cal. App. 4th 1406, 1414-1418, 71 Cal. Rptr. 3d 65*

Order granting unopposed motion for summary judgment was not default judgment or dismissal so as to entitle party to mandatory relief under *Code Civ. Proc. § 473(b)* based on attorney error. Further, counsel's flat assertion that he did not receive motion for summary judgment was simply a statement of fact, not an acknowledgment that counsel was at fault in not opposing motion for summary judgment. *Prieto v. LoyolaMarymount University (2005) 132 Cal. App. 4th 290, 294-297, 33 Cal. Rptr. 3d 639*

Extension of mandatory relief for dismissals resulting from attorney error under *Code Civ. Proc. § 473(b)* is not available when judgment of dismissal is for failure to comply with 90-day limitations provisions for commencement of suit and service of summons set forth in *Gov. Code § 66499.37*. *Sprague v. County of San Diego (2003) 106 Cal. App.*

4th 119, 135, 130 Cal. Rptr. 2d 517

"Dismissal" in mandatory provision of *Code Civ. Proc. § 473(b)* does not encompass judgment to which court had determined defendant is entitled as matter of law based on undisputed facts before court, so that summary judgment is not "dismissal" within meaning of *Code Civ. Proc. § 473(b)*. *English v. IKON Business Solutions, Inc. (2001) 94 Cal. App. 4th 130, 136-149, 114 Cal. Rptr. 2d 93*

Trial court abused its discretion in dismissing action when court failed to give consideration to plaintiff's personal and family traumas and court's comments about wanting to "keep heat on" plaintiff and dismissing action shortly thereafter seemed arbitrary and created appearance of substantial unfairness, when plaintiff had received information that was plainly inaccurate as she was not informed that plaintiff's counsel's motion to withdraw had been granted and she needed to retain other counsel immediately, and dismissal continued to list her counsel; although in pro per litigants are not entitled to special exemptions from rules of procedure, they are entitled to equal treatment, and confusing and misleading nature of various orders and communications plaintiff received from trial court was particularly important in light of her involuntary in pro per status. *Gamet v. Blanchard (2001) 91 Cal. App. 4th 1276, 1283, 111 Cal. Rptr. 2d 439*

Mandatory relief provision of *Code Civ. Proc. § 473(b)* did not apply when counsel's declaration concerning his inexcusable neglect in filing fourth amended complaint presented no answer to issues posed by plaintiff's motion for leave to amend or by defendants' motion to strike fourth amended complaint and dismiss, since plaintiffs could only use counsel's declaration of fault as basis for vacating entered dismissal, while court could not enter dismissal until it had exercised its informed discretion on basis of showings made in support of pending motions; further, court could not say that plaintiffs' attorney's conduct deprived them of their day in court since proposed amendment, which did not address all issues previously raised by trial court, would not necessarily have allowed plaintiffs to proceed to trial. *Leader v. Health Industries of America, Inc. (2001) 89 Cal. App. 4th 603, 615-621, 107 Cal. Rptr. 2d 489*

"Dismissal" within meaning of *Code Civ. Proc. § 473(b)* does not include judgment of dismissal for failure of plaintiff to comply with statute of limitations, hence, relief is unavailable under *Code Civ. Proc. § 473* in those circumstances. *Castro v. Sacramento County Fire Protection Dist. (1996) 47 Cal. App. 4th 927, 929, 934, 55 Cal. Rptr. 2d 193*

Trial court has jurisdiction, even after voluntary dismissal with prejudice is filed, to vacate judgment of dismissal under *Code Civ. Proc. § 473(b)*, when it was entered is result of plaintiff's mistake, inadvertence, surprise, or excusable neglect. *Basinger v. Rogers & Wells (1990) 220 Cal. App. 3d 16, 21, 269 Cal. Rptr. 332*

[4] Claims Against Public Entities

Showing required for relief from failure to file timely claim against public entity (*Gov. Code §§ 911.4, 911.6*) on grounds of mistake, inadvertence, surprise, or excusable neglect is same as that required under *Code Civ. Proc. § 473(b)*. *Torbitt v. State of California (1984) 161 Cal. App. 3d 860, 864, 208 Cal. Rptr. 1*

[5] Settlements

No rule of law gives appellate court carte blanche to set aside "unjust" settlement; motion under *Code Civ. Proc. § 473* to vacate stipulated judgment based on settlement agreement is not governed by same standards applicable to judgments incurred through excusable neglect; when parties by their own agreement, while represented by counsel, and after protracted negotiation, settled litigation, policies of law of contract, which favors enforcement of valid bargains between private parties, and of settlements, which favors private resolution of disputes, and of finality of judgments prevail. *Philippine Export & Foreign Loan Guarantee Corp. v. Chuidian (1990) 218 Cal. App. 3d 1058, 1075-1076, 267 Cal. Rptr. 457*

[6] Grounds for Relief

[a] In General

In action against medical providers based on plaintiffs' mother's death in nursing home, trial court properly denied relief under discretionary portion of *Code Civ. Proc. § 473(b)* to set aside order dismissing complaint for failure to timely amend on basis of mistake, inadvertence, surprise, or excusable neglect, when plaintiff's mistake of law was unreasonable, and where plaintiffs' inaction after remand appeared to trial court to be intentional conduct rather than mistake, inadvertence, surprise, or neglect. Trial court also properly denied relief under mandatory portion, when trial court did not believe failure to timely file amended complaint was due to mistake, inadvertence, surprise, or neglect, but was instead knowing and intentional conduct. *Pagarigan v. Aetna U.S. Healthcare of California, Inc. (2007) 158 Cal. App. 4th 38, 43-46, 69 Cal. Rptr. 3d 627*

Personal injury plaintiff's self-representation was not grounds for relief from judgment against him when mistake was not mistake of law but mistake of judgment; there is no authority for relieving litigant from consequences of mistake in judgment when choosing to act as his or her own attorney. *Burnete v. La Casa Dana Apartments (2007) 148 Cal. App. 4th 1262, 1267-1268, 56 Cal. Rptr. 3d 437*

Trial court correctly concluded that defendants' Portuguese lawyer was attorney whose affidavit of fault entitled his clients to relief under *Code Civ. Proc. § 473(b)*. *Rodrigues v. Superior Court (2005) 127 Cal. App. 4th 1027, 1033-1037, 26 Cal. Rptr. 3d 194*

Trial court was not required to grant relief from dismissal of interpleader action under mandatory portion of *Code Civ. Proc. § 473(b)* based on client's failure to file claims in interpleader action due to attorney neglect, when counsel did not file affidavit of fault, but rather attorney's first declaration chiefly authenticated documents filed in support of motion for relief from dismissal and second declaration stated only that counsel lacked authority to dismiss on client's behalf affirmative claims not then on file in instant proceeding, and neither declaration contained any sworn admission of mistake, inadvertence, surprise or error resulting in dismissal of claims. Attorney's affirmation of contents of legal memorandum were not adequate to satisfy requirement of attorney's sworn affidavit attesting to fault within meaning of *Code Civ. Pro. § 473(b)*, when it contained no concession of error on attorney's part. *State Farm Fire & Casualty Co. v. Pietak (2001) 90 Cal. App. 4th 600, 608-610, 109 Cal. Rptr. 2d 256*

Although attorney affidavit of fault makes relief mandatory under *Code Civ. Proc. § 473(b)* from default judgment or dismissal, it does not mandate relief from judgment entered on arbitration award unless the client was denied hearing; in this case, attorney negligence consisted of failing to timely request trial de novo after arbitration award in defendants' favor, so relief was not mandated; further, award resulted from arbitration hearing in which plaintiff and her attorney actually participated, and denial ofdiscretionary relief was not error. *Brown v. Williams (2000) 78 Cal. App. 4th 182, 92 Cal. Rptr. 2d 634*

Mandatory language of *Code Civ. Proc. § 473(b)*, requiring that default judgment be set aside when application for relief is accompanied by attorney's affidavit attesting to his or her error, was not applicable to attorney's failure to make timely request for trial de novo after judgment was entered on arbitrator's award; rather, judgment was governed by discretionary provisions of section. *Ayala v. Southwest Leasing & Rental, Inc. (1992) 7 Cal. App. 4th 40, 44, 8 Cal. Rptr. 2d 637*

Relief is granted when default is result of excusable mistake or neglect on part of party's attorney or attorney's total failure to represent client; relief is not granted if attorney has not totally failed to represent client, but has been guilty of inexcusable neglect. *Lopez v. Superior Court (1986) 178 Cal. App. 3d 925, 935, 223 Cal. Rptr. 798*

When defendant, with full knowledge of proceedings, obtained extension of time within which to answer, but failed to answer because it was considering filing petition in bankruptcy, trial court's refusal to vacate default taken against defendant is proper under *Code Civ. Proc. § 473(b)*. *Northridge Financial Corp. v. Hamblin (1975) 48 Cal. App. 3d 819, 824, 122 Cal. Rptr. 109*

When answer was mailed on last day before time to answer expired and default was taken before answer reached clerk, defense attorney's unexplained delay in discussing settlement with client and preparing answer until next to last day is insufficient showing to entitle defendant to relief under *Code Civ. Proc. § 473(b)*. *A & B Metal Products v. MacArthur Properties, Inc. (1970) 11 Cal. App. 3d 642, 648, 89 Cal. Rptr. 873*

[b] Mistake

Trial court abused its discretion in denying motion for relief from default based on paralegal's mistake in calendaring order to show cause hearing so that attorney failed to appear and trial court ordered attorney's client's answer stricken; attorney is responsible for supervising work of legal assistants and paralegal's error was attributable to attorney for purposes of *Code Civ. Proc. § 473(b)*. *Hu v. Fang (2002) 104 Cal. App. 4th 61, 64-66, 127 Cal. Rptr. 2d 756*

Trial court did not abuse its discretion in vacating plaintiff's voluntary dismissal of action against county based on plaintiff's mistaken belief that on dismissal county would cooperate with development of real property under ground lease, when trial court could have inferred that plaintiff was mistaken as to county's general intent to cooperate and acted under erroneous conviction that county wanted plaintiff to proceed with development. *H. D. Arnaiz, Ltd. v. County of San Joaquin (2002) 96 Cal. App. 4th 1357, 1368-1369, 118 Cal. Rptr. 2d 71*

Trial court abused its discretion in denying motion for relief from dismissal under *Code Civ. Proc. § 473(b)* of interpleader action brought by insurer against insured and bank, when insured's failure to file cross-complaint in interpleader action and instead filing independent action in federal court was attributable to attorney's reasonable misinterpretation of interpleader statute [*Code Civ. Proc. § 386*] that led attorney to conclusion that filing cross-complaint was not compulsory under *Code Civ. Proc. § 426.30*, even though counsel failed to consult compulsory cross-complaint statute. *State Farm Fire & Casualty Co. v. Pietak (2001) 90 Cal. App. 4th 600, 611-615, 109 Cal. Rptr. 2d 256*

Code Civ. Proc. § 473(b), has no application to judicial mistakes, but only to mistake, inadvertence, surprise, or excusable neglect of moving party; in that defendant cannot participate in default judgment hearing, any action taken at that hearing cannot possibly result from any mistake by defendant, thus, award of excessive damages in default judgment is "mistake" by court. *Don v. Cruz (1982) 131 Cal. App. 3d 695, 702, 182 Cal. Rptr. 581*

Defendants' attorney's mistaken belief as to rules governing attorney's fees on default matters in county in which plaintiff brought action does not require that defendants' default be vacated. *A & S Air Conditioning v. John J. Moore Co. (1960) 184 Cal. App. 2d 617, 620, 7 Cal. Rptr. 592*

[c] Inadvertence

Inadvertence presupposes mistake or negligence of one degree or another, either excusable or inexcusable under particular facts of case. *Westinghouse Electric Corp. v. Superior Court (1983) 143 Cal. App. 3d 95, 108-109, 191 Cal. Rptr. 549*

When defendant placed summons and complaint in general file and inadvertently failed to make notation of it and there was no indication that he did not understand nature of papers or any indication that acts of any third person intervened, contributing to inadvertence, such inadvertence is mere forgetfulness not entitling defendant to relief. *Kooper v. King*

(1961) 195 Cal. App. 2d 621, 627, 15 Cal. Rptr. 848

[d] Surprise

Surprise was not grounds for relief from dismissal under *Code Civ. Proc. § 473(b)* in interpleader action brought by insurer against insured and bank, when, after insured stipulated to disbursement of deposited funds, he received copy of letter by insurer to clerk of court requesting filing of enclosed request for dismissal as soon as funds had actually been disbursed, and insured made no objection, so that it could be inferred that trial court concluded insured anticipated insurer would dismiss interpleader once deposited funds had been disbursed so that dismissal was not unexpected, which was reasonable inference. *State Farm Fire & Casualty Co. v. Pietak (2001) 90 Cal. App. 4th 600, 611, 109 Cal. Rptr. 2d 256*

Under *Code Civ. Proc. § 473(b)*, surprise is some condition or situation in which a party is unexpectedly placed to his or her injury, without any fault or negligence of his or her own, which ordinary prudence could not have guarded against. *Credit Managers Ass'n v. National Indep. Bus. Alliance (1984) 162 Cal. App. 3d 1166, 1173, 209 Cal. Rptr. 119* ; *Lint v. Chisholm (1981) 121 Cal. App. 3d 615, 620, 177 Cal. Rptr. 314* ; *Hodge Sheet Metal Products v. Palm Springs Riviera Hotel (1961) 189 Cal. App. 2d 653, 656-657, 11 Cal. Rptr. 435*

[e] Excusable Neglect

"Excusable neglect," in context of ruling on motion for relief from default judgment under *Code Civ. Proc. § 473(b)*, encompasses mistake, inadvertence, and surprise. *Iott v. Franklin (1988) 206 Cal. App. 3d 521, 528 n.8, 253 Cal. Rptr. 635*

Defendant's neglect in failing to file answer is not ground for relief under *Code Civ. Proc. § 473(b)*, when failure was based on defendant's wrongful belief that case was moot and that it was under no obligation to answer. *Jackson v. Bank of America (1983) 141 Cal. App. 3d 55, 58, 190 Cal. Rptr. 78*

[f] Failure to Notify Opposing Counsel of Intent to Take Default

If a plaintiff's counsel knows the identity of the lawyer representing a defendant, he or she owes an ethical obligation to warn before requesting entry of the defendant's default. *Fasuyi v. Permatex, Inc. (2008) 167 Cal. App. 4th 681, 696, 84 Cal. Rptr. 3d 351*

Plaintiff's counsel is under no legal obligation to give notice of impending default toattorney who represented defendant in another case in which the two attorneys were adversaries, although counsel should have done so as matter of professional courtesy; failure to give notice does not require court to set aside default, although, by taking default without notice, counsel takes risk that court would grant relief. *Bellm v. Bellia (1984) 150 Cal. App. 3d 1036, 1038, 198 Cal. Rptr. 389*

While no statute or rule requires plaintiff's attorney to notify defendant's attorney that he or she intends to take default, failure to do so usually is sufficient ground for setting default aside on motion under *Code Civ. Proc. § 473(b)*. *Nelson v. Southerland (1960) 187 Cal. App. 2d 140, 142, 9 Cal. Rptr. 735*

[g] Insurer's Neglect

Unexcused neglect of insurance carrier in failing to defend insured defendant is imputed to defendant. *Don v. Cruz*

(1982) 131 Cal. App. 3d 695, 699, 182 Cal. Rptr. 581

[h] Attorney's Error or Omission

Trial court did not abuse its discretion in denying discretionary relief under *Code Civ. Proc. § 473(b)* based on plaintiff's failure to appear at all in opposition to summary judgment motion on grounds of unexplained delay or inexcusable neglect, when plaintiff did not act diligently in seeking relief based on length of delay in seeking relief since triggering event for seeking relief from judgment was notice of its entry, and plaintiff waited to file his motion until more than three months later and plaintiff offered no evidence explaining delay in seeking relief; and when plaintiff failed to carry burden of establishing entitlement to relief from judgment since counsel being overwhelmed and disorganized, misfiling summary judgment motion among completed items and not calendaring hearing date or due date of opposition was not excusable neglect because there was no clerical mistake or extraordinary circumstance. *Huh v. Wang (2007) 158 Cal. App. 4th 1406, 1420-1425, 71 Cal. Rptr. 3d 65*

Attorney who brought action on attorney's own behalf in pro per and on behalf of others as taxpayer in representative capacity was not entitled to mandatory relief under *Code Civ. Proc. § 473(b)*, when mandatory relief provision of that section applied only in case of attorney representing client, and where, as to aspect of bringing action on behalf of other taxpayers, if attorney bound other taxpayers by action, attorney did so as fellow taxpayer, not as attorney for taxpayers. *Esther B. v. City of Los Angeles (2008) 158 Cal. App. 4th 1093, 1099-1100, 70 Cal. Rptr. 3d 596*

In dispute over termination of partnership for operation of hotel, trial court properly denied plaintiff relief under *Code Civ. Proc. § 473(b)* based on attorney's failure to file timely opposition to motion to enforce settlement agreement, and plaintiff's tardiness in filing his own motion to enforce, which trial court declined to consider; attorney fault provision in *Code Civ. Proc. § 473(b)* did not apply to attorney's failure to timely file opposition and cross-motion to motion to enforce settlement. *Hossain v. Hossain (2007) 157 Cal. App. 4th 454, 457-459, 69 Cal. Rptr. 3d 356*

In action on sublease, defendants were entitled under *Code Civ. Proc. § 473(b)* to mandatory relief from defaults entered by court after striking defendants' answer as sanction for failure to comply with discovery order and from resulting default judgment, based on attorney's affidavit of fault, when default judgment was "default judgment" within meaning of statute, and when defendant's attorney's declaration stated that, due to his own neglect, he had failed to file opposition to discovery motions, failed to attend hearing on those motions, failed to inform defendants of discovery order against them, failed to file opposition to motion for terminating sanction, and failed to attend hearing on that motion, and attorney's neglect was sole cause of defendants' failure to comply with discovery order resulting in terminating sanction. Plaintiffs or their counsel were entitled to recover from attorney reasonable compensatory legal fees and costs necessitated by his neglect [*Code Civ. Proc. § 473(b)*], and trial court on remand could impose sanctions and grant other relief provided by *Code Civ. Proc. § 473(c)(1)*. *Matera v. McLeod (2006) 145 Cal. App. 4th 44, 62-68, 51 Cal. Rptr. 3d 331*

Defendants whose attorney did not inform them of trial date were not entitled to have amended judgment issued after uncontested trial set aside under *Code Civ. Proc. § 473(b)*, because judgment was not "default," "default judgment," or "dismissal" within meaning of *Code Civ. Proc. § 473(b)*, and uncontested trial in their absence and resulting judgment were not procedural equivalent of default. *Vandermoon v. Sanwong (2006) 142 Cal. App. 4th 315, 319-321, 47 Cal. Rptr. 3d 772*

Affidavit of fault signed by attorney who represented partnership in bankruptcy proceeding but not in civil action against city was competent to support partnership's motion in civil action for mandatory relief under *Code Civ. Proc. § 473(b)*, when attorney's declaration made clear his fault lay in not appearing at order to show cause hearing in spite of fact that he had not been retained to represent partnership in civil action because of his belief that court could take no action in civil action based on stay obtained in bankruptcy proceeding. *SJP Limited Partnership v. City of Los Angeles*

(2006) 136 Cal. App. 4th 511, 516-520, 39 Cal. Rptr. 3d 55

Trial court properly refused to grant plaintiffs mandatory relief under *Code Civ. Proc. § 473(b)* from dismissal based on granting of motion for terminating sanctions based on plaintiffs' failure to respond to discovery requests or oppose motions to compel discovery or terminating sanctions, when plaintiffs' attorneys regularly failed to respond to discovery when due without informing other side or seeking extension, attempts by opposing counsel to discuss or "meet and confer" were ignored, giving opposing counsel no choice but to go to trouble and expense of preparing and filing motion to compel, which still did not engender response, and, while plaintiffs' counsel did not oppose such motions, neither did they concede, drawing court into conflict, wasting judicial resources and, in case of appointed referee, leading to further expense, and when order issued compelling responses, plaintiffs' counsel defied that too, leading to second go round of each step; and when ultimate sanction of dismissal reared its head, plaintiffs' counsel's obvious plan was to claim attorney fault and revive claims through Section 473(b) motion for relief. *Jerry's Shell v. Equilon Enterprises, LLC (2005) 134 Cal. App. 4th 1058, 1069-1074, 36 Cal. Rptr. 3d 637*

In action by California Attorney General against attorney to make attorney stop filing shakedown lawsuits against small businesses under the unfair competition law, trial court was within its discretion to enter default judgment against attorney and to conclude that attorney had not shown excusable neglect or genuine surprise, mistake or inadvertence to justify relief under *Code Civ. Proc. § 473(b)* and excuse his failure to answer after his demurrer was overruled based on his answer being stolen out of his home mailbox; claim of lost mail is not grounds for automatic relief from a default judgment, and, although attorney provided trial court with series of anecdotes suggesting mail theft from his home mailbox and other mailboxes in his neighborhood, he failed to specify dates, and trial court was justified in concluding that attorney knew of risks of putting mail out for collection in his neighborhood prior to putting his answer in theft-prone mailbox, and proceeded without due regard for known risk; alternatively, given vagueness of attorney's declaration, trial court could reasonably conclude he was being untruthful in asserting story that could not be disproved; and even assuming attorney was truthful in his declaration, absence of conformed copy of his answer should have put him on notice something was wrong and needed correction. *People ex rel. Lockyer v. Brar (2005) 134 Cal. App. 4th 659, 662-664, 36 Cal. Rptr. 3d 272*

Trial court erred in denying motion for relief from entry of default judgment under *Code Civ. Proc. § 473(b)* and showing of attorney fault was sufficient, when attorney's declarations explicitly absolved his clients from any responsibility for failure to answer complaint, and although attorney admitted that failure to answer was not accidental or inadvertent, but was calculated result of his mistaken suppositions about settlement possibilities, statute did not require unintentional failure to act, and client was entitled to relief when attorney admitted inaction was his responsibility. *Solv-All v. Superior Court (2005) 131 Cal. App. 4th 1003, 1008-1012, 32 Cal. Rptr. 3d 202*

Trial court properly concluded that counsel's mistake or neglect caused entry of default and granted relief from default and default judgment, when record did not contain disclaimer of attorney fault, and it would have been difficult to accept full disclaimer of responsibility from counsel since before entry of default, counsel learned that court file included declaration of service from process server setting up possible credibility dispute between process server and agent for service of process, who was also defendant, and, even if counsel believed agent accurately described attempted service, counsel should not have presumed court would believe agent's description over process server's; and when although entry of default was not solely caused by defendants or by their counsel, but was caused by both defendants and their counsel, defendants' conduct contributing to default was mistake and not intentional. *Benedict v. Danner Press (2001) 87 Cal. App. 4th 923, 104 Cal. Rptr. 2d 896*

Code Civ. Proc. § 473 applied to circumstances under which judgment was entered after trial on reserved issues arising from marital dissolution, at which neither former wife nor her attorney appeared, when circumstances were akin to procedural equivalent of default judgment as there was no litigation on merits, and attorney had been formally retained one week prior to trial and former attorney did not advise him of trial date so that both counsel and former wife failed to appear, trial was had and former wife did not have her day in court; further, trial court should have granted motion to set

aside judgment under *Code Civ. Proc. § 473(b)*, when attorney attested in affidavit one of reasons in § 473(b) existed as to why no appearance was made to defend former wife at trial, i.e., attorney's negligence in not inquiring of former attorney about status of case, when attorney's negligence was proximate cause of default, and when former wife had not contributed to default. *In re Marriage of Hock & Gordon-Hock (2000) 80 Cal. App. 4th 1438, 96 Cal. Rptr. 2d 546*

Attorney's failure to effectuate proper service of notice of intent to commence medical malpractice action against physicians pursuant to *Code Civ. Proc. § 364(d)* does not constitute excusable mistake of law; *Code Civ. Proc. § 473* is not available to toll statute of limitations. *Hanooka v. Pivko (1994) 22 Cal. App. 4th 1553, 1562-1563* ,

Attorney, who assumes that opposing counsel has granted him extensions of time to file answer because he placed phone calls and wrote letter to opposing counsel in effort to request extension but received no response, is guilty of inexcusable neglect within meaning of *Code Civ. Proc. § 473(b)*; trial court's granting of relief on such showing is abuse of discretion. *Iott v. Franklin (1988) 206 Cal. App. 3d 521, 531, 253 Cal. Rptr. 635*

Existence of excusable neglect for purposes of motion under *Code Civ. Proc. § 473(b)*, based on attorney's mistake of law is determined by reasonableness of misconception and justifiability of lack of determination of correct law. *Brochtrup v. INTEP (1987) 190 Cal. App. 3d 323, 329, 235 Cal. Rptr. 390* (default under former *Code Civ. Proc. § 2033* for failure to respond to requests for admissions)

Attorney's inexcusable neglect in failing to research law is chargeable to client, whose remedy is action for malpractice against attorney. *Torbitt v. State of California (1984) 161 Cal. App. 3d 860, 866, 208 Cal. Rptr. 1*

Relief under *Code Civ. Proc. § 473(b)*, for attorney's neglect or mistake requires excusable neglect or mistake of counsel; mere neglect or negligence is insufficient basis for relief. *Cochran v. Linn (1984) 159 Cal. App. 3d 245, 252, 205 Cal. Rptr. 550* ; *Robinson v. Varela (1977) 67 Cal. App. 3d 611, 615-616, 136 Cal. Rptr. 783*

Evaluation of attorney's neglect under *Code Civ. Proc. § 473(b)* involves consideration of reasonableness of defaulting attorney's conduct and conduct of attorney in taking default. *Westinghouse Electric Corp. v. Superior Court (1983) 143 Cal. App. 3d 95, 109, 191 Cal. Rptr. 549*

When party's failure to appear is result of neglect of his or her attorney, party is charged with neglect. *Conway v. Municipal Court (1980) 107 Cal. App. 3d 1009, 1017, 166 Cal. Rptr. 246*

[i] Attorney Abandonment

Record showing that former attorney was served with complaint, written request for responsive pleading, and notice of request to enter default, but failed to file answer and then withdrew from case, was not sufficient to support relief from default under exception for attorney neglect of extreme degree amounting to positive misconduct. *Kendall v. Barker (1988) 197 Cal. App. 3d 619, 626, 243 Cal. Rptr. 42*

Default judgment of dissolution of marriage was properly set aside when amended petition was not properly served on husband, husband's attorney failed to represent him and lied to conceal that failure, and wife's attorney took unfair advantage of husband. *In re Marriage of Rhoades (1984) 157 Cal. App. 3d 169, 172-173, 211 Cal. Rptr. 531*

[j] Lack of Actual Notice

Error to deny relief under *Code Civ. Proc. § 473(b)*, when presumption arising from proof of service was overcome by defendant's detailed, credible, and unimpeached evidence that it received no actual notice of hearing. *Bonzer v. City of Huntington Park (1993) 20 Cal. App. 4th 1474, 1479-1481, 25 Cal. Rptr. 2d 278*

[7] Attorneys's Act or Omission as Imputed to Client

When defaulting defendant has relied on attorney retained for purpose of defending action, general rule is that attorney's inexcusable negligence is charged to client who is relegated to action against attorney for malpractice. *Don v. Cruz (1982) 131 Cal. App. 3d 695, 700, 182 Cal. Rptr. 581*

Negligence of attorney is imputed to client and may not be offered by latter is basis for relief from judgment. *Buckert v. Briggs (1971) 15 Cal. App. 3d 296, 301, 93 Cal. Rptr. 61*

[8] Constructive Knowledge

Even though knowledge of lawyer is knowledge of client, client ordinarily is charged with constructive notice only when knowledge of attorney has been gained in course of particular transaction in which he or she has been employed by principal. *Zirbes v. Stratton (1986) 187 Cal. App. 3d 1407, 1413, 232 Cal. Rptr. 653*

[9] Timeliness of Motion

[a] In General

When attorney affidavit of fault is filed under 1991 amendment to *Code Civ. Proc. § 473*,six month period commences from date default judgment is entered, not date of entry of default. *Sugasawara v. Newland (1994) 27 Cal. App. 4th 294, 297, 32 Cal. Rptr. 2d 484*

Court was unable to say as matter of law that delay of 21 days after entry of default and 12 days from time default judgment was taken was unreasonable under *Code Civ. Proc. § 473(b).* *Robinson v. Varela (1977) 67 Cal. App. 3d 611, 617, 136 Cal. Rptr. 783*

Delay of nearly six months in filing motion to set aside default after discovery of its entry is unreasonable under *Code Civ. Proc. § 473(b).* *Northridge Financial Corp. v. Hamblin (1975) 48 Cal. App. 3d 819, 824, 122 Cal. Rptr. 109*

When strong possibility existed that default judgment, if allowed to stand, would affirm transactions in violation of usury law, court was unable to say as matter of law that unexplained delay of 93 days in filing motion to set aside default should compel trial court, in exercise of discretion, to deprive defendant of trial on merits. *Berman v. Klassman (1971) 17 Cal. App. 3d 900, 910, 95 Cal. Rptr. 417*

When defendant's attorney was informed that plaintiff's attorney was seeking to have default entered and motion to vacate default was not made until one day before expiration of six months after entry of default, court was warranted in determining that defendant's motion to set aside default was not timely made under *Code Civ. Proc. § 473(b).* *Cannon v. American Hydrocarbon Corp. (1970) 4 Cal. App. 3d 639, 651, 84 Cal. Rptr. 575*

[b] Diligence Requirement

Every party desiring to resist an action or participate in a judicial proceeding has duty to take timely and adequate steps to retain counsel or act personally to avoid undesirable judgment; motion for relief from default under *Code Civ. Proc. § 473(b)*, is denied unless defendant shows that, in arranging for his or her defense, he or she has exercised that reasonable diligence that person of ordinary prudence usually bestows on important business. *Luz v. Lopes (1960) 55 Cal. 2d 54, 62, 10 Cal. Rptr. 161, 358 P.2d 289*

Delay of several years in seeking relief did not demonstrate diligence. *Lee v. An (2008) 168 Cal. App. 4th 558, 566, 85 Cal. Rptr. 3d 620*

In action by county to impose child support obligation on biological father, county timely moved to set aside voluntary declaration of paternity signed by another man under *Code Civ. Proc. § 473*, and county and mother met diligence requirement, when biological father took child into his house, held her out as his own, and supported her for three years, so that it was perfectly reasonable that mother, who did not understand legal effect of voluntary declaration, did not attempt to rescind declaration, and she acted promptly once biological father refused to continue to support his daughter. *County of Los Angeles v. Sheldon P. (2002) 102 Cal. App. 4th 1337, 1346-1347, 126 Cal. Rptr. 2d 350*

Code Civ. Proc. § 473(b), motion for relief from default is properly denied when events raised as excuse each occurred after entry of default and related only to counsel's diligence in seeking relief. *Barragan v. Banco BCH (1986) 188 Cal. App. 3d 283, 301, 232 Cal. Rptr. 758*

Showing of due diligence is as much of a prerequisite to granting relief under *Code Civ. Proc. § 473(b)*, as it is under inherent equitable power of court; party failing to show due diligence or reasonable excuse for failing to file timely response is not entitled to relief under statute. *De Mello v. Souza (1973) 36 Cal. App. 3d 79, 86, 111 Cal. Rptr. 274*

[c] Reasonable Time Requirement

Trial court did not abuse its discretion in finding that moving party filed *Code Civ. Proc. § 473* motion within reasonable time in filing motion only a few days short of six months after court issued order denying attorney's fees and costs, even though moving party apparently obtained declaration from former counsel in support of *Code Civ. Proc. § 473* relief on the very day the order was issued, when although former attorney, after refusing to communicate with client for protracted period and eventually abandoning him, advised him on September 30, 1999, that he had six months to pursue *Code Civ. Proc. § 473* relief, between September 30th and March 4, 2000, moving party sought to retain counsel to represent him in bringing motion, but because of financial difficulties caused in part by underlying lawsuit, could not obtain counsel until he arranged for personal loan to provide necessary financial retainer in February 2000, and during same period was occupied by loss of his business. *Lee v. Wells Fargo Bank (2001) 88 Cal. App. 4th 1187, 1200-1201, 106 Cal. Rptr. 2d 726*

Lack of funds to obtain counsel does not require default to be set aside as matter of law, but trial court properly considers this matter in determining whether motion to set aside default under *Code Civ. Proc. § 473(b)*, was brought within reasonable time; trial court does not abuse its discretion in determining under facts of case that excuse did not tip scales in favor of granting relief. *Carrasco v. Craft (1985) 164 Cal. App. 3d 796, 805-806, 210 Cal. Rptr. 599*

When plaintiff claimed without contradiction that defendant's attorney was informed of entry of default within two days of entry, defendant's four-month delay in applying for relief from default judgment under *Code Civ. Proc. § 473(b)*, was unreasonable. *A & B Metal Products v. MacArthur Properties, Inc. (1970) 11 Cal. App. 3d 642, 749, 89 Cal. Rptr. 873*

[d] Unexplained Delays

Unexplained delays of more than three months in seeking relief from default after knowledge of its entry generally results in denial of relief. *Kendall v. Barker (1988) 197 Cal. App. 3d 619, 625, 243 Cal. Rptr. 42*

[e] Six-Month Limitation

Trial court erred in vacating summary judgment in favor of defendant on plaintiff's motion to set aside summary judgment based on procedural default resulting from counsel's excusable neglect, when, although plaintiff filed first motion for relief within six months of entry of judgment, plaintiff failed to serve defendant within six months and second motion for relief was both filed and served after six-month period had expired, so motions were untimely and court had no authority to grant requested relief; when defendant did not waive six-month limit by appearing at hearing on motion and opposing motion on merits; and when trial court had no authority under *Code Civ. Proc. § 473(b)* to excuse plaintiff's noncompliance with six-month time limit. *Arambula v. Union Carbide Corp. (2005) 128 Cal. App. 4th 333, 340-345, 26 Cal. Rptr. 3d 854*

Trial court did not err in granting motion for *Code Civ. Proc. § 473* relief from order denying attorney's fees and costs which was filed more than six months after opposing party raised issue of untimeliness of original motion but within six months of date trial court issued final order denying fees and costs, where six-month deadline in *Code Civ. Proc. § 473* ran from date trial court issued its final order, not date opposing party raised issue. *Lee v. Wells Fargo Bank (2001) 88 Cal. App. 4th 1187, 106 Cal. Rptr. 2d 726*

Six-month time limit for granting relief under *Code Civ. Proc. § 473(b)*, is jurisdictional and relief is not granted under statute if application for relief is instituted more than six months after entry of judgment, order, or proceeding from which relief is sought. *Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 735 n.3, 216 Cal. Rptr. 300*

[10] Proposed Pleading

Code Civ. Proc. § 473(b), requirement that application for relief be accompanied by copy of pleading proposed to be filed is not satisfied by motion for order continuing time within which to plead. *Sousa v. Capital Co. (1963) 220 Cal. App. 2d 744, 759-760, 34 Cal. Rptr. 71*

[11] Burden of Proof

In motion under *Code Civ. Proc. § 473(b)*, initial burden is on moving party to prove excusable neglect by preponderance of evidence. *Iott v. Franklin (1988) 206 Cal. App. 3d 521, 528, 253 Cal. Rptr. 635* ; *Kendall v. Barker (1988) 197 Cal. App. 3d 619, 624, 243 Cal. Rptr. 42*

Moving party has burden of proving he or she is entitled to relief. *Conway v. Municipal Court (1980) 107 Cal. App. 3d 1009, 1017, 166 Cal. Rptr. 246*

[12] Prejudice to Opposing Party

Judgment is not permitted to be set aside under *Code Civ. Proc. § 473(b)*, in spite of inexcusable neglect, simply because other side has not been prejudiced. *Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal. 3d 892, 900, 187 Cal. Rptr. 592, 654 P.2d 775*

If conduct of defendant's attorney was excusable, prejudice to plaintiff does not make it inexcusable; and if conduct was inexcusable, absence of prejudice to plaintiff does not make it excusable. *Iott v. Franklin (1988) 206 Cal. App. 3d 521, 531, 253 Cal. Rptr. 635*

Lack of prejudice to party opposing motion for relief does not permit relief from default if moving party fails to establish sufficient grounds for relief. *Gribin Von Dyl & Associates, Inc. v. Kovalsky (1986) 185 Cal. App. 3d 653,*

660, 230 Cal. Rptr. 50

Although in determining whether defendant acted diligently in filing delayed application for relief from default judgment under *Code Civ. Proc. § 473(b)*, court may properly consider plaintiff's inability to assert any prejudice suffered from delay of trial on merits and very slight evidence is required to justify court in setting aside default, plaintiff's failure to show any prejudice resulting from defendant's claimed lack of diligence is not decisive. *Carrasco v. Craft (1985) 164 Cal. App. 3d 796, 806, 210 Cal. Rptr. 599*

[13] Hearing on Motion

In hearing on motion, trial court has discretion to refuse oral testimony and decide issues raised on declarations alone. *Robinson v. Varela (1977) 67 Cal. App. 3d 611, 618, 136 Cal. Rptr. 783*

[14] Discretion of Trial Court

[a] In General

Default judgment entered after defendant did not appear at trial is proper exercise of court discretion even though court clerk did not comply with *Code Civ. Proc. § 1013* (relating to service by mail) in giving defendant notice of trial date, when jurisdictional requirements in case of nonappearance under *Code Civ. Proc. § 594(a)* were met. *Isherwood v. Hydrosen Properties, Inc. (1987) 240 Cal. Rptr. 157*

[b] Abuse of Discretion

Granting relief under *Code Civ. Proc. § 473(b)*, from dismissal of case is abuse of discretion when trial court characterized attorney's continuous failure to provide court-ordered discovery was grossly negligent and attorney's conduct was not within inexcusable negligence exception (attorney abandonment). *Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal. 3d 892, 898-900, 187 Cal. Rptr. 592, 654 P.2d 775*

Trial court did not abuse its discretion in setting aside default judgment under *Code Civ. Proc. § 473(b)*, on basis of assertion that continued negotiations between parties had lulled defendant's attorney into sense of security. *Beard v. Beard (1940) 16 Cal. 2d 645, 648, 107 P.2d 385*

Trial court abused its discretion as matter of law in denying *Code Civ. Proc. § 473(b)*, motion for relief from waiver of right to jury trial for failure to post jury fees when failure resulted from confusion over amount required to be posted and there was no showing that adverse party would suffer any prejudice if relief from waiver were granted. *Wharton v. Superior Court (1991) 231 Cal. App. 3d 100, 104, 282 Cal. Rptr. 349*

Trial court did not abuse its discretion in denying motion to vacate default, under *Code Civ. Proc. § 473(b)*, or court's equitable powers, when defendant averred reasonable reliance on an insurance carrier to defend action but failed to make any showing that carrier's inaction was excusable. *Don v. Cruz (1982) 131 Cal. App. 3d 695, 702, 182 Cal. Rptr. 581*

Trial court, in action arising out of defendants' alleged wrongful eviction of tenant, did not abuse its discretion in denying defendants' motion under *Code Civ. Proc. § 473(b)*, to set aside default when defendants unreasonably relied on insurance company to defend them, where they were placed on notice that some action was required of them when plaintiff's counsel informed them that their default would be taken and that insurance company was not protecting their position. *Cyrus v. Haveson (1977) 65 Cal. App. 3d 306, 315, 135 Cal. Rptr. 246*

[15] Motions to Reconsider and Renewed Motions

Trial court erred in denying plaintiff's motion for order setting aside default judgment, which court properly characterized as motion for reconsideration of its original granting of defendants' motion to set aside default under *Code Civ. Proc. § 473*, when plaintiff was not given notice of defendants' motion because plaintiff's addresses to which it was sent contained wrong zip codes, and when trial court erred in placing burden of proof as to certain elements on plaintiff, rather than on defendants. *Moghaddam v. Bone (2006) 142 Cal. App. 4th 283, 288-292, 47 Cal. Rptr. 3d 283*

Trial court has jurisdiction to entertain second motion for relief under *Code Civ. Proc. § 473(b)*, after denial of first such motion, even if no new evidence is presented to support second motion; in that case, motion is considered to be renewal of first motion. *Rambush v. Rambush (1968) 267 Cal. App. 2d 734, 740, 73 Cal. Rptr. 268*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseGovernmentsLegislationInterpretationGovernmentsLegislationStatutes of LimitationsTime Limitations

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43-489 California Forms of Pleading and Practice--Annotated § 489.293

§ 489.293 Text References

Witkin, California Procedure, vol. 8, *Attack on Judgment in Trial Court*, §§ 176-187 (4th ed. 1997)

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[Reserved]

§§ 489.294[Reserved]

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43-489 California Forms of Pleading and Practice--Annotated § 489.300

§ 489.300 Related Matthew Bender Publications

For memoranda supporting and opposing motions for relief under *Code Civ. Proc. §§ 473.5, 473.1, 585.5,* and *50 U.S.C. App. 521*, see California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresJudgmentsRelief From JudgmentGeneral Overview

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43-489 California Forms of Pleading and Practice--Annotated § 489.301

§ 489.301 Federal Statutes

Servicemembers' Civil Relief Act. *50 U.S.C. App. § 501 et seq.*

Purpose of act and suspension of enforcement of civil liabilities. *50 U.S.C. App. § 502*

Definitions under Servicemembers' Civil Relief Act. *50 U.S.C. App. § 511*

Jurisdiction and applicability of Servicemembers' Civil Relief Act. *50 U.S.C. App. § 512*

Protection of persons secondarily liable. *50 U.S.C. App. § 513*

Extension of benefits to citizens serving with allied forces. *50 U.S.C. App. § 514*

Notification of benefits to persons in or entering military service. *50 U.S.C. App. § 515*

Extension of rights and protections to reserves ordered to report for military service and to persons ordered to report for induction. *50 U.S.C. App. § 516*

Waiver of rights pursuant to written agreement. *50 U.S.C. App. § 517*

Protection of servicemembers against default judgments. *50 U.S.C. App. § 521*

Stay of proceedings when servicemember has notice. *50 U.S.C. App. § 522*

Fines and penalties in contracts sued on. *50 U.S.C. App. § 523*

Stay or vacation of execution of judgments, attachments and garnishments. *50 U.S.C. App. § 524*

Duration and term of stays, and codefendants not in military service. *50 U.S.C. App. § 525*

Protection relating to rent, installment contracts, mortgages, liens, assignments, and leases. *50 U.S.C. App. §§ 531 et seq., 591*

Protection relating to life insurance. *50 U.S.C. App. § 541 et seq.*

Protection relating to taxes and public lands. *50 U.S.C. App. §§ 561 et seq., 591*

Transfers with intent to use Act to delay proceedings. *50 U.S.C. App. § 581*

Proof of military service status. *50 U.S.C. App. § 582*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 489.302 State Statutes

Relief from judgment, order, or other proceeding taken against party when court has assumed jurisdiction over law practice of party's attorney. *Code Civ. Proc. § 473.1*

Relief from default and any subsequent default judgment when service of summons did not result in actual notice to defendant in time to defend. *Code Civ. Proc. § 473.5*

Relief from default and default judgment when plaintiff failed to comply with venue provisions of *Civ. Code § 1812.10* or *2984.4* or *Code Civ. Proc. § 395(b). Code Civ. Proc. § 585.5(b)-(e)*

Relief from judgments entered during period of military service. *Mil. & Vet. Code § 402(d)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act

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43-489 California Forms of Pleading and Practice--Annotated § 489.303

§ 489.303 Decisions

[1] Relief Under Code Civ. Proc. § 473.5

Trial court did not abuse its discretion in denying defendants' motion to vacate default judgment and reasonably concluded that defendants had actual notice in time to defend when, after substituted service on defendants at their private post office box, defendant called plaintiffs' counsel to discuss lawsuit and faxed document to counsel proposing to waive/toll deadline to answer complaint, which referenced case number, and then called to settle case, so that it was reasonable to find actual notice; and when defendants had actual knowledge of lawsuit two weeks before answer was due, and plaintiffs' counsel warned defendant default would be taken if they did not answer, so that failure to answer was result of inexcusable neglect. *Ellard v. Conway (2001) 94 Cal. App. 4th 540, 547-548, 114 Cal. Rptr. 2d 399*

Party is required to show that lack of actual notice was not due to inexcusable neglect; although inexcusable neglect of party's attorney is normally imputed to party, exception exists when attorney's neglect is so extreme as to amount to positive misconduct that obliterates attorney-client relationship. *Tunis v. Barrow (1986) 184 Cal. App. 3d 1069, 1077-1078, 229 Cal. Rptr. 389*

Service of summons on attorney who represented defendant in previous action between parties does not constitute actual notice for purposes of *Code Civ. Proc. § 473.5*. *Tunis v. Barrow (1986) 184 Cal. App. 3d 1069, 1077, 229 Cal. Rptr. 389* ; *Rosenthal v. Garner (1983) 142 Cal. App. 3d 891, 897, 191 Cal. Rptr. 300*

Code Civ. Proc. § 473.5 is not applicable to set aside default when jurisdiction was acquired by fraud, but is available only to persons on whom service was made or attempted and who did not have actual notice of pendency of action. *In re Marriage of Smith (1982) 135 Cal. App. 3d 543, 554-555, 185 Cal. Rptr. 411*

[2] Servicemembers' Civil Relief Act

[a] In General

Denial of motion to vacate default judgment modifying support order is error when service was made on attorney who represented serviceman in divorce, but not on serviceman, and no attorney was appointed to represent his interests. *Allen v. Allen (1947) 30 Cal. 2d 433, 435-437, 182 P.2d 551*

Denial of motion to vacate default judgment modifying spousal support award is error when court entering default knew defendant was stationed abroad in military service, but no affidavit of military status was filed, no attorney was appointed to represent serviceman's interests, and service was made only on his former attorney of record. *In re Marriage of Lopez (1981) 115 Cal. App. 3d 776, 782-784, 173 Cal. Rptr. 718*

Denial of motion to set aside default judgment is not error despite erroneous affidavit of nonmilitary status and failure to appoint attorney, when defendant actively sought uncontested divorce and property settlement. *Wilterdink v. Wilterdink (1947) 81 Cal. App. 2d 526, 532-535, 184 P.2d 527*

Denial of motion to vacate decree changing minor's name is error when notice was not given to father in military service who was prisoner of war at time of proceedings, no affidavit of military status was made, and no attorney was appointed to represent his interests. *In re Larson (1947) 81 Cal. App. 2d 258, 260-263, 183 P.2d 688*

Granting motion to vacate judgment under former *50 U.S.C. App. § 520* (*now see 50 U.S.C. App. § 521*) is error when plaintiff fully complied with Act's requirements and defendant made no showing that military service prejudiced him in making defense orthat he had meritorious or legal defense and refused advice and services of appointed attorney. *Reeh v. Reeh (1945) 69 Cal. App. 2d 200, 203-206, 158 P.2d 751*

[b] Liberal Construction of Act

Former *50 U.S.C. App. § 520* (*now see 50 U.S.C. App. § 521*) is liberally construed to extend to persons who are interested parties in probate and equity proceedings. *Winslow v. Harold G. Ferguson Corp. (1944) 25 Cal. 2d 274, 280-281, 153 P.2d 714*

Former *50 U.S.C. App. § 520* (*now see 50 U.S.C. App. § 521*) is liberally construed "defendant" to include "interested party," and "judgment" to decree changing child's name. *In re Larson (1947) 81 Cal. App. 2d 258, 261-262, 183 P.2d 688*

[c] Prejudice

Absence when rights or liabilities are being adjudicated is prima facie prejudicial except in few cases when absence is matter of policy rather than result of military service. *In re Marriage of Lopez (1981) 115 Cal. App. 3d 776, 783, 173 Cal. Rptr. 718*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 489.304 Text References

6 C.J.S. Armed Services §§ 143-146

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43-489 California Forms of Pleading and Practice--Annotated §§ 489.305-489.309

[Reserved]

§§ 489.305[Reserved]

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43-489 California Forms of Pleading and Practice--Annotated § 489.310

§ 489.310 Related Matthew Bender Publications

For memoranda of points and authorities supporting and opposing a motion to set aside or vacate a void judgment or order, see California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeOpposing MemorandaCivil ProceduresPleading & PracticeMotion PracticeSupporting MemorandaCivil ProceduresJudgmentsRelief From JudgmentMotions to VacateCivil ProceduresJudgmentsRelief From JudgmentVoid Judgments

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43-489 California Forms of Pleading and Practice--Annotated § 489.311

§ 489.311 State Statutes

Court is authorized on motion of either party after notice to other to set aside void judgment or order. *Code Civ. Proc. § 473(d)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments

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43-489 California Forms of Pleading and Practice--Annotated § 489.312

§ 489.312 Decisions

[1] Void Judgments Generally

Judgment entered in plaintiff's favor following ex parte trial at which defendant corporation failed to appear was void, despite plaintiff's service on defendant of notice of trial under *Code Civ. Proc. § 594(a)*, when defendant had previously received inadequate notice of withdrawal of its counsel thus rendering notice of trial ineffective. *Urethane Foam Experts, Inc. v. Latimer (1995) 31 Cal. App. 4th 763, 767, 37 Cal. Rptr. 2d 404*

Stipulated judgment secured by county from unrepresented welfare recipient in action by county for reimbursement of welfare funds is void when record showed that defendant did not voluntarily, knowingly, and intelligently waive right to counsel and to trial. *County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 112-113, 183 Cal. Rptr. 741*

Any judgment entered either for or against person who is not party to proceeding is void as to that person. *Fazzi v. Peters (1968) 68 Cal. 2d 590, 594, 68 Cal. Rptr. 170, 440 P.2d 242* (disapproving *Calimpco, Inc. v. Warden (1950) 100 Cal. App. 2d 429, 224 P.2d 421*)

[2] Void on Face Judgments

Validity of judgment on its face is determined only by consideration of matters constituting part of judgment roll. *Johnson v. Hayes Cal Builders, Inc. (1963) 60 Cal. 2d 572, 576, 35 Cal. Rptr. 618, 387 P.2d 394*

Cross-defendants were entitled to relief at any time under *Code Civ. Proc. § 473(d)* from default judgment entered on cross-complaint on their failure to appear at trial as judgment void on its face, where although cross-defendants had answered cross-complaint, plaintiff neglected to inform them of trial date, court improperly ordered their default for failing to appear apparently without confirming they were notified, plaintiff sought type and amount of damages not specified in cross-complaint, and court granted request. Plaintiff's sole remedy was to move court to proceed with trial and introduce evidence to sustain plaintiff's cause of action. Further, damages awarded clearly exceeded what was pled,

both because amount was higher and because each cross-defendant was held jointly liable for damages alleged against the other, and none of damages were alleged to be jointly owed by them. *Heidary v. Yadollahi, 99 Cal. App. 4th 857, 862-867, 121 Cal. Rptr. 2d 695*

[3] Service of Summons

California's Jurisdiction and Service of Process Act of 1969 (*Code Civ. Proc. § 410.10 et seq.*) clearly rejects common law rule that defendant's general appearance after entry of default judgment against him or her based on void service of summons retroactively makes that service valid. *In re Marriage of Smith (1982) 135 Cal. App. 3d 543, 546, 185 Cal. Rptr. 411*

Court is without jurisdiction when summons is served on defendant in manner other than that specified by statute. *Wilson v. Eddy (1969) 2 Cal. App. 3d 613, 616, 82 Cal. Rptr. 826* (involving former *Code Civ. Proc. § 411(8)*, requiring delivery of summons when not otherwise specified to defendant personally [*now see Code Civ. Proc. § 416.90*, authorizing delivery of summons when not otherwise specified to person or to person authorized by him or her to receive service])

[4] Constructive Service of Process

Compliance with statutory conditions for constructive service of process is jurisdictional, and person not designated by his or her name is not proper party to action. *Sousa v. Freitas (1970) 10 Cal. App. 3d 660, 667, 89 Cal. Rptr. 485*

[5] Excess of Jurisdiction

When statute requires court to exercise its jurisdiction in particular manner, follow particular procedure, or subject to certain limitations, act beyond those limits are in excess of jurisdiction and void. *Vershbow v. Reiner (1991) 231 Cal. App. 3d 879, 883, 282 Cal. Rptr. 684*

[6] Partial Invalidity

Interest on judgment provision in judgment entered pursuant to stipulation of parties, but that was contrary to stipulation by providing for interest on judgment "as provided by law" from date some 16 months prior to rendition or entry of judgment, was contrary to law, beyond jurisdiction of court, void, and subject to collateral attack by motion to quash execution and vacate levy of execution, although remainder of judgment, which was in accord with stipulation, was valid and not subject to collateral attack. *Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 840, 844-848, 131 Cal. Rptr. 674*

[7] Corporate Defendants

Suspension of corporate powers at time corporation filed action does not affect jurisdiction of court to proceed; suspension after filing of action but before rendition of judgment in favor of corporation does not deprive court of jurisdiction or rendering judgment void and subject to collateral attack after it has become final. *Traub Co. v. Coffee Break Service, Inc. (1967) 66 Cal. 2d 368, 371, 57 Cal. Rptr. 846, 425 P.2d 790*

Judgment against corporation is nullity and subject to collateral attack when lack of jurisdiction over corporation is disclosed on face of judgment roll. *Traub Co. v. Coffee Break Service, Inc. (1967) 66 Cal. 2d 368, 370, 57 Cal. Rptr. 846, 425 P.2d 790*

Default judgment against foreign corporation is void for lack of jurisdiction when service of process was made in manner not authorized by statute. *Nagel v. P & M Distributors, Inc. (1969) 273 Cal. App. 2d 176, 180-181, 78 Cal. Rptr. 65*

[8] Void Judgments by Default

[a] In General

When action for accounting, declaratory relief, and damages was brought against three defendants, but complaint named first defendant alone as one who had received money belonging to parties and who had failed to account for it and complaint specifically stated that only purpose for joining second defendant was to name all parties in interest, portion of default judgment imposing liability on second defendant is void on face of record and vulnerable to collateral attack. *Nemeth v. Trumbull (1963) 220 Cal. App. 2d 788, 790-791, 792, 34 Cal. Rptr. 127*

[b] Defective Service or Nonservice of Summons

Failure to designate and serve corporation in its corporate capacity as requiring reversal of default judgment entered against corporation since it was not possible for individual to have been served in his or her representative capacity for unnamed corporation. *Earl W. Schott, Inc. v. Kalar (1993) 20 Cal. App. 4th 943, 946-947, 24 Cal. Rptr. 2d 580*

Service of substantially defective summons does not confer jurisdiction over party; hence, default judgment against defendant corporation was void for lack of personal jurisdiction when summons was fatally defective in that it failed to notify recipient that he was being served on behalf of defendant corporation was required by *Code Civ. Proc. § 412.30*. *MJS Enterprises, Inc. v. Superior Court (1984) 153 Cal. App. 3d 555, 557-558, 200 Cal. Rptr. 286*

[c] Default to Amended Complaint

When defendant answered original complaint, default judgment entered after failure to answer amended complaint when amendments consisted only of minor corrections not affecting cause of action was void. *Carrasco v. Craft (1985) 164 Cal. App. 3d 796, 808-811, 210 Cal. Rptr. 599*

Judgment awarding relief requested in amended complaint that was served in incorrect manner after default was taken was void for granting relief in excess of that requested in original complaint when amended complaint increased amount of relief requested. *Engebretson & Co. v. Harrison (1981) 125 Cal. App. 3d 436, 444, 178 Cal. Rptr. 77* (attack by independent action in equity)

[d] Cross Complaints

Code Civ. Proc. § 580, declaring that relief granted to plaintiff, if there is no answer, cannot exceed that which he or she demanded in his or her complaint, is applicable to relief granted on cross complaint. *Swycaffer v. Swycaffer (1955) 44 Cal. 2d 689, 692-693, 285 P.2d 1*

[e] Answer or Other Responsive Pleading Filed

Code Civ. Proc. § 585 does not authorize entry of any default in case in which answer is on file, whether or not defendant appears when action is called for hearing, and *Code Civ. Proc. § 594*, relating to procedure when party fails

to appear at trial, does not authorize entry of default if defendant fails to appear; default entered after answer has been filed is void. *Wilson v. Goldman (1969) 274 Cal. App. 2d 573, 576-577, 79 Cal. Rptr. 309*

Default entered by court clerk when demurrer was on file was void and properly set aside on motion. *Stevens v. Torregano (1961) 192 Cal. App. 2d 105, 112, 13 Cal. Rptr. 604*

[f] Amendment of Complaint After Entry of Default

When, after defendant's default has been entered, complaint is amended in matter of substance is distinguished from mere matter of form, that amendment opens default, and, unless amended complaint has been served on defendant in manner provided for service of summons, no judgment can properly be entered on default. *Thompson v. Cook (1942) 20 Cal. 2d 564, 568, 127 P.2d 909* ; *Engebretson & Co. v. Harrison (1981) 125 Cal. App. 3d 436, 440, 178 Cal. Rptr. 77*

Substantive amendment to complaint effectively opens default, which permits defaulting defendant to answer; purpose of rule is to insure that defendant has opportunity to reassess action in light of changes made in complaint; but rule was inapplicable when amendment did not result in any substantive changes and did not expose defendant to any greater or different liabilitythan was presented by complaint on file. *Beeman v. Burling (1990) 216 Cal. App. 3d 1586, 1594-1595, 265 Cal. Rptr. 719*

General rule that when plaintiff amends declaration or complaint so as to change cause of action or add new one, judgment by default may be taken against defendant if he or she fails to file new or amended answer or plea, is without application when amendment is merely as to formal or immaterial matters or when original plea or answer set forth sufficient defense to declaration or complaint is amended. *Smith v. Los Angeles Bookbinders Union (1955) 133 Cal. App. 2d 486, 500-501, 284 P.2d 194* , disapproved on other grounds in *Macleod v. Tribune Publishing Co. (1959) 52 Cal. 2d 536, 551, 343 P.2d 36*

[g] Failure to Serve Statement of Damages

Default judgment not void under *Code Civ. Proc. § 473(d)* when statement of damages properly served in same manner as summons. *Sakaguchi v. Sakaguchi (2009) 173 Cal. App. 4th 852, 860-861, 92 Cal. Rptr. 3d 717*

Default judgment taken by plaintiff against one defendant in personal injury action was not void under *Code Civ. Proc. § 473(d)*, where plaintiffs complied with *Code Civ. Proc. § 425.11* by personally serving statement of damages on defendant. Statement set forth amounts of general and special damages each plaintiff was seeking, default was entered 15 days after statement was served, and more than three years later, default judgment was entered in aggregate amount less than amounts set forth in statement of damage. Default judgment was also properly entered on another defendant's cross-complaint for indemnity and contribution against same defendant, where cross-complainant personally served defendant with statement of damages setting forth property and other damages, including detailed declaration stating that amounts were paid in settlement of various claims in action, including plaintiffs' claims, identifying persons to whom each amount was paid, sufficiently specific to allow defendant to make informed decision whether to appear and defend cross-complaint, and default was entered more than six weeks after cross-complainant's statement of damages was properly served, allowing defendant reasonable time to determine whether to appear and defend the action. However, default judgments taken by two other cross-complainants for indemnity against same defendant were void, where neither statement of damages served by cross-complainants on defendant was served in same manner as summons as required by *Code Civ. Proc. § 425.11(d)*, and cross-complainants failed to give formal notice of amount of money damages sought within reasonable time before defaults were entered because defendant had no time to respond to cross-complaints after it was finally given formal notice of amount of damages, and where although defendant had actual notice of amount of damages cross-complainant sought, actual notice does not satisfy formal notice requirements

of *Code Civ. Proc. §§ 425.10 et seq., 585*. *Schwab v. So. Cal. Gas Co. (2004) 114 Cal. App. 4th 1308, 1320-1326, 8 Cal. Rptr. 3d 627*

Default judgment for trespass, assault, conversion, intentional infliction of emotional distress, and wrongful repossession was properly set aside when plaintiff had failed to inform defendant of amount of damages sought as required by *Code Civ. Proc. § 425.11*; nonpersonal injury claims alleged is so closely tied to personal injury claims as to require *Code Civ. Proc. § 425.11* disclosure for all causes of action. *Jones v. Interstate Recovery Service (1984) 160 Cal. App. 3d 925, 929-930, 206 Cal. Rptr. 924*

[h] Discovery Proceedings

Default judgment entered after defendant's answer was stricken for failure to answer interrogatories or comply with discovery motions is void under due process clause of federal constitution when defendant had neither actual nor constructive notice of interrogatories and motions; relief from such a judgment is available either on motion at law under court's inherent power or by motion in equity on ground of extrinsic fraud. *Lovato v. Santa Fe Internat. Corp. (1984) 151 Cal. App. 3d 549, 553-555, 198 Cal. Rptr. 838*

[i] Judgment Entered by Court Clerk

Clerk's authority under *Code Civ. Proc. § 585(1)* [*now Code Civ. Proc. § 585(a)*] to enter default judgment is limited to actions on contracts in which proper amount appears in contract is alleged in complaint or follows therefrom by mathematical computation; if determination of damages involves discretion or taking of evidence, clerk is without power to enter judgment, and clerk's action in doing so is void on face of record. *Brown v. Superior Court (1966) 242 Cal. App. 2d 519, 525-526, 51 Cal. Rptr. 633*

[j] Premature Default Judgments

Premature default judgment is merely irregular or erroneous and not void; as against collateral attack in proceeding in which it has been pleaded is res judicata, it is res judicata, even though erroneous. *Guardianship of Jacobson (1947) 30 Cal. 2d 326, 334, 182 P.2d 545*

[k] Judgment Exceeds Demand or Gives Unrequested Relief

Default judgment that exceeds demand of complaint or gives relief that has not been demanded is in excess of court's jurisdiction and void. *Swycaffer v. Swycaffer (1955) 44 Cal. 2d 689, 693, 285 P.2d 1*

In legal malpractice action, trial court properly set aside $2.5 million superior court default judgment as void because it was greater than amount demanded in first amended complaint, when first amended complaint was for legal malpractice and sought damages based on contract and tort theories according to proof, and filing of statement of damages under *Code Civ. Proc. § 425.11* before default was entered based on sixteenth cause of action for emotional distress based on same professional negligence did not make action one for personal injury or wrongful death within meaning of § 425.11, and plaintiff suing for legal malpractice may not, as general rule, recover emotional distress damages. *Levine v. Smith (2006) 145 Cal. App. 4th 1131, 1136-1137, 52 Cal. Rptr. 3d 197*

Marital dissolution petition provided adequate notice to husband who defaulted that wife sought division of property and liabilities. *In re Marriage of Andresen (1994) 28 Cal. App. 4th 873, 878-880, 34 Cal. Rptr. 2d 147*

When complaint alleged $50,000 actual damages plus statutory entitlement to treble damages, default judgment awarding $150,000 actual damages was properly vacated; trial court erred in setting aside entry of default, however, and should have entered default judgment for $50,000 actual damages, doubled under statute that authorized treble, but mandated double damages for malicious injury to trees on another's land. *Ostling v. Loring (1994) 27 Cal. App. 4th 1731, 1742, 33 Cal. Rptr. 2d 391*

In cause of action involving defendant corporation's failure to allow plaintiff to exercise option to purchase shares of stock in two corporations, default judgment awarding plaintiff $17,500 was void when adequate notice to defendant of amount of plaintiff's claim as required by *Code Civ. Proc. § 580* was not given in complaint that alleged damages "in sum equal to the present market value" of the shares, less the option price, and praying for damages "according to proof." *Ludka v. Memory Magnetics International (1972) 25 Cal. App. 3d 316, 322-323, 101 Cal. Rptr. 615*

Allegation in complaint that "by reason of said facts plaintiffs have been damaged in sum of $10,000" combined with prayer for "damages according to proof" gives defendant sufficient notice that plaintiff sought damages in addition to restitutional relief to sustain award of damages. *Thorson v. Western Development Corp. (1967) 251 Cal. App. 2d 206, 213, 59 Cal. Rptr. 299*

Portion of judgment granting relief in excess of that demanded in complaint is void on face of record and subject to collateral attack. *Nemeth v. Trumbull (1963) 220 Cal. App. 2d 788, 792, 34 Cal. Rptr. 127*

[l] Damages

Award of punitive damages in default judgment that had been prayed for was not void because no award of compensatory damages was made or requested when defendant's fraudulent acts and actual damages caused were alleged and proved, because *Civ. Code § 3294* requirement of "actual damages" is simply requirement that tortious act be proved if punitive damages are to be assessed. *Weiss v. Blumencranc (1976) 61 Cal. App. 3d 536, 542-543, 131 Cal. Rptr. 298*

[m] Review on Appeal

Default judgment is void when it is clear from "face of the appellate record" that default should not have been entered, and relief from default on which it rests may be sought at any time; thus, when it appears from appellate record that default judgment was entered without giving defendant notice of special and general damages sought to be recovered, as required by *Code Civ. Proc. § 425.11* when damages cannot be alleged under former *Code Civ. Proc. § 425.10(a)* [*now see Code Civ. Proc. § 425.10(b)*], default judgment is void. *Stevenson v. Turner (1979) 94 Cal. App. 3d 315, 318-320, 156 Cal. Rptr. 499*

[9] Void Orders

Trial court erred in denying motion to set aside order dismissing case that had been stayed based on defendant's petition in bankruptcy, where petition created automatic stay of all judicial proceedings against bankruptcy debtor [*11 U.S.C. § 362 (a)*], and judicial proceedings in violation of automatic stay are void [*In re Shamblin (9th Cir. 1989) 890 F.2d 123, 125*], so that trial court had no power to dismiss case based on statement on preprinted form that unless plaintiff filed declaration before stated hearing date indicating why case should not be dismissed at that time, stayed action would be dismissed on court's own motion and dismissal was void. *Sindler v. Brennan (2003) 105 Cal. App. 4th 1350, 129 Cal. Rptr. 2d 888*

Order made on motion requiring notice of which no notice was given was void. *Thompson v. Cook (1942) 20 Cal. 2d*

564, 569, 127 P.2d 909

[10] Writ of Execution

Trial court has power and duty to vacate or recall writ of execution improvidently issued, such as one issued to enforce void judgment. *Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 840, 131 Cal. Rptr. 674*

[11] Timeliness of Motion for Relief

Judgment or order that is in fact void for want of jurisdiction, but invalidity of which does not appear from judgment roll or record, is subject to beingset aside on motion within a reasonable time after its entry, not exceeding time limit prescribed by *Code Civ. Proc. § 473* [*see Code Civ. Proc. §§ 473(b), 473.5(a)*], and independent suit in equity to set aside judgment or order is not necessary. *Norton v. Atchison, T., & S. F. R. Co. (1893) 97 Cal. 388, 393, 32 P. 452* ; *In re Dahnke (1923) 64 Cal. App. 555, 560, 222 P. 381* (criticized on another point in *Rogers v. Silverman (1989) 216 Cal. App. 3d 1114, 1122-1123, 265 Cal. Rptr. 286*)

Judgment naming incorrect defendant void on its face and subject to attack at any time. *Manson, Iver & York v. Black (2009) 176 Cal. App. 4th 36, 43-47, 97 Cal. Rptr. 3d 522*

Judgment void for lack of due process notice or extrinsic fraud is subject to attack at any time in proceeding or action initiated for that purpose; judgment that is proven void due to lack of due process notice suffers from fatal jurisdictional defect. *Ansley v. Superior Court (1986) 185 Cal. App. 3d 477, 488, 490, 229 Cal. Rptr. 771*

Judgment that is void on its face is subject to attack at any time, and six-month limit (set forth in *Code Civ. Proc. § 473(b)*) to make other motions to vacate judgment does not apply. *National Diversified Services, Inc. v. Bernstein (1985) 168 Cal. App. 3d 410, 414, 214 Cal. Rptr. 113*

Judgment or order that is void on face of record is subject to being set aside at any time by court that made it. *Daudert v. People (1979) 94 Cal. App. 3d 580, 585, 156 Cal. Rptr. 640*

Judgment or order that is void on its face and that requires only inspection of judgment roll or record to show its invalidity is subject to being set aside on motion at any time after its entry by court that rendered judgment or made order. *Neubrand v. Superior Court (1970) 9 Cal. App. 3d 311, 317, 88 Cal. Rptr. 586* ; *Thorson v. Western Development Corp. (1967) 251 Cal. App. 2d 206, 210, 59 Cal. Rptr. 299*

That portion of judgment giving greater relief than that demanded in complaint is void on face of record and is vulnerable to collateral attack on motion independent of *Code Civ. Proc. § 473*, that is, with no limit on time within which motion must be made. *Nemeth v. Trumbull (1963) 220 Cal. App. 2d 788, 792, 34 Cal. Rptr. 127*

[12] Inherent Power of Court to Vacate Void Judgment

Trial court has inherent power to set aside judgment void on its face at any time. *Connelly v. Castillo (1987) 190 Cal. App. 3d 1583, 1588, 236 Cal. Rptr. 112*

Code Civ. Proc. § 473 [*now see Code Civ. Proc. § 473(d)*] codifies inherent power of court to set aside order or judgment void on its face at any time. *National Diversified Services, Inc. v. Bernstein (1985) 168 Cal. App. 3d 410, 414, 214 Cal. Rptr. 113*

Court has inherent power to set aside judgment obtained by fraud on it, such as filing false return of service. *In re Marriage of Smith (1982) 135 Cal. App. 3d 543, 555, 185 Cal. Rptr. 411*

[13] Attacks on Void Judgments

[a] In General

Judgment absolutely void on its face is subject to attack anywhere, directly or collaterally, whenever it presents itself, either by parties or strangers; judgment is simply a nullity and neither basis nor evidence of any right whatever; when judgment on face of judgment roll is void for lack of jurisdiction, it may be attacked at any time. *Nagel v. P & M Distributors, Inc. (1969) 273 Cal. App. 2d 176, 180, 78 Cal. Rptr. 65*

Wrong decision made within limits of court's power is error correctable on appeal or other direct review, but decision that oversteps jurisdiction and power of court is void and subject to being set aside directly or collaterally. *Vasquez v. Vasquez (1952) 109 Cal. App. 2d 280, 283, 240 P.2d 319*

[b] Collateral Attack

Collateral attack is proper to contest judgment void on its face for lack of personal or subject matter jurisdiction or granting relief that court has no power to grant. *Becker v. S.P.V. Construction Co. (1980) 27 Cal. 3d 489, 493, 165 Cal. Rptr. 825, 612 P.2d 915*

On collateral attack on order or judgment of court of general jurisdiction only evidence that may be considered in determining whether order or judgment is void is record in proceeding in which it was entered, and, if record is silent as to existence of jurisdictional fact, that fact is presumed; but if proceeding is wholly statutory and unknown to common law, court, even though ordinarily one of general jurisdiction, is a court of special jurisdiction for that proceeding, and if jurisdictional facts do not appear of record in such proceeding, no presumption of regularity exists; however, failure of record to recite jurisdictional fact does not make judgment void, because extrinsic evidence is admissible to prove that fact, unless applicable statute makes record exclusive mode of proof. *Burge v. City & County of San Francisco (1953) 41 Cal. 2d 608, 612-613, 262 P.2d 6*

Judgment, in action to recover taxes paid under protest, erroneously awarding aggrieved taxpayer interest calculated from wrong date is not open to collateral attack on ground that scope of relief granted exceeds relief to which taxpayer is entitled under law applicable to its cause of action; and judgment awarding costs against city and county is not subject to collateral attack, costs being incident of judgment, but is conclusive after judgment becomes final when court had jurisdiction of person and subject matter. *Wells Fargo & Co. v. San Francisco (1944) 25 Cal. 2d 37, 44, 152 P.2d 625*

Judgment of any court against party over whose person court has not acquired jurisdiction is void for want of jurisdiction and is subject to collateral attack when lack of jurisdiction appears from record. *Forbes v. Hyde (1866) 31 Cal. 342, 347-348*

Fact that defendant was not served and return of service was not filed within three years of commencement of action (former *Code Civ. Proc. § 581a*; *nowsee Code Civ. Proc. § 583.210*) does not render resulting default judgment subject to collateral attack for being void on its face. *National Diversified Services, Inc. v. Bernstein (1985) 168 Cal. App. 3d 410, 413-416, 214 Cal. Rptr. 113*

Judgment that is void on its face is subject to collateral attack. *County of Ventura v. Tillett (1982) 133 Cal. App. 3d 105, 110, 183 Cal. Rptr. 741*

Judgment that is simply erroneous but not void, even though error appears on face of judgment or record, is not subject to collateral attack. *Jones v. World Life Research Institute (1976) 60 Cal. App. 3d 836, 840, 131 Cal. Rptr. 674*

Judgment of prior conviction, even though valid on its face, is subject to attack on constitutional grounds at any time in proceeding in which, by reason of prior conviction, increased sanctions may be imposed against person suffering it; similarly, collateral attack on conviction on constitutional grounds is permitted in proceeding in which license is revoked is result of that conviction. *De Rasmo v. Smith (1971) 15 Cal. App. 3d 601, 607-608, 93 Cal. Rptr. 289* (proceeding to revoke real estate salesman's license by reason of past conviction of crime in sister state)

One rule on collateral attack is that hearsay in affidavit for publication of summons may be considered and supports judgment thereafter made. *Cradduck v. Financial Indem. Co. (1966) 242 Cal. App. 2d 850, 855, 52 Cal. Rptr. 90*

Failure of complaint to state cause of action does not expose default judgment to collateral attack so long as complaint apprises defendant of nature of demand. *Brown v. Superior Court (1966) 242 Cal. App. 2d 519, 524, 51 Cal. Rptr. 633*

[c] Direct Attack

Rule is settled that judgment or order that is void on its face, and that requires only inspection of judgment-roll or record to show its invalidity, may be set aside on motion at any time after its entry by court that rendered judgment or made order. *Hayashi v. Lorenz (1954) 42 Cal. 2d 848, 851, 271 P.2d 18* ; *Neubrand v. Superior Court (1970) 9 Cal. App. 3d 311, 317, 88 Cal. Rptr. 586* ; *Nagel v. P & M Distributors, Inc. (1969) 273 Cal. App. 2d 176, 179, 78 Cal. Rptr. 65*

[14] Presumptions

When it does not appear affirmatively that jurisdictional defect was present, absence of recital that jurisdictional requisites were met does not make judgment void on its face; all presumptions favors judgment, and if invalidity does not appear from face of record, presumption is that which ought to have been done was not only done but rightly done. *Olivia v. Suglio (1956) 139 Cal. App. 2d 7, 8-9, 293 P.2d 63*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsGovernmentsCourtsAuthority to AdjudicateGovernmentsCourtsCourt Records

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[Reserved]

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43-489 California Forms of Pleading and Practice--Annotated § 489.320

§ 489.320 Related Matthew Bender Publications

For memoranda of points and authorities supporting and opposing motions on various grounds for relief in equity, and supporting and opposing demurrers and motions for summary judgment in actions in equity seeking relief from judgments, as well as points and authorities supporting grounds for granting or denying equitable relief, see California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* (Matthew Bender)

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§ 489.321 Decisions

[1] In General

First duty of equity is to be equitable; court of equity is bound to consider substance over form (*see Civ. Code § 3528*). *In re Marriage of Umphrey (1990) 218 Cal. App. 3d 647, 657, 267 Cal. Rptr. 218*

[2] When Equitable Relief Is Available

[a] Alternative to Relief Under Code Civ. Proc. § 473

Once relief is no longer available under *Code Civ. Proc. § 473(b)*, public policy favoring finality of judgments predominates and power to set aside final judgments and marital settlement agreements incorporated in them is to be exercised only when exceptional circumstances require that consequences of res judicata be denied; exceptional circumstances that are only basis for overturning judgment in equity is commonly referred to is extrinsic fraud or mistake. *In re Marriage of Umphrey (1990) 218 Cal. App. 3d 647, 655, 267 Cal. Rptr. 218* ; *see also In re Marriage of Alexander (1989) 212 Cal. App. 3d 677, 681, 261 Cal. Rptr. 9*

Court of equity in independent action has authority to grant relief respecting default judgment when defendant was prevented by extrinsic mistake from presenting meritorious defense in original proceedings, even though motion to vacate default had previously been denied. *Huff v. Mendoza (1980) 109 Cal. App. 3d 677, 680, 167 Cal. Rptr. 348*

[b] Basis of Equitable Jurisdiction

Court of equity interferes in suit when legal judgment was obtained or entered through fraud, mistake, or accident, or when defendant in action, having valid legal defense on merits, was prevented from maintaining it by fraud, mistake, or accident, without negligence, laches, or other fault on his, her, or his or her agents' part; ground for exercise of jurisdiction was that there has been no fair adversary trial at law. *Olivera v. Grace (1942) 19 Cal. 2d 570, 575, 122*

P.2d 564 ; *Baske v. Burke (1981) 125 Cal. App. 3d 38, 44,177 Cal. Rptr. 794* ; *In re Marriage of Guardino (1979) 95 Cal. App. 3d 77, 87, 156 Cal. Rptr. 883*

Basis of equitable relief from judgment, whether denominated extrinsic fraud or extrinsic mistake, is that which results in judgment taken under circumstances of unfairness and injustice without affording party opportunity to participate in proceedings. *Palmer v. Moore (1968) 266 Cal. App. 2d 134, 140-141, 71 Cal. Rptr. 801*

[c] Court's Equity Power Is Inherent

Equity is empowered to grant relief from orders and decrees in probate proceedings for extrinsic fraud. *Carney v. Simmonds (1957) 49 Cal. 2d 84, 94, 315 P.2d 305*

Superior court has inherent equity power under which, apart from statutory authority, it may grant relief from default judgment obtained through extrinsic fraud or mistake. *Munoz v. Lopez (1969) 275 Cal. App. 2d 178, 181, 79 Cal. Rptr. 563*

[d] Public Policy

Policy of law is to favor hearing on merits whenever possible, and appellate courts are much more disposed to affirm order that compels trial on merits than to allow default judgment to stand; policy is to disapprove of party who attempts to take advantage of mistake, surprise, inadvertence, or neglect of adversary. *Weitz v. Yankosky (1966) 63 Cal. 2d 849, 854-855, 48 Cal. Rptr. 620, 409 P.2d 700* ; *Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 737, 216 Cal. Rptr. 300*

[3] Meritorious Claim or Defense Is Essential

Court does not set aside valid judgment merely because it was obtained by extrinsic fraud or mistake in order to give barren right to adversary hearing; plaintiff is required to plead and prove that he or she has meritorious case, i.e., good claim or defense that, if asserted in new trial, would be likely to result in judgment favorable to him or her; party seeking to vacate judgment under *Code Civ. Proc. § 1710.40* (vacating judgment entered on sister state money judgment) is required to allege facts establishing meritorious defense to action in which judgment was entered. *New York Higher Education Assistance Corp. v. Siegel (1979) 91 Cal. App. 3d 684, 688-689, 154 Cal. Rptr. 200*

In husband's prior divorce action, based on foreign wife's alleged refusal to come to him in America, in which a judgment of divorce was entered, that he did not send for her or provide funds for her transportation was sufficient meritorious defense. *Sousa v. Freitas (1970) 10 Cal. App. 3d 660, 664, 89 Cal. Rptr. 485*

Moving party ordinarily has burden of demonstrating to court that move favorable result might be obtained if matter were to be heard on merits. *McCreadie v. Arques (1967) 248 Cal. App. 2d 39, 45, 56 Cal. Rptr. 188*

Equity does not overturn judgment unless it appears that like judgment would not follow; hence, complainant is required to plead and prove that result in main action would have been different had fraud or mistake not occurred. *Wilson v. Wilson (1942) 55 Cal. App. 2d 421, 427, 130 P.2d 782*

[4] Grounds for Relief

[a] In General

Attack on order or judgment by motion in equity on ground of extrinsic fraud is permitted when there was willful failure to give required notice or willfully false affidavits of service were filed; direct attack by independent action in equity is also allowed when there has been a failure to exercise degree of diligence required by law in connection with personal service, when false recitals of service were result of fraud, negligence, or mistake, and when failure to name person as party was result of mistake; extrinsic mistake is ground to vacate judgment by independent action in equity when there has been no fair adversary trial. *Carney v. Simmonds (1957) 49 Cal. 2d 84, 95-96, 315 P.2d 305*

Final judgment of court having jurisdiction over persons and subject matter is subject to attack in equity after expiration of time for direct attack at law only if alleged fraud or mistake is extrinsic. *Westphal v. Westphal (1942) 20 Cal. 2d 393, 397, 126 P.2d 105*

Trial court did not abuse its discretion in refusing to grant personal injury plaintiff who represented himself equitable relief from judgment against him, when plaintiff had his day in court and lost his case due to his own inability to present his case as a licensed attorney would have; self-represented litigants generally are entitled to no special treatment. *Burnete v. La Casa Dana Apartments (2007) 148 Cal. App. 4th 1262, 1268-1270, 56 Cal. Rptr. 3d 437*

While grounds for equitable action to set aside default judgment are commonly stated as being those of extrinsic fraud or mistake, terms are given very broad meaning that tends to encompass all circumstances that deprive adversary of fair notice of hearing whether or not those circumstances would qualify as fraudulent or mistaken in strict sense. *In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 149, 133 Cal. Rptr. 583*

Terms "extrinsic fraud or mistake" are given very broad meaning that tends to encompass all circumstances that deprive adversary of fair notice of hearing whether or not those circumstances would qualify are fraudulent or mistaken in strict sense; thus, false recital of service of summons although not deliberate was treated as extrinsic fraud or mistake in context of equitable action to set aside default judgment. *Munoz v. Lopez (1969) 275 Cal. App. 2d 178, 181, 79 Cal. Rptr. 563*

Extrinsic accident and mistake of fact, as well as extrinsic fraud, is, in some situations, proper basis for exercise of court's equitable jurisdiction to vacate default judgment; ground for exercise of that jurisdiction is that there has been no fair adversary trial at law. *Turner v. Allen (1961) 189 Cal. App. 2d 753, 757, 11 Cal. Rptr. 630*

Rule is established that, in cases in which aggrieved party is unable to make out case of intentional fraud, courts on motion will extend liberal interpretation to relieve party from judgment taken without fair adversary hearing; basis for equitable relief in these cases, whether denominated "extrinsic fraud" or "extrinsic mistake," is that which has resulted in judgment taken under circumstances of unfairness and injustice without affording party opportunity to participate in proceedings. *Davisv. Davis (1960) 185 Cal. App. 2d 788, 794, 8 Cal. Rptr. 874*

Suppression of fact by one who gives information of other facts likely to mislead for want of communication of fact concealed is deceit [*Civ. Code § 1710*], and any other act intended to deceive is actual fraud [*Civ. Code § 1572*]. *Harkins v. Fielder (1957) 150 Cal. App. 2d 528, 536, 310 P.2d 423*

Fraud or mistake is extrinsic when it deprives unsuccessful party of opportunity to present his or her case. *Cardozo v. Bank of America (1953) 116 Cal. App. 2d 833, 838, 254 P.2d 949*

Equity relieves injured party from effect of judgment procured by extrinsic fraud, mistake, or excusable neglect that was not result of complaint's negligence or laches. *Wilson v. Wilson (1942) 55 Cal. App. 2d 421, 426, 130 P.2d 782*

[b] Extrinsic Fraud

Fraud that will justify setting aside final judgment by court of equity is required to be of such character as to prevent trial of issues presented to court for determination. *Gale v. Witt (1948) 31 Cal. 2d 362, 365, 188 P.2d 755*

Taking default judgment against defendant known by plaintiff to be incompetent without having a general guardian or guardian ad litem appointed, thereby preventing defendant from presenting whatever defense he or she has, constitutes fraud on court and extrinsic fraud as to defendant; relief is warranted whenever extrinsic fraud prevents fair adversary proceeding. *Olivera v. Grace (1942) 19 Cal. 2d 570, 576-577, 122 P.2d 564*

To qualify for equitable relief on the ground of extrinsic fraud or mistake, moving party must demonstrate diligence in seeking to set aside default once it was discovered. *Manson, Iver & York v. Black (2009) 176 Cal. App. 4th 36, 48, 97 Cal. Rptr. 3d 522*

Though plaintiff did not receive notice of entry, judgment could not be set aside on grounds of extrinsic fraud, when plaintiff failed to establish essential elements of extrinsic fraud because there was neither misrepresentation by defendant nor reliance by plaintiff. *Kimball Avenue v. Franco (2008) 162 Cal. App. 4th 1224, 1229-1230* , 78 Cal. Rtpr. 3d 352

No extrinsic fraud in settlement of earlier action based on defendant-former joint venturer's alleged misrepresentations about profitability of franchisee loans and financial condition of company, because plaintiff conducted no formal discovery to obtain financial documents relating to those issues, and there was no evidence of elaborate conspiracy to keep those records or information from him. Any alleged fraud in securing dismissal of earlier action through misleading statements about value of company or loan servicing rights was intrinsic, because plaintiff settled action on reviewing single 10-page financial statement, conducted no formal discovery and undertook no review of financial records of company he claimed to have interest in. *Heyman v. Franchise Mortgage Acceptance Corp. (2003) 107 Cal. App. 4th 921, 926-928, 132 Cal. Rptr. 2d 465*

No extrinsic fraud shown when both parties in marital dissolution action were represented by counsel and wife's attorney could have conducted discovery on pension plan, even though husband mispresented estimate of present value of future pension benefits. *In re Marriage of Melton (1994) 28 Cal. App. 4th 931, 936, 33 Cal. Rptr. 2d 761*

Confession of judgment was fraudulently entered and properly set aside when, despite attorney's declaration in support of judgment, attorney was found to have represented opposing parties to dispute and was, therefore, not acting independently in representing party. *Rivercourt Co. Ltd. v. Dyna-Tel, Inc. (1996) 41 Cal. App. 4th 1477, 1481-1482, 49 Cal. Rptr. 2d 279*

No extrinsic fraud is shown when party is given notice of action and is not prevented from participating in action and thus had opportunity to protect against fraud or mistake of adversary but unreasonably neglected to do so. *In re Marriage of Melone (1987) 193 Cal. App. 3d 757, 762, 238 Cal. Rptr. 510*

Defaulting party was entitled to relief for extrinsic fraud when default was due to positive misconduct of his or her former attorney, who purported to continue representing him or her without authority and failed to notify defaulting party of, or respond to, papers served on him by opposing party, and when defaulting party was relatively free from personal neglect and opposing party did not sufficiently show prejudice resulting from grant of relief. *Lovato v. Santa Fe Internat. Corp. (1984) 151 Cal. App. 3d 549, 554-555, 198 Cal. Rptr. 838*

Collusive judgment adversely affecting rights of third persons may be set aside on ground of extrinsic fraud. *People ex rel. Public Util. Com. v. Ryerson (1966) 241 Cal. App. 2d 115, 121, 50 Cal. Rptr. 246*

Actual fraud is not required to grant relief from judgment; extrinsic fraud that deprives adversary of fair notice of hearing exists even though it was accomplished by mistake. *Davis v. Davis (1960) 185 Cal. App. 2d 788, 793, 8 Cal.*

Rptr. 874

Fraud or mistake is extrinsic when it deprives unsuccessful party of opportunity to present his or her case to court; if unsuccessful party to action has been kept in ignorance of action, or has been prevented from fully participating in it, there has been no true adversary proceeding, and judgment is open to attack at any time. *Harkins v. Fielder (1957) 150 Cal. App. 2d 528, 535-536, 310 P.2d 423*

[c] Extrinsic Mistake

Reasonable reliance on insurer to defend action on defendant's behalf and insurer's failure to do so, resulting in entry of default and default judgment against defendant, constitutes extrinsic mistake. *Weitz v. Yankosky (1966) 63 Cal. 2d 849, 857-858, 48 Cal. Rptr. 620, 409 P.2d 700*

Three elements are required to set aside judgment based on extrinsic mistake: (1) defaulted party must show it has meritorious case; (2) it must articulate satisfactory excuse for not presenting defense to original action; and (3) it must demonstrate that it was diligent in seeking to set aside default once it had been discovered; same rule applies when motion is to vacate order of dismissal. *People v. One Parcel of Land (1991) 235 Cal. App. 3d 579, 583-584, 286 Cal. Rptr. 739* ; *Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 738, 216 Cal. Rptr. 300*

Doctrine of permitting relief in equity from judgment entered as result of extrinsic mistake is applicable to court clerk's mistakes; hence, when elderly defendant wrote letters to court clerk requesting that clerk do "what was needed" to answer complaint, stating that defendant would pay any necessary fees, and sufficiently alleging meritorious defense, failure of clerk to file letters was responsive pleading was ministerial mistake entitling defendant to equitable relief. *Baske v. Burke (1981) 125 Cal. App. 3d 38, 44-45, 177 Cal. Rptr. 794*

Cases that grant equitable relief from final judgments are without exception being those in which aggrieved party or court has been victim of factual misrepresentations rather than legal misrepresentations. *In re Marriage of Guardino (1979) 95 Cal. App. 3d 77, 92, 156 Cal. Rptr. 883*

Reasonable reliance on codefendant to defend action on defendant's behalf and his failure to do so, resulting in entry of default and default judgment against defendant, constitutes extrinsic mistake. *Bailey v. Roberts (1969) 271 Cal. App. 2d 282, 285-286, 76 Cal. Rptr. 572*

Reasonable reliance by defendant former owners of property on assurances of present owner codefendants to protect their rights in action arising out of interference by present owners with plaintiff's easement right over the property constitutes mistake of fact or accident. *Crane v. Kampe (1964) 225 Cal. App. 2d 200, 205-206, 37 Cal. Rptr. 220*

[5] Insufficient Grounds

[a] Inexcusable Neglect

Inexcusable neglect bars equitable relief on grounds of extrinsic fraud or mistake. *Carroll v. Abbott Laboratories, Inc. (1982) 32 Cal. 3d 892, 901-902 n.8, 187 Cal. Rptr. 592, 654 P.2d 775* ; *In re Marriage of Park (1980) 27 Cal. 3d 337, 345, 165 Cal. Rptr. 792, 612 P.2d 882* ; *Jackson v. Bank of America (1986) 188 Cal. App. 3d 375, 386, 386 n.6, 233 Cal. Rptr. 162*

[b] Attorney's Act or Omission

On motion for relief in equity, plaintiff was required to plead that his or her attorney's neglect or omission was excusable, because inexcusable neglect is ordinarily imputed to client whose redress is malpractice action; however, when attorney's neglect is of extreme degree amounting to positive misconduct and client is relatively free from negligence, attorney's conduct obliterates existence of attorney-client relationship. *Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 738, 216 Cal. Rptr. 300*

[c] Intrinsic Fraud

Use of forged documents or perjured testimony to secure judgment constitutes intrinsic fraud and is no basis for attack on judgment in equity. *Gale v. Witt (1948) 31 Cal. 2d 362, 366, 188 P.2d 755*

Party who has been given proper notice of action, and who has not been prevented from full participation in it, has had opportunity to present case to court and to protect self from any fraud attempted by adversary; fraud perpetrated under those circumstances is intrinsic, even though unsuccessful party does not avail himself or herself of opportunity to appear before court; having had opportunity to protect his or her interest, he or she cannot attack judgment once time has elapsed for appeal or other direct attack. *Westphal v. Westphal (1942) 20 Cal. 2d 393, 397, 126 P.2d 105* ; *Janetsky v. Avis (1986) 176 Cal. App. 3d 799, 811, 222 Cal. Rptr. 342*

Introduction of perjured testimony is a classic example of intrinsic fraud and may not be used to overturn a judgment. *Buesa v. City of Los Angeles (2009) 177 Cal. App. 4th 1537, 1545-1548, 100 Cal. Rptr. 3d 86*

Ordinarily, if aggrieved party is aware of proceeding and is not prevented from appearing, any fraud is intrinsic and not basis for equitable relief, although rule is sometimes relaxed when, by fraud, aggrieved party's claim or defense is concealed from him or her; perjured evidence is not ground for setting aside judgment, particularly when perjury involved is that of person seeking to set aside judgment; rule is same in case of default judgment or a judgment after contested trial. *In re Marriage of Guardino (1979) 95 Cal. App. 3d 77, 88-89, 156 Cal. Rptr. 883*

[d] Mutual Mistake

Mutual mistake that might be sufficient to set aside contract is not sufficient to set aside final judgment on equitable grounds. *Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 472, 82 Cal. Rptr. 489, 462 P.2d 17*

[e] Unjust Judgment or Order

Unjust judgment or order by itself is not enough to grant relief under equitable principles. *De Mello v. Souza (1973) 36 Cal. App. 3d 79, 85, 111 Cal. Rptr. 274*

[6] Defenses to Equitable Relief

[a] Laches

Facts set forth in wife's declaration, in proceeding to set aside interlocutory judgment of dissolution of marriage disposing of community property rendered after uncontested hearing on wife's default, does not establish laches on her part as matter of law when wife stated that she first consulted an attorney in March 1975, after entering into marital settlement agreement in 1974 without benefit of counsel, from which it may be inferred that she did not appreciate her rights until that time, and reason for delay from April to August of 1975 before filing notice of motion for relief was to avoid interfering with child's marriage; husband's claim of prejudice that it will be time consuming and cause great expense to relitigate whole issue of dissolution of marriage and community property rights was not prejudice arising out

of delay; such prejudice results whenever decree was set aside. *In re Marriage of Coffin (1976) 63 Cal. App. 3d 139, 155, 133 Cal. Rptr. 583*

One is not barred by alleged laches in negligence in failing to discover sooner that his or her rights have been injured by fraud of another. *Sousa v. Freitas (1970) 10 Cal. App. 3d 660, 668, 89 Cal. Rptr. 485*

[b] Estoppel

Estoppel arises in context of court's exercise of equitable powers; estoppel is enforced to prevent person from asserting right when person's conduct or silence makes it unconscionable for person to assert it; elements of estoppel is (1) representation or promise; (2) made with knowledge of facts; (3) to party ignorant of truth; (4) with intent that other party act on it; (5) when other party has, in fact, been induced to rely on it. *In re Marriage of Umphrey (1990) 218 Cal. App. 3d 647, 658, 267 Cal. Rptr. 218*

[7] Proceedings Subject to Equitable Relief

[a] Default and Default Judgment

In creditor's action on promissory note to obtain possession of property securing note against debtor and guarantor of note in which defendants'default was entered, trial court granted plaintiff possession of property but continued default judgment hearing until after sale, and then entered deficiency judgment against defendants, defect in notice, required by former *Com. Code § 9504(3)* (*now see Com. Code §§ 9611-9614*) before selling collateral, which occurred after default was entered, provides no equitable grounds for vacating default. *Rutan v. Summit Sports, Inc. (1985) 173 Cal. App. 3d 965, 970, 219 Cal. Rptr. 381*

[b] Void Judgments

While diligence is enjoined on those who seek to avoid default judgments, what is initially void is always void and life is not breathed into it by lapse of time. *Sousa v. Freitas (1970) 10 Cal. App. 3d 660, 668, 89 Cal. Rptr. 485* (relief from invalid divorce decree entered some 46 years before)

[c] Satisfaction of Judgment

Satisfaction of judgment is subject to being vacated and judgment revived in appropriate circumstances. *Kachig v. Boothe (1971) 22 Cal. App. 3d 626, 632, 99 Cal. Rptr. 393*

[d] Foreign Judgments

Full faith and credit clause does not bar aggrieved party's right to pursue equitable relief in California from sister-state judgment when sister state authorizes such relief under its laws. *Huff v. Mendoza (1980) 109 Cal. App. 3d 677, 680, 167 Cal. Rptr. 348*

[8] Substantive Areas in Which Equitable Relief Is Available

[a] Family Law Cases

Law is well settled that extrinsic fraud is proper ground for setting aside alimony award and property settlement

incorporated in divorce decree; failure of one spouse to disclose existence of community property assets constitutes fraud and warrants equitable relief from judgment dividing community property between parties. *In re Marriage of Modnick (1983) 33 Cal. 3d 897, 904-906, 191 Cal. Rptr. 629, 663 P.2d 187*

When property settlement is incorporated in divorce decree, settlement was merged with decree and becoming the final judicial determination of parties' property rights; thus, rules governing extrinsic fraud and mistake applies to alimony awards and property settlements incorporated in divorce decrees. *Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 470-471, 82 Cal. Rptr. 489, 462 P.2d 17*

Deliberate concealment by one spouse of existence of community assets constitutes extrinsic fraud; however, when party has had opportunity to protect self from any mistake or fraud on part of his or her adversary but unreasonably fails to do so, equitable relief is unavailable. *In re Marriage of Umphrey (1990) 218 Cal. App. 3d 647, 655, 267 Cal. Rptr. 218*

Trial court errs, in setting aside judgment and marital settlement agreement on motion for relief on ground of extrinsic fraud, when court found that moving party had failed to establish extrinsic fraud and there was, therefore, no basis for relief in equity. *In re Marriage of Alexander (1989) 212 Cal. App. 3d 677, 681, 261 Cal. Rptr. 9*

[b] Probate Cases

Even absent timely will contest, court may exercise its equitable jurisdiction to set aside orders and decree of probate proceedings in cases of fraud or mistake. *Estate of Sanders (1985) 40 Cal. 3d 607, 613-614, 221 Cal. Rptr. 432, 710 P.2d 232*

When sole basis for motion under *Code Civ. Proc. § 473* is that party did not receive actual notice of the probate action, relief from the judgment is not available. *Parage v. Couedel (1997) 60 Cal. App. 4th 1037, 1043-1044, 70 Cal. Rptr. 2d 671*

Former rule that probate court lacked equitable jurisdiction to set aside its own orders and decree on ground of extrinsic fraud was eroded by subsequent case authorities. *Goldberg v. Frye (1990) 217 Cal. App. 3d 1258, 1265, 266 Cal. Rptr. 483*

When decree of distribution has been procured from probate court by fraud in matters outside issues to be adjudicated, as when distributee has prevented party who has interest in estate from making appearance to protect his or her interest, equity intervenes to rectify wrong perpetrated by that extrinsic fraud; while there are many varieties, facets, and shadings of extrinsic fraud, familiar example consists of deceptive conduct on part of distributee of estate that has kept other interested parties away from court by some fraudulent artifice or wilful suppression of material facts; invocation of equity on grounds of extrinsic fraud is warranted when heir or legatee fails to notify court of existence of other heirs of whose existence he or she has knowledge and files false petitions with court representing nonexistence of such heirs; actual or positive fraud is not required as element of extrinsic fraud, since mistake on part of distributee that kept legatee in ignorance of true facts or deprives him or her of fair notice of probate proceedings constitutes type of extrinsic fraud; extrinsic mistake that has foreclosed party from presenting his or her case in court also furnishes ground for equitable intervention. *Harkins v. Fielder (1957) 150 Cal. App. 2d 528, 534-535, 310 P.2d 423*

[9] Invoking Equity

Equitable power of court is invoked either by motion or by independent action in equity. *Baske v. Burke (1981) 125 Cal. App. 3d 38, 45, 177 Cal. Rptr. 794*

Equitable power is invoked by party seeking to set aside default judgment either by filing separate suit for that purpose or by motion made in action in which default was taken. *Munoz v. Lopez (1969) 275 Cal. App. 2d 178, 181, 79 Cal. Rptr. 563*

After a lapse of six months [*see Code Civ. Proc. § 473(b)*], attack on default judgment may be made by separate action in equity or by motion based on equitable grounds in same action. *Desper v. King (1967) 251 Cal. App. 2d 659, 662, 59 Cal. Rptr. 657*

Action in equity to vacate and set aside default judgment on ground of lack of jurisdiction over defendant's person based on nonservice of summons is direct attack on judgment. *Hayes v. Risk (1967) 255 Cal. App. 2d 613, 623, 64 Cal. Rptr. 36*

[10] Timeliness of Motion

[a] In General

Judgment obtained through extrinsic fraud, though long since final, was subject to being set aside by independent suit in equity. *Lazzarone v. Bank of America (1986) 181 Cal. App. 3d 581, 595, 226 Cal. Rptr. 855*

Rule that invalidity of default judgment or order that is in fact void for want of jurisdiction over defendant that is not apparent from judgment roll or record may be set aside in motion at law only within time limit specified in *Code Civ. Proc. § 473* [*now see Code Civ. Proc. § 473.5*], which applies by analogy, is inapplicable to proceeding in equity to set aside judgment. *Munoz v. Lopez (1969) 275 Cal. App. 2d 178, 182-183, 79 Cal. Rptr. 563*

Application for relief from default based on extrinsic fraud is not subject to six-month time limit contained in *Code Civ. Proc. § 473(b)* (relief from judgment, order, or proceeding taken through mistake, inadvertence, surprise, or excusable neglect), but is required to be made within reasonable time, determination of which is within trial court's discretion. *Davis v. Davis (1960) 185 Cal. App. 2d 788, 792, 8 Cal. Rptr. 874*

[b] Delay in Seeking Relief

Participation of plaintiff's counsel in defendant's delay in seeking relief from default and default judgment by indicating willingness to discuss setting aside default on conditions affecting codefendant, which were met, and then after receiving full satisfaction of codefendant's obligation refusing to set aside default, renders defendant's inaction during that period reasonable. *Bailey v. Roberts (1969) 271 Cal. App. 2d 282, 287, 76 Cal. Rptr. 572*

[11] Discretion of Court

Equitable motion to set aside default judgment is addressed to trial court's sound discretion. *Weitz v. Yankosky (1966) 63 Cal. 2d 849, 854, 48 Cal. Rptr. 620, 409 P.2d 700* ; *People v. One Parcel of Land (1991) 235 Cal. App. 3d 579, 584, 286 Cal. Rptr. 739* ; *Palmer v. Moore (1968) 266 Cal. App. 2d 134, 142, 71 Cal. Rptr. 801* ; *Roussey v. Ernest W. Hahn, Inc. (1967) 251 Cal. App. 2d 251, 255, 59 Cal. Rptr. 399* ; *McCreadie v. Arques (1967) 248 Cal. App. 2d 39, 44-45, 56 Cal. Rptr. 188*

Use of equitable powers to provide relief from default is within trial court's sound discretion. *Janetsky v. Avis (1986) 176 Cal. App. 3d 799, 811, 222 Cal. Rptr. 342*

Order of dismissal for failure to comply with order compelling answers to interrogatories, signed by court and filed in

action, is practical equivalent of default judgment; motion to set aside order is addressed to trial court's sound discretion. *Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 736, 216 Cal. Rptr. 300*

Equitable motion for relief from default judgment is addressed to trial court's sound discretion. *Slusher v. Durrer (1977) 69 Cal. App. 3d 747, 753, 138 Cal. Rptr. 265*

Like motion for relief under *Code Civ. Proc. § 473(b)*, relating to judgment, order, or proceeding taken through mistake, inadvertence, surprise, or excusable neglect, motion for relief from default based on extrinsic fraud is addressed to trial court's sound discretion. *Davis v. Davis (1960) 185 Cal. App. 2d 788, 792, 8 Cal. Rptr. 874*

[12] Extrinsic Evidence

Extrinsic evidence is admissible on equitable motion for relief from judgment void in fact but not void on its face to show invalidity of judgment. *Munoz v. Lopez (1969) 275 Cal. App. 2d 178, 183, 79 Cal. Rptr. 563*

Fraud, like any other fact, may be proved by circumstantial evidence. *Harkins v. Fielder (1957) 150 Cal. App. 2d 528, 536, 310 P.2d 423*

[13] Denial of Relief

Equity denies relief from judgment when complaining party has contributed to fraud or mistake giving rise to judgment thus obtained or if complainant was guilty of negligence in permitting fraud to be practiced or mistake to occur. *Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 473, 82 Cal. Rptr. 489, 462 P.2d 17* ; *In re Marriage of Guardino (1979) 95 Cal. App. 3d 77, 89-90, 156 Cal. Rptr. 883*

Equitable relief from default and default judgment is singularly inappropriate when defendant was negligent in failing to take any meaningful action to protect self after being served with summons and complaint and notices requesting entry of default. *Davis v. Thayer (1980) 113 Cal. App. 3d 892, 911, 170 Cal. Rptr. 328*

Equitable relief from judgment is denied when complainant is chargeable with fault, as when complainant was guilty of negligence in permitting fraud to be practiced or mistake to occur; not every mistake justifies equity's setting aside final judgment. *Wilson v. Wilson (1942) 55 Cal. App. 2d 421, 427, 130 P.2d 782*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseCivil ProcedureJudgmentsRelief From JudgmentExtraordinary CircumstancesCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentVoid Judgments

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§ 489.322 Text References

Witkin, California Procedure, vol. 8, *Attack on Judgment in Trial Court*, §§ 219-221 (4th ed. 1997)

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[Reserved]

§§ 489.323[Reserved]

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§ 489.330 Planning and Procedures

[1] Ascertain Facts

☐ Identify judgment, dismissal, order, or other proceeding from which relief is sought.

☐ Ascertain circumstances leading to entry of the judgment or order, including timing of relevant events.

☐ Ascertain which facts appear of record and which do not.

☐ For all persons who have personal knowledge of facts that do not appear of record, obtain:

- ☐ Names.
- ☐ Addresses.
- ☐ Phone numbers.

☐ If relief is available on facts that do not appear of record [*see* [2], *below*], determine whether persons with personal knowledge are willing to:

- ☐ Testify.

☐ Give affidavit or make declaration under penalty of perjury.

[2] Make Preliminary Determinations

☐ Determine whether judgment or order from which relief is sought is:

☐ Valid or

☐ Void.

☐ If valid, for available relief, see *§§ 489.331* and *489.333*.

☐ If void, determine whether it is [*see § 489.134*]:

☐ Void on its face or

☐ Void in fact but not on its face.

☐ For available relief, see *§§ 489.332* and *489.333*.

☐ Determine whether there are any defenses to relief [*see §§ 489.341 489.343*].

[3] Review Time Limits

☐ Consider any time limitations that apply to ground on which relief will be sought [*see §§ 489.331 -489.333*; *see also § 489.15*].

[4] Consider Combining Motions

☐ If several grounds for relief exist, consider combining those that are not time barred in one motion for relief.

☐ Review the following alternative grounds and determine which apply to judgment, order, or other proceeding at issue.

☐ Relief from judgment, dismissal, order, or proceeding based mistake, inadvertence, surprise, or excusable neglect [*Code Civ. Proc. § 473(b)*; *see § 489.331[1]*; *see also § 489.30* et seq.].

☐ Relief from default, default and default judgment, or dismissal based on attorney's affidavit or declaration of fault [*Code Civ. Proc. § 473(b)*; *see § 489.331[2]*; *see also § 489.40*].

☐ Relief from default, default and default judgment, or dismissal when service did not result in actual notice in time to defend [*Code Civ. Proc. § 473.5*; *see § 489.331[3]*; *see also § 489.70* et seq.].

☐ Relief from default and default judgment under consumer venue statutes [*Code Civ. Proc. § 585.5*; *see § 489.331[4]*; *see also § 489.90* et seq.].

☐ Relief based on California court's having assumed jurisdiction over attorney's law practice [*Code Civ. Proc. § 473.1*; *see § 489.331[5]*; *see also § 489.100* et seq.].

☐ Relief from default or default and default judgment based on Servicemembers' Civil Relief Act [*50 U.S.C. App. § 521(g)*; *see § 489.331[6]*; *see also § 489.110* et seq.].

☐ Relief from void judgment and order that is void on its face [*Code Civ. Proc. § 473(d)*; *Olivera v. Grace (1942) 19 Cal. 2d 570, 574, 122 P.2d 564* (court's inherent power); *see § 489.332[1]*; *see also § 489.130* et seq.].

☐ Relief from void judgment and order that is void in fact although not void on its face [*Code Civ. Proc. § 473(d)*; *Olivera v. Grace (1942) 19 Cal. 2d 570, 574, 122 P.2d 564* (court's inherent power); *see § 489.332[1]*; *see also § 489.130* et seq.].

☐ Relief from valid or void judgment, dismissal, or order in equity [*Cal. Const., art. VI, § 10* (general jurisdiction of superior court); *Code Civ. Proc. § 86(b)(3)* (limited civil case); *see § 489.333*; *see also § 489.220* et seq.].

NOTE:

Consider Separate Conditions for Relief. If counsel desires to combine grounds, he or she should keep in mind the separate requirements of each form of relief and, generally, the respects in which the preconditions for relief on the several grounds might differ. Counsel should be aware of the terms, conditions, and penalties that might be imposed either on the makingof the motion or the granting of relief [*see §§ 489.331 489.333*]. In addition, if counsel is attacking a judgment on the ground that the court lacked personal jurisdiction, care should be taken to avoid inadvertently making a general appearance and, in so doing, waiving the lack of jurisdiction objection by voluntarily submitting to the in personam jurisdiction of the court [*see Code Civ. Proc. § 410.50(a)*; *see also § 489.16[2*]].

[5] Prepare Notice of Motion

☐ Select or reserve hearing date according to local practice.

☐ Calendar:

☐ Hearing date and reminder to call for tentative ruling.

☐ Last day to serve opposing party's attorney (or opposing party who is not represented by attorney) with copy of notice of motion and accompanying papers.

☐ Last day to file papers; calendar at least 16 court days before time appointed for the hearing [*Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(a)*].

NOTE:
Time for Service. Service must be made at least 16 court days, plus specified extended periods when service is by mail, fax, or overnight delivery, before the time appointed for the hearing, unless an order shortening time is obtained [*see Code Civ. Proc. §§ 1005(a)(10), (12), (13), (b), 1010*; *Cal. Rules of Ct., Rule 3.1300(a)*].

☐ Prepare papers for relief selected as indicated in §§ *489.331 489.333*.

☐ Prepare proof of service [*see* Ch. 518, *Service of Summons and Papers*].

☐ If required, prepare applicable for order shortening time [for a form of ex parte application for an order shortening time, *see* Ch. 524, *Shortening and Extension of Time*].

[6] Serve and File Papers

☐ Serve copy of notice of motion and accompanying papers, as discussed under [5] and [6], *above.* For an outline of the procedure for serving a notice of motion, see Ch. 372, *Motions and Orders* .

☐ Determine required filing fee.

☐ Deliver the originals of the notice of motion and accompanying papers to the court clerk for filing and pay the required fee [*see Gov. Code §§ 70611, 70613*] at least 16 court days before time appointed for the hearing [*Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(a)*].

NOTE:
Comply With Local Practice Regarding Proof of Service. Normal practice is to attach the original of the proof of service to the original notice of motion, to file them together, and to attach a copy of the proof of service to each copy of the notice of motion. However, *Code Civ. Proc. § 1013a* (relating to service by mail) does not require this, and unless otherwise required by local court rule, the proof of service can be filed after the notice of motion is filed. If the motion is subject to the Civil Law and Motion Rules, which applies to most pretrial motions and to motions to set aside a default judgment, proof of service must be filed no later than five calendar days before the time appointed for the hearing [*Cal. Rules of Ct., Rules 3.1100, 3.1300(b)*; *see Cal. Rules of Ct., Rules 3.1100, 3.1103* (proceedings to which rules apply)].

[7] Prepare for Hearing

☐ If counsel intends to present oral evidence at hearing and motion is subject to Civil Law and Motion Rules:

☐ Prepare written statement setting forth nature and extent of evidence proposed to be introduced and reasonable time estimate for hearing.

☐ Deliver statement to the court for filing no later than three court days before the hearing.

☐ If statement is filed less than five court days before hearing, prepare additional copy and serve it on adverse party in manner to assure delivery to that party no later than two days before hearing [*Cal. Rules of Ct., Rule 3.1306(a)*].

NOTE:
Civil Law and Motion Rules. Evidence received at a motion hearing subject to the Civil Law and Motion Rules (*see Cal. Rules of Ct., Rules 3.1100, 3.1103*) must be by declaration and affidavit and by request for judicial notice (*see Cal. Rules of Ct., Rule 3.1306(b)*) without testimony or cross-examination, except as allowed in the court's discretion for good cause shown or as permitted by local rule. A party seeking permission to introduce oral evidence, except in rebuttal to oral evidence presented by the other party, must file, no later than three court days before the hearing, a written statement setting forth the nature and extent of the evidence proposed to be introduced and a reasonable time estimate for the hearing [*Cal. Rules of Ct., Rules 3.1100, 3.1103(b), 3.1306(a)*].

☐ Advise persons who will offer supporting testimony at hearing of time, date, and place of the hearing, and instruct them to attend.

NOTE:
Consider Issuing Subpoena. Counsel may wish to consider the advisability of issuing, or having issued, a subpoena [*see Code Civ. Proc. § 1985*] and serving it on the witnesses to secure their attendance in court [*see generally, Code Civ. Proc. § 1985 et seq.* and Ch. 535, *Subpoena*].

[8] Call for Tentative Ruling

☐ Call for tentative ruling, if available. If counsel wishes to appear at hearing and argue motion, contact clerk of court within time specified in tentative ruling message.

[9] Attend Hearing

☐ Attend the hearing, if necessary or desired.

☐ Have witnesses testify, if applicable.

☐ Argue motion.

[10] Prepare and Serve Order

☐ If the motion is granted, present order for signature:

- [ ] If counsel previously prepared order granting motion:
- [ ] Present original of order to courtroom clerk for judge's signature.
- [ ] Deliver copies to be conformed to courtroom clerk.
- [ ] If counsel has not prepared order, or order is different from one prepared:
- [ ] Prepare order and deliver it to courtroom clerk for delivery to judge for signature.
- [ ] Deliver copies to be conformed to courtroom clerk.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsGovernmentsLegislationStatutes of LimitationsTime LimitationsMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief Act

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§ 489.331 Consideration of Alternative Remedies for Relief: Valid Judgment and Order

[1] Relief Under Code Civ. Proc. § 473(b) Based on Mistake, Inadvertence, Surprise, or Excusable Neglect

[a] Is Client Proper Party?

☐ Determine whether party seeking relief is proper party. Confirm that moving party is any of the following:

☐ Aggrieved party in favor of or against whom judgment, dismissal, order, or proceeding was taken;

☐ Party's legal representative; or

☐ Stranger whose rights have been adversely affected by judgment, order, or proceeding.

[b] Is Judgment or Order Proper Target of Relief?

☐ Moving party seeks relief against any of following [*Code Civ. Proc. § 473(b)*]:

☐ Judgment.

☐ Dismissal.

☐ Order.

☐ Proceeding, including default and default judgment.

[c] Does Basis for Relief Exist?

☐ Determine whether any of following grounds exist:

☐ Mistake (*see § 489.44[1]*).

☐ Inadvertence (*see § 489.44[2]*).

☐ Surprise (*see § 489.44[3]*).

☐ Excusable neglect (*see § 489.44[4]*).

NOTE:

Attorney's Affidavit of Mistake, Etc. In the case of a default, default judgment, or dismissal only, if the attorney will give an affidavit or declaration attesting to his or her mistake, inadvertence, surprise, or neglect, the defendant may move for relief under a different provision of *Code Civ. Proc. § 473(b)* [*see* [2], *below*].

[d] Is Relief Appropriate to Client's Case?

☐ Determine what kind of relief is desired; that is, order:

☐ Setting aside or vacating judgment, dismissal, or order, or

☐ Nullifying proceeding and allowing moving party to file pleading or paper if appropriate.

[e] Has Time to File Motion for Relief Expired?

☐ Determine whether time to file notice of motion has expired:

☐ The motion must be made within reasonable time, in no case exceeding six months from the date the judgment or dismissal was entered, order was made, or proceeding was taken [for discussion, *see § 489.39*].

NOTE:

Shorter Time for Determination of Ownership or Possession Right. A potentially shorter period applies to a judgment, dismissal, order, or other proceeding determining the ownership or right to possession of property [*Code Civ. Proc. § 473(b)*; for discussion, *see § 489.39[9*]].

☐ If time to file notice of motion has *not* expired, determine whether moving party has at all times exercised diligence in seeking relief [for discussion, *see § 489.39[6]*].

[f] If Time Has Expired, Is Alternative Remedy Available?

☐ Determine whether relief might still be a vailable under one of other statutory proceedings [*see* [2]-[6], *below*] or in equitable proceedings [*see § 489.333*; for discussion, *see § 489.220*].

[g] What Is Proper Court for Motion?

☐ Ascertain proper court for motion; motion must be made in court in which judgment or dismissal was entered, order was made, or proceeding was taken.

[h] Prepare Moving Papers

☐ Prepare notice of motion [*see § 489.360[1]* (form of notice of motion)].

☐ Prepare one or more affidavits or declarations under penalty of perjury [*see §§ 489.360[1], 489.361* (forms of declaration)].

☐ Prepare supporting memorandum of points and authorities [*see* s California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* (Matthew Bender)].

☐ Prepare papers to be filed if motion is granted:

☐ If relief is sought from default or default and default judgment, copy of proposed verified answer showing meritorious defense to action; or

☐ In other cases, a copy of the pleading or other paper, if any, proposed to be filed.

☐ Prepare proposed order, if desired or required [*see § 489.360[2]* (form)].

[2] Relief From Default, Default and Default Judgment, or Dismissal Under Code Civ. Proc. § 473(b) Based on Attorney's Affidavit or Declaration of Fault

[a] Is Client Proper Party?

☐ Determine whether party seeking relief is proper party. Confirm that moving party is either of the following:

☐ Defendant or

☐ Cross defendant.

[b] Is Judgment or Order Proper Target of Relief?

☐ Moving party seeks relief against any of following [*Code Civ. Proc. § 473(b)*]:

☐ Default.

☐ Default and default judgment.

☐ Dismissal.

[c] Does Basis for Relief Exist?

☐ Determine whether any of following exist [for discussion, *see § 489.40[1]*]:

☐ Mistake.

☐ Inadvertence.

☐ Surprise.

☐ Neglect of attorney whether excusable or not.

[d] Is Relief Appropriate to Client's Case?

☐ Relief available under *Code Civ. Proc. § 473(b)* is order setting aside and vacating default, default and default judgment, or dismissal and permitting defendant to answer.

[e] Has Time to File Motion for Relief Expired?

☐ Determine whether time to file notice of motion has expired; the motion must be made within six months from the date the judgment was entered.

[f] If Time Has Expired, Is Alternative Remedy Available?

☐ There appears to be no alternative relief available, other than:

☐ Appeal.

☐ Client may have claim against attorney that can be pursued in independent action for malpractice (*see* Ch. 76, *Attorney Professional Liability*).

[g] What Is Proper Court for Motion?

☐ Ascertain proper court for motion; motion must be made in court in which default, default and default judgment, or dismissal was entered.

[h] Prepare Moving Papers

☐ Prepare notice of motion [*see § 489.360[1]* (form of notice of motion)].

☐ Prepare one or more affidavits or declarations under penalty of perjury [*see §§ 489.360[1], 489.361[3]* (forms of declaration)].

NOTE:
Facts May Be Combined With Affidavit of Fault. If the affidavit or declaration is made by the party's attorney, these facts may, instead of being set forth in a separate affidavit or declaration, be combined with the attorney's affidavit or declaration of fault (discussed below;).

☐ Prepare attorney's affidavit or declaration under penalty of perjury attesting to his or her fault, that is, to his or her mistake, inadvertence, surprise, or neglect and that the default, default and default judgment, or dismissal was entered because of it [*see § 489.362* (form)].

☐ Prepare copy of the answer showing a meritorious defense proposed to be filed [*see* Ch. 26, *Answers*].

☐ Prepare supporting memorandum of points and authorities [*see* California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* . (Matthew Bender)].

☐ Prepare proposed order, if desired or required [*see § 489.360[2]* (form)].

[3] Relief From Default or Default and Default Judgment Under Code Civ. Proc. § 473.5 Based on Lack of Notice in Time to Defend

[a] Is Client Proper Party?

☐ Determine whether party seeking relief is proper party. Confirm that moving party is either of the following:

☐ Defendant or

☐ Cross defendant.

[b] Is Judgment or Order Proper Target of Relief?

☐ Moving party seeks relief against either of following [*Code Civ. Proc. § 473.5(a)*; *see § 489.70*]:

☐ Default.

☐ Default and default judgment.

[c] Does Basis for Relief Exist?

☐ Determine whether service of summons did not result in actual notice in time to defend [for discussion, *see §§ 489.70, 489.71*].

[d] Is Relief Appropriate to Client's Case?

☐ Relief available under *Code Civ. Proc. § 473.5* is order setting aside or vacating default and default judgment and granting leave to defend the action.

[e] Has Time to File Motion for Relief Expired?

☐ Determine whether time to file notice of motion has expired. The motion for relief must be filed within reasonable time in no case exceeding the earlier of [for discussion, *see § 489.75*]:

☐ Two years after entry of default judgment, or

☐ One hundred eighty days after service on moving party of written notice that default or default judgment has been entered.

[f] If Time Has Expired, Is Alternative Remedy Available?

☐ Determine whether relief might still be available in equitable proceedings [*§ 489.333* (checklist); for discussion, *see § 489.220*].

[g] What Is Proper Court for Motion?

☐ Ascertain proper court for motion. Motion made in court in which default or default and default judgment were entered.

[h] Prepare Moving Papers

☐ Prepare notice of motion [*see § 489.380[1]* (form of notice of motion)].

☐ Prepare one or more affidavits or declarations under penalty of perjury [*see § 489.360[1]* (form)], setting forth evidentiary facts showing:

☐ How summons was served.

☐ That service did not result in actual notice to defendant until specified date.

☐ That date of service was too late to file responsive pleading or motion.

NOTE:
Facts May Be Combined With Declaration of No Fault of Defendant. If the affidavit or declaration is made by the defendant or cross defendant, these facts may, instead of being set forth in a separate affidavit or declaration, be combined with the affidavit or declaration discussed below.

☐ Prepare moving party's affidavit or declaration under penalty of perjury showing that the lack of actual notice in time to defend was not caused by the defendant's or cross defendant's avoidance of service or inexcusable neglect [*see § 489.380[1]*].

☐ Prepare copy of the answer, motion, or other pleading proposed to be filed in the action [*see § 489.73*; *see also* Ch. 26, *Answers* , Ch. 123, *Complaints and Cross Complaints* , Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* , and Ch. 372, *Motions and Orders* Ch. 375, *Motions to Strike: Pleadings* , Ch. 376, *Motions to Strike: Anti-SLAPP* , and Ch. 389, *Nonsuit and Motions for Judgment*].

☐ Prepare supporting memorandum of points and authorities [*see* California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* (Matthew Bender)].

☐ Prepare proposed order, if desired or required [*see § 489.380[2]* (form)].

[4] Relief From Default or Default and Default Judgment in Certain Consumer Actions Under Code Civ. Proc. § 585.5 Based on Filing of Action in Wrong Court

[a] Is Client Proper Party?

☐ Determine whether party seeking relief is proper party. Confirm that moving party is either of the following [*see § 489.90*]:

☐ Defendant or

☐ Cross defendant.

[b] Is Judgment or Order Proper Target of Relief?

☐ Moving party seeks relief against either of following:

☐ Default.

☐ Default and default judgment.

[c] Does Basis for Relief Exist?

☐ Determine whether action was filed in wrong court under one of following venue provisions [*see § 489.90*]:

☐ Unruh Act (*Civ. Code § 1812.10*).

☐ Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2984.4*).

☐ *Code Civ. Proc. § 395(b)* (venue of actions relating to goods, services, loans, or credit intended primarily for personal, family, or household use).

[d] Is Relief Appropriate to Client's Case?

☐ Relief available under *Code Civ. Proc. § 585.5* is order setting aside or vacating default and default judgment and granting leave to defend action in proper court [*see § 489.93*].

[e] Has Time to File Motion for Relief Expired?

☐ Determine whether time to file notice of motion has expired; the motion for relief must be served and filed within 60 days after defendant first receives notice of levy under writ of execution, or notice of any other procedure for enforcing the default judgment [*Code Civ. Proc. § 585.5(b)*; *see § 489.93*].

[f] If Time Has Expired, Is Alternative Remedy Available?

☐ Determine whether any of following relief is available:

☐ Claim against plaintiff for securing judgment in wrong court that can be pursued in independent action for abuse of process.

☐ Claim against plaintiff for unlawful business practice [*see Barquis v. Merchants Collection Assn. (1972) 7 Cal. 3d 94, 103-113, 101 Cal. Rptr. 745, 496 P.2d 817*] if plaintiff habitually files actions in wrong county.

☐ Potentially, relief in equitable proceedings [*see § 489.333*; for discussion, *see § 489.220*].

NOTE:

Question of Whether Equitable Relief Available Not Resolved. Prior to the 1970 enactment of *Code Civ. Proc. § 585.5*, a default judgment entered in an action filed in an improper court under *Civ. Code § 1812.10* or *2984.4* or *Code Civ. Proc. § 395(b)* was subject to attack by motion under *Code Civ. Proc. § 473(b)* [*see Barquis v. Merchants Collection Asso. (1972) 7 Cal. 3d 94, 119 n.22, 101 Cal. Rptr. 745, 496 P.2d 817*], and, inferentially, to an attack in equity if the statutory motion would have been untimely [*see § 489.220*]. However, no case has been found holding that equitable relief from a default and default judgment subject to *Code Civ. Proc. § 585.5* is or is not available.

[g] What Is Proper Court for Motion?

☐ Ascertain proper court for motion; motion is made in court in which default or default and default judgment were entered [*Code Civ. Proc. § 585.5(d)*].

[h] Prepare Moving Papers

☐ Prepare notice of motion [*see § 489.390[1]* (form of notice of motion)].

☐ Prepare one or more affidavits or declarations under penalty of perjury sworn to or signed by person having personal knowledge of facts, setting forth evidentiary facts showing that action was not commenced in proper court [*see § 489.390[1]* (form of declaration)].

☐ Prepare copy of the answer, motion, or other pleading proposed to be filed in the action [*see § 489.91*; *see also* Ch. 26, *Answers* , Ch. 123, *Complaints and Cross Complaints* , Ch. 206, *Demurrers, Motions to Strike, Motions for Judgment on the Pleadings, and Motions for Nonsuit and Judgment* , and Ch. 372, *Motions and Order* Ch. 375, *Motions to Strike: Pleadings* , Ch. 376, *Motions to Strike: Anti-SLAPP* , and Ch. 389, *Nonsuit and Motions for Judgment*].

☐ Prepare supporting memorandum of points and authorities [*see* California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* (Matthew Bender)].

☐ Prepare proposed order, if desired or required [*see § 489.390[2]* (form)].

[5] Relief Under Code Civ. Proc. § 473.1 Based on California Court's Having Assumed Jurisdiction Over Attorney's Law Practice

[a] Is Client Proper Party?

☐ Determine whether party seeking relief is proper party. Confirm that moving party is aggrieved party in favor of or against whom judgment, order, or proceeding was taken [*Code Civ. Proc. § 473.1*; *see § 489.100*].

[b] Is Judgment or Order Proper Target of Relief?

☐ Moving party seeks relief against any of following [for discussion, *see § 489.100*]:

☐ Judgment.

☐ Order.

☐ Proceeding, including dismissal or default and default judgment.

[c] Does Basis for Relief Exist?

☐ Determine whether California court has assumed jurisdiction pursuant to *Bus. & Prof. Code § 6180* or *6190* over law practice of party's attorney who is unable to practice because of incapacity, death, disbarment, etc. [for discussion, *see § 489.100*].

[d] Is Relief Appropriate to Client's Case?

☐ Relief available under *Code Civ. Proc. § 473.1* is order setting aside or vacating judgment or order, or nullifying proceeding [for discussion, *see § 489.100*].

[e] Has Time to File Motion for Relief Expired?

☐ Determine whether time to file notice of motion has expired [*see § 489.101*]:

☐ The motion must be made within reasonable time, in no case exceeding six months from date court took jurisdiction over attorney's law practice.

NOTE:
Shorter Time for Determination of Ownership or Possession Right. A shorter period may apply if the judgment, order, or proceeding is one determining the ownership or right to possession of real or personal property.

☐ Because motion must be made within reasonable time, moving party must, apparently, exercise diligence in seeking relief within six-month period after discovery of the court's assumption of jurisdiction.

[f] If Time Has Expired, Is Alternative Remedy Available?

☐ If time in which relief may be sought expires before aggrieved party discovers that jurisdiction over his or her attorney's practice has been assumed by California court, determine whether relief might still be available in equitable proceedings discussed in *§ 489.333* [for discussion, *see § 489.220*].

[g] What Is Proper Court for Motion?

☐ Ascertain proper court for motion. Motion must be made in court in which judgment was entered, order was made, or proceeding was taken [for discussion, *see § 489.100*].

[h] Prepare Moving Papers

☐ Prepare notice of motion [*see § 489.400[1]* (form of notice of motion)].

☐ Prepare one or more affidavits or declarations under penalty of perjury [*see § 489.400[1]*].

☐ Prepare supporting memorandum of points and authorities [*see* California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* (Matthew Bender)].

☐ Prepare proposed order, if desired or required [*see § 489.400[2]* (form)].

[6] Relief From Default or Default and Default Judgment Based on Servicemembers' Civil Relief Act

[a] Is Client Proper Party?

☐ Determine whether party seeking relief is proper party. Confirm that moving party is either [*see 50 U.S.C. App. § 511*; for discussion, *see § 489.112*]:

☐ Member of:

☐ Army.

☐ Navy.

☐ Marine Corps.

☐ Air Force.

☐ Coast Guard.

☐ Public Health Service officer detailed by proper authority for duty with Army or Navy.

[b] Is Judgment or Order Proper Target of Relief?

☐ Relief is sought against either of following [for discussion, *see § 489.110*]:

☐ Default.

☐ Default and default judgment.

[c] Does Basis for Relief Exist?

☐ Determine whether there was the following [for discussion, *see § 489.113*]:

☐ Prejudice in making defense by reason of military service.

☐ Defendant has meritorious or legal defense to action or to some part of it.

[d] Is Relief Appropriate to Client's Case?

☐ Relief available under *50 U.S.C. App. § 521(g)* is order vacating and setting aside default or default and default judgment and granting defendant leave to defend.

[e] Consider Effect of Other Limitations

☐ Vacating, setting aside, or reversing of any judgment under Servicemembers' Civil Relief Act will not impair any right or title acquired by bona fide purchaser for value under judgment.

[f] Has Time to File Motion Expired?

☐ Determine whether time to file notice of motion has expired. The motion must be filed either [*50 U.S.C. App. § 521(g)(2)*; for discussion, *see § 489.113*]:

☐ While defendant is in military service, or

☐ Ninety days after military service terminates.

[g] If Time Has Expired, Is Alternative Remedy Available?

☐ Determine whether relief might still be available under one of other statutory proceedings [*see* [1]-[5], *above*] or in equitable proceedings [*see § 489.333*; for discussion, *see § 489.220*].

[h] What Is Proper Court for Motion?

☐ Ascertain proper court for motion; motion is made in court in which judgment was entered, order was made, or proceeding was taken.

[i] Prepare Moving Papers

☐ Prepare notice of motion [*see § 489.410[1]* (form of notice of motion)].

☐ Prepare one or more affidavits or declarations under penalty of perjury setting forth evidentiary facts showing that [*see § 489.410[1]* (form of declaration)]:

☐ Moving party was prejudiced in making defense by reason of his or her military service.

☐ He or she has meritorious defense to action or to some part of it.

NOTE:
Copy of Proposed Verified Answer Sufficient. Similar to a motion under *Code Civ. Proc. § 473(b)*, a copy of the verified answer proposed to be filed containing a meritorious defense would appear to be sufficient to show the defense.

☐ Motion is timely.

☐ Prepare supporting memorandum of points and authorities [*see* California Points and Authorities, Ch. 70,

Defaults, Default Judgments, and Relief From Judgments and Orders (Matthew Bender)].

☐ Prepare proposed order, if desired or orders [*see § 489.410[2]* (form)].

[7] Relief From Judgment Under State Law Based on Military Service

[a] Is Client Proper Party?

- Determine whether party seeking relief is proper party. Confirm that moving party is one of the following [*see Mil. & Vet. Code § 400(a)*; for discussion, *see § 489.118*]:

  ☐ Officer or enlisted member of National Guard called or ordered into active state service by Governor pursuant to *Mil. & Vet. Code §§ 143* or *146*.

  ☐ Officer or enlisted member of National Guard called or ordered into active federal service by President pursuant to Title 10 or 12 of United States Code.

  ☐ Reservist of United States Military Reserve called to full-time active duty.

[b] Is Judgment or Order Proper Target of Relief?

☐ Relief is sought against a judgment [for discussion, *see § 489.117*].

[c] Does Basis for Relief Exist?

☐ Determine the following [for discussion, *see § 489.117*]:

  ☐ Was there prejudice in making defense by reason of military service.

  ☐ Does the defendant has meritorious or legal defense to action or to some part of it.

[d] Is Relief Appropriate to Client's Case?

☐ Relief available under *Mil. & Vet. Code § 402(d)* is order vacating and setting aside judgment and granting defendant leave to defend.

[e] Consider Effect of Other Limitations

☐ Vacating, setting aside, or reversing of any judgment will not impair any right or title acquired by bona fide purchaser for value under judgment.

[f] Has Time to File Motion Expired?

☐ Determine whether time to file notice of motion has expired. The motion must be filed within ninety days after military service terminates [*Mil. & Vet. Code § 402(d)*].

[g] If Time Has Expired, Is Alternative Remedy Available?

☐ Determine whether relief might still be available under one of other statutory proceedings [*see* [1]-[5], *above*] or in equitable proceedings [*see § 489.333*; for discussion, *see § 489.220*].

[h] What Is Proper Court for Motion?

☐ Motion is made in court in which judgment was entered, order was made, or proceeding was taken.

[i] Prepare Moving Papers

☐ Prepare notice of motion [see *§ 489.411[1]* (form of notice of motion)].

☐ Prepare one or more affidavits or declarations under penalty of perjury setting forth evidentiary facts showing that [*see § 489.411[1]* (form of declaration)]:

☐ Moving party was prejudiced in making defense by reason of his or her military service.

☐ He or she has meritorious defense to action or to some part of it.

NOTE:
Copy of Proposed Verified Answer Sufficient. Similar to a motion under *Code Civ. Proc. § 473(b)*, a copy of the verified answer proposed to be filed containing a meritorious defense would appear to be sufficient to show the defense.

☐ Motion is timely.

☐ Prepare supporting memorandum of points and authorities [*see* s California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* (Matthew Bender)].

☐ Prepare proposed order, if desired or orders [*see § 489.411[2]* (form)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPretrial JudgmentsDefaultRelief From DefaultCivil ProceduresJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProceduresJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProceduresJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProceduresJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseGovernmentsLegislationStatutes of LimitationsTime LimitationsMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief ActMilitary & Veterans LawServicemembersU.S. National Guard

California Forms of Pleading and Practice--Annotated

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Volume 43: Receivers thru Rewards-Chs. 486-499
Chapter 489 RELIEF FROM JUDGMENTS AND ORDERS
IV. PROCEDURAL CHECKLIST
A. Moving Party's Checklist

43-489 California Forms of Pleading and Practice--Annotated § 489.332

§ 489.332 Consideration of Alternative Remedies for Relief: Void Judgment and Order

[1] Relief Under Code Civ. Proc. § 473(d) From Judgment or Order that Is Void on Its Face

[a] Is Client Proper Party?

☐ Determine whether party seeking relief is proper party:

☐ Party to action.

☐ Third person prejudiced by judgment or order.

[b] Is Judgment or Order Proper Target of Relief?

☐ Person is seeking relief from:

☐ Judgment.

☐ Order.

[c] Does Basis for Relief Exist?

☐ Determine whether judgment or order is void on its face [for discussion, *see §§ 489.134, 489.136*].

[d] Is Relief Appropriate to Client's Case?

☐ Relief available is order setting aside or vacating judgment or order or declaring it void [for discussion, *see § 489.131*].

[e] No Time Limits Apply

☐ Judgment or order void on its face is always subject to attack [for discussion, *see § 489.141*]

[f] What Manner of Attack Is Preferred?

☐ Direct attack [*see § 489.138*]; may be commenced in action in which judgment or order was entered by:

☐ Motion.

☐ Ex Parte Application.

NOTE:
Ex Parte Application Permitted. Party's motion may be made ex parte because the court can vacate or set aside a void judgment on its own motion, a party's motion may be made ex parte.

☐ Collateral attack [*see § 489.139*]; may be made in many different procedural contexts, for example [for discussion, *see § 489.14[3]*]:

☐ Second action on same grounds as action dismissed with prejudice and judgment entered.

☐ Action to quiet title to property awarded to another by partially void judgment.

☐ Proceeding in prohibition to prevent threatened punishment for contempt for violating order appointing receiver in accounting action.

☐ Action on claim previously settled with court approval on petition to court.

☐ Action to quiet title to land sold under execution.

☐ Proceeding in mandate to compel trial court to strike from its records portion of appealable order that reduced judgment.

☐ Action on judgment.

☐ Subsequent attack on orders independently appealable and final by lapse of time by appeal from later order or judgment.

[g] Prepare Papers

☐ Prepare papers as appropriate in procedural context in which issue is raised.

[2] Relief Under Code Civ. Proc. § 473(d) From Judgment or Order That Is Void in Fact Although Not Void on Its Face

[a] Is Client Proper Party?

☐ Determine whether party seeking relief is proper party. Confirm that party seeking relief is aggrieved party.

[b] Is Judgment or Order Proper Target of Relief?

☐ Moving party is seeking relief from:

☐ Judgment.

☐ Order.

[c] Does Basis for Relief Exist?

☐ Determine whether judgment or order is void in fact although it is not void on its face any of following exist [for discussion, *see § 489.134*].

[d] Is Relief Appropriate to Client's Case?

☐ Relief available is order setting aside or vacating judgment or order.

[e] Has Time to File Motion for Relief Expired?

☐ Determine whether time to file notice of motion has expired [for discussion, *see § 489.142*].

☐ Motion to set aside judgment that is void because defendant was never served in action and return of service filed is false must be made within time specified in *Code Civ. Proc. § 473.5(a)*, which applies by analogy, namely, within earlier of:

☐ Two years from the date the judgment was entered, or

☐ One hundred eighty days after service on the moving party of a written notice that judgment has been entered.

☐ Motion for relief from any other judgment or order must be made within six-month period specified in *Code Civ. Proc. § 473(b)*, which applies by analogy.

[f] If Time Has Expired, Is Alternative Remedy Available?

☐ Determine whether relief might still be available in equitable proceedings [*see § 489.333*; for discussion, *see § 489.220*].

[g] What Is Proper Court for Motion?

☐ Ascertain proper court for motion. Motion made in court in which judgment or order was entered.

[h] Prepare Moving Papers

☐ Prepare notice of motion [*see § 489.420[1]* (form of notice of motion)].

☐ Prepare one or more affidavits or declarations under penalty of perjury setting forth evidentiary facts showing that [*see § 489.420[1]* (form of declaration)]:

☐ Judgment or order is void.

☐ Motion is timely.

☐ Prepare supporting memorandum of points and authorities [*see* s California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* (Matthew Bender)].

☐ Prepare proposed order, if desired or required [*see § 489.420[2]* (form)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresJudgmentsEntry of JudgmentsGeneral OverviewCivil ProceduresJudgmentsRelief From JudgmentGeneral OverviewCivil ProceduresJudgmentsRelief From JudgmentIndependent ActionsCivil ProceduresJudgmentsRelief From JudgmentVoid Judgments

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Volume 43: Receivers thru Rewards-Chs. 486-499
Chapter 489 RELIEF FROM JUDGMENTS AND ORDERS
IV. PROCEDURAL CHECKLIST
A. Moving Party's Checklist

43-489 California Forms of Pleading and Practice--Annotated § 489.333

§ 489.333 Consideration of Alternative Remedies for Relief: Equitable Relief From Valid or Void Judgment, Dismissal, or Order

[1] Is Client Proper Party?

☐ Determine whether party seeking relief is proper party. Confirm that moving party is any of the following [for discussion, *see § 489.225*]:

- ☐ Aggrieved party.
- ☐ Person in privity with party.
- ☐ Stranger whose rights have been adversely affected by judgment or order.

[2] Is Judgment or Order Proper Target of Relief?

☐ Determine whether judgment or order at issue is final [*see Code Civ. Proc. §§ 904.1*, *904.2*; *see also* Ch. 42, *Appeal: Notice of Appeal*].

[3] Does Basis for Relief Exist?

☐ Determine whether judgment or order is either:

- ☐ Void [for discussion, *see § 489.132*], or
- ☐ Obtained through extrinsic:

- ☐ Fraud [for discussion, *see §§ 489.241 -489.243*].
- ☐ Mistake [for discussion, *see §§ 489.241 -489.242*, *489.244*].
- ☐ Duress [for discussion, *see § 489.245*].

[4] Is Relief Appropriate to Client's Case?

- ☐ Consider whether equitable relief is appropriate in client's case [*see § 489.220* et seq.].
- ☐ Determine what manner of relief is desired; that is, order or judgment:
  - ☐ Modifying, setting aside, or nullifying judgment or order.
  - ☐ Permitting defendant in default case to defend against action.
  - ☐ Permitting aggrieved party to file pleading or paper.
  - ☐ Granting, or other appropriate relief.

[5] Which Proceedings Are Preferred?

- ☐ Consider the advantages and disadvantages of equitable motion compared to independent action in equity [for discussion, *see § 489.266*]:
  - ☐ Time limits: Applicable time limit or statute of limitations [*see* [7] and [8], *below*].
  - ☐ Speed of relief: Moving party may obtain hearing on equitable motion sooner than trial.
  - ☐ Expense: Equitable motion is less expensive than independent action in equity.
  - ☐ Need for discovery: Independent action in equity permits formal discovery, such as deposition of witnesses.
  - ☐ Willingness of witnesses to testify at trial: Hearing on equitable motion is normally based on affidavits or declarations.
  - ☐ Credibility of witnesses: In independent action, counsel may cross examine witnesses.

☐ Judge to determine case: Desirability of disposition by law and motion judge versus trial judge.

☐ Claim and issue preclusion: Collateral estoppel and res judicata effect of full opportunity to litigate when witnesses testify in court [for discussion, *see § 489.266[2]*].

[6] Which Court Is Proper Court to Seek Relief?

☐ Equitable motion: relief may be sought in court that rendered judgment [for discussion, *see § 489.225*].

☐ Independent action in equity: may be filed in superior court only [for discussion, *see § 489.266*].

[7] Motion for Equitable Relief

☐ Determine whether time to file motion has expired:

☐ Motion must be made within reasonable time after discovery of judgment or facts constituting extrinsic fraud or mistake [for discussion, *see § 489.262[1]*].

NOTE:
No Other Time Limit. No specific time limitation is otherwise imposed for a motion for relief from judgment or order in equity.

☐ Moving party must act diligently in seeking relief after discovering the facts [for discussion, *see § 489.262[2]*].

☐ Prepare moving papers.

☐ Prepare notice of motion [*see § 489.430[1]* (form of notice of motion)].

☐ Prepare one or more affidavits or declarations under penalty of perjury [*see §§ 489.430[1], 489.431* (forms)], setting forth evidentiary facts showing:

☐ If relief is sought on ground of extrinsic fraud or mistake, that judgment or order resulted from extrinsic fraud or mistake, and stating that judgment or order was entered because of that extrinsic fraud or mistake.

☐ If relief is sought on ground that judgment or order is void, that judgment or order is void (and, in case of judgment that is void on its face, including appropriate reference to judgment roll).

☐ Moving party has meritorious case [for discussion, *see § 489.264*].

☐ Motion is timely [*see above*].

☐ Prepare supporting memorandum of points and authorities [*see* s California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* (Matthew Bender)].

☐ Prepare proposed order, if desired or required [*see § 489.430[2]* (form)].

[8] Independent Action in Equity

☐ Determine whether statute of limitations has expired. A complaint for relief in equity must be filed within either [for discussion, *see § 489.261*]:

☐ Three years, subject to a delayed discovery rule [*see Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 560, 305 P.2d 20* (applying *Code Civ. Proc. § 338(d)* limitation period governing actions for fraud or mistake)] or

☐ Four years [*Zastrow v. Zastrow (1976) 61 Cal. App. 3d 710, 717, 132 Cal. Rptr. 536* (applying *Code Civ. Proc. § 343* limitation period for when no other period is provided)].

☐ Determine court in which plaintiff prefers to file action.

NOTE:
Independent Action May Be Filed in Different Court. Independent action need not be filed in the court that rendered the judgment or made the order [for discussion, *see § 489.266[1]*].

☐ Prepare complaint for equitable relief to vacate or set aside the judgment or order [*see §§ 489.440, 489.441* (forms)].

☐ Commence action by filing complaint for equitable relief, and paying appropriate filing fee.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsGovernmentsLegislationStatutes of LimitationsTime Limitations

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Chapter 489 RELIEF FROM JUDGMENTS AND ORDERS
IV. PROCEDURAL CHECKLIST
A. Moving Party's Checklist

43-489 California Forms of Pleading and Practice--Annotated §§ 489.334-489.339

[Reserved]

§§ 489.334[Reserved]

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B. Opposing Party's Checklist

43-489 California Forms of Pleading and Practice--Annotated § 489.340

§ 489.340 Response to Request for Relief From Judgment, Dismissal, or Order

[1] Make Preliminary Determinations

☐ Read reading notice of motion and supporting papers, determine:

☐ Whether notice of motion was properly served.

☐ Whether motion is timely.

☐ If diligence is requirement of relief sought, whether moving party has acted diligently in seeking relief.

☐ Whether notice of motion sets forth legal grounds for relief [*see §§ 489.331 -489.333*].

☐ Whether any supporting affidavits or declarations contain facts within affiant's or declarant's personal knowledge or contain inadmissible hearsay.

☐ Determine whether to oppose or stipulate to motion.

NOTE:
Stipulation to Terms of Relief. If the moving papers support the relief requested and there is no defense to the motion, counsel may wish to stipulate that the motion be granted (*see Code Civ. Proc. §§ 128.5(a), (b), 128.7* (relating to sanctions imposed for bad faith actions or tactics), discussed in *§ 489.42*. If counsel believes that the court could go either way on the motion, he or she may still wish to negotiate

a stipulation granting the motion on the best terms obtainable for his or her client [*see* discussion in *§ 489.42*].

[2] Prepare Papers

☐ Prepare one or more counter affidavits or counter declarations under penalty of perjury [*see* Ch. 15, *Affidavits, Certificates, and Declarations* (for general requirements for affidavits and declarations)].

☐ Prepare opposing memorandum of points and authorities [*see* s California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From Judgments and Orders* (Matthew Bender)].

☐ Prepare proof of service [*see* Ch. 518, *Service of Summons and Papers*].

[3] Serve and File Papers

☐ Serve opposing papers on other party's attorney (or on other party if he or she has no attorney) at least 9 court days before the hearing [*see Code Civ. Proc. §§ 1005(a)(10), (12), (13), (b), 1010*; *see also* Ch. 372, *Motions and Orders*].

☐ Deliver the originals of all opposition papers to court clerk for filing at least 9 court days before the hearing [*see Code Civ. Proc. § 1005(b)*].

[4] Prepare for Hearing

☐ Advise persons who will be offering testimony at hearing in opposition to the motion of the time, date, and place of the hearing, and instruct them to attend the hearing.

[5] Attend Hearing

☐ Attend the hearing and argue against the motion.

[6] Prepare and Serve Order, if Required

☐ If motion is denied and court requires preparation of formal order, draft order in compliance with court's instructions [*see* Ch. 372, *Motions and Orders*].

☐ Prepare sufficient copies of order to provide copies to:

- ☐ Court (with original as well).
- ☐ Opposing counsel (if the court so requires).
- ☐ Office copy.

☐ Prevailing party.

☐ Deliver copies to courtroom clerk to deliver original to judge for signing and to conform copies.

NOTE:

Ruling. The judge may rule on the motion from the bench or take the matter under submission and render his or her decision at a later date.

[7] Prepare Notice of Order

☐ Prepare the notice of order [*see* Ch. 372, *Motions and Orders*]:

☐ Set forth verbatim language of order, or notice of order.

☐ Attach conformed copy of order attached.

☐ Serve notice of order, or have it served, on attorney for moving party (or on party if he or she has no attorney).

NOTE:

Prevailing Party to Give Notice of Order. Unless otherwise ordered by the court or notice is waived by all parties in open court and is entered in the minutes, notice of the court's order granting or denying the motion must be given by the prevailing party to all other parties or their attorneys [*Code Civ. Proc. § 1019.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeOpposing MemorandaCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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43-489 California Forms of Pleading and Practice--Annotated § 489.341

§ 489.341 Defenses to Relief From Valid Judgment and Order From Judgment, Dismissal, or Order

[1] Relief Based on Mistake, Inadvertence, Surprise, or Excusable Neglect

☐ Motion is not timely and relief is therefore barred [*Code Civ. Proc. § 473(b)*; for discussion, *see § 489.39*; *see also § 489.331[1][e]* (moving party's checklist)].

NOTE:
Court May Treat Motion as Equitable Motion. The court may on its own motion treat an untimely motion for relief as a motion in equity and therefore timely.

☐ Judgment, dismissal, order, or proceeding did not result from mistake, inadvertence, surprise, or excusable neglect claimed [for discussion, *see § 489.44*].

☐ Mistake, inadvertence, surprise, or neglect is not excusable [for discussion, *see § 489.45*].

☐ Moving party failed to act diligently in seeking relief, and/or there are substantial periods of total inactivity in seeking relief [for discussion, *see § 489.39[6]*].

[2] Relief From Default, Default and Default Judgment, or Dismissal Based on Attorney's Affidavit or Declaration of Fault

☐ Motion is not timely and relief is therefore barred [*Code Civ. Proc. § 473(b)*; for discussion, *see § 489.40[2]*; *see also § 489.331[2][e]* (moving party's checklist)].

☐ Default, default and default, or dismissal judgment did not result from attorney's mistake,

inadvertence, surprise, or neglect [*Code Civ. Proc. § 473(b)*; for discussion, *see §§ 489.40[1], 489.44*].

[3] Relief From Default or Default and Default Judgment Based on Lack of Notice in Time to Defend

☐ Motion is not timely and relief is therefore barred [*Code Civ. Proc. § 473.5*; for discussion, *see § 489.75*; *see also § 489.331[3][e]* (moving party's checklist)].

☐ Defendant or cross defendant received actual notice of action in time to defend.

[4] Relief From Default or Default and Default Judgment in Certain Consumer Actions Based on Filing of Action in Wrong Court

☐ The motion is not timely and relief is therefore barred [*Code Civ. Proc. § 585.5*; for discussion, *see § 489.92*; *see also § 489.331[4][e]* (moving party's checklist)].

☐ The action was filed in proper court, if that is true.

[5] Relief Based on California Court's Having Assumed Jurisdiction Over Attorney's Law Practice

☐ Motion is not timely and relief is therefore barred [*Code Civ. Proc. § 473.1*; for discussion, *see § 489.101*; *see also § 489.331[5][e]* (moving party's checklist)].

☐ Moving party failed to act diligently in seeking relief, and/or there are substantial periods of total inactivity in seeking relief.

[6] Relief From Default or Default and Default Judgment Based on Servicemembers' Civil Relief Act

☐ Motion is not timely and relief is therefore barred [*50 U.S.C. App. § 521(g)(2)*; for discussion, *see § 489.115*; *see also § 489.331[6][f]* (moving party's checklist)].

☐ Defendant was not prejudiced in making his or her defense by reason of military service [for discussion, *see § 489.110*].

☐ Facts relied on do not constitute prejudice.

☐ Facts relied on as establishing prejudice were not cause of party's failure to file answer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesExcusable NeglectCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesInadvertenceCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesSurpriseGovernmentsLegislationStatutes of LimitationsTime LimitationsMilitary & Veterans

LawServicemembersSoldiers & Sailors Civil Relief Act

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43-489 California Forms of Pleading and Practice--Annotated § 489.342

§ 489.342 Defenses to Relief From Void Judgment and Order

[1] Relief From Judgment or Order That Is Void on Its Face

☐ There are no defenses.

[2] Relief From Judgment or Order That Is Void in Fact Although Not Void on Its Face

☐ Motion is not timely and relief is therefore barred [*Code Civ. Proc. § 473.1*; for discussion, *see § 489.142*; *see also § 489.332[2][e]* (moving party's checklist)].

☐ Judgment or order is not void [for discussion, *see § 489.132*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsGovernmentsLegislationStatutes of LimitationsTime Limitations

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43-489 California Forms of Pleading and Practice--Annotated § 489.343

§ 489.343 Defenses to Relief From Valid or Void Judgment, Dismissal, or Order In Equity

[1] Motion for Equitable Relief:

☐ Facts relied do not constitute extrinsic fraud or mistake [for discussion, *see § 489.241* et seq.].

☐ Extrinsic fraud or mistake did not result in judgment or order from which relief is sought.

☐ Fraud or mistake was intrinsic [for discussion, *see § 489.246*].

☐ Moving party failed to act diligently in seeking relief after discovery of judgment or order or facts constituting extrinsic fraud or mistake, and opposing party was prejudiced by delay [for discussion, *see § 489.262[2]*].

[2] Independent Action in Equity Filed in Superior Court

☐ Facts relied on do not constitute extrinsic fraud or mistake.

☐ Extrinsic fraud or mistake did not result in judgment or order from which relief is sought.

☐ Fraud or mistake was intrinsic.

☐ Action is barred by statute of limitations [for discussion, *see § 489.261*; *see also § 489.333[8]* (moving party's checklist)].

☐ Plaintiff is guilty of laches; that is, plaintiff's unnecessary delay in seeking relief after learning facts prejudiced defendant's rights [for discussion, *see § 489.261[4]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeCivil ProcedureJudgmentsRelief From JudgmentFraudCivil ProcedureJudgmentsRelief From JudgmentIndependent ActionsCivil ProcedureJudgmentsRelief From JudgmentVoid JudgmentsGovernmentsLegislationStatutes of LimitationsGeneral Overview

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43-489 California Forms of Pleading and Practice--Annotated §§ 489.344-489.359

[Reserved]

§§ 489.344[Reserved]

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Chapter 489 RELIEF FROM JUDGMENTS AND ORDERS
V. FORMS
A. Statutory Relief From Valid Judgments and Orders
1. Mistake, Inadvertence, Surprise, or Excusable Neglect

43-489 California Forms of Pleading and Practice--Annotated § 489.360

§ 489.360 Relief From Judgment, Dismissal, Order, or Other Proceeding Taken Through Mistake, Inadvertence, Surprise, or Excusable Neglect or Based on Attorney's Affidavit (Declaration) of Fault [Code Civ. Proc. § 473(b)]

[1] Notice of Motion and Motion and Supporting Declaration--General Form

[a] FORM Relief From Judgment, Dismissal, Order, or Other Proceeding Taken Through Mistake, Inadvertence, Surprise, or Excusable Neglect or Based on Attorney's Affidavit (Declaration) of Fault [Code Civ. Proc. § 473(b)]--Notice of Motion and Supporting Declaration--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION AND MO-
_____ [*name*]	)	TION_____ [*specify, e.g.,* FOR OR-
Defendant.	)	DER VACATING AND SETTING ASIDE DE-
	)	FAULT (AND DEFAULT JUDGMENT)], DE-
	)	CLARATION(S) OF _____
	)	[*name(s)*], AND MEMORANDUM OF POINTS
	)	AND AUTHORITIES
		Date: _____
		Time: _____
		Dept: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of

record:

[*EITHER, if motion is for relief from default, default judgment, or dismissal and based on attorney's affidavit or declaration attesting to his/her fault*]

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at_____ [*address*], _____ [*city*], _____ [*moving party, e.g.,* defendant] will, and hereby does, move _____ [*specify, e.g.,* to vacate and set aside] the _____ [*specify judgment, dismissal, order, or proceeding from which relief is sought, e.g.,* default (and default judgment) entered against defendant] on _____ [*date*]. The motion will be made on the ground(s) that the _____ [default (and resulting default judgment) *or* dismissal was/were] taken against _____ [*specify party, e.g.,* defendant] as the result of the _____ [mistake *or* inadvertence *or* surprise *or* neglect *or all or any combination of these*] of his/her attorney, _____ [*name*], who has _____ [given an affidavit *or* executed a declaration under penalty of perjury] attesting to this fault.

[*OR, if motion is for relief from default, default judgment, or dismissal without attorney's affidavit or declaration attesting to fault, or is for relief from any other judgment, dismissal, order, or proceeding*]

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [*moving party, e.g.,* defendant] will, and hereby does, move _____ [*specify, e.g.,* to vacate and set aside] the _____ [*specify judgment, dismissal, order, or proceeding from which relief is sought, e.g.,* default (and default judgment) entered against defendant] on _____ [*date*]. The motion will be made on the ground(s) that the _____ [judgment *or* dismissal *or* order *or* proceeding] was taken _____ [by *or* against] _____ [*specify moving party, e.g.,* defendant] through his/her _____ [mistake *or* inadvertence *or* surprise *or* excusable neglect *or all or any combination of these*].

[*CONTINUE*]

The motion will be based on this notice of motion, the accompanying _____ [affidavit(s) *and/or* declaration(s)] of _____ [*name(s)*] [, the _____ (*specify pleading proposed to be filed, e.g.,* proposed answer to the complaint herein], and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*moving party*]

DECLARATION OF _____ [*name*] IN SUPPORT OF MOTION FOR RELIEF FROM _____ [*specify, e.g.,* THE DEFAULT AND DEFAULT JUDGMENT ENTERED HEREIN]

I, _____ [*name*], declare:

1. I am the _____ [*specify, e.g.,* defendant] in this action and make this declaration in support of my motion for an order _____ [*specify relief sought, e.g.,* vacating and setting aside] the _____ [*specify judgment, order, or proceedings from which relief is sought, e.g.,* default (and default judgment) taken against me] in this action.

2. As shown by the records herein, of which the court is requested to take judicial notice, the _____ [*specify judgment, order, or proceeding from which relief is sought, e.g.,* default (and default judgment) was/were] _____ [entered *or* taken] through my _____ [mistake *or* inadvertence *or* surprise *or* excusable neglect *or all or any combination of these*] in that _____ [*set forth all facts establishing the ground(s) of the motion*].

3. I have at all times acted diligently in seeking this relief as shown by the following facts: _____ [*state how and when party discovered the entry or taking of the judgment, order, or proceeding from which relief is sought, set forth the steps taken to secure relief, and explain with good reason each and every delay between the date of discovery and the date this notice of motion will be filed*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

MEMORANDUM
[*Add memorandum supporting motion*]

[b] Use of Form

This form is a notice of motion and supporting declaration for use by a party or his or her legal representative (discussed in *§ 489.47[1]*) to obtain relief under *Code Civ. Proc. § 473(b)*, from any judgment, dismissal, order, or other proceeding, including a default or default judgment, taken by or against the party through his or her mistake, inadvertence, surprise, or excusable neglect.

The first alternative paragraph in the notice of motion is to be used when relief is sought under the mandatory relief provisions of *Code Civ. Proc. § 473(b)*, from a default and any resulting default judgment or dismissal entered as a result of the mistake, inadvertence, surprise, or neglect of the moving party's attorney to which the attorney has attested in an affidavit or declaration under penalty of perjury [*see § 489.362[1]* (form of declaration); *see also § 489.40* (legal background)].

The second alternative paragraph of the notice of motion is to be used when relief is sought under the discretionary provisions of *Code Civ. Proc. § 473(b)*, if the motion is for relief from:

- A default, default judgment, or dismissal without an attorney's affidavit or declaration attesting to fault or

- Any other judgment, order, or proceeding whether or not the attorney attests to his or her fault.

For statements that may be inserted in Paragraph 2 of the declaration, see *§ 489.361*. For additional statements that may be modified for use in Paragraph 2, see *§ 489.431*.

The form in [a], *above*, may also be used by a party's legal representative, such as an assignee [*see § 489.47[1]*].

For discussion of the time within which the motion must be filed, see *§ 489.39*. For discussion of alternative relief that may be available when the time for relief under *Code Civ. Proc. § 473(b)*, has expired, see *§ 489.39[8]*.

[c] Judgment, Dismissal, Order, or Proceeding Taken by Party

Although *Code Civ. Proc. § 473(b)*, on its face, authorizes relief from a judgment, dismissal, order, or other proceeding taken *against* a party or his or her legal representative, the statute has been construed to authorize relief when the judgment, dismissal, order, or proceeding, was taken *by* a party as well [*Olson v. Olson (1957) 148 Cal. App. 2d 479, 482-483, 306 P.2d 1036* ; *see § 489.47*]. However, relief based on an attorney's affidavit or declaration of fault is limited to relief from a default, default judgment, or dismissal taken against a party [*Code Civ. Proc. § 473(b)*; for discussion of relief based on attorney's affidavit, *see § 489.40*].

[d] Relief From Default Judgment

The time for moving for relief from a default and default judgment commences to run when the default was entered [*Rutan v. Summit Sports, Inc. (1985) 173 Cal. App. 3d 965, 970, 219 Cal. Rptr. 381* ; *see also § 489.39[3*]].

Normally, if relief is sought from a default judgment the default must also be set aside; otherwise, the vacated judgment would leave the prior default intact and, on application, the court would be required to render immediately a judgmentof like effect, which defendant, being still in default, could not oppose [*Howard Greer etc. Originals v. Capritti (1950)35 Cal. 2d 886, 888-889, 221 P.2d 937* (affirming order denying motion to set aside default judgment); *see also Rutan v. Summit Sports, Inc. (1985) 173 Cal. App. 3d 965, 970, 219 Cal. Rptr. 381* (affirming order granting relief from default judgment as to one defendant and reversing as to other defendant and reversing orders vacating default of both defendants as untimely; criticized on another ground in *Canadian Commercial Bank v. Ascher Findley Co. (1991) 229 Cal. App. 3d 1139, 1152, 280 Cal. Rptr. 521*)].

Consequently, the notice of motion should request that both the default and default judgment be vacated and set aside. However, a motion in equity, made after the time for attacking a judgment under *Code Civ. Proc. § 473(b)*, had expired, to set aside the default without mentioning the default judgment, entered for failure to answer interrogatories, and to reinstate the answer has been treated as a matter of "common sense" as one to set aside both the default and the default judgment [*Palmer v. Moore (1968) 266 Cal. App. 2d 134, 137, 71 Cal. Rptr. 801* (affirming order granting relief); for further discussion of equitable relief, *see § 489.220* et seq.]. Although the rule on this point would apparently be the same whether the motion is based on the court's equitable powers or on the statutory motion, the better practice on all motions is to specify in the notice of motion all the relief sought.

If equitable, as well as statutory, grounds exist for vacating the judgment, counsel may wish to move for relief under both *Code Civ. Proc. § 473(b)*, and alternatively on the grounds of extrinsic fraud and mistake [*see Rutan v. Summit Sports, Inc. (1985) 173 Cal. App. 3d 965, 974, 219 Cal. Rptr. 381* ; for a discussion of equitable motions and relief in equity, *see § 489.220* et seq.].

The foregoing rules would not apply when the attack is solely on the default judgment as, for example, when the judgment makes an award different from or in excess of that requested in the complaint, or statement of damages [*see Code Civ. Proc. §§ 425.10(b), 425.11, 580*]. For a discussion and forms for use in attacking a void or partially void default judgment, see *§§ 489.130 et seq. and 489.220* et seq., respectively.

[e] Notice Requirement

Code Civ. Proc. § 473(b), unlike *Code Civ. Proc. § 473(d)* (relating to void judgments, discussed in *§ 489.130* et seq.), does not expressly require that the application for relief from a judgment, order, or other proceeding, be made on notice or served on the adverse party. Nor does *Code Civ. Proc. § 1005(a)* (specifying motions of which notice is required) expressly require that a motion for relief under *Code Civ. Proc. § 473(b)*, unlike a motion for relief from default under *Code Civ. Proc. § 473.5* or *585.5* (*see Code Civ. Proc. § 1005(a)(10), (12)*, respectively), discussed in *§§ 489.70 et seq. and 489.90* et seq., respectively, be made on notice [*see also Code Civ. Proc. § 1003* ("an application for an order is a motion")].

Nevertheless, the general rule is that notice of a motion must be given whenever the order sought may affect the rights of the adverse party [*see McDonald v. Severy (1936) 6 Cal. 2d 629, 631, 59 P.2d 98* ; *Bohn v. Bohn (1913) 164 Cal. 532, 536, 129 P. 981* ; *St. Paul Fire & Marine Ins. Co. v. Superior Court (1984) 156 Cal. App. 3d 82, 85, 202 Cal. Rptr. 571* ; *People ex rel. Dept. Public Wks. v. Loop (1958) 161 Cal. App. 2d 466, 474, 326 P.2d 902*]. Since an order granting relief under *Code Civ. Proc. § 473(b)*, will affect the right of the party in whose favor the judgment, order, or proceeding was taken, the motion is one that, under the general rule, requires notice. Consequently, the motion would be governed by *Code Civ. Proc. § 1005*, which, in addition to specified motions, requires written notice of a motion in "[a]ny other proceeding under this code in which notice is required and no other time or method is prescribed by law or by court or judge" [*Code Civ. Proc. § 1005(a)(13)*].

[f] Amount of Notice Required

Because the motion is one that falls within the provisions of *Code Civ. Proc. § 1005(a)(13)* [*see* discussion under [e], *above*], the provisions for service and filing under *Code Civ. Proc. § 1005(b)* apply. Consequently, unless otherwise ordered by the court, all moving and supporting papers are required to be served and filed at least 16 court days before the time appointed for the hearing, provided that, if the notice is served by mail, the required 16-day period of notice before the time appointed for the hearing is increased by five calendar days if the place of mailing and the place of address are within California, 10 calendar days if either the place of mailing or place of address is outside California but in the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States. If notice is served by fax, express mail, or other overnight delivery method, the 16-day period is extended by two calendar days [*Code Civ. Proc. § 1005(b)*; *see also Cal. Rules of Ct., Rule 3.1300(a)*].

Opposing papers must be filed and served at least nine court days and all reply papers at least five court days before the hearing [*Code Civ. Proc. § 1005(b)*].

[g] Supporting Declaration

[i] Requirement

In addition to the memorandum of points and authorities, the notice of motion for relief based on mistake, inadvertence, surprise, or excusable neglect of a party or the party's attorney must be accompanied by one or more affidavits or declarations under penalty of perjury [*see Code Civ. Proc. §§ 2003, 2009, 2015.5*] setting forth the facts establishing the ground or grounds of the motion. A generalform for a supporting declaration is included in the form in [1], *above*. For other forms for supporting declarations, see *§ 489.361*. If the motion will be based on the attorney's affidavit or declaration of fault, that affidavit or declaration must accompany the notice of motion [*Code Civ. Proc. § 473(b)*; *see § 489.361*].

[ii] Content and Form

Absent statutory authority to the contrary, an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) to be used as evidence of facts must normally be positive, direct, and not based on hearsay [*see Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 204, 151 Cal. Rptr. 721*]. A statement made without personal knowledge and solely on information and belief is hearsay and does not prove the facts contained in it [*Kendall v. Barker (1988) 197 Cal. App. 3d 619, 624, 243 Cal. Rptr. 42* ; *see also Magnolia Square Homeowners Assn. v Safeco Ins. Co. (1990) 221 Cal. App. 3d 1049, 1057, 271 Cal. Rptr. 1* (allegation on information and belief is hearsay)]. However, facts averred on information and belief are proper when, for example, the facts to be established are incapable of positive averment [*see City of Santa Cruz v. Municipal Court (1989) 49 Cal. 3d 74, 87, 260 Cal. Rptr. 520, 776 P.2d 222*]. Moreover, unobjected-to hearsay may be considered by the court in ruling on a motion [*see Slusher v. Durrer (1977) 69 Cal. App. 3d 747, 753, 138 Cal. Rptr. 265*].

An affidavit or declaration setting forth only conclusions, opinions, or ultimate facts is also insufficient [*Kendall v. Barker (1988) 197 Cal. App. 3d 619, 624, 243 Cal. Rptr. 42*]. The declaration should be carefully drafted to avoid these, and it should set forth evidentiary, or probative, facts sufficient to show the following:

- One or more grounds for relief [*see § 489.44*; and cases cited in *§ 489.292[10]*].

- That the motion is filed within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken [*Code Civ. Proc. § 473(b)*].

- That the moving party exercised diligence in seeking relief [*see, e.g., Kendall v. Barker (1988) 197 Cal. App. 3d 619, 623-624, 243 Cal. Rptr. 42* ; *see also* discussion in *§ 489.39[6*]].

Explanations should be clear and detailed. For example, it will be insufficient to merely indicate that one was ill, without stating the dates of the illness [*see, e.g., Gudarov v. Hadjieff (1952) 38 Cal. 2d 412, 417-418, 240 P.2d 621*].

Inexcusable carelessness on the part of the defendant or his or her attorney can be disclosed by silence as well as by facts affirmatively set out [*Transit Ads, Inc. v. Tanner Motor Livery, Ltd. (1969) 270 Cal. App. 2d 275, 281, 75 Cal. Rptr. 848* (nonproduction of evidence that would naturally be produced by moving party allows inference that it is unfavorable)].

A declaration attached or appended to the notice of motion, which in its caption refers to the declaration, normally need not have a separate caption. But if it does not have a separate caption, it should nevertheless be titled.

For further discussion of the form and content of affidavits and declarations, see Ch. 15, *Affidavits, Certificates, and Declarations* .

[h] Other Accompanying Papers

[i] Supporting Memorandum

A memorandum must be served and filed with the notice of motion [a], *above,* if the motion is subject to the Civil Law and Motion Rules (*Cal. Rules of Ct., Rule 3.1100 et seq.*) [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Cal. Rules of Ct., Rules 3.1100, 3.1103* (motions subject to rules)] or if required by local court rule. A motion to set aside a default judgment is subject to the Civil Law and Motions Rules [*see Cal. Rules of Ct., Rule 3.1103(a)(2)*]. The better practice is to prepare, serve, and file memorandum in support of any noticed motion, unless excluded expressly or by implication from the Civil Law and Motion Rules or by local court rule.

[ii] Pleading Proposed to Be Filed

A copy of the answer or other pleading, if any, proposed to be filed must also be submitted and is normally served and filed with the notice of motion [*Code Civ. Proc. § 473(b)*; for further discussion of this requirement, including a discussion of a conflict among the courts of appeal as to when the proposed pleading must be filed, *see § 489.53*].

[i] Affidavit of Merits

No affidavit of merits is required [*Code Civ. Proc. § 473(b)*; *see* discussion in *§ 489.52[3*]].

[j] Service of Notice of Motion

The notice of motion must be served on the adverse party's attorney if any or, if none, on the adverse party [*see Code Civ. Proc. §§ 1011, 1012, 1015*].

[k] Parties to Be Served

The person entitled to notice is, of course, the adverse party. Moreover, in the case of multiple parties, notwithstanding the provisions of *Code Civ. Proc. § 1014* that service of notice or papers need not be made on a defendant who has not appeared in the action, "adverse party" would include all parties who may be adversely affected by the order sought, whether or not they have appeared in the action [*see McDonald v. Severy (1936) 6 Cal. 2d 629, 631, 59 P.2d 98* (involving motion under *Code Civ. Proc. § 473(d)* (then fourth paragraph) [*see § 489.130* et seq.], which expressly requires notice, to set aside dismissal with prejudice based on fraud)], including, in the case of a motion by defendant, any codefendants whose rights would be adversely affected by the granting of relief [*see Washko v. Stewart (1941) 44 Cal. App. 2d 311, 319, 112 P.2d 306* (involving motion under *Code Civ. Proc. § 473(d)* (then fifth), to set aside default and default judgment, void in fact but not void on its face, for lack of personal jurisdiction over the defaulting defendant [*see § 489.130* et seq.])].

[l] Cross References

For alternative statements for use in supporting declarations, see *§ 489.361*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the entry of default and default judgment, see Ch. 205, *Defaults and Default Judgments*

For additional discussion and forms relating to written motions, see Ch. 372, *Motions and Orders*

For general discussion and form of a memorandum of points and authorities, see Ch. 417, *Points and Authorities*

[2] Order Granting Motion

[a] FORM Relief From Judgment, Dismissal, Order, or Other Proceeding Taken Through Mistake, Inadvertence, Surprise, or Excusable Neglect or Based on Attorney's Affidavit (Declaration) of Fault [Code Civ. Proc. § 473(b)]--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

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

Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*]	)	Time: _____
Defendant.	)	Dept: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.,* defendant] for an order _____ [*specify, e.g.,* setting aside and vacating the default (and default judgment) heretofore entered] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

[*EITHER*]

On proof made to the satisfaction of the court that the motion ought to be granted,

[*OR*]

The court, having considered [the evidence presented at the hearing, and] the _____ [affidavit(s) *or* declaration(s) *or* affidavit(s) and declaration(s) *or* _____ (affidavit *or* declaration) of fault of defendant's attorney], submitted in support of and in opposition to the motion, and being fully advised in the premises, finds that the _____ [*specify, judgment, dismissal, order, or proceeding, e.g.,* default and default judgment] was/were taken _____ [against *or* by] _____ [*specify party, e.g.,* defendant] through _____ [his/her *or* his/her attorney's] _____ [mistake *or* inadvertence *or* surprise *or* excusable neglect *or all or any combination of these*].

[*CONTINUE*]

IT IS HEREBY ORDERED that the _____ [*specify, e.g.,* default (and default judgment)] heretofore entered in this action _____ [*e.g.,* against defendant][, this judgment having been _____ (*specify, e.g.,* entered on _____ [*date*] in Volume _____, Page _____, of the Judgment Book),] be hereby set aside and vacated.

[IT IS FURTHER ORDERED that _____ (*name of party or party's attorney*) pay to _____ (*specify, e.g.,* plaintiff) legal fees and costs in the sum of $_____.]

[IT IS FURTHER ORDERED that _____ (*name*), the attorney for _____ (*specify party, e.g.,* defendant) pay to _____ (*specify, e.g.,* plaintiff) legal fees and costs in the sum of $_____.]

[IT IS FURTHER ORDERED that _____ (*specify any monetary penalties imposed, e.g.,* defendant's attorney, _____ [*name*], pay the amount of $_____ [*not exceeding $1,000*] to the State Bar Client Security Fund)].

[IT IS FURTHER ORDERED that _____ (*specify party, e.g.,* defendant) be permitted to _____ (*specify, e.g.,* file) the _____ (answer *or other pleading or paper*) _____ (proposed to be filed *or* accompanying the notice of motion)].

[*Add, if sanctions are imposed*]

STATEMENT OF REASONS

The above _____ [*identify sanctions*] are imposed for the following reasons:

1. _____ [*Set forth in this and subsequent paragraphs each fact that support the sanctions, including the award of attorney fees and costs*].
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[b] Use of Form

The form in [a], *above*, is an order for use when the court grants a motion for relief from a judgment, dismissal, order, or other proceeding taken through mistake, inadvertence, surprise, or excusable neglect of a party or a party's attorney, or a motion for relief based on an attorney's affidavit (declaration) of fault [*see Code Civ. Proc. § 473(b)*]. For legal background relating to orders granting or denying relief, see *§ 489.54*.

The order should be submitted to the judge for signature in accordance with the local court's rules and practice.

For discussion of the appealability of the order, see *§ 489.18[5]*.

[c] Findings

Unless a specific finding is required by statute or case law, findings of fact are not required and, in fact, have no place in the court's ruling on a motion [*Waller v. Weston (1899) 125 Cal. 201, 204, 57 P. 892* ; *see also Allstate Ins. Co. v. Orlando (1968) 262 Cal. App. 2d 858, 867, 69 Cal. Rptr. 702* ; *Skouland v. Skouland (1962) 201 Cal. App. 2d 677, 679, 20 Cal. Rptr. 185*]. The only express finding required by *Code Civ. Proc. § 473(b)*, is in the requirement that relief be granted from a default, default judgment, or dismissal based on an attorney's affidavit of fault, "unless the court finds the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." Nevertheless, one court has stated that to grant relief on this basis, the court must find that the default (or dismissal) was actually caused by the attorney's fault [*see Billings v. Health Plan of America (1990) 225 Cal. App. 3d 250, 256, 275 Cal. Rptr. 80* (to extent *Billings* held that relief is limited to relief from default judgments, this holding has been abrogated by 1992 amendment of *Code Civ. Proc. § 473(b)*, which expressly allows for relief from dismissals)]. If the court meant that the order must set forth that express finding, it is not supported by the statute. However, so long as the *Billings* dictum remains unrepudiated, counsel may wish to include in the proposed order granting relief an express finding that the default (or dismissal) was caused by the attorney's mistake, inadvertence, surprise, or neglect. Because the same rule would seem equally applicable to a motion for relief under the first part of *Code Civ. Proc. § 473(b)*, from a judgment, dismissal, order, or proceeding taken through mistake, inadvertence, surprise, or excusable neglect, counsel for the moving party may also wish to include findings if the motion under that provision is granted to avoid an unnecessary appeal or one that might result in an adverse judgment.

[d] Conditions of Relief

[i] On Any Terms That May Be Just

Code Civ. Proc. § 473(b), permits the court to relieve a party from a judgment, dismissal, order, or other proceeding "upon any terms as may be just." This phrase has been interpreted as authorizing the court to order payment of costs or attorney's fees to the adverse party as compensation for loss or expense occasioned by the granting of the motion [*Jade K. v. Viguri (1989) 210 Cal. App. 3d 1459, 1474, 258 Cal. Rptr. 907* (criticized on other grounds in *Passavanti v. Williams (1990) 225 Cal. App. 3d 1602, 1608 n.5, 275 Cal. Rptr. 887*); *Hearst v. Ferrante (1987) 189 Cal. App. 3d 201, 204, 234 Cal. Rptr. 385* ; *see also* *Kodiak Films, Inc. v. Jensen (1991) 230 Cal. App. 3d 1260, 1264, 281 Cal. Rptr. 728*].

For further legal background, see *§ 489.42*.

[ii] Relief Based on Attorney's Affidavit or Declaration of Fault

Whenever relief is granted based on an attorney's affidavit (or declaration) of fault, the court is required to direct the attorney to pay reasonablecompensatory legal fees and costs to opposing counsel or parties [*Code Civ. Proc. § 473(b)*]. Therefore, if the motion for relief is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, the second bracketed order in the form in [a], *above*, limited to directing the attorney to pay legal fees and costs, should be included in the order. The relief cannot, however, be made conditional on the attorney's payment of compensatory legal fees or costs or monetary penalties (discussed under [iii], *below*) imposed by the court or on compliance with other sanctions ordered by the court [*Code Civ. Proc. § 473(c)(2)*].

[iii] Penalties

Whenever the court grants relief from a default, default judgment, or dismissal based on any of the provisions of *Code Civ. Proc. § 473(b)*, the court may [*Code Civ. Proc. § 473(c)(1)*]:

- Impose a penalty of no greater than $1,000 on an offending attorney or party,
- Direct that an offending attorney pay an amount no greater than $1,000 to the State Bar Client Security Fund, or
- Grant other appropriate relief.

For discussion of the imposition of penalties under *Code Civ. Proc. § 128.5(a)*, see *§ 489.42[3]*. If penalties are imposed, the third optional order in the form in [a], *above*, should be included.

[e] Statement of Reasons

If attorney's fees are awarded as a sanction or other sanctions are imposed, the order must also contain a written statement of the reasons [*see* *Hearst v. Ferrante (1987) 189 Cal. App. 3d 201, 204, 234 Cal. Rptr. 385* ; *see also* discussion in *§ 489.42[4*]].

[f] Cross References

For additional discussion and forms relating to orders, see Ch. 372, *Motions and Orders*

California Forms of Pleading and Practice--Annotated

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Volume 43: Receivers thru Rewards-Chs. 486-499
Chapter 489 RELIEF FROM JUDGMENTS AND ORDERS
V. FORMS
A. Statutory Relief From Valid Judgments and Orders
1. Mistake, Inadvertence, Surprise, or Excusable Neglect

43-489 California Forms of Pleading and Practice--Annotated § 489.361

§ 489.361 Relief From Judgment, Dismissal, Order, or Other Proceeding Taken Through Mistake, Inadvertence, Surprise, or Excusable Neglect or Based on Attorney's Affidavit (Declaration) of Fault [Code Civ. Proc. § 473(b)]--
Supporting Declaration--Statement in Supporting Declaration

[1] Default Was Due to Defendant's Excusable Mistake of Fact

[a] FORM Relief From Judgment, Dismissal, Order, or Other Proceeding Taken Through Mistake, Inadvertence, Surprise, or Excusable Neglect or Based on Attorney's Affidavit (Declaration) of Fault [Code Civ. Proc. § 473(b)]--Supporting Declaration--Statement in Supporting Declaration--Default Was Due to Defendant's Excusable Mistake of Fact

[*The following may be substituted for the factual statement in Paragraph 2 of the declaration in support of motion for relief from a judgment, dismissal, order, or proceeding under Code Civ. Proc. § 473(b) in § 489.360[1][a].*]

[*SET FORTH facts showing that entry of default (and default judgment, if applicable) was due to defendant's excusable mistake of fact, e.g.:*]

2. As shown by the records herein, of which the court is requested to take judicial notice, the default [and default judgment] was/were entered through my _____ [mistake *or* inadvertence *or* surprise *or* excusable neglect *or all or any combination of these*].

3. I was served with the summons and complaint in this action by a process server. At that time, I wrote at the top of the papers the date I received them, _____ [*specify date, e.g.,* June 24, 1992].

4. I read the summons which said that I had 30 days from the date of service in which to answer, and believed that I, therefore, had through _____ [*e.g.,* July 24] in which to do so. I read the complaint and believed that I

had a good and substantial defense to the action, and continue to believe so, as shown by my proposed answer to the complaint.

5. Sometime within the next day or two, I phoned the office of my attorney, _____ [*name*], and learned that he/she was out of town on a trial and would not be back in his/her office until _____ [*e.g.*, July 20]. I explained to the secretary that I had received the summons and complaint and, in response to his/her question, said that I had received them on _____ [*e.g.*, June 24]. The secretary told me that he/she believed that Mr./Ms. _____ [*name of attorney*] would be able to handle my defense and file a timely pleading, but that Mr./Ms. _____ would be checking in with him/her on _____ [*e.g.*, July 1], he/she would then confirm it with the attorney and call me back.

6. On _____ [*e.g.*, July 1], Mr./Ms. _____ [*name of attorney*] phoned me personally and we discussed the case. He/she suggested that I obtain copies of certain papers that he/she believed would support my defense and that I leave them, together with the summons and complaint,with the secretary at his/her office no later than _____ [*e.g.*, July 17], and I did so.

7. In the evening of _____ [*e.g.*, July 23], I went to my attorney's office where I read and signed the answer he/she had prepared.

8. On _____ [*e.g.*, July 24] my attorney phoned to tell me that when he/she attempted to file the answer that morning, the court clerk rejected it on the ground my default had been entered the day before, that he/she then checked the file of the case and learned that I had been served on _____ [*e.g.*, June 23].

9. If in fact I was served on _____ [*e.g.*, June 23], I honestly believed in good faith that it was _____ [*e.g.*, June 24] and do not understand how I could have been mistaken as to the date of the day service was made. Ever since reading the complaint I have had every intention of answering it and at no time would have intentionally misled my attorney as to the date I was served. If I did, in fact, err in the date I wrote on the papers, it was an honest mistake made in the utmost good faith.

[b] Use of Form

The form of declaration in [a], *above*, is for use to support a motion for relief from a judgment, dismissal, order, or proceeding taken by or against a party through his or her mistake, inadvertence, surprise, or excusable neglect [*Code Civ. Proc. § 473(b)*].

The form in [a], *above*, is an illustration of the type of detailed statement that may be substituted for Paragraph 2 of the supporting declaration in *§ 489.360[1]*. In the statement, the defendant is seeking relief from a default that resulted from his or her reasonable mistake of fact as to the date of service, and the mistake led to an untimely presentation of the answer for filing. In this situation, a declaration by the secretary setting forth his/her statement of the facts should also be prepared and submitted. The attorney should also make a declaration verifying what he/she did prior to the default, the plaintiff's refusal to stipulate to setting aside the default, and the prompt steps the attorney took in making the motion to set aside.

For additional examples of mistakes of fact, see *§ 489.44[1][b]*.

The general requirements for drafting a declaration in support of a motion for relief under *Code Civ. Proc. § 473(b)* are discussed in *§ 489.360[1][g]*.

For a memorandum of points and authorities supporting relief from default based on the defendant's reasonable mistake of fact as to service, see California Points and Authorities, Ch. 70, *Defaults, Default Judgments, and Relief From*

Judgments and Orders (Matthew Bender).

[2] Default Was Due to Defendant's Excusable Neglect in Reasonably Relying on Promise of Codefendant or Employer to Defend

[a] FORM

[*The following may be substituted for the factual statement in Paragraph 2 of the declaration in support of motion for relief from a judgment, dismissal, order, or proceeding under Code Civ. Proc. § 473(b) in § 489.360[1][a]* .]

[*SET FORTH facts showing that entry of default (and default judgment, if applicable) was due to defendant's excusable neglect in reasonably relying on a codefendant's or employer's promise to defend, e.g.:*]

2. The default [and default judgment] was/were entered through my _____ [mistake *or* inadvertence *or* surprise *or* excusable neglect *or all or any combination of these*].

3. On _____ [*date*], immediately after being served with the summons and complaint in this action, defendant notified _____ [*name*], his/her _____ [codefendant *or* employer] of the service. _____ [*Name of codefendant or employer*] advised defendant _____ [*state substance of representations made to defendant*] [and instructed defendant to forward the summons and complaint to him/her.

4. Thereafter, on _____ (*date*), defendant forwarded the summons and complaint by mail to _____ (*name of codefendant or employer*)].

5. As a result of these representations [and instructions] and because the cause of action arose out of _____ [*specify, e.g.,* a debt for which _____ (*name of codefendant*) was primarily liable *or* defendant's employment] defendant reasonably relied on _____ [*name of codefendant or employer*] to defend the action on behalf of defendant and defendant took no further action in the matter. However, without defendant's knowledge or fault, _____ [*name of codefendant or employer*] failed to answer or otherwise plead to the complaint [within the proper time].

6. Defendant's default was taken on _____ [*date*] [and a default judgment subsequently entered on _____ (*date*)].

[b] Use of Form

The form of declaration in [a], *above*, is for use to support a motion for relief from a judgment, dismissal, order, or proceeding taken by or against a party through his or her mistake, inadvertence, surprise, or excusable neglect [*Code Civ. Proc. § 473(b)*].

The form in [a], *above*, is an illustration of the type of detailed statement that may be substituted for Paragraph 2 of the supporting declaration in *§ 489.360[1]*. In the statement, the defendant is seeking relief from a default (and default judgment) that resulted from his or her reasonable reliance on a codefendant or employer to defend the action on defendant's behalf. If the time for relief under *Code Civ. Proc. § 473(b)*, has expired, relief may still be available by a motion in equity [*see, e.g., Desper v. King (1967) 251 Cal. App. 2d 659, 662, 59 Cal. Rptr. 657*].

The general requirements for drafting a declaration in support of a motion for relief under *Code Civ. Proc. § 473(b)* are discussed in *§ 489.360[1][g]*.

With appropriate modifications to substitute equitable for statutory grounds, that is, to substitute extrinsic mistake for excusable neglect, the statement in [a], *above*, may be included in a declaration in support of the equitable motion. For a form of declaration in support of a motion for equitable relief, see *§ 489.430[1]*. For discussion of equitable relief, see *§ 489.260* et seq..

For additional examples of excusable neglect, see *§ 489.44[4]*.

[c] Reliance on Third Party to Defend

When a default is entered because the defendant has relied on a codefendant or other interested party to defend, the question is whether the defendant was reasonably justified under the circumstances in his or her reliance or whether his or her neglect to attend to the matter was inexcusable [*Weitz v. Yankosky (1966) 63 Cal. 2d 849, 855, 48 Cal. Rptr. 620, 409 P.2d 700* (treating motion for relief filed more than six months after default was entered as motion for relief in equity based on extrinsic mistake in relying on insurer to defend after following mailing summons and complaint to insurer pursuant to instructions in policy, but insurer never received them); *Roussey v. Ernest W. Hahn, Inc. (1967) 251 Cal. App. 2d 251, 256, 59 Cal. Rptr. 399* ; *see* discussion in *§ 489.39[8]*)].

[d] Reliance on Insurer to Defend

The inexcusable neglect of the insurer, who is, in effect if not in law, the real party in interest, like that of the defendant's attorney, is imputed to the defendant [*see Don v. Cruz (1982) 131 Cal. App. 3d 695, 700-701, 182 Cal. Rptr. 581*]. Thus, a defendant seeking to vacate a default under *Code Civ. Proc. § 473(b)*, or under the court's equitable powers, who alleges reasonable reliance on an insurance carrier to defend, must also establish justification for the carrier's inaction in failing to file an answer [*see Don v. Cruz (1982) 131 Cal. App. 3d 695, 702, 182 Cal. Rptr. 581*].

[3] Default Was Due to Attorney's Excusable Neglect Resulting From Press of Business Coupled With Unusual Circumstances

[a] FORM

[*The following may be substituted for the factual statement in Paragraph 2 of the declaration in support of motion for relief from a judgment, dismissal, order, or proceeding under Code Civ. Proc. § 473(b) in § 489.360[1][a]* .]

[*SET FORTH facts showing that entry of default (and default judgment, if applicable) was due to attorney's excusable neglect resulting from press of business coupled with unusual circumstances, e.g.:*]

2. The default [and default judgment] was/were entered through my _____ [mistake *or* inadvertence *or* surprise *or* excusable neglect *or all or any combination of these*].

3. _____ [*State nature of proceeding and time within which answer must be filed if less than the normal 30 day period, e.g.,* This is an unlawful detainer proceeding arising out of a complex commercial transaction in which the defendant had only five days to answer the complaint].

4. _____ [*Specify when the action was commenced and the summons was served, e.g.,* As shown by the court's file herein, the complaint was filed on _____ (*specify day of week, e.g.,* Friday) _____ (*date*) and served on the defendant late the same day]. _____ [*Specify circumstances in which counsel undertook to represent defendant, e.g.,* The summons and complaint were delivered to my office the following Monday.]

5. _____ [*Describe office situation, e.g.,* Normally, an attorney would have been available to handle the manner forthwith. However, the office's Chief Trial attorney had become seriously ill the week before and has not

yet returned, and his cases had been reassigned between myself and the office's other attorney. At the time the defendant's papers arrived both of us were out of town on other trials.]

6. _____ [*Specify additional circumstances, e.g.,* Moreover, the papers arrived during Christmas week. I arrived back in the office on Wednesday, the day before Christmas, and the day the answer was due. The other attorney in the office had not yet returned. After reading the papers, I phoned the office of the attorneys representing the plaintiff to request an extension of time and was informed that the attorney handling the matter had left town for the Christmas holiday and would not be back until Monday, and that there was no one else in the office who could grant me an extension of time. I also tried several times to reach the defendant by phone, but there as no answer. The following Monday I phoned the office of plaintiff's attorney and was informed that the defendant's default hadbeen entered the preceding Friday, although neither I nor the defendant, as shown by his/her declaration submitted herewith, had received any advance notice at all of plaintiff's intention to have the default entered].

[b] Use of Form

The form of declaration in [a], *above*, is for use to support a motion for relief from a judgment, dismissal, order, or proceeding taken by or against a party through his or her mistake, inadvertence, surprise, or excusable neglect [*Code Civ. Proc. § 473(b)*].

The form in [a], *above,* is an illustration of the type of detailed statement that may be substituted for Paragraph 2 of the supporting declaration in *§ 489.360[1]*. In the statement, the defendant is seeking relief from a default (and default judgment) that resulted from the failure of the defendant's attorney to file an answer on behalf of a client within the limited time allotted. The ground of the motion would be excusable neglect [*see § 489.44[4]*, for discussion of what constitutes excusable neglect]. The fact situation illustrated is adapted from the one described in *Robinson v. Varela (1977) 67 Cal. App. 3d 611, 614-615, 616, 136 Cal. Rptr. 783* , in which relief was granted.

Note, however, that press of business alone is not normally a valid ground for relief from a default judgment entered as the result of an attorney's failure to file an answer [*see* discussion *§ 489.45[2][c]*].

The general requirements for drafting a declaration in support of a motion for relief under *Code Civ. Proc. § 473(b)* are discussed in *§ 489.360[1][g]*.

[4] Default Resulted From Attorney Abandonment

[a] FORM

[*The following may be substituted for the factual statement in Paragraph 2 of the declaration in support of motion for relief from a judgment, dismissal, order, or proceeding under Code Civ. Proc. § 473(b) in § 489.360[1][a]* .]

[*SET FORTH facts showing that entry of default (and default judgment, if applicable) was due to abandonment by the declarant's attorney, e.g.:*]

2. On being served with the summons and complaint in this action on or about _____ [*date*], I immediately phoned the plaintiff, who told me that he/she would not talk with me and that I should contact his/her attorney, whose name and phone number he/she gave me.

3. I immediately phoned the attorney who informed me that if I intended to contest the complaint I should consult with my own attorney.

4. I had no attorney, but immediately, on the same day phoned _____ [*name*], an attorney duly

licensed to practice law in this state, whose name I got from the yellow pages of the phone book. The attorney said he could see me that day and that I should come in. I did. The attorney said that he/she would take my case, and that I should "leave everything" to him/her. He/she further instructed me to have no further communication with either the plaintiff or his/her attorney and that any contact with them should be made solely by himself/herself.

5. At that time I paid him/her the sum of $_____, as a retainer, and he/she gave me a receipt, a copy of which is attached hereto as Exhibit A.

6. On or about _____ [*date*], the attorney phoned to tell me that he/she had talked with plaintiff's attorney and told plaintiff's attorney that he/she was representing me. The attorney subsequently drafted an answer to the complaint, which he/she had me read and sign on _____ [*date*] at his/her office, at which time he/she told me the answer would be filed forthwith. Unknown to me the answer was not filed "forthwith" or at all.

7. Not hearing from the attorney for about two weeks, I phoned him/her and asked the status of the matter. He/She told me the answer had been filed, that he/she was preparing papers to send to the plaintiff to obtain certain admissions, and that he/she would contact me at such time it became necessary to do so, and that it could take over a year before the case was brought to trial. At the same time, he/she asked that I send him/her an additional payment in the amount of $_____, which I sent by check. A copy of the canceled check is attached hereto as Exhibit B.

8. Approximately five weeks later, over a period of several days, I again phoned the attorney several times and was informed each time by the man/woman who answered the phone, who I assumed was the attorney's secretary, that the attorney was "in trial" or "on a trial out of town" or "on a business trip" and that he/she would have the attorney call when the attorney "got in" or "got back."

9. Receiving no return call, again, on or about _____ [date], I phoned, and this time the attorney answered. He/she seemed flustered and upset and told me the case had been dismissed, that I had nothing more to worry about, that he/she would send me a copy of the judgment. Thereafter, on or about _____ [*date*], I received what purported to be, but was not, a valid judgment of the court, which had stamped over the signature line the name of a judge. A copy of this document is attached hereto as Exhibit C and made a part hereof.

10. Subsequently, on or about _____ [*date*], I was notified by my bank that my savings account had been levied on by the plaintiff pursuant to a judgment that had been rendered against me. I immediately tried to phone my attorney, but was told by the operator that the number had beendisconnected. I immediately went to the attorney's office and found that it was vacant. I went to the building manager who told me that the attorney's lease had run out, the attorney had moved, and that the manager did not know the attorney's new address. I phoned information and asked for the attorney's current phone number and was told that there was no listing for him/her.

11. I then retrieved the copy of the judgment my attorney had sent me and went to the courthouse where I spoke to a clerk and showed him/her the judgment. The clerk said he/she had no record of any such judgment in his/her records, that his/her records showed an answer was mailed to the court for filing, but that it was returned to the attorney for failure to pay the filing fee.

12. The clerk further got the court file of my case and went through it in my presence. There was no judgment in my favor in the file. Rather, both the court's records and the file showed that the clerk had entered my default for failure to file an answer and that a judgment was entered against me on _____ [*date*].

13. The clerk further suggested that I might locate the attorney's present address by phoning the State Bar, which I did, but the only address it had was the one for the now vacated office.

14. Pursuant to the suggestion of the person at the State Bar, I phoned the local bar association and secured the names of

three attorneys any one of which they felt could help me. I phoned the first name on the list and was given an appointment for the following day, which appointment I kept.

15. I explained the facts as set forth herein to the attorney, who agreed to represent me. That same day, while I remained in the office, the attorney drafted a motion to vacate and set aside the default and default judgment, and this declaration, which I signed in his/her presence.

[b] Use of Form

The form of declaration in [a], *above*, is for use to support a motion for relief from a judgment, dismissal, order, or proceeding taken by or against a party through his or her mistake, inadvertence, surprise, or excusable neglect [*Code Civ. Proc. § 473(b)*].

The form in [a], *above*, is an illustration of the type of detailed statement that may be substituted for Paragraph 2 of the supporting declaration in § 489.360[1]. In the statement, the defendant is seeking relief from a default (and default judgment) that resulted from the defendant's employment of, and reliance on the assurances of, his or her attorney, to represent the defendant when, with no notice to the defendant, the attorney, through positive misconduct, of which the defendant had no knowledge, abandoned the defendant [*see Carroll v. Abbott Laboratories, Inc. (1982) 187 Cal. Rptr. 592, 654 P.2d 775* ; *Tunis v. Barrow (1986) 184 Cal. App. 3d 1069, 1078, 229 Cal. Rptr. 389* ; for discussion, *see § 489.46*].

The same facts would support either a motion for relief under *Code Civ. Proc. § 473(b)*, based on mistake, or a motion for relief in equity based on extrinsic mistake [*see Buckert v. Briggs (1971) 15 Cal. App. 3d 296, 301, 93 Cal. Rptr. 61* ; *see also § 489.430[g*]]. Diligence in seeking relief is required whether the motion is made pursuant to the statute [*see* discussion in *§ 489.39[6]*], or is directed to the equitable powers of the court [*see § 489.262[2]*]. A motion under the statute cannot be made more than six months after the default was entered, whereas the only limitation on a motion for equitable relief is that the motion be made within a reasonable time after discovery of the entry of the default and judgment. Both forms of relief may be sought in the same motion, but if more than six months have passed since the judgment was entered, the motion should be limited to a request for equitable relief based on extrinsic mistake.

The general requirements for drafting a declaration in support of a motion for relief under *Code Civ. Proc. § 473(b)* are discussed in *§ 489.360[1][g]*.

[5] Dismissal of Action Resulted From Defendant's Reliance on Erroneous Information Given by Court Officer

[a] FORM

[*The following may be substituted for the factual statement in Paragraph 2 of the declaration in support of motion for relief from a judgment, dismissal, order, or proceeding under Code Civ. Proc. § 473(b) in § 489.360[1][a]* .]

[*SET FORTH facts showing that entry of default (and default judgment, if applicable) was due to defendant's excusable neglect in reasonably relying on a codefendant's or employer's promise to defend, e.g.:*]

2. As shown by the records herein, of which the court is requested to take judicial notice, the judgment dismissing plaintiff's action was entered through my _____ [mistake *or* inadvertence *or* surprise *or* excusable neglect *or all or any combination of these*] arising from erroneous information I received from _____ [*specify court officer, e.g.,* the courtroom clerk].

3. On _____ [*date*], _____ [*specify what was done, e.g.,* the date scheduled for trial

of this action, as attorney for the plaintiff, I arrived early with my client in the courtroom of Judge _____, who was scheduled to try the case]. At that time I was advised by the _____ [*specify court officer, e.g.,* courtroom clerk] _____ [*set forth statement(s), e.g.,* that the trial had been postponed, that it would be reset, and that I would be notified at a later time of the new trial date].

4. _____ [*Specify action taken in reliance on statement, e.g.,* So notified, the plaintiff and I left the courtroom].

5. The _____ [*e.g.,* clerk's] statement was erroneous in that _____ [*specify true facts, e.g.,* the trial had not been postponed, and it was called for trial as scheduled]. As a result of the clerk's erroneous advice, _____ [*specify, e.g.,* no one appeared for the plaintiff when the case was called, and the action was dismissed on defendant's motion].

[b] Use of Form

The form of declaration in [a], *above,* is for use to support a motion for relief from a judgment, dismissal, order, or proceeding taken by or against a party through his or her mistake, inadvertence, surprise, or excusable neglect [*Code Civ. Proc. § 473(b)*].

The form in [a], *above,* is an illustration of the type of detailed statement that may be substituted for Paragraph 2 of the supporting declaration in *§ 489.360[1]*. In the statement, the defendant is seeking relief from a judgment of dismissal resulting from justifiable reliance on statements of a court officer on the ground of mistake, inadvertence, and excusable neglect.

For additional examples of these grounds, see discussion in *§ 489.44[1][a]*. The general requirements for drafting a declaration in support of a motion for relief under *Code Civ. Proc. § 473(b)* are discussed in *§ 489.360[1][g]*.

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43-489 California Forms of Pleading and Practice--Annotated § 489.362

§ 489.362 Relief From Default, Resulting Default Judgment, or Dismissal Based on Attorney's Affidavit (Declaration) of Fault--Supporting Declaration [Code Civ. Proc. § 473(b)] Attesting to Attorney's Mistake, Inadvertence, Surprise, or Neglect--General Form

[1] FORM Relief From Default, Resulting Default Judgment, or Dismissal Based on Attorney's Affidavit (Declaration) of Fault--Supporting Declaration [Code Civ. Proc. § 473(b)] Attesting to Attorney's Mistake, Inadvertence, Surprise, or Neglect--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff, vs. _____ [*name*], Defendant.	)))))))))	NO. _____ DECLARATION OF _____ [*name of attorney*] ATTESTING TO FAULT IN SUPPORT OF _____ [PLAINTIFF'S *or* DEFENDANT'S] MOTION FOR ORDER VACATING AND SETTING ASIDE _____ [DEFAULT (AND DEFAULT JUDGMENT) *or* DISMISSAL] Date: _____ Time: _____ Dept: _____ Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am an attorney at law duly admitted to practice in the State of California and _____ [attorney *or* attorney of record *or* former attorney of record] for the _____ [*specify moving party*] herein and make this declaration in support of _____'s [*specify moving party*] motion for an order setting aside and vacating the _____ [default (and default judgment) *or* dismissal] taken against _____ [*specify moving party*].

2. The _____ [default (and default judgment) *or* dismissal] was/were entered through my _____ [mistake *or* inadvertence *or* surprise *or* neglect *or all or any combination of these*] in that _____ [*set forth all facts establishing the attorney's fault and showing that the default (and resulting default judgment) or dismissal were caused by the attorney's mistake, inadvertence, surprise, or neglect*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [2], *above*, is a declaration for use by a party's attorney to attest to his or her mistake, inadvertence, surprise, or neglect, which resulted in the entry of a default, default judgment, or dismissal entered against his or her client. The declaration should be attached or appended to, and submitted with, the notice of motion [*see Code Civ. Proc. § 473(b)*].

The general requirements for drafting a declaration are discussed in *§ 489.360[1][g]*.

[3] Effect of Affidavit or Declaration

If the motion is made no more than six months after entry of judgment, is in proper form, and is accompanied by the attorney's sworn affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) attesting to his or her mistake, inadvertence, surprise, or neglect, the court is required to vacate any resulting default, default judgment, or dismissal entered against the attorney's client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect [*Code Civ. Proc. § 473(b)*]. The statute does not require the moving party to act diligently in filing the motion.

For further discussion, as well as the conditions and penalties that may be imposed on the granting of relief, see *§ 489.40[1]*.

[4] Cross References

For discussion of format, contents, and other requirements, as well as forms, of affidavits and declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

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[Reserved]

§§ 489.363[Reserved]

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43-489 California Forms of Pleading and Practice--Annotated § 489.370

§ 489.370 Relief From Judgment, Dismissal, Order, or Other Proceeding Taken Through Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--Opposing Declaration--General Form

[1] FORM Relief From Judgment, Dismissal, Order, or Other Proceeding Taken Through Mistake, Inadvertence, Surprise, or Excusable Neglect [Code Civ. Proc. § 473(b)]--Opposing Declaration--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	DECLARATION OF
	)	_____ [*name*] IN
	)	OPPOSITION TO MOTION
_____ [*name*], Plaintiff,	)	_____ [*specify, e.g.,* FOR
vs.	)	ORDER VACATING AND SETTING
_____ [*name*], Defendant.	)	ASIDE DEFAULT (AND
	)	DEFAULT JUDGMENT)]
	)	Date: _____
	)	Time: _____
	)	Dept: _____
	)	Trial Date: None
	)	
_____		

I, _____ [*name*], declare:

1. I am _____ [*specify, e.g.,* the plaintiff in the above-entitled action *or* an attorney at law duly

admitted to practice in all California state courts and the attorney of record for the _____ (*specify party, e.g.,* plaintiff)] and make this declaration in opposition to _____ [*party, e.g.,* defendant's] motion _____ [*specify relief sought, e.g.,* to set aside and vacate] _____ [*specify judgment, dismissal, order, or proceeding, e.g.,* the default and default judgment] entered in this action against _____ [*party, e.g.,* the defendant].

2. As shown by the records of this court, the _____ [*specify when judgment, dismissal, order, or proceeding was taken, e.g.,* default was entered on _____ (*date*) and the default judgment was entered on _____ (*date*)].

[*EITHER*]

3. As further shown by the records herein, of which this court is requested to take judicial notice, _____ [*specify moving party, e.g.,* defendant's] motion was filed on _____ [*date*], and is therefore untimely in that it was not filed within six months from the date _____ [*specifyjudgment, dismissal, order, or proceeding moving party seeks to set aside, e.g.,* the default was entered *or, if relief is sought only from a default judgment or other judgment,* the (default) judgment was entered].

[*OR*]

3. As further shown by the proof of service filed in this action, _____ [*specify moving party, e.g.,* defendant] was served with notice of _____ [*specify judgment, dismissal, order, or proceeding moving party seeks to set aside, e.g.,* entry of the default and default judgment] on _____ [*date*], yet failed to take any steps to seek relief from _____ [*specify, e.g.,* default] until _____ [*date*], when _____ [*specify moving party, e.g.,* defendant's] motion was filed. The declaration of _____ [*name*] submitted in support of the motion shows not only that _____ [*specify moving party, e.g.,* defendant] failed to act diligently in seeking relief from _____ [*specify, e.g.,* default], but that he/she failed to take any action at all for a period of _____ [*e.g.,* four months] after receiving notice that the _____ [*specify, e.g.,* default and default judgment were entered].

[*AND/OR*]

4. There is no showing that the _____ [mistake *or* inadvertence *or* surprise *or* neglect *or any combination of these*] relied on by _____ [*specify moving party, e.g.,* defendant] is excusable.

5. [*Specify any defects, omissions, or statements in moving party's supporting declaration that admit or imply inexcusability, or are disputed, e.g.,* Defendant makes no claim that at the time he/she was served with the summons and complaint in this action that he/she did not have full possession of his/her faculties, that he/she was ill or incapacitated, or that he/she could not read or write the English language or did not understand the summons, but states in sum only that on receipt of the papers he/she "didn't really understand what the fuss was all about," mislaid the papers, and forgot about them until he/she received a copy of plaintiff's request to enter default. Plaintiff knew, or was bound to know, the meaning of the contents of the summons and complaint served, and knew, or was bound to know, from a simple reading of the summons, that action on his/her part was required within 30 days of service, and knew, or was bound to know, that a judgment would be taken against him/her in the amount stated in the complaint in the event that he/she failed to file a responsive pleading].

6. _____ [*Set forth facts within declarant's personal knowledge negating any claims in moving party's*

supporting declaration, e.g., Defendant is _____ (*specify business or occupation*). Over a period beginning almost two months before the complaint was filed, I attempted unsuccessfully to negotiate a settlement of the dispute with the defendant. These negotiations terminated on _____ (*date*), at which time, I told the defendant that I was going to hire an attorney and file an action against him/her to recover the money he/she owed me. His/Her reply to me was that I could do what I wanted, but that, if I did sue, he/she would keep the case tied up in the trial and appellate courts for years and I'd never receive a cent. Consequently, defendant knew in advance that I was going to sue him/her, had my statement confirmed when he/she received the summons and complaint, and his/her statement about tying up the case in the courts implies familiarity with court proceedings].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is a declaration to oppose a motion for relief from a judgment, dismissal, order, or proceeding taken through a party's mistake, inadvertence, surprise, or excusable neglect.

For discussion of the requirement that any mistake, inadvertence, or surprise, as well as neglect, be excusable, see *§ 489.32*. For discussion of when the motion must be filed, see *§ 489.39*. For discussion of what constitutes mistake, inadvertence, surprise, or excusable neglect, see *§ 489.44[1]*.

The general requirements for drafting a declaration are discussed in *§ 489.360[1][g]*.

[3] Contents of Counterdeclaration

Counterdeclarations should be limited to showing that the motion is not timely, or that the moving party was not diligent in seeking relief, or that the mistake, inadvertence, surprise, or neglect was not excusable, or, if it is excusable, that it was not the cause of the judgment, dismissal, order, or proceeding [*see, e.g.*, *First Small Business Inv. Co. v. Sistim, Inc. (1970) 12 Cal. App. 3d 645, 651, 90 Cal. Rptr. 798*]. It would also appear to be proper, if the motion is for relief from a default judgment and the moving party's claimed meritorious defense consists of an affirmative defense alleged in the proposed answer, to show that the defense, if true, would be no defense to the cause of action alleged in the complaint.

Otherwise, counterdeclarations going to the merits of the case are irrelevant and improper, because a hearing on the motion is not theoccasion to try the merits of the case. Hence, on a motion for relief from a default and default judgment, for example, facts stated in the defendant's supporting affidavit or declaration or in the proposed answer showing a sufficient defense to the action may not be rebutted in the counteraffidavits or counterdeclarations of the opposing party [*see* *Douglass v. Todd (1892) 96 Cal. 655, 657-658, 31 P. 623* ; *First Small Business Inv. Co. v. Sistim, Inc. (1970) 12 Cal. App. 3d 645, 651, 90 Cal. Rptr. 798* (noting that *H.A. Pulaski, Inc. v. Abbey Contr. Specialties, Inc. (1969) 268 Cal. App. 2d 883, 74 Cal. Rptr. 590* , apparently holding to the contrary, was out of line with the Supreme Court cases); *see also* *Beard v. Beard (1940) 16 Cal. 2d 645, 649, 107 P.2d 385* (proposed answer denying allegations clearly raised issue of fact and law that trial court was justified in holding a meritorious defense);

Rauer's Law etc. Co. v. Gilleran (1903) 138 Cal. 352, 353-354, 71 P. 445 (trial court erred in denying motion to vacate default judgment because defendant refused to appear to be examined under oath as to defense's nature when court doubted its merits)].

[4] Legal Argument

Legal argument is normally set forth in the accompanying memorandum of points and authorities, rather than in an opposing declaration. However, there appears to be no prohibition against legal argument in the declaration when it helps to give legal meaning to the probative facts averred or summarizes the basis of the result sought. Nevertheless, the memorandum of points and authorities should set forth any statement of law supporting a legal argument in the declaration, as well as the statutory, case, or other authority for the statement.

[5] Service of Opposing Papers

Opposing papers must be filed and served at least 9 court days before the hearing [*Code Civ. Proc. § 1005(a)(13), (b)*].

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43-489 California Forms of Pleading and Practice--Annotated § 489.371

§ 489.371 Relief From Judgment, Dismissal, Order, or Other Proceeding Taken Through Mistake, Inadvertence, Surprise, or Excusable Neglect--Order Denying Motion

[1] FORM Relief From Judgment, Dismissal, Order, or Other Proceeding Taken Through Mistake, Inadvertence, Surprise, or Excusable Neglect--Order Denying Motion
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.,* defendant] for an order _____ [*specify, e.g.,* setting aside and vacating the default (and default judgment) heretofore entered] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

[*EITHER, if motion was based on mistake, inadvertence, surprise, or excusable neglect*]

The court being fully advised in the premises, and good cause appearing therefore,

[*OR, if motion was based on attorney's affidavit of fault*]

Being fully advised in the premises, the court finds that the default was not in fact caused by the _____ [mistake *or* inadvertence *or* surprise *or* neglect *or any combination of these*] of defendant's counsel, _____ [*name*], and, therefore,

[*CONTINUE*]

IT IS ORDERED that the motion of _____ [*party*, *e.g.*, defendant] be, and it hereby is, denied.
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

The form in [1], *above*, is an order denying a motion for relief from a judgment, dismissal, order, or proceeding allegedly taken through mistake, inadvertence, surprise, or excusable neglect or a motion for relief from default based on an attorney's affidavit or declaration of fault is for use when the motion is denied and a formal order denying the motion is required by the court or by statute [*see Code Civ. Proc. § 473(b)*].

The order should be submitted to the judge for signature in accordance with the local court's rules and practice, which should be checked if counsel is unfamiliar with them.

The general requirements for drafting an order, including conditions for relief, are discussed in *§ 489.360[2]* in the context of an order granting a motion for relief under *Code Civ. Proc. § 473(b).*

For discussion of the appealability of an order denying relief, see *§ 489.18[6][a]*.

[3] Motion Based on Attorney's Affidavit of Fault

A motion for relief from a default and any resulting default judgment, or dismissal, based on an attorney's affidavit (or declaration) of fault meeting the requirements of *Code Civ. Proc. § 473(b)*, must be granted unless the court finds that the default, or dismissal, was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect [*Code Civ. Proc. § 473(b)*].

[4] Cross References

For a general form of notice of motion for relief under *Code Civ. Proc. § 473.5*, coupled with a motion for relief under *Code Civ. Proc. § 418.10*, see Ch. 323, *Jurisdiction: Personal*

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[Reserved]

§§ 489.372[Reserved]

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2. Relief on Other Grounds

43-489 California Forms of Pleading and Practice--Annotated § 489.380

§ 489.380 Motion to Set Aside Default and Default Judgment When Service of Summons Did Not Result in Actual Notice to Defendant in Time to Defend [Code Civ. Proc. § 473.5]

[1] Notice of Motion and Motion and Supporting Declaration

[a] FORM Motion to Set Aside Default and Default Judgment When Service of Summons Did Not Result in Actual Notice to Defendant in Time to Defend [Code Civ. Proc. § 473.5]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR OR-
vs.	)	DER SETTING ASIDE AND VACATING DE-
_____ [*name*],	)	FAULT [AND DEFAULT JUDGMENT] AND
Defendant.	)	GRANTING DEFENDANT LEAVE TO DEFEND,
	)	DECLARATION(S) OF _____
	)	[*name(s)*], AND MEMORANDUM
		Date: _____
		Time: _____
		Dept: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], defendant will, and hereby does, move for an order setting aside and vacating the default [and default judgment] entered against defendant on _____ [*date*] and granting defendant leave to defend the action. The motion will be made on the ground that the service of summons in this case did not result in actual notice to the defendant in time to defend.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*], the proposed _____ [answer to the complaint herein *or other pleading or motion proposed to be filed*] and the memorandumserved and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*signature*]

Attorney for Defendant

DECLARATION OF _____ [*name*] IN SUPPORT OF MOTION FOR ORDER SETTING ASIDE AND VACATING DEFAULT [AND DEFAULT JUDGMENT] AND GRANTING DEFENDANT LEAVE TO DEFEND

I, _____ [*name*], declare:

1. I am the defendant in the above-entitled matter.

2. As shown by the records in this action, of which the court is requested to take judicial notice, the summons was served _____ [*specify, e.g.,* by publication from _____ (*date*) to _____ (*date*) in the _____ (*name*) newspaper, which is published in _____, California].

[*SET FORTH in as many paragraphs as necessary facts showing why personal service may have been difficult, e.g.:*]

3. My permanent residence is _____ [*address*], but the business in which I am engaged often requires my absence from my home for extended periods, during which time I have the utilities turned off and close up my house.

4. I am an unmarried self-employed entrepreneur affiliated with over 200 business establishments, including a number of the largest jewelry houses, department stores, and other stores and shops throughout California. I am engaged in the business of searching out unique merchandise ranging from trinkets and novelties to fine furniture, porcelain, jewelry, and dry goods, which I will buy and then resell to one or more of the businesses with which I am affiliated. My search for unique merchandise frequently takes me to faraway places.

5. During the entire period the summons was being published, and for several months thereafter, I was traveling about in Central America, and eventually to a small village where the villagers are engaged in the manufacture of unique porcelain pottery. After lengthy negotiations, I managed to purchase and receive a guarantee of a continued supply of a substantial amount of this pottery. I then negotiated for, and supervised, the shipment of this pottery to California.

6. I returned to _____ [*city*], California on _____ [*date*]. The following day a neighbor informed me that she had read in a legal newspaper that I was being sued and asked me what it was all about. She told me the name of the newspaper and its location. I immediately went to the newspaper office where I was shown a copy of the summons that had been published with the name of the court and a case number on it; I then went to the court clerk's office where I was told that my default for failing to file an answer had been entered on _____ [*date*] and that a default judgment in the sum of $_____ had been entered against me on _____ [*date*]. I explained that I knew nothing of the lawsuit and asked whether the judgment were legal. The clerk said it was and suggested that I see a lawyer.

7. It was too late to phone a lawyer that day, but the next day I phoned and made an appointment with my present lawyer, _____ [*name*]. After learning the above facts from me, the lawyer said he would draw up the necessary papers to try to have the default and judgment set aside and that I should return the following morning to sign them, which I did.

8. My failure to obtain actual notice of the service of summons in time to defend in no way resulted from any attempt on my part to avoid service or by any inexcusable neglect on my part. Rather, my absence from the country was normal to the business in which I am engaged and of which plaintiff was fully aware. Moreover, in talking to the court clerk, I learned that the complaint, of which until that day I'd known nothing, had been filed almost a year before I left on my trip to Central America.

9. At no time during that almost one-year period did I have any inkling that an action had been filed against me, and all during that period, except for a one-week period in July when I went to Arizona to purchase some Indian art work, I was living at my home where I was available for service of process. After my departure for Central America, any reasonable inquiry of any of my neighbors, all of whom watch my house when I am on a trip, would have revealed where I was, the approximate time I would return, and how I could be reached. My neighbors have assured me that no such inquiries were made.

10. Further, I have a good and meritorious defense to the complaint _____ [*specify, e.g.,* as shown by the proposed answer which I have this day signed (and verified) *or specify facts showing a meritorious defense*].

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[b] Use of Form

This form is a notice of motion and supporting declaration for use by a defendant to move for an order vacating and setting aside defendant's default and,if entered, the default judgment, when service of the summons did not result in actual notice to the defendant in time to defend [*see Code Civ. Proc. § 473.5(a)*]. With appropriate modifications, the notice of motion may be used by a cross defendant for the same purpose.

The declaration contained in the form in [a], *above,* illustrates the type of detailed statement a defendant should provide in a declaration in support of his or her motion for relief. As required by *Code Civ. Proc. § 473.5(b),* the declaration shows that the defendant's lack of actual notice in time to defend was not caused by any attempt by him or her to avoid

service of summons and was not the result of any inexcusable neglect on the defendant's part.

For discussion of the papers that must accompany the motion, the time the motion must be filed, the required notice, and other matters, see *§ 489.70* et seq.

The general requirements for drafting a declaration are discussed in *§ 489.360[1][g]*.

[c] Supporting Memorandum

A memorandum must be served and filed with the notice of motion in [a], *above* [*see Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(2), 3.1103(a)*; for discussion and forms, *see* Ch. 417, *Points and Authorities*]. The notice must also be accompanied by an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) showing that the party's lack of actual notice in time to defend was not caused by his or her avoidance of service or inexcusable neglect [*Code Civ. Proc. § 473.5(b)*]. A copy of the answer, motion, or other pleading proposed to be filed in the action must also accompany the notice [*Code Civ. Proc. § 473.5(b)*].

[2] Order Granting Motion

[a] FORM Motion to Set Aside Default and Default Judgment When Service of Summons Did Not Result in Actual Notice to Defendant in Time to Defend [Code Civ. Proc. § 473.5]--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*]	)	Time: _____
Defendant.	)	Dept: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.,* defendant] for an order _____ [*specify, e.g.,* setting aside and vacating the default (and default judgment) heretofore entered] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

The court, having considered _____ [*describe all types of evidence presented, e.g.,* the evidence presented at the hearing and the declarations submitted in support of and in opposition to the motion], having heard the argument of counsel, and being fully advised in the premises, finds as follows:

1. The service of the summons did not result in actual notice to the defendant in time to defend;

2. The motion for relief was timely filed; and

3. The defendant's lack of actual notice in time to defend the action was not caused by his/her avoidance of service or inexcusable neglect.

IT IS, THEREFORE, ORDERED that the default [and default judgment] heretofore entered in this action against defendant _____ [*name*] be, and hereby is/are vacated and set aside and defendant is granted leave to file his/her proposed answer and to defend the action.

[IT IS FURTHER ORDERED that _____ (*name of party or party's attorney*) pay to _____ (*specify, e.g.,* plaintiff) legal fees and costs in the sum of $_____.]
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[b] Use of Form

This is for use when a motion for relief from default under *Code Civ. Proc. § 473.5* is granted.

For legal background relating to the court's ruling on a motion under *Code Civ. Proc. § 473.5*, see *§ 489.77*. The general requirements for drafting an order are discussed in *§ 489.360[2]*. For a form of formal order that may be adapted for use in lieu of the form in [a], *above*, when relief is denied and a formal order is required, see *§ 489.371[1]*.

[c] Findings

The court may set aside the default and any subsequent default judgment on whatever terms as may be just and allow the party to defend the action, if it finds that the motion for relief was made within the period specified in *Code Civ. Proc. § 473.5(a)* (discussed in *§ 489.75*), and that the party's lack of actual notice in time to defend the action was not caused by his or her avoidance of service orinexcusable neglect [*Code Civ. Proc. § 473.5(c)*].

[d] Terms on Granting Relief

Any terms imposed should be included in the order. For example, in granting the motion, the court may make a monetary award to plaintiff in a proper case, as, for example, when the defendant's lack of notice resulted from the defendant's excusable neglect, mistake, or inadvertence, or when the service was entirely proper but for some reason the defendant did not receive actual notice in time to defend [*Kodiak Films, Inc. v. Jensen (1991) 230 Cal. App. 3d 1260, 1264, 281 Cal. Rptr. 728*]. However, when a defendant is free from fault and nothing more is at issue than the legal expense the plaintiff has incurred, it is error to condition relief from a default and default judgment on the payment of a monetary award to plaintiff [*Kodiak Films, Inc. v. Jensen (1991) 230 Cal. App. 3d 1260, 1265, 281 Cal. Rptr. 728*].

[e] Sanctions

Unlike Code Civ. Proc. *§ 473(c), Code Civ. Proc. § 473.5* does not authorize the court, in granting relief from the default and default judgment, to impose sanctions on the defendant, and none may be imposed under that statute [*see Kodiak Films, Inc. v. Jensen (1991) 230 Cal. App. 3d 1260, 1263, 281 Cal. Rptr. 728*].

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[Reserved]

§§ 489.381[Reserved]

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43-489 California Forms of Pleading and Practice--Annotated § 489.390

§ 489.390 Motion for Relief From Default and Default Judgment for Improper Venue Under Civ. Code § 1812.10 or 2984.4 or Code Civ. Proc. § 395(b)][Code Civ. Proc. § 585.5]

[1] Notice of Motion and Motion and Supporting Declaration

[a] FORM Motion for Relief From Default and Default Judgment for Improper Venue Under Civ. Code § 1812.10 or 2984.4 or Code Civ. Proc. § 395(b)][Code Civ. Proc. § 585.5]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION
vs.	)	_____ [*specify, e.g.*, FOR ORDER
_____ [*name*]	)	VACATING AND SETTING ASIDE DEFAULT
Defendant.	)	(AND DEFAULT JUDGMENT)], DECLARA-
	)	TION(S) OF _____ [*name(s)*], AND
	)	MEMORANDUM
		Date: _____
		Time: _____
		Dept: _____
		Trial Date: None

_____

To defendant _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], defendant will, and hereby does, move for an order vacating and setting aside the default [and default judgment] entered against him/her on _____ [*date*] and granting defendant leave to defend the action in the proper court, and awarding him/her damages, attorney's fees, and costs. The motion will be made on the ground that this action is subject to _____ [Civil Code Section _____ (1812.10 *or* 2984.4) *or Code of Civil Procedure Section 395(b)*], that the action was not commenced in the proper court, and that plaintiff did not use reasonable diligence to avoid filing the action in an improper court.

The motion will be based on this notice of motion, on the accompanying declaration(s) of _____ [*name(s)*], the memorandum, the copy of the _____ [answer *or* motion *or other pleading*] proposed to be filed, on therecords and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*signature*]

Attorney for Defendant

DECLARATION OF _____ [*name*] IN SUPPORT OF MOTION FOR ORDER VACATING AND SETTING ASIDE DEFAULT [AND DEFAULT JUDGMENT]

I, _____ [*name*], declare:

1. I am _____ [the defendant in this action *or* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney for the defendant].

[*EITHER, if action is subject to Unruh Act*]

2. This action arises out of a retail installment sales contract between plaintiff and me, which _____ [*specify fact or facts fixing venue, e.g.,* I signed in _____ County, California], whereby plaintiff sold me _____ [*specify, e.g.,* a set of living room-dining room furniture for my home].

[*OR, if action is subject to Rees-Levering Motor Vehicle Sales and Finance Act*]

2. This action arises out of a conditional sales contract between plaintiff and me, which _____ [*specify fact or facts fixing venue, e.g.,* I signed in _____ County, California], whereby plaintiff _____ [sold *or* leased] me a _____ [*specify make, model, and year of car*].

[*OR, if action is subject to Code Civ. Proc. § 395(b)*]

2. This action arises out of an agreement under which I _____ [*describe offer or provision of goods, services, a loan, or extension of credit on which action is based*], _____ [primarily *or* only] for _____ [personal *or* family *or* household use], which _____ [*specify fact or facts fixing venue, e.g.,* I signed in _____ County, California].

[*CONTINUE*]

3. I signed the contract in _____ County, California, at which time I resided in _____ County, California. At the time the complaint in this action was filed, I [still] resided in _____ County, California. [*If under Unruh Act, add:* The goods purchased under the contract have _____ (not been affixed to any real property *or* have been affixed to real property in _____ County, California).] [*If under Rees-Levering Act, add:* The vehicle that is the subject of the contract is permanently garaged in _____ County, California).]

4. Rather than filing this action in the proper court in _____ [that county *or* one of those counties], plaintiff has filed the action in this court.

5. Plaintiff has failed to exercise reasonable, or any, diligence to avoid filing suit in the wrong court, as a result of which defendant has incurred actual damages and costs, including attorney's fees, in the following amounts: _____ [*specify nature and value of damages, costs, and attorney's fees*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[b] Use of Form

This form of notice of motion may be used by a defendant to move for relief from a default and, if entered, a default judgment in an action that is subject to any of the following venue provisions:

- *Civ. Code § 1812.10* (Unruh Act).
- *Civ. Code § 2984.4* (Rees-Levering Motor Vehicle Sales and Finance Act).
- *Code Civ. Proc. § 395(b)* (contract action arising from offer or provision of goods, services, loans, or extensions of credit intended primarily for personal, family, or household use or from transaction consummated as proximate result of unsolicited phone call made by seller engaged in business of consummating transactions of that kind).

The ground of the motion is that the applicable statute has not been fully complied with [*see Code Civ. Proc. § 585.5(b)*].

The form of declaration in [a], *above,* may be used by a defendant to support his or her motion to set aside a default and, if entered, default judgment, and for leave to defend and for an award of damages, costs, and attorney's fees when the plaintiff fails to show that he or she used reasonable diligence to avoid filing the action in the improper court [*see Code Civ. Proc. § 585.5(c), (e)*]. The general requirements for drafting a declaration are discussed in *§ 489.360[1][g]* in the context of a declaration supporting a motion for relief under *Code Civ. Proc. § 473(b)*.

For further discussion, including the time the motion must be filed, accompa nying papers, the amount of notice required, and the availability of damages, costs, and attorney's fees under *Code Civ. Proc. § 585.5(e)*, see *§ 489.90* et

seq. [*see also § 489.360[1]*].

[c] Declaration Required

A notice of motion to set aside a default and, if entered, default judgment, and for leave to defend the action must be accompanied by an affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) showing under oath (or penalty of perjury) that the action was not commenced in the proper court according to *Civ. Code § 1812.10* or *2984.4* or *Code Civ. Proc. § 395(b)*, as the case may be [*Code Civ. Proc. § 585.5(c)*].

[d] Cross References

For discussion of venue under the Rees-Levering Motor Vehicle Sales and Finance Act, see Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act*

For discussion of venue under the Unruh Act, see Ch. 501, *Sales: Retail Installment Sales*

For a discussion of venue generally and the provisions of *Code Civ. Proc. § 395(b)* specifically, see Ch. 571, *Venue*

[2] Order Granting Motion

[a] FORM Motion to Set Aside Default and Default Judgment When Service of Summons Did Not Result in Actual Notice to Defendant in Time to Defend [Code Civ. Proc. § 473.5]--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*]	)	Time: _____
Defendant.	)	Dept: _____
	)	Trial Date: None
	)	

_____

The motion of _____ [*identify party, e.g.,* defendant] for an order _____ [*specify, e.g.,* setting aside and vacating the default (and default judgment) heretofore entered] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

The court, having considered _____ [*describe all types of evidence presented, e.g.,* the evidence presented at the hearing and the declarations submitted in support of and in opposition to the motion], having heard the argument of counsel, and being fully advised in the premises, finds as follows:

1. The motion for relief was timely filed.

2. This action was not filed in the proper court.

[3. The plaintiff failed to show that he/she exercised reasonable diligence to avoid filing the action in an improper

court.]

IT IS, THEREFORE, ORDERED THAT the default [and default judgment] heretofore entered in this action against defendant _____ [*name*] be,and hereby is/are, vacated and set aside and defendant is granted leave to defend the action when it is filed in the proper court.

IT IS FURTHER ORDERED that plaintiff pay to defendant damages in the sum of $_____, a reasonable attorney's fee in the further sum of $_____, and costs in the sum of $_____.]
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[b] Use of Form

This form is for use when a motion for relief from default under *Code Civ. Proc. § 585.5* is granted. Any terms on the granting of relief imposed by the court should also be set out in the order. For legal background regarding the court's ruling on a motion under *Code Civ. Proc. § 585.5*, see *§ 489.93*.

For a form of formal order that may be adapted for use in lieu of the form in [a], *above*, when relief is denied and a formal order is required, see *§ 489.371[1]*.

[c] Findings

If the court finds that the motion for relief was made within the period specified in *Code Civ. Proc. § 585.5(b)* (discussed in *§ 489.92*), and that the action was not commenced in the proper court, the court must set aside the default and default judgment on such terms as may be just and allow the party to defend the action in the proper court [*Code Civ. Proc. § 585.5(d)*].

[d] Award of Damages, Costs, and Attorney's Fee

If the court finds that the action was commenced in an improper court, the court must award the defendant actual damages and costs, including reasonable attorney's fees, unless the plaintiff showed that he or she used reasonable diligence to avoid filing the action in the improper court [*Code Civ. Proc. § 585.5(e)*].

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[Reserved]

§§ 489.391[Reserved]

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43-489 California Forms of Pleading and Practice--Annotated § 489.400

§ 489.400 Motion for Relief From Judgment, Order, or Other Proceeding Taken Against Party When California Court Has Assumed Jurisdiction Over Law Practice of Party's Attorney Pursuant to Bus. & Prof. Code § 6180 or 6190 [Code Civ. Proc. § 473.1]

[1] Notice of Motion and Motion and Supporting Declaration

[a] FORM Motion for Relief From Judgment, Order, or Other Proceeding Taken Against Party When California Court Has Assumed Jurisdiction Over Law Practice of Party's Attorney Pursuant to Bus. & Prof. Code § 6180 or 6190 [Code Civ. Proc. § 473.1]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR OR-
vs.	)	DER VACATING AND SETTING ASIDE
_____ [*name*],	)	_____ [*e.g.*, DEFAULT (AND DE-
Defendant.	)	FAULT JUDGMENT)], DECLARATION(S) OF
	)	_____ [*name(s)*], AND MEMOR-
	)	ANDUM
		Date: _____
		Time: _____
		Dept: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.*, plaintiff] _____ [*name*] and to his/her attorney of

record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*party, e.g.,* defendant] will, and hereby does, move for an order vacating and setting aside the _____ [*specify, e.g.,* default (and default judgment)] entered against _____ [*party, e.g.,* defendant] on _____ [*date*] and granting _____ [*party, e.g.,* defendant] leave to _____ [*specify, e.g.,* defend] the action. The motion will be made on the ground that the Superior Court of California, County of _____, pursuant to the provisions of Business and Professions Code Section _____ [6180 *or* 6190]. has assumed jurisdiction over the law practice of the _____ [*specify party, e.g.,* defendant's] attorney and that the _____ [*specify, e.g.,* default (and default judgment)] was/were entered after the application for the court to assume jurisdiction over the attorney's practice was filed.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing on this motion.
Dated: _____.

_____ [*signature*]

Attorney for _____ [*party, e.g.,* Defendant]

DECLARATION OF _____ [*name*] IN SUPPORT OF MOTION FOR ORDER VACATING AND SETTING ASIDE _____ [*e.g.,* DEFAULT (AND DEFAULT JUDGMENT)]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record for the _____ (*moving party, e.g.,* defendant)].

2. As shown by the records of this court, of which the court is requested to take judicial notice, this action was filed on _____ [*date*], and _____ [*specify proceeding leading to judgment, order, or proceeding from which relief is sought, e.g.,* the summons was served on _____ (date), and defendant's default was entered on _____ (*date*), and a default judgment against the defendant was entered on _____ (*date*)].

3. As shown by the declaration of _____ [*moving party, e.g.,* defendant] submitted herewith, on _____ [*date*], _____ [*moving party, e.g.,* defendant] employed _____ [*name*] (hereinafter, the attorney) as his/her attorney [of record] to file a responsive pleading and otherwise represent him/her in this action.

4. Thereafter, on the application of _____ [*name*], filed in the Superior Court of California, County of _____, in a proceeding entitled _____, File Number _____, _____ [that *or* this] court, by order dated _____, assumed jurisdiction over the attorney's law practice on the ground the attorney _____ [*specify reason for cessation of practice or*

incapacity, e.g., had been disbarred], and the court continues to exercise jurisdiction. This court is requested to take judicial notice of the court records and file in the foregoing described proceeding.

5. As further shown by the _____ [*moving party, e.g.,* defendant's] declaration submitted herewith, _____ [*moving party, e.g.,* defendant] did not receive notice of his/her attorney's _____ [*specify, e.g.,* disbarment] until _____ [*date*].

6. As shown by Paragraphs 2 and 4, above, the _____ [*specify judgment, order, or proceeding from which relief is sought, e.g.,* defendant's default was entered] after the application to assume jurisdiction had been filed.

[7. On _____ (*date*), I was appointed by the Superior Court of California, County of _____, in the above-described matter, to file, with the consent of the client, notices, motions, and pleadings on behalf of the attorney's clients when jurisdictional time limits are involved and other legal counsel has not yet been obtained. Pursuant to this authority, I am appearing, with the consent of the _____ (*moving party, e.g.,* defendant) in this action on his/her behalf.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[b] Use of Form

This form of notice of motion and supporting declaration is for use by a party seeking relief from a judgment, order, or other proceeding taken against him or her when a California court has assumed jurisdiction over the law practice of the party's attorney and the judgment, order, or other proceeding was taken against the party after the application for the court to assume jurisdiction over the practice was filed [*Code Civ. Proc. § 473.1*].

As indicated in the form, an additional declaration by the party should be drafted and submitted setting forth those relevant facts within the party's personal knowledge, but not within the personal knowledge of the attorney.

For discussion of when the application must be filed, and the amount of notice that must be given, see *§ 489.100* et seq.

Code Civ. Proc. § 473.1 does not require the moving party to attach to the notice of motion a copy of the answer or other pleading proposed to be filed if relief is granted.

[c] Supporting Memorandum

A memorandum must be served and filed with this notice of motion if the motion is subject to the Civil Law and Motion Rules [*Cal. Rules of Ct., Rule 3.1113(a)*; for motions subject to the Civil Law and Motion Rules, *see Cal. Rules of Ct., Rules 3.1100, 3.1103*], or if required by local court rule. The better practice is to prepare, serve, and file memoranda in support of any noticed motion, unless excluded expressly or by implication from the Civil Law and Motion Rules or by local court rule. For discussion and forms relating to memoranda, *see* Ch. 417, *Points and Authorities* .

[2] Order Granting Motion

[a] FORM Motion for Relief From Judgment, Order, or Other Proceeding Taken Against Party When California Court Has Assumed Jurisdiction Over Law Practice of Party's Attorney Pursuant to Bus. & Prof. Code § 6180 or 6190 [Code Civ. Proc. § 473.1]--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept:_____
	)	Trial Date: _____
	)	

The motion of _____ [*identify party, e.g.,* defendant] for an order _____ [*specify, e.g.,* setting aside and vacating the default (and default judgment) heretofore entered] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the _____ [default (and default judgment)] heretofore entered in this action be, and hereby is/are, vacated and set aside.

[IT IS FURTHER ORDERED that _____ (*set forth any terms or conditions on the grant of relief*).]
Date: _____.

_____ [*signature*]

Judge of the _____ Court

[b] Use of Form

This form of order is for use when the court grants a motion for relief from a judgment, order, or proceeding under *Code Civ. Proc. § 473.1*. For discussion of general requirements relating to orders granting motions for relief, see *§ 489.360[2]*.

For a form of formal order that may be adapted for use in lieu of the form in[a], *above*, when relief is denied and a formal order is required, see *§ 489.371[1]*.

[c] Terms

The court may grant relief from a judgment, order, or proceeding on such terms as may be just [*Code Civ. Proc. § 473.1*]. Any such terms should be set forth in the order.

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[Reserved]

§§ 489.401[Reserved]

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43-489 California Forms of Pleading and Practice--Annotated § 489.410

§ 489.410 Motion for Relief From Default and Default Judgment Under Servicemembers' Civil Relief Act (50 U.S.C. App. § 501 et seq.) [50 U.S.C. App. § 521]

[1] Notice of Motion and Motion and Supporting Declaration

[a] FORM Motion for Relief From Default and Default Judgment Under Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. App. § 501 et seq.) [50 U.S.C. App. § 520(4)]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR OR-
vs.	)	DER SETTING ASIDE AND VACATING DE-
_____ [*name*],	)	FAULT [AND DEFAULT JUDGMENT] AND
Defendant.	)	GRANTING DEFENDANT LEAVE TO DEFEND,
	)	DECLARATION(S) OF _____
	)	[*name(s)*], AND MEMORANDUM
		Date: _____
		Time: _____
		Dept: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], defendant will, and hereby does, move for an order vacating and setting aside the default [and default judgment] entered against him/her on _____ [*date*] and granting defendant leave to defend the action. The motion will be made under the Servicemembers' Civil Relief Act, Section 521 of the Appendix to Tile 50 of the United States Code, on the grounds that the default [and default judgment] were taken against defendant _____ [while he/she was in *or* within 60 days of his/her discharge from] _____ [*specify branch of service, e.g.,* the United States Army], that he/she was prejudiced in making his/her defense by reason of that military service, and that he/she has a _____ [meritorious *or* legal] defense.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*signature*]

Attorney for Defendant

DECLARATION OF _____ [*name*] IN SUPPORT OF MOTION FOR ORDER SETTING ASIDE AND VACATING DEFAULT [AND
DEFAULT JUDGMENT] AND GRANTING DEFENDANT LEAVE TO DEFEND

I, _____ [*name*], declare:

1. I am the defendant in the above-entitled matter.

2. As shown by the court's records, the default [and default judgment] was/were entered against me in this action on _____ [*date*] [and _____ (*date*), respectively].

[*EITHER*]

3. At the time the default [and default judgment] was/were entered, I was on active military service in the _____ [*specify branch of service, e.g.,* United States Army]. I entered active service on _____ [*date*], and _____ [have been in active service at all times since then *or* was discharged on _____ (*date*)].

[*OR*]

3. I served on active duty in the _____ [*branch of service, e.g.,* United States Army] from _____ [*date*] to _____ [*date*], on which latter date I received my discharge. As shown by Paragraph 2, above, the default [and default judgment] was/were entered within 30 days from the date of my discharge.

[*CONTINUE*]

4. My default [and the judgment based thereon] resulted from _____ [*specify reasons why moving party's military service prejudiced him or her in making a defense, e.g.,* my confinement to a military hospital in Germany as a result of serious injuries I sustained in a jeep accident while on military police duty. I was hospitalized and bedridden from _____ (*date*) to _____ (*date*)].

5. I have a _____ [meritorious *or* legal] defense to the action in that _____ [*specify in detail the facts constituting a meritorious or legal defense*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[b] Use of Form

This form of notice of motion and supporting declaration may be used by a party to set aside a default and default judgment pursuant to *50 U.S.C. App. § 521(g)* on the ground that he or she did not appear and was prejudiced in making a defense by reason of his or her military service. To obtain relief the defendant must show that he or she has a meritorious or legal defense to the action or to a part of it [*50 U.S.C. App. § 521(g)*]. For further discussion, including the time in which the motion must be filed, and the amount of notice that must be given, see *§ 489.110* et seq.

[c] Contents of Declaration

The affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) in support of the motion to vacate must show:

- That the servicemember was materially affected by reason of military service in making a defense to the action (Declaration, Paragraph 4) [*50 U.S.C. App. § 521(g)*; *Kromm v. Kromm (1948) 84 Cal. App. 2d 523, 530, 191 P.2d 115* (nothing in supporting affidavit showing that defendant's being in the military service prevented him from being represented in the case or from being present at trial)].

- The affidavit or declaration must also show that there is a meritorious or legal defense to the action or proceeding or to some part of it (Declaration, Paragraph 5) [*50 U.S.C. App. § 521(g)*]. Although no California appellate court has apparently ruled on this requirement, an Arizona case has held that this requirement is not satisfied by a mere declaration that there is such a defense, but that the affidavit or declaration must set out what that defense is [*La Mar v. La Mar (1973) 19 Ariz. App. 128, 505 P.2d 566, 569*].

[d] Supporting Memorandum

A memorandum must be served and filed with the form of notice of motion in [a], *above* [*see Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(2), 3.1103(a)*; for discussion and forms, *see* Ch. 417, *Points and Authorities*].

[e] Cross References

For a form of declaration of military status that must be filed before a default can be entered, see Ch. 205, *Defaults and Default Judgments*

[2] Order Granting Motion

[a] FORM Motion for Relief From Default and Default Judgment Under Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. App. § 501 et seq.) [50 U.S.C. App. § 520(4)]--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.,* defendant] for an order _____ [*specify, e.g.,* setting aside and vacating the default (and default judgment) heretofore entered] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

The court, having considered _____ [*describe all types of evidence presented, e.g.,* the evidence presented at the hearing and the declarations submitted in support of and in opposition to the motion], having heard the argument of counsel, and being fully advised in the premises, and it appearing therefrom that the defendant's military service prejudiced him/her in making a defense to the action and that he/she has a _____ [meritorious *or* legal] defense to the action,

IT IS ORDERED THAT the default [and default judgment] heretofore entered in this action against defendant _____ [*name*] be, and hereby is/are, vacated and set aside and defendant is granted leave to defend the action.
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[b] Use of Form

This form is for use when a motion for relief from default under *50 U.S.C. App. § 521(g)* is granted.

For a form of formal order that may be adapted for use in lieu of the form in [a], *above,* when relief is denied and a formal order is required, see *§ 489.371[1]*.

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Chapter 489 RELIEF FROM JUDGMENTS AND ORDERS
V. FORMS
A. Statutory Relief From Valid Judgments and Orders
2. Relief on Other Grounds

43-489 California Forms of Pleading and Practice--Annotated § 489.411

§ 489.411 Motion for Relief From Judgment Taken Against Party During Period of Military Service [Mil. & Vet. Code § 402(d)]

[1] Notice of Motion and Motion and Supporting Declaration

[a] FORM Motion for Relief From Judgment Taken Against Party During Period of Military Service [Mil. & Vet. Code § 402(d)]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR RE-
Plaintiff,	)	LIEF FROM JUDGMENT TAKEN AGAINST DE-
vs.	)	FENDANT DURING PERIOD OF MILITARY SER-
_____ [*name*], Defendant.	)	VICE
	)	[*Mil. & Vet. Code § 402(d)*]
	)	Date: _____
	)	Time: _____
	)	Dept: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.*, plaintiff] _____ [*name*] and to his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*party, e.g.,* defendant] will, and hereby does, move for an order vacating and setting aside the judgment entered against _____ [*party, e.g.,* defendant] on _____ [*date*] and granting _____ [*party, e.g.,* defendant] leave to defend the action. The motion will be made pursuant to *Section 402(d) of the Military and Veterans Code* on the ground that the judgment entered against _____ [*party, e.g.,* defendant] by this court on _____ [*date*] was entered against a service member as defined by *Section 400(a) of the Military and Veterans Code* _____ [*specify either* during a period of military service as defined by *Section 400(b) of the Military and Veterans Code or* within 30 days after a period of military service as defined by *Section 400(b) of the Military and Veterans Code*], and that _____ [*party, e.g.,* defendant] was prejudiced by reason of military service in making a defense to the action and has a _____ [*specify* meritorious *or* legal] defense to _____ [*specify* all *or* part] of the action. The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing on this motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*party, e.g.,* Defendant]

DECLARATION OF _____ [*name*] IN SUPPORT OF MOTION FOR ORDER VACATING AND SETTING ASIDE JUDGMENT

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* the defendant named in this action].

2. As shown by the records of this court, of which the court is requested to take judicial notice, this action was filed on _____ [*date*], and _____ [*specify proceeding leading to judgment from which relief is sought, e.g.,* the summons was served on _____ (*date*), and defendant's default was entered on _____ (*date*), and a default judgment against the defendant was entered on _____ (*date*)].

[*EITHER*]

3. On _____ [*date*], I was called to active _____ [*specify* state *or* federal] military service as _____ [*specify, e.g.,* an enlisted member of the National Guard] by the _____ [*specify* Governor of the State of California pursuant to the provisions of Section _____ (*specify* 143 *or* 146) of the Military and Veterans Code *or* the President of the United States of America pursuant to Title _____ (*specify* 10 *or* 12) of the United States Code].

[*OR*]

3. On _____ [*date*], I was called to full-time active duty as a reservists of the United States Military Reserve.

[*CONTINUE*]

4. As shown by the attached certificate, of which the court is requested to take judicial notice, from _____ [*date*] to _____ [*date*], I was in full-time active _____ [*specify* state *or* federal] service as defined in *Section 400(b) of the Military and Veterans Code*.

5. As shown by Paragraphs 2 through 4, above, the judgment from which relief is sought was entered during a period of military service governed by *Section 402(d) of the Military and Veterans Code*.

6. I was prejudiced by reason by military service in making my defense to this action because _____ [*specify facts showing prejudice*].

7. I have a _____ [*specify* meritorious *or* legal] defense to _____ [*specify* all *or* part] of the action, which is _____ [*specify*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[b] Use of Form

This form of notice of motion and supporting declaration is for use by a party seeking relief from a judgment taken against him or her during or within 30 days after a period of military service after being called or ordered into active state service as an officer or enlisted member of the National Guard by the Governor pursuant *Mil. & Vet. Code §§ 143* or *146* or into active federal service by the President pursuant to Title 10 or 12 of the United States Code or as a reservist of the United States Military Reserve called to full-time active duty [*Mil. & Vet. Code §§ 400(a), (b), 402(d)*], who was prejudiced by reason of military service in making a defense to the action.

For discussion of when the application must be filed, and the requirement that the application state a meritorious or legal defense to the action or a part of it, *see § 489.117*.

[c] Supporting Memorandum

A memorandum must be served and filed with the notice of motion if the motion is subject to the Civil Law and Motion Rules [*Cal. Rules of Ct., Rule 3.1113(a)*; for motions subject to the Civil Law and Motion Rules, see *Cal. Rules of Ct., Rules 3.1100, 3.1103*], or if required by local court rule. The better practice is to prepare, serve, and file a memorandum in support of any noticed motion, unless excluded expressly or by implication from the Civil Law and Motion Rules or by local court rule. For discussion and forms relating to points and authorities, see Ch. 417, *Points and Authorities* .

[2] Order Granting Motion

[a] FORM Motion for Relief From Judgment Taken Against Party During Period of Military Service [Mil. & Vet. Code § 402(d)]--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*]	)	Time: _____
Defendant.	)	Dept: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.*, defendant] for an order _____ [*specify, e.g.*, setting aside and vacating the judgment heretofore entered] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion should be granted,

IT IS ORDERED that the judgment heretofore entered in this action be, and hereby is, vacated and set aside.
Date: _____.

_____ [*signature*]

Judge of the _____ Court

[b] Use of Form

This form of order is for use when the court grants a motion for relief from a judgment under *Mil. & Vet. Code § 402(d)*. For discussion, see *§ 489.117*.

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A. Statutory Relief From Valid Judgments and Orders
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43-489 California Forms of Pleading and Practice--Annotated §§ 489.412-489.419

[Reserved]

§§ 489.412[Reserved]

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Chapter 489 RELIEF FROM JUDGMENTS AND ORDERS
V. FORMS
B. Relief From Void Judgments and Orders

43-489 California Forms of Pleading and Practice--Annotated § 489.420

§ 489.420 Motion to Set Aside Void Judgment or Order [Code Civ. Proc. § 473(d)]

[1] Notice of Motion and Motion and Supporting Declaration

[a] FORM Motion to Set Aside Void Judgment or Order [Code Civ. Proc. § 473(d)]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION TO SET
vs.	)	ASIDE VOID [*specify judgment or order, e.g.,* DE-
_____ [*name*],	)	FAULT AND DEFAULT JUDGMENT], DECLAR-
Defendant.	)	ATION(S) OF [*name(s)*], AND MEMORANDUM
	)	Date: _____
	)	Time: _____
		Dept: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*party, e.g.,* defendant] will, and hereby does, move for an order setting aside the _____ [*specify*

judgment or order, e.g., default (and default judgment)] entered against _____ [*party, e.g.,* defendant] on _____ [date]. The motion will be made on the ground that the _____ [*specify judgment or order, e.g.,* default (and default judgment)] is/are void _____ [*specify defect, e.g.,* for lack of jurisdiction over the person of the defendant].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*signature*]

Attorney for _____ [*moving party*]

DECLARATION OF _____ [*name*] IN SUPPORT OF MOTION FOR ORDER TO SET ASIDE VOID _____ [*specify judgment or order, e.g.,* DEFAULT AND DEFAULT JUDGMENT]

I, _____ [*name*], declare:

1. I am _____ the _____ [*specify party, e.g.,* defendant] herein, and I make this declaration in support of my motion _____ [*specify relief sought, e.g.,* to set aside and vacate the default and default judgment heretofore entered against me].

[*SET FORTH facts showing that the judgment or order is void in fact, e.g.:*]
[*EITHER*]

2. At no time have I ever been served with or received a copy of the summons and of the complaint filed in this action. I reside, and since _____ [*date*] have resided, at _____ [*address*] in the city of _____. I am, and for the past _____ years have been, listed by my full and correct name in that city's directory and in the phone directory for that city.

3. At no time have I ever lived or resided in the city of _____ [*city where summons was served*]. As shown by the return of service in this action, of which the court is requested to take judicial notice, the summons purportedly was served on me by delivering a copy of the summons and complaint to some unnamed person in the city of _____ [*name*] at the following residential address: _____ [*specify*], and thereafter mailing a copy of the summons and complaint to me at the same address. I do not now, and have never, resided at or visited the address specified, or in the city specified, nor have I ever represented to anyone at any time that I did so.

4. I do not know the unnamed person to whom the summons and complaint were delivered, or anyone else who might be a resident of or a visitor to that address.

5. I have never received the copy of the summons and complaint delivered to the unnamed person or the copy of the summons and complaint thereafter mailed to that address, nor was I in any other way notified of them.

6. Rather, I discovered their existence and the default judgment that was entered against me on _____ [*date*], _____ [*specify circumstances of discovery, e.g.,* when, in the course of trying to secure a loan on my home, I was informed that a "lis pendens" had been recorded in the county recorder's office and that it constituted

a lien on my property to secure payment of a judgment entered against me by this court. Immediately went to the court clerk's office and was shown my "file" and specifically the above-mentioned so-called proof of sevice].

[*OR*]

2. As shown by the record herein, of which the court is requested to take judicial notice, the complaint was filed on _____ [*date*] by my then attorney of record, _____ [*name*] and dismissed on _____ [*date*] as a sanction for my having "repeatedly" failed to respond to discovery motions or to answer written interrogatories.

3. At no time was I ever informed by anyone that I had been ordered to appear at depositions or to answer interrogatories. When I employed my attorney, he/she told me it could take a year or two before the matter would get to trial and there would be periods of noticeable inaction.

4. On _____ [*date*], I signed and verified the complaint. Thereafter, on or about _____ [*date*] my attorney mailed me a conformed copy of the filed complaint, and on _____ [*date*] I received in the mail a file stamped copy of the summons and proof of service.

5. Several times over the next few weeks, I phoned my attorney and each time was assured that everything was proceeding normally. I phoned again on _____ [*date*] and was told by the man/woman who answered the phone that my attorney had "closed his/her office the day before and moved away." I immediately phoned the court clerk's office to learn the status of my case and was told that my complaint had been dismissed on _____ [*date*] for the reasons stated above. This was the first and only notice I had that my case had been dismissed or that I was supposed to have appeared at depositions and answer interrogatories. Had I been informed that I was supposed to attend depositions or to answer interrogatories I would have done so.

6. The same day I consulted another attorney, _____ [*name*] who, in my presence, phoned the State Bar of California and was told that my attorney, _____ [*name*], had been disbarred on _____ [*date*], which was the day I received the file-stamped copy of the summons and proof of service. This was the very first I had heard of his/her disbarment. At no time did he/she tell me he/she had been disbarred or was being investigated by the State Bar, and I have never received any letter or notice from him/her informing me of this fact. Nor have I at any time received any notice, written or oral, from the defendant herein or his/her counsel advising me of the disbarment of my attorney.

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[b] Use of Form

This form of notice of motion and supporting declaration is for use to move for an order setting aside a void judgment or order that is not void on its face but is void in fact. For discussion of what constitutes a void judgment, see *§ 489.132*. For discussion of the court's power to grant relief, when the motion must be filed, and requirements relating to the

notice of motion, see *§§ 489.131, 489.141 et seq., and 489.200* et seq., respectively. For discussion of relief in equity if the motion at law is untimely, see *489.220* et seq.

For further discussion of requirements for notice of motion for relief from judgment or order generally, including accompanying papers and service, see *§ 489.430[1]*.

The alternative paragraphs in the supporting declaration are illustrative only. The first set of alternative paragraphs supports a motion by a defendant to set aside and vacate a default and default judgment, and the second set of alternative paragraphs supports a motion by plaintiff to vacate an order dismissing the complaint.

No affidavit of merits is required (*see* discussion in *§ 489.143*).

[c] Alternative Use for Judgment or Order Void on Its Face

No notice is required to set aside a judgment or order that is void on its face (*see* discussion in *§ 489.200[1]*). However, to avoid any possible due process objections, the better practice might be to proceed by noticed motion. The form in [a], *above*, of notice of motion may be used for this purpose, in which case "on its face" should be inserted after "void" in the first paragraph and the nature of the invalidity should be added, for example, "in that the default judgment grants relief entirely different from that prayed for in the complaint." A judgment that is void on its face requires no extrinsic evidence to show its invalidity, and, hence, any reference to affidavits or declarations or to evidence in the second paragraph should be omitted.

[d] Extrinsic Evidence

A judgment that is not void on its face but is void in fact requires extrinsic evidence to show its invalidity; it is subject to direct attack only and to time limitations (*see* discussions *§ 489.140*). Consequently, one or more affidavits or declarations under penalty of perjury setting forth the facts showing the invalidity will be required.

[e] Alternative Remedies

A void judgment may be set aside on the ground of invalidity (that is, at law) or in equity on the ground of extrinsic fraud or mistake [*see Lovato v. Santa Fe Internat. Corp. (1984) 151 Cal. App. 3d 549, 554, 198 Cal. Rptr.838]* . Thus, if the time for an attack at law by motion on a void judgment or order has expired, relief in equity may still be available. For a discussion and requirements for relief in equity, see *§ 489.220* et seq.

[f] Nonservice or Defective Service of Summons and Motion to Quash

A judgment against a party who was not served with summons (and a false return of service was filed) or who was defectively served is void for lack of personal jurisdiction (*see* discussion in *§ 489.132*). In such a case, the moving party may also want to have service of the summons quashed under *Code Civ. Proc. § 418.10(a)(1)*, particularly if the defendant would not be subject to the in personam jurisdiction of the California courts, or the quashing of the summons might subject the action to the mandatory dismissal statutes (*Code Civ. Proc. § 583.110 et seq.*, discussed in Ch. 212, *Dismissal*) or to some affirmative defense such as the bar of the statute of limitations.

A motion for relief under *Code Civ. Proc. § 473*, when combined with a motion to quash service of summons under *Code Civ. Proc. § 418.10(a)(1)*, does not constitute a general appearance [*Code Civ. Proc. § 418.10(d)*]. For the distinction between general and special appearances, as well as a combined form of notice of motion to set aside and vacate a default and default judgment and quash service of summons, see Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* .

[g] Supporting Memorandum

A memorandum must be served and filed with this notice of motion if the motion is subject to the Civil Law and Motion Rules (*Cal. Rules of Ct., Rules 3.1100 et seq.*) [*Cal. Rules of Ct., Rule 3.1113(a)*; for motions subject to the Civil Law and Motion Rules, *see Cal. Rules of Ct., Rules 3.1100, 3.1103*], or if required by local court rule. A motion to set aside a default judgment, for example, is subject to the Civil Law and Motions Rules [*see Cal. Rules of Ct., Rule 3.1103(a)(2)*]. The better practice is to prepare, serve, and file a memorandum in support of any noticed motion, unless excluded expressly or by implication from the Civil Law and Motion Rules or by local court rule. For discussion and forms, *see* Ch. 417, *Points and Authorities* .

[2] Order Granting Motion

[a] FORM Motion to Set Aside Void Judgment or Order [Code Civ. Proc. § 473(d)]--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____
	)	Trial Date: _____
	)	

_____ [*Specify party, e.g.,* Defendant's] motion for an order _____ [*specify, e.g.,* setting aside and vacating the default (and default judgment) heretofore entered] came on regularly for hearing before this court on _____ [*date*]. _____ [*Name*] appeared as attorney for plaintiff, and _____ [*name*] appeared as attorney for defendant.

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the _____ [*specify judgment, order, or proceeding, e.g.,* default (and default judgment)] be, and hereby is/are, vacated and set aside.

_____ [*date*]

_____ [*signature*]

Judge of the _____ Court

[b] Use of Form

The form in [a], *above,* is for use when a motion to vacate and set aside a void judgment or order is granted.

For a form of formal order that may be adapted for use in lieu of the form in [a], *above,* when relief is denied and a formal order is required, see *§ 489.371[1]*.

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43-489 California Forms of Pleading and Practice--Annotated §§ 489.421-489.429

[Reserved]

§§ 489.421[Reserved]

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C. Relief From Valid or Void Judgment or Order in Equity

43-489 California Forms of Pleading and Practice--Annotated § 489.430

§ 489.430 Motion in Equity to Set Aside Judgment or Order Procured by Extrinsic Fraud or Mistake

[1] Notice of Motion and Motion and Supporting Declaration

[a] FORM Motion in Equity to Set Aside Judgment or Order Procured by Extrinsic Fraud or Mistake--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR
vs.	)	_____ [*specify, e.g.,* ORDER SET-
_____ [*name*],	)	TING ASIDE AND VACATING DEFAULT (AND
Defendant.	)	DEFAULT JUDGMENT)], DECLARATION(S) OF
	)	_____ [*name(s)*], AND MEMOR-
	)	ANDUM
		Date: _____
		Time: _____
		Dept: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of]

this court, located at _____ [*street address*], _____ [*city*], _____ [*moving party, e.g.,* defendant] will, and hereby does, move for _____ [*specify relief sought, e.g.,* an order setting aside and vacating the default (and default judgment)] entered _____ [*specify, e.g.,* against defendant] on _____ [*date*]. The motion will be made on the ground(s) that the _____ [judgment *or* order] [is void and] was taken against _____ [*specify party, e.g.,* defendant] through the _____ [extrinsic _____ (fraud *and/or* mistake [*and/or* accident *and/or* duress])] of _____ [*party, e.g.,* plaintiff], which prevented _____ [*party, e.g.,* defendant] from presenting his/her case to the court, thereby denying him/herof a fair adversary hearing[, and that defendant has a meritorious defense to the action].

The motion will be based on this notice of motion, the accompanying _____ [affidavit(s) *and/or* declaration(s)] of _____ [*name(s)*] [, the _____ (*specify pleading or other paper proposed to be filed, e.g.,* proposed verified answer to the complaint herein,] and memorandum, [and] on the records and file herein[, and on such oral and documentary evidence as may be presented at the hearing on this motion].
Date: _____.

_____ [*signature*]

Attorney for _____ [*moving party*]

DECLARATION OF _____ [*name*] IN SUPPORT OF _____ [*specify party, e.g.,* DEFENDANT'S] MOTION _____ [*specify, e.g.,* FOR ORDER SETTING ASIDE AND VACATING DEFAULT (AND DEFAULT JUDGMENT)]

I, _____ [*name*], declare:

1. I am the _____ [*party, e.g.,* defendant in this action *or other person having personal knowledge of the facts*] and make this declaration in support of _____ [my *or* _____ (*party, e.g.,* defendant's)] motion for an order _____ [*specify relief sought, e.g.,* setting aside and vacating the default (and default judgment)] taken against _____ [me *or* the _____ (*specify party, e.g.,* defendant)] herein.

2. _____ [*Set forth facts within declarant's personal knowledge showing that the judgment, order, or proceeding was rendered, made, or taken as a result of extrinsic fraud or mistake, e.g.:* The _____ (*specify, e.g.,* default (and default judgment) was/were entered as a result of _____ (my extrinsic mistake *or* extrinsic fraud or mistake on the part of _____ [*specify, e.g.,* plaintiff]) in that _____ (*set forth the facts establishing the ground(s) of the motion, e.g.,* at no time did I ever receive any notice of the action, by the service of a summons and complaint or otherwise, and had absolutely no knowledge of the fact that I was being sued until _____ [*date*] when my home, located at _____ [*street address and city*], and in which I have lived all my life, was levied on in satisfaction of the judgment and, at which time, I was given a copy of the writ of execution)].

3. _____ [*Set forth facts showing moving party has acted diligently in seeking relief, e.g.:* Immediately on being given a copy of the writ of execution, I phoned my attorney, _____ (*name*), explained the situation, and, together, later that same day, we went to the courthouse and checked the file of the case. In the file was a proof of service that stated the summons and complaint had been served on me at _____ (*street address and city*) by leaving a copy of the complaint and summons with a "a man" apparently in charge of the place and thereafter mailing a copy of the summons and complaint addressed to me at the same address. Priorto my reading the

proof of service, I had never heard of the address mentioned and have never resided at, worked or done business in, or visited that address and know no one at that address, and, as already stated, I never, at any time, received the copy of the summons and complaint, or either of them, left with "the man" or mailed to that address, or any other copy of them].

4. _____ [*State facts showing that the moving party has either a good claim or defense, as the case may be, e.g.:* When my attorney and I went through the court file of the case as stated in Paragraph 2, we also read the complaint on file and made photocopies of it. As shown by _____ (the proposed verified _____ (answer or other pleading)) to the _____ (complaint *or other pleading*) attached to the notice of motion *and/or* the following facts, the _____ (*specify, e.g.*, judgment) would not have been _____ (*e.g.*, rendered) had there been a _____ (hearing *or* trial) on the merits (: _____ [*set forth facts within declarant's personal knowledge supporting the moving party's claim or defense, as the case may be*])].

5. _____ [*State facts showing that moving party acted diligently in seeking relief, e.g.:* As shown by the court's records herein, the _____ (*specify, e.g.*, default was entered on _____ [*date*] and the default judgment was entered on _____ [*date*]). Immediately after learning of the judgment, and phoning and then going with my attorney to the courthouse to examine the court file of the case, as stated in Paragraph 2, I directed my attorney to do whatever was necessary to get the matter straightened out and the judgment set aside. He said he would prepare the necessary papers that same day and that I should come to his office the following morning, namely, on _____ (*date*), to sign the declaration, which I did].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[b] Use of Form

This form of notice of motion and supporting declaration is for use by a party to obtain equitable relief from a judgment or order (including a default or default judgment) taken through extrinsic fraud or mistake.

If the judgment is void, the optional phrase "is void and" in the first paragraph of the notice should be included. The optional statement at the end of thatparagraph, relating to a meritorious defense, should be included unless the judgment is void for lack of jurisdiction (*see* discussion in *§ 489.264[3]*. For further discussion of void judgments and orders, see *§ 489.130* et seq.

For other statements that may be inserted in lieu of Paragraph 2 of the declaration, see *§ 489.431*. For additional statements that may be modified and substituted for Paragraph 2, see *§ 489.361*; and in particular, see *§ 489.361[2]* and *[4]*. The statement in *§ 489.361[2]* may be used when the extrinsic mistake consists of the defendant's reasonable reliance on the representation of a codefendant or the defendant's employer that the codefendant or employer would defend on behalf of defendant [*see Weitz v. Yankosky (1966) 63 Cal. 2d 849, 855, 48 Cal. Rptr. 620, 409 P.2d 700* ; *Roussey v. Ernest W. Hahn, Inc. (1967) 251 Cal. App. 2d 251, 256, 59 Cal. Rptr. 399*]. The statement in § 489.361[4] may be used when the extrinsic mistake consists of the defendant's reliance on his or her attorney and the attorney abandoned the defendant [*see People v. One Parcel of Land (1991) 235 Cal. App. 3d 579, 584, 286 Cal. Rptr. 739*].

For discussion of the jurisdiction of courts to grant equitable relief, see *§ 489.227*. For when relief may be obtained by an action in equity, see [g], *below*.

When relief from a default judgment is based on nonservice of summons (a false return having been filed), the motion for equitable relief may be joined with a motion to quash service of summons [*Code Civ. Proc. § 418.10(d)*], or, if knowledge of the defective or nonservice of summons is discovered before default is entered, by a simple motion to quash service of summons [*see Code Civ. Proc. § 418.10(a)(1)*]. For forms of notices of motion to quash service of summons for lack of jurisdiction, as well as a combined notice of motion to quash service of summons and to vacate and set aside a default judgment, and related forms, see Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* .

For further discussion of requirements for notice of motion for relief from judgment or order generally, including accompanying papers and service, see *§ 489.360[1]*.

[c] Determining Whether Grounds for Relief Exist

The starting point in determining whether equitable grounds for relief exist is to determine whether the aggrieved party was deprived of a fair opportunity to fully present his or her case. If so, the second step is to determine why. The third step is to classify the reason; if the reason is because of some act or omission (when a duty to act existed) of the adverse party or that party's attorney, does that act come within any of the broad definitions of extrinsic fraud or mistake. If the reason is because of some act or omission of a third person or the aggrieved party, does the act or omission come within any of the broad definitions of extrinsic mistake, and, if the act or omission was of the aggrieved party did it involve excusable or inexcusable neglect.

If it is determined that the party was deprived of a fair opportunity to fully present his or her case either because of some act or omission of the adverse party or of that party's attorney or because of some act or omission of a third party or of the aggrieved party, and, if of the aggrieved party, that the party was not inexcusably negligent, relief should be granted if the fraud or mistake may properly be classified as extrinsic and the other requirements for equitable relief are met.

[d] Alternative Remedies

If the judgment attacked is a valid judgment and relief is sought within a reasonable time, in no case exceeding six months after the judgment was entered, a motion for relief at law on the ground of mistake, inadvertence, surprise, or excusable neglect under *Code Civ. Proc. § 473(b)* (discussed in *§ 489.30* et seq.), may be available. If both statutory and equitable grounds exist for setting the judgment aside, a single notice of motion combining both statutory and equitable grounds may be made.

If the judgment attacked is a void judgment and relief is sought within the time periods that apply by analogy to attacking such judgments (discussed in *§ 489.130* et seq.), counsel may move for relief at law directed to the court's inherent power to set aside void judgments or under *Code Civ. Proc. § 473(d)*.

[e] Showing Required

The moving party must show that the judgment or order was entered as a result of extrinsic fraud or mistake and that the moving party has been diligent in seeking relief after discovery of the judgment or order. This is normally done by having the moving party, or other person, give an affidavit (*see Code Civ. Proc. §§ 2002(a), 2003, 2009*) or execute a declaration under penalty of perjury (*see Code Civ. Proc. § 2015.5*), illustrated in the form in [a], *above*, stating the facts within the affiant's or declarant's personal knowledge that establish the ground for relief and the diligence of the moving party.

The moving party must also show that he or she has a meritorious claim or defense, as the case may be (for an exception, *see § 489.264[3]*). If the motion seeks relief from a default judgment, this may be done by attaching a copy of a proposed verified answer either denying essential allegations of the complaint or setting forth an affirmative

defense, or both. In seeking relief from some other judgment or order, the facts showing that the result would probably have been different had the extrinsic fraud or mistake not occurred may be contained in the supporting affidavits or declarations.

[f] Supporting Memorandum

A memorandum of points and authorities must be served and filed with the foregoing notice of motion if the motion is subject to the Civil Law and Motion Rules (*Cal. Rules of Ct., Rules 3.1100 et. seq.*) [*Cal. Rules of Ct., Rule 3.1113(a)*; for motions subject to the Civil Law and Motion Rules, *see Cal. Rules of Ct., Rules 3.1100, 3.1103*], or if required by local court rule. The better practice is to prepare, serve, and file a memorandum in support of any noticed motion, unless excluded expressly or by implication from the Civil Law and Motion Rules or by local court rule. For discussion and forms, *see* Ch. 417, *Points and Authorities* .

[g] Action in Equity

If any probative facts must be established by the affidavit or declaration of a person other than the moving party who is unwilling to give an affidavit or make a declaration, counsel may wish to file a separate action in equity [*see § 489.440[1]*] rather than use the noticed motion procedure. In a separate action, counsel could subpoena witnesses to testify and take depositions, and may secure ancillary relief by a provisional remedy or otherwise [*see, e.g., Hayes v. Risk (1967) 255 Cal. App. 2d 613, 64 Cal. Rptr. 36*].

[2] Order Granting Motion

[a] FORM Motion in Equity to Set Aside Judgment or Order Procured by Extrinsic Fraud or Mistake--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____
	)	Trial Date: _____
	)	

The motion of _____ [*identify party, e.g.*, defendant] for an order _____ [*specify, e.g.*, setting aside and vacating the default (and default judgment) heretofore entered] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

[*EITHER*]

On proof made to the satisfaction of the court that the motion ought to be granted,

[*OR*]

The court being fully advised in the premises, and it satisfactorily appearing from the evidence and the _____ [*specify, e.g.,* proposed verified answer] that the _____ [*specify, e.g.,* default (and default judgment)] was/were entered against _____ [*specify party, e.g.,* defendant] by reason of the extrinsic _____ [fraud *and/or* mistake] of _____ [*specify, e.g.,* plaintiff], that _____ [*specify party, e.g.,* defendant] was diligent in filing the motion, and that _____ [*specify party, e.g.,* defendant] has a meritorious _____ [*specify, e.g.,* defense to the action],

[*CONTINUE*]

IT IS ORDERED that the _____ [*specify, e.g.,* default (and default judgment)] [entered on _____ (*date*) in Volume _____, Page _____ of the Judgment Book] be, and hereby is/are, vacated and set aside [and that defendant's proposed verified answer be filed].
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[b] Use of Form

This form of order is for use when the court grants the motion for equitable relief from a judgment or order.

For a form of formal order that may be adapted for use in lieu of the form in [a], *above,* when relief is denied and a formal order is required, see *§ 489.371[1]*. For the appealability of the order, see discussions *§ 489.18[5]*.

[C] Ruling on Motion for Relief

To set aside a default judgment on a motion based on equitable grounds, three elements must be satisfied [*see Stiles v. Wallis (1983) 147 Cal. App. 3d 1143, 1147-1148, 195 Cal. Rptr. 377* (holding that ignorance of the law is not a proper excuse); *see also Bailey v. Roberts (1969) 271 Cal. App. 2d 282, 285, 76 Cal. Rptr. 572*]:

- The defaulted party must show that it has a meritorious case (for an exception when relief is granted on the ground that the court never acquired jurisdiction over the person of the defendant, see discussion in *§ 489.264[3]*;

- It must articulate a satisfactory excuse for not presenting a defense to the original action; and

- It must demonstrate that it was diligent in seeking to set aside the default once it was discovered.

The rule applies equally when the motion is to vacate an order of dismissal [*Aldrich v. San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 738, 216 Cal. Rptr. 300*].

[d] Discretion of Trial Court

As in the case of a motion under *Code Civ. Proc. § 473(b)* (discussed in *§ 489.30* et seq.), a motion for equitable relief is addressed to the trial court's sound discretion and absent a clear showing of abuse in its exercise will not be disturbed by an appellate court [*Weitz v. Yankosky (1966) 63 Cal. 2d 849, 854, 48 Cal. Rptr. 620, 409 P.2d 700* ; *Aldrich v.*

San Fernando Valley Lumber Co. (1985) 170 Cal. App. 3d 725, 736, 216 Cal. Rptr. 300 ; *Crane v. Kampe (1964) 225 Cal. App. 2d 200, 204-205, 37 Cal. Rptr. 220* ; for discussion, *see § 489.21[3]*, and *§ 489.38*].

[e] Findings

Unless statute or case law requires a specific finding, the general rule is that findings of fact are not required, and, in fact, have no place in the court's ruling on a motion [*Waller v. Weston (1899) 125 Cal. 201, 204, 57 P. 892* ; *see also Allstate Ins. Co. v. Orlando (1968) 262 Cal. App. 2d 858, 867, 69 Cal. Rptr. 702* ; *Skouland v. Skouland (1962) 201 Cal. App. 2d 677, 679, 20 Cal. Rptr. 185*]. Consequently, the first alternative in the form in [a], *above*, should be sufficient [*see* *Sullivan v. Sullivan (1967) 256 Cal. App. 2d 301, 306, 64 Cal. Rptr. 82* (findings are not required to support orders made after motions)]. However, if counsel wishes to include findings, because equitable relief may be granted only when the judgment or order resulted from extrinsic fraud or mistake and the moving party diligently sought relief and has a meritorious claim or defense, the second alternative may be used.

[f] Award of Costs

Whether or not costs incurred in connection with the default judgment are awarded to plaintiff on an equitable motion for relief from a default judgment is within the trial court's discretion [*Weitz v. Yankosky (1966) 63 Cal. 2d 849, 859, 48 Cal. Rptr. 620, 409 P.2d 700* (trial court did not abuse discretion in denying costs)].

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Chapter 489 RELIEF FROM JUDGMENTS AND ORDERS
V. FORMS
C. Relief From Valid or Void Judgment or Order in Equity

43-489 California Forms of Pleading and Practice--Annotated § 489.431

§ 489.431 Motion in Equity to Set Aside Judgment or Order Procured by Extrinsic Fraud or Mistake--Supporting Declaration

[1] Default Due to Disability of Party

[a] FORM Motion in Equity to Set Aside Judgment or Order Procured by Extrinsic Fraud or Mistake--Supporting Declaration--Default Due to Disability of Party

[*The following may be substituted for the factual statement in Paragraph 2 of the declaration in support of motion for relief in equity provided in § 489.430[1].*]

[*SET FORTH facts showing that entry of default (and default judgment, if applicable) was due to party's disability, e.g.:*]

2. At the time the summons and complaint in this action were served, I _____ [did not understand the nature and purpose of the documents served on me *and/or* was not familiar with the requirements of the California legal system *and/or* was unable to arrange to defend the action] because _____ [*state facts showing defendant's disability, for example, mental or physical illness or inability to comprehend the English language*].

3. By reason of my _____ [disability *or* inability], I failed to answer or otherwise plead to the complaint and as a result plaintiff obtained entry of the default and default judgment.

[4. Plaintiff at all times was well aware of my inability in that _____ (*specify*) and concealed such fact(s) from the court.]

[b] Use of Form

The form in [a], *above*, is an illustration of the type of detailed statement that may be substituted for Paragraph 2 of the

declaration in § 489.430[1]. The statement in [a], *above*, may be used to support a motion for relief from a default or default judgment entered against the defendant as a result of his or her disability. That is, the right to equitable relief from a judgment, based on extrinsic mistake, extends to cases in which the complaining party was disabled at the time the judgment was entered [*Humes v. MarGil Ventures, Inc. (1985) 174 Cal. App. 3d 486, 499, 220 Cal. Rptr. 186*].

[c] Examples of Party Disability

The disability might consist of any of the following:

- Mental incompetency [*Olivera v. Grace (1942) 19 Cal. 2d 570, 577-578, 122 P.2d 564*];

- Physical illness of a serious nature [*McCreadie v. Arques (1967) 248 Cal. App. 2d 39, 45, 56 Cal. Rptr. 188*];

- Unfamiliarity with the English language or the American legal system [*Berri v. Rogero (1914) 168 Cal. 736, 739, 145 P. 95*];

- In certain circumstances, imprisonment [*Humes v. MarGil Ventures, Inc. (1985) 174 Cal. App. 3d 486, 499, 500, 220 Cal. Rptr. 186*]; or

- Deportation to or detention in another country [*In re Marriage of Park (1980) 27 Cal. 3d 337, 343, 165 Cal. Rptr. 792, 612 P.2d 882*].

[d] Plaintiff's Concealment Is Extrinsic Fraud

If the plaintiff was aware of defendant's inability and concealed that information from the court in order to obtain the default judgment, the ground of defendant's motion would be extrinsic fraud [*In re Marriage of Park (1980) 27 Cal. 3d 337, 343, 165 Cal. Rptr. 792, 612 P.2d 882* ; *Olivera v. Grace (1942) 19 Cal.2d 570, 577-578, 122 P.2d 564*]. If the plaintiff lacked that knowledge, the ground of the motion would be extrinsic mistake [*see Olivera v. Grace (1942) 19 Cal.2d 570, 577-578, 122 P.2d 564*].

For further discussion, see *§ 489.243*.

[e] Related Uses

With appropriate modifications, the statement in [a], *above*, may be substituted for Paragraph 5 in the complaint for equitable relief *set out in § 489.440[1]*.

[f] Alternative Statutory Relief

If relief is sought within a reasonable time, in no case exceeding six months from the date the default was entered, relief may be sought by motion under *Code Civ. Proc. § 473(b)* (discussed in *§ 489.30* et seq.), on the ground of mistake, inadvertence, surprise, or excusable neglect. In that case, the form in [a], *above*, omitting the optional statement regarding plaintiff's knowledge and concealment from the court, may be adapted for use in to fill in the blank at the end of Paragraph 2 of the declaration in § 489.360[1].

[2] Default Due to Disability of Defendant's Attorney

[a] FORM

**[*The following may be substituted for the factual statement in Paragraph 2 of the declaration in support of motion*

***for relief in equity provided in § 489.430[1].*]**

[*SET FORTH facts showing that entry of default (and default judgment, if applicable) was due to disability of defendant's attorney, e.g.:*]

2. On _____ [*date*], I was served with the summons and complaint herein and immediately thereafter, on _____ [*date*], I obtained the services of _____ [*name*], an attorney, to represent me in this action.

3. Thereafter, and without my knowledge, the attorney became seriously ill and disabled and was away from, and unable to attend to matters then pending in, his/her office, including the preparation and filing of my answer to the complaint.

4. At all times I reasonably believed that the attorney was properly handling the matter on my behalf and I was unaware of his/her condition until _____ [*date*], when I _____ [*specify manner of discovery including nature and extent of illness and disability and from whom information was obtained*].

5. Subsequently, on _____ [*date*], I secured the services of my present counsel who discovered that my default, as shown by the records of this court, was entered on _____ [*date*] and the default judgment was entered on _____ [*date*].

6. By reason of the illness and disability of my attorney and my ignorance of it, plaintiff obtained entry of the default and default judgment against me.

[b] Use of Form

The form in [a], *above*, is an illustration of the type of detailed statement that may be substituted for Paragraph 2 of the declaration in § 489.430[1]. The statement in [a], *above*, may be used to support a motion for relief from a default and default judgment entered against the defendant as a result of the sudden illness and disability of his or her counsel. The ground of the motion is the defendant's extrinsic mistake (akin to excusable neglect) in failing to learn of the illness and disability and secure new counsel in time to file an answer to prevent the entry of default.

To be fully prepared at the hearing on the motion, and to avoid any delay that might result from an objection that the foregoing statement contains hearsay, counsel should obtain an additional supporting affidavit ordeclaration from the treating doctor or other individual having personal knowledge of the facts regarding the attorney's death or illness.

[c] Related Use

With appropriate modifications, the foregoing statement may be substituted for Paragraph 5 in the complaint for equitable relief *set out in § 489.440[1]*.

[d] Alternative Statutory Relief

If relief is sought within a reasonable time, in no case exceeding six months after the default was entered, relief may be sought by motion under *Code Civ. Proc. § 473(b)* (discussed in *§ 489.30* et seq.), in which event the ground of the motion would be mistake, inadvertence, surprise, or excusable neglect. The form in [a], *above*, by deleting the last two sentences and substituting a statement of the manner in which the defendant and his or her counsel learned of the entry of the default and judgment, may be adapted for use in the blank space at the end of Paragraph 2 of the declaration in *§ 489.360[1]*.

[3] Default Due to Defendant's Reliance on Representations of Adverse Party's Attorney

[a] FORM

[*The following may be substituted for the factual statement in Paragraph 2 of the declaration in support of motion for relief in equity provided in § 489.430[1].*]

[*SET FORTH facts showing that entry of default (and default judgment, if applicable) was due to defendant's reliance on representations of adverse party's attorney, e.g.:*]

2. As shown by the return of service herein on file, the summons and complaint were served on the defendant on _____ [*date*].

3. Thereafter, on _____ [*date*], the defendant retained me to represent him/her in this action. After discussing the matter with my client, I was of the opinion that the case might be settled.

4. On _____ [*date*], I phoned plaintiff's attorney, _____ [*name*], to explore the possibility. In that conversation, _____ [*name of plaintiff's attorney*] told me that so long as there was a possibility of settlement, I need not file an answer on behalf of my client, and that, should negotiations not prove satisfactory, he/she would give me _____ days written notice to file the answer.

5. Negotiations between me and plaintiff's attorney continued on and off over a period of _____ weeks, and at no time were the negotiations ever expressly terminated by either of us.

6. Notwithstanding the representation of plaintiff's counsel that he/she would give me notice before taking a default, and while negotiations were continuing, plaintiff on _____ [*date*] had defendant's default entered. At no time did I ever receive from plaintiff's counsel or anyone else notice, written or oral, that the defendant's answer would have to be filed in _____ days or at all.

7. Moreover, no Request to Enter Default was ever served on me, and the copy on file states that the request was mailed to the defendant on _____ [*date*]. As shown by the accompanying declaration of the defendant, no notice to file an answer and no Request to Enter Default were ever received by him/her.

8. Thereafter, according to the records herein, a default judgment was rendered against defendant on _____ [*date*].

9. No attempt to enforce the judgment was made at that time. But, as shown by the statement from _____ Bank, a copy of which is attached hereto, on _____ [*date*], more than six months after the default had been entered, plaintiff attached defendant's bank account. This was the first notice defendant or I had that a default and judgment had been entered].

[b] Use of Form

The form in [a], *above*, is an illustration of the type of detailed statement that may be substituted for Paragraph 2 of the declaration in *§ 489.430[1]*. The statement in [a], *above*, may be used to support a motion for relief from a default and default judgment entered against the defendant as a result of the failure of plaintiff's counsel to comply with his or her express representations. The ground of the motion is the extrinsic fraud (negligent or intentional) of plaintiff's counsel or the extrinsic mistake (akin to excusable neglect) of defendant's counsel in relying on the attorney's promise.

[c] Related Use

With appropriate modifications, the foregoing statement may be substituted for Paragraph 5 in the complaint for

equitable relief *set out in § 489.440[1]*.

[d] Alternative Statutory Relief

If relief is sought within a reasonable time, in no case exceeding six months after the default was entered, relief may be sought by motion under *Code Civ. Proc. § 473(b)* (discussed in *§ 489.30* et seq.), in which event the ground of the motion would be mistake, inadvertence, surprise, or excusable neglect. The form in [a], *above*, by deleting the last two sentences and substituting a statement of the manner in which the defendant and his or her counsel learned of the entry of the default and judgment, may be adapted for use in the blank at the end of Paragraph 2 of the declaration in *§ 489.360[1]*.

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[Reserved]

§§ 489.432[Reserved]

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43-489 California Forms of Pleading and Practice--Annotated § 489.440

§ 489.440 Complaint in Equity to Set Aside Judgment or Order Obtained by Extrinsic Fraud or Mistake--General Form

[1] FORM Complaint in Equity to Set Aside Judgment or Order Obtained by Extrinsic Fraud or Mistake--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*]	)	COMPLAINT TO SET ASIDE JUDGMENT
Defendant.	)	
	)	
	)	

_____

Plaintiff alleges:

1. _____ [*Allege capacity, residence, and/or agency of plaintiff:* Plaintiff is, and at all times herein mentioned was a corporation, organized and existing under the laws of California)].

2. _____ [*Allege capacity if other than an individual and principal place of business or residence, and/or agency of defendant, e.g.:* Defendant _____ (*name*) is, and at all times herein mentioned was, a California corporation with its principal place of business in _____ (*city*), California].

3. _____ [*Identify action or proceeding in which judgment or order under attack was entered, e.g.:* On _____ (*date*) the defendant, as plaintiff, filed in _____ (this court *or* the

_____ [Superior *or* Municipal] Court [of the _____ Judicial District], County of _____), against plaintiff, as defendant, a complaint entitled _____ (*specify, e.g.,*, _____ [*name*], Plaintiff, vs. _____ [*name*], Defendant), Case No. _____, in which defendant herein sought _____ (*specify, e.g.,* damages for an alleged breach of contract) against plaintiff herein. The court is hereby requested to take judicial notice of _____ (*specify, e.g.,* the complaint and answer therein filed), a copy of each of which is attached hereto as Exhibits A and B, respectively, and made a part hereof)].

4. _____ [*Identify judgment or order under attack, e.g.:* As shown by the records of _____ (this court *or* the _____ [Superior *or* Municipal] Court [of the _____ Judicial District], County of _____) in the case referred to in Paragraph 3, a judgment against plaintiff herein was entered on _____ (*date*) in _____ (*specify, e.g.,* Vol. _____ of the Judgment Book, page _____)]. The court is hereby requested to take judicial notice of the judgment, a copy of which is attached hereto as Exhibit C and made a part hereof.

5. _____ [*Allege grounds on which judgment or order is sought to be set aside, e.g.,* Defendant herein obtained the entry of the judgment through extrinsic _____ (fraud *and/or* mistake) in that _____ (*specify facts showing the fraud or mistake and how it occurred*)].

6. _____ [*Allege how and when plaintiff learned of the judgment or order and any facts showing good cause for any failure to have discovered the facts sooner, and plaintiff's freedom from any contributory fault in the entry of the judgment*].

[7. _____ (*Allege any facts showing that plaintiff was diligent in seeking relief after discovering the facts if any delay between the time plaintiff discovered the facts and the commencement of this action would be prejudicial to the defendant*).]

8. _____ [*Allege meritorious case, e.g.,* At all times herein mentioned plaintiff herein had, and continues to have, a meritorious defense to the prior action in that _____ (*specify facts showing the existence of a valid claim or defense to the action in whole or in part*)].

[*EITHER*]

9. Plaintiff has no adequate remedy at law in that, through no fault of his/her own, he/she did not discover the _____ [fraud *and/or* mistake] herein alleged until after the time had expired for appeal, seeking a new trial, or seeking relief under *Code of Civil Procedure Section 473(b)* or *(d)*, for the reasons hereinabove alleged.

[*OR*]

9. Plaintiff's motion for relief under *Code of Civil Procedure Section 473* _____ [(b) *or* (d)] paragraph, was denied by the court on _____ [*date*] _____ [*specify reason for denial, e.g.,* as untimely *or* without a full hearing of the merits of plaintiff's claim, in that _____ (*set forth facts showing that issues raised in this action were not considered or adjudicated by the court in the statutory motion and any reasons for the failure to raise or consider them*)].

[*CONTINUE*]

WHEREFORE, plaintiff prays judgment as follows:

1. That _____ [the default and default judgment entered in the prior action be vacated and set aside (and leave granted to plaintiff herein to file an answer to the complaint therein) *or* the judgment entered against plaintiff herein in the prior action be declared null and void *or* defendant be declared a constructive trustee for the benefit of the plaintiff of all funds it received as a result of the prior _____ (judgment *or* order) *or specify other relief sought*].

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by a party seeking relief in equity from a prior judgment or order entered against the plaintiff. The grounds of relief are extrinsic fraud or mistake. Alternatively, relief may be sought by a motion on the same grounds in the court in which the judgment or order was entered [*see § 489.430[1]*]. For discussion of trial court's equitable jurisdiction, see *§ 489.227*. For matters of which a court may take judicial notice and the manner of requesting it to do so, see *Evid. Code §§ 452(d), 453*.

For a form of complaint for use when relief is sought from a default judgment on the ground of lack of personal jurisdiction, see *§ 489.441*.

For discussion of when an action as opposed to a motion should be used to set aside a judgment or order, see *§ 489.266*. For discussion of the statute of limitations that apply to the action, see *§ 489.261*.

[3] Venue

An action in equity to set aside the judgment of a court is transitory and, under the general rule that a defendant is

entitled to have transitory actions tried in the county of his or her residence (*see* Code Civ. Proc.§ 395(a)), the proper county for trial is the county in which the defendant or some of the defendants reside at the commencement of the action [*Brown v. Happy Valley Fruit Growers (1929) 206 Cal. 515, 523-524, 274 P. 977* (reversing order denying motion to change venue to county in which defendants resided and judgment was entered); *Deas v. Lido Lumber Co. (1955) 132 Cal. App. 2d 402, 404-407, 282 P.2d 90* (explaining apparently contrary dictum in *Brown* and reversing order denying motion to change venue from county in which judgment was entered to defendant's county of residence)].

[4] Allegations

The complaint identifies the judgment or order from which relief is sought and requests that the court take appropriate judicial notice [*see Evid. Code §§ 452(d), 453*] (Paragraphs 3, 4). The complaint then alleges [*see, e.g., Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 559, 305 P.2d 20* ; *Turner v. Allen (1961) 189 Cal. App. 2d 753, 758-759, 11 Cal. Rptr. 630*]:

- The grounds for relief (the fraud or mistake must be specifically pleaded) (Paragraph 5);

- Plaintiff's discovery of the fraud or mistake, which normally starts the running of the statute of limitations [*see* discussion in *§ 489.261[1]*], and if it was not promptly discovered after entry of the judgment, the reason for failure to discover it earlier, and plaintiff's freedom from fault in the entry of the judgment or order [*see Kulchar v. Kulchar (1969) 1 Cal. 3d 467, 470-473, 82 Cal. Rptr. 489, 462 P.2d 17*], (Paragraph 6);

- Plaintiff's diligence in seeking relief if there is any delay between the time plaintiff discovered the facts constituting the fraud or mistake and the filing of the present action, anticipating the defense of laches [*see* discussion in *§ 489.261[4]*] (Paragraph 7);

- That plaintiff has a meritorious claim or defense with respect to the prior judgment [*see* discussion in *§ 489.264*] (Paragraph 8); and

- The absence of any remedy at law, either because the time for relief by appeal or by motion under *Code Civ. Proc. § 473(b)* or *(d)* or any other remedy at law, expired before plaintiff was aware of the judgment [*see Parsons v. Weis (1904) 144 Cal. 410, 421, 77 P. 1007* ; *see also Weitz v. Yankosky (1966) 63 Cal. 2d 849, 855, 48 Cal. Rptr. 620, 409 P.2d 700*], or because the plaintiff's earlier motion under *Code Civ. Proc. § 473(b)* or *(d)* was denied without a full hearing of the issues [*see Rose v. Fuqua (1962) 200 Cal. App. 2d 719, 724, 19 Cal. Rptr. 634*] (alternative Paragraphs 9).

Allegations for use in declarations supporting motions for relief are contained §§ *489.430* and *489.431*. With appropriate modifications as to parties and grounds relied on, these averments may be used to describe the particular extrinsic fraud or mistake in Paragraph 5 of the form in [1], *above*.

[5] Prayer

The prayer should request the precise relief sought. Paragraph 1 of the prayer in the form in [1], *above*, illustrates three possibilities:

- Plaintiff seeks relief from a default and default judgment with leave to answer;

- Plaintiff seeks to have declared null and void a judgment procured by extrinsic fraud or mistake, for example, a judgment quieting the defendant's title to real property owned by plaintiff; and

- Plaintiff seeks to have the defendant declared to be a constructive trustee of property for the plaintiff's benefit, as, for example, when the judgment attacked is one in probate distributing to another property that, but for the extrinsic fraud or mistake, would have been distributed to plaintiff, and the property has been distributed in accordance with the judgment.

[6] No Jury Trial

Being an action in equity, there is no right to a jury trial [*see Holt v. Parmer (1951) 106 Cal. App. 2d 329, 331-332, 235 P.2d 43*].

[7] Cross References

For a discussion and forms of common allegations, see Ch. 20, *Allegations Commonly Used*

For a discussion of the form and format and general forms of complaints and answers, see Chs. 123, *Complaints and Cross Complaints* , and 26, *Answers* , respectively

For a discussion of judicial jurisdiction and appearances, see Ch. 323, *Jurisdiction: Personal*

For a discussion of the manners of serving a complaint and summons, see Ch. 518, *Service of Summons and Papers*

For a general discussion of venue and forms for use in securing a change of venue, see Ch. 571, *Venue*

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Chapter 489 RELIEF FROM JUDGMENTS AND ORDERS
V. FORMS
C. Relief From Valid or Void Judgment or Order in Equity

43-489 California Forms of Pleading and Practice--Annotated § 489.441

§ 489.441 Complaint in Equity to Set Aside Judgment or Order Obtained by Extrinsic Fraud or Mistake--Default and Default Judgment Rendered by Court Lacking Jurisdiction Over Defendant

[1] FORM Complaint in Equity to Set Aside Judgment or Order Obtained by Extrinsic Fraud or Mistake--Default and Default Judgment Rendered by Court Lacking Jurisdiction Over Defendant

[*Caption. See § 489.440[1]*.]

1. [*Capacity, residence, and/or agency of plaintiff. See § 489.440[1] , Paragraph 1*.]

2. [*Capacity, residence, and/or agency of defendant. See § 489.440[1] , Paragraph 2*.]

3. [*Identify action and court in which judgment or order was entered. See § 489.440[1] , Paragraph 3*.]

4. [*Allege entry of judgment sought to be set aside. See § 489.440[1] , Paragraph 4*.]

5. The judgment referred to in Paragraph 4 is void for lack of jurisdiction over the person of the defendant (plaintiff herein), in that _____ [*specify why judgment or order is void, e.g.*, at no time was the plaintiff herein (defendant in the prior action) ever served with a copy of the summons and/or complaint in that action in person, by mail, or in any other manner, and had no notice whatsoever of this proceeding until on or about _____ (*date*) when execution of that judgment was levied on my account in the _____ Bank, located in _____ (*city*)].

6. The judgment was entered as the result of the extrinsic fraud or mistake of the defendant (plaintiff in prior action) in that the proof of service filed in the prior action, a copy of which is attached hereto as Exhibit _____, and made a part hereof, and of which the court is hereby requested to take judicial notice, _____ [*specify what proof of service states and state facts showing that it is false*].

WHEREFORE, plaintiff prays judgment as follows:

1. That the default and default judgment entered against plaintiff herein in the prior action be _____ [vacated and set aside (and plaintiff be granted leave to file an answer) *or* declared null and void].

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

[*Verification. See § 489.440[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use to secure relief from a judgment that is valid on its face but void in fact for lack of jurisdiction over the defendant's person because [*see, e.g., In re Marriage of Merideth (1982) 129 Cal. App. 3d 356, 363, 180 Cal. Rptr. 909* ; *Sousa v. Freitas (1970) 10 Cal. App. 3d 660, 667, 89 Cal. Rptr. 485* ; *see also* discussion in *§ 489.134* et seq.]:

- The defendant (plaintiff herein) was never served with a copy of the summons and complaint and the return of service filed was false; or

- The service of the summons or the summons was defective and the defect does not appear from the judgment roll; or

- Defendant (plaintiff herein) is a nonresident and lacks sufficient contacts with California to permit the exercise of judicial jurisdiction over him or her.

The form of complaint in [1], *above*, is for use either when relief is sought from a court other than the one that rendered the judgment or, if filed in the same court, when an equitable motion, or a motion at law (discussed in [3], *below*), might not provide adequate relief, or, in the case of a motion at law, is time barred [*see* discussion in *§ 489.266*].

For further discussion relating to a complaint commencing an independent action in equity, such as venue, and unavailability of jury trial, see *§ 489.440[1]*.

[3] Motion at Law

A judgment rendered in an action in which the court did not acquire jurisdiction over the person of the defendant is void [*see, e.g., Fazzi v. Peters (1968) 68 Cal. 2d 590, 594, 68 Cal. Rptr. 170, 440 P.2d 242*]. A judgment that is not void on its face but is void in fact may be attacked by a motion at law, either under the court's inherent jurisdiction at law or under *Code Civ. Proc. § 473(d)*, codifying that inherent power (*see* discussion in *§ 489.10*). However, if not sought within a reasonable time, relief at law is time barred and the aggrieved party's only remedy is in equity, either by a motion or by an independent action (*see* discussion in *§ 489.142*).

[4] Judgment Void on Its Face for Lack of Jurisdiction

A judgment that is void on its face for lack of jurisdiction is subject to an attack at law, not only in the court that rendered it, but anywhere, anytime, directly or collaterally, and there is no need to resort to equityto have it declared void (*see §§ 489.137 -489.141*). The most expedient method of directly attacking it is by a motion at law in the court that rendered the judgment.

[5] Meritorious Defense

To require the showing of a meritorious defense on a defendant's motion for relief from a default judgment in an action in which the trial court never acquired personal jurisdiction over the defendant, that is, when the judgment is void for lack of personal jurisdiction, violates procedural due process and cannot constitutionally be required [*see Peralta v. Heights Medical Center, Inc. (1988) 485 U.S. 80, 84-87, 108 S. Ct. 896, 99 L. Ed. 2d 75*]. For further discussion of *Peralta*, see discussion in *§ 489.264[3]*. California cases that have pointed out that the meritorious defense requirement applies to a judgment that is void in fact, but not on its face, because the summons had not been served or the service was in some manner defective [*see, e.g., Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 554, 305 P.2d 20* ; (and cases there cited); *see also New York Higher Education Assistance Corp. v. Siegel (1979) 91 Cal. App. 3d 684, 689, 154 Cal. Rptr. 200* ; *Sousa v. Freitas (1970) 10 Cal. App. 3d 660, 667, 89 Cal. Rptr. 485]* do not appear to be viable in light of *Peralta*.

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Chapter 489 RELIEF FROM JUDGMENTS AND ORDERS
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C. Relief From Valid or Void Judgment or Order in Equity

43-489 California Forms of Pleading and Practice--Annotated § 489.442

§ 489.442 Judgment Setting Aside Judgment--General Form

[1] FORM Judgment Setting Aside Judgment--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	JUDGMENT SETTING ASIDE JUDGMENT
Defendant.	)	
	)	
	)	
_____		

This cause came on regularly for trial before the Honorable _____ [*name*], sitting without a jury on _____ [*date*] in [Department _____ of] the above-entitled court, _____ [*name*], appearing as attorney for the plaintiff, and _____ [*name*], appearing as attorney for the defendant. Evidence, both oral and documentary, having been presented by both parties, the cause having been argued and submitted for decision, and _____ [the court (, on _____ (plaintiff's *or* defendant's) request), having caused to be made and filed herein its written statement of decision *or* a statement of decision not having been requested],

IT IS ORDERED AND ADJUDGED that the [default and default] judgment entered against the plaintiff herein as defendant in Action No. _____ in _____ [this court *or* the _____ (Superior *or* Municipal) Court (of the _____ Judicial District), State of California], entitled _____ [*specify, e.g.*, _____ (*name*), plaintiff vs. _____ (*name*), defendant], and entered on or about _____ [*date*], is null and void and is set aside and vacated, and

_____ [*specify any additional relief requested and granted, e.g.,* that defendant therein is granted until _____ days after this judgment becomes final to file his/her answer to the complaint in that action].

IT IS FURTHER ORDERED that plaintiff recover from the defendant his/her costs of suit in the sum of $_____.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above,* of judgment may be used in the action to vacate or set aside a judgment obtained by extrinsic fraud or mistake, and in the case of a default judgment, to allow the filing of an answer. The judgment is normally prepared by counsel for the prevailing party for the judge's signature.

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Chapter 490 RESCISSION AND RESTITUTION

43-490 California Forms of Pleading and Practice--Annotated 490.syn

§ 490.syn Synopsis to Chapter 490: RESCISSION AND RESTITUTION

§ 490.01 Scope of Chapter

§ 490.02 Cross References

§§ 490.03-490.09 [Reserved]

§ 490.10 Governing Law

§ 490.11 Rescission and Cancellation

[1] Distinguished

[2] Terminology of Parties Not Controlling

[3] Under the Commercial Code

§ 490.12 Rescission and Abandonment of Contract Distinguished

§ 490.13 Determining Whether Contract Was Formed or Is Void or Voidable

§ 490.14 Contract Provision for Unilateral Termination

§ 490.15 Rescission by Mutual Agreement

[1] Requirements

[2] Implied Mutual Rescission

[3] Oral Rescission of Written Agreement

§ 490.16 Unilateral Rescission for Cause

[1] Grounds

[2] Failure of Consent

[3] Failure of Consideration

[a] In General

[b] Failure to Pay Money

[i] Delay in Performance

[ii] Impossibility or Commercial Frustration

[c] Contract Unlawful or Prejudicial to Public Interest

[d] Rescission of Participation in Chain Scheme

[e] Contract Made Before Adjudication of Incompetency

[f] Creditor's Right to Rescind Novation

[g] Repudiation

[h] Bailments

[i] Principal's Rescission of Ratification

[j] Insurance Contracts

[k] Contracts for Sale of Goods

[i] Applicable Law

[ii] Commercial Code Rights and Remedies

[l] Transfer of Corporation Share Certificates

§ 490.17 Partial Rescission

§ 490.18 Rescission of Gifts

§ 490.19 Rescission of Third-Party Beneficiary Contracts

§ 490.20 Defenses to Rescission

[1] Executed Contract

[2] "Rescinding" Party in Default

[3] Waiver of Right to Rescind

[4] Statute of Limitations

[5] Prejudicial Delay

[6] Substantive Statute or Policy Precludes Rescission

[a] Judicial Privilege

[b] Health Care Service Plan Contracts

[c] Insurance Contracts: Post-Claim Underwriting

§ 490.21 Notice of Rescission and Offer to Restore Consideration

[1] Requirements

[2] Restoration or Offer to Restore Excused

§ 490.22 Judicial Enforcement of Rescission

[1] By Action or as Defense

[2] Nature of Action

[3] Form of Action

§ 490.23 Recovery by Rescinding Party

[1] In General

[2] Restitution and Consequential Damages

[a] Recoverable

[b] Examples of Consequential Damages

[3] Emotional Distress

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[5] Punitive Damages

[6] Attorney's Fees

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§ 490.24 Damages or Offsets Allowed to Defendant

§ 490.25 Election of Remedies

[1] What Constitutes Election

[2] Asserting Election of Remedies as Defense

§ 490.26 Right to Jury Trial

§ 490.27 Restitution to Avoid Unjust Enrichment

[1] Equitable Principle

[2] When Contract Is Forfeited

[3] Pleading Doctrine as Common Count

§§ 490.28-490.39 [Reserved]

§ 490.40 Federal Statutes

§ 490.41 State Statutes

[1] Rescission

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§ 490.42 Decisions

[1] Alternative Remedies and Procedures

[2] Election of Remedies

[3] Defendant's Right to Offsets

[4] Delay in Performance

[5] Dismissal of Prior Action for Rescissionary Relief

[6] Judgments

[7] Mistake of Fact

[8] Mistake of Law

[9] Nature of Rescission

[10] Rescission Unavailable

[11] Restitution Based on Repudiation

[12] Restitution Based on Undue Influence

[13] Restitution to Avoid Unjust Enrichment

[14] Restoration Excused

§ 490.43 Law Reviews

§ 490.44 Text References

§§ 490.45-490.59 [Reserved]

§ 490.60 Notice of Rescission of Contract--General Form [Civ. Code § 1691]

[1] FORM

[2] Use of Form

[3] Contents of Notice

[a] Grounds

[b] Offer to Restore

[c] Setoffs or Credits

[4] State Statutes

[5] Decisions

[6] Text References

§ 490.61 Complaint for Relief Based on Rescission of Contract [Civ. Code § 1692], or in the Alternative, for Damages [Civ. Code § 3333] for Fraud [Civ. Code §§ 1709, 3343]--Fraudulent Misrepresentation [Civ. Code §§ 1572, 1689(b)(1), 1710]

[1] FORM

[2] Use of Form

[3] Other Possible Remedies

[4] Parties

[5] Relief Based on Rescission

[a] General Allegations

[b] Fraudulent Misrepresentation

[6] Damages for Fraud

[7] Common Count for Money Had and Received

[8] Verification

[9] Jurisdiction and Venue

[a] In General

[b] Actions Under Unruh or Rees-Levering Act

[c] Other Goods or Services for Personal or Family Use; Telephone or Electronic Solicitation

[10] Lis Pendens

[11] Cross References

[12] State Statutes

[13] Decisions

[a] Acts of Third Persons as Grounds for Rescission

[b] Attorney's Fees

[c] Damages

[d] Notice

[e] Fraudulent Misrepresentation

[i] Damages

[ii] Reliance

[f] Injury

[g] Pleading

[h] Text References

[i] Cross Reference

§ 490.62 Complaint for Relief Based on Rescission of Contract [Civ. Code § 1692], or in the Alternative, for Damages [Civ. Code § 3300] for Breach of Contract--Failure of Consideration [Civ. Code § 1689(b)(2)-(4)]

[1] FORM

[2] Use of Form

[3] Allegations

[a] Preliminary Allegations

[b] Failure of Consideration

[c] Other Allegations

[d] Damages for Breach of Contract

[4] Jurisdiction and Venue

[5] Cross References

[6] State Statutes

[7] Decisions

[a] Common Count

[b] Consequential Damages

[c] Failure of Consideration

[d] Pleading

[e] Repudiation

[8] Text References

[9] Cross Reference

§ 490.63 Complaint for Relief Based on Rescission of Contract [Civ. Code § 1692]--Incompetency Prior to Adjudication [Civ. Code §§ 39, 1689(b)(7)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction

[5] Cross References

[6] California Points and Authorities

[7] State Statutes

[8] Decisions

[a] Incompetency as Ground for Rescission

[b] Lack of Understanding

[c] Limitations and Laches

[d] Party Plaintiff

[e] Restoration or Offer to Restore

[9] Text References

[10] Cross Reference

§ 490.64 Complaint for Relief Based on Rescission of Contract [Civ. Code § 1692]--Contract Unlawful or Prejudicial to Public Policy [Civ. Code § 1689(b)(5), (6)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

[5] State Statutes

[6] Decisions

[a] Attorney's Ethical Duties

[b] Change in Law

[c] Cohabitation

[d] Collusive Bidding

[e] Corruption of Public Officials

[f] Defraud Creditors

[g] Drugs and Drug Paraphernalia

[h] Failure to Obtain License

[i] Gambling

[j] Inequality of Fault

[k] Laches

[l] Parties

[m] Persons Accused of Crime

[n] Ratification

[o] Renunciation During Locus Penitentiae

[p] Restoration by Plaintiff

[q] Silence

[r] Spouses

[s] Subdivided Lands

[t] Tax Evasion

[7] Text References

[8] Cross Reference

§ 490.65 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Relief Based on Rescission of Contract--Waiver of Right to Rescind [Civ. Code § 1691]--General Form

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Text References

[6] Cross Reference

§ 490.66 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Relief Based on Rescission of Contract--Waiver of Right to Rescind [Civ. Code § 1691]--Prejudicial Delay [Civ. Code § 1693]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Text References

[6] Cross Reference

§ 490.67 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Election of Another Remedy

[1] FORM

[2] Use of Form

[3] Cross References

[4] Decisions

[a] Acts Constituting Election

[b] Acts Not Constituting Election

[5] Text References

[6] Cross Reference

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Chapter 490 RESCISSION AND RESTITUTION
PART I. SCOPE

43-490 California Forms of Pleading and Practice--Annotated § 490.01

§ 490.01 Scope of Chapter

This chapter discusses the procedural and general aspects of rescission of contract, restitution based on rescission, and defenses to those actions. It contains the following:

- A general form for giving notice of unilateral rescission [*see § 490.60*].
- Forms of complaints for relief based on rescission [*see § 490.61 -490.64*].
- Forms of defenses to complaints for rescission [*see § 490.65 -490.67*].

Rescission as a remedy in particular contexts is considered in this chapter only by way of example. For a listing of chapters that discuss or contain forms relating to rescission of particular contracts or transactions, see the Research Guide under Cross References.

Discussion and forms relating to general contract requirements and factors negating formation of contract or providing grounds for avoidance of contract are discussed in Ch. 140, *Contracts* , and Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* . Requirements for rescission of contracts for the sale of goods governed by *Com. Code § 2101 et seq.* are discussed in Ch. 500, *Sales: Sales Under the Commercial Code* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawFormationGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawRemediesRestitution

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§ 490.02 Cross References

For discussion and forms relating to the right of restitution of a good faith improver of another's property, see Ch. 279, *Good Faith Improver of Real Property* .

For discussion and forms relating to a parent's right to rescind his or her relinquishment of parental rights or consent to his or her child's adoption, see *Ch. 12B, Adoptions: Unmarried Minors, §§ 12B.96, 12B.174*.

For a complaint for relief based on rescission of a sale of a business because the Department of Alcoholic Beverage Control did not approve transfer of the business' liquor license, see Ch. 18, *Alcoholic Beverage Licenses* .

For a form of affirmative defense based on rescission on the ground of incapacity to contract due to intoxication, see Ch. 19, *Alcoholic Beverages: Civil Liability* .

For a form of affirmative defense based on rescission for use in response to a petition to compel arbitration, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

For a complaint for relief based on rescission of a sale of art work, see Ch. 57, *Art* .

For a complaint for relief based on rescission of auction sales, see Ch. 77, *Auctions and Auctioneers* .

For discussion and forms relating to rescission of automobile sales contracts, see Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* .

For discussion and forms relating to rescission of automobile leases, see Ch. 90, *Automobiles: Vehicle Leasing Act* .

For discussion of the Consumer Contract Awareness Act of 1990 (*Civ. Code § 1799.200 et seq.*) as applied to financial services, including safe deposit rentals and personal property safekeeping and storage agreements, see Ch. 95, *Banks, Deposits, and Checks* .

For a form of affirmative defense based on rescission for use in response to a complaint by a real estate broker for commission, see Ch. 103, *Brokers* .

For discussion and forms relating to rescission of building and construction contracts, see Ch. 104, *Building Contracts* .

For discussion and forms relating to cancellation of instruments, including allegation of rescission of underlying transaction, see Ch. 107, *Cancellation of Instruments* .

For discussion and forms relating to cancellation of dating service and weight loss contracts, see Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* .

For discussion and forms relating to rescission of home solicitation or seminar sales solicitation contracts, see Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* .

For discussion and forms relating to rescission of discount buying service organization memberships, see Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* .

For discussion of unconscionable contracts and unenforceable exculpatory clauses, see Ch. 140, *Contracts* .

For forms of affirmative defense based on rescission of a contract by mutual consent or for failure of consideration, see Ch. 140, *Contracts* .

For discussion and forms relating to cancellation of deeds, see *Ch. 184, Deeds, § 184.10* et seq.

For discussion and forms relating to rescission of property settlement agreements, see Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

For discussion and forms concerning contracts relating to gambling transactions, see Ch. 272, *Gambling* .

For discussion and forms relating to rescission of gifts, see Ch. 278, *Gifts* .

For discussion and forms relating to restitution of medical, housing, or other expenses in an order enjoining domestic violence, see Ch. 293, *Harassment and Domestic Violence* .

For forms for affirmative defense based on rescission of an insurance policy, see Ch. 308, *Insurance* .

For discussion and forms for judgments see Ch. 318, *Judgments* .

For discussion and forms relating to imposition of equitable liens to effect restitution and to avoid unjust enrichment, see Ch. 342, *Liens and Wage Preferences* .

For discussion of rescission of emancipation of a minor, see Ch. 245, *Emancipation of Minors* .

For a form of complaint for relief based on wrongful rescission of an agency by the principal, see Ch. 427, *Principal and Agent* .

For discussion of rescission of contracts for the sale of goods governed by *Com. Code § 2101 et seq.*, see Ch. 500, *Sales: Sales Under the Commercial Code* , and Ch. 502, *Sales: Warranties* .

For discussion and forms relating to rescission of consumer contracts governed by Unruh Act (*Civ. Code § 1801 et seq.*)

and federal Truth in Lending Act (*15 U.S.C. § 1601 et seq.*), see Ch. 501, *Sales: Retail Installment Sales* .

For discussion and forms relating to rescission of securities transactions governed by the California Corporate Securities Law of 1968 (*Corp. Code § 25000 et seq.*), see Ch. 515, *Securities and Franchise Regulation* .

For discussion and forms relating to rescission of franchises governed by the California Franchise Investment Law (*Corp. Code § 31000 et seq.*), see Ch. 515, *Securities and Franchise Regulation* .

For discussion and forms relating to rescission of sale or lease of seller assisted marketing plan, see Ch. 515, *Securities and Franchise Regulation* .

For discussion of the Consumer Contract Awareness Act of 1990 (*Civ. Code § 1799.200 et seq.*) as applied to consumer contract guaranties, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

For discussion of rescission rights after unsconscionable transfer of residential real property in foreclosure, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

For discussion and forms relating to rescission of real estate sales and exchanges, see Ch. 569, *Vendor and Purchaser* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesContracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawRemediesRestitutionReal Property LawPurchase & SaleRemediesRescission & Restitution

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Chapter 490 RESCISSION AND RESTITUTION

PART I. SCOPE

43-490 California Forms of Pleading and Practice--Annotated §§ 490.03-490.09

[Reserved]

§§ 490.03[Reserved]

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§ 490.10 Governing Law

Rescission of contract in general is governed by *Civ. Code § 1688 et seq.* Many statutes provide a right of rescission in particular situations that are beyond the scope of this chapter. For a listing of the more frequently invoked of these statutes, see *§ 490.40*.

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§ 490.11 Rescission and Cancellation

[1] Distinguished

One of the difficulties in distinguishing between rescission and cancellation is that the term cancellation has several meanings. One meaning refers to a specific statutory remedy relating to written instruments [*see Civ. Code §§ 3412-3414*]. A written instrument, in respect to which there is a reasonable apprehension that, if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, on that person's application, be so adjudged and ordered to be delivered up or canceled [*Civ. Code § 3412*]. In this context, the distinction must be made between rescission of the underlying contract and cancellation of the instrument. After a fraudulently induced real estate transaction, for example, the contract may be rescinded and the deed cancelled [*see, e.g., Millar v. James (1967) 254 Cal. App. 2d 530, 532, 62 Cal. Rptr. 335]* . Another aspect of this distinction concerns the requirement of restitution. Both rescission of contracts and cancellation of voidable instruments require restitution, but cancellation of a void instrument, such as a deed of trust one was tricked into signing, does not require restitution [*Fleming v. Kagan (1961) 189 Cal. App. 2d 791, 796-799, 11 Cal. Rptr. 737]* . For discussion and forms relating to cancellation of instruments, see Ch. 107, *Cancellation of Instruments* .

The term cancellation is also used to refer to termination of contracts. In this context, the distinction between rescission and cancellation is that cancellation is prospective [*see, e.g., Welles v. Turner Entm't Co. (9th Cir. 2007) 488 F.3d 1178, 1187* (contract was not rescinded but was canceled, with only prospective effect, when parties made subsequent agreement expressing "the mutual desire of the parties to terminate and cancel" their prior contract)], whereas rescission is retroactive. Cancellation terminates further performance under the contract and operates as of the time of cancellation, whereas rescission operates to restore the parties to the *status quo ante* as of the time the contract was formed [*Fireman's Fund American Ins. Co. v. Escobedo (1978) 80 Cal. App. 3d 610, 619, 145 Cal. Rptr. 785* ; *Mamula v. McCulloch (1969) 275 Cal. App. 2d 184, 197, 79 Cal. Rptr. 571]* . After termination or cancellation the parties retain their right to damages for breaches occurring prior to termination [*B.L. Metcalf General Contractor, Inc. v. Earl Erne, Inc. (1963) 212 Cal. App. 2d 689, 694, 28 Cal. Rptr. 382]* . In contrast, rescission is an alternative to damagesfor breach and amounts to renunciation and waiver of any claim for damages. Except in the case of a mutual rescission agreement that affirmatively reserves the right, rescission extinguishes the contract so that thereafter, neither party can maintain an action for its breach [*Imperial Cas. and Indem. Co. v. Sogomonian (1988) 198 Cal. App. 3d*

169, 184-185, 243 Cal. Rptr. 639 ; *Larsen v. Johannes (1970) 7 Cal. App. 3d 491, 502, 86 Cal. Rptr. 744]* . In this context, confusion often results from the the parties' use of the terms rescission, termination, and cancellation without any regard to the legal distinctions [*see, e.g., Pico Citizens Bank v. Tafco Inc. (1962) 201 Cal. App. 2d 131, 136, 19 Cal. Rptr. 905]* .

[2] Terminology of Parties Not Controlling

The question of whether a contract has been cancelled, rescinded, or abandoned is a mixed question of law and fact. The terminology used is not controlling. Generally, the use of the term rescission does not amount to renunciation of claims for prior damages unless such an intention clearly appears [*Pico Citizens Bank v. Tafco Inc. (1962) 201 Cal. App. 2d 131, 136, 19 Cal. Rptr. 905* ("notice of rescission" as actually notice of cancellation pursuant to contract provision); *Grant v. The Aerodraulics Co. (1949) 91 Cal. App. 2d 68, 72-74, 204 P.2d 683* (cancellation only; parties intended that liability for accrued royalties remain)].

[3] Under the Commercial Code

The distinctions between rescission, cancellation, and termination have been codified in Division 2 of the Commercial Code, which governs contracts for the sale of goods. Termination occurs when either party pursuant to a power created by agreement or law puts an end to a contract otherwise than for its breach. On termination, all obligations that are still executory on both sides are discharged, but any right based on prior breach or performance survives [*Com. Code § 2106(3)*]. Cancellation occurs when either party puts an end to the contract for breach by the other party. On cancellation, all executory obligations are discharged, except that the cancelling party retains any remedy for breach of the whole contract or any unperformed balance [*Com. Code § 2106(4)*]. Unless the contrary intention clearly appears, the terms cancellation and rescission are not to be construed as a renunciation or discharge of any claim in damages for an antecedent breach [*Com. Code § 2720*]. Under Division 2, unless otherwise provided by the specific agreeement of the parties, rejection [*Com. Code §§ 2601, 2602*] or revocation of acceptance of nonconforming goods [*Com. Code § 2608*], which are akin to rescission, or rescission itself, does not bar and is not inconsistent with, a claim for damages or any other remedy [*Com. Code §§ 2703, 2711, 2720, 2721*; *Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 14, 45 Cal. Rptr. 17, 403 P.2d 145* ; Cal. Code Comment to *Com. Code § 2608*; *see* Ch. 500, *Sales: Sales Under the Commercial Code* .].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseGeneral OverviewCommercial Law (UCC)Sales (Article 2)Breach, Repudiation & ExcuseAcceptance of GoodsRevocation of AcceptanceGeneral OverviewContracts LawBreachCauses of ActionGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawRemediesRestitutionContracts LawSales of GoodsTermination NoticesContracts LawTypes of ContractsExecutory Contracts

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§ 490.12 Rescission and Abandonment of Contract Distinguished

Abandonment is another term that has several meanings, one of which is implied mutual rescission. Abandonment by one party is likely to be a form of breach of contract [*C. Norman Peterson Co. v. Container Corp. of America (1985) 172 Cal. App. 3d 628, 640-644, 218 Cal. Rptr. 592]* . Once one party has abandoned the contract, the other party is not required to tender his or her performance [*Sausalito Bay Land Co. v. Sausalito Improv. Co. (1913) 166 Cal. 302, 308, 136 P. 57* ; *United California Bank v. Maltzman (1974) 44 Cal. App. 3d 41, 52, 118 Cal. Rptr. 299]* . If the other party acquiesces or concurs in the unilateral abandonment, a mutual abandonment amounting to implied mutual rescission results [*C. Norman Peterson Co. v. Container Corp. of America (1985) 172 Cal. App. 3d 628, 640-643, 218 Cal. Rptr. 592* ; *see § 490.15[2]*].

Whether called mutual abandonment or implied rescission, the conduct of the parties relied on to establish it must be positive, unequivocal, and inconsistent with the contract [*Pennel v. Pond Union School Dist. (1973) 29 Cal. App. 3d 832, 838, 105 Cal. Rptr. 817* ; *see § 490.15[2]*]. Mutual abandonment is a question of intent to be determined from the facts and circumstances surrounding the transaction and out of which the abandonment is claimed to have resulted. It may be implied from the acts of the parties, often from their negotiating a new and different contract concerning the same subject matter [*Busch v. Globe Industries (1962) 200 Cal. App. 2d 315, 320, 19 Cal. Rptr. 441* ; *Honda v. Reed (1958) 156 Cal. App. 2d 536, 539, 319 P.2d 728]* .

Like cancellation or termination, mutual abandonment has been described as abrogating so much of the contract as remains unperformed [*Honda v. Reed (1958) 319 P.2d728* ; *Grant v. Aerodraulics Co. (1949) 91 Cal. App. 2d 68, 75, 204 P.2d 683]* . However, it is not always clear whether the parties intended to reserve any rights after abandonment [*see* *Busch v. Globe Industries (1962) 200 Cal. App. 2d 315, 320, 19 Cal. Rptr. 441* (noting there was no evidence of any such intention); *Kane v. Sklar (1954) 122 Cal. App. 2d 480, 481-483, 265 P.2d 29* (employment contract for salary and share of profits mutually abandoned; employee awarded accrued unpaid salary to date of abandonment but held to have no right to share of profits)]. Sometimes, often in the context of a construction contract, after abandoning the original contract the parties continue with the project on a quantum meruit basis [*see* *C. Norman Peterson Co. v. Container Corp. of America (1985) 172 Cal. App. 3d 628, 644-646, 218 Cal. Rptr. 592* (maximum price contract abandoned by owner's excessive design changes; contractor entitled to recover for work on quantum meruit basis); *Daugherty Co. v. Kimberly-Clark Corp. (1971) 14 Cal. App. 3d 151, 156-159, 92 Cal. Rptr. 120* (same)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 490.13 Determining Whether Contract Was Formed or Is Void or Voidable

Whether a contract in fact exists, and if so, whether it is void, or merely voidable, will determine the remedies available. If a contract is voidable, usually notice of rescission and an offer to restore will be necessary to recover what one has parted with [*see Civ. Code § 1689(b)(5),(6)* (illegality as grounds for rescission) (*see § 490.16[3][c]*); *Civ. Code § 1691* (offer to restore), (*see § 490.21*)]. If the contract is void, it may be disregarded without necessity of rescission, and one can proceed on other theories [*Ford v. Shearson Lehman American Express, Inc. (1986) 180 Cal. App. 3d 1011, 1015, 1028, 225 Cal. Rptr. 895* (contract described as void for lack of voluntary assent; negligence, conversion, breach of fiduciary duty, conspiracy to commit fraud); for discussion of voidable contracts and contracts that are void based on lack of assent or illegality, see Ch. 140, *Contracts*]. If there is no contract and plaintiff has not suffered any tort damages, for instance when plaintiff's loss amounts only to that with which he or she has parted, the equitable theory of restitution allows recovery under an implied-in-law contract [*Ward v. Taggart (1959) 51 Cal. 2d 736, 741-743, 336 P.2d 534* ; *Desny v. Wilder (1956) 46 Cal. 2d 715, 734-740, 744, 750, 299 P.2d 257* ; *see § 490.27*].

In determining whether or not a contract was ever formed, a distinction is made between consent that is not free because it was obtained by duress, menace, fraud, undue influence, or mistake [*Civ. Code §§ 1565, 1567*] and consent that is not mutual because the parties did not agree on the same thing in the same sense. If the consent is not free, the contract is not absolutely void, but may be rescinded by the parties [*Civ. Code § 1566*]. If consent is not mutual, no contract is formed [*Chakmak v. H. J. Lucas Masonry, Inc. (1976) 55 Cal. App. 3d 124, 129, 127 Cal. Rptr. 404* (newspaper printed wrong name of contractor for construction of student health center when centers were being bid for Fresno and Hayward campuses; subcontractor's bid intended to be submitted to Hayward contractor was submitted to and accepted by Fresno contractor); *German Sav. and Loan Soc. v. McLellan (1908) 154 Cal. 710, 716, 99 P. 194* ; *Carlson, Collins, Gordon & Bold v. Banducci (1967) 257 Cal. App. 2d 212, 222, 64 Cal. Rptr. 915]* .

In the context of mistake, when an offer is made on terms that the offeree misunderstands, and the offeree accepts it in terms that the offeror understands as an assent to the offer that he or she meant to make, each party is mistaken about the meaning of the other and no contract exists unless one of the parties so negligently expressed himself or herself that the other was caused to reasonably believe that agreement existed [*Chakmak v. H. J. Lucas Masonry, Inc. (1976) 55 Cal. App. 3d 124, 129, 127 Cal. Rptr. 404]* . In the context of fraud, when the promisor knows what he or she is signing, but the signature is induced by fraud, a voidable contract is formed and notice of rescission and an offer to restore are

necessary. However, when the fraud goes to the inception or execution so that the promisor is deceived as to nature of the act and does not know what he or she is signing or did not intend to enter a contract, mutual assent is lacking, no contract is formed, and rescission is not necessary [*Ford v. Shearson Lehman American Express, Inc. (1986) 180 Cal. App. 3d 1011, 1028, 225 Cal. Rptr. 895]* . Defenses to formation of contract based on lack of free and mutual assent are discussed in Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesIllegal BargainsContracts LawFormationAmbiguity & MistakeMutual MistakeContracts LawFormationMeeting of MindsContracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawTypes of ContractsImplied-in-Law Contracts

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§ 490.14 Contract Provision for Unilateral Termination

A contract provision purporting to give one party the unconditional and unilateral right to terminate the contract at his or her pleasure will cause the entire contract to be unenforceable for lack of mutuality of obligation and want of consideration [*Kowal v. Day (1971) 20 Cal. App. 3d 720, 723-725, 98 Cal. Rptr. 118]* . The validity of such a provision, and thus the entire contract, is saved if the option is exerciseable only within a certain time or on specified conditions, such as on notice or for cause. Courts do not favor arbitrary termination clauses and tend to interpret even a slight restriction on the exercise of the right as constituting a legal detriment to satisfy the requirement of sufficient consideration [*R. J. Cardinal Co. v. Ritchie (1963) 218 Cal. App. 2d 124, 143-144, 32 Cal. Rptr. 545]* . Nevertheless, a clause in a contract other than one between employer and employee, which gives one party the right to terminate without cause on notice, is valid and allows that party to terminate on account of the other party's refusal to participate in or condone practices that are contrary to public policy [*Abrahamson v. NME Hospitals, Inc. (1987) 195 Cal. App. 3d 1325, 1328-1330, 241 Cal. Rptr. 396]* .

A contract that would otherwise fail because of a provision giving one party the unconditional and unilateral right to terminate the contract is saved if at least one party has partially performed [*The Money Store v. Southern California Bank (2002) 98 Cal. App. 4th 722, 728-729, 120 Cal. Rptr. 2d 58* (lender's performance-providing loan money necessary to complete sale- cured any illusory aspect of agreement); *Kowal v. Day (1971) 20 Cal. App. 3d 720, 725-728, 98 Cal Rptr 118* (part performance by party who had right to rescind as creating irrevocable option); *Burgermeister Brewing Corp. v. Bowman (1964) 227 Cal. App. 2d 274, 280, 38 Cal. Rptr. 597* (performance by both parties)].

When a provision allowing one party to unilaterally terminate the contract is valid, unless the contract specifies otherwise, termination of the contract by exercise of the right discharges all liability for further transactions, but obligations that have accrued prior to termination remain enforceable [*Merrill v. Continental Assurance Co. (1962) 200 Cal. App. 2d 663, 670, 19 Cal. Rptr. 432]* . This is to be distinguished from the ordinarysituation in which there is no termination provision in the contract, but one party unilaterally rescinds for cause. Then, although no liability remains for obligations or breaches that accrued prior to rescission, the compensation and adjustments provided for by *Civ. Code § 1692* (*see § 490.23*) should be taken into account [*see, e.g., Runyan v. Pacific Air Industries, Inc. (1970) 2 Cal. 3d 304, 308 n. 3, 318-319, 85 Cal. Rptr. 138, 466 P.2d 682* ; *see § 490.23[2][b]*].

For discussion of unilateral termination, Ch. 140, *Contracts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawConsiderationMutual ObligationContracts LawConsiderationSufficient ConsiderationContracts LawPerformanceDischarges & TerminationsContracts LawPerformancePartial PerformanceGeneral Overview

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§ 490.15 Rescission by Mutual Agreement

[1] Requirements

A contract may be rescinded if all the parties to the contract consent [*Civ. Code § 1689(a)*]. The formalities required for mutual rescission of a contract are the same as those required for formation of a contract--namely a meeting of the minds evidenced by an offer, acceptance, and consideration [*Harriman v. Tetik (1961) 56 Cal. 2d 805, 810, 17 Cal. Rptr. 134, 366 P.2d 486* ; *Tuso v. Green (1924) 194 Cal. 574, 582, 229 P. 327]* . The mutual promises to waive all rights under the contract being rescinded constitute consideration for the rescission [*Schertzinger v. Williams (1961) 198 Cal. App. 2d 242, 246, 17 Cal. Rptr. 719* ; *Sass v. Hank (1952) 108 Cal. App. 2d 207, 215, 238 P.2d 652]* . An offer of rescission can be withdrawn at any time before it is accepted [*Sanders Construction Co. v. San Joaquin First Fed. Sav. & Loan Assn. (1982) 136 Cal. App. 3d 387, 397, 186 Cal. Rptr. 218]* . Mutual rescission is sometimes referred to as mutual abandonment [*see, e.g., Evans v. Rancho Royale Hotel Co. (1952) 114 Cal. App. 2d 503, 508, 250 P.2d 283* ; for discussion of mutual abandonment, *see § 490.12*].

[2] Implied Mutual Rescission

A mutual rescission need not be express, but the intent to mutually rescind may be implied from the conduct of the parties [*Unger v. Isaacs (1954) 123 Cal. App. 2d 533, 535, 266 P.2d 869* ; *see § 490.12*]. The intent of the parties may be determined from the facts and circumstances surrounding the transaction and out of which the mutual abandonment or rescission is claimed to have resulted. It may be implied from the acts of the parties, often from their negotiating a new and different contract concerning the same subject matter [*Busch v. Globe Industries (1962) 200 Cal. App. 2d 315, 320, 19 Cal. Rptr. 441* ; *Honda v. Reed (1958) 156 Cal. App. 2d 536, 539, 319 P.2d 728]* . The conduct of the parties relied on to establish mutual rescission must be positive, unequivocal, and inconsistent with the continued assertion of rights under the contract. For example, conduct equally consistent with illness, as claimed by one party, will not establish an intent to rescind or abandon the contract [*Pennel v. PondUnion School Dist. (1973) 29 Cal. App. 3d 832, 838, 105 Cal. Rptr. 817* ; *Ross v. Tabor (1921) 53 Cal. App. 605, 615, 200 P. 971]* . Commencement of a quiet title action can constitute both a repudiation and an offer of rescission. A cross complaint in that action for reasonable value of services performed amounts to an acceptance [*Mayo v. Pacific Project Consultants, Inc. (1969) 1 Cal. App. 3d 1013, 1018, 82 Cal. Rptr. 117]* .

[3] Oral Rescission of Written Agreement

Unless the contract being rescinded is one for the sale of goods governed by *Com. Code §§ 2101-2801*, and provides that it can only be rescinded in writing, an oral agreement to rescind is sufficient [*Sass v. Hank (1951) 108 Cal. App. 2d 207, 215, 238 P.2d 652* ; *Com. Code § 2209(2)*; *but see Com. Code § 2209(4)* (oral rescission agreement may operate as waiver)]. An oral agreement for rescission of a written contract is sufficient even when the underlying contract is within the statute of frauds [*Hastings v. Matlock (1985) 171 Cal. App. 3d 826, 837, 217 Cal. Rptr. 856]* . An oral agreement for mutual rescission may be specifically enforced [*see Hastings v. Matlock (1985) 171 Cal. App. 3d 826, 840-842, 217 Cal. Rptr. 856* : for a complaint for specific performance, *see* Ch. 528, *Specific Performance*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawFormationOffersGeneral OverviewContracts LawPerformanceFailure of ConsiderationContracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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§ 490.16 Unilateral Rescission for Cause

[1] Grounds

The grounds for rescission are set forth in *Civ. Code § 1689*, discussed *below*.

[2] Failure of Consent

A contract requires that the consent of the parties be free, mutual, and communicated by each to the other [*Civ. Code § 1565*]. Consent that is not free is nevertheless not absolutely void, but provides a basis for rescission [*Civ. Code §§ 1566, 1689(b)(7)*]. Thus, a party to a contract may rescind the contract if his or her consent, or that of any party jointly contracting with him or her, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he or she rescinds, or of any party jointly interested with that party [*Civ. Code § 1689(b)(1)*; *see, e.g., Harris v. Rudin, Richman & Appel (2002) 95 Cal. App. 4th 1332, 1339, 116 Cal. Rptr. 2d 552* (reversing summary judgment for plaintiff because defendants raised triable issues of fact as to whether they were entitled to rescind settlement agreement based on mutual mistake of fact or law)]. Acts and omissions constituting duress, menace, fraud, undue influence, and mistake that vitiate consent are defined by *Civ. Code §§ 1567-1584*, and are discussed in Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* . Forms for allegations regarding the various bases for failureof consent are contained in that chapter, and may be used in conjunction with § 490.61 of this chapter.

[3] Failure of Consideration

[a] In General

A party to a contract may rescind the contract if the consideration for his or her obligation:

- Fails, in whole or in part, through the fault of the party against whom he or she rescinds [*Civ. Code § 1689(b)(2)*];

- Becomes entirely void from any cause [*Civ. Code § 1689(b)(3)*]; or

- Before it is rendered to him or her, fails in a material respect from any cause [*Civ. Code § 1689(b)(4)*].

Partial failure of consideration under *Civ. Code § 1689(b)(2)* must be material in order to provide the basis for rescission [*Wyler v. Feuer (1978) 85 Cal. App. 3d 392, 403-404, 149 Cal. Rptr. 626* ; *Crofoot Lumber, Inc. v. Thompson (1958) 163 Cal. App. 2d 324, 332-333, 329 P.2d 302]* . Breach by nonperformance without repudiation supports rescission only if it is so material that it goes to the essence of the contract. It must be a breach that would discharge the rescinding party from any further obligations on his or her part. Failure of consideration is material if it will render it impossible for the rescinding party to perform or will frus trate the whole purpose of the contract. Failure of consideration is immaterial if it is only of minor importance, does not go to the root of the matter, and can be readily compensated for by damages [*Fountain v. Semi-Tropic L. & W. Co. (1893) 99 Cal. 677, 680-681, 34 P. 497* ; *Crofoot Lumber, Inc. v. Thompson (1958) 163 Cal. App. 2d 324, 332-333, 329 P.2d 302]* . A willful default may be a material failure even though no economic loss ensues [*Coleman v. Mora (1968) 263 Cal. App. 2d 137, 150, 69 Cal. Rptr. 166* ; *Wilson v. Corrugated Kraft Containers (1953) 117 Cal. App. 2d 691, 697, 256 P.2d 1012]* . Breach of a requirements contract by purchasing from outside sources is an example of such a willful, material breach that is not vitiated by the ability of the injured party to sell the excess elsewhere [*Wilson v. Corrugated Kraft Containers (1953) 117 Cal. App. 2d 691, 696-697, 256 P.2d 1012]* .

The party against whom the contract is rescinded need not have been the cause of the failure of consideration contemplated by *Civ. Code § 1689(b)(4)* in order for rescission to be available. Failure of consideration from any cause includes failure of consideration on account of acts of third parties. Even though a defendant in such a situation is totally without fault, he or she will still have to return any consideration received from the plaintiff [*Nelson v. Sperling (1969) 270 Cal. App. 2d 194, 195, 76 Cal. Rptr. 481* (manufacturer failed to deliver home defendant sold to plaintiff)].

If a party gets all the consideration he or she bargained for, the fact that it proves worthless or of little value because of an unexpected occurrence, does not constitute a failure of consideration or ground for rescission [*Fox v. Ehrmantraut (1980) 28 Cal. 3d 127, 137, 167 Cal. Rptr. 595, 615 P.2d 1383* ; *Schultz v. County of Contra Costa (1984) 157 Cal. App. 3d 242, 247-248, 203 Cal. Rptr. 760* (conveyance of undevelopable property); *Konecko v. Konecko (1958) 164 Cal. App. 2d 249, 253, 330 P.2d 393* (death of wife as not ground for rescission of property settlement agreement)].

For a form of complaint for relief based on rescission on the ground of failure of consideration, see *§ 490.62*. For further discussion of failure of consideration, see Ch. 140, *Contracts* .

[b] Failure to Pay Money

Failure to pay money is often a breach that will not justify rescission, especially failure to make installment payments, be cause it is a breach that can be compensated by damages [see *Walker v. Harbor Business Blocks Co. (1919) 181 Cal. 773, 780, 186 P. 356* ; *Murphy v. Sheftel (1932) 121 Cal. App. 533, 540, 9 P.2d 568]* . For failure to pay to justify rescission, it must amount to a breach that is material enough to discharge the injured party from further performance. Thus, failure of a producer to pay an actor the weekly salary stipulated by their contract was material enough to give the actor the election to terminate the contract under *Lab. Code § 2925*, as well as to recover accrued salary to the date he elected to declare the termination [*Warner Bros. Pictures, Inc. v. Bumgarner (1961) 197 Cal. App. 2d 331, 350, 17 Cal. Rptr. 171* (willful failure and refusal)]. Similarly, failure of an owner to make progress payments under a contruction contract is material enough to warrant rescission if it involves an extended or unreasonable delay, imposition of new and onerous conditions to payment, outright refusal, or total repudiation [*Porter v. Arrowhead Reservoir Co. (1893) 100 Cal. 500, 504, 35 P. 146* ; *Integrated, Inc. v. Alec Fergusson Electrical Contractor (1967) 250 Cal. App. 2d 287, 296-297, 58 Cal. Rptr. 503]* . In construction contracts, a material failure to make progress payments, in addition to entitling the contractor to rescind, entitles the contractor to recovery in quantum meruit for the reasonable value of services performed to the date of rescission [*Porter v. Arrowhead Reservoir Co. (1893) 100 Cal.*

500, 502, 35 P. 146 ; *Integrated, Inc. v. Alec Fergusson Electrical Contractor (1967) 250 Cal. App. 2d 287, 296, 58 Cal. Rptr. 503]* .

[i] Delay in Performance

Delay in performance is another failure of consideration that is often not material. Unless the contract declares time to be of the essence, performance within a reasonable time is sufficient and rescission cannot be granted for a slight delay. What is a reasonable time in any given situation is a question of fact [*Civ. Code § 1657*; *Baypoint Mortgage Corp. v. Crest Premium Real Estate etc. Trust (1985) 168 Cal. App. 3d 818, 825-826* al. Rptr. 531; *Palmquist v. Palmquist (1963) 212 Cal. App. 2d 322, 330-331, 27 Cal. Rptr. 744* (dismissal of action 11 days after settlement agreement as reasonable); but see *Fowler v. Ross (1982) 142 Cal. App. 3d 472, 478-478, 191 Cal. Rptr. 183* (no time of the essence clause; rescission upheld on notice given 52 days after date specified for verification of financing)]. Even if the time-essence provision gives a unilateral right of terminiation for failure to perform on time, if the parties by their conduct have waived it, the party seeking to rescind must first make demand for performance, notify the other party that the time provision is being reinstated, and allow a reasonable time after demand for performance [*Major-Blakeney Corp. v. Jenkins (1953) 121 Cal. App. 2d 325, 335-337, 263 P.2d 655* (termination pursuant to time-essence provision giving unilateral right of cancellation held proper after demand on June 29, when performance was seven weeks overdue, for performance by July 5)]. Even when time is declared to be of the essence, a slight delay will not support rescission if rescission would work a forfeiture, the default is not willful, grossly negligent, or a fraudulent breach of duty, and the injured party can be compensated by money [*Civ. Code § 3275* (relief from forfeiture); *Holiday Inns of America v. Knight (1969) 70 Cal. 2d 327, 329, 74 Cal. Rptr. 722, 450 P.2d 42* ; *Williams Plumbing Co. v. Sinsley (1975) 53 Cal. App. 3d 1027, 1031-1035, 126 Cal. Rptr. 345]* .

For further discussion of the time for performance, see Ch. 140, *Contracts* .

[ii] Impossibility or Commercial Frustration

The doctrine of commercial frustration is a species of failure of consideration, akin to the doctrine of impossibility. It operates when a not reasonably foreseeable supervening event totally or nearly totally destroys the value of counterperformance in a contract or lease [*Lloyd v. Murphy (1944) 25 Cal. 2d 48, 53-54, 153 P.2d 47* ; *Federal Leasing Consultants, Inc. v. Mitchell Lipsett Co. (1978) 150 Cal. Rptr. 82* (leased burglar alarm system forced to be rendered inoperable by federal injunction)]. For a form of complaint for relief based on rescission on the ground of failure of consideration, see *§ 490.62*. For discussion of impossibility and commercial frustation, see Ch. 140, *Contracts* .

[c] Contract Unlawful or Prejudicial to Public Interest

The ordinary rule is that a party to an illegal contract can neither recover damages for its breach nor, by rescinding the contract, recover the performance he or she rendered under the contract or its value [*Tiedje v. Aluminum Taper Milling Co. (1956) 46 Cal. 2d 450, 453-454, 296 P.2d 554* ; *Fong v. Miller (1951) 105 Cal. App. 2d 411, 413, 233 P.2d 606* ; *Rest Contracts 2d § 197*; for forms of affirmative defense based on illegality and conflict with public policy, see Ch. 140, *Contracts*]. This rule is, however, subject to many exceptions.

A contract contrary to public policy is not always void, nor is it universally true that it cannot be subject to rescission [*People ex rel Mosk v. Barenfeld (1962) 203 Cal. App. 2d 166, 181, 21 Cal. Rptr. 501]* . The extent of enforceability and the kind of remedy granted depend on factors including the particular policy of law transgressed, the kind of illegality and particular facts, whether the party claiming illegality would be unjustly enriched if the other party were denied recovery, and whether any forfeiture resulting from refusal to permit recovery would be harsh in proportion to the character and extent of the illegality. Relief may also involve restitution of money to either party under the contract or enforcement of an election to rescind by the party to be protected if he or she restores whatever he or she received under

the contract. Generally, all the consequences that attend a contract that is *malum in se* or contrary to public morals do not attend one that is only *malum prohibitum* [*Asdourian v. Araj (1985) 38 Cal. 3d 276, 291-294, 211 Cal. Rptr. 703, 696 P.2d 95* (allowing recovery to contractor under oral contract for home improvement despite statutory requirement that contract be in writing); *South Tahoe Gas Co. v. Hofmann Land Improvement Co. (1972) 25 Cal. App. 3d 750, 758-761, 102 Cal. Rptr. 286* (allowing recovery at reasonable rate under utility contract written at illegal rate); for further discussion, see Ch. 140, *Contracts*].

A party to a contract may rescind the contract (1) if the contract is unlawful for causes which do not appear in its terms or conditions, and the parties are not equally at fault [*Civ. Code § 1689(b)(5)*] or (2) if the public interest would be prejudiced by permitting the contract to stand [*Civ. Code § 1689(b)(6)*]. A contract is unlawful if its consideration or object is (1) contrary to an express provision of law, (2) contrary to the policy of express law, though not expressly prohibited, or (3) otherwise contrary to good morals [*Civ. Code § 1667*]. Whether a contract is illegal or contrary to public policy is a question of law to be determined from the circumstances of each particular case [*Jackson v. Rogers & Wells (1989) 210 Cal. App. 3d 336, 349-350, 258 Cal. Rptr. 454* ; *Kallen v. Delug (1984) 157 Cal. App. 3d 940, 951, 203 Cal. Rptr. 879* ; *Russell v. Soldinger (1976) 59 Cal. App. 3d 633, 642, 131 Cal. Rptr. 145]* . Although the cases rarely mention *Civ. Code § 1689(b)(5),(6),* two rules relating to rescission and restitution reflect application of the rules set forth in *Civ. Code § 1689(b)(5),(6)*. Under one rule, similar to *Civ. Code § 1689(b)(5),* rescission is granted merely because the parties are not equally at fault (*in pari delicto*) [*Tiedje v. Aluminum Taper Milling Co. (1956) 46 Cal. 2d 450, 454-455, 296 P.2d 554* ; *Smith v. Turner (1965) 238 Cal. App. 2d 141, 145-151, 47 Cal. Rptr. 582* (rescission and restitution of money paid for shares under unlawful preincorporation agreement); *Restatement (2d) of Contracts, § 198*]. Sometimes when this exception is applied, the additional factor of whether or not the contract is executed is taken into consideration. Rescission is allowed under this rationale when the contract is not fully executed and the party rescinding is less at fault. In such a case, it is considered the duty of the court in furtherance of justice to aid one not *in pari delicto,* though to someextent involved in the illegality, and to permit him or her to recover money paid on a contract as the circumstances of the case may require [*Murphy v. San Gabriel Mfg. Co. (1950) 99 Cal. App. 2d 365, 368-369, 222 P.2d 85* (seller rescinded sale of real property in violation of *Bus. & Prof. Code § 11012*)].Whether or not the parties are equally at fault is a question of fact. While even the innocent party is chargeable with knowledge of the law, if he or she has no duty to perform under the applicable law, he or she may assume the other party complied with the law [*Tiedje v. Aluminum Taper Milling Co. (1956) 46 Cal. 2d 450, 454-455, 296 P.2d 554]* .

A second exception provides that even when the parties are equally at fault, there is a period of time referred to as the *locus penitentiae* prior to performance or the accomplishment of the illegal object, during which either party may repent and have rescission [*Wassermann v. Sloss (1897) 117 Cal. 425, 428, 49 P. 566* ; *Glos v. McBride (1920) 47 Cal. App. 688, 690-691, 191 P. 67* (but restitution not allowed for value during portion of lease term prior to renunciation); *Restatement (2d) of Contracts, § 199*].

Another ground for rescission and restitution not addressed by *Civ. Code § 1689(b)* allows recovery when the parties were ignorant of the illegality at the time they entered into the contract [*Adams v. Heinsch (1948) 89 Cal. App. 2d 300, 302-305, 200 P.2d 796* (also on ground of mistake); *Brashears v. Giannini (1933) 131 Cal. App. 706, 709-711, 22 P.2d 47* ; *Restatement (2d) of Contracts, § 198*].

For a form of complaint for relief after rescission based on these grounds, see *§ 490.64*.

[d] Rescission of Participation in Chain Scheme

A participant in an endless chain scheme, as defined in *Penal Code § 327,* may rescind the contract on which the scheme is based, and may recover all consideration he or she paid pursuant to the scheme, less any amounts paid or consideration provided to him or her pursuant to the scheme [*Civ. Code § 1689.2*]. In such an action, the court may, on motion, award reasonable attorney's fees to a prevailing plaintiff [*Civ. Code § 1689.2*]. *§ 490.64* may be used with appropriate modifications to obtain relief after rescission based on these grounds.

[e] Contract Made Before Adjudication of Incompetency

A contract of a person who is of unsound mind but not totally without understanding, made before his or her incapacity has been judicially determined, may be rescinded [*Civ. Code §§ 39(a), 1689(b)(7)*]. It is not necessary that one be incompetent to enter any kind of contract; the test is whether or not the person could deal with the subject matter of the contract sought to be rescinded with a full understanding of his or her rights and the nature, purpose, and effect of what he or she did with respect to the particular transaction [*Walton v. Bank of California (1963) 218 Cal. App.2d 527, 541, 32 Cal. Rptr. 856* ; *Smalley v. Baker (1968) 262 Cal. App. 2d 824, 832, 69 Cal. Rptr. 521]* . Thus, the test of understanding varies from one contract to the next [*Smalley v. Baker (1968) 262 Cal. App. 2d 824, 832, 69 Cal. Rptr. 521]* . However, for purposes of rescission, there exists a rebuttable presumption affecting the burden of proof that a person is of unsound mind if the person is substantially unable to manage his or her own financial resources or resist fraud or undue influence [*Civ. Code § 39(b)*]. Substantial inability may not be proved solely by isolated incidents of negligence or imprudence [*Civ. Code § 39(b)*]. For further discussion and a form of affirmative defense based on *Civ. Code § 39*, see Ch. 140, *Contracts* . For a form of complaint for relief based on rescission on this ground, see *§ 490.63*.

[f] Creditor's Right to Rescind Novation

When a creditor has accepted the obligation of a third person, or an order on that person in satisfaction, the creditor may rescind the acceptance if the debtor prevents the third person from complying with the order or from fulfulling the obligation; or if, at the time the obligation or order is received, the third person is insolvent, and the fact of insolvency is unknown to the creditor, or if, before the creditor can with reasonable diligence present the order to the person on whom it is given, the third person becomes insolvent [*Civ. Code §§ 1533, 1689(b)(7)*]. This is an exception to the general rule that a novation extinguishes the original obligation, whether or not the obligation of the novation is performed [*see Alexander v. Angel (1951) 37 Cal. 2d 856, 862, 236 P.2d 561* (failure to perform novation did not revive original agreement)].

[g] Repudiation

A party to a contract may rescind the contract if the other party repudiates the contract with respect to a performance not yet due, the loss of which will substantially impair the value of the contract to the rescinding party [*see Civ. Code § 1689(b)(7)*, referring to former *Civ. Code § 1785* (repealed; *now see Com. Code § 2610*) as a ground for rescission]. The refusal of one party to perform an obligation that is a condition precedent or concurrent will not justify rescission if it is of minor importance or does not go to the root of the matter. A party injured by a refusal of minor importance cannot rescind, but must perform his or her obligations under the contract and seek compensation in damages [*Fountain v. Semi-Tropic L. & W. Co. (1893) 99 Cal. 677, 680, 34 P. 497* ; *see also § 490.62* and *§ 490.62[10]*]. Repudiation gives the injured party the election to treat the contract as rescinded and to recover on a quantum meruit basis the value of any services rendered as partial performance [*Oliver v. Campbell (1954) 43 Cal. 2d 298, 302, 273 P.2d 15]* .

A notice of rescission given without legal cause amounts to a repudiation [*Mayo v. Pacific Project Consultants, Inc. (1969) 1 Cal. App. 3d 1013,1017-1018, 82 Cal. Rptr. 117]* . Likewise, if one is bound to perform, conditioning an offer to perform on an unwarranted condition constitutes a repudiation [*Woody v. Bennett (1891) 88 Cal. 241, 243-244, 26 P. 117* ; *Loop Bldg. Co. v. DeCoo (1929) 97 Cal. App. 354, 364, 275 P. 881]* . An obligor's statement to the obligee indicating that the obligor would breach an important contractual promise, thereby substantially impairing the value of the contract, constitutes repudiation of the contract [*Mobil Oil Exploration & Producing Southeast, Inc. v. United States (2000) 530 U.S. 604, 120 S. Ct. 2423, 147 L.Ed. 2d 528, 534* (holding that plaintiffs were entitled to restitution whether or not repudiated contracts would have ultimately produced financial gain); *see Restatement (Second) of Contracts § 373*].

[h] Bailments

When a thing is let for a particular purpose and the hirer uses it for any other purpose, the hirer is liable to the letter for all damages resulting from the unauthorized use, or the letter may treat the contract as rescinded [*Civ. Code §§ 1689(b)(7), 1930*]. This type of bailment is discussed in *Ch. 93, Bailments, § 93.60* et seq.

[i] Principal's Rescission of Ratification

A principal may rescind a ratification made without such consent as is required for a contract, or with an imperfect knowledge of the material facts of the transaction ratified, but not otherwise [*Civ. Code §§ 1689(b)(7), 2314*; *see Civ. Code §§ 1565-1590* (consent to contract); *see generally* Ch. 427, *Principal and Agent*]. However, *Civ. Code § 2314* does not grant the right of rescission to a principal who has deliberately remained ignorant of certain material facts regarding the transaction ratified [*Hutchinson Co. v. Gould (1919) 180 Cal. 356, 358, 181 P. 651]* .

[j] Insurance Contracts

Civ. Code § 1689(b)(7) specifically incorporates the right of rescission granted by the following sections of the Insurance Code [*Civ. Code § 1689(b)(7)*]:

- Any party injured by a concealment, whether intentional or unintentional, is entitled to rescind insurance [*Ins. Code § 331*, discussed in Ch. 308, *Insurance* ,];

- An intentional and fraudulent omission, on the part of an insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind [*Ins. Code § 338*, discussed in Ch. 308, *Insurance* ,];

- Any party injured by a representation that is false in a material point, whether affirmative or promissory, is entitled to rescind the insurance contract from the time the representation becomes false [*Ins. Code § 359*, discussed in Ch. 308, *Insurance* ,];

- The violation of a material warranty or other material provision of a policy, on the part of either party thereto, entitles the other party to rescind [*Ins. Code § 447*, discussed in Ch. 308, *Insurance* ,];

- In marine insurance, if a representation by the insured is intentionally false in any respect, whether material or immaterial, the insurer may rescind the entire contract [*Ins. Code § 1904*; for discussion of marine insurance generally, see Ch. 308, *Insurance* ; *see also California Insurance Law & Practice, Ch. 44, Marine Insurance, § 44.06[2]* (Matthew Bender)];

- An insurer is entitled to rescind a contract of fire insurance on an alteration in the use or condition of the subject matter insured from that to which it is limited by the policy when the alteration is made without the consent of the insurer by means within the control of the insured, and increases the risk [*Ins. Code § 2030*; *see also California Insurance Law & Practice, Ch. 35, Property Insurance In General, § 35.12* (Matthew Bender)].

For a general form of affirmative defense based on rescission of an insurance contract, see *Ch. 308, Insurance, § 308.10* et seq. For more detailed coverage of rescission in the context of insurance policies, see *California Insurance Law & Practice, Ch. 8, The Insurance Contract, §§ 8.08, 8.09, 8.10[1]* (Matthew Bender).

[k] Contracts for Sale of Goods

[i] Applicable Law

Since 1931, *Civ. Code § 1689* has provided that a party to a contract may rescind it under the circumstances provided

for in former *Civ. Code § 1785* and *Civ. Code § 1789* [*see* Stats. 1931, ch. 1070, § 10, p 2260]. Former *Civ. Code § 1789* gave a buyer of goods the election to rescind in the event of the seller's breach of warranty [former *Civ. Code § 1789(1)(d)*]. Former *Civ. Code § 1785* gave a seller of goods the right to rescind when the goods had not been delivered and the buyer had repudiated the contract, manifested an inability to perform, or committed a material breach [former *Civ. Code § 1785*]. Both of those sections were repealed in 1963 and replaced by the California Commercial Code [*see* Stats. 1963, ch. 819].

Under the Commercial Code, the remedies of *Com. Code §§ 2101-2801* will be available if the transaction involves "goods" as defined in *Com. Code § 2105(1)*, which are all things (including specially manufactured goods) that are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities [*see Com. Code §§ 8101-8603*], and things in action. Goods also includes theunborn young of animals and growing crops and other identified things attached to realty as described in *Com. Code § 2107* [*Com. Code § 2105(1)*]. Unless the context otherwise requires, Division 2 applies to transactions in goods; those sections do not apply to any transaction which, although in the form of an unconditional contract to sell or a present sale, is intended to operate only as a security transaction.

Division 2 does not "impair or repeal" any statute regulating sales to consumers, farmers, or other specified classes of buyers [*Com. Code § 2102*]. This language in *Com. Code § 2102* does not actually exclude particular transactions from the coverage of Division 2. Thus, for example, the sale of an automobile from one dealer to another and the sale of that vehicle by the "buyer" dealer to a consumer are both subject to Division 2, although certain sections of the Vehicle Code and the Rees-Levering Act (*Civ. Code § 2981 et seq.*) also apply to the transactions [*English v. Ralph Williams Ford (1971) 17 Cal. App. 3d 1038, 1046, 95 Cal. Rptr. 501]* .

[ii] Commercial Code Rights and Remedies

In place of the right to rescind for breach of warranty, the Commercial Code established the right of revocation of acceptance of nonconforming goods if the nonconformance substantially impairs the value to the buyer [*Com. Code § 2608*]. Under *Com. Code § 2608*, the buyer need not elect between "revocation of acceptance" and damages, but may have both [*Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 14, 45 Cal. Rptr. 17, 403 P.2d 145* ; *see* Cal. Code Comment to *Com. Code § 2608*; *see also Com. Code §§ 2601-2607* (buyer's rights and duties regarding rejection of delivered goods prior to acceptance; definition and effect of acceptance)].

The rights of either party in the event of a repudiation with respect to a performance not yet due are governed by *Com. Code § 2610*, which allows resort to any remedy for breach [*see also Com. Code §§ 2703-2710* (seller's remedies); *Com. Code §§ 2711-2717* (buyer's remedies)]. The specific manifestation of inability to perform created by the buyer's insolvency is governed by *Com. Code § 2702*. Rights of the buyer in the event of the seller's insolvency are governed by *Com. Code § 2502*.

Under the Commerical Code, specific types of material breach or failure of consideration require that specific steps be taken by the injured party. For example, a buyer who rejects nonconforming goods on inspection before acceptance is required to follow the seller's instructions regarding those goods or to resell them [*Com. Code § 2603*]. The remedies provided are equally specific and generally include consequential damages [*see, e.g., Com. Code §§ 2711-2717* (buyer's remedies)]. In most instances, however, unlike the Civil Code rescission provisions applicable to other contracts, the Commercial Code remedies are cumulative and allow the equivalent of rescission, albeit sometimes under other names, as well as recovery of damages [*see Com. Code § 2721* (rescission as not barring, nor as inconsistent with, other remedies for fraud); *Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 14, 45 Cal. Rptr. 17, 403 P.2d 145* (no election between rescission and damages required on breach of warranty); *see also* U.C.C. and Cal. Code Comments to *Com. Code § 2703*].

If the transaction is governed by Division 2, remedies for material misrepresentation or fraud include all remedies

available under Division 2 for nonfraudulent breach, and neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods bars, or is to be deemed inconsistent with, a claim for damages or other remedy [*Com. Code § 2721*]. Since *Com. Code § 2714(2),(3)* provides that the measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount, and also provides for recovery of incidental and consequential damages in a proper case, the effect of *Com. Code § 2721* may be to change the "out-of-pocket" measure of damages for fraud set forth in *Civ. Code § 3343* to substitute or permit the "loss of bargain" rule under which the defrauded party is permitted to obtain the benefits he or she would have received if the representations had been true [*see Civ. Code § 3343*; *Com. Code §§ 2714, 2721*; *see also Com. Code § 2721*, Cal. Code Comment]. Unless the contrary intention clearly appears, expressions of "cancellation" or "rescission" of a contract or the like will not be construed as a renunciation or discharge of any claim in damages for an antecedent breach [*Com. Code § 2720*].

Although punitive damages ordinarily are not recoverable under the Commercial Code, they may be recovered if provided for by another statute [*Com. Code § 1305(a)*; *see Metowski v. Traid Corp. (1972) 28 Cal. App. 3d 332, 336-337, 104 Cal. Rptr. 599* (class action seeking punitive damages and stating causes of action for fraud and Commercial Code warranty claims)].

The remedies available under Division 2, other than those for breach of warranty, are discussed in Ch. 500, *Sales: Sales Under the Commercial Code* . Remedies for breach of warranty under *Com. Code §§ 2321(2), 2607, 2714, 2715, 2800, 2801*, and *8301 et seq.* are discussed in Ch. 502, *Sales: Warranties* .

[l] Transfer of Corporation Share Certificates

Since 1961, *Civ. Code § 1689(b)(7)* has provided that a party to a contract may rescind it under the circumstances provided for in former Corp. Code § 2470 [*see* Stats. 1961, ch. 589, § 1]. Former Corp. Code § 2470 was repealed in 1963 [*see* Stats. 1963, ch. 819, § 34]. It established grounds for rescission of transfer ofshare certificates.

Currently, various statutory provisions specifically provide a right of rescission to purchasers of corporate securities under specified circumstances. These statutes include *Corp. Code § 25501*, which authorizes rescission for violation of *Corp. Code § 25401*, which generally prohibits material misrepresentations in connection with the purchase or sale of securities, and *Com. Code § 8307*, which permits a purchaser of investment securities to rescind a transaction if the transferor refuses, within a reasonable time, to comply with the transferee's demand for proof of the transferor's authority to transfer the security or with any other requisite necessary to obtain registration of the transfer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsExpress ConditionsTime LimitationsContracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawPerformanceFailure of ConsiderationContracts LawPerformanceImpossibility of PerformanceGeneral OverviewContracts LawPerformanceImpossibility of PerformanceImpracticabilityContracts LawRemediesEquitable ReliefQuantum MeruitContracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawTypes of ContractsConstruction Contracts

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PART II. LEGAL BACKGROUND

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§ 490.17 Partial Rescission

Generally one must rescind all of the contract and cannot retain the rights under it that he or she deems desirable to have and rescind the remainder [*IMO Development Corp. v. Dow Corning Corp. (1982) 135 Cal. App. 3d 451, 458, 185 Cal. Rptr. 341]* . However, this rule is not controlling in the case of a severable or divisible contract. If the consideration for a contract is entire, the contract is entire and not divisible. If the consideration is apportioned, the contract may be regarded as severable. A contract may be severable as to some of its terms, or for certain purposes, but indivisible as to others [*Simmons v. California Institute of Technology (1949) 34 Cal. 2d 264, 275, 209 P.2d 581* (rescission of royalty agreement as to licensee but not as to manufacturer); *Merced County Mut. Fire Ins. Co. v. State of California (1991) 233 Cal. App. 3d 765, 775-776, 284 Cal. Rptr. 680* (additional insured endorsement severable from main policy and could be separately rescinded); *Howell v. Courtesy Chevrolet, Inc. (1971) 16 Cal. App. 3d 391, 404, 94 Cal. Rptr. 33* (rescission of garbage truck sales as to rubbish bodies that were to have been furnished by another company but were never mounted on trucks)]. If there is a showing that the parties intended to treat the contract as entire and that they would not have entered into it except on a clear understanding that the full object of the contract would be performed, the contract is not divisible [*IMO Development Corp. v. Dow Corning Corp. (1982) 135 Cal. App. 3d 451, 458-459, 185 Cal. Rptr. 341]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawTypes of ContractsDivisible Contracts

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43-490 California Forms of Pleading and Practice--Annotated § 490.18

§ 490.18 Rescission of Gifts

A gift can be rescinded if it was induced by fraud or material misrepresentation, whether committed by the donee or a third person, or by mistake as to a basic fact. The failure of the donee to reveal material facts when he or she knows that the donor is mistaken as to those facts is fraudulent nondisclosure. A mistake as to the identity or essential character of the gift or one that entails a frustration of the donor's purpose entitles the donor to restitution [*Earl v. Saks & Co (1951) 36 Cal. 2d 602, 609, 226 P.2d 340* ; *see also Restatement Restitution, §§ 26, 39* and Comments]. In one case, it was held that when the retailer and the donee both lied to a purchaser/donor about the price of a gift and the fact that the donee paid part of the price, the purchaser/donor was entitled to rescind both the purchase and the gift although no economic injury was suffered. The injury is in the alteration of the essential character of the transaction and to the donor's interest in making a free choice and exercising his or her own judgment in the transaction [*Earl v. Saks & Co (1951) 36 Cal. 2d 602, 609-613, 226 P.2d 340]* .

A gift may also be rescinded on the ground of undue influence [*see Estate of Bliss (1962) 199 Cal. App. 2d 630, 639-640, 18 Cal. Rptr. 821* (elements leading to presumption of undue influence); *McDonald v. Hewlett (1951) 102 Cal. App. 2d 680, 686, 228 P.2d 83]* .

For further discussion and forms relating to rescission of gifts, see Ch. 278, *Gifts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesRescission & RedhibitionGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGeneral OverviewEstate, Gift & Trust LawWill ContestsUndue InfluenceElements

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43-490 California Forms of Pleading and Practice--Annotated § 490.19

§ 490.19 Rescission of Third-Party Beneficiary Contracts

A third-party beneficiary contract may be rescinded by the parties just like any other contract at any time before the third-party beneficiary has accepted it, or a benefit under it, or changed his or her position in reliance on it [*see Civ. Code § 1559*; *R. J. Cardinal Co. v. Ritchie (1963) 218 Cal. App. 2d 124, 149-150, 32 Cal. Rptr. 545* ; *Griffin v. Williamson (1955) 137 Cal. App. 2d 308, 317-318, 290 P.2d 361* (no acceptance found)]. Even if the third-party beneficiary has accepted the contract for his or her benefit, rescission is still permissible if the third-party beneficiary had knowledge of the facts that provide the ground for rescission at the time he or she accepted the property. A third-party beneficiary who has notice of the possible defect in the underlying contract at the time he or she received the benefit must make restitution [*see Holmes v. Steele (1969) 269 Cal. App. 2d 675, 678-679, 75 Cal. Rptr. 216* (broker as third-party creditor beneficiary of real estate sales contract)]. However, a third-party beneficiary has no standing to rescind a contract [*Schauer v. Mandarin Gems of California, Inc. (2005) 125 Cal. App. 4th 949, 957-958, 23 Cal. Rptr. 3d 233]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawRemediesRestitutionContracts LawThird PartiesBeneficiariesGeneral Overview

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43-490 California Forms of Pleading and Practice--Annotated § 490.20

§ 490.20 Defenses to Rescission

[1] Executed Contract

Rescission is unavailable to one who has fully performed under the contract when the counterperformance owing is only money; however, full performance does not bar rescission if at least some of the return consideration is other than a liquidated debt [*Oliver v. Campbell (1954) 43 Cal. 2d 298, 306-307, 273 P.2d 15]* .

[2] "Rescinding" Party in Default

A party cannot unilaterally rescind if he or she is in material default of performance of a covenant or obligation on which the obligation the other party has failed to perform is dependent or that is concurrent to the obligation the other party has failed to perform or that affects the other party's performance or duty to perform [*Nelson v. Spence (1960) 182 Cal. App. 2d 493, 499, 6 Cal. Rptr. 312* ; *Joshua Tree T. Co. v. Joshua Tree L. Co. (1950) 100 Cal. App. 2d 590, 596, 224 P.2d 85]* . This rule will not prevent rescission if the default of the rescinding party is unrelated to the other party's obligation on which the asserted right of rescission is based [*American-Hawaiian Engineering & Constr. Co. v. Butler (1913) 165 Cal. 497, 516, 133 P. 280* ; *Integrated, Inc. v. Alec Fergusson Electrical Contractor (1967) 250 Cal. App. 2d 287, 298, 58 Cal. Rptr. 503]* . California's presumption against construing covenants is dependent, especially when the "rescinding" party's default is partial and can be fully compensated. If the party in default is entitled to rescind, its obligation to perform will be expunged by the rescission [*FDIC v. Air Florida System, Inc. (9th Cir. 1987) 822 F.2d 833, 841]* .

Moreover, a purchaser who has been defrauded may have rescission even though he or she is in default, because such a purchaser has a right to withhold payments once he or she learns of the grounds for rescission [*Kent v. Clark (1942) 20 Cal. 2d 779, 783, 128 P.2d 868* ; *Warfield v. Richey (1959) 167 Cal. App. 2d 93, 97-98, 334 P.2d 101]* .

[3] Waiver of Right to Rescind

When a party has full knowledge of the facts that would warrant rescission but nevertheless accepts and receives benefits under a contract, waiver of his or her right to rescind will be presumed [*Neet v. Holmes (1944) 25 Cal. 2d 447, 458, 154 P.2d 854* ; *Whitney Inv. Co. v. Westview Dev. Co. (1969) 273 Cal. App. 2d 594, 603, 78 Cal. Rptr. 302]* .

To support a claim of waiver, the conduct must be so inconsistent with an intent to enforce the contract as to induce a reasonable belief that the right to rescind has been relinquished [*Soon v. Beckman (1965) 234 Cal. App. 2d 33, 36, 44 Cal. Rptr. 190* ; *Howard J. White, Inc. v. Varian Associates (1960) 178 Cal. App. 2d 348, 355, 2 Cal. Rptr. 871]* . Waiver is a question of fact to be determined after consideration of all the circumstances of the particular case. Acceptance of rent accruing after a known default is a common example of waiver [*Soon v. Beckman (1965) 234 Cal. App. 2d 33, 36, 44 Cal. Rptr. 190]* . A spouse could not rescind a property settlement agreement on the ground that the other spouse delayed unreasonably in dismissing a separate maintenance action because, before the attempted rescission and after the dismissal had been filed, he continued to reap the benefits of that agreement by not making support payments as called for by an order in the action dismissed [*Palmquist v. Palmquist (1963) 27 Cal. Rptr. 744]* . Acceptance of later performance waives the right to rescind for failure of compliance with a time provision [*Leiter v. Eltinge (1966) 246 Cal. App. 2d 306, 317, 54 Cal. Rptr. 703]* . For discussion of waiver by delay, see *§ 490.20[5]*.

Acts by which the rescinding party preserves the subject matter in order to be able to restore it to the party against whom he or she rescinds will not amount to waiver. For instance, one can make payments on a note or mortgage after giving notice of rescission without waiving the right to rescind [*Hefferan v. Freebairn (1950) 34 Cal. 2d 715, 723, 214 P.2d 386* (payments made with intent to avoid default); *see Cameron v. Evans Securities Corp. (1931) 119 Cal. App. 164, 171, 6 P.2d 272* (payments made after discovery of fraud but before giving of notice, offer to restore)]. Payment of stock assessments does not necessarily waive the right to rescind a stock purchase [*Munson v. Fishburn (1920) 183 Cal. 206, 215, 190 P. 808]* .

Waiver is an affirmative defense that must be pleaded [*Calabrese v. Rexall Drug & Chemical Co. (1963) 218 Cal. App. 2d 774, 785, 32 Cal. Rptr. 665* ; for a form of affirmative defense of waiver, *see § 490.65*].

[4] Statute of Limitations

An action based on the rescission of a contract in writing is subject to a four-year limitation period that commences on the date on which the facts that entitle the aggrieved party to rescind occurred [*Code Civ. Proc. § 337(3)*; *Miller v. Bechtel Corp. (1983) 33 Cal. 3d 868, 873, 191 Cal. Rptr. 619, 663 P.2d 177* (referred to as limitation for rescission of written contract); *see Luna Records Corp., Inc. v. Alvarado (1991) 232 Cal. App. 3d 1023, 1026, 283 Cal. Rptr. 865* (parties had consented in writing to rescission; court and parties considered statute as beginning to run on date of written consent to rescission)].

If the ground for rescission is fraud or mistake, the time does not begin to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake [*but see Miller v. Bechtel Corp. (1983) 33 Cal. 3d 868, 873, 191 Cal. Rptr. 619, 663 P.2d 177* (action commenced in 1978 for rescission of marital settlement agreement based on misrepresentation of value of stock; statute commenced when spouse first had constructive notice and thus duty to inquire arose in 1971-1972, not with spouse's sale of stock in 1977); *Keidatz v. Albany (1952) 39 Cal. 2d 826, 829, 249 P.2d 264* (action for rescission for fraud filed one year after discovery as barred by laches)].

If the ground for rescission is misrepresentation under *Ins. Code § 359*, the time does not begin to run until the representation becomes false [*Code Civ. Proc. § 337(3)*].

If the claim for rescission is brought as a cross complaint in an action for breach of contract, the limitation period "relates back" to the time thecomplaint was filed; but, if no cross complaint is filed, the limitation period is not considered tolled or suspended while the breach of contract action is pending [*Luna Records Corp. v. Alvarado (1991) 232 Cal. App. 3d 1023, 1028-1031, 283 Cal. Rptr. 865]* . In *Luna Records*, plaintiff notified defendants that it had rescinded the contract for failure of consideration. Defendants consented to the rescission in writing on June 1, 1981. Defendants, however, never returned the consideration furnished by plaintiff, and commenced a breach of contract action against plaintiff on August 7, 1981. Plaintiff never filed an answer or a cross complaint in that action, which was dismissed on August 1, 1985, on the court's own motion for lack of prosecution. Plaintiff commenced an action for

rescission in July 1988, claiming that the statute of limitations was tolled during the pendency of the breach of contract action. The court of appeal held otherwise, making the distinction described above between "tolling" and relating back: it is the fact that the action is pending that triggers the relation-back doctrine and allows a defendant to file in that action a cross complaint that was viable when the complaint was filed. If the defendant makes no appearance and offers no defense or cross claim, there is simply nothing to relate back [*Luna Records Corp. v. Alvarado (1991) 232 Cal. App. 3d 1023, 1028, 283 Cal. Rptr. 865]* .

[5] Prejudicial Delay

Since September 15, 1961, a delay in giving notice of rescission or tendering restoration of benefits received does not bar relief based on rescission unless the delay has substantially prejudiced the other party [*Civ. Code § 1693*]. This is a reversal of prior case law that held that no prejudice had to be shown in order for laches to bar rescission [*Wilke v. Coinway, Inc. (1967) 257 Cal. App. 2d 126, 140, 64 Cal. Rptr. 845]* . Ordinarily, the defense of laches does not rest entirely on the lapse of time, as does a statute of limitations. Laches can be applied, even if any applicable limitation period has not run, if, in addition to mere showing of passive neglect or acquiescence in the acts complained of, other circumstances make the granting of relief inequitable [*Neet v. Holmes (1944) 25 Cal. 2d 447, 460, 154 P.2d 854* (acceptance of royalties under transfer of mining interests sought to be rescinded and fluctuations in value of mining interests in general as rendering rescission inequitable); *Joshua Tree T. Co. v. Joshua Tree L. Co. (1950) 100 Cal. App. 2d 590, 596-597, 224 P.2d 85* (plaintiff's own defaults that prevented defendant from doing anything with land that was the subject of the contract as providing equitable grounds for application of laches)].

Under prior law, a complaint was demurrable if it showed an unexplained delay between the discovery of the ground for rescission and the notice of rescission [*Williams v. Smith (1954) 127 Cal. App. 2d 607, 612, 274 P.2d 204]* . Since adoption of *Civ. Code § 1693*, however, a plaintiff seeking relief based on rescission need not establish promptness. The defendant must establish that he or she has been prejudiced by any delay. Prejudice is a question of fact to be determined from the particular circumstances of each case [*see Saret-Cook v. Gilbert, Kelly, Crowley & Jennett (1999) 74 Cal. App. 4th 1211, 1225-1227, 88 Cal. Rptr. 2d 732* (employee's delay in giving notice of rescission of settlement agreement resulted in substantial prejudice to employer); *In re Consol. Pretrial Proceedings in Air West (N.D. Cal. 1977) 436 F. Supp. 1281, 1290* (applying California law)]. Laches and waiver are sometimes pleaded or established together [*see, e.g., Neet v. Holmes (1944) 25 Cal. 2d 447, 458-461, 154 P.2d 854]* as are laches, waiver, and estoppel [*see, e.g., Wilson v. Beazley (1921) 186 Cal. 437, 441-442, 199 P. 772]* . Forms for affirmative defenses based on waiver, prejudicial delay, and estoppel by election of another remedy are *set forth in § 490.65 -490.67*, respectively.

[6] Substantive Statute or Policy Precludes Rescission

[a] Judicial Privilege

The judicial privilege of *Civ. Code § 47(b)* precludes rescission. In a federal diversity action turning on California law, one court concluded that participation in a government investigation was within the privilege and denied the purchaser of a $762,240 computer system rescission after it paid for the system and received a "dummy" system [*Caesar Electronics Inc. v. Andrews (9th Cir. 1990) 905 F.2d 287, 289-290]* . The manufacturer suspected that the system, which could be converted to military use and was therefore subject to strict export regulations, was going to be diverted to a purchaser other than the ostensible purchaser and notified the United States Customs Service of its suspicions. After receiving written assurances from the United States Departments of Justice and Commerce that it was acting with the consent of those departments, the manufacturer aided in the government's investigation, including giving false information to the purchaser. It manufactured a "dummy" system, which the government substituted for the functioning one immediately before its shipment to France. The purchaser had opened a letter of credit in a Swiss bank. On presentation of the shipping documents, the purchaser authorized transfer of the funds to the manufacturer. The purchaser, its agent, and key officers of each were charged with violations of United States export laws and French customs laws. The purchaser sued for rescission and damages for fraud and breach of fiduciary duty. All relief was

denied on the basis of *Civ. Code § 47(b)*. For further discussion of *Civ. Code § 47(b)*, see *Ch. 340, Libel and Slander, § 340.50* et seq.

[b] Health Care Service Plan Contracts

Health & Safety Code § 1389.3 proscribes post-claim underwriting [*see* [c], *below*] by a health care service plan and has the effect of precluding a health care service plan's rescission of a subscriber's contract because of the subscriber's material misrepresentation or omission, unless the health care service plan can demonstrate that the misrepresentation or omission was willful or that the health care service plan made reasonable efforts, as part of the pre-contract underwriting process, to ensure that the subscriber's application was accurate and complete [*Hailey v. California Physicians' Service (2007) 158 Cal. App. 4th 452, 459, 69 Cal. Rptr. 3d 789*].

[c] Insurance Contracts: Post-Claim Underwriting

Health & Safety Code § 1389.3 [*see* [b], *above*] proscribes a practice, common in the insurance business generally, known as post-claim underwriting. It is the practice, by an insurer, of waiting until a claim has been filed before diligently obtaining the relevant information and making the underwriting decision--something that should be done when the application for insurance is made and before the policy is issued. Inother words, the insurer postpones doing significant underwriting research (such as investigating a health care service plan subscriber's pre-contract health) until after a claim is made, so as to determine then whether to rescind the insurance contract on the ground of misrepresentations or omissions in the application. It is not clear whether post-claim underwriting would preclude rescission of an insurance contract in circumstances in which a statute like *Health & Safety Code § 1389.3* did not exist or could not be invoked [*cf.* *Hailey v. California Physicians' Service (2007) 158 Cal. App. 4th 452, 467-469, 69 Cal. Rptr. 3d 789* (discussing reasons to support that result in absence of applicable statute; but in this case, section 1389.3 did apply and provided sufficient basis for decision)].

It appears that *Ins. Code § 331* ("Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance.") and considerations of public policy can support the imposition of a no-rescission rule on an automobile insurer that engaged in post-claim underwriting in a particular case [*see* *Barrera v. State Farm Mut. Auto. Ins. Co. (1969) 71 Cal. 2d 659, 79 Cal. Rptr. 106, 456 P. 2d 674* ; *Hailey v. California Physicians' Service (2007) 158 Cal. App. 4th 452, 469-471, 69 Cal. Rptr. 3d 789* (effect of *Barrera* explained)].

If an insurance contract were wrongly rescinded by the insurer, in a case of post-claim underwriting, the insured probably would have a bad faith claim against the insurer [*see* *Hailey v. California Physicians' Service (2007) 158 Cal. App. 4th 452, 472-473, 69 Cal. Rptr. 3d 789*]. For discussion of bad faith claims against insurers, see *Ch. 308, Insurance, § 308.24*. The insured might also have a claim for intentional infliction of emotional distress [*see* *Hailey v. California Physicians' Service (2007) 158 Cal. App. 4th 452, 473-476, 69 Cal. Rptr. 3d 789*]. For discussion of that cause of action, see *Ch. 362, Mental Suffering and Emotional Distress, § 362.10*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewContracts LawContract Conditions & ProvisionsExpress ConditionsTime LimitationsContracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 490.21 Notice of Rescission and Offer to Restore Consideration

[1] Requirements

Subject to *Civ. Code § 1693, see § 490.20[5]*, a party seeking rescission must, promptly on discovering the facts that entitle him or her to rescind if he or she is free from duress, menace, undue influence, or disability andis aware of his or her right to rescind, give notice of rescission to the party as to whom he or she rescinds and restore to the other party everything of value that he or she has received from that party under the contract or offer to restore everything received on condition that the other party do the same, unless the other party is unable to do so or positively refuses to do so [*Civ. Code § 1691*]. When notice of rescission has not otherwise been given or an offer to restore the benefits received under the contract has not otherwise been made, service of a pleading in an action or proceeding that seeks relief based on rescission is deemed notice or an offer to restore or both [*Civ. Code § 1691*].

It is not necessary that the notice of rescission be formal and explicit; a notice is sufficient if it clearly shows the intention of the person rescinding to consider the contract at an end [*Hull v. Ray (1930) 211 Cal. 164, 167-168, 294 P. 700* ; *Wilson v. Lewis (1980) 106 Cal. App. 3d 802, 809, 165 Cal. Rptr. 396]* . Thus, notice of rescission need not state the grounds relied on. One may even justify an asserted rescission by proving that at the time there was adequate cause although it did not become known to the rescinding party until after the asserted rescission [*Earl v. Saks & Co. (1951) 36 Cal. 2d 602, 609, 226 P.2d 340* ; *Wilson v. Lewis (1980) 106 Cal. App. 3d 802, 809, 165 Cal. Rptr. 396]* . For example, a seller's oral rescission of a contract for the sale of real property was effective although she did not learn of the failure of consideration providing the ground for rescission until later [*see Wilson v. Lewis (1980) 106 Cal. App. 3d 802, 809-810, 165 Cal. Rptr. 396]* .

[2] Restoration or Offer to Restore Excused

If the rescinding party has not received anything of value, no offer to restore is necessary [*Orton v. Privett (1927) 202 Cal. 754, 757, 262 P. 713* (total failure of consideration); *Realty Co. of America v. Burton (1958) 160 Cal. App. 2d 178, 195-196, 325 P.2d 171]* . For example, when plaintiffs, owners of an oil and gas lease, hired defendants to drill a well to a depth of 5,000 feet, and defendants abandoned the work after drilling a crooked well to a depth of 2,111 feet, leaving their equipment cemented to the well and over it, making other drilling operations impossible, plaintiffs had received nothing of value and were not required to make restoration [*Modoc Mineral & Oil Co. v. Cal-Vada Drilling*

etc. Co. (1965) 236 Cal. App. 2d 868, 873-874, 46 Cal. Rptr. 508] . No offer of restoration is necessary when the plaintiff would be entitled to whatever would be restored in any event. This rule applies after rescission based on breach of contract when plaintiff has rendered services in part performance. Because such a plaintiff would be entitled to the reasonable value of those services, payments made under the contract before breach need not be restored [*Oliver v. Campbell (1954) 43 Cal. 2d 298, 306, 273 P.2d 15* ; *Hil-Mac Corp. v. Mendo Wood Products, Inc. (1965) 235 Cal. App. 2d 526, 530, 45 Cal. Rptr. 396]* . Nor is an offer to restore necessary when the transactions between the parties are so complicated that full judicial action or an accounting is necessary to determine their respective rights [*California etc. Co. v. Schiappa-Pietra (1907) 151 Cal. 732, 739-742, 91 P. 593* ; *Klein v. Farmer (1945) 70 Cal. App. 2d 51, 61-62, 160 P.2d 30]* .

No offer to restore is necessary when, because of no fault of the rescinding party, restoration cannot be made [*Carruth v. Fritch (1950) 36 Cal. 2d 426, 430-431, 224 P.2d 702* (defendant's fraud); *Stegeman v. Vandeventer (1943) 57 Cal. App. 2d 753, 760-762, 135 P.2d 186* (same)]. When the rescinding party seeks return of the specific thing with which he or she has parted, as opposed to the value of it, no offer to restore need be made prior to commencement of the action. In an action for relief based on rescission, the court can condition return of the specific property on return of the consideration received by the rescinding party [*see Civ. Code § 1692* (rescinding party may recover thing parted with); *Alder v. Drudis (1947) 30 Cal. 2d 372, 384, 182 P.2d 195* (rescinding party sought return of models of invention)]. Failure to make an offer of restoration does not bar recovery if the court can fashion a decree that adjusts the equities between parties [*Alder v. Drudis (1947) 30 Cal. 2d 372, 384-385, 182 P.2d 195* ; *Lobdell v. Miller (1952) 114 Cal. App. 2d 328, 344, 250 P.2d 357* (status quo as not required to be exactly reproduced)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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43-490 California Forms of Pleading and Practice--Annotated § 490.22

§ 490.22 Judicial Enforcement of Rescission

[1] By Action or as Defense

The party seeking rescission may begin either by giving notice of rescission and, if necessary, restoring or offering to restore any benefits he or she received under the contract, or by instituting an action for relief based on rescission [*see Civ. Code § 1691* (service of pleading in action for relief based on rescission deemed notice and offer to restore)]. If the rescinding party has not restored or offered to restore anything he or she received under the contract before commencing suit, he or she will have to preserve anything received by him or her during the pendency of the action so that it can be returned [*see Prichard v. Reitz (1986) 178 Cal. App. 3d 465, 467-469, 223 Cal. Rptr. 734* (rescission of real property sale as unavailable after purchasers demolished house with defective foundation, believing that was only way to correct defect)]. A rescinding party who gives notice of rescission and restores or offers to restore benefits does not have to commence an action for additional relief based on rescission, but may wait to see if the other party insists on performance. If the party against whom the contract was rescinded insists on performance and sues the rescinding party, the rescinding party then can assert the rescission and seek relief based on the rescission by way of defense and/or cross complaint [*Civ. Code § 1692*; for forms of affirmative defense based on rescission, *see* Ch. 140, *Contracts*].

[2] Nature of Action

Prior to 1961, a party seeking to rescind a contract had two options. He or she could invoke the power of a court of equity to effect a rescission that had not previously been made [*see* former *Civ. Code §§ 3406-3408*]; or, he or she could effect "unilateral" rescission as provided in *Civ. Code §§ 1688-1691*, going into court based on a prior out-of-court rescission if met with a reluctant response from the party as to whom the contract was rescinded. Since 1961, the rescinding party has been able to seek any form of relief warranted by the situation, whether legal or equitable in nature in an action or cross action. The fusing of the procedures available under prior law did not eradicate the substantial differences in the underlying procedures. Now, the right to a jury trial and the court in which the action must be brought are determined by the nature of the substantive relief requested [*Runyan v. Pacific Air Industries, Inc. (1970) 2 Cal. 3d 304, 311-313, 85 Cal. Rptr. 138, 466 P.2d 682]* .

Under prior law, if a party sought the legal remedy (court enforcement of an out-of-court rescission), the court could not award any consequential damages, but was limited to restoration of the consideration received by the defendant [

Runyan v. Pacific Air Industries, Inc. (1970) 2 Cal. 3d 304, 314, 85 Cal. Rptr. 138, 466 P.2d 682 ; *Philpott v. Superior Court (1934) 1 Cal. 2d 512, 518, 36 P.2d 635]* . The present statute, like the former equitable remedy, authorizes the court to provide the aggrieved party complete relief and to otherwise adjust the equities between the parties [*Civ. Code § 1692*; *Runyan v. Pacific Air Industries, Inc. (1970) 2 Cal. 3d 304, 314-318, 85 Cal. Rptr. 138, 466 P.2d 682]* .

[3] Form of Action

Relief based on rescission may seek only money, or it may take the form of an action for declaratory relief or one for claim and delivery [*Civ. Code § 1692*; *see, e.g., City of Torrance v. Castner (1975) 46 Cal. App. 3d 76, 77-78, 83, 120 Cal. Rptr. 23* (setting aside sale by purchaser at execution sale; judgment debtor did not own property on which levy was made); *but see Alder v. Drudis (1947) 30 Cal. 2d 372, 384-385, 182 P.2d 195* (judgment for plaintiff in action for claim and delivery as not proper unless conditioned on plaintiff's restoration of benefits received under rescinded contracts); *see* Ch. 182, *Declaratory Relief* , Ch. 119, *Claim and Delivery*].

Imposition of a constructive trust on the consideration paid by the plaintiff is another possible way of implementing relief following rescission. It is especially useful when the consideration paid by plaintiff has reaped profits or dividends or secondary rights and is often coupled with a request for an accounting of those profits [*see Neet v. Holmes (1944) 25 Cal. 2d 447, 455, 461-468, 154 P.2d 854* (reversing sustaining of demurrer); *see* Chs. 561, *Trusts: Constructive Trusts* and 562, *Resulting Trusts*].

A common count for money had and received is also appropriate, based on the implied promise of restitution arising after rescission [*Runyan v. Pacific Air Industries, Inc. (1970) 2 Cal. 3d 304, 312, 85 Cal. Rptr. 138, 466 P.2d 682* ; *Philpott v. Superior Court (1934) 1 Cal. 2d 512, 523-526, 36 P.2d 635* ; *see* Ch. 121, *Common Counts*].

Quiet title may be a proper procedural alternative in some instances. For instance if a vendee fails to make any payments, the vendor is entitled to rescission on the ground of failure of consideration. If such a vendee refuses to comply with a demand by the vendor for rescission and return of the deed, the vendor is entitled to have his or her title quieted [*J. R. Garrett Co. v. States (1935) 3 Cal. 2d 379, 383-384, 44 P.2d 538]* . Commencement of a quiet title action after sending notice of rescission may amount to an offer of rescission. In that instance, a cross complaint for the reasonable value of services rendered amounts to an acceptance of the offer [*Mayo v. Pacific Project Consultants, Inc. (1969) 1 Cal. App. 3d 1013, 1018, 82 Cal. Rptr. 117* ; *see* Ch. 482, *Quieting Title*]. A vendor's retaking possession and commencing a quiet title action without offering to restore excess payments to the purchaser does not amount to rescission or an offer of rescission [*Gantner v. Johnson (1969) 274 Cal. App. 2d 869, 875, 79 Cal. Rptr. 381]* .

Legal Topics:

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Volume 43: Receivers thru Rewards-Chs. 486-499
Chapter 490 RESCISSION AND RESTITUTION
PART II. LEGAL BACKGROUND

43-490 California Forms of Pleading and Practice--Annotated § 490.23

§ 490.23 Recovery by Rescinding Party

[1] In General

When a contract has been rescinded in whole or in part, any party to the contract may seek relief based on rescission by bringing an action to recover any money or thing owing to him or her by the other party to the contract as a consequence of the rescission or for any other relief to which he or she may be entitled under the circumstances [*Civ. Code § 1692*; *see Alder v. Drudis (1947) 30 Cal. 2d 372, 384-385, 182 P.2d 195* (recovery of specific property)]. Rescission may also be asserted as an affirmative defense to an action on the contract [*Civ. Code § 1692*; for a form of affirmative defense based on rescission, *see* Ch. 140, *Contracts*].

If the relief sought by a plaintiff based on rescission cannot be awarded because rescission has not in fact occurred, the court may grant any party to the action any relief to which he or she is entitled under the circumstances [*Civ. Code § 1692*; *see, e.g., Walters v. Marler (1978) 83 Cal. App. 3d 1, 16, 147 Cal. Rptr. 655]* .

[2] Restitution and Consequential Damages

[a] Recoverable

A claim for damages is not inconsistent with a claim for relief based on rescission. The aggrieved party is entitled to complete relief, includingrestitution of any benefits conferred by him or her as a result of the transaction and any consequential damages to which he or she is entitled. However, duplicate recovery or inconsistent items of recovery are not permitted [*Civ. Code § 1692*; *see, e.g., Jahn v. Brickey (1985) 168 Cal. App. 3d 399, 406, 214 Cal. Rptr. 119* (seller's loss on sale seller rescinded disallowed by trial court as duplicative; not contested on appeal)]. Some courts have used *Civ. Code § 1692* to allow damages for fraud as well as consequential damages required to make the rescinding party whole [*Jahn v. Brickey (1985) 168 Cal. App. 3d 399, 406-407, 214 Cal. Rptr. 119* (consequential damages after rescission and emotional distress damages for fraud and breach of fiduciary duty relating to rescinded contract as not inconsistent)], whereas others have adhered to the rule applicable under prior law, requiring the rescinding party to elect between damages for fraud and rescissionary relief [*Whistler v. Ondulando Highlands Corp. (1970) 13 Cal. App. 3d 108, 118, 91 Cal. Rptr. 879]* .

Restitution is discretionary with the court and is not required even when rescission is ordered. Before restitution can be ordered, it must be determined that the party seeking restitution has conferred a benefit or something of economic value on the other party [*Ogden Martin Systems v. San Bernardino County (9th Cir. 1991) 932 F.2d 1284, 1287* (applying California law and finding that environmental impact report compiled by contractor at cost of $3.5 million amounted to benefit conferred on county)]. In a case in which plaintiffs sought restitution after the federal government repudiated their contracts, the United States Supreme Court held that plaintiffs were entitled to restitution whether or not the repudiated contracts would have ultimately produced financial gain to plaintiffs [*Mobil Oil Exploration & Producing Southeast, Inc. v. United States (2000) 530 U.S. 604, 120 S. Ct. 2423, 147 L.Ed. 2d 528, 543-544]* .

[b] Examples of Consequential Damages

The consequential damages recoverable vary widely from case to case. For example, a vendee of real property can recover any portion of the purchase price paid, plus the value of any improvements he or she made to the property, less the reasonable rental value of the land while he or she had possession [*Kent v. Clark (1942) 20 Cal. 2d 779, 785-786, 128 P.2d 868* ; *see Whistler v. Ondulando Highlands Corp. (1970) 13 Cal. App. 3d 108, 115, 91 Cal. Rptr. 879* (calculation in findings included improvements, loan payments, moving costs, downpayment, less offset for use of house)]. A rescinding vendee can also recover any payments made on a mortgage placed on the property by the vendor [*Arthur v. Graham (1923) 64 Cal. App. 608, 612, 222 P. 371]* . A seller who rescinds a sale of personal property may recover the reasonable value of the use of the property during the time the purchaser had possession [*Vice v. Thacker (1947) 30 Cal. 2d 84, 92, 180 P.2d 4* ; *see Gentry v. Kelley Kar Co. (1961) 193 Cal. App. 2d 324, 337, 14 Cal. Rptr. 121* (seller cannot omit evidence of value of use and base award on depreciation during time purchaser had possession); *see also Berge v. International Harvester Co. (1983) 142 Cal. App. 3d 152, 163, 190 Cal. Rptr. 815* (buyer's award of restitution and lost profits were offset by reasonable rental value of item purchased prior to repossession by seller)].

The purchaser of a franchise who gave up his former employment to operate the franchise and later rescinded that transaction was entitled, in addition to the return of the franchise fee, to consequential damages including loss of income from the date the service area contract was signed to the date of the notice of rescission at the rate of his former salary, plus his training and operating expenses, less the gross income from the franchise operation [*Runyan v. Pacific Air Industries, Inc. (1970) 2 Cal. 3d 304, 308 n. 3, 318-319, 85 Cal. Rptr. 138, 466 P.2d 682]* . Consequential damages recoverable by a lender on rescission of a fraudulently induced loan secured by a second deed of trust include amounts advanced for payments on the first deed of trust and for maintenance of the property taken back in foreclosure, as well as costs and attorney's fees expended for the appointment of a receiver in accordance with a trust deed provision, net of deductions for rentals received [*Kass v. Weber (1968) 261 Cal. App. 2d 417, 420 n.2, 423-424, 67 Cal. Rptr. 876]* .

Towing charges and rental expense for a substitute vehicle are proper elements of consequential damages on rescission of a vehicle conditional sale contract [*Leaf v. Phil Rauch, Inc. (1975) 47 Cal. App. 3d 371, 376, 120 Cal. Rptr. 749]* .

After rescission of an insurance contract, the insured is entitled to recover the premiums paid and whatever else may be required to restore the insured to the *status quo ante* as though the insurance contract had never existed [*Akin v. Certain Underwriters at Lloyd's London (2006) 140 Cal. App. 4th 291, 298, 44 Cal. Rptr. 3d 284]* .

[3] Emotional Distress

The case law is inconsistent with respect to whether damages for emotional distress can be recovered as a form of consequential damages under *Civ. Code § 1692*. They have been denied under both *Civ. Code § 1692* and *Civ. Code § 3343* if rescission was granted on the ground of undue influence or fraud [*In re Marriage of McNeill (1984) 160 Cal. App. 3d 548, 559, 206 Cal. Rptr. 641* ; *O'Neil v. Spillane (1975) 45 Cal. App. 3d 147, 158-159, 119 Cal. Rptr. 245]* . Damages for emotional distress have been sustained on the theory that plaintiff had also prevailed on tort theories [*Jahn v. Brickey (1985) 168 Cal. App. 3d 399, 406-407, 214 Cal. Rptr. 119* (court's finding that rescission was available did not require plaintiff to elect between rescisssionary relief and tort remedies); *see Erlich v. Menezes (1999) 21 Cal.*

4th 543, 551-554, 87 Cal. Rptr. 2d 886, 981 P.2d 978 (discussing when breach of contract allows recovery of tort damagesincluding emotional distress); *see also* discussion § 490.42[2]].

Damages for emotional distress are not recoverable as consequential damages for breach of contract, subject to a narrow exception when emotional tranquility is the contract's essence [*see Erlich v. Menezes (1999) 21 Cal. 4th 543, 558-560, 87 Cal. Rptr. 2d 886, 981 P.2d 978* (recognizing exception, but declining to extend it to action regarding home constructiondefect)]. For further discussion of the availability of damages for emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress* .

[4] Interest

In an action for relief based on rescission of contract, since right to the repayment of moneys paid under the contract is fixed by the rescission, interest on those moneys is recoverable from the date of rescission [*Potter v. Contra Costa Realty Co. (1934) 220 Cal. 31, 34, 29 P.2d 189* ; *Leaf v. Phil Rauch, Inc. (1975) 47 Cal. App. 3d 371, 376, 120 Cal. Rptr. 749]* . When the elements of consequential damages are certain, interest on them is also recoverable from the date of rescission. When the party against whom the rescission is made is entitled to an offset, for example, the reasonable value of the use of the subject matter of the contract, interest is calculated on the rescinding party's net recovery [*Leaf v. Phil Rauch, Inc. (1975) 47 Cal. App. 3d 371, 376-377, 120 Cal. Rptr. 749]* .

[5] Punitive Damages

When defendant's conduct meets the requirements of *Civ. Code § 3294(a)*--that is, when plaintiff has established by clear and convincing evidence that the defendant acted with malice, fraud, or oppression--punitive damages are awardable in a rescission action. Punitive damages cannot be awarded under *Civ. Code § 3294(a)* except in addition to actual damages. This actual damage requirement is satisfied in a rescission action by plaintiff's recovery in the form of specific restitution [*see Douglas v. Ostermeier (1991) 1 Cal. App. 4th 729, 750, 2 Cal. Rptr. 2d 594* (although plaintiffs recovered $10,000 on related fraud cause of action, substantial portion of money returned to them on rescission count was net monetary award to them)]. Recovery of money damages is not necessary [*In re Marriage of McNeill (1984) 160 Cal. App. 3d 548, 561, 206 Cal. Rptr. 641* ; *Millar v. James (1967) 254 Cal. App. 2d 530, 533, 62 Cal. Rptr. 335]* .

[6] Attorney's Fees

Although a contract is extinguished by its rescission, an action for relief based on rescission involves the contract within the meaning of *Civ. Code § 1717*. Thus, if the contract rescinded contained a provision for attorney's fees that did not limit its operation to particular types of actions on the contract, attorney's fees are recoverable in an action for relief based on rescission [*Hastings v. Matlock (1985) 171 Cal. App. 3d 826, 840-842, 217 Cal. Rptr. 856* ; *Leaf v. Phil Rauch, Inc. (1975) 47 Cal. App. 3d 371, 377-379, 120 Cal. Rptr. 749]* . In addition, if the contract rescinded is governed by the Unruh Act (*Civ. Code § 1801 et seq.*) or the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*), *Civ. Code § 1811.1* or *Civ. Code § 2983.4* provides the basis for recovery of attorney's fees in an action for relief based on rescission [*see Morgan v. Reasor Corp.(1968) 69 Cal. 2d 881, 896-897, 73 Cal. Rptr. 398, 447 P.2d 638 (Unruh)* ; *Leaf v. Phil Rauch, Inc. (1975) 47 Cal. App. 3d 371, 378-379, 120 Cal. Rptr. 749 (Rees-Levering)* ; for discussion and forms relating to rescission of installment sales contracts governed by the Unruh Act, *see* Ch. 501, *Sales: Retail Installment Sales* ; for discussion and forms relating to rescission of motor vehicle conditional sales contracts, *see* Ch. 89, *Automobiles: Actions Involving Defects and Repairs*].

Also, as discussed in *§ 490.23[2][b]*, attorney's fees in other litigation reasonably required to protect the party's interests may be recovered as consequential damages [*Kass v. Weber (1968) 261 Cal. App. 2d 417, 423-424, 67 Cal. Rptr. 876]* .

[7] Attachment Available

Attachment is available to one seeking restitution based on rescission because the basis of recovery is the implied contract for repayment [*see Code Civ. Proc. § 483.010(a)* (attachment available in action on implied contract when more than $500 is involved); *Landry v. Marshall (1966) 243 Cal. App. 2d 170, 177-178, 52 Cal. Rptr. 119* ; *Modoc Mineral & Oil Co. v. Cal-Vada Drilling etc. Co. (1965) 236 Cal. App. 2d 868, 875, 46 Cal. Rptr. 508]* . Attachment is a positive act in pursuit of a contractual right inconsistent with the right to pursue an action for tort damages, but it does not amount to an election to pursue damages for breach of contract, which would bar rescission [*Modoc Mineral & Oil Co. v. Cal-Vada Drilling etc. Co. (1965) 236 Cal. App. 2d 868, 874-875, 46 Cal. Rptr. 508]* . For further discussion and forms relating to attachment procedures, see Ch. 62, *Attachment* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 490.24 Damages or Offsets Allowed to Defendant

In an action for relief based on rescission, the court may require the party to whom relief is granted to make any compensation to the other that justice may require and may otherwise adjust the equities between the parties [*Civ. Code § 1692*]. Thus, when a purchaser rescinds a sale of real or personal property, the seller is ordinarily entitled to payment or credit for the value of the property during the time the purchaser had possession [*Kent v. Clark (1942) 20 Cal. 2d 779, 785-786, 128 P.2d 868* (real property)]. The burden of proof as to the value of use or rental value is on the seller [*McCoy v. West (1977) 70 Cal. App. 3d 295, 302, 138 Cal. Rptr. 660* ; *Gentry v. Kelley Kar Co. (1961) 193 Cal. App. 2d 324, 337, 14 Cal. Rptr. 121* (no recovery for depreciation of vehicle during plaintiffs' use when no evidence of value of use was introduced)]. In a transaction involving the sale of a business, recovery by the seller against whom the sale is rescinded is limited to the lesser of the reasonable rental value of the property involved or the profits, if any, generated by the purchaser from the subject matter. Applying this rule to the burden of proof, a seller who does notintroduce evidence of both rental value and profits is not entitled to recover based on either [*McCoy v. West (1977) 70 Cal. App. 3d 295, 303, 138 Cal. Rptr. 660* ; *see* comments to *Restatement of Restitution § 157*; *but see* *Heintzsch v. La France (1935) 3 Cal. 2d 180, 183, 44 P.2d 358* (defendant seller allowed rental value although plaintiffs contended no profits were made)].

A defendant is not allowed a setoff to compensatory damages in the form of a deduction or credit for income tax benefits that the plaintiff may have derived from the rescinded contract [*DePalma v. Westland Software House (1990) 225 Cal. App. 3d 1534, 1539-1546, 276 Cal. Rptr. 214* ; for further discussion, *see* Ch. 177, *Damages*].

Legal Topics:

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43-490 California Forms of Pleading and Practice--Annotated § 490.25

§ 490.25 Election of Remedies

[1] What Constitutes Election

Whenever a party entitled to enforce two remedies institutes an action on one of them or performs any act in pursuit of one remedy whereby he or she gains an advantage over the other party, he or she will be held to have made an election of that remedy and will not be entitled to pursue any other remedy for the enforcement of his or her rights [*Steiner v. Rowley (1950) 35 Cal. 2d 713, 720, 221 P.2d 9* ; *Modoc Mineral & Oil Co. v. Cal-Vada Drilling etc. Co. (1965) 236 Cal. App. 2d 868, 874-875, 46 Cal. Rptr. 508]* . The doctrine of election of remedies is a specific application of the doctrine of estoppel. Thus, mere pursuit by the injured party of a different or additional remedy does not amount to an election unless it involves a prejudice to the opposing party [*Warfield v. Richey (1959) 167 Cal. App. 2d 93, 99, 334 P.2d 101]* . Simply giving notice of rescission does not amount to an election. Notice of rescission is revocable until everything with which plaintiff has parted has been restored to him or her [*Mackenzie v. Voelker (1954) 123 Cal. App. 2d 538, 541, 266 P.2d 867* ; *Karapetian v. Carolan (1948) 83 Cal. App. 2d 344, 355, 188 P.2d 809]* . However, an agreement for rescission will generally bar any claims for fraud arising out of the same transaction unless the release or mutual rescission agreement specifically provides otherwise [*Evans v. Rancho Royale Hotel Co. (1952) 114 Cal. App. 2d 503, 508-509, 250 P.2d 283]* .

It is permissible for plaintiff to plead inconsistent remedies [*Walters v. Marler (1978) 83 Cal. App. 3d 1, 16, 147 Cal. Rptr. 655]* . When all the evidence is in, the court will determine which remedies the plaintiff may have [*Mackenzie v. Voelker (1954) 123 Cal. App. 2d 538, 541, 266 P.2d 867]* . Pleading inconsistent remedies allows a plaintiff to recover on another theory, without having to bring a second action, if rescission is for some reason unavailable [*Walters v. Marler (1978) 83 Cal. App. 3d 1, 16, 147 Cal. Rptr. 655* ; *Karapetian v. Carolan (1948) 83 Cal. App. 2d 344, 352, 188 P.2d 809]* . The general rule is that no election need be made before the case goes to the jury. If the jury or the court finds that plaintiff is entitled to rescission and damages, the plaintiff must then elect, and may recover, compensatory damages consistent with rescission so long as there is no double recovery [*Jahn v. Brickey (1985) 168 Cal. App. 3d 399, 406, 214 Cal. Rptr. 119* ; *Walters v. Marler (1978) 83 Cal. App. 3d 1, 16, 147 Cal. Rptr. 655]* .

It is not always clear what constitutes an election. For example, in *Whistler v. Ondulando Highlands Corp. (1970) 13 Cal. App. 3d 108, 91 Cal. Rptr. 879* , in which the trial was bifurcated, the court did not clearly indicate whether it was

the determination of the rescission issue in the first part of the trial or later correspondence by counsel that constituted the election [*Whistler v. Ondulando Highlands Corp. (1970) 13 Cal. App. 3d 108, 116, 118, 91 Cal. Rptr. 879]* . Some cases that have not required an election between tort and rescissionary remedies can be explained as ones in which the defendant did not require clear findings or special verdicts regarding damages. In those cases, the damages that the opinion refers to as being awarded under the fraud cause of action might properly have been awarded as consequential or punitive damages under the rescissionary relief provisions of *Civ. Code § 1692* [*see, e.g.,* *Campbell v. McClure (1986) 182 Cal. App. 3d 806, 808, 810, 227 Cal. Rptr. 450* (compensatory damages not separated under causes of action for fraud, rescission of sale of business, and cancellation of assumption of obligations of business); *Cobian v. Ordonez (1980) 163 Cal. Rptr. 126* (no showing of duplication of damages); *see also* *Horn v. Guaranty Chevrolet Motors (1969) 270 Cal. App. 2d 477, 484-485, 75 Cal. Rptr. 871* (punitive damages as proper even when restitution is only relief awarded after rescission)].

[2] Asserting Election of Remedies as Defense

The defendant can waive its right to require an election by failing to assert it [*Bank of America N.T. & S. Assn v. Hill (1937) 9 Cal. 2d 495, 500, 71 P.2d 258* ; *City Bank of San Diego v. Ramage (1968) 266 Cal. App. 2d 570, 588, 72 Cal. Rptr. 273]* . If the facts giving rise to the alleged election occurred prior to commencement of the action, election of remedies must be specifically pleaded as an affirmative defense, unless it appears on the face of the complaint [*Modoc Mineral & Oil Co. v. Cal-Vada Drilling etc. Co. (1965) 236 Cal. App. 2d 868, 875, 46 Cal. Rptr. 508* (dicta); *Karapetian v. Carolan (1948) 83 Cal. App. 2d 344, 346-347, 188 P.2d 809* (dicta); *see § 490.67* for a form of affirmative defense]. If the facts giving rise to the alleged election occurred after commencement of the action, the election must be raised at the earliest possible time [*Modoc Mineral & Oil Co. v. Cal-Vada Drilling etc. Co. (1965) 236 Cal. App. 2d 868, 875, 46 Cal. Rptr. 508* (dicta, election claimed to arise from plaintiff's filing attachment asserted for first time on appeal as too late)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 490.26 Right to Jury Trial

The right to a jury trial is determined by the nature of the substantive relief requested [*Runyan v. Pacific Air Industries, Inc. (1970) 2 Cal. 3d 304, 312-313, 85 Cal. Rptr. 138, 466 P.2d 682]* . When restitution or damages are sought and there is a question of fact to be resolved regarding the amount of damages or restitution, a party is entitled to a jury trial in an action for relief based on rescission [*Paularena v. Superior Court (1965) 231 Cal. App. 2d 906, 911-913, 42 Cal. Rptr. 366]* . When one is not seeking restitution or damages, but only relief of an equitable nature, there is no right to a jury trial [*Porter v. Superior Court (1977) 73 Cal. App. 3d 793, 798-801, 141 Cal. Rptr. 59* (cancellation of deed)].

When a party to a contract, after rescinding the contract on a ground allowed in *Civ. Code § 1689(b)*, sues for relief under *Civ. Code § 1692* and, in lieu of asking for the return of consideration, demands the value of the consideration given (because, for instance, it would be impracticable to return the consideration), that demand for a money judgment does not make the action one "at law" in which the party may have a jury trial. The action is equitable in nature, and no party is entitled to have a jury trial [*NMSBPCSLDHB v. County of Fresno (2007) 152 Cal. App. 4th 954, 956, 962-963, 61 Cal. Rptr. 3d 425]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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43-490 California Forms of Pleading and Practice--Annotated § 490.27

§ 490.27 Restitution to Avoid Unjust Enrichment

[1] Equitable Principle

When no contract exists between the parties, equity sometimes will imply a contract in order to prevent the unjust enrichment of the party who has received some benefit [*Kossian v. American Nat'l Ins. Co. (1967) 254 Cal. App. 2d 647, 650-651, 62 Cal. Rptr. 225* ; *County of Santa Clara v. Robbiano (1960) 180 Cal. App. 2d 845, 848-849, 5 Cal. Rptr. 19]* . To some extent, recovery is premised on the equitable maxim of *Civ. Code § 3521* that one who takes a benefit must bear the burden [*Civ. Code § 3521*; *Halperin v. Raville (1986) 176 Cal. App. 3d 765, 771-774, 222 Cal. Rptr. 350]* . Similar principles allow recovery to one who has made payments under a void contract [*Page v. Preuss (1964) 226 Cal. App. 2d 494, 496-497, 38 Cal. Rptr. 221* ; *see §§ 490.13, 490.16[3][c]*].

Unjust enrichment is synonymous with the term "restitution" [*Dinosaur Development, Inc. v. White (1989) 216 Cal. App. 3d 1310, 1314, 265 Cal. Rptr. 525]* . Restitution includes not only the restoration or giving back of something to its rightful owner, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury caused to, another. The phrase "unjust enrichment" is used to characterize the result or effect of a failure to make restitution of or for property or benefits received under circumstances that give rise to a legal or equitable obligation to account for them [*Dinosaur Development, Inc. v. White (1989) 216 Cal. App. 3d 1310, 1315, 265 Cal. Rptr. 525* ; *Lucky Auto Supply v. Turner (1966) 244 Cal. App. 2d 872, 885, 53 Cal. Rptr. 628]* . It is not enough that one has conferred a benefit on another. To be entitled to restitution, one must confer the benefit by mistake, fraud, coercion, or request [*Dinosaur Development, Inc. v. White (1989) 216 Cal. App. 3d 1310, 1315-1316, 265 Cal. Rptr. 525* ; *Nibbi Brothers, Inc. v. Home Federal Sav. & Loan Assn. (1988) 205 Cal. App. 3d 1415, 1422, 253 Cal. Rptr. 289* ; *see* Restatement of Restitution §§ 2, 106].

This principle allows recovery of money paid by mistake, no matter how negligent the paying party may have been in making the mistake, providedthe party who received the money has not changed his or her postion in reliance [*National Bank of California v. Miner (1914) 167 Cal. 532, 537, 140 P. 27* ; *Doyle v. Matheron (1957) 148 Cal. App. 2d 521, 522-523, 306 P.2d 913* ; *see First Sav. & Loan Assn. v. Bank of America (1970) 4 Cal. App. 3d 393, 396, 84 Cal. Rptr. 532* (no detrimental change of position found)]. A request coupled with assurances of payment, however, may not invoke sufficient reliance or change of position to allow recovery of the value of the benefit conferred unless

the party making the request promises to make payment itself. For example, a promise of payment that amounts to an optimistic and nonactionable opinion that another person will pay for the benefit conferred will not support restitution [*Nibbi Brothers, Inc. v. Home Federal Sav. & Loan Assn. (1988) 205 Cal. App. 3d 1415, 1422-1423, 253 Cal. Rptr. 289]* . Similarly, a request by the owner of landlocked property to a local government agency not to approve an adjacent owner's development plans unless the plans required the developer to provide access to the landlocked parcel does not constitute either request or coercion for purposes of entitling the developer to restitution from the benefited owner [*Dinosaur Development, Inc. v. White (1989) 216 Cal. App. 3d 1310, 1316, 265 Cal. Rptr. 525]* . Nor, in that situation, does the agency's action constitute coercion [*Dinosaur Development, Inc. v. White (1989) 216 Cal. App. 3d 1310, 1318, 265 Cal. Rptr. 525]* . The cost of rerouting and extending its planned access road to service the adjoining parcel and the benefit to the landlocked owner were merely indirect and incidental consequences of the developer's decision to build the project [*Dinosaur Development, Inc. v. White (1989) 216 Cal. App. 3d 1310, 1316, 265 Cal. Rptr. 525]* .

Equitable restitution generally is not available to provide recovery of money paid voluntarily with knowledge of the facts. One situtation in which restitution is not available arises when an insurer denies coverage, but provides a defense to the insured under a reservation of rights. The insurer cannot recover defense costs under the theory of equitable restitution because the primary reason for the expenditure is usually the insurer's desire to protect itself from a subsequent claim that it breached its agreement with the insured [*Insurance Co. of the West v. Haralambos Beverage Co. (1987) 195 Cal. App. 3d 1308, 1323, 241 Cal. Rptr. 427]* .

A health insurer could mistakenly pay benefits to a health care provider under the usual assignment of benefits by the insured patient. The insurer could, for example, pay for treatment that is not covered by the policy or pay for treatment that the insured received after the policy expired. In that case, if the health care provider disclosed all material facts in connection with presenting the claim to the insurer and received payment without knowledge of the insurer's mistake, the insurer has no claim for equitable restitution [*City of Hope Nat. Medical Center v. Superior Court (1992) 8 Cal. App. 4th 633, 636-637, 10 Cal. Rptr. 2d 465]* .

[2] When Contract Is Forfeited

When a contract has a forfeiture clause or one party is allowed to cancel it because of the other party's breach or nonperformance, the party in default is entitled to restitution of any benefits he or she bestowed on the other party that are in excess of the damages suffered by that party [*Freedman v. St. Matthias Parish (1951) 37 Cal. 2d 16, 20-23, 230 P.2d 629* ; *Barkis v. Scott (1949) 34 Cal. 2d 116, 118, 208 P.2d 367]* . For instance, if a contract for the purchase and sale of real estate is canceled by the seller after the purchaser has made substantial improvements or expended time and money in obtaining subdivision approval, the seller would be unjustly enriched if he or she were allowed to keep the land at its enhanced value without any compensation to the purchaser. In that case, the purchaser's restitution is measured by the reasonable value of services rendered by it that benefited the land owner, not the increase in value of the property attributable to those services. The purpose of this type of restitution is to make the defaulting party whole, not to bestow a benefit [*Lesny Development Co. v. Kendall (1985) 164 Cal. App. 3d 1010, 1022-1025, 210 Cal. Rptr. 890]* .

[3] Pleading Doctrine as Common Count

No particular form of pleading is necessary to invoke the doctrine of restitution [*Dinosaur Development, Inc. v. White (1989) 216 Cal. App. 3d 1310, 1316, 265 Cal. Rptr. 525]* . Nevertheless, a common count is often the proper form of action [*see* *Philpott v. Superior Court (1934) 1 Cal. 2d 512, 520-526, 36 P.2d 635* ; *Doyle v. Matheron (1957) 148 Cal. App. 2d 521, 522-523, 306 P.2d 913]* .

A cause of action for unjust enrichment has been described as a quasi-contractual form of common count for money had and received to recover money paid by fraud or mistake. As such, it is governed by the three-year limitation period applicable to fraud actions. That period commences not at the time of the mistake but when the defendant realizes a

windfall from the mistake [*First Nationwide Savings v. Perry (1992) 11 Cal. App. 4th 1657, 1670, 15 Cal. Rptr. 2d 173]* . For discussion and forms for various types of common counts, see Ch. 121, *Common Counts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityMaximsGeneral OverviewContracts LawContract Conditions & ProvisionsForfeiture ClausesContracts LawRemediesRestitutionContracts LawTypes of ContractsImplied-in-Law ContractsGovernmentsLegislationStatutes of LimitationsTime Limitations

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[Reserved]

§§ 490.28[Reserved]

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PART III. RESEARCH GUIDE

43-490 California Forms of Pleading and Practice--Annotated § 490.40

§ 490.40 Federal Statutes

Rescission of consumer contracts governed by Truth in Lending Act (*15 U.S.C. § 1601 et seq*). *15 U.S.C. § 1635*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionTruth in LendingGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview

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43-490 California Forms of Pleading and Practice--Annotated § 490.41

§ 490.41 State Statutes

[1] Rescission

Rescission of fraudulently induced membership in, or right to damages from, nonprofit retailers' cooperative. *Bus. & Prof. Code § 20001(d)(3)(J)*; *Civ. Code § 3343.7*; *Corp. Code § 31005(d)*

Rescission of contract or conveyance by person of unsound mind prior to incapacity decree. *Civ. Code § 39*

Rescission of offer to purchase 1 to 4 unit residential property. *Civ. Code § 1102.3*

Rescission by creditor of acceptance in satisfaction of obligations or orders drawn on third parties. *Civ. Code § 1533*

Rescission for failure to provide foreign language translation of specified contracts negotiated primarily in foreign. *Civ. Code § 1632*

Rescission of contracts in general. *Civ. Code § 1688 et seq.*

Rescission of participation in endless chain scheme, as defined in *Penal Code § 327*. *Civ. Code § 1689.2*

Right to rescind dental service contract. *Civ. Code § 1689.3*

Cancellation of contract with dating service. *Civ. Code § 1694.1*

Cancellation of contract with weight loss program or center. *Civ. Code § 1694.6*

Rescission of sale of residential real property in foreclosure. *Civ. Code § 1695 et seq.*

Rescission of grey market goods for failure to give required disclosures. *Civ. Code § 1797.86*

Failure to comply with Consumer Contract Awareness Act of 1990 (*Civ. Code § 1799.200 et seq.*) does not create independent basis for rescission but is admissible to establish basis for rescission of consumer contract or consumer contract guaranty otherwise authorized by law. *Civ. Code §§ 1799.205(b), 1799.206(d)* (consumer contact; consumer contract guaranty)

Rescission of consumer retail installment contract governed by Unruh Act (*Civ. Code § 1801 et seq.*) for failure of consumer to obtain financing. *Civ. Code § 1803.9*

Rescission of contract for discount buying services. *Civ. Code § 1812.121*

Rescission of sale or lease of seller assisted marketing plan. *Civ. Code § 1812.215*

Rescission of membership camping contract. *Civ. Code § 1812.306*

Right to rescind contract with employment counseling service. *Civ. Code §§ 1812.511, 1812.523(d)-(h)*

Right to rescind contract with job listing service. *Civ. Code §§ 1812.516, 1812.523(d)-(h)*

When principal may rescind ratification. *Civ. Code § 2314*

Rescission of motor vehicle conditional sale contracts. *Civ. Code §§ 2982.5, 2982.9-2983.1*

Rescission of motor vehicle lease. *Civ. Code § 2988.7*

Even if contract for sale of goods governed by *Com. Code §§ 2101-2801* requires writing to rescind, oral attempted rescission is possible waiver. *Com. Code § 2209(2), (4)*

Rescission of emancipation of minor. *Fam. Code § 7130 et seq.*

[2] Restitution

Restitution of downpayment under motor vehicle conditional sale contracts. *Civ. Code § 2982.7(a)*

Restitution order in domestic violence action. *Fam. Code § 6342*

Restitution of decedent's property paid or transferred through small estate administration. *Prob. Code §§ 13111, 13206*

If contract made by corporation when its powers are suspended or forfeited for failure to pay taxes or file returns is voided at instance of other party, court so ordering must provide that suspended corporation receive full restitution of benefits provided by it under contract. *Rev. & Tax. Code § 23304.5*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesRatificationContracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawRemediesRestitutionContracts LawTypes of ContractsGuaranty ContractsContracts LawTypes of ContractsInstallment Contracts

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43-490 California Forms of Pleading and Practice--Annotated § 490.42

§ 490.42 Decisions

[1] Alternative Remedies and Procedures

Question of California courts' jurisdiction to grant equitable relief under civil remedies provision of Racketeer Influenced and Corrupt Organizations Act (herainafter "RICO"), specifically order requiring divestiture of interests sold to defendants (*18 U.S.C. § 1964(a)*), is open; trial court properly refused summary judgment to defendant; court of appeal was reluctant to decide emerging question of law without full evidentiary record. *Nakash v. Superior Court (1987) 196 Cal. App. 3d 59, 71, 241 Cal. Rptr. 578*

[2] Election of Remedies

Rescission is not cause of action, but is remedy; thus continuing conduct is basis for series of actions based on rescission. *Nakash v. Superior Court (1987) 196 Cal. App. 3d 59, 70, 241 Cal. Rptr. 578*

Superior court action was not election of remedy barring petition to Labor Commission to avoid contract because remedies were not inconsistent; court action was based on execution of agreement; Commission proceeding was based on conduct after execution. *Humes v. MarGil Ventures, Inc. (1985) 174 Cal. App. 3d 486, 493-494, 220 Cal. Rptr. 186*

Choice of remedy is that of wronged party, not of court. *Walters v. Marler (1978) 83 Cal. App. 3d 1, 16, 147 Cal. Rptr. 655*

[3] Defendant's Right to Offsets

On rescission of partnership agreement for fraud and franchise law violations, plaintiff was entitled to continue to use partnership name, but defendant was entitled to compensation for contributions that enhanced value of name. *Neptune Society Corp. v. Longanecker (1987) 194 Cal. App. 3d 1233, 1245-1246, 240 Cal. Rptr. 117*

Failure to award defendant rental value of car, misrepresented to be new but that was used, was not error when defendant produced no evidence of rental value of used car, but only of new car. *Horn v. Guaranty Chevrolet Motors (1969) 270 Cal. App. 2d 477, 483, 75 Cal. Rptr. 871*

[4] Delay in Performance

Unless contract declares time to be of essence, performance within reasonable time is sufficient and rescission cannot be granted for slight delay. Hofland v. Gustafson (1955) 132 Cal. App. 907, 282 P.2d 1039 (8 days)

[5] Dismissal of Prior Action for Rescissionary Relief

State court action for rescission of sale of business, breach of fiduciary duty, and other relief was not barred by plaintiffs' dismissal and settlement of prior federal court action for rescission be cause breaches of contract, fiduciary duties, and tortious conduct were continuing, and second action alleged transactional nucleus of facts that occurred after first judgment. *Nakash v. Superior Court (1987) 196 Cal. App. 3d 59, 67-70, 241 Cal. Rptr. 578*

[6] Judgments

When plaintiff proved two grounds for rescission (fraud and violation of *Corp. Code § 31300*, relating to franchises), judge's failure to articulate one ground in oral announcement of decision did not preclude finding or judgment on that ground. *Neptune Society Corp. v. Longanecker (1987) 194 Cal. App. 3d 1233, 1245, 240 Cal. Rptr. 117*

Judgment against both principals and agents was proper for restitution after rescission of sale for fraud and mistake; agents allowed their default to be taken. *Heintzsch v. La France (1935) 3 Cal. 2d 180, 183-184, 44 P.2d 358*

[7] Mistake of Fact

Principle that valid contract may be rescinded for unilateral mistake of fact by one party if other party should have known about mistake required reversal of summary judgment for trial of factual question whether attorney should have known from demand letter that opposing counsel miscalculated amount of interest claimed. *Bldg. Serv. Emp. Pension Tr. v. Amer. Bldg. Maint. (9th Cir. 1987) 828 F.2d 576, 578*

Rescission was justified because of both parties' mistake of fact regarding one party's ability to qualify for status that was essential to achieving contract's purpose. *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga (2009) 175 Cal. App. 4th 1306, 1343, 96 Cal. Rptr. 3d 813*

Life annuity contract cannot be rescinded for buyer's benefit on ground of mistake of fact when alleged mistake is that, at time of making contract, buyer was ignorant of preexisting condition leading inexorably to unexpectedly early death. *Grenall v. United of Omaha Life Ins. Co. (2008) 165 Cal. App. 4th 188, 193-196, 80 Cal. Rptr. 3d 609*

[8] Mistake of Law

Summary judgment for plaintiff reversed because defendants raised triable issues of fact as to whether they were entitled to rescind settlement agreement based on mutual mistake of fact or law; parties' mutual mistake regarding amendment to Probate Code, which would diminish plaintiff's damages from trust which exposed trustees to tax

liability, went to heart of agreement settling action for legal malpractice in drafting trust. *Harris v. Rudin, Richman & Appel (2002) 95 Cal. App. 4th 1332, 1339-1341, 116 Cal. Rptr. 2d 552*

[9] Nature of Rescission

Rescission voided contract *ab initio* and extinguished all rights of either party undercontract, including right to bring action for tortious breach of that contract; each party was entitled to recover payments made to other party under rescinded contract. *Imperial Cas. and Indem. Co. v. Sogomonian (1988) 198 Cal. App. 3d 169, 184-185, 243 Cal. Rptr. 639*

[10] Rescission Unavailable

Rescission under Truth in Lending Act [*see 15 U.S.C. § 1635*] is personal remedy not suitable for class-action treatment. *LaLiberte v. Pacific Mercantile Bank (2007) 147 Cal. App. 4th 1, 10, 53 Cal. Rptr. 3d 745*

Rescission of former member's gift to religious organization made on basis of religious beliefs no longer held was not permitted; challenge to validity of former beliefs is prohibited by constitutional guarantees of freedom of religion. *Estate of Supple (1966) 247 Cal. App. 2d 410, 414-415, 55 Cal. Rptr. 542*

[11] Restitution Based on Repudiation

Obligor's statement to obligee indicating that obligor will breach important contractual promise, thereby substantially impairing value of contract, constitutes repudiation of the contract, entitling obligee to restitution. *Mobil Oil Exploration & Producing Southeast, Inc. v. United States (2000) 530 U.S. 604, 120 S. Ct. 2423, 147 L.Ed. 2d 528, 534*

[12] Restitution Based on Undue Influence

Undue influence occurs when one party uses its dominant psychological position in unfair manner to induce subservient party to consent to agreement to which he or she would not otherwise have consented; claim for restitution alleging subservient party had been deceived by church into submitting unknowingly to coercive persuasion was not direct attack on truth or falsity of religious beliefs prohibited by *First Amendment*. *Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1124-1125, 252 Cal. Rptr. 122, 762 P.2d 46*

[13] Restitution to Avoid Unjust Enrichment

Cause of action for unjust enrichment could be stated by beneficiary of first deed of trust which was mistakenly reconveyed against purchaser at foreclosure sale of junior deed of trust when facts would support amendmentto allege that purchaser knew of mistake; statute barring deficiency judgments [*see Code Civ. Proc. § 580b*] was inapplicable. *First Nationwide Savings v. Perry (1992) 11 Cal. App. 4th 1657, 1662-1665, 1669-1670, 15 Cal. Rptr. 2d 173*

Restitution may be required when person benefitting from another's mistake knew about mistake and circumstances surrounding unjust enrichment. *First Nationwide Savings v. Perry (1992) 11 Cal. App. 4th 1657, 1664, 15 Cal. Rptr. 2d 173*

One who has been unjustly enriched at another's expense is required to make restitution if benefit was conferred by

mistake, fraud, coercion or request; claim for restitution was properly stated when lessor's lack of knowledge that defendant had taken possession of equipment and was making lease payments prevented it from asserting its rights regarding assignment of lease. *Enterprise Leasing Corp. v. Shugart Corp. (1991) 231 Cal. App. 3d 737, 748-749, 282 Cal. Rptr. 620*

Restitution of money paid by plaintiff as guarantor of restaurant equipment lease when money was paid under material mistake as to lessor's title. *Bridges v. Cal-Pacific Leasing Co. (1971) 16 Cal. App. 3d 118, 124-127, 93 Cal. Rptr. 796*

[14] Restoration Excused

On dissolution of partnership formed by franchisor and franchisee under agreement that did not grant, assign, or sell any name to partnership, franchisee was permitted to continue using partnership name; unregistered name was not thing of value bestowed by franchisor, but franchisor was entitled to money compensation for contributions that enhanced name. *Neptune Society Corp. v. Longanecker (1987) 194 Cal. App. 3d 1233, 1245-1246, 240 Cal. Rptr. 117*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesAmbiguity & MistakeMutual MistakeContracts LawDefensesAmbiguity & MistakeUnilateral MistakeContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesElection of RemediesContracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawRemediesRestitution

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43-490 California Forms of Pleading and Practice--Annotated § 490.43

§ 490.43 Law Reviews

Kull, *Restitution as a Remedy for Breach of Contract, 67 S. Cal. L. Rev. 1465 (1994)*

Comment, *Restitutionary Recovery for Rescuers of Human Life, 74 Cal. L. Rev. 85 (1986)*

Comment, *Beyond Repatriation: A Proposal for the Equitable Restitution of Cultural Property, 33 UCLA L. Rev. 642 (1985)*

Comment, *In Defense of Restitution: A Comment on Mather, Restitution as a Remedy for Breach of Contract: The Case of the Partially Performing Seller, 57 S. Cal. L. Rev. 723 (1984)*

H. Mather, *Restitution as a Remedy for Breach of Contract: The Case of the Partially Performing Seller, 92 Yale L. J. 14 (1982)*

Note, *Garnishing Graft: A Strategy for Recovering the Proceeds of Bribery, 92 Yale L. J. 128 (1982)*

Note, *Judicial Protection for the Consumer: Vasquez v. Superior Court, 23 Hastings L. J. 513 (1972)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformancePartial PerformanceGeneral OverviewContracts LawRemediesRestitution

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43-490 California Forms of Pleading and Practice--Annotated § 490.44

§ 490.44 Text References

Witkin, California Procedure, vol. 3, *Actions*, §§ 101, 154-156, 186; vol. 4, *Pleading*, §§ 490-503; Vol. 7, *Judgments*, § 22 (4th ed.)

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 257-684, 930-945, 1013-1042; vol. 2, *Insurance*, *§§ 28*, 68, 71, 75-80, *100-103*, *105-109*, *111-113*, *127-130*, 146-147, 216-217, 224-229, 231-232, 277-280 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachCauses of ActionGeneral OverviewContracts LawRemediesGeneral Overview

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43-490 California Forms of Pleading and Practice--Annotated §§ 490.45-490.59

[Reserved]

§§ 490.45[Reserved]

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43-490 California Forms of Pleading and Practice--Annotated § 490.60

§ 490.60 Notice of Rescission of Contract--General Form [Civ. Code § 1691]

[1] FORM Notice of Rescission of Contract--General Form [Civ. Code § 1691]

TO: _____

You are hereby notified that _____ [*name or* the undersigned] hereby rescinds that certain _____ [*describe the contract or lease in terms of parties, date, and purpose, mentioning all documents comprising it, e.g.,* three-year lease of an ABC Co. type 275 burglar alarm system by and between you as lessor and _____ (*name or* the undersigned), as lessee dated _____ (*date*), _____ (*specify purpose/relevant terms of contract, e.g.,* under the terms of which title to the system remained in you and the undersigned was to have possession and use of the system for the protection of its retail outlet at 359 Main Street, Anytown, California)].

[This rescission is made on the ground that _____ (*specify, e.g.,* The United States District Court issued an injunction requiring the burglar alarm system to be rendered inoperable because it interfered with secret government radio frequencies. The system has therefore been rendered useless.]

[_____ (*Name or* The undersigned) hereby _____ (offers to restore *or* restores) and tenders to you all consideration and benefits received by him/her/it pursuant to the _____ (lease *or* contract), specifically _____ (*specify, e.g.,* all removable parts of the alarm system). (This offer is conditioned on your restoring the consideration you recieved as demanded below).]

_____ [*Name or* The undersigned] hereby demands that you restore to him/her/it all consideration furnished to you by him/her/it, specifically _____ [*specify consideration to be returned, taking into account any offsets the rescinding party agrees to allow, e.g.,* $1,000, less the sum of $250 that was the reasonable value to the undersigned of the use of the system for the three weeks it operated before the undersigned was notified of the injunction, for a total of $750].

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This notice of rescission is for use by a rescinding party to give notice of rescission and to tender restoration to the party against whom he or she rescinds [*see Civ. Code § 1691*]. It can be used as is, as a formal notice, or the pertinent paragraphs can be incorporated into a letter. The factualexample is based in part on the facts in *Federal Leasing Consultants, Inc. v. Mitchell Lipsett Co. (1978) 150 Cal. Rptr. 82* .

When notice of rescission has not otherwise been given or an offer to restore the benefits received under the contract has not otherwise been made, service of a pleading in an action or proceeding that seeks relief based on rescission is deemed notice or an offer to restore or both [*Civ. Code § 1691*].

[3] Contents of Notice

[a] Grounds

The grounds for rescission need not be stated, as long as the intent to rescind is clear [*Hull v. Ray (1930) 211 Cal. 164, 167-168, 294 P. 700]* . One may even justify an asserted rescission by proving that at the time there was adequate cause even though the rescinding party did not learn of it until after he or she had given notice of rescission [*Earl v. Saks & Co. (1951) 36 Cal. 2d 602, 609, 226 P.2d 340* ; *Wilson v. Lewis (1980) 106 Cal. App. 3d 802, 809, 165 Cal. Rptr. 396* (both cases involved oral notice of rescission)]. If grounds other than those set forth in the notice are the basis of the complaint and the defendant is not prejudiced by the change or addition, as when he or she knew of the grounds relied on in the complaint before suit was filed, the notice is sufficient [*Hull v. Ray (1930) 211 Cal. 164, 167-168, 294 P. 700]* .

[b] Offer to Restore

Unless the other party is unable to do so or positively refuses to do so, a party seeking rescission ordinarily must restore to the other party everything of value that he or she has received from that party or offer to restore everything received on condition that the other party do the same [*Civ. Code § 1691*]. If the rescinding party has not received anything of value, no offer to restore is necessary [*Realty Co. of America v. Burton (1958) 160 Cal. App. 2d 178, 195-196, 325 P.2d 171* ; *Esau v. Briggs (1948) 89 Cal. App. 2d 427, 436, 201 P.2d 25]* . Nor is an offer to restore necessary when the transactions between the parties are so complicated that full judicial action or an accounting is necessary to determine their respective rights [*California etc. Co. v. Schiappa-Pietra (1907) 151 Cal. 732, 739-742, 91 P. 593* ; *Klein v. Farmer (1945) 70 Cal. App. 2d 51, 61-62, 160 P.2d 30]* . In addition, no offer to restore is necessary when, due to no fault of the rescinding party, restoration cannot be made [*Carruth v. Fritch (1950) 36 Cal. 2d 426, 430-431, 224 P.2d 702* (defendant's fraud); *Stegeman v. Vandeventer (1943) 57 Cal. App. 2d 753, 760-762, 135 P.2d 186* (same); *see § 490.21[2]*].

[c] Setoffs or Credits

The party against whom a contract is rescinded must restore anything of value that he or she has received, but he or she is also entitled to credit for anything of value furnished to the rescinding party [*see Civ. Code § 1692*]. In rescinding a real property contract or lease, the rescinding party ordinarily must pay or allow credit for the value of the use of the property during the time he or she had possession [*Heintzsch v. La France (1935) 3 Cal. 2d 180, 183, 44 P.2d 358* (sale of auto camp and lease); *Bush v. Vernon (1955) 135 Cal. App. 2d 33, 39, 286 P.2d 903]* . When a construction contract is voided, the contractor is entitled to be compensated for the value of labor done and materials delivered to the site prior to the owner's avoidance of the contract [*Sullivan v. California Realty Co. (1904) 142 Cal. 201, 204, 75 P. 767]* .

[4] State Statutes

Grounds for unilateral rescission. *Civ. Code § 1689(b)*

Effect of stipulation regarding errors of description. *Civ. Code § 1690*

Notice of rescission and offer to restore. *Civ. Code § 1691*

Relief based on rescission; damages; compensation to party against whom rescission is made. *Civ. Code § 1692*

Effect of delay in giving notice of rescission. *Civ. Code § 1693*

[5] Decisions

Broker who was party to related commission agreement, but not party to purchase and sale contract, and was named defendant in action to rescind purchase and sale contract, was not entitled to attorney's fees for successfully defending that claim; rescission was based on tort of fraud, not on contract. *Super 7 Motel Assocs. v. Wang (1993) 16 Cal. App. 4th 541, 547-550, 20 Cal. Rptr. 2d 193*

Until express contract is voided, relief based on implied contract or common count is unavailable. *McCall v. Superior Court (1934) 1 Cal. 2d 527, 533, 538, 36 P.2d 642* ; *Lloyd v. Williams (1964) 227 Cal. App. 2d 646, 649, 38 Cal. Rptr. 849*

Party who cannot restore consideration cannot rescind and therefore cannot maintain action for money had and received; such party's remedy is tort action for damages. *Lloyd v. Williams (1964) 227 Cal. App. 2d 646, 649, 38 Cal. Rptr. 849*

Notice of rescission is not required to be served on party whose interest in contract has been assigned; notice to assignee as sufficient. *Drips v. Moore (1918) 179 Cal. 249, 252, 176 P. 159*

When nothing of value has been received by rescinding party, institution of suit is sufficient notice of rescission. *Realty Co. of America v. Burton (1958) 160 Cal. App. 2d 178, 195-196, 325 P.2d 171*

To rescind sale of business including leasehold and goodwill, sublessee is not required to give notice of rescission to seller/sublessor who acquiesced insublessee's payment of rent to primary lessor after primary lessor exercised option to terminate primary lease. *Esau v. Briggs (1948) 89 Cal. App. 2d 427, 435-436, 201 P.2d 25*

Offer to restore is unnecessary when rescinding party has not received anything of value. *Esau v. Briggs (1948) 89 Cal. App. 2d 427, 436, 201 P.2d 25*

Notice of rescission of fraudulently induced transaction is properly addressed to joint tortfeasors. *McDevitt v. Butte City Ranch (1935) 7 Cal. App. 2d 252, 256, 46 P.2d 290*

[6] Text References

Witkin, California Procedure, vol. 4, *Pleading*, §§ 575-576 (4th ed. 1997)

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 930-944 (10th ed. 2005)

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43-490 California Forms of Pleading and Practice--Annotated § 490.61

§ 490.61 Complaint for Relief Based on Rescission of Contract [Civ. Code § 1692], or in the Alternative, for Damages [Civ. Code § 3333] for Fraud [Civ. Code §§ 1709, 3343]--Fraudulent Misrepresentation [Civ. Code §§ 1572, 1689(b)(1), 1710]

[1] FORM Complaint for Relief Based on Rescission of Contract [Civ. Code § 1692], or in the Alternative, for Damages [Civ. Code § 3333] for Fraud [Civ. Code §§ 1709, 3343]--Fraudulent Misrepresentation [Civ. Code §§ 1572, 1689(b)(1), 1710]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RELIEF BASED ON RESCIS-
_____ [*name*],	)	SION; FOR MONEY HAD AND RECEIVED; [AND
[and DOES I through _____,]	)	FOR DAMAGES FOR FRAUD]
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

FIRST COUNT
(Relief Based on Rescission)

[1. Plaintiff is, and at all times herein mentioned was, a resident of _____ County, California (*or other*

allegations of capacity or residence as necessary).]

2. Defendant is, and at all times herein mentioned was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a resident of _____ County, California *or* a corporation organized and existing under the laws of the state of California with its principal place of business at _____ (*street address, including city and county*), California].

[3. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.)]

[4. (Plaintiff is informed and believes and thereon alleges that) at all times herein mentioned, defendants DOE I through DOE _____ were agents, servants, and employees of their codefendants, and in doing the things hereinafter alleged were acting in the scope of their authority as agents,servants, and employees, and with the permission and consent of their codefendants.]

5. On or about _____ [*date*], at _____, California, plaintiff and defendant entered into _____ [a written *or* an oral] _____ [contract *or* lease] whereby _____ [*describe relevant terms of the contract, attaching a copy if desired, e.g.,* plaintiff was to purchase from defendant and defendant was to sell to plaintiff defendant's 1984 Mercedes 500 SEL automobile, California registration number _____, for the sum of $_____. A copy of the contract is attached as Exhibit "A" and incorporated by reference].

6. On or about _____ [*date*], at _____, California, defendant, knowing the representations to be false and with the intent to deceive plaintiff and to induce him/her to enter into the contract, falsely and fraudulently represented to plaintiff that _____ [*allege in exact language or as close to exact language as possible the statements of material fact claimed by plaintiff to be false, e.g.,* the odometer correctly indicated that the automobile had only been driven approximately 25,000 miles and that no repairs to the automobile other than normal maintenance had ever been necessary or made].

7. The representations made by defendant were in fact false. The true facts were _____ [*set forth true facts, e.g.,* the odometer had been turned back and the automobile had in fact been driven approximately 125,000 miles by the date the parties made their contract. Further, the automobile had been involved in a collision and although major repairs were made to it on account of the collision, it was never thereafter properly alignable].

8. At the time the representations were made, at the time plaintiff entered into the _____ [contract *or* lease], and at the time plaintiff rendered his/her performance under the _____ [contract *or* lease], plaintiff did not know the representations were false, but believed them to be true and reasonably relied on them. _____ [*Specify facts making reliance reasonable, e.g,* Plaintiff drove the automobile before entering into the contract. During that test drive, it handled well, even at high speeds, and plaintiff noticed no abnormalities. Plaintiff would have taken the car to be checked by his/her mechanic, but when plaintiff expressed a desire to do so, defendant said he/she had another offer for $_____, which he/she was bound to accept at 5 P.M. that evening unless he/she and plainfiff had come to an agreement by that time]. Had plaintiff known the true facts, he/she would not have entered into the _____ [contract *or* lease] and would not have rendered or accepted performance thereunder.

9. Under the terms of the _____ [contract *or* lease], on or about _____ [*date*], plaintiff _____ [*describe plaintiff's performance, excuse for nonperformance, or impossibility of*

performance, e.g., personally delivered to defendant cashier's check number _____ drawn on _____ (*name of bank*) and payable to defendant in the amount of $_____, the full purchase price].

10. On or about _____ [*date*], defendant _____ [*describe defendant's performance or nonperformance, e.g.,* delivered possession of the automobile to plaintiff, along with the registration and certificate of ownership that he/she had properly endorsed].

11. Thereafter, on or about _____ [*date*], plaintiff discovered the true facts to be those alleged in Paragraph 7. _____ [*Describe circumstances of discovery, e.g.,* The automobile overheated often in traffic and after plaintiff had owned it for a few weeks, it pulled to the right when the brakes were applied. In addition, the tires were wearing unevenly. In the course of having these problems repaired, plaintiff discovered the true facts].

12. Plaintiff would/will suffer substantial harm and injury under the _____ [contract *or* lease] if it were/is not rescinded in that [as a result of defendant's conduct,] plaintiff _____ [*specify, e.g.,* would/will be deprived of his/her bargain and would/will have an automobile substantially different from and inferior to the one he/she bargained and paid for and intended to purchase].

[*EITHER, if notice of rescission has not been given and plaintiff has not received anything of value*]

13. Plaintiff intends service of the summons and complaint in this action to serve as notice of rescission of the _____ [contract *or* lease], and hereby demands that defendant restore to him/her the consideration furnished by plaintiff, specifically _____ [*specify, e.g.,* the sum of $_____ (plus $_____ representing _____ (*describe any consequential damages, or in the case of real property, the value of any improvements made by plaintiff, e.g.,* the amount expended by plaintiff in attempted repairs before discovering that the representations made by defendant were false))][, _____ (*specify any offsets which plaintiff agrees to allow, e.g.,* less the reasonable value to the plaintiff of the use of the automobile for the two months before the misrepresentations were discovered)].

[*OR, if notice of rescission has not been given and plaintiff has received something of value*]

13. Plaintiff intends service of the summons and complaint in this action to serve as notice of rescission of the _____ [contract *or* lease], and hereby offers to restore all consideration furnished by defendant under the _____ [contract *or* lease], on condition that defendant restore to him/her the consideration furnished by plaintiff, specifically _____ [*specify, e.g.,* the sum of $_____ (plus $_____ representing _____ (*describe any consequential damages, or in the case of real property, the value of any improvements made by plaintiff, e.g.,* the amount expended by plaintiff in attempted repairs before discovering that the representations made by defendant were false))][, _____ (*specify any offsets which plaintiff agrees to allow, e.g.,* less the reasonable value to the plaintiff of the useof the automobile for the two months before the misrepresentations were discovered)].

[*OR, if a notice of rescission and, when necessary, an offer to restore, which sufficiently set forth all claims and demands, has already been given*]

13. On or about _____ [*date*], plaintiff notified defendant in writing that plaintiff had rescinded the

_____ [contract *or* lease] [on the ground of _____ (*specify, e.g.,* fraudulent misrepresentation)]. A copy of that notice is attached hereto marked Exhibit "_____" and made a part hereof. Defendant refused, and continues to refuse, to restore to plaintiff, in whole or in part, the consideration paid by plaintiff [or to recognize that the _____ (contract *or* lease) has been rescinded].

[*CONTINUE*]

[14. As a result of entering into the _____ (contract *or* lease) with defendant, plaintiff has incurred expenses in addition to those alleged above. Additional expenses include, without limitation, _____ (*specify additional items plaintiff will have to recover in order to be placed in the position he or she was in prior to the execution of the contract being rescinded, e. g.,* registration fees, insurance, and storage costs). Plaintiff has paid a total of $_____ for those expenses to the date of this complaint (and will continue to incur them in an amount unknown to him/her at this time. Plaintiff prays leave of this court to amend this complaint to insert the true amount of those expenses when they are ascertained).]

[15. In performing the acts herein alleged, defendant intentionally _____ (misrepresented to *or* concealed from) plaintiff material facts known to defendant, specifically _____ (*specify substance of misrepresentations or nondisclosures, e.g.,* the automobile's mileage and the fact that the automobile had suffered irreparable damage in a collision), with the intention on the part of defendant of depriving plaintiff of his/her money and property, thereby justifying an award of punitive damages against defendant.]

SECOND COUNT
(Damages for Fraud)

16. Plaintiff realleges and incorporates herein Paragraphs 1-11 (and Paragraph(s) 14 *and/or* 15) of the First Count.

17. As a proximate result of defendant's fraud and deceit and the facts herein alleged, plaintiff was _____ [*allege facts showing specific items of damage recoverable for fraud, e.g.,* damages in the sum of $_____, which is the difference between the purchase price paid by plaintiff for the automobile and its true value, which is $_____].

THIRD COUNT
(Common Count for Money Had and Received)

18. Plaintiff realleges and incorporates herein Paragraphs 1-4 of the First Count.

19. _____ [Within the last _____ (two *or* four) years *or* On or about _____ (*date*)], at _____ [*city*], California, defendant became indebted to plaintiff in the sum of $_____ for money had and received by defendant for the use and benefit of plaintiff.

20. Neither the whole nor any part of this sum has been paid [except the sum of $_____ (, which is acknowledged as an offset owing from plaintiff to defendant),] although demand therefor has been made, and there is now due, owing, and unpaid the sum of $_____, with interest thereon at the legal rate from _____ [*date*].

WHEREFORE, plaintiff prays judgment as follows:

On the first COUNT:

1. That this Court declare that the _____ [contract *or* lease] has been rescinded;

2. That defendant be ordered to pay plaintiff the following sums:

[*Use any or all of the following subparagraphs as applicable*]

(a) The consideration paid by plaintiff in the sum of $_____, with interest thereon at _____ [*specify legal or agreed rate*] percent per annum from _____ [*date of rescission*];

(b) The sums paid, or which will be paid, by plaintiff for _____ [*enumerate other items for which plaintiff will have to be reimbursed to be placed in the position he or she was in prior to the execution of the contract being rescinded, e.g.,* registration fees, insurance, repairs, and storage] _____ [in the sum of $_____ *or* according to proof], with interest thereon at _____ [*specify legal or agreed rate*] percent per annum from _____ [*date of rescission*];

(c) Exemplary damages.

3. That plaintiff be ordered to _____ [*specify, e.g.,* transfer title and possession of the automobile to defendant] on condition that defendant pay to plaintiff the sums as ordered by the judgment of this Court;

[4. For reasonable attorney's fees as _____ (provided for in the contract *or* authorized by _____ (*specify any applicable statute that provides for attorney's fees, e.g., Civil Code Section 2983.4*)) according to proof.]

On the second COUNT:

5. For general damages _____ [in the sum of $_____ *or* according to proof];

6. For special damages _____ [in the sum of $_____ *or* according to proof];

7. For exemplary damages.

On the third COUNT:

8. For the sum of $_____, with interest thereon at _____ [*specify legal or agreed rate*] percent per annum from _____ [*date of rescission*].

On all COUNTS:

9. For costs of suit herein incurred; and

10. For such other relief as the Court deems just.

_____ [*signature*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This complaint is for use by a person to whom material false representations have been made to bring an action for restitution after rescission or, in the alternative, for damages for fraud or deceit [*see Civ. Code §§ 1692, 1709, 3333, 3343*]. The common count for money had and received is an additional alternative ground for recovery of sums paid by plaintiff under the rescinded contract [*see Philpott v. Superior Court (1934) 1 Cal. 2d 512, 518, 36 P.2d 635* (propriety of pleading express count and common count based on same facts); *Lloyd v. Williams (1964) 227 Cal. App. 2d 646, 649, 38 Cal. Rptr. 849* (common count not applicable until voidable contract has been rescinded)]. Because recovery under the common count is limited to the value of what defendant actually received, counsel may wish to consult Ch. 121, *Common Counts,* before deciding to include the third count [*see Pollak v. Staunton (1930) 210 Cal. 656, 665-666, 293 P. 26* (money had and received based on false representations)].

Allegations from Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake,* can be used in place of Paragraphs 6-8 in the first count of the foregoing complaint to modify that count for use when the failure of assent is based on a ground other than intentional misrepresentation. In most of those situations, Paragraph 11 of the foregoing form, alleging discovery of the true facts, will also be unnecessary. Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake,* contains the following forms of allegations:

- Duress and menace by threats of or actual confinement of, or injury to, a person or property [*see § 215.120*].

- Duress by depriving one of the ability to exercise free will but without confining a person or detaining property [*see § 215.121*].

- Duress in the form of threats to economic, business, or property interests [*see § 215.122*].

- Undue influence or constructive fraud arising from a confidential relationship [*see § 215.130*].

- Undue influence in the form of taking unfair advantage of another's trust, confidence, or weakness [*see § 215.131*].

- Undue influence in the form of taking unfair advantage of another's distress or weakness [*see § 215.132*].

- Mutual mistake of fact [*see § 215.140*].

- Unilateral mistake of fact [*see § 215.141*].
- Mistake of law [*see § 215.142*].
- Innocent misrepresentation [*see § 215.143*].
- Intentional misrepresentation of fact [*see § 215.144*].

[3] Other Possible Remedies

If the transaction being rescinded involves goods, see the discussion of the possibly broader remedies available under *Com. Code § 2101 et seq.* [*see Com. Code § 2105* (defining goods as all movable things except money, investment securities, and things in action)].

If the transaction being rescinded involves a manufacturer or a retailer and a consumer, additional remedies may be provided by the following laws:

- The Consumers Legal Remedies Act (*Civ. Code § 1750 et seq.*) [*see, e.g., Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 817-820, 94 Cal. Rptr. 796, 484 P.2d 964* (Act held not to apply retroactively to transactions at issue)], discussed in Ch. 504, *Sales: Consumers Legal Remedies Act* .
- The Unruh Act (*Civ. Code § 1801 et seq.*) [*see, e.g., Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 806, 94 Cal. Rptr. 796, 484 P.2d 964]* , discussed in Ch. 501, *Sales: Retail Installment Sales* .
- The Song-Beverly Consumer Warranty Act (*Civ. Code § 1790 et seq.*), discussed in Ch. 502, *Sales: Warranties* . and as applied to new motor vehicles, discussed in Ch. 91, *Automobiles: Actions Involving Defects and Repairs* .
- The federal Truth in Lending Act (*15 U.S.C. § 1601 et seq.*), discussed in Ch. 501, *Sales: Retail Installment Sales* .
- The federal Magnuson-Moss Warranty--Federal Trade Commission Improvement Act (*15 U.S.C. § 2301 et seq.*), discussed in Ch. 502, *Sales: Warranties* .
- The Rees-Levering Motor Vehicle Sales and Finance Act (Civ. Code § 2981et seq.), discussed in Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* .

If the transaction involved a deed or other instrument that may cause plaintiff harm if left outstanding, a count for cancellation can be added. For complaints for cancellation, see Ch. 107, *Cancellation of Instruments* . For complaints containing causes of action for both rescission and cancellation of real property transactions and the instruments created by them. see Ch. 569, *Vendor and Purchaser* . See the Research Guide, Cross References, for additional particular types of contracts, such as home solicitation contracts, that may be governed by specific statutes discussed in other chapters.

[4] Parties

This complaint alleges the residences and capacities of the parties (Paragraphs 1, 2) [*see Civ. Code §§ 1812.10, 2984.4*; *see also § 490.61[9]*, regarding certain contracts that may require additional allegations to establish proper venue]. Every party to the rescinded contract or lease is an indispensible party to an action for relief based on rescission, and must therefore be joined as a plaintiff or defendant [*see Hartman Ranch Co. v. Associated Oil Co (1937) 10 Cal. 2d 232, 262-265, 73 P.2d 1163* (lessor of master lease indispensible to action based on rescission of sublease); *Holder v.*

Home Sav. & Loan Assn. (1968) 267 Cal. App. 2d 91, 107, 72 Cal. Rptr. 704] .

As long as the court can devise a decree granting relief without infringing the rights of a third-party lender from whom the plaintiff obtained a loan in order to finance his or her performance of the rescinded contract, the third-party lender is not an indispensible party to an action based on rescission of the primary contract. Such a lender is a necessary party, and difficulties are alleviated by making the lender a party [*Snelson v. Ondulando Highlands Corp. (1970) 5 Cal. App. 3d 243, 254-255, 84 Cal. Rptr. 800]* . If there are grounds for rescission of such a loan and plaintiff seeks to rescind the loan as well as the transaction that the loan financed, the third-party lender would have to be named as a party. Whether or not such a loan can be rescinded by requiring the defendant to pay the remaining balance is determined by each situation. For instance, when the lender is not a party, the defendant cannot be made to pay a loan secured by a purchase money deed of trust but can be required to assume it and to hold plaintiff harmless on any claims arising under it [*Snelson v. Ondulando Highlands Corp. (1970) 5 Cal. App. 3d 243, 254-258, 84 Cal. Rptr. 800]* .

In addition, the complaint includes optional allegations for alleging fictitious defendants (Paragraph 3) [*see Code Civ. Proc. § 474*; *see also* Ch. 20, *Allegations Commonly Used*] and the agency relationship of the defendants (Paragraph 4) [*see* Ch. 20, *Allegations Commonly Used* , Ch. 427, *Principal and Agent*].

[5] Relief Based on Rescission

[a] General Allegations

To establish the basis for relief based on rescission, the complaint alleges the following:

- The formation and relevant terms of the contract (Paragraph 5).

- Facts showing the existence of a ground for rescission. In this case, the ground alleged is fraudulent misrepresentation (Paragraphs 6-8) [*see § 490.61[18]*].

- Plaintiff's performance or excuse for nonperformance (Paragraph 9).

- The extent of defendant's performance and nonperformance (Paragraph 10) [*see Conslolidated Concessions Co. v. McConnell (1919) 40 Cal. App. 443, 444-445, 180 P. 842* (complaint insufficient for failure to specify whether note and stock certificates sought to be cancelled were executed/issued)].

- Plaintiff's discovery of the basis for rescission, in the example of misrepresentation, being discovery of the true facts (Paragraph 11).

- The injury or harm suffered by plaintiff (Paragraph 12) [*see Engalla v. Permanente Medical Group (1997) 15 Cal. 4th 951, 979-980, 64 Cal. Rptr. 2d 843, 938 P.2d 903* (defrauded party does not have to show pecuniary damages in order to defeat petition to compel arbitration); *Earl v. Saks & Co. (1951) 36 Cal.2d 602, 611-613, 226 P.2d 340* (pecuniary loss not necessary; alteration of essential character of transaction is sufficient injury); *Guthrie v. Times-Mirror Co. (1975) 51 Cal. App. 3d 879, 886, 124 Cal. Rptr. 577* (complaint that fails to set forth facts showing plaintiff was harmed was fatally defective)].

- Plaintiff's giving of notice of rescission and offer of restoration or facts showing restoration is not necessary or statement that service of summons and complaint are to serve as notice of rescission and/or offer of restoration (Alternative Paragraphs 13) [*see Civ. Code § 1691*; *Walsh v. Majors (1935) 4 Cal. 2d 384, 396, 49 P.2d 598* (plaintiff is not required to restore or offer to restore when action is based on theory of constructive trust or when plaintiff received nothing of value to which he or she would not have been entitled independently of the transations sought to be rescinded)].

- Optional allegations to assert any additional or consequential damages (Paragraph 14) [*Civ. Code § 1692*; *see, e.g., De La Hoya v. Slim's Gun Shop (1978) 146 Cal. Rptr. 68]* .

- Optional allegations of the basis for punitive damages (Paragraph 15) [*see Civ. Code § 3294, 3295(e)*; *Horn v. Guaranty Chevrolet Motors (1969) 270 Cal. App. 2d 477, 484, 75 Cal. Rptr. 871* ; *Millar v. James (1967) 254 Cal. App. 2d 530, 533, 62 Cal. Rptr. 335]* .

[b] Fraudulent Misrepresentation

As noted in the preceding discussion, this complaint alleges fraudulent misrepresentation as the basis for rescission. To establish fraudulent misrepresentation as the grounds for rescission, the complaint alleges the following [*see Civ. Code § 1689(b)(1)*; *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 811, 94 Cal. Rptr. 796, 484 P.2d 964* (rescinding party must establish that defendant made false representations, with knowledge of their falsity and with intent to induce reliance, that plaintiff's reliance was reasonable, and resultant injury); *Horn v. Guaranty Chevrolet Motors (1969) 270 Cal. App. 2d 477, 482-483, 75 Cal. Rptr. 871* (elements are fraud by concealment or misrepresentation, materiality, intent, reliance; materiality and reliance as questions of fact; intent to deceive as often proved by inference)]:

- Misrepresentations made knowingly by defendant to induce plaintiff to enter the contract (Paragraph 6).

- The true facts (Paragraph 7).

- Plaintiff's ignorance of the true facts and reliance on the misrepresentations at all relevant times, together with facts showing that the misrepresentations were material (Paragraph 8).

[6] Damages for Fraud

The second count incorporates all allegations of the first and adds only the measure of damages (Paragraph 17). Because the hypothetical situation that is used for illustration in the complaint involves fraudulent misrepresentation, the form alleges the measure of damages for fraud in the sale, purchase, or exchange of property [*see Civ. Code § 3343*].

If the transaction involves goods as defined by *Com. Code § 2105*, the measure of damages established by *Com. Code §§ 2101-2801* will be available. If no sale or exchange was involved, damages would be governed by *Civ. Code § 3333* [*see Civ. Code §§ 1709, 3333*; *Sprague v. Frank J. Sanders Lincoln Mercury, Inc. (1981) 120 Cal. App. 3d 412, 419, 174 Cal. Rptr. 608* (distinguishing fraud in sale and fraud occurring after sale)].

[7] Common Count for Money Had and Received

The third count is the common count for money had and received. It is based on the right to restitution arising from the rescission of the contract [*see Crocker-Anglo Nat. Bank v. Kuchman (1964) 224 Cal. App. 2d 490, 496-497, 36 Cal. Rptr. 806]* . The necessary allegations are a statement of indebtedness in a sum certain and nonpayment [*Allen v. Powell (1967) 248 Cal. App. 2d 502, 510, 56 Cal. Rptr. 715]* .

A common count is demurrable if the specifically pleaded cause of action on which it necessarily rests is insufficient [*Zumbrun v. University of Southern California (1972) 25 Cal. App. 3d 1, 14, 101 Cal. Rptr. 499]* . One may plead a cause of action based on contract and one based on tort along with a common count [*see Weitzenkorn v. Lesser (1953) 40 Cal. 2d 778, 793-795, 256 P.2d 947* (demurrer sustained as to tort cause of action on grounds unrelated to inconsistency of remedies); *Zumbrun v. University of Southern California (1972) 25 Cal. App. 3d 1, 11-14, 101 Cal. Rptr. 499* (same)].

For additional discussion, see Ch. 121, *Common Counts* .

[8] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

If the rescinded contract is governed by the Unruh Act [*Civ. Code § 1801 et seq.*] or the Rees-Levering Act [*Civ. Code § 2981 et seq.*], either the complaint must be verified and show that the action is commenced in a proper place for trial under *Civ. Code § 1812.10* (Unruh Act) or 2984.4 (Rees-Levering Act), or an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) showing that the action is being commenced in a proper place for the trial of the action [*see § 490.61[9]*] must be filed concurrently with the complaint [*Civ. Code §§ 1812.10(c), 2984.4(c)*; *Code Civ. Proc. § 396a(a)*; *see also § 490.61[9][b]*].

[9] Jurisdiction and Venue

[a] In General

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

If the gravamen of an action for relief based on rescission is fraud, the action is considered transitory, and the proper venue is the county of defendant'sresidence [*Code Civ. Proc. § 395(a)*; *Postin v. Griggs (1944) 66 Cal. App. 2d 147, 149-150, 151 P.2d 887]* .

[b] Actions Under Unruh or Rees-Levering Act

An action on a contract or installment account governed by the Unruh Act (*Civ. Code § 1801 et seq.*) or on a contract or purchase order governed by the Rees-Levering Act (*Civ. Code § 2981 et seq.*) must be tried in the county in which (1) the contract was signed by the buyer, (2) the buyer resided at the time the contract was entered into or at the time of the commencement of the action, or (3) the goods purchased have become affixed to realty (Unruh Act) or the vehicle purchased is permanently garaged (Rees-Levering Act) [*Civ. Code §§ 1812.10(a), 2984.4(a)*; *see Morgan v. Reasor Corp. (1968) 69 Cal. 2d 881, 896-897, 73 Cal. Rptr. 398, 447 P.2d 638* (action for relief based on rescission as "on contract" for purposes of attorney's fee award under *Civ. Code § 1811.1*); *Leaf v. Phil Rauch, Inc. (1975) 47 Cal. App. 3d 371, 377-379, 120 Cal. Rptr. 749* (action for relief based on rescission as "on contract" for purposes of attorney's fee award under *Civ. Code § 2983.4*)].

If the contract that was rescinded was governed by the Unruh Act or the Rees-Levering Act, either the complaint must be verified and allege facts showing that the action is commenced in a proper place for trial under *Civ. Code § 1812.10* or *Civ. Code § 2984.4*, or, concurrently with the filing of the complaint, the plaintiff must file an affadavit (or declaration under *Code Civ. Proc. § 2015.5*) showing that the action is being commenced in a proper place for the trial [

Civ. Code §§ 1812.10(c), 2984.4(c); *Code Civ. Proc. § 396a(a)*]. For a declaration under the Unruh Act, see Ch. 501, *Sales: Retail Installment Sales* ; for a declaration under the Rees-Levering Act, see Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* .

[c] Other Goods or Services for Personal or Family Use; Telephone or Electronic Solicitation

In an action arising from an offer or provision of goods, services, loans, or extensions of credit intended primarily for personal, family or household use (other than obligations under the Unruh Act or Rees-Levering Act [*see § 490.61[9][b]*]), or an action arising from a transaction consummated as a proximate result of either an unsolicited telephone call made by a seller whose business is consummating that type of transaction, or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller, the superior court in the county where the buyer or lessee in fact signed the contract, or where the buyer or lessee resided at the time the contract was entered into, or where the buyer or lessee resides at the commencement of the action, is the proper court for the trial of the action [*Code Civ. Proc. § 395(b)*; *Fontaine v. Superior Court (CashCall, Inc.) (2009) 175 Cal. App. 4th 830, 838-840, 96 Cal. Rptr. 3d 607* (statute applies to action by consumer plaintiff, as well as to action against consumer, and if any defendant in consumer's action is individual, that is irrelevant to application of statute)].

If the action is a limited civil case, either the complaint must be verified and state facts showing that the action is subject to the requirements noted in the preceding paragraph and has been commenced in the proper court for trial, or those facts must be shown in an affidavit of the plaintiff or the plaintiff's attorney filed with the complaint. If an affidavit is used, it must be served with the summons [*Code Civ. Proc. § 396a(a)*].

[10] Lis Pendens

If the property plaintiff is seeking to regain as a result of rescission is real property, plaintiff should record a notice of pendency of the action in order to put third parties on notice and prevent their acquisition of a right to the property superior to plaintiff's [*see Code Civ. Proc. § 405 et seq.*; *Mason v. Superior Court (1985) 163 Cal. App. 3d 989, 994-995, 210 Cal. Rptr. 63* (lis pendens improperly expunged in action to set aside deed, for cancellation, and declaratory relief); *Joshua Tree T. Co. v. Joshua Tree L. Co. (1950) 100 Cal. App. 2d 590, 596, 224 P.2d 85* (rescission unavailable as to parcels conveyed to third persons); *see* Ch. 348, *Lis Pendens*]. The recording of a lis pendens may amount to an election of remedies, foreclosing damages, if defendant is prejudiced [*but see* *Brandolino v. Lindsay (1969) 269 Cal. App. 2d 319, 325, 75 Cal. Rptr. 56* (recordation of lis pendens in action for specific performance or damages for breach of contract does not constitute election; damages as proper when specific performance was not available)]. For discussion of election of remedies, § 490.42[2]. For an affirmative defense based on election of remedies, see *§ 490.67*.

[11] Cross References

For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions*

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For discussion and forms relating to rescission of automobile leases and conditional sales contracts, see Ch. 89, *Automobiles: Sales and Leasing Under the Rees-Levering Act*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, § 177.40* et seq.

For discussion and forms relating to rescission of gifts, see Ch. 278, *Gifts*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to remedies available under *Com. Code § 2101 et seq.*, see Ch. 502, *Sales: Warranties*

For discussion and forms relating to rescission of securities transactions governed by the California Corporate Securities Law of 1968 (*Corp. Code § 25000 et seq.*), see *Ch. 515, Securities and Franchise Regulation, § 515.10* et seq.

For discussion and forms relating to rescission of franchises governed by the California Franchise Investment Law (*Corp. Code § 31000 et seq.*), see *Ch. 515, Securities and Franchise Regulation, § 515.50* et seq.

For discussion and forms relating to rescission of sale or lease of seller assisted marketing plan, see *Ch. 515, Securities and Franchise Regulation, § 515.50* et seq.

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For discussion and forms relating to rescission of real estate sales and exchanges for fraud, see *Ch. 569, Vendor and Purchaser, § 569.10* et seq.

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

[12] State Statutes

Actual fraud defined. *Civ. Code § 1572*

Actual fraud as question of fact. *Civ. Code § 1574*

Rescission for failure of consent. *Civ. Code § 1689(b)(1)*

Relief based on rescission. *Civ. Code § 1692*

Liability for deceit. *Civ. Code § 1709*

Exemplary damages. *Civ. Code §§ 3294, 3295(e)*

Measure of damages not arising from contract. *Civ. Code § 3333*

Measure of damages for fraud in purchase, sale, or exchange of property. *Civ. Code § 3343*

Offenses involving odometer tampering. *Veh. Code §§ 28050-28053*

[13] Decisions

[a] Acts of Third Persons as Grounds for Rescission

Duress or fraud of third party renders transaction voidable only if other party has reason to know of fraud or duress before giving or promising in good faith something of value or materially changing position by reason of transaction. *Leeper v. Beltrami (1959) 53 Cal. 2d 195, 206, 1 Cal. Rptr. 12, 347 P.2d 12* ; *Hall v. Department of Adoptions (1975) 47 Cal. App. 3d 898, 903, 121 Cal. Rptr. 223*

[b] Attorney's Fees

If rescinded contract is governed by Unruh Act (*Civ. Code §§ 1801-1812.20*), *Civ. Code § 1811.1* is basis for recovery of attorney's fees in action for relief based on rescission. See *Morgan v. Reasor Corp. (1968) 69 Cal. 2d 881, 896-897, 73 Cal. Rptr. 398, 447 P.2d 638*

If rescinded contract contains provision for attorney's fees that does not limit its operation to particular types of actions, attorney's fees are recoverable under *Civ. Code § 1717* in action for relief based on rescission. *Hastings v. Matlock (1985) 171 Cal. App. 3d 826, 840-842, 217 Cal. Rptr. 856* ; *Leaf v. Phil Rauch, Inc. (1975) 47 Cal. App. 3d 371, 377-379, 120 Cal. Rptr. 749*

If rescinded contract is governed by Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code §§ 2981-2984.4*), *Civ. Code § 2983.4* is basis for recovery of attorney's fees in action for relief based on rescission. *Leaf v. Phil Rauch, Inc. (1975) 47 Cal. App. 3d 371, 378-379, 120 Cal. Rptr. 749*

[c] Damages

Price of gun, costs, and attorney's fees for defense after arrest were properly awarded to innocent buyer of stolen gun under *Com. Code §§ 2714, 2715* for breach of warranty of title. *De La Hoya v. Slim's Gun Shop (1978) 80 Cal. App. 3d Supp. 6, 8-12 , 146 Cal. Rptr. 68*

Exemplary damages are proper in action for relief based on rescission. *Horn v. Guaranty Chevrolet Motors (1969) 270 Cal. App. 2d 477, 484, 75 Cal. Rptr. 871* ; *Millar v. James (1967) 254 Cal. App. 2d 530, 533, 62 Cal. Rptr. 335*

[d] Notice

Requirement of notice of breach set forth in *Com. Code § 2607* is applicable even when breach of warranty is framed according to tort theory. *Metowski v. Traid Corp. (1972) 28 Cal. App. 3d 332, 339, 104 Cal. Rptr. 599*

[e] Fraudulent Misrepresentation

[i] Damages

$80,000 punitive damage award (27 times compensatory damages) was proper against dealer who defrauded elderly couple in connection with sale of vehicle whose odometer had been turned back. *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc. (1984) 155 Cal. App. 3d 381, 389-392, 202 Cal. Rptr. 204*

Proper measure of damages is that set forth in *Civ. Code §§ 1709, 3333,* not *Civ. Code § 3343,* when gravamen of complaint was not fraud inducing purchase contract but later misrepresentations as to defects and repairs. *Sprague v. Frank J. Sanders Lincoln Mercury, Inc. (1981) 120 Cal. App. 3d 412, 419, 174 Cal. Rptr. 608*

Storage charges are proper element of damages for deceit. *Sprague v. Frank J. Sanders Lincoln Mercury, Inc. (1981) 120 Cal. App. 3d 412, 419-420, 174 Cal. Rptr. 608*

[ii] Reliance

Direct evidence is not required to show reliance; circumstances of case as basis for inferring reliance. *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 814, 94 Cal. Rptr. 796, 484 P.2d 964*

Independent investigation of property does not preclude reliance on representation when falsity of statement would not be apparent from inspection or when person making misrepresentation has superior knowledge. *Bagdasarian v. Gragnon (1948) 31 Cal. 2d 744, 748, 192 P.2d 935* ; *Arthur L. Sachs, Inc. v. City of Oceanside (1984) 151 Cal. App. 3d 315, 323, 198 Cal. Rptr. 483* ; *Horn v. Guaranty Chevrolet Motors (1969) 270 Cal. App. 2d 477, 482, 75 Cal. Rptr. 871*

Buyer ordinarily does not have duty to investigate. *Arthur L. Sachs, Inc. v. City of Oceanside (1984) 151 Cal. App. 3d 315, 323, 198 Cal. Rptr. 483*

[f] Injury

Pecuniary loss is not necessary; gift and sale of gift item are rescindable for fraud or donee and retailer; alteration of essential character of transaction is sufficient injury. *Earl v. Saks & Co (1951) 36 Cal. 2d 602, 611-613, 226 P.2d 340*

Pecuniary loss is not required to be pleaded or proved to justify rescission for fraud so long as some injury is shown. *Hefferan v. Freebairn (1950) 34 Cal. 2d 715, 721-722, 214 P.2d 386* (misrepresentation regarding earnings of business sold)

[g] Pleading

Complaint that fails to set forth facts showing plaintiff was harmed is fatally defective. *Guthrie v. Times-Mirror Co. (1975) 51 Cal. App. 3d 879, 886-889, 124 Cal. Rptr. 577* (mistake of law)

Fraud is required to be specifically pleaded. *Hall v. Department of Adoptions (1975) 47 Cal. App. 3d 898, 904-905, 121 Cal. Rptr. 223*

Unsupported allegations of fraud are insufficient; rescinding party as required to have actually been deceived by misrepresentation of material fact, by which other party intended to deceive, and to have relied to his or her injury. Contra *Costa County Title Co. v. Waloff (1960) 184 Cal. App. 2d 59, 65, 7 Cal. Rptr. 358* (party attempting rescission found to have breached contract)

[h] Text References

Witkin, California Procedure, vols. 4, 5, *Pleading*, §§ 345, 502-512, 667-687 (4th ed. 1997)

[i] Cross Reference

For related form, *see § 490.60*.

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Volume 43: Receivers thru Rewards-Chs. 486-499
Chapter 490 RESCISSION AND RESTITUTION
PART IV. FORMS

43-490 California Forms of Pleading and Practice--Annotated § 490.62

§ 490.62 Complaint for Relief Based on Rescission of Contract [Civ. Code § 1692], or in the Alternative, for Damages [Civ. Code § 3300] for Breach of Contract--Failure of Consideration [Civ. Code § 1689(b)(2)-(4)]

[1] FORM Complaint for Relief Based on Rescission of Contract [Civ. Code § 1692], or in the Alternative, for Damages [Civ. Code § 3300] for Breach of Contract--Failure of Consideration [Civ. Code § 1689(b)(2)-(4)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RELIEF BASED ON RESCIS-
_____ [*name*],	)	SION; FOR MONEY HAD AND RECIEVED; [AND
[and DOES I through _____,]	)	FOR DAMAGES FOR BREACH OF CONTRACT]
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff allege(s):

FIRST COUNT
(Relief Based on Rescission)

1. [*Capacity and residence of parties. See § 490.61[1], Paragraphs 1. and 2.*]

[2. *Fictitious name allegations. See § 490.61[1], Paragraph 3.*]

[3. *Agency allegations. See § 490.61[1], Paragraph 4.*]

4. [*Formation and terms of contract or lease. See § 490.61[1], Paragraph 5.*]

5. [*Plaintiff's performance or excuse for performance. See § 490.61[1], Paragraph 9.*]

[6. On or about _____ (*date*), _____ (*describe the occurrence, satisfaction, or waiver of any condition precedent to defendant's performance, e.g.,* the Board of Directors of the defendant corporation approved and ratified the contract as written).]

[*EITHER, if failure of consideration is total*]

7. _____ [Despite plaintiff's demand that he/she/it do so, defendant *or* Defendant] has failed and refused _____ [*describe defendant's failure to perform and if failure to perform was not accompanied by a specific repudiation, indicate that failure has continued either for more than a reasonable time or, if time has been specified by the contract to be of theessence, beyond the time specified in the contract, e.g.,* execute and deliver to plaintiff its note for two months after the time called for by the contract].

[*OR, if failure of consideration is material*]

7. Defendant _____ [*describe defendant's performance and manner and extent of failure of consideration, e.g.,* delivered and installed the security system on plaintiff's premises. When the system had been operating for only two weeks, plaintiff was served an injunction issued by the United States District Court requiring the system to be rendered inoperable because it interfered with secret government radio frequencies. The system has therefore been rendered useless].

[*OR, if failure of consideration is based on repudiation*]

7. On or about _____ [*date*], defendant _____ [*if defendant expressly repudiated contract:*, by _____ (*specify form of notice, e.g.,* a letter to plaintiff) gave notice that defendant would not perform the contract, and defendant totally repudiated it *or, if repudiation was implied by defendant's conduct, allege facts showing that defendant put it out of defendant's power to perform, e.g.,* dissolved the partnership, liquidated its assets, and voluntarily went out of business despite defendant's promise to pay plaintiff's note from the profits of the partnership]. [*If appropriate, add:* A copy of defendant's _____ (*e.g.,* letter) is attached as Exhibit _____ and incorporated by reference.] Defendant's repudiation of the contract by this _____ [notice *or* action] has not been retracted. At the time of defendant's repudiation, plaintiff had performed all of the conditions and things on his/her/its part to be done and performed, and was ready, able, and willing to _____ [perform those terms and conditions on his/her/its part to be performed or complete performance on his/her/its part].

[*CONTINUE*]

8. [*Plaintiff's injury. See § 490.61[1], Paragraph 12.*]

9. [*Notice of rescission and offer to restore or allegation that service of complaint is to serve as notice and offer. See §*

490.61[1], Alternative Paragraphs 13.]

[10. *Consequential damages, if any. See § 490.61[1], Paragraph 14.*]

SECOND COUNT
(Damages for Breach of Contract)

11. Plaintiff realleges and incorporates herein Paragraphs 1-7 [and Paragraph 10] of the First Count.

12. As a result of _____ [defendant's breach of *or* the failure of the consideration to be received by plaintiff under] the contract, plaintiff has been damaged in the sum of $_____, which is the amount that plaintiff _____ [*specify items of damage, e.g.,* expended on a totally useless burglar alarm system (*if any offsets or credits are to be acknowledged, add them here, e.g.,* less the sum of $_____ which plaintiff acknowledges to be the reasonable value of the use of the system for the two weeks it operated before the plaintiff was notified of the injunction)].

THIRD COUNT
(Common Count for Money Had and Received)

13. Plaintiff realleges and incorporates herein Paragraphs 1-3 of the First Count.

14. [*Defendant's indebtedness. See § 490.61[1], Paragraph 19.*]

15. [*Nonpayment. See § 490.61[1], Paragraph 20.*]

WHEREFORE, plaintiff prays judgment as follows:

On the first COUNT:

1. That this Court declare that the _____ [contract *or* lease] has been rescinded;

2. That defendant be ordered to pay plaintiff the following sums:

[*Use any or all of the following subparagraphs as applicable*]

(a) The consideration paid by plaintiff in the sum of $_____, with interest thereon at _____ [*specify legal or agreed rate*] percent per annum from _____ [*date of rescission*];

(b) The sums paid, or which will be paid, by plaintiff for _____ [*enumerate other items for which plaintiff will have to be reimbursed to be placed in the position he or she was in prior to execution of the contract being rescinded, e.g.,* costs of installing and dismantling the alarm system on plaintiff's premises] _____ [in the sum of $_____ *or* according to proof], with interest thereon at _____ [*specify legal or agreed rate*] percent per annum from _____ [*date of rescission*];

3. That plaintiff be ordered to _____ [*specify, e.g.,* return possession of the alarm system to defendant] on condition that defendant pay to plaintiff the sums as ordered by the judgment of this Court;

[4. For reasonable attorney's fees as _____ (provided for in the contract *or* authorized by _____ (*specify any applicable statute that provides for attorney's fees, e.g., Civ. Code § 2983.4*)) according to proof.]

On the second COUNT:

5. For compensatory damages _____ [in the sum of $_____ *or* according to proof], with interest thereon at _____ [*specify legal or agreed rate*] percent per annum from _____ [*date of rescission*];

On the third COUNT:

6. For the sum of $_____, with interest thereon at _____ [*specify legal or agreed rate*] percent per annum from _____ [*date of rescission*].

On all COUNTS:

7. For costs of suit herein incurred; and

8. For such other relief as the Court deems just.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 490.61.*]

CAUTION:
If the rescinded contract is governed by the Unruh Act (*Civ. Code § 1801 et seq.*) or the Rees-Levering Act (*Civ. Code § 2981 et seq.*), an affadavit (or declaration under *Code Civ. Proc. § 2015.5*), showing that the action is being commenced in a proper place for the trial of the action, must be filed concurrently with the complaint, unless the complaint is verified and shows the action is commenced in a proper place for trial under *Civ. Code § 1812.10* or *Civ. Code § 2984.4* [*Civ. Code §§ 1812.10(c), 2984.4(c)*; *Code Civ. Proc. § 396a(a)*; *see* *§ 490.61[9]*].

[2] Use of Form

This complaint is for use by a plaintiff to bring an action to seek restitution after rescission or, in the alternative, damages for breach of contract, when the consideration he or she was to receive under a contract or lease failed in whole or in material part [*see Civ. Code §§ 1689(b)(2), (4), 1692, 3300*]. The common count for money had and received is an additional alternative ground for recovery of sums paid by plaintiff under the rescinded contract [*see Philpott v. Superior Court (1934) 1 Cal. 2d 512, 518, 36 P.2d 635* (propriety of pleading express count and common count based on same facts); *Bray v. Lowery (1912) 163 Cal. 256, 260, 124 P. 1004* (failure of consideration as proper basis for action for money had and received)]. If plaintiff's performance, or part performance, took the form of work, labor, or services rather than money, then quantum meruit is the appropriate common count, not money had and received as set forth in the foregoing form [*Oliver v. Campbell (1954) 43 Cal. 2d 298, 304, 273 P.2d 15* (after employer's repudiation by wrongful discharge, employee may recover reasonable value of services rendered on quantum meruit even if reasonable value exceeds contract rate); *Mayo v. Pacific Project Consultants, Inc. (1969) 1 Cal. App. 3d 1013, 1018-1019, 82 Cal. Rptr. 117* ; for a form of complaint based on quantum meruit, see Ch. 121, *Common Counts*].

If the transaction involved a deed or other instrument that may cause plaintiff harm if left outstanding, a count for cancellation may be added. For forms of complaint for cancellation, see Ch. 107, *Cancellation of Instruments* . For forms of complaint containing causes of action for both rescission and cancellation of real property transactions and the instrument created by them, see Ch. 569, *Vendor and Purchaser* .

[3] Allegations

[a] Preliminary Allegations

The first count of this complaint incorporates the allegations from *§ 490.61* regarding the capacity and residence of the parties (Paragraphs 1-3), the formation of the contract or lease being rescinded (Paragraph 4), and the extent of plaintiff's performance or excuse for nonperformance (Paragraph 5). For discussion of those allegations, see *§ 490.61*.

[b] Failure of Consideration

Optional Paragraph 6 is for use when defendant's performance was conditioned on the occurrence of an event or performance of some act to allege the performance, happening, or waiver of the condition precedent or concurrent [*see* Ch. 140, *Contracts*].

Alternative Paragraphs 7 allege failure of consideration based on one of the following:

- Defendant's total failure to perform the contract [Paragraph 7, first alternative provision].

- Defendant's material breach of the contract [Paragraph 7, second alternative provision].

- Defendant's repudiation of the contract [Paragraph 7, third alternative provision; *see Oliver v. Campbell (1954) 43 Cal. 2d 298, 302, 273 P.2d 15]* . For discussion of repudiation of a contract, see *§ 490.16[3][g]*. For a complaint for damages based on anticipatory repudiation, see *Ch. 140, Contracts, § 140.105*.

All of the above alternatives allege facts establishing that the breach or failure is total or material [*Civ. Code § 1689(b)(2)-(4)*; *see also Fountain v. Semi-Tropic L. & W. Co. (1893) 99 Cal. 677, 680-681, 34 P. 497* (what constitutes material breach or failure); *Wyler v. Feuer (1978) 85 Cal. App. 3d 392, 403-404, 149 Cal. Rptr. 626* (partial failure of consideration under *Civ. Code § 1689(b)(2)* must be material to provide basis for rescission)]. For additional discussion of these grounds for rescission, see *§ 490.16[3][b][ii]*

Under *Civ. Code § 1689(b)(3)* and*(b)(4)*, rescission is available even if the defendant was not the cause of the failure of consideration [*see Nelson v. Sperling (1969) 270 Cal. App. 2d 194, 195-196, 76 Cal. Rptr. 481* (*Civ. Code § 1689(b)(4)*)].

[c] Other Allegations

The first count of this complaint incorporates allegations from § 490.61 regarding the following:

- Plaintiff's injury [Paragraph 8; *see Coleman v. Mora (1968) 263 Cal. App. 2d 137, 150, 69 Cal. Rptr. 166* ; *Wilson v. Corrugated KraftContainers (1953) 117 Cal. App. 2d 691, 697, 256 P.2d 1012* (willful default may be material failure justifying rescission even though no economic loss ensues)].

- That plaintiff gave notice of rescission and offered to restore, or facts showing that restoration is not necessary, or allegations that service of the summons and complaint are to serve as notice of rescission

and/or offer of restoration [Alternative Paragraphs 9; *see Civ. Code § 1691*; *Oliver v. Campbell (1954) 43 Cal. 2d 298, 306, 273 P.2d 15* (plaintiff need not restore reasonable value of services he or she performed before defendant's breach)].

- Optional allegations regarding plaintiff's additional or consequential damages [Paragraph 10; *see Civ. Code § 1692*; *see, e.g.,* *Runyan v. Pacific Air Industries, Inc. (1970) 2 Cal. 3d 304, 308 n.3, 310-313, 318-319, 85 Cal. Rptr. 138, 466 P.2d 682* (rescission of franchise agreement, loss of former salary, training, and net operating expenses)].

These allegations are discussed in *§ 490.61*. The essential allegations for money had and received are discussed in *§ 490.61*.

[d] Damages for Breach of Contract

The allegations in the count for damages for breach of contract differ from those in the count for relief based on rescission only in that plaintiff's injury is assigned a money value in the count for damages (Paragraph 12), while allegation in the count for relief based on rescission did not necessarily do so [*see* *Coleman v. Mora (1968) 263 Cal. App. 2d 137, 150, 69 Cal. Rptr. 166* ; *Wilson v. Corrugated Kraft Containers (1953) 117 Cal. App. 2d 691, 697, 256 P.2d 1012* (willful default may be material failure justifying rescission even though no economic loss ensues)].

A vendor who rescinds a contract for the sale of personal property is entitled to the cost of replacement if the specific property cannot be returned [*Gardiner Solder v. SupAlloy Corp. (1991) 232 Cal. App. 3d 1537, 1544, 284 Cal. Rptr. 206* (seller of solder sought rescission and restitution after solder had been shipped and buyer had failed to pay)].

[4] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless it is a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. § 85*]. Actions to cancel or rescind a contract when the relief is sought in connection with an action to recover money not exceeding $25,000 or property of a value not exceeding $25,000, paid or delivered under or in consideration of the contract, are limited civil cases [*Code Civ. Proc. § 86(a)(3)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

If the gravamen of an action for relief based on rescission is deemed to be quasi-contractual arising from the implied contract for restitution, the proper venue is the county in which the obligation is to be performed, in which the contract was entered into, or in which the defendant resides at the commencement of the action. If no place is specified as the place of performance, performance is due where the liability was incurred [*Code Civ. Proc. § 395(a)*; *see* *Philpott v. Superior Court (1934) 1 Cal. 2d 512, 517-518, 524-526, 36 P.2d 635* (considering jurisdiction under former law, not venue; when tort is waived action for money had and received or quantum meruit as ex contractu)]. The implied contract is formed when and where the notice of rescission is served, which will usually be the defendant's residence or principal place of business [*Code Civ. Proc. § 395(a)*; *Fitzhugh v. University Realty Co. (1920) 46 Cal. App. 198, 201, 188 P. 1023* ; *see Code Civ. Proc. § 395.5* (venue for action against corporation or association, same as venue for contract action under *Code Civ. Proc. § 395(a)* with additional option of county of principal place of business)].

If the rescinded contract is governed by the Unruh Act (*Civ. Code § 1801 et seq.*) or the Rees-Levering Act (*Civ. Code § 2981 et seq.*), or arises from an offer or provision of goods, services, loans or extensions of credit intended primarily for personal, family or household use, or from a transaction consummated as the result of either an unsolicited telephone call made by a seller or a telephone call or electronic transmission made by the buyer or lessee in response to a

solicitation by the seller [*see Code Civ. Proc. § 395(b)*], special venue requirements apply [*Civ. Code §§ 1812.10, 2984.4*; *Code Civ. Proc. § 396a*]. Those requirements are discussed in *§ 490.61*.

[5] Cross References

For discussion and forms relating to contracts generally, see Ch. 140, *Contracts*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages* .

[6] State Statutes

Rescission for failure of consideration to be received by rescinding party, in whole or in part, through fault of party against whom he or she rescinds. *Civ. Code § 1689(b)(2)*

Rescission for failure of consideration to be received by rescinding party, before it is rendered to him or her, in material respect from any cause. *Civ. Code § 1689(b)(4)*

[7] Decisions

[a] Common Count

After breach of contract by employer that is material enough to warrant rescission by employee, employee is entitled to recover reasonable value of services rendered on quantum meruit even if reasonable value exceeds contract rate. *Oliver v. Campbell (1954) 43 Cal. 2d 298, 304, 273 P.2d 15*

Cross complaint to recover reasonable value of services and moneys advanced in part performance was acceptance of offer of rescission manifested by plaintiff's repudiation and commencement of quiet title action. *Mayo v. Pacific Project Consultants, Inc. (1969) 1 Cal. App. 3d 1013, 1018-1019, 82 Cal. Rptr. 117*

[b] Consequential Damages

After rescission for failure of defendant's performance, plaintiff is entitled to recover loss of income from date service-area contract was signed to date of notice of rescission at rate of former salary, training, and operating expenses, less gross income from franchise operation. *Runyan v. Pacific Air Industries, Inc. (1970) 2 Cal. 3d 304, 308 n.3, 310-313, 318-319, 85 Cal. Rptr. 138, 466 P.2d 682*

[c] Failure of Consideration

When agreement for sale of block of stock required purchaser to make tender offer for outstanding shares held by other minority interests at price no less than price paid to seller, and, if purchaser acquired 80 percent of shares, to adjust price paid to seller to reflect price paid to other offerees, purchaser's failure to make tender offer was breach of contract and failure of consideration; whether failure of consideration was sufficiently material to allow seller to rescind was question of fact. *FDIC v. Air Florida System, Inc. (9th Cir. 1987) 822 F.2d 833, 839-840*

No mistake of fact or failure of consideration, only error in judgment, was established when contract became unprofitable for party who knew that its value could be effected by particular future event and made no provision in contract with respect to that risk; risk is borne by that party, who is not entitled to avoid, rescind, or reform contract. *Mosher v. Mayacamas Corp. (1989) 215 Cal. App. 3d 1, 5-6, 263 Cal. Rptr. 373*

Partial failure of consideration under *Civ. Code § 1689(b)(2)* required to be material to justify rescission. *Wyler v. Feuer (1978) 85 Cal. App. 3d 392, 403-404, 149 Cal. Rptr. 626* ; *Crofoot Lumber, Inc. v. Thompson (1958) 163 Cal. App. 2d 324, 332-333, 329 P.2d 302*

Materiality of failure of consideration is question of fact; failure to endorse notes without recourse and deliver them to plaintiff held material failure affording plaintiff ground for rescission. *Calabrese v. Rexall Drug & Chemical Co. (1963) 218 Cal. App. 2d 774, 782, 785, 32 Cal. Rptr. 665*

Failure of goods to conform to warranty permits rescission for failure of consideration. *Hot-N-Kold Corp. v. Todd (1930) 105 Cal. App. 718, 723, 288 P. 687*

When goods are of no use for purpose for which they were purchased, failure of consideration is total, and restoration need not be made prior to suit. *Hot-N-Kold Corp. v. Todd (1930) 105 Cal. App. 718, 723, 288 P. 687*

Failure to use money loaned for agreed purpose is failure of consideration. *Richards v. Tavares (1930) 105 Cal. App. 261, 269, 287 P. 552*

[d] Pleading

Service of complaint for money had and received equivalent to notice of unilateral rescission. *Nelson v. Sperling (1969) 270 Cal. App. 2d 194, 195 n. 1, 76 Cal. Rptr. 481*

[e] Repudiation

Obligor's statement to obligee indicating that obligor will breach important contractual promise, thereby substantially impairing value of contract, constitutes repudiation of contract, entitling obligee to restitution; restitution is appropriate whether or not contracts ultimately would have produced financial gain to plaintiff. *Mobil Oil Exploration & Producing Southeast, Inc. v. United States (2000) 530 U.S. 604, 120 S. Ct. 2423, 147 L. Ed. 2d 528, 534, 543-544*

Repudiation gives other party election to rescind. *Oliver v. Campbell (1954) 43 Cal. 2d 298, 302, 273 P.2d 15* ; *Loop Bldg. Co. v. DeCoo (1929) 97 Cal. App. 354, 364, 275 P. 881*

Offer of obligor that includes demand for performance of unwarranted condition is refusal to perform *Woody v. Bennett (1891) 88 Cal. 241, 243-244, 26 P. 117* ; *Loop Bldg. Co. v. DeCoo (1929) 97 Cal. App. 354, 364, 275 P. 881*

[8] Text References

Witkin, California Procedure, vols. 4, 5, *Pleading*, §§ 483-504, 513, 896-848 (4th ed. 1997)

[9] Cross Reference

For a related form, *see § 490.61*.

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Volume 43: Receivers thru Rewards-Chs. 486-499
Chapter 490 RESCISSION AND RESTITUTION
PART IV. FORMS

43-490 California Forms of Pleading and Practice--Annotated § 490.63

§ 490.63 Complaint for Relief Based on Rescission of Contract [Civ. Code § 1692]--Incompetency Prior to Adjudication
[Civ. Code §§ 39, 1689(b)(7)]

[1] FORM Complaint for Relief Based on Rescission of Contract [Civ. Code § 1692]--Incompetency Prior to Adjudication
[Civ. Code §§ 39, 1689(b)(7)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], [_____ (an incompetent person *or* a person for whom a conservator has been appointed), by _____ (*name*) his/her _____ (guardian ad litem *or* conservator)], Plaintiff, vs. _____ [*name*], [and DOES I through _____,] Defendant(s).	NO. _____ COMPLAINT FOR RELIEF BASED ON RESCISSION [Amount demanded _____ (exceeds *or* does not exceed) $10,000] [LIMITED CIVIL CASE]

Plaintiff [_____ (*name*), _____ (an incompetent person *or* a person for whom a conservator has been appointed), through his/her _____ (guardian ad litem *or* conservator)] alleges:

[*EITHER, if conservator has been appointed*]

1. On _____ [*date*], _____ [*name*] was appointed conservator of the [person and] estate of plaintiff _____ [*name*] by the _____ Court of _____; and on _____ [*date*], letters of conservatorship were issued. [A certified copy of those letters is attached as Exhibit "A" and incorporated by reference.]

[*OR, if suit is by guardian ad litem*]

1. On _____ [*date*], _____ [*name*] was appointed guardian ad litem of plaintiff _____ [*name*], an incompetent person, by the _____ [above-entitled *or specify other*] Court for purposes of this action.

[*OR use neither of the above paragraphs if plaintiff is suing in his or her own behalf*]

[*CONTINUE*]

2. [*Capacity and residence of defendant. See § 490.61[1], Paragraph 2.*]

[3. *Fictitious name allegations. See § 490.61[1], Paragraph 3.*]

[4. *Agency allegations. See § 490.61[1], Paragraph 4.*]

5. [*Formation and terms of contract or lease. See § 490.61[1], Paragraph 5.*]

6. [*Plaintiff's performance or excuse for performance. See § 490.61[1], Paragraph 9.*]

7. [*Defendant's performance. See § 490.61[1], Paragraph 10.*]

8. At the time plaintiff and defendant entered into the _____ [contract *or* lease] [and at the time plaintiff rendered his/her performance (and accepted defendant's performance) thereunder], plaintiff was a person of unsound mind, but not entirely without understanding, and was wholly and absolutely incompetent and unable to understand the nature, purpose, and affect of the transaction.

[9. At the time plaintiff and defendant entered into the _____ (contract *or* lease) (, and at the time plaintiff rendered his/her performance [and accepted defendant's performance] thereunder), plaintiff was a person of unsound mind, substantially unable _____ (to manage his/her own financial resources *and/or* to resist fraud or undue influence).]

[10. On _____ (*date*), plaintiff was adjudicated incompetent by order of the _____ (above-entitled *or specify other*) Court in Case No. _____.]

[11. Plaintiff has been damaged in that _____ (*set forth any facts showing harm from bargain, e.g.*, in that he parted with property worth approximately $33,000, which then represented approximately two-thirds of his entire net worth, in return for an unprofitable orchard, on real property worth only $12,000).]

12. [*Notice of rescission and offer to restore or allegation that service of complaint is to serve as notice and offer. See § 490.61[1], Alternative Paragraphs 13.*]

[13. *Consequential damages, if any. See § 490.61[1], Paragraph 14.*]

WHEREFORE, plaintiff prays judgment as follows:

1. That this Court declare that the _____ [contract *or* lease] has been rescinded;

2. That defendant be ordered to pay plaintiff the following sums:

[*Use any or all of the following subparagraphs as applicable*]

a. The consideration paid by plaintiff in the sum of $_____, with interest thereon at _____ [*specify legal or agreed rate*] percent per annumfrom _____ [*date of rescission*];

b. The sums paid, or which will be paid, by plaintiff for _____ [*enumerate other items for which plaintiff will have to be reimbursed to be placed in the position he or she was in prior to the execution of the contract being rescinded, e.g.,* losses incurred in operating the orchard]_____ [in the sum of $_____ *or* according to proof], with interest thereon at _____ [*specify legal or agreed rate*] percent per annum from _____ [*date of rescission*];

3. That plaintiff be ordered to _____ [*specify, e.g.,* return title and possession of the real and personal property to the defendant] on condition that defendant pay to plaintiff the sums as ordered by the judgment of this Court;

[4. For reasonable attorney's fees as _____ (provided for in the contract *or* authorized by _____ [*specify any applicable statute that provides for attorney's fees, e.g., Civ. Code § 2983.4*]) according to proof.]

5. For costs of suit herein incurred; and

6. For such other relief as the Court deems just.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 490.61[1].*]

CAUTION:

If the rescinded contract is governed by the Unruh Act (*Civ. Code § 1801 et seq.*) or the Rees-Levering Act (*Civ. Code § 2981 et seq.*), an affadavit (or declaration under *Code Civ. Proc. § 2015.5*), showing that the action is being commenced in a proper place for the trial of the action, must be filed concurrently with the foregoing complaint, unless the complaint is verified and shows the action is commenced in a proper place for trial under *Civ. Code § 1812.10* or *Civ. Code § 2984.4* [*Civ. Code §§ 1812.10(c),*

2984.4(c); *Code Civ. Proc. § 396a(a)*; *see § 490.61[9]*]. In a limited civil case that arises from an offer or provision of goods, services, loans or extensions of credit intended primarily for personal, family or household use, or from a transaction consummated as the result of either an unsolicited telephone call made by a seller or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller [*see Code Civ. Proc. § 395(b)*], the complaint must be accompanied by an affidavit of plaintiff or plaintiff's attorney showing that the action is being commenced in the proper court, unless the complaint is verified and shows that the action and showsthat the action is being commenced in the proper court [*Code Civ. Proc. § 396a(a)*].

[2] Use of Form

This complaint is for use by an adult plaintiff, appearing alone, or by his or her conservator or guardian ad litem if one has been appointed, to bring an action for restitution after rescission on the ground that plaintiff had no understanding of the nature, purpose, and effect of the contract or conveyance rescinded [*see Civ. Code §§ 39(a), 1689(b)(7)*]. If the plaintiff is incompetent at the time of the commencement of the action and no conservator of the estate has been appointed, a guardian ad litem will have to be appointed to represent the incompetent in the action [*see Code Civ. Proc. §§ 372(a), 373* (party who is incompetent is required to appear by conservator or guardian ad litem); for a petition for appointment of a guardian ad litem, see Ch. 291, *Guardians ad Litem*].

When using this form, an attorney should consider whether other grounds for rescission, such as unsound mind, undue influence, or mistake, exist in the particular situation and should be alleged [*see Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 131, 54 Cal. Rptr. 533* (continuum of undue susceptibility in which weakness that provides sufficient ground to rescind for undue influence is lesser degree of weakness than lack of capacity to make contract under *Civ. Code § 39*)]. Allegations setting forth those grounds are in Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*.

If the transaction involved a deed or other instrument that may cause plaintiff harm if left outstanding, a count for cancellation may be added. For complaints for cancellation, see Ch. 107, *Cancellation of Instruments* . For complaints containing causes of action for both rescission and cancellation of real property transactions and the instrument created by them, see Ch. 569, *Vendor and Purchaser* .

[3] Allegations

This complaint provides allegations for three alternatives as to plaintiff's appearance (Introduction and Alternative Paragraphs 1). If the plaintiff is competent at the time the action is commenced, he or she may appear alone [*Code Civ. Proc. § 367*]. If a conservator of the estate has been appointed, plaintiff may appear by the conservator of his or her estate [*Code Civ. Proc. §§ 372(a), 373*; *see In re Marriage of Higgason (1973) 10 Cal. 3d 476, 484, 110 Cal. Rptr. 897, 516 P.2d 289* , *overruled on other grounds* (when conservator has been appointed, conservatee should not appear in action except by conservator or guardian ad litem)]. A guardian ad litem can be appointed even if there is a conservator of the estate if the conservator has not acted or has a conflict of interest or if it is otherwise appropriate [*Boyd v. Lancaster (1942) 56 Cal. App. 2d 103, 108-109, 132 P.2d 214* (inaction)].

Paragraphs are incorporated from other forms to allege:

- Defendants' capacities and residences, if necessary to establish venue or for any other reason (Paragraphs 2-4) [*see Code Civ. Proc. §§ 395(a), 395.5*; *see also § 490.62[4]*].

- Formation of the contract, and the extent to which either or both parties have performed under it (Paragraphs 5-7).

- The giving notice of rescission and the making of an offer to restore (alternative Paragraphs 12) [*Civ. Code § 1691*; *Burgess v. Security-First Nat. Bank (1941) 44 Cal. App. 2d 808, 818-821, 113 P.2d 298]* .

Paragraph 8 of this form alleges plaintiff's incompetence with regard to the particular transaction at issue [*Civ. Code § 39*; *see Guidici v. Guidici (1935) 2 Cal. 2d 497, 502, 41 P.2d 932* (incapacity may arise from intoxication of such a degree as to deprive person of reason and understanding; *Drum v. Bummer (1946) 77 Cal. App. 2d 453, 460, 175 P.2d 879]* .

This complaint includes optional paragraphs for use to allege the following:

- That the plaintiff was of unsound mind because he or she was substantially unable to manage his or her own financial resources or to resist fraud or undue influence (Paragraph 9) [*see Civ. Code § 39(b)* (rebuttable presumption affecting burden of proof that person is of unsound mind)].

- That the plaintiff has been adjudicated incompetent since the contract was made (Paragraph 9) [*see Prob. Code § 1872(a)* (appointment of conservator as adjudication of conservatee's lack of capacity to enter into contracts except as provided in *Prob. Code §§ 1872(b)-1876*); *but see In re Marriage of Higgason (1973) 10 Cal. 3d 476, 484, 110 Cal. Rptr. 897, 516 P.2d 289* (decided before enactment of *Prob. Code § 1872*) (overruled on other grounds in *In re Marriage of Dawley (1976) 17 Cal. 3d 342, 352, 131 Cal. Rptr. 3, 551 P.2d 323*)].

- That the plaintiff entered into the transaction for less than adequate consideration or any other facts tending to establish the inequity of the transaction or incompetence of plaintiff in entering into it (Paragraph 11) [*see, e.g., Guidici v. Guidici (1935) 2 Cal. 2d 497, 499-501, 41 P.2d 932* ; *Philbrook v. Howard (1958) 157 Cal. App. 2d 210, 213, 320 P.2d 609]* .

- Any damages sustained by plaintiff as a result of the transaction (Paragraph 13) [*Civ. Code § 1692* (providing for complete relief); *Weseman v. Latham (1957) 153 Cal. App. 2d 841, 845-846, 315 P.2d 364* (defendant's profit and expenses deducted from amount plaintiff was required to restore)].

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[5] Cross References

For discussion of and affirmative defenses based on the various degrees of contractual incapacity, see Ch. 140, *Contracts*

For discussion and forms for appointment of conservators, see Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators*

For discussion and forms relating to the powers of a conservator, see Ch. 287, *Guardianship and Conservatorship: General Management Powers* , through Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment*

[6] California Points and Authorities

For memoranda supporting and opposing a general demurrer to a complaint and to an answer for rescission or cancellation of a voidable contract or conveyance and opposing a motion for summary judgment in such an acton, see California Points and Authorities, Ch. 117, *Insane and Incompetent Persons* (Matthew Bender)

[7] State Statutes

Person entirely without understanding is unable to contract, but is liable for necessities. *Civ. Code § 38*

Conveyance or contract by person of unsound mind but not entirely without understanding is rescindable. *Civ. Code § 39(a)*

Rebuttable presumption affecting burden of proof that person is of unsound mind exists if person is substantially unable to manage his or her own financial resources or to resist fraud or undue influence. *Civ. Code § 39(b)*

After adjuciation of incapacity, person of unsound mind is unable to contract. *Civ. Code § 40*

Party who is incompetent as required to appear by conservator or guardian ad litem. *Code Civ. Proc. § 372(a)*

Appointment of guardian ad litem. *Code Civ. Proc. § 373*

Appointment of conservator as adjudication of conservatee's lack of capacity to enter into contracts; exceptions. *Prob. Code § 1872(a)*

Authority of conservator to initiate and maintain action on behalf of conservatee. *Prob.Code § 2462*

Payment of conservator's attorney's fees. *Prob. Code § 2640 et seq.*

[8] Decisions

[a] Incompetency as Ground for Rescission

Right of incompetent under *Civ. Code § 39* to rescind is entirely predicated on his or her incompetency; defendant's fraud or knowledge of plaintiff's incompetency is not required. *Weseman v. Latham (1957) 153 Cal. App. 2d 841, 846, 315 P.2d 364* ; *Neale v. Sterling (1931) 117 Cal. App. 507, 509, 4 P.2d 250*

Right of incompetent under *Civ. Code § 39* is supported by finding of incompetency; overreaching by defendant is not required. *Stratton v. Grant (1956) 139 Cal. App. 2d 814, 816-817, 294 P.2d 500*

Right of incompetent under *Civ. Code § 39* to rescind does not require that he or she have been adjudicated incompetent prior to transaction. *Neale v. Sterling (1931) 117 Cal. App. 507, 509, 4 P.2d 250*

[b] Lack of Understanding

Intoxication that deprives person of reason and understanding is basis for incapacity. *Guidici v. Guidici (1932) 2 Cal. 2d 497, 502, 41 P.2d 932* ; *Walton v. Bank of California (1963) 218 Cal. App. 2d 527, 541, 32 Cal. Rptr. 856* (plaintiff found competent); *Mundorff v. Ramm (1924) 66 Cal. App. 553, 565, 226 P. 820*

To rescind under *Civ. Code § 39*, test is whether or not person could deal with subject matter of contract with full understanding of his or her rights and nature, purpose, and effect of what he or she did with respect to particular transaction; incompetency to enter any kind of contract is not required. *Smalley v. Baker (1968) 262 Cal. App. 2d 824, 832, 69 Cal. Rptr. 521* (plaintiff found competent); *Walton v. Bank of California (1963) 218 Cal. App. 2d 527, 541, 32 Cal. Rptr. 856* (plaintiff found competent); *Peterson v. Ellebrecht (1962) 205 Cal. App. 2d 718, 721, 23 Cal. Rptr. 349* ; *Philbrook v. Howard (1958) 157 Cal. App. 2d 210, 214, 320 P.2d 609* ; *Stratton v. Grant (1956) 139 Cal. App. 2d 814, 817, 294 P.2d 500* ; *Drum v. Bummer (1946) 77 Cal. App. 2d 453, 460, 175 P.2d 879*

Test of understanding varies from one contract to next; test is cognitive rather than motivational; imprudent tendencies of manic phase of manic depression is example of motivational test applied in some jurisdictions; California test is narrower, focusing only on impaired understanding. *Smalley v. Baker (1968) 262 Cal. App. 2d 824, 832-835, 69 Cal. Rptr. 521*

Incompetency is question of fact to be determined by jury or trial court; findings supported by evidence will not be disturbed on appeal. *Peterson v. Ellebrecht (1962) 205 Cal. App. 2d 718, 721, 23 Cal. Rptr. 349*

Evidence that one's mental capacity is limited to simple, everyday situations, and that one is unable to deal with abstractions, such as concept of title to property, supports finding that one is unable to competently deal with subject matter with full understanding of his or her rights. *Peterson v. Ellebrecht (1962) 205 Cal. App. 2d 718, 722, 23 Cal. Rptr. 349*

One lacking enough mental vigor to protect him or herself against imposition is entitled to protection even though mental weakness is not such as to justify one being regarded as totally incompetent. *Philbrook v. Howard (1958) 157 Cal. App. 2d 210, 214, 320 P.2d 609*

Evidence of incompetence before and after transaction is admissible and will support finding of incompetence despite existence of some evidence of competence at time of transaction. *Mundorff v. Ramm (1924) 66 Cal. App. 553, 565-566, 226 P. 820*

[c] Limitations and Laches

If based on fraud or mistake, complaint is required to allege discovery within three years prior to commencement of action to avoid bar of former Code Civ. Prov. § 338.4 (*now see Code. Civ. Proc. § 338(d)*); laches not applicable when statute of limitation for fraud applies. *Castro v. Geil (1895) 110 Cal. 292, 295-296, 42 P. 804*

Laches does not bar rescission when guardian acted as soon as she discovered facts. *Philbrook v. Howard (1958) 157 Cal. App. 2d 210, 215, 320 P.2d 609*

Four-year limitation of *Code Civ. Proc. § 343* did not bar rescission of deed when plaintiff never recovered his mental powers sufficiently to comprehend situations and guardian ad litem first learned of facts one month before action was brought *Boyd v. Lancaster (1942) 56 Cal. App. 2d 103, 111, 132 P.2d 214*

[d] Party Plaintiff

When conservator has been appointed, *Code Civ. Proc. § 372* requires conservatee to appear in action by conservator or guardian ad litem; other party can raise defect; guardian ad litem is only representative, not party. *In re Marriage of Higgason (1973) 10 Cal. 3d 476, 484, 110 Cal. Rptr. 897, 516 P.2d 289* (overruled on other grounds in *In re Marriage of Dawley (1976) 17 Cal. 3d 342, 352, 131 Cal. Rptr. 3, 551 P.2d 323*)

Suit should be brought in name of incompetent by guardian; cause of action is ward's not guardian's; complaint in name of guardian is demurrable for want of plaintiff. *Dixon v. Gries (1895) 106 Cal. 506, 507, 39 P. 857* ; *Fox v. Minor (1867) 32 Cal. 111, 117-119*

[e] Restoration or Offer to Restore

Failure of plaintiff to make offer to restore is not fatal since decree could be conditioned on payment or restoration. *Weseman v. Latham (1957) 153 Cal. App. 2d 841, 846-847, 315 P.2d 364*

Offer to restore made during trial is sufficient. *Boyd v. Lancaster (1942) 56 Cal. App. 2d 103, 109-111, 132 P.2d 214*

If offer to restore was made prior to suit, allegation or finding that parties can be restored to status quo is not necessary. *Neale v. Sterling (1931) 117 Cal. App. 507, 509-510, 4 P.2d 250*

Right of incompetent under *Civ. Code § 39* to rescind held barred for failure to offer to restore value with which other party had parted in reliance on contract. *Burgess v. Security-First Nat. Bank (1941) 44 Cal. App. 2d 808, 818-821, 113 P.2d 298*

[9] Text References

Witkin, California Procedure, vol. 4, *Pleading*, §§ 502-504, 512 (4th ed. 1997)

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 50-57 (10th ed. 2005)

[10] Cross Reference

For related forms, *see §§ 490.61* and *490.62*.

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Volume 43: Receivers thru Rewards-Chs. 486-499
Chapter 490 RESCISSION AND RESTITUTION
PART IV. FORMS

43-490 California Forms of Pleading and Practice--Annotated § 490.64

§ 490.64 Complaint for Relief Based on Rescission of Contract [Civ. Code § 1692]--Contract Unlawful or Prejudicial to Public Policy [Civ. Code § 1689(b)(5), (6)]

[1] FORM Complaint for Relief Based on Rescission of Contract [Civ. Code § 1692]--Contract Unlawful or Prejudicial to Public Policy [Civ. Code § 1689(b)(5), (6)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RELIEF BASED ON RESCIS-
_____ [*name*],	)	SION [FOR MONEY HAD AND RECEIVED]
[and DOES I through _____,]	)	[Amount demanded _____ (exceeds
Defendant(s).	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

FIRST COUNT
(Relief Based on Rescission)

1. [*Capacity and residence of defendant. See § 490.61[1], Paragraph 2.*]

[2. *Fictitious name allegations. See § 490.61[1], Paragraph 3.*]

[3. *Agency allegations. See § 490.61[1], Paragraph 4.*]

4. On or about _____ [*date*], at _____, California, [*if circumstances in which agreement was made bear on its unlawfulness, set forth those circumstance, e.g.,* plaintiff was a stockholder in a corporation of which defendant was president and which held certain logging permits relating to land owned by the United States. The permits were subject to cancellation or renewal. Defendant told plaintiff that certain persons of authority and influence would require financial renumeration to successfully negotiate the renewal of the logging rights. In response to this specific request of defendant plaintiff and defendant entered into _____ [a written *or* an oral] _____ [contract *or* lease] whereby _____ [*describe the contract or lease, setting forth the purpose or consideration that renders it and/or its enforcement unlawful and/or prejudicial to public policy, attaching a copy if desired, e.g.,* plaintiff was to make $35,000 in cash or gold bars available to defendant. Defendant promised plaintiff that the cash or gold would be used to influence the course of the negotiations for the renewal of the logging permits].

[*EITHER*]

5. The _____ [contract *or* lease] is unlawful because it is contrary to _____ [an express provision of law *and/or* the policy of express law, though not expressly prohibited *and/or* good morals] in that _____ [*specify, statute or policy that is offended by purpose or consideration provided for by contract or lease rescinded, e.g., Section 201 of Title 18 of the United States Code* prohibits, and provides criminal penalties for, making a payment or gift to a public official for the purpose of influencing an official act. The object of the contract that plaintiff _____ (rescinded *or* seeks to rescind) is to pay a public official to influence an official act].

[*AND/OR*]

5. The public interest will be prejudiced if the _____ [contract *or* lease] is permitted to stand in that _____ [*specify public interest that is offended by purpose of the contract or lease rescinded, e.g.,* public confidence in public officials requires that any contract by a public officer that could give the appearance of interefering with the unbiased discharge of his or her duty to the public in the exercise of his or her office be voided. If completed, the contract that plaintiff _____ (rescinded *or* seeks to rescind) would interfere with a public official's unbiased performance of his or her duty to the public].

[*CONTINUE*]

6. [*Plaintiff's performance or excuse for performance. See § 490.61[1], Paragraph 9.*]

7. Defendant _____ [*describe the extent of defendant's performance, e.g.,* has done nothing in furtherance of the contract and has rendered no performance thereunder].

8. [*Notice of rescission and offer to restore or allegation that service of complaint is to serve as notice and offer. See § 490.61[1], Alternative Paragraphs 13.*]

[9. *Damages in addition to restitution, if any, required to make plaintiff whole. See § 490.61[1], Paragraph 14.*]

[10. *Punitive damage allegations. See § 490.61[1], Paragraph 15.*]

SECOND COUNT
(Common Count for Money Had and Received)

11. Plaintiff realleges and incorporates herein Paragraphs 1-7 of the First Count.

12. [*Defendant's indebtedness. See § 490.61[1], Paragraph 19.*]

13. [*Nonpayment. See § 490.61[1], Paragraph 20.*]

WHEREFORE, plaintiff prays judgment as follows:

On the first COUNT:

1. That this Court declare that the _____ [contract *or* lease] has been rescinded;

2. That defendant be ordered to pay plaintiff the following sums:

[*Use any or all of the following subparagrphs as applicable*]

(a) The consideration paid by plaintiff in the sum of $_____, with interest thereon at _____ [*specify legal or agreed rate*] percent per annum from _____ [*date of rescission*];

(b) The sums paid, or which will be paid, by plaintiff for _____ [*enumerate other items for which plaintiff will have to be reimbursed to be placed in the position he or she was in prior to the execution of the contract being rescinded, e.g.,* courier fees, and brokerage commissions] _____ [in the sum of $_____ *or* according to proof], with interest thereon at _____ [*specify legal or agreed rate*] percent per annum from _____ [*date of rescission*];

[(c) Exemplary damages.]

[3. For reasonable attorney's fees as _____ (provided for in the contract *or* authorized by _____ (*specify any applicable statute that provides for attorney's fees, e.g., Civ. Code § 2983.4*)) according to proof.]

On the second COUNT:

4. For the sum of $_____, with interest thereon at _____ [*specify legal or agreed rate*] percent per annum from _____ [*date of rescission*].

On all COUNTS:

5. For costs of suit herein incurred; and

6. For such other relief as the Court deems just.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 490.61[1].*]

CAUTION:

If the rescinded contract is governed by the Unruh Act (*Civ. Code § 1801 et seq.*) or the Rees-Levering Act (*Civ. Code § 2981 et seq.*), an affidavit (or declaration under *Code Civ. Proc. § 2015.5*), showing that the action is being commenced in a proper place for the trial of the action, must be filed concurrently with the complaint, unless the complaint is verified and shows the action is commenced in a proper place for trial under *Civ. Code § 1812.10* or *Civ. Code § 2984.4* [*Civ. Code §§ 1812.10(c), 2984.4(c)*; *Code Civ. Proc. § 396a(a)*; *see § 490.61*]. In a limited civil case that arises from an offer or provision of goods, services, loans or extensions of credit intended primarily for personal, family or household use, or from a transaction consummated as the result of either an unsolicited telephone call made by a seller or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller [***see*** *Code Civ. Proc. § 395(b)*], the complaint must be accompanied by an affidavit of plaintiff or plaintiff's attorney showing that the action is being commenced in the proper court, unless the complaint is verified and shows that the action and shows that the action is being commenced in the proper court [*Code Civ. Proc. § 396a(a)*].

[2] Use of Form

This complaint is for use by a plaintiff to bring an action for restitution after rescission of a contract or lease that is unlawful or that would prejudice the public interest if allowed to stand [*see Civ. Code § 1689(b)(5),(6), see also § 490.16[3][c]*]. If the transaction rescinded concerns an interest in real property, an additional count for quiet title may be necessary to prevent a cloud on plaintiff's title [*see, e.g., Harper v. Raya (1984) 154 Cal. App. 3d 908, 913, 201 Cal. Rptr. 563* (suggesting quiet title or forcible detainer as proper remedy to terminate possession and claimed life estate of former mistress); *see* Ch. 482, *Quieting Title* , and Ch. 333, *Landlord and Tenant: Eviction Actions*]. If a written instrument must be cancelled to give the plaintiff complete relief, a count for cancellation should be added [see *Civ. Code § 3412*; *see* Ch. 107, *Cancellation of Instruments*]. Other complaints for relief based on rescission on the ground of noncompliance with particular statutes, mostly licensing statutes and consumer protection statutes, may be found in the chapters listed under References, Cross References.

[3] Allegations

In addition to allegations incorporated from previous forms, this complaint alleges the following:

- The formation and relevant terms of the contract (Paragraph 4).

- The particular statute or public policy or interest that is offended by the contract or lease (alternative Paragraphs 5) [*see Civ. Code § 1689(b)(5),(6), see also § 490.16[3][c]*].

- The extent of plaintiff's performance (Paragraph 6).

- The extent of defendant's performance (Paragraph 7).

Note that the theory that provides the basis for the factual allegations used as examples requires the plaintiff to withdraw from the illegal bargain while the contract is still executory [*see, e.g., Wassermann v. Sloss (1897) 117 Cal. 425, 428, 49 P. 566* (imposition of constructive trust on stock to be used as bribe); *cf. Tognazzi v. Wilhelm (1936) 6 Cal. 2d 123, 125-126, 56 P.2d 1227* (agreement to defraud creditor was complete when property is transferred, even if creditor does not yet have judgment)].

If plaintiff is proceeding under *Civ. Code § 1689.2* [for discussion, *see § 490.16[3][d]*], he or she does not have to withdraw while the contract is executory, but can only recover net losses, that is, amounts paid pursuant to the scheme, less any amounts or consideration received [*Civ. Code § 1689.2*].

[4] Cross References

For discussion and forms for complaints for restitution based on violation of statutes prohibiting false or deceptive advertising, see Ch. 14, *Advertising*

For discussion and forms for complaints for restitution based on rescission for violation of statutes pertaining to automobile leases and sales contracts, see Ch. 90, *Automobiles: Vehicle Leasing Act*

For discussion of remedies available to or against unlicensed real estate brokers, see Ch. 103, *Brokers*

For discussion of remedies availale to or against unlicensed building contractors, see Ch. 104, *Building Contracts*

For discussion and an alternative form of complaint for restitution based on rescission and cancellation, see Ch. 107, *Cancellation of Instruments*

For discussion and a form of complaint for restitution based on rescission of a noncomplying home solicitation contract, see Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts*

For discussion and a form of complaint for restitution based on rescission of a noncomplying contract for discount buyer services, see Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts*

For discussion and a form of complaint to recover illegal corporate distributions, see Ch. 164, *Corporations: Dividends and Reacquisitions of Shares*

For discussion and a form of complaint for restitution based on rescission and cancellation of a transaction because of corporate director's prohibited interest, see Ch. 167, *Corporations: Directors and Management*

For discussion and complaints to set aside transfers in fraud of creditors, see Ch. 270, *Fraudulent Conveyances*

For discussion and forms concerning contracts relating to gambling transactions, see Ch. 272, *Gambling*

For discussion and complaints for restitution based on rescission of contracts for noncompliance with the Unruh Act (*Civ. Code § 1801 et seq.*) and federal Truth in Lending Act (*15 U.S.C. § 1601 et seq.*), see Ch. 501, *Sales: Retail Installment Sales*

For discussion and complaints for restitution based on rescission of securities transactions for noncompliance with the

California Corporate Securities Law of 1968 (*Corp. Code § 25000 et seq.*), see *Ch. 515, Securities and Franchise Regulation, § 515.10* et seq.

For discussion and complaints for restitution based on rescission of a noncomplying franchise offer or agreement, see *Ch. 515, Securities and Franchise Regulation, § 515.50* et seq.

For discussion of cancellation rights and a form relating to rescission of sale or lease of a seller assisted marketing plan, see *Ch. 515, Securities and Franchise Regulation, § 515.50* et seq.

For discussion and forms for complaints for relief based on rescission of a contract for the sale and purchase of real property, see Ch. 569, *Vendor and Purchaser*

For discussion and forms for complaints for recovery of usurious interest, see Ch. 568, *Usury*

For discussion of requirements for subdividing land, see Ch. 579, *Zoning and Planning*

[5] State Statutes

Unlawful contracts defined. *Civ. Code § 1667 et seq.*

Rescission of unlawful contracts and contracts that prejudice public policy. *Civ. Code § 1689(b)(5),(6)*

Rescission of participation in endless chain scheme; attorney's fees to prevailing plaintiff. *Civ. Code § 1689.2*

[6] Decisions

[a] Attorney's Ethical Duties

Attorney's fee agreement coerced from client in violation of attorney's ethical duties is clearly contrary to public policy; enforcement of agreement denied. *Kallen v. Delug (1984) 157 Cal. App. 3d 940, 951, 203 Cal. Rptr. 879*

[b] Change in Law

In determining whether subject of contract violates public policy, courts are required to rely on state of law as it existed at time contract was made. *Bovard v. American Horse Enterprises, Inc. (1988) 201 Cal. App. 3d 832, 840 n.3, 247 Cal. Rptr. 340* ; *Moran v. Harris (1982) 131 Cal. App. 3d 913, 918, 182 Cal. Rptr. 519*

[c] Cohabitation

Lease in consideration of cohabitation is illegal, against public policy; lessor who renounces as entitled to have title quieted against lease, but not to relief for use of leasehold during expired portion of term. *Glos v. McBride (1920) 47 Cal. App. 688, 690-691, 191 P. 67*

[d] Collusive Bidding

Agreement for collusive bidding at probate sale as void and unenforceable as against public policy; party who stopped bidding so other party could acquire at lower price was not entitled to recover interest in property. *Russell v. Soldinger (1976) 59 Cal. App. 3d 633, 641-642, 131 Cal. Rptr. 145*

[e] Corruption of Public Officials

Lease and sale of property to public entity obtained by gifts to and entertainment of public official was illegal and contrary to public policy. *People ex rel Mosk v. Barenfeld (1962) 203 Cal. App. 2d 166, 172, 181-182, 21 Cal. Rptr. 501*

[f] Defraud Creditors

Contract made to defraud creditors was void and unenforceable by colluding vendee. *Severance v. Knight-Counihan Co. (1947) 29 Cal. 2d 561, 567-569, 177 P.2d 4*

[g] Drugs and Drug Paraphernalia

Court may refuse to enforce alleged settlement agreement for sums owed as purchase price for company that manufactured jewelry and drug paraphernalia; fact that law making manufacture of paraphernalia illegal was enacted after sale was irrelevant; statute prohibiting possession, use, or transfer of marijuana was basis for public policy against manufacture of paraphernalia when company was sold. *Bovard v. American Horse Enterprises, Inc. (1988) 201 Cal. App. 3d 832, 838-841, 247 Cal. Rptr. 340*

[h] Failure to Obtain License

Rescission and restitution of sums paid under life care contract with unlicensed party was required to protect class of persons from unlicensed and unsupervised activities of another; no unjust enrichment or forfeiture was found. *Stenger v. Anderson (1967) 66 Cal. 2d 970, 978-979, 59 Cal. Rptr. 844, 429 P.2d 164*

When illegality consists of failure to secure license, and performance has already been rendered to parties designed to be protected by licensing statute, culpable party was unable to rely on licensing statute to retain proceeds of transaction and avoid payment to innocent party. *Holland v. Morgan & Peacock Properties (1959) 168 Cal. App. 2d 206, 211, 335 P.2d 769*

[i] Gambling

Public policy is best served by court's refusal to aid recovery of amounts lost on wager, even rigged wager. *Bradley v. Doherty (1973) 30 Cal. App. 3d 991, 997-998, 106 Cal. Rptr. 725* ; *Schmitt v. Gibson (1910) 12 Cal. App. 407, 412-413, 415-416, 107 P. 571*

Gambling debt is not supported by consideration and is therefore unenforceable, unlawful; payment of gambling debt is transfer of community funds without consent of other spouse; nongambler spouse is entitled to avoid transfer. *Novo v.*

Hotel Del Rio (1956) 141 Cal. App. 2d 304, 307-308, 295 P.2d 576

Restaurant lease given in partial consideration of percentage of profits earned from illegal gambling on premises is illegal and unenforceable; consideration not severable; waiver of claim for gambling profits does not entitle lessee to recover value of improvements to premises. *Fong v. Miller (1951) 105 Cal. App. 2d 411, 413-415, 233 P.2d 606*

[j] Inequality of Fault

When parties to executed illegal contract are not equally at fault, recovery by party whose fault is slight is permitted. *Tiedje v. Aluminum Taper Milling Co. (1956) 46 Cal. 2d 450, 454, 296 P.2d 554* ; *Severance v. Knight-Counihan Co. (1947) 29 Cal. 2d 561, 569, 177 P.2d 4* (dicta)

Whether or not parties are equally at fault is question of fact. *Tiedje v. Aluminum Taper Milling Co. (1956) 46 Cal. 2d 450, 455, 296 P.2d 554*

Relatively innocent party is chargeable with knowledge of law; if he or she has no duty to perform under applicable law, he or she is entitled to assume other party complied with law. *Tiedje v. Aluminum Taper Milling Co. (1956) 46 Cal. 2d 450, 455, 296 P.2d 554*

If parties are not in pari delicto, party who is only slightly at fault is entitled to recover money paid under executory contract. *Severance v. Knight-Counihan Co. (1947) 29 Cal. 2d 561, 569, 177 P.2d 4* (dicta); *McAllister v. Drapeau (1939) 14 Cal. 2d 102, 112, 92 P.2d 911*

Party not equally at fault is entitled to repudiate contract any time before it is executed and reclaim consideration furnished thereunder. *Smith v. Bach (1920) 183 Cal. 259, 263-264, 191 P. 14*

[k] Laches

Laches, estoppel not applicable to illegal contract. *Colby v. Title Ins. and Trust Co. (1911) 160 Cal. 632, 638-644, 117 P. 913*

[l] Parties

Third party whose interests are affected by contract is entitled to invoke its illegality. *River Garden Farms, Inc. v. Superior Court (1972) 26 Cal. App. 3d 986, 1000, 103 Cal. Rptr. 498* (nonsettling tortfeasor attacking settlements)

[m] Persons Accused of Crime

Party who committed no crime and whose consent was obtained in return for promise not to prosecute is not in pari delicto and is entitled to defeat enforcement of contract and have cancellation and restoration; such consideration is void. *Colby v. Title Ins. and Trust Co. (1911) 160 Cal. 632, 638-644, 117 P. 913* ; *Woodham v. Allen (1900) 130 Cal. 194, 198-199, 62 P. 398*

Police officer's entering into any transaction with prisoner in his or her custody is against public policy; public confidence in law enforcement official requires avoidance of such contract; any contract by officer that interferes with unbiased discharge of his or her duty to public in exercise of office is against public policy. *Grimes v. Allen (1949) 93 Cal. App. 2d 653, 656-657, 209 P.2d 651*

[n] Ratification

One is never estopped to deny validity of illegal contract because he or she accepted receipts under it; illegal contract is not subject to ratification. *Fewel & Dawes, Inc. v. Pratt (1941) 17 Cal. 2d 85, 91, 109 P.2d 650* ; *Russell v. Soldinger (1976) 59 Cal. App. 3d 633, 646, 131 Cal. Rptr. 145*

Payment on note given for illegal consideration is not ratification of transaction. *Woodham v. Allen (1900) 130 Cal. 194, 199, 62 P. 398*

[o] Renunciation During Locus Penitentiae

Recovery of what one paid under illegal contract is allowed even to party equally at fault if he or she repudiates contract before illegal part of bargain is executed. *Severance v. Knight-Counihan Co. (1947) 29 Cal. 2d 561, 569,177 P.2d 4* (dicta); *Wassermann v. Sloss (1897) 117 Cal. 425, 428, 49 P. 566* (imposition of constructive trust on stock to be used as bribe)

[p] Restoration by Plaintiff

Necessity of restoration to wrongdoer in order for innocent party to rescind illegal transaction. *People ex rel Mosk v. Barenfeld (1962) 203 Cal. App. 2d 166, 181-182, 21 Cal. Rptr. 501*

[q] Silence

Although it is illegal and against public policy for one who has duty to reveal material fact to court to agree to conceal that fact, provision in settlement agreement requiring parties to keep agreement private did not amount to agreement to suppress evidence and therefore was not illegal or against public policy. *Philippine Export & Foreign Loan Guarantee Corp. (1990) 218 Cal. App. 3d 1058, 1082-1083, 267 Cal. Rptr. 457*

[r] Spouses

Contract of married woman to perform domestic services that are incidental to her marital status is void as against public policy because it would breed discord within and mischief to marital relation; husband not in pari delicto entitled to recover sums paid thereunder. *Brooks v. Brooks (1941) 48 Cal. App. 2d 347, 349-351, 119 P.2d 970*

[s] Subdivided Lands

Innocent purchaser is entitled to rescind purchase of real property for seller's failure to comply with *Bus. & Prof. Code § 11012* and to recover money paid on contract. *Murphy v. San Gabriel Mfg. Co. (1950) 99 Cal. App. 2d 365, 368-369, 222 P.2d 85*

[t] Tax Evasion

Court may refuse to enforce oral agreement for payment of interest when note stated that it did not bear interest and purpose of secret oral agreement was to allow payee not to have to report interest as income on tax returns. *Homami v. Iranzadi (1989) 211 Cal. App. 3d 1104, 1112, 260 Cal. Rptr. 6*

[7] Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 419-684; vol. 2, *Insurance* §§ 75-80, *100-109*, *111-113*, 146, 147, 226-229, 277, 279, *280* (10th ed. 2005)

[8] Cross Reference

For related forms, *see §§ 490.61* and *490.62*.

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Chapter 490 RESCISSION AND RESTITUTION
PART IV. FORMS

43-490 California Forms of Pleading and Practice--Annotated § 490.65

§ 490.65 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Relief Based on Rescission of Contract--Waiver of Right to Rescind [Civ. Code § 1691]--General Form

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Relief Based on Rescission of Contract--Waiver of Right to Rescind [Civ. Code § 1691]--General Form

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. On _____ [*date*], plaintiff had full knowledge _____ [*specify facts giving rise to plaintiff's right to rescind, e.g.,* of the wave damage and erosion thatconstitute the alleged failure on consideration referred to in the complaint. The damage occurred in January and February, 1992. Plaintiff had possession of the property from and after October 14, 1991. Plaintiff and defendant discussed the damage in March, 1992].

2. Plaintiff waived his/her/its right to rescind the _____[contract *or* lease] by _____ [*specify actions of plaintiff which constitute waiver, e.g.,* making payments due to this defendant under the contract for a period of 18 months after learning of the alleged failure of consideration. This continuation of payments] was consistent with an intention to treat the _____ [contract *or* lease] as still valid, viable, and binding.

[2] Use of Form

This form of affirmative defense is for use in an answer to an action for relief based on rescission when the plaintiff has waived his or her right to rescind the contract or lease [*see Civ. Code § 1691*]. The form is based in part on the facts in *Carpenter v. First Trust etc. Bank (1936) 11 Cal. App. 2d 668, 54 P.2d 495* . For forms of affirmative defenses based on prejudicial delay and on plaintiff's election of another remedy, see *§ 490.66* and *490.67*, respectively.

[3] State Statutes

Notice of rescission is required to be given promptly on learning of facts justifying rescission. *Civ. Code § 1691*

[4] Decisions

Waiver is question of fact to be determined after consideration of all circumstances of particular case. *Hefferan v. Freebairn (1950) 34 Cal. 2d 715, 722, 214 P.2d 386* (no waiver found); *Howell v. Courtesy Chevrolet, Inc. (1971) 16 Cal. App. 3d 391, 405, 94 Cal. Rptr. 33*

Acceptance of benefits, even when stipulated to be "without prejudice," i waiver, which bars rescission. *Neet v. Holmes (1944) 25 Cal. 2d 447, 458-460, 154 P.2d 854*

Waiver of one breach or ground for rescission is not waiver of subsequent or other breach or ground. *Hunt v. L. M. Field, Inc. (1927) 202 Cal. 701, 705-706, 262 P. 730* ; *Bowman v. Santa Clara County (1957) 153 Cal. App. 2d 707, 713, 315 P.2d 67*

By joining in grant of supplemental easement to same party, vendee waives right to rescind on ground of defect in title due to existence of easement; delay in claiming rescission and payment of balance of purchase price is election to affirm contract. *Wilson v. Beazley (1921) 186 Cal. 437, 441-442, 199 P. 772*

Estoppel, but not waiver, requires detrimental reliance by other party. *Rubin v. Los Angeles Fed. Sav. & Loan Assn. (1984) 159 Cal. App. 3d 292, 298, 205 Cal. Rptr. 455*

Commencement and continuation of action for damages for two and one-half years by party who has notice of facts allowing rescission is election of remedies and waiver of right to rescind. *Doctor v. Lakeridge Constr. Co. (1967) 252 Cal. App. 2d 715, 720-721, 60 Cal. Rptr. 824*

Acceptance of late performance is waiver of right to rescind. *Leiter v. Eltinge (1966) 246 Cal. App. 2d 306, 317, 54 Cal. Rptr. 703*

Waiver of right to rescind is affirmative defense to action for relief based on rescission, which must be pleaded. *Calabrese v. Rexall Drug & Chemical Co. (1963) 218 Cal. App. 2d 774, 782, 785, 32 Cal. Rptr. 665*

Under both Commercial Code and Song-Beverly Consumer Warranty Act, reasonable continued use of motorized vehicle that does not conform to express warranty did not, as matter of law, amount to waiver of right to rescind or to revoke acceptance. *Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 897-898, 263 Cal. Rptr. 64*

[5] Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, § 939 (10th ed. 2005)

[6] Cross Reference

For related forms, *see §§ 490.66* and *490.67*.

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§ 490.66 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Relief Based on Rescission of Contract--Waiver of Right to Rescind [Civ. Code § 1691]--Prejudicial Delay [Civ. Code § 1693]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action for Relief Based on Rescission of Contract--Waiver of Right to Rescind [Civ. Code § 1691]--Prejudicial Delay [Civ. Code § 1693]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. On or before _____ [*date*], plaintiff had full knowledge _____ [*specify facts giving rise to plaintiff's right to rescind, e.g.,* that the 1996 crop and the gross receipts from it were not as large as those of the three previous years. Plaintiff and defendant discussed this in March, 1997].

[*EITHER, if no notice of rescission was given prior to service of complaint*]

2. Plaintiff inexcusably and unreasonably delayed the filing of this action and gave no prior notice of rescission, causing substantial prejudice to plaintiff in that _____ [*set forth facts showing prejudice, e.g.,* during the 18 months after learning of the alleged failure of consideration during which plaintiff continued to operate the business before commencing this action, several large accounts became dissatisfied with plaintiff's service and found other suppliers to meet their needs. The goodwill of the business, its value, and its competitive position in the industry have been so substantially eroded by plaintiff that defendant could not be made whole by its return. Plaintiff's continuation of the business was consistent with an intention to treat the contract of sale as still valid, viable, and binding].

[*OR, if notice of rescission and offer to restore were given before commencement of the action*]

2. Plaintiff inexcusably and unreasonably delayed providing defendant with notice of rescission and tender of restoration, causing substantial prejudice to plaintiff in that _____ [*set forth facts showing prejudice, e.g.*, during the 18 months after learning of the alleged failure of consideration during which plaintiff continued to operate the business before commencing this action, several large accounts became dissatisfied with plaintiff's service and found other suppliers to meet their needs. The goodwill of the business, its value, and its competitive position in the industry have been so substantially eroded by plaintiff that defendant could not be made whole by its return. Plaintiff's continuation of the business was consistent with an intention to treat the contract of sale as still valid, viable, and binding].

[2] Use of Form

This form of affirmative defense is for use in an answer to an action for relief based on rescission when plaintiff's delay in giving notice of rescission or commencing the action has substantially prejudiced defendant [*see Civ. Code § 1693*]. For forms raising the affirmative defenses of waiver, plaintiff's election of another remedy, see *§§ 490.65* and *490.67*, respectively.

[3] State Statutes

Relief based on rescission is not to be denied for delay in giving notice of rescission unless delay has been substantially prejudicial to other party. *Civ. Code § 1693*

[4] Decisions

Laches requires more than delay or passive acquiescence in acts complained of, and requires other facts making relief inequitable. *Neet v. Holmes (1944) 25 Cal. 2d 447, 460, 154 P.2d 854*

Employee's delay in giving notice of rescission of settlement agreement resulted in substantial prejudice to employer. *Saret-Cook v. Gilbert, Kelly, Crowley & Jennett (1999) 74 Cal. App. 4th 1211, 1225-1227, 88 Cal. Rptr. 2d 732*

Defrauded buyer entitled to reasonable time to investigate, and time thus consumed was not unreasonable delay. *Howell v. Courtesy Chevrolet, Inc. (1971) 16 Cal. App. 3d 391, 405-406, 94 Cal. Rptr. 33*

Rescission was impracticable or inequitable because of intervening rights of third parties to whom defendant had sold land. *Shumaker v. Foster (1954) 129 Cal. App. 2d 216, 221, 276 P.2d 876*

Plaintiff's own defaults that prevented defendant from doing anything with land and sale or option by plaintiff of land to third parties provided equitable grounds for denial of rescission. *Joshua Tree T. Co. v. Joshua Tree L. Co. (1950) 100 Cal. App. 2d 590, 596-597, 224 P.2d 85*

Plaintiff's silence after learning of forged loan documents and endorsement on check for proceeds until lapse of limitation period on lender's action against bank for payment on forged endorsement barred rescission on basis of laches. *Merry v. Garibaldi (1941) 48 Cal. App. 2d 397, 401, 119 P.2d 768*

Making payments under contract for two years after discovering facts, during which time value of land depreciated to

defendant's prejudice barred rescission. *McCray v. Title Ins. & Trust Co. (1936) 12 Cal. App. 2d 537, 540-541, 55 P.2d 1234*

[5] Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, § 945 (10th ed. 2005)

[6] Cross Reference

For related forms, *see §§ 490.65* and *490.67*.

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§ 490.67 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Election of Another Remedy

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Election of Another Remedy

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. [*Plaintiff's knowledge of grounds for remedy being defended against. See § 490.65[1], Paragraph 1.*]

2. By _____ [*set forth plaintiff's acts and time during which they occurred, e.g.,* commencing an action for specific performance on June 17, 1998, and pursuing that action to judgment] plaintiff has _____ [*describe injury or prejudice to defendant, e.g.,* required defendant to keep the property off the market and to expend attorney's fees and defense costs for three years], all to defendant's injury and prejudice and is thereby estopped to now seek _____ [*specify remedy, e.g.,* rescission].

[2] Use of Form

This form of affirmative defense is for use in an answer to any type of action based on rescission when earlier actions or conduct of plaintiff amounted to an election of another remedy [*see Steiner v. Rowley (1950) 35 Cal. 2d 713, 720, 221 P.2d 9* ; *Modoc Mineral & Oil Co. v. Cal-Vada Drilling etc. Co. (1965) 236 Cal. App. 2d 868, 874-875, 46 Cal. Rptr. 508* ; *see § 490.42[2]*]. For instance, the form may be used to claim that plaintiff's own alteration or destruction of the property that would have to be restored on rescission constituted an election to seek only damages [*see, e.g., Prichard v. Reitz (1986) 178 Cal. App. 3d 465, 467-469, 223 Cal. Rptr. 734]* .

Conversely, the form may also be used to claim that damages for fraud were barred by a mutual rescission agreement of the parties [*see, e.g., Evans v. Rancho Royale Hotel Co. (1952) 114 Cal. App. 2d 503, 507, 250 P.2d 283]* .

For forms of affirmative defenses based on waiver and prejudicial delay, see *§§ 490.65* and *490.66*, respectively.

[3] Cross References

Election of remedies is also discussed in Ch. 269, *Fraud and Deceit*

[4] Decisions

[a] Acts Constituting Election

Attachment obtained in pursuit of contract remedy estops recovery under tort theory. *Estrada v. Alvarez (1952) 38 Cal. 2d 386, 391, 240 P.2d 278*

Plaintiff's destruction of house after learning of defects in foundation and believing condition could only be corrected by rebuilding barred relief based on restitution. *Prichard v. Reitz (1986) 178 Cal. App. 3d 465, 467-469, 223 Cal. Rptr. 734*

Appeal of judgment for defendant in specific performance action manifested election to pursue one of two inconsistent remedies; because amendment to seek relief based on rescission would prejudice defendant, relief was barred. *Lawrence v. Shutt (1969) 269 Cal. App. 2d 749, 766-767, 75 Cal. Rptr. 533*

Foreclosure was election to affirm agreement inconsistent with rescission for fraud inducing loan transaction. *City Bank of San Diego v. Ramage (1968) 266 Cal. App. 2d 570, 587, 72 Cal. Rptr. 273*

[b] Acts Not Constituting Election

Filing claim in bankruptcy was not election of remedy absent evidence that dividends had been received on claim. *Kraus v. Willow Park Public Golf Course (1977) 73 Cal. App. 3d 354, 370-371, 140 Cal. Rptr. 744* (action to impose constructive trust on property conveyed due to fraud)

Dismissal of action for relief based on rescission and damages for fraud did not amount to election of remedy barring second action for same remedies arising from same facts when no disadvantages were caused to defendant. *Warfield v. Richey (1959) 167 Cal. App. 2d 93, 99, 334 P.2d 101*

When plaintiff pleaded damages for fraud and rescission, defendant's offer to restore only part of what plaintiff was entitled to did not bar recovery of fraud damages on theory of election. *Mackenzie v. Voelker (1954) 123 Cal. App. 2d 538, 541, 266 P.2d 867*

Plaintiff was entitled to seek rescission even after judgment in her favor for specific performance when defendant had conveyed property to third party and could not comply with specific performance judgment. *Timm v. McCartney (1938) 30 Cal. App. 2d 241, 247-248, 85 P.2d 920*

[5] Text References

Witkin, California Procedure, Vol. 3, *Actions*, §§ 174-197 (4th ed. 1996)

[6] Cross Reference

For related forms, *see §§ 490.65* and *490.66*.

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Chapter 491 RES JUDICATA

43-491 California Forms of Pleading and Practice--Annotated 491.syn

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§ 491.02 Cross References

§§ 491.03-491.09 [Reserved]

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§ 491.11 Terminology

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[2] Merger and Bar as Claim Preclusion

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[4] Direct Estoppel as Issue Preclusion

§ 491.12 Effects of Claim and Issue Preclusion Compared

§ 491.13 Purpose of Res Judicata

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[b] Denial of Extraordinary Writ

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§ 491.18 Waiver of Defense

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[3] Merger

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[6] Cross References

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[1] FORM

[2] Use of Form

[3] Bar

[4] Contents

[5] Cross References

§ 491.53 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Judgment for Employee Defendant in

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[1] FORM

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§ 491.54 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Basic Issue Between Parties Was Determined in Former Action [Code Civ. Proc. § 1908]

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§ 491.57 Proceedings for Order That Nonparty Be Bound by Judgment [Code Civ. Proc. § 1908(b)]--Order Granting Motion

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§ 491.58 Proceedings for Order Requiring Separate Trial of Special Defense of Res Judicata [Code Civ. Proc. § 597]--Notice of Motion

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§ 491.59 Proceedings for Order Requiring Separate Trial of Special Defense of Res Judicata [Code Civ. Proc. § 597]--Order Granting Motion

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§ 491.01 Scope of Chapter

This chapter discusses the preclusion of civil claims or issues by a prior adjudication, including the terminology used in this field [*see § 491.11*], claim preclusion, traditionally known as res judicata [*see § 491.14*], issue preclusion, traditionally known as collateral estoppel [*see § 491.15*], and the assertion and waiver of the defense [*see § 491.17 -491.20*]. The discussion also covers the relationship of claim and issue preclusion and their purpose [*see § 491.12 -491.13*] and federal and sister-state judgments [*see § 491.16*].

The chapter also discusses the doctrine of judicial estoppel, or preclusion of inconsistent positions [*see § 491.21*].

The chapter includes a Research Guide [*see § 491.40* et seq.] the following forms:

- Demurrer on the ground the action is barred by a prior judgment [*see § 491.50*].

- Allegations raising the affirmative defense that an action or issue is barred by a prior adjudication [*see §§ 491.51 -491.55*].

- Notice of motion, declaration, and order for a judicial determination that a judgment is conclusive as to a nonparty [*see §§ 491.56, 491.57*].

- Notice of motion and order for a separate trial of the special defense of res judicata [*see §§ 491.58, 491.59*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProceduresJudgmentsPreclusion & Effect of JudgmentsEstoppelJudicial

EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

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§ 491.02 Cross References

For discussion of the res judicata effect of a default judgment, see Ch. 205, *Defaults and Default Judgments* .

For discussion and forms relating to separate trial of the defense of res judicata before trial on the merits, see Ch. 3, *Abatement of Actions*

The application of res judicata in particular actions is discussed in relation to those actions, as indicated in the following list:

- For discussion of res judicata in class actions, see Ch. 120, *Class Actions*

- For discussion of the preclusive effect of a final judgment under the federal Fair Credit Reporting Act [*15 U.S.C. §§ 1681n, 1681o*], see Ch. 129, *Consumer Credit Reporting*

- For discussion and a form of affirmative defense to an action for wrongful death based on res judicata, see Ch. 181, *Death and Survival Actions*

- For discussion of the res judicata effect of a default judgment, see Ch. 205, *Defaults and Default Judgments*

- For discussion of the res judicata effect of interspousal property settlement agreements, see Ch. 220, *Dissolution of Marriage: Property Division and Valuation*

- For discussion of res judicata in proceedings to obtain a writ of habeas corpus, see Ch. 292, *Habeas Corpus*

- For discussion of the effect of a judgment based on stipulation, see *Ch. 318, Judgments, § 318.40* et seq.

- For discussion of the applicablity of res judicata to judgments in mandate and prohibition proceedings, see Ch. 358, *Mandate and Prohibition*

- For discussion of res judicata in proceedings for administrative mandamus, see *Ch. 473F, Agency Adjudication Hearings, § 473F.41*

- For discussion of the conclusive effect of a judgment in a quiet title action, see Ch. 482, *Quieting Title*

For extensive coverage of the doctrines of res judicata and collateral estoppel as applied in federal courts, see s Moore' s S s Federal Practice, Ch.131, Ch. 132 (3d ed. Matthew Bender). For discussion of the application of these doctrines in criminal actions, and, in particular, the constitutional double jeopardy protection against successive prosecutions, see s California Criminal Defense Practice, Ch. 63 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsCollateral EstoppelAdministrative LawAgency AdjudicationDecisionsRes JudicataAdministrative LawJudicial ReviewRemediesMandamusCivil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessDouble Jeopardy

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[Reserved]

§§ 491.03[Reserved]

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§ 491.10 Governing Law

Code Civ. Proc. §§ 1908-1917 govern the conclusiveness and effect of judgments and orders.

The pleading of a judgment is governed by *Code Civ. Proc. § 456*. The admissibility of a judgment is governed by *Evid. Code §§ 1300-1302*. *Evid. Code § 639* sets forth presumptions applicable to nonconclusive judgments.

Various statutes set forth additional rules concerning the effect of particular types of judgments. For example, *Fam. Code § 2212(b)* governs the conclusive effect of a judgment annulling marriage and Veh. Code § 40384 governs the effect of a judgment of conviction for violation of Vehicle Code provisions. For a listing of other provisions concerning the conclusive effect of particular types of judgments, see *§ 491.41[3]*.

Res judicata and collateral estoppel principles have also been extensively developed by decisional law. In fact, most courts continue to discuss and to apply these principles as a matter of common law, without reference to the their codification under *Code Civ. Proc. §§ 1908-1917* [*see, e.g., Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 972-976, 104 Cal. Rptr. 42, 500 P.2d 1386* ; *Lockwood v. Superior Court (1984) 160 Cal. App. 3d 667, 671-672, 206 Cal. Rptr. 785* ; *see also Lazzarone v. Bank of America (1986) 181 Cal. App. 3d 581, 591, 226 Cal. Rptr. 855* (stating that ordinarily, res judicata is a "judicially created" doctrine)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataEvidenceHearsayExceptionsJudgmentsGeneral Overview

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§ 491.11 Terminology

[1] Res Judicata

In traditional usage, "res judicata" (literally "a thing adjudged") referred to the doctrine precluding relitigation of a previously adjudicated *claim*, while "collateral estoppel" referred to the doctrine precluding relitigation of a previously adjudicated *issue* [*see* Restatement (Second) of Judgments Ch. 1, Introduction]. California courts, however, typically use "res judicata" to include both doctrines [*see Henn v. Henn (1980) 26 Cal. 3d 323, 329, 161 Cal. Rptr. 502, 605 P.2d 10* ; *see also Kahn v. Pelissetti (1968) 260 Cal. App. 2d 832, 833, 67 Cal. Rptr. 517* ; *O'Connor v. O'Leary (1967) 247 Cal. App. 2d 646, 648, 56 Cal. Rptr. 1]* . In accordance with the latter usage, "res judicata" is used in this chapter when referring to both doctrines collectively. For separate definition of the two doctrines, see [2] and [3], *below*.

[2] Merger and Bar as Claim Preclusion

The traditional or primary aspect of res judicata operates to preclude parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction [*see Henn v. Henn (1980) 26 Cal. 3d 323, 329, 161 Cal. Rptr. 502, 605 P.2d 10* ; *Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 972, 104 Cal. Rptr. 42, 500 P.2d 1386* ; *Rice v. Crow (2000) 81 Cal. App. 4th 725, 734, 97 Cal. Rptr. 2d 110* ; *see also* Restatement (Second) of Judgments §§ 17-20]. The term "claim preclusion" is used in this chapter to refer to this aspect of res judicata, to distinguish it from the separate aspect of "issue preclusion" (discussed under [3], *below*), and also to distinguish it from the broader doctrine of res judicata (discussed under [1], *above*). "Claim preclusion" is the term adopted by the American Law Institute [*see* Restatement (Second) of Judgments Ch. 1, Introduction].

Claim preclusion consists of the rules of merger and bar, both of which operate to preclude a second action between the same parties or their privies on the same cause [*see Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 972-973, 104 Cal. Rptr. 42, 500 P.2d 1386]* . Under the rule of merger, a valid, final judgment for the plaintiff merges his or her cause of action in the judgment [*Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 973, 104 Cal. Rptr. 42, 500 P.2d 1386]* . The merged cause of action is extinguished, and the plaintiff cannot thereafter bring another action on that same cause [*Sukut Construction, Inc. v. Cabot, Cabot & Forbes Land Trust (1979) 95 Cal. App. 3d 527, 530, 157 Cal. Rptr. 289* ; *see* Restatement (Second) of Judgments §§ 17(1), 18]. The plaintiff's remedies, or those of the person claiming under the plaintiff, are limited to satisfaction of the judgment [*Panos v. Great Western*

Packing Co. (1943) 21 Cal. 2d 636, 638-639, 134 P.2d 242 ; *Wick v. Wick Tool Co. (1959) 176 Cal. App. 2d 677, 685, 1 Cal. Rptr. 531]* . For a form of affirmative defense allegation based on the rule of merger, see *§ 491.51*.

Under the rule of bar, a valid, final judgment for the defendant extinguishes the plaintiff's cause of action and bars any subsequent action by the plaintiff on that same cause [*Panos v. Great Western Packing Co. (1943) 21 Cal. 2d 636, 639-640, 134 P.2d 242* ; *Louie Queriolo Trucking, Inc. v. Superior Court (1967) 252 Cal. App. 2d 194, 200, 60 Cal. Rptr. 389* ; Restatement (Second) of Judgments §§ 17(2), 19]. For forms of affirmative defense allegation based on the rule of bar, see *§§ 491.52* and *491.53*.

[3] Collateral Estoppel as Issue Preclusion

The second aspect of res judicata operates, in the second of two actions that do not involve identical causes of action, to preclude the relitigation of any issue that was decided in the first action, when the second action involves the same parties or their privies, and when the first action was finally determined by a court of competent jurisdiction [*see Lockwood v. Superior Court (1984) 160 Cal. App. 3d 667, 671, 206 Cal. Rptr. 785* ; *O'Connor v. O'Leary (1967) 247 Cal. App. 2d 646, 648, 56 Cal. Rptr. 1]* . In other words, the parties or their privies are precluded from relitigating in a new proceeding on a different cause of action issues litigated in a prior proceeding [*In re Russell (1974) 12 Cal. 3d 229, 233, 115 Cal. Rptr. 511, 524 P.2d 1295* ; *see also Professional Engineers v. Department of Transportation (1997) 15 Cal. 4th 543, 568, 63 Cal. Rptr. 2d 467, 936 P.2d 473]* . This aspect of res judicata is commonly termed "collateral estoppel" [*see, e.g., Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 828, 88 Cal. Rptr. 2d 366, 982 P.2d 229* ; *Henn v. Henn (1980) 26 Cal. 3d 323, 329-330, 330 n.4, 161 Cal. Rptr. 502, 605 P.2d 10* ; *see also Henn v. Henn (1980) 26 Cal. 3d 323, 330 n.4, 161 Cal. Rptr. 502, 605 P.2d 10* ("judgment by estoppel"); *Ion Equipment Corp. v. Nelson (1980) 110 Cal. App. 3d 868, 881, 168 Cal. Rptr. 361* ("estoppel by judgment")]. The term "issue preclusion" has also been used [*see, e.g., Rosse v. DeSoto Cab Co. (1995) 34 Cal. App. 4th 1047, 1051, 40 Cal. Rptr. 2d 680* ; *see also Rice v. Crow (2000) 81 Cal. App. 4th 725, 734, 97 Cal. Rptr. 2d 110]* , and is so used in this chapter to distinguish this aspect of res judicata from the separate aspect of "claim preclusion" (discussed under [2], *above*), and also to distinguish it from the broader doctrine of res judicata (discussed under [1], *above*). "Issue preclusion" is the term adopted by the American Law Institute [*see* Restatement (Second) of Judgments, Ch. 1, Introduction].

For a form of affirmative defense allegation based on the doctrine of issue preclusion, see *§ 491.54*.

[4] Direct Estoppel as Issue Preclusion

Most commonly, issue preclusion arises from successive suits on different claims and is referred to as collateral estoppel. If, however, the second action is on the same claim, issue preclusion based on the earlier determination is described as direct estoppel. Both collateral estoppel and direct estoppel, like the related doctrine of res judicata have the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his or her privy and of promoting judicial economy by preventing needless litigation [*Plumley v. Mockett (2008) 164 Cal. App. 4th 1031, 1050, 79 Cal. Rptr. 3d 822* ; *Sabek, Inc. v. Engelhard Corp. (1998) 65 Cal. App. 4th 992, 997, 76 Cal. Rptr. 2d 882* (after orders quashing service for lack of personal jurisdiction, plaintiff's failure to seek reconsideration or appellate review barred plaintiff from relitigating issue by direct estoppel); *see also People v. Mitchell (2000) 81 Cal. App. 4th 132, 136, 154-156, 96 Cal. Rptr. 2d 401* (direct estoppel and law of case applied to preclude relitigation of defendant's prior serious felony conviction allegations for purpose of both five-year enhancement and a strike under three strikes law)].

In either of its forms, issue preclusion should be determined according to the same threshold requirements [*see Sabek, Inc. v. Engelhard Corp. (1998) 65 Cal. App. 4th 992, 997, 76 Cal. Rptr. 2d 882* ; for discussion of threshold requirements, *§ 491.15, below*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

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§ 491.12 Effects of Claim and Issue Preclusion Compared

The preclusive effect of claim preclusion is substantially broader than that of issue preclusion. When successfully asserted as a defense, claim preclusion prevents not only the relitigation of issues that were decided in the former action, but also the relitigation of issues that might have been litigated in the former action [*see Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 975, 104 Cal. Rptr. 42, 500 P.2d 1386* ; *Duffy v. City of Long Beach (1988) 201 Cal. App. 3d 1352, 1357-1358, 247 Cal. Rptr. 715* ; *see also § 491.14[4], below*]. In contrast, issue preclusion only precludes relitigation of issues actually litigated and determined in the prior action [*Taylor v. Hawkinson (1957) 47 Cal. 2d 893, 895-896, 306 P.2d 797* ; *Corral v. State Farm Mutual Auto. Ins. Co. (1979) 92 Cal. App. 3d 1004, 1010, 155 Cal. Rptr. 342* ; *see also § 491.15[3], below*]. When the issue is a question of law rather than one of fact, however, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed [*City of Sacramento v. State of California (1990) 50 Cal. 3d 51, 64, 266 Cal. Rptr. 139, 785 P.2d 522]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

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§ 491.13 Purpose of Res Judicata

The doctrine of res judicata rests on the ground that a party who has litigated a matter or had an opportunity to do so should not be permitted to litigate it again to the harassment and vexation of his or her opponent. Public policy and the interests of litigants alike require that there be an end to litigation [*Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 972, 104 Cal. Rptr. 42, 500 P.2d 1386* ; *see also* *Rubenstein v. Rubenstein (2000) 81 Cal. App. 4th 1131, 1144, 97 Cal. Rptr. 2d 707* (whether applied as total bar to further litigation or as collateral estoppel, doctrine rests on sound policy of limiting litigation by preventing party that had one fair adversary hearing on issue from drawing it into controversy again and subjecting other party to further expense in its reexamination); *Brinton v. Bankers Pension Services, Inc. (1999) 76 Cal. App. 4th 550, 556, 90 Cal. Rptr. 2d 469* (purpose of res judicata doctrine is to preserve integrity of judicial system, promote judicial economy, and protect litigants from harassment by vexatious litigation)]. The rule of res judicata is to prevent vexatious litigation and to require the parties to rest on one decision in their controversy; res judicata bars not only the reopening of the original controversy, but also subsequent litigation of all issues that were or could have been raised in the original suit [*Torrey Pines Bank v. Superior Court (1989) 216 Cal. App. 3d 813, 821, 265 Cal. Rptr. 217* ; *see* *Allstate Ins. Co. v. Mel Rapton, Inc. (2000) 77 Cal. App. 4th 901, 907, 92 Cal. Rptr. 2d 151* (rule against plaintiff splitting single cause of action so as to make it the basis of several suits is, in part, application of doctrine of res judicata); for provisions relating to vexatious litigants, *see* *Weikel v. TCW Realty Fund II Holding Co. (1997) 55 Cal. App. 4th 1234, 1245, 1249-1250, 65 Cal. Rptr. 2d 25* (res judicata precludes piecemeal litigation by splitting a single cause of action, i.e., dividing a primary right, or relitigation of the same cause of action on a different legal theory or for different relief); *see also* Ch. 573, *Vexatious Litigants*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes Judicata

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§ 491.14 Claim Preclusion

[1] General Requirements

For the claim preclusion aspect of res judicata to apply as an affirmative defense to an action [*Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 974, 104 Cal. Rptr. 42, 500 P.2d 1386]* :

- The prior action relied on must have been a final judgment on the merits;
- The present action must be on the same cause of action as the prior action; and
- There must be privity between the parties to the prior action and the present action.

[2] Former Judgment Final

[a] Generally

It is an elementary principle that the doctrine of res judicata applies when the prior judgment is final [*People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater (1980) 101 Cal. App. 3d 296, 306, 161 Cal. Rptr. 562* ; *see also Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 974, 104 Cal. Rptr. 42, 500 P.2d 1386* ; *Boccardo v. Safeway Stores, Inc. (1982) 134 Cal. App. 3d 1037, 1041, 184 Cal. Rptr. 903]* . A judgment should not be the basis for application of res judicata if anything is left to conjecture as to what was necessarily involved and decided [*Irwin v. Irwin (1977) 69 Cal. App. 3d 317, 322, 138 Cal. Rptr. 9]* .

[b] Judgment Free From Direct Attack

Only judgments that are free from direct attack are final and may not be relitigated [*People v. Sims (1982) 32 Cal. 3d 468, 486, 186 Cal. Rptr. 77, 651 P.2d 321* ; *but see Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 558, 305 P.2d 20* (under certain circumstances, direct attack of final judgment possible through suit in equity to set aside judgment)]. Once a judgment is free from direct attack on appeal, it is final and conclusive even if it is erroneous rather than correct [*see Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 975, 104 Cal. Rptr. 42, 500 P.2d 1386* ; *see also*

Castro v. Higaki (1994) 31 Cal. App. 4th 350, 359, 37 Cal. Rptr. 2d 84 ; *Smith v. Smith (1981) 127 Cal. App. 3d 203, 209, 179 Cal. Rptr. 492]* . A final judgment or order is res judicata even if it is wrong or unjust, so long as the merits of the claim have been tried and determined [*Hight v. Hight (1977) 67 Cal. App. 3d 498, 502-503, 136 Cal. Rptr. 685* ; *see Weir v. Ferreira (1997) 59 Cal. App. 4th 1509, 1515, 70 Cal. Rptr. 2d 33* (erroneous final judgments bar to further proceedings based on same cause of action)].

Consistent application of the traditional principle that final judgments, even erroneous ones, are a bar to further proceedings based on the same cause of action is necessary to the well-ordered functioning of the judicial process. It should not be impaired for the benefit of particular plaintiffs, regardless of the sympathy their plight might arouse in an individual case [*Slater v. Blackwood (1975) 15 Cal. 3d 791, 797, 126 Cal. Rptr. 225, 543 P.2d 593* ; *Robert J. v. Leslie M. (1997) 51 Cal. App. 4th 1642, 1647, 59 Cal. Rptr. 2d 905]* . A judgment is final even if its factual underpinning is erroneous [*Robert J. v. Leslie M. (1997) 51 Cal. App. 4th 1642, 1648, 59 Cal. Rptr. 2d 905]* . Similarly, a final judgment or order is res judicata even though it is contrary to statute, when the court has jurisdiction over subject matter and parties [*People v. Silva (1981) 114 Cal. App. 3d 538, 549-550, 170 Cal. Rptr. 713* ; *see Law Offices of Stanley J. Bell v. Shine, Browne & Diamond (1995) 36 Cal. App. 4th 1011, 1019-1026, 43 Cal. Rptr. 2d 717* (order was res judicata when court had jurisdiction over subject matter and parties, but acted contrary to case law in excess of jurisdiction)].

A judgment based on a statute that is later ruled unconstitutional is nevertheless res judicata in a subsequent suit [*Slater v. Blackwood (1975) 15 Cal. 3d 791, 797, 126 Cal. Rptr. 225, 543 P.2d 593]* .

For discussion of the federal rule concerning finality of a judgment for purposes of res judicata, which differs from the state rule, see [d], *below*.

[c] Invalid Judgment Distinguished

Res judicata may apply only when the prior judgment is valid; void judgments cannot be res judicata [*see Balaam v. Perazzo (1931) 211 Cal. 375, 380-381, 295 P. 330* (holding that judgment in favor of defendant quieting title against plaintiff and co-defendant was void as against co-defendant who defaulted and was never served with defendant's answer); *California Nat. Supply Co. v. Flack (1920) 183 Cal. 124, 126, 190 P. 634* (holding that judgment rendered against defunct corporation was void in action brought after forfeiture of corporation's charter)]. If a judgment is void only in part, the judgment is res judicata to the extent that it is not void [*see Lang v. Lang (1920) 182 Cal. 765, 769, 190 P. 181* (holding that in default judgment, any relief exceeding prayer is not entitled to res judicata effect); *Ludwig v. Murphy (1904) 143 Cal. 473, 476, 77 P. 150* (prior judgment was void to the extent it decreed a foreclosure, notwithstanding its other possible conclusive effect)].

Thus, even when a judgment is final in the sense that it is free from direct attack, it may be void and subject to collateral attack, and thus not conclusive for purposes of res judicata [*see Code Civ. Proc. § 1916* (judicial record may be impeached by evidence of want of jurisdiction in court or judicial officer, of collusion between parties, or of fraud in party offering record); *see also* Ch. 489, *Relief From Judgments and Orders*].

[d] Cases on Appeal

A judgment is not final for purposes of res judicata during the pendency of and until the resolution of the appeal [*Agarwal v. Johnson (1979) 25 Cal. 3d 932, 954 n.11, 160 Cal. Rptr. 141, 603 P.2d 58]* ; Franklin & Franklin v. 7-*Eleven Owners for Fair Franchising (2000) 85 Cal. App. 4th 1168, 1171, 102 Cal. Rptr. 2d 770* (finality required to invoke preclusive bar of res judicata is not achieved until appeal from trial court judgment has been exhausted or time to appeal has expired)]. A technically pending appeal does not preclude the application of res judicata when the appeal is abandoned and is subject to dismissal on the motion of the appellate court [*see Wood v. Herson (1974) 39 Cal. App. 3d 737, 748, 114 Cal. Rptr. 365]* .

Moreover, the dismissal of an appeal is with prejudice to the right to file another appeal within the time permitted, unless the dismissal is expressly made without prejudice to another appeal [*Code Civ. Proc. § 913*; *Lyons v. Security Pacific Nat. Bank (1995) 40 Cal. App. 4th 1001, 1017, 48 Cal. Rptr. 2d 174]* . Thus, when an appeal was dismissed for mootness, the dismissal was not made without prejudice, and approximately one year elapsed from the date of filing the judgment to a remittitur being issued, it was held that the underlying judgment become final, absent the appeal, when the period for filing the appeal had expired and principles of res judicata applied [*Lyons v. Security Pacific Nat. Bank (1995) 40 Cal. App. 4th 1001, 1017, 48 Cal. Rptr. 2d 174* ; *but see Chamberlin v. City of Palo Alto (1986) 186 Cal. App. 3d 181, 187, 230 Cal. Rptr. 454* (decided in context of collateral estoppel; when party to judgment cannot obtain decision of appellate court because matter determined against party is moot, judgment is not conclusive against party in subsequent action on different cause of action)].

When a former federal judgment is involved, the federal rule concerning finality of a judgment on appeal for purposes of res judicata differs from the state rule. Under the federal rule, a judgment or order, once rendered, is final for purposes of res judicata until it is reversed on appeal, or modified or set aside in the court of rendition [*Calhoun v. Franchise Tax Bd. (1978) 20 Cal. 3d 881, 887, 143 Cal. Rptr. 692, 574 P.2d 763* , *cert. denied, 439 U.S. 872* ; *Lumpkin v. Jordan (1996) 49 Cal. App. 4th 1223, 1230, 57 Cal. Rptr. 2d 303* ; *see, e.g. Abdallah v. United Savings Bank (1996) 43 Cal. App. 4th 1101, 1110, 51 Cal. Rptr. 2d 286* , *cert. denied, 519 U.S. 1081 (1997)* (plaintiffs' cause of action untenable in state court action in light of earlier action that had been dismissed with prejudice in federal district court; although appeal from that judgment was pending, judgment is final for res judicata purposes until reversed and doctrine of res judicata precludes litigation of any claim that could have been raised in federal action)]. For discussion of the full faith and credit requirement, see *§ 491.16*.

[e] Interlocutory Orders

As a general rule, res judicata applies to interlocutory judgments and decrees that are appealable by law [*see Rebco Development, Inc. v. Superior Court (1977) 67 Cal. App. 3d 13, 16-17, 136 Cal. Rptr. 351* ; *see also Acuna v. Regents of University of California (1997) 56 Cal. App. 4th 639, 649-650, 65 Cal. Rptr. 2d 388* (summary judgment in federal court on two of several claims involved in action barred their relitigation in state court)]. For example, an interlocutory decree in a divorce case is conclusive with respect to all proper or necessary issues determined thereby [*Green v. Green (1944) 66 Cal. App. 2d 50, 61, 151 P.2d 679* (disapproved on other grounds in *Pacific Mut. Life Ins. Co. v. McConnell (1955) 44 Cal. 2d 715, 725, 285 P.2d 636*); *see Weir v. Ferreira (1997) 59 Cal. App. 4th 1509, 1515, 70 Cal. Rptr. 2d 33* (interlocutory and final judgments of dissolution of marriage entitled to res judicata as to all questions determined by them)].

[f] Simultaneous Actions

When two actions involving the same issue are pending at the same time, it is not the final judgment in the first suit, but the first final judgment, although it may be rendered in the second suit, that renders the issue res judicata in the other court [*Consumer Advocacy Group, Inc. v. ExxonMobil Corp. (2008) 168 Cal. App. 4th 675, 684, 86 Cal. Rptr. 3d 39* ; *Domestic & Foreign Pet. Co., Ltd. v. Long (1935) 4 Cal. 2d 547, 562, 51 P.2d 73]* .

When the judgment in one suit becomes final through lapse of time or affirmance on appeal while an appeal is still pending in another court from judgment in the other action, the first final judgment may be brought to the attention of the court in which an appeal is still pending and relied on as res judicata [*Domestic & Foreign Pet. Co., Ltd. v. Long (1935) 4 Cal. 2d 547, 562, 51 P.2d 73]* .

[g] Prior Conflicting Judgments

If the res judicata effect of a prior judgment is not raised or established in a subsequent action in which it could have

been raised or established, and the litigated matter arises again in a third action, it is the final judgment in the second of the first two actions that controls and determines the rights of the parties in the third action [*California Bank v. Traeger (1932) 215 Cal. 346, 351, 10 P.2d 51]* . As a general rule, when there are successive and conflicting judgments in different proceedings between the same parties on the same issues, the last judgment is conclusive [*Maloney v. Mass. Bonding & Ins. Co. (1942) 20 Cal. 2d 1, 6, 123 P.2d 449]* .

[3] Former Judgment on Merits

[a] Generally

A final judgment is res judicata only if it is based on the merits [*Hasson v. Cozens (1970) 1 Cal. 3d 576, 580, 83 Cal. Rptr. 161, 463 P.2d 385]* . A judgment is on the merits for purposes of res judicata if the substance of the claim is tried and determined [*Johnson v. City of Loma Linda (2000) 24 Cal. 4th 61, 77, 99 Cal. Rptr. 2d 316* (quoting Witkin, California Procedure, vol. 7, *Judgment*, § 313 (4th ed. 1997)]; *see also Burdette v. Carrier Corp. (2008) 158 Cal. App. 4th 1668, 1682, 71 Cal. Rptr. 3d 185* (claim tried and determined by summary judgment was determined on the merits). For example, the defense of laches has nothing to do with the merits of the cause against which it is asserted, and a judgment denying a petition for writ of administrative mandate because of the defense of laches is not a judgment on the merits for purposes of res judicata [*Johnson v. City of Loma Linda (2000) 24 Cal. 4th 61, 76-77, 99 Cal. Rptr. 2d 316* (for discussion of laches, see *Ch. 345, Limitation of Actions, §§ 345.40 -345.43*)]. Similarly, a determination by a court that it has no jurisdiction is not a decision on the merits, and cannot be res judicata [*Maddern v. Superior Court (1972) 22 Cal. App. 3d 998, 1004, 99 Cal. Rptr. 832]* .

[b] Stipulated Judgment

A stipulated judgment may be given res judicata effect [*see Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn. (1998) 60 Cal. App. 4th 1053, 1064-1069, 1073, 71 Cal. Rptr. 2d 77* ; *Robert J. v. Leslie M. (1997) 51 Cal. App. 4th 1642, 1647-1648, 59 Cal. Rptr. 2d 905]* .

For example, when a district attorney child support division filed a complaint in 1990 to establish paternity against a party, and the party stipulated to paternity and entry of judgment requiring payment of child support without asking for appointment of counsel or demanding a blood test with full knowledge of his rights and without coercion, that judgment was held to bar, based on res judicata, that party's action in 1995 to establish nonpaternity, even though a 1994 blood test excluded him as the biological father [*Robert J. v. Leslie M. (1997) 51 Cal. App. 4th 1642, 1647-1648, 59 Cal. Rptr. 2d 905]* .

Although parties may stipulate to a judgment binding between them, it will not necessarily bind third parties [*Xebec Development Partners, Ltd. v. National Union Fire Ins. Co. (1993) 12 Cal. App. 4th 501, 540-544, 15 Cal. Rptr. 2d 726* ; *see Knowles v. Tehachapi Valley Hospital Dist. (1996) 49 Cal. App. 4th 1083, 1091, 57 Cal. Rptr. 2d 192]* . For example, a judgment based on stipulation by an insured and third parties in which the insurer did not join should not be regarded as a binding adjudication of the insurer's interests, particularly when the stipulation was given for a covenant not to execute [*Xebec Development Partners, Ltd. v. National Union Fire Ins. Co. (1993) 12 Cal. App. 4th 501, 540-544, 15 Cal. Rptr. 2d 726* (judgment based on stipulation might be entitled to presumptive weight, but should bind the insurer only to the extent it represents a true independent adjudication of the insured's liability)]. Similarly, a stipulated judgment between a plaintiff and a defendant doctor in which the doctor admitted negligence was not res judicata and thus not binding on the codefendant hospital district, which had no contractual or statutory right to control the doctor's defense in the action and did not in fact control the defense. The trial court did not err, however, in treating stipulated judgment as presumptive evidence of doctor's liability [*Knowles v. Tehachapi Valley Hospital Dist. (1996) 49 Cal. App. 4th 1083, 1089-1092, 57 Cal. Rptr. 2d 192]* .

Nonetheless, in some instances third parties may be bound by judgments entered in earlier actions in accordance with a

settlement agreement and rendered through consent and stipulation. For example, when authority to pursue public rights or interests in litigation is given to a public entity by statute, a stipulated judgment rendered in an action involving the agency is res judicata as to all members of the class represented. Thus, when issues in the current and earlier actions are identical, the plaintiff is bound by its terms when found to be in privity with the state agencies who pursued public rights in the earlier actions even though plaintiff was not a party to the settlement agreement [*Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn. (1998) 60 Cal. App. 4th 1053, 1064-1069, 1073, 71 Cal. Rptr. 2d 77* ; *see also Consumer Advocacy Group, Inc. v. ExxonMobil Corp. (2008) 168 Cal. App. 4th 675, 694, 86 Cal. Rptr. 3d 39* (settlement of prior lawsuit plaintiff filed against ExxonMobil on behalf of public operated as final judgment on merits for res judicata purposes although second suit brought by different public interest plaintiff)].

For a settlement and dismissal with prejudice of an action constituting a retraxit invoking the principles of res judicata, *see* [e], *below*.

[c] Default Judgment

In general, a prior default judgment may have collateral estoppel effect [*see, e.g.,* *English v. English (1937) 9 Cal. 2d 358, 363-364, 70 P.2d 625]* . In a subsequent proceeding between the parties on a different cause of action, a default judgment conclusively establishes the truth of all material allegations contained in the complaint in the first action, and every fact necessary to uphold the default judgment [*Four Star Electric, Inc. v. F & H Construction (1992) 7 Cal. App. 4th 1375, 1380, 10 Cal. Rptr. 2d 1]* . However, a default judgment is not conclusive as to any defense or issue that was not raised and is not necessary to uphold the judgment [*Four Star Electric, Inc. v. F & H Construction (1992) 7 Cal. App. 4th 1375, 1380, 10 Cal. Rptr. 2d 1* (reversing dismissal when default judgments not entitled to collateral estoppel effect)].

[d] Judgment on Demurrer

[i] General Demurrer

A judgment following the sustaining of a general demurrer may be on the merits and provide the basis for res judicata[Pollock v. University of Southern *California (2003) 112 Cal. App. 4th 1416, 1427-1428, 6 Cal. Rptr. 3d 122* ; *Ojavan Investors, Inc. v. California Coastal Com. (1996) 54 Cal. App. 4th 373, 383-384, 62 Cal. Rptr. 2d 803]* . Whether a judgment based on the sustaining of a general demurrer is a judgment on the merits depends on the facts of the specific case and the reason for the ruling [*Kanarek v. Bugliosi (1980) 108 Cal. App. 3d 327, 334, 166 Cal. Rptr. 526]* .

It is generally held that a demurrer sustained for failure of the facts alleged to establish a cause of action is a judgment on the merits [*Kanarek v. Bugliosi (1980) 108 Cal. App. 3d 327, 334, 166 Cal. Rptr. 526* ; *see* *Ojavan Investors, Inc. v. California Coastal Com. (1996) 54 Cal. App. 4th 373, 383-384* and n.8, *62 Cal. Rptr. 2d 803]* . However, this is true only if the same facts are pleaded in the complaint in the second action, or if complaint in the second action, although pleading different facts, contains the same defects as the former complaint [*Kanarek v. Bugliosi (1980) 108 Cal. App. 3d 327, 334, 166 Cal. Rptr. 526]* . The causes of action need not be identical [*Ojavan Investors, Inc. v. California Coastal Com. (1996) 54 Cal. App. 4th 373, 384, 62 Cal. Rptr. 2d 803* (rulings on former appeal after general demurrer was sustained held binding when crux former and present appeals dealt with enforceability of deed restrictions as to plaintiffs)].

When a judgment is entered after a general demurrer has been sustained with leave to amend and plaintiff has failed to amend within the time allowed, the judgment is a judgment on the merits to the extent that it adjudicates that the facts alleged do not constitute a cause of action, and will, accordingly be a bar to a subsequent action alleging the same facts. Moreover, even though different facts may be alleged in the second action, if the demurrer was sustained in the first action on a ground equally applicable to the second, the judgment will also be a bar. If, on the other hand, new or

additional facts are alleged that cure the defects in the original pleading, the judgment is not a bar to the subsequent action whether or not plaintiff had an opportunity to amend his or her complaint [*Keidatz v. Albany (1952) 39 Cal. 2d 826, 828, 249 P.2d 264* ; *see also* *Wells v. Marina City Properties, Inc. (1981) 29 Cal. 3d 781, 789, 176 Cal. Rptr. 104, 632 P.2d 217* ; for related discussion, *see* [e], *below*].

[ii] Special Demurrer

A judgment based on the sustaining of a special demurrer for technical or formal defect is not on the merits and is not a bar to the filing of a new action [*Goddard v. Security Title Ins. & Guar. Co. (1939) 14 Cal. 2d 47, 52, 92 P.2d 804* ; *see* *Ojavan Investors, Inc. v. California Coastal Com. (1996) 54 Cal. App. 4th 373, 384, 62 Cal. Rptr. 2d 803* (dicta)].

[e] Judgment of Dismissal

Dismissal is a judgment on the merits to the extent that it adjudicates that the facts alleged do not constitute a new cause of action. [*see* *Wells v. Marina City Properties, Inc. (1981) 29 Cal. 3d 781, 789, 176 Cal. Rptr. 104, 632 P.2d 217* (dismissal with prejudice under former *Code Civ. Proc. § 581* subdivision 3 (*now see Code Civ. Proc. § 581(f)(2)*) following sustaining of general demurrer with leave to amend and plaintiff failed to amend within time allowed)].

A common law "retraxit" has a similar effect. At common law, a retraxit was an open and voluntary renunciation of a suit in open court. The primary features of a common law retraxit were that it was made by the plaintiff in person and in open court. A dismissal with prejudice is the modern name for a common law retraxit. A retraxit invokes the principles of res judicata and is a judgment on the merits preventing a subsequent action on the dismissed claim. Because it invokes the principles of res judicata, however, a retraxit only bars claims dismissed with prejudice between the same parties or their privies [*Deleon v. Verizon Wireless (2008) 170 Cal. App. 4th 519, 528, 88 Cal. Rptr. 3d 29* (dismissal with prejudice of class action suit following settlement was final judgment on the merits); *see also* *Rice v. Crow (2000) 81 Cal. App. 4th 725, 733-736, 97 Cal. Rptr. 2d 110* (settlement and dismissal with prejudice of action operated as retraxit)].

On the other hand, if the plaintiff voluntarily dismisses the entire action without prejudice, the dismissal is not a final judgment on the merits [*Syufy Enterprises, L.P. v. City of Oakland (2002) 104 Cal. App. 4th 869, 879, 128 Cal. Rptr. 2d 808* (not final judgment when appellate division reversed and remanded, then plaintiff voluntarily dismissed without prejudice)].

[f] Denial of Writ Petition

Denial without opinion of a petition for a writ of mandate or prohibition is not res judicata [*Hoversten v. Superior Court (1999) 74 Cal. App. 4th 636, 640, 88 Cal. Rptr. 2d 197* (noting summary denial of previous writ petition was not decision on merits); *see* *Gammoh v. City of Anaheim (1999) 73 Cal. App. 4th 186, 196, 86 Cal. Rptr. 2d 194* (court of appeal's denial of petition does not mean it made decision on merits)]. Moreover, unless there is a written opinion following the issuance of an alternative writ, the denial of a writ petition does not have issue preclusive effect [*Gammoh v. City of Anaheim (1999) 73 Cal. App. 4th 186, 196, 86 Cal. Rptr. 2d 194* ; for discussion of issue preclusion generally, *see § 491.15, below*)].

Hoversten and *Gammoh* relied on *Kowis v. Howard (1992) 3 Cal. 4th 888, 12 Cal. Rptr. 2d 728, 838 P. 2d 250* as authority for the above stated rules. In *Kowis*, the court held the summary denial of a writ petition does not establish the law of the case whether or not that denial is intended to be on the merits or is based on some other reason [*Kowis v. Howard (1992) 3 Cal. 4th 888, 899, 12 Cal. Rptr. 2d 728, 838 P. 2d 250]* . The *Kowis* court in part stated that "[w]hen the court denies a writ petition without issuing an alternative writ, *it does not take jurisdiction over the case*; it does not give the legal issue full plenary review" [*Kowis v. Howard (1992) 3 Cal. 4th 888, 897, 12 Cal. Rptr. 2d 728, 838 P. 2d 250* (italics added)]. More recently, the Supreme Court, distinguished *Kowis* in a case in which the issue was whether

the court of appeal had failed to exercise its appellate jurisdiction to review an administrative decision as it was required to do by statute when the court summarily denied an extraordinary writ petition [*Leone v. Medical Board (2000) 22 Cal. 4th 660, 669-670, 94 Cal. Rptr. 2d 61, 995 P.2d 191]* . In *Leone*, the Court noted that *Kowis* was addressed to writ petitions challenging pretrial superior court rulings that could also be reviewed on appeal from the judgment ultimately entered in the action; it was not addressed to situations in which a writ petition was the only authorized mode of appellate review. In the latter situation, an appellate court must judge the petition on its procedural and substantive merits, and a summary denial of the petition is necessarily on the merits [*Leone v. Medical Board (2000) 22 Cal. 4th 660, 669-670, 94 Cal. Rptr. 2d 61, 995 P.2d 191]* .

From *Leone* it may be reasoned that there is a distinction for res judicata purposes between summary denial of writ petitions that are the exclusive means of judicial review versus summary denial of writ petitions challenging pretrial superior court rulings that could also be reviewed on appeal from a later judgment. Thus, later courts may ultimately limit the rule stated by *Hoversten* and *Gammoh* to the latter situation.

[g] Arbitration Award

The doctrine of res judicata applies not only to judicial proceedings but also to arbitration proceedings [*Lyons v. Security Pacific Nat. Bank (1995) 40 Cal. App. 4th 1001, 1015, 48 Cal. Rptr. 2d 174* ; *Thibodeau v. Crum (1992) 4 Cal. App. 4th 749, 755, 6 Cal. Rptr. 2d 27* ; *see also Kelly v. Vons Companies, Inc. (1998) 67 Cal. App. 4th 1329, 1335, 79 Cal. Rptr. 2d 763* (citing cases concerning res judicata or collateral estoppel effect)]. Further, depending on the circumstances, an unconfirmed arbitration award may or may not have res judicata effect [*Thibodeau v. Crum (1992) 4 Cal. App. 4th 749, 761, 6 Cal. Rptr. 2d 27* (plaintiffs precluded from litigating tort and contract claims against contractor after arbitration on specific construction defects); *Kahn v. Pelissetti (1968) 260 Cal. App. 2d 832, 834-835, 67 Cal. Rptr. 517* (unconfirmed award finding third-party uninsured motorist not liable had no res judicata effect because third-party was not a third-party beneficiary of unconfirmed award as contract)].

Res judicata can even operate to bar a plaintiff from litigating a claim against a non-arbitrating party where an arbitration award eliminated the basis for that party's liability [*Richard B. LeVine, Inc. v. Higashi (2005) 131 Cal. App. 4th 566, 579, 32 Cal. Rptr. 3d 244]* . In *LeVine*, plaintiff initiated an arbitration proceeding against his medical partners for breach of fiduciary duty. The arbitrator ruled that the partners had not committed such a breach. Plaintiff subsequently sued the partnership's accounting firm for civil conspiracy and aiding and abetting the partners. The trial court held that the arbitration proceedings operated to preclude plaintiff's claim against the accounting firm despite the fact that the accounting firm had not been a party to the arbitration. The court of appeals agreed. Prior cases such as *Thibodeau and Sartor v. Superior Court (1982) 136 Cal. App. 3d 322, 187 Cal. Rptr. 247* held a res judicata defense was available in such a circumstance, where the liability of the party in the second proceeding was strictly derivative. The court noted that liability based on conspiracy or aiding and abetting is also derivative. If the arbitrator had found no underlying tort had been committed, it would be anomalous for the court to then find the accounting firm had conspired to commit a tort or aided and abetted the commission of a tort [*Richard B. LeVine, Inc. v. Higashi (2005) 131 Cal. App. 4th 566, 579, 32 Cal. Rptr. 3d 244]* .

Res judicata only applies to issues which were or could have been litigated in the arbitration [*Truck Ins. Exchange v. Superior Court (1996) 51 Cal. App. 4th 985, 998-999, 59 Cal. Rptr. 2d 529* (when insurer reserves it rights to contest coverage and provides defense by independent counsel, arbitration award under *Civ. Code § 2860(c)*, relating to attorney's fees incurred by independent counsel, is not res judicata of coverage issues; absent an agreement, arbitrator could not decide coverage issues, and in this case parties specifically agreed that arbitrator would not have power to decide coverage issues)]. Moreover, a court may not give preclusive effect to a decision in a prior arbitration proceeding if doing so is contrary to the legislative body's intent that established the proceeding in which res judicata is urged [*Liska v. Arns Law Firm (2004) 117 Cal. App. 4th 275, 283, 12 Cal. Rptr. 3d 21* (arbitration under Mandatory Fee Arbitration statute did not preclude subsequent lawsuit by plaintiff against his former attorneys for breach of contract, negligence, and fraud as the only binding determination made in the arbitration was as to the amount of fees awarded

the attorneys); *Brosterhous v. State Bar (1995) 12 Cal. 4th 315, 326, 48 Cal. Rptr. 2d 87, 906 P.2d 1242* (arbitration decision concerning State Bar members' objections to manner in which State Bar calculates portion of annual dues used for political and ideological purposes not entitled to res judicata effect at demurrer stage to preclude plaintiffs' action under *42 U.S.C. § 1983*)].

An arbitration award will not be given preclusive effect unless the arbitration agreement "clearly and unmistakably" provides for arbitration of the issues to be precluded and the arbitration record shows that the procedures followed allowed for full and fair adjudication of those issues [*Camargo v. California Portland Cement Co. (2001) 86 Cal. App. 4th 995, 1018, 103 Cal. Rptr. 2d 841* (arbitration of sex discrimination and sexual harassment claims under collective bargaining agreement did not bar state court action for sex discrimination and sexual harassment under the Fair Employment and Housing Act)].

For further discussion of the res judicata effect of arbitration awards, see Ch. 34, *Contractual Arbitration: Judicial Review* , and Ch. 36, *Judicial Arbitration* .

[h] Small Claims Court Judgment

Generally speaking, a valid final judgment in plaintiff's favor merges any claim of the same cause of action in the judgment, and precludes the plaintiff from maintaining any later suit on the same cause of action. This aspect of res judicata applies to judgments rendered by the small claims court. The rule against a plaintiff splitting a single cause of action so as to make it the basis of several suits is, in part, an application of the doctrine of res judicata [*Allstate Ins. Co. v. Mel Rapton, Inc. (2000) 77 Cal. App. 4th 901, 907, 92 Cal. Rptr. 2d 151]* .

Thus, when (1) a person whose car was damaged by the negligence of a car dealer tendered the claim to her insurance company, (2) the company paid off, but the policy did not cover all the damages, (3) the policyholder thereafter filed a small claims action against the car dealer tortfeasor to recover the uninsured loses and obtained a small claims court judgment, and (4) after the small claims court judgment was obtained, the insurance company brought a municipal court subrogation action against the tortfeasor to recover what the insurance company had paid to its policyholder to cover losses she suffered as a result of the tortfeasor's negligence, it was held that the small claims judgment against the tortfeasor barred the insurance company from pursuing its subrogation action because the latter action was precluded by the res judicata effect of the rule against splitting a cause of action. Although the insurer may bring a separate action against the tortfeasor, the rule against splitting a cause of action is violated when both the insurer and insured pursue separate actions. This is so because the general rule of subrogation provides that an insurer stands in the shoes of its insured; if a second action by the insured is barred, so is the action by the insurer [*Allstate Ins. Co. v. Mel Rapton, Inc. (2000) 77 Cal. App. 4th 901, 905-909, 913-914, 92 Cal. Rptr. 2d 151* (when tortfeasor's single act causes plaintiff to suffer both personal injury and property damage, however, there two separate causes of action exist; for what constitute single cause of action for purposes of rule, *see* discussion under [4], *below*)]. For discussion of issue preclusion and small claims court judgments, see *§ 491.15[3][i]*.

[i] Retraxit

A retraxit is a judgment on the merits [*Rice v. Crow (2000) 81 Cal. App. 4th 725, 733, 97 Cal. Rptr. 2d 110]* . For discussion, see § 419.14[3][e].

[4] Same Cause of Action

[a] Generally

Whenever a judgment in one action is raised as a bar to a later action under the doctrine of claim preclusion, the key issue is whether the same cause of action is involved in both suits [*Eichman v. Fotomat Corp. (1983) 147 Cal. App. 3d 1170, 1174, 197 Cal. Rptr. 612]* .

Although claim preclusion will bar relitigation of the same cause of action by the same parties, the question of whether a cause of action is identical for purposes of claim preclusion depends not on the legal theory or label used, but on the primary right sought to be protected in the two actions. The invasion of one primary right gives rise to a single cause of action [*Slater v. Blackwood (1975) 15 Cal. 3d 791, 795, 126 Cal. Rptr. 225, 543 P.2d 593* ; *Frommhagen v. Board of Supervisors (1987) 197 Cal. App. 3d 1292, 1299-1300, 243 Cal. Rptr. 390* ; *accord Brinton v. Bankers Pension Services, Inc. (1999) 76 Cal. App. 4th 550, 557, 90 Cal. Rptr. 2d 469]* . That is, a cause of action consists of [*Gamble v. General Foods Corp. (1991) 229 Cal. App. 3d 893, 898, 899, 280 Cal. Rptr. 457]* :

- A primary right possessed by the plaintiff;
- A corresponding primary duty devolving on the defendant; and
- A delict or wrong done by the defendant consisting of a breach of the primary right and duty.

Each invasion of a primary right gives rise to a separate cause of action [*Gamble v. General Foods Corp. (1991) 229 Cal. App. 3d 893, 898, 899, 280 Cal. Rptr. 457]* .

Thus, a single cause of action is based on the substantive right violated or the harm suffered, rather than on the particular legal theory asserted or relief sought by plaintiff [*Deleon v. Verizon Wireless (2008) 170 Cal. App. 4th 519, 528, 88 Cal. Rptr. 3d 29* ; *Burdette v. Carrier Corp. (2008) 158 Cal. App. 4th 1668, 1682, 71 Cal. Rptr. 3d 185* ; *Gamble v. General Foods Corp. (1991) 229 Cal. App. 3d 893, 899, 280 Cal. Rptr. 457* ; *see also Peiser v. Mettler (1958) 50 Cal. 2d 594, 605, 328 P.2d 953]* . For example, when a defendant's negligence causes injury both to the property and person of the plaintiff, there are two causes of action under the primary right theory, one for harm to the property and one for harm to the person [*see Holmes v. David H. Bricker (1969) 70 Cal. 2d 786, 788-789, 76 Cal. Rptr. 431, 452 P.2d 647]* . Conversely, two actions constitute a single cause of action if they both affect the same primary right [*Weikel v. TCW Realty Fund II Holding Co. (1997) 55 Cal. App. 4th 1234, 1246, 65 Cal. Rptr. 2d 25]* .

The distinction is between the violation of one primary right giving rise to multiple legal theories of recovery and the violation of different primary rights by the same wrongful conduct. When there are multiple legal theories on which recovery might be predicated, one injury gives rise to only one claim for relief [*Slater v. Blackwood (1975) 15 Cal. 3d 791, 795, 126 Cal. Rptr. 225, 543 P.2d 593* ; *see Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn. (1998) 60 Cal. App. 4th 1053, 1067, 71 Cal. Rptr. 2d 77* (for invasion of one primary right there is single cause of action, even if multiple theories of recovery asserted); *Weikel v. TCW Realty Fund II Holding Co. (1997) 55 Cal. App. 4th 1234, 1246-1247, 65 Cal. Rptr. 2d 25* (a cause of action is to be distinguished from the remedy or relief sought, for a plaintiff may frequently be entitled to several species of remedy for the enforcement of a single right); *Henry v. Clifford (1995) 32 Cal. App. 4th 315, 321, 38 Cal. Rptr. 2d 116* (when two actions involve same injury to plaintiff and same wrong by defendant, same primary right at stake even if plaintiff in second suit pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery)]. For example, one breach of a nonseverable contract can only give rise to one cause of action for legal and equitable relief; a plaintiff cannot bring successive actions for specific performance and damages based on the same breach [*see Abbott v. The 76 Land and Water Co. (1911) 161 Cal. 42, 47-48, 118 P. 425]* .

When different primary rights are violated by the same wrongful conduct, a final adjudication of one of the plaintiff's rights does not necessarily bar a second action [*Agarwal v. Johnson (1979) 25 Cal. 3d 932, 954, 160 Cal. Rptr. 141, 603 P.2d 58]* . For example, a judgment in defendant's favor in a civil rights action under Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.*, does not have res judicata effect over a subsequent action brought in state court for common law claims arising out of the same employment dispute since Title VII vests employees with independent federal statutory rights against discriminatory employment practices and does not supplant state remedies [*Agarwal v. Johnson (1979) 25 Cal. 3d 932, 954, 160 Cal. Rptr. 141, 603 P.2d 58* ; *see also Dunkin v. Boskey (2000) 82 Cal. App.*

4th 171, 182, 98 Cal. Rptr. 2d 44 (action for breach of contract did not assert same primary right as plaintiff's prior action in family law court to establish paternity); *Branson v. Sun-Diamond Growers (1994) 24 Cal. App. 4th 327, 343-345, 29 Cal. Rptr. 2d 314* (primary right to seek authorization for indemnity under *Corp. Code § 317* is not the same cause of action as one for breach of a contract for indemnity or for equitable estoppel since *Corp. Code § 317(g)* expressly provides no preclusive effect on other legal rights for indemnity)].

However, if plaintiff has two mutually exclusive remedies, and judgment is rendered in the plaintiff's favor giving the plaintiff one of the remedies, the plaintiff cannot thereafter maintain an action for the other *[Mycogen Corporation v. Monsanto Company (2002) 28 Cal. 4th 888, 904-909* (company that sued another company seeking the equitable remedy of specific performance of a license agreement was precluded from bringing a subsequent suit for the legal remedy of monetary damages); *see also Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 973, 104 Cal. Rptr. 42, 500 P.2d 1386* (employee, who suffered injuries inflicted by her employer and successfully brought tort action against employer's estate, as precluded from bringing separate worker's compensation action based on same injuries)].

Because res judicata only applies between the same parties or their privies, when defendants are neither it makes no difference that the claims in the underlying action and current action arose from the same primary right. Such defendants cannot invoke res judicata on their behalf [*Rice v. Crow (2000) 81 Cal. App. 4th 725, 736, 97 Cal. Rptr. 2d 110]* . For discussion of same parties or privies requirement, see *§ 491.14[5]*.

The primary right theory has been criticized on the grounds that the term "primary right" is not of fixed meaning, but may be broadly or narrowly interpreted [*see* Witkin, California Procedure (3d ed), Vol. 4, *Pleading*, § 24; *see also Sawyer v. First City Financial Corp. (1981) 124 Cal. App. 3d 390, 399-400* (discussing application of primary right theory)]. The trend in other jurisdictions has been to reject primary right analysis and to adopt the "transaction" approach taken by the Second Restatement of Judgments, under which a cause of action (or "claim") is defined for res judicata purposes to include all rights of the plaintiff to remedies against the defendant arising out of the same transaction or series of connected transactions [*see* Restatement (Second) of Judgments § 24(1) cmt. a; s Moore's Federal Practice § 130.10[3] (3rd ed. Matthew Bender)].

[b] Compulsory Cross Complaint

An effect analogous to claim preclusion can occur when, in a prior action, a party has failed to plead in a cross complaint a related cause of action against the plaintiff. In such a case, the party may be precluded from reasserting that unpleaded cause of action in a later action [*see Code Civ. Proc. § 426.30*]. For general discussion of compulsory cross complaints, see Ch. 123, *Complaints and Cross Complaints* . For a form for use by a defendant as an affirmative defense allegation in his or her answer, to allege a plaintiff's failure in a prior action to allege a related cause of action in a compulsory cross complaint, see Ch. 26, *Answers* .

[c] Special Proceeding Distinguished

A judgment rendered in a special proceeding, such as in a mandamus proceeding, does not give rise to claim preclusion in a cause of action [*see Mata v. City of Los Angeles (1993) 20 Cal. App. 4th 141, 149, 24 Cal. Rptr. 2d 314* (holding that *42 U.S.C. § 1983* civil rights action for damages was not barred by earlier mandate proceeding that directed city to reinstate plaintiff as a police officer)]. Nonetheless, the judgment in the mandate proceeding is not to be ignored, and may result in issue preclusion [*see Mata v. City of Los Angeles (1993) 20 Cal. App. 4th 141, 149, 24 Cal. Rptr. 2d 314]* .

[5] Same Parties or Privies

[a] Generally

For claim preclusion to be available as a defense, the same parties or their privies must be involved in both the prior and

present actions [*see Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 974, 104 Cal. Rptr. 42, 500 P.2d 1386* ; *Rice v. Crow (2000) 81 Cal. App. 4th 725, 734, 97 Cal. Rptr. 2d 110* ; *see also Code Civ. Proc. §§ 1908, 1910*; *but see Law Offices of Stanley J. Bell v. Shine, Browne & Diamond (1995) 36 Cal. App. 4th 1011, 1019-1026, 43 Cal. Rptr. 2d 717* (when court issued order in earlier minor's personal injury action denying plaintiff's quantum meruit lien, plaintiff in subsequent declaratory relief action with respect to entitlement to those fees was barred by res judicata from proceeding against defendant attorneys who represented minor in earlier action who were not technically parties to that action)].

[b] Effect of Party Acting in Different Capacities

The identity of parties necessary to establish the defense of res judicata must be identity of parties in the same capacity [*Meldrim v. Board of Supervisors (1976) 57 Cal. App. 3d 341, 346, 127 Cal. Rptr. 52* (res judicata inapplicable when first action against county, second action against county board of supervisors in their capacity as public officers); *see Finnerty v. Cummings (1933) 132 Cal. App. 48, 50-51, 22 P.2d 37* (res judicata inapplicable when first action by mother as guardian ad litem for injuries suffered by child, second action by mother in her own right for medical expenses and loss of earnings)].

[c] Persons in Privity

The requirement of identity of parties or privies is a requirement of due process of law [*Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn. (1998) 60 Cal. App. 4th 1053, 1070, 71 Cal. Rptr. 2d 77* ; *see also* discussion in *§ 491.15[5], below*].

Traditionally, courts considered a person to be in privity with a party when he or she was so identified in interest with that party that he or she represented the same legal right [*Zaragosa v. Craven (1949) 33 Cal. 2d 315, 318, 202 P.2d 73* ; *see Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn. (1998) 60 Cal. App. 4th 1053, 1069, 71 Cal. Rptr. 2d 77]* . The concept of privity was expanded from rights acquired after judgment through or under inheritance, succession, or purchase to include a mutual or successive relationship to the same rights of property, or to such an identification in interest of one person with another as to represent the same legal rights, and, more recently, to a relationship between the party to be estopped and the unsuccessful party in the prior litigation that is sufficiently close so as to justify application of the doctrine of collateral estoppel [*Dyson v. State Personnel Bd. (1989) 213 Cal. App. 3d 711, 723, 262 Cal. Rptr. 112* ; *see Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn. (1998) 60 Cal. App. 4th 1053, 1069-1070, 71 Cal. Rptr. 2d 77]* .

Thus, under the modern approach, privity denotes that the plaintiffs in the succeeding action have an identity or community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication [*Clemmer v. Hartford Insurance Co. (1978) 22 Cal. 3d 865, 875, 151 Cal. Rptr. 285, 587 P.2d 1098* ; *Helfand v. National Union Fire Ins. Co. (1992) 10 Cal. App. 4th 869, 902, 13 Cal. Rptr. 2d 295* ; *Ceresino v. Fire Ins. Exchange (1989) 215 Cal. App. 3d 814, 820, 264 Cal. Rptr. 30* ; *White Motor Corp. v. Teresinski (1989) 214 Cal. App. 3d 754, 761, 263 Cal. Rptr. 26* ; *see Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn. (1998) 60 Cal. App. 4th 1053, 1070, 71 Cal. Rptr. 2d 77* ; *see also Dyson v. State Personnel Bd. (1989) 213 Cal. App. 3d 711, 724-725, 262 Cal. Rptr. 112]* .

Privity, however, is not susceptible of a neat definition, and determination of whether it exists is not a cut-and-dried exercise. In the final analysis, the determination of privity depends on the fairness of binding one with the results obtained in earlier proceedings in which it did not participate [*Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn. (1998) 60 Cal. App. 4th 1053, 1070, 71 Cal. Rptr. 2d 77]* . Thus, with respect to the issue of privity, in deciding whether to apply collateral estoppel, the court must balance the rights of the party to be estopped against the need for applying collateral estoppel in the particular case, in order to promote judicial economy by minimizing repetitive

litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system, or to protect against vexatious litigation [*Clemmer v. Hartford Insurance Co. (1978) 22 Cal. 3d 865, 875, 151 Cal. Rptr. 285, 587 P.2d 1098* ; *Martin v. County of Los Angeles (1996) 51 Cal. App. 4th 688, 701, 59 Cal. Rptr. 2d 303* ; *see Zapata v. Department of Motor Vehicles (1991) 2 Cal. App. 4th 108, 115, 2 Cal. Rptr. 2d 855* (DMV in privity with prosecution for purposes of municipal court hearing on lawfulness of driving under the influence arrest)].

A person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of the judgment as though he or she were a party [*Del Costello v. State of California (1982) 135 Cal. App. 3d 887, 891, 185 Cal. Rptr. 582]* . For example, a five-year-old child ordinarily has no cognizable independent interest in relitigating a liability claim that has been determined adversely to his parents; sufficient privity exists to invoke the doctrine of collateral estoppel [*Garcia v. Rehrig Internat., Inc. (2002) 99 Cal. App. 4th 869, 878, 121 Cal. Rptr. 2d 723]* .

In certain actions, courts have found that California governmental entities brought suit as the representative of individual claimants and were thus in privity with the individuals [*see, e.g., Rynsburger v. Dairymen's Fertilizer Coop., Inc. (1968) 266 Cal. App. 2d 269, 277-278, 72 Cal. Rptr. 102* (plaintiffs in private nuisance action held to have been represented by cities that had earlier brought public nuisance actions on plaintiff's request); *Trujillo v. County of Santa Clara (9th Cir. 1985) 775 F. 2d 1359, 1366* (California Fair Employment & Housing Commission brought administrative proceeding at claimant's request and thus, represented him for purposes of claimant's federal civil rights action under *42 U.S.C. § 1983*); *see also Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn. (1998) 60 Cal. App. 4th 1053, 1070, 71 Cal. Rptr. 2d 77* (plaintiff, a nonprofit public interest group, who brought action for implied dedication of a public recreational easement, held to be in privity with state agencies that pursued rights of public concerning same property in earlier actions)]. However, the courts will examine the particular facts of each case to determine whether the action was brought on the individual's behalf [*see Victa v. Merle Norman Cosmetics, Inc. (1993) 19 Cal. App. 4th 454, 463-468, 24 Cal. Rptr. 2d 117* (Equal Employment Opportunity Commission's action, although initially prompted by plaintiff's discrimination charge against employer for age discrimination under the Age Discrimination in Employment Act *29 U.S.C. § 261 et seq.*, did not bar plaintiff's action against employer for state-based age discrimination since EEOC pursued action on behalf of all of defendant's employees)]. Successors in interest to the original parties and persons who control the prior action may also be privies for purposes of res judicata [*see Code Civ. Proc. § 1908(a)(2), (b)*]. For further discussion of how parties who control an action may be bound, see [d], *below*.

[d] Party Who Controlled Prior Action

A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he or she were a party if he or she has a proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction; if the other party has notice of his or her participation, the other party is equally bound [*Code Civ. Proc. § 1908(b)*].

At any time prior to a final judgment, as defined in *Code Civ. Proc. § 577*, a determination of whether the judgment, verdict on which it was entered, or a finding on which it was entered is to be binding on a nonparty pursuant to *Code Civ. Proc. § 1908(b)* or whether such nonparty is entitled to the benefit of *Code Civ. Proc. § 1908(b)* may, on the noticed motion of any party or any nonparty that may be affected by *Code Civ. Proc. § 1908(b)*, be made in the court in which the action was tried or in which the action is pending on appeal. If no such motion is made before the judgment becomes final, the determination may be made in a separate action. If appropriate, a judgment may be entered or ordered to be entered pursuant to such a determination [*Code Civ. Proc. § 1908(b)*]. For a form of notice of motion and order that may be used in proceedings to determine whether a judgment is binding on a nonparty pursuant to *Code Civ. Proc. § 1908(b)*, see *§§ 491.56* and *491.57*.

[e] Representative Actions Under the Unfair Competition Law

Traditional res judicata principles do not apply to a judgment obtained by the Attorney General or a district attorney under the Unfair Competition Law [*Bus. & Prof. Code § 17200 et seq.*] because an action brought pursuant to those sections by a prosecutor is fundamentally different from a class action or other representative litigation; it is fundamentally a law enforcement action and seeks primarily injunctive relief [*Payne v. National Collection Systems (2001) 91 Cal. App. 4th 1037, 1045-1047, 111 Cal. Rptr. 2d 260]* . Any request for restitution is ancillary. Moreover, in such an action brought by a prosecutor, there is no occasion to give notice to the persons directly affected by the action. Therefore, res judicata effect is not accorded to a judgment in an unlawful competition law lawsuit commenced by a prosecutor in a subsequent lawsuit by persons defrauded by a defendant [*Payne v. National Collection Systems (2001) 91 Cal. App. 4th 1037, 1045-1047, 111 Cal. Rptr. 2d 260]* .

[6] Public Interest Exception to Res Judicata

When the issue is a question of law rather than of fact, the prior legal determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed [*Kopp v. Fair Pol. Practices Com. (1995) 11 Cal. 4th 607, 622-623, 675, 685, 693, 47 Cal. Rptr. 2d 108, 905 P.2d 1248* (Lucus, C.J.; Werdegar, J., concurring; Baxter, J., joined by Arabian, J., and George, J., concurring and dissenting)]. Application of the public interest exception is not conditioned on a finding that the initial determination of an issue was erroneous [*Kopp v. Fair Pol. Practices Com. (1995) 11 Cal. 4th 607, 622-623 n.16, 675, 685, 693, 47 Cal. Rptr. 2d 108, 905 P.2d 1248* (Lucus, C.J.; Werdegar, J., concurring; Baxter, J., joined by Arabian, J., and George, J., concurring and dissenting].

In *Kopp*, several Government Code sections enacted by Proposition 73, which was designed to reform financing of statewide and local political campaigns, were declared unconstitutional by a federal district court, and their enforcement was enjoined. The Ninth Circuit Court of Appeals affirmed the judgment of the district court. Thereafter, an original mandate proceeding was brought in the California Supreme Court. The issue before the Court was one of state law, that is, assuming enforcement of the challenged sections as enacted would violate the federal constitution, may the statutes be judicially reformed in a manner that avoids its unconstitutionality, and if so, should they be reformed [*Kopp v. Fair Pol. Practices Com. (1995) 11 Cal. 4th 607, 614, 47 Cal. Rptr. 2d 108, 905 P.2d 1248]* . The Court assumed that the principles of res judicata or collateral estoppel applied, but held that they should entertain and resolve the litigation under the public interest exception to those doctrines [*Kopp v. Fair Pol. Practices Com. (1995) 11 Cal. 4th 607, 621, 47 Cal. Rptr. 2d 108, 905 P.2d 1248* (Lucus, C.J.; Werdegar, J., concurring; Baxter, J., joined by Arabian, J., and George, J., concurring and dissenting)]. The Court noted that a state supreme court is not constrained by principles of res judicata, collateral estoppel, or comity, to keep silent on a state law statutory reformation issue, when the question is presented to it in litigation such as the one before the court. The court's sovereign duty as a state court of last resort, consistent with principles of federalism and comity, requires that the court not automatically accept the federal court's ruling on this important state law issue, but consider the reformation question afresh and reach a different conclusion if state law leads the court to that result [*Kopp v. Fair Pol. Practices Com. (1995) 11 Cal. 4th 607, 625-626, 675, 679, 47 Cal. Rptr. 2d 108, 905 P.2d 1248* (Lucus, C.J.; Werdegar, J., concurring; Baxter, J., joined by Arabian, J., and George, J., concurring and dissenting)]. The court further held, however, that reformation was inappropriate in the particular case [*Kopp v. Fair Pol. Practices Com. (1995) 11 Cal. 4th 607, 671, 675, 685, 693, 47 Cal. Rptr. 2d 108, 905 P.2d 1248* (Lucus, C.J.; Mosk, J. (based on lack of authority to do so), and Werdegar, J., concurring; Kennard, J., concurring and dissenting (based on full faith and credit reasons); *see also Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn. (1998) 60 Cal. App. 4th 1053, 1065, 71 Cal. Rptr. 2d 77* (even if thresholdrequirements for application of res judicata are established, that is, issues adjudicated in earlier action are identical with those in later action, final judgment on merits was rendered in earlier action, and party against whom plea is raised was party or in privity with party to earlier adjudication, res judicata will not be applied if injustice would result or if public interest requires relitigation not be foreclosed)].

A statutory scheme may also create an exception to res judicata [*see Rubenstein v. Rubenstein (2000) 81 Cal. App. 4th 1131, 1144, 97 Cal. Rptr. 2d 707* (statutory scheme under *Fam. Code § 2120 et seq.*, dealing with setting aside a

dissolution judgment, creates exception to res judicata based on recognition that public policy of assuring finality of judgments must be balanced against public interest in ensuring proper division of marital property, in ensuring sufficient support awards, and in deterring misconduct)].

For further discussion of the public interest exception to the doctrine of res judicata or collateral estoppel, see *§ 491.15[6], below*.

[7] Prior Action Was in Federal Court

Although it is established that the doctrine of res judicata precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction, the ways in which the federal courts define "cause of action" and the way California courts define the term differs. The federal courts utilize a transactional analysis; that is, two suits constitute a single cause of action if they both arise from the same "transactional nucleus of facts" or a single "core of operative facts." California on the other hand, follows the primary right theory of Pomeroy [for discussion, *see* [4], *above*]. Thus, two actions constitute a single cause of action if they both affect the same primary right. When an action is filed in a California state court and the defendant claims the suit is barred by a final federal judgment, California law will determine the res judicata effect of the prior federal court judgment on the basis of whether the federal and state actions involve the same primary right [*Gamble v. General Foods Corp. (1991) 229 Cal. App. 3d 893, 898, 280 Cal. Rptr. 457* ; *see also* Acu na v. *Regents of University of California (1997) 56 Cal. App. 4th 639, 648, 65 Cal. Rptr. 2d 388]* .

Also following a federal judgment, the state court is not bound by federal law when determining whether an exception to the doctrine of res judicata applies [*Kopp v. Fair Pol. Practices Com. (1995) 11 Cal. 4th 607, 622 n.16, 675, 685, 693, 47 Cal. Rptr. 2d 108, 905 P.2d 1248* (Lucus, C.J.; Werdegar, J., concurring; Baxter, J., joined by Arabian, J., and George, J., concurring and dissenting); for discussion of public interest exception to res judicata doctrine, *see* [6], *above*].

The state court, however, will apply the federal rule as to when a judgment is considered final for purposes of res judicata [*Lumpkin v. Jordan (1996) 49 Cal. App. 4th 1223, 1230-1231, 57 Cal. Rptr. 2d 303* ; *see also* *Butcher v. Truck Ins. Exchange (2000) 77 Cal. App. 4th 1442, 1452-1455, 1460, 92 Cal. Rptr. 2d 521* (California follows rule that preclusive effect of prior federal court judgment is determined by federal law, at least where prior judgment was based on federal question jurisdiction; on question of finality federal law is controlling)]. For discussion of the federal rule concerning finality of a judgment for purposes of res judicata, see [2][d], *above*.

The courts of appeal are split over whether res judicata should apply to bar a state law claim that is dismissed out of a federal lawsuit that has resulted in a final judgment. The Fourth Appellate District, Division Two, held that once it is known that the federal court will not exercise pendent jurisdiction over the state claim and it is dismissed out of the lawsuit, if the plaintiff then elects to proceed to trial and judgment in the federal court, the plaintiff's entire cause of action is either merged in or barred by the federal court judgment so that the plaintiff may not thereafter maintain a second suit on the same cause of action in a state court [*Mattson v. City of Costa Mesa (1980) 106 Cal. App. 3d 441, 445-446, 164 Cal. Rptr. 913]* . However, the Second Appellate District, Division Eight, is of the opposite view, finding that despite *Mattson*'s concerns, a contrary rule would not invite manipulation, thus the plaintiff is not barred by res judicata from going forth with the state claim after the federal claim has resulted in a final judgment [*Harris v. Grimes (2002) 104 Cal. App. 4th 180, 188-189, 127 Cal. Rptr. 2d 791]* .

For discussion of the full faith and credit requirement, see *§ 491.16, below*.

[8] Effect of Change of Law After Final Judgment on the Merits

When a cause of action has been adjudicated under the law in effect at that time resulting in a final judgment on the

merits, the judgment is res judicata and bars relitigation between the same parties on the same cause of action despite a subsequent change of law. A change in statute or law does not entitle a litigant to escape an earlier ruling by filing a new action [*Slater v. Blackwood (1975) 15 Cal. 3d 791, 796-797, 126 Cal. Rptr. 225, 543 P.2d 593* ; *Castro v. Higaki (1994) 31 Cal. App. 4th 350, 359, 37 Cal. Rptr. 2d 84]* .

Legal Topics:

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PART II. LEGAL BACKGROUND

43-491 California Forms of Pleading and Practice--Annotated § 491.15

§ 491.15 Issue Preclusion

[1] General Requirements

The doctrine of issue preclusion precludes relitigation of an issue previously adjudicated when the following requirements are satisfied [*Hernandez v. City of Pomona (2009) 46 Cal. 4th 501, 94 Cal. Rptr. 3d 1, 207 P.3d 506* ; *Lucido v. Superior Court (1990) 51 Cal. 3d 335, 341, 795 P.2d 1223* ; *Silver v. Los Angeles County Metropolitan Transportation Authority (2000) 79 Cal. App. 4th 338, 357, 94 Cal. Rptr. 2d 287* ; *Kelly v. Vons Companies, Inc. (1998) 67 Cal. App. 4th 1329, 1339, 79 Cal. Rptr. 2d 763* ; *see Producers Dairy Delivery Co. v. Sentry Ins. Co. (1986) 41 Cal. 3d 903, 910, 226 Cal. Rptr. 558, 718 P.2d 920* ; :

- The issue sought to be precluded must be identical to that decided in a prior proceeding;
- The issue must have been actually litigated in the prior proceeding;
- The issue must have been necessarily decided in the prior proceeding;
- The decision in the former proceeding must be final and on the merits; and
- The party against whom issue preclusion is asserted must be the same as or in privity with the party to the prior proceeding.

These same threshold requirements apply to both collateral estoppel and direct estoppel [*see Sabek, Inc. v. Engelhard Corp. (1998) 65 Cal. App. 4th 992, 997-998, 76 Cal. Rptr. 2d 882]* .

The burden is on the party asserting collateral estoppel to establish these requirements [*Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 181, 98 Cal. Rptr. 2d 44* ; *Lumpkin v. Jordan (1996) 49 Cal. App. 4th 1223, 1230, 57 Cal. Rptr. 2d 303]* .

[2] Final Judgment on Merits

[a] Less Strict Requirement Than for Claim Preclusion

For issue preclusion to apply, there must ordinarily be a final judgment on the merits in the previous suit [*Producers Dairy Delivery Co. v. Sentry Ins. Co. (1986) 41 Cal. 3d 903, 910, 226 Cal. Rptr. 558, 718 P.2d 920]* . However, the requirement of finality of judgment is interpreted less strictly for the purpose of issue preclusion than for the purpose of claim preclusion [*Sandoval v. Superior Court (1983) 140 Cal. App. 3d 932, 936, 190 Cal. Rptr. 29* ; *see Producers Dairy Delivery Co. v. Sentry Ins. Co. (1986) 41 Cal. 3d 903, 911, 226 Cal. Rptr. 558, 718 P.2d 920* ; *see also Sabek, Inc. v. Engelhard Corp. (1998) 65 Cal. App. 4th 992, 997-998, 76 Cal. Rptr. 2d 882* (involving direct estoppel; issue preclusion may be appropriate even though stage of litigation for merger and bar requirement for claim preclusion has not been reached; thus, issue preclusion may apply when underlying cause of action itself is not barred)].

For example, settlement of a prior adjudication during the pendency of an appeal may render a prior judgment sufficiently final to support the doctrine of issue preclusion, provided other factors of certainty and finality are satisfied [*see Sandoval v. Superior Court (1983) 140 Cal. App. 3d 932, 936-937, 190 Cal. Rptr. 29]* . The final determination on the merits can be a judgment, a motion, or an order that determines a substantial matter of right on issues of fact or law [*People v. Howie (1995) 41 Cal. App. 4th 729, 736-737, 48 Cal. Rptr. 2d 505* (court determination that prior felony conviction is constitutionally invalid collaterally estops subsequent court proceeding that seeks to impose sentence based on invalid prior); *see Code Civ. Proc. § 577* (a judgment is final determination of rights of parties in action or proceeding)].

When the prior action was in a California state court, the judgment is not final for the purposes of collateral estoppel while it is open to direct attack, for example, by appeal [*Lumpkin v. Jordan (1996) 49 Cal. App. 4th 1223, 1231 n.5, 57 Cal. Rptr. 2d 303]* .

When, however, the prior action was in federal court, a federal judgment has the same effect in the California courts as it would have in federal court [*Lumpkin v. Jordan (1996) 49 Cal. App. 4th 1223, 1230, 57 Cal. Rptr. 2d 303* ; *see* discussion in *§ 491.16, below*]. Under the federal rule, an order or judgment, once rendered, is final for res judicata purposes until it is reversed on appeal, or modified or set aside in the court of rendition [*Calhoun v. Franchise Tax Bd. (1978) 20 Cal. 3d 881, 887, 143 Cal. Rptr. 692, 574 P. 2d 763 , cert. denied, 439 U.S. 872* ; *Lumpkin v. Jordan (1996) 49 Cal. App. 4th 1223, 1230, 57 Cal. Rptr. 2d 303]* . Thus, for collateral estoppel purposes, a federal court's ruling on a summary judgment, even though appealed, must be considered final, that is, if the federal court's ruling on the summary judgment has not been reversed or modified, the decision is final [*Lumpkin v. Jordan (1996) 49 Cal. App. 4th 1223, 1230-1231, 57 Cal. Rptr. 2d 303]* .

For further discussion of the requirement that the former judgment be final and on the merits, see *§ 491.14[2]* and *[3], above.*

[b] Denial of Extraordinary Writ

Just because the court of appeal denies a petition for a writ of mandate does not mean it made a decision on the merits having res judicata effect. The proper rule is that unless there is a written opinion following the issuance of an alternative writ, the denial of a writ petition does not have issue preclusive effect [*Gammoh v. City of Anaheim (1999) 73 Cal. App. 4th 186, 196, 86 Cal. Rptr. 2d 194]* .

For discussion of *Leone v. Medical Board (2000) 22 Cal. 4th 660, 669-670, 94 Cal. Rptr. 2d 61, 995 P.2d 191* , concerning when a summary denial of a writ petition is necessarily on the merits and its potential impact on res judicata/collateral estoppel issues, *see § 491.14[3][f], above*].

[3] Identity of Issues

[a] Generally

For issue preclusion to apply, the issue decided in the prior adjudication must be identical with the issue presented in the instant action [*Producers Dairy Delivery Co. v. Sentry Ins. Co. (1986) 41 Cal. 3d 903, 910, 226 Cal. Rptr. 558, 718 P.2d 920* ; *Plumley v. Mockett (2008) 164 Cal. App. 4th 1031, 1049, 79 Cal. Rptr. 3d 822* ; *Wimsatt v. Beverly Hills Weight Etc. Internat., Inc. (1995) 32 Cal. App. 4th 1511, 1516, 38 Cal. Rptr. 2d 612]* . The doctrine of collateral estoppel depends on what issues were adjudicated, not the nature of the proceeding or the relief requested [*Lumpkin v. Jordan (1996) 49 Cal. App. 4th 1223, 1231, 57 Cal. Rptr. 2d 303]* . For example, a 1941 Ohio bastardy proceeding was found to have presented an identical issue to that presented in a probate proceeding for intestate distribution: whether the relationship of natural parent and child existed [*Estate of Griswold (2001) 25 Cal. 4th 904, 922, 108 Cal. Rptr. 2d 165, 24 P.3d 1191]* .

The issue must have been actually litigated and determined in the first action [*Taylor v. Hawkinson (1957) 47 Cal. 2d 893, 895-896, 306 P.2d 797* (collateral estoppel not found); *Nash v. Workers' Comp. Appeals Bd. (1994) 24 Cal. App. 4th 1793, 1812-1813, 30 Cal. Rptr. 2d 454* (collateral estoppel not found); *Corral v. State Farm Mutual Auto. Ins. Co. (1979) 92 Cal. App. 3d 1004, 1010, 155 Cal. Rptr. 342* (collateral estoppel not found); *see Lumpkin v. Jordan (1996) 49 Cal. App. 4th 1223, 1232, 57 Cal. Rptr. 2d 303* (collateral estoppel found)]. An issue is actually litigated when it is properly raised by the pleadings or otherwise, is submitted for determination and is actually determined. A determination may be based on a failure of proof [*Younan v. Caruso (1996) 51 Cal. App. 4th 401, 407, 59 Cal. Rptr. 2d 103* (citing *People v. Sims (1982) 32 Cal. 3d 468, 484, 186 Cal. Rptr. 77, 651 P.2d 321* which quoted from Restatement (Second) of Judgments § 27, comment d (1982))].

The issue must have been necessarily decided in former proceeding [*Townsel v. San Diego Metropolitan Transit Development Bd. (1998) 65 Cal. App. 4th 940, 951, 77 Cal. Rptr. 2d 231* (collateral estoppel not found); *see McMillin Development, Inc. v. Home Buyers Warranty (1998) 68 Cal. App. 4th 896, 906, 80 Cal. Rptr. 2d 611* (determination of issue must have been necessary to judgment; collateral estoppel not found)]. This requirement prevents the incidental or collateral determination of a nonessential issue from precluding reconsideration of that issue in later litigation [*McMillin Development, Inc. v. Home Buyers Warranty (1998) 68 Cal. App. 4th 896, 906-907, 80 Cal. Rptr. 2d 611]* . No aspect of what was decided in the previous proceeding can be left to conjecture on the record, and if it is left to conjecture, estoppel is inapplicable [*Silver v. Los Angeles County Metropolitan Transportation Authority (2000) 79 Cal. App. 4th 338, 357, 94 Cal. Rptr. 2d 287* ; *see Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 181-182, 98 Cal. Rptr. 2d 44* (it must appear precise question was raised and determined in former suit)].

A settlement that avoids trial generally does not constitute actually litigating any issues and thus prevents application of collateral estoppel. There is a line of cases, however, holding that a consent or stipulated judgment may properly be given collateral estoppel effect. This principle, however, has been tempered by the rule that a consent judgment is not usually given preclusive effect in subsequent litigation on a different cause of action, unless the parties manifest an intent in the consent judgment to give it preclusive effect [*Rice v. Crow (2000) 81 Cal. App. 4th 725, 736, 737 n.15, 97 Cal. Rptr. 2d 110]* .

[b] Multiple Issues

If the questions involved in a suit are tried and decided, no matter how numerous they may be, issue preclusion will apply to each point so settled, in the same degree as if it were the sole issue in the case [*Bank of America v. McLaughlin etc. Co. (1940) 40 Cal. App. 2d 620, 628, 105 P.2d 607]* .

[c] Binding Even Though Facts or Arguments That Could Have Been Presented Were Not

Issue preclusion will apply with respect to all issues that were involved in the prior case, even though some factual matters or legal arguments that could have been presented in the prior case in support of those issues were not

presented. Thus, when two lawsuits are brought and they arise out of the same alleged factual situation, and although the causes of action or forms of relief may be different, the prior determination of an issue in the first lawsuit becomes conclusive in the subsequent lawsuit between the same parties with respect to that issue and also with respect to every matter that might have been urged to sustain or defeat its determination [*Frommhagen v. Board of Supervisors (1987) 197 Cal. App. 3d 1292, 1301, 243 Cal. Rptr. 390* ; *see also Interinsurance Exchange of the Auto. Club v. Superior Court (1989) 209 Cal. App. 3d 177, 181-182, 257 Cal. Rptr. 37]* . However, when determination of an issue was entirely unnecessary to the former judgment, it will not have issue preclusion effect [*Estate of Simmons (1966) 64 Cal. 2d 217, 222-223, 49 Cal. Rptr. 369, 411 P.2d 97* ; *Berry v. City of Santa Barbara (1967) 248 Cal. App. 2d 438, 444-445, 56 Cal. Rptr. 553* ; *see Wilson v. Interlake Steel Co. (1982) 32 Cal. 3d 229, 234, 185 Cal. Rptr. 280, 649 P.2d 922]* .

[d] Effect of New Facts or Different Substantive Law

Collateral estoppel does not apply when there are changed conditions or new facts which did not exist at the time of the prior judgment, or where the previous decision was based on different substantive law [*United States Golf Ass'n v. Arroyo Software Corp. (1999) 69 Cal. App. 4th 607, 616-619, 81 Cal. Rptr. 2d 708]* .

[e] Determining What Issues Have Been Adjudicated

What has been adjudicated is to be determined not from the opinion rendered but from a consideration of the judgment actually entered in reference to the issues presented for decision [*Ball v. Rodgers (1960) 187 Cal. App. 2d 442, 448, 9 Cal. Rptr. 666]* . Whatever issue was actually and necessarily included in a former judgment will be deemed to have been adjudged thereby [*Branson v. Sun-Diamond Growers (1994) 24 Cal. App. 4th 327, 348, 29 Cal. Rptr. 2d 314* (no collateral estoppel found); *Strickland v. Calancorporation, Ltd. (1957) 156 Cal. App. 2d 488, 495, 319 P.2d 737* ; *see Code Civ. Proc. § 1911*].

To determine what issues were actually litigated in the underlying action the court in the subsequent action cannot rely exclusively on the findings in the underlying action, but must carefully scrutinize the pleadings and proof. This scrutiny includes looking behind the findings at the evidence presented to determine what was actually decided [*Hernandez v. City of Pomona (2009) 46 Cal. 4th 501, 514, 94 Cal. Rptr. 3d 1, 207 P.3d 506* (court must look at entire record from prior proceeding, including pleadings, evidence, jury instructions and any special jury findings or verdicts); *Schaefer/Karpf Productions v. CNA Ins. Companies (1998) 64 Cal. App. 4th 1306, 1314, 76 Cal. Rptr. 2d 42* ; *see also Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 182, 98 Cal. Rptr. 2d 44* (reference must be made to pleadings and proof in each case)].

Making the distinction between "issues" and "legal theories" is not always easy; reference must be made to the pleadings and proof in each case [*see United States Golf Ass'n v. Arroyo Software Corp. (1999) 69 Cal. App. 4th 607, 617, 81 Cal. Rptr. 2d 708* ; *Wimsatt v. Beverly Hills Weight Etc. Internat., Inc. (1995) 32 Cal. App. 4th 1511, 1517, 38 Cal. Rptr. 2d 612]* . Evidence extrinsic to the judgment roll, such as a reporter's trial transcript, may be used to ascertain what issues were determined in the former action [*Southwell v. Mallery, Stern & Warford (1987) 194 Cal. App. 3d 140, 144, 239 Cal. Rptr. 371]* .

ILLUSTRATION:

Identifying Issue That Was Litigated. Residents of California sign franchise agreements under which they agree that any action against the franchisor will be brought in a Virginia court. They sue the franchisor on claims relating to the agreement in federal district court in California based on diversity jurisdiction. The judge, applying federal procedural law, grants the franchisor's motion to dismiss for lack of proper venue based on the forum selection clause. Plaintiffs bring suit in a California state court. Can the case be dismissed on the ground that the issue of the "validity and enforceabiltiy" of the forum selection clause has been fully and fairly litigated in federal court? No [*Wimsatt v. Beverly Hills Weight*

Etc. Internat., Inc. (1995) 32 Cal. App. 4th 1511, 1517-1524, 38 Cal. Rptr. 2d 612] . The *Wimsatt* court noted that the case turned on what the exact issue was that was decided in the federal diversity action. The court held that framing the issue as the validity and enforceability of the forum selection clause was unreasonably broad [*Wimsatt v. Beverly Hills Weight Etc. Internat., Inc. (1995) 32 Cal. App. 4th 1511, 1517, 38 Cal. Rptr. 2d 612]* . Looking at the factual and legal foundation of the prior decision, the court found that it really decided only whether plaintiff had the right to sue in federal court in California as a matter of federal procedural law, and held that this did not and by definition could not reach the question of the validity of the forum selection clause as a matter of California substantive law [*Wimsatt v. Beverly Hills Weight Etc. Internat., Inc. (1995) 32 Cal. App. 4th 1511, 1517-1520, 38 Cal. Rptr. 2d 612]* .

If a court of first instance makes its judgment on alternative grounds and a reviewing court affirms on only one of those grounds, declining to consider the other, the second ground is no longer conclusively established [*Butcher v. Truck Ins. Exchange (2000) 77 Cal. App. 4th 1442, 1460, 92 Cal. Rptr. 2d 521* (court declining to follow *Bank of America v. McLaughlin etc. Co. (1940) 40 Cal. App. 2d 620, 105 P.2d 607* , which held that judgment is conclusive on both grounds); *see also Newport Beach Country Club v. Founding Members of the Newport Beach Country Club (2006) 140 Cal. App. 4th 1120, 1130, 45 Cal. Rptr. 3d 207* (adopting *Butcher* court's reasoning and declining to follow *Bank of America* case); *Zevnik v. Superior Court (2008) 159 Cal. App. 4th 76, 86, 70 Cal. Rptr. 3d 817* (also adopting *Butcher* court's reasoning)].

If an issue such as that of attorney's fees is raised in two separate appeals, and the appellate court defers determination of it in the first appeal, then dismisses the second appeal, the issue has not been conclusively resolved and may be raised in a third appeal [*McAdams v. Aiello (2002) 104 Cal. App. 4th 1221, 1226, 128 Cal. Rptr. 2d 742]* .

[f] Issue Decided in Prior Criminal Action

[i] Conviction

When successive proceedings are different in nature, one criminal and one civil, issue preclusion may still prevent relitigation of issues decided in the first action [*People v. Sims (1982) 32 Cal. 3d 468, 482, 186 Cal. Rptr. 77, 651 P.2d 321]* . For example, the doctrine of issue preclusion may be applicable when a civil action follows a criminal prosecution; any issue necessarily decided in a prior criminal trial resulting in conviction is conclusively determined as to the parties if it is involved in a subsequent civil action [*Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd. (1962) 58 Cal. 2d 601, 607, 25 Cal. Rptr. 559, 375 P.2d 439* ; *see, e.g., Higginbotham v. King (1997) 54 Cal. App. 4th 1040, 1044, 63 Cal. Rptr. 2d 114* ; *People ex rel. State of Cal. v. Drinkhouse (1970) 4 Cal. App. 3d 931, 935, 84 Cal. Rptr. 773* ; *see also Leader v. State of California (1986) 182 Cal. App. 3d 1079, 1083-1089, 226 Cal. Rptr. 207* (misdemeanor conviction as having issue preclusion effect in subsequent civil action)].

If a criminal conviction is subject to a successful collateral attack, for example because it was obtained through the knowing use of perjured testimony or the suppression of evidence, it has no issue preclusion effect in a subsequent action [*see Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd. (1962) 58 Cal. 2d 601, 607, 25 Cal. Rptr. 559, 375 P.2d 439* (recognizing, but declining to apply rule)]. This does not require the exhaustion of every conceivable collateral attack. Rather, a judgment is "subject to collateral attack" only when the party actually advances meritorious grounds that would sustain such an attack [*Mueller v. J.C. Penney Co. (1985) 173 Cal. App. 3d 713, 719-720, 219 Cal. Rptr. 272* (statements that conviction resulted from perjury and suppression of evidence insufficient when already considered and found meritless by several courts)].

[ii] Acquittal

Because of the difference in the degree of proof required in the two proceedings, an acquittal in a prior criminal case is

not res judicata of the issue in a subsequent civil case [*People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater (1980) 101 Cal. App. 3d 296, 306, 161 Cal. Rptr. 562* ; *see also* *Holt v. Department of Food & Agriculture (1985) 171 Cal. App. 3d 427, 433, 218 Cal. Rptr. 1* (similar rule applies when subsequent proceeding is administrative hearing)].

[iii] Guilty Plea

A criminal judgment arising from a guilty plea does not draw any issues into controversy and has no issue preclusion effect [*see* *Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd. (1962) 58 Cal. 2d 601, 605-606, 25 Cal. Rptr. 559, 375 P.2d 439* (dictum); *People v. Camp (1970) 10 Cal. App. 3d 651, 654, 89 Cal. Rptr. 242* (issue preclusion denied in subsequent criminal action); *but see* *Olson v. Meacham (1933) 129 Cal. App. 670, 675, 19 P.2d 527* (guilty plea may be used in evidence in subsequent civil trial as admission against interest)].

[iv] Ruling on Habeas Corpus

Although a final judgment granting habeas corpus relief is res judicata and a decision denying habeas corpus relief is not res judicata, under appropriate circumstances a decision denying a request for habeas corpus relief may, for all intents and purposes, be final as to the facts adjudicated and may be given collateral estoppel effect [*Younan v. Caruso (1996) 51 Cal. App. 4th 401, 410-412, 59 Cal. Rptr. 2d 103]* . This turns on the burden of proof, because collateral estoppel ordinarily will not apply if the party sought to be bound by a previous factual determination faced a higher burden of proof in the first proceeding than is required by the later proceeding [*Younan v. Caruso (1996) 51 Cal. App. 4th 401, 409 n.4, 59 Cal. Rptr. 2d 103]* . Thus, for example, because the threshold determination on a habeas corpus petition regarding ineffective assistance of counsel is whether or not counsel's performance was deficient, based on a preponderance of the evidence, the same burden as in a civil trial, collateral estoppel may apply to bar relitigation of the issue of the attorney's competence in a later malpractice action [*Younan v. Caruso (1996) 51 Cal. App. 4th 401, 408-414, 59 Cal. Rptr. 2d 103]* . The result might well be different if the issue were lack of prejudice, the other element of habeas relief based on ineffective assistance of counsel, since a habeas petitioner must do more than show harm by a preponderance of the evidence, but must instead show that it is reasonably probable that trial counsel's poor representation prejudiced petitioner [*Younan v. Caruso (1996) 51 Cal. App. 4th 401, 409 n.4, 414 n.7, 59 Cal. Rptr. 2d 103]* .

[v] Ruling At Preliminary Hearing

A prior judicial determination at a preliminary hearing that there was sufficient evidence to hold the plaintiff over for trial may, in some situations, preclude the plaintiff from relitigating the issue of probable cause to arrest in a subsequent civil suit [*McCutchen v. City of Montclair (1999) 73 Cal. App. 4th 1138, 1147, 87 Cal. Rptr. 2d 95* (court, however, concluded that finding of probable cause at preliminary hearing did not have collateral estoppel effect because evidence presented at preliminary hearing was not same as evidence available to officer at time of plaintiff's arrest)].

On the other hand, if a defendant in a criminal case has a tactical reason not to litigate the probable cause issue, in that situation collateral estoppel might not apply. Unless, however, the plaintiff in a civil suit can demonstrate that the issue of probable cause was not litigated at the preliminary hearing for tactical reasons, an appellate court will presume that the plaintiff had a full and fair opportunity to litigate the issue of probable cause [*McCutchen v. City of Montclair (1999) 73 Cal. App. 4th 1138, 1147, 87 Cal. Rptr. 2d 95]* .

[vi] Mental Health Determination

In light of the changeable nature of a person's mental health and dangerousness, it is inconsistent with the legislative intent under the Sexually Violent Predators Act to give conclusive effect to a 20-year-old finding that defendant was a not a mentally disordered sex offender [*People v. Carmony (2002) 99 Cal. App. 4th 317, 325-326, 120 Cal. Rptr. 2d 896* (the doctrines of res judicata and collateral estoppel are not generally considered to be constitutional rules, and the Legislature may abrogate them in appropriate circumstances, such as in the facts of this case)].

[g] Issue Decided in Prior Administrative Action

Issue preclusion applies to a final adjudication of an administrative agency of statutory creation so as to preclude relitigation of the same issues in a subsequent case, if the following apply [*People v. Sims (1982) 32 Cal. 3d 468, 479, 186 Cal. Rptr. 77, 651 P.2d 321* ; *Marie Y. v. General Star Indemnity Company (2003) 110 Cal. App. 4th 928, 954-955, 2 Cal. Rptr. 3d 135* ; *Housing Authority v. Workers' Comp. Appeals Bd. (1998) 60 Cal. App. 4th 1076, 1083, 70 Cal. Rptr. 2d 738* ; *County of Los Angeles v. Department of Industrial Relations (1989) 214 Cal. App. 3d 1538, 1544, 263 Cal. Rptr. 351* ; *Carmel Valley Fire Protection Dist. v. State of California (1987) 190 Cal. App. 3d 521, 535, 234 Cal. Rptr. 795]* :

- The administrative agency acted in a judicial capacity;
- It resolved disputed issues properly before it; and
- All parties were provided with the opportunity to fully and fairly litigate their claims.

This general rule may not apply if the statutory scheme that is involved specifically addresses the collateral estoppel effect of the type of adjudication in issue [*see* *Gikas v. Zolin (1993) 6 Cal. 4th 841, 851-852, 25 Cal. Rptr. 2d 500, 863 P.2d 745* (recognizing that, by statute, DMV administrative proceedings to suspend drivers' licenses for driving under the influence have no collateral estoppel effect on criminal prosecution for driving under the influence)].

In determining whether an agency acted in a judicial capacity, the court must consider the presence of factors indicating that the administrative proceedings and determination possessed a judicial character [*Imen v. Glassford (1988) 201 Cal. App. 3d 898, 906-907, 247 Cal. Rptr. 514]* . These factors include the following [*Imen v. Glassford (1988) 201 Cal. App. 3d 898, 907, 247 Cal. Rptr. 514]* :

- Whether the administrative hearing was conducted in a judicial-like adversary proceeding;
- Whether the proceedings required witnesses to testify under oath;
- Whether the agency determination involved the adjudicatory application of rules to a single set of facts;
- Whether the proceedings were conducted before an impartial hearing officer;
- Whether the parties had the right to subpoena witnesses and present documentary evidence; and
- Whether the administrative agency maintained a verbatim record of the proceedings.

Additional factors include whether the hearing officer's decision was adjudicatory and in writing and contained a statement of reasons and whether the decision was adopted by the director of the agency with the potential for later judicial review [*Imen v. Glassford (1988) 201 Cal. App. 3d 898, 907, 247 Cal. Rptr. 514]* .

When a statutory scheme of remedies contemplates proceedings in different tribunals affording different remedies which are cumulative, not mutually exclusive, res judicata has been held inapplicable because the first proceeding was an administrative proceeding at which the second remedy (statutorily decreed to be a cumulative remedy) could not be sought [*People v. Damon (1996) 51 Cal. App. 4th 958, 967-974, 59 Cal. Rptr. 2d 504* (People's civil action alleging unfair business practices in defendant's operation of automotive repair dealership, pursuant to Automotive Repair Act (*Bus. & Prof. Code § 9880 et seq.*), not barred by res judicata following administrative proceeding by Department of Consumer Affairs for violations of Automotive Repair Act; civil statutes do not authorize any action to be taken against

registration whereas administrative statutes do not authorize imposition of civil penalty for unfair business practices)]. The court in *Damon*, in holding res judicata inapplicable, noted that there was no prior judgment but only an administrative decision. Res judicata principles sometimes, but not always, apply to administration decisions. The cases typically deal with the secondary aspect of res judicata, that is, collateral estoppel [*People v. Damon (1996) 51 Cal. App. 4th 958, 969, 59 Cal. Rptr. 2d 504]* . The court further noted that administrative decisions should not be given res judicata effect if the statutory scheme explicitly or implicitly shows a contrary intent, citing as one authority *Gikas v. Zolin (1993) 6 Cal. 4th 841, 851-852, 25 Cal. Rptr. 2d 500, 863 P. 2d 745* , which addressed the issue in the context of collateral estoppel [*see People v. Damon (1996) 51 Cal. App. 4th 958, 970, 59 Cal. Rptr. 2d 504]* . The court specifically stated, however, that it was expressing no view on whether collateral estoppel should be applied in the circumstances of the case [*People v. Damon (1996) 51 Cal. App. 4th 958, 968 n.10, 59 Cal. Rptr. 2d 504]* .

[h] Issue Decided in Prior Arbitration Proceeding

An arbitration award in an private arbitration governed by *Code Civ. Proc. § 1280 et seq.*, is not entitled to collateral estoppel effect in favor of a nonparty to the arbitration unless the parties to the arbitration agreed to that effect in the particular case [*Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 824, 88 Cal. Rptr. 2d 366, 982 P.2d 229]* .

In so holding in *Vandenberg*, the Supreme Court noted that it was making a very narrow holding, and listed a number of issues it was not addressing [*Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 824 n.2, 88 Cal. Rptr. 2d 366, 982 P.2d 229]* :

- The strict res judicata ("claim preclusion") effect of a private arbitration award [citing *Thibodeau v. Crum (1992) 4 Cal. App. 4th 749, 756-761, 6 Cal. Rptr. 2d 27* (award between homeowner and general contractor barred homeowner action against subcontractor); *Sartor v. Superior Court (1982) 136 Cal. App. 3d 322, 327-328, 187 Cal. Rptr. 247* (award between homeowner and architectural firm barred homeowner's identical action against firm's employees)].

- The circumstances, if any, in which a private arbitration award would have collateral estoppel effect in subsequent litigation between the same parties on a different cause of action.

- Whether the Federal Arbitration Act (*9 U.S.C. § 1 et seq.*) would alter the ruling.

- The application of collateral estoppel to arbitrations under collective bargaining agreements within the purview of federal or state labor relations laws [citing *Kelly v. Vons Companies, Inc. (1998) 67 Cal. App. 4th 1329, 1339-1341, 79 Cal. Rptr. 2d 763* (arbitration between union and employer bound employees on similar issues in later litigation with employer) and *Lehto v. Underground Constr. Co. (1977) 69 Cal. App. 3d 933, 939-944, 138 Cal. Rptr. 419* (union-employer arbitration not preclusive against union member's subsequent unfair representation claim)].

- The collateral estoppel effect of arbitrations under various other California statutory schemes, including:

  - Mandatory judicial arbitration under *Code Civ. Proc. § 1141.10 et seq.*

  - Statutory arbitration of uninsured motorist claims under *Ins. Code §§ 11580.2(f), 11580.5*.

  - Statutory arbitration of attorney-client fee disputes under *Bus. & Prof. Code § 6204*.

In other contexts, collateral estoppel may apply to findings made in an arbitration award [*see Liska v. Arns Law Firm*

(2004) 117 Cal. App. 4th 275, 284, 12 Cal. Rptr. 3d 21 (in suit where former client sued his attorneys for breach of contract and fraud following a binding attorney-client fee dispute, court held that only the arbitrator's award of attorney fees was to be given collateral estoppel effect in the subsequent lawsuit and therefore reversed the trial court's sustaining of the law firm's demurrer; plaintiff was permitted to maintain his action in so far as he was seeking affirmative relief relating to the prior lawsuit and not merely to recover the fees awarded to the law firm in the fee arbitration)].

Findings made during arbitration may have collateral estoppel effect so long as the arbitration had the elements of an adjudicatory procedure. Parties to an arbitration, like parties to an administration hearing, are often afforded the opportunity for a hearing before an impartial and qualified officer, at which they may give formal recorded testimony under oath, cross-examine and compel the testimony of witnesses, and obtain a written decision. It is not unjust to bind the parties to determinations made during the proceedings when the arbitration has these attributes [*Kelly v. Vons Companies, Inc. (1998) 67 Cal. App. 4th 1329, 1336-1337, 79 Cal. Rptr. 2d 763* (labor arbitration; distinguishing *Flynn v. Gorton (1989) 207 Cal. App. 3d 1550* , which holds that findings made during judicial arbitration under *Code Civ. Proc. § 1141.10* et seq. not entitled to collateral estoppel effect, and cases which hold that findings made during labor arbitration are not binding in employee lawsuit asserting federal statutory causes of action); *see also* *State Farm Mut. Auto Ins. Co. v. Superior Court (1989) 211 Cal. App. 3d 5, 12-14, 259 Cal. Rptr. 50* (judgment based on judicial arbitration can have collateral estoppel effect; *Flynn* distinguished and rationale rejected)].

Two conditions must be satisfied before an arbitration award of a Fair Employment and Housing Act (FEHA) claim under a collective bargaining agreement (CBA) can be given collateral estoppel effect [*Camargo v. California Portland Cement Company (2001) 86 Cal. App. 4th 995, 1018-1019, 103 Cal. Rptr. 2d 841]* :

(1) The agreement to resolve the claims by arbitration in the CBA must be clear and unmistakable; and

(2) the procedures of the arbitration must allow for the full litigation and fair adjudication of the FEHA claim.

The court distinguished *Kelly*, on the basis that it held only that the arbitration of common law claims under a CBA collaterally estops a subsequent attempt to litigate those claims [*Camargo v. California Portland Cement Company (2001) 86 Cal. App. 4th 995, 1019, 103 Cal. Rptr. 2d 841]* .

In *Taylor v. Lockheed Martin Corp. (2003) 113 Cal. App. 4th 380, 6 Cal. Rptr. 3d 358* , the second appellate district applied the reasoning of *Camargo* to claims for retaliatory discharge under *Lab. Code § 6310(b)*. The court held that a labor arbitration can only have a collateral estoppel effect on a subsequent statutory claim under *Lab. Code § 6310(b)* if the collective bargaining agreement contained a clear and unmistakable waiver of the employee's right to file a lawsuit on the statutory claim; and distinguished *Kelly* on the ground that *Kelly* did not involve a statutory discrimination claim but rather a common law tort claim [*Taylor v. Lockheed Martin Corp. (2003) 113 Cal. App. 4th 380, 386-387, 6 Cal. Rptr. 3d 358]* .

[i] Issue Decided in Prior Small Claims Proceeding

Issue preclusion does not generally apply to a small claims court judgment or superior court judgment after a hearing de novo in an action arising under the Small Claims Act, *Code Civ. Proc. § 116.110 et seq.* [*Rosse v. DeSoto Cab Co. (1995) 34 Cal. App. 4th 1047, 1050-1053, 40 Cal. Rptr. 2d 680* (rejecting *Perez v. City of San Bruno (1980) 27 Cal. 3d 875, 168 Cal. Rptr. 114, 616 P.2d 1287* , on ground it is no longer sound due to repeal of former Cal. Rules of Ct., Rule 155, and enactment of *Code Civ. Proc. § 116.770(b)*)]. Because a superior court judgment in a de novo small claims proceeding is final and not appealable (*Code Civ. Proc. § 116.780(a)*), the proceeding is not ordinarily transcribed as there is no need to do so, and also because the superior court provides no statement of decision in a small claims matter (*Code Civ. Proc. § 116.770(b)*), it will be ordinarily impossible to reliably determine whether particular issues were actually litigated and decided which must be established to accord a prior judgment issue preclusion effect [

Rosse v. DeSoto Cab Co. (1995) 34 Cal. App. 4th 1047, 1052, 40 Cal. Rptr. 2d 680] .

However, issue preclusion may be applied to prevent a plaintiff from relitigating an issue litigated and expressly decided against the plaintiff in a small claims action [*Pitzen v. Superior Court (2004) 120 Cal. App. 4th 1374, 1381, 16 Cal. Rptr. 3d 628]* . In *Pitzen*, the small claims court had issued a memorandum of decision stating that plaintiffs had failed to meet their burden of proving that defendant had caused the accident. Accordingly, the small claims court entered judgment against plaintiffs. One of the plaintiffs subsequently filed a superior court action against defendant based on the same accident. The court of appeals reversed the trial court's order overruling defendant's demurrer and held that issue preclusion prevented plaintiff from relitigating the matter against defendant. The court noted that its holding was limited to cases in which it was the small claims plaintiff who sought to relitigate the matter. The court further stated that its holding was further based on the fact that the record from the small claims proceeding adequately reflected that the issue was litigated and decided in the proceeding.

[j] Issue Decided in Prior Bastardy Proceeding--Application to Probate Action

Issue preclusion applied to a probate proceeding after a 1941 Ohio judgment in a bastardy proceeding where the father admitted paternity [*Estate of Griswold (2001) 25 Cal. 4th 904, 923, 108 Cal. Rptr. 2d 165, 24 P.3d 1191]* . The California Supreme Court rejected the argument that res judicata should not apply because, even assuming the bastardy proceeding was quasi-criminal, the circumstances did not call for application of the rule that a trial court in a civil proceeding may not give collateral estoppel effect to a criminal conviction involving the same issues if the conviction resulted from a guilty plea because the paternity judgment was not being challenged by the father nor those claiming a right to inherit through him and the record failed to support any claim that the father's confession merely reflected a compromise [*Estate of Griswold (2001) 25 Cal. 4th 904, 923, 108 Cal. Rptr. 2d 165, 24 P.3d 1191]* .

[k] Issue Decided in Prior Bankruptcy Proceeding

Issue preclusion applies to a bankruptcy court's factual findings in a wrongful death case in which plaintiffs' sons were killed in an automobile accident caused by defendant [*Roos v. Red (2005) 130 Cal. App. 4th 870, 886, 30 Cal. Rptr. 3d 446]* . After a one-day trial, the bankruptcy court ruled that plaintiffs' claims were not discharged because the claims were a result of defendant's willful and malicious conduct. The court of appeals held that the trial court correctly gave collateral estoppel effect to the bankruptcy court findings and that defendant could not contest liability in the state court proceedings. The court rejected defendant's contention that he had not had a full and fair opportunity to litigate the issue of liability because he had not had a jury trial on the issue. Defendant's right to a jury trial was not denied simply because the court had given collateral estoppel effect to the bankruptcy court's findings on the issue of liability [*Roos v. Red (2005) 130 Cal. App. 4th 870, 881-886, 30 Cal. Rptr. 3d 446]* .

[4] Identity of Parties or Privies

[a] Generally

The party against whom issue preclusion is asserted must have been a party or in privity with a party to the prior adjudication [*see* *Bernhard v. Bank of America (1942) 19 Cal. 2d 807, 813, 122 P.2d 892* ; *People v. Gillard (1997) 57 Cal. App. 4th 136, 159-160, 66 Cal. Rptr. 2d 790]* .

The term "privity" refers to some relationship or connection with the party that makes it proper to hold privies bound with the actual party. Whether privity exists is determined by analyzing the circumstances that are involved in each case. The courts have abandoned application of rigid categories in favor of a practical approach that addresses the question of whether the nonparty is sufficiently close to the original case so that issue preclusion may be applied [*Martin v. County of Los Angeles (1996) 51 Cal. App. 4th 688, 700, 59 Cal. Rptr. 2d 303* ; *see* *Weir v. Ferreira (1997) 59 Cal. App. 4th 1509, 1515, 70 Cal. Rptr. 2d 33* (privity arising from representing same legal right)]. Thus, for purposes of issue preclusion, privity is a relationship between the party to be estopped and the unsuccessful party in the

prior litigation that is sufficiently close so as to justify application of issue preclusion [*Shopoff & Cavallo LLP v. Hyon (2008) 167 Cal. App. 4th 1489, 1516, 85 Cal. Rptr. 3d 268* ; *Clemmer v. Hartford Insurance Co. (1978) 22 Cal. 3d 865, 875, 151 Cal. Rptr. 285, 587 P.2d 1098]* .

Three factors may favor the application of issue preclusion in a given case even though precise identity of parties and issues may be lacking. Issue preclusion may be invoked to protect against vexatious litigation, to further the finality of litigation in which public interests are involved, or to promote the stability of adjudications in prior criminal actions [*Lynch v. Glass (1975) 44 Cal. App. 3d 943, 947, 119 Cal. Rptr. 139]* .

Issue preclusion may be applied against nonparties who had a proprietary or financial interest in and control of a prior action [*see Zingheim v. Marshall (1967) 249 Cal. App. 2d 736, 745, 57 Cal. Rptr. 809]* . It may also be applied against a nonparty for whom the unsuccessful party in the first action acted in a representative capacity [*see Rynsburger v. Dairymen's Fertilizer Coop., Inc. (1968) 266 Cal. App. 2d 269, 277-278, 72 Cal. Rptr. 102* ; *see also Alvarez v. May Department Stores Co. (2006) 143 Cal. App. 4th 1223, 1238, 49 Cal. Rptr. 3d 892* (plaintiffs in prior attempt to obtain class certification were "virtual representatives" of plaintiffs as the parties, claims, and counsel were all the same; denial of class certification in prior case therefore had collateral estoppel effect); *but see Johnson v. GlaxoSmithKline, Inc. (2008) 166 Cal. App. 4th 1497, 83 Cal. Rptr. 3d 607* (prior class certification determinations were litigated before effective date of a proposition that significantly changed standing requirements for actions under *Bus.& Prof. Code § 17200* and therefore the element of identity of the issue to be precluded from relitigation was missing); *Bufil v. Dollar Financial Group, Inc. (2008) 162 Cal. App. 4th 1193, 76 Cal. Rptr. 3d 804* (trial court's judgment on the pleadings in favor of class-action defendant on collateral estoppel grounds reversed; class asserted in second action was distinct subclass restricted to certain employees and therefore the issues surrounding class certification were different)].

However, whatever may be the scope of expanded notions of privity, it is clear that collateral estoppel may only be applied when due process requirements are met [*Nein v. HostPro, Inc. (2009) 174 Cal. App. 4th 833, 846-847, 95 Cal. Rptr. 3d 34* ; *Rodgers v. Sargent Controls & Aerospace (2006) 136 Cal. App. 4th 82, 92-93, 38 Cal. Rptr. 3d 528* (fact that plaintiff was represented by same counsel as plaintiffs in prior cases was not sufficient to extend doctrine of privity to plaintiff's case; plaintiff had no proprietary interest in prior cases and could not be charged with notice that he "avoided the prior proceedings at his peril"); *Old Republic Ins. Co. v. Superior (1998) 66 Cal. App. 4th 128, 154-155, 77 Cal. Rptr. 2d 642* (insurers held not bound by earlier judicial determination requiring coverage by another insurer because they were neither parties nor privies to prior coverage action in that they were not named in that action as parties, they did not have a financial or proprietary interest in the outcome of the coverage action, nor could it be fairly said that insurer in earlier action was in any way acting as their representative; they had no control over, or impact on, the earlier coverage action)].

For further discussion of privity, see *§ 491.14[5]*. For discussion of the due process limitations on privity and the due process requirement that the litigant in the prior proceeding must have had an adequate opportunity to litigate, see [5] and [6], *below*.

[b] Use of Issue Preclusion by Stranger

For issue preclusion to be applicable, the person asserting issue preclusion need not be in privity with parties to the prior action [*see Producers Dairy Delivery Co. v. Sentry Ins. Co. (1986) 41 Cal. 3d 903, 910, 226 Cal. Rptr. 558, 718 P.2d 920* (party against whom issue preclusion asserted as only party required to be in privity); *Housing Authority v. Workers' Comp. Appeals Bd. (1998) 60 Cal. App. 4th 1076, 1083, 70 Cal. Rptr. 2d 738* (it is the party against whom collateral estoppel is sought to be invoked that must be the same as or in privity with the party in the earlier proceeding)]. Issue preclusion may be asserted by a stranger to the prior judgment [*see, e.g., Bernhard v. Bank of America (1942) 19 Cal. 2d 807, 813, 122 P.2d 892]* .

Issue preclusion may be asserted by a stranger to a prior judgment either offensively, as a plaintiff, or defensively, as a

defendant [*see Parklane Hosiery Co. v. Shore (1979) 439 U.S. 322, 329, 99 S. Ct. 645, 58 L. Ed. 2d 552* ; *see also Burdette v. Carrier Corp. (2008) 158 Cal. App. 4th 1668, 1688, 71 Cal. Rptr. 3d 185*]. Defensive use of issue preclusion occurs when a defendant argues that an issue in the present suit was previously litigated in his or her favor in a prior suit in which the same plaintiff lost against another defendant. This type of issue preclusion is clearly authorized under California law [*see Bernhard v. Bank of America (1942) 19 Cal. 2d 807, 813, 122 P.2d 892]* . A party, however, cannot assert collateral estoppel if that party's negligence led to the adjudication sought to be used defensively [*Ruffalo v. Patterson (1991) 234 Cal. App. 3d 341, 344, 285 Cal. Rptr. 647* (issue decided in underlying action not given collateral estoppel effect in malpractice action against attorney); *see Campbell v. Scripps Bank (2000) 78 Cal. App. 4th 1328, 1335, 93 Cal. Rptr. 2d 635* (recognizing rule)].

Offensive use of issue preclusion occurs when a plaintiff is seeking to prevent a defendant from relitigating issues that a defendant litigated and lost against another plaintiff [*Parklane Hosiery Co. v. Shore (1979) 439 U.S. 322, 329, 99 S. Ct. 645, 58 L. Ed. 2d 552]* . Courts have denied the offensive assertion of issue preclusion when, under the circumstances, it would be unfair to the defendant or otherwise against public policy [*see, e.g., Kelly v. Trans Globe Travel Bureau, Inc. (1976) 60 Cal. App. 3d 195, 202, 131 Cal. Rptr. 488* ; *O'Connor v. O'Leary (1967) 247 Cal. App. 2d 646, 649-650, 56 Cal. Rptr. 1]* . The most common area in which offensive assertion of issue preclusion has been denied for unfairness to the defendant is when the plaintiff's suit is one of a set of cases maintained by different persons in separate negligence actions for personal injuries against a single defendant [*R.E. Spriggs Co. v. Adolph Coors Co. (1979) 94 Cal. App. 3d 419, 430, 156 Cal. Rptr. 738 , cert. denied, 444 U.S. 1076 (1980)* ; *see Nevarov v. Caldwell (1958) 161 Cal. App. 2d 762, 774-775, 327 P.2d 111]* . Issue preclusion may also be denied in successive products liability actions involving the same defendant when inconsistent verdicts are extant on the issue of liability [*see Sandoval v. Superior Court (1983) 140 Cal. App. 3d 932, 941-944, 190 Cal. Rptr. 29]* .

Although the United States Supreme Court has expressly approved the offensive use of issue preclusion, the Court also stated that judges should deny issue preclusion when the plaintiff could easily have joined in the earlier action or when the application of preclusion would be unfair to the defendant [*Parklane Hosiery Co. v. Shore (1979) 439 U.S. 322, 331, 99 S. Ct. 645, 58 L. Ed. 2d 552]* . Moreover, the court has held that nonmutual offensive collateral estoppel does not extend against the United States [*United States v. Mendoza (1984) 464 U.S. 154, 157-158, 104 S. Ct. 568, 78 L. Ed. 2d 379]* .

[c] When Coparties Use of Issue Preclusion May Be Appropriate

Ordinarily, when the plaintiff and defendant in a subsequent action were merely codefendants in the original action, the prior judgment cannot be used by one against the other as an estoppel since they were not adversary parties in the original action and no issues were raised or adjudicated between them in the original action. Coparties to an action, however, may in some situations have adverse interests even when no issue is framed between them by the pleadings. Coparties who were not adversaries may be bound by a judgment in a subsequent controversy between each other when they, in fact, occupied, in the prior trial an attitude of adversaries. The formal arrangement of parties on the record is unimportant, so that if coparties on the record were, in fact, adversaries on an issue, and the issue was actually litigated, and they had full opportunity to contest it with each other, coparties are concluded by adjudication of that issue in a subsequent controversy between each other [*Pleasant Valley Canal Co. v. Borror (1998) 61 Cal. App. 4th 742, 769, 72 Cal. Rptr. 2d 1* ; *see also Sutton v. Golden Gate Bridge Highway & Transportation Dist. (1998) 68 Cal. App. 4th 1149, 1155, 81 Cal. Rptr. 2d 155]* .

[5] Constitutional and Public Policy Restrictions on Issue Preclusion

Issue preclusion may be applied only if due process requirements are satisfied [*Clemmer v. Hartford Insurance Co. (1978) 22 Cal. 3d 865, 875, 151 Cal. Rptr. 285, 587 P.2d 1098* ; *Bernhard v. Bank of America (1942) 19 Cal. 2d 807, 811-812, 122 P.2d 892* ; *White Motor Corp. v. Teresinski (1989) 214 Cal. App. 3d 754, 761, 263 Cal. Rptr. 26]* . The requirement of identity of parties or privity is a due process requirement [*Children's Hospital v. Sedgwick (1996) 45*

Cal. App. 4th 1780, 1788, 53 Cal. Rptr. 2d 725] . Due process requires that the party to be estopped must have had an identity or community of interest with, and adequate representation by, the losing party in the first action. Furthermore, the circumstances of the case should reflect that the party to be estopped should reasonably have expected to be bound by the prior adjudication [*Lynch v. Glass (1975) 44 Cal. App. 3d 943, 948, 119 Cal. Rptr. 139* ; *accord Sutton v. Golden Gate Bridge Highway & Transportation Dist. (1998) 68 Cal. App. 4th 1149, 1155, 81 Cal. Rptr. 2d 155* ; *Old Republic Ins. Co. v. Superior (1998) 66 Cal. App. 4th 128, 154, 77 Cal. Rptr. 2d 642* ; *Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn. (1998) 60 Cal. App. 4th 1053, 1070, 71 Cal. Rptr. 2d 77]* . Due process also requires that the party sought to be estopped must have had a fair opportunity to pursue his or her claim the first time [*Blonder-Tongue Lab. v. University of Illinois Found. (1971) 402 U.S. 313, 333, 91 S. Ct. 1434, 28 L. Ed. 2d 788* ; *accord Old Republic Ins. Co. v. Superior (1998) 66 Cal. App. 4th 128, 154, 77 Cal. Rptr. 2d 642]* .

A party is adequately represented for purposes of the privity rule if his or her interests are so similar to a party's interest that the latter was the former's virtual representative in the earlier action. If the party's motive for asserting a common interest is relatively weak, however, one does not infer adequate representation and there is no privity [*Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn. (1998) 60 Cal. App. 4th 1053, 1070-1071, 71 Cal. Rptr. 2d 77]* .

Collateral estoppel is not mechanically applied. In each case the court must determine whether its application will advance the public policies that underlie the doctrine [*Wright v. Ripley (1998) 65 Cal. App. 4th 1189, 1191, 1193, 77 Cal. Rptr. 2d 334* (issues resolved on routine sanction motion are not entitled to preclusive effect in later action for malicious prosecution)]. Those public policies are [*Lucido v. Superior Court (1990) 51 Cal. 3d 335, 343, 795 P.2d 1223* ; *AmericanContinental Ins. Co. v. American Casualty Co. of Reading, Pa. (2001) 86 Cal. App. 4th 929, 945, 103 Cal. Rptr. 2d 632]* :

- Preservation of the integrity of the judicial system,
- Promotion of judicial economy,
- Protection of litigants from harassment by vexatious litigation.

Thus, in deciding whether to apply issue preclusion, the court must balance the rights of the party to be estopped against the need for applying issue preclusion in the particular case, in order to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments that undermine the integrity of the judicial system, or to protect against vexatious litigation [*Clemmer v. Hartford Insurance Co. (1978) 22 Cal. 3d 865, 875, 151 Cal. Rptr. 285, 587 P.2d 1098* ; *accord Sutton v. Golden Gate Bridge Highway & Transportation Dist. (1998) 68 Cal. App. 4th 1149, 1155, 81 Cal. Rptr. 2d 155* ; *White Motor Corp. v. Teresinski (1989) 214 Cal. App. 3d 754, 761-762, 263 Cal. Rptr. 26* ; *see Younan v. Caruso (1996) 51 Cal. App. 4th 401, 407, 59 Cal. Rptr. 2d 103]* .

Even when the minimal prerequisites for invocation of the doctrine are present, collateral estoppel is not an inflexible, universally applicable principle. Policy considerations may limit its use when underpinnings of the doctrine are outweighed by other factors. Whether collateral estoppel is fair and consistent with public policy in a particular case depends in part on the character of the forum that first decided issue later sought to be foreclosed. In this regard, courts consider the judicial nature of the prior forum, i.e., its legal formality, the scope of its jurisdiction, and its procedural safeguards, particularly including the opportunity for judicial review of adverse rulings. Moreover, particular danger of injustice arises when collateral estoppel is invoked by a nonparty to the prior litigation. Such cases require close examination to determine whether nonmutual use of the doctrine is fair and appropriate [*Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 829-830, 88 Cal. Rptr. 2d 366, 982 P.2d 229]* .

Ultimately, determination of privity may depend on whether it is fair to reach that conclusion [*see Children's Hospital v. Sedgwick (1996) 45 Cal. App. 4th 1780, 1788, 53 Cal. Rptr. 2d 725* (fair to bind hospital with earlier judgment in medical malpractice action in which it was dismissed as party before trial so as to bar hospital's action for equitable

indemnity against anesthesiologist, who had prevailed in first action, after award of damages against hospital in second suit by same plaintiff; in earlier action hospital had opportunity to prove anesthesiologist caused plaintiff's injuries and had community of interest with plaintiff in seeking to hold anesthesiologist liable for plaintiff's injuries)].

When injustice would result either because of the effect on third persons or because the public interest requires full litigation, issue preclusion may not be applied [*Moore v. Panish (1982) 32 Cal. 3d 535, 540 n.5, 186 Cal. Rptr. 475, 652 P.2d 32* ; *City of Los Angeles v. City of San Fernando (1975) 14 Cal. 3d 199, 230, 123 Cal. Rptr. 1, 537 P.2d 1250* ; *Gutierrez v. Superior Court (1994) 24 Cal. App. 4th 153, 169-170, 29 Cal. Rptr. 2d 376* , *cert. denied, 514 U.S. 1049 (1995)* (collateral estoppel inappropriate against criminal defendant in successive criminal proceedings; would vitiate right to fair trial); *People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 532, 206 Cal. Rptr. 164* ; *see also Wright v. Ripley (1998) 65 Cal. App. 4th 1189, 1191, 1193, 77 Cal. Rptr. 2d 334]* .

For example, collateral estoppel cannot be used to bind a California litigant to a principle of law adopted in prior out-of-state litigation that is contrary to California law, or to preclude a party from litigating a novel issue of law in California [*American Continental Ins. Co. v. American Casualty Co. of Reading, Pa. (2001) 86 Cal. App. 4th 929, 945, 103 Cal. Rptr. 2d 632]* . In this situation, none of the policies underlying the doctrine of issue preclusion would be advanced because determining an issue of first impression (1) could not degrade public confidence in judicial system, which is threatened when two or more courts render inconsistent decisions, (2) could not be waste of judicial resources, and (3) could not be seen as baseless or unjustified litigation that might harass a party [*American Continental Ins. Co. v. American Casualty Co. of Reading, Pa. (2001) 86 Cal. App. 4th 929, 945-946, 103 Cal. Rptr. 2d 632]* .

In deciding whether to apply collateral estoppel, a court must balance the need to limit litigation against the right of a fair adversary proceeding in which a party may fully present his or her case. Thus, collateral estoppel should not be applied if there was no opportunity for a full presentation of the issue in the first proceeding [*Wright v. Ripley (1998) 65 Cal. App. 4th 1189, 1193, 1194 n.4, 77 Cal. Rptr. 2d 334* (mere showing that affidavits were submitted may not be sufficient to carry burden of proving issue was actually litigated)].

At least one court has also declined to apply collateral estoppel for equitable reasons after determining that the party against whom the doctrine was to be invoked had not, through no fault of its own, had a "full and fair opportunity" to litigate the claim in the prior litigation. In a case where defendant's expert was unable to testify at the last minute due to his daughter's death in a car accident, the court held it was not equitable to apply collateral estoppel on the issue of defendant's liability in a subsequent lawsuit involving the same issues. The court noted that the unavailability of a crucial witness at the prior proceeding might render the use of collateral estoppel inappropriate and, in the "unusual and compelling" circumstance presented in that case, collateral estoppel should not have been applied [*Smith v. Exxon Mobile Oil Corp. (2007) 153 Cal. App. 4th 1407, 1417, 1420, 64 Cal. Rptr. 3d 69]* .

Issue preclusion is not applicable when the party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action [*Long Beach Grand Prix Assn. v. Hunt (1994) 25 Cal. App. 4th 1195, 1203, 31 Cal. Rptr. 2d 70* ; *Anderson-Cottonwood Disposal Service v. Workers' Comp. Appeals Bd. (1982) 135 Cal. App. 3d 326, 332, 185 Cal. Rptr. 336]* .

[6] Public Interest Exception to Issue Preclusion

A public interest exception to issue preclusion may apply in certain cases involving public entities [*see Arcadia Unified School Dist. v. State Dept. of Education (1992) 2 Cal. 4th 251, 257, 5 Cal. Rptr. 2d 545, 825 P.2d 438]* . In these cases, when the issue is a question of law rather than of fact, the prior determination is not conclusive either if injustice would result or if the public interest requires that relitigation not be foreclosed [*Arcadia Unified School Dist. v. State Dept. of Education (1992) 2 Cal. 4th 251, 257, 5 Cal. Rptr. 2d 545, 825 P.2d 438* (applying exception); City of Sacramento v. *State of California (1990) 50 Cal. 3d 51, 64, 266 Cal. Rptr. 139, 785 P.2d 522* (applying exception); *Oliver v. County of Los Angeles (1998) 66 Cal. App. 4th 1397, 1402 n.3, 78 Cal. Rptr. 2d 641* (applying exception);

Pleasant Valley Canal Co. v. Borror (1998) 61 Cal. App. 4th 742, 771, 72 Cal. Rptr. 2d 1 (exception not applicable); *Housing Authority v. Workers' Comp. Appeals Bd. (1998) 60 Cal. App. 4th 1076, 1084-1086, 70 Cal. Rptr. 2d 738* (exception not applicable)].

In *Arcadia Unified*, taxpayers in a prior action in which the opinion was depublished, had successfully challenged the constitutionality of a statute permitting school districts to charge fees for pupil transportation. The primary defendant, the State Board of Education, then issued an advisory that the stature authorizing the fee was unconstitutional, but many school districts that were not parties to the taxpayer suit continued to charge the fee, and ultimately brought a subsequent action to determine the validity of the statute [*Arcadia Unified School Dist. v. State Dept. of Education (1992) 2 Cal. 4th 251, 255-256, 5 Cal. Rptr. 2d 545, 825 P.2d 438]* . In upholding the statute, the Court first ruled that the plaintiff school districts were not bound by the prior decision because the public interest exception to the collateral estoppel rule applied. The Court determined it would be detrimental to the public interest to foreclose relitigation of the issue, since there had been a continuing and demonstrable uncertainty about the validity of the statute [*Arcadia Unified School Dist. v. State Dept. of Education (1992) 2 Cal. 4th 251, 256-257, 5 Cal. Rptr. 2d 545, 825 P.2d 438* ; *see Connell v. Superior Court (1997) 59 Cal. App. 4th 382, 394-397, 402, 69 Cal. Rptr. 2d 231* (public interest exception applied; Water Control Board's decision did not constitute final adjudication precluding further consideration; issue presented was not limited to validity of any finally adjudicated individual claim, but encompassed question of subvention obligations in general under regulatory amendment of wastewater purification standards; if Board's decision were wrong but unimpeachable, taxpayers statewide would suffer unjustly consequences of a continuing obligation to fund costs of local water districts); *Millan v. Restaurant Enterprises Group, Inc. (1993) 14 Cal. App. 4th 477, 490-491, 18 Cal. Rptr. 2d 198* (finding no estoppel against public agency)].

Application of the public interest exception to issue preclusion may also apply in certain cases that do not involve public entities. The California Supreme Court, discussing *Arcadia Unified School Dist. and City of Sacramento v. State of California (1990) 50 Cal. 3d 51, 64-65, 266 Cal. Rptr. 139, 785 P.2d 522* , has noted in a matter involving a public agency that no authority confines application of the public interest exception to cases concerning public agencies [*Kopp v. Fair Pol. Practices Com. (1995) 11 Cal. 4th 607, 622-623 n.16, 675, 685, 693, 47 Cal. Rptr. 2d 108, 905 P.2d 1248* (Lucus, C.J., Werdegar, J., concurring, Baxter, J., joined by Arabian, J., and George, J., concurring and dissenting)].

Some cases suggest that court may have discretionary power to relax res judicata and collateral estoppel rules somewhat, in rare instances when the inability to raise a constitutional argument would work a serious injustice and harm the public interest [*Littoral Development Co. v. San Francisco Bay Conservation Com. (1995) 33 Cal. App. 4th 211, 217, 39 Cal. Rptr. 2d 266* (rule inapplicable to case before court)]. The public interest exception, however, is a very narrow one [Acu na v. *Regents of University of California (1997) 56 Cal. App. 4th 639, 652, 65 Cal. Rptr. 2d 388]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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Chapter 491 RES JUDICATA
PART II. LEGAL BACKGROUND

43-491 California Forms of Pleading and Practice--Annotated § 491.16

§ 491.16 Judgments of Federal or Sister-State Courts

As a general rule, full faith and credit must be given to the final orders and judgments of federal and sister state courts [*Levy v. Cohen (1977) 19 Cal. 3d 165, 172, 137 Cal. Rptr. 162, 561 P.2d 252 , cert. denied, 434 U.S. 833* ; *Hicks v. Corbett (1955) 130 Cal. App. 2d 87, 90-91, 278 P.2d 77 , cert. denied, 349 U.S. 965* ; *see* U.S. *Const., art. IV, § 1*; *Code Civ. Proc. §§ 1908(a), 1913*]. Such an order or judgment must be given the same effect in the courts of California as it would have been given in the federal or sister state court in which it was made [*Levy v. Cohen (1977) 19 Cal. 3d 165, 173, 137 Cal. Rptr. 162, 561 P.2d 252 , cert. denied, 434 U.S. 833* ; *Hood v. Hood (1962) 211 Cal. App. 2d 332, 337-338, 27 Cal. Rptr. 47* ; for discussion of the distinction between the federal and California rule concerning finality of a judgment for purposes of res judicata, *see § 491.14[2][d]*]. Likewise, a final judgment entered in an action filed in California will be given res judicata effect in federal court [*Palomar Mobilehome Park v. City of San Marcos (9th Cir. 1993) 989 F.2d 362, 364]* .

California follows the rule that the preclusive effect of a prior federal court judgment is determined by federal law, at least where the prior judgment was based on federal question jurisdiction [*Butcher v. Truck Ins. Exchange (2000) 77 Cal. App. 4th 1442, 1452-1455, 1460, 92 Cal. Rptr. 2d 521]* . In *Butcher*, the court noted that the *California Supreme Court in Levy v. Cohen (1977) 19 Cal. 3d 165, 172-173, 137 Cal. Rptr. 162, 561 P.2d 252* and *Martin v. Martin (1970) 2 Cal. 3d 752, 761, 470 P.2d 662* , did not give any indication that the rule it was announcing (i.e., the preclusive effect of a prior judgment of a federal court is determined by federal law) would differ depending on whether federal court's jurisdiction was based on diversity or federal question. *Butcher* involved diversity jurisdiction and did not resolve the issue of whether the res judicata law of the state whose law the federal court applyied in the action leading to the judgment in the federal action or federal law would apply to determine the effect of the judgment, because in either case, California law would apply [*Butcher v. Truck Ins. Exchange (2000) 77 Cal. App. 4th 1442, 1455, 92 Cal. Rptr. 2d 521]* .

However, following a federal judgment, a state court is not bound by federal law when determining whether an exception to the doctrines of res judicata or collateral estoppel applies, such as the public interest exception [*Kopp v. Fair Pol. Practices Com. (1995) 11 Cal. 4th 607, 620-626, 622 n.16, 675, 685, 693, 47 Cal. Rptr. 2d 108, 905 P.2d 1248* (Lucus, C.J.; Werdegar, J., concurring; Baxter, J., joined by Arabian, J., and George, J., concurring and dissenting)]. For discussion of public interest exception to res judicata and collateral estoppel, see *§§ 491.14[6]* and

491.15[6].

In making its determination as to whether a sister state or federal court judgment is res judicata, a California court may take judicial notice of the judgment [*see Evid. Code § 452(d)*].

A judgment or order of another state must be given full faith and credit if final and rendered by a court of competent jurisdiction in accordance with constitutional procedural requirements and the forum state's laws. The court that rendered the judgment must have had proper jurisdiction over both the subject matter and the parties [*In re Marriage of Hanley (1988) 199 Cal. App. 3d 1109, 1119, 245 Cal. Rptr. 441* (disavowed on other grounds, *Leadford v. Leadford (1992) 6 Cal. App. 4th 571, 575 n.5, 8 Cal. Rptr. 2d 9*)].

However, the doctrine of collateral estoppel cannot be utilized to bind a California litigant to a principle of law adopted in prior litigation in a foreign state court which is contrary to the law of California; nor can it be utilized to preclude a party from litigating a novel issue of law in California [*American Continental Insurance Co. v. American Casualty Co. (2001) 86 Cal. App. 4th 929, 945, 103 Cal. Rptr. 2d 632]* .

If the forum court lacked jurisdiction, the judgment may be collaterally attacked in a California court, and extrinsic evidence is admissible to support the attack. However, a collateral attack for jurisdictional defect is not available if the attacking party litigated or could have litigated the jurisdictional issue in the forum court. In such a case, the judgment is res judicata as to the forum court's jurisdiction and cannot be challenged by collateral attack in a later proceeding [*In re Marriage of Hanley (1988) 199 Cal. App. 3d 1109, 1120, 245 Cal. Rptr. 441* ; *see also* *Bank of America v. Jennett (1999) 77 Cal. App. 4th 104, 113-114, 91 Cal. Rptr. 2d 359* (judgment may be challenged on jurisdictional grounds only if issue of jurisdiction was not litigated in foreign state; if question was expressly litigated, determination is res judicata and is protected by full faith and credit clause)].

The courts of appeal are split over whether res judicata should apply to bar a state law claim that is dismissed out of a federal lawsuit that has resulted in a final judgment. The Fourth Appellate District, Division Two, held that once it is known that the federal court will not exercise pendent jurisdiction over the state claim and it is dismissed out of the lawsuit, if the plaintiff then elects to proceed to trial and judgment in the federal court, the plaintiff's entire cause of action is either merged in or barred by the federal court judgment so that the plaintiff may not thereafter maintain a second suit on the same cause of action in a state court [*Mattson v. City of Costa Mesa (1980) 106 Cal. App. 3d 441, 445-446, 164 Cal.Rptr. 913]* . However, the Second Appellate District, Division Eight, is of the opposite view, finding that despite *Mattson*'s concerns, a contrary rule would not invite manipulation, thus the plaintiff is not barred by res judicata from going forth with the state claim after the federal claim has resulted in a final judgment [*Harris v. Grimes (2002) 104 Cal. App. 4th 180, 188-189, 127 Cal. Rptr. 2d 791]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureFederal & State InterrelationshipsErie DoctrineCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataConstitutional LawRelations Among GovernmentsFull Faith & Credit

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43-491 California Forms of Pleading and Practice--Annotated § 491.17

§ 491.17 Asserting Defense of Res Judicata

[1] Pleading Judgment

When a judgment or order of a court is conclusive, the judgment or order must be alleged in the pleadings if there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence [*Code Civ. Proc. § 1908.5*].

In pleading a judgment, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made and to have become final. If such allegation is controverted, the party pleading must establish on the trial the facts conferring jurisdiction and creating finality [*Code Civ. Proc. § 456*].

[2] By Demurrer

If the defense of res judicata appears from the face of the complaint, or from matter of which the court must or may take judicial notice [*see Evid. Code §§ 451, 452*; *Code Civ. Proc. § 430.30(a)*], the complaint is subject to a general demurrer (or a motion for judgment on the pleadings) on the ground that the complaint does not state facts sufficient to constitute a cause of action in that it appears the action is res judicata, unless facts are alleged that will justify setting the prior judgment aside [*Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 554, 305 P.2d 20* ; *Henry v. Clifford (1995) 32 Cal. App. 4th 315, 320, 38 Cal. Rptr. 2d 116* ; *Frommhagen v. Board of Supervisors (1987) 197 Cal. App. 3d 1292, 1299-1300, 243 Cal. Rptr. 390* ; for a form of demurrer, *see § 491.50*]. For discussion and forms relating to demurrers generally, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

A trial court may take judicial notice of a prior judgment in deciding whether to sustain a demurrer based on res judicata, regardless of whether the prior judgment was pleaded, provided that the court has been correctly apprised of the judgment and the party responding to the demurrer is given adequate notice and an opportunity to be heard as to the effect of the judgment [*Pease v. Pease (1988) 201 Cal. App. 3d 29, 32, 246 Cal. Rptr. 762]* .

[3] By Answer

When the defense of res judicata exists but does not appear from the face of the complaint or from judicially noticed

matter, the objection may be raised by answer [*Code Civ. Proc. §§ 430.30(b), 431.30(b)(2)*] and separate trial of that issue [*see Code Civ. Proc. § 597*; for discussion of special trial of the defense, *see § 491.20, below*].

[4] By Motion for Summary Judgment

The defense of res judicata is properly raised by a motion for summary judgment, and is a proper ground on which to grant a summary judgment [*Allstate Ins. Co. v. Mel Rapton, Inc. (2000) 77 Cal. App. 4th 901, 907, 92 Cal. Rptr. 2d 151* ; *Seltzer v. Seltzer (1969) 276 Cal. App. 2d 137, 141-142, 80 Cal. Rptr. 688]* .

Summary judgment is an appropriate remedy when the doctrine of issue preclusion refutes all triable issues of fact suggested by the pleadings and supporting documents [*Southwell v. Mallery, Stern & Warford (1987) 194 Cal. App. 3d 140, 144, 239 Cal. Rptr. 371* ; *County of Alameda v. Sampson (1980) 104 Cal. App. 3d 584, 589-590, 163 Cal. Rptr. 915]* .

For forms and discussion relating to summary judgment, see Ch. 537, *Summary Judgment* .

[5] By Motion to Dismiss

Although there is no statutory procedure to move for dismissal on res judicata grounds, earlier decisions permitted that defense to be raised by a motion to dismiss supported by affidavits, citing the inherent power of the courts to dismiss sham or fictitious complaints [*see High v. Cavanaugh (1962) 205 Cal. App. 2d 495, 497, 23 Cal. Rptr. 121* ; *McKenna v. Elliott & Horne Co. (1953) 118 Cal. App. 2d 551, 554-555, 258 P.2d 528]* . More recently, however, the Supreme Court has stated that nonstatutory speaking motions (that is, motions that are supported by facts outside the pleadings) have been superseded by the procedure governing motions for summary judgment contained in *Code Civ. Proc. § 437c* [*Vesely v. Sager (1971) 5 Cal. 3d 153, 167-168, 95 Cal. Rptr. 623, 486 P.2d 151* ; *see also McKinney v. County of Santa Clara (1980) 110 Cal. App. 3d 787, 793, 168 Cal. Rptr. 89* (speaking motion to dismiss treated as motion for summary judgment in order to preserve safeguards provided by summary judgment statute)]. It appears that a motion to dismiss on the ground of res judicata constitutes a speaking motion of the type contemplated by the court in *Vesely*, and consequently this motion would be deemed to be one for summary judgment, subject to the procedural requirements of *Code Civ. Proc. § 437c*.

[6] Invoking Defense on Appeal

Normally, the res judicata effect of a prior judgment must be pleaded and proven at trial. However, when the prior judgment becomes final during the pendency of an appeal in another action, the first final judgment may be brought to the attention of the appellate court in which the appeal is pending and may be there relied on as a bar [*Palm Springs Paint Co. v. Arenas (1966) 242 Cal. App. 2d 682, 688, 51 Cal. Rptr. 747]* . Similarly, issue preclusion may be raised for the first time on appeal when a judgment in a prior action becomes final pending appeal and there was no opportunity to raise the issue in the trial court [*First N.B.S. Corp. v. Gabrielsen (1986) 179 Cal. App. 3d 1189, 1195, 225 Cal. Rptr. 254]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to DismissCivil ProceduresSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProceduresJudgmentsPreclusion & Effect of JudgmentsRes JudicataEvidenceHearsayExceptionsJudgmentsGeneral OverviewEvidenceJudicial NoticeGeneral Overview

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§ 491.18 Waiver of Defense

Res judicata is merely a defense. It is not jurisdictional, and as such, it may be waived if not properly raised by pleading or evidence [*Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 977, 104 Cal. Rptr. 42, 500 P.2d 1386* ; *Wolfsen v. Hathaway (1948) 32 Cal. 2d 632, 638, 198 P.2d 1* (overruled on other grounds in *Flores v. Arroyo (1961) 56 Cal. 2d 492, 497, 15 Cal. Rptr. 87, 364 P.2d 263*); *see People v. Gillard (1997) 57 Cal. App. 4th 136, 160, 66 Cal. Rptr. 2d 790* (collateral estoppel argument waived when not raised in trial court by timely objection)]. Otherwise stated, because the prohibition against splitting a cause of action exists for the defendant's benefit, the defendant may waive it and if he or she fails to object, will be deemed to have acquiesced in plaintiff's splitting a cause of action [*Allstate Ins. Co. v. Mel Rapton, Inc. (2000) 77 Cal. App. 4th 901, 909, 92 Cal. Rptr. 2d 151]* .

The defense of res judicata is not waived for failure to assert a claim if the facts forming the basis of that cause of action are not known by the plaintiff at the time of the earlier action [*see Allied Fire Protection v. Diede Const. (2005) 127 Cal. App. 4th 150, 154-155, 25 Cal. Rptr. 3d 195]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProceduresJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProceduresJudgmentsPreclusion & Effect of JudgmentsRes Judicata

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§ 491.19 Proof of Defense

Generally, the burden of establishing the defense of res judicata is on the party asserting it [*Erlich v. Superior Court (1965) 63 Cal. 2d 551, 556-557, 47 Cal. Rptr. 473, 407 P.2d 649* ; *Casad v. Qualls (1977) 70 Cal. App. 3d 921, 927, 139 Cal. Rptr. 243* ; *see also Vella v. Hudgins (1977) 20 Cal. 3d 251, 257, 142 Cal. Rptr. 414, 572 P.2d 28* (requiring party asserting issue preclusion to prove that each of the elements of the doctrine have been met)]. In carrying this burden of proof, the party may resort to the judgment, the record of the entire proceedings, and extrinsic evidence [*Casad v. Qualls (1977) 70 Cal. App. 3d 921, 927, 139 Cal. Rptr. 243]* .

A party asserting issue preclusion must prove that the issue was raised, actually submitted for determination, and determined, and that contrary evidence on issue was not restricted [*Schaefer/Karpf Productions v. CNA Ins. Companies (1998) 64 Cal. App. 4th 1306, 1314, 76 Cal. Rptr. 2d 42* ; *Barker v. Hull (1987) 191 Cal. App. 3d 221, 226, 236 Cal. Rptr. 285]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

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§ 491.20 Special Trial of Defense of Res Judicata

When an answer raises the affirmative defense that the action is barred by a prior judgment, the court may, either on its own motion or on the motion of any party, proceed to trial of that defense before trial of any other issue in the case [*see Code Civ. Proc. § 597*; *Ball v. Citizens Casualty Co. (1959) 170 Cal. App. 2d 590, 591, 339 P.2d 241]* . When the defense of res judicata is tried separately and first, there is no right to a jury trial of the res judicata defense even if plaintiff's action is an action at law. Therefore, the facts underlying the applicability of the res judicata defense are tried to the court and not a jury [*Windsor Square Homeowners Assn. v. Citation Homes (1997) 54 Cal. App. 4th 547, 557-558, 62 Cal. Rptr. 2d 818]* .

For a form of notice of motion and order that may be used in proceedings to obtain a separate trial under *Code Civ. Proc. § 597*, see *§§ 491.58* and *491.59*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPretrial MattersSeparate TrialsCivil ProceduresTrialsJury TrialsRight to Jury TrialCivil ProceduresJudgmentsPreclusion & Effect of JudgmentsRes Judicata

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43-491 California Forms of Pleading and Practice--Annotated § 491.21

§ 491.21 Judicial Estoppel

[1] Preclusion of Inconsistent Positions

Judicial estoppel is an equitable doctrine that prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding [*Jackson v. County of Los Angeles (1997) 60 Cal. App. 4th 171, 181-183, 70 Cal. Rptr. 2d 96* ; *see Drain v. Betz Laboratories, Inc. (1999) 69 Cal. App. 4th 950, 955-958, 81 Cal. Rptr. 2d 864]* .

Judicial estoppel is sometimes referred to as the doctrine of preclusion of inconsistent positions, and its purpose is to protect the integrity of the judicial process [*Jackson v. County of Los Angeles (1997) 60 Cal. App. 4th 171, 181, 70 Cal. Rptr. 2d 96* ; *see Cloud v. Northrop Grumman Corp. (1998) 67 Cal. App. 4th 995, 1015-1016, 79 Cal. Rptr. 2d 544* (doctrine intended to protect court rather than litigants; under majority view privity not required for its application); *International Engine Parts, Inc. v. Feddersen & Co. (1998) 64 Cal. App. 4th 345, 351, 354, 75 Cal. Rptr. 2d 178* (reliance or prejudice not required before doctrine may be invoked); *Billmeyer v. Plaza Bank of Commerce (1995) 42 Cal. App. 4th 1086, 1092, 1096 n.8, 50 Cal. Rptr. 2d 119* (federal doctrine of judicial estoppel does not require reliance or prejudice before party may invoke it; its primary purpose is not to protect litigants, but to protect integrity of judiciary); *but see In re Marriage of Dekker (1993) 17 Cal. App. 4th 842, 850, 21 Cal. Rptr. 2d 642* (purpose is to prevent injury to innocent party); *see also California Coastal Com. v. Tahmassebi (1998) 69 Cal. App. 4th 255, 259, 81 Cal. Rptr. 2d 321* (under doctrine of judicial estoppel, party who has taken particular position in litigation, may under some circumstances, be estopped from taking inconsistent position to detriment of other party)].

[2] When Doctrine Applies

[a] Equitable Doctrine Vague in Application

California courts have not established a clear set of principles for applying judicial estoppel [*Jackson v. County of Los Angeles (1997) 60 Cal. App. 4th 171, 181-182, 70 Cal. Rptr. 2d 96]* , and the doctrine is vague in its application [*Associated Creditors' Agency v. Wong (1963) 216 Cal. App. 2d 61, 67, 30 Cal. Rptr. 705* ; *Coleman v. Southern Pacific Co. (1956) 141 Cal. App. 2d 121, 128, 296 P.2d 386* ; *see International Engine Parts, Inc. v. Feddersen & Co. (1998) 64 Cal. App. 4th 345, 351, 75 Cal. Rptr. 2d 178* (equitable doctrine with some vagueness in its application); *Ng*

v. Hudson (1977) 75 Cal. App. 3d 250, 258, 142 Cal. Rptr. 69 (proper application of doctrine at best uncertain); *see also Prilliman v. United Air Lines, Inc. (1997) 53 Cal. App. 4th 935, 956, 62 Cal. Rptr. 2d 142* (doctrine of judicial estoppel not uniformly defined or applied by federal courts; federal and state law discussed)].

Judicial estoppel should be applied with caution. It is an extraordinary remedy to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice [*Haley v. Dow Lewis Motors, Inc. (1999) 72 Cal. App. 4th 497, 511, 85 Cal. Rptr. 2d 352]* .

The doctrine of judicial estoppel should apply when [*Drain v. Betz Laboratories, Inc. (1999) 69 Cal. App. 4th 950, 957, 81 Cal. Rptr. 2d 864* ; *International Engine Parts, Inc. v. Feddersen & Co. (1998) 64 Cal. App. 4th 345, 351, 75 Cal. Rptr. 2d 178* ; *Jackson v. County of Los Angeles (1997) 60 Cal. App. 4th 171, 183, 70 Cal. Rptr. 2d 96]* :

- The same party has taken two positions;
- The positions were taken in judicial or quasi-judicial administrative proceedings;
- The party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true) [*see* [b], *below*];
- The two positions are totally inconsistent; and
- The first position was not taken as a result of ignorance, fraud, or mistake.

[b] Successful Assertion of Earlier Position

California courts have recognized that there is no hard and fast rule that limits application of the doctrine of judicial estoppel to those situations where the litigant was successful in asserting the contradictory position [*Thomas v. Gordon (2000) 85 Cal. App. 4th 113, 118, 102 Cal. Rptr. 2d 28]* . In *Jackson v. County of Los Angeles (1997) 60 Cal. App. 4th 171, 70 Cal. Rptr. 2d 96* , the court noted that under the "majority view," the party sought to be estopped must have been successful in asserting the earlier position because if the earlier position was not adopted by the tribunal, there is no danger of inconsistent results and thus no impairment of the judicial process. However, because judicial estoppel is an equitable doctrine, the *Jackson* court recognized the possibility that in a future case circumstances might warrant application of the doctrine even if the earlier position was not adopted by the tribunal [*Jackson v. County of Los Angeles (1997) 60 Cal. App. 4th 171, 183 n.8, 70 Cal. Rptr. 2d 96* ; *accord Thomas v. Gordon (2000) 85 Cal. App. 4th 113, 118, 102 Cal. Rptr. 2d 28* ; *Drain v. Betz Laboratories, Inc. (1999) 69 Cal. App. 4th 950, 958, 81 Cal. Rptr. 2d 864* (in a suit for racial harassment and wrongful termination, when plaintiff had earlier received a workers' compensation award through a compromise and settlement approved by a workers' compensation referee, judicial estoppel was applied even though the referee's approval of the parties' compromise and release did not incorporate any factual findings)]. Under the "minority view," judicial estoppel may be applied even if the party was unsuccessful in asserting the inconsistent position if by the party's change of position, the party is playing "fast and loose" with the court [*see Thomas v. Gordon (2000) 85 Cal. App. 4th 113, 119, 102 Cal. Rptr. 2d 28]* . For example, in *Thomas v. Gordon (2000) 85 Cal. App. 4th 113, 102 Cal. Rptr. 2d 28* , the court found that the case before it warranted application of the doctrine even absent proof of success in the earlier litigation, given the party's egregious attempt to manipulate the legal system [*Thomas v. Gordon (2000) 85 Cal. App. 4th 113, 119, 102 Cal. Rptr. 2d 28* (plaintiff's action was predicated on an interest in assets she had previously transferred to keep out of the hands of credits and had failed to list in bankruptcy proceedings; alternatively, the court found that although her bankruptcy petitions were dismissed, plaintiff had derived a benefit from automatic stay of creditors' actions adequate to satisfy the successful assertion factor)]. However, courts have since made clear that such situations are "rare" and that only "egregious misconduct" warranted an exception to the successful assertion of earlier position doctrine [*Gottlieb v. Kest (2006) 141 Cal. App. 4th 110, 142, 46 Cal. Rptr. 3d 7* (judicial estoppel doctrine not applicable because bankruptcy court in prior proceeding had not

accepted plaintiff's position by confirming a plan of reorganization).]

Similarly, a party's claim of entitlement to attorney fees based on breach of a contract containing a fees provision judicially estops that party from contending that the provision does not authorize an award of attorney fees against himself or herself. Consistent with the purposes of *Civ. Code § 1717*, a pleader should not be permitted to threaten a litigant with the prospect of an adverse attorney fees award and avoid the same fate if unsuccessful [*International Billing Services, Inc. v. Emigh (2000) 84 Cal. App. 4th 1175, 1186-1192, 101 Cal. Rptr. 2d 532* (recognizing that some jurisdictions require prior success on the fact asserted, but stating that the doctrine may also apply to prevent a party from changing its position over the course of a proceeding)].

[c] Not Applicable When Prior Position Was Taken as Result of Ignorance or Mistake

Asserting inconsistent positions does not trigger application of judicial estoppel unless intentional self-contradiction is used as a means of obtaining unfair advantage. An inconsistent argument sufficient to invoke judicial estoppel must be attributable to intentional wrongdoing [*Haley v. Dow Lewis Motors, Inc. (1999) 72 Cal. App. 4th 497, 509-510, 85 Cal. Rptr. 2d 352]* . Thus, the doctrine cannot be invoked when the position was taken as a result of ignorance or mistake in the first proceeding [*Coleman v. Southern Pacific Co. (1956) 141 Cal. App. 2d 121, 128, 296 P.2d 386* ; *accord Jackson v. County of Los Angeles (1997) 60 Cal. App. 4th 171, 182-183, 70 Cal. Rptr. 2d 96* ; *see also Haley v. Dow Lewis Motors, Inc. (1999) 72 Cal. App. 4th 497, 509* (doctrine does not apply when position taken because of good faith mistake rather than as part of scheme to mislead court); *Cloud v. Northrop Grumman Corp. (1998) 67 Cal. App. 4th 995, 1016-1018, 79 Cal. Rptr. 2d 544* (doctrine only applies to deliberate inconsistencies that are tantamount to a knowing misrepresentation to or even fraud on court); *cf. Michelson v. Camp (1999) 72 Cal. App. 4th 955, 959-961, 970-971, 85 Cal. Rptr. 2d 539* (when plaintiffs sought and obtained leave of bankruptcy court for relief from stay to allow them to foreclose on property, in later action plaintiffs estopped to deny knowledge of appraisal report submitted by their counsel on their behalf in bankruptcy court to convince court there was no equity to protect on behalf of debtor's estate and gain advantage for them in court of law; possibility plaintiffs might not have been aware of their counsel's specific arguments to court does not make them innocent bystanders; they accepted benefits of their counsel's representations to court and went ahead with foreclosure and resale; for purposes of judicial estoppel, their actual knowledge irrelevant)].

[d] Final Judgment Not Required

Unlike collateral estoppel, judicial estoppel does not require a final judgment [*Jackson v. County of Los Angeles (1997) 60 Cal. App. 4th 171, 189 n.12, 70 Cal. Rptr. 2d 96* (when workers' compensation judge accepted parties' stipulations with request for award and approved work restrictions as part of award, judicial estoppel barred plaintiff's claim under the Americans with Disabilities Act of 1990 (*42 U.S.C. § 12101 et seq.*) because of position plaintiff took in workers' compensation proceeding with respect to work restrictions although award did not become final until five years after plaintiff's injury)].

[e] In Court's Discretion

The doctrine is invoked by the courts in their discretion [*International Engine Parts, Inc. v. Feddersen & Co. (1998) 64 Cal. App. 4th 345, 351, 75 Cal. Rptr. 2d 178]* .

[3] Raises Factual Issues

A defense of judicial estoppel raises factual issues. Cases concerning judicial estoppel have generally been decided after a fact-finding or evidence-reviewing proceeding of some sort [*Cloud v. Northrop Grumman Corp. (1998) 67 Cal. App. 4th 995, 1000, 1018-1020, 79 Cal. Rptr. 2d 544* (factual determinations necessary to support judicial estoppel could not be decided solely by reviewing plaintiff's complaint and matters that could be judicially noticed, and thus could not be decided on motion for judgment on pleadings); *see also Haley v. Dow Lewis Motors, Inc. (1999) 72 Cal.*

App. 4th 497, 510 (whether judicial estoppel should be applied is factual question; determination of existence of judicial estoppel is factual finding that will be upheld if supported by substantial evidence)]. Whether or not to apply judicial estoppel, however, is a question of law for the trial court which can be made in the context of a summary judgment motion where none of the facts material to the court's decision to apply judicial estoppel are disputed [*Drain v. Betz Laboratories, Inc. (1999) 69 Cal. App. 4th 950, 959 n.8, 81 Cal. Rptr. 2d 864]* .

[4] Application in Multiple Proceedings

Judicial estoppel is especially appropriate when a party has taken inconsistent positions in separate proceedings [*International Engine Parts, Inc. v. Feddersen & Co. (1998) 64 Cal. App. 4th 345, 350-351, 75 Cal. Rptr. 2d 178* ; *Jackson v. County of Los Angeles (1997) 60 Cal. App. 4th 171, 181, 70 Cal. Rptr. 2d 96]* . In the context of multiple proceedings, the doctrine of judicial estoppel precludes a party who has assumed a particular position in a judicial proceeding to assume an inconsistant position to the prejudice of an adverse party in a later proceeding involving the same parties and questions. For such an estoppel to apply, the position taken in the first proceeding must be so clearly inconsistent with the position taken in the later proceeding that the one necessarily excludes the other [*Coleman v. Southern Pacific Co. (1956) 141 Cal. App. 2d 121, 128, 296 P.2d 386* ; *see Jackson v. County of Los Angeles (1997) 60 Cal. App. 4th 171, 182, 70 Cal. Rptr. 2d 96* (inconsistency must be clear so that one necessarily excludes other); *Prilliman v. United Air Lines, Inc. (1997) 53 Cal. App. 4th 935, 960-963, 62 Cal. Rptr. 2d 142* (following *Coleman*; plaintiff's assertion of disability for purpose of obtaining Social Security benefits did not constitute judicial estoppel that precluded plaintiff from arguing in Fair Employment and Housing Act case that plaintiff was capable of performing an alternative position with employer); *Billmeyer v. Plaza Bank of Commerce (1995) 42 Cal. App. 4th 1086, 1091-1096, 50 Cal. Rptr. 2d 119* (doctrine precludes party from asserting position in judicial proceeding that is inconsistent with position party previously successfully asserted in earlier proceeding; doctrine's essential function and justification is to prevent use of intentional self-contradiction as means of obtaining unfair advantage in forum provided for suitors seeking justice); *see also International Engine Parts, Inc. v. Feddersen & Co. (1998) 64 Cal. App. 4th 345, 350, 75 Cal. Rptr. 2d 178* (judicial estoppel most commonly applied to bar party from making factual assertion in legal proceeding that directly contradicts earlier assertion made in same proceeding or a prior one); *cf. Loube v. Loube (1998) 64 Cal. App. 4th 421, 428, 74 Cal. Rptr. 2d 906* (position taken by attorneys on behalf of their clients not binding on attorneys when later sued by same clients; judicial estoppel inapplicable because attorneys were not parties to earlier proceeding)].

Thus, for example, when parties to a pending action have been properly shown to have been less than sufficiently forthcoming in another tribunal, the doctrine is available to maintain the integrity of the judicial system [*International Engine Parts, Inc. v. Feddersen & Co. (1998) 64 Cal. App. 4th 345, 354, 75 Cal. Rptr. 2d 178* (judicial estoppel applied to bar plaintiffs' action against defendant when plaintiffs had failed to disclose potential action against defendant in bankruptcy proceeding)].

[5] Equitable Estoppel Distinguished

Unlike equitable estoppel, judicial estoppel looks to the connection between the litigant and the judicial system while equitable estoppel focuses on the relationship between the parties to the prior litigation [*International Engine Parts, Inc. v. Feddersen & Co. (1998) 64 Cal. App. 4th 345, 350-351, 75 Cal. Rptr. 2d 178]* .

Equitable estoppel entails detrimental reliance by one party, judicial estoppel does not. Judicial estoppel may apply to prevent a party from changing its position over the course of a judicial proceeding when the positional change has an adverse impact on the judicial process [*International Billing Services, Inc. v. Emigh (2000) 84 Cal. App. 4th 1175, 1190-1191, 101 Cal. Rptr. 2d 532* (claim of entitlement to attorney's fees under *Civ. Code § 1717* in complaint estopped plaintiff from denying contract contained fee clause)]. Unlike equitable estoppel, judicial estoppel may be applied even if detrimental reliance or privity does not exist [*International Billing Services, Inc. v. Emigh (2000) 84 Cal. App. 4th 1175, 1190, 101 Cal. Rptr. 2d 532* , citing *Jackson v. County of Los Angeles (1997) 60 Cal. App. 4th 171, 181, 70 Cal.*

Rptr. 2d 96] .

[6] Distinguished From Pleading Inconsistent or Alternative Theories

The doctrine of judicial estoppel should be distinguished from the permissible practice of allowing a plaintiff to plead inconsistent or alternative theories in a complaint [*see Jackson v. County of Los Angeles (1997) 60 Cal. App. 4th 171, 181, 70 Cal. Rptr. 2d 96* ; for discussion of pleading inconsistent or alternative theories in a complaint, see s California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* , Form 27 (Matthew Bender)].

[7] Distinguished From Election of Remedies

Similarly, the doctrine should be distinguished from an election of remedies that occurs in two ways, under the doctrine of res judicata or under the doctrine of estoppel [*see Kirkpatrick v. Westamerica Bank (1998) 65 Cal. App. 4th 982, 990-991, 76 Cal. Rptr. 2d 876]* .

[8] Application of State Versus Federal Law

State law governs the issue of whether plaintiff is judicially estopped from proceeding with a claim when the state law supplies the rule of decision on the claim [*Prilliman v. United Air Lines, Inc. (1997) 53 Cal. App. 4th 935, 959-960, 62 Cal. Rptr. 2d 142* (state law governs issue of judicial estoppel concerning plaintiff's Fair Employment and Housing Act (FEHA) claim brought in state court; distinguishing federal decision dealing with FEHA claim which held that federal law governs application of judicial estoppel in federal courts)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsChoice of LawGeneral OverviewCivil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelJudicial Estoppel

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[Reserved]

§§ 491.22[Reserved]

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43-491 California Forms of Pleading and Practice--Annotated § 491.40

§ 491.40 Related Titles From Matthew Bender

For memoranda of points and authorities opposing a motion for summary judgment in a wrongful death action on the ground that the plaintiff is not collaterally estopped from maintaining the action, see s California Points and Authorities, Ch. 66, *Death and Survival Actions* (Matthew Bender)

For a memorandum of points and authorities supporting a motion for summary judgment in a personal injury action by an employee against an employer on the ground that a Workers' Compensation Appeals Board determination is res judicata, see s California Points and Authorities, Ch. 100, *Employer and Employee* , Pt. III (Matthew Bender)

For a memorandum of points and authorities opposing a petition for a writ of mandate or prohibition on the ground that a ruling on a prior petition is res judicata, see s California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender)

For a memorandum of points and authorities supporting an obligor's contention that a partial subrogee suing on a split cause of action is barred by the doctrine of res judicata, see s California Points and Authorities, Ch. 220, *Subrogation* (Matthew Bender)

For extensive coverage of the doctrines of res judicata and collateral estoppel as applied in federal courts, see s Moore' s S s Federal Practice, Ch.131, Ch. 132 (3d ed. Matthew Bender)

For discussion of the application of these doctrines in criminal actions, and, in particular, the constitutional double jeopardy protection against successive prosecutions, see s California Criminal Defense Practice, Ch. 63 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary

JudgmentOppositionMemoranda in OppositionCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataCivil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessDouble Jeopardy

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43-491 California Forms of Pleading and Practice--Annotated § 491.41

§ 491.41 State Statutes

[1] Conclusiveness and Effect of Judgment

Effect of failure by party against whom complaint has been filed and served to allege in cross complaint any related cause of action that he or she has against plaintiff. *Code Civ. Proc. § 426.30(a)*

Conclusiveness and effect of judgment or final order on party. *Code Civ. Proc. § 1908(a)*

Conclusiveness and effect of judgment or final order on nonparty; procedure to establish judgment as binding on nonparty. *Code Civ. Proc. § 1908(b)*

Effect of orders other than judgments or final orders. *Code Civ. Proc. § 1909*

When parties deemed same for purposes of determining conclusiveness of judgment. *Code Civ. Proc. § 1910*

Matters deemed to have been adjudged in former judgment. *Code Civ. Proc. § 1911*

When principal bound by judgment against surety. *Code Civ. Proc. § 1912*.

Effect of judicial record of sister state. *Code Civ. Proc. § 1913*

Effect of judicial record of admiralty court of foreign country. *Code Civ. Proc. § 1914*

Grounds for impeaching judicial record. *Code Civ. Proc. § 1916*

Jurisdiction sufficient to sustain record. *Code Civ. Proc. § 1917*

[2] Pleading and Proving Judgment

Necessity of pleading jurisdiction in support of judgment. *Code Civ. Proc. § 456*

Pleading and use in evidence of conclusive judgment or order. *Code Civ. Proc. § 1908.5*

Judgment, when not conclusive, as presumed correctly to determine rights of parties, but no presumption as created that facts essential to judgment have been correctly determined. *Evid. Code § 639*

Judgment as evidence. *Evid. Code §§ 1300-1302*

Proving judgment as official recorded writing. *Evid. Code § 1530-1532*

[3] Res Judicata Effect of Particular Types of Judgments and Orders

Entry of final judgment against consumer credit reporting agency under *15 U.S.C. § 1681n* or *1681o* as barring subsequent action for damages under Consumer Credit Reporting Agencies Act (*Civ. Code § 1785.1 et seq.*) or Investigative Consumer Reporting Agencies Act (*Civ. Code § 1786 et seq.*). *Civ. Code §§ 1785.34, 1786.52*

Determination in summary proceedings involving release of stop notice for public work as entitled to limited res judicata effect. *Civ. Code § 3205*

Conclusive effect of judgment annulling marriage. *Fam. Code § 2212*

Validity or interpretation of gift, devise, bequest, or trust under will as conclusively established by action to quiet title. *Code Civ. Proc. § 764.020(a)(2), (3)*

Conclusive effect of judgment in validation proceeding brought by public agency. *Code Civ. Proc. § 870*

When principal bound by judgment against surety. *Code Civ. Proc. §§ 1055, 1912*

Conclusive effect of foreign money judgments. *Code Civ. Proc. § 1713 et seq.*

Binding and conclusive effect of judgment determining validity of bonds and plans concerning Capitol area redevelopment. *Gov. Code § 8189*

In arbitration of uninsured motorist disputes, award or judgment confirming award as having limited conclusive effect. *Ins. Code § 11580.2(f)*

Effect of judgment in favor of claimant in action establishing liability of decedent for which decedent was protected by liability insurance. *Prob. Code § 554*

Conclusive effect of order admitting will to probate or appointing personal representative. *Prob. Code § 8007*

Application of res judicata in determination of case involving *Rev. & Tax. Code § 6001 et seq.* (sales and use tax laws). *Rev. & Tax. Code § 7176*

Limited res judicata effect of administrative determinations under Personal Income Tax Law (*Rev. & Tax. Code § 17001 et seq.*), Bank and Corporation Tax Law (*Rev. & Tax. Code § 23001 et seq.*), and *Rev. & Tax. Code § 18401 et seq.* (administration of franchise and income tax laws). *Rev. & Tax. Code §§ 19801, 19802*

Limited application of res judicata in determination of case arising under *Rev. & Tax. Code § 38101 et seq.* (timber yield tax laws). *Rev. & Tax. Code § 38805*

Conclusive effect of decision by Unemployment Insurance Appeals Board. *Unemp. Ins. Code § 410*

Certain factual determinations of Workers' Compensation Appeals Board have no collateral estoppel effect in criminal proceedings. *Lab. Code §§ 5006, 5413, 5816*

Judgment of conviction for violation of Vehicle Code provision as having no res judicata or collateral estopel effect in any subsequent civil action. *Veh. Code § 40834*

Conclusiveness of factual or legal determinations made pursuant to cease and desist order in private litigation involving water rights. *Water Code § 1850*

[4] Special Trial of Defense of Res Judicata

Trial of defense of res judicata preceding trial of defense on merits. *Code Civ. Proc. § 597*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePretrial MattersSeparate TrialsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsFull Faith & CreditGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataEvidenceHearsayExceptionsJudgmentsGeneral OverviewGovernmentsCourtsCourt Records

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43-491 California Forms of Pleading and Practice--Annotated § 491.42

§ 491.42 Decisions

[1] Administrative Agencies

Enforcement of res judicata rules relating to administrative orders is permitted to be more flexible than judicial orders; recognition that traditional principle of res judicata as developed in judicial system should be fully applicable to some administrative action but not applicable to other administrative action and that much administrative action should be subject to relaxed set of rules concerning res judicata. *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd. (1989) 49 Cal. 3d 1279, 1290, 265 Cal. Rptr. 162, 783 P.2d 749*

Res judicata did not bar employee's action against California Unemployment Insurance Appeals Board under Fair Employment and Housing Act for retaliation, based on impropriety of discipline imposed in administrative proceedings, where primary right protected by the state civil service system was right to continued employment, while primary right protected by FEHA was right to be free from invidious discrimination and from retaliation for opposing discrimination, and doctrine of res judicata did not act as complete bar to FEHA action when employee sought review through alternative administrative remedy available as consequence of employee's civil servant status. Doctrine of collateral estoppel did not act to preclude employee from recovering on her FEHA claim, where, although Board's decisions established that some reasons given for suspensions were legitimate and it upheld two suspensions, and these findings were binding on employee in her FEHA action under doctrine of collateral estoppel, findings did not preclude entire retaliation cause of action, because employee was not simply challenging adverse action on ground it was discriminatory, she alleged agency accumulated number of minor incidents and used them collectively to support suspensions with retaliatory animus, and board's findings did not resolve these issues in favor of agency so as to completely defeat retaliation cause of action. *George v. California Unemployment Ins. Appeals Bd. (2009) 179 Cal. App. 4th 1475, 1482-1488, 102 Cal. Rptr. 3d 431*

Doctrine of collateral estoppel applies to administrative determination when made by administrative agency that is acting in judicial capacity and resolving disputed issues which parties have had adequate opportunity to litigate; opinion and order of Workers' Compensation Appeals Board qualifies as such administrative determination. *Housing Authority v. Workers' Comp. Appeals Bd. (1998) 60 Cal. App. 4th 1076, 1083, 70 Cal. Rptr. 2d 738*

Although jurisdiction of agency in particular proceeding ordinarily lapses when it renders its decision, decision must be on merits in order to be entitled to res judicata effect. *Hunt v. County of Shasta (1990) 225 Cal. App. 3d 432, 442 n.8, 275 Cal. Rptr. 113*

Finality for purposes of administrative collateral estoppel is two-step process: (1) decision is final with respect to action by administrative agency; and (2) decision has conclusive effect, that is, it must be free from direct attack; because direct attack on administrative decision may be made by appeal to superior court for review by petition for administrative mandamus, decision is not given collateral estoppel effect if such appeal has been taken or if time for such appeal has not lapsed. *Long Beach Unified Sch. Dist. v. State of California (1990) 225 Cal. App. 3d 155, 168-169, 275 Cal. Rptr. 449*

No privity exists between city and county retirement board and Workers' Compensation Appeals Board because former is designated by city and county to administer workers' compensation benefits and allegedly has proprietary interest in Appeals Board's award; hence, retirement board was not collaterally estopped to deny Appeals Board finding that plaintiff's heart trouble was due to industrial cause. *Geoghegan v. Retirement Board (1990) 222 Cal. App. 3d 1525, 1531, 272 Cal. Rptr. 419*

Collateral estoppel applies to prior administrative adjudications when (1) administrative agency acted in judicial capacity, (2) agency resolved disputed issues properly before it, and (3) all parties were provided with opportunity to litigate their claims fully and fairly. *County of Los Angeles v. Department of Industrial Relations (1989) 214 Cal. App. 3d 1538, 1544, 263 Cal. Rptr. 351*

[2] Burden of Proof

Party asserting collateral estoppel bears burden of establishing requirements for its application. *Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 181, 98 Cal. Rptr. 2d 44*

Defendant bore burden of demonstrating that waiver issue was actually determined by federal district court when that court, on defendant's motion, issued order compelling arbitration and thereafter in state court action between parties defendant moved to compel arbitration and plaintiff in opposition argued, among other things, that defendant waived its right to arbitrate; defendant did not meet its burden, and trial court did not err in reaching merits of plaintiff's waiver argument because nothing in district court's ruling or pleadings suggested that district court decided waiver issue. *McMillin Development, Inc. v. Home Buyers Warranty (1998) 68 Cal. App. 4th 896, 906-907, 80 Cal. Rptr. 2d 611*

Party asserting collateral estoppel must prove issue was raised, actually submitted for determination, and determined, and that contrary evidence on issue was not restricted. *Schaefer/Karpf Productions v. CNA Ins. Companies (1998) 64 Cal. App. 4th 1306, 1314, 76 Cal. Rptr. 2d 42*

Burden of proving collateral estoppel as resting with party asserting doctrine. *Bronco Wine Co. v. Frank A. Logoluso Farms (1989) 214 Cal. App. 3d 699, 708, 262 Cal. Rptr. 899*

[3] Claim Preclusion

[a] Claims That Could Have Been Raised

Res judicata is not a bar to claims that arise after the initial complaint is filed. Although the parties litigated a breach of contract action in federal court, res judicata did not bar plaintiff from later suing defendant on a fraud theory in state court where plaintiff was unaware of the facts forming the basis for the fraud suit until after the federal complaint was filed. *Allied Fire Protection v. Diede Const. (2005) 127 Cal. App. 4th 150, 154-155, 25 Cal. Rptr. 3d 195* .

Order settling account is entitled to res judicata effect and is conclusive as to all matter passed on notwithstanding some theory that might have been advanced, and probate court approving account necessarily passes on trustee's veracity and exercise of due care. *Noggle v. Bank of America (1999) 70 Cal. App. 4th 853, 862, 82 Cal. Rptr. 2d 829*

Res judicata only applies to issues which were or could have been litigated in arbitration; when insurance carrier is providing defense under reservation of rights and has agreed to use of independent counsel, *Civ. Code § 2860* arbitration is appropriate to resolve attorneys fee disputes before legal determination of coverage issues; carrier was not precluded by res judicata from litigating coverage issues when parties specifically agreed that the arbitrator would not have power to decide any coverage issues and the only issues resolved by arbitrator were those relating to attorney fees. *Truck Ins. Exchange v. Superior Court (1996) 51 Cal. App. 4th 985, 998-999, 59 Cal. Rptr. 2d 529*

With regard to bankruptcy court's order granting defendants relief from automatic stay, res judicata bars plaintiffs from thereafter asserting in state court action that rules of procedure in connection with motion for relief from stay were violated, including rules requiring advance notice of specific relief sought and submission of proposed order, when order was not appealed, modified, or set aside in bankruptcy court; res judicata bars relitigation of issues that could have been raised in prior action. *Abdallah v. United Savings Bank (1996) 43 Cal. App. 4th 1101, 1106-1107, 51 Cal. Rptr. 2d 286*

Valid final judgment on merits in favor of defendant as barring future litigation on same cause of action; bar as including matters that were relevant and within scope of first action, which thus could have been raised by first suit. *Craig v. County of Los Angeles (1990) 221 Cal. App. 3d 1294, 1299, 271 Cal. Rptr. 82*

Res judicata as applying to claims actually litigated in prior proceeding and to those that could have been litigated as part of that cause of action; fact that plaintiff requests different type of relief, or even presents different legal theory, as not negating or lessening binding effect of previous state court judgment. *California Coastal Com. v. Superior Court (1989) 210 Cal. App. 3d 1488, 1499, 258 Cal. Rptr. 567*

[b] Final Judgment on Merits

Defense of laches has nothing to do with merits of cause against which it is asserted and thus, judgment denying petition for writ of administrative mandate because of defense of laches is not judgment on merits for purposes of res judicata. *Johnson v. City of Loma Linda (2000) 24 Cal. 4th 61, 76-77, 99 Cal. Rptr. 2d 316*

Termination of an action by statute of limitations is a technical rather than a substantive termination and does not operate as a final determination on the merits; therefore, a statute reviving claims arising out of the Northridge earthquake revived claimant's case against his insurance company because his prior lawsuit, dismissed after the court sustained a demurrer, was not litigated to finality in the res judicata sense. *Mid-Century Insurance Co. v. Superior Court (2006) 138 Cal. App. 4th 769, 776-777, 41 Cal. Rptr. 3d 883*

Defendant's dismissal of cross-complaint with prejudice was a judgment on the merits and operated to bar defendant from asserting affirmative defenses involving the same primary rights as those asserted in the cross-complaint. *Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of America (2005) 133 Cal. App. 4th 1319, 1327-1329, 35 Cal. Rptr. 3d 496*

Final judgment on merits not found when appellate division reversed and remanded, then plaintiff voluntarily dismissed without prejudice. *Syufy Enterprises, L.P. v. City of Oakland (2002) 104 Cal. App. 4th 869, 879, 128 Cal. Rptr. 2d 808*

Denial without opinion of writ of mandate or prohibition is not res judicata; court's summary denial of previous writ petition was not decision on merits. *Hoversten v. Superior Court (1999) 74 Cal. App. 4th 636, 640, 88 Cal. Rptr. 2d 197*

Partial summary judgment, not entered as judgment, is not final; election of remedies occurs in two ways, under doctrine of res judicata or under doctrine of estoppel. *Kirkpatrick v. Westamerica Bank (1998) 65 Cal. App. 4th 982, 990-991, 76 Cal. Rptr. 2d 876*

Judgments entered in earlier actions in accordance with settlement agreement and rendered through consent and stipulation, qualified as final on the merits for purposes of res judicata. *Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn. (1998) 60 Cal. App. 4th 1053, 1067-1069, 1073, 71 Cal. Rptr. 2d 77*

When party stipulated to paternity and entry of judgment requiring payment of child support without asking for appointment of counsel or demanding blood test with full knowledge of his rights and without coercion, judgment barred party's later action to establish nonpaternity, even though blood test taken after judgment excluded him as biological father. *Robert J. v. Leslie M. (1997) 51 Cal. App. 4th 1642, 1647-1648, 59 Cal. Rptr. 2d 905*

Res judicata principles sometimes, but not always, apply to administration decisions; cases typically deal with the secondary aspect of res judicata, *i.e.*, collateral estoppel; administrative decisions should not be given res judicata effect if the statutory scheme explicitly or implicitly shows contrary intent; when statutory scheme of remedies contemplates proceedings in different tribunals affording different remedies that are cumulative, not mutually exclusive, res judicata held inapplicable because first proceeding was an administrative proceeding at which the second remedy (statutorily decreed to be a cumulative remedy) could not be sought. *People v. Damon (1996) 51 Cal. App. 4th 958, 967-974, 59 Cal. Rptr. 2d 504*

Trial judge's ruling on issue of substantial justification in awarding costs and attorney fees after trial in taxpayers refund action was not binding on later motion following appeal and remittitur filed by taxpayers in superior court seeking litigation expenses incurred in appellate proceeding; doctrines of res judicata and collateral estoppel inapplicable because first ruling was not in a former action, but was earlier ruling in same action; prior appealable order becomes res judicata in sense that it becomes binding in same case if not appealed; law of case doctrine inapplicable because no appellate court in the litigation ever actually determined question. *Lennane v. Franchise Tax Board (1996) 51 Cal. App. 4th 1180, 1185-1186, 59 Cal. Rptr. 2d 602*

Under federal rule, order or judgment, once rendered, is final for res judicata purposes until it is reversed on appeal, or modified or set aside in the court of rendition. *Lumpkin v. Jordan (1996) 49 Cal. App. 4th 1223, 1230, 57 Cal. Rptr. 2d 303*

Under *Code Civ. Proc. § 913*, when dismissal of appeal was not expressly made without prejudice to another appeal, dismissal does not mean that underlying judgment is not final; res judicata applied. *Lyons v. Security Pacific Nat. Bank (1995) 40 Cal. App. 4th 1001, 1017, 48 Cal. Rptr. 2d 174*

Order denying petition for leave to file complaint alleging civil conspiracy between attorneys under *Civ. Code § 1714.10* on merits is res judicata barring new action based on same primary right; amendment of Section 1714.10 not relevant because change in statute or law does not entitle litigant to escape earlier ruling by filing new action. *Castro v. Higaki (1995) 31 Cal. App. 4th 350, 359, 37 Cal. Rptr. 2d 84*

Doctrine of res judicata as precluding parties or their privities from relitigating cause of action that has been finally determined by court of competent jurisdiction; but judgment not rendered on merits as not operating as a bar; termination of action by statute of limitations as deemed technical or procedural, rather than substantive, termination; hence, summary judgment granted on ground that action is barred by statute of limitations as not precluding subsequent

action on new theory on which statute of limitations has not yet run. *Koch v. Rodlin Enterprises (1990) 223 Cal. App. 3d 1591, 1595-1597, 273 Cal. Rptr. 438*

Fact that judgment is based in part on granting of a nonsuit as not making it any less a judgment on merits for purposes of res judicata. *Aronow v. LaCroix (1990) 219 Cal. App. 3d 1039, 1047, 268 Cal. Rptr. 866*

Although admission by party may be admissible as evidence of liability under *Evid. Code § 1220*, such evidence as not conclusively establishing liability as matter of law for purposes of res judicata. *Aronow v. LaCroix (1990) 219 Cal. App. 3d 1039, 1053, 268 Cal. Rptr. 866*

Final judgment or order as having res judicata effect, even if it is incorrect, if merits of claim are tried and determined or might have been urged, but were not, by one of parties; order as deemed final if it is directly appealable. *Peck v. Hagen (1989) 215 Cal. App. 3d 602, 607-608, 263 Cal. Rptr. 198*

Prior judgment on question of law as conclusive in subsequent action between parties or their privities when both causes of action arose out of same subject matter or transaction and when conclusive reach of that judgment to present action will not result in injustice. *City of Gilroy v. State Bd. of Equalization (1989) 212 Cal. App. 3d 589, 606, 260 Cal. Rptr. 723*

Single adverse intermediate appellate decision, although binding trial court, as not excusing party's failure to pursue available judicial remedies on theory it would have been futile to do so; final judgment on merits of action as precluding parties or their privities from relitigating issues that were or could have been raised in that action; res judicata consequences of final, unappealed judgment on merits as not altered by fact that judgment may have been wrong or rested on legal principle subsequently overruled in another case; change in controlling law as not providing exception to res judicata. *California Coastal Com. v. Superior Court (1989) 210 Cal. App. 3d 1488, 1498, 1498 n.6, 1499, 258 Cal. Rptr. 567*

Order denying motion for summary judgment as not a final judgment and not res judicata. *De La Pena v. Wolfe (1986) 177 Cal. App. 3d 481, 485, 223 Cal. Rptr. 325*

Fraud by party as not undermining conclusiveness of judgment unless fraud was extrinsic, that is, unless it deprived opposing party of opportunity to appear and present its case. *Eichman v. Fotomat Corp. (1983) 147 Cal. App. 3d 1170, 1176, 197 Cal. Rptr. 612*

[c] Policy Considerations

Doctrine of res judicata rests on ground that party to be affected, or some other with whom he or she is in privity, has litigated, or had opportunity to litigate same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to harassment and vexation of his or her opponent; public policy and interests of litigants alike require that there be end to litigation. *Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 181, 98 Cal. Rptr. 2d 44*

Purpose of res judicata doctrine is to preserve integrity of judicial system, promote judicial economy, and protect litigants from harassment by vexatious litigation. *Brinton v. Bankers Pension Services, Inc. (1999) 76 Cal. App. 4th 550, 556, 90 Cal. Rptr. 2d 469*

Doctrine of res judicata, whether applied as total bar to further litigation or as collateral estoppel, rests on sound policy of limiting litigation by preventing party that had one fair adversary hearing on issue from drawing it into controversy again and subjecting other party to further expense in its reexamination; thus, spouse who conceals existence of

community assets, thereby depriving other spouse of opportunity fully to present his or her case in dissolution proceeding, cannot claim judgment of dissolution bars subsequent tort action based on that failure. *Rubenstein v. Rubenstein (2000) 81 Cal. App. 4th 1131, 1144, 97 Cal. Rptr. 2d 707*

Application of res judicata based on policy of preventing party who has had one fair adversary hearing on an issue from relitigating it; res judicata as not barring claim that husband in prior dissolution proceedings violated fiduciary duty to account to wife for community property, including excess assets. *Worton v. Worton (1991) 234 Cal. App. 3d 1638, 1648-1649, 286 Cal. Rptr. 410*

[d] Same Cause of Action in Prior Action

Res judicata did not bar disabled plaintiff's state court action for damages against defendant for alleged violation of California's Disabled Persons Act although federal court had entered a consent decree resolving federal class action for violation of ADA; consent decree was limited to injunctive relief, declaratory relief and attorney fees. *Louie v. BFS Retail and Commercial Operations, LLC (2009) 178 Cal. App. 4th 1544, 1553, 101 Cal. Rptr. 3d 441*

In a case where a company first sought specific performance of a license agreement and in a second suit sought monetary damages based on the same agreement, both suits sought to vindicate the same primary right and therefore the second suit seeking monetary damages was barred under the res judicata doctrine. *Mycogen Corporation v. Monsanto Company (2002) 28 Cal. 4th 888, 904-909, 123 Cal. Rptr. 2d 432*

Plaintiff could not bring action against insurer for breach of the implied covenant of good faith and fair dealing where court had already entered judgment on prior cross-complaint for breach of the duty to defend and indemnify; the two causes of action involved the same primary right and could not be split. *Lincoln Property Co., N.C., Inc. v. The Travelers Indemnity Co. (2006) 137 Cal. App. 4th 905, 913, 41 Cal. Rptr. 3d 39*

When federal court does not exercise pendent jurisdiction over the state claim and it is dismissed out of lawsuit, and plaintiff elects to proceed to trial and judgment in federal court, res judicata does not bar plaintiff from thereafter maintaining second suit on same cause of action in state court. *Harris v. Grimes (2002) 104 Cal. App. 4th 180, 188-189, 127 Cal. Rptr. 2d 791*

To define cause of action California follows primary right theory; two actions constitute single cause of action if they both affect same primary right; there is only single cause of action for invasion of one primary right, even if multiple theories of recovery are asserted. *Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 182, 98 Cal. Rptr. 2d 44*

Rule against plaintiff splitting single cause of action so as to make it basis of several suits is, in part, application of doctrine of res judicata; in determining whether cause of action has been split, relief sought by injured party should not be confused with cause of action; violation of one primary gives rise to single cause of action although many forms of relief may be available; thus, when an insured obtained small claims court judgment against tortfeasor to recover uninsured part of loss, that judment barred insurance company's subrogation action against the tortfeasor to recover amount insurance company had paid to its policyholder to cover losses she suffered as a result of the tortfeasor's negligence; although insurer may bring separate action against the tortfeasor, rule against splitting a cause of action is violated when both insurer and insured pursue separate actions because in subrogation insurer stands in shoes of its insured, and if second action by insured is barred, so is action by insurer; when tortfeasor's single act causes plaintiff to suffer both personal injury and property damage, however, two separate causes of action exist. *Allstate Ins. Co. v. Mel Rapton, Inc. (2000) 77 Cal. App. 4th 901, 905-909, 913-914, 92 Cal. Rptr. 2d 151*

California employs primary rights theory to determine if two successive proceedings involve same cause of action; under primary rights theory, invasion of one primary right gives rise to single cause of action; when court confirmed

private arbitration award against plaintiff, plaintiff barred by doctrine of res judicata from proceeding with subsequent lawsuit when both arbitration and later lawsuit were based on alleged violations of same primary right. *Brinton v. Bankers Pension Services, Inc. (1999) 76 Cal. App. 4th 550, 557, 90 Cal. Rptr. 2d 469*

Unless cause of action in two actions is identical, first judgment does not bar second suit; to define cause of action, California follows primary rights theory, under which cause of action consists of primary right belonging to plaintiff, defendant's corresponding primary duty and defendant's breach of primary right or duty; thus, two actions constitute single cause of action if they both affect same primary right; there is only single cause of action for invasion of one primary right, even if multiple theories of recovery are asserted; court must compare actions, looking at rights which are sought to be vindicated and harm for which redress is claimed; reference must also be made to pleadings and proof in each case. *Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn. (1998) 60 Cal. App. 4th 1053, 1067, 71 Cal. Rptr. 2d 77*

Under primary rights theory, invasion of one primary right gives rise to a single cause of action; two actions constitute single cause of action if they both affect same primary right; cause of action is based on harm suffered rather than particular theory asserted by litigant; cause of action is to be distinguished from remedy or relief sought; when there is only one primary right adverse judgment on merits in first suit is bar even though second suit is based on different theory, or seeks different remedy; thus, when plaintiff splits cause of action, i.e., divides a primary right, into more than one lawsuit and judgment on merits is entered in one of them, defendant in second suit may set up judgment as bar under principles of res judicata. *Weikel v. TCW Realty Fund II Holding Co. (1997) 55 Cal. App. 4th 1234, 1246-1250, 65 Cal. Rptr. 2d 25*

Whether res judicata doctrine applies does not depend on whether the causes of action in present action are identical to causes of action in prior action; although causes of action in first lawsuit may differ from those in second lawsuit, prior determination of an issue in first lawsuit becomes conclusive in subsequent lawsuit between same parties with respect to that issue and also with respect to every matter that might have been urged to sustain or defeat its determination. *Ojavan Investors, Inc. v. California Coastal Com. (1996) 54 Cal. App. 4th 373, 384, 62 Cal. Rptr. 2d 803*

Change in statute or law after final judgment on merits does not entitle litigant to escape earlier ruling by filing new action based on same primary right as adjudicated in earlier action. *Castro v. Higaki (1995) 31 Cal. App. 4th 350, 359, 37 Cal. Rptr. 2d 84*

Doctrine of res judicata does not apply when primary right to seek authorization for indemnity under *Corp. Code § 317* was not same cause of action as one for breach of contract for indemnity or for equitable estoppel since *Corp. Code § 317(g)* expressly provided no preclusive effect on other legal rights for indemnity. *Branson v. Sun-Diamond Growers (1994) 24 Cal. App. 4th 327, 343-345, 29 Cal. Rptr. 2d 314*

California courts as employing "primary rights" theory to determine scope of causes of action; under this theory, only single cause of action exists for invasion of one primary right; involvement of same facts in both suits as not conclusive. *Gill v. Hughes (1991) 227 Cal. App. 3d 1299, 1305, 278 Cal. Rptr. 306*

If second action involves different cause of action, rather than different legal theory, doctrine of res judicata as not applying. *Craig v. County of Los Angeles (1990) 221 Cal. App. 3d 1294, 1299, 271 Cal. Rptr. 82*

Under "primary rights" theory, underlying right sought to be enforced as determinative as to whether cause of action is barred by res judicata principles; in determining primary right, significant factor as being harm suffered. *Takahashi v. Board of Education (1988) 202 Cal. App. 3d 1464, 1474, 249 Cal. Rptr. 578*

Mere fact that plaintiff requested injunctive relief in first suit and monetary relief in second suit as not distinguishing two law suits sufficiently to avoid bar of res judicata in second suit. *Duffy v. City of Long Beach (1988) 201 Cal. App.*

3d 1352, 1358, 247 Cal. Rptr. 715

"Primary right" theory as applied to suits brought to attack similar governmental charges or taxes levied in different years. *Frommhagen v. Board of Supervisors (1987) 197 Cal. App. 3d 1292, 1300, 243 Cal. Rptr. 390*

Doctrine of res judicata as not applying when there are changed conditions and new facts that were not in existence at time of prior judgment, and on which prior judgment was based. *Neil Norman, Ltd. v. William Kasper & Co. (1983) 149 Cal. App. 3d 942, 947, 197 Cal. Rptr. 198*

[e] Claims Decided In Prior Arbitration Proceeding

Arbitration determination of claims against driver and owner of vehicle in which plaintiff was a passenger in which arbitrator assigned one percent of liability to the driver of the other vehicle involved in the accident did not preclude the litigation of the other driver's liability as that defendant was not involved in the arbitration. *Cuevas v. Truline Corp. (2004) 118 Cal. App. 4th 56, 62, 12 Cal. Rptr. 3d 706*

No collateral estoppel effect would be given to arbitration award when on record, two conditions necessary to be satisfied before arbitration award of Fair Employment and Housing Act (FEHA) claim under a collective bargaining agreement (CBA) can be given collateral estoppel effect were not met: (1) agreement to resolve claims by arbitration in CBA must be clear and unmistakable; and (2) arbitration procedures must allow for full litigation and fair adjudication of FEHA claim. *Camargo v. California Portland Cement Company (2001) 86 Cal. App. 4th 995, 1018-1019, 103 Cal. Rptr. 2d 841*

In light of *Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 88 Cal. Rptr. 2d 366, 982 P.2d 229* , no collateral estoppel effect given to private arbitration award; nothing in *Vanderberg* decision, however, imposes or implies any limitation on strict res judicata, or claim preclusive, effect of California law private arbitration award; prior judgment confirming private arbitration award that denied plaintiff's claims was subject to res judicata doctrine's claim preclusion rule thus barring plaintiff's subsequent lawsuit that sought recovery for same injury against defendant whose liability was merely derivative of one of parties in whose favor arbitration award was rendered. *Brinton v. Bankers Pension Services, Inc. (1999) 76 Cal. App. 4th 550, 556-558, 90 Cal. Rptr. 2d 469*

[f] Public Interest Exception

Issue in prior litigation of whether peace officer personnel records may be disclosed at public disciplinary appeal hearings is subject to the public interest exception to the res judicata doctrine. *San Diego Police Officers' Assn. v. City of San Diego Civil Service Commission (2002) 104 Cal. App. 4th 275, 280, 128 Cal. Rptr. 2d 248*

[4] Extraordinary Writs

Summary denial of writ does not establish law of the case whether or not denial is intended to be on merits or is based on some other reason. *Kowis v. Howard (1992) 3 Cal. 4th 888, 899, 12 Cal. Rptr. 2d 728, 838 P. 2d 250*

Denial without opinion of petition for writ of mandate or prohibition is not res judicata; summary denial of previous writ petition in case was not decision on merits. *Hoversten v. Superior Court (1999) 74 Cal. App. 4th 636, 640, 88 Cal. Rptr. 2d 197*

Just because court of appeal denies petition for writ of mandate does not mean it made decision on merits having res judicata effect; proper rule is that unless there is written opinion following issuance of alternative writ, denial of writ

petition does not have issue preclusive effect. *Gammoh v. City of Anaheim (1999) 73 Cal. App. 4th 186, 196, 86 Cal. Rptr. 2d 194*

Terminated police officer, who obtained writ of mandate directing city and its chief of police to reinstate him, was not barred from seeking compensatory damages for violation of his civil rights pursuant to *42 U.S.C. § 1983*, as mandamus proceeding was special proceeding. *Mata v. City of Los Angeles (1993) 20 Cal. App. 4th 141, 149, 24 Cal. Rptr. 2d 314*

[5] Issue Preclusion

[a] Constitutional and Public Policy Restrictions

Sound judicial policy against applying collateral estoppel in cases that concern matters of important public interest, such as certain banking practices. *Chern v. Bank of America (1976) 15 Cal. 3d 866, 872, 127 Cal. Rptr. 110, 544 P.2d 1310*

Public policies underlying collateral estoppel include preservation of integrity of judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation, and these factors can strongly influence whether application of collateral estoppel in particular circumstance would be fair to parties and constitutes sound judicial policy; determination of issue not previously addressed by California court [whether insurer of nurse not named in malpractice complaint was liable for equitable contribution to insurer of hospital and its employees for its "fair share" of indemnity and defense costs incurred in settling malpractice claim] would not undermine any of fundamental public policies and counsels against application of collateral estoppel doctrine, despite contention that previous Arizona court judgment had held under identical facts presented and involving same insurers that insurer was liable for equitable contribution regardless of whether nurse was named as defendant in underlying action; because issue was one of first impression in California; none of policies underlying doctrine of issue preclusion would be advanced in this case where (1) determining issue could not degrade public confidence in judicial system which is threatened when two or more courts render inconsistent decisions, (2) directly addressing issue in California could not be waste of judicial resources, and (3) addressing novel issue could not be seen as baseless or unjustified litigation that might harass party. *American Continental Ins. Co. v. American Casualty Co. of Reading, Pa. (2001) 86 Cal. App. 4th 929, 942-946, 103 Cal. Rptr. 2d 632*

Even if threshold requirements for collateral estoppel are established, res judicata will not be applied if injustice would result or if public interest requires that relitigation not be foreclosed. *Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 181, 98 Cal. Rptr. 2d 44*

Doctrine of collateral estoppel, similar to res judicata, is based on sound public policy of limiting litigation by preventing party who has had one fair trial on an issue from again drawing it into controversy; purposes of both are to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments that undermine integrity of judicial system, and to provide repose by preventing person from being harassed by vexatious litigation; generally, court in deciding whether res judicata is applicable in particular case must balance need to limit litigation against right of fair adversary proceeding in which party may fully present his or her case. *People v. Mitchell (2000) 81 Cal. App. 4th 132, 146, 96 Cal. Rptr. 2d 401*

Collateral estoppel may be applied only if due process requirements are satisfied; due process requires that party to be estopped must have had identity or community of interest with, and adequate representation by, losing party in first action as well as that circumstances must have been such that party to be estopped should reasonably have been expected to be bound by the prior adjudication; court must balance rights of party to be estopped against need for applying collateral estoppel in particular case, in order to promote judicial economy by minimizing repetitive litigation,

to prevent inconsistent judgments which undermine integrity of judicial system, or to protect against vexatious litigation. *Sutton v. Golden Gate Bridge Highway & Transportation Dist. (1998) 68 Cal. App. 4th 1149, 1155, 81 Cal. Rptr. 2d 155* (quoting *Clemmer v. Hartford Insurance Co. (1978) 22 Cal. 3d 865, 874, 151 Cal. Rptr. 285, 587 P.2d 1098*)

Collateral estoppel is not mechanically applied; in each case court must determine whether its application will advance public policies which underlie doctrine; those policies are to (1) promote judicial economy by minimizing repetitive litigation, (2) prevent inconsistent judgments that undermine integrity of judicial system, and (3) provide repose by preventing person from being harassed by vexatious litigation; court concluded that issues resolved on routine sanction motion are not entitled to preclusive effect in later action for malicious prosecution. *Wright v. Ripley (1998) 65 Cal. App. 4th 1189, 1193, 77 Cal. Rptr. 2d 334*

Court's inquiry does not end when threshold requirements for collateral estoppel are met; court must also consider whether application of collateral estoppel in particular case will advance public policies that underlie doctrine; purposes of doctrine are to promote judicial economy by minimizing repetitive litigation, prevent inconsistent judgments that undermine integrity of judicial system and to protect against vexatious litigation. *Younan v. Caruso (1996) 51 Cal. App. 4th 401, 407, 59 Cal. Rptr. 2d 103*

Court of appeal decision affirming that portion of San Francisco Bay Conservation and Development Commission jurisdictional decision which asserted jurisdiction over landowner's property, based on administrative decision that property was "marshland" subject to Commission's jurisdiction under *Gov. Code § 66610* barred landowner who on later appeal contended that property did not meet statutory definition of "marshland," and who should have produced evidence on this issue in earlier proceeding, from producing such evidence due to res judicata and collateral estoppel; although some cases suggest that court may have discretionary power to relax these rules somewhat in rare instances when inability to raise constitutional argument would work serious injustice and harm public interest, case before court not such an exceptional case. *Littoral Development Co. v. San Francisco Bay Conservation and Development Commission (1995) 33 Cal. App. 4th 211, 215-221, 39 Cal. Rptr. 2d 266*

When plaintiff voluntarily dismisses with prejudice one defendant against whom other defendant has cross complained for indemnity, cross defendant cannot use dismissal entered by plaintiff to bar cross complainant from litigating question of cross defendant's negligence in relation to plaintiff. *Long Beach Grand Prix Assn. v. Hunt (1994) 25 Cal. App. 4th 1195, 1203, 31 Cal. Rptr. 2d 70*

Public interest requires full litigation of issue involving public agency's ongoing obligation to administer statutes and regulations enacted for public benefit; application of collateral estoppel against Department of Health Services in action involving limitations period was therefore unjust. *Palmdale Hospital Medical Center v. Department of Health Services (1992) 8 Cal. App. 4th 1306, 1311, 10 Cal. Rptr. 2d 926*

Even if collateral estoppel were otherwise applicable, public interest exception as permitting zoning authority to pass zoning ordinance again; considerations as including changed circumstances, language, or goals. *Ewing v. City of Carmel-by-the-Sea (1991) 234 Cal. App. 3d 1579, 1586, 286 Cal. Rptr. 382*

Doctrine of res judicata as intended to prevent multiple litigation causing vexation and expense to parties and wasted effort and expense in judicial administration by precluding parties from relitigating issues they could have raised in prior action concerning same controversy; most important criterion in determining that two suits concern same controversy is whether they both arose from same transactional nucleus of facts. *Hulsey v. Koehler (1990) 218 Cal. App. 3d 1150, 1157, 267 Cal. Rptr. 523*

Collateral estoppel as not barring separate equitable action for relief from default judgment on grounds of extrinsic fraud even though motion to vacate judgment, denied in earlier action, was made on same grounds, because party

seeking relief did not have opportunity for detailed presentation on issue of extrinsic fraud on earlier motion but was limited to affidavits. *Rohrbasser v. Lederer (1986) 179 Cal. App. 3d 290, 297-300, 224 Cal. Rptr. 791*

[b] Final Judgment on Merits

Litigation of a claim for rent and property damages in a bankruptcy proceeding rendered subsequent proceedings in a superior court for breach of a lease agreement res judicata notwithstanding the fact that the bankruptcy proceeding was dismissed before confirmation of a reorganization plan. *Hecker v. Nathanson (2002) 99 Cal. App. 4th 1158, 1163-1165, 121 Cal. Rptr. 2d 773*

For purposes of issue preclusion, final determination by Workers' Compensation Appeals Board as final judgment. *Traub v. Board of Retirement (1983) 34 Cal. 3d 793, 798, 195 Cal. Rptr. 681, 670 P.2d 335*

Finality for purposes of issue preclusion is not same as finality essential to claim preclusion; issue preclusion may be appropriate even when litigation has not reached stage of merger and bar required for claim preclusion; thus, when underlying cause of action itself is not barred, issue preclusion may nevertheless apply to final order in which personal jurisdiction was found lacking; after previous orders quashing service on ground of lack of personal jurisdiction, plaintiff's failure to seek reconsideration or appellate review barred plaintiff from relitigating issue by direct estoppel. *Sabek, Inc. v. Engelhard Corp. (1998) 65 Cal. App. 4th 992, 997-998, 76 Cal. Rptr. 2d 882* (court distinguishing and disagreeing with *GMS Properties, Inc. v. Superior Court of Fresno County (1963) 219 Cal. App. 2d 407, 33 Cal. Rptr. 163*)

Jury verdict determining comparative fault in wrongful death action was entitled to collateral estoppel effect in action on cross-complaint for equitable indemnity when cross complaint was severed for later trial to the court alone; judgment in wrongful death action would become final when appeal process in that action was completed, allowing application of collateral estoppel principles. *Martin v. County of Los Angeles (1996) 51 Cal. App. 4th 688, 699-701, 59 Cal. Rptr. 2d 303*

While final judgment granting habeas corpus relief is res judicata and decision denying habeas corpus relief is not, under appropriate circumstances decision denying request for habeas corpus relief may, for all intents and purposes, be final as to facts adjudicated and may be given collateral estoppel effect. *Younan v. Caruso (1996) 51 Cal. App. 4th 401, 410-412, 59 Cal. Rptr. 2d 103*

Under federal rule, order or judgment, once rendered, is final for res judicata purposes until it is reversed on appeal, or modified or set aside in court of rendition; for collateral estoppel purposes, federal court's ruling on summary judgment, even though appealed, must be considered final, i.e., if federal court's ruling on summary judgment has not been reversed or modified, decision is final; when prior action was in California state court, however, rule is that judgment is not final for purposes of collateral estoppel while it is open to direct attack, e.g., by appeal. *Lumpkin v. Jordan (1996) 49 Cal. App. 4th 1223, 1230-1231, 57 Cal. Rptr. 2d 303*

First judgment as not precluding second action between same parties on different cause of action, but first judgment as operating as estoppel or conclusive adjudication as to such issues in second action as having been actually litigated or determined in first action; trial court's adjudication, which is interlocutory and nonappealable, as having no res judicata effect and as not constituting estoppel. *Casella v. City of Morgan Hill (1991) 230 Cal. App. 3d 43, 48-49, 280 Cal. Rptr. 876*

Traditional elements of collateral estoppel as including requirement that prior judgment be final. *Long Beach Unified Sch. Dist. v. State of California (1990) 225 Cal. App. 3d 155, 168, 275 Cal. Rptr. 449*

Term "final judgment" as defined less strictly for purposes of issue preclusion through collateral estoppel than for purposes of merger or bar through res judicata; term as including any prior adjudication of issue in another action that is determined to be sufficiently firm to be accorded conclusive effect. *Rymer v. Hagler (1989) 211 Cal. App. 3d 1171, 1181, 260 Cal. Rptr. 76*

In action to determine insurer's duty to defend insured in wrongful-death action, doctrine of collateral estoppel regarding issue of willfulness of insured's act (relating to exclusion in policy) as inapplicable when insured was granted writ of habeas corpus in criminal action that provided basis for collateral estoppel; collateral estoppel doctrine as requiring final judgment on merits. *Grain Dealers Mutual Ins. Co. v. Marino (1988) 200 Cal. App. 3d 1083, 1088-1089, 246 Cal. Rptr. 410*

Doctrine of issue preclusion as not encompassing informal evidentiary ruling that is not binding on judge or parties and that is unnecessary to judgment. *Reed v. Department of Motor Vehicles (1979) 102 Cal. App. 3d 662, 667, 164 Cal. Rptr. 373*

[c] Identical Issue Litigated in Previous Suit

Collateral estoppel doctrine precludes relitigation of issue of parentage previously adjudicated in bastardy proceeding. *Estate of Griswold (2001) 25 Cal. 4th 904, 922, 108 Cal. Rptr. 2d 165, 24 P.3d 1191*

Collateral estoppel doctrine precludes relitigation of issue previously adjudicated by final judgment between the parties; later legislation provided insufficient basis for modifying final injunction. *Professional Engineers v. Department of Transportation (1997) 15 Cal. 4th 543, 568, 574, 63 Cal. Rptr. 2d 467, 936 P.2d 473*

Failure to appeal trial court judgment in prior proceeding in which statement of decision contained dicta unnecessary to judgment did not collaterally estop county from raising different issue. *County of Santa Clara v. Deputy Sheriffs' Ass'n (1992) 3 Cal. 4th 873, 878 n.7, 13 Cal. Rptr. 2d 53, 838 P.2d 781*

Insurer that timely and adequately reserves its right to assert noncoverage defense later and that does not subsequently intentionally waive its reservation of rights as not collaterally estopped by judgment in favor of third party against its insured to assert that insured's conduct was intentional rather than negligent in later action by third party or insured against insurer or by insurer for declaratory relief. *J.C. Penney Casualty Ins. Co. v. M.K. (1991) 52 Cal. 3d 1009, 1017-1018, 278 Cal. Rptr. 64, 804 P.2d 689*

Under collateral estoppel or issue preclusion effect of res judicata, party as barred from raising issue of fact or law if issue was actually litigated and determined by valid and final judgment in previous proceeding and determination was essential to judgment. *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd. (1989) 49 Cal. 3d 1279, 1289-1290, 265 Cal. Rptr. 162, 783 P.2d 749*

For identity of issues purposes when asserting res judicata or collateral estoppel, the issue of whether an appeal is frivolous is not identical to the issue of whether an attorney who pursues an appeal that is ultimately adjudged to be frivolous has committed malpractice. *Dawson v. Toledano (2003) 109 Cal. App. 4th 387, 398, 134 Cal. Rptr. 2d 689*

When issue of attorney's fees is raised in two separate appeals of a litigation, and appellate court defers determination of it in the first appeal, then dismisses the second appeal, issue has not been conclusively resolved and may be raised in a third appeal. *McAdams v. Aiello (2002) 104 Cal. App. 4th 1221, 1226, 128 Cal. Rptr. 2d 742*

Denial of event promoter's motion to intervene in action by district agriculture association to declare municipal ordinance imposing certain license fees and admission taxes invalid did not necessarily decide issue of promoter's

entitlement to reimbursement of license fees and admission taxes paid by him, and therefore action for reimbursement of such fees and taxes was not barred by res judicata and collateral estoppel principles. *Bame v. City of Del Mar (2001) 86 Cal. App. 4th 1346, 1363-1365, 104 Cal. Rptr. 2d 183*

Under doctrine of res judicata, parties to prior proceeding are precluded from relitigating issues determined in prior proceeding; prior judgment operates as estoppel to issues actually litigated and determined in first action; unless issue or cause of action in two actions is identical, first judgment does not bar second suit; if anything is left to conjecture as to what was necessarily involved and decided, there can be no collateral estoppel; it must appear precise question was raised and determined in former suit; there is only a single cause of action for invasion of one primary right, even if multiple theories of recovery are asserted; court focused on identity-of-issues requirement to resolve defendant's claim of res judicata and held prior judgment against plaintiff did not bar plaintiff's current action in that plaintiff's present action for breach of contract did not assert same primary right as plaintiff's prior action in family law court to establish paternity; resolution of issue of enforceability of contract was unnecessary to court's judgment in family law dispute that plaintiff lacked standing to bring paternity action, and neither issue of plaintiff's standing to request paternity nor plaintiff's paternity rights must necessarily be adjudicated to resolve plaintiff's claim for damages for defendant's breach of contract. *Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 180-182, 98 Cal. Rptr. 2d 44*

Settlement that avoids trial generally does not constitute actually litigating any issues and thus prevents application of collateral estoppel; there is line of cases, however, holding that consent or stipulated judgment may properly be given collateral estoppel effect; this principle, however, has been tempered by rule that consent judgment is not usually given preclusive effect in subsequent litigation on different cause of action, unless parties manifest intent in consent judgment to give it preclusive effect. *Rice v. Crow (2000) 81 Cal. App. 4th 725, 736, 737 n.15, 97 Cal. Rptr. 2d 110*

No aspect of what was decided in previous proceeding can be left to conjecture on the record and if it is left to conjecture estoppel is inapplicable. *Silver v. Los Angeles County Metropolitan Transportation Authority (2000) 79 Cal. App. 4th 338, 357, 94 Cal. Rptr. 2d 287*

Issues before family law court and juvenile court can never, in fact, be identical, even if some or all of facts of abuse or neglect adduced in two proceedings are same, because of important differences between purposes and operations of two courts, and state's overriding concern for protection of children. *In re Carissa G. (1999) 76 Cal. App. 4th 731, 736, 90 Cal. Rptr. 2d 561*

Collateral estoppel does not apply when there are changed conditions or new facts which did not exist at time of prior judgment, or where previous decision based on different substantive law; because both underlying factual conditions and substantive law at issue changed from time of earlier decision, issues before court in earlier case and present case were not identical. *United States Golf Ass'n v. Arroyo Software Corp. (1999) 69 Cal. App. 4th 607, 616-619, 81 Cal. Rptr. 2d 708*

For determination of issue to be given preclusive effect, it must have been necessary to judgment. *McMillin Development, Inc. v. Home Buyers Warranty (1998) 68 Cal. App. 4th 896, 906, 80 Cal. Rptr. 2d 611*

Issues resolved on routine sanction motion are not entitled to preclusive effect in later action for malicious prosecution. *Wright v. Ripley (1998) 65 Cal. App. 4th 1189, 1193, 77 Cal. Rptr. 2d 334*

Employee who was terminated was not collaterally estopped from litigating issue of whether he was entitled to posttermination evidentiary hearing by federal district court's earlier ruling that he was not entitled to postdisciplinary hearing following three weeks' suspension; because suspension and termination trigger significantly different due process protections, employee's federal court case did not involve identical issues; also, employee's posttermination rights were not necessarily decided in federal court action because employee had not been terminated when he brought that action. *Townsel v. San Diego Metropolitan Transit Development Bd. (1998) 65 Cal. App. 4th 940, 951-952, 77*

Cal. Rptr. 2d 231

Insurer on notice of action against its insured, but who refuses to defend on ground alleged claim not within policy coverage, is bound by judgment in action, absent fraud or collusion, as to all material findings of fact essential to judgment of liability; insurer not bound, however, as to issues not necessarily adjudicated in prior action and can still present any defenses not inconsistent with judgment against insured; generally speaking, in injured party's action against party alleged to have caused injury, court does not adjudicate issue of insurance coverage; rather only questions litigated are defendant's liability and amount of damages; plaintiff not concerned with theory of liability that produces victory but only with procuring largest possible judgment; similarly, defendant concerned only with avoiding, or at least minimizing, judgment for plaintiff; whether plaintiff's loss covered by defendant's insurance is not germane to action and evidence on that issue would be excluded as irrelevant. *Schaefer/Karpf Productions v. CNA Ins. Companies (1998) 64 Cal. App. 4th 1306, 1313, 76 Cal. Rptr. 2d 42*

When on trustor's death, trust assets were to be distributed to trustor's children, or if they predeceased trustor, to their issue, and trustor's son (decedent) predeceased trustor leaving issue, and trustee filed petition to ascertain beneficiaries and determine entitlement to trust distribution pursuant to *Prob. Code § 17200(b)(4)*, asking whether respondent was an issue of decedent, other son of decedent who opposed trustee's petition held barred from relitigating parent-child relationship between respondent and decedent by interlocutory judgment of dissolution of marriage that made express finding that respondent was one of decedent's four children; although California court's have held child who is not party to divorce action is not bound by determination of his or her status made in that proceeding, those cases did not support decedent's son; those cases might support action by respondent attacking finding of parentage as to her, but she did not make that claim; neither did decedent's son attack finding as to himself; instead, decedent's son challenged finding as to respondent only. *Weir v. Ferreira (1997) 59 Cal. App. 4th 1509, 1514-1517, 70 Cal. Rptr. 2d 33*

In criminal prosecution for making false or fraudulent statements for purpose of obtaining workers' compensation benefits and for perjury, court rejected defendant's contention that because workers' compensation judge concluded defendant did suffer work-related injury, prosecution was collaterally estopped from relitigating whether defendant was injured and if so how injury occurred; element of collateral estoppel is that issue sought to be precluded from relitigation is identical to that decided in former proceeding; issue identity absent in case because issue in criminal trial was whether defendant made material false statements in obtaining workers' compensation benefits, not whether defendant suffered compensable injury. *People v. Gillard (1997) 57 Cal. App. 4th 136, 159, 66 Cal. Rptr. 2d 790*

Trial judge's ruling on issue of substantial justification in awarding costs and attorney fees after trial was not binding on later motion, following appeal and remittitur, filed in superior court seeking litigation expenses incurred in appellate proceeding; res judicata inapplicable in that trial judge's ruling on issue after trial necessarily was made on facts as they then appeared; following remittitur, judge limited decision to question of litigation costs in appellate proceedings in court of appeal and Supreme Court; rulings concerned two different temporal assessments. *Lennane v. Franchise Tax Board (1996) 51 Cal. App. 4th 1180, 1185-1186, 59 Cal. Rptr. 2d 602*

State of California Department of Industrial Relations (DLSE) was not collaterally estopped from litigating proper limitation period in action by it on behalf of workers on public works project for prevailing wages against surety furnishing required payment bond by virtue of DLSE having been losing party in unpublished court of appeal decision of another district of same division when in current case DLSE argued limitation period is governed by *Civ. Code § 3249* and earlier unpublished decision did not address that contention; since identical issue was not necessarily decided in earlier unpublished decision first element for applying collateral estoppel missing. *Division of Labor Standards Enforcement v. Seaboard Sur. Co. (1996) 50 Cal. App. 4th 1501, 1512-1515, 58 Cal. Rptr. 2d 532*

Previously dismissed federal action based on diversity of citizenship that only decided issue of whether plaintiffs had right to sue in federal court and ruled on validity and enforceability of forum selection clause as matter of federal procedural law, did not estop plaintiffs from raising issue of validity and enforceability of clause in later state court

action governed by state substantive law, which involved different considerations. *Wimsatt v. Beverly Hills Weight Loss Clinics Internat., Inc. (1995) 32 Cal. App. 4th 1511, 1516-1524, 38 Cal. Rptr. 2d 612*

Issue adjudicated in prior workers' compensation proceeding was not identical to subsequent proceeding for purposes of collateral estoppel, despite applicant's status as injured worker with substantial percentage of permanent disability in same body parts. *Nash v. Workers' Comp. Appeals Bd. (1994) 24 Cal. App. 4th 1793, 1812-1813, 30 Cal. Rptr. 2d 454*

Factual issue of application of fair return formulas in rent control ordinance was not resolved by earlier cases that challenged only the facial validity of formulas in ordinance; dismissal based on res judicata defense as reversed. *Kirkpatrick v. City of Oceanside (1991) 232 Cal. App. 3d 267, 282, 283 Cal. Rptr. 191*

Collateral estoppel as depending on several preconditions, including (1) issue must have been actually litigated in previous action, which is to say it must have been properly raised by pleadings or otherwise, submitted for determination, and determined; and (2) issue thus litigated must be identical to issue to which estoppel is to apply. *Briggs v. Lawrence (1991) 230 Cal. App. 3d 605, 611, 281 Cal. Rptr. 578*

Request for temporary equitable relief pending determination of case on its merits as entreaty to court to exercise its discretion, and ruling thereon as not determination of merits of case; such pretrial ruling as not subject to issue preclusive effect with respect to merits of action. *People ex rel. Bender v. Wind River Mining Project (1990) 219 Cal. App. 3d 1390, 1395, 269 Cal. Rptr. 106*

Collateral estoppel as precluding parties from litigating issue previously determined in another cause of action between them or their privities; as prerequisite for asserting this doctrine, that issue was in fact litigated and decided in prior action as required to be shown. *Hulsey v. Koehler (1990) 218 Cal. App. 3d 1150, 1156, 1158, 267 Cal. Rptr. 523*

Matrix for determining whether collateral estoppel doctrine may be invoked as being that second action between same parties on different cause of action is not precluded by former judgment, but that first judgment operates as an estoppel or conclusive adjudication as to such issues in second action that were actually litigated and determined in first action. *McClain v. Rush (1989) 216 Cal. App. 3d 18, 28-29, 264 Cal. Rptr. 563*

Issue as "actually litigated" only when it is raised by pleadings and factually resolved either by proof or failure of proof. *In re Pedro C. (1989) 215 Cal. App. 3d 174, 181, 263 Cal. Rptr. 428*

In new action on different cause of action, former judgment as not complete merger or bar, but as effective as collateral estoppel, that is, as conclusive on issues actually litigated between parties in former action; former judgment as not collateral estoppel on issues that might have been raised but were not; just as clearly, former judgment as collateral estoppel on issues that were raised, even though some factual matters or legal arguments that could have been presented were not. *Interinsurance Exchange of the Auto. Club v. Superior Court (1989) 209 Cal. App. 3d 177, 181, 257 Cal. Rptr. 37*

Collateral estoppel as preventing parties from relitigating any issue that was actually litigated and finally decided in earlier action; issue decided in earlier proceeding as required to be identical to one presented in subsequent action. *Flynn v. Gorton (1989) 207 Cal. App. 3d 1550, 1554, 255 Cal. Rptr. 768*

Summary judgment on plaintiff's complaint in favor of one defendant, against whom another defendant had cross complained for comparative indemnity, as not barring cross complaint under principles of collateral estoppel when plaintiff and cross complainant have asserted different theories of liability. *Frank v. State of California (1988) 205 Cal. App. 3d 488, 491-495, 252 Cal. Rptr. 410*

After plaintiff has lost personal injury suit and then dies, heirs as precluded by issue preclusion from bringing

wrongful-death suit based on same injury. *Evans v. Celotex Corp. (1987) 194 Cal. App. 3d 741, 744-745* , 238 Cal. Rtpr. 259

Issue as not finally determined for purposes of issue preclusion if appellate court would not rule on the decision of the trial court on the issue because the issue was moot. *Chamberlin v. City of Palo Alto (1986) 186 Cal. App. 3d 181, 187, 230 Cal. Rptr. 454*

Principles of collateral estoppel as barring cross complaint against first defendant by second defendant for comparative indemnity when summary judgment has been entered on plaintiff's complaint in favor of first defendant on ground that first defendant is not concurrent tortfeasor responsible for plaintiff's injuries. *Columbus Line, Inc. v. Gray Line Sight-Seeing Companies Associated, Inc. (1981) 120 Cal. App. 3d 622, 628-631, 174 Cal. Rptr. 527*

[d] Issue Decided in Prior Administrative Action

At administrative hearing at which government seeks recoupment from welfare recipient for overpayments, recipient may in appropriate circumstances assert equitable estoppel as defense; application of equitable estoppel by administrative agency does not violate either separation of powers doctrine set forth in *Cal. Const., art. III, § 3*, or proscription against exercise of judicial power, as that term is used in *Cal. Const., art. VI, § 1*. *Lentz v. McMahon (1989) 49 Cal. 3d 393, 396, 405-406, 261 Cal. Rptr. 310, 777 P.2d 83*

Los Angeles Housing Authority was collaterally estopped from denying that respondent was entitled to benefits of *Lab. Code § 4850* because issue had been resolved against Housing Authority in previous workers' compensation case. *Housing Authority v. Workers' Comp. Appeals Bd. (1998) 60 Cal. App. 4th 1076, 1083-1084, 70 Cal. Rptr. 2d 738*

When statutory scheme contemplates proceedings in different tribunals affording different remedies which are cumulative, not mutually exclusive, res judicata held inapplicable because first proceeding was administrative proceeding at which second remedy could not be sought; administrative decisions should not be given res judicata effect if statutory scheme explicitly or implicitly shows contrary intent; People's civil action alleging unfair business practices in defendant's operation of automotive repair dealership, pursuant to Automotive Repair Act (*Bus. & Prof. Code § 9880 et seq.*), was not barred by res judicata following administrative proceeding by Department of Consumer Affairs for violations of Automotive Repair Act; civil statutes did not authorize any action be taken against registration whereas administrative statutes did not authorize imposition of civil penalty for unfair business practices. *People v. Damon (1996) 51 Cal. App. 4th 958, 967-974, 59 Cal. Rptr. 2d 504*

Doctrine of collateral estoppel does not apply when fundamental nature of proceedings before administrative agency and trial court are significantly different, as when primary issue in administrative hearings is to determine whether to revoke license and primary issue in civil action is to determine amount necessary to compensate injured party fully for licensee's breach of contract. *Bronco Wine Co. v. Frank A. Logoluso Farms (1989) 214 Cal. App. 3d 699, 710-712, 262 Cal. Rptr. 899*

Failure of probationary teaching employee to seek judicial review by writ under *Gov. Code § 11523* of State Personnel Board determination that he could not reasonably be accommodated because of aggravation of epilepsy collaterally estopped employee from pursuing claim in civil action under *Fair Employment and Housing Act. Oquendo v. California Institution for Women (1989) 212 Cal. App. 3d 520, 522-523, 260 Cal. Rptr. 688*

Doctrine of collateral estoppel applies to final decisions of administrative agencies acting in judicial or quasi-judicial capacity; administrative agency acts in judicial capacity when it resolves disputed issues of fact properly before it and provides parties with opportunity to present evidence and to litigate issues fully. *Rymer v. Hagler (1989) 211 Cal. App. 3d 1171, 1178-1179, 260 Cal. Rptr. 76*

Term "jurisdiction," for purposes of applying narrow res judicata exception permitting collateral attack of agency's action taken without jurisdiction, is limited to jurisdiction of most fundamental kind; if tribunal has jurisdiction of parties and of subject matter, decision by it as res judicata notwithstanding that decision is incorrect. *California Coastal Com. v. Superior Court (1989) 210 Cal. App. 3d 1488, 1501, 258 Cal. Rptr. 567*

Decision of quasi-judicial administrative agency is entitled to res judicata effect when agency's function is reviewing another agency's decision to determine whether the decision conforms to the law and is supported by substantial evidence. *City and County of San Francisco v. Ang (1979) 97 Cal. App. 3d 673, 678-679, 159 Cal. Rptr. 56*

[e] Issue Decided in Prior Criminal Action

Applicability of doctrine of collateral estoppel (issue preclusion) in criminal proceedings. *Lucido v. Superior Court (1990) 51 Cal. 3d 335, 341-351, 272 Cal. Rptr. 767, 795 P.2d 1223*

Issue preclusion as applicable in civil case to issues determined in previous criminal prosecution. *Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd. (1962) 58 Cal. 2d 601, 604-607, 25 Cal. Rptr. 559, 375 P.2d 439*

Applicability of collateral estoppel in later action for attorney malpractice when civil malpractice complaint is based on same factual allegations of attorney neglect which were actually determined after full evidentiary hearing in earlier habeas corpus proceeding in which relief sought was based on ineffective assistance of counsel. *Younan v. Caruso (1996) 51 Cal. App. 4th 401, 408-414, 59 Cal. Rptr. 2d 103*

Collateral estoppel properly applied to preclude relitigation, in civil declaratory relief action, of issue determined in juvenile court proceeding. *Western Mutual Ins. Co. v. Yamamoto (1994) 29 Cal. App. 4th 1474, 1483, 35 Cal. Rptr. 2d 698*

Purposes of collateral estoppel as being (1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments that undermine integrity of judicial system; and (3) to provide repose by preventing person from being harassed by vexatious litigation; in deciding whether doctrine is applicable in particular criminal trial, court as required to balance need to limit litigation against right of fair adversary proceeding in which party may fully present his or her case; pursuit of judicial economy and efficiency as never to be used to deny defendant right to fair trial. *People v. Hogue (1991) 228 Cal. App. 3d 1500, 1506, 279 Cal. Rptr. 647*

Department of Social Services, in administrative proceeding to recover entire amount of welfare funds wrongfully received by petitioner as not collaterally estopped to claim portion of amount by criminal proceeding in which petitioner had pleaded guilty to welfare fraud and, as condition of probation, has been ordered to pay that portion in restitution, since issue necessarily decided in criminal proceeding (appropriate amount of restitution) was not same as issue litigated in administrative proceeding (amount of overpayment). *Shor v. Department of Social Services (1990) 223 Cal. App. 3d 70, 73-74, 272 Cal. Rptr. 632*

In administrative disciplinary proceeding before State Personnel Board resulting in discharge of youth counselor for theft of property from youth facility, board erred in failing to exclude as evidence property improperly seized at employee's home under doctrine of res judicata when property seized was excluded as evidence in criminal prosecution, criminal prosecution was dismissed, and subsequent administrative hearing was initiated by facility. *Dyson v. State Personnel Bd. (1989) 213 Cal. App. 3d 711, 715-728, 262 Cal. Rptr. 112*

Doctrine of collateral estoppel as applicable in civil case to issues determined in prior criminal proceeding by court in ruling on motion to suppress evidence under Code Civ. Proc. § 1538.5, provided necessary criteria are met: (1) prior

conviction must have been for serious offense so that defendant was motivated to litigate charges fully; (2) there must have been full and fair trial to prevent convictions of doubtful validity from being used; (3) issue on which prior conviction is offered must of necessity have been decided at criminal trial; and (4) party against whom collateral estoppel is asserted was party or in privity with party at prior trial. *McGowan v. City of San Diego (1989) 208 Cal. App. 3d 890, 895, 256 Cal. Rptr. 537*

Any doubt as to what was decided by prior criminal proceeding as to be resolved against using it as estoppel in civil action, as litigant invoking doctrine will still have opportunity to establish its contentions at trial. *McGowan v. City of San Diego (1989) 208 Cal. App. 3d 890, 897, 256 Cal. Rptr. 537*

Application of doctrine of collateral estoppel to bar civil action after prior adjudication in criminal prosecution of issues raised in it as not violating plaintiff's right to jury trial under *U.S. Const., amend. VII*, which was designed to preserve basic institution of jury trial in only its most fundamental elements. *McGowan v. City of San Diego (1989) 208 Cal. App. 3d 890, 897-898, 256 Cal. Rptr. 537*

[f] Use of Issue Preclusion by Stranger

Offensive use of issue preclusion does not violate right to jury trial under *U.S. Const., amend. VII*. *Parklane Hosiery Co. v. Shore (1979) 439 U.S. 322, 337, 99 S. Ct. 645, 58 L. Ed. 2d 552*

Defendant is not precluded by lack of privity or of mutuality of estoppel from asserting issue preclusion against plaintiff. *Bernhard v. Bank of America (1942) 19 Cal. 2d 807, 813, 122 P.2d 892*

By abrogating requirement of mutuality, different parties, not party to or in privity with party to prior action, may assert collateral estoppel defensively as shield against one who was party to prior action to prevent party to prior action from relitigating issue it already actually litigated. *Rice v. Crow (2000) 81 Cal. App. 4th 725, 736, 97 Cal. Rptr. 2d 110*

It is party against whom collateral estoppel is sought to be invoked that must be same as or in privity with party in earlier proceeding. *Housing Authority v. Workers' Comp. Appeals Bd. (1998) 60 Cal. App. 4th 1076, 1083, 70 Cal. Rptr. 2d 738*

Collateral estoppel is equitable concept based on fundamental principles of fairness; offensive use of collateral estoppel is more closely scrutinized than defensive use of doctrine. *White Motor Corp. v. Teresinski (1989) 214 Cal. App. 3d 754, 763, 263 Cal. Rptr. 26*

Consent judgment against trustors in lender's foreclosure action in which they had raised lender's fraud in inducement as affirmative defense barred trustors' cross complaint for fraud against lender's parent corporation by collateral estoppel, because fraud alleged in cross complaint was related only to inducing loan and could have been fully litigated in foreclosure action. *Wittman v. Chrysler Corp (1988) 199 Cal. App. 3d 586, 591-593, 245 Cal. Rptr. 20*

[6] Judgments of Federal or Sister-State Courts

Final judgment in 1941 Ohio bastardy proceeding is res judicata in probate action in California court. *Estate of Griswold (2001) 25 Cal. 4th 904, 922-923, 108 Cal. Rptr. 2d 165, 24 P.3d 1191*

Final judgment entered in action filed in California is res judicata in federal court action. *Palomar Mobilehome Park Ass'n v. San Marcos (9th Cir. 1993) 989 F.2d 362, 364*

After federal court found some sections of Proposition 73 unconstitutional, relitigation of state law issue, i.e., whether

sections that were declared unconstitutional could be reformed so as to avoid their unconstitutionality, was not precluded in later state court proceeding under public interest exception to doctrines of res judicata and collateral estoppel; following federal judgment, state court not bound by federal law when determining whether exception to the doctrines of res judicata or collateral estoppel applies; application of public interest exception is not conditioned on finding that initial determination of issue was erroneous. *Kopp v. Fair Pol. Practices Com. (1995) 11 Cal. 4th 607, 620-626* and n.16, 675, 685, 693, *47 Cal. Rptr. 2d 108, 905 P 2d 1248* (Lucus, C.J.; Werdegar, J., concurring; Baxter, J., joined by Arabian, J., and George, J., concurring and dissenting)

Because Florida federal district court class action alleging defendant's facilities denied equal access to disabled persons in violation of Americans with Disabilities Act was resolved by consent decree expressly reserving damage claims, res judicata did not bar plaintiff's action for alleged violation of California's Disabled Persons Act [*Civ. Code § 54 et seq.*] because countertops in defendant's business establishments were allegedly too high to allow wheelchair access, where federal court was not required to decide whether to dismiss state law claims, because those claims were reserved by the consent of parties reserving any issue of damages. *Louie v. BFS Retail & Commercial Operations, LLC (2009) 178 Cal. App. 4th 1544, 1553-1560, 101 Cal. Rptr. 3d 441*

Insurer was not collaterally estopped from relitigating issue of its liability for equitable contribution, despite contention that Arizona court had held in different case, but under identical fact situation involving same insurance companies, that insurer of nurse under professional liability policy was liable for equitable contribution to insurer of hospital and its employees who had settled medical malpractice action, even though nurse was not named as defendant in underlying action; Arizona court was applying Arizona law, and to extent it may have relied on California law, Arizona court wrongly applied it; doctrine of collateral estoppel cannot be used to bind California litigant to principle of law adopted in prior foreign court litigation that is contrary to California law, nor can it be utilized to preclude party from litigating novel issue of law in California merely because that party had failed to persuade court of another state on wisdom of its position, particularly where it appeared that foreign court based its decision, at least in part, on its interpretation of California authority; insurer seeking equitable contribution failed to establish that "same issue" was actually litigated and resolved in prior litigation since Arizona court reached its decision under Arizona law. *American Continental Ins. Co. v. American Casualty Co. of Reading, Pa. (2001) 86 Cal. App. 4th 929, 942-946, 103 Cal. Rptr. 2d 632*

Preclusive effect of prior federal court judgment is determined by federal law, at least when prior judgment was on bases of federal question jurisdiction; *California Supreme Court in Levy v. Cohen (1977) 19 Cal. 3d 165, 172-173, 137 Cal. Rptr. 162, 561 P.2d 252* and *Martin v. Martin (1970) 2 Cal. 3d 752, 761, 470 P.2d 662* , did not give any indication that rule would differ depending on whether federal court jurisdiction was based on diversity or federal question; whether California Supreme Court, in a diversity situation, would apply res judicata law of state whose law federal court was applying, or would apply federal law under rule of *Levy* and *Martin*, result would be to look to California law. *Butcher v. Truck Ins. Exchange (2000) 77 Cal. App. 4th 1442, 1452-1455, 92 Cal. Rptr. 2d 521*

Judgment of court of one state is conclusive on merits in court in another state only if court in first state had jurisdiction to render judgment; thus, before court is bound by judgment rendered in another state, it may inquire into jurisdictional basis of foreign court's decree; if that court did not have jurisdiction over subject matter or relevant parties, full faith and credit need not be given; judgment may be challenged only if issue of jurisdiction was not litigated in foreign state; if that question was expressly litigated, determination is res judicata and is itself protected by full faith and credit clause. *Bank of America v. Jennett (1999) 77 Cal. App. 4th 104, 113-114, 91 Cal. Rptr. 2d 359*

When federal court granted summary judgment to defendant concerning plaintiff's employment discrimination claim brought under *42 U.S.C. § 1983* and declined to exercise supplemental jurisdiction on plaintiff's cause of action under the California Fair Employment and Housing Act (FEHA) barring discrimination in employment decisions on the basis of religion (*Gov. Code § 12940*) and dismissed the FEHA claims without prejudice to refiling in state court, state court held to have properly sustained defendant's demurrer to plaintiff's complaint in that issues raised in plaintiff's complaint had been fully litigated in prior federal action and plaintiff was collaterally estopped from relitigating them. *Lumpkin*

v. Jordan (1996) 49 Cal. App. 4th 1223, 1229-1234, 57 Cal. Rptr. 2d 303

Federal judgment has same effect in California state courts as it would have in federal court; under federal rule, federal order or judgment, once rendered, is final for res judicata purposes until it is reversed on appeal, or modified or set aside in court of rendition. *Lumpkin v. Jordan (1996) 49 Cal. App. 4th 1223, 1230-1231, 57 Cal. Rptr. 2d 303*

Plaintiffs' cause of action for violation of Racketeer Influenced and Corrupt Organizations Act (RICO) was untenable in state court action in light of plaintiffs' RICO claim against defendants having been earlier dismissed with prejudice in federal district court; although appeal from district court's judgment was pending before Ninth Circuit, federal judgment is final for res judicata purposes until reversed, and doctrine of res judicata precludes litigation of any claim that could have been raised in federal action. *Abdallah v. United Savings Bank (1996) 43 Cal. App. 4th 1101, 1110, 51 Cal. Rptr. 2d 286*

Failure of a debtor to disclose its lender-liability lawsuit cause of action in bankruptcy proceeding barred debtor under one or another form of issue preclusion from thereafter proceeding with state court action against lender alleging that lender was catalyst for bankruptcy when in bankruptcy proceeding the lender obtained final bankruptcy orders liquidating its claims against debtor and giving lender all of debtors tangible and intangible property. *Billmeyer v. Plaza Bank of Commerce (1995) 42 Cal. App. 4th 1086, 1096, 50 Cal. Rptr. 2d 119*

Federal court's summary adjudication of federal claim and dismissal of plaintiffs' pendent claims without prejudice to their being refiled in state court, all of which claims arose out of alleged fraudulent acquisition, subdivision, and resale of Arizona property to plaintiffs, as not res judicata on plaintiffs' state law claims and as not barring action in California state court on those claims. *Koch v. Hankins (1990) 223 Cal. App. 3d 1599, 1602, 1605, 273 Cal. Rptr. 442* (distinguishing *Mattson v. City of Costa Mesa (1980) 106 Cal. App. 3d 441, 164 Cal. Rptr. 913*)

Prior judgment rendered by federal court as required to be given same effect by state courts that it would have in federal court; in addition, principles governing federal court's power over nonfederal claims as coming into play in determining preclusive effect of judgment in subsequent state court action on state claims. *Koch v. Hankins (1990) 223 Cal. App. 3d 1599, 1603, 273 Cal. Rptr. 442*

Full faith and credit clause (U.S. *Const., art. IV, § 1*) as generally requiring every state to give to judgment of court of another state at least res judicata effect that judgment would be accorded in state rendering it; state court judgment as not to be given full faith and credit by other states as to parties or property not subject to jurisdiction of court that rendered it unless that state fully and fairly litigated its jurisdiction and finally decided question in favor of jurisdiction, in which case second state is not permitted to reexamine question but must give judgment of first state full faith and credit; burden of showing invalidity of judgment as on party attacking it, and, in absence of violation of federal constitutional rights, validity and effect of judgment of sister state as governed by law of state where judgment was rendered. *St. Sava Mission Corp. v. Serbian Eastern Orthodox Diocese (1990) 223 Cal. App. 3d 1354, 1364, 273 Cal. Rptr. 340*

Trial court as erring in sustaining defendant's demurrer to complaint for employment discrimination on ground of res judicata based on prior federal civil rights action because federal court had dismissed state actions without consideration when they were pendent to federal civil rights causes of action that had been summarily dismissed; federal court left resolution of pendent state claims to state court by noting that statute of limitations on those claims was equitably tolled by federal court's decision not to exercise pendent jurisdiction. *Craig v. County of Los Angeles (1990) 221 Cal. App. 3d 1294, 1299, 1301, 271 Cal. Rptr. 82*

Judgment in federal court action against plaintiff as res judicata of simultaneously filed state court action containing virtually identical allegations; although state court had concurrent jurisdiction over matter and plaintiff could theoretically initiate simultaneous actions in both forums, final judgment deciding matter by one court as barring action

in other court under basic res judicata principles. *Weber v. Willard (1989) 207 Cal. App. 3d 1006, 1009, 255 Cal. Rptr. 165*

Final judgment in sister-state action as res judicata in California action involving same issues even though California action filed first. *Baughman v. State Farm Mut. Auto. Ins. Co. (1983) 148 Cal. App. 3d 621, 624-625, 196 Cal. Rptr. 35*

If federal court declines to exercise pendent jurisdiction over state claim that would be barred by res judicata principles from being prosecuted if federal claim is fully litigated and plaintiff then elects to proceed to trial and judgment in federal court, entire cause of action, including state claim, as either merged or barred by federal court judgment so that plaintiff may not thereafter maintain second suit on same cause of action in state court. *Mattson v. City of Costa Mesa (1980) 106 Cal. App. 3d 441, 455, 164 Cal. Rptr. 913*

[7] Judicial Estoppel

Doctrine of judicial estoppel prevents party from taking two inconsistent positions in the same proceeding, including in the same document. Plaintiffs sued hospital contending that hospital's policy of terminating medical care for patients who file lawsuits is illegal. In opposition to the hospital's motion for summary judgment, plaintiffs contended that the hospital's actions violated the professional duty of care. Elsewhere in the same document, the plaintiffs asserted that the hospital's actions were administrative, not professional decisions. This latter assertion was made by plaintiffs in an attempt to avoid summary adjudication of the punitive damages claim. The court held that plaintiffs were judicially estopped from asserting the latter position. Each of the elements of the test for judicial estoppel set forth in *Jackson v. Cty. of Los Angeles (1997) 60 Cal. App. 4th 171, 183, 70 Cal. Rptr. 2d 96* were met. *Scripps Clinic v. Superior Court (Thompson) (2003) 108 Cal. App. 4th 917, 943, 134 Cal. Rptr. 2d 101*

Principles stated in *Thomas v. Gordon (2000) 85 Cal. App. 4th 113, 102 Cal. Rptr. 2d 28* (some courts not limiting judicial estoppel where litigant successfully asserted contradictory position) did not apply in case in which defendant's position in prior proceeding was not adopted by the trial court in that proceeding and defendant had not gained any advantage by virtue of the inconsistent position taken in the prior matter; exception stated in *Thomas* limited to "rare situation" where litigant has made an egregious attempt to manipulate the legal system. *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port District (2003) 106 Cal. App. 4th 1219, 1244-1247, 132 Cal. Rptr. 2d 57*

In plaintiff's suit against accountant and accountancy corporation for fraud or breach of a duty of care for failing to inform her of financial condition of corporations to which she had transferred assets to keep those assets out of her creditors' hands, plaintiff was estopped from claiming any equitable interest in those corporations; plaintiff had declared under oath in multiple unrelated bankruptcy proceedings that she had no interest in assets of those corporations, and court held that, assuming that doctrine of judicial estoppel should be applied to unsuccessful litigant only in rare situation where litigant had made egregious attempt to manipulate legal system, this was situation that warranted application of judicial estoppel even absent proof of success in earlier litigation; also, trial court properly inferred that position taken in earlier litigation was not taken as result of ignorance, fraud, or mistake given plaintiff's admission that she formed corporations to hide assets from creditors and her failure to list corporations in bankruptcy petition two years later; alleged failure to read bankruptcy petitions or schedules before signing them and reliance on advice of professionals as to which assets to list was not type of ignorance that permits party to avoid impact of signing legal document. *Thomas v. Gordon (2000) 85 Cal. App. 4th 113, 118-121, 102 Cal. Rptr. 2d 28*

When former employees prevailed in action brought against them by their former employer for, among other things, misappropriation of trade secrets, unfair competition, and breach of confidentiality agreements, and sought attorney's fees award under *Civ. Code § 1717*, employer was judicially estopped from denying that the contract authorized award of attorney fees when employer's complaint had included request for attorney fees incurred in action and had copy of

agreement that included fees provision attached. *International Billing Services, Inc. v. Emigh (2000) 84 Cal. App. 4th 1175, 1186-1192, 101 Cal. Rptr. 2d 532*

Doctrine of judicial estoppel precludes party from asserting position in judicial proceeding that is inconsistent with position previously successfully asserted in prior proceeding and prevents use of intentional self-contradiction as means of obtaining unfair advantage in forum provided for suitors seeking justice; when plaintiffs sought and obtained leave of bankruptcy court for relief from stay to allow them to foreclose on property, in later action plaintiffs were estopped to deny knowledge of appraisal report submitted through their counsel on their behalf in bankruptcy court; plaintiffs cannot be permitted to obtain right to foreclose on piece of property by assuring bankruptcy court that it is worth less than its liens, and then complain in later suit that they were surprised by their inability to make huge windfall profit on it; possibility plaintiffs might not have been aware of their counsel's specific arguments to court does not make them innocent bystanders; they accepted benefits of their counsel's representations to court and went ahead with foreclosure and resale; for purposes of judicial estoppel, their actual knowledge irrelevant. *Michelson v. Camp (1999) 72 Cal. App. 4th 955, 959, 970-971, 85 Cal. Rptr. 2d 539*

Judicial estoppel (doctrine against assertion of inconsistent positions) is judge made doctrine that seeks to prevent litigant from asserting position inconsistent with one that litigant previously asserted in same or previous proceeding; it is designed to prevent litigants from playing fast and loose with courts; asserting inconsistent positions does not trigger application of judicial estoppel unless intentional self-contradiction is used as means of obtaining unfair advantage; doctrine does not apply when position taken because of good faith mistake rather than as part of scheme to mislead court; inconsistent argument sufficient to invoke judicial estoppel must be attributable to intentional wrongdoing; whether judicial estoppel should apply is factual question; determination of existence of judicial estoppel is factual finding that will be upheld if supported by substantial evidence; judicial estoppel should be applied with caution; it is extraordinary remedy to be invoked when party's inconsistent behavior will otherwise result in miscarriage of justice; judicial estoppel rarely appropriate in chapter 7 context in case in which debtor failed to schedule claim. *Haley v. Dow Lewis Motors, Inc. (1999) 72 Cal. App. 4th 497, 509-511, 85 Cal. Rptr. 2d 352*

In suit claiming racial harassment and wrongful termination, evidence of inconsistency in positions taken in disability proceeding and current lawsuit supported trial court's application of judicial estoppel doctrine; doctrine of judicial estoppel has had particular significance in cases involving Americans With Disabilities Act of 1990 (*42 U.S.C. § 12101 et seq.*); significant number of federal courts have decided that person who characterizes himself or herself as "totally disabled" to receive state, federal, or even insurance benefits will normally be estopped from proving that he or she is qualified individual with disability within meaning of ADA or similar state laws; although phrased in terms of racial discrimination, instant case analogous to an ADA claim; because judicial estoppel is equitable doctrine, circumstance may warrant application of doctrine even if earlier position was not adopted by tribunal; thus, when plaintiff earlier sought workers' compensation benefits and received award through compromise and settlement, approved by workers' compensation referee, although no factual findings were incorporated in referee's approval of parties' compromise and release, that held not fatal to applying judicial estoppel under facts of case. *Drain v. Betz Laboratories, Inc. (1999) 69 Cal. App. 4th 950, 956-960, 81 Cal. Rptr. 2d 864* (distinguishing *Bell v. Wells Fargo Bank (1998) 62 Cal. App. 4th 1382, 73 Cal. Rptr. 2d 354* , as not involving totally inconsistent position in the two proceedings, and *Prilliman v. United Airlines, Inc. (1997) 53 Cal. App. 4th 935, 62 Cal. Rptr. 2d 142* , as not involving two clearly inconsistent positions)

Doctrine of judicial estoppel applied to bar defendant from successfully opposing California Coastal Commission's motion to enforce previously entered stipulated judgment in its favor when defendant's defense against motion was that "Calvo exclusion" applied, but merits of that defense had been resolved when defendant earlier stipulated to judgment thereby agreeing that Commission had authority to require defendant to restore property; under doctrine of judicial estoppel, party who has taken particular position in litigation, may under some circumstances, be estopped from taking inconsistent position to detriment of other party; here defendant took inconsistent positions in litigation, first waiving right to further litigate exclusion and agreeing to obey any Commission order regarding restoration of property, and

later asserting exclusion and denying obligation to obey Commission orders; detriment to other party clear. *California Coastal Com. v. Tahmassebi (1998) 69 Cal. App. 4th 255, 259, 81 Cal. Rptr. 2d 321*

Cases such as *Ryan Operations G.P. v. Santiam-Midwest Lumber Co (3d Cir 1996) 81 F.3d 355, 359-360* and *International Engine Parts, Inc. v. Feddersen & Co. (1998) 64 Cal. App. 4th 345, 350-351, 75 Cal. Rptr. 2d 178* , can be cited as authority for proposition that (1) judicial estoppel can be applied to bar claim beyond reaches of res judicata and can preclude suit even against party whose legal liabilities have never previously been determined, (2) doctrine is intended to protect judiciary without regard to litigant's rights, (3) doctrine may be invoked in court's discretion, (4) it requires neither reliance nor prejudice, and (5) it may bar claim without regard to rights of creditors of bankruptcy estate involved; trial court should not have attempted to decide issue on motion for judgment on pleadings. *Cloud v. Northrop Grumman Corp. (1998) 67 Cal. App. 4th 995, 1016, 79 Cal. Rptr. 2d 544*

[8] Merger of Cause of Action in Judgment

Under doctrine of res judicata, once plaintiff prevails on his or her claim, cause of action as merged into judgment and plaintiff's only remaining right as on judgment; merger as prohibiting plaintiff from splitting single cause of action into successive suits. *Craig v. County of Los Angeles (1990) 221 Cal. App. 3d 1294, 1301, 271 Cal. Rptr. 82*

Doctrine of res judicata as giving conclusive effect to former judgment in subsequent litigation between same parties involving same cause of action; prior judgment for plaintiff as resulting in merger and superseding new action by right of action on judgment, and prior judgment for defendant on same cause of action as complete bar to new action. *Rymer v. Hagler (1989) 211 Cal. App. 3d 1171, 1178, 260 Cal. Rptr. 76*

[9] Nature and Effect of Res Judicata Doctrine

Collateral estoppel is one of two aspects of doctrine of res judicata; in its narrowest form, res judicata precludes parties or their privies from relitigating cause of action finally resolved in prior proceeding; res judicata also includes broader principle, collateral estoppel, under which issue necessarily decided in prior litigation may be conclusively determined against parties thereto or their privies; thus, res judicata does not merely bar relitigation of identical claims or causes of action; in its collateral estoppel aspect, doctrine may preclude party to prior litigation from redisputing issues decided against him or her, even when those issues bear on different claims raised in later case. *Vandenberg v. Superior Court (1999) 21 Cal. 4th 815, 828, 88 Cal. Rptr. 2d 366, 982 P.2d 229*

Under doctrine of res judicata, parties to prior proceeding are precluded from relitigating issues determined in prior proceeding; prior judgment operates as estoppel to issues actually litigated and determined in first action; unless issue or cause of action in two actions is identical, first judgment does not stand as bar to second suit; prior determination by tribunal will be given collateral estoppel effect when (1) issue is identical to that decided in former proceeding, (2) issue is actually litigated and (3) necessarily decided, (4) doctrine is asserted against party to former action or one in privity with such party, and (5) former decision is final and made on merits; if anything is left to conjecture as to what was necessarily involved and decided, there can be no collateral estoppel; it must appear the precise question was raised and determined in former suit. *Dunkin v. Boskey (2000) 82 Cal. App. 4th 171, 180-181, 98 Cal. Rptr. 2d 44*

Doctrine of res judicata consists of two different aspects; first, it precludes parties or their privies from relitigating cause of action that has been finally determined by court of competent jurisdiction; this is traditionally referred to as "res judicata" or "claim preclusion"; second, any issue necessarily decided in such litigation is conclusively determined as to parties or their privies if it is involved in subsequent lawsuit as to parties on different cause of action; this is known as "collateral estoppel" or "issue preclusion"; res judicata is applicable only to same causes of action between same parties or their privies; collateral estoppel is applicable to bar relitigation of issues previously litigated between same parties on different cause of action if issues for which collateral estoppel is sought in second action (1) are identical to

those litigated in first action, (2) were actually litigated and necessarily decided in determining first action, (3) are asserted against a participant in first action or one in privity with that party, and (4) former decision was final on merits. *Rice v. Crow (2000) 81 Cal. App. 4th 725, 734-735, 97 Cal. Rptr. 2d 110*

Prior determination will be given collateral estoppel effect when (1) issue is identical to that decided in a former proceeding, (2) issue was actually litigated and (3) necessarily decided, (4) doctrine is asserted against party to former action or one who was in privity with such a party, and (5) former decision is final and was made on merits; no aspect of what was decided in previous proceeding can be left to conjecture on the record and if it is left to conjecture estoppel is inapplicable. *Silver v. Los Angeles County Metropolitan Transportation Authority (2000) 79 Cal. App. 4th 338, 357, 94 Cal. Rptr. 2d 287*

Doctrine of collateral estoppel precludes relitigation of issue previously adjudicated if (1) the issue necessarily decided in previous suit is identical to issue sought to be relitigated, (2) there is final judgment on merits of previous suit, and (3) party against whom plea is asserted was party, or in privity with party, to previous suit, stranger to prior judgment may assert defensive issue preclusion. *Campbell v. Scripps Bank (2000) 78 Cal. App. 4th 1328, 1334-1335, 93 Cal. Rptr. 2d 635*

Generally speaking, valid final judgment in plaintiff's favor merges any claim of same cause of action in judgment, and precludes plaintiff from maintaining any later suit on same cause of action; rule against plaintiff splitting single cause of action so as to make it basis of several suits is, in part, an application of doctrine of res judicata. *Allstate Ins. Co. v. Mel Rapton, Inc. (2000) 77 Cal. App. 4th 901, 907, 92 Cal. Rptr. 2d 151*

Doctrine of res judicata has two aspects; it applies to both a previously litigated cause of action, referred to as claim preclusion, and to an issue necessarily decided in prior action, referred to as issue preclusion; prerequisite elements for applying doctrine to either entire cause of action or one or more issues are same: (1) claim or issue raised in present action is identical to claim or issue litigated in prior proceeding, (2) prior proceeding resulted in final judgment on the merits, and (3) party against whom doctrine is asserted was party or in privity with party to prior proceeding. *Brinton v. Bankers Pension Services, Inc. (1999) 76 Cal. App. 4th 550, 556, 90 Cal. Rptr. 2d 469*

Doctrine of collateral estoppel or issue preclusion is secondary form of res judicata; it prevents party who had full and fair opportunity to litigate particular issue in prior proceeding from relitigating it in subsequent proceeding; prior determination by tribunal will be given collateral estoppel effect when (1) issue is identical to that decided in former proceeding, (2) issue was actually litigated and (3) necessarily decided, (4) doctrine is asserted against party to former action or one in privity with such party, and (5) former decision is final and was made on merits. *McCutchen v. City of Montclair (1999) 73 Cal. App. 4th 1138, 1144, 87 Cal. Rptr. 2d 95*

Under collateral estoppel aspect of res judicata, relitigation of issue previously adjudicated is generally precluded if certain criteria met: (1) issue necessarily decided in previous suit identical to issue sought to be relitigated, (2) there was final judgment on merits of previous suit, and (3) party against whom plea asserted was party, or in privity with party, to previous suit. *Gregory v. State Bd. of Control (1999) 73 Cal. App. 4th 584, 592, 86 Cal. Rptr. 2d 575*

Collateral estoppel bars party to action, or one in privity, from subsequently relitigating issues actually litigated and finally decided against that party in earlier action; nonparty may invoke collateral estoppel against party to earlier action only if three conditions met: (1) issue necessarily decided in earlier action is identical to issue sought to be relitigated in current action, (2) there was final judgment on merits in earlier action, and (3) party against whom collateral estoppel asserted was party, or in privity with party, to previous suit. *United States Golf Ass'n v. Arroyo Software Corp. (1999) 69 Cal. App. 4th 607, 616, 81 Cal. Rptr. 2d 708*

Party will be collaterally estopped from relitigating issue only if (1) issue decided in prior adjudication identical with that presented in action in question, (2) there was final judgment on merits, and (3) party against whom plea asserted

was party or in privity with party to prior adjudication. *Sutton v. Golden Gate Bridge Highway & Transportation Dist. (1998) 68 Cal. App. 4th 1149, 1155, 81 Cal. Rptr. 2d 155*

Collateral estoppel or issue preclusion aspect of res judicata does not operate as complete bar to subsequent relitigation; rather, under collateral estoppel, issues that have been fully and fairly litigated and determined between parties are regarded as conclusively determined in subsequent litigation; resolved issues may or may not be determinative in subsequent litigation, depending on its importance to cause of action, but when collateral estoppel applies parties will not be permitted to relitigate previously determined issue; threshold requirements for application of collateral estoppel are (1) issue sought to be precluded must be identical to that decided in prior litigation, (2) issue must have been actually litigated in prior litigation, (3) issue must have been necessarily decided in prior litigation, (4) decision in prior litigation must be final and on merits, and (5) party against whom issue preclusion sought must be same as or in privity with party to prior litigation. *Old Republic Ins. Co. v. Superior Court (1998) 66 Cal. App. 4th 128, 151, 77 Cal. Rptr. 2d 642*

Collateral estoppel, or issue preclusion, is form of res judicata; collateral estoppel precludes party to action from relitigating in second proceeding matters litigated and determined in prior proceeding. *Wright v. Ripley (1998) 65 Cal. App. 4th 1189, 1193, 77 Cal. Rptr. 2d 334*

Most commonly, issue preclusion arises from successive suits on different claims and is referred to as collateral estoppel; if, however, second action is on same claim, issue preclusion based on the earlier determination is described as direct estoppel; both collateral and direct estoppel, like res judicata, have dual purpose of protecting litigants from burden of relitigating identical issue with same party or his or her privy and of promoting judicial economy by preventing needless litigation; in either form, issue preclusion should be determined according to threshold requirements: (1) issue sought to be precluded from relitigation must be identical to that decided in former proceeding, (2) issue must have been actually litigated in former proceeding, (3) it must have been necessarily decided in former proceeding, (4) decision in former proceeding must be final and on merits, and (5) party against whom preclusion sought must be same, or in privity with, party to former proceeding. *Sabek, Inc. v. Engelhard Corp. (1998) 65 Cal. App. 4th 992, 997-998, 76 Cal. Rptr. 2d 882*

Collateral estoppel, as aspect of res judicata, precludes relitigation of issues decided in prior proceeding; traditionally, collateral estoppel applies only if following requirements satisfied: (1) issue sought to be precluded from relitigation must be identical to that decided in former proceeding, (2) issue must have been actually litigated in former proceeding, (3) it must have been necessarily decided in former proceeding, (4) decision in former proceeding must be final and on merits, and (5) party against whom preclusion sought must be same, or in privity with, party to former proceeding. *Townsel v. San Diego Metropolitan Transit Development Bd. (1998) 65 Cal. App. 4th 940, 951, 77 Cal. Rptr. 2d 231*

Elements of collateral estoppel are (1) issue sought to be precluded from relitigation is identical to that decided in former proceeding, (2) issue was actually litigated and necessarily decided in former proceeding, and (3) party against whom preclusion sought was party, or in privity with party, to former proceeding. *People v. Gillard (1997) 57 Cal. App. 4th 136, 159, 66 Cal. Rptr. 2d 790*

Res judicata precludes piecemeal litigation by splitting single cause of action or relitigation of the same cause of action on different legal theory or for different relief; res judicata operates as bar to maintaining second suit between same parties or parties in privity with them on same cause of action; doctrine of res judicata gives conclusive effect to final judgment rendered on merits by court having jurisdiction of cause. *Weikel v. TCW Realty Fund II Holding Co. (1997) 55 Cal. App. 4th 1234, 1245, 65 Cal. Rptr. 2d 25*

Doctrine of res judicata precludes parties or their privies from relitigating cause of action that has been finally determined by court of competent jurisdiction; any issue necessarily decided in such litigation is conclusively determined as to parties or their privies if it is involved in later lawsuit on different cause of action; prior judgment is res

judicata on matters that were raised, or could have been raised, on matters litigated or litigable; in determining validity of plea of res judicata there are three pertinent questions: (1) were issues decided in former adjudication identical with those in later litigation; (2) was there final judgment on the merits; and (3) was party against whom plea asserted party or in privity with party to prior adjudication? *Lyons v. Security Pacific Nat. Bank (1995) 40 Cal. App. 4th 1001, 1015, 48 Cal. Rptr. 2d 174*

Three prerequisites to applying doctrine of collateral estoppel as being (1) issue in second action must be identical to issue adjudicated in first action; (2) first action must have proceeded to final judgment on merits; and (3) party against whom collateral estoppel is to be asserted must have been party, or in privity with party, to first action. *Brown v. Rahman (1991) 231 Cal. App. 3d 1458, 1461, 282 Cal. Rptr. 815* ; *People v. Hogue (1991) 228 Cal. App. 3d 1500, 1504, 279 Cal. Rptr. 647* ; *Gill v. Hughes (1991) 227 Cal. App. 3d 1299, 1304, 278 Cal. Rptr. 306* ; *People v. Henderson (1990) 225 Cal. App. 3d 1129, 1150, 275 Cal. Rptr. 837* ; *Oro Fino Gold Mining Corp. v. County of El Dorado (1990) 225 Cal. App. 3d 872, 878, 274 Cal. Rptr. 720*

Res judicata effect of final judgment on merits as having two aspects: (1) judgment bars parties (or those in privity with them) from litigating same cause of action in subsequent proceeding; and (2) parties (or those in privity with them) are collaterally estopped from litigating in subsequent proceeding on different cause of action any issue actually litigated and determined in former proceeding; res judicata aspect that bars relitigation on same cause of action as precluding piecemeal litigation by splitting single cause of action and as also precluding relitigation of same cause of action on different legal theory or for different relief; prior final judgment on merits as settling issues that were not only actually litigated but every issue that might have been raised and litigated in first action. *Koch v. Hankins (1990) 223 Cal. App. 3d 1599, 1602, 273 Cal. Rptr. 442*

Doctrine of res judicata as providing that final judgment on merits bars parties or those in privity with them from litigating same cause of action in subsequent proceeding, and collaterally estops parties or those in privity with them from litigating in subsequent proceeding on different cause of action any issue actually litigated or determined in former proceeding; for purposes of res judicata, erroneous judgment as being as conclusive as correct one. *White Motor Corp. v. Teresinski (1989) 214 Cal. App. 3d 754, 761, 763, 263 Cal. Rptr. 26*

Doctrines of res judicata and collateral estoppel as serving two public policies: (1) preventing party who already has had fair trial on issue from again drawing it into controversy; and (2) protecting parties from being twice vexed for same cause; preventing relitigation of same issue as also fostering important public policy of judicial economy. *Bronco Wine Co. v. Frank A. Logoluso Farms (1989) 214 Cal. App. 3d 699, 708, 262 Cal. Rptr. 899*

Collateral estoppel as distinct aspect of res judicata and as involving second action between same parties on different cause of action; in such case, first action as not operating as complete merger or bar, but as operating as an estoppel or conclusive adjudication of issues in second action that were actually litigated and determined in first action. *Rymer v. Hagler (1989) 211 Cal. App. 3d 1171, 1178, 260 Cal. Rptr. 76*

Doctrine of res judicata as composed of two parts, claim preclusion and issue preclusion; claim preclusion as prohibiting party from relitigating previously adjudicated cause of action; thus, new lawsuit on same cause of action as entirely barred; issue preclusion, or collateral estoppel, as applying to subsequent suit between parties on different cause of action. *Flynn v. Gorton (1989) 207 Cal. App. 3d 1550, 1554, 255 Cal. Rptr. 768*

Res judicata and collateral estoppel as sharing common goals; both prevent inconsistent results and promote finality and judicial economy by bringing an end to litigation. *Flynn v. Gorton (1989) 207 Cal. App. 3d 1550, 1554, 255 Cal. Rptr. 768*

[10] Pleading

Although normally res judicata effect of prior judgment must be pleaded and proven at trial, when judgment becomes final during pendency of appeal in another action, first final judgment may be brought to attention of appellate court in which appeal is pending and may there be relied on as res judicata. *Aronow v. LaCroix (1990) 219 Cal. App. 3d 1039, 1046, 268 Cal. Rptr. 866*

Collateral estoppel as not required to be specially alleged as defense; in contrast, objection based on doctrine of res judicata as required to be specially pleaded or it is waived. *Hulsey v. Koehler (1990) 218 Cal. App. 3d 1150, 1156, 1158, 267 Cal. Rptr. 523*

[11] Privity

[a] Considerations

A five-year-old child ordinarily has no cognizable independent interest in relitigating a liability claim that has been determined adversely to his parents; sufficient privity exists to invoke the doctrine of collateral estoppel. *Garcia v. Rehrig Internat., Inc. (2002) 99 Cal. App. 4th 869, 878, 121 Cal. Rptr. 2d 723*

Party is one with direct interest in subject matter who has right to raise defense, or to control action, and to appeal; privy is one who, after rendition of judgment, has acquired interest in subject matter affected by judgment through or under one of parties, as by inheritance, succession, or purchase. *Rice v. Crow (2000) 81 Cal. App. 4th 725, 735, 97 Cal. Rptr. 2d 110*

Ordinarily, collateral estoppel does not apply against parties who were codefendants in former action; this rule does not apply, however, when codefendants were adversaries who opposed and litigated issues adversely to each other. *Sutton v. Golden Gate Bridge Highway & Transportation Dist. (1998) 68 Cal. App. 4th 1149, 1155, 81 Cal. Rptr. 2d 155*

Findings made during labor arbitration are only binding in subsequent employee lawsuit if employee was party to arbitration or in privity with union during proceeding; privity requires identity of interest, or relationship which is sufficiently close to justify application of of collateral estoppel; person in privity with party to former proceeding bound by that proceeding only when his or her interests were adequately represented; when employee does not participate directly in labor arbitration and union's position was contrary to his or her interests, employee can successfully assert lack of privity or fair representation as bar to collateral estoppel. *Kelly v. Vons Companies, Inc. (1998) 67 Cal. App. 4th 1329, 1338, 79 Cal. Rptr. 2d 763*

Whatever scope of expanded notions of privity may be, it is clear that collateral estoppel may only be applied when due process requirements are met; in context of collateral estoppel, due process requires that party to be estopped must have had identity or community of interest with, and adequate representation by, losing party in first action as well as that circumstances must have been such that party to be estopped should reasonably have expected to be bound by prior adjudication; reasonable expectation requirement is satisfied if party to be estopped had propriety interest in and control of prior action, or if unsuccessful party in first action might fairly be treated as acting in representative capacity for party to be estopped; moreover, due process requires that party to be estopped must have had fair opportunity to pursue his or her claim first time. *Old Republic Ins. Co. v. Superior Court (1998) 66 Cal. App. 4th 128, 154, 77 Cal. Rptr. 2d 642*

Privity for purposes of res judicata or collateral estoppel refers to mutual or successive relationship to same property rights, to identification in interest of one person with another as to represent the same legal rights, or to relationship between party to be estopped and unsuccessful party in prior litigation that is sufficiently close so as to justify application of collateral estoppel; due process requires that nonparty have had identity or community of interest with,

and adequate representation by party in first action; nonparty should reasonably have expected to be bound by prior adjudication; privity is not susceptible of neat definition and determination of whether it exists is not cut-and-dried exercise; in final analysis, determination of privity depends on fairness of binding one with result obtained in earlier proceedings in which it did not participate; whether someone is in privity with actual parties requires examination of facts and circumstances of case; party is adequately represented for purposes of privity if his or her interests are so similar to party's interest that latter was former's virtual representative in earlier action; adequacy of representation is inferred from whether party in suit asserted to have preclusive effect had same interest as party to be precluded and whether party had strong motive to assert that interest; if interests are divergent or party's motive for asserting common interest is relatively weak, one does not infer adequate representation and there is no privity. *Citizens for Open Access Etc. Tide, Inc.v. Seadrift Assn. (1998) 60 Cal. App. 4th 1053, 1069-1071, 71 Cal. Rptr. 2d 77*

Close examination of circumstances of case required to determine whether someone is in privity with party; in general, privity involves person being so identified in interest with another as to represent same legal right. *Weir v. Ferreira (1997) 59 Cal.App. 4th 1509, 1522, 70 Cal. Rptr. 2d 33*

"Privity" as relationship between party to be estopped and unsuccessful party in prior litigation that is sufficiently close so as to justify application of doctrine of collateral estoppel; historically, parties as not deemed to be in privity unless they shared same legal interests; under more contemporary approach in context of collateral estoppel, due process as requiring that party to be estopped had identity or community of interest with, and adequate representation by, losing party in first action, as well as that circumstances must have been such that party to be estopped should reasonably have expected to be bound by prior adjudication. *Brown v. Rahman (1991) 231 Cal. App. 3d 1458, 1462, 282 Cal. Rptr. 815*

Whether someone is in privity with actual parties as requiring close examination of circumstances of each case; privity as involving person so identified in interest with another that he or she represents same legal right. *People v. Henderson (1990) 225 Cal. App. 3d 1129, 1150-1151, 275 Cal. Rptr. 837*

Concept of privity as operating as safety valve to defeat preclusive effect of prior decision in circumstances in which such result would be unfair; "privity" as representing legal conclusion that relationship between one who is party on record and nonparty is sufficiently close to afford application of principle of preclusion. *City of Gilroy v. State Bd. of Equalization (1989) 212 Cal. App. 3d 589, 606, 260 Cal. Rptr. 723*

[b] No Privity Found

A dismissal with prejudice is a judgment on the merits between the plaintiff and the dismissed defendant. It is not, however, a judgment on the merits between the plaintiff and other defendants in the action. *Johnson v. County of Fresno (2003) 111 Cal. App. 4th 1087,1096, 4 Cal. Rptr. 3d 475*

Plaintiff who settled and dismissed with prejudice legal malpractice action against counsel who represented plaintiff in underlying action that was still pending was not barred from going forward with underlying action because defendants in underlying action were not parties to malpractice action, nor in privity with them; moreover, since malpractice action was settled and not tried, collateral estoppel did not bar litigating any issue in underlying action. *Rice v. Crow (2000) 81 Cal. App. 4th 725, 736-740, 97 Cal. Rptr. 2d 110* (declining to follow *Arciniega v. Bank of San Bernardino (1997) 52 Cal. App. 4th 213, 60 Cal. Rptr. 2d 495*)

When plaintiff and defendant in present case had been codefendants in earlier action, record failed to support requirement of privity between parties because plaintiff did not have incentive to litigate issue in earlier action despite plaintiff and defendant having been adversaries in that action by virtue of a cross complaint; in earlier action, plaintiff was not represented by present counsel, but by plaintiff's insurer who had no interest in pursuing any claim against

codefendant in that action and hence did not oppose codefendant's summary judgment motion and did not appear at oral argument on motion; plaintiff's counsel in present action not served with that summary judgment motion; under circumstances, it would violate due process to preclude plaintiff from litigating same issue decided in previous motion; plaintiff was not adequately represented on issue in earlier case, had no incentive to litigate issue in earlier case and could not have reasonably been expected to be bound by that adjudication. *Sutton v. Golden Gate Bridge Highway & Transportation Dist. (1998) 68 Cal. App. 4th 1149, 1155-1157, 81 Cal. Rptr. 2d 155*

When insurer in earlier declaratory relief action was found liable to provide defense and indemnify its insureds under coverage provisions of its policy and other insurers not named in earlier action also issued liability policies to same insureds containing substantially same language, but denied coverage and refused to participate in defense, and insurer thereafter brought suit against those other insurers, other insurers were held not bound by earlier judicial determination requiring coverage because they were neither parties nor privies to prior action in that they were not named in that action as parties, did not have financial or proprietary interest in its outcome, and it could not be fairly said that insurer in earlier action was in any way acting as their representative. *Old Republic Ins. Co. v. Superior Court (1998) 66 Cal. App. 4th 128, 134-135, 154-155, 77 Cal. Rptr. 2d 642*

In criminal prosecution for making false or fraudulent statements for purpose of obtaining workers' compensation benefits and for perjury, workers' compensation judge's conclusion that defendant suffered work-related injury did not collaterally estop prosecution from relitigating whether, and if so, how, defendant was injured; party identity element was absent because defendant's adversary in Workers' Compensation Appeals Board proceeding was defendant's employer, state agency that was not part of executive branch, whereas defendant's adversary in criminal proceeding was county district attorney's office, which is part of executive branch. *People v. Gillard (1997) 57 Cal. App. 4th 136, 159-160, 66 Cal. Rptr. 2d 790*

Action for attorney malpractice arising out of terms of probate court settlement order as not barred by res judicata when parties did not have adversarial interests in prior probate action and thus, lacked privity. *Schultz v. Harney (1994) 27 Cal. App. 4th 1611, 1620, 33 Cal. Rptr. 2d 276*

Due to nature of principal/surety relationship, rule as that when one party to judgment has unity of interest with another party whose rights are not determined by judgment, no appeal lies until rights or duties of interested party have been resolved by final judgment. *T&R Painting Construction, Inc. v. St. Paul Fire & Marine Ins. Co. (1994) 23 Cal. App. 4th 738, 743, 29 Cal. Rptr. 2d 199*

Equal Employment Opportunity Commission prosecuting federal discrimination action brought under Age Discrimination in Employment Act, *29 U.S.C. § 261, et seq.*, against defendant employer, eventually entering into injunctive consent judgment, did not stand in privity with plaintiff in subsequent action against employer for state-based age discrimination since EEOC had dispensed with plaintiff's particular interest during prosecution of its action. *Victa v. Merle Norman Cosmetics, Inc. (1993) 19 Cal. App. 4th 454, 463-468, 24 Cal. Rptr. 2d 117*

Person who is neither party to action nor in privity with party as not bound by judgment; fact that person may have been vitally interested in and directly affected by outcome of action as immaterial; due process as requiring that that person have his or her own day in court. *County of Fresno v. Lehman (1991) 229 Cal. App. 3d 340, 347, 280 Cal. Rptr. 310*

Fact that individual appears as witness in action as not in and of itself supporting finding of privity with party in that action for purposes of application of collateral estoppel in subsequent proceeding. *Dyson v. State Personnel Bd. (1989) 213 Cal. App. 3d 711, 727 n.6, 262 Cal. Rptr. 112*

Judgment against principal as not binding in separate action against surety. *All Bay Mill & Lumber Co. v. Surety Co. (1989) 208 Cal. App. 3d 11, 17, 255 Cal. Rptr. 790*

Department of Motor Vehicles, in role of controlling licensing of drivers, as not in privity with prosecutor in criminal proceeding arising from driving of motor vehicle. *Pawlowski v. Pierce (1988) 202 Cal. App. 3d 692, 698, 249 Cal. Rptr. 49* (noting that courts of appeal are split on this issue)

[c] Privity Found

Plaintiff nonprofit public interest group that brought action for implied dedication of public recreational easement, held to be in privity with state agencies that were responsible for representation of public interest who pursued rights of public concerning same property in earlier state and federal actions; when authority to pursue public rights or interests in litigation is given to public entity by statute, judgment rendered is res judicata as to all members of class represented; similarly, when one governmental agency represents interests of State of California in prior litigation and another seeks to pursue same issue, agents of same government are in privity with each other, since they represent not their own rights but rights of government. *Citizens for Open Access Etc. Tide, Inc. v. Seadrift Assn. (1998) 60 Cal. App. 4th 1053, 1073, 1073 n.12, 71 Cal. Rptr. 2d 77*

In proceeding on trustee's petition to ascertain beneficiaries and determine entitlement to trust distribution, determination of parent-child relationship in interlocutory judgment of dissolution of marriage barred one child from relitigating parent-child relationship of another child to their deceased parent when sole interest of decedent's child in trust was as member of class of remaindermen defined by their relationship to decedent; because point in dispute, i.e., whether other party was decedent's child, was same point adjudicated in dissolution action, and because its determination was binding on decedent, it should likewise be binding on those claiming through decedent. *Weir v. Ferreira (1997) 59 Cal. App. 4th 1509, 1514-1517, 1521-1522, 70 Cal. Rptr. 2d 33*

Hospital bound by earlier judgment in medical malpractice action in which it was dismissed as party before trial in which anesthesiologist prevailed so as to bar hospital's action for equitable indemnity against anesthesiologist after award of damages against hospital in second suit by same plaintiff; in earlier action hospital had opportunity to prove anesthesiologist caused plaintiff's injuries and had community of interest with plaintiff in seeking to hold anesthesiologist liable for plaintiff's injuries. *Children's Hospital v. Sedgwick (1996) 45 Cal. App. 4th 1780, 1788, 53 Cal. Rptr. 2d 725*

Plaintiff barred by res judicata from collaterally attacking order made in earlier minor's personal injury action that denied plaintiff's quantum meruit lien claim for attorney fees in that action when defendant attorneys represented minor in that action and were not technically parties to it and plaintiff became party to that action by filing purported lien; fact that defendants were not technically parties in that action was not significant for res judicata purposes as long as issue presented was same, there was final judgment on merits, and party against whom res judicata asserted is same. *Law Offices of Stanley J. Bell v. Shine, Browne & Diamond (1995) 36 Cal. App. 4th 1011, 1026, 43 Cal. Rptr. 2d 717*

Liability insurance carrier, who significantly participated in uncontested proceeding against its insured resulting in nondisclosure agreement and covenant not to execute, and who stood to gain financially from agreement, as collaterally estopped from relitigating issues of liability and damages in separate action. *National Union Fire Ins. Co. v. Lynette C. (1994) 27 Cal. App. 4th 1434, 1452-1453, 33 Cal. Rptr. 2d 496*

Privity for collateral estoppel purposes found between Department of Motor Vehicles and prosecution in prior criminal action on issue of lawfulness of arrest when both represented government's interest in protecting public from persons driving under influence. *Zapata v. Department of Motor Vehicles (1991) 2 Cal. App. 4th 108, 115, 2 Cal. Rptr. 2d 855*

Nonparty should reasonably be expected to be bound if he or she had in reality contested prior action even if he or she did not make formal appearance; thus, collateral estoppel as having been applied against nonparties who had a

proprietary or financial interest in, and control of, prior action and as applicable when nonparty has such an interest in determination of question of fact or law with reference to same subject matter or transaction. *Ceresino v. Fire Ins. Exchange (1989) 215 Cal. App. 3d 814, 820, 264 Cal. Rptr. 30*

When probate litigation between son of decedent and son's creditor over disposition of estate assets results in judgment adjudicating creditor's rights, son's children (decedent's grandchildren) as bound by adjudication, notwithstanding their status as beneficiaries of trust created by decedent's will; rights of grandchildren as accruing solely through estate, which was party to first action and consequently bound. *Estate of Baumann (1988) 201 Cal. App. 3d 927, 935, 247 Cal. Rptr. 532*

Agents and officials of same government as in privity with one another. *Carmel Valley Fire Protection Dist. v. State of California (1987) 190 Cal. App. 3d 521, 535-536, 234 Cal. Rptr. 795*

Spouse of party to prior action as in privity with that party for purposes of issue preclusion when prior litigation was community in nature. *Mueller v. J.C. Penney Co. (1985) 173 Cal. App. 3d 713, 723-724, 219 Cal. Rptr. 272*

[12] Proof of Defense

Action as not barred by res judicata when defendant did not present any evidence to support its contention that factual issues in case at bench were finally litigated in earlier action. *Santa Clara County Environmental Health Assn. v. County of Santa Clara (1985) 173 Cal. App. 3d 74, 83-84, 218 Cal. Rptr. 678*

[13] Requirement of Final Judgment

[a] Demurrer

Judgment on general demurrer as having effect of bar in new action in which complaint states same facts that were held not to constitute cause of action on former demurrer or, notwithstanding differences in facts alleged, when ground on which demurrer in former action was sustained is equally applicable to second action. *McKinney v. County of Santa Clara (1980) 110 Cal. App. 3d 787, 794, 168 Cal. Rptr. 89*

[b] Dismissal

Plaintiffs' voluntary dismissal with prejudice of municipal court complaint after they had filed virtually identical complaint in superior court as constituting determination on merits and as res judicata, thus barring superior court action; request for dismissal with prejudice as not depending on consideration and as operating as retraxit, barring new action on same subject matter. *Roybal v. University Ford (1989) 207 Cal. App. 3d 1080, 1085-1087, 255 Cal. Rptr. 469*

Dismissal of action on court's own motion under *Code Civ. Proc. §§ 583.310* and *583.360* as dismissal without prejudice under *Code Civ. Proc. § 581(b)(4), (g)* and, hence, as not barring subsequent action under doctrine of res judicata or collateral estoppel. *Ashworth v. Memorial Hospital (1988) 206 Cal. App. 3d 1046, 1063 ns.2, 3, 1063-1064, 254 Cal. Rptr. 104*

For res judicata pruposes, dismissal for failure to obey court's discovery orders as having effect of judgment on merits against plaintiff. *Bernstein v. Allstate Insurance Co. (1981) 119 Cal. App. 3d 449, 451, 173 Cal. Rptr. 841 , cert. denied, 454 U.S. 966, 102 S. Ct. 508, 70 L. Ed. 2d 382*

Order of dismissal based on plaintiff's failure to amend complaint within specified time as not judgment on merits, therefore as not res judicata. *Kanarek v. Bugliosi (1980) 108 Cal. App. 3d 327, 333-334, 166 Cal. Rptr. 526*

[b.1] Retraxit

At common law, "retraxit" was open and voluntary renunciation of suit in open court; primary features of common law retraxit were that it was made by plaintiff in person and in open court; dismissal with prejudice is modern name for common law retraxit; retraxit invokes principles of res judicata; retraxit is judgment on merits preventing subsequent action on dismissed claim; because it invokes principles of res judicata, however, retraxit only bars claims dismissed with prejudice between same parties or their privies; settlement and dismissal with prejudice of action operated as retraxit so as to invoke doctrine of res judicata. *Rice v. Crow (2000) 81 Cal. App. 4th 725, 733-736, 97 Cal. Rptr. 2d 110*

[c] Stipulation

When parties have consented or stipulated to dismissal of previous action after compromise or settlement of case, issue and scope of settlement agreement as required to be determined before application of res judicata doctrine. *Nakash v. Superior Court (1987) 196 Cal. App. 3d 59, 67, 241 Cal. Rptr. 578*

Dismissal, when filed in return for consideration from defendant, as complete bar to any future actions on same controversy and as having same legal effect as common law retraxit. *Gates v. Superior Court (1986) 178 Cal. App. 3d 301, 311, 223 Cal. Rptr. 678*

Judgment by stipulation as equivalent to judgment after trial for purpose of applying bar of res judicata. *De Weese v. Unick (1980) 102 Cal. App. 3d 100, 105, 162 Cal. Rptr. 259*

[d] Summary Judgment

Partial summary judgment, not entered as judgment, is not final. *Kirkpatrick v. Westamerica Bank (1998) 65 Cal. App. 4th 982, 990-991, 76 Cal. Rptr. 2d 876*

Summary judgment on complaint is judgment on merits. *Lumpkin v. Jordan (1996) 49 Cal. App. 4th 1223, 1230, 57 Cal. Rptr. 2d 303*

Judgment entered on motion for summary judgment as determination that there is no factual dispute and one party is entitled to judgment as matter of law; such judgment as final and conclusive a determination of merits as judgment after trial and, once final, as res judicata. *Stuart v. Lilves (1989) 210 Cal. App. 3d 1215, 1219, 258 Cal. Rptr. 780*

Order denying motion for summary judgment as not final judgment and not res judicata. *De La Pena v. Wolfe (1986) 177 Cal. App. 3d 481, 485, 223 Cal. Rptr. 325*

[14] Small Claims Courts

Although small claims judgment may not be given issue preclusion effect with regard to common questions arising in subsequent proceeding on different cause of action, when losing defendant in small claims action invokes his or her right of appeal to superior court and when superior court conducts a trial de novo and enters judgment against appealing defendant, doctrine of issue preclusion as precluding defendant from raising issues decided in such trial de novo in

subsequent proceeding. *Perez v. City of San Bruno (1980) 27 Cal. 3d 875, 884-885, 168 Cal. Rptr. 114, 616 P.2d 1287*

Under rule against splitting cause of action, which is application of doctrine of res judicata, judgment of small claims court held to bar subsequent suit on same cause of action. *Allstate Ins. Co. v. Mel Rapton, Inc. (2000) 77 Cal. App. 4th 901, 907, 914, 92 Cal. Rptr. 2d 151*

Issue preclusion does not apply to small claims court judgment or superior court judgment after a hearing de novo in an action arising under the Small Claims Act (*Code Civ. Proc. § 116.110 et seq.*); holding of *Perez v. City of San Bruno (1980) 27 Cal. 3d 875, 168 Cal. Rptr. 114, 616 P.2d 1287* , that collateral estoppel applies to superior court judgment entered after trial de novo on appeal from small claims judgment, is no longer sound due to enactment of *Code Civ. Proc. § 116.770(b).* *Rosse v. DeSoto Cab Company (1995) 34 Cal. App. 4th 1047, 1050-1053, 40 Cal. Rptr. 2d 680*

Small claims judgment does not invoke issue preclusion as to later actions. *Foothills Townhome Assn. v. Christiansen (1998) 65 Cal. App. 4th 688, 692, 76 Cal. Rptr. 2d 516*

Small claims decisions as having only limited collateral estoppel effect as to issues actually litigated and as not res judicata. *Jellinek v. Superior Court (1991) 228 Cal. App. 3d 652, 659, 279 Cal. Rptr. 6*

[15] Summary Judgment Motion

Defense of res judicata is properly raised by motion for summary judgment and is ground on which to grant summary judgment. *Allstate Ins. Co. v. Mel Rapton, Inc. (2000) 77 Cal. App. 4th 901, 907, 914, 92 Cal. Rptr. 2d 151*

Summary judgment is appropriate remedy when doctrine of res judicata in its subsidiary form of collateral estoppel refutes all triable issues of fact suggested by pleadings. *Gill v. Hughes (1991) 227 Cal. App. 3d 1299, 1304, 278 Cal. Rptr. 306*

Plea of res judicata is properly raised by motion for summary judgment. *Roybal v. University Ford (1989) 207 Cal. App. 3d 1080, 1088, 255 Cal. Rptr. 469*

[16] Waiver of Defense

Rule against splitting single cause of action so as to make it basis of several suits is, in part, application of doctrine of res judicata; because prohibition against splitting cause of action exists for defendant's benefit, defendant may waive it; under facts, however, waiver not found. *Allstate Ins. Co. v. Mel Rapton, Inc. (2000) 77 Cal. App. 4th 901, 907, 909, 92 Cal. Rptr. 2d 151*

Plaintiff's failure to raise res judicata as defense in plaintiff's pleadings or at trial resulted in waiver of defense. *Parker v. Walker (1992) 5 Cal. App. 4th 1173, 1191, 6 Cal. Rptr. 2d 908* (defense based on order of final distribution of decedent's estate waived when not raised in subsequent *Prob. Code § 9860* petition claiming estate property or at trial)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 491.43 Law Reviews

Heiser, *California's Confusing Collateral Estoppel (Issue Preclusion) Doctrine, 35 San Diego L. Rev. 509 (1998)*

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Richards, *Richards v. Jefferson County: The Supreme Court Stems the Crimson Tide of Res Judicata, 38 Santa Clara L. Rev. 645 (1998)*

Crosby, *Administrative Collateral Estoppel in California: A Critical Evaluation of People v. Sims, 40 Hastings L.J. 907 (1989)*

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Note, *Preclusion of Nonparties: A Due Process Violation? 13 Sw. L. Rev. 169 (1982)*

Callen and Kadue, *To Bury Mutuality, Not to Praise It: An Analysis of Collateral Estoppel After Parklane Hosiery Co. v. Shore, 31 Hastings L.J. 755 (1980)*

George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action, 32 Stan. L. Rev. 655 (1980)*

Note, *Offensive Assertion of Collateral Estoppel by Persons Opting Out of a Class Action, 31 Hastings L.J. 1189 (1980)*

Comment, *Res Judicata and Section 1983: The Effect of State Court Judgments on Federal Civil Rights Actions, 27 UCLA L. Rev. 177 (1979)*

Comment, *Res Judicata and Collateral Estoppel Beneath the Corporate Veil, 66 Cal. L. Rev. 1093 (1978)*

Note, *Res Judicata: New Standards for Evaluating the Effect of a Change in Law After Judgment, 30 Hastings L.J. 191 (1978)*

Note, *The Collateral Estoppel Effect of Prior State Court Findings in Cases Within Exclusive Federal Jurisdiction, 91 Harv. L. Rev. 1281 (1978)*

McCoid, *A Single Package for Multiparty Disputes, 28 Stan. L. Rev. 707 (1976)*

Note, *Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions, 85 Yale L.J. 541 (1976)*

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Note, *The Res Judicata Effect of Declaratory Relief in the Federal Courts, 46 S. Cal. L. Rev. 803 (1973)*

Nellis, *Avoiding Collateral Estoppel in California Multiple Party Tort Litigation, 9 Cal. W.L. Rev. 115 (1972)*

Hazard *Res Nova in Res Judicata, 44 S. Cal. L. Rev. 1036 (1971)*

Comment, *Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered, 56 Calif. L. Rev. 1098 (1968)*

Comment, *Res Judicata and the Bifurcated Negligence Trial, 16 UCLA L. Rev. 203 (1968)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 491.44 Text References

Restatement (Second) of Judgments, §§ 13-33

Witkin, California Procedure, vol. 5, *Pleading*, §§ 918, 1053, 1054, vol. 7, *Judgment*, § 280 et seq. (4th ed. 1997)

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[Reserved]

§§ 491.45[Reserved]

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43-491 California Forms of Pleading and Practice--Annotated § 491.50

§ 491.50 Demurrer to Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--On Ground That No Cause of Action Is Stated [Code Civ. Proc. § 430.10(e)] Because Action Is Precluded by Prior Judgment [Code Civ. Proc. § 1908(a)]

[1] FORM Demurrer to Complaint [Code Civ. Proc. §§ 430.30(a), 430.40(a)]--On Ground That No Cause of Action Is Stated [Code Civ. Proc. § 430.10(e)] Because Action Is Precluded by Prior Judgment [Code Civ. Proc. § 1908(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	DEMURRER OF _____ [*name*] TO
Plaintiff,	)	COMPLAINT OF _____ [*name*]
vs.	)	AND SUPPORTING MEMORANDUM
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
		[LIMITED CIVIL CASE]

_____

[*EITHER, if merger is defense*]

Defendant demurs to the complaint herein on the ground that it does not state facts sufficient to state a cause of action, in that it appears on the face thereof that _____ [plaintiff *or* _____ (*specify other party in privity with plaintiff*)] [, with whom plaintiff is in privity,] obtained a final judgment on the merits in the action referred to in _____ [*specify, e.g.,* Paragraph 3] of the complaint, and that the cause of action asserted in the action was merged in the judgment and is the same cause of action asserted in this action, and that plaintiff may not therefore maintain this action.

[*OR, if bar is defense*]

Defendant demurs to the complaint herein on the ground that it does not state facts sufficient to state a cause of action, in that it appears on the face thereof that _____ [defendant *or* _____(*specify other party in privity with defendant*)] [, with whom defendant is in privity,] obtained a final judgment on the merits against _____ [plaintiff *or* _____ (*specify other party in privity with plaintiff*)] [, with whom plaintiff is in privity,] in the action referred to in _____ [*specify, e.g.,* Paragraph 3] of the complaint and that the cause of action asserted in this action is the same as that asserted in the former action, and that the judgment rendered in the former action is a bar to the maintenance of this action.

[*OR, if collateral estoppel is defense*]

Defendant demurs to the complaint herein on the ground that it does not state facts sufficient to state a cause of action in that it appears on the face thereof that this action involves only the issue(s) of _____ [*specify issue or issues involved in present action*]; and that the issue(s) _____ [was *or* were] actually and necessarily determined in the former action referred to in _____ [*specify, e.g.,* Paragraph 3] of the complaint, in favor of _____ [defendant *or* _____ (*specify other party*)] [, with whom defendant is in privity,] and against _____ [plaintiff *or* _____ (*specify other party in privity with plaintiff*)] [, with whom plaintiff is in privity,] and final judgment on the merits was rendered therein so that such issue(s) cannot therefore be relitigated in this action.

[WHEREFORE, defendant prays that this demurrer be sustained without leave to amend, that plaintiff take nothing by his/her complaint, that defendant have judgment for his/her costs, and for all other proper relief.]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant

SUPPORTING MEMORANDUM

[*Add memorandum supporting demurrer*]

[2] Use of Form

The form of general demurrer in [1], *above,* is for use by a defendant to object to a complaint on the ground that it does not state a cause of action in that the cause of action is precluded by a prior judgment [*Code Civ. Proc. §§ 430.10(e),*

1908(a)].

The demurrer must be accompanied by a supporting memorandum in support of each ground thereof [*Cal. Rules of Ct., Rule 3.1113(a)*; *see also Cal. Rules of Ct., Rule 3.1103(c)*; for discussion and forms, see Ch. 417, *Points and Authorities*]. It must also be accompanied by a notice of hearing [*Cal. Rules of Ct., Rule 3.1320(c)*; for a form of notice of hearing, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadngs*].

Counsel should select one of the three alternative paragraphs in the body of the form, depending on whether the demurrer is based on (1) merger, (2) bar, or (3) collateral estoppel [for discussion of these terms, *see § 491.11*]. The form contains an optional prayer; a prayer to a demurrer is not required but is frequently included.

This form should only be used if the facts giving rise to the defense of res judicata appear on the face of the complaint [*see Code Civ. Proc. § 430.30(a)*]. Reference by the plaintiff to the prior judgment in the complaint, aided by judicial notice, sufficiently raises the issue of res judicata, justifying an order sustaining a demurrer [*Legg v. United Benefit Life Ins. Co. (1960) 182 Cal. App. 2d 573, 580-581, 6 Cal. Rptr. 73]* . The court can consider a prior judgment by judicial notice on defendant's general demurrer to determine whether the prior judgment bars the action [*Lazzarone v. Bank of America (1986) 181 Cal. App. 3d 581, 590, 226 Cal. Rptr. 855]* . Otherwise, the defendant may raise the res judicata issue by way of affirmative defense in the answer [for forms of affirmative defense, *see §§ 491.51 -491.55*].

[3] Specification of Ground of Objection

A demurrer must distinctly specify the grounds on which any of the objections to the complaint are taken and unless it does so, it may be disregarded [*Code Civ. Proc. § 430.60*]. Nevertheless, a general demurrer expressed in the words of *Code Civ. Proc. § 430.10(e)* need not specify particulars in which the complaint fails to state facts constituting a cause of action [*Burke v. Maguire (1908) 154 Cal. 456, 462-463, 98 P. 21* ; *Patton v. Board of Harbor Commissioners (1970) 13 Cal. App. 3d 536, 544 n.7, 91 Cal. Rptr. 832]* . Therefore, as an alternative to form of demurrer in [1], *above*, stating specific res judicata grounds, the defendant may simply demur on the ground that the complaint does not state a cause of action [*Code Civ. Proc. § 430.10(e)*; for further discussion and forms, *see* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*].

[4] Cross References

For discussion and forms relating to demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

For a memorandum supporting a demurrer to a complaint for wrongful death on the ground that a wrongful death action is barred by a previous action, see California Points and Authorities, Ch. 66, *Death and Survival Actions*

For a memorandum supporting a demurrer to a complaint based on res judicata in a declaratory relief action, see California Points and Authorities, Ch. 67, *Declaratory Relief*

For a memorandum supporting a demurrer to a complaint on the ground that the action is barred by a prior judgment, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*

For a memorandum opposing a demurrer to a complaint on the ground that an action on a state claim is not barred by a prior judgment when a federal court in a prior action declined to exercise pendent jurisdiction over the claim, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*

For a memorandum supporting a demurrer to a complaint against a guardian for money not accounted for by the guardian on the ground that an approved final accounting is res judicata, see California Points and Authorities, Ch. 106,

Guardianship and Conservatorship

Witkin, California Procedure, Vol. 5, *Pleading*, § 918 (4th ed. 1997)

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§ 491.51 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Cause of Action Was Merged in Prior Judgment [Code Civ. Proc. § 1908(a)]

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Cause of Action Was Merged in Prior Judgment [Code Civ. Proc. § 1908(a)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. On _____ [*date*], an action was commenced by _____ [plaintiff *or* _____ (*specify other party in privity with plaintiff*)] [, with whom plaintiff is in privity,] against _____ [defendant *or* _____ (*specify other party in privity with defendant*)] [, with whom defendant is in privity,] in an action entitled _____ [*specify title of prior action*] in the Superior Court of California, _____ County, Case number _____.

2. Judgment in the action was duly rendered on the merits in favor of _____ [plaintiff *or* _____ (*specify other party in privity with plaintiff*)], [with whom plaintiff is in privity,] the Court having jurisdiction of the parties and subject matter; the judgment became final on _____ [*date*], prior to the filing of this action. _____ [*Specify whether defendant in prior action appealed from judgment, and if defendant appealed, note the disposition of the appeal, e.g.,* The judgment has never been appealed from and the time for appealing has expired]. The judgment has never been vacated or modified. A certified copy of the judgment is attached hereto as Exhibit "A" and made a part hereof.

3. The cause of action asserted in this action involves the same cause of action as that decided in the former action.

4. By reason of the aforesaid, the cause of action asserted by plaintiff in this action has been merged in the judgment and the judgment is res judicata of this action.

[2] Use of Form

The form in [1], *above,* is for use by a defendant as an affirmative defense allegation in his or her answer, to allege that the cause of action has merged with a prior action. For further discussion relating to an swers generally, including general forms of answer into which the foregoing affirmative defense allegation may be inserted, see Ch. 26, *Answers* .

[3] Merger

Merger is the concept that a cause of action that has been reduced to judgment has merged in the judgment, so that another action based on the same cause cannot be asserted. The doctrine serves to protect a defendant who has been unsuccessful in litigating a cause of action; the successful plaintiff is precluded from bringing successive lawsuits against the defendant based on the same cause [*see Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 973, 104 Cal. Rptr. 42, 500 P.2d 1386]* .

[4] Contents

This form of affirmative defense alleges the existence of a prior action against the defendant or another party in privity with the defendant (Paragraph 1); that such action was final (Paragraph 2); that the cause of action asserted in the present action involves the same cause of action as that decided in the former action (Paragraph 3); and that the former judgment is res judicata (Paragraph 4) [*see Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 974, 104 Cal. Rptr. 42, 500 P.2d 1386* (stating that only a final judgment on merits between same parties or their privies and on the same cause of action is entitled to res judicata effect of merger)].

[5] Pleading Prior Judgment

When a judgment or order of a court is conclusive, the judgment or order must be alleged in the pleadings if there is an opportunity to do so. If there is no such opportunity, the judgment or order may be used in evidence [*Code Civ. Proc. § 1908.5*].

In pleading a judgment, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made and to have become final (*see* Paragraph 2). If such allegation is controverted, the party pleading must establish on the trial the facts conferring jurisdiction and creating finality [*Code Civ. Proc. § 456*].

[6] Cross References

For discussion and forms relating to the format of answers, see Ch. 26, *Answers*

Witkin, California Procedure, Vol. 5, *Pleading,* § 1053, 1054; Vol. 7, *Judgment,* § 342 et seq. (4th ed. 1997)

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§ 491.52 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Prior Judgment for Defendant [or Defendant's Privy] Bars Present Action [Code Civ. Proc. § 1908(a)]

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Prior Judgment for Defendant [or Defendant's Privy] Bars Present Action [Code Civ. Proc. § 1908(a)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. On _____ [*date*], an action was commenced by _____ [plaintiff *or* _____ (*specify other party in privity with plaintiff*)] [, with whom plaintiff is in privity,] against _____ [defendant *or* _____ (*specify other party in privity with defendan* t)] [, with whom defendant is in privity,] in an action entitled _____ [*specify title of prior action*] in the Superior Court of California, _____ County, Case number _____.

2. Judgment in the action was duly rendered on the merits in favor of _____ [defendant *or* _____ (*specify other party in privity with defendant*)] [, with whom defendant is in privity], the Court having jurisdiction of the parties and subject matter; the judgment became final on _____ [*date*], prior to the filing of this action. _____ [*State whether plaintiff in prior action appealed from judgment, and if plaintiff appealed, note the disposition of the appeal, e.g.,* The judgment has never been appealed from and the time for appealing has expired]. The judgment has never been vacated or modified. A certified copy of the judgment is attached hereto as Exhibit "A" and made a part hereof.

3. The cause of action asserted in this action involves the same cause of action as that decided in the former action.

4. By reason of the aforesaid, the cause of action asserted by plaintiff in this action is barred by the judgment rendered in the prior action, and the judgment is res judicata of the cause of action asserted herein.

[2] Use of Form

The form in [1], *above*, is for use by a defendant as an affirmative defense allegation in his or her answer, to allege that the cause of action is barred by a prior action. For further discussion relating to answers generally, including general forms of answer into which the foregoing affirmative defense allegation may be inserted, see Ch. 26, *Answers* .

[3] Bar

Bar occurs when one who has maintained a cause of action has been unsuccessful and judgment has been rendered for the defendant in that action. The judgment operates as a bar to the later assertion of the same cause of action [*Panos v. Great Western Packing Co. (1943) 21 Cal. 2d 636, 639-640, 134 P.2d 242* ; *Louie Queriolo Trucking, Inc. v. Superior Court (1967) 252 Cal. App. 2d 194, 200, 60 Cal. Rptr. 389]* .

[4] Contents

This form of affirmative defense alleges the existence of a prior action against the defendant or another party in privity with the defendant (Paragraph 1); that such action was final (Paragraph 2); that the cause of action asserted in the present action involves the same cause of action as the former action (Paragraph 3); and that the former judgment is res judicata (Paragraph 4) [*see* *Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 974, 104 Cal. Rptr. 42, 500 P.2d 1386* (stating that only a final judgment on merits between same parties or their privies and on the same cause of action is entitled to res judicata effect of merger)].

[5] Cross References

For additional discussion and references, see *§ 491.51[2]* et seq.

Witkin, California Procedure, Vol. 5, *Pleading*, § 1053, 1054; Vol. 7, *Judgment*, § 348 et seq. (4th ed. 1997)

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§ 491.53 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Judgment for Employee Defendant in Prior Action Bars Present Action Against Employer [Code Civ. Proc. § 1908(a)]

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Judgment for Employee Defendant in Prior Action Bars Present Action Against Employer [Code Civ. Proc. § 1908(a)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. On or about _____ [*date*], a complaint in a previous cause of action was filed by plaintiff against _____ [*name of defendant's employee*], the action being filed in the _____[*specify court*] and numbered _____ in the files and records thereof.

2. _____ [*Recite allegations of prior complaint and specify any denials and affirmative defenses offered by employee, e.g.,* In the complaint, plaintiff alleged negligence by _____ (*name of defendant's employee*), proximately causing damage to plaintiff. In an answer to this complaint, which was duly filed by _____ (*name of defendant's employee*), he/she denied his/her own negligence, and, by affirmative defense, alleged contributory negligence on the part of plaintiff].

3. Trial was duly had in the previous action, the Court having jurisdiction of the persons and subject matter thereof, and judgment against plaintiff and in favor of defendant therein, on the merits thereof, was duly rendered in favor of the defendant, on findings that _____ [*specify, e.g.,* there was no negligence on the part of defendant and that there was contributory negligence on the part of plaintiff].

4. Judgment in the action became final on _____ [*date*]. _____ [*State whether plaintiff in prior action appealed from judgment, and if plaintiff appealed, note the disposition of the appeal, e.g.,* The judgment has never been appealed from and the time for appealing has expired]. The judgment has never been vacated or modified.

5. A certified copy of judgment roll in the prior action is attached hereto as Exhibit "A" and made a part hereof.

6. Defendant admits that at the time of _____ [*specify incident at issue, e.g.,* the accident] as alleged in the complaint, _____ [*name of defendant's employee*] was acting as an employee of defendant.

7. By reason of the aforesaid, plaintiff cannot assert the purported cause of action herein; the judgment is res judicata.

[2] Use of Form

The form in [1], *above,* is for use by a defendant as an affirmative defense allegation in his or her answer, to allege that the cause of action is barred by a prior action against the defendant's employee [*see City of Los Angeles v. Superior Court (1978) 85 Cal. App. 3d 143, 154, 149 Cal. Rptr. 320* ; *Barrabee v. Crescenta Mutual Water Co. (1948) 88 Cal. App. 2d 192, 195-196, 198 P.2d 558* (judgment in favor of defendant for whom another party is vicariously liable is res judicata as to other party if judgment was based on merits)]. For further discussion relating to answers generally, including general forms of answer into which the foregoing affirmative defense allegation may be inserted, see Ch. 26, *Answers* .

[3] Cross References

For additional discussion and references, see *§ 491.51[2] et seq. and § 491.52* et seq.

Witkin, California Procedure, Vol. 7, *Judgment,* § 409 (4th ed. 1997)

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§ 491.54 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Basic Issue Between Parties Was Determined in Former Action [Code Civ. Proc. § 1908]

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Basic Issue Between Parties Was Determined in Former Action [Code Civ. Proc. § 1908]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. On _____ [*date*], and prior to the filing of the within action, an action was commenced against _____, [*name*] [the defendant in the present action,] in the _____ [*specify court*], the prior action being numbered _____ in the files and records of the Court.

2. The prior action was brought by _____, [*name*] [_____ the plaintiff in the present action,] and was based on _____ [*specify, e.g.,* personal injuries sustained in a motor vehicle accident in which _____ (*name of plaintiff in prior action*) was the operator of one of the vehicles involved and defendant the operator of the other].

3. One of the issues necessarily determined in the prior action was _____ [*specify issue in present action that was determined in prior action, e.g.,* whether defendant was negligent in the operation of his/her motor vehicle].

[4. Although the plaintiff in this action was not a party to the former action, the plaintiff in this action controlled the former action and had a _____ (proprietary *and/o* r financial) interest in the _____ (judgment *or* determination of a question of _____ (law *or* fact) with reference to _____ (*specify matter or transaction in prior action that is also at issue in the present action*)).]

[5. Although the defendant in this action was not a party to the former action, the defendant controlled the prior action and had a _____ (proprietary *and/or* financial) interest in the _____ (judgment *or*

determination of a question of _____ (law *or* fact) with reference to _____ (*specify matter or transaction in prior action that is also at issue in the present action*)). Plaintiff had notice of the defendant's participation in the prior action.]

6. In the prior action, the Court having jurisdiction of the parties and subject matter, judgment was rendered on the merits for _____, [*name*] [the defendant in the present action,] on findings that [_____ *specify, e.g.,* defendant was not negligent in the operation of his/her motor vehicle]. A certified copy of the judgment roll in the action is attached hereto as Exhibit "A" and made a part hereof. Judgment in the action became final on _____ [*date*]. _____ [*State whether losing party in prior action appealed from judgment, and if losing party appealed, note the disposition of the appeal, e.g.,* The judgment has never been appealed from and the time for appealing has expired]. The judgment has never been vacated or modified.

7. The instant action is one for _____ [*specify, e.g.,* wrongful death of the plaintiff in prior action] and liability of defendant is predicated on and depends on _____ [*specify, e.g.,* his/her asserted negligence in the accident].

8. By reason of the aforesaid, and the determination in the prior action that _____ [*specify, e.g.,* defendant was not negligent in the operation of his vehicle in the accident], plaintiff is estopped to assert _____ [*specify, e.g.,* negligence] and to maintain this action.

[2] Use of Form

The form in [1], *above,* is for use by a defendant as an affirmative defense allegation in his or her answer, to allege that an issue or issues in the action have already been adjudicated in a prior action based on a different cause of action. For further discussion relating to answers generally, including general forms of answer into which the foregoing affirmative defense allegation may be inserted, see Ch. 26, *Answers* .

[3] Issue Preclusion

Issue preclusion, also known as collateral estoppel, bars parties or their privies from relitigating in a new proceeding on a different cause of action issues litigated in a prior proceeding [*In re Russell (1974) 12 Cal. 3d 229, 233, 115 Cal. Rptr. 511, 524 P.2d 1295]* . Under issue preclusion, the prior judgment is not a complete bar, but it operates against the party against whom it was obtained as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action [*Henn v. Henn (1980) 26 Cal. 3d 323, 329-330, 161 Cal. Rptr. 502, 605 P.2d 10]* .

Three requirements must be met before issue preclusion can be applied [*Producers Dairy Delivery Co. v. Sentry Ins. Co. (1986) 41 Cal. 3d 903, 910, 226 Cal. Rptr. 558, 718 P.2d 920* ; :

- The issue necessarily decided at the previous proceeding must be identical to the one that is sought to be relitigated.

- The previous proceeding must have resulted in a final judgment on the merits.

- The party against whom collateral estoppel is asserted must be party or in privity with a party at the prior proceeding.

The person asserting issue preclusion has the burden of proof that each of the requirements for application of the doctrine have been met [*Vella v. Hudgins (1977) 20 Cal. 3d 251, 257, 142 Cal. Rptr. 414, 572 P.2d 28]* .

For additional discussion, see *§ 491.15*.

[4] Contents

The form of affirmative defense alleges, in part, the existence of a prior action in which final judgment was rendered on the merits (Paragraphs 1, 2 and 6); the issue necessarily determined in the prior action (Paragraph 3); the issue in the present action that was adjudicated in the prior action (Paragraph 7); and the applicability of estoppel (Paragraph 8) [*see Producers Dairy Delivery Co. v. Sentry Ins. Co. (1986) 41 Cal. 3d 903, 910, 226 Cal. Rptr. 558, 718 P.2d 920* (listing requirements for collateral estoppel)].

The form also includes two optional paragraphs that should be used if the plaintiff (Paragraph 4) or defendant (Paragraph 5) were not parties to the previous action but controlled the action. A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he or she were a party if he or she has a proprietary or financial interest in the judgment or in the determination of a question of fact or law with reference to the same subject matter or transaction. If the other party has notice of his or her participation, the other party is equally bound [*Code Civ. Proc. § 1908(b)*; for a form of notice of motion to bind a nonparty on a judgment, *see § 491.56*].

[5] Cross References

For additional discussion and references, see *§ 491.51[2]* et seq.

Witkin, California Procedure, Vol. 7, *Judgment,* § 354 et seq. (4th ed. 1997)

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43-491 California Forms of Pleading and Practice--Annotated § 491.55

§ 491.55 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Plaintiff's Asserted Remedy and Cause of Action Barred by Previous Judgment--Attempt to Split Single Cause of Action

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Plaintiff's Asserted Remedy and Cause of Action Barred by Previous Judgment--Attempt to Split Single Cause of Action

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. On _____ [*date*], plaintiff filed an action against defendant, in the _____ [*specify court*], which action was numbered _____ in the files and records of the Court.

2. The purported cause of action in the previous suit was, and is, identical to the cause of action asserted by plaintiff in the complaint on file herein.

3. In the previous suit, plaintiff _____ [*state relief sought by plaintiff in prior action, e.g.,* sought to have a deed to certain real property located in _____ County set aside on the ground of fraud].

4. Reference is hereby made to the judgment roll of the former action, including the pleadings and judgment therein, a certified copy of which roll is attached hereto as Exhibit "A" and made a part hereof.

5. The remedy plaintiff seeks in this action, that is, _____ [*specify, e.g.,* setting aside of the deed on the ground of undue influence], is a remedy arising out of the identical purported cause of action between plaintiff and defendant in the former action and one that plaintiff could have sought in the action.

6. The judgment rendered in the previous suit has, prior to the filing of the within pleading, become final. _____ [*State whether losing party in prior action appealed from judgment, and if losing party appealed, note the disposition of the appeal, e.g.,* The judgment has never been appealed from and the time for appealing has expired]. The judgment has never been vacated or modified.

7. By reason of the aforesaid, plaintiff is estopped from seeking the relief he/she seeks in this action.

[2] Use of Form

The form in [1], *above,* is for use by a defendant as an affirmative defense allegation in his or her answer, to allege that plaintiff's asserted cause of action is identical to a cause of action asserted by plaintiff against defendant in a previous suit. The form is designed for the specific situation in which a plaintiff attempts to split a single cause of action into separate causes of action [*see Wulfjen v. Dolton (1944) 24 Cal. 2d 891, 894, 151 P.2d 846* (party prohibited from splitting up single cause of action and making it the basis of separate suits); *Allstate Ins. Co. v. Mel Rapton, Inc. (2000) 77 Cal. App. 4th 901, 907, 914, 92 Cal. Rptr. 2d 151* (rule against plaintiff splitting single cause of action is, in part, an application of doctrine of res judicata; judgment of small claims court held to bar subsequent suit on same cause of action)].

[3] Cross References

For further discussion relating to answers generally, including general forms of answer into which the this affirmative defense allegation may be inserted, see Ch. 26, *Answers*

For additional discussion and references, see *§ 491.51[2] et seq. and § 491.52* et seq.

Witkin, California Procedure, Vol. 4, *Pleading,* § 35 et seq. (4th ed. 1997)

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43-491 California Forms of Pleading and Practice--Annotated § 491.56

§ 491.56 Proceedings for Order That Nonparty Be Bound by Judgment [Code Civ. Proc. § 1908(b)]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings for Order That Nonparty Be Bound by Judgment [Code Civ. Proc. § 1908(b)]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER DETERMINING THAT NONPARTY BE BOUND BY JUDGMENT, DECLARATION OF _____ [*name*], and SUPPPORTING MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.*, plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] will, and hereby does, move for an order that the judgment _____ [entered *or* to be entered] in the above-entitled action be entered as a binding judgment on _____ [*identify party to be bound*]. The motion will be made on the ground that _____ [*identify party to be bound*] has a financial or proprietary interest in the judgment _____ [rendered *or* to be rendered] and, although not a party thereto, controls or participates in the control of such action.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name*(*s*)] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

SUPPORTING DECLARATION OF _____ [*name*]

1. I, _____ [*name*], declare:

2. I am _____ [*identify declarant, e.g.,* the attorney of record for defendant in the above-entitled action *or other statement as appropriate*].

3. _____ [*State evidentiary facts with particularity, to establish that nonparty sought to be bound controls or participates in the control of the above-entitled action*].

4. _____ [*State evidentiary facts with particularity, to establish that the declarant has personal knowledge of the foregoing facts and is competent to testify to such facts under oath*].

[5. I have personal knowledge of the foregoing facts, and if called as a witness can and will competently testify to them under oath.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion.*]

[2] Use of Form

The form of notice of motion and supporting declaration in [1], *above*, are for use to obtain a determination that a judgment is binding on a nonparty who controls or participates in the control of the action. The motion must be brought before the judgment becomes final. If not, the determination may be made in a separate action [*Code Civ. Proc. § 1908(b)*]. For further discussion, see *§ 491.14[5][d]*.

A memorandum must be filed and a copy served with this form [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, *see* Ch. 417, *Points and Authorities* .

[3] Cross References

For a discussion of procedures and additional forms for use in making motions, see Ch. 372, *Motions and Orders*

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43-491 California Forms of Pleading and Practice--Annotated § 491.57

§ 491.57 Proceedings for Order That Nonparty Be Bound by Judgment [Code Civ. Proc. § 1908(b)]--Order Granting Motion

[1] FORM Proceedings for Order That Nonparty Be Bound by Judgment [Code Civ. Proc. § 1908(b)]--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.,* defendant] for an order that _____ [*identify party to be bound*] be bound by the judgment _____ [entered *or* to be entered] in the above-entitled

action came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that the judgment entered in the case of _____ [*identify case by name, court, and docket number*] be binding on _____ [*identify party to be bound*].

[IT IS FURTHER ORDERED that the judgment in the above-entitled action be entered in accordance with this order.]
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, is for use in proceedings to establish that a judgment is conclusive on a nonparty who controls an action. It includes an optional paragraph for use, when appropriate, to direct that judgment be entered pursuant to such determination [*see Code Civ. Proc. § 1908(b)*].

For additional discussion and references, see *§ 491.56[2] et seq. and § 491.52* et seq.

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43-491 California Forms of Pleading and Practice--Annotated § 491.58

§ 491.58 Proceedings for Order Requiring Separate Trial of Special Defense of Res Judicata [Code Civ. Proc. § 597]--Notice of Motion

[1] FORM Proceedings for Order Requiring Separate Trial of Special Defense of Res Judicata [Code Civ. Proc. § 597]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR SEP-
Plaintiff,	)	ARATE TRIAL OF SPECIAL DEFENSE, DE-
vs.	)	CLARATION OF _____ [*name*],
_____ [*name*],	)	and
Defendant.	)	SUPPPORTING MEMORANDUM
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.*, plaintiff]] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*moving party, e.g.,* defendant] will, and hereby does, move for an order under *Code of Civil Procedure Section 597* for the separate trial of the special defense pleaded in defendant's answer that plaintiff's action is barred by res judicata. The motion will be made on the ground that the special defense of res judicata constitutes a complete bar to the action, and a separate trial thereof will eliminate the need, time, and expense of a regular trial of the action.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name*(*s*)] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion.*]

[2] Use of Form

The form of notice of motion in [1], *above*, is for use when a defendant or cross defendant seeks a separate, prior trial of the defense of bar of a prior judgment [*Code Civ. Proc. § 597*]. When the answer pleads any of several special defenses, among them that the action is barred by a prior judgment, the court may, either on the court's own motion or on the motion of any party, proceed to the trial of that special defense before the trial of any other issue in the case [*Code Civ. Proc. § 597*].

A memorandum of points and authorities must be filed and a copy served with this form [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[3] Cross References

For a related form of order, see *§ 491.59*

For further discussion and forms relating to separate trial under *Code Civ. Proc. § 597* generally, see *Ch. 3, Abatement of Actions, § 3.110* et seq.

For discussion and forms relating to motions and orders generally, see Ch. 372, *Motions and Orders*

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43-491 California Forms of Pleading and Practice--Annotated § 491.59

§ 491.59 Proceedings for Order Requiring Separate Trial of Special Defense of Res Judicata [Code Civ. Proc. § 597]--Order Granting Motion

[1] FORM Proceedings for Order Requiring Separate Trial of Special Defense of Res Judicata [Code Civ. Proc. § 597]--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*identify party, e.g.,* defendant] for an order for a separate trial of the special defense of res judicata came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared

by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and the separate trial of the special defense of res judicata be had before trial of other issues herein.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, may be used when the court grants a motion for separate trial of the special defense that an action is barred by res judicata [*see Code Civ. Proc. § 597*; for the related form of notice of motion, *see § 491.58*].

[3] Decision or Verdict After Special Trial

If, on separate trial of the special defense, the decision or verdict is in favor of the defendant pleading it, then judgment for that defendant must thereupon be entered; and no trial of other issues in the case may be had againt that defendant unless the judgment is reversed on appeal or is set aside or otherwise vacated. If, however, this decision or verdict is in the plaintiff's favor, then trial of the other issues must thereafter be had, either on the court's own motion or on the motion of any party; and judgment must thereafter be entered thereon in the same manner and with the same effect as if all of the issues in the case had been tried at one time [*Code Civ. Proc. § 597*]. In the event of a decision or verdict in the plaintiff's favor, any and all decisions and verdicts on the special defense and all rulings on the trial of it are deemed excepted to, and they may be reviewed on a motion for a new trial or on appeal from the final judgment [*Code Civ. Proc. § 597*].

[4] Cross References

For forms of judgment for use after a separate trial under *Code Civ. Proc. § 597*, see *Ch. 3, Abatement of Actions, § 3.110* et seq.

For additional discussion and references, see *§ 491.51[2] et seq. and § 491.58* et seq.

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43-492 California Forms of Pleading and Practice--Annotated 492.syn

§ 492.syn Synopsis to Chapter 492: REVIEW (CERTIORARI), WRIT OF

§ 492.01 Scope of Chapter

§ 492.02 Cross References

§§ 492.03-492.09 [Reserved]

§ 492.10 Governing Law

§ 492.11 Definitions

§ 492.12 Nature and Purpose of Writ of Review

§ 492.13 Other Writs Compared

[1] Writ of Prohibition

[2] Writ of Mandate or Administrative Mandate

[3] Writ of Habeas Corpus

§ 492.14 Alternative or Mislabeled Petitions

§ 492.15 Parties to Proceeding for Writ of Review

§ 492.16 Original Jurisdiction to Issue Writ

§ 492.17 Refusal to Exercise Original Jurisdiction

[1] When Lower Court Has Concurrent Jurisdiction

[2] For Unreasonable Delay in Bringing Petition

§ 492.18 Grounds for Issuance of Writ of Review

[1] In General

[2] Judicial Function

[a] Act Must Be Completed

[b] Act Must Be in Exercise of Constitutionally Conferred Judicial Power

[c] Acts of Most Administrative Agencies Excluded

[3] No Appeal

[a] In General

[b] Lack of Appeal Not Shown

[i] Interlocutory Orders

[ii] Lapse of Time for Appeal

[c] Lack of Appeal Shown

[i] Decision of Superior Court Appellate Department

[ii] Nonappealable Arbitration Orders

[iii] Contempt Orders

[iv] Small Claims Judgments

[v] Particular Probate Orders

[4] No Other Plain, Speedy, and Adequate Remedy

[5] Lack or Excess of Jurisdiction

[a] Jurisdiction Defined

[b] Errors in Exercise of Jurisdiction Distinguished

[c] Failure to Follow Statutory Procedure

[d] Refusal to Follow Stare Decisis

[e] Nonexistence of Jurisdictional Facts

[6] Beneficial Interest of Petitioner

§ 492.19 Stay of Proceedings Pending Disposition of Writ

§ 492.20 Petition for Writ of Review

[1] General Rules of Pleading Apply

[2] Contents

[3] Verification

[4] Accompanying Papers

[a] Points and Authorities

[b] Record of Proceedings Below

[c] Proof of Service of Petition

[d] Proposed Order and Writ

[e] Certificate of Interested Entities or Persons

§ 492.21 Ex Parte Petition for Writ of Review

§ 492.22 Service of Petition

§ 492.23 Initial Opposition to Petition

§ 492.24 Summary Denial of Petition

§ 492.25 Grant of Petition

[1] Issuance of Writ

[2] Form and Contents of Writ

[3] Service of Writ

§ 492.26 Return of Writ With Required Transcript

[1] By Respondent

[2] Burden on Petitioner to Insure Timely Return

[3] Proceedings for Further Return of Transcript

§ 492.27 Return by Demurrer or Answer to Writ

[1] By Respondent or Real Party in Interest

[2] Time for Return

[3] Return by Demurrer

[4] Return by Answer

§ 492.28 Scope of Review

[1] In General

[2] Existence of Jurisdictional Facts

[3] Petitioner's Burden on Review

[4] Contempt Orders

§ 492.29 Judgment

§ 492.30 Finality of Writ or Order Issued by Reviewing Court

§ 492.31 Costs

[1] Generally Allowed

[2] No Award on Summary Denial

[3] Not Charged to Respondent Court

§ 492.32 Subsequent Review of Writ Proceedings

§§ 492.33-492.49 [Reserved]

§ 492.50 Related Matthew Bender Publications

§ 492.51 State Constitution

§ 492.52 State Statutes

§ 492.53 California Rules of Court

§ 492.54 Local Rules of the Courts of Appeal

§ 492.55 Local Rules of Court

[1] Los Angeles County

[2] Sacramento County

§ 492.56 Decisions

[1] Burden of Insuring Adequate Return to Writ

[2] Grounds for Issuance of Writ of Review

[a] Beneficial Interest

[b] Exercise of Judicial Function

[c] Lack or Excess of Jurisdiction

[i] Burden of Establishing Jurisdiction

[ii] Error in Exercise of Jurisdiction Distinguished

[iii] Examples of Lack or Excess of Jurisdiction

[iv] Jurisdiction Defined

[v] Nonexistence of Jurisdictional Facts Supporting Contempt Order

[d] No Appeal

[i] In General

[ii] Lack of Appeal Not Shown

[iii] Lack of Appeal Shown

[e] No Other Plain, Speedy, and Adequate Remedy

§ 492.57 Mislabeled Petitions

§ 492.58 Original Jurisdiction to Issue Writ

[1] In General

[2] Refusal to Exercise Jurisdiction for Delay

§ 492.59 Scope of Review

[1] In General

[2] Contempt Orders

§ 492.60 Summary Denial of Writ

§ 492.61 Law Reviews

§ 492.62 Text References

§§ 492.63-492.79 [Reserved]

§ 492.80 Petitioner's Checklist

[1] Preliminary Determinations

[2] Documents to Be Obtained

[3] Prepare Petition for Writ of Review

[4] Prepare Proposed Order and Writ for Superior Court

[5] Prepare Points and Authorities

[5a] Prepare Certificate of Interested Entities or Persons

[6] Serve Petition

[7] Prepare Proof of Service of Petition

[8] File Original Petition

[9] Consideration and Ruling on Petition

[10] Serve Writ of Review

[11] Insure Return of Certified Record

§ 492.81 Guide for Real Party in Interest

[1] Prepare Opposition to Petition

[2] Serve and File Opposition to Petition

[3] Return to Writ of Review: Answer or Demurrer

§ 492.82 Hearing and Posthearing Procedure

[1] Attend Hearing and Present Oral Argument, if Appropriate

[2] Prepare and Serve Proposed Judgment (Superior Court Only)

[3] Prepare Notice of Entry of Judgment (Superior Court Only)

[4] Prepare Costs Memorandum or Motion to Tax Costs

§ 492.83 Postjudgment Procedure

[1] Superior Court

[2] Appellate Court

§§ 492.84-492.99 [Reserved]

§ 492.100 Special Proceeding for Writ of Review in Appellate Court [Code Civ. Proc. § 1069; Cal. Rules of Ct.,

Rule 8.486]--Cover of Petition [Cal. Rules of Ct., Rule 8.204]

[1] FORM

[2] Use of Form

[3] Format

[4] Request for Stay

[5] Related Appeal Pending

[6] Proceeding Involving Unfair Competition Case

[7] California Rules of Court

[8] Local Rules of Courts of Appeal

§ 492.101 Special Proceeding for Writ of Review in Appellate Court [Code Civ. Proc. § 1069; Cal. Rules of Ct., Rule 8.486]--Petition [Cal. Rules of Ct., Rule 8.486(a)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] General Rules of Pleading Apply

[5] Naming Respondent

[6] Request for Stay

[a] Pending Disposition of Writ

[b] Pending Disposition of Petition

[7] Verification

[8] Format of Petition

[a] Generally Subject to Requirements for Appellate Briefs

[b] Headings, References, Index, and Tables

[c] Format Requirements

[d] Word or Page Limit

[e] Certificate of Interested Entities or Persons

[9] Copies

[10] Attaching Complete Record

[11] Ex Parte Petition

[12] Service Requirements

[a] Methods of Service

[b] Proof of Service

[13] Petition for Writ of Review in the Alternative

[14] State Constitution

[15] State Statutes

[16] California Rules of Court

[17] Local Rules of the Courts of Appeal

[18] Decisions

[19] Law Reviews

[20] Text References

[21] Cross References

§ 492.102 Special Proceeding for Writ of Review in Superior Court [Code Civ. Proc. § 1069]--Petition

[1] FORM

[2] Use of Form

[3] Number of Copies

[4] Points and Authorities

[5] Service Requirements

[a] Prior Service Usually Required

[b] Applications Ex Parte

[6] State Statutes

[7] California Rules of Court

[8] Local Rules of Court

[a] Los Angeles County

[b] Sacramento County

[9] Cross Reference

§ 492.103 Special Proceeding for Writ of Review in Superior Court [Code Civ. Proc. § 1069]--Order Directing Issuance of Writ

[1] FORM

[2] Use of Form

[3] Number of Copies

[4] Notice of Order

[5] Cross Reference

§ 492.104 Special Proceeding for Writ of Review in Superior Court [Code Civ. Proc. § 1069]--Writ of Review [Code Civ. Proc. §§ 1071, 1072]

[1] FORM

[2] Use of Form

[3] Stay of Proceedings

[4] Service of Writ

[5] State Statutes

[6] Cross References

§ 492.105 Proceedings to Obtain Further Return to Writ of Review [Code Civ. Proc. § 1075]--Notice of Motion and Supporting Declaration

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

§ 492.106 Proceedings to Obtain Further Return to Writ of Review [Code Civ. Proc. § 1075]--Order Granting Motion

[1] FORM

[2] Use of Form

[3] Cross Reference

§ 492.107 Return to Writ of Review by Demurrer or Verified Answer [Code Civ. Proc. § 1069.1, 1089; Cal. Rules of Ct., Rule 8.487(b)]--Demurrer

[1] FORM

[2] Use of Form

[3] Effect of Demurrer

[4] Time for Making Return by Demurrer

[5] State Statutes

[6] California Rules of Court

[7] Cross References

§ 492.108 Return to Writ of Review by Demurrer or Verified Answer [Code Civ. Proc. §§ 1069.1, 1089; Cal. Rules of Ct., Rule 8.487(b)]--Verified Answer

[1] FORM

[2] Use of Form

[3] State Statutes

[4] California Rules of Court

[5] Cross References

§ 492.109 Judgment on Writ of Review in Superior Court [Code Civ. Proc. § 1075]

[1] FORM

[2] Use of Form

[3] Preparation of Written Judgment

[4] Notice of Entry of Judgment

[5] State Statutes

[6] California Rules of Court

[7] Cross References

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Chapter 492 REVIEW (CERTIORARI), WRIT OF
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43-492 California Forms of Pleading and Practice--Annotated § 492.01

§ 492.01 Scope of Chapter

This chapter discusses the special proceeding in state superior and appellate courts known as writ of review or writ of certiorari. It includes a procedural guide and the following forms:

- Petitions for the writ [*see §§ 492.100 -492.102*].
- Order granting a petition and directing issuance of the writ [*see § 492.103*].
- The writ [*see § 492.104*].
- Notice of motion and order for use in obtaining further return to the writ [*see §§ 492.105 -492.106*].
- Demurrer to the writ [*see § 492.107*].
- Verified answer to the writ [*see § 492.108*].
- Judgment affirming, modifying, or annulling the decision below following review on the writ [*see § 492.109*].

Specialized writs of review, used to review decisions of various administrative agencies, are discussed in the chapters pertaining to the particular agency. Thus, for discussion and forms relating to writs of review under *Bus. & Prof. Code §§ 23090* and *23090.1* to review decisions of the Alcoholic Beverage Control Appeals Board, see Ch. 18, *Alcoholic Beverage Licenses* . For discussion and forms relating to writs of review under *Pub. Util. Code § 1756* to review decisions of the Public Utilities Commission, see Ch. 480, *Public Utilities* . For discussion and forms relating to writs of review under *Lab. Code § 5950* to review decisions of the Workers' Compensation Appeals Board, see Ch. 577, *Workers' Compensation* . For discussion and forms relating to a similar proceeding for review of disciplinary actions by the State Bar, see Ch. 71, *Attorney Discipline* .

Petitions for review in the California Supreme Court and petitions for writ of certiorari in the United States Supreme

Court are both distinct from petitions for writ of review discussed in this chapter. For discussion and forms relating to these proceedings, see Ch. 54, *Appeal: California Supreme Court Review* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionState Court ReviewLegal EthicsSanctionsDisciplinary ProceedingsAppealsWorkers' Compensation & SSDIAdministrative ProceedingsJudicial ReviewGeneral Overview

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§ 492.02 Cross References

For discussion and forms relating to writs of review to review decisions of the Alcoholic Beverage Control Appeals Board, see Ch. 18, *Alcoholic Beverage Licenses* .

For discussion and forms relating to appeals in civil actions generally, see Ch. 40, *Appeal: An Overview* , through Ch. 54, *Appeal: California Supreme Court Review* .

For discussion and a form relating to writs of review to review disciplinary actions by the State Bar, see Ch. 71, *Attorney Discipline* .

For discussion and forms relating to writs of review, habeas corpus, and prohibition for review of contempt orders, see Ch. 135, *Contempt* .

For discussion and forms relating to writs of habeas corpus, see Ch. 292, *Habeas Corpus* .

For discussion and forms relating to writs of mandate, see Ch. 358, *Mandate and Prohibition* .

For discussion and forms relating to writs of prohibition, see Ch. 358, *Mandate and Prohibition* .

For discussion and forms relating to writs of administrative mandamus to review decisions of public administrative agencies, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

For discussion and a form relating to writs of review to review decisions of the Public Utilities Commission, see Ch. 480, *Public Utilities* .

For discussion and forms relating to writs of review to review decisions of the Workers' Compensation Appeals Board, see Ch. 577, *Workers' Compensation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewRemediesProhibitionCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionCivil ProcedureAppealsAppellate JurisdictionState Court ReviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsJudicial ReviewLegal EthicsSanctionsDisciplinary ProceedingsAppealsWorkers' Compensation & SSDIAdministrative ProceedingsJudicial ReviewGeneral Overview

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[Reserved]

§§ 492.03[Reserved]

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§ 492.10 Governing Law

Writs of review (certiorari) are governed generally by Cal. Const., art. VI, *§ 10, Code Civ. Proc.* §§ *1027, 1067-1077, 1107, 1108*, and, in appellate courts, by *Cal. Rules of Ct., Rules 8.485-8.493*. Local appellate or superior court rules may also affect writ proceedings [*see, e.g.*, Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Policy Statement A].

To the extent that they are consistent, the general provisions governing civil actions (*Code Civ. Proc. §§ 307-1062.10*) also apply to writ of review proceedings [*see Code Civ. Proc. §§ 1109, 1110*]. Similarly, the civil law and motion rules for trial courts (*Cal. Rules of Ct., Rules 3.1100-3.1390*) apply to writ of review proceedings in superior courts [*see Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(2)*].

Legal Topics:

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

A writ of "review" is synonymous with the common law writ of "certiorari" [*see Code Civ. Proc. § 1067*]. In conformity with code usage, this chapter uses the term "review," although the term "certiorari" is also in common use [*see, e.g., Cal. Const., art. VI, § 10*; *Cal. Rules of Ct., Rule 8.485*].

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§ 492.12 Nature and Purpose of Writ of Review

A writ of review is the method by which a superior or appellate court may examine a decision or other action by a lower court, a board, or an officer exercising judicial functions, when the latter has exceeded its jurisdiction and there is no right to appeal or any plain, speedy, and adequate remedy [*see Code Civ. Proc. § 1068(a)*]. The writ commands the respondent to certify fully to the reviewing court the transcript of the record and proceedings to be reviewed, and may, in addition, require the respondent to desist in the meantime from further proceedings in the matter to be reviewed [*Code Civ. Proc. § 1071*; *see Code Civ. Proc. § 1070* (respondent is inferior tribunal, board, or officer, or any other person having custody of record or proceeding to be certified); *see also § 492.19*]. On full return of the writ, the court reviews the certified record and renders judgment affirming, annulling, or modifying the proceedings below [*Code Civ. Proc. § 1075*].

A writ of review proceeding constitutes a direct, and not a collateral, attack on the challenged judgment or order [*Great Western Power Co. v. Pillsbury (1915) 170 Cal. 180, 185, 149 P. 35]* .

Use of the writ of review proceeding is extremely limited in comparison with other writ proceedings, particularly writ of mandate proceedings [*see § 492.13[2]*]. This is because review is limited to jurisdictional issues involving a judicial action concerning which there is no right to appeal [*Code Civ. Proc. § 1074*; *see § 492.18[2], [3], [5]*]. The circumstances under which a writ of review may be granted under *Code Civ. Proc. § 1068* has been summarized by one court of appeal as "not very often" [*see Freedom Newspapers, Inc. v. Superior Court (1986) 186 Cal. App. 3d 1102, 1107, 231 Cal. Rptr. 189]* . Its most common use is to challenge a contempt order [*see § 492.18[3][c][iii]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureSanctionsContemptGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsRecords on Appeal

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§ 492.13 Other Writs Compared

[1] Writ of Prohibition

A writ of prohibition arrests the proceedings of a tribunal, board, or person exercising judicial functions when such proceedings are in excess of jurisdiction [*Code Civ. Proc. § 1102*]. It will issue only to enjoin threatened judicial action and will not lie after judgment is entered where there are no further judicial acts to be performed [*Chodos v. Superior Court (1964) 226 Cal. App. 2d 703, 714, 38 Cal. Rptr. 301]* . While a writ of review issues only when there is no appeal and no other plain, speedy, and adequate remedy [*Code Civ. Proc. § 1068(a)*], prohibition may issue when there is a remedy by appeal, so long as the appellate remedy is inadequate [*Code Civ. Proc. § 1103(a)*]. When a petitioner seeks to annul a judgment or order and, at the same time, to stop any further proceedings in the case, the court may issue both writs of review and of prohibition [*County of Marin v. Superior Court (1960) 53 Cal. 2d 633, 642-643, 2 Cal. Rptr. 758, 349 P.2d 526]* . For discussion and forms relating to proceedings seeking a writ of prohibition, see Ch. 358, *Mandate and Prohibition* .

[2] Writ of Mandate or Administrative Mandate

A writ of mandate compels an inferior tribunal, corporation, board, or person to perform a legal duty, or to extend to a party a right or office to which that party is entitled, when no other speedy or adequate remedy exists at law [*Code Civ. Proc. §§ 1085, 1086*]. The writ may be used to challenge any action of a court or of a nonjudicial body that constitutes an abuse of discretion, even when that action lies within the jurisdiction of the court or other body [*see Simmons v. Superior Court (1950) 96 Cal. App. 2d 119, 132, 214 P.2d 844* ; *see also* discussion *§ 492.56[2][c]*]. For discussion and forms relating to proceedings seeking a writ of mandate, see Ch. 358, *Mandate and Prohibition* .

A special type of writ of mandate, administrative mandate, is available to review decisions resulting from administrative hearings held by either governmental or nongovernmental bodies [*Code Civ. Proc. § 1094.5(a)*; *Anton v. San Antonio Community Hospital (1977) 19 Cal. 3d 802, 815-817, 140 Cal. Rptr. 442, 567 P.2d 1162]* . The scope of review under this writ goes beyond the issue of jurisdiction and includes a determination of whether the administrative body held a fair trial or committed any prejudicial abuse of discretion [*Code Civ. Proc. § 1094.5(b)*]. For a discussion, procedural guide, and forms relating to proceedings seeking a writ of administrative mandamus, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

[3] Writ of Habeas Corpus

A writ of habeas corpus generally reviews the legality of custody when a person is incarcerated [*Penal Code § 1473(a)*]. In contempt cases, when both a fine and prison sentence have been imposed, it is appropriate to petition a higher court for a writ of habeas corpus or, alternatively, for a writ of review [*In re Buckley (1973) 10 Cal. 3d 237, 240 n.1, 110 Cal. Rptr. 121, 514 P.2d 1201]* . The scope of review for both writs is the same [*In re Karpf (1970) 10 Cal. App. 3d 355, 364, 88 Cal. Rptr. 895* ; *In re Circosta (1963) 219 Cal. App. 2d 777, 784-785, 33 Cal. Rptr. 514]* . For discussion and forms relating to proceedings seeking a writ of habeas corpus, see Ch. 292, *Habeas Corpus* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewStandards of ReviewAbuse of DiscretionCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal ContemptCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionCriminal Law & ProcedureHabeas CorpusCustody RequirementNoncustody DeterminationsFines & Restitution

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§ 492.14 Alternative or Mislabeled Petitions

Superior and appellate courts are authorized to grant extraordinary relief "in the nature of mandamus, certiorari, and prohibition" [*Cal. Const., art. VI, § 10*]. Under modern principles of pleading, neither a mislabeled petition nor a defective prayer bars the relief justified by proper allegations and proof [*Peck's Liquors, Inc. v. Superior Court (1963) 221 Cal. App. 2d 772, 775, 34 Cal. Rptr. 735]* . A petitioner who is in doubt as to the type of writ he or she should seek can petition, in an alternative form, for a writ of review, prohibition, or mandate [*Peck's Liquors, Inc. v. Superior Court (1963) 221 Cal. App. 2d 772, 775, 34 Cal. Rptr. 735]* . Should a party petition for the wrong writ, the reviewing court will treat the petition as one for the appropriate writ [*Davis v. Superior Court (1980) 102 Cal. App. 3d 164, 170-171, 162 Cal. Rptr. 167* (petition for review treated as petition for mandate); *Chase v. Superior Court (1962) 210 Cal. App. 2d 872, 878, 27 Cal. Rptr. 383* (petition for prohibition treated as petition for review); *Thomasian v. Superior Court (1953) 122 Cal. App. 2d 322, 324, 265 P.2d 165* (petition for prohibition treated as petition for review or mandate)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 492.15 Parties to Proceeding for Writ of Review

Although *Code Civ. Proc. § 1063* provides that the party bringing a writ may be known as the "plaintiff" and the adverse party as the "defendant," the party seeking the writ files a "petition" rather than a complaint and so the parties are usually referred to as the "petitioner" and the "respondent" [*see Code Civ. Proc. § 1069*].

A proceeding for a writ of review is normally a three-party proceeding when a court is named as the respondent. In this situation the "real party in interest," the party whose interest will be directly affected by issuance of the writ, must be named and identified as a party in the petition [*Cal. Rules of Ct., Rule 8.486(a)(2)*; *Inland Counties Regional Center, Inc. v. Office of Administrative Hearings (1987) 193 Cal. App. 3d 700, 704-705, 238 Cal. Rptr. 422]* . When the petition seeks review of the decision of a municipal, superior, or appellate court, normally the real party in interest will be the opposing party in the action below. The respondent court is a neutral party with no interest in the controversy [*Hupp v. Superior Court (1913) 22 Cal. App. 162, 133 P. 987]* . Because a respondent court will not usually file any opposition to the writ proceedings, opposition to the petition and to the writ must ordinarily be made solely by the real party in interest.

When the writ seeks to review action by a court, the respondent is the court as such, not the judge as a person [*Lois R. v. Superior Court (1971) 19 Cal. App. 3d 895, 903, 97 Cal. Rptr. 158* (prohibition); *Lawson v. Superior Court (1957) 155 Cal. App. 2d 755, 761, 318 P.2d 812]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 492.16 Original Jurisdiction to Issue Writ

The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in proceedings for extraordinary relief in the nature of certiorari [*Cal. Const., art. VI, § 10*]. In other words, any court may issue a writ of review to any inferior tribunal, board, or officer [*Code Civ. Proc. § 1068(a)*].

The appellate division of the superior court has original jurisdiction in proceedings for extraordinary relief in the nature of certiorari directed to the superior court in causes subject to its appellate jurisdiction [*Cal. Const., art. VI, § 10*]. In other words, the appellate division of the superior court has original jurisdiction to issue a writ or review to the superior court in a limited civil case [*Code Civ. Proc. § 1068(b)*; *see Code Civ. Proc. § 904.2* (appeal of ruling by superior court judge or other judicial officer in limited civil case is to appellate division of superior court)]. When the appellate division of the superior court issues a writ of review to the superior court, the superior court is an inferior tribunal for purposes of *Code Civ. Proc. §§ 1067-1077*, the provisions governing review or certiorari generally [*Code Civ. Proc. § 1068(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionJurisdictional SourcesConstitutional SourcesCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionState Court Review

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§ 492.17 Refusal to Exercise Original Jurisdiction

[1] When Lower Court Has Concurrent Jurisdiction

Absent exceptional circumstances, the courts of appeal and the Supreme Court normally refuse to exercise their original jurisdiction when a petition for an extraordinary writ could have been made first to a lower court [*Funeral Dir. Assn. v. Bd. of Funeral Dirs. (1943) 22 Cal. 2d 104, 110, 136 P.2d 785* (mandate); *Cohen v. Superior Court (1968) 267 Cal. App. 2d 268, 270, 274, 72 Cal. Rptr. 814* (mandate)]. Therefore, a petitioner for a writ of review should usually file in the superior court to challenge the act of a municipal or justice court, or of aconstitutionally created administrative agency, in a court of appeal to challenge the act of a superior court, and in the California Supreme Court to challenge the act of a court of appeal.

If the petition could lawfully be made to a lower court in the first instance, it must set forth the circumstances that, in the opinion of the petitioner, render it proper that the writ should issue originally from the reviewing court [*Cal. Rules of Ct., Rule 8.486(a)(1)*]. A court of appeal will take jurisdiction without a prior petition to a lower court to resolve issues of great public import whose prompt resolution is necessary [*Aden v. Younger (1976) 57 Cal. App. 3d 662, 670, 129 Cal. Rptr. 535]* . The Supreme Court will consider an original petition only when some emergency exists or the public welfare is involved, and even then usually only in a mandate case [*Jolicoeur v. Mihaly (1971) 5 Cal. 3d 565, 570 n.1, 96 Cal. Rptr. 697, 488 P.2d 1* (mandate to compel registration of voters 18 and older); *County of Sacramento v. Hickman (1967) 66 Cal. 2d 841, 845, 59 Cal. Rptr. 609, 428 P.2d 593* (mandate to compel proper county tax assessments); *cf. Sacramento v. Superior Court (1972) 8 Cal. 3d 479, 481, 481, 105 Cal. Rptr. 374, 503 P.2d 1382* (prohibition to restrain private wrongful death action in light of sovereign immunity defense)].

Absent a showing sufficient to justify the court's exercise of its original jurisdiction, the court may deny the petition, and the petitioner's right to reapply for the writ in the proper lower tribunal will not be prejudiced [*Funeral Dir. Assn. v. Bd. of Funeral Dirs. (1943) 22 Cal. 2d 104, 110, 136 P.2d 785]* . Alternatively, the Supreme Court has the power to transfer the case to the appropriate court of appeal [*Cal. Const., art. VI, § 12*; *see also Cal. Rules of Ct., Rule 10.1000(a)*].

[2] For Unreasonable Delay in Bringing Petition

There is no statutory time limit in which a petition for a writ of review must be filed. When there has been an unreasonable, unexplained delay in seeking the writ, however, the courts may refuse to consider the petition [*Bernstein v. Superior Court (1941) 46 Cal. App. 2d 568, 569, 116 P.2d 172]* . The court's refusal to exercise jurisdiction because of excessive delay differs from the defense of laches. One appellate court has explained that the doctrine of laches, which requires a showing of prejudice to opposing parties, might bar those writs, such as administrative mandamus, for which review is essentially a matter of right. Review of an action of a court, however, is a matter of discretion, and delay in seeking a writ of review is a sufficient reason for the higher court to refuse the writ unless the delay is satisfactorily explained [*Scott v. Municipal Court (1974) 40 Cal. App. 3d 995, 997, 115 Cal. Rptr. 620]* .

The time allowed by law within which to appeal from a final judgment has been held, by analogy, to be a reasonable time in which to file a petition for a writ of review, and the writ may be barred by the unexcused lapse of the same length of time [*Reynolds v. Superior Court (1883) 64 Cal. 372, 373, 28 P. 121* ; *Bryant v. Superior Court (1936) 16 Cal. App. 2d 556, 561, 61 P.2d 483* (dictum)]. Usually an appeal must be filed on or before 60 days after the date the court serves a notice of entry of judgment or appealable order, or 60 days after service of a notice of entry of judgment or appealable order, or 180 days after the date of entry of the judgment, whichever is earliest [*see Cal. Rules of Ct., Rule 8.104(a)*]. Applying this guideline and examining the particular facts of a case, a court may refuse to consider a writ petition once a comparable length of time has elapsed [*Donovan v. Board of Police Commrs. (1916) 32 Cal. App. 392, 399, 163 P. 69* (14-month delay); *Estate of Glassgold (1950) 97 Cal. App. 2d 859, 863-864, 218 P.2d 1016* (nine-month delay); *Scott v. Municipal Court (1974) 40 Cal. App. 3d 995, 996, 115 Cal. Rptr. 620* (six-month delay); *Krueger v. Superior Court (1979) 89 Cal. App. 3d 934, 938, 152 Cal. Rptr. 870* (six-month delay)]. Denial of a petition in these cases is not an abuse of the reviewing court's discretion [*Scott v. Municipal Court (1974) 40 Cal. App. 3d 995, 997, 115 Cal. Rptr. 620]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 492.18 Grounds for Issuance of Writ of Review

[1] In General

A writ of review may be granted only when a petitioner shows all of the following [*Code Civ. Proc. § 1068(a)*; *People v. Cimarusti (1978) 81 Cal. App. 3d 314, 319, 146 Cal. Rptr. 421* ; *Buchwald v. Superior Court (1967) 254 Cal. App. 2d 347, 353, 62 Cal. Rptr. 364]* :

- An inferior tribunal, board, or officer exercised judicial functions.

- The petitioner has no remedy by appeal, nor, in the judgment of the court, does any plain, speedy, and adequate remedy exist.

- The challenged judicial act exceeded the jurisdiction of the tribunal, board, or officer.

In addition, the petitioner must show that he or she has a beneficial interest in the writ of review proceedings [*Code Civ. Proc. § 1069*; *see Taylor v. Superior Court (1942) 20 Cal. 2d 244, 247, 125 P.2d 1]* .

For discussion of additional facts that an appellate court requires to be shown when the petition could have been brought in a lower court, see *§ 492.17[1]*. For discussion of the time requirement for filing a petition, see *§ 492.17[2]*.

[2] Judicial Function

[a] Act Must Be Completed

Courts employ writ of review proceedings to scrutinize the acts of an inferior tribunal, board, or officer "exercising judicial functions" [*Code Civ. Proc.§ 1068(a)*]. A judicial act cannot be challenged by a writ of reviewunless that act has been completed [*Holabird v. Railroad Commission (1916) 171 Cal. 691, 694, 154 P. 831]* . If a court has only threatened to act in excess of its jurisdiction, a writ of prohibition may lie [*see § 492.13*]. Conversely, if a party petitions for a writ of prohibition, and before the petition can be heard, the lower court completes its decision, the reviewing court will deem the petition as one for a writ of review [*Chase v. Superior Court (1962) 210 Cal. App. 2d 872, 878, 27*

Cal. Rptr. 383] .

[b] Act Must Be in Exercise of Constitutionally Conferred Judicial Power

Only a constitutional grant of judicial power, like that resting in the state's courts, authorizes an inferior tribunal, board, or officer to exercise judicial functions [*Standard Oil Co. v. State Board of Equal. (1936) 6 Cal. 2d 557, 562-563, 59 P.2d 119* ; *see Cal. Const., art. VI, § 1*]. For example, a writ of review will not lie to review an adjudication by a nongovernmental body [*Hill-Tellman v. Musicians' Union (1924) 67 Cal. App. 279, 280-281, 227 P. 646* (writ of review held to be improper to review action of voluntary unincorporated association)]. On the other hand, the writ may issue to review a quasi-judicial action by the state governor in the exercise of a constitutionally conferred power to hold a hearing and remove prison directors from office [*O'Brien v. Olson (1941) 42 Cal. App. 2d 449, 453, 109 P.2d 8]* .

A ministerial act of a court, such as the issuance of a writ of execution, does not constitute a judicial action subject to writ of review [*Duke v. Justice's Court of Berkeley (1940) 42 Cal. App. 2d 178-179, 180, 108 P.2d 707* ; *Community Nat. Bank v. Superior Court (1966) 242 Cal. App. 2d 770, 771, 773, 51 Cal. Rptr. 782]* .

[c] Acts of Most Administrative Agencies Excluded

The decisions of statewide administrative agencies, entities that the state constitution prohibits from exercising judicial functions, are not subject to a writ of review [*Standard Oil Co. v. State Board of Equal. (1936) 6 Cal. 2d 557, 559-564, 59 P.2d 119]* . More recently the courts have recognized that local agencies, too, are without constitutional authority to exercise judicial functions [*Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 42-44, 112 Cal. Rptr. 805, 520 P.2d 29]* . Examples of such local agencies no longer subject to a writ of review are city councils, school boards, planning commissions, and civil service and merit systems boards and commissions [*see Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 46 n.1, 112 Cal. Rptr. 805, 520 P.2d 29* (Burke, J., dissenting)]. The sole type of administrative agency whose acts are judicial for purposes of a writ of review is one that derives its adjudicating powers from the constitution itself [*Boren v. State Personnel Board (1951) 37 Cal. 2d 634, 637-638, 234 P.2d 981* (StatePersonnel Board)]. For a discussion of those agencies authorized to perform judicial functions, see *Ch. 470, Overview of Public Administrative Law, § 470.12*.

Adjudicatory decisions of state constitutional agencies can also be challenged by writs of administrative mandate [*Boren v. State Personnel Board (1951) 37 Cal. 2d 634, 637-638, 234 P.2d 981* ; *People v. County of Tulare (1955) 45 Cal. 2d 317, 319, 289 P.2d 11]* . Because the scope of review allowed in a writ of mandate proceeding extends beyond the question of jurisdiction, and reaches to whether or not there is evidentiary support for the decision, the writ of review is, for all practical purposes, a seldom-used tool for review of administrative adjudications [*see § 492.13[2]*].

[3] No Appeal

[a] In General

A writ of review will not lie when the aggrieved party has a remedy by appeal from the order or judgment [*Stoddard v. Superior Court of Stanislaus County (1895) 108 Cal. 303, 305* ; *Stoner v. Superior Court (1945) 67 Cal. App. 2d 760, 761, 155 P.2d 697* ; *see Code Civ. Proc. § 1068(a)*]. This distinguishes a writ of review from a writ of mandate or prohibition; the latter writs will issue even when there is a remedy of appeal, so long as that remedy is inadequate [*see Code Civ. Proc. §§ 1086, 1103*]. The writ of review is not available to a petitioner who has a right of appeal, whether or not such appeal affords a plain, speedy, and adequate remedy [*Monterey Club v. Superior Court (1941) 44 Cal. App. 2d 351, 355, 112 P.2d 321]* .

For further discussion of appealable judgments and orders under *Code Civ. Proc. §§ 904.1* (unlimited civil cases in superior court) and 904.2 (ruling by superior court judge or other judicial officer in limited civil cases in superior or municipal court), see *Ch. 42, Appeal: Notice of Appeal, § 42.12*, and see *Ch. 345A, Limited Civil Cases, § 345A.34*.

[b] Lack of Appeal Not Shown

[i] Interlocutory Orders

In general, there is no appeal from orders that are interlocutory, with the exception of certain orders in probate or real property actions [*see Code Civ. Proc. § 904.1(a), 904.2(a)*].

Nevertheless, a writ of review normally is not available so long as the petitioner has an adequate remedy by appeal from an eventual final judgment, even though the challenged order itself is interlocutory and not appealable [*Bank of America v. Superior Court (1942) 20 Cal. 2d 697, 703, 128 P.2d 357]* . The analysis used by some courts is that the opportunity for review of an interlocutory ruling by an eventual appeal affords a "plain, speedy, and adequate remedy" for the purposes of *Code Civ. Proc. § 1068* [*see De Lao v. Superior Court (1951) 37 Cal. 2d 711, 712-713, 234 P.2d 961* ; *see also § 492.18[4]*].

If an appeal from a final judgment is arguably not an adequate remedy a writ of review may lie, for example, to annul an interlocutory order that is void for lack of jurisdiction [*see Howard v. Superior Court (1944) 25 Cal. 2d 784, 787, 154 P.2d 849* (dictum)]. In *Estate of Bodger (1954) 128 Cal. App. 2d 710, 715, 276 P.2d 83* , for example, a probate court made an ex parte appointment of an attorney to represent trust beneficiaries, over the objection of one of the beneficiaries who then petitioned for a writ of review to annul the probate order. The court of appeal, holding the order void and violative of due process, stated that the petitioner should not have to wait and appeal from the order for the appointed attorney's fees to challenge the appointment and, therefore, the order was annulled on a writ of review.

[ii] Lapse of Time for Appeal

Generally, if a petitioner loses an existing right of appeal for failure to file a timely notice of appeal, this fact will not support issuance of a writ of review on the ground that there is no remedy of appeal [*Simmons v. Superior Court (1959) 52 Cal. 2d 373, 375, 341 P.2d 13* ; *see also O'Kuna v. Small Claims Court, etc. (1927) 81 Cal. App. 588, 589-590, 254 P. 291]* . This is particularly true when the petitioner's loss of the right of appeal is attributable to neglect or laches [*see Hochheimer & Co. v. Superior Court (1924) 65 Cal. App. 206, 211, 223 P. 564]* .

A petitioner's loss of the right of appeal will, however, support the issuance of a writ of review if the loss is not the petitioner's fault, but is due to the fact that he or she received no notice and had no knowledge of the entry of the judgment or order until after the time for appeal had expired [*Lee v. Small Claims Court (1939) 34 Cal. App. 2d 1, 4, 92 P.2d 937* ; *O'Kuna v. Small Claims Court, etc. (1927) 81 Cal. App. 588, 590, 254 P. 291* ; *see also Grinbaum v. Superior Court (1923) 192 Cal. 528, 556, 221 P. 635]* . This exception does not apply if notice was not required to be given to the petitioner [*Simmons v. Superior Court (1959) 52 Cal. 2d 373, 376, 341 P.2d 13* ; *Arens v. Superior Court (1955) 45 Cal. 2d 623, 625, 290 P.2d 257]* .

The writ may also be available if there is uncertainty in the law concerning whether the challenged order or judgment is appealable. If the court considering the writ petition determines that the remedy of appeal was available, the court may nevertheless go on to decide the merits of the petition even though the time to appeal has lapsed [*see Phelan v. Superior Court (1950) 35 Cal. 2d 363, 371-372, 217 P.2d 951* (overruling prior decisions holding there was no right to appeal)].

[c] Lack of Appeal Shown

[i] Decision of Superior Court Appellate Department

Generally, a ruling by a superior court judge or other judicial officer in a limited civil case may be appealed to the appellate division of the superior court [*Code Civ. Proc. §§ 77(e), 904.2(a)*; *see Whittaker v. Superior Court (1968) 68 Cal. 2d 357, 363-364, 66 Cal. Rptr. 710, 438 P.2d 358]* . Once the superior court has decided the appeal, there is no

further right of appeal from the judgment of the appellate division, although the aggrieved party may move the superior court to transfer on certification to the court of appeal, or alternatively, may request the court of appeal to exercise its discretion to take certification [*see Code Civ. Proc. §§ 904.1(a), 911*; *Cal. Rules of Ct., Rules 8.1002-8.1008*]. Even when certified by the superior court, the court of appeal has discretion to refuse to transfer the case, and this refusal ordinarily terminates appellate review [*see Dvorin v. Appellate Dep't of Superior Court (1975) 15 Cal. 3d 648, 650-651, 125 Cal. Rptr. 771, 542 P.2d 1363]* .

A writ of review will issue from a court of appeal when the appellate division of the superior court exceeded its jurisdiction in a judgment on appeal from the municipal court, and when the superior court refused certification [*see, e.g., East Bay Municipal Utility Dist. v. Appellate Department (1979) 23 Cal. 3d 839, 842, 153 Cal. Rptr. 597, 591 P.2d 1249* ; *Dvorin v. Appellate Dep't of Superior Court (1975) 15 Cal. 3d 648, 650-651, 125 Cal. Rptr. 771, 542 P.2d 1363* ; *Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 456, 20 Cal. Rptr. 321, 369 P.2d 937]* .

[ii] Nonappealable Arbitration Orders

Although an order denying a petition to compel arbitration is appealable [*Code Civ. Proc. § 1294(a)*], an order compelling arbitration is nonappealable [*see Code Civ. Proc. § 1294*]. If the arbitration order has exceeded the court's jurisdiction and the party compelled to arbitrate has no other plain, speedy, or adequate remedy, a writ of review is an appropriate method of challenging the order [*Buchwald v. Superior Court (1967) 254 Cal. App. 2d 347, 353, 62 Cal. Rptr. 364]* . An order compelling arbitration has been held to exceed a court's jurisdiction when provisions of the Labor Code conferred exclusive jurisdiction of the dispute on the state Labor Commissioner [*Buchwald v. Superior Court (1967) 254 Cal. App. 2d 347, 358, 62 Cal. Rptr. 364]* . Another court reviewing an arbitration order on appeal from a subsequent judgment has suggested that a jurisdictional fact is missing when the parties did not voluntarily and fairly enter into the arbitration agreement [*Ramirez v. Superior Court (1980) 103 Cal. App. 3d 746, 752, 163 Cal. Rptr. 223* (dictum)].

A party compelled to arbitrate may have the validity of the order reviewed on an appeal from a judgment confirming an arbitration award [*Wheeler v. St. Joseph Hospital (1976) 63 Cal. App. 3d 345, 353, 133 Cal. Rptr. 775* ; *see Code Civ. Proc. § 1294(d)* (arbitration judgment appealable)]. Some cases have described orders to compel arbitration as interlocutory in nature, noting that the rationale behind the rule making such orders nonappealable is that the party who objects to arbitration may win at the arbitration hearing and, if not, the issue is still reviewable on appeal from the order of confirmation [*see Wheeler v. St. Joseph Hospital (1976) 63 Cal. App. 3d 345, 353, 133 Cal. Rptr. 775* ; *Maddy v. Castle (1976) 58 Cal. App. 3d 716, 719-720, 130 Cal. Rptr. 160]* . Courts recognize, however, that the extraordinary writs of mandate or prohibition are available to review orders to arbitrate if the matters ordered arbitrated fall clearly outside the scope of the arbitration agreement, or if the arbitration would appear to be unduly time consuming or expensive [*Atlas Plastering, Inc. v. Superior Court (1977) 72 Cal. App. 3d 63, 68, 140 Cal. Rptr. 59* (writ of mandate or prohibition); see *Unimart v. Superior Court (1969) 1 Cal. App. 3d 1039, 1041, 82 Cal. Rptr. 249* (writ of mandate)]. A petitioner for a writ of review may argue, by analogy, that the court's order was in excess of its jurisdiction and, due to the expense to the parties of participating in and seeking review of the arbitration award, appeal from a subsequent judgment confirming the award does not constitute a plain, speedy, or adequate remedy [*see Atlas Plastering, Inc. v. Superior Court (1977) 72 Cal. App. 3d 63, 68, 140 Cal. Rptr. 59* ; *Code Civ. Proc. § 1068(a)*; *see also § 492.56[2][d][ii]*]. For discussion of appeal and review of orders to arbitrate, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

[iii] Contempt Orders

All judgments and orders relating to contempt proceedings are final and conclusive, and no appeal may be taken [*Code Civ. Proc. §§ 904.1(a)(1)(B), 904.2(a), 1222*; *Moffat v. Moffat (1980) 27 Cal. 3d 645, 656, 165 Cal. Rptr. 877, 612 P.2d 967]* . Thus, when a sentence of contempt has been imposed, the appropriate petition is for a writ of habeas corpus or for a writ of review [*In re Buckley (1973) 10 Cal. 3d 237, 240 n.1, 110 Cal. Rptr. 121, 514 P.2d 1201* (habeas

petition denied)]. In current practice, in fact, writs of review are used predominantly in the area of contempt adjudications.

Although a judgment of contempt is not appealable under *Code Civ. Proc. § 904.1(a)(1)(B)*, the denial by a superior court of a writ of review from a judgment of contempt in a municipal court is appealable to the court of appeal [*Bermudez v. Municipal Court (1992) 1 Cal. 4th 855, 861-864, 4 Cal. Rptr. 2d 609, 823 P. 2d 1210]* .

For further discussion of the scope of review applicable to contempt orders, see *§ 492.59[2]*. For forms and discussion relating to review of contempt proceedings, see Ch. 135, *Contempt* .

[iv] Small Claims Judgments

Generally, a small claims judgment is conclusive on the plaintiff, who chose the special forum, but the defendant may appeal to the superior court, which then tries the cause de novo [*see Code Civ. Proc. § 116.710*]. The superior court's judgment on that trial is not appealable [*Code Civ. Proc. § 116.780(a)*], so a writ of review will lie to attack it for lack of jurisdiction [*see Davis v. Superior Court (1980) 102 Cal. App. 3d 164, 170, 162 Cal. Rptr. 167* (jurisdiction exceeded); *Yoakum v. Small Claims Court (1975) 53 Cal. App. 3d 398, 403, 404, 125 Cal. Rptr. 882* (jurisdiction not exceeded); *Cook v. Superior Court (1969) 274 Cal. App. 2d 675, 676, 679, 79 Cal. Rptr. 282* (jurisdiction exceeded)]. For discussion and forms relating to proceedings in small claims courts, see Ch. 526, *Small Claims* .

[v] Particular Probate Orders

A writ of review lies to examine and annul certain unappealable probate orders [*see Lilienkamp v. Superior Court (1939) 14 Cal. 2d 293, 295, 297, 93 P.2d 1008* (order vacating order for partial distribution); *Fredrickson v. Superior Court (1952) 38 Cal. 2d 593, 597, 241 P.2d 541* (order vacating decree settling final account, ordering distribution, and discharging administratrix)]. For a discussion of nonappealable probate orders, see Ch. 42, *Appeal: Notice of Appeal* .

[4] No Other Plain, Speedy, and Adequate Remedy

A petitioner for a writ of review must show that there is not only no appeal from the lower court's order or judgment but also that there is no other plain, speedy, and adequate remedy [*Code Civ. Proc. § 1068(a)*]. The language of this requirement parallels the language in the statutes governing issuance of writs of mandate and prohibition, where it refers to a discretionary determination, made by the reviewing court, that the delay involved in an appeal might result in injury to the petitioner [*W.A. Rose Co. v. Municipal Court (1959) 176 Cal. App. 2d 67, 74-75, 1 Cal. Rptr. 49* ; *see Code Civ. Proc. §§ 1086, 1103*]. With respect to writs of review, one court has stated that for a legal remedy to be adequate, it must afford relief on the very matter that is the subject of the petition and must be as convenient and efficacious as the extraordinary remedy demanded [*Estate of Bodger (1954) 128 Cal. App. 2d 710, 715, 276 P.2d 83* (appeal from eventual attorney's fees award inadequate remedy when probate court made unauthorized appointment of attorney for petitioner), citing *Dufton v. Daniels (1923) 190 Cal. 577, 582, 213 P. 949* (mandate proceeding); *but see Monterey Club v. Superior Court (1941) 44 Cal. App. 2d 351, 354-355, 112 P.2d 321* (writ of review not available to petitioner who has a right of appeal, whether or not such appeal affords a plain, speedy and adequate remedy)].

[5] Lack or Excess of Jurisdiction

[a] Jurisdiction Defined

The meaning of "jurisdiction" for purposes of the writ of review is different and broader than the fundamental meaning of a court's jurisdiction over the parties and over the subject matter of the cause of action [*Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 454-455, 20 Cal. Rptr. 321, 369 P.2d 937* ; *Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 762, 104 Cal. Rptr. 921]* . Any acts that exceed the power of a court, whether that power is defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the

doctrine of stare decisis, are in excess of the court's jurisdiction [*Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 291, 109 P.2d 942]* .

[b] Errors in Exercise of Jurisdiction Distinguished

In contrast to the remedy of appeal, a writ of review cannot reach errors of law or fact [*Abelleira v. District Court of Appeal (1941) 17 C2d 280, 287, 109 P.2d 942* ; *Brown Co. v. Appellate Department (1983) 148 Cal. App. 3d 891, 904, 196 Cal. Rptr. 258]* . Once the reviewing court finds that the lower court had jurisdiction to make the challenged order, the reviewing court must deny the writ notwithstanding its view that the ruling was erroneous [*Freedom Newspapers, Inc. v. Superior Court (1986) 186 Cal. App. 3d 1102, 1105, 231 Cal. Rptr. 189* (writ of review granted in original appellate proceeding and then discharged on rehearing)].

For example, when the appellate department of a superior court overturned a judgment on a mechanic's lien, finding as a matter of fact and law that the materialman's preliminary notice was defective, there was no basis for a court of appeal to annul the reversal on a writ of review [*Brown Co. v. Appellate Department (1983) 148 Cal. App. 3d 891, 896, 904, 196 Cal. Rptr. 258]* . A superior court's refusal to disclose the amount of appointed criminal counsel's earned fees to the press under the California Public Records Act also was affirmed on a writ of review, even though the majority of the appellate panel disagreed with the superior court's factual conclusion that disclosure would prejudice the indigent defendant's right to a fair trial [*Freedom Newspapers, Inc. v. Superior Court (1986) 186 Cal. App. 3d 1102, 1106-1107, 231 Cal. Rptr. 189* , on petition for rehearing].

[c] Failure to Follow Statutory Procedure

When a statute authorizes a prescribed procedure and a court acts contrary to this authority, it has exceeded its jurisdiction and a writ of review will lie to correct such excess [*Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 762, 104 Cal. Rptr. 921* (trial court exceeded its jurisdiction in appointing receiver and instructing him)]. For example, an appellate court acts in excess of its jurisdiction when, in reversing a summary judgment, it orders that judgment be entered for the opposing party even though that party never made a motion for summary judgment [*Dvorin v. Appellate Dep't of Superior Court (1975) 15 Cal. 3d 648, 650, 125 Cal. Rptr. 771, 542 P.2d 1363]* . It is beyond the jurisdiction of a court to make an order extending time to plead beyond limits that have been set by statute [*Thelander v. Superior Court of Placer County (1962) 58 Cal. 2d 811, 813 n.3, 26 Cal. Rptr. 643* (interpreting *Code Civ. Proc. § 1054*)]. A court has no power to allow a district attorney, absent any statutory authority, to bring civil proceedings for contempt on behalf of one party to a private lawsuit [*Safer v. Superior Court (1975) 15 Cal. 3d 230, 233, 124 Cal. Rptr. 174, 540 P.2d 14]* .

[d] Refusal to Follow Stare Decisis

The scope of review for lack or excess of jurisdiction was greatly expanded in the leading case of *Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 454, 20 Cal. Rptr. 321, 369 P.2d 937* , in which the court, issuing a writ of review, held that the appellate department of a superior court exceeded its jurisdiction by failing to follow a clear, binding precedent laid down by a higher court. The court stated that the rule of stare decisis is a rule of jurisdiction for the purposes of a writ of review [*Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 456, 20 Cal. Rptr. 321, 369 P.2d 937]* . In Auto Equity, the appellate department of the superior court had explicitly refused to follow a case that it admitted was directly on point, holding that the case had been wrongly decided [*Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 454, 20 Cal. Rptr. 321, 369 P.2d 937]* . In a subsequent case, the Supreme Court found that a lower court exceeded its jurisdiction by failing to follow the rule of stare decisis even when the applicable law, according to the lower court, was unclear [*see* *East Bay Municipal Utility Dist. v. Appellate Department (1979) 23 Cal. 3d 839, 842-843, 153 Cal. Rptr. 597, 591 P.2d 1249* (holding that language in single case interpreting applicable statute as on point and not dicta)]. If, on the other hand, there is statutory authority for the outcome and the lower court attempted conscientiously to follow the law, the decision below will not be be overturned on a writ of

review [*Brown Co. v. Appellate Department (1983) 148 Cal. App. 3d 891, 896, 904, 196 Cal. Rptr. 258]* .

[e] Nonexistence of Jurisdictional Facts

When an inferior board or tribunal has power to act only on certain facts, and there is no evidence whatever to show the existence of those jurisdictional facts, the court will annul the decision or judgment below [*Great Western Power Co. v. Pillsbury (1915) 170 Cal. 180, 185-186, 191, 149 P. 35* ; *see also* discussion *§ 492.28[2]*].

In the case of contempt orders, the factual question of whether petitioner's acts constituted contempt is jurisdictional [*In re Ciraolo (1969) 70 Cal. 2d 389, 394, 74 Cal. Rptr. 865, 450 P.2d 241]* . The order of contempt must recite on its face particular facts showing that petitioner's conduct constituted contempt; if not, the order is void and should be annulled for lack of jurisdiction [*Arthur v. Superior Court (1965) 62 Cal. 2d 404, 409, 42 Cal. Rptr. 441, 398 P.2d 777* ; *see Chula v. Superior Court (1962) 57 Cal. 2d 199, 203, 18 Cal. Rptr. 507, 368 P.2d 107]* . Although the power to weigh evidence and to determine the credibility of witnesses rests with the trial court, the role of the reviewing court is to ascertain whether any substantial evidence exists in support of the trial court's finding that a contempt was committed and, in the absence of sufficient evidence, the contempt order will be annulled [*In re Buckley (1973) 10 Cal. 3d 237, 247, 110 Cal. Rptr. 121, 514 P.2d 1201* ; *Coursey v. Superior Court (1987) 194 Cal. App. 3d 147, 154, 239 Cal. Rptr. 365]* . For discussion of the elements constituting contempt, see Ch. 135, *Contempt* .

[6] Beneficial Interest of Petitioner

A writ of review can only issue on the verified petition of "the party beneficially interested" [*Code Civ. Proc. § 1061*]. This standing requirement is generally common to petitions for all the extraordinary writs [*see, e.g., Code Civ. Proc. §§ 1086* (mandate), *1103* (prohibition)].

To be a beneficially interested party for purposes of a writ of review, the petitioner need not be a party in the action below but need only demonstrate that he or she was directly and prejudicially affected by the challenged order [*Burlingame v. Justice's Court (1934) 1 Cal. 2d 71, 75, 33 P.2d 669]* . Early cases emphasized that the writ was available to a stranger to the record only when the matter sought to be reviewed grew out of a collateral proceeding and was not an order or judgment made between the parties [*Burlingame v. Justice's Court (1934) 1 Cal. 2d 71, 75, 33 P.2d 669* (dictum); *Elliott v. Superior Court (1904) 144 Cal. 501, 508, 77 P. 1109]* . Since then courts have recognized various situations in which a nonparty petitioner for a writ of review has the requisite beneficial interest. For instance, buyers who acquire title to property that is the subject of pending litigation may be sufficiently interested in a motion to expunge a lis pendens that they can challenge the court's ruling by writ of review even though they were not parties to the motion [*Peery v. Superior Court (1981) 29 Cal. 3d 837, 841, 176 Cal. Rptr. 533, 633 P.2d 198 , superseded by statute* (dictum)]. When a court refuses to hold a party in contempt for disobeying an injunction, the person for whose benefit the injunction was issued can successfully challenge the dismissal of contempt proceedings by writ of review [*Goodall v. Superior Court (1918) 37 Cal. App. 723, 726-727, 174 P. 924]* . While the person who presents a charging declaration is not, strictly speaking, a party to the contempt proceeding, he or she is beneficially interested in the discharge ruling for purposes of *Code Civ. Proc. § 1069* [*Taylor v. Superior Court (1942) 20 Cal. 2d 244, 247, 125 P.2d 1]* . On the other hand, a default in an heirship proceeding will not be annulled on a writ of review when the petitioners are too far removed in relationship from the decedent to be beneficially interested in the estate [*Marlow v. Superior Court (1941) 17 Cal. 2d 393, 395, 110 P.2d 11* (petitioner's grandfather was uncle of the decedent)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusAdministrative LawSeparation of PowersConstitutional ControlsAuthority to AdjudicateGeneral OverviewCivil ProcedureAlternative Dispute ResolutionJudicial ReviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law

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§ 492.19 Stay of Proceedings Pending Disposition of Writ

A writ of review may provide for a temporary stay ordering the respondent court to desist from further proceedings in the matter to be reviewed, pending entry of judgment [*Code Civ. Proc. § 1071*]. The decision to stay proceedings rests with the sound discretion of the reviewing court. To be effective, the words of the stay must be inserted explicitly into the writ [*Code Civ. Proc. § 1072*].

There is no statutory requirement that the petitioner put up a bond as a condition for the stay. Nor is any express procedure prescribed for requesting that a stay order be included in the writ. The usual practice, however, is to ask for the stay in the verified petition, setting out the reasons for urgency as well as the relevant time constraints [*see Cal. Rules of Ct., Rule 8.486(a)(7)* (appellate courts)].

There appear to be no decisions that are specifically concerned with the propriety of a stay pending determination of a writ of review. By analogy, however, denial of a motion to stay execution of a judgment pending appeal has been held to be an abuse of discretion when the appellant has demonstrated that he or she is raising a substantial question on the appeal, that he or she will suffer irreparable injury if the stay is not granted, and that the respondent would not be sorely prejudiced by the stay [*Mehr v. Superior Court (1983) 139 Cal. App. 3d 1044, 1050, 189 Cal. Rptr. 138* (motion to stay execution pending appeal of unlawful detainer judgment)]. It is arguable that similar allegations in a petition for a writ of review are sufficient to support the inclusion of a stay order in the writ.

For a form of petition including allegations supporting a request for a stay order, see *§ 492.101*. For a form of writ including a stay order, see *§ 492.104*. For discussion relating to a request for an immediate stay of the proceedings below, as distinguished from a request for a stay in a petition filed after prior service, see *§ 492.21*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionState Court Review

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§ 492.20 Petition for Writ of Review

[1] General Rules of Pleading Apply

Writ of review proceedings are subject to the general rules of procedure (*Code Civ. Proc. §§ 307-1062.10*) to the extent that these provisions are consistent with directly applicable provisions of *Code Civ. Proc. §§ 1063-1110b* [*Code Civ. Proc. § 1109*]. Accordingly, a petition for a writ of review is subject to the general rules of pleading (*Code Civ. Proc. §§ 420-475*) governing complaints [*see, e.g., Code Civ. Proc. § 425.10*]. For discussion of these general rules of pleading, *see* Ch. 123, *Complaints and Cross Complaints* .

[2] Contents

A petition for a writ of review must be verified and must set forth all the allegations required by law to support its issuance [*Cal. Rules of Ct., Rule 8.486(a), (b)*; *see also Code Civ. Proc. § 1069*; for discussion of the showing necessary for issuance of the writ, see *§ 492.18*]. The petition must not only name the respondent court or other tribunal, but must also name the real party in interest [*see § 492.15*].

If the petition might lawfully have been made to a lower court in the first instance, it must also set forth the circumstances which, in the petitioner's opinion, justify issuance of the writ originally from the reviewing court [*Cal. Rules of Ct., Rule 8.486(a)(1)*]. For discussion of these circumstances, see *§ 492.17[1]*.

If the petitioner seeks a stay of the proceedings below until such time as the judgment or order below is affirmed or an nulled, the petition should include factual allegations showing the need for the stay [*see § 492.19*]. If the petitioner seeks an immediate stay, but the reviewing court, as a matter of local practice, does not normally grant a petition without prior service, the petition should allege reasons for the urgency of the stay and request that the court exercise its discretion to grant the petition ex parte [*see §§ 492.21, 492.22*].

For forms of petition for writ of review, see *§§ 492.100 -492.102*.

[3] Verification

A petition for a writ of review must be verified [*Code Civ. Proc. § 1069*; *Cal. Rules of Ct., Rule 8.486(a)(4)*]. The allegations in the petition must not be verified on information and belief because such hearsay cannot support issuance of an extraordinary writ [*see Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 204, 151 Cal. Rptr. 721* (petition for writ of mandate verified wholly on information and belief by petitioner's attorney)]. If, however, a petition made on information and belief otherwise supplies a sufficient record of the underlying facts and trial court proceedings, enabling the appellate court to review the judgment or order below, the petition is not fatally defective [*Pacific Gas & Electric Co. v. Superior Court (1983) 145 Cal. App. 3d 253, 255 n.1, 193 Cal. Rptr. 336* ; *Ansley v. Superior Court (1986) 185 Cal. App. 3d 477, 489, 229 Cal. Rptr. 771* (writ of mandate)].

Failure to verify the original petition is a procedural defect readily cured by amendment of the petition [*Franchise Tax Bd. v. Municipal Court (1975) 45 Cal. App. 3d 377, 383-384, 119 Cal. Rptr. 552* (mandate)]. One court, reviewing the issuance of a writ of prohibition on appeal, has held that a petitioner should have the opportunity to amend an improperly verified petition even though the real party in interest raised an objection by demurrer in response to the alternative writ [*see Perlman v. Municipal Court (1979) 99 Cal. App. 3d 568, 574-575, 160 Cal. Rptr. 567* (suggesting that the proper objection is a motion to strike)].

[4] Accompanying Papers

[a] Points and Authorities

A petition for a writ of review filed in an appellate court must be accompanied by a supporting memorandum [*Cal. Rules of Ct., Rule 8.486(a)*]. Although there is no correspondingly explicit requirement applicable to petitions for writ of review filed in superior courts, *Cal. Rules of Ct., Rule 3.1113(a)* provides that a party filing a notice of motion must serve and file with it a supporting memorandum [*see also Code Civ. Proc. § 1003* (any written direction of a court not included in a judgment is denominated an order, and any application for an order is a motion)]. Writ of review proceedings are subject to this rule as well as to all other general law and motion rules applicable in superior courts (*Cal. Rules of Ct., Rules 3.1110 et seq.* [*Cal. Rules of Ct., Rule 3.1103(a)(2)*; *see also Cal. Rules of Ct., Rule 3.1100*].

For forms of memoranda of points and authorities for use in support of petitions for writs of review, *see* California Points and Authorities, Ch. 205, *Review* (Matthew Bender).

[b] Record of Proceedings Below

In the Supreme Court or a court of appeal, the verified petition must be accompanied by a transcript of the proceedings leading to the order or judgment below [*Cal. Rules of Ct., Rule 8.486(b)(1)*]. If a transcript is unavailable, counsel must make and file a declaration that either (1) explains why a transcript is unavailable and fairly summarizes the proceedings, including arguments by counsel and the basis of the trial court's decision, if stated; or (2) states that the transcript has been ordered, the date it was ordered, and the date it is expected to be filed, which must be a date prior to any action requested of the reviewing court other than issuance of a stay supported by other parts of the record [*Cal. Rules of Ct., Rule 8.486(b)(2)*]. The writ petition must also be accompanied by (1) a copy of the order or judgment from which relief is sought, (2) copies of all documents and exhibits submitted to the trial court supporting and opposing petitioner's position, and (3) copies of all other documents submitted to the trial court that are necessary for a complete understanding of the case and the ruling. In exigent circumstances, a petition may be filed without these documents if a declaration by counsel explains the urgency and the circumstances making the documents unavailable and fairly summarizes their substance [*Cal. Rules of Ct., Rule 8.486(b)(4)*]. If a petitioner does not submit the required record and explanations or does not present facts sufficient to excuse the failure to submit them, the court may summarily deny the petition [*Cal. Rules of Ct., Rule 8.486(b)(5)*].

If a party seeks to seal or unseal all or a portion of the record supporting the petition, that party must follow the procedures of *Cal. Rules of Ct., Rule 8.46* [*Cal. Rules of Ct., Rule 8.486(d)*; *see Cal. Rules of Ct., Rule 8.46(e), (f)*

(motions to seal, unseal records in reviewing court)]. Rule 8.46 also sets out other requirements relating to sealed records in appeals or writ proceedings in reviewing courts, including the manner of filing a sealed record in a reviewing court [*Cal. Rules of Ct., Rule 8.46(e)*], and the requirement that publically filed documents, including writ petitions and supporting and opposing papers, not disclose material contained in a sealed record or a record proposed to be sealed [*Cal. Rules of Ct., Rule 8.155(g)*]. For detailed discussion and forms relating to sealed records and proceedings in the reviewing court to seal or unseal records under Rule 8.46, see *Ch. 44, Appeal: Preparing and Filing the Record, § 44.100 et seq. and § 44.300* et seq.

In a superior court, there is no rule requiring that such a full record be filed, and a petition that simply incorporated the order or judgment to be reviewed will probably be sufficient to withstand a demurrer, as long as all required allegations are otherwise adequately pleaded [*see Code Civ. Proc. § 430.10(e)*; *see also § 492.27*]. The better practice, however, is to provide the court with a transcript of the relevant proceedings, as well as copies of all relevant documents that were submitted to the trial court. As a matter of decisional law, the burden is on the petitioner to allege a prima facie case of entitlement to an extraordinary writ, and courts require that the petition not only plead facts supporting the writ sought but also incorporate enough documentation filed in the trial court so that the reviewing court can intelligently consider the the petition [*see Krueger v. Superior Court (1979) 89 Cal. App. 3d 934, 936-938, 152 Cal. Rptr. 870]* .

[c] Proof of Service of Petition

The petition normally must be accompanied by proof of service of a copy on the respondent and the real party or parties in interest at the time it is submitted for filing [*see Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.486(c)*]. The usual sequence of service and filing for a writ of review is, therefore, the reverse of the order of filing and service of a complaint in an ordinary civil action. For a discussion of ex parte petitions, which may be filed and granted without prior service, see *§ 492.21*. For further discussion of service requirements, see *§ 492.22*.

[d] Proposed Order and Writ

Appellate courts draft their own orders and writs. When the petition is filed in a superior court, in which counsel is expected to draft orders for the court's signature, a proposed order and writ may accompany the petition at the time of filing. For forms of order directing issuance of the writ and writ of review, see *§§ 492.103* and *492.104*.

[e] Certificate of Interested Entities or Persons

Each party to an appeal must serve and file a Certificate of Interested Entities or Persons at the time it files its first document in the Court of Appeal [Cal. Rules of Ct., Rule 8.280(c)] and must include a copy of the certificate in its principal brief [*Cal. Rules of Ct., Rule 8.208(d)*]. The petitioner's certificate must be included in the petition [*Cal. Rules of Ct., Rule 8.488(c)(1)*]. The certificates of the respondent and real party in interest must be included in their preliminary opposition or, if no such opposition is filed, in their return, if any. The certificate must appear after the cover and before the tables [*Cal. Rules of Ct., Rule 8.488(c)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsPrelitigation NoticesCivil ProcedurePleading & PracticeService of ProcessProofGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsRecords on AppealGovernmentsCourtsRule Application & Interpretation

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43-492 California Forms of Pleading and Practice--Annotated § 492.21

§ 492.21 Ex Parte Petition for Writ of Review

A court may grant a petition for a writ of review ex parte, without prior notice or service of the petition, on a showing of good cause [*Code Civ. Proc. § 1107*; *see Code Civ. Proc. § 1069* (writ may be granted without notice); *see also Cal. Rules of Ct., Rule 8.486(e)(6)* (court in its discretion may allow filing of petition without prior service)]. This constitutes an exception to the general rule that the petition must be accompanied by proof of prior service on the respondent and each real party in interest [*Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.486(e)(1)*; *see §§ 492.20[4][c], § 492.22*]. The construction given to this exception varies among local courts, and counsel should therefore consult local practice to determine the circumstances under which a particular court will grant a petition ex parte.

A superior court may, in general, grant an application for an order ex parte only if it is supported by an affidavit or declaration showing that (1) within a reasonable time before the application the party informed the opposing party or the opposing party's attorney when and where the application would be made; (2) the party in good faith attempted to inform the opposing party and the opposing party's attorney but was unable to do so, specifying the efforts made to inform them; or (3) for reasons specified the party should not be required to inform the opposing party or the opposing party's attorney [*Cal. Rules of Ct., Rule 3.1204(b)*; *see Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(2)* (law and motion rules made applicable to writs of review)]. For further discussion and a general form of declaration supporting an ex parte application, see Ch. 372, *Motions and Orders* .

Circumstances may arise in which a petitioner may desire an immediate stay of the proceedings below, such as one involving direct contempt [*see Code Civ. Proc. § 1211*; *see also Code Civ. Proc. § 1209* (attorney under sentence of contempt entitled to three-day stay of execution during which to file petition)]. Although *Code Civ. Proc. §§ 1071* and *1072* provide for inclusion of a stay order in the writ of review, there is no express provision for obtaining an immediate stay pending issuance of the writ [*cf. Cal. Rules of Ct., Rule 8.112* (ex parte stay pending disposition of petition for writ of supersedeas)]. Because courts do, however, have express authority to grant a petition for a writ of review without notice to the adverse party, a petitioner seeking an immediate stay of proceedings may simply combine a request for a stay with a request that the petition be granted immediately, without notice or opposition. For further discussion of a temporary stay, see *§ 492.19*.

For a form of petition for writ of review that may be used in an ex parte application, including a request for stay and a

proposed order directing the clerk to permit filing without proof of prior service, see *§ 492.101*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 492.22 Service of Petition

Normally a copy of the petition for writ of review must be served before filing, because at the time of filing it usually must be accompanied by proofof service of a copy on the respondent and the real party in interest [*Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.486(e)*; *see discussion under § 492.20[4][c]*]. For discussion of circumstances under which a petition might be filed without proof of prior service, see *§ 492.21*.

The petition must be served pursuant to *Code Civ. Proc. §§ 1010-1020*, which govern service of papers generally [*Code Civ. Proc. § 1107*; *see also § 492.101*]. For discussion and forms relating to methods of service of papers and pleadings generally, see Ch. 518, *Service of Summons and Papers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 492.23 Initial Opposition to Petition

If the court has required the petitioner to give notice of the petition by serving copies on the respondent and the real party in interest [*Code Civ. Proc. §§ 1069, 1107*; *Cal. Rules of Ct., Rule 8.486(e)*; *see §§ 492.21, 492.22*], within 10 days after the petition is filed, the respondent or any real party in interest, separately or jointly, may serve and file a preliminary opposition [*Code Civ. Proc. § 1107*; *see also Cal. Rules of Ct., Rule 8.487(a)*]. The opposition must contain points and authorities and a statement of any material fact not included in the petition [*Cal. Rules of Ct., Rule 8.487(a)(2)*]. This initial opposition is not an opposing pleading or return but rather is a legal argument for the benefit of the court, designed to prevent issuance of the writ where the real party in interest or the respondent can show the petition has no merit [*see Patterson v. Board of Supervisors (1947) 79 Cal. App. 2d 670, 671-672, 180 P.2d 945* ; *Peter v. Board of Supervisors (1947) 78 Cal. App. 2d 515, 521, 178 P.2d 73]* .

For discussion of subsequent opposition by return, see *§ 492.27*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 492.24 Summary Denial of Petition

An appellate court is entitled to deny summarily an application for a writ of review, either before or after entertaining preliminary opposition, without a hearing on the merits [*Cal. Rules of Ct., Rule 8.487(a)(4)*; *see Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd. (1979) 24 Cal. 3d 335, 350, 156 Cal. Rptr. 1, 595 P.2d 579* ; *Wine v. Council of City of Los Angeles (1960) 177 Cal. App. 2d 157, 164, 2 Cal. Rptr. 94]* . Appellate courts also have the authority to deny a petition summarily if the petitioner fails to submit the transcript and other documents that are required to support the petition [*Cal. Rules of Ct., Rule 8.487(a)(4)*; *see discussion under § 492.20[4][b]*].

An order summarily denying a petition for an extraordinary writ does not have res judicata effect in subsequent proceedings [*see People v. Medina (1972) 6 Cal. 3d 484, 490-492, 99 Cal. Rptr. 630, 492 P.2d 686* (prohibition proceeding); *Hagan v. Superior Court (1962) 57 Cal. 2d 767, 770, 22 Cal. Rptr. 206, 371 P.2d 982* (mandate proceeding); *De Bottari v. Melendez (1975) 44 Cal. App. 3d 910, 914 n.3, 119 Cal. Rptr. 256* (mandate proceeding)], regardless of whether the denial is intended to be on the merits or is based on some other reason [*Kowis v. Howard (1992) 3 Cal. 4th 888, 899, 12 Cal. Rptr. 2d 728, 838 P.2d 250* (discrediting and rejecting long-standing "sole possible ground" exception, and disapproving the one case that applied the rule and the many cases that contain dicta implying the existence of the exception, including *Hagan v. Superior Court (1962) 57 Cal. 2d 767, 770, 22 Cal. Rptr. 206, 371 P.2d 982*)].

Summary denial of a petition for a writ of review by a superior court may be reviewed on appeal to a court of appeal [*Code Civ. Proc. § 904.1*]. When a court of appeal denies a petition without issuance of the writ, the order is final immediately on filing and petitioner may therefore petition the Supreme Court for a hearing without waiting the normal 30-day period prescribed by *Cal. Rules of Ct., Rule 8.264(b)* [*Cal. Rules of Ct., Rule 8.264(b)(2)*]. For forms and discussion of appeal and petition for review, see Ch. 54, *Appeal: California Supreme Court Review* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 492.25 Grant of Petition

[1] Issuance of Writ

The reviewing court grants a petition by signing an order that directs the clerk to issue a writ of review. The court may grant the petition and issue the writ, or may grant an order to show cause why it should not be issued, with or without notice to the respondent and real party in interest [*Code Civ. Proc. § 1069*; *see Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.487(a)(4)*; *see also* discussion *§ 492.21*]. For a form of order directing that the writ issue for use in a superior court, see *§ 492.103*.

[2] Form and Contents of Writ

The writ is directed to the respondent or to any other person having the custody of the record or proceedings to be certified, and commands the respondent or custodian to certify to the reviewing court a transcript of the proceedings below [*Code Civ. Proc. § 1070*]. It may also require the respondent to desist in the meantime from further proceedings in the matter to be reviewed [*Code Civ. Proc. § 1071*; *see also § 492.19*]. For a form of a writ of review, including an optional stay order, see *§ 492.104*.

[3] Service of Writ

The writ must be served in the same manner as a summons in a civil action unless otherwise expressly directed by the court [*Code Civ. Proc. § 1073*; *see Code Civ. Proc. §§ 413.10-417.40* (governing service of summons generally); *see also § 492.104*]. For discussion and forms relating to methods of service of summons generally, see Ch. 518, *Service of Summons and Papers* .

If the writ is issued by an appellate court, the clerk of that court is required to promptly transmit a certified copy of the writ to the respondent to whom it is directed. If, in addition, this writ includes an order that stays proceedings that are scheduled to occur within seven days of its issuance, the clerk of that court is required to make a reasonable effort to give telephone notice to the respondent to whom it is directed [*Cal. Rules of Ct., Rule 8.489*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 492.26 Return of Writ With Required Transcript

[1] By Respondent

When the writ of review is directed to a court, the clerk of court must return the writ with the required transcript [*Code Civ. Proc. § 1070*]. The return must be made on the date for the return of the writ [*Code Civ. Proc. § 1071*].

[2] Burden on Petitioner to Insure Timely Return

The burden is on the petitioner, not the real party in interest, to see that the return is filed and, in the absence of a return, the writ will be discharged and the proceeding will be dismissed [*Middlebrook v. Superior Court (1943) 21 Cal. 2d 579, 580, 134 P.2d 241]* . The petitioner must pay the fees charged by the clerk to make a return of the record [*see Gov. Code §§ 26831-26837, 72054* (clerks' transcript fees); *Cal. Rules of Ct., Rules 8.130(b), 8.753(c)* (reporter's transcript fees)]. Even though a writ of review has issued, the respondent court's compliance with the writ cannot be compelled unless the petitioner has paid for preparation of the clerk's transcript [*I.X.L. Lime Co. v. Superior Court (1904) 143 Cal. 170, 175, 76 P. 973]* .

[3] Proceedings for Further Return of Transcript

If the return of the writ is defective or incomplete, the reviewing court may order that a further return be made [*Code Civ. Proc. § 1075*]. For a form for notice of motion and order for further return, see *§§ 492.105* and *492.106*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 492.27 Return by Demurrer or Answer to Writ

[1] By Respondent or Real Party in Interest

In addition to the return by the respondent with the certified transcript of the proceedings to be reviewed [*discussed under § 492.26*], either the respondent or the real party in interest may make a return by demurrer, verified answer, or both [*see Code Civ. Proc. §§ 1069.1, 1089*; *Cal. Rules of Ct., Rule 8.487(b)(1)*]. For a form of return by demurrer, see *§ 492.107*. For a form of return by answer, see *§ 492.108*.

[2] Time for Return

If the petition is before a superior court, the return must be made on the date for the return of the writ [*Code Civ. Proc. § 1089*; *see Code Civ. Proc. § 1069.1*]. If the petition is before an appellate court, the return or opposition must be served and filed within 30 days after the court issues the alternative writ or order to show cause or notifies the parties that it is considering issuing a peremptory writ in the first instance [*Cal. Rules of Ct., Rule 8.487(b)(2)*].

If the return is by demurrer only, but the demurrer is not sustained, the court may or may not allow a further return by verified answer within a time that it may designate [*Code Civ. Proc. § 1089*; *see Code Civ. Proc. § 1069.1*; *see also Cal. Rules of Ct., Rule 8.487(b)(4)* (when return to alternative writ is by demurrer only and is not sustained, court may issue peremptory writ without leave to answer)].

[3] Return by Demurrer

The effect of a return by demurrer is to adopt all the facts alleged in the petition as the return to the writ [*Estrin v. Superior Court (1939) 14 Cal. 2d 670, 672, 96 P.2d 340]* .

The grounds enumerated in *Code Civ. Proc. § 430.10* for demurrers in ordinary civil actions apply to proceedings for writs of review [*Code Civ. Proc. § 1109*]. The most commonly asserted ground is the failure of the petition to state facts that constitute a cause of action [*see Code Civ. Proc. § 430.10(e)*], by which the real party in interest argues that one or more of the grounds for issuance of the writ has not been adequately alleged [*see discussion under § 492.56[2]*]. In addition, the demurrer may argue that the court should not exercise its original jurisdiction to entertain the writ petition,

either when the petitioner could have filed for the writ of review in a lower tribunal, or when the petitioner filed later than the period allowed for an appeal, with no explanation for the delay [*Cal. Rules of Ct., Rule 8.486(a)*; *Scott v. Municipal Court (1974) 40 Cal. App. 3d 995, 997, 115 Cal. Rptr. 620* ; *see § 492.17*]. For discussion of a demurrer on the ground of defective verification of the petition, see *§ 492.20[3]*].

If a return is made by demurrer only, but the demurrer is not sustained, the courtmay allow an answer to be filed within such time as it may designate [*Code Civ. Proc. § 1089*; *see Code Civ. Proc. § 1069.1*; *but see Cal. Rules of Ct., Rule 8.487(b)(4)* (when return to alternative writ is by demurrer only and is not sustained, court may issue peremptory writ without leave to answer)].

For forms and discussion of demurrers generally, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* . For a form of return by demurrer, see *§ 492.107*.

[4] Return by Answer

The statutes governing an answer to a complaint in a civil action apply to the answer to a petititon for a writ of review [*Code Civ. Proc. § 1109*]. Thus the answer must generally contain a general or specific denial of each of the material allegations in the petition, as well as any statement of new matter constituting a defense [*Code Civ. Proc. § 431.30*]. The answer must be verified [*Code Civ. Proc. § 1089*; *see Code Civ. Proc. § 1069.1*; *see also Cal. Rules of Ct., Rule 8.487(b)(1)*].

Leave of court is required to file a return by answer when an initial return was made by demurrer only and the demurrer was not sustained [*see § 492.27[3]*].

For forms and discussion of answers generally, see Ch. 26, *Answers* . For a form of answer to a petition for writ of review, see *§ 492.108*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 492.28 Scope of Review

[1] In General

Review in a writ of review proceeding is limited to the determination of whether the lower court or tribunal has regularly pursued its authority; that is, whether it has exceeded its jurisdiction [*Code Civ. Proc. § 1074*; *see also Code Civ. Proc. § 1068*; for further discussion, see *§ 492.56[2][c]*]. In making this determination, the reviewing court is not limited to examination of the clerk's transcript, but may also look to the transcript of the oral proceedings and even to the evidence offered below [*Little v. Superior Court (1968) 260 Cal. App. 2d 311, 317, 67 Cal. Rptr. 77]* . The court may not, however, consider facts that do not appear in record as it is transmitted. No evidence outside the record is admissible for any purpose, and the reviewing court may not try any factual issue [*see Rinaldo v. Superior Court (1936) 15 Cal. App. 2d 585, 593, 59 P.2d 868* ; *but see Wilde v. Superior Court (1942) 53 Cal. App. 2d 168, 176, 127 P.2d 560* (testimony allowed in contempt review)].

[2] Existence of Jurisdictional Facts

When the jurisdiction of the lower court or tribunal exists only on given facts, a review of its action in a writ proceeding extends to the whole of the record below and the reviewing court may examine the evidence itself [*Great Western Power Co. v. Pillsbury (1915) 170 Cal. 180, 185, 191, 149 P. 35* ; *People v. Board of Delegates (1860) 14 Cal. 479, 500]* . If there is no evidence whatever to show the existence of the necessary jurisdictional facts, the reviewing court will annul the decision or judgment below [*Great Western Power Co. v. Pillsbury (1915) 170 Cal. 180, 185, 149 P. 35]* .

This principle now applies mainly to the review of contempt orders, which includes an examination of the entire record below to ascertain whethersubstantial evidence existed to support the finding of contempt [*Chula v. Superior Court (1962) 57 Cal. 2d 199, 204-205, 18 Cal. Rptr. 507, 368 P.2d 107* ; *see also § 492.18[5][e]*].

[3] Petitioner's Burden on Review

In usual writ proceedings, all intendments and presumptions are indulged to support the judgment on matters as to which the record is silent, and error must be affirmatively shown [*Lemelle v. Superior Court (1978) 77 Cal. App. 3d*

148, 156, 143 Cal. Rptr. 450 (mandate)].

Initially, a petitioner on writ of review has the burden of ensuring a proper return of the transcript to be reviewed, much as an appellant must perfect the record on appeal [*see Middlebrook v. Superior Court (1943) 21 Cal. 2d 579, 134 P.2d 241* ; *North Side etc. Assn. v. County of L.A. (1945) 70 Cal. App. 2d 598, 608, 161 P.2d 613* ; *see § 492.26[2]*]. This burden is particularly important when the petition challenges the sufficiency of the evidence [*see Landtbom v. Board of Fire Commrs. (1929) 98 Cal. App. 629, 631, 632, 277 P. 369* (annulment by writ of review not proper when return showed on its face that it did not include all the evidence and showed some competent evidence in support of board's decision)].

On the question of whether the lower court acted without or in excess of its jurisdiction, a reviewing court, faced with no record of how the lower court reached its findings and seeing that conflicting inferences could be made from the evidence, is compelled to resolve all conflicts in favor of the respondent court and to indulge in all reasonable inferences to uphold the findings [*Tomlinson v. Superior Court (1944) 66 Cal. App. 2d 640, 643, 152 P.2d 517* (prohibition)].

[4] Contempt Orders

On a writ of review a contempt order is to be construed strictly in favor of the accused and no presumption of the sufficiency of the evidence applies [*see Bennett v. Superior Court of San Diego County (1950) 99 Cal. App. 2d 585, 593, 222 P.2d 276* ; *Andrews v. Superior Court (1960) 183 Cal. App. 2d 756, 759, 7 Cal. Rptr. 194]* . Even in a contempt review, however, the court will not annul the judgment unless the record is devoid of competent evidence in support of the trial court's findings. If the reviewing court can find a conflict in the evidence, it will defer to the lower court's resolution of the conflict [*see Freeman v. Superior Court (1955) 44 Cal. 2d 533, 538-539*]. For a discussion relating to review of contempt orders generally, see Ch. 135, *Contempt* .

Legal Topics:

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§ 492.29 Judgment

After a full return is filed, the court must hear those parties who attend for that purpose [*Code Civ. Proc. § 1075*]. After the hearing, the courtrenders a judgment either affirming, annulling, or modifying the proceedings reviewed [*Code Civ. Proc. § 1075*]. A copy of the judgment, signed by the clerk, is then transmitted to the lower court [*Code Civ. Proc. § 1076*; *see also Code Civ. Proc. § 1077* (copy of judgment, writ, and return constitute judgment-roll)].

Legal Topics:

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§ 492.30 Finality of Writ or Order Issued by Reviewing Court

A decision in an original writ proceeding in a reviewing court is filed with the clerk, who then transmits copies of the decision to the lower court or tribunal and to the parties [*Cal. Rules of Ct., Rule 8.264(a)(1)*].

A decision of a court of appeal becomes final as to that court 30 days after filing. The decision becomes final as to that court immediately after filing upon the denial of a petition for a writ of supersedeas [*Cal. Rules of Ct., Rule 8.264(b)(2)*].

A decision of the Supreme Court becomes final 30 days after filing unless the court orders a shorter time or, prior to the expiration of the 30-day period or any extension, orders one or more additional periods not to exceed a total of 60 additional days [*Cal. Rules of Ct., Rule 8.264(b)(1)*].

For further discussion of the rules relating to finality of decisions in reviewing courts generally, and related discussion and forms regarding rehearing or modification, see respectively Ch. 51, *Appeal: Hearing and Decision* , and Ch. 52, *Appeal: Rehearing* .

Legal Topics:

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

[1] Generally Allowed

When the decision of a court of inferior jurisdiction is brought before a higher court in any other way than by appeal, the same costs must be allowed as in cases on appeal [*Code Civ. Proc. §§ 1027, 1109*; *see Cal. Rules of Ct., Rules 8.278* (costs in appellate court), 8.764 (costs in superior court)]. For discussion and forms relating to costs on appeal in appellate courts generally, see *Ch. 51, Appeal: Hearing and Decision, § 51.18*. For discussion and forms relating to costs on appeals to the appellate division of superior courts generally, see Ch. 345A, *Limited Civil Cases* .

[2] No Award on Summary Denial

An appellate court normally awards costs through the issuance of a remittitur [*see Cal. Rules of Ct., Rule 8.272(b)*]. In writ proceedings, however, a remittitur cannot be issued when an original petition is summarily denied and the court never determined on the merits whether the decision of the lower court, board, or tribunal was valid [*Cal. Rules of Ct., Rule 8.272(b)*]. Apparently no mechanism exists for an appellate court to award costs to the prevailing respondent when it summarily denies a petition for writ of review [*see* Johnson v. Workers' Comp. Appeals Bd. (1984)] .

[3] Not Charged to Respondent Court

Although a party prevailing on the merits in writ proceedings can recover costs from the real party or parties in interest, the reviewing court will not charge such costs against a respondent court, a neutral party with no interest in the controversy [*Hupp v. Superior Court (1913) 22 Cal. App. 162, 166-167, 133 P. 987* (contempt review); *Platnauer v. Superior Court (1917) 33 Cal. App. 394, 395, 165 P. 41* ; *Oksner v. Superior Court (1964) 229 Cal. App. 2d 672, 690-691, 40 Cal. Rptr. 621]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 492.32 Subsequent Review of Writ Proceedings

A superior court judgment on a writ of review can be appealed to a court of appeal [*Code Civ. Proc. §§ 904.1(a), 1110*]. *Code Civ. Proc. § 1064* states that a judgment in a special proceeding is the final determination of the rights of the parties therein. *Code Civ. Proc. § 1110* makes the statutes on appeal applicable to writ actions except where they are inconsistent with writ statutes. Thus, because an appeal is the regular and adequate remedy, a reviewing court will usually decline to consider a new and independent application of the same writ [*L.A. Surety Co., Inc. v. Municipal Court (1931) 111 Cal. App. 133, 135, 295 P. 591* ; *City of South Gate v. Los Angeles Unified School Dist. (1986) 184 Cal. App. 3d 1416, 1421 n.2, 229 Cal. Rptr. 568* (writ of mandate denied because an adequate remedy available in right of appeal)].

When writ of review proceedings are initiated in the court of appeal, review from that court's judgment may be had by a petition for review by the state Supreme Court [*Cal. Rules of Ct., Rule 8.500(a)(1)*]. This is not a refiling of a writ petition but rather a request for a hearing. The Supreme Court will grant review only when it appears necessary to secure uniformity of decisions of the courts of appeal or to the settlement of important questions of law, when the court of appeal was without jurisdiction to hear the writ of review proceedings, or when the court of appeal decision lacked the concurrences of the required majority of qualified judges [*Cal. Rules of Ct., Rule 8.500(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureRemediesWritsCommon Law WritsProhibitionCivil ProcedureAppealsAppellate JurisdictionState Court Review

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[Reserved]

§§ 492.33[Reserved]

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43-492 California Forms of Pleading and Practice--Annotated § 492.50

§ 492.50 Related Matthew Bender Publications

For memoranda of points and authorities in support of and in opposition to petitions for writs of review in contempt proceedings, see California Points and Authorities, Ch. 47, *Contempt* (Matthew Bender)

For memoranda of points and authorities relating to writ of review proceedings generally, see California Points and Authorities, Ch. 205, *Review* (Matthew Bender)

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§ 492.51 State Constitution

Supreme Court, courts of appeal, superior court, and their judges as having original jurisdiction in writ of review proceedings. *Cal. Const., art. VI, § 10*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 492.52 State Statutes

Appealable judgments and orders. *Code Civ. Proc. §§ 904.1, 904.2*

Costs allowed in writ of review proceedings as in cases on appeal. *Code Civ. Proc. § 1027*

Writ of certiorari may be denominated writ of review. *Code Civ. Proc. § 1067*

Courts are authorized to grant writ of review when inferior tribunal, board, or officer, exercising judicial functions, has exceeded its jurisdiction, and there is no appeal, nor any plain, speedy, and adequate remedy. *Code Civ. Proc. § 1068(a)*

Application for writ of review as required to be made on verified petition of party beneficially interested. *Code Civ. Proc. § 1069*

Court as authorized to require notice of petition for writ of review to be given to adverse party, or as authorized to grant order to show cause why writ should not be allowed, or as authorized to grant writ without notice. *Code Civ. Proc. § 1069*

Return of writ of review by demurrer, verified answer, or both. *Code Civ. Proc. §§ 1069.1, 1089*

Return of writ by respondent with required transcript. *Code Civ. Proc. § 1070*

Form and content of writ of review. *Code Civ. Proc. § 1071*

Stay of proceeding pending disposition by reviewing court on writ of review. *Code Civ. Proc. § 1072*

Service of writ of review. *Code Civ. Proc. § 1073*

Scope of review on writ or review. *Code Civ. Proc. § 1074*

Further return of transcript; hearing and decision on writ of review. *Code Civ. Proc. § 1075*

Transmittal of judgment; judgment roll. *Code Civ. Proc. §§ 1076, 1077*

Service of application for extraordinary writ. *Code Civ. Proc. § 1107*

Return and hearing on extraordinary writ. *Code Civ. Proc. § 1108*

General procedural rules as applicable to extraordinary writs to extent consistent with *Code Civ. Proc. §§ 1067-1110b*. *Code Civ. Proc. §§ 1109, 1110*

Fee for filing original petition for writ of review is $655 for petition filed in Court of Appeal and $590 for petition filed in Supreme Court. *Gov. Code §§ 68926, 68926.1(b)* (requires additional $170 for deposit in appellate court trust fund), *68927*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 492.53 California Rules of Court

Certificate of Interested Entities or Persons. *Cal. Rules of Ct., Rule 8.208*

Cover of petition for writ or answer to writ filed in appellate court as required to be red. *Cal. Rules of Ct., Rule 8.40(b)*

Petitions to reviewing courts for writ. *Cal. Rules of Ct., Rule 8.486*

Opposition and attorney general amicus briefs. *Cal. Rules of Ct., Rule 8.487*

Certificate of Interested Entities or Persons. *Cal. Rules of Ct., Rule 8.488*

Notice to trial court. *Cal. Rules of Ct., Rule 8.489*

Filing, finality, and modification of decisions; remittitur. *Cal. Rules of Ct., Rule 8.490*

Sanctions. *Cal. Rules of Ct., Rule 8.492*

Costs. *Cal. Rules of Ct., Rule 8.493*

Civil law and motion rules as applicable to petitions for writs of review filed in a superior court. *Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(2)*

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§ 492.54 Local Rules of the Courts of Appeal

Assignment of writ petitions. Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Policy Statement A

Requirements for writ petitions; petitions for extraordinary writs, other than habeas corpus, as required to be accompanied by properly completed Appellate Court Writ Petition Information Sheet, which is available from court clerk. Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 5th App. Dist., Rule 3 and Local Court Form

Assignment of, and procedures for, extraordinary writ proceedings. First App. Dist., Internal Operating Practices and Procedures, §§ 25, 26, 29; Second App. Dist., Internal Operating Practices and Procedures, Assignment of Cases; Fourth App. Dist., Div. One, Internal Operating Practices and Procedures, § V; Fourth App. Dist., Div. Three, Internal Operating Practices and Procedures, § III(B); Sixth App. Dist., Internal Operating Practices and Procedures, § II(D)

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§ 492.55 Local Rules of Court

[1] Los Angeles County

Writs of review. Los Angeles Co. Super. Ct. Rules, Rules 2.5(i), 9.31

[2] Sacramento County

Writs of review or certiorari; presentment to judge. Sacramento Co. Super. Ct. Rules, Rule 2.01

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§ 492.56 Decisions

[1] Burden of Insuring Adequate Return to Writ

Burden as on petitioner to see to it that return is filed and that complete record is made. *North Side etc. Assn. v. County of L.A. (1945) 70 Cal. App. 2d 598* , 608, *161 P.2d 613* ; *Goodrich v. Superior Court (1928) 92 Cal. App. 695, 696, 268 P. 669*

[2] Grounds for Issuance of Writ of Review

[a] Beneficial Interest

Beneficiary of injunction that has been disobeyed as party beneficially interested under *Code Civ. Proc. § 1069* and so as able to bring writ of review to challenge court's order refusing to hold person enjoined in contempt. *Taylor v. Superior Court (1942) 20 Cal. 2d 244, 247, 125 P.2d 1* ; *Goodall v. Superior Court (1918) 37 Cal. App. 723, 726, 174 P. 924*

Order of default in heirship proceeding as not subject to writ of review when petitioners were too far removed in relationship from decedent to be beneficially interested in estate. *Marlow v. Superior Court (1941) 17 Cal. 2d 393, 395, 110 P.2d 11* (petitioner's grandfather was uncle of the decedent)

Beneficially interested party under *Code Civ. Proc. § 1069* as person directly and prejudicially affected by challenged order but not necessarily party to action below. *Burlingame v. Justice's Court (1934) 1 Cal. 2d 71, 75, 33 P.2d 669*

Writ of review as not granted to stranger to record when matter sought to be reviewed is judgment or order made in cause litigated inter partes. *Elliott v. Superior Court (1904) 144 Cal. 501, 508-509, 77 P. 1109*

[b] Exercise of Judicial Function

Local agencies as without constitutional authority to exercise judicial functions. *Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 36, 112 Cal. Rptr. 805, 520 P.2d 29*

State Personnel Board as deriving its adjudicating power directly from the *Constitution. Boren v. State Personnel Board (1951) 37 Cal. 2d 634, 637-638, 234 P.2d 981*

Statewide administrative agencies as not authorized by Constitution to exercise judicial functions. *Standard Oil Co. v. State Board of Equal. (1936) 6 Cal. 2d 557, 559, 59 P.2d 119*

State Personnel Board derives its adjudicating power from the *Constitution. Alameida v. State Personnel Board (2004) 120 Cal. App. 4th 46, 52-53, 15 Cal. Rptr. 3d 383*

[c] Lack or Excess of Jurisdiction

[i] Burden of Establishing Jurisdiction

In writ of review proceeding to review decision of subordinate tribunal created by statute, respondent tribunal as required to establish jurisdiction and as not entitled to presumption of regularity. *Petersen v. Civil Service Board (1924) 67 Cal. App. 70, 78* (decision of civil service commission)

[ii] Error in Exercise of Jurisdiction Distinguished

Court that allows action to proceed in spite of plaintiff's failure to file statutorily mandated government claim as acting, at most, in error and not in excess of jurisdiction. *County of Santa Clara v. Superior Court (1971) 4 Cal. 3d 545, 549, 94 Cal. Rptr. 158, 483 P.2d 774* ; *Redlands etc. Sch. Dist. v. Superior Court (1942) 20 Cal. 2d 348, 360, 125 P.2d 490*

Court's refusal to disclose payments made to court-appointed defense counsel pursuant to California Public Records Act (*Gov. Code §§ 6250-6265*) as based on error of fact but not exceeding court's jurisdiction. *Freedom Newspapers, Inc. v. Superior Court (1986) 186 Cal. App. 3d 1102, 1106-1107, 231 Cal. Rptr. 189*

Appellate court's reversal of judgment on mechanic's lien on ground that materialman's preliminary notice was defective as mere error of law or fact, not excess of jurisdiction. *Brown Co. v. Appellate Department (1983) 148 Cal. App. 3d 891, 896, 904, 196 Cal. Rptr. 258*

[iii] Examples of Lack or Excess of Jurisdiction

Order extending time to plead beyond 30-day limit in *Code Civ. Proc. § 1054* as excess of jurisdiction. *Thelander v. Superior Court of Placer County (1962) 58 Cal. 2d 811, 813-814, 26 Cal. Rptr. 643, 376 P.2d 571*

Refusal to follow binding precedent, under doctrine of stare decisis, as excess of jurisdiction. *Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal. 2d 450, 454, 20 Cal. Rptr. 321, 369 P.2d 937*

Orders made by trial court after appeal has been perfected and court was divested of jurisdiction as annullable by writ of review. *Hollaway v. Scripps Memorial Hospital (1980) 111 Cal. App. 3d 719, 722, 168 Cal. Rptr. 782*

Court's attempt to compel particular settlement of case, by refusing to sign parties' stipulation and ordering plaintiff to reduce proposed judgment, as beyond court's jurisdiction; court's absolute refusal to proceed, in absence of any grounds for dismissal of action, as beyond court's jurisdiction. *People v. Cimarusti (1978) 81 Cal. App. 3d 314, 324, 146 Cal.*

Rptr. 421

Trial court's appointment of receiver to take possession of judgment debtor's property, absent statutory authorization, as excess of jurisdiction. *Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 762-763, 104 Cal. Rptr. 921*

Entertaining motion of nonparties as beyond court's jurisdiction. *Chase v. Superior Court (1962) 210 Cal. App. 2d 872, 876-878, 27 Cal. Rptr. 383*

Court's refusal to award costs when statute makes award mandatory as excess of jurisdiction that may be corrected by writ of review. *Bue v. Superior Court (1928) 93 Cal. App. 147, 150, 269 P. 553*

[iv] Jurisdiction Defined

Meaning of "jurisdiction" for purposes of writ of review as different from and broader than meaning of same term when used in connection with "jurisdiction" over person and subject matter; acts that exceeds court's power, whether conferred by constitutional provision, statute, or rules developed and followed under doctrine of stare decisis, as in excess of jurisdiction. *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288, 109 P.2d 942* ; *Mitchell v. Superior Court (1972) 28 Cal. App. 3d 759, 762, 104 Cal. Rptr. 921*

[v] Nonexistence of Jurisdictional Facts Supporting Contempt Order

Contempt order as annullable by writ of review when based on failure to obey improperly served subpoena. *Chapman v. Superior Court (1968) 261 Cal. App. 2d 194, 200-201, 67 Cal. Rptr. 842*

Contempt order as annullable by writ of review when based on unverified charging affidavit. *Palm Springs Alpine Estates, Inc. v. Superior Court (1967) 255 Cal. App. 2d 883, 888, 63 Cal. Rptr. 618*

[d] No Appeal

[i] In General

Writ of review as not lying when petitioner has remedy by appeal. *Stoddard v. Superior Court of Stanislaus County (1895) 108 Cal. 303, 305* ; *Stoner v. Superior Court (1945) 67 Cal. App. 2d 760, 761, 155 P.2d 697*

Writ of review as available to review judgment in criminal case when no right of appeal or other plain, speedy, and adequate remedy exists, nor any threat of trial or retrial. *People v. Gonter (1981) 125 Cal. App. 3d 333, 338, 178 Cal. Rptr. 66*

Writ of review as unavailable to petitioner who has right to appeal, whether or not such appeal affords a plain, speedy, and adequate remedy. *Monterey Club v. Superior Court (1941) 44 Cal. App. 2d 351, 354-355, 112 P.2d 321*

[ii] Lack of Appeal Not Shown

Loss of right of appeal by failure to file timely notice of appeal as not supporting issuance of writ of review on grounds that there exists no remedy of appeal. *Simmons v. Superior Court (1959) 52 Cal. 2d 373, 375, 341 P.2d 13*

Probate order setting aside attorney's fees award on grounds of mistake as unappealable under former *Prob. Code § 1240* but as reviewable on appeal from subsequent order granting or denying attorney's fees, thereby precluding writ of

review. *Howard v. Superior Court (1944) 25 Cal. 2d 784, 787-788, 154 P.2d 849*

Order granting leave to amend complaint as not directly appealable but as subject to review on appeal from final judgment, thereby precluding writ of review; writ of review as unavailable as long as petitioner has adequate remedy by appeal from final judgment, even though challenged order itself is not appealable. *Bank of America v. Superior Court (1942) 20 Cal. 2d 697, 703, 128 P.2d 357*

Loss of right of appeal by failure to file timely notice of appeal as supporting issuance of writ of review when loss is not petitioner's fault but instead due to fact that petitioner received no notice and had no knowledge of entry of judgment or order until after time for appeal had expired. *Lee v. Small ClaimsCourt (1939) 34 Cal. App. 2d 1, 4, 92 P.2d 937* ; *O'Kuna v. Small Claims Court, etc. (1927) 81 Cal. App. 588, 590, 254 P. 291*

[iii] Lack of Appeal Shown

Nonparty substituted for debtor misnamed in complaint as having no remedy by appeal and substitution order as therefore reviewable by writ of review. *Burlingame v. Justice's Court (1934) 1 Cal. 2d 71, 73-74, 33 P.2d 669*

Court order under California Public Records Act (*Gov. Code §§ 6250-6265*) as not a final judgment or order under *Code Civ. Proc. § 904.1* and as therefore subject to writ of review. *Freedom Newspapers, Inc. v. Superior Court (1986) 186 Cal. App. 3d 1102, 231 Cal. Rptr. 189*

Conditional probation order deferring judgment and sentencing as unappealable order after judgment and as therefore subject to writ of review. *People v. Gonter (1981) 125 Cal. App. 3d 333, 337, 178 Cal. Rptr. 66*

Order denying motion to set case for trial as unappealable and as therefore subject to writ of review. *People v. Cimarusti (1978) 81 Cal. App. 3d 314, 318, 319, 146 Cal. Rptr. 421*

Order compelling arbitration as unappealable and as therefore subject to writ of review. *Buchwald v. Superior Court (1967) 254 Cal. App. 2d 347, 353, 62 Cal. Rptr. 364*

Writ of review as available to review judgments by appellate departments of superior courts, from which there is no right of appeal. *Redlands, etc. Sch. Dist. v. Superior Court (1942) 20 Cal. 2d 348, 351, 125 P.2d 490* (trial de novo in superior court)

[e] No Other Plain, Speedy, and Adequate Remedy

Order setting aside judgment as appealable special order after final judgment and so not reviewable by writ of review. *De Lao v. Superior Court (1951) 37 Cal. 2d 711, 712, 234 P.2d 961*

Writ of review as not available as long as petitioner has adequate remedy by appeal from final judgment, even though challenged order itself is not appealable. *Bank of America v. Superior Court (1942) 20 Cal. 2d 697, 703, 128 P.2d 357*

Writ of review as not available to review decision of County Board of Equalization when petitioner had plain, speedy, and adequate remedy that permitted petitioner to pay taxes under protest and subsequently to file action to recover taxes. *Jillson v. Board of Supervisors (1963) 221 Cal. App. 2d 192, 195, 34 Cal. Rptr. 419*

Legal Topics:

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

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§ 492.57 Mislabeled Petitions

Petition for writ of review as deemed petition for writ of mandate when petitioner presented full record of lower court proceedings. *Davis v. Superior Court (1980) 102 Cal. App. 3d 164, 170-171, 162 Cal. Rptr. 167*

Mislabeled petition as no bar to relief justified by proper allegations and proof. *Peck's Liquors, Inc. v. Superior Court (1963) 221 Cal. App. 2d 772, 775, 34 Cal. Rptr. 735*

Petition for writ of prohibition as deemed petition for writ of review when lower court completes threatened decision before petition heard. *Chase v. Superior Court (1962) 210 Cal. App. 2d 872, 878, 27 Cal. Rptr. 383*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 492.58 Original Jurisdiction to Issue Writ

[1] In General

Appellate department of superior court as without jurisdiction to issue writ of review. *Thomasian v. Superior Court (1953) 122 Cal. App. 2d 322, 329, 265 P.2d 165*

[2] Refusal to Exercise Jurisdiction for Delay

Reasonable time in which to file petition for writ of review as same time allowed by law for appeal. *Reynolds v. Superior Court (1883) 64 Cal. 372, 373, 28 P. 121* ; *Bryant v. Superior Court (1936) 16 Cal. App. 2d 556, 561, 61 P.2d 483* (dictum)

Unexcused delay in seeking writ of review as sufficient reason for court to deny petition for writ, even absent showing of laches. *Scott v. Municipal Court (1974) 40 Cal. App. 3d 995, 997, 115 Cal. Rptr. 620*

Legal Topics:

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§ 492.59 Scope of Review

[1] In General

When jurisdiction of lower court or tribunal exists only on given facts, a review in writ proceeding as extending to whole of record below. *Great Western Power Co. v. Pillsbury (1915) 170 Cal. 180, 185, 191, 149 P. 35*

When conflicting inferences could be made from the evidence, and absent record showing how lower court reached its findings, re viewing court as compelled to resolve all conflicts in favor of the respondent court and indulge in all reasonable inferences to uphold the findings. *Tomlinson v. Superior Court (1944) 66 Cal. App. 2d 640, 643, 152 P.2d 517* (prohibition)

Evidence outside record as beyond scope of review in proceedings on writ of review. *Rinaldo v. Superior Court (1936) 15 Cal. App. 2d 585, 593, 59 P.2d 868* ; contra *Wilde v. Superior Court (1942) 53 Cal. App. 2d 168, 176, 127 P.2d 560* (testimony allowed in contempt review)

Annulment by writ of review as not proper when return showed on its face that it did not include all the evidence and showed some competent evidence in support of board's decision. *Landtbom v. Board of Fire Commrs. (1929) 98 Cal. App. 629, 631, 632, 277 P. 369*

[2] Contempt Orders

Examination of trial record on review of contempt order as extending to whether any substantial evidence was before trial court to sustain its jurisdiction. *In re Buckley (1973) 10 Cal. 3d 237, 247, 259, 110 Cal. Rptr. 121, 514 P.2d 1201* (writ of habeas corpus); *Chula v. Superior Court (1962) 57 Cal. 2d 199, 204, 18 Cal. Rptr. 507, 368 P.2d 107* (writ of review)

Power to weigh evidence in review of contempt proceeding as beyond scope of review. *In re Ciraolo (1969) 70 Cal.*

2d 389, 394, 74 Cal. Rptr. 865, 450 P.2d 241 (writ of habeas corpus)

In proceeding on application for writ of writ of review, question whether acts constituted contempt as jurisdictional and, in absence of evidence showing contempt, order of commitment as required to be annulled. *Arthur v. Superior Court (1965) 62 Cal. 2d 404, 409, 42 Cal. Rptr. 441, 398 P.2d 777*

Court, on writ of review, as indulging no presumption of validity in support of judgment of contempt. *Freeman v. Superior Court (1955) 44 Cal. 2d 533, 536, 282 P.2d 857*

Scope of review on application for writ of habeas corpus as identical to that by way of writ of review, namely, whether act or omission charged against alleged contemnor confers jurisdiction to adjudicate contempt and whether jurisdictional act or omission is supported by evidence. *In re Karpf (1970) 10 Cal. App. 3d 355, 364, 88 Cal. Rptr. 895* ; *In re Circosta (1963) 219 Cal. App. 2d 777, 785, 33 Cal. Rptr. 514*

Evidence outside record as within scope of review in proceedings on writ of review. *Wilde v. Superior Court (1942) 53 Cal. App. 2d 168, 176, 127 P.2d 560* ; contra *Rinaldo v. Superior Court (1936) 15 Cal. App. 2d 585, 593, 59 P.2d 868*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsContemptGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsRecords on Appeal

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PART III. RESEARCH GUIDE

43-492 California Forms of Pleading and Practice--Annotated § 492.60

§ 492.60 Summary Denial of Writ

Summary denial of petition for extraordinary writ as not res judicata in subsequent proceedings, regardless of whether denial is intended to be on merits or is based on some other ground. *Kowis v. Howard (1992) 3 Cal. 4th 888, 899, 12 Cal. Rptr. 2d 728, 838 P.2d 250* (rejecting "sole possible ground" exception)

Court as capable of summarily denying petition for writ of review without any statement of reasons. *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Bd. (1979) 24 Cal. 3d 335, 350, 156 Cal. Rptr. 1, 595 P.2d 579*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataCivil ProcedureRemediesWritsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionState Court Review

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43-492 California Forms of Pleading and Practice--Annotated § 492.61

§ 492.61 Law Reviews

Chernoff and Watson, *Writ Lore*, 56 State B.J. 12 (1981)

Note, *Extraordinary Writs--Discretion or* Matter of Right? *15 Hastings L.J. 218 (1963)*

Witkin, *The Extraordinary Writ-- Friend or Enemy*, 29 Cal. State B.J. 467 (1954)

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43-492 California Forms of Pleading and Practice--Annotated § 492.62

§ 492.62 Text References

California Civil Writ Practice (Cal. CEB 3d ed. 2000)

Witkin, California Procedure, vol. 2, *Jurisdiction*, § 276 et seq., vol. 8, *Extraordinary Writs*, §§ 1-45, 134 et seq., (4th ed. 1997)

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43-492 California Forms of Pleading and Practice--Annotated §§ 492.63-492.79

[Reserved]

§§ 492.63[Reserved]

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PART IV. PROCEDURAL CHECKLIST

43-492 California Forms of Pleading and Practice--Annotated § 492.80

§ 492.80 Petitioner's Checklist

[1] Preliminary Determinations

1. Review all papers relating to the case to determine whether facts support issuance of writ of review [*Code Civ. Proc. § 1068*; *see § 492.18*].

a. Petitioner must have no right to review by appeal, including review of interlocutory order on appeal from final order or judgment [*Code Civ. Proc. § 1068*; *see Code Civ. Proc. §§ 904.1, 904.2*].

b. Petitioner must have no other plain, speedy, and adequate remedy [*Code Civ. Proc. § 1068*].

c. The act sought to be reviewed must be the exercise of a judicial function by a lower court, board, or officer [*Code Civ. Proc. § 1068*].

d. The act sought to be reviewed must be one made in excess of jurisdiction [*Code Civ. Proc. § 1068*].

e. Petitioner must have a beneficial interest in the challenged decision [*Code Civ. Proc. § 1069*].

2. Determine proper court in which to file petition.

NOTE:
All appellate courts and superior courts have original jurisdiction to issue a writ of review [*see Const., art. VI, § 10*; *Code Civ. Proc. § 1068*]. Usually, however, a petition is filed in the superior court to challenge the act of a or constitutionally created administrative agency within its district; in the appellate division of the superior court to challenge the act of the superior court in a limited civil case [*Code Civ. Proc. § 1068(b)*]; in a court of appeal to challenge the act of a superior court within its district; and in the

California Supreme Court to challenge the act of a court of appeal. If the petition is filed in an appellate court, and might lawfully be made to a lower court in the first instance, it must set forth the circumstances which, in the opinion of the petitioner, render it proper that the writ should issue originally from the reviewing court [*Cal. Rules of Ct., Rule 8.486(a)(1)*].

3. Determine whether it is desirable to petition, in the alternative, for another type of extraordinary writ [*see §§ 492.13, 492.14*].

[2] Documents to Be Obtained

Obtain certified copies of the judgment or order sought to be reviewed. Obtain certified transcripts of relevant portions of the record as necessary to make a prima facie showing that writ should issue. For review of a contempt order, obtain at least a copy of the order violated, a transcript of the contempt hearing, and if appropriate, the process by which the court acquired jurisdiction over the contemner, such as proof of service of a subpoena or court order.

NOTE:

When filed in the Supreme Court or in a court of appeal, the verified petition must be accompanied by (1) a copy of the order or judgment from which relief is sought, (2) copies of all documents and exhibits submitted to the trial court supporting and opposing petitioner's position, and (3) copies of all other documents submitted to the trial court that are necessary for a complete understanding of the case and the ruling. In exigent circumstances, a petition may be filed without these documents if a declaration by counsel explains the urgency and the circumstances making the documents unavailable and fairly summarizes their substance [*Cal. Rules of Ct., Rule 8.486(b)(1)-(3)*]. In addition, a transcript of the proceedings leading to the order or judgment below must accompany the writ petition [*Cal. Rules of Ct., Rule 8.486(b)(1)(D)*]. If a transcript is unavailable, counsel must make and file a declaration that either (1) explains why a transcript is unavailable and fairly summarizes the proceedings, including arguments by counsel and the basis of the trial court's decision, if stated; or (2) states that the transcript has been ordered, the date it was ordered, and the date it is expected to be filed, which must be a date prior to any action requested of the reviewing court other than issuance of a stay supported by other parts of the record [*Cal. Rules of Ct., Rule 8.486(b)(2)*].

Although the statutes and rules of court governing writ of review proceedings do not expressly require that a petition filed in superior court be supported by portions of the record, the inclusion of these exhibits may be required by local practice and, in any event, may be necessary to preclude summary denial of the petition [*see § 492.20[4][b]*]

Follow local practice regarding the preparation of documentary exhibits to be submitted with the petition. In appellate court proceedings, counsel need only lodge one set of any separately bound supporting documents, in contrast with the greater number of copies of the petition that are required to be filed [*see Cal. Rules of Ct., Rule 8.44(b)(5)*].

Clerks' fees for preparing copies of the court's record are set forth in *Gov. Code §§ 26831-26837*. Court reporters' fees for preparation of transcripts are set forth in *Gov. Code § 69950*.

[3] Prepare Petition for Writ of Review

1. Review essential allegations. See generally *§§ 492.101* and *492.102*.

2. Draft petition.

For discussion of the required number of copies of the petition and format requirements, see *§ 492.101[8], [9]*. For a cover for use in filing a petition in an appellate court, see *§ 492.100*.

3. Sign petition.

The petition must be signed by the petitioner or his or her attorney [*see Code Civ. Proc. §§ 446, 1109*; *see also §§ 492.101*, 492.102].

4. Verify petition.

The petition must be verified [*Code Civ. Proc. § 1069*; *Cal. Rules of Ct., Rule 8.486(a)(4)*; §§ 492.101, 492.102]. For discussion of verification in superior and appellate courts, see *§§ 492.101[7]* and *492.102*.

[4] Prepare Proposed Order and Writ for Superior Court

For a proceeding in a superior court, prepare an order for the judge's signature and the writ of review for issuance by the clerk of court. Counsel should draft the writ of review and order either separately [*see §§ 492.103* and *492.104*] or as one document [*see § 492.104*], depending on what the local practice requires. The Supreme Court and courts of appeal prepare their own orders and writs.

[5] Prepare Points and Authorities

Draft a supporting memorandum [*Cal. Rules of Ct., Rule 8.486(a)(5)* (appellate courts); *see also Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(2), 3.1113* (superior courts)]. Prepare the same number of copies as were prepared for the petition and attach a copy to each copy of the petition. For forms of memoranda for use in supporting a petition for writ of review, see California Points and Authorities, Ch. 205, *Review* (Matthew Bender).

[5a] Prepare Certificate of Interested Entities or Persons

If a party files a motion, an application, or an opposition to a motion or application before filing its principal brief, the party must serve and file a Certificate of Interested Entities or Persons at the time it files the first such motion, application, or opposition and must include a copy of this certificate in the party's principal brief. If no motion, application, or opposition to such motion or application is filed before the parties file their principal briefs, each party must include a Certificate of Interested Entities or Persons in its principal brief [*Cal. Rules of Ct., Rule 8.208(d)*]. If the identity of any party or any entity or person subject to disclosure has not been publicly disclosed in the proceedings and a party wants to keep that identity confidential, the party may serve and file an application for permission to file its certificate under seal separately from its principal brief, motion, application, or opposition. If the application is granted, the party must file the certificate under seal and without service within 10 days of the court's order granting the application [*Cal. Rules of Ct., Rule 8.208(d)(2)*]. The petitioner's certificate must be included in the petition [*Cal. Rules of Ct., Rule 8.488(c)(1)*]. The certificates of the respondent and real party in interest must be included in their preliminary opposition or, if no such opposition is filed, in their return, if any. The certificate must appear after the cover and before the tables [*Cal. Rules of Ct., Rule 8.488(c)(3)*].

For a form of the Certificate of Interested Entities or Persons--Judicial Council Form APP-008, see *Ch. 50, Appeal: Briefs, § 50.83*.

[6] Serve Petition

Serve copy of petition and accompanying papers on respondent and real party in interest. The general service

requirements of *Code Civ. Proc. §§ 1010-1020* apply [*Code Civ. Proc. § 1107*; for further discussion and forms, *see* Ch. 518, *Service of Summons and Papers* ; *see also § 492.101[12]*].

NOTE:

Usually the petition must be filed with proof that it has been served on both the respondent and the real party in interest, unless the court exercises its discretion power to permit filing without service [*Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.486(e)*; *see also Code Civ. Proc. § 1069*]. Consult local practice with respect to this requirement. For further discussion of ex parte applications, see *§ 492.102[5][b]*.

[7] Prepare Proof of Service of Petition

When the petition is served on the respondent and real party in interest before filing [*see § 492.80[6]*], prepare a proof of service in as many copies as the petition, and append the original and copies of the proof of service to the original and copies of the petition.

Proof of service is made in the same manner as proof of service of summons and complaint [*Code Civ. Proc. § 1109*; *see, e.g., Code Civ. Proc. §§ 417.10, 1013a, 2009, 2015.3, 2015.5*]. Thus, for example, the mandatory Judicial Council form of proof of service of summons [Cal. Judicial Council Form 982(a)(23); *see* Cal. Rules of Ct., Appen., Div., III] may be adapted for use as proof of service of the petition. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge. For further discussion and forms of proof of service, *see* Ch. 518, *Service of Summons and Papers* .

NOTE:

If the petition is to be filed in an appellate court, in addition to complying *Cal. Rules of Ct. Rule 8.25*, the proof of service must give the telephone number of each attorney served; an appellate court may strike a petition accompanied by a defective proof of service, or may impose a lesser sanction, unless a proper proof of service is filed within five days after the clerk gives notice of the defect [*Cal. Rules of Ct., Rule 8.486(e)(5)*].

[8] File Original Petition

File, with the clerk of the proper court, the original petition and the required number of copies [*see, e.g., Cal. Rules of Ct., Rule 8.44*; *see also § 492.101[9]*]. Aside from incorporated exhibits, if any [*see § 492.80[2]*], the original and each copy must be accompanied by a supporting memorandum of points and authorities [§ 492.80[5]] and by a proof of service, if prior service was required [*§ 492.80[6], [7]*]. Counsel should consult local practice for additional requirements [*see, e.g.*, Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 5th App. Dist., Rule 3 (requiring writ petition to be accompanied with completed fact sheet available from court clerk)].

NOTE:

A filing fee of $655, payable to the clerk of the court, must accompany the filing of a petition for a writ of review in the Court of Appeal (or $590 in the Supreme Court) [*Gov. Code §§ 68926, 68926.1(b)* (requires additional $170 for deposit in appellate court trust fund), *68927*]. The filing fee required in superior courts varies [*see Code Civ. Proc. §§ 411.20, 1109*; *Bus. & Prof. Code §§ 6321-6324*], and counsel should check with the clerk of the court to determine the applicable amount. For a form of waiver of filing fees in proceedings *in forma pauperis*, see Ch. 174, *Costs and Attorney's Fees* .

[9] Consideration and Ruling on Petition

1. Hearing of petition

A superior court judge may hear and dispose of the writ petition in chambers [*Code Civ. Proc. § 166(a)(1)*]. Appellate courts usually determine in conference whether to grant the petition and issue the writ of review or to deny the petition.

2. Review of summary denial

If the petition is denied summarily, determine whether to seek review of the denial. The usual method of review of an order denying a petition for a writ of review is by appeal. When a court of appeal denies a petition without issuance of the writ, the order is final immediately on filing and petitioner may therefore petition the Supreme Court for a hearing without waiting the normal 30-day period prescribed by *Cal. Rules of Ct., Rule 8.264(b)* [*Cal. Rules of Ct., Rule 8.264(b)(2)*].

3. Granting of petition and issuance of writ of review.

If the superior court grants an order commanding a writ of review to issue [*see §§ 492.103* and *492.104*], the clerk then issues the writ. In a superior court proceeding, counsel will have drafted the writ and order [*see § 492.80[4], [5],* and *§§ 492.103,* 104]. Appellate courts draft their own writs and orders.

The date for hearing on the writ of review is supplied by the judge or the clerk. A hearing date may be set at any time [*see Code Civ. Proc. § 1108*].

[10] Serve Writ of Review

Serve a copy of the writ on the respondent and each real party in interest in the same manner as a summons would be served in a civil action, unless the court expressly directs otherwise [*Code Civ. Proc. § 1073*]. If they were not served before filing, a copy of the petition and the memorandum of points and authorities should accompany the writ when served [*see Code Civ. Proc. §§ 415.10-415.40* (service of complaint with summons); *see also Code Civ. Proc. § 1073* and *§ 492.104[4]*]. When the respondent is a court, consult local procedure to determine if service should be made on the presiding judge or on the clerk of the court.

If the writ is issued by an appellate court, the clerk of that court is required to promptly transmit a certified copy of the writ to the respondent to whom it is directed. If, in addition, this writ includes an order that stays proceedings scheduled to occur within seven days of its issuance, the clerk of that court is required to make a reasonable effort to give telephone notice to the respondent to whom it is directed [*Cal. Rules of Ct., Rule 8.489*].

[11] Insure Return of Certified Record

Insure that a certified record of the proceedings below is filed and that therecord provided to the reviewing court is complete [*see also § 492.26[2]*].

1. Pay the fees charged by the clerk to make a return of the record.

Clerks' fees for preparing copies of the court's record are set forth in *Gov. Code §§ 26831-26837* (superior court) and *72054* (appellate division). If a transcript of some or all of the proceedings below will be necessary to meet the burden on review, deposit with the court the estimated cost of preparing court a reporter's transcript as required by *Cal. Rule of Ct., Rule 8.130(b)* (superior court) and *Cal. Rule of Ct., Rule 8.753(c)* (appellate division).

2. See that the certified record of the proceedings below has been properly prepared and filed by the date set for the return in the writ of review.

The burden is on the petitioner to ensure that the record is filed and, in the absence of a return, the writ can be discharged and the proceeding dismissed.

3. If the record filed by the respondent is incomplete, file a motion in the reviewing court to compel a further return of record [*see Code Civ. Proc. § 1075* and §§ *492.105, 492.106*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessProofGeneral OverviewCivil ProceduresPartiesReal Parties in InterestGeneral OverviewCivil ProceduresAppealsAppellate JurisdictionState Court ReviewCivil ProceduresAppealsRecords on AppealGovernmentsCourtsCourt PersonnelGovernmentsCourtsCourt Records

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43-492 California Forms of Pleading and Practice--Annotated § 492.81

§ 492.81 Guide for Real Party in Interest

NOTE:

When the circumstances or local practice permit, the petitioner may be able to obtain issuance of a writ of review without prior service of the petition on the real party in interest [*see Code Civ. Proc. § 1107*; *Code Civ. Proc. § 1069*; *Cal. Rules of Ct., Rule 8.486(e)(6)*; *§ 492.80[6]*]. In this situation the first step for the real party in interest will be a return to the writ by demurrer or verified answer [*see § 492.81[3]*].

[1] Prepare Opposition to Petition

1. Draft opposing memorandum [*Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.487(a)*].

For forms of memoranda of points and authorities for use in opposing a petition for writ of review, see California Points and Authorities, Ch. 205, *Review* (Matthew Bender).

2. If proceeding is in an appellate court, prepare, in the same number of copies as the opposing memorandum, a statement of any material fact that was not included in the petition [*Cal. Rules of Ct., Rule 8.487(a)*].

3. If proceeding is in appellate court, serve and file a Certificate of Interested Entities or Persons in the first document filed [*Cal. Rules of Ct., Rule 8.208(d)*] and include a copy of the certificate in the principal brief [*Cal. Rules of Ct., Rule 8.208(d)*].

For a form of the Certificate of Interested Entities or Persons--Judicial Council Form APP-008, see *Ch. 50, Appeal: Briefs, § 50.83*.

[2] Serve and File Opposition to Petition

Within 10 days after the petition is filed, serve a copy of the opposing memorandum on the petitioner, and file the original and any required copies, together with proof of service, with the clerk of the court [*Code Civ. Proc. § 1107*;

Cal. Rules of Ct., Rule 8.486(a)(1)]. The general requirements for service of papers under *Code Civ. Proc. §§ 1010-1020* apply [*see Code Civ. Proc. § 1109*; for further discussion and forms, *see* Ch. 518, *Service of Summons and Papers*].

[3] Return to Writ of Review: Answer or Demurrer

1. Preliminary determinations

Determine whether grounds exist to challenge the petition and support a judgment discharging the writ, either by demurrer or by answer filed as a return to the writ [*Code Civ. Proc. §§ 1069.1, 1089*; *Cal. Rules of Ct., Rule 8.487(b)*].

a. Is the petition properly verified [*Code Civ. Proc. § 1069*; *see § 492.20[3]*], timely filed [*see § 492.17[2]*], or unjustifiably filed in higher court [*Cal. Rules of Ct., Rule 8.486(a)(1)*; *see § 492.17[1]*].

b. Does petition disclose, or do facts otherwise indicate, the absence of any necessary ground for issuance of the writ, that is, beneficial interest on part of petitioner, judicial action lacking or in excess of jurisdiction, and no right to appeal or other plain, speedy, and adequate remedy [*Code Civ. Proc. § 1068*; see *§ 492.18*].

2. Prepare demurrer or verified answer, or both.

NOTE:
If demurrer alone is filed but is not sustained, the reviewing court may or may not permit subsequent filing of a verified answer [*see Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.486(b)(4)*; *see also § 492.26*].

If grounds for an objection appear on the face of the petition, draft a demurrer [*Code Civ. Proc. §§ 1069.1, 1089*; *see § 492.107*], showing why the petition does not state facts sufficient to support annulment of the challenged order or judgment [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*; *see Code Civ. Proc. § 1109*].

If grounds for objection do not appear on the face of the petition but can be raised by denial of the petition's material allegations or by a statement of new matters, draft an answer [*Code Civ. Proc. §§ 1069.1, 1089*; *see § 492.108*] showing why, given the denials or allegations in the verified answer, petitioner is not entitled to annulment of the challenged order or judgment [*Code Civ. Proc. §§ 430.30(b), 431.30(b)*; *see Code Civ. Proc. § 1109*].

Prepare enough copies to file the original and required number of court copies, to serve all other parties to the action, and to retain one office copy.

3. Sign demurrer or answer.

The demurrer or answer must be signed by the petitioner or his or her attorney [*see Code Civ. Proc. §§ 446, 1109*].

4. Verify answer.

A return by answer must be verified [*Code Civ. Proc. §§ 1069.1, 1089*; *Cal. Rules of Ct., Rule*

8.486(b)(1); *see §§ 492.101[7]* and *492.102*].

5. Prepare an opposing memorandum.

Draft a memorandum in support of the demurrer, if filing in superior court [*see Cal. Rules of Ct., Rule 3.1320(a)*]. In other situations, a memorandum of points and authorities is not expressly required, although they may be desirable, particularly if a previous opposing memorandum has not been filed [§ 492.81[1]].

Prepare the same number of copies as the demurrer (or answer) and attach. For forms of memoranda for use in supporting a petition for writ of review, see California Points and Authorities, Ch. 205, *Review* (Matthew Bender).

6. Serve and file answer or demurrer.

Serve a copy of the demurrer or answer, or both, together with the supporting memorandum, if any, on the petitioner, and file the original and any required copies, together with proof of service, with the clerk of the court. The general requirements for service of papers under *Code Civ. Proc. §§ 1010-1020* apply [*see Code Civ. Proc. § 1109*; for further discussion and forms, *see* Ch. 518, *Service of Summons and Papers*]. Service and filing must be completed on the date specified for the return if the proceeding is in a superior court [*Code Civ. Proc. § 1089*; *see Code Civ. Proc. § 1069.1*; *see also Code Civ. Proc. § 1171* (writ specifies date for return)], if in the appellate court, within 30 days after the court issues the alternative writ or order to show cause or notifies the parties that it is considering issuing a peremptory writ in the first instance [*Cal. Rules of Ct., Rule 8.409(h)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsAnswersCivil ProceduresPleading & PracticeService of ProcessProofGeneral OverviewCivil ProceduresPartiesReal Parties in InterestGeneral OverviewCivil ProceduresAppealsAppellate JurisdictionState Court Review

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43-492 California Forms of Pleading and Practice--Annotated § 492.82

§ 492.82 Hearing and Posthearing Procedure

[1] Attend Hearing and Present Oral Argument, if Appropriate

When a full return has been made, the court will hear those parties who attend for that purpose [*Code Civ. Proc. § 1075*]. This does not mean, however, that oral argument may not be waived. Appellate procedures, in particular, may deem argument waived unless requested [*see, e.g.,* Cal. Cts. of Appeal Internal Operating Practices and Procedures, 1st Dist., Part III(A), § 20].

[2] Prepare and Serve Proposed Judgment (Superior Court Only)

If the judge of the superior court orders counsel to prepare a proposed judgment, or if local practice so requires, draft the appropriate judgment affirming, modifying, or annulling the order or judgment below, serve it on all other parties, and submit it to the court [*see Cal. Rules of Ct., Rule 3.1590(f)-(h)*]. In a proceeding in an appellate court, the written opinion of the court constitutes its judgment and therefore counsel does not prepare a form of judgment.

For a form of judgment for use in superior court, see *§ 492.104*.

[3] Prepare Notice of Entry of Judgment (Superior Court Only)

The party submitting the proposed judgment for entry must also prepare and mail a copy of the notice of entry of judgment to all parties who have appeared in the proceeding and then file with the court the original notice of entry of judgment, together with the proof of service by mail [*Code Civ. Proc. § 664.5(a), (c)*].

[4] Prepare Costs Memorandum or Motion to Tax Costs

The party in whose favor the court has awarded costs should prepare a verified memorandum of costs to be served and filed in the trial court within 40 days after the remittitur is filed with the trial court [*Cal. Rules of Ct., Rules 8.278(c)* (appellate court), 8.764(d); *see also Code Civ. Proc. § 1027*]. The party against whom the court awards costs may move to tax costs by a notice of motion served and filed 15 days after service of the cost memorandum, or 20 days after service if the service was by mail [*Cal. Rules of Ct., Rule 3.1700(b)*; *Code Civ. Proc. § 1013*, applicable by *Cal. Rules*

of Ct., Rule 8.278(c)(2) (appellate court), Rule 8.764(d); *see also Code Civ. Proc. § 1027*]. For forms and discussion of the memorandum of costs, or the motion to tax costs, see Ch. 174, *Costs and Attorney's Fees* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsCosts & Attorney Fees

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43-492 California Forms of Pleading and Practice--Annotated § 492.83

§ 492.83 Postjudgment Procedure

[1] Superior Court

If aggrieved by the judgment [*see Code Civ. Proc. §§ 902, 904.1, 1110*], file a timely notice of appeal [*see Cal. Rules of Ct., Rule 8.104(a)*; for further discussion and forms, see Ch. 42, *Appeal: Notice of Appeal*].

[2] Appellate Court

1. Petition for rehearing

If aggrieved by the judgment, file a petition for rehearing within 15 days after the filing of the decision [*Cal. Rules of Ct., Rule 8.268(b)(1)*; for further discussion and forms, see Ch. 52, *Appeal: Rehearing*].

2. Petition for review (court of appeal only)

Serve and file in the Supreme Court a petition for review within 10 days after the decision of the court of appeal becomes final as to that court [*Cal. Rules of Ct., Rule 8.500(d)(1)*; for further discussion and forms, *see* Ch. 54, *Appeal: California Supreme Court Review*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsRehearingsCivil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsReviewabilityTime Limitations

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43-492 California Forms of Pleading and Practice--Annotated §§ 492.84-492.99

[Reserved]

§§ 492.84[Reserved]

142 of 170 DOCUMENTS

California Forms of Pleading and Practice--Annotated

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Volume 43: Receivers thru Rewards-Chs. 486-499
Chapter 492 REVIEW (CERTIORARI), WRIT OF
PART V. FORMS

43-492 California Forms of Pleading and Practice--Annotated § 492.100

§ 492.100 Special Proceeding for Writ of Review in Appellate Court [Code Civ. Proc. § 1069; Cal. Rules of Ct., Rule 8.486]--Cover of Petition [Cal. Rules of Ct., Rule 8.204]

[1] FORM Special Proceeding for Writ of Review in Appellate Court [Code Civ. Proc. § 1069; Cal. Rules of Ct., Rule 8.490]--Cover of Petition [Cal. Rules of Ct., Rule 8.204]

[CIVIL NO.
_____]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[*OR*]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, _____ APPELLATE DISTRICT

_____ [*name*],	)	
Petitioner,	)	
vs.	)	[CIVIL NO. _____]
_____ [*name*],	)	PETITION FOR WRIT OF REVIEW AND SUP-
Respondent,	)	PORTING MEMORANDUM OF POINTS AND
_____ [*name*],	)	AUTHORITIES
Real Party in Interest.	)	[STAY REQUESTED]
	)	
	)	

_____

The Honorable _____ [*name of trial judge*], Judge
[Case No. _____ [*specify case number in trial court, if any*]

_____ [*firm name, if any*]
By: _____ [*typed name*]
_____ [*address*]
_____ [*telephone number*]
California State Bar No. _____
Attorney for Petitioner _____ [*name*]

[2] Use of Form

This form illustrates the format of a cover for a petition for a writ of review to be filed in the Supreme Court or in a court of appeal. For a form of petition, see *§ 492.101*.

[3] Format

A petition for review filed in an appellate court must, on its cover, designate the title of the case, the name, address, and telephone numberof the attorney filing the petition, the name of the trial judge, and the number of the case in the trial court, if any [*Cal. Rules of Ct., Rule 8.204*].

The cover must also contain the California State Bar membership number of the attorney filing the petition and of every attorney who joins in the petition. California State Bar membership numbers of the supervisors in a law firm or public law office of the attorney responsible for the case need not be stated [*Cal. Rules of Ct., Rule 8.204*].

So far as practicable, the cover of any petition for an original writ should be red in color [*Cal. Rules of Ct., Rule 8.40(b)*]. The court will accept a petition with the wrong color cover for filing but, in case of repeated violations by an attorney or a party, may order the petition returned or stricken until corrected within a specified time [*Cal. Rules of Ct., Rules 8.204(e), 8.40(b)*].

The use of recycled paper for the cover is encouraged [*Cal. Rules of Ct., Rule 8.204(b)*].

[4] Request for Stay

This form includes, in the title, optional language indicating that a stay is requested. Whenever a petition for a writ filed in an appellate court includes a request for a temporary stay [*see, e.g., Code Civ. Proc. § 1071* (temporary stay in writ of review proceeding)], the cover of the petition must bear the conspicuous notation "STAY REQUESTED," and identify the nature and date of the proceeding or act sought to be stayed.

[5] Related Appeal Pending

When the petition seeks review of trial court proceedings that are also the subject of a pending appeal, the title of the petition must include the notation "Related Appeal Pending." In such a case this form should be modified accordingly [*Cal. Rules of Ct., Rule 8.486(a)(3)*; *see also § 492.101*].

[6] Proceeding Involving Unfair Competition Case

For discussion of service requirements in an unfair competition case under *Bus. & Prof. Code § 17200 et seq., see Bus. & Prof. Code § 17209*.

[7] California Rules of Court

Certificate of Interested Entities or Persons. *Cal. Rules of Ct., Rule 8.208*

Cover of petition for original writ filed in appellate court as required to be red. *Cal. Rules of Ct., Rule 8.40(b)*

Cover of petition for writ filed in appellate court that includes request for stay as required to bear conspicuous notation that stay is requested and identify the nature and date of the proceeding or act sought to be stayed. *Cal. Rules of Ct., Rule 8.116*

Information required to be included on cover of petition for writ filed in appellate court. *Cal. Rules of Ct., Rule 8.204*

[8] Local Rules of Courts of Appeal

Requirements for covers on documents filed with court. Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 4th App. Dist., Rule 2

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Chapter 492 REVIEW (CERTIORARI), WRIT OF
PART V. FORMS

43-492 California Forms of Pleading and Practice--Annotated § 492.101

§ 492.101 Special Proceeding for Writ of Review in Appellate Court [Code Civ. Proc. § 1069; Cal. Rules of Ct., Rule 8.486]--Petition [Cal. Rules of Ct., Rule 8.486(a)]

[1] FORM Special Proceeding for Writ of Review in Appellate Court [Code Civ. Proc. § 1069; Cal. Rules of Ct., Rule 8.490]--Petition [Cal. Rules of Ct., Rule 8.490(b)]

[CIVIL NO.
_____]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[OR]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, _____ APPELLATE DISTRICT

_____ [*name*],	)	
Petitioner,	)	
vs.	)	[CIVIL NO. _____]
_____ [*name*],	)	PETITION FOR WRIT OF REVIEW AND SUP-
Respondent,	)	PORTING MEMORANDUM OF POINTS AND
_____ [*name*],	)	AUTHORITIES
Real Party in Interest.	)	[STAY REQUESTED]
	)	
	)	

_____

TO THE HONORABLE _____ [CHIEF *or* PRESIDING] JUSTICE AND ASSOCIATE JUSTICES OF THE _____ [SUPREME COURT *or* COURT OF APPEAL OF THE _____ (*number*) APPELLATE DISTRICT] OF THE STATE OF CALIFORNIA:

Petitioner alleges:

1. Petitioner is _____ [*identify petitioner and describe capacity, if other than as an individual, in which the proceeding is being brought, e.g.,* and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California].

2. Respondent is _____ [*identify respondent, e.g.,* the Superior Court of the _____ County, California, in which the above entitled action is pending].

3. Real party in interest is _____ [*name*], and has an interest that is directly affected by this proceeding in that _____ [*specify facts that make person the real party in interest, e.g.,* he/she is the _____ (plaintiff *or* defendant) in the action entitled _____ (*case name*), Civil Action No. _____, now pending before respondent court].

4. Petitioner is a person beneficially interested in the issuance of a writ of review by virtue of the fact that _____ [*specify facts that demonstrate petitioner's beneficial interest in the issuance of a writ, e.g.,* he/she is_____ (plaintiff *or* defendant) in the action entitled _____ (*case name*), Civil Action No. _____, now pending before respondent court].

5. _____ [*Allege facts showing that challenged action of respondent constitutes exercise of a judicial function, e.g.,* On _____ (*date*), in respondent court, the Honorable _____ (*name*), Judge, made an order directing petitioner to _____ (*specify*). A copy of this order is attached and incorporated as Exhibit A. On _____ (*date*), in respondent court, the Honorable _____ (*name*), Judge, issued an order to show cause directing petitioner to appear at a hearing to determine whether or not he/she should be held in contempt of court for allegedly violating the order attached as Exhibit A. At the conclusion of the hearing, the Honorable _____ (*name*), Judge, ordered that petitioner be held in contempt of court for failure to comply with the order attached as Exhibit A. A copy of the order of contempt is attached and incorporated as Exhibit B. A transcript of the contempt hearing, held on _____ (*date*), is attached and incorporated as Exhibit C].

6. _____ [*Allege facts showing that the challenged action of respondent was made without or in excess of jurisdiction, e.g.,* Respondent, in making _____ (*specify challenged action, e.g.,* the contempt order attached as Exhibit B), _____ (acted without *or* exceeded its) jurisdiction in that _____ (*specify, e.g.,* the order contains a finding, unsupported by substantial evidence, that petitioner was able to comply with the allegedly disobeyed order attached as Exhibit A)].

7. Petitioner has no right of appeal from _____ [*specify, e.g.,* the above-described order of respondent attached as Exhibit A], and he/she has no plain, speedy, and adequate remedy other than the relief sought in this petition.

[8. This petition is made to this court in the first instance rather than to the _____ (*specify lower court in which petition might lawfully have been made, e.g.,* Superior Court of _____ County, California), for the following reason(s): _____ (*specify circumstances, as required under Cal. Rules of Ct., Rule 8.486(a)(1),* which, in petitioner's opinion, render it proper that the writ should issue originally from the reviewing court).]

[9. Unless the proceedings before respondent are stayed by order of this Court, petitioner will sustain immediate and irreparable damage in that _____ (a *llege facts showing that the challenged order or judgment caused serious detriment to petitioner and set forth the relevant time constraints justifying the inclusion in the writ of a stay of the proceedings below, e.g.,* as a result of the above-described order of respondent attached as Exhibit A, petitioner has been held in criminal contempt and will be required to pay monetary sanctions in the amount of $_____ by _____ (*date*) unless said requirement is stayed by order of this Court).]

[10. As a result of _____ (*specify, e.g.,* the above-described order of respondent attached as Exhibit A), petitioner will sustain irreparableinjury before this matter can be heard on notice in that _____ (*allege facts showing urgency of need for relief and justifying the court's grant of the petition ex parte, if local practice requires that good cause be shown, e.g.,* as a result of the above-described order of respondent attached as Exhibit A, petitioner has been sentenced for criminal contempt and ordered to serve 30 days in the county jail, which order may be executed immediately), and the serious and imminent injury to petitioner constitutes good cause for this Court to consider and grant this petition ex parte without notice or service to or on respondent or real party in interest named in this action.]

WHEREFORE, petitioner prays,

1. That a writ of review issue under the seal of this Court commanding respondent to certify fully to this court, at a specified time and place, a transcript of the record and proceedings described above.

2. That the foregoing cause be heard and fully considered by this court and that the _____ [*specify challenged action, e.g.,* order of contempt made on _____ (*date*), by the Honorable _____ (*name*), Judge of respondent court], be annulled and set aside;

[3. That this court issue an order requiring respondent to desist and refrain from further proceedings in the above-described matter during the pendency of this proceeding;]

4. For recovery of costs incurred in this proceeding; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know its contents. The facts stated therein are true and are within my personal knowledge.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[*Add, if seeking to file petition without proof of prior service*]

ORDER

TO THE CLERK OF COURT:

GOOD CAUSE APPEARING from the verified petition set forth above,

IT IS HEREBY ORDERED that the aforesaid petition be accepted and filed, without proof that copies of the petition have been served on respondent and real party or parties in interest named in this action.
Dated: _____.

_____ [*signature*]
[Chief Justice *or* Presiding Justice]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add supporting memorandum of points and authorities*]

CAUTION:
The petition for writ or review filed in an appellate court must be verified [*Code Civ. Proc. § 1069*; *Cal. Rules of Ct., Rule 8.486(a)(4)*]. Proof of service of a copy of the petition on each respondent and real party in interest must accompany the petition at the time of filing, except when the court has exercised its discretion to permit filing without notice or service [*Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.486(e)*; *see also Code Civ. Proc. § 1069*].

[2] Use of Form

This form of petition for a writ of review is for use in the Supreme Court or in a court of appeal. Because the reviewing court may deny the petition summarily, counsel should insure, when adapting this form to particular fact situations, that no essential allegations are omitted inadvertently.

The form of petition must be accompanied by a supporting memorandum of points and authorities [*Cal. Rules of Ct., Rule 8.486(a)*].

For a form of cover to be used with this petition, see *§ 492.100*. For a form of petition for writ of review for use in superior courts, see *§ 492.102*.

[3] Allegations

The petition alleges (1) the identity and capacity of the petitioner (Paragraph 1); (2) the identity and capacity of the respondent (Paragraph 2); (3) the identity and capacity of the real party or parties in interest (Paragraph 3) [*Cal. Rules of Ct., Rule 8.486(a)*; *see Inland Counties Regional Center, Inc. v. Office of Administrative Hearings (1987) 193 Cal.*

App. 3d 700, 704-705, 238 Cal. Rptr. 422] ; (4) the beneficial interest of the petitioner [*Code Civ. Proc. § 1069*; *see Burlingame v. Justice's Court (1934) 1 Cal. 2d 71, 75, 33 P.2d 669]* ; (5) respondent's exercise of judicial functions (Paragraph 5) [*Code Civ. Proc. § 1068*; *see Standard Oil Co. v. State Bd. of Equalization (1936) 6 Cal. 2d 557, 559, 59 P.2d 119]* ; (6) lack or excess of jurisdiction (Paragraph 6) [*Code Civ. Proc. § 1068*; *see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 288, 291, 109 P.2d 942]* ; and (7) petitioner'slack of appeal or any other plain, speedy, or adequate remedy (Paragraph 7) [*Code Civ. Proc. § 1068*; *see De Lao v. Superior Court (1951) 37 Cal. 2d 711, 712, 234 P.2d 961]* . Optional Paragraph 8 is included for use when the petition is filed in an appellate court but could have been properly filed in a lower court, alleging the circumstances that render it appropriate for the appellate court to exercise its original jurisdiction in the first instance [*Cal. Rules of Ct., Rule 8.486(a)(1)*]. Optional Paragraph 9 is included for use when the petitioner seeks to allege facts supporting his or her request for a stay of the proceedings below pending disposition of the writ [*Code Civ. Proc. § 1071*; *see Cal. Rules of Ct., Rule 8.486(a)(7)*]. Optional Paragraph 10 is included for use when the petitioner seeks to allege facts showing good cause for allowing the petition to be filed without proof of prior service on the respondent and real party in interest [*Code Civ. Proc. §§ 1069, 1107*; *Cal. Rules of Ct., Rule 8.486(e)(6)*].

[4] General Rules of Pleading Apply

A petition for a writ of review is subject to the general rules of pleading (*Code Civ. Proc. § 420 et seq.*) governing complaints to the extent that these provisions are consistent with *Code Civ. Proc. §§ 1063-1110* [*Code Civ. Proc. § 1109*; for discussion of general rules of pleading, *see* Ch. 123, *Complaints and Cross Complaints*].

[5] Naming Respondent

When identifying the respondent (Paragraph 2), a petition should name the court, board, or other body, as distinguished from an individual judge, board member, or other person [*see Lois R. v. Superior Court (1971) 19 Cal. App. 3d 895, 903, 97 Cal. Rptr. 158* (prohibition); *Sperry & Hutchinson Co. v. Cal. State Bd. of Pharmacy (1966) 241 Cal. App. 2d 229, 236, 50 Cal. Rptr. 489]* .

[6] Request for Stay

[a] Pending Disposition of Writ

There are no express requirements for requesting that the court include a stay order in the writ of review. However, a petitioner who requests a stay of the proceedings below should explain in the petition the reasons for the urgency and set forth all relevant time constraints [*see Cal. Rules of Ct., Rule 8.486(a)(7)*]. The showing necessary to obtain a temporary stay order, at least in an appellate court proceeding, may be inferred from that required to stay a lower court's proceeding pending appeal [*see Mehr v. Superior Court (1983) 139 Cal. App. 3d 1044, 1050, 189 Cal. Rptr. 138* (writ of mandate issued to compel lower court to stay proceedings pending appeal when appeal raised substantial question and stay appeared proper in view of potential irreparable injury to petitioner absent stay order andlack of prejudice to respondent); *see also Cal. Rules of Ct., Rule 8.112* (procedure for writ of supersedeas to stay lower proceeding pending appeal)]. For further discussion and forms relating to stays pending appeal, see Ch. 43, *Appeal: Stay of Proceedings* . For a form of writ including a stay order, see *§ 492.104*.

If the petition includes a request for a stay, the cover must include a notation to that effect and identify the nature and date of the proceeding or act sought to be stayed [*see Cal. Rules of Ct., Rule 8.116* and *§ 492.100[4]*].

[b] Pending Disposition of Petition

Although *Code Civ. Proc. §§ 1071* and *1072* provide for inclusion of a stay order in the writ of review, there is no express provision for obtaining an immediate stay before the court grants or denies the petition for the writ [*cf. Cal. Rules of Ct., Rule 8.112* (ex parte stay pending disposition of petition for writ of supersedeas)]. Courts do, however,

have express authority to grant a petition for a writ of review without notice to the adverse party, and thus a petitioner seeking an immediate stay of proceedings may simply combine a request for a stay with a request that the petition be granted immediately, without notice or opposition [*see § 492.101[11]*].

In a jurisdiction where filing of the petition without a proof of service is allowed as a matter of course, counsel simply should include in the prayer of the petition the allegations necessary to support a stay of the proceedings below [Optional Paragraph 9]. In a court that normally requires proof of service before accepting the petition for filing, counsel should request a stay in the petition and also allege facts showing good cause for issuance of the writ without proof of prior service [Optional Paragraph 10; *see also § 492.101[11], [12]*]. To facilitate filing without proof of prior service in a court in which this is not routinely permitted, counsel may append to the petition the optional order in the foregoing form, for the court's endorsement, directing the clerk to permit filing of the petition without proof of prior service. After filing, the court may then sign an order for immediate issuance of the writ. For forms to use in preparing an order and writ in a superior court, see *§§ 492.103* and *492.104*.

[7] Verification

The requirement that the petition be verified [*Code Civ. Proc. § 1069*] may be satisfied by affidavit or by declaration under penalty of perjury [*Code Civ. Proc. §§ 446, 1109, 2015.5*]. The usual method of verification, and that used in the foregoing form, is by declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5*]. The declaration is executed by the petitioner if an individual is involved. It is executed by counsel if petitioner is out of the county in which counsel has his or her office, if for some reason petitioner is unable to verify it, or when the facts are within the attorney'sknowledge [*Code Civ. Proc. § 446*]. If petitioner is a corporation, the declaration is executed by an officer of that corporation [*Code Civ. Proc. § 446*].

The verification in the form omits standard language by which matters in the petition are verified on information and belief as well as on personal knowledge, because verification on information and belief is a form of hearsay that will not support the issuance of a writ for extraordinary relief [*see Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 204, 151 Cal. Rptr. 721* (petition for writ of mandate verified wholly on information and belief by petitioner's attorney); *see also § 492.20[3]*].

For further discussion of the general requirements for verification and for alternative forms of verification, see Ch. 572, *Verification* .

[8] Format of Petition

[a] Generally Subject to Requirements for Appellate Briefs

Except as otherwise provided in *Cal. Rules of Ct., Rules 8.485-8.493*, a petition must, insofar as practicable, comply with *Cal. Rules of Ct., Rule 8.204* [*Cal. Rules of Ct., Rule 8.485(a)*]. Rule 8.204 sets out the format requirements governing appellate briefs. Accordingly, in the following discussion of the requirements of Rule 8.212, the term "petition" has been substituted for the term "brief."

[b] Headings, References, Index, and Tables

Each point in a petition must appear separately under an appropriate heading, with subheadings if desired. Such headings should be concise headings which are generally descriptive of the subject matter covered [*Cal. Rules of Ct., Rule 8.204(a)(1)(B)*].

The statement of any matter in the record must be supported by appropriate reference to the record [*Cal. Rules of Ct., Rule 8.204(a)(1)(C)*].

A petition must be prefaced by a topical index of its contents and a table of authorities, separately listing cases, statutes, court rules, constitutional provisions, and other authorities [*Cal. Rules of Ct., Rule 8.204(a)(1)(A)*].

For a form of appellate brief illustrating compliance with the heading, index, and tables requirements of *Cal. Rules of Ct., Rule 8.204(a)(1)*, see Ch. 50, *Appeal: Briefs* .

[c] Format Requirements

A petition may be reproduced by any process that produces a clear, black image of letter quality. The paper must be white or unbleached, recycled, 81/2 by 11 inches, and of at least 20-pound weight [*Cal. Rules of Ct., Rule 8.204(b)(1)*]. Any conventional typeface may be used. The typeface may be either proportionally spaced or monospaced [*Cal. Rules of Ct., Rule 8.204(b)(2)*]. The type style must be roman; but for emphasis, italics or boldface may be used, or the text may be underscored. Case names must be italicized or underscored. Headings may be in uppercase letters [*Cal. Rules of Ct., Rule 8.204(b)(3)*]. The type size, including footnotes, must not be smaller than 13-point, and both sides of the paper may be used [*Cal. Rules of Ct., Rule 8.204(b)(4)*]. The lines of text must be unnumbered and at least one-and-a-half spaced. Headings and footnotes may be single-spaced. Quotations may be block-indented and single-spaced. Single-spaced means six lines to a vertical inch [*Cal. Rules of Ct., Rule 8.204(b)(5)*]. The margins must be at least 11/2 inches on the left and right and 1 inch on the top and bottom [*Cal. Rules of Ct., Rule 8.204(b)(6)*]. The pages must be consecutively numbered. The tables and the body of the petition may have different numbering systems [*Cal. Rules of Ct., Rule 8.204(b)(7)*].

A typewritten original and carbon copies may be filed only with the presiding justice's permission, which will ordinarily be given only to unrepresented parties proceeding in forma pauperis. All other typewritten petitions must be filed as photocopies [*Cal. Rules of Ct., Rule 8.204(b)(11)(A)*]. Both sides of the paper may be used if a photocopy is filed; only one side may be used if a typewritten original and carbon copies are filed [*Cal. Rules of Ct., Rule 8.204(b)(11)(B)*]. The type size, including footnotes, must not be smaller than standard pica, 10 characters per inch. Unrepresented incarcerated litigants may use elite type, 12 characters per inch, if they lack access to a typewriter with larger characters [*Cal. Rules of Ct., Rule 8.204(b)(11)(C)*]. In all other respects, the typewritten motion must conform to the requirements for all other papers [*Cal. Rules of Ct., Rule 8.204(b)*; *see § 492.101[8][a]*].

[d] Word or Page Limit

A petition produced on a computer must not exceed 14,000 words, including footnotes. Such a petition must include a certificate by appellate counsel or an unrepresented party stating the number of words in the petition. The person certifying may rely on the word count of the computer program used to prepare the petition [*Cal. Rules of Ct., Rule 8.204(c)(1)*]. A petition produced on a typewriter must not exceed 50 pages [*Cal. Rules of Ct., Rule 8.204(c)(2)*].

The following items are not included in the word or page limit [*Cal. Rules of Ct., Rule 8.204(c)(3)*]:

- The tables.
- The certificate stating the number of words in the petition.
- Any attachment, not to exceed 10 pages, except with permission from the presiding justice, consisting of copies of exhibits or other materials in the appellate record [*see Cal. Rules of Ct., Rule 8.204(d)*].

[e] Certificate of Interested Entities or Persons

If a party files a motion, an application, or an opposition to a motion or application before filing its principal brief, the

party must serve and file a Certificate of Interested Entities or Persons at the time it files the first such motion, application, or opposition and must include a copy of this certificate in the party's principal brief. If no motion, application, or opposition to such motion or application is filed before the parties file their principal briefs, each party must include a Certificate of Interested Entitites or Persons in its principal brief [*Cal. Rules of Ct., Rule 8.208(d)*]. If the identity of any party or any entity or person subject to disclosure has not been publicly disclosed in the proceedings and a party wants to keep that identity confidential, the party may serve and file an application for permission to file its certificate under seal separately from its principal brief, motion, application, or opposition. If the application is granted, the party must file the certificate under seal and without service within 10 days of the court's order granting the application [*Cal. Rules of Ct., Rule 8.208(d)(2)*]. The petitioner's certificate must be included in the petition [*Cal. Rules of Ct., Rule 8.488(c)(1)*]. The certificates of the respondent and real party in interest must be included in their preliminary opposition or, if no such opposition is filed, in their return, if any. The certificate must appear after the cover and before the tables [*Cal. Rules of Ct., Rule 8.488(c)(3)*].

For a form of the Certificate of Interested Entities or Persons--Judicial Council Form APP-008, see *Ch. 50, Appeal: Briefs, § 50.83*.

[9] Copies

Format requirements applicable generally to appellate papers, include the requirement that copies be clear and legible [*Cal. Rules of Ct., Rule 8.204(b)(1)* (the clerk or the court may reject for filing or strike any petition that is not clearly legible, or that appears to be printed with the characters artificially close to each other)].

The petition must be drafted in the following number of copies:

(1) Original and 13 copies for filing if petition is filed in Supreme Court [*Cal. Rules of Ct., Rule 8.44(a)(1)*]; original and four copies for filing if petition is filed in Court of Appeal [*Cal. Rules of Ct., Rule 8.44(b)(1)*].

(2) Copy for service on respondent.

(3) Copy for service on real party in interest. When there are two or more respondents or two or more real parties in interest, a copy for service on each such party will be prepared.

(4) Office copy.

(5) Copy for petitioner, if desired.

(6) Additional copies as desired.

[10] Attaching Complete Record

Whenever a petition for a writ of mandate in an appellate court seeks review of a trial court ruling, it must be accompanied by a record adequate to permit the review, including the following [*Cal. Rules of Ct., Rule 8.486(b)*]:

(1) A copy of the ruling from which relief is sought;

(2) Copies of all documents and exhibits submitted to the trial court supporting and opposing the petitioner's position;

(3) Copies of all other documents submitted to the trial court that are necessary for a complete understanding of the case and the ruling; and

(4) A transcript of the proceedings leading to the order or judgment below or, if a transcript is unavailable, a declaration by counsel explaining why a transcript is unavailable and fairly summarizing the proceedings, including arguments by counsel and the basis of the trial court's decision, if stated; or a declaration by counsel stating that the transcript has been ordered, the date it was ordered, and the date it is expected to be filed, which must be a date prior to any action requested of the reviewing court other than issuance of a stay supported by other parts of the record.

In exigent circumstances, a petition may be filed without a copy of the order, judgment, or relevant documents, other than the transcript, if a declaration by counsel explains the urgency and the circumstances making the documents unavailable and fairly summarizes their substance [*Cal. Rules of Ct., Rule 8.486(b)*].

All copies of documents must be legible [*Cal. Rules of Ct., Rule 8.204(b)*].

Documents submitted in support of a petition must comply with the following requirements [*Cal. Rules of Ct., Rule 8.486(c)*]:

- They must be bound together at the end of the petition or in separate volumes not to exceed 300 pages each, with consecutive pagination throughout.

- They must be index-tabbed by number or letter.

- They must begin with a table of contents listing each document by title and its index-tab number or letter.

The appellate court clerk is required to accept for filing petitions and supporting documents not in compliance with *Cal. Rules of Ct., Rule 8.486(c)*, but the court may give the petitioner notice requiring that the petition and documents be brought into compliance within a stated reasonable time of not less than five days, or the petition may be stricken or denied summarily [*Cal. Rules of Ct., Rule 8.486(c)*].

Unless the court orders otherwise by local rule or in the specific case, only one set of any separately bound supporting documents accompanying a petition need be filed [*Cal. Rules of Ct., Rule 8.44(b)(5)*].

For detailed discussion and forms relating to requirements for preparing a record to be filed in a reviewing court, see Ch. 44, *Appeal: Preparing and Filing the Record* .

[11] Ex Parte Petition

The court in which a petition for a writ of review is filed is authorized to grant the petition ex parte, without notice or service of the petition, on a showing of good cause [*Code Civ. Proc. § 1107*; *see Code Civ. Proc. § 1069* (writ may be granted without notice); *see also Cal. Rules of Ct., Rule 8.487(a)(4)* (court in its discretion may issue alternative writ without service or filing of opposition)]. This constitutes an exception to the general rule that the petition must be accompanied by proof of service on the respondent and each real party in interest [*Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.486(e)*; *see § 492.102[5]*; *see also § 492.21*]. As a practical matter, appellate courts are usually reluctant to grant an ex parte writ of review and usually request an opposing memorandum of points and authorities, which helps the courts to weed out those petitions with no merit.

When seeking to file a petition without prior notice, counsel may append to the petition the optional order set out in this form, for the court's endorsement, directing the clerk to permit filing of the petition without proof of prior service. Local procedure should be consulted to determine whom counsel should approach to sign the order [*cf. Cal. Rules of Ct., Rule 8.50* (Chief Justice or Presiding Justice for applications on routine matters)]. Once the petition has been filed, the court may rule on it in conference and order the clerk to issue the writ [*see Code Civ. Proc. § 165* (ex parte writ cannot be

granted in chambers)].

[12] Service Requirements

[a] Methods of Service

The petition must be served pursuant to *Code Civ. Proc. §§ 1010-1020*, which governs service of papers generally [*Code Civ. Proc. § 1107*]. Therefore, service of a copy of the petition and memorandum of points and authorities on respondent and each real party in interest may be made by delivering a copy to each person personally or by mail [*Code Civ. Proc. §§ 1011-1013a, 1107*]. Local rules may provide that service on a respondent court should be made on the presiding judge, or on the court clerk if he or she is authorized to accept service for the court. If a real party in interest is a board or commission, proper service can be made on the presiding officer, on the secretary, or on a majority of the members of the board or commission [*Code Civ. Proc. § 1107*].

For discussion and forms relating to methods of service of papers and pleadings generally, see Ch. 518, *Service of Summons and Papers* .

[b] Proof of Service

The petition normally must be accompanied by proof of service of a copy on the respondent and the real party or parties in interest at the time it is submitted for filing [*see Code Civ. Proc. § 1107*; *Cal. Rules of Ct., Rule 8.486(e)*; for exception to normal procedure, *see § 492.101[11]*]. In addition to complying with *Cal. Rules of Ct., Rule 8.25*, the proof of service must give the telephone number of each attorney served [*Cal. Rules of Ct., Rule 8.486(e)*]. A petition accompanied by a defective proof of service will be filed, but if a proper proof of service is not filed within five days after the clerk gives notice of the defect the court may strike the petition or impose a lesser sanction [*Cal. Rules of Ct., Rule 8.486(e)*]. Although it is not expressly required, the proof of service should also show that copies of petitioner's memorandum of points and authorities, as well as of any exhibits incorporated into the petition, were properly served on the opposing parties.

For discussion and forms relating to a declaration of proof of service of papers and pleadings generally, see Ch. 518, *Service of Summons and Papers* .

[13] Petition for Writ of Review in the Alternative

This form of petition may be adapted and combined with requests for other writs in the alternative, such as prohibition, habeas corpus, and mandate [Lankton v. Superior Court (9136) *5 Cal. 2d 694, 697, 55 P.2d 1170* (prohibition); *In re Smith (1976) 65 Cal. App. 3d 291, 296, 135 Cal. Rptr. 5* (habeas corpus); *Oksner v. Superior Court (1964) 229 Cal. App. 2d 672, 691, 40 Cal. Rptr. 621* (mandate)]. A petitioner who is in doubt as to the type of writ he or she should seek can petition, in the alternative form, for a writ of review, prohibition, or mandate [*Peck's Liquors, Inc. v. Superior Court (1963) 221 Cal. App. 2d 772, 775, 34 Cal. Rptr. 735]* . For discussion and forms of petition for writs of habeas corpus, mandate, or prohibition, see respectively Ch. 292, *Habeas Corpus* , and Ch. 358, *Mandate and Prohibition* .

[14] State Constitution

Supreme Court, courts of appeal, superior court, and their judges as having original jurisdiction in writ of review proceedings. *Cal. Const., art. VI, § 10*

[15] State Statutes

Appealable judgments and orders. *Code Civ. Proc. §§ 904.1, 904.2*

Costs allowed in writ of review proceedings as in cases on appeal. *Code Civ. Proc. § 1027*

Application for writ of review. *Code Civ. Proc. §§ 1067-1069*

Stay of proceeding pending disposition by reviewing court on writ of review. *Code Civ. Proc. § 1072*

Service of application for writ of review. *Code Civ. Proc. § 1107*

General rules governing civil actions (*Code Civ. Proc. §§ 307-1062.10*) as applicable to writs of review to extent consistent with *Code Civ. Proc. §§ 1063-1110b*. *Code Civ. Proc. §§ 1109, 1110*

Fee for filing original petition for writ of review with court of appeal and Supreme Court. *Gov. Code § 68926*

[16] California Rules of Court

Form and filing of record in appellate court. *Cal. Rules of Ct., Rule 8.144*

Certificate of Interested Entities or Persons. *Cal. Rules of Ct., Rule 8.208*

Recovery of costs on review in appellate courts. *Cal. Rules of Ct., Rule 8.272*

Form and filing of papers in appellate court. *Cal. Rules of Ct., Rule 8.40*

Petitions to reviewing courts for writ. *Cal. Rules of Ct., Rule 8.486*

Opposition and attorney general amicus briefs. *Cal. Rules of Ct., Rule 8.487*

Certificate of Interested Entities or Persons. *Cal. Rules of Ct., Rule 8.488*

Notice to trial court. *Cal. Rules of Ct., Rule 8.489*

[17] Local Rules of the Courts of Appeal

Assignment of writ petitions. Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 1st App. Dist., Policy Statement A

Requirements for writ petitions; petitions for extraordinary writs, other than habeas corpus, as required to be accompanied by properly completed Appellate Court Writ Petition Information Sheet, which is available from court clerk. Cal. Rules of Ct., Supp., Local Rules of Cts. of Appeal, 5th App. Dist., Rule 3 and Local Court Form

Internal procedures for writ petitions. Cal. Cts. of Appeal, 1st App. Dist. Internal Operating Practices and Procedures, Part III(B), § 25 et seq.; Cal. Cts. of Appeal, 4th App. Dist., Div. One, Internal Operating Practices and Procedures, Part V; Cal. Cts. of Appeal, 4th App. Dist., Div. Three, Internal Operating Practices and Procedures, Part III(B); Cal. Cts. of Appeal, 6th App. Dist. Internal Operating Practices and Procedures, Part II(D)

[18] Decisions

Beneficiary of injunction that has been disobeyed as party beneficially interested under *Code Civ. Proc. § 1069* and so as able to bring writ of review to challenge court's order refusing to hold person enjoined in contempt. *Taylor v. Superior Court (1942) 20 Cal. 2d 244, 247, 125 P.2d 1* ; *Goodall v. Superior Court (1918) 37 Cal. App. 723, 726, 174 P. 924*

Petition for writ of review as deemed petition for writ of mandate when petitioner presented full record of lower court proceedings. *Davis v. Superior Court (1980) 102 Cal. App. 3d 164, 170-171, 162 Cal. Rptr. 167*

Petitioner for prerogative writ as required to plead prima facie case for relief and to support allegations of trial court action by appropriate exhibits to extent necessary to understand proceedings; petition as also required to be properly verified. *Krueger v. Superior Court (1979) 89 Cal. App. 3d 934, 936-938, 152 Cal. Rptr. 870*

Verification as inadequate when all allegations of writ application verified under penalty of perjury upon information and belief. *Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 203-205, 151 Cal. Rptr. 721*

Mislabeled petition as no bar to relief justified by proper allegations and proof. *Peck's Liquors, Inc. v. Superior Court (1963) 221 Cal. App. 2d 772, 775, 34 Cal. Rptr. 735*

Petition for writ of prohibition as deemed petition for writ of review when lower court completes threatened decision before petition heard. Chase v. Superior Court *(1962) 210 Cal. App. 2d 872, 878, 27 Cal. Rptr. 383*

[19] Law Reviews

Chernoff and Watson, "Writ Lore," 56 State B.J. 12 (1981)

[20] Text References

California Civil Writ Practice (Cal. CEB 3d ed. 2000)

Witkin, California Procedure, vol. 2, *Jurisdiction*, § 276 et seq., vol. 8., *Extraordinary Writs*, §§ 1-45, 134 et seq., (4th ed. 1997)

[21] Cross References

See also *§ 492.100*.

For alternative allegations as to capacity of parties, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion of general pleading requirements, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms of petition for writ of habeas corpus, see Ch. 292, *Habeas Corpus*

For discussion and forms of petition for writ of mandate or prohibition, see Ch. 358, *Mandate and Prohibition*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms of petition for writ of administrative mandate, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

For discussion and forms relating to service of papers generally, see Ch. 518, *Service of Summons and Papers*

For forms and discussion relating to verification of pleadings, see Ch. 572, *Verification*

For memoranda of points and authorities in support of a petition for writ of review, in general and in certain specific situations, see California Points and Authorities, Ch. 205, *Review* (Matthew Bender)

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PART V. FORMS

43-492 California Forms of Pleading and Practice--Annotated § 492.102

§ 492.102 Special Proceeding for Writ of Review in Superior Court [Code Civ. Proc. § 1069]--Petition

[1] FORM Special Proceeding for Writ of Review in Superior Court [Code Civ. Proc. § 1069]--Petition

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	
_____ [*name*],	)	NO. _____
Respondent.	)	PETITION FOR WRIT OF REVIEW [, REQUEST
_____ [*name*],	)	FOR TEMPORARY STAY,] AND SUPPORTING
Real Party in Interest	)	MEMORANDUM OF POINTS AND AUTHORIT-
	)	IES
	)	

Petitioner alleges:

1-7. [*Allege, as in § 492.101[1], Paragraphs 1 through 7, all matters necessary to support issuance of the writ*.]

8. [*Allege, as in § 492.101[1], Paragraph 9, all matters necessary to support grant of temporary stay order, if desired*.]

9. [*Allege, as in § 492.101[1], Paragraph 10, all matters necessary to support grant of petition ex parte, if desired*.]

[*Prayer. See § 492.101[1]*.]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[*Verification. See § 492.101[1].*]
[*Optional Order Permitting Filing Without Service*. See *§ 492.101[1]*.]

MEMORANDUM
[*Add supporting memorandum*]

CAUTION:
A petition for a writ of review filed in superior court must be verified [*see Code Civ. Proc. § 1069*]. Proof of service of a copy of the petition on each respondent and real party in interest must accompany the petition at the time of filing, except when the court has exercised its discretion to permit filing without notice or service [*Code Civ. Proc. § 1107*; *see also Code Civ. Proc. § 1069*].

[2] Use of Form

This form of petition is for use when filing an original petition for a writ of review in a superior court. For a form of petition for use in an appellate court, see *§ 492.101*.

It appears that this form of petition must be accompanied by a supporting memorandum of points and authorities [*see § 492.102[4]*].

[3] Number of Copies

The original petition and copies should be prepared as follows: (1) original for filing; (2) copies as needed to serve on respondent and on each real party in interest [*see Code Civ. Proc. § 1107*]; (3) one office copy; (4) one copy for petitioner, if desired; (5) additional copies, if desired.

[4] Points and Authorities

The general rules governing law and motion proceedings (*Cal. Rules of Ct., Rules 3.1100 et seq.*) apply to proceedings for writ of review in the superior court [*see Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(2)*]. Thus, it appears that the foregoing form of petition must be accompanied by a supporting memorandum [*see Cal. Rules of Ct., Rule 3.1113* (notice of motion required to be supported by memorandum); *see also Code Civ. Proc. § 1003* (motion is any application for order); for further discussion, *see § 492.20[4]*]. For forms of points and authorities for use in support of petitions for writs of review, see California Points and Authorities, Ch. 205, *Review* (Matthew Bender).

[5] Service Requirements

[a] Prior Service Usually Required

A petition for a writ of review generally must be accompanied by proof of service of a copy of the petition on the respondent and on each real party in interest [*Code Civ. Proc. § 1107*]. For further discussion of methods of service and proof of service, see *§ 492.101[12]*.

[b] Applications Ex Parte

A court may, in its discretion and for good cause, grant a petition ex parte without the notice or service usually required under *Code Civ. Proc. § 1107* [*Code Civ. Proc. § 1107*]. Construction of this exception varies among local courts, and counsel should therefore consult local practice to deter mine the circumstances under which a particular court will grant a petition ex parte. As a general rule, a court may not grant an application ex parte unless it appears by affidavit or declaration that (1) within a reasonable time before the application the party informed the opposing party or the opposing party's attorney when and where the applications would be made;(2) the party in good faith attempted to inform the opposing party and the opposing party's attorney but was unable to do so, specifying the efforts made to inform them; or (3) for reasons specified the party should not be required to inform the opposing party or the opposing party's attorney [*Cal. Rules of Ct., Rule 3.1204(b)*; *see Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(2)*; *see also* Los Angeles Co. Super. Ct. Rules, Rules 9.31(e)(1), (2)].

When a court does grant a petition ex parte, counsel may then simultaneously serve the petition, memorandum of points and authorities, and the writ of review, thereby avoiding the cost of double service.

[6] State Statutes

Application for writ of review. *Code Civ. Proc. §§ 1067-1069*

Service of application for writ of review. *Code Civ. Proc. § 1107*

[7] California Rules of Court

Form and filing of record in superior court. *Cal. Rules of Ct., Rule 8.758*

Recovery of costs on review in superior court. *Cal. Rules of Ct., Rule 8.764*

Civil law and motion rules as applicable to petitions for writs of review filed in a superior court. *Cal. Rules of Ct., Rules 3.1100, 3.1103(a)(2)*

Notification requirements for ex parte application in superior court. *Cal. Rules of Ct., Rule 3.1204*

[8] Local Rules of Court

[a] Los Angeles County

Writ of review. Los Angeles Co. Super. Ct. Rules, Rules 2.5(i), 9.31

[b] Sacramento County

Writs of review or certiorari; presentment to judge. Sacramento Co. Super. Ct. Rules, Rule 2.01

[9] Cross Reference

See also *§ 492.101*.

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43-492 California Forms of Pleading and Practice--Annotated § 492.103

§ 492.103 Special Proceeding for Writ of Review in Superior Court [Code Civ. Proc. § 1069]--Order Directing Issuance of Writ

[1] FORM Special Proceeding for Writ of Review in Superior Court [Code Civ. Proc. § 1069]--Order Directing Issuance of Writ

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	
_____ [*name*],	)	NO. _____
Respondent,	)	ORDER DIRECTING ISSUANCE OF WRIT OF
_____ [*name*],	)	REVIEW
Real Party in Interest.	)	
	)	
	)	

_____

GOOD CAUSE APPEARING from the verified petition on file in this action,

IT IS HEREBY ORDERED that a writ of review issue under the seal of this Court directing respondent _____ [*name of court*] to certify to this Court a full, true, and complete transcript of the record and proceedings in the matter of _____ [*case name*], No. _____[*number*], including _____ [*describe with particularity the transcript that respondent is ordered to prepare as a return*], so

that the same may be reviewed by this Court; and to show cause before this Court why the _____ [order *or* judgment *or other action to be reviewed*] described in the petition should not be annulled.

[IT IS FURTHER ORDERED that the writ command respondent to desist from further proceedings in the matter to be reviewed, pending further order of this Court.]

[IT IS FURTHER ORDERED that a copy of the writ (and a copy of the petition and this order) be served at least _____ (*number*) days before hearing on the return to the writ of review.]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use in a superior court when local practice requires the writ and order to be prepared separately. The order directing issuance of the writ of review is drafted for the judge's signature, in contrast to the writ itself, which requires the signature of the clerk of the court [*see § 492.104*]. The proposed order and writ may both be submitted to the court at the same time the writ petition is filed.

[3] Number of Copies

The original order and copies may be prepared as follows: (1) original and copies for respondent and each real party in interest who will be served with the writ, all delivered to the clerk for the judge's signature; (2) one copy for petitioner, if desired; (3) additional copies, if desired.

[4] Notice of Order

Notice of the order should be given to all other parties or to their attorneys [*see Code Civ. Proc. § 1019.5* (notice after ruling on motions); *see also* San Francisco City & Co. Uniform Local Rules of Ct., Rule 8.6(c) (endorsed copies of all written orders to be served on all parties)]. For further discussion and a forms of notice and proof of service, see Ch. 372, *Motions and Orders* , and Ch. 518, *Service of Summons and Papers* .

[5] Cross Reference

See also *§§ 492.102* and *492.104*

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43-492 California Forms of Pleading and Practice--Annotated § 492.104

§ 492.104 Special Proceeding for Writ of Review in Superior Court [Code Civ. Proc. § 1069]--Writ of Review [Code Civ. Proc. §§ 1071, 1072]

[1] FORM Special Proceeding for Writ of Review in Superior Court [Code Civ. Proc. § 1069]--Writ of Review [Code Civ. Proc. §§ 1071, 1072]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	
_____ [*name*],	)	NO. _____
Respondent,	)	WRIT OF REVIEW
_____ [*name*],	)	
Real Party in Interest.	)	
	)	
	)	

To _____ [*name*], Respondent:

WHEREAS it is alleged by the verified petition of _____[*name of petitioner*] that _____ [*state briefly facts giving rise to petition for writ*]; and

WHEREAS it appears from the same verified petition that petitioner is a party beneficially interested in this proceeding

and has no right of appeal nor any other plain, speedy, or adequate remedy;

THEREFORE, you are commanded to certify and return to this court on or before _____ [*leave blank for the Clerk of Court to insert a date*] a full, true, and complete transcript of the record and proceedings in the action entitled _____ [*specify*], including _____ [*describe with particularity the transcript that respondent is ordered to prepare as a return*], so that the same may be reviewed by this Court; and to appear in this court [in _____ (*Department number*),] at _____ [*address*], on _____ [*leave blank for the Clerk of Court to insert date*] at _____ [*time*] to show cause why the _____ [order *or* judgment *or specify other action to be reviewed*] described above should not be annulled.

[YOU ARE FURTHER COMMANDED, in the meantime, to desist from further proceedings in the matter to be reviewed.]

Witness the Honorable _____ [*name*], _____ [*specify title of judge*].
Dated: _____.

_____, Clerk
By _____ [*signature*],
Deputy Clerk

ORDER

Let the foregoing writ issue.

[IT IS FURTHER ORDERED that a copy of this writ (and a copy of the petition) be served at least _____ (*number*) days before the hearing set in the above order.]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of writ of review is for use by a successful petitioner in a superior court proceeding. Appellate courts usually draft their own writs. The relevant parts of the record to be returned for review must be described in the writ with convenient certainty [*Code Civ. Proc. § 1071*]. The writ is to be drafted for signature by the court clerk, as it is the clerk who issues the writ on order of the court. The attached court order, directing issuance of the writ, should be used only when local practice permits or requires that the order be combined with the writ. For a form of separate order, see *§ 492.103*.

[3] Stay of Proceedings

This form includes optional language to be used when the court has exercised its discretion to stay the proceedings in the lower court pending disposition of the writ [*see Code Civ. Proc. §§ 1071, 1072*]. If the words requiring the stay are omitted from the writ, the power of the inferior court is not suspended or the proceedings stayed [*Code Civ. Proc. § 1072*]. For discussion of the court's power to stay the proceedings below, see *§ 492.19*. For a form of allegations and prayer to be used in a petition requesting a stay, see *§ 492.101*.

[4] Service of Writ

The writ must be served on any real party in interest [*see Lee v. Small Claims Court (1939) 34 Cal. App. 2d 1, 5-6, 92 P.2d 937]* , and, of course, on the respondent to whom it is directed [*see Code Civ. Proc. §§ 1070, 1071*]. Counsel should consult local practice to determine the individual to be served on a respondent court, such as the presiding judge or the court clerk.

The writ must be served in the same manner as a summons in a civil action, unless the court expressly directs otherwise [*Code Civ. Proc. § 1073*]. Service of a summons is governed generally by *Code Civ. Proc. §§ 413.10-417.40*. Although *Code Civ. Proc. § 415.30* permits service by mail, courts prefer personal service because of the certainty that notice of the hearing has been received by the respondent and the real party in interest. Personal service may be made by counsel, provided that he or she is not a party to the action, or by any other person over the age of 18 years who is not a party to the action [*Code Civ. Proc. §§ 414.10, 1073*]. For further discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers* .

For further discussion concerning notice of the writ to be given by the clerk when it is issued by an appellate court, see *§ 492.25[3]*.

[5] State Statutes

Service of summons. *Code Civ. Proc. §§ 413.10-417.40*

Form, content, and service of writ of review. *Code Civ. Proc. §§ 1071-1073*

[6] Cross References

See also *§§ 492.102* and *492.103*

For forms and discussion relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

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43-492 California Forms of Pleading and Practice--Annotated § 492.105

§ 492.105 Proceedings to Obtain Further Return to Writ of Review [Code Civ. Proc. § 1075]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Obtain Further Return to Writ of Review [Code Civ. Proc. § 1075]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	NOTICE OF MOTION AND MOTION FOR FURTHER RETURN TO WRIT OF REVIEW, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
_____ [*name*],	)	
Respondent,	)	
_____ [*name*],	)	
Real Party in Interest.	)	
	)	Date: _____
	)	Time: _____
		Location: _____
		Judge: _____
		Date Action Filed: _____

_____

To _____ [*names and titles of respondent and real parties in interest*]:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*] or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], petitioner will, and hereby does, move for an order requiring respondent to make further return to the writ of review of this court issued on _____ [*date*], as follows: _____ [*specify additional pleadings, transcript, or other portions of proceeding below for which further return of writ is sought*]. The motion will be made on the grounds that _____ [*specify, e.g.,* the foregoing items were described with reasonable certainty in the above-described writ of review, but respondent failed to include these items in its return of the writ dated _____].

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record for petitioner in the above-entitled special proceeding].

2. _____ [*Set forth facts from declarant's personal knowledge establishing the grounds for the motion, e.g.,* On _____ (*date*), petitioner made a payment in the amount of $_____ to respondent court, as required by *Gov. Code §§ 26831-26837,* for copying and certification of the parts of the record that respondent was commanded to certify to this Court in the writ of review issued on _____ (*date*). On _____ (*date*), respondent _____ (*name*) made its return to the writ, but failed to include the following items: _____ (*specify*). The writ issued by this Court, a true of copy of which is attached hereto as Exhibit A and made a part hereof, described these items with reasonable particularity as follows: _____ (*specify*). Respondent failed to include those parts of the record described above].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

MEMORANDUM
[*Add supporting memorandum*]

CAUTION:

Although notice of the motion is not expressly required under *Code Civ. Proc. § 1075*, a notice of motion, if given, is required to be supported by a memorandum [*Cal. Rules of Ct., Rules 8.54*, 3.113].

[2] Use of Form

This form of motion and supporting declaration is for use by a petitioner in a proceeding on writ of review, to obtain a further return of the record when the respondent has failed to make a full return [*Code Civ. Proc. § 1075*]. For discussion relating to motions and declarations generally, see Ch. 372, *Motions and Orders* , and Ch. 15, *Affidavits, Certificates, and Declarations* . For discussion and forms relating to service of this form, see Ch. 518, *Service of Summons and Papers* .

[3] State Statutes

Reviewing court as authorized to order further return of writ of review if initial return of writ is defective. *Code Civ. Proc. § 1075*

Clerk's fees for preparation of record. *Gov. Code §§ 26831-26837* (superior court; made applicable to municipal court by *Gov. Code § 72054*)

[4] Decisions

In absence of return, reviewing court as able to discharge writ and dismiss proceeding. *Middlebrook v. Superior Court (1943) 21 Cal. 2d 579, 580, 134 P.2d 241*

Compliance with writ of review as not compelled unless petitioner pays for preparation of return. *I.X.L. Lime Co. v. Superior Court (1904) 143 Cal. 170, 175, 76 P. 973*

Burden as on petitioner to see to it that return is filed and that complete record is made. *North Side etc. Assn. v. County of L.A. (1945) 70 Cal. App. 2d 598, 608, 161 P.2d 613* ; *Goodrich v. Superior Court (1928) 92 Cal. App. 695, 696, 268 P. 669* (review of contempt order)

When conflicting inferences could be made from the evidence, and absent record showing how lower court reached its findings, reviewing court as compelled to resolve all conflicts in favor of the respondent court and to indulge in all reasonable inferences to uphold the findings. *Tomlinson v. Superior Court (1944) 66 Cal. App. 2d 640, 643, 152 P.2d 517* (prohibition)

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43-492 California Forms of Pleading and Practice--Annotated § 492.106

§ 492.106 Proceedings to Obtain Further Return to Writ of Review [Code Civ. Proc. § 1075]--Order Granting Motion

[1] FORM Proceedings to Obtain Further Return to Writ of Review [Code Civ. Proc. § 1075]--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	ORDER GRANTING MOTION AND REQUIRING
_____ [*name*],	)	FUTHER RETURN TO WRIT OF REVIEW
Respondent,	)	Date: _____
_____ [*name*],	)	Time: _____
Real Party in Interest.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____

_____

The motion of _____ [*name*], petitioner, for an order for a further return to the writ of review issued by this Court on _____ [*date*], came on regularly for hearing on _____ [*date*]. Petitioner appeared by counsel _____ [*name*]; [respondent appeared by counsel _____ (*name*);] real party in interest appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted, and that respondent file further return to the writ of review on or before _____ [*date*], by including therein the following: _____ [*specify*].

Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is for use in a superior court when counsel prepares the order granting the motion for further return of the record [*see Code Civ. Proc. § 1075*]. Appellate courts usually prepare their own orders.

The petitioner who prevails on a motion for further return to the writ must serve notice of the order on the respondent and all real parties in interest, unless the court orders otherwise [*see Code Civ. Proc. § 1019.5*]. For further discussion and forms of such notice and proof of service, see Ch. 372, *Motions and Orders* ; and Ch. 518, *Service of Summons and Papers* .

[3] Cross Reference

See also *§ 492.105*.

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Chapter 492 REVIEW (CERTIORARI), WRIT OF
PART V. FORMS

43-492 California Forms of Pleading and Practice--Annotated § 492.107

§ 492.107 Return to Writ of Review by Demurrer or Verified Answer [Code Civ. Proc. § 1069.1, 1089; Cal. Rules of Ct., Rule 8.487(b)]--Demurrer

[1] FORM Return to Writ of Review by Demurrer or Verified Answer [Code Civ. Proc. § 1069.1, 1089; Cal. Rules of Ct., Rule 8.490(h)]--Demurrer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	DEMURRER OF _____ [*name*] TO
_____ [*name*],	)	PETITION FOR WRIT OF REVIEW OF
Respondent,	)	_____ [*name*], AND SUPPORTING
_____ [*name*],	)	MEMORANDUM
Real Party in Interest.	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____

_____

Real party in interest _____ [*name*], by way of return to the writ of review issued, demurs to the

petition for the writ on (each of) the following ground(s):

1. The petition fails on its face to state facts sufficient to constitute a cause of action for issuance of a writ of review in that _____ [*specify, e.g.*, respondent court did not act without or in excess of its jurisdiction].

2. [*State any additional grounds in separate paragraphs*].

WHEREFORE, real party in interest prays:

1. That this demurrer be sustained [without leave to amend],

2. That the petition be dismissed,

3. That the writ of review be discharged,

4. That real party in interest recover his/her costs of suit incurred herein, and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*signature*]
Attorney for _____ [*real party in interest*]

MEMORANDUM

[*Add supporting memorandum*]

CAUTION:
A memorandum in support of each ground of the demurrer must accompany a demurrer filed in a superior court [*Cal. Rules of Ct., Rule 3.1113(a)*; for discussion and forms, see Ch. 417, *Points and Authorities*]. There is no express requirement for a points and authorities in support of a demurrer in an appellate court but this would seem indispensable in arguing the legal merits of the demurrer [*cf. Cal. Rules of Ct., Rule 8.54(a)* (motion shall be accompanied by memorandum)]. A demurrer filed in superior court must be served and filed with a notice of hearing [*Cal. Rules of Ct., Rule 3.1320(c)*; for further discussion and a form of notice, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*].

[2] Use of Form

This form of demurrer is for use in either a superior or an appellate court by the real party in interest who wishes to demur to a petition for a writ of review [*see Code Civ. Proc. §§ 1069.1, 1089*; *Cal. Rules of Ct., Rule 8.487(b)*]. The form may adapted for use by a respondent as well, in those situations in which the respondent is not a court that is, in effect, a neutral party [*Code Civ. Proc. §§ 1069.1, 1089*; *Cal. Rules of Ct., Rule 8.487(b)*]. For discussion of the grounds for a demurrer to a petition for a writ of review, see *§ 492.27[3]*.

[3] Effect of Demurrer

The effect of a demurrer is to adopt all the facts alleged in the petition as the return to the writ [*Estrin v. Superior Court (1939) 14 Cal. 2d 670, 672, 96 P.2d 340]* . If a return is made by demurrer only, but the demurrer is not

sustained, the court may allow an answer to be filed within such time as it may designate [*Code Civ. Proc. § 1089*; *see Code Civ. Proc. § 1069.1*; *but see Cal. Rules of Ct., Rule 8.487(b)(4)* (when return to alternative writ is by demurrer only and is not sustained, court may issue peremptory writ without leave to answer)]. For a form of return by answer, see *§ 492.108*.

[4] Time for Making Return by Demurrer

When the proceeding is in the superior court, the demurrer must be filed no later than the date, as set forth in the writ, for making a return to the writ [*see Code Civ. Proc. § 1089, see also Code Civ. Proc. § 1069.1*]. If the proceeding is in an appellate court, the demurrer must be served and filed within 30 days after the court issues the alternative writ or order to show cause or notifies the parties that it is considering issuing a peremptory writ in the first instance [*Cal. Rules of Ct., Rule 8.487(b)(2)*].

[5] State Statutes

Grounds for demurrer. *Code Civ. Proc. § 430.10*

Demurrer as proper when ground for objection appears on face of pleading. *Code Civ. Proc. § 430.30(a)*

Statement of grounds required. *Code Civ. Proc. § 430.60*

Return to petition by demurrer, verified answer, or both. *Code Civ. Proc. §§ 1069.1, 1089*

[6] California Rules of Court

Certificate of Interested Entities or Persons. *Cal. Rules of Ct., Rule 8.208*

Making, opposing, and disposing of motions in reviewing court. *Cal. Rules of Ct., Rule 8.54*

Return by demurrer; time for return. *Cal. Rules of Ct., Rule 8.487*

Demurrer filed in superior court as required to be supported by memorandum. *Cal. Rules of Ct., Rule 3.1113(a)*

Format, contents, and notice of demurrer in superior court. *Cal. Rules of Ct., Rule 3.1320*

[7] Cross References

See also *§ 492.108*.

For discussion and forms relating to demurrers generally, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

For discussion and forms relating to service of papers generally, see Ch. 518, *Service of Summons and Papers* .

For forms of memoranda of points and authorities in support of demurrer to a petition for writ of review, see California Points and Authorities, Ch. 205, *Review* (Matthew Bender).

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43-492 California Forms of Pleading and Practice--Annotated § 492.108

§ 492.108 Return to Writ of Review by Demurrer or Verified Answer [Code Civ. Proc. §§ 1069.1, 1089; Cal. Rules of Ct., Rule 8.487(b)]--Verified Answer

[1] FORM Return to Writ of Review by Demurrer or Verified Answer [Code Civ. Proc. §§ 1069.1, 1089; Cal. Rules of Ct., Rule 8.490(h)]--Verified Answer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Petitioner,	)	
vs.	)	
_____ [*name*],	)	NO. _____
Respondent,	)	ANSWER OF _____ [*name*] TO
_____ [*name*],	)	PETITION FOR WRIT OF REVIEW OF
Real Party in Interest.	)	_____ [*name*]
	)	
	)	

_____

Real party in interest _____ [*name*], by way of return to the writ issued, answers the petition for a writ of review as follows:

1. Real party in interest admits that _____ [*set forth admission*].

2. Real party in interest denies each and every allegation in the petition not heretofore expressly admitted.

FIRST AFFIRMATIVE DEFENSE

_____ [*Set forth factual allegations showing first ground for objection to petition, e.g.,* Although petitioner was not served with the order made by respondent court on _____ [*date*], a true copy of which is attached as Exhibit A and made a part hereof, real party in interest gave petitioner actual notice of the attached order in a phone conversation on _____ [*date*], in which real party in interest stated to petitioner that _____ (*specify*)].

SECOND AFFIRMATIVE DEFENSE

_____ [*Set forth factual allegations showing second ground for objection to petition*].

WHEREFORE, real party in interest prays:

1. That the petition be dismissed,

2. That the writ of review be discharged,

3. That real party in interest recover his/her costs of suit incurred herein, and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*signature*]
Attorney for Real Party in Interest

[*Verification. See § 492.101*.]

CAUTION:
An answer filed as a return to a writ of review must be verified [*Code Civ. Proc. §§ 1069.1, 1089*; *Cal. Rules of Ct., Rule 8.487(b)(1)*].

[2] Use of Form

This form of verified answer is for use by the real party in interest in a proceeding on writ of review before either a superior or an appellate court [*see Code Civ. Proc. §§ 1069.1, 1089*; *Cal. Rules of Ct., Rule 8.487*]. The form may adapted for use by a respondent as well, in those situations in which the respondent is not a court that is, in effect, a neutral party [*Code Civ. Proc. §§ 1069.1, 1089*; *Cal. Rules of Ct., Rule 8.487*].

The statutes governing an answer to a complaint in a civil action apply to the answer to a petition for a writ of review [*Code Civ. Proc. § 1109*]. Thus the answer must generally contain a general or specific denial of each of the material allegations in the petition, as well as any statement of new matter constituting a defense [*Code Civ. Proc. § 431.30*].

Leave of court is required to file a return by answer when a initial return was made by demurrer only and the demurrer was not sustained [*see §§ 492.27[3], 492.107[3]*].

For discussion and forms relating to answers generally, see Ch. 26, *Answers* .

[3] State Statutes

Grounds for objection by answer. *Code Civ. Proc. § 430.10*

Answer as appropriate when grounds for objection to pleading does not appear on face of pleading. *Code Civ. Proc. § 430.30(b)*

Return to petition by demurrer, verified answer, or both. *Code Civ. Proc. §§ 1069.1, 1089*

General rules of procedure as applicable to writs of review to extent consistent with provisions specifically governing special proceedings. *Code Civ. Proc. §§ 1109, 1110*

[4] California Rules of Court

Certificate of Interested Entities or Persons. *Cal. Rules of Ct., Rule 8.208*

Cover of petition for writ of review or answer to writ of review filed in appellate court as required to be red. *Cal. Rules of Ct., Rule 8.40(b)*

Return by answer; time for return. *Cal. Rules of Ct., Rule 8.487*

[5] Cross References

See also *§ 492.107*.

For forms and discussion of answers generally, see Ch. 26, *Answers* .

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43-492 California Forms of Pleading and Practice--Annotated § 492.109

§ 492.109 Judgment on Writ of Review in Superior Court [Code Civ. Proc. § 1075]

[1] FORM Judgment on Writ of Review in Superior Court [Code Civ. Proc. § 1075]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	
_____ [*name*],	)	NO. _____
Respondent,	)	JUDGMENT ON WRIT OF REVIEW
_____ [*name*],	)	
Real Party in Interest.	)	
	)	
	)	

The return to the writ of review issued by this Court on _____ [*date*], came on regularly for hearing on _____ [*date*]. Petitioner appeared by counsel _____ [*name*]; [respondent appeared by counsel _____ (*name*);] real party in interest appeared by counsel _____ [*name*]. On consideration by the Court of the verified petition, all documents filed in support of or in opposition to the petition, the return of the transcript filed by respondent, and arguments of counsel, it appears that petitioner is [not] entitled to the relief prayed for, and therefore:

[*EITHER*]

IT IS ORDERED that the _____ [*describe challenged order, judgment, or other action, e.g.* order of contempt] made in the matter described above on _____ [*date*], be _____ [annulled *or* modified in that _____ (*specify modification*)].

IT IS FURTHER ORDERED that the petitioner recover costs in the sum of $_____ from _____ [*name*(*s*)], real _____ [party *or* parties] in interest.

[*OR*]

IT IS HEREBY ORDERED that:

1. The writ of review issued in this matter on _____ [*date*], be discharged; and

2. The _____ [*describe challenged order, judgment, or other action, e.g.* order of contempt] made in the matter described above on _____ [*date*], be affirmed.

IT IS FURTHER ORDERED that the real _____ [party *or* parties] in interest, _____ [*name*(*s*)], recover costs in the sum of $_____ from the petitioner.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of judgment is for use by a petitioner in superior court once the cause has been heard and decided in the petitioner's favor. A copy of the judgment, signed by the clerk, must be transmitted to the court or board having custody of the record [*Code Civ. Proc. § 1076*]. A proposed judgment is not required in a writ proceeding in an appellate court.

[3] Preparation of Written Judgment

In the superior courts of most counties, it is customary for the judge to order counsel for one of the parties to prepare, serve on the others, and submit to the court a proposed judgment [*see Cal. Rules of Ct., Rule 3.1590(a)-(f)*]. Local practice may require that the prevailing party always prepare the judgment, whether the judge requests it or not. If any of the parties requests a statement of decision, the court may prepare the statement of decision and proposed judgment or may order a party to do so [see *Cal. Rules of Ct., Rule 3.1590(f)*]. Any party may object to the proposed statement of decision and the proposed judgment, or both [*Cal. Rules of Ct., Rule 3.1590(g), (j)*]. For discussion and forms relating to a statement of decision, see Ch. 529, *Statement of Decision* .

[4] Notice of Entry of Judgment

The party submitting an appealable judgment for entry must also prepare and mail a copy of a notice of entry of judgment to all parties who have appeared in the proceeding [*Code Civ. Proc. § 664.5*; *see also Code Civ. Proc. §§ 904.1(a), 1110* (judgment on writ of review as appealable)]. For discussion and forms for notice of entry of judgment, see Ch. 318, *Judgments* .

[5] State Statutes

Judgment after hearing on writ of review. *Code Civ. Proc. § 1075*

Transmittal of judgment on writ of review; contents of judgment roll. *Code Civ. Proc. §§ 1076, 1077*

[6] California Rules of Court

Preparation and service of proposed judgment. *Cal. Rules of Ct., Rule 3.1590(f)-(i)*

[7] Cross References

For discussion and forms relating to claiming costs, see Ch. 174, *Costs and Attorney's Fees* .

For discussion and forms relating to judgments generally, see Ch. 318, *Judgments* .

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43-493 California Forms of Pleading and Practice--Annotated 493.syn

§ 493.syn Synopsis to Chapter 493: REWARDS

§ 493.01 Scope of Chapter

§ 493.02 Governing Law

§§ 493.03-493.09 [Reserved]

§ 493.10 Reward as Unilateral Contract

§ 493.11 Cause of Action for Breach of Reward Contract

[1] Private Reward

[2] Public Reward

§ 493.12 Defenses

[1] Controverting Matter

[2] Revocation of Offer

[3] Other Compensation for Performance

[4] Public Reward

§ 493.13 Restrictions on Rewards Offered by Public Entities, Officers, or Employees

[1] Statutory Authorization Required

[2] Rewards Offered by Governor

[3] Rewards Offered by Local Agency

[a] Willful Misconduct Resulting in Injury or Death

[b] Willful Damage to or Destruction of Property

[c] Aiding Peace Officer

[4] Rewards Offered by Board of Supervisors

[5] Rewards to Be Paid by Local Court

[6] Rewards Offered by Department of Forestry

[7] Rewards Offered by State Department of Health Services

[8] Rewards Offered by South Coast Air Quality Management District

[9] Establishment of Reward Program by Tax Board

[10] Performing Official Act

[11] Person Employed to Return Fugitive

§§ 493.14-493.29 [Reserved]

§ 493.30 State Statutes

[1] Reward From Public Entities at Local Level

[2] Reward From Public Entities at State Level

[3] Prohibited Rewards

§ 493.31 Decisions

§ 493.32 Attorney General Opinions

§ 493.33 Law Reviews

§ 493.34 Text References

§§ 493.35-493.49 [Reserved]

§ 493.50 Complaint for Damages [Civ. Code § 3300] for Breach of Contract for Reward--Breach by Private Party

[1] FORM

[2] Use of Form

[3] Allegations

[4] Costs and Attorney's Fees

[5] Verification

[6] Jurisdiction and Venue

[7] Cross References

§ 493.51 Complaint for Damages [Civ. Code § 3300] for Breach of Contract for Reward--Breach by Public Entity, Officer, or Employee

[1] FORM

[2] Use of Form

[3] Allegations

[4] Venue

[5] Verification

[6] Cross References

§ 493.52 Affirmative Defense to Action for Breach of Contract for Reward--Withdrawal of Offer of Reward Before Performance of Act

[1] FORM

[2] Use of Form

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Chapter 493 REWARDS
PART I. SCOPE

43-493 California Forms of Pleading and Practice--Annotated § 493.01

§ 493.01 Scope of Chapter

This chapter concerns actions to recover a reward offered by either a public entity or a private person or entity. It includes forms for complaints for damages for breach of a unilateral reward contract [*see §§ 493.50, 493.51*], and a form for an affirmative defense to such a complaint [*see § 493.52*].

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Chapter 493 REWARDS
PART I. SCOPE

43-493 California Forms of Pleading and Practice--Annotated § 493.02

§ 493.02 Governing Law

Private rewards are generally governed by case law.

Rewards by various public entities are governed by a variety of statutes:

- Rewards offered by the governor of California are governed by *Penal Code § 1547*.
- Rewards offered by local agencies are governed by *Gov. Code §§ 53069.5* and *53069.7*.
- Rewards offered by boards of supervisors are governed by *Gov. Code §§ 26207-26209*.
- Rewards offered by certain state agencies are governed by *Health & Safety Code § 25191.7*, *Pub. Res. Code § 4417*, and *Rev. & Tax Code § 19525*.
- Certain rewards to be paid by local courts are governed by *Penal Code § 374a*.

Prohibitions against certain awards are set out under *Penal Code §§ 70*, *94*, and *1558*.

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[Reserved]

§§ 493.03[Reserved]

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PART II. LEGAL BACKGROUND

43-493 California Forms of Pleading and Practice--Annotated § 493.10

§ 493.10 Reward as Unilateral Contract

A reward is an offer, made to no person in particular, of payment for the performance of some particular act. When the act is performed, the offer and the act combined make a complete contract between the person making the offer and the person who performs the act [*County of San Luis Obispo v. Gage (1903) 139 Cal. 398, 407, 73 P. 174]* . An offer of a reward is an offer of a unilateral contract that may be accepted only by performance, not by a promise to perform [*Davis v. Jacoby (1934) 1 Cal. 2d 370, 378, 34 P.2d 1026]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationAcceptanceGeneral OverviewContracts LawTypes of ContractsUnilateral ContractsRewards

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43-493 California Forms of Pleading and Practice--Annotated § 493.11

§ 493.11 Cause of Action for Breach of Reward Contract

[1] Private Reward

A cause of action for damages for breach of a reward contract must allege an offer of reward, performance by the plaintiff of the requested act in reliance on the offer, a demand for the reward, and the defendant's refusal to pay [*see, e.g., Wilson v. Stump (1894) 103 Cal. 255, 257-258, 37 P. 151]* .

As a contract action, a cause of action based on reward is subject to defenses applicable to such actions generally, such as the incompetency of the offeror [*see Civ. Code §§ 38-40*]. For discussion and forms relating to contract actions generally, see Ch. 140, *Contracts* .

[2] Public Reward

An action for damages based on a reward offered by a public entity or official differs from one based on a private offer of reward, in that publicly offered rewards must be authorized by statute, and before a complaint may be filed in court to recover this type of reward, the plaintiff must first exhaust his or her administrative remedies by presenting a claim in accordance with *Gov. Code §§ 900-915.4*. For further discussion, see *§ 493.13, below*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityExhaustion of RemediesCivil ProcedureJusticiabilityExhaustion of RemediesAdministrative RemediesContracts LawBreachCauses of ActionGeneral OverviewContracts LawFormationCapacity of PartiesMental CapacityContracts LawTypes of ContractsUnilateral ContractsRewardsGovernmentsState & Territorial GovernmentsClaims By & Against

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43-493 California Forms of Pleading and Practice--Annotated § 493.12

§ 493.12 Defenses

[1] Controverting Matter

A defendant in an action based on reward may, in addition to other general defenses, simply rebut one or more of the essential elements that plaintiff must prove. For example, a plaintiff cannot claim a reward if he or she has only promised to perform the act for which the reward is offered; the offer can be accepted only by actual performance of the act [*Davis v. Jacoby (1934) 1 Cal. 2d 370, 378, 34 P.2d 1026]* . Similarly, a plaintiff also cannot claim a reward if he or she has performed the act for which the reward is offered, but has not done so with the intent of obtaining the reward or a part of it [*Hewitt v. Anderson (1880) 56 Cal. 476, 477-478]* .

[2] Revocation of Offer

Revocation of the offer of reward, before the plaintiff has performed the act for which the reward is offered, is an affirmative defense [*see, e.g., Wilson v. Stump (1894) 103 Cal. 255, 257-258, 37 P. 151* ; for a form for such an affirmative defense, *see § 493.52*].

[3] Other Compensation for Performance

A plaintiff cannot claim the reward if he or she was already otherwise being compensated for performing the act for which the reward is separately offered [*Van Horn v. Ricks Water Co. (1896) 115 Cal. 448, 452, 47 P. 361]* .

[4] Public Reward

Because a public offer of reward must be authorized by statute, an action based on such a reward may be subject to statutory restrictions that may be raised in defense. For further discussion of the various statutes and restrictions regarding public rewards, see *§ 493.13, below*.

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewContracts LawFormationOffersRevocable OffersContracts LawTypes of ContractsUnilateral ContractsRewards

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§ 493.13 Restrictions on Rewards Offered by Public Entities, Officers, or Employees

[1] Statutory Authorization Required

Rewards offered by public entities, officers, or employees must be authorized by statute. For example, early case law held that absent other legislation, *Penal Code § 1547* (discussed under [2], *below*) precludes local public entities from offering rewards for the apprehension of persons charged with offenses against the people of the state, because *Penal Code § 1547* grants that power exclusively to the governor [*Brite v. Board of Supervisors (1937) 21 Cal. App. 2d 233, 236-237, 68 P.2d 1007]* . Thus, a city has no inherent power to offer a reward for the apprehension and conviction of a felon, and a city's charter cannot vest a municipality with that authority [*City of Los Angeles v. Gurdane (1932) 59 F.2d 161, 164-165]* . However, an exception might be made if the need for protection of the public interest is peculiarly local and municipal [*Griffin v. City of Los Angeles (1933) 134 Cal. App. 763, 773-774, 26 P.2d 655]* .

Various legislation has been passed over the years authorizing certain public entities, officers, or employees, under certain circumstances as discussed *below*, to offer rewards. To claim a reward offered by a public entity, officer, or employee, a claim must be presented in accordance with *Gov. Code § 900 et seq.* [*see § 493.51[2]* and Ch. 464, *Public Entities and Officers: California Tort Claims Act*].

For a complaint for breach of a reward contract by a public entity, officer, or employee, see *§ 493.51*.

[2] Rewards Offered by Governor

The governor of California may offer a reward of not more than $50,000, payable out of the General Fund, for information leading to the arrest and conviction of any of the following [*Penal Code § 1547(a)*]:

- Any convict who has escaped from a state prison, prison camp, prison farm, or the custody of any prison officer or employee, or as provided in *Penal Code § 4530*, or any paroled prisoner who has left the state without permission [*see Penal Code § 3059*].

- Any person who has committed or is charged with the commission of an offense punishable with death.

- Any person engaged in the robbery or hijacking of, or any attempt to rob or hijack, any person on, or in charge of, in whole or in part, any public conveyance engaged at the time in carrying passengers within California [*see Penal Code § 1547(a)(3)(B)* (defining "hijacking")].

- Any person who attempts to murder, assails with a deadly weapon, or inflicts serious bodily harm on, a peace officer or firefighter who is acting in the line of duty.

- Any person who has committed a crime involving the burning or bombing of public or private property, including any public hospital housed in a privately owned facility.

- Any person who has committed a crime involving the burning or bombing of any private hospital, only if a reward in conjunction with the same crime is offered by the hospital or other public or private donor on its behalf; however, the reward offered by the Governor may not exceed the aggregate amount offered privately or $50,000, whichever is less.

- Any person who explodes, ignites, or attempts to explode or ignite any destructive device or any explosive, or who commits arson, in or about any health facility, place where medical care is provided by a licensed health care professional, church, temple, synagogue, mosque, or other place of worship, abortion-counseling facilities, bookstores, public or private libraries, buildings, facilities designated as a courthouse, homes or offices, of judicial officers, buildings or facilities regularly occupied by county probation department personnel in which the employees perform official duties of the probation department, private property which was targeted in whole or in part because of any of the actual or perceived characteristics of the owner or occupant of the property listed in *Penal Code § 422.55(a)* (disability, gender, nationality, race or ethnicity, religion, sexual orientation, or association with a person or group with one or more of these actual or perceived characteristics), or any public or private school providing instruction in kindergarten or grades 1 through 12, for the purpose of terrorizing another or in reckless disregard of terrorizing another [*see Penal Code § 11413*].

- Any person who commits a violation of *Penal Code § 207* (kidnapping).

- Any person who has committed a crime involving the burning or bombing of any bookstore or public or private library not subject to *Penal Code § 11413*, if a reward in conjunction with the same crime is offered by the bookstore or library, or any other public or private donor on its behalf, provided that the reward offered by the Governor may not exceed the aggregate amount offered privately or $50,000, whichever is less.

- Any person who commits a violation of *Penal Code § 454* (arson-related offenses committed during a state of emergency or local emergency resulting from specified disasters) or *Penal Code § 463* (second-degree burglary during an emergency).

- Any person who willfully and maliciously sets fire to, or willfully and maliciously attempts to set fire to, any property that is included in a hazardous fire area designated by the Department of Forestry [*see Pub. Res. Code §§ 4252, 4253*], if the fire, or attempt to set the fire, results in death or great bodily injury to anyone, including fire protection personnel, of if the fire causes substantial structural damage.

- Any person who has committed, or is charged with the commission of, a felony that is punishable under *Penal Code § 422.75*(felonies against persons or property of public agency or private institution because of class membership) and that resulted in serious bodily injury or in property damage of more than $10,000.

- Any person who commits an act that violates *Penal Code § 11411* (placing marks or desecrating religious symbols on private property to terrorize owner or occupant), if the governor determines that the act is one in a series of similar or related acts committed in violation of that statute by the same person or group.

In addition, the Governor may offer a reward of not more than $100,000 for information leading to the arrest and conviction of any person who kills a peace officer or firefighter acting in the line of duty [*Penal Code § 1547(b)*]. The Governor also may offer a reward of not more than $100,000 for information leading to the arrest and conviction of any person who commits arson upon a place of worship [*Penal Code § 1547(c)*].

The reward must be paid to the person giving the information, promptly on the conviction of the person so arrested, after a recommendation from the United States attorney, or the California Attorney General, or the district attorney and the chief law enforcement officer, or his or her designate, in the jurisdiction where the crime occurred. Rewards may be paid to the person only if the information is given voluntarily, at the person's own initiative. Rewards may not be paid as part of any plea bargain [*Penal Code § 1547(d)*].

The reward may also be paid to the person giving the information if both of the following requirements are met [*Penal Code § 1547(e)*]:

- The arrest or conviction of the person for an offense described in *Penal Code § 1547(a)-(c)* is rendered impossible by an intervening event, including, but not limited to, the death of the person during a pursuit by law enforcement, or while in custody.

- The appropriate law enforcement officials, after reviewing the evidence related to the crime or crimes, determine that the person is the individual responsible for the crime or crimes for which the reward was offered, and that the information would have reasonably led to the arrest and conviction of that person.

If more than one claimant is eligible for any reward issued pursuant to *Penal Code § 1547*, the governor may apportion the reward money in a manner the governor deems appropriate [*Penal Code § 1547(f)*].

[3] Rewards Offered by Local Agency

[a] Willful Misconduct Resulting in Injury or Death

A local agency may offer and pay a reward for information leading to the determination of the identity of, and the apprehension of, any person whose willful misconduct results in injury or death to any person. The amount of the reward is to be determined by the local agency [*Gov. Code § 53069.5*; *see Gov. Code § 54951* (defining "local agency")].

The person who committed the willful misconduct is liable for the amount of the reward paid, if the person's willful misconduct resulted in injury or death to any student or any person employed by or performing volunteer services for a local agency. If the person is an unemancipated minor, his or her parent or guardian is also liable for the amount of the reward paid [*Gov. Code § 53069.5*].

[b] Willful Damage to or Destruction of Property

A local agency may offer and pay a reward for information leading to the determination of the identity of, and the apprehension of, any person who willfully damages or destroys any property. The amount of the reward is to be

determined by the local agency [*Gov. Code § 53069.5*; *see Gov. Code § 54951* (defining "local agency")].

The person who committed the willful damage or destruction is liable for the amount of the reward paid, if the person willfully damaged or destroyed any property of a local agency, or any property of any other local agency or state or federal agency located within the boundaries of the local agency. If the person is an unemancipated minor, his or her parent or guardian is also liable for the amount of the reward paid [*Gov. Code § 53069.5*].

[c] Aiding Peace Officer

A local agency may offer and pay a reward to any person who comes to the aid of any peace officer of the local agency or who furnishes information leading to the arrest and conviction of any person or persons killing or assaulting with a deadly weapon or inflicting serious bodily harm on a peace officer of the local agency while the officer is acting in the line of duty. The amount of the reward is to be determined by the local agency [*Gov. Code § 53069.7*; *see Gov. Code § 54951* (defining "local agency")].

[4] Rewards Offered by Board of Supervisors

The board of supervisors of a county may offer and pay rewards, payable from county funds, for the furnishing of information leading to the apprehension and conviction of persons who willfully destroy or damage property of the county [*Gov. Code § 26207*].

The board of supervisors may also offer and pay rewards, payable from county funds, for the furnishing of information leading to the apprehension and conviction of persons who commit within the county criminal acts against the person or residence of a public officer or employee [*Gov. Code § 26207*].

The board of supervisors may establish a uniform procedure for the payment of rewards, payable from county funds, for ideas or suggestions made by members of the public, which the board determines, in its discretion, would reasonably result in financial savings to the county [*Gov. Code § 26208*; *see Gov. Code § 26209* (authorizing board of supervisor of Humboldt County to establish reward procedure for ideas and suggestions of county employees as well as members of public)].

[5] Rewards to Be Paid by Local Court

Every person giving information leading to the arrest and conviction of any person for refuse dumping in violation of *Penal Code § 374.3*, or for shooting a firearm from or on a public road or highway in violation of *Penal Code § 374c*, is entitled to a reward equal to half of the fine levied against and collected from the offender. The reward is to be paid by the court. If the reward is payable to two or more persons, it is to be divided equally [*Penal Code § 374a*].

[6] Rewards Offered by Department of Forestry

A person who gives information leading to the arrest and conviction, or commitment to a public facility, of any person who willfully and maliciously sets fire to any property in a state responsibility area [*see Pub. Res. Code § 4125 et. seq.*], is eligible for a reward of up to $10,000 out of state funds that are made available to the Department of Forestry for fire protection [*Pub. Res. Code § 4417(a)*; *see Pub. Res. Code § 4003* ("department" defined)]. If the fire results in death or great bodily injury to anyone, including fire protection personnel, or if the fire causes substantial structural damage, the person is eligible for an enhanced reward of up to $25,000 [*Pub. Res. Code § 4417(b), (c)*]. The reward may be paid on the initiative of the Department or on application by the person eligible for the reward. If more than one person is eligible for the reward, the Department will determine how the reward should be divided, taking into consideration the significance of the information contributed by each of the eligible persons [*Pub. Res. Code § 4417(d)*].

[7] Rewards Offered by State Department of Health Services

Any person who provides information that materially contributes to the imposition of a civil penalty or criminal fine against any person violating the hazardous waste control laws shall be paid a reward pursuant to the regulations adopted by the State Department of Health Services [*Health & Safety Code § 25191.7(a)*; *see Health & Safety Code § 25191.7(f)* (adoption of regulations; determination of "materially contributed"); *see also Health & Safety Code § 25100 et seq.* (hazardous waste control)]. If more than one person provides information about a single violation, the first notification received by the Department is eligible for the reward, unless the notifications are postmarked on the same day or telephone notifications are received on the same day, in which case the reward is to be equally divided among the informants [*Health & Safety Code § 25191.7(c)*].

The reward is required to be equal to 10 percent of the amount of the civil penalty or criminal fine that is collected, not to exceed $5000 [*Health & Safety Code § 25191.7(a)*].

If the information results in an imposition of a civil penalty, the reward is paid by the State Department of Health Services. If the information results in an imposition of a criminal fine, the reward is paid by the county [*Health & Safety Code § 25191.7(a)*].

No public officer or employee is eligible for the reward, unless the reporting of the violation does not relate in any manner to his or her responsibilities as a public officer or employee [*Health & Safety Code § 25191.7(d)*].

If an informant has provided information that the business in which he or she is employed has committed a violation, the informant is not eligible for the reward if the employee intentionally or negligently caused the violation or if the employee's primary and regular responsibilities included investigating the violation, unless the business knowingly caused the violation [*Health & Safety Code § 25191.7(e)*].

[8] Rewards Offered by South Coast Air Quality Management District

Any person who provides information that materially contributes to the imposition of a civil penalty or criminal fine against any person for violating any provision of *Health & Safety Code § 41500 et seq.* or any rule, regulation, or order of a district pertaining to mobile source emission regulations or limitations must be paid a reward in accordance with regulations adopted by the South Coast Air Quality Management District under *Health & Safety Code § 42405.1(f)* [*Health & Safety Code § 42405.1(a),(h)*]. The reward may not exceed 10 percent of the amount of the civil penalty or criminal fine collected by the district, district attorney, or city attorney, and may not exceed $5,000 [*Health & Safety Code § 42405.1(a)*].

If there is more than one informant for a single violation, the first to notify the district is eligible for the reward. If notifications are postmarked or telephoned on the same day, the reward must be divided equally among the informants [*Health & Safety Code § 42405.1(c)*].

Federal, state, and local public officers and employees are not eligible for the reward, unless the reporting of the violations is not related to their responsibilities as public officers or employees [*Health & Safety Code § 42405.1(d)*].

No employee who reports a violation by the business in which he or she is employed is eligible for the reward, if the employee intentionally or negligently caused the violation or if the employee's primary and regular responsibilities include investigating the violation, unless the business knowingly caused the violation [*Health & Safety Code § 42405.1(e)*].

[9] Establishment of Reward Program by Tax Board

The State Board of Equalization, under its regulations, may establish a reward program for information resulting in the

identification of underreported or unreported sales and use taxes. The reward may not exceed 10 percent of the taxes collected as a result of the information provided [*Rev. & Tax Code § 7060(a)*]. However, any person employed by or under contract with any state or federal tax collection agency is not eligible for the reward [*Rev. & Tax Code § 7060(a)*].

The Franchise Tax Board, under its regulations, may establish a reward program for information resulting in the identification of underreported or unreported bank and corporation income subject to taxes. The reward may not exceed 10 percent of the taxes collected as a result of the information provided [*Rev. & Tax Code § 19525*]. Persons employed by or under contract to state or federal tax collection agencies are not eligible for awards under *Rev. & Tax. Code § 19525*.

[10] Performing Official Act

It is against sound public policy to allow a public officer who is under a duty to arrest criminals to receive a reward for the performance of that duty [*see, e.g., Lees v. Colgan (1898) 120 Cal. 262, 265-270, 52 P. 502* (even though Legislature gave governor authority to offer reward under *Penal Code § 1547*, authority does not include offering reward to public officer performing his or her duties)]. Further, every executive or ministerial officer, employee, or appointee of the State of California or any county, city, or other political subdivision, who knowingly asks, receives, or agrees to receive, and every judicial officer who asks for or receives, any emolument, gratuity, or reward, or any promise of the same, except such as may be authorized by law, for doing any official act, is guilty of a misdemeanor [*Penal Code §§ 70(a), 94*]. These provisions abrogate earlier decisions holding that an officer could accept a reward from a private party if his or her superiors consented [*see, e.g., Lees v. Colgan (1898) 120 Cal. 262, 265-270, 52 P. 502]* . They do not, however, appear to abrogate other early decisions holding that a public officer may accept a reward for services rendered that do not fall within the scope of his or her official duties [*see 2 Ops. Cal. Att'y Gen. 301, 301-302 (1943)]* .

[11] Person Employed to Return Fugitive

When the governor of California has demanded the surrender of a fugitive from justice from the executive authority of another state or foreign government, either the state or a local government may employ a person to travel to the foreign jurisdiction for the express purpose of returning the fugitive to California. The state controller on approval of the governor will pay the employed person for the services rendered [*Penal Code § 1557*]. It is a misdemeanor for a public officer or other person to pay or receive any other reward for this service [*Penal Code § 1558*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsUnilateral ContractsRewardsCriminal Law & ProcedureCriminal OffensesGeneral OverviewGovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsLocal GovernmentsDuties & PowersGovernmentsLocal GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsEmployees & OfficialsTortsWrongful Death & Survival ActionsGeneral Overview

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[Reserved]

§§ 493.14[Reserved]

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Chapter 493 REWARDS
PART III. RESEARCH GUIDE

43-493 California Forms of Pleading and Practice--Annotated § 493.30

§ 493.30 State Statutes

[1] Reward From Public Entities at Local Level

Reward offered by board of supervisors for information concerning person who willfully destroys or damages county property. *Gov. Code § 26207*

Reward offered by board of supervisors for information concerning person who commits criminal acts against person or residence of public officer or employee. *Gov. Code § 26207*

Reward for public suggestions resulting in savings to county. *Gov. Code §§ 26208, 26209*

Reward offered by local agency for information concerning person whose willful misconduct results in injury or death. *Gov. Code § 53069.5*

Reward offered by local agency for information concerning person who willfully damages or destroys property. *Gov. Code § 53069.5*

Reward offered by local agency to person who aids peace officer or who gives information concerning killing of or assault on peace officer. *Gov. Code § 53069.7*

Reward for information concerning refuse dumping or shooting firearm from or on public highway. *Penal Code § 374a*

[2] Reward From Public Entities at State Level

Reward for giving information concerning hazardous waste control violations. *Health & Safety Code § 25191.7*

Reward for giving information concerning violations of mobile source emissions regulations or limitations. *Health & Safety Code § 42405.1*

Permissible reward of up to $50,000 (or $100,000 in case of any person killing peace officer or firefighter acting in line of duty) by Governor for information leading to arrest and conviction of person for specified crimes. *Penal Code § 1547*

Reward for giving information concerning arson in state responsibility area. *Pub. Res. Code § 4417*

Reward for information concerning underreported or unreported sales and use taxes. *Rev. & Tax Code § 7060(a)*

Reward for information concerning underreported or unreported bank and corporation income subject to taxes. *Rev. & Tax Code § 19525*

[3] Prohibited Rewards

Public officer asking for or receiving reward for performing official act is misdemeanor. *Penal Code §§ 70, 94*

Receipt of reward for delivering fugitive from justice, except as provided for in *Penal Code § 1557*, is misdemeanor. *Penal Code § 1558*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsUnilateral ContractsRewardsGovernmentsLocal GovernmentsAdministrative Boards

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43-493 California Forms of Pleading and Practice--Annotated § 493.31

§ 493.31 Decisions

Reward is not available when claimant was already being compensated for performing act for which reward is posted; plaintiff not eligible for reward because he had been requested to keep lookout for acts or sources of pollution, and request had been accompanied by offer of compensation; immaterial whether or not plaintiff had actually agreed to keep lookout for compensation. *Van Horn v. Ricks Water Co. (1896) 115 Cal. 448, 452, 47 P. 361*

"Bounty" distinguished from "reward," although both close in meaning; "bounty" refers to offer of gratuity for performance of many persons, each of whom on performance will be entitled to gratuity without prejudice from or to claims of others, while "reward" applies to single service that can only be performed once, and is earned only by person or cooperating persons who succeed while others fail. *Ingram v. Colgan (1895) 106 Cal. 113, 124, 39 P. 437*

When offer for reward is not expressly limited in time, presumption is that it remained open on fifth day after it was made; revocation of offer is matter of defense. *Wilson v. Stump (1894) 103 Cal. 255, 258, 37 P. 151*

Offer and promise to pay reward is only proposal or conditional promise and not consummated contract; however, when person relies on offer and performs service before offer is revoked, valid contract is consummated. *Wilson v. Stump (1894) 103 Cal. 255, 257, 37 P. 151*

To recover reward that is advertised, claimant must prove that he or she substantially performed service as proposed in advertisement. *Burke v. Wells, Fargo & Co. (1875) 50 Cal. 218, 221*

Offer of reward or compensation, either to particular person or class of persons, or to any and all persons, is conditional promise that becomes legal and binding contract if any one to whom offer is made performs service before offer is revoked; offer may be revoked at any time by offeror. *Ryer v. Stockwell (1859) 14 Cal. 134, 137*

When grant of award was by its own terms discretionary by private company, employee reading about award could not have reasonably concluded that he or she would be entitled to reward by submitting suggestion, but should have understood that submission was only gratuity and did not create binding contract. *Lisec v. United Air Lines, Inc.*

(1978) 85 Cal. App. 3d 969, 978, 149 Cal. Rptr. 847

Valid contract is formed when person returns property to another who has made express promise of reward, either to particular person or in general terms to any one who will return property to him or her, or even by publication of advertisement offering reward; offer may be revoked before being acted on. *Berthiaume v. John Doe (1913) 22 Cal. App. 78, 79-80, 133 P. 515*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationOffersRevocable OffersContracts LawPerformanceSubstantial PerformanceContracts LawTypes of ContractsUnilateral ContractsRewards

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§ 493.32 Attorney General Opinions

Governing board of junior college district is without authority to offer reward for information leading to apprehension and conviction of person who committed arson on school building. *52 Ops. Cal. Att'y Gen. 35, 35-36 (1969)*

Power to offer rewards for apprehension and conviction of offender against people of state is not conferred on county board of supervisors, but remains state function; thus county cannot offer reward for cattle rustling which is grand theft; some authorities make exception for arson, which is local affair. *2 Ops. Cal. Att'y Gen. 509, 509-510 (1943)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsUnilateral ContractsRewardsGovernmentsLocal GovernmentsAdministrative Boards

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43-493 California Forms of Pleading and Practice--Annotated § 493.33

§ 493.33 Law Reviews

Note, *Municipal Corporations--Power to Offer Rewards Under General Welfare Clause, 6 S. Cal. L. Rev. 248 (1933)*

Note, *Contracts --Rewards-- Substantial Performance--Meaning of Word 'Conviction' in Offer, 5 S. Cal. L. Rev. 247 (1931)*

Comment, *Contracts: Offer of Reward for Return of Lost Property: Consideration, 1 Cal. L. Rev. 470 (1913)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceSubstantial PerformanceContracts LawTypes of ContractsUnilateral ContractsRewardsGovernmentsLocal GovernmentsDuties & Powers

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§ 493.34 Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, § 182 (10th ed. 2005)

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[Reserved]

§§ 493.35[Reserved]

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PART IV. FORMS

43-493 California Forms of Pleading and Practice--Annotated § 493.50

§ 493.50 Complaint for Damages [Civ. Code § 3300] for Breach of Contract for Reward--Breach by Private Party

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Contract for Reward--Breach by Private Party

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Breach of Contract)
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

[1. _____ (*Allege basis for venue, e.g.,* Defendant _____ (*name*) is, and at all times herein mentioned was, a resident of _____ County, California.]

[2. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that

plaintiff's damages as herein alleged were proximately caused by those defendants.)]

[3. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned defendant _____ (*name*) was the agent of defendant _____ (*name*), and in doing the things hereinafter alleged was acting in the scope of that agency and with the permission and consent of his/her codefendant.]

4. On or about _____ [*date*], _____ [*describe circumstances over which offer of reward arose, e.g.,* a pet collie dog, Fido, belonging to _____ (*name*), disappeared from the residence of _____ (*name*)].

5. On or about _____ [*date*], _____ [*describe offer of reward, e.g.,* defendant _____ (*name*) placed an advertisement in the _____ (*name of publication*), a copy of which is attached hereto and made a part hereof, offering a reward of $30,000 for the safe return of Fido to him/her].

6. Plaintiff, on or about _____ [*date*], after _____ [reading *or* learning of *or other as appropriate*] the above-described offer of reward and in reliance on that offer, _____ [*describe performance of offer, e.g.,* discovered the whereabouts of Fido, and safely returned the dog to defendant _____ (*name*).]

7. On or about _____ [*date*], plaintiff by _____ [*form of demand, e.g.,* telephone], made demand on defendant _____ [*name*] at _____, California, for payment of the promised reward, which defendant _____ [*name*] refused and continues to refuse to pay.

8. As a result of the breach of the contract by defendant(s) _____ [*name(s)*] for payment of reward, plaintiff has suffered damages in the amount of $_____.

WHEREFORE, plaintiff prays judgment against defendant(s) as follows:

1. For compensatory damages in the sum of $_____;

2. For interest on the sum of $_____ from and after _____ [*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The complaint in [1], *above,* is for use in an action for damages for breach of contract for a reward offered by private party [*see also Code Civ. Proc. §§ 337, 339* (statute of limitations)].

[3] Allegations

The complaint includes initial, optional paragraphs that allege:

- A basis for venue (Paragraph 1).
- Fictitiously named defendants (Paragraph 2).
- Agency (Paragraph 3).

It then alleges the elements of a cause of action for breach of contract for reward:

- Defendant's offer of a reward (Paragraphs 4, 5).
- The performance of the act for which the reward was offered (Paragraph 6).
- The demand for payment of reward (Paragraph 7) [*see Wilson v. Stump (1894) 103 Cal. 255, 257, 37 P. 151]* .
- The amount of damages to which plaintiff is entitled (Paragraph 8) [*see Civ. Code §§ 3300, 3302*].

[4] Costs and Attorney's Fees

If the plaintiff prevails in the action, he or she is entitled to costs [*see Code Civ. Proc. § 1021, 1032-1033.5*]. Attorney's fees, however, are generally available in a contract action only when specifically provided for in the contract itself [*see Civ. Code § 1717*; *see also Code Civ. Proc. § 1021*; for general discussion and forms relating to costs and attorney's fees, see Ch. 174, *Costs and Attorney's Fees*].

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[6] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

When a defendant has contracted to perform an obligation in a particular county, venue is proper either in the county in which the obligation is to be performed or in which the contract in fact was entered into, or in the county in which the defendant or any defendant resides at the commencement of the action [*see* Paragraph 1]. The county in which the obligation is incurred is deemed to be the county in which it is to be performed, unless there is a special contract in writing to the contrary [*Code Civ. Proc. § 395(a)*]. For further discussion, including alternative bases for venue, see Ch. 571, *Venue* .

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to pleading a complaint for breach of contract generally, see Ch. 140, *Contracts* .

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages* .

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For allegations showing proper venue, see Ch. 571, *Venue* .

For alternative verification forms, see Ch. 572, *Verification*

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43-493 California Forms of Pleading and Practice--Annotated § 493.51

§ 493.51 Complaint for Damages [Civ. Code § 3300] for Breach of Contract for Reward--Breach by Public Entity, Officer, or Employee

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Contract for Reward--Breach by Public Entity, Officer, or Employee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES (Breach of Con-
_____ [*name*],	)	tract)
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

[*EITHER*]

1. Defendant _____ [City *or* County] of _____ is, and at all times mentioned herein was, a _____ [municipal corporation *or* chartered city *or* county], duly organized and existing under the laws of the State of California [and situated in the County of _____].

[*OR*]

1. Defendant State of California is, and at all times mentioned herein was, a sovereign state of the United States of America.

[*OR*]

1. Defendant _____ [*name*] is, and at all times mentioned herein was, _____ [*specify, e.g.,* an agency] of the State of California, duly organized and existing under the laws of the State of California.

[*AND/OR*]

1. Defendant(s) _____ [*name(s)*] is/are, and at all times herein mentioned was/were, _____ [governor of the state of California *or* the director of _____ (*name of local agency*) *or* members of the Board of Supervisors of the City of _____ (*name*) *or* the Director of the Department of Forestry *or other as appropriate*].

[*CONTINUE*]

[2. *Fictitious name allegation. See § 493.50, Paragraph 2.*]

[3. *Agency allegation. See § 493.50, Paragraph 3.*]

4. On or about _____ [*date*], _____ [*describe circumstances over which offer of reward arose, e.g.,* John Doe, a convicted murderer serving a life sentence in California, escaped from the correctional facility at San Quentin, California].

5. On or about _____ [*date*], _____, pursuant to his/her/its authority under _____ [*specify statute, e.g., Penal Code Section 1547(a)*], defendant _____ offered a reward for _____ [*describe, e.g.,* information leading to the arrest and conviction of John Doe]. The amount of the reward offered was $_____.

6. Plaintiff, on or about _____ [*date*], after _____ [reading *or* learning of *or other as appropriate*] the above-described offer of reward and in reliance on that offer, _____ [*describe performance of offer, e.g.,* discovered the whereabouts of John Doe, and relayed that information to _____ (*name and capacity*), who immediately went to the location and arrested John Doe. On or about _____ (*date*), John Doe was convicted of escape from a correctional facility].

7. On or about _____ [*date*], plaintiff presented a claim for the reward that was offered to _____[*name of public entity*] by _____ [delivering *or* mailing] it to the _____ [clerk *or* secretary *or* auditor], all in compliance with the requirements of Section _____ [905 *or* 905.2] of the Government Code. A copy of the claim is attached hereto as Exhibit A and made a part hereof.

8. On or about _____ [*date*], _____ [*name of public entity*] _____[rejected the claim in its entirety *or* allowed the claim in the amount of

$_____ and rejected it as to the remainder *or* failed to act on the claim within the period of 45 days after its presentation, and the claim was thus deemed rejected, under the provisions of *Government Code Section 912.4*, at the expiration of the 45-day period, to wit, on _____ (date)].

WHEREFORE, plaintiff prays judgment against defendant(s) as follows:

1. For compensatory damages in the sum of $_____;

2. For interest on the sum of $_____ from and after _____ [*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

[*Verification, if desired. See Form 1.*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action for damages for breach of contract for a reward offered by a public entity, officer, or employee, as authorized by statute, after a claim for the reward has been rejected.

To claim a reward offered by a public entity, officer, or employee, a claim must be presented in accordance with *Gov. Code § 900 et seq.* within one year after the accrual of the cause of action [*see Gov. Code §§ 905* (claims against local public entities), 905.2 (claims against state), 911.2 (statute of limitations), 950.2 (claim against public employee)]. The claim requirement is a condition precedent to an action against the public entity, officer, or employee [*Gov. Code §§ 945.4, 950.2*; *see also Gov. Code §§ 945.6, 950.6* (statutes of limitations)]. For further discussion of and forms for use as claims against public entities, officers, and employees, *see* Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[3] Allegations

This complaint includes initial, optional paragraphs that allege:

- A basis for venue (Paragraph 1),
- Fictitiously named defendants (Paragraph 2), and
- Agency (Paragraph 3).

It then alleges the elements of a cause of action for breach of contract for reward:

- The circumstances over which the offer for reward arose (Paragraph 4),
- The offer of reward (Paragraph 5),
- The performance of the act for which the reward was offered (Paragraph 6),
- The claim for payment of reward (Paragraph 7) [*see Gov. Code §§ 905, 905.2*], and the rejection of the claim for reward (Paragraph 8) [*see Gov. Code § 912.4*].

[4] Venue

If the action is against a county, city and county, city, or local agency, the action is properly brought in the county in which the public entity is located [*Code Civ. Proc. § 394(a)*]. If the action is against a public officer, the action is brought in the county in which the cause of action arose [*Code Civ. Proc. § 393(b)*]. If, however, the action is brought against the state or a state agency or officer, the action may be brought in any county in which the Attorney General has an office, although the Attorney General may request a change of venue to Sacramento County [*Code Civ. Proc. § 401*; *Gov. Code § 955*].

[5] Verification

A public entity need not verify its answer even though the complaint is verified [*see Code Civ. Proc. § 446*]. The verification of a complaint against a public entity does, however, preclude a general denial in superior court and in some limited civil cases [*see Code Civ. Proc. § 431.30(d)*].

[6] Cross References

For discussion and forms relating to claims and actions against public entities and officers, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

For additional cross references relating to complaints generally, see *§ 493.50[7]*

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Volume 43: Receivers thru Rewards-Chs. 486-499
Chapter 493 REWARDS
PART IV. FORMS

43-493 California Forms of Pleading and Practice--Annotated § 493.52

§ 493.52 Affirmative Defense to Action for Breach of Contract for Reward--Withdrawal of Offer of Reward Before Performance of Act

[1] FORM Affirmative Defense to Action for Breach of Contract for Reward--Withdrawal of Offer of Reward Before Performance of Act

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that on or about _____ [*date*], before plaintiff acted on the offer of reward stated in the complaint, defendant withdrew the offer by _____ [*describe withdrawal, e.g.,* publicly announcing on the evening news programs of the American Broadcasting Company, the National Broadcasting Company, and the Columbia Broadcasting Company, that the offer of reward was thereby withdrawn].

[2] Use of Form

The form in [1], *above,* is for use by a defendant as an affirmative defense allegation in his or her answer in an action for damages for breach of contract for a reward. The affirmative defense alleged is that the defendant withdrew the offer [*Wilson v. Stump (1894) 103 Cal. 255, 258, 37 P. 151* ; *Ryer v. Stockwell (1859) 14 Cal. 134, 137]* of reward before the plaintiff performed the act for which the reward was offered [*Berthiaume v. John Doe (1913) 22 Cal. App. 78, 79-80, 133 P. 515]* . For further discussion relating to answers generally, including general forms into which the affirmative defense allegation may be inserted, see Ch. 26, *Answers* .

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Chapter 500 SALES: SALES UNDER THE COMMERCIAL CODE

44-500 California Forms of Pleading and Practice--Annotated 500.syn

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[1] FORM

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[3] Allegations

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[1] FORM

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[1] FORM

[2] Use of Form

[3] Allegations

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[2] Use of Form

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[1] FORM

[2] Use of Form

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Chapter 500 SALES: SALES UNDER THE COMMERCIAL CODE
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44-500 California Forms of Pleading and Practice--Annotated § 500.01

§ 500.01 Scope of Chapter

This chapter discusses actions available to sellers and buyers arising from sales or contracts to sell goods under Division 2 of the Uniform Commercial Code as adopted in California [*Com. Code § 2101 et seq.*].

It contains forms for breach of contract actions by sellers against buyers [*see § 500.100* et seq.] and by buyers against sellers [*see § 500.110* et seq.], as well as forms for affirmative defenses [*see § 500.120*] for use in those actions.

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§ 500.02 Cross References

- Assignment and delegation of rights and obligations subject to Division 2 under *Com. Code § 2210* is discussed in Ch. 60, *Assignments* .

- Sale by auction under *Com. Code § 2328* is discussed in Ch. 77, *Auctions and Auctioneers* .

- For discussion and forms for use in contract actions other than those covered by Division 2, see Ch. 140, *Contracts* , Ch. 528, *Specific Performance* , Ch. 488, *Reformation of Instruments* , and Ch. 530, *Statute of Frauds* .

- For discussion of the measure of damages for unlawful motor vehicle subleasing, see Ch. 90, *Automobiles: Vehicle Leasing Act* .

- For discussion and forms relating to damages generally, see Ch. 177, *Damages* .

- For further discussions of, and forms for use in, actions involving contracts for the sale of timber and the extraction of minerals, see Ch. 350, *Logs and Timber* , Ch. 363, *Mining* , and Ch. 393, *Oil and Gas* .

- The statute of frauds contained in *Com. Code § 2201* is discussed in Ch. 530, *Statute of Frauds* .

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[Reserved]

§§ 500.03[Reserved]

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44-500 California Forms of Pleading and Practice--Annotated § 500.10

§ 500.10 Governing Statutes

[1] Division 2 of the Commercial Code

Statutes governing sales or contracts to sell goods under Division 2 of the Commercial Code are contained in *Com. Code § 2101 et seq.* Unless the context otherwise requires, Division 2 applies to transactions in goods; it does not apply to any transaction that, although in the form of an unconditional contract to sell or present sale, is intended to operate only as a security transaction [*see* Ch. 503, *Sales: Secured Transactions*]. Nor does Division 2 impair or repeal any statute regulating sales to consumers, farmers, or other specified classes of buyers [*Com. Code § 2102*]. For instance, vehicles, although goods, are excluded from the scope of Division 2 because sales of vehicles are regulated by the Vehicle Code [*Quartz of S. Cal., Inc. v. Mullen Bros., Inc. (2007) 151 Cal. App. 4th 901, 907-908, 61 Cal. Rptr. 3d 54*].

[2] Applicability of Division 9 to Sales Covered by Division 2

Division 9 (Secured Transactions, *Com. Code § 9101 et seq.*), discussed in Ch. 503, *Sales: Secured Transactions* , governs particular security interests arising under Division 2 as follows [*Com. Code § 9109(a)*]:

- Interests arising under *Com. Code § 2401* (identification of goods), discussed in *§ 500.11[4]*.
- Interests arising under *Com. Code § 2505* (shipment under reservation), discussed in *§ 500.35[6]*.
- The buyer's special interest under *Com. Code § 2711(3)*, which arises on buyer's indentifying the goods to the contract, discussed in *§ 500.76[2]*.

However, until the debtor obtains possession of the goods, all of the following rules apply [*Com. Code § 9110*]:

- The security interest is enforceable, even if *Com. Code § 9203(b)(3)* has not been satisfied.
- Filing is not required to perfect the security interest.

- The rights of the secured party after default by the debtor are governed by Division 2 (*Com. Code § 2101 et seq.*) or Division 10 (*Com. Code § 10101 et seq.*), in the case of personal property leases.

- The security interest has priority over a conflicting security interest created by the debtor.

Security interests arising under *Com. Code § 2401* or *2505*, a buyer's security interest under *Com. Code § 2711(3)*, or a lessee's security interest under *Com. Code § 10508(e)*, until the debtor obtains possession of the collateral, are perfected when they attach [*Com. Code § 9309(6)*].

The general rule [*Com. Code § 9322(a)-(e)*] governing priority of security interests is subject to *Com. Code § 9110* (discussed *above*) with respect to a security interest arising under Division 2 [*Com. Code § 9322(f)(4)*].

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§ 500.11 Definitions

[1] Buyer

In Division 2, unless the context otherwise requires, "buyer" means a person who buys or contracts to buy goods [*Com. Code § 2103(1)(a)*].

[2] Goods

"Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Division 8) and things in action. "Goods" also includes the unborn young of animals, growing crops, and other identified things attached to realty as described in *Com. Code § 2107*, governing goods to be severed from realty, and discussed in [5], *below* [*Com. Code § 2105(1)*].

Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest them operates as a contract to sell [*Com. Code § 2105(2)*]. There may be a sale of a part interest in existing identified goods [*Com. Code § 2105(3)*]. An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of that bulk or any quantity of it agreed on by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common [*Com. Code § 2105(4)*].

"Lot" means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract [*Com. Code § 2105(5)*].

"Commercial unit" means a unit of goods which by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole [*Com. Code § 2105(6)*].

[3] Merchant; Between Merchants

"Merchant" means a person who deals in goods of the kind, or otherwise by his or her occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods, involved in the transaction or to whom that knowledge or skill may be attributed by his or her employment of an agent or broker or other intermediary who by his or her occupation holds himself or herself out as having that knowledge or skill [*Com. Code § 2104(1)*]. "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants [*Com. Code § 2104(3)*].

[4] Sale

The term "sale" as used in this chapter and in Division 2 means the passing of title from the seller to the buyer for a price [*Com. Code § 2106(1)*; *see* Imperial NH3 v. *Central Valley Feed Yards, Inc. (1977) 70 Cal. App. 3d 513, 520, 139 Cal. Rptr. 8]* . In determining when a "sale" occurs, therefore, the passage of title is critical. Each provision of Division 2 with regard to the rights, obligations, and remedies of the seller, the buyer, purchasers, or other third parties applies irrespective of title to the goods except when the provision refers to title. Insofar as situations are not covered by the other provisions of Division 2 and matters concerning title become material, the following rules apply [*Com. Code § 2401*]:

- Title to goods may not pass under a contract for sale prior to their identification to the contract (discussed in *§ 500.51*), and, unless otherwise explicitly agreed to, the buyer acquires by their identification a special property as limited by the Commercial Code. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of Division 9 (secured transactions, discussed in Ch. 503, *Sales: Secured Transactions*), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties [*Com. Code § 2401(1)*].

- Unless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes its performance regarding the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place. In particular, despite any reservation of a security interest by the bill of lading, if the contract requires or authorizes the seller to send the goods to the buyer but does not require him or her to deliver them at destination, title passes to the buyer at the time and place of shipment. If the contract requires delivery at destination, title passes on tender there [Com. Code. § 2401(2)].

- Unless otherwise explicitly agreed, when delivery is to be made without moving the goods:

  - If the seller is to deliver a tangible document of title, title passes at the time when and the place where the seller delivers that document [*Com. Code § 2401(3)(a)*].

  - If the seller is to deliver an electronic document of title, title passes when the seller delivers the document [*Com. Code § 2401(3)(a)*].

  - If the goods are already identified at the time of contracting and no documents of title are to be delivered, title passes at the time and place of contracting [*Com. Code § 2401(3)(b)*].

- A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance reverts title to the goods in the seller. This revesting occurs by

operation of law and is not a "sale" [*Com. Code § 2401(4)*].

A contract for the sale, apart from the land, of growing crops or other things attached to realty and capable of severance without material harm thereto, or of timber to be cut, is a contract for the sale of goods regardless of whether the subject matter is to be severed by the buyer or by the seller, even though it forms a part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance [*Com. Code § 2107(2)*]. In addition, a contract for the sale of minerals or the like (including oil and gas) or a structure or its material to be removed from realty is a contract for the sale of goods if they are to be severed by the seller. Until severance, however, a purported interest in land is effective only as a contract to sell [*Com. Code § 2107(1)*].

[5] Seller

In Division 2 unless the context otherwise requires, "seller" means a person who sells or contracts to sell goods [*Com. Code § 2103(1)(d)*].

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[Reserved]

§§ 500.12[Reserved]

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44-500 California Forms of Pleading and Practice--Annotated § 500.20

§ 500.20 Formation

[1] Generally

A contract for sale of goods may be made in any manner sufficient to show agreement [*see Com. Code § 1201(b)(3)*], including conduct by both parties [*see Com. Code § 1201(b)(26)*] that recognizes the existence of the contract [*Com. Code § 2204(1)*]. An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined [*Com. Code § 2204(2)*] and one or more terms [*Com. Code § 1201(b)(40)*] are left open, if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy [*Com. Code §§ 1201(b)(32), 2204(3)*]. A party includes a person [*Com. Code § 1201(b)(27)*] acting through an agent [*see Com. Code § 1201(b)(26)*].

If terms are left open, commercial standards on the point of "indefiniteness" are intended to be applied [*see* UCC Comment to *Com. Code § 2204*]. Some of these standards are supplied by the Code itself, including provisions for certain missing terms, such as the provisions in *Com. Code § 2305* fixing the price when the contract contains an open price term [*see § 500.33[2]*], and in *Com. Code § 2311* permitting the parties to supply missing terms in the course of their performance [*see § 500.32[2]*].

The more terms the parties leave open, the less it is likely the parties intend to conclude a binding contract [*see* UCC Comment to *Com. Code § 2204*]. Even the failure to agree on one term that is essential to the contract and that cannot be added by recourse to commercial standards may indicate that the parties did not reach an agreement. For example, an open price term that is to be fixed by a third person is deemed to be the price at the time of delivery if the person fails to fix the price [*see Com. Code § 2305(1)(c)*]. But if the third person was chosen not merely as a barometer or index of a fair price but as an essential condition to entering into a contract, the failure to set the price may show that no contract was formed [*see* UCC Comment to *Com. Code § 2305*].

Even if the parties' writings [*Com. Code § 1201(b)(43)*] are insufficient to establish a contract for sale, conduct by both parties that recognizes the existence of a contract, such as shipping the goods, accepting the goods, and paying for the goods, is sufficient. In those cases, the terms of the contract consist of those on which the writings of the parties agree,

together with any supplementary terms incorporated under the provisions of the Commercial Code [*Com. Code § 2207(3)*; *see Steiny & Co. v. California Elec. Supply Co. (2000) 79 Cal. App. 4th 285, 294-296* (when conduct by contractor and seller showed that contract had been formed despite materially differing terms of purchase order and invoice, trial court's failure to instruct the jury on *Com. Code § 2207* was prejudicial error); *Textile Unlimited, Inc. v. A.BMH and Co. Inc. (9th Cir. 2001) 240 F.3d 781, 787-788* (because under *Com. Code § 2207(3)* disputed additional terms on which parties do not agree drop out from contract, disputed arbitration clause did not become part of contract; UCC does not contain "gap-filler" provision providing for arbitration)].

[2] Offer and Acceptance

Unless otherwise unambiguously indicated by the language or circumstances of the agreement, an offer to make a contract is construed as inviting acceptance in any manner and by any medium reasonable in the circumstances [*Com. Code § 2206(1)(a)*]. However, if the beginning of a requested performance is a reasonable mode of acceptance, an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed before acceptance [*Com. Code § 2206(2)*].

An order or other offer to buy goods for prompt or current shipment is construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming [*Com. Code § 2106(2)*] or nonconforming goods, unless the seller seasonably [*Com. Code § 1205(c)*] notifies the buyer that the shipment of nonconforming goods is offered only as an accommodation to the buyer [*Com. Code § 2206(1)(b)*; *see Com. Code § 2504*]. "Shipment" for the purpose of acceptance under *Com. Code § 2206(b)* does not include the beginning of delivery by the seller's own truck or by messenger, although loading on the seller's own truck might be construed as the beginning of performance under *Com. Code § 2206(2)*[*see* UCC Comment to *Com. Code § 2206*].

[3] Firm Offers

A merchant's [*Com. Code § 2104(1)*] offer to buy or sell goods in a signed [*Com. Code § 1201(b)(37)*] writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or, if no time is stated, for a reasonable time [*Com. Code § 1205*], although the period of irrevocability may never exceed three months [*Com. Code § 2205(a)*]. For the purpose of this provision, almost every person in business would be deemed to be a merchant [*see* UCC Comment to *Com. Code § 2104*]. Any term of assurance on a form supplied by the offeree must be separately signed by the offeror [*Com. Code § 2205(a)*]. For the purpose of this statute, "signed" includes authentication [*see* UCC Comment to *Com. Code § 2205*]. An assurance under *Com. Code § 2205* which is made for a period longer than three months will bind the offeror only for the first three months, unless it is renewed or supported by consideration [*see* UCC Comment to *Com. Code § 2205*].

In any case, an oral or written offer to supply goods to a contractor made by a merchant who has actual or imputed knowledge that the contractor (1) is licensed under California law or a similar law of another state and (2) will rely on the offer in submitting its bid for a construction contract with a third party is irrevocable for 10 days after the awarding of the contract to the prime contractor but in no event for more than 90 days after the date the bid or offer was made, unless the merchant provides that the offer will be held open for less than these prescribed times. A merchant is released from an oral bid or offer of $2,500 or more unless the contractor or his or her agent confirms the offer within 48 hours after it was rendered [*Com. Code § 2205(b)*]. For a further discussion and a form for use in an action on a firm offer, see *§ 500.110*.

[4] Additional Terms

A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed on, unless acceptance is expressly made conditional on assent to the additional or different terms [*Com. Code § 2207(1)*; *see, e.g.,*

PMC Inc. v. Porthole Yachts Ltd. (1998) 65 Cal. App. 4th 882, 888-889, 76 Cal.Rptr. 2d 832 (there was no acceptance under *Com. Code § 2207(1)* because addendum to agreement was sent on last day to accept, contents of addendum included new term, and cover letter emphasized conditional nature of acceptance); *Textile Unlimited v. A..BMH & Co. (9th Cir. 2001) 240 F.3d 781, 787-788* (contract containing new terms, including arbitration clause, not formed under *Com. Code § 2207(1)* when no specific and unequivocal assent was given to supplemental conditions)]. Any additional terms are construed as proposals for addition to the contract and, between merchants, become part of the contract, unless (1) the offer expressly limits acceptance to the terms of the offer, (2) the terms materially alter the contract, or (3) notification [*Com. Code § 1202(d)*] of objection to the terms has already been given or is given within a reasonable time after notice of them is received [*Com. Code § 2207(2)*; *Boyd v. Oscar Fisher Co. (1989) 210 Cal. App. 3d 368, 379, 258 Cal. Rptr. 473* (attorney's fees provision in invoices was additional term of dealership agreement between parties); *see National Controls, Inc. v. Commodore Bus. Machines, Inc. (1985) 163 Cal. App. 3d 688, 693-695, 209 Cal. Rptr. 636* (oral contract complete in phone conversation, thus purchase order adding materially different term had no effect)].

If clauses on confirming forms sent by both parties conflict, each party is assumed to object to the other party's conflicting clause; thus, the requirement that there be notice of objection [*Com. Code § 2207(2)*] is satisfied and the conflicting terms do not become a part of the contract. The contract then consists of the terms originally expressly agreed to, the terms on which the confirmations agree, and the terms supplied by the provisions of the Code [*Com. Code § 2207(3)*; *see* UCC Comment to *Com. Code § 2207*; *see also Transwestern Pipeline Co. v. Monsanto (1996) 46 Cal. App. 4th 502, 514-515, 53 Cal. Rptr. 2d 887]* .

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44-500 California Forms of Pleading and Practice--Annotated § 500.21

§ 500.21 Unconscionability

Section 2-302 of the Uniform Commercial Code dealing with unconscionable contracts or clauses has not been enacted in California based, in part, on the belief that giving courts unqualified power to strike down terms they might consider "unconscionable" could result in the renegotiation of contracts in every case of disagreement with the fairness of provisions the parties had accepted [*see* Cal. Code Comment to *Com. Code § 2302*].

In 1979, however, California enacted a general unconscionability statute, *Civ. Code § 1670.5*, governing all contracts, including contracts for the sale of goods under Division 2 [Stats. 1979, Ch 819, § 3; *see Civ. Code § 1670.5*]. *Civ. Code § 1670.5* provides that if the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made, the court may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or so limit the application of that clause as to avoid any unconscionable result [*Civ. Code § 1670.5(a)*]. When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable, the parties are afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect in order to aid the court in its determination [*Civ. Code § 1670.5(b)*].

The basic test of unconscionability under *Civ. Code § 1670.5* is whether, in the light of the general background and the needs of the particular case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract [*see* Legislative Committee Comment to *Civ. Code § 1670.5*-Assembly 1979 Addition]. For a form and further discussion relating to unconscionability as an affirmative defense to a breach of contract action, see *Ch. 140, Contracts, § 140.146*.

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§ 500.22 Modification, Rescission, and Waiver

[1] No Consideration Required

An agreement modifying a contract within Division 2 needs no consideration to be binding [*Com. Code § 2209(1)*; *see also Civ. Code § 1697*]. This rule also applies to oral modifications of oral contracts [*see* Cal. Code Comment to *Com. Code § 2209*]. Modifications nevertheless must be made in good faith, which may, as between merchants or against merchants in some situations, require an objectively demonstrable reason for seeking a modification. In any case the use of bad faith to escape performance on the original contract is barred, and the extortion of a modification without legitimate commercial reason is ineffective as a violation of the duty of good faith. A mere technical consideration also may not be used to support a modification made in bad faith [*see* UCC Comment to *Com. Code § 2209*].

[2] Satisfying Requirement of Writing

A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded. Except as between merchants, such a requirement on a form supplied by a merchant must be separately signed by the other party [*Com. Code § 2209(2)*]. Modification or rescission includes abandonment or other change by mutual consent but does not include unilateral termination or cancellation [*Com. Code § 2106(3),(4)*; *see* UCC Comment to *Com. Code § 2209*]. In addition, the requirements of the statute of frauds [*Com. Code § 2201*] must be satisfied if the contract, as modified, is within the statute's provisions [*Com. Code § 2209(3)*; *see* Ch. 530, *Statute of Frauds*].

[3] Waiver

When an attempt at modification or rescission does not satisfy the writing requirements of *Com. Code § 2209(2)* or *(3)*, it nevertheless can operate as a waiver [*Com. Code § 2209(4)*]. A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification, received by the other party, indicating that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver [*Com. Code § 2209(5)*].

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[Reserved]

§§ 500.23[Reserved]

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§ 500.30 General Obligations

The obligation of the seller is to transfer and deliver and the buyer's obligation is to accept [*Com. Code § 2606*] and pay in accordance with the contract [*Com. Code § 2301*]. To determine what is "in accordance with the contract," usage of trade, course of dealing and performance, and the general background of circumstances must be given due consideration in conjunction with the lay meaning of the words used to define the scope of the conditions and duties [*see* UCC Comment to *Com. Code § 2301*].

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§ 500.31 Parol Evidence

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to the terms included in that writing may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented by course of dealing or usage of trade [*Com. Code § 1303(b), (c)*] or by course of performance [*Com. Code §§ 1303(a), 2202(a)*; *see § 500.32[1]*], and by evidence of consistent additional terms, unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement [*Com. Code § 2202(b)*; *see Com. Code § 2207*].

The Commercial Code alters the parol evidence rule by rejecting both the premise that the language used in the agreement or contract has the meaning attributable to it by rules of legal construction rather than the meaning which arises out of the commercial context in which it was used and the requirement that as a condition precedent to the admissibility of evidence of course of dealing, usage of trade, or course of performance the court determine that the language used in the writing be ambiguous [*see* UCC Comment to *Com. Code § 2202*]. More fundamentally, the Code alters the rule by assuming that the contract does not express the full agreement of the parties unless the court expressly so finds [*see* Cal. Code Comment to *Com. Code § 2202*; *see also Civ. Code §§ 1625, 1647*; *Code Civ. Proc. §§ 1856, 1857*]. Moreover, if the court determines that the additional terms are such that, if agreed on, they would certainly have been included in the document, then evidence of their alleged making must not be considered by the trier of fact [*see* UCC Comment to *Com. Code § 2202*].

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44-500 California Forms of Pleading and Practice--Annotated § 500.32

§ 500.32 Performance

[1] Course of Performance

A course of performance is a sequence of conduct between the parties to a particular transaction that exists if (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection [*Com. Code § 1303(a)*]. The express terms of the agreement and any course of performance, as well as any course of dealing and usage of trade, are construed whenever reasonable as consistent with each other; but when that construction is unreasonable, express terms control course of performance and course of performance controls both course of dealing and usage of trade [*Com. Code § 1303(e)*]. Subject to the provisions of *Com. Code § 2209*[*see* discussion in *§ 500.22*], course of performance is relevant to show a waiver or modification of any term inconsistent with that course of performance [*Com. Code § 1303(f)*].

[2] Specification of Particulars of Performance

An agreement for sale which is otherwise sufficiently definite [*Com. Code § 2204(3)*] to be a contract is not made invalid because it leaves particulars of performance to be specified by one of the parties, although any specification must be made in good faith and within limits set by commercial reasonableness [*Com. Code § 2311(1)*]. The agreement which permits one party to specify certain particulars of performance may be found in a course of dealing, usage of trade, or by implication from circumstances, as well as in the explicit language used by the parties [*see* UCC Comment to *Com. Code § 2311*].

Specifications or arrangements relating to shipment are at the seller's option, except as otherwise provided in *Com. Code § 2319(1)(c),(3)* (F.O.B. and F.A.S. terms) [*see* discussion in *§ 500.52[5][a]*], and specifications relating to assortment of the goods are at the buyer's option, unless otherwise agreed [*Com. Code § 2311(2)*], not only under the parties' express terms but in the light of the background and circumstances in which they entered into the agreement [*see* UCC Comment to *Com. Code § 2311*].

If specifications relating to assortment of the goods or to shipment which would materially affect the other party's

performance are not seasonably made, or if one party's cooperation which is necessary to the agreed performance of the other is not seasonably forthcoming, the other party, in addition to all other remedies, is excused for any resulting delay in his or her own performance [*Com. Code § 2311(3)(a)*] and in addition, may either proceed to perform in any reasonable manner or, after the time for a material part of his or her own performance, treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods [*Com. Code § 2311(3)*]. These remedies are not available to the party adhering to the terms of the contract, however, if the situation falls within the scope of *Com. Code § 2614*, discussed in *§ 500.32[4]*.

[3] Right to Assurance

A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party, the other may, in writing, demand adequate assurance of due performance. Until receiving that assurance, the other party may, if commercially reasonable, suspend any performance for which he or she has not already received the agreed return by holding up performance pending the outcome of the demand, including holding up any preparatory action [*see Com. Code § 2609(1)*; UCC Comment to *Com. Code § 2609*]. Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered is determined according to commercial standards [*Com. Code § 2609(2)*]. Under commercial standards and in accordance with commercial practice, a ground for insecurity need not arise from or be directly related to the contract in question, because the law as to "dependence" or "independence" of promises within a single contract does not control the application of *Com. Code § 2609* [*see* UCC Comment to *Com. Code § 2609*]. In any case, acceptance of any improper delivery or payment does not prejudice the aggrieved party's right [*Com. Code § 1201(b)(34)*] to demand adequate assurance of future performance [*Com. Code § 2609(3)*].

After receipt of a justified demand, failure to provide, within a reasonable time not exceeding 30 days, reasonable assurance of due performance which is adequate under the circumstances of the particular case is a repudiation of the contract [*Com. Code § 2609(4)*]. A party who fails to provide that assurance may retract the repudiation, unless the aggrieved party has acted on the breach in some manner [*see* UCC Comment to *Com. Code § 2609*; *Com. Code § 2611*].

In addition to the protection given by statute when a ground for insecurity arises, a party may be given wide powers to cancel or readjust the contract when a ground for insecurity arises. This contract protection, however, must be read in light of the good faith obligation which is not subject to modification by agreement [*Com. Code § 1302(b)*], and any clause seeking to set up arbitrary standards for action is ineffective [*see* UCC Comment to *Com. Code § 2609*].

[4] Substituted Performance When Agreed Performance Impracticable

If, without fault [*Com. Code § 1201(b)(17)*] of either party, the agreed berthing, loading, or unloading facilities fail, an agreed type of carrier becomes unavailable, or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, that substitute performance must be tendered and accepted [*Com. Code § 2614(1)*].

If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery, unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive, or predatory [*Com. Code § 2614(2)*].

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§ 500.33 Price

[1] Manner of Payment

The price can be made payable in money or otherwise. If it is payable in whole or in part in goods, each party is a seller of the goods which he or she is to transfer [*Com. Code § 2304(1)*]. When all or part of the price is payable in an interest in realty, the transfer of the goods and the seller's obligations with reference to them are subject to Division 2, but not the transfer of the interest in realty or the transferor's obligations in connection with realty [*Com. Code § 2304(2)*; *see also* discussions in *§ 500.35[3]* and *[4]*].

[2] Open Price Term

The parties, if they so intend, can conclude a contract for sale even though the price is not settled. In that case, the price is a reasonable price at the time for delivery if any of the following is true [*Com. Code § 2305(1)*]:

- Nothing is said as to price.
- The price is left to be agreed by the parties and they fail to agree.
- The price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.

Thus, an agreement is not unenforceable on the ground of indefiniteness because the price term is left open if the parties intend a binding agreement [*see also* discussion in *§ 500.20[1]*; for a form for use in an action on a contract with an open price term, *see § 500.101*].

A price to be fixed by the seller or buyer means a price to be fixed in good faith [*Com. Code § 2305(2)*; *see Com. Code § 1201(b)(20)*]. But in the normal case, a "posted price" or a future seller's or buyer's "given price," "price in effect," "market price," or the like satisfies the good faith requirement [*see* UCC Comment to *Com. Code § 2305*]. When a price left to be fixed in a way other than by agreement of the parties fails to be fixed through fault of one party, the other

party has the option to treat the contract as canceled or to fix a reasonable price [*Com. Code § 2305(3)*].

If, however, the parties intend not to be bound unless the price is fixed or agreed, and it is not fixed or agreed, there is no contract [*see § 500.121*(form for affirmative defense)]. In that case the buyer must return any goods already received or if unable to do so, must pay their reasonable value at the time of delivery, and the seller must return any portion of the price paid on account [*Com. Code § 2305(4)*].

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§ 500.34 Quantity

[1] When Quantity Must Be in Writing

The UCC makes no specific provision for supplying the quantity term in an agreement when none has been agreed to by the parties, except in the case of output and requirements contracts [*see Com. Code § 2306* and discussion in [2], *below*; *but see* also *Com. Code § 1201(b)(3)* and the discussion in *§ 500.20[1]*]. In any case, a contract for the sale of goods for the price of $500 or more is not enforceable under the statute of frauds beyond the quantity of goods shown in a writing [*Com. Code § 2201(1)*] or admitted [*Com. Code § 2201(3)(b)*]. Thus, while it need not be accurately stated, the quantity term is the only term which must appear in the writing [*see* UCC Comment to *Com. Code § 2201*].

[2] Output and Requirements Contracts

A term which measures the quantity by the output of the seller or the requirements of the buyer means the actual output or requirements that may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or, in the absence of a stated estimate, to any normal or otherwise comparable prior output or requirements, may be tendered or demanded [*Com. Code § 2306(1)*; *see also Shea-Kaiser-Lockheed-Healy v. Department of Water & Power (1977) 73 Cal. App. 3d 679, 687-688, 140 Cal. Rptr. 884]* . For further discussion and a form for use in an action on a requirements contract, see *§ 500.102*.

A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes, unless otherwise agreed, an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale [*Com. Code § 2306(2)*]. Parties to these contracts are held to have impliedly, even when not expressly, bound themselves to use reasonable diligence as well as good faith in their performance [*see* UCC Comment to *Com. Code § 2306*]. In the case of a seller's breach of an output and requirements contract involving a limited source or market, specific performance is the typical remedy [*see* UCC Comment to *Com. Code § 2716* and discussion in *§ 500.76[5]*].

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§ 500.35 Delivery

[1] General Rule

Unless otherwise agreed, all goods called for by a contract for sale must be tendered in a single delivery, and payment is due only on tender. However, if the circumstances give either party the right to make or demand delivery in lots [*see Com. Code § 2105(5)*, discussed in *§ 500.11[2]*], the price, if it can be apportioned, may be demanded for each lot [*Com. Code § 2307*]. A partial delivery under circumstances when it is not commercially feasible to deliver or to receive the goods in a single lot is not subject to rejection for a defect in quantity alone, unless the circumstances indicate a repudiation or default by the seller as to the expected balance or do not give the buyer ground for suspending his or her performance because of insecurity [*see* UCC Comment to *Com. Code § 2307*].

[2] Place

Unless otherwise agreed, the place for delivery of goods is the seller's place of business, or if the seller has none, the seller's residence [*Com. Code § 2308(a)*]. But, in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery [*Com. Code § 2308(b)*]. Documents of title [*Com. Code § 1201(b)(16)*] may be delivered through customary banking channels [*Com. Code § 2308(c)*].

[3] Tender of Delivery and Payment

[a] Two Senses in Which "Tender" Is Used

"Tender" may be used in Division 2 in two different senses. Unless the context indicates otherwise, it refers to "due tender," which contemplates an offer coupled with a present ability to fulfill all the conditions resting on the tendering party and must be followed by actual performance if the other party shows himself or herself ready to proceed. At other times it is used to refer to an offer of goods or documents under a contract as if in fulfillment of its conditions, even though there is a defect when measured against the contract obligation. Used in either sense, however, "tender" connotes performance by the tendering party which puts the other party in default by failing to proceed in some manner

[*see* UCC Comment to *Com. Code § 2503*].

[b] General Requirements for Tender

Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable the buyer to take delivery. The manner, time, and place for tender are determined by the agreement and by *Com. Code § 2501 et seq.* (performance) [*Com. Code § 2503(1)*]. In particular, tender must be at a reasonable hour, and if it is of goods, they must be kept available for the period reasonably necessary to enable the buyer to take possession [*Com. Code § 2503(1)(a)*], but unless otherwise agreed, the buyer must furnish facilities reasonably suited to the receipt of the goods [*Com. Code § 2503(1)(b)*]. Usage of the trade and the circumstances of the particular case determine what is a reasonable hour for tender and what constitutes a reasonable period of holding the goods available [*see* UCC Comment to *Com. Code § 2503*].

If the case is within *Com. Code § 2504* respecting shipment by the seller [*see* discussion in [5], *below*], tender requires that the seller comply with its provisions [*Com. Code § 2503(2)*]. If the seller is required to deliver at a particular destination, tender requires that the seller comply with *Com. Code § 2503(1), above*, and also, in any appropriate case, tender documents as described in *Com. Code § 2503(4),(5)* [*Com. Code § 2503(3)*]. However, the seller is not obligated to deliver at a named destination and bear the concurrent risk of loss until arrival, unless he or she has specifically agreed to so deliver or the commercial understanding of the terms used by the parties contemplates such delivery [*see* UCC Comment to *Com. Code § 2503*].

[c] Tender of Goods in Possession of Bailee

If goods are in the possession of a bailee [*see Com. Code § 7102(a)(1)*] and are to be delivered without being moved, tender requires that the seller either tender a negotiable document of title covering those goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods [*Com. Code § 2503(4)(a)*]. However, tender to the buyer of a nonnegotiable document of title or of a record directing to the bailee to deliver is sufficient tender unless the buyer seasonably objects, receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons. Risk of loss of the goods and of any failure by the bailee to honor the nonnegotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender [*Com. Code § 2503(4)(b)*].

If the contract requires the seller to deliver documents [*see Com. Code § 1201(b)(15)*], the seller must tender all documents in correct form, except as provided in *Com. Code § 2323(2)* with respect to bills of lading [*Com. Code § 1201(b)(6)*] in a set [*Com. Code § 2503(5)(a)*]. Tender through customary banking channels is sufficient. Dishonor of a draft [*Com. Code §§ 3104, 3502*] accompanying or associated with the documents constitutes nonacceptance or rejection [*Com. Code § 2503(5)(b)*].

[4] Tender of Deliver and Payment as Conditions

Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed (as when payment in advance has been promised or a letter of credit term included), to the buyer's duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract [*Com. Code § 2507(1)*; *see* UCC Comment to *Com. Code § 2507*]. If payment is due and demanded on the delivery to the buyer of goods or documents of title, the buyer's right as against the seller to retain or dispose of them is conditional on his or her making the payment due [*Com. Code § 2507(2)*].

Unless otherwise agreed, tender of payment is a condition to the seller's duty to tender and complete any delivery [*Com. Code § 2511(1)*]. This requirement is applicable to noncommercial sales generally, to ordinary sales at retail, to

documentary contracts in general, and to contracts which anticipate shipment by the seller but contain no term on time and manner of payment. It has no application, however, to the great body of commercial contracts which carry credit terms [*see* UCC Comment to *Com. Code § 2511*]. Tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it [*Com. Code § 2511(2)*].

Subject to the provisions of the Commercial Code on the effect of an instrument on an obligation [*Com. Code § 3310*], payment by check [*Com. Code § 3104*] is conditional and is defeated as between the parties by dishonor of the check on due presentment [*Com. Code § 2511(3)*].

[5] Shipment

If the seller is required or authorized to send the goods to the buyer and the contract does not require delivery at a particular destination, then unless otherwise agreed, the seller must put the goods in the possession of a carrier and make a contract for their transportation that is reasonable with regard to the nature of the goods and other circumstances of the case [*Com. Code § 2504(a)*]. The seller must also obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade [*Com. Code § 2504(b)*]. In addition, the seller must promptly notify the buyer of the shipment [*Com. Code § 2504(c)*].

Failure to notify the buyer, however, or to make a proper contract for transportation is a ground for rejection only if material delay or loss ensues [*Com. Code § 2504(c)*]. A standard and acceptable manner of notification in open credit shipments is the sending of an invoice and, in the case of documentary contracts, is the prompt forwarding of the documents as provided under *Com. Code § 2504(b), above* [*see* UCC Comment to *Com. Code § 2504*].

[6] Shipment Under Reservation

If the seller has identified goods to the contract by or before shipment, the seller's procurement of a negotiable bill of lading to his or her own order or otherwise reserves in him or her a security interest [*Com. Code § 1201(b)(35)*] in the goods; the seller's procurement of the bill to the order of a financing agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named [*Com. Code § 2505(1)(a)*]. A nonnegotiable bill of lading to the seller or his or her nominee reserves possession of the goods as security, but except in a case of conditional delivery [*Com. Code § 2507(2)*], a nonnegotiable bill of lading naming the buyer as consignee [*see Com. Code § 7102(a)(3)*] reserves no security interest even though the seller retains possession or control of the bill of lading [*Com. Code § 2505(1)(b)*]. When shipment by the seller with reservation of a security interest is in violation of the contract for sale, it constitutes an improper contract for transportation within *Com. Code § 2505(1)* but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder [*Com. Code § 1201(b)(21)*] of a negotiable document of title [*Com. Code § 2505(2)*].

[7] Rights of Financing Agency

A financing agency, by paying or purchasing for value [*Com. Code § 1201(b)(29), 1204*] a draft which relates to a shipment of goods, acquires, to the extent of the payment or purchase and in addition to its own rights under the draft and document of title securing it, any rights of the shipper in the goods, including the right to stop delivery and the shipper's right to have the draft honored by the buyer [*Com. Code § 2506(1)*]. A draft which "relates to a shipment of goods" is a broad term which particularly covers the case of a draft against an invoice or against a delivery order. It is unnecessary that there be an explicit assignment of the invoice attached to the draft to bring the transaction within the reason of *Com. Code § 2506(1)*. The rights of the shipper of the goods which are acquired by the financing agency are merely security rights and are subject to the buyer's right to force delivery on tender of the price [*see* UCC Comment to *Com. Code § 2506*].

The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular [*Com. Code § 2506(2)*].

"Financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany or are associated with the draft. "Financing agency" includes also a bank or other person who similarly intervenes between persons who are in the position of seller [*see Com. Code § 2707*] and buyer in respect to the goods [*Com. Code § 2104(2)*].

[8] Improper Delivery and Cure by Seller

When any tender or delivery by the seller is rejected because it is nonconforming, and the time for performance has not yet expired, the seller may seasonably notify the buyer of his or her intention to cure and may then, within the contract time, make a conforming delivery [*Com. Code § 2508(1)*]. Even a seller who has taken back the nonconforming goods and refunded the purchase price may still make a good tender within the contract period [*see* UCC Comment to *Com. Code § 2508*].

When the buyer rejects a nonconforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance [*see Com. Code § 1201(b)(24)*], the seller may, by seasonally notifying the buyer, have a further reasonable time to substitute a conforming tender [*Com. Code § 2508(2)*]. Reasonable grounds can lie in prior course of dealing, course of performance, or usage of trade, as well as in the particular circumstances surrounding the making of the contract. However, the seller is charged with commercial knowledge of any factors in a particular sales situation, including implicit or express notice given by the buyer, which require the seller to comply strictly with his or her obligations under the contract [*see* UCC Comment to *Com. Code § 2508*].

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§ 500.36 Time

The time for shipment or delivery or any other action under a contract, if not provided in Division 2 or agreed on, is a reasonable time [*Com. Code § 2309(1)*]. What is a "reasonable time" [*Com. Code § 1205*] depends on what constitutes acceptable, commercial conduct in view of the nature, purpose, and circumstances of the action to be taken; the time for payment, if not agreed on, is related to the time for delivery [*see* UCC Comment to *Com. Code § 2309* and the discussion in *§ 500.35[3]* and *[4]*].

If the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but, unless otherwise agreed, may be terminated at any time by either party [*Com. Code § 2309(2)*]. Termination of a contract by one party, except on the happening of an agreed event, requires that reasonable notification be received by the other party, and an agreement dispensing with notification is invalid if its operation would be unconscionable [*Com. Code § 2309(3)*].

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§ 500.37 When Payment Is Due

[1] If No Time for Payment Is Specified

Payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery [*Com. Code § 2310(a)*]. Because the receipt of goods rather than delivery is a concurrent condition with payment, the buyer has an opportunity to inspect the goods before making payment, even though under the delivery term the risk of loss may have previously passed to the buyer or the running of the credit period has already started [*see* Cal. Code Comment and UCC Comments to *Com. Code § 2310*].

Although a seller who is authorized to send the goods may ship them under reservation and may tender the documents of title, the buyer may inspect the goods after their arrival [*Com. Code § 2513*] and before payment is due, unless inspection is inconsistent with the terms of the contract [*Com. Code § 2310(b)*]. If delivery is authorized and made by way of documents of title otherwise than by *Com. Code § 2310(b)*, then payment is due, regardless of where the goods are to be received [*Com. Code § 2310(c)*]:

- At the time and place at which the buyer is to receive delivery of tangible documents.
- At the time the buyer is to receive delivery of electronic documents
- At the seller's place of business or, if none, the seller's residence.

If the seller is required or authorized to ship the goods on credit, the credit period runs from the time of shipment, but postdating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period [*Com. Code § 2310(d)*].

For discussion of the rights of a buyer who has made partial or complete payment and has a special property interest under *Com. Code § 2501* (identification of goods to the contract, discussed in *§ 500.51*) if the seller becomes insolvent, or in the case of consumer goods, repudiates or fails to deliver as required by the contract, see *Com. Code § 2502*,

discussed in *§ 500.74[3]*.

[2] Buyer's Right of Inspection

Unless otherwise agreed, and subject to *Com. Code § 2513(3)*, the buyer has a right, before payment or acceptance, to inspect goods at any reasonable place and time and in any reasonable manner, where they are tendered, delivered, or identified to the contract for sale. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival [*Com. Code § 2513(1)*]. Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected [*Com. Code § 2513(2)*]. Unless otherwise agreed, and subject to the provisions of *Com. Code § 2321(3)* on C.I.F. contracts [*see* discussion in *§ 500.52[5][b]*], the buyer is not entitled to inspect the goods before payment of the price when the contract provides for delivery "C.O.D." or on other like terms [*Com. Code § 2513(3)(a)*] or for payment against documents of title, except when that payment is due only after the goods are to become available for inspection [*Com. Code § 2513(3)(b)*].

A place or method of inspection fixed by the parties is presumed to be exclusive, but unless otherwise expressly agreed, it does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection is as provided in *Com. Code § 2513*, discussed above, unless the place or method fixed was clearly intended as an indispensable condition, failure of which avoids the contract [*Com. Code § 2513(4)*].

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§ 500.38 Sale on Approval and Sale or Return

A transaction is a "sale on approval" if the goods are delivered primarily for use, and unless otherwise agreed, they may be returned by the buyer even though they conform to the contract [*Com. Code § 2326(1)(a)*]. Although the goods are delivered to the proposed purchaser, they remain the property of the seller until the buyer accepts them. The buyer's willingness to receive and test the goods is the consideration for the seller's engagement to deliver and sell [*see* UCC Comment 1 to *Com. Code § 2326*]. Goods held on approval are not subject to the claims of the buyer's creditors until acceptance [*Com. Code § 2326(2)*].

An ordinary retail sale, in which the seller gives the buyer a privilege to return the goods and get a refund, is not a "sale on approval" of the kind contemplated by *Com. Code § 2326*. In order for a sale to be a sale on approval under that code section, there must be some provision or objective fact demonstrating the parties' intent that, whether or not the buyer has paid any amount before the goods are shipped or delivered, the goods do not belong to the buyer until the buyer approves them. In such a case, the seller's rights in the goods are superior to the rights of the buyer's creditors until the approval period has passed. On the other hand, a retailer's practice of permitting a customer to return goods for a refund is merely a benefit to the customer. That does not in and of itself suggest that the parties intended the seller to retain an interest in the goods until some time after they have been delivered to the customer, and does not convert a routine sale with a right to return into a sale on approval [*Wilson v. Brawn of Cal., Inc. (2005) 132 Cal. App. 4th 549, 559-560, 33 Cal. Rptr. 3d 769]* .

A transaction is a "sale or return" if the goods are delivered primarily for resale, and unless otherwise agreed, they may be returned by the buyer even though they conform to the contract [*Com. Code § 2326(1)(b)*]. Goods held on sale or return are subject to the claims of the buyer's creditors while in the buyer's possession [*Com. Code § 2326(2)*]. Any "or return" term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of Division 2 (*Com. Code § 2201*) and as contradicting the sale aspect of the contract within the provisions of Division 2 on parol or extrinsic evidence (*Com. Code § 2202*) [*Com. Code § 2326(3)*]. A "sale or return" typically is a sale to a merchant whose unwillingness to buy is overcome by the seller's engagement to take back the goods (or any commercial unit of the goods) in lieu of payment if they fail to be resold. "Sale on approval" and "sale or return" are so strongly delineated in practice and in general understanding that every presumption runs against delivery to a consumer

being a "sale or return" and against a delivery to a merchant for resale being a "sale on approval" [*see* UCC Comment 1 to *Com. Code § 2326*].

Although the goods are identified to the contract under a sale on approval, the risk of loss and the title do not pass to the buyer until acceptance, unless otherwise agreed [*Com. Code § 2327(1)(a)*]. Unless otherwise agreed, use of the goods consistent with the purpose of trial is not acceptance, but failure to notify the seller seasonably of election to return the goods is acceptance. If the goods conform to the contract, acceptance of any part is acceptance of the whole [*Com. Code § 2327(1)(b)*]. After due notification of election to return, the return is at the seller's risk and expense, but a merchant must follow any reasonable instructions, unless otherwise agreed [*Com. Code § 2327(1)(c)*].

Unless otherwise agreed, under a sale or return the option to return extends to the whole or any commercial unit [*Com. Code § 2105(6)*] of the goods while in substantially their original condition, but the option must be exercised seasonably, and the return is at the buyer's risk and expense [*Com. Code § 2327(2)*].

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§ 500.39 Consignments of Consumer Goods

Certain true consignments were governed by former *Com. Code § 2326(3)* and *(5)*. Consignments to merchants are now governed by revised Division 9 [*Com. Code § 9109(a)(4)*], are defined in *Com. Code § 9102(a)(20)*, and are discussed in *Ch. 503, Sales: Secured Transactions, §§ 503.11[7]* and *503.46*. Consignments of goods that were consumer goods immediately before delivery to the consignee are now governed by *Com. Code § 2326(4)*, which provides that if a person delivers or consigns for sale goods which the person used or bought for use for personal, family, or household purposes, these goods do not become the property of the consignee unless the consignee purchases and fully pays for the goods [*Com. Code § 2326(4)*]. Nothing in *Com. Code § 2326(4)* prevents the consignee from acting as the deliverer's agent to transfer title to these goods to a buyer who pays the full purchase price. Any payment received by the consignee from a buyer of these goods, less any amount which the deliverer expressly agreed could be deducted from the payment for commissions, fees, or expenses, is the property of the deliverer and is not subject to the claims of the consignee's creditors [*Com. Code § 2326(4)*].

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[Reserved]

§§ 500.40[Reserved]

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§ 500.50 General Rules for Allocation of Risk

The rules governing allocation of risk under Division 2 are controlled by the issues that arise between seller and buyer in terms of performance or nonperformance under the contract for sale and not in terms of whether or not title to the goods has passed [*see* UCC Comment to *Com. Code § 2401*]. The concept of title, which is governed by *Com. Code §§ 2401-2403*, is significant only as it affects the definition of a sale [*Com. Code § 2106(1)*; see discussion in *§ 500.11[4]*], which determines the issue of which transactions are covered by Division 2 [*see Com. Code § 2102*].

If Division 2 allocates a risk or a burden as between the parties "unless otherwise agreed," the agreement may not only shift the allocation but may also divide the risk or burden [*Com. Code § 2303*]. The risk or burden may be divided by the express terms of the agreement or by the attending circumstances, because the circumstances surrounding a transaction, as well as the express language used by the parties, enter into the meaning and substance of the agreement [*see* UCC Comment to *Com. Code § 2303*].

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§ 500.51 Insurable Interest in Goods

The buyer obtains a special property and an insurable interest in goods identified as goods to which the contract refers, even if the identified goods are nonconforming. In the absence of an explicit agreement, identification occurs in existing and identified goods when the contract is made and in future goods when the goods are designated by the seller as goods to which the contract refers, except for unborn young and future crops in which case identification occurs when the crops become growing crops or the young are conceived [*Com. Code § 2501(1)(a),(b)*]. There is no requirement, however, that the goods be in a deliverable state or that all of the seller's duties with respect to the processing of the goods be completed in order that identification occur. For example, despite identification, the risk of loss remains on the seller under the risk of loss provisions until completion of his or her duties as to the goods, and all of the seller's remedies remain dependent on not defaulting under the contract [*see* UCC Comment to *Com. Code § 2501*].

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§ 500.52 Risk of Loss in Absence of Breach

[1] General Rule

Risk of loss in the absence of breach by either party is governed by contract rather than by the use of title passage or property passage [*see* Cal. Code Comment and UCC Comment to *Com. Code § 2509*]. Unless the parties agree otherwise, *Com. Code § 2509* provides the rules to be applied to the issue of risk of loss depending on the type of delivery anticipated by the contract [*Com. Code § 2509(4)*; see [2]-[4], *below*].

[2] Shipment by Carrier

If the contract requires or authorizes the seller to ship the goods by carrier and does not require the seller to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier, even though the shipment is under reservation [*Com. Code § 2509(1)(a)*; *see* discussion in *§ 500.35[6]*].

If the contract does require the seller to deliver the goods at a particular destination and the goods are duly tendered there while in the possession of the carrier, the risk of loss passes to the buyer when the goods are tendered there so as to enable the buyer to take delivery [*Com. Code § 2509(1)(b)*].

[3] Goods Held by Bailee

If the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer on receipt of possession or control of a negotiable document of title covering the goods; on acknowledgment by the bailee of the buyer's right to possession of the goods; or after the buyer's receipt of possession or control of a nonnegotiable document of title or other direction to deliver in a record, as provided in *Com. Code § 2503(4)(b)* [*Com. Code § 2509(2)(a)-(c)*].

[4] Other Situations

In any case in which the contract does not require or authorize the seller to ship the goods by carrier or in which the

goods are not held by a bailee to be delivered without being moved, the risk of loss passes to the buyer on receipt of the goods if the seller is a merchant; otherwise, the risk passes to the buyer on tender of delivery [*Com. Code § 2509(3)*].

[5] UCC Rules Governing Shipment

[a] F.O.B. and F.A.S.

The general rules set out in *Com. Code § 2509* for allocating the risk of loss in the absence of breach are subject to the parties' agreement and special terms governing shipment that the parties may use which are set out in Division 2 and discussed below.

"F.O.B." (free on board) and "F.A.S." (free alongside) are delivery terms commonly used in sales contracts, the use of which affect a variety of rights and obligations. *Com. Code § 2319* specifies the duties of a seller who engages to deliver F.O.B. or F.A.S. When delivery is F.O.B. seller's city [*Com. Code § 2319(1)(a)*], the obligation is a shipment contract and the allocation of risk is governed by *Com. Code § 2509(1)(a)*, discussed in *§ 500.52[2]* when it is F.O.B. buyer's city [*Com. Code § 2319(1)(b)*] the obligation creates a destination contract, under which risk is governed by *Com. Code § 2509(1)(b)*, also discussed in [2], *above*.

[b] C.I.F. and C. & F.

Com. Code § 2320 governs the obligations of buyers and sellers under "C.I.F." and "C. & F." contracts. "C.I.F." means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term "C. & F." (or C.F.) means that the price so includes cost and freight to the named destination [*Com. Code § 2320(1)*]. The C.I.F. contract is not a destination but a shipment contract with risk of subsequent loss or damage to the goods passing to the buyer on shipment if the seller has properly performed all obligations with respect to the goods. Delivery to the carrier is delivery to the buyer for purposes of risk and title [*see* UCC Comment to *Com. Code § 2320*].

"C.I.F." is a term usually found in contracts between merchants. While "C.I.F." is not commonly used in consumer mail-order or Internet sales, the same result as under a standard C.I.F. contract--the buyer bears the risk of loss in transit even though the cost of insurance is rolled into the purchase price and is in fact paid by the seller--would follow from the practice of expressly requiring the buyer to pay for transit insurance as part of the total price for the sale [*Wilson v. Brawn of Cal., Inc. (2005) 132 Cal. App. 4th 549, 556-557, 33 Cal. Rptr. 3d 769]* .

[c] Ex-Ship

The delivery term "ex-ship" (from the carrying vessel) [*Com. Code § 2322(1)*], as between seller and buyer, is the reverse of the term F.A.S. [*see* UCC Comment to *Com. Code § 2322* and the discussion under [a], *above*]. Under an "ex-ship" term, unless otherwise agreed, the risk of loss does not pass to the buyer until the goods leave the ship's tackle or are otherwise properly unloaded [*Com. Code § 2322(2)(b)*].

[d] Overseas

A shipment by water or by air or a contract contemplating a shipment by water or air is "overseas" insofar as by usage of trade or agreement it is subject to the commercial, financing, or shipping practices characteristic of international deep-water commerce [*Com. Code § 2323(3)*]. The parties' obligations with respect to documents in "overseas" shipments, if they have not agreed otherwise, are set out in *Com. Code § 2323*.

[6] Casualty to Identified Goods

When the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, the contract is avoided if loss is total. If

loss is partial or the goods no longer conform to the contract, the buyer is relieved from his or her obligation but may demand inspection and has the option of taking the surviving goods at a fair adjustment without further right against the seller or treating the contract as avoided [*Com. Code § 2613*]. Fault includes negligence as well as willful wrong and *Com. Code § 2613* applies if the goods were already destroyed at the time of contracting without the knowledge of either party or are destroyed subsequently but before the risk of loss passes to the buyer [*see* UCC Comment to *Com. Code § 2613*]. The rights of the buyer under *Com. Code § 2613* also apply in a proper case under a "no arrival, no sale" term [*Com. Code § 2324*] if the goods arrive after the time provided in the contract.

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§ 500.53 Effect of Breach

If the seller breaches the contract by tendering or delivering goods which do not conform to the contract, the risk of loss remains on the seller until cure or acceptance [*Com. Code § 2510(1)*]. If there has been a breach and the aggrieved party is in control of the goods, the extent of any deficiency in the effective insurance coverage of the aggrieved party falls on the breaching party [*Com. Code § 2510(2),(3)*; *see* UCC Comment to *Com. Code § 2510*].

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[Reserved]

§§ 500.54[Reserved]

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44-500 California Forms of Pleading and Practice--Annotated § 500.60

§ 500.60 Buyer's Options Concerning Nonconforming Goods

[1] Rejection

[a] In Whole or in Part

If the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may either reject the whole [*Com. Code § 2601(a)*; *see § 500.112* (form)], accept the whole [*Com. Code § 2601(b)*], or accept any commercial unit or units and reject the rest [*Com. Code § 2601(c)*], subject to the provisions of *Com. Code § 2612* (breach in installment contracts) and unless otherwise agreed under *Com. Code §§ 2718, 2719* (contractual limitations of remedy) [*Com. Code § 2601*]. The buyer is not penalized by the loss of any remedy otherwise open to him or her by accepting a nonconforming tender [*see* UCC Comment to *Com. Code § 2601*].

Rejection of goods must be within a reasonable time after their delivery or tender and is ineffective unless the buyer seasonably notifies the seller [*Com. Code § 2602(1)*]. What constitutes a reasonable time must be viewed in light of the provisions of Division 2 dealing with the right to inspection of the goods [*see* UCC Comment to *Com. Code § 2602*; *§ 500.37*].

Subject to the provisions of *Com. Code §§ 2603, 2604* (rejected goods), any exercise of ownership by the buyer after rejection with respect to any commercial unit is wrongful as against the seller [*Com. Code § 2602(2)(a)*]. A buyer who has, before rejection, taken physical possession of goods in which he or she does not have a security interest under *Com. Code § 2711(3)* is required after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them [*Com. Code § 2602(2)(b)*]. Otherwise, the buyer has no further obligations with regard to goods rightfully rejected [*Com. Code § 2602(2)(c)*].

If the seller has made a tender which in all respects conforms to the contract, the buyer has a positive duty to accept, and failure to do so constitutes a wrongful rejection, which gives the seller the immediate remedies for breach set out in *Com. Code § 2703* [*see* UCC Comment to *Com. Code § 2602*; *§ 500.75[1]*].

[b] Failure to Particularize

The buyer's failure to state, in connection with rejection, a particular defect which is ascertainable by reasonable inspection, precludes him or her from relying on the unstated defect to justify rejection or to establish breach if the seller could have cured it if stated seasonably [*Com. Code § 2605(1)(a)*; *see Lockheed Electronics Co. v. Keronix, Inc. (1981) 114 Cal. App. 3d 304, 314-315, 170 Cal. Rptr. 591* (failure to object precluded on defect)]. A failure to justify rejection or to establish breach is also precluded between merchants when the seller has, after rejection, made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely [*Com. Code § 2605(1)(b)*; *see § 500.112[2] -[3]*].

Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent in the documents [*Com. Code § 2605(2)*]. When payment is required against the documents, they must be in inspected before payment, and the payment then constitutes acceptance of the documents [*see* UCC Comment to *Com. Code § 2605*].

[c] Obligations Respecting Rejected Goods

Subject to any security interest in the buyer under *Com. Code § 2711(3)*, when the seller has no agent or place of business at the market of rejection, a merchant buyer is under a duty, after rejection of goods in his or her possession or control, to follow any reasonable instructions received from the seller with respect to the goods, and in the absence of such instructions, to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if, on demand, indemnity for expenses is not forthcoming [*Com. Code § 2603(1)*]. The limitations on the buyer's duty to resell are to be liberally construed, and in effect, the measure of the buyer's control is whether or not he or she can practicably effect control without undue commercial burden. A buyer who fails to make a salvage sale when under a duty to do so has arisen is subject to a claim for damages [*see* UCC Comment to *Com. Code § 2603*].

A buyer who sells goods under *Com. Code § 2603(1)* is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission, to a commission that is usual in the trade or if there is none, to a reasonable sum not exceeding 10 percent on the gross proceeds [*Com. Code § 2603(2)*]. In complying with *Com. Code § 2603*, such as in determining if the value of the goods is sufficiently threatened to justify a quick resale, or the buyer has waited a sufficient length of time for instructions, or what a reasonable means and place of resale is, the buyer is held only to good faith, and good faith conduct under that statute is neither acceptance, conversion, nor the basis of an action for damages [*Com. Code § 2603(3)*; *see* UCC Comment to *Com. Code § 2603*].

Subject to the provisions of *Com. Code § 2603(1)* on perishables, if the seller gives no instructions within a reasonable time after notification of rejection, the buyer may store the rejected goods for the seller's account, reship them to the seller, or resell them for the seller's account with reimbursement as provided in *Com. Code § 2603(2)*. That action is not acceptance or conversion [*Com. Code § 2604*]. These options are conditioned on nonconformity of the goods and due notification of rejection to the seller under *Com. Code § 2602*. They are available to merchant and non-merchant buyers alike. The merchant-buyer may in some instances, however, be under a duty, rather than an option, to resell under the provisions of *Com. Code § 2603*[*see* UCC Comment to *Com. Code § 2604*].

[2] Acceptance

[a] Defined

Acceptance of goods occurs when the buyer, after a reasonable opportunity to inspect the goods, signifies to the seller that the goods are conforming or that he or she will take or retain them in spite of their nonconformity [*Com. Code § 2606(1)(a)*]. Payment made after tender is one circumstance tending to signify acceptance of the goods, but it is not

conclusive [*see* UCC Comment to *Com. Code § 2606*].

Acceptance also occurs when the buyer fails to make an effective rejection [*Com. Code § 2602(1)*] after having had a reasonable opportunity to inspect the goods [*Com. Code § 2606(1)(b)*]. When the buyer does any act inconsistent with the seller's ownership, it constitutes acceptance; if the act is wrongful as against the seller however, it is an acceptance only if the seller ratifies it [*Com. Code § 2606(1)(c)*]. Acceptance of a part of any commercial unit is acceptance of that entire unit [*Com. Code § 2606(2)*].

Under Division 2, acceptance of goods is always acceptance of identified goods which have been appropriated to the contract or are appropriated by the contract. There is no provision for acceptance of title apart from acceptance in general, because acceptance of title is not material to the detailed rights and duties of the parties [*see* UCC Comment to *Com. Code § 2606* and discussion in *§ 500.50* et seq.].

[b] Effect of Acceptance

A buyer who accepts a tender must pay at the contract rate for any goods accepted [*Com. Code § 2607(1)*]. In cases of partial acceptance, the price of any part accepted is, if possible, to be reasonably apportioned, to be determined in terms of the contract rate, which is the rate determined from the bargain in fact (the agreement) after the rules and policies of Division 2 have been applied [*see* UCC Comment to *Com. Code § 2607*].

The buyer's acceptance of goods precludes rejection of the goods accepted and, if made with knowledge of a nonconformity, cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured; acceptance, however, does not of itself impair any other remedy provided by Division 2 for nonconformity, including the buyer's rights with respect to future installments despite acceptance of any earlier nonconforming installment [*Com. Code § 2607(2)*; *see* UCC Comment to *Com. Code § 2607*].

When a tender has been accepted, the buyer must notify the seller of any breach within a reasonable time after the buyer discovers or should have discovered the breach, or be barred from any remedy [*Com. Code § 2607(3)(A)*; for discussion of the notification requirements when the seller is sued for a breach of the warranty of infringement, *see Com. Code § 2607(3)(B)*, discussed in Ch. 502, *Sales: Warranties*]. While the time of notification is to be determined by applying commercial standards to a merchant buyer, what constitutes a reasonable time for notification from a retail consumer is judged by the good faith standard [*see Metowski v. Traid Corp. (1972) 28 Cal. App. 3d 332, 339, 104 Cal. Rptr. 599]* . To preserve the buyer's rights, the notification need only inform the seller that the transaction is claimed to involve a breach. It need not include a clear statement of all the objections that will be relied on by the buyer nor contain a claim for damages, threat of litigation, or other resort to a remedy [*see* UCC Comment to *Com. Code § 2607*]. The buyer has the burden of proving reasonable notice. The question whether notice was properly given must be determined from the particular circumstances, and when but one inference can be drawn from undisputed facts, the issue may be determined as a matter of law [*Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116, 135-136, 87 Cal. Rptr. 3d 5]* .

Under the provision which codifies the practice known as "vouching in" [*Com. Code § 2607(5)(A)*], a dealer (buyer), who is being sued in connection with a product furnished to him or her by a manufacturer (seller), may "vouch in" the manufacturer by giving the manufacturer written notice of the litigation. If the notice states that the seller may come in and defend or otherwise be bound in any action the buyer brought against him or her by any determination of fact common to the two litigations, then unless the seller, after seasonable receipt of the notice, does come in and defend, the seller is so bound [*Com. Code § 2607(5)(A)*]. This "vouching in" procedure has a collateral estoppel effect against the manufacturer if the dealer and manufacturer are both liable but the manufacturer is not joined as a defendant, as when the manufacturer is in a different jurisdiction and thus, is not able to be joined [*see* Cal. Code Comment to *Com. Code § 2607*].

In most cases, one letter from the buyer to the seller cannot double as both a breach of warranty letter under *Com. Code § 2607(3)(A)* and a "vouching in" letter under *Com. Code § 2607(5)(A)*; the vouching in letter must meet far more stringent statutory requirements. If a litigant is to be bound by application of *Com. Code § 2607(5)(A)*, due process demands that the literal requirements be strictly obeyed [*Bendix-Westinghouse Automotive Air Brake Co. v. Swan Rubber Co. (1976) 55 Cal. App. 3d 256, 261-262, 127 Cal. Rptr. 571]* . If the buyer is sued for breach of a warranty or other obligation for which his or her seller is answerable over and the claim is one for infringement or the like [*Com. Code § 2312(3)*], the original seller may demand in writing that his or her buyer turn over to the original seller control of the litigation, including settlement, or else be barred from any remedy over, and if the original seller also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer, after seasonable receipt of the demand, does turn over control, the buyer is so barred [*Com. Code § 2607(5)(B)*].

[c] Revocation of Acceptance

A buyer may revoke acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to the buyer if he or she has accepted it (1) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured or (2) without discovery of the nonconformity, if acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances [*Com. Code § 2608(1)*]. A lot is a parcel or a single article that is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract [*Com. Code § 2105(5)*]. Thus, when the goods are shipped in a single lot, the right of revocation extends to the entirety [*S & R Metals, Inc. v. C. Itoh & Co. (America) (9th Cir. 1988) 859 F.2d 814, 817* (diversity action applying California law)].

ILLUSTRATION:

Entire Shipment Constituted Lot. A shipment of steel was warranted to be of commercial quality and thus was required to pass a "bend test" according to industry custom. The shipment consisted of steel of several gauges, including 14-gauge steel, which comprised approximately 25 percent, by weight, of the shipment. Usually, a buyer will not perform the bend test on receipt of a delivery because the test, as well as being expensive, destroys or substantially harms the coil being tested. The buyer, which was in the business of selling steel in smaller lots, did not learn of the defect until one of its customers reported that the 14-gauge steel was not of commercial quality. Limited tests were run on other gauges. The buyer revoked as to the entire shipment. The seller argued that the buyer could only revoke acceptance of the "commercial lot" consisting of the 14-gauge steel, half of which was defective. Was revocation as to the entire shipment proper? Yes. The court found that the requirements of *Com. Code § 2608* were satisfied because performing the bend test would substantially reduce the value of the steel, yet without performing the test, the buyer could not be confident that it was of sufficient quality for resale. The purpose of the commercial unit provision is to protect a seller against return of components that make up less than a commercial unit and therefore have a severely reduced market value [*S & R Metals, Inc. v. C. Itoh & Co. (America) (9th Cir. 1988) 859 F.2d 814, 817]* .

Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects; revocation is not effective until the buyer notifies the seller [*Com. Code § 2608(2)*]. Because revocation will generally be resorted to only after attempts at adjustment have failed, the reasonable time period should extend in most cases beyond the time (1) in which notification of breach must be given, (2) for discovery of nonconformity after acceptance, and (3) for rejection after tender, although the parties may limit the time for notification by agreement. The content of the notice of the revocation of acceptance should be determined by considerations of good faith, prevention of surprise, and reasonable adjustment, although more will generally be necessary than the mere notification of breach required under *Com. Code § 2607(3)(A)*, and the content requirements are less stringent in the case of a nonmerchant buyer [*see* UCC Comment to *Com. Code § 2608*; *see, e.g.,* *S & R Metals, Inc. v. C. Itoh & Co. (America) (9th Cir. 1988) 859 F.2d 814, 817* (revocation given five months after delivery and nine days after buyer learned of defect held to have been

made within reasonable time after discovery of latent defect)]. In the case of a nonconforming motor vehicle, because the practical reality often requires purchasers of unsatisfactory vehicles to continue using them in view of the financial burdens of securing alternative means of transportation for a substantial period of time, reasonable continued use of the vehicle does not, as a matter of law, prevent the buyer from asserting revocation of acceptance [*Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 897-898, 263 Cal. Rptr. 64]* . A buyer who revokes has the same rights and duties with regard to the goods involved as if he or she had rejected them [*Com. Code § 2608(3)*]. For further discussion and a form for use as an affirmative defense in an action involving revocation of acceptance, see *§ 500.123*.

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§ 500.61 Anticipatory Repudiation

[1] Requires Overt Communication or Action

Anticipatory repudiation centers on an overt communication of an intention or an action that renders performance impossible or demonstrates a clear determination not to continue with performance. Performance need not be made literally and utterly impossible, but may result from action which reasonably indicates a rejection of the continuing obligation [*see* UCC Comment to *Com. Code § 2610*].

When either party repudiates the contract with respect to a performance not yet due, the loss of which will substantially impair the value of the contract to the other, the aggrieved party may await performance by the repudiating party for a commercially reasonable time [*Com. Code § 2610(a)*] or resort to any remedy for breach (*Com. Code §§ 2703, 2711*), even though the aggrieved party has notified the repudiating party that he or she would await the latter's performance and has urged retraction [*Com. Code § 2610(b)*]. If the aggrieved party awaits performance beyond a commercially reasonable time however, he or she cannot recover resulting damages which should have been avoided [*see* UCC Comment to *Com. Code § 2610*]. In either case, the aggrieved party may suspend his or her own performance or proceed in accordance with the provisions of Division 2 on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods as provided in *Com. Code § 2704* [*Com. Code § 2610(c)*].

The test of substantial impairment of value under *Com. Code § 2610* is the determination whether material inconvenience or injustice will result if the aggrieved party is forced to wait and receive an ultimate tender minus the part or aspect repudiated [*see* UCC Comment to *Com. Code § 2610*].

[2] May Be Retracted

Until the repudiating party's next performance is due, he or she can retract the repudiation, unless the aggrieved party, since the repudiation, has canceled or materially changed his or her position or otherwise indicated that the repudiation is final [*Com. Code § 2611(1)*]. Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under *Com. Code § 2609* [*Com. Code § 2611(2)*], because repudiation is sufficient to give reasonable ground for insecurity and to warrant a

request for assurance as an essential condition of the retraction [*see* UCC Comment to *Com. Code § 2611*]. Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation [*Com. Code § 2611(3)*].

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44-500 California Forms of Pleading and Practice--Annotated § 500.62

§ 500.62 Installment Contracts

A contract that requires or authorizes the delivery of goods in separate lots to be separately accepted is an "installment contract," even if it contains a clause providing that "each delivery is a separate contract" or its equivalent [*Com. Code § 2612(1)*]. Such clauses nonetheless call for installment deliveries [*see* UCC Comment to *Com. Code § 2612*].

The buyer may reject any installment which is nonconforming if the nonconformity substantially impairs the value of that installment and cannot be cured or if the nonconformity is a defect in the required documents. If the nonconformity does not fall within *Com. Code § 2612(3)*, as discussed below, and the seller gives adequate assurance of its cure, the buyer must accept that installment [*Com. Code § 2612(2)*]. However, an installment contract may require accurate conformity in quality as a condition to the right to acceptance if the need for conformity is made clear either by express provision or by the circumstances. In such a case, the agreement, in effect, defines explicitly what amounts to substantial impairment of value impossible to cure [*see* UCC Comment to *Com. Code § 2612*].

Whenever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract, there is a breach of the whole. But the aggrieved party reinstates the contract by accepting a nonconforming installment without seasonable notification of cancellation [*see Gantry Constr. Co. v. American Pipe & Constr. Co. (1975) 49 Cal. App. 3d 186, 193-194, 122 Cal. Rptr. 834]* , bringing an action with respect only to past installments, or demanding performance as to future installments [*Com. Code § 2612(3)*].

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§ 500.63 Impossibility

[1] Excuses Seller's Performance

Subject to *Com. Code § 2614*, on substituted performance and except so far as a seller may have assumed a greater obligation, delay in delivery or nondelivery in whole or in part by a seller who complies with *Com. Code § 2615(b)* and *(c)*, as discussed below, is not a breach of his or her duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency, the nonoccurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order, whether or not it later proves to be invalid [*Com. Code § 2615(a)*]. The failure of conditions which go to convenience or collateral values rather than to the commercial practicability of the main performance does not amount to a complete excuse. In regard to compliance with a governmental regulation or order, the seller's good faith belief in the validity of the regulation is the test, and the best evidence of good faith is the general commercial acceptance of the regulation. However, government interference is not an excuse unless it truly supervenes in such a manner as to be beyond the seller's assumption of risk [*see* UCC Comment to *Com. Code § 2615*].

If the causes of impracticability or nonperformance affect only a part of the seller's capacity to perform, the seller must allocate production and deliveries among his or her customers but has the option of including regular customers not then under contract, as well as his or her own requirements for further manufacture; the seller may so allocate in any manner which is fair and reasonable [*Com. Code § 2615(b)*]. The statutory demand for a "fair and reasonable" allocation of short supplies denotes a collective quality characterizing the supplier's treatment of his or her customers as a group. An individualized approach, geared solely to the needs of particular customers, may provide adequacy to some, insufficiency to others. A fair and reasonable allocation distributes benefit and hardship equally. The seller, however, is no longer obligated to adopt a proration plan applicable to the entire group of customers, as the cases required prior to the adoption of the Commercial Code in California [*Terry v. Atlantic Richfield Co. (1977) 72 Cal. App. 3d 962, 968-969, 140 Cal. Rptr. 510]* .

The seller must notify the buyer seasonably that there will be delay or nondelivery and, when allocation is required under *Com. Code § 2615(b)*, of the estimated quota thus made available for the buyer [*Com. Code § 2615(c)*].

[2] Buyer's Rights

If the buyer receives notification of a material or indefinite delay or an allocation justified under *Com. Code § 2615*, the buyer may by written notification to the seller as to any delivery concerned, and if the prospective deficiency substantially impairs the value of the whole contract under *Com. Code § 2612*, relating to breach of installment contracts, then also as to the whole, terminate and thereby discharge any unexecuted portion of the contract or modify the contract by agreeing to take his or her available quota in substitution [*Com. Code § 2616(1)*]. No consideration is necessary in such a case to support a modification [*see* UCC Comment to *Com. Code § 2616*].

If, after receipt of the seller's notification the buyer fails so to modify the contract within a reasonable time not exceeding 30 days, the contract lapses with respect to any deliveries affected [*Com. Code § 2616(2)*]. The buyer's silence, after receiving the seller's claim of excuse, operates as a termination of the contract [*see* UCC Comment to *Com. Code § 2616*]. The provisions of *Com. Code § 2616* may not be negated by agreement, except insofar as the seller has assumed a greater obligation under *Com. Code § 2615* [*Com. Code § 2616(3)*].

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[Reserved]

§§ 500.64[Reserved]

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§ 500.70 Remedies Generally

An agreement may provide for remedies in addition to or in substitution for those provided in Division 2 and may limit or alter the measure of damages recoverable thereunder, within certain limitations [*Com. Code § 2719(1)(a)*]. However, it is of the very essence of a sales contract that at least minimum adequate remedies be available. Thus, if parties intend to conclude a contract for sale within Division 2, they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract [*see* UCC Comment to *Com. Code § 2719*].

Division 2 rejects any doctrine of election of remedy as a fundamental policy; thus, the remedies are essentially cumulative in nature. Whether the pursuit of one remedy bars another depends entirely on the facts of the individual case [*see B.K.K. Co. v. Schultz (1970) 7 Cal. App. 3d 786, 793-794, 86 Cal. Rptr. 760]* . It should also be noted that the Commercial Code requires its remedies to be liberally administered and provides that any right or obligation which it declares is enforceable by action unless a different effect is specifically prescribed (*Com. Code § 1305*) [*see* UCC Comment to *Com. Code § 2703*]. For a more detailed discussion of the specific remedies available to both parties, see *§§ 500.75 -500.78*.

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§ 500.71 Liquidated Damages

Damages for breach by either party may be liquidated in the agreement subject to and in compliance with *Civ. Code § 1671* (reasonable at time made), which is discussed in *Ch. 177, Damages, § 177.140* et seq. [*Com. Code § 2718(1)*]. If the agreement provides for liquidated damages, but the liquidated damage provision does not comply with *Civ. Code § 1671*, damages may be had as provided in *Com. Code § 2101 et seq.* [*Com. Code § 2718(1)*].

If the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of its payments to the seller exceeds the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with *Com. Code § 2718(1)* [*Com. Code § 2718(2)(a)*] or, in the absence of terms, 20 percent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller [*Com. Code § 2718(2)(b)*]. No distinction is made between cases in which the buyer's payment was to be applied on the price of the goods and those cases in which it was intended as security for performance [*see* UCC Comment to *Com. Code § 2718*].

The buyer's right to restitution under *Com. Code § 2718(2)* is subject to offset to the extent that the seller establishes a right to recover damages under *Com. Code § 2701 et seq.*, other than under *Com. Code § 2718(1)*, and establishes the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract [*Com. Code § 2718(3)*]. If a seller has received payment in goods, their reasonable value or the proceeds of their resale are treated as payments for the purposes of *Com. Code § 2718(2)*, but if the seller has notice of the buyer's breach before reselling goods received in part performance, the resale is subject to the conditions laid down in *Com. Code § 2706* on resale by an aggrieved seller [*Com. Code § 2718(4)*; *see* discussion in *§ 500.75[6]*].

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§ 500.72 Contractual Limitation on Remedies

Subject to the provisions of *Com. Code § 2718*, discussed in *§ 500.71*, and *Com. Code § 2719(2),(3)*, discussed *below*, the agreement may provide for remedies in addition to or in substitution for those provided in Division 2, and may limit or alter the measure of damages recoverable under Division 2, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts [*Com. Code § 2719(1)(a)*]. Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy [*Com. Code § 2719(1)(b)*]. Thus, parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect. However, there is a presumption that clauses prescribing remedies are cumulative with those provided by the code rather than exclusive, unless the parties expressly agree otherwise [*see* UCC Comment to *Com. Code § 2719*].

If circumstances cause an exclusive or limited remedy to fail in its essential purpose, remedy may be had as provided in the Commercial Code [*Com. Code § 2719(2)*]. For example, a purchaser of machinery, on failure of the limited repair remedy to serve its essential purpose because of the seller's inability to repair, is entitled to recover the difference between the value of what he should have received and the value of what the buyer received under *Com. Code § 2714(2)* (measure of damages for breach of warranty) [*S.M. Wilson & Co. v. Smith Int'l, Inc. (9th Cir. 1978) 587 F.2d 1363, 1375* ; *see* discussion in *§ 500.76[4][b]*].

Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is invalid unless it is proved that the limitation is not unconscionable. Limitation of consequential damages when the loss is commercial is valid unless it is proved that the limitation is unconscionable [*Com. Code § 2719(3)*; *see Dorman v. International Harvester Co. (1975) 46 Cal. App. 3d 11, 19-20, 120 Cal. Rptr. 516]* . However, a contractual provision barring consequential damages may not be enforceable against the buyer after a limited repair remedy has failed of its essential purpose [*Com. Code § 2719(2)*]; whether the consequential damage limitation will be expunged from the contract depends on the facts of the individual case [*S.M. Wilson & Co. v. Smith Int'l, Inc. (9th Cir. 1978) 587 F.2d 1363, 1375-1376]* .

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44-500 California Forms of Pleading and Practice--Annotated § 500.73

§ 500.73 Remedies Against Third Parties

If a third party so deals with goods which have been identified to a contract for sale as to cause actionable injury to a party to that contract, a right of action against the third party belongs to either party to the contract for sale who has title to, a security interest, a special property, or an insurable interest in the goods. If the goods have been destroyed or converted, a right of action also belongs to the party who either bore the risk of loss under the contract for sale or has since the injury assumed that risk as against the other [*Com. Code § 2722(a)*].

If at the time of the injury, the party plaintiff did not bear the risk of loss as against the other party to the contract for sale, and there is no arrangement between them for disposition of the recovery, the party's suit or settlement is, subject the party's own interest, as a fiduciary for the other party to the contract [*Com. Code § 2722(b)*]. Either party may, with the consent of the other, sue for the benefit of whom it may concern [*Com. Code § 2722(c)*].

Prior to the time the goods have been identified to a contract for sale only the seller has a right of action. During the period between identification and final acceptance (except in the case of revocation of acceptance) it is possible for both parties to have the right of action. Even after final acceptance, both parties may have the right of action if the seller retains possession or otherwise retains an interest [*see* UCC Comment to *Com. Code § 2722*].

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44-500 California Forms of Pleading and Practice--Annotated § 500.74

§ 500.74 Effect of Insolvency

[1] Insolvency Defined

Division 2 provides special remedies to a party to a sales contract if the other party to the contract becomes insolvent. For the purpose of these provisions, a person is "insolvent" who either has ceased to pay his or her debts in the ordinary course of business or cannot pay his or her debts as they become due or is insolvent within the meaning of the federal bankruptcy law [*Com. Code § 1201(b)(23)*; for a discussion of the definition of an insolvent person under federal bankruptcy law, *see* Ch. 94, *Bankruptcy*].

[2] Buyer's Insolvency

If the seller discovers the buyer to be insolvent, the seller may refuse delivery except for cash including payment for all goods already delivered under the contract, and stop delivery as provided in *Com. Code § 2705* [*Com. Code § 2702(1)*]. The seller may exercise these rights regardless of the passage of title [*see* UCC Comment to *Com. Code § 2702* and the discussion of title in *§ 500.50* et seq.].

A seller who discovers that the buyer has received goods on credit while insolvent may reclaim the goods on demand made within 10 days after the receipt, but if a misrepresentation of solvency has been made to the particular seller in writing within three months before delivery, the 10-day limitation does not apply. Except as so provided, the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay [*Com. Code § 2702(2)*]. Misrepresentation of solvency is considered to have been "made" at the time it is presented to the seller, not as of the date that the written misrepresentation is prepared or dated [*see In re Bel Air Carpets, Inc. (9th Cir. 1971) 452 F.2d 1210, 1211-1212]* .

The seller's right to reclaim under *Com. Code § 2702(2)*, however, is subject to the rights of a buyer in ordinary course or other good faith purchaser under *Com. Code § 2403*. Successful reclamation of goods excludes all other remedies with respect to them [*Com. Code § 2702(3)*; *see In re Daylin, Inc. (9th Cir. 1979) 596 F.2d 853, 856]* .

[3] Seller's Insolvency

Even though the goods have not been shipped, and subject to *Com. Code § 2502(2)* and *(3)*, discussed *below*, a buyer who has paid a part or all of the price of goods in which the buyer has a special property under the provisions of *Com. Code § 2501*[*see* discussion in *§ 500.51*], may, on making and keeping good a tender of any unpaid portion of their price, recover them from the seller if either of the following occurs:

- In the case of goods bought for personal, family, or household purposes, the seller repudiates or fails to deliver as required by the contract [*Com. Code § 2502(1)(a)*].

- In all cases, if the seller becomes insolvent within 10 days after receipt of the first installment on their price [*Com. Code § 2502(1)(b)*].

The buyer's right to recover the goods under *Com. Code § 2502(1)(a)* vests on acquisition of a special property, even if the seller had not then repudiated or failed to deliver [*Com. Code § 2502(2)*]. Inasmuch as a secured party normally acquires no greater rights than its debtor had or had power to convey [*see Com. Code § 2403(1)*], a buyer who acquires a right to recover under this section will take free of a security interest created by the seller if it attaches to the goods after the goods have been identified to the contract. The buyer will take free even if the buyer does not buy in the ordinary course and even if the security interest is perfected. Of course, to the extent that the buyer pays the price after the security interest attaches, the payments will constitute proceeds of the security interest [*see* UCC Comment 3 to *Com. Code § 2502*]. Whether or not the buyer also acquires a security interest in identified goods and has rights to the goods when insolvency takes place after the 10-day period depends on compliance with the provisions of Division 9 of the Commercial Code on secured transactions [*see* UCC Comment 2 to *Com. Code § 2502* and discussion in *Ch. 503, Sales: Secured Transactions, § 503.20* et seq.].

A buyer who has made the identification creating special property acquires the right to recover the goods only if they conform to the contract for sale [*Com. Code § 2502(3)*]. This provision precludes the possibility of unjust enrichment which exists if the buyer were permitted to recover goods even though they were greatly superior in quality or quantity to that called for by the contract for sale [*see* UCC Comment 4 to *Com. Code § 2502*].

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§ 500.75 Seller's Remedies

[1] Generally

If the buyer wrongfully rejects or revokes acceptance of goods, fails to make a payment due on or before delivery, or repudiates with respect to a part or the whole, then with respect to any goods directly affected, and with respect to the whole undelivered balance if the breach is of the whole contract [*see Com. Code § 2612*], the aggrieved seller may do the following:

- Withhold delivery of the goods [*Com. Code § 2703(a)*];
- Stop delivery by any bailee as provided in *Com. Code § 2705* [*Com. Code § 2703(b)*];
- Proceed under *Com. Code § 2704* respecting goods still unidentified to the contract [*Com. Code § 2703(c)*];
- Resell and recover damages as provided in *Com. Code § 2706* [*Com. Code § 2703(d)*];
- Recover damages for nonacceptance [*Com. Code § 2708*] or in a proper case, the price (*Com. Code § 2709*) [*Com. Code § 2703(e)*]; and
- Cancel [*Com. Code § 2703(f)*].

The buyer's action in failing to make a payment due, which would make the foregoing remedies available to the seller, includes the dishonor of a check on due presentment, the nonacceptance of a draft, and the failure to furnish an agreed letter of credit, in addition to the typical case of refusal to pay or default in payment. The buyer's breach which gives rise to these statutory remedies may involve only one lot or delivery of goods, or may involve all of the goods which are the subject matter of the particular contract [*see* UCC Comment to *Com. Code § 2703*].

[2] Person in Position of Seller

A person in the position of a seller may withhold or stop delivery under *Com. Code § 2705* and resell under *Com. Code § 2706* and recover incidental damages under *Com. Code § 2710* [*Com. Code § 2707(2)*]. A "person in the position of a seller" includes, as against a principal, an agent who has paid or become responsible for the price of goods on behalf of the principal, such as a financing agency which has acquired documents by honoring a letter of credit for the buyer or by discounting a draft for the seller, or anyone who otherwise holds a security interest or other right in goods similar to that of a seller [*Com. Code § 2707(1)*; *see* UCC Comment to *Com. Code § 2707*].

[3] Right to Identify Goods Which Are Subject of Breach

Under *Com. Code § 2703*, an aggrieved seller may do either of the following:

- Identify to the contract [*Com. Code § 2501*] conforming goods not already identified if, when the seller learns of the breach, those goods are in its possession or control [*Com. Code § 2704(1)(a)*], or

- Treat as the subject of resale goods which have demonstrably been intended for the particular contract, even though those goods are unfinished [*Com. Code § 2704(1)(b)*].

If the goods are unfinished, an aggrieved seller, in the exercise of reasonable commercial judgment for the purposes of avoiding loss and of effective realization, may either complete the manufacture and wholly identify the goods to the contract, cease manufacture and resell for scrap or salvage value, or proceed in any other reasonable manner [*Com. Code § 2704(2)*]. "Any other reasonable manner" includes an action for the price to give the seller the value of its contract in the special case in which resale is not practicable [*see* UCC Comment to *Com. Code § 2704*]. The seller's right to identify certain unfinished and finished goods to the contract and proceed to dispose of them in a commercially reasonable fashion in order to mitigate damages only applies to raw materials which are the property of the aggrieved seller. This remedy is distinguishable from a possessory lien and does not permit the seller to appropriate material furnished by the buyer on which no work has been performed [*Morton Regent Enterprises, Inc. v. Leadtec California, Inc. (1977) 74 Cal. App. 3d 842, 849, 141 Cal. Rptr. 706]* .

[4] Withhold Delivery

One of the remedies available to an aggrieved seller on the buyer's breach is the withholding of delivery of goods directly affected by the breach, whether they are the subject of the whole or only a part of the contract [*Com. Code § 2703(a)*].

[5] Stop Delivery

The seller may stop delivery of goods in the possession of a carrier or other bailee on discovering the buyer to be insolvent [*Com. Code § 2702*] and may stop delivery of carload, truckload, planeload, or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods [*Com. Code § 2705(1)*]. These rights are also given to a "person in the position of a seller" under *Com. Code § 2707*.

PRACTICE TIP:

Seller May Want to Ship C.O.D. The right to stoppage is limited to carload, truckload, planeload, or larger shipments to avoid the burden on carriers if it covered all small shipments in these situations. Thus, a seller shipping to a buyer of doubtful credit can always be protected by shipping C.O.D. [*see* UCC Comment to *Com. Code § 2705*].

As against the buyer, the seller may stop delivery until any of the following occurs [*Com. Code § 2705(2)*]:

- Receipt of the goods by the buyer, including receipt by the buyer's designated representative, the subpurchaser, when shipment is made directly to the subpurchaser and the buyer never receives the goods [*see* UCC Comment to *Com. Code § 2705*];

- Acknowledgment to the buyer, by any bailee of the goods except a carrier, that the bailee holds the goods for the buyer;

- Acknowledgment to the buyer that a carrier, by reshipment or as a warehouse, holds the goods for the buyer; or

- Negotiation to the buyer of any negotiable document of title covering the goods.

To stop delivery, the seller must so notify the bailee by reasonable diligence to prevent delivery of the goods [*Com. Code § 2705(3)(a)*]. After it receives notification, the bailee must hold and deliver the goods according to the directions of the seller. The seller is liable to the bailee for any ensuing charges or damages [*Com. Code § 2705(3)(b)*].

If a negotiable document of title has been issued for goods, the bailee is not obliged to obey a notification to stop until surrender of possession or control of the document [*Com. Code § 2705(3)(c)*]. A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor [*Com. Code § 2705(3)(d)*]. In effect, the carrier is under no duty to recognize the stop order of a person who is a stranger to the carrier's contract, but the seller's right as against the buyer to stop delivery remains, whether or not the carrier is obligated to recognize the stop order. If the carrier does obey it, the seller becomes obligated under *Com. Code § 2705(3)(b)* to pay the carrier any ensuing damages or charges [*see* UCC Comment to *Com. Code § 2705*].

[6] Resale

[a] Seller's Right to Resell; Measure of Damages After Resale

On the buyer's breach, the aggrieved seller may resell and recover damages [*Com. Code § 2703(d)*; *see § 500.100*]. If the buyer wrongfully rejects or revokes acceptance of goods, fails to make a payment due on or before delivery, or repudiates with respect to a part or the whole, the seller may resell the goods concerned or the undelivered balance [*Com. Code § 2703*].

Com. Code § 2706 governs resales. Under this section, if the resale is made in good faith and in a commercially reasonable manner, the seller may recover the difference between the resale price and the contract price, together with any incidental damages allowed under the provisions of *Com. Code § 2710*, but less expenses saved in consequence of the buyer's breach [*Com. Code §§ 2703, 2706(1)*]. The permissible methods of resale under *Com. Code § 2706* are discussed in [b], *below*.

Com. Code § 2706 and the official comments do not prohibit resale to affiliates, nor do they say that these sales are per se commercially unreasonable. Of course, resale to an affiliated entity may be a sham, for example, if it is conducted when there is an actual market for the goods being resold [*Allied Grape Growers v. Bronco Wine Co. (1988) 203 Cal. App. 3d 432, 445-446, 249 Cal. Rptr. 872]* . On the other hand, if there is such a glut that there is no market for the goods, the seller makes unsuccessful attempts to resell to others, and the resale to the affiliate is an attempt to mitigate losses, resale to an affiliate is commercially reasonable and executed in good faith [*Allied Grape Growers v. Bronco Wine Co. (1988) 203 Cal. App. 3d 432, 447, 249 Cal. Rptr. 872]* .

[b] Approved Methods of Resale

Unless otherwise agreed, or except as otherwise provided in *Com. Code § 2706(3)*, resale may be at public (auction) or

private sale (directly or through a broker), including sale by way of one or more contracts to sell or of identification to an existing contract of the seller. Sale may be as a unit or in parcels, at any time and place, and on any terms, but every aspect of the sale, including the method, manner, time, place and terms, must be commercially reasonable [*Com. Code § 2706(2)*]. If the sale does not meet this standard, the seller is not entitled to the measure of damages set forth in *Com. Code § 2706(1)*, but is relegated to that provided in *Com. Code § 2708*, discussed in [7][a], *below*. Division 2 rejects the theory that the seller is required to resell at the agreed place for delivery and that a resale elsewhere can be permitted only in exceptional cases [*see* UCC Comment to *Com. Code § 2706*].

The resale must be reasonably identified as referring to the broken contract, but except in the case of a public sale (as discussed *below*), it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach [*Com. Code § 2706(2)*; *but see Com. Code § 2706(4)(a)*]. This provision applies when the buyer is guilty of anticipatory repudiation of a contract for future goods before the goods, or some of them, have come into existence. The seller may then exercise the right of resale and fix damages by "one or more contracts to sell" the quantity of conforming future goods affected by the repudiation. If the goods have come into existence, but have not been identified prior to the breach, their resale will fix the seller's damages [*see* UCC Comment to *Com. Code § 2706*].

If the resale is at public sale, only identified goods can be sold except when there is a recognized market for a public sale of futures in goods of the kind [*Com. Code § 2706(4)(a)*; *see Com. Code § 2706(2)*]. The sale must be made at a usual place or market for public sale if one is reasonably available, and except in the case of goods that are perishable or threaten to decline in value speedily, the seller must give the buyer reasonable notice of the time and place of the resale [*Com. Code § 2706(4)(b)*]. One of the purposes of requiring notice is to give the buyer the opportunity to bid at the sale or to secure the attendance of other bidders. A "usual place or market for public sale" is one which prospective bidders may reasonably be expected to attend. When a market is "reasonably available," even though it is at a considerable distance from the location of the goods, the expense of transporting the goods for resale is recoverable by the seller from the buyer as incidental damages under *Com. Code § 2706(1)* [*see* UCC Comment to *Com. Code § 2706*].

The seller may buy at the public resale [*Com. Code § 2706(4)(d)*], which benefits the buyer by tending to increase the resale price, thus decreasing the damages for which the latter might be liable [*see* UCC Comment to *Com. Code § 2706*].

[c] Notification of Sale

If the resale is at private sale, the seller must give the buyer reasonable notification of the intention to resell [*Com. Code § 2706(3)*]. The length of notification depends on the urgency of the matter. However, notice of the time and place of the resale is not necessary [*see* Cal. Comment and UCC Comment to *Com. Code § 2706*]. A seller's attorney's declaration in support of a motion for partial summary judgment was sufficient notice under *Com. Code § 2706(3)* when it described attempts to resell the crop of which defendant refused to take delivery and was served before the sale [*Allied Grape Growers v. Bronco Wine Co. (1988) 203 Cal. App. 3d 432, 448, 448 n.12, 249 Cal. Rptr. 872]* .

If the resale is at public sale, except in the case of goods which are perishable or threaten to decline in value speedily, the seller must give the buyer reasonable notice of the time and place of the resale [*Com. Code § 2706(4)(b)*; *see* UCC Comment to *Com. Code § 2706*, discussed in [b], *above*, purposes of giving notice]. If the goods are not to be within the view of those attending the public resale, the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders [*Com. Code § 2706(4)(c)*].

[d] Purchaser Takes Free

A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer, even though the seller fails to comply with one or more of the requirements of *Com. Code § 2706* [*Com. Code § 2706(5)*]. The seller is not accountable to the buyer for any profit made on any resale [*Com. Code § 2706(6)*].

However, if resale is made by "a person in the position of a seller" [*Com. Code § 2707*] or a buyer who has rightfully rejected or justifiably revoked acceptance [*Com. Code § 2711(3)*], that person or buyer must account to the seller for any excess of the resale price over its security interest as defined in *Com. Code § 2711(3)* [*Com. Code § 2706(6)*]. In that situation, the person or buyer exercises the right of resale only for the limited purpose of obtaining cash for its security interest in the goods [*see* UCC Comment to *Com. Code § 2706*].

[7] Recovery of Damages

[a] Measure of Damages

On the buyer's breach, the seller may recover damages for nonacceptance or in a proper case, the price [*Com. Code § 2703(e)*; *see §§ 500.100, 500.101* (forms)].

The measure of damages for nonacceptance or repudiation by the buyer, subject to *Com. Code §§ 2708(2), 2723* (proof of market price), is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in *Com. Code § 2710(1)*, but less expenses saved in consequence of the buyer's breach [*Com. Code § 2708(1)*]. The time and place of tender is determined by reference to *Com. Code §§ 2503, 2319, 2320, 2322, 2324* [*see* discussions in *§§ 500.35 -500.38*]. In the event that there is no evidence available of the current market price at the time and place of tender, proof of a substitute market may be made under *Com. Code §§ 2723, 2724* [*see* UCC Comment to *Com. Code § 2708* and discussion in *§ 500.77*].

If the measure of damages provided in *Com. Code § 2708(1)* is inadequate to put the seller in as good a position as performance would have done, then the measure of damages is the profit, including reasonable overhead, which the seller would have made from full performance by the buyer, together with any incidental damages provided in *Com. Code § 2710*, due allowance for costs reasonably incurred, and due credit for payments or proceeds of resale [*Com. Code § 2708(2)*]. This measure of damages should be applied when, due to special circumstances, the measure of damages as the difference between the market price and the contract price under *Com. Code § 2708(1)* is not a true representation of the seller's damages, such as in a sale to a buyer by an intermediate dealer or "middleman" whose relationship with a producer enables him or her to supply all obtainable customers. In that case, the buyer's breach does not make possible a new sale in which the profit lost by the breach would be replaced but, instead, results in an irreplaceable loss of profits, because every new sale by the seller would bring in a new profit [*see Distribu-Dor, Inc. v. Karadanis (1970) 11 Cal. App. 3d 463, 469-470, 90 Cal. Rptr. 231]* . Nor will the *Com. Code § 2708(1)* measure of damages be adequate when a so-called lost-volume seller is involved. A lost-volume seller is one who proves that, even though it resold the contract goods, the sale to the third party would have been made regardless of the buyer's breach. Put another way, the lost-volume seller must establish that had the breaching buyer performed, the seller would have realized profits from both sales. A lost-volume seller is entitled to the *Com. Code § 2708(2)*measure of damages, except that no credit is to be given for the proceeds of the resale [*National Controls, Inc. v. Commodore Bus. Machines, Inc. (1985) 163 Cal. App. 3d 688, 696-699, 209 Cal. Rptr. 636]* .

[b] Price

When the buyer fails to pay the price as it becomes due, the seller may recover, together with any incidental damages under *Com. Code § 2710* (*see* discussion in [b], *below*), both of the following:

- The price of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer [*Com. Code § 2709(1)(a)*; *see Com. Code § 2510(3)*].

- The price of goods identified to the contract [*see Com. Code §§ 2501, 2704*], if the seller is unable,

after reasonable effort, to resell them at a reasonable price or the circumstances reasonably indicate that a reasonable effort to resell will be unavailing [*Com. Code § 2709(1)*].

Goods accepted by the buyer under *Com. Code § 2709(1)(a)* include only goods as to which there has been no justified revocation of acceptance, for a justifiable revocation would mean that there has been a default by the seller which would bar that seller's right to maintain an action for the price [UCC Comment to *Com. Code § 2709*]. The test of whether or not a seller may maintain an action for the price of goods identified to the contract under *Com. Code § 2709(1)(b)* is an objective one based on whether or not the seller has made a reasonable effort to resell the goods at a reasonable price or the circumstances indicate that the seller's efforts to do so would be unavailing [*see* UCC Comment to *Com. Code § 2709*].

Com. Code § 2709 is intended to be exhaustive in its enumeration of the situations when an action for the price by the seller lies. Neither the passing of title to the goods [*see* discussion in *§ 500.50* et seq.] nor the appointment of a day certain for payment is now material to a price action [*see* UCC Comment to *Com. Code § 2709*]. Acceptance of goods without payment allows the seller to sue at once, not only for past due payments, but for the price of all goods then delivered and accepted [*see Gantry Constr. Co. v. American Pipe & Constr. Co. (1975) 49 Cal. App. 3d 186, 192, 122 Cal. Rptr. 834]* .

A seller who sues for the price must hold for the buyer any goods which have been identified to the contract and are still in that seller's control, except that if resale becomes possible, the seller may resell them at any time prior to the collection of the judgment; the net proceeds of any resale must be credited to the buyer and payment of the judgment entitles the buyer to any goods not resold [*Com. Code § 2709(2)*]. This prevents an action for the price from being construed as an election of a remedy which would prevent the resale of goods [*see* Cal. Code Comment to *Com. Code § 2709*].

After the buyer has wrongfully rejected or revoked acceptance of the goods, has failed to make a payment due, or has repudiated [*Com. Code § 2610*], a seller who is held not entitled to the price under *Com. Code § 2709* nevertheless should be awarded damages for nonacceptance under *Com. Code § 2708* [*Com. Code § 2709(3)*].

[c] Incidentals

Incidental damages to an aggrieved seller or to a "person in the position of a seller" [*Com. Code § 2707*], which are recoverable on the seller's resale under *Com. Code § 2706* [*see* discussion in *§ 500.75[6]*] and on the buyer's repudiation under *§ 2708* [*see* discussion in *§ 500.75[7][a]*], include any commercially reasonable charges, expenses, or commissions incurred in stopping delivery, in the transportation, care, and custody of goods after the buyer's breach, in connection with return or resale of the goods, or otherwise resulting from the breach [*Com. Code § 2710*]. While this provision only sets forth the principal normal and necessary additional elements of damage flowing from the breach, it intends to allow all commercially reasonable expenditures the seller has made [*see* UCC Comment to *Com. Code § 2710*; *see § 500.100[3]*].

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§ 500.76 Buyer's Remedies

[1] Buyer's Options

If the seller fails to make delivery or repudiates, or the buyer rightfully rejects or justifiably revokes acceptance, then the buyer has the following options:

- The buyer may cancel with respect to any goods involved and with respect to the whole if the breach goes to the whole contract as provided in *Com. Code § 2612* [*Com. Code § 2711(1)*].

- Whether or not the buyer has canceled, the buyer may recover as much of the price as has been paid [*see Com. Code § 2711(1)*; *Green Wood Indus. Co. v. Forceman Int'l Dev. Group, Inc. (2008) 156 Cal. App. 4th 766, 772, 67 Cal. Rptr. 3d 624*]. The buyer's right to recover entire amount paid is not affected by the fact that part of that amount was paid, at the buyer's request, directly to the seller by a person with whom the buyer had made a resale contract [*Green Wood Indus. Co. v. Forceman Int'l Dev. Group, Inc. (2008) 156 Cal. App. 4th 766, 772, 67 Cal. Rptr. 3d 624*].

- In addition to recovering as much of the price as has been paid, the buyer may either:

  - "Cover" and have damages under *Com. Code § 2712* as to all goods affected, whether or not they have been identified to the contract [*Com. Code § 2711(1)(a)*; *see § 500.76[3]*; *see also § 500.110* (form)]; or

  - Recover damages for nondelivery as provided in *Com. Code § 2713* [*Com. Code § 2711(1)(b)*; *see § 500.76[4][a]*].

The buyer's right to "cover" or to have damages for nondelivery is not impaired by exercise of the right of resale under *Com. Code § 2711(3)* [*see* UCC Comment to *Com. Code § 2711*].

If the seller fails to deliver or repudiates, the buyer also may recover the goods as provided in *Com. Code § 2502* if they have been identified [*Com. Code § 2711(2)(a)*] or, in a proper case, may obtain specific performance or replevy the goods as provided in *Com. Code § 2716* [*Com. Code § 2711(2)(b)*; *see* discussion in *§ 500.76[5], [6]*].

In a case of fraudulent nondelivery--for example, when the seller never had the goods and did not intend to obtain them for delivery, yet nevertheless promised to deliver the goods and required a prepayment of the price--the buyer's remedies for the seller's fraud include all remedies available under Division 2 for nonfraudulent breach [*Com. Code § 2721*]. This rule is an exception to the general rule in California [*see Civ. Code § 3343*] that a plaintiff defrauded in the purchase or sale of property may recover only out-of-pocket loss [*Green Wood Indus. Co. v. Forceman Int'l Dev. Group, Inc. (2008) 156 Cal. App. 4th 766, 773-774, 67 Cal. Rptr. 3d 624* (buyer that did not "cover" could recover lost profits as consequential damages, pursuant to *Com. Code §§ 2713* and *2715*); *see* discussion of consequential damages in [4][c], *below*)].

[2] Buyer's Security Interest

On rightful rejection or justifiable revocation of acceptance, a buyer has a security interest in goods in his or her possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody, and may hold those goods and resell them in the same manner as an aggrieved seller under *Com. Code § 2706* [*Com. Code § 2711(3)*; *see* discussion in *§ 500.10[2]* (extent to which Divisions 2 and 9 govern)]. However, the buyer may not keep any profit resulting from the resale and is limited to retaining only the amount of the price paid and the costs involved in the inspection and handling of the goods. The security interest in the goods is limited to the items specifically listed in *Com. Code § 2711(3)*, and the buyer is not permitted to retain any amount of those funds he or she might believe adequate as damages [*see* UCC Comment to *Com. Code § 2711*]. A buyer's payments on the price of goods under *Com. Code § 2711(3)* includes acceptance of a draft or other time negotiable instrument or the signing of a negotiable note [*see* UCC Comment to *Com. Code § 2711*].

[3] Cover

After a seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance within *Com. Code § 2711*, the buyer may "cover" by making, in good faith and without any unreasonable delay, any reasonable purchase of, or contract to purchase, goods in substitution for those due from the seller [*Com. Code § 2712(1)*]. This remedy is the buyer's equivalent of the seller's right to resell and envisages: (1) a series of contracts or sales, as well as a single contract or sale; (2) goods not identical with those contracted for but commercially usable as reasonable substitutes; and (3) contracts on credit or delivery terms differing from the breached contract but reasonable under the circumstances. The test of proper cover is whether the buyer acted in good faith and in a reasonable manner at the time and place of cover, not in hindsight [*see* UCC Comment to *Com. Code § 2712*].

The buyer may recover as damages from the seller the difference between the cost of cover and the contract price, together with any incidental or consequential damages as defined in *Com. Code § 2715* [*see* discussion in [c], *below*], but less expenses saved in consequence of the seller's breach [*Com. Code § 2712(2)*]. One court has held that this contract-cover differential is appropriate even when the aggrieved buyer ultimately is able to pass on its additional costs to other parties [*KGM Harvesting Co. v. Fresh Network (1995) 36 Cal. App. 4th 376, 384, 42 Cal. Rptr. 2d 286* , *criticizing Allied Canners & Packers, Inc. v. Victor Packing Co. (1984) 162 Cal. App. 3d 905, 209 Cal. Rptr. 60* (discussed in [4][a], *below*)]. Failure of the buyer to effect cover within *Com. Code § 2712* does not bar any other remedy [*Com. Code § 2712(3)*]. However, the recovery of consequential damages is limited to those which could not reasonably be prevented by cover or otherwise [*see Com. Code § 2715(2)(a)*]. Thus, in order to recover consequential damages other than those which could not have been avoided by cover or otherwise, the buyer must have made a good faith attempt to mitigate his or her losses by "cover" [*see § 500.110[2] -[3]*].

The concept of "cover" thus serves two purposes: it enables the buyer to make reasonable substitute purchases and to

recover the cost of those purchases rather than the difference between market value and contract price and, at the same time, protects the seller from consequential damages which could have been mitigated by the purchase of substitute goods [*Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists (1971) 14 Cal. App. 3d 209, 219, 92 Cal. Rptr. 111]* . It should be noted that *Com. Code § 2715(2)(a)* applies the reasonable standard to a buyer's attempts to cover. Thus, for example, a buyer who fails to purchase substitute items because of their unavailability at prices within the buyer's financial ability nevertheless may be entitled to recover consequential damages [*Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists (1971) 14 Cal. App. 3d 209, 219-220, 92 Cal. Rptr. 111]* .

[4] Damages

[a] Measure of Damages for Nondelivery

On the seller's breach, another remedy available to the aggrieved buyer is to recover damages for nondelivery [*Com. Code § 2711(1)(b)*]. This remedy is a complete alternative to cover under *Com. Code § 2712*, discussed in *§ 500.76[3]*, and applies only when, and to the extent that, the buyer has not covered [*see* UCC Comment to *Com. Code § 2713* and *§ 500.111* (form)]. The measure of damages for nondelivery or repudiation by the seller, subject to the provisions of *Com. Code § 2723* (discussed in *§ 500.77[1]*) with respect to proof of market price, is the difference between the market price at the time when the buyer learned of the breach and the contract price, together with any incidental and consequential damages provided in *Com. Code § 2715* [*see § 500.76[3]*, and *§ 500.76[4][c]*], but less expenses saved in consequence of the seller's breach [*Com. Code § 2713(1)*]. One appellate court, construing former *Com. Code § 1106* (now see *Com. Code § 1305*) and Com. Code § *2713* together, adopted a rule limiting this market price measure of damages for the noncovering buyer, in the absence of any bad faith on seller's part, to the actual profit the buyer would have made on resale. Thus, when the seller knows the buyer has a resale contract but does not act in bad faith and the buyer does not show that it will be liable in damages to the buyer on its forward contract, the buyer's damages are limited to the actual amount it expected to make on the transaction [*Allied Canners & Packers, Inc. v. Victor Packing Co. (1984) 162 Cal. App. 3d 905, 914-915, 209 Cal. Rptr. 60* ; *contra KGM Harvesting Co. v. Fresh Network (1995) 36 Cal. App. 4th 376, 384, 42 Cal. Rptr. 2d 286]* .

The use of the market price at the time of knowledge of the breach as the standard of comparison with the contract price is intended to be measured by the market in which the buyer would have obtained cover had he or she sought that relief, so the place for measuring damages is the place of tender or the place of arrival if the goods are rejected or their acceptance is revoked after reaching their destination [*Com. Code § 2713(2)*]. The price is for goods in the same branch of trade. When the market price is difficult to prove, *Com. Code § 2723* may be used to permit a showing of a comparable market price; if no market price is available, evidence of spot sale prices is proper. It should be noted that, if the unavailability of a market price is caused by a scarcity of goods of the type involved, a good case may be made for specific performance (*Com. Code §§ 2711(2)(b), 2716*, and discussion in *§ 500.76[5], below*) [*see* UCC Comment to *Com. Code § 2713*].

[b] Measure of Damages for Nonconforming Goods

If the buyer has accepted goods and given notification of breach pursuant to *Com. Code § 2607(3)* [*see* discussion in *§ 500.60[2][b]*], the buyer may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach, as determined in any manner which is reasonable [*Com. Code § 2714(1)*]. Nonconformity includes not only breaches of warranties but also any failure of the seller to perform according to the seller's obligations under the contract [*see* UCC Comment to *Com. Code § 2714*]. Incidental and consequential damages under *Com. Code § 2715* may also be recovered in a proper case [*Com. Code § 2714(3)*; *see § 500.76[4][c]*].

The buyer, on notifying the seller of his or her intention to do so, may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract [*Com. Code § 2717* ; *see AmerisourceBergen Corp. v. Dialysist West, Inc. (9th Cir. 2006) 445 F.3d 1132, 1135-1136* (construing Arizona statute

identical to *Com. Code § 2717*; buyer may not set off contractual claim against debt on separate contract; statute preempts common law right of equitable setoff in situations in which statute applies)]. The buyer must give this notice to avoid a default within the meaning of *Com. Code § 2609* on insecurity and right to assurances [*see* discussion in *§ 500.32[4]*]. However, no formality of notice is required, and any language which reasonably indicates the buyer's reason for withholding payment is sufficient [*see* UCC Comment to *Com. Code § 2717*].

[c] Buyer's Incidental and Consequential Damages

Incidental damages [*Com. Code § 2714(3)*] resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation, care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover, and any other reasonable expense incident to the delay or other breach [*Com. Code § 2715(1)*]. These specific damages enumerated are not intended to be an exhaustive list but are merely illustrative [*see* UCC Comment to *Com. Code § 2715*].

Consequential damages resulting from the seller's breach [*Com. Code § 2714(3)*; *see § 500.110* (form)] include any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise [*Com. Code § 2715(2)(a)*; *see Sun Maid Raisin Growers v. Victor Packing Co. (1983) 146 Cal. App. 3d 787, 791, 194 Cal. Rptr. 612]* and injury to person or property proximately resulting from any breach of warranty [*Com. Code § 2715(2)(b)*]. To charge the seller with knowledge, particular needs of the buyer must generally be made known, while general needs must rarely be made known [*see* UCC Comment to *Com. Code § 2715*]. Under *Com. Code § 2715(2)(a)*, the injured buyer has the burden of proving the extent of its consequential damages. The allegedly breaching seller has the burden of proving the inadequacy of buyer's efforts to mitigate its consequential damages [*Carnation Co. v. Olivet Egg Ranch (1986) 189 Cal. App. 3d 809, 818, 229 Cal. Rptr. 261]* .

When loss of anticipated profits is an element of consequential damages, the evidence must show, with reasonable certainty, both their occurrence and the extent of the damages, and the loss is measured by net, not gross, profits [*see Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists (1971) 14 Cal. App. 3d 209, 221-223, 92 Cal. Rptr. 111]* . If the seller knows that the buyer is in the business of reselling the goods, the seller is charged with knowledge that the buyer will be selling the goods in anticipation of a profit. Absent a contractual provision against consequential damages, a seller breaching in bad faith therefore will be liable for the buyer's resulting loss of profit [*Sun Maid Raisin Growers v. Victor Packing Co. (1983) 146 Cal. App. 3d 787, 791, 194 Cal. Rptr. 612]* .

Financing costs, such as amounts paid or owed to the buyer's financier, were held to be a proper element of the buyer's consequential damages when the seller knew of the loan. In the case of a finance lease in which the financing lessor validly disclaimed all warranties and the lessor was entitled to revoke acceptance as to the manufacturer for defects [*see Com. Code §§ 2608, 2711*], the lessor was entitled to recover from the manufacturer the amount of the deficiency it owed to the financing lessor after the financing lessor repossessed the equipment and sold it [*U. S. Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal. App. 3d 1431, 1454, 279 Cal. Rptr. 533]* .

[5] Specific Performance

Specific performance may be decreed if the goods are unique or in other proper circumstances [*Com. Code § 2716(1)*]. However, specific performance is no longer limited to goods which are already specific or ascertained at the time of contracting; the test of uniqueness must be made in terms of the total situation which characterizes the contract. For example, output and requirements contracts [*see* discussion in *§ 500.34[2]*] involving a particular or peculiarly available source or market present a typical, commercial specific performance situation. If the goods are not unique, inability to cover is strong evidence of "other proper circumstances" justifying specific performance [*see* UCC Comment to *Com. Code § 2716* and *Copylease Corp. of America v. Memorex Corp. (S.D.N.Y. 1976) 408 F. Supp. 758, 759-760]* . When a seller refuses to perform and the buyer shows threatened irreparable injury as a result, the latter may be entitled to a

preliminary injunction to restrain the seller from failing to perform under the contract pending the outcome of an action for specific performance and damages [*see Kaiser Trading Co. v. Associated Metals & Minerals Corp. (N.D. Cal. 1970) 321 F. Supp. 923, 933]* . The decree for specific performance may include such terms and conditions as to payment of price, damages, or other relief as the court may deem just [*Com. Code § 2716(2)*].

[6] Replevin

The buyer has a right of replevin for goods identified to the contract if, after reasonable effort, the buyer is unable to effect cover for the goods, the circumstances reasonably indicate that the effort will be unavailing, or the goods have been shipped under reservation and satisfaction of the (seller's) security interest in them has been made or tendered [*Com. Code §§ 2711(2)(b), 2716(3)*]. This remedy is in addition to the buyer's right to recover identified goods under *Com. Code § 2502*, discussed in *§ 500.74* [*see* UCC Comment 3 to *Com. Code § 2716*].

In the case of goods bought for personal, family, or household purposes, the buyer's right of replevin vests when the buyer acquires his or her special property [*see Com. Code § 2501*, discussed in *§ 500.51*], even if the seller had not then repudiated or failed to deliver [*Com. Code § 2716(3)*].

Inasmuch as a secured party normally acquires no greater rights in its collateral than its debtor had or had power to convey [*see Com. Code § 2403(1)*], a buyer who acquires a right of replevin under *Com. Code § 2716(3)* will take free of a security interest created by the seller if it attaches to the goods after the goods have been identified to the contract. The buyer will take free even if the buyer does not buy in the ordinary course and even if the security interest is perfected. Of course, to the extent that the buyer pays the price after the security interest attaches, the payments will constitute proceeds of the security interest [*see* UCC Comment 3 to *Com. Code § 2716*; *see Ch. 503, Sales: Secured Transactions, § 503.20* et seq. for discussion of when security interests attach].

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§ 500.77 Proof of Price

[1] Time as of Which Price is Determined

If an action based on anticipatory repudiation [*see* the discussion in *§ 500.61*] comes to trial before the time for performance with respect to some or all of the goods, any damages based on market price [*Com. Code §§ 2708, 2713*] are determined according to the price of those goods prevailing at the time when the aggrieved party learned of the repudiation [*Com. Code § 2723(1)*].

If evidence of a price prevailing at the times or places described in Division 2 is not readily available, the price prevailing within any reasonable time before or after the time described or at any other place which in commercial judgment or under usage of trade would serve as a reasonable substitute for the one described may be used, making any proper allowance for the cost of transporting the goods to or from that other place [*Com. Code § 2723(2)*].

Evidence of a relevant price prevailing at a time or place other than the one described in Division 2 offered by one party is not admissible unless and until the party has given the other party such notice as the court finds sufficient to prevent unfair surprise [*Com. Code § 2723(3)*]. The provisions of *Com. Code § 2723*, however, are not intended to exclude the use of any other reasonable method of determining market price or of measuring damages if the circumstances of the case make this necessary [*see* UCC Comment to *Com. Code § 2723*].

[2] Market Quotations

Whenever the prevailing price or value of any goods regularly bought and sold in any established commodity market is in issue, reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of that market are admissible in evidence [*Com. Code § 2724*]. "Any established commodity market" is one in which transactions in the commodity are frequent and open enough to make a market established by usage in which one price can be expected to affect another and in which an informed report of the range and trend of prices can be assumed to be reasonably accurate [*see* UCC Comment to *Com. Code § 2724*]. The circumstances of the preparation of the report may be shown to affect its weight but not its admissibility [*Com. Code § 2724*]. Although *Com. Code § 2724* does not explicitly provide for the weight to be given to market quotations, such quotations, in the absence of

compelling challenge, offer an adequate basis for a verdict [*see* UCC Comment to *Com. Code § 2724*].

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§ 500.78 Statute of Limitations

An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By their original agreement, the parties may reduce the period of limitation to not less than one year but may not extend it [*Com. Code § 2725(1)*; *see Therma-Coustics Manufacturing, Inc. v. Borden, Inc. (1985) 167 Cal. App. 3d 282, 296, 213 Cal. Rptr. 611* (upholding one-year limitation inserted under *Com. Code § 2207*)]. The period of limitation prescribed by *Com. Code § 2725(1)* applies to both oral and written contracts. It also applies to implied-in-law sales contracts, as when the plaintiff waives a claim in conversion and elects to treat the action as a purchase and sale of the converted property [*see H. Russell Taylor's Fire Prevention Service, Inc. v. Coca Cola Bottling Corp. (1979) 99 Cal. App. 3d 711, 719-725, 160 Cal. Rptr. 411]* . A cause of action accrues for the breach of any contract of sale when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach [*Com. Code § 2725(2)*]. A breach of warranty occurs when tender of delivery is made, except that when a warranty explicitly extends to future performance of the goods and discovery of the breach of the breach must await the time of that performance, the cause of action accrues when the breach is or should have been discovered [*Com. Code § 2725(2)*; *see Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116, 131-133, 87 Cal. Rptr. 3d 5* (seller's promise that product would work for 50,000 cycles did not fall within future-performance exception in *Com. Code § 2725(2)* because it did not specify date or time in future, nor did it pertain to time period that could be determined by reference to external source, and buyer could have discovered defect at any time without waiting for completion of 50,000 cycles; additionally, both parties were large and sophisticated companies and could have drafted their agreement to explicitly state duration of warranty so as to ensure that limitation period would extend beyond four years, if that had been their intent); *Carrau v. Marvin Lumber and Cedar Co. (2001) 93 Cal. App. 4th 281, 290-292, 112 Cal. Rptr. 2d 869* (generalized assertions in advertisements and literature do not rise to level of warranty explicitly extending to "future performance"; plaintiff thus did not meet exception to four-year limitation period)]. The future performance exception in *Com. Code § 2725(2)* cannot apply with respect to an implied warranty, however. Because an implied warranty is one that arises by operation of law rather than by an express agreement of the parties, it is not a warranty that "explicitly" extends to future performance of the goods, as that code section requires [*Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116, 134, 87 Cal. Rptr. 3d 5]* .

When an action commenced within the time provided in *Com. Code § 2725(1)* is so terminated as to leave available a

remedy by another action for the same breach, the other action may be commenced after the expiration of the time limit and within six months after the termination of the first action, unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute [*Com. Code § 2725(3)*].

The provisions contained in *Com. Code § 2725* governing the period of limitations for the commencement of an action for the breach of any contract for sale do not alter the law on tolling the statute of limitations [*Com. Code § 2725(4)*; *see generally* Ch. 345, *Limitation of Actions*].

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§ 500.79 Goods Bought Through Web Site--Personal Jurisdiction of Seller

While it is possible that Internet activity alone could create the necessary minimum contacts to expose a nonresident defendant to personal jurisdiction in California courts, that issue must be determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the defendant's web site [*Pavlovich v. Superior Court (2002) 29 Cal. 4th 262, 274, 127 Cal. Rptr. 2d 329, 58 P.3d 2* ; *see Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances, § 323.14[4][b]*]. A disgruntled California consumer will not necessarily be able to sue a nonresident seller in a California court. In one case, for instance, a Florida seller's web site merely advertised a consumer product (a car) for sale, which a California resident bought after initiating contact with the seller. There was no evidence that files were exchanged through the web site or that any business was actually conducted through the web site, nor any evidence that anything about the web site specifically targeted California residents, and the seller had none of the traditionally sufficient ties with California to establish minimum contact. Therefore, the seller's maintenance of the web site alone was insufficient to establish personal jurisdiction when the California consumer sued the seller in a California court for rescission or damages [*Shisler v. Sanfer Sports Cars, Inc. (2007) 146 Cal. App. 4th 1254, 1260-1262, 53 Cal. Rptr. 3d 335]* .

The Ninth Circuit has said that when a seller uses the eBay web site as a means for "establishing regular business with" persons in a state other than the seller's state, that may be properly taken into account for purposes of determining whether asserting personal jurisdiction of the seller in that other state would comport with traditional notions of fair play and substantial justice [*Boschetto v. Hansing (9th Cir. 2008) 539 F.3d 1011, 1019* (in this case involving one-time transaction by Wisconsin seller and California buyer, "the use of eBay as the conduit for that transaction does not have any dispositive effect on jurisdiction" in California)]. Relevant evidence could include [*Boschetto v. Hansing (9th Cir. 2008) 539 F.3d 1011, 1018-1019, 1019 n.6*]:

- The seller's overall eBay statistics, experience, or any marketing directed at potential customers and designed to welcome bids from residents in the buyer's state.

- That the seller engaged in other transactions, even if only a few transactions, with the buyer or other residents of the buyer's state, either through the eBay web site or otherwise.

- That the seller was a commercial seller, and the eBay web site was the seller's primary marketing vehicle, or that the seller's use of the eBay web site was regular.

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[Reserved]

§§ 500.80[Reserved]

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§ 500.90 Related Matthew Bender Publications

For interrogatories used in actions involving sales, see Bender's Forms of Discovery, Ch. 169, *Sales* (Matthew Bender)

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§ 500.91 State Statutes

[1] Allocation of Risk

Allocation or division of risks. *Com. Code § 2303*

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Effect of breach on risk of loss. *Com. Code § 2510*

[2] Attorney's Fees

Contingency fee contract between attorney and merchant who employs 10 or more individuals for recovery of claim against another merchant is not required to be in writing if fee within specified limits. *Bus. & Prof. Code § 6147.5*

[3] Breach

Cure by seller of improper tender or delivery; replacement. *Com. Code § 2508*

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[4] Buyer's Rights and Remedies

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Buyer's options as to salvage of rightfully rejected goods. *Com. Code § 2604*

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Revocation of acceptance in whole or in part. *Com. Code § 2608*

Buyer's remedies in general; buyer's security interest in rejected goods. *Com. Code § 2711*

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[5] Damages

Seller's damages for nonacceptance or repudiation. *Com. Code § 2708*

Seller's incidental damages. *Com. Code § 2710*

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[6] Definitions

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Written instrument is presumptive evidence of consideration. *Civ. Code § 1614*

Modification of contract not in writing. *Civ. Code § 1697*

Variation of Com. Code terms by agreement. *Com. Code § 1302(a)*

Formal requirements for contract for sale of goods: statute of frauds. *Com. Code § 2201*

Formation of contract generally. *Com. Code § 2204*

Firm offers. *Com. Code § 2205*

Offer and acceptance in formation of contract. *Com. Code § 2206*

Additional terms in acceptance or confirmation. *Com. Code § 2207*

Modification, rescission and waiver. *Com. Code § 2209*

Contractual modification or limitation of remedy. *Com. Code § 2719*

[8] Goods

"Goods" defined. *Com. Code § 2105(1)*

"Conforming" goods defined. *Com. Code § 2106(2)*

Insurable interest in goods; manner of identification of goods. *Com. Code § 2501*

Casualty to identified goods. *Com. Code § 2613*

[9] Interpretation of Contracts

Manner of creating and interpreting contracts. *Civ. Code §§ 1625, 1647*; *Code Civ. Proc. §§ 1856, 1857*

Meaning of words in contract. *Civ. Code § 1644*

Court action regarding unconscionable contract or clause of contract. *Civ. Code § 1670.5*

Course of performance, course of dealing, and usage of trade. *Com. Code § 1303*

Final written expression: parol or extrinsic evidence. *Com. Code § 2202*

Open price term. *Com. Code § 2305*

Output, requirements and exclusive dealings. *Com. Code § 2306*

Absence of specific time provisions; notice of termination. *Com. Code § 2309*

Special incidents of sale on approval and sale or return. *Com. Code § 2327*

[10] Payment

"Money" defined. *Com. Code § 1201(b)(24)*

"Value" defined. *Com. Code § 1204*

Price payable in money, goods, realty, or otherwise. *Com. Code § 2304*

Open time for payment or running of credit; authority to ship under reservation. *Com. Code § 2310*

Tender of payment by buyer; payment by check. *Com. Code § 2511*

Form of negotiable instruments; "Draft;" "Check;" "Certificate of Deposit;" "Note." *Com. Code § 3104*

Effect of instrument on obligation for which it is given. *Com. Code § 3310*

Dishonor of negotiable instrument. *Com. Code §§ 3503-3505*

[11] Performance

General obligations of parties. *Com. Code § 2301*

Options and cooperation respecting performance. *Com. Code § 2311*

What constitutes acceptance of goods. *Com. Code § 2606*

Right to adequate assurance of performance. *Com. Code § 2609*

Substituted performance. *Com. Code § 2614*

Excuse by failure of presupposed conditions. *Com. Code § 2615*

Procedure on notice claiming excuse. *Com. Code § 2616*

[12] Procedure

Burden of proving lack of consideration. *Civ. Code § 1615*

Original jurisdiction in limited civil cases. *Code Civ. Proc. §§ 85, 86*

Statute of limitations on actions on written contracts. *Code Civ. Proc. § 337(1)*

Statute of limitations on actions on oral contracts. *Code Civ. Proc. § 339(1)*

Venue of contract action. *Code Civ. Proc. § 395(a)*

Venue for corporations or associations. *Code Civ. Proc. § 395.5*

Contents of complaint. *Code Civ. Proc. § 425.10*

Lack of capacity as ground for demurrer. *Code Civ. Proc. § 430.10(b)*

Failure to allege whether contract is written or oral or implied by conduct as ground for demurrer. *Code Civ. Proc. § 430.10(g)*

Form and content of answer. *Code Civ. Proc. § 431.30*

Verification of pleadings. *Code Civ. Proc. § 446*

[13] Sales Generally

Uniform Fraudulent Transfer Act. *Civ. Code § 3439 et seq.*

Remedies to be liberally administered. *Com. Code § 1305*

Scope of Division 2. *Com. Code § 2102*

"Sale" defined. *Com. Code § 2106(1)*

[14] Seller's Rights and Remedies

Seller's remedies on discovery of buyer's insolvency. *Com. Code § 2702*

Seller's remedies in general. *Com. Code § 2703*

Seller's remedy of resale. *Com. Code § 2703(d)*

Seller's remedy of recovery of damages for nonacceptance. *Com. Code § 2703(e)*

Seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods. *Com. Code § 2704*

Seller's stoppage of delivery in transit or otherwise. *Com. Code § 2705*

Seller's resale including contract for resale. *Com. Code § 2706*

"Person in the position of a seller." *Com. Code § 2707*

Seller's damages for nonacceptance or repudiation. *Com. Code § 2708*

Action for the price. *Com. Code § 2709*

Seller's incidental damages. *Com. Code § 2710*

[15] Shipment and Delivery

"Bill of lading" defined. *Com. Code § 1201(b)(6)*

"Delivery" defined. *Com. Code § 1201(b)(15)*

Delivery in single lot or several lots. *Com. Code § 2307*

Absence of specified place for delivery. *Com. Code § 2308*

F.O.B. and F.A.S. terms. *Com. Code § 2319*

C.I.F. and C. & F. terms. *Com. Code § 2320*

C.I.F. or C. & F.: "net landed weights"; "payment on arrival;" warrant of condition of arrival. *Com. Code § 2321*

Delivery "ex-ship." *Com. Code § 2322*

Form of bill of lading required in overseas shipment; "Overseas" defined. *Com. Code § 2323*

"No arrival, no sale" term. *Com. Code § 2324*

Manner of seller's tender of delivery. *Com. Code § 2503*

Shipment by seller. *Com. Code § 2504*

Seller's shipment under reservation. *Com. Code § 2505*

Effect of seller's tender; delivery on condition. *Com. Code § 2507*

"Bailee" defined. *Com. Code § 7102(a)(1)*

"Consignee" defined. *Com. Code § 7102(a)(3)*

[16] Third Parties

"Holder" defined. *Com. Code § 1201(b)(21)*

"Financing agency" defined. *Com. Code § 2104(2)*

Sale on approval and sale or return; consignment sales and rights of creditors. *Com. Code § 2326*

Title, creditors and good faith purchasers. *Com. Code § 2401 et seq.*

Rights of financing agency. *Com. Code § 2506*

"Person in the position of a seller." *Com. Code § 2707*

Who can sue third parties for injury to goods. *Com. Code § 2722*

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§ 500.92 Decisions

[1] Contractual Limitations on Damages

Carrier who delivers goods into consignee's possession in breach of C.O.D. contract and who allows consignee to dispose of them may not dispute market value of goods because of alleged defects. *Cermetek, Inc. v. Butler Avpak, Inc. (9th Cir. 1978) 573 F.2d 1370, 1379*

Criteria established by *Tunkl v. Regents of University of California (1963) 60 Cal. 2d 92, 32 Cal. Rptr. 33, 383 P.2d 441* , for determining whether exculpatory clause is unenforceable on grounds of public interest, are not applicable to commercial transaction between large sophisticated companies. *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 27-32, 262 Cal. Rptr. 716*

Total disclaimer of all warranties and requirement that buyer purchase insurance to cover all losses and hold seller and all seller's contractors and subcontractors harmless was reasonable allocation of risk between large sophisticated commercial entities in specially manufactured, specialized high technology, high-risk product (rocket for launching communications satellite). *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 27, 262 Cal. Rptr. 716*

When warranty disclaimer and hold-harmless provisions are clear and unambiguous in precluding suit by purchaser against manufacturer's subcontractors, intent of drafters of related service contract between different parties and covering different subject matter was not relevant. *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 18, 262 Cal. Rptr. 716*

[2] Definitions

Car dealership's name in printed newspaper advertisement was "signature" within meaning of *Com. Code § 1201(b)(37)* sufficient to satisfy statute of frauds; when advertisement reasonably justifies recipient's understanding that communication was intended as offer; offeror's intent to authenticate his or her name as signature can be established

from face of advertisement. *Donovan v. RRL Corp. (2001) 26 Cal. 4th 261, 276- 278, 109 Cal. Rptr. 2d 807, 27 P.3d 702*

Exporter with resale contract was "buyer" under *Com. Code § 2103(1)(a)* when it contracted with seller in its own name; thus, damages for seller's breach were not limited to commission but were established by *Com. Code § 2713*. *Allied Canners & Packers, Inc. v. Victor Packing Co. (1984) 162 Cal. App. 3d 905, 910-911, 209 Cal. Rptr. 60*

Funds held by bank as result of money orders remaining uncashed more than seven years were not "goods" under *Com. Code § 2105(1)*. *Cory v. Golden State Bank (1979) 95 Cal. App. 3d 360, 368, 157 Cal. Rptr. 538*

[3] Formation of Contract

When buyer's purchase order stated that it could only be accepted on its own terms unless additional terms were agreed to in writing, fact that seller's acceptance specified different terms did not impose different terms because acceptance was not made conditional on acceptance of different terms; fact that parties had used same forms on earlier orders did not impose seller's terms by custom because those terms and conditions were not utilized. *Lockheed Electronics Co. v. Keronix, Inc. (1981) 114 Cal. App. 3d 304, 310-313, 170 Cal. Rptr. 591*

[4] Good Faith Purchaser; Entrustment; Power to Transfer

"Full title" scheme of vehicle registration [*see Veh. Code § 6300 et seq.*] relates only to security interests, not title, and does not defeat *Com. Code § 2403(1)*; good faith purchaser who relied on facially valid certificate of title "laundered" through another state acquired no title as against true owner. *Suburban Motors, Inc. v. State Farm Mut. Auto. Ins. Co. (1990) 218 Cal. App. 3d 1354, 1361-1364, 268 Cal. Rptr. 16*

Com. Code § 2403 is applicable to sale of automobiles; good faith purchaser from thief acquires no title; thief's title is void, not just voidable, and thief has no power to transfer; voidable title under *Com. Code § 2403(1)* only arises from voluntary transfer or delivery by true owner. *Suburban Motors, Inc. v. State Farm Mut. Auto. Ins. Co. (1990) 218 Cal. App. 3d 1354, 1359-1361, 268 Cal. Rptr. 16*

Entrusting goods so that person with possession has power to transfer all rights of entruster to buyer in ordinary course of business [*Com. Code § 2403(2)*] requires entruster's acquiescence in retention of possession for purpose of sale, obtaining offers to purchase, locating buyer, or the like under *Com. Code § 2403(3)*. *Budget Rent-A-Car of So. Cal. v. Bergman (1981) 121 Cal. App. 3d 256, 262, 263, 175 Cal. Rptr. 286*

[5] Liquidated Damages

Defendant having failed to prove that interest of 1.5 percent per month on balance due for assembly work and remaining unpaid after 30 days was unreasonable, interest provision was validated liquidated damages provision under *Civ. Code § 1671(b)* and *Com. Code § 2718*; in addition, parties were merchants and bound to provision under *Com. Code § 2718*. *O'Connor v. Televideo System, Inc. (1990) 218 Cal. App. 3d 709, 718-719, 267 Cal. Rptr. 237*

[6] Revocation of Acceptance

When financing lessor validly disclaimed all warranties and goods conform to lease, lessee could not revoke acceptance as to lessor, but could as to manufacturer. *U.S. Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal. App. 3d 1431, 1445, 1450-1453, 279 Cal. Rptr. 533*

[7] Sale or Service

Film processing is service, not goods; contract relating to those services was not governed by Division 2. *Eichman v. Fotomat Corp. (9th Cir. 1989) 880 F.2d 149, 165*

Oral contract to make release prints of motion picture from other party's negatives was not contract for sale of goods within meaning of *Com. Code § 2105(1)*, but contract for services; action for breach of contract was governed by two-year limitation period, not *Com. Code § 2725*. *Filmservice Laboratories, Inc. v. Harvey Bernhard Enterprises, Inc. (1989) 208 Cal. App. 3d 1297, 1305-1306, 256 Cal. Rptr. 735* ; *accord U.S. ex rel. Bartec Ind. v. United Pacific (9th Cir. 1992) 976 F.2d 1274, 1277-1278* (essence test applied to steel painting and fabricating, which were incidental to sale of goods)

When transaction has elements of sale and of service, essence or predominant element of transaction is determinative. *Filmservice Laboratories, Inc. v. Harvey Bernhard Enterprises, Inc. (1989) 208 Cal. App. 3d 1297, 1305, 256 Cal. Rptr. 735*

[8] Statute of Limitations

Although action for breach of oral contract of sale is governed by four-year limitation of *Com. Code § 2725*, oral contract for services is subject to two-year limitation. *Filmservice Laboratories, Inc. v. Harvey Bernhard Enterprises, Inc. (1989) 208 Cal. App. 3d 1297, 1304-1305, 256 Cal. Rptr. 735*

Action seeking deficiency judgment on sales contract but not seeking recovery for any penalty or forfeiture is governed by four-year limitations period set out in *Com. Code § 2725*. *Jack Heskett Lincoln-Mercury, Inc. v. Metcalf (1984) 158 Cal. App. 3d 38, 42-43, 204 Cal. Rptr. 355*

[9] Strict Liability

Strict liability is not applicable to defective product in commercial setting when only business loss is involved; thus, disclaimer of strict liability in commercial transaction was effective. *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 33, 262 Cal. Rptr. 716*

[10] Unconscionability

Disclaimer of warranties by financing lessor was not per se unconscionable, but was to be tested under *Com. Code § 2316*. *U. S. Roofing, Inc. v. CreditAlliance Corp. (1991) 228 Cal. App. 3d 1431, 1450-1453, 279 Cal. Rptr. 533*

Fact that manufacturer is better able than buyer to detect defects was not relevant in evaluating claimed unconscionability of exculpatory clauses when item was not mass produced but was specialized high technology, high-risk product and contract was not preprinted but was negotiated by parties. *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 25-26, 262 Cal. Rptr. 716*

Purchaser that drafted one of two exculpatory clauses in contract and had dealt with similar provisions in previous contracts between parties was unable to claim surprise at scope of provisions claimed to be unconscionable. *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 24-25, 262 Cal. Rptr. 716*

Between large sophisticated companies no procedural element of unconscionability was established with respect to

exculpatory provisions by alleged total monopoly on manufacture of upper-stage rockets used to launch communications satellites when French company, with which purchaser had originally contracted, provided alternative launch capability. *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 23, 262 Cal. Rptr. 716*

When parties had 20-year-long commercial relationship, unconscionability of seller's limitation on consequential damages was tested under *Com. Code § 2719(3)* rather than under *Civ. Code § 1668*; limitation was not unconscionable, but was material part of bargain; each case is determined on its particular facts. *Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co., Inc. (1988) 200 Cal. App. 3d 1518, 1538-1539, 246 Cal. Rptr. 823*

Unconscionability is common law doctrine applicable in absence of statutory authorization; although UCC § 2-302 has not been adopted by Legislature, *Civ. Code § 1670.5* incorporates identical language and applies to all contracts, not just sales transactions. *A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473, 484-485, 186 Cal. Rptr. 114*

Disclaimer of warranties and exclusion of consequential damages appearing on reverse side of standard contract was unconscionable and unenforceable because (1) seller made no attempt to provide buyer with knowledge of disclaimer or exclusion, even though warranty was conspicuous and buyer could have read back of contract; (2) seller was much larger company and terms of seller's contract were standard; (3) disclaimer was commercially unreasonable because it attempted to disclaim all warranties; (4) buyer was forced to rely on seller's expertise due to lack of experience with product; (5) consequential damages were obvious; and (6) seller was only party reasonably able to prevent loss. *A & M Produce Co. v. FMC Corp. (1982) 135 Cal. App. 3d 473, 489-493, 186 Cal. Rptr. 114*

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[Reserved]

§§ 500.95[Reserved]

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PART IV. FORMS
A. Complaints by Sellers

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§ 500.100 Complaint for Damages for Breach of Contract [Com. Code §§ 2703(e), 2704, 2706, 2708-2710]

[1] FORM Complaint for Damages for Breach of Contract [Com. Code §§ 2703(e), 2704, 2706, 2708-2710]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] [, a California Corporation],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*] [, individually and doing business as _____ (*fictitious name*)],	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
Defendant.	)	

_____

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was a corporation, organized and existing under the laws of California, with its principal place of business in _____ County [*or allege other capacity and residence of plaintiff, if appropriate*].

2. At all times herein mentioned, defendant _____[*name*], was doing business under the fictitious name of _____ [*name*] with its principal office in _____ [*city*], _____ County, California [*or allege other capacity of defendant and basis of venue as appropriate*].

3. _____ [*Allege that plaintiff is a merchant, if appropriate, e.g.,* Plaintiff is a merchant engaged in the retail sale of _____ (*describe goods, wares, or merchandise*)].

4. _____ [*Allege that defendant is a merchant, if appropriate, e.g.,* Defendant is a merchant engaged in the wholesale _____ (*type of business*) business.]

[*EITHER, if agreement is evidenced by written contract*]

5. _____ [*Allege facts showing execution and terms of contract, e.g.,* On _____ (*date*), defendant (, acting by and through its duly authorized agent,) executed and delivered to plaintiff a contract for the purchase of goods. The contract, a true copy of which is attached as Exhibit A and incorporated by reference, provides for the sale by plaintiff to defendant of _____ (*in general terms describe goods, wares, or merchandise made subject of contract*), and obligates defendant to make payment in the sum of $ _____, on delivery of the goods].

[*OR, if no written contract is in existence*]

5. _____ [*Allege facts showing making and substance of agreement, e.g.,* On _____ (*date*), at the special instance and request of defendant, and in consideration of defendant's promise to pay the purchase price, plaintiff shipped and delivered to defendant the goods, wares and merchandise shown on the attached Exhibit B, which is incorporated by reference].

[*CONTINUE*]

6. _____ [*Allege facts showing performance by plaintiff under contract, e.g.,* Plaintiff fully and in all things performed his/her/its part of the agreement described in Paragraph 5, in that on _____ (*date*), plaintiff _____ (delivered *or* tendered delivery of), the goods to defendant in the time and manner and at the place required by the agreement].

7. _____ [*Allege defendant's breach of contract, e.g.,* In violation of its promises and obligations under the agreement described in Paragraph 5, defendant _____ (wrongfully refused to accept delivery of the goods *or* wrongfully revoked acceptance of the goods *or* wrongfully fails and refuses to make payment due for the goods)].

[*EITHER, if resale was at public sale*]

8. _____ [*Set forth plaintiff's actions in response to defendant's breach, e.g.,* Following defendant's breach of the contract as described in Paragraph 7, plaintiff attempted to locate another party willing to purchase the goods. After giving defendant reasonable notice of the time and place of the resale of the goods, plaintiff sold the goods to the highest bidder for cash in a public sale conducted in good faith and in a commercially reasonable manner.]

[*OR, if resale was at private sale*]

8. _____ [*Set forth plaintiff's actions in response to defendant's breach, e.g.,* Following defendant's breach of the contract as described in Paragraph 7, plaintiff attempted to locate another party willing to purchase the goods. After giving defendant reasonable notification of his/her intention to resell the goods, plaintiff sold the goods in a commercially reasonable manner and in good faith to _____ (*name*). The resale contract, a true copy

of which is attached as Exhibit B and incorporated by reference, provides for the sale by plaintiff to third party _____(*name*) on the following terms: _____ (*in general terms, state contract price, delivery terms, etc., of resale contract*).]

[*CONTINUE*]

[*EITHER, if damages are based on resale*]

9. _____ [*Set forth claim for damages, e.g.,* The price received by plaintiff from the resale of the goods described in Paragraph 8 is $_____. The price defendant contracted and agreed to pay for these goods, as described in Paragraph 5, is $ _____. As a direct and proximate result of defendant's breach of contract, plaintiff has suffered damages _____ (in the sum of $_____)].

[*OR, if resale damages are not sought, and claim is for lost profits for completed goods*]

9. _____ [*Set forth claim for damages for lost profits, e.g.,* The price defendant contracted and agreed to pay for the goods, as described in Paragraph 5, is $ _____. Plaintiff's costs directly attributable to the manufacture of these goods are _____ (*specify variable costs only, not fixed costs*). The damages specified in *Commercial Code Section 2708(1)* would be inadequate to put plaintiff in as good a position as performance would have done, because plaintiff was operating at less than full capacity at the time of defendant's breach, and plaintiff's volume of sales was decreased by defendant's breach. Thus, as a direct and proximate result of defendant's breach of contract, plaintiff has suffered damages _____ (in the sum of $ _____)].

[*OR, if resale damages are not sought, and claim is for lost profits as "lost volume seller"*]

9. _____ [_____. Plaintiff's costs directly attributable to the manufacture of these goods are _____ (*specify variable costs only, not fixed costs*). The damages specified in *Commercial Code Section 2708(1)* would be inadequate to put plaintiff in as good a position as performance would have done, because plaintiff was operating at less than full capacity at the time of defendant's breach, and plaintiff would have made the sale referred to in Paragraph 8, even if defendant had not breached the contract described in Paragraph 5. If defendant had not breached the contract described in Paragraph 5, plaintiff would have earned the profits from both sales. The damages specified in *Commercial Code Section 2708(1)*would only compensate plaintiff for the loss of profits on one sale. Thus, as a direct and proximate result of defendant's breach of contract, plaintiff has suffered damages _____ (in the sum of $ _____)].

[*OR, if resale damages are not sought, claim for lost profit for incomplete goods*]

9. _____ [*If goods were incomplete at time of breach and manufacture of goods was not completed following breach, set forth claim for lost profits, e.g.,* The price defendant contracted and agreed to pay for the goods, as described in Paragraph 5, is $ _____. Plaintiff's costs incurred in the manufacture of the goods up to the time of defendant's breach, including fixed expenses attributable to the contract, are $ _____. However, plaintiff saved expenses in the amount of $_____ by not being required to complete manufacture because of defendant's breach, and plaintiff was able to recoup $ _____ of the expenses incurred by selling the partially manufactured goods. It not being commercially reasonable to complete manufacture of

the goods under the contract, as a direct and proximate result of defendant's breach of contract, plaintiff has suffered damages in the sum of _____].

[*CONTINUE*]

[*EITHER, if the contract included liquidated damages provision*]

10. The parties agreed in Paragraph _____ of the contract that _____ [*specify conditions under which liquidated damages provision would apply, e.g.,* in the event of a breach by either party] plaintiff would be entitled to recover _____ [*specify amount of damages and/or formula for determining amount*].

[*OR, if defendant has made a deposit which the contract stipulates will be liquidated damages in the event of a breach*]

10. On entering into the contract with plaintiff, defendant provided a deposit of $ _____ as security for the performance of his/her contractual obligations. The contract provided that this deposit would be liquidated damages in the event of a breach of the contract. Since defendant has breached the contract as herein alleged, plaintiff is entitled to the sum of $_____ as damages.

[*CONTINUE*]

11. _____ [*Set forth claim for incidental damages, if sought, e.g.,* As a further direct result of defendant's breach of contract, plaintiff was caused to incur the following commercially reasonable charges, expenses, and commissions: _____ (*list, e.g.:*)

Transportation costs to and from defendant's warehouse	$ _____
Storage for 14 days	$ _____
Auctioneer's commission	$ _____
Total	$ _____]

WHEREFORE, plaintiff prays judgment against defendant as follows:

[*EITHER*]

1. For actual damages in the sum of $ _____ and liquidated damages according to the agreement of the parties in the amount of $ _____;

[*OR, if agreement provides for liquidated damages*]

1. For liquidated damages according to the agreement of the parties in the sum of $_____;

[*CONTINUE*]

[2. For incidental damages in the sum of $ _____;]

3. For interest on the sum of $ _____ from and after _____ [*date on which amount of damages was capable of being made certain or date on which action was filed, whichever is appropriate*];

4. For costs of suit herein incurred [including reasonable attorney's fees as authorized by *Civil Code Section 1717*]; and

5. For such other further relief as the court may deem proper.

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The complaint for damages [*Com. Code §§ 2703(e), 2704, 2706, 2708-2710*] in [1], *above*, is for use by an aggrieved seller of goods whose buyer has wrongfully rejected [*Com. Code §§ 2601(a), 2602*] or revoked acceptance of goods [*Com. Code § 2608*] or failed to make a payment due on or before delivery [*Com. Code § 2301*; *see § 500.75[1], [3], [6][a], [7]* (seller's options, measure of damages)].

[3] Allegations

This complaint alleges the following:

- Plaintiff's capacity to sue (Paragraph 1). This need not be alleged if plaintiff is a natural person, but if plaintiff is a legal entity, failure to allege capacity to sue may be grounds for demurrer to the complaint under *Code Civ. Proc. § 430.10(b)*.

- Defendant's capacity to be sued and basis of venue (Paragraph 2) [*see* [8], *below*].

- Plaintiff's and/or defendant's status as a merchant (Paragraphs 3 and 4). The complaint should allege that the parties are merchants [*Com. Code § 2104(1)*] if appropriate, because any transaction between

merchants impliedly charges the parties with the knowledge or skill of merchants [*Com. Code § 2104(3)*]. That knowledge may be specialized knowledge as to the goods, specialized knowledge as to business practices, or both, depending on the provisions of Division 2 involved in the transaction [*see* UCC Comment to *Com. Code § 2104*].

- Facts showing the existence of a contract between plaintiff as seller and defendant as buyer (alternative Paragraphs 5) [*see § 500.11[1]* and *[5]* (definitions of buyer and seller). The form contains alternative allegations of a written contract (first alternative Paragraph 5) and of a sale of goods on open account or by verbal order (second alternative Paragraph 5). A complaint on a contract is subject to demurrer if it does not allege whether the contract sued on was oral or in writing [*Code Civ. Proc. § 430.10(g)*]. Consideration to support the contract should be pleaded, as it is here, whenever the claim is not founded on a written contract, because consideration is a necessary element of executory contracts [*see Civ. Code § 1605*; *see also Ch. 140, Contracts, § 140.23*]. However, because a written instrument is presumptive evidence of consideration [*Civ. Code § 1614*], the plaintiff does not need to plead the existence and character of the consideration if the pleading states that the contract was in writing. The burden of pleading and proving lack of consideration sufficient to support a written instrument is on the party seeking to avoid it or invalidate it [*Civ. Code § 1615*; *but see Rancho Santa Fe Pharmacy, Inc. v. Seyfert (1990) 219 Cal. App. 3d 875, 884, 883, 268 Cal. Rptr. 505* (*Civ. Code § 1614* is presumption affecting burden of producing evidence and not burden of proof; once evidence is admitted sufficient to call existence of consideration into question, proponent of written instrument retains burden of proving consideration); *see* Ch. 140, *Contracts*]. A contract not evidenced by a written instrument is not enforceable by way of action if the price of the goods is $500 or more [*Com. Code § 2201(1)*] unless it comes within one of the exceptions to the Statute of Frauds under *Com. Code § 2201(3)*, but pleading facts raising the statute is the defendant's burden as an affirmative defense [*see* Ch. 530, *Statute of Frauds*].

- The terms of the contract (alternative Paragraphs 5) [*see §§ 500.20* et seq., *500.30* et seq.].

- Plaintiff's performance under the contract (Paragraph 6) [*see § 500.32*].

- Defendant's breach (Paragraph 7) [*see § 500.60* et seq.]. When particular contract terms or additional verbal agreements are pertinent to plaintiff's cause of action those terms should be added to the allegations [*see § 500.20[4]*]. Additional allegations may also be necessary to outline the complete history of the dispute following the seller's tender of delivery, such as the buyer's attempt to revoke acceptance of delivery [*Com. Code § 2608*; *see § 500.60[2][c]*] and any relevant actions by plaintiff-seller in response to defendant's breach.

- If plaintiff seller has resorted to the remedy of resale [*Com. Code § 2703(d)*], that should be alleged (alternative Paragraphs 8), in addition to facts showing compliance with the conditions governing resale, whether public or private, under *Com. Code § 2706*[*see § 500.75[6][b] -[c]*]. The seller is entitled to incidental damages resulting from the resale [*Com. Code §§ 2706(1), 2710*], which should be alleged (Paragraph 11) and included in the prayer for incidental damages.

- Four alternative claims for damages (alternative Paragraphs 9), depending on whether the claim is based on resale or lost profits and whether the goods were completed and/or identified to the contract at the time of breach. The plaintiff-seller will usually prefer to claim damages based on lost profits, because that measure of damages should fully compensate the plaintiff. However, if the seller is operating at full capacity so that it had more customers than it could supply, making the resale contract a true substitute contract in the sense that the seller could not have made it in addition to the one with the defendant, then resale damages should entitle the seller to a more advantageous recovery. If lost profits are claimed under

Com. Code § 2708(2), plaintiff must allege that damages based on the difference between the market price and the contract price under *Com. Code § 2708(1)* are inadequate to put the seller in as good a position as performance would have done [*Com. Code § 2708(2)*; *see* Paragraphs 9; *see also § 500.75[3], [6][a], [7][a]*]. The alternative damage allegations are based on the following:

- Resale, in which case the plaintiff is entitled to the difference between the resale price and the contract price, together with any incidental damages under *Com. Code § 2710*, but less expenses saved in consequence of the breach (first alternative Paragraph 9) [*Com. Code § 2706(1)*; *§ 500.75[6][a]*] or

- Lost profits. If the goods were complete at the time of the breach, and plaintiff, due to its excess capacity, does not think the *Com. Code § 2708(1)* measure of damages is adequate but cannot prove that the specific resale would have taken place in addition to the sale to the defendant, the second alternative Paragraph 9 should be used. In that case, plaintiff is entitled to damages equal to the profit it would have made from full performance (including reasonable overhead or fixed costs) together with consequential damages [*Com. Code § 2710*] and costs, less credit for payments or proceeds of resale [*Com. Code § 2708(2)*; *see § 500.75[7][a]*].

- If the goods were complete at the time of the breach and plaintiff can qualify for the "lost volume seller" measure of damages by proving that the specific resale would have taken place in addition to the sale to the defendant, the third alternative Paragraph 9 should be used. In that case, plaintiff is entitled to damages equal to its lost profit on defendant's contract but without deduction for proceeds of the resale [*National Controls, Inc. v. Commodore Bus. Machines, Inc. (l985) 163 Cal. App. 3d 688, 696-699, 209 Cal. Rptr. 636]* .

- If the goods were incomplete at the time of breach, the fourth alternative Paragraph 9 should be used [*Com. Code § 2704*; *see § 500.75[3]*].

- If the contract included a liquidated damages provision, its existence and terms should be alleged (Paragraph 10); it should be kept in mind that there is a presumption that clauses prescribing remedies are cumulative with those provided by the code rather than exclusive, unless otherwise agreed by the parties; thus plaintiff may be entitled to liquidated as well as actual damages [*see* UCC Comment to *Com. Code § 2719* and discussion in *§ 500.71*]. If plaintiff is claiming that the liquidated damages provision is unreasonable, unconscionable, or void for any other reason, that must also be alleged [*see Com. Code § 2718* and discussion in *§ 500.71*].

- A claim for incidental damages (Paragraph 11) [*see Com. Code § 2710*; *see also § 500.75[7][c]*].

If the claim is payable in a foreign currency, or computable by conversion to or from a foreign currency, allegations should be added setting forth that fact. Otherwise, the claim is made in U.S. dollars [*Code Civ. Proc. § 676.6(a)*]. For discussion and a form for a judgment under the Uniform Foreign-Money Claims Act [*Code Civ. Proc. § 676 et seq.*], see Ch. 177, *Damages* , and Ch. 318, *Judgments* .

[4] Recovery of Interest

The prayer includes a request for interest on awarded damages, although failure to include it does not preclude interest from being awarded [*Sanders v. City of Los Angeles (1970) 3 Cal. 3d 252, 263, 90 Cal. Rptr. 169, 475 P.2d 201]* . The date from which the interest is calculated depends on whether the amount of damages was capable of being made

certain (liquidated) prior to the filing of the action [*see Civ. Code § 3287*; *see also Ch. 140, Contracts, § 140.56[3]*].

[5] Attorney's Fees

In an action on a contract, when the contract specifically provides that attorney's fees and costs that are incurred to enforce the provisions of the contract will be awarded to one of the parties, the prevailing party may recover reasonable attorney's fees as an element of the costs of suit, not as damages [*Civ. Code § 1717*; *see Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.]. For discussion of attorney's fees under *Civ. Code § 1717.5* in certain contract actions based on a book account as defined in *Code Civ. Proc. § 337a*, see Ch. 8, *Accounts Stated and Open Accounts* .

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified [*Code Civ. Proc. §§ 92(b), 446*], and will also preclude a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[7] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[8] Venue

When a defendant has contracted to perform an obligation in a particular county, the proper county for the trial of an action founded on that obligation is in either the county in which the obligation is to be performed or in which the contract in fact was entered into or in the county in which the defendant or any defendant resides at the commencement of the action; the county in which the obligation is incurred will be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary [*Code Civ. Proc. § 395(a)*].

A corporation or association may be sued in the county where the contract is made or is to be performed, where the obligation or liability arises or the breach occurs, or in the county where the principal place of business of the corporation is situated, subject to the power of the court to change the place of trial as in other cases [*Code Civ. Proc. § 395.5*]. The last act necessary to the validity of a contract, usually the act constituting acceptance, or the place where the obligation arises is the place the contract is made for the purpose of *Code Civ. Proc. § 395.5* [*Jhirmack Enterprises, Inc. v. Superior Court (1979) 96 Cal. App. 3d 715, 723, 158 Cal. Rptr. 192]* .

[9] Statute of Limitations

An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued [*Com. Code § 2725(1)*]. A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach [*Com. Code § 2725(2)*]. A breach of warranty occurs when tender of delivery is made, except that when a warranty explicitly extends to future performance of the goods and discovery of the breach of the breach must await the time of that performance, the cause of action accrues when the breach is or should have been discovered [*Com. Code § 2725(2)*; *see Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116, 131-133, 87 Cal. Rptr. 3d 5* (seller's promise that product would work for 50,000 cycles did not fall within future performance exception in *Com. Code § 2725(2)* because it did not specify date or time in future, nor did it pertain to

time period that could be determined by reference to external source, and buyer could have discovered defect at any time without waiting for completion of 50,000 cycles; additionally, both parties were large and sophisticated companies and could have drafted their agreement to explicitly state duration of warranty so as to ensure that limitation period would extend beyond four years, if that had been their intent); *Carrau v. Marvin Lumber and Cedar Co. (2001) 93 Cal. App. 4th 281, 290-292, 112 Cal. Rptr. 2d 869* (generalized assertions in advertisements and literature do not rise to level of warranty explicitly extending to "future performance"; plaintiff thus did not meet exception to four-year limitation period)]. However, by their original agreement, the parties may reduce the period of limitation to not less than one year but may not extend it [*Com. Code § 2725(1)*]. For further discussion of the period of limitation in an action for breach of a contract for sale, see *§ 500.78*.

The future performance exception in *Com. Code § 2725(2)* cannot apply with respect to an implied warranty. Because an implied warranty is one that arises by operation of law rather than by an express agreement of the parties, it is not a warranty that "explicitly" extends to future performance of the goods, as that code section requires [*Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116, 134, 87 Cal. Rptr. 3d 5]* .

[10] Parties

In addition to the buyer and seller maintaining actions for breach, a "person in the position of a seller" [*Com. Code § 2707(1)*; *see § 500.75[2]*] may resell and recover incidental damages [*Com. Code § 2707(2)*].

[11] Cross References

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For a discussion of and forms for use in breach of contract actions, see Ch. 140, *Contracts*

For alternative forms for prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification*

For a discussion of and forms for use in actions on oral contracts, see Ch. 530, *Statute of Frauds*

California Forms of Pleading and Practice--Annotated

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Volume 44: Sales thru Sanitation and Sewerage Districts-Chs. 500-511
Chapter 500 SALES: SALES UNDER THE COMMERCIAL CODE
PART IV. FORMS
A. Complaints by Sellers

44-500 California Forms of Pleading and Practice--Annotated § 500.101

§ 500.101 Complaint to Recover Price of Goods as Damages for Breach of Written Contract [Com. Code §§ 2703(e), 2709]

[1] FORM Complaint to Recover Price of Goods as Damages for Breach of Written Contract [Com. Code §§ 2703(e), 2709]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] [, a California Corporation],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR PRICE OF GOODS
_____ [*names*] [, individually and doing business as _____ (*fictitious name*),	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
Defendant.	)	

_____

Plaintiff alleges:

FIRST COUNT
(Price)

1. [*Capacity and residence of plaintiff. See § 500.100[1], Paragraph 1.*]

2. [*Capacity of defendant and basis of venue. See § 500.100[1], Paragraph 2.*]

3. [*Plaintiff's status as merchant. See § 500.100[1] 1, Paragraph 3.*]

4. [*Defendant's status as merchant. See § 500.100[1], Paragraph 4.*]

5. _____ [*Allege facts showing execution and terms of contract, e.g.,* On _____ [*date*], defendant[, acting by and through its duly authorized agent,] executed and delivered to plaintiff a contract for the purchase of goods. The contract, a true copy of which is attached as Exhibit A and incorporated by reference, provides for the sale by plaintiff to defendant of _____ [*in general terms describe goods, wares, or merchandise made subject of contract*], and obligates defendant to pay on delivery of the goods _____ [the sum of $_____ *or* a reasonable price, as determined by the parties at the time of delivery *or* a reasonable price to be fixed in terms of _____ (*set forth agreed market or other standard by which price was to be fixed*)].

6. [*Plaintiff's performance under contract. See § 500.100[1], Paragraph 6.*]

7. [*Defendant's breach of contract. See § 500.100[1], Paragraph 7.*]

[*If contract had open price term, add if appropriate, EITHER*]

8. Plaintiff and defendant have been unable to agree on the price of the goods delivered.

[*OR*]

8. The price of the goods delivered has not been fixed in terms of _____ [*set forth agreed market or other standard by which price was to be fixed*] because _____ [*allege reason why price has not been fixed as provided for in contract*].

[*CONTINUE*]

9. _____ [*If defendant has not accepted delivery of goods, add either* Plaintiff has made a reasonable effort to resell the goods described in Paragraph 5 at a reasonable price but has been unable to do so *or* Circumstances reasonably indicate at all times herein alleged that any effort by plaintiff to resell the goods described in Paragraph 5 would be impracticable].

10. _____ [*Set forth claim for price, e.g.,* The price defendant contracted and agreed to pay for the goods, as described in Paragraph 5, is _____ ($_____ *or* a reasonable price, as determined by the parties at the time of delivery *or* a reasonable price to be fixed in terms of _____ [*set forth agreed market or other standard by which price was to be fixed*]. The reasonable price of the goods described in Paragraph 5 is $_____ per unit, and a total of $_____ for the units delivered and accepted by the defendant). Thus, as a direct and proximate result of defendant's breach of contract, plaintiff has suffered damages in the sum of $_____ (*set forth either the contract price or the reasonable price of the goods described in Paragraph 5*)].

[11. *Claim for incidental damages. See § 500.100[1], 11.*]

SECOND COUNT
(Damages)

1. Plaintiff refers to and herein incorporates Paragraphs 1-9, inclusive, of the First Count.

2-5. [*Allegations supplying claim for damages. See § 500.100[1], Paragraphs 8-10.*]

6. Plaintiff refers to and herein incorporates Paragraph 11 of the First Count.

WHEREFORE, plaintiff prays judgment against defendant as follows:

On The FIRST CAUSE OF ACTION:

1. For the price of the goods described in Paragraph 3 in the sum of $_____ [*set forth either the contract price or if the contract had open price term, the reasonable price of the goods*];

[2. For incidental damages in the sum of $_____;]

3. For interest on the sum of $_____ from and after _____ [*date on which amount of damages was capable of being made certain or date on which action was filed, whichever is appropriate*];

On the SECOND CAUSE OF ACTION:

[*EITHER*]

4. For actual damages in the sum of $_____ and liquidated damages according to the agreement of the parties in the amount of $_____;

[*OR, if the agreement provides that liquidated damages agreed to are the exclusive remedy*]

4. For liquidated damages according to the agreement of the parties in the sum of $_____;

[*CONTINUE*]

[5. For incidental damages in the sum of $_____;]

6. For interest on the sum of $_____ from and after _____ [*date on which amount of damages was capable of being made certain or date on which action was filed, whichever is appropriate*];

On BOTH CAUSES OF ACTION:

7. For costs of suit herein incurred [including reasonable attorney's fees as authorized by *Civ. Code § 1717*]; and

8. For such other and further relief as the court may deem proper.

[*Verification, if desired. See § 500.100[1]* .]

[2] Use of Form

The complaint in [1], *above*, is for use by an aggrieved seller whose buyer has wrongfully rejected [*Com. Code §§ 2601(a), 2602*] or revoked acceptance of goods [*see Com. Code § 2608*] or failed to make a payment due on delivery [*Com. Code § 2301*], to recover the contract price of goods [*see Com. Code §§ 2703(e), 2709*; *see also § 500.100[4] -[11]*]. An action for the price is generally limited to those cases in which resale of the goods is impracticable, except when the buyer has accepted the goods or when they have been destroyed after risk of loss has passed to the buyer. A defaulting seller cannot maintain an action for the price. Thus, if the buyer's rejection or revocation of acceptance was justifiable, this complaint should not be used, or at least counsel should be prepared to resist a demurrer [*see* UCC Comment to *Com. Code § 2709*; *see also §§ 500.33, 500.75[7][b], 500.77* and *[3], below*].

[3] Allegations

The complaint in [1], *above*, sets forth two counts as a basis for recovery of damages for breach. The first count alleges in pertinent part:

- Facts showing the existence of a written contract between plaintiff as seller and defendant as buyer, and the terms of the contract (Paragraph 5). The form contains alternative allegations for the price term (Paragraph 5), one being a specifically stated price and the others, a reasonable price to be determined by the parties or by an agreed market or standard, or an open price term [*Com. Code § 2305*; *see § 500.33[2]*].

- Optional allegations, to be included when appropriate to the facts, that the parties have been unable to agree on the price of the goods or that the price has not been fixed by the agreed standard, and the reason why the price has not been so fixed (Paragraph 8). The reason for the failure of the price to be fixed is significant, because when a price is left to be fixed (other than by agreement of the parties) and fails to be fixed through fault of one party, the other has the option of treating the contract as cancelled or fixing a reasonable price [*Com. Code § 2305(3)*]. This complaint does *not* allege the intent of the parties to be bound to the agreement unless the price be fixed or agreed, which is an essential element of the contract [*see Com. Code § 2305(4)*], because that appears to be an affirmative defense involving the defendant's burden of pleading and proof [*see § 500.121*].

- Another optional allegation, to be used if defendant has not accepted delivery of the goods, that either plaintiff has made a reasonable but unsuccessful effort to resell the goods or that an effort to do so would be impracticable (Paragraph 9). An action for the price is generally limited to cases in which resale of the goods is impracticable, except when the buyer has accepted the goods [*see* UCC Comment to *Com. Code § 2709*].

- Alternative terms to be used in the claim for price, depending on whether the contract stated a price term or left it open (Paragraph 10). In the latter situation, the complaint alleges what amount constitutes a reasonable price for the goods delivered and accepted by the defendant, because if the parties fail to agree to a price, the contract is interpreted so as to provide for a reasonable price [*Com. Code § 2305(1)(b)*]. This also enables the plaintiff to request a specific dollar amount in damages, in order to satisfy the jurisdictional requirements of the appropriate court [*see § 500.33[1]*].

The second count alleges in pertinent part a claim for damages pursuant to *Com. Code § 2708* (Paragraphs 2-5) [*see § 500.100[3]*]. If the buyer has wrongfully rejected or revoked acceptance of the goods, failed to make a payment due, or repudiated, and the seller is not successful in its action on the price, that seller may nevertheless be awarded damages for nonacceptance in the same action [*Com. Code § 2709(3)*; *see* UCC Comment to *Com. Code § 2709*].

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Chapter 500 SALES: SALES UNDER THE COMMERCIAL CODE
PART IV. FORMS
A. Complaints by Sellers

44-500 California Forms of Pleading and Practice--Annotated § 500.102

§ 500.102 Complaint for Damages or Price for Breach of Requirements Contract [Com. Code §§ 2306, 2703(e), 2709]

[1] FORM Complaint for Damages or Price for Breach of Requirements Contract [Com. Code §§ 2306, 2703(e), 2709]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] [, a California Corporation],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR _____
_____ [*names*] [, individually and doing business as _____ (*fictitious name*),	)	[DAMAGES *or* PRICE OF GOODS
	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
Defendant.	)	(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

FIRST COUNT
(Price)

1. [*Capacity and residence of plaintiff. See § 500.100[1], Paragraph 1.*]

2. [*Capacity of defendant and basis of venue. See § 500.100[1], Paragraph 2.*]

3. [*Plaintiff's status as merchant. See § 500.100[1], Paragraph 3.*]

4. [*Defendant's status as merchant. See § 500.100[1], Paragraph 4.*]

5. _____ [*Allege facts showing execution and terms of contract, e.g.,* On _____ (*date*), defendant (, acting by and through its duly authorized agent,) executed and delivered to plaintiff a contract for the purchase of goods. The contract, a true copy of which is attached as Exhibit A and incorporated by reference, provides that plaintiff agrees to specially manufacture for defendant and defendant agrees to purchase _____ (*in general terms describe goods, wares, or merchandise made subject of contract*), and obligates defendant to purchase these _____ (*describe goods*) in such quantity as defendant, in good faith, requires for its manufacturing needs. (Defendant agreed to pay $_____ per unit with certain discounts which would depend on the size of orders placed from time to time.) The contract also provides that delivery will be made from time to time as ordered and required by defendant].

6. _____ [*Allege defendant's estimation of its anticipated requirements, if any, e.g.,* Defendant's requirements were estimated by the defendant to be at least 10,000 units, and further units would be required depending on the demand for the goods by defendant's dealers.]

7. _____ [*Allege facts showing performance by plaintiff under contract, e.g.,* Plaintiff fully and in all things performed his/her/its part of the agreement described in Paragraph 5, in that he/she/it proceeded to specially manufacture for defendant _____ (*number*) units of the goods described in Paragraph 5 and notified defendant that at all times he/she/it was ready and able to deliver those goods].

8. _____ [*Allege any additional facts relevant to the history of dealings between the parties, e.g.,* On _____ (*date*), plaintiff delivered _____ (*number of units*) of the goods described in Paragraph 5 to the defendant at $_____each, for which defendant paid the sum of $_____).]

9. _____ [*Allege defendant's breach of contract, e.g.,* Defendant was obligated under its agreement with plaintiff to make the subject goods available to its dealers and in good faith to ascertain from all of its dealers in the United States which of those dealers desired to distribute the subject goods. Defendant, in violation of its promises and obligations described in Paragraph 5, failed to acquaint all of its dealers with plaintiff's goods, did not request its division managers to make the subject goods available to its dealers, and did not give all of its dealers an opportunity to order the subject goods. Defendant advised plaintiff on _____ (*date*), that defendant rejected any further purchase of the goods described in Paragraph 5, because the majority of its divisions did not feel that they could distribute them to its dealers in sufficient quantities].

10. _____ [*Set forth claim for price, e.g.,* The price defendant contracted and agreed to pay for the goods, as described in Paragraph 5, is $_____ per unit. Defendant was obligated to purchase its good faith requirements for the goods described in Paragraph 5 from plaintiff under the subject agreement. The number of units of goods which the defendant would have required in good faith was easily ascertainable by defendant and would not have been less than _____(*number*) units. Thus, as a direct and proximate result of defendant's breach of contract, plaintiff has suffered damages in the sum of $_____ (*set forth the price of the number of units of goods which the defendant would have required in good faith*)].

[11. *Claim for incidental damages. See § 500.100[1], Paragraph 11.*]

SECOND COUNT
(Damages)

1. Plaintiff refers to and herein incorporates Paragraphs 1-9, inclusive, of the First Count.

2. [*Allegation supplying claim for liquidated damages, if applicable. See § 500.100[1], Paragraph 10.*]

3. _____ [*Set forth claim for damages for lost profit, e.g.,* Defendant was obligated to purchase its good faith requirements for the goods described in Paragraph 5 from plaintiff under the subject agreement. The number of units of goods which the defendant would have required in good faith was easily ascertainable by defendant and would not have been less than _____ (*number*) units. The price defendant contracted and agreed to pay for the goods, as described in Paragraph 5, is $_____ per unit. Thus, as a direct and proximate result of defendant's breach of contract, plaintiff has suffered damages in the sum of $_____].

4. Plaintiff refers to and herein incorporates Paragraph 11 of the First Count.

[*Prayer. See § 500.101[1].*]

[*Verification, if desired. See § 500.100[1]* .]

[2] Use of Form

The complaint in [1], *above*, for the contract price of goods [*Com. Code §§ 2703(e), 2709*] is for use by an aggrieved seller-supplier whose buyer-user under a requirements contract [*Com. Code § 2306*] has failed to demand and pay for the amount of specially manufactured goods which in good faith the buyer estimated to be required under the contract. Good faith and reasonableness are required, in addition to other obligations of parties to a requirements contract and may not be disclaimed by agreement [*see Shea-Kaiser-Lockheed-Healy v. Department of Water & Power (1977) 73 Cal. App. 3d 679, 689, 140 Cal. Rptr. 884* ; discussion in *§ 500.34[2]*]. Although two counts are alleged, one for price and one for damages, the action for the price, rather than damages, would be more appropriate, because when goods are specially manufactured to fit the needs of the buyer, it may be unreasonable to resell them to anyone else [*see* UCC Comment to *Com. Code § 2709*; *see also §§ 500.75[7][b], 500.100[4] -[11], 500.101[2] -[3]*].

[3] Allegations

The complaint in [1], *above*, sets forth two counts as a basis for recovery of damages for breach. The first count alleges in pertinent part:

- Facts showing the existence of a requirements contract for specially manufactured goods between plaintiff and defendant (Paragraph 5).

- Plaintiff's and defendant's respective statuses as seller-supplier and buyer-user (Paragraphs 3 and 4).

- The terms of the contract (Paragraph 5). A term which measures the contract quantity by the requirements of the buyer means actual requirements as would occur in good faith [*Com. Code § 2306(1)*; *see § 500.34[2]*].

- That the contract contained an estimation of the buyer's requirements which should be alleged (Paragraph 6), because the estimate will be regarded as a measure of the variation or elasticity which the parties intended to allow within the good faith standard [*see* UCC Comment to *Com. Code § 2306*].

- Defendant's breach, by failing to acquaint its dealers with the goods contracted for, thereby denying

them the opportunity to order them and resulting in defendant's failure to order the amount of goods estimated as required in the contract (Paragraph 9). Defendant, as a merchant, has a duty to conduct his or her business not only in good faith, but according to commercial standards of fair dealing in the trade, which implies that the buyer's requirements approximate a reasonably foreseeable figure [*see* UCC Comment to *Com. Code § 2306*].

- The amount of goods that the defendant would have required in good faith was easily ascertainable (Paragraph 10). If a contract term, such as quantity, is left open, the contract may fail for indefiniteness unless there is a reasonably certain basis for giving an appropriate remedy [*Com. Code § 2204*; *see § 500.20* et seq.].

The second count alleges in pertinent part a claim for damages pursuant to *Com. Code § 2708* (Paragraph 3) [*see §§ 500.75[7][a], 500.100[3]*] as an alternative to the claim for price, as authorized by *Com. Code § 2709(3)* [*see § 500.101[2]* and *[3]*].

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Chapter 500 SALES: SALES UNDER THE COMMERCIAL CODE
PART IV. FORMS
A. Complaints by Sellers

44-500 California Forms of Pleading and Practice--Annotated §§ 500.103-500.109

[Reserved]

§§ 500.103[Reserved]

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PART IV. FORMS
B Complaints by Buyer

44-500 California Forms of Pleading and Practice--Annotated § 500.110

§ 500.110 Complaint for Damages for Breach of Contract [Com. Code §§ 2711(1), 2712, 2713] After Seller's Revocation of Firm Offer [Com. Code § 2205]

[1] FORM Complaint for Damages for Breach of Contract [Com. Code §§ 2711(1), 2712, 2713] After Seller's Revocation of Firm Offer [Com. Code § 2205]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] [, a California Corporation],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*] [, individually and doing business as _____ (*fictitious name*)],	)	[LIMITED CIVIL CASE]
Defendant.	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. [*Capacity and residence of plaintiff. See § 500.100[1], Paragraph 1.*]

2. [*Capacity of defendant and basis of venue. See § 500.100[1], Paragraph 2.*]

3. [*Plaintiff's status as merchant. See § 500.100[1], Paragraph 3.*]

4. [*Defendant's status as merchant. See § 500.100[1], Paragraph 4.*]

5. _____ [*Allege facts showing course of conduct between plaintiff and defendant leading to making of firm offer by defendant, e.g.,* On _____ (*date*), plaintiff requested defendant to submit an offer to supply _____ (*in general terms describe goods, wares, or merchandise made subject of firm offer*), for purchase by plaintiff].

6. _____ [*Allege facts showing making and substance of firm offer, e.g.,* By a writing dated _____, a true copy of which is attached as Exhibit A and incorporated by reference, defendant offered to supply the goods described in Paragraph 5 to plaintiff for the total amount of $_____].

7. _____ [*Allege facts showing plaintiff's acceptance of defendant's firm offer and any facts relevant to plaintiff's requirements made known to defendant, e.g.,* Plaintiff advised defendant that he/she would accept his/her offer, provided he/she received orders from his/her distributors within two weeks from the date of the offer for the goods described in Paragraph 5].

8. _____ [*Allege facts showing defendant's assurance to hold offer open, e.g.,* Defendant assured plaintiff he would hold his/her offer open for a period of _____ (*number*) days and, at plaintiff's request, defendant reduced that assurance to a separate writing dated _____, a true copy of which is attached as Exhibit B and incorporated by reference].

9. _____ [*Allege facts showing plaintiff's reliance on defendant's firm offer, e.g.,* Relying on defendant's firm offer described in Paragraph 6, plaintiff quoted a firm price to his/her distributors for the goods described in Paragraph 5, which was accepted by them on _____ (*date*)].

10. _____ [*Allege defendant's revocation of offer, e.g.,* Subsequent to plaintiff's acts in reliance on defendant's firm offer, as described in Paragraph 9, on _____ (*date*), and prior to _____ (*date on which firm offer became revocable under terms of writing described in Paragraph 8*), defendant withdrew his/her firm offer to supply the goods described in Paragraph 5, which were necessary for plaintiff to complete his/her contract with his/her distributors, as described in Paragraph 9].

11. _____ [*Set forth plaintiff's actions in response to defendant's breach, e.g.,* On _____(*date*), in good faith and without unreasonable delay, plaintiff entered into another contract with a third party a true copy of which is attached as Exhibit C and incorporated by reference, for the purchase of an equal quantity of the goods described in Paragraph 5).]

[*EITHER, if damages are based on cover*]

12. _____ [*Set forth claim for damages, e.g.,* The cover price plaintiff paid for the goods sold to him/her by the third party, as described in Paragraph 11, was $_____ per unit, or a total of $_____. The price for which defendant offered to sell these goods to plaintiff, as described in Paragraph 6, is $_____. As a direct and proximate result of defendant's revocation of his/her firm offer, plaintiff has been compelled to expend an additional $_____ to obtain substitute goods and has suffered damages in the sum of $_____. Defendant's breach of contract did not result in any saving of expenses to plaintiff].

[*OR, if damages based on cover are not sought*]

12. _____ [*Set forth claim for damages for repudiation, e.g.,* The price for which the defendant made a firm offer to sell the goods, as described in Paragraph 6, is $_____. The market price of the goods

described in Paragraph 5 on _____ (*date on which plaintiff learned of defendant's revocation of firm offer*) was $_____. Thus, as a direct and proximate result of defendant's revocation of his/her firm offer, plaintiff has suffered damages in the sum of $_____. Defendant's breach of contract did not result in any saving of expenses to plaintiff].

[*CONTINUE*]

[13. *Claim for incidental damages. See § 500.100[1], Paragraph 11.*]

[14. _____ (*Set forth claim for consequential damages, if sought, e.g.,* As a further result of defendant's revocation of his firm offer, plaintiff suffered the following consequential loss and damage in the sum of $_____. This sum is the discount which plaintiff was required to give to its distributors when plaintiff was unable to deliver the goods described in Paragraph 5 on the date promised. Defendant knew of plaintiff's commitment to furnish these goods to plaintiff's distributors at the time of the making of the contract between plaintiff and defendant).]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For actual damages in the sum of $_____;

[2. For incidental damages in the sum of $_____;]

[3. For consequential damages in the sum of $_____;]

4. For interest on the sum of $_____ from and after _____ [*date on which amount of damages was capable of being made certain or date on which action was filed, whichever is appropriate*];

5. For costs of suit herein incurred[, including reasonable attorney's fees as authorized by *Civil Code Section 1717*]; and

6. For such other and further relief as the court may deem proper.

[*Verification, if desired. See § 500.100[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by a buyer whose seller has wrongfully repudiated by revoking a firm offer [*Com. Code § 2205*; *see* discussion in *§ 500.20[3]*] to recover damages [*Com. Code §§ 2711(1), 2712, 2713*; *see* discussions in *§ 500.76[3]* and *[4]*].

[3] Allegations

The complaint in [1], *above*, alleges:

- The status of the parties as merchants (Paragraphs 3, 4). Although plaintiff's merchant status is an optional allegation, defendant's is mandatory, because *Com. Code § 2205* governing firm offers only applies to offers by a merchant [*see* discussion in *§ 500.20[3]*].

- The conduct of the parties leading to the making of the offer and a description of the goods (Paragraph 5)

- The making and substance of a firm offer (Paragraph 6). A firm offer must be made in a signed writing [*Com. Code § 2205*].

- Plaintiff's acceptance of the offer, together with any facts relevant to his or her requirements made known to defendant at the time of contracting which might affect defendant's liability for consequential damages (Paragraph 7) [*see Com. Code § 2715(2)(a)*; *see* discussion in *§ 500.76[4][c]*].

- Defendant's written signed assurance to plaintiff to hold the offer open for a certain period of time (Paragraph 8). This assurance must be in a signed writing and the period for which it is kept open may not exceed three months [*Com. Code § 2205*].

- Plaintiff's detrimental reliance on the offer (Paragraph 9).

- Defendant's revocation of the firm offer prior to the expiration of the period during which defendant assured plaintiff it would remain open (Paragraph 10).

- Plaintiff's actions in response to defendant's breach (Paragraph 11), such as procuring substitute goods or "cover" [*Com. Code §§ 2711(1)(a), 2712*; *see § 500.76[3]*]. The allegation that plaintiff "covered" in good faith and without unreasonable delay is necessary to claim damages under *Com. Code § 2712*.

- Alternative claims for plaintiff buyer's damages (alternative Paragraphs 12), the first based on "cover," being the difference between the cost of "cover" and the firm offer price, less any expenses saved in consequence of the seller's breach [*Com. Code § 2712(2)*], and the second based on damages for repudiation, being the difference between the market price at the time when the buyer learned of the breach and the contract price, less expenses saved in consequence of the seller's breach [*Com. Code § 2713*]. Both measures of damages may include incidental (Paragraph 13) and consequential damages (Paragraph 14) [*Com. Code § 2715*; *see § 500.76[4][c]*]. Consequential damages are recoverable only if they could not reasonably be prevented by cover [*Com. Code § 2715(2)(a)*]. Under *Com. Code § 2715(2)(a)* (damages after cover), the burden of proving the extent of the loss incurred is on the injured buyer, but the burden of proving the inadequacy of efforts to mitigate consequential damages is on allegedly breaching seller [*Carnation Co. v. Olivet Egg Ranch (1986) 189 Cal. App. 3d 809, 818, 229 Cal. Rptr. 261]* .

Any allegation that plaintiff procured "cover" and any claim for damages based thereon is optional. Failure of the buyer to effect "cover" does not bar any other remedy [*Com. Code § 2712(3)*].

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B Complaints by Buyer

44-500 California Forms of Pleading and Practice--Annotated § 500.111

§ 500.111 Complaint for Specific Performance [Civ. Code § 3384] After Seller's Breach of Contract [Com. Code § 2716]

[1] FORM Complaint for Specific Performance [Civ. Code § 3384] After Seller's Breach of Contract [Com. Code § 2716]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] [, a California Corporation], Plaintiff, vs. _____ [*names*] [, individually and doing business as _____ (*fictitious name*)], Defendant.	)	NO. _____ COMPLAINT FOR SPECIFIC PERFORMANCE

_____

Plaintiff alleges:

1. [*Capacity and residence of plaintiff. See § 500.100[1], Paragraph 1.*]

2. [*Capacity of defendant and basis of venue. See § 500.100[1], Paragraph 2.*]

3. [*Plaintiff's status as merchant. See § 500.100[1], Paragraph 3.*]

4. [*Defendant's status as merchant. See § 500.100[1], Paragraph 4.*]

5. _____ [*Allege facts showing execution and terms of contract, e.g.,* On _____ (*date*), plaintiff (, acting by and through its duly authorized agent,) executed and delivered to defendant a contract for the purchase of goods. The contract, a true copy of which is attached as Exhibit A and incorporated by reference, provides for the sale by defendant to plaintiff of _____(*in specific terms describe goods, wares, or merchandise made subject of contract*), and obligates defendant to make payment in the sum of $_____, on delivery of the goods].

6. _____ [*Allege facts showing plaintiff's performance or willingness to perform under contract, e.g.,* Plaintiff fully and in all things performed his/her part of the agreement described in Paragraph 5, in that on _____ (*date*), plaintiff _____ (paid *or* tendered payment of) the purchase price set forth in the agreement to defendant and requested defendant to deliver the goods as described in Paragraph 5].

7. _____ [*Allege defendant's breach of contract, e.g.,* In violation of its promises and obligations under the agreement described in Paragraph 5, defendant _____ (wrongfully refused to accept plaintiff's tender of payment of the purchase price *or* has failed and refused, and continues to fail and refuse to make delivery of the goods described in Paragraph 5, and has repudiated the agreement described therein)].

8. _____ [*Allege defendant's ability to perform, e.g.,* At all times referred to herein, defendant was, and now is, the owner and in possession of the goods described in Paragraph 5].

9. _____ [*Allege unique nature of goods or other circumstances warranting specific performance and inadequacy of remedy at law, e.g.,* The goods described in Paragraph 5 are unique in character in that _____ (*describe why goods are unique*). Therefore, plaintiff has no plain, speedy, or adequate remedy in the ordinary course of law, and damages, if awarded, cannot be properly ascertained and would be inadequate to compensate plaintiff for the detriment suffered as a result of defendant's breach].

10. At the time the agreement described in Paragraph 5 was entered into, on _____ [*date*] the goods described therein were reasonably worth $_____; accordingly, that agreement is just, fair, and reasonable as to the defendant, and the consideration therefor accruing to the defendant is adequate.

11. _____ [*Set forth claim for consequential damages, if sought, e.g.,* As a further result of defendant's breach of contract, plaintiff suffered the following consequential loss and damage in the sum of $_____. This sum is the penalty plaintiff was required to pay to _____ (*third party*) when plaintiff was unable to forward to that third party on schedule the goods defendant failed to deliver to plaintiff. Defendant knew of plaintiff's commitment to furnish these unique goods to _____ (*third party*) at the time of the making of the contract between plaintiff and defendant. This consequential loss to plaintiff could not reasonably be prevented by cover or otherwise.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. That the court decree specific performance of the agreement described in Paragraph 5;

2. That defendant be specifically ordered to deliver to plaintiff the goods described in Paragraph 5;

[3. For consequential damages in the sum of $_____;]

[4. For interest on the sum of $_____ from and after _____ (*date on which amount of consequential damages was capable of being made certain or date on which action was filed, whichever is appropriate*);]

5. For costs of suit herein incurred [, including reasonable attorney's fees as authorized by *Civil Code Section 1717*]; and

6. For such other and further relief as the court may deem proper.

[*Verification, if desired. See § 500.100[1].*]

[2] Use of Form

The complaint for specific performance [*Civ. Code § 3384*] in [1], *above*, is for use by an aggrieved buyer whose seller has wrongfully repudiated or failed to deliver unique goods [*Com. Code § 2716*]. An action for specific performance under the Commercial Code is generally limited to those cases in which the goods involved are unique, although the remedy may be decreed in other proper circumstances [*Com. Code § 2716(1)*; *see § 500.76[5]* and *[3], below*; *see also §§ 500.100[4] -[11], 500.110[3]*]. A decree for specific performance may include such terms and conditions as to payment of the price, damages, or other relief as the court may deem just [*Com. Code § 2716(2)*].

For additional discussion and forms for use in actions for specific performance, see Ch. 528, *Specific Performance* .

[3] Allegations

The complaint in [1], *above*, alleges the following:

- Facts showing the execution and terms of the contract (Paragraph 5), including a specific description of the goods in order to support the allegation of their unique nature.

- Facts showing the plaintiff's performance or tender of performance (Paragraph 6), because performance by the plaintiff is generally a condition precedent to a decree of specific performance [*see Civ. Code § 3392*].

- Facts showing the defendant's breach and refusal to perform (Paragraph 7) and the plaintiff's demand for the defendant's performance (Paragraph 6), because both are essential to a cause of action for specific performance [*see Crocker v. Grandi (1961) 189 Cal. App. 2d 431, 435, 11 Cal. Rptr. 330]* .

- The defendant's ability to perform (Paragraph 8) [*Civ. Code § 3394*].

- The unique nature of the subject goods or other proper circumstances warranting specific performance (Paragraph 9) [*Com. Code § 2716(1)*].

- The inadequacy of the remedy at law (Paragraph 9) [*Korabek v. Weaver Aircraft Corp. (1944) 65 Cal. App. 2d 32, 40, 149 P.2d 876]* .

- That the consideration to be received by the defendant is adequate, and the contract as to the defendant is just and reasonable (Paragraph 10) [*Civ. Code § 3391*].

Even when the contract provides for liquidated damages or a penalty in the event of breach, which the defendant is willing to pay, the contract may be specifically enforced if the case satisfies all other requirements for that remedy [*Civ. Code § 3389*].

[4] Jurisdiction

The superior court has jurisdiction of actions for specific performance. Specific performance is an equitable remedy [

Schaefer v. United Bank & Trust Co. (1930) 104 Cal. App. 635, 641, 286 P. 723 ; *see* discussion of the elements of specific performance in Ch. 528, *Specific Performance*]. It is not one of the types of equitable remedies that are limited civil cases under *Code Civ. Proc. § 86(b)*, nor do *Civ. Code §§ 3384-3402*, which govern specific performance, authorize such an action to be brought as a limited civil case. It appears, therefore, that an action for specific performance cannot be brought as a limited civil case, regardless of the amount in controversy [*see Code Civ. Proc. § 85(c)* (relief sought must be exclusively of a type described in one or more statutes that classify action or proceeding as limited civil case)].

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B Complaints by Buyer

44-500 California Forms of Pleading and Practice--Annotated § 500.112

§ 500.112 Complaint for Damages [Com. Code §§ 2711(1), 2712, 2713] After Buyer's Rightful Rejection of Defective Goods [Com. Code §§ 2601(a), 2602]

[1] FORM Complaint for Damages [Com. Code §§ 2711(1), 2712, 2713] After Buyer's Rightful Rejection of Defective Goods [Com. Code §§ 2601(a), 2602]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] [, a California Corporation], Plaintiff, vs. _____ [*name*] [, individually and doing business as _____ (*fictitious name*)], Defendant.	)))))))	NO. _____ COMPLAINT FOR DAMAGES [LIMITED CIVIL CASE] [Amount demanded _____ (exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. [*Capacity and residence of plaintiff. See § 500.100[1], Paragraph 1.*]

2. [*Capacity of defendant and basis of venue. See § 500.100[1], Paragraph 2.*]

3. [*Plaintiff's status as merchant. See § 500.100[1], Paragraph 3.*]

4. [*Defendant's status as merchant. See § 500.100[1], Paragraph 4.*]

5. _____ [*Allege facts showing execution and terms of contract, e.g.,* On _____ (*date*), plaintiff (, acting by and through its duly authorized agent,) executed and delivered to defendant a contract for the purchase of goods. The contract, a true copy of which is attached as Exhibit A and incorporated by reference, provides for the sale by defendant to plaintiff of _____(*in general terms describe goods, wares, or merchandise made subject of contract*), and obligated plaintiff to make payment in the sum of $_____, on delivery of the goods and that there would be no acceptance of the goods unless they remained free of defects for _____ months].

6. _____ [*Allege facts showing plaintiff's performance under contract, e.g.,* Plaintiff fully and in all things performed his/her part of the agreement described in Paragraph 5, in that on _____(*date*), plaintiff paid the purchase price set forth in the agreement to defendant on delivery of the goods).]

7. _____ [*Allege facts showing grounds for plaintiff's rightful rejection of goods, e.g.,* Approximately _____months after delivery of the goods described in Paragraph 5, on _____ (*date*), plaintiff discovered substantial defects in those goods in that _____ (*describe all defects*), which resulted in plaintiff's inability to use those goods for the purpose for which they were purchased].

8. _____ [*Allege facts showing plaintiff's seasonable notification of defendant of grounds for rejection, e.g.,* Plaintiff notified defendant that he had discovered the defects described in Paragraph 7 in a letter dated _____ (*date*), a true copy of which is attached as Exhibit B and incorporated by reference].

9. _____ [*Allege defendant's breach of contract, e.g.,* Defendant acknowledged that the defects described in Paragraph 7 existed but failed to cure them or to make any attempt to cure them within a reasonable time].

10. _____ [*Allege plaintiff's seasonable notification to defendant of plaintiff's rightful rejection, within a reasonable time, e.g.,* By letter dated _____ (*date*), a true copy of which is attached as Exhibit C and incorporated by reference, plaintiff notified defendant that plaintiff was invoking his/her right to reject the goods described in Paragraph 5 on the basis of the defects described in Paragraph 7 and defendant's failure to cure those defects, as alleged in Paragraph 9].

11. _____ [*If plaintiff buyer is merchant, allege plaintiff's compliance with duties as to rightfully rejected goods pursuant to Com. Code § 2603(1), e.g.,* Plaintiff received no instructions from defendant with respect to the rejected goods in plaintiff's possession and plaintiff had no good faith duty to attempt resale of those goods for defendant's account because those goods are not perishable and do not threaten to decline in value speedily).]

[12. *Plaintiff's cover. See § 500.110[1], Paragraph 11.*]

13. _____ [*Set forth claim for price, e.g.,* The price plaintiff contracted and paid for the goods, as described in Paragraph 5, is $_____].

[*EITHER, if damages are based on cover*]

14. _____ [*Set forth claim for damages, e.g.,* The cover price paid by plaintiff for the goods sold to him by the third party, as described in Paragraph 12, was $_____ per unit or a total of $_____. The price for which defendant sold these goods to plaintiff, as described in Paragraph 5, was $_____. As a direct and proximate result of defendant's breach, plaintiff has been compelled to expend an additional $_____ to obtain substitute goods and has suffered damages in the sum of $_____. Defendant's breach of contract did not result in any saving of expenses to plaintiff].

[*OR, if damages based on cover are not sought*]

14. _____ [*Set forth claim for damages for repudiation, e.g.,* The price for which the defendant sold the goods to plaintiff, as described in Paragraph 5, is $_____. The market price of the goods described in Paragraph 5 on _____ (*date on which plaintiff learned of breach*), was $_____. Thus, as a direct and proximate result of defendant's breach, plaintiff has suffered damages in the sum of $_____. Defendant's breach of contract did not result in any saving of expenses to plaintiff].

[*CONTINUE*]

[15. *Claim for incidental damages. See § 500.100[1], Paragraph 11.*]

16. _____ [*Set forth claim for consequential damages, if sought, e.g.,* As a further result of defendant's breach of contract, plaintiff suffered the following consequential loss and damage in the sum of $_____. This sum is the commission which plaintiff would have collected from _____ (*third party*) for supplying the nondefective goods which defendant failed to deliver to plaintiff. Defendant knew of plaintiff's commitment to furnish these goods to _____ (*third party*) at the time of the making of the contract between plaintiff and defendant. This consequential loss to plaintiff could not reasonably be prevented by cover or otherwise.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the price of the goods described in Paragraph 5 in the sum of $_____ [*price paid by plaintiff*];

2. For actual damages in the sum of $_____;

[3. For incidental damages in the sum of $_____;]

[4. For consequential damages in the sum of $_____;]

5. For interest on the sum of $_____ from and after _____ [*date on which amount of damages was capable of being made certain or date on which action was filed, whichever is appropriate*];

6. For costs of suit herein incurred[, including reasonable attorney's fees as authorized by *Civil Code Section 1717*]; and

7. For such other and further relief as the court may deem proper.

[*Verification, if desired. See § 500.100[1].*]

[2] Use of Form

The complaint for damages in [1], *above*, is for use by an aggrieved buyer who has rightfully rejected [*Com. Code §§ 2601(a), 2602*] defective goods and is seeking recovery of the price paid [*Com. Code § 2711(1)*], as well as damages for repudiation [*Com. Code §§ 2711(1), 2712, 2713*]. This complaint is only applicable if the buyer has not yet accepted the goods [*Com. Code § 2606*] at the time of discovering their defects, and, therefore, the provisions governing buyer's damages in regard to accepted goods [*Com. Code § 2714*] and the burden of proving breach with respect to accepted goods [*Com. Code § 2607(4)*; *see* UCC Comment to *Com. Code § 2607*] do not apply [*see* discussion in [3], *below*].

Acceptance of goods by the buyer precludes resort to the remedy of rejection with regard to the accepted goods, unless the acceptance was on the reasonable assumption that any nonconformity would be seasonably cured [*Com. Code § 2607(2)*]. For discussion of buyers' remedies with respect to accepted goods, see *§ 500.60[2][b]* and *[c]*.

[3] Allegations

The complaint in [1], *above*, alleges the following:

- The status of the parties as merchants (Paragraphs 3, 4) which in the case of the plaintiff buyer affects his or her duties as to the rejected goods [*Com. Code § 2603*] and as to notification to the seller (*Com. Code § 2605(1)(b)*) [*see* discussion in *§ 500.60[1][b]* and *[c]*].

- The execution and terms of the contract, including a provision that there would be no acceptance of the goods unless they remained defect-free for a specified period of time (Paragraph 5) [*see* discussion in [2], *above*].

- Plaintiff's performance under the contract (Paragraph 6). Plaintiff need not have already performed or paid for the goods to be entitled to maintain an action based on rightful rejection; however, if the buyer has already performed, he or she may recover any part of the price that has been paid, in addition to damages [*Com. Code § 2711(1)*].

- The grounds for plaintiff's rejection of the goods and the date on which they were discovered (Paragraph 7).

- Plaintiff's seasonable notification to defendant of discovery of the defects (Paragraph 8). The buyer's failure to seasonably state a particular defect that is ascertainable by reasonable inspection precludes that buyer from relying on that defect to justify rejection or to establish defendant's breach if the seller could have cured it [*Com. Code § 2605(1)(a)*; *see* discussion in *§ 500.60[1][b]*].

- Defendant's breach (Paragraph 9), such as failure to cure or make an attempt to cure within a reasonable time [*Com. Code § 2508*; *see* discussion in *§ 500.35[8]*].

- Plaintiff's seasonable notification of rejection after defendant's failure to cure (Paragraph 10), which must be made within a reasonable time after delivery of the goods [*Com. Code § 2602(1)*; *see* the discussion in *§ 500.60[1]*].

- If plaintiff is a merchant, plaintiff's compliance with *Com. Code § 2603(1)* regarding duties with respect to the rejected goods (Paragraph 11).

- Plaintiff's "cover" [*Com. Code § 2712*], if any (Paragraph 12).

- An optional claim for price (Paragraph 13), which is applicable if plaintiff paid any portion of the purchase price prior to rejection [*Com. Code § 2711(1)*].

- Alternative claims for damages (Paragraph 14), the first based on "cover" [*Com. Code § 2712(2)*; *see* discussion in *§ 500.76[3]*], and the second based on damages for repudiation including incidental and consequential damages, if appropriate [*Com. Code § 2713*; *see* discussion in *§ 500.76[4][b]* and *[c]*]. If the seller repudiates, as in this case, the buyer's claims for price and damages are cumulative, not alternative [*see Com. Code § 2711(1)*].

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[Reserved]

§§ 500.113[Reserved]

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C. Affirmative Defenses

44-500 California Forms of Pleading and Practice--Annotated § 500.120

§ 500.120 Defense Based on Custom and Usage [Com. Code § 1303(b), (c)]

[1] FORM Defense Based on Custom and Usage [Com. Code § 1303(b), (c)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. At all times mentioned in plaintiff's complaint herein, there existed and still exists, in the _____ [*describe type of business in which parties are engaged*] business, a well-established and well-understood custom and usage in _____ [*set out locality, e.g.,* the State of California] to the effect that _____ [*describe custom and usage*]. Plaintiff had notice of that custom and usage, and the contract referred to in plaintiff's complaint herein was made by the parties with reference to, and with knowledge of, that custom and usage.

2. In accordance with custom and usage, defendant _____ [*set forth defendant's actions under the custom and usage that he or she relies on to constitute a defense*].

[2] Use of Form

The defense of custom and usage is appropriate in any action on an agreement [*Com. Code § 1303(d)*] unless the parties have specifically agreed that usage of trade should not be construed as a part of the agreement [*Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc. (1976) 59 Cal. App. 3d 948, 955, 131 Cal. Rptr. 183* ; *see Com. Code § 1303(e)*], because an agreement, by definition, is the bargain of the parties as found in their language or by implication from circumstances including usage of trade [*Com. Code § 1201(b)(3)*]. Some sections of Division 2, such as the following, specifically incorporate usage of trade into their provisions:

- *Com. Code § 2314(3)* (warranties implied from usage of trade), discussed in Ch. 502, *Sales: Warranties* .

- *Com. Code § 2316(3)(c)* (modification of implied warranty by usage of trade), discussed in Ch. 502,

Sales: Warranties .

- *Com. Code § 2323(3)* ("overseas" shipment), discussed in *§ 500.52[5][d]*.
- *Com. Code § 2504(b)* (shipment by seller), discussed in *§ 500.35[5]*.

The admission of trade usage evidence does not violate the parol evidence rule [*Com. Code § 2202(a)*; *see* discussion in *§ 500.31*]. However, evidence of a relevant usage of trade offered by one party is not admissible unless and until that party has given the other party notice which the court finds sufficient to prevent unfair surprise to the latter [*Com. Code § 1303(g)*].

[3] Allegations

The existence and scope of trade usage must be proven as facts [*Com. Code § 1303(c)*] and therefore, must be specifically pleaded (Paragraph 1). Defendant may allege in the alternative either that the usage of trade exists, that the parties are aware of it, or that they should be aware of it (Paragraph 1) [*see Com. Code § 1303(d)*]. The knowledge of persons carrying on a particular trade as to prominent trade customs may be actual or constructive [*Heggblade-Marguleas-Tenneco, Inc. v. Sunshine Biscuit, Inc. (1976) 59 Cal. App. 3d 948, 956, 131 Cal. Rptr. 183]* . The affirmative defense [*Code Civ. Proc. § 431.30(b)(2)*] in [1], *above*, also alleges the particular conduct of the answering defendant that is in accordance with the custom and usage alleged in the first paragraph (Paragraph 2.).

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Chapter 500 SALES: SALES UNDER THE COMMERCIAL CODE
PART IV. FORMS
C. Affirmative Defenses

44-500 California Forms of Pleading and Practice--Annotated § 500.121

§ 500.121 Defense Based Lack of Intent to Be Bound While Price Term Remained Open [Com. Code § 2305(4)]

[1] FORM Defense Based Lack of Intent to Be Bound While Price Term Remained Open [Com. Code § 2305(4)]

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

1. The terms of the transaction described in Paragraph _____ of the complaint herein provided that the price of the subject _____ [*describe in general terms goods, wares, or merchandise made subject of agreement*] was to be determined [by mutual agreement of the parties *or* by _____ (*set forth agreed market or other standard by which price was to be fixed*)] no later than _____ [*date*].

2. Plaintiff and defendant did not intend to be bound to the agreement described in Paragraph _____ of the complaint herein unless a price for the subject goods was _____ [agreed on by mutual consent of the parties *or* fixed according to the method described in Paragraph 1].

3. _____ [Plaintiff and defendant were unable to agree on a price for the subject goods prior to _____(*date*), and _____ (have never agreed on a price *or* a price has never been set according to the method set forth in Paragraph 1) prior to the service of the complaint herein, on _____ (*date*)].

4. The transaction described in Paragraph _____ of the complaint herein did not, therefore, result in a binding agreement, and defendant has no further duties thereunder.

[2] Use of Form

The defense of no intention to be bound unless price term agreed on is appropriate in an action on an agreement which contains an open price term if either (1) the parties have failed to agree on a price or (2) a price has not been fixed as agreed on [*see § 500.101*], and the parties did not intend to be bound unless the price was set according to the terms of the agreement [*Com. Code § 2305(4)*; *see* discussion in *§§ 500.33[2], 500.101[3]*].

[3] Allegations

The defendant should specifically allege that the parties did not intend to be bound by the agreement unless and until the price term was agreed on or fixed. In the absence of that intent, the agreement will be considered binding in spite of the absent price term, and a reasonable price will be fixed (Paragraph 2) [*Com. Code § 2305(1)*]. In addition, if defendant successfully proves this defense of no intent to be bound, there is no contract (Paragraph 4), and the defendant buyer is liable only for returning goods already received or paying their reasonable value at the time of delivery [*Com. Code § 2305(4)*].

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44-500 California Forms of Pleading and Practice--Annotated § 500.122

§ 500.122 Defense Based on Fact That Defendant Is Not a Merchant [Com. Code § 2104(1)]

[1] FORM Defense Based on Fact That Defendant Is Not a Merchant [Com. Code § 2104(1)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. Defendant is an inexperienced _____ [buyer *or* seller] of _____ [*describe goods, wares or merchandise involved in the subject contract*].

2. Defendant is not a merchant of _____[*describe goods, wares, or merchandise made subject of contract*] as defined by *Commercial Code Section 2104(1)* and has no knowledge of the customs and practices peculiar to the _____ [selling *or* marketing] of those goods.

3. Defendant is a _____ [*describe defendant's business or profession*].

[2] Use of Form

This form sets forth the affirmative defence that the defendant is not a "merchant" within the meaning of the Commercial Code. The defense of not being a merchant is available in any action in which the defendant is inappropriately being charged with having knowledge or skill peculiar to the practices or goods involved in the transaction [*Com. Code § 2104(1),* discussed in *§ 500.11[3]*] or is being incorrectly held to a standard of performance required of merchants in certain situations, such as those involving firm offers [*Com. Code § 2205*; *see §§ 500.20[3], 500.110[3]*] and rejected goods [*Com. Code §§ 2603, 2605(1)(b)*; *see §§ 500.60[1][b]* and *[c], 500.112[3]*].

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44-500 California Forms of Pleading and Practice--Annotated § 500.123

§ 500.123 Defense Based on Buyer's Failure to Effectively Revoke Acceptance [Com. Code § 2608]

[1] FORM Defense Based on Buyer's Failure to Effectively Revoke Acceptance [Com. Code § 2608]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

[1. *Plaintiff's status as merchant, if appropriate. See § 500.100[1], Paragraph 3.*]

[2. *Defendant's status as merchant, if appropriate. See § 500.100[1], Paragraph 4.*]

3. On _____ [*date*], defendant delivered _____ (*describe goods, wares or merchandise made subject of agreement*) to plaintiff (in accordance with the specifications contained in the contract between plaintiff and defendant, a true copy of which is attached as Exhibit A and incorporated by reference)].

4. _____ [*Set forth facts showing plaintiff's alleged revocation, e.g.,* On _____ [*date*], plaintiff notified defendant by letter, a true copy of which is attached as Exhibit B and incorporated by reference, that he/she was dissatisfied with the subject goods and was placing them in storage. That notification was not made within a reasonable time after plaintiff should have discovered any defects in the subject goods].

5. _____ [*Allege facts showing defendant's response to plaintiff's alleged revocation, e.g.,* By letter dated _____ [*date*], a true copy of which is attached as Exhibit C and incorporated by reference, defendant requested that plaintiff particularize his/her dissatisfaction with the accepted goods, but defendant received no further communication from plaintiff until the service of the complaint in this action on _____ [*date*].

[6. Prior to the filing of the complaint herein, plaintiff never asserted to defendant that the alleged nonconformity in _____ (*describe subject goods*) substantially impaired the value of those goods.]

7. _____ [*Allege grounds for defense of ineffective revocation, e.g.,* Plaintiff's failure to particularize any alleged defects in the subject goods, and thus, to allow defendant an opportunity to cure them, and plaintiff's failure to notify defendant of any alleged nonconformity in the subject goods within a reasonable time after he/she should have discovered any defects, precludes plaintiff from recovering from defendant any damages resulting from any alleged breach by defendant].

[2] Use of Form

The defense that the buyer has failed to effectively revoke acceptance of the goods is available to a defendant seller if the buyer has failed to comply with the requirements of proper revocation [*see Com. Code § 2608*, discussed in *§ 500.60[2][c]*] or has failed to particularize defects on which the revocation is based [*Com. Code § 2605(1)*; *see* discussions in *§§ 500.60[1][b], 500.112[2] -[3]*].

[3] Allegations

If both parties are merchants, that status should be alleged (Paragraphs 1, 2), because between merchants, the buyer's failure to particularize any defect which is ascertainable by reasonable inspection after rejection, when so requested in writing by the seller (Paragraph 5), precludes the buyer from relying on the unstated defect to justify the rejection [*Com. Code § 2605(1)(b)*; *see* discussion in *§ 500.60[1][b]*].

Defendant may allege, depending on the facts, that plaintiff's revocation of acceptance was improper because defendant's performance was in total conformity with the contract requirements (Paragraph 3), plaintiff's revocation was not made within a reasonable time after plaintiff should have discovered any defects in the goods (Paragraph 4) [*Com. Code § 2608(2)*; *see* discussion in *§ 500.60[2][c]*], or plaintiff failed to particularize the alleged defects on which plaintiff based the revocation (Paragraph 5). If the seller could have cured the defect if it had been stated seasonably, the failure to particularize precludes plaintiff from relying on the unstated defect to justify revocation [*Com. Code § 2605(1)(a)*]. The affirmative defense may also allege that plaintiff never asserted that the alleged nonconformity substantially impaired the value of the goods (Paragraph 6), which is a prerequisite to the right of revocation [*see Com. Code § 2608(1)*] and, finally, the basis for defendant's claim that plaintiff's revocation was ineffective (Paragraph 7).

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Chapter 501 SALES: RETAIL INSTALLMENT SALES

44-501 California Forms of Pleading and Practice--Annotated 501.syn

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[4] Effect of Federal Requirements on State Law

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[2] Retail Buyer

[3] Retail Installment Sale

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§ 501.12 Truth In Lending Act Definitions

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[4] Credit Sale

§§ 501.13 through 501.19 [Reserved]

§ 501.20 Purpose of Credit Disclosure Laws

[1] To Aid Consumer in Making Comparisons

[2] RISA Waiver Is Void

§ 501.21 Transactions and Persons Governed by Credit Disclosure Laws

[1] Retail Installment Sales Act

[a] Transactions to Which RISA Applies

[b] Transactions to Which RISA Does Not Apply

[i] Sales of Vehicles

[ii] Construction

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[iv] Transactions by Supervised Financial Institutions

[v] Transactions by Other Licensed Lenders

[2] Truth In Lending Act

[a] Transactions to Which TILA Applies

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[a] Retail Installment Contract

[b] Add-on Sales

[c] Retail Installment Account

[3] TILA

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§ 501.30 Disclosures to Cosigners Required for Various Types of Credit

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[2] Civil Liability for Violations of RISA

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[iii] In Action by Agency Empowered to Enforce TILA

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[7] Verification

[8] Cross References

§ 501.101 Complaint for Recovery of Statutory Penalty [Civ. Code § 1812.9] After Seller's Willful Violation of RISA Provisions Concerning Finance Charges on Consolidated Contracts

[1] FORM

[2] Use of Form

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[4] Allegations

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[1] FORM

[2] Use of Form

§ 501.107 Allegation for Use in RISA Complaint--Failure to Provide Buyer With Copy of Contract [Civ. Code § 1803.7]

[1] FORM

[2] Use of Form

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§ 501.108 Allegation for Use in RISA Complaint--Inclusion of Prohibited Provision in Contract [Civ. Code §§ 1804.1, 1804.4]

[1] FORM

[2] Use of Form

[3] Prohibited Contractual Provisions

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§ 501.120 Affirmative Defense to Creditor's Action Against Cosigner on Consumer Credit Contract-Failure to Comply With Cosigner Liability Notice Requirements [Civ. Code § 1799.95; see Civ. Code §§ 1799.90-1799.99]

[1] FORM

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[3] Allegations

[4] Cross References

§§ 501.121through 501.129 [Reserved]

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[2] Use of Form

[3] Accompanying Affidavit

[4] Allegations

[5] Interest

[6] Attorney's Fees

[7] Limitation of Action

[8] Verification

[9] Cross References

§§ 501.131-501.139 [Reserved]

§ 501.140 Affirmative Defense to Buyer's Action Based on Seller's Correction of Error Within Statutory Time Allowed [Civ. Code § 1812.8]

[1] FORM

[2] Use of Form

[3] Cross References

§§ 501.141through 501.199 [Reserved]

§ 501.200 Complaint for Damages, Statutory Penalty, Costs, and Attorney's Fees Based on Violation of TILA [15 U.S.C. §§ 1638, 1640]

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[5] Statute of Limitations

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§ 501.201 Complaint for Restitution After Rescission of Credit Transaction Creating Security Interest in Buyer's Residence [15 U.S.C. § 1635]

[1] FORM

[2] Use of Form

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[4] Exempted Transactions

[5] Time Limit on Right to Rescind

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[7] Cross References

§§ 501.202-501.209 [Reserved]

§ 501.210 Affirmative Defense for Use by Seller in TILA Action Based on Defendant's Correction of Error Within Statutory Time Allowed [15 U.S.C. § 1640(b)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 501.211 Affirmative Defense for Use by Seller in TILA Action Based on Defendant's Unintentional and Bona Fide Error [15 U.S.C. § 1640(c)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 501.212 Affirmative Defense for Use by Seller in TILA Action Based on Defendant's Good Faith Compliance and Conformity With Written Opinion of Approval of Board of Governors of Federal Reserve System [15 U.S.C. § 1640(f)]

[1] FORM

[2] Use of Form

[3] Cross References

§§ 501.213through 501.299 [Reserved]

§ 501.300 Application for Stay of Enforcement of Pre-Existing Obligation During Period of Military Service [15 U.S.C. § 591, Mil. & Vet. Code § 409.3]

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[2] Use of Form

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[4] Who May Invoke Relief Provisions

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[b] Notice and Hearing

[c] Discretion of Court to Grant or Deny Relief

[d] Relief from Mortgages or Installment Contracts for Purchase of Real Estate

[e] Relief From Other Obligations

[f] Other Effects of Relief

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[6] Contents of Form

[7] Cross References

§ 501.301 Defense to Action on Obligation or Liability--Application (Motion) for Temporary Relief From Obligation on Ground Person Is or Was In Active Military Service After Entering Into Obligation [50 U.S.C. App. § 591; Mil. & Vet. Code § 409.3]

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[2] Use of Form

[3] Governing Law and Eligibility for Relief

[4] Stay of Pre-Existing Obligation

[5] Procedure and Accompanying Papers

[6] Cross References

§ 501.302 Affirmative Defense to Action on Interest-Bearing Obligation--Annual Rate of Interest May Not Exceed 6 Percent per Year During Period of Military Service [50 U.S.C. App. § 527; Mil. & Vet. Code § 405]

[1] FORM

[2] Use of Form

[3] Governing Law

[4] Enforcement

[5] Cross References

§ 501.303 Defense to Action on Contract for Purchase of Personal Property--Application (Motion) for Stay of Proceedings on Ground Person Is On Active Military Service [50 U.S.C. App. § 532; Mil. & Vet. Code § 407]

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[2] Use of Form

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[5] Stay of Proceeding

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[7] Procedure and Accompanying Papers

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PART I. SCOPE

44-501 California Forms of Pleading and Practice--Annotated § 501.01

§ 501.01 Scope of Chapter

This chapter focuses on credit disclosure requirements as they apply to retail installment sales of personal property, and services for other than commercial or business use. It discusses the requirements of the Unruh Act [*Civ. Code § 1801*], also known as the Retail Installment Sales Act (*Civ. Code § 1801 et seq.*; hereinafter referred to as RISA) and similar or parallel provisions of the federal Truth in Lending Act (*15 U.S.C. § 1601 et seq.*; referred to as TILA), insofar as that act affects retail installment sales, as well as certain notice requirements to cosigners of retail installment contracts or accounts [*Civ. Code § 1799.90 et seq.*]. Rights and remedies of consumer litigants as well as the defenses available to creditors are treated. Discussion and forms relating to the special protections available under California and federal law with respect to pre-existing obligations incurred by military personnel serving on active duty [*see 50 U.S.C. App. § 501 et seq.*; *Mil. & Vet. Code § 400 et seq.*] are also discussed [*see §§ 501.60 et seq., 501.300* et seq.].

Included are forms for complaints by a buyer to recover the following:

- Statutory penalties from a seller for violations of RISA [*see § 501.100*].
- Statutory penalties based on a willful violation by a seller of the provisions of RISA pertaining to finance charges on a consolidated total of two or more contracts [*see § 501.101*].
- Damages and statutory penalties for violations of TILA [*see § 501.200*].
- The consideration paid under a contract rescinded pursuant to TILA [*see § 501.201*].

This chapter also contains the following forms:

- Allegations of violations of a number of specific provisions of RISA [*see §§ 501.104 -501.109*].
- A seller's affirmative defenses based on the provisions of RISA [*see § 501.140*] and TILA [*see §§ 501.210 -501.212*].

- A declaration of proper venue which must be filed with the complaint in any action on a contract or account subject to RISA [*see § 501.102*].

- A complaint by a seller against a buyer who defaults on a contract that is subject to RISA [*see § 501.130*].

- A buyer cosigner's affirmative defense based on the creditor's failure to comply with liability notice requirements [*see § 501.120*].

- An application for stay of enforcement of pre-existing obligation during the period of the applicant's military service [*see § 501.300*].

- An application (motion) for temporary relief from an obligation on the ground that the person is or was in active military service after entering into the obligation [*see § 501.301*].

- An affirmative defense to an action on an interest-bearing obligation on the ground that the annual rate of interest may not exceed 6 percent per year during the period of the defendant's military service [*see § 501.302*].

- An application (motion) in an action on a contract for the purchase of personal property for a stay of proceedings on the ground that the defendant is on active military service [*see § 501.303*].

This chapter does not discuss automotive sales and leases, credit advertising, credit reporting, credit transactions under credit cards issued by persons other than retail sellers, discrimination in the extension of credit, home solicitation sales, unsolicited goods or services, discount buying services, open-end credit accounts with financing institutions unless those accounts come within the terms of RISA [*see Civ. Code § 1801.6*], installment loans of financing institutions, service contracts other than those related to a sale of goods regulated by RISA, or real estate sales purchased with federally related mortgage loans.

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44-501 California Forms of Pleading and Practice--Annotated § 501.02

§ 501.02 Cross References

- For discussion and forms relating to credit advertising, *see* Ch. 14, *Advertising* , and Ch. 127, *Consumer Contracts and Loans* .

- For discussion and forms relating to actions involving leases and conditional sales of motor vehicles, *see* Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* and Ch. 90, *Automobiles: Vehicle Leasing Act* .

- For discussion and forms relating to actions involving warranty and tort liability of automobile manufacturers, dealers, and repairers, *see* Ch. 91, *Automobiles: Actions Involving Defects and Repairs* .

- For discussion and forms relating to class actions, *see* Ch. 120, *Class Actions* .

- For discussion and forms relating to credit reporting, credit cards, credit transactions regarding women, dance and health studio contracts, home solicitation contracts, unsolicited goods or services, and discount buying services, *see* Ch. 127, *Consumer Contracts and Loans* and Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* .

- For discussion and forms relating to declaratory relief, *see* Ch. 182, *Declaratory Relief* .

- For sales governed by the Commercial Code, *see* Ch. 500, *Sales: Sales under the Commercial Code* .

- For actions by persons, whether buyers or others, who have been injured by defective products, against sellers, manufacturers, and others, *see* Ch. 502, *Sales: Warranties* (addressing the Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*]), and Ch. 460, *Products Liability* .

- For discussion and forms regarding the Consumers Legal Remedies Act (*Civ. Code § 1770 et seq.*), *see* Ch. 504, *Sales: Consumers Legal Remedies Act* .

- For discussion and legal forms relating to credit cards, open-end credit accounts with financing institutions, revolving charge accounts, installments, leases, and the Consumer Credit Reporting Agencies Act (*Civ. Code § 1785.1*), see California Legal Forms, Ch. 45, *Consumer Installment Loans and Credit Sales* ; Ch. 46, *Credit Card and Other Open-End Credit Transactions*; Ch. 92, *Service Contracts* (Matthew Bender).

- For transaction guides and forms covering credit transactions involving security interests in real property, see California Legal Forms, Ch. 25, *Real Estate Loans* ; Ch. 25A, *Security Instruments for Real Estate Financing* (Matthew Bender).

- For a notice of rescission of transactions involving real property security interests, see California Legal Forms, Ch. 45, *Consumer Installment Loans and Credit Sales* (Matthew Bender); *see also 15 U.S.C. §§ 1635* (right of rescission), *1640(d)* (liability of subsequent assignees), and *1641* (written acknowledgment of receipt of disclosures required by *15 U.S.C. § 1635* as proof of receipt).

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44-501 California Forms of Pleading and Practice--Annotated §§ 501.03through 501.09

[Reserved]

§§ 501.03[Reserved]

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§ 501.10 Governing Law

[1] State Statutes

The provisions of the Retail Installment Sales Act (RISA) are set out in *Civ. Code § 1801 et seq.*

- *Civ. Code §§ 1801-1801.7* set forth general provisions applicable to all retail installment sales transactions entered into in California, whether made under a retail installment contract or an installment account.

- Definitions applicable to retail installment sales are set forth in *Civ. Code § 1803.1 et seq.* and *§ 1802.21 et seq.*

- Provisions governing the retail installment contract, including restrictions, finance charge limitations, payments, refinancing and consolidation, and treatment of add-on sales, are set forth in *Civ. Code §§ 1803.1-1808.6*.

- Purchase by a financing agency of a retail installment contract or an installment account is governed by *Civ. Code § 1809.1*.

- Provisions governing retail installment accounts are set forth in *Civ. Code §§ 1810.1-1810.11*.

- Attorney's fees and court costs in actions on both retail installment contracts and installment accounts are set forth in *Civ. Code § 1811.1*.

- Procedures for repossession and resale after a default in payment under a retail installment contract or an installment account are set forth in *Civ. Code §§ 1812.2-1812.5*.

- Statutory penalties and buyer remedies for seller violations of RISA are provided in *Civ. Code §§*

1812.6-1812.9.

- The proper place for trial of an action on a retail installment contract or an installment account is determined by *Civ. Code § 1812.10*.

- *Civ. Code § 1812.20* prohibits any person from requiring a purchaser of goods or services to obtain financing from any particular source.

- Criminal liability for violation of RISA is proscribed by *Civ. Code § 1812.6*.

Disclosure and notice requirements, applicable when consumer credit contracts involve cosigners who are not married to each other are governed by *Civ. Code § 1799.90 et seq.* Confidentiality of information obtained from a federal or state income tax return submitted by a consumer in connection with a financial or other business-related transaction is governed by *Civ. Code § 1799.1a*.

[2] Truth in Lending Act (TILA)

Federal credit disclosure requirements as prescribed by the Truth in Lending Act (TILA) are set out in *15 U.S.C. § 1601 et seq.* and are in addition to the requirements of RISA.

For a description of how TILA is organized and what topics are covered by the provisions in each part, see *Ch. 127, Consumer Contracts and Loans, § 127.21*.

[3] Federal Regulations; Regulation Z

Regulations prescribed by the Board of Governors of the Federal Reserve System in compliance with TILA [*see 15 U.S.C. § 1604(a)*] for the purpose of implementing and enforcing TILA are contained in Regulation Z, *12 C.F.R. § 226.1 et seq.*

Regulation Z refers to any rule, regulation, or interpretation promulgated by the Board of Governors of the Federal Reserve System under TILA, and any interpretation or approval issued by an official or employee of the Federal Reserve System duly authorized by the board under TILA to issue interpretations or approvals [*Civ. Code § 1802.18*].

[4] Effect of Federal Requirements on State Law

[a] TILA Supersedes Inconsistent State Law

TILA does not annul, alter or affect, or exempt any creditor from complying with the laws of California relating to the disclosure of information in credit transactions, except to the extent that the California law is inconsistent with the provisions of TILA or Regulation Z, and then only to the extent of the inconsistency [*see 15 U.S.C. § 1610(a)*]. A state law is inconsistent if it requires a creditor to make disclosures or take actions that contradict the requirements of federal law. A state law is contradictory if it requires the use of the same term to represent a different amount or a different meaning than the federal law, or if it requires the use of a term different from that required in the federal law to describe the same term [*12 C.F.R. § 226.28(a)(1)*]. A creditor, state, or other interested party may request the Board of Governors of the Federal Reserve System to determine whether a state law requirement is inconsistent with TILA. If the board determines that the state requirement is inconsistent, creditors located in that state may not make disclosures using the inconsistent term or form, and will incur no liability for failure to use the term or form, notwithstanding that the board's determination is subsequently amended, rescinded, or determined to be invalid by judicial or other authority for any reason [*see 15 U.S.C. § 1610(a)(1)*; *12 C.F.R. § 226.28(a)(1)*].

Any creditor, state, or other interested party may request the board to determine whether any state-required disclosure is

substantially the same in meaning as a disclosure required by TILA or Regulation Z. If the board determines that the state-required disclosure is substantially the same in meaning as that required by TILA or Regulation Z, creditors located in that state may make the state-required disclosure in lieu of the federally required disclosure, except that the annual percentage rate and finance charge must be disclosed as required by *15 U.S.C. § 1632*, and the disclosure applicable to certain mortgages must be made as required by *15 U.S.C. § 1639* [*see 15 U.S.C. § 1610(a)(2)*; *12 C.F.R. § 226.28(b)*].

[b] When TILA Disclosures Satisfy RISA

Notwithstanding any provision of RISA to the contrary, any information required to be disclosed in a retail installment contract or other document under RISA may be disclosed in any manner, method, or terminology required or permitted under Regulation Z, as in effect at the time the disclosure is made, except that permitted by *12 C.F.R. § 226.18(c)(2)* (relating to itemization of amount financed), provided that all of the requirements and limitations set forth in *Civ. Code § 1803.3(b)* are satisfied. Nothing contained in RISA may be deemed to prohibit the disclosure in the contract or other document of additional information required or permitted under Regulation Z, as in effect at the time the disclosure is made [*Civ. Code § 1801.5*; *see Civ. Code § 1802.18* ("Regulation Z" defined, discussed in [3], *above*)].

[5] Servicemembers Civil Relief Act and Similar California Legislation

The Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*] provides for the temporary suspension of various legal proceedings, obligations, and liabilities, including pre-existing installment obligations, for persons in military service [*see 50 U.S.C. App. § 502* (purpose of statute)]. The statute is applicable to all members of the uniformed services [*see 10 U.S.C. § 101(a)(5)* (definition)] during periods of military service [*see 50 U.S.C. § 511(1)-(3)*] and, in many cases, for 90 days after termination of a member's period of military service. The California counterpart to the federal legislation [*Mil. & Vet. Code § 400 et seq.*] is designed to fill certain gaps in the federal law in the wake of the events of September 11, 2001. The latter statute, many provisions of which are virtually identical to their federal counterparts, is designed to apply to military reservists and National Guard members who are called to active military service under specified circumstances and, in many cases, for limited periods of time [*see Mil. & Vet. Code § 400*]. For detailed discussion of the relief available under these statutes, the manner in which such relief can be requested, and the persons who qualify for this relief, see *§§ 501.60 et seq., 501.300*.

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§ 501.11 Retail Installment Sales Act Definitions

[1] Goods

RISA defines "goods" as tangible chattels bought for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for those goods, and including goods which, at the time of sale or subsequently, are to be so affixed to real property as to become a part of it, whether or not severable from it. The term does not include any vehicle required to be registered under the Vehicle Code, nor any goods sold or leased with the vehicle if sold under a contract governed by *Civ. Code § 2981 et seq.* (Rees-Levering Motor Vehicle Sales and Finance Act) or leased under a contract governed by *Civ. Code § 2985.7* (vehicle leasing act). "Goods" also includes a trailer that is sold in conjunction with a vessel, as defined in *Veh. Code § 9840(a)*, unless the sales transaction is exempted under *Civ. Code § 1801.4*. As used in this definition, "trailer" means a vehicle designed solely for carrying vessels [*Civ. Code § 1802.1*]. The purchaser's intent at the time the contract is entered into determines whether the goods are for personal, family, or household purposes [*Cessna Finance Corp. v. Pivo (1976) 58 Cal. App. 3d 281, 287, 129 Cal. Rptr. 888]* .

[2] Retail Buyer

A "retail buyer" or "buyer" is a person who buys goods or obtains services from a retail seller in a retail installment sale and not principally for the purpose of resale [*Civ. Code § 1802.4*].

[3] Retail Installment Sale

A "retail installment sale" is defined as the sale of goods or furnishing of services by a retail seller to a retail buyer for a deferred payment price which is payable in installments [*Civ. Code § 1802.5*]. Retail installment sales are divided by RISA into two types of transactions: retail installment contracts and retail installment accounts [*see* discussion in *§ 501.22*].

[4] Retail Seller

A "retail seller" is any individual, partnership, corporation, association, or other group, however organized, which is engaged in the business of selling goods or furnishing services [as defined in [5], *below*] to retail buyers [*Civ. Code § 1802.3*; *see Civ. Code § 1802.15* (definition of "person")].

The provisions of RISA may also apply to assignees in certain instances [*see Civ. Code § 1804.2*; *see also* discussion in *§ 501.50[5]*].

[5] Services

"Services" means work, labor, and services, for other than commercial or business use, including services furnished in connection with the sale or repair of goods as defined in *Civ. Code § 1802.1* or furnished in connection with the repair of motor vehicles (except for service contracts defined by *Civ. Code § 2981(p)* which are sold in conjunction with the sale or lease of a vehicle required to be registered under the Vehicle Code) or furnished in connection with the improvement of real property or the providing of insurance. The term does not include the services of physicians or dentists, nor services for which the tariffs, rates, charges, costs, or expenses, including in each instance the deferred payment price, are required by law to be filed with and approved by the federal government or any official, department, division, commission, or agency of the United States [*Civ. Code § 1802.2*].

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§ 501.12 Truth In Lending Act Definitions

[1] Consumer Credit

Under TILA, consumer credit is credit that is offered or extended to a natural person, primarily for personal, family, or household purposes [*15 U.S.C. § 1602(h)*; *12 C.F.R. § 226.2(a)(11), (12)*].

[2] Credit

Under TILA the term "credit" means the right granted by a creditor to a debtor to defer payment of a debt or to incur a debt and defer its payment [*15 U.S.C. § 1602(e)*; *12 C.F.R. § 226.2(a)(14)*; *see 12 C.F.R. § 226.2(b)(2)* ("obligation" and "transaction" in Regulation Z refer to consumer credit obligation or transaction, depending on context, and "credit" means consumer credit unless context clearly indicates otherwise)].

[3] Creditor

A "creditor" within the meaning of TILA is any person or organization who both (1) regularly extends consumer credit that is subject to a finance charge or is payable by agreement in more than four installments (not including a downpayment), and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable, either on the face of the evidence of indebtedness, or, if there is no evidence of indebtedness, by agreement [*15 U.S.C. § 1602(f)*; *12 C.F.R. § 226.2(a)(17)(i)*]. The term "creditor" includes certain persons who issue credit cards and those who honor the credit cards, under certain circumstances [*see 15 U.S.C. § 1602(f)*; *12 C.F.R. § 226.2(a)(17)(ii)-(iv)*]. The term "creditor" also includes persons who originate certain mortgages [*see 15 U.S.C. § 1602(f)*; *see also 15 U.S.C. § 1602(aa)* ("mortgage" defined as consumer credit transaction secured by consumer's principal dwelling, other than residential mortgage transaction, reverse mortgage transaction, or transaction under open end credit plan, if certain conditions are met)].

[4] Credit Sale

A "credit sale" is any sale in which the seller is a creditor. "Credit sale" includes contracts in the form of a bailment or

lease if the bailee or lessee agrees to pay, as compensation for use, a sum substantially equivalent to, or in excess of, the value of the property or services involved for use thereof, and it is agreed that the bailee or lessee will become, or has the option of becoming, for no added cost or for nominal consideration, the owner of the property on full compliance with his or her obligations under the contract [*15 U.S.C. § 1602(g)*].

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44-501 California Forms of Pleading and Practice--Annotated § 501.20

§ 501.20 Purpose of Credit Disclosure Laws

[1] To Aid Consumer in Making Comparisons

RISA (*Civ. Code § 1801 et seq.*) and TILA (*15 U.S.C. § 1601 et seq.*) are designed to regulate retail installment sales of consumer goods and services, and assure meaningful disclosure of credit terms so that consumers may compare the various forms of credit available and avoid the uninformed use of credit [*see 15 U.S.C. § 1601(a)* (purpose of *TILA); Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 823, 94 Cal. Rptr. 796, 484 P.2d 964 (RISA to be liberally construed to protect consumers)]* . The provisions of TILA apply to a broader range of transactions, but only those provisions applicable to retail installment sales of consumer goods and services are addressed in this chapter.

[2] RISA Waiver Is Void

Any waiver by the buyer of the provisions of RISA is unenforceable and void as contrary to public policy [*Civ. Code § 1801.1*].

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§ 501.21 Transactions and Persons Governed by Credit Disclosure Laws

[1] Retail Installment Sales Act

[a] Transactions to Which RISA Applies

RISA applies to all retail installment sales transacted in California [*see Civ. Code § 1802.5* ("retail installment sale" defined, discussed in *§ 501.11[3]*]. Any of the following occurrences is deemed to have been made within California state, thereby triggering the operation of RISA:

- An offer or agreement by a seller in California, to sell to a buyer who is a California resident, or an offer or acceptance of a buyer in California, regardless of the situs of the contract as specified therein [*Civ. Code § 1802.19(a)*];

- Any oral or written solicitation or communication to sell, originating outside California, but forwarded to, and received in California by, a buyer who is a California resident [*Civ. Code § 1802.19(b)*]; or

- Any oral or written solicitation or communication to buy, originating within California, from a buyer who is a California resident, but forwarded to, and received by, a retail seller outside of California [*Civ. Code § 1802.19(c)*].

The provisions of RISA may also apply to assignees in certain instances [*see Civ. Code § 1804.2*; *see also* discussion in *§ 501.50[5]*].

[b] Transactions to Which RISA Does Not Apply

[i] Sales of Vehicles

RISA does not apply to contracts for the sale of a vehicle required to be registered under the Vehicle Code, or to goods

sold or leased with that vehicle, if the sale is subject to the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*) or if the lease is governed by the Vehicle Leasing Act (*Civ. Code § 2985.7 et seq.*). A trailer sold in conjunction with a vessel, as defined in *Veh. Code § 9840(a)*, is subject to RISA unless the transaction is exempted under *Civ. Code § 1801.4* [*Civ. Code § 1802.1*].

[ii] Construction

RISA does not apply to any contract for either of the following [*Civ. Code § 1801.4*]:

- The construction and/or sale of an entire residence or all or part of a structure designed for commercial or industrial occupancy, with or without a parcel of real property or an interest in one.

- The sale of a lot or parcel of real property, including any site preparation incidental to the sale.

[iii] Sales of Vessels or Aircraft

RISA also does not apply to any contract for either of the following [*Civ. Code § 1801.4*]:

- The sale of any aircraft required to be registered under the Federal Aviation Act of 1958.

- The sale of any vessel as defined in *Veh. Code § 9840(a)* if the cash price of the vessel, including accessories and equipment sold in conjunction with it, exceeds $25,000.

[iv] Transactions by Supervised Financial Institutions

The provisions of RISA are also inapplicable to any transaction in the form of a loan made by a "supervised financial organization" to a buyer of goods or services if all or a portion of the loan proceeds are used to purchase those goods or services, regardless of whether the seller arranges the loan or participates in the preparation of loan documents. RISA does apply, however, if the seller and the supervised financial organization (1) are related by common ownership and control and the relationship was a material factor in the loan transaction, or (2) share in the profits and losses of either or both the sale and the loan [*Civ. Code § 1801.6(b)*].

Receipt of a loan commission, brokerage, or referral fee by a seller from a supervised financial organization does not constitute a sharing of profits of the supervised financial organization, provided that the payment (1) is reasonable under the circumstances existing at the time the loan is consummated, and (2) is not refundable or is wholly or partly refundable only if the loan is voluntarily paid in full prior to its scheduled maturity. A loan commission, brokerage, or referral fee not exceeding the greater of one percent of the amount financed (as that term is defined by Regulation Z with respect to loans), or $20, is deemed reasonable under the circumstances existing at the time the loan is consummated, for purposes of this provision [*Civ. Code § 1801.6(c)(2)*]. Likewise, payment of money by a seller to a supervised financial organization pursuant to an actual or alleged contractual or statutory obligation to indemnify a supervised financial organization for losses incurred as a result of the assertion by a buyer of claims or defenses with respect to the goods or services purchased with loan proceeds does not constitute participation in or sharing of loan losses by the seller [*Civ. Code § 1801.6(c)(3)*].

For purposes of *Civ. Code § 1801.6*, the term "supervised financial organization" means a person [*see Civ. Code § 1802.15* (definition of "person" under RISA)] organized, chartered, or holding a license or authorization to make loans pursuant to the laws of California or the United States, who is subject to supervision by an official or agency of California or the United States [*Civ. Code § 1801.6(c)(1)*].

[v] Transactions by Other Licensed Lenders

The California Finance Lenders Law (*Fin. Code § 22000 et seq.*), which supplanted the Personal Property Brokers Law (*Fin. Code § 22000 et seq.*) and the Consumer Finance Lenders Law (former *Fin. Code § 24000 et seq.*), effective July 1, 1995 [Stats. 1994, ch. 1115], provides that RISA does not apply to loans made to refinance a retail installment contract by any finance lender or broker licensed under the California Finance Lenders Law. For a discussion of refinancing retail installment contracts under RISA, including brief discussions of the refinancing provisions, which were operative until July 1, 1995, that applied to loans made under the Personal Property Brokers Law and the Consumer Finance Lenders Law and of the comparable refinancing provisions that apply to loans made under the California Finance Lenders Law, which became operative on July 1, 1995, see *§ 501.36*.

[2] Truth In Lending Act

[a] Transactions to Which TILA Applies

Any creditor within the meaning of TILA [*see 15 U.S.C. § 1602(f)*, discussed in *§ 501.12[3]*], must comply with TILA, regardless of whether credit is extended in connection with loans, sales of property or services, or otherwise [*15 U.S.C. § 1602(f)*; *12 C.F.R. § 226.2(a)(17)(i)*]. TILA applies to any credit sale to a consumer [*15 U.S.C. § 1602(g)*; *see* definition of "credit sale" in § 501.12[4]].

With regard to consumer loans and leases, TILA is broader in scope than RISA. TILA is not limited to governing only loans made by a supervised financial organization under circumstances as described in *Civ. Code § 1801.6* [*see* discussion in [1][b][iv], *above*]. Rather, TILA governs all consumer loans offered or extended by lenders which do not constitute a consumer credit sale [*see 15 U.S.C. § 1602(f)* (definition of "creditor" applicable to persons who regularly extend consumer credit in connection with loans)]. In addition to the leases governed by *15 U.S.C. § 1602(g)*, discussed in *§ 501.12[4]*, for which RISA contains a parallel provision [*see Civ. Code § 1802.6*; *see also* discussion in [1], *above*], TILA governs all other consumer leases, as well [*see 15 U.S.C. §§ 1667-1667e* (consumer lease provisions)]. For discussions and forms respecting loans and leases outside the scope of RISA, see the discussion in *§ 501.01*.

Unlike RISA, however, TILA is solely a disclosure statute. TILA does not contain substantive limitations on the types of provisions that may be included in consumer credit contracts, nor does it limit the amount of finance charges which may be made, as does RISA.

[b] Transactions to Which TILA Does Not Apply

TILA does not apply to the following transactions [*12 C.F.R. § 226.3*; *see 15 U.S.C. § 1603*]:

- An extension of credit primarily for a business, commercial, or agricultural purpose.

- An extension of credit to other than a natural person, including credit to government agencies or instrumentalities.

- An extension of credit in which the amount financed exceeds $25,000 or in which there is an express written commitment to extend credit in excess of $25,000, except that TILA does apply, regardless of the amount of credit, to extensions of credit in which a security interest is or will be acquired in real property, or in personal property used or expected to be used as the principal dwelling, of the consumer [*12 C.F.R. § 226.3(b)*] and to private education loans subject to *15 U.S.C. § 1650* [*15 U.S.C. § 1603(3)*].

- An extension of credit that involves public utility services provided through pipe, wire, other connected facilities, or radio or similar transmission (including extensions of those facilities), if the charges for service, delayed payment, or any discounts for prompt payment are filed with or regulated by any government unit. The financing of durable goods or home improvements by a public utility is not

exempt from the provisions of TILA.

- Transactions in securities or commodities accounts in which credit is extended by a broker-dealer registered with the Securities and Exchange Commission or the Commodity Futures Trading Commission.

- An installment agreement for the purchase of home fuels in which no finance charge is imposed.

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44-501 California Forms of Pleading and Practice--Annotated § 501.22

§ 501.22 Classification of Credit Plans

[1] In General

Both RISA and TILA divide credit transactions into two types. Each type of transaction is subject to a separate set of statutory regulations.

[2] RISA

[a] Retail Installment Contract

A retail installment contract is any contract for a retail installment sale [*see Civ. Code § 1802.5* (defining "retail installment sale")], between a buyer and seller, entered into in California [*see* discussion in *§ 501.21[1][a]*], which provides for [*Civ. Code § 1802.6*]:

- Repayment in installments, whether or not the contract contains a title retention provision, and in which the buyer (a) agrees to pay a finance charge; or (b) does not agree to pay a finance charge, but the goods or services are available at a lesser price if paid for by cash or credit card; or (c) would have received additional or higher quality goods or services at no added cost above the total amount payable in installments had the sale been for cash; or

- Payment in more than four installments.

When taken in connection with a retail installment sale, a retail installment contract includes but is not limited to a security agreement. It also includes a contract for the bailment or leasing of goods by which the bailee or lessee contracts to pay as compensation for their use a sum substantially equivalent to or in excess of their value and by which is agreed that the bailee or lessee will become, or has the option of becoming, for no other or nominal consideration, the owner of the goods on full compliance with the terms of the contract [*Civ. Code § 1802.6*].

[b] Add-on Sales

A retail installment contract [*Civ. Code § 1802.6*] made in compliance with RISA may contain a provision allowing the buyer to make subsequent purchases under the contract, thereby increasing the amount due on the contract by the price of the additional purchases. The provision may provide that all finance charges and installments, may, at the seller's option, be increased proportionately, and that all terms and conditions of the contract apply equally to the additional purchases. The provision may also provide that add-on purchases be secured by the goods purchased under the previous contract, but only until all payments thereunder are paid [*Civ. Code § 1808.1*; *compare 15 U.S.C. § 1638(d)* discussed in [3][a], *below*]. For a further discussion of the add-on sales provisions of RISA, see *§ 501.37*.

[c] Retail Installment Account

Retail installment accounts, also known as installment accounts or revolving accounts, are defined as accounts established by an agreement entered into in California [*see* discussion in *§ 501.21[1][a]*] by which a buyer promises to make installment payments to the retail seller with whom the buyer has contracted for the purpose of liquidating the outstanding balance the buyer has incurred in making retail installment purchases, and which provides for payment of a finance charge. The retail installment account is distinguished from the retail installment contract [*Civ. Code § 1802.6*; *see* discussion in [a], *above*] by the fact that the retail installment account finance charge is expressed as a percentage of the periodic balance rather than as a stated dollar amount or capitalized item [*Civ. Code § 1802.7*].

[3] TILA

[a] Closed-end Credit Plan

The TILA counterpart to the RISA retail installment contract [*Civ. Code § 1802.6*; *see* discussion in [2][a], *above*] is the closed-end credit plan, which refers to any extension of consumer credit other than open-end credit [*12 C.F.R. § 226.2(a)(10)*; *see* discussion at [b], *below*; *see also 15 U.S.C. § 1638*; *12 C.F.R. §§ 226.17, 226.18* (setting forth specific disclosures required)]. Like RISA, TILA contains provisions for add-on sales under a closed-end credit plan contract [*see 15 U.S.C. § 1638(d)*; *12 C.F.R. § 226.17(h)*].

[b] Open-end Credit Plan

The counterpart to the RISA retail installment account [*Civ. Code § 1802.7*] is the TILA open-end credit plan. Open-end credit is consumer credit extended by a creditor under a plan in which all of the following are true [*12 C.F.R. § 226.2(a)(20)*; *see 15 U.S.C. § 1602(i)*]:

- The creditor reasonably contemplates repeated transactions.
- The creditor may impose a finance charge from time to time on an outstanding unpaid balance.
- The amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.

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[Reserved]

§§ 501.23[Reserved]

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44-501 California Forms of Pleading and Practice--Annotated § 501.30

§ 501.30 Disclosures to Cosigners Required for Various Types of Credit

[1] Types of Credit Included

The requirements and penalties of *Civ. Code § 1799.90 et seq.* apply to the following types of credit [*Civ. Code § 1799.90*; *see also Civ. Code § 1799.99* discussed in [6], *below*]:

- Retail installment contracts, as defined in *Civ. Code § 1802.6*.

- Retail installment accounts, as defined in *Civ. Code § 1802.7*.

- Conditional sales contracts as defined in *Civ. Code § 2981* (Rees-Levering Motor Vehicle Sales and Finance Act).

- Loans or extension of credit secured by other than real property, or unsecured, for use primarily for personal, family, or household purposes.

- Loans or extension of credit for use primarily for personal, family, or household purposes if the loan or extension of credit is subject to the provisions of *Bus. & Prof. Code § 10240 et seq.* (loans negotiated by real estate licensees), *Fin. Code § 18000 et seq.* (industrial loan companies), or *Fin. Code § 22000 et seq.* (finance lenders), whether secured by real property or otherwise.

- Lease contracts as defined in *Civ. Code § 2985.7(d)*.

[2] Notice Requirement

Unless the borrowers are married to each other, whenever a creditor obtains the signature of more than one person on a consumer credit contract, the notice must be delivered to each person who does not in fact receive any money, property, or services which are the subject matter of the contract. The notice must be given prior to the time that person becomes obligated on the contract, and it must be given in Spanish and English [*Civ. Code § 1799.91(a)*]. If the consumer credit

contract is written in a language other than Spanish or English, the notice must be given in English and in the language in which the contract is written [*Civ. Code § 1799.91(b)*]. The creditor may not obtain the signature of any person entitled to notice if the consumer credit contract contains blank spaces to be filled in after the person's signature has been obtained [*Civ. Code § 1799.93(a)*].

In the case of a motor vehicle lease contract on which the lessor obtains the signature of more than one person, unless the persons are married to each other, the lessor must deliver to each person who does not in fact receive the vehicle that is the subject of the lease contract, before that person becomes liable on the lease contract, a prescribed notice in English and Spanish or possibly another language [*see Civ. Code § 1799.91(b)*], in lieu of the notice prescribed in *Civ. Code § 1799.91(a)* [*Civ. Code § 1799.91(d)*].

[3] Exceptions

The notice requirements of *Civ. Code § 1799.91(a), (b)* do not apply to open-end credit as defined in Regulation Z or extended to joint applicants if both of the following conditions are satisfied [*Civ. Code § 1799.91(c)*; *see Civ. Code § 1799.91(e)* (Regulation Z has same meaning as set forth in *Civ. Code § 1802.18*, discussed in *§ 501.10[3*])]:

- The application or agreement signed by each applicant clearly and conspicuously discloses that after credit approval each applicant shall have the right to use the open-end credit plan to the extent of any limit set by the creditor and may be liable for all amounts extended under the plan to any joint applicant; and

- After credit approval, the creditor issues for the use of each applicant any credit device, such as a credit card, which may be used to obtain credit under the open-end credit plan and sends the credit device to the address specified in the application or otherwise delivers the credit device in a manner specified in the application or agreement signed by each applicant. This requirement does not apply to a creditor who does not issue a credit card or other credit device to obtain credit under the creditor's open-end credit plan.

If federal law or regulations require or permit the use of a notice substantially similar to the *Civ. Code § 1799.91* notice, the use of the federally sanctioned notice and an accurate Spanish translation of that notice constitutes compliance with *Civ. Code § 1799.91*, but the other provisions of *Civ. Code §§ 1799.90-1799.99* remain unaffected [*Civ. Code § 1799.96*; *see Civ. Code § 1799.99* discussed in [6], *below*].

[4] Size, Placement, and Content of Notice

The notice is entitled NOTICE TO COSIGNER and AVISO PARA EL FIADOR. The form of notice is prescribed by *Civ. Code § 1799.91(a)* and informs the cosigner, in English and in Spanish, that, among other things, he or she may be held liable for the full amount, plus collection costs, and late fees, if the borrower does not pay, and that default may become part of his or her credit record.

The notice must be set forth in both languages in at least 10-point type [*Civ. Code § 1799.91(a)*]. If the notice is included in the consumer credit contract or other document establishing liability, it must appear either directly above the space for signature or above or adjacent to any other notices legally required to be placed immediately above the signature space. It must be contained in a box formed by a heavy line [*Civ. Code § 1799.92(a)*]. If the notice is not included in the contract, it must be on a separate sheet which must not contain any other text except as necessary to identify the creditor and the consumer credit contract to which it refers and to provide for the date and the person's acknowledgment of receipt [*Civ. Code § 1799.92(b)*].

[5] Other Documents That Must Be Given

In addition to the notice, each person entitled to the notice must receive a copy of the debt instrument and security agreement or deed of trust, if any, evidencing the consumer credit contract, as well as a copy of the document evidencing that person's obligation and a copy of the notice [*Civ. Code § 1799.93(b)*].

[6] Effect of Noncompliance

A creditor who fails to comply with *Civ. Code § 1799.90 et seq.*, or any assignee of that creditor, cannot bring an action or enforce a security interest against any person, however designated, who is entitled to notice under *Civ. Code § 1799.91* and who does not in fact receive any of the money, property, or services that are the subject matter of the consumer credit contract [*Civ. Code § 1799.95*; *see Engstrom v. Kallins (1996) 49 Cal. App. 4th 773, 778-779, 56 Cal. Rptr. 2d 842]* . However, this does not affect the rights of a bona fide purchaser for value of property sold pursuant to the enforcement of a security interest if the purchase was made without notice of any facts constituting a violation of *Civ. Code § 1799.90 et seq.* [*Civ. Code § 1799.95*; for a form for an affirmative defense, *see § 501.120*].

Additionally, if a transaction is not one of the consumer credit contracts described in *Civ. Code § 1799.90* but is subject to the provisions of *12 C.F.R. § 227.14* (consumer credit extended by bank or subsidiary that is not member of Federal Home Loan Bank Board), *12 C.F.R. § 535.3* (consumer credit extended by member institutions of Federal Home Loan Bank Board), or *16 C.F.R. § 444.3* (credit regulated by Federal Trade Commission), unless the persons who are obligated under the transaction are married to each other, no action may be brought, and no security interest enforced, against the persons entitled to receive notice under *12 C.F.R. §§ 227.14* or *535.3* or *16 C.F.R. § 444.3*, whichever is applicable, if that person did not receive the notice in the manner prescribed by the applicable regulation and an accurate Spanish translation [*Civ. Code § 1799.99*].

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44-501 California Forms of Pleading and Practice--Annotated § 501.31

§ 501.31 Required Formalities and Disclosures for Retail Installment Contracts

[1] In General

The disclosure requirements discussed in [2]-[11], *below*, are those prescribed by RISA. Applicable TILA disclosure requirements are discussed in *§ 501.32*.

[2] Dated and Written Document Required

Every retail installment contract must be dated and in writing [*Civ. Code § 1803.1*].

[3] Translation of Contract Negotiated in Language Other than English

If a language other than English is the primary language used for negotiations with a consumer, the consumer may have to be provided with a translation of the contract in that other language. For contracts entered into prior to July 1, 2004, this requirement is applicable only to contracts negotiated primarily in Spanish. On and after July 1, 2004, it is applicable to contracts negotiated primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean [*see Civ. Code § 1632*].

Generally, any person engaged in a trade or business who negotiates primarily in the other language, orally or in writing, in the course of entering into a contract or agreement subject to the Unruh Retail Installment Sales Act, must deliver to the lessee, before he or she executes the contract or agreement, a translation of the contract or agreement in the other language, which includes a translation of every term and condition in that contract or agreement [*Civ. Code § 1632(b)(1)*]. At the time and place for entering into the contract or agreement, a notice in the other language must be conspicuously displayed, to the effect that the seller is required to provide a contract or agreement in the other language in which the contract or agreement was negotiated [*Civ. Code § 1632(f)*]. However, these requirements do not apply if the buyer negotiates using his or her own interpreter who is fluent and literate in both English and the other language and who is not employed or furnished by the seller [*Civ. Code § 1632(h)*]. Noncompliance with the foreign-language requirements is a ground for rescission of the contract or agreement by the buyer [*Civ. Code § 1632(k)*].

For a more detailed discussion of *Civ. Code § 1632*, see Ch. 127, *Consumer Contracts and Loans* . For a discussion of, and forms for use in, an action to rescind a contract, see Ch. 490, *Rescission and Restitution* .

[4] Printing and Notice Requirements

The printed portion of a retail installment contract must be in at least 8-point type [*Civ. Code § 1803.1*]. If a security interest in the goods purchased is retained or a lien on other goods or realty is obtained by the seller as security for the purchase, the contract must be labeled, in at least 12-point bold type: "Security Agreement." When the seller does not retain a security interest or lien, the contract must be clearly labeled, in at least 12-point bold type: "Retail Installment Contract" [*Civ. Code § 1803.2(b)(1), (2)*]. The buyer must also be alerted not to sign the contract before he or she has read it or if it contains any blank spaces, and must be notified of his or her right to a completely filled-in copy of the agreement [*see Civ. Code § 1803.2(c)-(e)*].

The contract must also contain a notice, in at least 10-point boldface, alerting the buyer of his or her right to prepay the full amount due on the contract and, depending on the method of computation of the finance charge, his or her entitlement to a partial refund of the finance charge [*Civ. Code § 1803.2*]. The exact language required is specified in *Civ. Code § 1803.2(c)-(e)*, and the choice of language depends on whether the finance charge is determined on a precomputed or simple-interest basis and also on whether the refund of the unearned finance charge is computed on the actuarial basis or some other basis.

Any contract for goods or services that provides for a security interest in real property must also provide notice in the form and content prescribed by RISA, alerting the buyer that on signing the contract his or her property will be put up as security. A security interest in any contract that does not provide the required notice is void and unenforceable [*Civ. Code § 1803.2(b)(3)*].

[5] Required Disclosures

[a] In General

Except as provided in *Civ. Code § 1801 et seq.* (governing add-on sales provisions), every retail installment contract is required by RISA to contain the information at [b]-[h], *below*.

[b] Identification of Parties and Subject Matter

The contract must disclose the names of the seller and the buyer, the place of business of the seller, the residence or place of business of the buyer as specified by the buyer, and a description of the goods or services sufficient to identify them. Services or multiple items of goods may be described in general terms and may be described in detail sufficient to identify them in a separate writing [*Civ. Code § 1803.3(a)*].

[c] Regulation Z Disclosures

Every contract subject to RISA must contain the disclosures required by Regulation Z [*see § 501.32[2]*], whether or not Regulation Z applies to the transaction. In addition, to the extent applicable, the contract must contain the other disclosures and notices required by, and must satisfy the requirements and limitations of, *Civ. Code § 1803.3*. Except for the disclosures required by *Civ. Code § 1803.3(c)* [*see* discussion in [d], *below*], the disclosures and notices required by *Civ. Code § 1803.3* may appear in the contract in any location or sequence and may be combined or interspersed with other provisions of the contract [*see Civ. Code § 1803.3(b)*].

[d] Itemization of Amount Financed

The retail installment contract must contain the following disclosures, as applicable, which must be labeled "itemization

of the amount financed" [*Civ. Code § 1803.3(c)*]:

- The cash price [*see Civ. Code § 1802.8* (definition of cash price)], exclusive of taxes imposed on the sale;
- Taxes imposed on the sale;
- The total of first and second items;
- An itemization of the amount to be paid to any public officer for official fees;
- The aggregate amount of premiums agreed, on execution of the contract, to be paid for policies of insurance included in the contract, excluding the amount of any insurance premium included in the finance charge;
- A subtotal representing the sum of the third through the fifth items;
- The amount of the buyer's downpayment (not including any administrative finance charge charged, received, or collected by the seller pursuant to former *Civ. Code § 1805.1(c)* and disclosed under the next item), itemized to show (1) the net agreed value of the property being traded in, (2) the amount of any portion of downpayment to be deferred until not later than the due date of the second regularly scheduled installment under the contract and which is not subject to a finance charge, (3) the amount of any manufacturer's rebate applied or to be applied to the downpayment, and (4) the remaining amount paid or to be paid by the buyer as a downpayment;
- The amount of any administrative finance charge, labeled as prepaid finance charge; and
- The difference between the sixth item above and the sum of the seventh and eighth items above, labeled as amount financed.

The disclosures required by *Civ. Code § 1803.3(c)* may be itemized or subtotaled to a greater extent than set forth above; however, the disclosures must be made together and in the sequence set forth above. No particular terminology is required to disclose the above items, except as expressly indicated [*see Civ. Code § 1803.3(b)*].

If the payment of all or a portion of the downpayment is to be deferred, the deferred payment must be reflected in the payment schedule disclosed pursuant to Regulation Z [*Civ. Code § 1803.3(d)*].

[e] Description of Trade-In Property

If the downpayment includes property being traded in, the contract must contain a brief description of that property [*Civ. Code § 1803.3(e)*].

[f] Information Concerning Prepayment

If the contract includes a finance charge determined on the precomputed basis, the contract must identify the method of computing the unearned portion of the finance charge in the event of prepayment in full of the buyer's obligation and contain a statement of the amount or method of computation of any charge that may be deducted from the amount of any unearned finance charge in computing the amount that will be credited to the obligation or refunded to the buyer. Reference to the Rule of 78's, the sum of the digits, the sum of the periodic time balances, or the actuarial method constitutes a sufficient identification of the method of computing the unearned portion of the finance charge [*Civ. Code*

§ 1803.3(f)(1)].

If the contract includes a finance charge determined on the simple-interest basis, but provides for a minimum finance charge in the event of prepayment in full, the contract must contain a statement of that fact and the amount of the minimum finance charge or its method of calculation [*Civ. Code § 1803.3(f)(2)*].

[g] Itemization of Insurance

The contract must contain an itemization of any insurance included as part of the amount financed (disclosed pursuant to *Civ. Code § 1803.3(c)(3)*) and of any insurance included as part of the finance charge. The itemization must identify the type of insurance coverage and the premium charged, and, if the insurance expires before the date of the last scheduled installment included in the repayment schedule, the term of the insurance must be stated [*Civ. Code § 1803.3(g)*].

[h] Disclosures Regarding Insurance

If the cost of any insurance is included in the retail installment contract and a separate charge is made to the buyer for that insurance, then the seller must comply with the requirements of *Civ. Code § 1803.5*. Under *Civ. Code § 1803.5*, the contract must state if the insurance is to be procured by the buyer or the seller. The amount included in the contract for insurance must not exceed the premiums chargeable in accordance with the rate fixed for that insurance by the insurer. If the insurance is procured by the seller or holder, he or she must deliver or mail to the buyer, at the address specified in the contract, notice of the seller's or holder's procurement of insurance or a copy of the insurance policies or certificates procured. These must be mailed or delivered to the buyer within 45 days after delivery of the goods or furnishing of the services under the contract [*Civ. Code § 1803.5*].

[6] Single-Document Rule

Except as provided in *Civ. Code § 1808.3*, every retail installment contract must consist of a single document containing the entire agreement between the parties as to the cost and terms of payment, including any promissory notes or other evidence of indebtedness [*Civ. Code § 1803.2*].

Certain add-on sales transactions which conform to the requirements of *Civ. Code § 1808.3* are excepted from the single-document rule of *Civ. Code § 1803.2*. For a further discussion of the add-on sales provisions of RISA, see *§ 501.37*.

[7] Execution and Delivery of Documents

Except with regard to catalog sales [*see* discussion in [11], *below*], a seller must not obtain the signature of the buyer to a contract when the contract contains blank spaces to be filled in after it has been signed [*Civ. Code § 1803.4*]. At the time the buyer signs the contract, the seller must deliver to the buyer a legible copy of the contract or any other document which the seller has required or requested the buyer to sign, and which the buyer has signed, during the contract negotiation [*Civ. Code § 1803.7*].

[8] Effect of Nondelivery

In addition to the statutory penalties provided in *Civ. Code §§ 1812.6-1812.9* [*see* discussion in *§ 501.50*], until the seller delivers the required documents to the buyer, the buyer is obligated to pay only the cash price [*Civ. Code § 1803.7*].

[9] Acknowledgment of Delivery

Any acknowledgment by the buyer of delivery of a copy of the contract or other document must be printed or written in at least 10-point bold type, and if contained in the contract itself, must also appear directly above the space reserved for the buyer's signature [*Civ. Code § 1803.7*].

[10] Presumption of Delivery

The buyer's written acknowledgment of delivery of a copy of the contract or other document raises a rebuttable presumption of delivery under *Civ. Code § 1803.7* and of compliance with *Civ. Code § 1803.4* (prohibition against obtaining buyer's signature if contract contains blank spaces). This presumption applies in any action or proceeding by or against an assignee of the contract who has no knowledge to the contrary, when he or she purchases the contract. Moreover, a conclusive presumption of delivery under *Civ. Code § 1803.7* and of compliance with *Civ. Code § 1803.4* is raised if either (1) the holder furnishes the buyer a copy of the contract or other document, or (2) the buyer fails to respond within 30 days to a notice containing the items required by *Civ. Code § 1803.3* (required contents of RISA contract) and stating that the buyer must give the holder 30 days written notice that he or she was not furnished a copy of the contract or any other document signed by the buyer at the seller's request during the contract negotiation [*Civ. Code § 1803.7*].

[11] Catalog Sales

When a retail installment sale is negotiated and entered into by mail or telephone, without personal solicitation by a salesperson or other representative of the seller, and the seller's cash and deferred payment prices and other terms are clearly set forth in a catalog or other printed solicitation of business which is generally available to the public, the seller is not required to deliver a copy of the contract to the buyer as provided in *Civ. Code § 1803.7* [*see* discussion in [7], *above*]. Moreover, if when the proposed retail installment contract is received by the seller from the buyer, there are blank spaces to be filled in, the seller may insert in the appropriate blank spaces the amounts of money and other terms which are set forth in the seller's catalog then in effect. In lieu of a copy of the contract provided for in *Civ. Code § 1803.7* the seller, within 15 days from the date of shipment of the goods, must furnish the buyer with a written statement of the items inserted in those blank spaces [*Civ. Code § 1803.8*].

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§ 501.32 Formalities and Disclosures Required by TILA

[1] Time and Form of Disclosures

Retail installment contracts under RISA are also subject to the disclosure requirements of TILA for closed-end credit transactions [*see* discussions in *§§ 501.21, 501.22[2][a]*]. Except in the case of certain transactions involving residential mortgages, mail or telephone orders, or variable-rate transactions add-on sales, for which TILA has provisions similar to those of RISA [*see* discussion at *§ 501.37*], these disclosures must be made before credit is extended [*see 15 U.S.C. § 1638(b)*; *12 C.F.R. § 226.17(b)*]. The disclosures required by TILA must be made clearly, conspicuously, and in writing, in a form that the consumer may keep. The disclosures must be grouped together and segregated from all other terms, data, or information provided in connection with the transaction, including any computations or itemization [*see 15 U.S.C. § 1638(b)(1)*; *12 C.F.R. § 226.17(a)(1)*].

[2] Disclosures Required by TILA

For each closed-end credit transaction, the creditor must disclose the following information as applicable [*12 C.F.R. § 226.18*; *see 15 U.S.C. § 1638(a)*]:

- The identity of the creditor making the disclosure.

- The "amount financed," using that term, and a brief description, such as "the amount of credit provided to you or on your behalf." The amount financed is calculated by (1) determining the principal loan amount or cash price (subtracting any downpayment), (2) adding any other amounts that are financed by the creditor and are not part of the finance charge, and (3) subtracting any prepaid finance charge.

- A separate written itemization of the amount financed, including (1) the amount of any proceeds distributed directly to the consumer, (2) the amount credited to the consumer's account with the creditor, (3) any amount paid to other persons by the creditor on the consumer's behalf and the identity of those persons, and (4) the prepaid finance charge. The creditor need not provide the foregoing itemization if

the creditor provides a statement that the consumer has the right to receive a written itemization of the amount financed, together with a space for the consumer to indicate whether or not he or she desires such an itemization, and the consumer does not request it. The itemization of the amount financed must be separate from the other required disclosures [*see 12 C.F.R. § 226.17(a)(1)*].

- The "finance charge," using that term, and a brief description such as "the dollar amount the credit will cost you."

- The "annual percentage rate," using that term, and a brief description such as "the cost of your credit as a yearly rate." The creditor need not disclose the annual percentage rate if the transaction involves a finance charge of $5 or less on an amount financed of $75 or less, or a finance charge of $7.50 or less on an amount financed of more than $75.

- If the annual percentage rate may increase after consummation, a statement of (1) the circumstances under which the rate may increase, (2) any limitations on the increase, (3) the effect of an increase, and (4) an example of the payment terms that would result from an increase.

- The number, amounts, and timing of payments scheduled to repay the obligation.

- The "total of payments," using that term and descriptive explanation such as "the amount you will have paid when you have made all scheduled payments."

- If the obligation has a demand feature, that fact must be disclosed.

- In a credit sale, the "total sale price," using that term, and a descriptive explanation (including the amount of any down payment) such as "the total price of your purchase on credit, including your downpayment of $_____." The total sale price is the sum of the cash price, any other amounts that are financed by the creditor, and the finance charge.

- A statement indicating whether a penalty may be imposed if the obligation is prepaid in full, or whether the consumer is entitled to a rebate of any finance charge if the obligation is prepaid in full. It should be noted that under RISA, no such penalty may be charged, and a consumer is entitled to a rebate of unearned finance charges in the event of prepayment in full [*see* discussion in *§ 501.35[4]*].

- Any dollar or percentage charge that may be imposed before maturity due to a late payment, other than a deferral or extension charge.

- The fact that the creditor has or will acquire a security interest in the property purchased as part of the transaction, or in other property identified by item or type.

- Any items required by *12 C.F.R. § 226.4(d)* in order to exclude certain insurance premiums from the finance charge.

- Disclosures required by *12 C.F.R. § 226.4(e)* in order to exclude from the finance charge certain fees prescribed by law or certain premiums for insurance in lieu of perfecting a security interest.

- A statement that the consumer should refer to the appropriate contract document for information about nonpayment, default, the right to accelerate the maturity of the obligation, and prepayment rebates and penalties. At the creditor's option, the statement may also include a reference to the contract for further information about security interests.

- In a residential mortgage transaction, a statement of whether or not a subsequent purchaser of the dwelling from the consumer may be permitted to assume the remaining obligation on its original terms.

- If the creditor requires the consumer to maintain a deposit as a condition of the specific transaction, a statement that the annual percentage rate does not reflect the effect of the required deposit.

In the case of any variable interest rate residential mortgage transaction, in disclosures provided at the time of application as prescribed by regulations for a variable rate transaction secured by the consumer's principal dwelling, at the option of the creditor, the creditor must state that the periodic payments may increase or decrease substantially, and the maximum interest rate and payment for a $10,000 loan originated at a recent interest rate, as determined by regulations, assuming the maximum periodic increases in rates and payments under the program, or a historical example illustrating the effects of interest-rate changes implemented according to the loan program [*15 U.S.C. § 1638(a)(14)*].

In the case of a consumer credit transaction that is secured by the principal dwelling of the consumer, in which the extension of credit may exceed the fair market value of the dwelling, the creditor must provide, at the time of application, a clear and conspicuous statement that the interest on the portion of the credit extension that is greater than the fair market value of the dwelling is not tax deductible for Federal income tax purposes, and the consumer should consult a tax adviser for further information regarding the deductibility of interest and charges [*15 U.S.C. § 1638(a)(15), (b)(3)*].

[3] Model TILA Forms and Clauses

Pursuant to TILA [*see 15 U.S.C. § 1604(b)*], the Board of Governors of the Federal Reserve System has published model disclosure forms and clauses for common transactions to facilitate compliance with TILA [*see* 12 C.F.R., Part 226, Appendices G, H]. Creditors are not required to use these forms and clauses; however, a creditor who uses an appropriate model clause or form is deemed to be in compliance with TILA [*see 15 U.S.C. § 1604(b)*].

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C. Disclosures, Requirements, and Prohibitions

44-501 California Forms of Pleading and Practice--Annotated § 501.33

§ 501.33 RISA Restrictions on Retail Installment Contracts

[1] Prohibited Terms Are Void

Certain types of provisions contained in retail installment contracts are either unenforceable or prohibited. Any contract provision proscribed by RISA is void but does not otherwise affect the validity of the contract [*Civ. Code § 1804.4*].

[2] Inducing Contract Contingent on Happening of Future Event Proscribed

It is unlawful for a seller to induce or attempt to induce a person to enter into a retail installment contract by offering a rebate, discount, commission, or other consideration, contingent on the happening of a future event, on condition that the person either sell or assist in the sale of the same or related goods [*Civ. Code § 1803.10*].

[3] Requiring Buyer to Obtain Financing From Particular Source

RISA provides that, notwithstanding *Civ. Code § 1801.6* [*see* discussion in *§ 501.20[1][b][iv]* and *[v]*] which exempts certain third-party loan transactions, no person may require a purchaser of goods or services to obtain financing from a particular source, and violation of this provision subjects the violator to the penalties provided in *Civ. Code § 1812.6* (criminal penalties) [*Civ. Code § 1812.20*].

[4] Acceleration Clauses

A retail installment contract must not contain a provision by which the holder, in the absence of the buyer's default in performing his or her obligations, may accelerate the maturity of any part or all of the amount owing thereunder [*Civ. Code § 1804.1(b)*].

[5] Agency Appointments by Buyer

A retail installment contract must not provide for the buyer's execution of a power of attorney appointing the seller or holder of the contract, or other person acting on his or her behalf, as the buyer's agent in the collection of payments

under the contract or in the repossession of goods [*Civ. Code § 1804.1(f)*].

[6] Change of County of Trial

A retail installment contract must not provide that the seller or holder of the contract is given the right to commence an action on the contract in a county other than (1) the county in which the contract was in fact signed by the buyer, (2) the county in which the buyer resides at the commencement of the action, (3) the county in which the buyer resided at the time that the contract was entered into, or (4) the county in which the goods purchased pursuant to that contract have been so affixed to real property as to become a part thereof [*Civ. Code § 1804.1(i)*]. For a discussion of the venue provisions of RISA, see *§ 501.102[3]*.

[7] Confession of Judgment or Assignment of Wages

A retail installment contract must not provide for a power of attorney to confess judgment in California, or for an assignment of wages. However, the giving of an assignment of wages contained in a separate instrument, executed pursuant to *Lab. Code § 300*, is not prohibited [*Civ. Code § 1804.1(c)*].

[8] Lien Provisions

No retail installment contract other than one for services may provide for a security interest on any goods theretofore fully paid for or which have not been sold by the seller [*Civ. Code § 1804.3(a)*].

Any contract for goods that provides for a lien on real property if the goods sold are not to be attached to the real property is a violation of RISA and subject to the statutory penalties thereof [*Civ. Code § 1804.3(b)*; *see Civ. Code §§ 1812.6-1812.9* (penalty provisions of RISA)].

[9] Rescission or Avoidance of Contract

A retail installment contract must not provide that the buyer agrees to the payment of any charge by reason of the exercise of his or her right to rescind or avoid the contract [*Civ. Code § 1804.1(h)*].

[10] Security Interest

A retail installment contract must not provide that the seller takes a security interest, other than a mechanic's lien, in the buyer's real property that is the buyer's primary residence, when the buyer is 65 years of age or older and the contract is for a home improvement as defined in Bus. & Prof. Code § 7151.1 [*Civ. Code § 1804.1(j)*].

[11] Unlawful Acts

A retail installment contract must not provide that the seller or holder of the contract or other person on his or her behalf is given authority to enter on the buyer's premises unlawfully or to commit any breach of the peace in the repossession of goods [*Civ. Code § 1804.1(d)*].

[12] Waivers

In addition to the general rule that a waiver by the buyer of any RISA provision is contrary to public policy and is unenforceable and void [*Civ. Code § 1801.1*], a retail installment contract must not contain the following:

- A provision by which the buyer agrees not to assert against a seller a claim or defense arising out of the sale or agrees not to assert against an assignee such a claim or defense, other than as provided in *Civ. Code § 1804.2*, which subjects the assignee to all the buyer's equities and defenses against the seller

arising out of the sale, notwithstanding an agreement to the contrary [*Civ. Code § 1804.1(a)*]. *Civ. Code § 1804.1(a)* only precludes waiver of defenses arising out of a sale and does not apply to a defense such as the statute of limitations, which the buyer may waive in the contract [*Mysel v. Gross (1977) 70 Cal. App. 3d Supp. 10, 138 Cal. Rptr. 873]* .

- A provision by which the buyer waives any right of action against the seller or holder of the contract, or other person acting on his or her behalf, for any illegal act committed in the collection of payments under the contract or in the repossession of goods [*Civ. Code § 1804.1(e)*].

- A provision by which the buyer relieves the seller from liability for any legal remedies which the buyer may have against the seller under the contract or any separate instrument executed in connection with the contract [*Civ. Code § 1804.1(g)*].

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44-501 California Forms of Pleading and Practice--Annotated § 501.34

§ 501.34 Finance Charges in Retail Installment Contracts

[1] Components of Finance Charge Under RISA

The finance charge constitutes the amount charged to the buyer for the privilege of purchasing goods or services on an installment basis [*see Civ. Code § 1802.10* (defining "finance charges")]. Under RISA, the charge must include all charges incident to investigating and making the contract and for the extension of the credit provided for in the contract, and no fee, expense, or other charge can be taken, received, reserved, or contracted for except as otherwise provided by RISA [*Civ. Code § 1805.4*]. Charges for insurance premiums, delinquency charges, attorney's fees, court costs, collection expenses, official fees, extension or deferral agreement charges as provided for in *Civ. Code § 1807.1*, or amounts for insurance, repairs to or preservation of goods, or preservation of the holder's security interest therein advanced by the holder subsequent to the execution of the contract are not considered finance charges under RISA [*Civ. Code § 1802.10*; *compare 15 U.S.C. § 1605(d)*; *12 C.F.R. § 226.4(c)-(e)* (items that may be excluded from finance charge under TILA); *see* discussions in [2][a] and [b], *below*]. The seller or holder of a retail installment contract may charge and collect a $15 fee for the return by a depository institution of a dishonored check, negotiable order of withdrawal, or share draft issued in connection with the retail installment contract. This fee also is not considered a finance charge under RISA [*Civ. Code § 1805.4*].

[2] Components of Finance Charge Under TILA

[a] Includable Charges

Under TILA, the finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction [*12 C.F.R. § 226.4(a)*; *see 15 U.S.C. § 1605(a)*]. The finance charge also does not include fees and amounts imposed by third party closing agents, including settlement agents, attorneys, and escrow and title companies, if the creditor does not require the imposition of the charges or the services provided and does not retain the charges [*15 U.S.C. § 1605(a)*]. The finance charge includes the following types of charges, except for charges specifically excluded by *12 C.F.R. § 226.4(c)-(e)* [*see* discussion, *below*]:

- Interest, time price differential, and any amount payable under an add-on or discount system of additional charges [*15 U.S.C. § 1605(a)(1)*; *12 C.F.R. § 226.4(b)(1)*].

- Service, transaction, activity, and carrying charges, including any charge imposed on a checking or other transaction account to the extent that the charge exceeds the charge for a similar account without a credit feature [*15 U.S.C. § 1605(a)(2)*; *12 C.F.R. § 226.4(b)(2)*].

- Points, loan fees, assumption fees, finder's fees, and similar charges [*15 U.S.C. § 1605(a)(3)*; *12 C.F.R. § 226.4(b)(3)*].

- Appraisal, investigation, and credit report fees [*15 U.S.C. § 1605(a)(4)*; *12 C.F.R. § 226.4(b)(4)*].

- Premiums or other charges for any guarantee or insurance protecting the creditor against the consumer's default or other credit loss [*15 U.S.C. § 1605(a)(5)*; *12 C.F.R. § 226.4(b)(5)*].

- Charges imposed on a creditor by another person for purchasing or accepting a consumer's obligation, if the consumer is required to pay the charges in cash, as an addition to the obligation, or as a deduction from the proceeds of the obligation [*15 U.S.C. § 1605(a)(6)*; *12 C.F.R. § 226.4(b)(6)*].

- Premiums or other charges for credit life, accident, health, or loss-of-income insurance, written in connection with a credit transaction [*12 C.F.R. § 226.4(b)(7)*] unless (1) the coverage of the debtor by the insurance is not a factor in the approval by the creditor of the extension of credit, and this fact is clearly disclosed in writing to the person applying for or obtaining the extension of credit, and (2) in order to obtain the insurance in connection with the extension of credit, the person to whom the credit is extended must give specific affirmative written indication of his or her desire to do so after written disclosure of the cost [*15 U.S.C. § 1605(b)*; *see 12 C.F.R. § 226.4(d)* (exclusion of premiums or other charges for voluntary credit life, accident, health, or loss-of-income insurance)].

- Premiums or other charges for insurance against loss of or damage to property, or against liability arising out of the ownership or use of property, written in connection with a credit transaction [*12 C.F.R. § 226.4(b)(8)*] unless a clear and specific statement in writing is furnished by the creditor to the person to whom the credit is extended, setting forth the cost of the insurance if obtained from or through the creditor, and stating that the person to whom the credit is extended may choose the person through which the insurance is to be obtained [*15 U.S.C. § 1605(c)*].

- Discounts for the purpose of inducing payment by a means other than the use of credit [*12 C.F.R. § 226.4(b)(9)*; *see Virachack v. University Ford (9th Cir. 2005) 410 F.3d 579, 581-582* (rebate available to cash buyer after completion of sale transaction is not discount, since price to be paid is not reduced, nor is it "charge" of any kind--charge is request for payment; rebate is reduction of amount paid--and it need not be accounted for, either in computing finance charge or in making related disclosures)].

- Charges or premiums paid for debt cancellation or debt suspension coverage written in connection with a credit transaction, whether or not the coverage is insurance under applicable law [*12 C.F.R. § 226.4(b)(10)*].

[b] Excludable Charges

If itemized and disclosed to the customer, the following types of charges need not be included in the finance charge under TILA [*15 U.S.C. § 1605(d)*; *12 C.F.R. § 226.4(e)*]:

- Fees and charges prescribed by law that actually are or will be paid to public officials for determining the existence of, or for perfecting, releasing, or satisfying, any security interest related to the credit transaction.

- The premium payable for any insurance in lieu of perfecting any security interest otherwise required by the creditor in connection with the transaction, if the premium does not exceed the fees and charges described immediately above, which otherwise would be payable.

- Any tax levied on security instruments or on documents evidencing indebtedness, if the payment of those taxes is a precondition for recording the instrument securing the evidence of indebtedness.

The following charges may also be excluded from the finance charge [*12 C.F.R. § 226.4(c)*]:

- Application fees charged to all applicants for credit, whether or not credit is actually extended.

- Charges for actual unanticipated late payments, or for exceeding a credit limit [*see Household Credit Servs., Inc. v. Pfennig (2004) 541 U.S. 232, 235, 124 S. Ct. 1741, 158 L. Ed. 2d 450* (regulatory exclusion of over-limit fees from definition of "finance charge" is not unreasonable interpretation of TILA)], or for a delinquency, default, or similar occurrence.

- Charges imposed by a financial institution for paying items that overdraw an account, unless the payment of such items and imposition of the charge were previously agreed on in writing.

- Fees charged for participation in a credit plan, whether assessed on an annual or other periodic basis.

- Seller's points.

- Interest forfeited as a result of an interest reduction required by law on a time deposit used as security for an extension of credit.

- Discounts offered to induce payment for a purchase by cash, check, or other means, as provided in *15 U.S.C. § 1666f(b)*.

In a transaction secured by real property, or in a residential mortgage transaction, the following fees may also be excluded from the finance charge, if bona fide and reasonable in amount [*12 C.F.R. § 226.4(c)(7)*; *see 15 U.S.C. § 1605(e)*]:

- Fees for title examination, abstract of title, title insurance, property survey, and similar purposes.

- Fees for preparation of loan-related documents.

- Notary fees, appraisal fees, (including fees related to any pest infestation or flood hazard inspections conducted prior to closing [*15 U.S.C. § 1605(e)(5)*; *but see 15 U.S.C. § 1649(a)(1)(B)* (no liability for transactions occurring prior to Sept. 30, 1995)]), and credit report.

- Property appraisal fees or fees for inspections to assess the value or condition of the property if the service is performed before closing, including fees related to pest infestation or flood hazard determinations.

- Amounts required to be paid into escrow or trustee accounts, if the amounts would not otherwise be included in the finance charge.

[c] Prohibited Offsets

Interest, dividends, or other income received or to be received by the consumer on deposits or investments may not be deducted in computing the finance charge [*12 C.F.R. § 226.4(f)*].

[d] Tolerances for Accuracy

The disclosure of finance charges in connection with an open end credit plan secured by real property or a dwelling will be treated as being accurate for purposes of the TILA if the amount disclosed in the finance charge does not vary from the actual finance charge by more than $100, or is greater than the amount required to be disclosed by the TILA [*15 U.S.C. § 1605(f)(1)*]. For purposes of the obligor's right of rescission under *15 U.S.C. § 1635* [*see* discussion in *§ 501.51[1][a]*], the disclosure will be treated as accurate if either [*15 U.S.C. § 1605(f)(2)*]:

- The amount disclosed as the finance charge does not vary from the actual finance charge by more than an amount equal to one-half of one percent to the total amount of credit extended [*15 U.S.C. § 1605(f)(2)(A)*]; or

- In the case of a transaction that is a refinancing of the principal balance then due and any unpaid finance charges of a residential mortgage transaction [*see 15 U.S.C. § 1502(w)*], or any subsequent refinancing of such a transaction, and that does not provide any new consolidation or new advance, if the amount disclosed as the finance charge does not vary from the actual finance charge by more than an amount equal to one percent of the total amount of credit extended [*but see 15 U.S.C. §§ 1605(f)(2)(B), 1602(aa)* (standard specified in this subparagraph (2) inapplicable to certain specified mortgages)].

These tolerance requirements do not apply to transactions after the initiation of any judicial or nonjudicial foreclosure process on the primary dwelling of an obligor securing an extension of credit. In the latter situation, the disclosures of any finance charge and other disclosures affected by any finance charge will be treated as accurate if the amount disclosed as the finance charge does not vary from the actual finance charge by more than $35 or is greater than the amount required to be disclosed by the TILA [*15 U.S.C. § 1635(i)(2)*].

These tolerances are also inapplicable to disclosures made before the passage of 1995 TILA amendments [*15 U.S.C. § 1649(a)(3)*; Pub. L. No. 104-29, § 4 (Sept. 30, 1995)]. The latter disclosures may be treated as accurate for TILA purposes if the amount disclosed as the finance charge does not vary from the actual finance charge by more that $200, or if they satisfy the requirements of *15 U.S.C. § 1605(f)(2)*, or if the amount disclosed is greater than the amount or percentage required to be disclosed by the TILA [*see 15 U.S.C. § 1649(a)(3)*].

[3] Annual Percentage Rate Under TILA

The annual percentage rate (commonly referred to as APR) is a measure of the cost of credit, expressed as a yearly rate [*12 C.F.R. § 226.22(a)(1)*]. It relates the finance charge to the amount financed over a specified period of time. In the case of closed-end credit transactions, such as retail installment contracts, the APR must be determined by either the actuarial method or the United States rule, and the APR disclosed must be accurate to within 1/8 of 1 percentage point of the true rate as determined under either method [*see 12 C.F.R. § 226.22(a)(1), (2)*]. Because the mathematical formulas used to calculate the APR under both methods are quite complex, the Federal Reserve Board has published tables which may be used by creditors to determine the APR on any particular transaction. Any rate determined from these tables in accordance with the instructions therein will comply with the requirements of TILA [*see 12 C.F.R. § 226.22(b)(1)*].

The APR, as defined by Regulation Z, must be included in all retail installment contracts [*Civ. Code § 1803.3(b)*; *see 12 C.F.R. § 226.18(e)*]. It should also be noted that although RISA has omitted any reference to the appearance of the annual percentage rate on the periodic statement of a RISA installment account, it is still required by virtue of the federal provisions [*12 C.F.R. § 226.7(g)*; *see Civ. Code § 1801.5* (stating that notwithstanding any provision of RISA, disclosures required by Regulation Z must be provided in a RISA contract or other document required by RISA)]. For additional discussion of the annual percentage rate, see California Legal Forms, Ch. 45, *Consumer Installment Loans and Credit Sales* (Matthew Bender)

[4] Methods for Computing Finance Charges Under RISA

[a] Options

Finance charges on retail installment contracts may be determined on the simple-interest basis [*Civ. Code § 1802.20*] or on the precomputed basis [*see Civ. Code § 1802.21*]. However, no RISA contract or obligation may provide for a finance charge that is determined in part by the precomputed basis and in part by the simple-interest basis, except for a finance charge permitted by *Civ. Code § 1805.8* (finance charge on certain amounts advanced by holder subsequent to execution of contract) [*Civ. Code § 1805.9*].

Finance charges on contracts entered into on or after January 1, 1983, must be calculated as provided for in *Civ. Code § 1805.1(a)(1)* [*see* discussion in [5], *below*] on the simple-interest basis if, according to the original contract terms, the due date of the final installment is more than 62 months from the date of the contract [*Civ. Code § 1805.7*].

[b] Simple-Interest Basis

Under the simple-interest method for determining finance charges, a constant rate is applied to the unpaid balance as it changes from time to time, either (1) calculated on the basis of a 365-day year and actual days elapsed, or (2) for contracts entered into prior to January 1, 1988, calculated on the basis of a 360-day year consisting of 12 months of 30 days each and on the assumption that all payments will be received by the seller on their respective due dates [*Civ. Code § 1802.20*].

[c] Precomputed Basis

Under the precomputed basis, the finance charge is determined by multiplying the original unpaid balance of the contract by a periodic rate and multiplying that product by the number of payment periods elapsing between the date on which the finance charge begins to be assessed and the date of the last scheduled payment [*Civ. Code § 1802.21*].

[5] Maximum Amount of Finance Charge Under RISA

There is no limit on the interest rate that may be charged, received, or collected on a retail installment contract, although no annual fee may be charged. The only limitation is that the holder of the contract shall not charge, collect, or receive any finance charge in excess of that shown on the disclosure required by *Civ. Code § 1803.3(b)*, discussed in *§ 501.31[5][c]* [*Civ. Code § 1805.1*]. There are three exceptions. One exception is that the holder may retain any excess finance charge that it received because one or more payments under a contract that determined the finance charge on a 365-day basis were made at a time or times other than as originally scheduled. This exception applies whether or not the parties enter into a refinancing agreement under *Civ. Code § 1807.1* [*see* discussion in *§ 501.36[2]*]. The holder may also retain any excess finance charge that is permitted by *12 C.F.R. § 226.17(c)(2)-(4)* (estimates, payments at unscheduled times, unequal billing periods) or by *Civ. Code § 1805.8* (finance charge on amounts advanced by holder after execution of contract) [*Civ. Code § 1805.1*].

[6] When Finance Charge May Be Assessed Under RISA

Notwithstanding the provision of any contract to the contrary, except as provided in *Civ. Code § 1805.6(b)* or *(c)*, no retail seller is to assess any finance charge for goods purchased under a retail installment contract until the goods are in the buyer's possession [*Civ. Code § 1805.6(a)*]. A finance charge may be assessed for undelivered goods (1) from the date when the goods are available for pickup by the buyer and the buyer is notified of their availability or (2) from the date of purchase when the goods are delivered or available for pickup by the buyer within 10 days of the date of purchase [*Civ. Code § 1805.6(b)*]. In the case of a home improvement contract as defined in *Bus. & Prof. Code § 7151.2*, a finance charge may be assessed from the approximate date of commencement of the work as set forth in the home improvement contract [*Civ. Code § 1805.6(c)*].

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44-501 California Forms of Pleading and Practice--Annotated § 501.35

§ 501.35 Payments on Retail Installment Contracts

[1] Schedule of Installments

Contracts may be payable in successive monthly, semimonthly, or weekly installments [*Civ. Code § 1805.2*].

[2] Payment to Last Known Holder

Unless the buyer has notice of actual or intended assignment of a contract or installment account, payment thereunder made by the buyer to the last known holder of the contract discharges the buyer's obligation to the extent of the payment [*Civ. Code § 1806.1*].

[3] Statement of Unpaid Balance

At any time after the execution of a retail installment contract, but not later than one year after the last payment thereunder, the holder of the contract must, on written request of the buyer made in good faith, promptly give or forward to the buyer a detailed written statement that states with accuracy the total amount, if any, unpaid thereunder. This statement must be supplied by the holder once each year without charge. If any additional statement is requested by the buyer, the holder must supply the statement to the buyer at a charge not exceeding $1 for each additional statement supplied to the buyer [*Civ. Code § 1806.2*]. The provisions of *Civ. Code § 1806.2* apply only to those transactions wherein, instead of periodic statements of account, the buyer is provided with a passbook or payment book in which all payments, credits, charges, and the unpaid balance are entered [*Civ. Code § 1806.2*].

[4] Prepayment; Refund Credit

Notwithstanding any provision of a contract to the contrary, the buyer may pay at any time before maturity the entire indebtedness evidenced by the contract without penalty [*Civ. Code § 1806.3(a)*]. When prepayment in full occurs, the amount required to repay or prepay the contract depends on whether the finance charge was determined on a precomputed or simple-interest basis and the formula for computing the amount is provided by the statute [*see Civ. Code § 1806.3(a)*]. These computations also apply in determining the buyer's outstanding obligation, notwithstanding

any provision of a contract to the contrary, when the indebtedness in a retail installment contract is satisfied prior to maturity through surrender of the collateral, repossession of the collateral, redemption of the collateral after repossession, or judgment, provided that the buyer's obligation is computed by the holder as of the date the holder recovers the value of the collateral or the date judgment is entered or, if the holder elects to keep the collateral, the date the holder takes possession of the collateral [*Civ. Code § 1806.3(b)*]. Nothing in *Civ. Code § 1806.3* precludes the collection or retention by the holder of any delinquency charge made pursuant to *Civ. Code § 1803.6* [*Civ. Code § 1806.3(c)*; *see* discussion in [6], *below*].

[5] Delivery of Instruments Indicating Payment in Full

After payment of all sums for which the buyer is obligated under a contract and on demand made by the buyer, the holder must deliver, or mail to the buyer at his or her last known address, good and sufficient documentation to acknowledge payment in full and to release all security in the goods under contract [*Civ. Code § 1806.4*].

[6] Delinquency and Collection Charges Permitted

A retail installment buyer may be obligated to pay delinquency charges. A delinquency charge may not exceed $10 for a period in default of not less than 10 days or $15 for a period in default of not less than 15 days [*Civ. Code § 1803.6(a)*]. Only one charge may be collected on any installment, regardless of how long it remains in default. The buyer also may be obligated to pay actual and reasonable collection costs occasioned by (1) the removal of the goods from the state without the written permission of the holder of the installment contract, (2) the buyer's failure to notify the holder of any change in residence, or (3) the buyer's failure to communicate with the holder for 45 days after the buyer's default in making payments under the contract [*Civ. Code § 1803.6(b)*].

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§ 501.36 Refinancing and Consolidation of Retail Installment Contracts

[1] Extension of Payment Dates

On agreement between the parties, the holder of a retail installment contract may extend the scheduled due date or defer the scheduled payment of all or part of any installment payments under the contract. If the agreement is in writing and signed by the parties, the holder can charge a fee for the extension or deferral, in an amount and for a period as prescribed by *Civ. Code § 1807.1*. The agreement may also provide that the buyer pay any additional insurance premiums if insurance coverage is provided for in the contract [*Civ. Code § 1807.1(d)*; *see Civ. Code § 1803.5*].

[2] Refinancing Agreement

On a written agreement signed by the parties, the holder of a retail installment contract may refinance the remaining amount owing on the contract by providing for a new schedule of installment payments. The holder may charge a fee for refinancing, in an amount prescribed by *Civ. Code § 1807.2*. The agreement may also provide that the buyer pay any additional insurance premiums if insurance coverage is provided for in the refinanced contract. The items required to be disclosed in the refinancing agreement are prescribed by *Civ. Code § 1807.2(a)-(g)* [*Civ. Code § 1807.2(d)*; *Civ. Code § 1803.5*].

[3] New Payment Schedule After Default on "Balloon Payment"

If any payment under a contract or refinancing agreement, other than a deferred downpayment, is more than twice the amount of an otherwise regularly scheduled equal payment, the contract or refinancing agreement must contain a provision notifying the buyer of the fact [*Civ. Code § 1807.3(a)*]. The exact wording of the required provision is set forth in *Civ. Code § 1807.3(a)*. If the buyer defaults in the payment of any such balloon payment, he or she must be given an absolute right to obtain a new payment schedule. Unless agreed to by the buyer, the periodic payments under the new schedule must not be substantially greater than the average of the preceding installments [*Civ. Code § 1807.3(b)*].

[4] Refinancing by California Finance Lenders

In 1994 the Legislature repealed the Personal Property Brokers Law (former *Fin. Code § 22000 et seq.*), which regulated certain persons making loans secured by personal property, and the Consumer Financial Lender's Law (former *Fin. Code § 24000 et seq.*), which regulated certain consumer lenders [Stats. 1994, ch. 1115]. Effective July 1, 1995, those laws and the Commercial Finance Lenders Law (*Fin. Code § 26000 et seq.*), regulating certain commercial lenders, are consolidated in the California Finance Lenders Law [*Fin. Code § 22000 et seq.*].

No licensee under the California Finance Lenders Law [*see Fin. Code § 22007*] may make a loan to refinance a retail installment contract subject to RISA (*Civ. Code § 1801 et seq.*) that is held by the licensee, or subsidiaries or affiliates of the licensee, unless specified conditions are satisfied [*see Fin. Code § 22341(a)*]. These conditions are substantially similar to comparable provisions under the superseded laws. For example, the loan may not be made unless (1) the buyer has been making installment payments for at least 90 days, and (2) the contract has a term of at least 180 days and does not provide for any scheduled installment that is more than twice the amount of any other scheduled installment [*Fin. Code § 22341(a)(1)*]. In addition, the licensee may not take a security interest in real property that is the borrower's principal residence unless the principal amount of the loan is $5,000 or more and the licensee furnishes a written notice as provided by statute that warns the borrower of the consequences of accepting the loan [*see Fin. Code § 22341(a)(3)*].

The requirements of the Finance Lenders Law are matters of fundamental public policy and cannot be waived by agreement between the parties. For example, the Finance Lenders Law may not be circumvented by a choice-of-law provision in a loan agreement of a type regulated by the law, by which another state's law is chosen as the governing law. In determining whether such a provision should be enforced in California, a court will consider which state, under the circumstances presented, would suffer greater impairment of its policies if the other state's law were applied [*Brack v. Omni Loan Co., Ltd. (2008) 164 Cal. App. 4th 1312, 1326, 1329, 80 Cal. Rptr. 3d 275* (choice of Nevada law, in consumer loan contract of adhesion, was not enforceable)].

Loans made under the California Finance Lenders Law to refinance retail installment contracts are subject to that law and are not governed by RISA [*Fin. Code § 22341(b)*].

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44-501 California Forms of Pleading and Practice--Annotated § 501.37

§ 501.37 Add-on Sales Provisions

[1] In General

RISA contains special provisions for retail installment contracts that contemplate the incorporation of a number of retail installment sales into a single contract. RISA divides add-on sales transactions into two types, as discussed in [2] and [3], *below*.

[2] Subsequent Purchases Added to Prior Contract

[a] Terms

The first type of add-on sales transaction permitted by RISA is one that gives the seller the option of adding subsequent purchases made by the buyer to the existing contract. That contract may provide that the total price of the goods or services covered by the contract will be increased by the price of the additional goods or services purchased, that all finance charges and installment payments may be increased proportionately, and that all terms and conditions of the original contract will apply equally to the subsequent sale [*Civ. Code § 1808.1*].

[b] Allocation of Installment Payments After Subsequent Purchase

When a subsequent purchase is added to an existing contract, the entire amount of all payments previously made must be deemed to have been applied toward the deferred payment price(s) of any goods or services previously purchased. Each payment received thereafter must be allocated to all of the various deferred payment prices in the same proportion or ratio as the original cash prices of the various purchases bear to one another. If the amount of each installment payment is increased with the subsequent purchase, the seller may elect to allocate the subsequent payments as follows: (1) an amount equal to the original installment payment to the previous deferred payment price; and (2) an amount equal to the increase to the subsequent deferred payment price. Any downpayment on the subsequent purchase must, however, be allocated in its entirety to that purchase [*Civ. Code § 1808.2*].

[c] Security Interest in Goods Previously Purchased

The contract, the terms of which apply to subsequent purchases, may provide that previously purchased goods will be security for goods subsequently purchased, but only until the total of payments under previous purchases is fully paid [*Civ. Code § 1808.1*].

[d] Time and Contents of Disclosures

When a subsequent purchase is added to an existing contract, the seller must deliver a memorandum to the buyer prior to the due date of the first installment that sets forth information similar to that required in an ordinary retail installment contract under *Civ. Code § 1803.3* [*see* discussion in *§ 501.31[5]*]. In addition, the seller also must disclose the following:

- The amount of the existing outstanding balance to be consolidated, which consists of the unpaid time balance(s) of the prior contract(s) to be consolidated;

- The amount of any unearned finance charge, determined by deducting from the amount of item (1) *above*, any unearned finance charge in an amount not less than the refund credit provided for by *Civ. Code § 1806.3* (providing for refund of unearned finance charges in the event of prepayment in full of a retail installment contract); in computing this amount, no minimum finance charge is allowed; and

- The difference between these two items, *above*, which is the net outstanding balance to be consolidated [*see Civ. Code § 1808.2*].

[3] Series of Credit Sale Transactions

[a] In General

The second type of add-on sale transaction under RISA is one that is part of a series of credit sales made pursuant to an agreement providing for the addition of the amount financed plus the finance charge for the current sale to an existing outstanding balance [*see Civ. Code § 1808.3*]. Those transactions differ from the transactions governed by *Civ. Code §§ 1808.1* and *1808.2* [*see* discussion in [2], *above*] in that, under the latter type of transaction, the outstanding balance, less a refund credit for any unearned finance charge, is added to the unpaid balance of the cash price of the subsequent purchase, and the finance charge is recomputed on the basis of the consolidated total of the previous and subsequent purchases [*see Civ. Code § 1808.2(e)-(g), (j)*]. By contrast, in a transaction governed by *Civ. Code § 1808.3*, the amount financed plus the finance charge for the current sale are simply added to the existing outstanding balance from prior sales, with no recomputation of the finance charge on the prior sale transactions [*see Civ. Code § 1808.3(g)-(j)*].

[b] Delay of Disclosures Permitted

Both RISA and TILA provide that, in the case of subsequent purchases under both types of provisions [*see* discussion in [a], *above*], the disclosures required to be made for the current sale may be made at any time prior to the date that the first installment for that sale is due, provided that (1) the customer has approved in writing both the annual percentage rate(s) and the method of treating any unearned finance charge on an existing outstanding balance in computing the new finance charge, and (2) the creditor retains no security interest in any property as to which he or she has received payments aggregating the amount of the sale price, including any finance charges attributable thereto [*15 U.S.C. § 1638(d)*; *12 C.F.R. § 226.17(h)*; *see Civ. Code § 1808.3*]. *Civ. Code § 1808.3* is worded differently than the comparable federal provisions, and its meaning is unclear. The Legislature apparently intended, however, that *Civ. Code § 1808.3* conform to the requirements of TILA and Regulation Z [*see* Stats. 1969, ch. 626, § 24].

For purposes of the above provisions, when items are purchased on different dates, the first purchased must be deemed the first paid for. When several items are purchased on the same date, the lowest priced must be deemed the first paid

for [*15 U.S.C. § 1638(d)*; *12 C.F.R. § 226.17(h)*; *Civ. Code § 1808.3*].

[c] Contents of Disclosure Memorandum

The contents of the memorandum that the seller must deliver to the buyer prior to the due date of the first installment for a particular credit sale are set forth in *Civ. Code § 1808.3* and are similar to the items required to be disclosed in an ordinary retail installment contract under *Civ. Code § 1803.3* [*see* discussion in *§ 501.31[5]*].

[4] Consequences of Failure to Make Disclosures

Until the seller delivers to the buyer the memoranda required by *Civ. Code § 1808.2* or *1808.3* [*see* discussions in [2][d] and [3][b], *above*], the buyer is obligated only to pay the cash price of the subsequent purchase [*Civ. Code § 1808.4*].

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44-501 California Forms of Pleading and Practice--Annotated § 501.38

§ 501.38 Retail Installment Accounts

[1] In General

As discussed above [*see* discussion in *§ 501.22[2][c]*], a retail installment account [*Civ. Code § 1802.7*] differs from a retail installment contract [*Civ. Code § 1802.6*] in that the former provides for the extension of credit on a revolving basis, whereas the latter provides for a single credit transaction pursuant to a contract. Retail installment accounts are subject to regulations that differ from those applicable to retail installment contracts.

[2] Acceptance by Buyer

A retail installment account agreement is considered to be accepted by the buyer if (1) the buyer signs the agreement, including signing the application containing the agreement's terms, or (2) the buyer, or a person authorized by the buyer, uses the account, and the buyer has been notified in writing that the use of the credit card will mean that the agreement has been accepted by the buyer [*Civ. Code § 1810*]. The agreement will not become effective, however, unless and until the buyer has been given the disclosures required by *Civ. Code § 1810.1* [*see* [3][b], *below*] and has accepted the agreement as required [*Civ. Code § 1810*]. A change in any term of the agreement will not become effective until the seller has been given notice of the change and complies with the provisions of *Civ. Code § 1810.3* [*see* [3][d], *below*].

[3] Disclosure Requirements Under RISA

[a] Disclosure in Credit Card Application

State law requirements relating to the disclosure of credit information in credit or charge card applications or solicitations that are subject to *15 U.S.C. § 1637(c)* (the section of TILA that governs these disclosures) are preempted by the federal law [*15 U.S.C. § 1610(e)*]. Therefore, *Civ. Code § 1810.21*, which sets forth the disclosures that must appear in an application form or preapproved written solicitation for a credit card issued in connection with a retail installment account that is mailed on or after October 1, 1987, is preempted. Nevertheless, a disclosure that satisfies the initial disclosure statement requirements of Regulation Z (*12 C.F.R. § 226.6*) is sufficient for purposes of *Civ. Code § 1810.21(a)* [*Civ. Code § 1810.21(a)(2)*]. In addition, if a retail seller is required under federal law to make any

disclosure of the terms applicable to a retail installment account in connection with application forms or solicitations, the retail seller is deemed to have complied with the requirements of *Civ. Code § 1810.21(a)(1)* with respect to those application forms or solicitations if the retail seller complies with the federal disclosure requirement [*Civ. Code § 1810.21(f)*].

The TILA disclosure requirements apply to certain direct mail, telephone, and other applications and solicitations offering a credit or charge card, whether the card is connected to a retail installment account or not [*see 15 U.S.C. § 1637(c)*]. For discussion of the TILA requirements, see Ch. 127, *Consumer Contracts and Loans* .

[b] Initial Disclosure

Before the first transaction is made on any retail installment account, the seller must disclose to the buyer, in a single written statement, information regarding the following [*Civ. Code § 1810.1*]:

- Conditions under which a finance charge may be imposed, including an explanation of the time period, if any, within which any credit extended may be paid without incurring a finance charge;

- The method of determining the balance on which the finance charge may be imposed;

- The method of determining the amount of the finance charge, including the method of determining any minimum charge that may be imposed as a finance charge;

- When one or more periodic rates may be used to compute the finance charge, each such rate, the range of balances to which it is applicable, and the corresponding annual percentage rate determined by multiplying the periodic rate by the number of periods in the year;

- The conditions under which any other charges may be imposed, and the method by which they will be determined;

- The conditions under which the creditor may retain or acquire any security interest in any property to secure the payment of any credit extended on the account, and a description or identification of the type of interest that may be retained or acquired; and

- The minimum periodic payment required.

Until the single written statement is delivered to the buyer, the buyer is obligated to pay only the cash price of the goods or services purchased under the account [*Civ. Code § 1810.1*; *see 12 C.F.R. § 226.7* (setting out similar requirements under TILA that must be disclosed to the consumer prior to the first transaction on an open-end credit account)].

[c] Statement Regarding Insurance

If the cost of any insurance is to be separately charged to the buyer, there must be a written agreement signed by both buyer and seller, and the buyer must be provided with a copy of the agreement. The agreement must state if the insurance is to be procured by the buyer or by the seller or holder. If the insurance is to be procured by the seller or holder, the seller or holder must comply with *Civ. Code § 1803.5* [*Civ. Code § 1810.5*; *see Civ. Code § 1803.5* (required disclosures when insurance included in price and charged to buyer) and discussion in *§ 501.31[5][h]*].

[d] Change in Terms of Account

If any change is to be made in terms of a retail installment account previously disclosed to the buyer, the seller must

mail or deliver to the buyer written disclosure of such proposed change not less than 30 days prior to the effective date of the change or 30 days prior to the beginning of the billing cycle within which the change will become effective, whichever is the earlier date [*Civ. Code § 1810.3(d)*; *cf. 12 C.F.R. § 226.9(c)* (providing that, except in certain circumstances, creditor must mail or deliver to consumer written notice of change in any term required to be disclosed under *12 C.F.R. § 226.6* at least 15 days prior to effective date of change)].

If the change only involves the reduction of any component of a finance or other charge, then a notice of the change that appears on the periodic statement or accompanies it is sufficient [*Civ. Code § 1810.3(d)*].

If a change involves any of the following, it will be effective only with respect to purchases made on or after the effective date of the change [*Civ. Code § 1810.3(d)*]:

- An increase in any component of a finance charge [*see Civ. Code 1802.10* (finance charge defined)];
- A change in a charge permitted by *Civ. Code 1810.4* [*see* [9], *below*]; or
- A change in the attorney's fee provision of the agreement [*see Civ. Code 1802.4*].

[e] Periodic Statement of Account; Required Contents

Except in the case of an account that the seller deems to be uncollectible or with respect to which delinquency collection procedures have been instituted, the seller must provide the buyer with a statement of account in the format prescribed by *Civ. Code § 1810.3(b)* and *(c)* for each billing cycle [*see Civ. Code § 1802.17* ("billing cycle" defined)] at the end of which there is a balance due in excess of one dollar, setting out the following to the extent applicable [*Civ. Code § 1810.3(a)*; *see 12 C.F.R. § 226.7(b)* (similar requirements for periodic billing statements)]:

- The previous balance on the account;
- The amount and date of each extension of credit and, unless previously furnished, a brief identification of any goods or services purchased or other extension of credit;
- All amounts credited to the account during the billing cycle, including payments, returns, rebates of finance charges, and adjustments, and, unless previously furnished, a brief identification of each of the items;
- The amount and itemization of finance charges debited to the account during the billing cycle, using appropriate descriptive terminology;
- Each periodic rate, using the term "periodic rate" or "periodic rates," that may be used to compute the finance charge (whether or not applied during the billing cycle), and the range of balances to which it applies;
- The balance on which the finance charge was computed and a statement of how it was determined; if any balance is determined without first deducting all credits during the billing cycle, that fact and the amount of such credits must also be disclosed; and
- The closing date of the billing cycle and the outstanding balance on that date, using the term "new balance," accompanied by the statement of the date that, or the period, if any, within which, payment must be made to avoid additional finance charges.

The seller must mail or deliver the statements required by *Civ. Code § 1810.3(a)* at least 14 days prior to any date or the end of any time period required to be disclosed under *Civ. Code § 1810.3(a)(7)* for the consumer to avoid an additional or other finance charge. A seller that fails to meet this requirement may not collect any finance or other charges imposed as a result of that failure [*Civ. Code § 1810.3(b)*].

[4] Disclosure Requirements Under TILA

[a] In General

As noted previously [*see* discussions in *501.22*[1and [2][b]]], retail installment accounts are also subject to the TILA disclosure requirements for open-end credit plans. Like RISA, TILA requires certain disclosures to be made before an account is opened, and periodically thereafter.

TILA also requires that certain disclosures be made in applications or solicitations offering a credit or charge card, whether the card is connected to a retail installment account or not [*see 15 U.S.C. § 1637(c)*]. These disclosure requirements preempt state law disclosure requirements relating to credit card applications and solicitations [*15 U.S.C. § 1610(e)*]. For discussion of the TILA requirements, see Ch. 127, *Consumer Contracts and Loans* .

[b] Initial Disclosures

Before opening any account under an open-end consumer credit plan, the creditor is required to disclose a number of items to the person to whom credit is to be extended. These items are substantially the same as those required by RISA [*compare Civ. Code § 1810.2 with 15 U.S.C. § 1637(a)*]. In addition to these items, TILA requires the creditor to disclose to the obligor his or her rights with respect to billing errors under *15 U.S.C. § 1666 et seq.* [*15 U.S.C. § 1637(a)*; *see 12 C.F.R. § 226.7(a)(9)* for the exact wording of the required notice].

[c] Periodic Statement

Like RISA, TILA requires that the creditor of any open-end account mail or deliver a statement to the customer for each billing cycle at the end of which there is an outstanding credit or debit balance in excess of $1, or on which a finance charge has been imposed [*see 12 C.F.R. § 226.5(b)(2)(i)*]. The items required to be disclosed on the periodic statement are basically the same as those required by *Civ. Code § 1810.3(a)* [*see* discussion in [3][e], *above*]. The requirements of TILA, as implemented by Regulation Z, differ from those of *Civ. Code § 1810.3(a)* in that TILA requires that the amounts and dates of any credits made to an account during the billing cycle be disclosed on the statement, whereas RISA requires disclosure of only the total amounts credited for payments and for other credits [*compare 12 C.F.R. § 226.7(c) with Civ. Code § 1810.3(a)(3)*]. In addition to the items required to be disclosed by RISA under *Civ. Code § 1810.3*, TILA also requires disclosure of the annual percentage rate when a finance charge is imposed during the billing cycle [*15 U.S.C. § 1637(b)(5)*; *12 C.F.R. § 226.7(g)*]. In addition, the periodic statement must include an address to be used by the creditor for the purpose of receiving billing inquiries from customers [*see 15 U.S.C. § 1637(b)(10)*; *12 C.F.R. § 226.7(k)*].

[5] Refund of Credit Balance on Retail Installment Account

If any outstanding credit balance in excess of $1 exists in a retail installment account, the seller must either refund to the buyer the amount of the credit balance or notify the buyer of the credit balance [*Civ. Code § 1810.3(e)(1)*].

If the credit balance exists for 90 days, the seller must either (1) notify the buyer, as prescribed by *Civ. Code § 1810.3(e)(2)(A)*, of his or her right to receive a cash refund, or (2) refund to the buyer the outstanding credit balance at any time after the credit balance is created and prior to the date by which the first notice of the outstanding balance would have been sent had the seller elected to proceed under *Civ. Code § 1810.3(e)(2)(A)* [*Civ. Code § 1810.3(e)(2)*].

If the account with an outstanding balance is dormant for 180 days after the credit balance is created, the seller must proceed as prescribed by *Civ. Code § 1810.3(f)*. If, after three years, the seller is unable to refund the credit balance, the balance escheats to the state [*Civ. Code § 1810.3(g)*].

For the purposes of *Civ. Code § 1810.3*, an outstanding credit balance is created at the end of the billing cycle in which the credit balance is first recorded on a buyer's account and is created anew at the end of the billing cycle in which the recorded amount of an existing credit balance is changed because of the buyer's use of the account [*Civ. Code § 1810.3(h)*].

[6] Security Interest Until Goods Paid For

The buyer and seller may execute an agreement under which the seller retains a security interest in the goods sold until full payment has been made. For purposes of release of the security interests, in the case of goods or services purchased on different dates, the first purchase is deemed first paid for. In the case of goods or services purchased on the same date, the lowest priced is deemed first paid for. All amounts allocated to payment for these goods and services must be applied to accomplish the above result. However, any downpayment on a specific purchase must be deemed to be allocated in its entirety to that purchase [*Civ. Code § 1810.6*].

[7] Notes Cutting off Buyer's Defenses Prohibited

No installment account may require or entail the execution of any note or series of notes by the buyer that, when separately negotiated, will cut off as to third parties any right of action or defense that the buyer may have against the seller [*Civ. Code § 1810.7*].

[8] Delinquency Charges

Notwithstanding the restrictions on charges set forth in *Civ. Code § 1810.4*, a seller or holder of a retail installment account may, subject to the provisions of *Civ. Code § 1810.3(d)* [*see* discussion in [3][d], *above*], provide that, for each installment in default, the buyer must pay a delinquency charge not to exceed $10 for a period in default of not less than 10 days or not to exceed $15 for a period in default of not less than 15 days [*Civ. Code § 1810.12(a)*]. Only one delinquency charge may be collected on any installment regardless of the period during which it remains in default. No delinquency charge may be imposed for any default of payment due prior to the mailing or delivery to the buyer of the written disclosure concerning a change in the delinquency charge required by *Civ. Code § 1810.3(d)* [*see* discussion in [3][d], *above*]. Payments received by the seller in a timely manner under a written extension or deferral agreement shall not be subject to any delinquency charge [*Civ. Code § 1810.12(b)*].

The agreement may also provide for payment of any actual and reasonable costs of collection occasioned (a) by the removal of goods from the state without written permission of the holder, (b) by the failure of the buyer to notify the holder of any change of residence, or (c) by the failure of the buyer to communicate with the holder for a period of 45 days after any default in making payments due under the agreement [*Civ. Code § 1810.12(b)*].

Notwithstanding the time period for statements set forth in *Civ. Code § 1810.3(b)* [*see* discussion in [3][e], *above*], the seller or holder of a retail installment account must provide a minimum of 20 days between the monthly billing date and the date on which the minimum payment is due, exclusive of the applicable grace period [*Civ. Code § 1810.12(c)*].

[9] Finance Charge Limits on Retail Installment Accounts

There is no limit on the interest rate that may be charged, received, or collected by the seller or holder of a retail installment account, as long as the finance charge has been disclosed to the buyer as required by *Civ. Code § 1810.3* [*Civ. Code § 1810.2*; *see* [3][e], *above*].

The seller or holder of a retail installment account may charge and collect a fee not to exceed $15 for the return by a depository institution of a dishonored check, negotiable order of withdrawal, or share draft issued in connection with the retail installment account. This fee is not considered to be part of the finance charge under RISA [*Civ. Code § 1810.4*]. In addition, when credit cards are issued in connection with a retail installment account, the seller, either in the agreement or after giving the notice required by *Civ. Code § 1810.3(d)* (*see* discussion in [3][e], *above*), may require an annual payment of not more than $15 for membership in the credit card plan. This fee is also not considered part of the finance charge under RISA [*Civ. Code § 1810.4*].

[10] Payments on Account

The payment provisions set out in *Civ. Code §§ 1806.1* and *1806.4* with regard to retail installment contracts govern payment on retail installment accounts [*Civ. Code § 1810.8*; *see § 501.35*, *above*].

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[Reserved]

§§ 501.39[Reserved]

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44-501 California Forms of Pleading and Practice--Annotated § 501.50

§ 501.50 Buyer Remedies Under RISA

[1] Rescission of Retail Installment Contract

If there is an explicit understanding between the seller and the buyer that all or any part of the cash price will be paid from the proceeds of a loan to be obtained by the buyer from a third party, the contract or purchase order can be rescinded at the buyer's election, and all considerations will be returned to the respective parties without further demand, if the buyer is unable to obtain the loan on reasonable terms after having made a reasonable effort to do so, and the buyer notifies the seller of the rescission within three business days [*Civ. Code § 1803.9*].

[2] Civil Liability for Violations of RISA

Both RISA and TILA impose specific duties on creditors to disclose information to debtors and subject any creditor in breach of those duties to statutory damages [*see Civ. Code §§ 1812.7, 1812.9*; *15 U.S.C. § 1640(a)*]. There apparently is no rule in California regarding whether or not federal and state remedies are cumulative. It appears that, absent a case or statute providing that recovery under one act is in lieu of recovery under the other when based substantially on the same violation, both RISA and TILA remedies would be available.

If any person fails to comply with the provisions of RISA, that person, or any person who acquires a contract or installment account with knowledge of the noncompliance, is barred from recovery of any finance charge or of any delinquency, collection, extension, deferral, or refinance charge imposed in connection with the contract or installment account. The buyer has the right to recover from that person an amount equal to any charges he or she has paid [*Civ. Code § 1812.7*].

[3] Statutory Penalty for Willful Violation on Consolidated Contracts

In any case in which a person willfully violates any provision of RISA in connection with the imposition, computation, or disclosures of or relating to a finance charge on a consolidated total of two or more contracts under the provisions of RISA governing add-on sales [*see Civ. Code §§ 1801.1-1808.5*], the buyer may recover from that person an amount equal to three times the total of the finance charges and any delinquency, collection, extension, deferral, or refinance

charges imposed, contracted for, or received on all contracts included in the consolidated total. In addition, the seller is barred from the recovery of any such charges [*Civ. Code § 1812.9*].

[4] Costs and Attorney's Fees

RISA provides that reasonable attorney's fees and costs must be awarded to the prevailing party in an action on a retail installment contract or installment account, regardless of whether the action is instituted by the seller, holder, or buyer. If the defendant alleges in his or her answer that he or she has tendered to the plaintiff the full amount to which the plaintiff is entitled, and deposits that amount in court for the plaintiff, and the allegation is found to be true, then the defendant is deemed to be the prevailing party within the meaning of RISA [*Civ. Code § 1811.1*]. However, the tender must be made prior to commencement of the litigation [*Joseph Magnin Co. v. Schmidt (1978) 89 Cal. App. 3d Supp. 7, 13 , 152 Cal. Rptr. 523]* .

[5] Assignee Liability Under RISA

An assignee of the seller's rights is subject to all equities and defenses of the buyer against the seller arising out of the sale, notwithstanding an agreement to the contrary; however, the assignee's liability cannot exceed the amount of the debt owing to the assignee at the time of the assignment [*Civ. Code § 1804.2(a)*].

The assignee has recourse against the seller to the extent of any liability incurred by the assignee pursuant to *Civ. Code § 1804.2*, regardless of whether the assignment was with or without recourse [*Civ. Code § 1804.2(b)*].

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§ 501.51 Buyer's Remedies Under TILA

[1] Rescission of Contract Creating Security Interest in Principal Dwelling

[a] Availability

In any consumer credit transaction in which a security interest, including any security interest arising by operation of law, is or will be retained or acquired in any property that is used as the principal dwelling of the obligor, the obligor has the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and forms required under *15 U.S.C. § 1635* together with a statement containing the material disclosures required by TILA, whichever is later, by notifying the creditor of his or her intention to do so [*15 U.S.C. § 1635(a)*; *see 15 U.S.C. § 1602(u)* (definition of "material disclosures"); *see also 15 U.S.C. § 1605(f)(2)* (criteria for determining whether amount disclosed as finance charge is accurate for purposes of determining when period for exercise of rescission rights begins to run), discussed in *§ 501.34[2][d]*]. The transaction is "consummated" at the time the consumer becomes contractually obligated, which is determined by looking to California contract law [*Jackson v. Grant (9th Cir. 1989) 890 F.2d 118, 120]* . For example, if an essential element of the contract is reserved for future agreement of the parties, no legal obligation is created and the transaction is consummated only when the parties agree to the missing term [*Jackson v. Grant (9th Cir. 1989) 890 F.2d 118, 120-121* (mortgage contract with real estate loan broker did not bind borrower until eventual lender was identified)].

It should be noted that RISA contains no provision for rescission in this situation. RISA does, however, require notice when a security interest is granted or retained [*see Civ. Code § 1803.2*, discussed in *§ 501.31[4]*]. RISA also provides that any contract for the sale of goods that provides for a security interest in real property if the primary goods sold are not to be attached to the real property is a violation of RISA and subject to the penalties provided in *Civ. Code §§ 1812.6-1812.9* [*Civ. Code § 1804.3(b)*].

In addition to the general right to rescind, after the initiation of any judicial or nonjudicial foreclosure process on the primary dwelling of an obligor securing an extention of credit, the obligor has a right to rescind the transaction, equivalent to the other rights provided by *15 U.S.C. § 1635*, if (1) a mortgage broker fee is not included in the finance charge in accordance with the applicable statutes and regulations; or (2) the notice of rescission for the transaction is not

the appropriate form of written notice published and adopted by the Federal Reserve Board, or a comparable written notice complying with all applicable notice requirements [*15 U.S.C. § 1635(i)(1)*]. Special tolerances for the required disclosures apply in the latter situation [*see 15 U.S.C. § 1635(i)(2)*].

Rescission under *15 U.S.C. § 1635* is a personal remedy not suitable for class-action treatment [*LaLiberte v. Pacific Mercantile Bank (2007) 147 Cal. App. 4th 1, 10, 53 Cal. Rptr. 3d 745]* .

[b] Disclosure of Right to Rescind Required

The creditor must clearly and conspicuously disclose, in accordance with regulations of the Federal Reserve Board, to any obligor in a transaction in which a security interest is created, the rights of the obligor to rescind the transaction under the provisions of *15 U.S.C. § 1635* [*15 U.S.C. § 1635(a)*]. The contents of the required notice are prescribed by *12 C.F.R. §§ 226.15(b)* (open-end credit) and *226.23(b)* (closed-end credit). Suggested model forms for notice of the right to rescind are contained in 12 C.F.R. Part 226, Appendices G and H.

The obligor has no rescission rights arising solely from the form of the written notice the creditor uses to inform the obligor of the obligor's rights under *15 U.S.C. § 1635*, as long as the creditor provided the obligor with the appropriate form of written notice published and adopted by the Federal Reserve Board, or a comparable written notice of the obligor's rights that was properly completed by the creditor and otherwise complied with all other requirements of *15 U.S.C. § 1635* regarding notice [*15 U.S.C. § 1635(h)*].

[c] Form of Notice to Creditor

The consumer must notify the creditor of his or her intent to rescind the transaction by mail, telegram, or other writing. Notification by mail is deemed given at the time the notice is mailed; notification by telegram is deemed given at the time the notice is filed for transmission; notification by other writing is deemed given at the time the writing is delivered to the creditor's designated place of business [*12 C.F.R. §§ 226.15(a)(2)* (open-end credit), *226.23(a)(2)* (closed-end credit)].

[d] Return of Money or Property

When an obligor exercises his or her right to rescind, he or she is not liable for any finance or other charge, and any security interest given by the obligor, including any security interest arising by operation of law, becomes void on rescission. Within 20 days after receipt of a notice of rescission, the creditor must return to the obligor any money or property given as earnest money, downpayment, or otherwise, and must take any action necessary or appropriate to reflect the termination of the security interest created. If the creditor has delivered any property to the obligor, the obligor must return that property to the creditor only when the creditor has performed all obligations with regard to the rescission. If the return of the property in kind would be impracticable or inequitable, the obligor must tender its reasonable value. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his or her part to pay for it [*15 U.S.C. § 1635(b)*].

The Tenth Circuit has held that even though an obligor who exercises the right to rescind is not liable by statute for finance or other charges, a court may apply equitable principles, for example, to impose interest charges if the borrower had the benefit of the use of loan proceeds [*see Rachbach v. Cogswell (10th Cir. 1977) 547 F.2d 502, 505* (involving rescission of mortgage contract)]. However, the latter position has been rejected by the Ninth Circuit on the ground that it contravenes *15 U.S.C. § 1635(b)*, which states that a borrower is not liable for any finance charge, and *15 U.S.C. § 1605(a)*, which lists interest as an example of a finance charge [*Semar v. Platte Valley Federal S. & L. Ass'n (9th Cir. 1986) 791 F.2d 699, 706]* .

[e] Action for Restitution of Money or Property

If the consumer exercises his or her right to rescind a transaction under *15 U.S.C. § 1635*, but the creditor fails to return to the consumer any money or property given by the consumer under the agreement, the consumer's remedy is to bring an action for restitution of the money or property based on the rescission of the agreement [*see Civ. Code §§ 1689(b)(7), 1692*]. For a complaint for use by the consumer in seeking restitution, see *§ 501.201*.

[f] Time Limit

[i] Three-day Optional Rescission Period

If the transaction has been consummated and the required disclosures, forms, and information have not been delivered, the obligor has the right to rescind the transaction at any time until midnight of the third business day following delivery of the disclosures, forms, and information [*15 U.S.C. § 1635(a)*]. If there are two or more obligors, one court has held that the time period for rescinding the transaction does not begin to run until a disclosure statement has been delivered to each obligor [*Gerasta v. Hibernia Nat. Bank (E.D. La. 1975) 411 F. Supp. 176, 188 , rev'd in part on other grounds, (5th Cir. 1978) 575 F.2d 580, 583* ; *see 12 C.F.R. §§ 226.5(d), 226.17(d)*; *see also* former 12 C.F.R. § 226.603 (interpretation of the board regarding transactions involving multiple customers)].

If the disclosures are delivered before consummation of the transaction and, because of the timing of the delivery, notify the consumer of the wrong expiration date on his or her right to rescind, one court has held that this is equivalent to making no disclosure at all [*see Jackson v. Grant (9th Cir. 1989) 890 F.2d 118, 120-122]* .

If no disclosure has been delivered, the right to rescind expires three years after the date of the consummation of the transaction or on the sale of the property, which ever occurs first [*15 U.S.C. § 1635(f)*; *see Pacific Shore Funding v. Lozo (2006) 138 Cal. App. 4th 1342, 1347, 1355, 42 Cal. Rptr. 3d 283* (borrowers not precluded from rescinding consumer loan that is secured by their residence and subject to TILA merely because they already refinanced that loan, provided they rescind within three years after original loan date)].

[ii] Use as Affirmative Defense

The United States Supreme Court has held that a borrower may not assert the right to rescind as an affirmative defense in a collection action brought by the lender more than three years after the consummation of the transaction. Because *15 U.S.C. § 1635(f)* completely extinguishes the right of rescission at the end of the three-year period, it is not a statute of limitations and the mortgagors cannot assert the right to rescind as a recoupment defense beyond the expiration period [*Beach v. Ocwen Federal Bank (1998) 523 U.S. 410, 417-419, 118 S. Ct. 1408, 140 L. Ed. 2d 566]* .

[iii] In Action by Agency Empowered to Enforce TILA

If an agency empowered to enforce the provisions of TILA, institutes an action, the obligor's right of rescission expires three years after the date of consummation of the transaction or earlier sale of the property, or one year following the conclusion of the proceeding or any judicial review or period for judicial review, whichever is later [*15 U.S.C. § 1635(f)*]. The foregoing applies when all of the following occur:

- The agency instituted a proceeding to enforce the provisions of *15 U.S.C. § 1635* within three years after the date of consummation of the transaction.

- The agency found a violation of *15 U.S.C. § 1635*.

- The obligor's right to rescind is based in whole or in part on any matter involved in the proceeding.

[g] Election of Remedies Not Required

In addition to rescission, the court may award relief under *15 U.S.C. § 1640* for violations of TILA not related to the right to rescind [*15 U.S.C. § 1635(g)*; *see* discussion in *§ 501.51[2]*]. Thus, a debtor can successfully pursue damages under the statutory penalty provisions of TILA, as well as seeking rescission [*Ljepava v. M.L.S.C. Properties, Inc. (9th Cir. 1975) 511 F.2d 935, 945* ; *Eby v. Reb Realty, Inc. (9th Cir. 1974) 495 F.2d 646, 651* ; *see § 501.200* (complaint for statutory damages and penalties)]. Accordingly, failure to state the obligor's right to rescind coupled with failure to make other required disclosures entitles an obligor to rescission as well as statutory penalties provided for under the federal act [*see Palmer v. Wilson (9th Cir. 1974) 502 F.2d 860, 861]* .

[h] Right to Rescind as Against Assignee

Any consumer who has the right to rescind a transaction under *15 U.S.C. § 1635* may rescind the transaction as against any assignee of the obligation [*15 U.S.C. § 1641(c)*].

[i] Attorney's Fees

Reasonable attorney's fees may also be awarded to the successful consumer-litigant in any action in which he or she is found to have a right of rescission under *15 U.S.C. § 1635* [*see 15 U.S.C. § 1640(a)*, 1st sentence, cl. (3); *see also § 501.201[6]* and *[3]*, respectively].

[2] Civil Liability for Violations of TILA

[a] Individual Action for Damages and Statutory Penalties

Except as otherwise provided in *15 U.S.C. § 1640*, a creditor is liable for the recovery of any actual damages sustained by a consumer that are the result of the creditor's failure to meet the disclosure requirements of TILA [*15 U.S.C. § 1640(a)*, 1st sentence, cl. (1)]. The creditor also may be liable for a statutory penalty in an amount equal to twice the amount of any finance charge imposed in connection with the transaction [*15 U.S.C. § 1640(a)*, 1st sentence, cl. (2)(A)(i)]; or, if the transaction was under an open end consumer credit plan that is not secured by real property or a dwelling, the penalty is twice the amount of any finance charge in connection with the transaction, with a minimum of $500 and a maximum of $5,000, or such higher amount as may be appropriate in the case of an established pattern or practice of such failures [*15 U.S.C. § 1640(a)*, 1st sentence, cl. (2)(A)(iii)]; or, if the transaction was not under an open end credit plan and was secured by real property or a dwelling, the penalty is not less than $400 or more than $4,000 [*15 U.S.C. § 1640(a)*, 1st sentence, cl. (2)(A)(iv)]. Liability for a penalty can be based only on a violation of any of the following [*15 U.S.C. § 1640(a)*, 5th sentence]:

- *15 U.S.C. § 1635* (concerning the consumer's right to rescind);
- *15 U.S.C. § 1638(a)(2)* insofar as it requires a disclosure of the amount financed;
- A disclosure requirement in *15 U.S.C. § 1638(a)(3)-(6)* or *(9)*;
- The variable-rate disclosure requirement in *15 U.S.C. § 1638(b)(2)(C)(ii)*.
- Certain requirements applicable to private educational loans [*see 15 U.S.C. § 1638(e)(2)(A), (B), (D), (F), (J), (4)(c), (6)-(8)*; for discussion, see *Ch. 127, Consumer Contracts and Loans, § 127.34*]; or
- *15 U.S.C. § 1641(f)* or *(g)* (requirements regarding treatment of a servicer or notice of a new creditor).

The statutory penalty may be recovered without proving actual damages [*Demando v. Morris (9th Cir. 2000) 206 F.3d 1300, 1303]* .

TILA imposes a statutory penalty in "twice the amount of the finance charge" [*15 U.S.C. § 1640(a)*, 1st sentence, cl. (2)(A)(i)]. It is not clear whether these words refer to the amount of the finance charge as disclosed to the buyer at the time of the sale or refer to the amount of the finance charge actually owing as determined under the provisions of TILA and Regulation Z [*see 15 U.S.C. § 1605*; *12 C.F.R. § 226.4(a)*; *see also* discussion in *§ 501.34*].

When there are multiple obligors in a consumer credit transaction, there may be only one recovery of the statutory penalty under *15 U.S.C. § 1640(a)* for violation of TILA [*15 U.S.C. § 1640(d)*].

[b] Class Action Under TILA

In the case of a class action the creditor is liable for the recovery of any actual damages sustained by class members which resulted from the creditor's failure to meet the disclosure requirements. In addition, the court may award an additional amount as a penalty, but this additional amount may not exceed the lesser of $500,000 or one percent of the net worth of the creditor in any class action or series of class actions arising out of the same failure to comply [*15 U.S.C. § 1640(a)*, 1st sentence, cl. (2)(B).]. In a class action, a lender liable for a TILA violation is subject to statutory damages even in the absence of any actual damages [*Demando v. Morris (9th Cir. 2000) 206 F.3d 1300, 1303]* .

In determining the amount of award in any class action, the court must consider, among other relevant factors, the following [*15 U.S.C. § 1640(a)*, 1st sentence, cl. (4)]:

- The amount of any actual damages awarded.
- The frequency and persistence of failures of compliance by the creditor.
- The resources of the creditor.
- The number of persons adversely affected.
- The extent to which the creditor's failure to comply was intentional.

[c] Applicability of Statutory Penalty

Creditor liability for the statutory penalty provided in *15 U.S.C. § 1640(a)* is limited to violations of TILA provisions specified in *15 U.S.C. § 1640(a)* [*see McDonald v. Checks-N-Advance, Inc. (In re Ferrell) (9th Cir. BAP 2006) 358 B.R. 777, 785* (list in *15 U.S.C. § 1640* of specified TILA provisions for violation of which statutory penalty may be claimed is exclusive, since list is introduced with qualifier "only")].

[3] Costs and Attorney's Fees

In the case of any successful action to enforce creditor liability under TILA, the individual plaintiff or the class may recover the costs of the action, together with reasonable attorney's fees, as determined by the court [*15 U.S.C. § 1640(a)*, 1st sentence, cl. (3); *see 15 U.S.C. § 1640(a)*, 1st sentence, cl. (4) (amounts recoverable for failure to comply with requirements for certain mortgages under *15 U.S.C. § 1639*)].

[4] Multiple Violations in Single Transaction

TILA limits an obligor to a single recovery for multiple failures to disclose with regard to a single credit transaction [*15 U.S.C. § 1640(g)*]. However, continued failure to disclose after a recovery has been granted gives rise to the right to additional recoveries [*15 U.S.C. § 1640(g)*].

[5] Penalties Inapplicable to Government Agencies

No civil or criminal penalty provided under TILA for any violation may be imposed on the United States, any state or political subdivision, or any government agency [*15 U.S.C. § 1612*].

[6] Assignee Liability Under TILA

[a] In General

Except as otherwise specifically provided by TILA, any civil action for a violation of TILA that may be brought against a creditor may be maintained against any assignee of the creditor only if the violation for which the action or proceeding is brought is apparent on the face of the disclosure statement, except when the assignment was involuntary [*15 U.S.C. § 1641(a)*].

For purposes of *15 U.S.C. § 1641*, a violation apparent on the face of the disclosure statement includes, but is not limited to the following [*15 U.S.C. § 1641(a)*]:

- A disclosure that can be determined to be incomplete or inaccurate from the face of the disclosure statement or other documents assigned; or

- A disclosure that does not use the terms required to be used by TILA.

Except as provided in *15 U.S.C. § 1635(c)* pertaining to rescission of certain transactions, in any proceeding or action by or against any subsequent assignee of the original creditor, written acknowledgment of receipt by a person to whom a statement is required to be given pursuant to TILA, absent contrary knowledge by the assignee at the time of the assignment, constitutes conclusive proof of the delivery of the statement and of compliance with the requirements of TILA, except if violations are apparent on the face of the disclosure statement, as discussed above. The foregoing provisions do not affect the rights of the obligor in any action against the original creditor [*15 U.S.C. § 1641(b)*].

A servicer of consumer credit obligations is not treated as the assignee of those obligations unless it is or was the owner of the obligations [*15 U.S.C. § 1640(f)*].

In addition to other disclosures required by TILA, not later than 30 days after the date on which any consumer credit transaction that is secured by the principal dwelling of a consumer (that is, a mortgage loan) is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt must give the borrower written notice of the transfer, including the identity, address, telephone number of the new creditor, the date of transfer, how to reach an agent or party having authority to act on behalf of the new creditor, the location of the place where transfer of ownership of the debt is recorded, and any other relevant information regarding the new creditor [*15 U.S.C. § 1641(g)*].

[b] Consumer Credit Transactions Secured by Real Property

A civil action for a TILA violation may be maintained against the assignee of a creditor with respect to a consumer credit transaction secured by real property only if (1) the violation is apparent on the face of the disclosure statement provided in connection with the transaction, and (2) the assignment to the assignee was voluntary [*15 U.S.C. § 1641(e)(1)*]. For purposes of this requirement, a violation is apparent on the face of the disclosure statement if the disclosure can be determined to be complete or inaccurate by a comparison among the disclosure statement, any itemization of the amount financed, the note, or any other disclosure of disbursement, or if the disclosure does not use the terms or format required by the TILA [*15 U.S.C. § 1641(e)*].

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§ 501.52 Action for Declaratory Relief

When a controversy exists between a buyer and a seller in a retail installment transaction as to whether or not the transaction is one governed by the provisions of either RISA or TILA, the remedy of declaratory relief under *Code Civ. Proc. § 1060* should be considered. For discussion and forms involving actions for declaratory relief, see Ch. 182, *Declaratory Relief* .

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§ 501.53 Procedural Considerations

[1] Jurisdiction of TILA Action

Any action based on a violation of TILA may be brought in any United States district court, or in any other court of competent jurisdiction [*15 U.S.C. § 1640(e)*]. Although the federal act does not specifically provide that federal district courts have jurisdiction over actions for rescission, that jurisdiction has been upheld on the basis of a federal statute [*28 U.S.C. § 1337*] conferring original jurisdiction on federal district courts in any civil action arising under any act of Congress regulating commerce [*Sosa v. Fite (5th Cir. 1972) 465 F.2d 1227, 1229* ; *28 U.S.C. § 1337*; *but see Wachtel v. West (6th Cir. 1973) 476 F.2d 1062, 1065 , cert. denied, 414 U.S. 874* ; *see § 501.51[1]*]. If violations of both TILA and RISA arise out of a common nucleus of operative facts, an action under RISA may be joined with an action under TILA in federal court under the doctrine of pendant jurisdiction. For a further discussion of pendant jurisdiction, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

[2] Removal of Actions

When a plaintiff relying on federal law brings an action in state court, a defendant may be able to remove the case to federal court [*28 U.S.C. §§ 1441-1445*]. However, actions for violation of disclosure laws are frequently brought defensively by an obligor who is being sued for payment of a credit contract. In that instance, an obligor who sets up a defense based on the plaintiff's violation of TILA cannot remove the action to a federal court if the plaintiff's claim is based solely on California law. The state court provides the defendant with "a court of competent jurisdiction" to try the issues involving the federal act [*15 U.S.C. § 1640(e)*]. For further discussion and forms for use in removing cases to federal courts, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

[3] Venue in Action on Contract or Account Subject to RISA

An action on a contract or installment account subject to RISA must be tried in one of the following counties [*Civ. Code § 1812.10(a)*]:

- The county in which the contract was in fact signed by the buyer.

- The county in which buyer resided at the time the contract was entered into.
- The county in which the buyer resides at the commencement of the action.
- The county in which the goods purchased pursuant to the contract have been so affixed to real property as to become a part of the real property.

In any action subject to the provisions of *Civ. Code § 1812.10*, the plaintiff must file an affidavit, concurrently with the filing of the complaint, stating facts showing that the action has been commenced in a proper county. These facts may be stated in a verified complaint and may not be stated on information and belief. If a plaintiff fails to file such an affidavit or allege such facts in a verified complaint, no further proceedings may be had, and the court must dismiss the action without prejudice, on its own motion or on the motion of any party [*see Civ. Code § 1812.10(c)*]. For a further discussion of the venue provisions of *Civ. Code § 1812.10, see § 501.102[3] -[5]*.

[4] Limitation of Actions

[a] TILA

An action for violation of TILA must be brought within one year from the date of the occurrence of the violation [*15 U.S.C. § 1640(e)*]. It appears that a violation involving a failure to disclose in an open-end credit plan occurs at the time the account is opened, or, at the latest, sometime before the first credit transaction takes place [*see 12 C.F.R. § 226.5(b)(1)*]. On the other hand, a violation by an incomplete, inaccurate, or misleading disclosure of credit terms in connection with an open-end credit plan occurs, and limitation commences, on the date on which a finance charge was first imposed [*Goldman v. First Nat'l Bank of Chicago (7th Cir. 1976) 532 F.2d 10, 20-21 , cert. denied, 429 U.S. 870]* .

If the credit transaction is other than an open-end account, the transaction is completed when the creditor and obligor contract for the extension of credit. Accordingly, if the proper disclosure is not made, violation of the act occurs, at the latest, when the parties perform their contract [*Wachtel v. West (6th Cir. 1973) 476 F.2d 1062, 1065 , cert. denied, 414 U.S. 874]* .

The one-year statute of limitations does not bar a person from asserting a violation of TILA in an action to collect the debt that was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in an such action, except as otherwise provided by state law [*15 U.S.C. § 1640(e)*]. An action to enforce a violation of *15 U.S.C. § 1639* (disclosure requirements for certain mortgages) may also be brought by the state attorney general not later than three years after the date on which the violation occurs [*15 U.S.C. § 1640(e)*].

[b] RISA

Because RISA itself contains no specific time limit for bringing actions under *Civ. Code §§ 1812.7* and *1812.9*, the-one year statute of limitations for statutory penalties or forfeitures would appear to be applicable [*see Code Civ. Proc. § 340(a)*].

[5] Joinder With Action Under Consumers Legal Remedies Act

If an action under TILA or RISA involves deceptive practices that are unlawful under *Civ. Code § 1770*, as well as in violation of the disclosure requirements of RISA or TILA, counsel should consider the possibility of joining the action with one under the Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*]. For procedures and forms involving the Consumers Legal Remedies Act, see Ch. 504, *Sales: Consumers Legal Remedies Act* .

One possible advantage of joinder with an action under the Consumers Legal Remedies Act is that the act contains specific provisions [*see Civ. Code § 1781*] authorizing the bringing of a class action in which the unlawful method, act, or practice has caused damage to consumers similarly situated with the plaintiff.

[6] TILA Claims Are Arbitrable

A provision in a contract subject to TILA that requires the parties to arbitrate any disputes arising regarding the agreement is enforceable. There is nothing in the Truth in Lending Act to indicate that Congress evinced an intention to preclude a waiver of judicial remedies for the statutory rights under the Act [*Green Tree Financial Corp.-Ala. v. Randolph (2000) 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373, 383]* . Nor does the fact that the agreement is silent with respect to costs and fees create a risk that the consumer will be required to bear prohibitive arbitration costs if he or she pursues a TILA claim in an arbitral forum, in effect rendering it impossible for the consumer to vindicate his or her statutory rights. The party seeking to resist arbitration bears the burden of showing the likelihood of incurring costs that would be prohibitively expensive [*Green Tree Financial Corp.-Ala. v. Randolph (2000) 531 U.S. 79, 148 L. Ed 2d 373, 383-384, 121 S. Ct. 513]* .

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§ 501.54 Statutory Defenses to Liability

[1] Correction of RISA Violation Within 30 Days of Execution Date

Any failure to comply with any provision of RISA may be corrected by the holder [*see Civ. Code § 1802.13* (defining "holder")] in accordance with *Civ. Code § 1812.8*, provided that a willful violation may not be corrected, and a correction that will increase the amount owed by the buyer or the amount of any payment will not be effective unless the buyer agrees to the correction in writing. If a violation is corrected by the holder in accordance with *Civ. Code § 1812.8*, neither the seller nor the holder will be subject to any penalty under RISA. The correction must be made by delivery to the buyer of a corrected copy of the contract within 30 days from the execution of the original contract by the buyer. Any amount that was improperly collected from the buyer must be credited against the indebtedness evidenced by the contract [*Civ. Code § 1812.8*].

[2] Correction of TILA Error Within 60 Days of Discovery

A creditor or assignee is not liable under *15 U.S.C. § 1607*, *1611*, or *1640* for any violation of TILA if within 60 days after discovering an error, whether pursuant to a final written examination report or notice issued under *15 U.S.C. § 1607(e)(1)* or through the creditor's or assignee's own procedures, and prior to the institution of an action under *15 U.S.C. § 1640* or the receipt of written notice of the error from the obligor, the creditor or assignee notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower [*15 U.S.C. § 1640(b)*].

It should be emphasized that TILA permits correction of errors within 60 days after discovery of an error, whenever that may occur, whereas RISA permits the avoidance of penalties only if the error is corrected within 30 days after execution of the contract [*see Civ. Code § 1812.8*; *see also* [1], *above*].

[3] Bona Fide Error Under TILA

The federal act provides that a creditor may not be held liable in any action brought for violation of disclosure

requirements if he or she shows, by a preponderance of the evidence, that the violation was not intentional but resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adopted to avoid that type of error [*15 U.S.C. § 1640(c)*]. The creditor has the burden of pleading and proving both that the error was not intentional [*Turner v. Firestone (5th Cir. 1976) 537 F.2d 1296, 1298]* , and that it constituted a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid those errors [*Demando v. Morris (9th Cir. 2000) 206 F.3d 1300, 1303* (reversing summary judgment because creditor's affidavit not did explain what procedures it employed that were reasonably adapted to avoid the error)]. Apparently, the bona fide error defense is available only for clerical errors that occur despite the creditor's system for correction of those errors and is not available for mistakes of law [*see Ives v. W.T. Grant (2d Cir. 1975) 522 F.2d 749, 757-758]* . This rule appears to have been codified in an amendment to *15 U.S.C. § 1640(c)*, effective April 1, 1982, which states that examples of "bona fide errors" include, but are not limited to clerical, calculation, computer malfunction, programming, and printing errors. Errors of legal judgment with respect to a person's obligations under TILA are specifically excluded from the category of "bona fide errors." RISA contains no comparable provision for defense based on bona fide error.

[4] Good Faith Compliance With TILA Rule, Regulation, or Interpretation

Acts or omissions done in Good Faith conformity with the rules, regulations, and interpretations of the Federal Reserve System Board [*15 U.S.C. § 1602(b)*], or interpretations or approvals of its employees or officials, preclude liability under *15 U.S.C. §§ 1611* (criminal liability), or 1640, notwithstanding that after the occurrence of the act or omission, the rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason [*15 U.S.C. § 1640(f)*]. Under RISA, there is no comparable good faith compliance defense.

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§ 501.55 Seller's Remedies Under RISA

[1] Repossession and Resale

If the buyer defaults in the performance of his or her contract or installment account obligations, the holder, pursuant to any rights granted therein, may either retake the goods or proceed to recover judgment for the balance due without retaking the goods. If the seller retakes the goods, he or she must, within 10 days, notify the buyer in the manner prescribed by *Civ. Code § 1812.3*, of his or her intention either to sell the goods at public sale or to retain the goods in satisfaction of the balance due. The notice must state the amount of the overdue payments that the buyer must pay within 10 days of the notice in order to redeem the goods. In either case, the buyer has an absolute right to redeem the goods within 10 days after the notice is given by paying the amount owing under the contract. If the holder gives notice of election to sell the goods, the buyer also has the absolute right to redeem the goods at any time before the sale by paying the amount specified by the holder, as well as any expense reasonably incurred in good faith by the seller or holder for repairing or reconditioning the goods or preparing them for sale. If the holder gives notice of his or her intention to retain the goods in satisfaction of the indebtedness, he or she is deemed to have done so at the end of the 10-day period if the goods are not redeemed [*Civ. Code § 1812.2*].

At the time the notice is given, the holder must furnish the buyer with a written statement of the sum due under the contract and of any expenses incurred by the holder for repairing or reconditioning the goods or preparing them for sale. If the holder fails to render such a statement, he or she must forfeit $10 to the buyer and is also liable to the buyer for all damages suffered because of that failure [*Civ. Code § 1812.2*].

[2] Application of Resale Proceeds

The proceeds of a resale must be applied to the following [*Civ. Code § 1812.4*]:

- Payment of the expenses of the resale.

- Payment of any expenses of retaking, including reasonable attorney's fees actually incurred, and of any expenses of keeping, storing, repairing, reconditioning, or preparing the goods for sale to which the

holder may be entitled.

- Satisfaction of the balance due under the contract.

Any sum remaining after satisfaction of these claims must be paid to the buyer [*Civ. Code § 1812.4*].

[3] No Deficiency Judgment

If the proceeds of the resale are not sufficient to cover the items set forth in *Civ. Code § 1812.4*, the holder may not recover the deficiency from the buyer or from anyone who has succeeded to the obligations of the buyer [*Civ. Code § 1812.5*].

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[Reserved]

§§ 501.56[Reserved]

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44-501 California Forms of Pleading and Practice--Annotated § 501.60

§ 501.60 Governing Law

[1] Servicemembers Civil Relief Act

The Servicemembers Civil Relief Act of 1940 [*50 U.S.C. App. § 501 et seq.*] provides for the temporary suspension of various legal proceedings, and relief from contracts and obligations, for persons in military service [*see 50 U.S.C. App. § 502* (purpose of statute)]. The statute is applicable to all members of the uniformed services [*see 10 U.S.C. § 101(a)(5)* (definition)] during periods of military service [*see 50 U.S.C. § 511(1)-(3)*] and, in many cases, for 90 days after termination of a member's period of military service. Although the Act is a federal statute, it is specifically made enforceable in state courts. Any application required to be made to a court in which no proceeding has already been commenced with respect to the matter may be made in any court [*50 U.S.C. App. § 512(c)*]. For these purposes, "court" includes any court of competent jurisdiction of the United States or any state, whether or not it is a court of record [*50 U.S.C. App. § 511(5)*].

[2] California Statutes

The California counterpart to the Servicemembers Civil Relief Act [*Mil. & Vet. Code § 400 et seq.*] is designed to fill certain gaps in the federal law in the wake of the events of September 11, 2001. This statute, many provisions of which are virtually identical to their federal counterparts, is designed to apply to military reservists and National Guard members who are called to active military service under specified circumstances and, in many cases, for limited periods of time [*see Mil. & Vet. Code § 400*]. Because the federal and California statutes are so similar in content, language, and purpose, decisions of California and federal courts under the federal act can provide guidance in construing and applying the California law.

[3] Available Relief

The federal and California statutes provide specific relief to qualifying military personnel in a variety of areas, including default judgments [*50 U.S.C. App. § 521*; *Mil. & Vet. Code § 402(a)*], pending judicial proceedings [*50 U.S.C. App. § 522*; *Mil. & Vet. Code § 403(a)*], fines or penalties on contracts and similar obligations [*50 U.S.C. App. § 523*; *Mil. & Vet. Code § 403(b)*], execution of judgments, attachments, and similar matters [*50 U.S.C. App. § 524*; *Mil. & Vet. Code*

§ 403(c)], statutes of limitations [*50 U.S.C. App. § 526*; *Mil. & Vet. Code § 404*], interest rates [*50 U.S.C. App. § 527*; *Mil. & Vet. Code § 405*], rent and eviction [*50 U.S.C. App. § 531*], leases [*50 U.S.C. App. § 535*; *Mil. & Vet. Code § 409*], installment contracts [*50 U.S.C. App. § 532*; *Mil. & Vet. Code § 407*], mortgages [*50 U.S.C. App. § 532*; *Mil. & Vet. Code § 408*], insurance [*50 U.S.C. App. §§ 536, 541* et seq.; *Mil. & Vet. Code § 409.1*], and taxes [*50 U.S.C. App. §§ 561 et seq.*; *Mil. & Vet. Code § 409.2*]. In addition to these specific types of relief, the federal and California statutes contain "catch-all" type provisions that allow qualifying service members to initiate proceedings to seek relief.

Any interlocutory order made by any court under these statutes may, on the court's own motion or otherwise, be revoked, modified, or extended by it, on notice to the parties affected as the court may require [*50 U.S.C. App. § 583*; *Mil. & Vet. Code § 409.9*].

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§ 501.61 Persons Who May Invoke Relief Provisions

[1] Under Federal Statute

The Servicemembers Civil Relief Act applies to members of the uniformed services [*see 10 U.S.C. § 101(a)(5)* (definition)] during periods of military service [*see 50 U.S.C. § 511(1)-(3)*] and, in many cases, for 90 days after termination of a member's period of military service. A servicemember who has been reported missing is presumed to continue in service until accounted for [*50 U.S.C. § 582(c)*].

[2] Under California Statute

The California counterpart to the Servicemebers Civil Relief Act generally applies to the following persons [*Mil. & Vet. Code § 400(a)*]:

- Members of the National Guard called or ordered into active state service by the Governor under *Mil. & Vet. Code §§ 143* or *146*, or by the President of the United States under Titles 10 or 32 of the United States Code.

- Reservists of the United States Military Reserve who have been called to full-time active duty.

For these purposes, "military service" means full time active service, as described above, for a period in excess of seven days in any 14-day period. For any service member who has been called to active service or duty since September 11, 2001, to engage in homeland defense against terrorism, his or her days of service since that time will be credited toward that seven-day period, even if they precede the effective date of the California statute [*Mil. & Vet. Code § 400(b)*; *see also Mil. & Vet. Code § 409.8(c)* (persons missing in action considered to be on active service)].

[3] Dependents

Dependents of service members are entitled to many (but not all) of the key benefits of the federal and California statutes. Dependents are entitled to these benefits upon application to a court, unless in the opinion of the court the

ability of the dependents to comply with the terms of the obligation, contract, lease, or bailment has not been materially impaired by reason of the military service of the person upon whom the applications are dependent [*50 U.S.C. App. § 538*; *Mil. & Vet. Code § 409.5*].

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§ 501.62 Actions or Proceedings Involving Military Service Members

[1] Tolling of Statutes of Limitation

Statutes of limitation are tolled for personnel on military service. Specifically, the period of military service is not to be included in computing any period to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any service member or by or against his or her heirs, executors, administrators, or assigns, whether the cause of action or the right or privilege to institute the action or proceeding accrued before or during the period of service [*see 50 U.S.C. App. § 526(a)*; *Mil. & Vet. Code § 404(a)* (from June 21, 2002, forward)]. For further discussion, see Ch. 345, *Limitation of Actions* .

Under California law, any person violating any provision of *Mil. & Vet. Code § 404* is guilty of a misdemeanor [*Mil. & Vet. Code § 404(c)*]. Federal law does not contain a specific comparable provision.

[2] Court-Ordered Stays in Civil Actions and Proceedings

[a] Stay of Action or Proceeding

At any stage in any action or proceeding in which a service member is involved, either as plaintiff or defendant, during the period of military service or within 90 days after that period, the court may, in its discretion on its own motion, and must on application to it by the service member or some person on his or her behalf, stay the action or proceeding unless, in the opinion of the court, the ability of the service member as plaintiff to prosecute the action or as defendant to conduct his or her defense is not materially affected by reason of his or her military service [*50 U.S.C. App. § 522*; *Mil. & Vet. Code § 403(a)*]. For further discussion and forms, see Ch. 136, *Continuances* .

[b] Automatic Suspension of Contractual Penalties

When an action for compliance with the terms of any contract is stayed, no fine or penalty can accrue by reason of failure to comply with the terms of the contract during the period of the stay. In any case in which a person fails to

perform any obligation, if a fine or penalty for the nonperformance is incurred, a court, on terms that are just, may provide relief against the enforcement of that fine or penalty if it appears that the person who would suffer by that fine or penalty was in the military service when the penalty was incurred and that by reason of military service the ability of the person to pay or perform was materially impaired [*50 U.S.C. App. § 523*; *Mil. & Vet. Code § 403(b)*].

[c] Stay of Attachment or Garnishment and Stay of Execution of Judgment or Order

In any action or proceeding against a service member, before or during the period of the service, or within 90 days after that period, the court may, in its discretion on its own motion, or must on application to it by the service member or some person on his or her behalf, unless in the opinion of the court the ability of the defendant to comply with the judgment or order entered or sought is not materially affected by reason of his or her military service, (1) vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment, and (2) stay the execution of any judgment or order entered against a service member [*50 U.S.C. App. § 524*; *Mil. & Vet. Code § 403(c)*]. For further discussion and forms, see Ch. 62, *Attachment* , Ch. 276, *Garnishment* , and Ch. 254, *Executions and Enforcement of Judgments* .

[d] Extended Duration of Stay

Any stay of any action, proceeding, attachment, or execution ordered by any court may, except as otherwise provided, be ordered for the period of military service and 90 days after that period or any part of that period, and subject to terms that are just, including terms with respect to payment in installments of whatever amounts at whatever times the court may fix. If the service member is a codefendant with others, the plaintiff may nevertheless, by leave of court, proceed against the others [*50 U.S.C. App. § 525*; *Mil. & Vet. Code § 403(d)*].

[3] Defaults and Default Judgments

[a] Declaration Regarding Defendant's Military Service

In any action or proceeding commenced in any court, if any defendant defaults in any appearance, the plaintiff, before entering judgment, must file in the court a declaration under penalty of perjury setting forth facts showing that the defendant is not in the military service. If unable to file that declaration, the plaintiff must instead file a declaration setting forth either that the defendant is in the service or that the plaintiff is not able to determine whether the defendant is in the service. If a declaration is not filed showing that the defendant is not in the military service, no judgment may be entered without first obtaining an order of court directing that entry, and no order may be made if the defendant is in the military service until after the court appoints an attorney to represent the defendant and protect his or her interest [*see* [c], *below*]. The court, on application, must make that appointment [*50 U.S.C. App. § 521(b)(2)*; *Mil. & Vet. Code § 402(a)*]. For further discussion and forms, see Ch. 205, *Defaults and Default Judgments* .

[b] Plaintiff's Bond

Unless it appears that the defendant is not in the military service, the court may require, as a condition before judgment is entered, that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in the military service, against any loss or damage that he or she may suffer by reason of any judgment, should the judgment be later set aside in whole or in part. The court may make such other and further order or enter that judgment as in its opinion may be necessary to protect these rights of the defendant [*50 U.S.C. App. § 521(b)(3)*; *Mil. & Vet. Code § 402(a)*].

[c] Appointment of Attorney for Defendant

In any action or proceeding in which a service member is a party, if the service member does not personally appear or is not represented by an authorized attorney, the court may appoint an attorney to represent the service member. In that case a bond may be required and an order made to protect the rights of the service member. However, no attorney

appointed under an order to protect a service member has the power to waive any right of the person for whom he or she is appointed or to bind him or her by the attorney's acts [*50 U.S.C. App. § 521(b)(2),(3)*; *Mil. & Vet. Code § 402(c)*]. For further discussion and forms, see Ch. 2, *Procedural Guide to Civil Actions* , and Ch. 323, *Jurisdiction, Inconvenient Forum, and Appearances* .

[d] Relief From Judgment

If any judgment is rendered against any service member in any action or proceeding governed by the federal or California statutes discussed in this section during the period of that member's service or within 30 days (or 60 days, under the federal statute) after that period, and it appears that the service member was prejudiced (or "materially affected," under the federal statute) by reason of his or her military service in making his or her defense, the judgment, on application made by the service member or his or her legal representative not later than 90 days after the termination of the service, may be opened by the court that rendered it, and the defendant or his or her legal representative may be let in to defend, provided the application states a meritorious or legal defense to the action or some part of it. Vacating, setting aside, or reversing any judgment in this manner will not impair any right or title acquired by any bona fide purchaser for value under that judgment [*50 U.S.C. App. § 521(g),(h)*; *Mil. & Vet. Code § 402(d)*]. For further discussion and forms, see Ch. 489, *Relief From Judgments and Orders* .

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§ 501.63 Contracts and Obligations

[1] Interest Rate Ceiling

No obligation or liability bearing interest at a rate in excess of 6 percent per year incurred by a service member before that person's entry into service can bear interest during any part of the period of military service at a rate in excess of 6 percent per year unless, in the opinion of the court, on application by the obligee, the ability of the service member to pay interest on that obligation or liability at a rate in excess of 6 percent per year is not materially affected by reason of that service, in which case the court may make whatever order is in its opinion just. "Interest" includes service charges, renewal charges, fees, or any other charges, except bona fide charges for insurance, in respect of any obligation or liability [*50 U.S.C. App. § 527(d)*; *Mil. & Vet. Code § 405*]. For additional discussion, and an affirmative defense against enforcement of an obligation bearing interest at a rate in excess of 6 percent, see *§ 501.302*.

[2] Rescission or Termination of Installment Contract; Repossession

Under both the Servicemembers Civil Relief Act and the comparable California legislation, after a service member enters military service, a contract by the service member for either the purchase of real or personal property (including a motor vehicle) or the lease or bailment of such property may not be rescinded or terminated for a breach of terms of the contract occurring before or during that person's military service, nor may the property be repossessed for such a breach without a court order [*50 U.S.C. App. § 532(a)*; *see Mil. & Vet. Code § 407(a)*]. This relief applies only to a contract for which a deposit or installment has been paid by the servicemember before the servicemember enters military service [50 U.S.C. App. § 532(b), Mil. & Vet. Code § 407(a)]. This provision is designed to protect military service members against repossession, forfeiture of deposits and payments, and termination of installment contracts while they are in active military service. It compels the holder of the obligation to institute a court proceeding before any of these actions can be taken. In such an action, the court may order the repayment of all or part of any prior installments or deposits as a condition of terminating the contract and resuming possession. Instead the court may, on its own motion, or must on application by the service member when the service member's ability to comply with the contract is materially affected by military service, stay the proceedings for a period of time as, in the opinion of the court, justice and equity require; or the court may make other disposition as is equitable to preserve the interests of all parties [*50 U.S.C. App. § 532(c)*; *see Mil. & Vet. Code § 407(b)*].

There are penalties for repossessing or attempting to repossess property in violation of these requirements. Violators are guilty of a misdemeanor [*50 U.S.C. App. § 532(b)(1)*; *Mil. & Vet. Code § 407(c)*].

For additional discussion of these requirements and a form for an application (motion) for a stay of proceedings on the ground that a person is on active military service, see *§ 501.303*.

[3] Enforcement of Security Interests

The Servicemembers Relief Act and the comparable California law provisions limit the enforcement of security interests in real or personal property. These protections are available only with respect to an obligation on real or personal property owned by a service member (1) that originated before the period of the service member's military service and (2) for which the service member is still obligated and (3) that is secured by a mortgage, trust deed, or other security in the nature of a mortgage [*50 U.S.C. App. § 533(a)*; *see Mil. & Vet. Code § 408(a)*]. Security agreements covering goods (such as motor vehicles) under Division 9 of the Commercial Code apparently are "in the nature of a mortgage" in this context.

A sale, foreclosure, or seizure of property for a breach of an obligation described above is not valid if made during, or within 90 days after, the period of the service member's military service, except if made either on a court order granted before the sale, foreclosure, or seizure, with a return made and approved by the court, or pursuant to an enforceable waiver agreement [*50 U.S.C. App. § 533(c)*; *Mil. & Vet. Code § 408(c)* ("pursuant to an agreement between the parties"); *see also 50 U.S.C. § 517* (waiver agreement)]. Violators are guilty of a misdemeanor [*50 U.S.C. App. § 533(d)(1)*; *Mil. & Vet. Code § 408(d)*].

In an action filed during, or within 90 days after, a service member's period of military service to enforce an obligation described above, the court may, after a hearing and on its own motion, or must, on application by a service member, when the service member's ability to comply with the obligation is materially affected by military service, either stay the proceedings for a period of time as justice and equity require or adjust the obligation to preserve the interests of all parties [*50 U.S.C. App. § 533(b)*; *see Mil. & Vet. Code § 408(b)*].

Secured transactions are discussed in detail in Ch. 503, *Sales: Secured Transactions* . For additional discussion of these requirements and a form for an application (motion) for a stay of enforcement of a security interest on the ground that a person is on active military service, see *Ch. 503, Sales: Secured Transactions, § 503.113*.

[4] General Relief from Contracts and Obligations

[a] Availability of Relief

In addition to the specific types of relief discussed in [1]-[3], *above*, additional relief of a more general nature also may be available under *50 U.S.C. App. § 591* or *Mil. & Vet. Code § 409.3*, the general relief provisions of the federal and California statutes. These statutes basically authorize courts to grant an extension of any obligation for a period equal to the period of military service or, in the case of installment obligations for the purchase of real property or secured by a real property mortgage or similar instrument, for a period equal to the period of the military service plus a period equal to the remaining installments, or any part of that combined period [*see 50 U.S.C. App. § 591(b)*; *Mil. & Vet. Code § 409.3(a)*]. Relief under this provision is available only for pre-existing obligations, not those entered into during the period of military service. When a court has granted a stay of the obligation, no fine or penalty may accrue during the period the terms and conditions of the stay are complied with by reason of failure to comply with the terms or conditions of the obligation in respect of which the stay was granted [*50 U.S.C. App. § 591(c)*; *Mil. & Vet. Code § 409.3(b)*].

The court is required to hold a hearing on the application prior to granting any relief. For more detailed discussion, and a form for an application requesting relief under these provisions, see *§ 501.300*. For a form asserting these statutes in a pending action or proceeding, see *§ 501.301*.

[b] Court's Discretion

The court has a measure of discretion on whether to grant relief. If, in the opinion of the court, the applicant's ability to comply with the terms of the obligation in question has not been materially affected by reason of the applicant's military service, the court may deny relief [*see 50 U.S.C. App. § 591(b)*; *Mil. & Vet. Code § 409.3(a)*]. The court also is empowered to deny relief if it demonstrated to the court's satisfaction that the obligation in question was transferred or acquired with the intent to delay its enforcement by taking advantages of these provisions. In such a case, the court is required to enter such a judgment or make such an order as might otherwise lawfully have been entered or made, without regard to the provisions authorizing relief [*50 U.S.C. App. § 581*; *Mil. & Vet. Code § 409.7*].

[c] Relief from Mortgages or Installment Contracts for Purchase of Real Estate

If the obligation is payable under its terms in installments under a contract for the purchase of real estate, or if it is secured by a mortgage (or other instrument in the nature of a mortgage) on real estate, the court may grant a stay of the enforcement of the obligation during the applicant's period of military service and, from the date of termination of the period of military service, or from the date of the application if the application is made after the termination of that service, for a period equal to the period of the remaining life of the installment contract or other instrument plus a period of time equal to the period of military service or any part of that combined period, subject to payment of the balance of principal and accumulated interest due and unpaid at the date of termination of the period of military service (or from the date of application, as the case may be), in equal installments during that combined period at the rate of interest on the unpaid balance that is prescribed in the contract or other instrument evidencing the obligation, for installments paid when due, and subject to such other terms as may be just [*50 U.S.C. App. § 591(b)(1)*; *Mil. & Vet. Code § 409.3(a)(1)*].

[d] Relief From Other Obligations

In the case of any obligation or liability other than those covered under [c], *above*, the court may grant a stay of the enforcement during the applicant's period of military service and, from the date of termination of the period of military service, or from the date of the application if the application is made after the termination of that service, for a period of time equal to the period of military service or any part of that period, subject to payment of the balance of principal and accumulated interest due and unpaid at the date of termination of the period of military service (or the date of the application, as the case may be), in equal periodic installments during the extended period at such a rate of interest as may be prescribed for the obligation, liability, tax, or assessment, if paid when due, and subject to such other terms as may be just [*50 U.S.C. App. § 591(b)(2)*; *Mil. & Vet. Code § 409.3(a)(2)*].

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§ 501.64 Transfers to Take Advantage of Statutes

When in any proceeding to enforce a civil right in any court, it is made to appear to the satisfaction of the court that any interest, property, or contract has been transferred or acquired with the intent to delay the just enforcement of that right by taking advantage of the benefits provided under the Servicemembers Civil Relief Act or the comparable California statutes, the court has power to enter any judgment or make any order that might lawfully be entered or made, notwithstanding any contrary provision in the Servicemembers Civil Relief Act or the comparable California statutes [*50 U.S.C. App. § 581*; *Mil. & Vet. Code § 409.7*].

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§ 501.65 Retaliation by Lender, Creditor, or Other Person

It is unlawful for any lender, creditor, credit reporting agency, or other person to take specified retaliatory actions relating to the extension or denial of credit, or the creditworthiness of a service member solely because the service member applied for or received a stay, postponement, or suspension in the payment of any tax, fine, penalty, insurance premium, or other civil obligation or liability [*50 U.S.C. App. § 518*; *Mil. & Vet. Code § 401(a)*].

The California statute expressly creates a cause of action for violation of the prohibitions discussed above. Any person violating any of these prohibitions is liable for actual damages and reasonable attorney's fees incurred by the injured party [*Mil. & Vet. Code § 401(b)*]. The Servicemembers Civil Relief Act, unlike its California counterpart, does not expressly provide for a private right of action for violation of these prohibitions [*compare 50 U.S.C. App. § 518 with Mil. & Vet. Code § 401(b)*].

In addition to the civil cause of action, the California statute also provides that any person violating the above prohibitions is guilty of a misdemeanor [*Mil. & Vet. Code § 401(c)*].

For more detailed discussion of the anti-retaliation provisions of these statutes, and a form for a complaint against a party who has violated these prohibitions, see *Ch. 129, Consumer Credit Reporting, § 129.150*.

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44-501 California Forms of Pleading and Practice--Annotated § 501.66

§ 501.66 Temporary Debt Relief for Service Members in Iraq and Afghanistan

[1] Service Members Who Qualify for Relief

Relief under *Mil. & Vet. Code § 800 et seq.* is available to a member of the U.S. military reserve or California national guard called to active duty as a result of the Iraq conflict pursuant to the Authorization for Use of Military Force Against Iraq Resolution of 2002 [Pub. L. No. 107-243] or the Afghanistan conflict pursuant to Presidential Order No. 13239. Such a service member is called a "reservist" in the statutes [*Mil. & Vet. Code § 803*].

Mil. & Vet. Code § 800 et seq. will not apply to any active duty voluntarily served after the close of the Iraq or Afghanistan conflicts or to any reservist on active duty as part of the Iraq or Afghanistan conflicts before January 1, 2006 [*Mil. & Vet. Code § 809*].

[2] Option to Defer Payments on Debts

[a] Debts Eligible for Deferred-Payment Option

In addition to any other benefits provided by law and to the extent permitted by federal law, any member of the U.S. military reserve or the California national guard who is called to active duty after February 9, 2005, as a part of the Iraq and Afghanistan conflicts may defer payments on any of the following obligations while serving on active duty [*Mil. & Vet. Code § 800(a)*; *see* [c], *below* (relief during deferment period)]:

- An obligation secured by a mortgage or deed of trust.
- Credit-card debt [*see Civ. Code § 1747.02* (definition); Ch. 127, *Consumer Contracts and Loans*].
- Retail installment contract debt [*see Civ. Code § 1802.6* (definition); § 501.22[2][a]].
- Retail installment account or revolving account debt [*see Civ. Code § 1802.7* (definition); § 501.22[2][c]].

- Up to two loans subject to the Rees-Levering Automobile Sales and Finance Act [*see Civ. Code § 2981 et seq.*; Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act*].

- Any payment of property tax or any special assessment of in-lieu property tax imposed on real property [*see* Ch. 540, *Taxes and Assessments*] that is assessed on residential property owned by the reservist and used as that reservist's primary place of residence on the date the reservist was ordered to active duty.

During the deferment period, the reservist also may defer payments for leased vehicles without breach of the lease or the foreclosure or repossession of the vehicle [*Mil. & Vet. Code § 808*; *see Veh. Code § 670* (definition of vehicle); Ch. 90, *Automobiles: Vehicle Leasing Act*].

Mil. & Vet. Code § 800 et seq. apply only to an obligation that was incurred prior to the date a member of the U.S. military reserve or California national guard was called to active duty as part of the Iraq and Afghanistan conflicts [*Mil. & Vet. Code § 811*].

[b] Procedure to Obtain Deferment

In order for an obligation or liability of a reservist to be subject to the provisions of *Mil. & Vet. Code § 800 et seq.*, the reservist or the reservist's designee must deliver to the lender both of the following [*Mil. & Vet. Code § 800(b)*]:

- A letter signed by the reservist, under penalty of perjury, requesting a deferment of financial obligations.

- If required by a financial institution, proof that the reservist's employer does not provide continuing income to the reservist while the reservist is on active military duty, including the reservist's military pay, of more than 90 percent of the reservist's monthly salary and wage income earned before the call to active duty.

On request of the reservist or the reservist's dependent or designee and within five working days of that request, if applicable, the employer of a reservist must furnish the letter or other comparable evidence showing that the employer's compensation policy does not provide continuing income to the reservist, including the reservist's military pay, of more than 90 percent of the reservist's monthly salary and wage income earned before the call to active duty [*Mil. & Vet. Code § 800(c)*].

[c] Relief During Deferment Period

The deferment period on financial obligations will be the lesser of 180 days or the period of active duty plus 60 calendar days and will apply only to those payments due subsequent to the notice provided to a lender by the reservist or reservist's designee [*Mil. & Vet. Code § 800(d)*].

If a lender defers payments on an open-end credit obligation [*see § 501.22[3][b]*], the lender may restrict the availability of additional credit with respect to that obligation during the term of the deferment [*Mil. & Vet. Code § 800(f)*].

If a lender defers payments on a closed-end credit obligation [*see § 501.22[3][a]*] or an open-end credit obligation with a maturity date, the lender must extend the term of the obligation by the number of months the obligation was deferred [*Mil. & Vet. Code § 800(e)*]. If a lender defers payments for a leased vehicle, the lender must extend the term of the lease by the number of months the lease was deferred [*Mil. & Vet. Code § 808*].

During the deferment period, the reservist may defer the payment of principal and interest on the specified obligations. No penalties may be imposed on the nonpayment of principal or interest during this period. No interest may be charged or accumulated on the principal or interest on which the payment was delayed. No foreclosure or repossession of property on which payment has been deferred may take place during the period [*Mil. & Vet. Code § 804*].

[d] Effect on Holder in Due Course

When a financial obligation covered by *Mil. & Vet. Code § 800 et seq.* is sold, any requirement to defer payments as specified in those code sections is transferred to the purchaser of the obligation [*Mil. & Vet. Code § 810*].

[e] No Adverse Effect on Creditworthiness

A stay, postponement, or suspension under *Mil. & Vet. Code § 800 et seq.* of the payment of any tax, fine, penalty, insurance premium, or other civil obligation or liability of a person in military service may not provide the basis for affecting credit ratings, denial or revocation of credit, or a change by the lender in the terms of an existing credit arrangement [*Mil. & Vet. Code § 805*].

[3] Continuation of Credit Disability Insurance

The holder of a loan or retail installment sales contract with respect to which the debtor has purchased prepaid credit disability insurance [*see* Ch. 127, *Consumer Contracts and Loans*] must give notice to the debtor, not less than 30 days before the expiration date of the insurance, that the debtor will not be protected during the period between that expiration date and the deferred maturity date of the loan or contract unless the insurance is extended. The debtor, at the debtor's option, may direct the holder to add the amount of the additional premium to the unpaid balance of the loan or contract [*Mil. & Vet. Code § 807(a)*].

The holder of an open-ended loan or retail installment account with respect to which the debtor has purchased credit disability insurance with premiums payable monthly together with the installment payments on the loan or the account must give notice to the debtor that the debtor will not be protected by the insurance during the deferment period specified in [2], *above*, unless the debtor elects to continue payment of premiums during that period. The debtor, at the debtor's option, may direct the holder to add the amount of those premiums to the unpaid balance of the account [*Mil. & Vet. Code § 807(b)*].

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44-501 California Forms of Pleading and Practice--Annotated § 501.67

§ 501.67 Additional Relief for Service Members and Families

[1] Who Qualifies for Relief

The California Military Families Financial Relief Act of 2005 [*Mil. & Vet. Code § 820 et seq.*] provides various kinds of relief for members of the militia called or ordered into active state service by the Governor under *Mil. & Vet. Code § 143* or § 146, or into active federal service by the President under *10 U.S.C. § 32*, as well as for reservists of the U.S. military reserve who have been called to full-time active duty [*see Mil. & Vet. Code § 820(a)*].

The relief will relate to a service member's period of "military service," meaning full-time active state service or full-time active federal service, or full-time active duty of a reservist, for a period of 30 consecutive days [*see Mil. & Vet. Code § 820(a)*].

[2] Relief Under Retail Installment Contracts

[a] Termination of Cell Phone Contract Without Penalty

Any service member who is in military service [*see* [1], *above*], or any spouse or legal dependent of that service member, may terminate, without penalty, a mobile telephony services contract (that is, a cell phone contract) that meets both of the following requirements [*Mil. & Vet. Code § 823(a)*]:

- It was entered into on or after January 1, 2006.

- It was executed by or on behalf of the service member, or by any spouse or legal dependent of the service member.

Termination of the contract will not be effective until both of the following occur [*Mil. & Vet. Code § 823(b)*]:

- Thirty days have passed after the service member or the spouse or legal dependent gave notice by certified mail, return receipt requested, of the intention to terminate the contract, and provided a copy of

the service member's activation or deployment order and any other information that substantiates the duration of the service member's military service.

- The cell phone has been returned to the custody or control of the company that provides service under the contract, or the service member or the spouse or legal dependent has agreed in writing to return the cell phone as soon as practicable after the military service is completed. This requirement does not apply if the service member, or the spouse or legal dependent of the service member, owns the cell phone.

[b] Equal-Payments Plan for Debt Remaining After Termination of Vehicle Lease

Beginning January 1, 2006, any service member who terminates a motor vehicle lease pursuant to the federal Servicemembers Civil Relief Act must be allowed by the lessor to make payment of any arrearages and other obligations that are due and unpaid at the time of termination of the lease in equal installments over a period equal to at least the period of military service [*Mil. & Vet. Code § 826*].

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[Reserved]

§§ 501.68[Reserved]

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§ 501.70 California Legal Forms

For transactional forms relating to leases, installment loans, credit cards, and the Consumer Credit Reporting Act, see the following chapters of California Legal Forms (Matthew Bender):

Ch. 45, *Consumer Installment Loans and Credit Sales*

Ch. 46, *Credit Card and Other Open-End Credit Transactions*

Ch. 47, *Automotive Financing and Vehicle Leasing*

Ch. 53, *Personal Property Leasing*

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§ 501.71 Federal Statutes

[1] Servicemembers Civil Relief Act

Servicemembers Civil Relief Act. *50 U.S.C. App. § 501 et seq.*

[2] Truth In Lending Act

Consumer credit transaction disclosures under federal Truth in Lending Act. *15 U.S.C. § 1601 et seq.*

Definitions. *15 U.S.C. § 1602*

Determination of finance charge. *15 U.S.C. § 1605*

Determination of annual percentage rate. *15 U.S.C. § 1606*

General disclosure requirements. *15 U.S.C. § 1631*

Form of disclosure. *15 U.S.C. § 1632*

Inaccuracy of required disclosures resulting from subsequent occurrence does not violate TILA. *15 U.S.C. § 1634*

Rescission rights in certain transactions. *15 U.S.C. § 1635*

Required disclosure when sale is not under open-end credit plan. *15 U.S.C. § 1638*

Civil liability for failure to disclose. *15 U.S.C. § 1640*

Assignee liability. *15 U.S.C. § 1641*

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§ 501.72 Federal Regulations

Truth in Lending regulations. *12 C.F.R. § 226.1 et seq.*

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§ 501.73 State Statutes

[1] Definitions

RISA definitions. *Civ. Code §§ 1802.1-1802.21*

[2] Disclosures and Notices

Notice must be given to cosigners of specified types of credit; action against cosigner or security barred for noncompliance. *Civ. Code § 1799.90 et seq.*

Disclosure of information required by RISA may be set forth in manner required or permitted under Regulation Z (12 C.F.R. Part 226). *Civ. Code § 1801.5*

Disclosures required in retail installment contracts. *Civ. Code § 1803.1-1803.11*

Disclosure of periodic rate required in advertisements. *Civ. Code § 1803.11*

[3] Remedies

Attorney's fees and court costs in retail installment sales actions. *Civ. Code § 1811.1*

Repossession and resale in retail installment sales actions. *Civ. Code §§ 1812.2-1812.5*

Penalties and liabilities for violation of Retail Installment Sales Act. *Civ. Code §§ 1812.6-1812.9*

Place for trial of actions on contracts or accounts subject to RISA. *Civ. Code § 1812.10*

Creditor remedies against debtor with credit disability insurance. *Civ. Code §§ 1812.400-1812.410*

If contract entered into after January 1, 1986, does not specify legal rate of interest chargeable after breach, obligation bears interest at 10 percent per annum, except for note secured by deed of trust on real property. *Civ. Code § 3289(b)*

For purposes of *Civ. Code § 3289*, in contract subject to *Civ. Code § 1801 et seq.*, contracted finance charge is legal rate of interest. *Civ. Code § 3289.5*

[4] Requirements and Restrictions

Confidentiality of information obtained from a federal or state income tax return submitted by a consumer in connection with a financial or other business-related transaction is governed by *Civ. Code § 1799.1a*

Restrictions on retail installment contracts. *Civ. Code §§ 1804.1-1804.4*

Finance charges; schedule of installments. *Civ. Code §§ 1805.1-1805.9*

Payments. *Civ. Code §§ 1806.1-1806.4*

Refinancing and consolidation of retail installment contracts. *Civ. Code §§ 1807.1-1807.3*

Add-on sales. *Civ. Code §§ 1808.1-1808.5*

Terms of purchase of retail installment contract or retail installment account by financing agency. *Civ. Code § 1809.1*

Retail installment accounts. *Civ. Code §§ 1810.1-1810.21*

Areias Retail Installment Account Full Disclosure Act of 1986 governs disclosures on applications or solicitations for credit card issued in connection with retail installment account. *Civ. Code §§ 1810.20, 1810.21*

Seller is prohibited from requiring a purchaser of goods or services to obtain financing from any particular source. *Civ. Code § 1812.20*

Suspension of certain civil obligations and liabilities of National Guard and military reserve members during qualifying periods of military service after September 11, 2001. *Mil. & Vet. Code § 400 et seq.*

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§ 501.74 Decisions

[1] Disclosures

Over-limit fees were not required to be classified as "finance charge" in disclosure under Truth in Lending Act (*15 U.S.C. § 1605(a)*); Regulation Z (*12 C.F.R. § 226.4(c)(2)*), which specifically excludes over-limit fees from definition of "finance charge," is not unreasonable interpretation of § 1605(a). *Household Credit Servs. v. Pfennig (2004) 541 U.S. 232, 235, 124 S. Ct. 1741, 158 L. Ed. 2d 450*

Assignment to seller of unearned premiums on insurance policy covering automobile purchased under retail installment contract does not constitute "security interest" required to be disclosed under *15 U.S.C. § 1638(a)*. *Anderson Bros. Ford v. Valencia (1981) 452 U.S. 205, 211-222, 101 S. Ct. 2266, 68 L. Ed. 2d 783*

Creditor's undisclosed intent to act inconsistently with its disclosures is irrelevant in determining sufficiency of those disclosures under Regulation Z sections mandating general disclosure requirements, content of initial disclosure statement, and subsequent disclosure requirements [*see 12 C.F.R. §§ 226.5, 226.6, 226.9*]. *Hauk v. JP Morgan Chase Bank USA (9th Cir. 2009) 552 F.3d 1114, 2009 U.S. App. LEXIS 1285, at *18*

Purchase price of insurance is not required to be disclosed under Truth in Lending Act (*15 U.S.C. § 1601 et seq.*) when neither car dealer nor bank financed insurance purchase even though purchase of insurance was a prerequisite for buyer to take possession of car. *Boncyk v. Cavanaugh Motors (9th Cir. 1982) 673 F.2d 256, 260-261*

[2] Purpose and Application of Credit Disclosure Laws

[a] Purpose

Retail Installment Sales Act, constituting a broad legislative approval of the credit sale principle, is an exception to the usury laws and a recognition that, whatever the rational weakness of the distinction on which it is based, significant practical considerations justify the regulation of credit sales by a means more flexible than that provided by the usury

laws. *Boerner v. Colwell Co. (1978) 21 Cal. 3d 37, 46, 145 Cal. Rptr. 380, 577 P.2d 200*

RISA is to be construed liberally to protect consumers, with a view toward expanding, rather than limiting, its coverage. *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 823, 94 Cal. Rptr. 796, 484 P.2d 964*

[b] Transactions Covered

Finance charges on retail installment accounts are subject to time-price doctrine and not subject to usury laws; RISA limits on finance charges were not a violation of usury limits of *California Constitution. Fox v. Federated Dep't Stores, Inc. (1979) 94 Cal. App. 3d 867, 880-882, 156 Cal. Rptr. 893*

[c] Transactions Not Covered

Automobile insurance payment plan that was actually policy for one-month term renewable for successive terms on payment of monthly premium plus service charge did not constitute consumer credit transaction and, therefore, was not subject to either RISA or TILA. Crawford v. Framers Group, Inc. (l984) *160 Cal. App. 3d 1164, 1168-1170, 207 Cal. Rptr. 155*

[3] Remedies

[a] In General

TILA claims are arbitrable; nothing in TILA evinces a Congressional intention to preclude waiver of judicial remedies for the statutory rights under the Act. *Green Tree Financial Corp.-Ala. v. Randolph (2000) 531 U.S. 79*

Fact that arbitration agreement which is silent with respect to costs and fees may require consumer to bear prohibitive arbitration costs to pursues a TILA claim in arbitral forum, in effect rendering it impossible for the consumer to vindicate his or her statutory rights, does not prohibit arbitration; party seeking to resist arbitraiton bears the burden of showing likelihood of incurring costs that would be prohibitively expensive. *Green Tree Financial Corp.-Ala. v. Randolph (2000) 531 U.S. 79, 148 L. Ed.2d 373, 383-384, 121 S. Ct. 513*

Civ. Code § 1804.3(b) requires deeds of trust taken by carpet seller to be voided when carpets were not attached to purchasers' real property; when those deeds of trust had been sold to finance companies, trial court's failure to require carpet seller to make restitution to purchasers, to repurchase contracts, or to pay any delinquencies necessary to avoid foreclosure was abuse of discretion. *People v. Custom Craft Carpets, Inc. (l984)159 Cal. App. 3d 676, 685-686, 206 Cal. Rptr. 12*

Civ. Code § 1811.1, which deems a defendant who tenders the amount due on a contract or installment account to be the prevailing party in any action on a contract or installment account governed by RISA, requires defendant to tender amount due prior to commencement of litigation. *Joseph Magnin Co. v. Schmidt (1978) 89 Cal. App. 3d Supp. 7, 152 Cal. Rptr. 523*

[b] Rescission Under Truth in Lending Act

Borrower may not assert right to rescind under *15 U.S.C. § 1635(f)* as affirmative defense in collection action brought by lender more than three years after consummation of transaction; because statute expressly extinguishes right of rescission at end of three-year period, it is not a statute of limitations and right to rescind cannot be asserted as recoupment defense beyond expiration period. *Beach v. Ocwen Federal Bank (1998) 523 U.S. 410, 417-419, 118 S.*

Ct. 1408, 140 L. Ed. 2d 566

Technical violation (failure to specify date of expiration of three-day rescission period, for example) allows borrowers to rescind entire transaction within three years after date of loan. *Semar v. Platte Valley Federal S. & L. Ass'n. (9th Cir. 1986) 791 F.2d 699, 703*

Court is not permitted to deny rescission to unsympathetic borrowers or borrowers who do not need protection of TILA and is not permitted to weigh equities; lender is entitled to require weighing of equities only by assertion of defense under *15 U.S.C. § 1604(c)*. *Semar v. Platte Valley Federal S. & L. Ass'n. (9th Cir. 1986) 791 F.2d 699, 704-705*

If only 10 percent of loan proceeds were used for business capital and lender had treated loan as primarily for personal purposes by issuing TILA disclosures, finding that loan was primarily for personal purposes was not clearly erroneous. *Semar v. Platte Valley Federal S. & L. Ass'n. (9th Cir. 1986) 791 F.2d 699, 704 n.11*

On rescission in accordance with *15 U.S.C. § 1635(b)*, borrower is required to return loan amount less sum of (1) all payments previously made on loan, (2) loan expenses (closing charges), (3) civil penalty ($1,000), and (4) any attorney's fees awarded; lender is not entitled to finance charge; court is not empowered to require borrower to pay finance charge in contravention of *15 U.S.C. § 1635(b)*. *Semar v. Platte Valley Federal S. & L. Ass'n. (9th Cir. 1986) 791 F.2d 699, 704-705*

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§ 501.75 Law Reviews

Levine, *The Installment Sales Revision Act of 1980*, 27(2) Prac. Law. 11 (1981)

Willenzik & Schmelzer, *Truth in Lending Activities During 1980, 36 Bus. Law. 1161 (1981)*

O'Connor, *Truth in Lending Simplification, 35 Bus. Law. 1221 (1980)*

Landers, *Open End Credit Disclosure Requirements Under the Truth in Lending Act, 52 S. Cal. L. Rev. 1005 (1979)*

Landers & Rohner, *A Functional Analysis of Truth in Lending, 26 UCLA L. Rev. 711 (1979)*

Landers, *Truth in Lending: Open End Credit, 24 Prac. Law. No. 6, p. 13*; No. 7, p. 35; No. 8, p. 45 (1978)

Comment, *Confession of Judgment in California, 8 Pac. L.J. 99 (1977)*

Recent Cases, *Retail Installment Sales-Unruh Act Permits Use of Previous Balance Method in Computing Finance Charges on Revolving Credit Accounts-Seibert v. Sears, Roebuck & Co., 16 Santa Clara L. Rev. 416 (1976)*

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[Reserved]

§§ 501.76[Reserved]

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PART IV. FORMS
A. Retail Installment Sales Act
1. Buyer's Forms

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§ 501.100 Complaint for Recovery of Finance Charges Paid on Retail Installment Contract [Civ. Code § 1812.7] After Seller's Violation of RISA--General Form

[1] FORM Complaint for Recovery of Finance Charges Paid on Retail Installment Contract [Civ. Code § 1812.7] After Seller's Violation of RISA--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____ COMPLAINT FOR STATUTORY PENALTY, COSTS, AND ATTORNEY'S FEES
Plaintiff,	)	
vs.	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
_____ [*name*(*s*)],	)	
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence of plaintiff*].

2. Defendant _____ [*name*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of California, with its principal office for the transaction of business located in _____ County, California [*or allege other capacity and residence of defendant(s)*], _____ [authorized *or* licensed] to engage in, and engaging in, business as a retail seller, within the meaning of *Civil Code Section 1802.3*, of _____ [*describe defendant's business, e.g.*, household goods

and appliances].

[3. *If one of defendants is an assignee of the original seller, add:* Plaintiff is informed and believes and thereon alleges that on or about _____ (*date*), defendant _____ (*name of seller*) assigned his/her/its rights under the above-described retail installment contract to defendant _____ (*name of assignee*).]

[*EITHER*]

4. On or about _____, [*date*], in _____ County, California, plaintiff and defendant(s) _____ [*name*(*s*)] entered into a written retail installment contract by the terms of which defendant(s) _____ [*name*(*s*)] agreed to sell and plaintiff agreed to buy the following _____ [goods *or* services]: _____ [*describe goods or services*] for a price payable in installments. A copy of the contract is attached to this complaint as Exhibit A and made a part of it by this reference.

[*OR*]

4. On or about _____ [*date*], plaintiff and defendant _____ [*name of lender*] entered into a written agreement by the terms of which defendant _____ [*name of lender*] agreed to lend to plaintiff the sum of $_____, and plaintiff agreed to repay this sum with interest. Plaintiff entered into the loan agreement for the purpose of financing the purchase of the following _____ [goods *or* services] from defendant _____ [*name of seller*]: _____ [*describe goods or services purchased*]. A copy of the loan agreement is attached as Exhibit A and incorporated by reference. Plaintiff is informed and believes and thereon alleges that defendant _____ [*name of lender*] and defendant _____ [*name of seller*] _____ [*either* are related by common ownership and control and the relationship was a material factor in the loan transaction (in that _____ (*specify*)) *or* share in the profits and losses of either or both the sale of the above-described _____ (goods *or* services) and the loan agreement *or both*].

[CONTINUE]

5. The _____ [goods *or* services] described above were bought by plaintiff primarily for _____ [personal *or* family *or* household] purposes. The retail installment contract described above and attached as Exhibit A was, and is, subject to the requirements of the Retail Installment Sales Act, *Civil Code Section 1801 et seq.*

6. Defendant(s) _____ [*name*(*s*)] _____ [has *or* have] failed to comply with the provisions of _____ [*specify Civil Code section*(*s*) *which defendant has allegedly violated*], in connection with the above-mentioned retail installment contract, in that: _____ [*set forth facts showing that defendant*(*s*) *failed to comply with the specified provision*(*s*) *of RISA. For examples of allegations of violations of specific provisions, see §§ 501.104 -501.109*].

7. By reason of the above-described violation(s) of _____ [*specify Civil Code section*(*s*) *allegedly violated by defendant*(*s*)], defendant(s) _____ [*name*(*s*)] _____ [is *or* are] barred from recovering any _____ [finance charges *or* delinquency charges *or other as appropriate*] whatsoever from plaintiff in connection with the above-described retail installment contract, and plaintiff is entitled to recover from defendant(s) _____[*name*(*s*)] the sum of $_____, which is the total amount of _____ [finance charges *or* delinquency charges *or other as appropriate*] heretofore

imposed on and paid by plaintiff to defendant(s) _____ [*name*(*s*)] in connection with the above-described retail installment contract.

8. Under *Civil Code Section 1811.1*, plaintiff is entitled to recover reasonable attorney's fees and costs incurred, and to be incurred, in this action, in an amount to be determined by the court.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For the sum of $_____, which is the total of all _____ [finance charges *or* delinquency charges *or other as appropriate*] paid by plaintiff to defendant(s) _____ [*name*(*s*)] in connection with the above-described retail installment contract.

2. For a declaration that defendant(s) _____ [*name*(*s*)] [, and each of them,] _____ [is *or other as appropriate* are] barred from any recovery of any _____ [finance charges *or other as appropriate* delinquency charges *or other as appropriate*];

3. For reasonable attorney's fees in an amount to be determined by the court;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The complaint in [1], *above*, is a general form for use by a buyer under a retail installment contract [*see Civ. Code § 1802.6*; *see also Civ. Code § 1802.5* ("retail installment sale")] to recover the amount of finance, delinquency,

collection, extension, deferral, or refinance charges he or she paid in connection with that contract, when the seller violated one or more of the provisions of RISA [*see Civ. Code § 1812.7*, discussed in *§ 501.50[2*]; *see also § 501.53[4][b]* (statue of limitation)]. For examples of allegations of violations of specific provisions of RISA, see *§§ 501.104 -501.109*.

When the violation alleged is a willful violation of a provision of RISA in connection with the imposition, computation, or disclosure of a finance charge on a consolidated total of two or more contracts, counsel will want to combine the complaint with the one set forth in *§ 501.101[1]*, to recover three times the amount of the finance or other charges contracted for or received [*see Civ. Code § 1812.9*].

This form may also be used, with appropriate modifications, as a cross complaint [*see Code Civ. Proc. § 428.10*] filed by the buyer in a seller's action to recover money allegedly due under the contract.

[3] Accompanying Affidavit

Unless a complaint for RISA remedies is verified and shows that the action is commenced in a proper place for trial under *Civ. Code § 1812.10*, counsel must file concurrently with the complaint an affidavit, or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*], showing that the action is being commenced in a proper place for the trial of the action [*Civ. Code § 1812.10(c)*; *Code Civ. Proc. § 396a(a)*; *see § 501.102* (form of affidavit) and discussions in [6] and [7], *below*].

[4] Allegations

The complaint at [1], *above* alleges:

- Plaintiff's capacity and residence (Paragraph 1).
- Defendant's capacity and residence, and status as a retail seller [*see Civ. Code § 1802.3*] (Paragraph 2).
- Any assignment of the contract (Optional Paragraph 3).
- Execution of a retail installment contract (alternative Paragraphs 4), for the purchase of goods or services primarily for personal, family, or household purposes (Paragraph 5) [*see Civ. Code §§ 1801.6, 1802.1, 1802.2, 1802.5, 1802.6*].
- A violation of one of the provisions of RISA (Paragraph 6), which bars defendant from recovering finance charges or delinquency, collection, extension, deferral, or refinance charges under the contract.
- Plaintiff's entitlement to recover from defendant the total amount of any charges previously paid by plaintiff [*Civ. Code § 1812.7*] (Paragraph 7).
- Plaintiff's entitlement to reasonable attorney's fees and costs incurred in bringing the action [*Civ. Code § 1811.1*] (Paragraph 8).

[5] Right to Recover Finance Charges Paid Under Contract Violating RISA

When a seller fails to comply with the provisions of RISA, the seller, and any person who acquires a contract or installment account with knowledge of the noncompliance, is barred from recovering any finance charge or any delinquency, collecting, extending, deferring, or refinancing any charge imposed in connection with that contract or

installment account. In addition, the buyer has a right to recover from the seller an amount equal to any charges paid by the buyer [*Civ. Code § 1812.7*].

[6] Venue in Action Brought Under RISA

In any action brought on a contract or installment account subject to RISA, the plaintiff must, concurrently with the filing of the complaint, file an affidavit stating facts showing that the action has been commenced in a proper place for trial of the action under *Civ. Code § 1812.10*. In lieu of an affidavit, those facts may be stated in a verified complaint [*Civ. Code § 1812.10(c)*] or in a declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]. For a further discussion of the venue requirements of RISA and a form of declaration of proper venue, see *§ 501.102*.

[7] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

Moreover, if the plaintiff states in his or her complaint facts showing that the action has been commenced in a proper place for trial of the action, and no affidavit or declaration is filed stating those facts, the complaint must be verified [*see Civ. Code § 1812.10(c)*; *Code Civ. Proc. § 396a(a)*].

[8] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, §§ 177.40* et seq. and *177.140* et seq.

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms for verification, see Ch. 572, *Verification*

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44-501 California Forms of Pleading and Practice--Annotated § 501.101

§ 501.101 Complaint for Recovery of Statutory Penalty [Civ. Code § 1812.9] After Seller's Willful Violation of RISA Provisions Concerning Finance Charges on Consolidated Contracts

[1] FORM Complaint for Recovery of Statutory Penalty [Civ. Code § 1812.9] After Seller's Willful Violation of RISA Provisions Concerning Finance Charges on Consolidated Contracts

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR STATUTORY PENALTY,
_____ [*name*(*s*)], Defendant(s).	)	COSTS, AND ATTORNEY'S FEES
	)	[Amount demanded _____ (exceeds
	)	*or other as appropriate* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Plaintiff's capacity and residence. See § 501.100[1], Paragraph 1.*]

2. [*Defendant's capacity and residence. See § 501.100[1], Paragraph 2.*]

3. [*Allegation of execution of retail installment contract, and description thereof. See § 501.100[1], Paragraph 4.*]

4. The _____ [goods *or other as appropriate* services] purchased pursuant to the above-described retail installment contract and all _____ [goods *or other as appropriate* services] subsequently

purchased by plaintiff from defendant(s) were bought primarily for plaintiff's _____ [personal *or other as appropriate* family *or other as appropriate* household] purposes [, thereby subjecting the contract to the requirements of the Retail Installment Sales Act, *Civil Code Section 1801 et seq.*].

5. The above-described retail installment contract provided in part that _____ [*show that contract is within the provisions of Civ. Code § 1808.1 et seq., e.g.,* the seller, defendant _____ (*name*) herein, may, at his/her/its option, add subsequent purchases made by the buyer, plaintiff, to the contract, and that the total price of the _____ (goods *or other as appropriate* services) covered by the contract is to be increased by the price of such additional _____ (goods *or other as appropriate* services), and that all finance charges and installment payments may, at the seller's option, be increased proportionately, and that all terms and conditions of the contract apply equally to such subsequent purchases].

6. On or about _____ [*date*], in _____ [*city*], _____ County, California, plaintiff made a subsequent purchase from defendant(s) _____[*name*(*s*)] of the following _____ [goods *or other as appropriate* services], all of which were purchased by plaintiff primarily for _____ [personal *or other as appropriate* family *or other as appropriate* household] purposes: _____ [*list goods and/or services purchased*].

7. _____ [*Set forth defendant's (defendants') violation(s) of RISA in connection with imposing, computing, or disclosing finance charge on consolidated total of two or more contracts under Civ. Code § 1808.1 et seq., e.g.,* Defendant(s) _____ (*name*(*s*)) has/have violated the provisions of *Civil Code Section 1808.2* with respect to the subsequent purchase described above in that he/she/they/it has/have failed to provide plaintiff with a memorandum disclosing the amount of the finance charge and other information pertinent to the transaction prior to the due date of the first installment(, or at any time thereafter,) as required by that section].

8. Plaintiff is informed and believes and thereon alleges that the violation(s) of _____ [*specify Civil Code section(s) violated*] by defendant(s) as alleged in this complaint was/were willful.

9. By reason of the above-described willful violation[s] of Civil Code Section[s] _____ [*specify*], plaintiff is entitled to recover from defendant(s) three times the sum of $_____, which is the total amount of finance charges and delinquency, collection, extension, deferral, and refinance charges imposed, contracted for, or received on the consolidated total of the above-described retail installment contract(s).

10. By reason of the above-described willful violation(s) of Civil Code Section[s] _____ [*specify*], defendant(s) _____ [*name*(*s*)] is/are barred from recovering any finance, delinquency, collection, extension, deferral, or refinance charges in connection with the above-described retail installment contract(s)[, and any subsequent purchases made by plaintiff under that contract].

11. [*Allegation of plaintiff's right to attorney's fees and costs. See § 501.100[1], Paragraph 8.*]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For the sum of $_____, which is three times the total of all _____ [finance charges *and/or* finance *and/or* delinquency *and/or* collection *and/or* extension *and/or* deferral *and/or* refinance charges] imposed, contracted for, or received by defendant[s] in connection with the above-described retail installment contract(s)[, and all subsequent purchases thereunder];

2. For a declaration that defendant(s) _____ [*name*(*s*)] is/are barred from any recovery of those charges;

3. For reasonable attorney's fees in an amount to be determined by the court;

4. For costs of suit incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*] _____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 501.100[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by a buyer to recover the statutory penalty for the seller's willful violations of the provisions of RISA in connection with the imposition, computation, or disclosure of or relating to finance charges on a consolidated total of two or more retail installment contracts [*see Civ. Code § 1812.9*, discussed in *§§ 501.50[2], [3], 501.51[1][a]*; *see also § 501.53[4][b]* (statue of limitation)].

Willful violations of other provisions of RISA are not subject to the statutory penalty imposed by *Civ. Code § 1812.9* (three times the amount of the finance charge), but do subject the seller or holder to liability under *Civ. Code § 1812.7* [*see § 501.100*]. This form may be combined with the complaint *set forth in § 501.100* if there are additional or nonwillful violations of RISA [*see Civ. Code § 1812.7*].

The complaint at [1], *above*, also may be used, with appropriate modifications, as a cross complaint [see *Code Civ. Proc. § 428.10*] in an action brought by the seller to recover amounts allegedly due under the contract.

[3] Accompanying Affidavit

Unless a complaint for RISA remedies is verified and shows that the action is commenced in a proper place for trial under *Civ. Code § 1812.10*, counsel must file concurrently with the complaint an affidavit, or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*], showing that the action is being commenced in a proper place for the trial of the action [*Civ. Code § 1812.10(c)*; *Code Civ. Proc. § 396a(a)*; *see § 501.102* (form of affidavit)].

[4] Allegations

The complaint in [1], *above*, alleges the following:

- That the goods or services purchased under a retail installment contract were primarily for personal, family, or household purposes (Paragraph 4) [*see Civ. Code §§ 1802.1, 1802.2, 1802.5, 1802.6*].

- The terms of the contract that make it subject to *Civ. Code § 1808.1 et seq.* (Paragraph 5) [*Civ. Code § 1812.9*].

- A subsequent purchase of additional goods or services by plaintiff (Paragraph 6) [*see Civ. Code §§ 1808.1-1808.3* (add-on sales provisions, discussed in *§§ 501.22[2][b], 501.37*)].

- The defendant's violation of the provisions of RISA in connection with the imposition, computation, or disclosure of or relating to a finance charge on the consolidated total of two or more contracts under the provisions of *Civ. Code § 1808.1 et seq.* (Paragraph 7) [*see Civ. Code § 1812.9, § 501.50[3]*].

- That the violation was willful (Paragraph 8) [*Civ. Code § 1812.9*];

- That the plaintiff is entitled to recover the statutory penalty equal to three times the amount of all finance, delinquency, collection, extension, deferral, and refinance charges imposed, contracted for, or received by the defendant on the consolidated total (Paragraph 9) [*see Civ. Code § 1812.9*].

- That the defendant is barred from recovering any of those charges (Paragraph 10) [*Civ. Code § 1812.9*].

- That the plaintiff is entitled to reasonable attorney's fees and costs incurred in bringing the action (Paragraph 11) [*Civ. Code § 1811.1*].

[5] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, § 177.140* et seq.

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue*

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44-501 California Forms of Pleading and Practice--Annotated § 501.102

§ 501.102 Declaration of Proper Venue for Action on Retail Installment Sale [Civ. Code § 1812.10; Code Civ. Proc. § 396a]

[1] FORM Declaration of Proper Venue for Action on Retail Installment Sale [Civ. Code § 1812.10; Code Civ. Proc. § 396a]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DECLARATION OF _____ [*name*]
Defendant.	)	
	)	
	)	

_____

I _____ [*name*], declare:

I am the plaintiff in the above-entitled action which is based on a retail installment _____ [contract *or other as appropriate* account] subject to the provisions of *Civil Code Section 1812.10*. _____ [*Set forth facts showing that the action is being commenced in a county in which the contract was in fact signed by the buyer, in which the buyer resided at the time the contract was entered into, in which the buyer resides at the commencement of the action, or in which the goods purchased have been so affixed to real property as to become a part thereof*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

The declaration in [1], *above*, satisfies *Civ. Code § 1812.10* and *Code Civ. Proc. § 396a*, which require a plaintiff in an action under RISA at the time the complaint is filed, if that complaint is not verified and does not allege compliance with the venue provisions of *Civ. Code § 1812.10* and *Code Civ. Proc. § 396a*. The declaration must set forth facts showing that the action is commenced in the proper court [*see* discussion at [3], *below*]. Those facts also may be set forth in an affidavit, as opposed to a declaration under penalty of perjury, or in the verified complaint [*Civ. Code § 1812.10(c)*; *Code Civ. Proc. § 396a(a)*].

For an affidavit, see Ch. 15, *Affidavits, Certificates, and Declarations* .

For alternative forms for captions, see Ch. 108, *Captions and Introductions* .

[3] Venue

An action on a contract or account subject to the provisions of RISA must be tried in one of the following counties [*Civ. Code § 1812.10(a)*]:

- The county where the contract was in fact signed by the buyer.
- The county where the buyer resided at the time the contract was entered into.
- The county where the buyer resides at the commencement of the action.
- The county in which the goods purchased have been so affixed to real property as to become a part thereof.

[4] Requirement That Affidavit Be Filed

Concurrently with the filing of the complaint the plaintiff must file an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) stating facts showing that the action has been commenced in a proper county [*see* discussion in [3], *above*]. In addition, a copy of the declaration must be served on the defendant at the time the summons is served. The facts establishing proper venue may be stated in a verified complaint, but cannot be stated on information or belief. If the plaintiff fails to file the affidavit or state facts in a verified complaint (or declaration) as required, there can be no further proceedings and the court must, on its own motion or on the motion of any party, dismiss the action without prejudice. However, on any terms that are just, the court has discretion to permit late filing of the affidavit (or declaration) [*Civ. Code § 1812.10(c)*; *Code Civ. Proc. § 396a(a)*; *see* [5], *below*].

[5] Late Filing of Affidavit

On any terms that are just, the court may permit the affidavit (or declaration) to be filed subsequent to the filing of the complaint. A copy of the affidavit must be served on the defendant. Then, the time to answer or otherwise plead dates from that service [*Civ. Code § 1812.10(c)*; *Code Civ. Proc. § 396a(a)*].

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[Reserved]

§ 501.103[Reserved]

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44-501 California Forms of Pleading and Practice--Annotated § 501.104

§ 501.104 Allegation for Use in RISA Complaint--Seller Violated Single Document Rule [Civ. Code § 1803.2]

[1] FORM Allegation for Use in RISA Complaint--Seller Violated Single Document Rule [Civ. Code § 1803.2]

Defendant(s) _____ [*name*(*s*)] _____ [has *or other as appropriate* have] failed to comply with the provisions of *Civil Code Section 1803.2* in connection with the above-described retail installment contract, a copy of which is attached as Exhibit A and incorporated by reference, in that defendant(s) failed to include within a single document all of the terms of the agreement between plaintiff and defendant(s) with respect to the cost and terms of payment for the _____ [goods *or other as appropriate* services] purchased according to the contract, as required by that section. [The following terms were omitted from the agreement: _____ (*specify*)].

[2] Use of Form

The allegation in [1], *above*, is for use in a complaint or cross complaint to recover the amount of finance or other charges imposed and paid in connection with a retail installment contract when the seller has violated the provisions of RISA [*see Civ. Code § 1812.7*]. The allegation may be inserted in lieu of Paragraph 6 of the complaint at § 501.100[1]. It alleges that defendant(s) failed to include all of the terms of the agreement between the parties with respect to the cost and terms of payment for goods and services within a single document, as is required by RISA [*see Civ. Code § 1803.2*, discussed in *§ 501.31[6]*].

With appropriate modifications, this form the form may also be used as an affirmative defense in a seller's action against the buyer to recover finance or other charges imposed pursuant to the contract.

For allegations of violations of other provisions of RISA, see *§§ 501.105 -501.109*.

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44-501 California Forms of Pleading and Practice--Annotated § 501.105

§ 501.105 Allegation for Use in RISA Complaint--Failure to Disclose All Required Information [Civ. Code §§ 1803.2, 1803.3, 1807.2, 1808.3, 1810.1, 1810.3]

[1] FORM Allegation for Use in RISA Complaint--Failure to Disclose All Required Information [Civ. Code §§ 1803.2, 1803.3, 1807.2, 1808.3, 1810.1, 1810.3]

Defendant(s) _____ [*name*(*s*)] _____ [has *or other as appropriate* have] failed to comply with the provisions of _____ [*specify the appropriate disclosure provision of the Civil Code which defendant*(*s*) *have violated, e.g., Civil Code Section 1803.2(c)*] in connection with the above-described _____ [retail installment contract *or other as appropriate* retail installment account *or other as appropriate* refinancing agreement *or other as appropriate*], a copy of which is attached to this complaint as Exhibit A and incorporated by reference, in that _____ [*set forth specific facts showing a violation of the specified disclosure provision, e.g.,* the contract contains a finance charge which is computed on the precomputed basis, as defined by *Civil Code Section 1802.21*, and defendant(s) failed to include in the contract a notice concerning plaintiff's right to prepay the amount due under the contract, as required by *Civil Code Section 1803.2(c)*].

[2] Use of Form

The form in [1], *above*, is an allegation for use in a complaint or cross complaint to recover the amount of finance or other charges imposed and paid in connection with a retail installment contract or account when the seller has violated the provisions of RISA [*see Civ. Code § 1812.7*]. The allegation may be inserted in lieu of Paragraph 6 of the form of complaint in § 501.100[1]. It alleges that defendant(s) failed to disclose information required by RISA.

The allegation may also be used, with appropriate modifications, as an affirmative defense by the buyer to a seller's action to recover finance or other charges imposed under the contract.

For examples of allegations of violations of other provisions of RISA, see *§§ 501.104, 501.106 -501.109*.

[3] Disclosure Requirements of RISA

RISA contains detailed provisions setting forth the information that must be disclosed in various types of retail installment sales transactions. This allegation contains only one of many possible violations of these provisions. The act has separate disclosure provisions for retail installment contracts [*Civ. Code §§ 1803.2-1803.8*, discussed in *§ 501.31*], refinancing agreements [*Civ. Code § 1807.2*, discussed in *§ 501.36*], and add-on sales contracts [*Civ. Code §§ 1810.1-1810.3*, discussed in *§ 501.37*]. For discussion of other restrictions and disclosure requirements, see *§§ 501.33 -501.35* (restrictions and rules regarding payment) and § 501.38 (retail installment accounts).

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44-501 California Forms of Pleading and Practice--Annotated § 501.106

§ 501.106 Allegation for Use in RISA Complaint--Failure to Fill in Blanks Prior to Obtaining Buyer's Signature [Civ. Code § 1803.4]

[1] FORM Allegation for Use in RISA Complaint--Failure to Fill in Blanks Prior to Obtaining Buyer's Signature [Civ. Code § 1803.4]

Defendant(s) _____ [*name*(s)] _____ [has *or other as appropriate* have] failed to comply with the provisions of *Civil Code Section 1803.4* in connection with the above-described _____ [retail installment contract *or other as appropriate*], a copy of which is attached to this complaint as Exhibit A and incorporated by reference, in that defendant(s) obtained plaintiff's signature to the contract when it contained blank spaces to be filled in after the contract was signed. [The following portions of the contract were left blank at the time defendant(s) obtained plaintiff's signature thereto: _____ (*specify*).]

[2] Use of Form

The allegation in [1], *above*, is for use in a complaint or cross complaint to recover the amount of finance or other charges imposed and paid in connection with a retail installment contract when the seller has violated the provisions of RISA [*see Civ. Code § 1812.7*]. The allegation may be inserted in lieu of Paragraph 6 of the complaint in § 501.100[1]. It alleges that defendant(s) obtained plaintiff's signature to the contract when it contained blank spaces to be filled in after it was signed, in violation of RISA [*see Civ. Code § 1803.4*; *see* discussions in *§ 501.31[7]* and *[10]*].

The buyer may also use the allegation, with appropriate modifications, as an affirmative defense to a seller's action for recovery of finance charges or other charges imposed pursuant to the contract.

For examples of allegations of violations of other provisions of RISA, see *§§ 501.104, 501.105, 501.107 -501.109*.

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44-501 California Forms of Pleading and Practice--Annotated § 501.107

§ 501.107 Allegation for Use in RISA Complaint--Failure to Provide Buyer With Copy of Contract [Civ. Code § 1803.7]

[1] FORM Allegation for Use in RISA Complaint--Failure to Provide Buyer With Copy of Contract [Civ. Code § 1803.7]

Defendant(s) _____ [*name*(s)] _____ [has *or other as appropriate* have] failed to comply with the provisions of *Civil Code Section 1803.7* in connection with the above-described retail installment contract in that defendant(s) failed to deliver to plaintiff a legible copy of the contract [*or of any other document which the defendant(s) requested plaintiff to sign*] at the time plaintiff signed the contract [*or at any time thereafter*].

[2] Use of Form

The allegation in [1], *above*, for use in a complaint or cross complaint to recover the amount of finance or other charges imposed on and paid by the buyer in connection with a retail installment contract when the seller has violated the provisions of RISA [*see Civ. Code § 1812.7*]. The allegation may be inserted in lieu of Paragraph 6 of the form of complaint at § 501.100[1]. It alleges that defendant(s) failed to deliver to plaintiff a legible copy of the contract at the time of obtaining the plaintiff's signature, as required by RISA [*see Civ. Code § 1803.7*, discussed in *§ 501.31[7]*].

The buyer may also use this allegation, with appropriate modifications, as an affirmative defense to a seller's action for recovery of finance charges or other charges imposed pursuant to the contract.

For examples of allegations of violations of other provisions of RISA, see *§§ 501.104*, *501.106*, *501.108 -501.109*.

[3] Seller's Obligation to Provide Buyer With Copy of Contract

The seller must deliver to the buyer at the time the buyer signs the contract a legible copy of the contract or of any other document which the seller has requested or required the buyer to sign, and which the buyer has signed, during the contract negotiation. In addition to the civil and criminal penalties provided for in *Civ. Code §§ 1812.6-1812.9*, a buyer

is obligated to pay only the cash price of the contract until the seller delivers these documents to the buyer [*Civ. Code § 1803.7, see* discussions in *§ 501.31[7]* and *[8]*].

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44-501 California Forms of Pleading and Practice--Annotated § 501.108

§ 501.108 Allegation for Use in RISA Complaint--Inclusion of Prohibited Provision in Contract [Civ. Code §§ 1804.1, 1804.4]

[1] FORM Allegation for Use in RISA Complaint--Inclusion of Prohibited Provision in Contract [Civ. Code §§ 1804.1, 1804.4]

Defendant(s) _____ [*name*(*s*)] _____ [has *or other as appropriate* have] violated the provisions of _____ [*specify applicable subdivision which has been violated, e.g.,* Subdivision (b) of *Civil Code Section 1804.1*] in connection with the above-described retail installment contract, a copy of which is attached to this complaint as Exhibit A and incorporated by reference, in that the contract provides that _____ [*describe the contractual provision which violates Civ. Code § 1804.1, e.g.,* in the absence of plaintiff's default in the performance of any of his/her contractual obligations, the defendant(s) may accelerate the maturity of any part or all of the amount owing under the contract]. [In accordance with *Civil Code Section 1804.4*, the above-described contractual provision is void and unenforceable.]

[2] Use of Form

The allegation in [1], *above*, is for use in a complaint or cross complaint to recover the amount of finance or other charges imposed on and paid by the buyer in connection with a retail installment contract when the seller has violated the provisions of RISA [*see Civ. Code § 1812.7*]. The allegation may be inserted in lieu of Paragraph 6 of the form of complaint at § 501.100[1]. It alleges that defendant(s) inserted into the contract a provision which is prohibited by RISA [see discussion in [3], *below*].

The buyer may also use this allegation, with appropriate modifications, as an affirmative defense to an action by the seller to enforce the illegal contractual provision or to recover finance charges or other charges imposed pursuant to the contract.

For examples of allegations of violations of other provisions of RISA, see *§§ 501.104 -501.107, 501.109.*

[3] Prohibited Contractual Provisions

RISA prohibits sellers from inserting certain types of provisions into retail installment contracts. The provision contained in this allegation is only one of many types of contractual provisions prohibited by RISA. The types of provisions prohibited by RISA are set forth in *Civ. Code §§ 1803.10, 1804.1-1804.3,* and *1812.20*, and discussed in *§ 501.33*. A contract provision proscribed by RISA is void but does not otherwise affect the validity of the contract [*Civ. Code § 1804.4*]. Inclusion of a prohibited provision in a contract constitutes a failure to comply with RISA, thus subjecting the seller or holder to liability under the penalty provisions of RISA [*see Civ. Code §§ 1812.6-1812.9*, discussed in *§ 501.51[2], [3]*].

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44-501 California Forms of Pleading and Practice--Annotated § 501.109

§ 501.109 Allegation for Use in RISA Complaint--Excessive Finance Charge Imposed [Civ. Code §§ 1805.1, 1810.2]

[1] FORM Allegation for Use in RISA Complaint--Excessive Finance Charge Imposed [Civ. Code §§ 1805.1, 1810.2]

Defendant(s) _____ [*name*(*s*)] _____ [has *or other as appropriate* have] violated the provisions of Civil Code Section _____ [1805.1 *or other as appropriate* 1810.2] in connection with the above-described _____ [retail installment contract *or other as appropriate* retail installment account *or other as appropriate* refinancing agreement *or other as appropriate*], a copy of which is attached to this complaint as Exhibit A and incorporated by reference, in that the _____ [contract *or other as appropriate* account *or other as appropriate* agreement] provides for the payment by plaintiff of a finance charge in the sum of $_____, over a period extending from _____ [*date*] to _____ [*date*]. [This finance charge exceeds the maximum amount permitted to be charged in a _____ (retail installment contract *or other as appropriate* retail installment account *or other as appropriate* refinancing agreement *or other as appropriate*) under Civil Code Section _____ (1805.1 *or other as appropriate* 1810.2).]

[2] Use of Form

The allegation in [1], *above*, for use in a complaint or cross complaint to recover the amount of finance or other charges imposed on and paid by the buyer in connection with a retail installment contract or account when the seller has violated the provisions of RISA [*see Civ. Code § 1812.7*]. This allegation may be inserted in lieu of Paragraph 6 of the form of complaint at § 501.100[1]. It alleges that the contract or account provides for payment by the buyer of a finance charge which exceeds the maximum amount permissible under RISA [*see Civ. Code §§ 1805.1, 1810.2*].

A provision in a retail installment contract or account for a finance charge which exceeds the maximum amount permitted by *Civ. Code § 1805.1* or *1810.2* is a failure to comply with RISA which bars the seller or holder from recovering any finance charge whatsoever in connection with the contract or account [*see Civ. Code § 1812.7*]. For a

more detailed discussion of finance charge limitations under RISA, see *§§ 501.34* (retail installment contracts) and 501.38[9] (retail installment accounts).

The buyer may use this allegation, with appropriate modifications, as an affirmative defense to the seller's action to collect finance charges imposed pursuant to the contract or account.

For examples of allegations of violations of other provisions of RISA, see *§§ 501.104 -501.108*.

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[Reserved]

§§ 501.110[Reserved]

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A. Retail Installment Sales Act
2. Cosignors' Affirmative Defenses

44-501 California Forms of Pleading and Practice--Annotated § 501.120

§ 501.120 Affirmative Defense to Creditor's Action Against Cosigner on Consumer Credit Contract-Failure to Comply With Cosigner Liability Notice Requirements [Civ. Code § 1799.95; *see* Civ. Code §§ 1799.90-1799.99]

[1] FORM Affirmative Defense to Creditor's Action Against Cosigner on Consumer Credit Contract-Failure to Comply With Cosigner Liability Notice Requirements [Civ. Code § 1799.95; *see* Civ. Code §§ 1799.90-1799.99]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

1. The consumer credit contract on which this action is based is _____ [*specify type of account described at Civ. Code § 1799.90 or account that does not qualify for exceptions of Civ. Code § 1799.91(c) or Civ. Code § 1799.99, e.g.,* a retail installment account as defined in *Civil Code Section 1802.7*] [and is written in _____ (*specify language other than English or Spanish*)].

2. Defendant is not now and was not at the time he/she signed the _____ [application *or other as appropriate* agreement] married to _____ [*name*], the primary obligor. Defendant did not in fact receive any money, property, or services which are the subject matter of the consumer credit contract.

[*EITHER, if transaction is not one which could qualify for any of the exceptions set forth in Civ. Code § 1799.91(c)*]

3. Defendant did not receive [a _____ (*specify language other than English or Spanish*) translation of] the notice required by *Civil Code Section 1799.91* [prior to becoming obligated on the consumer credit contract].

[*OR, if action is on open-end credit subject to Regulation Z or to allegedly joint applicants but notices or issuance of a credit device did not comply with Civ. Code § 1799.91(c), use as many of the sentences below as are applicable*]

3. [Defendant was not a joint applicant, but only provided credit information to plaintiff and signed the _____ (application *or other as appropriate* agreement) after _____ (*name*), the original sole applicant and primary obligor, failed to qualify for credit in his/her name alone.] [Plaintiff's _____ (application *or other as appropriate* agreement) did not contain the clear and conspicuous statement required by *Section 1799.91(c) of the Civil Code* to the effect that each applicant would have the right to use the open-end credit plan to the extent of the credit limit established by plaintiff and would be liable for all amounts extended under the plan to any joint applicant.] [Although plaintiff normally issues a credit _____ (card *or other as appropriate* device) to its borrowers in order to allow them to obtain credit under this open-end credit plan, plaintiff did not issue any credit _____ (card *or other as appropriate* device) to this defendant.]

[*OR, if action is on credit subject to 12 C.F.R. § 227.14, 12 C.F.R. § 535.3, or 16 C.F.R. § 444.3 but notice did not comply with applicable regulation*]

3. Plaintiff did not provide defendant with the notice required by _____ *[Section 227.14 of Title 12 of the Code of Federal Regulations or other as appropriate Section 535.3 of Title 12 of the Code of Federal Regulations or other as appropriate Section 444.3 of Title 16 of the Code of Federal Regulations*] [or with an accurate Spanish translation of that notice] [in the manner required by that regulation].

[*CONTINUE*]

4. For the foregoing reasons, plaintiff's action [against this defendant] is precluded by Section _____ [1799.95 *or other as appropriate* 1799.99] of the Civil Code.

[2] Use of Form

The affirmative defense in [1], *above*, is for use by a cosigner who did not receive the notice required by *Civ. Code § 1799.91* or the notice required by any of the federal regulations set forth in *Civ. Code § 1799.99* in action by the creditor against that cosigner or to enforce any security. The types of accounts for which the cosigner notice is required are discussed in *§ 501.30[1]*. The form in [1], *above*, may be modified to allege the failure to deliver to the cosigner copies of any of the documents evidencing the obligation or any security interest taken [*see Civ. Code § 1799.93(a)*]. If the complaint does not allege that the cosigner actually received money, property, or services which were the subject of the contract or that the cosigner is married to the person who did receive the consideration, the foregoing form may be used as a demurrer [see *Code Civ. Proc. § 430.30*; see Ch. 206, *Demurrersn and Motions for Judgment on the Pleadings*].

[3] Allegations

The affirmative defense in [1], *above*, alleges the following:

- That the credit transaction was of the type governed by *Civ. Code §§ 1799.90-1799.99* (Paragraph 1) [*see Civ. Code §§ 1799.90, 1799.99*].

- That the defendant was not married to the primary obligor and did not receive any of the subject matter of the transaction (Paragraph 2) [*see Civ. Code § 1799.91(a)*].

- If appropriate, that the plaintiff was required to comply with *Civ. Code § 1799.91(a)* and *(b)* (first alternative Paragraph 3).

- If appropriate, that the plaintiff failed to bring itself within the exceptions of *Civ. Code § 1799.91(c)* by selecting allegations which describe the noncompliance involved (second alternative Paragraph 3.).

- If true, that the plaintiff failed to comply with whichever of the federal regulations applied to it by selecting allegations which describe the particular noncompliance involved (third alternative Paragraph 3.) [see *Civ. Code § 1799.99(b)*].

[4] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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44-501 California Forms of Pleading and Practice--Annotated §§ 501.121through 501.129

[Reserved]

§§ 501.121[Reserved]

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3. Seller's Complaints

44-501 California Forms of Pleading and Practice--Annotated § 501.130

§ 501.130 Complaint for Balance Due on Buyer's Default Under Retail Installment Contract [Civ. Code §§ 1812.2, 1810.10]

[1] FORM Complaint for Balance Due on Buyer's Default Under Retail Installment Contract [Civ. Code §§ 1812.2, 1810.10]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*], a Corporation,	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Breach of Contract)
_____ [*name*], Defendant.	)	[Amount demanded _____ (exceeds
	)	*or other as appropriate* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of California, with its principal office for the transaction of business located in _____ County, California [*or allege other capacity and residence of plaintiff*], _____ [authorized *or other as appropriate* licensed] to engage, and engaging in, business as a _____ [*state, e.g.,* department store for retail sales].

2. Defendant is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence of defendant*].

[*EITHER*]

3. _____ [*Allege filing of declaration regarding venue, e.g.,* In compliance with *Civil Code Section 1812.10*, plaintiff will file, concurrently with the filing of this complaint, a declaration showing that the action has been commenced in the county described by that section as a proper place for the trial of the action].

[*OR*]

3. _____ [*Allege facts showing that action has been commenced in a proper place under Civ. Code § 1812.10. If this is done in lieu of an affidavit or declaration, the complaint must be verified*].

4. _____ [*Allege occurrence of retail installment sale transaction, e.g.,* On or about _____ [*date*], at _____ [*city*], _____ County, California, plaintiff and defendant entered into a _____ (written retail installment contract under which plaintiff agreed to sell and defendant agreed to buy *or other as appropriate*) for a deferred payment price _____ (payable in installments *or other as appropriate* payable on a revolving charge account basis) the following described goods: _____ (*describe goods purchased or services rendered and, if purchases made pursuant to retail installment account, include dates of all such purchases*). A copy of the _____ (*either* retail installment contract *or where an installment account is involved, identify the appropriate document or documents establishing the installment account*) is/are attached to this complaint as Exhibit(s) A (_____) and incorporated by reference].

5. Plaintiff has performed each and every obligation on his/her/its part to be performed under the _____ [retail installment contract *or other as appropriate* agreement establishing the retail installment account *or other as appropriate*] and on _____ [*date*], _____ [delivered the goods *or other as appropriate* rendered the services] to defendant [, who took possession thereof and ever since has retained possession thereof].

6. Defendant failed to pay the installment of $_____ due on _____ [*date*], under the _____ [retail installment contract *or other as appropriate* agreement establishing the retail installment account *or other as appropriate*] and thereby became indebted to the plaintiff in the sum of $_____.

7. Plaintiff has demanded that defendant pay the sum due under the _____ [contract *or other as appropriate* agreement *or other as appropriate*] but defendant failed and refused, and continues to fail and refuse, to pay all or any part of that sum. [*When appropriate, add:* As a result of that failure, plaintiff has exercised his/her right under the _____ (retail installment contract *or other as appropriate* agreement establishing the retail installment account) to declare the _____ (amount unpaid on the deferred payment price *or other as appropriate* outstanding balance *as appropriate*) immediately due and payable, which _____ (amount unpaid *or other as appropriate* outstanding balance *as appropriate*) is the sum of $_____.]

[8. *When contract allows seller to declare entire indebtedness immediately due and payable if buyer defaults, add:* By reason of defendant's default as alleged above and plaintiff's declaring the _____ (amount unpaid on the deferred payment price *or other as appropriate* outstanding balance *as appropriate*) immediately due and payable, defendant is indebted to plaintiff in the sum of $_____, which sum is computed after extending to defendant all credits to which he/she is entitled.]

9. The retail installment _____ [contract *or other as appropriate* account] involved herein is subject to

the provisions of the Retail Installment Sales Act, *Civil Code Section 1801 et seq.* Under *Civil Code Section 1801 et seq.*, plaintiff is entitled to recover reasonable attorney's fees and costs incurred, and to be incurred, in this action on the _____ [contract *or other as appropriate* account], in an amount to be determined by the court.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____, with interest thereon from _____ [*date*], at _____ percent per year;

2. For attorney's fees in an amount to be determined by the court;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 501.100[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by a seller in an action to recover the balance due under a retail installment contract or account subject to the provisions of RISA when the buyer has defaulted in making payments under the contract or account [*see Civ. Code § 1812.2*, discussed in *§ 501.55[1]*].

[3] Accompanying Affidavit

Plaintiff must either file, concurrently with the complaint, an affidavit, or declaration [*Code Civ. Proc. § 2015.5*], showing that the action is being commenced in a proper place for the trial of the action [*see § 501.102* for a form of declaration] or verify the complaint, which must show that the action is commenced in a proper place for trial under *Civ. Code § 1812.10* [*Civ. Code § 1812.10(c)*; *Code Civ. Proc. § 396a(a)*]. The second alterative of Paragraph 3 may be used to allege those facts, which are set forth in *Civ. Code § 1812.10*, discussed in *§ 501.102[4]* and *[5]*. In some cases, Paragraph 2 will, or could be modified to, set forth the facts showing proper court [*see also* [8], *below*].

[4] Allegations

The complaint in [1], *above*, alleges the following:

- Capacity and residence of plaintiff and defendant (Paragraphs 1, 2);

- Facts showing the action was commenced in a proper place, or the filing of a declaration so stating [*Civ. Code § 1812.10*] (Paragraph 3);

- Execution of a retail installment contract [*see Civ. Code § 1812.6*, discussed in *§ 501.22[2][a]*] or an

agreement establishing a retail installment account [*Civ. Code § 1812.7*, discussed in *§ 501.22[2][c]*] (Paragraph 4);

- Plaintiff's performance of all conditions precedent under the contract or the agreement establishing the account (Paragraph 5);

- Defendant's default, plaintiff's demand for payment, and, if appropriate, plaintiff's exercise of a contractual right to declare the entire indebtedness immediately due and payable [*cf. Civ. Code § 1804.1(b)*, discussed in *§ 501.33[4*] (acceleration under retail installment contract is not permitted in absence of buyer's default)] (Paragraphs 6-8); and

- Plaintiff's right to recover attorney's fees and costs [*Civ. Code § 1811.1*] (Paragraph 9).

[5] Interest

For purposes of *Civ. Code § 3289*, which allows interest at "any legal rate" specified in a contract from the time of breach until the contract is superseded by a verdict or another new obligation, the contracted finance charge is the legal rate of interest stipulated by a retail installment contract governed by RISA [*Civ. Code § 3289.5*]. In the unlikely event that a contract entered into after January 1, 1986, does not stipulate a legal rate of interest, the obligation bears interest at 10 percent a year after a breach [*Civ. Code § 3289(b)*]. For purposes of *Civ. Code § 3289(b)*, the term "contract" does not include a note secured by a deed of trust on real property [*Civ. Code § 3289(b)*].

[6] Attorney's Fees

Civ. Code § 1811.1 provides that: "[r]easonable attorney's fees and costs shall be awarded to the prevailing party in any action on a contract or installment account subject to the provisions of this chapter [*Civ. Code § 1801 et seq.*] regardless of whether such action is instituted by the seller, holder or buyer." The statutory language appears to authorize a court to award attorney's fees to a seller suing for the balance due on a contract or account which is subject to the provisions of RISA, regardless of whether any violation of RISA is alleged by any party to the action.

[7] Limitation of Action

RISA contains no specific statute pertaining to a limitation of action. Therefore, the four-year limitation period applicable to contracts and accounts applies [*Code Civ. Proc. § 337*].

[8] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*].

Also, if the plaintiff states his or her complaint facts showing that the action has been commenced in a proper place for trial of the action, and no affidavit or declaration is filed stating those facts, the complaint must be verified [*see Civ. Code § 1812.10(c)*; *Code Civ. Proc. § 396a(a)*; *see also* [3], *above*].

For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[9] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, §§ 177.40* et seq. and *177.140* et seq.

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms for verification, see Ch. 572, *Verification*

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[Reserved]

§§ 501.131[Reserved]

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44-501 California Forms of Pleading and Practice--Annotated § 501.140

§ 501.140 Affirmative Defense to Buyer's Action Based on Seller's Correction of Error Within Statutory Time Allowed [Civ. Code § 1812.8]

[1] FORM Affirmative Defense to Buyer's Action Based on Seller's Correction of Error Within Statutory Time Allowed [Civ. Code § 1812.8]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

Plaintiff's action has been precluded by defendant's correction of the violation complained of by the plaintiff, within the statutory time provided by *Civil Code Section 1812.8*, in that _____ [*allege facts showing correction in compliance with statutory provisions, e.g.,* On or about _____ (*date*), the day after the plaintiff and defendant executed the retail installment credit contract, defendant discovered the error. Defendant immediately notified the plaintiff in writing, informing plaintiff of the error, and on the same day mailed by registered mail a corrected copy of the contract including all required information. The correction of the error did not increase the amount owed to defendant by the plaintiff]. The error complained of was not willful.

[2] Use of Form

The affirmative defense in [1], *above*, is for inclusion with the defendant's answer to an action filed against him or her for violation of RISA [*Civ. Code § 1801 et seq.*]. The defense is statutory [*Civ. Code § 1812.8*] and provides that if a defendant corrects a nonwillful error within 30 days of the execution of the contract, there will be no liability under the penalty provisions of RISA, provided that the correction does not result in increasing the amount owed by the buyer, unless the buyer agrees to that increase in writing [*Civ. Code § 1812.8*; *see* discussion at *§ 501.54[1]*].

[3] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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[Reserved]

§§ 501.141[Reserved]

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44-501 California Forms of Pleading and Practice--Annotated § 501.200

§ 501.200 Complaint for Damages, Statutory Penalty, Costs, and Attorney's Fees Based on Violation of TILA [15 U.S.C. §§ 1638, 1640]

[1] FORM Complaint for Damages, Statutory Penalty, Costs, and Attorney's Fees Based on Violation of TILA [15 U.S.C. §§ 1638, 1640]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____,

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES, STATUTORY
_____ [*name*(*s*)], Defendant(s).	)	PENALTY, COSTS, AND ATTORNEY'S FEES
	)	[Amount demanded _____ (exceeds
	)	*or other as appropriate* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Plaintiff's capacity and residence. See § 501.100[1], Paragraph 1.*]

2. [*Defendants' capacity and residence. See § 501.100[1], Paragraph 2.*]

3. Defendant _____ [*name of seller*] is, and at all times herein mentioned was, a _____ [person *or other as appropriate* corporation *or other as appropriate*] who/which regularly extends, or arranges for the extension of, credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and is a creditor subject to the provisions of the federal

Truth in Lending Act, *15 United States Code Section 1601 et seq.*

4. On or about _____ [*date*], at _____ [*city*], _____ County, California, plaintiff and defendant _____ [*name of seller*] entered into a written retail installment contract by the terms of which defendant agreed to sell and plaintiff agreed to buy the following-described goods: _____ [*describe goods*]. A copy of the contract is attached as Exhibit A and incorporated by reference.

5. The above-described goods were bought by plaintiff primarily for _____ [personal *or other as appropriate* family *or other as appropriate* household] purposes. The above-mentioned retail installment contract _____ [*allege facts showing that transaction is subject to federal Truth in Lending Act, e.g.,* provided for payment by plaintiff of a finance charge *or other as appropriate* provided for payment of the purchase price in more than four installments], and is a consumer credit sale subject to the disclosure requirements of *Section 1638 of Title 15 of the United States Code* [and to *Section 226.18 of Title 12 of the Code of Federal Regulations*].

6. Defendant _____ [*name of seller*] violated the provisions of *Section 1638 of Title 15 of the United States Code* [and *Section 226.18 of Title 12 of the Code of Federal Regulations*] in connection with the above-described retail installment contract in that _____ [*specify violation of disclosure requirements of federal Truth in Lending Act or Regulation Z, e.g.,* defendant failed to disclose in the contract the amount of any default, delinquency, or similar charges payable in the event of late payments as required by that section].

[7. *If one of defendants is an assignee of original seller, add:* (Plaintiff is informed and believes and thereon alleges that) (O)n or about _____ [*date*], defendant _____ (*name of seller*) voluntarily assigned the above-mentioned retail installment contract to defendant _____ (*name of assignee*). The above-mentioned violation(s) of *Section 1638 of Title 15 of the United States Code* were apparent on the face of _____ (*specify appropriate document, e.g.,* the contract *or other as appropriate* the disclosure statement issued in connection with the contract) in that _____ (*specify, e.g.,* the disclosure could be determined to be incomplete and inaccurate from the face of the disclosure statement *or other as appropriate* the disclosure statement does not use the terms required to be used under the federal Truth in Lending Act).]

[8. *If plaintiff has served defendant with written notice of the federal Truth in Lending Act violations prior to the institution of the action, counsel may add the following:* On or about _____ [*date*], plaintiff served on defendant(s) _____ (*name(s) of seller and/or assignee*) a written notice, a copy of which is attached as Exhibit B and incorporated by reference, of the above-mentioned violation of *Section 1638 of Title 15 of the United States Code*.]

9. By reason of the above-mentioned violation of *Section 1638 of Title 15 of the United States Code* [and of *Section 226.18 of Title 12 of the Code of Federal Regulations*] by defendant(s), plaintiff is entitled to recover from defendant(s), pursuant to Subparagraph (A) of Paragraph (2) of Subsection (a) of *Section 1640 of Title 15 of the United States Code*, the sum of $_____, which is twice the amount of the finance charge imposed in connection with the above-mentioned retail installment contract, computed as follows: _____ [*describe method of computing finance charge*].

10. By reason of the above-mentioned violation of *Section 1638 of Title 15 of the United States Code* [and *Section 226.18 of Title 12 of the Code of Federal Regulations*] by defendant(s), plaintiff has suffered actual damages in the amount of $_____ in that _____ [*specify nature of plaintiff's damages*].

11. Under Paragraph (3) of Subsection (a) of *Section 1640 of Title 15 of the United States Code*, plaintiff is entitled to recover reasonable attorney's fees and costs incurred in bringing this action in an amount to be determined by the court.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For actual damages in the amount of $_____;

2. For the sum of $_____, which is twice the amount of the finance charges imposed under the contract;

3. For reasonable attorney's fees in an amount to be determined by the court;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 501.100[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action by a buyer under *15 U.S.C. § 1640* to enforce the civil liability of a seller or assignee for violations of the disclosure provisions of TILA and Regulation Z relating to credit sales [*see 15 U.S.C. § 1638*; *12 C.F.R. § 226.18*]. Because a single retail installment contract may give rise to violations of both TILA and RISA, counsel should consider combining this complaint with the complaints *set forth in §§ 501.100[1]* and *501.101[1]*, alleging each as a separate cause of action.

The complaint in [1], *above*, also may be used, with appropriate modifications, as a cross complaint [*see Code Civ. Proc. § 428.10*] in an action brought by the seller to recover money allegedly due under the contract.

[3] Allegations

The complaint in [1], *above*, alleges the following:

- Capacity and residence of plaintiff and defendant (Paragraphs 1, 2).
- Defendant's status as creditor [*see 15 U.S.C. § 1602(f)*] subject to the provisions of TILA (Paragraph 3).
- Execution of a retail installment contract (Paragraph 4).
- That the goods were purchased primarily for personal, family, or household purposes, making the transaction a consumer credit sale subject to TILA [*see 15 U.S.C. §§ 1602(g), (h), 1638*] (Paragraph 5).
- That defendant violated the disclosure provisions of TILA (Paragraph 6).
- When appropriate, assignment of the contract by the seller to a third party [*see 15 U.S.C. § 1641(a)*] (Paragraph 7).
- That plaintiff served written notice on defendant of the violations (optional) (Paragraph 8).

- That plaintiff is thus entitled to damages, statutory penalties, attorney's fees, and costs [*see 15 U.S.C. § 1640(a)*] (Paragraphs 9-11).

[4] Applicability of Statutory Penalty

A creditor is liable for the statutory penalty provided in *15 U.S.C. § 1640(a)* only for violations of specified TILA provisions. For example, on the question of liability for a statutory penalty in connection with the disclosures referred to in *15 U.S.C. § 1638*, the Ninth Circuit held that a creditor cannot be liable for a penalty except for failing to comply with any of the provisions of that section mentioned in the fifth sentence of *15 U.S.C. § 1640(a)* [*see § 501.51[2][a]*]. Therefore, a consumer could not recover the statutory penalty for a violation of *15 U.S.C. § 1638(b)(l)* because that subsection is not one of the provisions specified in the fifth sentence of *15 U.S.C. § 1640(a)* [*McDonald v. Checks-N-Advance, Inc. (In re Ferrell) (9th Cir. 2008) 539 F.3d 1186, 1190-1191]* .

[5] Statute of Limitations

Any action under *15 U.S.C. § 1640* brought in any U.S. District Court, or in any other court of competent jurisdiction, must be brought within one year after the date of the occurrence of the violation [*15 U.S.C. § 1640(e)*]. An action to enforce a violation of *15 U.S.C. § 1639* (disclosure requirements for certain mortgages) may also be brought by the state attorney general not later than three years after the date the violation occurred [*15 U.S.C. § 1640(e)*].

[6] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, § 177.140* et seq.

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative verification forms, see Ch. 572, *Verification*

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B. Truth in Lending Act
1. Buyers' Complaints

44-501 California Forms of Pleading and Practice--Annotated § 501.201

§ 501.201 Complaint for Restitution After Rescission of Credit Transaction Creating Security Interest in Buyer's Residence [15 U.S.C. § 1635]

[1] FORM Complaint for Restitution after Rescission of Credit Transaction Creating Security Interest in Buyer's Residence [15 U.S.C. § 1635]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*],	)	NO. _____
Plaintiff, vs. _____ [*name*],	)	COMPLAINT FOR RESTITUTION
Defendant.	)	[Amount demanded
	)	_____(exceeds *or* does not exceed)
	)	$10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of plaintiff. See § 501.100[1], Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 501.100[1], Paragraph 2.*]

3. [*Defendant's status as creditor subject to requirements of TILA. See § 501.200[1], Paragraph 3.*]

4. On or about _____ [*date*], at _____ [*city*], _____ County, California, plaintiff and defendant entered into _____ [*describe transaction, e.g.*, a written retail

installment contract by the terms of which defendant agreed to sell and plaintiff agreed to buy the following-described goods and services: _____ (*describe*)]. A copy of the _____ [retail installment contract *or other as appropriate*] is attached as Exhibit A and incorporated by reference. Pursuant to the above-described contract, plaintiff paid to defendant _____ [*name*] the sum of $_____ as _____ [a downpayment *or other as appropriate* earnest money *or other as appropriate*].

5. The above-described _____ [retail installment contract *or other as appropriate*] provided for the acquisition by defendant _____ [*name*] of a security interest in the following real property which is used as dwelling of plaintiff: _____ [*describe property*].

[*EITHER*]

6. On or about _____ [*date*], prior to midnight on the third business day following the consummation of the above-mentioned _____ [retail installment contract *or other as appropriate*], plaintiff exercised his/her right under *Section 1635(a) of Title 15 of the United States Code* to rescind this transaction by _____ [*specify manner of notification, e.g.,* mailing a letter by registered mail, return receipt requested, to defendant _____ (*name*) at his/her/its principal place of business, notifying defendant of plaintiff's intention to rescind the above-described transaction. A copy of the letter and return receipt are attached as Exhibit B and incorporated by reference].

[*OR*]

6. On or about _____ [*date*], defendant _____ [*name*] furnished plaintiff with the disclosures required by Sections 1635 and 1638 of Title 15 of the United States Code. On or about _____ [*date*], at _____ [*time*], prior to midnight on the third business day following the delivery of the above-mentioned disclosures, plaintiff exercised his/her right under *Section 1635(a) of Title 15 of the United States Code* to rescind the above-described _____ [retail installment contract *or other as appropriate*] by _____ [*specify manner of notification, as above*].

[*OR*]

6. Defendant _____ [*name*] has failed and refused, and continues to fail and refuse, to deliver to plaintiff the disclosures required by Sections 1635 and 1638 of Title 15 of the United States Code. On or about _____ [*date*], plaintiff exercised his/her right under *Section 1635(a) of Title 15 of the United States Code* to rescind the above-described _____ [retail installment contract *or other as appropriate*] by _____ [*specify manner of notification, as above*].

[*CONTINUE*]

7. By reason of plaintiff's rescission of the above-mentioned _____ [retail installment contract *or other as appropriate*], plaintiff is entitled under *Section 1635(b) of Title 15 of the United States Code* to recover from defendant _____ [*name*] the sum of $_____, which is the total amount paid by plaintiff to defendant pursuant to the above-mentioned _____ [retail installment contract *or other as appropriate*] as _____ [a downpayment *or other as appropriate* earnest money *or other as appropriate*].

8. On or about _____ [*date*], [and on numerous occasions thereafter,] plaintiff requested defendant _____ [*name*] to return to plaintiff the above-mentioned sum of money. Defendant _____ [*name*] has failed and refused, and continues to fail and refuse, to refund this sum, or any part thereof, to plaintiff.

[9. *If plaintiff has received property from defendant pursuant to the contract, add:* Plaintiff is ready, willing, and able to restore to defendant all property received by plaintiff pursuant to the above-mentioned _____ (retail installment contract *or other as appropriate*), or its reasonable value, on the performance by defendant of his/her/its obligations under *Section 1635 of Title 15 of the United States Code or other as appropriate* On or about _____ [*date*], plaintiff tendered all property received by him/her under the above-mentioned _____ (retail installment contract *or other as appropriate*) to defendant. Defendant has failed to take possession within 20 days of that tender, and ownership of this property has vested in plaintiff under *Section 1635 of Title 15 of the United States Code*, without any obligation on the part of plaintiff to pay for that property.]

10. [*Plaintiff's right to reasonable attorney's fees and costs. See § 501.200[1], Paragraph 11.*]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For a determination by the court that the above-mentioned _____ [retail installment contract *or other as appropriate*] has been rescinded and that the security interests created thereby are void;

2. For the sum of $_____, which is the total amount paid by plaintiff to defendant under the above-mentioned _____ [retail installment contract *or other as appropriate*], with interest thereon at the legal rate from _____ [*date*];

3. For reasonable attorney's fees in an amount to be determined by the court;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 501.100[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by a buyer in an action to recover the amount of any downpayment or other consideration paid to the seller pursuant to a retail installment contract which the seller has rescinded in accordance with *15 U.S.C. § 1635(a)* [*see* discussions in *§ 501.51[1][a]* and in [3], *below*]. No election of remedy is required: if the creditor has violated TILA, a plaintiff may have rescission, restitution, and statutory damages and penalties under *15 U.S.C. § 1640(a)* [*15 U.S.C. § 1635(g)*; *see* discussion in *§ 501.51[1][g]*]. Thus, the complaint in [1], *above*, may be combined with the one in § 501.100[1].

The allegations of the complaint may be adopted for use in an answer and cross complaint in an action brought by the seller to recover from the buyer amounts allegedly due under the contract.

[3] Right to Rescind Certain Transactions

Under TILA, a consumer may rescind a consumer credit transaction (including opening or increasing the credit line for an open-end credit plan) in which a security interest is or will be retained or acquired in any property which is used as the principal dwelling of the obligor. The consumer must rescind the contract prior to midnight of the third business day following the consummation of the transaction or the delivery of the disclosures and forms required by TILA, whichever is later, by notifying the creditor, in accordance with *12 C.F.R. §§ 226.15(a)(2), 226.23(a)(2)*, of his or her intention to rescind [*15 U.S.C. § 1635(a)*].

When a consumer exercises his or her right to rescind under *15 U.S.C. § 1635(a)*, he or she is not liable for any finance or other charge, and any security interest given by the consumer becomes void. Within 20 days after receipt of a notice of rescission, the creditor must return to the obligor any money or property given as earnest money, downpayment or otherwise, and must take any action necessary or appropriate to the termination of the security interest created by the transaction. If the creditor has delivered any property to the consumer, the consumer may retain possession of it until the creditor has performed its obligations under *15 U.S.C. § 1635*, at which time the consumer must tender the property, or its reasonable value, if return of the property in kind would be impracticable or inequitable, to the creditor. Tender may be made at the location of the property or the residence of the consumer, at the consumer's option. If, after tender by the consumer, the creditor does not take possession of the property within 20 days, ownership vests in the consumer without any obligation on his or her part to pay for it [*15 U.S.C. § 1635(b)*; *see § 501.51[1][d]*]. A court cannot apply equitable principles, for example, to impose interest charges if the borrower had the benefit of the use of loan proceeds [*see Semar v. Platte Valley Federal S. & L. Ass'n (9th Cir. 1986) 791 F.2d 699, 706* (rejecting Tenth Circuit position, held in *Rachbach v. Cogswell (10th Cir. 1977) 547 F.2d 502, 505* (involving rescission of mortgage contract)].

[4] Exempted Transactions

The right of rescission provided in *15 U.S.C. § 1635* does not apply to the following [*15 U.S.C. § 1635(e)*]:

- A residential mortgage transaction, as defined in *15 U.S.C. § 1602(w)*.

- A transaction which constitutes a refinancing or consolidation (with no new advances) of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the same property.

- A transaction in which an agency of a state is the creditor.

- Advances under a preexisting open-end credit plan if a security interest has already been retained or acquired and the advances are in accordance with a previously established credit limit for the plan.

[5] Time Limit on Right to Rescind

A consumer's right of rescission expires three years after the date of the consummation of the transaction or on the date of the sale of the property, whichever occurs earlier, notwithstanding the fact that the disclosures required by TILA have not been delivered to the consumer [*15 U.S.C. § 1635(f)*; *see Pacific Shore Funding v. Lozo (2006) 138 Cal. App. 4th 1342, 1347, 1355, 42 Cal. Rptr. 3d 283* (borrowers not precluded from rescinding consumer loan that is secured by their residence and subject to TILA merely because they already refinanced that loan, provided they rescind within three years after original loan date); *see also* discussion in *§ 501.51[1][f][i]*]. The United States Supreme Court has held that a borrower may not assert the right to rescind as an affirmative defense in a collection action brought by the lender more than three years after the consummation of the transaction. Because *15 U.S.C. § 1635(f)* completely extinguishes the right of rescission at the end of the three-year period, it is not a statute of limitations and the mortgagors cannot assert the right to rescind as a recoupment defense beyond the expiration period [*Beach v. Ocwen Federal Bank (1998) 523*

U.S. 410, 417-419, 118 S. Ct. 1408, 140 L. Ed. 2d 566] .

If an agency empowered to enforce the provisions of TILA institutes a proceeding to enforce the provisions of *15 U.S.C. § 1635* within three years after the date of consummation of the transaction and finds a violation of *15 U.S.C. § 1635*, and if the obligor's right to rescind is based in whole or in part on any matter involved in the proceeding, then the obligor's right of rescission expires three years after the date of consummation of the transaction or earlier sale of the property, or one year following the conclusion of the proceeding or any judicial review or period for judicial review of the proceeding, whichever is later [*15 U.S.C. § 1635(f), see § 501.51[1][f][iii]*].

[6] Attorney's Fees

In any action in which a consumer is found to have a right of rescission under *15 U.S.C. § 1635*, the creditor is liable to the consumer for reasonable attorney's fees in an amount to be determined by the court [*15 U.S.C. § 1640(a)*, 1st sentence, cl. (3)].

[7] Cross References

For alternative allegations of agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, §§ 177.40* et seq. and *177.140* et seq.

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms for verification, see Ch. 572, *Verification*

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1. Buyers' Complaints

44-501 California Forms of Pleading and Practice--Annotated §§ 501.202-501.209

[Reserved]

§§ 501.202[Reserved]

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B. Truth in Lending Act
2. Sellers' Affirmative Defenses

44-501 California Forms of Pleading and Practice--Annotated § 501.210

§ 501.210 Affirmative Defense for Use by Seller in TILA Action Based on Defendant's Correction of Error Within Statutory Time Allowed [15 U.S.C. § 1640(b)]

[1] FORM Affirmative Defense for Use by Seller in TILA Action Based on Defendant's Correction of Error Within Statutory Time Allowed [15 U.S.C. § 1640(b)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

Plaintiff's action has been precluded by defendant's correction of the violation, in compliance with *United States Code, Title 15, Section 1640(b)* in that: _____ [*describe acts taken to correct error, e.g.,* On _____ [*date*], defendant discovered the error in plaintiff's _____ (contract *or other as appropriate* account agreement) on which plaintiff bases his/her cause of action. Thereafter, on _____ [*date*], within 60 days of the date the error was discovered by the defendant, defendant notified the plaintiff of the error, by registered mail, informing plaintiff that the error had been corrected, that no additional charges would accrue against plaintiff therefor, and enclosing a corrected copy of the _____ (contract *or other as appropriate* account agreement). A copy of the return receipt signed by the plaintiff on receipt of the registered mail is attached to this document as Exhibit A and incorporated by reference]. The error complained of was corrected, and the above-described notification was given to plaintiff prior to the commencement of this action [, and prior to receipt by defendant of any written notice of the error].

[2] Use of Form

The affirmative defense in [1], *above*, is for incorporation into defendant's answer to an action filed against him or her for violation of TILA [*15 U.S.C. § 1601 et seq.*]. TILA provides a statutory defense to liability if a creditor or assignee discovers an error which constitutes a violation of TILA, and within 60 days thereafter notifies the buyer of the error and makes whatever adjustments in the appropriate account are necessary to assure that the buyer will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually

disclosed, whichever is lower. It should be noted, however, that the defense is only available if the creditor corrects the error and notifies the buyer before the receipt of a written notice from the buyer or the institution of an action by the buyer to impose liability for the error [*15 U.S.C. § 1640(b)*; *see also § 501.54[2]*].

[3] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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44-501 California Forms of Pleading and Practice--Annotated § 501.211

§ 501.211 Affirmative Defense for Use by Seller in TILA Action Based on Defendant's Unintentional and Bona Fide Error [15 U.S.C. § 1640(c)]

[1] FORM Affirmative Defense for Use by Seller in TILA Action Based on Defendant's Unintentional and Bona Fide Error [15 U.S.C. § 1640(c)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

1. Defendant's failure to _____ [*describe violation, e.g.,* include the amount of the finance charge in the retail installment contract] was the result of an unintentional and bona fide error. _____ [*Specify reason for error, e.g.,* Defendant's computer is programmed to include all disclosures required by law. On or about _____ [*date*], the day plaintiff's contract was executed, the computer repair agency of _____ (*name of agency*) had just completed a general maintenance check of the computer. It was not until the following morning that defendant discovered that all of the contracts prepared by the computer after the time of the maintenance check failed to reflect the amount of the finance charge].

2. _____ [*Describe system for preventing errors, e.g.,* Defendant retains a full-time employee whose job is to recheck all retail installment credit transactions, and it was on the day following the maintenance check, in rechecking plaintiff's contract, that the error was discovered by defendant. Never before in defendant's six years of use of the same computer has this type of omission occurred].

[2] Use of Form

The affirmative defense [*see Code Civ. Proc. § 431.30(b)(2)*] in [1], *above*, may be included in a defendant's answer to a complaint filed against him or her for violation of the disclosure requirements of TILA [*15 U.S.C. § 1601 et seq.*]. TILA provides a defense to liability when the creditor's error is unintentional and results from a bona fide error, notwithstanding the maintenance of reasonable procedures for avoiding errors of that type [*15 U.S.C. § 1640(c)*]. The

creditor has the burden of pleading and proving by a preponderance of the evidence both that the error was not intentional and that it constituted a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid those errors [*Demando v. Morris (9th Cir. 2000) 206 F.3d 1300, 1303* (reversing summary judgment because creditor's affidavit not did explain what procedures it employed that were reasonably adapted to avoid the error)]. For a discussion of what constitutes a "bona fide error," see *§ 501.54[3]*.

[3] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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2. Sellers' Affirmative Defenses

44-501 California Forms of Pleading and Practice--Annotated § 501.212

§ 501.212 Affirmative Defense for Use by Seller in TILA Action Based on Defendant's Good Faith Compliance and Conformity With Written Opinion of Approval of Board of Governors of Federal Reserve System [15 U.S.C. § 1640(f)]

[1] FORM Affirmative Defense for Use by Seller in TILA Action Based on Defendant's Good Faith Compliance and Conformity With Written Opinion of Approval of Board fo Governors of Federal reserve System of Authorized official or Employee Thereof [15 U.S.C. § 1640(f)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

1. The matters complained of by plaintiff and attributed to defendant as allegedly wrongful _____ [acts *or other as appropriate* omissions] were _____ [performed *or other as appropriate* abstained from] in good faith by the defendant in conformity with the opinions, rules, regulations, interpretations, and approval of the Federal Reserve System Board of Governors for the reason that _____ [*state facts showing reliance by defendant on interpretation or other information provided by the Federal Reserve Board, e.g.,* On _____ [*date*], defendant contacted the Board of Governors of the Federal Reserve System and requested an interpretation regarding the _____ (statutory provision(s) *or other as appropriate* Regulation Z provisions) on which plaintiff bases his/her claim. Thereafter, on _____ [*date*], _____ (the Board *or other as appropriate* an official of the Board *or other as appropriate* an employee of the Board authorized to issue interpretations) issued a written _____ (opinion *or other as appropriate* interpretation *or other as appropriate* approval of defendant's method of compliance), a copy of which is attached to this complaint as Exhibit A and incorporated by reference].

[2] Use of Form

The affirmative defense in [1], *above*, is for use by a creditor in an action brought by a consumer against the creditor for alleged violations of TILA. Under TILA, a creditor has a complete defense to any liability based on an act done or

omitted in good faith in conformity with any rule, regulation, or interpretation of by the Board of Governors of the Federal Reserve System or its authorized officials or employees, notwithstanding that subsequent to the commission of the act or omission, the rule, regulation, or interpretation relied on by the creditor is amended, rescinded, or determined by judicial or other authority to be invalid for any reason [*15 U.S.C. § 1640(f)*].

[3] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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44-501 California Forms of Pleading and Practice--Annotated §§ 501.213through 501.299

[Reserved]

§§ 501.213[Reserved]

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C. Servicemembers Civil Relief Act and Related California Statutes

44-501 California Forms of Pleading and Practice--Annotated § 501.300

§ 501.300 Application for Stay of Enforcement of Pre-Existing Obligation During Period of Military Service [15 U.S.C. § 591, Mil. & Vet. Code § 409.3]

[1] FORM Application for Stay of Enforcement of Pre-Existing Obligation During Period of Military Service [15 U.S.C. § 590, Mil. & Vet. Code § 412]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In re _____ [*name of applicant*], Applicant,	))))	NO. _____ APPLICATION FOR RELIEF FROM OBLIGATION DURING MILITARY SERVICE

Applicant respectfully represents:

1. Applicant, _____ [*name*], is, and at all times herein mentioned was, a resident of _____ County, California.

2. On or about _____ [*date*], Applicant entered into _____ [*describe obligation, e.g.,* a home improvement loan secured by a second mortgage on Applicant's principal residence located at _____ (*address*)], under the terms of which Applicant was required to _____ [*describe relevant terms of obligation, e.g.,* make _____ monthly payments of $_____ until the balance of principal and interest on the loan was paid in full]. [A copy of the contract evidencing that obligation is attached as Exhibit A and incorporated by reference.]

3. At the time this Application was filed, the remaining balance owed by Applicant under this obligation was approximately $_____ [*or describe other liability or obligation incurred by applicant that remains*

outstanding].

[*For members of regular armed forces*]

4. On _____ [*date*], which date is subsequent to the date Applicant entered into the obligation described in Paragraph 2, above, Applicant entered military service (within the meaning of Title *50 United States Code Appendix, Section 511(2)*) with the United States _____ [*list branch of military service, e.g.,* Army *or* Navy *or* Marine Corps *or* Air Force *or* Coast Guard]. Applicant _____ [is currently in military service *or* was released from active military service on _____ (*date not more than 180 days prior to date application is filed*)].

[*OR, for members of United States Military Reserve or the National Guard*]

4. Applicant is a member of _____ [*specify branch of service, e.g.,* the United States Air Force Reserve *or* the California National Guard]. On _____ [*date subsequent to Sept. 11, 2001*], which date is subsequent to the date Applicant entered into the obligation described in Paragraph 2, above, Applicant was called to active military service (within the meaning of *Military and Veterans Code Section 400*) for a period in excess of seven days in a 14-day period. Applicant _____ [is currently on active military service *or* was released from active military service on _____ (*date not more than six months prior to date application is filed*)].

[*CONTINUE*]

5. By virtue of Applicant's military service as described in Paragraph 4, above, Applicant's ability to comply with the terms of the obligation described in Paragraph 2, above, has been materially affected in that _____ [*describe, e.g.,* applicant is self-employed as a _____ (*e.g.,* lawyer) and has been unable to work at _____ (his *or* her) regular occupation during the terms of Applicant's military service as described in Paragraph 4, above, as a result of which Applicant has been unable to generate enough income to meet Applicant's financial obligations, including the obligation referred to in Paragraph 2, above].

WHEREFORE, applicant prays the court for the following relief as permitted by law:

[*For an obligation payable under its terms in installments under a contract for the purchase of real estate, or secured by a mortgage or other instrument in the nature of a mortgage upon real estate, use the following:*]

1. For a stay of the enforcement of the obligation described in Paragraph 2, above, as permitted by _____ [*for members of regular armed forces:* Title *50 United States Code Appendix, Section 591(b)(1) or, for members of United States Military Reserve or National Guard*: *Military and Veterans Code Section 409.3(a)(1)*], _____ [during Applicant's period of military service and, from the date of termination of Applicant's period of military service *or, if application is made after termination of applicant's military service:* from the date of this application], for a period equal to the period of the remaining life of the obligation described in Paragraph 2, above, plus a period of time equal to the period of military service of the Applicant or any part of the combined period, subject to payment of the balance of principal and accumulated interest due and unpaid at the date of _____ [termination of Applicant's period of military service *or* this application], in equal installments during the combined period at the rate of interest on the unpaid balance as is prescribed in the _____ [contract *or other instrument*] evidencing the obligation, for installments paid when due, and subject to any other terms as may be just.

[*OR, for any other obligation:*]

1. For a stay of the enforcement of the obligation described in Paragraph 2, above, as permitted by _____ [*for members of regular armed forces:* Title *50 United States Code Appendix, Section 590(b)(2) or, for members of United States Military Reserve or National Guard*: *Military and Veterans Code Section 409.3(a)(2)*] _____ [during Applicant's period of military service and, from the date of termination of Applicant's period of military service *or, if application is made after termination of applicant's military service:* from the date of this application], for a period of time equal to the period of Applicant's military service or any part of that period, subject to payment of the balance of principal and accumulated interest due and unpaid at the date of _____ [termination of Applicant's period of military service *or* this application], in equal periodic installments during the extended period at the rate of interest prescribed for the obligation, if paid when due, and subject to any other terms as may be just.

[*CONTINUE*]

2. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Applicant _____ [*name*]

[2] Use of Form

This form is an application by a person in active military service, or who has been in active military service within six months preceding the date of the application, requesting a stay of the enforcement of a pre-existing obligation for the duration of the applicant's military service and a specified period thereafter, as permitted by the Servicemembers Civil Relief Act of 1940 [*50 U.S.C. App. § 501 et seq.*] and comparable provisions of California law [*Mil. & Vet. Code § 400 et seq.*].

Many, possibly even most instances involving claims for relief under these statutes, can be expected to arise when a military service member is the defendant in a pending action for a matter such as breach of contract, foreclosure, eviction, attachment, garnishment, or other creditor's action, or in connection with the entry of a default judgment or execution of a judgment previously entered. In these situations, the federal and state statutes granting relief to military personnel will be raised by the defendant in response to some other action by another party. For cross references to forms for use in these situations, see [7], *below*. However, the governing statutes also permit military service members to initiate proceedings on their own, in anticipation of or prior to the commencement of any action against them, to obtain temporary relief from obligations before any suit is commenced against them. The form in [1], *above*, is for use in the latter type of proceeding.

[3] Governing Law

The Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*] provides for the temporary suspension of various legal proceedings and transactions for persons in military service [*see 50 U.S.C. App. § 502* (purpose of statute)]. The statute is applicable to all members of the uniformed services [*see 10 U.S.C. § 101(a)(5)* (definition)] during periods of

military service [*see 50 U.S.C. § 511(1)-(3)*] and, in many cases, for 90 days after termination of a member's period of military service. Although the Act is a federal statute, it is specifically made enforceable in state courts. Any application required to be made to a court in which no proceeding has already been commenced with respect to the matter may be made in any court [*50 U.S.C. App. § 512(c)*]. For these purposes, "court" includes any court of competent jurisdiction of the United States or any state, whether or not it is a court of record [*50 U.S.C. App. § 511(5)*].

The California counterpart to the federal legislation [*Mil. & Vet. Code § 400 et seq.*] is designed to fill certain gaps in the federal law in the wake of the events of September 11, 2001. This statute, many provisions of which are virtually identical to their federal counterparts, is designed to apply to military reservists and National Guard members who are called to active military service under specified circumstances and, in many cases, for limited periods of time [*see Mil. & Vet. Code § 400*].

The federal and California statutes provide specific relief to qualifying military personnel in a variety of areas, including default judgments [*50 U.S.C. App. § 521*; *Mil. & Vet. Code § 402(a)*], pending judicial proceedings [*50 U.S.C. App. § 522*; *Mil. & Vet. Code § 403(a)*], fines or penalties on contracts and similar obligations [*50 U.S.C. App. § 523*; *Mil. & Vet. Code § 403(b)*], execution of judgments, attachments, and similar matters [*50 U.S.C. App. § 524*; *Mil. & Vet. Code § 403(c)*], statutes of limitations [*50 U.S.C. App. § 526*; *Mil. & Vet. Code § 404*], interest rates [*50 U.S.C. App. § 527*; *Mil. & Vet. Code § 405*], rent and eviction [*50 U.S.C. App. § 531*], leases [*50 U.S.C. App. § 535*; *Mil. & Vet. Code § 409*], installment contracts [*50 U.S.C. App. § 532*; *Mil. & Vet. Code § 407*], mortgages [*50 U.S.C. App. § 533*; *Mil. & Vet. Code § 408*], insurance [*50 U.S.C. App. §§ 536, 541* et seq.; *Mil. & Vet. Code § 409.1*], and taxes [*50 U.S.C. App. §§ 561 et seq.*; *Mil. & Vet. Code § 409.2*]. For discussion of some of these specific types of relief, see *§ 501.60* et seq. and the cross-references to other chapters of this publication cited in [7], *below*. In addition to these specific types of relief, the federal and California statutes contain "catch-all" type provisions that allow qualifying service members to initiate proceedings to seek relief. These general provisions, discussed in greater detail in [5], *below*, provide the statutory basis for this form.

[4] Who May Invoke Relief Provisions

[a] Federal Statute

The Servicemembers Civil Relief Act applies to members of the uniformed services [*see 10 U.S.C. § 101(a)(5)* (definition)] during periods of military service [*see 50 U.S.C. § 511(1)-(3)*] and, in many cases, for 90 days after termination of a member's period of military service. A servicemember who has been reported missing is presumed to continue in service until accounted for [*50 U.S.C. § 582(c)*].

[b] California Statute

The California counterpart to the Servicemembers Civil Relief Act generally applies to the following persons [*Mil. & Vet. Code § 400(a)*]:

- Members of the National Guard called or ordered into active state service by the Governor under *Mil. & Vet. Code §§ 143* or *146*, or by the President of the United States under Titles 10 or 32 of the United States Code.

- Reservists of the United States Military Reserve who have been called to full-time active duty.

For these purposes, "military service" means full time active service, as described above, for a period in excess of seven days in any 14-day period. For any service member who has been called to active service or duty since September 11, 2001, to engage in homeland defense against terrorism, his or her days of service since that time will be credited toward that seven-day period, even if they precede the effective date of the California statute [*Mil. & Vet. Code § 400(b)*; *see*

also Mil. & Vet. Code § 409.8(c) (persons missing in action considered to be on active service)].

[c] Dependents

Dependents of service members are entitled to many of the key benefits of the federal and California statutes, including those covered by this form. Dependents are entitled to these benefits upon application to a court, unless in the opinion of the court the ability of the dependents to comply with the terms of the obligation, contract, lease, or bailment has not been materially impaired by reason of the military service of the person upon whom the applications are dependent [*50 U.S.C. App. § 538*; *Mil. & Vet. Code § 409.5*].

This form is drafted for the situation in which the applicant is the service member. If the applicant is one of the service member's dependents, an additional statement to that affect should be added to the form, and the form modified accordingly.

[5] Stay of Obligation or Liability

[a] Application for Relief

A service member [*see* [4], *above*] may apply to a court for relief with respect to any obligation or liability incurred by the service member *prior to his or her period of military service* [*50 U.S.C. App. § 591(b)*; *Mil. & Vet. Code § 409.3(a)*]. Note that relief under this provision is available only for pre-existing obligations, not those entered into during the period of military service].

[b] Notice and Hearing

The court is required to hold a hearing on the application prior to granting any relief. "Appropriate notice" must be given [*50 U.S.C. App. § 591(b)*; *Mil. & Vet. Code § 409.3(a)*]. The statutes do not specify any more detailed requirements for the notice.

[c] Discretion of Court to Grant or Deny Relief

The federal and California statutes confer discretion on the court on whether or not to grant relief. If, in the opinion of the court, the applicant's ability to comply with the terms of the obligation in question has not been materially affected by reason of the applicant's military service, the court may deny relief [*see 50 U.S.C. App. § 591(b)*; *Mil. & Vet. Code § 409.3(a)*]. In other cases, the court may grant the relief discussed in [d] and [e], *below*.

The court also is empowered to deny relief if it demonstrated to the court's satisfaction that the obligation in question was transferred or acquired with the intent to delay its enforcement by taking advantages of these provisions. In such a case, the court is required to enter such a judgment or make such an order as might otherwise lawfully have been entered or made, without regard to the provisions authorizing relief [*50 U.S.C. App. § 581*; *Mil. & Vet. Code § 409.7*].

[d] Relief from Mortgages or Installment Contracts for Purchase of Real Estate

If the obligation is payable under its terms in installments under a contract for the purchase of real estate, or if it is secured by a mortgage (or other instrument in the nature of a mortgage) on real estate, the court may grant a stay of the enforcement of the obligation during the applicant's period of military service and, from the date of termination of the period of military service, or from the date of the application if the application is made after the termination of that service, for a period equal to the period of the remaining life of the installment contract or other instrument plus a period of time equal to the period of military service or any part of that combined period, subject to payment of the balance of principal and accumulated interest due and unpaid at the date of termination of the period of military service (or from the date of application, as the case may be), in equal installments during that combined period at the rate of interest on

the unpaid balance that is prescribed in the contract or other instrument evidencing the obligation, for installments paid when due, and subject to such other terms as may be just [*50 U.S.C. App. § 591(b)(1)*; *Mil. & Vet. Code § 409.3(a)(1)*].

[e] Relief From Other Obligations

In the case of any obligation or liability other than those covered under [d], *above*, the court may grant a stay of the enforcement during the applicant's period of military service and, from the date of termination of the period of military service, or from the date of the application if the application is made after the termination of that service, for a period of time equal to the period of military service or any part of that period, subject to payment of the balance of principal and accumulated interest due and unpaid at the date of termination of the period of military service (or the date of the application, as the case may be), in equal periodic installments during the extended period at such a rate of interest as may be prescribed for the obligation, liability, tax, or assessment, if paid when due, and subject to such other terms as may be just [*50 U.S.C. App. § 591(b)(2)*; *Mil. & Vet. Code § 409.3(a)(2)*].

[f] Other Effects of Relief

When a court has granted a stay, no fine or penalty may accrue during the period the terms and conditions of the stay are complied with by reason of failure to comply with the terms or conditions of the obligation in respect of which the stay was granted [*50 U.S.C. App. § 591(c)*; *Mil. & Vet. Code § 409.3(b)*].

A stay has other ancillary consequences. Specifically, application for or receipt of a stay may not, without other considerations, provide the basis for any of the following [*see 50 U.S.C. App. § 518*; *Mil. & Vet. Code § 401(a)*]:

- A determination by any lender or other person that the service member is unable to pay any civil obligation or liability in accordance with its terms.

- With respect to a credit transaction between a creditor and the service member, any denial or revocation of credit by the creditor, change by the creditor in the terms of an existing credit arrangement, or refusal by the creditor to grant credit to the service member in substantially the amount or on substantially the terms requested.

- An adverse report relating to the creditworthiness of the service member by or to any person or entity engaged in the practice of assembling or evaluating consumer credit information.

- A refusal by an insurer to insure the service member.

- An annotation in a service member's record by a creditor or a person engaged in the practice of assembling or evaluating consumer credit information, identifying the service member as a member of the National Guard or a reserve component.

- A change in the terms offered or conditions required for the issuance of insurance.

The California statute provides that any person violating the above provisions is liable for actual damages and reasonable attorney's fees incurred by the injured party [*Mil. & Vet. Code § 401(b)*]. The California statute also provides that any person violating the above prohibitions is guilty of a misdemeanor [*Mil. & Vet. Code § 409.3(c)*].

For additional discussion and a complaint for violation of the above provisions, see *Ch. 129, Consumer Credit Reporting, § 129.150*.

[g] Limitations with Respect to Child Support Obligations

Under the California provisions, service members may not use the provisions discussed above to obtain a delay, deferment, or stay on an obligation to pay child support. However, this does not preclude a service member ordered to military service from seeking a modification of an order to pay child support due to a reduction in income resulting from the order to service, or from seeking the imposition of the maximum 6-percent interest rate under the statute [*see Mil. & Vet. Code § 405* (maximum rate of interest limited to 6 percent)] on arrearages in child support payments existing prior to the order to service. [*Mil. & Vet. Code § 409.3(c)*]. The Servicemembers Civil Relief Act has no analogous provision; nevertheless, the California Supreme Court set aside, under the general provision for relief from default judgments under the federal act [*see 50 U.S.C. App. § 521(g)*], an order for increased spousal and child support against an absent serviceman who was unable to appear and defend the proceeding due to his military service [*Allen v. Allen (1947) 30 Cal. 2d 433, 435, 182 P.2d 551* (applying antecedent provision in former *50 U.S.C. § 520(1)*)].

[6] Contents of Form

The application in [1], *above*, states the following:

- The applicant's California residence [Paragraph1].

- The date applicant entered into the obligation in question, and the nature of the obligation [Paragraph 2].

- The approximate remaining balance due on the obligation, or other portion of the obligation remaining outstanding [Paragraph 3].

- The fact that the applicant subsequently entered or was called up to active military service, and the dates of that service [Paragraph 4]. Alternative versions are presented, depending on whether the applicant's service was as a member of the regular armed forces and therefore subject to the Servicemembers Civil Relief Act, or alternatively as a member of the member of the military reserve of National Guard called to active duty, and as such subject to the California statute.

- The fact that the applicant's ability to comply with the terms of the obligation has been materially affected by virtue of the applicant's military service [Paragraph 5]. For the significance of this statement, see [5][c], *above*.

The application in [1], *above*, contains alternative prayers for relief, depending on whether the obligation in question is (1) an installment contract for the purchase of real estate, or another obligation secured by a mortgage (or other instrument in the nature of a mortgage) on real estate (first alternative); or (2) any other kind of obligation (second alternative). For discussion of the nature of the relief that may be granted in each of these cases, see [5][d], [e], *below*.

[7] Cross References

For discussion of how a party's military service may affect family law proceedings and declaration requirements, see Ch. 12A, *Adoptions: Termination of Parental Rights* ; Ch. 221, *Dissolution of Marriage: Procedure* and Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* .

For an application for a stay of attachment involving a person in military service, see Ch. 62, *Attachment* .

For a declaration for a stay of attachment involving a person in military service, see Ch. 62, *Attachment* , Form 19.

For a complaint for unlawful retaliation by a lender, creditor, or other person against a person who received a stay or postponement because of military service, see *Ch. 129, Consumer Credit Reporting, § 129.150*.

For discussion and an application for a stay of a pending action or proceeding based on military service, see *Ch. 136, Continuances, §§ 136.20[2], 136.78A.*

For discussion and a plaintiff's declaration under penalty of perjury setting forth facts showing that the defendant is not in the military service prior to entry of default judgment, see *Ch. 205, Defaults and Default Judgments, §§ 205.25[5], 205.92 -205.94*.

For an application for a stay of execution of a judgment or order involving a person in military service, see Ch. 254, *Executions and Enforcement of Judgments* .

For an application for a stay of garnishment involving a person in military service, see Ch. 276, *Garnishment* .

For a defendant's notice of admitting service of summons and complaint, waiving further notice, and waiving rights under the Servicemembers Civil Relief Act and similar state statutes, see *Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances, and Ch. 324, Jurisdiction: Subject Matter Jurisdiction* .

For a lessee's notice of termination of a lease due to the lessee's military service, see *Ch. 332, Landlord and Tenant: The Tenancy, § 332.71A.*

For a stay of eviction in an unlawful detainer proceeding during a period of military service, see *Ch. 333, Landlord and Tenant: Eviction Actions, § 333.111*.

For an application for relief against the enforcement of a fine or penalty against a person in military service when the penalty was incurred, see Ch. 489, *Relief From Judgment or Order* .

For a service member's application for relief from judgment, supporting declaration and order, see *Ch. 489, Relief From Judgments and Orders, § 489.411*

For an application for a stay during military service in an action to enforce a security interest in real or personal property, see *Ch. 503, Sales: Secured Transactions, § 503.113*.

For discussion of ascertaining a defendant's military status at the time of service of summons and its benefits and effect on subsequent proceedings, see *Ch. 518, Service of Summons and Papers, § 518.19.*

For a petition for a stay of foreclosure proceedings and relief from an installment contract, mortgage, or trust deed for the purchase of real property by an active member of the military service, see *Ch 555, Trust Deeds and Real Property Mortgages, § 555.139A.*

For an application for a stay of proceedings to collect real property taxes or assessments by an active member of the military service, see Ch 555, *Trust Deeds and Real Property Mortgages*, § 555.139B.

For an order staying foreclosure proceedings in relation to an obligation secured by a mortgage or trust deed on real property for an active member of the military service, see Ch 555, *Trust Deeds and Real Property Mortgages*, § 555.139C.

California Forms of Pleading and Practice--Annotated

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Volume 44: Sales thru Sanitation and Sewerage Districts-Chs. 500-511
Chapter 501 SALES: RETAIL INSTALLMENT SALES
PART IV. FORMS
C. Servicemembers Civil Relief Act and Related California Statutes

44-501 California Forms of Pleading and Practice--Annotated § 501.301

§ 501.301 Defense to Action on Obligation or Liability--Application (Motion) for Temporary Relief From Obligation on Ground Person Is or Was In Active Military Service After Entering Into Obligation [50 U.S.C. App. § 591; Mil. & Vet. Code § 409.3]

[1] FORM Defense to Action on Obligation or Liability--Application (Motion) for Temporary Relief From Obligation on Ground Person Is or Was In Active Military Service After Entering Into Obligation [50 U.S.C. App. § 591; Mil. & Vet. Code § 412]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF APPLICATION AND APPLICATION FOR ORDER TO STAY ENFORCEMENT OF OBLIGATION [*or* LIABILITY] [, SUPPORTING DECLARATION OF _____ (*name*), AND MEMORANDUM OF POINTS AND AUTHORITIES]
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To plaintiff _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] _____ [*name*] will, and hereby does, move for an order granting Defendant a stay of enforcement of the _____ [obligation *or* liability] on which Plaintiff's complaint is based. The motion will be made on the grounds that Defendant _____ [is currently *or* was] in military service (within the meaning of _____ [*for members of regular armed forces:* Title *50 United States Code Appendix, Section 511(2) or, for members of United States Military Reserve or National Guard*: *Military and Veterans Code Section 400*] [during a portion of the term of this obligation]) and therefore is entitled under _____ [*for members of regular armed forces:* the Servicemembers Civil Relief Act, specifically Title *50 United States Code Appendix, Section 591 or, for members of United States Military Reserve or National Guard*: *Military and Veterans Code Section 409.3*] to such a stay.

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s*)] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name of defendant or person making application on defendant's behalf*]

I, _____ [*name of defendant of person making application on defendant's behalf*], declare:

1. I am [*if someone other than defendant is making application, include the following:* acting on behalf of _____ (*name of defendant*), who is] the Defendant in this action.

[*For members of regular armed forces*]

2. On _____ [*date*], which date is subsequent to the date Defendant _____ [entered into *or* incurred] the _____ [obligation *or* liability] described in Plaintiff's complaint, Defendant entered military service (within the meaning of Title *50 United States Code Appendix, Section 511(2)*) with the United States _____ [*list branch of military service, e.g.,* Army *or* Navy *or* Marine Corps *or* Air Force *or* Coast Guard]. Defendant _____ [is currently in military service *or* was released from active military service on _____ (*date not more than 180 days prior to date application is filed*)].

[*OR, for members of United States Military Reserve or the National Guard*]

2. Defendant is a member of _____ [*specify branch of service, e.g.,* the United States Air Force Reserve *or* the California National Guard]. On _____ [*date subsequent to Sept. 11, 2001*], which date is subsequent to the date Defendant _____ [entered into *or* incurred] the _____ [obligation *or* liability] described in Plaintiff's complaint, Defendant was called to active military service (within the meaning of *Military and Veterans Code Section 400*) for a period in excess of seven days in a 14-day period. Defendant _____ [is currently on active military service *or* was released from active military service on _____ (*date not more than six months prior to date application is filed*)].

[*CONTINUE*]

3. By virtue of Defendant's military service, Defendant's ability to comply with the terms of the _____ [obligation *or* liability] described in Plaintiff's complaint has been materially affected in that _____ [*describe, e.g.,* Defendant is self-employed as a _____ (*e.g.,* lawyer) and has been unable to work at _____ (his *or* her) regular occupation while on active military service, as a result of which Defendant has been unable to generate enough income to meet Defendant's financial obligations, including the obligation referred to in Plaintiff's complaint].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[Add memorandum of points and authorities supporting motion]

Respectfully Submitted,

_____ [*signature*]

Attorney for _____ [moving party]

[2] Use of Form

This form is an application by a defendant, or a person acting on the defendant's behalf, for an order granting a stay in an action to enforce an obligation or liability that was entered into by a defendant who was subsequently called to active military service. The application requests a stay of the enforcement of the underlying obligation for the duration of the applicant's military service and a specified period thereafter, as permitted by the general relief provisions [*50 U.S.C. App. § 591*; *Mil. & Vet. Code § 409.3*] of the Servicemembers Civil Relief Act of 1940 [*50 U.S.C. App. § 501 et seq.*] and comparable provisions of California law [*Mil. & Vet. Code § 400 et seq.*].

As explained in the discussion below, under the circumstances this application functions in effect as a temporary defense to the underlying action.

Many, possibly even most instances involving claims for relief under these statutes, can be expected to arise when a military service member is the defendant in a pending action for a matter such as breach of contract, foreclosure, eviction, attachment, garnishment, or other creditor's action, or in connection with the entry of a default judgment or execution of a judgment previously entered. In these situations, the federal and state statutes granting relief to military personnel will be raised by the defendant in response to some other action by another party. This form is for use when requesting a stay in a pending proceeding against the service member on the underlying liability or obligation. In addition, however, the governing statutes also permit military service members to initiate proceedings on their own, in anticipation of or prior to the commencement of any action against them, to obtain temporary relief from obligations before any suit is commenced against them [*50 U.S.C. App. § 591*; *Mil. & Vet. Code § 409.3*]. For an application to use when there is no proceeding pending to collect on the underlying liability of obligation, see *§ 501.300*.

[3] Governing Law and Eligibility for Relief

The Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*] provides for the temporary suspension of various legal proceedings, obligations, and liabilities for persons in military service [*see 50 U.S.C. App. § 502* (purpose of statute)]. The statute is applicable to all members of the uniformed services [*see 10 U.S.C. § 101(a)(5)* (definition)] during periods of military service [*see 50 U.S.C. § 511(1)-(3)*] and, in many cases, for 90 days after termination of a member's period of military service. The California counterpart to the federal legislation [*Mil. & Vet. Code § 400 et seq.*] is designed to fill certain gaps in the federal law in the wake of the events of September 11, 2001. The latter statute, many provisions of which are virtually identical to their federal counterparts, is designed to apply to military reservists and National Guard members who are called to active military service under specified circumstances and, in many cases, for limited periods of time [*see Mil. & Vet. Code § 400*]. For detailed discussion of the relief available under these statutes, the manner in which such relief can be requested, and the persons who qualify for this relief, see *§ 501.300[4], [5]*.

[4] Stay of Pre-Existing Obligation

Under the general relief provisions of the federal and California statutes, an eligible service member or dependent [for discussion of who is eligible, *see § 501.300[4]*] may apply to a court for relief in for relief with respect to any obligation or liability incurred by the service member *prior to his or her period of military service* [*50 U.S.C. App. § 591(a), (b)*; *Mil. & Vet. Code § 409.3(a)*]. Relief under this provision is available only for pre-existing obligations; those entered into during the period of military service].

The court is required to hold a hearing on the application prior to granting any relief. "Appropriate notice" must be given [*50 U.S.C. App. § 591(b)*; *Mil. & Vet. Code § 409.3(a)*].

For a detailed discussion of the nature of relief available under these general relief provisions of these statutes, see *§ 501.300*.

[5] Procedure and Accompanying Papers

The statute states that the service member may "apply" to the court for a stay of the type discussed in this statute [*see 50 U.S.C. App. § 591(a)*; *Mil. & Vet. Code § 409.3(a)*]. For purposes of the applicable procedural requirements, an application in this context is deemed a motion [*Code Civ. Proc. § 1003* (any application for order is deemed a motion)]. Accordingly, the application in this form is in the form of a motion, although the term "application" is retained in deference to the statutory language.

A notice of motion is normally accompanied by one or more affidavits or declarations under penalty of perjury setting forth the evidentiary facts required to establish the grounds of the motion [*see Ch. 372, Motions and Orders, §§ 372.21[5][b], [17], 372.61[2]* et seq.; *see also Cal. Rules of Ct., Rule 3.1306(a)* (evidence received at a law and motion

hearing must be by declaration and affidavit); *Code Civ. Proc. §§ 2003* (affidavit defined), 2009, (use of affidavit in support of motion), 2015.5].

A supporting memorandum must be filed and a copy served with this notice of motion [*Cal Rules of Ct, Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*].

For discussion, a procedural checklist, and general forms relating to law and motion practice, see Ch. 372, *Motions and Orders* .

[6] Cross References

See the cross references in § 501.300[7].

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Volume 44: Sales thru Sanitation and Sewerage Districts-Chs. 500-511
Chapter 501 SALES: RETAIL INSTALLMENT SALES
PART IV. FORMS
C. Servicemembers Civil Relief Act and Related California Statutes

44-501 California Forms of Pleading and Practice--Annotated § 501.302

§ 501.302 Affirmative Defense to Action on Interest-Bearing Obligation--Annual Rate of Interest May Not Exceed 6 Percent per Year During Period of Military Service [50 U.S.C. App. § 527; Mil. & Vet. Code § 405]

[1] FORM Affirmative Defense to Action on Interest-Bearing Obligation--Annual Rate of Interest May Not Exceed 6 Percent per Year During Period of Military Service [50 U.S.C. App. § 526; Mil. & Vet. Code § 405]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], Defendant alleges:

1. The obligation forming the basis for Plaintiff's complaint bears interest at the annual rate of _____ percent, including all applicable service charges, renewal charges, fees, or other charges with respect to that obligation.

[*For members of regular armed forces*]

2. On _____ [*date*], which date is subsequent to the date Defendant entered into the obligation forming the basis for Plaintiff's complaint, Defendant entered military service (within the meaning of Title *50 United States Code Appendix, Section 511(2)*) with the United States _____ [*list branch of military service, e.g.,* Army *or* Navy *or* Marine Corps *or* Air Force *or* Coast Guard]. Defendant _____ [is currently in military service *or* was released from active military service on _____ (*date*)].

[*OR, for members of United States Military Reserve or the National Guard*]

2. Defendant is a member of _____ [*specify branch of service, e.g.,* the United States Air Force Reserve *or* the California National Guard]. On _____ [*date subsequent to Sept. 11, 2001*], which date is subsequent to the date Defendant entered into the obligation forming the basis for Plaintiff's complaint, Defendant was called to active military service (within the meaning of *Military and Veterans Code Section 400*) for a period in

excess of seven days in a 14-day period. Defendant _____ [is currently on active military service *or* was released from active military service on _____(*date*)].

[*CONTINUE*]

3. The ability of Defendant to pay interest on the obligation forming the basis for Plaintiff's complaint has been materially affected by Defendant's military service in that _____ [*describe, e.g.,* Defendant is self-employed as a _____ (*e.g.,* lawyer) and has been unable to work at _____ (his *or* her) regular occupation during the terms of Defendant's military service as described in Paragraph 2, above, as a result of which Defendant has been unable to generate enough income to meet Defendant's financial obligations, including the obligation forming the basis for Plaintiff's complaint].

4. The rate of interest on the obligation referred to in Plaintiff's complaint exceeds the maximum rate of 6 percent per year for pre-existing obligations incurred by individuals in active military service as specified in _____ [*for members of regular armed forces:* Title *50 United States Code Appendix, Section 527(a) or, for members of United States Military Reserve or National Guard*: *Military and Veterans Code Section 405*]. Defendant therefore is not liable to pay any interest (as defined in _____ [*for members of regular armed forces:* Title *50 United States Code Appendix, Section 527(d) or, for members of United States Military Reserve or National Guard*: *Military and Veterans Code Section 405*]) on the obligation referred to in Plaintiff's complaint during the period of Defendant's active military service beginning _____ [*date*] and continuing without interruption _____ [until _____ *(ending date of service*) *or, if defendant remains on active military service*: through this date and until further notice]. Plaintiff is not entitled to any interest on the obligation in excess of the 6 percent limitation during the period of Defendant's active military service. [Defendant asserts that the amount of the difference between the rate of interest specified in Paragraph 1, above, and the maximum 6 percent rate imposed by law on the obligation during Defendant's period of military service, amounts to $ _____.]

[2] Use of Form

This form is an affirmative defense to an action on an interest-bearing obligation bearing interest at an annual rate in excess of 6 percent. In this defense, the defendant asserts that he or she entered active military service after entering into the interest-bearing obligation, and that under the Servicemembers Civil Relief Act of 1940 [*50 U.S.C. App. § 501 et seq.*] and comparable provisions of California law [*Mil. & Vet. Code § 400 et seq.*], the annual interest rate on the obligation during the period of defendant's active military service may not exceed 6 percent [*50 U.S.C. App. § 527(a)*; *Mil. & Vet. Code § 405*] and the defendant is not liable for interest in excess of that amount.

[3] Governing Law

The Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*] provides for the temporary suspension of various legal proceedings, obligations, and liabilities for persons in military service [*see 50 U.S.C. App. § 502* (purpose of statute)]. The statute is applicable to all members of the uniformed services [*see 10 U.S.C. § 101(a)(5)* (definition)] during periods of military service [*see 50 U.S.C. § 511(1)-(3)*] and, in many cases, for 90 days after termination of a member's period of military service. The California counterpart to the federal legislation [*Mil. & Vet. Code § 400 et seq.*] is designed to fill certain gaps in the federal law in the wake of the events of September 11, 2001. The latter statute, many provisions of which are virtually identical to their federal counterparts, is designed to apply to military reservists and National Guard members who are called to active military service under specified circumstances and, in many cases, for limited periods of time [*see Mil. & Vet. Code § 400*]. For general discussion of the relief available under these statutes, the manner in which such relief can be requested, and the persons who qualify for this relief, see *§§ 501.60 et seq., 501.300*.

With respect to interest-bearing obligations, the California and federal statutes provide that no obligation or liability bearing interest at a rate in excess of 6 percent per year incurred by a service member before that person's entry into service may, during any part of the period of military service, bear interest at a rate in excess of 6 percent per year unless, in the opinion of the court, upon application by the obligee, the ability of the service member to pay interest on the obligation or liability at a rate in excess of 6 percent per year is not materially affected by reason of that service. For this purpose, "interest" also includes service charges, renewal charges, fees, or any other charges, except bona fide insurance, with respect to any obligation or liability [*50 U.S.C. App. § 527(d)*; *Mil. & Vet. Code § 405*].

[4] Enforcement

The statutes do not specify exactly how a claim of relief based on an interest-bearing obligation should be asserted. However, it is likely that this issue would frequently arise in the context of an action against a present or former service member who has defaulted on an interest-bearing obligation. For this reason, this form is set forth as an affirmative defense for use in an answer to a complaint seeking unpaid principal and interest on such an obligation. The statutes do not specifically authorize the service member to institute an affirmative action for relief under the provisions governing the maximum rate of interest, as they do in the case of stays of obligations or liabilities [*see 50 U.S.C. App. § 591*; *Mil. & Vet. Code § 409.3*; *see also § 501.300* (application for stay of enforcement of pre-existing obligation during period of military service)], but if an appropriate situation arose, it may be that such an action would be permitted under the general enforcement powers available to courts under these statutes.

Although the Servicemembers Civil Relief Act is a federal statute, it is enforceable in state courts. Any application required to be made to a court in which no proceeding has already been commenced with respect to the matter may be made in any court [*50 U.S.C. App. § 512(c)*]. For these purposes, "court" includes any court of competent jurisdiction of the United States or any state, whether or not it is a court of record [*50 U.S.C. App. § 511(5)*].

[5] Cross References

See the cross references in § 501.300[7].

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Volume 44: Sales thru Sanitation and Sewerage Districts-Chs. 500-511
Chapter 501 SALES: RETAIL INSTALLMENT SALES
PART IV. FORMS
C. Servicemembers Civil Relief Act and Related California Statutes

44-501 California Forms of Pleading and Practice--Annotated § 501.303

§ 501.303 Defense to Action on Contract for Purchase of Personal Property--Application (Motion) for Stay of Proceedings on Ground Person Is On Active Military Service [50 U.S.C. App. § 532; Mil. & Vet. Code § 407]

[1] FORM Defense to Action on Contract for Purchase of Personal Property--Application (Motion) for Stay of Proceedings on Ground Person Is On Active Military Service [50 U.S.C. App. § 531; Mil. & Vet. Code § 407]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF APPLICATION AND APPLICATION FOR ORDER TO STAY PROCEEDING [, SUPPORTING DECLARATION OF _____ (*name*), AND MEMORANDUM OF POINTS AND AUTHORITIES]
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To plaintiff _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of]

this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] _____ [*name*] will, and hereby does, move for an order granting a stay of these proceedings. The motion will be made on the grounds that Defendant is currently in military service (within the meaning of _____ [*for members of regular armed forces:* Title *50 United States Code Appendix, Section 511(2) or, for members of United States Military Reserve or National Guard*: *Military and Veterans Code Section 400*]) and therefore is entitled under _____ [*for members of regular armed forces:* the Servicemembers Civil Relief Act, specifically Title *50 United States Code Appendix, Section 532 or, for members of United States Military Reserve or National Guard*: *Military and Veterans Code Section 407*] to such a stay as a matter of right.

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s)*] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name of defendant or person making application on defendant's behalf*]

I, _____ [*name of defendant or person making application on defendant's behalf*], declare:

1. I am [*if someone other than defendant is making application, include the following:* acting on behalf of _____ (*name of defendant*), who is] the Defendant in this action.

[*For members of regular armed forces*]

2. On _____ [*date*], which date is subsequent to the date Defendant entered into the obligation described in Plaintiff's complaint, Defendant entered military service (within the meaning of Title *50 United States Code Appendix, Section 511(2)*) with the United States _____ [*list branch of military service, e.g.,* Army *or* Navy *or* Marine Corps *or* Air Force *or* Coast Guard], and remains in military service as of the date of this application.

[*OR, for members of United States Military Reserve or the National Guard*]

2. Defendant is a member of _____ [*specify branch of service, e.g.,* the United States Air Force Reserve *or* the California National Guard]. On _____ [*date subsequent to Sept. 11, 2001*], which date is subsequent to the date Defendant entered into the obligation described in Plaintiff's complaint, Defendant was called to active military service (within the meaning of *Military and Veterans Code Section 400*) for a period in excess of seven days in a 14-day period, and remains on active military service as of the date of this application.

[*CONTINUE*]

3. By virtue of Defendant's military service, Defendant's ability to comply with the terms of the obligation described in Plaintiff's complaint has been materially affected in that _____ [*describe, e.g.,* Defendant is self-employed as a _____ (*e.g.,* lawyer) and has been unable to work at _____ (his *or* her) regular occupation while on active military service, as a result of which Defendant has been unable to generate enough income to meet Defendant's financial obligations, including the obligation referred to in Plaintiff's complaint].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[Add memorandum of points and authorities supporting motion]

Respectfully Submitted,

_____ [*signature*]

Attorney for _____ [moving party]

[2] Use of Form

This form is an application by a defendant, or a person acting on the defendant's behalf, for an order granting a stay in an action under an installment contract for the purchase of real or personal property in which the plaintiff is seeking to exercise a right or option to rescind or terminate the contract, or resume possession of the property, due to the defendant's alleged nonpayment of an installment or other breach of the contract. The application seeks the stay on the ground that the nonpayment or breach occurred while the defendant was on active military service [*see 50 U.S.C. App. § 532(a)*; *Mil. & Vet. Code § 407(b)*].

As illustrated in the discussion below, under the circumstances, this application functions in effect as a temporary defense to the underlying action.

[3] Governing Law

The Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*] provides for the temporary suspension of various legal proceedings, obligations, and liabilities for persons in military service [*see 50 U.S.C. App. § 502* (purpose of statute)]. The statute is applicable to all members of the uniformed services [*see 10 U.S.C. § 101(a)(5)* (definition)] during periods of military service [*see 50 U.S.C. § 511(1)-(3)*] and, in many cases, for 90 days after termination of a member's period of military service. The California counterpart to the federal legislation [*Mil. & Vet. Code § 400 et seq.*] is designed to fill certain gaps in the federal law in the wake of the events of September 11, 2001. The latter

statute, many provisions of which are virtually identical to their federal counterparts, is designed to apply to military reservists and National Guard members who are called to active military service under specified circumstances and, in many cases, for limited periods of time [*see Mil. & Vet. Code § 400*]. For detailed discussion of the relief available under these statutes, the manner in which such relief can be requested, and the persons who qualify for this relief, see *§§ 501.60* et seq., *501.300*.

[4] Rescission or Termination of Installment Contract; Repossession

Under both the Servicemembers Civil Relief Act and the comparable California legislation, after a service member enters military service, a contract by the service member for either the purchase of real or personal property (including a motor vehicle) or the lease or bailment of such property may not be rescinded or terminated for a breach of terms of the contract occurring before or during that person's military service, nor may the property be repossessed for such a breach without a court order [*50 U.S.C. App. § 532(a)*; *see Mil. & Vet. Code § 407(a)*]. This relief applies only to a contract for which a deposit or installment has been paid by the servicemember before the servicemember enters military service [50 U.S.C. App. § 532(b), *Mil. & Vet. Code § 407(a)*]. This provision is designed to protect military service members against repossession, forfeiture of deposits and payments, and termination of installment contracts while they are in active military service. It compels the holder of the obligation to institute a court proceeding before any of these actions can be taken. In such an action, the court may order the repayment of all or part of any prior installments or deposits as a condition of terminating the contract and resuming possession. Instead the court may, on its own motion, or must on application by the service member when the service member's ability to comply with the contract is materially affected by military service, stay the proceedings for a period of time as, in the opinion of the court, justice and equity require; or the court may make other disposition as is equitable to preserve the interests of all parties [*50 U.S.C. App. § 532(c)*; *see Mil. & Vet. Code § 407(b)*].

There are penalties for repossessing or attempting to repossess property in violation of these requirements. Violators are guilty of a misdemeanor [*50 U.S.C. App. § 532(b)(1)*; *Mil. & Vet. Code § 407(c)*].

[5] Stay of Proceeding

The governing statutes do not specify the length of time for which a stay of the proceeding may be granted. Rather, it is simply left to the discretion of the court [*see 50 U.S.C. App. § 532(c)*; *Mil. & Vet. Code § 407(b)*]. This raises some interesting practical issues regarding the time period of the stay. If the stay is granted for a period of indefinite duration, such as the period of the defendant's military service or a specified amount of time (for example, six months) thereafter, it may be difficult for the plaintiff to determine when the action can resume, as it might be expected that in the ordinary case the plaintiff would not know, and could not determine without difficulty, when the defendant's period of military service is over. On the other hand, if the stay is set for a finite period of time, such as six months, and the defendant either (1) is released from military service earlier than the time period specified in the stay, or (2) conversely, is still in military service when the period of the stay ends, the defendant presumably would have to seek an additional stay at that point. It appears that the court would have discretion to grant either type of stay under its general authority to order a stay for a period of time as, in the opinion of the court, justice and equity require [*see 50 U.S.C. App. § 532(c)*; *Mil. & Vet. Code § 407(b)* (stay of proceedings "as the court deems just")]. This form does not request a specific length of time for the stay, but the party filing the application may wish to consider whether inclusion of such language is desirable or whether the length of the stay would be better left to the discretion of the court. The form may be modified to add a specific length of time for the stay if desired.

Additional relief of a more general nature also may be available *50 U.S.C. App. § 591* or *Mil. & Vet. Code § 409.3*, the general relief provisions of the federal and California statutes. These statutes basically grant an extension of the underlying installment obligation for a period equal to the period of military service or, in the case of installment obligations for the purchase of real property or secured by a real property mortgage or similar instrument, for a period equal to the period of the military service plus a period equal to the remaining installments, or any part of that combined

period [*see 50 U.S.C. App. § 591(b)*; *Mil. & Vet. Code § 409.3(a)*]. For more detailed discussion of these provisions, see *§ 501.300*.

[6] Who May Request Stay

The statutes are extremely broad as to who may request a stay of the proceeding. Under California law, application for a stay may be made by the person in military service or by "some person on the service member's behalf" [*Mil. & Vet. Code § 407(b)*]. There are no statutory restrictions on who that "some person" may be. Presumably in many cases the service member will be absent due to the military service, and the request will have to be made by someone else on the service member's behalf. Under federal law, the stay may be requested by an attorney acting on the behalf of the service member, or by an individual possessing a power of attorney from the service member [*see 50 U.S.C. App. § 519*; *see also 50 U.S.C. § 592* (automatic extension of power of attorney while service member is missing)].

[7] Procedure and Accompanying Papers

The statute states that a request for a stay of the type discussed in this statute is to be made by "application" to the court [*50 U.S.C. App. § 532(c)*; *Mil. & Vet. Code § 407(b)*]. For purposes of the applicable procedural requirements, an application in this context is deemed a motion [*Code Civ. Proc. § 1003* (any application for order is deemed a motion)]. Accordingly, the application in this form is in the form of a motion, although the term "application" is retained in deference to the statutory language.

A notice of motion is normally accompanied by one or more affidavits or declarations under penalty of perjury setting forth the evidentiary facts required to establish the grounds of the motion [*see Ch. 372, Motions and Orders, §§ 372.21[5][b], [17], 372.61[2]* et seq.; *see also Cal. Rules of Ct., Rule 3.1306(a)* (evidence received at a law and motion hearing must be by declaration and affidavit); *Code Civ. Proc. §§ 2003* (affidavit defined), *2009*, (use of affidavit in support of motion), *2015.5*].

A supporting memorandum must be filed and a copy served with this notice of motion [*Cal Rules of Ct, Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*].

For discussion, a procedural checklist, and general forms relating to law and motion practice, see Ch. 372, *Motions and Orders* .

[8] Cross References

See the cross references in *§ 501.300[7]*.

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Volume 44: Sales thru Sanitation and Sewerage Districts-Chs. 500-511
Chapter 502 SALES: WARRANTIES

44-502 California Forms of Pleading and Practice--Annotated 502.syn

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[1] In General

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[1] FORM

[2] Use of Form

[3] Use in Consumer Litigation

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Rights Under Implied Warranty of Merchantability

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[b] Magnuson-Moss Act

[5] Cross References

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[1] FORM

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[4] Cross References

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[3] When Usable in Consumer Litigation

[4] Cross References

§ 502.213 Affirmative Defense to Complaint for Breach of Implied Warranty Arising Under Commercial Code Based on Exclusion or Modification of That Implied Warranty by Course of Dealing or Usage of Trade [Com. Code § 2316(3)(c)]

[1] FORM

[2] Use of Form

[3] Cross References

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[3] Cross References

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[3] Cross References

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[3] Allegations

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[2] Use of Form

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[2] Use of Form

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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[5] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Requirement of Notification

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[1] FORM

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[4] Attorney's Fees as Consequential Damages

[5] Cross References

§§ 502.284-502.289 [Reserved]

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

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§ 502.01 Scope of Chapter

This chapter discusses the basic warranty laws applicable to the sale of goods generally, as well as the special warranty provisions that apply to consumer purchases under the Song-Beverly Consumer Warranty Act (*Civ. Code § 1790 et seq.*) and the federal Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (*15 U.S.C. § 2301 et seq.*). This chapter primarily addresses breaches of warranties that result in commercial losses. Losses in the nature of personal injuries and related consequential damages are covered in Ch. 460, *Products Liability* . Remedies connected with warranties on mobilehomes are treated in Ch. 369, *Mobilehomes and Mobilehome Parks* .

Three different types of statutory bases for actions for breach of warranty are discussed.

- The large variety of express and implied warranties as well as other statutory warranties that are found in Division 2 of the Commercial Code for basic sales transactions [*see § 502.20* et seq.].

- The Song-Beverly Consumer Warranty Act (*Civ. Code § 1790 et seq.*; hereinafter referred to as the "Song-Beverly Act"), which recognizes particular kinds of express warranties made to consumers--those in writing which undertake to make good on the product, and those resulting from employing demonstration wares [*see § 502.40* et seq.]. The act sets up a system whereby the manufacturers must provide, in connection with the creation of an express warranty, service facilities or substitutions for those facilities if they are not available [*see §§ 502.43, 502.44*]. Special causes of action are made available in the case of express warranties [*see §§ 502.45 -502.50*]. The act also mandates the presence of certain implied warranties somewhat more streamlined than under the Commercial Code in consumer sales [*see § 502.51*]. An action on an implied warranty action may be simpler than that provided in the Commercial Code, with broader remedies and a fuller range of possible defendants, and fewer defenses available [*see § 502.53*].

- The federal Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (*15 U.S.C. § 2301 et seq.*; hereinafter referred to as the "Magnuson-Moss Act"), which recognizes a broader type of written warranty made to consumers than that made under the Song-Beverly Act, but requires more elements to be present [*see § 502.60* et seq.]. It imposes certain disclosure requirements on warrantors [

see §§ 502.62, 502.63]. It recognizes any implied warranties arising under state law and ties them to written warranties [*see § 502.64*]. It provides a broad cause of action in state as well as federal courts for a range of plaintiffs broader than that available under state law and against a full range of defendants with few defenses available to defendants in the action [*see § 502.68*].

Forms in this chapter include the following:

- Notices of breach of warranty under the Commercial Code [*see § 502.100*] and under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act [*see § 502.101*].

- A notice to take over defense of a suit given by a defendant to a third party who is answerable over [*see § 502.102*].

- A complaint by a former defendant against a third party answerable over for the claim established in the earlier suit [*see § 502.103*].

- An allegation for consequential damages arising out of personal or property injuries for use in a breach of warranty action under the Commercial Code [*see § 502.104*].

- Forms for defense against breaches of warranty generally [*see §§ 502.120* and *502.121*].

- Forms of complaint and allegations for, and defense to, a breach of an express warranty under the Commercial Code [*see §§ 502.140 -502.142, 502.150*].

- A complaint and an allegation, for use by a retail buyer, for violation of the Song-Beverly Consumer Warranty Act applicable to express warranty [*see §§ 502.160 -502.161*], as well as a complaint by a seller or service agent against a manufacturer for willful or repeated violations of the Song-Beverly Consumer Warranty Act [*see § 502.162*].

- Complaints and allegations for use in a class action under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act [*see §§ 502.180* and *502.181*].

- A complaint and allegations for, and a form for defense to, a breach of the implied warranty of merchantability under the Commercial Code [*see §§ 502.200, 502.201*, and *502.210*].

- A complaint for a breach of the implied warranty of merchantability, and a form for defense to breaches of implied warranty, under the Song-Beverly Consumer Warranty Act [*see §§ 502.202* and *502.211*].

- A complaint for, and a form for defense to, a breach of the implied warranty of fitness under the Commercial Code [*see §§ 502.220* and *502.230*].

- A complaint for breach of an implied warranty through course of dealing or usage of trade [*see § 502.240*].

- Forms for defenses to breaches of implied warranties under the Commercial Code [*see §§ 502.212 -502.214*].

- Forms for a complaint and allegations for, and defense to, a breach of the warranty of title [*see § 502.260* et seq.].

- Forms for notice and demand, a complaint for, and defenses to, a breach of the warranty against infringement [*see § 502.280* et seq.].

- A complaint for breach of warranty as to quality or condition of goods on arrival [*see § 502.300*].

Remedies for violation of *Civ. Code §§ 1770(a)(21)* and *1797.8 et seq.* (required advertising disclosures regarding trademark consumer goods normally accompanied by manufacturer's warranty that are imported into this country through unauthorized channels and do not have manufacturer's express warranty) are discussed in Ch. 14, *Advertising* .

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§ 502.02 Cross References

- For discussion and complaints for remedies for false advertising, including failure to disclose lack of accompanying warranty on "grey market goods," see Ch. 14, *Advertising* .

- For a complaint for breach of warranty against an auctioneer, see Ch. 77, *Auctions and Auctioneers* .

- For discussion and forms for recovery for breach of automobile warranties, see Ch. 91, *Automobiles: Actions Involving Defects and Repairs* .

- For discussion and complaints for breach of warranty against contractors and developers, see Ch. 104, *Building Contracts* .

- For discussion and forms for use in class actions, see Ch. 120, *Class Actions* .

- For discussion and complaints involving consumer credit transaction remedies, see Ch.127, *Consumer Protection* .

- For discussion and forms relating to breach of contract, see Ch. 140, *Contracts* .

- For discussion and forms pertaining to costs and attorney's fees generally, see *Ch. 174, Costs and Attorney's Fees, §§ 174.10 et seq. and 174.50* et seq.

- For discussion and forms dealing with damages in contract actions, see *Ch. 177, Damages, § 177.40* et seq.

- For discussion and forms relating to warranties on packaged or served food, see Ch. 268, *Food* .

- For a complaint against an electrical contractor for breach of warranty, see Ch. 277, *Gas and Electricity* .

- For discussion and complaints based on a right to indemnification, see Ch. 300, *Indemnity and Contribution* .

- For discussion of warranty in insurance contracts, see Ch. 308, *Insurance* .

- For discussion of mobilehome warranties, see Ch. 369, *Mobilehomes and Mobilehome Parks* .

- For discussion and forms for complaints concerning patent infringement, see Ch. 411, *Patents and Inventions* .

- For discussion and forms for complaints for injuries caused by defective products and design, see Ch. 460, *Products Liability* .

- For discussion and forms dealing with infringement of trademark, see Ch. 549, *Trademarks and Trade Names* .

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[Reserved]

§§ 502.03[Reserved]

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§ 502.10 Governing Law

[1] State Statutes

Warranties for the sale of goods is basically and most broadly covered in Division 2 of the Commercial Code known as "Uniform Commercial Code--Sales" (*Com. Code § 2101*), in *Com. Code §§ 2312-2317, 2321(2), 2607(3)(B), (5), (6), 2714(2), 2715(2)(b), 2800,* and *2801*. This law is amplified in certain substantive ways as to consumer sales only (and related wholesale transactions) by the Song-Beverly Consumer Warranty Act in *Civ. Code § 1790 et seq.*

As a complement to consumer warranty legislation, a statutory standard of performance by service personnel has been adopted with respect to labor involving consumer goods brought in for repair under warranty, or otherwise. Any individual, partnership, corporation, association, or other legal entity that engages in the business of installing new or used consumer goods has a duty to the buyer to install them in a "good and workmanlike" manner [*Civ. Code § 1796*]. If the entity engages in the business of providing service or repair to new or used consumer goods, it has a duty to the purchaser to perform those services in "good and workmanlike" manner [*Civ. Code § 1796.5*]. These provisions, however, do not provide a specific remedy for their violation.

[2] Federal Statutes and Regulations

Consumer protection with respect to warranties in the sale of goods is further extended, primarily through disclosure requirements, and otherwise given support concurrent with or residual to the state scheme, through the federal Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (*15 U.S.C. § 2301 et seq.*), with implementing regulations found in *16 C.F.R. §§ 700.1-703.8*.

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§ 502.11 Definitions

[1] Warranty

A warranty is not a technical term for legal purposes in the area of sales transactions in the absence of some added qualification, such as "express" or "implied." It was defined in the sales context in an early statute, former Civ. Code § 1763, as an engagement by which a seller assures to a buyer the existence of some fact affecting the transaction [*see Harley v. Golden State & M.I.W. (1884) 66 Cal. 238, 239, 5 P. 160]* . A warranty may involve title, character, quantity, quality, identity, or condition of goods [*A.A. Baxter Corp. v. Colt Indus., Inc. (1970) 10 Cal. App. 3d 144, 153, 88 Cal. Rptr. 842]* .

[2] Express Warranty

An "express warranty" is sometimes described as an affirmation of fact or a promise [*see Com. Code § 2313(1)(a)*; *15 U.S.C. § 2301(6)(A)*], or as a written undertaking [*see Civ. Code § 1791.2(a)(1)*; *15 U.S.C. § 2301(6)(B)*] concerning the goods. In some instances it may take the form of a description of goods [*see Com. Code § 2313(1)(b)*] or a sample or model of the goods [*see Com. Code § 2313(1)(c)*; *Civ. Code § 1791.2(a)(2)*]. To be enforceable, an express warranty may be required to be part of the basis of the bargain between the parties [*see Com. Code § 2313(1)*; *15 U.S.C. § 2301(6)*].

[3] Implied Warranty

An "implied warranty" is a warranty that is implied in a contract for sale of the goods involved [*see Com. Code § 2314*], or exists at the time of contracting for a sale of goods under particular circumstances [*see Com. Code § 2315*], or accompanies in certain situations a sale of particular goods [*see Civ. Code §§ 1792-1792.2*]. An implied warranty is normally, and under certain legislation, exclusively, one for merchantability or for fitness for certain purposes [*see Com. Code § 2314(1), (2)*; *Civ. Code § 1791.1*], but other implied warranties may be present from time to time through course of dealing or usage of trade [*see Com. Code § 2314(3)*]. An implied warranty has been described as one "arising under" or "imposed by" [*see* U.C.C. Comment 2 to *Com. Code § 2314*] "State law" [*see 15 U.S.C. § 2301(7)*]; however, certain other nonexpress warranties also may be imposed by law without being designated or treated as "implied" [*see* U.C.C.

Comment to *Com. Code § 2312*; *Com. Code § 2312(1)(B)*].

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§ 502.12 Nature of Action for Breach of Warranty

[1] Hybrid of Tort and Contract

The seller's warranty has been referred to as "a curious hybrid" of tort and contract and as unique in the law [Prosser on Torts (4th ed), § 95]. Liability for a breach of a warranty originally was considered a tort, but eventually it became identified as being governed by contract principles in the area of sales. Nevertheless, it is regarded as having essentially retained its substantive tort character, and recovery for breach of warranty is seen as a form of strict liability [*see* Prosser on Torts (4th ed), § 95; Frumer & Friedman, Products Liability, Ch. 3, *Introduction to Strict Liability* , Ch. 3A, *Manufacturer's Strict Liability in Warranty* (Matthew Bender)]. The basis for recovery is the failure of a promise or representation [*see* Corbin on Contracts, Vol. I, § 14], or of an engagement or assurance [*see § 502.11[1], above*], by the seller to the buyer in association with a sale. Thus, while a warranty arises in connection with a sale, it is independent of the contract for sale (although the agreement may refer directly or implicitly to the warranty as well), and an action on the warranty is not in the nature of a formal proceeding on the breach of a contract.

This analysis of the nature of the action for a breach of a warranty would not appear to be affected by the requirement that express warranties governed by Division 2 of the Commercial Code [*see § 502.20* et seq., *below*] must have become or been made "part of the basis of the bargain" [*see Com. Code § 2313(1)*], a requirement that is also part of the description of a written warranty under the Magnuson-Moss Act [*see 15 U.S.C. § 2301(6)* and § 502.60 et seq., *below*]. The requirement is not given a definitive meaning in the Uniform Commercial Code [*see* U.C.C. Comments 1-8 to *Com. Code § 2313*; *see also* Comment, *The Meaning of 'Part of the Basis of the Bargain,' 19 Santa Clara L. Rev. 447, 448 (1979)*], but the Supreme Court has made it clear that it imposes a less onerous burden on the plaintiff in proving the existence of an express warranty than was imposed prior to the adoption of the Commercial Code, because a plaintiff is no longer required to prove his or her reliance on the seller's affirmation or promise [*see Hauter v. Zogarts (1975) 14 Cal. 3d 104, 115-116, 116 n.13, 120 Cal. Rptr. 681, 534 P.2d 377* ; *see also § 502.23[1]*]. Thus, it appears that the "basis of the bargain" requirement for express warranties under the Magnuson-Moss Act does not require that the representation constituting the warranty be part of the bargain proper or that it be a consideration for the agreement.

A distinction remains between damages recoverable for breach of warranty and those recoverable in product liability

cases. The difference between price paid and value received, and deviations from standards of quality that have not resulted in property damage or personal injury, are primarily the domain of contract and warranty law or the law of fraud, rather than of negligence. In actions for negligence, a manufacturer's liability is limited to damages for physical injuries; no recovery is allowed for economic loss alone, under a general principle, referred to as the economic loss rule [*see* *Aas v. Superior Court (2000) 24 Cal. 4th 627, 636, 101 Cal. Rptr. 2d 718, 12 P.3d 1125]* .

[2] Breach of Warranty as Alternative to Breach of Contract

There may be instances when an expression appearing in, or intended to be incorporated into, a contract may be capable of being interpreted as a warranty or as an integral element or condition of the primary contract of sale itself. It would seem that in those instances the plaintiff has a cause of action for breach of warranty and for breach of the sales contract. Normally, the plaintiff suing for breach of warranty may expect the contract to remain in force, and the usual elements of a cause of action for breach of contract will not be required to be shown [*see* discussion in [1], *above*]. On the other hand, the plaintiff in an action for breach of contract must plead all the necessary elements to state a cause of action, such as plaintiff's compliance with all conditions of the contract, but presumably may be able to invoke other remedies provided in the Commercial Code [*see* Ch. 500, *Sales: Sales Under the Commercial Code*].

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[Reserved]

§§ 502.13[Reserved]

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44-502 California Forms of Pleading and Practice--Annotated § 502.20

§ 502.20 Warranties Applicable to Sales of Goods Only

Warranties arising under Division 2 of the Commercial Code (which is also referred to as the Uniform Commercial Code--Sales, and which is the general sales law) are generally restricted to sales of goods only [*see Com. Code §§ 2102, 2105(1)*; *see also Com. Code §§ 2312-2316*]. Although general sales warranty law extends to other transactions by reasoning which is analogous to the law of sales, the law typically has been considered unavailable in the area of services, including professional services [*see Allied Props. v. John A. Blume & Associates (1972) 25 Cal. App. 3d 848, 855-856, 102 Cal. Rptr. 259* (relying principally on *Gagne v. Bertran (1954) 43 Cal. 2d 481, 487-490, 275 P.2d 15*)]. The Commercial Code, however, does provide that the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale for purposes of the implied warranty of merchantability [*Com. Code § 2314(1)*]. Thus, generally, if a transaction is treated as a service rather than as a sale of a good, such as transactions in blood and its by-products for purposes of injecting or transfusing into humans [*see Health & Safety Code § 1606*; *Shepard v. Alexian Brothers Hosp. (1973) 33 Cal. App. 3d 606, 609-610, 614, 109 Cal. Rptr. 132* ; *see also Fogo v. Cutter Laboratories, Inc. (1977) 68 Cal. App. 3d 744, 750-754, 758-761, 137 Cal. Rptr. 417]* , Division 2 does not apply.

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44-502 California Forms of Pleading and Practice--Annotated § 502.21

§ 502.21 Warranty of Title

[1] Scope of Warranty of Title

In every contract for sale (unless excluded or modified in a permissible fashion, as discussed *below*), the seller warrants both knowledge [*Com. Code § 2312(1)*]:

- That the title conveyed is good, and its transfer rightful.

- That the goods are delivered free from any security interest, or other lien or encumbrance, of which the buyer at the time of contracting has no knowledge.

This warranty is intended to make provisions for a buyer's basic needs regarding a title that he or she expects in good faith to acquire--a good, clean title transferred in a rightful manner so that the buyer will not be exposed to a lawsuit in order to protect it. This warranty is extended whether or not the seller was in possession of the goods at the time the sale or contract to sell was made. The "knowledge" which the buyer might have of title deficiencies that could delimit the warranty is "actual" [*see Com. Code § 1202(a)(b)*] knowledge as distinct from broader notice. The warranty has not been designated an "implied" one and thus is not subject to restrictions applicable to implied warranties per se [U.C.C. Comments 1, 6 to *Com. Code § 2312*].

[2] Exclusion or Modification

The warranty of title may be excluded or modified, but only by specific language or by circumstances that give the buyer reason to know that the seller is not personally claiming title or is purporting to sell only whatever right the seller or a third person may have [*Com. Code § 2312(2)*].

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§ 502.22 Warranty Against Infringement

A seller who is a merchant regularly dealing in goods of the kind automatically gives a warranty against infringement, unless there is an agreement otherwise. The parties' agreement "otherwise" can be an agreement that expands, rather than limits or excludes, the statutory warranty against a "rightful claim" of infringement [*Linear Tech. Corp. v. Applied Materials, Inc. (2007) 152 Cal. App. 4th 115, 127, 61 Cal. Rptr. 3d 221* ("[h]ere the parties' contracts ... were expansive in embracing a warranty that the use of the purchased equipment would not result in *any* claim of infringement"; original emphasis)]. The warranty is that the goods will be delivered free of the rightful claim of any third person by way of infringement or the like. However, if the buyer furnishes specifications to the seller, the buyer must hold the seller harmless against any claim that arises out of compliance with the specifications [*Com. Code § 2312(3)*].

A "rightful claim" under *Com. Code § 2312(3)* is not synonymous with a claim that ultimately will prove successful in litigation. Rather, it is a nonfrivolous claim of infringement that has any significant and adverse effect on the buyer's ability to make use of the goods [*Pacific Sunwear of Cal., Inc. v. Olaes Enters., Inc. (2008) 167 Cal. App. 4th 466, 470, 481, 84 Cal. Rptr. 3d 182*].

Special examples of sellers who are not merchants are sheriffs, executors, foreclosing lienors and persons similarly situated, and sellers who are so out of the ordinary commercial course that their peculiar character is immediately apparent to the buyer. No personal obligation is imposed on such a seller who is purporting to sell only an unknown or limited right [U.C.C. Comment 5 to *Com. Code § 2312*].

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§ 502.23 Express Warranties

[1] Creation by Seller

A seller creates express warranties as follows [*Com. Code § 2313(1)*]:

- Any affirmation of fact or promise made by the seller to the buyer, which relates to the goods and becomes part of the basis of the bargain, creates an express warranty that the goods will conform to the affirmation or promise.

- Any description of the goods that is made part of the basis of the bargain creates an express warranty that the goods will conform to the description.

- Any sample or model which is made a part of the basis of the bargain creates an express warranty that the whole of the goods will conform to the sample or model.

When the seller makes "[a]ny affirmation of fact or [any] promise ... to the buyer which relates to the goods" [*Com. Code § 2313(1)(a)*], there is a presumption that it "is intended to become a basis of the bargain" [*see* U.C.C. Comment 6 to *Com. Code § 2313*]. Therefore, unless the presumption is rebutted, the affirmation or promise "becomes part of the basis of the bargain" [*Keith v. Buchanan (1985) 173 Cal. App. 3d 13, 23, 220 Cal. Rptr. 392]* , and thus the seller "creates an express warranty that the goods shall conform to the affirmation or promise" [*Com. Code § 2313(1)(a)*]. Rebuttal of the presumption "requires clear affirmative proof" of "any fact which is [relied on] to take such affirmations, once made, out of the agreement" [*Hauter v. Zogarts (1975) 14 Cal. 3d 104, 115, 120 Cal. Rptr. 681, 534 P.2d 377* ; *Weinstat v. Dentsply Int'l, Inc. (2010) 180 Cal. App. 4th 1213, 1229, 103 Cal. Rptr. 3d 614* ; U.C.C. Comment 3 to *Com. Code § 2313*].

The express warranty in that case is presumptively created solely by the seller's making an "affirmation of fact or [a] promise" that "relates to the goods" and is "made to the buyer" [*Com. Code § 2313(1)(a)*]. In that event, once the sale is concluded, the warranty exists (unless and until the presumption is rebutted), whether or not any of the following facts

can be shown:

- The seller did not use the word "warrant" or a similar word, or the seller did not intend to make a warranty [*Com. Code § 2313(2)*; U.C.C. Comment 3 to *Com. Code § 2313*].

- The seller's affirmation of fact or promise did not come to the buyer's attention until after the sale was concluded [*Weinstat v. Dentsply Int'l, Inc. (2010) 180 Cal. App. 4th 1213, 1230-1231, 103 Cal. Rptr. 3d 614* ("affirmations, promises and descriptions about the goods contained in product manuals and other materials that are given to the buyer at the time of delivery can become part of the basis of the bargain, ... notwithstanding that delivery occurs after the purchase price has been paid. ... Even before purchasing a product, a buyer would reasonably expect any statement or description of the product appearing in a user manual or similar publication to be true, regardless of when the manual was received or read. A seller's defense based solely on the postsale timing of receipt or awareness of the manual arguably would fall short of good faith."); U.C.C. Comment 7 to *Com. Code § 2313*].

- The buyer did not rely on that affirmation of fact or promise when deciding to buy [*Hauter v. Zogarts (1975) 14 Cal. 3d 104, 114, 120 Cal. Rptr. 681, 534 P.2d 377* (*Com. Code § 2313* embodies change from pre-U.C.C. law on reliance issue); *Weinstat v. Dentsply Int'l, Inc. (2010) 180 Cal. App. 4th 1213, 1227, 103 Cal. Rptr. 3d 614* (reliance is not required); U.C.C. Comment 3 to *Com. Code § 2313* ("In actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement.")].

- The seller purported to disclaim "all warranties, expressed or implied" in such or similar general terms [U.C.C. Comment 4 to *Com. Code § 2313*; *see § 502.23[6]*].

The buyer's inspection of the goods before purchase does not necessarily waive the express warranties. For instance, warranties based on statements in advertising brochures that a boat was "a picture of sure-footed seaworthiness" and "a carefully equipped and very seaworthy vessel" were not waived by the buyer's, and buyer's expert's, inspection of the boat before it was placed in the water [*Keith v. Buchanan (1985) 173 Cal. App. 3d 13, 23-24, 220 Cal. Rptr. 392]* .

Whether a seller has created an express warranty or merely made nonactionable statements of opinion is for the trier of fact to determine from all of the circumstances of the transaction [*Schauer v. Mandarin Gems of California, Inc. (2005) 125 Cal. App. 4th 949, 959, 23 Cal. Rptr. 3d 233]* .

Com. Code § 2313 applies only to the sale of goods. Thus, a representation made in connection with the sale of a business, regarding the volume of gross and net profits, is not governed by *Com. Code § 2313* [*Kazerouni v. De Satnick (1991) 228 Cal. App. 3d 871, 873-874, 279 Cal. Rptr. 74]* .

[2] By Description

A description need not be by words. Technical specifications, blueprints, and the like can afford more exact description than mere language; if these descriptions are made part of the basis of the bargain, goods must conform with them. Past deliveries may set the description of quality, either expressly, impliedly, or by course of dealing. All descriptions by merchants must be read against applicable trade usages, with the general rules as to merchantability resolving any doubts [U.C.C. Comment 5 to *Com. Code § 2313*].

[3] By Sample

Samples include both those drawn from the bulk of goods that is the subject matter of the sale, and from models that are

offered for inspection when the subject matter is not available and which has not been drawn from the bulk of the goods. There may be a question of fact, however, as to when something has been shown merely as illustrative, that is, demonstrated only to suggest, rather than as constituting the character of the subject matter of the contract. A sample drawn from the bulk should be regarded as describing values of the goods contracted for unless accompanied by an unmistakable denial of that responsibility. A model of merchandise not on hand is not as strong an indicator that it is a literal description of the sales subject matter, particularly if the buyer's modification of the model impairs any feature of the model [U.C.C. Comment 6 to *Com. Code § 2313*].

[4] Puffery Excluded

An affirmation merely of the value of goods, or a statement purporting to be merely the seller's opinion or commendation of the goods, does not create a warranty [*Com. Code § 2313(2)*]. Statements in advertising brochures that a boat was "a picture of sure-footed seaworthiness" and "a carefully equipped and very seaworthy vessel" were specific and unequivocal enough to create express warranties under *Com. Code § 2313* [*Keith v. Buchanan (1985) 173 Cal. App. 3d 13, 20-22, 220 Cal. Rptr. 392* (but no express warranties were created under *Civ. Code § 1791.2(a)(1)* because there was no undertaking by seller to preserve or maintain utility or performance of vessel)].

[5] Elimination of Privity

Privity is not required for an action based on express warranty [*Rodrigues v. Campbell Industries (1978) 87 Cal. App. 3d 494, 500-501, 151 Cal. Rptr. 90* ; *see* *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 114 n.8, 120 Cal. Rptr. 681, 534 P.2d 377* ; *Schauer v. Mandarin Gems of California, Inc. (2005) 125 Cal. App. 4th 949, 23 Cal. Rptr. 3d 233* (third-party beneficiary plaintiff)].

[6] Limitation, Modification, and Disclaimer

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit a warranty are construed whenever reasonable as consistent with each other. Negation or limitation is inoperative, however, to the extent that a limited construction is unreasonable, subject to the provisions of Division 2 of the Commercial Code on parol or extrinsic evidence [*Com. Code § 2316(1)*; *see Com. Code § 2202*].

Because a disclaimer or modification is inconsistent with an express warranty, words of disclaimer or modification give way to words of warranty unless some clear agreement between the parties dictates the contrary [*Hauter v. Zogarts (1975) 14 Cal. 3d 104, 119, 120 Cal. Rptr. 681, 534 P.2d 377* ; *see also* U.C.C. Comment 1 to *Com. Code § 2313*]. For example, the scope of an express warranty that a golfer training device is completely safe has been held to be not limited by reference to a picture in an instruction manual showing the correct use of the device or the general understanding that golf is a dangerous game [*see* *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 118, 120, 120 Cal. Rptr. 681, 534 P.2d 377]* .

A purchaser cannot claim the benefit of an express warranty of which it had no knowledge at the time of contracting. Thus, a disclaimer in the primary contract is effective to bar a claim by the purchaser based on an express warranty in a contract between the seller and one of the seller's subcontractors that the purchaser discovers after the primary contract is executed [*Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 34, 262 Cal. Rptr. 716* (purchaser claimed to be third-party beneficiary of contract between seller and subcontractor)].

When an express warranty is limited to a specified period (for example, the typical time-or-miles warranty on a new car), generally the warranty does not cover repairs made after the warranty period has expired. Furthermore, a latent defect discovered after expiration of the warranty period does not form the basis for a valid claim under the warranty, even if the warrantor knew of the defect at the time of sale. To hold that all latent defects are covered under a limited-period express warranty, whether they become apparent to the customer before or after expiration of the

warranty period, would place an undue burden on the warrantor, who under such a rule would, in effect, be obliged to ensure that the product is defect free for its entire life [*Daugherty v. American Honda Motor Co. (2006) 144 Cal. App. 4th 824, 830-831, 51 Cal. Rptr. 3d 118]* .

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§ 502.24 Implied Warranties

[1] Origin in Law

The implied warranty, unlike the basically contractual express warranty, arises by operation of law. The defendant's liability therefor does not depend on his or her specific conduct or promises. It turns instead on whether defendant's product is merchantable or fit as required under the Commercial Code [*Hauter v. Zogarts (1975) 14 Cal. 3d 104, 117, 120 Cal. Rptr. 681, 534 P.2d 377]* .

[2] Merchantability

A warranty that the goods are merchantable is implied in a contract for their sale if (1) the seller is a merchant of goods of that kind, and (2) the warranty has not otherwise been excluded or modified. The serving for value of food or drink to the consumer, either on the premises or elsewhere, is a sale for warranty purposes. To be merchantable, goods must do at least all of the following [*Com. Code § 2314(1), (2)*]:

- Pass without objection in the trade under the contract description.

- Be of fair average quality within the description, if fungible goods [*see* U.C.C. Comment to *Com. Code § 2314*].

- Be fit for the ordinary purposes for which such goods are used [*Burr v. Sherwin Williams Co. (1954) 42 Cal. 2d 682, 694, 268 P.2d 1041* (if goods contain impurity of such nature as to render them unusable, and therefore unsalable, for general uses and purposes of goods of that kind, those goods are not merchantable); *see, e.g.,* *Garlock Sealing Techs., LLC v. NAK Sealing Techs. Corp. (2007) 148 Cal. App. 4th 937, 953-954, 56 Cal. Rptr. 3d 177* (substantial evidence supported trial court's conclusion that seller breached implied warranty of merchantability because goods contained impurity)].

- Run of even kind, quality, and quantity (within the variations permitted by the agreement) within each unit and among all units involved.

- Be adequately contained, packaged, and labeled as the agreement may require.
- Conform to the promises or affirmations of fact made on the container or label, if any.

[3] Merchant Defined

A person making an isolated sale of goods is not a "merchant" within the meaning of the full scope of the implied warranty of merchantability provision. Thus, no warranty of merchantability applies. In keeping with the underlying reason for the implied warranty and the provision on good faith, a person who is not a merchant but who knows of defects that were not apparent on inspection fully must disclose any known material but hidden defects, even in the absence of an express agreement. If a seller states generally that the goods are "guaranteed," the implied warranty provisions may furnish a guide to the content of the resulting express warranty. This consequence has particular significance in the case of secondhand sales, and has further significance in limiting the effect of fine print disclaimer clauses if their effect would be inconsistent with large print assertions of guarantee [U.C.C. Comments 3, 4 to *Com. Code § 2314*].

[4] Fitness for Particular Purpose

A sale carries an implied warranty that the goods will be fit for a particular purpose if the seller at the time of contracting has reason to know any particular purpose for which the goods are required and the buyer is relying on the seller's skill or judgment to select or furnish suitable goods. This warranty may be excluded or modified [*Com. Code § 2315*; *see Keith v. Buchanan (1985) 173 Cal. App. 3d 13, 25-26, 220 Cal. Rptr. 392* (no implied warranty because buyer made own selection rather than relying on seller's skill or judgment to select or furnish suitable goods)].

A "particular" purpose differs from an "ordinary" one in that it envisages a specific use by the buyer which is peculiar to the nature of his or her needs. The ordinary purposes of the uses of goods are those encompassed by the concept of merchantability and serve uses that are customarily made of the goods. The ordinary purpose of shoes is walking on ordinary surfaces, but the seller may know that a particular pair is being selected for use in mountain climbing [U.C.C. Comment 2 to *Com. Code § 2315*].

It is basically a question of fact as to whether the warranty of special fitness arises in any individual case. The seller need not have actual knowledge of the particular purpose or of the buyer's reliance if the circumstances are such that the seller should realize either of these. The buyer's reliance must be actual. For example, a buyer who insists on a particular brand or trade name is not relying on the seller's skill and judgment and there is no warranty of particular fitness. However, the mere fact that the article purchased has a special patent or trade name is not sufficient to indicate nonreliance [U.C.C. Comments 1, 5 to *Com. Code § 2315*].

[5] When "Fitness" Controls Over Other Warranties

Any question of fact as to which warranty was intended by the parties to apply is resolved in favor of the warranty of fitness for a particular purpose as against all other warranties. If, however, the purpose for which the goods are to be used combines the buyer's requirements as to quality of the goods as well as compliance with certain laws or regulations, the provisions of Division 2 of the Commercial Code [*see Com. Code §§ 2509, 2510*] on allocation or division of risks may apply. Division of the risks may be handled by express agreement or by surrounding circumstances or matters of custom [*see* U.C.C. Comments 2, 3 to *Com. Code § 2315*; *see also* discussion in *§ 502.27*].

[6] Other Implied Warranties

Implied warranties, other than merchantability, may arise from course of dealing or usage of trade unless excluded or modified [*Com. Code § 2314(3)*; *see Com. Code § 1303(b), (c)* ("course of dealing" and "usage of trade" defined)], such

as in the sale of an animal in which the seller must deliver certification of the animal's pedigree or blooded character [U.C.C. Comment 12 to *Com. Code § 2314*].

[7] Requirement of Privity

Privity between the plaintiff and defendant is a requirement for actions based on the implied warranty of merchantability or the implied warranty of fitness [*Burr v. Sherwin Williams Co. (1954) 42 Cal. 2d 682, 695-696, 268 P.2d 1041* ; *All-West Electronics, Inc. v. M-B-W, Inc. (1998) 64 Cal. App. 4th 717, 725-727, 75 Cal. Rptr. 2d 509* ; *U.S. Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal. App. 3d 1431, 1441, 279 Cal. Rptr. 533* ; *Osborne v. Subaru of America, Inc. (1988) 198 Cal. App. 3d 646, 656, 243 Cal. Rptr. 815*]. A buyer and a seller stand in privity if they are in adjoining links of the distribution chain; therefore, a consumer who buys from a retailer is not in privity with the manufacturer, for example [*Osborne v. Subaru of America, Inc. (1988) 198 Cal. App. 3d 646, 656 n.6, 243 Cal. Rptr. 815*]. The Ninth Circuit has noted that the privity requirement may be an archaism in the modern consumer marketplace [*Clemens v. Daimlerchrysler Corp. (9th Cir. 2008) 530 F.3d 852, 858*].

Some exceptions to the normal privity rule have been developed. One can arise when the plaintiff relies on written labels or advertisements of the manufacturer [*see Burr v. Sherwin Williams Co. (1954) 42 Cal. 2d 682, 696, 268 P.2d 1041*]. Other exceptions can arise in special cases involving foodstuffs, pesticides, and pharmaceuticals, or where the plaintiff is an employee of the buyer [*see Burr v. Sherwin Williams Co. (1954) 42 Cal. 2d 682, 695, 268 P.2d 1041* ; *Windham at Carmel Mountain Ranch Assn. v. Superior Court (2003) 109 Cal. App. 4th 1162, 1169, 135 Cal. Rptr. 2d 834* ; *Fieldstone Co. v. Briggs Plumbing Prods. (1997) 54 Cal. App. 4th 357, 369, 62 Cal. Rptr. 2d 701* ; *Gottsdanker v. Cutter Labs. (1960) 182 Cal. App. 2d 602, 608, 6 Cal. Rptr. 320]* . An exception also may exist when the plaintiff is a member of the buyer's family [*Rodrigues v. Campbell Industries (1978) 87 Cal. App. 3d 494, 500, 151 Cal. Rptr. 90* ; *see Hauter v. Zogarts (1975) 14 Cal. 3d 104, 114 n.8, 120 Cal. Rptr. 681, 534 P.2d 377]* .

If the manufacturer or supplier of goods affirmatively engages in conduct directly with the ultimate buyer, so that functionally the manufacturer or supplier is in the position of the direct seller, then it is fair and appropriate to hold that manufacturer or supplier to an implied warranty that the goods will be fit for the buyer's purposes, if all other elements of the buyer's claim have been established [*Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116, 144, 87 Cal. Rptr. 3d 5* ; *see, e.g., U.S. Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal. App. 3d 1431, 1441-1442, 1445, 279 Cal. Rptr. 533* (roofing contractor negotiated with equipment supplier for specific item at agreed price; unrelated finance lessor then bought that item from supplier and leased it to contractor, because lease was financially advantageous for contractor; court held that implied warranty of fitness ran from supplier to contractor, in spite of lack of actual privity between them, because of their direct dealings; participation of finance lessor as accommodation party was disregarded)].

[8] Exclusion Generally

All implied warranties are excluded by expressions such as "as is," "with all faults," or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. However, the exclusion does not operate if the circumstances indicate otherwise [*Com. Code § 2316(3)(a)*].

When the buyer, before entering into the contract, has examined the goods, or the sample or model, as fully as he or she desired, or has refused to examine them, there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed [*Com. Code § 2316(3)(b)*; *see, e.g., Garlock Sealing Techs., LLC v. NAK Sealing Techs. Corp. (2007) 148 Cal. App. 4th 937, 953-954, 56 Cal. Rptr. 3d 177* (substantial evidence supported trial court's finding that abrasiveness of oil seal lips was not defect that buyer ought to have discovered)]. Examination by the buyer is not synonymous with inspection before acceptance or at any other time after the contract has been made. Rather, examination signifies the nature of the responsibility assumed by the seller at the time of making the contract. Thus, if the buyer discovers the defect and uses the goods anyway, or if such person unreasonably fails to examine the

goods before using them, any injuries that occur may be found to result from the buyer's own action rather than proximately from a breach of warranty [UCC Comment 8 to *Com. Code § 2316*]. A buyer is deemed to have refused to examine goods only if the seller demands that the buyer examine the goods fully, thereby putting the buyer on notice that he or she assumes the risk of defects which the examination ought to reveal [UCC Comment 8 to *Com. Code § 2316*].

The particular buyer's skill and the normal method of examining goods under the circumstances determine which defects are excluded by the examination. A failure to notice defects that are obvious cannot excuse the buyer. However, an examination under circumstances that do not permit chemical or other testing of the goods would not exclude defects which could be ascertained only by that testing. Latent defects are not excluded by a simple examination. A professional buyer examining a product in his or her field of expertise is held to have assumed the risk as to all defects that a professional ought to observe. A nonprofessional buyer is held only to the standard of what a layperson might have found to be defects [UCC Comment 8 to *Com. Code § 2316*].

If the offer of examination by the seller is accompanied by words concerning the merchantability of specific attributes of the goods, and the buyer clearly indicates reliance on those words rather than on the examination, the words give rise to an "express" warranty. The question then is whether or not a warranty of merchantability has been expressly incorporated in the agreement [UCC Comment 8 to *Com. Code § 2316*].

An implied warranty also can be excluded or modified by course of dealing or course of performance or by usage of trade. These rules take precedence over the special provisions for exclusion of the individual types of implied warranties [*Com. Code § 2316(3)(c)*].

[9] Exclusion or Modification of Warranty of Merchantability

To exclude or modify the implied warranty of merchantability, or any part thereof (apart from the general rules for altering implied warranties) [*see § 502.24[8]*], the language must mention merchantability. In the case of a writing, that language must be conspicuous [*Com. Code § 2316(2)*]. Thus, for example, a contract for the sale of secondhand goods involves only the obligation that is appropriate to secondhand goods, because that is their contract description [U.C.C. Comment 3 to *Com. Code § 2314*]. However, even if the word "merchantability" is not used, a seller apparently may limit the scope of the implied warranty by specifying that the product should b e used with caution or in a certain prescribed manner. For example, there was no breach of the implied warranty of merchantability when a customer developed a skin irritation after the application of a product which advertised itself as appropriate for use on the skin but cautioned that certain skin might be sensitive to the product and that sample testing should be tried and its use discontinued if any irritation developed [*see Harris v. Belton (1968) 258 Cal. App. 2d 595, 605-607, 65 Cal. Rptr. 808]* .

If the buyer gives precise and complete specifications to the seller, the warranty of merchantability must be considered in connection with the provisions governing the cumulation and conflict of warranties and would be expected to be displaced by the express warranty that the goods will comply with the specifications [UCC Comment 9 to *Com. Code § 2316*; *see § 502.27*].

[10] Exclusion of Warranty of Fitness

Other than as discussed in analysis of general exclusions [*see § 502.24[8]*], an implied warranty of fitness may be excluded only by a writing in a conspicuous fashion. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "there are no warranties which extend beyond the description on the face hereof" [*Com. Code § 2316(2)*].

The warranty of fitness for a particular purpose normally would not arise in a situation in which the buyer gives precise

and complete specifications to the seller, because the buyer in that case is not usually relying on the seller [UCC Comment 9 to *Com. Code § 2316*].

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§ 502.25 Warranties Affecting Delivery

Any warranty of quality or condition of goods on their arrival on shipment places on the seller the risk of ordinary deterioration, shrinkage, and the like in transportation. It has no effect, however, on the place or time of identification to the contract for sale or delivery or on the passing of the risk of loss [*Com. Code § 2321(2)*; *see Ch. 500, Sales: Sales Under the Commercial Code, § 500.75[3]*].

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44-502 California Forms of Pleading and Practice--Annotated § 502.26

§ 502.26 Restrictions on Disclaimers

No warranty, express or implied, can be modified or disclaimed, according to the purpose of *Com. Code § 2316*, unless a seller clearly limits his or her liability. At the very least, the statute allows limitation on warranties only through words that clearly communicate that a particular risk falls on the buyer. Furthermore, any disclaimer or modification must be strictly construed against the seller. The purchaser must be placed on fair notice of any disclaimer or modification of a warranty and must freely agree to the seller's terms [*Hauter v. Zogarts (1975) 14 Cal. 3d 104, 119-120, 120 Cal. Rptr. 681, 534 P.2d 377]* . The disclaimer should be in clear and distinct language prominently set forth in large, bold print in such a position as to compel notice [*Dorman v. International Harvester Co. (1975) 46 Cal. App. 3d 11, 18-19, 120 Cal. Rptr. 516* (disclaimer provision was unenforceable which only slightly contrasted with rest of contract, failed to have a heading, was not accompanied by the express warranty provided by the seller, and emphasized words which implied that the excluded, implied warranties might actually be available)].

If a contract has been completed containing a warranty, a unilateral nonwarranty cannot thereafter be given [*Hauter v. Zogarts (1975) 14 Cal. 3d 104, 119-120, 120 Cal. Rptr. 681, 534 P.2d 377* ; *see* *Dorman v. International Harvester Co. (1975) 46 Cal. App. 3d 11, 19-20, 120 Cal. Rptr. 516* (disclaimer of consequential damages, not specifically bargained for, given to buyer after signing contract as not binding)].

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§ 502.27 Rules for Determining Compatibility Among Warranties

Warranties, whether express or implied, are construed as consistent with each other and as cumulative. However, if this construction is unreasonable, the parties' intention determines which warranty is dominant. Certain rules are applicable in ascertaining that intention [*Com. Code § 2317*]:

- Exact or technical specifications displace an inconsistent sample or model or general language of description.

- A sample from an existing bulk displaces inconsistent general language of description.

- Express warranties displace inconsistent implied warranties other than an implied warranty of fitness for a particular purpose [*see Garlock Sealing Techs., LLC v. NAK Sealing Techs. Corp. (2007) 148 Cal. App. 4th 937, 950 n.7, 56 Cal. Rptr. 3d 177* (when buyer specifies standard component with no knowledge of its ingredients and no reason to know of any potential flaws in those ingredients, its specification of standard component is not inconsistent with implied warranty of merchantability by seller of that component)].

The foregoing rules are not absolute and may be changed by evidence showing that the conditions which existed during the contractual period make those rules of construction inconsistent or unreasonable. For example, a seller who has led the buyer to believe that all warranties can be performed is estopped from setting up any essential inconsistency as a defense [UCC Comments 2, 3 to *Com. Code § 2317*; *see § 502.24[5]*].

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44-502 California Forms of Pleading and Practice--Annotated § 502.28

§ 502.28 Commercial Code Action for Breach of Warranty

[1] Elements

In an action for breach of warranty it is necessary to show not only the existence of the warranty but the fact that it was broken and that its breach was the proximate cause of the loss sustained. An affirmative showing by the seller that the loss resulted from some action or event following the seller's delivery of the goods can operate as a defense. Evidence indicating that the seller exercised care in the manufacture, processing, or selection of the goods is relevant to the issue of whether or not the warranty was in fact broken. Action by the buyer following an examination of the goods which ought to have indicated the defect complained of can be shown as a matter bearing on whether or not the breach itself was the cause of the injury [UCC Comment 13 to *Com. Code § 2314*].

To establish causation on a warranty claim, the evidence need only afford a reasonable basis for the conclusion that it is more likely than not that the defect caused the harm [*Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116, 146, 87 Cal. Rptr. 3d 5]* .

[2] Damages

The measure of damages for breach of warranty is the difference, at the time and place of acceptance, between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount [*Com. Code § 2714(2)*]. This measure is not exclusive. If the nonconformity of the goods would have justified revocation of acceptance, the time and place of acceptance is determined as of the buyer's decision not to revoke [UCC Comment 3 to *Com. Code § 2714*].

Consequential damages resulting from the seller's breach include injury to person or property proximately resulting from any breach of warranty [*Com. Code § 2715(2)(b)*]. If the injury involved follows the use of goods without discovery of the defect causing the damage, liability arises only if it was reasonable for the buyer to use the goods without an inspection which would have revealed the defects [UCC Comment 5 to *Com. Code § 2715*].

Remedies for breach of warranty can be limited in accordance with the provisions of Division 2 of the Commercial

Code on liquidation or limitation of damages, and on contractual modification of remedy [*Com. Code § 2316(4)*; *see Com. Code §§ 2718, 2719*; *see also Ch. 500, Sales: Sales Under the Commercial Code, § 500.72*].

[3] Recovery for Personal Injuries or Property Damage

A plaintiff who is seeking damages for personal injuries or injuries to property based on a defective product has the possible, alternative remedies of a cause of action for breach of warranty and one for strict liability in tort. However, the doctrine of strict products liability has virtually displaced the law of warranty. Proof of a contractual relationship or of particular representations, such as those found in an accompanying brochure or made by the seller to the buyer or based on the product's appearance of excellence is not required [*Hauter v. Zogarts (1975) 14 Cal. 3d 104, 114-115, 117-118, 120-121, 120 Cal. Rptr. 681, 534 P.2d 377]* . Thus, with the introduction of the doctrine of strict liability in tort for injuries resulting from defective products in the Supreme Court case of *Greenman v. Yuba Power Products, Inc. (1963) 59 Cal. 2d 57, 63, 27 Cal. Rptr. 697, 377 P.2d 897* , warranty law was relegated to governing the consensual economic relationship between the parties while strict liability governs both personal injury and physical injury to property based on duties imposed by law [*see* *Seely v. White Motor Co. (1965) 63 Cal. 2d 9, 15-16, 18-19, 45 Cal. Rptr. 17, 403 P.2d 145* ; *see generally* Ch. 460, *Products Liability*].

[4] Notification of Breach of Warranty

[a] In General

The Commercial Code requires generally that if a tender has been accepted, the buyer must, within a reasonable time after he or she discovers or should have discovered any breach, notify the seller of the breach or be barred from any remedy [*Com. Code § 2607(3)(A)*]. Prior to bringing an action for breach of warranty under a sale of goods, notification of the breach of warranty must be given.

The time of notification is to be determined by applying commercial standards to a merchant buyer. A reasonable time for notification from a retail consumer is to be judged by different standards, and may be extended. The rule of requiring notification is designed to defeat commercial bad faith, not to deprive a good-faith consumer of a remedy. The content of the notification of breach of warranty need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There appears to be no reason to require that the notification saving the buyer's rights must include a clear statement of all the objections that will be relied on by the buyer; nor should it be a claim for damages or of any threatened litigation or other resort to remedy. It must merely inform the seller that the transaction is claimed to involve a breach, thus opening the way for normal settlement through negotiation [UCC Comment 4 to *Com. Code § 2607*].

The buyer has the burden of proving reasonable notice. The question whether notice was properly given must be determined from the particular circumstances, and when but one inference can be drawn from undisputed facts, the issue may be determined as a matter of law [*Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116, 135-136, 87 Cal. Rptr. 3d 5]* .

[b] Notification of Breach of Warranty of Infringement

If, after tender of the goods has been accepted, the buyer develops a claim of breach of warranty against infringement or the like through being sued by a third party as a result of the breach, the buyer must notify the seller of that suit within a reasonable time after receiving notice of the litigation. Otherwise, the buyer is barred from any remedy over for liability established thereby [*Com. Code § 2607(3)(B)*]. The seller then has the right to demand in writing that the buyer turn over control of the litigation, including settlement, or else be barred from any remedy. If the seller also agrees to bear all expenses and to satisfy adverse judgment, the buyer is barred unless he or she turns over control after seasonable receipt of the demand [*Com. Code § 2607(5)(B)*; *see also § 502.28[5]*].

These provisions also apply if a buyer has supplied the seller with specifications for the goods being sold. The seller who then has furnished the goods in compliance with those specifications, and who is thereby entitled to be held harmless by the buyer in the event of any infringement, must give the buyer the same kind of notices as above. The buyer has the same right to demand control of the defense in any infringement suit [*Com. Code § 2607(6)*].

[5] "Vouching in" Seller by Buyer

If the buyer is sued for breach of a warranty for which the buyer's seller is answerable over, the buyer may give the seller written notice of the litigation. The notice may state that the seller may come in and defend and that, if the seller does not do so, the seller will be bound in any action brought against the seller by the buyer by any determination of fact common to the two litigations. Then, unless the seller after seasonable receipt of the notice does come in and defend, the seller is so bound [*Com. Code § 2607(5)(A)*; for further discussion of "vouching in," *see Ch. 500, Sales: Sales Under the Commercial Code, § 500.60[2][b]*].

[6] Statute of Limitations

[a] Parties May Reduce Four-Year Period to One Year

An action for breach of any contract for sale governed by Division 2 of the Commercial Code must be commenced within four years after the cause of action has accrued, although by their original agreement the parties may reduce the period to as little as one year [*Com. Code § 2725(1)*; *see Therma-Coustics Manufacturing, Inc. v. Borden, Inc. (1985) 167 Cal. App. 3d 282, 296, 213 Cal. Rptr. 611* (upholding one-year limitation under *Com. Code § 2207*)]. A breach of warranty occurs when tender of delivery is made; however, when a warranty explicitly extends to future performance of the goods, and discovery of the breach must await the time of that performance, the cause of action accrues when the breach is, or should have been, discovered [*Com. Code § 2725(2)*; *see Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 215-219, 285 Cal. Rptr. 717* (cause of action for breach of express warranty under Song-Beverly Act)]. Generalized assertions in advertisements and literature, however, do not rise to the level of a warranty explicitly extending to "future performance" [*Carrau v. Marvin Lumber and Cedar Co. (2001) 93 Cal. App. 4th 281, 290-292, 112 Cal. Rptr. 2d 869* (plaintiff who failed to file suit within four years of delivery of allegedly defective windows did not meet exception to limitation period based on generalized assertions made in seller's advertisements)]. Furthermore, a seller's promise expressed merely in terms of a product's durability (such as that the product will work for "50,000 cycles") does not fall within the future performance exception because it does not specify a date or time in the future, nor does it pertain to a time period that can be determined by reference to an external source, and the buyer would not necessarily have to wait for the durability promise to fail before having opportunities to discover defects [*Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116, 131-133, 87 Cal. Rptr. 3d 5* (additionally in this case, both parties were large and sophisticated companies and could have drafted their agreement to explicitly state duration of warranty so as to ensure that limitation period would extend beyond four years, if that had been their intent)].

The future performance exception in *Com. Code § 2725(2)* cannot apply with respect to an implied warranty. Because an implied warranty is one that arises by operation of law rather than by an express agreement of the parties, it is not a warranty that "explicitly" extends to future performance of the goods, as that code section requires [*Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116, 134, 87 Cal. Rptr. 3d 5]* .

The limitation period of *Com. Code § 2725* applies only when a contract of sale exists between a disgruntled buyer and the one he or she seeks to hold liable. It does not apply to actions brought by the buyer against the manufacturer of the unsatisfactory product [*Fundin v. Chicago Pneumatic Tool Co. (1984) 152 Cal. App. 3d 951, 960, 199 Cal. Rptr. 789]* .

[b] Tolling for Repairs

The statute of limitations adopted for sales contracts and breaches of warranty does not alter the law on the tolling of the statute [*Com. Code § 2725(4)*]. Whenever one who has breached a warranty claims that the defect can be repaired, then the limitation period is tolled while he or she attempts to make repairs [*Aced v. Hobbs-Sesack Plumbing Co. (1961) 55 Cal. 2d 573, 585, 12 Cal. Rptr. 257, 360 P.2d 897* ; *see Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 218-219, 285 Cal. Rptr. 717* (accrual after last of several repair attempts)].

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[Reserved]

§§ 502.29[Reserved]

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44-502 California Forms of Pleading and Practice--Annotated § 502.40

§ 502.40 Song-Beverly Act Definitions

[1] Buyer

The "buyer" or "retail buyer" is an individual who buys consumer goods from a person engaged in the business of manufacturing, distributing, or selling consumer goods at retail. This person may be an individual, partnership, corporation, limited liability company, association, or other legal entity which engages in any of these businesses [*Civ. Code § 1791(b)*].

[2] Consumer Goods; Exclusions

"Consumer goods" means any new product or part of a product that is used or bought or leased for use primarily for personal, family, or household purposes. The term includes new and used "assistive devices," but does not include "clothing" or "consumables" [*Civ. Code § 1791(a)*; *see Atkinson v. Elk Corporation (2003) 109 Cal. App. 4th 739, 757, 135 Cal. Rptr. 2d 433* (analyzing statutory definition of "consumer goods" under *Civ. Code § 1794(a)* and holding that roof shingles are not consumer goods under the Act)].

An "assistive device" is any instrument, apparatus, or contrivance (including any component, part, or accessory) used or intended to be used to assist an individual with a disability in the mitigation or treatment of an injury or disease, or to assist, affect, or replace the structure or any function of that person's body [*Civ. Code § 1791(p)*]. An "assistive device" does not, however, include prescriptive lenses and other ophthalmic goods unless they are sold or dispensed to a blind person, as defined in *Welf. & Inst. Code § 19153*, and unless they are intended to assist the limited vision of the person so disabled [*Civ. Code § 1791(p)*].

"Clothing" consists of any wearing apparel, worn for any purpose. It includes under and outer garments, shoes, and accessories composed primarily of woven material, natural or synthetic yarn, fiber, leather, or similar fabric [*Civ. Code § 1791(c)*]. "Consumables" refers to any product intended for consumption by individuals or use by individuals for purposes of personal care or in the performance of services ordinarily rendered within the household and which usually is consumed or expended in the course of that consumption or use [*Civ. Code § 1791(d)*].

The Song-Beverly Act applies to any equipment or mechanical, electrical, or thermal component of a system designed to heat, cool, or otherwise condition air. However, it is inapplicable to the system as a whole if the latter becomes a fixed part of a structure [*Civ. Code § 1795.1*].

[3] Leasing

"Lease" means any contract for the lease, or for the bailment for use, of consumer goods by an individual, for a term exceeding four months, primarily for personal, family, or household purposes, whether or not it is agreed that the lessee bears the risk of the consumer goods' depreciation [*Civ. Code § 1791(g)*]. "Lessee" means an individual who leases consumer goods under a lease [*Civ. Code § 1791(h)*]. "Lessor"means a person who regularly leases consumer goods under a lease [*Civ. Code § 1791(i)*].

[4] Mercantile Parties

The chain of mercantile participants under consumer warranty legislation may consist of the following individuals, partnerships, corporations, associations, or other legal entities:

- The "manufacturer" manufactures, assembles, or produces consumer goods [*Civ. Code § 1791(j)*].

- The "distributor" stands between the manufacturer and the retail seller in purchases, consignments, or contracts for sale of consumer goods [*Civ. Code § 1791(e)*].

- The "retail seller," also known as the "seller" or the "retailer," engages in the business of selling consumer goods to retail buyers [*Civ. Code § 1791(l)*].

[5] Sales

A "sale" means either of the following [*Civ. Code § 1791(n)*]:

- The passing of title from the seller to the buyer for a price.

- A consignment for sale.

A "catalog or similar sale" is one in which neither the seller nor any employee or agent of the seller, nor anyone related to any such person, nor anyone with a financial interest in the sale, participates in the diagnosis of the buyer's condition or in the selection or fitting of the device [*Civ. Code § 1791(q)*]. The "place of business," for the purposes of any retail seller that sells consumer goods by catalog or mail order, is the distribution point for those goods [*Civ. Code § 1791(k)*]. A "return to the retail seller" in that context refers to that place of business [*Civ. Code § 1791(m)*].

[6] Service Factors

A "service contract" is a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance, replacement, or repair of a consumer product, except that the term does not include a policy of automobile insurance as defined in *Ins. Code § 116* [*Civ. Code § 1791(o)*].

An "independent repair or service facility" or "independent service dealer" is an individual or legal entity that engages in the business of servicing and repairing consumer goods. Neither phrase includes an employee or subsidiary of a manufacturer or distributor [*Civ. Code § 1791(f)*].

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§ 502.41 Effect on Other State Law

The provisions of the Song-Beverly Act (*Civ. Code § 1790 et seq.*) do not affect the rights and obligations of parties determined by reference to the Commercial Code [*see Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 212-215, 285 Cal. Rptr. 717* (adopting limitation of *Com. Code § 2725* for actions under Song-Beverly Act, which was intended to supplement existing remedies)]. However, if the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the Song-Beverly Act, the provisions of the latter prevail [*Civ. Code § 1790.3*].

The remedies provided by the Song-Beverly Act are cumulative and are not to be construed as restricting any remedy that is otherwise available. In particular, the act does not supplant the provisions of the Unfair Practices Act [*Bus. & Prof. Code § 17000 et seq.*], which is designed to assure competition among merchants by prohibiting unjustifiably low prices [*Civ. Code § 1790.4*; for discussion of unfair trade practices, *see* Ch. 565, *Unfair Competition*].

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§ 502.42 Express Warranty Generally

[1] Coverage

An "express warranty" is either of the following [*Civ. Code § 1791.2(a)(2)*]:

- A written statement arising out of a sale to the "consumer" of a consumer good, pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance (the act uses the word "consumer" here although the word is not defined in the act, the closest related technical term being "buyer" or "retail buyer" [*see § 502.40[1]*]).

- In the case of any sample or model, that the whole of the good conforms to this sample or model.

The act compares with the general law of sales in that the act's express warranty is confined to a single type of representation, that in which the appropriate utility or performance of the good is guaranteed [*Civ. Code § 1791.2(a)(1)*]. The act's definition does not support every kind of relevant promise, affirmation, or description [*cf. Com. Code § 2313(1)(a), (b)*; *see Keith v. Buchanan (1985) 173 Cal. App. 3d 13, 20-22, 220 Cal. Rptr. 392* (express warranties under *Com. Code § 2313* but none under *Civ. Code § 1791.2(a)(1)* because no undertaking by seller to preserve or maintain utility or performance)]. However, if a sample or model is used in selling, the act's definition applies to all representations made thereby [*Civ. Code § 1791.2(a)(2)*], as does that of the sales law [*Com. Code § 2313(1)(c)*]. The act is broader in protection than the sales law by not requiring that the express warranty be made the "basis of the bargain" between the parties [*cf. Com. Code § 2313(1)*] and by providing that the warranty may be made by the manufacturer or distributor and not just by the seller [*Civ. Code § 1791.2(a)*; *cf. Com. Code § 2313*].

[2] By Particular Words

It is not necessary to the creation of an express warranty that formal words such as "warrant" or "guarantee" be used. If those words are used, however, then an express warranty is created [*Civ. Code § 1791.2(b)*]. Thus, unlike the general sales law, which simply states that no formal words are required for warranty [*see Com. Code § 2313(2)*], the

Song-Beverly Act assures that those words will create an express warranty [*see Civ. Code § 1791.2(a)*].

[3] Puffery Excluded

A mere affirmation of the value of the consumer goods or a statement purporting to be a mere opinion or commendation of the goods does not create a warranty, nor do statements or representations such as expressions of general policy concerning customer satisfaction that are not subject to any limitation [*Civ. Code § 1791.2(b), (c)*]. In this respect the act conforms to the sales law but adds the category of policy of satisfaction [*see Com. Code § 2313(2)*].

[4] Requirements of Marketing Parties

Nothing in the Song-Beverly Act affects the right of the manufacturer, distributor, or retailer to make express warranties with respect to consumer goods, except for special provisions affecting the sale of assistive devices [*Civ. Code § 1793*; *see Civ. Code § 1793.02*]. Every marketing party making express warranties with respect to consumer goods must set forth fully the warranties in simple and readily understood language, must clearly identify the party making the warranties, and must conform to the federal standards for disclosure of warranty terms and conditions set forth in the federal Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (*15 U.S.C. § 2301 et seq.*), and in the regulations of the Federal Trade Commission adopted pursuant to the provisions of that act [*Civ. Code § 1793.1(a)(1)*; *see also § 502.60* et seq. (discussion of warranties under Magnuson-Moss Act)]. The act does not preclude a manufacturer making express warranties from suggesting methods of effecting service and repair, in accordance with the terms and conditions of these warranties, other than those the act requires [*Civ. Code § 1794.5*]. If express warranties are made by anyone other than the manufacturer of the goods, the obligation of that person becomes the same as that imposed on the manufacturer under the act [*Civ. Code § 1795*].

After 2003, if the manufacturer, distributor, or retailer provides a warranty or product registration card or form, or an electronic online warranty or product registration form, to be completed and returned by the consumer, the card or form must contain statements, each displayed in a clear and conspicuous manner, that inform the consumer that the card or form is for product registration and that failure to complete and return the card or form does not diminish his or her warranty rights [*Civ. Code § 1793.1(a)(1), (c)*; *but see Civ. Code § 1793.1(d)* (requirement not applicable to any warranty or product registration card or form that was printed before January 1, 2004, and was shipped or included with product that was placed in stream of commerce before January 1, 2004)].

No warranty or product registration card or form, nor any electronic online warranty or product registration form, may be labeled as a warranty registration or a warranty confirmation [*Civ. Code § 1793.1(b)*].

[5] Duty to Supply Appliance Parts

Every manufacturer making an express warranty with respect to an electronic or appliance product described in *Bus. & Prof. Code § 9801(h)-(k)* (listed below) with a wholesale price to the retailer of between $50.00 and $99.99 has to make available to service and repair facilities sufficient service literature and functional parts to effect repairs of the product for at least three years after the date a product model or type was manufactured, regardless of whether the three-year period exceeds the warranty period for the product [*Civ. Code § 1793.03(a)*]. Similarly, every manufacturer making an express warranty with respect to a product described in *Bus. & Prof. Code § 9801(h)-(k)* with a wholesale price to the retailer of $100.00 or more has to make available to service and repair facilities sufficient service literature and functional parts to effect repairs of the product for at least seven years after the date a product model or type was manufactured, regardless of whether the seven-year period exceeds the warranty period for the product [*Civ. Code § 1793.03(b)*].

The listed products are:

- Antennae [*Bus. & Prof. Code § 9801(j)*].
- Appliances and major home appliances [*Bus. & Prof. Code § 9801(i)*].
- Electronic sets [*Bus. & Prof. Code § 9801(h)*].
- Rotators [*Bus. & Prof. Code § 9801(k)*].

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44-502 California Forms of Pleading and Practice--Annotated § 502.43

§ 502.43 Manufacturer Must Provide Service and Repair Facilities in California

[1] In General

Every manufacturer of consumer goods sold in California, and for which it has made an express warranty, must maintain in California sufficient service and repair facilities, reasonably close to all areas where its consumer goods are sold, to carry out the terms of those warranties. Alternatively, it may designate and authorize in California as service and repair facilities independent repair or service facilities reasonably close to those areas for the same purposes. It may enter into warranty service contracts with these facilities at rates in conformity with the requirements of the act fixing liability amounts and limits [*see Civ. Code § 1793.3(c)*].

The warranty service contracts may not be executed to cover a period of time longer than one year, renewable only by a separate, new contract or letter of agreement. In the event of noncompliance with the obligation to assure service and repair facilities, the manufacturer is specially liable under the act [*see Civ. Code § 1793.5*] to retail sellers [*Civ. Code § 1793.2(a)*; *but see California State Electronics Assn. v. Zeos Int'l (1996) 41 Cal. App. 4th 1270, 1276-1277, 49 Cal. Rptr. 2d 127* (personal computers sold by Minnesota manufacturer by mail order to California residents were not "sold in this state" for purposes of Act's local repair facilities requirement)].

[2] Informing Buyer of Location of Service and Repair Facilities

The marketing party making express warranties who elects to maintain service and repair facilities in California under provisions of the act must select one of three prescribed methods of informing the buyer of the facilities. At the time of sale, the marketing party may provide the buyer with the name and address of each service and repair facility within California. Alternatively, at the time of sale, the marketing party may provide the buyer with the name, address, and telephone number of a service and repair facility central directory within the state, or the toll-free telephone number of a facility directory outside the state. In the latter instance, the central directory is to provide, on inquiry, the name and address of the authorized service and repair facility nearest the buyer. As a last choice, the marketing party may maintain at the premises of retail sellers of the warrantor's consumer goods a current listing of the warrantor's authorized service and repair facilities, or retail sellers to whom the consumer goods are to be returned for service and repair, whichever is applicable, within the state. In this last case, it is the duty of every retail seller provided with a listing to

provide, on inquiry, the name, address, and telephone number of the nearest authorized service and repair facility, or the retail seller to whom the consumer goods are to be returned for service and repair, whichever is applicable [*Civ. Code § 1793.1(e)*].

[3] Duty of Timely Service or Repair

When service and repair facilities are maintained in California and service or repair of the goods is necessary because they do not conform to the applicable express warranties, service and repair must be commenced within a reasonable time by the manufacturer or its representative in the state. The goods must be serviced or repaired to conform to the applicable warranties within 30 days unless the buyer agrees in writing to the contrary. Delay caused by conditions beyond the control of the manufacturer or its representatives serve to extend the time requirement, in which case conforming goods are to be tendered as soon as possible following termination of the delaying condition [*Civ. Code § 1793.2(b)*].

[4] Buyer's Obligation to Deliver Goods or Give Notification

The buyer has the duty to deliver nonconforming goods to the manufacturer's service and repair facility in California unless, because of size and weight, method of attachment or installation, or nature of the nonconformity, delivery cannot be reasonably accomplished. If the buyer is unable to effect return of the goods for these reasons, the party is to notify the manufacturer or its nearest service and repair facility within the state. Written notice of nonconformity to the manufacturer or the facility constitutes return of the goods. On receipt of the notice, the manufacturer may, at its option, service or repair the goods at the buyer's residence, pick up the goods for service and repair, or arrange for transporting them to its service and repair facility. All reasonable costs of transporting the goods in such an instance are at the manufacturer's expense, as are the costs after delivery of the goods to the service and repair facility until their return to the buyer [*Civ. Code § 1793.2(c)*].

The buyer's delivery requirement is satisfied when the manufacturer or its authorized repair facility voluntarily makes a service call to the consumer's residence and thereby obtains from the buyer a reasonable opportunity to repair the product [*Robertson v. Fleetwood Travel Trailers of Cal., Inc. (2006) 144 Cal. App. 4th 785, 809-810, 50 Cal. Rptr. 3d 731]* .

[5] Procedure on Failure of Service or Repair

[a] Other Than New Motor Vehicles

If the manufacturer or its representative in California is unable to service or repair the goods, other than new motor vehicles, to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer must either replace the goods or reimburse the buyer. Reimbursement is in an amount equal to the purchase price paid by the buyer, less an amount directly attributable to use by the buyer prior to the discovery of the nonconformity [*Civ. Code § 1793.2(d)(1)*]. For purposes of the reimbursement remedy under *Civ. Code § 1793.2(d)(1)*, the term "purchase price paid" includes finance charges incurred in conjunction with the purchase [*Robertson v. Fleetwood Travel Trailers of Cal., Inc. (2006) 144 Cal. App. 4th 785, 814, 50 Cal. Rptr. 3d 731]* .

Civ. Code § 1793.2(d)(1) does not appear to require the manufacturer to offer to reimburse the buyer within a specified time. In addition, when the buyer demands reimbursement or replacement after some not-unreasonable number of failed attempts to have the problem fixed, and the manufacturer responds that it has been unable to replicate the alleged problem and requests the consumer to submit the item to an authorized dealer to have a technical service manager inspect and repair it, that response does not amount to a refusal to comply with the Song-Beverly Act [*Dominguez v. American Suzuki Motor Corp. (2008) 160 Cal. App. 4th 53, 59-60, 72 Cal. Rptr. 3d 354*].

If the goods cannot practicably be serviced or repaired by the manufacturer or its representative to conform to the

applicable express warranties because of the method of installation or because the goods have become so affixed to real property as to become a part of the real property, the manufacturer must either replace and install the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, including installation costs, less the amount directly attributable to use by the buyer before the discovery of the nonconformity [*Civ. Code § 1793.2(e)(1)*]. However, with respect to claims arising out of deficiencies in the construction of a new residential dwelling, this requirement does not apply to either (1) a product that is not a manufactured product, as defined in *Civ. Code § 896(g)* (concerning standards for determining when post-2002 construction is defective) [*see Ch. 104, Building Contracts, § 104.40* et seq.], or (2) a claim against a person or entity that is not the manufacturer that originally made the express warranty for that manufactured product [*Civ. Code § 1793.2(e)(2)*].

Although *Civ. Code § 1793.2(d)(1)* does not provide a definition of the term "nonconformity," in light of the remedial nature of the statute the term is broad enough to encompass the entirety of a problem, such as a plumbing leak in a travel trailer and ensuing water damage. Accordingly, a jury could appropriately find that a manufacturer's merely repairing the proximate cause (the plumbing leak) did not cure the entirety of the nonconformity (if the resulting water damage still remained) [*Robertson v. Fleetwood Travel Trailers of Cal., Inc. (2006) 144 Cal. App. 4th 785, 801, 50 Cal. Rptr. 3d 731]* . In a related provision applicable to new motor vehicles, a "nonconformity" is defined broadly as "a nonconformity which substantially impairs the use, value, or safety of the new motor vehicle" [*Civ. Code § 1793.22(e)(1)*; *see Ch. 91, Automobiles: Actions Involving Defects and Repairs, § 91.12[2]*]. This definition generally is synonymous with what the average person would understand to be a defect [*Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 887, 263 Cal. Rptr. 64]* . In view of the latitude inherent in these provisions, there is no reason that a "nonconformity" may not include an entire complex of related conditions (such as a cracked pipe and resulting water damage) [*Robertson v. Fleetwood Travel Trailers of Cal., Inc. (2006) 144 Cal. App. 4th 785, 801, 50 Cal. Rptr. 3d 731]* .

[b] New Motor Vehicles

Special rules and presumptions apply to express warranties regarding new motor vehicles and to the manufacturer's inability to service or repair them to conform to the express warranties after a reasonable number of attempts [*see Civ. Code §§ 1793.2(d)(2), 1793.22, 1794(e)*; *see also Silvio v. Ford Motor Company (2003) 109 Cal. App. 4th 1205, 1207-1208, 135 Cal. Rptr. 2d 846* (because phrase "reasonable number of attempts" in *Civ. Code § 1793.2(d)(2)* is written in plural, statute does not require manufacturer to make restitution or replacement after only one opportunity to repair)]. These provisions are discussed Ch. 91, *Automobiles: Actions Involving Defects and Repairs* . Forms for complaints under the Song-Beverly Act [*see §§ 502.160, 502.161*] also may be used by a buyer of a new motor vehicle to seek restitution or replacement of the nonconforming vehicle.

Insofar as the Song-Beverly Act applies to new motor vehicles [*see Civ. Code §§ 1793.2(d)(2), 1793.22*], the Act is limited in application to vehicles that were bought in California [*Cummins, Inc. v. Superior Court (2005) 36 Cal. 4th 478, 483, 493, 30 Cal. Rptr. 3d 823, 115 P.3d 98* (Act did not apply to new vehicle that California resident had bought in Idaho and that could not be repaired after repeated attempts at manufacturer's authorized repair facility in California)].

In addition, any person in the business of selling used motor vehicles in California who knows or should know that a vehicle was required by law to be replaced or accepted for restitution due to the inability of the manufacturer to conform the vehicle to the applicable warranties pursuant to *Civ. Code § 1793.2(d)* or pursuant to warranties required by any other applicable law of California, any other state, or federal law must disclose that fact to the buyer in writing prior to the purchase [*Civ. Code § 1793.23(c)*; *see Veh. Code § 4453(b)(7)* (similar notice on vehicle registration card)]. For more discussion, Ch. 91, *Automobiles: Actions Involving Defects and Repairs* .

For purposes of *Civ. Code §§ 1793.2(d), 1793.22(e)(2),* and *1794(e),* "new motor vehicle" means a new motor vehicle that is bought or used primarily for personal, family, or household purposes. New motor vehicle includes the chassis,

chassis cab, and that portion of a motorhome devoted to its propulsion, but does not include any portion designed, used, or maintained primarily for human habitation. New motor vehicle includes a dealer-owned vehicle and a demonstrator or other motor vehicle sold with a manufacturer's new car warranty, but does not include a motorcycle or motor vehicle that is not registered under the Vehicle Code because it is to be operated or used exclusively off the highways. A "demonstrator" is a vehicle assigned by a dealer for the purpose of demonstrating the qualities and characteristics common to vehicles of the same or similar model and type [*Civ. Code § 1793.22(e)(2)*]. "New motor vehicle" also includes a new motor vehicle with a gross vehicle weight under 10,000 pounds that is bought or used primarily for business purposes by a person,including a partnership, limited liability company, corporation, association, or any other legal entity, to which not more than five motor vehicles are registered in California [*Civ. Code § 1793.22(e)(2)*], provided that at least one motor vehicle must be registered to that person in California [*Park City Services, Inc. v. Ford Motor Co. (2006) 144 Cal. App. 4th 295, 306-309, 50 Cal. Rptr. 3d 373]* .

[6] Buyer's Recourse If State Service and Repair Facilities Are Not Maintained

If the manufacturer of consumer goods sold in California, for which the manufacturer has made an express warranty, does not provide service and repair facilities within the state pursuant to the act, or does maintain the required facilities but fails to supply them with adequate replacement parts and service literature [*see Civ. Code § 1793.2*], the buyer of nonconforming goods may follow either of two courses of action. The buyer may return the goods to their retail seller, who then must do one of the following [*Civ. Code § 1793.3(a)*]:

- Service or repair them to conform to the applicable warranty;
- Direct the buyer to a reasonably close independent repair or service facility willing to accept service or repair as prescribed by the act;
- Replace the goods with those identical or reasonably equivalent to the warranted goods; or
- Refund to the buyer the original purchase price less an amount directly attributable to use by the buyer prior to discovery of the nonconformity.

The buyer instead may choose to return the goods to some other retail seller of like goods of the same manufacturer in the state who, if willing to accommodate the buyer, has the same options described above as the original retail seller [*Civ. Code § 1793.3(b)*].

If the retailer decides to handle the service and repair of the nonconforming goods presented by the buyer, that work must be commenced and tendered within 30 days unless otherwise agreed in writing, and may be delayed for the permissible period, in the same manner as when the manufacturer maintains service and repair facilities in the state [*see Civ. Code § 1793.2(b)*] and receives nonconforming goods [*Civ. Code § 1793.4*; *see also* [3], *above*]. If the retailer instead chooses to direct the buyer to a nearby cooperative repair or service facility, the manufacturer is liable for the reasonable cost of repair services in the same manner as when the buyer separately seeks out the facility as a follow-up remedy if a retailer offered no relief [*Civ. Code § 1793.3(c), (d)*].

If the buyer is unable to return nonconforming goods to the retailer because of size and weight, method of attachment or installation, or nature of the nonconformity, the buyer may give notice of nonconformity to the retailer. On receipt of the notice, the retailer has the same options available to the manufacturer in that situation when the latter maintains service and repair facilities in this state [*see Civ. Code § 1793.2(c)*; *see also* [4], *above*]. The retailer is likewise responsible for the reasonable costs of transporting the goods but is entitled to recover all such costs from the manufacturer under the statutory liability of the latter to the retailer for failing to maintain service or repair facilities [*see Civ. Code § 1793.5*]. If the retailer incurs costs of transporting the goods after their receipt and until their return to the buyer, the seller may recover the reasonable costs from the manufacturer on the same basis of liability. Written notice of

nonconformity to the retailer constitutes return of the goods with respect to the buyer's obligation of delivery [*Civ. Code § 1793.3(e)*].

[7] Manufacturer's Duty to Inform Buyer of Right to Recourse

The manufacturer of consumer goods with a wholesale price to the retailer of at least $50, for which the manufacturer has made express warranties, must provide written notice to the buyer of the course of action available to the buyer for nonconforming goods if the manufacturer does not maintain service or repair facilities in California [*Civ. Code § 1793.3(f)*].

[8] Liability of Manufacturer to Retailer

The manufacturer who makes express warranties but does not provide service and repair facilities in California under the act [*see Civ. Code § 1793.2*] is liable to every retail seller of the manufacturer's consumer goods who incurs obligations in giving effect to the warranties which accompany the goods. In the event of replacement, liability is in an amount equal to the actual cost to the retailer of the replaced goods and any cost of transporting them, plus a reasonable handling charge. If there has been service and repair, liability is an amount equal to that which would be received by the retailer for like service rendered to retail consumers who are not entitled to warranty protection, including actual and reasonable costs of the work and any cost of transporting the goods, plus a reasonable profit. If reimbursement was made [*see Civ. Code § 1793.3*], liability is an amount equal to the buyer's reimbursement plus a reasonable handling charge [*Civ. Code § 1793.5(c)*].

[9] Buyers' Recourse If Manufacturer or Retailer Fail to Remedy

If (and only if) the buyer has pursued any of the above courses and it has not provided appropriate relief, the buyer may secure the services of an independent repair or service facility for the service or repair of the nonconforming consumer goods, when the work can be economically accomplished. In that event, the manufacturer is liable to the buyer, or to the facility on an assignment of the buyer's rights, for the actual and reasonable cost of service and repair, including costs for parts and reasonable costs of transporting the goods or parts, plus a reasonable profit. The amount charged by the independent service dealer for like services or repairs rendered to service or repair customers not entitled to warranty protection is presumed to be the reasonable cost for the purposes of producing evidence, though that factor may be rebutted. Any waiver of the manufacturer's liability is void and unenforceable. This follow-up remedy is unavailable if the goods involved have a wholesale price to the retailer of under $50. In no event, however, is the buyer responsible or liable for service or repair costs charged by the independent facility. Only the latter party is authorized to hold the manufacturer liable for such costs [*Civ. Code § 1793.3(c)*].

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44-502 California Forms of Pleading and Practice--Annotated § 502.44

§ 502.44 Liability of Manufacturer to Service and Repair Facilities

If the manufacturer maintains service and repair facilities in California and has entered into a warranty service contract with an independent service and repair facility, that contract may list rates for warranty work [*see Civ. Code § 1793.2(a)*]. Otherwise, any manufacturer making express warranties whose consumer goods are sold in the state is liable, as prescribed by the act, to every independent service person who performs services or incurs obligations in giving effect to the warranties accompanying the manufacturer's goods. This applies whether or not the service person is acting as an authorized service and repair facility designated by the manufacturer or as an independent facility [*see Civ. Code § 1793.3(c), (d)*].

Liability is in an amount equal to the actual and reasonable costs of the service and repair, including any cost for parts and reasonable cost of transporting the goods, plus a reasonable profit. The reasonable cost of service or repair is presumed to be an amount equal to that charged by the independent service person for like services or repairs rendered to service or repair customers not entitled to warranty protection, a rebuttable presumption affecting the burden of producing evidence. Any waiver of the manufacturer's liability is void and unenforceable [*Civ. Code § 1793.6*].

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44-502 California Forms of Pleading and Practice--Annotated § 502.45

§ 502.45 Express Warranty's Compatibility With Service Contract

[1] In General

Nothing in the Song-Beverly Act prevents the sale of a service contract to the buyer in addition to or in lieu of an express warranty if that contract fully and conspicuously discloses, in simple and readily understood language, the terms, conditions, and exclusions of that contract [*Civ. Code § 1794.4(a)*], and if other legal requirements are met [*see Civ. Code § 1794.4(b)-(e)*; § 502.45[2]]. A retailer that sells such a service contract must, as long as the service contract is in effect, either (1) maintain contract information that includes a description of the terms and conditions of the service contract, and provide that information to the buyer of the service contract or other beneficiary on request, or (2) on request from the buyer of the service contract or other beneficiary, obtain a copy of the service contract, and provide that copy to the requester within 10 business days after receiving the request [*Civ. Code § 1794.45(a)*].

Civ. Code § 1794.4 does not apply, and therefore *Civ. Code § 1794.45* also does not apply [*see Civ. Code § 1794.45(a)*], to a home protection contract issued by a home protection company [*Civ. Code § 1794.4(a)*; *see Ins. Code § 12740 et seq.* (regulation of home protection contracts)]. Although a vehicle service contract [*see Ins. Code § 12800 et seq.* (regulation of vehicle service contracts)] must comply with *Civ. Code § 1794.4* [*Ins. Code § 12820(b)(3)(c)*], a retailer that sells such a vehicle service contract is not required to comply with *Civ. Code § 1794.45* [*Civ. Code § 1794.45(b)*].

Civ. Code § 1794.41 specially governs any service contract covering a motor vehicle, a home appliance, or a home electronic product, if it is bought for use in California. Such service contracts covering motor vehicles are discussed in *Ch. 91, Automobiles: Actions Involving Defects and Repairs, § 91.14*, and such service contracts covering home appliances or electronic products are discussed in *§ 502.45[2]*.

[2] Service Contracts for Home Appliances and Home Electric Products

[a] Definitions

As used in the Song-Beverly Consumer Warranty Act (*Civ. Code § 1790 et seq.*), "home appliance" means any

refrigerator, freezer, range, microwave oven, washer, dryer, dishwasher, garbage disposal, trash compactor, or room air conditioner, normally used or sold for personal, family, or household purposes [*Civ. Code § 1791(r)*].

"Home electronic product" means any television, radio, antenna rotator, audio or video recorder or playback equipment, video camera, video game, video monitor, computer equipment, telephone, telecommunications equipment, electronic alarm system, electronic appliance control system, or other kind of electronic product, if it is normally used or sold for personal, family, or household purposes. The term includes any electronic accessory that is normally used or sold with a home electronic product for one of those purposes. The term excludes any single product with a wholesale price to the retail seller of less than $50 [*Civ. Code § 1791(s)*].

[b] Provisions Required in Appliance Service Contracts

Except as otherwise expressly provided in the service contract, every service contract must obligate the service contractor to provide to the buyer of the product all of the services and functional parts that may be necessary to maintain proper operation of the entire product under normal operation and service for the duration of the service contract and without additional charge [*Civ. Code § 1794.4(b)*]. A service contract on a home appliance or home electronic product must contain all of the following items of information [*Civ. Code § 1794.4(c)*]:

- A clear description and identification of the covered product [*Civ. Code § 1794.4(c)(1)*].

- The point in time or event when the term of the service contract commences, and its duration measured by elapsed time or an objective measure of use [*Civ. Code § 1794.4(c)(2)*].

- If the enforceability of the service contract is limited to the original buyer or is limited to persons other than every consumer owner of the covered product during the term of the service contract, a description of the limits on transfer or assignment of the service contract [*Civ. Code § 1794.4(c)(3)*].

- A statement of the general obligation of the service contractor in the same language set forth in *Civ. Code § 1794.4(b)*, with equally clear and conspicuous statements of the following [*Civ. Code § 1794.4(c)(4)*]:

  - Any services, parts, characteristics, components, properties, defects, malfunctions, causes, conditions, repairs or remedies that are excluded from the scope of the service contract [*Civ. Code § 1794.4(c)(4)(A)*].

  - Any other limits on the application of the language in *Civ. Code § 1794.4(b)*, such as a limit on the total number of service calls [*Civ. Code § 1794.4(c)(4)(B)*].

  - Any additional services that the service contractor will provide [*Civ. Code § 1794.4(c)(4)(C)*].

  - Whether the obligation of the service contractor includes preventive maintenance and, if so, the nature and frequency of the preventive maintenance that the service contractor will provide [*Civ. Code § 1794.4(c)(4)(D)*].

  - Whether the buyer has an obligation to provide preventive maintenance or perform any other obligations and, if so, the nature and frequency of the preventive maintenance and of any other obligations, and the consequences of any noncompliance [*Civ. Code § 1794.4(c)(4)(E)*].

- A step-by-step explanation of the procedure that the buyer should follow in order to obtain performance of any obligation under the service contract including the following [*Civ. Code § 1794.4(c)(5)*]:

  - The full legal and business name of the service contractor [*Civ. Code § 1794.4(c)(5)(A)*].

  - The mailing address of the service contractor [*Civ. Code § 1794.4(c)(5)(B)*].

  - The persons or class of persons that are authorized to perform service [*Civ. Code § 1794.4(c)(5)(C)*].

  - The name or title and address of any agent, employee, or department of the service contractor that is responsible for the performance of any obligations [*Civ. Code § 1794.4(c)(5)(D)*].

  - The method of giving notice to the service contractor of the need for service [*Civ. Code § 1794.4(c)(5)(E)*].

  - Whether in-home service is provided and, if not, whether the costs of transporting the product, for service or repairs will be paid by the service contractor [*Civ. Code § 1794.4(c)(5)(F)*].

  - If the product must be transported to the service contractor, either the place where the product may be delivered for service or repairs or a toll-free telephone number that the buyer may call to obtain that information [*Civ. Code § 1794.4(c)(5)(G)*].

  - All other steps that the buyer must take to obtain service [*Civ. Code § 1794.4(c)(5)(H)*].

  - All fees, charges, and other costs that the buyer must pay to obtain service [*Civ. Code § 1794.4(c)(5)(I)*].

- An explanation of the steps that the service contractor will take to carry out its obligations under the service contract [*Civ. Code § 1794.4(c)(6)*].

- A description of any right to cancel the contract if the buyer returns the product or the product is sold, lost, stolen, or destroyed, or if there is no right to cancel or the right to cancel is limited, a statement of that fact [*Civ. Code § 1794.4(c)(7)*].

- Information respecting the availability of any informal dispute settlement process [*Civ. Code § 1794.4(c)(8)*].

[c] Disclosures Required Before Sale of Service Contract

A service contract covering any home appliance or home electronic product purchased for use in California may not be offered for sale or sold unless all of the following elements exist [*Civ. Code § 1794.41*]:

- The contract must contain the disclosures specified in *Civ. Code § 1794.4* and must disclose in the manner described in that section the buyer's cancellation and refund rights.

- The contract must be available for inspection by the buyer prior to purchase and either the contract, or a brochure that specifically describes the terms, conditions, and exclusions of the contract, and the provisions of this section relating to contract delivery, cancellation, and refund, must be delivered to the buyer at or before the time of purchase of the contract. Within 60 days after the date of purchase, the contract itself must be delivered to the buyer. If a service contract for a home appliance or a home electronic product is sold by means of a telephone solicitation, the seller may elect to satisfy the requirements of this paragraph by mailing or delivering the contract to the buyer not later than 30 days after the date of the sale of the contract.

- The contract is applicable only to items, costs, and time periods not covered by the express warranty. However, a service contract may run concurrently with or overlap an express warranty if the contract covers items or costs not covered by the express warranty or provides relief to the purchaser not available under the express warranty, such as an automatic replacement of a product when the express warranty provides for repair.

- The purchaser must be entitled to cancel the contract on the following conditions:

  - Unless the contract provides for a longer period, within the first 60 days after receipt of the contract, or within the first 30 days after receipt of a contract covering a home appliance or a home electronic product, the full amount paid must be refunded by the seller to the purchaser if the purchaser provides a written notice of cancellation to the person specified in the contract, and if no claims have been made against the contract. If a claim has been made against the contract within the first 60 days after receipt of the contract, or within the first 30 days after receipt of the contract with respect to a home appliance or home electronic product, a pro rata refund based on either elapsed time or an objective measure of use, such as the retail value of any service performed, at the seller's option as indicated in the contract, must be made by the seller to the purchaser if the purchaser provides a written notice of cancellation to the person specified in the contract.

  - Unless the contract provides for a longer period for obtaining a full refund, after the first 60 days after receipt of the contract, or after the first 30 days after receipt of a contract covering a home appliance or a home electronic product, a pro rata refund based on either elapsed time or an objective measure of use, such as the retail value of any service performed, at the seller's option as indicated in the contract, must be made by the seller to the purchaser if the purchaser provides a written notice of cancellation to the person specified in the contract. In addition, the seller may assess a cancellation or administrative fee, not to exceed 10 percent of the price of the service contract or $25, whichever is less.

  - If the purchase of the service contract was financed, the seller may make the refund payable to the purchaser, the assignee, or lender of record, or both.

Nothing in *Civ. Code § 1794.41* applies to a home protection plan that is issued by a home protection company that is subject to *Ins. Code § 12740 et seq.* [*Civ. Code § 1794.41(b)*].

If any provision of *Civ. Code § 1794.41* conflicts with any provision of *Ins. Code § 12800 et seq.* (concerning vehicle service contracts), the Insurance Code provision applies [*Civ. Code § 1794.41(d)*].

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§ 502.46 Express Warranties as to Clothing and Consumables

When the retail sale of clothing or consumables is accompanied by an express warranty but the items do not conform with the terms of that warranty, the buyer may return them within 30 days of purchase or any longer period specified in the warranty. The manufacturer, within the warranty, may direct the purchaser to return nonconforming goods to a retail seller of like goods of the same manufacturer for replacement. In the latter instance, the retailer must replace the goods. If the manufacturer has not so directed their replacement in this manner, the retailer may either replace the nonconforming goods or reimburse the buyer in an amount equal to the purchase price paid thereby for the goods. Costs of reimbursement or replacement may be recovered by the retailer from the manufacturer in the same manner as when a manufacturer not having service or repair facilities in California [*see Civ. Code § 1793.5*] is liable to the retailer [*Civ. Code § 1793.35(a), (b)*; *see also § 502.43[8]*].

Because the act's enforcement provisions apply only to "consumer goods," which are not defined to include clothing and consumables [*see § 502.40[2]*], there does not appear to be any particular remedy provided in the act for enforcing a breach of an express warranty relating to clothing or consumables. For further discussion, see *§ 502.53[1][f]*.

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44-502 California Forms of Pleading and Practice--Annotated § 502.47

§ 502.47 Express Warranties as to Used Goods

Although consumer goods are defined to mean "new" products or parts [*see Civ. Code § 1791(a)*], the obligation of a distributor or retail seller of used consumer goods is the same as that imposed on manufacturers in a sale in which an express warranty is given, with certain exceptions. The distributor or retailer making an express warranty on used consumer goods is obliged to maintain sufficient service and repair facilities within California to carry out the terms of the warranty [*Civ. Code § 1795.5(a)*]. The original manufacturer, as well as distributors and retail sellers who made express warranties with respect to the goods when new, are specifically exempted from this requirement [*Civ. Code § 1795.5(a)*]. Moreover, *Civ. Code § 1793.5*, which imposes liability on every manufacturer who makes express warranties and does not provide service and repair facilities in California, is inapplicable to the sale of used consumer goods in California [*Civ. Code § 1795.5(b)*]. However, the obligation of the distributor or retail seller who makes express warranties with respect to used goods sold in California extends to the sale of all used goods, regardless of when they may have been manufactured [*Civ. Code § 1795.5(d)*]. It has been held that a written service contract covering a used vehicle, under which the dealer "undertakes to preserve or maintain the utility or performance" of the vehicle, is an express warranty under *Civ. Code § 1795.5*, even though the consumer is required to pay additional consideration for the promised services [*Reveles v. Toyota By the Bay (1997) 57 Cal. App. 4th 1139, 1155-1158, 67 Cal. Rptr. 2d 543* (overruled on other grounds in *Snukal v. Flightways Manufacturing, Inc. (2000) 23 Cal. 4th 754, 3 P.3d 286*); *see* Ch. 91, *Automobiles: Actions Involving Defects and Repairs*].

The Song-Beverly Act does expressly state whether or not its provisions governing used consumer goods apply to clothing and consumables. However, these two categories are expressly excluded from the act's basic definition of "consumer goods" [*see Civ. Code § 1791(a), (c), (d)*; *see also § 502.40[2]*], and there is nothing to suggest an intention to expand that definition to classify these two categories as "consumer goods" when the goods in question are used rather than new [*see Civ. Code § 1795.5* (statutory obligations are the same with respect to new and used goods except as otherwise stated in that section)]. On the other hand, the separate statutory definitions of "clothing" [*see Civ. Code § 1791(c)*] and "consumables" [*see Civ. Code § 1791(d)*], unlike the definition of "consumer goods" [*see Civ. Code § 1791(a)*], are not expressly limited to new goods, and therefore the special statutory provisions governing the return and replacement of clothing and consumables [*see Civ. Code § 1793.35*; *see also § 502.46, above*] appear to apply to used as well as new items in these categories.

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44-502 California Forms of Pleading and Practice--Annotated § 502.48

§ 502.48 Express Warranties on Assistive Devices

[1] Coverage

The Song-Beverly Consumer Protection Act (*Civ. Code § 1790 et seq.*) defines "assistive device" as any instrument, apparatus, or contrivance, including any component, part, or accessory, that is used or intended to be used to assist an individual with a disability in the mitigation or treatment of an injury or disease or to assist or affect or replace the structure or any function of the body of a physically disabled person. The term "assistive device" does not include prescription lenses and other ophthalmic goods, unless they are sold or dispensed to a blind person, as defined in *Welf. & Inst. Code § 19153* and unless they are intended to assist the limited vision of the person so disabled [*Civ. Code § 1791(p)*].

All new and used assistive devices sold at retail in California must be accompanied by a specified form of retail seller's express warranty [*see Civ. Code § 1793.02(a), (b)*] that informs the buyer of his or her right to return the device if it does not specifically fit the buyer's needs [*see Civ. Code § 1793.02(a)*]. When the retail sale of an assistive device is made to an individual, organization, or agency known by the seller to be purchasing for the ultimate user of the device, the provisions governing express warranties of assistive devices are construed to require that the device be specifically fit for the particular needs of the ultimate user [*Civ. Code § 1793.02(d)*]. These provisions, however, do not apply to the following [*Civ. Code § 1793.02(e)*]:

- A catalog or similar sale as defined in *Civ. Code § 1791(q)*, except a sale of a hearing aid. A "catalog or similar sale" is a sale in which neither the seller, nor any employee or agent of the seller, nor any person related to the seller, nor any person with a financial interest in the sale, participates in the diagnosis of the buyer's condition or in the selection or fitting of the device.

- A sale that involves a retail sale price of less than $15.

- A surgical implant performed by a physician and surgeon, or a restoration or dental prosthesis provided by a dentist.

If the buyer does return the device within the period specified in *Civ. Code § 1793.02(a)*, the seller, without charge and within a reasonable time, must adjust the device or replace it, if appropriate, with a device that is specifically fit for the buyer's particular needs. Doing neither of these, the seller must instead promptly refund to the buyer the total amount paid, the transaction is deemed rescinded, and the seller is promptly to return to the buyer all payments and any assistive device or other consideration exchanged as part of the transaction. The seller then must also promptly cancel, or cause to be canceled, all contracts, instruments, and security agreements executed by the buyer in connection with the sale. On rescission, no charge, penalty, or other fee may be imposed in connection with the purchase, fitting, financing, or return of the device [*Civ. Code § 1793.02(c)*].

The express warranty of fitness on assistive devices does not impose on manufacturers the obligations imposed on service facilities [*see Civ. Code §§ 1793.2, 1793.3*] applicable to consumer goods [*see Civ. Code § 1793.02(h)*].

[2] Used Assistive Devices

The buyer of a used assistive device has the same rights and remedies as does the buyer of a new one. The provisions of the act as to obligations of sellers with respect to express warranties on used consumer goods [*see Civ. Code § 1795.5*] do not apply to sales of assistive devices [*Civ. Code § 1793.02(g)*].

[3] Remedy Is Cumulative and Not Waivable

The rights and remedies of buyers of new and used assistive devices are not subject to waiver under the act on the basis of "as is" or "with all faults" disclaimers. These rights and remedies are cumulative and are not construed to affect the obligations of the retail seller or any other party, or to supplant the rights and remedies under any other provision of the act or under any other law or instrument [*Civ. Code § 1793.02(f)*].

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§ 502.49 Express Warranties on Motorized Wheelchairs

All new and used wheelchairs, including but not limited to wheelchairs that are motorized or have been otherwise customized to suit the needs of the user, must be accompanied by the manufacturer's or lessor's written express warranty that the wheelchair is free of defects [*Civ. Code § 1793.025(a)*]. The warranty must be at least one year from the date of the first delivery of a new wheelchair to the consumer, or at least 60 days from the date of the first delivery of a used, refurbished, or reconditioned wheelchair to the consumer. If the written express warranty is not furnished to the consumer, the wheelchair nevertheless will be deemed to be covered by the express warranty [*Civ. Code § 1793.025(a)*]. These rules do not apply to wheelchairs manufactured specifically for athletic, competitive, or off-road use [*Civ. Code § 1793.025(a)*].

The provisions in *Civ. Code §§ 1790-1795.8* for express warranties govern the express warranty described above, whether or not those provisions only apply to the sale, and not the lease, of goods [*Civ. Code § 1793.025(b)*]. In addition, a manufacturer or lessor of a motorized wheelchair may not sell or lease a chair that has been returned by the consumer for failure to repair a nonconformity after a reasonable number of attempts unless the reasons for the return are fully disclosed to the prospective buyer or lessee [*Civ. Code § 1793.025(d)*].

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§ 502.50 Express Warranties on Housecars

Vehicle manufacturers who alter new vehicles into housecars must assume any warranty responsibility of the original vehicle manufacturer for any and all components of the finished product which are, by virtue of any act of the alterer, no longer covered by the warranty issued by the original vehicle manufacturer. This is in addition to any new product warranty offered by the alterer [*Civ. Code § 1793.05*].

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§ 502.51 Implied Warranties

[1] Warranty of Merchantability Is Required

An "implied warranty of merchantability," or "implied warranty that goods are merchantable," means that the consumer goods meet the following criteria [*Civ. Code § 1791.1(a)*; *see Mocek v. Alfa Leisure, Inc. (2003) 114 Cal. App. 4th 402, 406-408, 7 Cal. Rptr. 3d 546* (giving overview of implied warranty of merchantability and holding that buyer is not required to give seller opportunity to repair before rescinding when implied warranty is breached)]:

- Pass without objection in the trade under the contract description.
- Are fit for the ordinary purposes for which such goods are used.
- Are adequately contained, packaged, and labeled.
- Conform to the promises or affirmations of fact made on the container or label.

Every sale of consumer goods sold at retail in California is accompanied by the manufacturer's and the retail seller's implied warranty that the goods are merchantable, unless the warranty has been disclaimed as provided in the act. The retail seller has a right of indemnity against the manufacturer in the amount of any liability under this requirement [*Civ. Code § 1792*].

The Song-Beverly Act compares with the general sales law under Division 2 of the Commercial Code as follows:

- The Song-Beverly Act does not describe the case of fungible goods or that of permissible variations within runs, both of which are usually identified with mercantile rather than consumer agreements [*cf. Com. Code § 2314(2)(b), (d)*].
- The Song-Beverly Act requires adequate containering and labeling rather than merely permitting it in

fact or by agreement [*Civ. Code § 1791.1(a)(3)*; *cf. Com. Code § 2314(2)(e)*].

- It extends the warranty to the manufacturer as well as to the seller [*Civ. Code § 1792*], whereas *Com. Code § 2314(1)* makes only the seller a party to the warranty.

- The Song-Beverly Act does not limit the seller to one who is a merchant in goods of the particular kind as is the case under the general sales law [*see Com. Code § 2314(1)*].

- The Song-Beverly Act indemnifies the seller against the manufacturer [*Civ. Code § 1792*] (although the Commercial Code recognizes situations in which the seller's seller may be "answerable over" [*see Com. Code § 2607(5)*]).

- The Song-Beverly Act does not include sales of food or drink specifically in an implied warranty and then thus could be excluded thereunder, since the warranty here applies to "consumer goods," which does not encompass "consumables," [*see Civ. Code § 1791(a), (d)*], whereas the sales law does specifically extend merchantability to food and drink [*see Com. Code § 2314(1), (2)*].

- For the same reason, the Song-Beverly Act may exclude clothing from an implied warranty, since, while clothing automatically is absorbed into the meaning of goods under the general sales law [*Com. Code § 2105(1)*], it is excluded from "consumer goods" under the Song-Beverly Act [*see Civ. Code § 1791(a), (c)*].

[2] Fitness for Particular Purposes

The "implied warranty of fitness," in its more general application, means that if the retailer, distributor, or manufacturer has reason to know any particular purpose for which the consumer goods are required--and further, that the buyer is relying on the skill and judgment of the seller to select and furnish suitable goods--there is an implied warranty that the goods are fit for that purpose [*Civ. Code § 1791.1(b)(1)*]. Every sale of consumer goods sold at retail in California by a manufacturer who has reason to know at the time of the retail sale that the goods are required for a particular purpose and that the buyer is relying on the manufacturer's skill or judgment to select or furnish suitable goods, is accompanied by the manufacturer's implied warranty of fitness [*Civ. Code § 1792.1*]. The same warranty occurs in a sale by a retailer or distributor knowing both the buyer's purpose at the time and that the buyer is so relying on the retailer's or distributor's skill or judgment [*Civ. Code § 1792.2(a)*; *see Keith v. Buchanan (1985) 173 Cal. App. 3d 13, 25-26, 220 Cal. Rptr. 392* (no implied warranty because buyer made own selection rather than relying on seller's skill or judgment to select or furnish suitable goods)].

There is a slight discrepancy between the definition and the requirement of the warranty discussed above, in that the former refers to "skill and judgment" and "select and furnish" in the conjunctive, while the latter refers to "skill or judgment" and "select or furnish" in the disjunctive. In addition, the definition requires that the defendant's awareness be of the buyer's reliance on the seller's skill and judgment only, whereas in the provision for the requirement of the implied warranty, liability apparently may arise against the manufacturer or distributor, in addition to the retailer, whenever any one of these parties is aware of the buyer's reliance on the skill and judgment of that party.

The act compares with the general sales law in that under the act the requisite awareness of the buyer's reliance may apply to the manufacturer or distributor [*see Civ. Code §§ 1792.1, 1792.2(a)*], not just the seller. The warranty also is not conditioned by the possibility of disclaimer [*see Com. Code § 2315*]. In addition, both clothing and consumables may be excepted from the implied warranty of fitness under the act since the warranty applies to "consumer goods," which excepts those two commodities from its definition [*see Civ. Code § 1791(a), (c), (d)*; *see also § 502.40[1]*].

[3] Fitness as to Assistive Devices

The definition of "implied warranty of fitness" also applies to a sale of an assistive device sold at retail in California; there is an implied warranty by the retailer that the device is specifically fit for the particular needs of the buyer [*Civ. Code § 1791.1(b)*]. A sale of an assistive device must be accompanied by this warranty [*Civ. Code § 1792.2(b)*]. There is no requirement either that the retailer know the buyer's purpose or of the buyer's reliance, since the presence of these elements is presumed. Because assistive devices are also included in the term "consumer goods" [*see Civ. Code § 1791(a)*; *see also § 502.40[2]*], the more general requirements of the implied warranty of fitness discussed below which pertain to consumer goods still apply to the manufacturer or distributor of assistive devices [*see Civ. Code §§ 1792.1, 1792.2(a)*].

[4] Fitness as to Used Goods

Because, with certain exceptions, the obligation of a distributor or retail seller of used consumer goods is the same as that imposed on manufacturers in a sale in which an express warranty is given [*Civ. Code § 1795.5(a)*; *see § 502.47*], the obligations a manufacturer has under the act with respect to implied warranties of fitness for particular purposes apply equally to the distributor or retail seller of used consumer goods as well when an express warranty is being made in connection with the sale.

[5] Duration as to New Goods

The duration of the implied warranty of merchantability, and, if present, the implied warranty of fitness, is coextensive with an express warranty that accompanies the consumer goods, provided the duration of the latter is reasonable. In no event, however, may the implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer. If no duration for an express warranty is stated with respect to consumer goods, or parts of those goods, the duration of the implied warranty is the maximum period of one year [*Civ. Code § 1791.1(c)*; *see Mexia v. Rinker Boat Co. (2009) 174 Cal. App. 4th 1297, 1310, 95 Cal. Rptr. 3d 285* (statute merely provides that implied warranty has limited prospective existence beyond date of delivery; it does not impose any requirement for buyer to discover latent defect and report it to seller within specified period of warranty duration)].

[6] Duration as to Used Goods

The duration of an implied warranty on used goods is calculated exactly as is that for an implied warranty on new goods [*see Civ. Code § 1791.1(c)*]. However, the minimum time is 30 days and the maximum is three months following the sale of used goods to a retail buyer [*Civ. Code § 1795.5(c)*].

[7] General Prohibition Against Waiver and Disclaimer

No implied warranty of merchantability and, if applicable, no implied warranty of fitness may be waived, except in the case of a sale of consumer goods on an "as is" or "with all faults" basis, when the provisions of the Song-Beverly Act affecting these disclaimers are strictly complied with [*Civ. Code § 1792.3*; *see § 502.51[8]*]. Thus, neither the manufacturer, distributor, nor retailer, in transacting a sale in which express warranties are given, may limit, modify, or disclaim the implied warranties guaranteed by the Song-Beverly Act in the sale of consumer goods [*Civ. Code § 1793*].

In any case, the rights and remedies of the buyer of an assistive device are not subject to waiver, even by the proper employment of the terms "as is" or "with all faults" [*Civ. Code § 1793.02(f)*].

[8] Exception for Sale Made "As Is" or "With All Faults"

A sale made "as is" or "with all faults" means that the manufacturer, distributor, and retailer disclaim all implied warranties that would otherwise attach to the sale of consumer goods under the provisions of the act [*Civ. Code § 1791.3*].

A sale of goods made on an "as is" or "with all faults" basis, in order to be effective, must be made with a conspicuous writing attached to the goods clearly informing the buyer, prior to the sale, in simple and concise language, of each of the following [*Civ. Code § 1792.4*]:

- The goods are being sold on an "as is" or "with all faults" basis.
- The entire risk as to the quality and performance of the goods is with the buyer.
- Should the goods prove defective following their purchase, the buyer and not the manufacturer, distributor, or retailer assumes the entire cost of all necessary servicing or repair.

If the sale is by mail order catalog, the catalog offering the goods must contain the required writing as to each item so offered in lieu of the requirement of notification prior to the sale [*Civ. Code § 1792.4*].

A sale of goods on an "as is" or "with all faults" basis, made in compliance with the act, constitutes a waiver by the buyer of the implied warranty of merchantability and, if applicable, of the implied warranty of fitness [*Civ. Code § 1792.5*].

[9] Disclaimer as to Drapery Fabrics

When the retail sale of draperies is not accompanied by an express warranty and the sale is accompanied by a conspicuous writing disclaiming the retailer's implied warranty of merchantability on the fabric, the retailer's implied warranty of merchantability does not apply to the fabric [*Civ. Code § 1793.35(c)*].

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§ 502.52 Warranty Period for Servicing of Product

[1] Tolling of Period

Every warranty period relating to an implied or express warranty accompanying a sale or consignment for sale of consumer goods selling for at least $50 is automatically tolled in particular instances. The tolling period begins with the date on which the buyer does either of the following [*Civ. Code § 1795.6(a)*]:

- Delivers nonconforming goods to the manufacturer or seller for warranty repairs or services.
- Notifies the manufacturer or seller, in accordance with *Civ. Code § 1793.2(c)* or *1793.22*, of the nonconformity.

The limitation period remains tolled up to and including the date on which one of the following occurs [*Civ. Code § 1795.6(a)*]:

- The repaired or serviced goods are delivered to the buyer.
- The buyer is notified the goods are repaired or serviced and are available for the buyer's possession.
- The buyer is notified that repairs or service is completed, if the work is done at the buyer's residence.

For purposes of the above, the term "manufacturer" includes the manufacturer's service or repair facility [*Civ. Code § 1795.6(c)*].

[2] Extension of Period

Notwithstanding the date or conditions set for the expiration of the warranty period, the period is not deemed expired if the buyer has satisfied the requirements of delivery or notification as to nonconforming goods [*see Civ. Code § 1795.6(a)*; *see also § 502.52[1]*] and the warranty repairs or service has not been performed owing to delays caused by

circumstances beyond the buyer's control. The period alternatively or additionally is not deemed expired if the repairs or service did not remedy the nonconformity and the buyer has notified the manufacturer or seller of the failure within 60 days after completion of the work. When the warranty work has been performed so as to remedy the nonconformity, the warranty period does expire in accordance with its terms, including any extension of the period for warranty repairs or service [*Civ. Code § 1795.6(b)*].

[3] Notifying Buyer of Extension When Repairs Are Ordered

Every work order or repair invoice for warranty repairs or service must clearly and conspicuously incorporate, in prescribed type size, a statutory statement on the face of the work order or repair invoice, or on the reverse side or on an attachment. The statement informs the buyer of extensions of the warranty period for times connected with the existing defect and for processing repair work, as provided under the act. If the required notice is placed on the reverse side of the work order or repair invoice, the face of the work order or repair invoice must include the following notice in 10-point boldface type: "Notice to Consumer: Please read important information on back." A copy of the work order or repair invoice and any attachment must be presented to the buyer at the time the warranty service is rendered or repairs are made [*Civ. Code § 1793.1(a)(2)*].

[4] Duty to Provide Purchase and Service Date Documentation to Consumer

Every manufacturer or seller of consumer goods selling for at least $50 must provide a receipt to the buyer showing the date of purchase. The marketing party, when performing warranty repairs or service on the goods, also must furnish the buyer with a work order or receipt with the date of return and either the date the buyer was notified that the goods were repaired or serviced, or, if applicable, the date the goods were shipped or delivered to the buyer [*Civ. Code § 1795.6(d)*].

[5] Tolling of Period of Manufacturer's Liability

Whenever a warranty is tolled as a result of repairs or service [*see Civ. Code § 1795.6*] performed by any retail seller, the warranty is also extended with regard to the liability of the manufacturer to a retail seller pursuant to law. In that event, the manufacturer is liable, under the liability provisions pertinent to manufacturers who do not maintain service and repair facilities in California [*see Civ. Code § 1793.5*], for the period that an express warranty has been extended [*see Civ. Code § 1795.6*], to every retailer who incurs obligations in giving effect to the express warranty. The manufacturer's liability for implied warranty is similarly extended for the retailer's benefit. If, however, a manufacturer provides for warranty repairs and service through its own service and repair facilities and, through independent repair facilities in California, its exclusive liability under the extension provisions is to those facilities [*Civ. Code § 1795.7*].

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§ 502.53 Actions Under the Song-Beverly Act

[1] Consumer Remedy of Special Recovery

[a] Damages and Other Relief Available

Any buyer of consumer goods who is damaged by a failure to comply with any obligation under the Song-Beverly Consumer Warranty Act, or under an implied or express warranty or service contract, may bring an action for the recovery of damages and other legal and equitable relief [*Civ. Code § 1794(a)*; *see Atkinson v. Elk Corporation (2003) 109 Cal. App. 4th 739, 757, 135 Cal. Rptr. 2d 433* (analyzing statutory definition of "consumer goods" and holding that roof shingles are not consumer goods under the Act)].

The measure of the buyer's damages in an action under *Civ. Code § 1794* includes the rights of replacement or reimbursement as set forth in *Civ. Code § 1793.2(d)* [*Civ. Code § 1794(b)*; *see § 502.43[5]*]. When a buyer has rightfully rejected or justifiably revoked acceptance of the goods, or has exercised any right to cancel the sale, the measure of the buyer's damages are the same as those available under *Com. Code §§ 2711-2713* (discussed in Ch. 500, *Sales: Sales Under the Commercial Code*). If the buyer has accepted the goods, the buyer's measure of damages is the one applicable under *Com. Code §§ 2714* and *2715* [*see § 502.28[2]*; Ch. 500, *Sales: Sales Under the Commercial Code*] and includes the cost of repairs necessary to make the goods conform [*Civ. Code § 1794(b)*].

Nothing in the Song Beverly Consumer Warranty Act bars recovery of prejudgment interest under *Civ. Code § 3287* [*Doppes v. Bentley Motors, Inc. (2009) 174 Cal. App. 4th 1004, 1010-1011, 94 Cal. Rptr. 3d 797* ; *see Civ. Code § 1790.4* (remedies under Act "are cumulative and shall not be construed as restricting any remedy that is otherwise available")]. For discussion of *Civ. Code § 3287*, see *Ch. 177, Damages, § 177.80[2]*.

[b] Civil Penalty

If the buyer establishes that the failure to comply was willful, the judgment may include, in addition to the amounts recovered under *Civ. Code § 1794(a)*, a civil penalty that may not exceed twice the amount of actual damages [*Civ. Code § 1794(c)*]. "Willful" within meaning of *Civ. Code § 1794(c)* requires only that an illegal act or omission occur

intentionally without regard to motive or ignorance of the act's prohibited character, and does not include a moral component. Thus, jury instructions using words such as "blameworthy" and "reckless disregard of consumer's rights" are error [*Schreidel v. American Honda Motor Co. (1995) 34 Cal. App. 4th 1242, 40 Cal. Rptr. 2d 576* ; *Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 894, 263 Cal. Rptr. 64]* . A manufacturer's failure to refund or replace a defective automobile has been held not to be "willful" under *Civ. Code § 1794(c)* when the manufacturer reasonably and in good faith believed the facts did not call for a refund or replacement [*Kwan v. Mercedes Benz of North America, Inc. (1994) 23 Cal. App. 4th 174, 186, 28 Cal. Rptr. 2d 371*]. Evidence regarding the manufacturer's belief that it could readily repair the defective item, including the nature and details of the prospective repairs, would be relevant to the question of the manufacturer's good faith. For example, the evidence could be relevant to the manufacturer's belief that it had not yet been given a reasonable number of repair attempts [*Robertson v. Fleetwood Travel Trailers of Cal., Inc. (2006) 144 Cal. App. 4th 785, 815, 50 Cal. Rptr. 3d 731]* .

A successful plaintiff may not recover both the civil penalty of *Civ. Code § 1794(c)* and punitive damages under *Civ. Code § 3294* because that would amount to double recovery [*Troensegaard v. Silvercrest Industries, Inc. (1985) 175 Cal. App. 3d 218, 221, 226-228, 220 Cal. Rptr. 712* (mobilehome)]. Similarly, the fact that there is a specific statutory remedy provided by *Civ. Code § 1794(c)* precludes extension of the tort of bad faith breach of the covenant of good faith and fair dealing to provide a cause of action on account of seller's wrongful refusal to make repairs or provide replacement under an express warranty [*Gomez v. Volkswagen of America, Inc. (1985) 169 Cal. App. 3d 921, 925-929, 215 Cal. Rptr. 507]* .

Civ. Code § 1794(e), governing attorney's fees, interest, and penalties in the case of a manufacturer's failure to comply with *Civ. Code § 1793.2(d)(2)* (restitution or replacement of new motor vehicle that cannot be made to conform to express warranties), provides for the civil penalty, without need to show willfulness, for manufacturer's failure to comply with new motor vehicle warranty obligation [*Suman v. BMW of North America, Inc. (1994) 23 Cal. App. 4th 1, 10-11, 28 Cal. Rptr. 2d 133]* and is discussed in Ch. 91, *Automobiles: Actions Involving Defects and Repairs* .

[c] Limitation Period

The four-year specific limitation period of *Com. Code § 2725*, rather than the general three-year provision of *Code Civ. Proc. § 338(a)* for liabilities created by statute, governs actions under the Song-Beverly Act. The Act was intended to supplement the provisions of the Uniform Commercial Code, rather than to supersede the rights and obligations created by that statutory scheme [*see Civ. Code § 1790.3*; *Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 215, 285 Cal. Rptr. 717]* . Under *Com. Code § 2725(2)*, when a warranty explicitly extends to future performance of the goods, the discovery rule applies to accrual of the cause of action and commencement of the limitation period [*Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 215-219, 285 Cal. Rptr. 717* ; *see* *Carrau v. Marvin Lumber and Cedar Co. (2001) 93 Cal. App. 4th 281, 290-292, 112 Cal. Rptr. 2d 869* (generalized assertions in advertisements and literature do not rise to the level of a warranty explicitly extending to "future performance"; plaintiff thus did not meet exception to four-year limitations period)].

For discussion of *Com. Code § 2725, see § 502.28[6]*.

[d] Costs and Attorney's Fees

A buyer who prevails in any action for recovery of damages under the Song-Beverly Act must be allowed by the court to recover, as part of the judgment, a sum equal to the aggregate amount of costs and expenses (including attorney's fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for, or in connection with, the commencement and prosecution of the action, unless the court in its discretion determines that an award of attorney's fees would be inappropriate [*Civ. Code § 1794(d)*]. If the seller made a settlement offer to which *Code Civ. Proc. § 998* applies [*see Ch. 520, Settlement and Release, § 520.14*], and the buyer did not accept it but then failed to obtain a more favorable judgment or award, the buyer may not recover post-offer costs and must pay the

seller's costs from the time of the offer [*Code Civ. Proc. § 998(c)(1)*; *Duale v. Mercedes-Benz USA, LLC (2007) 147 Cal. App. 4th 880, 889, 54 Cal. Rptr. 3d 711]* .

The California Supreme Court has held that defendant sellers who are prevailing parties are also entitled to recover their costs and expert witness fees under the Song-Beverly Consumer Warranty Act. Although *Civ. Code § 1794(d)* refers only to "prevailing buyers," it may be reconciled with *Civ. Code § 1032(b)* under which prevailing defendants are entitled to costs [*Murillo v. Fleetwood Enterprises (1998) 17 Cal. 4th 985, 999, 73 Cal. Rptr. 2d 682, 953 P. 2d 858]* .

The lodestar adjustment method is the prevailing rule for statutory attorney's fee awards. It is to be applied in the absence of clear legislative intent to the contrary [*Ketchum v. Moses (2001) 24 Cal. 4th 1122, 1135-1136, 104 Cal. Rptr. 2d 377, 17 P.3d 735]* and is applicable to attorney's fee awards under *Civ. Code § 1794(d)*. The statute provides that fees must be based on "actual time expended" and must be "determined by the court to have been reasonably incurred." The legislative intent was to ensure that attorney's fee awards would be based on actual time expended, rather than a percentage of the recovery, so that pursuit of consumer warranty cases would be economically feasible. Since the lodestar adjustment method is based on actual, reasonable attorney time expended as the objective starting point of the analysis, it is compatible with this statutory provision. That method can include application of a multiplier, provided the multiplier is based on factors different from those used in determining the lodestar amount [*Robertson v. Fleetwood Travel Trailers of Cal., Inc. (2006) 144 Cal. App. 4th 785, 819-823, 50 Cal. Rptr. 3d 731* ; *see Levy v. Toyota Motor Sales U.S.A., Inc. (1992) 4 Cal. App. 4th 807, 813-816, 5 Cal. Rptr. 2d 770* (court is not required to use multiplier, and use of multiplier could be inappropriate when case does not involve contingent fee)]. For further discussion of the lodestar adjustment method for determining statutory attorney's fees, see *Ch. 174, Costs and Attorney's Fees, §§ 174.54[14][b], 174.56[12]*.

Further, for purposes of awarding attorney's fees under the Song-Beverly Consumer Warranty Act (*Civ. Code § 1790 et seq.*), the plain language of the statute allows for recovery of attorney's fees that have been "reasonably incurred by the buyer" [*see Civ. Code § 1794(d)*]. Attorney's fees were not "incurred" by the prevailing buyer at rates that increased over the years since the case was begun, and, thus, could not be awarded at higher rates, when the buyer was billed and liable only for fees at the hourly rate set at the beginning of the litigation [*Nightingale v. Hyundai Motor America (1994) 31 Cal. App. 4th 99, 104-105]* .

[e] Class Action Excluded

The buyer's right to recover treble damages does not apply to any cause of action commenced or maintained as a class or representative action, either generally [*see Code Civ. Proc. § 382*] or under the Consumers Legal Remedies Act [*Civ. Code § 1794(c)*; *see Civ. Code § 1781*].

[f] Clothing and Consumables Not Expressly Included

An action under the Song-Beverly Act may be brought by "any buyer of consumer goods" injured as described by the Song-Beverly Act [*see Civ. Code § 1794(a)*]. Apparently, because neither clothing nor consumables is included within the definition of "consumer goods" [*see Civ. Code § 1791(a), (c), (d)*; *see also § 502.40[2]*], neither the provision for treble damages nor the authorization of an attorney's fees award applies to either of these commodities, although this would leave consumers without the ability under the act to enforce its special provisions with regard to return or replacement of clothing and consumables [*see Civ. Code § 1793.35*].

[2] Recovery for Breach of Implied Warranty Only

Civ. Code § 1794 authorizes recovery of damages and other legal and equitable relief as well as attorney's fees even when a claim is based solely on a breach of an implied warranty [*see Civ. Code § 1794(a), (b), (d)*; *see also Mocek v.*

Alfa Leisure, Inc. (2003) 114 Cal. App. 4th 402, 406-408, 7 Cal. Rptr. 3d 546 (holding that buyer is not required to give seller opportunity to repair before rescinding when implied warranty of merchantability is breached, and affirming judgment in amount of purchase price plus interest upon return of defective travel trailer)]. However, the civil penalty for a willful breach provided for in *Civ. Code § 1794(c)* for breach of warranty does not apply in an action based solely on a breach of an implied warranty [*Civ. Code § 1794(c)*].

Additionally *Civ. Code § 1791.1(d)* states that any buyer of consumer goods injured by a breach of either the implied warranty of merchantability, or if present, the implied warranty of fitness has the remedies provided in *Com. Code §§ 2601 et seq., 2701 et seq.* [*Civ. Code § 1791.1(d)*]. *Civ. Code § 1791.1(d)* provides that in any action brought under the Commercial Code for breach of an implied warranty under the Song-Beverly Act, *Civ. Code § 1794* applies. This reference to *Civ. Code § 1794* apparently does not refer to an award of a civil penalty when the buyer establishes a willful failure to comply with the act under *Civ. Code § 1794(c)*, because that subsection specifies that it does not apply in an action based solely on a breach of an implied warranty. Rather, it appears to refer to the right to costs and attorney's fees set out in *Civ. Code § 1794(d)*, thereby giving the buyer the right to recover such fees and costs in any action under the Commercial Code authorized by *Civ. Code § 1791.1(a)*. This analysis is confirmed by the fact that originally the reference in *Civ. Code § 1791.1(d)* to *Civ. Code § 1794* was to *Civ. Code § 1794(b)*, which provided for the recovery of attorney's fees [*see* Stats. 1971, ch. 1523]. Stats. 1978, ch. 991, deleted the subdivisions of *Civ. Code § 1794*, but the legislative intent apparently was not to limit the recovery permitted in an action for breach of an implied warranty under *Civ. Code § 1791.1(d)*. Thus, it appears that the wider scope of the implied warranties under the Song-Beverly Act (with the greater number of persons responsible for these warranties under the act, that is, the manufacturer and distributor, as well as the seller) governs in an action under the Commercial Code when the transaction sued on is otherwise subject to the provisions of the Song-Beverly Act. Likewise, the notice provisions of *Com. Code § 2607*, which a buyer must comply with prior to commencing an action for breach of a warranty under the Commercial Code, also appear to apply, even though the Song-Beverly Act otherwise does not require that notice be given prior to commencing an action for a violation of an express or implied warranty.

[3] Special Remedy for Seller or Independent Service Person

A retail seller of consumer goods injured by the willful or repeated violation of the provisions of the act may bring an action for the recovery of damages. Judgment may be entered for three times the amount at which the actual damages are assessed plus reasonable attorney's fees [*Civ. Code § 1794.1(d)*]. An independent service person also has this identical cause of action and remedy under the act [*Civ. Code § 1794.1(b)*].

[4] Defenses

The act does not apply to any defect or nonconformity in consumer goods caused by the unauthorized or unreasonable use of the goods following sale [*Civ. Code § 1794.3*].

Any waiver of the provisions of the act by the buyer of consumer goods, except as the act expressly provides, is deemed contrary to public policy and remains unenforceable and void [*Civ. Code § 1790.1*].

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§ 502.54 Manufacturer's Warranty on Service Member's Vehicle

Notwithstanding any other provision of law, the Song-Beverly Act applies to a purchase in the United States of a new motor vehicle [*see Civ. Code § 1793.22(e)(2)* (definition); *see also § 502.43[5][b]*] with a manufacturer's express warranty by a member of the U.S. armed forces [*see Civ. Code § 1791(t)* (definition)], regardless of the state in which the vehicle is purchased or registered, if both the following conditions are satisfied [*Civ. Code § 1795.8*]:

- The service member purchased the vehicle with the manufacturer's express warranty from a manufacturer that sells motor vehicles in California or from an agent or representative of that manufacturer; and

- The service member was stationed in or a resident of California at the time he or she purchased the vehicle or at the time he or she filed an action pursuant to the Song-Beverly Act.

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[Reserved]

§§ 502.55[Reserved]

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44-502 California Forms of Pleading and Practice--Annotated § 502.60

§ 502.60 Magnuson-Moss Act Definitions

[1] Consumer

A "consumer" is a buyer (other than for purposes of resale or use in the ordinary course of the buyer's business) of any consumer product, any person to whom the product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and anyone else who is entitled by the terms of the warranty (or service contract) or under applicable state law to enforce the obligations of the warranty (or service contract) against the warrantor (or service contractor) [*15 U.S.C. § 2301(3)*; 16 C.F.R. § 701.l(h); *but see Najran Co. v. Fleetwood Enterprises, Inc. (S.D. Ga. 1986) 659 F. Supp. 1081, 1101* (commercial volume purchaser for resale may invoke protection of Magnuson-Moss Warranty Act; criteria for invocation; determination is made on case-by-case basis)].

[2] Consumer Product

A "consumer product" is any tangible personal property which is distributed in commerce and normally used for personal, family, or household purposes (including that intended to be attached to or installed in any real property, whether or not so attached or installed) [*15 U.S.C. § 2301(1)*]. Ambiguity of purpose is resolved in favor of coverage. Products like automobiles and typewriters that are used for both personal and commercial purposes are covered, while products purchased solely for commercial or industrial use are excluded. Agricultural products used in the occupation of farming are not covered when their use for the listed consumer purposes is uncommon; however, gardening tools used for personal consumption purposes would be covered. The federal definition may include many kinds of appliances and equipment that would be considered fixtures under California law (but not those items which are integral component parts of the structure, like wiring and plumbing). Typically, building materials originally comprising the structure are not consumer products unless they are sold over the counter as hardware and building products [*16 C.F.R. § 700.1(a)-(f)*; *see 16 C.F.R. §§ 701.1(b), 702.1(b)*; *see, e.g., Atkinson v. Elk Corp. (2006) 142 Cal. App. 4th 212, 226, 48 Cal. Rptr. 3d 247* (roofing shingles, bought by contractor that installed them pursuant to contract to replace homeowner's roof, were consumer products, and homeowner had cause of action for breach of warranty under Magnuson-Moss Act)].

[3] Marketing Parties

A "supplier" is anyone engaged in the business of making a consumer product directly or indirectly available to consumers [*15 U.S.C. § 2301(4)*].

The "warrantor" is any supplier or other person who gives, or offers to give, a written warranty, or who is or may be obligated under an implied warranty [*15 U.S.C. § 2301(5)*].

Additionally, a "seller" is any person who sells or offers for sale, for purposes other than resale or use in the ordinary course of the buyer's business, any consumer product [*16 C.F.R. § 702.1(e)*].

[4] Remedies

A "remedy" refers to whichever corrections or adjustments the warrantor elects to make on a claim under a written warranty, from among the prescribed alternatives of (1) repair, (2) replacement, or (3) refund. The warrantor may not elect refund, however, unless either [*15 U.S.C. § 2301(10)*]:

- The warrantor is unable to provide replacement and repair is not commercially practicable or cannot be timely made; or

- The consumer is willing to accept the refund.

"Replacement" means furnishing a new consumer product which is identical or reasonably equivalent to the warranted consumer product [*15 U.S.C. § 2301(11)*].

"Refund" means refunding the actual purchase price (less reasonable depreciation based on actual use when permitted by implementing regulations) [*15 U.S.C. § 2301(12)*].

[5] Service Contact

A "service contract" is one in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair (or both) of a consumer product [*15 U.S.C. § 2301(8)*].

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§ 502.61 Jurisdiction, Preemptive Effects, and Federal Trade Commission Regulation

The federal Magnuson-Moss Act applies to consumer products "distributed in commerce." This means to be sold in commerce, introduced or delivered for introduction into commerce, or held for sale or distribution after introduction into commerce [*15 U.S.C. § 2301(13)*]. "Commerce" itself means trade, traffic, commerce, or transportation between a place in a state and anywhere outside, or that which affects such movement [*15 U.S.C. § 2301(14)*]. "State" includes all states and other specified United States jurisdictions [*15 U.S.C. § 2301(15)*]. The Federal Trade Commission (hereinafter referred to as the "FTC") is charged with implementation of the act by regulations and enforcement thereof [*see 15 U.S.C. §§ 2301(2), 2309*].

The Magnuson-Moss Act does not invalidate or restrict any right of remedy a consumer has under state law or any other federal law. It does not adversely affect the Federal Trade Commission Act [*see 15 U.S.C. § 41*] or any antitrust statute therein. In like manner it does not impinge on the Federal Seed Act [*see 7 U.S.C. § 1551*], nor does anything in the Magnuson-Moss Act apply to seed for planting. The act is inapplicable to any written warranty, the making or content of which is otherwise governed by federal law; if only a portion is so governed, however, the remaining portion is subject to the Magnuson-Moss Act [*15 U.S.C. § 2311(a), (b)(1), (d)*].

Any state law relating to labeling or disclosure affecting written warranties or performance thereunder that conflicts with the requirements of the Magnuson-Moss Act as to warranty disclosures, full and limited warranty requirements, and federal minimum standards [*see 15 U.S.C. §§ 2302-2304*] is preempted by the federal law. Nevertheless, the FTC can approve state requirements, on a submission by an appropriate state agency, which afford protection to consumers greater than the federal law and which do not unduly burden interstate commerce. Approval may be for a specified time, as long as the state requirements are effectively enforced [*15 U.S.C. § 2311(c)*]. On application by California authority, the FTC has determined that nothing in the Song-Beverly Act was preempted by the provisions of the *Magnuson-Moss Act [42 Fed. Reg. 54004* et seq.].

The Magnuson Moss Act calls for the application of state warranty law. It does not create additional federal warranty law except in specific instances in which it expressly prescribes a regulating rule. Therefore, generally, a plaintiff's failure to allege facts constituting a warranty claim under state law necessarily leads to a failure to state a claim under

the Magnuson Moss Act, if the plaintiff relies on the same set of facts to support each claim [*Daugherty v. American Honda Motor Co. (2006) 144 Cal. App. 4th 824, 833, 51 Cal. Rptr. 3d 118]* .

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44-502 California Forms of Pleading and Practice--Annotated § 502.62

§ 502.62 Written Warranty Generally

[1] Coverage

A "written warranty" refers in the first instance to a written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a "buyer" (a term not defined but used to define "consumer") [*see 15 U.S.C. § 2301(3)*]. It relates to the nature of the "material or workmanship" and affirms or promises that the material or workmanship is defect-free or will meet a specified level of performance over a specified period of time. In the second instance a "written warranty" refers to an undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to the product in the event it fails to meet the specifications set forth in the undertaking. In either case the written affirmation, promise, or undertaking also must become part of the basis of the bargain between a supplier and a buyer for purposes other than resale of the product [*15 U.S.C. § 2301(6)*].

It is recognized under the Magnuson-Moss Act that certain representations--such as energy efficiency ratings for electrical appliances, or care labeling for wearing apparel--may be express warranties under the Uniform Commercial Code. However, they are not written warranties under the federal law because they do not relate to a specified period of time as required under the federal law. Nevertheless, the FTC encourages practices that disclose product information so long as it is not deceptive and which is of benefit to customers. Suppliers should avoid characterization of other kinds of benefits as warranties, however, such as the right to revoke within a certain period or the ability to return goods for credit [*16 C.F.R. § 700.3(a), (b)*].

The Magnuson-Moss Act compares with the Song-Beverly Act and the general sales law under Division 2 of the Commercial Code as follows:

- A federal written warranty may be made by a "supplier," which term includes anyone in the business of making the goods available to consumers [*see 15 U.S.C. § 2301(4)*], and is a term at least as comprehensive as the group of marketing parties listed under the Song-Beverly Act [*see Civ. Code § 1791(e), (j),* (*l*)], while the general sales law is confined to the acts of sellers [*see Com. Code §*

2103(1)(d)].

- The federal act's provisions extend to a "written" warranty only [*see 15 U.S.C. § 2301(6)*] which is similar to the main warranty regulated under the Song-Beverly Act and contained in a written statement arising in a sale [*see Civ. Code § 1791.2(a)(1)*; *see also § 502.42*].

- Although the federal law refers to affirmations of fact and promises as giving rise to one type of warranty subject to the law's provisions, similar to the sales law [*see Com. Code § 2313(1)(a)*] but not the Song-Beverly Act, the law restricts covered affirmations to those without inherent faults or which meet a specified level of performance for a specified duration [*see 15 U.S.C. § 2301(6)(A)*]--neither of which is directly designated under the state consumer warranty law.

- The type of warranty subject to the provision of the federal law when an undertaking is made to carry out some remedial action (including recompense) if the product does not live up to its specifications therein [*see 15 U.S.C. § 2301(6)(B)*] is similar to, but broader than, the type of warranty under the Song-Beverly Act consisting of an undertaking to keep up utility or performance, or to make payment otherwise.

- The federal law requires that the warranty be part of the basis of the bargain, an element present under the general sales law [*see Com. Code § 2313(1)*] but absent from the Song-Beverly Act [*see Civ. Code § 1791.2(a)*].

[2] Meaning of "Basis of the Bargain" Requirement

Being part of "the basis of the bargain" means that a written warranty must be conveyed at the time of sale of the consumer product. The consumer must not give any consideration beyond the purchase price in order to benefit from the agreement. The Magnuson-Moss Act does not require that the agreement obligate a supplier of a consumer product to a written warranty, but simply that it be part of the basis of the bargain between a supplier and a consumer. This also contemplates written warranties by third-party nonsuppliers [*16 C.F.R. § 700.11(b)*].

[3] Disclosure Requirements of Warranties

[a] Purpose of Warranty Disclosures

A primary purpose of the Magnuson-Moss Act is to require any warrantor (one who warrants a consumer product to a consumer by means of a written warranty) to fully and conspicuously disclose in simple and readily understood language the terms and conditions of the warranty. This purpose is designed to improve the adequacy of information available to consumers, to prevent deception, and to improve competition in the marketing of consumer products. The FTC is charged to various degrees with effectuating these Congressional purposes through rulemaking. The enabling law specifies that consumer products covered must cost more than $5 [*15 U.S.C. § 2302(e)*], but the FTC has raised the basis for the requirements to $15 [*16 C.F.R. § 701.2*].

[b] Required Elements of Disclosures

A written warranty must disclose in a single document all of the following [*16 C.F.R. § 701.3(a)(1)-(9)*]:

- The identity of the party or parties to whom the written warranty is extended, if enforceability is limited to the original consumer-purchaser or otherwise limited to persons other than every consumer-owner during the warranty term.

- A clear description and identification of products, parts, characteristics, or components or properties

covered by--and, when necessary for clarification, excluded from--the warranty.

- A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with the written warranty, including the items or services the warrantor will pay for or provide, and, where necessary for clarification, those which the warrantor will not pay for or provide.

- The time or event on which the warranty term commences, if different from the purchase date, and the time period or other measurement of warranty duration.

- A step-by-step explanation of the procedure the consumer should follow to obtain performance of any warranty obligation, including the persons or class thereof authorized to perform warranty obligations- including names, addresses, parties to be reached, and toll-free information numbers.

- Information respecting the availability of any informal dispute settlement mechanism elected by the warrantor under the law.

- Any limitations on the duration of implied warranties, to be disclosed on the face of the warranty [*see 16 C.F.R. § 701.1(i)*].

- Any exclusions of or limitations on relief, such as incidental or consequential damages.

- A statement concerning the availability of rights under both federal and state law.

These requirements are made less extensive in the case of general policy statements of third parties on seals, emblems, and insignias which promise replacement or refund for defective products if they do not otherwise give assurance as to quality or performance [*see 16 C.F.R. § 701.3(a)(7)-(9), (b)*].

The federal legislation proposes a comprehensive scheme of disclosure. The Song-Beverly Act prescribes a special content for warranties only in the case of most assistive devices [*see Civ. Code § 1793.02*]. Otherwise, the state consumer law generally insists on warranties being in readily understood language, clearly identifying the warranting parties. State law also requires informing buyers in particular ways of the availability of service facilities [*see Civ. Code § 1793.1*].

[c] Applicability to Components and Replacements

While warranties on replacement parts and components used for repair are covered, warranties on services are not. If a written agreement warrants both repair parts and repair work, the warranty must comply with the Magnuson-Moss Act and with FTC regulations [*16 C.F.R. § 700.1(h)*]. In most instances the act does not cover warranties of component parts of consumer products. Warranties on parts are typically given by the component manufacturer to the maker of the assembled product (who, in turn, may directly warrant them to the consumer). The component warranty does not become part of the basis of the bargain of the consumer sale and thus is not covered by the act. However, in some instances a component supplier's warranty is intended to be and is given directly to the consumer, as in the case of a refrigerator installed directly into a recreational vehicle. In such case the written warranty falls under the act [*16 C.F.R. § 700.3(c)*].

[4] Designation as Full or Limited Warranty

The warrantor in the written warranty must clearly and conspicuously designate it either a "full _____ warranty," a statement of duration to be placed in the blank space, or a "limited warranty." The former designation is appropriate if the written warranty meets the "federal minimum standards" for warranty [*see 15 U.S.C. § 2304*];

otherwise, the limited label must be used. The FTC may exempt a written warranty from this requirement. These provisions apply only to warranties pertaining to consumer products actually costing the consumer more than $10 and that are not formally designated as a full warranty [*15 U.S.C. § 2308(d)*]. However, warrantors may include a statement of duration in a limited warranty designation as well. All designations should appear clearly and conspicuously in the form of a caption or prominent title clearly separated from the warranty test. No other designation should be used unless permitted by FTC rule [*16 C.F.R. § 700.6(a)*]. A consumer product may be sold with both types of warranties if they are clearly and conspicuously differentiated [*15 U.S.C. § 2305*].

[5] Minimum Standards on Full Warranty

[a] In General

To meet federal minimum standards under the Magnuson-Moss Act, a warrantor must abide by the following requirements [*15 U.S.C. § 2304*]:

- Remedy the consumer product within a reasonable time and without charge in the case of a defect, malfunction, or failure to conform with the written warranty.

- Not impose any limitation on the duration of an implied warranty on the product (despite the fact that a limitation is permitted in certain other circumstances under the act [*see 15 U.S.C. § 2308(b)*].

- Not exclude or limit consequential damages for breach of any written or implied warranty on the product unless the exclusion or limitation conspicuously appears on the face of the warranty.

- Allow the consumer to elect either a refund for, or replacement without charge of, product, or part if the product, or a component part of the product, contains a defect or malfunction after a reasonable number of attempts (as the FTC may prescribe) by the warrantor to remedy the defect or malfunction.

Replacement of a part includes installation without charge [*15 U.S.C. § 2304(a)*]. The FTC may further define duties under these standards [*15 U.S.C. § 2304(b)(3)*].

A warranty designated by a supplier as a full warranty is deemed to incorporate at least the federal minimum requirements for warranty, as amplified by any FTC regulations in any action brought under the Magnuson-Moss Act or under any state law [*15 U.S.C. § 2304(e)*].

[b] When Service Is "Without Charge"

Under the minimum standard, the phrase "without charge" means not to assess the consumer for any costs the warrantor or its representatives incur in connection with the required remedy of a warranted product [*15 U.S.C. § 2304(d)*; *see 15 U.S.C. §§ 2302(c), 2304(a)(1)*]. Remedy without charge does not necessarily require the warrantor to compensate the consumer for incidental expenses. However, if any expenses are incurred because the remedy is not made within a reasonable time or because the warrantor imposed an unreasonable duty on the consumer as a condition of securing remedy, then the consumer is entitled to recover the expenses so incurred in any action against the warrantor [*15 U.S.C. § 2304(d)*; *see 15 U.S.C. § 2304(a)(1)*].

[c] Imposition of Other Duties on Consumer

If a warranted product may only be utilized when installed, a full warranty must provide the installation without charge, regardless of whether or not the consumer originally paid therefor. Nevertheless, the warrantor may still impose on the consumer a duty to remove, return, or reinstall if the duty can be demonstrated to be reasonable in some relevant official proceeding [*16 C.F.R. § 700.9*; *see 15 U.S.C. § 2304(b)(1)*].

[d] Full Duties Owed to Transferees

The minimum standard duties extend from the warrantor to anyone who is a consumer with respect to the product involved [*15 U.S.C. § 2304(b)(4)*]. Because a consumer includes transferees [*see 15 U.S.C. § 2301(3)*], a full warranty may not expressly restrict the warranty rights of a transferee during its stated duration. However, when the duration of a full warranty is defined solely in terms of first purchaser ownership, there can be no violation as to transferees because the warranty duration expires by definition at the time of transfer. The FTC points out that a "first purchaser" type of warranty often is worded in a way to lead the consumer to believe that no proof of purchase is needed. Therefore, it concludes that requirement of documentary proof may not be reasonably imposed on a consumer under that warranty, and the burden of proof that the consumer is not the original purchaser or owner is on the warrantor. Warrantors or their designated agents may nevertheless properly ask consumers to state or affirm that they are the true first purchasers [*16 C.F.R. § 700.6(b)*].

[e] Duties Are Not Required on Showing of Consumer's Abuse

The minimum duties are not required of a warrantor who can show that the defect, malfunction, or failure of any warranted consumer product to conform with a written warranty was caused by damage while in the possession of the consumer. The damage, however, cannot result from the defect or malfunction. The usage exception includes the consumer's failure to provide "reasonable and necessary maintenance" [*15 U.S.C. § 2304(c)*]. This latter requirement consists of operations that the consumer reasonably can be expected to perform or have performed and that are necessary to keep any consumer product performing its intended function and operating at a reasonable level of performance [*15 U.S.C. § 2301(9)*].

[f] Prohibition Against Unreasonable Duties to Secure Remedy

In fulfilling the requirements of the federal minimum standards, the warrantor may not impose any duty on the consumer other than notification as a condition of securing a remedy because of a malfunction or defect of the product or because it does not conform to the written warranty. However, the warrantor may be excepted if he or she is able to demonstrate to the FTC or a court that the duty is reasonable. In any case, a warrantor may require, as a condition to replacement or refund, that the consumer product be made available free and clear of liens and encumbrances, unless the FTC declares that requirement to be unreasonable in the circumstances [*15 U.S.C. § 2304(b)(1), (2)*].

The FTC has concluded that requiring consumers to return "warranty registration cards" after purchase to assure warranty protection is an unreasonable duty under a full warranty; therefore, providing that the warranty is void without return of a card is impermissible, nor may the condition even be implied. The warrantor still may suggest use of the card as one means of showing proof of purchase; but in doing so, the warrantor must give notice that failure to return the card does not affect warranty rights [*16 C.F.R. § 700.7*]. In a somewhat contradictory rule, the FTC provides that if a warranty registration card is made a condition precedent to warranty coverage, that fact must be disclosed in the warranty. If return of the card reasonably appears to be a condition to coverage and performance, but is not, that fact also must be so disclosed [*16 C.F.R. § 701.4*].

[6] Meaning of Minimum Price Requirements

The minimum price restrictions of the Magnuson-Moss Act, whether $10, $15, or otherwise, is exclusive of tax. The minimum also applies to multiple-packaged items that may individually sell for less but which have been packaged to sell only as an ensemble at the minimum or higher price [*16 C.F.R. § 700.1(g)*].

[7] Puffery Excluded

Requirements pertaining to written warranties, full warranties and the federal minimum standards, and limited warranties are inapplicable in the case of statements or representations that are similar to expressions of general policy

concerning customer satisfaction, and that are not subject to any specific limitations [*15 U.S.C. § 2303(b)*]. This exception to warranty law requirements applies only to general policies, not to those that are limited to specific consumer products manufactured or sold by the supplier, nor may a policy be general while at the same time being subject to any specific limitations. Policies that have an express limitation of duration or of amount to be refunded, for instance, are not general and thus are not excepted from warranty law requirements. However, reasonable limitations applied in individual consumer's circumstances will not necessarily remove a policy from the general to the specific context. A warrantor's refusing to honor expression of general policy with reasonable limitations when a consumer has been using the product for a decade without complaint does not amount to imposing a specific limitation and thus invoking the warranty law [*16 C.F.R. § 700.5*].

This limitation is similar to that in the Song-Beverly Act [*see Civ. Code § 1791.2(c)*], but the exception is not as broad in the federal law because the federal law covers a greater area of representations which give rise to express warranties. The federal law's exception in turn is also not as great as that under the sales law because the latter allows the greatest area of what might constitute an express warranty [*see Com. Code § 2313(2)*].

[8] Service Contract Distinguished

An agreement that would meet the definition of a written warranty but for its failure to satisfy the basis of the bargain test is a service contract--that is, one which requires consideration beyond the purchase price or is entered into after purchase of the product. Agreements that relate only to performance of maintenance or inspection services and that do not otherwise meet the requirements of a written warranty are also service contracts--that is, an agreement to perform periodic cleaning and inspection over a definite time period, even when the agreement is offered at time of sale and for no extra charge [*16 C.F.R. § 700.11(c)*].

A supplier is not prevented from entering into a service contract with the consumer, whether in addition to or in lieu of a written warranty. However, the contract must fully, clearly, and conspicuously disclose (as may be interpreted by the FTC) its terms and conditions in simple and readily understood language [*15 U.S.C. § 2306*]. The right to enter into, and the requirements respecting, service contracts are similar to those with respect to express warranties under the Song-Beverly Act [*see Civ. Code § 1794.4*; *see also § 502.45*].

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§ 502.63 Written Warranty Presale Availability Requirements

[1] Seller's Responsibilities

The FTC has promulgated regulations with respect to sellers and warrantors that require that the terms of any written warranty on a consumer product be made available to the consumer prior to sale. These regulations apply to products actually costing the consumer more than $15 [*16 C.F.R. §§ 702.2, 702.3*].

Except as provided in *16 C.F.R. § 702.3(c), (d)*, the seller of a consumer product with a written warranty must make the text of the warranty available for examination by the prospective buyer by doing either of the following [*16 C.F.R. § 702.3(c), (d)*]:

- Displaying it in close proximity to the warranted product.

- Furnishing it on request prior to sale and placing signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the store or department advising prospective buyers of the availability of the warranties on request.

The seller's responsibilities do not apply to statements of general policy on emblems, seals, or insignias issued by third parties promising replacement or refund for defects. Those statements cannot represent or assure the quality or performance characteristics of the products. However, the required disclosures of a written warranty must be published by the marketing parties in each issue of a publication with a general circulation, to be provided free to any consumer on written request [*16 C.F.R. § 702.3(b)(2)*].

[2] Warrantor's Responsibilities

A warrantor as such also has particular obligations attached to making a written warranty on consumer products retailing in fact for more than $15. Sellers must be provided with warranty materials necessary to enable them to comply with their own warranty requirements. The warrantor may accomplish this by furnishing a copy of the warranty with every such product. Instead, or additionally, a tag, sign, sticker, label, decal, or other attachment may be put on the

product containing the full text of the written warranty. In like manner the warranty may be printed on or attached to the package, carton, or other container of the product if normally used for display purposes. Under this option a copy of the warranty must also accompany the product. Another alternative is that the warrantor may provide a notice, sign, or poster disclosing the warranty text if a copy of the warranty accompanies the product [*16 C.F.R. § 702.3(b)(1)(i)*].

If a sale is door-to-door by catalog or mail order, the warrantor must disclose in a catalog or solicitation or in a reference to an information section clearly and conspicuously placed in close conjunction with the description of the warranted product, either the full text of the written warranty or a statement that the complete text can be obtained free on specific written request at a particular address. The catalog, mail order, or door-to-door seller then must promptly provide a copy on consumer request. In door-to-door sales the seller must disclose the fact that the sales representative has copies of the warranties for warranted products being offered, which may be inspected by the prospective buyer at any time during the sales presentation. The disclosure must be made orally and also must be included in any written materials to be shown [*16 C.F.R. § 703.1(d), (c)*].

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§ 502.64 Implied Warranty

[1] Reference to State Law

The term "implied warranty" means an implied warranty that arises under state law in connection with the sale by a supplier of a consumer product [*15 U.S.C. § 2301(7)*]. However, implied warranties arising from state law may be affected by federal provisions [*see* [2], *below*], concerning their limitation, disclaimer, or modification [*see 15 U.S.C. §§ 2304(a), 2308*], and accompanied by written warranties or service contracts in certain instances.

The federal implied warranty appears to refer to any warranty implied under California law. Thus, to the extent it applies to a retail sale of consumer goods, the implied warranties of the general sales law and the Song-Beverly Act (that is, merchantability and fitness) appear to be incorporated into the federal provisions.

[2] Disclaimer or Modification

A supplier may not disclaim or modify any implied warranty to a consumer with respect to a consumer product if making any written warranty to the consumer thereon or, either at the time of sale or within 90 days thereafter, entering into a service contract with the consumer applicable to the product. However, the duration of an implied warranty may be limited to that of the duration of a written warranty of reasonable duration, if the limitation is conscionable and is set forth in clear and unmistakable language and is prominently displayed on the face of the warranty. This exception does not apply to a supplier meeting the federal minimum standards [*see 15 U.S.C. § 2304(a)(2)*]. Any disclaimer, modification, or limitation in violation of this provision is ineffective for purposes of the Magnuson-Moss Act or state law [*15 U.S.C. § 2308*].

The Magnuson-Moss Act compares with the Song-Beverly Act as follows:

- It reinforces the state provision that no modification or disclaimer of an implied warranty may take place in the presence of an express one [*see Civ. Code § 1793*], but adds similar protection in the case of a service contract [*see 15 U.S.C. § 2308(a)*].

- The federal limitation of the duration of an implied warranty to any reasonable duration of the written warranty differs from the state law that requires coextensive durations of express and implied warranties with outside limits [*see Civ. Code § 1791.1(c)*; *Atkinson v. Elk Corp. (2006) 142 Cal. App. 4th 212, 231, 48 Cal. Rptr. 3d 247* (*Civ. Code § 1791.1* "controls the length of the implied warranty of merchantability under Magnuson-Moss"); *see also § 502.51[5]*].

- The federal law adds that the limitation must be conscionable and provides certain disclosure requirements [*see 15 U.S.C. § 2308(b)*].

It should be noted that the FTC has ruled there is no preemption of the state law [*see § 502.61*]. Notwithstanding the above, a full warranty (that is, one meeting the minimum federal standards) may not limit the duration of implied warranties [*15 U.S.C. § 2304(a)(2)*].

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§ 502.65 Prohibited Terms in Warranties and Service Contracts

A warrantor is not allowed to indicate in any written warranty or service contract, directly or indirectly, that the decision of itself, a service contractor, or any designated third party is final or binding in any dispute, nor may the warrantor or service contractor state that it alone may determine what is a defect under the agreement. The foregoing statements are deceptive because the Magnuson-Moss Act gives state and federal courts jurisdiction over breach of warranty and service contract controversies [*16 C.F.R. § 700.8*].

A warrantor may not condition any written or implied warranty of a product on the consumer's using, in connection therewith, any article or service identified by brand, trade, or corporate name. Articles or services provided without charge under the terms of the warranty are excepted. The FTC may waive the requirements in instances in which it finds the product will function only with the required article or service and that the requirement serves the public interest [*15 U.S.C. § 2302(c)*].

Thus, under a limited warranty providing only for replacement of defective parts but no labor, the consumer cannot be required to use only designated labor, nor may the warrantor or representative thereof provide parts under the warranty in a manner which impedes or precludes the consumer's choice of person or business to perform the necessary labor. The continued validity of a warranty may not be conditioned on the use of only authorized repair service or replacement parts for nonwarranty service and maintenance, for it violates both the ban on "tying arrangements" and the liability of the warrantor under a written warranty for defects unrelated to consumer use [*see 15 U.S.C. § 2310(d)*]. Of course, the warrantor still can expressly exclude liability for defects or damages from "unauthorized" articles or service or can deny liability when able to prove the defect or damage was caused thereby [*16 C.F.R. § 700.10*].

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§ 502.66 Contracts With Service Personnel

A warrantor may designate representatives to perform duties under the written or implied warranty. However, the warrantor must make reasonable arrangements for compensation of its designated representatives. Furthermore, the designation does not relieve the warrantor of direct responsibility to the consumer, nor does it make the representative a cowarrantor [*15 U.S.C. § 2307*].

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§ 502.67 True Insurance Contracts Are Unregulated

Certain agreements marketed under state law as insurance contracts may, in certain instances, meet the statutory definitions of warranties under the Magnuson-Moss Act. The McCarran-Ferguson Act (*15 U.S.C. § 1011 et seq.*) precludes federal jurisdiction over the business of insurance to the extent it is regulated by state law. Thus, any insurance agreements that are warranties would fall under coverage of the Magnuson-Moss Act only to the extent they are not regulated in the state as insurance. One example is the automobile breakdown insurance policy sold in many jurisdictions and regulated by the state as a form of casualty insurance [*16 C.F.R. § 700.11*].

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§ 502.68 Actions Under the Magnuson-Moss Act

[1] Provision for Informal Dispute Settlements

The Magnuson-Moss Act attempts to encourage fair and expeditious private settlements of consumer disputes by allowing warrantors to set up informal dispute settlement procedures that meet FTC requirements and are then incorporated into written warranties as a prerequisite to bringing suit under the act (except in a class action, to any extent necessary to establish the class as under federal rules) [*see Fed. R. Civ. P., Rule 23*]) [*15 U.S.C. § 2310(a), (d)(1)*]. The FTC has set up elaborate guidelines for warrantors to institute fair and independent informal dispute settlement "mechanisms" and to inform consumers of the existence of these mechanisms [*see 16 C.F.R. §§ 703.1-703.8*]. Although some manufacturers or retailers have devised more complex complaint processing procedures, these do not operate to postpone legal action under the act in the absence of compliance with FTC guidelines [*see 15 U.S.C. § 2310(a)(3)*].

[2] Alternative Requirement for Affording Opportunity to Correct

In the absence of availability of an informal dispute settlement mechanism, no action may be brought under the Magnuson-Moss Act for failure to comply with any obligation thereunder or under any written or implied warranty or service contract unless the person obligated under the warranty or service contract is afforded a reasonable opportunity to cure the failure to comply. A class action may be entertained only to the point of establishing the class (such as in a United States District Court where the procedure of *Fed. R. Civ. P., Rule 23* is employed), in which case reasonable opportunity must be afforded by the named plaintiff to notify the defendant that the plaintiff is acting on behalf of the class [*15 U.S.C. § 2310(e)*].

[3] Consumer Remedy

A consumer damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation of the Magnuson-Moss Act, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief. The plaintiff must have complied first with the requirements of any available informal dispute settlement mechanism [*15 U.S.C. § 2310(d)(1)*; *see* [1], *above*] or else have afforded a reasonable opportunity

for curing the failure [*15 U.S.C. § 2310(e)*; *see* [2], *above*].

The Magnuson-Moss Act differs from the Song-Beverly Act in that an action under the federal act is available to buyers, transferees, and others who may be entitled (or not limited) under the warranty or state law [*see 15 U.S.C. § 2301(3)*], whereas the state action is open only to the retail buyer. The range of possible defendants and the types of warranties or service contracts involved (to the extent they conform to the requirements of the laws in question) are generally equivalent under the federal and state laws. However, the federal law does not provide for treble damages, as does the state law, and requires as a condition to bringing suit the utilization of any available informal dispute settlement mechanism or other opportunity for the defendants to cure the defect [*see Civ. Code § 1794(c)*].

It should also be pointed out that the definitions of the federal act appear to provide broader protection in certain cases that those provided under the Song-Beverly Act. For example, federal law does not exclude clothing and consumables from its definition of consumer products [*see 15 U.S.C. § 2301(1)*], while the state consumer warranty law does exclude them from its description of "consumer goods" [*see Civ. Code § 1791(a), (c), (d)*]. Thus, a federal cause of action may be available for these commodities (in conjunction with Division 2 of the Commercial Code) while the state action under the Song-Beverly Act may not be [*see § 502.60[2]*]. Likewise, the federal definition of consumer products refers to products that are "normally" used for personal, family, or household purposes, which includes products (such as automobiles and typewriters) that are commonly used for consumer purposes [*see 16 C.F.R. § 700.1(a)*], whereas the Song-Beverly Act describes consumer goods as "used or bought for use primarily" for consumer purposes without other qualification. The federal law also specifically includes personal property attached to real property [*see 16 C.F.R. § 700.1(e), (f)*], while the state law expressly excludes heating or air conditioning equipment when installed [*see Civ. Code § 1795.1*].

[4] Recovery of Costs and Attorney's Fees

The court may allow a consumer who finally prevails in an action under the Magnuson-Moss Act to recover, as part of the judgment, a sum equal to the aggregate amount of cost and expenses reasonably incurred for, or in connection with, the commencement and prosecution of the action. This includes attorney's fees based on actual time expended unless the court in its discretion determines that such an award would be inappropriate [*15 U.S.C. § 2310(d)(2)*; *Milicevic v. Fetcher Jones Imports, Ltd. (2004) 402 F.3d 912, 919-920* (district court did not abuse its discretion when concluding that attorneys' hourly rate was not reasonable and eliminating hours it considered to be unnecessarily duplicative); *Drouin v. Fleetwood Enterprises (1985) 163 Cal. App. 3d 486, 492-493, 209 Cal. Rptr. 623* (attorney fee award need not be apportioned among causes of action when some do not provide for recovery of attorney's fees)]. Under the Song-Beverly Act, an award of costs and attorney's fees to a prevailing buyer is mandatory [*Civ. Code § 1794(d)*].

[5] Available Forums

Suit may be brought in any court of competent jurisdiction in any state or the District of Columbia, or in a appropriate United States District Court. To be brought in the latter forum, the amount in controversy of any individual claim cannot be less than the sum or value of $25; the total claim cannot be less than the sum of $50,000 (exclusive of interest and costs) computed on the basis of any or all claims to be determined in the suit; and if the proceeding is a class action, the number of named plaintiffs cannot be less than 100 [*15 U.S.C. § 2310(d)(1), (3)*]. It thus appears that the Magnuson-Moss Act intends suit thereunder to be commenced in state court on most occasions because it seems to require a $50,000 minimum amount in issue in all instances, regardless of whether the action is commenced by an individual plaintiff or is a class action.

[6] Defendants

For purposes of dispute settlements and actions on consumer grievances under the Magnuson-Moss Act, only the warrantor actually making a written affirmation of fact, promise, or undertaking is deemed to have created a written

warranty. Any rights arising under the warranty may be enforced under the act only against that warrantor and no one else [*15 U.S.C. § 2310(f)*]. A supplier who does no more than sell or distribute a consumer product covered by a written warranty offered and identified as being offered by another is not liable for failure of the warranty to comply with the act or rules thereunder. However, other actions and written or oral representations of a supplier in connection with the offer or sale of a warranted product may make the supplier a warrantor under the act and liable for its own breach of warranty or contract. In addition, if under state law the supplier is deemed to have "adopted" the written affirmation of fact, promise, or undertaking, the supplier is also liable under the act [*see 16 C.F.R. § 700.4*].

[7] Effect on Other Kinds of Recovery

The Magnuson-Moss Act does not affect the liability of, or impose liability on, any person for personal injury; nor does it supersede state law regarding consequential damages for injury to the person or other injury [*15 U.S.C. § 2311(b)(2)*].

[8] Punishable Offenses Under the Act

A violation of the Magnuson-Moss Act also constitutes engaging in unfair and deceptive trade practices, subject to enforcement by the FTC [*15 U.S.C. § 2310(c)*; *see 15 U.S.C. § 45(a)(1)*]. Either that agency or the Attorney General may seek injunctive relief with respect to warrantors failing to comply with or violating prohibitions of the act or for the making of a "deceptive warranty." The latter is a written warranty which does any of the following [*15 U.S.C. § 2310(c)*]:

- Contains an affirmation, promise, description, or representation which is either false or fraudulent, or which, in light of all the circumstances, would mislead a reasonable individual exercising due care.

- Fails to contain information necessary in light of all of the circumstances, to make the warranty not misleading to a reasonable individual exercising due care.

- Created by the use of such terms as "guaranty" or "warranty" if the terms and conditions thereof so limit its scope and application as to deceive a reasonable individual [*15 U.S.C. § 2310(c)*].

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[Reserved]

§§ 502.69[Reserved]

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§ 502.80 Other Matthew Bender Publications

[1] Forms of Discovery

For forms for use in interrogatories involving breach of warranty, see Bender's Forms of Discovery, Ch. 169, *Sales*, Form 1; Ch. 211, *Warranties*, Forms 1-4 (Matthew Bender)

[2] California Legal Forms

For legal forms dealing with sales warranties, see California Legal Forms, Ch. 52, *Sales of Goods Under the Uniform Commercial Code* (Matthew Bender)

For a manufacturer's express warranty, see California Legal Forms, Ch. 92, *Service Contracts* (Matthew Bender)

[3] Legal Forms With Tax Analysis

Rabkin & Johnson, Current Legal Forms With Tax Analysis, Ch. 4, *Sale of Goods* (Matthew Bender)

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§ 502.81 Federal Statutes

Warranties under Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. *15 U.S.C. § 2301 et seq.*

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§ 502.82 State Statutes

[1] In General

"Grey market goods" sold without manufacturer's express warranty. *Civ. Code §§ 1770(a)(21), 1797.8 et seq.*

Song-Beverly Consumer Warranty Act. *Civ. Code § 1790 et seq.*

Consumer goods services. *Civ. Code §§ 1796, 1796.5*

Mobilehome warranties. *Civ. Code §§ 1797-1797.5*

[2] Warranties Under Division 2 of Commercial Code (Sales)

Existence and construction of warranties. *Com. Code §§ 2312-2317*

Warranty affecting arrival of goods. *Com. Code § 2321(2)*

Notice of breach of warranty. *Com. Code § 2607(3)(A)*

Notification by defendant buyer to third-party seller of breach of warranty of infringement for remedy over. *Com. Code § 2607(3)(B)*

Notification by defendant buyer to third-party seller for remedy over. *Com. Code § 2607(5)(A)*

Seller's demand for control of buyer's defense in action for breach of warranty of infringement. *Com. Code § 2607(5)(B)*

Seller's remedies against buyer for breach of obligation to hold harmless after claim for breach of warranty of

infringement. *Com. Code § 2607(6)*

Measure of damages for breach of warranty. *Com. Code § 2714(2)*

Consequential damages. *Com. Code §§ 2714(3), 2715(2)*

Incidental damages. *Com. Code § 2714(3)*

Statute of limitations. *Com. Code § 2725*

Warranty procedure in retail sales. *Com. Code §§ 2800, 2801*

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§ 502.83 Federal Regulations

Interpretations of Magnuson-Moss Warranty Act. *16 C.F.R. §§ 700.1-700.12*

Disclosure requirements under Magnuson-Moss Warranty Act *16 C.F.R. §§ 701.1-701.4*

Presale availability of warranties under Magnuson-Moss Warranty Act. *16 C.F.R. §§ 702.1-702.3*

Informal dispute settlement procedures authorized by Magnuson-Moss Warranty Act *16 C.F.R. §§ 703.1-703.8*

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Volume 44: Sales thru Sanitation and Sewerage Districts-Chs. 500-511
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44-502 California Forms of Pleading and Practice--Annotated § 502.84

§ 502.84 Decisions

[1] Actions for Breach of Warranty

[a] Attorney's Fees

For purposes of awarding attorney's fees under Song-Beverly Consumer Warranty Act (*Civ. Code § 1790 et seq.*), plain language of statute allows for recovery of attorney's fees that have been "reasonably incurred by buyer" [*see Civ. Code § 1794(d)*]; attorney's fees were not "incurred" by prevailing buyer at rates that increased over the years since case began, and thus could not be awarded at higher rates, when buyer was billed and liable only for fees at hourly rate set at beginning of litigation. *Nightingale v. Hyundai Motor America (1994) 31 Cal. App. 4th 99, 104-105, 37 Cal. Rptr. 2d 149*

[b] Costs

Defendant sellers are entitled to recover their costs and expert witness fees as prevailing parties under Song-Beverly Consumer Warranty Act; although *Civ. Code § 1794(d)* mentions only "prevailing buyers," it may be reconciled with *Civ. Code § 1032(b)* under which prevailing defendants are entitled to costs. *Murillo v. Fleetwood Enterprises (1998) 17 Cal. 4th 985, 999, 73 Cal. Rptr. 2d 682, 953 P.2d 858*

Defendant is responsible only for costs reasonably incurred by plaintiff in commencing and prosecuting suit against them, and cannot be charged for service of process on another defendant that settled. *Levy v. Toyota Motor Sales U.S.A., Inc. (1992) 4 Cal. App. 4th 807, 813, 5 Cal. Rptr. 2d 770*

[c] Damages

Emotional distress damages and loss of use damages for period when buyer did not have replacement vehicle are not recoverable under Song-Beverly *Consumer Warranty Act. Bishop v. Hyundai Motor Co. (1996) 44 Cal. App. 4th 750, 757-758, 52 Cal. Rptr. 2d 134*

Award of lost profits and restitution of sums paid for trucks in breach of warranty action was not per se inconsistent because California Commercial Code has not adopted rule of election of remedies. *Berge v. International Harvester Co. (1983) 142 Cal. App. 3d 152, 163, 190 Cal. Rptr. 815*

[d] Penalty

"Willful" within meaning of *Civ. Code § 1794(c)* requires only that illegal act or omission occur intentionally without regard to motive or ignorance of act's prohibited character, and does not include moral component; jury instructions using words such as "blameworthy" and "reckless disregard of consumer's rights" are error. *Schreidel v. American Honda Motor Co. (1995) 34 Cal. App. 4th 1242, 1249-1250, 40 Cal. Rptr. 2d 576* ; *Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 894, 263 Cal. Rptr. 64*

Manufacturer's failure to refund or replace defective automobile is not "willful" under *Civ. Code § 1794(c)* if it reasonably and in good faith believed facts did not call for refund or replacement. *Kwan v. Mercedes Benz of North America, Inc. (1994) 23 Cal. App. 4th 174, 186, 28 Cal. Rptr. 2d 371*

Plaintiff is not entitled to recover both civil penalty of *Civ. Code § 1794(c)* and punitive damages under *Civ. Code § 3294* because that would amount to double recovery. *Troensegaard v. Silvercrest Industries, Inc. (1985) 175 Cal. App. 3d 218, 221, 226-228, 220 Cal. Rptr. 712*

Existence of specific statutory remedy provided by *Civ. Code § 1794(c)* precludes cause of action for tort of bad faith breach of covenant of good faith and fair dealing on account of seller's wrongful refusal to make repairs or provide replacement under an express warranty. *Gomez v. Volkswagen of America, Inc. (1985) 169 Cal. App. 3d 921, 925-929, 215 Cal. Rptr. 507*

[2] Express Warranty

[a] Labels

Failure of goods to conform to label was breach of express warranty. *Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co., Inc. (1988) 200 Cal. App. 3d 1518, 1532, 246 Cal. Rptr. 823*

Food & Agric. Code § 52252(e) was construed to conform to Federal Seed Act and related regulations; thus, apparent 5-percent tolerance in California provision was overridden; labels "0.00 other crop; 0.00 weed" on perennial ryegrass seed shipments containing 1 percent and 4.25 percent, respectively, of annual or Italian ryegrass, were in violation of California and federal law. *Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co., Inc. (1988) 200 Cal. App. 3d 1518, 1527-1532, 246 Cal. Rptr. 823*

[b] Particular Promise

Section 5(b) of Public Health Cigarette Smoking Act of 1969 (*15 U.S.C. § 1334(b)*) does not preempt state law damage claims against cigarette manufacturers and sellers for breach of express warranty, even if warranties were made in advertising. *Cipollone v. Liggett Group, Inc. (1992) 505 U.S. 504, 526-527, 112 S. Ct. 2608, 120 L. Ed. 2d 407, 428-429, 432, 440*

Evidence did not show that manufacturer of motors used to propel satellites from space shuttle breached its express warranty under *Com. Code § 2313(1)(a)* to supply motors that were free from defects in labor, material, or manufacture.

McDonnell-Douglas Corp. v. Thiokol Corp. (9th Cir. 1997) 124 F.3d 1173, 1176-1178

Statements in brochure advertising rental bikes and stating that particular trail was safe cycling area amounted to express warranty that bikes were safe and became part of bargain. *Pau v. Yosemite Park and Curry Co. (9th Cir. 1991) 928 F.2d 880, 887*

Defendant manufacturer's and seller's representation on shipping carton and instruction book cover for its golfer training device which plaintiff read and relied on constituted express warranty of safety of product resulted in liability for injuries resulting from breach thereof after defendant failed to present any evidence which could remove those assurances of safety from basis of bargain. *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 117, 120 Cal. Rptr. 681, 534 P.2d 377*

Sales brochure disseminated to public and buyer stating that drill rig would drill to certain depth under particular circumstances was express warranty as to rig's capacity. *Fundin v. Chicago Pneumatic Tool Co. (1984) 152 Cal. App. 3d 951, 957, 199 Cal. Rptr. 789*

Promise of time of delivery was not warranty and therefore delay in delivery was not breach of warranty. *A.A. Baxter Corp. v. Colt Indus., Inc. (1970) 10 Cal. App. 3d 144, 153, 88 Cal. Rptr. 842*

Representation through advertisements, labels, and pamphlets that product is appropriate for purchaser's skin, but which cautions that some skin may be sensitive to and react against application thereof and advises patch test before full application, which instruction plaintiff purchaser has followed, was not express warranty that product is good for all skin, even though plaintiff performed patch test before application. *Harris v. Belton (1968) 258 Cal. App. 2d 595, 605-606, 65 Cal. Rptr. 808* (evidence also introduced in action of prior skin irritation and that plaintiff had treated herself with other products when irritation developed after use of seller's product, even though instructions cautioned against mixing)

[c] Limitation, Modification, and Disclaimer

Disclaimer of warranties by financing lessor was not per se unconscionable, but was to be tested under *Com. Code § 2316*; when financing lessor validly disclaimed all warranties and goods conformed to lease, lessee could not revoke acceptance as to lessor, but could look to manufacturer or supplier for its remedy. *U.S. Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal. App. 3d 1431, 1450-1453, 279 Cal. Rptr. 533*

Commercial entities were entitled to contract to limit liability of one to the other, or otherwise allocate risk of doing business; requirements of agreements excluding liability for one's negligence. *Philippine Airlines, Inc. v. McDonnell Douglas Corp. (1987) 189 Cal. App. 3d 234, 237-238, 234 Cal. Rptr. 423* (citing *Com. Code §§ 2316(2), (4), 2719*)

When product was expressly described by manufacturer as having certain detailed capacities under certain conditions, language in brochure disclaiming warranty of product's suitability for any particular purpose did not negate express warranty. *Fundin v. Chicago Pneumatic Tool Co. (1984) 152 Cal. App. 3d 951, 958, 199 Cal. Rptr. 789*

[d] Privity

When consumer relied on representations made by manufacturer in labels or advertising material, recovery was allowed on theory of express warranty without showing of privity. *Fundin v. Chicago Pneumatic Tool Co. (1984) 152 Cal. App. 3d 951, 957, 199 Cal. Rptr. 789*

[e] Single Cause of Action

Breach of express warranty did not give rise to two separate causes of action when both injury to person and to property resulted; warranty is essentially contractual in character, created by parties' agreement rather than operation of law, and subject to negotiation and modification at time of agreement; thus, all damages for single breach must be recovered in one action. *Holmes v. David H. Bricker, Inc. (1969) 70 Cal. 2d 786, 789-790, 76 Cal. Rptr. 431, 452 P.2d 647*

[3] Implied Warranty

[a] Fitness for Particular Purpose

Class action cannot be predicated on breach of implied warranty for particular purpose because breach consists of elements that could be established only by testimony as to each purchaser's intended purpose and reliance, and defendant seller's awareness of these elements, testimony which could be expected to vary greatly with no common method of proof available to large group of purchasers. *Metowski v. Traid Corp. (1972) 28 Cal. App. 3d 332, 341-342, 104 Cal. Rptr. 599*

[b] Merchantability

In action for breach of implied warranty of merchantability under Song-Beverly Consumer Warranty Act against automobile manufacturer, trial court properly instructed jury by defining fitness-for-ordinary-purpose requirement in terms of vehicle that is "in safe condition and substantially free of defects"; defendant requested instruction that vehicle was unfit only if it did not provide transportation, but that would have been unjustified dilution of implied warranty of merchantability: merely because vehicle provides transportation from point A to point B, it does not necessarily conform to fitness-for-ordinary-purpose requirement of implied warranty of merchantability. *Isip v. Mercedes-Benz USA, LLC (2007) 155 Cal. App. 4th 19, 27, 65 Cal. Rptr. 3d 695* ("[a] vehicle that smells, lurches, clanks, and emits smoke over an extended period of time is not fit for its intended purpose")

Golfer training device, by being conducive to, and actually resulting in, injury to plaintiff, breaches implied warranty of merchantability in two respects: (1) failing to conform to promise or affirmation of fact made on container, which promised completely safe mechanism; and (2) failing to be fit for ordinary purposes for which goods are used. *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 117-118, 120 Cal. Rptr. 681, 534 P.2d 377*

Although different rule may apply when express warranty is breached, under Song-Beverly Consumer Warranty Act there is no requirement that seller be given opportunity to repair when implied warranty of merchantability is breached. *Mocek v. Alfa Leisure, Inc. (2003) 114 Cal. App. 4th 402, 406-408, 7 Cal. Rptr. 3d 546*

[c] Privity

In owners association's construction defect action against developer, trial court erred in concluding that association did not have requisite privity of contract to state cause of action for breach of implied warranty; Civ. Code § 383 provided requisite privity. *Windham at Carmel Mountain Ranch Association v. Superior Court (2003) 109 Cal. App. 4th 1162, 1166, 135 Cal. Rptr. 2d 834*

[4] Jury Instructions

When manufacturer admits existence of warranties, even slight evidence of their breach entitles plaintiff to jury instruction covering warranty. *Bernal v. Richard Wolf Medical Instruments Corp. (1990) 221 Cal. App. 3d 1326,*

1337-1338, 272 Cal. Rptr. 41

[5] Notice to Seller

Question of what constitutes reasonable time under *Com. Code § 2607(3)(A)* for giving of notice is usually question of fact for jury. *Los Angeles Nut House v. Holiday Hardware Corp. (9th Cir. 1987) 825 F.2d 1351, 1354* ; *but see Davidson v. Herring-Hall-Marvin Safe Co. (1954) 131 Cal. App. 2d Supp. 874, 280 P.2d 549* (question of law)

Required proof of notice by buyer to seller of breach of warranty within reasonable time, under *Com. Code § 2607*, is not sufficient to defeat class action under claim that timely notice must be separately litigated by each plaintiff when: (1) a number of dissatisfied customers have sued within reasonable time, which might satisfy notice requirement particularly when seller knew or should have discovered failure of merchandise to conform to express warranties; (2) issues otherwise which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that class action would be advantageous to judicial process and litigants involved; and (3) individual damages sought would make separate recoveries economically infeasible. *Metowski v. Traid Corp. (1972) 28 Cal. App. 3d 332, 339-341, 104 Cal. Rptr. 599* (suggesting that element of timely notice by each plaintiff could be considered after liability is established in order to assess individual's own collectible damages)

[6] Rescission; Revocation of Acceptance

Under both Commercial Code and Song-Beverly Consumer Warranty Act, reasonable continued use of motorized vehicle that does not conform to express warranty did not, as matter of law, prevent buyer from asserting rescission or revocation of acceptance. *Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 897-898, 263 Cal. Rptr. 64*

[7] Restrictions on Disclaimers

Total disclaimer of all warranties and requirement that buyer purchase insurance to cover all losses and hold seller and all seller's contractors and subcontractors harmless was reasonable allocation of risk between large sophisticated commercial entities in specially manufactured, specialized high technology, high-risk product. *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 27, 262 Cal. Rptr. 716*

Fact that manufacturer is better able than buyer to detect defects was not relevant in evaluating claimed unconscionability of warranty disclaimer and hold-harmless clauses when item was not mass produced but was specialized high technology, high-risk product and contract was not preprinted but was negotiated by parties. *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 25-26, 262 Cal. Rptr. 716*

Purchaser that drafted one of two exculpatory clauses in contract and had dealt with similar provisions in previous contracts between parties was unable to claim surprise at scope of provisions claimed to be unconscionable. *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 24-25, 262 Cal. Rptr. 716*

Between large sophisticated companies no procedural element of unconscionability was established with respect to warranty disclaimer and hold-harmless provisions by alleged total monopoly on manufacture of upper-stage rockets used to launch communications satellites when French company, with which purchaser had originally contracted, provided alternative launch capability. *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 23, 262 Cal. Rptr. 716*

When warranty disclaimer and hold-harmless provisions are clear and unambiguous in precluding suit by purchaser against manufacturer's subcontractors, intent of drafters of related service contract between different parties and

covering different subject matter is not relevant. *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 18, 262 Cal. Rptr. 716*

Unconscionable disclaimer of warranty was unenforceable despite technical compliance with requirements of *Com. Code § 2316* because policing provisions of *Com. Code § 2316* are limited to problems involving visibility of disclaimers and conflicts with express warranties; oppression and unfair surprise are principal targets of unconscionability doctrine, resulting from other types of questionable commercial practices. *A & M Produce Co v. FMC Corp. (1982) 135 Cal. App. 3d 473, 484, 186 Cal. Rptr. 114*

[8] Strict Liability

Strict liability is not applicable to defective product in commercial setting when only business loss is involved; thus, disclaimer of strict liability in commercial transaction was effective. *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 33, 262 Cal. Rptr. 716*

[9] Waiver of Warranty

Waiver of warranty must be pleaded to make it available as defense. *Southern Pac. Co. v. Unarco Industries, Inc. (1974) 42 Cal. App. 3d 142, 151, 116 Cal. Rptr. 847*

Warranty is not waived by mere acceptance of defective goods with knowledge of their defects; buyer's participation in seller's program of replacement and upgrading of product components did not cut off buyer's right of action for breach of express warranty as matter of law. *Southern Pac. Co. v. Unarco Industries, Inc. (1974) 42 Cal. App. 3d 142, 150-151, 116 Cal. Rptr. 847*

[10] Warranty of Title

Seller is liable for buyer's attorney's fees in action for breach of warranty of title involving gun which, unknown to seller and buyer, had been stolen at time of sale, when parties could reasonably foresee that possession of gun could result in plaintiff buyer's arrest and resulting need to engage attorney. *De La Hoya v. Slim's Gun Shop (1978) 80 Cal. App. 3d Supp. 6, 146 Cal. Rptr. 68*

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§ 502.85 Law Reviews

Note, *Can Warrantors Make an End Run? The Magnuson-Moss Act and Mandatory Arbitration*, 34 Vol. *3 Ga. L. Rev. 1483 (2000)*

P. A. Alces, *Whither Warranty: The Bloom of Products Liability Theory in Cases of Deficient Software Design*, 87 Vol. *1 Cal. L. Rev. 269 (1999)*

Note, *"Much Ado Leads to Nothing: That Basis of the Bargain" in Section 2-313 of the Uniform Commercial Code Should Be Eliminated Is Still Lost on Drafters*, 24 Vol. *2 J. Corp. L. 453 (1999)*

J. C. Selman, C. S. Chen, *Steering the Titanic Clear of the Iceberg: Saving the Sale of Software from the Perils of Warranties, 31 U.S.F. L. Rev. 531 (1997)*

Donald W. Grantel, *Determining Whether a Nonconformity Substantially Impairs the Value of Goods, 26 U.CC. L. J. 129 (1993)*

Marc M. Schneier, *The Magnuson-Moss Warranty Act: Federalizng Homeowner Construction Defect Cases*, 13-Oct. Construction Law 1 (1993)

Alex Devience, Jr., *Magnuson-Moss Act: Substitute for UCC Warranty Protections? 95 Com. L. J. 323 (1990)*

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§ 502.86 Text Reference

Witkin, Summary of California Law vol. 3, *Sales*, §§ 51-113, 198-205, 327 (10th ed. 2005)

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[Reserved]

§§ 502.87[Reserved]

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§ 502.100 Notice of Breach of Warranty [Com. Code § 2607(3)(A)]

[1] FORM Notice of Breach of Warranty [Com. Code § 2607(3)(A)]

TO: _____ [*seller at business address*]

YOU ARE HEREBY NOTIFIED that you have breached the _____ [express *or* implied *if applicable*] warranty _____ [of _____ (*describe type, e.g.*, title *or* that _____ (*describe, e.g.*, the material is defect-free) *or* against infringement] _____ [made *or* arising] in connection with your sale to _____ [*name and other identifying data of buyer, such as address*] on or about _____ [*date*], at _____ [*location*] of goods consisting of _____ [*describe quantity and nature of goods*].

[Please contact the undersigned at your earliest convenience with regard to resolution of this matter.]

[Sincerely yours,]

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*name of buyer*]

Dated: _____.

[2] Use of Form

The notice in [1], *above*, is for use by a buyer to notify a seller of a claim for breach of warranty. Notice must be given

by a buyer who, after acceptance of goods, discovers that a particular warranty arising under Division 2 of the Commercial Code has been breached by the seller and seeks a remedy for the breach [*see Com. Code § 2607(3)(A)*]. Notice of breach of warranty is required in order to prevent stale claims [*see Metowski v. Traid Corp. (1972) 28 Cal. App. 3d 332, 339, 104 Cal. Rptr. 599* (allowing class action on express warranty to proceed despite need to establish notice of breach in each individual plaintiff's instance)].

[3] Requirement of Notification of Breach of Warranty

A buyer who has accepted a tender of goods must, within a reasonable time after he or she discovers or should have discovered any breach, including breach of warranty, notify the seller of the breach or else be barred from any remedy for the breach [*Com. Code § 2607(3)(A)*]. This type of notice should be given with respect to any breach of warranty arising under the provisions of Division 2 of the Commercial Code, the general law of sales. Better practice suggests that the notice be written and given separately and in addition to any other form of notification required, even when the discovery and need for notification arise concurrently.

The buyer has the burden of proving reasonable notice. The question whether notice was properly given must be determined from the particular circumstances, and when but one inference can be drawn from undisputed facts, the issue may be determined as a matter of law [*Cardinal Health 301, Inc. v. Tyco Electronics Corp. (2008) 169 Cal. App. 4th 116, 135-136, 87 Cal. Rptr. 3d 5]* .

When a buyer is suing for a breach of an implied warranty under the Song-Beverly Act, which incorporates the "remedies" under those portions of the Commercial Code which include *Com. Code § 2607*, it would appear that this notice should also be served before the commencement of the action [*see Civ. Code § 1791.1(d)*].

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§ 502.101 Notice to Warrantor Affording Opportunity to Cure Failure to Comply With Warranty or Provisions of Magnuson-Moss Warranty-Federal Trade Commission Improvement Act [15 U.S.C. § 2310(e)]

[1] FORM Notice to Warrantor Affording Opportunity to Cure Failure to Comply With Warranty or Provisions of Magnuson-Moss Warranty-Federal Trade Commission Improvement Act [15 U.S.C. § 2310(e)]

TO: _____ [*name of warrantor at business address*]

YOU ARE HEREBY NOTIFIED that the undersigned, a [transferee of a] purchaser of your _____ [*describe consumer product*], which carried your written warranty, is hereby affording you a reasonable opportunity to cure your failure to comply with the provisions of [the Magnuson-Moss Act with respect to] the warranty. The product fails to _____ [_____ (be free of defect *or* meet the specified level of performance over the specified period of time) as _____ (affirmed *or* promised) with regard to the material or workmanship therein *or* meet the specifications set forth in the undertaking] and you have failed to take any remedial action with regard thereto although requested to do so by the undersigned. [This matter has been sufficiently brought to your attention for correction heretofore, and] [T]he undersigned intends to file an action against you on or about _____ [*date*], unless you take curative action prior thereto. This notification is provided in lieu of any informal dispute settlement mechanism, which has not been incorporated into the above-mentioned warranty.

[Very truly yours,]

_____ [*signature*]

[Attorney for] _____ [*name of consumer*]

Dated: _____.

[2] Use of Form

The notice in [1], *above*, is for use by a consumer purchaser, or transferee, who contemplates bringing an action under

the Magnuson-Moss Act against a warrantor of a defective product when the warranty does not provide for resort to an informal dispute settlement mechanism as a necessary prelude to instituting the action [*see 15 U.S.C. § 2310(d)(1), (e)*; *§ 502.68[2]* and *[3]*].

[3] Notice Requirements Under Magnuson-Moss Act

A consumer (including a transferee [*see 15 U.S.C. § 2301(3)*]) who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under the Magnuson-Moss Act or under a written warranty, implied warranty, or service contract may bring suit for damages and other legal and equitable relief. However, the damaged party must first resort to any informal dispute settlement mechanism incorporated into the warranty and set up by the manufacturer (alone or with others) according to requirements of the FTC [*see 15 U.S.C. § 2310(a), (d)(1)*; *16 C.F.R. § 703.1 et seq.*]. In the absence of an informal dispute resolution mechanism, the consumer must afford the person obligated under the warranty or service contract a reasonable opportunity to cure the failure to comply with any obligation under the written or implied warranty or service contract before bringing suit [*15 U.S.C. § 2310(e)*; as to class actions, *see § 502.181* (form of allegations)]. Because this latter requirement does not expressly apply to a failure to comply with an obligation of the act (as opposed to a warranty or service contract obligation), it is conceivable that an action may be brought for damages for the failure without giving prior notice.

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§ 502.102 Notice to Seller That Buyer Has Been Sued for Breach of Warranty for Which Seller Is Answerable Over [Com. Code § 2607(5)(A)]

[1] FORM Notice to Seller That Buyer Has Been Sued for Breach of Warranty for Which Seller Is Answerable Over [Com. Code § 2607(5)(A)]

TO: _____ [*seller at business address*]

YOU ARE HEREBY NOTIFIED that _____ [*name and other identifying data of buyer, such as address*] has been sued in an action entitled _____ vs. _____, No. _____, filed on or about _____ [*date*], in _____ [*name of court*] at _____ [*specify locale*], for the breach of a warranty _____ [made *or* arising] in connection with the sale of goods consisting of _____ [*describe quantity and nature of goods*], originally purchased from you by _____ [*buyer*] on or about _____ [*date*], at _____ [*location*] for which you are answerable over [by virtue of a[n] _____ (express *or* implied) warranty _____ (of _____ (*describe type*) *or* that _____ (*describe substance*) *or* against infringement)]. You may enter that suit after seasonable receipt of this notice and defend therein; and if you do not do so, you shall be bound in any action _____ [*name of buyer*] brings against you by any determination of fact common to the two litigations.

[Very truly yours,]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*name of buyer*]

Dated: _____.

[2] Use of Form

The notice in [1], *above*, is for use by a buyer who has been sued by a customer for breach of warranty with respect to goods sold to the buyer by a third-party seller, and for which breach that seller is answerable over to the buyer when the buyer's rights are protected through this notification [*see Com. Code § 2607(5)(A)*].

[3] Notification to Seller of Suit Against Buyer

A buyer who has been sued for a breach of a warranty for which the seller is answerable may gain important rights against the seller by giving the seller written notice of the litigation in accordance with *Com. Code § 2607(5)(A)*. Under that section, if the notice states that the seller may defend and that if the seller does not do so, the seller will be bound in any action by the buyer against the seller by any determination of fact common to the two lawsuits, then unless the seller after seasonable receipt of the notice does defend, the seller is so bound [*Com. Code § 2607(5)(A)*]. An ordinary demand for indemnity and that the seller come in and assume the defense is not sufficient to bind the seller. The notice must specifically state that unless the seller assumes the defense (of the action against the buyer) the seller will be bound by any determination of the facts common to the two litigations (the one against the buyer and the buyer's action over against the seller) [*Bendix-Westinghouse Automotive Air Brake Co. v. Swan Rubber Co. (1976) 55 Cal. App. 3d 256, 260-262, 127 Cal. Rptr. 571]* .

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§ 502.103 Complaint by Buyer Against Seller After Buyer's Loss of Action Against It for Breach of Warranty (Remedy Over) for Which Seller Is Answerable [Com. Code § 2607(5)(A)]

[1] FORM Complaint by Buyer Against Seller After Buyer's Loss of Action Against It for Breach of Warranty (Remedy Over) for Which Seller Is Answerable [Com. Code § 2607(5)(A)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR REMEDY OVER FOR
_____ [*names*],	)	BREACH OF WARRANTY
Defendants.	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence of plaintiff*].

[*OR*]

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of _____ [California *or other*] [and qualified to transact business in California] with its principal business office located in _____ County, California [*or allege*

other capacity and residence of defendant(s)].

[*OR*]

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a partnership with its principal business office located in _____ County, California [*or allege other capacity and residence of defendant(s)*]. [Defendants _____ (*names*) are, and at all times herein mentioned were, members of the partnership (and are, and at all times mentioned herein were, residents of _____ County, California).]

[*CONTINUE*]

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

3-4. [*Allegations of sale and of warranty created by that sale. For allegations of sale and warranty imposed by law, see § 502.260[1] or 502.283[1], Paragraphs 3 and 4 and § 502.261[1] or § 502.262[1]; for allegations of express warranty and sale, see § 502.140[1], Paragraphs 3 and 4 and § 502.1411[1] or § 502.142[1]; for allegations of sale and implied warranty, see § 502.200[1], § 502.220[1], § 502.240[1], Paragraphs 3 and 4 and § 502.104[1] or § 502.201[1]* .]

5. On or about _____ [*date*], plaintiff resold these goods[, as contemplated in the contract of sale with defendant,] to _____ [*name of third party*]. Thereafter, and on or about _____ [*date*], _____ [*name of third party*] notified plaintiff of a breach warranty, in that _____ [*describe complaint, e.g.,* the goods were not of merchantable quality *or other direct expression or indication of breach of warranty*]. Plaintiff thereon, and on or about _____ [*date*], notified defendant of this breach of warranty by _____ [writing, in the form of a _____ (letter *or* telegram *or other*), a true copy of which is attached as Exhibit A and incorporated by reference *or* personal visit and communication *or* telephone call *or other*].

6. On or about _____ [*date*], that _____ [*name of third party*] sued plaintiff for the breach of warranty in an action entitled _____ vs. _____, No. _____, in _____ [*name of court*] at _____ [*locale*]. [*If claim of infringement involved, and separate notice of suit was deemed necessary or given at earlier time* (*see Com. Code § 2607(3)(B)*)]: On or about _____ [*date*], plaintiff gave defendant notice of that litigation by _____ (writing, in the form of a _____ (letter *or* telegram *or other*), a true copy of which is attached as Exhibit B and incorporated by reference *or* personal visit and communication *or* telephone call *or other*).] On or about _____ [*date*], plaintiff sent defendant a [further] notice of that litigation and a request to come in and defend, a true copy of which is attached as Exhibit _____ and incorporated by reference, containing a warning that defendant would otherwise be bound by any common questions determined; but defendant failed and refused to enter that litigation.

7. By the decision and judgment in that action, that breach of warranty was established and plaintiff was held liable therefor in total damages in the amount of $_____. [A certified copy of the judgment is attached as Exhibit _____ and incorporated by reference.] All facts that were determined and which established breach and liability in that case were in common with the transaction in which defendant sold that goods to plaintiff and made a warranty regarding the goods: _____ [*specify which facts are common to the two litigations*]; so that defendant herein is bound thereby and as a result thereof is liable over to plaintiff for damages in the amount of

$_____.

8. Plaintiff has been further damaged as a result of defendant's breach in that plaintiff had to retain the legal services of _____ [*name of attorney*] to defend plaintiff in that action, resulting in reasonable legal fees in the amount of $_____. _____ [*Specify any other incidental or consequential damages*].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the sum of $_____;

2. For damages for _____ [*specify incidental or consequential damages, e.g.*, attorney's fees] the sum of $_____;

3. For costs of suit herein incurred, including attorney's fees, if appropriate; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The complaint in [1], *above*, is for use by a buyer who is suing a seller for remedy over after the buyer has been sued by a customer and found liable for breach of warranty concerning goods the buyer procured from the seller [*see Com. Code § 2607(5)(A)*]. In the unlikely event this form is used in connection with a consumer transaction that is subject to the Unruh Retail Installment Sales Act (RISA; *Civ. Code § 1801 et seq.*) or the Rees-Levering Motor Vehicles Sales and Finance Act (Rees-Levering Act; *Civ. Code § 2981 et seq.*), the plaintiff must, concurrently with the filing of the complaint, file the affidavit of proper venue [*see § 502.160[7]*].

[3] Allegations

The complaint in [1], *above*, alleges the following:

- The residence and capacity of the defendant (Paragraph 1).

- Fictitious names of defendants, if any (Paragraph 2).

- The applicable sale and warranty involved in the original sale of the goods from defendant to plaintiff (Paragraphs 3, 4).

- Plaintiff's resale of the goods, discovery of the breach through the customer therein, and separate notice of breach to defendant (Paragraph 5) [*Com. Code § 2607(3)(A)*].

- Suit against plaintiff by the customer, and notice given by plaintiff to defendant (of any claim for infringement, and, separately [*see § 502.280[3]*) of that suit and request for defendant to come in and defend or be bound thereby (Paragraph 6) [*see Com. Code § 2607(3)(B), (5)(A)*].

- Establishment of plaintiff's liability in that suit by facts common to present suit, proximately resulting in damages in the amount of that liability (Paragraph 7) [*Com. Code §§ 2607(5)(A), 2714(2)*].

- Consequential damages consisting of attorney's fees for defending the suit by the customer, and other incidental or consequential damages (Paragraph 8) [*Com. Code §§ 2714(3), 2715*; *see § 502.283[4]*].

[4] Claims Payable in Foreign Currency

If the claim is payable in a foreign currency, or payment requires conversion to or from a foreign currency, additional allegations should be added setting forth that fact. Otherwise, the claim is made in United States dollars [*Code Civ. Proc. § 676.6(a)*]. For discussion of and a form for judgment applicable to the Uniform Foreign-Money Claims Act [*Code Civ. Proc. § 676 et seq.*], *see* Ch. 177, *Damages* , and Ch. 318, *Judgments* .

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Attorney's Fees

In an action on a contract, when the contract specifically provides that attorney's fees and costs incurred to enforce the contract will be awarded to one of the parties, reasonable attorney's fees may be recovered by the prevailing party, but as an element of the costs of suit, not as damages [*Civ. Code § 1717*]. However, the court must award costs and attorney's fees to a prevailing plaintiff in litigation governed by to *Civ. Code § 1780* (consumer suffering damage from any practice deemed unlawful under *Civ. Code § 1770*) [*Civ. Code § 1780(d)*]. Reasonable attorney's fees may be awarded to a prevailing defendant on a finding by the court that the plaintiff's prosecution of the action was not in good faith [*Civ. Code § 1780(d)*]. In addition, the seller may be liable for attorney's fees as a natural and usual consequence of breach of warranty of title [*see De La Hoya v. Slim's Gun Shop (1978) 80 Cal. App. 3d Supp. 6, 146 Cal. Rptr. 68* (sale of stolen gun in which parties should have reasonably foreseen buyer's arrest and resulting need to engage attorney); *see*

also § 502.283[4]]. For discussion and forms relating to recovery of attorney's fees, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq. For discussion of attorney's fees under *Civ. Code § 1717.5* in certain contract actions based on a book account as defined in *Code Civ. Proc. § 337a*, see Ch. 8, *Accounts Stated and Open Accounts* .

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, §§ 177.40 et seq. and 177.140* et seq.

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue*

For alternative verification forms, see Ch. 572, *Verification*

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44-502 California Forms of Pleading and Practice--Annotated § 502.104

§ 502.104 Allegation for Use in Complaint for Breach of Warranty--Damages for Personal Injuries and Property Damage [Com. Code § 2714(3), 2715(2)(b)]

[1] FORM Allegation for Use in Complaint for Breach of Warranty--Damages for Personal Injuries and Property Damage [Com. Code § 2714(3), 2715(2)(b)]

As a further natural and consequential result of defendant's breach of the warranty herein, plaintiff suffered injuries to person and property, in that _____ [*specify, e.g.*, when these goods exploded they caused grave trauma to the body of plaintiff for which injuries plaintiff was hospitalized for a considerable amount of time and required serious medical attention, in _____ (an amount to be determined by this court *or* the amount of $_____); and the explosion caused serious damage to plaintiff's business premises where the explosion occurred, doing injury to the walls, roof, floors, and equipment thereof in the amount of $_____].

[2] Use of Form

The allegation in [1], *above*, may be added to a complaint, specifically to the paragraph alleging incidental and consequential damages, or may form a new paragraph, in a complaint for any type of breach of warranty, express or implied, which may have naturally resulted in consequential personal injuries or property damage [*see Com. Code §§ 2714(3), 2715(2)(b)*]. The Magnuson-Moss Act does not affect liability of, or impose liability on, persons for personal injury, nor does it supersede state law regarding consequential damages for injury to person or other injury [*15 U.S.C. § 2311(b)(2)*].

[3] Cross References

For discussion and forms relating to strict liability for injuries caused by defective products and design, see Ch. 460, *Products Liability*

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44-502 California Forms of Pleading and Practice--Annotated §§ 502.105-502.119

[Reserved]

§§ 502.105[Reserved]

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44-502 California Forms of Pleading and Practice--Annotated § 502.120

§ 502.120 Affirmative Defense to Complaint for Breach of Warranty Under the Commercial Code Based on Agreement to Limit Remedies for Breach of Warranty [Com. Code § 2316(4)]

[1] FORM Affirmative Defense to Complaint for Breach of Warranty Under the Commercial Code Based on Agreement to Limit Remedies for Breach of Warranty [Com. Code § 2316(4)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

The contract of sale between plaintiff and defendant limits the remedies that may be obtained by plaintiff for any alleged breach of warranty, in that plaintiff thereunder is entitled to seek only _____ [*describe, e.g.,* liquidated damages in the amount of $_____, which amount is reasonable in the light of the anticipated and alleged actual harm caused by the alleged breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy *or* the return of the goods and repayment of the price *or* the repayment and replacement of nonconforming goods or parts].

[2] Use of Form

The affirmative defense in [1], *above*, is for use in defending against a claim of breach of warranty of any kind by virtue of an agreement between the parties limiting the available remedies in event of a breach [*see Com. Code § 2316(4)*; *see also Com. Code § 2718(1)* (liquidated damages in contracts for sale of goods); *Com. Code § 2719* (contractual modification or limitation of remedies in sale of goods)].

For additional discussion of affirmative defenses and answers in general, see Ch. 26, *Answers* .

[3] When Usable in Consumer Litigation

The affirmative defense in [1], *above*, may not be used in an action for breach of the implied warranties of merchantability or fitness under the provisions of the Song-Beverly Act because any waiver of remedy of that act by the

buyer is unenforceable and void [*see Civ. Code § 1790.1*; *see also Civ. Code §§ 1791.1(d), 1794*]. Under the federal Magnuson-Moss Act any warranty that is not designated a full warranty must be designated a limited warranty [*see 15 U.S.C. § 2303(a)*]. If the warranty is a full one and thereby meets the federal minimum standards, it still may limit or exclude consequential damages for breach of written or implied warranty on the product if it does so conspicuously on the face of the warranty [*15 U.S.C. § 2304(a)(3)*]. A limited warranty is not otherwise defined under the federal legislation and presumably is allowed to limit remedies in any way not otherwise in conflict with the provisions of the act.

[4] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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44-502 California Forms of Pleading and Practice--Annotated § 502.121

§ 502.121 Affirmative Defense to Complaint for Violation of Song-Beverly Consumer Warranty Act Claiming Defect in Consumer Good Was Caused by Unauthorized or Unreasonable use After Sale [Civ. Code § 1794.3]

[1] FORM Affirmative Defense to Complaint for Violation of Song-Beverly Consumer Warranty Act Claiming Defect in Consumer Good Was Caused by Unauthorized or Unreasonable use After Sale [Civ. Code § 1794.3]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

Any defect or noncomformity of which the plaintiff complains in this matter was proximately caused by the unauthorized or unreasonable use of the goods by the plaintiff following sale and delivery of those goods by defendant to plaintiff.

[2] Use of Form

The affirmative defense in [1], *above*, may be used in any action for breach of an express or implied warranty arising under the Song-Beverly Act when the defect or nonconformity complained of was proximately caused by the unauthorized or unreasonable use of the product [*see Civ. Code § 1794.3*, § 502.53[4]].

[3] Applicability of Defense to Federal Actions

Under the Magnuson-Moss Act, a warrantor offering a full warranty must comply with certain federal minimum standards. However, a warrantor is excused from performance of any duties required by these standards if the warrantor shows that the defect, malfunction, or failure of the consumer product to conform with a written warranty was caused by damage (not resulting from a defect or malfunction) while in the possession of the consumer or by unreasonable use (including the failure to provide reasonable and necessary maintenance) [*15 U.S.C. § 2304(c)*; *see § 502.62[5][e]*].

[4] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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44-502 California Forms of Pleading and Practice--Annotated §§ 502.122-502.139

[Reserved]

§§ 502.122[Reserved]

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44-502 California Forms of Pleading and Practice--Annotated § 502.140

§ 502.140 Complaint for Damages for Breach of Express Warranty Made by Promise or Affirmation of Fact [Com. Code § 2313(1)(a)]

[1] FORM Complaint for Damages for Breach of Express Warranty Made by Promise or Affirmation of Fact [Com. Code § 2313(1)(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR BREACH OF EXPRESS WAR-
_____ [*names*],	)	RANTY
Defendants.	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 502.103[1], Paragraph 1.*]

2. [*Fictitious defendants. See § 502.103[1], Paragraph 2.*]

3. On or about _____ [*date*], at _____ [*city*], California, plaintiff negotiated with defendant for the purchase of certain goods consisting of _____ [*describe quantity and nature of goods*]. In the course of the negotiations, defendant _____ [affirmed the fact *or* promised] _____ [orally *or* in writing] that _____ [*describe representation relating to the*

goods, e.g., they were the original of that type of product on the market and not a later imitation thereof]. That _____ [affirmation *or* promise] became part of the basis of the bargain between the parties and thus constituted an express warranty. [A true copy of the writing is attached as Exhibit A and incorporated by reference.]

4. _____ [Thereon *or* Thereafter, on or about _____ [*date*], at _____ (the locale stated in Paragraph 3 of this complaint *or* _____ (*city*), California)] defendant sold the goods to plaintiff, and plaintiff bought the goods from defendant for the amount of $_____ [*or describe other consideration*]. [_____ (*Either* That contract of sale between the parties was oral (*if sale price was $500 or more, add:*, a true copy of a memorandum of which is attached as Exhibit B and incorporated by reference) *or* A true copy of the contract of sale between the parties is attached as Exhibit B and incorporated by reference).]

5. However, defendant breached the express warranty in that _____ [*describe breach, e.g.,* the goods were not manufactured by their original producer as _____ (affirmed or promised) but were made by another manufacturer who imitated the style of the original]. As a result of this breach plaintiff in fact did not receive goods as warranted by defendant.

6. Plaintiff discovered the breach of warranty on or about _____ [*date*]. Thereafter, and on or about _____ [*date*], plaintiff notified defendant of this breach by _____ [writing, in the form of a _____ (letter *or* telegram *or other*), a true copy of which is attached to this complaint as Exhibit B and made a part of it *or* personal visit and communication *or* telephone call *or other*].

7. As a proximate result of this breach of warranty by defendant, plaintiff has been damaged in the amount of $_____ [, the difference at the time and place plaintiff accepted the goods between their value then and that which they would have had if they had been as warranted].

[*OR*]

7. As a proximate result of this breach of warranty by defendant, plaintiff has been damaged [in the amount of $_____] as a result of special circumstances in which _____ [*describe circumstances, e.g.,* plaintiff transferred a portion of the goods to third-party buyers, who received them in the belief that plaintiff was capable of conveying good title to the goods, and who were commercially embarrassed as a result]. [These damages are not all assessable at this time, but this complaint will be amended to state the damages when plaintiff becomes able to determine them.]

8. Plaintiff has been further damaged as a result of this breach in that _____ [*describe incidental or consequential damages, e.g.,* plaintiff was required to transport the goods to _____ (the true owner *or* a new market) for the amount of $_____. Defendant also knew that plaintiff needed the goods as demonstration wares, and plaintiff was forced to arrange to procure replacement goods for these purposes through travel and negotiations, in the total amount of $_____].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the sum of $_____;

2. For damages for _____ [*specify incidental or consequential damages, e.g.,* transportation of goods, and travel expenses] in the sum of $_____;

3. For costs of suit herein incurred, including attorney's fees, if appropriate; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The complaint in [1], *above*, is for use by a buyer in an action against a seller for breach of express warranty consisting of an affirmation of fact or a promise [*see Com. Code § 2313(1)(a)*; *§§ 502.11[2], 502.23, 502.28*].

[3] When Form May Be Used in Consumer Litigation

The complaint in [1], *above*, may be used in a suit by a consumer, but its use normally is limited to those situations not covered by special consumer warranty legislation. Thus, the form would be most appropriate when the warranty was made orally; or when a written warranty was not directed to maintenance or preservation of utility of performance of the product, or to its freedom from defect or specifications as to performance level, or to some form of recompense or replacement on failure of its warranted character [*see Civ. Code § 1791.2(a)(1)*; *15 U.S.C. § 2301(6)*; *see also §§ 502.160, 502.180* (complaints under Song-Beverly Act and Magnuson-Moss Act, respectively)]. However, even if consumer warranty legislation might otherwise be applicable, certain requirements might not be present in the individual case, so that this form may still be used. If this form is used in connection with a consumer transaction that is subject to the Unruh Retail Installment Sales Act (RISA; *Civ. Code § 1801 et seq.*) or the Rees-Levering Motor Vehicles Sales and Finance Act (Rees-Levering Act; *Civ. Code § 2981 et seq.*), the plaintiff must, concurrently with the filing of the complaint, file the affidavit of proper venue discussed at *§ 502.160[7]*.

[4] Allegations

The complaint in [1], *above*, alleges the following in pertinent part:

- The seller's affirmation of fact or promise which became a part of the basis of the bargain (Paragraph 3) [*Com. Code § 2313(1)(a)*]. To be a basis of the bargain, a statement constituting an express warranty need be only one factor or consideration in inducing the buyer to enter bargain. A statement constituting an express warranty is presumptively part of the basis of a bargain, and the burden of proof is on the seller to show the bargain does not rest at all on that representation [*Keith v. Buchanan (1985) 173 Cal. App. 3d 13, 23, 220 Cal. Rptr. 392* ; *see also* *Hauter v. Zogarts (1975) 14 Cal. 3d 104, 117, 120 Cal. Rptr. 681, 534 P.2d 377* (representation relied on by plaintiff consisting of assurance of safety was express warranty of safety because defendant could present no evidence removing it from basis of bargain)].

- The sale of goods to which the warranty refers (Paragraph 4) [*Com. Code § 2204*].

- The breach of the express warranty (Paragraph 5).

- Plaintiff's notification of the breach (Paragraph 6) [*Com. Code § 2607(3)(A)*].

- Damages from the breach (Paragraph 7) [*Com. Code § 2714(2)*].

- Incidental and consequential damages (Paragraph 8) [*Com. Code §§ 2714(3), 2715*].

If the claim is payable in a foreign currency, or payment requires conversion to or from a foreign currency, additional allegations should be added setting forth that fact. Otherwise, the claim is made in United States dollars [*Code Civ. Proc. § 676.6(a)*]. For discussion of and a form for judgment applicable to the Uniform Foreign-Money Claims Act [*Code Civ. Proc. § 676 et seq.*], *see* Ch. 177, *Damages* , and Ch. 318, *Judgments* .

[5] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages* .

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue* .

For alternative forms of verification, see Ch. 572, *Verification*

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44-502 California Forms of Pleading and Practice--Annotated § 502.141

§ 502.141 Allegation for Use in Complaint for Breach of Express Warranty Based on Description of Goods [Com. Code § 2313(1)(b)]

[1] FORM Allegation for Use in Complaint for Breach of Express Warranty Based on Description of Goods [Com. Code § 2313(1)(b)]

On or about _____ [*date*], at _____ [*city*], California, plaintiff negotiated with defendant for the purchase of certain goods consisting of _____ [*describe quantity and nature of goods*]. In the course of the negotiations, a particular description of the goods was made part of the basis of the bargain between the parties as a result of _____ [*explain how description was incorporated, e.g.,* plaintiff and defendant examining and reading a statement of the manufacturer available on the defendant's premises *or* a statement printed on the _____ (carton *or* container *or* label *or* package *or* brochure *or* instructions *or* technical specifications *or other*) that accompanied the goods *or* the defendant's verbal response to plaintiff's inquiry of what the goods consisted of *or other*] and, thus, constituted an express warranty. _____ [The description stated _____ (in effect *or* exactly) as follows: _____ *or* A true copy of the description is attached as Exhibit _____ and incorporated by reference].

[2] Use of Form

The allegation in [1], *above*, may be substituted for Paragraph 3 of the preceding form (*§ 502.140*) for use in an action against a seller for breach of express warranty consisting of a description of the goods [*see Com. Code § 2313(1)(b)*; *Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co., Inc. (1988) 200 Cal. App. 3d 1518, 1532, 246 Cal. Rptr. 823* (failure of goods to conform to label is breach of express warranty); *see also § 502.23[2]*].

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44-502 California Forms of Pleading and Practice--Annotated § 502.142

§ 502.142 Allegation for Use in Complaint for Breach of Express Warranty Based on Sample or Model [Com. Code § 2313(1)(c)]

[1] FORM Allegation for Use in Complaint for Breach of Express Warranty Based on Sample or Model [Com. Code § 2313(1)(c)]

On or about _____ [*date*], at _____ [*city*], California, plaintiff negotiated with defendant for the purchase of certain goods consisting of _____ [*describe quantity and nature of goods*]. In the course of the negotiations, a particular _____ [sample *or* model] of the goods was made part of the basis of the bargain between the parties as a result of _____ [*explain how the example was so incorporated, e.g.,* defendant's showing the sample to plaintiff as an example of exactly what plaintiff was purchasing *or* a model of the goods, advertised to be the exact product plaintiff was attempting to buy, being available on the premises, which plaintiff freely consulted *or other*], and thus constituted an express warranty that the whole of the goods plaintiff purchased would conform to the _____ [sample *or* model].

[2] Use of Form

The allegation in [1], *above*, may be substituted for Paragraph 3 of the form at *§ 502.140[1]* in an action against a seller for breach of express warranty consisting of a sample or model of the goods [*see Com. Code § 2313(1)(c), § 502.23[3]*].

[3] Use in Action Under Song-Beverly Act

The Song-Beverly Act defines one type of express warranty, consisting of a sample or model, in a manner virtually identical to that of the general sales law [*compare Com. Code § 2313(1)(c) with Civ. Code § 1791.2(a)(2)*]. Therefore, if the conditions for maintaining an action under the Song-Beverly Act do apply (including the facts that the goods were consumer goods and the breach was willful), plaintiff should include a cause of action under the Song-Beverly Act [*see* form at *§ 502.160*].

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PART IV. FORMS
B. Express Warranties
1. Commercial Code Actions

44-502 California Forms of Pleading and Practice--Annotated §§ 502.143-502.149

[Reserved]

§§ 502.143[Reserved]

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1. Commercial Code Actions

44-502 California Forms of Pleading and Practice--Annotated § 502.150

§ 502.150 Affirmative Defense to Complaint for Breach of Express Warranty Based on Negation or Limitation of Express Warranty [Com. Code § 2316(1)]

[1] FORM Affirmative Defense to Complaint for Breach of Express Warranty Based on Negation or Limitation of Express Warranty [Com. Code § 2316(1)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

At the time of sale, defendant expressly _____ [negated *or* limited] any express warranty on the goods sold to plaintiff in that _____ [*describe, e.g.,* defendant explained that if plaintiff purchased the particular item involved in this case, the express warranty printed on the carton could not apply because a previous customer had returned the item after having used it, but that defendant would, and did, charge plaintiff a lesser price than for other items of the same kind *or* defendant stated that the express warranties which defendant was orally making would only apply for 90 days, after which time the product no longer could be so warranted *or* defendant took a large black marker and drew a large "X" through all visible express warranties that appeared on the carton and label of the goods sold to plaintiff. Defendant believed those were the only written warranties accompanying the goods and explained to plaintiff that the goods were a special shipment and the defendant could make no representations regarding them].

[2] Use of Form

The affirmative defense in [1], *above,* is for use in defending against a claim of breach of express warranty when defendant negated or limited any express warranty by words or conduct [*see Com. Code § 2316(1), § 502.23[6]*].

[3] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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44-502 California Forms of Pleading and Practice--Annotated §§ 502.151-502.159

[Reserved]

§§ 502.151[Reserved]

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2. Actions Under the Song-Beverly Consumer Warranty Act

44-502 California Forms of Pleading and Practice--Annotated § 502.160

§ 502.160 Complaint by Retail Buyer for Damages (and Civil Penalty) for Violation of Song-Beverly Consumer Warranty Act and Willful Breach of Express Warranty by Manufacturer (Or Person in That Position) Maintaining Local Service and Repair Facilities [Civ. Code § 1794; Com. Code §§ 2711-2715]

[1] FORM Complaint by Retail Buyer for Damages (and Civil Penalty) for Violation of Song-Beverly Consumer Warranty Act and Willful Breach of Express Warranty by Manufacturer (Or Person in That Position) Maintaining Local Service and Repair Facilities [Civ. Code § 1794; Com. Code §§ 2711-2715]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR VIOLATION OF SONG-BEVERLY CONSUMER WARRANTY ACT AND [WILLFUL] BREACH OF EXPRESS WARRANTY
_____ [*names*], Defendants.	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 502.103[1], Paragraph 1.*]

2. [*Fictitious defendants. See § 502.103[1], Paragraph 2.*]

3. On or about _____ [*date*], at _____ [*location*], defendant manufactured

_____ [*specify type of consumer goods manufactured by defendant, e.g.,* refrigerators *or* motor vehicles]. Defendant manufactured these goods for purposes of their eventual sale to retail buyers. Defendant appended to the goods an express warranty _____ [undertaking to preserve or maintain the utility or performance of the goods and/or provide compensation if there is a failure in utility or performance by means of a written statement designed to accompany the product, a true copy of which is attached as Exhibit A and incorporated herein by reference *or* that the whole of the goods would conform to the _____ (sample *or* model) that defendant provided to the retail seller for demonstration purposes].

4. On or about _____ [*date*], at _____ [*city*], California, a _____ [*specify type of seller, e.g.,* retail merchant], _____ [*name of seller*], sold _____ [*specify quantity and type of goods, or, if product is a motor vehicle, specify make, model, year, and if available, serial number of vehicle, e.g.,* a side-by-side refrigerator-freezer] to plaintiff, at retail for _____ [*specify price or other consideration*]. [_____ (*Either* This contract of sale between the parties was oral (*if sale price was $500 or more, add:*, a true copy of a memorandum of which is attached hereto as Exhibit B and made a part hereof) *or* A true copy of the contract of sale between the parties is attached as Exhibit B and incorporated by reference.]

5. In connection with the sale, plaintiff received the express warranty of defendant manufacturer in that _____ [the defendant's written statement described above _____ (accompanied the product *or* was separately delivered to plaintiff) *or* plaintiff had occasion to examine the _____ (sample *or* model) used as a demonstrator at the seller's premises].

6. On or about _____ [*date*], plaintiff discovered that the _____ [*specify goods, e.g.,* refrigerator-freezer] _____ [exhibited a failure in utility or performance *or* failed to conform to the _____ (sample *or* model)] in that _____ [*describe defective character, e.g.,* it entirely failed to operate when its electric cord was plugged into an outlet]. Plaintiff thereon attempted to act on defendant's express warranty, as subject to the requirements of the Song-Beverly Act, under which defendant was required to and did maintain local service and repair facilities.

7. However, defendant [willfully] violated the provisions of the act and breached the express warranty made in the sale to plaintiff in that _____ [*describe violation, e.g.,* because of the size and weight of the goods, plaintiff on or about _____ [*date*], gave written notification to defendant of the nonconformity of the _____ [*specify goods*], with full particulars for purposes of service, a true copy of which notification is attached as Exhibit C and incorporated by reference, but defendant, although receiving that notification, failed to repair the _____ [*specify goods*] or arrange therefor in any way although plaintiff persisted in reminding defendant of its warranty obligations].

[*EITHER, if plaintiff rightfully rejected or justifiably revoked acceptance of the goods use Paragraphs 8 through 10, below*]

8. By letter dated _____, a true and correct copy of which is attached as Exhibit D and incorporated by reference, plaintiff notified defendant manufacturer that plaintiff was exercising his/her right to rescind the contract on the basis of the nonconformity and of defendant manufacturer's failure to repair the _____ [*specify goods*] to conform to the express warranty, demanding that defendant manufacturer return to plaintiff the consideration paid by plaintiff under the contract [or replace the _____ (*specify goods*) with _____ (*specify goods*) that conform(s) to the express warranty].

9. Defendant manufacturer refused and failed, and continues to refuse and fail, to return to plaintiff the amount paid by plaintiff under the contract [and refused and failed, and continues to refuse and fail, to replace the

_____ (*specify goods*) with _____ (*specify goods*) that conform(s) to the express warranty].

10. As a proximate result of defendant manufacturer's failure to restore the consideration paid by plaintiff, plaintiff has been damaged in the sum of $_____.

[*OR, if plaintiff seeks damages for the difference in value and cost of repairs necessary to make the goods conform, use Paragraphs 8 through 10, below*]

8. At the time of the delivery to plaintiff, the _____ [*specify goods*] had a value of $_____. If the warranty of defendant manufacturer had been true, the _____ [*specify goods*] would have been of a value of $_____.

9. Plaintiff has expended the sum of $_____ to have the _____ [*specify goods*] repaired and serviced to conform to defendant manufacturer's express warranty.

10. As a proximate result of the failure of the _____ [*specify goods*] to conform to defendant manufacturer's express warranty and defendant manufacturer's failure to repair or service the _____ [*specify goods*] to conform to the warranty, plaintiff has been damaged in the sum of $_____.

[*CONTINUE, alleging incidental and consequential damages as applicable*]

11. As a further proximate result of defendant manufacturer's [willful] failure to comply with its obligations to plaintiff, plaintiff was damaged in that _____ [*describe, e.g.,* plaintiff was unable to use the _____ (*specify goods*) for a period of _____ months, and was forced to expend sums for (a) replacement _____ (*specify goods*) during that period]. The total amount of these additional damages is $_____.

12. As a further proximate result of defendant manufacturer's [willful] failure to comply with its obligations to plaintiff, plaintiff has been required to incur attorney's fees herein.

WHEREFORE, plaintiff prays judgment as follows:

1. For actual damages in the sum of $_____;

[2. *If alleged violation was willful, add:* For a civil penalty of two times the amount of actual damages;]

3. For reasonable attorney's fees in the sum of $_____;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 502.103[1].*]

[2] Use of Form

This complaint is for use by a retail buyer of consumer goods who has been injured by a violation of the provisions of the Song-Beverly Act and the breach of express warranty of the manufacturer [*see Civ. Code § 1794(a)-(d)*; *Com. Code §§ 2711-2715*; *see §§ 502.43* and *503.53*, and, in Ch. 500, *Sales: Sales Under the Commercial Code*, §§ 500.60 and 500.76].

[3] Failure to Supply Parts and Repair Literature

The duty to maintain service and repair facilities in California includes the duty to supply them with adequate replacement parts and service literature [*Civ. Code § 1793.2(a)*]. By making appropriate changes to Paragraphs 6 and 7, this complaint can be modified for use when repair and service facilities are maintained in California but not supplied with adequate replacement parts and service literature.

[4] Allegations

This complaint alleges the following:

- The manufacture of the goods by defendant and the making of an express warranty in connection therewith (Paragraph 3) [*Civ. Code § 1791.2(a)*].

- The purchase of the goods by plaintiff at retail (Paragraph 4) [*Civ. Code § 1791(a), (b), (l)*; *see California State Electronics Assn. v. Zeos Int'l (1996) 41 Cal. App. 4th 1270, 1276-1277, 49 Cal. Rptr. 2d 127* (consumer goods are not "sold in this state" for purposes of Song-Beverly Consumer Warrant Act's local repair facilities requirement when goods are shipped from another state pursuant to mail order; title passes on shipment, pursuant to *Com. Code § 2401*)].

- The receipt of the warranty during the sale (Paragraph 5). The warranty may be in the form of a service contract [*see Reveles v. Toyota by the Bay (1997) 57 Cal. App. 4th 1139, 1158, 67 Cal. Rptr. 2d 543* , overruled on other grounds in *Snukal v. Flightways Manufacturing, Inc. (2000) 23 Cal. 4th 754, 3 P.3d 286* (service contract sold for additional fee in conjunction with sale of used vehicle held to be "express warranty" under *Civ. Code § 1795.5* of Song Beverly Consumer Warranty Act)].

- Breach of the warranty through violation of the requirements of the Song-Beverly Act (Paragraphs 6, 7) [*Civ. Code § 1794(a)*].

- Two alternatives with regard to actual damages based whether or not the buyer retains the goods. If the plaintiff's rightfully rejected or justifiably revoked acceptance of the goods or otherwise rescinded the sale, use the first alternative Paragraphs 8-10 [*see Civ. Code § 1794(b)(1)*; *Com. Code §§ 2711-2713*; *Krotin v. Porsche Cars, North America, Inc. (1995) 38 Cal. App. 4th 294, 45 Cal. Rptr. 2d 10* (to establish breach of warranty obligations under Beverly-Song Consumer Warranty Act, buyer need not reject or revoke acceptance of vehicle at any time; buyer need only provide manufacturer with reasonable opportunity to fix vehicle)]. Note that under both the Commercial Code and the Song-Beverly Consumer Warranty Act, reasonable continued use of a motor vehicle that does not conform to the express warranty does not, as matter of law, prevent the buyer from asserting rescission or revocation of acceptance [*Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 897-898, 263 Cal. Rptr. 64]* . If plaintiff's

retains the goods, actual damages are based on the difference in value and costs to obtain conformance from some entity other than the manufacturer or its repair facility (second alternative Paragraphs 8-10) [*see Civ. Code § 1794(b)(2)*; *Com. Code §§ 2714-2715*].

- Entitlement to other damages or relief (Paragraph 11) [*Civ. Code § 1794(a), (b)*; *Com. Code §§ 2711(1), (3), 2712, 2714(2), (3), 2715*].

- Attorney's fees (Paragraph 12) [*Civ. Code § 1794(d)*], and if appropriate, that defendant's breach was willful, thus entitling plaintiff to the penalty under *Civ. Code § 1794(c)* (Paragraph 12).

[5] Remedies Under Song-Beverly Act

The buyer injured by a violation of the provisions of the Song-Beverly Act, or of an express or implied warranty or of a service contract, may bring an action for the recovery of actual damages, other legal and equitable relief, and reasonable attorney's fees [*Civ. Code § 1794(a), (b), (d)*]. Prejudgment interest [*see Civ. Code § 3287*] may be recovered in an appropriate case [*Doppes v. Bentley Motors, Inc. (2009) 174 Cal. App. 4th 1004, 1010-1011, 94 Cal. Rptr. 3d 797* ; *see § 502.53[1][a]*]. If the violation was willful and the claim is not based solely on a breach of an implied warranty, the buyer may also recover a civil penalty of up to two times the amount of actual damages [*Civ. Code § 1794(c)*].

The four-year limitation period of *Com. Code § 2725* governs actions under the Song-Beverly Act. Under *Com. Code § 2725(2)*, when a warranty explicitly extends to future performance of the goods, the discovery rule applies to accrual of the cause of action and commencement of the limitation period [*see Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 215-219, 285 Cal. Rptr. 717 ; see also Carrau v. Marvin Lumber and Cedar Co. (2001) 93 Cal. App. 4th 281, 290-292, 112 Cal. Rptr. 2d 869* (generalized assertions in advertisements and literature do not rise to the level of a warranty explicitly extending to "future performance"; plaintiff thus did not meet exception to four-year limitations period)]. For discussion of *Com. Code § 2725*, see *§ 502.28[6]*.

An express warranty as defined in the Song-Beverly Act may be made by a distributor or retail seller, as well a by a manufacturer [*Civ. Code § 1791.2(a)*]. If the express warranty is made by anyone other than the manufacturer, that person becomes subject to the same obligations that are imposed on a manufacturer under the Song-Beverly Act [*Civ. Code § 1795*]. Thus, the foregoing form may be modified for use against a retailer or distributor by naming the retailer or distributor as the defendant, by modifying Paragraphs 3 and 4 to allege the retailer's or distributor's business and the manner in which the sale occurred, and by changing the term "defendant manufacturer" to "defendant" in the other paragraphs. However, the plaintiff may wish to join the retail seller otherwise by joining a separate cause of action against the seller for breach of express warranty under Division 2 of the Commercial Code [*see form in § 502.140*].

[6] Alternative Remedy Under Magnuson-Moss Act

The federal Magnuson-Moss Act also provides for enforcement of any written warranty by which a warrantor undertakes, in connection with the sale by a supplier of a consumer product, to refund, repair, replace, or take other remedial action as to the product if it fails to meet the specifications in the undertaking [*15 U.S.C. § 2301(6)(B)*; *see § 502.180*]. In this instance, a consumer plaintiff may include any transferee of a buyer during the warranty period who is not limited by the warranty [*15 U.S.C. § 2301(3)*]. However, it must be shown that the undertaking was part of the basis of the bargain between the supplier and buyer for purposes other than resale [*15 U.S.C. § 2301(6)*]. The plaintiff must first exhaust any available informal dispute settlement mechanism or, in its absence, give the defendant an opportunity to cure the defect [*15 U.S.C. § 2310(a)(3), (d)(1), (e)*]. The federal law makes available only actual damages and other legal and equitable relief, but does afford reasonable attorney's fees [*15 U.S.C. § 2310(d)*].

[7] Installment or Auto Sales Actions

[a] Filing of Affidavit or Declaration of Proper Venue Required

In any action subject to the Unruh Retail Installment Sales Act (RISA; *Civ. Code § 1801 et seq.*) or the Rees-Levering Motor Vehicles Sales and Finance Act (Rees-Levering Act; *Civ. Code § 2981 et seq.*), the plaintiff must, concurrently with the filing of the complaint, file an affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) stating facts showing that the action has been commenced in a proper place for the trial of the action under *Civ. Code § 1812.10* or *Civ. Code § 2984.4*. In lieu of filing a separate affidavit or declaration, the plaintiff may allege these facts in a verified complaint, but not on information and belief [*Civ. Code §§ 1812.10(c), 2984.4(c)*]. If an affidavit or declaration is filed with the complaint, a copy of the affidavit or declaration must be served with the summons [*Civ. Code §§ 1812.10(c), 2984.4(c)*; *Code Civ. Proc. § 396a(a)*].

[b] Consequences of Failure to File Affidavit or Declaration

If a plaintiff fails to file the affidavit or declaration or state facts showing proper venue in a verified complaint as required in *Civ. Code § 1810.10* or *Civ. Code § 2984.4*, no further proceedings may occur, and the court must, on its own motion or the motion of any party, dismiss the action without prejudice [*Civ. Code §§ 1812.10(c), 2984.4(c)*; *Code Civ. Proc. § 396a(a)*]. The court, however, on terms that may be just, may permit the affidavit or declaration to be filed after the filing of the complaint. In this case, a copy of the affidavit or declaration must be served on the defendant, and the time to answer or otherwise plead begins at the time of that service [*Civ. Code §§ 1812.10(c), 2984.4(c)*; *Code Civ. Proc. § 396a(a)*].

For further discussion of venue requirements for RISA, and a declaration of proper venue, see Ch. 501, *Sales: Retail Installment Sales* . For further discussion of venue requirements for the Rees-Levering Act, and related forms, see Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* . For venue allegations, see Ch. 20, *Allegations Commonly Used* .

[8] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, §§ 177.40* et seq. and *177.140* et seq.

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue*

For alternative verification forms, see Ch. 572, *Verification*

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44-502 California Forms of Pleading and Practice--Annotated § 502.161

§ 502.161 Allegation for Use in Complaint for Damages Under Song-Beverly Consumer Warranty Act for Failure to Repair to Conform to Express Warranty [Civ. Code §§ 1793.2(d), 1794]

[1] FORM Allegation for Use in Complaint for Damages Under Song-Beverly Consumer Warranty Act for Failure to Repair to Conform to Express Warranty [Civ. Code §§ 1793.2(d), 1794]

[1. Plaintiff bought the vehicle in California primarily for personal, family, or household purposes. The vehicle is a new motor vehicle as that term is defined in *Civil Code Section 1793.22(e)(2)*.]

2. Plaintiff delivered the _____ [*specify goods, e.g.,* vehicle] to defendant manufacturer['s repair facility in this state] [and notified defendant manufacturer of the nonconformity in writing, with full particulars for the purposes of service, a true copy of that notice is attached as Exhibit C and incorporated by reference]. Thereafter, _____ [defendant manufacturer *or* the defendant manufacturer's representative in this state] made a reasonable number of attempts [on account of the same nonconformity] to service or repair the _____ [*specify goods*] to conform to the express warranty. Those attempts were unsuccessful, in that the _____ [*specify goods*] still _____ [*describe continuing nonconformity, e.g.,* would not start, or, if it did start, emitted sparks from the starter mechanism, causing fires or threats of fire, approximately one out of every three times it did start]. The dates and duration of the attempts at service or repair are as follows: _____ [*list dates and length of service, e.g.:*

March 3-6, 1995	4 days
April 14-17, 1995	5 days
July 10-24, 1995	13 days
October 6-14, 1995	9 days]

[*EITHER, if product is other than a new motor vehicle*]

3. After the unsuccessful attempts at repair, plaintiff demanded that defendant manufacturer replace the _____ [*specify goods*] or reimburse plaintiff in an amount equal to the purchase price paid less an amount directly attributable to plaintiff's use of the goods prior to the time plaintiff discovered the nonconformity as required by *Civil Code Section 1793.2(d)(1)*. Defendant manufacturer has failed and refused, and continues to fail and refuse, to make replacement or reimbursement. As a result of defendant manufacturer's violation of *Civil Code Section 1793.2(d)(1)*, plaintiff has been damaged in the amount of $_____.

[*OR, if product is a new motor vehicle*]

3. After the unsuccessful attempts at repair, plaintiff demanded that defendant manufacturer _____ [replace the vehicle in accordance with *Civil Code Section 1793.2(d)(2)(A) or* make restitution to plaintiff in accordance with *Civil Code Section 1793.2(d)(2)(B)*]. Defendant manufacturer has failed and refused, and continues to fail and refuse, to make _____[replacement *or* restitution]. As a result of defendant manufacturer's violation of *Civil Code Section 1793.2(d)(2)*, plaintiff has been damaged in the amount of $_____.

[2] Use of Form

The allegations in [1], *above*, are for use in a buyer's action against a manufacturer when the manufacturer's breach of its obligations under the Song-Beverly Act consists of a failure to make replacement or reimbursement (restitution) after having failed for a reasonable number of attempts to conform the product to its express warranties [*see Civ. Code § 1793.2(b)-(d)*; for products other than new motor vehicles, see discussion at *§ 502.43[3]* and *[5]*; for discussion relating to new motor vehicles, *see* Ch. 91, *Automobiles: Actions Involving Defects and Repairs* ; *see also Civ. Code § 1793.22(e)(2)* (defining new motor vehicle)].

The allegations in [1], *above*, may be substituted for Paragraphs 7-10 of the form of complaint at *§ 502.160[1]*.

[3] Allegations

Paragraph 1 need only be used when the product is a new motor vehicle [*see Civ. Code § 1793.22(e)(2)* (defining new motor vehicle)]. The plaintiff should allege that the vehicle was bought in California, inasmuch as application of the Song-Beverly Act to new motor vehicles is limited to vehicles bought in California [*see Cummins, Inc. v. Superior Court (2005) 36 Cal. 4th 478, 483, 493, 30 Cal. Rptr. 3d 823, 115 P.3d 98* (Song-Beverly Act did not apply to new vehicle that California resident had bought in Idaho and that could not be repaired after repeated attempts at manufacturer's authorized repair facility in California)].

Paragraph 2 should be used in place of Paragraph 7 of the complaint in *§ 502.160[1]* and describes the reasonable attempts at repair [*see Silvio v. Ford Motor Company (2003) 109 Cal. App. 4th 1205, 1207-1208, 135 Cal. Rptr. 2d 846* (because phrase "reasonable number of attempts" in *Civ. Code § 1793.2(d)(2)* is written in plural, statute does not require manufacturer to make restitution or replacement after only one opportunity to repair)]. For products other than new motor vehicles, there is no definition of or presumption relating to reasonable attempts at repair, although *Civ. Code § 1793.2(b)* (discussed in *§ 502.43[3]*) provides that repair must be made within 30 days. For new motor vehicles, there is a presumption regarding when reasonable attempts have been made [*see Civ. Code § 1793.22(b)*], but, if the manufacturer has made timely notification to the buyer that it maintains a qualified third-party dispute resolution process as defined in *Civ. Code § 1793.22(d)*, the buyer cannot assert the presumption until he or she has first resorted to the qualified third-party dispute resolution process [*Civ. Code § 1793.22(c)*]. For a discussion of the provisions relating to new vehicles, see Ch. 91, *Automobiles: Actions Involving Defects and Repairs*. In the context of motor vehicles, it has been held that the manufacturer at its representative are entitled to separate attempts to repair; the repair attempts of the manufacturer's agent (retail dealer) are attributed to manufacturer; and the attempts of both must be

considered in establishing reasonableness [*Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 890, 263 Cal. Rptr. 64]* .

Alternative Paragraphs 3 are for use in place of Paragraphs 8-10 of the form of complaint in *§ 502.160[1]*. In the case of products other than new motor vehicles, the election of whether to replace or to reimburse is the manufacturer's [*Civ. Code § 1793.2(d)(1)*], whereas in the case of new motor vehicles, the election is the buyer's [*Civ. Code § 1793.2(d)(2)*].

Additional incidental and consequential damages in both situations should be alleged as set forth in Paragraph 11 of the form of complaint at § 502.160[1]. In the case of products other than new motor vehicles, those damages are governed by *Civ. Code § 1794(b)* and *Com. Code §§ 2711-2715* (discussed at *§ 502.53[1]*, and in *Ch. 500, Sales: Sales under the Commerical Code, § 500.70* et seq.). In the case of new motor vehicles, those damages are specified in *Civ. Code § 1793.2(d)(2)(A)-(C)* (discussed in Ch. 91, *Automobiles: Actions Involving Defects and Repairs*) and include repair, towing, and rental costs. *Civ. Code § 1793.2(d)(2)(C)* contains a formula for determining the value of the use of the vehicle by the buyer prior to discovery of the nonconformity.

[4] Cross Reference

For discussion of special rules, presumptions, and penalties applicable to express warranties regarding new motor vehicles and to the manufacturer's inability to service or repair them to conform to the express warranties after a reasonable number of attempts (*Civ. Code §§ 1793.2(d)(2), 1793.22, 1794(e)*), see Ch. 91, *Automobiles: Actions Involving Defects and Repairs* .

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44-502 California Forms of Pleading and Practice--Annotated § 502.162

§ 502.162 Complaint by Retail Seller or Independent Service and Repair Facility Acting on Manufacturer's Express Warranty for Treble Damages for Manufacturer's Failure to Provide Repair Facilities [Civ. Code §§ 1793.3, 1793.5, 1793.6, 1794.1]

[1] FORM Complaint by Retail Seller or Independent Service and Repair Facility Acting on Manufacturer's Express Warranty for Treble Damages for Manufacturer's Failure to Provide Repair Facilities [Civ. Code §§ 1793.3, 1793.5, 1793.6, 1794.1]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR TREBLE DAMAGES
_____ [*names*], Defendants.	)	(Song-Beverly Consumer Warranty Act: by
	)	_____ [Retailer *or* Service Facility]
	)	Against Manufacturer)
	)	[LIMITED CIVIL CASE]
		[Amount demanded _____
		(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 502.103[1], Paragraph 1.*]

2. [*Fictitious defendants. See § 502.103[1], Paragraph 2.*]

3. [*Defendant's manufacture of product and attachment of express warranty. See § 502.160[1], Paragraph 3.*]

4. On or about _____ [*date*], at _____ [*city*], California, _____ [plaintiff, a _____ (*specify type of seller*), _____ (*name*)] sold _____ [*quantity*] of _____ [*describe goods*] to a consumer, _____ [*name*], hereinafter referred to as the "consumer," and the consumer bought those goods from plaintiff for the amount of $_____ [*or other consideration*].

5. In connection with that sale, the consumer received the express warranty of defendant manufacturer in that _____ [the written statement of the defendant described above _____ (accompanied the product *or* was separately delivered to the consumer) *or* the consumer had occasion to examine the above-described _____ (sample *or* model) of the goods at _____ (*if seller is plaintiff*, plaintiff's *or otherwise*, the seller's) premises].

6. On or about _____ [*date*], the consumer discovered that those goods _____ [exhibited a failure in utility or performance *or* failed to conform to the _____ (sample *or* model)] in that [*describe defective character, e.g.,* it had a nonfunctioning engine]. The consumer, on understanding the defendant improperly did not maintain [sufficient and reasonably convenient official or designated] service and repair facilities in this state, appropriately returned the nonconforming consumer goods to _____ [plaintiff *or* _____ (*name of seller*)] as _____ [the retail seller *or* a retail seller of like goods of the same manufacturer within this state. _____ [Plaintiff *or* The seller] then _____ [*if plaintiff is original or other seller to whom goods were returned:* _____ (serviced or repaired the nonconforming goods to conform to the applicable warranty *or* replaced the nonconforming goods with goods that were identical or reasonably equivalent to the warranted goods *or* refunded to the consumer the original purchase price less that amount directly attributable to use by the buyer prior to the discovery of nonconformity) *or, if plaintiff is servicer:* _____ (directed the consumer to plaintiff as a reasonably close independent repair or service facility willing to accept service or repair *or* did not furnish the consumer with appropriate relief, so that the consumer secured the services of plaintiff as an independent repair or service facility for the service or repair of the nonconforming consumer goods, since the wholesale price to the retailer of those goods was not less than $50, and plaintiff determined that service or repair of the goods could be economically accomplished]; and plaintiff did so _____ (service *or* repair) the goods and took an assignment of the consumer's rights against the manufacturer for that _____ (service *or* repair), a true copy of which is attached as Exhibit A and incorporated by reference].

7. Defendant has violated the provisions of the Song-Beverly Act, namely *Section 1793.2 of the Civil Code*, in manufacturing consumer goods sold in this state for which defendant has made an express warranty while failing and refusing to maintain sufficient service and repair facilities [reasonably close to all areas where its consumer goods are sold] to carry out the terms of those warranties or to designate and authorize in this state as service and repair facilities independent repair or service facilities [so situated]. Plaintiff is entitled to treble damages for defendant's violation in this matter because defendant's violation has been _____

[*EITHER*]

willful, in that _____ [*describe, e.g.,* defendant expressly has refused to make any arrangements for repair or services here although plaintiff and retail sellers and service repair facilities in the lines of business carrying or servicing defendant's products have made themselves available to help defendant set up a repair and service system, but defendant has refused to establish a repair and service system or to take advantage of the offers of plaintiff and others although they have demonstrated that defendant's products would have a frequent repair needs experience that would be difficult to accommodate without defendant's cooperation].

[*OR*]

repeated, in that _____ [*describe, e.g.,* plaintiff has had to handle numerous adjustments of the kind involving the consumer in this matter and to have to settle with or sue defendant in order to obtain compensation, but defendant still has not set up a satisfactory service and repair system in this state].

[*EITHER, if plaintiff is original or other seller*]

8. As a result of defendant's acts in this instance, plaintiff has been damaged in fulfilling the requirements and purposes of the Song-Beverly Act and accommodating the needs of the consumer in this matter _____ [*if replacement:* in an amount equal to the actual cost to plaintiff of the replaced goods of $_____, (and cost of transporting the goods of $_____,) plus a reasonable handling charge of $_____ *or, if service or repair:* in an amount equal to that which would be received by plaintiff for like service rendered to retail consumers who are not entitled to warranty protection, including actual and reasonable costs of the service and repair, of $_____, (and the cost of transporting the goods of $_____,) plus a reasonable profit of $_____ *or, if reimbursement, and if plaintiff is original seller* (*other sellers may not be restricted to the following* [*see Civ. Code § 1793.3(a), 1793.5(c)*]): in an amount equal to that reimbursed to the buyer of $_____, plus a reasonable handling charge of $_____].

[*OR, if plaintiff is independent servicer and repairer*]

8. As a result of defendant's acts in this instance, plaintiff has been damaged in fulfilling the requirements and purposes of such legislation and accommodating the needs of the consumer in this matter in an amount equal to the actual and reasonable costs of the service and repair, including any cost for parts, of $_____, [and reasonable costs of transporting the goods and parts of $_____,] plus a reasonable profit of $_____.

9. Plaintiff has incurred reasonable attorney's fees herein in the amount of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For treble the amount of actual damages herein, or $_____;

2. For reasonable attorney's fees in the sum of $_____;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 502.103[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by a retail seller or independent service facility that has provided services to a buyer of retail goods as a result of the failure of the goods to conform with the terms of a manufacturer's express warranty when the manufacturer has willfully or repeatedly violated requirements of the Song-Beverly Act by failing to provide service and repair facilities in the state or to compensate the retail seller or independent service facility [*see Civ. Code § 1794.1*; *§ 502.53[3]* and at *[4], below*].

Because express warranties may be made by a person other than the manufacturer of the goods and the obligation of that person is the same as that imposed on the manufacturer under the Song-Beverly Act [*see Civ. Code § 1795*; *§ 502.42[4]*], the form in [1], *above*, may be used with appropriate modifications in an action against a person other than the manufacturer who made the warranty.

[3] Allegations

The complaint in [1], *above*, alleges the following:

- The defendant's identity as manufacturer and express warrantor of the goods (Paragraph 3).
- The purchase of the goods by the consumer (Paragraph 4).
- The extension of the express warranty to the purchaser (Paragraph 5).
- The consumer's discovery of the defect and return of the goods to the plaintiff, if a retailer, or to a retailer and then to the plaintiff if a service and repair business, and plaintiff's appropriate accommodation of the consumer to make good under the warranty (Paragraph 6) [*Civ. Code § 1793.3*; *see § 502.43[1], [6], [8]*].
- Defendant's willful or repeated violation of the Song-Beverly Act by failing to maintain or provide for adequate local service and repair facilities (Paragraph 7); detriment and damages of plaintiffs in various alternatives (Paragraph 8) [*Civ. Code § 1794.1*; *see Civ. Code §§ 1793.4, 1793.6*].
- Reasonable attorney's fees (Paragraph 9) [*Civ. Code § 1794.1*].

[4] Bases of Remedies for Retail Sellers or Service Facilities Against Manufacturer's Violation of Song-Beverly Act

A retail seller of consumer goods or an independent servicer of consumer goods who is injured by the willful or repeated violation of the Song-Beverly Consumer Warranty Act may bring an action for the recovery of three times the amount at which the actual damages are assessed plus reasonable attorney's fees [*Civ. Code § 1794.1*]. Every manufacturer of consumer goods sold in California and for which the manufacturer has made an express warranty must maintain or designate and authorize local facilities to service or repair goods under their accompanying express warranties. The retail seller must, and any other retail seller of like goods of the manufacturer may, accommodate consumers who need service or repair under such warranties when the manufacturer has failed to meet the requirement for those facilities as provided in *Civ. Code § 1793.3*. The manufacturer is subject in that instance to liability for the efforts of the seller or retailer of the manufacturer's goods [*Civ. Code §§ 1793.2(a)(2), 1793.5, 1793.6*].

[5] Failure to Supply Parts and Repair Literature

The duty to maintain service and repair facilities in California includes the duty to supply them with adequate replacement parts and service literature [*Civ. Code §§ 1793.2(a)(3), 1793.3*]. A manufacturer that fails to supply its authorized facilities with adequate replacement parts and service literature is liable to the buyer, or to the independent repair facility whose services were obtained by the retail seller to which the buyer returned the item, for the actual and reasonable cost of service or repair, including the cost of replacement parts, their reasonable transportation costs, and a reasonable profit [*Civ. Code § 1793.3(c)*].

[6] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, §§ 177.40* et seq. and *177.140* et seq.

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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44-502 California Forms of Pleading and Practice--Annotated §§ 502.163-502.179

[Reserved]

§§ 502.163[Reserved]

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3. Magnuson-Moss Act Warranties

44-502 California Forms of Pleading and Practice--Annotated § 502.180

§ 502.180 Complaint by Consumer Against Warrantor Manufacturer for Failure to Comply With Warranty or Provisions of Magnuson-Moss Warranty-Federal Trade Commission Improvement Act [15 U.S.C. § 2310(d)]

[1] FORM Complaint by Consumer Against Warrantor Manufacturer for Failure to Comply With Warranty or Provisions of Magnuson-Moss Warranty-Federal Trade Commission Improvement Act [15 U.S.C. § 2310(d)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*], Defendants.	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 502.103[1], Paragraph 1.*]

2. [*Fictitious defendants. See § 502.103[1], Paragraph 2.*]

3. On or about _____ [*date*], at _____ [*city*], California, _____ [plaintiff *or* a particular consumer, _____ (*name of buyer*), (purchaser)] negotiated with a particular supplier, _____ [*name of seller*], (supplier) for the purchase of a certain consumer product consisting of _____ [*describe quantity and nature of product*] manufactured by defendant. In the course of negotiations and to the time of sale alleged in this complaint, the product was disclosed to be accompanied by a writing

appended by defendant which contained _____ [*describe, e.g.,* the designation "FULL THREE-YEAR WARRANTY," *or* _____ (an affirmation of fact *or* a promise) that the material and workmanship of the product were free of any defect *or other*]. This writing became part of the basis of the bargain between the parties and thus constituted a written warranty made and given by defendant. A true copy of the warranty is attached as Exhibit A and incorporated by reference.

4. _____ [Thereon *or* Thereafter, on or about _____ (*date*), at _____ (that locale *or* _____ (*city*), California)] the supplier sold the goods to _____ [plaintiff *or* purchaser], who bought the goods from supplier for the amount of $_____ [*or describe other consideration*]. [_____ (*Either* The contract between the parties was oral (*if sale price was $500 or more, add:*, a true copy of a memorandum of which is attached as Exhibit B and incorporated by reference) *or* A true copy of the contract of sale between the parties is attached as Exhibit B and incorporated by reference).] [On or about _____ (*date*), plaintiff received transfer of the product from the purchaser thereof and has been the true owner of the product ever since.]

5. On or about _____ [*date*], plaintiff discovered the product was defective in that _____ [*describe, e.g.,* its casing did not bear up under temperatures of 100 degrees or more, which a product of the type, in keeping with its ordinary performance, would be required to do]. On or about _____ [*date*], plaintiff brought this defect to the attention of defendant and demanded the product be remedied within a reasonable time and without charge, but defendant then, and has ever since, failed and refused to correct those defects, replace the product, or refund any amount to plaintiff, or to take any other remedial action with respect thereto.

[*EITHER, if no informal dispute settlement mechanism exists*]

6. The written warranty does not contain references to any informal dispute settlement mechanism. However, on or about _____ [*date*], plaintiff formally notified defendant that this suit would be commenced unless, within a reasonable period of time [and up to and including _____ (*date*),] defendant cured its failure to comply with the provisions of its written warranty to remedy the defect of its product. A true copy of this notice is attached as Exhibit "C" and incorporated by reference. Defendant, from that time to the present, has failed and refused to remedy the product.

[*OR, if informal dispute settlement mechanism exists*]

6. Plaintiff has resorted initially in this matter to the informal dispute settlement procedure established by defendant by notification thereto on or about _____ [*date*], _____ [*either* and a decision was rendered on _____ (*date*), a true copy of which is attached as Exhibit C and incorporated by reference. However, plaintiff is dissatisfied with _____ (the decision *or* defendant's intended actions thereunder *or* defendant's performance thereunder) *or* and all parties to this procedure have completed all their duties thereunder *or if a period of at least 40 days has passed since notification:* but the procedure has not been completed although there is and will be no permissible period of delay in the completion of those duties].

[*CONTINUE*]

7. As a proximate result of defendant's failure to remedy the defective product and to comply with the provisions of its written warranty, plaintiff has been damaged, in that _____ [*describe, e.g.,* plaintiff has been unable to have the benefit of the product and of equipment dependent on the proper functioning of the defective product], in the

amount of $_____.

8. _____ [*Plead any allegation of further legal or equitable relief appropriate in the circumstances. For consequential and incidental damages, see § 502.103[1], Paragraph 8.*]

9. Plaintiff has incurred reasonable attorney's fees herein in the amount of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the amount of $_____;

2. For incidental and consequential damages in the amount of $_____;

3. For reasonable attorney's fees in the amount of $_____;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 502.103[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by a plaintiff whether the original purchaser, or a transferee from the original purchaser, of a consumer product for which the manufacturer-warrantor thereof fails to provide any remedy for the defective condition of the product [*see 15 U.S.C. § 2310(d)(a)(3)(d)-(f)*; *§ 502.68[3]-[7]*]. If this form is used in connection with a consumer transaction that is subject to the Unruh Retail Installment Sales Act (RISA; *Civ. Code § 1801 et seq.*) or the Rees-Levering Motor Vehicles Sales and Finance Act (Rees-Levering Act; *Civ. Code § 2981 et seq.*), the plaintiff, concurrently with the filing of the complaint, must file the affidavit of proper venue [*see § 502.160[7]*].

[3] Allegations

The complaint in [1], *above*, alleges the following:

- The purchase of the consumer product with a written warranty being part of the basis of the bargain (Paragraph 3) [*15 U.S.C. § 2301(6)*].

- The sale of the product (with any subsequent transfer to plaintiff) (Paragraph 4) [*15 U.S.C. § 2301(3)*].

- Plaintiff's discovery of the defect and his or her attempt to have defendant remedy it (Paragraph 5).

- Exhaustion of any available informal dispute settlement mechanism, or, in its absence, defendant's reasonable opportunity to cure its failure to comply with the warranty terms (Paragraph 6) [*15 U.S.C. § 2310(a)(3), (d)(1), (e)*].

- The damages which resulted from defendant's failure to comply (Paragraph 7); any incidental or consequential damages (Paragraph 8).

- Reasonable attorney's fees as provided by law (Paragraph 9) [*15 U.S.C. § 2310(d)(2)*].

An attorney's fee award need not be apportioned among causes of action when some do not provide for recovery of attorney's fees. An attorney's fee award under *15 U.S.C. § 2310(d)(2)* need not be based on the amount recovered but should be based on time spent [*Drouin v. Fleetwood Enterprises (1985) 163 Cal. App. 3d 486, 492-493, 209 Cal. Rptr. 623]* .

[4] Remedies Under Magnuson-Moss Act for Consumers and Transferees

The federal Magnuson-Moss Act makes available the possibility for consumers and transferees from original purchasers of consumer products to obtain relief for defects in the products, for failure of warrantors to comply with the provisions of the written warranties or the act (and regulations thereunder), or for noncompliance by others obligated under the act [*see 15 U.S.C. § 2301(3)* ("consumer" is defined to include transferee); *15 U.S.C. § 2301(6)* ("written warranty" defined)]. Damages are awardable (although not necessarily bound by the measure prescribed under Division 2 of the Commercial Code [*see Com. Code § 2714(2)*]), and reasonable attorney's fees are possible [*15 U.S.C. § 2310(d)(1), (2)*; *see, e.g., Milicevic v. Fetcher Jones Imports, Ltd. (2004) 402 F.3d 912, 919-920* (district court did not abuse its discretion when concluding that attorneys' hourly rate was not reasonable and eliminating hours it considered to be unnecessarily duplicative); *see also § 502.68[3] -[7]*]. The action normally must be brought in a state forum because there are restrictions as to minimum amount in controversy or numbers of plaintiffs in any class prosecution if a federal court is utilized [*see 15 U.S.C. § 2310(d)(3)*; *§ 502.68[5]*]. In addition, the act applies to a particular definition of a "written warranty," one which must have become part of the basis of the original buyer's bargain [*15 U.S.C. § 2301(6)*; *§ 502.62[2]*]. Prior to bringing suit, the plaintiff must first take advantage of any informal dispute settlement mechanism incorporated into the warranty, or, in its absence, afford the defendant a reasonable opportunity to cure the failure to comply with the warranty's provisions or those of the Magnuson-Moss Act otherwise [*15 U.S.C. § 2310(a)(3), (d)(1), (e)*; *see § 502.101* (form of notice affording opportunity to comply)].

[5] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, §§ 177.40* et seq. and *177.140* et seq.

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For allegations showing proper venue, see Ch. 571, *Venue*

For alternative verification forms, see Ch. 572, *Verification*

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44-502 California Forms of Pleading and Practice--Annotated § 502.181

§ 502.181 Allegations for Use in Class or Representative Action Complaint for Violation of Magnuson-Moss Warranty-Federal Trade Commission Improvement Act Based on Failure to Comply With Written Warranty [15 U.S.C. § 2310(d)]

[1] FORM Allegations for Use in Class or Representative Action Complaint for Violation of Magnuson-Moss Warranty-Federal Trade Commission Improvement Act Based on Failure to Comply with Written Warranty [15 U.S.C. § 2310(d)]

1. This action is brought on behalf of plaintiff and of all other persons similarly situated. The class which plaintiff represents is composed of all consumers who presently own one or more of the consumer products consisting of _____ [*describe product*], manufactured by defendant and accompanied by a written warranty thereof. This class of consumers is still holding this/these product(s) during its/their stated warranty period, and are either the original purchasers thereof or are proper first or subsequent transferees therefrom. The persons in the class are so numerous[, consisting of approximately _____ individuals,] that the joinder of all of them is impracticable and the disposition of their claims in a class action is a benefit to the parties and to the court.

2. There is a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented:

a. Each product as above-described was purchased originally from suppliers at various locations in California and elsewhere on various dates, beginning on or about _____ [*date*], and continuing to the present time.

b. Each product was purchased by a consumer who still owns the product or who has transferred it directly or through one or more intermediate transfers to the transferee consumer who presently owns it, and each and every consumer who still or presently owns that product is a plaintiff in this case.

c. Each product was purchased from a supplier for various prices, ranging from approximately $_____ to $_____, and was sold by that supplier with a writing accompanying the

product and containing _____ [an affirmation of fact *or* a promise] that the material and workmanship of the product were entirely free from defects for a period of _____ [*specify warranty period*] from purchases, which writing became part of the basis of the bargain between the purchasing consumer and the supplier and thus constituted a written warranty. This warranty was made and given in each sale by defendant. The sale contract was oral [in various instances, and written in other instances, as may be established with respect to any individual transaction herein]. A true copy of the written warranty is attached as Exhibit A and incorporated by reference.

d. Each product is equally and inherently defective in the same manner, and remains so without regard to the type of us age or maintenance performed by any plaintiff, whether or not as authorized by defendant; each plaintiff will be damaged in the same manner, to a greater or lesser degree, as may be established with respect to any individual circumstances.

[3. There is no plain, speedy, or adequate remedy other than by maintenance of this class action since plaintiff is informed and believes that the damage to each plaintiff is relatively small (in that _____ (*specify damage, e.g.,* the price of each individual product sold was likely no more than $_____ in any circumstance)), making it economically unfeasible to pursue remedies other than a class action. Consequently there would be a failure of justice but for the maintenance of the present class action.]

4. The written warranty does not contain reference to, nor has defendant established a procedure for, any informal dispute settlement mechanism. However, by this complaint and through this paragraph, plaintiff hereby affords defendant a reasonable opportunity to cure its failure to comply with the provisions of the warranty and to make each product defect-free. Defendant, by virtue of this notice within this complaint, is notified that plaintiff is acting on behalf of the class herein-described. If defendant fails and refuses to so cure its failure to comply, plaintiff will continue in the prosecution of this suit.

[2] Use of Form

The allegations in [1], *above*, are for use in a class action under the federal Magnuson-Moss Act for failure to comply with provisions of the written warranty under that Act or other provisions of that law [*see 15 U.S.C. § 2310(d)*]. Allegations 1-3 of the form may be inserted in the form of complaint at *§ 502.180[1]*, modifying that form appropriately, after the introductory paragraphs which set forth actual and fictitious parties (Paragraphs 1 and 2). Allegation 4 of this form also may be substituted for Paragraph 6 of the form of complaint in *§ 502.180[1]*.

[3] Class Actions Under the Magnuson-Moss Act

The federal Magnuson-Moss Act recognizes that its provisions may be utilized for class action purposes [*see 15 U.S.C. § 2310*]. The prerequisite of compliance with any existing informal dispute settlement mechanism or, in its absence, of giving defendant reasonable opportunity to cure its failure to comply [*15 U.S.C. § 2310(a)(3), (d)(1), (e)*], does not apply in a class action, which may be commenced prior to resort to an informal dispute mechanism. However, the class may not proceed in that action except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the named plaintiffs (on notifying the defendant that they are named plaintiffs in a class action with respect to a warranty obligation) initially resort to that procedure. If the informal dispute settlement mechanism is not available, the reasonable opportunity to be afforded the defendant is to be by the named plaintiffs, who at that time must notify the defendant they are acting on behalf of the class [*15 U.S.C. § 2310(e)*; *see § 502.68[1]*].

It appears that in the absence of an informal dispute settlement mechanism, compliance with the notification requirement after a class action has commenced in a state court may be by including the final allegation in this form (Paragraph 4). Service on the defendant of a copy of the complaint containing this allegation would thus constitute transmission of the noticed opportunity to cure noncompliance. The defendant would still have an opportunity to contest the representative capacity of the named plaintiff in the time for response to the complaint although prior to the period

for reasonable opportunity to cure [*see § 502.68[2]*].

[4] Compliance With Certain Class Action Requirements

Particular precedents for the bringing of a class action in the state court under the Magnuson-Moss Act that may comply with the procedural requirements of a class suit under California law may be found in the case of *Metowski v. Traid Corp. (1972) 28 Cal. App. 3d 332, 104 Cal. Rptr. 599* , a case arising under the Commercial Code sales law and containing two topics of significant concern: (1) the nature of the class, and (2) the requirement for giving notice.

For discussion and forms for class actions, see Ch. 120, *Class Actions* .

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[Reserved]

§§ 502.182[Reserved]

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C. Implied Warranties of Merchantability

44-502 California Forms of Pleading and Practice--Annotated § 502.200

§ 502.200 Complaint for Damages for Breach of Implied Warranty of Merchantability [Com. Code § 2314(1), (2)]

[1] FORM Complaint for Damages for Breach of Implied Warranty of Merchantability [Com. Code § 2314(1), (2)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR BREACH OF IMPLIED WARRANTY
_____ [*names*], Defendants.	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 502.103[1], Paragraph 1.*]

2. [*Fictitious defendants. See § 502.103[1], Paragraph 2.*]

3. On or about _____ [*date*], at _____ [*city*], California, defendant sold to plaintiff certain goods consisting of _____ [*describe quantity and nature of goods*], and plaintiff bought those goods from defendant for the amount of $_____ [*or describe other consideration*].
[_____ (*Either* The contract of sale between the parties was oral (*if sale price was $500 or more, add:*, a true copy of a memorandum of which is attached to this complaint as Exhibit A and made a part of it by this

reference) *or* A true copy of the contract of sale between the parties is attached as Exhibit A and incorporated by reference *or allege other compliance with statute of frauds*).]

4. Defendant was a merchant with respect to goods of the kind which were sold to plaintiff, and there was in the sale to plaintiff an implied warranty that those goods were merchantable.

5. However, defendant breached that warranty implied in the contract for the sale of goods in that _____ [*describe breach, e.g.,* those goods could not pass without objection in the trade under the contract description *or, if fungible goods:* those goods were not of fair average quality within the description *or* those goods were not fit for the ordinary purposes for which those goods are used (in that _____ (*describe unfitness*)) *or* those goods did not run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved *or* those goods were not adequately contained, packaged, and labeled as the agreement required *or* those goods did not conform to the _____ (promises *or* affirmations of fact) made on the _____ (container *or* label)]. As a result thereof plaintiff did not receive goods as impliedly warranted by defendant to be merchantable.

6. [*Notification by plaintiff to defendant of breach. See § 502.140[1], Paragraph 6.*]

7. [*Damages for breach. See § 502.140[1], Paragraph 7.*]

8. [*Incidental or consequential damages. See § 502.140[1], Paragraph 8.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the sum of $_____;

2. For damages for _____ [*specify incidental or consequential damages, e.g.,* transportation of goods, and travel expenses] in the sum of $_____;

3. For costs of suit herein incurred, including attorney's fees, if appropriate; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 502.103[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action against a seller for breach of implied warranty of merchantability [*see Com. Code § 2314(1), (2); § 502.24[2]*]. The measure of damages is governed by *Com. Code § 2714(2), (3),* discussed in *§ 502.28[2]*. There must be privity between the plaintiff/buyer and defendant/seller showing on the face of a complaint for breach of implied warranty; otherwise a demurrer to the complaint should be sustained [*Anthony v.*

Kelsey-Hayes Co. (1972) 25 Cal. App. 3d 442, 448, 102 Cal. Rptr. 113 ; *see also § 502.24[7]*].

[3] When Usable in Consumer Litigation

The complaint in [1], *above*, is available for use in a suit by a consumer, but its use normally would be limited to any situation not covered by the Song-Beverly Act. That act applies the implied warranty of merchantability to every retail sale of "consumer goods" [*see Civ. Code § 1792*, discussed at *§ 502.51[1]*], but it is not clear that this reference includes clothing and consumables, which are expressly excepted from the definition of consumer goods under the act [*see Civ. Code § 1791(a), (c), (d)*]. The act's definition of merchantability also does not expressly include the elements of fungible goods' fair average quality or the run of even kind among units, which in any case are usually references to commercial standards absent from retail sales [*see Civ. Code § 1791.1(a)*]. An action under the Song-Beverly Act otherwise may be preferred because the nature of the consumer protective coverage is broader and the range of possible defenses narrower [*see § 502.51[1]*; *see also § 502.202* (Complaint for Breach of Implied Warranty of Merchantability Under Song-Beverly Act)].

[4] Allegations

The complaint in [1], *above*, alleges the following:

- That the buyer was a merchant in the kind of goods sold, and that the implied warranty of merchantability arose out of the sale (Paragraph 4) [*Com. Code § 2314(1)*].
- The breach of the implied warranty (Paragraph 5) [*see Com. Code § 2314(2)*].
- Notification of the breach (Paragraph 6) [*Com. Code § 2607(3)(A)*].
- Damages (Paragraphs 7, 8) [*Com. Code §§ 2714(2), (3), 2715*].

[5] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, §§ 177.40* et seq. and *177.140* et seq.

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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44-502 California Forms of Pleading and Practice--Annotated § 502.201

§ 502.201 Allegations for Use in Complaint for Breach of Implied Warranty of Merchantability of Food or Drink Served for Consumption [Com. Code § 2314(1), (2)]

[1] FORM Allegations for Use in Complaint for Breach of Implied Warranty of Merchantability of Food or Drink Served for Consumption [Com. Code § 2314(1), (2)]

1. On or about _____ [*date*], in _____ [*city*], California, defendant sold and served to plaintiff for consumption _____ [on the premises *or* specify other location] _____ [food *or* drink *or both*] consisting of _____ [*describe quantity of servings and nature of food or drink*], and plaintiff purchased that _____ [food *or* drink *or both*] from defendant for the amount of $_____ [*or describe other consideration*]. [The contract of sale between the parties was oral (*if sale price was $500 or more, add:*, a true copy of a memorandum of which is attached as Exhibit _____ and incorporated by reference).]

2. Defendant was a merchant with respect to the kind of _____ [food *or* drink *or both*] served and sold to plaintiff, and there was in the sale and service to plaintiff an implied warranty that the _____ [food *or* drink *or both*] was/were merchantable.

3. However, defendant breached that warranty implied in the contract for sale and service of the _____ [food *or* drink *or both*] in that _____ [*describe breach, e.g.,* the food could not pass without objection in the trade under the contract description (in that it was _____ (*specify, e.g.,* deleterious and inedible)) *or* the food and drink were not fit for the ordinary purposes of human consumption (in that _____ (*specify, e.g.,* plaintiff and others of plaintiff's party could not ingest, swallow, or digest any of the ingredients)) *or* the food was not adequately contained or packaged as the agreement between the parties required (in that _____ (*specify, e.g.,* plaintiff had to transport the food for several miles in an automobile, but the food immediately overran its wrappings, spilled, and became totally inedible and unserviceable)) *or* the drink did not conform to the _____ (promises *or* affirmation of fact) made on the _____ (containers *or* labels) (in that _____ (*specify, e.g.,* the descriptions read "sausages," but the ingredients were purely vegetable compounds)) *or other*].

[2] Use of Form

The allegations in [1], *above*, may be substituted for Paragraphs 3-5, respectively, of the form at § 502.200[1] for use in an action against a seller of food or drink for consumption on the premises or elsewhere for damages for breach of the implied warranty of merchantability [*see Com. Code § 2314(1), (2)*].

[3] Use in Consumer Litigation

Apparently, these allegations should be used only in a suit under the Commercial Code because the Song-Beverly Act does not cover "consumables" within its definition of "consumer goods" [*see Civ. Code § 1791(a), (d)*]; *see also § 502.53[1][f]* (definition of implied warranty only covers consumer goods [*Civ. Code § 1791.1(a), (b)*]). The Magnuson-Moss Act does not contain special provisions as to the nature of implied warranties [*see 15 U.S.C. § 2301(7)*].

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44-502 California Forms of Pleading and Practice--Annotated § 502.202

§ 502.202 Complaint for Damages for Breach of Implied Warranty of Merchantability Under Song-Beverly Consumer Warranty Act [Civ. Code §§ 1791.1(d), 1792, 1794]

[1] FORM Complaint for Damages for Breach of Implied Warranty of Merchantability Under Song-Beverly Consumer Warranty Act [Civ. Code §§ 1791.1(d), 1792, 1794]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR BREACH OF IMPLIED WARRANTY
_____ [*names*], Defendants.	)	(Song-Beverly Consumer Warranty Act)
	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 502.103[1], Paragraph 1.*]

2. [*Fictitious defendants. See § 502.103[1], Paragraph 2.*]

3. On or about _____ [*date*], at _____ [*location*], defendant _____ [*name*], hereinafter referred to as the "defendant manufacturer," manufactured certain consumer goods consisting of _____ [*describe nature of goods*] for purposes of their eventual sale to retail buyers.

4. On or about _____ [*date*], defendant _____ [*name*], hereinafter referred to as the "defendant distributor," acquired the goods from defendant manufacturer and distributed them to defendant _____ [*name of seller*] for eventual retail to consumers. In the process defendant distributor _____ [appended to those goods a written warranty in the form of a written statement pursuant to which it undertook to preserve or maintain the utility or performance of the goods or provide compensation if there was a failure in its utility or performance *or* supplied to _____ (*seller*) a sample or model of the goods for demonstration at retail, thereby making an express warranty that the whole of the goods conformed thereto].

5. On or about _____ [*date*], at _____ [*city*], California, defendant _____ [*name*], hereinafter referred to as the "defendant seller," sold _____ [*quantity*] of those goods to plaintiff, at retail, and plaintiff bought those goods from defendant for the amount of $_____ [*or describe other consideration*]. _____ [The contract of sale between the parties was oral (*if sale price was $500 or more, add:* a true copy of a memorandum of which is attached as Exhibit _____ and incorporated by reference) *or* A true copy of the contract of sale between the parties is attached as Exhibit _____ and incorporated by reference].

6. This retail sale to plaintiff was accompanied separately, individually, and respectively by the defendant manufacturer's[, defendant distributor's,] and defendant seller's implied warranties that the goods were merchantable.

7. However, defendants, and each of them, breached their respective warranties implied in the sale in that _____ [*describe breach, e.g.,* the goods could not pass without objection in the trade under the contract description *or* the goods were not fit for the ordinary purposes for which the goods are used *or* the goods were not adequately contained, packaged, and labeled *or* the goods failed to conform to the _____ (promises *or* affirmations of fact) made on the _____ (container *or* label)] because _____ [*describe in what manner goods did not meet description, were not fit, were inadequately contained, packaged, or labeled, or failed to conform*]. As a result thereof plaintiff did not receive merchantable goods as impliedly warranted by defendants, and each of them.

8. [*Notification of breach by plaintiff to each defendant. See § 502.140[1], Paragraph 6.*]

9. [*Damages for breach by defendants. See § 502.140[1], Paragraph 7.*]

10. [*Incidental or consequential damages. See § 502.140[1], Paragraph 8.*]

11. Plaintiff has incurred reasonable attorney's fees in the amount of $_____.

WHEREFORE, plaintiff prays judgment against defendant[(s) and each of them] as follows:

1. For damages in the sum of $_____;

2. For damages for _____ [*specify incidental or consequential damages, e.g.,* transportation of goods, and travel expenses] in the sum of $_____;

3. For costs of suit herein incurred, including attorney's fees, if appropriate; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 502.103[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in action by a retail buyer against a manufacturer, any distributor who has made an express warranty as to the goods, and the retail seller for breach of their respective implied warranties of merchantability [*see Civ. Code § 1791.1(d)* (measure of damages for implied warranty, discussed at *§ 502.53[2]*); *Civ. Code § 1792* (implied warranty of manufacturer and retail seller accompanies all sales unless disclaimed, discussed at *§ 502.51[1]*); *Civ. Code § 1795* (liability of person other than manufacture for express warranty, discussed at *§ 502.42[4]*); *see also* discussion at *§ 502.160[2] -[6]*].

[3] Allegations

The complaint in [1], *above*, alleges the following:

- The manufacture of the consumer goods (Paragraph 3) [*Civ. Code § 1791(a), (j)*].

- The evidence of any distributor who made an express warranty for consumer goods purposes (Paragraph 4) [*Civ. Code § 1791(e)*].

- Sale of the goods to plaintiff by seller (Paragraph 5) [*Civ. Code § 1791(l), (n)*].

- Accompaniment of the sale by the implied warranty of merchantability of each defendant (Paragraph 6) [*Civ. Code § 1792*; *see Civ. Code § 1795*; discussions at *§§ 502.42[4], 502.51[1]*].

- Breach of the consumer warranty (Paragraph 7).

- Notification of breach by plaintiff to each defendant (Paragraph 8) [*see Civ. Code § 1791.1(d), Com. Code § 2607(3)(A)*; *see also* [4], *below*].

- Damages (Paragraphs 9, 10) [*Civ. Code § 1791.1(d)*; *Com. Code §§ 2714(2), (3), 2715*]. *Com. Code §§ 2714(2), (3), 2715* express the measure of damages for accepted goods and are discussed at *§§ 502.28[2]* and *502.53[1][a], [2]*. The buyer also has the option of rejecting noncomforming goods, in which case the measure of damages would be that set forth in *Com. Code §§ 2711-2713*, the primary discussion of which is in Ch. 500, *Sales: Sales Under the Commercial Code* .

- Attorney's fees (Paragraph 11) [*Civ. Code § 1791.1(d), 1794(d)*].

[4] Rights Under Implied Warranty of Merchantability

[a] Song-Beverly Act

Under the Song-Beverly Act the manufacturer's and retail seller's implied warranty of merchantability [*see Civ. Code § 1791.1(a)*] must accompany every sale of consumer goods as defined in *Civ. Code § 1791(a)* [*Civ. Code § 1792*].

Although a different rule may apply when an express warranty is breached, under the Song-Beverly Consumer Warranty Act there is no requirement that the seller be given an opportunity to repair when the implied warranty of merchantability is breached [*Mocek v. Alfa Leisure, Inc. (2003) 114 Cal. App. 4th 402, 406-408, 7 Cal. Rptr. 3d 546* (affirming judgment in amount of purchase price plus interest upon return of defective travel trailer)]. In addition, if express warranties [*see Civ. Code § 1791.2(a)*] are made by anyone other than the manufacturer of the goods, the obligation of that person is the same as that imposed on the manufacturer by the act [*Civ. Code § 1795*]. A buyer of consumer goods injured by a breach of warranty has the remedies provided under Division 2 of the Commercial Code [*Civ. Code § 1791.1(d)*]. Although it is not clear, this presumably includes the preliminary duty of notifying the defendant of breach of warranty after acceptance of a tender and within a reasonable time of discovery [*see Com. Code § 2607(3)(A)*]; it also includes both proximate and incidental or consequential damages [*Com. Code § 2714(2), (3)*]. However, the Song-Beverly Act allows a consumer who prevails in an action for breach of implied warranty to recover reasonable attorney's fees based on actual time expended [*Civ. Code §§ 1791.1(d), 1794(d)*].

[b] Magnuson-Moss Act

A consumer who is damaged by the failure of a supplier, warrantor, or service contractor [*see 15 U.S.C. § 2301(3), (4), (5), (8)*] to comply with any obligation under an implied warranty may bring suit under the federal Magnuson-Moss Act [*15 U.S.C. § 2310(d)(1)*]. However, under that Act an implied warranty means one arising under state law, with certain modifications in requirements as to duration of the warranty if a written warranty exists [*15 U.S.C. §§ 2301(7), 2304(a), 2308(a), (b)*]. No greater damages are afforded under the federal legislation; however, reasonable attorney's fees are provided for thereunder [*15 U.S.C. § 2310(d)(2)*] as they are under the Song-Beverly Act [*see Civ. Code §§ 1791.1(d), 1794*]. Under federal law it is necessary to have recourse first to any informal dispute settlement mechanism applicable in the case or, in its absence, to afford the defendants a reasonable opportunity to cure their failure to comply [*15 U.S.C. § 2310(a)(3), (d)(1), (e)*].

However, unlike the Song-Beverly Act, the federal remedy may be available to transferees of consumers who are allowed to bring suit under the Magnuson-Moss Act [*see 15 U.S.C. §§ 2301(3), 2310(d)(1)*]. Should it also be the case that the Song-Beverly Act does not cover clothing and consumables by implied warranty [*see Civ. Code §§ 1791(a), (c), (d), 1791.1(a)*; *see also* discussion in *§ 502.53[1][f]*], the federal law may be employed with respect to those commodities through the implied warranty of the general sales law [*see Com. Code § 2314*].

[5] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, §§ 177.40* et seq. and *177.140* et seq.

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue*

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44-502 California Forms of Pleading and Practice--Annotated §§ 502.203-502.209

[Reserved]

§§ 502.203[Reserved]

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44-502 California Forms of Pleading and Practice--Annotated § 502.210

§ 502.210 Affirmative Defense to Complaint for Breach of Implied Warranty of Merchantability Based on Exclusion or Modification of Warranty [Com. Code § 2316(2)]

[1] FORM Affirmative Defense to Complaint for Breach of Implied Warranty of Merchantability Based on Exclusion or Modification of Warranty [Com. Code § 2316(2)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

Defendant in the sale to plaintiff _____ [excluded *or* modified] any implied warranty of merchantability by _____ [expressly stating to plaintiff *or* delivering to plaintiff a writing, a true copy of which is attached as Exhibit _____ and incorporated by reference, containing a conspicuous statement] that _____ [*recite or summarize statement, e.g.,* "THERE IS NO IMPLIED WARRANTY OF MERCHANTABILITY ON THESE GOODS," *or* the implied warranty of merchantability was limited only to the fact that the goods would conform to the promises or affirmations of fact made on their container].

[2] Use of Form

The affirmative defense in [1], *above*, is for use in defending against a claim of breach of implied warranty of merchantability when defendant has directly excluded or has modified the warranty [*see Com. Code § 2316(2)*]. If the defense appears on the face of the complaint, a demurrer based on this defense may be filed [*see Code Civ. Proc. § 430.10(e)*]. The defense is available only when the exclusion or modification used the word "merchantable" and was conspicuous [*see Com. Code § 2316*; *§ 502.24[9]*; *see also* discussion at *§ 502.200[2] -[4]*].

[3] When Useable in Consumer Litigation

This defense is not available in any action prosecuted under the Song-Beverly Act, which invalidates exclusion or modification of an implied warranty of merchantability except as provided in *Civ. Code § 1792.3* [*see § 502.51[7]*]. Nor may it be utilized if defendant had given either a written warranty covered by the Magnuson-Moss Act or a service

contract subject to that act at the time of sale or within 90 days thereafter, because in either case an implied warranty may not be excluded or modified [*see 15 U.S.C. § 2308(a), (c)*].

[4] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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44-502 California Forms of Pleading and Practice--Annotated § 502.211

§ 502.211 Affirmative Defense to Complaint for Breach of Implied Warranty of Merchantability Under Song-Beverly Consumer Warranty Act Based on Consumer's Waiver of Implied Warranties [Civ. Code § 1792.5]

[1] FORM Affirmative Defense to Complaint for Breach of Implied Warranty of Merchantability Under Song-Beverly Consumer Warranty Act Based on Consumer's Waiver of Implied Warranties [Civ. Code § 1792.5]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

Prior to and at the time of sale herein, there was attached to the goods a conspicuous writing, a true copy of which is attached as Exhibit _____ and incorporated by reference, which clearly informs the buyer, and did so inform the plaintiff, in simple and concise language that the goods were being sold on a[n] _____ ["as is" *or* "with all faults"] basis; that the entire risk as to the quality and performance of the goods were with the buyer; and that should the goods prove defective following their purchase, the buyer and not the manufacturer, distributor, or retailer assumed the entire cost of all necessary servicing or repair. As a result, defendant effectively disclaimed any implied warranty of _____ [merchantability *or* fitness *or both*], and by that sale plaintiff effectively waived any that warranty.

[2] Use of Form

The affirmative defense in [1], *above*, is for use by a manufacturer, distributor, or retail seller defending an action by a retail buyer suing under the Song-Beverly Act for breach of an implied warranty of merchantability or [*see § 502.202* (form of complaint)], if applicable, of fitness for consumer goods [*see Civ. Code § 1792.5*, discussed at *§ 502.51[8]* and at [4][a], *below*; *see also §§ 502.200[2] -[4]* and *502.202[2] -[4]*].

[3] Demurrer to Answer

The affirmative defense set forth in [1], *above*, may be subject to demurrer as failing to state facts sufficient to

constitute a defense [*see Code Civ. Proc. § 430.20(a)*] if the answer otherwise reveals on its face that the defendant, in transacting the sale, also gave express warranties [*see Civ. Code § 1793*].

[4] Disclaimer or Waiver of Implied Warranties

[a] Song-Beverly Act

Under the Song-Beverly Act, no implied warranty of merchantability or fitness may be waived except in the case of a sale of consumer goods on an "as is" or "with all faults" basis when the provisions of the act are complied with [*Civ. Code §§ 1792.3, 1792.5*]. The act requires particular language of conspicuous warning and disclosure [*see Civ. Code § 1792.4*]. If present, a sale "as is" or "with all faults" constitutes the buyer's waiver of the warranties of merchantability, and if applicable, fitness [*Civ. Code § 1792.5*], unless an express warranty also was given [*Civ. Code § 1793*].

[b] Magnuson-Moss Act

No supplier, under the Magnuson-Moss Act, may disclaim or modify any implied warranty to a consumer as to the consumer product if the supplier makes any written warranty to the consumer person regarding that product. The same is true as to a service contract given at the time of sale or within 90 days thereafter. Implied warranties otherwise may be limited as to duration in compliance with provisions of the act [*15 U.S.C. § 2308*].

[5] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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44-502 California Forms of Pleading and Practice--Annotated § 502.212

§ 502.212 Affirmative Defense to Complaint for Breach of Implied Warranty Arising Under Commercial Code Based on Exclusion of All Implied Warranties by Language Such as "As Is" or "With All Faults" [Com. Code § 2316(3)(a)]

[1] FORM Affirmative Defense to Complaint for Breach of Implied Warranty Arising Under Commercial Code Based on Exclusion of All Implied Warranties by Language Such as "As Is" or "With all Faults" [Com. Code § 2316(3)(a)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

Defendant in the sale to plaintiff excluded any implied warranty of any kind by _____ [expressly stating to plaintiff *or* delivering to plaintiff a writing, a true copy of which is attached hereto as Exhibit _____ and made a part hereof, containing the statement that] the goods were being sold _____ ["as is" *or* "with all faults" *or other language which in common understanding called buyer's attention to the exclusion of warranties and made plain there was no implied warranty*].

[2] Use of Form

The form affirmative defense in [1], *above*, is for use in defending against a claim of breach of any implied warranty arising under Division 2 of the Commercial Code when the warranty has been excluded by specific language excluding all implied warranties [*see Com. Code § 2316(3)(a)*].

[3] When Usable in Consumer Litigation

The defense in [1], *above*, is not available in the case of implied warranties of merchantability or fitness under the Song-Beverly Act, which requires a written, conspicuous disclaimer that, in addition to stating that the goods are being sold on an "as is" basis, must also state that the entire risk as to quality and performance is on the buyer and that the buyer assumes all cost of repair [*see Civ. Code § 1792.4*]. For an affirmative defense for use when implied warranties

have been properly excluded under the Song-Beverly Act, see *§ 502.211[1]*. In addition, if an express warranty was given which was subject to that act, the implied warranties may not be disclaimed [*see Civ. Code § 1793*]. Likewise, the form of defense in [1], *above*, may not be utilized with regard to any type of implied warranty if a written warranty has been covered by the Magnuson-Moss Act or if a service contract subject to that act was given at the time of sale or within 90 days thereafter [*see 15 U.S.C. § 2308(a), (c)*].

[4] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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44-502 California Forms of Pleading and Practice--Annotated § 502.213

§ 502.213 Affirmative Defense to Complaint for Breach of Implied Warranty Arising Under Commercial Code Based on Exclusion or Modification of That Implied Warranty by Course of Dealing or Usage of Trade [Com. Code § 2316(3)(c)]

[1] FORM Affirmative Defense to Complaint for Breach of Implied Warranty Arising Under Commercial Code Based on Exclusion or Modification of That Implied Warranty by Course of Dealing or Usage of Trade [Com. Code § 2316(3)(c)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

Any implied warranty of _____ [merchantability (as to _____ [*describe any particular aspect involved, e.g.,* the fungible goods being of fair average quality within the description]) *or* fitness *or other*] with regard to the goods sold to plaintiff was _____ [excluded *or* modified] by _____ [course of dealing *or* usage of trade], in that _____ [*describe, e.g.,* the parties have dealt between themselves for many years in products of this same type with the express understanding, based on their earliest dealings, that defendant made no representation or guarantee as to the character of the goods *or* it has long been the practice in defendant's industry in dealing with any and all customers to sell all goods without warranting in any manner their character in any respect].

[2] Use of Form

The affirmative defense in [1], *above,* is for use in defending against a claim of breach of any implied warranty arising under Division 2 of the Commercial Code when the warranty has been excluded or modified by virtue of a course of dealing between the parties or a usage in the trade as to the kind of goods involved [*Com. Code § 2316(3)(c)*; *see Com. Code § 1303(b), (c)* ("course of dealing" and "usage of trade" defined)]. It is not appropriate for use in a consumer purchase situation [*see § 502.212[3]*].

[3] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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44-502 California Forms of Pleading and Practice--Annotated § 502.214

§ 502.214 Affirmative Defense to Complaint for Breach of Implied Warranty Arising Under Commercial Code Based on Buyer's Opportunity to Examine Goods [Com. Code § 2316(3)(b)]

[1] FORM Affirmative Defense to Complaint for Breach of Implied Warranty Arising Under Commercial Code Based on Buyer's Opportunity to Examine Goods [Com. Code § 2316(3)(b)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

Before entering into the contract for the sale of goods herein, defendant fully made available [a _____ (sample *or* model) of] the goods for plaintiff's examination and expressly invited plaintiff to make an examination of that _____ [sample *or* model], _____ [and plaintiff did so *or* but plaintiff refused to so] examine _____ the [sample *or* model]. The defects alleged by plaintiff to have been present in the goods ought to have been revealed to plaintiff through examination of that _____ [sample *or* model].

[2] Use of Form

The affirmative defense in [1], *above,* is for use in defending against a claim of breach of any implied warranty arising under Division 2 of the Commercial Code when the warranty has been excluded based on plaintiff's opportunity to examine the goods or an example thereof prior to entering into alleged contract [*see Com. Code § 2316(3)(b)*]. The defense in [1], *above,* is not available in any action prosecuted under the Song-Beverly Act [*see Civ. Code § 1792.3*] or the Magnuson-Moss Act [*15 U.S.C. § 2308(a)*; *see § 502.212[3]*].

[3] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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44-502 California Forms of Pleading and Practice--Annotated §§ 502.215-502.219

[Reserved]

§§ 502.215[Reserved]

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44-502 California Forms of Pleading and Practice--Annotated § 502.220

§ 502.220 Complaint for Damages for Breach of Implied Warranty of Fitness [Civ. Code §§ 1792.1, 1792.2; Com. Code § 2315]

[1] FORM Complaint for Amages for Breach of Implied Warranty of Fitness [Civ. Code §§ 1792.1, 1792.2; Com. Code § 2315]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR BREACH OF IMPLIED WAR-
_____ [*names*],	)	RANTY
Defendants.	)	(Song-Beverly Consumer Warranty Act)
	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
		(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 502.103[1], Paragraph 1.*]

2. [*Fictitious defendants. See § 502.103[1], Paragraph 2.*]

3. On or about _____ [*date*], plaintiff required [a specific quantity of] a certain kind of _____ [*described goods, e.g.,* automobile] for the particular purpose(s) of _____ [*describe, e.g.,* being able to maneuver both on dry land and in bodies of water]. Plaintiff relied on defendant's _____ [skill *or* judgment *or both*] to _____ [select *or* furnish *or both*] suitable goods

for that/those purpose(s), and on or about that time, at _____ [*city*], California, defendant sold to plaintiff certain goods consisting of _____ [*describe quantity and nature of goods*], and plaintiff bought those goods from defendant, in reliance of defendant's _____ [skill *or* judgment *or both*], for the amount of $ _____ [*or describe other consideration*]. _____ [This contract of sale between the parties was oral (*if sale price was $500 or more, add:*, a true copy of a memorandum of which is attached as Exhibit A and incorporated by reference) *or* A true copy of the contract of sale between the parties is attached as Exhibit _____ and incorporated by reference].

4. At the time of _____ [contracting for sale *or, if under Song-Beverly Act,* the retail sale] of the goods, defendant had reason to know the particular purpose(s) for which the goods were required [by virtue of the fact that _____ (*explain why defendant knew, e.g.,* plaintiff expressly communicated these purposes to defendant in requesting the goods)], and that plaintiff was relying on defendant's _____ [skill *or* judgment *or both*] to _____ [select *or* furnish *or both*] suitable goods; so that there was an implied warranty that the goods were fit for this/these purpose(s).

5. However, defendant breached the warranty implied at the time of sale in that defendant did not receive suitable goods, and the goods were not fit for the particular purpose(s) for which they were required [, in that _____ (*describe, e.g.,* the vehicles were incapable of negotiating in water but instead invariably sank on immersion therein)].

6. [*Notification by plaintiff to defendant of breach. See § 502.140[1], Paragraph 6.*]

7. [*Damages for breach. See § 502.140[1], Paragraph 7.*]

8. [*Incidental or consequential damages. See § 502.140[1], Paragraph 8.*]

9. [*Attorney's fees, if applicable. If action commenced under Song-Beverly Act, see § 502.202[1], Paragraph 11.*]

WHEREFORE, plaintiff prays judgment against defendant[(s) and each of them] as follows:

1. For damages in the sum of $ _____;

2. For damages for _____ [*specify incidental or consequential damages, e.g.,* transportation of goods, and travel expenses] in the sum of $ _____;

3. For costs of suit herein incurred, including attorney's fees, if appropriate; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 502.103[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action against a seller for breach of the implied warranty of fitness under either the Commercial Code [*see Com. Code § 2315*; *§§ 502.24[4]* and *502.28*] or the Song-Beverly Act [*see Civ. Code §§ 1792.1, 1792.2*, discussed in *§§ 502.51[2]* and *502.53[2]*; *see also* discussion in [4], *below*].

[3] Allegations

The complaint in [1], *above*, alleges the following:

- Plaintiff's need for product with special properties and reliance on defendant to select or furnish a product with those properties at time of sale (Paragraph 3) [*Civ. Code § 1791.1(b)(1)*; *Com. Code §§ 2204, 2315*].

- Defendant's awareness of plaintiff's need and reliance, giving rise to the implied warranty of fitness (Paragraph 4) [*Civ. Code § 1792.2(a)*; *Com. Code § 2315*].

- Breach of the implied warranty (Paragraph 5).

- Notification of breach (Paragraph 6) [*Com. Code § 2607(3)(A)*].

- The damages (Paragraphs 7, 8) [*Civ. Code §§ 1791.1(d), 1794(b)*; *Com. Code §§ 2714(2), (3), 2715*].

- Any attorney's fees, if applicable (Paragraph 9) [*see Civ. Code § 1794(d)*].

[4] Distinctions Between Implied Warranty of Fitness in Consumer Cases and in Commercial Cases

A retail buyer of consumer goods from either a manufacturer [*see Civ. Code § 1792.1*] or a distributor or retailer [*see Civ. Code § 1792.2(a)*] subject to the Song-Beverly Act receives an implied warranty of fitness if the marketing party has reason to know at the time of the sale that the goods are required for a particular purpose and that the buyer is relying on the marketing party's skill or judgment to select or furnish suitable goods. Although the same remedy from any kind of seller exists under Division 2 of the Commercial Code [*see Com. Code § 2315*], the retail buyer has two advantages in bringing the action under the Song-Beverly Act:

- The defendant's ability to disclaim or waive the warranty is very limited [*see Civ. Code §§ 1792.5, 1793*].

- The plaintiff may recover reasonable attorney's fees even in the absence of a contractual provision for attorney's fees [*see Civ. Code §§ 1791.1(d), 1794(d)*].

[5] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, §§ 177.40* et seq. and

177.140 et seq.

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571

For alternative forms for verification, see Ch. 572, *Verification*

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44-502 California Forms of Pleading and Practice--Annotated §§ 502.221-502.229

[Reserved]

§§ 502.221[Reserved]

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44-502 California Forms of Pleading and Practice--Annotated § 502.230

§ 502.230 Affirmative Defense to Complaint for Breach of Implied Warranty of Fitness Based on Exclusion or Modification of Implied Warranty of Fitness [Com. Code § 2316(2)]

[1] FORM Affirmative Defense to Complaint for Breach of Implied Warranty of Fitness Based on Exclusion or Modification of Implied Warranty of Fitness [Com. Code § 2316(2)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

Defendant in the sale to plaintiff _____ [excluded *or* modified] any implied warranty of fitness by delivering to plaintiff a writing, true copy of which is attached hereto as Exhibit _____ and made a part hereof, containing a conspicuous statement that _____ [*recite or summarize statement, e.g.,* "THERE ARE NO WARRANTIES WHICH EXTEND BEYOND THE DESCRIPTION ON THE FACE OF THIS STATEMENT" *or* any implied warranty of fitness is limited exclusively to personal, family, or household purposes].

[2] Use of Form

The affirmative defense in [1], *above,* is for use in defending against a claim of breach of implied warranty of fitness when the defendant has directly excluded or has modified the warranty [*see Com. Code § 2312(2),* discussed in *§ 502.24[8]* and *[10]*].

For other defenses that may be applicable to an implied warranty of fitness, see *§§ 502.212 -502.214*.

[3] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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44-502 California Forms of Pleading and Practice--Annotated §§ 502.231-502.239

[Reserved]

§§ 502.231[Reserved]

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44-502 California Forms of Pleading and Practice--Annotated § 502.240

§ 502.240 Complaint for Damages for Breach of Implied Warranty Arising From Course of Dealing and Usage of Trade [Com. Code § 2314(3)]

[1] FORM Complaint for Damages for Breach of Implied Warranty Arising from Course of Dealing and Usage of Trade [Com. Code § 2314(3)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR BREACH OF IMPLIED WAR-
_____ [*names*],	)	RANTY
Defendants.	)	(Song-Beverly Consumer Warranty Act)
	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
		(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 502.103[1], Paragraph 1.*]

2. [*Fictitious defendants. See § 502.103[1]*, Paragraph 2.]

3. On or about _____ [*date*], at _____ [*city*], California, defendant sold to plaintiff a[n] _____ [*type of goods or chattels, e.g.*, Irish Wolfhound], which defendant represented in the contract of sale _____ (orally *or* in writing) was of _____ (pedigreed *or* blooded) lineage, in that _____ (*describe particulars of animal's ancestry*)]. Plaintiff made that purchase from

defendant for the amount of $_____ [*or describe other consideration*]. [_____ (That contract of sale between the parties was oral (*if sale price was $500 or more, add:*, a true copy of a memorandum of which is attached as Exhibit A and incorporated by reference) *or* A true copy of the contract of sale between the parties is attached as Exhibit A and incorporated by reference).

4. At the time of sale to defendant there was an implied warranty, that defendant would [*describe, e.g.,* supply plaintiff with pedigree papers to evidence the animal was as represented in the contract. This warranty arose from _____

[*EITHER, if course of dealing*]

course of dealing, in that there had been a sequence of previous conduct between plaintiff and defendant [in their business of _____ (*specify, e.g.,* buying and selling cattle)], which is fairly to be regarded as establishing as a common basis of understanding for interpreting their expressions and other conduct in the transaction in this action that _____ [*describe basis of warranty, e.g.,* pedigree papers always were to be delivered with any sale of an animal defendant to plaintiff].

[*OR, if usage of trade*]

usage of trade, in that a _____ [practice *or* method of dealing] of _____ [*describe basis of warranty, e.g.,* delivery of pedigree papers by the seller to the buyer in any sale of an animal] had was regularity done in _____ [*specify place, vocation, or trade, e.g.,* the cattle trading business in this county] as to justify an expectation that it would be observed with respect to the transaction in this action.

[*CONTINUE*]

5. However, defendant breached the warranty implied in the contract for sale in that _____ [*explain, e.g.,* defendant did not at time of sale or at any time since supply plaintiff with pedigree papers of any kind for the animal *or* the only pedigree papers defendant supplied to plaintiff for the animal were not in conformity with the lineage thereof as represented to plaintiff in the contract of sale]. As a result plaintiff did not receive [_____ *specify, e.g.,* the animal] as impliedly warranted by defendant.

6. [*Notification by plaintiff to defendant of breach. See § 502.140[1], Paragraph 6.*]

7. *Damages for breach. See § 502.140[1], Paragraph 7.*

8. [*Incidental or consequential damages. See § 502.140[1], Paragraph 8.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the sum of $ _____;

2. For damages for _____ [*specify incidental or consequential damages, e.g.,* transportation of goods, and travel expenses] in the sum of $ _____;

3. For costs of suit herein incurred, including attorney's fees, if appropriate; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification if desired. See § 502.103[1]*.]

[2] Use of Form

The complaint in [1], *above*, is for use in an action against a seller of a pedigreed animal for breach of an implied warranty to furnish pedigree papers arising by course of dealing or usage of trade, particularly in the instance of certification of an animal's lineage [*see Com. Code § 2314(3)*; discussed in *§ 502.24[6]*; *see also* U.C.C. Comment 12 to *Com. Code § 2314*].

[3] Allegations

The complaint in [1], *above*, alleges the following:

- The sale to plaintiff of a particular pedigreed animal (Paragraph 3) [*Com. Code § 2204*].
- That the implied warranty of providing pedigreed papers arose out of a course of dealing or usage of trade (Paragraph 4) [*see Com. Code § 2314(3)*; *see Com. Code § 1303(b)(c)* ("course of dealing" and "usage of trade" defined)].
- Breach of the implied warranty (Paragraph 5).
- Notification of breach (Paragraph 6) [*Com. Code § 2607(3)(A)*].
- Damages (Paragraphs 7, 8) [*Com. Code §§ 2714(2), (3), 2715*].

[4] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, §§ 177.40* et seq. and *177.140* et seq.

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue*

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44-502 California Forms of Pleading and Practice--Annotated §§ 502.241-502.259

[Reserved]

§§ 502.241[Reserved]

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44-502 California Forms of Pleading and Practice--Annotated § 502.260

§ 502.260 Complaint for Damages for Breach of Warranty of Title Based on Seller's Failure to Give Good Title [Com. Code § 2312(1)(a)]

[1] FORM Complaint for Damages for Breach of Warranty of Title Based on Seller's Failure to Give Good Title [Com. Code § 2312(1)(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR BREACH OF WARRANTY OF
_____ [*names*], Defendants.	)	TITLE
	)	(Song-Beverly Consumer Warranty Act)
	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
		(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 502.103[1], Paragraph 1.*]

2. [*Fictitious defendants. See § 502.103[1], Paragraph 2.*]

3. [*Sale of goods by defendant to plaintiff. See § 502.200[1], Paragraph 3.*]

4. At the time of that sale defendant warranted to plaintiff that defendant was conveying to plaintiff good title to the goods and making rightful transfer of that title to plaintiff.

5. Defendant breached the warranty in that _____ [*describe breach, e.g.,* a certain _____ (*name of third party*) was actually the true and lawful owner of the goods at the time of their sale to plaintiff, and at the time of the sale the goods were not a lawful part of defendant's inventory for sale and defendant had no true or lawful title to them to rightfully transfer to plaintiff]. As a result, plaintiff in fact did not receive good title to these goods from defendant nor a rightful transfer of title.

6. Plaintiff discovered the breach of warranty on or about _____ [*date*]. Thereafter, and on or about _____ [*date*], plaintiff notified defendant of this breach by _____ [writing, in the form of a _____ (letter *or* telegram *or other*), a true copy of which is attached to this complaint as Exhibit B and made a part of it *or* personal visit and communication *or* telephone call *or other*].

[*EITHER*]

7. As a proximate result of this breach of warranty by defendant, plaintiff has been damaged in the amount of $_____ [, the difference at the time and place plaintiff accepted the goods between their value then and that which they would have had if they had been as warranted].

[*OR*]

7. As a proximate result of this breach of warranty by defendant, plaintiff has been damaged [in the amount of $_____] as a result of special circumstances in which _____ [*describe circumstances, e.g.,* plaintiff transferred a portion of the goods to third-party buyers, who received them in the belief that plaintiff was capable of conveying good title to the goods, and who were commercially embarrassed as a result]. [These damages are not all assessable at this time, but this complaint will be amended to state the damages when plaintiff becomes able to determine them.]

[*CONTINUE*]

8. Plaintiff has been further damaged as a result of this breach in that _____ [*describe incidental or consequential damages, e.g.,* plaintiff was required to transport the goods to _____ (the true owner *or* a new market) for the amount of $_____. Defendant also knew that plaintiff needed the goods as demonstration wares, and plaintiff was forced to arrange to procure replacement goods for these purposes through travel and negotiations, in the total amount of $_____].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the sum of $_____;

2. For damages for _____ [*specify incidental or consequential damages, e.g.,* transportation of goods, and travel expenses] in the sum of $_____;

3. For costs of suit herein incurred, including attorney's fees, if appropriate; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 502.103[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action by any buyer against a seller of goods for breach of warranty of title involving the seller's failure to give a good title [*see Com. Code § 2312(1)(a)*, discussed in *§ 502.21*].

[3] Allegations

The complaint in [1], *above*, alleges the following:

- Sale of goods out of which the injury arose (Paragraph 3) [*Com. Code § 2204*].
- Defendant's warranty of title made in the sale by imposition of law (Paragraph 4) [*Com. Code § 2312(1)*].
- Breach by defendant of the warranty (Paragraph 5).
- Plaintiff's notification of the breach to defendant within a reasonable time of discovery of the breach (Paragraph 6) [*Com. Code § 2607(3)(A)*].
- Damages owing as a result of the breach (Paragraph 7) [*Com. Code § 2714(2)*].
- Incidental and consequential damages (Paragraph 8) [*Com. Code §§ 2714(3), 2715*; § 502.283[4]].

[4] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, §§ 177.40* et seq. and *177.140* et seq.

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

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44-502 California Forms of Pleading and Practice--Annotated § 502.261

§ 502.261 Allegations for Use in Complaint for Damages for Breach of Warranty of Title Based on Seller's Lack of Authority to Transfer Third Person's Title [Com. Code § 2312(1)(a)]

[1] FORM Allegations for Use in Complaint for Damages for Breach of Warranty of Title Based on Seller's Lack of Authority to Transfer Third Person's Title [Com. Code § 2312(1)(a)]

1. At the time of sale alleged in this complaint, defendant modified the warranty of title imposed by law by conveying to plaintiff goods to which a certain _____ [*name of third person*] held good title and by making rightful transfer thereof to plaintiff.

2. However, defendant breached the modified warranty in that, while _____ [*name of third person*] was in fact the true owner of those goods, defendant did not have that person's authority to transfer those goods to plaintiff by sale. As a result, plaintiff did not receive a rightful transfer of the title to the goods.

[2] Use of Form

The allegations in [1], *above*, may be substituted for Paragraphs 4 and 5, respectively, of the form of complaint in § 502.260[1] for use in an action by a buyer against a seller of goods for breach of warranty of making a rightful transfer of the good title of a third person [*see Com. Code § 2312(1)(a)*, discussed in *§ 502.21[1]*].

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44-502 California Forms of Pleading and Practice--Annotated § 502.262

§ 502.262 Allegations for Use in Complaint for Damages for Breach of Warranty of Title Based on Seller's Failure to Deliver Free From Encumbrances [Com. Code § 2312(1)(b)]

[1] FORM Allegations for Use in Complaint for Damages for Breach of Warranty of Title Based on Seller's Failure to Deliver Free From Encumbrances [Com. Code § 2312(1)(b)]

1. At the time of the sale alleged in this complaint, defendant warranted to plaintiff, by imposition of law, that defendant was delivering the goods to plaintiff free from any security interest or other lien or encumbrance of which plaintiff at the time of contracting had no knowledge.

2. However, defendant breached that warranty in that _____ [*describe breach, e.g.,* a certain _____ (*name of third party*) had a security interest in the goods at the time of their sale to plaintiff, representing a debt still outstanding at that time of $_____ owed by defendant to that party, of which encumbrance plaintiff at the time of contracting had no knowledge]. As a result, plaintiff in fact did not receive delivery of the goods free from encumbrance of which plaintiff at time of contracting had no knowledge.

[2] Use of Form

The allegations in [1], *above*, may be substituted for Paragraphs 4 and 5, respectively, of the form of complaint at *§ 502.260[1]* for use in an action by a buyer against a seller of goods for breach of warranty of good title involving the failure to give a title free from encumbrances [*see Com. Code § 2312(1)(b)*, discussed in *§ 502.21[1]*].

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44-502 California Forms of Pleading and Practice--Annotated §§ 502.263-502.269

[Reserved]

§§ 502.263[Reserved]

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44-502 California Forms of Pleading and Practice--Annotated § 502.270

§ 502.270 Affirmative Defense to Complaint for Breach of Warranty of Title Based on Exclusion or Modification of Warranty by Specific Language [Com. Code § 2312(2)]

[1] FORM Affirmative Defense to Complaint for Breach of Warranty of Title Based on Exclusion or Modification of Warranty by Specific Language [Com. Code § 2312(2)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

At the time of the sale alleged in the complaint, defendant expressly and by specific language _____ [excluded *or* modified] any warranty of title in the goods by _____ [*describe, e.g.,* expressly stating to plaintiff that defendant could guarantee good title to the goods only as of _____ [*date*] *or* handing plaintiff a printed statement at the time of closing, a true copy of which is attached as Exhibit A and incorporated by reference, explaining that defendant only passed on the title that may have attached to the goods prior to their coming into defendant's possession *or* calling plaintiff's attention to certain signs posted at defendant's closings counter explaining the lack of a warranty of title in these goods, which signs all proclaim as follows: "NO WARRANTY OF TITLE IS CONTAINED IN ANY CONTRACT OF SALE FOR GOODS AT THIS ESTABLISHMENT"].

[2] Use of Form

The affirmative defense in [1], *above*, may be used by a seller defending against a claim for breach of warranty of title on the ground that the warranty was excluded or modified by specific language [*see Com. Code § 2312(2)*; *§ 502.21[2]*]. *Com. Code § 2312(2)* also provides that the warranty of title may be excluded or modified by circumstances that give the buyer reason to know that the person selling does not claim title in himself or herself in that the seller is purported to sell only that right or title the seller or a third person may have [*see § 502.271*].

[3] Demurrer in Lieu of Answer

If the warranty alleged to have been breached is contained in a written contract of sale that has been appended to the

complaint and that contains specific language excluding or modifying the warranty of title, defendant may demur on the ground that the complaint fails to state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*].

[4] Warranty of Title Is Not Excluded Necessarily With Other Warranties

The warranty of title is not designated by law as an "implied warranty." Thus, it is not excluded in the manner described specifically for implied warranties [UCC Code Comment 6 to *Com. Code § 2312*; *see Com. Code § 2316*]. As a result, it is doubtful that a contract of sale that excludes "all warranties, express or implied" necessarily excludes the warranty of title as well.

[5] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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44-502 California Forms of Pleading and Practice--Annotated § 502.271

§ 502.271 Affirmative Defense to Complaint for Breach of Warranty of Title Based on Fact That Buyer Had Reason to Know of Lack or Limitation of Title [Com. Code § 2312(2)]

[1] FORM Affirmative Defense to Complaint for Breach of Warranty of Title Based on Fact That Buyer had Reason to Know of Lack or Limitation of Title [Com. Code § 2312(2)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

The circumstances existing at the time of sale gave plaintiff reason to know that defendant _____ [did not claim title personally to *or* was purporting to sell only what right or title defendant or any third person might have in] the goods, in that _____ [*describe circumstances, e.g.,* defendant informed plaintiff that he/she was selling the goods in a private sale in order to foreclose his/her security interest in the goods and collect on an obligation that a third-party debtor owed to defendant].

[2] Use of Form

The affirmative defense in [1], *above,* is for use by a seller who is defending against a claim for breach of warranty of title on the ground that the circumstances gave the buyer reason to know that the seller did not claim title in himself or herself or was purporting to sell only the title the seller or a third person might have [*see Com. Code § 2312(2),* discussed in *§ 502.21[2]*].

[3] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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44-502 California Forms of Pleading and Practice--Annotated §§ 502.272-502.279

[Reserved]

§§ 502.272[Reserved]

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44-502 California Forms of Pleading and Practice--Annotated § 502.280

§ 502.280 Notice to Seller of Breach of Warranty Against Infringement for Which Buyer Has Been Sued [Com. Code § 2607(3)(B)]

[1] FORM Notice to Seller of Breach of Warranty Against Infringement for Which Buyer Has Been Sued [Com. Code § 2607(3)(B)]

TO: _____ [*name of seller at business address*]

YOU ARE HEREBY NOTIFIED that you have breached the warranty against infringement arising in connection with your sale to _____ [*name and other identifying data of buyer, such as address*] on or about _____ [*date*], at _____ [*location*], of goods consisting of _____ [*describe quantity and nature of goods*]; and that _____ [*name of buyer*] has been sued, as a result of your breach, in an action entitled _____ vs. _____, No. _____, filed on or about _____ [*date*], in _____ [*name of court*] at _____ [*location*].

[Very truly yours,]

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*name of buyer*]

Dated: _____.

[2] Use of Form

The notice in [1], *above*, is for use by a buyer who has been sued by a customer as a result of the seller's breach of the warranty against infringement in a sale of goods to the buyer. The buyer must notify the original seller of the customer's action in order not to be barred from any remedy over that he or she may have against the seller [*see Com. Code § 2607(3)(B)*, discussed in *§ 502.28[4][b]*].

[3] Requirement of Notification

If a buyer has a claim for breach of warranty against infringement or the like against the seller, and the buyer is sued as a result of this breach, the buyer must notify the seller of the action within a reasonable time after buyer receives notice of the litigation or be barred from any remedy over for liability established by the litigation [*see Com. Code § 2607(3)(B)*, discussed in *§ 502.28[4][b]*].

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44-502 California Forms of Pleading and Practice--Annotated § 502.281

§ 502.281 Notice to Buyer to Hold Seller Harmless Against Claim Arising Out of Compliance With Specifications of Goods Sold [Com. Code § 2607]

[1] FORM Notice to Buyer to Hold Seller Harmless Against Claim Arising Out of Compliance With Specifications of Goods Sold [Com. Code § 2607]

TO: _____ [*name of buyer at business address*]

YOU ARE HEREBY NOTIFIED that there is a claim of infringement [consisting of _____ (*specify claim and name of claimant*). This claim is] [as] a result of the compliance of _____ [*name of seller and identification, such as address*] with specifications furnished thereto by you in connection with your purchase from _____ [*name of seller*] on or about _____ [*date*], at _____ [*location*], of goods consisting of _____ [*describe quantity and nature of goods*]. You are obligated to hold _____ [*name of seller*] harmless against this claim.

[Very truly yours,]

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*name of seller*]

Dated: _____.

[2] Use of Form

The notice in [1], *above*, is for use by a seller who, after furnishing goods to the buyer in compliance with the latter's

specifications, discovers that an infringement has resulted and wishes to notify the buyer of that person's obligation to hold the seller harmless [*see Com. Code § 2607(3), (6)*, discussed in *§ 502.28[4][b]* and in [3], *below*].

[3] Seller's Notice of Infringement When Buyer Furnished Specifications for Goods

The requirements applicable to a buyer to protect the buyer's ability to sue the seller for breach of warranty all apply to a seller whom a buyer must hold harmless against claims for infringement if the buyer has furnished the specifications for the goods sold and the claim arises out of the seller's compliance with those specifications [*Com. Code § 2607(6)*; *see Com. Code § 2312(3)*]. Because a buyer who seeks to preserve his or her remedy for a claim of infringement after accepting tender of the goods must notify the seller of any breach within a reasonable time after discovery was or should have been made [*Com. Code § 2607(3)(A)*], a seller who seeks to preserve his or her remedy against the buyer after having delivered goods to the buyer, and having become aware that an infringement may have resulted by complying with specifications for the goods furnished by the buyer, must notify the buyer of the possible claim. The forms dealing with the other applicable requirements of the buyer-notice of being sued for infringement [*see § 502.280[1]*], and notice to come in and defend [*see § 502.102[1]*], may be adapted for purposes of the seller desiring to be held harmless [*see Com. Code § 2607(3)(B), (5)(A), (6)*], with reference to the form in [1], *above*, for any special language.

[4] Ability of Buyer to Demand Control Over Litigation

In the same manner as a seller who has been notified or informed that the buyer has been sued as a result of the seller's breach of warranty, a buyer who is obligated to hold a seller harmless for infringement arising out of the seller's compliance with specifications furnished by the buyer may make a demand for control of the action [*see Com. Code § 2607(5)(B), (6)*]. The form in *§ 502.282[1]* (seller's demand for control of litigation commenced against buyer) may be adapted for this purpose.

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44-502 California Forms of Pleading and Practice--Annotated § 502.282

§ 502.282 Demand by Seller That Buyer Turn Over Control of Litigation Resulting From Breach of Warranty Against Infringement [Com. Code § 2607(5)(B)]

[1] FORM Demand by Seller That Buyer Turn Over Control of Litigation Resulting From Breach of Warranty Against Infringement [Com. Code § 2607(5)(B)]

TO: _____ [*name of buyer at business address*]

DEMAND IS HEREBY MADE ON YOU that, after seasonable receipt hereof, you turn over to _____ [*name and any necessary identification of seller*] control of the litigation entitled _____ vs. _____, No. _____, filed on or about _____ [*date*] in _____ [*name of court*] at _____ [*location*], including any settlement therein. This litigation allegedly has arisen as a result of breach of warranty against infringement in connection with the sale to you by _____ [*name of seller*] on or about _____ [*date*], at _____ [*specify location*], of goods consisting of _____ [*describe quantity and nature of goods*], or else you will be barred from any remedy over against _____ [*name of seller*]. In connection with your acceptance of this demand, and only therewith, _____ [*name of seller*] hereby agrees to bear all expense and to satisfy any adverse judgment in this litigation.

[Very truly yours,]

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*name of seller*]

Dated: _____.

[2] Use of Form

The demand in [1], *above*, is for use by a seller who has been informed that the buyer has been sued as a result of the seller's breach of warranty against infringement, and who seeks to take control of that litigation [*see Com. Code § 2607(5)(B)*, discussed in *§ 502.28[4][b]* and in [3], *below*].

[3] Seller's Right to Demand Control

If the buyer has a claim against the seller for breach of the warranty against infringement or the like, for which the buyer has been sued, the seller may demand in writing that the buyer turn over to the seller control of the litigation, including settlement, or else be barred from any remedy over [*Com. Code § 2607(5)(B)*; *see Code Civ. Proc. § 431.30(b)(2)*]. If the seller also agrees to bear all expense and to satisfy any adverse judgment, the buyer is so barred unless he or she turns over control after seasonable receipt of the demand [*Com. Code § 2607(5)(B)*].

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44-502 California Forms of Pleading and Practice--Annotated § 502.283

§ 502.283 Complaint for Damages for Breach of Warranty Against Infringement [Com. Code § 2312(3)]

[1] FORM Complaint for Damages for Breach of Warranty Against Infringement [Com. Code § 2312(3)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR BREACH OF WARRANTY
_____ [*names*], Defendants.	)	AGAINST INFRINGEMENT
	)	(Song-Beverly Consumer Warranty Act)
	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
		(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 502.103[1], Paragraph 1.*]

2. [*Fictitious defendants. See § 502.103[1], Paragraph 2.*]

3. [*Sale of goods by defendant to plaintiff. See § 502.200[1], Paragraph 3.*]

4. Defendant was a merchant regularly dealing in goods of the kind which were sold to plaintiff and, at the time of that sale, warranted to plaintiff, by imposition of law, that the goods would be delivered free of the rightful claim of any third person by way of infringement or the like.

5. However, defendant breached that warranty in that each of the goods sold actually infringed on a _____ [patent *or* trademark] _____ [owned by *or* licensed to *or* assigned to] _____ [*name of third party*]. As a result of this breach plaintiff did not receive delivery of those goods free of the rightful claim of a third person by way of infringement or the like.

6. [*Notification by plaintiff to defendant of breach. See § 502.140[1], Paragraph 6*].

[7. *If damages are based, at least in part, on remedy over for liability established in suit against buyer for infringement of the goods in question, add:* In addition plaintiff was sued by the _____ (proprietor *or* assignee *or* licensee) of that _____ (patent *or* trademark) on or about _____ [*date*], in the _____ (*name of court, e.g.,* U.S. District Court for the Southern District of California) at _____ (*location*), in an action entitled _____ vs. _____, No. _____, notice of which plaintiff first received on or about _____ [*date*]. Plaintiff thereon notified defendant of that suit on or about _____ [*date*] by _____ (writing, in the form of a _____ (letter *or* telegram *or other*), a true copy of which is attached as Exhibit A and incorporated by reference *or* personal visit and communication *or* telephone call *or other*).]

8. As a proximate result of this breach of warranty by defendant, plaintiff has been damaged in that _____ [*describe, e.g.,* plaintiff had to pay royalties to the owner of the _____ (patent *or* trademark) for all goods sold of the lot purchased from defendant, in the amount of $_____, and turn over all remaining goods unsold of the lot, in the amount of $_____].

9. Plaintiff has been further damaged as a result of this breach in that _____ [*describe incidental and consequential damages, e.g.,* defendant had to retain the legal services of a patent attorney to negotiate a settlement in lieu of full prosecution by the owner of the _____ (patent *or* trademark), resulting in reasonable legal expenses in the amount of $_____. Furthermore, as provided in the contract between plaintiff and defendant, plaintiff purchased the above-described goods from defendant in order to meet its obligation to its customers. Plaintiff incurred additional expenses in traveling and negotiating for substitute goods in the amount of $_____, as a proximate result of plaintiff's inability to deliver those goods which it was required to turn over to _____ (*name of third-party owner, licensee, or assignee*) as alleged in Paragraph 7, and in purchasing replacement goods in the amount of $_____ over what those goods had cost from defendant].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the sum of $_____;

2. For damages for _____ [*specify incidental or consequential damages*] in the sum of $_____;

3. For costs of suit herein incurred, including attorney's fees, if appropriate; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 502.103[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action by any buyer against a seller of goods for breach of warranty against infringement [*see Com. Code § 2312(3)*, discussed in *§ 502.22*].

[3] Allegations

The complaint in [1], *above*, alleges the following:

- That defendant was a merchant regularly dealing in the goods sold and thereby warranting their freedom from infringement on delivery (Paragraph 4) [*Com. Code § 2312(3)*].

- Breach of the warranty against infringement (Paragraph 5).

- Notification of the breach to defendant by plaintiff (Paragraph 6) [*Com. Code § 2607(3)(A)*].

- Additional notification to defendant of any suit against plaintiff for infringement which resulted in liability therefor (Paragraph 7) [*Com. Code § 2607(3)(B)*].

- Proximate damages for breach of the warranty of infringement (Paragraph 8) [*Com. Code § 2714(2)*].

- Incidental and consequential damages (Paragraph 9) [*Com. Code §§ 2714(3), 2715*].

[4] Attorney's Fees as Consequential Damages

The allegation of consequential damages in Paragraph 9 of the form in [1], *above*, includes an example of a claim for attorneys' fees incurred in litigation commenced by the third party as a result of the seller's infringement. These fees are fees that are a reasonably foreseeable consequence of the seller's breach. Although no California decision has held that attorney's fees in another action may be recovered in a buyer's action for breach of the warranty against infringement, in an analogous action for damages for breach of the warranty of title in the sale of a gun, it was held that attorney's fees incurred in defending against criminal charges brought against the buyer for possessing the gun to which the seller did not have title were reasonably foreseeable damages [*see De La Hoya v. Slim's Gun Shop (1970) 80 Cal. App. 3d Supp. 6, 146 Cal. Rptr. 68]* . For discussion of when attorney's fees may be recovered in an action on a contract, see *§ 502.103[6]*.

[5] Cross References

For discussion and forms relating to patent infringement, see Ch. 411, *Patents and Inventions*

For discussion and forms concerning trademark infringement, see Ch. 549, *Trademarks and Trade Names*

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, §§ 177.40* et seq. and *177.140* et seq.

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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44-502 California Forms of Pleading and Practice--Annotated §§ 502.284-502.289

[Reserved]

§§ 502.284[Reserved]

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44-502 California Forms of Pleading and Practice--Annotated § 502.290

§ 502.290 Affirmative Defense to Complaint for Breach of Warranty Against Infringement Based on Agreement Excluding Infringement Protection [Com. Code § 2312(3)]

[1] FORM Affirmative Defense to Complaint for Breach of Warranty Against Infringement Based on Agreement Excluding Infringement Protection [Com. Code § 2312(3)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

At the time of sale and as part of their agreement, defendant and plaintiff agreed that defendant did not guarantee that the goods would be delivered free of the rightful claim of any third person under any _____ [trademark *or* patent] licenses, assignments, or agreements to the contrary because _____ [*describe, e.g.,* defendant was not the manufacturer or designated dealer in the goods and was not aware of the circumstances of their production or distribution].

[2] Use of Form

The affirmative defense in [1], *above,* is for use in defending against a claim of breach of warranty against infringement by a merchant otherwise regularly dealing in goods of the kind in question, when an agreement between the parties precluded a warranty against infringement from arising in the sale [*see Com. Code § 2312(3),* discussed in *§ 502.22*].

[3] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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44-502 California Forms of Pleading and Practice--Annotated § 502.291

§ 502.291 Affirmative Defense to Complaint for Breach of Warranty Against Infringement Based on Buyer's Having Furnished Specifications [Com. Code § 2312(3)]

[1] FORM Affirmative Defense to Complaint for Breach of Warranty Against Infringement Based on Buyer's Having Furnished Specifications [Com. Code § 2312(3)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

The goods sold by defendant to plaintiff were furnished only after receipt of, and [exactly] in compliance with, plaintiff's own specifications therefor, and any breach of the warranty against infringement that allegedly may have occurred, proximately resulted from defendant's compliance with plaintiff's specifications. Plaintiff, therefore, is required to hold defendant harmless against any claim for infringement arising from the sale.

[2] Use of Form

The affirmative defense in [1], *above*, is for use in defending against a claim of breach of warranty against infringement by a merchant otherwise regularly dealing in goods of the kind in question, when the claim of infringement arises out of the defendant's compliance with the plaintiff's own specifications [*see Com. Code § 2312(3)*, discussed in *§ 502.22*].

[3] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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44-502 California Forms of Pleading and Practice--Annotated §§ 502.292-502.299

[Reserved]

§§ 502.292[Reserved]

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H. Warranties With Regard to Quality or Condition of Goods on Arrival

44-502 California Forms of Pleading and Practice--Annotated § 502.300

§ 502.300 Complaint for Damages for Breach of Warranty of Quality or Condition of Goods on Arrival [Com. Code § 2321(2)]

[1] FORM Complaint for Damages for Breach of Warranty of Quality or Condition of Goods on Arrival [Com. Code § 2321(2)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR BREACH OF WARRANTY
_____ [*names*], Defendants.	)	(Condition of Goods on Arrival)
	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 502.103[1], Paragraph 1.*]

2. [*Fictitious defendants. See § 502.103[1], Paragraph 2.*]

[*EITHER, if express warranty is involved*]

3. On or about _____ [*date*], at _____ [*city*], California, plaintiff negotiated with defendant for the purchase of certain goods consisting of _____ [*describe quantity and nature of*

goods]. In the course of their negotiations, defendant _____ [affirmed the fact *or* promised] _____ [orally *or* in writing] that the goods on shipment and arrival would be _____ [of the quality *or* in the condition] _____ [*describe, e.g.,* they were in at the time of negotiations and before shipment]. That _____ [affirmation *or* promise] became a part of the basis of the bargain between the parties hereinbelow alleged, and thus constituted an express warranty. [A true copy of the writing is attached as Exhibit A and incorporated by reference.]

4. [*Sale of goods by defendant to plaintiff. See § 502.140[1], Paragraph 4.*]

[*OR, if implied warranty is involved*]

3. [*Sale of goods by defendant to plaintiff. See § 502.200[1], Paragraph 3.*]

4. At the time of sale to defendant there was an implied warranty, arising from _____ [course of dealing *or* usage of trade], that the goods on shipment and arrival would be _____ [of the quality *or* in the condition] _____ [*describe, e.g.,* they were in at the time of negotiations and before shipment].

[*CONTINUE*]

5. However, defendant breached the warranty in that _____ [*describe, e.g.,* the goods which arrived at plaintiff's business premises had greatly deteriorated since the time defendant had manufactured and shipped them, and were totally unfit for resale]. As a result thereof plaintiff in fact did not receive goods as _____ [*if express warranty:* expressly warranted *or if implied warranty:* impliedly warranted by defendant through _____ (course of dealing *or* usage of trade)].

6. [*Notification of breach by plaintiff to defendant. See § 502.140[1], Paragraph 6.*]

7. [*Damages for breach of warranty. See § 502.140[1], Paragraph 7.*]

8. [*Incidental or consequential damages. See § 502.140[1], Paragraph 8.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the sum of $_____;

2. For damages for _____ [*specify incidental or consequential damages, e.g.,* transportation of goods, and travel expenses] in the sum of $_____;

3. For costs of suit herein incurred, including attorney's fees, if appropriate; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification if desired. See § 502.103[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use in an action against a seller for breach of an express or implied warranty of quality or condition of goods on arrival after shipment [*see Com. Code § 2321(2)*, discussed in *§ 502.25*].

[3] Allegations

The complaint in [1], *above*, alleges:

- In the case of an express warranty, the making of the warranty as part of the contract, and the consequent sale; or, in the case of an implied warranty arising from course of dealing or usage of trade, the sale of the goods, and the arising of the implied warranty as a part thereof (Paragraphs 3, 4) [*see Com. Code § 2321(2)*].
- Breach of the warranty (Paragraph 5).
- Notification of the breach [*see Com. Code § 2607(3)(A)*].
- Damages (Paragraphs 7, 8) [*Com. Code §§ 2714(2), (3), 2715*].

[4] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, §§ 177.40* et seq. and *177.140* et seq.

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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Volume 44: Sales thru Sanitation and Sewerage Districts-Chs. 500-511
Chapter 503 SALES: SECURED TRANSACTIONS

44-503 California Forms of Pleading and Practice--Annotated 503.syn

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Volume 44: Sales thru Sanitation and Sewerage Districts-Chs. 500-511
Chapter 503 SALES: SECURED TRANSACTIONS
PART I. SCOPE

44-503 California Forms of Pleading and Practice--Annotated § 503.01

§ 503.01 Scope of Chapter

This chapter covers litigation arising out of transactions (usually sales or loans) secured by (or representing security interests in) personal property or fixtures. The Legal Background is divided into three parts:

- Part A [*see § 503.10* et seq.] gives relevant definitions and discusses the transition provisions applicable to revised Division 9 of the Commercial Code, which becomes operative on July 1, 2001.

- Part B [*see § 503.20* et seq.] discusses the general features of a secured transaction, including creation, perfection, and priorities of security interests.

- Part C [*see § 503.40* et seq.] adds information relative to transactions involving specific classes of collateral.

The chapter includes the following forms for use by debtors [Part IV. A.], secured parties [Part IV. B.], and other persons claiming interests in the collateral [Part IV. C.]:

- Complaints for use by debtors relating to enforcement of duties owed by the secured party to the debtor: to provide information to the debtor [*see § 503.100*]; to preserve collateral in the secured party's possession [*see § 503.101*]; to prevent disposition of the collateral in derogation of the debtor's right of redemption [*see § 503.102*]; to require disposition of the collateral after the debtor's rejection of a proposal that the secured party retain the collateral in full satisfaction of the secured obligation [*see § 503.103*]; for conversion based on the secured party's failure to make timely disposition of collateral that consists of consumer goods [*see § 503.104*]; and for accounting and payment of surplus remaining after the secured party's disposition of the collateral [*see § 503.105*].

- Affirmative defense forms for use by debtors based on debtor's rights to trade fixtures, which did not become collateral [*see § 503.110*]; on the secured party's failure to dispose of the collateral in a commercially reasonable manner, which will prevent the secured party from obtaining a deficiency judgment [*see § 503.111*]; on the fact that a disposition to the secured party or an affiliate or related

entity did not realize an much as disposition to an unrelated party would have realized [*see § 503.112*]; and an application (motion) for a stay of a proceeding to enforce a security interest on the ground that the defendant is on active military service [*see § 503.113*].

- A form for use by a secured party to comply with its obligations under *Com. Code § 9616* by explaining how the secured party calculated any deficiency or surplus [*see § 503.122*].

- Complaints for use by secured parties against debtors for damages and foreclosure or possession of collateral when the debtor has defaulted [*see § 503.120*]; for an accounting and payment of proceeds from the disposition of the collateral to the secured party when the debtor has failed to do so [*see § 503.121*]; and for a deficiency judgment after foreclosure [*see § 503.123*; *see also § 503.124* (optional allegation for use when deficiency remains after collection of collateral that is accounts or instruments)].

- Complaints for use by secured parties against other secured parties for judicial declaration of the order of priorities of competing security interests [*see § 503.130*]; for possession of collateral, asserting the priority of a nonpurchase money security interest perfected by filing first over the nonpurchase money security interest of a secured party in possession of collateral [*see § 503.131*]; for possession of collateral, asserting the priority a purchase money security interest in inventory over the nonpurchase money security interest of a secured party in possession of collateral [*see § 503.132*]; in intervention, for use by a consignor to assert priority to the consigned goods [*see § 503.133*]; and for use by a purchaser of chattel paper to quiet title to competing security interests in that chattel paper [*see § 503.134*].

- An affirmative defense for use by a secured party to raise the debtor's renunciation or modification of rights after default [*see § 503.150*].

- A complaint in intervention asserting the intervenor's rights in fixtures prior to the rights of either the secured party or the debtor [*see § 503.160*].

- A complaint for declaratory relief to determine the priority of a buyer in the ordinary course of business over the interest of a party claiming a security interest in inventory [*see § 503.161*].

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44-503 California Forms of Pleading and Practice--Annotated § 503.02

§ 503.02 Cross References

- For discussion of, and a complaint foreclosing, dairy cattle supply lien (*Food & Agric. Code § 57401 et seq.*), see Ch. 24, *Animals: Liens*

- For discussion of a consignor's rights relative to the consignee's creditors when an artist has consigned the artist's work of fine art to a California dealer for exhibition or sale (*Civ. Code § 1738 et seq.*), see Ch. 57, *Art* .

- For complaints, allegations, and affirmative defenses relating to assignment of secured obligations, see Ch. 60, *Assignments*

- For discussion of the measure of damages for unlawful motor vehicle subleasing, see Ch. 90, *Automobiles: Vehicle Leasing Act*

- For writs of possession for use in obtaining delivery of personalty prior to trial, and pleadings for delivery of property (replevin), see Ch. 119, *Claim and Delivery*

- For discussion and forms dealing with the right of one spouse to transfer marital holdings, see Ch. 122, *Community Property*

- For discussion and complaints concerning disclosures and special procedures for protection of purchasing or borrowing consumers, see Ch. 127, *Consumer Contracts and Loans*

- For forms concerning invalid or breached agreements generally (applicable to security agreements), see Ch. 140, *Contracts*

- For forms involving misappropriation of property generally (applicable to security), see Ch. 150, *Conversion*

- For writs to execute on judicially ordered possession or sale of property and notices involved in third-party claims in secured transactions, see Ch. 254, *Executions and Enforcement of Judgments*

- For false or purported transfer generally (applicable to improper conveyance of security) see Ch. 270, *Fraudulent Conveyances*

- For a discussion and forms concerning a guardian or conservator's ability to transfer property, see Ch. 290A, *Guardianship and Conservatorship: Asset Management and Investment*

- For a discussion of the right of a cotenant to transfer property held jointly or in common, see Ch. 316, *Joint Tenancy and Tenancy in Common*

- For a discussion and forms concerning right to fixtures as between lessor and lessee, see Ch. 332, *Landlord and Tenant: The Tenancy*

- For a discussion and forms concerning minors' rights to contract generally, see Ch. 365, *Minors: Contract Actions*

- For discussion and forms concerning partner's ability to transfer partnership property generally, see *Ch. 402, Partnerships: Actions Between General Partners or Partnership and Third Parties, §§ 402.13, 402.42*

- For discussion and forms concerning the authority of a personal representative or trustee to transfer property, see Ch. 455, *Probate: Sale of Estate Property* , and Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts*

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[Reserved]

§§ 503.03[Reserved]

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44-503 California Forms of Pleading and Practice--Annotated § 503.10

§ 503.10 Governing Statutes

[1] In General

The law governing all transactions secured by personal property (including fixtures and some agricultural liens, but excluding some investment securities to the extent that security interest in those securities are governed by Division 8) and disputes arising from these transactions is almost exclusively contained in Division 9 of the Commercial Code [*Com. Code § 9101 et seq.*; *see Com. Code § 9701 et seq.* (for certain transitional provisions, discussed in [2], *below*)], known as the "Uniform Commercial Code-Secured Transactions" [*Com. Code § 9101*]. The former version of Division 9 was repealed effective July 1, 2001, and a new, extensively revised version of Division 9 took effect on that date [*see* Stats. 1999, ch. 991, and discussion of transition provisions in [2], *below*]. In this chapter, the term "revised Division 9" refers to the version of Division 9 that took effect on July 1, 2001. The version of Division 9 that was effective prior to that date is referred to as "former Division 9."

Unless governed by the particular provisions authorizing the issuance of bonds, notes, commercial paper, leases, or other evidences of indebtedness by a public body, *Gov. Code § 5450 et seq.* govern a pledge of collateral by a public body to secure the evidence of indebtedness.

If the buyer or borrower entered military service after the obligation was incurred, the Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*] will limit the fees charged and the creditor's rights to enforce the obligation [*see 50 U.S.C. App. §§ 511, 514, 516* (definitions and persons protected)]. California law similarly provides temporary protection from creditors for eligible military service members during qualifying periods of military service [*see Mil. & Vet. Code § 400 et seq.*; Stats. 2002, Ch. 60]. For discussion of both the federal act (applicable to members of the regular armed forces) and the California law (applicable to members of the national guard on active service and members of the military reserve on active duty), see *Ch. 501, Sales: Retail Installment Sales, §§ 501.60 et seq, 501.300*. For an application under these statutes to stay a proceeding to enforce a security interest while the defendant is on active military service, see *§ 503.113*.

There are special liens in favor of suppliers of perishable agricultural commodities and inventories and proceeds derived

from them [*7 U.S.C. §§ 499a, 499e(c)*].

So-called finance leases first effective between the parties after 1989 may be governed by Division 10 [*Com. Code § 10101 et seq.*], which is discussed in Ch. 413, *Personal Property Leases* . Whether a transaction creates a lease or a security interest is determined by the facts of each case in accordance with the criteria set forth in *Com. Code § 1203*, discussed in *§ 503.11[22]*. Division 9 governs aspects of security interests created under *Com. Code § 10508(e)* [*see Com. Code §§ 9109(a)(5), 9110*, and discussions in *§§ 503.12[1]* and *503.40[1]*].

[2] Transition Provisions Relative to Revised Division 9 Effective July 1, 2000

[a] Application to Pre-effective Date Transactions and Liens

As noted in [1], *above*, a revised version of Division 9 became effective on July 1, 2001 [*see* Stats. 1999, ch. 991]. Except as otherwise provided in *Com. Code §§ 9701-9709*, revised Division 9 applies to a transaction or lien within its scope, even if the transaction or lien was entered into or created before July 1, 2001 [*Com. Code § 9702(a)*]. With respect to transactions and liens that were validly entered into or created before July 1, 2001, and that were *not* governed by former Division 9, but that would be subject to revised Division 9 if they had been entered into or created after July 1, 2001, the rights, duties, and interests flowing from those transactions and liens remain valid after July 1, 2001, except as otherwise provided with respect to actions, cases, or proceedings commenced before July 2, 2001 [*see Com. Code § 9702(c), below*], and except as provided in *Com. Code §§ 9703-9709* [*Com. Code § 9702(b)(1)*]. Subject to the same exceptions, those transactions and liens may be terminated, completed, consummated, and enforced as required or permitted by revised Division or by the law that otherwise would apply if revised Division 9 had not taken effect [*Com. Code § 9702(b)(2)*].

Revised Division 9 does not affect an action, case, or proceeding commenced before July 1, 2001 [*Com. Code § 9702(c)*].

[b] Security Interests Perfected Before Effective Date

A security interest that is enforceable immediately before July 1, 2001, and would have priority over the rights of a person that becomes a lien creditor at that time, is a perfected security interest under revised Division 9 if, on July 1, 2001, the applicable requirements for enforceability and perfection under revised Division 9 are satisfied without further action [*Com. Code § 9703(a)*]. Except as otherwise provided in *Com. Code § 9705* (discussed in [d][3], *below*), if, immediately before July 1, 2001, a security interest is enforceable and would have priority over the rights of a person that becomes a lien creditor at that time, but the applicable requirements for enforceability or perfection under revised Division 9 are not satisfied on July 1, 2001, the security interest is a perfected security interest until July 1, 2002. Such a security interest remains enforceable after July 1, 2002, only if the security interest becomes enforceable under *Com. Code § 9203* (discussed in *§ 503.21[2]*) before July 1, 2002, and remains perfected after July 1, 2002, only if the applicable requirements for perfection under revised Division 9 are satisfied before July 1, 2002 [*Com. Code § 9703(b)*].

ILLUSTRATION:

Action Required Within One Year for Interest to Remain Perfected. A pre-effective date possessory security interest in instruments was perfected by bailee's receipt of notification under former *Com. Code § 9305*. The bailee did not, however, acknowledge that it holds for the security party's benefit as required by revised *Com. Code § 9313(c)*. Will the security interest remain perfected after July 1, 2002? No. In order for the security interest to remain perfected, the bailee will have to authenticate a record acknowledging that it holds for the secured party (or appropriate steps must be taken to perfect the interest by some other method) within the one-year period following the effective date. Otherwise, the security interest becomes unperfected at the end of that period [UCC Comment 2 to *Com. Code § 9703*].

[c] Security Interest That Was Enforceable But Not Perfected Before Effective Date

A security interest that is enforceable immediately before July 1, 2001, but which would be subordinate to the rights of a person that becomes a lien creditor at that time, remains an enforceable security interest until July 1, 2002 [*Com. Code § 9704(1)*] and remains enforceable thereafter if the security interest becomes enforceable under *Com. Code § 9203* (discussed in *§ 503.21[2]*) on July 1, 2001, or on July 1, 2002 [*Com. Code § 9704(2)*]. That security interest becomes perfected either (1) without further action, on July 1, 2001, if the applicable requirements for perfection under revised Division 9 are satisfied on or before that time, or (2) when the applicable requirements for perfection are satisfied if the requirements are satisfied after that time [*Com. Code § 9704(3)*].

[d] Effect of Action Taken Before July 1, 2001

[i] Action Other Than Filing That Perfects Security Interest

Com. Code § 9705 primarily addresses situations in which a perfection step is taken under former Division 9 or other applicable law before July 1, 2001, but the security interest does not attach until after that date [*see* UCC Comment 1 to *Com. Code § 9705*]. If action, other than the filing of a financing statement, is taken before July 1, 2001, and the action would have resulted in priority of a security interest over the rights of a person that becomes a lien creditor had the security interest become enforceable before July 1, 2001, the action is effective to perfect a security interest that attaches under revised Division 9 on or before July 1, 2002. An attached security interest becomes unperfected on July 1, 2002, unless the security interest becomes a perfected security interest under revised Division 9 before that date [*Com. Code § 9705(a)*].

[ii] Financing Statement Filed Before July 1, 2001

The filing of a financing statement before July 1, 2001, is effective to perfect a security interest to the extent the filing would satisfy the applicable requirements for perfection under revised Division 9 [*Com. Code § 9705(b)*]. *Com. Code § 9705(b)* deals with financing statements that were not effective under former Division 9, but would perfect a security interest under revised Division 9. Examples include financing statements that do not accurately describe the collateral or were filed in the wrong place [*see* UCC Comment 3 to *Com. Code § 9705*; *but see Com. Code § 9706*, which determines whether financing statement filed before effective date operates to continue effectiveness of financing statement filed in another officer before effective date].

[iii] Filing in Jurisdiction or Office Applicable Under Prior Law

Revised Division 9 does not render ineffective an effective financing statement that, before July 1, 2001, is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in former *Com. Code § 9103*. However, with limited exceptions [*see Com. Code §§ 9705(d), (e), 9706*], the financing statement ceases to be effective at the earlier of (1) the time the financing statement would have ceased to be effective under the law of the jurisdiction in which it is filed, or (2) June 30, 2006 [*Com. Code § 9705(c)*].

PRACTICE TIP:

The effect of *Com. Code § 9705(c)* is that during the early years of revised Division 9, it may be necessary to search not only in the filing office of the jurisdiction whose law governs perfection under revised Division 9, but also (if different) in the jurisdiction and filing office(s) designated by former Division 9. Further, a financing statement filed before July 1, 2001, may remain effective beyond July 1, 2006 if *Com. Code § 9705(d)* (concerning continuation statements), *Com. Code § 9705(e)* (concerning transmitting utilities), or *Com. Code § 9706* (initial financing statements that operate to continue pre-effective-date financing statements) applies [*see* UCC Comment 4 to *Com. Code § 9705*].

Com. Code § 9705(c)(2) applies to a financing statement that, before July 1, 2001, is filed against a transmitting utility

and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in former *Com. Code § 9103* only to the extent that revised *Com. Code §§ 9301-9342* provide that the law of a jurisdiction other than the jurisdiction in which the financing statement is filed governs perfection of a security interest in collateral covered by the financing statement [*Com. Code § 9705(e)*].

Com. Code § 9705(c) is an exception to *Com. Code § 9703(b)*. Under the general rule in *Com. Code § 9703(b)* (discussed in [b], *above*), a security interest that is enforceable and perfected on July 1, 2001, remains perfected for a year after that even if the security interest is not enforceable under revised Division 9 and the applicable requirements for perfection under revised Division 9 have not been met. However, in some cases, *Com. Code § 9705(c)* may shorten the one-year period of perfection; in others, if the security interest is enforceable under *Com. Code § 9203*, it may extend the period of perfection [UCC Comment 4 to *Com. Code § 9705*].

[iv] Effect of Continuation Statements

A financing statement filed before July 1, 2001, may be continued only by filing in the state and office designated by revised Division 9 [UCC Comment 5 to *Com. Code § 9705*]. The filing of a continuation statement after July 1, 2001, does not continue the effectiveness of the financing statement filed before July 1, 200 [*Com. Code § 9705(d)*]. Instead, an initial financing statement must be filed under *Com. Code § 9706* [UCC Comment 5 to *Com. Code § 9705*]. However, on the timely filing of a continuation statement after July 1, 2001, and in accordance with the law of the jurisdiction governing perfection as provided in *Com. Code §§ 9301-9342*, the effectiveness of a financing statement filed in the same office in that jurisdiction before July 1, 2001, continues for the period provided by the law of that jurisdiction [*Com. Code § 9705(d)*].

A financing statement that includes a financing statement filed before July 1, 2001, and a continuation statement filed after July 1, 2001, is effective only to the extent that it satisfies the requirements of *Com. Code §§ 9501-9528* for an initial financing statement [*Com. Code § 9705(f)*].

[e] When Initial Financing Statement Suffices to Continue Effectiveness of Financing Statement

The filing of an initial financing statement in the office specified in *Com. Code § 9501* continues the effectiveness of a financing statement filed before July 1, 2001, if all of the following conditions are satisfied [*Com. Code § 9706(a)*]:

- The filing of an initial financing statement in that office would be effective to perfect a security interest under revised Division 9.

- The pre-effective-date financing statement was filed in an office in another state or another office in California.

- The initial financing statement satisfies *Com. Code § 9706(c)*, which requires that the initial financing statement do all of the following:

  - Satisfy the requirements of *Com. Code §§ 9501-9528* for an initial financing statement.

  - Identify the pre-effective-date financing statement by indicating the office in which the financing statement was filed and providing the dates of filing and file numbers, if any, of the financing statement and of the most recent continuation statement filed with respect to the financing statement.

  - Indicate that the pre-effective-date financing statement remains effective.

The filing of an initial financing statement under *Com. Code § 9706(a)* before July 1, 2001, continues the effectiveness of the pre-effective-date financing statement for five years [*Com. Code § 9706(b)(1)* (adopting period provided in former *Com. Code § 9403* with respect to financing statement)]. If the initial financing statement under *Com. Code § 9706(a)* is filed after July 1, 2001, the effectiveness of the pre-effective-date financing statement continues for the period provided in *Com. Code § 9515* with respect to an initial financing statement [*Com. Code § 9706(b)(2)*].

[f] Amendment of Pre-Effective Date Financing Statement

A "pre-effective-date financing statement" means a financing statement filed before July 1, 2001 [*Com. Code § 9707(a)*]. After that date, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or otherwise amend the information provided in, a pre-effective-date financing statement only in accordance with the law of the jurisdiction governing perfection as provided in *Com. Code §§ 9301-9342*. However, the effectiveness of a pre-effective-date financing statement also may be terminated in accordance with the law of the jurisdiction in which the financing statement is filed [*Com. Code § 9707(b)*].

Except as otherwise provided by *Com. Code § 9706(d)*, if California law governs perfection of a security interest, the information in a pre-effective-date financing statement may be amended after the date this section becomes operative only if any of the following occur [*Com. Code § 9707(c)*]:

- The pre-effective-date financing statement and an amendment are filed in the office specified in *Com. Code § 9501*.

- An amendment is filed in the office specified in *Com. Code § 9501* concurrently with, or after the filing in that office of, an initial financing statement that satisfies *Com. Code § 9706(c)*.

- An initial financing statement that provides the information as amended and satisfies *Com. Code § 9706(c)* is filed in the office specified in *Com. Code § 9501*.

If California law governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement may be continued only under *Com. Code § 9705(d)* and *(f)* or *Com. Code § 9706* [*Com. Code § 9707(d)*]. Whether or not California law governs the perfection of a security interest, the effectiveness of a pre-effective-date financing statement filed in California may be terminated after the date that this section becomes operative by filing a termination statement in the office in which the pre-effective-date financing statement is filed, unless an initial filing statement that satisfies *Com. Code § 9706(c)* has been filed in the office specified by the law of the jurisdiction governing perfection as provided in *Com. Code §§ 9301-9342* as the office in which to file a financing statement [*Com. Code § 9707(e)*].

[g] Persons Entitled to File Initial Financing Statements or Continuation Statements

A person may file an initial financing statement or a continuation statement under *Com. Code §§ 9701-9709* if the secured party of record authorizes the filing and the filing is necessary under *Com. Code §§ 9701-9709* either (1) to continue the effectiveness of a financing statement filed before July 1, 2001, or (2) to perfect or continue the perfection of a security interest [*Com. Code § 9708*].

[h] Priority

Revised Division 9 determines priority of conflicting claims to collateral. However, if the relative priorities of the claims were established before July 1, 2001, former Division 9 determines priority [*Com. Code § 9709(a)*]. For purposes of *Com. Code § 9322(a)*, the priority of a security interest that becomes enforceable under *Com. Code § 9203* dates from July 1, 2001, if the security interest is perfected under revised Division 9 by the filing of a financing

statement before July 1, 2001, which would not have been effective to perfect the security interest under former Division 9. The foregoing does not apply to conflicting security interests each of which is perfected by the filing of such a financing statement [*Com. Code § 9709(b)*].

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44-503 California Forms of Pleading and Practice--Annotated § 503.11

§ 503.11 Definitions

[1] "Account"

[a] Transactions Out of Which Account May Arise

"Account," except as used in "account for," means a right to payment of a monetary obligation, whether or not earned by performance, for any of the following [*Com. Code § 9102(a)(2)*]:

- Property that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of.
- Services rendered or to be rendered.
- A policy of insurance issued or to be issued.
- A secondary obligation incurred or to be incurred.
- Energy provided or to be provided.
- The use or hire of a vessel under a charter or other contract.
- Arising out of the use of a credit or charge card or information contained on or for use with the card.
- As winnings in a lottery or other game of chance operated or sponsored by a state, governmental unit of a state, or person licensed or authorized to operate the game by a state or governmental unit of a state.

"Account" includes health care insurance receivables [*Com. Code § 9102(a)(2)*].

[b] Exclusions

"Account" does not include the following [*Com. Code § 9102(a)(2)*]:

- Rights to payment evidenced by chattel paper or an instrument.
- Commercial tort claims.
- Deposit accounts.
- Investment property.
- Letter-of-credit rights or letters of credit.
- Rights to payment for money or funds advanced or sold, other than rights arising out of the use of a credit or charge card or information contained on or for use with the card.

[2] "Account Debtor"

"Account debtor" means a person obligated on an account, chattel paper, or general intangible. The term does not include persons obligated to pay a negotiable instrument, even if the instrument constitutes part of chattel paper [*Com. Code § 9102(a)(3)*].

[3] "Agricultural Lien"

"Agricultural lien" means an interest in farm products that has all of the following characteristics [*Com. Code § 9102(a)(5)*]:

- It secures payment or performance of an obligation for either goods or services furnished in connection with a debtor's farming operation or rent on property leased by a debtor in connection with its farming operation.
- It is created by statute in favor of a person that either in the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operation or leased real property to a debtor in connection with the debtor's farming operation.
- Its effectiveness does not depend on the person's possession of the personal property.

[4] "Authenticate"

"Authenticate" means to do either of the following [*Com. Code § 9102(a)(7)*]:

- To sign.
- To execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person and adopt or accept a record.

[5] "Chattel Paper;" "Electronic Chattel Paper"

"Chattel paper" means a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of specific goods and license of software used in the goods. For this purpose, "monetary obligation" means a monetary obligation secured by the goods or owed under

a lease of the goods and includes a monetary obligation with respect to software used in the goods. The term does not include either of the following [*Com. Code § 9102(a)(11)*]:

- Charters or other contracts involving the use or hire of a vessel

- Records that evidence a right to payment arising out of the use of a credit or charge card or information contained on or for use with the card.

If a transaction is evidenced by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper [*Com. Code § 9102(a)(11)*].

"Electronic chattel paper" is chattel paper evidenced by a record or records consisting of information stored in an electronic medium [*Com. Code § 9102(a)(31)*].

[6] "Collateral"

"Collateral" means the property subject to a security interest or agricultural lien. The term includes all of the following [*Com. Code § 9102(a)(12)*]:

- Proceeds to which a security interest attaches.

- Accounts, chattel paper, payment intangibles, and promissory notes that have been sold.

- Goods that are the subject of a consignment.

[7] "Consignment"

For purposes of revised Division 9 [*Com. Code § 9109(a)(4)*], "consignment" means a transaction, regardless of its form, in which a person delivers goods, other than goods that were consumer goods immediately before delivery, to a merchant who is not an auctioneer for the purpose of sale and all of the following conditions are satisfied [*Com. Code § 9102(a)(20)*; *see Com. Code § 2326* (consignment of consumer goods)]:

- The merchant deals in goods of that kind under a name other than the name of the person making delivery.

- The merchant is not generally known by its creditors to be substantially engaged in selling the goods of others.

- With respect to each delivery, the aggregate value of the goods is $1,000 or more at the time of delivery.

- The transaction does not create a security interest that secures an obligation.

[8] "Consumer Transaction;" "Consumer--goods Transaction"

"Consumer transaction" means a transaction in which [*Com. Code § 9102(a)(26)*]:

- An individual incurs an obligation primarily for personal, family, or household purposes;

- A security interest secures the obligation; and

- The collateral is held or acquired primarily for personal, family, or household purposes.

The term "consumer transaction" includes consumer-goods transactions [*Com. Code § 9102(a)(26)*]. "Consumer-goods transaction" means a consumer transaction in which both of the following conditions are satisfied [*Com. Code § 9102(a)(24)*]:

- An individual incurs an obligation primarily for personal, family, or household purposes.

- A security interest in consumer goods secures the obligation [*see Com. Code § 9102(a)(23)* (defining "consumer goods," set forth in [14][d], *below*].

[9] Debtors and Other Obligors

[a] "Debtor;" "New Debtor;" "Original Debtor"

"Debtor" means any of the following [*Com. Code § 9102(a)(28)*]:

- A person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor.

- A seller of accounts, chattel paper, payment intangibles, or promissory notes.

- A consignee.

By including in the definition of "debtor" all persons with a property interest (other than a security interest or other lien on collateral), the definition includes transferees of collateral, whether or not the secured party knows of the transfer or the transferee's identity. Exculpatory provisions [*see Com. Code §§ 9605, 9628*] protect the secured party in that circumstance [U.C.C. Comment 2.a. to *Com. Code § 9102*].

"New debtor" means a person that becomes bound as debtor under *Com. Code § 9203(d)*, discussed in *§ 503.21[2][b]*, by a security agreement previously entered into by another person [*Com. Code § 9102(a)(56)*]. "Original debtor," except as used in *Com. Code § 9310(c)*, means a person that, as debtor, entered into a security agreement to which a new debtor has become bound under *Com. Code § 9203(d)* [*Com. Code § 9102(a)(60)*].

[b] "Consumer Debtor;" "Consumer Obligor"

"Consumer debtor" means a debtor in a consumer transaction [*Com. Code § 9102(a)(22)*; *see Com. Code § 9102(a)(26)* (consumer transaction, set forth in [8], *above*); *Com. Code § 9102(a)(24)* (consumer goods transaction, set forth in [8], *above*)]. "Consumer obligor" means an obligor who is an individual and who incurred the obligation as part of a transaction entered into primarily for personal, family, or household purposes [*Com. Code § 9102(a)(25)*].

[c] "Obligor;" "Secondary Obligor"

"Obligor" means a person that, with respect to an obligation secured by a security interest in or an agricultural lien on the collateral [*Com. Code § 9102(a)(59)*]:

- Owes payment or other performance of the obligation;

- Has provided property other than the collateral to secure payment or other performance of the obligation; or

- Is otherwise accountable in whole or in part for payment or other performance of the obligation.

The term "obligor" does not include issuers or nominated persons under a letter of credit [*Com. Code § 9102(a)(59)*].

A "secondary obligor" is an obligor to the extent that either of the following conditions are satisfied [*Com. Code § 9102(a)(71)*]:

- The obligor's obligation is secondary [*see* U.C.C. Comment 2.a. to *Com. Code § 9102* (one must consult the law of suretyship to determine whether an obligation is secondary)].

- The obligor has a right of recourse with respect to an obligation secured by collateral against the debtor, another obligor, or property of either.

[d] Classes and Distinctions

The definitions of "debtor," "obligor," and "secondary obligor" in revised Division 9 distinguish, mostly for purposes of default and enforcement, among three classes of persons [U.C.C. Comment 2.a. to *Com. Code § 9102*]:

- Persons who may have a stake in the proper enforcement of the security interest by virtue of their non-lien property interest (typically ownership interest). These persons are debtors.

- Persons who may have a stake in the proper enforcement of the security interest because of their obligation to pay the secured debt. These persons are secondary obligors if any portion of the obligation is secondary or if the obligor has a right to recourse against the debtor or another obligor with respect to an obligation secured by the collateral.

- Persons who have an obligation to pay the secured debt but have no stake in proper enforcement of the security interest. These persons are neither debtors nor secondary obligors. With one exception (*Com. Code § 9616*, as it relates to consumer obligations), the rights and duties provided by *Com. Code § 9601 et seq.* (default), affect non-debtors only if they are "secondary obligors."

[10] "Deposit Account"

"Deposit account" means a demand, time, savings, passbook, or similar account maintained with a bank (or other organization that is engaged in the business of banking, including a savings bank, savings and loan association, credit unions, or trust company). The term does not include investment property or accounts evidenced by an instrument [*Com. Code § 9102(a)(29)*; *see Com. Code § 9102(a)(8)* (defining "bank"].

[11] "Document;" "Document of Title"

"Document" means a document of title or a receipt of the type described in *Com. Code § 7201(b)* (receipt for goods stored under a statute requiring a bond against withdrawal or a license for the issuance of receipts in the nature of warehouse receipts) [*Com. Code § 9102(a)(30)*].

"Document of title" includes a bill of lading, dock warrant, dock receipt, warehouse receipt, gin ticket, or compress receipt, and any other document that, in the regular course of business or financing, is treated as adequately evidencing that the person entitled under the document [*see Com. Code § 7102(a)(9)*] has the right to receive, hold, and dispose of the document and the goods it covers. To be a document of title, a document must purport to be issued by a bailee and purport to cover goods in the bailee's possession that either are identified as or are fungible portions of an identified

mass [*Com. Code § 1201(b)(16)*].

[12] "General Intangible;" "Payment Intangible"

"General intangible" means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software [*Com. Code § 9102(a)(42)*]. "General intangible" is the residual category of personal property, including things in action, that is not included in the other defined types of collateral. Examples are various categories of intellectual property and the right to payment of a loan of funds that is not evidenced by chattel paper or an instrument [UCC Comment 5d to *Com. Code § 9102*]. "Software" is a general intangible for purposes of Division 9. Thus, except as otherwise provided, statutory provisions applicable to general intangibles apply to payment intangibles and software [UCC Comment 5d to *Com. Code § 9102*]. "Things in action" includes rights that arise under a license of intellectual property, such as the right to exploit the property without liability for infringement.

The definition in revised Division 9 excludes commercial tort claims, deposit accounts, and letter of credit rights. Each of the foregoing is a separate type of collateral. One important consequence of this exclusion is that tortfeasors (commercial tort claims), banks (deposit accounts), and persons obligated under letters of credit (letters of credit) are not "account debtors" having the rights and obligations set forth in *Com. Code §§ 9104, 9105*, and *9106*. In particular, tortfeasors, banks, and persons obligated under letters of credit are not obligated to pay an assignee (secured party) on receipt of the notification described in *Com. Code § 9404(a)*. Another important consequence relates to the adequacy of the description in the security agreement [*see Com. Code § 9108*; UCC Comment 5d to *Com. Code § 9102*].

A right to payment of money is often buttressed by ancillary covenants, such as covenants in a purchase agreement or note or mortgage requiring insurance on the collateral or forbidding removal of the collateral, or covenants to preserve the creditworthiness of the promisor, such as covenants restricting dividends and the like. Division 9 does not treat these ancillary rights separately from the rights to payment to which they related. For example, attachment and perfection of an assignment of a right to payment of a monetary obligation, whether it be an account or a payment intangible, also carries these ancillary rights [UCC Comment 5d to *Com. Code § 9102*].

"Payment intangible" means a general intangible under which the account debtor's principal obligation is a monetary obligation [*Com. Code § 9102(a)(61)*]. Every payment intangible is also a general intangible [UCC Comment 5d to *Com. Code § 9102*]. The term "payment intangible" embraces only those intangibles "under which the account debtor's principal obligation is to pay money [UCC Comment 5d to *Com. Code § 9102*].

[13] "Good Faith"

In "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing [*Com. Code § 1201(b)(20)*].The same concept applies in the context of Division 9 for purposes of the obligation of good faith imposed by *Com. Code § 1304* (every contract or duty within the Commercial Code imposes an obligation of good faith in its performance or enforcement) [UCC Comment 19 to *Com. Code § 9102*].

[14] "Goods"

[a] Items Included in Definition of "Goods"

"Goods" means all things that are movable when a security interest attaches. The term includes the following [*Com. Code § 9102(a)(44)*]:

- Fixtures.

- Standing timber that is to be cut and removed under a conveyance or contract for sale.
- The unborn young of animals.
- Crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes.
- Manufactured homes.

[b] When Software May Be "Goods"

"Goods" includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if either [*Com. Code § 9102(a)(44)*]:

- The program is associated with the goods in such a manner that it customarily is considered part of the goods; or
- By becoming the owner of the goods, a person acquires a right to use the program in connection with the goods.

"Goods" does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded [*Com. Code § 9102(a)(44)*].

[c] Items Excluded from Definition of "Goods"

"Goods" does not include any of the following [*Com. Code § 9102(a)(44)*]:

- Accounts.
- Chattel paper.
- Commercial tort claims.
- Deposit accounts.
- Documents.
- General intangibles.
- Instruments.
- Investment property.
- Letter-of-credit rights.
- Letters of credit.
- Money [*see Com. Code § 1201(b)(24)* (money defined)].
- Oil, gas, or other minerals before extraction.

In addition, Division 9 does not govern--rather, *Veh. Code § 6300* exclusively governs--perfecting a security interest in a vehicle that is not classified as inventory. With respect to determining the rights of competing parties when a security interest is claimed in a non-inventory vehicle, the provisions of Division 9 do not come into play until the security interest is perfected under the Vehicle Code [*Quartz of S. Cal., Inc. v. Mullen Bros., Inc. (2007) 151 Cal. App. 4th 901, 908, 61 Cal. Rptr. 3d 54*].

[d] Classes of Goods

There are four mutually exclusive classes of goods [U.C.C. Comment 4.a. to *Com. Code § 9102*]:

(1) "Consumer goods," defined as goods that are used or bought for use primarily for personal, family, or household purposes [*Com. Code § 9102(a)(23)*].

(2) "Equipment," defined as goods other than inventory, farm products, or consumer goods [*Com. Code § 9102(a)(33)*].

(3) "Farm products," defined as goods, other than standing timber, with respect to which the debtor is engaged in a farming operation and which are any of the following [*Com. Code § 9102(a)(34)*]:

- Crops grown, growing, or to be grown, including both of the following:
- Crops produced on trees, vines, and bushes.
- Aquatic goods produced in aquacultural operations.
- Livestock, born or unborn, including aquatic goods produced in aquacultural operations.
- Supplies used or produced in a farming operation.
- Products of crops or livestock in their unmanufactured states.

(4) "Inventory," defined as goods, other than farm products, which are any of the following [*Com. Code § 9102(a)(48)*]:

- Leased by a person as lessor.
- Held by a person for sale or lease or to be furnished under a contract of service.
- Furnished by a person under a contract of service.
- Raw materials, work in process, or materials used or consumed in a business.

[15] "Instrument"

"Instrument" means a negotiable instrument or any other writing that evidences a right to the payment of a monetary obligation, is not itself a security agreement or lease, and is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment [*Com. Code § 9102(a)(47)*]. A promissory note is an instrument, specifically an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sumof money or funds [*Com. Code § 9102(a)(65)*]. A check may also be an instrument [*see* UCC Comment 7 to *Com. Code § 9330(d)*].

"Instrument" does not include (1) investment property, (2) letters of credit, or (3) writings that evidence a right to

payment arising out of the use of a credit or charge card or information contained on or for use with the card [*Com. Code § 9102(a)(47)*].

[16] "Investment Property;" "Commodity Account;" "Commodity Contract"

"Investment property" means a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account [*Com. Code § 9102(a)(49)*].

"Commodity account" means an account maintained by a commodity intermediary in which a commodity contract is carried for a commodity customer [*Com. Code § 9102(a)(14)*; *see Com. Code § 9102(a)(16)* (commodity customer defined); *Com. Code § 9102(a)(17)* (commodity intermediary defined)].

"Commodity contract" means a commodity futures contract, an option on a commodity futures contract, a commodity option, or another contract if the contract or option is either of the following [*Com. Code § 9102(a)(15)*]:

- Traded on or subject to the rules of a board of trade that has been designated as a contract market for such a contract pursuant to federal commodities laws.

- Traded on a foreign commodity board of trade, exchange, or market, and is carried on the books of a commodity intermediary for a commodity customer [*see Com. Code § 9102(a)(16)* (commodity customer defined); *Com. Code § 9102(a)(17)* (commodity intermediary defined)].

[17] "Lien Creditor"

"Lien creditor" means any of the following [*Com. Code § 9102(a)(52)(A)*]:

- A creditor that has acquired a lien on the property involved by attachment, levy, or the like.

- An assignee for benefit of creditors from the time of assignment.

- A trustee in bankruptcy from the date of the filing of the petition.

- A receiver in equity from the time of appointment.

"Lien creditor" does not include a creditor who by filing a notice with the Secretary of State has acquired only an attachment or judgment lien on personal property, or both [*Com. Code § 9102(a)(52)(B)*].

[18] "Proceeds;" "Cash Proceeds;" "Noncash Proceeds"

"Proceeds," except as used in *Com. Code § 9609(b)* (secured party's rights after default), means any of the following property [*Com. Code § 9102(a)(64)*]:

- Whatever is acquired on the sale, lease, license, exchange, or other disposition of collateral.

- Whatever is collected on, or distributed on account of, collateral [*see* UCC Comment 13a and b to *Com. Code § 9102* (this includes cash or stock dividends distributed on account of securities or other investment property that is original collateral as well as distributions on "supporting obligations"); *see also Com. Code § 9102(a)(77)* (defining "supporting obligation," discussed in *§ 503.24[2][b]*), *Com. Code § 9203(f)* (discussed in *§ 503.21[2]*].

- Rights arising out of collateral.

- To the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, the collateral.

- To the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, the collateral.

"Cash proceeds" are proceeds that are money, checks, deposit accounts, or the like [*Com. Code § 9102(a)(9)*]. The phrase "or the like" covers property that is the functional equivalent of money, checks, or deposit accounts, such as some money market accounts that are securities or part of securities entitlements [*see* UCC Comment 13e to *Com. Code § 9102*]. Cash proceeds retain their character as cash proceeds while in the possession of a levying officer pursuant to *Code Civ. Proc. § 481.010 et seq.* (Attachment Law) or *Code Civ. Proc. § 680.010 et seq.* (Enforcement of Judgments Law) [*Com. Code § 9315(f)*]. All other types of proceeds are "noncash proceeds" [*Com. Code § 9102(a)(58)*].

The definition of "proceeds" no longer provides that proceeds of proceeds are themselves proceeds. That idea is expressed in the revised Division 9 definition of collateral [*see Com. Code § 9102(a)(12)*, discussed in [6], *above*]. No change in meaning from former *Com. Code § 9306* is intended [*see* UCC Comment 13c to *Com. Code § 9102*; *see also* discussion and examples, at § 503.22[7][b]]. As in California cases decided under former Division 9 [*see, e.g., American National Bank v. Cloud (1988) 201 Cal. App. 3d 766, 775-776, 247 Cal. Rptr. 325* ; *Producers Cotton Oil Co. v. Amstar Corp. (1988) 197 Cal. App. 3d 638, 651, 242 Cal. Rptr. 914]* , revised Division 9 contains no requirement that property be received by the debtor for the property to qualify as proceeds. It is necessary only that the property be traceable, directly or indirectly, to the original obligation [*see* UCC Comment 13d to *Com. Code § 9102*].

ILLUSTRATION:

Examples of Proceeds Never Taken Into Debtor's Possession. Under a security agreement and financing statement, secured party perfected a security interest in debtor's crops and their proceeds. Buyer had notice of that interest, but because of a fraud perpetrated by the debtor and his sons, buyer mistakenly paid crop proceeds to the sons. Secured party sued the buyer for conversion. Were the sums paid to the sons proceeds? Yes. When buyer wrongfully disposed of proceeds to which secured party was entitled, it became liable for conversion [*American National Bank v. Cloud (1988) 201 Cal. App. 3d 766, 775-776, 247 Cal. Rptr. 325]* .

Under a security agreement and financing statement, secured party perfected a security interest in debtor's crops and their proceeds. Secured party sent notice to a crop buyer informing it of secured party's interests and stating that no setoff or deductions were to be made. Buyer applied $53,336.35, of the purchase price, including $43,336.35 for harvesting the 1981 crop and $10,000 still owing for the 1980 harvest, to payment of a bill submitted to it by the harvester. Was that $53,336.35 proceeds? Yes [*Producers Cotton Oil Co. v. Amstar Corp. (1988) 197 Cal. App. 3d 638, 651, 242 Cal. Rptr. 914]* . However, applying principles of unjust enrichment, because secured party knew of and acquiesced in the expenditure, which was necessary to the development of the crop, and ultimately benefited from that expenditure, secured party was not entitled to retain the $43,336.35 of proceeds expended with regard to the 1981 crop [*Producers Cotton Oil Co. v. Amstar Corp. (1988) 197 Cal. App. 3d 638, 658-660, 242 Cal. Rptr. 914]* .

[19] "Purchase Money Security Interest;" "Purchase Money Collateral;" "Purchase Money Obligation"

[a] In Goods

A security interest in goods is a purchase money security interest as follows [*Com. Code § 9103(b)*]:

- To the extent that the goods are purchase money collateral with respect to that security interest.

- If the security interest is in inventory [*see* [14][d], *above*] that is or was purchase money collateral, also to the extent that the security interest secures a purchase money obligation incurred with respect to other inventory in which the secured party holds or held a purchase money security interest.

- Also to the extent that the security interest secures a purchase money obligation incurred with respect to software in which the secured party holds or held a purchase money security interest.

The security interest of a consignor in goods that are the subject of a consignment is a purchase money security interest in inventory [*Com. Code § 9103(d)*].

"Purchase money collateral" means goods or software that secures a purchase money obligation incurred with respect to that collateral [*Com. Code § 9103(a)(1)*]. "Purchase money obligation" is an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used [*Com. Code § 9103(a)(2)*].

In a transaction other than a consumer goods transaction, a purchase money security interest does not lose its status as such, even if (1) the purchase money collateral also secures an obligation that is not a purchase money obligation, (2) collateral that is not purchase money collateral also secures the purchase money obligation, or (3) the purchase money obligation has been renewed, refinanced, consolidated, or restructured [*Com. Code § 9103(f)*].

[b] In Software

A security interest in software is a purchase money security interest to the extent that the security interest also secures a purchase money obligation incurred with respect to goods in which the secured party holds or held a purchase money security interest if both of the following conditions are satisfied *see also Com. Code § 9103(b)(3)*, set forth in [a], *above*]:

- The debtor acquired its interest in the software in an integrated transaction in which it acquired an interest in the goods.

- The debtor acquired its interest in the software for the principal purpose of using the software in the goods.

[c] Dual Status Rule

In a transaction other than a consumer goods transaction, if the extent to which a security interest is a purchase money security interest depends on the application of a payment to a particular obligation, the payment must be applied as follows [*Com. Code § 9103(e)*]:

- First, in accordance with any reasonable method of application to which the parties agree.

- Second, in the absence of the parties' agreement to a reasonable method, in accordance with any intention of the obligor manifested at or before the time of payment.

- Third, in the absence of an agreement to a reasonable method and a timely manifestation of the obligor's intention, first, to obligations that are not secured, and if more than one obligation is secured, to

obligations secured by purchase money security interests in the order in which those obligations were incurred.

In a transaction other than a consumer goods transaction, a secured party claiming a purchase money security interest has the burden of establishing the extent to which the security interest is a purchase money security interest [*Com. Code § 9103(g)*].

In consumer goods transactions, the court determines the proper rules for establishing the extent to which a security interest is a purchase money security interest. The court may not infer from the limitations in *Com. Code § 9103(e)-(g)* the nature of the proper rule in consumer-goods transactions and may continue to apply established approaches [*Com. Code § 9103(h)*].

[20] "Secured Party"

"Secured party" means any of the following [*Com. Code § 9102(a)(72)*]:

- A person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding.
- A person that holds an agricultural lien.
- A consignor.
- A person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold.
- A trustee, indenture trustee, agent, collateral agent, or other representative in whose favor a security interest or agricultural lien is created or provided for.
- A person that holds a security interest arising under *Com. Code § 2401, 2505, 2711(3), 4210, 5118,* or *10508(e)*.

[21] "Security Agreement"

A "security agreement" is an agreement that creates or provides for a security interest [*Com. Code § 9102(a)(73)*].

[22] "Security Interest"

A "security interest" is an interest in personal property or fixtures which secures payment or performance of an obligation. The term includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Division 9 [*Com. Code § 1201(b)(35)*].

The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer [*see Com. Code § 2401*] is limited in effect to a reservation of a "security interest" [*Com. Code § 1201(b)(35)*; *see Com. Code § 2505*]. The special property interest of a buyer of goods on identification of those goods to a contract for sale under *Com. Code § 2401* is not a "security interest," but a buyer may acquire a "security interest" by complying with Division 9 [*Com. Code § 1201(b)(35)*]. Except as otherwise provided in *Com. Code § 2505*, the right of a seller or lessor of goods under Division 2 (*Com. Code § 2101 et seq.*) or Division 10 (*Com. Code § 10101 et seq.*) to retain or acquire possession of the goods is not a "security interest," but a seller or lessor may acquire a"security interest" by complying with Division 9 [*Com. Code § 1201(b)(35)*].

Whether a transaction creates a lease or a security interest is determined by the facts of each case [*Com. Code § 1203(a)*; *see, e.g., Addison v. Burnett (1996) 41 Cal. App. 4th 1288, 1299, 49 Cal. Rptr. 2d 132* (finding that parties entered into lease rather than security agreement)]. However, the transaction creates a security interest if the consideration that the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee and any one of the following conditions is satisfied [*Com. Code § 1203(b)*]:

- The original term of the lease is equal to or greater than the remaining economic life of the goods.

- The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods.

- The lessee has an option to renew the lease for the remaining economic life of the goods for no, or nominal, additional consideration on compliance with the lease agreement.

- The lessee has an option to become the owner of the goods for no, or nominal, additional consideration on compliance with the lease agreement.

A transaction does not create a security interest, however, merely because any of the following conditions is satisfied [*Com. Code § 1203(c)*]:

- The present value of the consideration that the lessee must pay the lessor for the right to possession and use of the goods is substantially equal to or greater than the fair market value of the goods at the time the lease is entered into.

- The lessee assumes the risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs, with respect to the goods.

- The lessee has an option to renew the lease or to become the owner of the goods.

- The lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed.

- The lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

- In the case of a motor vehicle [*see Veh. Code § 415* (definition)] or a trailer [*see Veh. Code § 630* (definition)] that is not used primarily for personal, family, or household purposes, the amount of rental payments may be increased or decreased by reference to the amount realized by the lessor on sale or disposition of the vehicle or trailer. However, nothing in this subparagraph affects the application or administration of the Sales and Use Tax Law [*see Rev. & Tax. Code § 6001 et seq.*].

[23] "Software"

"Software" means a computer program and any supporting information provided in connection with a transaction relating to the program. "Software" does not include a computer program that is included in the definition of goods, as discussed in [14][b], *above* [*Com. Code § 9102(a)(75)*].

[24] "Value," "New Value"

Except as otherwise provided with respect to negotiable instruments and bank collections (*Com. Code §§ 3303, 4210*, and *4211*), a person gives "value" for rights if he or she acquires them in any of the following ways [*Com. Code § 1204*]:

- In return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a chargeback is provided for in the event of difficulties in collection.
- As security for, or in total or partial satisfaction of, a preexisting claim.
- By accepting delivery pursuant to a preexisting contract for purchase.
- Generally, in return for any consideration sufficient to support a simple contract.

"New value" means (1) money, (2) money's worth in property, services, or new credit, or (3) release by a transferee of an interest in property previously transferred to the transferee. The term does not include an obligation substituted for another obligation [*Com. Code § 9102(a)(57)*].

California Forms of Pleading and Practice--Annotated

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Chapter 503 SALES: SECURED TRANSACTIONS
PART II. LEGAL BACKGROUND
A. Introduction and Definitions

44-503 California Forms of Pleading and Practice--Annotated § 503.12

§ 503.12 Applicability of Division 9 of the Commercial Code

[1] In General

Except as otherwise provided in *Com. Code § 9109(c)* and *(d)*, discussed in *§ 503.13*, Division 9 of the Commercial Code applies to each of the following [*Com. Code § 9109(a)*]:

- A transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract.
- An agricultural lien.
- A sale of accounts, chattel paper, payment intangibles, or promissory notes.
- A consignment.
- A security interest arising under *Com. Code § 2401* (identification of goods), *Com. Code § 2505*, *Com. Code § 2711(3)*, or *Com. Code § 10508(e)* (personal property lease), as provided in *Com. Code § 9110*.
- A security interest arising under *Com. Code § 4210* (collecting bank's security interest in items being collected) or *Com. Code § 5118* (issuer's security interest in document presented under letter of credit).

With respect to security interest arising under Division 2 of the Commercial Code [*Com. Code § 9110*], see discussion in *§ 503.40[1]*.

Application of Division 9 to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which Division 9 does not apply [*Com. Code § 9109(b)*]. For instance, one who holds a promissory note secured by a deed of trust to real property may sell that note or give a security interest in

that not to secure his or her own obligation to another person. The security interest thus created in the note will be subject to Division 9 of the Commercial Code even though the original obligation under the deed of trust is not [*see* U.C.C. Comment 7. to *Com. Code § 9109*].

Division 9 does not extend the application of any the rule of law, statute, or regulation to a transaction not otherwise subject to it [*Com. Code § 9201(d)(2)*].

[2] When Transaction Is Subject to Consumer-protection Legislation

Division 9 does not validate any rate, charge, agreement, or practice that violates a rule of law, statute, or regulation described *Com. Code § 9201(b)*, set forth below [*Com. Code § 9201(d)*; *see* UCC Comment 3 to *Com. Code § 9201* (transaction is subject to both Division 9 and other law)].

A transaction that is subject to Division 9 is subject to any applicable rule of law which establishes a different rule for consumers, to any applicable consumer protection statute, regulation, or law, and to the following [*Com. Code § 9201(b)*]:

- *Bus. & Prof. Code § 17200 et seq.* (Chapter 5 of Part 2 of Division 7), relating to unfair competition.
- *Bus. & Prof. Code § 17500 et seq.* (Chapter 1 of Part 3 of Division 7), relating to advertising.
- The Unruh Retail Installment Sales Act [*Civ. Code § 1801 et seq.*; *see* Ch. 501, *Sales: Installment Sales*];
- The Rees-Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 2981 et seq.*; *see e.g., Bank of America v. Lallana (1998) 19 Cal. 4th 203, 209, 77 Cal. Rptr. 2d 910, 960 P.2d 1133* (discussed in *§ 503.27[5][b][v]*, if collateral is consumer motor vehicle, secured party must give notice of disposition that complies with both Division 9 and Rees-Levering)].
- Obligations arising from the following particular transactions:
  - Consignment of fine arts [*Civ. Code § 1738 et seq.*].
  - Credit cards [*Civ. Code § 1747 et seq.*].
  - Layaway practices [*Civ. Code § 1749 et seq.*].
  - Commercial credit reports [*Civ. Code § 1785.41 et seq.*].
  - Check cashing [*Civ. Code § 1789.30 et seq.*].
  - Precomputed interest [*Civ. Code § 1799.5 et seq.*].
  - Precomputed finance charges [*Civ. Code § 1799.8 et seq.*].
  - Consumer credit contracts [*Civ. Code § 1799.90 et seq.*].
  - Contracts for discount buying services [*Civ. Code § 1812.100 et seq.*].
  - Contracts for seller assisted marketing plans [*Civ. Code § 1812.200 et seq.*].

- Membership camping contracts [*Civ. Code § 1812.300 et seq.*].
- Creditor's remedies relating to credit disability insurance [*Civ. Code § 1812.400 et seq.*].
- Auctions and auctioneers [*Civ. Code § 1812.600 et seq.*].
- Deposits (bailments) [*Civ. Code § 1813 et seq.*].
- Loans for use or bailments [*Civ. Code § 1884 et seq.*].
- Liens [*Civ. Code § 2872 et seq.*].

- The Areias Credit Card Full Disclosure Act of 1986 [*Civ. Code § 1748.10 et seq.*].
- The Areias Charge Card Full Disclosure Act of 1986 [*Civ. Code § 1748.20 et seq.*].
- The Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*].
- The Consumer Credit Reporting Agencies Act [*Civ. Code § 1785.1 et seq.*].
- The Investigative Consumer Reporting Agencies Act [*Civ. Code § 1786 et seq.*].
- The Holden Credit Denial Disclosure Act of 1971 [*Civ. Code § 1787.1 et seq.*].
- The Rosenthal Fair Debt Collection Practices Act [*Civ. Code § 1788 et seq.*].
- The Electronic Commerce Act of 1984 [*Civ. Code § 1789 et seq.*].
- The Credit Services Act of 1984 [*Civ. Code § 1789.10 et seq.*].
- The Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*], discussed in Ch. 502, *Sales: Warranties* .
- The Information Practices Act of 1977 [*Civ. Code § 1798 et seq.*].
- The Consumer Contract Awareness Act of 1990 [*Civ. Code § 1799.200 et seq.*].
- The Dance Studio Act [*Civ. Code § 1812.50 et seq.*].
- The Health Studio Act [*Civ. Code § 1812.80 et seq.*].
- The Karnette Rental-Purchase Act [*Civ. Code § 1812.620 et seq.*].
- The Industrial Loan Law [*Fin. Code § 18000 et seq.*].
- The Pawnbroker Law [*Fin. Code § 21000 et seq.*].
- The California Finance Lenders Law [*Fin. Code § 22000 et seq.*].

- The Manufactured Housing Act of 1980 [*Health & Safety Code § 18000 et seq.*].

In case of conflict between Division 9 and a rule of law, statute, or regulation listed above, the rule of law, statute, or regulation controls, although the failure to comply with the applicable statute or regulation has only the effect the statute or regulation specifies [*Com. Code § 9201(c)*]. However, a case decided under former Division 9 held that Division 9 should apply in a case in which the applicable consumer-protection law provides a consumer less protection than is afforded under Division 9 [*see Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 823, 824, 94 Cal Rptr. 796, 484 P.2d 964]* .

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44-503 California Forms of Pleading and Practice--Annotated § 503.13

§ 503.13 When Division 9 Is Inapplicable

[1] In General

Division 9 does not apply to the extent that any of the following conditions is satisfied [*Com. Code § 9109(c)*]:

- A statute, regulation, or treaty of the United States preempts Division 9.

- Another California statute state expressly governs the creation, perfection, priority, or enforcement of a security interest created by California state or a governmental unit of California. These statutes include statutes that provide for pledges, liens, or security interests to secure bonds or other obligations (including, without limitation, leases) of this state or a governmental unit, whether the statute is of general application like *Gov. Code §§ 5450* and *5451* or is specific to particular types of obligations of the state of California or of governmental units or to particular governmental units.

- A statute of another state, a foreign country, or a governmental unit of another state or a foreign country, other than a statute generally applicable to security interests, expressly governs creation, perfection, priority, or enforcement of a security interest created by the state, country, or governmental unit.

- The rights of a transferee beneficiary or nominated person under a letter of credit are independent and superior under *Com. Code § 5114*.

[2] Specific Transactions to Which Division 9 Does Not Apply

Division 9 does not apply to any of the following [*Com. Code § 9109(d)*]:

- A landlord's lien, other than an agricultural lien.

- A lien, other than an agricultural lien, given by statute or other rule of law for services or materials,

but *Com. Code § 9333* applies with respect to priority of the lien.

- An assignment of a claim for wages, salary, or other compensation of an employee.

- A sale of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose.

- An assignment of accounts, chattel paper, payment intangibles, or promissory notes which is for the purpose of collection only.

- An assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract.

- An assignment of a single account, payment intangible, or promissory note to an assignee in full or partial satisfaction of a preexisting indebtedness.

- Any loan made by an insurance company pursuant to the provisions of a policy or contract issued by it and on the sole security of the policy or contract.

- An assignment of a right represented by a judgment, other than a judgment taken on a right to payment that was collateral.

- A right of recoupment or setoff, provided that both *Com. Code § 9340*, with respect to the effectiveness of rights of recoupment or setoff against deposit accounts, and *Com. Code § 9404*, with respect to defenses or claims of an account debtor, apply.

- The creation or transfer of an interest in or lien on real property, including a lease or rents thereunder, except to the extent that provision is made for each of the following:

    - Liens on real property in *Com. Code §§ 9203* and *9308*.

    - Fixtures in *Com. Code § 9334*.

    - Fixture filings in *Com. Code §§ 9501, 9502, 9512, 9516*, and *9519*.

    - Security agreements covering personal and real property in *Com. Code § 9604*.

- An assignment of a claim arising in tort, other than a commercial tort claim, but *Com. Code §§ 9315* and *9322* apply with respect to proceeds and priorities in proceeds.

- An assignment of a deposit account in a consumer transaction, but *Com. Code §§ 9315* and *9322* apply with respect to proceeds and priorities in proceeds.

- Any security interest created by the assignment of the benefits of any public construction contract under the Improvement Act of 1911 (*Streets & Highways Code § 5000 et seq.*).

- Transition property, as defined in *Pub. Util. Code § 840*, except to the extent that the provisions of Division 9 are referred to in *Pub. Util. Code § 840 et seq.*, and recovery property, as defined in *Pub. Util. Code § 848*, except to the extent that the provisions of Division 9 are referred to in *Pub. Util. Code § 848 et seq.*

- A claim or right of an employee or employee's dependents to receive workers' compensation under Division 1 or Division 4 of the Labor Code (*Lab. Code §§ 50 et seq., 3200 et seq.*).

- A transfer by a government or governmental unit.

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[Reserved]

§§ 503.14[Reserved]

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44-503 California Forms of Pleading and Practice--Annotated § 503.20

§ 503.20 Security Agreement

[1] Formalities

No special form is necessary for a security agreement to exist and thus to create or provide for a security interest [*see Com. Code § 9102(a)(73)* (definition)]. Whether an agreement creates a security interest depends not on whether the parties intend that the law characterize the transaction as a security interest, but rather on whether the transaction falls within the definition of "security interest" inCom. Code § 1201(b)(35) (set forth in *§ 503.11[22]*). Thus, an agreement that the parties characterize as a "lease" of goods may be a "security agreement" notwithstanding the parties' stated intention that the law treat the transaction as a lease and not as a secured transaction [*see* UCC Comment 3b to *Com. Code § 9102*; *Triple C Leasing, Inc. v. All-American Mobile Wash (1976) 64 Cal. App. 3d 244, 248, 249, 134 Cal. Rptr. 328]* . The essential terms of a security agreement need not be contained in a single document. For example, even without a separate formal agreement, a financing statement, loan application, promissory note, and other documents, taken together, would be able to establish a security agreement [*New West Fruit Corp. v. Coastal Berry Corp. (1991) 1 Cal. App. 4th 92, 97-98, 1 Cal. Rptr. 2d 664* ; *Komas v. Future Systems, Inc. (1977) 71 Cal. App. 3d 809, 816, 139 Cal. Rptr. 669]* .

The description of the collateral in a security agreement must reasonably identify what it describes. Except as provided in *Com. Code § 9108(c)-(e)*, a description need not be specific to be sufficient [*Com. Code § 9108(a)*]. Except with respect to investment property [*see Com. Code § 9108(d)*, discussed in *§ 503.56[1][a]*], a description of collateral reasonably identifies the collateral if it identifies the collateral by any of the following [*Com. Code § 9108(b)*]:

- Specific listing.
- Category.
- Except for commercial tort claims, or in a consumer transaction, consumer goods, a security entitlement, a securities account, or a commodity account [*Com. Code § 9108(e)*], a type of collateral defined in the Commercial Code.

- Quantity.
- Computational or allocational formula or procedure.
- Any other method, if the identity of the collateral is objectively determinable, except that a supergeneric description is not permitted in a security agreement [*see Com. Code § 9108(c)*].

A description of collateral as "all the debtor's assets" or "all the debtor's personal property" or using words of similar import does not reasonably identify the collateral in a security agreement [*Com. Code § 9108(c)*]; however, it is sufficient in a financing statement [*see Com. Code § 9504(2)*, discussed in *§ 503.22[6][b]*]. A description only by a type of collateral defined in the Commercial Code is an insufficient description of either (1) a commercial tort claim, or, (2) in a consumer transaction, consumer goods, a security entitlement, a securities account, or a commodity account [*Com. Code § 9108(e)*]. Descriptions of investment property collateral and consumer good collateral also must meet the applicable requirements of *Civ. Code § 1799.103* (investment property) or 1799.100 (consumer goods), respectively [*Com. Code § 9108(f)*]. For discussion of *Civ. Code § 1799.100*, see Ch. 127, *Consumer Contracts and Loans* .

[2] Scope and Effect

A security agreement [*see Com. Code § 9102(a)(73)* (definition)] is effective according to its terms between the parties, against purchasers of the collateral, and against creditors, unless particular exception is made by the Commercial Code [*Com. Code § 9201(a)*; *see Pearl v. General Motors Acceptance Corp. (1993) 13 Cal. App. 4th 1023, 1033, 16 Cal. Rptr. 2d 805* (*Civ. Code § 2815* also applies to security agreement that secures continuing guaranty)]. The agreement gives the secured party the rights to proceeds [*see Com. Code §§ 9203(f), 9315*] unless the parties have otherwise agreed.

Except with respect to collateral consisting of commercial tort claims or certain consumer goods (as discussed in *§ 503.21[5]*), a security agreement may create or provide for a security interest in after-acquired collateral [*Com. Code § 9204(a), (b)*]. A security agreement may provide that collateral secures, or that accounts, chattel paper, payment intangibles, or promissory notes are sold in connection with, future advances or other value, whether or not the advances or value are given pursuant to commitment [*Com. Code § 9204(c)*; *see Com. Code § 9102(a)(68)* ("pursuant to commitment")]. Revised Division 9 rejects cases under former Division 9 that tested security interests based on future advances by whether the future advance of other obligation was of the same or a similar type or class as earlier advances [UCC Comment 5 to *Com. Code § 9204*].

The fact that a security agreement secures a continuing guaranty does not preclude the guarantor's exercise of his or her right to revoke the guaranty as to future transactions under *Civ. Code § 2815* [*Pearl v. General Motors Acceptance Corp. (1993) 13 Cal. App. 4th 1023, 1032-1033, 16 Cal. Rptr. 2d 805]* .

[3] Statute of Frauds Exception

The Commercial Code provision that requires a written agreement for enforcement of any contract for the sale of personal property beyond $5,000 [*see Civ. Code § 1624.5(a)*] does not apply to security agreements, nor to the sale of goods [*Civ. Code § 1624.5(b)*].

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44-503 California Forms of Pleading and Practice--Annotated § 503.21

§ 503.21 Security Interest in Collateral

[1] Nature

A security interest is created or provided for by a security agreement [*Com. Code § 9102(a)(73)*]. It attaches when it becomes enforceable against the debtor with respect to the collateral, that is, as soon as certain events specified by the governing law occur, unless an agreement expressly postpones the time of attachment [*Com. Code § 9203(a)*; *see* discussion in*§ 503.21[2]*]. Except as otherwise provided in *Com. Code § 9308* [*see* discussion in *§ 503.22[1]*] and in *Com. Code § 9309* (perfection on attachment), a security interest is perfected for purposes of obtaining priority over claims of other creditors in the collateral [*see Com. Code § 9317*] when it has attached and all the applicable requirements for perfection in *Com. Code §§ 9310-9316* have been satisfied [*Com. Code § 9308(a)*; *see* discussion in *§ 503.22*]. A security interest is perfected when it attaches if the applicable requirements are satisfied before the security interest attaches [*Com. Code § 9308(a)*].

[2] Attachment for Enforceability

[a] In General

A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment [*Com. Code § 9203(a)*]. Generally, a security interest does not become enforceable against the debtor and third parties with respect to the collateral until (1) value has been given [*see Com. Code § 1204* (defining "value," discussed in *§ 503.11[24]*)], (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party, and (3) one of the following conditions has been met [*Com. Code § 9203(b)*; *see also Com. Code § 9203(c)-(i)* (exceptions)]:

- The debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned.

- The collateral is not a certificated security and is in the possession of the secured party under *Com. Code § 9313* pursuant to the debtor's security agreement.

- The collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under *Com. Code § 8301* pursuant to the debtor's security agreement.

- The collateral is deposit accounts, electronic chattel paper, investment property, letter-of-credit rights, or electronic documents, and the secured party has control under *Com. Code § 7106, 9104, 9105, 9106*, or *9107*, respectively, pursuant to the debtor's security agreement.

All of the foregoing are subject to the following [*Com. Code § 9203(c)*]:

- *Com. Code § 4210* in the case of the security interest of a collecting bank.

- *Com. Code § 5118* in the case of the security interest of a letter-of-credit issuer or nominated person.

- *Com. Code § 9110* (discussed in *§ 503.40[1]*) in the case of security interests arising under *Com. Code § 2101 et seq.* (sale of goods) or *Com. Code § 10101 et seq.* (personal property leases).

- *Com. Code § 9206* in the case of security interests in investment property.

[b] When New Debtor Becomes Bound

A person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than Division 9 or by contract, either the security agreement becomes effective to create a security interest in the person's property, or the person becomes generally obligated for the obligations of the other person, including the obligation secured under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person [*Com. Code § 9203(d)*]. If a new debtor becomes bound as debtor by a security agreement entered into by another person both of the following apply [*Com. Code § 9203(e)*]:

- The agreement satisfies *Com. Code § 9203(b)(3)* with respect to existing or after-acquired property of the new debtor to the extent the property is described in the agreement.

- Another agreement is not necessary to make a security interest in the property enforceable.

[c] In Proceeds, Supporting Obligations, Security Interests or Liens

The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by *Com. Code § 9315* (discussed in*§ 503.21[4], below* and *§ 503.21[7]*) and is also attachment of a security interest in a supporting obligation for the collateral [*Com. Code § 9203(f)*; *see Com. Code § 9102(a)(77)*, supporting obligation defined, discussed in *§ 503.24[2][b]*]. The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien [*Com. Code § 9203(g)*].

[d] Security Accounts and Commodity Accounts

The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account [*Com. Code § 9203(h)*]. Similarly, the attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contracts carried in the commodity account [*Com. Code § 9203(i)*].

[3] Interest Unaffected by Debtor's Right to Use Collateral

A security interest is not invalid or fraudulent against creditors solely because the debtor has the right or ability to use, commingle, or dispose of all or part of the collateral, including returned or repossessed goods, to collect, compromise, enforce, or otherwise deal with collateral, to accept the return of collateral or make repossessions, to use, commingle, or dispose of proceeds, or because the secured party fails to require the debtor to account for proceeds or replace collateral [*Com. Code § 9205(a)*]. However, the foregoing rule does not relax the requirements of possession if attachment, perfection, or enforcement of a security interest depends on possession of the collateral by the secured party [*Com. Code § 9205(b)*].

The existence of a security interest, agricultural lien, or authority given to a debtor to dispose of or use collateral, without more, does not subject a secured party to liability in contract or tort for the debtor's acts or omissions [*Com. Code § 9402*].

[4] Effect of Transfer of Collateral

[a] General Rule on Unauthorized Disposition

Except as otherwise provided in Division 9 and *Com. Code § 2403(2)*:

- A security interest or agricultural lien continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest or agricultural lien [*Com. Code § 9315(a)(1)*].

- A security interest attaches to any identifiable proceeds of the collateral [*Com. Code § 9315(a)(2); see Com. Code § 9315(b)* (set forth *below*, defining "identifiable proceeds")], including collections on account of the collateral [*see Com. Code § 9102(a)(64)(B)* ("proceeds," *set forth in § 503.11[18*], include collections); *American National Bank v. Cloud (1988) 201 Cal. App. 3d 766, 774-776, 247 Cal. Rptr. 325* (buyer who paid proceeds to third parties who, with debtor, misrepresented to buyer that they owned crop, was liable to creditor with perfected security interest in crop and proceeds)].

Even if a disposition was authorized, a security interest in or agricultural lien on proceeds may exist as a perfected security interest [*see Com. Code § 9315(c)* discussed in *§ 503.22[7]*] by virtue of the security agreement and financing statement or by virtue of the statute creating the agricultural lien [*see* UCC Comment 9 to *Com. Code § 9315*, discussed in*§ 503.21[4][b]*].

The exception noted in *Com. Code § 2403* refers to a situation in which the secured party entrusts goods collateral to a merchant who deals in goods of that kind and the merchant sells the collateral to a buyer in the ordinary course of business. Even if wrongful as against the secured party, the buyer takes free of the security interest [*see* UCC Comment 2 to *Com. Code § 9315*; *compare Gordon v. Hamm (1998) 63 Cal. App. 4th 1324, 1330-1332, 74 Cal. Rptr. 2d 631* (decided under former *Com. Code § 9306(2)*, debtor/owners' entrustment of used motor home to dealer did not constitute "disposition"; dealer's buyers therefore took motor home subject to original owners' lenders' perfected security interest)].

Division 9 contains several provisions under which a transferee takes free of an unperfected security interest or agricultural lien [*see Com. Code § 9317*] or takes free of a perfected security interest on acquiring goods, general intangibles, chattel paper and instruments, negotiable instruments, negotiable documents, or securities [*see Com. Code §§ 9320, 9321, 9330, 9331*]. Most transferees (including non-purchasers) of funds from a deposit account, and most transferees of money, take free of a perfected security interest in the deposit account or money [*see Com. Code § 9332*]. *Com. Code § 9315(b)* (*see below*), which had no counterpart in former Division 9 and defines "identifiable proceeds," a security interest could attach in proceeds placed in a deposit account [*see* UCC Comment 3 to *Com. Code § 9315*; *ITT Commercial Fin. Corp. v. Tech. Power Inc. (1996) 43 Cal. App. 4th 1551, 1556-1557, 51 Cal. Rptr. 2d 344* (perfected

security interest in inventory and proceeds applies to proceeds of sale, including deposit account to extent that funds are identifiable as sale proceeds)].

Proceeds that are commingled with other property are identifiable proceeds as follows *Com. Code § 9315(b)*]:

- If the proceeds are goods, to the extent provided by *Com. Code § 9336*, discussed in *§ 503.40[4]*.

- If the proceeds are not goods, to the extent that the secured party identifies the proceeds by a method of tracing, including application of equitable principles, that is permitted under law other than Division 9 with respect to commingled property of the type involved.

Among the equitable principles whose use other law may permit for tracing is the "lowest intermediate balance rule" of Restatement 2d, Trusts § 202 [*see* UCC Comment 3 to *Com. Code § 9315*; *see also ITT Commercial Fin. Corp. v. Tech. Power Inc. (1996) 43 Cal. App. 4th 1551, 1558-1559, 51 Cal. Rptr. 2d 344* (description and application of "lowest intermediate balance rule")].

[b] Proceeds of Collateral Subject to Agricultural Lien

Division 9 [*see Com. Code § 9315(a)(2)*, set forth in [a], *above*] does not determine whether a lien extends to proceeds of farm products encumbered by an agricultural lien. If the proceeds are themselves farm products on which an "agricultural lien" arises under other law, then the agricultural lien provisions of Division 9 apply to the agricultural lien on the proceeds in the same way in which they would apply had the farm products not been proceeds [UCC Comment 9 to *Com. Code § 9315*].

[c] Determining Whether Disposition Was Authorized

Com. Code § 9315(a)(1) (set forth in [a], *above*) adopts the view and makes explicit that the authorized disposition to which it refers is an authorized disposition "free of" the security interest or agricultural lien. The secured party's right to proceeds under the express terms of an agreement does not in itself constitute an authorization of disposition. This change in language from former *Com. Code § 9306(2)* is not intended to address the frequently litigated situation in which the effectiveness of the secured party's consent to a disposition is conditioned on the secured party's receipt of the proceeds. In that situation, as in former Division 9, the court makes the determination of whether the disposition was authorized [*see* UCC Comment 2 to *Com. Code § 9315*].

Cases decided under former Division 9 hold that in the face of a security agreement that prohibits sale of the collateral without written consent, evidence sufficient to sustain a finding of implied consent must be clear and convincing. Mere acquiescence to disposition is not enough; however, a prior course of dealing permitting sale may support a finding of implied authorization of sale [*Producers Cotton Oil Co. v. Amstar Corp. (1988) 197 Cal. App. 3d 638, 646-647, 242 Cal. Rptr. 914* (third year crop was sold without secured party's express consent); *Central Cal. Equip. Co. v. Dolk Tractor Co. (1978) 78 Cal. App. 3d 855, 862, 144 Cal. Rptr. 367]* . If the sale is authorized by prior conduct, the secured party no longer has a lien on the collateral after completion of the sale but may have a lien on the proceeds [*Producers Cotton Oil Co. v. Amstar Corp. (1988) 197 Cal. App. 3d 638, 647, 652-653, 242 Cal. Rptr. 914]* . When acquiescence and prior conduct are found to have authorized a sale of the collateral conditioned on continuance of the secured party's interest in the proceeds, the buyer takes the collateral free of the security interest but must pay the price (to the extent of the lien on the proceeds) to the secured party [*Producers Cotton Oil Co. v. Amstar Corp. (1988) 197 Cal. App. 3d 638, 652-653, 242 Cal. Rptr. 914* ; *but see Bank of Stockton v. Diamond Walnut Growers, Inc. (1988) 199 Cal. App. 3d 144, 156-160, 244 Cal. Rptr. 744* (turned on interpretation of agreement between secured parties with competing claims to proceeds); *see also Com. Code §§ 9320, 9323*; discussion in *§ 503.24[3]*].

[d] Provision Prohibiting Transfer

The debtor's rights in collateral may be voluntarily or involuntarily transferred, such as by way of sale, creation of a security interest, attachment, levy, garnishment, or other judicial process. This can occur notwithstanding a provision in the security agreement prohibiting any transfer. Except as otherwise provided in *Com. Code §§ 9401(b)* and in *Com. Code §§ 9406, 9407, 9408,* and *9409,* whether a debtor's rights in collateral maybe voluntarily or involuntarily transferred is governed by law other than Division 9 [*Com. Code § 9401(a)*]. An agreement between the debtor and secured party which prohibits a transfer of the debtor's rights in collateral or makes the transfer a default does not prevent the transfer from taking effect [*Com. Code § 9401(b)*], but the transfer may create a default [*see* UCC Comment 5 to *Com. Code § 9401*].

[5] After-Acquired Collateral

Except as provided below [*Com. Code § 9204(b)*], a security agreement may create or provide for a security interest in after-acquired collateral [*Com. Code § 9204(a)*]. However, a security interest does not attach under a term constituting an after-acquired property clause to either (1) consumer goods (other than an accession when given as additional security), unless the debtor acquires rights in them within 10 days after the secured party gives value, or (2) a commercial tort claim [*Com. Code § 9204(b)*]. A security interest in after-acquired property is not merely an equitable interest: no further action by the secured party is required. *Com. Code § 9204* adopts the principle of the "continuing general lien" or "floating lien." It validates a security interest in the debtor's existing and (on acquisition) future assets, even though the debtor has liberty to dispose of collateral without being required to account to proceeds or substitute new collateral [*see Com. Code § 9205,* discussed in [3], *above*]. *Com. Code § 9204(a)* and *(c)* together also validate "cross-collateral" clauses under which collateral acquired at any time secures advances whenever made [UCC Comment 2 to *Com. Code § 9204*; *Com. Code § 9204(c)* is discussed in *§ 503.20[2]*].

In order for a security interest in a commercia tort claim to attach, the claim must be in existence when the security agreement is authenticated [*Waltrip v. Kimberlin (2008) 164 Cal. App. 4th 517, 528-529, 79 Cal. Rptr. 3d 460* (since security interest in commercial tort claim cannot attach unless claim is in existence when security agreement is authenticated, after-acquired *property clause* in agreement antedating claim cannot create such a security interest except by modification of agreement once claim exists)]. In addition, the security agreement must describe the tort claim with greater specificity than just "all tort claims" [UCC Comment 4 to *Com. Code § 9204*; *see Com. Code § 9108(e),* discussed in *§ 503.20[1]*].

The effect of after-acquired property and future advance clauses as components of a security agreement should not be confused with the requirements applicable to financing statements. The references to after-acquired property clauses and future advance clauses in *Com. Code § 9204* are limited to security agreements. There is no need to refer to after acquired property or future advances in a financing statement [UCC Comment 7 to *Com. Code § 9204*; *see* UCC Comment 2 to *Com. Code § 9502*].

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44-503 California Forms of Pleading and Practice--Annotated § 503.22

§ 503.22 When Perfection Occurs

[1] In General

The general rule, except with respect to security interests that are automatically perfected on attachment [*see Com. Code § 9309*, discussed in *§ 503.22[2]*], is that a security interest is perfected when it has attached and when all of the applicable requirements for perfection [*see Com. Code §§ 9310-9316*] have been satisfied. If all applicable requirements are satisfied before the security interest attaches, it is perfected when it attaches [*Com. Code § 9308(a)*; *see Com. Code § 9308(b)*, regarding perfection of agricultural lien, discussed in *§ 503.45[1]*; discussion in *§ 503.21[2]*, regarding attachment of security interest]. A security interest or agricultural lien is perfected continuously if it is originally perfected by one method under Division 9 and is later perfected by another method under Division 9, without an intermediate period when it was unperfected [*Com. Code § 9308(c)*].

Perfection of a security interest in collateral also perfects a security interest in a supporting obligation for the collateral [*Com. Code § 9308(d)*; *see Com. Code § 9102(a)(77)*, supporting obligation defined, discussed in *§ 503.24[2*][b]; *Com. Code § 9308(f), (g)*, regarding perfection of certain interests in investment property, discussed in *§ 503.56[1][d]*]. Perfection of a security interest in a right to payment or performance also perfects a security interest in a security interest, mortgage, or other lien on personal or real property securing the right [*Com. Code § 9308(e)*].

The same collateral can be different things to different secured parties. For example, when a bank had a security interest in a crop and the proceeds and a marketing cooperative had a security interest in "member proceeds" derived from sale of the crop, the cooperative's interest was in an "account" under former *Com. Code § 9106* [*see now Com. Code § 9102(a)(2)*], and filing with the Secretary of State perfected that interest [*Bank of Stockton v. Diamond Walnut Growers, Inc. (1988) 199 Cal. App. 3d 144, 151-152, 244 Cal. Rptr. 744]* . The bank's interest in the proceeds amounted to "proceeds" under former *Com. Code § 9306(1)* [*see* now *Com. Code § 9315*], and its security interest was perfected by filing with the county recorder in the county in which the crop was grown [*Bank of Stockton v. Diamond Walnut Growers, Inc. (1988) 199 Cal. App. 3d 144, 154, 244 Cal. Rptr. 744* ; *but see Com. Code §§ 9501, 9502* (interest in crops is now filed with Secretary of State); *see also* UCC Comment 4a to *Com. Code § 9102*].

[2] Perfection on Attachment

The following security interests are perfected when they attach [*Com. Code § 9309*]:

- A purchase money security interest in consumer goods, except as otherwise provided in *Com. Code § 9311(b)* with respect to consumer goods that are subject to a certificate of title statute or treaty described in *Com. Code § 9311(a)*.

- An assignment of accounts or payment intangibles which does not by itself or in conjunction with other assignments to the same assigneetransfer a significant part of the assignor's outstanding accounts or payment intangibles.

- A sale of a payment intangible.

- A sale of a promissory note.

- A security interest created by the assignment of a health care insurance receivable to the provider of the health care goods or services.

- A security interest arising under *Com. Code § 2401* or *2505*, a buyer's security interest under *Com. Code § 2711(3)*, or a lessee's security interest under *Com. Code § 10508(e)*, until the debtor obtains possession of the collateral.

- A security interest of a collecting bank arising under *Com. Code § 4210*.

- A security interest of an issuer or nominated person arising under *Com. Code § 5118*.

- A security interest arising in the delivery of a financial asset under *Com. Code § 9206(c)*.

- A security interest in investment property created by a broker or securities intermediary.

- A security interest in a commodity contract or a commodity account created by a commodity intermediary.

- An assignment for the benefit of all creditors of the transferor and subsequent transfers by the assignee thereunder.

- A security interest created by an assignment of a beneficial interest in a decedent's estate.

- A sale by an individual of an account that is a right to payment of winnings in a lottery or other game of chance.

[3] Perfection by Possession

Except as otherwise provided with regard to goods covered by a certificate of title [*see Com. Code § 9313(b)*, discussed in *§ 503.23[3][b]*], a secured party may perfect a security interest in tangible negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession of the collateral [*Com. Code § 9313(a)*]. In fact, as to money, except as otherwise provided in *Com. Code § 9315(c)* and *(d)* for proceeds, the only way a security interest in money may be perfected is by the secured party's taking possession under *Com. Code § 9313* [*Com. Code § 9312(b)(3)*]. A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under *Com. Code § 8301* [*Com. Code § 9313(a)*; for further discussion of perfection of security interests in certificated

securities, *see § 503.56[1][b], [c]*]. If perfection of a security interest depends on possession of the collateral by a secured party, perfection occurs no earlier than the time the secured party takes possession and continues only while the secured party retains possession [*Com. Code § 9313(d)*; *but see Com. Code § 9313(h), (i)*].

With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor's business, when either of the following conditions is satisfied [*Com. Code § 9313(c)*]:

- The person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party's benefit.

- The person takes possession of the collateral after having authenticated a record acknowledging that it will hold possession of collateral for the secured party's benefit.

A person in possession of collateral is not required to acknowledge that it holds possession for a secured party's benefit [*Com. Code § 9313(f)*]. If a person acknowledges that it holds possession for the secured party's benefit both of the following apply [*Com. Code § 9313(g)*]:

- The acknowledgment is effective under *Com. Code § 9313(c)* or under *Com. Code § 8301(a)*, even if the acknowledgment violates the rights of a debtor.

- Unless the person otherwise agrees or law other than Division 9 otherwise provides, the person does not owe any duty to the secured party and is not required to confirm the acknowledgment to another person.

A secured party having possession of collateral does not relinquish possession by delivering the collateral to a person other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor's business if the person was instructed before the delivery or is instructed contemporaneously with the delivery either to hold possession of the collateral for the secured party's benefit, or to redeliver the collateral to the secured party to do either of the following [*Com. Code § 9313(h)*]. A secured party does not relinquish possession, even if a delivery under *Com. Code § 9313(h)* violates the rights of a debtor. A person to which collateral is delivered under *Com. Code § 9313(h)* does not owe any duty to the secured party and is not required to confirm the delivery to another person unless the person otherwise agrees or law other than Division 9 otherwise provides [*Com. Code § 9313(i)*].

[4] Perfection by Control

Except as otherwise provided in *Com. Code § 9315(c)* and *(d)* for proceeds [*see* [7], *below*], security interests in deposit accounts and letter-of-credit rights (except when the letter-of-credit right is a supporting obligation), may be perfected only by control under *Com. Code § 9314* [*Com. Code § 9312(b)(1)*, (2); *see Com. Code § 9308(d)*, discussed in *§ 503.22[1*], perfection of security interest in collateral also perfects security interest in a supporting obligation for the collateral)]. "Control" in regard to deposit accounts is defined in *Com. Code § 9104* [*Com. Code § 9314(a)*] and discussed in *§ 503.58[1]*. "Control" in the case of letter-of-credit rights is defined in *Com. Code § 9107* [*Com. Code § 9314(a)*] and discussed in *§ 503.59[1]*.

Security interests in investment property, electronic chattel paper, or electronic documents also may be perfected by control of the collateral [*Com. Code § 9314(a)*]. "Control" in regard to electronic chattel paper is defined in *Com. Code § 9105* [*Com. Code § 9314(a)*] and discussed in *§ 503.50[1][b]*. In the case of investment property, "control" is defined in *Com. Code § 9106* [*Com. Code § 9314(a)*] and discussed in *§ 503.56[1][b]*.

A security interest in deposit accounts, electronic chattel paper, electronic documents, or letter-of-credit rights is perfected by control under *Com. Code § 9104, 9105,* or *9107* when the secured party obtains control and remains perfected by control only while the secured party retains control [*Com. Code § 9314(b)*; *see Com. Code § 9314(c),* as to investment property, discussed in *§ 503.56[1][b]*].

[5] Property Requiring Registration or Certificate of Title

Although the filing of a financing statement might otherwise be required, filing is not necessary or effective to perfect a security interest in certain types of property calling for registration or certificate of title. One such exception to filing requirements is a vehicle or boat which must be registered under the Vehicle Code [*Com. Code § 9311(a)(2)(A)*]. Excepted also are interests in approved air contaminant emission reduction required to be registered elsewhere [*Com. Code § 9311(a)(2)(C)*; *see Health & Safety Code §§ 40709-40713*] and interests in mobilehomes and commercial coaches required to be registered by the Health & Safety Code, except that during any period in which the mobilehome or commercial coach is inventory, the filing provisions of *Com. Code § 9501 et seq.* apply to a security interest in that collateral [*Com. Code § 9311(a)(2)(B)*]. Similarly, during any period in which any of the previously mentioned types of collateral is inventory held for sale or lease by a person or leased by that person as lessor and that person is in the business of selling goods of that kind, the Division 9 filing provisions do apply to a security interest in that collateral [*Com. Code § 9311(d)*; *Louis & Daturic, Inc. v. Cambridge European Imports, Inc. (1987) 189 Cal. App. 3d 1574, 1585-1586, 234 Cal. Rptr. 889* (Commercial Code governed perfection of interest in dealer's inventory)]. Property subject to either of the following is also excepted:

- A certificate of title statute of another jurisdiction which provides for a security interest to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the property [*Com. Code § 9311(a)(3)*].

- A federal statute, regulation, or treaty whose requirements for a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt *Com. Code § 9310* [*Com. Code § 9311(a)(1)*; *but see Moldo v. Matsco, Inc. (In re Cybernetic Servs.) (9th Cir. 2001) 252 F.3d 1039, 1059*, decided under version of Division 9 in effect prior to July 1, 2001 (holder of security interest in patent is not required to record that interest with federal Patent and Trademark Office in order to perfect interest as against subsequent lien creditor; Patent Act does not preempt filing requirements of Article 9)].

Compliance with the requirements of a statute, regulation, or treaty mentioned in the previous paragraph for obtaining priority over the rights of a lien creditor is equivalent to the filing of a financing statement under Division 9. Except as otherwise provided with respect to collateral that is inventory in *Com. Code § 9313* [*see § 503.22[3]*], and in *Com. Code § 9316(d)* and *(e)* for goods covered by a certificate of title [*see § 503.22[6][a][i]*], a security interest in property subject to one of those statutes, regulations, or treaties may be perfected only by compliance with those requirements. A security interest so perfected remains perfected notwithstanding a change in the use or transfer of possession of the collateral [*Com. Code § 9311(b)*]. Similarly, except as otherwise provided with respect to collateral that is inventory [*see § 503.22[3]*], and in *Com. Code § 9316(d)* and *(e)* [*see § 503.22[6][a][i]*], duration and renewal of perfection of a security interest perfected by compliance with one of those, statutes, regulations, or treaties are governed by the statute, regulation, or treaty. In other respects, the security interest is subject to Division 9 [*Com. Code § 9311(c)*].

For discussion of choice of law rules governing goods covered by certificates of title and changes in perfection when that law changes, see *§ 503.23[3]*.

[6] Perfection by Filing of Financing Statement

[a] When Filing Is Permitted or Required

[i] Interests for Which Filing Is Permitted or Required

Perfection is typically accomplished by filing a financing statement (or a fixture filing) [*see* discussion in *§ 503.47[4]*] so as to give third parties notice of the existence of security interests in the collateral [*K.N.C. Wholesale, Inc. v. AWMCO, Inc. (1976) 56 Cal. App. 3d 315, 319, 128 Cal. Rptr. 345]* . The filing of the statement serves the same purpose as the recordation of traditional liens by giving the secured party the same rights of priority as the holders of liens [*see People ex rel. Franchise Tax Bd. v. Credit Managers Assn. (1977) 76 Cal. App. 3d 344, 351, 142 Cal. Rptr. 777]* .

A security interest in chattel paper, negotiable documents, instruments, or investment property may be perfected by filing [*Com. Code § 9312(a)*].

Except as otherwise provided in *Com. Code § 9312(b)*, discussed in *§ 503.22[4]*, a financing statement must be filed to perfect all security interests and agricultural liens, except the following [*Com. Code § 9310(a), (b)*]:

- Those that are perfected under *Com. Code § 9308(e)-(g)* [*Com. Code § 9310(b)(1)*; *see § 503.22[1]* regarding perfection under *Com. Code § 9308(e)-(g)*; § 503.56[1][d] regarding perfection under *Com. Code § 9308(f), (g)* of certain interests in investment property].

- Those perfected under *Com. Code § 9309* when they attach [*Com. Code § 9310(b)(2)*; *see § 503.22[2]*].

- A security interest in property subject to a certificate of title statute, regulation, or treaty described in *Com. Code § 9311(a)* [*Com. Code § 9310(b)(3)*; *see § 503.22[5]*].

- A security interest in goods in possession of a bailee which is perfected under *Com. Code § 9312(d)(1)* or *(2)* [*Com. Code § 9310(b)(4)*; *see § 503.40[2][b]*].

- Security interests in certificated securities, documents, goods, or instruments which are temporarily perfected without filing or possession under *Com. Code § 9312(e), (f)*, or *(g)* [*Com. Code § 9310(b)(5)*; *see §§ 503.40[2][b]* (goods), 503.48[1][b] (documents), 503.49[1] (instruments), § 503.56[1][c] (certificated security)].

- A security interest in collateral in the secured party's possession under *Com. Code § 9313* [*Com. Code § 9310(b)(6)*; *see § 503.22[3]*].

- A security interest in a certificated security which is perfected by delivery of the security certificate to the secured party under *Com. Code § 9313* [*Com. Code § 9310(b)(7)*; *see § 503.56[1][b]*].

- Security interests in deposit accounts, electronic chattel paper, electronic documents, investment property, or letter-of-credit rights which are perfected by control under *Com. Code § 9314* [*Com. Code § 9310(b)(8)*; *see §§ 503.58[1]* (deposit accounts), 503.50[1][b] (electronic chattel paper), 503.48[1] (documents), 503.56[1][b] (investment property), 503.59[1] (letter-of-credit rights)].

- A security interest in proceeds which is perfected under *Com. Code § 9315* [*Com. Code § 9310(b)(9)*; *see § 503.22[7]*].

- A security interest perfected under *Com. Code § 9316* [*Com. Code § 9310(b)(10)*; *see § 503.23*].

- A security interest in, or claim in or under, any policy of insurance including unearned premiums which is perfected by written notice to the insurer under *Com. Code § 9312(b)(4)* [*Com. Code §*

9310(b)(11); *see § 503.53[2]*].

If a secured party assigns a perfected security interest or agricultural lien, a filing under Division 9 is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor [*Com. Code § 9310(c)*; *see* discussion in [m], *below*; *see also Com. Code § 9521(a)* (UCC-1 initial financing statement with space to indicate assignee as secured party)].

[ii] Who Is Entitled to File

A person may file an initial financing statement, an amendment that adds collateral covered by a financing statement, or an amendment that adds a debtor to a financing statement, only if the debtor authorizes the filing in an authenticated record or pursuant to *Com. Code § 9509(b)* or *(c)*, or if the person holds an agricultural lien that has become effective at the time of filing and the financing statement covers only collateral in which the person holds an agricultural lien [*Com. Code § 9509(a)*]. By authenticating or becoming bound as debtor by a security agreement, a debtor or new debtor authorizes the filing of an initial financing statement, and an amendment, covering both the collateral described in the security agreement and any property that becomes collateral by virtue of being proceeds of an unauthorized disposition of the original collateral [*see Com. Code § 9315(a)(2)*, discussed in *§ 503.21[4]*], whether or not the security agreement expressly covers proceeds [*Com. Code § 9509(b)*]. By acquiring collateral in which a security interest or agricultural lien continues after an unauthorized disposition of that collateral [*see Com. Code § 9315(a)(1)*, discussed in *§ 503.21[4]*], a debtor authorizes the filing of an initial financing statement, and an amendment, covering the collateral and proceeds of that collateral [*Com. Code § 9509(c)*; *see Com. Code § 9315(a)(2)*].

A filed record is effective only to the extent that it was filed by a person that may file it under *Com. Code § 9509(c)* [*Com. Code § 9510(a)*; *see also Com. Code § 9625* (imposing liability for unauthorized filings); UCC Comment 3 to *Com. Code § 9502*].

[b] Contents

[i] In General

A financing statement (except one that covers as-extracted collateral or timber to be cut, or which is filed as a fixture filing and covers goods that are or are to become fixtures) is sufficient if it gives the names of the debtor and the secured party, and indicates the collateral covered by the financing statement [*Com. Code § 9502(a)*; *see Com. Code § 9502(b), (c)* (financing statement that covers as-extracted collateral or timber to be cut, or which is filed as a fixture filing, discussed in *§ 503.44[3*]; *Com. Code § 9505* (acceptable terminology for describing parties in financing statement, discussed in *§ 503.46[4]*]. A financing statement may provide the name of more than one debtor and the name of more than one secured party [*Com. Code § 9503(e)*]. The requirement that the debtor's signature or other authorization appear on the financing statement has been dropped to facilitate electronic filing. Instead, *Com. Code § 9509*, discussed in [a][ii], *above*, specifies who is authorized to file a financing statement, and *Com. Code § 9625* imposes liability for unauthorized filings [UCC Comment 3 h to *Com. Code § 9101*; UCC Comment 3 to *Com. Code § 9502*]. The standardized universal form of written financing statement is set forth in *Com. Code § 9521(a)*. This form is known as Form UCC-1. A California version of this form has been prepared by the Secretary of State and is illustrated in California Legal Forms, Ch. 42, *Secured Transactions*, § 542.211 (Matthew Bender). The form must be accepted for filing whether it has or lacks a space identified for the disclosure of the social security number of an individual [*Com. Code § 9521(a)*; *but see Com. Code § 9526.5* (requirement for truncation of social security numbers in publicly accessible filed documents)].

[ii] Debtor's Name

A financing statement sufficiently provides the name of the debtor only if it does so in accordance with the following rules [*Com. Code § 9503(a)*; *see also Com. Code § 9506(c)*, discussed in [iv], *below*]:

- If the debtor is a registered organization, only if the financing statement provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization which shows the debtor to have been organized.

- If the debtor is a decedent's estate, only if the financing statement provides the name of the decedent and indicates that the debtor is an estate.

- If the debtor is a trust or a trustee acting with respect to property held in trust, only if the financing statement both (1) provides the name specified for the trust in its organic documents or, if no name is specified, provides the name of the settlor and additional information sufficient to distinguish the debtor from other trusts having one or more of the same settlors and (2) indicates, in the debtor's name or otherwise, that the debtor is a trust or is a trustee acting with respect to property held in trust.

- In other cases, if the debtor has a name, only if it provides the individual or organizational name of the debtor, or, if the debtor does not have a name, only if it provides the names of the partners, members, associates, or other persons comprising the debtor.

A financing statement that provides the name of the debtor in accordance with *Com. Code § 9503(a)* is not rendered ineffective by the absence of either a trade name or other name of the debtor, or, unless otherwise required in the case of a debtor that does not have a name [*see Com. Code § 9503(a)(4)(B)*, last item listed *above*], names of partners, members, associates, or other persons comprising the debtor [*Com. Code § 9503(b)*]. However, a financing statement that provides only the debtor's trade name does not sufficiently provide the name of the debtor [*Com. Code § 9503(c)*]. Failure to indicate the representative capacity of a secured party or representative of a secured party does not affect the sufficiency of a financing statement [*Com. Code § 9503(d)*].

[iii] Description of Collateral

A financing statement sufficiently describes the collateral that it covers if it describes the collateral pursuant to *Com. Code § 9108* (discussed in *§ 503.20[2]*) or indicates that it covers all assets or all personal property [*Com. Code § 9504*]. The sufficiency of the "all assets" or "all personal property" description is an exception applicable only to financing statements. It will not suffice in the security agreement [*see Com. Code § 9108(c)*; UCC Comment 2 to *Com. Code § 9108*; UCC Comment 2 to *Com. Code § 9504*].

[iv] Mistakes Allowed Unless Misleading

A financing statement substantially satisfying the requirements of *Com. Code §§ 9501-9528* is effective, even if it has minor errors or omissions, unless the errors or omissions make the financing statement seriously misleading [*Com. Code § 9506(a)*]. A financing statement that fails sufficiently to provide the name of the debtor in accordance with *Com. Code § 9503(a)* is seriously misleading [*Com. Code § 9506(b)*; *see, e.g., Corona Fruits & Veggies, Inc. v. Frozsun Foods, Inc. (2006) 143 Cal. App. 4th 319, 323-325, 48 Cal. Rptr. 3d 868* (debtor's true name was Armando Munoz Juarez, and UCC-1 financing statement was seriously misleading because it showed his name as Armando Munoz; other creditor's subsequently filed UCC-1 statement, showing Juarez name, had priority)], except that if a search of the records of the filing office under the debtor's correct name, using the filing office's standard search logic, if any, fails sufficiently to provide the name of the debtor in accordance with *Com. Code § 9503(a)*, the name provided does not make the financing statement misleading [*Com. Code § 9506(c)*]. For purposes of *Com. Code § 9508(b)* [*see § 503.22[6][i]*], the "debtor's correct name" in *Com. Code § 9506(c)* means the correct name of the new debtor [*Com. Code § 9506(d)*].

The failure of the filing office to index a record correctly does not affect the effectiveness of the filed record [*Com.*

Code § 9517].

[c] Place of Filing

The proper place for filing in order to perfect a security interest in collateral, including a case in which the collateral is goods that are or are to become fixtures and the financing statement is *not* filed as a fixture filing, or agricultural lien on collateral is the office of the Secretary of State, except in the case of collateral consisting of (1) goods that are or are to become fixtures and the financing statement is filed as a fixture filing [*see* discussion in *§ 503.47[3]*]; (2) timber to be cut or minerals (including oil and gas), to be extracted [*Com. Code § 9501(a)*]; *see* discussion in *§ 503.44[3]*; and (3) collateral of a transmitting utility, as discussed in *§ 503.57[2][a]* [*Com. Code § 9501(b)*].

[d] Time of Filing

A financing statement may be filed before a security agreement is made or a security interest otherwise attaches [*Com. Code § 9502(d)*]. Any financing statement also remains effective with respect to collateral sold, exchanged, leased, licensed, or otherwise disposed of by the debtor and in which a security interest or agricultural lien continues, even though the secured party knows of or consents to the disposition [*Com. Code § 9507(a)*]. Normally, a security interest does continue after disposition of the collateral [*see Com. Code § 9315(a)*]. Law other than Division 9 determines whether an agricultural lien survives disposition of the collateral.

As a consequence of the disposition, the collateral may be owned by a person other than the debtor against whom the financing statement was filed. Under *Com. Code § 9507(a)*, the secured party remains perfected even if it does not correct the public record. For this reason, any person seeking to determine whether a debtor owns collateral free of security interest must inquire as to the debtor's source of title, and, if circumstances seem to require it, search in the name of a former owner. *Com. Code § 9507(a)* addresses only the sufficiency of the information contained in the financing statement. A disposition of collateral may result in loss of perfection for other reasons, *see, e.g., Com. Code § 9316* [UCC Comment 3 to *Com. Code § 9508*].

[e] Completion of Filing

Except as otherwise provided in *Com. Code § 9516(b), (1)* communication of a record to a filing office and (2) tender of the filing fee or acceptance of the record by the filing office constitutes filing [*Com. Code § 9516(a)*]. A record that is communicated to the filing office with tender of the filing fee, but which the filing office refuses to accept for a reason other than one set forth in *Com. Code § 9516(b)*, is effective as a filed record except as against a purchaser of the collateral which gives value in reasonable reliance upon the absence of the record from the files [*Com. Code § 9516(d)*; *see Com. Code §§ 9519-9523* (duties of filing office)].

Filing does not occur with respect to a record that a filing office refuses to accept because of any of the following [*Com. Code § 9516(b)*]:

- The record is not communicated by a method or medium of communication authorized by the filing office.
- An amount equal to or greater than the applicable filing fee is not tendered.
- The filing office is unable to index the record because of any of the following:
  - In the case of an initial financing statement, the record does not provide a name for the debtor.

- In the case of an amendment or correction statement, either (1) the record does not identify the initial financing statement as required by *Com. Code § 9512* or *9518*, as applicable, or (2) the record identifies an initial financing statement whose effectiveness has lapsed under *Com. Code § 9515*.

- In the case of an initial financing statement that provides the name of a debtor identified as an individual or an amendment that provides a name of a debtor identified as an individual which was not previously provided in the financing statement to which the record relates, the record does not identify the debtor's last name.

- In the case of a record filed or recorded in the filing office described in *Com. Code § 9501(a)(1)*, the record does not provide a sufficient description of the real property to which it relates.

- In the case of an initial financing statement or an amendment that adds a secured party of record, the record does not provide a name and mailing address for the secured party of record.

- In the case of an initial financing statement or an amendment that provides a name of a debtor which was not previously provided in the financing statement to which the amendment relates, the record does not (1) provide a mailing address for the debtor, (2) indicate whether the debtor is an individual or an organization, or (3) if the financing statement indicates that the debtor is an organization, provide either a type of organization for the debtor, a jurisdiction of organization for the debtor, or an organizational identification number for the debtor or indicate that the debtor has none.

- In the case of an assignment reflected in an initial financing statement under *Com. Code § 9514(a)* or an amendment filed under *Com. Code § 9514(b)*, the record does not provide a name and mailing address for the assignee.

- In the case of a continuation statement, the record is not filed within the six-month period prescribed by *Com. Code § 9515(c)*.

For purposes of the foregoing rules [*Com. Code § 9516(b)*], a record does not provide information if the filing office is unable to read or decipher the information and a record that does not indicate that it is an amendment or identify an initial financing statement to which it relates, as required by *Com. Code § 9512, 9514*, or *9518*, is an initial financing statement.

[f] Duration of Effectiveness

Generally, a filed financing statement is effective for a period of five years after the date of filing [*Com. Code § 9515(a)*; *but see Com. Code § 9515(b), (e), (f)* (transmitting utility), and (g) (mortgage as fixture filing)]. An initial financing statement filed in connection with a public finance transaction or manufactured home transaction is effective for a period of 30 years after the date of filing if it indicates that it is filed in connection with a public finance transaction or manufactured home transaction *Com. Code § 9515(b)*; *but see Com. Code § 9515(e), (f)*, and *(g)*].

The effectiveness of a filed financing statement lapses on the expiration of the period of its effectiveness unless before the lapse a continuation statement is filed pursuant to *Com. Code § 9515(d)*, discussed in [j], *below* [*Com. Code § 9515(c)*]. On lapse, a financing statement ceases to be effective and any security interest or agricultural lien that was perfected by the financing statement becomes unperfected, unless the security interest is perfected otherwise. If the security interest or agricultural lien becomes unperfected on lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value [*Com. Code § 9515(c)*].

A filed financing statement remains effective with respect to collateral that is sold, exchanged, leased, licensed, or otherwise disposed of and in which a security interest or agricultural lien continues, even if the secured party knows of or consents to the disposition [*Com. Code § 9507(a)*]. Except as otherwise provided in *Com. Code § 9507(c)* and in *Com. Code § 9508* [*see* [i], *below*], a financing statement is not rendered ineffective if, after the financing statement is filed, the information provided in the financing statement becomes seriously misleading under *Com. Code § 9506*, discussed in [b][iv], *above* [*Com. Code § 9507(b)*]. If a debtor so changes its name that a filed financing statement becomes seriously misleading under *Com. Code § 9506*, the following rules apply [*Com. Code § 9507(c)*]:

- The financing statement is effective to perfect a security interest in collateral acquired by the debtor before, or within four months after, the change.

- The financing statement is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless an amendment to the financing statement which renders the financing statement not seriously misleading is filed within four months after the change.

[g] Amendment

[i] Authority to File Amendment

For general discussion of who may file an amendment, see *Com. Code § 9509(a)-(c)*, discussed in [a][ii], *above*. A person may file an amendment other than an amendment that adds collateral covered by a financing statement or an amendment that adds a debtor to a financing statement only if the secured party of record authorizes the filing or the amendment is a termination statement for a financing statement as to which the secured party of record has failed to file or send a termination statement as required by *Com. Code § 9513(a)* or *(c)*, the debtor authorizes the filing, and the termination statement indicates that the debtor authorized it to be filed [*Com. Code § 9509(d)*]. If there is more than one secured party of record for a financing statement, each secured party of record may authorize the filing of an amendment under *Com. Code § 9509(d)*[*Com. Code § 9509(e)*].

Except with respect to an assignment of record of a security interest in a fixture covered by a fixture filing [*see Com. Code § 9514(c)*, discussed in *§ 503.47[4]*], an initial financing statement may reflect an assignment of all of the secured party's power to authorize an amendment to the financing statement by providing the name and mailing address of the assignee as the name and address of the secured party [*Com. Code § 9514(a)*]. Except with respect to an assignment of record of a security interest in a fixture covered by a fixture filing [*Com. Code § 9514(c)*], a secured party of record may assign all or part of its power to authorize an amendment to a financing statement by filing in the filing office an amendment of the financing statement which (1) identifies the initial financing statement to which it relates by its file number, (2) provides the name of the assignor, and (3) provides the name and mailing address of the assignee [*Com. Code § 9514(b)*].

[ii] Types of Amendments That May Be Filed

Subject to *Com. Code § 9509* (authority to file amendment), a person may add or delete collateral covered by, continue or terminate the effectiveness of, or, subject to *Com. Code § 9512(e)*, otherwise amend the information provided in, a financing statement by filing an amendment that both (1) identifies, by its file number, the initial financing statement to which the amendment relates, and (2) if the amendment relates to an initial financing statement filed or recorded in the real estate records [*see Com. Code § 9501(a)(1)*], provides the date that the initial financing statement was filed or recorded and the information specified in *Com. Code § 9502(b)*, discussed in *§ 503.44[3]* [*Com. Code § 9512(a)*; *see also Com. Code § 9707(b), (c)* (amendment of pre-effective date financing statements), discussed in *§ 503.10[2][f]*].

[iii] When Amendment Becomes Effective

Except as otherwise provided with regard to a continuation statement [*see Com. Code § 9515*, discussed in [j], *below*] the filing of an amendment does not extend the period of effectiveness of the financing statement [*Com. Code § 9512(b)*]. A financing statement that is amended by an amendment that adds collateral is effective as to the added collateral only from the date of the filing of the amendment [*Com. Code § 9512(c)*]. A financing statement that is amended by an amendment that adds a debtor is effective as to the added debtor only from the date of the filing of the amendment [*Com. Code § 9512(d)*]. An amendment is ineffective to the extent that it purports to delete either all debtors or all secured parties of record and fails to provide the name of a debtor to be covered by the financing statement or the name of a new secured party of record, as applicable [*Com. Code § 9512(e)*].

[h] Correction Statement

If the person believes that a filed record indexed under his or her name is inaccurate or was wrongfully filed, that person may file in the filing office a correction statement with respect to the record [*Com. Code § 9518(a)*]. A correction statement must do all of the following [*Com. Code § 9518(b)*]:

- Identify the record to which it relates, by both the file number assigned to the initial financing statement to which the record relates, and, if the correction statement relates to a record filed or recorded in a filing office for real estate records [*see Com. Code § 9501(a)(1)*], the date that the initial financing statement was filed or recorded and the information specified in *Com. Code § 9502(b)*].

- Indicate that it is a correction statement.

- Provide the basis for the person's belief that the record is inaccurate and indicate the manner in which the person believes the record should be amended to cure any inaccuracy or provide the basis for the person's belief that the record was wrongfully filed.

The filing of a correction statement does not affect the effectiveness of an initial financing statement or other filed record [*Com. Code § 9518(c)*].

Com. Code § 9518 was added in revised Division 9 and affords a debtor a nonjudicial means to correct a financing statement or other record that was inaccurate or wrongfully filed. *Com. Code § 9518* does not permit the aggrieved person to change the legal effect of the public record, but the filed correction statement becomes part of the "financing statement" as defined in *Com. Code § 9102(a)(39)* ("financing statement" means a record or records composed of an initial financing statement and any filed record relating to the initial financing statement). *Com. Code § 9518* does not displace other provisions in Division 9 that impose liability for making unauthorized filings or failing to file or send a termination statement [*see Com. Code § 9625(e)*], nor does it displace any available judicial remedy [UCC Comment 2 to *Com. Code § 9518*].

[i] Debtor's Name Change or Reorganization; New Debtor

Except with respect to collateral as to which a filed financing statement remains effective against the new debtor [*see Com. Code § 9508(c)*; *see also Com. Code § 9507(a)*, discussed in [d], *above*], a financing statement is not rendered ineffective if, after the financing statement is filed, the information provided in the financing statement becomes seriously misleading under *Com. Code § 9506*, discussed in [b][ii] and [iv], *above* [*Com. Code § 9507(b)*]. If a debtor so changes its name that a filed financing statement becomes seriously misleading under *Com. Code § 9506*, the financing statement is effective to perfect a security interest in collateral acquired by the debtor before, or within four months after, the change, but is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless an appropriate amendment is filed within four months after the change *Com. Code § 9507(c)*]. As a general matter, post-filing changes that render a financing statement seriously misleading have no effect on the financing statement. There are two exceptions: a change that involves a new debtor who becomes bound by the

original security agreement [*see Com. Code § 9508*] and a "pure" change, that is one that does not implicate a new debtor but causes the financing statement to become seriously misleading [UCC Comment 4 to *Com. Code § 9507*].

Except as otherwise provided in *Com. Code § 9508*, a filed financing statement naming an original debtor is effective to perfect a security interest in collateral in which a new debtor has or acquires rights to the extent that the financing statement would have been effective had the original debtor acquired rights in the collateral [*Com. Code § 9508(a)*]. If the difference between the name of the original debtor and that of the new debtor causes a filed financing statement that is effective under *Com. Code § 9508(a)* to be seriously misleading under *Com. Code § 9506*, the financing statement is effective to perfect a security interest in collateral acquired by the new debtor before, and within four months after, the new debtor becomes bound under *Com. Code § 9203(d)* [*see § 503.21[2][b]*], but the financing statement is not effective to perfect a security interest in collateral acquired by the new debtor more than four months after the new debtor becomes bound under *Com. Code § 9203(d)* unless an initial financing statement providing the name of the new debtor is filed before the expiration of that time [*Com. Code § 9508(b)*]. *Com. Code § 9508* does not apply to collateral as to which a filed financing statement remains effective against the new debtor under *Com. Code § 9507(a)* [*Com. Code § 9508(c)*], that is to say *Com. Code § 9508* does not apply to collateral transferred by the original debtor to the new debtor. Under those circumstances, the filing against the original debtor continues to be effective until it lapses or perfection is lost for another reason [UCC Comment 5 to *Com. Code § 9508*; *see Com. Code §§ 9316, 9507(a)*].

Com. Code § 9203(d), (e) and *Com. Code § 9508* deal with situations in which a new debtor becomes bound by a security agreement entered into by another person (the original debtor). These situations often arise as a consequence of changes in business structure. For example, the original debtor may be an individual who operates a sole proprietorship and then incorporates. Under both former Division 9 and revised Division 9, collateral that is transferred in the course of an incorporation or merger would normally remain subject to a perfected security interest [UCC Comment 2 to *Com. Code § 9508*; *see Com. Code §§ 9315(a), 9507(a)*]. *Com. Code § 9203(d),(e)* create exceptions to the general rule of *Com. Code § 9203(b)* by setting forth ways, other than authenticating the security agreement, that a new debtor becomes bound by a security agreement entered into by another person. Under *Com. Code § 9203(d)* 1) a new debtor becomes bound if, by contract or operation of other law, the security agreement becomes effective to create a security interest in the new debtor's property. Applicable corporate law may provide that following a merger, the survivor becomes bound. Even if applicable corporate law does not so provide, *Com. Code § 9203(d)(2)* may cause the new debtor to become bound if, by contract or operation of other law, if becomes obligated not only for the secured obligation but also generally for the obligations of the original debtor and acquires or succeeds to substantially all the assets of the original debtor. The "substantially all of the assets" requirement of *Com. Code § 9203(d)(2)* excludes sureties and other secondary obligors as well as person whom becomes obligated through piercing the corporate veil and other non-successor doctrines. In most cases, it will exclude successors to the assets and liabilities of a division of a debtor [UCC Comment 3 to *Com. Code § 9508*]. If the original debtor and the new debtor are located in different jurisdictions, a filing against the original debtor will not be effective to perfect a security interest in collateral that the new debtor acquires, or has acquired from a person other than the original debtor [UCC Comment 4 to *Com. Code § 9508*].

[j] Continuation Statement

A continuation statement may be filed only within six months before the expiration of the five-year period specified in *Com. Code § 9515(a)* [*see* [f], *above*] or the 30-year period specified in *Com. Code § 9515(b)* [*see* [f], *above*], whichever is applicable [*Com. Code § 9515(d)*]. Except as otherwise provided in *Com. Code § 9510*, on timely filing of a continuation statement, the effectiveness of the initial financing statement continues for a period of five years commencing on the day on which the financing statement would have become ineffective in the absence of the filing. On the expiration of the five-year period, the financing statement lapses in the same manner as provided in *Com. Code § 9515(c)* [*see* [f], *above*], unless, before the lapse, another continuation statement is filed pursuant to *Com. Code § 9515(d)*[*Com. Code § 9515(e)*]. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the initial financing statement [*Com. Code § 9515(e)*]. Continuation statements need not be filed if the

debtor is a transmitting utility [*see Com. Code § 9515(f)*, discussed in *§ 503.57[2][b]*] or for a mortgage filed as a fixture filing [*see Com. Code § 9515(g)*, discussed in *§ 503.47[4]*].

A continuation statement that is not filed within the six-month period prescribed by *Com. Code § 9515(d)* is ineffective [*Com. Code § 9510(c)*; *see SCT (U.S.A.), Inc. v. Mitsui Manufacturers Bank (1984) 155 Cal. App. 3d 1059, 1061, 1066, 202 Cal. Rptr. 547* (decided under former Division 9; continuation statement may be filed at any time on the final day of effectiveness of the financing statement or prior continuation statement)].

[k] Termination Statement

Because most financing statements expire in five years, no compulsion is placed on the secured party to file a termination statement unless demanded by the debtor, except in the case of consumer goods [UCC Comment 2 to *Com. Code § 9513*]. If a financing statement covers consumer goods and either (1) there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value, or (2) the debtor did not authorize the filing of the initial financing statement, a secured party must cause the secured party of record for a financing statement to file a termination statement for that financing statement [*Com. Code § 9513(a)*]. To comply with *Com. Code § 9513(a)*, a secured party must cause the secured party of record to file the termination statement either within one month after there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value, or, if earlier, within 20 days after the secured party receives an authenticated demand from a debtor [*Com. Code § 9513(b)*]. A secured party of record with respect to a financing statement is a person whose name is provided as the name of the secured party, or a representative of the secured party, in an initial financing statement that has been filed. If an initial financing statement is filed to reflect an assignment of all of the secured party's power to authorize an amendment to the financing statement [*see Com. Code § 9514(a)*, discussed in [m], *below*], the assignee named in the initial financing statement is the secured party of record with respect to the financing statement [*Com. Code § 9511(a)*; *see also Com. Code § 9511(b), (c)*, discussed in [m], *below*].

Because *Com. Code § 9311(b)* provides that compliance with a certificate of title statute is "equivalent to the filing of a financing statement," *Com. Code § 9513* applies to certificates of title unless the particular certificate of title statute contains a specific superseding rule that addresses a secured party's duty to cause a notation of a security interest to be removed from a certificate of title. In the context of a certificate of title, the secured party could comply with *Com. Code § 9513* by causing the removal of the notation of security interest or by providing the debtor with documentation sufficient to enable the debtor to effect the removal [UCC Comment 2 to *Com. Code § 9513*].

If a financing statement covers collateral other than consumer goods, within 20 days after a secured party receives an authenticated demand from a debtor, the secured party must cause the secured party of record for a financing statement to send to the debtor a termination statement for the financing statement or file the termination statement in the filing office if any of the following conditions is satisfied [*Com. Code § 9513(c)*]:

- Except in the case of a financing statement covering accounts or chattel paper that has been sold or goods that are the subject of a consignment, there is no obligation secured by the collateral covered by the financing statement and no commitment to make an advance, incur an obligation, or otherwise give value.

- The financing statement covers accounts or chattel paper that has been sold but as to which the account debtor or other person obligated has discharged its obligation.

- The financing statement covers goods that were the subject of a consignment to the debtor but are not in the debtor's possession.

- The debtor did not authorize the filing of the initial financing statement.

Except as otherwise provided in *Com. Code § 9510* when only one of several secured parties files the termination statement, on the filing of a termination statement with the filing office, the financing statement to which the termination statement relates ceases to be effective [*Com. Code § 9513(d)*]. A record authorized by one secured party of record does not affect the financing statement with respect to another secured party of record [*Com. Code § 9510(b)*].

[l] Statement of Release

A secured party may release its security interest in all or a part of the collateral covered by a filed financing statement by filing an amendment that deletes collateral. The amendment must identify the initial financing statement by its file number [*see Com. Code § 9512(a)*, discussed in [g][ii], *above*].

[m] Assignment of, or Reflected in, Financing Statement

Com. Code § 9514 provides a permissive device whereby a secured party of record may assign its power to affect a financing statement. It may also be useful for a secured party who has assigned all or part if its security interest or agricultural lien and wishes to have that fact noted of record so that inquiries concerning the transaction would be addressed to the assignee. On the filing of the assignment, the assignee becomes the "secured party of record" [*see Com. Code § 9511(a)*, discussed in [k], *above*] and may authorize the filing of a continuation statement, termination statement, or other amendment. Under *Com. Code § 9310(c)*, discussed in [a][i], *above*, it is not necessary to file an assignment to continue the perfected status of a security interest against creditors and transferees of the original debtor. However, if an assignment is not filed, the assignor remains the secured party of record with the power (even if not the right) to authorize the filing of effective amendments [UCC Comment 2 to *Com. Code § 9514*].

Except as otherwise provided with respect to fixture fillings [*see Com. Code § 9514(c)*, discussed in *§ 503.47[4]*], an initial financing statement may reflect an assignment of all of the secured party's power to authorize an amendment to the financing statement by providing the name and mailing address of the assignee as the name and address of the secured party [*Com. Code § 9514(a)*; *see Com. Code § 9521(a)* (universal form of initial financing statement with space to indicate assignee as secured party)].

Except as otherwise provided with respect to fixture fillings [*see Com. Code § 9514(c)*, discussed in *§ 503.47[4]*], a secured party of record may assign all or part of its power to authorize an amendment to a financing statement by filing in the filing office an amendment of the financing statement which does all of the following [*Com. Code § 9514(b)*]:

- Identifies, by its file number, the initial financing statement to which it relates.
- Provides the name of the assignor.
- Provides the name and mailing address of the assignee.

If an amendment of a financing statement which provides the name of a person as a secured party or a representative of a secured party is filed, the person named in the amendment is a secured party of record. If an amendment is filed under *Com. Code § 9514(b)*, the assignee named in the amendment is a secured party of record [*Com. Code § 9511(b)*]. A person remains a secured party of record until the filing of an amendment of the financing statement which deletes the person [*Com. Code § 9511(c)*].

An assignment of only some of the secured party's power to affect a financing statement, for example, the power to affect the financing statement as it relates to particular items of collateral or as it relates to an undivided interest in a security interest in all the collateral, cannot be done in an initial financing statement; it must be done by an amendment

adding the assignee as a secured party of record [UCC Comment 3 to *Com. Code § 9514*].

[n] Request for Financing Statement Information

Any person who requests the following information may receive it from the filing office [*Com. Code § 9523(c)*]:

- Whether there is on file on a date and time specified by the filing office, but not a date earlier than three business days before the filing office receives the request, any financing statement that (1) designates a particular debtor or, if the request so states, designates a particular debtor at the address specified in the request, (2) has not lapsed under *Com. Code § 9515* with respect to all secured parties of record, and (3) if the request so states, it has lapsed under *Com. Code § 9515* and a record of which is maintained by the filing office for one year after lapse in accordance the *Com. Code § 9522(a)*.

- The date and time of filing of each financing statement.

- The information provided in each financing statement.

The filing office may communicate the foregoing information in any medium. However, if requested, the filing office must communicate the information by issuing its written certificate [*Com. Code § 9523(d)*]. If requested, the Secretary of State must issue a combined certificate showing the information as to financing statements as specified in *Com. Code § 9523*, the information as to state tax liens as specified in *Gov. Code § 7226*, the information as to attachment liens as specified in *Code Civ. Proc. §§ 488.375* and *488.405*, the information as to judgment liens as specified in *Code Civ. Proc. § 697.580*, and the information as to federal liens as specified in *Code Civ. Proc. § 2103* [*Com. Code § 9528*].

[7] Perfection in Proceeds

[a] When Perfection Occurs and Ceases

A security interest in proceeds is a perfected security interest if the security interest in the original collateral was perfected [*Com. Code § 9315(c)*; *see Com. Code §§ 9203(f), 9315(a)(2)* (discussed in *§ 503.21[2*] and [4], respectively, when security interest attaches to proceeds); *see also Com. Code § 9102(a)(64)* (definition of "proceeds," discussed in *§ 503.11[18]*)].

A perfected security interest in proceeds becomes unperfected on the 21st day after the security interest attaches to the proceeds unless any of the following conditions is satisfied [*see* UCC Comment 4 to *Com. Code § 9315* (period of automatic perfection extended form 10 days under former Division 9; loss of perfected status is prospective only, as opposed to retroactive unperfected status under *Com. Code § 9515(c)*)]:

- A filed financing statement covers the original collateral, the proceeds are collateral in which a security interest may be perfected by a filing in the same office where that financing statement has been filed, and the proceeds are not acquired with cash proceeds [*Com. Code § 9315(d)(1)*; *but see*, UCC Comment 5 to *Com. Code § 9315*, at [b], *below*].

- The proceeds are identifiable cash proceeds [*Com. Code § 9315(d)(2)*; *see Com. Code § 9315(b)* (discussed in *§ 503.21[4]*, identifiable proceeds)].

- The security interest in the proceeds is perfected other than under *Com. Code § 9315(c)* (*above*) when the security interest attaches to the proceeds or within 20 days thereafter [*Com. Code § 9315(d)(3)*].

If a filed financing statement covers the original collateral, a security interest in proceeds which remains perfected under *Com. Code § 9315(d)(1)* becomes unperfected either (1) when the effectiveness of the filed financing statement lapses under *Com. Code § 9515* (lapse) or is terminated under *Com. Code § 9513* (termination statement), or (2) the 21st day after the security interest attaches to the proceeds, whichever is later [*Com. Code § 9315(e)*].

Revised Division 9 deletes the provision of former *Com. Code § 9306(4)*, regarding restrictions on a secured party's interest in proceeds if insolvency proceedings are instituted by or against a debtor. Except as provided in the Bankruptcy Code, the debtor's act of entering into bankruptcy does not affect a secured party's right to proceeds [*see* UCC Comment 8 to *Com. Code § 9315*].

[b] Perfection of Security Interest in Proceeds Acquired With Cash Proceeds

Com. Code § 9315(d)(1) and *(3)* reach the same result as former *Com. Code § 9306(3)(a)* with respect to proceeds acquired with cash proceeds--namely, that a security interest in proceeds acquired with cash proceeds remains perfected only if the description of the collateral in the original filed financing statement included the type of property acquired with cash proceeds--but take a different approach. *Com. Code § 9315(d)(1)* makes the general rule of continued perfection inapplicable to proceeds acquired with cash proceeds, leaving perfection of a security interest in those proceeds to the generally applicable perfection rule under *Com. Code § 9315(d)(3)* [*see*, UCC Comment 5 to *Com. Code § 9315*].

ILLUSTRATIONS:

Perfection of Security Interest in Proceeds Acquired With Cash Proceeds. Lender perfects a security interest in Debtor's inventory by filing a financing statement covering "inventory." Debtor sells the inventory and deposits the buyer's check in its deposit account. Debtor draws a check on that account and uses it to pay for equipment. Under the "lowest intermediate balance rule," the funds used to pay for the equipment are identifiable cash proceeds of the inventory. Does Lender's security interest remain perfected in the equipment? No. Because the equipment was purchased with cash proceeds, *Com. Code § 9315(d)(1)* does not extend perfection beyond the 20-day automatic period [*see* UCC Comment 5, Example 1, to *Com. Code § 9315*].

Lender perfects a security interest in Debtor's inventory by filing a financing statement covering "all debtor's property." As in the previous example, debtor sells the inventory, deposit buyer's check in its deposit account, and draws a check on that account to pay for equipment. Under the "lowest intermediate balance rule," the funds used to pay for the equipment are identifiable cash proceeds of the inventory. Does Lender's security interest in the equipment remain perfected beyond the 20-day automatic period ? Yes. Because the financing statement was sufficient to perfect a security interest in debtor's equipment, under *Com. Code § 9315(d)(3)*, lender's security interest in the equipment proceeds remains perfected [*see* UCC Comment 5, Example 2, to *Com. Code § 9315*].

[c] Continuation of Perfection in Cash Proceeds

Com. Code § 9315(d)(2) extends the benefits for former *Com Code § 9306(3)(b)* and *(c)* to identifiable cash proceeds of all types of collateral in which a security interest is perfected by any method. Under *Com. Code § 9315(d)(2)*, if the security interest in the original collateral was perfected, a security interest in identifiable cash proceeds will remain perfect indefinitely, regardless of whether the security interest in the original collateral remains perfected. In many cases, however, such as those governed by *Com. Code §§ 9330(d)* (purchaser of instrument), *9331* (holder in due course of check), *9332* (transferee of money or funds from deposit account), a purchaser or other transferee of the cash proceeds will take free of the perfected security interest [*see* UCC Comment 7 to *Com. Code § 9315*].

California Forms of Pleading and Practice--Annotated

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Volume 44: Sales thru Sanitation and Sewerage Districts-Chs. 500-511
Chapter 503 SALES: SECURED TRANSACTIONS
PART II. LEGAL BACKGROUND
B. Creation, Perfection, and Priorities of Security Interests Generally

44-503 California Forms of Pleading and Practice--Annotated § 503.23

§ 503.23 Conflict of Laws as to Perfection and Priority of Security Interests

[1] General Rules

[a] Nonpossessory Security Interests

Except as otherwise provided in *Com. Code §§ 9303-9306*, inclusive, with respect to the specific types of property mentioned in those sections, and except as otherwise provided in this section, while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral [*Com. Code § 9301(1)*]. *Com. Code § 9301(1)* is intended to simplify prior law and governs both tangible and intangible collateral [UCC Comment 4 to *Com. Code § 9301*; *but see Com. Code §§ 9705, 9706* (discussed in *§ 503.10[2]*, transition provisions may require refiling)].

Except as otherwise provided in *Com. Code § 9301(4)* [*see § 503.23[1][c]*], while negotiable tangible documents, goods, instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs all of the following [*Com. Code § 9301(3)*]:

- Perfection of a security interest in the goods by filing a fixture filing.
- Perfection of a security interest in timber to be cut.
- The effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral.

Com. Code § 9301(3)(B) governs only timber to be cut, not timber that has been cut. Once the timber is cut, the general rule of *Com. Code § 9301(1)* applies. However, to ensure continued perfection, the secured party should file in both the jurisdiction in which the timber to be cut is located (in the office in which a real property mortgage would be filed) and in the state where the debtor is located (a central filing) [UCC Comment 5c to *Com. Code § 9301*; *see Com. Code § 9501* (filing)].

Com. Code §§ 9303-9306 govern the following types of collateral and are discussed as follows:

- *Com. Code § 9303* governs goods covered by certificates of title and is discussed in*§ 503.23[2]*.
- *Com. Code § 9304* governs deposit accounts and is discussed in *§ 503.58[2]*.
- *Com. Code § 9305* governs investment property and is discussed in *§ 503.56[2]*.
- *Com. Code § 9306* governs letter-of-credit rights and is discussed in *§ 503.59[2]*.

[b] Possessory Security Interests

Except as otherwise provided in *Com. Code §§ 9303-9306*, inclusive, with respect to the specific types of property mentioned in those sections [*see § 503.23[1][a]*], while collateral is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a possessory security interest in that collateral [*Com. Code § 9301(2)*]. *Com. Code § 9301(2)* eliminates the troublesome "last event" test of former law [UCC Comment 5a to *Com. Code § 9301*].

A possessory security interest in collateral, other than goods covered by a certificate of title and as-extracted collateral consisting of goods, remains continuously perfected if all of the following conditions are satisfied [*Com. Code § 9316(c)*]:

- The collateral is located in one jurisdiction and subject to a security interest perfected under the law of that jurisdiction.
- Thereafter the collateral is brought into another jurisdiction.
- On entry into the other jurisdiction, the security interest is perfected under the law of the other jurisdiction.

[c] Minerals [As-Extracted Collateral]

Except as otherwise provided in *Com. Code §§ 9303-9306*, inclusive, with respect to the specific types of property mentioned in those sections [*see* [a], *above*], the local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in as-extracted collateral [*Com. Code § 9301(4)*]. A filing with respect to minerals that are as-extracted collateral should be made in the office in which a real property mortgage would be filed [UCC Comment 5 d to *Com. Code § 9301*; *see Com. Code § 9501* (filing)].

[d] Farm Products

While farm products are located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of an agricultural lien on the farm products [*Com. Code § 9302*].

[2] Rules Regarding Debtor's Location

[a] In General

Except as otherwise provided in *Com. Code § 9307*, the following rules determine a debtor's location [*Com. Code § 9307(b)*; *see Com. Code § 9307(k)* (*Com. Code § 9307* applies only for purposes of *Com. Code §§ 9301-9342*)]:

- A debtor who is an individual is located at the individual's principal residence.

- A debtor that is an organization and has only one place of business is located at its place of business [*see Com. Code § 9307(a)* ("place of business" means a place where a debtor conducts its affairs)].

- A debtor that is an organization and has more than one place of business is located at its chief executive office.

However, the foregoing rules of *Com. Code § 9307(b)* apply only if a debtor's residence, place of business, or chief executive office, as applicable, is located in a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral. If *Com. Code § 9307(b)* does not apply, the debtor is located in the District of Columbia [*Com. Code § 9307(c)*].

A person that ceases to exist, have a residence, or have a place of business continues to be located in the jurisdiction specified by *Com. Code § 9307(b)* and *(c)* [*Com. Code § 9307(d)*].

[b] Registered Organizations

"Registered organization" means an organization organized solely under the law of a single state or the United States and as to which the state or the United States must maintain a public record showing the organization to have been organized [*Com. Code § 9102(a)(70)*]. A registered organization that is organized under the law of a state is located in that state [*Com. Code § 9307(e)*; *see Com. Code § 9307(k)* (*Com. Code § 9307* applies only for purposes of this *Com. Code §§ 9301-9342*)]. Except as otherwise provided in *Com. Code § 9307(i)*, a registered organization that is organized under the law of the United States and a branch or agency of a bank that is not organized under the law of the United States or a state are located in any of the following jurisdictions [*Com. Code § 9307(f)*]:

- In the state that the law of the United States designates, if the law designates a state of location.

- In the state that the registered organization, branch, or agency designates, if the law of the United States authorizes the registered organization, branch, or agency to designate its state of location.

- In the District of Columbia, if neither of the two preceding rules applies.

A registered organization continues to be located in the jurisdiction specified by *Com. Code § 9307(e)* or *(f)* notwithstanding either (1) the suspension, revocation, forfeiture, or lapse of the registered organization's status as such in its jurisdiction of organ, or (2) the dissolution, winding up, or cancellation of the existence of the registered organization [*Com. Code § 9307(g)*].

[c] Federal Government, Banks, and Foreign Air Carriers

The United States is located in the District of Columbia [*Com. Code § 9307(h)*; *see Com. Code § 9307(k)* (*Com. Code § 9307* applies only for purposes of this *Com. Code §§ 9301-9342*)].

A branch or agency of a bank that is not organized under the law of the United States or a state is located in the state in which the branch or agency is licensed, if all branches and agencies of the bank are licensed in only one state [*Com. Code § 9307(i)*].

A foreign air carrier under the Federal Aviation Act of 1958, as amended, is located at the designated office of the agent

on which service of process may be made on behalf of the carrier [*Com. Code § 9307(j)*].

[3] Goods Covered by Certificate of Title

[a] General Rule

The local law of the jurisdiction under whose certificate of title the goods are covered governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in goods covered by a certificate of title from the time the goods become covered by the certificate of title until the goods cease to be covered by the certificate of title [*Com. Code § 9303(c)*]. Com. Code § 9303applies to goods covered by a certificate of title, even if there is no other relationship between the jurisdiction under whose certificate of title the goods are covered and the goods or the debtor [*Com. Code § 9303(a)*]. Goods become covered by a certificate of title when a valid application for the certificate of title and the applicable fee are delivered to the appropriate authority. Goods cease to be covered by a certificate of title at the earlier of the time the certificate of title ceases to be effective under the law of the issuing jurisdiction or the time the goods become covered subsequently by a certificate of title issued by another jurisdiction [*Com. Code § 9303(b)*].

[b] Perfection When Governing Law Changes

With respect to goods covered by a certificate of title issued by California, a secured party may perfect a security interest in those goods by taking possession of the goods only in the circumstances described in *Com. Code § 9316(d)* [*Com. Code § 9313(b)*]. *Com. Code § 9313(b)* is necessary to effect changes to the choice of law rules governing goods covered by certificates of title. It indicates the circumstances under which the secured party's act of taking possession of goods covered by a certificate of title is effective to perfect a security interest in the goods: the goods become covered by a certificate of title issued by California at a time when the security interest is perfected by any method under the law of another jurisdiction [UCC Comment 7 to *Com. Code § 9313*].

A security interest in goods covered by a certificate of title which is perfected by any method under the law of another jurisdiction remains perfected until the security interest would have become unperfected under the law of the other jurisdiction had the goods not become covered by the certificate of title from California [*Com. Code § 9316(d)*]. A security interest described in *Com. Code § 9316(d)* becomes unperfected as against a purchaser of the goods for value and is deemed never to have been perfected as against a purchaser of the goods for value if the applicable requirements for perfection under the relevant certificate of title law, regulation, or treaty [*see Com. Code § 9311 (b)*] or under *Com. Code § 9313* (possession) are not satisfied before the earlier of either of the following [*Com. Code § 9316(e*]:

- The time the security interest would have become unperfected under the law of the other jurisdiction had the goods not become covered by a certificate of title from California.

- The expiration of four months after the goods had become covered by a certificate of title from California.

[c] Interest Omitted From Certificate of Title

If, while a security interest in goods is perfected by any method under the law of another jurisdiction, California state issues a certificate of title that does not show that the goods are subject to the security interest or contain a statement that they may be subject to security interests not shown on the certificate, a buyer of the goods, other than a person in the business of selling goods of that kind, takes free of the security interest if the buyer gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest [*Com. Code § 9337(1)*]. In that situation, the omitted security interest also is subordinate to a conflicting security interest in the goods that attaches, and is perfected by compliance with the applicable certificate of title statute [*see Com. Code § 9311(b)*], after issuance of the certificate and without the conflicting secured party's knowledge of the security interest [*Com. Code § 9337(2)*].

[4] When Perfection of Security Interest Lapses Following Change in Governing Law

A security interest perfected pursuant to the law of the jurisdiction designated in *Com. Code § 9301(1)* (discussed in *§ 503.23[1][a]*) or in *Com. Code § 9305(c)* (discussed in *§ 503.56[2][a]*) remains perfected until the earliest of any of the following [*Com. Code § 9316(a)*]:

- The time perfection would have ceased under the law of that jurisdiction.
- The expiration of four months after a change of the debtor's location to another jurisdiction.
- The expiration of one year after a transfer of collateral to a person that thereby becomes a debtor and is located in another jurisdiction.

If a security interest described in *Com. Code § 9316(a)* becomes perfected under the law of the other jurisdiction before the earliest time or event described in that subdivision, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earliest time or event, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value [*Com. Code § 9316(b)*].

Other rules concerning changes in law governing perfection and priority of security interests are *Com. Code § 9316(c)*, governing possessory security interests, discussed in *§ 503.23[1][b]*, *Com. Code § 9316(d), (e)*, governing goods covered by certificates of title, discussed in *§ 503.23[3][b]*, and *Com. Code § 9316(f), (g)*, governing security interest in deposit accounts, letter-of-credit rights, or investment property, which is discussed in *§ 503.58[2][b]*.

California Forms of Pleading and Practice--Annotated

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Volume 44: Sales thru Sanitation and Sewerage Districts-Chs. 500-511
Chapter 503 SALES: SECURED TRANSACTIONS
PART II. LEGAL BACKGROUND
B. Creation, Perfection, and Priorities of Security Interests Generally

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§ 503.24 Determination of Priorities

[1] Unperfected Interests

An unperfected security interest or agricultural lien normally is subordinate to the rights of persons specifically given priority under *Com. Code § 9322* (discussed at *§ 503.24[2]*) [*see Com. Code § 9317(a)(1)*] and of persons who become lien creditors before the earlier of the following times [*Com. Code § 9317(a)(2)*; *but see Com. Code §§ 9317(e), 9323(b), below; see also, e.g., Full Throttle Films, Inc. v. National Mobile Television, Inc. (2009) 180 Cal. App. 4th 1438, 1442-1445, 103 Cal. Rptr. 3d 560* (creditor's lien was prior to third-party claim on attached property because evidence failed to prove that claimant had priority under either statutory test)]:

- The time the security interest or agricultural lien is perfected, or

- The time one of the conditions specified in *Com. Code § 9203(b)(3)* (requirements for security interest to become enforceable, discussed in *§ 503.21[2]*) is met and a financing statement covering the collateral is filed.

Additionally, in the case of goods, instruments, tangible documents, and tangible chattel paper, or a security certificate, a buyer takes free of an unperfected security interest or agricultural lien if that buyer is not a secured party, gives value, and receives delivery of the collateral without knowledge of the security interest or agricultural lien before it is perfected [*Com. Code § 9317(b)*; *see Louis & Diederich, Inc. v. Cambridge European Imports, Inc. (1987) 189 Cal. App. 3d 1574, 1586-1587, 234 Cal. Rptr. 889* (under former *Com. Code § 9301(1)(c)*, knowledge of transferee is actual knowledge, not what reasonable person should have known from circumstances; because California motor vehicle registration system is "full title system," transferee who had no knowledge of defect in title was entitled to rely on information in registration and ownership certificates without further inquiry)]. Similarly, a licensee of a general intangible or a buyer, other than a secured party, of accounts, electronic chattel paper, general intangibles, or investment property other than a certificated security takes free of a security interest if the licensee or buyer gives value without knowledge of the security interest and before it is perfected [*Com. Code § 9317(c)*]. Both of the foregoing (*Com. Code § 9317(b), (c)*) and *Com. Code § 9317(a)(2)*, are subject to *Com. Code § 9317*(e), which, except with respect to certain

persons taking goods in the ordinary course of business [*see Com. Code §§ 9320, 9321*, discussed in *§ 503.24[3]*], gives priority to a person who files a financing statement with respect to a purchase money security interest before or within 20 days after the debtor receives delivery of the collateral. That purchase money security interest takes priority over the rights of a buyer, lessee, or lien creditor which arose between the time the security interest attached and the time of filing [*Com. Code § 9317(e)*].

Except with respect to a security interest held by a secured party that is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor [*Com. Code § 9323(c)*], a security interest is subordinate to the rights of a person who becomes a lien creditor to the extent that the security interest secures an advance made more than 45 days after the person becomes a lien creditor unless (1) the advance was made without knowledge of the lien or (2) the advance was made pursuant to a commitment entered into without knowledge of the lien [*Com. Code § 9323(b)*]. The foregoing does not elevate the priority of a security interest that is subordinate to the rights of a lien creditor under *Com. Code § 9317(a)(2)*; it only subordinates [UCC Comment 4 to *Com. Code § 9323*]. A secured party's knowledge does not cut short the 45-day period during which future advances can achieve priority over an intervening line creditor's interest. Rather, because of the impact of *Com. Code § 9323(b)* on the question whether a security interest in future advances is "protected" under *I.R.C. § 6323(c)(2)* and *(d)*, the priority of the security interest for future advances over a lien creditor is made absolute for 45 days regardless of the knowledge of the secured party concerning the lien. However, if the advance is made after the 45 days, the advance will not have priority unless it was made or committed without knowledge of the lien [UCC Comment 4 to *Com. Code § 9323*].

[2] Perfected Interests

[a] General Priority Rules

Generally, conflicting security interests and agricultural liens rank in priority according to time of filing or perfection. Priority dates from the time a filing covering the collateral is first made, or from the time the security interest or agricultural lien is first perfected, whichever is earlier, if there is no period thereafter when there is neither filing nor perfection [*Com. Code § 9322(a)(1)*]. A perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien [*Com. Code § 9322(a)(2)*]. If conflicting security interests and agricultural liens are unperfected, the first to attach or become effective has priority [*Com. Code § 9322(a)(3)*]. The foregoing may be affected by *Com. Code § 9709(b)* (discussed in *§ 503.10[2][h]*) if a filing that occurred before the effective date of revised Division 9 was ineffective to perfect a security interest under former Division 9, but is effective under revised Division 9 [*see* U.C.C. Comment 3 to *Com. Code § 9322*].

When there is more than one perfected security interest, the security interests rank according to priority in time of filing or perfection. "Filing" of course refers to the filing of a financing statement. "Perfect" refers to the acquisition of a perfected security interest, that is one that has attached and as to which any required perfection step has been taken [*see* U.C.C. Comment 4 to *Com. Code § 9322*; *Com. Code §§ 9308, 9309*]. The rule in *Com. Code § 9322(a)(1)* applies to security interests that are perfected by any method, including temporarily (*Com. Code § 9312*) or on attachment (*Com. Code § 9309*) even though there may be no notice to creditors or subsequent purchasers and notwithstanding any common-law rule to the contrary. The form of the claim to priority--filing or perfection--may shift from time to time, and the rank will be based on the first filing or perfection as long as there is no intervening period without filing or perfection [U.C.C. Comment 4 to *Com. Code § 9322*; *see Com. Code § 9308(c)*]

ILLUSTRATION:

First to File Has Priority. On February 1, A files a financing statement covering a certain item of Debtor's equipment. On March 1, B files a financing statement covering the same equipment. On April 1, B makes a loan to Debtor and obtains a security interest in the equipment. On May 1, A makes a loan to Debtor and obtains a security interest in the same collateral. Who has priority? A has priority even though B's loan was made earlier and was perfected when made. It makes no difference whether A knew

> of B's security interest when A made its advance. The foregoing problem is particular to a notice-filing system under which filing may occur before the security interest attaches [*see Com. Code § 9502*]. The justification for determining priority by order of filing lies in the necessity of protecting the filing system--that is of allowing the first secured party who has filed to make subsequent advances without each time having to check for subsequent filings as a condition of protection. However, this first-to-file protection is not absolute. For example *Com. Code § 9324* affords priority to certain purchase money security interests, even if a competing secured party was the first to file or perfect [*see* U.C.C. Comment 4, Example 1, to *Com. Code § 9322*].

A perfected agricultural lien on collateral has priority over a conflicting security interest in or agricultural lien on the same collateral if the statute creating the agricultural lien so provides [*Com. Code § 9322(g)*]. If the statute creating the agricultural lien does not grant it priority, *Com. Code § 9322(a)* applies the same priority rules to an agricultural line as to a security interest, regardless of whether the agricultural line conflicts with another agricultural lien or with a security interest [UCC Comment 12 to *Com. Code § 9322*].

Com. Code § 9322 states the general priority rules, which are subject to other rules in *Com. Code 9301 et seq.* and the following exceptions [*Com. Code § 9322(f)*]:

- A perfected agricultural lien on collateral [*Com. Code § 9322(f)(1), (g)*].
- A security interest of a collecting bank [*Com. Code § 9322(f)(2)*; *see Com. Code § 4210*].
- A security interest of an issuer or nominated person [*Com. Code § 9322(f)(3)*; *see Com. Code § 5118*].
- A security interest arising under Division 2 (*Com. Code § 2101 et seq.*) or Division 10 (*Com. Code § 10101*) [*Com. Code § 9322(f)(4)*; *see Com. Code § 9110*].

Some of the other rules in *Com. Code 9301 et seq.* that override the general rules of *Com. Code § 9322* are those governing purchase money interests [*Com. Code § 9324*; *see § 503.24[2][c]*] and those allowing special priority in particular types of collateral, such as *Com. Code § 9327* (deposit accounts, discussed in *§ 503.58[3]*), *Com. Code § 9328* (investment property, discussed in *§ 503.56[3]*), *Com. Code § 9329* (letter of credit rights, discussed in *§ 503.59[3]*), *Com. Code § 9330* (chattel paper and instruments, discussed in *§§ 503.49[3], 503.50[2],* and *503.52[8]*), and *Com. Code § 9334* (fixtures, discussed in *§§ 503.24[2][e]* and *503.47[6]*) [see U.C.C. Comment 2 to *Com. Code § 9322*].

[b] Priorities in Supporting Obligations and Proceeds

For purposes of *Com. Code § 9322(a)(1)* [*see § 503.24[2][a]*], the time of filing or perfection as to a security interest in collateral is also the time of filing or perfection as to a security interest in proceeds of the collateral [*Com. Code § 9322(b)(1)*; *see Com. Code § 9315*, discussed in *§§ 503.21[4], 503.22[7]*]. Similarly, for purposes of *Com. Code § 9322(a)(1)*, the time of filing or perfection as to a security interest supported by a supporting obligation is also the time of filing or perfection as to a security interest in the supporting obligation [*Com. Code § 9322(b)(2)*]. A "supporting obligation" is a letter-of-credit right or secondary obligation that supports the payment or performance of an account, chattel paper, document, general intangible, instrument, or investment property [*Com. Code § 9102(a)(77)*]. Inasmuch as no agricultural lien on proceeds arise under Division 9, *Com. Code § 9322(b)-(e)* do not apply to proceeds of agricultural liens. However, if an agricultural lien has priority under *Com. Code § 9322(g)* (discussed in *§ 503.24[2][a]*), and the statute creating the agricultural lien gives the secured party a line on proceeds of the collateral subject to the lien, a court should apply the principle of *Com. Code § 9322(g)* and award priority in the proceeds to the holder of the perfected agricultural lien [UCC Comment 12 to *Com. Code § 9322*].

Except as otherwise provided in *Com. Code § 9322(f)* [*see § 503.24[2][a]*], a security interest in collateral which qualifies for priority over a conflicting security interest under *Com. Code § 9327* (deposit accounts, discussed in *§ 503.58[3]*), *Com. Code § 9328* (investment property, discussed in *§ 503.56[3]*), *Com. Code § 9329* (letter-of-credit rights, discussed in *§ 503.59[3]*), *Com. Code § 9330* (chattel paper and instruments, discussed in §§ 503.49[3], 503.50[2], 503.52[9]), or *Com. Code § 9331* (purchasers of instrument, documents, or securities, discussed in *§ 503.24[3]*), also has priority over a conflicting security interest in both of the following [*Com. Code § 9322(c)*]:

- Any supporting obligation for the collateral.

- Proceeds of the collateral if (1) the security interest in proceeds is perfected, (2) the proceeds are cash proceeds or of the same type as the collateral, and (3) in the case of proceeds that are proceeds of proceeds, all intervening proceeds are cash proceeds, proceeds of the same type as the collateral, or an account relating to the collateral.

Com. Code § 9322(c)(2) provides the baseline priority rule for proceeds of "non-filing" collateral, which applies if the secured party has taken steps required for a non-temporal priority over a conflicting security interest in "non-filing" collateral, such as control in the case of a deposit account. *Com. Code § 9322(c)(2)* determines the priority of proceeds of non-filing collateral whether or not there exists an actual conflicting security interest in the original non-filing collateral. Under *Com. Code § 9322(c)(2)*, the priority in the original collateral continues in proceeds, if the security interest in proceeds is perfected and the proceeds are cash-proceeds or non-filing proceeds of the same type as the original collateral. "Type of collateral" means a type of collateral defined in the Uniform Commercial Code and should be read broadly. For example, a security is "of the same type" as a security entitlement (i.e., investment property) and a promissory note is "of the same type" as a draft (i.e., instrument) [UCC Comment 8 to *Com. Code § 9322*].

Except as otherwise provided in *Com. Code § 9322(f)* [*see 503.24[2][a]*], if the proceeds of the collateral are not cash proceeds, chattel paper, negotiable documents, instruments, investment property, or letter-of-credit rights, and a security interest was perfected in collateral that is chattel paper, deposit accounts, negotiable documents, instruments, investment property, or letter-of-credit rights by a method other than filing, conflicting perfected security interests in proceeds of the collateral rank according to priority in time of filing [*Com. Code § 9322(d), (e)*].

[c] Purchase Money Security Interests

Except as otherwise provided in *Com. Code § 9324(g)*, a perfected purchase money security interest [*see Com. Code § 9103* (defining "purchase money security interest," discussed in *§ 503.11[19]*)], in goods other than inventory or livestock [*see* discussions in *§§ 503.40[5*] (purchase money security interests in goods, livestock, and software), 503.41[2] (purchase money security interest in inventory)] has priority over a conflicting security interest in the same goods, and, except as otherwise provided in *Com. Code § 9327* [*see* discussion in *§ 503.58[3]*], a perfected security interest in its identifiable proceeds also has priority, if the purchase money security interest is perfected when the debtor receives possession of the collateral or within 20 days thereafter [*Com. Code § 9324(a)*]. The rationale for giving purchase money security interests priority is in part to counteract the fact creditors may tie up all of debtor's assets through after-acquired property clauses [*see T.M. Cobb Co. v. County of Los Angeles (1976) 16 Cal. 3d 606, 621, 128 Cal. Rptr. 655, 547 P.2d 431* (discussing former *Com. Code §§ 9312(3)* and *(4)*)].

The secured party may file with respect to a purchase money security interest before or within 20 days after the debtor receives possession of the collateral. In that case, except as otherwise provided in *Com. Code §§ 9320, 9321* (discussed in *§ 503.24[3]*), the purchase money security takes priority over the rights of a buyer, lessee, or lien creditor which arise between the time the security interest attaches and the time of filing [*Com. Code § 9317(e)*].

If more than one security interest qualifies for priority in the same collateral under *Com. Code § 9324(a), (b), (d),* or *(f)*

[*see* discussions in *§§ 503.40[5], 503.41[2]*], the following rules apply [*Com. Code § 9324(g)*]:

- A security interest securing an obligation incurred as all or part of the price of the collateral has priority over a security interest securing an obligation incurred for value given to enable the debtor to acquire rights in, or the use of, collateral.

- In all other cases, *Com. Code § 9322(a)* (discussed in *§ 503.24[2][a]*) applies to the qualifying security interests.

[d] Future Advances

A security agreement may provide that collateral secures futures advances [*see Com. Code § 9204(c)* (discussed in *§ 503.21[5]*)]. Generally, the rule in Code § 9322(a)(l) [*see § 503.24[2][a]*] does not distinguish among various advances made by a secured party. The priority of every advance dates from the earlier of filing or perfection. However, in rare instances, the priority of an advance dates from the time the new advance is made [UCC Comment 4 to *Com. Code § 9322*]. *Com. Code § 9323* collects all the special rules dealing with the priority of advances made by a secured party after a third party acquires an intervening security interest in the collateral [UCC Comment 2 to *Com. Code § 9323*]:

- *Com. Code § 9323(b)* (when lien creditor takes subject to advance) is discussed in [1], *above*.

- *Com. Code § 9323(d), (e)* (when buyer, other than in ordinary course of business, takes free of interest securing advance) is discussed in *§ 503.40[5][a]*.

- *Com. Code § 9323(f), (g)* (when lessee, other than in ordinary course of business, takes free of interest securing advance) is discussed in *§ 503.40[5][b]*.

Except with respect to a security interest held by a secured party who is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor [*Com. Code § 9323(c)*], for purposes of determining the priority of a perfected security interest under *Com. Code § 9322(a)(1)*, perfection of the security interest dates from the time an advance is made to the extent that the security interest secures an advance that satisfies both of the following conditions [*Com. Code § 9323(a)*]:

- It is made while the security interest is perfected only under *Com. Code § 9309* when it attaches, or temporarily under *Com. Code § 9312 (e), (f),* or *(g)*.

- It is not made pursuant to a commitment entered into before or while the security interest is perfected by a method other than under *Com. Code § 9309* or under *Com. Code § 9312 (e), (f),* or *(g)*.

The only time the first-to-file-or-perfect rule of *Com. Code § 9322(a)(1)* does *not* determine priority is when a financing statement was not filed and the advance is the giving of value, which constitutes the last step for attachment of perfection. *Com. Code § 9323(a)* states the only other instance when the time of an advance figures in the priority scheme in *Com. Code § 9322*: when the (other) security interest is perfected only automatically under *Com. Code § 9309*, or temporarily under *Com. Code § 9312 (e), (f),* or *(g),* and the advance was not made pursuant to a commitment entered into while the security interest was perfected by another method [UCC Comment 3 to *Com. Code § 9323*].

[e] Priority of Perfected Security Interest in Crops Over Real Estate Encumbrance

A perfected security interest in crops growing on real property has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in, or is in possession of, the real property [*Com. Code § 9334(i)*].

[f] Possessory Liens

A person in the ordinary course of business may furnish services or materials with respect to goods subject to a security interest. A lien on goods that depends on that person's possession, and is given by statute or rule of law for the materials, takes priority over a security interest unless the lien is statutory and the statute expressly provides otherwise [*Com. Code § 9333*]. If the statute creating the possessory lien is silent as to its priority relative to security interests, *Com. Code § 9333* provides a rule of interpretation that the possessory lien takes priority, even if the statue has been construed judicially to make the possessory lien subordinate [UCC Comment 2 to *Com. Code § 9333*].

[3] Favored Position of Certain Buyers and Holders

[a] Buyers in Ordinary Course of Business

Although, under the Commercial Code generally, a buyer in the ordinary course of business is one who buys in good faith and without knowledge that the sale is in violation of a security interest [*see Com. Code § 1201(b)(9)*, discussed in *§ 503.161[4]*], *Com. Code § 9320(a)* specifically provides that, except when the goods are in the possession of the secured party under *Com. Code § 9313* [*Com. Code § 9320(e)*], a buyer in the ordinary course of business takes free of a security interest created by the buyer's seller even if the security interest is perfected and the buyer knows of its existence [*Com. Code § 9320(a)*]. Read together, the general definition of buyer in the ordinary course of business and *Com. Code § 9320(a)* provide that the buyer takes free of the security interest if he or she merely knows there is a security interest that covers the goods, but takes subject to the security interest if he or she knows the sale violates a term in an agreement with the secured party [*see* U.C.C. Comment 3 to *Com. Code § 9320*; *Producers Cotton Oil Co. v Amstar Corp (1988) 197 Cal. App. 3d 638, 653-654, 242 Cal. Rptr. 914* (decided under former *Com. Code § 9307(1)*)]. *Com. Code § 9320(b)*, which relates to consumer goods, is discussed in *§ 503.42[3]*. For a complaint for use by a buyer in the ordinary course of business to seek a declaration that he or she takes free of another interest, see *§ 503.161*.

The limitations of *Com. Code § 9320(a)* and *(b)* on persons who may take free of a security interest apply only to unauthorized sales by the debtor. If the secured party authorized the sale, in an express agreement or otherwise, the buyer takes free under *Com. Code § 9315(a)* without regard to the limitations of *Com. Code § 9320* [*see* U.C.C. Comment 6 to *Com. Code § 9320*].

Other requirements for maintenance of a buyer's favored position vis-a-vis the holder of a perfected security interest are inherent in the definition of "buyer in the ordinary course of business," namely, that the sale was made by a person in the business of selling goods of the same kind as the collateral [*American National Bank v. Cloud (1988) 201 Cal. App. 3d 766, 772-774, 247 Cal. Rptr. 325* ; *see Com. Code § 1201(b)(9)*, discussed in *§ 503.161[4]*], and that bulk sales, distress sales at an obvious loss price, or liquidation sales will not qualify as in the ordinary course of business [*American National Bank v. Cloud (1988) 201 Cal. App. 3d 766, 772, 247 Cal. Rptr. 325* (dicta)].

[b] Licensees in Ordinary Course of Business

Until January 1, 2013 [*Com. Code § 9321(d)*], a licensee in ordinary course of business takes its rights under a nonexclusive license free of a security interest in the general intangible created by the licensor, even if the security interest is perfected and the licensee knows of its existence [*Com. Code § 9321(b)*].

A "licensee in ordinary course of business" is a person that becomes a licensee of a general intangible in good faith, without knowledge that the license violates the rights of another person in the general intangible, and in the ordinary course from a person in the business of licensing general intangibles of that kind. A person becomes a licensee in the ordinary course if the license to the person comports with the usual or customary practices in the kind of business in which the licensor is engaged or with the licensor's own usual or customary practices [*Com. Code § 9321(a)*].

[c] Lessees in Ordinary Course of Business

A lessee in ordinary course of business takes its leasehold interest free of a security interest in the goods created by the lessor, even if the security interest is perfected and the lessee knows of its existence [*Com. Code § 9321(c)*].

[d] Holders, Holders in Due Course, and Protected Purchasers

Nothing in Division 9 limits the rights of a holder in due course of a negotiable instrument [*see Com. Code § 3302*], a holder to which a negotiable document of title has been duly negotiated [*see Com. Code § 7501*], or a protected purchaser of a security [*see Com. Code § 8303*]. These holders or purchasers take priority over an earlier security interest, even if perfected, to the extent provided in Division 3 (*Com. Code § 3101 et seq.*, Division 7 (*Com. Code § 7101 et seq.*), and Division 8 (*Com. Code § 8101 et seq.*) [*Com. Code § 9331(a)*]. Division 9 does not limit the rights of or impose liability on a person to the extent that the person is protected against the assertion of a claim under Division 8 [*Com. Code § 9331(b)*], nor does filing under Division 9 constitute notice of a claim or defense to the holders, or purchasers, or persons described in *Com. Code § 9331(a)* and *(b)* [*Com. Code § 9331(c)*].

[4] Interest or Lien Perfected by Filing Statement Containing Incorrect Information

If a security interest or agricultural lien is perfected by a filed financing statement providing information described in *Com. Code § 9516(b)(5)* which is incorrect at the time the financing statement is filed, the security interest or agricultural lien is subordinate to a conflicting perfected security interest in the collateral to the extent that the holder of the conflicting security interest gives value in reasonable reliance on the incorrect information [*Com. Code § 9338(1)*]. In addition, in that situation a purchaser of the collateral, other than a secured party, takes free of the security interest or agricultural lien to the extent that, in reasonable reliance on the incorrect information, the purchaser gives value and, in the case of tangible chattel paper, tangible documents, goods, instruments, or a security certificate, receives delivery of the collateral [*Com. Code § 9338(2)*]. A secured party or purchaser who has not made itself aware of the information in the filing office with respect to the debtor cannot act in "reasonable reliance" on the information [UCC Comment 2 to *Com. Code § 9338*].

Com. Code § 9338 applies to financing statements that contain information that is incorrect at the time of filing and imposes a small risk of subordination on the filer. *Com. Code § 9507* deals with financing statements containing information that is correct at the time of filing but become incorrect later. Except as provided by *Com. Code § 9507(c)* with respect to changes in the debtor's name, an otherwise effective financing statement does not become ineffective if the information contained in it becomes inaccurate [UCC Comment 3 to *Com. Code § 9338*].

The information described in *Com. Code § 9516(b)(5)* is:

- The debtor's mailing address.
- An indicate whether the debtor is an individual or an organization.
- If the financing statement indicates that the debtor is an organization, one of the following: (1) a type of organization for the debtor, (2) a jurisdiction of organization for the debtor, or (3) an organizational identification number for the debtor or an indication that the debtor has none.

For analogous rules applicable in the case of a certificate of title that omits a security interest, see *Com. Code § 9337*, discussed in *§ 503.23[3][c]*.

[5] Between Transferor's Secured Party and Transferee's Secured Party

[a] Security Interests in Transferred Collateral

Com. Code § 9325 is new in revised Division 9 and addresses the "double debtor" problem that arises when a debtor acquires property that is subject to a security interest created by another debtor [UCC Comment 2 to *Com. Code § 9325*]. Except as otherwise provided in *Com. Code § 9325(b)*, a security interest created by a debtor is subordinate to a security interest in the same collateral created by another person if the acquired the collateral subject to the security interest created by the other person, the security interest created by the other person was perfected when the debtor acquired the collateral, and there is no period thereafter when the security interest is unperfected [*Com. Code § 9325(a)*]. *Com. Code § 9325(a)* subordinates a security interest only if the security interest otherwise would have priority solely under the basic priority rules of *Com. Code § 9322(a)* (discussed in*§ 503.24[2][a]*) or under the purchase money priority rules of *Com. Code § 9324*, or the security interest arose solely under *Com. Code § 2711(3)* (buyer) or *Com. Code § 10508(e)* (lessee) [*Com. Code § 9325(b)*].

The appropriateness of the rule in *Com. Code § 9325(a)* is most apparent when it works to subordinate security interests having priority under the basic priority rules of *Com. Code § 9322(a)* (discussed in [2][a], *above*) or under the purchase money priority rules of *Com. Code § 9324*. The rule also works properly when applied to the security interest of a buyer under *Com. Code § 2711(3)* or a lessee under *Com. Code § 10508(e)*. However, *Com. Code § 9325(a)* may provides an inappropriate resolution of the "double debtor" problem in some of the wide variety of other contexts in which the problem may arise. Although *Com. Code § 9325(b)* limits application of *Com. Code § 9325(a)* to those case in which *Com. Code § 9325(a)* is known to be appropriate, courts should apply the rule in other settings, if necessary to promote underlying purposes and policies of the Uniform Commercial Code [UCC Comment 6 to *Com. Code § 9325*].

[b] New Debtors

Com. Code § 9326 is new in revised Division 9 and addresses the priority contests that may arise when a new debtor becomes bound by the security agreement of an original debtor and each debtor has a secured creditor [UCC Comment 2 to *Com. Code § 9326*]. Subject to *Com. Code § 9326(b)*, a security interest created by a new debtor [*see Com. Code § 9102(a)(56)* (defining "new debtor," at *§ 503.11[9][a]*] which is perfected by a filed financing statement that is effective solely under *Com. Code § 9508* (discussed in *§ 503.22[5][i]*) in collateral in which a new debtor has or acquires rights is subordinate to a security interest in the same collateral which is perfected other than by a filed financing statement that is effective solely under *Com. Code § 9508*[*Com. Code § 9326(a)*]. "A filed financing statement that is effective solely under *Com. Code § 9508*" refers to a financing statement filing against the original debtor that continues to be effective under *Com. Code § 9508*. It does not encompass a new initial financing statement providing the name of the new debtor even if the initial financing statement is filed to maintain the effectiveness of a financing statement under circumstances described in *Com. Code § 9508*. Nor does it encompass a financing statement filed against the original debtor which remains effective against collateral transferred by the original debtor to a new debtor [UCC Comment 2 to *Com. Code § 9326*].

The other provisions relating to perfection and priority (*Com. Code § 9301 et seq.*) determine the priority among conflicting security interests in the same collateral perfected by filed financing statements that are effective solely under *Com. Code § 9508*. However, if the security agreements to which a new debtor became bound as debtor were not entered into by the same original debtor, the conflicting security interests rank according to priority in time of the new debtor's having become bound [*Com. Code § 9326(b)*; *see* discussion in *§ 503.22[5][i]*].

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44-503 California Forms of Pleading and Practice--Annotated § 503.25

§ 503.25 Debtor's Statement of Indebtedness or List of Collateral

[1] Permitted Types of Requests

A debtor, by an authenticated record, may request information from the secured party (other than a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor) regarding the collateral or the obligation. The request can be in any of the following three forms [*Com. Code § 9210(a)*; see *Com. Code § 9210(b)* (exceptions to types of secured parties required to respond)]:

- A "request for an accounting," by which a debtor requests the recipient to provide an accounting of the unpaid obligations secured by collateral and reasonably identifies the transaction or relationship that is the subject of the request.

- A "request regarding a list of collateral," by which a debtor requests the recipient to approve or to correct a list of what the debtor believes to be the collateral securing an obligation and reasonably identifies the transaction or relationship that is the subject of the request.

- A "request regarding a statement of account," by which a debtor requests the recipient to approve or to correct a statement indicating what the debtor believes to be the aggregate amount of unpaid obligations secured by collateral as of a specified date and reasonably identifies the transaction or relationship that is the subject of the request.

A debtor is entitled to one response to a request under this section without charge during any six-month period. The secured party may require payment of a charge not exceeding $25 for each additional response [*Com. Code § 9210(f)*].

For a complaint for damages caused by the secured party's failure to respond to a request for accounting or correction or approval of statement, see *§ 503.100*.

[2] Required Responses

A secured party, other than a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor, must comply with a request within 14 days after receipt. In the case of a request for an accounting, the secured party must authenticate an accounting and send it to the debtor [*Com. Code § 9210(b)(1)*]. In the case of a request regarding a list of collateral or a request regarding a statement of account, the secured party must approve or correct the list or statement, authenticate it, and send the debtor the approval or correction [*Com. Code § 9210(b)(2)*].

Alternatively, with respect to a request regarding a list of collateral, if a secured party claims a security interest in all of a particular type of collateral owned by the debtor, that secured party may comply with by sending the debtor an authenticated record including a statement to the effect that it claims an interest in all of that particular type of collateral within 14 days after receipt [*Com. Code § 9210(c)*].

A secured party who fails to comply with a request regarding a list of collateral or a statement of account under *Com. Code § 9210*, may claim a security interest only as shown in the list or statement included in the request as against a person that is reasonably misled by the failure [*Com. Code § 9625(g)*]. A secured party who fails to comply with the request is also liable for actual and statutory damages ($500), as discussed in *§§ 503.29* and *503.100[4]*.

[3] Procedure if Recipient Claims No Interest In Collateral or Obligation

If the person that receives a request regarding a list of collateral, a request for an accounting, or a request regarding a statement of account, claims no interest in the collateral or in the obligations (depending on which type of request is involved) when it receives the request, but claimed an interest in the collateral or in the obligations at an earlier time must comply with the request within 14 days after receipt by sending to the debtor an authenticated record that disclaims any interest in the collateral or the obligations (depending on the type of request involved) and, if known to the recipient, provides the name and mailing address of any assignee of or successor to the recipient's interest in the collateral or in the obligations [*Com. Code § 9210(d)* (collateral), (e) (obligations)].

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44-503 California Forms of Pleading and Practice--Annotated § 503.26

§ 503.26 Rights and Duties of Parties in Possession

[1] Secured Party

A secured party must use reasonable care in the custody and preservation of collateral in that party's possession, as well as follow various other requirements and procedures discussed below. In the case of chattel paper or an instrument, reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed [*Com. Code § 9207(a)*]. Except when the secured party in possession is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor [*see Com. Code § 9207(d)*], reasonable expenses (including the cost of any insurance and payment of taxes or other charges) incurred in the custody, preservation, use, or operation of the collateral are chargeable to the debtor and are secured by the collateral. The debtor bears the risk of accidental loss or damage to the extent of any deficiency in any effective insurance coverage [*Com. Code § 9207(b)(1), (2)*]. The secured party must keep the collateral identifiable, but fungible collateral may be commingled [*Com. Code § 9207(b)(3)*]. Except when the secured party in possession is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor [*see Com. Code § 9207(d)*], a secured party having possession of collateral, or control of collateral that is an electronic document of title, a deposit account, electronic chattel paper, investment property or a financial asset, or letter-of-credit rights [*see generally Com. Code §§ 7106, 9104-9107*] (1) may hold as additional security any proceeds, except money or funds, received from the collateral, (2) must apply money or funds received from the collateral to reduce the secured obligation, unless remitted to the debtor, and (3) may create a security interest in the collateral [*Com. Code § 9207(c)*]. *Com. Code § 9207(d)*, applicable when the secured party is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor, is discussed in *§ 503.46[5]*.

A secured party is liable for any loss caused by his or her failure to meet any obligation imposed above [*Com. Code § 9625(b)-(c)*; *see §§ 503.29, 503.101*]. The secured party may use or operate the collateral (1) for the purpose of preserving it or its value, (2) as permitted by an order of a court having competent, or (3) except in the case of consumer goods, in the manner and to the extent agreed by the debtor [*Com. Code § 9207(b)(4)*].

[2] Debtor in Possession

Because the debtor, as the owner of the collateral, is the one originally and normally entitled to its possession, a typical

security agreement expressly provides for the rights and responsibilities of the debtor as to the collateral while it remains subject to the creditor's security interest.

A security agreement that expressly prohibits the debtor's disposition of the collateral without the written consent of the secured party in effect requires an actual prior or subsequent consent in writing by the secured creditor that manifests the creditor's intent to authorize disposition free of the security interest. Mere acquiescence of the creditor is insufficient, and any allowable exception of an implied agreement is limited to the situation of a prior course of dealing with the debtor that would permit such a disposition [*Central Cal. Equip. Co. v. Dolk Tractor Co. (1978) 78 Cal. App. 3d 855, 862, 144 Cal. Rptr. 367* ; *see Com. Code § 9315(a)(2)*; *see also Gordon v. Hamm (1998) 63 Cal. App. 4th 1324, 1330-1332, 74 Cal. Rptr. 2d 631* (owners' entrustment of used motor home to dealer did not constitute "disposition" for purposes of former *Com. Code § 9306(2)*; buyers took motor home subject to original owners' lenders' perfected security interest)].

A secured party may also sue for impairment of the collateral or security interest by the alleged wrongful acts of third parties. The amount of damages for impairment is limited to a sum not greater than the balance due on the indebtedness plus collection costs [*Baldwin v. Marina City Properties, Inc. (1978) 79 Cal. App. 3d 393, 414, 145 Cal. Rptr. 406* (secured party holding limited partnership interest as collateral, however, is not able to sue generally for breach of partnership agreement or breach of fiduciary duty arising out of the impairment)].

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44-503 California Forms of Pleading and Practice--Annotated § 503.27

§ 503.27 Secured Party's Rights and Duties on Default

[1] Generally

After default, a secured party has the rights provided in *Com. Code § 9601 et seq* and, except to the extent that certain waivers by debtors and obligors are prohibited by *Com. Code § 9602* [*see* discussion in *§ 503.28[2][a]*], those rights provided by agreement of the parties [*Com. Code § 9601(a)*]. A secured party in possession of collateral or control of collateral under *Com. Code § 7106* (electronic document of title), 9104 (deposit account), 9105 (electronic chattel paper), 9106 (investment property), or 9107 (letter-of-credit right) has the rights and duties provided in *Com. Code § 9207*, discussed in *§ 503.26[1]* [*Com. Code § 9601(b)*]. The secured party may reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure. If the collateral is documents, the secured party may proceed either as to the documents or as to the goods they cover [*Com. Code § 9601(a)(2)*]. The foregoing rights and remedies are cumulative and may be exercised simultaneously [*Com. Code § 9601(c)*]. The secured party may take possession of the collateral, as discussed in [2], *below* [*Com. Code § 9609(1)(a)*; *see KMAP, Inc. v. Town & Country Broadcasters, Inc. (1975) 49 Cal. App. 3d 544, 546-548, 122 Cal. Rptr. 420* (suit for deficiency after sale of collateral, which collateral was obtained by earlier suit for possession after default of debtor, does not constitute splitting of single cause of action barring subsequent deficiency suit, because two different causes of action are involved: right to improve security on default, and right to satisfaction of remaining debt after exhaustion of collateral)] and may dispose of the collateral, as discussed in [4], *below* [*Com. Code § 9610*]. The secured party may pursue alternative remedies until the obligation is satisfied [*Brunzell Construction Co., Inc. v. Smith (1988) 200 Cal. App. 3d 617, 622-623, 246 Cal. Rptr. 182]* .

Com. Code § 9601 et seq impose no duties on a secured party that is a consignor or is a buyer of accounts, chattel paper, payment intangibles, or promissory notes except, as provided by *Com. Code § 9607(c)*, discussed in [3][a], *below* [*Com. Code § 9601(g)*]. As discussed in *§ 503.29[4]*, a secured party owes no duties to debtors or obligors of whom it does not know or who it does know how to contact [*see Com. Code §§ 9605, 9628*].

[2] Taking Possession of Collateral

After default, a secured party has the right to take possession of the collateral unless otherwise agreed [*Com. Code §*

9609(a)(1)]. The secured party may proceed pursuant to judicial process in taking possession of the collateral or without judicial process, if it does so without breach of the peace [*Com. Code § 9609(b)*]. For a form for use to obtain possession by judicial process, see *§ 503.120*. If so agreed, and in any event after default, the secured party may require the debtor to assemble the collateral and make it available at a place to be designated by the secured party which is reasonably convenient to both parties [*Com. Code § 9609(c)*]. The provision for self-help repossession has been held constitutional in that, although it allows for the taking of property without prior notice and opportunity for hearing, it is a procedure traditionally recognized at common law and it may be executed without state action [*Kipp v. Cozens (1974) 40 Cal. App. 3d 709, 713-716, 115 Cal. Rptr. 423* ; *see also Adams v. Southern Cal. First Nat'l Bank (1973) 492 F.2d 324, 329 , cert. denied, 419 U.S. 1006 (1974)]* .

[3] Collection or Enforcement After Default

[a] In General

If so agreed, and in any event after default, a secured party may do all of the following [*Com. Code § 9607(a), (b)*]:

- Notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party.

- Take any proceeds to which the secured party is entitled under *Com. Code § 9315*.

- Enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral. If necessary to enable a secured party to exercise the right of a debtor to enforce a mortgage nonjudicially, the secured party may record in the office in which a record of the mortgage is recorded both (1) a copy of the security agreement that creates or provides for a security interest in the obligation secured by the mortgage, and (2) the secured party's sworn affidavit in recordable form stating that a default has occurred and that the secured party is entitled to enforce the mortgage nonjudicially.

- If it holds a security interest in a deposit account perfected by control under paragraph *Com. Code § 9104(a)(1)* (bank at which deposit is maintained is secured party, as discussed in *§ 503.58[1]*), apply the balance of the deposit account to the obligation secured by the deposit account.

- If it holds a security interest in a deposit account perfected by control under *Com. Code § 9104(a)(2)* or *(3)* (discussed in *§ 503.58[1]*), instruct the bank to pay the balance of the deposit account to or for the benefit of the secured party.

A secured party must proceed in a commercially reasonable manner if the secured party undertakes to collect from or enforce an obligation of an account debtor or other person obligated on collateral and the secured party is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor or a secondary obligor [*Com. Code § 9607(c)*]. The fact that a greater amount could have been obtained by a collection or enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner [*Com. Code § 9627(a)*]. A collection, enforcement, disposition, or acceptance is commercially reasonable if it has been approved in or by (1) a judicial proceeding, (2) a bona fide creditors' committee, (3) a representative of creditors, or (4) an assignee for the benefit of creditors [*Com. Code § 9627(c)*], but approval in one of those ways need not be obtained; and lack of approval does not mean that the collection, enforcement, disposition, or acceptance is not commercially reasonable [*Com. Code § 9627(d)*]. A secured

party may deduct from the collections made reasonable expenses of collection and enforcement, including reasonable attorney's fees and legal expenses incurred by the secured party [*Com. Code § 9607(d)*]. *Com. Code § 9607(c)* does not determine whether an account debtor, bank, or other person obligated on collateral owes a duty to a secured party [*Com. Code § 9607(e)*].

After application of the proceeds of collection in the order described in [b], *below*, the secured party must account to and pay a debtor for any surplus, and except as otherwise provided in *Com. Code § 9626(b)* (consumer goods transactions), the obligor is liable for any deficiency [*Com. Code § 9608(a)(4)*]. However, if the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, the debtor is not entitled to any surplus, and the obligor is not liable for any deficiency. *Code Civ. Proc. § 701.040(b)* relating to the payment of proceeds applies only if the security agreement provides that the debtor is entitled to any surplus [*Com. Code § 9608(b)*].

[b] Application of Proceeds of Collection or Enforcement

If a security interest or agricultural lien secures payment or performance of an obligation, a secured party must apply or pay over for application the cash proceeds of collection or enforcement under *Com. Code § 9607* in the following order to [*Com. Code § 9608(a)(1), (2)*]:

- First, the reasonable expenses of collection and enforcement and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party.

- Second, the satisfaction of obligations secured by the security interest or agricultural lien under which the collection or enforcement is made.

- Third, the satisfaction of obligations secured by any subordinate security interest in or other lien on the collateral subject to the security interest or agricultural lien under which the collection or enforcement is made if the secured party receives an authenticated demand for proceeds before distribution of the proceeds is completed. If requested by a secured party, a holder of a subordinate security interest or other lien must furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder complies, the secured party need not comply with the holder's demand.

A secured party need not apply or pay over for application noncash proceeds of collection and enforcement under *Com. Code § 9607* unless the failure to do so would be commercially unreasonable. A secured party that applies or pays over for application noncash proceeds must do so in a commercially reasonable manner [*Com. Code § 9608(a)(3)*].

[4] Acceptance of Collateral in Satisfaction of Debt (Strict Foreclosure)

[a] Requirements and Proposal

The secured party may accept the collateral in full or partial satisfaction of the obligation it secures, except when the collateral is consumer goods and the debtor has made a 60 percent payment, in which case the collateral must be disposed of unless the debtor waives the right to require disposition [*Com. Code § 9620(a), (e)*; *see § 503.42[5][a]* (rules applicable to consumer goods collateral)]. The secured party's acceptance of the collateral in satisfaction of the debt is called "strict foreclosure" [*see* UCC Comment 2. to *Com. Code § 9620*]. An additional requirement when the collateral is consumer goods is that the collateral is not in the possession of the debtor when the debtor consents to the acceptance [*Com. Code § 9620(a)(3)*]. Other requirements, applicable in all cases, are that the debtor consent to the acceptance under *Com. Code § 9620(c)* and that the secured party not receive, within the time set forth in *Com. Code § 9620(d)* (generally 20 days after notification), discussed in [d], *below*, a notification of objection to the proposal authenticated by either (1) a person to which the secured party was required to send the proposal under *Com. Code §*

9621, or *(2)* any other person, other than the debtor, holding an interest in the collateral subordinate to the security interest that is the subject of the proposal [*Com. Code § 9620(a)(1), (2)*; *see also Com. Code § 9627* (indicia of commercially reasonable acceptance, discussed in [3][a], *above* and [5][a] *below*].

In addition to all of the foregoing, for a purported or apparent acceptance of collateral to be effective, the secured party must consent to the acceptance in an authenticated record or send a proposal to the debtor [*Com. Code § 9620(b)*]. This last requirement expands prior law by allowing the debtor to be the one to propose the acceptance of the collateral in satisfaction of the obligation [*see* UCC Comment 2. to *Com. Code § 9620*]. Further, it makes clear that mere delay in collection or disposition of collateral does not constitute a "constructive" strict foreclosure and that a debtor's voluntary surrender of collateral to a secured party and the secured party's acceptance of possession of the collateral does not, of itself, raise the implication that the secured party intends or is proposing to accept the collateral in satisfaction of the secured obligation [*see* UCC Comment 5. to *Com. Code § 9620*].

"Proposal" means a record authenticated by a secured party that includes the terms on which the secured party is willing to accept collateral in full or partial satisfaction of the obligation it secures pursuant to *Com. Code §§ 9620, 9621*, and *9622* [*Com. Code § 9102(a)(66)*]. A proposal need not take any particular form as long as it sets forth the terms on which the secured party is willing to accept the collateral in satisfaction. A proposal to accept collateral should specify that amount of the secured obligation to be satisfied or a means of calculating the amount, such as by including a per diem accrual figure. A proposal should include any conditions under which it may be revoked and describe any other applicable conditions. A conditional proposal generally requires the debtor's agreement under *Com. Code § 9620(c)*[*see* UCC Comment 4. to *Com. Code § 9620*]. For a notice of intention to accept collateral in satisfaction of the obligation it secures, see *California Legal Forms, Ch. 42, Secured Transactions, § 42.246* (Matthew Bender).

[b] Debtor's Consent

A debtor consents to an acceptance of collateral in partial satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record authenticated after default [*Com. Code § 9620(c)(1)*; *see Com. Code § 9620(g)*; (partial satisfaction not permitted in consumer transactions)].

There are two ways in which a debtor can consent to acceptance of collateral in full satisfaction of the obligation it secures. A debtor can consent to an acceptance of collateral in full satisfaction of the obligation it secures (1) by agreeing to the terms of the acceptance in a record authenticated after default, or (2) by failing to object to a proposal by the secured party to accept the collateral in full satisfaction of the debt within the time allowed for objection, which requires the secured party to receive notification of the objection, authenticated by the debtor, within 20 days after the secured party sent the proposal [*Com. Code § 9620(c)(2)*]. The alternative of acceptance by silence is only available for unconditional proposals sent by the secured party after default or for proposals that are subject only to a condition that collateral not in the possession of the secured party be preserved or maintained [*Com. Code § 9620(c)(2)(A)*]. As noted in [a], *above*, if the collateral is consumer goods, the collateral cannot be in the debtor's possession when the debtor consents to the acceptance [*Com. Code § 9620(a)(3)*].

[c] Who Is Entitled to Notification of Proposal

A secured party that desires to accept collateral in full or partial satisfaction of the obligation it secures must send its proposal to all of the following persons [*Com. Code § 9621(a)*]:

- Any person from which the secured party has received, before the debtor consented to the acceptance, an authenticated notification of a claim of an interest in the collateral.

- Any other secured party or lienholder that, 10 days before the debtor consented to the acceptance, held a security interest in or other lien on the collateral perfected by the filing of a financing statement

that (1) identified the collateral, (2) was indexed under the debtor's name as of that date, and (3) was filed in the office or offices in which to file a financing statement against the debtor covering the collateral as of that date.

- Any other secured party that, 10 days before the debtor consented to the acceptance, held a security interest in the collateral perfected by compliance with a registration or certificate of title statute, regulation, or treaty described in *Com. Code § 9311(a)*.

An additional requirement in the case of a secured party that desires to accept collateral in partial satisfaction of the obligation it secures is to send the proposal to any secondary obligor [*Com. Code § 9621(b)*].

The foregoing notification requirements are expanded from those under prior law, in part because, unlike the effect under prior law, acceptance of the collateral by the secured party will cut off subordinate liens. The holder of a security interest who is entitled to notification and does not receive it has the right to recover any loss from the enforcing secured party under *Com. Code § 9625(b)*, discussed in *§ 503.29* [*see* UCC Comment 2. to *Com. Code § 9621*; discussion in [e], *below*].

[d] Notification of Objection to Proposal

To be effective under *Com. Code § 9620(a)(2)*, a notification of objection by a person to which the proposal was sent pursuant to *Com. Code § 9621* must be received by the secured party within 20 days after notification (of the proposal) was sent to that person [*Com. Code § 9620(d)(1)*]. In other cases, to be effective under *Com. Code § 9620(a)(2)*, a notification of objection must be received by the secured party within 20 days after the last notification was sent pursuant to *Com. Code § 9621*, or, if a notification was not sent, before the debtor consents to the acceptance in accordance with *Com. Code § 9620(c)*[*Com. Code § 9620(d)(2)*].

[e] Effect of Secured Party's Acceptance of Collateral

A secured party's acceptance of collateral in full or partial satisfaction of the obligation it secures does all of the following [*Com. Code § 9622(a)*]:

- Discharges the obligation to the extent consented to by the debtor.

- Transfers all of a debtor's rights in the collateral to the secured party.

- Discharges the security interest or agricultural lien that is the subject of the debtor's consent and any subordinate security interest or other subordinate lien.

- Terminates any other subordinate interest.

A subordinate interest is discharged or terminated under *Com. Code § 9622(a)*, even if the secured party fails to comply with Division 9 [*Com. Code § 9622(b)*]. Thus, subordinate interests are discharged regardless of whether a proposal was required to be sent, or, if required, was sent. However, a secured party's failure to send a proposal or otherwise comply with Division 9 may subject the secured party to liability under *Com. Code § 9625*, discussed in *§ 503.29* [*see* UCC Comment 2. to *Com. Code § 9622*].

[5] Disposition of Collateral

[a] Commercially Reasonable Conduct

After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present

condition or following any commercially reasonable preparation or processing [*Com. Code § 9610(a)*]. This includes the right of a secured party, without removal, to render equipment unusable and dispose of collateral on the debtor's premises [*Com. Code § 9609(a)(2)*; *see also Com. Code § 9609(c)*, discussed in [2], *above*].

Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms [*Com. Code § 9610(b)*]. A secured party may purchase collateral at a public disposition [*Com. Code § 9610(c)(1)*], but a secured party may purchase at a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations [*Com. Code § 9610(c)(2)*; *see Aspen Enterprises, Inc. v. Bodge (1995) 37 Cal. App. 4th 1811, 1825* (decided under prior law, indicia of "recognized market")]. The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, disposition, or acceptance was made in a commercially reasonable manner [*Com. Code § 9627(a)*]. A collection, enforcement, disposition, or acceptance is commercially reasonable if it has been approved in or by (1) a judicial proceeding, (2) a bona fide creditors' committee, (3) a representative of creditors, or (4) an assignee for the benefit of creditors [*Com. Code § 9627(c)*], but approval in one of those ways need not be obtained; and lack of approval does not mean that the collection, enforcement, disposition, or acceptance is not commercially reasonable [*Com. Code § 9627(d)*]. A disposition of collateral is made in a commercially reasonable manner if the disposition satisfies any of the following conditions [*Com. Code § 9627(b)*]:

- It is made in the usual manner on any recognized market.
- It is made at the price current in any recognized market at the time of the disposition.
- It is made otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

Division 9 does not define the term "public disposition," but it is one at which the price is determined after the public has had a meaningful opportunity for competitive bidding. "Meaningful opportunity" is meant to imply that some form of advertisement or public notice must precede the sale (or other disposition) and that the public must have access to the sale (disposition) [*see* UCC Comment 7. to *Com. Code § 9610*].

A contract for sale, lease, license, or other disposition includes the warranties relating to title, possession, quiet enjoyment, and the like which by operation of law accompany a voluntary disposition of property of the kind subject to the contract [*Com. Code § 9610(d)*]. However, a secured party may disclaim or modify those warranties in a manner that would be effective to disclaim or modify the warranties in a voluntary disposition of property of the kind subject to the contract of disposition or by communicating to the purchaser a record evidencing the contract for disposition and including an express disclaimer or modification of the warranties [*Com. Code § 9610(e)*]. A record is sufficient to disclaim warranties under *Com. Code § 9610(e)* if it indicates "There is no warranty relating to title, possession, quiet enjoyment, or the like in this disposition" or uses words of similar import [*Com. Code § 9610(f)*; *see Com. Code § 9103* (defining "purchase money security interest", discussed in *§ 503.11[19]*)].

[b] Notice of Disposition

[i] Who Must Be Notified

Except when the collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market [*Com. Code § 9611(d)*; *see Aspen Enterprises, Inc. v. Bodge (1995) 37 Cal. App. 4th 1811, 1825* (decided under former Division 9, indicia of "recognized market"; existence of recognized market is usually question of

fact)], a secured party that disposes of collateral under *Com. Code § 9610* must send a reasonable authenticated notification of disposition to all of the following persons *Com. Code § 9611(b), (c)*]:

- The debtor.

- Any secondary obligor [*In re Kirkland (9th Cir. 1990) 915 F.2d 1236, 1239-1242* ; *Hollander v. Cal. Manufacturing Ent., Inc. (1996) 44 Cal. App. 4th 561, 566-567, 51 Cal. Rptr. 2d 694* ; *Canadian Commercial Bank v. Ascher Findley Co. (1991) 229 Cal. App. 3d 1139, 1153-1157, 1161, 280 Cal. Rptr. 521* ; *C.I.T. Corp. v. Anwright Corp. (1987) 191 Cal. App. 3d 1420, 1425-1427, 237 Cal. Rptr. 108* ; *Connolly v. Bank of Sonoma County (1986) 184 Cal. App. 3d 1119, 1123-1125, 229 Cal. Rptr. 396* (guarantor's waiver of right to notification before default is ineffective; all discussed and declined to follow *Rutan v. Summit Sports, Inc. (1985) 173 Cal. App. 3d 965, 973, 219 Cal. Rptr. 381* , which held otherwise); *see also Com. Code § 9624(a)* (permitted waivers)].

- If the collateral is other than consumer goods, to the following persons:

  - Any other person from which the secured party has received, before the notification date, an authenticated notification of a claim of an interest in the collateral.

  - Any other secured party or lienholder that, 10 days before the notification date, held a security interest in or other lien on the collateral perfected by the filing of a financing statement which (1) identified the collateral, (2) was indexed under the debtor's name as of that date, and (3) was filed in the office in which to file a financing statement against the debtor covering the collateral as of that date.

  - Any other secured party that, 10 days before the notification date, held a security interest in the collateral perfected by compliance with a registration or certificate of title statute, regulation, or treaty described in *Com. Code § 9311(a)*.

"Send," in connection with a notification, means either (1) to deposit in the mail, deliver for transmission, or transmit by any other usual means of communication, with postage or cost of transmission provided for, addressed to any address reasonable under the circumstances, or (2) to cause the notification to be received within the time that it would have been received if properly sent under (1) [*Com. Code § 9102(a)(74)*]. "Notification date" means the earlier of the date on which (1) a secured party sends to the debtor and any secondary obligor an authenticated notification of disposition or (2) the debtor and any secondary obligor waive the right to notification [*Com. Code § 9611(a)*; *see Com. Code § 9624(a)* (discussed in *§ 503.28[2][b]*, notification may be waived only after default)]. Although revised Division 9 does not retain the requirement found in former *Com. Code § 9504(3)* for advertisement of public sales, and the term "public disposition" is not defined in revised Division 9, the term implies that some sort of advertisement is made to attract the public to bid [*see* UCC Comment 7. to *Com. Code § 9610*, discussed in [a], *above*].

The exception for collateral that threatens to decline speedily in value does not apply when the threat of rapid decline is caused by the secured party's procrastination. For instance, in a situation involving restaurant equipment collateral, which was worth much more if it could be sold in place to someone who intended to operate a restaurant than it would be if it were removed from the premises, the secured party took no action during two months of default, although the landlord had by then acquired the right to regain possession of the premises. The threatened speedy decline in value that occurred when a new tenant was found to take possession immediately did not excuse notice [*Backes v. Village Corner, Inc. (1987) 197 Cal. App. 3d 209, 213-215, 242 Cal. Rptr. 716]* .

A secured party complies with the requirement for notification of lienholders who held perfected interests in the collateral 10 days before the notification date [*Com. Code § 9611(c)(3)(B)*], if the secured party satisfies both of the

following conditions [*Com. Code § 9611(e)*]:

- Not later than 20 days or earlier than 30 days before the notification date, the secured party requests, in a commercially reasonable manner, information concerning financing statements indexed under the debtor's name in the office indicated in *Com. Code § 9611(c)(3)(B)*.

- Before the notification date, the secured party either (1) did not receive a response to the request for information, or (2) received a response to the request for information and sent an authenticated notification of disposition to each secured party or other lienholder named in that response whose financing statement covered the collateral.

[ii] Time for Notification

Except as otherwise provided in *Com. Code § 9612(b)*, whether a notification is sent within a reasonable time is a question of fact [*Com. Code § 9612(a)*]. In a transaction other than a consumer transaction, a notification of disposition sent after default and 10 days or more before the earliest time of disposition set forth in the notification is sent within a reasonable time before the disposition [*Com. Code § 9612(b)*].

Nothing in Division 9 prevents a secured party from electing not to conduct a disposition after sending notification. Nor does Division 9 prevent a secured party from electing to send a revised notification if its plans for disposition change. This assumes, however, that the secured party acts in good faith, the revised notification is reasonable, and the revised plan for disposition and any attendant delay are commercially reasonable [*see* UCC Comment 8 to *Com. Code § 9611*].

[iii] Contents of Notification in Transaction Other Than Consumer-Goods Transaction

Except in a consumer-goods transaction, the contents of a notification of disposition are sufficient if the notification does all of the following [*Com. Code § 9613(1)*]:

- Describes the debtor and the secured party.

- Describes the collateral that is the subject of the intended disposition.

- States the method of intended disposition.

- States that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting [*see Com. Code § 9210*, discussed in *§ 503.25*].

- States the time and place of a public disposition or the time after which any other disposition is to be made.

A particular phrasing of the notification is not required [*Com. Code § 9613(4)*]. The notification set forth in *Com. Code § 9613(5)*, when completed, provides sufficient information [*Com. Code § 9613(5)*]. For an illustration of that form, see *California Legal Forms, Ch. 42, Secured Transactions, § 42.240* (Matthew Bender).

Whether the contents of a notification that lacks any of the information specified in *Com. Code § 9613(1)* are nevertheless sufficient is a question of fact [*Com. Code § 9613(2)*]. The contents of a notification providing substantially the information specified in *Com. Code § 9613(1)* are sufficient, even if the notification includes information not specified by that paragraph or minor errors that are not seriously misleading [*Com. Code § 9613(3)*].

[iv] Contents of Notification in Consumer-Goods Transaction

In a consumer-goods transaction, the notification of disposition must provide the information specified *Com. Code § 9613(1)*, set forth in [iii], *above*, as well as all of the following information [*Com. Code § 9614(1)*]:

- A description of any liability for a deficiency of the person to which the notification is sent.

- A telephone number from which the amount that must be paid to the secured party to redeem the collateral under *Com. Code § 9623* is available.

- A telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.

A particular phrasing of the notification is not required [*Com. Code § 9614(2)*]. The form of notification set forth in *Com. Code § 9614(3)*, when completed, each provides sufficient information [*Com. Code § 9614(3)*]. That form of notification is set forth in *California Legal Forms, Ch. 42, Secured Transactions, § 42.241* (Matthew Bender).

A notification in the form of *Com. Code § 9614(3)* is sufficient even if additional information appears at the end of the form [*Com. Code § 9614(4)*]. A notification in the form of *Com. Code § 9614(3)* is sufficient even if includes errors in information not required by *Com. Code § 9614(1)*, unless the error is misleading with respect to rights arising under Division 9 [*Com. Code § 9614(5)*]. If a notification under *Com. Code § 9614* is not in the form of *Com. Code § 9614(3)*, law other than Division 9 determines the effect of including information not required by *Com. Code § 9614(1)* [*Com. Code § 9614(6)*]. Nothing in *Com. Code § 9614* will be construed to alter or disturb any right to inspect a consumer good prior to sale under existing law [*Com. Code § 9614(9)*].

[v] Additional Requirements on Disposition of Motor Vehicle in Consumer-Goods Transaction

If the collateral in a consumer-goods transaction is a motor vehicle, a public disposition includes, but is not limited to, the following defined categories [*Com. Code § 9614(7)*]:

- Retail disposition by a retail seller of motor vehicles who offers the collateral for sale or lease to the general public in the same manner as goods that the seller disposes of on the seller's own behalf.

- Retail disposition made subsequent to advertising in a publication with a recognized ability to attract retail motor vehicle buyers and lessees and in a manner designed to reach the retail buying and leasing public for vehicles of that type and condition.

For dispositions of the types set forth in *Com. Code § 9614(7)(A)* and *(B)*, the secured creditor must ensure that the consumer has reasonable access to the motor vehicle in question in order to be able to exercise the right to inspect the motor vehicle [*Com. Code § 9614(8)*].

It had been held under prior law that when the collateral is consumer motor vehicle, to obtain a deficiency judgment, a secured creditor who sells a defaulting debtor's repossessed car must comply with all the provisions of the Rees-Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 2981 et seq.*; *see* California Legal Forms, Ch. 47, *Automotive Financing and Vehicle Leasing* (Matthew Bender)], as well as with any relevant provisions in Division 9 of the Commercial Code [*Bank of America v. Lallana (1998) 19 Cal. 4th 203, 209, 77 Cal. Rptr. 2d 910, 960 P.2d 1133* ; *see Civ. Code §§ 2983.2(a), 2983.8(b)*; *see also* Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* , Form 89.80]. That holding is consistent with *Com. Code § 9201(b)*, discussed in *§ 503.12[3]*. Further, Legislation enacting part of revised Division 9 specifies that nothing will be construed to alter or disturb the holding in *Bank of America v. Lallana (1998) 19 Cal. 4th 203* . The new law does not define "public" and "private" sales and dispositions in general, but describes a limited subset of "public" sales and dispositions when the consumer goods collateral is a

motor vehicle and provides a specific form of notice solely for those sales [*see Com. Code § 9614(3)* (form of notice)]. Nothing will be construed to alter or disturb any applicable requirements contained in the Rees-Levering Automobile Sales Finance Act (*Civ. Code § 2981 et seq.*) [Stats 2000, ch. 188, § 2].

ILLUSTRATION:

Notice Must Comply With Both Division 9 and Rees-Levering. Secured party repossessed debtor's motor vehicle in a consumer transaction, and gave notice of disposition (public auction) that complied with provisions of Rees-Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 2981 et seq.*; *see* Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act*] but failed to give debtor proper notice of public sale, including both time and place of sale pursuant to former *Com. Code § 9504(3).* Was that notice sufficient? No. Secured party's failure to comply with Division 9 precluded it from recovering a deficiency judgment [*Bank of America v. Lallana (1998) 19 Cal. 4th 203, 209, 214-215, 77 Cal. Rptr. 2d 910, 960 P.2d 1133]* .

[c] Allocation of Proceeds

After default, a secured party, may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing [*Com. Code § 9610(a)*]. The secured party must apply or pay over the cash proceeds of disposition under *Com. Code § 9610* in the following order to each of the following [*Com. Code § 9615(a), (b)*]:

- The reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party.

- The satisfaction of obligations secured by the security interest or agricultural lien under which the disposition is made.

- The satisfaction of obligations secured by any subordinate security interest in or other subordinate lien on the collateral and to the satisfaction of any subordinate attachment or execution lien pursuant to *Code Civ. Proc. § 701.040(b)* if the secured party receives an authenticated demand for proceeds or notice of levy of attachment or execution from the holder of the subordinate security interest or other lien before distribution of the proceeds is completed, and, in a case in which a consignor has an interest in the collateral, the subordinate security interest or other lien is senior to the interest of the consignor. If requested by the secured party, a holder of a subordinate security interest or other lien must furnish reasonable proof of the interest or lien within a reasonable time, and unless the holder does so the secured party need not comply with the holder's demand.

- A secured party that is a consignor of the collateral if the secured party receives from the consignor an authenticated demand for proceeds before distribution of the proceeds is completed.

A secured party need not apply or pay over for application noncash proceeds of disposition under *Com. Code § 9610* unless the failure to do so would be commercially unreasonable. A secured party that applies or pays over for application noncash proceeds must do so in a commercially reasonable manner [*Com. Code § 9615(c)*].

[d] Calculation of Proceeds on Disposition to Secured Party, Related Entity, or Secondary Obligor

If the transferee in the disposition is the secured party, a person related to the secured party, or a secondary obligor and the amount of proceeds of the disposition is significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought,

any surplus or deficiency following that disposition is calculated based on the amount of proceeds that would have been realized in a disposition complying with *Com. Code §§ 9601-9629(c)* to a transferee other than the secured party, a person related to the secured party, or a secondary obligor [*Com. Code § 9615(f)*].

[e] Debtor's Right to Surplus

If the security interest under which a disposition is made secures payment or performance of an obligation, after making the payments and applications required by *Com. Code § 9615(a)*, discussed in [c], *above*, and permitted by *Com. Code § 9615(c)*, also discussed in [c], *above*, unless *Com. Code § 9615(a)(4)* requires the secured party to apply or pay over cash proceeds to a consignor, the secured party must account to, and pay a debtor, for any surplus except as provided in *Code Civ. Proc. § 701.040* (payments to judgment lien creditors) [*Com. Code § 9615(d)(1)*]. In a consumer goods transaction, at the time the secured party pays any surplus, or within 14 days of receipt of a request for an explanation, the secured party must provide an explanation of how that surplus was calculated [*Com. Code § 9616(b)*]. For a form illustrating such an explanation and discussion of liability for failure to provide the explanation, see *§ 503.122*.

If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, the debtor is not entitled to any surplus, and *Code Civ. Proc. § 701.040(b)* relating to the payment of proceeds and the liability of the secured party applies, only if the security agreement provides that the debtor is entitled to any surplus [*Com. Code § 9615(e)(1)(A), (2)*].

[f] Creditor's Right to Deficiency

If the security interest under which a disposition is made secures payment or performance of an obligation, after making the payments and applications required by *Com. Code § 9615(a)*, discussed in [c], *above*, and permitted by *Com. Code § 9615(c)*, also discussed in [c], *above*, subject to *Com. Code § 9626(b)* (consumer transactions), the obligor is liable for any deficiency [*Com. Code § 9615(d)(2)*]. In a consumer goods transaction, at the time the secured party first makes written demand on the obligor for payment of the deficiency, or within 14 days of a request for an explanation, the secured party must provide an explanation of how the deficiency was calculated [*Com. Code § 9616(b)*]. For a form of explanation and discussion of liability for failure to provide the explanation, see *§ 503.122*.

If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, the obligor is not liable for any deficiency [*Com. Code § 9615(e)(1)(B)*].

[g] Junior Secured Party's Immunity on Good Faith Retention of Proceeds in Derogation of Another Lien or Secured Interest

A secured party that receives cash proceeds of a disposition in good faith and without knowledge that the receipt violates the rights of the holder of a security interest or other lien that is not subordinate to the security interest or agricultural lien under which the disposition is made [*Com. Code § 9615(g)*]:

- Takes the cash proceeds free of the security interest or other lien.

- Is not obligated to apply the proceeds of the disposition to the satisfaction of obligations secured by the security interest or other lien.

- Is not obligated to account to or pay the holder of the security interest or other lien for any surplus.

[h] Effect of Disposition; Purchaser's Rights

A secured party's disposition of collateral after default (1) transfers to a transferee for value all of the debtor's rights in the collateral; (2) discharges the security interest under which the disposition is made; and (3) discharges any

subordinate security interest or other subordinate lien [*Com. Code § 9617(a)*].

A transferee that acts in good faith takes free of the debtor's rights and interests in the collateral, the security interest under which the disposition was made, and any subordinate security interest or other subordinate lien in the collateral, even if the secured party fails to comply with Division 9 or the requirements of any judicial proceeding [*Com. Code § 9617(b)*]. If the secured party fails to comply with Division 9, the aggrieved person (for example the holder of a subordinate security interest to whom notification required by *Com. Code § 9611* was not sent) has a right to recover for any loss under *Com. Code § 9625(b)* [UCC Comment 2. to *Com. Code § 9617*]. If a transferee does not take free of the above rights and interests, the transferee takes the collateral subject to all of the following [*Com. Code § 9617(c)*]:

- The debtor's rights in the collateral.
- The security interest or agricultural lien under which the disposition was made.
- Any other security interest or other lien.

[i] Transfer Statement

Potential buyers of collateral that is covered by a certificate of title or subject to a registration system typically require as a condition of their purchase that the certificate or registry reflect their ownership. In many cases, this condition can only be met with the consent of the record owner. If the record owner is the debtor and the debtor refuses to cooperate, the secured party may have great difficulty disposing of the collateral [UCC Comment 2. to *Com. Code § 9619*]. To facilitate transfer, the secured party may give the purchaser a transfer statement, which is a record authenticated by the secured party stating the following [*Com. Code § 9619(a)*]:

- That the debtor has defaulted in connection with an obligation secured by specified collateral.
- That the secured party has exercised its postdefault remedies with respect to the collateral.
- That, by reason of the exercise, a transferee has acquired the rights of the debtor in the collateral.
- The name and mailing address of the secured party, debtor, and transferee.

A transfer statement entitles the transferee to the transfer of record of all rights of the debtor in the collateral specified in the statement in any official filing, recording, registration, or certificate of title system covering the collateral. If a transfer statement is presented with the applicable fee and request form to the official or office responsible for maintaining the system, the official or office must (1) accept the transfer statement; (2) promptly amend its records to reflect the transfer; and (3) if applicable, issue a new appropriate certificate of title in the name of the transferee [*Com. Code § 9619(b)*]. *Com. Code § 9619(b)* contemplates both a transfer of record title to a third party following a secured party's exercise of its disposition or acceptance remedies under *Com. Code §§ 9601-9620* as well as a transfer by the debtor to a secured party prior to the secured party's exercise of those rights. *Com. Code § 9619(c)* specifies that when the transfer is to the secured party prior to the exercise of its remedies, the secured party retains its duties with respect to enforcement of its security interest, and the debtor retains its rights as well [UCC Comment 2 to *Com. Code § 9619*]. A transfer of the record or legal title to collateral to a secured party under *Com. Code § 9619(b)* or otherwise is not of itself a disposition of collateral under Division 9 and does not of itself relieve the secured party of its duties under Division 9 [*Com. Code § 9619(c)*].

[6] Sale Pursuant to Execution; Priority of Execution Lien

If a secured party has reduced its claim to judgment, the lien of any levy that may be made on the collateral by virtue of

an execution based on the judgment relates back to the earliest of any of the following [*Com. Code § 9601(e)*]:

- The date of perfection of the security interest or agricultural lien in the collateral.
- The date of filing a financing statement covering the collateral.
- Any date specified in a statute under which the agricultural lien was created.

A sale pursuant to an execution is a foreclosure of the security interest or agricultural lien by judicial procedure within the meaning of *Com. Code § 9601*. A secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of Division 9 [*Com. Code § 9601(f)*].

[7] Action for Deficiency or Surplus

[a] Transaction Other than Consumer Transaction

[i] When Secured Party Must Prove Compliance

In an action arising from a transaction, other than a consumer transaction, in which the amount of a deficiency or surplus is in issue, the secured party need not prove compliance with the provisions of *Com. Code §§ 9601-9629* (default) relating to collection, enforcement, disposition, or acceptance unless the debtor or a secondary obligor places the secured party's compliance in issue [*Com. Code § 9626(a)(1)*]. If the secured party's compliance is placed in issue, the secured party has the burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with *Com. Code §§ 9601-9629* [*Com. Code § 9626(a)(2)*]. Compliance therefore includes the requirements of *Com. Code §§ 9610* and *9627*, discussed in [5][a], *above*, that every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable [*see Com. Code § 9610(a)*]. For an affirmative defense for use by a debtor to impose this burden of proof on the secured party, see *§ 503.111*.

[ii] Limited Deficiency if Secured Party Fails to Prove Compliance

Except as otherwise provided in *Com. Code § 9628* (discussed in *§ 503.29[4]*), in a transaction other than a consumer transaction, if the debtor or a secondary obligor has placed the secured party's compliance in issue and the secured party fails to prove that the collection, enforcement, disposition, or acceptance was conducted in accordance with the provisions of *Com. Code §§ 9601-9629* (default) relating to collection, enforcement, disposition, or acceptance, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney's fees exceeds the greater of either of the following [*Com. Code § 9626(a)(3)*]:

- The proceeds of the collection, enforcement, disposition, or acceptance, or
- The amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with the provisions of *Com. Code §§ 9601-9629* relating to collection, enforcement, disposition, or acceptance.

For purposes of determining the amount that would have been realized had the secured party proceeded in accordance with the provisions of *Com. Code §§ 9601-9629*, the amount of proceeds that would have been realized is equal to the sum of the secured obligation, expenses, and attorney's fees unless the secured party proves that the amount is less than that sum [*Com. Code § 9626(a)(4)*].

[iii] Debtor's Burden of Proof After Disposition to Secured (or Related) Party

In a transaction other than a consumer transaction, if a deficiency or surplus is calculated under *Com. Code § 9615(f)* (disposition to secured party, party related to secured party, or secondary obligor, discussed in [5][d], *above*), the debtor or obligor has the burden of establishing that the amount of proceeds of the disposition is significantly below the range of prices that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought [*Com. Code § 9626(a)(5)*].

[b] In Consumer Transaction

[i] Secured Party's Burden of Proof

In a consumer transaction, in an action in which a deficiency or a surplus is an issue, the secured party has the burden of proving compliance with the provisions of *Com. Code §§ 9601-9629* (default) relating to collection, enforcement, disposition, and acceptance whether or not the debtor or a secondary obligor places the secured party's compliance in issue *Com. Code § 9626(b)(1)(A)*]. Compliance includes the requirements of *Com. Code §§ 9610* and *9627*, discussed in [5][a], *above*, that every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable [*see Com. Code § 9610(a)*]. In addition, if a deficiency or surplus is calculated under *Com. Code § 9615(f)* (disposition to secured party, party related to secured party, or secondary obligor, discussed in [5][d], *above*), the secured party has the burden of establishing that the amount of proceeds of the disposition is not significantly below the range of prices that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought [*Com. Code § 9626(b)(1)(B)*].

[ii] Other Conditions for Obtaining Deficiency

In an action arising out of a consumer transaction, the debtor, or any secondary obligor, is liable for any deficiency only if all of the following condition as are met [*Com. Code § 9626(b)(2)*]:

- It is not otherwise agreed or otherwise provided in the Unruh Retail Installment Sales Act (*Civ. Code § 1801 et seq.*), and in particular *Civ. Code § 1812.5* or any other statute.

- The debtor and obligor were given notice, in accordance with *Com. Code §§ 9611, 9612* and *Com. Code § 9613* or 6414, as applicable (discussed in [5][b], *above*), of the disposition of the collateral.

- The collection, enforcement, disposition, and acceptance by the secured party were conducted in good faith and in a commercially reasonable manner [*see also* discussion in [5][a], *above*].

[iii] Effect of Judgment That Creditor Is Not Entitled to Deficiency

In a action arising out of a consumer transaction, on entry of a final judgment that the debtor or obligor is not liable for a deficiency by reason of *Com. Code § 9626(b)(2)* (discussed in [ii], *above*) or *Com. Code § 9615(f)* (disposition to secured party, party related to secured party, or secondary obligor, discussed in [5][d], *above*), the secured party may neither obtain a deficiency judgment nor retain a security interest in any other collateral of the debtor or obligor that secured the indebtedness for which the debtor or obligor is no longer liable *Com. Code § 9626(b)(3)*].

[iv] Debtor's Right to Damages or Proceeds of Subsequent Dispositions

In a consumer transaction, if, subsequent to a disposition that does not satisfy any one or more of the conditions set forth in *Com. Code § 9626(b)(2)* (discussed in [ii], *above*), or subsequent to a disposition that is subject to *Com. Code § 9615(f)* (proceeds calculated as if disposition were complying disposition to unrelated party, discussed in [4][d], *above*), the secured party disposes of other collateral securing the same indebtedness, the debtor or obligor may, to the extent he or she is no longer liable for a deficiency judgment by reason of *Com. Code § 9626(b)(2)* or *Com. Code § 9615(f)*, recover the proceeds realized from the subsequent dispositions, as well as any damages to which the debtor may be

entitled if the subsequent disposition is itself noncomplying or otherwise wrongful [*Com. Code § 9626(b)(4)*].

Nothing in *Com. Code § 9626* deprives the debtor of any right to recover damages from the secured party under *Com. Code § 9625(b)*, or to offset any damages against any claim by the secured party for a deficiency, or of any right or remedy to which the debtor may be entitled under any other law. A debtor or obligor in a consumer transaction will not have any damages owed to it reduced by the amount of any deficiency that would have resulted had the disposition of the collateral by the secured party been conducted in conformity with Division 9 [*Com. Code § 9626(b)(5)*].

[v] Secured Party Must Account for Surplus

In a consumer transaction, the secured party must account to the debtor for any surplus, except as provided in *Code Civ. Proc. § 701.040* (payments to judgment lien creditors) [*Com. Code § 9626(b)(6)*]. This requirement appears redundant to the requirement of *Com. Code § 9615(d)(1)*, discussed in [5][e], *above*.

[8] Alternative Rights to Foreclose Mixed Security

[a] Creditor's Options

If an obligation secured by personal property or fixtures is also secured by an interest in real property or an estate therein, the secured party may do any of the following [*Com. Code § 9604(a)(1)*; *see also Com. Code § 9102(a)(41)* (defining fixtures)]:

- Proceed, in any sequence, (1) in accordance with the secured party's rights and remedies in respect of real property as to the real property security, and (2) in accordance with *Com. Code §§ 9601-9629* as to the personal property or fixtures.

- Proceed, in any sequence, as to both some or all of the real property and some or all of the personal property or fixtures in accordance with the secured party's rights and remedies in respect of the real property, by including the portion of the personal property or fixtures selected by the secured party in the judicial or nonjudicial foreclosure of the real property in accordance with the procedures applicable to the real property. In such a proceeding [*Com. Code § 9604(a)(1)(B)*]:

  - No provision of *Com. Code §§ 9601-9629* other than this subparagraph, *Com. Code § 9604(a)(4)(C)* (discussed in [c], *below*), *Com. Code § 9604(a)(7)* (discussed in [e], *below*), and *Com. Code § 9604(a)(8)* (discussed in [b], *below*) will apply to any aspect of the foreclosure.

  - A power of sale under a deed of trust or mortgage will be exercisable with respect to both the real property and the personal property or fixtures being sold.

  - The sale may be conducted by the mortgagee under the mortgage or by the trustee under the deed of trust.

  - The secured party will not be deemed to have elected irrevocably to proceed as to both real property and personal property or fixtures as with respect to any particular property, unless and until that particular property has been actually disposed of pursuant to a unified sale (judicial or nonjudicial) conducted in accordance with the procedures applicable to real property, and then only as to the property so sold.

- Proceed, in any sequence, as to part of the personal property or fixtures as provided in *Com. Code §*

9604(a)(1)(A), and as to other of the personal property or fixtures as provided in *Com. Code § 9604(a)(1)(B)*.

[b] Limited Application of One Action Rule and Antideficiency Legislation

If an obligation secured by an interest in personal property or fixtures [*see Com. Code § 9102(a)(41)*] is also secured by an interest in real property or an estate therein, except as otherwise provided in *Com. Code § 9604(a)(3)* (discussed *below*), provisions and limitations of any law respecting real property and obligations secured by an interest in real property or an estate therein, including but not limited to *Code Civ. Proc. § 726*, provisions regarding acceleration or reinstatement of obligations secured by an interest in real property or an estate therein, prohibitions against deficiency judgments, limitations on deficiency judgments based on the value of the collateral, limitations on the right to proceed as to collateral, and requirements that a creditor resort either first or at all to its security, do not in any way apply to either of the following [*Com. Code § 9604(a)(1)(A)*]:

- Any personal property or fixtures other than personal property or fixtures as to which the secured party has proceeded or is proceeding under *Com. Code § 9604(a)(1)(B)* (unified sale); or

- The obligation.

In the event that an obligation secured by personal property or fixtures would otherwise become unenforceable by reason of *Code Civ. Proc. § 726* or of any requirement that a creditor resort first to its security, then, notwithstanding that section or any similar requirement, the obligation nevertheless remains enforceable to the full extent necessary to permit a secured party to proceed against personal property or fixtures securing the obligation in accordance with the secured party's rights and remedies as permitted under *Com. Code §§ 9601-9629*[*Com. Code § 9604(a)(2)(B)*; *see also Com. Code § 9604(a)(3)(G)* (discussed in last subparagraph of list, *below*)].

The three-month time limit for seeking a deficiency judgment after a real property judicial foreclosure sale set forth in *Code of Civ. Proc. § 726(b)* does not apply to a mixed collateral obligation, when the real property is sold in a nonunified sale [*Florio v. Lau (1998) 68 Cal. App. 4th 637, 653, 80 Cal. Rptr. 2d 409* (deciding, in case of first impression, that *Code of Civ. Proc. § 726(b)* cannot be applied in its entirety to mixed collateral situation without running afoul of Legislature's stated purpose in enacting mixed collateral statutes)].

The exceptions in which *Code Civ. Proc. § 726* or the antideficiency statutes *do* apply are as follows [*Com. Code § 9604(a)(3)*]:

- *Com. Code § 9604(a)(2)* does not limit the application of *Code Civ. Proc. § 580b* (no deficiency on purchase money mortgage, deed of trust, or chattel mortgage on residential property).

- If the secured party commences an action, as defined in *Code Civ. Proc. § 22*, and the action seeks a monetary judgment on the debt [*see Com. Code § 9604(a)(6)* (discussed in [d], *below*)], *Com. Code § 9604(a)(2)* does not prevent the debtor's assertion of any right to require the inclusion in the action of any interest in real property or an estate therein securing the debt. If a monetary judgment on the debt is entered in the action, *Com. Code § 9604(a)(2)* does not prevent the debtor's assertion of the subsequent unenforceability of the encumbrance on any interest in real property or an estate therein securing the debt and not included in the action.

- Nothing in *Com. Code § 9604(a)(2)* may be construed to excuse compliance with *Civ. Code § 2924c* as a prerequisite to the sale of real property, but *Civ. Code § 2924c* has no application to the right of a secured party to proceed as to personal property or fixtures except, and then only to the extent that, the secured party is proceeding as to personal property or fixtures in a unified sale as provided in *Com. Code*

§ 9604(a)(1)(B).

- *Com. Code § 9604(a)(2)* does not deprive the debtor of the protection of *Code Civ. Proc. § 580d* against a deficiency judgment following a sale of real property collateral pursuant to a power of sale in a deed of trust or mortgage.

- *Com. Code § 9604(a)(2)* does not affect, nor will it determine the applicability or inapplicability of, any law respecting real property or obligations secured in whole or in part by real property with respect to a loan or a sale made to any individual primarily for personal, family, or household purposes.

- *Com. Code § 9604(a)(2)* does not deprive the debtor of the protection of *Code Civ. Proc. § 580a* (procedure of obtaining money judgment) following a sale of real property collateral.

- If the secured party violates any statute or rule of law that requires a creditor who holds an obligation secured by an interest in real property or an estate therein to resort first to its security before resorting to any property of the debtor that does not secure the obligation, *Com. Code § 9604(a)(2)* does not prevent the debtor's assertion of any right to require correction of the violation, any right of the secured party to correct the violation, the debtor's assertion of the subsequent unenforceability of the encumbrance on any interest in real property or an estate therein securing the obligation, or the debtor's assertion of the subsequent unenforceability of the obligation except to the extent that the obligation is preserved by *Com. Code § 9604(a)(2)(B)* (discussed *above*).

The foregoing rules of real property law are discussed in Ch. 555, *Trust Deeds and Real Property Mortgages* .

When a secured party proceeds by unified sale as to both real and personal property [*see Com. Code § 9604(a)(1)(B)* (discussed under [1], *above*)], then, for purposes of applying *Code Civ. Proc. § 580a* or *726(b)* to the unified sale, the personal property or fixtures included in the unified sale are deemed to be included in the "real property or other interest sold," as that term is used in *Code Civ. Proc. § 580a* or *726(b)* [*Com. Code § 9604(a)(8)*].

[c] When Application of Proceeds of Disposition of Personal Property Collateral Does Not Cure of Default

When an obligation is secured by both an interest in personal property or fixtures [*see Com. Code § 9102(a)(41)*] and an interest in real property or an estate therein, if the secured party realizes proceeds from the disposition of collateral that is personal property or fixtures, then the disposition of the collateral, the realization of the proceeds, the application of the proceeds, or any one or more of the foregoing does not operate to cure any nonmonetary default [*Com. Code § 9604(a)(4)(A)*]. Similarly, disposition of collateral that is personal property or fixtures, the realization of the proceeds, the application of the proceeds, or any one or more of the foregoing does not operate to cure any monetary default (although the application of the proceeds will, to the extent of those proceeds, satisfy the secured obligation) so as to affect in any way the secured party's rights and remedies under *Com. Code §§ 9601-9629* with respect to any remaining personal property or fixtures collateral [*Com. Code § 9604(a)(4)(B)*; *see Com. Code § 9604(a)(5),(6)* (discussed in [d], *below*)].

All proceeds realized from the disposition of collateral that is personal property or fixtures must be applied by the secured party to the secured obligation in accordance with the agreement of the parties and applicable law [*Com. Code § 9604(a)(4)(C)*].

[d] Definition of Monetary Judgment on Debt

As used in *Com. Code § 9604(a)*, "monetary judgment on the debt" means a judgment for the recovery from the debtor of all or part of the principal amount of the secured obligation, including contractual interest on it. Monetary judgment

on the debt does not include a judgment that provides only for other relief (whether or not that other relief is secured by the collateral), such as one or more forms of nonmonetary relief, and monetary relief ancillary to any of the foregoing, such as attorney's fees and costs incurred in seeking the relief [*Com. Code § 9604(a)(6)*].

An action by the secured party using any available judicial procedure, as provided in *Com. Code § 9601(a)(1)*, is in no way affected by the omission of a prayer for monetary judgment on the debt. Notwithstanding *Code Civ. Proc. § 726*, any prohibition against splitting causes of action, or any other statute or rule of law, a judicial action that neither seeks nor results in a monetary judgment on the debt does not preclude a subsequent action seeking a monetary judgment on the debt [*Com. Code § 9604(a)(5)*].

[e] Effect of Secured Party's Noncompliance on Purchaser

When an obligation is secured by both an interest in personal property or fixtures [*see Com. Code § 9102(a)(41)*] and an interest in real property or an estate therein, and the secured party, in proceeding with a unified sale as to both real and personal property [*see Com. Code § 9604(a)(1)(B)* (discussed in [a], *above*)], fails to comply with the procedures applicable to real property, a purchaser for value of any interest in the real property at a judicial or nonjudicial foreclosure proceeding conducted pursuant to *Com. Code § 9604(a)(1)(B)* takes that interest free from any claim or interest of another person, or any defect in title, based on that noncompliance unless one of the following conditions applies [*Com. Code § 9604(a)(7)*]:

- The purchaser is the secured party and the failure to comply with *Com. Code § 9601 et seq.* occurred other than in good faith; or

- The purchaser is other than the secured party and at the time of the sale of the real property at that foreclosure the purchaser had knowledge of the failure to comply with *Com. Code § 9601 et seq.* and that the noncompliance occurred other than in good faith.

Even if the purchaser at the foreclosure sale does not take his or her interest free of claims, interests, or title defects based on that noncompliance with *Com. Code § 9601 et seq.*, a subsequent purchaser for value who acquires an interest in that real property from the purchaser at that foreclosure takes that interest free from any claim or interest of another person, or any defect in title, based on that noncompliance, unless at the time of acquiring the interest the subsequent purchaser has knowledge of the failure to comply with *Com. Code § 9601 et seq.* and that the noncompliance occurred other than in good faith [*Com. Code § 9604(a)(7)*].

[9] Rights and Duties of Secondary Obligors

[a] After Assignment of Secured Obligation or Collateral or Subrogation

Secondary obligors are defined in *Com. Code § 9102(a)(71)*, discussed in *§ 503.11 [9][c]* and *[d]*, and include guarantors and persons with a right of recourse against the debtor or another obligor with respect to the collateral. A secondary obligor acquires the rights and becomes obligated to perform the duties of the secured party after any of the following occurs [*Com. Code § 9618(a)*]:

- The secondary obligor receives an assignment of a secured obligation from the secured party.

- The secondary obligor receives a transfer of collateral from the secured party and agrees to accept the rights and assume the duties of the secured party.

- The secondary obligor is subrogated to the rights of a secured party with respect to collateral.

An assignment, transfer, or subrogation described in *Com. Code § 9618(a)* is not a disposition of collateral under *Com. Code § 9610* and it relieves the secured party of further duties under Division 9 [*Com. Code § 9618(b)*]. When a secondary obligor becomes assignee, transferee, or subrogee, it does not assume any liability for the earlier actions or inactions of the secured party whom it has succeeded unless it agrees to do so. Once the successor becomes obligated, it is responsible for complying with the secured party's duties. The assignment or transfer relieves the original secured party of any further duties under Division 9 but does not excuse the assignor from duties that arose before the event or impose liability on the assignee for the assignor's failure to comply [UCC Comment 4 to *Com. Code § 9618*].

Application of *Com. Code § 9618* may require an investigation into the agreement of the parties. *Com. Code § 9618* does not constitute a comprehensive or general rule for allocating rights and duties on assignment of a secured obligation, but is limited to the situations involving a secondary obligor described in *Com. Code § 9618(a)*. In other contexts, the agreement of the parties and applicable law other than Division 9 determine whether the assignment imposes on the assignee any duties to the debtor and whether the assignor retains its duties to the debtor after the assignment [UCC Comment 2 to *Com. Code § 9618*].

Secondary obligors are entitled to the same notification of disposition as the debtor [*Com. Code § 9611(c)*], and they are entitled to purchase the collateral at a disposition under *Com. Code § 9610* [*see Com. Code § 9615(f)* (discussed in*§ 503.27[5][d]*, special rule for calculation of surplus or deficiency on disposition to secondary obligor)]. If the secondary obligor acquires the collateral at a disposition and simultaneously or subsequently discharges any unsecured deficiency obligation, *Com. Code § 9618(a)(1)* is not implicated [UCC Comment 2 to *Com. Code § 9618*]. Similarly, a secondary obligor who takes the collateral on disposition in exchange for payment that is applied against the secured obligation may or may not be subrogated to the rights of the secured party as contemplated by *Com. Code § 9618(a)(3)*. The secondary obligor becomes subrogated only to the extent that it makes a payment in satisfaction of its secondary obligation. To the extent its payment constitutes the price of the collateral at a *Com. Code § 9610* disposition by the (original) secured party, the secondary obligor would not be subrogated [UCC Comment 2 to *Com. Code § 9618*].

[b] Before Succeeding to Secured Party's Position

A secondary obligor has rights based on that status before it succeeds to the secured party's position or if it never does. Those rights, in addition to the right to notification of any disposition [*Com. Code § 9611(c)*] and the right to purchase the collateral at a disposition under *Com. Code § 9610* [*see* UCC Comment 3 to *Com. Code § 9618*; *Com. Code § 9615(f)*], discussed in*§ 503.27[9][a]*, include the following:

- If the secured party is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor and has recourse against the secondary obligor based on the nonpayment or other default of an account debtor or other obligor on the collateral, the secondary obligor has the right to require a secured party in possession of the collateral to use reasonable care in the custody and preservation of collateral in the secured party's possession. In the case of chattel paper or an instrument, reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed [*Com. Code § 9207(a), (d)(1)(B)*].

- A secondary obligor may require the secured party to proceed in a commercially reasonable manner if the secured party undertakes to collect from or enforce an obligation of an account debtor or other person obligated on collateral when that secured party is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor or a secondary obligor [*Com. Code § 9607(c)*].

- A secondary obligor's approval is required to allow a secured party to delay, beyond 90 days from the date it takes possession, disposition of consumer goods in the situations covered by *Com. Code § 9620(e)* [*Com. Code § 9620(f)(2)*].

- A secondary obligor is entitled to receive notice of, and may object to, a secured party's proposal to accept collateral in partial satisfaction of the secured obligation [*Com. Code § 9621(b)*].

- A secondary obligor may redeem collateral by an appropriate time under *Com. Code § 9623* [*Com. Code § 9623(a)*].

- A secondary obligor may waive the right to notification of disposition of collateral under *Com. Code § 9611*, or except in a consumer-goods transaction, the right to redeem collateral under *Com. Code § 9623*, only by an agreement to that effect entered into and authenticated after default [*Com. Code § 9624(a), (c)*].

- A secondary obligor may sue for injunctive relief and damages if the secured party fails to comply with Division 9 [*Com. Code § 9625*].

- A secondary obligor may require the secured party to prove, in an action for surplus or deficiency, arising other than from a consumer transaction, that the secured party acted in compliance with *Com. Code § 9601 et seq.* and if the secured party does not so prove, to have its liability for deficiency limited as provided by *Com. Code § 9626(a)(3)-(5)* or its surplus calculated in accordance with *Com. Code § 9615(f)*[*Com. Code § 9626(a)(1), (5)*].

- In an action for surplus or deficiency arising from a consumer transaction, a secondary obligor may have the benefit of *Com. Code § 9626(b)*.

[10] Rights of Owners of Collateral Other Than Primary Obligors

"Debtor" is defined in revised Division 9 to include anyone who has an interest (other than a security interest) in the collateral, whether or not that person is an obligor [*see Com. Code § 9102(a)(28)(A)*; *compare Com. Code § 9102(a)(59)(ii)* (obligor is someone who has provided property *other than the collateral* to secure payment or other performance of the obligation)]. Therefore, in revised Division 9, there is no counterpart to former *Com. Code § 9112*, and a person who owns any interest in the collateral (other than a security interest) is entitled to all the rights expressed in revised Division 9 as rights of debtors.

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B. Creation, Perfection, and Priorities of Security Interests Generally

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§ 503.28 Debtor's Rights on Default

[1] In General

Except as otherwise provided in *Com. Code § 9601(g)* and in *Com. Code § 9605* (discussed in *§ 503.29[4]*), after default, a debtor and an obligor have the rights provided in *Com. Code § 9601 et seq.* and by agreement of the parties [*Com. Code § 9601(d)*]. *Com. Code § 9601 et seq.* impose no duties on a secured party that is a consignor or is a buyer of accounts, chattel paper, payment intangibles, or promissory notes except, as provided by *Com. Code § 9607(c)*, to require that a secured party proceed in a commercially reasonable manner if the secured party undertakes to collect from or enforce an obligation of an account debtor or other person obligated on collateral and the secured party is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor or a secondary obligor [*Com. Code § 9601(g)*].

[2] Waiver, Renunciation, and Modification of Rights

[a] Prohibited Waivers

Except as otherwise provided in *Com. Code § 9624* (discussed in*§ 503.20[2][b]*, to the extent that they give rights to a debtor or obligor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in the following listed sections [*Com. Code § 9602*]:

- *Com. Code § 9207(b)(4)(C)*, which deals with use and operation of the collateral by the secured party.

- *Com. Code § 9210*, which deals with requests for an accounting and requests concerning a list of collateral and statement of account.

- *Com. Code § 9607(c)*, which deals with collection and enforcement of collateral.

- *Com. Code § 9608(a)* and *Com. Code § 9615(c)* to the extent that they deal with application or

payment of noncash proceeds of collection, enforcement, or disposition.

- *Com. Code § 9608(a)* and *Com. Code § 9615(d)* to the extent that they require accounting for or payment of surplus proceeds of collateral.

- *Com. Code § 9609* to the extent that it imposes on a secured party that takes possession of collateral without judicial process the duty to do so without breach of the peace.

- *Com. Code § 9610(b)*, and *Com. Code §§ 9611, 9613*, and *9614*, which deal with disposition of collateral.

- *Com. Code § 9615(f)*, which deals with calculation of a deficiency or surplus when a disposition is made to the secured party, a person related to the secured party, or a secondary obligor.

- *Com. Code § 9616*, which deals with explanation of the calculation of a surplus or deficiency.

- *Com. Code §§ 9620, 9621*, and *9622*, which deal with acceptance of collateral in satisfaction of obligation.

- *Com. Code § 9623*, which deals with redemption of collateral.

- *Com. Code § 9624*, which deals with permissible waivers.

- *Com. Code §§ 9625* and *9626*, which deal with the existence of a deficiency and with the secured party's liability for failure to comply with Division 9.

The parties may determine by agreement the standards measuring the fulfillment of the rights of a debtor or obligor and the duties of a secured party under a rule stated in *Com. Code § 9602* if the standards are not manifestly unreasonable [*Com. Code § 9603(a)*]. However, that right does not apply to the duty under *Com. Code § 9609* to refrain from breaching the peace [*Com. Code § 9603(b)*].

Provisions that are not specified in *Com. Code § 9602* are subject to the general rules in *Com. Code § 1302(a), (b)* [*see* UCC Comment 2 to *Com. Code § 9602*]. Further, *Com. Code § 9602* does not restrict the ability of the parties to agree, settle, compromise, or renounce claims for past conduct that may have constituted a violation or breach of the rights and duties listed in *Com. Code § 9602*, even if the settlement involves an express waiver [*see* UCC Comment 3 to *Com. Code § 9602*]. The restrictions on waiver contained in *Com. Code § 9602* apply to obligors as well as debtors. This resolves questions under former Division 9 as to whether secondary obligors were permitted, under the law of suretyship, to waive rights and duties under the filing provisions [*Com. Code § 9501 et seq.*], assuming that secondary obligors were "debtors" for purposes of the filing provisions [*see* UCC Comment 4 to *Com. Code § 9602*].

[b] Permitted Waivers

A debtor or secondary obligor may waive the right to notification of disposition of collateral under *Com. Code § 9611* (discussed in *§ 503.27[5][b]*) only by an agreement to that effect entered into and authenticated after default [*Com. Code § 9624(a)*].

A debtor may waive the right to require disposition of collateral under *Com. Code § 9620(e)* (discussed in *§ 503.42[5][a]*) only by an agreement to that effect entered into and authenticated after default *Com. Code § 9624(b)*].

Except in a consumer goods transaction, a debtor or secondary obligor may waive the right to redeem collateral under

Com. Code § 9623 (discussed in [4], *below*) only by an agreement to that effect entered into and authenticated after default [*Com. Code § 9624(c)*].

No renunciation or modification by the debtor of any of his or her rights under *Com. Code § 9601 et seq.* as to consumer goods is valid or enforceable unless the renunciation or modification is in consideration of a waiver by the secured party of any right to a deficiency on the debt [*Com. Code § 9629*]. California's *Com. Code § 9629* is a nonuniform provision. Waivers made in accordance with *Com. Code § 9624* must be made in authenticated agreements. Under *Com. Code § 1201(b)(3)*, an "agreement" means a bargain of the parties in fact." In considering waivers under *Com. Code § 9624* and analogous agreements in other contexts, courts should carefully scrutinized putative agreements that appear in records that also address many additional or unrelated matters [*see* UCC Comment 5 to *Com. Code § 9602*].

[3] Defense Against Assignee

Except as otherwise provided in *Com. Code § 9403*, an agreement between an account debtor and an assignor not to assert against an assignee any claim or defense that the account debtor may have against the assignor is enforceable by an assignee that takes an assignment for value, in good faith, without notice of a claim of a property or possessory right to the property assigned, and without notice of a defense or claim in recoupment of the type that may be asserted against a person entitled to enforce a negotiable instrument under *Com. Code § 3305(a)*, discussed in Ch. 385, *Negotiable Instruments* [*Com. Code § 9403(b)*; *see Com. Code § 9403(a)* (in *Com. Code § 9403*, "value" has the meaning provided in *Com. Code § 3303(a)*, discussed in Ch. 385, *Negotiable Instruments*)]. *Com. Code § 9403(b)* does not apply to defenses of a type that may be asserted against a holder in due course of a negotiable instrument under *Com. Code § 3305(b)*, the so-called "real defenses," discussed in Ch. 385, *Negotiable Instruments* [*Com. Code § 9403(c)*; UCC Comment 3 to *Com. Code § 9403*]. Except as otherwise provided in *Com. Code § 9403(d)*, *Com. Code § 9403* does not displace law other than Division 9 which gives effect to an agreement by an account debtor not to assert a claim or defense against an assignee [*Com. Code § 9403(f)*].

In a consumer transaction, if a record evidences the account debtor's obligation, law other than Division 9 requires that the record include a statement to the effect that the rights of an assignee are subject to claims or defenses that the account debtor could assert against the original obligee, and the record does not include such a statement, then the record has the same effect as if the record included such a statement and the account debtor may assert against an assignee those claims and defenses that would have been available if the record included such a statement [*Com. Code § 9403(d)*]. *Com. Code § 9403* is subject to law other than Division 9 which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes [*Com. Code § 9403(e)*]. *Com. Code § 9403(d)* is new in revised Division 9 and applies to rights evidenced by a record that is required to contain the notice set out in Federal Trade Commission Rule 433 [*see 16 C.F.R. § 433.1 et seq.*, discussed in Ch. 385, *Negotiable Instruments*]. Thus, *Com. Code § 9403(d)* effectively renders waiver-of-defense clauses ineffective in the transactions with consumers to which it applies [UCC Comment 5 to *Com. Code § 9403*].

[4] Right of Redemption

A debtor, any secondary obligor, or any other secured party or lienholder may redeem collateral [*Com. Code § 9623(a)*]. Redemption may occur at any time before a secured party has (1) collected the collateral [*see Com. Code § 9607*]; (2) disposed of the collateral or entered into a contract for its disposition [*see Com. Code § 9610*]; or (3) accepted the collateral in full or partial satisfaction of the obligation it secures under *Com. Code § 9622* [*Com. Code § 9623(c)*].

To redeem collateral, a person must tender both fulfillment of all obligations secured by the collateral and the secured party's reasonable expenses for retaking and holding the collateral, preparing it for disposition, processing, and disposing of the collateral, and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party [*Com. Code § 9623(b)*; *see Com. Code § 9614(1)(C)* (notice of disposition in consumer transaction must give phone number from which amount that must be paid to secured party to

redeem collateral is available) *Com. Code § 9615(a)(1)* (expenses required to be paid on redemption)].

[5] Bringing Secured Party Into Compliance With Law

If it is established that a secured party is not proceeding in accordance with Division 9, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions [*Com. Code § 9625(a)*; *see §§ 503.102*, *503.103* (forms)]. As an alternative, the debtor or obligor may recover damages for the secured party's noncompliance, as discussed in *§ 503.29* [*Com. Code § 9625(b)-(g)*].

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§ 503.29 Secured Party's Liability for Noncompliance

[1] In General

In addition to obtaining injunctive relief to restrain noncompliance or to bring a secured party into compliance [*see Com. Code § 9625(a)*, discussed in *§ 503.29[5]*], a debtor or obligor may recover damages in the amount of any loss caused by a person's failure to comply with Division 9. Recovery is subject to *Com. Code § 9625(c), (d)*, and *(f)*, discussed in [2], *below* and in *§ 503.100[4]*, respectively. Loss caused by a failure to comply may include loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing [*Com. Code § 9625(b)*]. For a complaint that can be adapted to seek damages for any type of noncompliance, see *§ 503.101[1]*.

[2] Parties Who May Recover Damages

Except as otherwise provided in *Com. Code § 9628*, discussed in [4], *below*, a person that, at the time of the failure, was a debtor or an obligor, or held a security interest in or other lien on the collateral, may recover damages under *Com. Code § 9625(b)* for its loss [*Com. Code § 9625(c)*]. In this regard, *Com. Code § 9628(d)* contains what appears to be a drafting error; it provides that a secured party is not liable under *Com. Code § 9625(c)(2)* more than once with respect to any one secured obligation. However, the California version of the Uniform Commercial Code has no provision numbered 9625(c)(2). In the national version of the UCC, Section 9-625(c)(2) refers to consumer transaction and establishes a "floor" for damages equal to a credit service charge plus 10% of the obligation. However, the latter provision does not appear in the California version of Section 9-625(c).

A debtor whose deficiency is eliminated under *Com. Code § 9626*, discussed in *§ 503.27[7][b]*, may recover damages for the loss of any surplus. However, in a transaction other than a consumer transaction, a debtor or secondary obligor whose deficiency is eliminated or reduced under *Com. Code § 9626* may not otherwise recover under *Com. Code § 9625(b)* for noncompliance with the provisions of *Com. Code §§ 9601-9629* relating to collection, enforcement, disposition, or acceptance [*Com. Code § 9625(d)*].

[3] Statutory Damages

In addition to any damages recoverable under *Com. Code § 9625(b)*, the debtor, consumer obligor, or person named as a debtor in a filed record, as applicable, may recover $500 in each case from any of the following persons [*Com. Code § 9625(e)*; *see also Com. Code § 9625(f)* (statutory damages for failure to reply to request or statement under *Com. Code § 9210*, discussed in *§ 503.100[4*])]:

- A person that fails to comply with *Com. Code § 9208* (after obligation secured by deposit account, electronic chattel paper, investment property, or letter of credit right is satisfied).

- A person that fails to comply with *Com. Code § 9209* (release after assignment).

- A person that files a record that the person is not entitled to file under *Com. Code § 9509(a)*.

- A person that fails to cause the secured party of record to file or send a termination statement as required by *Com. Code § 9513(a)* or *(c)*.

- A person that fails to comply with *Com. Code § 9616(b)(1)* (explanation of calculation of surplus or deficiency in a consumer goods transaction) and whose failure is part of a pattern, or consistent with a practice, of noncompliance.

- A person that fails to comply with *Com. Code § 9616(b)(2)* (explanation of calculation of deficiency in a consumer goods transaction).

[4] Secured Party Must Know of, and How to Communicate With, Debtor or Obligor

Unless a secured party knows that a person is a debtor or obligor, knows the identity of the person, and knows how to communicate with the person, the secured party is not liable to the person, or to a secured party or lienholder that has filed a financing statement against the person, for failure to comply with Division 9, nor does the secured party's failure to comply with Division 9 affect the liability of the person for a deficiency [*Com. Code § 9628(a)*].

A secured party does not owe and duty based on its status as a secured party and is not liable because of its status as secured party to a person that is a debtor or obligor, unless the secured party knows all of the following [*Com. Code §§ 9605(1)* (duty), *9628(b)(1)* (liability)]:

- That the person is a debtor or obligor.

- The identity of the person.

- How to communicate with the person.

Further, a secured party does not owe any duty because of its status as a secured party and is liable because of its status as a secured party to a secured party or lienholder that has filed a financing statement against a person, unless the secured party knows both that (1) the person is a debtor and (1) the identity of the person [*Com. Code §§ 9605(2)* (duty), *9628(b)(2)* (liability)].

A secured party may also be free from liability based on its reasonable belief that a transaction is not a consumer transaction [*see Com. Code § 9628(c)*, discussed in *§ 503.42[6]*].

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[Reserved]

§§ 503.30[Reserved]

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§ 503.40 Goods

[1] Security Interests in Goods Arising Under Sales Law

A security interest arising under *Com. Code § 2401*, *2505*, *2711(3)*, or *10508(e)*, is subject to Division 9. However, until the debtor obtains possession of the goods, all of the following apply [*Com. Code § 9110*]:

- The security interest is enforceable, even if *Com. Code § 9203(b)(3)* has not been satisfied.
- Filing is not required to perfect the security interest.
- The rights of the secured party after default by the debtor are governed by Division 2 (*Com. Code § 2101 et seq.*) or Division 10 (*Com. Code § 10101 et seq.*).
- The security interest has priority over a conflicting security interest created by the debtor.

Security interests arising under *Com. Code § 2401* or *2505*, a buyer's security interest under *Com. Code § 2711(3)*, or a lessee's security interest under *Com. Code § 10508(e)*, until the debtor obtains possession of the collateral, are perfected when they attach [*Com. Code § 9309(6)*].

The general rule [*Com. Code § 9322(a)-(e)*] governing priority of security interests is subject to *Com. Code § 9110* with respect to a security interest arising under Division 2 (*Com. Code § 2101 et seq.*) or Division 10 (*Com. Code § 10101*) [*Com. Code § 9322(f)(4)*].

[2] Perfection of Interest in Goods

[a] Generally

A security interest in goods may be perfected by filing [*Com. Code §§ 9310(a), 9501(a)-(b)*], or by the secured party taking possession of the goods [*Com. Code § 9310(b)(6), 9313(a)*]. See *§ 503.23* for discussion of choice of law rules.

Perfection of a security interest in goods by compliance with a certificate of title statute, see *§ 503.22[5]*. *Com. Code § 9303*, discussed in *§ 503.23[3]*, sets forth the choice of law rules regarding goods covered by certificates of title.

[b] Goods in Possession of Bailee Issuing Nonnegotiable Document

While goods are in the possession of a bailee that has issued a nonnegotiable document covering the goods, a security interest in the goods may be perfected by any of the following methods [*Com. Code § 9312(d)*]:

- Issuance of a document may in the name of the secured party.
- The bailee's receipt of notification of the secured party's interest.
- Filing as to the goods.

Once perfected, a security interest in goods in the possession of a bailee, other than one that has issued a negotiable documents for the goods, remains perfected for 20 days without filing if the secured party makes available to the debtor the goods or documents representing the goods for the purpose of ultimate sale or exchange, or for the purpose of loading, unloading, storing, shipping, transshipping, manufacturing, processing, or otherwise dealing with them in a manner preliminary to their sale or exchange [*Com. Code § 9312(f)*]. After the expiration of the 20-day period, perfection depends on compliance with Division 9 [*Com. Code § 9312(h)*].

Priority between conflicting security interests in the goods is subject to provisions governing priority of purchase money security interests [*see Com. Code § 9324(a), (b)*], discussed in [5][c], *below*, in the case of goods other than inventory, and at *§ 503.41[2]*, in the case of inventory.

Perfection of a security interest in goods in the possession of a bailee that has issued a negotiable document covering the goods is discussed in *§ 503.48[1][b]*.

[3] Accessions

[a] Security Interest In Accessions

"Accession" means goods that are physically united with other goods in such a manner that the identity of the original goods is not lost [*Com. Code § 9102(a)(1)*], for example tires placed on an automobile [*see* UCC Comment 7 to *Com. Code § 9335*]. A security interest may be created in an accession and continues in collateral that becomes an accession [*Com. Code § 9335(a)*]. If a security interest is perfected when the collateral becomes an accession, the security interest remains perfected in the collateral [*Com. Code § 9335(b)*]. *Com. Code § 9335* does not address whether a secured party acquires a security interest in the whole if its collateral becomes an accession. Normally, that will turn on the description of the collateral in the security agreement. Similarly, *Com. Code § 9335* does not address whether perfection against collateral that becomes an accession is effective to perfect a security interest in the whole. Other provisions of Division 9, including the requirements for indicating the collateral covered by a security agreement resolve that question [*see* UCC Comment 5 to *Com. Code § 9335*].

A security interest in an accession is subordinate to a security interest in the whole which is perfected by compliance with the requirements of a certificate of title statute under *Com. Code § 9311(b)* [*Com. Code § 9335(d)*]. Except for the foregoing, the priority of a security interest in an accession is determined by the other provisions governing perfection and priorities (*Com. Code § 9301 et seq.*) [*Com. Code § 9335(c)*; *see* UCC Comment 6 to *Com. Code § 9335*].

[b] Remedies on Default Involving Accessions

After default and subject to the provisions governing default generally (*Com. Code § 9601 et seq.*), a secured party with

a security interest in an accession which has priority over the claims of every person having an interest in the whole may remove the accession from other goods [*Com. Code § 9335(e)*]. The secured party must promptly reimburse any holder of a security interest or other lien on, or owner of, the whole or of the other goods, other than the debtor, for the cost of repair of any physical injury to the whole or the other goods. The secured party need not reimburse the holder or owner for any diminution in value of the whole or the other goods caused by the absence of the accession removed or by any necessity for replacing it. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate assurance for the performance of this obligation [*Com. Code § 9335(f)*].

[4] Commingled Goods

In *Com. Code § 9336*, "commingled goods" means goods that are physically united with other goods in such a manner that their identity is lost in a product or mass [*Com. Code § 9336(a)*]. No security interest exists in commingled goods as such. However, a security interest may attach to a product or mass that results when goods become commingled goods [*Com. Code § 9336(b)*]. If collateral becomes commingled goods, a security interest attaches to the product or mass [*Com. Code § 9336(c)*]. If a security interest in collateral is perfected before the collateral becomes commingled goods, the security interest that attaches to the product or mass under *Com. Code § 9336(c)* is perfected [*Com. Code § 9336(d)*]. Except as discussed below, when two or more security interests attach to the same product or mass under *Com. Code § 9336(c)*, the other provisions of the general rules governing priority determine the priority of a security interest that attaches to the product or mass under *Com. Code § 9336(c)* [*Com. Code § 9336(e)*; *see, e.g., Com. Code § 9315(b)* (secured party's rights in proceeds, discusses at *§ 503.21[4][a]*)].

If more than one security interest attaches to the product or mass under *Com. Code § 9336(c)*, a security interest that is perfected under *Com. Code § 9336(d)* has priority over a security interest that is unperfected at the time the collateral becomes commingled goods [*Com. Code § 9336(f)(1)*]. If more than one security interest is perfected under *Com. Code § 9336(d)*, the security interests rank equally in proportion to the value of the collateral at the time it became commingled goods [*Com. Code § 9336(f)(2)*].

ILLUSTRATION:

Multiple Security Interests in Final Product. SP-1A has a perfected first priority security interest in Debtor's eggs. SP-1B has a perfected second priority security interest in the same collateral. The eggs have a value of $300. Debtor owes SP-1A $200 and $200 to SP-1B. SP-2 has a security interest in Debtor's flour, which has a value of $500 and secures a debt of $600. Debtor uses the eggs and flour to make cakes, which have a value of $1,000. Do all three security interests in the cakes rank equally and what amount of the cakes' value is reachable by each? For purposes of *Com. Code § 9336(f)(2)*, SP-1A and SP-1B are treated like a single secured party; and the secured parties share in the ratio of 3 (for SP-1A and SP-1B combined) to 5 (for SP-2). Applying this ratio to the entire product, SP-1A and SP-1B would be entitled in the aggregate to 3/8 x $1,000 or $375; and SP-2 would be entitled to 5/8 x $1,000 or $625 (except SP-2 is only entitled to $600, the amount it is owed). SP-1A and SP-1B would share the $375 in accordance with their priority as established other than under *Com. Code § 9336*: because SP-1A has first priority, it would receive $200 and SP-1B would receive $175 [*see* UCC Comments 4 and 6 to *Com. Code § 9336*].

[5] Priority of Security Interests in Goods

[a] When Buyer of Goods Takes Free of Interest That Secures Advance

A buyer of goods, other than a buyer in ordinary course of business, takes free of a security interest to the extent that it secures advances made after the earlier the time the secured party acquires knowledge of the buyer's purchase or 45 days after the purchase [*Com. Code § 9323(d)*], unless the advance was made pursuant to a commitment entered into without knowledge of the buyer's purchase and before the expiration of the 45-day period [*Com. Code § 9323(e)*]. A buyer in the ordinary course of business who takes free of a security interest under *Com. Code § 9320* (discussed in *§*

503.24[3]) is not subject to any future advance [UCC Comment 6 to *Com. Code § 9323*].

[b] When Lessee of Goods Takes Free of Interest That Secures Advance

A lessee of goods, other than a lessee in ordinary course of business, takes the leasehold free of a security interest to the extent that it secures advances made after the earlier the time the secured party acquires knowledge of the lease or 45 days after the lease contract becomes enforceable [*Com. Code § 9323(f)*], unless the advance was made pursuant to a commitment entered into without knowledge of the lease and before the expiration of the 45-day period [*Com. Code § 9323(g)*]. A lessee in the ordinary course of business who takes free of a security interest under *Com. Code § 9321* (discussed in *§ 503.24[3]*) is not subject to any future advance [UCC Comment 6 to *Com. Code § 9323*].

[c] Purchase Money Security Interest in Good Other than Inventory

Except as otherwise provided in *Com. Code § 9324(g)* (conflicting purchase money security interests, discussed in *§ 503.24[2][c]*), a perfected purchase money security interest [*see Com. Code § 9103* (defining "purchase money security interest," discussed in *§ 503.11[19]*)] in goods other than inventory or livestock [*see* discussions in *§ 503.41[2]* and at [d], *below*] has priority over a conflicting security interest in the same goods, and, except as otherwise provided in *Com. Code § 9327* [*see* discussion in *§ 503.58[3]*], a perfected security interest in its identifiable proceeds also has priority, if the purchase money security interest is perfected when the debtor receives possession of the collateral or within 20 days thereafter [*Com. Code § 9324(a)*; *see also Com. Code § 9317(e)*, discussed in *§ 503.24[2][c]*].

[d] Purchase Money Interest in Livestock

Subject to *Com. Code § 9324(e)*, and except as otherwise provided in *Com. Code § 9324(g)* (conflicting purchase money security interests, discussed in *§ 503.24[2][c]*), a perfected purchase money security [*see Com. Code § 9103* (defining "purchase money security interest," discussed in *§ 503.11[19]*)] in livestock that are farm products [*see Com. Code § 9102(a)(34)(B)-(D)*, discussed in *§ 503.11[14][d]*] has priority over a conflicting security interest in the same livestock, and, except as otherwise provided in *Com. Code § 9327* [*see* discussion in *§ 503.58[3]*], a perfected security interest in their identifiable proceeds and identifiable products in their unmanufactured states also has priority, if all of the following conditions are satisfied [*Com. Code § 9324(d)*; *see also Com. Code § 9317(e)*, discussed in *§ 503.24[2][c]*]:

- The purchase money security interest is perfected when the debtor receives possession of the livestock.
- The purchase money secured party sends an authenticated notification to the holder of the conflicting security interest.
- The holder of the conflicting security interest receives the notification within six months before the debtor receives possession of the livestock.
- The notification states that the person sending the notification has or expects to acquire a purchase money security interest in livestock of the debtor and describes the livestock.

Com. Code § 9324(d)(2)-(4), inclusive, apply only if the holder of the conflicting security interest had filed a financing statement covering the same types of livestock before the date of the filing, if the purchase money security interest is perfected by filing, or if the purchase money security interest is temporarily perfected without filing or possession under *Com. Code § 9312(f)*, before the beginning of the 20-day period thereunder [*Com. Code § 9324(e)*].

[e] Purchase Money Security Interest in Software

Except as otherwise provided in *Com. Code § 9324(g)* (conflicting purchase money security interests, discussed in *§ 503.24[2][c]*), a perfected purchase money security [*see Com. Code § 9103* (defining "purchase money security interest," discussed in *§ 503.11[19]*)] in software has priority over a conflicting security interest in the same collateral, and, except as otherwise provided in *Com. Code § 9327* (discussed in *§ 503.58[3]*), a perfected security interest in its identifiable proceeds also has priority, to the extent that the purchase money security interest in the goods in which the software was acquired for use has priority in the goods and proceeds of the goods under *Com. Code § 9324* [*Com. Code § 9324(f*); *see also Com. Code § 9317(e)*, discussed in *§ 503.24[2][c]*; *Com. Code § 9102(a)(44)* (when software is goods, discussed in *§ 503.11[14][b]*)].

[6] Rules for Disposition of Goods on Default

In proceeding to dispose of collateral after the debtor's default, the secured party, without removal, may render equipment unusable and dispose of it on the debtor's premises in the regularly prescribed manner [*Com. Code § 9609(a)(2)*; *see Com. Code § 9610* (conditions for disposal)]. When the collateral is documents, the secured party may proceed either as to the documents or as to the goods covered thereby [*Com. Code § 9601(a)(2)*].

A secured party generally has all the options discussed in *§ 503.27*, except for limitations and requirements specific to collateral that is consumer goods, such as the requirement that the goods be disposed of (*see Com. Code § 9620(e), (f)*, discussed in *§ 503.42[5][a]*) and the fact that in a consumer transaction, a secured party may not accept collateral in partial satisfaction of the obligation it secures [*see Com. Code § 9620(g)*, discussed in *§ 503.27[4][b]*; *see also Com. Code § 9624* (waivers permitted and prohibited, discussed in *§ 503.28[2]*)].

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§ 503.41 Inventory

[1] Exception to Certificate of Title Statute

During any period in which goods that are collateral are inventory held for sale or lease by a person or leased by that person as lessor and that person is in the business of selling goods of that kind, the Division 9 filing provisions, not the certificate of title statute, apply to a security interest in that collateral [*Com. Code § 9311(d)*; *Louis & Diederich, Inc. v. Cambridge European Imports, Inc. (1987) 189 Cal. App. 3d 1574, 1585-1586, 234 Cal. Rptr. 889* (Commercial Code governed perfection of interest in dealer's inventory)].

Perfection of security interests under certificate of title statutes is discussed in *§§ 503.22[5]* and *503.23[3], [4]*. The perfection of purchase money security interests in goods that are inventory are discussed in [2], *below*. Priority of security interests in goods generally is discusses at *§ 503.40[5]*.

[2] Priority of Purchase Money Security Interest in Inventory

Subject to *Com. Code § 9324(c)* and except as otherwise provided in *Com. Code § 9324(g)* (conflicting purchase money security interests, discussed in *§ 503.24[2][c]*), a perfected purchase money security interest [*see Com. Code § 9103* (defining "purchase money security interest," discussed in *§ 503.11[19]*)] in inventory has priority over a conflicting security interest in the same inventory, has priority over a conflicting security interest in chattel paper or an instrument constituting proceeds of the inventory and in proceeds of the chattel paper, if so provided in *Com. Code § 9330* (discussed in *§ 503.24[3]*), and, except as otherwise provided in *Com. Code § 9327* (discussed in *§ 503.28[3]*), also has priority in identifiable cash proceeds of the inventory to the extent the identifiable cash proceeds are received on or before the delivery of the inventory to a buyer, if all of the following conditions are satisfied [*Com. Code § 9324(b)*]:

- The purchase money security interest is perfected when the debtor receives possession of the inventory.

- The purchase money secured party sends an authenticated notification to the holder of the conflicting security interest.

- The holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory.

- The notification states that the person sending the notification has or expects to acquire a purchase money security interest in inventory of the debtor and describes the inventory.

Com. Code § 9324(b)(2)-(4), inclusive, apply only if the holder of the conflicting security interest had filed a financing statement covering the same types of inventory as follows [*Com. Code § 9324(c)*]:

- If the purchase money security interest is perfected by filing, before the date of the filing.

- If the purchase money security interest is temporarily perfected without filing or possession under *Com. Code § 9312(f)*, before the beginning of the 20-day period thereunder.

For purposes of the *Com. Code § 9330(a)* and *(b)*, discussed in *§ 503.50[3]* the holder of a purchase money security interest in inventory gives new value for chattel paper constituting proceeds of the inventory [*Com. Code § 9330(e)*]. A purchase money priority in inventory carries over to proceeds consisting of chattel paper and its proceeds (and also to instruments) to the extent provided by *Com. Code § 9330*. Taken together *Com. Code § 9334(b)* and *Com. Code § 9330(e)* enable a purchase money inventory secured party to obtain priority in chattel paper consisting of proceeds of inventory, even if the secured party does not actually give new value for the chattel paper, provided the purchase money secured party satisfies the other conditions for achieving priority [UCC Comment 8 to *Com. Code § 9324*].

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§ 503.42 Consumer Goods

[1] Definitions and Issues Discussed Elsewhere

Consumer goods are goods that are used or bought for use primarily for personal, family, or household purposes [*Com. Code § 9102(a)(23)*; *see also § 503.11[8], [9][b], [14][d]* (related definitions)]. By definition, a consignment that is subject to Division 9 does not occur with respect to consumer goods [*Com. Code § 9102(a)(20)(C)*; *see § 503.11[7]*].

No special rule governs the creation or attachment of a security interest in consumer goods except that, as discussed in *§ 503.21[5]*, a security interest does not attach to after-acquired consumer goods, other than accessions given as additional security, unless the debtor acquires rights in them within 10 days after the secured party gives value [*Com. Code § 9204(b)(1)*]. With respect to notices in consumer transaction documents addressing assertion of defenses against assignees [*Com. Code § 9403(d)*], see *§ 503.28[3]*.

After a consumer's default, the requirements for the notice of disposition are governed by *Com. Code § 9614*, discussed in *§ 503.27[5][b][iv]* and *[v]*. Waivers by consumer debtors and obligors are governed by *Com. Code §§ 9602, 9603, 9624, 9629* and discussed in *§ 503.28[2]*. A secured party must provide a consumer obligor with an explanation that meets the requirements of *Com. Code § 9616* of how the secured party calculated the surplus or deficiency after disposition [*see Com. Code § 9616(b)*, form and discussion in *§ 503.122*]. Limitations on a secured party's liability for failure to comply with requirements of Division 9 specifically applicable to consumer transactions are governed by *Com. Code § 9628(c)* (reasonable belief that transaction was not consumer transaction), and discussed in [6], *below*. Other limitations and procedural requirements regarding deficiency judgments in consumer transactions are governed by *Com. Code § 9626* and discussed in *§ 503.27[7][b]*. When and whether a secured party must file a termination statement with respect to a consumer transaction is governed by *Com. Code § 9513*, discussed in *§ 503.22[6][k]*.

[2] Perfection by Filing of Financing Statement; Purchase Money Security Interest

Generally, the filing of a financing statement is necessary to perfect a security interest in consumer goods [*Com. Code § 9310(a), (b)(2), (3)*; *see Com. Code § 9501(a)(2)* (place of filing)], except that a purchase money security interest [*see Com. Code § 9103*, discussed in *§ 503.11[19]*] in consumer goods (other than goods subject to a certificate of title or

other statue mentioned in *Com. Code § 9311(a)*) is perfected on attachment [*Com. Code § 9309(1)*]. *Com. Code § 9309(1)* represents a change from former *Com. Code § 9302(1)(d)* to allow perfection of a purchase money security interest in consumer goods, other than goods such as automobiles, that are subject to a statute or treaty described in *Com. Code § 9311(a)*, without filing or any other step. However, filing is required to perfect a non-purchase-money security interest in consumer goods and is necessary to prevent a buyer of consumer goods from taking free of a security interest under *Com. Code § 9320(b)*, discussed in [3], *below* [UCC Comment 3 to *Com. Code § 9309*]. A fixture filing is required for priority over conflicting interests in fixtures to the extent provided by *Com. Code § 9334* [UCC Comment 3 to *Com. Code § 9309*; *see Com. Code § 9334(d)*, discussed in *§ 503.47[6][b]*]. Priority of purchase money security interests is discussed in *§ 503.24[2][c]*.

Com. Code § 9108(e) establishes the degree of specificity required into describe the consumer goods in which a security agreement grants a security interest [*see* discussion in *§ 503.20[1]*]. Descriptions of consumer good collateral also must meet the applicable requirements of *Civ. Code § 1799.100* [*Com. Code § 9108(f)*]. For discussion of *Civ. Code § 1799.100*, see Ch. 127, *Consumer Contracts and Loans* .

[3] Buyer May Take Free Before Financing Statement Is Filed

Except when the goods are in the possession of the secured party under *Com. Code § 9313* [*Com. Code § 9320(e)*], a buyer of goods from a person who used or bought the goods for use primarily for personal, family, or household purposes takes free of a security interest, even if perfected, if the buyer buys for value, without knowledge of the security interest, primarily for the buyer's personal, family, or household purposes, and before the filing of a financing statement covering the goods [*Com. Code § 9320(b)*]. To the extent that it affects the priority of a security interest over a buyer of goods under *Com. Code § 9320(b)*, the period of effectiveness of a filing made in the jurisdiction in which the seller is located is governed by *Com. Code § 9316(a)* and *(b)*, discussed in *§ 503.23[4]* [*Com. Code § 9320(c)*; *see also* discussion in *§ 503.24[3][a]*].

Com. Code § 9320(b) deals with buyers of collateral that the debtor-seller holds as "consumer goods." As to purchase money security interests that are perfected without filing under *Com. Code § 9309(1)* (discussed in [2], *above*), a secured party may file a financing statement, although filing is not required for perfection. If the secured party does file, all buyers take subject to the security interest. If the buyer secured party does not file, a buyer who meets the qualifications of *Com. Code § 9320(b)* takes free of the security interest [UCC Comment 5 to *Com. Code § 9320*].

As to security interests for which a perfection step is required--namely non-purchase-money security interests and all security interests, whether purchase money or not, in goods subject to a certificate-of-title statute or treaty described in *Com. Code § 9311(a)*, such as automobiles--as long as the required perfection step has not been taken, and the security interest remains unperfected, not only the buyers described in *Com. Code § 9320(b)*, but also the purchasers described in *Com. Code § 9317* (unperfected interests, discussed in *§ 503.24[1]*) will take free of the security interest [UCC Comment 5 to *Com. Code § 9320*]. After a financing statement has been filed or the perfection requirements of any applicable certificate-of-title statute or treaty have been complies with [*see Com. Code § 9311(b)* (compliance is the equivalent of filing)], all subsequent buyers, under the rule of *Com. Code § 9320(b)*, are subject to the security interest [UCC Comment 5 to *Com. Code § 9320*].

The rights of a buyer under *Com. Code § 9320(b)* turn on whether a financing statement has been filed against consumer goods. Occasionally, a debtor changes his or her location after a filing is made. *Com. Code § 9320(c)*, *above*, deals with the continued effectiveness of the filing under the circumstances interest [UCC Comment 5 to *Com. Code § 9320*]. For a form of complaint for use by a buyer in the ordinary course of business to seek a declaration that he or she takes free of another interest, see *§ 503.161*.

[4] Secured Party in Possession of Consumer Goods

A secured party in possession of collateral that is consumer goods is not necessarily entitled to use or operate that collateral in the manner and to the extent agreed by the debtor [*Com. Code § 9207(b)(4)(C)*], but may use or operate the collateral for the purpose of preserving the collateral or its value and as permitted by an order of a court having competent jurisdiction [*Com. Code § 9207(b)(4)(A), (B)*]. For detailed discussion of the rights of a secured party in possession of collateral, see *§ 503.26[1]*.

[5] Secured Party's Duty to Dispose of Consumer Goods in Possession After Default

[a] When Disposition Is Required

Unless the debtor has waived the right to require disposition of collateral under *Com. Code § 9620(e)* by an agreement to that effect entered into and authenticated after default, a secured party who has taken possession of collateral consisting of consumer goods must dispose of it on default pursuant to *Com. Code § 9610* if there is (1) a purchase money security interest in the collateral, and the debtor has paid 60 percent of the cash price, or (2) a nonpurchase money security interest in the collateral, and the debtor has paid 60 percent of the secured obligation [*Com. Code § 9620(e)*; *see Com. Code §§ 9602(10), 9624(b)* (waiver)]. If the secured party fails to dispose of the consumer goods within 90 days after taking possession, or within any longer period to which the debtor and all secondary obligors have agreed in an agreement to that effect entered into and authenticated after default [*Com. Code § 9620(f)*], the debtor has the option to recover either in conversion [*see* discussion [b], *below*] or under *Com. Code § 9625(b)-(d)*, discussed in *§ 503.29*.

For a form for waiver of debtor's right to require disposition of collateral under *Com. Code § 9620(e)*, see *California Legal Forms, Ch. 42, Secured Transactions, § 42.242* (Matthew Bender). For a complaint for damages under *Com. Code § 9625(a)-(d)* that can be modified for use in this situation see *§ 503.102*. As a third alternative, the debtor or obligor may request the court to arrange for disposition of the collateral pursuant to *Com. Code § 9625(a)*, discussed in *§ 503.28[5]*. For a complaint that can be modified to use to seek an order for disposition, see *§ 503.103*.

[b] Enforcement by Suit for Conversion of Consumer Goods

Former Division 9 [*see* former *Com. Code § 9505(1)*] specified that the debtor was allowed to sue in conversion if, after default, the secured party took possession collateral that was consumer goods and failed to dispose of them in a prescribed time period when 60 percent of the cash price or secured obligation had been paid [*see Com. Code § 9620(e), (f)*, discussed in [a], *above*]. Current *Com. Code § 9620(e)* has eliminated the superfluous reference to conversion; but remedies available under other law, including conversion, remain available [*see* UCC Comment 12. to *Com. Code § 9620*, *see also Com. Code §§ 1302, 1305* (general principles and remedies available unless specifically displaced, but consequential, special, or penal damages may not be had except as specifically provided in the Commercial Code or by other rule of law)]. For a complaint for conversion for use in this situation, see *§ 503.104*.

[6] Secured Party's Immunity Based on Reasonable Belief That Transaction Is Not Consumer Goods Transaction

A secured party is not liable to any person, and a person's liability for a deficiency is not affected, because of any act or omission arising out of the secured party's reasonable belief that a transaction is not a consumer goods transaction or a consumer transaction [*see Com. Code § 9102(a)(24), (26)* (definitions, discussed in *§ 503.11*[8])] [*see Com. Code § 9102(a)(23)* (definition, discussed in *§ 503.11[14][d]*)], if the secured party's belief is based on its reasonable reliance on either (1) a debtor's representation concerning the purpose for which collateral was to be used, acquired, or held, or (2) an obligor's representation concerning the purpose for which a secured obligation was incurred [*Com. Code § 9628(c)*]. Of course, if the secured party's belief is not reasonable or, even if reasonable, is not based on reasonable reliance on the debtor's representation, the limitation on liability is not applicable [UCC Comment 2 to *Com. Code § 9628*].

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§ 503.43 Perishable Agricultural Commodities

Perishable agricultural commodities [*7 U.S.C. § 499a(b)(4)*] received by a commission merchant, broker, or dealer [*7 U.S.C. § 499a(b)(5)-(7)*] in interstate or foreign commerce [*7 U.S.C. § 499a(b)(8)*], inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of perishable agricultural commodities or products are held by the commission merchant, broker, or dealer in trust for the benefit of all unpaid sellers, suppliers, or agents [*7 U.S.C. § 499e(c)(2)*]. The unpaid seller, supplier, or agent loses the benefit of the trust unless it gives notice of intent to preserve the trust to the commission merchant, broker, or dealer within 30 days after (1) payment was due, either in accordance with regulations promulgated by the Secretary of Agriculture [*see 7 C.F.R. § 46.2(aa)*] or in accordance with the parties' written agreement entered into before the transaction; or (2) the seller, supplier, or agent received notice of dishonor of a promptly presented payment instrument [*7 U.S.C. § 499e(c)(3)*]. The written notice to the commission merchant, dealer, or broker must set forth information in sufficient detail to identify the transaction subject to the trust [*7 U.S.C. § 499e(c)(3)*].

When the parties agree to a payment period different from that established by the Secretary, each party must have a copy of the agreement, and those payment terms must be disclosed on invoices, accountings, and other documents relating to the transaction [*7 U.S.C. § 499e(c)(3)*; *see In re San Joaquin Food Service, Inc. (9th Cir. 1992) 958 F.2d 938, 940-941* (produce seller's interest in trust nullified by its failure to include payment terms on invoices; fact that buyer had actual knowledge of payment terms did not provide defense)].

Notice of intent to preserve the trust must be given directly to the commission merchant, dealer, or broker in order to preserve the benefits of the trust as against a competing secured party [*In re Marvin Properties, Inc. (9th Cir. 1988) 854 F.2d 1183, 1186* (receipt of copy of USDA's letter acknowledging receipt of notice of intent held insufficient)].

Federal district courts have jurisdiction over actions by trust beneficiaries to enforce payment from the trust [*7 U.S.C. § 499e(c)(5)(i)*].

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§ 503.44 Timber and Minerals

[1] Extent of Division 9 Applicability to Timber to Be Cut and As Extracted Collateral

The filing system in revised Division 9 is oriented more towards personal property and less towards real property than the former Division 9 [*see* UCC Comment 4c to *Com. Code § 9102*]. Crops, for instance, are goods [*see Com. Code § 9102(a)(34)(A), (44)* ("farm products" means goods, other than standing timber, with respect to which the debtor is engaged in a farming operation and includes crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes)], and a security interest in growing crops is perfected by filing in the Secretary of State's office [*Com. Code §§ 9310(a), 9501(a)*], or by the secured party taking possession of the crops [*Com. Code § 9310(b)(6), 9313(a)*]. See *§§ 503.23, 503.40[2][a]* for discussions of choice of law rules and general rules for perfecting security interests in goods. The priority of a security interest in crops as against an owner or encumbrancer of the land is established in accordance with *Com. Code § 9334(i)*, discussed in *§ 503.24[2][e]*. In Revised Division 9, there is a distinction between crops and standing timber [UCC Comment 4a to *Com. Code § 9102*].

"Goods" includes standing timber that is to be cut and removed under a conveyance or contract for sale [*Com. Code § 9102(a)(44)(ii)*]. A security interest in timber to be cut is perfected by filing in the office designated for the filing or recording of a record of a mortgage on the related real property [*see Com. Code § 9501(a)(1)(A)*]. *Com. Code § 9501(a)(1)(A)* is also applicable to filing to perfect interest in as-extracted collateral, which is defined as either of the following [*Com. Code § 9102(a)(6)*]:

- Oil, gas, or other minerals that are subject to a security interest that both (1) is created by a debtor having an interest in the minerals before extraction and (2) attaches to the minerals as extracted.

- Accounts arising out of the sale at the wellhead or minehead of oil, gas, or other minerals in which the debtor had an interest before extraction.

Under Revised Division 9, oil, gas, and other minerals that have not been extracted from the ground are treated as real property to which Division 9 does not apply [*see Com. Code § 9109(d)(11)*]. On extraction, minerals become personal

property (goods) eligible to be collateral under Division 9 [UCC Comment 4c to *Com. Code § 9102*]. The definition of "goods" excludes oil, gas, or other minerals before extraction [*Com. Code § 9102(a)(44)*].

ILLUSTRATIONS:

Elements of Definition of "As-Extracted Collateral." Debtor owns an interest in oil that is to be extracted and contracts to sell the oil to Buyer at the wellhead. In an authenticated agreement, Debtor agrees to sell to Lender the right to payment from Buyer (carved out production payment). This right to payment is an account that constitutes "as-extracted collateral." If Lender then resells the right to payment to Financier, Financier acquires a security interest. Is Financier's security interest "as-extracted collateral?" No. The Debtor-seller in that transaction (Lender) had no interest in the oil before extraction, thus, Financier's collateral (the account it owns) is not "as-extracted collateral" [UCC Comment 4c to *Com. Code § 9102*, Example 6].

Under the same facts, before extraction, Buyer grants a security interest in the oil to Bank. Is Bank's security interest in as-extracted collateral?" No. Although Bank's security interest attaches when the oil is extracted, Buyer did not have an interest in the oil before extraction, so Bank's collateral is not "as-extracted collateral" [UCC Comment 4c to *Com. Code § 9102*, Example 7].

[2] Security Agreement as to Timber to Be Cut

A security agreement that grants a security interest in timber to be cut must include a description of the land concerned *Com. Code § 9203(b)(3)(A)*; *see also Com. Code § 9502(b)(3)* (real property description in financing statement, discussed in*§ 503.44[3]*]. For general discussion of the requirements of a security agreements, see *§ 503.21[2][a]*.

[3] Perfecting a Security Interest in Timber to Be Cut or As Extracted Collateral

Security interests in minerals attach on extraction and in accounts resulting from the sale of minerals at the wellhead or minehead [*see Com. Code § 9301(4)* (choice of law, discussed in *§ 503.23[1][c]*)]. The term "at the wellhead" encompasses arrangements based on a sale of the product from the moment that it passes from the ground, and is measured without technical distinctions as to whether title passes "at the Christmas tree" of a well, the far side of a gathering tank, or at some other point. The term "at the minehead" is comparable [UCC Comment 4c to *Com. Code § 9102*]. A security interest as extracted collateral is perfected by filing in the office designated for the filing or recording of a record of a mortgage on the related real property [*see Com. Code § 9501(a)(1)(A)*].

Except as otherwise provided in *Com. Code § 9501(b)*, to be sufficient, a financing statement that covers as-extracted collateral or timber to be cut (, or which is filed as a fixture filing and covers goods that are or are to become fixtures), must satisfy *Com. Code § 9502(a)*, discussed in *§ 503.22[6][b]*, and also satisfy all of the following conditions [*Com. Code § 9502(b)*]:

- Indicate that it covers this type of collateral.
- Indicate that it is to be recorded in the real property records.
- Provide a description of the real property to which the collateral is related sufficient to give constructive notice of a mortgage under the law of this state if the description were contained in a record of the mortgage of the real property.
- If the debtor does not have an interest of record in the real property, provide the name of a record owner.

A record of a mortgage is effective, from the date of recording, as a financing statement filed as a fixture filing or as a financing statement covering as-extracted collateral or timber to be cut only if all of the following conditions are satisfied [*Com. Code § 9502(c)*]:

- The record indicates the goods or accounts that it covers.

- The goods are or are to become fixtures related to the real property described in the record or the collateral is related to the real property described in the record and is as-extracted collateral or timber to be cut.

- The record satisfies the requirements for a financing statement in *Com. Code § 9502* [*see* at *§ 503.22[6][b]*] other than an indication that it is to be filed in the real property records.

- The record is duly recorded.

Financing statements covering as-extracted collateral (or timber to be cut) must be recorded and the filing office must index them in accordance with *Com. Code § 9519(d)*, discussed in *§ 503.47[5]* [*see Com. Code § 9519(e)* (indexing of assignment of financing statement that covers as-extracted collateral or timber to be cut)].

[4] Buyer in Ordinary Course of Minerals Takes Free of Encumbrance

A buyer in ordinary course of business buying oil, gas, or other minerals at the wellhead or minehead or after extraction takes free of an interest arising out of an encumbrance [*Com. Code § 9320(d)*]. For general discussion of priority accorded buyers in the ordinary course of business, see *§§ 503.24[3], 503.42[3]*]. For a complaint for use by a buyer in the ordinary course of business to seek a declaration that he or she takes free of another interest, see *§ 503.161*.

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§ 503.45 Agricultural Liens

[1] Perfection of Agricultural Liens

Agricultural liens, defined by *Com. Code § 9102(a)(5)*, which is set forth in *§ 503.11[3]*, are perfected by the filing of a financing statement [*Com. Code § 9310(a)*; *see Com. Code § 9302* (choice of law regarding agricultural liens, discussed in *§ 503.23[1][d]*)]. An agricultural lien is perfected if the lien has become effective and the financing statement has been filed. An agricultural lien is perfected when it becomes effective if the applicable requirements are satisfied before the agricultural lien becomes effective [*Com. Code § 9308(b)*]. An agricultural lien is perfected continuously if it is originally perfected by one method under Division 9 and is later perfected by another method under Division 9, without an intermediate period when it was unperfected [*Com. Code § 9308(c)*].

If a secured party assigns a perfected agricultural lien, it is not necessary to make an additional filing to continue the perfected status of the lien against creditors of and transferees from the original debtor [*Com. Code § 9310(c)*].

A person is authorized to file an initial financing statement (or an amendment that adds collateral covered by a financing statement, or an amendment that adds a debtor to a financing statement) with respect to an agricultural lien if that person holds an agricultural lien that has become effective at the time of filing and the financing statement covers only collateral in which the person holds an agricultural lien [*Com. Code § 9509(a)(2)*].

[2] Statute Creating Agricultural Lien May Give It Priority

A perfected agricultural lien on collateral has priority over a conflicting security interest in or agricultural lien on the same collateral if the statute creating the agricultural lien so provides [*Com. Code § 9322(g)*]. If the statute creating the agricultural lien does not grant it priority, *Com. Code § 9322(a)* applies the same priority rules to an agricultural line as to a security interest, regardless of whether the agricultural line conflicts with another agricultural lien or with a security interest [UCC Comment 12 to *Com. Code § 9322*]. For general discussion of priority, see *§ 503.24[2]*.

[3] Statute Creating Agricultural Lien Determines Time of Default

For purposes of *Com. Code § 9601 et seq.*, a default occurs in connection with an agricultural lien at the time the secured party becomes entitled to enforce the lien in accordance with the statute under which it was created [*Com. Code § 9606*]. For general discussion of a secured party's options on debtor's default, see *§ 503.27*.

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§ 503.46 Goods on Consignment

[1] Definitions and Parties

The term "consignment" does not imply a sale, but rather imports an agency and that the title remains in the consignor. The consignor entrusts property to the consignee as agent for the purposes of sale. There may be any kind of sale arrangement, such as that the consignee may sell for any price but remit to the consignor only a fixed price. It may also be that at the time of sale the consignee will be considered the purchaser. Prior to the contemplated sale, however, the goods are the property of the consignor [*see Cass v. Rochester (1917) 174 Cal. 358, 361, 362, 163 P. 212* ; *see also § 503.133* (complaint in intervention by consignor, who complied with filing and notification procedure, to protect ownership in consigned goods); *Fariba v. Dealer Servs. Corp. (2009) 178 Cal. App. 4th 156, 172-173, 100 Cal. Rptr. 3d 219* (trial court properly instructed jury that possession as between competing claimants to goods in inventory at premises of consignment merchant is accomplished when one with right to possess accomplishes actual custody and control of those goods under all circumstances demonstrated by evidence; wholesaler that had consigned used vehicles to dealer was entitled to possession of them after dealer went out of business, and consignor had actual custody and control of those vehicles because of having keys to them in hand, even after vehicles were taken from dealer's premises by creditor that had security interest in dealer's inventory)].

The consignments governed by revised Division 9 [*Com. Code § 9109(a)(4)*], are defined in *Com. Code § 9102(a)(20), set forth in § 503.11[7]* to exclude consignments of goods that were consumer goods immediately before delivery to the consignee. Consignments of consumer goods are governed in California by *Com. Code § 2326*, which is discussed in Ch. 500, *Sales: UCC Sales* . A consignment that is subject to Division 9 creates a security interest in the consignor [*Com. Code § 1201(b)(35*], who, under Division 9 is a secured party [*Com. Code § 9102(a)(72)(C)*; *see Com. Code § 9102(a)(12)(C), (28)(C)* (consigned goods are collateral; consignee is debtor)]. The security interest of the consignor is a purchase money security interest in inventory [*Com. Code § 9103(d)*], and it must be perfected as such [*see Com. Code § 9324(b), (c)*; *see also §§ 503.46[2], [3], 503.42[1]*].

[2] Consignor's Goods Subject to Claims of Consignee's Creditors

Under Division 2 of the Commercial Code, governing sales, when goods are delivered to a person primarily for resale,

the goods are deemed to be on "sale or return" [*Com. Code § 2326(1)(b)*]. Goods held on "sale or return" are subject to the claims of creditors of the "buyer" or consignee while they are in the "buyer's" or consignee's possession [*Com. Code § 2326(2)*]. Except as otherwise provided in *Com. Code § 9319(b)*, for purposes of determining the rights of creditors of, and purchasers for value of goods from, a consignee, while the goods are in the possession of the consignee, the consignee is deemed to have rights and title to the goods identical to those the consignor had or had power to transfer [*Com. Code § 9319(a)*]. For purposes of determining the rights of a creditor of a consignee, law other than Division 9 determines the rights and title of a consignee while goods are in the consignee's possession if, under the priority rules of Division 9, a perfected security interest held by the consignor would have priority [*Com. Code § 9319(b)*]. over the rights of the creditor.

ILLUSTRATION:

Consignor Does Not Perfect Security Interest. SP-1 delivers goods to Debtor in a consignment transaction as defined in *Com. Code § 9102(a)(20)*. SP-1 does not file a financing statement. Debtor then grants a security interest in the goods to SP-2, SP-2 files a financing statement. Whose interest is senior: SP-1's or SP-2's? Under *Com. Code § 9322(a)(2)*, SP-2's interest is senior. Even though, under a "true" consignment, Debtor is a mere bailee and would not have any rights, beyond those of a bailee, in the consigned goods to which SP-2's security interest could attach, under *Com. Code § 9319(a)*, for purposes of determining the rights of Debtor's creditors, Debtor is deemed to have SP-1's rights [*see* UCC Comment 2 to *Com. Code § 9319*].

ILLUSTRATION: Consignor Does Perfect Security Interest. SP-1 delivers goods to Debtor in a consignment transaction as defined in *Com. Code § 9102(a)(20)*. SP-1 files a proper financing statement. Debtor then grants a security interest in the goods to SP-2. Whose interest is senior: SP-1's or SP-2's? Under *Com. Code § 9322(a)*, SP-1's interest is senior. Further, under *Com. Code § 9319(b)*, Debtor acquired only the special interest of a bailee in the consigned goods; thus, SP-2's security interest would attach only to that special interest [*see* UCC Comment 3 to *Com. Code § 9319*].

[3] Filing and Notification Procedure for Protection of Consignments

In order to enjoy the priority of its security interest as a purchase money security interest in inventory [*Com. Code § 9103(d)*], a consignor must perfect that interest as it would perfect a security interest in inventory; that is, in accordance with *Com. Code § 9324(b)* and *(c)*, discussed in *§ 503.41[2]* [*see* UCC Comment 7 to *Com. Code § 9324*]. The consignor must file a financing statement before the consignee receives possession of the goods [*Com. Code § 9324(b)(1)*]. If the holder of a competing security interest has filed a financing statement covering the same types of inventory/goods before the date of the consignor's filing, the consignor must give that secured party authenticated notification that the consignor expectsto acquire a security interest in the goods on consignment and describes the goods [*Com. Code § 9324(b)(2), (4), (c)(1)*]. This notice must be received within five years before the consignee receives possession of the goods [*Com. Code § 9324(b)(3)*; *see § 503.133*].

[4] Form of Financing Statement for Consignments

A consignor (as well as a lessor or other bailor of goods, a licensor, or a buyer of a payment intangible or promissory note) may file a financing statement, or may comply with a registration or certificate of title statue [*see Com. Code § 9311(a)*], using the terms "consignor," "consignee," (or "lessor," "lessee," "bailor," "bailee," "licensor," "licensee," "owner," "registered owner," "buyer," "seller,") or words of similar import, instead of the terms "secured party" and "debtor" [*Com. Code § 9505(a)*]. The filing of a financing statement or compliance that is equivalent to filing a financing statement under a registration or certificate of title statue [*see Com. Code § 9311(b)*] is not of itself a factor in determining whether the collateral secures an obligation. If it is determined for another reason that the collateral secures an obligation, a security interest held by the consignor (or lessor, bailor, licensor, owner, or buyer) which attaches to the collateral is perfected by the filing or compliance [*Com. Code § 9505(b)*].

[5] Ordinary Duties of Secured Party in Possession Do Not Apply to Consignor

The ordinary duties of a secured party in possession of collateral [*see Com. Code § 9207(a)*, discussed in *§ 503.26[1]*], do not apply to a consignor (or to a buyer of accounts, chattel paper, payment intangibles, or promissory notes) unless the secured party is entitled under an agreement either to charge back uncollected collateral or otherwise to full or limited recourse against the debtor or a secondary obligor based on the nonpayment or other default of an account debtor or other obligor on the collateral [*Com. Code § 9207(d)(1)*]. *Com. Code § 9207(b)*, discussed in *§ 503.26[1]*, and *Com. Code § 9207(c)*, discussed in *§ 503.50[4]*, do not apply at all to a secured party who is a consignor or a buyer of accounts, chattel paper, payment intangibles, or promissory notes [*Com. Code § 9207(d)(2)*].

[6] Actual Knowledge That Consignee Sells Goods on Consignment

When a consignor of goods does not have the superior security interest in the goods that arises from filing a financing statement [*see § 503.46[3]*], it is possible for the consignor to have a superior interest, relative to a creditor with a perfected security interest in the inventory of the consignee, based on proof that, when the creditor's security interest in the consignee's inventory was perfected, either (1) the consignee's creditors generally knew that the consignee was substantially engaged in selling the goods of others [*see Com. Code § 9102(a)(20)(A)(iii)*], or (2) the particular creditor in question actually knew that the consignee was substantially engaged in selling the goods of others [*Fariba v. Dealer Servs. Corp. (2009) 178 Cal. App. 4th 156, 166, 100 Cal. Rptr. 3d 219]* .

Jury instructions in the following forms would be proper on the crucial issues of fact [*Fariba v. Dealer Servs. Corp. (2009) 178 Cal. App. 4th 156, 160, 163-164, 100 Cal. Rptr. 3d 219]* :

- The consignor holds a superior interest in the consigned goods if the consignor proves, by a preponderance of the evidence, that the secured party had actual knowledge, at the date of perfection of the security interest, that the debtor was substantially engaged in selling of the goods of others.

- The debtor is considered to be substantially engaged in selling goods that belong to others if 20 percent or more of the debtor's inventory belonged to others.

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§ 503.47 Fixtures

[1] Relation to Goods for Security Interest Purposes

Division 9 applies to a transaction, regardless of its form, that creates a security interest in fixtures by contract [*Com. Code § 9109(a)(1)*; *see Com. Code § 1201(b)(35)* (defining "security interest" to include interest in fixtures)] and defines goods to include fixtures [*Com. Code § 9102(a)(44)*].

Fixtures are an exception to the general rule that Division 9 does not apply to creation or transfer of an interest in or lien on real property, including a lease or rents thereunder. Division 9 applies to fixtures to the extent provided in *Com. Code § 9334* and to fixture filings as provided in *Com. Code §§ 9501, 9502, 9512, 9516,* and *9519* [*Com. Code § 9109(d)(11)(B), (C)*].

[2] "Fixtures" and "Trade Fixtures" Defined

"Real property" consists not only of land, but also that which is affixed to it, or incidental or appurtenant to it, and that which is immovable by law (except for certain land products to be sold) [*Civ. Code § 658*]. Things are "affixed to land" when attached to it by roots, imbedded in it, permanently resting on it, or permanently attached to what is thus permanent--such as by means of cement, plaster, nails, bolts, or screws [*Civ. Code § 660*]. Division 9 defines "fixtures" as goods that have become so related to particular real property that an interest in them arises under real property law [*Com. Code § 9102(a)(41)*].

A tenant is entitled to remove during the lease any "trade fixtures," that is, anything affixed for trade, manufacture, ornament, or domestic use purposes, if removal will not injure the premises, and unless the manner of fixation has caused it to become an integral part of the premises [*Civ. Code § 1019*]. While "trade fixtures" are ordinarily removable by the tenant on termination of the lease, the lease may effectively provide that on termination for breach by the tenant the trade fixtures will belong to the landlords. In effect, a trade fixture is not formally considered a fixture at all under California law; nor is "fixture" a factual description of an object, but only a statement of a legal conclusion as to whether it constitutes, in the circumstances, a part of the real property [*Goldie v. Bauchet Properties (1975) 15 Cal. 3d 307, 313, 316, 124 Cal. Rptr. 161, 540 P.2d 1* ; *see § 503.110*].

[3] Creation of Security Interest in Fixtures

A security interest under Division 9 may be created in goods that are fixtures or may continue in goods that become fixtures. However, no security interest exists under Division 9 in ordinary building materials incorporated into an improvement on land [*Com. Code § 9334(a)*]. Division 9 does not prevent creation of an encumbrance on fixtures under real property law [*Com. Code § 9334(b)*].

[4] Procedure and Effectiveness of Fixture Filing

A fixture filing, which is a financing statement recorded in the real property records and covering goods which are, or are to become fixtures [*Com. Code §§ 9102(a)(40), 9501(a)(1)(B), 9502(b)*], may be recorded at the county recorder's office without acknowledgment, certificate of acknowledgment, or further proof [*Gov. Code § 27282(a)(7)*]. A filing office may refuse to accept a financing statement tendered to be filed or recorded under *Com. Code § 9501(a)(1)* if the statement does not provide a sufficient description of the real property to which it relates [*Com. Code § 9516(b)(3)(D)*]. A mortgage with certain additions prescribed by law may be effective as a financing statement [*Com. Code § 9502(c)*; *see § 503.44[3]*]. A financing statement filed as a fixture filing to perfect a security interest in fixtures of a transmitting utility must be filed in the office of the Secretary of State [*Com. Code § 9501(b)*].

A financing statement filed as a fixture filing, if the debtor is not a transmitting utility, must contain certain statutorily required statements in order to be effective [*see Com. Code § 9502(a), (b),* discussed in *§§ 503.22[6][b]* and *503.44[3],* respectively]. Financing statements substantially complying with statutory requirements of *Com. Code § 9502* are effective even though containing minor errors that are not seriously misleading [*Com. Code § 9506*]. A fixture filing is effective for five years from the date of filing [*Com. Code § 9515(a)*; *but see Com. Code § 9515(b)* (financing statement filed in connection with manufactured home transaction is effective for 30 years after date of filing if it indicates that it is filed in connection with a manufactured home transaction)]. The effectiveness of the filed financing statement lapses on the expiration of the five-year period unless a continuation statement is filed within six months before the expiration of the five-year period [*Com. Code § 9515(c), (d)*]. A real estate mortgage effective as a financing statement filed as a fixture filing [*see Com. Code § 9502(c)*] remains effective as a financing statement filed as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real property [*Com. Code § 9515(g)*].

An assignment of record of a security interest in a fixture covered by a record of a mortgage which is effective as a financing statement filed as a fixture filing under *Com. Code § 9502(c)* can be made only by an assignment of record of the mortgage in the manner provided by California law other than the Commercial Code [*Com. Code § 9514(c)*].

[5] Notice to Real Estate Interest

If a financing statement is filed as a fixture filing (or covers as-extracted collateral or timber to be cut), it must be recorded and the filing office must index it both (1) under the names of the debtor and of each owner of record shown on the financing statement as if they were the mortgagors under a mortgage of the real property described, and (2) to the extent that California law provides for indexing records of mortgages under the name of the mortgagee, under the name of the secured party as if the secured party were the mortgagee thereunder, or, if indexing is by description, as if the financing statement were a record of a mortgage of the real property described [*Com. Code § 9519(d)*]. When properly containing the description of the real property affected thereby [*see Com. Code § 9502(b)(3)*], the fixture filing constitutes constructive notice of its contents to subsequent purchasers and mortgagees, from the time it is filed with the recorder for record [*Gov. Code § 27282(b)*].

[6] Priorities as to Fixtures

[a] Residual Rule

In cases not governed by *Com. Code § 9334(d)-(h)*, inclusive, discussed in*§ 503.47[6][b] -[h]*, a security interest in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of the related real property other than the debtor [*Com. Code § 9334(c)*].

[b] Perfected Interests in Fixtures

A perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property in the following cases:

- First, except as discussed in*§ 503.47[6][d]* with respect to construction mortgages [*see Com. Code § 9334(h)*], a perfected purchase money security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in or is in possession of the real property, the interest of the encumbrancer or owner arises before the goods become fixtures, and the security interest is perfected by a fixture filing before the goods become fixtures or within 20 days thereafter [*Com. Code § 9334(d)*].

- Second, a perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the debtor has an interest of record in the real property or is in possession of the real property, the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, and the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner [*Com. Code § 9334(e)(1)*; *see also* UCC Comment 6 to *Com. Code § 9334*].

- Third, a perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the fixtures are readily removable factory or office machines or readily removable replacements of domestic appliances that are consumer goods [*Com. Code § 9334(e)(2)*].

- Fourth, a perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the conflicting interest is a lien on the real property obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by Division 9 [*Com. Code § 9334(e)(3)*].

- Finally, a perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if the security interest is created in a manufactured home in a manufactured home transaction and is perfected pursuant to a certificate of title statute described in *Com. Code § 9311(a)(2)*[*Com. Code § 9334(e)(4)*; *see Com. Code § 9102(a)(53), (54)* (defining "manufactured home" and "manufactured home transaction")]. *Com. Code § 9334(e)(4)* is only one of the priority rules applicable to security interests in a manufactured home that becomes a fixture. Thus, a security interest in a manufactured home that does not qualify under *Com. Code § 9334(e)(4)* may qualify under another provision [*see* UCC Comment 10 to *Com. Code § 9334*].

[c] Unperfected Interests in Fixtures

Whether or not it has been perfected, a security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real property if either (1) the encumbrancer or owner has consented, in an authenticated record, to the security interest or disclaimed an interest in the goods as fixtures; or (2) the debtor has a right to remove the goods as against the encumbrancer or owner [*Com. Code § 9334(f)*]. In the latter instance, if the debtor's right to remove the goods as against the encumbrancer or owner terminates, the priority of the security interest continues for a reasonable time [*Com. Code § 9334(g)*].

[d] Construction Mortgage

Except as otherwise provided in *Com. Code § 9334(e)* and *(f)*, discussed in*§ 503.47[6][b]* and *[c]*, a security interest in fixtures is subordinate to a construction mortgage if a record of the mortgage is recorded before the goods become fixtures and the goods become fixtures before the completion of the construction. A mortgage is a construction mortgage to the extent that it secures an obligation incurred for the construction of an improvement on land, including the acquisition cost of the land, if the recorded record of the mortgage so indicates [*Com. Code § 9334(h)*]. A mortgage has this priority to the same extent as a construction mortgage to the extent that it is given to refinance a construction mortgage [*Com. Code § 9334(h)*].

[7] Governing Law When Foreign Goods Affixed to California Property

If goods are or become fixtures in relation to real estate located in California, the both perfection of a security interest in the goods by filing a fixture filing and the effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral are governed by California law, specifically, Division 9 [*Com. Code § 9301(3)(A), (C)*].

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§ 503.48 Documents

[1] Perfection of Interests in Negotiable Documents

[a] Negotiation

A negotiable tangible document of title is negotiated as follows [*Com. Code § 7501(a)(1)-(4)*]:

- If the document's original terms run to the order of a named person, the document is negotiated by the named person's indorsement and delivery. After the named person's indorsement in blank or to bearer, any person may negotiate the document by delivery alone.

- If the document's original terms run to bearer, it is negotiated by delivery alone.

- If the document's original terms run to the order of a named person and it is delivered to the named person, the effect is the same as if the document had been negotiated.

- Negotiation of the document after it has been indorsed to a named person requires indorsement by the named person and delivery.

A negotiable electronic document of title is negotiable as follows [*Com. Code § 7501(b)(1), (2)*]:

- If the document's original terms run to the order of a named person or to bearer, the document is negotiated by delivery of the document to another person. Indorsement by the named person is not required to negotiate the document.

- If the document's original terms run to the order of a named person and the named person has control of the document, the effect is the same as if the document had been negotiated.

A negotiable tangible or electronic document or title is "duly negotiated" if it is negotiated in the appropriate manner

stated above to a holder that purchases it in good faith, without notice of any defense against or claim to it on the part of any person, and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving (in the case of a tangible document) or taking delivery of (in the case of an electronic document) the document in settlement or payment of a monetary obligation [*Com. Code § 7501(a)(5)* (tangible documents), (b)(3) (electronic documents)]. The holder acquires title to the document, title to the goods covered thereby, and specified rights against the issuer and certain agents of the issuer [*Com. Code § 7502(a)*; *see also Com. Code § 9331*]. However, such a document confers no right in goods against one who before its issuance had a legal interest or a perfected security interest in them and who neither delivered nor entrusted them or any document covering them to the bailor, or a nominee of the bailor, with actual or apparent authority to ship, store, or sell, or with power to obtain delivery [*see Com. Code § 7403*] or with power of disposition under any statute or rule of law, nor acquiesced in the procurement by the bailor or a nominee of the bailor of any document of title [*Com. Code § 7503(a)*].

[b] Perfection

A security interest in tangible negotiable documents may be perfected by the secured party's act of taking possession of the documents [*Com. Code § 9313(a)*]. It also may be perfected by filing [*Com. Code § 9312(a)*]. However, it may be perfected without filing or taking possession or control for a period of 20 days from the time it attaches to the extent that it arises for new value given under an authenticated security agreement [*Com. Code § 9312(e)*].

While goods are in the possession of a bailee that has issued a negotiable document covering the goods, a security interest in the goods is perfected by perfecting a security interest in the document [*Com. Code § 9312(c)(1)*]. A security interest perfected in the document has priority over any security interest that becomes perfected in the goods by another method during that time [*Com. Code § 9312(c)(2)*]. A perfected security interest in a negotiable document can remain perfected for 20 days without filing if the document representing the goods is made available to the debtor by the secured party for certain purposes, in the same manner as that described for goods in possession of a bailee not issuing a negotiable document for those goods [*Com. Code § 9312(f)*; *see* discussion in *§ 503.40[2][b]*].

After the expiration of the 20-day period in either *Com. Code § 9312(e)* or *(f)*, perfection depends on compliance with Division 9 [*Com. Code § 9312(h)*].

[2] Conflict of Laws as to Security Interests in Documents

The question as to which jurisdiction's law governs the perfection or nonperfection of and the priority of a security interest in documents is resolved in the same manner as that applicable generally, discussed in *§ 503.23[1]* [*Com. Code § 9301*]. However, the distinction between possessory and nonpossessory interests [*Com. Code § 9301(1), (2)*] creates the potential for the same jurisdiction to apply two different choice of law rules to determine perfection in the same collateral. For example, if a secured party was in possession of an instrument or document to relinquish possession in reliance on temporary perfection, the applicable law immediately would change from that of the location of the collateral to that of the location of the debtor. The application of two different choice-of-law rules for perfection is unlikely to lead to any material practical problems because the perfection rules of one Division 9 jurisdiction are likely to be identical to those of another. Moreover, under *Com. Code § 9301(3)(C)*, the relative priority of competing security interests in tangible collateral is resolved by reference to the law of the jurisdiction in which the collateral is located, regardless of how the security interests are perfected [UCC Comment 5a to *Com. Code § 9301*].

Com. Code § 9301 takes a bifurcated approach with respect to collateral mentioned in *Com. Code § 9301(3)* (negotiable tangible documents, goods, instruments, money, or tangible chattel paper): *Com. Code § 9301(1)* and *(2)* govern perfection, while under *Com. Code § 9301(3) (C)*, the law of the jurisdiction where the collateral is located determines "the effect of perfection or nonperfection and priority," including for example, the effect of an execution lien on priority [*see* UCC Comment 7 to *Com. Code § 9301*].

[3] Secured Party's Rights on Default Involving Documents

If the collateral consists of documents, on the default of the debtor the secured party may proceed either as to the documents or as to the goods they cover [*Com. Code § 9601(a)(2)*].

[4] Secured Party's Duties When Electronic Document of Title No Longer Secures Any Obligation

If there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations, or otherwise give value, a secured party having control of an electronic document of title under *Com. Code § 7106* must give control of the electronic document to the debtor or its designated custodian. If the debtor designates a custodian that is the designated custodian with which the authoritative copy of the electronic document is maintained for the secured party, then the secured party must communicate to the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions originated by the secured party and instructing the custodian to comply with instructions originated by the debtor. The secured party must take appropriate action to enable the debtor or its designated custodian to make copies of or revisions to the authoritative copy which add or change an identified assignee of the authoritative copy without the consent of the secured party. All of the above must be done within 10 days after the secured party receives an authenticated demand by the debtor [*Com. Code § 9208(a), (b)(6)*].

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§ 503.49 Instruments

[1] Perfection of Security Interest in Instruments

The term "instruments" is defined by *Com. Code § 9102(a)(47)*, and includes promissory notes, as defined by *Com. Code § 9102(a)(65)*. Both definitions are *set forth in § 503.11[15]*. A security interest in an instrument may be perfected by filing [*Com. Code § 9312(a)*], which is a change from prior law, or by the secured party taking possession of the instrument [*Com. Code § 9313(a)*]. If perfection of a security interest depends on possession of the instrument by the secured party, perfection occurs no earlier than the time the secured party takes possession and continues only while the secured party retains possession [*Com. Code § 9313(d)*].

A security interest in an instrument is perfected without filing or the taking of possession or control for a period of 20 days from the time it attaches to the extent that it arises for new value given under an authenticated security agreement [*Com. Code § 9312(e)*; *see Com. Code § 9102(a)(57)* ("new value," discussed in *§ 503.11[24]*)]. After the 20-day period expires, perfection depends on compliance with Division 9 [*Com. Code § 9312(h)*].

Subject to *Com. Code § 9312(h), above*, a perfected security interest in an instrument remains perfected for 20 days without filing if the secured party delivers the instrument to the debtor for the purpose of ultimate sale or exchange, presentation, collection, enforcement, renewal, or registration of transfer [*Com. Code § 9312(g)*].

It is not necessary to file a financing statement to perfect a security interest in an instrument which is perfected without filing, control, or possession under *Com. Code § 9312(e)-(g)* [*Com. Code § 9310(b)(5)*].

The buyer's security interest created by the sale of a promissory note is perfected when it attaches [*Com. Code § 9309(4)*].

With respect to perfection of a security interest in proceeds of an instrument, see *§ 503.21[7]* [*see Com. Code § 9315(c),(d)*; *see also Com. Code § 9315(a) (b)* (security interest in proceeds of unauthorized disposition of collateral, discussed in *§ 503.21[4]*)].

Attachment of a security interest in any supporting obligation for the instrument [*Com. Code § 9203(f)*; *see Com. Code § 9102(a)(77)* (supporting obligation defined, discussed in *§ 503.24[2][b])*], and in any security interest, mortgage, or other lien that secures the instrument [*Com. Code § 9203(g)*], is discussed in *§ 503.21[2][c]*.

[2] Conflict of Laws as to Security Interests in Instruments

The question as to which jurisdiction's law governs the perfection or nonperfection of, and the priority of a security interest in, instruments is resolved in the same manner as that applicable generally, discussed in *§ 503.23[1]* [*Com. Code § 9301*]. However, the application of *Com. Code § 9301* to instruments is subject to the same complications as those applicable in the case of documents, discussed in *§ 503.48[2]*.

[3] Priorities Among Interests in Instruments

Instruments are governed by the general priority rules of *Com. Code § 9322*, discussed in *§ 503.24*. Because instruments may be proceeds of other collateral, *Com. Code § 9322(d)* and *(e)*, discussed in *§ 503.24[2][b]*, may be applicable.

Except as otherwise provided in *Com. Code § 9331(a)* (holders in due course, discussed in *§ 503.21[3]*), a purchaser of an instrument has priority over a security interest in the instrument perfected by a method other than possession if the purchaser gives value and takes possession of the instrument in good faith and without knowledge that the purchase violates the rights of the secured party [*Com. Code § 9330(d)*; *see Com. Code § 1204*, defining "value," discussed in *§ 503.11[24]*]. *Com. Code § 9330(d)*, applies to checks as well as notes [UCC Comment 7 to *Com. Code § 9330*]. For purposes of *Com. Code § 9330(d)*, if an instrument indicates that it has been assigned to an identified secured party other than the purchaser, a purchaser of instrument has knowledge that the purchase violates the rights of the secured party [*Com. Code § 9330(f)*].

[4] Secured Party's Rights and Duties as to Instruments

In addition to the ordinary duties of a secured party in possession of collateral [*see Com. Code § 9207*, discussed in *§ 503.26[1]*], in the case of an instrument, the secured party's duty of reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed [*Com. Code § 9207(a)*].

[5] Right to Make Collection

When so agreed, and in any event after default, a secured party is entitled to notify the obligor on an instrument to make payment to or for the benefit of the secured party and to otherwise exercise the rights of the debtor with respect to the obligations represented by the collateral and with respect to any property that secures the obligations on the collateral, including for example, the right to foreclose a mortgage that secures an instrument. The secured party also is entitled to take control of any proceeds to which he or she is entitled under *Com. Code § 9315* [*Com. Code § 9607(a)(1)-(3)*; *see Com. Code § 9608* (application of proceeds of collection); *§ 503.27[1], [3]*].

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§ 503.50 Chattel Paper

[1] Perfection of Security Interest in Chattel Paper

[a] Tangible Chattel Paper

"Chattel paper" is defined by *Com. Code § 9102(a)(11)*, which is set forth in *§ 503.11[5]*. A security interest in chattel paper may be perfected by the secured party's taking possession of it [*Com. Code § 9313(a)*] or filing a financing statement [*Com. Code § 9312(a)*]. If perfection of a security interest depends on possession of the instrument by the secured party, perfection occurs no earlier than the time the secured party takes possession and continues only while the secured party retains possession [*Com. Code § 9313(d)*].

[b] Electronic Chattel Paper

"Electronic chattel paper" is defined by *Com. Code § 9102(a)(31)*, which is set forth in *§ 503.11[5]*. A security interest in electronic chattel paper may be perfected by the secured party's taking by control of the collateral under *Com. Code § 9105* [*Com. Code § 9314(a)*] or filing a financing statement [*Com. Code § 9312(a)*].

A security interest in electronic chattel paper is perfected by control under *Com. Code § 9105* when the secured party obtains control and remains perfected by control only while the secured party retains control [*Com. Code § 9314(b)*]. A secured party has control of electronic chattel paper if the record or records comprising the chattel paper are created, stored, and assigned in such a manner that each of the following conditions is satisfied [*Com. Code § 9105*]:

(1) A single authoritative copy of the record or records exists which is unique, identifiable, and, except as otherwise provided in (4), (5), and (6), *below*, unalterable.

(2) The authoritative copy identifies the secured party as the assignee of the record or records.

(3) The authoritative copy is communicated to and maintained by the secured party or its designated custodian.

(4) Copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the participation of the secured party.

(5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy.

(6) Any revision of the authoritative copy is readily identifiable as an authorized or unauthorized revision.

[2] Conflict of Laws as to Security Interests in Chattel Paper

The question as to which jurisdiction's law governs the perfection or nonperfection of, and the priority of a security interest in, chattel paper is resolved in the same manner as that applicable generally, discussed in *§ 503.23[1]* [*Com. Code § 9301*]. However, the application of *Com. Code § 9301* to tangible chattel paper is subject to the same complications as those applicable in the case of documents, discussed in *§ 503.48[2]*.

[3] Priority of Purchaser of Chattel Paper

[a] Over Claim of Interest in Chattel Paper as Proceeds of Inventory

A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed merely as proceeds of inventory subject to a security interest if, in good faith and in the ordinary course of the purchaser's business, the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under *Com. Code § 9105* and the chattel paper does not indicate that it has been assigned to an identified assignee other than the purchaser [*Com. Code § 9330(a)*; *see Com. Code § 9102(a)(57)*, defining "new value," discussed in *§ 503.11[24*]; *Com. Code § 9342(b)*, regarding conflicting purchase money interest in inventory, discussed in *§ 503.41[2]*]. For purposes of the foregoing, the holder of a purchase money security interest in inventory gives new value for chattel paper constituting proceeds of the inventory [*Com. Code § 9330(e)*; *see* discussion in *§ 503.41[2]*].

Com. Code § 9330(a) revises the rule in former *Com. Code § 9308(b)* to eliminate reference to what the purchaser knows. Instead, a purchaser who meets the possession or control, ordinary course, and new value requirements takes priority over a competing security interest unless the chattel paper itself indicates that it has been assigned to an identified assignee other than the purchaser. This recognized the common practice of placing a "legend" on chattel paper to indicate that it has been assigned. This approach, allowing the purchaser who gives new value to rely on the lack of a legend, without concern for other facts that it may know, comports with the expectations of both inventory and chattel paper financers [UCC Comment 5 to *Com. Code § 9330*].

If a possessory security interest in chattel paper does not qualify for priority under *Com. Code § 9330*, it may be subordinate, under *Com. Code § 9322(a)(1)* to a security interest that was perfected by filing [UCC Comment 3 to *Com. Code § 9330*].

[b] Over Interest Claimed Other than as Proceeds

A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed other than merely as proceeds of inventory subject to a security interest if the purchaser gives new value and takes possession of the chattel paper or obtains control of the chattel paper under *Com. Code § 9105* in good faith, in the ordinary course of the purchaser's business, and without knowledge that the purchase violates the rights of the secured party [*Com. Code § 9330(b)*; *see Com. Code § 9102(a)(57)* (defining "new value" discussed in *§ 503.11[24*]); *Com. Code § 9342(b)* (regarding conflicting purchase money interest in inventory, discussed in *§ 503.41[2]*)]. For purposes of the foregoing, the holder of a purchase money security interest in inventory gives new value for chattel paper constituting proceeds of

the inventory [*Com. Code § 9330(e)*; *see also* discussion in *§ 503.41[2]*]. In addition, for purposes of *Com. Code § 9330(b)*, if chattel paper indicates that it has been assigned to an identified secured party other than the purchaser, a purchaser of the chattel paper has knowledge that the purchase violates the rights of the secured party [*Com. Code § 9330(f)*].

Com. Code § 9330(b) eliminates the former requirement that the purchaser take without knowledge that the "specific paper" is subject to the security interest and substitutes for it the requirement that the purchaser take "without knowledge that the purchase violates the rights of the secured party." The current standard derives from the definition of "buyer in the ordinary course of business" in *Com. Code § 1201(b)(9)*. The source of the purchaser's knowledge is irrelevant. "Knowledge" means "actual knowledge" as defined inCom. Code § 1202(b) [UCC Comment 6 to *Com. Code § 9330*].

If a possessory security interest in chattel paper does not qualify for priority under *Com. Code § 9330*, it may be subordinate, under *Com. Code § 9322(a)(1)* to a security interest that was perfected by filing [UCC Comment 3 to *Com. Code § 9330*].

[c] Competing Priorities in Proceeds

Except as otherwise provided in *Com. Code § 9327* (discussed in *§ 503.58[3]*), a purchaser having priority in chattel paper under *Com. Code § 9330(a)* or *(b)* also has priority in proceeds of the chattel paper to the extent that either *Com. Code § 9322* provides for priority in the proceeds, or the proceeds consist of the specific goods covered by the chattel paper or cash proceeds of the specific goods, even if the purchaser's security interest in the proceeds is unperfected [*Com. Code § 9330(c)*]. Returned and repossessed goods may constitute proceeds of chattel paper [UCC Comment 9 to *Com. Code § 9330*].

ILLUSTRATIONS:

Chattel Paper Purchaser's Rights in Returned or Repossessed Goods. SP-1 has a security interest in all inventory of a dealer in goods. SP-1's security interest is perfected by filing. Dealer sells some of its inventory to a buyer in the ordinary course of business (BIOCOB) under a conditional sales contract (chattel paper) that does nod indicate that it has been assigned to SP-1. SP-2 purchases the chattel paper from Dealer and takes possession of the paper in good, faith, in the ordinary course of business, and without knowledge that the purchase violates the rights of SP-1. Subsequently, BIOCOB returns the goods to Dealer because they are defective. Who has the superior security interest in the returned goods? SP-2 does, under *Com. Code § 9330(c)(2)*. Dealer is merely a bailee and acquires no interest to which SP-1's security interst could attach. SP-2 enjoys priority regardless of whether or when SP-2 filed a financing statement covering the chattel paper.

If Dealer acquires the goods under circumstances in which it once again becomes the owner (BIOCOB's revocation or rejection), whose security interest is superior? Again, under *Com. Code § 9330(c)(2)*, SP-2. SP-1's security interest would reattach because the goods would be proceeds of chattel paper [*see Com. Code § 9315(d)*]. Because Dealers's newly reacquired interest in the goods is also proceeds of the chattel paper, SP-2's security interest also attaches to the goods as proceeds collection.

If Dealer, SP-1, or SP-2 repossesses, who has the superior interest? Again, under *Com. Code § 9330(c)(2)*, SP-2. BIOCOB remains owner of the goods. Dealer's interest is in the chattel paper, not the goods. SP-1's interest in the goods does not reattach until Dealer reacquires an interest beyond bare possession, for instance, if Dealer purchases at a foreclosure sale the goods [UCC Comments 9 and 10 to *Com. Code § 9330*].

[d] While Buyer's Security Interest is Unperfected

A debtor that has sold chattel paper does not retain a legal or equitable interest in the collateral sold [*Com. Code § 9318(a)*]. For purposes of determining the rights of creditors of, and purchasers for value of chattel paper from, a debtor that has sold chattel paper, while the buyer's security interest is unperfected, the debtor is deemed to have rights and title to the chattel paper identical to those the debtor sold [*Com. Code § 9318(b)*]. If the purchaser of chattel paper does not perfect it's interset, it is vulnerable: seller/debtor can transfer, and the creditors of the seller can reach, the chattel paper as if it had not been sold [UCC Comment 2 to *Com. Code § 9318*].

[4] Secured Party in Possession of Chattel Paper

In addition to the ordinary duties of a secured party in possession of collateral [*see Com. Code § 9207*, discussed in *§ 503.26[1]*], in the case of chattel paper, the secured party's duty of reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed [*Com. Code § 9207(a)*]. *Com. Code § 9601 et seq.* impose no duties on a secured party that is buyer of chattel paper except, as provided by *Com. Code § 9607(c)* (when secured party who undertakes to make collections on collateral must do so in commercially reasonable manner), discussed in *§ 503.27[3][a]* [*Com. Code § 9601(g)*].

[5] Right to Make Collection

When so agreed, and in any event after default, a secured party is entitled to notify the obligor on chattel paper to make payment to or for the benefit of the secured party and to otherwise exercise the rights of the debtor with respect to the obligations represented by the collateral and with respect to any property that secures the obligations on the collateral. The secured party is also entitled to take control of any proceeds to which he or she is entitled under *Com. Code § 9315* [*Com. Code § 9607(a)(1)-(3)*; *see Com. Code § 9608* (application of proceeds of collection); *§ 503.27[1]* and *[3]*].

[6] Secured Party's Duties When Electronic Chattel Paper No Longer Secures Any Obligation

If there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations, or otherwise give value, a secured party, other than a buyer, having control of a chattel paperaccount under *Com. Code § 9105* must do all of the following within 10 days after receiving an authenticated demand by the debtor [*Com. Code § 9208(a), (b)(3)*]:

- Communicate the authoritative copy of the electronic chattel paper to the debtor or its designated custodian.

- If the debtor designates a custodian that is the designated custodian with which the authoritative copy of the electronic chattel paper is maintained for the secured party, communicate to the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions originated by the secured party and instructing the custodian to comply with instructions originated by the debtor.

- Take appropriate action to enable the debtor or its designated custodian to make copies of or revisions to the authoritative copy which add or change an identified assignee of the authoritative copy without the consent of the secured party.

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§ 503.51 Accounts

[1] Expanded Definition Under Revised Division 9

"Account" is defined in revised Division 9 by *Com. Code § 9102(a)(2)*, set forth in *§ 503.11[1]*. The new definition of account is broader than the definition in former Division 9 and includes things that were general intangibles under the former law [UCC Comment 5 a to *Com. Code § 9102*]. "Account" is no longer limited to rights to payment relating to goods or services. Many categories of rights to payment that were classified as general intangibles under former law are accounts under revised Division 9. Thus, if they are sold, a financing statement must be filed to protect the buyer's in them. Among the types of property that are expressly excluded from the definition of account in revised Division 9 (they are still general intangibles) are rights to payment of money or funds advanced or sold. Money is limited essentially to currency [*see Com. Code § 1201(b)(24)*]. As used in the exclusion from the definition of account, "funds" is a broader concept (although the term is not defined). For example, when a bank-creditor credits a deposit account with the amount of a loan, the bank's advance of funds is not a transaction giving rise to an account [UCC Comment 5a to *Com. Code § 9102*; *see* UCC Comment 5d to *Com. Code § 9102* (deposit account is separate type of collateral)].

The definition of "health care insurance receivable" was new in revised Division 9. "Health care insurance receivables" are a subset of "account." However, the rules generally applicable to debtors on accounts [*see, e.g., Com. Code §§ 9404(e), 9405(d), 9406(i)*, discussed in *§§ 503.54[2], 503.60*] do not apply to insurers obligated on health care insurance receivables [UCC Comment 5a to *Com. Code § 9102*; *see* discussion in *§ 503.54*].

Certain accounts are also "as-extracted" collateral [*see Com. Code § 9102(a)(6)*; discussion in *§ 503.44[1]*].

[2] Conflict of Laws as to Interests in Accounts

Accounts may be governed by the general choice of law rule of *Com. Code § 9301(1)*, that while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral [*see also Com. Code § 9301(2)* (choice of law governing possessory security interests, discussed in *§ 503.23[1]*)]. If the debtor moves, *Com. Code § 9316(a)(2)*, discussed in *§ 503.23[4]*, will generally continue perfection until the expiration of four months after a change of the debtor's location to another

jurisdiction [*see also Com. Code § 9307* (defining "debtor's location," discussed in *§ 503.23[2*])].

[3] Perfection of Security Interest in Account

Although a security interest represented by an assignment of accounts or payment intangibles which does not by itself or in conjunction with other assignments to the same assignee transfer a significant part of the assignor's outstanding accounts or payment intangibles is perfected when it attaches [*see Com. Code § 9309(2)*], any person who regularly takes assignments of any debtor's accounts or payment intangibles should file. Note also that *Com. Code § 9109(d)(4)-(7)* (discussed in *§ 503.13[2]*) exclude specified transfers of accounts, chattel paper, and payment intangibles from Division 9 [*see* UCC Comment 4 to *Com. Code § 9309*]. Because of the expansion of the definition of "account" in revised Division 9 [*see* [1], *above*], an interest perfected as a general intangible under former law may need to be reperfected as an interest in an "account" after July 1, 2001 [*see* UCC Comment 3 to *Com. Code § 9703*, Example 3].

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§ 503.52 Sales of Accounts or Chattel Paper, Payment Intangibles, or Promissory Notes

[1] Terminology: "Assignment" and "Transfer"

In numerous provisions, Division 9 refers to the "assignment" or "transfer" of property interest, but these terms are not defined. Division 9 generally follows common usage by using the terms "assignment" and "assign" to refer to transfers of rights to payment, claims, and lines and other security interests. Division 9 generally uses the term "transfer" to refer to other transfers of interests in property. Except when used in connection with a letter-of-credit transaction [*see* UCC Comment 4 to *Com. Code § 9107*], no significance should be placed on the use of one term or the other. Depending on the context, each term may refer to the assignment or transfer of an outright ownership interest or the assignment or transfer of a limited interest, such as a security interest [UCC Comment 26 to *Com. Code § 9102*]. Thus, the provisions discussed in *§ 503.60* also may need to be considered in connection with the sale of accounts, chattel paper, payment intangibles, and promissory notes.

A sale of an account, chattel paper, payment intangible, or promissory note includes any right in the receivable, such as the sale of a participation interest. The term also includes the sale of an enforcement right, for example, a person "entitled to enforce a negotiable promissory note" [*see Com. Code § 3301*], may sell its ownership rights in the instrument [UCC Comment 5 to *Com. Code § 9109*; *see* UCC Comment 1 to *Com. Code § 3203*]. The right under *Com. Code § 3309* to enforce a lost, destroyed, or stolen negotiable promissory note also may be sold to a purchaser who could enforce that right by requiring the seller to provide the proof required under that section. Article 9 rejects cases reaching a contrary result, such as *Dennis Joslin Co. v. Robinson Broadcasting (D.D.C. 1997) 977 F. Supp. 491* [UCC Comment 5 to *Com. Code § 9109*].

Nothing in *Com. Code § 9109* prevents the transfer of a full and complete ownership of an account, chattel paper, instrument, or payment intangible. However, as mentioned in UCC Comment 4 to *Com. Code § 9109* neither Division 9 nor the definition of security interest [*Com. Code § 1201(b)(35)*] provide rules for distinguishing sales transactions from those that create a security interest securing an obligation. Division 9 applies to both types of transactions. The principle effect of this coverage is to apply Division 9's perfection and priority rules to these sales transactions. Use of terminology such as "security interest," "debtor," and "collateral" is merely a drafting convention adopted to reach this

end, and its use has no relevance to distinguishing sales form other transactions [UCC Comment 5 to *Com. Code § 9109*].

[2] Extent to Which Division 9 Is Applicable

[a] Those Covered by Division 9

The term "security interest" includes any interest of a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Division 9 [*Com. Code § 1201(b)(35)*]. Those include most sales of accounts, chattel paper, payment intangibles, or promissory notes [*see Com. Code § 9109(a)(3)*], except the single assignments listed in *Com. Code § 9109(d)(4)-(7), below*. Division 9 will not govern if another California statute expressly governs the creation, perfection, priority, or enforcement of a security interest created by California or a governmental unit of California. These statutes include statutes that provide for pledges, liens, or security interests to secure bonds or other obligations (including, without limitation, leases) of California or a governmental unit of California, whether the statute is of general application like *Gov. Code §§ 5450* and *5451*, or is specific to particular types of obligations of the state of California or of governmental units or to particular governmental units [*Com. Code § 9109(c)(1), (2)*]. The following sales of accounts, chattel paper, payment intangibles, or promissory notes also are outside the scope of Division 9 [*Com. Code § 9109(d)(4)-(7)*]:

- A sale of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose.

- An assignment of accounts, chattel paper, payment intangibles, or promissory notes which is for the purpose of collection only.

- An assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract.

- An assignment of a single account, payment intangible, or promissory note to an assignee in full or partial satisfaction of a preexisting indebtedness.

Certain "accounts," namely health care insurance receivables and "as-extracted collateral" (accounts arising at wellhead), are subject to particular rules of their own, which are discussed in *§§ 503.53* and *503.44*, respectively. Priority afforded to purchasers of chattel paper is governed in part by *Com. Code § 9330*, discussed in *§ 503.50[3]*.

[b] Expansion in Revised Division 9 to Include Payment Intangibles and Promissory Notes

Under *Com. Code § 9109(a)(3)*, as under former *Com. Code § 9102*, Division 9 applies to sales of accounts and chattel paper. This approach generally has been successful in avoiding problems of distinguishing between transactions in which a receivable secures an obligation and those in which the receivable has been sold outright. In many commercial financing transactions, the distinction is blurred [UCC Comment 4 to *Com. Code § 9109*]. Although Division 9 occasionally distinguishes between outright sales of receivables and sales that secure an obligation, neither Division 9 nor the definition of security interest [*Com. Code § 1201(b)(35)*] delineates how a particular transaction is to be classified. That issue is left to the courts [UCC Comment 4 to *Com. Code § 9109*].

Com. Code § 9109(a)(3) expands the scope of Division 9 by including the sale of a payment intangible (defined as a general intangible under which the account debtor's principal obligation is to pay money) [*see Com. Code § 9102(a)(61)*, as discussed in *§ 503.11 [12]*] and the sale of a promissory note (defined as an instrument, specifically an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds) [*see Com. Code*

§ 9102(a)(65); *§ 503.11[15]*]. To a considerable extent, Division 9 treats those transactions as identical to a sale of accounts or chattel paper. In some respects, however, sales of payment intangibles and promissory notes are treated differently [UCC Comment 4 to *Com. Code § 9109*; *see, e.g., Com. Code§ 9309* (automatic attachment on perfection, discussed in [6], *below*); *Com. Code § 9408* (effect of restrictions on assignment, discussed in [5], *below*)].

By virtue of the expanded definition of "account," Division 9 now covers sales of and other interests in health care insurance receivables [UCC Comment 4 to *Com. Code § 9109*], which are discussed in *§ 503.54*.

[3] Conflict of Laws as to Sales of Receivables

Conflict of laws governing security interests in chattel paper, accounts, promissory notes, and general intangibles is governed by the general choice of law rule of *Com. Code § 9301*, discussed in *§ 503.23[1]*. Under *Com. Code § 9301(3)(C)* the effect of perfection or nonprefection and the priority of a nonpossessory security interest in tangible chattel paper [*see § 503.50[2]*] and instruments, which includes promissory notes [*Com. Code § 9102(a)(47), (65)*; *see § 503.48[2]*], is governed by the local law of the jurisdiction where the collateral is located. For discussion of the complications that may arise in applying *Com. Code § 9301(1), (2)*, and *(3)(C)* to promissory notes and tangible chattel paper, see discussion in *§ 503.48[2]*. If the debtor moves, *Com. Code § 9316(a)(2)*, discussed in *§ 503.23[4]*, will generally continue perfection until the expiration of four months after a change of the debtor's location to another jurisdiction [*see also Com. Code § 9307* (defining "debtor's location," discussed in *§ 503.23[2*])].

[4] Buyer as Secured Party; Seller as Debtor

A seller of accounts, chattel paper, payment intangibles, or promissory notes is a debtor [*Com. Code § 9102(a)(28)(B)*]. A person to which accounts, chattel paper, payment intangibles, or promissory notes have been sold is a "secured party" [*Com. Code § 9102(a)(72)(D)*].

[5] Ineffectiveness of Terms Against Transfer or Assignment

A term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health care insurance receivable or a general intangible, including a contract, permit, license, or franchise, and which term prohibits, restricts, or requires the consent of the person obligated on the promissory note or the account debtor to, the assignment or transfer of, or the creation, attachment, or perfection of a security interest in, the promissory note, health care insurance receivable, or general intangible, is ineffective to the extent that the term does, or would either (1) impair the creation, attachment, or perfection of a security interest, or (2) provide that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health care insurance receivable, or general intangible [*Com. Code § 9408(a)*]. The foregoing rule applies to a security interest in a payment intangible or promissory note only if the security interest arises out of a sale of the payment intangible or promissory note [*Com. Code § 9408(b)*].

Similarly, any rule of law, statute, or regulation, that prohibits, restricts, or requires the consent of a government, governmental body or official, person obligated on a promissory note, or account debtor to the assignment or transfer of, or the creation of a security interest in, a promissory note, health care insurance receivable, or general intangible, including a contract, permit, license, or franchise between an account debtor and a debtor, is ineffective to the extent that the rule of law, statute, or regulation does, or would, either (1) impair the creation, attachment, or perfection of a security interest, or (2) provide that the assignment or transfer or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the promissory note, health care insurance receivable, or general intangible [*Com. Code § 9408(c)*]. *Com. Code § 9408(c)* does not apply to an assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, a claim or right to receive compensation for injuries or sickness as described in *26 U.S.C. §*

104(a)(1) or *(2)*, as amended, or a claim or right to receive benefits under a special needs trust as described in *42 U.S.C. § 1396p(d)(4)*, as amended, to the extent that it is inconsistent with those laws [*Com. Code § 9408(e)*].

To the extent that a term in a promissory note or in an agreement between an account debtor and a debtor which relates to a health care insurance receivable or general intangible or a rule of law, statute, or regulation described in *Com. Code § 9408(c)* would be effective under law other than Division 9 but is ineffective under *Com. Code § 9408(a)* or *(c)*, all of the following rules apply with respect to the creation, attachment, or perfection of a security interest in the promissory note, health care insurance receivable, or general intangible [*Com. Code § 9408(d)*]:

- It is not enforceable against the person obligated on the promissory note or the account debtor.

- It does not impose a duty or obligation on the person obligated on the promissory note or the account debtor.

- It does not require the person obligated on the promissory note or the account debtor to recognize the security interest, pay or render performance to the secured party, or accept payment or performance from the secured party.

- It does not entitle the secured party to use or assign the debtor's rights under the promissory note, health care insurance receivable, or general intangible, including any related information or materials furnished to the debtor in the transaction giving rise to the promissory note, health care insurance receivable, or general intangible.

- It does not entitle the secured party to use, assign, possess, or have access to any trade secrets or confidential information of the person obligated on the promissory note or the account debtor.

- It does not entitle the secured party to enforce the security interest in the promissory note, health care insurance receivable, or general intangible.

[6] Interest of Buyer of Promissory Note or Payment Intangible Is Perfected on Attachment

An assignment of accounts or payment intangibles which does not by itself or in conjunction with other assignments to the same assignee transfer a significant part of the assignor's outstanding accounts or payment intangibles also is perfected on attachment without further action [*Com. Code § 9309(2)*]. *Com. Code § 9309(2)* is an expansion of former *Com. Code § 9302(1)(e)* by affording automatic perfection to certain assignments of payment intangibles as well as accounts. The purpose of *Com. Code § 9309(2)* is to save from ex post facto invalidation casual or isolated assignments--assignments which no one would think of filing. Any person who regularly takes assignments of debtor's accounts or payment intangibles should file [UCC Comment 4 to *Com. Code § 9309*].

A security interest arising from the sale of a promissory note or payment intangible is perfected on attachment without further action [*Com. Code § 9309(3), (4)*]. *Com. Code § 9309(3), (4)* are new in revised Division 9 and reflect practice under former Division 9. Under former Division 9, filing a financing statement did not affect the rights of a buyer of payment intangibles or promissory notes because the former Division 9 did not cover those sales. To the extent that the exception on *Com. Code § 9309(2)* covers outright sales of payment intangibles, which are automatically perfected under *Com. Code § 9309(3)*, the exception is redundant [UCC Comment 4 to *Com. Code § 9309*].

[7] Seller's Interest

Following a debtor's outright sale and transfer of ownership of a receivable [*Com. Code § 9102(a)(28)(B)* (seller as debtor)], the debtor-seller retains no legal or equitable rights in the receivable that has been sold [*Com. Code § 9318(a)*;

UCC Comment 5 to *Com. Code § 9109*]. This is so whether the buyer's security interest is perfected. A security interest arising from the sale of a promissory note or payment intangible is perfected on attachment without further action [*see Com. Code § 9309(3), (4)*; UCC Comment 5 to *Com. Code § 9109*]. However, if the buyer's interest in accounts or chattel paper is unperfected, a subsequent lien creditor, perfected secured party, or qualified buyer can reach the sold receivable and take priority over (or take free of) the buyer's unperfected security interest under *Com. Code § 9317* (discussed in *§ 503.24[1]*). This is so not because the seller of a receivable retains any rights in the property sold; it does not. Nor is this so because the seller of a receivable is a "debtor" and the buyer of a receivable is a "secured party" under Division 9 (they are). It is so for the simple reason that *Com. Code § 9317, 9318(b)*, and *9322* make it so, as did former *Com. Code §§ 9301, 9312*. Because the buyer's security interest is unperfected, for purposes of determining the rights of creditors of and purchasers for value from the debtor-seller under *Com. Code § 9318(b)*, the debtor-seller is deemed to have the rights and title it sold. *Com. Code § 9317* subjects the buyer's unperfected interest in accounts and chattel paper to that of the debtor-seller's lien creditors and other persons who qualify under that section [UCC Comment 5 to *Com. Code § 9109*].

[8] Priority Accorded Buyer

Except against a perfected purchase money security interest which has been the subject of a filing [*see Com. Code § 9317(e)*], a buyer, other than a secured party, of tangible chattel paper takes free of security interest or agricultural lien if that buyer gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected [*Com. Code § 9317(b)*]. Buyers of chattel paper are also accorded priorities by *Com. Code § 9330*, which is discussed in *§ 503.50[3]*.

The priority rules of *Com. Code § 9323(a)* and *(b)*, with respect to future advances (discussed in *§ 503.24[1], [2][d]*) do not apply to a security interest held by a secured party that is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor [*Com. Code § 9323(c)*]. The priority of the security interest of a buyer of accounts is governed by the general rule of *Com. Code § 9322(a)(1)*, discussed in *§ 503.24[2][a]*.

[9] Special Rules Regarding Surplus and Deficiency

If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, and the secured party has made collections on those receivables [*see Com. Code § 9607(a)(1)-(3)*, discussed in *§ 503.27[3][a]*], the debtor is not entitled to any surplus, and the obligor is not liable for any deficiency. *Code Civ. Proc. § 701.040(b)*, relating to the payment of proceeds applies only if the security agreement provides that the debtor is entitled to any surplus [*Com. Code § 9608(b)*].

Similarly, when the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, and the secured party has disposed of the collateral [*see Com. Code § 9610*, discussed in *§ 503.27[5]*], the debtor is not entitled to any surplus, the obligor is not liable for any deficiency, and *Code Civ. Proc. § 701.040(b)*, relating to the payment of proceeds applies only if the security agreement provides that the debtor is entitled to any surplus [*Com. Code § 9615(e)*].

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§ 503.53 Insurance Policies

[1] Policy Loans Not Covered by Division 9

California's provisions with regard to insurance policies are not uniform. Although, consistent with the uniform provisions, California's Division 9 does not apply to any loan made by an insurance company pursuant to the provisions of a policy or contract issued by it and on the sole security of the policy or contract [*Com. Code § 9109(d)(8)*], California's Division 9 applies to other security interests in and claims under insurance policies. Like the uniform provisions, California's Division 9 applies to and has specific provisions governing assignment of health care insurance receivables, discussed in *§ 503.54, below*.

[2] Perfection of Security Interest in Insurance Policy

A financing statement is not necessary to perfect a security interest in an insurance policy. Except as otherwise provided in *Com. Code § 9315(c)* and *(d)*, with respect to proceeds, a security interest in, or claim in or under, any policy of insurance, including unearned premiums, may be perfected only by giving written notice of the security interest or claim to the insurer. This provision does not apply to a health care insurance receivable [*Com. Code §§ 9310(b)(11), 9312(b)(4)*].

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§ 503.54 Health Care Insurance Receivables

[1] Defined

"Health care insurance receivable" means an interest in or claim under a policy of insurance which is a right to payment of a monetary obligation for health care goods or services provided or to be provided [*Com. Code § 9102(a)(46)*]. The term "account" includes health care insurance receivables [*Com. Code § 9102(a)(2)*].

[2] Assignment of Health Care Insurance Receivable

No financing statement is necessary to perfect a security interest in a health care insurance receivable. A security interest created by the assignment of a health care insurance receivable to the provider of the health care goods or services is perfected when it attaches [*Com. Code § 9309(5)*]. Assignments of health care insurance receivables are not subject to the ordinary rules regarding debtor's assertion of claims and defenses against the assignee [*Com. Code § 9404(e)*], making a modification of the original contract effective as against the assignee [*Com. Code § 9405(d)*], discharge by payment to assignor [*Com. Code § 9406(i)*]. See also *Com. Code § 9408*, discussed in *§ 503.52[5]*, which renders ineffective any prohibition (in an agreement between an account debtor and a debtor which relates to a health care insurance receivable) on the assignment or transfer of, or the creation, attachment, or perfection of a security interest in, the health care insurance receivable.

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§ 503.55 Financial Assets

[1] Defined

"Financial asset," except as otherwise provided in *Com. Code § 8103*, means any of the following [*Com. Code § 8102(a)(9)*; *see Com. Code § 8103(f)* (excludes from definition of financial asset, a commodity contract, as defined in *Com. Code § 9102(a)(15)*)]:

- A security.

- An obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person, that is, or is of a type, dealt in or traded on financial markets, or that is recognized in any area in which it is issued or dealt in as a medium for investment.

- Any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this division. As context requires, the term means either the interest itself or the means by which a person's claim to it is evidenced, including a certificated or uncertificated security, a security certificate, or a security entitlement.

[2] Security Interest of Unpaid Financial Intermediary

If a person buys a financial asset [*see Com. Code § 8102(a)(9)* (definition)] through a securities intermediary [*see Com. Code § 8102(a)(14)* (definition)] in a transaction in which the buyer is obligated to pay the purchase price to the securities intermediary at the time of the purchase, and the securities intermediary credits the financial asset to the buyer's securities account [*see Com. Code § 8501(a)* (definition)] before the buyer pays the securities intermediary, a security interest in favor of the securities intermediary attaches to the buyer's security entitlement [*Com. Code § 9206(a)*; *see Com. Code § 8102(a)(17)* (defining "securities entitlement")] securing the buyer's obligation to pay for the financial asset [*Com. Code § 9206(b)*]. A security agreement is not required for attachment or enforceability of that security interest [*Com. Code § 9203(c)*], and the security interest is automatically perfected by control [*Com. Code §*

9314(a); *see Com. Code §§ 8106(d), 9106(a),(c)* (defining "control" of security entitlements and securities accounts)].

If a certificated security [*see Com. Code § 8102(a)(4)* (definition)], or other financial asset [*see Com. Code § 8102(a)(9)* (definition)] represented by a writing that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment is delivered under an agreement between persons in the business of dealing with those securities or financial assets and the agreement calls for delivery against payment, a security interest in favor of the person who delivers the certificate or other financial asset attaches to the security or other financial asset securing the obligation to make payment for the delivery [*Com. Code § 9206(c)*]. A security agreement is not required for attachment or enforceability of the security interest [*Com. Code § 9203(c)*]; and the security interest is automatically perfected [*Com. Code § 9309(9)*].

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§ 503.56 Investment Property

[1] Perfection of Security Interests in Investment Property

[a] Definitions and Descriptions

"Investment property" means a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account [*Com. Code § 9102(a)(49)*; *see also* related definitions, discussed in *§ 503.11[16]*].

Except as otherwise provided in *Com. Code § 9108(e)*, in a security agreement or financing statement, a description of a security entitlement, securities account, or commodity account is sufficient if it describes either the collateral by those terms or as investment property or if it describes the underlying financial asset or commodity contract [*Com. Code § 9108(d)*]. In a consumer transaction, a description only by type of collateral defined in the Commercial Code is an insufficient description of a security entitlement, a securities account, or a commodity account [*Com. Code § 9108(d)(2)*]. Further, a description of investment property collateral also must meet the applicable requirements of *Civ. Code § 1799.103* [*Com. Code § 9108(f)*]. For discussion of sufficiency of description of collateral generally, see *§ 503.20[1]*.

[b] By Control or Filing

A security interest in investment property may be perfected by filing [*Com. Code § 9312(a)*], or by the secured party taking control of the collateral under *Com. Code § 9106*[*Com. Code § 9314(a)*; *see also Com. Code §§ 9203(b)(3)(D)* (when security interest in investment property becomes enforceable, discussed in *§ 503.21[2][a]*), 9310(b)(8) (filing not necessary to perfect security interest in investment property perfected by control)].

A person has control of a certificated security, uncertificated security, or security entitlement as provided in *Com. Code § 8106* [*Com. Code § 9106(a)*].

A secured party who is the commodity intermediary with which a commodity contract is carried has control of that

commodity contract [*Com. Code § 9106(b)(1)*]. A secured party also has control of a commodity contract if the commodity customer, secured party, and commodity intermediary have agreed that the commodity intermediary will apply any value distributed on account of the commodity contract as directed by the secured party without further consent by the commodity customer [*Com. Code § 9106(b)(2)*].

A secured party having control of all security entitlements or commodity contracts carried in a securities account or commodity account has control over the securities account or commodity account [*Com. Code § 9106(c)*].

A security interest in investment property is perfected by control under *Com. Code § 9106* from the time the secured party obtains control and remains perfected by control until both the secured party does not have control and one of the following occurs [*Com. Code § 9314(c)(2)*]:

- If the collateral is a certificated security, the debtor has or acquires possession of the security certificate.

- If the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner.

- If the collateral is a security entitlement, the debtor is or becomes the entitlement holder.

PRACTICE TIP:

Interest Perfected by Control Is Superior to Interest Perfected by Filing. A security interest in investment property, including certificated securities, uncertificated securities, security entitlements, and securities accounts, may be perfected by filing. However, security interests created by brokers, securities intermediaries, or commodity intermediaries are automatically perfected [*Com. Code § 9309(10), (11),* discussed in [d], *below*]; filing is of no effect. A security interest in all kinds of investment property may also be perfected by control [*Com. Code §§ 9106, 9314(a)*]; and a security interest in a certificated security also may be perfected by the secured party taking delivery under *Com. Code § 8301* [*see* [c], *below*] A security interest perfected only by filing is subordinate to a conflicting security interest perfected by control or delivery [*Com. Code § 9328(1), (5),* discussed in [3], *below*]. Thus, although filing is a permissible method of perfection, a secured party who perfects by filing takes the risk that the debtor has granted or will grant a security interest in the same collateral to another party who obtains control. In addition, perfection by filing would not give the secured party protection against other types of adverse claims, because Division 8's adverse claim cut-off rules [*Com. Code § 8510*] require control [UCC Comment 4 to *Com. Code § 9312*].

[c] By Possession of Certificated Security

A secured party may perfect a security interest in certificated securities by taking delivery of the certificated securities under *Com. Code § 8301* [*Com. Code § 9313(a)*; *see Com. Code § 9310(b)(7)* (filing not necessary)]. A security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under *Com. Code § 8301* and remains perfected by delivery until the debtor obtains possession of the security certificate [*Com. Code § 9313(e)*; *see also Com. Code § 9203(b)(3)(C)* (when security interest in certificated security in registered form becomes enforceable, discussed in *§ 503.21[2][a]*)]. A person in possession of collateral is not required to acknowledge that it holds possession for a secured party's benefit [*Com. Code § 9313(f)*], but if a person acknowledges that it holds possession for the secured party's benefit, the acknowledgment is effective under *Com. Code § 8301(a),* even if the acknowledgment violates the rights of a debtor [*Com. Code § 9313(g)(1)*]. For delivery to occur when a person other than the secured party holds possession for the secured party, the person may not be a securities intermediary [UCC Comment 6 to *Com. Code § 9313*].

A security interest in a certificated security is perfected without filing or the taking of possession or control for a period of 20 days from the time it attaches to the extent that it arises for new value given under an authenticated security agreement [*Com. Code § 9312(e)*; *see Com. Code § 9102(a)(57)* ("new value," discussed in *§ 503.11[24*]); *Com. Code § 9310(b)(5)*]. A perfected security interest in a certificated security remains perfected for 20 days without filing if the secured party delivers the security certificate to the debtor for the purpose of ultimate sale or exchange, presentation, collection, enforcement, renewal, or registration of transfer [*Com. Code § 9312(g)*; *see Com. Code § 9310(b)(5)*]. After either of those 20-day periods expires, perfection depends on compliance with Division 9 [*Com. Code § 9312(h)*].

Perfection of a securities intermediary's security interest in the buyer's certificated security or other financial asset [*Com. Code § 9206(c)*], which is perfected on attachment [*Com. Code § 9309(9)*], is discussed in *§ 503.55[2]*.

[d] Perfection of Security Interests Created by Broker or Intermediary on Attachment

A security interest in investment property created by a broker or securities intermediary is perfected on attachment [*Com. Code § 9309(10)*], as is a security interest in a commodity contract or a commodity account created by a commodity intermediary [*Com. Code § 9309(11)*]. Perfection of a securities intermediary's security interest in the buyer's certificated security or other financial asset [*Com. Code § 9206(c)*], which is perfected on attachment [*Com. Code § 9309(9)*], is discussed in *§ 503.55[2]*.

Com. Code § 9309(10) and *(11)* replace former *Com. Code § 9115(4)(c)* and *(d)* concerning secured financing of securities and commodity firms and clearing corporations. The former sections indicated that with respect to security interests created by a securities intermediary or a commodity intermediary, "[t]he filing of a financing statement ... has no effect for purposes of perfection or priority with respect to that security interest." No change in meaning is intended by deletion of the quoted phrase [UCC Comment 6 to *Com. Code § 9309*].

Secured financing arrangements for securities firms are currently implemented in various ways. In some circumstances, lender may require that the transactions be structured as "hard pledges," in which the securities are transferred on the books of the clearing corporation from the debtor's account to the lender's account or to a special pledge account for the lender from which they cannot be disposed of without the specific consent of the lender. In other circumstances, lenders are content with so-called "agreement to pledge" or "agreement to deliver" arrangements, in which the debtor retains the positions in its own account, but reflects on its books that the positions have been hypothecated and promises that the securities will be transferred to the secured party's account on demand [UCC Comment 6 to *Com. Code § 9309*]. The perfection and priority rules of Division 9 are designed to facilitate current secured financing arrangements for securities firms as well as to provide sufficient flexibility to accommodate new arrangements that develop in the future. Hard pledge arrangement are covered by the concept of control [*see Com. Code §§ 8106, 9106, 9314(a)*]. Non-control secured financing arrangements for securities firms are covered by the automatic perfection rule of *Com. Code § 9309(10)*. Before the 1994 revision of Divisions 8 and 9, agreement to pledge arrangements could be implemented under a provision that a security interest in securities given for new value under a written security agreement was perfected without filing or possession for 21 days. Although those security interests were temporary in legal theory, the financing arrangements, in practice, could be continued indefinitely by rolling over the loans at least every 21 days. Accordingly, a knowledgeable creditor of a securities firm realizes that the firms' securities may be subject to security interests that are not discoverable from the public records. The automatic perfection rule of *Com. Code § 9309(10)* makes it unnecessary to engage in the purely formal practice of rolling over these arrangements every 21 days [UCC Comment 6 to *Com. Code § 9309*].

In some circumstances, a clearing corporation may be the debtor in a secured financing arrangement. For example, a clearing corporation that settles delivery-versus-payment transactions among its participants on a net, same-day basis relies on timely payment from all participants with net obligations due to the system. If a participant that was a net debtor were to default on its payment obligation, the clearing corporation would not receive some of the funds necessary to settle with participants that are net creditors to the system. To complete end-of-day settlement after a

payment default by a participant, a clearing corporation that settles on a net, same-day basis may need to draw on credit lines and pledge securities of the defaulting participant or other securities pledged by participants in the clearing corporation to secure those drawings. The clearing corporation may be the top-tier securities intermediary for the securities pledged, so that it would not be practical for the lender to obtain control. Even when the clearing corporation holds some types o securities through other intermediaries, however, the clearing corporation is unlikely to be able to complete the arrangements necessary to convey "control" over the securities to be pledged in time to complete settlement in a timely manner. However, the term "securities intermediary" is defined in *Com. Code § 8102(a)(14)* to include clearing corporations. Thus, the perfection rule of *Com. Code § 9309(10)* applies to security interests in investment property granted by clearing corporations [UCC Comment 6 to *Com. Code § 9309*].

[e] Perfection Includes Perfection in Entitlements and Commodity Contracts

Perfection of a security interest in a securities account also perfects a security interest in the security entitlements carried in the securities account [*Com. Code § 9308(f)*]. Perfection of a security interest in a commodity account also perfects a security interest in the commodity contracts carried in the commodity account [*Com. Code § 9308(g)*].

[2] Choice of Law Governing Perfection and Priority of Security Interests in Investment Property

[a] Perfection Under Law Where Debtor Is Located

The local law of the jurisdiction in which the debtor is located governs all of the following [*Com. Code § 9305(c)*]:

- Perfection of a security interest in investment property by filing.
- Automatic perfection of a security interest in investment property created by a broker or securities intermediary.
- Automatic perfection of a security interest in a commodity contract or commodity account created by a commodity intermediary.

[b] Certificated Securities

Except as otherwise provided in *Com. Code § 9305(c)*, (discussed in [a], *above*), while a security certificate is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the certificated security represented thereby [*Com. Code § 9305(a)(1)*].

[c] Uncertificated Securities

Except as otherwise provided in *Com. Code § 9305(c)*, (discussed in [a], *above*), the local law of the issuer's jurisdiction as specified in *Com. Code § 8110(d)* governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in an uncertificated security [*Com. Code § 9305(a)(2)*]. "Issuer's jurisdiction" means the jurisdiction under which the issuer of the security is organized or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified by the issuer. An issuer organized under California law may specify the law of another jurisdiction as the law governing the following matters [*Com. Code § 8110(a)(2)-(5), (d)*]:

- The rights and duties of the issuer with respect to registration of transfer.
- The effectiveness of registration of transfer by the issuer.
- Whether the issuer owes any duties to an adverse claimant to a security.

- Whether an adverse claim can be asserted against a person to whom transfer of a certificated or uncertificated security is registered or a person who obtains control of an uncertificated security.

[d] Securities Entitlements and Securities Accounts

Except as otherwise provided in *Com. Code § 9305(c)*, (discussed in [a], *above*), the local law of the securities intermediary's jurisdiction as specified in *Com. Code § 8110(e)* governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a security entitlement or securities account [*Com. Code § 9305(a)(3)*]. The following rules determine a "securities intermediary's jurisdiction" for purposes of *Com. Code § 8110* [*Com. Code § 8110(e)*]:

(1) If an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that a particular jurisdiction is the security intermediary' s jurisdiction for purposes of this code, that jurisdiction is the securities intermediary's jurisdiction.

(2) If (1) does not apply and an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.

(3) If neither (1) nor (2) applies and an agreement between the securities intermediary and its entitlement holder governing the securities account expressly provides that the securities account is maintained at an office in a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.

(4) If neither (1), (2), or (3) applies, the securities intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the entitlement holder's account is located.

(5) If none of the preceding rules applies, the securities intermediary's jurisdiction is the jurisdiction in which the chief executive office of the securities intermediary is located.

[e] Commodity Contract or Commodity Account

Except as otherwise provided in *Com. Code § 9305(c)*, (discussed in [a], *above*), the local law of the commodity intermediary's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a commodity contract or commodity account [*Com. Code § 9305(a)(4)*]. The following rules determine a commodity intermediary's jurisdiction for purposes of *Com. Code §§ 9301-9342* [*Com. Code § 9305(b)*]:

(1) If an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that a particular jurisdiction is the commodity intermediary's jurisdiction for purposes of *Com. Code §§ 9301-9342*, Division 9, or the Commercial Code, that jurisdiction is the commodity intermediary's jurisdiction.

(2) If (1) does not apply and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

(3) If neither (1) nor (2) applies and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the commodity account is maintained at an office in a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

(4) If neither (1), (2), or (3) applies, the commodity intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the commodity customer's account is located.

(5) If none of the preceding rules applies, the commodity intermediary's jurisdiction is the jurisdiction in which the chief executive office of the commodity intermediary is located.

[3] Priority of Security Interests in Investment Property

A security interest of a secured party who has control of investment property under *Com. Code § 9106* (discussed in [1][b], *above*) has priority over a security interest held by a secured party who does not have control of the investment property [*Com. Code § 9328(1)*].

When conflicting security interests are held by secured parties each of which has control under *Com. Code § 9106*, except as otherwise provided with respect to security interests held by a securities intermediary or a commodity intermediary [*see Com. Code § 9328(3)* and *(4), below*], the security interests rank according to priority in time of one of the following [*Com. Code § 9328(2)*]:

- If the collateral is a security, obtaining control.

- If the collateral is a security entitlement carried in a securities account and if the secured party obtained control under *Com. Code § 8106(d)(1)*, the secured party's becoming the person for which the securities account is maintained.

- If the collateral is a security entitlement carried in a securities account and if the secured party obtained control under *Com. Code § 8106(d)(2)*, the securities intermediary's agreement to comply with the secured party's entitlement orders with respect to security entitlements carried, or to be carried, in the securities account.

- If the collateral is a security entitlement carried in a securities account and if the secured party obtained control through another person under *Com. Code § 8106(d)(3)*, the time on which priority would be based under this paragraph if the other person were the secured party.

- If the collateral is a commodity contract carried with a commodity intermediary, the satisfaction of the requirement for control specified in *Com. Code § 9106(b)(2)* (discussed in [1][b], *above*) with respect to commodity contracts carried, or to be carried, with the commodity intermediary.

A security interest held by a securities intermediary in a security entitlement or a securities account maintained with the securities intermediary has priority over a conflicting security interest held by another secured party [*Com. Code § 9328(3)*]; and a security interest held by a commodity intermediary in a commodity contract or a commodity account maintained with the commodity intermediary has priority over a conflicting security interest held by another secured party [*Com. Code § 9328(4)*]. A security interest in a certificated security in registered form which is perfected by taking delivery under *Com. Code § 9313(a)* and not by control under *Com. Code § 9314* has priority over a conflicting security interest perfected by a method other than control [*Com. Code § 9328(5)*]. Conflicting security interests created by a broker, securities intermediary, or commodity intermediary which are perfected without control under *Com. Code § 9106* rank equally [*Com. Code § 9328(6)*].

In all other cases, priority among conflicting security interests in investment property is governed by *Com. Code §§ 9322* and *9323*, discussed in *§§ 503.24[1], [2][a], [b], [d], 503.40[5][a], [b]* [*Com. Code § 9328(7)*; *see also Com.*

Code § 9331, discussed in *§ 503.24[3][d]*].

[4] Secured Party's Duty When Investment Property No Longer Secures Any Obligation

If there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations, or otherwise give value, a secured party having control of investment property under *Com. Code § 8106(d)(2)* or under *Com. Code § 9106(b)* must send to the securities intermediary or commodity intermediary with which the security entitlement or commodity contract is maintained an authenticated record that releases the securities intermediary or commodity intermediary from any further obligation to comply with entitlement orders or directions originated by the secured party. This must be done within 10 days after the secured party receives an authenticated demand by the debtor [*Com. Code § 9208(a), (b)(4)*].

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§ 503.57 Collateral of Transmitting Utilities

[1] "Transmitting Utility" Defined

"Transmitting utility" means a person primarily engaged in the business of any of the following [*Com. Code § 9102(a)(80)*]:

- Operating a railroad, subway, street railway, or trolley bus.
- Transmitting communications electrically, electromagnetically, or by light.
- Transmitting goods by pipeline or sewer.
- Transmitting or producing and transmitting electricity, steam, gas, or water.

[2] Financing Statement for Utility's Collateral

[a] Place of Filing

The proper place to file in order to perfect a security interest in collateral, including fixtures, of a transmitting utility, is the office of the Secretary of State. The financing statement also constitutes a fixture filing as to the collateral indicated in the financing statement which is or is to become fixtures [*Com. Code § 9501(b)*].

[b] May Be Effective Until Termination Statement Filed

If the debtor is a transmitting utility, and the filed financing statement so indicates, the financing statement is effective until a termination statement is filed [*Com. Code § 9515(f)*]. Except that a record authorized by one secured party of record does not affect the financing statement with respect to another secured party of record [*see Com. Code § 9510(b)*], the filing with the filing office of a termination statement relating to a financing statement that indicates that the debtor is a transmitting utility also causes the effectiveness of the financing statement to lapse for the following

purposes [*Com. Code § 9513(d)*]:

- The time when filing office may remove debtor's name from the index [*see Com. Code § 9519(g)*].

- The time the filing office is required to retain retrievable information with regard to financing statements [*see Com. Code § 9522(a)*].

- Providing acknowledgments of filings [*see Com. Code § 9523(c)*].

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§ 503.58 Bank Deposits

[1] Perfection of Security Interest in Deposit Account

"Deposit account" means a demand, time, savings, passbook, or similar account maintained with a bank, but does not include investment property or accounts evidenced by an instrument [*Com. Code § 9102(a)(29)*]. Division 9 does not apply to an assignment of a deposit account in a consumer transaction, except to the extent that *Com. Code §§ 9315* and *9322* apply with respect to proceeds and priorities in proceeds [*Com. Code § 9109(d)(13), set forth in § 503.13[2]*]. Because a "deposit account" is a separate type of collateral, a security agreement covering general intangibles will not adequately describe deposit accounts. A security agreement must reasonably identify the deposit accounts that are the subject to the security interest, e.g., by using the term "deposit accounts" [*see* UCC Comment 16 to *Com. Code § 9109*].

Except with respect to perfection of security interests in proceeds [*see Com. Code § 9315(c), (d)*, discussed in *§ 503.22[7]*], a security interest in a deposit account may be perfected only by control under *Com. Code § 9314* [*Com. Code § 9312(b)(1)*]. A security interest in a deposit account is perfected by control under *Com. Code § 9104* when the secured party obtains control and remains perfected by control only while the secured party retains control [*Com. Code § 9314(a), (b)*]. A secured party has control of a deposit account if any of the following conditions is satisfied [*Com. Code § 9104(a)*]:

- The secured party is the bank with which the deposit account is maintained [*see Com. Code § 9102(a)(8)* ("bank" means an organization that is engaged in the business of banking, including savings banks, savings and loan associations, credit unions, and trust companies)].

- The debtor, secured party, and bank have agreed in an authenticated record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the account without further consent by the debtor. Division 9 does not require a bank to enter into an agreement of this kind, even if its customer so requests or directs. A bank that has entered into such an agreement is not required to confirm the existence of the agreement to another person unless requested to do so by its customer [*Com. Code § 9342*].

- The secured party becomes the bank's customer with respect to the deposit account.

A secured party that has satisfied *Com. Code § 9104(a)* has control, even if the debtor retains the right to direct the disposition of funds from the deposit account [*Com. Code § 9104(b)*].

For discussion of a secured party's right to require payment of the balance of a deposit account to it on default as provided by *Com. Code § 9607(a)(4)* and *(5)*, see *§ 503.27[3][a]*.

[2] Choice of Law Governing Interests in Deposit Accounts

[a] Originally

The local law of a bank's jurisdiction, specifically, the jurisdiction in which the office identified in an account statement as the office serving the customer's account is located, governs perfection the effect of perfection or nonperfection, and the priority of a security interest in a deposit account maintained with that bank [*Com. Code § 9304(a), (b)(4)*]. If no office is identified in the account statement as the office serving the customer's account, the bank's jurisdiction is the jurisdiction in which the chief executive office of the bank is located [*Com. Code § 9304(b)(5)*]. However, the parties may agree otherwise, as follows:

- If an agreement between the bank and its customer governing the deposit account expressly provides that a particular jurisdiction is the bank's jurisdiction for purposes of *Com. Code §§ 9301-9342*, Division 9, or the Commercial Code, that jurisdiction is the bank's jurisdiction [*Com. Code § 9304(b)(1)*].

- If an agreement between the bank and its customer governing the deposit account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the bank's jurisdiction [*Com. Code § 9304(b)(2)*].

- If an agreement between the bank and its customer governing the deposit account expressly provides that the deposit account is maintained at an office in a particular jurisdiction, that jurisdiction is the bank's jurisdiction [*Com. Code § 9304(b)(3)*].

[b] Change Due to Change of Bank's Jurisdiction

A security interest in deposit accounts, letter-of-credit rights, or investment property, which is perfected under the law of the bank's jurisdiction, the issuer's jurisdiction, a nominated person's jurisdiction, the securities intermediary's jurisdiction, or the commodity intermediary's jurisdiction, as applicable, remains perfected until the earlier of (1) the time the security interest would have become unperfected under the law of that jurisdiction, or (2) the expiration of four months after a change of the applicable jurisdiction to another jurisdiction [*Com. Code § 9316(f)*]. This four-month period is deemed long enough for a secured party to discover in most cases that the law of a different jurisdiction governs perfection and to reperfect under the law of that jurisdiction. If the secured party properly reperfects before its interest becomes unperfected, the security interest remains perfect continuously thereafter [UCC Comment 2 to *Com. Code § 9316*]. If a security interest described in *Com. Code § 9316(f)* becomes perfected under the law of the other jurisdiction before the earlier of the time or the end of the period described in that subdivision, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earlier of that time or the end of that period, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value [*Com. Code § 9316(g)*].

[3] Priorities of Security Interests in Deposit Accounts

A security interest held by a secured party having control of the deposit account under *Com. Code § 9104* has priority

over a conflicting security interest held by a secured party that does not have control [*Com. Code § 9327(1)*], such as a security interest in identifiable cash proceeds under *Com. Code § 9315*, discussed in *§§ 503.21[4]* and *503.22[7]* [*see* UCC Comment 3 to *Com. Code § 9327*]. Except as otherwise provided in *Com. Code § 9327(3)* and *(4)*, security interests perfected by control under *Com. Code § 9314* rank according to priority in time of obtaining control [*Com. Code § 9327(2)*].

Except as otherwise provided in *Com. Code § 9327(4)*, a security interest held by the bank with which the deposit account is maintained has priority over conflicting security interest held by another secured party [*Com. Code § 9327(3)*]. A security interest perfected by the secured party's becoming the bank's customer with respect to the deposit account [*see Com. Code § 9104(a)(3)*] has priority over a security interest held by the bank with which the deposit account is maintained [*Com. Code § 9327(4)*]. A secured party who claims a deposit account as proceeds of other collateral can reduce the risk of becoming junior by obtaining (1) the debtor's agreement to deposit proceeds into a specific cash-collateral account and (2) the bank's agreement to subordinate all its claims to those of the secured party [*see* UCC Comment 4 to *Com. Code § 9327*].

Com. Code § 9327 overrides conflicting priority rules, such as *Com. Code §§ 9322(f)(1)* (agricultural liens), *9324(a),(b), (d), (f)* (purchase money security interests) [*see* UCC Comment 3 to *Com. Code § 9327*]. The priority afforded by *Com. Code § 9327* does not extend to proceeds of a deposit account. Rather, *Com. Code § 9322(c)-(e)* and the provisions referred to in *Com. Code § 9322(f)* govern priorities in proceeds of a deposit account [*see* discussion in *§ 503.24[2][b]*]. *Com. Code § 9315(d)*, discussed in *§ 503.22[7]*, addresses continuation of perfection in proceeds of deposit accounts. For discussion of funds transferred from deposit accounts that constitute collateral, see *Com. Code § 9332*, discussed in [4], *below* [UCC Comment 5 to *Com. Code § 9327*].

[4] Transferee of Money From Deposit Account Takes Free of Security Interest

A transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party [*Com. Code § 9332(b)*]. For discussion of rights and remedies in a case of collusion between the debtor and a transferee, see Ch. 270, *Fraudulent Conveyances* .

An unsecured judgment creditor of the owner of a deposit account becomes a "transferee" under *Com. Code § 9332(b)* on obtaining funds from the account pursuant to a writ of execution [*Orix Financial Services, Inc. v. Kovacs (2008) 167 Cal. App. 4th 242, 245-246, 83 Cal. Rptr. 3d 900*].

[5] Bank's Right to Recoupment or Set-off

Except as otherwise provided in *Com. Code § 9340(c)*, a bank with which a deposit account is maintained may exercise any right of recoupment or setoff against a secured party that holds a security interest in the deposit account [*Com. Code § 9340(a)*]. Similarly, except as otherwise provided *Com. Code § 9340(c)*, the application of Division 9 to a security interest in a deposit account does not affect a right of recoupment or setoff of the secured party as to a deposit account maintained with the secured party [*Com. Code § 9340(b)*]. However, a bank's exercise of a setoff against a deposit account is ineffective against a secured party that holds a security interest in the deposit account which was perfected by the secured party's becoming the bank's customer with respect to the deposit account [*see Com. Code § 9104(a)(3)*], if the setoff is based on a claim against the debtor [*Com. Code § 9340(c)*; *see* UCC Comment 2 to *Com. Code § 9340* (bank's right of set-off for debt owed to it by secured party is preserved)].

Com. Code § 9340 deals with rights of set-off and recoupment that a bank may have under other law. It does not create a right of set-off or recoupment, nor is it intended to override any limitations or restrictions that other law imposes on the exercise of those rights [*see* UCC Comment 2 to *Com. Code § 9340*].

[6] Bank's Rights and Duties With Respect to Deposit Account

Except as otherwise provided in *Com. Code § 9340(c)*, discussed in [5], *above*, and unless the bank otherwise agrees in an authenticated record, a bank's rights and duties with respect to a deposit account maintained with the bank are not terminated, suspended, or modified by (1) the creation, attachment, or perfection of a security interest in the deposit account, (2) the bank's knowledge of the security interest, or (3) the bank's receipt of instructions from the secured party [*Com. Code § 9341*].

Com. Code § 9341 does not address the obligations of banks that issue instruments evidencing deposits, such as certain certificates of deposit [UCC Comment 5 to *Com. Code § 9341*; *see Com. Code § 9102(a)(29)* (defining "deposit account" to exclude investment property or accounts evidenced by an instrument)]. *Com. Code § 9341* is designed to prevent security interests from impeding the free flow of funds. A secured party who wishes to deprive the debtor of access to the funds on deposit or to appropriate those funds for itself needs to obtain the agreement of the bank, utilize the judicial process, or comply with the procedures set forth in other law [UCC Comment 2 to *Com. Code § 9341*].

Division 9 does not determine whether a bank that pays out funds from an encumbered deposit is liable to the holder of a security interest. Although the fact that a secured party has control over the deposit account and the manner by which control was achieved may be relevant to the imposition of liability, whatever rule applies generally when a bank pays out funds in which a third party has an interest would determine liability to a secured party. That rule is usually found in a non-UCC adverse claim statute [UCC Comment 4 to *Com. Code § 9341*].

[7] Secured Party's Duties When Deposit No Longer Secures Any Obligation

If there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations, or otherwise give value, a secured party having control of a deposit account under *Com. Code § 9104(a)(2)* (agreement between bank, debtor, and secured party, discussed in [1], *above*) must send to the bank with which the deposit account is maintained, within 10 days after receiving an authenticated demand by the debtor, an authenticated statement that releases the bank from any further obligation to comply with instructions originated by the secured party [*Com. Code § 9208(a), (b)(1)*].

In the case of a secured party having control of a deposit account under *Com. Code § 9104(a)(3)* (secured party is bank's customer with respect to the deposit account, discussed in [1], *above*), if there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations, or otherwise give value, a secured party must, within 10 days after receiving an authenticated demand by the debtor, either pay the debtor the balance on deposit in the deposit account or transfer the balance on deposit into a deposit account in the debtor's name [*Com. Code § 9208(a), (b)(2)*].

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§ 503.59 Letter-of-Credit Rights

[1] Perfection of Security Interest in Letter-of-Credit Rights

[a] In General

"Letter-of-credit right" means a right to payment or performance under a letter of credit, whether or not the beneficiary has demanded or is at the time entitled to demand payment or performance, but does not include the right of a beneficiary to demand payment or performance under a letter of credit [*Com. Code § 9102(a)(51)*; *see Com. Code § 5102* (defining letter of credit)]. Transfer of a beneficiary's right to demand payment or performance is governed by Division 5 [UCC Comment 5 e to *Com. Code § 9102*]. The Division 9 definition of letter-of-credit right is consistent with *Com. Code § 9109(c)(4)*, which provides that Division 9 does not apply to the extent that the rights of a transferee beneficiary or nominated person under a letter of credit are independent and superior under *Com. Code § 5114*. For discussion, procedural guides and forms relating to letters of credit, see California Legal Forms, Ch. 56, *Letters of Credit and Electronic Fund Transfers* (Matthew Bender).

Except with respect to perfection of security interests in proceeds [*see Com. Code § 9315(c), (d)*, discussed in *§ 503.22[7]*], and as otherwise provided in *Com. Code § 9308(d)* (perfection of a security interest in collateral also perfects a security interest in a supporting obligation for that collateral, discussed in *§ 503.22[1]*), a security interest in a letter-of-credit right may be perfected only by control under *Com. Code § 9314*[*Com. Code § 9312(b)(2)*]. A security interest in a letter-of-credit right is perfected by control under *Com. Code § 9107* when the secured party obtains control and remains perfected by control only while the secured party retains control [*Com. Code § 9314(b)*]. A secured party has control of a letter-of-credit right to the extent of any right to payment or performance by the issuer or any nominated person if the issuer or nominated person has consented to an assignment of proceeds of the letter of credit under *Com. Code § 5114(c)* or otherwise applicable law or practice [*Com. Code § 9107*]. To obtain control under *Com. Code § 9107*, the secured party will have to obtain consent from anyone who is obligated to give value under the letter of credit. In many cases the person or persons (issuer or nominated person) who will give value under a letter of credit will be clear from the terms of the letter of credit. In other cases, prudence may suggest obtaining consent from more than one person [UCC Comment 2 to *Com. Code § 9107*].

Com. Code § 5114(c) follows traditional banking terminology by referring to a letter of credit beneficiary's assignment of its right to receive payment under the letter of credit as an assignment of the "proceeds of a letter of credit." As the seller of goods can assign its right to receive payment (an "account") before it has been earned by delivering the goods to the buyer, so the beneficiary of a letter of credit can assign its contingent right to payment before the letter of credit has been honored. If the assignment creates a security interest, the security interest can be perfected at the time it is created. An assignment of, including creation of a security interest in, a letter-of-credit right is an assignment of a present interest [UCC Comment 3 to *Com. Code § 9107*]. Letter of credit law and practice distinguish between transfers and assignment. Under an transfer, the transferee itself becomes the beneficiary and acquires the right to draw. Whether a new, substitute credit is issued or the issuer advises the transferee of its status as such, the transfer constitutes a novation under which the transferee is the new, substituted beneficiary, to the extent of the transfer. *Com. Code § 5114(e)* provides that the rights of a transferee beneficiary or nominated person are independent of the beneficiary's assignment of the proceeds [UCC Comment 4 to *Com. Code § 9107*].

[b] As Supporting Obligation

A letter-of-credit right is a supporting obligation as defined in *Com. Code § 9102(a)(77)*. Under *Com. Code § 9203* and *Com. Code § 9308(d)* [*see* discussion in *§ 503.22[1]*], a security interest in a letter-of-credit right automatically attaches and is automatically perfected if the security interest in the supported obligation is a perfected security interest. However, unless the secured party has control of the letter-of-credit right or itself becomes a transferee beneficiary, it cannot obtain any rights against the issuer or nominated person under Division 5. Thus, as a practical matter, the secured party's rights would be limited to its ability to locate and identify proceeds distributed by the issuer of nominated person under the letter of credit [UCC Comment 5 to *Com. Code § 9107*].

[2] Choice of Law Governing Interests in Letter-of-Credit Rights

Subject to *Com. Code § 9306(c)*, the local law of the issuer's jurisdiction or a nominated person's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in a letter-of-credit right if the issuer's jurisdiction or nominated person's jurisdiction is a state *Com. Code § 9306(a)*]. For purposes of *Com. Code §§ 9301-9342*, an issuer's jurisdiction or nominated person's jurisdiction is the jurisdiction whose law governs the liability of the issuer or nominated person with respect to the letter-of-credit right as provided in *Com. Code § 5116* [*Com. Code § 9306(b)*]. *Com. Code § 9306* does not apply to a security interest that is perfected only under *Com. Code § 9308(d)* (perfection of security interest in collateral also perfects security interest in supporting obligation for the collateral) [*Com. Code § 9306(c)*].

If the jurisdiction whose law governs security interest in a letter-of-credit right changes, due to a change in the issuer's jurisdiction, the security interest will remain perfected or require to be reperfected in accordance with *Com. Code § 9316(f)* and *(g)*, discussed in *§ 503.58[2]*.

[3] Priority of Security Interests in Letter-of-Credit Rights

A security interest held by a secured party having control of the letter-of-credit right under *Com. Code § 9107* has priority to the extent of its control over a conflicting security interest held by a secured party that does not have control [*Com. Code § 9329(1)*], such as one that is perfected automatically under *Com. Code § 9308(d)*. This is consistent with international letter-of-credit practice and provides finality to payments made to recognized assignees of letter-of-credit proceeds [UCC Comment 2 to *Com. Code § 9329*].

Security interests perfected by control under *Com. Code § 9314* rank according to priority in time of obtaining control [*Com. Code § 9329(2)*]. If the issuer or nominated person recognizes multiple security interests in the letter-of-credit proceeds, resulting in multiple parties having control, the security interests rank according to time of obtaining control [UCC Comment 2 to *Com. Code § 9329*].

[4] Secured Party's Duties When Letter-of-Credit Right No Longer Secures Any Obligation

If there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations, or otherwise give value, a secured party having control of a letter-of-credit right under *Com. Code § 9107* must send to each person having an unfulfilled obligation to pay or deliver proceeds of the letter of credit to the secured party an authenticated release from any further obligation to pay or deliver proceeds of the letter of credit to the secured party. The release must be sent within 10 days after the secured party receives an authenticated demand for it from the debtor [*Com. Code § 9208(a), (b)(5)*].

[5] Ineffectiveness of Term Against Assignment of Letter-of-Credit Right

A term in a letter of credit or a rule of law, statute, regulation, custom, or practice applicable to the letter of credit which prohibits, restricts, or requires the consent of an applicant, issuer, or nominated person to a beneficiary's assignment of or creation of a security interest in a letter-of-credit right is ineffective to the extent that the term or rule of law, statute, regulation, custom, or practice does, or would (1) impair the creation, attachment, or perfection of a security interest in the letter-of-credit right, or (2) provide that the assignment or the creation, attachment, or perfection of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the letter-of-credit right [*Com. Code § 9409(a)*]. The automatic attachment and perfection of a security interest in a letter-of-credit right under *Com. Code § 9203* and *Com. Code § 9308(d)* (*see* discussion in *§ 503.22[1]*) would anomalous or misleading if, under other law, such as Division 5, a restriction on transfer or assignment were effective to block attachment and perfection [UCC Comment 2 to *Com. Code § 9409*].

To the extent that a term in a letter of credit is ineffective under *Com. Code § 9409(a),* but would be effective under law other than Division 9 or a custom or practice applicable to the letter of credit, to the transfer of a right to draw or otherwise demand performance under the letter of credit, or to the assignment of a right to proceeds of the letter of credit, all of the following rules apply with respect to the creation, attachment, or perfection of a security interest in the letter-of-credit right [*Com. Code § 9409(b)*; *see Com. Code §§ 5112, 5114*; UCC Comment 3 to *Com. Code § 9409*]:

- It is not enforceable against the applicant, issuer, nominated person, or transferee beneficiary.

- It imposes no duties or obligations on the applicant, issuer, nominated person, or transferee beneficiary.

- It does not require the applicant, issuer, nominated person, or transferee beneficiary to recognize the security interest, pay or render performance to the secured party, or accept payment or other performance from the secured party.

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§ 503.60 Assignments of Accounts, Chattel Paper, General Intangibles, and Promissory Notes

[1] Ineffectiveness of Agreement Against Assignment

Except as otherwise provided in *Com. Code § 9406(e)* with respect to sales of payment intangibles or promissory notes, and in *Com. Code §§ 9407* and *10303* with respect to leases, and subject to *Com. Code § 9406(h)*, a term in an agreement between an account debtor and an assignor or in a promissory note is ineffective to the extent that it either [*Com. Code § 9406(d)*; *but see Com. Code § 9406(e)* (*Com. Code § 9406(d)* does not apply to sale of payment intangible or promissory note, discussed in *§ 503.52*)]:

- Prohibits, restricts, or requires the consent of the account debtor or person obligated on the promissory note to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, the account, chattel paper, payment intangible, or promissory note; or

- Provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account, chattel paper, payment intangible, or promissory note.

Similarly, except as otherwise provided in *Com. Code §§ 9407* and *10303* with respect to leases, and subject to *Com. Code § 9406(h)* and *(i)* [*see Com. Code § 9406(h)* (*Com. Code § 9406* is subject to law other than Division 9 which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes); *Com. Code § 9406(i)* (*Com. Code § 9406* does not apply to an assignment of a health care insurance receivable)], a rule of law, statute, or regulation, that prohibits, restricts, or requires the consent of a government, governmental body or official, or account debtor to the assignment or transfer of, or creation of a security interest in, an account or chattel paper is ineffective to the extent that the rule of law, statute, or regulation either [*Com. Code § 9406(f)*; *see Com. Code § 9406(j)*]:

- Prohibits, restricts, or requires the consent of the government, governmental body or official, or account debtor to the assignment or transfer of, or the creation, attachment, perfection, or enforcement of

a security interest in, the account or chattel paper; or

- Provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account or chattel paper.

Com. Code § 9406(f) is not applicable to an assignment or transfer of, or the creation, attachment, perfection, or enforcement of a security interest in, a right to receive workers' compensation benefits or personal injury awards as described in 26 U.S.C. § 1049a)(1) and (2), or a claim or right to receive benefits under a special needs trust as described in *42 U.S.C. § 1396p(d)(4)* to the extent that *Com. Code § 9406(f)* is inconsistent with those laws [*Com. Code § 9406(j)*].

Subject to *Com. Code § 9406(h)* (account debtor in consumer transaction), an account debtor may not waive or vary its option under *Com. Code § 9406(b)(3)*, discussed in [5], *below*, to make partial payments to the assignee [*Com. Code § 9406(g)*].

[2] Security Interest Perfected on Attachment

An assignment of accounts or payment intangibles which does not by itself or in conjunction with other assignments to the same assignee transfer a significant part of the assignor's outstanding accounts or payment intangibles is perfected when it attaches [*Com. Code § 9309(2)*].

[3] Assignee's Position Against Account Debtor

Except with respect to assignments of health care insurance receivables [*Com. Code § 9404(e)*], unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to *Com. Code § 9404(b)-(d)*, inclusive, the rights of an assignee are subject to (1) all terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract, and (2) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee [*Com. Code § 9404(a)*]. For discussion of why tortfeasors, banks, and persons obligated under letters of credit are not "account debtors" for purposes of *Com. Code § 9404(a)*, see UCC Comment 5 d to *Com. Code § 9102*, discussed in *§ 503.11[12]*.

Subject to *Com. Code § 9404(c)* (consumer transactions) and except as otherwise provided in *Com. Code § 9404(d)*, the claim of an account debtor against an assignor may be asserted against an assignee under *Com. Code § 9404(a)* only to reduce the amount the account debtor owes [*Com. Code § 9404(b)*].

Com. Code § 9404 is subject to law other than Division 9 which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes [*Com. Code § 9404(c)*]. In a consumer transaction, if a record evidences the account debtor's obligation, law other than Division 9 requires that the record include a statement to the effect that the account debtor's recovery against an assignee with respect to claims and defenses against the assignor may not exceed amounts paid by the account debtor under the record, and the record does not include such a statement, the extent to which a claim of an account debtor against the assignor may be asserted against an assignee is determined as if the record included such a statement [*Com. Code § 9404(d)*]. *Com. Code § 9404(d)* applies to rights evidenced by a record that is required to contain the notice set out in Federal Trade Commission Rule 433 [*see 16 C.F.R. § 433.1 et seq.*, discussed in Ch. 385, *Negotiable Instruments*]. Thus, *Com. Code § 9404(d)* a consumer account debtor has the same right to an affirmative recovery from an assignee of such a record as the consumer would have had against the assignee has the record contained the required notice [UCC Comment 4 to *Com. Code § 9404*].

[4] Modifications by Original Parties After Assignment

Except with respect to assignments of health care insurance receivables [*Com. Code § 9405(d)*], and subject to *Com. Code § 9405(b), (c)*, a modification of or substitution for an assigned contract is effective against an assignee if made in good faith. The assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that the modification or substitution is a breach of contract by the assignor [*Com. Code § 9405(a)*].

The preceding rule applies to the extent that the right to all or part of a payment under an assigned contract has not been fully earned by performance, or the right to all or part of a payment has been fully earned by performance and the account debtor has not received notification of the assignment under *Com. Code § 9406(a)* [*Com. Code § 9405(b)*]. *Com. Code § 9405* is subject to law other than Division 9 which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes [*Com. Code § 9405(c)*].

[5] Account Debtor's Payments on Assignment

Subject to *Com. Code § 9406(b)-(i)*, inclusive, an account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor [*Com. Code § 9406(a)*]. The preceding rule is subject to law other than Division 9 which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes [*Com. Code § 9406(h)*].

Except in the case of an assignment of a health care insurance receivable [*see Com. Code § 9406(i)*; *§ 503.54[2]*], notification is ineffective under *Com. Code § 9406(a)* as follows [*Com. Code § 9406(b)*]:

- If it does not reasonably identify the rights assigned.

- To the extent that an agreement between an account debtor and a seller of a payment intangible limits the account debtor's duty to pay a person other than the seller and the limitation is effective under law other than Division 9.

- At the option of an account debtor, if the notification notifies the account debtor to make less than the full amount of any installment or other periodic payment to the assignee, even if (1) only a portion of the account, chattel paper, or payment intangible has been assigned to that assignee, (2) a portion has been assigned to another assignee, or (3) the account debtor knows that the assignment to that assignee is limited.

Subject to law other than Division 9 which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes [*Com. Code § 9406(h)*], if requested by the account debtor, an assignee must seasonably furnish reasonable proof that the assignment has been made. Unless the assignee complies, the account debtor may discharge its obligation by paying the assignor, even if the account debtor has received a notification under *Com. Code § 9406(a)* [*Com. Code § 9406(c)*].

If an account debtor uses a payment agent, the agent does not have the same obligations as the account debtor under *Com. Code § 9406* (or under principles of agency law) [*Nationwide Transp. Fin. v. Cass Info. Sys. (9th Cir. 2008) 523 F.3d 1051, 1065*].

[6] Secured Party's Right to Collect on Default Under Accounts Collateral

When so agreed, and in any event on default, the secured party is entitled to notify an account debtor to make payment to the secured party whether or not the assignor was then making collections on the collateral, and also to take control of any proceeds to which the secured party is entitled under *Com. Code § 9608* [*Com. Code § 9607(a)*].

[7] Secured Party's Duty to Release Debtor After Assignment When Obligation Has Been Satisfied

If there is no outstanding secured obligation and the secured party is not committed to make further advances, incur obligations, or otherwise give value, within 10 days after receiving an authenticated demand by the debtor, a secured party must send to an account debtor that has received notification of an assignment to that secured party as assignee under *Com. Code § 9406(a)*, an authenticated record that releases the account debtor from any further obligation to the secured party [*Com. Code § 9209(a), (b)*]. The preceding rule does not apply to an assignment constituting the sale of an account, chattel paper, or payment intangible [*Com. Code § 9209(c)*].

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[Reserved]

§§ 503.61[Reserved]

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§ 503.70 Related Matthew Bender Publications

[1] Bender's Forms of Discovery

For interrogatories relating to actions on secured transactions, see the following chapters of Bender's Forms of Discovery (Matthew Bender):

Ch. 172, *Secured Transactions*

Ch. 208, *Uniform Commercial Code*

[2] California Legal Forms

For discussion and transactional forms concerning secured transactions and related topics discussed in this chapter, see the following chapters of California Legal Forms (Matthew Bender):

Ch. 42, *Secured Transactions*

Ch. 43, *Commercial Loans*

Ch. 44, *Accounts Receivable Financing and Factoring*

Ch. 45, *Consumer Installment Loans and Credit Sales*

Ch. 49, *Agricultural Transactions*

Ch. 52, *Sales of Goods Under the Uniform Commercial Code*

Ch. 53, *Personal Property Leasing*

Ch. 55, *Negotiable Instruments*

Ch. 56, *Letters of Credit and Electronic Fund Transfers*

[3] California Real Estate Law and Practice

For discussion of personal property security when it is affixed as part of secured real estate, see California Real Estate Law & Practice, Ch. 111, *Deeds of Trust and Mortgages* (Matthew Bender)

For discussion of remedies and litigation, see California Real Estate Law & Practice, Ch. 121, *Priority of Liens* , and Ch. 122, *Antideficiency Legislation* (Matthew Bender)

For discussion of security interests in connection with real estate leases, see California Real Estate Law & Practice, Ch. 202, *Fixtures in Landlord-Tenant Context* , and Ch. 203, *Security Deposits* (Matthew Bender)

For discussion on security interests in connection with ownership rights, see California Real Estate Law & Practice, Ch. 342, *Fixtures* (Matthew Bender)

[4] Other Matthew Bender Publications

California Points and Authorities, Ch. 166, *Negotiable Instruments* (Matthew Bender)

McDonnell, Secured Transactions Under the Uniform Commercial Code (Matthew Bender)

McDonnell, Uniform Commercial Code Analysis of Revised Article 9 (Matthew Bender 1999)

Hart & Willier, Forms and Procedures Under the Uniform Commercial Code (Matthew Bender)

Article Rev 9, *Secured Transactions* (post-July 1, 2001 law).

Article 9, *Secured Transactions* (pre-July 1, 2001 law).

Rabkin & Johnson, Current Legal Forms With Tax Analysis, Ch. 6, *Credit and Finance* (Matthew Bender)

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§ 503.71 Federal Statutes

Perishable Agricultural Commodities Act. *7 U.S.C. § 499a et seq.*

Servicemembers Civil Relief Act. *50 U.S.C. App. § 501 et seq.*

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§ 503.72 State Statutes

[1] Applicability of Civil Procedure Laws to Secured Transactions

Inapplicability of attachment procedure to security interests subject to Division 9 of Commercial Code, except to extent security has become valueless without creditor's fault. *Code Civ. Proc. § 483.010(b)*

Writ of possession is available for wrongfully detained personalty. *Code Civ. Proc. § 512.010*

Enforcement of judgments for possession or sale of personal property by writ of execution. *Code Civ. Proc. §§ 699.530, 714.010, 714.020*

Unavailability of exemption from execution on judgment for foreclosure of lien or encumbrance. *Code Civ. Proc. § 703.010(b)*

Third-party claim procedure to preserve priority of security interest in property over another's claims. *Code Civ. Proc. § 720.210 et seq.*

One form of action required when creditor holds both real property and personal property security interests for same obligation. *Code Civ. Proc. § 726(a)*

Stay of judicially ordered delivery or sale of personal property only on special undertaking. *Code Civ. Proc. § 917.2*

Suspension of certain civil obligations and liabilities of national-guard and military-reserve members during qualifying periods of military service after September 11, 2001. *Mil. & Vet. Code § 400 et seq.*

[2] Applicability of Realty Security Laws to Secured Transactions

Inapplicability of mortgage statutes to secured transactions governed by Commercial Code. *Civ. Code § 2914, 2944* (

but cf. Com. Code §§ 9109(d)(2), (11), 9334, 9501, 9502, 9504, 9604(a)(1)(B) (fixture filings and foreclosure of mixed collateral))

[3] Applicability of Other Divisions of Commercial Code

[a] General Definitions

"Agreement." *Com. Code § 1201(b)(3)*

"Buyer in ordinary course of business." *Com. Code § 1201(b)(9)*

"Contract." *Com. Code § 1201(b)(12)*

"Creditor." *Com. Code § 1201(b)(13)*

"Delivery." *Com. Code § 1201(b)(15)*

"Good faith." *Com. Code § 1201(b)(20)*

"Money." *Com. Code § 1201(b)(24)*

"Notice." *Com. Code § 1202*

"Organization." *Com. Code § 1201(b)(25)*

"Purchase." *Com. Code § 1201(b)(29)*

"Purchaser." *Com. Code § 1201(b)(30)*

"Remedy." *Com. Code § 1201(b)(32)*

"Security Interest." *Com. Code § 1201(b)(35)*

"Value." *Com. Code § 1204*

"Warehouse receipt." *Com. Code § 1201(b)(42)*

[b] Construction of Code

Liberal construction of code and of remedies provided in code. *Com. Code §§ 1103(a), 1305(a)*

Purposes and policies of code. *Com. Code § 1103(a)*

Principles of law and equity supplement code. *Com. Code § 1103(b)*

Rule against implicit repeal by subsequent legislation. *Com. Code § 1104*

Parties' power to vary code provisions, except the obligations of good faith, diligence, reasonableness, and care. *Com. Code § 1302(a), (b)*

[c] Sales

Division 2 applies to transactions in goods, except it does not apply to any transaction which, although in form of an unconditional contract to sell or present sale, is intended to operate only as a security transaction, nor does Division 2 impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers. *Com. Code § 2102*

Reservation of security interest on passage of title. *Com. Code § 2401(1), (2)*

Reservation of security interest through bill of lading. *Com. Code § 2505(1)(b), (2)*

"Person in position of seller" including holder of security interest. *Com. Code § 2707(1)*

Buyer's security interest on rejection of goods or justifiable revocation. *Com. Code § 2711(3)*

Buyer's right of replevin for goods identified to contract or shipped under reservation and satisfaction of the security interest in them has been made or tendered. *Com. Code § 2716(3)*

[d] Commercial Paper

Transfer of instrument. *Com. Code §§ 3203, 3303*

Holder of instrument. *Com. Code §§ 3203, 3204, 3302*

[e] Bank Deposits and Collections

Security interest of collecting bank in particular items without necessity of filing. *Com. Code § 4210*

Bank's status as holder in due course through security interest held. *Com. Code § 4211*

Presenting bank's lien for expenses relating to dishonored item. *Com. Code § 4504(b)*

[f] Letters of Credit

Assignment of right to proceeds of letter is assignment of account. *Com. Code § 5114*

Security interest of issuer or nominated person in document presented under letter of credit to extent that issuer or nominated person honors or gives value for presentation. *Com. Code § 5118*

[g] Bulk Sales

"Bulk sale" defined. *Com. Code § 6102(a)(3)*

Security interest transactions to which bulk sales law (Division 6) is inapplicable. *Com. Code § 6103(c)(1)-(5)*

[h] Documents of Title

Notations required on warehouse receipts. *Com. Code § 7202(b)*

Lien for services. *Com. Code §§ 7209, 7307*

Enforcement of liens. *Com. Code §§ 7210, 7308*

Document of title confers no rights against certain secured parties. *Com. Code § 7503*

[i] Investment Securities

Definitions. *Com. Code §§ 8102, 8103*

Adverse claims to investment securities. *Com. Code § 8104*

Control of investment security. *Com. Code § 8106*

Issuer's lien on security. *Com. Code § 8209*

[j] Personal Property Leases

Definitions. *Com. Code § 10103*

Transfer of interest in lease, including creation of security interest; effect of provisions prohibiting transfer or making transfer default. *Com. Code § 10303*; *see also Com. Code § 9407*

Except as otherwise provided in *Com. Code § 10306*, lessee's creditor takes subject to lease contract. *Com. Code § 10307(a)*

Lessor's creditor takes subject to lease contract unless that creditor's lien attached to goods before lease contract became enforceable. *Com. Code § 10307(b)*

Except as otherwise provided [*see Com. Code §§ 9317, 9321*, and *9323*], lessee takes leasehold interest subject to any security interest held by lessor's creditor. *Com. Code § 10307(c)*

Lease subject to Division 10 may be of goods that are fixtures or may continue in goods that become fixtures, but no lease exists under Division 10 of ordinary building materials incorporated into improvement on land. *Com. Code § 10309(b)*

Priorities between interests of lessors of fixtures, including lessor's residual interest, and conflicting interest of encumbrancer or owner of real estate who is not lessee. *Com. Code § 10309(d)-(g)*

Lessee's remedies, including security interest in rejected goods. *Com. Code § 10508*

[4] Division 9 of Commercial Code

[a] General Provisions

Citation of division. *Com. Code § 9101*

Definitions. *Com. Code § 9102*

Purchase money security interests. *Com. Code § 9103*

Control of deposit account. *Com. Code § 9104*

Control of electronic chattel paper. *Com. Code § 9105*

Control of security, security entitlement, or commodity contract. *Com. Code § 9106*

Control of letter-of-credit right. *Com. Code § 9107*

Adequacy of description *Com. Code § 9108*

Application of Division 9. *Com. Code § 9109*

Provisions governing security interests arising under other divisions. *Com. Code § 9110*

[b] Security Agreements and Security Interests; Rights of Parties

Effectiveness of security agreement in general; applicability of other laws; conflict of law. *Com. Code § 9201*

Immateriality of title to collateral. *Com. Code § 9202*

Attachment of security interest; enforceability. *Com. Code § 9203*

Interest in after-acquired collateral; future advances. *Com. Code § 9204*

Effect of debtor's right to use or dispose of collateral; requirement of possession. *Com. Code § 9205*

Interest in favor of securities intermediary; interest in favor of person who delivers financial asset. *Com. Code § 9206*

Rights and duties of secured party in possession or control of collateral. *Com. Code § 9207*

Obligations of secured party having control of deposit account, investment property, or letter-of-credit right. *Com. Code § 9208*

Secured party's obligation to release account debtor that has received notice of assignment. *Com. Code § 9209*

Response to request for accounting, statement of account, or list of collateral. *Com. Code § 9210*

[c] Perfection and Priority

Law governing perfection, effect of perfection or nonperfection, and priority. *Com. Code § 9301*

Law governing perfection and priority issues relating to farm products. *Com. Code § 9302*

Law governing perfection and priority issues relating to goods covered by certificate of title. *Com. Code § 9303*

Law governing perfection and priority issues relating to deposit accounts; bank's jurisdiction. *Com. Code § 9304*

Law governing perfection and priority issues relating to investment property; determination of commodity intermediary's jurisdiction. *Com. Code § 9305*

Law governing perfection and priority relating to letter-of-credit rights. *Com. Code § 9306*

Determination of debtor's location. *Com. Code § 9307*

What constitutes perfection of security interest or agricultural lien. *Com. Code § 9308*

Security interests that are perfected when they attach. *Com. Code § 9309*

Requirement that financing statement be filed to perfect security interest or agricultural lien. *Com. Code § 9310*

Perfection of security interests in property subject to certain statutes, regulations, or treaties. *Com. Code § 9311*

Perfection of security interest in chattel paper, negotiable documents, instruments, or investment property; interests perfected by control or by notice of interest or claim; goods in possession of bailee; temporary perfection. *Com. Code § 9312*

Perfection by taking possession of collateral or by delivery. *Com. Code § 9313*

Perfection by control of collateral. *Com. Code § 9314*

Effect of disposition of collateral on security interest or agricultural lien; interest in proceeds. *Com. Code § 9315*

Effect of change in governing law on perfection of security interest. *Com. Code § 9316* Subordination of security interest or agricultural lien; persons who take free of interest or lien. *Com. Code § 9317*

Effect of sale of collateral on rights of debtor. *Com. Code § 9318*

Rights of consignee in relation to creditors and purchasers. *Com. Code § 9319*

Rights of buyer in ordinary course of business; buyer of goods from seller who bought or used them for personal or household use. *Com. Code § 9320*

Rights of licensee in ordinary course of business (until January 1, 2013). *Com. Code § 9321(a), (b), (d)*

Rights of lessee in ordinary course of business. *Com. Code § 9321(c)*

Priority among conflicting security interests and agricultural liens in same collateral. *Com. Code § 9322*

Dating of perfection from time of advance; subordination of security interest to interest of lien creditor; rights of buyer of goods; lessee of goods. *Com. Code § 9323*

Priority of perfected purchase money security interest. *Com. Code § 9324*

Subordination of security interest created by debtor to security interest created by another person. *Com. Code § 9325*

Subordination of security interest created by new debtor. *Com. Code § 9326*

Priority among conflicting security interests in same deposit account. *Com. Code § 9327*

Priority among conflicting security interests in same investment property. *Com. Code § 9328*

Priority among conflicting security interests in same letter-of-credit right. *Com. Code § 9329*

Priority of rights of purchaser of chattel paper; priority in proceeds. *Com. Code § 9330*

Rights of holder in due course of negotiable instrument, holder of negotiable document of title, or protected purchaser of security; rights of person protected under Division 8. *Com. Code § 9331*

Transferee of money or funds from deposit account. *Com. Code § 9332*

"Possessory lien"; priority over security interest. *Com. Code § 9333*

Security interest in fixtures; priority; security interest in growing crops. *Com. Code § 9334*

Security interest in accession; collateral that becomes an accession. *Com. Code § 9335*

"Commingled goods"; security interest and priority issues with respect to commingled goods. *Com. Code § 9336*

Certificate of title failing to show security interest perfected under another jurisdiction's law. *Com. Code § 9337*

Effect of inaccurate financing statement on security interest or agricultural lien. *Com. Code § 9338*

Subordination by agreement. *Com. Code § 9339*

Bank's right of recoupment or setoff against party holding security interest in deposit account. *Com. Code § 9340*

Effect of security interest on bank's rights and duties with respect to deposit account. *Com. Code § 9341*

Bank's right with respect to agreement giving secured party control of deposit account. *Com. Code § 9342*

[d] Rights of Third Parties

Transferability of debtor's rights. *Com. Code § 9401*

Secured party's liability for debtor's acts or omissions. *Com. Code § 9402*

"Value"; agreement not to assert claims or defenses against assignee. *Com. Code § 9403*

Claims and defenses assertable against assignee. *Com. Code § 9404*

Effect of modification or substitution of assigned contract. *Com. Code § 9405*

Discharge of account debtor; notice of assignment; proof of assignment; ineffective prohibitions or restrictions on assignments. *Com. Code § 9406*

Ineffective prohibitions or restrictions in lease agreement. *Com. Code § 9407*

Restrictions on assignment or transfer of promissory note, health care insurance receivable, or general intangible. *Com. Code § 9408*

Ineffective restrictions on assignment or creation of security interest in letter-of-credit right. *Com. Code § 9409*

[e] Filing

Office for filing financial statement for security interest or agricultural lien. *Com. Code § 9501*

Requirements for financing statement; record of mortgage as financing statement. *Com. Code § 9502*

Sufficiency of provision of debtor's name. *Com. Code § 9503*

Sufficiency of description of collateral. *Com. Code § 9504*

Filing by bailor of goods, licensor, or buyer of payment intangible or promissory note. *Com. Code § 9505*

Substantial compliance with requirements. *Com. Code § 9506*

Continuing effectiveness of filed financing statement. *Com. Code § 9507*

Effect of new debtor's rights in collateral. *Com. Code § 9508*

Authority to file initial financing statement or amendment adding collateral or debtor. *Com. Code § 9509*

Effectiveness of filed record. *Com. Code § 9510*

Person constituting secured party of record. *Com. Code § 9511*

Procedure for amending financing statement; effectiveness. *Com. Code § 9512*

Termination statement. *Com. Code § 9513*

Assignment of secured party's power to authorize amendment; assignment of record of security interest in fixture. *Com. Code § 9514*

Effective period for filed financing statement; effect of lapse. *Com. Code § 9515*

What constitutes filing; effect of filing office's failure to accept record for filing. *Com. Code § 9516*

Effect of incorrect indexing of record. *Com. Code § 9517*

Correction statement for filed record. *Com. Code § 9518*

Duties of filing office in dealing with records. *Com. Code § 9519*

Refusal by filing office to accept record. *Com. Code § 9520*

Forms for financing statement, amendment to statement, and addendum for either. *Com. Code § 9521*

Required retention of information from financing statement; destruction of written record. *Com. Code § 9522*

Acknowledgment of filing; information to be communicated from records on request; sale or licensing of records. *Com. Code § 9523*

Excuses for filing office failure to meet time limits. *Com. Code § 9524*

Fees for filing and indexing records. *Com. Code § 9525*

Rules and practices for filing offices. *Com. Code § 9526*

Annual report on filing office operation. *Com. Code § 9527*

Issuance of combined certificate with information about financing statements and liens. *Com. Code § 9528*

[f] Default

Rights of secured party after default; rights of debtor and obligor; relation back of judgment lien. *Com. Code § 9601*

Waiver or variance of rules by debtor or obligor. *Com. Code § 9602*

Agreement on standards for fulfilling rights and duties. *Com. Code § 9503*

Procedure if obligation secured by security interest in personal property or fixtures is also secured by interest in real property. *Com. Code § 9604*

Duty of secured party to unknown debtor or obligor or unknown secured party or lienholder. *Com. Code § 9605*

Time of default in connection with agricultural lien. *Com. Code § 9606*

Secured party's rights with respect to collection and enforcement. *Com. Code § 9607*

Application of proceeds; entitlement to surplus or liability for deficiency. *Com. Code § 9608*

Secured party's rights with respect to collateral following default. *Com. Code § 9609*

Disposition of collateral after default; treatment of warranties. *Com. Code § 9610*

"Notification date"; notification of disposition of collateral. *Com. Code § 9611*

Reasonable time for sending notification. *Com. Code § 9612*

Contents of notification; form. *Com. Code § 9613*

Notice of disposition for consumer goods transaction; form. *Com. Code § 9614*

Order of payment of cash proceeds; proof of subordinate security interest or lien; surplus or deficiency. *Com. Code § 9615*

"Explanation"; "request"; secured party's obligation to send explanation relating to surplus or deficiency. *Com. Code § 9616*

Rights of transferee of collateral disposed of after default. *Com. Code § 9617*

Rights and duties of secondary obligor. *Com. Code § 9618*

"Transfer statement"; rights of transferee; effect of transfer of record or legal title. *Com. Code § 9619*

Conditions for accepting collateral in full or partial satisfaction of obligation; requirement that collateral be disposed of. *Com. Code § 9620*

Persons who must receive secured party's proposal to accept collateral. *Com. Code § 9621*

Effect of acceptance of collateral. *Com. Code § 9622*

Persons who may redeem collateral; procedure. *Com. Code § 9623*

Waiver of rights. *Com. Code § 9624*

Sanctions for failure to proceed in accordance with Division; liability for damages. *Com. Code § 9625*

Action in which amount of deficiency or surplus is in issue. *Com. Code § 9626*

What constitutes commercially reasonable collection, enforcement, disposition, or acceptance. *Com. Code § 9627*

Limitations on liability of secured party. *Com. Code § 9628*

Condition to validity of renunciation or modification of rights by debtor. *Com. Code § 9629*

[g] Transition Provisions

Operative date of division. *Com. Code § 9701*

Effect of division on transactions or liens entered into or created before its operative date; effect on actions, cases, or proceedings. *Com. Code § 9702*

Effect of division on security interests enforceable before operative date. *Com. Code § 9703*

Effect of division on security interest enforceable before operative date but subordinate to rights of person becoming lien creditor. *Com. Code § 9704*

Effect of certain actions prior to operative date of division. *Com. Code § 9705*

Conditions to continuing effectiveness of financing statement filed before operative date. *Com. Code § 9706*

Amendment of pre-effective-date financing statement. *Com. Code § 9707*

Persons entitled to file initial financing statement or continuation statement under chapter. *Com. Code § 9708*

Determination of priority of conflicting claims to collateral; dating priority of security interest. *Com. Code § 9709*

[5] Vehicles

[a] Repossession of Vehicles

Notice to authorities by repossessor. *Veh. Code § 28*

Waiver of delinquencies on repossessed vehicles. *Veh. Code § 9561*

[b] Provisions Applicable to Vehicles Held as Security Interests

"Legal owner" defined. *Veh. Code § 370*

Transfer of security interest. *Veh. Code §§ 5600 et seq., 5900 et seq.*

Filing of instruments evidencing security interest. *Veh. Code §§ 6300-6303*

California Forms of Pleading and Practice--Annotated

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Chapter 503 SALES: SECURED TRANSACTIONS
PART III. RESEARCH GUIDE

44-503 California Forms of Pleading and Practice--Annotated § 503.73

§ 503.73 Decisions

[1] Buyer in Ordinary Course of Business

Allowing buyers in ordinary course of business to take free of security interest facilitates sales of inventory even if buyer knows goods are subject to security interest, as long as buyer does not have actual knowledge that sale violates terms of security agreement. *United States v. Handy & Harman (9th Cir. [Cal] 1984) 750 F.2d 777, 781-782* ; *Dowell v. Beech Acceptance Corp., Inc. (1970) 3 Cal. 3d 544, 548, 91 Cal. Rptr. 1, 476 P.2d 401* (decided under former *Com. Code § 9307(1)*)

System of recordation of title to aircraft under former 49 U.S.C. § 1403 [*see now 49 U.S.C. §§ 44107, 44108, 44110*] preempted priorities under former *Com. Code § 9307(1)* [*see now Com. Code § 9320(a)*] between prior security holders and subsequent buyers in ordinary course of business, so that holder of prior, recorded security interest in new airplane prevailed over subsequent buyer in ordinary course of business who neither recorded own title nor searched Federal Aviation Agency records to discover security holder's prior claim. *Dowell v. Beech Acceptance Corp., Inc. (1970) 3 Cal. 3d 544, 546, 91 Cal. Rptr. 1, 476 P.2d 401*

Only way to construe *Com. Code § 1201(b)(9)* (formerly *Com. Code § 1201(9)*) and former *Com. Code § 9307(1)* [*see now Com. Code § 9320(a)*] together is to allow buyer who merely knows of security interest covering goods to take free of that interest, but to hold buyer who knows of security interest, and knows that sale is in violation of some term of security agreement not waived by secured party, subject to secured party's interest. *Producers Cotton Oil Co. v. Amstar Corp. (1988) 197 Cal. App. 3d 638, 653-654, 242 Cal. Rptr. 914*

Debtor's financer, by advancing flooring money to debtor, was not buyer in ordinary course of business when, as financing agency only, it was excluded from protection for ordinary course buyers in former *Com. Code § 9307(1)* [*see now Com. Code § 9320(a)*], and when debtor had no rights in collateral to give to financer. *Mother Lode Bank v. General Motors Acceptance Corp. (1975) 46 Cal. App. 3d 807, 815, 120 Cal. Rptr. 429* Buyers of boat were not buyers in ordinary course of business under *Com. Code § 1201(b)(9)* (formerly *Com. Code § 1201(9)*) and did not take property free of security interest under former *Com. Code § 9307(1)* [*see now Com. Code § 9320(a)*] when security interest was created not by their seller but by earlier owner, who was not in business of selling boats. *Security Pacific*

Nat. Bank v. Goodman (1972) 24 Cal. App. 3d 131, 135-136, 100 Cal. Rptr. 763

Buyers were not buyers in ordinary course of business under *Com. Code § 1201(b)(9)* (formerly *Com. Code § 1201(9)*) and former *Com. Code § 9307(1)* [*see now Com. Code § 9320(a)*] when purported sale was not in good faith and not in ordinary course of either debtor's or buyer's business, as purpose of transaction was to finance and provide means for buyers to acquire control of floundering debtor, and when transaction was not sale but security transaction expressly excluded from *Com. Code § 1201(b)(9)*. *Sierra Financial Corp. v. Brooks-Farrer Co. (1971) 15 Cal. App. 3d 698, 702-703, 93 Cal. Rptr. 422*

[2] Duties of Secured Parties

Financing assignment, in which note and real estate deed of trust were assigned from debtor who was lender and mortgagee thereunder to debtor's own creditor as security only for separate obligation, did not impose duties on creditor but only assigned rights thereto, so that creditor had no duty to provide debtor's mortgagor with beneficiary statement of unpaid balance [*see Civ. Code § 2943*] on demand of latter, nor was creditor liable for damages resulting from failure to provide statement [*see now Com. Code §§ 9109(b), 9402*; *see also Com. Code § 2210(4)*]. *Black v. Sullivan (1975) 48 Cal. App. 3d 557, 564, 565, 122 Cal. Rptr. 119*

[3] Equitable Principles

Although equitable principles may be applied to require secured creditor who would otherwise be unjustly enriched to make restitution to third party [*see Com. Code § 1103(b)*], application of doctrine is limited to situations in which secured party instigated or acquiesced in third party's benefit to or preservation of collateral; mere enhancement of collateral by third party's efforts is not enough to require secured party to compensate third party who knew of secured party's interest, or could easily have learned of it, and took no steps to protect its position. *Atascadero Factory Outlets, Inc. v. Augustini & Wheeler, LLP (2000) 83 Cal. App. 4th 717, 721-722, 99 Cal. Rptr. 2d 911* ; *Knox v. Phoenix Leasing, Inc. (1994) 29 Cal. App. 4th 1357, 1366-1368, 35 Cal. Rptr. 2d 141*

Applying principles of unjust enrichment, because secured party knew of and acquiesced in third party's expenditure, which was necessary to development of crop (collateral), and ultimately benefited from that expenditure, amount expended by third party to harvest crop was deducted from amount of proceeds to which secured party was entitled. *Producers Cotton Oil Co. v. Amstar Corp. (1988) 197 Cal. App. 3d 638, 658-660, 242 Cal. Rptr. 914*

[4] Pledges

Pledge is bailment for security; it is perfected by delivery of possession of pledged property, although title remains in pledgor; secured party or bailee owes fiduciary duty of care to preserve and protect pledged property and may be liable for conversion if pledged property is wrongfully sold or transferred without authority. *Hartford v. State Bar (1990) 50 Cal. 3d 1139, 1153 n.11, 270 Cal. Rptr. 12, 791 P.2d 598* ; *see also* former *Com. Code §§ 8313, 8320-8321* (pledge of securities); *now see Com. Code § 8101 et seq.*

[5] Priorities

When federal government sought, pursuant to *31 U.S.C. § 3713*, to assert priority of federal tax lien over judgment lien that had been perfected under Pennsylvania law, federal Tax Lien Act rather than federal priority statute was governing statute; therefore, under *I.R.C. § 6323(a)*, unrecorded federal tax lien did not have priority over perfected judgment lien. *United States v. Estate of Romani (1998) 523 U.S. 517, 118 S. Ct. 1478, 1488, 140 L. Ed. 2d 710*

Because California motor vehicle registration system is "full title system," transferee who has no knowledge of defect in title is entitled to rely on information in registration and ownership certificates without further inquiry. *T & O Mobile Homes, Inc. v. United California Bank (1985) 40 Cal. 3d 441, 454, 454-455, 220 Cal. Rptr. 627, 709 P.2d 430* (transferee prevails over technically perfected security interest mistakenly not disclosed in certificate); *Louis & Diederich, Inc. v. Cambridge European Imports, Inc. (1987) 189 Cal. App. 3d 1574, 1587, 234 Cal. Rptr. 889* (transferee prevails over unperfected interest)

When consideration for subordination agreement was plaintiff's continued extension of credit to debtor, but agreement did not specify duration of continued financing, reasonable time was implied; whether four months was reasonable length of time was question of fact, which should not have been resolved by summary judgment. *Walter E. Heller Western, Inc. v. Tecrim Corp. (1987) 196 Cal. App. 3d 149, 159-160, 241 Cal. Rptr. 677*

Owners of cattle which they put out to feed at cattle ranch did not have interest prior to security interest of bank which had filed financing statement covering all cattle owned or acquired by ranch owner, in that either cattle owner's interest did not arise until receiving cattle from rancher, in which case cattle were subject of bank's interest already covering ranch cattle, or ownership interest preceded delivery of cattle to ranch but owners failed to record cattle feeding contract in order to avoid priority security interest of bank as bona fide encumbrancer of cattle. *Calva Prod. v. Security Pac. Nat'l Bank (1980) 111 Cal. App. 3d 409, 416-417, 168 Cal. Rptr. 582* (holding former *Civ. Code § 2980.5* constitutional in its requirement of recording cattle feeding contract in order to retain priority over subsequent bona fide encumbrancer)

Federal tax lien took priority over perfected security interest in accounts receivable when security did not exist, as defined by *I.R.C. § 6323(h)* prior to tax lien filing and when accounts receivable were not acquired within requisite time period for security interest to take priority over tax lien. *Gold Coast Leasing Co. v. California Carrots, Inc. (1979) 93 Cal. App. 3d 274, 279-280, 155 Cal. Rptr. 511*

Assignment of right to payment for services rendered did not create security interest until those services had been rendered, for purposes of calculating whether interest amounted to one in existence as "commercial transactions financing agreement" sufficiently before federal tax lien was filed in order to have priority over federal tax lien [*see I.R.C. § 6323(d)*]. *Gold Coast Leasing Co. v. California Carrots, Inc. (1979) 93 Cal. App. 3d 274, 278-280, 155 Cal. Rptr. 511*

Person surrendering taxpayer's property pursuant to federal tax lien, being thereby discharged under federal law from any obligation to taxpayer (*see I.R.C. § 6323(d)*), is also discharged from liability to holder of security interest in that property when that interest is subordinate to federal tax lien under federal law. *Gold Coast Leasing Co. v. California Carrots, Inc. (1979) 93 Cal. App. 3d 274, 280, 281, 155 Cal. Rptr. 511*

[6] Proceeds

[a] Examples of Proceeds

Given flexible and broad definition of "proceeds" under former *Com. Code § 9306(1)*, federal farm subsidy payments are proceeds of sugar beet farmer-debtor's collateral when security agreement is drafted with awareness of importance of subsidy payments to sugar beet farm financing and when interested third party examining financing statement could be expected to know that crops described in financing statement were sugar beets. In the Matter of Munger (9th Cir. [Cal] 1974) *495 F.2d 511, 513*

Flooring agreement that described collateral as "sales and service of new and used automobiles" created security

interest in inventory consisting of newand used automobiles and proceeds thereof, including proceeds of disposition of automobiles under conditional sales agreements. *Biggins v. Southwest Bank (9th Cir. [Cal] 1973) 490 F.2d 1304, 1308, 1311*

Security interest in inventory applies equally to proceeds of sale and attaches to deposit account to extent that funds are identifiable as sale proceeds. *ITT Commercial Fin. Corp. v. Tech. Power Inc. (1996) 43 Cal. App. 4th 1551, 1556-1557, 51 Cal. Rptr. 2d 344* .

Security interest in debtor's inventory and proceeds includes debtor's accounts receivable, given broad definition of "proceeds" in former *Com. Code § 9306(1)* and given absence of expression in security agreement of narrower interpretation of "proceeds." *Western Decor & Furnishings Industries, Inc. v. Bank of America (1979) 91 Cal. App. 3d 293, 302, 154 Cal. Rptr. 287*

[b] Need Not Come Into Debtor's Possession

Debtor is not required to take possession of whatever is received in exchange for collateral in order for it to be "proceeds;" thus, secured party was entitled to recover from buyer proceeds paid to third parties who, with debtor, misrepresented to buyer that they owned crop. *American National Bank v. Cloud (1988) 201 Cal. App. 3d 766, 775-776, 247 Cal. Rptr. 325* ; *Producers Cotton Oil Co. v. Amstar Corp. (1988) 197 Cal. App. 3d 638, 652-653, 242 Cal. Rptr. 914*

Although "account" in hands of marketing cooperative to which crop was sold was "proceeds," secured party that had perfected interest in crop and proceeds waived its interest in proceeds by allowing crop to be delivered to marketing cooperative with competing claim to proceeds, even though agreement between competing claimants specified that delivery of crop would not change rights of either; court interpreted agreement in favor of cooperative based on its first-perfected interest in proceeds. *Bank of Stockton v. Diamond Walnut Growers, Inc. (1988) 199 Cal. App. 3d 144, 151-153, 156-159, 244 Cal. Rptr. 744*

When buyer of collateral paid seed, harvesting, and other standard costs and paid remainder of purchase price to secured party, entire purchase price was proceeds even though none of it ever came into debtor's possession; however, under equitable principles, because secured party knew of and acquiesced in expenditures necessary for development of crop and ultimately benefited from those expenditures, buyer was entitled to recover those costs from crop proceeds. *Producers Cotton Oil Co. v. Amstar Corp. (1988) 197 Cal. App. 3d 638, 651, 658-660, 242 Cal. Rptr. 914*

Proceeds in which creditors' security interest was perfected included payment of transportation charges advanced by unsecured creditor. *Johanson Transportation Service v. Jimmy Grizzard Sales, Inc. (1985) 164 Cal. App. 3d 583, 592, 210 Cal. Rptr. 433* Secured party's interest in proceeds of debtor's hay crop does not extend to advances made by buyer to debtor before buyer knew of secured party's lien, but on delivery of hay to buyer, account payable became proceeds of sale of hay crop and buyer was not entitled to apply proceeds to reduction of its outstanding advances to debtor. Imperial NH3 v. *Central Valley Feed Yards, Inc. (1977) 70 Cal. App. 3d 513, 520, 139 Cal. Rptr. 8*

[c] Secured Party's Interest in Proceeds of Disposition

Even though no Commercial Code provision permitted purchaser of collateral who knew of secured party's interest and that sale was in violation of security agreement to pay harvesting costs from proceeds, equitable considerations supported payment to prevent secured party's unjust enrichment. *Producers Cotton Oil Co. v. Amstar Corp. (1988) 197 Cal. App. 3d 638, 658-660, 242 Cal. Rptr. 914*

Secured party that authorized sale of collateral by prior conduct, loses its lien on collateral on completion of sale, but

does not necessarily lose its lien on the proceeds. *Producers Cotton Oil Co. v. Amstar Corp. (1988) 197 Cal. App. 3d 638, 647, 652-653, 242 Cal. Rptr. 914*

[7] Secured Party in Possession

Fuel tax charges assessed against collateral in possession of secured party were chargeable to debtor and secured by collateral; on sale of collateral by secured party, taxes were required to be paid from proceeds before being applied to satisfaction of underlying indebtedness. *J.T. Jenkins Co. v. Kennedy (1975) 45 Cal. App. 3d 474, 480, 119 Cal. Rptr. 578*

Requirement that secured party in possession of collateral use reasonable care in custody and preservation thereof [*see Com. Code § 9207(a)*], when applied to securities being held, does not require secured party to sell call options on debtor's advice when secured party then would have been obligated to hold securities for additional length of time and to have realized on that sale far less than amount of debtor's obligation outstanding, and which would also conflict with secured party's right to hold collateral until principal obligation has been satisfied or to sell on default in good faith and commercially reasonable manner as prescribed by governing law [*see Com. Code § 9610*]. *Hutchison v. Southern California First Nat. Bank (1972) 27 Cal. App. 3d 572, 582, 583, 103 Cal. Rptr. 816*

[8] Secured Party's Remedies

[a] In General

Court order that debtor must convey collateral to secured party was reversible error when security agreement did not contain any promise to convey but contained only assignment of property as collateral; secured party was limited to remedies specified in Division 9 of *Commercial Code. Resolution Trust Corp. v. Winslow (1992) 9 Cal. App. 4th 1799, 1813-1814, 12 Cal. Rptr. 2d 510*

Equipment lease for carwash coupled with note was not itself collateral, such that on termination of lease and repossession of abandoned equipment note proper could be called "unsecured" and sued on for unpaid balance without first disposing of equipment and showing of deficiency thereafter. *Grossman v. Lippson (1978) 81 Cal. App. 3d 554, 559-562, 146 Cal. Rptr. 741*

[b] Commercially Reasonable Collection or Disposition

Requirements of notice and of commercial reasonableness of former *Com. Code § 9504(3)* [*see now Com. Code §§ 9610(a), (b), 9611*], including reasonable advertising, are distinct. *Ford & Vlahos v. ITT Commercial Financial Corp. (1994) 8 Cal. 4th 1220, 1231, 36 Cal. Rptr. 2d 464, 885 P.2d 877*

Secured party's organization of active collection program in attempting to realize on debtor's accounts receivables (only inactive when it had agreed to let cocreditor have responsibility for collecting on its own share of interests), coupled with fact that value of accounts was probably inflated and that debtor had failed to provide secured party with supporting records, was substantial evidence that secured party acted in commercially reasonable manner in collecting from account debtors. *Western Decor & Furnishings Industries, Inc. v. Bank of America (1979) 91 Cal. App. 3d 293, 303-305, 154 Cal. Rptr. 287*

[c] Notice of Disposition

Notice of sale sent to debtor, on default of whom collateral was being disposed of under security interest, by certified

mail, return receipt requested, addressed to debtor at residence thereof, but which was returned unclaimed before sale, after which no further attempt was made to notify debtor by secured party although its officers knew debtor's whereabouts and had business dealings with debtor through branch office, created rebuttable presumption that notice was given, which could be overcome by uncontradicted evidence of debtor that notice was never received. *In re Carter (1975) 511 F.2d 1203, 1204* ; *see* UCC Comment 6 to *Com. Code § 9611* (Division 9 leaves to judicial resolution, based on facts of each case, whether second try or attempt to locate debtor is necessary when secured party learns debtor did not receive first notification).

To obtain deficiency judgment, secured creditor who sells defaulting debtor's repossessed car must comply with Rees-Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 2981 et seq.*] as well as with any relevant provisions in Commercial Code Division 9; failure to give debtor proper notice of public sale pursuant to former *Com. Code § 9504(3)* [*see now Com. Code § 9614(3)* (form of notice)], including notice of both time and place of sale, precluded deficiency judgment. *Bank of America v. Lallana (1998) 19 Cal. 4th 203, 210, 213-214, 77 Cal. Rptr. 2d 910, 918, 960 P.2d 1133*

"Recognized market" within meaning of former *Com. Code § 9504(3)* [*see now Com. Code 9611(d)* (notice of sale or disposition of collateral need not be given to debtor if collateral is type customarily sold on recognized market)] is one in which sales involve many items so similar that individual differences are nonexistent or immaterial, in which haggling and competitive bidding are not primary factors in each sale, and in which prices paid are currently available by quotation. *Aspen Enterprises, Inc. v. Bodge (1995) 37 Cal. App. 4th 1811, 1825*

Whether there is recognized market within meaning of former *Com. Code § 9504(3)* [*see now Com. Code 9611(d)* (notice of disposition of collateral need not be given to debtor if collateral is type customarily sold on recognized market)] is generally question of fact. *Aspen Enterprises, Inc. v. Bodge (1995) 37 Cal. App. 4th 1811, 1825*

Creditor who mistakenly conducted sale one day before the date announced in notification was allowed to collect deficiency judgment after properly renoticing and conducting second sale because debtor was not prejudiced; factors influencing court included creditor's admission of its mistake and reasonableness in doing what it could to rectify matters and fact that debtor could raise good faith and commercial reasonableness on retrial. *PWS, Inc. v. Ban (1991) 234 Cal. App. 3d 223, 226-230, 285 Cal. Rptr. 598*

Purposes of notice are to allow debtor to discharge debt and redeem collateral, to produce another purchaser, and/or to ensure that sale is held in commercially reasonable manner. *Brunzell Construction Co., Inc. v. Smith (1988) 200 Cal. App. 3d 617, 621, 246 Cal. Rptr. 182*

Secured party is exempted from requirement of giving notice of sale [former *Com. Code § 9504(3)*; *see now Com. Code 9611(d)*] if sale of collateral is conducted by court-appointed receiver because receiver, not secured party, controls time and place of sale; creditor is required to account to debtor for any proceeds of sale received by it after discharge of receiver. *Security Pacific National Bank v. Geernaert (1988) 199 Cal. App. 3d 1425, 1431, 1431, 245 Cal. Rptr. 712* (stating as dicta that same reasoning and result would apply to sale by trustee in bankruptcy)

Threatened speedy decline in value of collateral that results from secured party's procrastination is not within exception; notice is still required; failure to give notice barred deficiency. *Backes v. Village Corner, Inc. (1987) 197 Cal. App. 3d 209, 213-215, 242 Cal. Rptr. 716*

"Retroactive" notice given after private sale is invalid. *Backes v. Village Corner, Inc. (1987) 197 Cal. App. 3d 209, 212 n. 3, 242 Cal. Rptr. 716* (dicta)

Doctrine of substantial compliance is not applicable to notice required by former *Com. Code § 9504(3)* [*see now Com. Code 9611(d)*]; thus, creditor was barred from recovering deficiency judgment when notice gave incorrect street

address, even though creditor's employees were allegedly posted at address given in notice to direct bidders to true location of sale. *C.I.T. Corp. v. Anwright Corp. (1987) 191 Cal. App. 3d 1420, 1422-1424, 237 Cal. Rptr. 108* ; *but see PWS, Inc. v. Ban (1991) 234 Cal. App. 3d 223, 226-230, 285 Cal. Rptr. 598*

Guarantor was entitled to notice of sale; guarantor's waiver, prior to default, of right to receive notice was ineffective. *C.I.T. Corp. v. Anwright Corp. (1987) 191 Cal. App. 3d 1420, 1425-1427, 237 Cal. Rptr. 108* ; *Connolly v. Bank of Sonoma County (1986) 184 Cal. App. 3d 1119, 1123-1125, 229 Cal. Rptr. 396* (both discussed and declined to follow *Rutan v. Summit Sports, Inc. (1985) 173 Cal. App. 3d 965, 973, 219 Cal. Rptr. 381* , which held otherwise)

[d] Repossession

Secured party retaining possession of equipment, after debtor had delivered it for repair, because of debtor's default in payments, was not liable in conversion because it also demanded payment of former debt not covered under present security agreement before releasing equipment, if debtor was still in default under present agreement. *Clark Equipment Co. v. Mastelotto, Inc. (1978) 87 Cal. App. 3d 88, 92-94, 150 Cal. Rptr. 797*

Principal who authorized agent to repossess collateral, when taking of possession was otherwise lawful, was not liable in punitive damages for wrongful method of taking on part of agent if principal itself was not shown to have had malice attended by outrageous conduct, requiring principal to have participated personally in wrongful acts, previously authorized them, or subsequently ratified them with full knowledge of facts. *Henderson v. Security Nat. Bank (1977) 72 Cal. App. 3d 764, 772, 773, 140 Cal. Rptr. 388*

Repossession of collateral by means of unlawful entry, such as breaking lock of garage door to obtain automobile, even though taking of possession is otherwise lawful, constitutes conversion for which principal who ordered repossession by agent may be liable based on unwarranted interference with debtor's dominion over property without regard to principal's good or bad faith, care or negligence, knowledge or ignorance of method of repossession. *Henderson v. Security Nat. Bank (1977) 72 Cal. App. 3d 764, 770, 771, 140 Cal. Rptr. 388*

Delivery to buyer of goods without taking of some form of security agreement did not entitle unpaid seller to repossess goods but rather rendered seller liable for conversion thereon. *English v. Ralph Williams Ford (1971) 17 Cal. App. 3d 1038, 1046-1049, 95 Cal. Rptr. 501*

Repossession of vehicle by secured party after debtor's default without removing other property contained therein and returning it to debtor on demand constituted conversion of other property. *Varela v. Wells Fargo Bank (1971) 15 Cal. App. 3d 741, 749, 750, 93 Cal. Rptr. 428*

[9] Security Interests

[a] Continuing Effectiveness

Security agreement giving creditor security interest in accounts receivable that was executed by proprietorship continued to be effective as to accounts receivable generated by corporation that was successor entity to proprietorship because debtor could not evade obligation of validly executed security agreement by altering its business structure. *In re West Coast Food Sales (9th Cir. 1981) 637 F.2d 707, 709-710*

[b] Creation of Security Interest

Bank can obtain valid security interest in one of its own deposit accounts under former *Com. Code § 9203(1)(c)* [*see*

now Com. Code § 9203(b)(3)(D)]; bank's interest attaches to personal property of depositor, not bank's own property. *Bakersfield Westar Ambulance, Inc. v. Parker (9th Cir. 1997) 123 F.3d 1243, 1246-1247*

Arrangement characterized as "negative pickup" deal did not provide appellants with superior security interest in tangible film materials; failure to show all elements required by former *Com. Code § 9203(1)* [*see now Com. Code § 9203(b)*]. *LeFlore v. Grass Harp Productions Inc. (1997) 57 Cal. App. 4th 824, 835, 840, 67 Cal. Rptr. 2d 340*

Stipulation in civil action fulfilled all requirements for security agreement and creation of security interest. *Louis & Diederich, Inc. v. Cambridge European Imports, Inc. (1987) 189 Cal. App. 3d 1574, 1586, 234 Cal. Rptr. 889*

Assignment of accounts which constituted consideration for consenting creditors, granting to debtor corporations under contemporaneous agreement limited moratorium on enforcement of their claims and limited extension of time within which corporations might pay, was not mere assignment of accounts for purpose of collection only which would be excluded from Division 9 of Commercial Code [*see* former *Com. Code § 9104(f), now Com. Code § 9109(d)(5)*], but was transaction intended to create security interest with security agreement. *People ex rel. Franchise Tax Bd. v. Credit Managers Assn., (1977) 76 Cal. App. 3d 344, 349, 350, 142 Cal. Rptr. 777*

Sale in which demonstrated purpose was to enable seller to obtain financing for foundering enterprise and provide means to acquire control of another business, and in which price for goods--coupled with contemporaneous agreement for resale at close to market price--evidenced transaction for security, did not amount to sale to buyers in ordinary course of business which would take free of security interest created by seller [*see Com. Code §§ 1201(b)(9), 9320(a)*]. *Sierra Financial Corp. v. Brooks-Farrer Co. (1971) 15 Cal. App. 3d 698, 702, 703, 93 Cal. Rptr. 422*

[c] Description of Collateral

Security agreement describing collateral by type and stating it is located at particular address in particular city, when actually collateral was never located there but only in other cities, did not give adequate description of collateral for purposes of creating valid security agreement versus claim of bankruptcy trustee; and description was not permissibly able to be corrected by parol evidence although reference to other documents containing fuller description, or coupling with fuller description in financing statement, would be capable of rendering complete description. *Matter of Cal. Pump & Mfg. Co., Inc. (1978) 588 F.2d 717, 719, 720*

Security agreement covering inventory and proceeds thereof included right to payment of debtor on latter's sale of inventory without having to specify in agreement that it covered accounts receivable. *Western Decor & Furnishings Industries, Inc. v. Bank of America (1979) 91 Cal. App. 3d 293, 301, 302, 154 Cal. Rptr. 287*

[d] Disguised as Lease

Lease and charter party were security interests when their purpose was to allow lessee to borrow money and to provide lessor greater security than it would have under ship mortgage; when lease is actually security interest, lessor has no reversionary ownership interest in subject of "lease"; thus, cancellation of charter party prior to attachment of vessel would not deprive "lessee" of attachable interest. *Interpool Ltd. v. Char Yigh Marine (Panama) S.A. (9th Cir. 1989) 890 F.2d 1453, 1459-1461* (applying California law)

[e] Perfection of Security Interests

Creditor could obtain security interest in proceeds of sale of FCC license; interest constituted "general intangible" that could be perfected before sale of license. *MLQ Investors LP v. Pacific Quadracasting, Inc. (9th Cir. 1998) 146 F.3d*

746, 749

Former *Com. Code § 9402(8)* [*see now Com. Code § 9506(a)*], providing that financing statement containing minor errors that are not seriously misleading may be effective, is displacement of principles of equity and law otherwise applicable; minor error is seriously misleading when it does not indicate to interested third party possible existence of prior encumbrance on collateral; reformation due to mistake was not available when error was seriously misleading. *In re Pacific Trencher & Equipment, Inc. (9th Cir. 1984) 735 F.2d 362, 364-365*

Secured party attempting to perfect security interest in instruments by taking possession thereof through having debtor make notations thereon that they were held as security but otherwise remaining in possession of those instruments, does not accomplish perfection under former *Com. Code §§ 9304(1), 9305* [*see now Com. Code §§ 9312, 9313*] because only secured party, agent, or bailee may perfect interest through possession, and debtor cannot qualify as agent [*see* U.C.C. Comment 2 to *Com. Code § 9313*]. *Matter of Staff Mortgage & Inv. Corp. (1977) 550 F.2d 1228, 1230*

Security interest in account in which the debtor has rights can be perfected before debtor earns right to payment under terms of account by performance. *Bank of Stockton v. Diamond Walnut Growers, Inc. (1988) 199 Cal. App. 3d 144, 152-153, 244 Cal. Rptr. 744*

Perfection of security interest in vehicle that was part of dealer's inventory was governed by Commercial Code, not Vehicle Code, and required filing of financing statement or possession. *Louis & Diederich, Inc. v. Cambridge European Imports, Inc. (1987) 189 Cal. App. 3d 1574, 1585-1586, 234 Cal. Rptr. 889*

Secured party's failure to file continuation statement of security interest in collateral when original financing statement lapsed after five years precluded action for conversion and impairment of security interest when collateral was transferred by debtor. *Growth Properties v. Lempert (1983) 144 Cal. App. 3d 983, 989, 193 Cal. Rptr. 102*

[10] Waiver or Modification of Debtor's Rights

Former *Com. Code §§ 9501(3), 9504,* and *9505* [*see now Com. Code §§ 9602, 9603,* and *9624*] did not prohibit individual debtor, guarantor of business obligation, after default, from consenting to entry of deficiency judgment; after entry of deficiency judgment in favor of secured party, execution and levy on debtor's property, including any collateral, were no longer governed by Division 9 of the *Commercial Code. Brunzell Construction Co., Inc. v. Smith (1988) 200 Cal. App. 3d 617, 622-623, 246 Cal. Rptr. 182* ; *but see Com. Code § 9629* (waiver by debtor of rights after default as to consumer goods is not valid or enforceable unless it is in consideration of secured party's waiver of any right to deficiency)

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§ 503.74 Attorney General Opinions

Under California Control of Profits of Organized Crime Act, court may distribute forfeited property to innocent holder of security interest. *78 Ops. Cal. Att'y Gen. 92 (1995)*

California Uniform Commercial Code forms prescribed by the Secretary of State are subject to format standards of California's recording laws adoped in 1994; those forms need not comply with format requirements of *Government Code section 27361.6*, but cover sheet must be recorded for any document not meeting new standards. *78 Ops. Cal. Att'y Gen. 8 (1995)*

Continuation of "trust receipt" concept for certain purposes of public policy. *49 Ops. Cal. Att'y Gen. 118, 120 (1967)*

Overlap of "security agreement" and Unruh Retail Installment Sales Act's "lien contract." *45 Ops. Cal. Att'y Gen. 8, 10 (1965)*

Financing statements in proper form are acceptable for filing regardless of collateral involved. *43 Ops. Cal. Att'y Gen. 254 (1964)*

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§ 503.75 Law Reviews

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[Reserved]

§§ 503.77[Reserved]

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PART IV. FORMS
A. Forms for Use by Debtors or Obligors

44-503 California Forms of Pleading and Practice--Annotated § 503.100

§ 503.100 Complaint for Damages for Failure of Secured Party to Supply Statement of Information Requested by Debtor [Com. Code §§ 9210, 9625(b)-(f)]

[1] FORM Complaint for Damages for Failure of Secured Party to Supply Statement of Information Requested by Debtor [Com. Code §§ 9210, 9625(b)-(f)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES--FAILURE OF SECURED PARTY TO SUPPLY INFORMATION REQUESTED UNDER SECURITY AGREEMENT
_____ [*name*] Defendant.	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California [*or allege other capacity and residence of defendant and if germane to creation of agricultural lien add:* In the ordinary course of business, defendant provides goods and service to farming operations].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

[3. As shown in this complaint, this action is subject to the provisions of _____ (*Civil Code Section 1812.10 or Civil Code Section 2984.4 or Code Civ. Proc. § 395(b)*).]

[*EITHER, if defendant's security interest was created by a security agreement*]

4. On or about _____ [*date*], plaintiff and defendant entered into a security agreement _____ [entitled _____ (*specify e.g.,* "Security Agreement" *or* "Installment Sales Contract" *or* "Promissory Note and Agreement") *or* consisting of _____ (*specify e.g.,* a promissory note and mortgage of _____ [personal property *or* fixtures] *or* an agreement assigning certain _____ (*specify e.g.,* accounts receivable])]. A true copy of this agreement (hereinafter referred to as "the agreement") is attached to this complaint as Exhibit A [consisting of Documents _____ through _____] and made a part of it by this reference.

[*AND*]

5. According to the provisions of the agreement, defendant agreed to _____ [*describe benefit given by secured party*], and plaintiff agreed to _____ [*describe consideration given therefor by plaintiff*]. By the agreement plaintiff also gave to defendant a security interest in _____ [*describe collateral*]. [*If financing statement was filed with respect to security interest, add:* A financing statement was _____ (filed *or* recorded) (in connection with perfection of the security interest under the agreement) on or about _____ (*date*), in the office of the _____ (County Recorder of _____ County, California *or* Secretary of State *as appropriate to the type of collateral*) (which has been maintained to date by appropriate filings relevant thereto). (A true copy of that statement is attached as Exhibit _____ and incorporated by reference.)]

[*OR, if defendant's interest is an agricultural lien*]

4. On or about _____ [*date*], defendant _____ [furnished _____(*specify goods or services, e.g.,* feed and materials) *or* leased real property] to plaintiff in connection with plaintiff's [*specify if desired, e.g.,* dairy] farming operation. Plaintiff agreed to _____ [*describe consideration promised by plaintiff*]. [The foregoing is evidenced by a(n) _____ (lease *or* agreement), dated _____, a true copy of which (hereinafter referred to as _____ ["the agreement" *or* "the lease") is attached to this complaint as Exhibit A (consisting of Documents _____ through _____) and made a part of it by this reference.]

[*AND*]

5. The effect of the transaction(s) described in Paragraph 4 was to give defendant an agricultural lien on plaintiff's _____ [*describe collateral, e.g.,* proceeds from the sale of milk] in accordance with _____[*specify statute creating lien whose effectiveness does not depend on defendant's possession of the personal property, e.g., Sections 57401 to 57414 of the Food and Agricultural Code*]. [*If filing was made to perfect agricultural lien, add:* A financing statement was filed in connection with perfection of the agricultural lien created by that _____ (agreement *or* lease) on or about _____ (*date*), in the office of the _____ (County Recorder of _____ County, California *or* Secretary of State *as appropriate to the type of collateral*) (which has been maintained to date by appropriate filings relevant thereto). A true copy of that statement is attached as Exhibit _____ and incorporated by reference.]

[*CONTINUE*]

6. On or about _____ [*date*], plaintiff _____ [authenticated *or* signed] a statement _____ [requesting that the defendant provide an accounting of the unpaid obligations secured by collateral *or* indicating what plaintiff believed to be _____ (the aggregate amount of unpaid indebtedness *or* a list of the collateral *or both*)] [under the agreement] as of that date, and sent it to defendant [with a request that the statement be approved or corrected and returned]. A true copy of this statement is attached to this complaint as Exhibit C and made a part of it by this reference. [Because plaintiff made a previous request for, and defendant supplied, a similar statement or accounting, at defendant's request, during the six months previous to sending the request that is the subject of this complaint, plaintiff included payment of a charge of $_____ (*amount not to exceed $25*).]

7. Defendant failed and refused to return a written _____ [accounting *or* correction or approval of the statement] within 14 days after receiving plaintiff's request therefor or _____ [at any other time since *or* within a reasonable time], and without reasonable excuse.

8. Plaintiff requested the _____ [accounting *or* statement] from defendant in order to _____[*describe purpose leading to loss by defendant's action, e.g.,* obtain additional financing from one or more sources which indicated that if plaintiff's obligations to defendant were below a stated amount, as was expected to be indicated on the statement sent defendant, they would lend the amount needed and secure it on the collateral subordinate to the defendant's security interest]. As a result of defendant's failure to respond to plaintiff's request for a statement, plaintiff has been injured in the amount of $_____, representing _____ [*describe, e.g.,* the difference in the cost of financing and in interest which plaintiff could have obtained at the time by using the collateral as security, as against the cost plaintiff did pay for the financing obtained, without being able to rely on the collateral].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the amount of $_____;

[2. For additional damages, as provided by *Commercial Code Section 9625*, of $500;]

3. For costs of suit herein incurred, including attorney's fees, if appropriate; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], declare:

I am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The complaint in [1], *above*, is for use by a debtor who has sent a secured party a request for accounting [*Com. Code § 9210(a)(2)*] or a statement regarding the remaining indebtedness or list of collateral for approval or correction [*Com. Code § 9210(a)(3), (4)*], and who has been injured in a particular fashion by failure of the secured party to return the statement [*see Com. Code §§ 9210, 9625(b), (f), (g)*; *see also* discussion in *§§ 503.25, 503.29*].

[3] Allegations

The complaint in [1], *above*, alleges:

- The capacity and residence of defendant (Paragraph 1).

- Fictitious names of defendants later to be discovered and joined, if any (Paragraph 2).

- Whether the action involves a retail installment agreement or motor vehicle conditional sales contract or arises from an offer or provision of goods, services, loans or extensions of credit intended primarily for personal, family or household use, or from a transaction consummated as the result of either an unsolicited telephone call made by a seller or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller [*see Code Civ. Proc. § 395(b)*], thereby requiring the plaintiff to comply with the provisions of *Civ. Code §§ 1812.10* or *2984.4* or *Code Civ. Proc. § 395(b)* (Paragraph 3) [*Code Civ. Proc. § 396a(a)*; *see* discussion in [6], *below*].

- Identification and execution of a security agreement and any financing statement, in the case of a security interest, or, a description of the transaction(s) that provide the basis for an agricultural lien (alternative Paragraphs 4).

- The key provisions of the security agreement, or the statute granting the agricultural lien, including the security interest or agricultural lien given in particular collateral (alternative Paragraphs 5).

- The sending of the request for accounting or the statement or collateral or outstanding indebtedness for approval or correction (Paragraph 6).

- Defendant's failure to return an accounting or the statement (Paragraph 7).

- The resulting injury to plaintiff (Paragraph 8). *Com. Code § 9625(b)* specifies that a person is liable for damages in the amount of any loss caused by a failure to comply with Division 9 and specifically provides that loss may include loss resulting from the debtor's inability to obtain, or increased costs of,

alternative financing. This form uses as an example a loss relating to additional financing rather than alternative financing.

[4] Statutory Damages

Com. Code § 9625(f) provides that in addition to damages under *Com. Code § 9625(b)*, a debtor or consumer obligor may recover $500 in each case from a person that, without reasonable cause, fails to comply with a request under *Com. Code § 9210*. A recipient of a request under *Com. Code § 9210* which never claimed an interest in the collateral or obligations that are the subject of a request has a reasonable excuse for failure to comply with the request within the meaning of this subdivision [*Com. Code § 9625(f)*; *see also Com. Code §§ 9210(d), (e), 9625(g)*, discussed in *§ 503.25[2]*].

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Installment or Auto Sales Actions

[a] Filing of Affidavit or Declaration of Proper Venue Required

In any action subject to the Unruh Retail Installment Sales Act (RISA) [*Civ. Code § 1801 et seq.*] or the Rees-Levering Motor Vehicles Sales and Finance Act (Rees-Levering Act) [*Civ. Code § 2981 et seq.*], or that arises from an offer or provision of goods, services, loans or extensions of credit intended primarily for personal, family or household use, or from a transaction consummated as the result of either an unsolicited telephone call made by a seller or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller [*see Code Civ. Proc. § 395(b)*], the plaintiff, concurrently with the filing of the complaint, must file an affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) stating facts showing that the action has been commenced in a proper place for the trial of the action under *Civ. Code § 1812.10* or *Civ. Code § 2984.4*. In lieu of filing a separate affidavit or declaration, the plaintiff may allege these facts in a verified complaint, but not on information and belief. If an affidavit or declaration is filed with the complaint, a copy of the affidavit or declaration must be served with the summons [*Civ. Code §§ 1812.10(c), 2984.4(c)*; *Code Civ. Proc. § 396a(a)*].

[b] Consequences of Failure to File Affidavit or Declaration

If the plaintiff fails to file the affidavit or declaration or state facts showing proper venue in a verified complaint as required in *Civ. Code § 1810.10*, *Civ. Code § 2984.4*, or *Code Civ. Proc. § 396a*, no further proceedings may occur, and the court, on its own motion or the motion of any party, must dismiss the action without prejudice. The court, however, on terms that may be just, may permit the affidavit or declaration to be filed after the filing of the complaint. In this case, a copy of the affidavit or declaration must be served on the defendant, and the time to answer or otherwise plead begins at the time of that service [*Civ. Code §§ 1812.10(c), 2984.4(c)*; *Code Civ. Proc. § 396a(a)*].

For further discussion of venue requirements for RISA, and a form for a declaration of proper venue, see *Ch. 501, Sales: Retail Installment Sales, § 501.102* . For further discussion of venue requirements for the Rees-Levering Act, and related forms, see Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* . For venue allegations, see Ch. 20, *Allegations Commonly Used* .

[7] Attorney's Fees

In an action on a contract, when the contract specifically provides that attorney's fees and costs incurred to enforce the provisions of the contract will be awarded to one of the parties, reasonable attorney's fees may be recovered by the prevailing party, but as an element of the costs of suit, not as damages [*Civ. Code § 1717*].

The court must award costs and attorney's fees to a prevailing plaintiff in litigation governed by *Civ. Code § 1780* (consumer suffering damage from any practice deemed unlawful under *Civ. Code § 1770*) [*Civ. Code § 1780(d)*]. Reasonable attorney's fees may be awarded to a prevailing defendant on a finding by the court that the plaintiff's prosecution of the action was not in good faith [*Civ. Code § 1780(d)*]. For discussion and forms relating to recovery of attorney's fees, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

For discussion of attorney's fees under *Civ. Code § 1717.5* in certain contract actions based on a book account as defined in *Code Civ. Proc. § 337a*, see Ch. 20, *Allegations Commonly Used* .

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44-503 California Forms of Pleading and Practice--Annotated § 503.101

§ 503.101 Complaint for Damages for Failure of Secured Party in Possession to Preserve Collateral [Com. Code §§ 9207, 9625(b)-(d)]

[1] FORM Complaint for Damages for Failure of Secured Party in Possession to Preserve Collateral [Com. Code §§ 9207, 9625(b)-(d)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR LOSS OF
_____ [*name*] Defendant.	)	COLLATERAL BY SECURED PARTY IN POS-
	)	SESSION
	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 503.100[1], Paragraph 1.*]

[2. *Fictitious names. See § 503.100[1], Paragraph 2.*]

[3. *Venue for certain consumer installment sales. See § 503.100[1], Paragraph 3.*]

4. [*Identification and execution of security agreement or transaction that provides basis for agricultural lien. See § 503.100[1], alternative Paragraphs 4.*]

5. [*Key provisions of security agreement or statute granting agricultural lien, and filing of financing statement. See § 503.100[1], alternative Paragraphs 5.*]

6. Defendant _____ [under the agreement had remained in *or* on or about _____ (*date*), took] possession of the collateral. However, defendant failed to use reasonable care in the custody and preservation of the collateral in that _____ [*describe failure, e.g.,* despite repeated warnings from plaintiff and precautions written in the instructions accompanying the equipment, and despite its obvious susceptibility to temperature, defendant kept the equipment stored outdoors directly in the heat of the sun, so that eventually the parts melted down from first-class working condition to a completely useless and valueless state *or, if collateral consisted of instruments or chattel paper, show, for example, how defendant failed to take necessary steps to preserve rights against prior parties (in the absence of agreement otherwise)*].

7. Plaintiff has suffered injury as a proximate result of defendant's failure to care properly for the collateral in the amount of $_____, the difference between the value of the collateral as it would be in its proper condition and its value as a result of the defendant's failure to preserve the collateral.

[*Prayer. See § 503.100[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 503.100[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by a debtor or obligor to recover damages caused by the loss of or injury to collateral in the possession of a secured party who has not properly maintained the collateral [*see Com. Code §§ 9207, 9625(b)-(d)*; *see also* discussion in *§§ 503.26[1], 503.29*].

[3] Allegations

The complaint in [1], *above*, alleges in pertinent part (1) the failure of the secured party to preserve properly the collateral in its possession (Paragraph 6); and (2) the resultant damage to the collateral, based on its value before injury (Paragraph 7) [*see Com. Code § 9207(a)*].

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44-503 California Forms of Pleading and Practice--Annotated § 503.102

§ 503.102 Complaint to Restrain Secured Party Not Proceeding in Accordance With Law From Dispositions of Collateral [Com. Code § 9625(a)]--Refusal to Honor Debtor's Right of Redemption [Com. Code § 9623]

[1] FORM Complaint to Restrain Secured Party Not Proceeding in Accordance With Law From Dispositions of Collateral [Com. Code § 9625(a)]--Refusal to Honor Debtor's Right of Redemption [Com. Code § 9623]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*] Defendant.	)	COMPLAINT TO RESTRAIN UNLAWFUL DIS-
	)	POSITION OF COLLATERAL AND TO ENFORCE
	)	RIGHT OF REDEMPTION

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 503.100[1], Paragraph 1.*]

[2. *Fictitious names. See § 503.100[1], Paragraph 2.*]

[3. *Venue for certain consumer installment sales. See § 503.100[1], Paragraph 3.*]

4. [*Identification and execution of security agreement or transaction that provides basis for agricultural lien. See § 503.100[1], alternative Paragraphs 4.*]

5. [*Key provisions of security agreement or statute that grants agricultural lien, and filing of any financing statement. See § 503.100[1], alternative Paragraphs 5.*]

6. On or about _____ [*date*], plaintiff defaulted _____ [under the security agreement *or* in his/her/its obligation to defendant] in that _____ [*describe default*]. Defendant _____ [had remained in *or* thereupon took] possession of the collateral. [Plaintiff is informed and believes and thereon alleges that] [D]efendant then prepared, and is now ready and about, to dispose of the collateral. [Defendant _____ (delivered *or* sent) to plaintiff a notice of sale on or about _____ (*date*), a true copy of which is attached as Exhibit B and incorporated by this reference.]

7. Defendant is not proceeding in accordance with the provisions of Division 9 of the Commercial Code, for the following reasons:

(a) On or about _____[*date*], plaintiff made demand on defendant to redeem the collateral and tendered fulfillment of all obligations secured thereby, as well as for the expenses reasonably incurred by defendant in [retaking,] holding, preparing and processing for disposition, and for reasonable attorney's fees and legal expenses as provided for in the security agreement.

(b) This was accomplished by _____ [*describe process, e.g.,* plaintiff first calculated that the entire sum of the above could be no more than $_____ and subsequently deposited such sum in escrow with _____ (*name of escrow holder*). The escrow holder then mailed and telephoned plaintiff's demand for redemption along with plaintiff's demand, made in good faith, for a statement from defendant of the aggregate amount of unpaid indebtedness as of _____ (*date*), containing plaintiff's statement that the obligation amounted to a total of $_____. _____ (*name of escrow holder*) explained in his/her/its cover letter that the funds were deposited to plaintiff's account and would be delivered as soon as the amount of the obligation was settled. A true copy of that correspondence is attached as Exhibit C and incorporated by reference].

(c) Defendant refused, and still refuses, to honor plaintiff's demand for redemption and has refused to accept any tender from plaintiff therefor.

8. By virtue of defendant's failure to proceed in accordance with the provisions of Division 9 of the Commercial Code, plaintiff is entitled to seek that disposition of the collateral be restrained on the appropriate terms and conditions as provided in *Section 9625(a) of the Commercial Code*.

[9. *Add if seeking temporary restraining order:* Furthermore, defendant's threatened disposition of the collateral, unless and until enjoined and restrained by order of this court, will cause great and irreparable injury to plaintiff in that _____ (*specify, e.g.,* equipment that is virtually irreplaceable in the recent market will not be returned to plaintiff's manufacturing establishment, effectively crippling plaintiff's enterprise in the manufacture of _____ [*describe*]).]

10. [As a proximate result of defendant's wrongful conduct, plaintiff has been damaged in the amount of $_____ for _____ (*describe basis, e.g.,* inability to properly operate a manufacturing plant). Plaintiff will be further damaged in like manner so long as defendant continues its conduct.] [Further,] [I]f defendant proceeds in noncompliance with the provisions of the Commercial Code referred to above, and disposes of the collateral, plaintiff will be injured in an amount not now known or calculable and will [seek leave to] amend this complaint to state that amount when it becomes known to plaintiff, or on proof thereof.

WHEREFORE, plaintiff prays judgment against defendant as follows:

[1. For an order requiring defendant to show cause, if any, why defendant should not be enjoined as hereinafter set forth, during the pendency of this action;]

2. For a [temporary restraining order,] preliminary injunction[,] and a permanent injunction[, each] enjoining defendant and any agent, servant, or employee of defendant, and all persons in concert with any such persons, or on behalf of any such persons:

a. From disposing of the collateral by sale, lease, or in any other manner;

b. To honor plaintiff's right to redeem the collateral as tendered heretofore and by this action on terms provided by court order and to return the collateral;

3. For [damages in the sum of $_____, plus] damages in any sums that may be sustained and are ascertained before final judgment;

4. For costs of suit herein incurred, including reasonable attorney's fees as authorized by *Civil Code Section 1717*; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 503.100[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by a debtor who desires to restrain the secured party from disposing of the collateral after default when the secured party has failed to honor the debtor's offer and tender to redeem the collateral [*see Com. Code §§ 9623, 9625(a)*; *see also* discussions at *§ 503.28[4]* and *[5]*; *Englert v. IVAC Corp. (1979) 92 Cal. App. 3d 178, 184, 154 Cal. Rptr. 804* (alternative of action for possession when collateral is wrongfully withheld after attempt to redeem)].

The special allowance of injunctive relief in *Com. Code § 9625(a)* is of particular importance when sought prospectively, before the unreasonable disposition of the collateral has been concluded. *Com. Code § 9625(a)* will apparently be applied even though plaintiff has not alleged additional facts which are ordinarily required to entitle him or her to injunctive relief under *Code Civ. Proc. §§ 526, 527*.

[3] Allegations

The complaint in [1], *above*, alleges in pertinent part:

- Plaintiff's default under the security agreement, and defendant's preparation to dispose of the collateral (Paragraph 6).

- Defendant's refusal to honor plaintiff's offer and tender to redeem the collateral [*Com. Code § 9623*] (Paragraph 7).

- The right to restrain disposition of collateral when a secured party is proceeding in violation of Division 9 of the Commercial Code (Paragraph 8) [*Com. Code § 9625(a)*].

- Additional facts entitling plaintiff to a temporary restraining order (Paragraph 9) [*Com. Code § 9625(a)*].

[4] Special Requirements for Injunctive Relief

A complaint seeking injunctive relief, particularly where accompanied by application for a temporary restraining order, requires the filing of additional certificates, affidavits, or declarations accompanying the complaint or the pleading of specific evidentiary facts in a verified complaint [*see Code Civ. Proc. § 527*]. For discussion of the procedure for injunctive relief, see Ch. 303, *Injunctions* .

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44-503 California Forms of Pleading and Practice--Annotated § 503.103

§ 503.103 Complaint to Order Disposition of Collateral When Secured Party Not Proceeding in Accordance With Law [Com. Code § 9625(a)]--Failure to Dispose of Collateral After Debtor Rejected Proposal to Retain Collateral in Satisfaction of Obligation [Com. Code § 9620(a)]

[1] FORM Complaint to Order Disposition of Collateral When Secured Party Not Proceeding in Accordance With Law [Com. Code § 9625(a)]--Failure to Dispose of Collateral After Debtor Rejected Proposal to Retain Collateral in Satisfaction of Obligation [Com. Code § 9620(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*] Defendant.	)	COMPLAINT TO ORDER DISPOSITION OF
	)	COLLATERAL AFTER REJECTION OF PROPOS-
	)	AL TO RETAIN IT ON DEFAULT

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 503.100[1], Paragraph 1.*]

[2. *Fictitious names. See § 503.100[1], Paragraph 2.*]

[3. *Venue for certain consumer installment sales. See § 503.100[1], Paragraph 3.*]

4. [*Identification and execution of security agreement or transaction that provides basis for agricultural lien. See § 503.100[1], alternative Paragraphs 4.*]

5. [*Key provisions of security agreement or statute that grants agricultural lien, and filing of any financing statement. See § 503.100[1], alternative Paragraphs 5.*]

6. On or about _____ [*date*], plaintiff defaulted under the agreement in that _____ [*describe default* (*see § 503.100[1], Paragraph 6*): Defendant _____ (had remained in *or* thereupon took) possession of the collateral. On or about _____ (*date*), defendant sent plaintiff an authenticated proposal that the collateral be retained in satisfaction of the obligation under the agreement. Within 20 days thereafter, on or about _____ (*date*), defendant received from _____ [plaintiff *or* _____ (*name*), a third-party creditor entitled to receive notice of defendant's original proposal], an authenticated objection to the proposal. Copies of this proposal and rejection are attached as Exhibits A and B, respectively, and incorporated by this reference.

7. Defendant is not proceeding in accordance with the provisions of Section *§ 9610 of the Commercial Code*, dealing with default, in that defendant has retained the collateral and failed and refused to dispose of it under the governing law although he/she/it received the aforementioned authenticated objection to the proposal to retain the collateral in satisfaction. By virtue of defendant's conduct, plaintiff is entitled to seek that disposition of the collateral be ordered on appropriate terms and conditions in accordance with the provisions of *Commercial Code Section 9625(a)*.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an order requiring disposition of the collateral by _____ [*specify person or enterprise which would best protect debtor's interest*], with application of proceeds to be made in the following order:

a. To the costs of the taking, keeping, and selling of the collateral;

b. To the costs of suit [and attorney's fees] herein, as may be awarded by the court;

c. To the satisfaction of plaintiff's indebtedness secured by defendant's _____ [security interest *or* agricultural lien];

d. To the satisfaction of indebtedness secured by any subordinate security interest in or other subordinate lien on the collateral [and to the satisfaction of any subordinate attachment lien or execution lien pursuant to *Code of Civil Procedure Section 701.040(b)*] [to the extent the foregoing are senior to the interest of _____ (*name*), as consignor, and] if written notification of demand therefor is received before distribution of the proceeds is completed;

[e. *If underlying transaction was a sale of accounts, chattel paper, payment intangibles, or promissory notes, the following is inapplicable: To plaintiff as to any surplus thereafter;*]

2. For costs of suit herein incurred, including reasonable attorney's fees as authorized by *Civil Code Section 1717*; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 503.100[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use when the collateral is any type other than consumer goods, at least 60 percent of which had been paid for, and the secured party, after default, has failed to dispose of the collateral after the debtor rejected the secured party's proposal to retain the collateral in satisfaction of the obligation [*see Com. Code §§ 9620, 9625(a)*; *see also* discussions in *§§ 503.27[3]* and *503.28[5]*].

[3] Allegations

The complaint in [1], *above*, alleges:

- After default, defendant, being in possession of the collateral, made an authenticated proposal to retain the collateral in satisfaction of the obligation, and plaintiff's or other person's rejection of that proposal (Paragraph 6)

- The failure of defendant to comply with statute requiring disposition of the collateral (Paragraph 7) [*see Com. Code §§ 9610, 9620*].

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§ 503.104 Complaint to Order Disposition of Collateral When Secured Party Not Proceeding in Accordance With Law [Com. Code § 9625(a)]--Failure to Dispose of Collateral After Debtor Rejected Proposal to Retain Collateral in Satisfaction of Obligation [Com. Code § 9620(a)]

[1] FORM Complaint to Order Disposition of Collateral When Secured Party Not Proceeding in Accordance With Law [Com. Code § 9625(a)]--Failure to Dispose of Collateral After Debtor Rejected Proposal to Retain Collateral in Satisfaction of Obligation [Com. Code § 9620(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*] Defendant.	)	(Conversion of Consumer Goods Collateral After
	)	Default Under Security Agreement)
	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 503.100[1], Paragraph 1.*]

[2. *Fictitious names. See § 503.100[1], Paragraph 2.*]

[3. *Venue for certain consumer installment sales. See § 503.100[1], Paragraph 3.*]

4. [*Identification and execution of security agreement. See § 503.100[1], first alternative Paragraph 4.*]

5. According to the provisions of the agreement, plaintiff agreed to pay $_____ over a period of _____ [*time*] at _____ percent interest, and defendant agreed to deliver immediately to plaintiff for plaintiff's use and possession certain consumer goods in the form of _____ [*describe*]. By the agreement plaintiff also gave to defendant a purchase money security interest in the goods. [*If financing statement was filed with respect to security interest, add:* A financing statement was _____ (filed *or* recorded) (in connection with perfection of the security interest under the agreement) on or about _____ (*date*), in the office of the _____ (County Recorder of _____ County, California *or* Secretary of State *as appropriate to the type of collateral*) (which has been maintained to date by appropriate filings relevant thereto). (A true copy of that statement is attached as Exhibit _____ and incorporated by reference.)]

6. By _____ [*date*], plaintiff had paid the sum of $_____, a sum which amounted to [more than] 60 percent of the cash price. On or about the same date plaintiff defaulted under the agreement in that _____[*describe default*]. Defendant thereupon took possession of the collateral.

7. At no time during the 90 days following defendant's repossession did defendant dispose of the collateral. Plaintiff never agreed to any longer period of time within which defendant could dispose of the collateral. The value of the collateral was $_____, and by retaining it, defendant has converted the collateral to his/her/its own use.

[8. *If seeking punitive damages, add:* The aforementioned acts of defendant were willful, wanton, malicious, and oppressive (, were undertaken with the intent to defraud plaintiff), and justify the awarding of exemplary and punitive damages.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the value of the property converted in the amount of $_____ less the amount of $_____ representing the remainder of plaintiff's indebtedness to defendant under the obligation, along with interest at the rate of _____ percent per annum from the date of conversion;

[2. For punitive and exemplary damages;]

3. For costs of suit herein incurred, including reasonable attorney's fees as authorized by *Civil Code Section 1717*; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 503.100[1]*]

[2] Use of Form

The complaint in [1], *above*, is for use when a debtor who has defaulted on a purchase money security contract or loan on consumer goods, and has paid in 60 percent of the cash price, seeks to recover damages for the conversion of the goods after the secured party's failure to dispose of the collateral within the required time period [*see Com. Code § 9620(e)(1), (f)*; *see also* discussion in *§ 503.42[5]*].

The complaint could be modified for use in a situation governed by *Com. Code § 9620(e)(2), (f)*, by modifying Paragraph 4 to describe a nonpurchase money transaction in consumer goods and by deleting from Paragraph 5 the reference to payment of 60 percent [or more] of the cash price and substituting instead an allegation of payment of 60 percent [or more] of the principal amount of the obligation. [*see Com. Code § 9620(e)(2)*].

[3] Allegations

The complaint in [1], *above*, alleges

- Defendant's repossession of collateral on default after plaintiff had repaid 60 percent of the cash price (Paragraph 6) [*Com. Code § 9620(e)(1)*].

- The failure of defendant to properly dispose of the goods by the required time, and the value of the goods on that date (Paragraph 7) [*Com. Code § 9620(f)*].

- Punitive damages, if desired (Paragraph 8) [*see Civ. Code § 3294*].

[4] Cross Reference

For discussion and forms for use in actions for conversion generally, see Ch. 150, *Conversion*

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PART IV. FORMS
A. Forms for Use by Debtors or Obligors

44-503 California Forms of Pleading and Practice--Annotated § 503.105

§ 503.105 Complaint for Accounting and Payment of Surplus After Collection or Disposition of Collateral After Default--By Debtor Against Secured Party [Com. Code § 9608 or 9615]

[1] FORM Complaint for Accounting and Payment of Surplus After Collection or Disposition of Collateral After Default--By Debtor Against Secured Party [Com. Code § 9608 or 9615]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR ACCOUNTING OF SURPLUS
_____ [*name*] Defendant.	)	AFTER COLLECTION OR DISPOSITION OF
	)	COLLATERAL
	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 503.100[1], Paragraph 1.*]

[2. *Fictitious names. See § 503.100[1], Paragraph 2.*]

[3. *Venue for certain consumer installment sales. See § 503.100[1], Paragraph 3.*]

4. [*Identification and execution of security agreement or transaction that provides basis for agricultural lien. See § 503.100[1], alternative Paragraphs 4.*]

5. [*Key provisions of agreement or statute that grants agricultural lien, and filing of any financing statement. See § 503.100[1], alternative Paragraphs 5.*]

[*EITHER, if collateral other than accounts, chattel paper, instruments, or promissory note(s)*]

6. _____ [Defendant had remained in *or* on or about _____ (*date*), defendant took] possession of the collateral. [Plaintiff is informed and believes, and thereon alleges that,] [O]n or about _____ [*date*], defendant disposed of the collateral after default of plaintiff for an amount in excess of both the indebtedness then due from plaintiff to defendant [under the agreement] and all proper expenses in connection with custody and disposition of the collateral. This excess is due therefore to plaintiff.

[*OR, if collateral was accounts, chattel paper, instruments, or promissory note(s) EXCEPT that this form is inapplicable if underlying transaction was sale of accounts, chattel paper, payment intangible(s), or promissory note(s) unless provided for in agreement*]

6. On or about _____ [*date*], after default of plaintiff, defendant proceeded to notify _____ [account debtors *or* obligors] on the collateral to make payments to defendant instead of plaintiff, and [plaintiff is informed and believes and thereon alleges,] collected an amount in excess of the indebtedness then due from plaintiff to defendant under the agreement and all proper expenses in connection with collection on the collateral, [under which agreement defendant _____ (was entitled to charge back collateral *or* had recourse against plaintiff personally)], which excess is due therefore to plaintiff.

[*CONTINUE*]

7. The exact amount of money received as surplus and due to plaintiff from defendant is unknown to plaintiff and cannot be ascertained without an accounting of the expenses and amount received by defendant on _____ [collection *or* disposition] of the collateral. [Plaintiff is informed and believes, and thereon alleged, the amount due to plaintiff exceeds $_____.]

8. Plaintiff has demanded an accounting of the disposition of collateral from defendant and payment of the surplus to plaintiff, but defendant has failed and refused, and continues to do so, to render an accounting and to pay the amount [*or allege facts showing such a demand would be useless*].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an accounting between plaintiff and defendant;

[2. For damages in the amount of $_____;]

[3. For additional damages, as provided by *Commercial Code Section 9625*, of $500;]

4. For the amount found to be due from defendant to plaintiff as the surplus existing after deducting from the amount received on _____ [collection *or* disposition] of the collateral:

a. Reasonable expenses of _____ [collection and enforcement *or* (retaking,) holding, preparing for disposition, processing, and disposing of the collateral] [*if provided for by agreement and not otherwise prohibited by*

law, reasonable attorney's fees and expenses incurred by defendant];

b. Amount of remaining obligation secured by the _____ [security interest in *or* agricultural lien on] the collateral;

c. The indebtedness secured by a subordinate security interest in or agricultural lien on the collateral and for with regard to which defendant received authenticated notification of demand before distribution of the proceeds;

5. For costs of suit herein incurred, including reasonable attorney's fees as authorized by *Civil Code Section 1717*; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 503.100[1].*]

[2] Use of Form

The complaint in [1], *above* is for use by a debtor who, after collection or disposition of the collateral by the secured party for default of the debtor, demands an accounting of the amount realized thereon, in excess of amounts owed the secured party, to be returned as surplus to the debtor [*see Com. Code §§ 9608* (collection), *9615* (disposition); *see also* discussions in *§§ 503.27[3], [5][c]* and *[e]*]. If the underlying transaction is a sale of accounts, chattel paper, payment intangibles, or promissory notes, the debtor is not entitled to any surplus [*see Com. Code §§ 9608(b), 9615(e)(1)(A)*], unless the parties have varied the statutory rule by their agreement [*see* UCC Comment 2 to *Com. Code § 9608*].

[3] Allegations

The complaint in [1], *above*, alleges in pertinent part [*see Com. Code § 9608* or *9615*]:

- The disposition of or collection on the collateral for an amount greater than that due the secured party (Paragraph 6).

- An unknown amount realized on the disposition (Paragraph 7).

- The failure of secured party to provide the debtor with an accounting of the disposition (Paragraph 8).

Counsel may wish to include allegations from Paragraphs 6 through 8 of the form in *§ 503.100[1]*, because if plaintiff's request for accounting took the form required by *Com. Code § 9210*, discussed in *§ 503.25[1]*, and defendant delayed more than 14 days without providing the accounting, plaintiff will be entitled to any actual damages caused by defendant's failure to provide the accounting and to statutory damages of $500 [*Com. Code § 9625(b)-(f)*, discussed in *§§ 503.29* and *503.100[4]*]. The bracketed items [2] and [3] in the prayer are for use when these additional allegations regarding failure to provide the accounting as required by *Com. Code § 9210* and resultant damages are used.

The form in [1], *above*, also does not include any allegation putting in issue whether defendant's conduct in collecting or disposing of the collateral was commercially reasonable [*see Com. Code §§ 9607(c), (d), 9610(a)-(c), 9627*, discussed in *§ 503.27[3][a]* and *[5][a]*]. Except in a consumer transaction, a secured party need not prove that its conduct was commercially reasonable unless the debtor puts the matter in issue [*see Com. Code §§ 9626(a)(1), (b)(1)(A)*, discussed in *§ 503.27[7]*]. If counsel wishes to put the question of commercial reasonableness in issue, counsel can incorporate the affirmative defense at § 503.111 or 503.112 as an allegation into complaint. Although the fact that a low price was received does not establish that a collection or disposition was not commercially reasonable [*see Com. Code § 9627(a)*, discussed in *§ 503.27[3][a]* and *[5][a]*], counsel may wish to put commercial reasonableness in issue if a low price was received, especially if the disposition was made to the secured party or an entity related to the secured party [*see Com. Code § 9615(f)*, discussed in *§ 503.27[5][d]*].

[4] Cross Reference

For discussion and forms of pleading for actions for accounting generally, see Ch. 7, *Accounting, Action for*

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[Reserved]

§§ 503.106[Reserved]

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44-503 California Forms of Pleading and Practice--Annotated § 503.110

§ 503.110 Affirmative Defense to Complaint for Priority in Fixtures--Trade Fixtures Did Not Become Interest in Real Estate and Were Intended to Remain Free Thereof [Civ. Code § 1019]

[1] FORM Affirmative Defense to Complaint for Priority in Fixtures--Trade Fixtures Did Not Become Interest in Real Estate and Were Intended to Remain Free Thereof [Civ. Code § 1019]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

The fixtures constituting the collateral in this action did not become and are not now part of or permanently attached to the premises. They were all affixed to the real property described herein for the purposes of _____ [trade *or* manufacture *or* ornamental *or* domestic] use. The removal thereof can be effected without injury to the premises. The manner in which those items have been affixed has not rendered them an integral part of the premises. _____ [*Name of debtor*] installed them on the premises for the specified purposes and without intending that they should become part of the real property [and _____ (*name of lessor of premises or holder of lien of deed of trust*) so understood at the time of their procurement and installation that they were temporary only and not intended to form part of the real property or of his/her/its interest therein].

[2] Use of Form

The affirmative defense in [1], *above*, is for use in an answer to a complaint based on priority in fixtures, such as § 503.160. It contests the fact that trade fixtures, which constituted collateral under a security agreement, ever became permanently installed on or a part of the real property to which they were affixed, and thus ever passed to a third-party holder of some interest in the real property [*see Civ. Code § 1019*; *see also Com. Code § 9334(e)(2)* (priority); discussions in *§ 503.47[2]* and [6][b]].

A tenant may remove from the demised premises, any time during the continuance of his term, anything affixed to those premises for purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing, by the manner in which it is affixed, has become an integral part of the premises [*Civ.*

Code § 1019].

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44-503 California Forms of Pleading and Practice--Annotated § 503.111

§ 503.111 Affirmative Defense to Complaint for Deficiency After Foreclosure--To Place Secured Party's Compliance in Issue [Com. Code § 9626(a)]--Secured Party Did Not Proceed in Commercially Reasonable Manner

[1] FORM Affirmative Defense to Complaint for for Deficiency After Foreclosure--To Place Secured Party's Compliance in Issue [Com. Code § 9626(a)]--Secured Party Did Not Proceed in Commercially Reasonable Manner

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

Plaintiff's _____ [collection *or* enforcement *or* disposition *or* acceptance] of the collateral was not conducted in compliance with *Commercial Code Sections 9601 through 9629*, inclusive, in that _____ [(collection *or* enforcement *or* disposition *or* acceptance) *then specify noncompliance and its consequences, e.g.,* was not conducted in a commercially reasonable manner, specifically, no advertisement was made of the sale, thus the sale was poorly attended and the amount realized by plaintiff on the sale of the collateral was much less than the amount that would have been realized had the disposition been conducted in good faith, after appropriate notice, and in a commercially reasonable manner].

[2] Use of Form

The affirmative defense in [1], *above*, is for use by a debtor, in a transaction that is not a consumer transaction, in an answer to a secured party's complaint for deficiency to place the burden on the secured party to prove that its collection, enforcement, disposition, or acceptance of the collateral was in compliance with *Com. Code §§ 9601-9629* [*Com. Code § 9626(a)(2)*]. Except when the underlying transaction was a consumer transaction [*compare Com. Code § 9626(b)(1)(A)*], the secured party need not prove that its actions were in compliance with *Com. Code §§ 9601-9629*, unless the debtor or a secondary obligor places the secured party's compliance in issue [*Com. Code § 9626(a)(1)*]. If the secured party fails to prove that its collection, enforcement, disposition, or acceptance was conducted in accordance with *Com. Code §§ 9601-9629*, the liability of a debtor or a secondary obligor for a deficiency is limited as provided by *Com. Code § 9626(a)(3)*, discussed in *§ 503.27[7][a][ii]*].

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44-503 California Forms of Pleading and Practice--Annotated § 503.112

§ 503.112 Affirmative Defense to Complaint for Deficiency After Foreclosure [Com. Code § 9626(a)(5)]--Proceeds of Disposition to Secured (or Related) Party Were Significantly Less Than What Would Have Been Obtained on Disposition to Unrelated Party

[1] FORM Affirmative Defense to Complaint for Deficiency After Foreclosure [Com. Code § 9626(a)(5)]--Proceeds of Disposition to Secured (or Related) Party Were Significantly Less Than What Would Have Been Obtained on Disposition to Unrelated Party

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

The _____ [purchaser *or* lessee *or* licensee] of the collateral at the disposition alleged in the complaint was _____ [plaintiff, the secured party *or* _____(*name*), _____ (a person related to the secured party *or* a secondary obligor)]. The amount realized on that disposition was significantly below the range of prices that would have been brought by a disposition in compliance with *Commercial Code Sections 9601 through 9629*, inclusive, to a person other than the secured party, a person related to the secured party, or a secondary obligor.

[2] Use of Form

The affirmative defense in [1], *above*, is for use by a debtor, in a transaction that is not a consumer transaction, in an answer to a secured party's complaint for deficiency to place in issue the amount to be used to calculate the deficiency when the disposition was to the secured party, a person related to the secured party, or a secondary obligor [*see Com. Code §§ 9615(f), 9626(a)(5)*; *see also* discussion in *§ 503.27[5][d]*]. The debtor or obligor has the burden of proof on this issue, i. e., must prove that the amount of proceeds of the disposition is significantly below the range of prices that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought [*Com. Code § 9626(a)(5)*; *compare Com. Code § 9626(b)(1)* (in consumer transaction, secured party has the burden of establishing that the amount of proceeds of the disposition is not significantly below the range of prices that a complying disposition to a person other than the secured party, a person related to the secured

party, or a secondary obligor would have brought)].

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44-503 California Forms of Pleading and Practice--Annotated § 503.113

§ 503.113 Defense to Action on Contract for Enforcement of Security Agreement--Application (Motion) for Stay of Proceedings on Ground Person Is On Active Military Service [50 U.S.C. App. § 533; Mil. & Vet. Code § 408]

[1] FORM Defense to Action on Contract for Enforcement of Security Agreement--Application (Motion) for Stay of Proceedings on Ground Person Is On Active Military Service [50 U.S.C. App. § 532; Mil. & Vet. Code § 408]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF APPLICATION AND APPLICATION
vs.	)	FOR ORDER TO STAY PROCEEDING [, SUP-
_____ [*name*],	)	PORTING DECLARATION OF
Defendant.	)	_____ (*name*), AND MEMOR-
	)	ANDUM OF POINTS AND AUTHORITIES]
	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To plaintiff _____ [*name*] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of]

this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] _____ [*name*] will, and hereby does, move for an order granting a stay of these proceedings. The motion will be made on the grounds that Defendant is currently in military service (within the meaning of _____ [*for members of regular armed forces:* Title *50 United States Code Appendix, Section 511(2) or, for members of United States Military Reserve or National Guard*: *Military and Veterans Code Section 400*]) and therefore is entitled under _____ [*for members of regular armed forces:* the Servicemembers Relief Act, specifically Title *50 United States Code Appendix, Section 533 or, for members of United States Military Reserve or National Guard*: *Military and Veterans Code Section 408*] to such a stay as a matter of right.

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s)*] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name of defendant or person making application on defendant's behalf*]

I, _____ [*name of defendant of person making application on defendant's behalf*], declare:

1. I am [*if someone other than defendant is making application, include the following:* acting on behalf of _____ (*name of defendant*), who is] the Defendant in this action.

[*For members of regular armed forces:*]

2. On _____ [*date*], which date is subsequent to the date Defendant entered into the obligation described in Plaintiff's complaint, Defendant entered military service (within the meaning of Title *50 United States Code Appendix, Section 511(2)*) with the United States _____ [*list branch of military service, e.g.,* Army *or* Navy *or* Marine Corps *or* Air Force *or* Coast Guard], and remains in military service as of the date of this application.

[*OR, for members of United States Military Reserve or the National Guard*]

2. Defendant is a member of _____ [*specify branch of service, e.g.,* the United States Air Force Reserve *or* the California National Guard]. On _____ [*date subsequent to Sept. 11, 2001*], which date is subsequent to the date Defendant entered into the obligation described in Plaintiff's complaint, Defendant was called to active military service (within the meaning of *Military and Veterans Code Section 400*) for a period in excess of seven days in a 14-day period, and remains on active military service as of the date of this application.

[*CONTINUE*]

3. By virtue of Defendant's military service, Defendant's ability to comply with the terms of the obligation described in Plaintiff's complaint has been materially affected in that _____ [*describe, e.g.,* Defendant is self-employed as a _____ (*e.g.,* lawyer) and has been unable to work at _____ (his *or* her) regular occupation while on active military service, as a result of which Defendant has been unable to generate enough income to meet Defendant's financial obligations, including the obligation referred to in Plaintiff's complaint].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

MEMORANDUM OF POINTS AND AUTHORITIES

[Add memorandum of points and authorities supporting motion]

Respectfully Submitted,

_____ [*signature*]

Attorney for _____ [moving party]

[2] Use of Form

This form is an application by a defendant, or a person acting on the defendant's behalf, for an order granting a stay in an action to enforce a security interest in real or personal property due to the defendant's alleged nonpayment of any sum due on the underlying obligation, or other breach of any term of that obligation. The application seeks the stay on the ground that the nonpayment or breach occurred while the defendant was in military service [*50 U.S.C. App. § 533*; *Mil. & Vet. Code § 408*].

As explained in the discussion below, under the circumstances this application functions in effect as a temporary defense to the underlying action.

[3] Governing Law

The Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*] provides for the temporary suspension of various legal proceedings, obligations, and liabilities for persons in military service [*see 50 U.S.C. App. § 502* (purpose of statute)]. The statute is applicable to all members of the uniformed services [*see 10 U.S.C. § 101(a)(5)* (definition)] during periods of military service [*see 50 U.S.C. § 511(1)-(3)*] and, in many cases, for 90 days after termination of a member's period of military service. The California counterpart to the federal legislation [*Mil. & Vet. Code § 400 et seq.*] is designed to fill certain gaps in the federal law in the wake of the events of September 11, 2001. The California statute, many provisions of which are virtually identical to their federal counterparts, is designed to apply to military reservists and National Guard members who are called to active military service under specified circumstances and, in

many cases, for limited periods of time [*see Mil. & Vet. Code § 400*]. For detailed discussion of the relief available under these statutes, the manner in which such relief can be requested, and the persons who qualify for this relief, see *Ch. 501, Sales: Retail Installment Sales, §§ 501.60* et seq., *501.300*.

[4] Enforcement of Security Interests

The protections afforded to military personnel in the area of security instruments under both the Servicemembers Civil Relief Act and the comparable California law provisions are available only with respect to an obligation on real or personal property owned by a service member (1) that originated before the period of the service member's military service; (2) for which the service member is still obligated; and (3) that is secured by a mortgage, trust deed, or other security in the nature of a mortgage [*50 U.S.C. App. § 533(a)*; *see Mil. & Vet. Code § 408(a)*]. Security agreements covering goods (such as motor vehicles) under Division 9 of the Commercial Code evidently would be "in the nature of a mortgage" in this context.

A sale, foreclosure, or seizure of property for a breach of an obligation described above is not valid if made during, or within 90 days after, the period of the service member's military service, except if made either on a court order granted before the sale, foreclosure, or seizure, with a return made and approved by the court, or pursuant to an enforceable waiver agreement [*50 U.S.C. App. § 533(c)*; *see Mil. & Vet. Code § 408(c)* ("pursuant to an agreement between the parties"); *see also 50 U.S.C. § 517* (waiver agreement)]. There are penalties for repossessing or attempting to repossess property in violation of these requirements. Violators are guilty of a misdemeanor [*50 U.S.C. App. § 533(d)(1)*; *Mil. & Vet. Code § 408(d)*].

[5] Stay of Proceeding

In an action filed during, or within 90 days after, a service member's period of military service to enforce an obligation described in [4], *above*, the court may, after a hearing and on its own motion, or must, on application by a service member, when the service member's ability to comply with the obligation is materially affected by military service, either stay the proceedings for a period of time as justice and equity require or adjust the obligation to preserve the interests of all parties [*50 U.S.C. App. § 533(b)*; *see Mil. & Vet. Code § 408(b)*].

The governing statutes do not specify the length of time for which a stay of the proceeding may be granted. Rather, it is simply left to the discretion of the court [*see 50 U.S.C. App. § 533(b)*; *Mil. & Vet. Code § 408(b)*]. This raises some interesting practical issues regarding the time period of the stay. If the stay is granted for a period of indefinite duration, such as the period of the defendant's military service or a specified amount of time (for example, six months) thereafter, it may be difficult for the plaintiff to determine when the action can resume, as it might be expected that in the ordinary case the plaintiff would not know, and could not determine without difficulty, when the defendant's period of military service is over. On the other hand, if the stay is set for a finite period of time, such as six months, and the defendant either (1) is released from active military service earlier than the time period specified in the stay, or (2) conversely, is still on active military service when the period of the stay ends, the defendant presumably would have to seek an additional stay at that point. It appears that the court would have discretion to grant either type of stay under its general authority to order a stay for a period of time as justice and equity require [*see 50 U.S.C. App. § 533(b)*; *Mil. & Vet. Code § 408(b)* ("for any period as the court deems just")]. This form does not request a specific length of time for the stay, but the party filing the application may wish to consider whether inclusion of such language is desirable or whether the length of the stay would be better left to the discretion of the court. The form may be modified to add a specific length of time for the stay if desired.

Additional relief of a more general nature also may be available under *50 U.S.C. App. § 591* or *Mil. & Vet. Code § 409.3*, the general relief provisions of the federal and California statutes. These statutes basically grant an extension of the underlying installment obligation for a period equal to the period of military service or, in the case of installment obligations for the purchase of real property or secured by a real property mortgage or similar instrument, for a period

equal to the period of the military service plus a period equal to the remaining installments, or any part of that combined period [*see 50 U.S.C. App. § 590(1)*; *Mil. & Vet. Code § 409.3(a)*]. For more detailed discussion of these provisions, see *Ch. 501, Sales: Retail Installment Sales, § 501.300*.

[6] Who May Request Stay

Under federal law, the stay may be requested by the service member, or an attorney acting on the behalf of the service member, or an individual possessing a power of attorney from the service member [*see 50 U.S.C. App. § 519*; *see also 50 U.S.C. § 592* (automatic extension of power of attorney while service member is missing)]. Under California law, application for a stay may be made by the person in military service or by "some person on the service member's behalf" [*Mil. & Vet. Code § 408(b)*]. There are no statutory restrictions on who that "some person" may be. Presumably in many cases the service member will be absent due to the military service, and the request will have to be made by someone else on the service member's behalf.

[7] Procedure and Accompanying Papers

The statute states that a request for a stay of the type discussed in this statute is to be made by "application" to the court [*see 50 U.S.C. App. § 533(b)*; *Mil. & Vet. Code § 408(b)*]. For purposes of the applicable procedural requirements, an application in this context is deemed a motion [*Code Civ. Proc. § 1003* (any application for order is deemed a motion)]. Accordingly, the application in this form is in the form of a motion, although the term "application" is retained in deference to the statutory language.

A notice of motion normally is accompanied by one or more affidavits or declarations under penalty of perjury setting forth the evidentiary facts required to establish the grounds of the motion [*see Ch. 372, Motions and Orders, §§ 372.21[5][b], [17], 372.61[2]* et seq.; *see also Cal. Rules of Ct., Rule 3.1306(a)* (evidence received at a law and motion hearing must be by declaration and affidavit); *Code Civ. Proc. §§ 2003* (affidavit defined), 2009, (use of affidavit in support of motion), 2015.5].

A memorandum of points and authorities must be filed and a copy served with this notice of motion [*Cal Rules of Ct, Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*].

For discussion, a procedural checklist, and general forms relating to law and motion practice, see Ch. 372, *Motions and Orders* .

[8] Cross References

- For discussion of how a party's military service may affect family law proceedings and declaration requirements, see Ch. 12A, *Adoptions: Termination of Parental Rights* ; Ch. 221, *Dissolution of Marriage: Procedure* ; and Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* .

- For an application for a stay of attachment involving a person in military service, see Ch. 62, *Attachment* .

- For an declaration for a stay of attachment involving a person in military service, see Ch. 62, *Attachment* , Form 19.

- For a complaint for unlawful retaliation by a lender, creditor, or other person against a person who received a stay or postponement because of military service, see *Ch. 129, Consumer Credit Reporting, § 129.150*.

- For discussion and an application for a stay of a pending action or proceeding based on military service, see *Ch. 136, Continuances, §§ 136.20[2], 136.78A.*

- For discussion and a plaintiff's declaration under penalty of perjury setting forth facts showing that the defendant is not in the military service prior to entry of default judgment, see *Ch. 205, Defaults and Default Judgments, §§ 205.25[5], 205.92 -205.94.*

- For an application for a stay of execution of a judgment or order involving a person in military service, see Ch. 254, *Executions and Enforcement of Judgments* .

- For an application for a stay of garnishment involving a person in military service, see Ch. 276, *Garnishment* .

- For a defendant's notice of admitting service of summons and complaint, waiving further notice, and waiving rights under the Servicemembers Civil Relief Act and similar state statutes, see *Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances, § 323.173*.

- For a lessee's notice of termination of a lease due to the lessee's military service, see *Ch. 332, Landlord and Tenant: The Tenancy, § 332.71A.*

- For a stay of eviction in an unlawful detainer proceeding during a period of military service, see *Ch. 333, Landlord and Tenant: Eviction Actions, § 333.111*.

- For discussion, a procedural checklist, and general forms relating to law and motion practice, see Ch. 372, *Motions and Orders* .

- For an application for relief against the enforcement of a fine or penalty against a person in military service when the penalty was incurred, see Ch. 489, *Relief From Judgment or Order* .

- For a service member's application for relief from judgment, supporting declaration and order, see *Ch. 489, Relief From Judgments and Orders, § 489.411*.

- For detailed discussion of relief under the Servicemembers Civil Relief Act and related California legislation, see *Ch. 501, Sales: Retail Installment Contracts; §§ 501.60* et seq.

- For an application for stay of enforcement of pre-existing obligation during the period of the applicant's military service, see *Ch. 501, Sales: Retail Installment Contracts, § 501.300.*

- For an application (motion) for temporary relief from an obligation on the ground that the person is or was in active military service after entering into the obligation, see *Ch. 501, Sales: Retail Installment Contracts, § 501.301*.

- For an affirmative defense to an action on an interest-bearing obligation on the ground that the annual rate of interest may not exceed 6 percent per year during the period of the defendant's military service, see *Ch. 501, Sales: Retail Installment Contracts, § 501.302.*

- For an application (motion) in an action on a contract for the purchase of personal property for a stay of proceedings on the ground that the defendant is on active military service see *Ch. 501, Sales: Retail Installment Contracts, § 501.303.*

- For discussion of ascertaining a defendant's military status at the time of service of summons and its benefits and effect on subsequent proceedings, see *Ch. 518, Service of Summons and Papers, § 518.19*.

- For a petition for a stay of foreclosure proceedings and relief from an installment contract, mortgage, or trust deed for the purchase of real property by an active member of the military service, see *Ch 555, Trust Deeds and Real Property Mortgages, § 555.139A*.

- For an application for a stay of proceedings to collect real property taxes or assessments by an active member of the military service, see Ch 555, *Trust Deeds and Real Property Mortgages*, § 555.139B.

- For an order staying foreclosure proceedings in relation to an obligation secured by a mortgage or trust deed on real property for an activemember of the military service, see Ch 555, *Trust Deeds and Real Property Mortgages*, § 555.139C.

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A. Forms for Use by Debtors or Obligors

44-503 California Forms of Pleading and Practice--Annotated §§ 503.114-503.119

[Reserved]

§§ 503.114[Reserved]

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B. Forms for Use by Secured Parties
1. Actions Against Debtors and Obligors

44-503 California Forms of Pleading and Practice--Annotated § 503.120

§ 503.120 Complaint for Damages for Default Under Security Agreement and for Judicial Foreclosure [Com. Code § 9601(a)(1)] or Possession of Collateral [Com. Code § 9609] Thereunder

[1] FORM Complaint for Damages for Default Under Security Agreement and for Judicial Foreclosure [Com. Code § 9601(a)(1)] or Possession of Collateral [Com. Code § 9609] Thereunder

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DEFAULT UNDER SECURITY AGREEMENT AND _____ [JUDICIAL FORECLOSURE *or* POSSESSION OF COLLATERAL]
_____ [*name*] Defendant.	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 503.100[1], Paragraph 1.*]

[2. *Fictitious names. See § 503.100[1], Paragraph 2.*]

[3. *Venue for certain consumer installment sales. See § 503.100[1], Paragraph 3.*]

[*EITHER, if plaintiff's security interest was created by a security agreement*]

4. On or about _____ [*date*], plaintiff and defendant entered into a security agreement _____ [entitled _____ (*specify e.g.,* "Security Agreement" *or* "Installment Sales Contract" *or* "Promissory Note and Agreement") *or* consisting of _____ (*specify e.g.,* a promissory note and mortgage of _____ [personal property *or* fixtures] *or* an agreement assigning certain _____ (*specify e.g.,* accounts receivable])]. A true copy of this agreement (hereinafter referred to as "the agreement") is attached to this complaint as Exhibit A [consisting of Documents _____ through _____] and made a part of it by this reference.

[*AND*]

5. According to the provisions of the agreement, plaintiff agreed to _____ [*specify, e.g.,* lend defendant the sum of $_____ *or* sell and deliver to defendant certain _____ (*describe items*) *or* render services to defendant in the form of _____ (*describe performance*) *or describe other benefit*], and defendant agreed to _____ [*specify, e.g.,* repay plaintiff therefor, with interest, at certain times and places as stated in the agreement *or* perform particular services for plaintiff, as scheduled in the agreement, in the form of _____ (*describe*) *or describe other consideration*]. By the agreement defendant also gave to plaintiff a security interest in _____ [*describe collateral, e.g.,* all the items of equipment described above], to which plaintiff would be entitled to resort to in fulfillment of all obligations secured thereby, as well as expenses reasonably incurred by plaintiff in any disposition thereof, should defendant default in any way under the agreement. [*If filing was made with respect to security interest, add:* A financing statement was _____ (filed *or* recorded) (in connection with perfection of the security interest under the agreement) on or about _____(*date*), in the office of the _____ (County Recorder of _____ County, California *or* Secretary of State *as appropriate to the type of collateral*) (which has been maintained to date by appropriate filings relevant thereto). (A true copy of that statement is attached as Exhibit _____ and incorporated by reference.)]

[*OR, if plaintiff's interest is an agricultural lien*]

4. On or about _____ [*date*], plaintiff _____ [furnished _____(*specify goods or services, e.g.,* feed and materials) *or* leased real property] to defendant in connection with defendant's [*specify if desired, e.g.,* dairy] farming operation. Defendant agreed to _____ [*describe consideration promised by defendant, e.g.,* repay plaintiff therefor, with interest, at certain times and places as stated in the agreement]. [The foregoing is evidenced by a(n) _____ (lease *or* agreement), dated _____, a true copy of which (hereinafter referred to as _____ ["the agreement" *or* "the lease") is attached to this complaint as Exhibit A (consisting of Documents _____ through _____) and made a part of it by this reference.]

[*AND*]

5. The effect of the transaction(s) described in Paragraph 4 was to give plaintiff an agricultural lien on defendant's _____ [*describe collateral, e.g.,* proceeds from the sale of milk] in accordance with _____[*specify statute creating lien whose effectiveness does not depend on defendant's possession of the personal property, e.g., Sections 57401 to 57414 of the Food and Agricultural Code*]. [*If filing was made to perfect agricultural lien, add:* A financing statement was filed in connection with perfection of the agricultural lien created by

that _____ (agreement *or* lease) on or about _____ (*date*), in the office of the _____ (County Recorder of _____ County, California *or* Secretary of State *as appropriate to the type of collateral*) (which has been maintained to date by appropriate filings relevant thereto). A true copy of that statement is attached as Exhibit _____ and incorporated by reference.]

[*CONTINUE*]

6. Plaintiff has fully performed under the agreement. However, on or about _____ [*date*], defendant defaulted on the agreement by failing _____ [*describe, e.g.,* to make any further payments as required under the agreement *or* to render performance of services as required under the agreement] in that _____ [*specify manner of default*]. As a result, pursuant to the terms of the agreement, defendant's entire obligation has become due, and there is now due, owing, and unpaid from defendant _____ [the principal sum of $_____, together with interest thereon from and after _____ (*date*), at the rate of _____ percent per annum *or* the amount of $_____, the amount as specified within the agreement to be the equivalent of that performance *or other damages as appropriate*]. No part of that amount has been paid although plaintiff has demanded it from the defendant.

[*EITHER, if possession of collateral is sought*]

7. Although, pursuant to the agreement, defendant has remained to the present time in possession of the collateral subject to plaintiff's _____[security interest *or* agricultural lien], as a further result of defendant's default, plaintiff is entitled to take immediate possession of the collateral described therein in/on which plaintiff was given a _____ [security interest *or* agricultural lien]. Plaintiff has demanded possession from defendant, but defendant wrongfully has _____[refused to give plaintiff possession *or* failed to respond to plaintiff's demands or in any way give plaintiff access to that collateral *or describe other failure of defendant to transfer collateral*].

[*OR, if judicial foreclosure is sought*]

7. _____ [_____(Plaintiff, pursuant to agreement, *or* Defendant *or specify third party*) has remained to the present time in *or* Plaintiff, on defendant's default, has taken] possession of the collateral subject to plaintiff's _____ [security interest *or* agricultural lien]. As a result of defendant's default, plaintiff is entitled to enforce this _____ [security interest *or* agricultural lien] by judicial foreclosure of all of defendant's rights in the property through public sale thereof by the proper judicial officer.

[*CONTINUE*]

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____;

2. For interest from and after _____ [*date*], to date of judgment at the rate of _____ percent per annum;

[*EITHER*]

3. For possession of the collateral described above;

[*OR*]

3. For an order directing public sale of the property herein described to foreclose [all of] defendant's right(s) therein and to apply the proceeds, in the following order:

a. To the costs of taking, holding, and selling the property [and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party in doing so];

b. To the costs of suit herein, as may be awarded by the court;

c. To the satisfaction of damages and interest thereon under the agreement;

d. To the satisfaction of obligations secured by any subordinate security interest in, or other subordinate lien on, the collateral, and to the satisfaction of any subordinate attachment lien or execution lien pursuant to *Code Civ. Proc. § 701.040(b)* if authenticated demand therefor or notice of the levy of attachment or execution is received before distribution of the proceeds is completed;

[e. *If underlying transaction was other than sale of accounts, chattel paper, payment intangible(s), or promissory note(s):* To defendant as to any surplus thereafter;]

[*CONTINUE*]

4. For costs of suit herein incurred, including reasonable attorney's fees as authorized by *Civil Code Section 1717*; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 503.100[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by a secured party, after default under a security agreement or under a lease or agreement that is the basis for an agricultural lien, to a reduce its claim to judgment, and for the remedy of foreclosure or possession of the collateral [*Com. Code §§ 9601(a)(2), 9609*; *see also Bank of California v. Leone (1974) 37 Cal. App. 3d 444, 446, 447, 112 Cal. Rptr. 394* (secured party may sue for default on obligation without first having recourse to security)]. The usual remedy is to seek damages and to request either possession of the collateral (if not already in the secured party's possession) or judicial foreclosure. Plaintiff may request damages only and retain the option of

executing on the collateral with the same priority as under private or judicial foreclosure. It is also possible for the secured party to request both possession (if not in possession already) of the collateral and judicial foreclosure, or to later request execution. Foreclosure and execution both work in the same manner, and the sheriff, as the appropriate judicial officer for foreclosure sale, can just as easily take custody of the property from the secured party as from the debtor [*see* discussions in *§ 503.29[1], [2], [6], [9], [10]*].

[3] Allegations

The complaint in [1], *above*, alleges [*see also § 503.100 [6]*]:

- The material bargain under the agreement, consisting of (1) the benefit that plaintiff gave to defendant in return for defendant's promise to pay or perform an obligation, and (2) the collateral which defendant agreed, or, in the case of an agricultural lien, which statute provided, would secure the obligation to plaintiff (alternative Paragraphs 4 and 5).

- Plaintiff's full performance and defendant's default, leading to acceleration of the obligation in full and the fact that it is still unsatisfied (Paragraph 6) [*see Com. Code § 9601(a)*].

- Either (1) plaintiff's demand for possession of the collateral, which defendant has wrongfully refused or failed to transfer on demand after default [*see Com. Code § 9609*], or (2) plaintiff's entitlement and desire to enforce the security interest by way of judicial foreclosure (Paragraph 7) [*see Com. Code § 9601(a)(1)*].

If the claim is payable in a foreign currency, or calculable by conversion to or from a foreign currency, additional allegations should be added setting forth that fact. Otherwise, the claim is made in United States dollars [*Code Civ. Proc. § 676.6(a)*; for discussion and a form of judgment applicable to the Uniform Foreign-Money Claims Act (*Code Civ. Proc. § 676 et seq.*), *see* Ch. 177, *Damages* , and Ch. 318, *Judgments*].

[4] Alternative Methods of Judicial Foreclosure

When a judgment requires the sale of property, it may be enforced by a writ of sale reciting the judgment, or the material parts of it, and directing the proper officer to execute on it by making the sale and applying the proceeds in conformity with the judgment [*Code Civ. Proc. §§ 716.010, 716.020*; *see also Code Civ. Proc. § 712.040(a)*, discussed in [5], *below*].

Alternatively, if the secured party has merely reduced the claim to judgment, it may then obtain issuance of a writ of execution, directing the proper officer to levy on the debtor's property serving as collateral under the security agreement [*see Code Civ. Proc. § 699.530*]. If a secured party has reduced its claim to judgment, the lien of any levy that may be made on the collateral by virtue of an execution based on the judgment relates back to the earliest of any of the following [*Com. Code § 9601(e)*]:

- The date of perfection of the security interest or agricultural lien in the collateral.

- The date of filing a financing statement covering the collateral.

- Any date specified in a statute under which the agricultural lien was created.

A sale pursuant to an execution is a foreclosure of the security interest or agricultural lien by judicial procedure within the meaning of *Com. Code § 9601*. A secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of Division 9 [*Com. Code § 9601(f)*].

[5] Methods of Enforcing Possession on Judgment

If the plaintiff does not resort to claim and delivery pending trial, the judgment for possession of personal property may be enforced by a writ of possession. The writ will be directed to the levying officer in the county where the judgment is to be enforced. Separate writs are issued for each county in which the judgment is to be enforced and may be issued successively until the judgment is satisfied [*Code Civ. Proc. § 714.010*]. A writ of possession requires the levying officer to whom it is directed to search for the property specified in the writ and, if it is in the possession of the judgment debtor or an agent of the judgment debtor, take custody of the property in the same manner as a levy under a writ of execution. The property taken into custody by the levying officer must be delivered to the judgment creditor in satisfaction of the judgment [*Code Civ. Proc. § 714.020(a)*]. If the property specified in the writ cannot be taken into custody, the levying officer must demand the property from the judgment debtor if the judgment debtor can be located. If custody is not then obtained, the levying officer must state so in the return. Thereafter the judgment for possession may be enforced in the same manner as a money judgment for the value of the property as specified in the judgment or a supplemental order [*Code Civ. Proc. § 714.020(b)*]. Under the circumstances described by *Code Civ. Proc. § 714.020(b)*, the writ of possession may be treated as a writ of execution [*Code Civ. Proc. § 714.020(c)*].

After entry of a judgment for possession of personal property, and whether or not a writ of possession has been issued, the judgment creditor may apply to the court for an order directing the judgment debtor to transfer possession of the property or documentary evidence of title to the property or both to the judgment creditor. The application must be by noticed motion if required by the court or a court rule; otherwise, it may be ex parte [*Code Civ. Proc. § 714.030(a)*].

A writ of possession (or sale) may be enforced as a writ of execution to satisfy any money judgment included in the judgment for possession (or sale). If amounts due under the money judgment are not satisfied pursuant to the writ of possession (or sale), the judgment creditor may use a writ of execution to satisfy the money judgment after the writ of possession has been returned or 180 days after its issuance, whichever is earlier. If the judgment creditor does not want a writ of possession (or sale) to issue, as for example, when possession of property has been voluntarily surrendered, he or she is entitled to a writ of execution instead to satisfy the money judgment portion of the judgment for possession [*Code Civ. Proc. § 712.040(a)*].

[6] Cross References

For discussion of and forms of action for possession of personal property generally, and for procedure and forms for writ of possession prior to trial, see Ch. 119, *Claim and Delivery*

For discussion and forms of breach of contract generally, see Ch. 140, *Contracts*

For discussion and forms of pleading for damages generally, see Ch. 177, *Damages*

For discussion of, and forms for use in, executing on personal property, see Ch. 254, *Executions and Enforcement of Judgments*

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44-503 California Forms of Pleading and Practice--Annotated § 503.121

§ 503.121 Complaint for Damages for Default Under Security Agreement--Failure to Pay Proceeds--By Secured Party Against Debtor [Com. Code §§ 9315, 9601(a)(1)]

[1] FORM Complaint for Damages for Default Under Security Agreement-Failure to Pay Proceeds--By Secured Party Against Debtor [Com. Code §§ 9315, 9601(a)(1)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR BREACH OF
_____ [*name*] Defendant.	)	SECURITY AGREEMENT
	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 503.100[1], Paragraph 1.*]

[2. *Fictitious names. See § 503.100[1], Paragraph 2.*]

[3. *Venue for certain consumer installment sales. See § 503.100[1], Paragraph 3.*]

4. [*Identification and execution of security agreement or transaction that provides basis for agricultural lien. See § 503.120[1], alternative Paragraphs 4.*]

5. [*Key provisions of security agreement or statute that grants agricultural lien, and filing of any financing statement. See § 503.120[1], alternative Paragraphs 5.*]

6. According to the provisions of the _____[agreement, defendant further agreed *and/or* statute governing plaintiff's agricultural lien, defendant was required], on sale or other disposition of any of the above-described _____ [*identify goods or other collateral*], to immediately account to plaintiff for the proceeds of disposition and to pay and deliver to plaintiff all proceeds in whatever form, to be applied to the payment and discharge of defendant's obligation.

7. According to the provisions of the agreement, on or about _____ [*date*], plaintiff _____[*allege plaintiff's performance of the agreement, e.g.*, paid to _____ (*name of seller*) the sum of $_____, the purchase price in full for _____ (*identify goods or other collateral*), and delivered to defendant an endorsed bill of lading permitting defendant to take possession thereof] [, and has performed all conditions precedent to and obligations incidental to the security agreement].

8. On or about _____ [*date*], defendant _____ [*allege disposition of goods or other collateral, for example, sold and delivered*] _____ [*identify goods or other collateral*] and has thereafter failed and refused to account and pay to plaintiff the proceeds of _____ [*allege disposition, for example, the sale*], although requested by plaintiff to do so.

9. By reason of defendant's _____ [breach of the security agreement *or* failure to perform in accordance with his/her/its obligations under the statute creating the agricultural lien], plaintiff has been damaged in the sum of $_____, no part of which [other than the sum of $_____] has been paid.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an accounting of the proceeds of _____[*allege disposition, for example, the sale*].

2. For an order directing defendant to pay to plaintiff the full amount of proceeds from _____ [*allege disposition, for example, the sale*].

3. For costs of suit herein incurred, including reasonable attorney's fees as authorized by *Civil Code Section 1717*; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 503.100[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by a secured party to bring an action to obtain an accounting for the proceeds of

collateral when the debtor has disposed of the collateral and has failed to pay the proceeds to the secured party in breach of the security agreement or agreement, lease, or statute that is the basis for an agricultural lien [*see Com. Code §§ 9315* (security interest in proceeds), *9601(a)(1)* (remedies)].

For further discussion proceeds and security interests in proceeds, see *§§ 503.11[18], 503.21[4],* and *503.22[7]*.

[3] Allegations

The complaint in [1], *above*, alleges:

- The parties' agreement, or the requirement in any statute creating plaintiff's agricultural lien, that defendant pay to plaintiff the proceeds of any disposition of the collateral (Paragraph 6) [*see Com. Code §§ 9201(a), 9203(f), 9315(a)*].

- Plaintiff's full performance (Paragraph 7).

- Defendant's default (Paragraph 8) [*see Com. Code § 9601(a)(1)*; *Guild Wineries & Distilleries v. Land Dynamics (1980) 103 Cal. App. 3d 966, 972, 163 Cal. Rptr. 348* (default under security agreement occurs when collateral is transferred without secured party's consent and proceeds from sale of collateral are not immediately delivered to secured party)].

- Plaintiff's damages (Paragraph 9) [*see Civ. Code § 3300*].

[4] Rights of Secured Party on Disposition of Collateral

[a] Pursuit of Collateral

In most cases, when a debtor makes an unauthorized disposition of collateral, the security interest or agricultural lien continues in the original collateral in the hands of the purchaser or other transferee [*see Com. Code § 9315(a)(1)*; for discussion regarding whether a disposition was authorized, *see § 503.21[4][c]*]. Because the transferee takes subject to the security interest or agricultural lien, the secured party may repossess the collateral from him or her or, in an appropriate case, maintain an action for conversion. In cases in which the secured party may claim both proceeds and collateral, it may have only one satisfaction [*see* U.C.C. Comment 2 to *Com. Code § 9315*].

[b] Pursuit of Proceeds

In many cases, a purchaser or other transferee of collateral will take free of a security interest. In those cases, the secured party's only right will be to proceeds. The transferee will take free of the secured party's interest in the original collateral whenever the disposition is authorized [*see § 503.21[4][c],* regarding whether a disposition was authorized]. The authorization may be contained in the security agreement or otherwise given. The secured party's right to proceeds, either under *Com. Code § 9315* or under the express terms of an agreement does not, in itself, constitute an authorization of disposition [*see* U.C.C. Comment 2 to *Com. Code § 9315*].

When cash proceeds are paid into the debtor's deposit account and paid out in the operation of the debtor's business, recipients of the funds take free of any claim that the secured party may have in them as proceeds unless they acted in collusion with the debtor in violating the rights of the secured party [*Com. Code § 9332(b)*].

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44-503 California Forms of Pleading and Practice--Annotated § 503.122

§ 503.122 Explanation to Consumer Debtor or Obligor of How Deficiency or Surplus Was Calculated [Com. Code § 9616]

[1] FORM Explanation to Consumer Debtor or Obligor of How Deficiency or Surplus Was Calculated [Com. Code § 9616]

TO: _____ [*name of debtor or consumer obligor*]

FROM: _____ [*name of secured party*]

RE: Calculation of _____ [Surplus *or* Deficiency] [on Loan #_____]

On or about _____ [*date*], the secured party disposed of collateral, specifically _____ [*describe collateral*] in which he/she/it held a security interest pursuant to _____ [*specify, e.g.,* a security agreement dated _____, entitled "Installment Sales Contract"].

The amount of proceeds of this disposition were ..... $_____

Amounts applied for expenses of this disposition:

Expenses of retaking collateral.....	$_____
Expenses of holding collateral.....	$_____
Expenses of preparing collateral for disposition.....	$_____
Expenses of processing the collateral for disposition	$_____

..... ____

Expenses of disposing of the collateral $_____
..... ____

Attorney's fees..... $_____
____

Sub-total of expenses.... $_____
.....
.....
...

Net proceeds after deducting expenses of disposition $_____
..... _____
_____

Amount of obligations secured by the security interest under which the disposition was made ..... $_____
_____
_____

This amount does [not] reflect a rebate of $ _____ for [unearned interest *or* credit service charge][*if amount does reflect rebate*, calculated as of a _____ (*date*)].

[If applicable: Rebate or credit for _____ [*specify any other rebates or credits not listed above*] ..... $_____
_____
_____.

Amount of obligation remaining after deduction of proceeds ..... $_____
_____
_____

Amount of deficiency ..... $_____
_____
_____

Amount of surplus ..... $_____
_____
_____

[*If applicable, add:* Future debits, credits, charges, including additional credit service charges or interest, rebates, and expenses may affect the amount of the surplus or deficiency shown above.]

You can obtain additional information concerning this transaction _____ [by calling _____ (*telephone number*) *and/or* by inquiries addressed to _____ (*mailing address*)].

[2] Use of Form

The form in [1], *above*, is for use by a secured party to comply with its obligation under *Com. Code § 9616* to provide an explanation to a debtor or consumer obligor of how the secured party calculated the surplus or deficiency after disposition. This explanation is required only in consumer goods transactions [*see Com. Code § 9616(b)* at [4], *below*]. No particular phrasing of the explanation is required. An explanation complying substantially with the requirements of *Com. Code § 9616(a)* and *(c)* is sufficient, even if it includes minor errors that are not seriously misleading [*Com. Code § 9616(d)*].

[3] Contents

The form in [1], *above* includes the following:

- The amount of proceeds of the disposition [*Com. Code § 9616(c)(2)*].

- The amount (these may be presented in the aggregate or by type) and types of expenses, including expenses of retaking, holding, preparing for disposition, processing, and disposing of the collateral, and attorney's fees secured by the collateral which are known to the secured party and relate to the current disposition [*Com. Code § 9616(c)(4)*].

- The aggregate amount of obligations secured by the security interest under which the disposition was made, and, if the amount reflects a rebate of unearned interest or credit service charge, an indication of that fact [*Com. Code § 9616(c)(1)*].

- If the amount applied in satisfaction of the secured obligation reflects a rebate of unearned interest or credit service charge, the date as of which that amount is calculated depends on whether the secured party took possession of the collateral or not, and if so when. If the secured party did not take possession of the collateral or took or received possession of the collateral before default, the rebate must be calculated as of a date not more than 35 days before the disposition [*Com. Code § 9616(c)(1)(B)*]. If the secured party takes or receives possession of the collateral after default, the rebate must be calculated as of a date not more than 35 days before the secured party took or received possession [*Com. Code § 9616(c)(1)(B)*].

- The amount (this may be presented in the aggregate or by type) and types of credits, including rebates of interest or credit service charges, to which the obligor is known to be entitled and which are not reflected in the amount in *Com. Code § 9616(c)(1)* [*Com. Code § 9616(c)(5)*]. Rebates of interest or credit service charge may be included in the aggregate amount of obligations secured under *Com. Code § 9616(c)(1)* or with other types of rebates and credits under *Com. Code § 9616(c)(5)*. Rebates of interest and credit service charges are the only type of rebates for which this discretion is provided. If the secured party provides and explanation that includes rebates of pre-computed interest, its explanation must so indicate [*see* UCC Comment 3. to *Com. Code § 9616*].

- The aggregate amount of the obligations after deducting the amount of proceeds [*Com. Code § 9616(c)(3)*].

- The amount of the surplus or deficiency [*Com. Code § 9616(c)(6)*].

- If applicable, a statement that future debits, credits, charges, including additional credit service charges or interest, rebates, and expenses may affect the amount of the surplus or deficiency [*Com. Code § 9616(a)(1)(C)*].

- A telephone number or mailing address from which additional information concerning the transaction is available [*Com. Code § 9616(a)(1)(D)*].

[4] When Explanation Must Be Sent

In a consumer-goods transaction in which the debtor is entitled to a surplus or a consumer obligor is liable for a deficiency under *Com. Code § 9615*, the secured party must send an explanation to the debtor or consumer obligor, as applicable, after the disposition and either (1) before or when the secured party accounts to the debtor and pays any surplus or first makes written demand on the consumer obligor after the disposition for payment of the deficiency [*Com. Code § 9616(b)(1)(A)*], or (2) within 14 days after receipt of a request [*Com. Code § 9616(b)(1)(B)*].

The secured party need not send an explanation to a consumer obligor who is liable for a deficiency if the secured party instead sends the consumer obligor a record waiving the secured party's right to a deficiency. The waiver must be sent within 14 days after the secured party receives a request for an explanation [*Com. Code § 9616(b)(2)*].

"Request" means a record that is authenticated by a debtor or consumer obligor, requesting that the recipient provide an explanation, and is sent after collateral is disposed of under *Com. Code § 9610* [*Com. Code § 9616(a)(2)*].

[5] Charge for Explanation

A debtor or consumer obligor is entitled without charge to one response to a request under *Com. Code § 9616* during any six-month period in which the secured party did not send to the debtor or consumer obligor an explanation pursuant to *Com. Code § 9616(b)(1)*. The secured party may require payment of a charge not exceeding $25 for each additional response [*Com. Code § 9616(e)*].

[6] Liability for Failure to Provide Explanation

A secured party who fails to provide the explanation is liable for damages for noncompliance under *Com. Code § 9625(b)-(d)*, discussed in *§ 503.29*. In addition, a secured party whose failure to comply with *Com. Code § 9616(b)(1)* is part of a pattern, or consistent with a practice, of noncompliance is liable for an additional $500 in statutory damages [*Com. Code § 9625(e)(5)*], as is a secured party who fails to comply with *Com. Code § 9616(b)(2)* [*Com. Code § 9625(e)(6)*].

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B. Forms for Use by Secured Parties
1. Actions Against Debtors and Obligors

44-503 California Forms of Pleading and Practice--Annotated § 503.123

§ 503.123 Complaint for Deficiency Remaining After Foreclosure on Collateral After Default Under Security Agreement or Agricultural Lien [Com. Code §§ 9615, 9626]

[1] FORM Complaint for Deficiency Remaining After Foreclosure on Collateral After Default Under Security Agreement or Agricultural Lien [Com. Code §§ 9615, 9626]

SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____

_____ [*name*] Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DEFICIENCY REMAINING
_____ [*name*] [and DOES I	)	AFTER FORECLOSURE FOR DEFAULT UNDER
_____, inclusive], Defendant.	)	SECURITY AGREEMENT
	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 503.100[1], Paragraph 1.*]

[2. *Fictitious names. See § 503.100[1], Paragraph 2.*]

[3. *Venue for certain consumer installment sales. See § 503.100[1], Paragraph 3.*]

4. [*Identification and execution of security agreement or transaction that provides basis for agricultural lien. See § 503.120[1], alternative Paragraphs 4.*]

5. [*Key provisions of the agreement or statute that is basis for agricultural lien, and filing of any financing statement. See § 503.120[1], alternative Paragraphs 5.*]

6. Plaintiff fully performed under the_____ [lease *or* agreement]. However, on or about _____[*date*], defendant defaulted on the _____ [lease *or* agreement] in that _____ [*describe default*]. As a result, under the terms of the _____ [lease *or* agreement], defendant's entire obligation then became due, and there was then due, owing, and unpaid from defendant the sum of $_____ [*describe damages as appropriate*]. Plaintiff was then entitled to have recourse to the collateral securing the _____ [lease *or* agreement], which collateral _____ [has remained in plaintiff's possession pursuant to the agreement *or* plaintiff then took possession of from defendant _____ (with defendant's consent *or* by appropriate self-help procedures)].

7. On or about _____ [*date*], plaintiff sent authenticated notification to defendant [and to _____ (*name(s), or* those persons listed in Exhibit _____, which is attached and incorporated by this reference) *continue if desired with status of other persons to whom notice was required to be given by Com. Code § 9611(c)(2), (3), e.g.,* as secondary obligor(s), and as a person who held a security interest in or other lien on the collateral perfected by the filing of a financing statement *and, if desired, describe method by which notification was sent, e.g,* by depositing that notification in the United States mail, postage prepaid, addressed to defendant at the address given in the (security) agreement] of the _____ [day, date, time and place of any public disposition *or* day and date after which a private sale or other disposition was to be made]. That notification was in the form provided by Commercial Code Section _____[9613 *or* 9614]. A true copy of the notification is attached as Exhibit _____ and incorporated by this reference. [Notice of the time and place of the public sale was also given at least five days before the date of sale by publication once in _____ (*name of newspaper*) on _____ (*date*), a newspaper of general circulation published in _____ County, _____ (in which the sale was to be held *or* which is the county in California contiguous to the county in which the sale was to be held and having the highest population of all similarly contiguous counties).]

[8. At all times with respect to disposition of the collateral plaintiff acted in good faith and in a commercially reasonable manner. Disposition was made in the form of a _____ (sale *or* lease *or* license) at _____ (wholesale *or* retail) _____ (as a single unit *or* in parcels), on _____ (*date*), at _____ (*time*) at _____ (*specify locale*).]

[*EITHER, if collateral was disposed of by public sale*]

10. The locale for the disposition of the collateral was _____ [the _____ (county *or* place) specified in the (security) agreement *or specify other place if desired, e.g.,* the county in which the collateral was located]. [The sale was postponed from time to time by public announcement at the time and place last scheduled for the sale.] The collateral was disposed of for the amount of $_____, and the purchaser was _____ [plaintiff *or name of third party,* a _____ (secondary obligor *or* a person that is [not] related to plaintiff)].

[*OR, if collateral was disposed of by private sale*]

10. The collateral was disposed of for the amount of $_____, and the purchaser was _____ [*name of third party or* plaintiff, the collateral being of the type which is _____(customarily sold in a recognized market *or* the subject of widely distributed standard price quotations)].

[*CONTINUE*]

11. The amount realized on the disposition of the collateral was applied by plaintiff as follows [*list as appropriate*]:

(a) $_____ for expenses of retaking;

(b) $_____ for expenses of holding;

(c) $_____ for expenses of [processing and] preparing for disposition;

(d) $_____ for expenses of _____ [selling *or* leasing];

(e) $_____ for attorney's fees and related legal expenses, as provided for under the (security) agreement and not prohibited by law;

(f) $_____ toward satisfaction of the obligation secured by the security interest or agricultural lien under which the disposition was made. There thus remains, as a deficiency after disposition of the collateral, the amount of $_____ for [expenses and] satisfaction of the obligation which is still due, owing, and unpaid [*add if underlying transaction was other than sale of accounts, chattel paper, payment intangible(s), or promissory note(s) (unless agreement provides for interest)* together with interest thereon, from and after _____ (*date*), to date of judgment, at the rate of _____ percent per annum]. No part of that amount has been paid although plaintiff has demanded it from the defendant. [*If transaction was a consumer goods transaction, add*: At the time plaintiff made that demand of defendant, plaintiff provided defendant an explanation of how that deficiency was calculated. A true copy of that explanation is attached as Exhibit _____ and incorporated by reference.]

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____, representing the deficiency remaining after plaintiff's disposition of the collateral under the _____ [security agreement *or* agricultural lien];

[2. For interest from and after _____[*date*], to the date of judgment at the rate of _____ percent per annum;]

3. For costs of suit herein incurred [including reasonable attorney's fees as authorized by *Civil Code Section 1717*]; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 503.100[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by a secured party who, after default of the debtor, has disposed of the collateral, but has not realized sufficient amounts to satisfy the underlying obligation plus expenses, to obtain a deficiency judgment against the debtor or a secondary obligor [*see Com. Code §§ 9615(d)(2), (e)(1)(B), 9626*; *see* discussions in *§ 503.27[5], [7]*, and *[10]*].

Use of this form is only appropriate if the secured party has given notice of sale as required by *Com. Code §§ 9611-9614* [*see Com. Code § 9626(b)(2)(B)*; discussion in *§ 503.27[5][b]*]. Although *Com. Code § 9610(b)* requires every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, to be commercially reasonable and to be conducted in good faith and in a commercially reasonable manner [*see Com. Code § 9627* (indicia of commercial reasonableness); discussion in *§ 503.27[5][a]*], the secured party has to prove that it acted in compliance with the provisions of *Com. Code §§ 9601-9629* (default) only if the underlying transaction is a consumer transaction [*Com. Code § 9626(b)(1)(A), (2)(C)*; *see* discussion in *§ 503.27[7][b][i]*], or if the debtor or a secondary obligor has placed the secured party's compliance in issue [*Com. Code § 9626(a)(1)*; *see* discussion in *§ 503.27[7][a][i]*]. Hence, Paragraph 8 need only be used in a consumer transaction or to anticipate debtor's response.

If the underlying transaction is a consumer transaction, a deficiency may be prohibited by the security agreement or the Retail Installment Sales Act (*Civ. Code § 1801 et seq.*), particularly *Civ. Code § 1812.5*, or any other statute [*see Com. Code § 9626(b)(2)(A)* (discussed in *§ 503.27[7][b][ii]*)], such as the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*), discussed in [4], *below*. If the underlying transaction is a consumer transaction and the secured party does not prove that the debtor and any secondary obligor were given notice, in accordance with *Com. Code §§ 9611-9612, 9614*, and that the disposition of the collateral was conducted in good faith and in a commercially reasonable manner, the secured party cannot recover a deficiency [*Com. Code § 9626(b)(2)(B)-(C)*; *see* discussion in *§ 503.27[7][b][ii]*].

In a transaction other than a consumer transaction, if the debtor or obligor has placed the secured party's compliance in issue and the secured party fails to prove that the disposition of the collateral was conducted in accordance with the provisions of *Com. Code §§ 9601-9629*, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the secured party is undercollateralized, that is, the amount by which the sum of the secured obligation, expenses, and attorney's fees exceeds the greater of either (1) the proceeds of the collection, enforcement, disposition, or acceptance, or (2) the amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with the provisions of *Com. Code §§ 9601-9629* [*Com. Code § 9626(a)(3)*; *see also Com. Code § 9626(a)(4)*; discussion in *§ 503.27[7][a][ii]*].

An additional limitation in the calculation of the amount of any deficiency may be imposed if the secured party, a person related to the secured party, or a secondary obligor purchased the collateral at the disposition. In a consumer transaction, the secured party has to prove that the amount of proceeds of the disposition is not significantly below the range of prices that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought [*Com. Code § 9626(b)(3)*].

In a transaction other than a consumer transaction, if the debtor or obligor proves that the amount of proceeds of a disposition to the secured party, a person related to the secured party, or a secondary obligor, is significantly below the range of prices that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought [*Com. Code § 9626(a)(5)*], the deficiency will be calculated based on the amount of proceeds that would have been realized in a complying disposition complying to a transferee other than the secured party, a person related to the secured party, or a secondary obligor [*Com. Code § 9615(f)*].

[3] Allegations

The complaint in [1], *above*, alleges that:

- All requirements for notice of sale were properly observed (Paragraph 7) [*Com. Code §§ 9611-9614*; *see* discussion in *§ 503.27[5][b]*]. Although the California Commercial Code no longer requires that notice of public disposition be published, UCC Comment 7. to *Com. Code § 9610*, discussed in *§ 503.27[5][a]* suggests that advertisement is one indication that there was a meaningful opportunity for competitive bidding.

- The sale was conducted in good faith and in a commercially reasonable manner, giving the principal details, and was held as legally prescribed (Paragraphs 8, 9) [*Com. Code §§ 9610(b), 9627*, discussed in *§ 503.27[5][a]*]. As noted at [2], *above*, and further discussed in *§ 503.27[7][a][i]* and *[b][i], [ii]*, the secured party has the burden of proving that it acted in good faith and in a commercially reasonable manner, only if the underlying transaction is a consumer transaction [*Com. Code § 9626(b)(1)(A), (2)(C)*], or if the debtor or a secondary obligor has placed the secured party's compliance in issue [*Com. Code § 9626(a)(1)*]. Thus, counsel may wish not to include allegations regarding that issue. Whether the purchaser was the secured party, a person related to the secured party, or a secondary obligor may effect how the deficiency is calculated [*see Com. Code §§ 9615(f), 9626(a)(5), (b)(3)*, discussed in [2], *above*, and at *§ 503.27[5][d], [7][a][iii], [b][i], [iii], [iv]*; *see also Clark v. EZN, Inc. (1997) 57 Cal. App. 4th 852, 857-859, 67 Cal. Rptr. 2d 403* (under former *Com. Code § 9504(2)(c)* trial court correctly imputed fair sales price on sale to secured party that was publicized without notice to distributors who were most likely bidders)].

- The amounts realized were allocated according to law, leaving a deficiency still to be collected (Paragraph 10) [*Com. Code § 9615*, discussed in *§ 503.27[5][c] -[g]*; *see also U.S. Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal. App. 3d 1431, 1453, 279 Cal. Rptr. 533* (once secured party has repossessed collateral, debtor is no longer obligated to make payments under security agreement; imposition of late charges and inclusion of late charges in deficiency for period after repossession is error)]. If the underlying transaction was a consumer goods transaction, at the time the secured party demands the amount of the deficiency from the debtor or any secondary obligor, it must provide an explanation in accordance with *Com. Code § 9616* of how that deficiency was calculated. For a form for such an explanation, see *§ 503.122*.

[4] Disposition Pursuant to Rees-Levering Act

The California Supreme Court has held that to obtain a deficiency judgment, a secured creditor who sells a defaulting debtor's repossessed car must comply the provisions of the Rees-Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 2981 et seq.*; *see* Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act*] as well as any relevant provisions in Division 9 of the Commercial Code [*Bank of America v. Lallana (1998) 19 Cal. 4th 203, 210, 77 Cal. Rptr. 2d 910, 960 P.2d 1133]* . The legislation enacting revised Division 9 specifies that the holding in *Bank of America v. Lallana* will remain undisturbed [*see* Stats 2000, ch. 188, § 2, discussed in *§ 503.27[5][b][v]*]. *Civ. Code § 2983.2(a)* requires a creditor to give the debtor written notice of its intent to dispose of a repossessed car. That section specifies that except as otherwise provided in *Civ. Code § 2983.8*, the debtor will be liable for any deficiency after disposition of the repossessed motor vehicle if the creditor gives the debtor requisite timely notice and provides information specified by the statute. *Civ. Code § 2983.8* provides that no deficiency judgment will lie after any sale or other disposition of a motor vehicle unless the court has determined that the sale or other disposition was in conformity with the provisions of both the Rees-Levering Act and the relevant provisions of Division 9, including *Com. Code §§ 9610, 9611, 9612, 9613, 9614, 9615*, and *9626*. In *Bank of America v. Lallana*, the debtor's car was sold at a public auction, which the Court concluded was a public sale [*Bank of America v. Lallana (1998) 19 Cal. 4th 203, 212-213, 77 Cal. Rptr. 2d 910, 960 P.2d 1133]* . The court determined that the secured creditor gave proper notice pursuant to the Rees-Levering Act but because it failed to give the debtor proper notice of a public sale pursuant to former *Com. Code §*

9504(3) (notice of both the time and place of sale), it was precluded from obtaining a deficiency judgment [*Bank of America v. Lallana (1998) 19 Cal. 4th 203, 214-215, 77 Cal. Rptr. 2d 910, 960 P.2d 1133]* . For a complaint for deficiency judgment alleging compliance with the notice provisions of both the Rees-Levering Act and Division 9, see Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* , Form 89.80.

[5] Statute of Limitations

Suit for deficiency after sale of repossessed collateral is barred if brought more than four years after breach of the underlying agreement [*Massey-Ferguson Credit Corp. v. Casaulong (1976) 62 Cal. App. 3d 1024, 1027, 133 Cal. Rptr. 497* ; *see also KMAP, Inc. v. Town & Country Broadcasters, Inc. (1975) 49 Cal. App. 3d 544, 546-548, 122 Cal. Rptr. 420* (suit for deficiency after sale of collateral, which collateral was obtained by earlier suit for possession after default of debtor, does not constitute splitting of single cause of action barring subsequent deficiency suit, because two different causes of action are involved: right to improve security on default, and right to satisfaction of remaining debt after exhaustion of collateral)].

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44-503 California Forms of Pleading and Practice--Annotated § 503.124

§ 503.124 Allegations for Use in Complaint for Deficiency Remaining After Collection by Secured Party of Accounts or Payment Obligations [Com. Code §§ 9607, 9608, 9626]

[1] FORM Allegations for Use in Complaint for Deficiency Remaining After Collection by Secured Party of Accounts or Payment Obligations [Com. Code §§ 9607, 9608, 9626]

[*EITHER, if collateral is account, chattel paper, payment intangible, promissory note, or other payment obligation*]

1. On or about _____ [*date*], plaintiff notified the _____ [account debtor(s) on the account(s) *or* obligor(s) under the _____ (*specify type of payment obligation, e.g,* promissory note(s)], assigned by defendant to plaintiff as collateral, to make payment to plaintiff until further notice. A true copy of this notice is attached as Exhibit _____ and incorporated by reference. [At all times in undertaking to collect these _____ (accounts *or* specify type of payment obligation, e.g, promissory note(s)), plaintiff has proceeded in a commercially reasonable manner, namely: _____ (*describe collection process, e.g.,* plaintiff telephoned each account debtor to follow up on the notice, arranged a time for and manner of collection as to each account debtor, and proceeded to enforce collection as arranged, by mail or by personal appearance of plaintiff at the account debtor's premises.] Plaintiff to date has fully collected on certain _____ [*specify, e.g.,* accounts], has only realized partial collections on others, and has received nothing on still others, all as described in the schedule of notices and collections attached as Exhibit _____ and incorporated by this reference]. The total amount thus collected was $_____. On or about _____ [*date*], pursuant to the (security) agreement under which plaintiff _____ [may charge back collateral to *or* has _____ (full *or* limited) recourse against] defendant, plaintiff reassigned the remaining _____ [accounts *or specify other obligation, e.g,* note(s)], to the extent uncollected, to defendant and notified all parties obligated thereunder to thereafter pay defendant, which notice is attached as Exhibit _____ and incorporated by reference.

[*OR, if collateral is deposit account*]

1. On or about _____ [*date*], plaintiff notified _____ [*name*], the bank at which the deposit account which is collateral is maintained, to pay the balance of that account _____ [to *or* for the benefit of] plaintiff. A true copy of that notice is attached as Exhibit _____ and incorporated by reference.

[*CONTINUE*]

[2. Although plaintiff's collection of the collateral was not conducted in a commercially reasonable manner, the amount realized by plaintiff on the collection of the collateral was equal to the amount that would have been realized had the collection been conducted in a commercially reasonable manner.]

[3. Defendant did not enter into the secured transaction described in this complaint primarily for personal, family, or household purposes and/or the collateral was not held or acquired by defendant primarily for personal, family, or household purposes (*continue if known, e.g.*, but to carry on its business as a shoe manufacturer).]

4. The amount realized on the collection [and/or enforcement] of the collateral was applied by plaintiff as follows [*list as appropriate*]:

(a) $_____ for expenses of collection [and/or enforcement];

(b) $_____ for attorney's fees and related legal expenses, as provided for under the (security) agreement and not prohibited by law;

(c) $_____ toward satisfaction of the obligation(s) secured by the security interest or agricultural lien under which collection [and/or enforcement] was made. Thus, there remains, as a deficiency after collection [and/or enforcement] of the collateral, the amount of $_____ for [expenses and] satisfaction of the obligation which is still due, owing, and unpaid [*add if underlying transaction was other than sale of accounts, chattel paper, payment intangible(s), or promissory note(s) (unless agreement provides for interest)* together with interest thereon, from and after _____ (*date*), to date of judgment, at the rate of _____ percent per annum]. No part of that amount has been paid although plaintiff has demanded it from the defendant. [*If transaction was a consumer goods transaction, add*: At the time plaintiff made that demand of defendant, plaintiff provided defendant an explanation of how that deficiency was calculated. A true copy of that explanation is attached as Exhibit _____ and incorporated by this reference.]

[2] Use of Form

The allegations in [1], *above*, are for use by a secured party instead of Paragraphs 7-11 of the form in *§ 503.123[1]* to obtain a deficiency judgment [*see Com. Code § 9626*, discussed in *§ 503.27[7]*] when the collateral involved was accounts or other payment obligations that were collected or enforced by the secured party after the debtor's default [*see Com. Code §§ 9607, 9608*, discussed in *§ 503.27[3]*], rather than collateral that was disposed of in accordance with *Com. Code § 9610*. If the underlying transaction was a sale of accounts, chattel paper, payment intangibles, or promissory notes, rather than an assignment or other arrangement for security, the secured party is not entitled to any deficiency [*Com. Code § 9608(b)*]. Alternative Paragraphs 1 provide for only the most common types of collateral that may be collected in accordance with *Com. Code § 9608*.

As with other collateral, although *Com. Code § 9607(c)* requires a secured party who undertakes to collect from or enforce an obligation of an account debtor or other person obligated on collateral to proceed in a commercially reasonable manner if it is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor or a secondary obligor [*see Western Decor & Furnishings Industries, Inc. v. Bank of America (1979) 91*

Cal. App. 3d 293, 303-305, 154 Cal. Rptr. 287 (example of commercially reasonable collection under prior law)], the secured party has to prove that it acted in a commercially reasonable manner in collecting and enforcing the collateral only if the underlying transaction is a consumer transaction [*Com. Code § 9626(b)(1)(A), (2)(C)*; *see* discussion in *§ 503.27[7][b][i]*], or if the debtor or a secondary obligor has placed the secured party's compliance in issue [*Com. Code § 9626(a)(1)*; *see* discussion in *§ 503.27[7][a][i]*]. Hence, the bracketed allegations in Paragraph 1 of this form with respect to commercial reasonableness need only be used in a consumer transaction or to anticipate the debtor's response.

In a transaction other than a consumer transaction (optional Paragraph 3), if the debtor or obligor has placed commercial reasonableness in issue and the secured party fails to prove that its collection or enforcement of the collateral was conducted in accordance with the provisions of *Com. Code §§ 9601-9629* (optional Paragraph 2), the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the secured party is undercollateralized, that is, the amount by which the sum of the secured obligation, expenses, and attorney's fees exceeds the greater of either (1) the proceeds of the collection or enforcement or (2) the amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with *Com. Code §§ 9601-9629* [*Com. Code § 9626(a)(3)*; *see also Com. Code § 9626(a)(4)*; discussion in *§ 503.27[7][a][ii]*].

The cash proceeds of collection are to be applied as set forth in Paragraph 4 [*see Com. Code § 9608, set forth in § 503.27[3]*].

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[Reserved]

§§ 503.125[Reserved]

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44-503 California Forms of Pleading and Practice--Annotated § 503.130

§ 503.130 Complaint for Declaratory Relief to Determine Priorities Among Security Interests in or Agricultural Liens on Particular Collateral

[1] FORM Complaint for Declaratory Relief to Determine Priorities Among Security Interests in or Agricultural Liens on Particular Collateral

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],cPlaintiff,	)	
vs.	)	NO. _____
_____[*name*(*s*)],vDefendant(s).	)	COMPLAINT FOR DECLARATORY RELIEF TO
	)	DETERMINE PRIORITIES AMONG SECURITY
	)	INTERESTS IN OR AGRICULTURAL LIENS ON
		COLLATERAL

_____

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 503.100[1], Paragraph 1.*]

[2. *Fictitious names. See § 503.100[1], Paragraph 2.*]

3. On or about _____ [*date*], plaintiff entered into a _____ [(security) agreement *or*

lease] _____ [*describe* (*see § 503.120[1]*, alternative Paragraphs 4)] with defendant _____ [*identify debtor*]. A true copy of that _____ [agreement *or* lease] is attached as Exhibit A [consisting of Documents _____through _____] and incorporated by reference. [*If filing is required to perfect security interest or agricultural lien, add:* A financing statement was filed in connection with perfection of the _____ [security interest *or* agricultural lien] under that _____ (agreement *or* lease) on or about _____ (*date*), in the office of the _____ (County Recorder of _____ County, California *or* Secretary of State *as appropriate to the type of collateral*) (which has been maintained to date by appropriate filings relevant thereto). (A true copy of that statement is attached as Exhibit B and incorporated by reference.)] By virtue of this transaction, plaintiff was given a _____ [security interest in *or* agricultural lien on] _____ [*describe collateral*].

4. Defendant(s) also claim(s) a[n] _____[agricultural lien *or* security *or other*] interest in the _____ [personal property *or* fixtures] [*to describe, add:* by virtue of _____ (*describe, e.g.*, a security agreement with the same _____ [*name of debtor*] in which a financing statement was filed on or about _____ [*date*] at _____ [*office*])].

5. An actual controversy has arisen and now exists between plaintiff and defendant(s) concerning their respective rights in and to the property in that plaintiff contends that plaintiff's interest therein has priority over that of defendant(s) [or any or all other parties herein], whereas this contention is disputed by defendant(s) on the grounds that _____ [*describe, e.g.*, defendant's security interests were perfected earlier than that of plaintiff].

6. Plaintiff desires a judicial determination of the respective rights of the parties in such property, including, as appropriate, the validity of agreements involved and the perfection of security instruments thereunder, or as to which party's interpretation of documents and transaction is correct.

7. A judicial declaration is necessary and appropriate at this time under the circumstances in order for plaintiff to ascertain his/her/its rights under plaintiff's _____ [*describe security remedy available, e.g.*, security agreement as a means of _____ (taking possession of *or* foreclosing on) the security and be assured of adequate realization of the obligation under the agreement free of all other obligations with any interest therein or claims of interest therein].

WHEREFORE, plaintiff prays judgment against the defendant[s, and each of them,] as follows:

1. For a declaration that plaintiff's security interest in the property herein has priority over that of any interest of the defendant[s, and each of them] [as arising out of a valid security agreement];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 503.100[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use as a complaint or cross complaint by a secured party who seeks a judicial declaration of the priority of its interest over that of any other creditor or person claiming an interest in the collateral [*see* discussion in *§ 503.24[1]*].

[3] Allegations

The complaint in [1], *above*, alleges:

- Plaintiff's or cross complainant's security or other agreement (or lease) with the defendant or cross defendant debtor giving a security interest in or agricultural lien on particular collateral (Paragraph 3).
- Defendant's or cross defendant's claim to some type of competing interest therein (Paragraph 4).
- The actual controversy as to which interest is superior (Paragraph 5).
- The requirement of a judicial determination on key matters in the case (Paragraph 6).
- The urgency of a judicial declaration at this time to determine the status and fate of plaintiff's security interest (Paragraph 7) [*see Code Civ. Proc. § 1060*].

[4] Availability of Declaratory Relief

Anyone who is interested under a contract or who desires a declaration of his or her rights or duties with respect to another or in respect to, in, over, or on property, in cases of actual controversy relating to the legal rights and duties of the respective parties, may bring an original action in the superior court or, along with an answer to a complaint, file a cross complaint in a pending action in a court for a declaration of those rights and duties in the premises, including a determination of any question of construction or validity arising under the instrument or contract. The pleading may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of those rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be had before there has been any breach of the obligation in respect to which the declaration is sought [*Code Civ. Proc. § 1060*].

For discussion and forms for applying for declaratory relief with respect to controversy among parties, see Ch. 182, *Declaratory Relief* .

[5] Jurisdiction of Actions for Declaratory Relief

This action for declaratory relief is in the jurisdiction of the superior court as an unlimited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86, 580(b)(4), 1060*; *see Code Civ. Proc. § 86(a)(7)(A)* (restricted extent to which declaratory relief may be maintained as limited civil case); *see* Ch. 182, *Declaratory Relief*].

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Chapter 503 SALES: SECURED TRANSACTIONS
PART IV. FORMS
B. Forms for Use by Secured Parties
2. Actions Against Competing Secured Parties

44-503 California Forms of Pleading and Practice--Annotated § 503.131

§ 503.131 Complaint for Possession of Collateral by Secured Party With Prior Security Interest or Agricultural Lien Perfected by Filing First [Com. Code § 9322(a)(1)] Against Secured Party With Perfected Security Interest in or Agricultural Lien on, and Possession of, Collateral

[1] FORM Complaint for Possession of Collateral by Secured Party With Prior Security Interest or Agricultural Lien Perfected by Filing First [Com. Code § 9322(a)(1)] Against Secured Party With Perfected Security Interest in or Agricultural Lien on, and Possession of, Collateral

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*] Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR POSSESSION OF COLLATERAL
_____ [*name*] Defendant.	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 503.100[1], Paragraph 1.*]

[2. *Fictitious names. See § 503.100[1], Paragraph 2.*]

[3. *Venue for certain consumer installment sales. See § 503.100[1], Paragraph 3.*]

4. On or about _____ [*date*], plaintiff filed a financing statement in the Office of the Secretary of State in order to perfect a _____ [security interest *or* agricultural lien] expected to arise out of a proposed [security] transaction between plaintiff and _____[*name of debtor*] [*if agricultural lien, add:* relating to his/her/its framing operation]. [The financing statement was renewed on _____ [*specify date or dates on which any continuation statements were filed*]. A true copy of the financing statement is attached as Exhibit _____ and incorporated by reference.

5. [*Identification and execution of security agreement or agreement that gave rise to agricultural lien. See § 503.120[1], alternative Paragraphs 4.*]

6. According to the provisions of the _____ [agreement *or* lease], plaintiff agreed to [*specify, e.g.,* loan to _____ (*name of debtor*) the sum of $_____].

7. According to the provisions of the _____ [agreement *or* lease], and in consideration of plaintiff's performance, _____ [_____ (*name of debtor*) granted plaintiff a security interest in *or set forth statute* granted plaintiff an agricultural line on] _____ [*describe collateral*], [together with all proceeds thereof]. _____ [*name of debtor*] further granted plaintiff the right to immediate possession of the collateral in the event of default by _____ [*name of debtor*] in payment of the obligation or in protection of plaintiff's interest in the collateral, or otherwise.

8. Plaintiff has fully performed his/her/its obligations under the [security] agreement. However, on or about _____ [*date*], _____ [*name of debtor*] defaulted on the agreement in that he/she/it _____ [granted defendant a security interest in *or* entered into a transaction with defendant that gave defendant an agricultural lien on] _____ [*identify collateral*].

9. On or about _____ [*date*], defendant filed a financing statement in the Office of the Secretary of State to perfect his/her _____ [security interest *or* agricultural lien]. A true copy of the financing statement is attached as Exhibit _____ and incorporated by reference.

10. According to the provisions of plaintiff's [security] agreement with _____ [*name of debtor*], on or about _____ [*date*], plaintiff _____ [*describe plaintiff's performance, e.g.,* loaned to _____ (*name of debtor*) the sum of $_____]. At that time, plaintiff had no knowledge of any other security interest or agricultural lien held by any other person, perfected or otherwise, in the collateral.

11. On or about _____ [*date*], defendant took and now has in his/her/its possession the above-described _____ [*identify collateral*]. As a result of _____'s [*name of debtor*] default under its security agreement with plaintiff, plaintiff is entitled to take immediate possession of the _____ [*specify, e.g.,* goods] in defendant's possession. Plaintiff has demanded possession from defendant, but defendant has wrongfully _____ [refused to give plaintiff possession *or* failed to respond to plaintiff's demands or in any way give plaintiff access to the _____ (*specify, e.g.,* goods) *or describe other failure of defendant to transfer collateral to plaintiff*].

12. At all times herein mentioned, the reasonable value of the _____ [*describe collateral, e.g.,* goods] in defendant's possession is $_____.

WHEREFORE, plaintiff prays judgment from defendant as follows:

1. For possession of the _____ [*describe collateral, e.g.,* goods] in defendant's possession, or its reasonable value in the amount of $_____, in the event delivery cannot be had;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 503.100[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by a secured party with a perfected nonpurchase money security interest in, or agricultural lien on, collateral to bring an action to obtain possession of the collateral, or its value, from another secured party with a perfected non-purchase money security interest in, or agricultural lien on, the same collateral of their mutual debtor. Because plaintiff filed its financing statement covering the collateral before defendant filed [*see Com. Code § 9509(a)-(c)* (when financing statement may be filed; in case of agricultural lien that is not yet effective, debtor must authorize filing)], plaintiff's interest in or lien on the collateral takes priority over defendant's interest or lien, even though defendant's security interest or agricultural lien was the first to attach to the collateral [*see Com. Code §§ 9203, 9322(a)(1)*; *Borg-Warner Acceptance Corp. v. Bank of Marin (1973) 36 Cal. App. 3d 286, 287-289, 111 Cal. Rptr. 361* (security interest of secured party who filed financing statement first took priority over that of party who filed subsequently, when party filing subsequently had opportunity to inform itself of earlier security interest and when listing of debtor's business name on earlier financing statement was not so different from its later corporate name as to seriously mislead party filing subsequently); for further discussion of priorities, see *§ 503.24[2]*].

This form is loosely based on based on U.C.C. Comment 4, Example 1, to *Com. Code § 9322*, which is *set forth in § 503.24[2][a]*. The form may be modified for use in other situations in which the interest of the secured party who is the first to file will take priority over that of the secured party whose interest is the first to attach but who is the last to file [*see Com. Code § 9322(a)(1)*].

If the security interest of the party who files later is a purchase money security interest, that party has priority under *Com. Code § 9324(a)* if the collateral is not inventory, and priority under *Com. Code § 9324(b)* if the collateral is inventory and the party has properly notified the party who filed first [*see* discussions in *§§ 503.40[5][c] -[e]* (goods other than inventory), *503.41[2]* (inventory)]. For a complaint for possession of inventory collateral by a purchase money secured party, see *§ 503.132*.

[3] Allegations

The complaint in [1], *above*, alleges:

- The filing of plaintiff's financing statement (Paragraph 4) [*see Com. Code §§ 9309, 9322(a)(1), 9509*].

- Plaintiff's and debtor's material obligations under plaintiff's security or other agreement with debtor

(Paragraphs 6 and 7).

- Debtor's default by granting defendant a security interest or agricultural line and defendant's filing to perfect that interest or lien (Paragraphs 8, 9) [*see Com. Code § 9509*].

- Plaintiff's full performance of its obligations under the agreement (Paragraph 10) [*see Com. Code §§ 9201, 9203*].

- Defendant's possession to the collateral, plaintiff's demand for possession of the collateral, and defendant's refusal or failure to transfer it (Paragraph 11).

- The reasonable value of the collateral in defendant's possession (Paragraph 12).

[4] Information Concerning and Copies of Current Filings

Interested parties may obtain information concerning, and certified copies of, existing financing statements and related documents on file from the office of the California Secretary of State [*see Com. Code § 9523(c)-(f)*]. The Secretary of State has adopted a standard form for submission of these requests, known as "Uniform Commercial Code Form-UCC-11" (known generally as "UCC-11"). The form is available from the office of the Secretary of State and may be downloaded from the Secretary of State's website at http://www.sos.ca.gov/business/ucc/information-request.htm or purchased at many office supply stores. For an illustration of Form UCC-3, see *California Legal Forms, Ch. 42, Secured Transactions, § 42.213* (Matthew Bender).

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2. Actions Against Competing Secured Parties

44-503 California Forms of Pleading and Practice--Annotated § 503.132

§ 503.132 Complaint for Possession of Collateral by Secured Party With Prior Perfected Purchase Money Security Interest in Inventory [Com. Code § 9324(b)-(c)] Against Secured Party With Perfected Security Interest in and Possession of Collateral

[1] FORM Complaint for Possession of Collateral by Secured Party With Prior Perfected Purchase Money Security Interest in Inventory [Com. Code § 9324(b)-(c)] Against Secured Party With Perfected Security Interest in and Possession of Collateral

SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____

_____ [*name*]	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR POSSESSION OF COLLATERAL
_____ [*name*]	)	
Defendant.	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
	)	
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 503.100[1], Paragraph 1.*]

[2. *Fictitious name. See § 503.100[1], Paragraph 2.*]

[3. *Venue for certain consumer installment sales. See § 503.100[1], Paragraph 3.*]

[4. On or about _____ [*date*], _____ [*name of debtor*] entered into an agreement

with _____ [*name of debtor's seller*] in which _____ [*name of debtor*] agreed to buy and _____ [*name of seller*] agreed to sell and deliver _____ [*describe goods*] for a total consideration of $_____.]

5. On or about _____ [*date*], plaintiff and _____ [*name of debtor*] entered into a security agreement _____ [*describe security agreement, for example*, entitled "Security Agreement"]. A true copy of the agreement is marked Exhibit "_____," is attached and incorporated by reference.

6. According to the provisions of the agreement, plaintiff agreed to pay value to the account of _____ [*name of debtor*], by paying to _____ [*name of seller*] the purchase price of _____ [*describe goods*], and to deliver possession of the goods to _____ [*name of debtor*] for sale in the ordinary course of his/her/its business.

7. According to the provisions of the agreement, and in consideration of plaintiff's payment of the purchase price, _____ [*name of debtor*] granted plaintiff a security interest in the goods, together with all proceeds thereof. _____ [*Name of debtor*] agreed not to grant any other securityinterests in that inventory and further granted plaintiff the right to immediate possession of the goods in the event of any default by _____ [*name of debtor*] in payment of the obligation, in protection of plaintiff's interest in the goods, or otherwise.

8. According to the provisions of the agreement, on or about _____ [*date*], plaintiff performed his/her promise to pay to _____ [*name of seller*] the purchase price of the above-described goods.

9. On or about _____ [*date*], plaintiff took possession of the goods by receipt of negotiable bills of lading and, according to the provisions of the security agreement, delivered the bills of lading to _____ [*name of debtor*] on or about _____ [*date*], so that he/she/it might take physical possession of the goods.

[*EITHER, if no prior security holders of record exist, or if none exist to plaintiff's knowledge*]

10. At the time that _____ [*name of debtor*] took possession of the goods there were no financing statements on record with the Secretary of State pertaining to _____ [*name of debtor*] and the above-described goods, and plaintiff had no knowledge of any security interest held by any other person in the collateral.

[*OR, if there exist prior security holders who filed financing statements covering the same type of inventory either before the date plaintiff filed his/her/its financing statement or before the beginning of the 20-day period during which plaintiff's interest was temporarily perfected*]

10. Before _____ [*name of debtor*] took possession of the goods, plaintiff notified _____ [*name, address, and status of security holders of record or security holders actually known to plaintiff*] that plaintiff intended to engage in a purchase money security transaction with _____ [*name of debtor*] as debtor, and described the collateral by item and type. A true copy of the notification is attached as Exhibit _____ and incorporated by reference.

[*CONTINUE*]

11. Plaintiff has fully performed his/her/its obligations under the security agreement. However, on or about _____ [*date*], _____ [*name of debtor*] defaulted on the agreement in that he/she/it granted defendant a security interest in _____ [*identify goods*].

12. On or about _____ [*date*], defendant filed a financing statement in the Office of the Secretary of State to perfect his/her/its security interest. A true copy of the financing statement is attached as Exhibit _____ and incorporated by reference.

13. On or about _____ [*specify date after defendant's filing and within 20 days after delivery of possession to the debtor*], plaintiff filed a financing statement in the Office of the Secretary of State to perfect his/her/its security interest under his/her/its security agreement with _____[*name of debtor*]. [The financing statement was renewed on _____ (*specify date or dates on which any continuation statements were filed*).] A true copy of the financing statement is attached as Exhibit _____ and incorporated by reference.

14. On or about _____ [*date*], defendant took and now has in his/her/its possession the above-described _____ [*identify goods*]. As a result of _____'s [*name of debtor*] default under its security agreement with plaintiff, plaintiff is entitled to take immediate possession of the goods in defendant's possession. Plaintiff has demanded possession from defendant, but defendant has wrongfully _____ [refused to give plaintiff possession *or* failed to respond to plaintiff's demands or in any way give plaintiff access to the goods *or describe other failure of defendant to transfer collateral to plaintiff*].

15. At all times herein mentioned, the reasonable value of the goods in defendant's possession is $_____.

WHEREFORE, plaintiff prays judgment from defendant as follows:

1. For possession of the goods in defendant's possession, or its reasonable value in the amount of $_____, in the event delivery cannot be had;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 503.100[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by a secured party with a perfected purchase money security interest in inventory collateral to bring an action to obtain possession of the collateral, or its value, from a secured party with a perfected nonpurchase money security interest in the same inventory collateral of their mutual debtor. Because plaintiff has a purchase money security interest in the debtor's inventory, plaintiff's security interest takes priority over defendant's

conflicting security interest in the same inventory if plaintiff meets all of the requirements of *Com. Code § 9324(b), (c)* [*see Com. Code § 9324(b), (c)*, discussed in *§ 503.41[2*]; *see also* discussion in *§ 503.24[2][c]*].

In this form, plaintiff/secured party's purchase money security interest is based on a tripartite transaction between a secured party, a seller, and a debtor; in which plaintiff, the purchase money secured party, pays the purchase price of its debtor's inventory to a seller and takes, in return,negotiable bills of lading (Paragraphs 4-6). Plaintiff then delivers the bills of lading to its debtor (Paragraph 9). Having obtained possession of the bills of lading or the inventory, the debtor then violates its security agreement with plaintiff by entering into a security agreement with defendant secured party, granting defendant an interest in inventory in which plaintiff already has a security interest (Paragraph 11).

In this transaction, plaintiff obtains temporary perfection of its interest through possession of the tangible negotiable documents [*Com. Code § 9313(a)*] (Paragraph 9), and then has 20 days after delivery of the bills of lading to the debtor in which it must file a financing statement in order to continue its perfection [*Com. Code § 9312(c), (f)*; *see § 503.48[1][b]*] (Paragraph 13). Even though defendant may have filed a financing statement before plaintiff, and even though defendant had no notice of plaintiff's security interest, record or otherwise, plaintiff will have a prior perfected interest if it complies with the requirements of *Com. Code § 9324(b)* [*Com. Code § 9324(b), (c)*; *see § 503.41[2]*].

The form may be modified for use in other situations in which purchase money security interests in inventory are created.

[3] Allegations

The complaint in [1], *above*, alleges:

- The existence and execution of both plaintiff's and defendant's security agreements, and the existence and filing of both plaintiff's and defendant's financing statements (Paragraphs 5, 11, 12, and 13) [*see Com. Code §§ 9308(a),(c), 9312, 9324(b), (c)*].

- Either that prior secured parties did not exist or that plaintiff notified the prior secured party of plaintiff's purchase money security interest within five years before debtor received possession of the inventory (alternative Paragraphs 10) [*see Com. Code § 9324(b)(2)-(4), (c)*; *see also* discussion in *§ 503.131[4]*].

- Plaintiff's and debtor's material obligations under plaintiff's security agreement (Paragraphs 6 and 7).

- Plaintiff's full performance (Paragraphs 8, 9, and 10).

- The debtor's default (Paragraph 11).

- Plaintiff's demand for possession of the collateral and defendant's refusal or failure to transfer it (Paragraph 14).

- The reasonable value of the collateral in defendant's possession (Paragraph 15).

The complaint includes an optional allegation of the existence of a contract between the seller and debtor to establish the debtor's rights in the collateral before he or she takes delivery from plaintiff secured party (optional Paragraph 4) [*see Com. Code § 9203(a), (b)(2)* (security interest does not attach and is not enforceable against debtor or third parties, unless debtor has rights in collateral and other specified conditions are met)].

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44-503 California Forms of Pleading and Practice--Annotated § 503.133

§ 503.133 Complaint in Intervention by Consignor Who Complied With Filing and Notification Procedure to Protect Ownership in Consigned Goods [Com. Code §§ 2326(1)(b), (2), 9324(b), (c)]

[1] FORM Complaint in Intervention by Consignor Who Complied With Filing and Notification Procedure to Protect Ownership in Consigned Goods [Com. Code §§ 2326(1)(b), (2), 9324(b), (c)]

SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____

_____ [*name*] Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*] Defendant.	)	COMPLAINT IN INTERVENTION BY CON-
_____ [*name*] Intervenor.	)	SIGNOR OF GOODS VERSUS PARTIES TO SE-
	)	CURITY AGREEMENT

_____

Intervenor alleges:

1. The court herein has permitted intervenor to make timely intervention in this action by virtue of claiming an interest relating to the property that is the subject of the action, because disposition of the action may, as a practical matter, impair or impede intervenor's ability to protect that interest, which is not adequately represented by the existing parties.

2. _____ [*name*] is the secured party under the security agreement described in the other pleadings herein, and _____ [*name*] is the debtor under this agreement. A copy of this security agreement is found in Exhibit _____ of the _____ [*particular pleading on file in main action*]. A copy of a financing statement filed in connection with the perfection of the security interest is found in Exhibit _____ of the _____ [*specify pleading*].

3. Intervenor is the owner of certain goods, described in the other pleadings herein, consisting of

_____ [*describe goods*]. On or about _____ [*date*], intervenor filed a financing statement covering those goods, in connection with an intended consignment thereof to _____ [*name of debtor*], in the office of the Secretary of State[, which has been maintained to date by appropriate filings relevant thereto]. A true copy of this statement is attached as Exhibit _____ and incorporated by this reference.

[4. *If secured party had filed a financing statement covering the same types of goods before the date of the filing by intervenor as consignor, add:* On or about _____ (*date*), intervenor gave sent authenticated notification to _____ (*secured party*) (*specify meals of transmittal if desired, e.g,* by _____ [personal delivery *or* _____ (certified *or* registered) mail, return receipt requested], which that party received on _____ (the same day *or* or about _____ (*date*)). This notification stated that intervenor as consignor expected to deliver goods on consignment to _____(*debtor*) and described these goods by item and type. A true copy of this notice is attached as Exhibit _____ and incorporated by this reference.]

5. Thereafter, and on or about _____ [*date; if notification was required to have been sent to secured party, set forth a date within five years after delivery of it*], intervenor delivered the goods, which are not consumer goods, to _____ [*name of debtor*] at his/her/its place of business, called _____ [*name of business*], at _____ [*address*], under a consignment, for sale of the goods to _____ [*specify, e.g.,* the retail public *or* wholesalers *or others*]. _____ [*name of debtor*] deals in goods of that kind, is not an auctioneer, and is not generally known by its creditors to be substantially engaged in selling the goods of others. The goods delivered by intervenor had an aggregate value of $_____. The proceeds of this sale were to be remitted to intervenor less an agreed commission. This consignment was not a security interest.

6. The other parties claim an interest adverse to intervenor's rights in these goods by the terms of their security agreement and threaten to deliver the goods to _____ [*secured party*] or to otherwise dispose of the goods. Each has refused and failed to deliver the goods to intervenor although demand has been made therefor, and threaten intervenor with loss of the goods or proceeds thereof by virtue of _____'s [*secured party*] attempt to possess or foreclose on the goods. The present value of these goods is approximately $_____.

WHEREFORE, intervenor prays judgment against _____[*secured party*] and _____ [*debtor*] as follows:

1. For an order determining that the ownership interest in the goods of intervenor is superior to that of either of the other parties in this action, by virtue of a valid consignment and to the extent of the terms thereof;

2. For damages in the amount of $_____ on any disposition of such goods by the other parties, or either of them;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ _____ [*party's status and name*]

[*Verification, if desired. See § 503.100[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by a consignor of goods who has properly complied with the filing and, if relevant, notification, procedure relating to consignments, to protect his or her right to the goods or their proceeds over those of a secured creditor of the consignee [*see Com. Code §§ 9102(a)(20), 2326(2), 9324(b), (c)*; *see also* discussions in *§§ 503.11[7]*, 503.46; *Fariba v. Dealer Servs. Corp. (2009) 178 Cal. App. 4th 156, 172-173, 100 Cal. Rptr. 3d 219* (trial court properly instructed jury that possession as between competing claimants to goods in inventory at premises of consignment merchant is accomplished when one with right to possess accomplishes actual custody and control of those goods under all circumstances demonstrated by evidence; wholesaler that had consigned used vehicles to dealer was entitled to possession of them after dealer went out of business, and consignor had actual custody and control of those vehicles by virtue of having keys to them in hand, even after vehicles were taken from dealer's premises by creditor that had security interest in dealer's inventory)].

[3] Application or Motion to Intervene Must Be Filed

Before filing a complaint for intervention, it is necessary to file an application to intervene or notice of motion to do so. Normally, the grounds of the application or motion may be referred to as being those set forth in the proposed complaint. The intervenor may choose to join the debtor as plaintiff or defendant in the main action in resisting the claims of the secured party, or may file adversely to both of them [*see Code Civ. Proc. § 387*]. For discussion and forms, see Ch. 395, *Parties* .

If the person seeking intervention claims an interest relating to the property which is the subject of the action, and that person is so situated that the disposition of the action may as a practical matter impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by existing parties, the court must, on timely application, permit that person to intervene [*Code Civ. Proc. § 387*]. Thus, if the consignor claiming an ownership interest in the goods superior to that of the consignee or a secured party of the consignee is aware of the fact that the secured party is attempting to possess or foreclose on the goods, the consignor may wish to intervene in an action for possession or foreclosure in order to best protect the consignor's interest under the consignment.

[4] Allegations

The complaint in [1], *above*, alleges in pertinent part:

- That the consignor filed a financing statement (Paragraph 3) [*see Com. Code § 9505*].

- That the consignor sent notification of the intended consignment to any secured party having previously filed a financing statement covering the type of goods consigned (Paragraph 4) [*see Com. Code § 9324(b)(2), (4), (c)*].

- The subsequent consignment by consignor to consignee and description of the parties and transaction as one that is governed by Division 9 (Paragraph 5) [*see Com. Code § 9102(a)(20)*].

- The threatened loss of goods or proceeds (Paragraph 6) [*see Code Civ. Proc. § 387*].

[5] Alternative Remedy of Third-Party Claim

Once tangible or intangible personal property has been levied on in an action by a secured party against the debtor under a particular security agreement, whether or not it is then in the actual possession of the levying officer, a third party who

claims a superior interest in the collateral under that security agreement may lodge a third-party claim. The third party, such as one who claims to be the owner or to have a priority perfected security interest, may claim the property by a written claim verified personally or by agent, setting out the reasonable value of the property and the claimant's title and right to possession. On delivery of the claim, the levying officer will release the property unless the person ordering the levy puts up an undertaking to continue execution. A hearing procedure is available for the parties to prosecute their claims to the property [*Code Civ. Proc. § 720.310 et seq.*].

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44-503 California Forms of Pleading and Practice--Annotated § 503.134

§ 503.134 Complaint for Damages and to Quiet Title By Purchaser of Chattel Paper Against Dealer, Buyer, and Secured Party Claiming Security Interest in Chattel Paper [Com. Code § 9330]

[1] FORM Complaint for Damages and to Quiet Title By Purchaser of Chattel Paper Against Dealer, Buyer, and Secured Party Claiming Security Interest in Chattel Paper [Com. Code § 9330]

SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____

_____ [*name*] Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s) of known defendants*] [*if unknown defendants are included, allege:*; all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to Plaintiff's title, or claiming any cloud on Plaintiff's title thereto] [; and DOES I-_____, inclusive],	)	COMPLAINT FOR DAMAGES AND TO QUIET TITLE
Defendants.	)	

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 503.100[1], Paragraph 1.*]

[2. *Venue for certain consumer installment sales. See § 503.100[1], Paragraph 3.*]

[3. *If "all persons unknown" are named as defendants, allege:* The defendants herein named as "all persons unknown claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to

plaintiff's title, or claiming any cloud on plaintiff's title thereto," are unknown to plaintiff. These defendants, and each of them, claim some right, title, estate, lien, or interest in the property described below adverse to plaintiff's title. These claims, and each of them, constitute a cloud on plaintiff's title thereto. These claims, and each of them, are without any right whatever, and these defendants, and each of them, have no right, title, estate, lien, or interest whatever in the property described below or any part of that property.]

[4. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, and therefore sues these defendants by those fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of these fictitiously named defendants claim some right, title, estate, lien, or interest in the property described below adverse to plaintiff's title, and their claims, and each of them, constitute a cloud on plaintiff's title to that property.]

5. Plaintiff is the sole owner of all right, title, and interest in and to certain chattel paper, consisting of _____ [*describe chattel paper, for example,* one contract of sale and security agreement, dated _____, with defendant _____ (*name of retail dealer*) as seller and holder of a security interest, and defendant _____ (*name of buyer of goods*), as debtor and buyer, and one promissory note between those parties, dated _____, with _____ (*name of retail dealer*) as payee, and _____ (*name of buyer of goods*) as maker]. A true copy is attached as Exhibit _____ and incorporated by this reference. The chattel paper is usually located at _____ [*specify usual location of chattel paper, including county*].

6. On or about _____ [*date*], defendant _____ [*name of retail dealer*] assigned all his/her right, title, and interest in the chattel paper described above to plaintiff.

7. The assignment was for new and valuable consideration, in that plaintiff _____ [*allege facts sufficient to satisfy the new value requirement of Com. Code § 9330(a), (b), e.g.,* paid to defendant _____ (*name of retail dealer*) the sum of $_____. The assignment was taken in the ordinary course of plaintiff's business as a financing institution engaged in, among other things, the purchase of chattel paper from retail dealers].

8. Defendant _____ [*name of retail dealer*] delivered the chattel paper to plaintiff on or about _____[*date*]. Plaintiff is now, and at all times herein mentioned was, in possession of the chattel paper.

9. As represented by the chattel paper, and pursuant to the terms of the assignment, plaintiff now has, and at all times herein mentioned had, a security interest in _____ [*describe property secured by chattel paper, e.g.,* one motor vehicle described as _____ (*describe vehicle*)]. The _____ [*describe property secured by chattel paper, e.g.,* vehicle] was sold to defendant _____ [*name of buyer of goods*] by defendant _____ [*name of retail dealer*] on or about _____ [*date*], and is presently located at _____ [*location of property secured by chattel paper*], in the possession of defendant _____ [*name of buyer of goods*].

10. On or about _____ [*specify date prior to retail dealer's assignment of chattel paper to plaintiff*], defendant _____ [*name of retail dealer*] granted defendant _____ [*name of secured party*] a security interest in _____ [*identify retail dealer's inventory, and proceeds, if applicable, e.g.,* defendant _____'s (*name of retail dealer*) inventory of motor vehicles, more fully described as _____ (*identify and describe motor vehicles*), and in the proceeds from the sale, transfer, or other disposition thereof].

11. On or about _____ [*date*], defendant _____ [*name of secured party*] filed a

financing statement in the Office of the Secretary of State, in order to perfect its security interest in the inventory of defendant _____ [*name of retail dealer*]. A true copy of the financing statement is attached as Exhibit _____ and incorporated by reference.

[*EITHER, if defendant secured party claims the chattel paper merely as proceeds of defendant dealer's inventory*]

12. The chattel paper does not indicate that it has been assigned to an identified assignee other than plaintiff.

[*OR, if defendant secured party's interest is directly in the chattel paper (as opposed to being in the chattel paper as proceeds of inventory)*]

12. On or about _____ [*date*], when plaintiff took possession of the chattel paper from defendant _____[*name of retail dealer*], plaintiff had no knowledge that the purchase of that chattel paper violated the rights of defendant _____ [*name of secured party*].

[*CONTINUE*]

[13. *If the claim of a named defendant is unknown, uncertain, or contingent, allege:* The claim of _____ (*name of defendant*) is _____ (unknown *or* uncertain *or* contingent). (*If the lack of knowledge, uncertainty, or contingency is caused by a transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, allege:* _____ (*name*), age _____, is the person who would be entitled to an adverse claim if _____(*describe contingency*) had occurred prior to the commencement of this action.) (*If the person is subject to a legal disability, allege:* This person is subject to _____ (*specify legal disability*).)]

14. At all times herein mentioned, the market value of the chattel paper has been and is the sum of $_____.

15. The chattel paper is now in the possession of plaintiff, but plaintiff is unable to assign or otherwise deal with the paper due to the adverse claims and demands of defendant _____ [*name of secured party*].

16. Plaintiff seeks to quiet his/her/its title in and to the chattel paper described in Paragraph 5 and in and to his/her/its [superior] security interest in the _____ [*describe property which is security, e.g.,* motor vehicle] described in Paragraph 9 against the following claims: the claims of defendants _____[*name of retail dealer*]; _____ [*name of secured party*], and _____ [*name of retail buyer of goods*][; _____(*continue with whichever are applicable:* the claims of the successor defendants described in Paragraph _____; the claims of all unknown defendants described in Paragraph 3, whether or not the claim or cloud is known to plaintiff; and the unknown, uncertain, or contingent claim, if any, of _____ (*name*) more fully described in Paragraph 13)]. Defendants' claims, and each of them, are without any right whatever and defendants, and each of them, have no right, title, estate, lien, or interest whatever in the above-described property, or any part of that property[, except that _____ (*set forth any adverse claims of which plaintiff admits the validity, e.g.,* defendant _____ [*name of retail buyer*] is entitled to possession and title to the vehicle, subject to plaintiff's security interest as reflected by the terms of the security agreement)].

17. Plaintiff seeks to quiet title as of _____[*date*]. [*If the date is a date other than the date the complaint is filed, allege why a determination as of that date is sought.*]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For a judgment that plaintiff is the sole owner of all right, title, and interest in the chattel paper described above, representing its security interest in the _____ [*describe property secured by chattel paper*] possessed by defendant _____ [*name of buyer*], and that defendants have no interest in the _____ [*describe property secured by chattel paper*] adverse to plaintiff's;

2. Damages from defendant _____ [*name of retail dealer*] in the sum of $_____;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See § 503.100[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use by a purchaser of chattel paper [*see Com. Code § 9102(a)(11)*, defining chattel paper, *set forth in § 503.11[5]*] to obtain damages and to quiet its title to the chattel paper, as against a secured party with a prior perfected security interest in the paper as either inventory or proceeds [*see Code Civ. Proc. §§ 760.010-764.080*; *Com. Code § 9330*; *see Com. Code § 9102(a)(72)(D)* (purchaser of chattel paper is secured party); discussions in *§§ 503.50*, *503.52*]. The allegations related to tangible chattel paper, but the form can be modified for use with electronic chattel paper [*see Com. Code § 9102(a)(31)*, defining electronic chattel paper, set forth in *§ 503.11[5]*] by changing the allegations in Paragraphs 8 and second alternative Paragraph 12 to refer to taking plaintiff's taking control of the chattel paper [*see Com. Code § 9105*, discussed in *§ 503.50[1][b]*], rather than taking possession of it, and to there being no indication on the authoritative copy of the electronic record of anyone other than plaintiff as secured party (first alternative Paragraph 12).

This form may be used, for example, when a dealer enters into a security agreement with an inventory financer (usually a bank or financing agency) in which the dealer grants the inventory financer a security interest in the dealer's inventory and all the proceeds on sale of the inventory. The transaction may be tripartite (the inventory financer takes a purchase money security interest, and the transaction involves the dealer's seller as the third party) or bipartite (the inventory financer takes a nonpurchase money security interest, and the transaction involves only the dealer and the inventory financer). The dealer then sells an item from its inventory to a purchaser in the ordinary course of business, retaining a security interest, in the form of a conditional sales contract, in the goods sold to assure payment of the credit obligation. The dealer then assigns this conditional sales contract, together with the security agreement and promissory note (these documents are known collectively as chattel paper), to a third party (usually a bank or financing agency). Often, the sale of the goods and assignment of chattel paper are contemporaneous, with the assignee ordinarily checking and approving the purchaser's credit beforehand.

If plaintiff intends to name unknown persons as defendants, before commencing the action it is recommended that plaintiff have searches done for other filings, assignments, or security interests regarding the chattel paper and the property on which that paper imposes a security interest, because in such an action, all persons having adverse claims that are of record or known to plaintiff or reasonably apparent from an inspection of the property must be named as defendants [*see Code Civ. Proc. § 762.060(b)*].

[3] Allegations

[a] Priority of Purchaser of Chattel Paper

The complaint in [1], *above*, alleges:

- The existence and identification of the chattel paper (Paragraphs 5, 9) [*see Com. Code § 9102(a)(11)*].

- Plaintiff's purchase of the chattel paper for new value and plaintiff's possession of the chattel paper in the ordinary course of its business (Paragraphs 6-8) [*see Com. Code § 9330(a), (b)*].

- Defendant secured party's perfected security interest in the chattel paper (Paragraphs 10, 11) [*see Com. Code § 9330*].

- Either the lack of any indication on the chattel paper that it had been assigned to anyone other than plaintiff [*Com. Code § 9330(a)*] (first alternative Paragraph 12), or plaintiff's lack of knowledge that the purchase/assignment violated the secured party's rights (second alternative Paragraph 12) [*see Com. Code § 9330(b), (f)*].

- The market value of the chattel paper (Paragraph 14).

- Plaintiff's damages (Paragraph 15).

[b] Quiet Title Action

A complaint in an action to quiet title in tangible personal property must allege the following:

- Defendants who have adverse claims to the title of the plaintiff against which a determination is sought (Paragraph 1) [*Code Civ. Proc. § 762.010*; for discussion of special requirements for naming parties in quiet title actions, *see* Ch. 482, *Quieting Title*].

- The adverse claims of unknown defendants if these defendants have been so named (Paragraph 3) [*Code Civ. Proc. §§ 762.020(a), 762.060*].

- A description of the property which is the subject of the action and its usual location (Paragraphs 5, 9) [*Code Civ. Proc. § 761.020(a)*].

- The title of plaintiff as to which a determination is sought, together with the basis of the title (Paragraphs 6, 16) [*Code Civ. Proc. § 761.020(b)*].

- The adverse claims to plaintiff's title against which a determination is sought (Paragraph 16) [*Code Civ. Proc. §§ 761.020(c)*].

- That the claim (or part of it) of a person required to be named as a defendant is unknown, uncertain, or contingent, if this is so (optional Paragraph 13) [*Code Civ. Proc. § 762.020(b)*].

- That the uncertainty, contingency, or lack of knowledge is caused by a transfer to an unborn or unascertained person or class member; or by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, if this is so; and, if so, the name, age, and legal disability (if any) of the person who would be entitled to the claim had the contingency on which the claim depends occurred prior to the commencement of the action (optional Paragraph 13) [*Code Civ. Proc. § 762.020(b)*].

- The date as of which the determination is sought, and if the determination is sought as of a date other than the date the complaint is filed, a statement of the reasons why a determination as of that date is sought (Paragraph 17) [*Code Civ. Proc. § 761.020(d)*].

- A prayer for the determination of plaintiff's title against the adverse claims (Paragraph 1 of prayer) [Civ. Code § 761.020(e)].

If plaintiff admits the validity of any adverse claim, the complaint must so state (Paragraph 16) [*Code Civ. Proc. § 762.060(c)*].

The complaint in [1], *above*, does not contain any allegations regarding defendants who are personal representatives [*Code Civ. Proc. § 762.030(a)*] or heirs and intestate or testate successors [*Code Civ. Proc. § 762.030(b)*] of persons known or believed by the plaintiff to be deceased. If those defendants are necessary in your particular situation, use the appropriate allegations from Ch. 482, *Quieting Title* , Form 1.

Optional Paragraph 4 names fictitious defendants pursuant to *Code Civ. Proc. § 474* [*see Code Civ. Proc. § 760.060* (rules governing civil actions generally as applicable in quiet title actions unless they are inconsistent with quiet title provisions)].

For discussion, a procedural checklist, and additional forms for use in bringing quiet title actions, see Ch. 482, *Quieting Title* .

[4] Verification Necessary

A complaint for an action to quiet title must be verified [*Code Civ. Proc. § 761.020*].

[5] Priority of Purchaser of Chattel Paper

Although perfection by filing is permitted as to chattel paper, certain purchasers of chattel paper who take possession of the chattel paper take free of other security interests in the chattel paper, even those that have been perfected by filing [*see Com. Code § 9330*; *§ 503.50[3*]; *Chrysler Credit Corp. v. Superior Court (1993) 17 Cal. App. 4th 1303, 1313, 22 Cal. Rptr. 2d 37* (one who takes chattel mortgage is protected against prior equities, such as third party's ownership of collateral, only if he or she takes mortgage for valuable consideration and without notice)].

[6] Quiet Title Action

[a] Jurisdiction and Venue

The superior court has jurisdiction in quiet title actions as an unlimited civil case [*Code Civ. Proc. §§ 85, 580(b)(3), 760.040(a)*]. Subject to the power of the court to transfer actions, the proper county for trial of an action to quiet title to personal property is the county in which, at the commencement of the action, the personal property is principally

located or the defendants, or any of them, reside [*Code Civ. Proc. § 760.050(b)*].

[b] Service of Summons

The form, content, and manner of service of summons is the same as in civil actions generally [*Code Civ. Proc. § 763.010(a)*]. If unknown defendants are named, they must be served by publication and posting [*Code Civ. Proc. § 763.010(b)*]. For discussion of the requirements for service by publication and posting, see Ch. 482, *Quieting Title* . For discussion of the procedure for service of summons, see Ch. 518, *Service of Summons and Papers* .

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B. Forms for Use by Secured Parties
2. Actions Against Competing Secured Parties

44-503 California Forms of Pleading and Practice--Annotated §§ 503.135-503.149

[Reserved]

§§ 503.135[Reserved]

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B. Forms for Use by Secured Parties
3. Defenses

44-503 California Forms of Pleading and Practice--Annotated § 503.150

§ 503.150 Affirmative Defense to Complaint Alleging That Secured Party Is Not Proceeding or Did Not Proceed in Accordance With Law Based on Debtor's Authenticated Modification or Waiver of Rights After Default [Com. Code §§ 9624, 9629]

[1] FORM Affirmative Defense to Complaint Alleging That Secured Party Is Not Proceeding or Did Not Proceed in Accordance With Law Based on Debtor's Authenticated Modification or Waiver of Rights After Default [Com. Code §§ 9624, 9629]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

After default, on or about _____ [*date*], plaintiff [*if collateral is consumer goods, add:*, in consideration of defendant's waiver of any right to a deficiency on the debt,] authenticated and delivered to defendant a _____ [waiver *or* modification], a true copy of which is attached as Exhibit _____ and incorporated by reference, in which plaintiff _____ [waived *or* modified] his/her/its right(s) _____

[*EITHER*]

[to notification of _____ (sale *or describe other disposition*) of the collateral (*if modification, describe, e.g.,* agreeing that no notification would be necessary if disposition of the collateral occurred by _____ [*date*]).]

[*OR*]

[to require that defendant, within 90 days after having taken possession of the collateral, dispose of that collateral,

which consists of consumer goods in which defendant had _____ (retained a purchase money security interest, and on which plaintiff has paid 60 percent of the cash price *or* taken a nonpurchase money security interest, and on which plaintiff has paid 60 percent of the secured obligation. (*If modification, describe, e.g.,* In this modification agreement, plaintiff agreed that if defendant had not sold the goods by _____ (*date*), defendant could retain them in satisfaction of the entire obligation.)]

[*OR*]

[to redeem the collateral herein (*if modification, describe, e.g.,* agreeing that the right to redeem could be exercised only by _____ (*date*)).]

[2] Use of Form

The affirmative defense in [1], *above*, is for use by a secured party in an answer to a complaint that alleges that it is not proceeding, or did not proceed, properly under the default law (*Com. Code §§ 9601-9629*). The defense is based on the fact that the secured party, after default, obtained an authenticated waiver or modification from the debtor or a secondary obligor waiving or varying in some manner the debtor's rights on default. There are only three situations in which waiver is permitted [*see Com. Code § 9624* (discussed in *§ 503.28[2]*]:

- A debtor or secondary obligor may waive the right to notification of disposition of collateral under *Com. Code § 9611* [*see* discussion in *§ 503.27[5][b*].

- A debtor may waive the right to require disposition of collateral under *Com. Code § 9620(e)* [*see* discussion in *§ 503.42[5][a]*].

- Except in a consumer-goods transaction, a debtor or secondary obligor may waive the right to redeem collateral under *Com. Code § 9623* [*see* discussion in *§ 503.28[4]*].

As to consumer goods, no waiver or modification is valid or enforceable unless it is in consideration of a waiver by the secured party of any right to a deficiency on the debt [*Com. Code § 9629*; *compare Brunzell Construction Co., Inc. v. Smith (1988) 200 Cal. App. 3d 617, 622-623, 246 Cal. Rptr. 182* (neither former *Com. Code § 9501(3), 9504*, or *9505* prohibited individual guarantor of business obligation, after default, from consenting to entry of deficiency judgment against him or her)].

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44-503 California Forms of Pleading and Practice--Annotated §§ 503.151-503.159

[Reserved]

§§ 503.151[Reserved]

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C. Forms for Use by Persons Other than Obligors or Secured Parties

44-503 California Forms of Pleading and Practice--Annotated § 503.160

§ 503.160 Complaint in Intervention by Party Claiming Right in Fixtures Prior to Secured Party or Debtor by Virtue of Real Property Interest [Com. Code § 9334]

[1] FORM Complaint in Intervention by Party Claiming Right in Fixtures Prior to Secured Party or Debtor by Virtue of Real Property Interest [Com. Code § 9334]

[*Caption and introduction. See § 503.133[1].*]

1. [*Basis for intervention. See § 503.133[1], Paragraph 1.*]

2. [*Identity of security agreement or agricultural lien and defendants as parties thereto, and of financing statement related thereto. See § 503.133[1], Paragraph 2.*]

[*EITHER*]

3. Intervenor is the owner _____ [in fee simple *or specify other interests*] of certain premises described as _____ [*describe*]. On or about _____[*date*], intervenor leased those premises to defendant _____ [*name of debtor*] under a written lease of that date for the purposes of _____ [*describe*] for the period of _____ years. A true copy of that lease is attached as Exhibit _____ and incorporated by reference.

[*OR*]

3. On or about _____ [*date*], to secure an indebtedness from defendant _____ [*name of debtor*] to intervenor in the principal amount of $_____ [for the purchase of real property hereinafter described], that defendant gave to intervenor a _____ [deed of trust *or similar security*] on

certain premises described as _____ [*describe*], carrying that date, in which _____ [*name*] was designated as trustee and intervenor was made beneficiary. This deed of trust was recorded in the Official Records of the County of _____, Book _____, page _____ [*or other record designation*] on _____[*date*]. A true copy of that deed of trust is attached as Exhibit _____ and incorporated by reference.

[*CONTINUE*]

4. According to the provisions of the above-described _____ [lease *or* deed of trust], all installations of personal property by defendant _____ [*name of debtor*] made to the real property, at any time, constituting fixtures or which are intended to be affixed to the property and become a permanent part thereof, including _____ [*describe items*], but excluding _____ [*describe items*] immediately on their installation were to become a part of the real property and _____ [*if lease:* belong to plaintiff as the owner thereof *or, if deed of trust:* are subject to plaintiffs lien thereon].

5. On or about _____ [*date*], defendant _____ [*debtor*] permanently affixed to the premises certain items which also constitute the collateral for the security agreement, described in the other pleadings herein, and consisting of _____ [*describe fixtures, e.g.,* ten 100-gallon water heaters under air conditioning system]. By virtue of the provisions of the _____ [lease *or* deed of trust] intervenor immediately thereon obtained the _____ [ownership *or* security] interest therein prior to that of defendants herein and all other parties.

6. Defendants herein contest intervenor's rights in these fixtures under their security agreement and threaten to remove the fixtures from the real property, threatening intervenor's interest with severe damage to the real property, by virtue of defendant _____'s [*secured party*] attempt to possess or foreclose on the fixtures.

WHEREFORE, intervenor prays judgment against defendants as follows:

1. For an order determining that the _____[ownership *or* security] interest of intervenor in the fixtures described herein is prior to that of either of the defendants herein [and restraining the defendants from removing, or otherwise interfering with, those fixtures];

2. For damages, in an amount not yet established but to be determined, for any removal of any fixtures from the real property described herein and for any resultant damage to the grounds or value of the property;

3. For costs of suit herein, including reasonable attorney's fees as authorized by *Civil Code Section 1717*; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

[*Verification, if desired. See § 503.100[1].*]

[2] Use of Form

The complaint in intervention in [1], *above*, is for use by the holder of an interest in the real property who claims a right in any fixtures therein senior to that of a secured party under a security agreement who is attempting to possess or foreclose on them [*see Com. Code § 9334(a), (d), (e)*; *see also* discussions in *§§ 503.47[6][a]* and *[b]* (priorities as to fixtures), *503.133[3]* and [5] (procedural aspects of, and alternative to, intervention); *Civ. Code §§ 660*, *1013.5*, *1019*; *Com. Code § 9102(a)(41)* (defining fixtures, discussed in *§ 503.47[2]*;]. Generally, Division 9 does not govern the creation or transfer of an interest in or lien on real property, including a lease or rents thereunder. However, exceptions exist to the extent that provision is made for fixtures by *Com. Code § 9334* and for fixture filings by *Com. Code §§ 9501*, *9502*, *9512*, *9516*, and *9519* [*Com. Code § 9109(d)(11)*].

[3] Allegations

The form in [1], *above*, alleges:

- Allowance of intervention in the main action by the court (Paragraph 1) [*see Code Civ. Proc. § 387*].
- Identification of the security arrangement between the main parties to the action (Paragraph 2).
- Intervenor's interest in the real estate and in all fixtures therein (Paragraphs 3, 4).
- Installation of the fixtures on the real property and intervenor's superior rights therein as against the threat of the secured party to possess or foreclose on them (Paragraphs 5, 6) [*see Code Civ. Proc. § 387*].

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44-503 California Forms of Pleading and Practice--Annotated § 503.161

§ 503.161 Complaint by Buyer in Ordinary Course of Business for Declaratory Relief to Determine Priority of Interest in Collateral and Damages--Against Seller and Secured Party Claiming Inventory Interest [Com. Code § 9320(a)]

[1] FORM Complaint by Buyer in Ordinary Course of Business for Declaratory Relief to Determine Priority of Interest in Collateral and Damages--Against Seller and Secured Party Claiming Inventory Interest [Com. Code § 9320(a)]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*] Defendants.	)	COMPLAINT FOR DECLARATORY RELIEF TO
	)	DETERMINE PRIORITY OF INTEREST IN COL-
	)	LATERAL AND FOR DAMAGES

_____

Plaintiff alleges:

1. [*Capacity and residence of defendants. See § 503.100[1], Paragraph 1.*]

[2. *Fictitious names. See § 503.100[1], Paragraph 2.*]

[3. *Venue for certain consumer installment sales. See § 503.100[1], Paragraph 3.*]

4. Defendant _____ [*name of seller*] is engaged in the business of the retail sale of _____ [*describe goods*].

5. On or about _____ [*date*], at _____ [*city*], California, defendant _____ [*name of seller*], in the ordinary course of his/her/its business, sold and delivered to plaintiff certain goods consisting of _____[*describe goods*].

6. The sale was for new and valuable consideration, in that plaintiff _____ [*describe form of payment or exchange, e.g.*, paid to defendant _____ (*name of seller*) the sum of $_____]. The goods were not taken as security for or in consideration of a pre-existing money debt. The sale constituted only a portion of defendant _____ [*name of seller*]'s total inventory.

7. On or about _____ [*date*], at _____ [*city*], California, defendant _____ [*name secured party*] notified plaintiff that it claimed a security interest in the goods sold to plaintiff, pursuant to a security agreement entered into between defendant _____ [*name of secured party*] and defendant _____ [*name of seller*]. At that time, defendant _____ [*name of secured party*] notified plaintiff that _____ [*specify secured party's threatened interference with plaintiff's interest in the goods*].

8. On or about _____ [*date*], when the goods were sold and delivered to plaintiff, plaintiff had no knowledge that the sale violated the rights of another person in the goods.

9. An actual controversy has arisen and now exists between plaintiff and defendants concerning their respective rights in and to the goods, in that plaintiff contends that his/her interest therein, as a buyer in the ordinary course of business, is free of defendant _____'s [*name of secured party*] claimed security interest in the goods. This contention is disputed by defendant _____ [*name of secured party*] on the grounds that _____ [*describe defendant's contentions, for example, plaintiff is not a buyer in the ordinary course of business*].

10. Plaintiff desires a judicial determination of the respective rights of the parties in the goods, including the validity of agreements and security instruments, if any, involved and the perfection, if any, of the claimed security instruments.

11. A judicial declaration is necessary and appropriate at this time under the circumstances in order for plaintiff to ascertain his/her rights in the goods.

12. The _____ [*describe goods*] is/are now in plaintiff's possession, but plaintiff is unable to enjoy, use, assign, or otherwise deal with them as owner because of the adverse claims of defendant _____ [*name of secured party*].

13. At all times mentioned herein, the market value of _____ [*describe goods*] is $_____.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For a declaration that plaintiff is the lawful owner of _____ [*describe goods*] and that defendant _____ [*name of secured party*] has no right, title, or interest therein;

2. For damages from defendant _____ [*name of seller*] in the sum of $_____;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 503.100[1].*]

[2] Use of Form

The complaint in [1], *above*, is for use as either a complaint or cross complaint by a buyer in the ordinary course of business [*see Com. Code § 1201(b)(9)* (definition, dismissed in § 503.161[4])] to obtain a judicial declaration of his or her ownership of goods free of a security interest in the goods created by the seller [*Code Civ. Proc. § 1060*; *Com. Code § 9320(a)*; *see* discussion in *§ 503.24[3*]; *see also Com. Code § 9323(d), (e)* (priority of person buying other than in ordinary course of business, discussed in *§ 503.40[5][a])*]. In conjunction with the action for declaratory relief, the complaint also seeks damages for the secured party's interference with the buyer's ownership interest in the goods. For discussion of jurisdiction of actions for declaratory relief, see *§ 503.130[5]* [*Code Civ. Proc. §§ 85, 86(a)(7), 580(b)(4), 1060*].

The limitations of *Com. Code § 9320(a)* on persons who may take free of a security interest apply only to unauthorized sales by the debtor. If the secured party authorized the sale, in an express agreement or otherwise, the buyer takes free *Com. Code § 9315(a)* without regard to the limitations of *Com. Code § 9320* [*see* U.C.C. Comment 6 to *Com. Code § 9320*].

[3] Allegations

The complaint in [1], *above*, alleges:

- Sale and delivery of goods to plaintiff (Paragraph 5).

- Plaintiff's status as a buyer in the ordinary course of business (Paragraphs 4, 5, 6, and 8) [*see Com. Code § 1201(b)(9)* (definition, at [4], *below*); *see also Producers Cotton Oil Co. v Amstar Corp (1988) 197 Cal. App. 3d 638, 653-654, 242 Cal. Rptr. 914* ; U.C.C. Comment 3 to *Com. Code § 9320* (read together, definition of buyer in the ordinary course of business and *Com. Code § 9320(a)* provide that buyer takes free of the security interest if he or she merely knows there is a security interest that covers the goods, but takes subject to the security interest if he or she knows the sale is in violation of some term of that security agreement)].

- Defendant secured party's claim of a security interest in and threatened interference with the goods (Paragraph 7).

- The actual controversy as to which interest is superior, together with the requirement of a judicial determination of the issues and the urgency of a judicial declaration to determine the status of plaintiff's

interest (Paragraphs 9, 10, and 11) [*see Code Civ. Proc. §§ 1060, 1061*].

- Plaintiff's inability to deal in the goods because of defendant secured party's adverse claims against them (Paragraph 12).

- The market value of the goods (Paragraph 13).

[4] Buyer in Ordinary Course of Business Defined

"Buyer in ordinary course of business" means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in the ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a preexisting contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Division 2 [*Com. Code § 2101 et seq.*] may be a buyer in ordinary course of business. A person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt is not a buyer in ordinary course of business [*Com. Code § 1201(b)(9)*].

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[a] In General

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[7] Installment or Automotive Sales Actions; Certain Limited Civil Cases

[8] Limitation of Action

[9] Declaration

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§ 504.32 Declaration to Be Filed With Complaint in Action Under Consumers Legal Remedies [Civ. Code § 1780(d); Code Civ. Proc. § 396a]

[1] FORM

[2] Use of Form

§ 504.33 Allegations for Use in Action Under Consumers Legal Remedies Act To Provide Basis for Findings for Award of Additional Damages to Senior Citizen or Disabled Person [Civ. Code §§ 1780(b), 3345]

[1] FORM

[2] Use of Form

[3] Allegations

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§ 503.34 Allegation for Use in Action Under Consumers Legal Remedies Act That Owners or Employees of Advertising Medium Had Knowledge of Violations of Act [Civ. Code § 1755]

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[2] Use of Form

§§ 504.35-504.39 [Reserved]

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[1] FORM

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44-504 California Forms of Pleading and Practice--Annotated § 504.01

§ 504.01 Scope of Chapter

This chapter discusses the Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*]. It includes:

- Discussion of the definitions of the act [*see § 504.10*], the purpose of the act [*see § 504.11*], and unlawful practices under the act [*see § 504.12*].

- Discussion [*see § 504.13[6]*] and a form [*see § 504.30*] for notice of a violation of the act and demand for remedy, which is required to be given at least 30 days prior to the filing of a complaint under the act.

- Discussion [*see § 504.13[1]*] and a form [*see § 504.31*] for a complaint for money damages and injunctive relief based on practices proscribed by the act.

- Discussion [*see § 504.13[6]*] and a form [*see § 504.32*] regarding a declaration required to be filed with the complaint.

- Discussion [*see § 504.13[4]*] and a form [*see § 504.33*] for allegations setting forth the basis for the special findings necessary to support an award of additional damages to a senior citizen or disabled person.

- Discussion [*see § 504.13[5]*] and a form [*see* § 504.34] for allegations that an owner or employee of an advertising medium published or disseminated an advertisement in violation of the act.

- Discussion [*see § 504.13[10]*] and a form [*see § 504.40*] for affirmative defense claiming that the alleged violation was the result of a bona fide error.

- Discussion of class actions under the Act [*see § 504.13[9]*].

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44-504 California Forms of Pleading and Practice--Annotated § 504.02

§ 504.02 Cross References

- For an alternative form for a complaint and additional allegations for insertion in the complaint, as well as a form for an affirmative defense, for use in an action under the Consumers Legal Remedies Act, see Ch. 14, *Advertising*

- For discussion and forms for initiating or resisting arbitration pursuant to an arbitration agreement between the parties, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*

- For discussion of additional deceptive or unfair practices or acts, see Ch. 14, *Advertising* , and Ch. 565, *Unfair Competition* , § 565.10 et seq.

- For forms for use in class actions, see Ch. 120, *Class Actions*

- For forms for use in obtaining costs and necessary disbursements, see Ch. 174, *Costs and Attorney's Fees*

- For allegations of damages in contract and tort actions, see Ch. 177, *Damages*

- For allegations in complaints involving permanent injunctions, temporary restraining orders, and preliminary injunctions, see Ch. 303, *Injunctions*

- For forms relating to the appointment of receivers, see Ch. 486, *Receivers*

Forms of points and authorities for use in briefing issues relating to arbitrability of claims under the Consumers Legal Remedies Act, class actions, injunctions, and receivers, may be found in California Points and Authorities, Ch. 20, *Contractual Arbitration* , Ch. 41, *Class and Representative Actions* , Ch. 116, *Injunctions* , and Ch. 200, *Receivers*.

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§ 504.03 Governing Law

Unlawful methods of competition and unfair or deceptive practices in the sale or lease of consumer goods or services are proscribed by the Consumers Legal Remedies Act, which is set forth in *Civ. Code § 1750 et seq.* If any provision of the act is held unconstitutional, the remainder of the act is not affected thereby [*Civ. Code § 1753*].

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[Reserved]

§§ 504.04[Reserved]

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44-504 California Forms of Pleading and Practice--Annotated § 504.10

§ 504.10 Definitions

[1] "Consumer"

The term "consumer" within the meaning of the Consumers Legal Remedies Act refers to an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes [*Civ. Code § 1761(d)*]. A third-party beneficiary of a contract for such goods or services is not a "consumer" within the meaning of the Act [*Schauer v. Mandarin Gems of California, Inc. (2005) 125 Cal. App. 4th 949, 960, 23 Cal. Rptr. 3d 233]* .

To be covered by the Consumers Legal Remedies Act, acts alleged as a cause of action must have been undertaken by the defendant in a consumer transaction "intended to result or which results in the sale or lease of goods or services" [*Civ. Code § 1770(a)*]. The Consumers Legal Remedies Act is not applicable if a defendant's acts were undertaken in a consumer transaction intended to result in the sale of real property. For example, a demurrer to a cause of action under the act was properly sustained without leave to amend when the consumers alleged that lenders overcharged them for underwriting, tax services, and wire transfer fees in conjunction with home loans [*McKell v. Washington Mutual, Inc. (2006) 142 Cal. App. 4th 1457, 1488, 49 Cal. Rptr. 3d 227]* .

[2] "Disabled Person"

The term "disabled person," as used in the act, means any person who has a physical or mental impairment that substantially limits one or more major life activities [*Civ. Code § 1761(g)*]. The term "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working [*Civ. Code § 1761(g)(2)*]. "Physical or mental impairment" means any of the following [*Civ. Code § 1761(g)(1)*]:

- Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss substantially affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; or endocrine.

- Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional

or mental illness, and specific learning disabilities.

The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairment, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, and emotional illness [*Civ. Code § 1761(g)(1)*].

[3] "Goods"

The term "goods," as used in the act, means tangible chattels bought for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for those goods, and including goods that, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of this real property, whether or not severable from it [*Civ. Code § 1761(a)*].

[4] "Home Solicitation"

The term "home solicitation," as used in the act, means any transaction made at the consumer's primary residence, except those transactions initiated by the consumer [*Civ. Code § 1761(h)*]. However, a consumer response to an advertisement is not a home solicitation [*Civ. Code § 1761(h)*].

[5] "Person"

The term "person" means an individual, partnership, corporation, limited liability company, association, or other group, however organized [*Civ. Code § 1761(c)*].

[6] "Senior Citizen"

The term "senior citizen," as used in the act, means a person who is 65 years of age or older [*Civ. Code § 1761(f)*].

[7] "Services"

The term "services," as used in the act, means work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods [*Civ. Code § 1761(b)*; *see Fairbanks v. Superior Court (2009) 46 Cal. 4th 56, 61, 92 Cal. Rptr. 3d 279, 205 P.3d 201* (insurer's contractual obligation to pay money under life insurance policy is not work or labor, nor is it related to sale or repair of any tangible chattel; therefore, life insurance policies are not services as defined in Consumers Legal Remedies Act)].

[8] "Transaction"

The term "transaction," as used in the act, means an agreement between a consumer and any other person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement [*Civ. Code § 1761(e)*].

However, the act does not apply to a transaction on the construction, sale, or construction and sale of an entire residence or all or part of a structure designed for commercial or industrial occupancy, with or without a parcel of real property, including any site preparation incidental to that sale [*Civ. Code § 1754*].

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§ 504.11 Purposes of Act

[1] In General

The purpose of the Consumers Legal Remedies Act is to protect consumers against unfair and deceptive business practices, insulate responsible businesses from spurious or vexatious lawsuits, and to provide efficient and economical procedures to secure that protection [*Pollard v. Ericsson, Inc. (2004) 125 Cal. App. 4th 214, 220, 22 Cal. Rptr. 3d 496* ; *Kramer v. Intuit Inc. (2004) 121 Cal. App. 4th 574, 579, 18 Cal. Rptr. 3d 412]* . The act is to be liberally construed and applied to promote its purposes [*Civ. Code § 1760*].

[2] Provisions Not Exclusive

The provisions of the Consumers Legal Remedies Act are not exclusive. The remedies provided in the act for violation of any section of the act or for conduct proscribed by any section of the act are in addition to any other procedures or remedies for any violation or conduct provided for in any other law [*Civ. Code § 1752*].

Because of the breadth of the unfair or deceptive acts or practices specified in *Civ. Code § 1770* [*see § 504.12, below*], several possible remedies exist under other consumer legislation that should be considered in addition to the remedies provided under the act, including the following:

- The Dance and Health Studio Acts [*Civ. Code § 1812.50 et seq.* and *Civ. Code § 1812.80 et seq.*, respectively], which are discussed in Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* .

- Provisions regulating home solicitation contracts [*Bus. & Prof. Code §§ 17500.3, 17533.8*; *Civ. Code § 1689.5 et seq.*], unsolicited goods or services [*Civ. Code §§ 1584.5, 1584.6, 1616*], and discount buying services [*Civ. Code § 1812.100 et seq.*], all of which are discussed in Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* .

- Provisions of the Business and Professions Code regulating unfair competition [*Bus. & Prof. Code § 16600 et seq.* (contracts or combinations in restraint of trade), 17000 et seq. (unfair trade practices),

17200 et seq. (provisions to enjoin acts of unfair competition), 17500 et seq. (false representations to the public)], which are discussed in Ch. 14, *Advertising* , and Ch. 565, *Unfair Competition* .

- The Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*] and the federal Magnuson-Moss Warranty-Federal Trade Commission Improvement Act [*15 U.S.C. § 2301 et seq.*] discussed in Ch. 502, *Sales: Warranties* .

- Legislation regulating installment sales under the Unruh Retail Installment Sales Act [*Civ. Code § 1801 et seq.*], discussed in Ch. 501, *Sales: Installment Sales* .

- The Rees-Levering Motor Vehicle Sales and Finance Act and the Vehicle Leasing Act [*Civ. Code § 2981 et seq.*], discussed in Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* .

[3] Waiver by Consumer Unenforceable and Void

A waiver by a consumer of the provisions of the act is contrary to public policy and is unenforceable and void [*Civ. Code § 1751*]. For example, in a case in which a forum selection clause designated Virginia as the jurisdiction in which all disputes arising out of the relationship would be litigated, the court held that because one of the causes of action sought class action relief under the Consumers Legal Remedies Act which voids any waiver of rights under the Act as contrary to public policy, enforcement of the clause would be the functional equivalent of a contractual waiver of the Act's statutory remedies and thus was prohibited under California law [*America Online, Inc. v. Superior Court (2001) 90 Cal. App. 4th 1, 14-15, 108 Cal. Rptr. 2d 699* (also concluding that because Virginia law does not allow consumer lawsuits to be brought as class actions, rights of California class members would be diminished if they were required to litigate in Virginia); *accord Doe 1 v. AOL LLC (9th Cir. 2009) 552 F.3d 1077, 2009 U.S. App. LEXIS 875, at *15-*19*].

[4] Federal Preemption Issues

Federal law mandates that any state law or regulation "on disclosure of fuel economy or fuel operating costs for an automobile" may impose only the same disclosure requirements as federal law imposes, with respect to any automobile covered by federal disclosure requirements [*49 U.S.C. § 32919(b)*]. The Consumers Legal Remedies Act, insofar as it prohibits the use of "unfair or deceptive acts or practices" in sales of goods [*Civ. Code § 1770(a)*; *see § 504.12*], is not a law "on disclosure of fuel economy or fuel operating costs for an automobile"; therefore, that federal preemptive mandate does not preclude application of the state law to a buyer's claim that an automobile manufacturer's statements, in a promotional brochure, relating to the fuel economy of a particular model were deceptive or misleading [*Paduano v. American Honda Motor Co., Inc. (2009) 169 Cal. App. 4th 1453, 1478, 88 Cal. Rptr. 3d 90* (express preemption provisions in *49 U.S.C. § 32919* do not purport to take away state's power to regulate advertising of new vehicles, even when that advertising includes EPA mileage estimates, as long as state's regulation does not require manufacturer to provide fuel estimate different from EPA fuel economy estimate, or to make claims that go beyond, or are contrary to, what federal scheme requires)].

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§ 504.12 Unlawful Practices

The following unfair methods of competition and unfair or deceptive acts or practices, undertaken by any person in a transaction intended to result, or that results, in the sale or lease of goods to any consumer, are unlawful:

- Passing off goods or services as those of another [*Civ. Code § 1770(a)(1)*].

- Misrepresenting the source, sponsorship, approval, or certification of goods or services [*Civ. Code § 1770(a)(2)*].

- Misrepresenting the affiliation, connection, or association with, or certification by, another [*Civ. Code § 1770(a)(3)*].

- Using deceptive representations or designations of geographic origin in connection with goods or services [*Civ. Code § 1770(a)(4)*].

- Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have, or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have [*Civ. Code § 1770(a)(5)*; *see, e.g., Williams v. Gerber Prods. Co. (9th Cir. 2008) 523 F.3d 934, 940* (reasonable consumers buying boxed snack food for children should not be expected to look beyond misleading representations on front of box in order to discover truth from ingredients list in small print on side of box); *Consumer Advocates v. Echostar Satellite Corp. (2003) 113 Cal. App. 4th 1351, 1353-1354, 8 Cal. Rptr. 3d 22* (finding triable issues on whether provider of satellite TV service violated *Civ. Code § 1770(a)(5)* with representations concerning number of channels and program schedule)].

- Representing that goods are original or new if they have deteriorated unreasonably or are altered, reconditioned, reclaimed, used, or secondhand [*Civ. Code § 1770(a)(6)*].

- Representing that goods or services are of a particular standard, quality, or grade, or that goods are of

a particular style or model, if they are of another [*Civ. Code § 1770(a)(7)*; *see, e.g., Williams v. Gerber Prods. Co. (9th Cir. 2008) 523 F.3d 934, 940* (reasonable consumers buying boxed snack food for children should not be expected to look beyond misleading representations on front of box in order to discover truth from ingredients list in small print on side of box); *Consumer Advocates v. Echostar Satellite Corp. (2003) 113 Cal. App. 4th 1351, 1353-1354, 8 Cal. Rptr. 3d 22* (finding triable issues of fact on whether provider of satellite TV service violated *Civ. Code § 1770(a)(7)* with representations concerning number of channels and program schedule)].

- Disparaging the goods, services, or business of another by false or misleading representation of fact [*Civ. Code § 1770(a)(8)*].

- Advertising goods or services with intent not to sell them as advertised [*Civ. Code § 1770(a)(9)*; *see, e.g., Consumer Advocates v. Echostar Satellite Corp. (2003) 113 Cal. App. 4th 1351, 1353-1354, 8 Cal. Rptr. 3d 22* (finding triable issues of fact on whether provider of satellite TV service violated *Civ. Code 1770(a)(9)* with representations concerning number of channels and program schedule)].

- Advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity [*Civ. Code § 1770(a)(10)*].

- Advertising furniture without clearly indicating that it is unassembled if that is the case [*Civ. Code § 1770(a)(11)*].

- Advertising the price of unassembled furniture without clearly indicating the assembled price of that furniture if the same furniture is available assembled from the seller [*Civ. Code § 1770(a)(12)*].

- Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions [*Civ. Code § 1770(a)(13)*].

- Representing that a transaction confers or involves rights, remedies, or obligations that it does not have or involve, or that are prohibited by law [*Civ. Code § 1770(a)(14)*; *see Wang v. Massey Chevrolet (2002) 97 Cal. App. 4th 856, 870, 118 Cal. Rptr. 2d 770* (parol evidence rule does not constitute defense or bar to claim based on *Civ. Code § 1770(a)(14)*)].

- Representing that a part, replacement, or repair service is needed when it is not [*Civ. Code § 1770(a)(15)*].

- Representing that the subject of a transaction has been supplied in accordance with a previous representation when it has not [*Civ. Code § 1770(a)(16)*].

- Representing that the consumer will receive a rebate, discount, or other economic benefit, if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction [*Civ. Code § 1770(a)(17)*; *Pollard v. Ericsson, Inc. (2004) 125 Cal. App. 4th 214, 220, 22 Cal. Rptr. 3d 496* (cell phone rebate conditioned on certain acts that could be accomplished before or at time of cell phone purchase did not violate this section)].

- Misrepresenting the authority of a salesperson, representative, or agent to negotiate the final terms of a transaction with a consumer [*Civ. Code § 1770(a)(18)*].

- Inserting an unconscionable provision in the contract [*Civ. Code § 1770(a)(19)*; *see Dean Witter Reynolds, Inc. v. Superior Court (1989) 211 Cal. App. 3d 758, 766, 767-768, 259 Cal. Rptr. 789*

(plaintiff who has reasonably available alternative sources of supply from which to obtain desired goods or services free of terms claimed to be unconscionable cannot establish unconscionability); *see also Belton v. Comcast Cable Holdings, LLC (2007) 151 Cal. App. 4th 1224, 1245-1247, 60 Cal. Rptr. 3d 631* (cable service provider's requirement that all customers must buy basic tier of cable service was not unconscionable when applied to visually impaired customers wanting only music or FM service without having to take television service as well); *Freeman v. Wal-Mart Stores, Inc. (2003) 111 Cal. App. 4th 660, 667-670, 3 Cal. Rptr. 3d 860* (clearly marked provision imposing service fee on shopping card after 24 months of nonuse was not unconscionable term under *Civ. Code § 1770(a)(19)*)].

- Advertising that a product is being offered at a specific price plus a specific percentage of that price unless (1) the total price is set forth in the advertisement, which may include, but is not limited to, shelf tags, displays, and media advertising, in a size larger than any other price in that advertisement, and (2) the specific price plus a specific percentage of that price represents a markup from the seller's costs or from the wholesale price of the product; this does not apply to in-store advertising by businesses that are open only to members or cooperative organizations organized pursuant to *Corp. Code § 12000 et seq.* when more than 50 percent of purchases are made at the specific price set forth in the advertisement [*Civ. Code § 1770(a)(20)*].

- Selling or leasing goods in violation of *Civ. Code § 1797.8 et seq.* (required advertising disclosures regarding trademark consumer goods normally accompanied by manufacturer's warranty that are imported into this country through unauthorized channels and do not have manufacturer's express warranty) [*Civ. Code § 1770(a)(21)*; *see* Ch. 14, *Advertising*].

- Disseminating an unsolicited prerecorded message by telephone without an unrecorded, natural voice first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or the telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message [*Civ. Code § 1770(a)(22)(A)*]. The prohibition does not apply, however, to a message disseminated to a business associate, customer, or other person having an established relationship with the person or organization making the call, to a call for the purpose of collecting an existing obligation, or to any call generated at the request of the recipient [*Civ. Code § 1770(a)(22)(B)*].

- The home solicitation [*see Civ. Code § 1761(h)* (definition)] of a consumer who is a senior citizen when a loan is made encumbering his or her primary residence for the purpose of paying for home improvements and when the transaction is part of a pattern or practice in violation of *15 U.S.C. § 1639(h)* or *(i)* [*Civ. Code § 1770(a)(23)*]. A third party, however, will not be liable under this subdivision unless (1) there was an agency relationship between the party who engaged in the home solicitation and the third party, or (2) the third party had actual knowledge of, or participated in, the unfair or deceptive transaction [*Civ. Code § 1770(a)(23)*]. A third party who is a holder in due course under a home solicitation contract will not be liable under this subdivision [*Civ. Code § 1770(a)(23)*].

- Charging or receiving an unreasonable fee to prepare, aid, or advise any prospective applicant, applicant, or recipient in the procurement, maintenance, or securing of public social services [*Civ. Code § 1770(a)(24)*; *see Civ. Code § 1780(c)* (treble damages); *see also Civ. Code §§ 1770(a)(24)(c), 1780(c)* (not applicable to attorneys licensed to practice law in California, who are subject to California Rules of Professional Conduct and to mandatory fee arbitration provisions of *Bus. & Prof. Code § 6200 et seq.*, when fees charged or received are for providing representation in administrative agency appeal proceedings or court proceedings for purposes of procuring, maintaining, or securing public social services on behalf of person or group of persons)].

- A mortgage broker or lender's direct or indirect use of a home improvement contractor to negotiate the terms of any loan that is secured, whether in whole or in part, by the residence of the borrower and which is used to finance all or any part of a home improvement contract [*Civ. Code § 1770(b)(1)*]. A "mortgage broker or lender" includes a licensed finance dealer [*see Fin. Code § 22000 et seq.*], a license residential mortgage lender [*see Fin. Code § 50000 et seq.*], or a license real estate broker [*Civ. Code § 1770(b)(1)*; *see Bus. & Prof. Code § 10000 et seq.*].

In addition, other statutes may provide that a violation of their provisions constitutes an unlawful practice within the meaning of *Civ. Code § 1770* [*see, e.g., Civ. Code §§ 1723* (posting of retailer's refund policy), 1797.86 ("grey market goods")].

Civ. Code § 1770(a) proscribes specified acts or practices "in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." An extension of credit, such as by issuing a credit card, if separate and apart from the sale or lease of any specific goods or services, does not fall within the scope of the Act [*Berry v. American Express Publishing, Inc. (2007) 147 Cal. App. 4th 224, 232-233, 54 Cal. Rptr. 3d 91]* .

California Forms of Pleading and Practice--Annotated

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Volume 44: Sales thru Sanitation and Sewerage Districts-Chs. 500-511
Chapter 504 SALES: CONSUMERS LEGAL REMEDIES ACT
PART II. LEGAL BACKGROUND

44-504 California Forms of Pleading and Practice--Annotated § 504.13

§ 504.13 Remedies and Procedures

[1] Damages and Other Relief

The act provides that any consumer who suffers any damage as a result of the use or employment by any person of an unlawful act, method, or practice [*see Civ. Code § 1770, set out in § 504.12*] may bring an action against that person for restitution of property, or to recover damages, punitive damages, injunctive relief, and any other relief that the court deems proper [*Civ. Code § 1780(a)*]. The phrase "any damage" in *Civ. Code § 1780(a)* is not synonymous with "actual damages." The breadth of the phrase "any damage" indicates a category that includes, but is greater than, "actual damages"; that is, those who are eligible for the remedy of "actual damages" compose a subset of those who have suffered "any damage" [*Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 640, 88 Cal. Rptr. 3d 859, 200 P.3d 295*]. In order to bring an action, not only must a consumer be exposed to an unlawful practice, but also some kind of damage must result [*Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 641, 88 Cal. Rptr. 3d 859, 200 P.3d 295*].

Incurring transaction costs--for instance, expending time and money in threatening a lawsuit--in order to avoid the consequences of a deceptive practice falls within the broad meaning of suffering "any damage as a result of the use or employment" of an unlawful practice, whether or not those transaction costs are cognizable as actual damages [*Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 641, 643, 88 Cal. Rptr. 3d 859, 200 P.3d 295*]. As another example, a consumer could have incurred "opportunity costs" if a merchant's use of an unlawful practice "diverted" the consumer from dealing with another merchant on acceptable terms [*Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 640, 88 Cal. Rptr. 3d 859, 200 P.3d 295*]. On the other hand, a consumer has not suffered any damage as a result of an unlawful practice if unconscionable terms in a consumer contract have not yet actually been enforced so as to impose "some kind of tangible increased cost or burden" on the consumer. In that situation, the consumer has no standing under *Civ. Code § 1780(a)* to sue for injunctive relief aimed at precluding the future use of an unlawful practice [*Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 643, 88 Cal. Rptr. 3d 859, 200 P.3d 295*].

For a complaint for damages for violation of the Act, see *§ 504.31*.

[2] Damage Claims Are Arbitrable

When there is an arbitration agreement between the consumer and the defendant, claims for damages under the Consumers Legal Remedies Act are arbitrable, at least to the extent those claims are governed by the Federal Arbitration Act. However, claims for injunctive relief in which the plaintiff is acting as private attorney general (a claim seeking to enjoin deceptive business practices), for example, are not arbitrable, even though hearing the damage claims and the claim for injunctive relief in separate forums is inefficient [*Broughton v. Cigna Healthplans of California (1999) 21 Cal. 4th 1066, 1072, 1079-1080, 1088, 90 Cal. Rptr. 2d 334, 988 P.2d 67* ; *see* *Cruz v. Pacificare Health Systems, Inc. (2003) 30 Cal. 4th 303, 307, 133 Cal. Rptr. 2d 58, 66 P.3d 1157* (finding that *Broughton*'s holding on non-arbitrability of CLRA public injunctions should be extended to include claims to enjoin unfair competition under *Bus. & Prof. Code § 17200 et seq.* and misleading advertising under *Bus. & Prof. Code § 17500 et seq.*)]. *Broughton* was based in part on the strong policy of the Federal Arbitration Act favoring arbitration, but California's policy favoring arbitration is also strong. Therefore, claims that were not governed by the Federal Arbitration Act probably also would be arbitrable.

For discussion and forms for initiating or resisting arbitration pursuant to an arbitration agreement between the parties, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

[3] Attorney's Fees

The court will award court costs and attorney's fees to a prevailing plaintiff in litigation filed pursuant to *Civ. Code § 1780* [*Civ. Code § 1780(e)*; *see, e.g.,* *Graciano v. Robinson Ford Sales, Inc. (2006) 144 Cal. App. 4th 140, 149-164, 50 Cal. Rptr. 3d 273* (how to determine whether plaintiff has prevailed, and how to compute amount of fees to which plaintiff is entitled); *Hayward v. Ventura Volvo (2003) 108 Cal. App. 4th 509, 513, 133 Cal. Rptr. 2d 514* (prevailing plaintiff is entitled to "reasonable" fees, although word is omitted from statute; court was not limited in awarding fees to those incurred under contingency fee contract); *Reveles v. Toyota By the Bay (1997) 57 Cal. App. 4th 1139, 1154, 67 Cal. Rptr.2d 543* (entitlement to attorney's fees for net recovery on violations of *Civ. Code § 1770(a)(5)-(7)*)]. Reasonable attorney's fees may be awarded to a prevailing defendant on a finding by the court that the plaintiff's prosecution of the action was not in good faith [*Civ. Code § 1780(e)*].

If the plaintiff moves for attorney's fees pursuant to *Civ. Code § 1780(d)*, generally the court is required to determine whether the plaintiff is the prevailing party and, if so, what amount is to be awarded to the plaintiff. The court must do this even if the action is concluded by a settlement. However, if the parties have agreed that attorney's fees are not to be awarded pursuant to *Civ. Code § 1780(d)*, then the court must give effect to that agreement [*Kim v. Euromotors West/The Auto Gallery (2007) 149 Cal. App. 4th 170, 178-181, 56 Cal. Rptr. 3d 780* (stating guidelines for determining whether plaintiff is prevailing party)].

[4] Additional Awards to Senior Citizen or Disabled Person

In an action under *Civ. Code § 1780(a)*, any consumer who is a senior citizen or a disabled person, as defined in *Civ. Code § 1761(f)* and *(g)*, respectively [*see* definitions in § 504.10[2] and [6]], may seek and be awarded, in addition to the remedies provided in *Civ. Code § 1780(a)*, up to $5,000 [*Civ. Code § 1780(b)*]. Before making that award, the trier of fact must do all of the following [*Civ. Code § 1780(b)(1)*]:

- Find that the consumer has suffered substantial physical, emotional, or economic damages resulting from the defendant's conduct;

- Make an affirmative finding in regard to one or more of the factors set forth in *Civ. Code § 3345(b)* (discussed *below*); and

- Find that an additional award is appropriate.

In addition, *Civ. Code § 3345* provides for increasing any applicable fine, penalty, or other remedy up to three times the amount authorized or to be imposed in actions brought by, on behalf of, or for the benefit of senior citizens or disabled persons (as defined in *Civ. Code § 1761(f)* and *(g)*, respectively), to redress unfair or deceptive acts or practices or unfair methods of competition [*see Civ. Code § 3345(a)*]. If a trier of fact is authorized by a statute in an action to impose either a fine or a civil penalty or other penalty, or any remedy the purpose or effect of which is to punish or deter, and the amount of the fine, penalty, or other remedy is subject to the trier of fact's discretion, the trier of fact must consider all of the factors listed below, in addition to other appropriate factors, in determining the amount of the fine, civil penalty or other penalty, or other remedy to impose. If the trier of fact makes an affirmative finding in regard to one or more of the factors listed below, it may impose a fine, civil penalty or other penalty, or other remedy in an amount up to three times greater than authorized by the statute, or, when the statute does not authorize a specific amount, up to three times greater than the amount the trier of fact would impose in the absence of that affirmative finding [*Civ. Code § 3345(b)*]. The following are the factors to be considered [*Civ. Code § 3345(b)*]:

- Whether the defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons.

- Whether the defendant's conduct caused one or more senior citizens or disabled persons to suffer loss or encumbrance of a primary residence, principal employment, or source of income; substantial loss of property set aside for retirement, or for personal or family care and maintenance; or substantial loss of payments received under a pension or retirement plan or a government benefits program, or assets essential to the health or welfare of the senior citizen or disabled person.

- Whether one or more senior citizens or disabled persons are substantially more vulnerable than other members of the public to the defendant's conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damages resulting from the defendant's conduct.

For a form with allegations to be used in a complaint by senior or disabled plaintiffs to redress unfair or deceptive acts or practices or unfair methods of competition, *see § 504.33*.

[5] Advertising Medium Excluded

An action under the act may not be brought against an owner or employee of any advertising medium, including, but not limited to, newspapers, magazines, broadcast stations, billboard and transit ads, who publishes or disseminates an advertisement in violation of the act, unless plaintiff establishes that the owner or employee had knowledge of deceptive methods, acts, or practices declared to be unlawful by *Civ. Code § 1770* [*Civ. Code § 1755*]. For a form for an allegation of the advertiser's guilty knowledge, see § 504.34. For an affirmative defense for use by an advertiser who does not know of the deceptive practice, see Ch. 14, *Advertising* .

[6] Precomplaint Notice and Demand

At least 30 days prior to the commencement of any action for damages, the consumer must notify the potential defendant of the particular alleged violations, and demand correction, repair, replacement, or other rectification of the goods or services allegedly in violation of the act. The notice must be in writing and sent by certified or registered mail, return receipt requested, to the place where the transaction occurred or to the person's principal place of business within California [*Civ. Code § 1782(a)*]. The notice may concern an individual grievance or a grievance that affects a class of consumers [*see Kagan v. Gibraltar Sav. & Loan Assn. (1984) 35 Cal. 3d 582, 591, 200 Cal. Rptr. 38, 676 P.2d 1060 , disapproved on other grounds, Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 643, 88 Cal. Rptr. 3d 859, 200 P.3d 295*]. For a form for notice and demand, see *§ 504.30*.

An action for injunctive relief under the act can be commenced without compliance with these precomplaint notice provisions. The plaintiff may amend his or her complaint for injunctive relief, without leave of court, to include a request for damages not less than 30 days after the commencement of the action for injunctive relief and after compliance with the precomplaint notice provisions. When the complaint is so amended, the defendant must be given an opportunity to remedy the violation, as discussed in *§ 504.13[7]* [*see Civ. Code § 1782(d)*].

When a consumer commences an action for injunctive relief and then amends the complaint to add a claim for damages, without having given the prescribed notice, and the defendant asserts that the claim for damages is procedurally unviable because of noncompliance with the notice requirement, the court's response to the defendant's assertion may not foreclose the plaintiff from giving the required notice, then waiting for 30 days for sufficient remedial measures by the defendant, and, if an action for damages then can be maintained [*see Civ. Code § 1782(b)*; § 504.13[7]], filing another amended complaint in which the plaintiff alleges compliance with the notice requirement [*Morgan v. AT&T Wireless Servs. (2009) 177 Cal. App. 4th 1235, 1260-1261, 99 Cal. Rptr. 3d 768* (trial court erred in sustaining demurrer to amended complaint without leave to amend, based on plaintiff's inability to allege that required notice was given before commencement of action)].

[7] Corrective Steps by Potential Defendant as Defense

Except for class actions under *Civ. Code § 1781* [*see* discussion in *§ 504.13[9][g]*], an action for damages may not be maintained under the provisions of *Civ. Code § 1780* if an appropriate correction, repair, replacement, or other remedy is given, or agreed to be given within a reasonable time, to the consumer within 30 days after receipt of the notice required by *Civ. Code § 1782(a)* [*Civ. Code § 1782(b)*; *see* [6], § 504.13[6]]. This provision only applies, however, if the notice given to the potential defendant concerned an individual grievance. If the notice concerned a grievance that affects a class of consumers, a prospective defendant can avert a subsequent class action only by remedying the contested practices as to all affected consumers [*Kagan v. Gibraltar Sav. & Loan Assn. (1984) 35 Cal. 3d 582, 591, 200 Cal. Rptr. 38, 676 P.2d 1060 , disapproved on other grounds, Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 643, 88 Cal. Rptr. 3d 859, 200 P.3d 295*].

Attempts by the potential defendant to comply with the precomplaint notice provisions of *Civ. Code § 1782* are construed as an offer to compromise and are inadmissible as evidence pursuant to *Evid. Code § 1152*; furthermore, attempts to comply with a demand are not considered an admission of engaging in an act or practice declared unlawful by the act. Evidence of compliance or attempts to comply with the provisions of *Civ. Code § 1782* may be introduced by a defendant for the purpose of establishing good faith or to show compliance [*Civ. Code § 1782(e)*].

[8] Declaration of Proper Court

In any action subject to *Civ. Code § 1780*, concurrently with the filing of the complaint, the plaintiff is required to file an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) stating facts showing that the action has been commenced in a county described in *Civ. Code § 1780(d)* as a proper place for the trial of the action. If the plaintiff fails to file the required affidavit or declaration, the court, either on its own motion or on the motion of any party, must dismiss the action without prejudice [*Civ. Code § 1780(d)*; *see* discussion in *§ 504.31[6]*]. For a form for this declaration, see *§ 504.32*.

[9] Class Actions

[a] Requirements

If an unlawful method, act, or practice has caused damage to other consumers similarly situated, a consumer entitled to bring an action under *Civ. Code § 1780* may bring an action on behalf of himself or herself and the other consumers to recover damages or obtain other relief as provided in *Civ. Code § 1780* [*Civ. Code § 1781(a)*]. *Civ. Code § 1780(a)(1)* provides that the total award of actual damages in a class action may not be less than $1,000 [*Civ. Code § 1780(a)(1)*].

An individual consumer may bring a class action under *Civ. Code § 1781(a)* if, pursuant to *Civ. Code § 1782(a)*, he or she has put the prospective defendant on notice that the alleged violations of *Civ. Code § 1770* affect a class of consumers, and the prospective defendant has failed to correct or to seek to correct the violations as to all similarly situated consumers pursuant to the conditions set forth in *Civ. Code § 1782(c)* [*Kagan v. Gibraltar Sav. & Loan Assn. (1984) 35 Cal. 3d 582, 595, 200 Cal. Rptr. 38, 676 P.2d 1060 , disapproved on other grounds, Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 643, 88 Cal. Rptr. 3d 859, 200 P.3d 295*].

Civ. Code § 1781(b) establishes the exclusive criteria for class certification of suits brought under the Consumers Legal Remedies Act [*Hogya v. Superior Court (1977) 75 Cal. App. 3d 122, 140, 142 Cal. Rptr. 325]* . The fact that damages are not even a necessary objective of a consumer class-suit under the Consumers Legal Remedies Act casts doubt that the Legislature intended the certification of a class action could be denied on the ground that individual monetary recovery will be slight [*see Hogya v. Superior Court (1977) 75 Cal. App. 3d 122, 138, 142 Cal. Rptr. 325]* .

[b] Class Action by Senior Citizens or Disabled Persons

Judgment in a class action under *Civ. Code § 1781* brought by senior citizens or disabled persons (as defined in *Civ. Code § 1761(f)* and *(g)*, respectively) may award each class member the additional award if the trier of fact has made the findings discussed under [4], *above* [*Civ. Code § 1780(b)(2)*].

[c] Necessary Conditions

The court must permit the suit to be maintained on behalf of all members of the represented class if all of the following conditions exist [*Civ. Code § 1781(b)*]:

- It is impracticable to bring all members of the class before the court;
- The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members;
- The claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class; and
- The representative plaintiffs will fairly and adequately protect the interests of the class.

If these conditions are met, the trial court must certify the class. It has no discretion to deny certification based on other considerations [*Hogya v. Superior Court (1977) 75 Cal. App. 3d 122, 140, 142 Cal. Rptr. 325]* .

[d] Determinations at Hearing

If notice of the time and place of the hearing is served on the other parties at least 10 days prior to the date of the hearing (or any longer period provided in *Code Civ. Proc. § 1013* if the notice is served by mail), the court must hold a hearing, on motion of any party to the action that is supported by affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) of anyone having knowledge of the facts, to determine if any of the following apply to the action [*Civ. Code § 1781(c)*]:

- A class action pursuant to *Civ. Code § 1781(b)* [*see* discussion in [c], *above*] is proper;
- Published notice pursuant to *Civ. Code § 1781(d)* [*see* discussion in [e], *below*] is necessary to adjudicate the claims of the class; or

- The action is without merit or there is no defense to the action.

This provision is in lieu of a motion for summary judgment [*Code Civ. Proc. § 437c*], which may not be granted by the court in any action commenced as a class action pursuant to *Civ. Code § 1781(a)* [*Civ. Code § 1781(c)(3)*; *Olsen v. Breeze, Inc. (1996) 48 Cal. App. 4th 608, 623-624, 55 Cal. Rptr. 2d 818* ; *see also* [a], *above*]. For notices of motion that may be adopted for the determination of these issues, see Ch. 120, *Class Actions* .

[e] Notification of Class Members

If the action is permitted as a class action, the court may direct either party to notify each member of the class of the action. If personal notification is unreasonably expensive or it appears that all members of the class cannot be notified personally, the party directed to serve notice may, with the court's consent, give notice by publication, in accordance with *Gov. Code § 6064*, in a newspaper of general circulation in the county in which the transaction occurred [*Civ. Code § 1781(d)*].

The notice must include the following information [*Civ. Code § 1781(f)*]:

- That the court will exclude the member notified from the class if he or she so requests by a specified date;

- That the judgment, whether favorable or not, will include all members who do not request exclusion; and

- That any member who does not request exclusion may enter an appearance through counsel if he or she desires.

The trial court, under its general authority, may impose notice costs pursuant to *Civ. Code § 1781(d)* on either party in the class action [*Civil Serv. Employees Ins. Co. v. Superior Court (1978) 22 Cal. 3d 362, 376, 149 Cal. Rptr. 360, 584 P.2d 497]* .

[f] Dismissal Procedures

A class action may not be dismissed, settled, or compromised without court approval, and notice of the proposed dismissal, settlement, or compromise must be given in any manner the court directs to each member who was given notice pursuant to *Civ. Code § 1781(d)* [*see* discussion in [e], *above*] and did not request exclusion [*Civ. Code § 1781(f)*]. The foregoing procedures are intended to prevent class members in future litigation from reviving the matters compromised [*Marcarelli v. Cabell (1976) 58 Cal. App. 3d 51, 57, 129 Cal. Rptr. 509]* .

[g] Statutory Defense to Class Action

Even though the conditions exist for a class action as provided in *Civ. Code § 1781(b)*, a class action may not be maintained if the potential defendant shows that all of the following exist [*Civ. Code § 1782(c)*; *see* *Kagan v. Gibraltar Sav.& Loan Assn. (1984) 35 Cal. 3d 582, 591, 595, 200 Cal. Rptr. 38, 676 P.2d 1060 , disapproved on other grounds,* *Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 643, 88 Cal. Rptr. 3d 859, 200 P.3d 295*]:

- All consumers similarly situated have been identified, or a reasonable effort to identify those other consumers has been made;

- All consumers so identified have been notified that on their request the potential defendant will make

the appropriate correction, repair, replacement, or other remedy of the goods and services;

- The correction, repair, replacement, or other remedy requested by those consumers has been, or in a reasonable time will be, given; and

- The potential defendant has ceased from engaging, or if immediate cessation is impossible or unreasonably expensive under the circumstances, he or she will, within a reasonable time, cease to engage, in those methods, acts, or practices.

[h] Judgment in Class Action

The judgment in a class action describes those to whom the notice was directed and who have not requested exclusion and those the court finds to be members of the class. The best possible notice of the judgment must be given in the manner the court directs to each member who was personally served with notice pursuant to *Civ. Code § 1781(d)* [*see* discussion in [e], *above*] and did not request exclusion [*Civ. Code § 1781(g)*].

[i] Recovery of Attorney's Fees

Recovery of attorney's fees in a class action is authorized by *Civ. Code § 1780(e)*, discussed in [3], *above*. Attorney's fees in class actions have been awarded under other theories, including the substantial benefit theory, the common fund principle, and the private attorney general theory, which may be relevant to calculation of the amount of attorney's fees provided for by *Civ. Code § 1780(e)*. Those theories are discussed in *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

[j] Payment of Damages to Class Members

Neither the act nor other statutory provision specifies a procedure for the payment of damages to consumers represented in a class action under *Civ. Code § 1781*. In the absence of a local court rule or practice specifying a particular procedure, a receiver may be appointed to carry the judgment into effect and after the judgment to dispose of the property according to the judgment [*see Code Civ. Proc. § 564(b)(3), (4)*; *see also* Ch. 486, *Receivers*].

[k] Act's Class Action Remedy Not Exclusive

Nothing in the act limits any other statutory or any common law rights of the Attorney General or any other person to bring class actions. Class actions by consumers brought under the act are governed exclusively by the provisions of the act. However, the consumer is not deprived of any statutory or common law right to bring a class action without resort to the act. If any act or practice proscribed under the act also constitutes a cause of action in common law or a violation of another statute, the consumer can assert that common law or statutory cause of action under the procedures and with the remedies provided for in that law [*Civ. Code § 1752*].

[l] Effect of Choice of Law Provision in Contract

A consumer contract, especially the usual kind of contract of adhesion (such as a credit card agreement), commonly contains a provision specifying that the parties' rights and obligations will be governed, not by California law, but by the law of another state. That law often will have rules that are not in the consumer's interest, since the choice of governing law is dictated by the other party, and naturally the law selected tends to favor that party. Under Delaware law (which is chosen in many cases), one such rule holds that a class action waiver, if clearly stated in the contract, is enforceable. When the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent that the obligation at issue is governed by California law, the waiver becomes in

practice what is prohibited by statute: the exemption of the stronger party from responsibility for its own fraud, or willful injury to the person or property of another [*see Civ. Code § 1668*]. Under these circumstances, those waivers are unconscionable under California law and should not be enforced [*Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 162-163, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* ; *Szetela v. Discover Bank (2002) 97 Cal. App. 4th 1094, 1099-1102, 118 Cal. Rptr. 2d 862]* . This is a "fundamental policy" of California, in the context of resolving a choice of law issue [*Klussman v. Cross Country Bank (2005) 134 Cal. App. 4th 1283, 1294, 36 Cal. Rptr. 3d 728]* . For discussion of how courts resolve choice of law issues and the significance of a state's fundamental policy in that context, see Ch. 140, *Contracts*, § 140.30.

In a case brought under the Consumers Legal Remedies Act, if the plaintiff pursues a class action the court might have to determine whether to give effect to a foreign law rule under which a class action waiver would be enforceable, when under California's fundamental policy the waiver would not be enforceable. Since the plaintiff would be asserting claims under California law, the court might well conclude that California's interest in enforcing its fundamental policy is greater than the other state's interest in enforcing its contrary law [*Klussman v. Cross Country Bank (2005) 134 Cal. App. 4th 1283, 1298-1300, 36 Cal. Rptr. 3d 728* (trial court correctly ruled that class action waiver in consumer contract of adhesion governed by Delaware law could not be enforced in action under Consumers Legal Remedies Act and California's unfair competition law)].

[10] Defense of Bona Fide Error

No award of damages may be given in an action based on violation of the act if the alleged violator proves that the violation was not intentional and was the result of a bona fide error, notwithstanding the use of reasonable procedures adopted to avoid any such error, and he or she takes appropriate corrective measures of *Civ. Code § 1782(b), (c)* discussed in *§ 504.13[7]* and *[9][g]* [*Civ. Code § 1784*]. Moreover, evidence of compliance or attempts to comply with the corrective measures set out in *Civ. Code § 1782(b), (c)* may be introduced by a defendant for the purpose of establishing good faith or showing compliance with the provisions of *Civ. Code § 1782(b), (c)* [*Civ. Code § 1782(e)*]. For an affirmative defense alleging bona fide error, see *§ 504.40*. (Although *Civ. Code § 1784* does not explicitly remove mistakes of law from the scope of the "bona fide error" defense--whereas some other statutes allowing the same defense do exclude mistakes of law--the defense probably does not cover a violation that arose from the defendant's mistaken interpretation of statutory requirements [*cf.* *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA (2010) -- U.S. --, 130 S. Ct. 1605, 176 L. Ed. 2d 519, 2010 U.S. LEXIS 3480, at *15-*59* (such defense allowed by Fair Debt Collection Practices Act, *15 U.S.C. § 1692k(c)*, in same language as *Civ. Code § 1784*, did not cover debt-collecting attorney's mistake of law as to Act's requirements)].)

[11] Statute of Limitation

Any action under the act for unlawful practice must be commenced not more than three years from the date of commission of that unlawful practice [*Civ. Code § 1783*].

[12] Consumer Product Bought Through Web Site--Personal Jurisdiction of Seller

While it is possible that Internet activity alone could create the necessary minimum contacts to expose a nonresident defendant to personal jurisdiction in California courts, that issue must be determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the defendant's web site [*Pavlovich v. Superior Court (2002) 29 Cal. 4th 262, 274, 127 Cal. Rptr. 2d 329, 58 P.3d 2* ; *see Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances, § 323.14[4][b]*]. A disgruntled California consumer will not necessarily be able to sue a nonresident seller in a California court. In one case, for instance, a Florida seller's web site merely advertised a consumer product (a car) for sale, which a California resident bought after initiating contact with the seller. There was no evidence that files were exchanged through the web site or that any business was actually conducted through the web site, nor any evidence that anything about the web site specifically targeted California

residents, and the seller had none of the traditionally sufficient ties with California to establish minimum contact. Therefore, the seller's maintenance of the web site alone was insufficient to establish personal jurisdiction when the California consumer sued the seller in a California court for rescission or damages [*Shisler v. Sanfer Sports Cars, Inc. (2007) 146 Cal. App. 4th 1254, 1260-1262, 53 Cal. Rptr. 3d 335]* .

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[Reserved]

§§ 504.14[Reserved]

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§ 504.20 Federal Statutes

Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. *15 U.S.C. § 2301 et seq.*

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44-504 California Forms of Pleading and Practice--Annotated § 504.21

§ 504.21 State Statutes

[1] Consumers Legal Remedies Act

[a] General Provisions

Civ. Code § 1750 et seq. cited as Consumers Legal Remedies Act. *Civ. Code § 1750*

Waiver of provision of act is unenforceable and void. *Civ. Code § 1751*

Provisions of act not exclusive. *Civ. Code § 1752*

Nothing in act affects right to bring class action. *Civ. Code § 1752*

Unconstitutional provision does not affect remaining provisions of act. *Civ. Code § 1753*

Provisions of act do not apply to construction or sale of an entire residence, to structures designed for commercial or industrial occupancy, or to sale of parcel of real property. *Civ. Code § 1754*

[b] Class Actions Under Consumers Legal Remedies Act

Right of consumer to bring class action. *Civ. Code § 1781(a)*

Conditions precedent to class action. *Civ. Code § 1781(b)*

Notice and hearing procedures as to determination of right to bring class action. *Civ. Code § 1781(c)*

Procedures as to notification of class members of class action. *Civ. Code § 1781(d)*

Contents of notice to class members. *Civ. Code § 1781(e)*

Requirement of court approval of dismissal, settlement, or compromise of class action. *Civ. Code § 1781(f)*

Judgment and notice in class actions. *Civ. Code § 1781(g)*

Effect of attempts to comply with notice and demand on right to bring class action for damages. *Civ. Code § 1782(c)*

[c] Construction and Definitions

Act liberally construed. *Civ. Code § 1760*

"Goods" defined. *Civ. Code § 1761(a)*

"Services" defined. *Civ. Code § 1761(b)*

"Person" defined. *Civ. Code § 1761(c)*

"Consumer" defined. *Civ. Code § 1761(d)*

"Transaction" defined. *Civ. Code § 1761(e)*

[d] Deceptive Practices

Delineation of unlawful practices constituting unfair methods of competition and unfair or deceptive acts or practices. *Civ. Code § 1770* Failure to post policy limiting buyer's right to return goods for refund or exchange to less than seven days is subject to remedies provided by Consumers Legal Remedies Act. *Civ. Code § 1723*

Sale of "grey market goods" is deceptive practice under *Civ. Code § 1770*. *Civ. Code § 1797.86*

[e] Remedies and Procedures

Action for actual damages, injunction, restitution punitive damages, and other relief. *Civ. Code § 1780(a)*

Additional award in action by senior or disabled plaintiff. *Civ. Code §§ 1780(b), 3345(b)*

Proper court for trial of action by consumer. *Civ. Code § 1780(d)*

Requirement of affidavit, or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*], as to commencement of action in proper court for trial. *Civ. Code § 1780(d)*

Attorney's fees. *Civ. Code § 1780(e)*

Conditions precedent to right to bring action for damages consists of notice of unlawful practice and demand for correction thereof. *Civ. Code § 1782(a)*

Compliance with notice and demand forecloses right to bring action for damages. *Civ. Code § 1782(b)*

Action for injunctive relief does not require prior notice and demand. *Civ. Code § 1782(d)*

Evidentiary treatment of attempts to comply with requirements of *Civ. Code § 1782*. *Civ. Code § 1782(e)*

No damage award for unintentional violations of act if correction made. *Civ. Code § 1784*

[f] Statute of Limitation

Action under act for unlawful practice must be commenced not more than three years from date of commission of unlawful practice. *Civ. Code § 1783*

[2] Receivers

In absence of local court rule specifying particular procedure, receiver may be appointed to carry class action judgment into effect and to dispose of property according to judgment. *Code Civ. Proc. § 564(b)(3), (4)*

[3] Related Acts and Provisions

Contracts or combinations in restraint of trade. *Bus. & Prof. Code § 16600 et seq.*

Cartwright Act on combinations in restraint of trade. *Bus. & Prof. Code § 16750*

Unfair Practices Act. *Bus. & Prof. Code § 17000 et seq.*

Provisions to enjoin acts of unfair competition. *Bus. & Prof. Code § 17200 et seq.*

Provisions prohibiting false representations to public. *Bus. & Prof. Code § 17500 et seq.*

Home solicitation contracts. *Bus. & Prof. Code §§ 17500.3, 17533.8*; *Civ. Code § 1689.5 et seq.*

Unsolicited goods or services. *Civ. Code §§ 1584.5, 1584.6, 1616*

Song-Beverly Consumer Warranty Act. *Civ. Code § 1790 et seq.*

Unruh Retail Installment Sales Act. *Civ. Code § 1801 et seq.*

Dance Studio Act. *Civ. Code § 1812.50 et seq.*

Health Studio Act. *Civ. Code § 1812.80 et seq.*

Discount buying services. *Civ. Code § 1812.100 et seq.*

Rees-Levering Motor Vehicle Sales and Finance Act. *Civ. Code § 2981 et seq.*

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§ 504.22 California Rules of Court

Ex parte appointment, confirmation, and miscellaneous provisions on receivers. *Cal. Rules of Ct., Rule 3.1175 et seq.*

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§ 504.23 Decisions

[1] Class Actions

[a] In General

[i] Attorney's Fees

Plaintiff successfully protecting, preserving, or increasing fund for benefit of himself and others is entitled to compensation from fund for services of attorney. *Estate of Reade (1948) 31 Cal. 2d 669, 671-672, 191 P.2d 745*

Attorney's fees in class action payable out of moneys recovered for joint benefit of class members for which plaintiff has prosecuted action. *Farmers etc. Nat'l Bank v. Peterson (1936) 5 Cal. 2d 601, 607, 55 P.2d 867*

[ii] Effect of Judgment

Class action judgment is res judicata as to claims of members represented. *Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 704, 63 Cal. Rptr. 724, 433 P.2d 732*

[b] Class Actions Under Consumers Legal Remedies Act

[i] Imposition of Notice Costs

California trial courts clearly possess general authority to impose notice costs pursuant to *Civ. Code § 1781(d)* on either party in class action. *Civil Serv. Employees Ins. Co. v. Superior Court (1978) 22 Cal. 3d 362, 376, 149 Cal. Rptr. 360, 584 P.2d 497*

[ii] Procedural Matters

Procedural devices of Federal Rules of Civil Procedure may be used when provisions of *Civ. Code § 1781* of Consumers Legal Remedies Act are inadequate to encompass all procedural problems facing trial court in class actions. *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 821, 94 Cal. Rptr. 796, 484 P.2d 964*

Civ. Code § 1781(f), dealing with dismissals and compromises in class action suits, is intended to prevent class members in future litigation from reviving the matters compromised. *Marcarelli v. Cabell (1967) 58 Cal. App. 3d 51, 57, 129 Cal. Rptr. 509*

[iii] Requisites of Action

Conditions precedent to class action; plaintiff must put prospective defendant on notice that alleged violations of *Civ. Code § 1770* affect class of consumers, and prospective defendant has failed to correct or to seek to correct violations as to all similarly situated consumers pursuant to conditions set forth in *Civ. Code § 1782(c).* *Kagan v. Gibraltar Sav. & Loan Assn. (1984) 35 Cal. 3d 582, 595, 200 Cal. Rptr. 38, 676 P.2d 1060 , disapproved on other grounds,* *Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 643, 88 Cal. Rptr. 3d 859, 200 P.3d 295*

To obtain relief in class action, both named plaintiff and class members must have suffered some damage caused by practice deemed unlawful under *Civ. Code § 1770*; that damage is "any damage," which is not synonymous with "actual damages" and may encompass harms other than pecuniary damages; putative class plaintiff was entitled to show that defendant's alleged deceptive conduct--namely, selling drug product over-the-counter without disclosing that product was unlawful to buy or possess without prescription--caused same damage to all members of class, by showing that alleged misrepresentation was material, even if defendant might be able to show that some class members would have bought its product even if they had known that product was unlawful to buy or possess without prescription; on showing that material misrepresentations were made to class members, putative class plaintiff would at least raise inference of reliance and therefore damage as to entire class; and that showing could be made because any reasonable person would find it important to know, when determining whether to buy particular product, that it is unlawful to buy or possess that product without prescription, since no reasonable person would knowingly commit criminal act. *Steroid Hormone Prod. Cases (2010) 181 Cal. App. 4th 145, 155-157, 104 Cal. Rptr. 3d 329*

Evidence supported trial court's conclusion that whether drug manufacturer's misrepresentations were material, and therefore induced reliance, was matter on which individual issues prevailed over common issues, justifying denial of class certification with respect to claim under *Consumers Legal Remedies Act. In re Vioxx Class Cases (2009) 180 Cal. App. 4th 116, 134, 103 Cal. Rptr. 3d 83*

Civ. Code § 1781(b) establishes exclusive criteria for class certification suits brought under *Consumers Legal Remedies Act. Hogya v. Superior Court (1977) 75 Cal. App. 3d 122, 140, 142 Cal. Rptr. 325*

Fact that damages are not necessary in consumer class suit under Consumers Legal Remedies Act casts doubt that Legislature intended certification of class action could be denied on ground that individual monetary recovery will be slight. *Hogya v. Superior Court (1977) 75 Cal. App. 3d 122, 138, 142 Cal. Rptr. 325*

[2] Consumers Legal Remedies Act

[a] Arbitrability of Damage Claims

When there is an arbitration agreement between consumer and defendant, claims for damages under CLRA are arbitrable, at least to extent those claims are governed by Federal Arbitration Act; however, claims for injunctive relief in which plaintiff is acting as private attorney general are not arbitrable. *Broughton v. Cigna Healthplans of*

California (1999) 21 Cal. 4th 1066, 1072, 1079-1080, 1088, 90 Cal. Rptr. 2d 334, 988 P. 2d 67 ; *see* *Cruz v. Pacificare Health Systems, Inc. (2003) 30 Cal. 4th 303, 307, 133 Cal. Rptr. 2d 58, 66 P.3d 1157* (finding that *Broughton*'s holding on inarbitrability of CLRA public injunctions should be extended to include claims to enjoin unfair competition under *Bus. & Prof. Code § 17200 et seq.* and misleading advertising under *Bus. & Prof. Code § 17500 et seq.*)

[b] Attorney's Fees

Prevailing plaintiff is entitled to attorney's fees for net recovery for violations of *Civ. Code § 1770(a)(5), (6)* & *(7). Reveles v. Toyota By the Bay (1997) 57 Cal. App. 4th 1139, 1154, 67 Cal. Rptr. 2d 543*

[c] Requisites of Action

In action in U.S. district court, claim based on violation of CLRA is subject to *Fed. R. Civ. P. 9(b),* which mandates that allegations of fraud must be pleaded with particularity; failure to plead with required particularity warrants dismissal. *Kearns v. Ford Motor Co. (9th Cir. 2009) 567 F.3d 1120, 1127*

In order to bring action, not only must consumer be exposed to unlawful practice, but also some kind of damage must result; consumer has not suffered any damage as result of unlawful practice if unconscionable terms in consumer services contract have not yet actually been enforced so as to impose transaction costs on consumer; in that situation, consumer has no standing under *Civ. Code § 1780(a)* to sue for injunctive relief aimed at precluding future use of unlawful practice. *Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 643, 88 Cal. Rptr. 3d 859, 200 P.3d 295*

[d] Unlawful Practices

Manufacturer's limited-period express warranty could not be construed as implicit representation that product had any characteristic it did not have or was of particular standard or quality when it was not [*see Civ. Code § 1770(a)(5), (7)*], even if, at time of making warranty, manufacturer knew of, and did not disclose, latent defect that could result in valid claim if it became manifest during warranty period. *Daugherty v. American Honda Motor Co. (2006) 144 Cal. App. 4th 824, 833-837, 51 Cal. Rptr. 3d 118*

Plaintiffs' claim for violation of CLRA failed because complaint neither alleged facts showing defendant was bound to disclose its use of inferior tubular steel exhaust manifolds (in lieu of superior cast iron manifolds), nor alleged facts showing defendant gave any information of other facts which could have likely effect of misleading public for want of communication of fact it used tubular steel exhaust manifolds, nor alleged any affirmative representation by defendant regarding exhaust manifolds. *Bardin v. DaimlerChrysler Corp. (2006) 136 Cal. App. 4th 1255, 1276, 39 Cal. Rptr. 3d 634*

Triable issues of fact existed on whether provider of satellite TV service violated *Civ. Code § 1770(a)(5), (7), (9)* with representations concerning number of channels and program schedule. *Consumer Advocates v. Echostar Satellite Corp. (2003) 113 Cal. App. 4th 1351, 1353-1354, 8 Cal. Rptr. 3d 22*

Clearly marked provision imposing service fee on shopping card after 24 months of nonuse was not unconscionable term under *Civ. Code § 1770(a)(19)*; take-it-or-leave-it situation without any reasonable alternative but to accept shopping card terms did not exist, as plaintiff could use card before imposition of fee or simply decline to purchase shopping card and make purchases by other means. *Freeman v. Wal-Mart Stores, Inc. (2003) 111 Cal. App. 4th 660, 667-670, 3 Cal. Rptr. 3d 860*

Claim based on former *Civ. Code § 1770(s)* (*now see Civ. Code § 1770(a)(19)*; unconscionable provision in contract) required plaintiff to show (1) oppression, which refers to inequality of bargaining power resulting in no real negotiation and the absence of meaningful choice, and (2) surprise, which occurs when supposedly agreed-on terms of bargain are hidden in prolix printed form drafted by a party seeking to enforce disputed terms; element of oppression was absent when plaintiff had reasonably available alternative sources of supply from which to obtain desired goods or services free of terms claimed to be unconscionable. *Dean Witter Reynolds, Inc. v. Superior Court (1989) 211 Cal. App. 3d 758, 766, 767-768, 259 Cal. Rptr. 789* (plaintiff challenging $50 IRA termination fee could have gone to competing financial service that did not charge fee)

[e] Venue

Venue provisions of the CLRA (place of transaction) do not override general venue provisions, i.e., *Code Civ. Proc. § 395(a)* placing venue in county where defendant resides. *Gallin v. Superior Court (1991) 230 Cal. App. 3d 541, 543, 545, 281 Cal. Rptr. 304*

[f] Waiver is Void

When forum selection clause designated Virginia as jurisdiction in which all disputes arising out of relationship would be litigated, and one of causes of action sought class action relief under Consumers Legal Remedies Act, enforcement of clause would be functional equivalent of contractual waiver of statutory remedies and thus was prohibited under California law. *America Online, Inc. v. Superior Court (2001) 90 Cal. App. 4th 1, 14-15, 108 Cal. Rptr. 2d 699*

[3] Receivers

Appointment of receiver is proper in action not prosecuted by plaintiff for his or her own right or for his or her own benefit but prosecuted by plaintiff in behalf of corporation to recover funds in which others were equally interested. *Fox v. Hale & Norcross S. M. Co. (1895) 108 Cal. 475, 477, 41 P. 328*

Court has power to appoint receiver to carry its judgment into effect. *Fox v. Hale & Norcross S. M. Co. (1895) 108 Cal. 475, 477, 41 P. 328*

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§ 504.24 Law Reviews

Smolin, *Investment Securities: Beyond the Scope of California's Consumers Legal Remedies Act? 25 Loy. L.A. L. Rev. 127 (1991)*

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Witkin, California Procedure Vol. 4, *Pleading*, §§ 246-251 (4th ed. 1997)

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[Reserved]

§§ 504.26[Reserved]

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§ 504.30 Notification of Violation of Consumers Legal Remedies Act and Demand for Remedy [Civ. Code § 1782]

[1] FORM Notification of Violation of Consumers Legal Remedies Act and Demand for Remedy [Civ. Code § 1782]

NOTICE OF VIOLATION OF CONSUMERS LEGAL REMEDIES ACT AND DEMAND FOR REMEDY

To: _____ [*name of person accused of violation*]

You are hereby notified that on or about _____ [*date*], in carrying out the terms of a transaction you entered into with _____ [*name of consumer*] namely _____ [*specify transaction, the particular goods or services involved, and, if applicable, the alleged violator's required performance under the transaction*], you violated the provisions of the California Consumers Legal Remedies Act by _____ [*specify method, act, or practice employed or committed in violation of act*] as proscribed by Subdivision(s) _____ [*specify*] of *Section 1770 of the Civil Code*. [You further violated that act by _____ (*specify any other violation*) as proscribed by Subsection(s) _____ (*specify*) of *Section 1770 of the Civil Code*.]

_____ [*Set out any other transaction and violation for which consumer seeks damages or other remedy*]. Demand is hereby made that you _____ [correct *or* repair *or* replace *or specify other remedy*] the _____ [violation *or* goods *or* services] within 30 days after receipt of this notice.

Dated: _____ [*date*].

Respectfully submitted,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____

[*name of consumer*]

[2] Use of Form

A notice [*see Civ. Code § 1782(a)(1)*] and demand [*see Civ. Code § 1782(a)(2)*] must be sent by certified or registered mail, return receipt requested [*see § 504.31[3][b]*], 30 days or more prior to the commencement of an action for damages pursuant to the provisions of the act. The notice is sent to the place where the transaction which resulted in a violation of the Consumers Legal Remedies Act occurred or to the alleged violator's principal place of business in California [*see Civ. Code § 1782(a)*; *see also* discussions at *§ 504.13[6]* and *[9][a]*].

This notice is not required to be sent before the commencement of an action for injunctive relief. However, the plaintiff must serve the notice before amending the complaint to include a request for damages [*see Civ. Code § 1782(d)*].

[3] Compliance with Demand Provides Defense

Unless the action is a class action, no action for damages may be maintained as provided in *Civ. Code § 1780* if an appropriate correction, repair, replacement, or other remedy is given, or agreed to be given within a reasonable time, to the consumer within 30 days after receipt of this notice [*Civ. Code § 1782(b)*; *see § 504.13[7*]. In a class action, the correction process must extend to all members and meet the other requirements of *Civ. Code § 1782(c)*, as set forth in § 504.14[9][g]].

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44-504 California Forms of Pleading and Practice--Annotated § 504.31

§ 504.31 Complaint for Damages Based on Unlawful Practice in Sale or Lease of Consumer Goods or Services [Civ. Code § 1780(a)], including Allegations as to Class Action [Civ. Code § 1781]

[1] FORM Complaint for Damages Based on Unlawful Practice in Sale or Lease of Consumer Goods or Services [Civ. Code § 1780(a)], including Allegations as to Class Action [Civ. Code § 1781]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff, [a consumer on behalf of himself/herself	)	NO. _____
and all other consumers similarly situated,]	)	COMPLAINT FOR DAMAGES [AND INJUNC-
vs.	)	TION]
_____ [*names*],	)	[LIMITED CIVIL CASE]
Defendants.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

Plaintiff [on behalf of himself/herself and all other consumers similarly situated] alleges:

1. Plaintiff is, and at all times herein mentioned was, a resident of _____ County, California[, and plaintiff is bringing this action on behalf of himself/herself and all other consumers similarly situated].

[*The following Paragraphs 2-6, inclusive, are included if the action is a class action. If it is not a class action, Paragraphs 2-6 are to be omitted and subsequent paragraphs renumbered accordingly.*]

[2. Plaintiff is a member of a class of consumers, and the members of this class of consumers were similarly situated and similarly affected by the alleged _____ (*specify violation, e.g.,* misrepresentations) of the

defendant and incurred similar damage, as alleged in this complaint, as a result of these _____ (*specify, e.g.,* misrepresentations) of the defendant.]

[3. It is impracticable to bring all members of the above class of consumers as individual plaintiffs before the court for the reasons that _____ (*specify, e.g.,* the members of the class are too numerous, consisting of approximately _____ (*number*) members *or other or additional allegations).*]

[4. The questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members in that _____ (*specify, e.g.,* the deceptive practices of the defendant, as alleged in this complaint, resulted in numerous sales under similar circumstances to individual consumers who are members of the above class of consumers *or other or additional allegations*).]

[5. The claims or defenses of this plaintiff are typical of the claims or defenses of the class in that _____ (*describe, e.g.,* plaintiff and all other members of the class similarly affected relied on the representations of the defendant, as alleged in this complaint, and suffered similar damages from the deceptive nature of such representations *or other or additional allegations*).]

[6. The interests of the class will be fairly and adequately protected by this plaintiff for the reason that _____ (*specify e.g.,* the success or failure of the plaintiff is identical with the success or failure of each of the members of the class *or other allegations showing lack of conflict between plaintiff and other class members*).]

7. Defendant _____ [*name*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of California, with its principal office for the transaction of business in _____ County [*or allege other capacity of defendant*], _____ [authorized *or* licensed] to engage, and engaging, in business as a _____ [*describe, e.g.,* seller of stereo and video and miscellaneous electronic equipment to the general public].

8. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I- _____, inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. [Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences alleged in this complaint, and that plaintiff's damages as alleged were proximately caused by such defendants.]

9. On or about _____ [*date*], at _____ [*street address and city*], _____ County, California, plaintiff _____ [*allege facts of purchase or lease of consumer goods or services by plaintiff, e.g.,* purchased a _____ (*brand name*) four-track stereo cassette deck].

10. The _____ [goods *or* services] as described above were _____ [bought by *or* leased by *or* rendered to] plaintiff [and _____ (by *or* to) other consumers similarly situated] primarily for personal, family, or household purposes. [*If action under Consumers Legal Remedies Act is joined with another cause of action, add appropriate allegations, such as*: The retail installment contract, attached to this complaint as Exhibit A and incorporated by reference, was and is subject to the requirements of the Unruh Retail Installment Sales Act (*Civil Code Section 1801 et seq.*), as well as to the requirements of the Consumers Legal Remedies Act (*Civil Code Section 1750 et seq.*).]

11. On or about _____ [*date*], at _____ [*street address and city*], _____ County, California, and prior to the _____ [purchase *or* lease *or* rendering] of the above-mentioned _____ [goods *or* services], defendant, in violation of Subdivision(s)

_____ [*specify*] of *Section 1770 of the Civil Code*, _____ [*allege facts constituting unfair methods of competition and unfair or deceptive acts or practices by defendant, e.g.*, represented that the above-mentioned goods were manufactured by _____ Company while in fact the goods were manufactured by _____ Company].

12. [Plaintiff is informed and believes, and thereon alleges, that] [T]he above-mentioned _____ [*specify violations, e.g.*, misrepresentations] [were intended by defendant to] result[ed] in the above-mentioned _____ [sale *or* lease] of the _____ [goods *or* services] to plaintiff[, and in other sales of like _____ (goods *or* services) to consumers similarly situated to plaintiff].

13. On or about _____ [*date*], plaintiff sent to defendant a written Notice of Violation of Consumers Legal Remedies Act and Demand for Remedy, attached to this complaint as Exhibit B and incorporated by reference, by _____ [certified *or* registered] mail, return receipt requested, to _____ [*place where transaction occurred, such as defendant's principal place of business within California, or, if neither will effect actual notice*, the office of the Secretary of State of California]. This notice and demand notified defendant of its above-mentioned violations of the Civil Code that resulted in the sale of the _____ [goods *or* services] to plaintiff [and in similar sales of _____ (goods *or* services) to members of the class of consumers that plaintiff is representing] and demanded that defendant remedy the violations.

14. [*If action is other than a class action, add:* Within 30 days of the receipt of the notice and demand, attached as Exhibit B, defendant failed to correct, repair, replace, or otherwise rectify, and failed to agree to correct, repair, replace, or otherwise rectify within a reasonable time, the above-mentioned violations of Subdivision(s) _____ (*specify*) of *Section 1770 of the Civil Code*].

15. By reason of the above-mentioned violations of the Civil Code, plaintiff[, and each member of the class of consumers of which plaintiff is a member,] _____ [has *or* have] suffered damages in the amount of $_____, determined as follows: _____ [*specify basis for determination of amount of damages, such as the difference between the purchase price of the goods or services and their fair retail price at time of purchase*].

[16. Defendant continues to engage in the above-described deceptive practices and unless enjoined from doing so by this court will continue to do so, all to the damage of its consumer who will purchase its _____ (goods *or* services) on the basis of its _____ (*specify e.g.*, misrepresentations) as herein alleged.]

[17. The aforementioned violations of the Civil Code by defendant were willful and _____ (*specify, e.g.*, oppressive *or* fraudulent *or* malicious). Plaintiff is therefore entitled to punitive damages.]

WHEREFORE, plaintiff prays[, on behalf of himself/herself and all other consumers similarly situated and constituting the class which plaintiff is representing,] judgment as follows:

1. For actual damages in the sum of $_____;

[2. For punitive damages;]

[3. For a permanent injunction enjoining the defendant, and its agents and employees from _____ (*set forth terms of requested permanent injunction*);]

[4. That defendant be required to make restitution to each plaintiff of any and all money or property paid by that plaintiff;]

[5. That each senior citizen and disabled person who is a plaintiff be awarded $5,000, as authorized by *Sections 1780(b)* and *3345(b) of the Civil Code*;]

6. For reasonable attorney's fees;

[7. For an allowance out of the total sum awarded for general, special, and punitive damages payable to plaintiff for his/her reasonable and nonreimbursable expenses incurred in bringing this action;]

[8. For a determination by the court of the most suitable mode by which class members are to come forward, identify themselves, and prove their entitlement to share in the total sum awarded by the court for actual and punitive damages;]

9. For costs of suit herein incurred; and

10. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The complaint in [1], *above*, is for use when filing an action under the Consumers Legal Remedies Act. The act provides that any consumer who suffers damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by the act [*see Meyer v. Sprint Spectrum L.P. (2009) 45 Cal. 4th 634, 88 Cal. Rptr. 3d 859, 200 P.3d 295, 2009 Cal. LEXIS 337, at *7-*9* ; *see also § 504.13[1]*] may bring an action against that person to recover or obtain any of the following [*Civ. Code § 1780(a)*]:

- Actual damages, but in no case is the total award of damages in a class action to be less than $1,000.
- An order enjoining the prohibited methods, acts, or practices.

- Restitution of property.
- Punitive damages.
- Any other relief which the court deems proper.

Any consumer entitled to bring an action under the Act, if the unlawful method, act, or practice has caused damage to other consumers similarly situated, may bring a class action on behalf of himself or herself and the other consumers to recover damages or obtain other relief as provided for in *Civ. Code § 1780* [*Civ. Code § 1781(a)*].

For allegations supporting an additional award to senior and disabled plaintiffs pursuant to *Civ. Code §§ 1780(b)* and *3345(b)*, see *§ 504.33*.

[3] Allegations

[a] In General

The complaint in [1], *above*, alleges:

- The plaintiff's name (Paragraph 1).
- If the action is filed as a class action [*see Civ. Code § 1781(b)*]:
  - That the plaintiff is a class member (Paragraph 2).
  - The impracticability of bringing all class members before the court and the reasons why it would be impracticable (Paragraph 3).
  - A common question of law or fact (Paragraph 4).
  - That the plaintiff's claims or defenses are typical of the claims or defenses of the class (Paragraph 5).
  - That the plaintiff will fairly and adequately protect the interests of the class (Paragraph 6).
  - The defendant's name and status (Paragraph 7).
  - The type of business in which the defendant is engaged (Paragraph 7).
  - Fictitious defendants (Paragraph 8).
  - Facts regarding the plaintiff's purchase or lease of goods or services (Paragraph 9).
  - The purpose for which the goods or services were purchased or leased (Paragraph 10) [*see Civ. Code § 1761(a), (b)*].
  - Acts of the defendant in violation of the Consumers Legal Remedies Act (Paragraph 11) [*see Civ. Code § 1770*].

- That the sale or lease of the goods or services was intended to result or did result in the alleged violations (Paragraph 12) [*see Civ. Code § 1770*].

- The plaintiff's compliance with precomplaint notice requirements (Paragraph 13) [*see Civ. Code § 1782(a)*].

- The defendant's failure to take corrective measures (Paragraph 14), which is an essential element only if the action is not a class action [*see Civ. Code § 1782(b)*].

- Damages suffered by the plaintiff and, if a class action is filed, damages suffered by each class and the basis for determining class damages (Paragraph 15) [*see Civ. Code § 1780(a)(1)*; *see also § 504.13[1]*].

- Continued acts in violation of the Consumers Legal Remedies Act (Paragraph 16) [*see Civ. Code § 1780(a)(2)*]; *see also § 504.31[3][c]*].

- Entitlement to exemplary damages (Paragraph 17) [*see Civ. Code § 1780(a)(4)*; *see also § 504.31[3][d]*].

Allegations in a complaint based on the Consumers Legal Remedies Act are not required to be confined to specific language of the Act [*Outboard Marine Corp. v. Superior Court (1975) 52 Cal. App. 3d 30, 36, 124 Cal. Rptr. 852]* .

A plaintiff asserting a CLRA claim sounding in fraud [*see, e.g., Civ. Code § 1770(a)(5), (7)*] must establish actual reliance on the relevant representations or omissions, because under *Civ. Code § 1780(a)*, the plaintiff must show that the defendant's deception caused harm to the plaintiff [*Buckland v. Threshold Enters. (2007) 155 Cal. App. 4th 798, 809-810, 66 Cal. Rptr. 3d 543* ; *accord, Princess Cruise Lines, Ltd. v. Superior Court (Wang) (2009) 179 Cal. App. 4th 36, 46, 101 Cal. Rptr. 3d 323*].

[b] Excuse From Pleading Precomplaint Notice Compliance

Substantial compliance with the provisions of *Civ. Code § 1782(a)*, requiring the sending of a notice of violation and a demand for remedy 30 days before the filing of a complaint under the Consumers Legal Remedies Act, is not sufficient. The fact that the defendant had notice of the violation does not excuse the sending of the notice because the 30-day period provided in *Civ. Code § 1782(b)* is designed to give the violator a chance to settle the matter before the filing of an action. However, the defendant can waive the right to a precomplaint notice by showing an actual intention to relinquish it or by conduct so inconsistent with the intent to enforce the notice requirement as to induce a reasonable belief that it has been relinquished. That conduct can take place even after the complaint has been filed, such as when the defendant expressly treats a letter of demand for correction, sent after the complaint was filed, as a notice under *Civ. Code § 1782(a)* [*see Outboard Marine Corp. v. Superior Court (1975) 52 Cal. App. 3d 30, 41, 124 Cal. Rptr. 852]* .

An action for injunctive relief under the act can be commenced without first sending a precomplaint demand and notice. However, if the plaintiff amends his or her complaint for injunctive relief to include a claim for damages, the demand and notice must be given, as discussed in *§ 504.13[6]* [*see Civ. Code § 1782(d)*].

[c] Pleading Injunctive Relief

The plaintiff may plead for relief from unlawful methods, acts, or practices by way of injunction [*Civ. Code § 1780(a)(2)*]. If a specific statute provides for injunctive relief, allegations showing a violation of that statute are sufficient cause for the issuance of an injunction [*see Paul v. Wadler (1962) 209 Cal. App. 2d 615, 625, 26 Cal. Rptr. 341* (when injunctive relief was authorized by statute, allegation of irreparable injury was unnecessary if specific

statutory violation was alleged)]. Therefore, it appears that specific allegations of irreparable injury, inadequacy of legal remedy, or multiplicity of judicial proceedings [*see Code Civ. Proc. § 526(a)(2), (4), (6)*] are not necessary or intended by the Legislature to be required in pleading an action for injunctive relief under the Consumers Legal Remedies Act.

[d] Punitive Damages

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion and forms for reserving the right to punitive damages when seeking a default judgment, see *Ch. 177, Damages, § 177.40* et seq., and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. § 425.115*].

[e] Combining With Claims Under Related Acts

The provisions of the Consumers Legal Remedies Act are not exclusive [*Civ. Code § 1752*] and a single unfair or deceptive act or practice may provide the basis for additional remedies under other consumer legislation, including the following acts [*see also* discussion in *§ 504.11[2]*]:

- Cartwright Act on combinations in restraint of trade. *Bus. & Prof. Code § 16750*
- Unfair Practices Act. *Bus. & Prof. Code § 17000 et seq.*
- Song-Beverly Consumer Warranty Act. *Civ. Code § 1790 et seq.*
- Unruh Retail Installment Sales Act. *Civ. Code § 1801 et seq.*
- Rees-Levering Motor Vehicle Sales and Finance Act. *Civ. Code § 2981 et seq.*

[4] Recovery of Attorney's Fees

The court must award court costs and attorney's fee to a prevailing plaintiff in litigation filed pursuant to *Civ. Code § 1780* [*Civ. Code § 1780(e)*; *see Hayward v. Ventura Volvo (2003) 108 Cal. App. 4th 509, 513, 133 Cal. Rptr. 2d 514* (prevailing plaintiff is entitled to "reasonable" fees, although word is omitted from statute; court was not limited in awarding fees to those incurred under contingency fee contract); *Reveles v. Toyota By the Bay (1997) 57 Cal. App. 4th 1139, 1154, 67 Cal. Rptr. 2d 543* (entitlement to attorney's fees for net recovery)]. Reasonable attorney's fees may be awarded to a prevailing defendant on a finding by the court that the plaintiff's prosecution of the action was not in good faith [*Civ. Code § 1780(e)*].

If the plaintiff moves for attorney's fees pursuant to *Civ. Code § 1780(e)*, generally the court is required to determine whether the plaintiff is the prevailing party and, if so, what amount is to be awarded to the plaintiff. The court must do this even if the action is concluded by a settlement. However, if the parties have agreed that attorney's fees are not to be awarded pursuant to *Civ. Code § 1780(e)*, then the court must give effect to that agreement [*Kim v. Euromotors West/The Auto Gallery (2007) 149 Cal. App. 4th 170, 178-181, 56 Cal. Rptr. 3d 780* (stating guidelines for determining whether plaintiff is prevailing party)].

For discussion and forms for motions relating to recovery of attorney's fees, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in

controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*]. However, if the optional language seeking permanent injunctive relief is included, the action may not be a limited civil case except as otherwise authorized by statute [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

For further discussion, see Ch. 324, *Jurisdiction: Subject Matter* .

[6] Venue

Venue is proper in the county in which the defendant resides, has his or her principal place of business, or is doing business, or in the county in which the transaction or any substantial portion of it occurred [*Civ. Code § 1780(c)*].

Any court in the county having jurisdiction of the subject matter is the proper court for trial [*Civ. Code § 1780(c)*].

The venue provisions of the CLRA do not override the general venue provisions, i.e., *Code Civ. Proc. § 395(a)* placing venue in the county where defendant resides [*Gallin v. Superior Court (1991) 230 Cal. App. 3d 541, 543, 545, 281 Cal. Rptr. 304]* .

In *Gallin*, which arose out of the great Milli Vanilli 'lip-synching' fraud, plaintiff sought to base venue on a single retail transaction in San Diego County although none of the multiple defendants resided there. Leaving open the question of whether a single retail transaction is enough on which to base venue, the court of appeal ordered a change of venue to Los Angeles County after distinguishing the CLRA from another act with special venue provisions on the basis that the interests protected by the CLRA in this case could just as easily be vindicated in the county where defendants resided [*Gallin v. Superior Court (1991) 230 Cal. App. 3d 541, 545, 281 Cal. Rptr. 304]* .

For further discussion, see Ch. 571, *Venue* .

[7] Installment or Automotive Sales Actions; Certain Limited Civil Cases

In any action or proceeding subject to the provisions of the Unruh Retail Installment Sales Act [*Civ. Code § 1801 et seq.*] or the Rees-Levering Motor Vehicle Sales and Finance Act [*Civ. Code § 2981 et seq.*], the plaintiff must state facts in the complaint, verified by his or her oath or the oath of his or her attorney, or in an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) of the plaintiff or the plaintiff's attorney filed with the complaint, showing that the action has been commenced in the proper court for trial and that the action or proceeding is subject to the provisions of *Civ. Code § 1812.10* or *2984.4* (proper courts for commencing actions under the Unruh Retail Installment Sales Act and the Rees-Levering Motor Vehicle Sales and Finance Act). When the affidavit or declaration is filed with the complaint, a copy must be served with the summons. If a proper complaint or affidavit or declaration is not filed, then unless the court, on any terms that may be just, permits the affidavit or declaration to be filed after the complaint is filed, the action must be dismissed without prejudice [*Code Civ. Proc. § 396a(a)*; *see Civ. Code §§ 1812.10(c), 2984.4(c)*]. For a declaration for use under the Unruh Retail Installment Sales Act, see *Ch. 501, Sales: Retail Installment Sales, § 501.102*. These verification and affidavit requirements also apply in any case that arises from an offer or provision of goods, services, loans or extensions of credit intended primarily for personal, family or household use, or from a transaction consummated as the result of either an unsolicited telephone call made by a seller or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller [*see Code Civ. Proc. §§ 395(b), 396a(a)*].

[8] Limitation of Action

An action brought under the Consumers Legal Remedies Act based on unlawful methods of competition or unfair or deceptive acts or practices [*Civ. Code § 1770*] must be commenced not more than three years after the date of the commission of the method, act, or practice [*Civ. Code § 1783*].

[9] Declaration

In any action filed under the Consumers Legal Remedies Act for relief other than injunctive relief, concurrently the plaintiff must file an affidavit, or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*], showing that the action has been commenced in the proper county [*Civ. Code § 1780(d)*; *see § 504.32*].

[10] Cross References

- For an alternative complaint and form for insertion in the complaint, as well as a form of affirmative defense, for use in an action under the Consumers Legal Remedies Act, see Ch. 14, *Advertising*

- For discussion of additional deceptive or unfair practices or acts, see Ch. 14, *Advertising* , and Ch. 565, *Unfair Competition* , § 565.10 et seq.

- For additional forms for use in filing class actions, see Ch. 120, *Class Actions*

- For additional forms for use in injunction actions that may be adapted for use in an action for injunctive relief under the Consumers Legal Remedies Act, see Ch. 303, *Injunctions*

- For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

- For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

- For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

- For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, § 177.40* et seq.

- For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

- For alternative forms for prayers, see Ch. 420, *Prayers*

- For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

- For forms for allegations showing proper venue, see Ch. 571, *Venue*

- For alternative verification forms, see Ch. 572, *Verification*

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Volume 44: Sales thru Sanitation and Sewerage Districts-Chs. 500-511
Chapter 504 SALES: CONSUMERS LEGAL REMEDIES ACT
PART IV. FORMS

44-504 California Forms of Pleading and Practice--Annotated § 504.32

§ 504.32 Declaration to Be Filed With Complaint in Action Under Consumers Legal Remedies [Civ. Code § 1780(d); Code Civ. Proc. § 396a]

[1] FORM Declaration to Be Filed With Complaint in Action Under Consumers Legal Remedies [Civ. Code § 1780(c); Code Civ. Proc. § 396a]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DECLARATION OF _____
Defendant.	)	[*name*]
	)	
	)	

_____

I, _____ [*name of plaintiff*], declare:

1. I am the plaintiff in this action.

2. I declare that the complaint therein is being filed concurrently with the filing of this declaration in a proper place for the trial thereof, which is _____ [*specify e.g.*, the county in which the defendant resides *or* the county in which the defendant has his or her principal place of business *or* the county in which the defendant is doing business, which is the county in which the transaction, the subject matter of the above-captioned action, or a substantial portion thereof, occurred].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The declaration in [1], *above*, is for use in an action under the Consumers Legal Remedies Act to set forth facts showing that the action is commenced in the proper court [*see § 504.31[5] -[7]*]. These facts may also be set forth in an affidavit, as opposed to a declaration under penalty of perjury [*Civ. Code § 1780(d)*; *Code Civ. Proc. § 396a(a)*]. For a form for an affidavit, see Ch. 15, *Affidavits, Certificates, and Declarations* .

Civ. Code § 1780(d) in part provides that concurrently with the filing of the complaint the plaintiff must file an affidavit (or declaration under penalty of perjury executed in California [*Code Civ. Proc. § 2015.5*]) stating facts showing that the action has been commenced in a county described in the section as a proper place for the trial of the action. The section further provides that, if plaintiff fails to file the affidavit, the court must on its own motion or on the motion of any party dismiss the action without prejudice.

This form also may be used to comply with the requirements of *Civ. Code § 1812.10* or *2984.4* when the action is subject to the requirements of *Civ. Code § 1801 et seq.*, the Retail Installment Sales Act, or *Civ. Code § 2891 et seq.*, the Rees-Levering Motor Vehicle Sales and Finance Act [*Code Civ. Proc. § 396a(a)*]. For further discussion of these requirements, see Ch. 501, *Sales: Retail Installment Sales* .

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Volume 44: Sales thru Sanitation and Sewerage Districts-Chs. 500-511
Chapter 504 SALES: CONSUMERS LEGAL REMEDIES ACT
PART IV. FORMS

44-504 California Forms of Pleading and Practice--Annotated § 504.33

§ 504.33 Allegations for Use in Action Under Consumers Legal Remedies Act To Provide Basis for Findings for Award of Additional Damages to Senior Citizen or Disabled Person [Civ. Code §§ 1780(b), 3345]

[1] FORM Allegations for Use in Action Under Consumers Legal Remedies Act To Provide Basis for Findings for Award of Additional Damages to Senior Citizen or Disabled Person [Civ. Code §§ 1780(b), 3345]

[*EITHER*]

1. Plaintiff _____ [*name*] is, and at the time of the acts complained of herein, was, over 65 years of age.

[*AND/OR*]

2. Plaintiff _____ [*name*] has, and at the time of the acts complained of herein, had, _____ [*specify physical or mental impairment, e.g.,* multiple sclerosis], which prevents and prevented plaintiff from _____ [*specify substantial limitation of one or more major life activities, e.g.,* walking, speaking, working, and caring for himself/herself without the aid of special braces and a mechanized wheelchair].

[*CONTINUE*]

3. As a result of defendant's conduct, plaintiff [and other senior citizens or disabled persons] has/have suffered substantial _____ [physical *and/or* emotional *and/or* economic] loss in that _____ [*allege factual basis of loss, e.g.,* plaintiff's inability to use the wheelchair purchased from defendant, or to have it repaired to conform to the representations made by defendant, and the resultant immobility, inability to care for himself/herself, inability to socialize, and inability to continue work(, as alleged below,) caused plaintiff great frustration, embarrassment, confusion, anger, depression, despair, mortification, humiliation, loss of sleep and appetite, mental anguish, and emotional distress].

[*EITHER*]

4. Defendant knew or should have know that its conduct was directed to one or more senior citizens or disabled persons in that _____ [*state facts showing defendant's advertising or marketing practices, or experience, or the nature of the good(s) or service(s) that would lead defendant to know that senior citizens or disabled persons would be affected, e.g.,* senior citizens or disabled persons are the only people likely to need, use, or invest in wheelchairs].

[*AND/OR*]

5. As a result of defendant's conduct, plaintiff has suffered the loss of _____ [*specify one or more losses of a type described in Bus. & Prof. Code § 17206.1(c)(2) and Civ. Code § 3345(b)(2), e.g.,* a minimum of _____ hours of time and least $_____ trying to have the wheelchair repaired to conform to the representations made by defendant. Plaintiff had to expend $_____ for substitute care and devices, and during a two-month period, was prevented from attending his regular employment. As a result, plaintiff lost his principal employment and was forced to expend substantial amounts of funds that had been set aside for personal care and maintenance and were assets essential to plaintiff's health and welfare].

[6. _____ (Plaintiff is informed and believes, and on that information and belief, alleges, that other *or* Other) senior citizens or disabled persons have suffered similar _____ (*allege as many as are applicable:* losses of principal employment or source of income; loss or encumbrance of a primary residence; substantial loss of property set aside for retirement, or for personal or family care and maintenance; or substantial loss of payments received under pension or retirement plan or a government benefits program, or assets essential to their health or welfare) because of the _____ (*specify conduct of defendant, e.g.,* deceptive marketing practices of defendant).]

[*AND/OR*]

7. Because of _____ [plaintiff's *or* their] _____ [*allege as many as are applicable:* age, poor health or infirmity, impaired understanding, restricted mobility *and/or* disability], plaintiff [and other senior citizens or disabled persons] is/are, and was/were, substantially more vulnerable than other members of the public to defendant's conduct.

[2] Use of Form

The allegations in [1], *above*, are for use in an action under *Civ. Code § 1780(a)* by or on behalf of one or more senior citizens or disabled persons against a defendant who engaged in a practice declared unlawful under *Civ. Code § 1770* [*Civ. Code §§ 1780(b), 3345(a)*]. Those allegations provide the basis for the findings necessary under *Civ. Code §§ 1780(b)* and *3345(b)* to support an *additional* award of up to $5,000 for each senior or disabled plaintiff [*Civ. Code §§ 1780(b), 3345(b)*; *see* discussions at *§ 504.12* and *§ 504.13[4]*].

Paragraphs 1 and/or 2 of this form may be inserted between Paragraphs 1 and 2 of the form of complaint in § 504.31[1]. The remaining paragraphs from this form may be inserted after Paragraph 16 of the complaint in § 504.31.

[3] Allegations

Either Paragraph 1 or Paragraph 2 of this form is necessary to establish plaintiff's status as a person who may seek the

benefit of *Civ. Code §§ 1780(b)* and *3345(b)* [*see Civ. Code §§ 1780(b), 3345(b)* (discussed in *§ 504.13[4*]); *see also Civ. Code § 1761(f)* (senior citizen defined); *Civ. Code § 1761(g)* (disabled person defined)]. Paragraph 3, alleging substantial emotional, physical, or economic loss, is also necessary [*Civ. Code § 1780(b)(1)(A)*]. Then, one or more of Paragraphs 4, 5, or 7 is necessary [Civ. Code § 1780(b)(1)(B); *see Civ. Code § 3345*]. Paragraph 6 is optional for use with Paragraph 5 [*see Civ. Code § 3345(b)(2)*].

No allegation is made that the additional award is appropriate, but a finding to that effect must be made to support any additional award [*Civ. Code § 1780(b)(1)(C)*]. For discussion and forms for regarding findings and requests for findings, see Ch. 529, *Statement of Decision* .

[4] Modification for Use in Unfair Competition or Deceptive Practices Action

The allegations in [1], *above*, may be adapted for use in an action under *Bus. & Prof. Code § 17206.1*, or in an action based on any statute imposing a civil penalty for unfair or deceptive acts or practices or unfair methods of competition brought by or on behalf of one or more senior citizens or disabled persons [*Bus. & Prof. Code § 17206.1(a), (c)* (discussed in *Ch. 565, Unfair Competition, § 565.10* et seq.; *Civ. Code § 3345* (discussed in Ch. 14, *Advertising*)]. In those situations, either Paragraph 1 or Paragraph 2 of the foregoing form is necessary to establish plaintiff's status as a person who may seek the benefit of *Bus. & Prof. Code § 17206.1* [*Bus. & Prof. Code § 17206.1(b)(1)* (senior citizen defined); *Bus. & Prof. Code § 17206.1(b)(2)* (disabled person defined); *Civ. Code § 3345(a)*].

Paragraphs 3 and 5 may be used together to describe the loss sustained, but neither alone is sufficient to establish the findings required by *Bus. & Prof. Code § 17206.1(c)(3)* or *Civ. Code § 3345(b)(3)* [*Bus. & Prof. Code § 17206.1(c)(3)*; *Civ. Code § 3345(b)(3)*]. In addition, pursuant to the passage of Proposition 64 in 2004, a private person may bring an action under *Bus. & Prof. Code § 17200 et seq.* only upon having suffered injury in fact and having lost money or property as a result of unfair competition [*Bus. & Prof. Code § 17204*]. A private plaintiff may file a representative action on behalf of others only if the plaintiff meets both this actual injury requirement and the requirements for class actions under *Code Civ. Proc. § 382* [*Bus. & Prof. Code § 17203*]. Thus, any action seeking recovery under *Bus. & Prof. Code § 17206.1* must include allegations that the plaintiffs have suffered actual financial or property loss as a result of the defendant's conduct, and if a representative action is pursued, the requirements for a class action will have to be met.

Paragraph 4 relates to the factors referred to in *Bus. & Prof. Code § 17206.1(c)(1)* and *Civ. Code § 3345(b)(1)*. Paragraphs 5 and 6 allege the existence of the facts addressed by *Bus. & Prof. Code § 17206.1(c)(2)* and *Civ. Code § 3345(b)(2)*. One or more of the factors set forth in *Civ. Code § 3345(b)* must be established to support a trebled penalty pursuant to that section [*Civ. Code § 3345(b)*]. *Bus. & Prof. Code § 17206.1(c)* requires only that the trier of fact consider those factors, in addition to any other appropriate factors, in determining whether to impose the civil penalty authorized by *Bus. & Prof. Code § 17206.1(a)* [*Bus. & Prof. Code § 17206.1(c)*].

[5] Cross References

- For discussion of additional deceptive or unfair practices or acts, see Ch. 14, *Advertising* and Ch. 565, *Unfair Competition* , § 565.10 et seq.

- For discussion of, and forms for use in, class actions, see Ch. 120, *Class Actions*

- For discussion and forms for regarding findings and requests for findings, see Ch. 529, *Statement of Decision*

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44-504 California Forms of Pleading and Practice--Annotated § 503.34

§ 503.34 Allegation for Use in Action Under Consumers Legal Remedies Act That Owners or Employees of Advertising Medium Had Knowledge of Violations of Act [Civ. Code § 1755]

[1] FORM Allegation for Use in Action Under Consumers Legal Remedies Act That Owners or Employees of Advertising Medium Had Knowledge of Violations of Act [Civ. Code § 1755]

Defendant(s) _____ [*name(s) of owner(s) or employee(s) of advertising medium*] _____ [published *or* disseminated] the above-described advertisement in violation of the act with knowledge of the aforementioned _____ [method *or* act *or* practice] constituting the violation.

[2] Use of Form

The allegation in [1], *above*, may be inserted after Paragraph 12 of the complaint in § 504.31[1], which is a general complaint for damages and other relief for violation of the Consumers Legal Remedies Act, when an owner or employee of any advertising medium published or disseminated an advertisement in violation of the act knowing of the deceptive methods, acts, or practices alleged to be unlawful. Without proof of such knowledge, no owner or employee of any advertising medium can be liable under the act [*see Civ. Code § 1755*, discussed in *§ 504.13[5]*]. Subsequent paragraphs of the form of complaint in § 504.31[1] will be renumbered accordingly and appropriate changes must be made to allege additional defendants.

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[Reserved]

§§ 504.35[Reserved]

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44-504 California Forms of Pleading and Practice--Annotated § 504.40

§ 504.40 Affirmative Defense in Action Under Consumers Legal Remedies Act That Violation Was Result of Bona Fide Error [Civ. Code § 1784]

[1] FORM Affirmative Defense in Action Under Consumers Legal Remedies Act That Violation Was Result of Bona Fide Error [Civ. Code § 1784]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state:* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

The violation of the Consumers Legal Remedies Act alleged in plaintiff's complaint was not intentional but resulted from a bona fide error notwithstanding the use of reasonable procedures that defendant adopted to avoid any violation of the act. Defendant has also made an appropriate _____ [correction *or* repair *or* replacement *or specify other remedy*] of the _____ [goods *or* services] plaintiff purchased from defendant, namely _____ [*specify remedy*].

[2] Use of Form

The affirmative defense in [1], *above*, may be included in a defendant's answer to a complaint brought under the Consumers Legal Remedies Act when defendant [*Civ. Code § 1784*; *see* discussion in *§ 504.13[10]*]:

- Can prove that the alleged violation of the act was not intentional and resulted from a bona fide error, notwithstanding the use of reasonable procedures adopted to avoid any such error, and

- Has made an appropriate correction, repair, or replacement or other remedy of the goods and services as provided in *Civ. Code § 1782(b)* or *(c)*

Under *Civ. Code § 1782(b)* and *(c)*, it is a complete defense to an individual action under the act if defendant has remedied, or agreed to remedy, the alleged violation within 30 days after receiving plaintiff's notice of the violation. Therefore, it appears that the foregoing defense would be used in any class action or in an individual action when defendant has failed to remedy, or to agree to remedy, the violation within 30 days after receiving the notice of

violation.

[3] Cross References

For discussion of answers and general forms of answer with which this form may be used, see Ch. 26, *Answers*

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44-505 California Forms of Pleading and Practice--Annotated 505.syn

§ 505.syn Synopsis to Chapter 505: SALES: INDEPENDENT WHOLESALE SALES REPRESENTATIVES CONTRACTUAL RELATIONS ACT

§ 505.01 Scope of Chapter

§ 505.02 Cross References

§§ 505.03through 505.09 [Reserved]

§ 505.10 Governing Law

§ 505.11 Purpose of Act

§ 505.12 Exclusion for Liquor Distributors

§ 505.13 Definitions

[1] Chargeback

[2] Distributor

[3] Jobber

[4] Manufacturer

[5] Wholesale Sales Representative

§ 505.14 Requirements of Written Contract

§ 505.15 Payment Documentation Required

§ 505.16 Jurisdiction Over Nonresidents

§ 505.17 Treble Damages for Representative; Attorney's Fees

§§ 505.18through 505.29 [Reserved]

§ 505.30 Related Matthew Bender Publications

§ 505.31 State Statutes

§ 505.32 Decisions

§§ 505.33through 505.39 [Reserved]

§ 505.40 Complaint for Damages for Willful Failure to Pay Commission or to Enter into Written Contract as Required by Independent Wholesale Sales Representatives Contractual Relations Act of 1990 [Civ. Code § 1738.15]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Statute of Limitations

[6] Cross References

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44-505 California Forms of Pleading and Practice--Annotated § 505.01

§ 505.01 Scope of Chapter

This chapter discusses the requirements of the Independent Wholesale Sales Representatives Contractual Relations Act of 1990 (*Civ. Code § 1738.10 et seq.*), and provides a form for a complaint for use by an independent wholesale representative to collect treble the amount of unpaid commissions [*see § 505.40*].

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§ 505.02 Cross References

- For discussion and forms relating to the Alcoholic Beverage Control Act (*Bus. & Prof. Code § 23000 et seq.*), see Ch. 18, Alcoholic Beverage Licensing.

- For general discussion and forms relating to contacts, see Ch. 140, Contracts.

- For discussion and forms relating to California Franchise Investment Law (*Corp. Code § 31000 et seq.*), see *Ch. 515, Securities and Franchise Regulations, § 515.50* et seq.

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[Reserved]

§§ 505.03[Reserved]

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§ 505.10 Governing Law

The Independent Wholesale Sales Representatives Contractual Relations Act of 1990 is set forth in *Civ. Code § 1738.10 et seq.*

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§ 505.11 Purpose of Act

The Independent Wholesale Sales Representatives Contractual Relations Act of 1990 (*Civ. Code § 1738.10 et seq.*; hereinafter referred to as the "Wholesale Sales Representatives Act") contains a statement of legislative intent to protect independent sales representatives from unjust termination of territorial market areas. It was the intent of the Legislature in enacting the Wholesale Sales Representatives Act to provide security and clarify the contractual relations between manufacturers and their nonemployee sales representatives, who the Legislature recognizes are a key ingredient in the California economy and who spend many hours developing their territories in order to properly market their products [*Civ. Code § 1738.10*].

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§ 505.12 Exclusion for Liquor Distributors

The Wholesale Sales Representatives Act does not apply to any person licensed pursuant to the Alcoholic Beverage Control Act (*Bus. & Prof. Code § 23000 et seq.*) [*Civ. Code § 1738.17*].

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§ 505.13 Definitions

[1] Chargeback

"Chargeback," within the meaning of the Wholesale Sales Representatives Act, is any deduction taken against the commissions earned by the sales representative that are not required by state or federal law [*Civ. Code § 1738.12(d)*].

[2] Distributor

A "distributor," within the meaning of the Wholesale Sales Representatives Act, is any business organization engaged in offering for sale products that are shipped from its inventory, or from goods in transit to its inventory, to purchasers and intended for resale to, or use by, California consumers [*Civ. Code § 1738.12(c)*].

[3] Jobber

A "jobber," within the meaning of the Wholesale Sales Representatives Act, is any business organization engaged in the business of purchasingproducts intended for resale and invoicing to purchasers for resale to, or use by, California consumers [*Civ. Code § 1738.12(b)*].

[4] Manufacturer

A "manufacturer," within the meaning of the Wholesale Sales Representatives Act, is any organization engaged in the business of producing, assembling, mining, weaving, importing, or by any other method of fabrication, a tangible or intangible product, intended for resale to, or use by, California consumers [*Civ. Code § 1738.12(a)*].

[5] Wholesale Sales Representative

A "wholesale sales representative," within the meaning of the Wholesale Sales Representatives Act, is any person who contracts with a manufacturer, jobber, or distributor for the purpose of soliciting wholesale orders and is compensated, in whole or in part, by commissions, but does not include one who places orders or purchases exclusively for his or her

own account for resale and does not include one who sells or takes orders for direct sale of products to the ultimate consumer [*Civ. Code § 1738.12(e)*].

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§ 505.14 Requirements of Written Contract

Whenever a manufacturer, jobber, or distributor is engaged in business within California, uses the services of a wholesale sales representative who is not an employee of the manufacturer, jobber, or distributor to solicit wholesale orders at least partially within California, and the contemplated method of payment involves commissions, the manufacturer, jobber, or distributor must enter into a written contract with the sales representative [*Civ. Code § 1738.13(a)*]. The written contract must include all of the following [*Civ. Code § 1738.13(b)*]:

- The rate and method by which the commission is computed.
- The time when the commissions will be paid.
- The territory assigned to the sales representative.
- All exceptions to the assigned territory and customers in that territory.
- What chargebacks will be made against the commissions, if any.

The sales representative and the manufacturer, jobber, or distributor must each be provided with a signed copy of the written contract, and the sales representative must sign a receipt acknowledging receipt of the signed contract [*Civ. Code § 1738.13(c)*].

No contract may contain any provision that waives any rights established pursuant to *Civ. Code § 1738.10 et seq.* Any waiver is deemed contrary to public policy and void [*Civ. Code § 1738.13(e)*].

For additional discussion of these requirements, see California Legal Forms, Ch. 91, *Contracts With Sales Representatives* (Matthew Bender). For an illustrative contract complying with the above requirements, see Form 91.160 in that publication.

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§ 505.15 Payment Documentation Required

The sales representative must be provided with the following written information and documentation with payment of the commission [*Civ. Code § 1738.13(d)*]:

- An accounting of the orders for which payment is made, including the customer's name and invoice number.
- The rate of commission on each order.
- Information relating to any chargeback included in the accounting.

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§ 505.16 Jurisdiction Over Nonresidents

A manufacturer, jobber, or distributor who is not a resident of California and who enters into a contract regulated by *Civ. Code § 1738.10 et seq.* is deemed to be doing business in California for purposes of personal jurisdiction [*Civ. Code § 1738.14*].

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44-505 California Forms of Pleading and Practice--Annotated § 505.17

§ 505.17 Treble Damages for Representative; Attorney's Fees

A manufacturer, jobber, or distributor who willfully fails to enter into a written contract as required by *Civ. Code § 1738.10 et seq.*, or willfully fails to pay commissions as provided in the written contract, is liable to the sales representative in a civil action for treble the damages proved at trial [*Civ. Code § 1738.15*]. In a civil action brought by a sales representative pursuant to *Civ. Code § 1738.15*, the prevailing party is entitled to reasonable attorney's fees and costs in addition to any other recovery [*Civ. Code § 1738.16*].

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[Reserved]

§§ 505.18[Reserved]

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§ 505.30 Related Matthew Bender Publications

California Legal Forms, Ch. 91, *Contracts With Sales Representatives* (Matthew Bender)

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§ 505.31 State Statutes

Statement of legislative purpose. *Civ. Code § 1738.10*

Definitions. *Civ. Code § 1738.12*

Requirement of written contract; contents. *Civ. Code § 1738.13(a),(b)*

Information required to be provided to sale representative with payments. *Civ. Code § 1738.13(d)*

Waiver of required provisions is void and contrary to public policy. *Civ. Code § 1738.13(e)*

Nonresident that enters into contract subject to Act is deemed to be doing business in California for purposes of personal jurisdiction. *Civ. Code § 1738.14*

Treble damages for willful failure to enter into written agreement or to pay commissions. *Civ. Code § 1738.15*

Prevailing party in action under Act is entitled to reasonable attorney's fees. *Civ. Code § 1738.16*

Act is inapplicable to person licensed under Alcoholic Beverage Control Act (*Bus. & Prof. Code § 23000 et seq.*). *Civ. Code § 1738.17*

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§ 505.32 Decisions

Plaintiffs were franchisees, not wholesale distributors, because they did more than solicit orders and were operating under marketing plan prescribed in substantial part by defendant. *Gentis v. Safeguard Bus. Sys. Inc. (1998) 60 Cal. App. 4th 1294, 1306-1306, 71 Cal. Rptr. 2d 122*

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§§ 505.33[Reserved]

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§ 505.40 Complaint for Damages for Willful Failure to Pay Commission or to Enter into Written Contract as Required by Independent Wholesale Sales Representatives Contractual Relations Act of 1990 [Civ. Code § 1738.15]

[1] FORM Complaint for Damages for Willful Failure to Pay Commission or to Enter into Written Contract as Required by Independent Wholesale Sales Representatives Contractual Relations Act of 1990 [Civ. Code § 1738.15]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR VIOLATION OF IND-
_____ [*nameds*], [and DOES I	)	PENDNENT WHOLESALE SALES REPRESENT-
through _____,]	)	ATIVES CONTRACTUAL RELATIONS ACT-
Defendant(s).	)	-TREBLE DAMAGES
	)	[LIMITED CIVIL CASE]
		[Amount demanded _____
		(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of _____ [California *or other*] [authorized to transact, and transacting, intrastate business in California] with its principal place of business [in this state and] situated in _____ County, _____ [California *or other*] [*or allege other capacity and residence of defendant*].

[2. Plaintiff is ignorant of the true names and capacities of the defendants sued herein as DOES I through _____, inclusive, and therefore sues these defendants by fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

[3. At all times herein mentioned, DOES I through _____ were the agents, servants, and employees of their codefendants, and in doing the things hereinafter alleged were acting in the course and scope of theirauthority as agents, servants, and employees, with the permission and consent of their codefendants.]

4. Plaintiff is engaged in the business of soliciting wholesale orders for the purchase by _____ [retailers *or other entity that will make the ultimate sale to the consumer*] of products manufactured, jobbed, or distributed by others. Plaintiff is compensated by the manufacturer, jobber, or distributor _____ [*describe, e.g.,* by commissions].

5. Defendant is engaged in the business of _____ [*describe manufacturing, jobbing, or distributing business of defendant, e.g.,* development, manufacture, and production of tennis rackets intended for resale to, or use by consumers, including California consumers].

6. On _____ [*date*], [at _____, California,] plaintiff and defendant entered into a written agreement[, a copy of which is attached as Exhibit A and incorporated by reference,] making plaintiff a wholesale sales representative of defendant for a term of _____ [*specify period, e.g.,* one year] beginning _____ [*date*]. The agreement provides in part _____ [*describe terms relating to defendant's breach or noncompliance, e.g.,* that plaintiff be defendant's only wholesale representative in California, and that plaintiff be paid a commission of two and one half percent on the gross receipts from orders generated by plaintiff. Commissions are payable to plaintiff quarterly, on April 30, July 31, October 31, and January 1 for payments collected by defendant from the purchaser during the previous calendar quarter].

7. Plaintiff devoted substantial time and effort to promoting defendant's product and _____ [*describe relevant scope of plaintiff's performance, e.g.,* forwarded orders aggregating $ _____ during the first six months of the term of the agreement].

8. On _____ [*date*], defendant _____ [*describe terms relating to defendant's breach or noncompliance, e.g.,* forwarded plaintiff a check for $ _____, covering commissions for the period _____ to _____ (*dates*). Although receipts from purchasers for orders generated by plaintiff during that period were $ _____, defendant failed and refused to pay plaintiff any commission on goods purchased by _____ (*name of purchaser*). Defendant claimed that _____ (*name of purchaser*) was already a direct customer of defendant and thus constituted an exception to plaintiff's territory. Under *Civil Code Section 1738.13(b)(4),* all exceptions to the assigned territory and customers therein are required to be stated the written contract, but the contract between plaintiff and defendant (Exhibit A) does not state any such exception. Therefore, no such exception for _____ (*name of purchaser*) was contemplated, and plaintiff is entitled to commissions on defendant's receipts from sales to _____ (*name of purchaser*)].

9. Because of the acts of defendant described above, plaintiff has sustained actual damages in the sum of $ _____.

10. The acts of defendant stated in this complaint constitute a violation of the Independent Wholesale Sales Representatives Contractual Relations Act and plaintiff is entitled under *Civil Code Section 1738.15* to damage from the defendant amounting to treble the damages proved at trial.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For damages in the sum of $_____, and that sum be trebled;

2. For interest from and after _____ [*date of breach or on which amount of damages was ascertainable*] at _____ [the legal rate *or* the rate of _____ (*rate specified in contract*) percent per annum];

3. For costs of suit herein incurred, including reasonable attorney's fees; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The complaint in [1], *above*, is for use by an independent wholesale representative to collect treble the amount of damages he or she sustained as a result of a manufacturer's, jobber's, or distributor's willful failure to pay commissions provided for in their written contract, or willful failure to enter into a written contract as required by *Civ. Code § 1738.13*; [*Civ. Code § 1738.15*; *see also* discussion at *§ 505.13* (definitions)].

[3] Allegations

The complaint in [1], *above*, alleges:

- The capacity and residence of defendant (Paragraph 1) [*see Civ. Code § 1738.14*, discussed at *§ 505.16*].

- Fictitious defendant (Paragraph 2) [*see Code Civ. Proc. § 474*].

- The existence of an agency relationship between the defendants (Paragraph 3).

- That plaintiff is an independent wholesale representative as that term is defined by *Civ. Code § 1738.12(e)* (Paragraph 4).

- That defendant is a manufacturer, jobber, or distributor, as defined by *Civ. Code § 1738.12(a), (b),* or *(c),* respectively (Paragraph 5).

- The formation of a contract between the parties, whether the contract was written or oral, and its relevant terms (Paragraph 6) [*Civ. Code § 1738.13(a),(b)*].

- Plaintiff's performance of the relevant contract terms (Paragraph 7).

- Defendant's breach of the contract or other actions that caused damage to plaintiff (Paragraph 8).

- The resultant damage to plaintiff (Paragraph 9).

- That defendant's acts violate the Independent Wholesale Sales Representatives Contractual Relations Act, thereby entitling plaintiff to treble damages (Paragraph 10) under *Civ. Code § 1738.15*.

[4] Verification

Verification of a complaint is not required, but verification of a complaint requires the defendant to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446*] and precludes a general denial except in limited civil cases. Even in limited civil cases, if the cause of action is a claim assigned to a third party for collection, verification of the complaint will preclude general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Statute of Limitations

An action on liability created by statute, other than a penalty or forfeiture, is subject to a three-year limitation period [*Code Civ. Proc. § 338(a)*].

[6] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, § 177.40* et seq.

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For allegations showing proper venue, see Ch. 571, *Venue*

For alternative verification forms, see Ch. 572, *Verification*

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Chapter 510 SANCTIONS

44-510 California Forms of Pleading and Practice--Annotated 510.syn

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

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§ 510.64 Proceedings to Impose Sanctions for Violation of Local Court Rule [Code Civ. Proc. § 575.2; Gov. Code § 68608(b)]--Notice of Motion and Supporting Declaration

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[1] FORM

[2] Use of Form

[3] Cross Reference

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FOOTNOTES:
(n95)Footnote *. **Anita Rae Shapiro** served as Commissioner of the Los Angeles Superior Court from 1982 to 1997. After that, she presided over all Long Beach Civil Law and Motion and Probate calendars. She has also conducted civil mandatory and voluntary settlement conferences, sat in civil and criminal trial, family law, and juvenile departments. In addition, she developed and successfully implemented a Temporary Judge Program. Retired from the bench, she conducts private dispute resolution. **Lawrence M. Freiser,** Attorney at Law, authored and updated a substantial portion

of this chapter. **Evelio M. Grillo,** formerly a civil litigator in San Francisco, now a Superior Court judge in Alameda County, provided additional commentary on *Code Civ. Proc. § 128.7* sanctions.

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Chapter 510 SANCTIONS
PART I. SCOPE

44-510 California Forms of Pleading and Practice--Annotated § 510.01

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.01 Scope of Chapter

This chapter discusses sanctions that may be awarded in trial courts. It includes forms for the following notices of motions and orders:

- To obtain sanctions under *Code Civ. Proc. § 128.7* [§§ *510.60, 510.61*].
- To have a monetary sanction imposed in the county's favor under *Code Civ. Proc. § 177.5* [*§§ 510.62, 510.63*].
- To obtain sanctions under local rules [*§§ 510.64, 510.65*].

Sanctions applicable only to particular procedures are discussed in connection with those procedures. [*See § 510.02*].

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44-510 California Forms of Pleading and Practice--Annotated § 510.02

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§ 510.02 Cross References

For discussion of an attorneys duties to the client and court, see Ch. 72, *Attorney Practice and Ethics* .

For discussion of the imposition of sanctions in the appellate courts, see Ch. 51, *Appeal: Hearing and Decision* .

For discussion and forms relating to evidence preclusion order for noncompliance with a bill of particulars under *Code Civ. Proc. § 454*, see Ch. 121, *Common Counts* .

For discussion and forms relating to contempt, see Ch. 135, *Contempt* .

For discussion and forms relating to costs and attorney's fees, see Ch. 174, *Costs and Attorney's Fees* .

For discussion of discovery sanctions, see Ch. 192, *Discovery: Sanctions for Discovery Abuse* .

For discussion and forms relating to sanctions against a small claims judgment debtor under *Code Civ. Proc. § 116.830*, see Ch. 526, *Small Caims* .

For discussion of sanctions under *Code Civ. Proc. § 396b(b)* on a motion for change of venue, see Ch. 571, *Venue* .

For discussion and forms relating to restrictions on vexatious litigants, see Ch. 573, *Vexatious Litigants* .

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44-510 California Forms of Pleading and Practice--Annotated §§ 510.03-510.09

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

[Reserved]

§§ 510.03[Reserved]

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PART II. LEGAL BACKGROUND

44-510 California Forms of Pleading and Practice--Annotated § 510.10

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§ 510.10 Determining Basis for Sanctions

Sanctions may be based on a number of statutes or rules, which are discussed in this chapter. The sanctions available and procedure for imposing them varies.

The general sanctions statute is *Code Civ. Proc. § 128.7*. Sanctions under *Code Civ. Proc. § 128.7* apply to a "complaint or petition filed on or after January 1, 1995, and any other pleading, written notice of motion, or other similar paper filed in such a matter" [*Code Civ. Proc. § 128.7(i)*; *see § 510.12*].

If sanctions are sought for violation of a court order, *Code Civ. Proc. § 177.5* is the basis for the sanctions [*see § 510.13*].

If sanctions are sought for violation of a local court rule, *Code Civ. Proc. § 575.2* and *Gov. Code § 68608* are the basis for the sanctions [*see §§ 510.14, 510.15*].

If defense costs are sought against a plaintiff, *Code Civ. Proc. § 1038* is the basis for a sanction available in limited circumstances [*see § 510.19*].

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44-510 California Forms of Pleading and Practice--Annotated § 510.11

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.11 Power of Court to Award Sanctions Generally

A court cannot order the payment of attorney's fees or other expenses as monetary sanctions absent express statutory authority [*Bauguess v. Paine (1978) 22 Cal. 3d 626, 635-639, 150 Cal. Rptr. 461, 586 P.2d 942* ; *Vidrio v. Hernandez (2009) 172 Cal. App. 4th 1443, 1454-1455* ; *Andrews v. Superior Court (2000) 82 Cal. App. 4th 779, 98 Cal. Rptr. 2d 426*]. A court has no inherent power to do so [*Bauguess v. Paine (1978) 22 Cal. 3d 626, 635-639, 150 Cal. Rptr. 461, 586 P.2d 942* ; *Lind v. Medevac, Inc. (1990) 219 Cal. App. 3d 516, 522-523, 268 Cal. Rptr. 359]* .

Thus, for example, a court may not impose monetary sanctions under *Code Civ. Proc. § 128*. Although that section provides the court with statutory powers to control proceedings before it, the court has no inherent power pursuant to that statute to impose monetary sanctions, whether as attorney's fees or as a penalty [*Bauguess v. Paine (1978) 22 Cal. 3d 626, 635-639, 150 Cal. Rptr. 461, 586 P.2d 942* ; *Andrews v. Superior Court (2000) 82 Cal. App. 4th 779, 98 Cal. Rptr. 2d 426*]. However, when a party's deliberate and egregious misconduct makes any sanction other than a terminating sanction inadequate, the trial court has inherent power to impose a terminating sanction [*Stephen Slesinger, Inc. v. Walt Disney Co. (2007) 155 Cal. App. 4th 736, 757-776, 66 Cal. Rptr. 3d 268]* . In addition, although attorney's fees may not be awarded as a sanction under the trial court's supervisory power, they may be awarded under the court's equitable power [*Rudnick v. Rudnick (2009) 179 Cal. App. 4th 1328, 1333, 102 Cal. Rptr. 3d 493* (trust case)].

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PART II. LEGAL BACKGROUND

44-510 California Forms of Pleading and Practice--Annotated § 510.12

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.12 Sanctions Under Code Civ. Proc. § 128.7

[1] Effective Dates

Code Civ. Proc. § 128.7 became effective January 1, 1995. The section applies to a complaint or petition filed on or after that date and to any other pleading, written notice of motion, or similar paper filed in the matter [*Code Civ. Proc. § 128.7(i)*; *see § 510.10*].

[2] Patterned on Federal Rule of Civil Procedure 11

Code Civ. Proc. § 128.7 closely tracks *Fed. R. Civ. P. 11*, although there are some significant differences. Federal cases construing *Rule 11* may frequently be persuasive, though not controlling, in construing *Code Civ. Proc. § 128.7*. The legislature has stated its intent for the courts to be guided (but not bound) by the Advisory Committee Notes to the 1993 amendments to *Rule 11* when interpreting *Code Civ. Proc. § 128.7*. For further discussion of *Rule 11* and cases applying it, see Moore's Federal Practice, Ch. 11, *Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions* (3d ed. Matthew Bender).

[3] Application to Judicial Arbitration

Because *Code Civ. Proc. § 128.7* sanctions require certification of papers presented to the court, the question may arise whether sanctions are available in the context of judicial arbitration proceedings [*see Code Civ. Proc. § 1141.10 et seq.*; *see also § 510.12[11]*]. *Code Civ. Proc. § 128.7* is silent on the matter.

[3A] Applicability to Juvenile Court Proceedings

Code Civ. Proc. § 128.7 on its face applies to all civil courts and civil proceedings, and therefore applies to juvenile court proceedings. For example, a juvenile court hearing a dependency case [*see Welf. & Inst. Code § 300*, discussed in Ch. 328, *Juvenile Courts: Dependency Proceedings*] may lawfully impose sanctions under *Code Civ. Proc. § 128.7* [*In re Mark B. (2007) 149 Cal. App. 4th 61, 74-80, 56 Cal. Rptr. 3d 697]* . Further, a juvenile court referee in

dependency proceedings may lawfully impose sanctions under *Code Civ. Proc. § 128.7*, because a juvenile court referee in dependency proceedings has essentially the same powers as a judge, and any differences are not material to this issue [*In re Mark B. (2007) 149 Cal. App. 4th 61, 80-81, 56 Cal. Rptr. 3d 697]* .

[4] Showing Sanctionable Conduct Under Section 128.7

Under *Code Civ. Proc. § 128.7*, sanctions may be imposed if it is "primarily" presented to the court for an improper purpose. *Code Civ. Proc. § 128.7*, does not provide for a subjective bad faith standard.

[5] Types of Sanctions

Code Civ. Proc. § 128.7 allows sanctions to be awarded in favor of a party, and expressly provides for the imposition of nonmonetary directives, and for the payment of penalties to the court.

[6] Amount of Sanctions

By "limiting" sanctions to an amount sufficient to deter repetition of the conduct or comparable conduct by others similarly situated, *Code Civ. Proc. § 128.7* may allow larger sanctions than former Section 128.5 which authorized only reasonable expenses, including attorney's fees, as sanctions [*Code Civ. Proc. § 128.7(d)*].

[7] Law Firms Subject to Derivative Liability

Law firms may be derivatively liable for acts of partners, attorneys, and employees under *Code Civ. Proc. § 128.7* [*Code Civ. Proc. § 128.7(c)(1)*]. For discussion, see *§ 510.12[12]*.

[8] Safe Harbor Provisons

Code Civ. Proc. § 128.7 expressly provides the offending attorney or party with 21 days from receipt of a notice of motion or order to show cause re sanctions to withdraw or appropriately correct the challenged matter [*Code Civ. Proc. § 128.7(c)(1),(2)*]. The purpose of the safe harbor provisions is to permit an offending party to avoid sanctions by withdrawing the improper pleading during the statutory safe harbor period without penalty, saving the court and the parties time and money litigating the pleading as well as the sanctions request [*Galleria Plus v. Hanmi Bank (2009) 179 Cal. App. 4th 535, 538, 101 Cal. Rptr. 3d 803* ; *Li v. Majestic Industrial Hills LLC (2009) 177 Cal. App. 4th 585, 591, 99 Cal. Rptr. 3d 334* (safe harbor period indicates *Code Civ. Proc. § 128.7* is remedial, not punitive); *Liberty Mutual Fire Ins. Co. v. McKenzie (2001) 88 Cal. App. 4th 681, 692, 105 Cal. Rptr. 2d 910* ; *Malovec v. Hamrell (1999) 70 Cal. App. 4th 434, 441, 82 Cal. Rptr. 2d 712]* . To avoid the award of sanctions, however, the offending party must not only take action to correct or withdraw the challenged pleading, it must also give notice to the moving party that it has taken the step. Absent that notice, the moving party has no knowledge that the problem has been resolved and will proceed with filing the sanctions motion with the court [*Liberty Mutual Fire Ins. Co. v. McKenzie (2001) 88 Cal. App. 4th 681, 692, 105 Cal. Rptr. 2d 910]* .

Specifically, once the motion has been served, it may not thereafter be *filed* until 21 days from service have elapsed without a withdrawal or correction of the of the paper, claim, defense, contention, allegation, or denial that is challenged by the motion [*Code Civ. Proc. § 128.7(c)(1)*].

If a motion for sanctions under *Code Civ. Proc. § 128.7* is served at a time when it is no longer possible for the opposing party to taken the necessary corrective action, the motion violates the safe harbor provision and must be denied, even if the moving party otherwise waited the requisite 21 days before filing the motion. Thus, for example, it is improper to award sanctions based on a motion claiming that the complaint is without merit, when the motion is not served until after judgment has been entered in the action, and the plaintiff accordingly has lost the ability to correct or withdraw the challenged pleading. A motion for sanctions under *Code Civ. Proc. § 128.7* claiming that a case is without

merit must, at the very least, be served before the conclusion of that case [*Barnes v. Department of Corrections (1999) 74 Cal. App. 4th 126, 128, 135-136, 87 Cal. Rptr. 2d 594* (reversing award of sanctions)]. In addition, a ruling on the challenged motion during the safe harbor period precludes recovery of sanctions under *Code Civ. Proc. § 128.7* [*Li v. Majestic Industrial Hills LLC (2009) 177 Cal. App. 4th 585, 595, 99 Cal. Rptr. 3d 334* (party seeking sanctions must move to continue challenged motion or shorten safe harbor period)].

On the other hand, an order sustaining a demurrer without leave to amend does not bar a motion for § 128.7 sanctions unless the order is reduced to judgment before the sanctions motion is served and filed [*Banks v. Hathaway, Perrett, Webster, Powers & Chrisman (2002) 97 Cal. App. 4th 949, 954, 118 Cal. Rptr. 2d 803]* .

When the party that is the subject of the sanctions does not take corrective action until after the safe harbor period has ended, such as by dismissing the complaint, the belated action does not fulfill the object of the safe harbor provision, and policies favoring allowing sanctions remain notwithstanding the corrective action [*see Eichenbaum v. Alon (2003) 106 Cal. App. 4th 967, 974-976, 131 Cal. Rptr. 2d 296* (dismissal of complaint with prejudice after safe harbor period expired did not preclude award of sanctions)].

[9] Section 128.7 Sanctions Inapplicable to Discovery Matters

Code Civ. Proc. § 128.7 does not apply to disclosures and discovery requests, responses, objections, and motions [*Code Civ. Proc. § 128.7(g)*]. Thus, in actions initiated on or after January 1, 1995, discovery sanctions may only be available through the provisions of the Code of Civil Procedure applicable to discovery [*Code Civ. Proc. § 2016.010 et seq.*]. One purpose of eliminating discovery from the ambit of Section 128.7 was to reduce "satellite" litigation that could be generated if the general sanctions statute continued to be applicable to discovery [Senate Committee on Judiciary Analysis of AB 3594 at 4 (Aug. 16, 1994)]. For discussion of sanctions under the discovery act, see Ch. 192, *Discovery: Sanctions for Discovery Abuse* .

[10] Signature and Address Requirement for Pleadings, Petitions, Written Notice of Motions, or Other Similar Papers

Under *Code Civ. Proc. § 128.7(a)*, every pleading, petition, written notice of motion, or other similar paper must be signed by at least one attorney of record in the attorney's individual name. If, however, a party is not represented by an attorney, the party must sign the papers. Each paper must state the signer's address and telephone number, if any [*Code Civ. Proc. § 128.7(a)*]. An unsigned paper must be stricken unless the omission of the signature is corrected promptly after being called to the attorney's or party's attention [*Code Civ. Proc. § 128.7(a)*].

Except when otherwise provided by law, a pleading need not be verified or accompanied by an affidavit [*Code Civ. Proc. § 128.7(a)*; *see Code Civ. Proc. § 446* (verification requirements generally); for discussion of verification, *see* Ch. 572, *Verification*].

[11] Conditions Certified to by Attorney or Unrepresented Party Presenting Papers to Court

Section 128.7 ties sanctions to the certification of pleadings, petitions, notices of motion and similar papers presented to the court. Certification is not in the nature of a verification, but is implied by law in every pleading. By presenting to the court a pleading, petition, written notice of motion, or other similar paper, an attorney or unrepresented party certifies under *Code Civ. Proc. § 128.7(b)* that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met:

- It is not being presented primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in litigation cost.

PRACTICE TIP:

Primarily for an Improper Purpose. The "primarily for an improper purpose" standard is different from the *Fed. R. Civ. P. 11* standard which allows sanctions when a paper is filed for *any* improper purpose. The *Code Civ. Proc. § 128.7 primarily* standard is higher. *By Evelio M. Grillo.*

- The claims, defenses, and other legal contentions set forth in the papers are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

- There is evidentiary support for the allegations and other factual contentions or, if specifically so identified, the allegations and other factual contentions are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

- The denials of factual contentions are warranted on the evidence, or if specifically so identified, are reasonably based on a lack of information or belief.

A paper is presented to the court by any of the following actions [*Code Civ. Proc. § 128.7(b)*]:

- Signing.

- Filing.

- Submitting.

- Later advocating.

Although the meaning of signing, filing, and submitting a paper to the court is relatively clear, the concept of "later advocating" a pleading is not. On the basis of the similarity of Section 128.7 to *Fed. R. Civ. P., Rule 11*, it could be argued that the later advocacy requirement of Section 128.7(b) is intended to create the same duty of candor in superior courts as is present in federal courts. Under Rule 11, attorneys and parties may not continue to insist on or argue a position to the court after the factual or legal basis for the position becomes untenable. The litigants' obligation to be candid regarding the contents of papers filed with the court is measured as of the time the papers are submitted to the court and also as of the time a pleading or paper is advocated to the court, that is, argued or supported by motions or other papers. Counsel and the parties who are not candid with the court by advocating positions contained in a motion or other pleading after learning that the position has no merit may be sanctioned under Rule 11. Thus, "later advocacy" may tip an originally meritorious pleading over the line and allow the imposition of sanctions if a pleading has been presented for an improper purpose (such as delay or harassment) or is found to be lacking a sound evidentiary basis [*Fed. R. Civ. P. 11* advisory committee's note]. This interpretation of Section 128.7 is consistent with both the Notes of Advisory Committee to the 1993 Amendments of Rule 11 as well as California cases decided under Section 128.5 which took into consideration counsel's candor when imposing sanctions [*Fed. R. Civ. P. 11* advisory committee's note; *cf. Luke v. Baldwin-United Corp. (1985) 167 Cal. App. 3d 664* (counsel filing motion later determined through discovery to be unmeritorious exonerated from sanctions where motion was timely withdrawn) *with Park Magnolia v. Fields (1987) 191 Cal. App. 3d Supp. 1, 4-5* (pursuit of obviously invalid writ of possession and requiring opposing counsel to vacate writ through motion and hearing totally and completely without merit would support imposition of sanctions)].

The certification is more than a simple prophylactic measure designed to make litigants "stop and think" prior to filing pleadings with the court, although that is certainly one of the purposes [Senate Committee on Judiciary Analysis of AB 3594 at 3 (Aug. 16, 1994)]. Under Section 128.7, actual sanctions may flow from a violation of any one of the four certifications. The certifications required by Section 128.7 are broad enough to embrace all of the grounds for sanctions

under former Section 128.5, and more.

For discussion of the impact of the implied certification on pleading, see Ch. 26, *Answers* , and Ch. 123, *Complaints and Cross Complaints* .

Although *Code Civ. Proc. § 128.7(a)* is explicit concerning the requirement of a signature and the consequences of failing to sign a pleading, it does not address technical issues related to the signature requirement. These include the following:

- Not defining what constitutes signing in an attorney's "individual name" for the purposes of certification.

- Not addressing whether an attorney's partner or an associate may sign the complaint if the attorney handling the case is unavailable.

- Omitting to define who is liable if a partner, associate or employee who is unfamiliar with the case, signs for the attorney who has primary responsibility, in the event that any of the *Code Civ. Proc. § 128.7(b)(2)* certifications are untrue.

Although there is no California authority on point, federal cases decided under analogous provisions of Rule 11 have held the requirement of the signing of a pleading in the individual attorney's name will not be satisfied by a typewritten name on a pleading [*Giebelhaus v. Spindrift Yachts (9th Cir. 1991) 938 F.2d 962, 965-966]* . Certification should require the actual signature of the certifying attorney, in the individual attorney's name. Thus, a pleading signed in the name of the firm "by (name of attorney)" would be sufficient, but a pleading signed "The XYZ Law Firm" without an individual attorney's signature would not be [*Giebelhaus v. Spindrift Yachts (9th Cir. 1991) 938 F.2d 962, 965-966]* .

The second issue, whether an attorney may delegate the signing of a pleading to another attorney, is intertwined with the third issue, liability for a Rule 11 violation. Prior to 1993, an attorney could not delegate his or her obligations under *Rule 11* [*Pavelic & Le Flore v. Marvel Entertainment Group (1989) 493 U.S. 120, 125-127, 110 S. Ct. 456, 107 L. Ed. 2d 438* (1983 version of Rule 11 did not permit sanctions of law firm signing groundless complaint)]. However, the 1993 amendments to Rule 11, the model for Section 128.7, incorporated provisions that allow an attorney, law firm, or employee to be sanctioned for a violation of the rule [*Fed. R. Civ. P. 11* advisory committee's note]. The purpose of the 1993 amendments was, absent exceptional circumstances, also to hold the law firm responsible when a partner, employee, or associate violated Rule 11. The federal rule allows the court to make additional inquiry in order to determine whether the sanctions should be imposed on additional persons, or the law firm, instead of the person actually making the presentation to the court [*Fed. R. Civ. P., Rule 11* advisory committee's note].

The court may impose appropriate sanctions under *Code Civ. Proc. § 128.7(c),(d)* for violation of *Code Civ. Proc. § 128.7(b)*. For sanctions that may be imposed, see discussion *§ 510.12[18]*.

[12] Who Is Subject to Sanctions

Sanctions for violation of *Code Civ. Proc. § 128.7(b)* may be awarded against attorneys, law firms, or parties that violated the section or that are responsible for the violation [*Code Civ. Proc. § 128.7(c)*]. Moreover, in the absence of exceptional circumstances, a law firm is required to be held jointly responsible for violations that are committed by its partners, associates and employees [*Code Civ. Proc. § 128.7(c)(1)*].

Monetary sanctions may not be awarded against a represented party for a violation of *Code Civ. Proc. § 128.7(b)(2)* (certification) [*Code Civ. Proc. § 128.7(d)(1)*]. Alternatively, it may be argued that monetary sanctions are authorized against a represented party for violation of *Code Civ. Proc. § 128.7(b)(1)* (improper purpose, harassment, unnecessary

delay or needless cost), (b)(3) (no evidentiary support), and (b)(4) (denials unwarranted by evidence) [*see Laborde v. Aronson (2001) 92 Cal. App. 4th 459, 466, 112 Cal. Rptr. 2d 119 , overruled on other grounds, Musaelian v. Adams (2009) 45 Cal. 4th 512, 520, 87 Cal. Rtpr. 3d 475, 198 P.3d 560*].

[12A] Who May Recover Sanctions

An attorney or any other party who chooses to represent himself or herself in an action does not "incur" or become liable for attorney's fees and therefore is not entitled to an award of such fees under *Code Civ. Proc. § 128.7* [*Musaelian v. Adams (2009) 45 Cal. 4th 512, 520, 87 Cal. Rptr. 3d 475, 198 P.3d 560*]. In *Musaelian v. Adams,* an attorney acted in propria persona to defend an action on the grounds that the claims were subject to the litigation privilege of *Civ. Code § 47*. The attorney defendant also moved under *Code Civ. Proc. § 128.7* for sanctions including attorney's fees against the plaintiff. The California Supreme Court held that the attorney could not recover attorney's fees under *Code Civ. Proc. § 128.7* as compensation for the time and effort expended on his own behalf to address the plaintiff's violation of *Code Civ. Proc. § 128.7*. The Court held that the inclusion of the words "incur" and "attorney's fees" in *Code Civ. Proc. § 128.7* implies an agency relationship under which the client and the party are not one and the same, and out of which the attorney expects remuneration [*Musaelian v. Adams (2009) 45 Cal. 4th 512, 520, 87 Cal. Rptr. 3d 475, 198 P.3d 560*].

The Court's holding disapproved, to the extent inconsistent, of two court of appeal decisions that had previously allowed recovery of attorney's fees by pro se attorney litigants [*Musaelian v. Adams (2009) 45 Cal. 4th 512, 520, 87 Cal. Rptr. 3d 475, 198 P.3d 560* (disapproving, to the extent inconsistent, decisions in *Abandonato v. Coldren (1995) 41 Cal. App. 4th 264, 269, 48 Cal. Rptr. 2d 429* and *Laborde v. Aronson (2001) 92 Cal. App. 4th 459, 469, 112 Cal. Rptr. 2d 119*)].

[13] Liability for Sanctions Under Code Civ. Proc. § 128.7(b)(1)

[a] Burden of Proof

Code Civ. Proc. § 128.7(b) imposes liability for sanctions when a paper or pleading is presented "primarily for an improper purpose" such as harassment or delay [*Code Civ. Proc. § 128.7(b)(1)*], and also for inadequate investigation, that is, when factual and legal assertions and contentions are not "warranted by existing law," or "likely to have evidentiary support," or are not "reasonably based on lack of information and belief" [*Code Civ. Proc. § 128.7(b)(2)*, (3), (4)]. Each of these terms, in turn, relates to the burden of proof to be applied under each subsection of the statute.

[b] Primarily for Improper Purpose

Code Civ. Proc. § 128.5 generally required an action or tactic to be taken in bad faith, or to be "frivolous," which was defined as "totally and completely without merit" or for the "for sole purpose of harassing" an opposing party [*Code Civ. Proc. § 128.5(b)(2)*]. Section 128.7 does not require such a high level of improper conduct, but rather specifies that if any pleading or paper is filed primarily for an improper purpose, the proponent of the paper will be subject to sanctions. These improper purposes are defined in Section 128.7(b) to include "causing unnecessary delay," "harassment," or "needless increase in the cost of litigation."

The burden of establishing the filing of a pleading primarily for an improper purpose under Section 128.7 is clearly higher than under Fed. R. *Civ. Proc. 11*, which allows sanctions to be imposed if a pleading is filed for any improper purpose.

[c] Objective Standard Established

Based on the legislative history, *Code Civ. Proc. § 128.7* appears to establish an objective standard for the imposition of sanctions if a pleading is more likely than not to have been submitted to the court for an improper purpose. This is

similar to California's preponderance of evidence standard. Borrowing from Fed. R. *Civ. Proc. 11* and California case law construing Section 128.5, the determination of whether a pleading or paper "more likely than not" has been presented for an improper purpose should be made from the standpoint of the reasonable attorney: If a reasonable attorney would agree that it is more likely than not that a pleading or other paper has been filed for an improper purpose, the proponent of that pleading may be sanctioned [*compare Derechin v. State University of New York (2d Cir. 1992) 963 F.2d 513, 520*] (sanctions may be imposed under Rule 11 when after reasonable inquiry competent attorney could not form reasonable belief that pleading is well grounded) *with Abbett Electric Corp. v. Sullwold (1987) 193 Cal. App. 3d 708, 713-714, 238 Cal. Rptr. 496* (objective determinations under *Section 128.5* to be made from standpoint of "reasonable attorney").

[14] Duty of Reasonable Inquiry Under Code Civ. Proc. § 128.7(b)(2)-(4)

An alternative basis for awarding sanctions under *Section 128.7* is contained in Subsections *(b)(2), (b)(3)*, and *(b)(4)*, which provide that by signing a paper or other pleading, the signatory is certifying that the claims, defenses, and legal contentions contained in a pleading are warranted by existing law, or a non-frivolous argument for extension, modification, reversal, or establishment of new law; that allegations and factual contentions have an evidentiary basis, or may reasonably be expected to have such support after further investigation and discovery; and that denials are reasonably based on a lack of information and belief [*Code Civ. Proc. § 128.7(b)(2)-(4)*]. In effect, these subsections impose a duty of reasonable inquiry on counsel to determine the legal and factual bases of all contentions asserted in a pleading.

The extent of the reasonable inquiry required of counsel and unrepresented parties is undefined by *Code Civ. Proc. § 128.7(b)*. However, under analogous provisions of *Fed. R. Civ. Proc. 11*, reasonable inquiry depends on a number of factors such as [*Fed. R. Civ. P. 11* advisory committee's note]:

- The time available to the signatory.
- Whether the attorney has had to rely on the client for information contained in the pleading.
- Whether the view of the law expounded in the pleading is plausible.

This view comports also with California cases, which require the court to consider timing considerations, such as potential statute of limitations problems, when considering imposing sanctions under *Section 128.5* [*see Atchison, Topeka and Santa Fe Ry. Co. v. Stockton Port Dist. (1983) 140 Cal. App. 3d 111, 115, 117, 189 Cal. Rptr. 208]* .

Although the burden of proof for awarding sanctions for a violation of subsections (b)(2), (b)(3), and (b)(4) is not specified, based on *Rule 11* and California authority construing Section 128.5, and the legislative history, two generalizations are possible. First, under *Section 128.7*, as under *Rule 11*, the obligation to conduct inquiry and research of legal theories and factual contentions is that which would be conducted by a reasonable attorney under the circumstances. [*Business Guides v. Chromatic Com. Enterprises (1991) 498 U.S. 533, 550-551, 111 S. Ct. 922, 112 L. Ed. 2d 1140]* . Second, creative "objective" legal arguments will still be permissible under *Section 128.7*, but "empty head, pure heart arguments" are prohibited, and will subject the proponent of a pleading to sanctions [*Fed. R. Civ. P. 11* advisory committee's note; Letter from Assemblyman T. Weggeland to Senator B. Lockyer (Aug. 17, 1994) (discussing legislative intent)].

[15] Pleadings On Information and Belief

Current pleading practice allows allegations and denials of material facts in both verified and unverified complaints to be made on information and belief [*Horacek v. Smith (1948) 33 Cal. 2d 186, 191, 199 P.2d 929* ; *Code Civ. Proc. § 431.30(d), (e)-(f)*]. Prior to January 1, 1995, the effect of an allegation or denial on information and belief was to raise

and to place into issue a material allegation or allegations of the complaint [*see FPI Development v. Nakashima (1991) 231 Cal. App. 3d 367, 383, 282 Cal. Rptr. 508]* . Pleadings filed after that date continue to have the same effect, but also implicitly certify that such allegations meet the criteria of *Code Civ. Proc. § 128.7(b)(2)-(4)*, that is, that the allegations have or will have evidentiary support after the opportunity for reasonable discovery or investigation [*see § 510.12[14][a]*].

PRACTICE TIP:

Paraphrase *Section 128.7* in Pleading. To remove all doubt as to the scope of the certification as to matters pleaded on information and belief, counsel should add a paragraph at the beginning of the body of a pleading which paraphrases *Section 128.7*, such as, for example, "The allegations of this complaint stated on information and belief have evidentiary support or are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." This should protect counsel from sanctions under Section 128.7 and, provided counsel has conducted adequate investigation of the factual contentions which are not asserted on information and belief, make it more difficult for a prevailing party in litigation from establishing the elements of malicious prosecution in a later action.

[16] General Denials

A litigant responding to an unverified complaint filed by a private party may file a general denial that serves to place at issue all material allegations of the complaint [*Code Civ. Proc. § 431.30(d)*]. In contrast to the Federal Rules of Civil Procedure, which expressly subject general denials to the provisions of *Fed. R. Civ. Proc. 11*, *Code Civ. Proc. §§ 128.7* and *431.30* do not expressly contemplate the application of *Section 128.7(b)* certifications to general denials [*compare Fed. R. Civ. P. 8(b) with Code Civ. Proc. §§ 431.30, 446*]. California case authorities on this point antedate both *Sections 128.5* and *128.7*, but suggest that litigants could be subjected to sanctions under *128.7* for failing to investigate the underlying factual basis of a general denial [*see Burke v. Superior Court (1968) 71 Cal. 2d 276, 282, 78 Cal. Rptr. 481, 455 P.2d 409* (general denials not distinguishing between allegations that are unquestionably true and thosethat are at issue in good faith are to be justly condemned); *Williamson v. Clapper (1948) 88 Cal. App. 2d 645, 648, 199 P.2d 337* (loose practice of pleading resulting in incorporation in answer of known false denials is to be condemned)]. By the plain language of *Section 128.7*, the court could clearly could impose sanctions for a litigant's general denial to an unquestionably true allegation of a complaint. Nevertheless, given the entrenched practice of interposing general denials to all unverified complaints, it is uncertain whether the courts will view the general denial as an exception to *Section 128.7* or subject to the statute's certification and reasonable investigation requirements.

[17] Court's Consideration of Due Diligence of Party Seeking Sanctions

A court in determining what sanction, if any, to impose must consider whether the party seeking sanctions has exercised due diligence [*Code Civ. Proc. § 128.7(c)*].

The due diligence requirement of *Code Civ. Proc. § 128.7* has no counterpart in *Fed. R. Civ. Proc. 11*. The purpose of including the due diligence requirement appears to have been to preclude counsel from intentionally delaying the filing of a motion for sanctions under Section 128.7 in order to maximize a potential award of attorney's fees relating to conduct or tactics that occurred earlier in the litigation, and could have been remedied [Senate Committee on Judiciary Analysis of AB 3594 at 6 (Aug. 16, 1994)]. This is consistent with *Code. Civ. Proc. § 128.7(h)*, which allows sanctions to be imposed if a motion for sanctions has been brought for an improper purpose, as well as California case law disfavoring the dilatory use of procedural motions to obtain a tactical advantage, when conduct underlying the motion or the motion is motivated by bad faith [*see M.E. Gray Co. v. Gray (1985) 163 Cal. App. 3d 1025, 1034-1036, 210 Cal. Rptr. 285* (affirming sanctions imposed on counsel who sought dismissal on technicality after having obtained extension of five-year statute); for discussion of *Section 128.7(h), see § 510.12[22]*].

[18] Sanctions Authorized Under Section 128.7 When Attorney's or Party's Certification Violated

[a] Types of Sanctions

A court imposing sanctions for violation of *Code Civ. Proc. § 128.7(b)* is required to limit the sanction to that which is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated [*Code Civ. Proc. § 128.7(d)*]. Subject to *Code Civ. Proc. § 128.7(d)(1)* and *(2)*, sanctions that a court can impose may consist of, or include [*Code Civ. Proc. § 128.7(d)*]:

- Directives of a nonmonetary nature,
- An order to pay a penalty into court, or
- If imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation.

[b] Directives of a Nonmonetary Nature

"Directives of a nonmonetary nature" authorized by *Code Civ. Proc. § 128.7(d)* are not defined by the statute, but could include the full panoply of nonmonetary sanctions available under *Fed. R. Civ. P. 11*. These sanctions might include, in the appropriate case, injunctive relief, disqualifying counsel from further participation in the litigation, and perhaps even referral to the appropriate bar disciplinary authorities [*see Total Television Entertainment Corp. v. Chestnut Hill Village Associates (E.D. Pa. 1992) 145 F.R.D. 375* ; *Merrigan v. Affiliated Bankshares of Colorado, Inc. (D. Colo. 1991) 775 F. Supp. 1408* (injunctive sanctions appropriate where monetary are not effective)]. For discussion of when the State Bar must be notified of the imposition of sanctions, see *§ 510.22*.

[c] Expenses and Attorney's Fees for Prevailing Party on Sanctions Motion

If a noticed motion for sanctions has been brought, the court may award to the prevailing party on the motion, if warranted, the reasonable expenses and attorney's fees incurred in presenting or opposing the motion [*Code Civ. Proc. § 128.7(c)(1)*; for discussion of the notice of motion procedure, see *§ 510.12[20]*].

An attorney may not recover sanctions under *Code Civ. Proc. § 128.7* if the attorney represents himself or herself in the action and does not pay or "incur" any liability for attorney's fees [*Musaelian v. Adams (2009) 45 Cal. 4th 512, 520, 87 Cal. Rptr. 3d 475, 198 P.3d 560* , *see § 510.12[12A]*].

[d] Limit on Sanctions Against Party Based on Unwarranted Legal Contentions

Money sanctions may not be awarded against a represented party for a violation of *Code Civ. Proc. § 128.7(b)(2)*, that is, for violation of the condition that the claims, defenses, and other legal contentions set forth in the papers are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law [*Code Civ. Proc. § 128.7(d)(1)*].

[e] Procedural Prerequisite to Award of Money Sanctions on Court's Own Motion

When the court proceeds on its own motion to impose sanctions, monetary sanctions may not be awarded unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned [*Code Civ. Proc. § 128.7(d)(2)*)]. For order to show cause procedure, see discussion in *§ 510.12[20][d]*.

[19] Availability of Punitive Damages in Action by Felon

In addition to any award of sanctions under *Code Civ. Proc. § 128.7* for conduct described in *Code Civ. Proc. § 128.7(b)*, the court may assess punitive damages against the plaintiff if the court determines that the following four requirements are met [*see Code Civ. Proc. § 128.7(f)*]:

- The plaintiff has been convicted of a felony;
- The action is brought against the plaintiff's victim, or the victim's heirs, relatives, or estate, or personal representative;
- The action is an action for injuries arising from the acts for which the plaintiff was convicted; and
- The plaintiff is guilty of fraud, oppression, or malice in maintaining the action.

[20] Procedure

[a] Notice and Reasonable Opportunity to Respond

For a court to award sanctions under *Code Civ. Proc. § 128.7* for a violation of *Code Civ. Proc. § 128.7(b)* notice and a reasonable opportunity to respond is required [*see Code Civ. Proc. § 128.7(c)*].

[b] Notice of Motion

A party may seek sanctions by way of noticed motion. The motion for sanctions must be made separately from other motions or requests. It must describe the specific conduct alleged to violate *Code Civ. Proc. § 128.7(b)* [*Code Civ. Proc. § 128.7(c)(1)*].

[c] Service of Notice; Opportunity to Withdraw Challenged Paper, Claim, Defense, Contention, Allegation, or Denial

The notice of motion must be served as provided in *Code Civ. Proc. § 1010*. It cannot, however, be filed with or presented to the court unless, within 21 days after service of the motion, or such other period as prescribed by the court, the challenged paper, claim, defense, contention, allegation, or denial is not appropriately corrected or withdrawn [*Code Civ. Proc. § 128.7(c)(1)*; *see, e.g., Galleria Plus v. Hanmi Bank (2009) 179 Cal. App. 4th 535, 538, 101 Cal. Rptr. 3d 803* (motion that did not provide 21-day notice was defective)].

[d] Court's Order to Show Cause

The court, on its own motion may enter an order describing the specific conduct that appears to violate *Code Civ. Proc. § 128.7(b)* and directing an attorney, law firm, or party to show cause why it has not violated *Code Civ. Proc. § 128.7(b)* unless, within 21 days of service of the order to show cause, the challenged paper, claim, defense, contention, allegation, or denial is appropriately corrected or withdrawn [*Code Civ. Proc. § 128.7(c)(2)*].

[21] Requirement Concerning Sanction Order

The court when imposing sanctions must describe the conduct determined to constitute a violation of *Code Civ. Proc. § 128.7* and must explain the basis for the sanctions imposed [*Code Civ. Proc. § 128.7(e)*]. Due process requires that any order imposing sanctions state with particularity the basis for finding a violation of the section [*see Caldwell v. Samuels Jewelers (1990) 222 Cal. App. 3d 970, 977-978, 272 Cal. Rptr. 126* (construing former Cal. Rules of Ct., Rule 227; *now see Cal. Rules of Ct., Rule 2.30*)].

[22] Improper Sanction Motion Is Sanctionable

A motion for sanctions is itself subject to a motion for sanctions if it is brought by a party or a party's attorney primarily for an improper purpose, for example, to harass or to cause unnecessary delay or needless increase in the cost of litigation [*Code Civ. Proc. § 128.7(h)*]. It is the Legislature's intent that the courts vigorously use its sanctions authority to deter such improper conduct or comparable conduct by others similarly situated [*Code Civ. Proc. § 128.7(h)*].

Under Fed. R. *Civ. Proc. 11*, and presumably under *Section 128.7*, improper conduct may include using sanctions motions as a discovery device or as a tool for exacting an unjust settlement, or to intimidate one's adversary into withdrawing contentions that are debatable [*Fed. R. Civ. P. 11*].

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Volume 44: Sales thru Sanitation and Sewerage Districts-Chs. 500-511
Chapter 510 SANCTIONS
PART II. LEGAL BACKGROUND

44-510 California Forms of Pleading and Practice--Annotated § 510.13

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.13 Sanctions Under Code Civ. Proc. § 177.5 for Violation of Lawful Court Order

[1] Basic Rule

Notwithstanding any other provision of law, a judicial officer has the power to impose reasonable money sanctions not to exceed $1500 payable to the county in which the judicial officer is located if a person violates any lawful court order without good cause or substantial justification [*Code Civ. Proc. § 177.5*]. This power does not apply, however, to advocacy before the court by counsel [*Code Civ. Proc. § 177.5*].

Imposition of sanctions under *Code Civ. Proc. § 177.5* is within the court's discretion, which must be exercised in a reasonable manner with the statutorily authorized purposes in mind and guided by existing legal standards as adapted to current circumstances [*In re Woodham (2001) 95 Cal. App. 4th 438, 443, 115 Cal. Rptr. 2d 431* ; *Moyal v. Lanphear (1989) 208 Cal. App. 3d 491, 501, 256 Cal. Rptr. 296]* .

Imposition of sanctions under Section 177.5 requires a knowing violation of a valid court order without good cause or substantial justification [*In re Woodham (2001) 95 Cal. App. 4th 438, 442, 115 Cal. Rptr. 2d 431* ; *Winikow v. Superior Court (2000) 82 Cal. App. 4th 719, 726, 98 Cal. Rptr. 2d 413* ; *see People v. Muhammad (2003) 108 Cal. App. 4th 313, 323-326, 133 Cal. Rptr. 2d 308* (*§ 177.5* has no application without court order)].

For the purposes of *Section 177.5*, the term "person" is defined to include a witness, a party, a party's attorney, or both [*Code Civ. Proc. § 177.5*].

Unlike *Code Civ. Proc. § 128.7*, *Section 177.5* is by its terms limited to a violation of a lawful court order, there is a $1500 limitation, and the sanction is payable to the county, not to the opposing party [*Code Civ. Proc. § 177.5*]. Moreover, *Code Civ. Proc. § 177.5*, applies to both civil and criminal matters [*People v. Tabb (1991) 228 Cal. App. 3d 1300, 1310, 279 Cal. Rptr. 480]* . Furthermore, a magistrate presiding over a criminal matter qualifies as a "judicial officer" within the meaning of *Code Civ. Proc. § 177.5* [*People v. Tabb (1991) 228 Cal. App. 3d 1300, 1306 n.5, 279 Cal. Rptr. 480]* .

The apparent purpose of *Code Civ. Proc. § 177.5* is to compensate public agencies, such as a court, for the costs of an unnecessary hearing [*Moyal v. Lanphear (1989) 208 Cal. App. 3d 491, 499, 256 Cal. Rptr. 296* ; *see In re Woodham (2001) 95 Cal. App. 4th 438, 443, 115 Cal. Rptr. 2d 431* (court properly imposed sanctions on Board of Prison Terms for unnecessary litigation)]. The section was enacted, according to its author, "to insure that all parties are present and prepared for court appearances" and "to help eliminate unnecessary delays in civil court proceedings" [*Seykora v. Superior Court (1991) 232 Cal. App. 3d 1075, 1080, 283 Cal. Rptr. 857]* . Section 177.5 requires only that a person violate any lawful court order without good cause or substantial justification for sanctions to be awarded [*Seykora v. Superior Court (1991) 232 Cal. App. 3d 1075, 1080, 283 Cal. Rptr. 857]* .

Thus, for example, sanctions under *Code Civ. Proc. § 177.5* have been upheld when counsel failed to file a joint at-issue memorandum as required by a fast track local rule and thereafter failed to comply with a court order to appear [*Moyal v. Lanphear (1989) 208 Cal. App. 3d 491, 501, 256 Cal. Rptr. 296]* . Similarly, sanctions were upheld when counsel walked out of a courtroom after being ordered to remain [*Seykora v. Superior Court (1991) 232 Cal. App. 3d 1075, 1083-1084, 283 Cal. Rptr. 857]* . A second sanction imposed for failure to pay the original *Code Civ. Proc. § 177.5* was upheld for the purpose of penalizing the attorney's ignoring lawful orders of the court [20th *Century Ins. Co. v. Choong (2000) 79 Cal.App. 4th 1274, 1277-1279, 94 Cal. Rptr. 2d 753* (first sanction imposed for failure to prepare mandatory settlement conference statement pursuant to local rule)]. Rules of Professional Conduct are not normally regarded as court orders of the type referred to in *Code Civ. Proc. § 177.5* [*Conservatorship of Becerra (2009) 175 Cal. App. 4th 1474, 1482-1484, 96 Cal. Rptr. 3d 910* (violation of *Rules of Professional Conduct, Rule 2-100(A)* not properly pursued under *Code Civ. Proc. § 177.5*)].

[2] Notice and Hearing Required to Obtain Section 177.5 Sanctions

A judicial officer cannot impose monetary sanctions under *Code Civ. Proc. § 177.5* except on notice contained in a party's moving papers or responding papers, or on the court's own motion, after notice and an opportunity to be heard [*Code Civ. Proc. § 177.5*; for a form of notice of motion, *see § 510.62*]. Adequate notice and an opportunity to be heard is mandated not only by statute, but also by the due process clauses of both the state and federal constitutions [*Caldwell v. Samuels Jewelers (1990) 222 Cal. App. 3d 970, 976-977, 272 Cal. Rptr. 126* (notice held adequate when counsel had requested sanctions under the discovery act but learned at hearing that court was considering *Section 177.5* sanctions based on same facts as those relevant to discovery act sanctions motion)].

The scope of the hearing under *Section 177.5*, is in the trial court's discretion [*see Seykora v. Superior Court (1991) 232 Cal. App. 3d 1075, 1081-1083, 283 Cal. Rptr. 857* (no abuse of discretion in denying request to call witnesses)].

PRACTICE TIP:

Supporting and Opposing Evidence. Put all evidence in support of and in opposition to *Code Civ. Proc. § 177.5* motions for sanctions in declarations, authenticated documents, and requests for judicial notice filed with the moving or opposing papers. *By Commissioner Anita Rae Shapiro.*

[3] Order Imposing Section 177.5 Sanctions Required to Be in Writing and Specify Reasons

An order imposing sanctions must be in writing and must recite in detail the conduct or circumstances justifying the order [*Code Civ. Proc. § 177.5*; for a form of order, *see § 510.63*]. The language of *Code Civ. Proc. § 177.5* is similar to that in *Code Civ. Proc. § 128.7* and presumably the same rules apply [*Caldwell v. Samuels Jewelers (1990) 222 Cal. App. 3d 970, 977-978, 272 Cal. Rptr. 126]* . Thus, for example, an order that set forth no facts justifying the imposition of sanctions but merely stated "good cause appearing" to impose sanctions was held insufficient [*Caldwell v. Samuels Jewelers (1990) 222 Cal. App. 3d 970, 977-978, 272 Cal. Rptr. 126* ; *see also Conservatorship of Becerra (2009) 175 Cal. App. 4th 1474, 1484-1485, 96 Cal. Rptr. 3d 910* (order referring to "good cause for issuance of" sanctions insufficient)]. Due process requires that any order imposing sanctions state with particularity the basis for finding a

violation of the section [*Caldwell v. Samuels Jewelers (1990) 222 Cal. App. 3d 970, 977-978, 272 Cal. Rptr. 126]* . For further discussion, see *§ 510.13[2]*.

PRACTICE TIP:

Preparing Order. When a *Code Civ. Proc. § 177.5* motion for sanctions is granted, the prevailing party should volunteer to prepare an attorney order if not ordered to do so by the court. *By Commissioner Anita Rae Shapiro.*

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Chapter 510 SANCTIONS
PART II. LEGAL BACKGROUND

44-510 California Forms of Pleading and Practice--Annotated § 510.14

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.14 Sanctions Under Code Civ. Proc. § 575.2 for Violation of Local Court Rule

[1] Basic Rule

Superior courts may promulgate local rules under *Code Civ. Proc. § 575.1* for the supervision and management of actions [*Code Civ. Proc. § 575.1(a)*]. These rules may provide that if counsel, a party represented by counsel, or a pro se party fails to comply with any of their requirements, the court on a party's motion, or on the court's own motion may do any of the following [*Code Civ. Proc. § 575.2(a)*; *see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rules 7.13 and 8.0 (providing for sanctions)]:

- Strike out all or any part of that party's pleadings,
- Dismiss the action or proceeding or any part of it,
- Enter a default judgment against that party, or
- Impose other penalties of a lesser nature as otherwise provided by law.

The court may also order that the party or party's counsel pay to the moving party the reasonable expenses, including reasonable attorney fees, in making the motion [*Code Civ. Proc. § 575.2(a)*; *see e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 8.0; *see also Cal. Rules of Ct., Rule 2.30* (discussed in *§ 510.17*)].

A court may not impose sanctions under *Code Civ. Proc. § 575.2* for conduct that, although objectionable, does not constitute a violation of local rules. For example, under Los Angeles Co. Super. Ct. Rules, Rule 7.12, a lawyer should avoid *ex parte* communication on the substance of a pending case with a judge (or the judge's law clerk) before whom the case is pending. It is not a violation of this rule for an attorney simply to call the court clerk to request that status conference be scheduled without having first conferred with other counsel, as the ex parte prohibitions were not intended to preclude simple communications between attorneys and court clerks on purely administrative matters

having nothing to with the substance of the case [*Blum v. Republic Bank (1999) 73 Cal. App. 4th 245, 248-249, 86 Cal. Rptr. 2d 226]* .

[2] Code Civ. Proc. § 575.2 Sanction Not to Affect Party if Counsel Is Responsible

Code Civ. Proc. § 575.2(b) limits the imposition of sanctions under *Code Civ. Proc. § 575.2(a)*. If a failure to comply with local rules is the responsibility of counsel and not of the party, sanctions can only be imposed on counsel and the sanction cannot adversely affect the party's cause of action or defense [*Code Civ. Proc. § 575.2(b)*]. *Section 575.2(b)* is thus an exception to the general rule that an attorney's negligence is imputed to the client [*State of California ex rel. Public Works Bd. v. Bragg (1986) 183 Cal. App. 3d 1018, 1026, 228 Cal. Rptr. 576* ; *see Tliche v. Van Quathem (1998) 66 Cal. App. 4th 1054, 1059-1064, 78 Cal. Rptr. 2d 458* (holding that it was error to dismiss action for attorney's failure to serve summons and complaint within 60 days under fast-track rules when there was no evidence that plaintiff, rather than attorney, caused the delay, and no less severe sanctions were imposed)]. Moreover, if negligent counsel does not invoke Section 575.2(b) to protect the client against sanctions the court must move sua sponte to do so to guarantee protection of an innocent party [*State of California ex rel. Public Works Bd. v. Bragg (1986) 183 Cal. App. 3d 1018, 1028-1029, 228 Cal. Rptr. 576]* .

Thus, under *Code Civ. Proc. § 575.2(b)*, a trial court's order denying a jury trial in a personal injury case because of defense counsel's failure to submit proposed jury instructions within the local fast-track rule deadline has been held to be error [*Cooks v. Superior Court (1990) 224 Cal. App. 3d 723, 726-727, 274 Cal. Rptr. 113]* . Similarly, it has been held error for a trial court not to have relieved a plaintiff from a jury waiver based on the plaintiff's counsel's failure to post jury fees as required under a local rule, when nothing suggested that the plaintiff was responsible for counsel's failure [*Massie v. AAR Western Skyways, Inc. (1992) 4 Cal. App. 4th 405, 409-412, 5 Cal. Rptr. 2d 654]* . Sanctions that effectively deny a party a trial on the merits because of counsel's actions are also improper under Section 575.2(b) [*see State of California ex rel. Public Works Bd. v. Bragg (1986) 183 Cal. App. 3d 1018, 1029-1030, 228 Cal. Rptr. 576* (error to grant motion in limine based solely on deputy attorney general's mistake in not timely filing a complete appraisal report as required by local rule that had practical effect of preventing the introduction of any evidence on the valuation of property when only issue was the property's fair market value; court could have devised other penalty and remedial action); *In re Marriage of Colombo (1987) 197 Cal. App. 3d 572, 578-580, 242 Cal. Rptr. 100* (error to rule that objections and disputes regarding matters in pretrial statement had been waived by attorney's failure to file responsive pretrial statement in accordance with applicable local rules when ruling precluded party from offering any evidence on those issues)].

Gov. Code § 68608(b), authorizing sanctions to enforce Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*), does not include comparable protection for parties. For discussion of whether *Section 68608(b)* takes precedence over *Code Civ. Proc. § 575.2, see § 510.16*.

[3] Notice, Hearing, and Order Requirements

The court may not impose a sanction under *Code Civ. Proc. § 575.2* for violation of a local court rule without prior notice to the party against whom the sanction is sought to be imposed and providing the party an opportunity to be heard [*Code Civ. Proc. § 575.2(a)*; *see Annex British Cars, Inc. v. Parker-Rhodes (1988) 198 Cal. App. 3d 788, 792, 244 Cal. Rptr. 48* (due process requires notice and hearing before sanctions can be imposed under *§ 575.2(a)*); for a form of notice of motion, *see § 510.64*]. Similarly, due process requires that the sanction order state with particularity the basis for finding a violation of the statute [*Caldwell v. Samuels Jewelers (1990) 222 Cal. App. 3d 970, 978, 272 Cal. Rptr. 126* (construing former Cal. Rules of Ct., Rule 227 [*now see Cal. Rules of Ct., Rule 2.30*]); for a form of order, *see § 510.65*]. For further discussion of notice, hearing and order requirements, *see § 510.14[3]*.

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44-510 California Forms of Pleading and Practice--Annotated § 510.15

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.15 Sanctions Under Gov. Code § 68608(b) for Violation of Fast Track Rules

[1] Basic Rules

The Trial Court Delay Reduction Act is contained in *Gov. Code § 68600 et seq.* The Judicial Council is required to adopt standards of timely disposition for the processing and disposition of civil and criminal actions [*Gov. Code § 68603(a)*]. The courts are given power under the act to enact local court rules to carry out the mandate of the act [*Gov. Code §§ 68607, 68612*; *see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rules 7.0 et seq.]. The judges have all the powers authorized by law to impose sanctions under the act, including the power to strike pleadings or dismiss actions, if less severe sanctions would appear not to be effective after taking into account the effect of any previous sanctions or previous lack of compliance in the case [*Gov. Code § 68608(b)*; *see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rules 7.7(c), 7.13 (sanctions; imposition on party and/or, if appropriate, counsel)]. Moreover, judges are encouraged to impose sanctions to achieve the purposes of the act [*Gov. Code § 68608(b)*; *but see* Los Angeles Co. Super. Ct. Rules, Rule 7.13 (court allowed to impose sanctions for specified conduct, but urged to do so sparingly and only when clearly warranted)]. The ultimate sanction, however, is rarely if ever proper in the first instance [*Sigala v. Anaheim City School Dist. (1993) 15 Cal. App. 4th 661, 673-674, 19 Cal. Rptr. 2d 38* (striking a request for a trial de novo after judicial arbitration held improper when there were no earlier refusals to comply with court orders or prior imposed sanctions)].

It is a drastic measure to prevent parties from presenting their cases on the merits. Terminating sanctions should only be ordered when there has been previous noncompliance with an order or rule and it appears that a less severe sanction would not be effective. Terminating sanctions should not be ordered as a first response when noncompliance is through no fault of the party [*Wantuch v. Davis (1995) 32 Cal. App. 4th 786, 795, 39 Cal. Rptr. 2d 47* (in propria persona litigant; striking pleadings and entry of judgment for failure to appear at status conference held improper when nonappearance not wilful but solely result of imprisonment of which trial court was aware throughout proceedings)].

Unlike *Code Civ. Proc. § 575.2, Gov. Code § 68608(b)* does not include protection for the party when the sanction is based on the attorney's actions. For discussion of whether *Section 68608(b)* takes precedence over *Code Civ. Proc. §*

575.2, see § 510.16.

[2] Procedural Requirements

Before sanctions can be imposed under *Gov. Code § 68608(b)* the procedural due process requirements of a fair warning and an opportunity to be heard must be met [*Youngworth v. Stark (1991) 232 Cal. App. 3d 395, 406, 283 Cal. Rptr. 668* (decided under former *Gov. Code § 68609(d)* (*now Gov. Code § 68608(b)*)); *see Sigala v. Anaheim City School Dist. (1993) 15 Cal. App. 4th 661, 673, 19 Cal. Rptr. 2d 38* (striking defendant's request for trial de novo when defendant told sanction hearing would be heard under *Cal. Rules of Ct. Rules 3.1380* and *2.30, Code Civ. Proc. § 128.5* and local rules, but no mention made of striking the request for trial de novo); for a form of notice of motion, *see § 510.64*]. The adequacy of notice to satisfy basic due process requirements will be determined on a case by case basis rather than on an arbitrary number of days' notice [*Youngworth v. Stark (1991) 232 Cal. App. 3d 395, 407, 283 Cal. Rptr. 668]* . Similarly, due process requires that the sanction order state with particularity the basis for finding a violation of the statute [*Caldwell v. Samuels Jewelers (1990) 222 Cal. App. 3d 970, 978, 272 Cal. Rptr. 126* (construing *Cal. Rules of Ct., Rule 2.30*); for a form of order, *see § 510.65*]. For further discussion of notice, hearing and order requirements, see *§ 510.14[3]*.

PRACTICE TIP:

Responding to Potential Dismissal. If the court issues an Order to Show Cause re Dismissal, be sure to file and serve an opposition. Failure to timely file and serve an opposition may preclude oral opposition at the court hearing. *By Commissioner Anita Rae Shapiro.*

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44-510 California Forms of Pleading and Practice--Annotated § 510.16

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.16 Relationship of Code Civ. Proc. § 575.2 and Gov. Code § 68608 Sanctions for Violation of Local Court Rules

Code Civ. Proc. §§ 177.5, 575.1, 575.2, together with *Gov. Code § 68608(b),* provide a comprehensive statewide scheme of regulation concerning fast track matters, and local rules supplement the statewide scheme [*see Moyal v. Lanphear (1989) 208 Cal. App. 3d 491, 500, 256 Cal. Rptr. 296]* . It is unclear, however, whether *Gov. Code § 68608(b)* supersedes *Code Civ. Proc. § 575.2(b)* so as to allow fast track courts to dismiss actions or otherwise impose sanctions on parties for their counsel's failure to comply with local court rules [*see Youngworth v. Stark (1991) 232 Cal. App. 3d 395, 404-405, 283 Cal. Rptr. 668]* .

There is authority that has held that *Code Civ. Proc. § 575.2(b)* applies to fast track rules and that when a party is in no way personally responsible for counsel's failure to comply with a local fast track rule, sanctions must only be imposed on counsel, not the innocent party [*Cooks v. Superior Court (1990) 224 Cal. App. 3d 723, 725-727, 274 Cal. Rptr. 113* ; for discussion of the protection of the party under *Code Civ. Proc. § 575.2(b), see § 510.14[2]*].

On the other hand, there is authority that has held that former *Gov. Code § 68609(d), now Gov. Code § 68608(b),* controls concerning the imposition of sanctions for violation of local delay reduction rules and therefore the standards set forth in that section take precedence over *Code Civ. Proc. § 575.2(b)* [*Laguna Auto Body v. Farmers Ins. Exchange (1991) 231 Cal. App. 3d 481, 490 n.8, 282 Cal. Rptr. 530 (Fourth Dist., Div. Three)* ; *Intel Corp. v. USAIR Inc. (1991) 228 Cal. App. 3d 1559, 1565-1568, 279 Cal. Rptr. 569 (Second Dist., Div. Four)]* . Under this view, trial courts have discretionary authority to impose the sanction of dismissal based on counsel's failure to comply with local fast track rules, if the standards set forth in *Gov. Code § 68608(b)* are satisfied [*Intel Corp. v. USAIR Inc. (1991) 228 Cal. App. 3d 1559, 1565-1566, 279 Cal. Rptr. 569]* . Thus, a dismissal sanction has been upheld under former Section § 68609(d), now *Gov. Code § 68608(b),* based on plaintiffs' counsel's repeated failure to proceed in accordance with local fast track rules [*Intel Corp. v. USAIR Inc. (1991) 228 Cal. App. 3d 1559, 1566-1568, 279 Cal. Rptr. 569]* . Note that in *Intel* the court referred to *Cooks v. Superior Court,* discussed above, which was decided in the same appellate district and division, and stated that the *Cooks* opinion should not be understood to contradict the holding reached in *Intel* [*Intel Corp. v. USAIR Inc. (1991) 228 Cal. App. 3d 1559, 1566 n.6, 279 Cal. Rptr. 569]* .

PRACTICE TIP:

Familiarity With Local Rules. Learn and comply with local fast track rules so you will not have to argue that the court does not have the authority to dismiss an action based on counsel's failure to comply with fast track rules, and you will not have to defend a subsequent legal malpractice lawsuit. *By Commissioner Anita Rae Shapiro.*

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44-510 California Forms of Pleading and Practice--Annotated § 510.17

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.17 Sanctions Under Cal. Rules of Ct., Rule 2.30 for Violation of California Rules of Court

[1] Application

Cal. Rules of Ct., Rule 2.30 prescribes sanctions for violations of California Rules of Court relating to general civil cases [*see Cal. Rules of Ct., Rule 2.1 et seq.*], unlawful detainer cases, probate proceedings [*see Cal. Rules of Ct., Rule 7.1 et seq.*], civil proceedings in the appellate division of the superior court [*see Cal. Rules of Ct., Rule 8.700 et seq.*], and small claims cases [*Cal. Rules of Ct., Rule 2.30(a)*; *Vidrio v. Hernandez (2009) 172 Cal. App. 4th 1443, 1456-1458* (upholding constitutionality of rule); for rules relating to small claims cases, *see Cal. Rules of Ct., Rule 3.2100 et seq.*].

Former Rule 227 provided for sanctions for unlawful interference with the proceedings of the court by failure to comply with the California Rules of Court, local rules, or court orders, unless good cause was shown, or failure to participate in good faith in a conference the California Rules of Court or a court order required. Effective July 1, 2001, former Rule 227 was amended to authorize monetary sanctions for failure to comply with the civil pretrial and trial rules of the California Rules of Court [former Cal. Rules of Ct., Rule 222, Drafter's Note]. Effective January 1, 2004, former Rule 227 was amended to provide sanctions for failure to comply with the California Rules of Court specified above. Effective January 1, 2007, former Rule 227 was renumbered as part of the reorganization of the California Rules of Court to be *Cal. Rules of Ct., Rule 2.30*. The renumbering made no substantive changes.

[2] Sanctions Available

In addition to any other sanctions permitted by law, the court may order a person to pay reasonable monetary sanctions to the court, to an aggrieved person, or both, for failure without good cause to comply with the California Rules of Court relating to general civil cases, unlawful detainer cases, probate proceedings, civil proceedings in the appellate division of the superior court, and small claims cases, after written notice and an opportunity to be heard. For these purposes, "person" means a party, a party's attorney, a witness and an insurer or any other individual or entity whose consent is necessary for the disposition of the case [*Cal. Rules of Ct., Rule 2.30(b)*]. If the failure to comply with an applicable rule is counsel's responsibility, not the party's responsibility, the court must impose the penalty on counsel. The penalty must not adversely affect the party's cause of action or defense [*Cal. Rules of Ct., Rule 2.30(b)*].

Effective July 1, 2001, former Rule 227 appeared to provide independent authority for the court to impose sanctions for violations of the Rules of Court. It no longer provided that the court could impose sanctions authorized under statutes, including *Code Civ. Proc. § 575.2* and *Gov. Code § 68608(b)*, or for violations of local rules or court orders. Cases decided under previous versions of Rule 227 that referred to the court's authority in relation to statutory authority or to violations of local rules or court orders no longer appeared to be relevant [*see, e.g., Blum v. Republic Bank (1999) 73 Cal. App. 4th 245, 248-249, 86 Cal. Rptr. 2d 226* (improper to impose sanctions under Rule 227 for conduct that does not actually constitute violation of local rule); *Trans-Action Commercial Investors, Ltd. v. Jelinek (1997) 60 Cal. App. 4th 352, 362-365, 70 Cal. Rptr. 2d 449* (while court's authority to sanction under former Cal. Rules of Ct., Rule 227 appeared broad, it was limited to situations in which there was statutory authority for sanctions because Rule 227 was intended only to consolidate authority found in statutes and did not provide independent authority to impose sanctions); *Caldwell v. Samuels Jewelers (1990) 222 Cal. App. 3d 970, 979, 272 Cal. Rptr. 126* (when court awards sanctions to county pursuant to Rule 227 as penalty for violating court order, maximum permissible sanction is $1,500, amount set in *Code Civ. Proc. § 177.5* as maximum sanction payable to county for violating court order)]. Cases interpreting former Rule 227 with regard to violations of the Rules of Court, however, are probably still good law [*see, e.g., Caldwell v. Samuels Jewelers (1990) 222 Cal. App. 3d 970, 979, 272 Cal. Rptr. 126* (if sanction award pursuant to Rule 227 is based on violation of state rule, limitation to $1,500 imposed by *Code Civ. Proc. § 177.5* does not apply)].

[3] Notice and Procedure

The court may not impose sanctions under *Cal. Rules of Ct., Rule 2.30* except on noticed motion by the party seeking sanctions or on the court's own motion after the court provides notice and an opportunity to be heard [*Cal. Rules of Ct., Rule 2.30(c)*]. A party's motion for sanctions must do each of the following [*Cal. Rules of Ct., Rule 2.30(c)*]:

- State the applicable Rule of Court that was violated.
- Describe the specific conduct that allegedly violated the rule.
- Identify the attorney, law firm, party, witness or other person against whom the party seeks sanctions.

The court on its own motion may issue an order to show cause that does each of the following [*Cal. Rules of Ct., Rule 2.30(c)*]:

- Sets forth the applicable Rule of Court that was violated.
- Describes the specific conduct that appears to have violated the Rule.
- Directs the attorney, law firm, party, witness or other person to show cause why the court should not impose sanctions against them for violation of the Rule.

The court must provide adequate notice and an opportunity to be heard to satisfy procedural due process requirements before imposing sanctions [*Bergman v. Rifkind & Sterling, Inc. (1991) 227 Cal. App. 3d 1380, 1387, 278 Cal. Rptr. 583* ; *Caldwell v. Samuels Jewelers (1990) 222 Cal. App. 3d 970, 976, 272 Cal. Rptr. 126* (both decided under pre-2001 versions of Rule 227)]. The court must provide notice before deciding whether, in fact, to impose sanctions and before making findings [*Bergman v. Rifkind & Stirling, Inc. (1991) 227 Cal. App. 3d 1380, 1387, 278 Cal. Rptr. 583]* .

An order imposing sanctions must be in writing. It must recite in detail the conduct or circumstances justifying the order [*Cal. Rules of Ct., Rule 2.30(e)*; *see also Caldwell v. Samuels Jewelers (1990) 222 Cal. App. 3d 970, 978, 272 Cal.*

Rptr. 126 (due process required that order imposing sanctions under former Cal. Rules of Ct., Rule 227 state with particularity basis for finding violation of rule; construing former Rule 527)].

[4] Award of Expenses

In addition to the sanctions awardable under *Cal. Rules of Ct., Rule 2.30(b)*], the court may order the person who violated an applicable rule [*see discussion under § 510.17[1]*] to pay to the party aggrieved by the violation that party's reasonable expenses, including reasonable attorney's fees and costs, incurred in connection with the motion for sanctions or the order to show cause [*Cal. Rules of Ct., Rule 2.30(d)*].

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44-510 California Forms of Pleading and Practice--Annotated § 510.18

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.18 Effect of Bankruptcy Laws on Sanctions

Federal bankruptcy laws may not be invoked to obstruct the imposition of sanctions by California courts against an attorney for frivolous or abusive litigation tactics [*Papadakis v. Zelis (1991) 230 Cal. App. 3d 1385, 1389, 282 Cal. Rptr. 18]* . Thus, the filing of a petition in bankruptcy by an attorney who has engaged in such tactics has been held not to invoke the automatic bankruptcy stay and a state court could thereafter consider and impose sanctions against the attorney [*see* *Papadakis v. Zelis (1991) 230 Cal. App. 3d 1385, 1389-1390, 282 Cal. Rptr. 18* (upholding sanctions against attorney for frivolous appeal)]. For general discussion of bankruptcy, see Ch. 94, *Bankruptcy* .

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44-510 California Forms of Pleading and Practice--Annotated § 510.19

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.19 Defense Costs Under Code Civ. Proc. § 1038 if Court Determines That Proceeding Not Brought in Good Faith and With Reasonable Cause

[1] Basic Rules

Code Civ. Proc. § 1038 authorizes an award of defense costs, in addition to those costs normally awarded to a prevailing party, in certain types of actions not brought in good faith and with reasonable cause. The actions Section 1038 applies to are [*Code Civ. Proc. § 1038(a)*]:

- Civil proceedings under the California Tort Claims Act (*Gov. Code § 810 et seq.*).
- Civil proceedings for express or implied indemnity or for contribution in a civil action.

For defense costs to be awardable under *Section 1038* in these proceedings one of the following motions must be brought by a defendant or cross defendant and must be granted [*Code Civ. Proc. § 1038(d)*]:

- Summary judgment.
- Judgment under *Code Civ. Proc. § 631.8*.
- Nonsuit.
- Directed verdict.

If the court finds that the proceeding was not brought in good faith and with reasonable cause, the defendant or cross defendant may recover all reasonable and necessary defense costs, in addition to costs normally awarded to the prevailing party [*Code Civ. Proc. § 1038(a)*].

Defense costs for the purpose of *Code Civ. Proc. § 1038* include reasonable attorney's fees, expert witness fees, the expense of services of experts, advisors and consultants in defending the proceeding, and where reasonably and necessarily incurred in defending the proceeding [*Code Civ. Proc. § 1038(b)*].

Code Civ. Proc. § 1038 authorizes the trial court to make a supplemental assessment for costs incurred in connection with an unsuccessful, but not frivolous, appeal [*Gonzales v. ABC Happy Realty (1997) 52 Cal. App. 4th 391, 392-393, 60 Cal. Rptr. 2d 566* (proceeding for indemnity or contribution)].

[2] Procedure Under Section 1038

The court, on the motion of the defendant or cross defendant must at the time of granting any summary judgment, motion for directed verdict, motion for judgment under *Code Civ. Proc. § 631.8*, or any nonsuit dismissing the moving party other than the plaintiff, petitioner, cross-complainant, or intervenor, or at a later time set by a Judicial Council rule adopted under *Code Civ. Proc. § 1034*, determine whether or not the plaintiff, petitioner, cross-complainant, or intervenor brought the proceeding with reasonable cause and in the good faith belief that under the facts and law there was a justifiable controversy that warranted filing of the complaint, petition, cross-complaint, or complaint in intervention. If the court determines that the proceeding was not brought in good faith and with reasonable cause, the court is required to decide an additional issue as to the defense costs reasonably and necessarily incurred by the party or parties opposing the proceeding. The court is required to render judgment in favor of that party in the amount of all reasonable and necessary defense costs, in addition to those costs normally awarded to the prevailing party [*Code Civ. Proc. § 1038(a)*].

Notice contained in a party's papers and an opportunity to be heard are, however, required before defense costs under *Code Civ. Proc. § 1038* can be awarded [*Code Civ. Proc. § 1038(a)*]. Moreover Section 1038 is applicable only on motion made before the jury is discharged or judgment entered [*Code Civ. Proc. § 1038(c)*].

Any party that requests relief under Section 1038 waives the right to seek damages for malicious prosecution [*Code Civ. Proc. § 1038(c)*]. Failure to make the motion, however, is not deemed a waiver of the right to bring a malicious prosecution action [*Code Civ. Proc. § 1038(c)*].

PRACTICE TIP:

Obtain Client's Decision. When preparing written motions for summary judgment, directed verdict, judgment under. *Code Civ. Proc § 631.8* or nonsuit, for a client defendant that is not a public entity, determine whether your client wishes to request *Code Civ. Proc. § 1038* defense costs as part of the motion, or not to request these defense costs to preserve the right to pursue a later malicious prosecution lawsuit [*see City of Long Beach v. Bozek (1982) 31 Cal. 3d 527, 538 n.9, 538-539, 183 Cal. Rptr. 86, 645 P. 2d 137* (holding that public entity cannot maintain malicious prosecution action and indicating in dicta that public employee acting through private counsel might be able to do so)]. *By Commissioner Anita Rae Shapiro.*

[3] Lack of Either Good Faith or Reasonable Cause as Sufficient Showing

Application of *Code Civ. Proc. § 1038* is not limited to the initiation of an action. The section also applies to steps to pursue it after the action has been filed [*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center (1998) 19 Cal. 4th 851, 853 n.1, 80 Cal. Rptr. 2d 803, 968 P.2d 514* ; *Knight v. City of Capitola (1992) 4 Cal. App. 4th 918, 931-932, 6 Cal. Rptr. 2d 874* ; *Carroll v. State of California (1990) 217 Cal. App. 3d 134, 140, 265 Cal. Rptr. 753]* . A plaintiff must have filed and pursued the action in good faith and with reasonable cause to avoid an order to pay defense costs under *Section 1038* [*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center (1998) 19 Cal. 4th 851, 861-862, 80 Cal. Rptr. 2d 803, 968 P.2d 514* ; *Knight v. City of Capitola (1992) 4 Cal. App. 4th 918, 931, 6 Cal. Rptr. 2d 874]* . Thus, a defendant, assuming the procedural criteria of *Code Civ. Proc. § 1038* is satisfied, need only show either that

the plaintiff (1) did not act in good faith, or (2) lacked a reasonable cause for the action [*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center (1998) 19 Cal. 4th 851, 861-862, 80 Cal. Rptr. 2d 803, 968 P.2d 514* ; *Knight v. City of Capitola (1992) 4 Cal. App. 4th 918, 931-932, 6 Cal. Rptr. 2d 874]* . Good faith or its absence involves a factual inquiry into plaintiff's subjective state of mind. A subjective state of mind is rarely susceptible of direct proof and will usually be inferred from circumstantial evidence. Reasonable cause is determined objectively, as a matter of law, on the basis of facts known to the plaintiff when the plaintiff filed or maintained the action. Once it is determined what the plaintiff or plaintiff's counsel knew, the court decides whether any reasonable attorney would have thought the claim tenable [*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center (1998) 19 Cal. 4th 851, 861-862, 80 Cal. Rptr. 2d 803, 968 P.2d 514* ; *Knight v. City of Capitola (1992) 4 Cal. App. 4th 918, 932, 6 Cal. Rptr. 2d 874]* .

Thus, it has been noted that under *Section 1038* "[i]f a legislative purpose to protect public entities from meritless claims is to be served, a plaintiff must bear a burden of investigation sufficient to establish at least a basis for reasonable belief that all elements [of the cause of action] exist" [*Knight v. City of Capitola (1992) 4 Cal. App. 4th 918, 933, 6 Cal. Rptr. 2d 874]* .

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44-510 California Forms of Pleading and Practice--Annotated § 510.20

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.20 Appellate Review

[1] Time for Review of Ruling Granting of Monetary Sanctions

An immediate appeal may be taken from a superior court order or interlocutory judgment in an unlimited civil case directing the payment of monetary sanctions by a party or a party's attorney if the amount exceeds $5,000 [*Code Civ. Proc. § 904.1(a)(11), (12)*]. The *Cal. Rules of Ct., Rule 8.104*, time limits for filing a notice of appeal apply to a interlocutory judgment or order in an unlimited civil case directing the payment of money sanctions in excess of $5,000 that is immediately appealable under *Code Civ. Proc. § 904.1(a)(11)-(12)* [*see Imuta v. Nakano (1991) 233 Cal. App. 3d 1570, 1578-1579, 285 Cal. Rptr. 681]* . Therefore, if the sanction is to be appealed, it is essential that the appeal be taken timely [*see Chong v. Fremont Indemnity Co. (1988) 202 Cal. App. 3d 1097, 1102-1103, 249 Cal. Rptr. 264* (appeal dismissed as untimely when notice of appeal not filed within period specified in Rule 8.104 after entry of order imposing sanctions, but rather filed after determination of main issue in action)].

A sanction order or judgment against a party or party's attorney for $5,000 or less may be reviewed on an appeal by the sanctioned party after entry of final judgment in the main action [*Code Civ. Proc. § 904.1(b)*; *Calhoun v. Vallejo City Unified School Dist. (1993) 20 Cal. App. 4th 39, 45 n.1, 24 Cal. Rptr. 2d 337*]. Alternatively, at the court of appeal's discretion, a sanction order or judgment for less than $5,000 may be reviewed on a petition for an extraordinary writ [*Code Civ. Proc. § 904.1(b)*; *see Rao v. Campo (1991) 233 Cal. App. 3d 1557, 1566-1567, 285 Cal. Rptr. 691* (extraordinary writ review under former *Code Civ. Proc. § 904.1(a)*, now *Code Civ. Proc. § 904.1(a)(1)*, available regardless of dollar amount of sanctions)].

PRACTICE TIP:

Cost Considerations. It may not be cost effective to request appellate review of a sanction order or judgment for $5,000 or less in a writ petition. Petitions for extraordinary writs are discretionary and are rarely heard on the merits. *By Commissioner Anita Rae Shapiro.*

On appeal challenging sanctions imposed under *Code Civ. Proc. § 128.7*, argument based on oral findings or statements made by the judge at the time the sanctions were imposed is inappropriate. The appellate court will review the trial

court's sanction order based on the written order [*see 580 Folsom Associates v. Prometheus Development Co. (1990) 223 Cal. App. 3d 1, 22-23, 272 Cal. Rptr. 227* (construing *Code Civ. Proc. § 128.5*)].

[2] Aggregation of Sanctions to Meet Appealable Amount

Separate sanctions involving separate acts and payable to separate persons cannot be aggregated to meet the $5000 appealability threshold amount contained in *Code Civ. Proc. § 904.1(a)(11), (12)* [*Imuta v. Nakano (1991) 233 Cal. App. 3d 1570, 1585 n.20, 285 Cal. Rptr. 681* (refusing to aggregate three contemporaneous orders to meet the former $750 threshold)]. Whether multiple monetary sanctions involving the same conduct may be aggregated is less clear. One case has suggested in dicta that aggregation would be proper if the sanctions all involved the same conduct [*Champion/L.B.S. Associates Development Co. v. E-Z Serve Petroleum Marketing, Inc. (1993) 15 Cal. App. 4th 56, 59-60, 18 Cal. Rptr. 2d 726* (Fourth Dist; declining to aggregate to meet the $750 threshold in the case before it)]. However, in a case involving sanctions ordered in favor of two different parties but based on the same conduct, it was held that aggregation is never appropriate [*Calhoun v. Vallejo City Unified School Dist. (1993) 20 Cal. App. 4th 39, 42-45, 24 Cal. Rptr. 2d 337* (First Dist., rejecting the *Champion/L.B.S. Associates Development Co.* dicta)].

[3] In Limited Civil Case

Code Civ. Proc. § 904.2 contains no provision on the right to appeal from a prejudgment order or interlocutory judgment for monetary sanctions in a limited civil case, and it has been held that such an order is not appealable [*Lim v. Silverton (1997) 61 Cal. App. 4th Supp. 1, 72 Cal. Rptr. 2d 408* (recognizing that order may be reviewed on appeal from the judgment in the action and that a post judgment sanction order would be subject to appeal under *Code. Civ. Proc. § 904.2(b)*]. In some cases, review by extraordinary writ might be appropriate.

[4] Standing

Assuming the monetary threshold of *Code Civ. Proc. § 904.1(a)(11), (12)* is met, if a superior court order is directed against a party's attorney, the attorney has the right and standing to appeal [*Code Civ. Proc. § 904.1(a)(11), (12)*; *Imuta v. Nakano (1991) 233 Cal. App. 3d 1570, 1580-1581, 285 Cal. Rptr. 681* ; *Moyal v. Lanphear (1989) 208 Cal. App. 3d 491, 497, 256 Cal. Rptr. 296* ; *see Calhoun v. Vallejo City Unified School Dist. (1993) 20 Cal. App. 4th 39, 42, 24 Cal. Rptr. 2d 337]* . If the sanctioned attorney does not file a separate notice of appeal, however, but only names an unsanctioned party in the notice of appeal, it has been held that the appellate court lacks jurisdiction to review the sanction ruling, and the purported appeal will be dismissed [*Calhoun v. Vallejo City Unified School Dist. (1993) 20 Cal.App. 4th 39, 42, 24 Cal. Rptr. 2d 337* (party, who was not sanctioned, appealed from order sanctioning attorney); *see Huenergardt v. Huenergardt (1963) 218 Cal. App. 2d 455, 459, 32 Cal. Rptr. 714* ; *but see Ellis v. Roshei Corp. (1983) 143 Cal. App. 3d 642, 645 n.3, 192 Cal. Rptr. 57* (court reviewed sanction order although appeal brought in name of unsanctioned party, not sanctioned attorney)]. Under such circumstances it would be better practice for the sanctioned attorney to file a separate notice of appeal although, if the notice of appeal includes as an additional appellant the unsanctioned party, the notice may be liberally construed in favor of its sufficiency [*Calhoun v. Vallejo City Unified School Dist. (1993) 20 Cal. App. 4th 39, 42, 24 Cal. Rptr. 2d 337* ; *Moyal v. Lanphear (1989) 208 Cal. App. 3d 491, 497, 256 Cal. Rptr. 296]* .

[5] Denial of Sanctions

Denial of a motion for sanctions is not appealable under *Code Civ. Proc. § 904.1(a)(11), (12)* [*Wells Properties v. Popkin (1992) 9 Cal. App. 4th 1053, 1055, 11 Cal. Rptr. 2d 845* (decided under former *Code Civ. Proc. § 904.1(k)*; appeal from order denying motion for sanctions under *Code Civ. Proc. § 128.5* dismissed)]. In unusual and compelling circumstances an appellate court may treat a purported appeal from a nonappealable order as a petition for a writ of mandate. A denial of a motion for sanctions has been held, however, not to present such circumstances [*Wells Properties v. Popkin (1992) 9 Cal. App. 4th 1053, 1056, 11 Cal. Rptr. 2d 845* (dissenting opinion would have treated appeal from nonappealable order as a petition for extraordinary relief)]. It appears that review of denial of such an order

may be had in connection with an appeal from an appealable order or final judgment [*see Code Civ. Proc. § 906*; *Wells Properties v. Popkin (1992) 9 Cal. App. 4th 1053, 11 Cal. Rptr. 2d 845* (dissenting opinion)]. Presumably, within the meaning of *Code Civ. Proc. § 906* dealing with the scope of appellate review, the denial of such a motion would be construed as involving the merits or necessarily affecting the judgment, or substantially affecting the rights of a party. Similarly, in some instances review by extraordinary writ may be appropriate.

[6] Standard of Review

[a] Abuse of Discretion

A trial court is vested with broad discretionary power to award sanctions. The test on appeal is whether there has been an abuse of discretion [*Olson Partnership v. Gaylord Plating Lab, Inc. (1990) 226 Cal. App. 3d 235, 240, 276 Cal. Rptr. 493* ; *Winick Corp. v. County Sanitation Dist. No. 2 (1986) 185 Cal. App. 3d 1170, 1176, 230 Cal. Rptr. 289]* . An appellate court will not reverse a trial court's imposition of sanctions unless the court finds that there has been an abuse of discretion [*Tenderloin Housing Clinic, Inc. v. Sparks (1992) 8 Cal. App. 4th 299, 304, 10 Cal. Rptr. 2d 371* (sanctions under *Code Civ. Proc. § 128.5*); *Intel Corp. v. USAIR, Inc. (1991) 228 Cal. App. 3d 1559, 1565-1566, 279 Cal. Rptr. 569* (sanctions under former *Gov. Code § 68609(d), now Gov. Code § 68608(b)*); *see Caldwell v. Samuels Jewelers (1990) 222 Cal. App. 3d 970, 977, 272 Cal. Rptr. 126* (sanctions under *Code Civ. Proc. § 177.5*; former Cal. Rules of Ct., Rule 227, *now Cal. Rules of Ct., Rule 2.30*)].

To be entitled to appellate relief, it must clearly appear that the injury resulting from the abuse of discretion in the imposition of sanctions is sufficient to amount to a miscarriage of justice. A showing is insufficient to reverse the trial court if it merely affords an opportunity for different opinions [*Winick Corp. v. County Sanitation Dist. No. 2 (1986) 185 Cal. App. 3d 1170, 1175-1176, 230 Cal. Rptr. 289]* . An appellate court is neither authorized to nor warranted in substituting its judgment for the trial court's judgment [*Winick Corp. v. County Sanitation Dist. No. 2 (1986) 185 Cal. App. 3d 1170, 1176, 230 Cal. Rptr. 289]* . The trial court's judgment or order is presumed correct. All intendments and presumptions are indulged in to support it. An affirmative showing of error must be made [*Brewster v. Southern Pacific Transportation Co. (1991) 235 Cal. App. 3d 701, 713, 1 Cal. Rptr. 2d 89]* . The appellate court will not disturb the trial court's findings when the evidence is in conflict [*Brewster v. Southern Pacific Transportation Co. (1991) 235 Cal. App. 3d 701, 713, 1 Cal. Rptr. 2d 89]* .

When it is claimed that the evidence is insufficient to justify sanctions, several appellate courts in determining whether there was an abuse of discretion have applied the substantial evidence rule to see if substantial evidence supported the trial court's findings [*see, e.g.,* *West Coast Development v. Reed (1992) 2 Cal. App. 4th 693, 697-698, 3 Cal. Rptr. 2d 790* ; *Brewster v. Southern Pacific Transportation Co. (1991) 235 Cal. App. 3d 701, 712, 1 Cal. Rptr. 2d 89* ; *Caldwell v. Samuels Jewelers (1990) 222 Cal. App. 3d 970, 977, 272 Cal. Rptr. 126]* .

[b] Failure to Specify Conduct or Circumstances in Order

The harmless error doctrine does not apply on appellate review of an order that fails to set forth in detail the conduct or circumstances justifying sanctions. Therefore, when faced with a statutorily insufficient order, a reviewing court is required to remand the case to the trial court for the fashioning of a proper order. Remand is required even when sanctions follow a detailed motion by opposing counsel that was fully argued and considered in an open hearing. Remand is also required even though the reviewing court has combed the record and determined it sufficient to sustain a finding in support of the imposition of sanctions [*West Coast Development v. Reed (1992) 2 Cal. App. 4th 693, 705-706, 3 Cal. Rptr. 2d 790* (order under *Code Civ. Proc. § 128.5*].

PRACTICE TIP:

Thoroughness of Order. When preparing an attorney order for the court's signature, set forth all of the conduct or circumstances that justify the sanctions imposed to avoid the delay of a remand of the case by the appellate court for the entry of a proper order. *By Commissioner Anita Rae Shapiro.*

[7] Staying Execution Pending Appeal

Although an award of attorney's fees authorized by contract, statute, or law is statutorily defined as costs [*see Code Civ. Proc. § 1033.5(a)(10)*], and a bond is not required to stay execution of a judgment solely for costs [*see Code Civ. Proc. § 917.1(d)*], an award of attorney's fees as sanctions under *Code Civ. Proc. § 128.5* has been held to be more analogous to a judgment for money damages than a judgment for costs, so that it must be bonded to stay execution pending appeal [*Banks v. Manos (1991) 232 Cal. App. 3d 123, 128-129, 283 Cal. Rptr. 318* (holding *Code Civ. Proc. § 1033.5(a)(10)* reference to attorney's fees authorized by statute to be inapplicable because *Section 128.5* does not "routinely" authorize attorney's fees; decided before *Section 1033.5(a)(10)*; was amended to include attorney's fees when authorized by "law" as costs)]. If part of a judgment must be bonded, the judgment must be bonded in its entirety to stay execution pending appeal [*Banks v. Manos (1991) 232 Cal. App. 3d 123, 128-129, 283 Cal. Rptr. 318* ; *see Code Civ. Proc. § 917.1*]. Presumably, this rule applies to the award of sanctions under the other statutes or rules of court.

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Chapter 510 SANCTIONS
PART II. LEGAL BACKGROUND

44-510 California Forms of Pleading and Practice--Annotated § 510.21

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.21 Ethical Pitfalls Concerning Sanctions

It is an attorney's duty to maintain inviolate the confidence, and at every peril to the attorney preserve the secrets, of the client [*Bus. and Prof. Code § 6068(e)*]. In certain instances a court's decision whether to impose sanctions on the attorney, on the client, or both, may give rise to ethical, privilege, or conflict problems. Counsel may not be able to exonerate himself or herself without breaching the attorney-client privilege or his or her ethical obligation to the client [*see generally Wong v. Davidian (1988) 206 Cal. App. 3d 264, 271-272, 253 Cal. Rptr. 675* ; *Luke v. Baldwin-United Corp. (1985) 167 Cal. App. 3d 664, 668-670, 213 Cal. Rptr. 654]* . Recognizing this, it has been noted that to avoid placing counsel in an impossible conflict situation the better practice in most cases is for the court to sanction the client party and leave it up to the client and the attorney to thereafter work out between themselves the ultimate responsibility for the sanctions [*Wong v. Davidian (1988) 206 Cal. App. 3d 264, 272, 253 Cal. Rptr. 675]* .

When, however, the misconduct is solely that of the attorney, for example, failure to appear at a hearing, it has been noted that it is proper to sanction the attorney alone [*Wong v. Davidian (1988) 206 Cal. App. 3d 264, 272, 253 Cal. Rptr. 675]* .

A sanction award against counsel alone for filing a motion to quash, which was not utterly without merit when filed but was thereafter withdrawn, has been reversed when the court had no way to determine whether counsel or the client was to blame for filing the motion without invading the attorney-client privilege and the privilege prevented counsel from exonerating themselves [*Luke v. Baldwin-United Corp. (1985) 167 Cal. App. 3d 664, 668-670, 213 Cal. Rptr. 654* ; *compare Manzetti v. Superior Court (1993) 21 Cal. App. 4th 373, 381, 25 Cal. Rptr. 2d 857* (sanctions in Court of Appeal; attorney constrained by ethical obligation not to disclose communications with client accepted full responsibility for sanctions)].

On the other hand, an attorney does not have an ethical obligation to his or her client to commit perjury or to file knowingly frivolous or bad faith motions (or to otherwise engage in tactics that the attorney concludes are frivolous or breach the attorney's obligation to the legal system). If a client demands that an attorney engage in such conduct, the attorney has an obligation to withdraw from the case [*Young v. Rosenthal (1989) 212 Cal. App. 3d 96, 127-128, 260*

Cal. Rptr. 369 , cert. denied, 494 U.S. 1080 (1990) ; *see Bus. & Prof. Code § 6068(c), (d)*; *Cal. Rules Prof. Conduct, Rules 3-700, 5-200*]. Under such circumstances, if the attorney does not withdraw the attorney does not face an ethical dilemma in that the attorney's obligation is to withdraw and an award of sanctions against the attorney is appropriate [*Young v. Rosenthal (1989) 212 Cal. App. 3d 96, 127-128, 260 Cal. Rptr. 369 , cert. denied, 494 U.S. 1080 (1990)]* .

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44-510 California Forms of Pleading and Practice--Annotated § 510.22

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.22 Duty to Notify State Bar of Imposition of Sanctions

An attorney against whom judicial sanctions are imposed, except sanctions for failure to make discovery or monetary sanctions of less than $1,000, must report this to the agency charged with attorney discipline. The report must be made in writing within 30 days of the time the attorney has knowledge of the imposition of the sanctions *Bus. and Prof. Code § 6068(o)(3)*].

Similarly, the court is required to notify the State Bar of the imposition of judicial sanctions, except sanctions for failure to make discovery or monetary sanctions for less than $1,000 [*Bus. and Prof. Code § 6086.7(a)(3)*]. The court must also notify the sanctioned attorney that the matter has been referred to the State Bar [*Bus. and Prof. Code § 6086.7(b)*]. The State Bar must investigate the matter to determine if initiating disciplinary proceedings against the attorney is appropriate [*Bus. and Prof. Code § 6086.7(c)*].

For further discussion of the attorney's duty to maintain confidences, see *Ch. 72, Attorney Practice and Ethics, § 72.30* et seq. For discussion of actions by an attorney exceeding the attorney's duty to zealously represent the client, see *Ch. 72, Attorney Practice and Ethics, § 72.270* et seq._____

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44-510 California Forms of Pleading and Practice--Annotated §§ 510.23-510.39

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[Reserved]

§§ 510.23[Reserved]

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44-510 California Forms of Pleading and Practice--Annotated § 510.40

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.40 California Points and Authorities

For memorandum in support of a motion to recover attorney's fees and other reasonable expenses under *Code Civ. Proc. § 128.7*, see California Points and Authorities, Ch. 60, *Costs* , and Ch. 80, *Discovery* (Matthew Bender)

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44-510 California Forms of Pleading and Practice--Annotated § 510.41

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.41 State Statutes

[1] General Authority for Sanctions

Sanctions for violation of signature and certification requirement under *Code Civ. Proc. § 128.7*

Money sanctions payable to county for violation of lawful court order. *Code Civ. Proc. § 177.5*

Sanctions for failure to comply with local rules promulgated under *Code Civ. Proc. § 575.1*. *Code Civ. Proc. § 575.2*

Appellate court sanctions when an appeal is frivolous or taken solely for delay. *Code Civ. Proc. §§ 907, 1109*

Sanctions under the Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*) for violation of fast track rules. *Gov. Code § 68608(b)*

[2] Sanctions in Specific Actions

Reasonable attorney's fees and costs in connection with action for misappropriation of trade secrets. *Civ. Code § 3426.4*

Reasonable attorney's fees when appeal from small claims court not based on good faith. *Code Civ. Proc. § 116.790*

Sanctions, including attorney fees, against small claim judgment debtor for noncompliance concerning debtor asset form. *Code Civ. Proc. § 116.830*

Reasonable expenses and attorney's fees in making or resisting a motion to transfer an action or proceeding. *Code Civ. Proc. § 396b(b)*

Sanctions based on bad faith affidavits in connection with a summary judgment motion. *Code Civ. Proc. § 437c(i)*

Evidence preclusion order for failure after a demand to deliver a timely account. *Code Civ. Proc. § 454*

Sanctions when court grants relief from a default, default judgment or dismissal. *Code Civ. Proc. § 473*

Sanctions for failure to appear at debtor examination. *Code Civ. Proc. § 708.170*

Reasonable attorney's fees based on action against peace officer arising out of performance of peace officer's duties or against public entity employing officer, including action for libel or slander, when action not filed or maintained in good faith and with reasonable cause. *Code Civ. Proc. § 1021.7*

Reasonable litigation expenses in addition to other costs if small business or licensee prevails in any civil action over state regulatory agency if agency's action was taken without substantial justification. *Code Civ. Proc. § 1028.5*

Defense costs in civil proceedings under the California Tort Claims Act (*Gov. Code § 810 et seq.*), or in civil proceedings for express or implied indemnity, or for contribution based on the proceeding not being brought in good faith or with reasonable cause. *Code Civ. Proc. § 1038*

Sanctions concerning discovery and expert witnesses. See generally *Code Civ. Proc. § 2017.010 et seq.*

Reasonable attorney's fees and court costs in proceeding brought by county to enforce child's right to support. Fam. Law § 4002

Sanctions concerning continuance of a hearing in a criminal proceeding. *Penal Code §§ 1050, 1050.5*

[3] Review of Sanctions

Appellate review of monetary sanctions. *Code Civ. Proc. § 904.1(a)(11), (12), (b)*

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44-510 California Forms of Pleading and Practice--Annotated § 510.42

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.42 California Rules of Court

Appellate court sanctions. *Cal Rules of Ct., Rules 8.276* (Supreme Court and courts of appeal) and 8.764 (superior court)

Sanctions for violation of Rules of Court. *Cal Rules of Ct., Rule 2.30*

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44-510 California Forms of Pleading and Practice--Annotated § 510.43

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.43 Decisions

[1] Amount of Award

Sanctions of large amount may be assessed when necessary to discourage party and party's attorney from pursuing totally baseless claims. *Simonian v. Patterson (1994) 27 Cal. App. 4th 773, 787, 32 Cal. Rptr. 2d 722*

Award of compensation for airfare and reimbursement for lost vacation is, under appropriate circumstances, item of reasonable expenses within meaning of *Cal. Civ. Proc. § 128.5*. *Tenderloin Housing Clinic, Inc. v. Sparks (1992) 8 Cal. App. 4th 299, 307-308, 10 Cal. Rptr. 2d 371*

Term "expenses" in *Code Civ. Proc. § 128.5(a)* is not limited to costs and attorney's fees; sanctions award as capable of including other expenses, such as compensation for time spent by party's nonlegal employees in defending against action brought in bad faith. *580 Folsom Associates v. Prometheus Development Co. (1990) 223 Cal. App. 3d 1, 27-28, 272 Cal. Rptr. 227*

In awarding attorney's fees under *Code Civ. Proc. § 128.5*, court is not bound in its determination by such traditional factors as hours consumed, statements mailed, results attained, and the like; court does not need expert testimony to make determination of reasonable fees award. *Dwyer v. Crocker National Bank (1987) 194 Cal. App. 3d 1418, 1438, 240 Cal. Rptr. 297*

[2] Appellate Review

Trial court did not abuse its discretion in imposing sanctions under *Code Civ. Proc. § 128.5* on law firm for acting in bad faith in pursuing litigation activities on behalf of corporate client suspended for failure to file statement required by *Corp. Code § 1502*, when although case law had not determined that suspension under *Corp. Code § 1502* for failure to file statement, rather than under *Rev. & Tax. Code § 23301* for nonpayment of taxes, disqualified corporation from

exercising any powers including right to resort to courts in litigation, any reasonable attorney reviewing relevant statutes would entertain strong suspicion that client was disqualified from pursuing litigation activities and law firm chose to conceal its knowledge of suspension and probable disability of client from both court and opposing counsel; when firm's failure to recommend to client to file required statement supported inference that firm made no investigation at time it discovered client's suspended status and likely believed client was suspended for failure to pay taxes and willful concealment of suspension militated toward finding of bad faith; and when record supported conclusion that firm suspected client was disabled from litigation but deliberately concealed this fact from court and other parties and continued to litigate vigorously, even seeking summary proceedings to terminate case before client's suspended status was discovered, serving only to delay and avoid otherwise inevitable default judgment in absence of any acts by client to cure suspended status. *Palm Valley Homeowners Assn., Inc. v. Design MTC (2000) 85 Cal. App. 4th 553, 102 Cal. Rptr. 2d 350*

Party's failure to object to trial court's proposed sanctions award at trial constitutes waiver of objection and party may not later claim on appeal that order was deficient. *Andrus v. Estrada (1995) 39 Cal. App. 4th 1030, 1043, 46 Cal. Rptr. 2d 300*

Order denying motion for sanctions under *Code Civ. Proc. § 128.5* is not appealable. *Wells Properties v. Popkin (1992) 9 Cal. App. 4th 1053, 1055, 11 Cal. Rptr. 2d 845*

Judgment including sanctions under *Code Civ. Proc. § 128.5* must be bonded pending appeal. *Banks v. Manos (1991) 232 Cal. App. 3d 123, 128-129, 283 Cal. Rptr. 318*

Postjudgment order declining to award sanctions under *Code Civ. Proc. § 128.5* is not appealable if it presents same issues as prior appeal from judgment or does not affect prior judgment. *Lubetzky v. Friedman (1991) 228 Cal. App. 3d 35, 45, 278 Cal. Rptr. 706*

[3] Change of Venue Motion

Sanction was proper under *Code Civ. Proc. § 128.5* against party for frivolously moving for change of venue. *Lieppman v. Lieber (1986) 180 Cal. App. 3d 914, 919, 225 Cal. Rptr. 845*

[4] Discretion of Trial Court

Trial court did not abuse its discretion in dismissing plaintiff's complaint as terminating sanction for deliberate and egregious misconduct after plaintiff (1) employed investigator who improperly entered areas of defendant's properties not accessible to public and trespassed onto document destruction firm's secure facility, and improperly took documents at those locations; (2) knew of investigator's illegal conduct or acted with deliberate indifference to whether investigator's conduct was legal; and (3) altered stolen documents with intent to mislead by creating false impression that documents were not confidential or that defendant had created confidential and nonconfidential sets of documents. *Stephen Slesinger, Inc. v. Walt Disney Co. (2007) 155 Cal. App. 4th 736, 757-776, 66 Cal. Rptr. 3d 268*

Trial court did not abuse its discretion in awarding monetary sanctions, including attorney's fees to defendant, against plaintiff and plaintiff's counsel for filing fourth amended complaint, when first-time assertion of fraud cause of action against decedent was precluded by previous orders striking all references to him from prior declaratory relief causes of action and failed to account for frivolousness of claim against deceased individual; when complaint contained misleading allegations regarding plaintiff's knowledge that decedent intended to withdraw his disclaimer of his transfer of partnership interest to plaintiff; and when, although plaintiff and plaintiff's counsel were assessed penalties under *Code Civ. Proc. § 177.5*, more than half of sanctions at issue were awarded under *Code Civ. Proc. § 128.7(c)(1)*, which specifically authorizes award of attorney's fees for sanctions motion itself, and rest of attorney fee sanctions were

admittedly authorized by *Code Civ. Proc. § 128.7(d)* and carefully limited by court, in relation to defendant's request for more than twice as much. *Eichenbaum v. Alon (2003) 106 Cal. App. 4th 967, 976-977, 131 Cal. Rptr. 2d 296*

Sanctions against party under *Code Civ. Proc. § 128.5* in conjunction with summary denial of party's motion was abuse of discretion when party's motion was absolutely meritorious as matter of law. *Optical Surplus, Inc. v. Superior Court (1991) 228 Cal. App. 3d 776, 785, 279 Cal. Rptr. 194*

Trial court's refusal to award sanctions against plaintiff under *Code Civ. Proc. § 128.5* was abuse of discretion when plaintiff engaged in trial tactics which any reasonable attorney would agree were totally devoid of merit, including the use of a void default judgment to obtain a writ of possession against defendant. *Park Magnolia v. Fields (1987) 191 Cal. App. 3d Supp 1, 4-5, 236 Cal. Rptr. 900*

[5] Frivolous Defined

Action not frivolous due to lack of uniformity in case law. *Betz v. Pankow (1993) 16 Cal. App. 4th 931, 941, 20 Cal. Rptr. 2d 841*

Mere absence of judicial construction does not by itself make all challenges arguably meritorious. *Bach v. McNelis (1989) 207 Cal. App. 3d 852, 878, 255 Cal. Rptr. 232*

[6] Interveners

Code Civ. Proc. § 128.5 sanctions are properly imposed when intervener files pleadings in action after intervener's right to appear in action has been terminated and intervener provides no discussion in pleadings of standing issue. *McFarland v. City of Sausalito (1990) 218 Cal. App. 3d 909, 911-912, 267 Cal. Rptr. 412*

[7] Nonappearance at Hearing

Bad faith failure of attorney to appear was adequate ground for imposition of sanctions against attorney under *Code Civ. Proc. § 128.5*. *Wong v. Davidian (1988) 206 Cal. App. 3d 264, 271-272, 253 Cal. Rptr. 675*

[8] Notice and Reasons for Order Required

Procedural due process requires notice and opportunity to be heard before ordering award of fees as sanctions for frivolous action, and requires written statement of reasons in order imposing sanctions. *In re Marriage of Flaherty (1982) 31 Cal. 3d 637, 651-654, 183 Cal. Rptr. 508, 646 P.2d 179*

Notice and opportunity to be heard as requirements before sanctions can be imposed under *Code Civ. Proc. § 128.5*. *Eby v. Chaskin (1996) 47 Cal. App. 4th 1045, 1049, 55 Cal. Rptr. 2d 517*

Trial court's award of sanctions against attorneys, in unreported status conference held in the judge's chambers, based on attorneys' alleged bickering, was improper when attorneys were not given notice of court's intent to impose sanctions and opportunity to be heard; indirect allusion by judge, made to only one of two attorneys, of possibility of sanctions award did not satisfy notice requirement; attorneys should have been provided with opportunity to explain, on record, their conduct before the court made its decision. *Barrientos v. City of Los Angeles (1994) 30 Cal. App. 4th 63, 71-72, 35 Cal. Rptr. 2d 520*

Trial court's offer to strike order imposing sanctions on condition that parties settle constitutes an improper attempt to coerce settlement. *Barrientos v. City of Los Angeles (1994) 30 Cal. App. 4th 63, 71-72, 35 Cal. Rptr. 2d 520*

Notice of motion or intent to dismiss and an opportunity to be heard are requirements before action can be dismissed under *Gov. Code § 68608(b)*. *Reid v. Balter (1993) 14 Cal. App. 4th 1186, 1193, 18 Cal. Rptr. 2d 287*

Summary in minute order of court's reasons for imposing sanctions met requirements of *Code Civ. Proc. § 128.5*. *Olson Partnership v. Gaylord Plating Lab, Inc. (1990) 226 Cal. App. 3d 235, 240-241, 276 Cal. Rptr. 493*

Court was not required to provide a strict accounting of expenses when imposing sanctions under *Code Civ. Proc. § 128.5*. *On v. Cow Hollow Properties (1990) 222 Cal. App. 3d 1568, 1577, 272 Cal. Rptr. 535*

Imposition of sanction, whether imposed under *Code Civ. Proc. § 177.5*, which requires notice and opportunity to respond, or under former Cal. Rules of Ct., Rule 227 [*now see Cal. Rules of Ct., Rule 2.30*], which was silent on the issue, always requires procedural due process, i.e., notice, an opportunity to be heard and that order imposing sanctions state with particularity the basis for finding a violation of the rule. *Caldwell v. Samuels Jewelers (1990) 222 Cal. App. 3d 970, 976-977, 272 Cal. Rptr. 126*

Failure to raise issue of inadequate notice in trial court is waiver of any objection based on that ground; formal written signed order is requirement for imposition of sanctions; order making no direct reference to conduct of attorney was insufficient to justify imposition of sanctions against attorney. *Jansen Associates, Inc. v. Codercard, Inc. (1990) 218 Cal. App. 3d 1166, 1170-1171, 267 Cal. Rptr. 516*

Order imposing sanctions on attorney under *Code Civ. Proc. § 128.5* based on grounds not asserted before its rendition constituted denial of due process when attorney had no adequate notice of or opportunity to respond to threat of sanctions. *In re Marriage of Quinlan (1989) 209 Cal. App. 3d 1417, 1419, 1421-1422, 257 Cal. Rptr. 850*

Fair warning and an opportunity to be heard are required before sanctions may be imposed under local rule pursuant to Code Civ. Proc. § 572.2. *Annex British Cars, Inc. v. Parker-Rhodes (1988) 198 Cal. App. 3d 788, 792, 244 Cal. Rptr. 48*

Adequate notice is provided when sanctioned parties had knowledge for extended period of time that sanctions hearing was upcoming, knew that relevant subjects and categories of bad faith conduct would be examined at the hearing, and had ample opportunity to prepare for hearing. *Dwyer v. Crocker National Bank (1987) 194 Cal. App. 3d 1418, 1437, 240 Cal. Rptr. 297*

Trial court's order imposing sanctions against plaintiff's counsel is reversible when defendant's written request for sanctions asked only for sanctions against plaintiffs; person against whom sanctions sought is entitled to actual notice of potential liability. *Staples v. Hoefke (1987) 189 Cal. App. 3d 1397, 1418-1419, 235 Cal. Rptr. 165*

Order imposing sanctions under *Code Civ. Proc. § 128.5* must include factual recital, with reasonable specificity, of circumstances that led court to impose sanctions; case remanded to trial court with order to draft new factual recital to replace conclusionary order. *Lieppman v. Lieber (1986) 180 Cal. App. 3d 914, 920-921, 225 Cal. Rptr. 845* ; *Lavine v. Hospital of the Good Samaritan (1985) 169 Cal. App. 3d 1019, 1028-1030, 215 Cal. Rptr. 708*

Notice under *Code Civ. Proc. § 128.5* is insufficient when expenses in defense were substantial and one or two days notice afforded plaintiff did not give him time to prepare declarations in support of his position. *Lesser v. Huntington Harbor Corp. (1985) 173 Cal. App. 3d 922, 930-935, 219 Cal. Rptr. 562*

Order imposing sanctions is erroneous when attorney against whom sanctions were imposed was not given sufficient

notice that motion was directed against him and order failed to detail reasons for sanctions as required by former *Code Civ. Proc. § 128.5* (now *Code Civ. Proc. § 128.5(c)*). *Corralejo v. Quiroga (1984) 152 Cal. App. 3d 871, 873-874, 199 Cal. Rptr. 733*

Award of sanctions under *Code Civ. Proc. § 128.5* did not satisfy statutory requirements or due process when notice was telephonic, rather than written, hearing was ex parte, and order did not recite detailed justification for imposition of sanctions. *O'Brien v. Cseh (1983) 148 Cal. App. 3d 957, 962, 196 Cal. Rptr. 409*

[9] Persons Who May Seek Code Civ. Proc. § 128.7 Sanctions

Pro se litigant does not "incur" attorney's fees and therefore may not recover *Code Civ. Proc. § 128.7* sanctions in form of attorney's fees. *Musaelian v. Adams (2009) 45 Cal. 4th 512, 520, 87 Cal. Rptr. 3d 475, 198 P.3d 560*

[10] Refusing Settlement

Defendant's decision to insist on its constitutional right to jury trial rather than to settle case, even if failure to settle was motivated by ulterior and allegedly improper purposes, is not sanctionable under *Code Civ. Proc. § 128.5*. *Triplett v. Farmers Ins. Exchange (1994) 24 Cal. App. 4th 1415, 1421-1422, 29 Cal. Rptr. 2d 741*

[11] Safe Harbor Provision of § 128.7

A ruling on the challenged motion during the safe harbor period precludes recovery of sanctions under *Code Civ. Proc. § 128.7*. Accordingly, the party seeking sanctions must move to continue the challenged motion or shorten the safe harbor period. *Li v. Majestic Industrial Hills LLC (2009) 177 Cal. App. 4th 585, 595, 99 Cal. Rptr. 3d 334*

Trial court did not lose authority to impose sanctions on plaintiff and plaintiff's counsel under *Code Civ. Proc. § 128.7* after plaintiff dismissed action with prejudice after defendant moved for sanctions, when plaintiff and plaintiff's counsel were given full latitude of the safe harbor period, which they ignored, and did not withdraw complaint, by dismissal, until after sanctions motion had been filed, argued, and submitted for decision. *Eichenbaum v. Alon (2003) 106 Cal. App. 4th 967, 974-976, 131 Cal. Rptr. 2d 296*

Trial court erred in vacating sanctions order and ruling that sustaining of demurrer eviscerated defendant's right to seek sanctions under *Code Civ. Proc. § 128.7* because trial court no longer had jurisdiction, when defendant served motion to dismiss action as frivolous and for monetary sanctions and demurred to complaint, trial court sustained demurrer without leave to amend, defendant filed and again served motion for sanctions two days after ruling on demurrer, trial court granted motion, dismissed complaint and ordered sanctions against plaintiff's attorney, so that defendant had timely served motion for sanctions and waited until safe harbor period passed, and plaintiff's counsel's action in requesting extension, filing amended complaint, opposing demurrer and moving for relief from default and new trial after trial court sustained demurrer was completely unjustified, and when order sustaining demurrer without leave to amend does not bar motion for *Code Civ. Proc. § 128.7* sanctions unless order is reduced to judgment before sanctions motion is served and filed. *Banks v. Hathaway, Perrett, Webster, Powers & Chrisman (2002) 97 Cal. App. 4th 949, 954, 118 Cal. Rptr. 2d 803*

In action by former husband against former wife for abuse of process and intentional and negligent infliction of emotional distress, alleging wife had falsely reported she was not receiving child support payments, trial court erred in awarding sanctions to wife under *Code Civ. Proc. § 128.7*, when wife's sanctions motion violated safe harbor provision of *Code Civ. Proc. § 128.7(c)(1)*, since wife's motion filed in November 1998, which court granted, was not same motion as she had served in December 1997, since it was based on new evidence and different legal theories, and by

November 1998, husband had dismissed case. *Hart v. Avetoom (2002) 95 Cal. App. 4th 410, 115 Cal. Rptr. 2d 511*

Trial court properly imposed sanctions on insured for naming insurer's employee as cross defendant as cross defendant, when insured did not dispute that insurance employee cannot be sued for either breach of contract or breach of implied covenant of good faith, and where although insured dismissed employee less than 30 days after being served with insurer's motion to dismiss, insured did not serve insurer with notice of dismissal and insurer did not learn of dismissal until more than 30 days after insurer had served insured with motion requesting dismissal, which was four days after insurer had served court with sanctions motion and one day before hearing. *Liberty Mutual Fire Ins. Co. v. McKenzie (2001) 88 Cal. App. 4th 681, 689-692, 105 Cal. Rptr. 2d 910*

[12] Violation of Court Order

Rules of Professional Conduct are not normally regarded as court orders of the type referred to in *Code Civ. Proc. § 177.5*. *Conservatorship of Becerra (2009) 175 Cal. App. 4th 1474, 1482-1484, 96 Cal. Rptr. 3d 910*

Trial court erroneously sanctioned prosecutor under *Code Civ. Proc. § 177.5* for discriminatory exercise of peremptory challenges to jurors, resulting in mistrial, because trial court did not order prosecutor not to violate constitution so that there was no court order on which to base sanction. *People v. Muhammad (2003) 108 Cal. App. 4th 313, 323-326, 133 Cal. Rptr. 2d 308*

Trial court exercised its discretion in reasonable manner in imposing sanctions under *Code Civ. Proc. § 177.5* against Board of Prison Terms in habeas corpus proceedings brought by life-term inmate to compensate county for unnecessary litigation, based on Board's violation of earlier court order requiring it to respond in timely manner to administrative appeals filed by life-term inmates, when inmate's petition for habeas corpus focused on Board's alleged violation of his due process rights by not answering his appeal, not on merits of his contention that he had right to be present at review hearing denying him parole, and asked court to set guidelines and time limits for Board to respond to life-term inmate appeals, and where hearing on petition was not inevitable and necessary, since if Board had timely responded to administrative appeal, it was by no means certain that inmate would have filed habeas corpus petition based solely on issue of whether he had legal right to be present at review hearing denying him parole or that court would have issued order to show cause requiring hearing to consider only that legal issue; further, even if hearing had been held solely on that issue, counsel and court would not have been required to consider factual circumstances surrounding Board's violation of underlying order. Further, on record, trial court could reasonably conclude Board violated underlying order without valid excuse, because Board's excuses of administrative error and backlog of appeals did not establish that Board had good cause or substantial justification for violating order. *In re Woodham (2001) 95 Cal. App. 4th 438, 115 Cal. Rptr. 2d 431*

Trial court erroneously imposed sanctions on counsel under *Code Civ. Proc. § 177.5* for violation of court order to give notice to opposing counsel of status conference, at which opposing counsel did not appear, by giving notice by mail instead of by personal service, when opposing counsel was personally served with summons and first amended complaint two days before status conference, which did not require appearance until 30 days after that service, so that even if opposing counsel had been personally served with notice of status conference, opposing counsel would not have been required to attend so that there was no proximate causation between failure to serve personally and opposing counsel's lack of attendance; and when notice of status conference required counsel to give notice to counsel of record or parties in *pro per*, and as of date of status conference, opposing counsel had not yet made formal appearance in action, so that counsel was under no duty to give notice of status conference. *Winikow v. Superior Court (2000) 82 Cal. App. 4th 719, 726-727, 98 Cal. Rptr. 2d 413*

[13] Violation of Local Rule

Trial court properly imposed monetary sanction on counsel under *Code Civ. Proc. § 575.2* for violation of Sacramento County Superior Court Rule 12.04 for failure to participate meaningfully in judicial arbitration, when counsel arrived 25 minutes late for arbitration, clients were not available, counsel failed to provide copies of complaint and answer and short arbitration brief to arbitrator as ordered by trial court, and counsel failed to produce evidence at arbitration, violating parts of local rule requiring attendance of those necessary to proceed to meaningful conclusion and production of evidence. *Rietveld v. Rosebud Storage Partners (2004) 121 Cal. App. 4th 250, 254-257, 16 Cal. Rptr. 3d 791*

[14] Writ Proceedings

Respondent against whom peremptory writ has issued as subject to sanctions under *Code Civ. Proc. § 128.5* for knowingly taking action that is contrary to intent of writ. *Union Pacific R.R. Co. v. State Bd. of Equalization (1989) 49 Cal. 3d 138, 157-158, 260 Cal. Rptr. 565, 776 P.2d 267*

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Chapter 510 SANCTIONS
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44-510 California Forms of Pleading and Practice--Annotated § 510.44

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.44 Law Reviews

Robertson, Keeping the Faith at Settlement Conferences, *14 Los Angeles Lawyer 38 (November 1991)*

Woods, Sanctions-Stepchild or Natural Heir to Trial and Appellate Court Delay Reduction, *17 Pepperdine L. Rev. 665 (1990)*

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44-510 California Forms of Pleading and Practice--Annotated § 510.45

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.45 Text References

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44-510 California Forms of Pleading and Practice--Annotated §§ 510.46-510.59

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

[Reserved]

§§ 510.46[Reserved]

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44-510 California Forms of Pleading and Practice--Annotated § 510.60

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.60 Proceedings to Impose Sanctions [Code Civ. Proc. § 128.7]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Impose Sanctions [Code Civ. Proc. § 128.7]--Notice of Motion and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR SANCTIONS SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.*, plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____

of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant, _____ (*name*)] will move pursuant to *Code of Civil Procedure Section 128.7* for an order _____ [*specify sanction sought, e.g.,* awarding reasonable expenses, including attorney's fees, in the amount of $_____, to be paid by _____ (*specify against whom the motion is directed, e.g.,* plaintiff's attorney, _____ *name*)] [and awarding punitive damages, to be paid by plaintiff, _____ (*name*)]. The motion will be made on the ground that _____ [*describe specific conduct alleged to violate Code Civ. Proc. § 128.7(b), e.g.,* the motion made by plaintiff's attorney to disqualify defendant's attorney for a conflict of interest is devoid of any evidentiaty support, is not warranted by existing law or by the nonfrivolous argument for extension, modification, or reversal of existing law or the establishment of new law and was interposed for primarily an improper purpose, i.e., to cause unnecessary delay and a needless increase in the cost of litigation].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*specify moving party*) *or other statement as appropriate*].

2. _____ [*Specify against whom the motion is directed, e.g.,* _____ (*Name*), attorney for plaintiff in this action], _____ [*state facts showing that Code Civ. Proc. § 128.7(b) has been violated, e.g.,* signed the notice of motion dated _____ (*date*) to disqualify the defendant's attorney for a conflict of interest. The motion was totally and completely without merit having no evidentiary support and was interposed for the purpose of harassing defendant, (*name*), and was solely intended to cause unnecessary delay and needless increase in the cost of the litigation in that _____ (*specify conduct, e.g.,* plaintiff's attorney _____ (*name*) neither produced any evidence nor pointed to anything in the record in this action to support factually the motion to disqualify defendant's attorney for a conflict of interest; moreover, plaintiff's attorney _____ (name) admitted to the court that there is no statutory or case law supporting the motion)].

3. As a result of this conduct, _____ [*specify moving party, e.g.,* defendant, _____ (*name*),] has incurred attorney's fees in the sum of $_____, and other costs/expenses in the sum of $_____, as follows _____ [*itemize amount sought giving a detailed calculation showing that each was incurred as a result of the specified conduct*].

[4. _____ (*If appropriate, set forth facts establishing entitlement to punitive damages under Code Civ. Proc. § 128.7(f), e.g.,* Defendant is entitled to recover punitive damages against plaintiff because plaintiff was convicted on _____ (*date*) of _____ (*specify felony, e.g,* voluntary manslaughter) against

_____ (*specify victim, e.g.,* _____ (*name*), the defendant's daughter), this action was for injuries arising from the acts for which plaintiff was convicted, and plaintiff is guilty of _____ (malice *and/or* fraud *and/or* oppression) in maintaining this action in that _____ (*specify circumstances indicating malice, fraud, or oppression*)).]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM

[*Add memorandum supporting motion*]

[2] Use of Form

This notice of motion and supporting declaration is for use to move for the imposition of sanctions for violation of *Code Civ. Proc. § 128.7(b)*. *Code Civ. Proc. § 128.7* authorizes the court to award monetary or other sanctions against the attorneys, law firms or parties that have violated *Code Civ. Proc. § 128.7(b)* subject to the conditions specified in that section. Section 128.7 applies to a complaint or petition filed on or after January 1, 1995, and any other pleading, written notice of motion, or any other similar paper filed is such a matter [*Code Civ. Proc. § 128.7(i)*]. For discussion of the types of sanctions that the court may award, see *§ 510.12[18]*. For discussion of grounds and requirements for sanctions under *Code Civ. Proc. § 128.7*, see *§ 510.12*.

With appropriate modifications, this notice of motion and supporting declaration may be used when the facts are such that other statutes or rules of court providing for monetary or other sanctions also apply. For examples of such other provisions, see *§§ 510.41*, *510.42*. For notices of motion for sanctions based on other authorities, see *§§ 510.62* and *510.64*.

[3] Punitive Damages

The notice of motion includes optional language for use when the moving party seeks to recover punitive damages under *Code Civ. Proc. § 128.7(f)*, in addition to an award of sanctions for conduct violating *Code Civ. Proc. § 128.7(b)*. For discussion of when punitive damages are recoverable, see *§ 510.12[19]*. For general discussion of punitive damages, see *Ch. 177, Damages, § 177.40* et seq.

[4] Notice Requirements

A noticed motion for sanctions under *Code Civ. Proc. § 128.7* must be made separately from other motions or requests and must describe the specific conduct alleged to have violated *Code Civ. Proc. § 128.7(b)* [*Code Civ. Proc. § 128.7(c)(1)*]. Local court rules and policies should be checked beforehand to ascertain if there are any local requirements.

Notice of motion must be served as provided in *Code Civ. Proc. § 1010*. It cannot, however, be filed with or presented to the court unless within 21 days after service of the motion, or such other period as prescribed by the court, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected [*Code Civ. Proc. § 128.7(c)(1)*; *see, e.g., Galleria Plus v. Hanmi Bank (2009) 179 Cal. App. 4th 535, 538, 101 Cal. Rptr. 3d. 803* (motion that did not provide 21-day notice was defective)]. For further discussion, see *§ 510.12[20]*.

[5] Declaration

The supporting declaration must show facts within the personal knowledge of the declarant supporting the motion [*see Code Civ. Proc. § 2015.5* (use of declaration in lieu of affidavit)]. The declaration should make an evidentiary showing of a violation of *Code Civ. Proc. § 128.7(b)* and why the specific sanction sought is warranted. If a monetary sanction based on the movant's expenses and attorney's fees is sought, the declaration should state detailed facts showing the calculation.

[6] Supporting Memorandum

A memorandum is required to be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion of memorandum of points and authorities and forms, see Ch. 417, *Points and Authorities* .

[7] Cross Reference

See also *§§ 510.60, 510.62,* and *510.64*.

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44-510 California Forms of Pleading and Practice--Annotated § 510.61

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.61 Proceedings to Impose Sanctions [Code Civ. Proc. § 128.7]--Order Granting Motion

[1] FORM Proceedings to Impose Sanctions [Code Civ. Proc. § 128.7]--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [*identify party, e.g.,* defendant, _____ (*name*),] for an order to impose sanctions pursuant to *Code of Civil Procedure Section 128.7* on _____ [*specify against whom sanctions sought, e.g.,* _____ (*name*), attorney of record for _____ (status, e.g., plaintiff) _____ (*name*)], came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court, the court finds that an order granting the motion is justified in that _____ [*describe the conduct determined to violate Code Civ. Proc. Section 128.7 and the basis for the sanctions imposed]. Accordingly,*

IT IS ORDERED that the motion be, and it hereby is, granted in favor of _____ [specify moving

party, e.g., defendant, _____ (*name*),] and that [*specify sanction imposed, e.g.,* defendant, _____ (*name*), is awarded the sum of $_____ for his/her attorney's fees and expenses, and _____ (*specify party and/or party's attorney against whom order is directed, e.g.,* plaintiff's attorney, _____ (*name*), is ordered to pay _____ (*specify moving party, e.g.,* defendant) this sum within _____ (*specify time period, e.g.,* 30 days).]

[IT IS FURTHER ORDERED that _____ (*specify moving party, e.g.,* defendant), _____ (*name*), is awarded punitive damages in the sum of $_____, and plaintiff, (name), is ordered to pay _____ (*specify moving party, e.g.,* defendant), _____ (*name*), this sum within _____ (*specify time period, e.g.,* 30 days)].
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use when a motion to impose sanctions under *Code Civ. Proc. § 128.7* is granted. Local rules or policies may require that a proposed order be served and lodged with the motion [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 9.17 (requirement for proposed order in separate blueback not attached to moving papers)].

[3] Content of Order

When imposing sanctions, the court must describe the conduct determined to constitute a violation of *Code Civ. Proc. § 128.7* and explain the basis for the sanction imposed [*Code Civ. Proc. § 128.7(e)*].

[4] Cross Reference

See also *§ 510.63* and *510.65*.

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44-510 California Forms of Pleading and Practice--Annotated § 510.62

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.62 Proceedings to Impose Monetary Sanction for Violation of Court Order [Code Civ. Proc. § 177.5]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Impose Monetary Sanction for Violation of Court Order [Code Civ. Proc. § 177.5]--Notice of Motion and Supporting Declaration

[*Caption. See § 510.60.*]

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant, _____ (*name*),] will move for an order pursuant to *Code of Civil Procedure Section 177.5* requiring _____ [*identify witness, party, attorney to be sanctioned, e.g.,* plaintiff, _____ (*name*),] to pay $_____ [*specify amount not to exceed $1,500*] to the County of _____ as a sanction. The motion will be made on the ground that _____ [*name of person to be sanctioned] violated this court's lawful order dated* _____ *[set forth order, violation of which is the basis of the sanctions*].

The motion will be based on this notice of motion, on the _____ [*specify violated order*], of which this court is requested to take judicial notice pursuant to the provisions of *Evidence Code Section 452, subdivision (d)* and *Section 453*, on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By:_____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ (*name*)

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*specify moving party*) *or other statement as appropriate*].

2. _____ [*Specify person against whom the motion is directed, e.g.*, _____ (*Name*), plaintiff in this action], _____ [*state facts showing that the person to be sanctioned violated a lawful order of the court*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM

[*Add memorandum supporting motion*]

[2] Use of Form

This notice of motion is for use by a party who seeks to have the court impose monetary sanctions on a witness, party, or attorney who has violated a court order [*see Code Civ. Proc. § 177.5*]. The sanction is not available in regard to counsel's advocacy before the court. The maximum amount of the sanction is $1500, and it is payable to the county [*Code Civ. Proc. § 177.5*].

With appropriate modifications, this notice of motion and supporting declaration may be used when other statutes or rules of court providing for monetary or other sanctions also apply. For examples of such other provisions, see *§§ 510.41, 510.42*. See also *§§ 510.60* and *510.64*.

A separate noticed motion for sanctions is not required so long as notice is contained in the party's moving or responding papers [*see Code Civ. Proc. § 177.5*]. Consequently, this form may be modified for inclusion in such other papers. Local court rules and policies should be checked beforehand, however, to ascertain if there are any local requirements in this or any other regard.

A memorandum is required to be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion of memoranda and forms, see Ch. 417, *PoInts and Authorities* .

For discussion of grounds and procedural requirements for sanctions under *Code Civ. Proc. § 177.5*, see *§ 510.13*.

[3] Judicial Notice

The form includes a request that the court take judicial notice of the order claimed to have been violated. Check local rules for any special requirements regarding how to bring a court file to the court's notice [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 9.2(b) (requiring separate document requesting clerk to order delivery of the file for the hearing)].

[4] Cross Reference

See also *§§ 510.60, 510.63,* 510.65.

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44-510 California Forms of Pleading and Practice--Annotated § 510.63

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.63 Proceedings to Impose Monetary Sanction for Violation of Court Order [Code Civ. Proc. § 177.5]--Order Granting Motion

[1] FORM Proceedings to Impose Monetary Sanction for Violation of Court Order [Code Civ. Proc. § 177.5]--Order Granting Motion

[*Caption. See 510.61*]

The motion of _____ [*identify party, e.g.,* defendant, _____ (*name*),] for an order to impose monetary sanctions pursuant to *Code of Civil Procedure Section 177.5* on _____ [*specify person to be sanctioned, e.g.,* _____ (*status, e.g.,* plaintiff) _____ (*name*)], came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court, the court finds that an order granting the motion is justified in that _____ [*recite in detail the violation of the court's order justifying the impostion of sanctions*]. Accordingly,

IT IS ORDERED that the motion be, and it hereby is, granted and that _____ [*specify person against whom order is directed, e.g.,* plaintiff, _____ (*name*),] is ordered to pay _____ [*specify county*] $_____ within _____ [*specify time period, e.g.,* 30 days].
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use when a motion to impose a monetary sanction of up to $1500 payable to the county for violation of a lawful court order is granted [*see Code Civ. Proc. § 177.5*]. This form of order can be modified when a sanction motion is also based on other statutes or rules of court providing for other sanctions and the motion is granted.

[3] Cross Reference

See also *§§ 510.63, 510.65*.

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Volume 44: Sales thru Sanitation and Sewerage Districts-Chs. 500-511
Chapter 510 SANCTIONS
PART IV. FORMS

44-510 California Forms of Pleading and Practice--Annotated § 510.64

AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.64 Proceedings to Impose Sanctions for Violation of Local Court Rule [Code Civ. Proc. § 575.2; Gov. Code § 68608(b)]--Notice of Motion and Supporting Declaration

[1] FORM Proceedings to Impose Sanctions for Violation of Local Court Rule [Code Civ. Proc. § 575.2; Gov. Code § 68608(b)]--Notice of Motion and Supporting Declaration

[*Caption. See § 510.60.*]

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant, _____ (*name*),] will move for an order pursuant to _____ [*specify appropriate statutes, California Rules of Court and local rules authorizing sanctions*] _____ [imposing a monetary sanction in the amount of $_____ to be paid by _____ (*specify party and/or attorney to be sanctioned) or specify other sanction sought, e.g.,* dismissing this action]. The motion will be made on the ground that _____ [*specify grounds, e.g.,* plaintiff's attorney has repeatedly failed to meet trial court delay reduction deadlines in this case contained in _____ (*specify local rule*) despite prior orders imposing monetary sanctions].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By:_____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ (*name*)

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*specify moving party*) *or other statement as appropriate*].

2. _____ [*Specify facts supporting imposition of the sanction requested*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

MEMORANDUM

[*Add memorandum supporting motion*]

[2] Use of Form

This notice of motion is for use by a party who seeks to to have the court impose sanctions on a party or attorney who has violated local court rules [*see Code Civ. Proc. § 575.2*; *Gov. Code § 68608(b)*].

Code Civ. Proc. § 575.2 provides general authority for the court to enforce local rules with sanctions [for discussion, *see § 510.14*]; *Gov. Code § 68608(b)* specifically authorizes sanctions to enforce local trial court delay reduction (fast track) rules [for discussion, *see § 510.15*]. For discussion of the relationship of these statutes and potential conflict between them as to what sanctions may be appropriate, see *§ 510.16* .

With appropriate modifications, this notice of motion and supporting declaration may be used when other statutes or rules of court providing for monetary or other sanctions also apply. For examples of such other provisions, see *§ 510.41* .

Local court rules and policies should be checked beforehand to ascertain if there are any local requirements concerning the motion.

[3] Declaration

If a monetary sanction based on the movant's expenses and attorney's fees is sought, the declaration should state detailed facts showing the calculation. If more severe sanctions, such as dismissal, are sought, the declaration should state facts showing repeated lack of compliance with local rule requirements and the ineffectiveness of lesser sanctions previously imposed in the case [*Sigala v. Anaheim City School Dist. (1993) 15 Cal. App. 4th 661, 673-674, 19 Cal Rptr. 2d 38* ;

Intel Corp. v. USAIR, Inc. (1991) 228 Cal. App. 3d 1559, 1565-1568, 279 Cal. Rptr. 569] .

[4] Supporting Memorandum

A memorandum is required to be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion of memoranda and forms, see Ch. 417, *Points and Authorities* .

[5] Cross Reference

See also *§§ 510.60, 510.62*.

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AUTHOR: Hon. Anita Rae Shapiro Editorial Consultant

§ 510.65 Proceedings to Impose Sanctions for Violation of Local Court Rule [Code Civ. Proc. § 575.2; Gov. Code § 68608(b)]--Order Granting Motion

[1] FORM Proceedings to Impose Sanctions for Violation of Local Court Rule [Code Civ. Proc. § 575.2; Gov. Code § 68608(b)]--Order Granting Motion

[*Caption. See § 510.61]*

The motion of _____ [*identify party, e.g.,* defendant _____ (*name*)] for an order to impose sanctions pursuant to _____ [*specify, e.g., Government Code Section 68608(b)*] on _____ [*specify person to be sanctioned, e.g.,* _____ (*status, e.g.,* plaintiff) _____ (*name*)], came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court, the court finds that an order granting the motion is justified in that _____ [*recite in detail the conduct or circumstances justifying imposition of sanction ordered*]. Accordingly,

IT IS ORDERED that the motion be, and it hereby is, granted and that _____ [_____ (*specify person against whom order is directed, e.g.,* plaintiff's attorney, _____ (*name*),) is ordered to pay _____ (*specify party, e.g.,* defendant, (name),) $_____ within _____ (*specify time period, e.g., 30 days*) *or specify other sanction being imposed*].
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use when the court grants a motion to impose a monetary sanction for violation of local court rules, as authorized by *Code Civ. Proc. § 575.2* and/or *Gov. Code 68608(b)*. This form of order can be modified when a sanction motion is also based on other statutes or rules of court and the motion is granted.

[3] Cross Reference

See also *§§ 510.60, 510.63*.

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44-511 California Forms of Pleading and Practice--Annotated 511.syn

§ 511.syn Synopsis to Chapter 511: SANITATION AND SEWERAGE DISTRICTS

§ 511.01 Scope of Chapter

§§ 511.03-511.09 [Reserved]

§ 511.10 Governing Statutes

§ 511.11 Garbage Disposal Districts

§ 511.12 Community Facilities Improvement Districts

[1] Formation

[2] Powers

§ 511.13 County Sanitation Districts

§ 511.14 Sewer Maintenance Districts

§ 511.15 Sanitary Districts

[1] Formation

[2] Powers

[3] Construction Contracts

[4] Liability for Damages

§ 511.16 Garbage and Refuse Disposal, Rural Sewer, County Sewerage and Water, Joint Municipal Sewage Disposal, and Regional Sewage Disposal Districts

§ 511.17 Actions Against Sanitation and Sewerage Districts

[1] Actions to Determine Validity of Bonds

[2] Actions to Determine Validity of Fees and Charges for Sewer or Water Connection

[3] Proceedings to Compel Performance of Ministerial Duty

[4] Liability for Torts

[5] Liability for Contracts

[6] Claims Statutes

[7] Venue of Actions Against Sanitation and Sewerage Districts

[8] Statute of Limitations on Actions Against Sanitation and Sewerage Districts

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§ 511.30 State Statutes

[1] Claims of Laborers and Suppliers

[2] Elections

[3] Provisions Governing Districts Generally

[4] Recyclable Materials

[5] Sanitation and Sewerage Districts

[6] Sanitation and Sewerage Systems, Projects, Zones

[7] Solid Waste

[8] Termination of Service

§ 511.31 Decisions

§ 511.32 Text References

§§ 511.33-511.49 [Reserved]

§ 511.50 Allegation of Capacity--District as Plaintiff or Defendant [Gov. Code § 945]

[1] FORM

[2] Use of Form

[3] Legal Capacity of Districts

[4] State Statutes

[5] Cross References

§ 511.51 Complaint to Invalidate [Code Civ. Proc. § 863] Issuance of Improvement Bonds and for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527] and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526]--By Property Owner Against Sanitary District

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Certification re Notice

[6] Jurisdiction and Venue

[7] Parties

[8] Statute of Limitations

[9] Consolidation

[10] Preference

[11] Costs

[12] Judgment; Inapplicability of Code Civ. Proc. §§ 473, 473.5

[13] Dismissal

[14] Appeal

[15] State Statutes

[16] Decisions

[a] Injunctive Relief

[b] Relief Denied

[17] Text References

[18] Cross References

§ 511.52 Allegations [Health & Safety Code § 49167] for Use in Complaint for Validating Proceedings [Code Civ.

Proc. §§ 860-870] Against County Sanitation District [Health & Safety Code § 4701], County Sewerage and Water District [former Health & Safety Code § 5501] or Garbage and Refuse Disposal District [Health & Safety Code § 49100]

[1] FORM

[2] Use of Form

[a] In Action Against County Sanitation District

[b] In Action Against County Sewerage and Water District

[c] In Action Against Garbage and Refuse Disposal District

[3] State Statutes

[a] County Sanitation Districts

[b] County Sewerage and Water Districts

[c] Garbage and Refuse Disposal Districts

[4] Cross References

§ 511.53 Allegations [Health & Safety Code § 4994] for Use in Complaint for Validating Proceedings [Code Civ. Proc. §§ 860-870] Against Sewer Maintenance District [Health & Safety Code § 4951]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 511.54 Complaint to Invalidate [Code Civ. Proc. § 863] Ordinance, Resolution, or Motion Adopting or Modifying Fee or Service Charge for Sewer or Water Connection [Gov. Code § 66022]--By Property Owner Against Local Agency

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Decisions

[6] Cross References

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44-511 California Forms of Pleading and Practice--Annotated § 511.01

§ 511.01 Scope of Chapter

This chapter discusses garbage disposal; community facilities; county sanitation; sewer maintenance; sanitary, garbage, and refuse disposal; rural sewer, county sewerage and water, and joint municipal sewage disposal districts. It contains a form of complaint against a sanitary district seeking injunctive and declaratory relief and the invalidation of bonds [*see § 511.51*], as well as forms of allegations for use in validating proceedings against other districts discussed in this chapter [*see § 511.51, 511.53*]. Also included is a form for use in alleging the capacity of the districts discussed in this chapter in actions in which such districts are named as parties [*see § 511.50*], and a form of complaint to invalidate an ordinance, resolution, or motion pertaining to fees or charges for sewer or water connections [*see § 511.54*].

For a discussion of and forms for use in actions against governmental entities generally, including tort claims and taxpayers' actions, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* . For a discussion of and forms for use in actions against related types of districts, see Ch. 315, *Irrigation* .

For a discussion of the liability of a utility for damages resulting from the utility's failure to commence service connection or repair within a specified period pursuant to *Civ. Code § 1722(c)*, see Ch. 545, *Telephone and Telegraph Communication* .

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[Reserved]

§§ 511.03[Reserved]

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44-511 California Forms of Pleading and Practice--Annotated § 511.10

§ 511.10 Governing Statutes

The Health and Safety and Public Contract Codes contain provisions for the organization of garbage disposal districts [Health & Safety Code § 49000 et seq.], community facilities improvement districts [*Health & Safety Code § 4600 et seq.*], county sanitation districts [*Health & Safety Code § 4700 et seq.*], sewer maintenance districts [*Health & Safety Code § 4860 et seq.*], sanitary districts [*Health & Safety Code § 6400 et seq.*; *Pub. Contract Code § 20800 et seq.*], garbage and refuse disposal districts [Health & Safety Code § 49100 et seq.], rural sewer districts [former *Health & Safety Code § 5500 et seq.*], joint municipal sewage disposal districts [former *Health & Safety Code § 5700 et seq.*], and regional sewage disposal districts [former *Health & Safety Code § 5900 et seq.*]. The foregoing provisions cited as "former" Health and Safety Code sections continue to govern the entities created or organized by those statutes [*see* Stats. 1959, ch. 1309; *see also § 511.16*].

Additionally, the Government and Public Contract Codes provide for the creation and regulation of joint sanitation projects [*Gov. Code § 55000 et seq.*], joint projects for sanitation and electrical lines [*Gov. Code § 55300 et seq.*], and community services districts [*Gov. Code § 61000 et seq.*; *Pub. Contract Code § 20680 et seq.*]. Procedure for the organization, operation, and government of districts is set forth in *Gov. Code § 58000 et seq.* Authority and procedure for changes of organization of districts appears in the Cortese Local Government Reorganization Act of 1985 (*Gov. Code § 56000 et seq.*).

Counties and cities are also empowered to make and enforce within their limits all sanitary ordinances and regulations not in conflict with general laws [*Cal. Const., art. XI, § 7*]. A city's legislative body may construct, establish, and maintain drains and sewers [*Gov. Code § 38900*], and, whenever the public interest or convenience requires, the legislative body of any municipality may acquire or install certain sanitary and sewerage works or improvements [*Sts. & Hy. Code § 10102*]. However, if the jurisdictions of a district and a municipality overlap, the operations of sanitation and sewerage districts, which are created by state law, are a matter of state rather than municipal concern, and provisions of state law control over municipal charters [*Jarvis v. Los Angeles (1977) 67 Cal. App. 3d 834, 837, 136 Cal. Rptr. 843* ; *see also Home Gardens Sanitary Dist. v. City of Corona (2001) 96 Cal. App. 4th 87, 91, 116 Cal. Rptr. 2d 638]* .

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44-511 California Forms of Pleading and Practice--Annotated § 511.11

§ 511.11 Garbage Disposal Districts

A garbage disposal district may be formed by election of the voters registered in the proposed district after the board of supervisors has determined that a portion of the county is in need of facilities for the disposal of garbage and that a district should be formed for that purpose [Health & Safety Code §§ 49006, 49010]. The district is given certain powers [*Health & Safety Code § 4121 et seq.*], including the right to enter into contracts for the disposal of garbage and other refuse matter [Health & Safety Code § 49019] and to levy and collect taxes [Health & Safety Code § 49030].

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44-511 California Forms of Pleading and Practice--Annotated § 511.12

§ 511.12 Community Facilities Improvement Districts

[1] Formation

Community facilities improvement districts are governed by the Community Facilities Law [*Health & Safety Code § 4601 et seq.*]. Such districts may be formed by the governing body of any city whenever in its judgment, after public hearing, the district is necessary or convenient for any improvement authorized by such law [*Health & Safety Code §§ 4605, 4609(d)*]. Improvements include, but are not limited to, the acquisition or construction of sanitary sewers of all types, the acquisition or construction of sewage treatment plants, works, or systems, and other related projects [*see Health & Safety Code § 4602.4*].

[2] Powers

The districts are given the power to levy and collect taxes and to issue bonds [*Health & Safety Code § 4614.13*]. A city may enter into contracts for the construction of any improvement for the district, including the acquisition of any property which the improvement includes, or a city may itself construct or complete the improvement [*Health & Safety Code §§ 4627, 4634*]. In addition, a city may require the owners of property within a district to pay a reasonable fee for connecting to any sanitary sewer improvement acquired or constructed pursuant to the Community Facilities Law [*Health & Safety Code § 4640.6*].

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44-511 California Forms of Pleading and Practice--Annotated § 511.13

§ 511.13 County Sanitation Districts

County sanitation districts are governed by the County Sanitation District Act [*Health & Safety Code § 4700 et seq.*]. The district may employ persons needed to effect its powers, to acquire property, to enter into contracts, to issue bonds, and to levy and collect taxes, among other things [*Health & Safety Code §§ 4739, 4740, 4742.1, 4742.3, 4742.5, 4746, 4747*].

Under *Health & Safety Code § 4744*, which gives a county sanitation district the right to sell or otherwise dispose of any water, sewage effluent, or fertilizer resulting from the operations of the sewage system, a sanitation district has a right to sell sewage effluent without the consent of a water district to private persons, firms, or corporations for treatment and processing with the resulting product of purified water to be used in steam-flooding operations [*Taft v. West Kern County Water Dist. (1968) 262 Cal. App. 2d 291, 297-298, 68 Cal. Rptr. 675]* .

The Local Agency Public Construction Act [*see Pub. Contract Code § 20100 et seq.*] governs construction contracts of county sanitation districts [*Pub. Contract Code § 20780*]. Specific provisions of the Act apply to construction contracts of county sanitation districts [*Pub. Contract Code § 20780*]. Under the applicable provision requiring award of bids to the highest qualified bidder [*see Pub. Contract Code § 20783*], a lease of pasture owned by a sanitation district for purposes of dispose of reclaimed municipal water in a fashion which, absent the agreement, the district would perform, constitutes a public work subject to the bid requirements [*Boydston v. Napa Sanitation Dist. (1990) 222 Cal. App. 3d 1362, 1369, 272 Cal. Rptr. 458]* . The term "responsible" refers not only to the attribute of trustworthiness, but also to the quality, fitness and capacity of the bidder to perform the proposed agreement satisfactorily [*Boydston v. Napa Sanitation Dist. (1990) 222 Cal. App. 3d 1362, 1368, 272 Cal. Rptr. 458* (ordering district to determine whether highest bidder was qualified)].

The district must make the initial determination whether a bidder is qualified [*Boydston v. Napa Sanitation Dist. (1990) 222 Cal. App. 3d 1362, 1369, 1370, 272 Cal. Rptr. 458]* . Before a contract may be awarded to one other than the lowest (or highest) bidder, the public body must [*Boydston v. Napa Sanitation Dist. (1990) 222 Cal. App. 3d 1362, 1369, 272 Cal. Rptr. 458]* :

- Notify that bidder of any evidence reflecting upon the bidder's responsibility received from others or

adduced as a result of independent investigation,

- Afford the bidder an opportunity to rebut such adverse evidence, and
- Permit the bidder to present evidence of qualification.

A mere statement that the district suggested that the bidder may have been qualified to operate the property is insufficient to satisfy the requirement that the bidder be found qualified [*Boydston v. Napa Sanitation Dist. (1990) 222 Cal. App. 3d 1362, 1370, 272 Cal. Rptr. 458]* .

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44-511 California Forms of Pleading and Practice--Annotated § 511.14

§ 511.14 Sewer Maintenance Districts

Any portion of the territory of a county, whether incorporated or unincorporated, in which lateral or collecting sanitary sewers have been installed and in which no provisions have been made to maintain or repair such sewers, may be formed into a sewer maintenance district on the determination of the board of supervisors of a county after a public hearing [*Health & Safety Code §§ 4870-4872*]. Such a district may become a part of a county sanitation district if the board of supervisors determines that it is in the best interests of the district [*Health & Safety Code § 4879*]. Sewer maintenance districts may acquire and dispose of property, enter into contracts for the purpose of carrying out certain of their purposes, issue bonds, and levy and collect taxes [*Health & Safety Code §§ 4886, 4887, 4888, 4891, 5002*]. A sewer maintenance district may also contract with other governmental entities for the joint construction or operation of facilities [*Pub. Contract Code § 20790 et seq.*]. The Local Agency Public Construction Act [*see Pub. Contract Code § 20100 et seq.*] governs construction contracts of sewer maintenance districts [*Pub. Contract Code § 20101*].

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44-511 California Forms of Pleading and Practice--Annotated § 511.15

§ 511.15 Sanitary Districts

[1] Formation

A sanitary district may be formed on the petition of 25 persons in the county or counties involved who are residents and freeholders in the proposed district [*Health & Safety Code §§ 6420, 6422*]. The petition is presented to the board of supervisors, which holds a public hearing and schedules an election on the issue of formation [*Health & Safety Code §§ 6420, 6440, 6446(b)*; *Stumpf v. Board of Supervisors (1901) 131 Cal 364, 368, 63 P 663* (failure to adhere to requirements for notice of election to create district renders election void); *Andresen v. Board of Supervisors (1965) 235 Cal. App. 2d 436, 442, 45 Cal. Rptr. 306* (sanitary district is not formed until it is favorably acted on by electors of proposed district)]. If a majority of the votes cast in each county are in favor of formation, the board of supervisors orders that a district of the name and with the boundaries stated in the order calling the election has been established [*see Health & Safety Code § 6465*]. A vote in favor of formation entails an election of the persons who will comprise the governing board of the district [*see Health & Safety Code §§ 6463, 6464*]. The supervisors' order establishing the district is conclusive evidence of, among other things, the existence and validity of the district [*see Health & Safety Code § 6465*].

[2] Powers

The full range of the sanitary district's powers is set forth in *Health and Safety Code § 6510 et seq.* These powers include the district's ability to acquire, to construct, to operate, and otherwise to become involved with garbage dump sites, garbage collection and disposal systems, sewers, drains, septic tanks, and other sanitary and water systems, as the board deems necessary and proper [*see Health & Safety Code § 6512(a)*]. Additionally, the district may acquire, lease, and dispose of property, and make and accept contracts [*see Health & Safety Code §§ 6514, 6514.1, 6515*]. The district is also empowered to collect charges for its services and facilities [*see Health & Safety Code § 6520.5*], and to certify to the county board of supervisors and the county auditor a statement of any delinquent and unpaid charges for services requested by a property owner. The amount of these charges that remains delinquent and unpaid for a period of 60 days or more becomes a part of the annual taxes next levied on the property and becomes a lien on the property in the same manner as a tax lien [*see Health & Safety Code § 6520.10*; *see also Health & Safety Code §§ 6520.11-6520.12*].

A sanitary district is a "similar public corporation" for purposes of *Cal. Const., art. I, § 14*, which gives those entities

the power to take the immediate possession and use of an easement or right of way sought to be condemned for purposes for which the district is empowered to undertake by *Health & Safety Code § 6512* [*Central Contra Costa Sanitary Dist. v. Superior Court (1950) 34 Cal. 2d 845, 849, 215 P.2d 462* ; for discussion of condemnation generally, see Ch. 247, *Eminent Domain*].

A sanitary district is allowed not only to construct its sewers in any public street [*Health & Safety Code § 6518*], but also to compel all residents and property owners in the district to connect their houses and habitations and structures requiring sewerage disposal service with the sewers [*Health & Safety Code § 6520*; *Galeb v. Cupertino Sanitary Dist. (1964) 227 Cal. App. 2d 294, 304-305, 38 Cal. Rptr. 580* (dedicator of right of way to which sanitary district had access was not entitled to compensation upon compulsory connection to sanitary district's service); *see Home Gardens Sanitary District v. City of Corona (2002) 96 Cal. App. 4th 87, 94, 116 Cal. Rptr. 2d 638]* . Where a sanitary district decides to exercise exclusive jurisdiction, the district's jurisdiction to provide sanitary services to the territory of its district is exclusive [*Home Gardens Sanitary Dist. v. City of Corona (2002) 96 Cal. App. 4th 87, 95, 116 Cal. Rptr. 2d 638* (sanitary district exercised its jurisdiction exclusively); *Rodeo Sanitary Dist. v. Board of Supervisors (1999) 71 Cal. App. 4th 1443, 1447, 84 Cal. Rptr. 2d 601]* .

By the same token, a sanitary district may reserve to itself the exclusive right, through its own agents or employees, to collect garbage within its limits [*Health & Safety Code § 6518.5*; *In re Sozzi (1942) 54 Cal. App. 2d 304, 306, 129 P.2d 40* (private party had to right to engage in business of garbage collection where sanitary district had exercised exclusive right to collect garbage)].

A city has the power to require a sanitation district to obtain a permit before excavating city streets and that City has the power to impose reasonable restrictions upon the excavation. However, a city may not attempt to require a sanitary district to amend its regulations to provide for a new procedure for the issuance of wastewater discharge permits, because such an attempt constitutes a usurpation of power that the Legislature vested exclusively in the board of the district [*West Bay Sanitary Dist. v. City of East Palo Alto (1987) 191 Cal. App. 3d 1507, 1511, 237 Cal. Rptr. 245]* . In fact, a city may not use its general police power to override a district's authority to provide sewer service [*Home Gardens Sanitary District v. City of Corona (2002) 96 Cal. App. 4th 87, 91, 116 Cal. Rptr. 2d 638* (court enjoined city from annexing land within sanitary district and imposing restrictions on property owners' ability to connect to district's sewers)]. The same rule applies to counties [*Rodeo Sanitary Dist. v. Board of Supervisors (1999) 71 Cal. App. 4th 1443, 1447, 84 Cal. Rptr. 2d 601* (*Pub. Res. Code § 40059* does not mandate otherwise)].

An improvement district may be formed within a sanitary district to undertake any project for the sanitary district that is of special benefit to the area of the improvement district projects [*Health & Safety Code §§ 6550.1, 6550.10, 6550.12, 6550.13*].

A sanitary district may become a part of a county sanitation district if the board of supervisors determines, after a hearing, that it is in the best interests of the district [*Health & Safety Code § 6524*]. A sanitary district may also issue bonds and assess, levy, and collect taxes for a variety of purposes [*Health & Safety Code §§ 6640, 6697*].

A sanitary district may also contract with other governmental entities for the joint construction or operation of facilities [*Health & Safety Code § 6823*]. Under this statutory authorization, a sanitary district does not have the contractual power to grant a preference in limited disposal capacity to entities outside the district who are not ready to use the capacity when such preference inhibits service to members of the district who have a current need for such service [*Trimont Land Co. v. Truckee Sanitary Dist. (1983) 145 Cal. App. 3d 330, 350-351, 193 Cal. Rptr. 568* (clause in contract between sanitary district and outside resort developer was ultra vires and void to the extent it purported to grant perpetual guarantee of disposal capacity to outside development during shortage)].

[3] Construction Contracts

The Local Agency Public Construction Act [*see Pub. Contract Code § 20100 et seq.*] governs construction contracts of sanitary districts [*Pub. Contract Code § 20101*]. Specific provisions of the Act apply to construction contracts of sanitary districts [*Pub. Contract Code § 20800*]. They apply to any construction, reconstruction, alteration, enlargement, renewal, or replacement of sewer facilities which the district is authorized to do, including, but not limited to, the furnishing of supplies or materials for any such work [*Pub. Contract Code § 20801*]. When the expenditure required for a subject project exceeds fifteen thousand dollars, it must be contracted for and let to the lowest responsible bidder after notice [*Pub. Contract Code § 20803*]. The "lowest responsible bidder" requirements must be followed even if the expenditure for a public work is not made from the district's treasury [*East Bay Garbage Co. v. Washington Township Sanitation Co. (1959) 52 Cal. 2d 708, 713, 344 P.2d 289* (contract calling for direct payments from customers to contractor was subject to bidding requirements)].

The request for bids must constitute proper notice [see *Pub. Contract Code § 20804*]. A contract with a sanitary district may be adjudged null and void because the bidding process did not comply with the notice requirements, such as for the failure to advertise the notice at least twice [*East Bay Garbage Co. v. Washington Township Sanitation Co. (1959) 52 Cal. 2d 708, 714, 344 P.2d 289* (contract awarded after only one publication of notice was void under prior similar statute requiring at least two publications of notice)].

Bids must be accompanied by proper security [*Pub. Contract Code § 20804.5*]. The district board has discretion to reject any bids presented and readvertise. If two or more bids are the same and the lowest, the district board may accept the one it chooses. If no bids are received, the district board may have the project done without further complying with this article [Pub. Contract Code § 2080]. Likewise, if the original contractor's contract is terminated, the district does not have to re-notice the contract for the completion of the original contract [*Shore v. Central Contra Costa Sanitary Dist. (1962) 208 Cal. App. 2d 465, 469, 25 Cal. Rptr. 419* (decided under prior similar statute)].

For discussion of public works contracts, see *Ch. 481, Public Works, § 481.10* et seq.

[4] Liability for Damages

A sanitary district is liable for creating and maintaining a nuisance [*Mulloy v. Sharp Park Sanitary Dist. (1958) 164 Cal. App. 2d 438, 441, 330 P.2d 441* ; *Ambrosini v. Alisal Sanitary Dist. (1957) 154 Cal. App. 2d 720, 728-729, 317 P.2d 33]* and negligence [*Mulloy v. Sharp Park Sanitary Dist. (1958) 164 Cal. App. 2d 438, 441, 330 P.2d 441* (failure to inspect sewer pipes)].

As a municipal corporation, a sanitary district may be liable for inverse condemnation arising from damage caused by the district's acts in pursuit of a public purpose, such as overflow from an outflow pipe [*Ambrosini v. Alisal Sanitary Dist. (1957) 154 Cal. App. 2d 720, 728-731, 317 P.2d 33* (damage award affirmed)]. However, the sanitary district may seek indemnity from a contractor responsible for defective construction of an outflow pipe causing damage to a third party's property where the district reasonably relied upon representations by the contractor that it adhered to the construction standards set forth n the contract [*Alisal Sanitary Dist. v. Kennedy (1960) 180 Cal. App. 2d 69, 82, 4 Cal. Rptr. 379]* .

For discussion of inverse condemnation generally, see Ch. 247, *Eminent Domain* . For discussion of inverse condemnation generally, see Ch. 247, *Eminent Domain* .

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44-511 California Forms of Pleading and Practice--Annotated § 511.16

§ 511.16 Garbage and Refuse Disposal, Rural Sewer, County Sewerage and Water, Joint Municipal Sewage Disposal, and Regional Sewage Disposal Districts

The formation of garbage and refuse disposal districts, as the site for disposal of garbage and refuse, has not been authorized since October 1, 1961 [Health & Safety Code §§ 49111, 49118]. However, the statutes governing the powers, duties, and other aspects of existing garbage and refuse disposal districts [Health & Safety Code § 49120 et seq.] remain in effect.

The statutes authorizing creation and organization of rural sewer districts [former *Health & Safety Code § 4659 et seq.*], county sewerage and water districts [former *Health & Safety Code § 5500 et seq.*], joint municipal sewage disposal districts [former *Health & Safety Code § 5700 et seq.*], and regional sewage disposal districts [former *Health & Safety Code § 5900 et seq.*] were repealed effective September 18, 1959 [Stats. 1959, ch. 1309]. Notwithstanding the repeal, however, the existence, organization, and powers of any district created by or organized pursuant to those statutes remains unaffected and continues to be governed by those statutes [Stats. 1959, ch. 1309].

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§ 511.17 Actions Against Sanitation and Sewerage Districts

[1] Actions to Determine Validity of Bonds

Code Civ. Proc. §§ 860-870 authorize any public agency or interested person to bring an action to determine the validity of any matter which under any other law is authorized to be determined pursuant to these sections [*see Code Civ. Proc. §§ 860, 863*]. The Health and Safety Code specifically authorizes such validating actions to determine the validity of any bonds issued by community facilities improvement districts [*Health & Safety Code § 4624*], county sanitation districts [*Health & Safety Code § 4803*; *see § 511.52*], sewer maintenance districts [*Health & Safety Code § 4996*; *see § 511.53*], and sanitary districts [*Health & Safety Code § 6653*; *see § 511.51*]. Additionally, the Health and Safety Code specifically authorizes actions to determine the validity of bonds issued by county sewerage and water districts [former Health & Safety Code § 5587; *see § 511.52*], joint municipal disposal districts [former Health & Safety Code § 5830], and regional sewage disposal districts [former Health & Safety Code § 6071]. It is not clear, however, if *Code Civ. Proc. §§ 860-870* apply to such actions, since these Health and Safety Code provisions, all of which still apply to districts formed prior to 1960 [*see* Stats. 1959, ch. 1309], were repealed prior to the enactment of *Code Civ. Proc. § 860 et seq.* in 1961. Similarly, Health & Safety Code § 49167, authorizing validating proceedings against garbage and refuse disposal districts, the formation of which has not been authorized since October 1961 [Health & Safety Code § 49118], does not refer to *Code Civ. Proc. § 860 et seq.* Therefore, the procedures set forth in *Code Civ. Proc. § 860 et seq.* may not apply to an action under Health & Safety Code § 49167. For further discussion of the applicability of *Code Civ. Proc. § 860 et seq.*, see *§§ 511.51 -511.53*.

There is no statutory authority for validating proceedings against garbage disposal districts [Health & Safety Code § 49000], although such districts are empowered to issue bonds and levy taxes in the same manner as garbage and refuse disposal districts [Health & Safety Code § 49017]. Nor are validating proceedings authorized against rural sewer districts [former *Health & Safety Code § 4659*], which are empowered to levy and collect taxes [former Health & Safety Code § 4665], but not to issue bonds.

Validating proceedings may also be brought to determine the legality of the existence of a district governed by the District Organization Law (*Gov. Code § 58000 et seq.*) [*Gov. Code § 58200*].

The aforementioned general laws may not apply to a sewer district created by special law, where the general law is permissive and the special law is mandatory [*Fairfield-Suisun Sewer Dist. v. Hutcheon (1956) 139 Cal. App. 2d 502, 507-508, 294 P.2d 102* (approval of bond election under terms of special law affirmed)].

Mandate is a proper remedy to require a district clerk to publish and mail a notice of sale of sewer district bonds [*Fairfield-Suisun Sewer Dist. v. Hutcheon (1956) 139 Cal. App. 2d 502, 504, 294 P.2d 102]* .

[2] Actions to Determine Validity of Fees and Charges for Sewer or Water Connection

Fees charged by a local agency for a sewer or water connection must not exceed the estimated reasonable cost of providing the service for which the fee is charged, unless a question regarding the amount of the fee charged in excess of the estimated reasonable cost of providing the services or materials is submitted to, and approved by, a popular vote of two thirds of those electors voting on the issue [*Gov. Code § 66013(a)*]. A local agency must hold a public meeting according to specified procedures prior to levying a new fee or service charge, or prior to approving an increase in an existing fee or service charge [*see Gov. Code § 66016(a)*], and can levy or approve the fees or charges only by ordinance or resolution [*see Gov. Code § 66016(b)*]. The term "local agency" means a county, general law or charter city, city and county, school district, special district, authority, agency, any other municipal public corporation or district, or other political subdivision of California [*Gov. Code §§ 66000(c), 66013(b)(4)*].

Any person may request an audit to determine whether the fees levied by a local agency exceed the amount reasonably necessary to cover the cost of any product or service provided by the local agency. If a request is made, the legislative body of the local agency may retain an independent auditor to determine whether the fees are reasonable, and the costs of the audit may be recovered from the person who made the request [*Gov. Code § 66023(a),(b)*].

A local agency or interested person may bring a judicial action or proceeding to attack, review, set aside, void, or annul an ordinance, resolution, or motion adopting a new fee or service charge or modifying or amending an existing fee or service charge for a sewer or water connection. An action may also be brought to attack an ordinance, resolution, or motion providing for an automatic adjustment in a fee or service charge for a sewer or water connection that results in an increase in the fee or charge [*see Gov. Code §§ 66013, 66016, 66022*]. These actions by a local agency or interested person must be brought pursuant to the provisions governing validating proceedings contained in *Code Civ. Proc. § 860 et seq.* [*Gov. Code § 66022(b*); *see Barratt Am., Inc. v. City of Rancho Cucamonga (2005) 37 Cal. 4th 685, 704, 37 Cal. Rptr. 3d 149, 124 P. 3d 719* ; *§ 511.54*; *Barratt American, Inc. v. City of Rancho Cucamonga (2005) 37 Cal. 4th 685, 704-705, 37 Cal. Rptr. 3d 149, 124 P. 3d 719]* .

Rates fixed by a lawful local agency for sewer or water service are presumed to be reasonable, fair, and lawful, and the burden of overcoming this presumption is on the party challenging the rates [*see Winnaman v. Cambria Community Services Dist. (1989) 208 Cal. App. 3d 49, 54, 256 Cal. Rptr. 40]* .

[3] Proceedings to Compel Performance of Ministerial Duty

A writ of mandate may be sought to compel a sanitation or sewerage district or its officers to perform a ministerial duty [*see Code Civ. Proc. § 1085*; *Rogers v. Detrich (1976) 58 Cal. App. 3d 90, 104, 128 Cal. Rptr. 261]* . For example, such proceedings may be brought to compel the publication of notice of the sale of improvement bonds [*Solvang Mun. Improvement Dist. v. Jensen (1952) 111 Cal. App. 2d 237, 238, 244 P.2d 492]* , to compel a county auditor to pay a valid judgment against a county sanitation district for bond interest [*Mitchell v. County Sanitation Dist. (1957)150 Cal. App. 2d 366, 370, 309 P.2d 930]* , or to compel a district to levy assessments to pay its bonds and interest thereon [*May v. Board of Directors (1949) 34 Cal. 2d 125, 129-136, 208 P.2d 661* ; *see Health & Safety Code §§ 5042, 5055*]. Mandate is not proper, however, to restrain the levy and collection of assessments, because it conflicts with the principle of withholding judicial restraints on tax levies when adequate remedies at law, such as validating proceedings, are available to test the validity of bonds and assessments [*Water Users Assn. v. Board of Directors (1973) 34 Cal.*

App. 3d 131, 135, 109 Cal. Rptr. 592] . For further discussion and forms for use in mandate proceedings, see Ch. 358, *Mandate and Prohibition* .

[4] Liability for Torts

A sanitary or sewerage district is considered a public entity under *Gov. Code § 811.2*. As such, it is liable for torts committed by it or its officers, within the limitations set forth in the Government Code concerning the liability of public entities [*see Gov. Code § 815 et seq.*; *see also* Ch. 464, *Public Entities and Officers: California Tort Claims Act*].

[5] Liability for Contracts

A contract between a district and a private individual, such as the original contractor [*Civ. Code § 3095*], is generally subject to the same rules of construction as a contract between private parties [*Hawley v. Orange County Flood Control Dist. (1963) 211 Cal. App. 2d 708, 713, 27 Cal. Rptr. 478]* .

The remedies of subcontractors on public works contracts are cumulative. The rights of all persons furnishing labor, services, equipment, or materials for any public improvement work, with respect to any fund for payment of construction costs, except those rights created by direct written contract between such persons and the fundholder, such as the district, are governed exclusively by *Civ. Code § 3179 et seq.* (stop notices) [*Civ. Code § 3264*]. The claimant [*Civ. Code § 3085*] on the stop notice may also have a cause of action on his or her contract with the original contractor [*see George F. Kennedy, Inc. v. Miles & Sons Constr. Div. (1970) 5 Cal. App. 3d 516, 522, 85 Cal. Rptr. 298]* . For further discussion and forms for use in actions on public works contracts, see Ch. 481, *Public Works* .

[6] Claims Statutes

All claims for money or damages against sanitation and sewerage districts are governed by *Gov. Code § 900 et seq.*, except as provided therein or by other applicable statutes [*see Health & Safety Code §§ 4817, 5745, 6096, 6805*, 49040, 49150]. Prior timely presentation of a claim for money or damages in compliance with *Gov. Code § 905* is a prerequisite to maintaining an action against a sanitation or sewerage district. For procedure in preparation and presentation of claims, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[7] Venue of Actions Against Sanitation and Sewerage Districts

The venue of validating proceedings, which must be brought in the superior court, is in the county in which the principal office of the district is located [*Code Civ. Proc. §§ 860, 863*]. The venue of an action for damages against a sanitary district is in the county or city and county in which the district is situated; if the action is brought in a county other than that in which the district is situated, it must be transferred to a neutral county on motion of the defendant district [*Code Civ. Proc. § 394(a)*]. Since actions against sanitary districts are governed by the venue provisions for suits against local agencies [*Code Civ. Proc. § 394(a)*], *Code Civ. Proc. § 395(a)*, which authorizes venue in the county in which the defendants reside, is inapplicable [*Central Contra Costa Sanitary Dist. v. Superior Court (1978) 84 Cal. App. 3d 702, 705-706, 148 Cal. Rptr. 801]* .

[8] Statute of Limitations on Actions Against Sanitation and Sewerage Districts

Validation proceedings brought pursuant to *Code Civ. Proc. § 860 et seq.* must be initiated within 60 days of the existence of the matter that is to be determined thereby, such as the validity of district bonds [*Code Civ. Proc. §§ 860, 863*]. Challenges to intermediate or later steps of an approval process must also be filed within the initial 60-day time limit [*Embarcadero Mun. Improvement Dist. v. County of Santa Barbara (2001) 88 Cal. App. 4th 781, 790-791, 107 Cal. Rptr. 2d 6]* . This limitation period may be considered substantive (jurisdictional) rather than procedural, since it is contained in the statute that creates the validation cause of action [*see Adams v. Albany (1954) 124 Cal. App. 2d 639, 643, 269 P.2d 142]* . For further discussion of the statute of limitations applicable to validating proceedings against

specific districts, see *§§ 511.51* and *511.53*.

A claim against a public entity under the Government Code relating to a cause of action for death or for injury to person, personal property, or growing crops must be presented not later than six months after the accrual of the cause of action; a claim relating to any other cause of action must be presented not later than one year after the accrual of the cause of action [*Gov. Code § 911.2(a)*; *see Gov. Code § 901*; *see also* Ch. 464, *Public Entities and Officers: California Tort Claims Act*].

An action on a stop notice claim may be commenced at any time after 10 days from the date of the service of the stop notice on the public entity, but not later than 90 days following the expiration of the period within which stop notices must be filed as provided in *Civ. Code § 3184* [*Civ. Code § 3210*].

A judicial action or proceeding to attack, review, set aside, void, or annul an ordinance, resolution, or motion adopting a new fee or service charge or modifying or amending an existing fee or service charge for a sewer or water connection must be commenced within 120 days of the effective date of the ordinance, resolution, or motion. If an ordinance, resolution, or motion provides for an automatic adjustment in a fee or service charge that results in an increase in the fee or charge, the action or proceeding must be commenced within 120 days of the effective date of the increase [*Gov. Code § 66022(a)*].

The statute of limitations governing actions against districts, other than validating proceedings, is determined by the nature of the underlying cause of action. See generally Ch. 345, *Limitation of Actions* .

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[Reserved]

§§ 511.18[Reserved]

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§ 511.30 State Statutes

[1] Claims of Laborers and Suppliers

Stop notices for public works. *Civ. Code §§ 3082 et seq., 3179 et seq.*

Payment bonds on public works. *Civ. Code §§ 3247-3252*; *Pub. Contract Code § 7103*

Construction fund claimants governed by stop notice provisions. *Civ. Code § 3264*

[2] Elections

District and bond issues election procedures. *Elec. Code § 5150 et seq.*

[3] Provisions Governing Districts Generally

District as "public entity." *Gov. Code § 811.2*

Liability of public entities. *Gov. Code § 815 et seq.*

Claims against public entities. *Gov. Code § 900 et seq.*

Uniform Standby Charge Procedures Act. *Gov. Code § 54984 et seq.*

Cortese Local Government Reorganization Act of 1985. *Gov. Code § 56000 et seq.*

Organization, operation, and government of districts. *Gov. Code § 58000 et seq.*

[4] Recyclable Materials

Authorized recycling agent. Gov. Code § 40105

Designated collection location. Gov. Code § 40120

Segregation from other waste material. Gov. Code § 40190

Unauthorized removal of recyclable materials from collection location as unlawful. Gov. Code § 41950 et seq.

[5] Sanitation and Sewerage Districts

Community services districts. *Gov. Code § 61000 et seq.*; *Pub. Contract Code § 20680 et seq.*

Community facilities improvement districts. *Health & Safety Code § 4600 et seq.*

County sanitation districts. *Health & Safety Code § 4700 et seq.*

Sewer maintenance districts. *Health & Safety Code § 4860 et seq.*

Sanitary districts. *Health & Safety Code § 6400 et seq.*; *Pub. Contract Code § 20800 et seq.*

Garbage disposal districts. Health & Safety Code § 49000 et seq.

Garbage and refuse disposal districts. Health & Safety Code § 49100 et seq.

Rural sewer districts. Former *Health & Safety Code § 4659 et seq.*

County sewerage and water districts. Former *Health & Safety Code § 5500 et seq.*

Joint municipal sewage disposal districts. Former *Health & Safety Code § 5700 et seq.*

Regional sewage disposal districts. Former *Health & Safety Code § 5900 et seq.*

[6] Sanitation and Sewerage Systems, Projects, Zones

Joint sanitation projects. *Gov. Code § 55000 et seq.*

Joint projects for sanitation and electrical lines. *Gov. Code § 55300 et seq.*

Sanitation and sewerage systems. *Health & Safety Code § 5470 et seq.*

On-site wastewater disposal zones. *Health & Safety Code § 6950 et seq.*

[7] Solid Waste

California Integrated Waste Management Act. Gov. Code § 40000 et seq.

Disposal and handling of solid waste. *Health & Safety Code § 4500 et seq.*

[8] Termination of Service

Termination of service as requiring notice. *Pub. Util. Code §§ 16482, 16482.1*

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§ 511.31 Decisions

Due process guarantees under both federal and state constitution not violated by unification of billing of all city services accompanied by cessation of water service on failure to pay only that portion of bill relating to municipal garbage collection. *Perez v. City of San Bruno (1980) 27 Cal. 3d 875, 893, 168 Cal. Rptr. 114, 616 P.2d 1287*

Sewer assessment districts as permitted to be created pursuant to general provisions of Municipal Improvement Act of 1913 [*Sts. & Hy. Code §§ 10000-10610*] as well as under Sewer Right of Way Law of 1921 [*Gov. Code §§ 39000-39374*] and Community Facilities Law of 1911 [*Health & Safety Code § 4600 et seq.*], none of which is exclusive means for formation. *Dawson v. Los Altos Hills (1976) 16 Cal. 3d 676, 685-686, 129 Cal. Rptr. 97, 547 P.2d 1377*

In reviewing trial court's grant of petition for peremptory writ of mandate under *Code Civ. Proc. § 1085*, involving sanitation district's award of public contract, appellate court's scope of review is whether district's decision is supported by substantial evidence. *Boydston v. Napa Sanitation Dist. (1990) 222 Cal. App. 3d 1362, 1369, 272 Cal. Rptr. 458*

Liability and obligation of industrial wastewater discharger to pay required surcharge or user charge fee, based on its discharge of industrial wastewater into sanitation district's wastewater and collection treatment system, is statutory liability arising from sanitation district ordinance, subject to three-year period of limitations prescribed by *Code Civ. Proc. § 338(a)*. County *Sanitation Dist. v. Superior Court (1990) 218 Cal. App. 3d 98, 101, 106-108, 266 Cal. Rptr. 777*

Local agency formation commission (LAFCO) has power under *Gov. Code § 56375(a)* to make changes in city incorporation proposal that would change new sanitation district's status from independent entity to subsidiary of proposed city; LAFCO-mandated changes in city incorporation proposal as proper so long as changes do not change general purpose or effect of proposal. *Fallbrook Sanitary Dist. v. San Diego Local Agency Formation Com. (1989)*

208 Cal. App. 3d 753, 765, 256 Cal. Rptr. 590

County entitled to impose gate fees on school districts for use of county's solid waste disposal site. *Anaheim City School District v. County of Orange (1985) 164 Cal. App. 3d 697, 700-702, 210 Cal. Rptr. 722*

County not precluded by *Gov. Code § 6103* or former *Gov. Code § 66780.1* from adopting resolution to charge user fees for commercial handlers to dump solid wastes at county landfill or transfer sites. *Garden Grove Sanitary Dist. v. County of Orange (1984) 162 Cal. App. 3d 842, 847-852, 208 Cal. Rptr. 777*

Sources of city's authority to discharge its annexation or sewage functions as impliedly vesting it with authority to contract for either purpose, since city has authority to enter into contracts which enable it to carry out its necessary functions. *Morrison Homes Corp. v. Pleasanton (1976) 58 Cal. App. 3d 724, 734, 130 Cal. Rptr. 196*

Sanitary and flood control district created by special act of Legislature and empowered to prescribe, revise, and collect tolls, as not required to follow *Health & Safety Code § 5474*, relating to notice of fees to land owners, since district is empowered by and collects fees pursuant to special act, rather than general legislation. *English Manor Corp. v. Vallejo Sanitation & Flood Control Dist. (1974) 42 Cal. App. 3d 996, 1002, 117 Cal. Rptr. 315*

Maintenance of sewer districts by their governing bodies as vital government function and as not subject to application of initiative or referendum. *Dare v. Lakeport City Council (1970) 12 Cal. App. 3d 864, 869, 91 Cal. Rptr. 124*

Consent of county water district pursuant to *Water Code § 30065* as prerequisite to board of supervisors proceeding with formation of sanitary district. *Andresen v. Board of Supervisors of Santa Cruz County (1965) 235 Cal. App. 2d 436, 439-440, 45 Cal. Rptr. 306*

Construction, maintenance, and repair of sewers and storm drains, and making reasonable charge for connection to and use of sewers as permitted to be provided by ordinance as valid exercise of police power in interest of public health and incident to construction and maintenance of streets. *Longridge Estates v. City of Los Angeles (1960) 183 Cal. App. 2d 533, 539, 6 Cal. Rptr. 900*

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§ 511.32 Text References

Antieau, Local Government Law (Matthew Bender)

California Government Tort Liability Practice (Cal. CEB 2000)

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[Reserved]

§§ 511.33[Reserved]

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44-511 California Forms of Pleading and Practice--Annotated § 511.50

§ 511.50 Allegation of Capacity--District as Plaintiff or Defendant [Gov. Code § 945]

[1] FORM Allegation of Capacity--District as Plaintiff or Defendant [Gov. Code § 945]
At all times mentioned herein, _____ [defendant *or* plaintiff] _____ [*name of district*] _____ [*type of district, e.g.*, Sanitary] District was, and now is, organized and existing as a _____ [*type of district, e.g.*, sanitary] district under Section _____ [*statute authorizing organization and existence of district, e.g.*, 6400] of the Health and Safety Code.

[2] Use of Form

This form of allegation of capacity is for use in any action in which any sanitation or sewerage district created under *Health & Safety Code §§ 4100, 4170, 4602.1, 4701, 4861, 6400*, 49000, or 49100; or under former Health & Safety Code §§ 4660, 5501, 5700.02, or 5902 is a named party [*see §§ 511.51 -511.53*]. Note that the caption of any pleading must also reflect the appropriate type of district involved.

[3] Legal Capacity of Districts

Sanitation and sewerage districts are "local public entities" and as such, may sue and be sued [*Gov. Code §§ 940.4, 945*]. The Health and Safety Code also specifically provides that county sanitation districts and sanitary districts may sue and be sued in their own names [*Health & Safety Code §§ 4738, 6511*].

[4] State Statutes

District as "local public entity." *Gov. Code § 940.4*

Public entity's capacity to sue and be sued. *Gov. Code § 945*

County sanitation district's capacity to sue and be sued in own name. *Health & Safety Code § 4738*

Sanitary district's capacity to sue and be sued in own name. *Health & Safety Code § 6511*

[5] Cross References

For alternative forms of allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

See also *§ 511.51*

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§ 511.51 Complaint to Invalidate [Code Civ. Proc. § 863] Issuance of Improvement Bonds and for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527] and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526]--By Property Owner Against Sanitary District

[1] FORM Complaint to Invalidate [Code Civ. Proc. § 863] Issuance of Improvement Bonds and for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527] and Permanent Injunction [Civ. Code § 3422; Code Civ. Proc. § 526]--By Property Owner Against Sanitary District

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT TO
vs.	)	INVALIDATE
_____ [*name*],	)	SANITARY DISTRICT
Defendants,.	)	PROCEEDINGS
	)	[*Code Civ. Proc. § 863*]
	)	

Plaintiff alleges:
1. Plaintiff is, and at all times herein mentioned was, a corporation, duly organized and existing under the laws of the State of California with its principal place of business in _____ County [*or allege other capacity and residence of plaintiff*].

2. [*Capacity of defendant. See § 511.50* .]
3. _____ [*Allege facts showing that plaintiff is an interested person as required by Code Civ. Proc. § 863, e.g. Code Civ. Proc. § 863*, Defendant has formed the _____ (*name of district*) Special Assessment District No. _____. Plaintiff is the owner of a[n] _____-acre parcel of

land, bearing Assessment No. _____, lying within this assessment district].
[4. _____ (*Allege facts showing that the defendant issued bonds, the validity of which is authorized to be challenged pursuant to the Health and Safety Code, e.g.,* On or about _____ (*date*), defendant adopted Resolution No. _____, a resolution calling a special election for the purpose of submitting to the qualified voters of the district the proposition of incurring a bonded indebtedness by the issuance of bonds and setting the date of such election, a true copy of which is attached hereto as Exhibit A, and made a part hereof. The special election on the issue of incurring the aforementioned bonded indebtedness was held on or about _____ (*date*). On or about _____ (*date*), defendant gave notice of a sale of the improvement bonds authorized by the results of the special election, the sale to be held on _____ (*date*). On or about _____ (*date*), defendants received bids for the purchase of the improvement bonds, therein designated as "Series _____ No. _____." Thereafter, defendant purported to sell the improvement bonds of the district designated as "Series _____ No. _____").]
5. _____ [*Allege facts showing irregularities or informalities in the special bond election resulting in election being unfairly conducted*].

6. [*Allege in separate paragraphs any other acts or omissions of defendants which show defendants' lack of compliance with the statutory requisites for the issuance of improvement bonds.*]
7. The above-described irregularities [, errors, and omissions] committed by defendant substantially affect the rights of plaintiff in that _____ [*show substantial rights of plaintiff adversely affected by defendant's irregularities as required by Code Civ. Proc. § 866*]. For these reasons the bonds are not a valid or lawful lien on the real property of plaintiff hereinabove described, and any attempt by defendant to collect unpaid assessments thereon from plaintiff would be unlawful and improper.
8. _____ [*Allege that complaint is being filed within statutory time limitation, e.g.,* This action has been brought within 60 days of the existence of the bonds, the validity of which is authorized to be determined pursuant to these proceedings].
9. Defendant's [threatened] wrongful conduct as alleged herein, unless and until enjoined and restrained by order of this court, will cause great and irreparable injury to plaintiff in that _____ [*specify particular facts which will constitute great and irreparable injury, e.g.,* the collection of unpaid assessments from plaintiff on plaintiff's real property pursuant to the void improvement bonds would result in irreparable financial injury since _____ (*describe injury*)].
10. Plaintiff has no adequate remedy at law for the injuries _____ [currently being suffered *or* which are threatened] _____ [*specify facts in addition to those previously alleged which tend to show the inadequacy of any legal remedy, especially monetary damages, which plaintiff might pursue, e.g.,* it will be impossible for plaintiff to determine the precise amount of damage which he or she will suffer if defendant's conduct is not restrained in that _____ (*describe speculative nature of damage*)].

WHEREFORE, plaintiff prays judgment against defendant as follows:
1. That the court render its judgment adjudicating the improvement bonds purportedly issued by defendant, designated as "Series _____ No. _____," void and illegally issued, and not a lien on any of the property of plaintiff;

2. For an order requiring defendant to show cause, if any it has, why it should not be enjoined as hereinafter set forth, during the pendency of this action;
3. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant and its agents, servants, and employees, and all persons acting under, in concert with, or for it from _____ [*specify each of the acts, courses of conduct, and conditions defendant is to be prohibited from doing, commencing, continuing, maintaining, failing to do, etc., e.g.,* collecting unpaid assessments on plaintiff's property from plaintiff pursuant to the void improvement bonds];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

CAUTION:
The allegtions of this complaint assume that counsel will file affidavits (declarations [Code Civ. Proc. § 2015.5E. ***E. H. Renzel Co. v. Warehousemen's Union I. L. A. 38-44 (1940) 16 Cal. 2d 369, 373, 106 P.2d 1 San Juan Gold Co. v. San Juan Ridge Mut. Water Asso. (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582 Code Civ. Proc. § 527***

[2] Use of Form

This form of complaint is for use in an action to determine the validity of improvement bonds issued by a sanitary district and for a temporary restraining order, preliminary injunction and permanent injunction against the collection of unpaid assessments on plaintiff's land pursuant to the invalid bonds [*Civ. Code § 3422*; *Code Civ. Proc. §§ 526, 527*; *Health & Safety Code § 6653*]. The complaint also prays for judgment that the allegedly void bonds are not a lien on any of the plaintiff's property.

This form of complaint may also be adapted for use in proceedings for invalidation of improvement bonds issued by sewer maintenance districts [*Health & Safety Code § 4996*; see *§ 511.53*], community facilities improvement districts (formerly, municipal sewer and water districts) [*Health & Safety Code § 4624*], county sanitation districts [*Health & Safety Code § 4803*; *see § 511.53*], county sewerage and water districts [former Health & Safety Code § 5587; *see § 511.52*], joint municipal disposal districts [former Health & Safety Code § 5830], regional sewage disposal districts [former Health & Safety Code § 6071], and garbage and refuse disposal districts [Health & Safety Code § 49167; *see § 511.52*].

[3] Allegations

The complaint alleges (1) plaintiff's capacity to sue (Paragraph 1). This need not be alleged if plaintiff is a natural person, but if plaintiff is a legal entity, failure to allege capacity to sue may be grounds for demurrer to the complaint under *Code Civ. Proc. § 430.10(b)*. It alleges (2) defendant's capacity to be sued (Paragraph 2) [for discussion and form of allegations of capacity, *see § 511.50*], (3) facts showing that plaintiff is an interested person as required by *Code Civ. Proc. § 863* (Paragraph 3) [for discussion of who are interested parties under *Code Civ. Proc. § 863, see Empire W. Side Irrigation Dist. v. Lovelace (1970) 5 Cal. App. 3d 911, 913-914, 85 Cal. Rptr. 552* (validating proceeding on irrigation proceeding contract) and *Regus v. Baldwin Park (1977) 70 Cal. App. 3d 968, 971, 972, 139 Cal. Rptr. 196* (validation and taxpayers' action on redevelopment project), and (4) facts showing that the defendant conducted the challenged bond election and purported to sell the authorized bonds (Paragraph 4).

The holding of the election and resulting issuance of bonds should be alleged (Paragraph 4), since a validating proceeding on sanitary district improvement bonds may only be brought on the ground that certain irregularities or informalities in the bond election resulted in the election being unfairly conducted and rendered the bonds void [*Health & Safety Code § 6550.11*; *see also Code Civ. Proc. §§ 860, 864* (validating proceedings as permitted only if bonds have come into existence); *Health & Safety Code § 6550.10* (sanitary improvement bonds issued only if approved by election)].

Note that although validating proceedings are the sole remedy of a plaintiff, other than a public agency, officer, or agent, to challenge the issuance of bonds after the election is held [*Code Civ. Proc. § 869*; *Health & Safety Code §*

6550.11; *see also Millbrae School Dist. v. Superior Court (1989) 209 Cal. App. 3d 1494, 1499, 261 Cal. Rptr. 409* (third party public agencies as required to comply with validating procedures)], mandate [*Code Civ. Proc. § 1085*] may be available to any interested party to challenge alleged irregularities in the proceedings leading up to the election [*see Miller v. Greiner (1964) 60 Cal. 2d 827, 830, 36 Cal. Rptr. 737, 389 P.2d 129]* . For example, mandate appears to lie to prevent further district proceedings if the board schedules a bond election even though the requisite number of property holders protest against the proposed project which the bonds are intended to finance [*Health & Safety Code § 6550.7*].

The complaint must also allege (5) facts showing irregularities or informalities in the bond election resulting in it being unfairly conducted (Paragraphs 6, 7) [*Health & Safety Code § 6550.11*]. Any error, irregularity, or omission which does not affect the substantial rights of the interested parties will be disregarded by the court and thus, will not serve to invalidate the bonds (Paragraph 7) [*Code Civ. Proc. § 866*; cf *De Jong v. Pasadena Unified School Dist. (1968) 264 Cal. App. 2d 877, 881, 70 Cal. Rptr. 913* (issuance of bonds as not invalidated under former Educ. Code § 21708, which provided that school district bonds would not be invalidated absent actual fraud in the proceedings leading to their issuance, when election officials failed to deface unused ballots in compliance with the Election Code)].

In addition, the complaint alleges (6) that the action has been brought within the statutory time limitation for validating proceedings under *Code Civ. Proc. §§ 860-870* (Paragraph 8) [*Code Civ. Proc. §§ 860, 863*; *see also* discussion *§ 511.51[8]*].

The complaint alleges facts supporting the prayer for injunctive relief, including facts showing why defendant's conduct will constitute great and irreparable injury (Paragraph 9) [*see Code Civ. Proc. §§ 526(a)(2), 527*; *E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1]* . It also alleges the inadequacy of any legal remedy which plaintiff might pursue (Paragraph 10) [*see Code Civ. Proc. § 526(a)(4),(5)*; *Helms Bakeries v. St. Bd. Equalization (1942) 53 Cal. App. 2d 417, 425, 128 P.2d 167* , and Ch. 303, *Injunctions*, *see § 511.50*, Comments].

[4] Verification

If a complaint is verified it precludes a general denial in the answer [*see Code Civ. Proc. § 431.30(d)*]. Verification of the complaint [*see Code Civ. Proc. § 446*] is required if plaintiff is seeking a temporary restraining order and/or preliminary injunction on a complaint without the use of affidavits (or declarations under penalty of perjury [*see Code Civ. Proc. § 2015.5*]) [*Code Civ. Proc. § 527*]. Otherwise, verification of the complaint is not required. The answer of a district or officer sued in his or her official capacity need not be verified whether or not the complaint is verified [*see Code Civ. Proc. § 446*]. Since the purpose of verifying the complaint is to require a verified answer [*see Code Civ. Proc. §§ 431.30(d)-(f), 446*], there would be no purpose served by verifying the foregoing complaint if plaintiff is not seeking a temporary restraining order and/or preliminary injunction on a complaint without the use of affidavits (or declarations under penalty of perjury).

[5] Certification re Notice

When a temporary restraining order is sought without formal notice, the applicant or the applicant's attorney is required to certify to the court under oath that either (1) within a reasonable time prior to the application he or she informed the opposing party (or his or her attorney, if any) at what time and where the application would be made, (2) he or she in good faith attempted to inform the opposing party (or attorney) but was unable to do so, specifying the efforts made to do so, or (3) for reasons specified he or she should not be required to inform the opposing party (or attorney) [*Code Civ. Proc. § 527(c)*].

[6] Jurisdiction and Venue

A validation action must be brought in the superior court of the county in which the principal office of the district is located [*see Code Civ. Proc. § 860*]. Because the action is in the nature of a proceeding in rem, the jurisdiction of the

superior court is complete after the date specified in the summons [*Code Civ. Proc. § 862*] if the statutory conditions for service of summons have been complied with [*Arnold v. Newhall County Water Dist. (1970) 11 Cal. App. 3d 794, 799-801, 89 Cal. Rptr. 450]* .

The form of the summons and its manner of service are governed by *Code Civ. Proc. §§ 861*, *861.1*, and *863*. The Judicial Council form of summons may be used if it is modified to be directed to "all persons interested in the matter of _____ [*specifying the matter*]," and to contain a notice to all persons interested in the matter to appear and answer the complaint not later than the date specified in the summons, which should be 10 or more days after the completion of publication [*Code Civ. Proc. § 861.1*].

[7] Parties

If no validation action has been brought by a public agency, as provided in *Code Civ. Proc. § 860*, any interested person may bring the action [*Code Civ. Proc. § 863*; *see Code Civ. Proc. § 17* ("person" as including corporation)]. In an action by an interested person, the public agency must be named as a defendant [*Code Civ. Proc. § 863*]. In addition, since the action is an in rem proceeding, any interested party may appear and contest the legality or validity of the matter to be determined within the time specified in the summons [*Code Civ. Proc. § 862*].

[8] Statute of Limitations

The action may be brought on the date of coming into existence of any matter which is authorized to be determined pursuant to these proceedings and for 60 days thereafter [*Code Civ. Proc. § 860*]. Bonds are deemed to be in existence upon their authorization, and they are deemed to be authorized as of the date of adoption by the governing body of the public agency of a resolution or ordinance authorizing their issuance [*Code Civ. Proc. § 864*]. Since the 60-day limitations period may be considered jurisdictional [*see* discussion in *§ 511.17[8]*], the complaint should allege compliance with the 60-day period.

In addition to the foregoing general statute of limitations on all validating proceedings brought pursuant to *Code Civ. Proc. §§ 860-870*, a provision enacted subsequent to *Code Civ. Proc. § 860* provides that any action or proceedings contesting the validity of the formation of a sanitary improvement district or of any bonds issued for it must be commenced within three months from the date of the election authorizing the formation of the district or the issuance of the bonds; otherwise, the bonds and all proceedings relating to them, including the formation of the district, will be held valid and in every respect legal and incontestable [*Health & Safety Code § 6550.11*]. This longer statute of limitations may apply to actions brought under provisions other than *Code Civ. Proc. §§ 860-870*, since *Health & Safety Code § 6653* provides only that validating actions "may" be brought under *Code Civ. Proc. §§ 860-870*; it does not require that such actions be brought pursuant to those procedures [*see Health & Safety Code § 6653*].

[9] Consolidation

If more than one action is pending concerning similar contests, they must be consolidated for trial [*Code Civ. Proc. § 865*].

[10] Preference

Validating proceedings have preference over all other civil actions in the matter of setting for hearing or trial [*Code Civ. Proc. § 867*].

[11] Costs

Costs of a validating proceeding may be allowed and apportioned between the parties or taxed to the losing party in the discretion of the court [*Code Civ. Proc. § 868*].

[12] Judgment; Inapplicability of Code Civ. Proc. §§ 473, 473.5

Judgments in validating proceedings are binding and conclusive as to all matters adjudicated or which could have been adjudicated notwithstanding *Code Civ. Proc. § 473* (relief from mistake, inadvertence, surprise, or excusable neglect) or 473.5 (relief from default); the judgment must permanently enjoin any action or proceeding by any person raising any issue as to which the judgment is binding and conclusive [*Code Civ. Proc. § 870*].

[13] Dismissal

If the interested person bringing the action fails to complete publication pursuant to *Code Civ. Proc. § 861* and file proof thereof within 60 days from the filing of the complaint, the action must be dismissed on motion of the public agency unless good cause for such failure is shown by the interested person [*Code Civ. Proc. § 863*]. Without a showing of good cause, failure to comply with the provisions of *Code Civ. Proc. § 863* with respect to the publication of a proper summons within the fixed time imposes a mandatory duty on the court to dismiss the action in its entirety [*Arnold v. Newhall County Water Dist. (1970) 11 Cal. App. 3d 794, 89 Cal. Rptr. 450* ; *see also Millbrae School Dist. v. Superior Court (1989) 209 Cal. App. 3d 1494, 1500, 261 Cal. Rptr. 409* (mistaken but reasonable belief that *Code Civ. Proc. §§ 860-870* does not apply as good cause for trial court to permit belated compliance with *Code Civ. Proc. § 863*)].

[14] Appeal

Notwithstanding any other provision of law including, without limitation, *Code Civ. Proc. § 901* (authorizing review of judgments and orders in civil actions and proceedings) and any rule of court, no appeal shall be allowed from any judgment entered in validation actions or proceedings under *Code Civ. Proc. §§ 860-870* unless a notice of appeal is filed within 30 days after the notice of entry of the judgment, or, within 30 days after the entry of the judgment if there is no answering party. If there is no answering party, only issues related to the jurisdiction of the court to render a judgment pursuant to this chapter may be raised on appeal [*Code Civ. Proc. § 870(b)*].

[15] State Statutes

Grounds for issuance of final injunction. *Civ. Code § 3422*

"Person" as including corporation as well as natural person. *Code Civ. Proc. § 17*

Required contents of complaint. *Code Civ. Proc. § 425.10*

Grounds for objection to complaint or cross complaint. *Code Civ. Proc. § 430.10*

Form and content of answer to complaint. *Code Civ. Proc. § 431.30*

Verification of pleadings. *Code Civ. Proc. § 446*

Grounds for issuance of injunction. *Code Civ. Proc. § 526*

Liability of litigant wrongfully seeking to restrain issuance or sale of securities for costs, damages, and necessary

expenses of defendant if litigant is interested in public utility of same nature. *Code Civ. Proc. § 526b*

Procedure to obtain preliminary injunction. *Code Civ. Proc. § 527*

Validating proceedings. *Code Civ. Proc. §§ 860-870*

Writ of mandate. *Code Civ. Proc. § 1085*

Certification under penalty of perjury in place of affidavit. *Code Civ. Proc. § 2015.5*

Action to test validity of community facilities district bonds. *Health & Safety Code § 4624*

Protests against formation of sanitary district. *Health & Safety Code § 6550.7*

Bond elections for sanitary districts. *Health & Safety Code § 6550.10*

Irregularities in sanitary district elections; limitation of actions. *Health & Safety Code § 6550.11*

Action to test validity of sanitary district bonds. *Health & Safety Code § 6653*

[16] Decisions

[a] Injunctive Relief

General averment in complaint "that great and irreparable injury will result" from threatened acts insufficient as basis for injunctive relief; facts concerning alleged irreparable injury as required to be pleaded. *E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan G. Co. v. San Juan R. etc. Assn. (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582*

[b] Relief Denied

Relief denied in action by landowner to establish illegality of improvement bonds and restrain collection of assessments by sanitary district because irregularities with respect to issuance of bonds, consisting of changes in denominations and maturity dates, as nonjurisdictional and subject to remedy by curative statutes. *Richardson Bay Foundation v. Richardson Bay Sanitary Dist. (1960) 187 Cal. App. 2d 5, 13, 9 Cal. Rptr. 343*

[17] Text References

Antieau, Local Government Law, Vol. 2, Ch. XIV, *Special Assignments* ; Ch. XV, *Municipal Borrowing* (Matthew Bender)

Witkin, California Procedure, Vol. 2, *Courts*, §§ 211, 215; Vol. 3, *Actions*, § 907; Vol. 5, *Pleading*, § 812 (4th ed. 1997)

[18] Cross References

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification* , respectively

For forms of taxpayers' complaints to enjoin or recover illegal expenditures of public funds, see Ch. 466, *Public Entities and Officers: Taxpayer's Actions*

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California Forms of Pleading and Practice--Annotated

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Volume 44: Sales thru Sanitation and Sewerage Districts-Chs. 500-511
Chapter 511 SANITATION AND SEWERAGE DISTRICTS
PART IV. FORMS

44-511 California Forms of Pleading and Practice--Annotated § 511.52

§ 511.52 Allegations [Health & Safety Code § 49167] for Use in Complaint for Validating Proceedings [Code Civ. Proc. §§ 860-870] Against County Sanitation District [Health & Safety Code § 4701], County Sewerage and Water District [former Health & Safety Code § 5501] or Garbage and Refuse Disposal District [Health & Safety Code § 49100]

[1] FORM Allegations [Health & Safety Code § 49167] for Use in Complaint for Validating Proceedings [Code Civ. Proc. §§ 860-870] Against County Sanitation District [Health & Safety Code § 4701], County Sewerage and Water District [former Health & Safety Code § 5501] or Garbage and Refuse Disposal District [Health & Safety Code § 49100]

1. _____ [*Allege facts showing that the provisions of the Health and Safety Code which authorize the issuance of bonds by county sanitation, county sewerage and water, or garbage and refuse disposal districts are unconstitutional or that the required hearing formation of the district was not regularly held or that proper notice of the hearing was not given*].

2. The hereinabove described _____ [unconstitutional statutes *or* irregularities *or* failure to give proper notice] substantially affect[s] the rights of plaintiff in that _____ [*show substantial rights of plaintiff adversely affected by defendant's irregularities as required by Code Civ. Proc. § 866*]. For these reasons the bonds are not a valid or lawful lien on the real property of plaintiff hereinabove described, and any attempt by defendant to collect unpaid assessments thereon from plaintiff would be unlawful and improper.

[2] Use of Form

This form of allegations is for use in a proceeding under *Code Civ. Proc. §§ 860-870* to test the validity of county sanitation or county sewerage and water, or garbage and refuse disposal district bonds (see *§ 511.52[2][c]*) [former Health & Safety Code § 5546]. With appropriate modification in the caption to *see § 511.51*, these allegations may be substituted for Paragraphs 5 and 6 of that form to state a cause of action to invalidate the proceedings of a county sanitation district, county sewerage and water district, or garbage and refuse disposal district.

[a] In Action Against County Sanitation District

Validating proceedings against a county sanitation district are authorized to be brought pursuant to *Code Civ. Proc. §§ 860-870* [*Health & Safety Code § 4809.2*]. It should be noted that *Health & Safety Code § 4809.2* also authorizes

separate proceedings to test the validity of bonds issued for improvement of a portion of a county sanitation district. The allegations in Paragraphs 5 and 6 of *§ 511.51*, which allege such irregularities or informalities, are sufficient for a validating action under *Health & Safety Code § 4809.2*, although the caption of the complaint should be modified accordingly. The statute of limitations for an action under *Health & Safety Code § 4809.2* is three months from the date of the special bond election [*Health & Safety Code § 4809.2*], which appears to conflict with the 60-day limitation of *Code Civ. Proc. § 860*. However, compliance with the 60-day limitation period for bringing a validating proceeding under *Code Civ. Proc. §§ 860-870* should be alleged since it appears to be a substantive rather than a procedural requirement [*see* discussion in *§ 511.17[8]*; *see also § 511.51*]

[b] In Action Against County Sewerage and Water District

While the statutes authorizing the creation and organization of county sewerage and water districts [former *Health & Safety Code §§ 5500-5656*] were repealed effective September 18, 1959 [Stats. 1959, ch. 1309], the existence, organization, and powers of any district created by or organized pursuant to those statutes continues to be governed by their provisions [Stats. 1959, ch. 1309]. While former Health & Safety Code § 5587 authorizes an action to test the validity of county sewerage and water district bonds on the grounds that the provisions authorizing their issuance [former Health & Safety Code §§ 5580-5603] are unconstitutional or that the required hearing regarding the formation of the district [former Health & Safety Code § 5514] was not regularly held or proper notice of it not given [former Health & Safety Code §§ 5511, 5513], it is not specifically provided that the validating proceedings should be brought pursuant to *Code Civ. Proc. §§ 860-870*. However, former Health & Safety Code § 5603 provides that the governing board of the district may commence validating proceedings to superior court similar to the proceeding in relation to irrigation bonds and that the judgment shall have the same effect as a judgment in relation to irrigation bonds [former Health & Safety Code § 5603]. Since validating proceedings in regard to irrigation district bonds may be brought pursuant to *Code Civ. Proc. §§ 860-870* [*Water Code § 22670*], it may be assumed that the same procedures govern validating proceedings in regard to county sewerage and water district bonds.

[c] In Action Against Garbage and Refuse Disposal District

While Health & Safety Code § 49167 authorizes an action to test the validity of garbage and refuse disposal district bonds on the grounds that the provisions authorizing their issuance [Health & Safety Code § 49160 et seq.] are unconstitutional or that the required hearing regarding the formation of the district [Health & Safety Code § 49111] was not regularly held or proper notice of it not given [Health & Safety Code §§ 49111-49113], there is no specific provision that such proceedings should be brought pursuant to *Code Civ. Proc. §§ 860-870*, a requirement under *Code Civ. Proc. § 860* for invoking the jurisdiction of the court under *Code Civ. Proc. §§ 860-870*. This absence of a specific reference may be inadvertent, however, since former *Health & Safety Code § 4186.07*, the predecessor statute of Health & Safety Code § 49167, was enacted prior to the enactment of *Code Civ. Proc. §§ 860-870* in 1961, and the formation of garbage and refuse disposal districts has not been authorized since October 1961.

[3] State Statutes

[a] County Sanitation Districts

County sanitation district defined. *Health & Safety Code § 4701*

Issuance of county sanitation district bonds. *Health & Safety Code § 4746*

Grounds for invalidity of district bonds. *Health & Safety Code § 4787*

Procedure governing validating proceeding. *Health & Safety Code § 4803*

Validity of improvement bonds for portion of district. *Health & Safety Code § 4809.2*

[b] County Sewerage and Water Districts

Creation and organization of county sewerage and water districts. Former *Health & Safety Code §§ 5500-5656*

County sewerage and water district defined. Former Health & Safety Code § 5501

Formation of county sewerage and water district and notice of hearing on formation. Former Health & Safety Code § 5511

Notice of district formation hearing. Former Health & Safety Code § 5513

Hearing of objections to district formation. Former Health & Safety Code § 5514

Issuance of bonds. Former Health & Safety Code § 5546

County sewerage and water district bonds. Former Health & Safety Code §§ 5580-5603

Grounds for invalidity of county sewerage and water district bonds. Former Health & Safety Code § 5587

Procedure governing county sewerage and water district validating proceedings. Former Health & Safety Code § 5603

Procedure governing irrigation district validating proceedings. *Water Code § 22670*

[c] Garbage and Refuse Disposal Districts

Garbage and refuse disposal district defined. Health & Safety Code § 49100

Authorization and procedure for formation of garbage and refuse disposal district. Health & Safety Code §§ 49111-49113

Invalidity of garbage and refuse disposal district bonds. Health & Safety Code § 49167

Issuance of garbage and refuse disposal district bonds. Health & Safety Code § 49160 et seq.

[4] Cross References

See also *§ 511.51*

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Volume 44: Sales thru Sanitation and Sewerage Districts-Chs. 500-511
Chapter 511 SANITATION AND SEWERAGE DISTRICTS
PART IV. FORMS

44-511 California Forms of Pleading and Practice--Annotated § 511.53

§ 511.53 Allegations [Health & Safety Code § 4994] for Use in Complaint for Validating Proceedings [Code Civ. Proc. §§ 860-870] Against Sewer Maintenance District [Health & Safety Code § 4951]

[1] FORM Allegations [Health & Safety Code § 4994] for Use in Complaint for Validating Proceedings [Code Civ. Proc. §§ 860-870] Against Sewer Maintenance District [Health & Safety Code § 4951]
1. _____ [*Allege facts showing errors, defects, irregularities, informalities, neglect, or omissions of any officer of the district in any proceeding relating to the bonds which affect the jurisdiction of the governing body to order the proposed acts, e.g., to issue the bonds*].
2. The hereinabove described _____ [errors (defects, irregularities, informalities, and neglect) *and/or* omissions] committed by defendant substantially affect the rights of plaintiff in that _____ [*show substantial rights of plaintiff adversely affected by defendant's errors as required by Code Civ. Proc. § 866*]. For these reasons the bonds are not a valid or lawful lien on the real property of plaintiff hereinabove described, and any attempt by defendant to collect unpaid assessments thereon from plaintiff would be unlawful and improper.
3. _____ [*Allege facts showing that plaintiff has exhausted any administrative remedies available to contest the bond proceedings prior to the special bond election, e.g.,* At the hearing held by defendant on _____, 20 _____, pursuant to Resolution No. _____, a resolution of intention to construct improvements in the special assessment district, plaintiff appeared and filed a protest, objection, appeal, and notice of irregularity in proceedings, a true copy of which is attached hereto as Exhibit A, and made a part hereof. Following a hearing of plaintiff's protests, defendant overruled and denied plaintiff's protest, objection, appeal, and notice of irregularity in proceedings and called a special election to submit the proposition of acquiring or constructing the proposed works].

[2] Use of Form

The foregoing form of allegations is for use in a proceeding under *Code Civ. Proc. §§ 860-870* to test the validity of sewer revenue bonds [*Health & Safety Code § 4986*]. With appropriate modifications in the caption and paragraph numbers of *§ 511.51*, Paragraphs 1 and 2 of the foregoing form may be substituted for Paragraphs 5 and 6 of *§ 511.51*, and Paragraph 3 inserted after Paragraph 7 of *§ 511.51*, to state a cause of action to invalidate the proceedings of a sewer maintenance district.

These proceedings are authorized to be brought pursuant to *Code Civ. Proc. §§ 860-870* [*Health & Safety Code § 4996*]

on the ground that an error, defect, irregularity, informality, neglect, or omission of any district officer in any proceedings under *Health & Safety Code §§ 4950-5072* which affects the jurisdiction of the governing body to issue the bonds invalidates those bonds [*Health & Safety Code § 4994*; *see also Health & Safety Code § 4979*]. However, the authorization of validating proceedings under *Health & Safety Code § 4996* conflicts with *Health & Safety Code § 4994*, which provides that the exclusive remedy of any person affected or aggrieved by such error, defect, irregularity, informality, neglect, or omission is to the governing body involved [*Health & Safety Code § 4994*]. Nevertheless, it would appear that the legislative intent in enacting *Health & Safety Code § 4996* in 1961 was to provide the additional remedy of judicial recourse under *Code Civ. Proc. §§ 860-870*, and that the failure to amend *Health & Safety Code § 4994*, which was enacted in 1939, was thus an oversight.

The validity of sewer revenue bonds may be challenged on the basis of irregularities in any proceeding leading to the issuance of the bonds, not merely on the basis of errors in the bond election or in the hearing on the formation of the district [*Health & Safety Code § 4994*]. The district is required, in its resolution of intention to acquire or construct sewer works, to notice a hearing where interested persons may appear before the governing body and voice any protests or objections they may have against the acquisition or construction and the issuance and sale of bonds before the special bond election takes place [*Health & Safety Code §§ 4966(g), 4975*]. Failure to appear at that hearing and raise any objections which exist at that time and to allege in the complaint for validating proceedings that plaintiff has done so, may result in the dismissal of plaintiff's action for lack of jurisdiction [*Environmental Law Fund, Inc. v. Town of Corte Madera (1975) 49 Cal. App. 3d 105, 111-112, 122 Cal. Rptr. 282]* .

[3] State Statutes

Sewer revenue bonds. *Health & Safety Code §§ 4950-5072*

District defined. *Health & Safety Code § 4951*

Hearing on acquisition or construction of proposed sewer works and issuance and sale of bonds. *Health & Safety Code § 4966(g)*

Petition for sewer revenue bond election. *Health & Safety Code § 4975*

Designation of sewer revenue bonds. *Health & Safety Code § 4986*

Grounds for invalidity of sewer revenue bonds and exclusiveness of remedy. *Health & Safety Code § 4994*

Procedure governing validating proceeding. *Health & Safety Code § 4996*

[4] Cross References

See also Comments and References to *§ 511.51*

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Volume 44: Sales thru Sanitation and Sewerage Districts-Chs. 500-511
Chapter 511 SANITATION AND SEWERAGE DISTRICTS
PART IV. FORMS

44-511 California Forms of Pleading and Practice--Annotated § 511.54

§ 511.54 Complaint to Invalidate [Code Civ. Proc. § 863] Ordinance, Resolution, or Motion Adopting or Modifying Fee or Service Charge for Sewer or Water Connection [Gov. Code § 66022]--By Property Owner Against Local Agency

[1] FORM Complaint to Invalidate [Code Civ. Proc. § 863] Ordinance, Resolution, or Motion Adopting or Modifying Fee or Service Charge for Sewer or Water Connection [Gov. Code § 66022]--By Property Owner Against Local Agency

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
	)	COMPLAINT TO INVALIDATE FEE OR SER-
vs.	)	VICE CHARGE FOR
	)	_____ [SEWER *or*
_____ [*name*],	)	WATER] CONNECTION
Defendant.	)	[Code Civ. Proc. § 863 Gov. Code § 66022]
	)	
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of plaintiff, when appropriate. See see § 511.51, Paragraph 1.*]
2. Defendant _____ [*specify, e.g.,* City of _____ (*name*)] is, and at all times herein mentioned has been, a _____ [*specify local agency capacity, e.g.,* a municipal corporation existing under and by virtue of the laws of California, and located in _____ County].
3. _____ [*Allege facts showing that plaintiff is an interested person as required by Code Civ. Proc. § 863, e.g., Code Civ. Proc. § 863* Plaintiff owns a building located at _____ (*address*), City of

_____ (*name*), California. Plaintiff connected this building to defendant's public sewer system on _____ (*date*). Defendant charged plaintiff the amount of $_____ as a fee for the sewer connection. Plaintiff has refused to pay the fee, and defendant has threatened a lien against plaintiff's property unless the fee is paid.]
4. _____ [*Allege that complaint is being brought within statutory time limitation, e.g.,* This action has been brought within 120 days of _____ (*date*), the effective date of Ordinance Number _____ of the City of _____ (*name*) which raised the fee for a sewer connection to the amount of $_____ from the amount of $ _____.]
5. _____ [*Allege facts showing why ordinance, resolution, or motion levying or modifying fee or service charge for sewer or water connection is invalid, e.g.,* The fee for a sewer connection in the amount of $_____, as established in Ordinance Number _____ of the City of _____ (*name*), exceeds the amount of $_____, the estimated reasonable cost of providing this service. However, the fee was neither submitted to nor approved by a popular vote of two thirds of those electors voting on the issue, and thus violates *Sections 66013* and *66018 of the Government Code*.]

WHEREFORE, plaintiff prays judgment against defendant as follows:
1. That the court render its judgment, adjudicating _____ [*specify ordinance, resolution, or motion levying or modifying fee or service charge, e.g.,* Ordinance Number _____ of the City of _____ (*name*)] to be void and invalid [, and declaring that no lien be applied to plaintiff's property for failure to pay any fee or service charge pursuant to such _____ (ordinance *or* resolution *or* motion)];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[2] Use of Form

The foregoing form of complaint is for use in an action by an interested person to determine the validity of an ordinance, resolution, or motion adopting a new fee or service charge, or modifying or amending an existing fee or service charge, adopted by a local agency for a sewer or water connection [*see Code Civ. Proc. § 860 et seq.*; *Gov. Code § 66022*]. As an optional request, the complaint also prays for judgment that no lien be applied to plaintiff's property for failure to pay the fee or service charge.

[3] Allegations

The complaint alleges (1) plaintiff's capacity to sue (Paragraph 1) [*see Code Civ. Proc. § 430.10(b)* (if plaintiff is a legal entity, allegation avoids possible demurrer for failure to allege capacity)], (2) defendant's capacity to be sued (Paragraph 2) [*see Code Civ. Proc. § 863*; *Gov. Code §§ 66000(c), 66022*], (3) facts showing that plaintiff is an interested person as required byCode *Civ. Proc. § 863* (Paragraph 3) [*see Regus v. Baldwin Park (1977) 70 Cal. App. 3d 968, 971-973, 139 Cal. Rptr. 196* (citizen, resident, and taxpayer as interested person in validation and taxpayers' action on redevelopment project)], (4) that the action has been brought within the statutory time limitation for actions reviewing local agency fees and charges (Paragraph 4) [*Gov. Code § 66022(a)*], and (5) facts showing that the ordinance, resolution, or motion adopting or modifying the fee or service charge for sewer or water connection is invalid (Paragraph 5) [*see Gov. Code §§ 66013, 66016* (requirements for valid sewer or water connection fee)].

[4] State Statutes

Procedures for validation action by or against public agency. *Code Civ. Proc. § 860 et seq.*

Limits on fees by local agencies for sewer and water connection. *Gov. Code § 66013*

Requirements for public meeting by local agency prior to adopting new or increasing existing fee or service charge. *Gov. Code § 66016*

Statute of limitations on action to review fees and charges. *Gov. Code § 66022(a)*

Action by local agency or interested person to review fees and charges as brought pursuant to *Code Civ. Proc. § 860 et seq. Gov. Code § 66022(b)*

[5] Decisions

When legislature has provided for validation action to review government actions, mandamus is unavailable to bypass the statutory remedy after the limitations period has expired. *Barratt American, Inc. v. City of Rancho Cucamonga (2005) 37 Cal. 4th 685, 704-705, 37 Cal. Rptr. 3d 149, 124 P.3d 719*

Vested rights doctrine as not shielding property developer from unforeseen increases in connection fees. *Winnaman v. Cambria Community Services Dist. (1989) 208 Cal. App. 3d 49, 56-57, 256 Cal. Rptr. 40*

Judicial action challenging fee increase in new ordinance as barred under former *Gov. Code § 54995* (*now see Gov. Code § 66022*) unless brought within 120 days of effective date of ordinance. *Winnaman v. Cambria Community Services Dist. (1989) 208 Cal. App. 3d 49, 53-54, 256 Cal. Rptr. 40*

Community services district as required to comply with *Health & Safety Code § 5471* and *Gov. Code § 61621.5* (repealed effective January 1, 2006), which allow for rate increases only through ordinance; more general provision of former *Gov. Code § 54992* (*now see Gov. Code § 66016*) allowing for increase through resolution as not controlling. *Cavalier Acres, Inc. v. San Simeon Acres Community Services Dist. (1984) 151 Cal. App. 3d 798, 801-802, 199 Cal. Rptr. 4*

[6] Cross References

For further discussion, see *§ 511.51*

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Volume 45: Schools: Certification thru Service of Summons and Papers-Chs. 512-519
Chapter 512 SCHOOLS: CERTIFICATION, DISMISSAL, AND RELATED EMPLOYMENT ISSUES

45-512 California Forms of Pleading and Practice--Annotated 512.syn

§ 512.syn Synopsis to Chapter 512: SCHOOLS: CERTIFICATION, DISMISSAL, AND RELATED EMPLOYMENT ISSUES

§ 512.01 Scope of Chapter

§ 512.02 Cross References

§§ 512.03-512.09 [Reserved]

§ 512.10 Governing Statutes

§ 512.11 Certificated Employees

§ 512.12 Certification Documents; Definitions

§ 512.13 Verification and Falsification of Credential Application

§ 512.14 Issuance of Credentials

§ 512.15 Denial of Issuance or Renewal of Credential

[1] Grounds

[2] Hearing

[3] Judicial Review of Credential Denial

§ 512.16 Revocation or Suspension of Credential by Commission on Teacher Credentialing

[1] At Request of Holder

[2] Failure to Fulfill Contract Duties

[3] Other Grounds for Revocation or Suspension

[a] In General

[b] Immoral or Unprofessional Conduct

[4] Right to Hearing

[5] Committee of Credentials Procedure--Investigation

[6] Formal Review

[7] Notice to Applicant or Certificate Holder

[8] Decision

[9] Hearing by County Board of Education

[10] Judicial Review of Revocation or Suspension

§ 512.17 Revocation or Suspension of Certificate by County Board of Education

[1] Grounds

[2] Notice and Hearing

[3] Unauthorized Departure From Service

§ 512.18 Mandatory Revocation of Certification Documents

[1] Conviction of Crime

[2] Sexual Psychopaths

§ 512.19 Classification of Certificated Employees

§ 512.20 Permanent (Tenured) Employees

[1] Attainment of Tenure

[a] Large School District

[b] Small School District

[2] Computation of Service Time

[3] Scope of Tenure

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[b] Multiple Credentials

[c] Administrative or Supervisory Positions

§ 512.21 Probationary Employees

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[2] Reclassification of Temporary and Substitute Employees to Probationary Status

§ 512.22 Substitute Employees

§ 512.23 Temporary Employees

[1] Generally

[2] Limited Hiring Preference for Credentialed Teachers Employed by District

[3] Employment of Temporary Employees to Fill Vacancies Caused by Leaves of Absence or Illnesses

[4] Employment of Temporary Employees for First Semester Only

§ 512.24 Effect of Reorganization of District on Classification

§ 512.25 Mandate Proceeding to Compel Reclassification

§ 512.26 General Principles Applicable to Dismissal or Suspension

§ 512.27 Constitutional Restraints on Dismissal

§ 512.28 Dismissal or Suspension of Permanent Employees

[1] Grounds

[2] Immoral or Unprofessional Conduct; Unfitness to Teach

[a] In General

[b] Evident Unfitness for Service

[c] Unprofessional Conduct; Notice Requirement

[d] Dishonesty

[e] Unsatisfactory Performance; Notice Requirement

[f] Physical or Mental Condition; Contagious Diseases

[g] Persistent Violation of School Laws or Rules

[h] Conviction of Crime

[i] Communist or Subversive Affiliations

[3] Notice of Charges

[4] Time Limit on Demand for Hearing; Governing Board's Response

[5] Immediate Suspension for Certain Charges

[a] Charges

[b] Time for Giving Notice of Suspension

[c] Payment of Salary During Suspension

[6] Hearing Procedure

[a] Time for Hearing

[b] Conduct of Hearing Before Commission on Professional Competence

[c] Right to Counsel

[d] Discovery Rights

[e] Commission on Professional Competence

[f] Place of Hearing

[g] Evidence Admissible

[h] Decision of Commission on Professional Competence

[i] Expenses of Hearing Before Commission on Professional Competence

[7] Judicial Review of Commission on Professional Competence Decision

[8] Effect of Judgment in Mandate Proceeding on Future Civil Action

[9] Reinstatement and Back Salary

§ 512.29 Dismissal or Suspension of Probationary Employees in Large School District

[1] Grounds

[2] Notice Required

[3] Hearing Procedure

§ 512.30 Dismissal or Suspension of Probationary Employees in Small School District

[1] During School Year

[2] At End of School Year for Reasons Other Than Those Specified in Educ. Code § 44955

[a] Initial Notice

[b] Grounds for Refusal to Rehire

[c] Request for Hearing

[d] Conduct of Hearing and Decision by Administrative Law Judge and Governing Board

[e] Expenses of Hearing

[f] Final Notice of Dismissal

[g] Effect of Continuance

§ 512.31 Judicial Review of Governing Board Decisions Regarding Dismissal of Probationary Employees

§ 512.32 Dismissal of Temporary and Substitute Employees

§ 512.33 Reduction of Number of Employees

[1] When Authorized

[2] Seniority Rights

[3] Procedure

[a] Initial Notice

[b] Request for Hearing

[c] Conduct of Hearing

[d] Decisions of Administrative Law Judge and Governing Board

[e] Expenses of Hearing

[f] Effect of Continuance

[g] Final Notice of Termination of Services; Effect of Failure to Give Notice and Hearing

[h] Sufficiency of Notice

[4] Reemployment Rights

§ 512.34 Compulsory Leaves of Absence for Employees Charged With Criminal Offenses

§ 512.35 Suspension or Transfer for Mental Illness

§ 512.36 Notice of Intent to Return to Teaching Position

§ 512.37 Resignations

§ 512.38 Reemployment After Resignation

§ 512.39 Salaries of Certificated Employees

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[2] Salary Schedules

[a] Uniformity Requirement

[b] Effect of Collective Bargaining Agreement

[3] Increase or Decrease in Salary

[4] Mandate Proceeding for Recovery of Salary

[a] Generally

[b] PERB Jurisdiction

§ 512.40 Waiver of Employment Rights as Void

§§ 512.41-512.59 [Reserved]

§ 512.60 California Points and Authorities

§ 512.61 State Constitution

§ 512.62 State Statutes

[1] Basic Skills Proficiency Examination

[2] Certification Documents; Issuance, Denial, Revocation, Suspension

[3] Classification of Certificated Employees

[4] Communist or Subversive Activities

[5] Definitions

[6] Dismissal or Suspension of Certificated Employees

[a] Permanent Employees

[b] Probationary Employees

[c] Substitute and Temporary Employees

[7] Employment of Certificated Persons

[8] Layoffs

[9] Miscellaneous Provisions

[10] Salaries of Certificated Employees

§ 512.63 Administrative Regulations

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[1] Certification Documents; Denial, Revocation, Suspension

[a] Grounds

[b] Procedure

[2] Classification

[a] Permanent Employees

[b] Probationary Employees

[c] Temporary Employees

[3] Constitutional Rights

[a] First Amendment Rights

[b] Due Process

[4] Dismissal of Permanent Employees

[a] Generally

[b] Attorney's Fees

[c] Discovery

[d] Grounds

[i] Conviction of Crime

[ii] Evident Unfitness for Service

[iii] Immoral Conduct

[iv] Unsatisfactory Performance

[v] Persistent Violation of or Refusal to Obey School Laws or Rules

[vi] Physical or Mental Disability

[e] Notice of Unprofessional Conduct

[f] Pretermination Hearing

[g] Judicial Review

[5] Dismissal of Probationary Employees

[a] During School Year

[b] End of School Year

[i] Generally

[ii] Grounds

[iii] Judicial Reviews

[iv] Notice

[6] Layoffs

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[b] Notice

[7] Mental Illness

[8] Preferential Hiring

[9] Resignations

[10] Salaries

[11] Sick Leave--Differential Compensation

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§ 512.67 Text References

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§ 512.80 Scope of Checklists

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§ 512.100 Investigation by Committee of Credentials

§ 512.101 Adjudicatory Hearing

§ 512.102 Judicial Review

§§ 512.103-512.119 [Reserved]

§ 512.120 Permanent Employees

§ 512.121 Probationary Employees

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§§ 512.142-512.159 [Reserved]

§ 512.160 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Commission on Teacher Credentialing [Educ. Code § 44246]--Denial, Suspension, or Revocation of Credential or Life Diploma

[1] FORM

[2] Use of Form

[a] In General

[b] Alternative Writ Procedure

[c] Noticed Application Procedure

[3] Allegations

[4] Evidentiary Hearing Required

[5] Invalidity of Decision

[6] Attorney's Fees

[7] Venue

[8] Time for Filing Petition

[9] Verification

[10] Cross References

[11] State Statutes

[12] Decisions

[13] Text References

§ 512.161 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Commission on Professional Competence [Educ. Code § 44945]--Dismissal of Permanent Employee

[1] FORM

[2] Use of Form

[a] In General

[b] Related Uses

[3] Allegations

[4] Attorney's Fees

[5] Cross References

[6] California Points and Authorities

[7] State Statutes

[8] Decisions

[9] Cross References

§ 512.162 Allegation--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Commission on Professional Competence to Dismiss Permanent Employee [Educ. Code § 44945]--Failure to Follow Statutory Dismissal Procedure [Code Civ. Proc. § 1094.5(a); Educ. Code §§ 44932-44947].

[1] FORM

[2] Use of Form

[3] Failure to Follow Statutory Procedure

[4] Cross References

§ 512.163 Allegation--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Commission on Professional Competence to Dismiss Permanent Employee [Educ. Code § 44945]--On Ground of Immoral or Unprofessional Conduct [Educ. Code § 44932(a)(1)]--Failure to

Show Lack of Fitness to Teach

[1] FORM

[2] Use of Form

[3] Cross References

§ 512.164 Allegation--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Commission on Professional Competence to Dismiss Permanent Employee [Educ. Code § 44945]--On Ground of Unsatisfactory Performance [Educ. Code § 44932(a), (4)]--Failure to Give Notice and Opportunity to Correct Faults [Educ. Code § 44938(b)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 512.165 Allegation--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Commission on Professional Competence to Dismiss Permanent Employee [Educ. Code § 44945]--On Ground of Unprofessional Conduct [Educ. Code § 44932(a)(1), 44933]--Failure to Give Notice and Opportunity to Correct Faults [Educ. Code § 44938(a)]

[1] FORM

[2] Use of Form

[3] Decisions

§ 512.166 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Governing Board of School District--Nonreemployment of Probationary Employee Employed Prior to 1983-1984 Fiscal Year or in Small School District for Subsequent School Year [Educ. Code § 44948.5]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Statute of Limitations

[5] California Points and Authorities

[6] State Statutes

[7] Decisions

[8] Cross References

§ 512.167 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Governing Board of School District--Dismissal of Probationary Employee Whose Probationary Period Commenced During or After 1983-1984 Fiscal Year [Educ. Code § 44948.3]

[1] FORM

[2] Use of Form

[a] In General

[b] Related Use

[3] Allegations

[4] State Statutes

[5] Cross References

§ 512.168 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Governing Board of School District--Termination of Services Due to Reduction of Number of Certificated Employees [Educ. Code §§ 44949, 44955]

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Cross References

§ 512.169 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Recognition of Permanent Status of School District Employee [Educ. Code § 44929.21]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Ordinary Mandate

[5] Statute of Limitations

[6] Cross References

[7] California Points and Authorities

[8] State Statutes

[9] Decisions

§ 512.170 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel School District to Reemploy and Reclassify Employee as Probationary [Educ. Code § 44918]

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Decisions

[6] Cross References

§ 512.171 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Payment of Lawful Salary by Governing Board to School District Employee

[1] FORM

[2] Use of Form

[3] Cross References

[4] California Points and Authorities

[5] State Statutes

[6] Decisions

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Chapter 512 SCHOOLS: CERTIFICATION, DISMISSAL, AND RELATED EMPLOYMENT ISSUES
PART I. SCOPE

45-512 California Forms of Pleading and Practice--Annotated § 512.01

§ 512.01 Scope of Chapter

This part discusses and contains forms for use in actions involving certificated employees of public elementary and secondary school districts (i.e., employees holding positions that require certification qualifications [*see Educ. Code §§ 44001, 44006*]). This part does not cover actions involving classified school district employees (i.e., those holding positions not requiring certification qualifications [*see Educ. Code § 45104*]). Classified employees are governed by separate provisions set forth in *Educ. Code § 45100 et seq.*

Included are forms of petitions for writs of mandate to review the denial, suspension, or revocation of a teaching credential [*see § 512.160*], to review the dismissal of a permanent employee of a school district [*see §§ 512.161 -512.164*], to review the failure to reemploy a probationary employee for the following school year [*see § 512.166*], to compel the governing board of a school district to recognize a teacher's permanent status [*see § 512.169*], to compel a governing board to reemploy a substitute or temporary teacher and reclassify him or her as a probationary employee [*see § 512.170*], and to compel a school district to pay a teacher's salary in accordance with law [*see § 512.171*].

For a discussion of the public school system and school districts generally, including constitutional limitations on public school finance and racial segregation in public schools, see *Ch. 513, Schools: Student Rights and Responsibilities, § 513.10 et seq.*

For a discussion and forms relating to actions involving employees subject to the civil service system, see Ch. 118, *Civil Service* .

For discussion and forms relating to student rights and responsibilities, see Ch. 513, *Schools: Student Rights and Responsibilities* .

For discussion and forms relating to injuries to students, see Ch. 514, *Schools: Injuries to Students* .

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§ 512.02 Cross References

For a discussion and forms relating to public employees subject to the civil service system, see Ch. 118, *Civil Service*

For discussion, forms, and a procedural checklist relating to ordinary mandate proceedings, see Ch. 358, *Mandate and Prohibition*

For discussion and forms relating to administrative hearings conducted under the Administrative Procedure Act (*Gov. Code § 11500 et seq.*) and judicial review thereof by petition for writ of mandate, see Ch. 473, *Public Agency Adjudication* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* .

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[Reserved]

§§ 512.03[Reserved]

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45-512 California Forms of Pleading and Practice--Annotated § 512.10

§ 512.10 Governing Statutes

General definitions and provisions relating to certificated employees of school districts are set forth in *Educ. Code § 44000 et seq.* General rights and duties of all school district employees are set forth in *Educ. Code § 44030 et seq.* The issuance, denial, suspension, and revocation of certification documents are governed by *Educ. Code § 44200 et seq.* General rules governing the employment and classification of certificated employees are set forth in *Educ. Code § 44830 et seq.* Resignations, dismissals, and leaves of absence of certificated employees are governed by *Educ. Code § 44930 et seq.* Salaries of certificated employees are governed by *Cal. Const., art. IX, § 6*, and *Educ. Code § 45021 et seq.*

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45-512 California Forms of Pleading and Practice--Annotated § 512.11

§ 512.11 Certificated Employees

A position requiring certification qualifications is a position for which certification qualifications are established pursuant to *Educ. Code §§ 44000-44012, 44065*, and *44200 et seq.* [*Educ. Code § 44001*]. Besides classroom teachers and counselors, such positions include principals [*see Educ. Code § 44860*], home teachers [*see Educ. Code §§ 44864, 44865*], librarians [*see Educ. Code §§ 44868, 44869*], teaching supervisors [*see Educ. Code § 44870*], and school health personnel [*see Educ. Code §§ 44871-44879*]. The governing board of a school district may employ for such positions only those persons who possess the qualifications prescribed therefor by law, including the requisite certificate or credential [*Educ. Code § 44830(a)*; *see Holbrook v. Board of Educ. (1951) 37 Cal. 2d 316, 329, 231 P.2d 853]* .

Any certificated employee who is required by an administrative superior to accept an assignment for which he or she has no legal authorization must, after exhausting any existing local remedies, notify the county superintendent of schools in writing of the illegal assignment. Adverse action against a certificated person who files such a notification of misassignment is prohibited. During the period of misassignment, the certificated person who filed a notification is exempt from *Educ. Code § 45034*, which prohibits payment of salary to any person employed in a position without proper certification. In addition, any performance evaluation of the employee in a subject to which he or she was misassigned must be nullified [*Educ. Code § 44258.9(e)(2)*].

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45-512 California Forms of Pleading and Practice--Annotated § 512.12

§ 512.12 Certification Documents; Definitions

A certification document refers to a certificate, credential, or life diploma [*Educ. Code § 44007*]. A certificate is a document issued by a county board of education to license the holder to perform the service specified in the certificate [*Educ. Code § 44004*]. For this purpose, a "credential" includes a credential, certificate, life document, life diploma, permit, certificate of clearance, or waiver issued by the Commission on Teacher Credentialing (referred to in this part as "CTC") [*Educ. Code § 44002*; *see Educ. Code § 44210 et seq.* (CTC)]. A life diploma is a document issued on the basis of a credential on completion by the applicant of specified requirements [*Educ. Code § 44003*].

A certificated person is one who holds one or more certification documents which singly or in combination license the holder to engage in the school service designated in the document or documents [*Educ. Code § 44006*].

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45-512 California Forms of Pleading and Practice--Annotated § 512.13

§ 512.13 Verification and Falsification of Credential Application

The credential application form is required to contain a verification under penalty of perjury, dated and subscribed by the applicant, of every fact necessary to establish his or her qualifications for the issuance of the license, credential, or certificate authorizing the performance of services in the public schools [*Educ. Code § 44362*; *see Educ. Code §§ 44360*, *44361* (misusing or fraudulently obtaining certificate as misdemeanor)].

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45-512 California Forms of Pleading and Practice--Annotated § 512.14

§ 512.14 Issuance of Credentials

The CTC issues two types of credentials: teaching credentials and service credentials [*Educ. Code § 44250*]. The Commission may also issue an internship teaching or service credential [*Educ. Code § 44250*]. The CTC is authorized to establish standards and procedures for the issuance of credentials [*Educ. Code § 44252(a)*]. The various types of credentials and the minimum requirements for obtaining a given credential are set forth in *Educ. Code § 44250 et seq.* The issuance and form of certificates and credentials are governed by *Educ. Code § 44330 et seq.*

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45-512 California Forms of Pleading and Practice--Annotated § 512.15

§ 512.15 Denial of Issuance or Renewal of Credential

[1] Grounds

The CTC may deny any application for the issuance or renewal of a credential made by any applicant under the following conditions [*Educ. Code § 44345*]:

(a) Lacks the qualifications that are prescribed by law or by regulations adopted by the commission pursuant thereto;

(b) Is physically or mentally so disabled as to be rendered unfit to perform the duties authorized by the credential for which he or she applies; provided, however, that the mere fact that an applicant has sought or received psychiatric treatment may not be considered preliminary evidence of mental disability and may not provoke special scrutiny of the applicant's qualifications for a credential;

(c) Is addicted to the use of intoxicating beverages to excess;

(d) Is addicted to the use of narcotics or habit-forming drugs;

(e) Has committed any act involving moral turpitude;

(f) Has had a certification document revoked;

(g) Has intentionally practiced or attempted to practice any material deception or fraud in his or her application;

(h) Fails or refuses to furnish reasonable evidence of identification or good moral character; or

(i) Has been convicted of any offense defined in *Penal Code § 314(1)* (indecent exposure) prior to September 7, 1955.

Any denial of an application pursuant to (a) through (e), *above*, must be based on reasons related to the applicant's fitness to teach or fitness to perform other duties for which that applicant is certificated, or his or her competence to

perform the duties which the credential would authorize the applicant to perform [*Educ. Code § 44345*; *see, e.g., Watson v. State Bd. of Educ. (1971) 22 Cal. App. 3d 559, 563-565, 99 Cal. Rptr. 468]* .

The CTC may take an adverse action on an existing credential, on the ground that an applicant or licensee subverted or attempted to subvert a licensing examination or its administration [*Educ. Code § 44439* (listing examples of conduct constituting such subversion)].

Furthermore, the CTC must deny any application for the issuance or renewal of a credential made by any applicant under the following conditions [*Educ. Code § 44346(a)*]:

(1) Has been determined to be a sexual psychopath under the provisions of *Welf. & Inst. Code §§ 6300-6330* or under similar provisions of law of any other state;

(2) Has been convicted of any sex offense as defined in *Educ. Code § 44010*;

(3) Has been convicted of any controlled substance offense as defined in *Educ. Code § 44011*; or

(4) Has been found to be insane through a criminal proceeding by a federal court or a court in this or any other state.

Note that *Welf. & Inst. Code §§ 6300-6330*, which are referred to in *Educ. Code § 44346(a)(1)*, were repealed by the Legislature in 1981 [*see* Stats. 1981, ch. 928, § 2].

Notwithstanding *Educ. Code § 44346(a)(2), (3)* (discussed *above*), ordinarily no person may be denied a credential solely because he or she has been convicted of a crime specified therein if he or she has obtained a certificate of rehabilitation under *Penal Code §§ 4852.01-4852.21* and if his or her probation has been terminated and the information or accusation has been dismissed pursuant to *Penal Code § 1203.4* [*Educ. Code § 44346(b)(1)*]. However, the CTC must deny a credential to any applicant who is required to register as a sex offender pursuant to the Sex Offender Registration Act [*Penal Code § 290 et seq.*] or a similar law of another state or of the United States [*Educ. Code § 44346(b)(2)*].

Notwithstanding *Educ. Code § 44346(a)(3), (b)* (discussed *above*), the CTC may issue a credential to a person convicted of a controlled substance offense as defined in *Educ. Code § 44011* if the CTC determines from the evidence presented that the person has been rehabilitated for at least five years, or has received a certificate or rehabilitation and pardon pursuant to *Penal Code § 4852.01*, or if the accusation or information against the person has been dismissed and he or she has been released from all disabilities and penalties resulting from the offense pursuant to *Penal Code § 1203.4* [*Educ. Code § 44346(c)*].

Notwithstanding *Educ. Code § 44346(a)(4)*, the CTC may issue a credential to a person found to be insane through a criminal proceeding by a federal court or a court in this or any other state if the commission determines from the evidence presented that the person has been rehabilitated for at least 5 years [*Educ. Code § 44346(d)*].

Whenever the holder of a credential is adjudged insane, the commission must immediately revoke all credentials held by that person [*Educ. Code § 44425.5*].

Notwithstanding any other provision of law, revocation of a credential shall be final without possibility of reinstatement if the holder is charged with a felony sex offense, a felony controlled substance offense involving a minor, or murder, and in response to the charge, the holder of the credential is found to be insane through a criminal proceeding by a federal court or a court in this or any other state [*Educ. Code § 44425.5*].

[2] Hearing

The CTC's duty to deny an application for issuance or renewal of a credential made by persons convicted of designated sex or controlled substance offenses under *Educ. Code § 44346* [*see § 512.15[1]*] is mandatory, and the CTC is not required to hold a hearing prior to denying such an application. Automatic denial of credentials pursuant to *Educ. Code § 44346* has been upheld as not violating equal protection or due process [*Vogulkin v. State Board of Education (1961) 194 Cal. App. 2d 424, 429-433, 15 Cal. Rptr. 335]* . By contrast, a hearing must be held prior to denial of issuance or renewal of a credential under *Educ. Code § 44345* [*see Educ. Code § 44242.5*; Matteson v. State Board of Education *(1943) 57 Cal. App. 2d 991, 995, 998, 999-1000, 136 P.2d 120* ; *see also* discussion in *§ 512.15[1]*].

Each allegation of an act or omission by an applicant for, or holder of, a credential for which he or she may be subject to an adverse action shall be presented to the Committee of Credentials [*Educ. Code § 44242.5(a)*]. An "adverse action" in this context means the denial of an application for a credential, a private admonition or public reproval of a credential holder, or the suspension or revocation of a credential [*Educ. Code § 44000.5*]. It is the committee's duty to investigate each allegation and, if it is determined that probable cause for denial of the application exists, to initiate an adjudicatory hearing before the CTC in accordance with *Gov. Code §§ 11500-11528* if requested by the applicant or credential holder [*see Educ. Code §§ 44242.5(c), 44246*]. The procedures of the CTC and the Committee of Credentials relating to the denial of applications are the same as those for the suspension or revocation of credentials, and are further discussed in *§ 512.16[5]*.

[3] Judicial Review of Credential Denial

A person who has been improperly denied issuance or renewal of a certification document may seek judicial review of the denial by petition for writ of mandate; however, the aggrieved party must first exhaust all administrative remedies [*see Pete v. State Bd. of Educ. (1956) 144 Cal. App. 2d 38, 39-42, 300 P.2d 147* ; *see also* Ch. 474, *Availability of Judicial Review of Agency Decisions*]. For a form of petition for a writ of mandate to review a decision of the commission denying a credential, see *§ 512.160*.

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45-512 California Forms of Pleading and Practice--Annotated § 512.16

§ 512.16 Revocation or Suspension of Credential by Commission on Teacher Credentialing

[1] At Request of Holder

Whenever the holder of any credential issued by the CTC requests in writing that the credential held by him or her be revoked, the CTC must revoke the credential [*Educ. Code § 44423(a)*]. However, a revocation pursuant to this procedure does not deprive the CTC of its authority to [*Educ. Code §§ 44423(b), 44440(b)*]:

- Institute or continue a disciplinary proceeding against the credential holder on any ground provided by law;
- Enter an order suspending or revoking the credential; or
- Issue a public reproval or private admonition to the credential holder.

When the CTC revokes a credential at the request of the holder pursuant to *Educ. Code § 44423*, no vestige of the credential remains, and any subsequent application to reinstate the credential must be treated as an original application for issuance of a credential [*Vogulkin v. State Board of Education (1961) 194 Cal. App. 2d 424, 427, 15 Cal. Rptr. 335]* .

[2] Failure to Fulfill Contract Duties

Whenever any person employed by a school district in a position requiring certification qualifications refuses, without good cause, to fulfill a valid contract of employment with the district or leaves the service of the district without the consent of the superintendent, if there is one, or the governing board of the district, except in the manner provided by law, the CTC must, after proof of the fact is made, take an adverse action on the credential holder but may not suspend the credential for more than one year or revoke the credential [*Educ. Code § 44420(a)*]. An "adverse action" in this context includes a private admonition, a public reproval of the credential holder, or the suspension of a credential [*Educ. Code § 44000.5*]. If a person's credentials become subject to suspension under the above provision for a second or subsequent time, the CTC may suspend his or her credentials for not more than two years [*Educ. Code § 44420(b)*].

[3] Other Grounds for Revocation or Suspension

[a] In General

The CTC must revoke or suspend any credential issued by it, or privately admonish or publicly reprove the holder, for (1) immoral or unprofessional conduct, (2) persistent defiance of, and refusal to obey, the laws regulating the duties of persons serving in the public school system, (3) evident unfitness for service, or (4) any cause that would have warranted the denial of an application for a credential or the renewal of the credential [*Educ. Code § 44421*; *see* discussion in *§ 512.15[1]*]. The CTC may also take an adverse action on the ground that an applicant or credential holder has subverted or attempted to subvert any licensing examination or the administration of an examination [*Educ. Code § 44439* (examples of conduct constituting such subversion)].

An action by the local school board to dismiss a teacher pursuant to *Educ. Code §§ 44932-44949* [*see* discussions in *§§ 512.64[4]* and *[5]*] is not a prerequisite to the revocation of his or her teaching credential by the CTC pursuant to *Educ. Code § 44421* [*Alford v. Department of Educ. (1970) 13 Cal. App. 3d 884, 890-891, 91 Cal. Rptr. 843]* .

Notwithstanding *Educ. Code § 44421*, the CTC must take an appropriate adverse action on any credential holder who knowingly and willfully reports false fiscal expenditure data relative to the conduct of any educational program [*Educ. Code § 44421.5*].

The CTC must also suspend a credential when it receives notice that (1) another state has taken final action to revoke a credential or license authorizing the holder of the credential to perform any duty in the public schools of the other state [*Educ. Code § 44423.5*]; (2) the ability of the holder of the credential to associate with minors has been limited as a term or condition of probation or sentencing resulting from a criminal conviction in California, another state, or the United States [*Educ. Code § 44423.6(a)(1)*; *see Educ. Code § 44423.6(a)(2)* (suspension not required when conviction is based solely on violation of domestic-violence protective order as set forth in *Penal Code § 273.6(a)*]; or (3) the holder of the credential has been ordered to surrender a credential or certification document as a term or condition of probation or sentencing resulting from a criminal conviction in California, another state, or the United States [*Educ. Code § 44423.6(b)*].

[b] Immoral or Unprofessional Conduct

Certification documents may not properly be revoked pursuant to *Educ. Code § 44421* for immoral or unprofessional conduct, or acts involving moral turpitude, unless the teacher's conduct demonstrates unfitness to teach. In determining whether a teacher's conduct indicates unfitness to teach, the CTC and courts may consider such factors as (1) the likelihood that such conduct may have adversely affected students or fellow teachers; (2) the degree of such adversity anticipated; (3) the proximity or remoteness in time of the conduct; (4) the type of teaching certificate held by the party involved; (5) the extenuating or aggravating circumstances, if any, surrounding the conduct; (6) the praiseworthiness or blameworthiness of the motives resulting in the conduct; (7) the likelihood of the recurrence of the questioned conduct; and (8) the extent to which disciplinary action may inflict an adverse impact or chilling effect on the constitutional rights of other teachers [*Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 225, 229, 82 Cal. Rptr. 175, 461 P.2d 375]* .

Generally, the mere fact that a teacher has engaged in homosexual conduct or has been convicted of possession of marijuana is not in itself sufficient to justify revocation of a credential on grounds of immoral conduct [*see Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 235-238, 82 Cal. Rptr. 175, 461 P.2d 375* ; *Comings v. State Bd. of Educ. (1972) 23 Cal. App. 3d 94, 104-105, 100 Cal. Rptr. 73* (revocation held improper)]. However, revocation may be proper if the record contains additional evidence of unfitness to teach [*see Pettit v. State Bd. of Education (1973) 10 Cal. 3d 29, 34-36, 109 Cal. Rptr. 665, 513 P.2d 889* ; *Moser v. State Bd. of Educ. (1972) 22 Cal. App. 3d 988, 988-992, 101 Cal. Rptr. 86* (revocation upheld)].

[4] Right to Hearing

Although the Education Code does not explicitly require a hearing prior to the suspension or revocation of a credential pursuant to *Educ. Code § 44421*, it has been held that a teacher has a right to such a hearing [*see Matteson v. State Bd. of Educ. (1943) 57 Cal. App. 2d 991, 998, 136 P.2d 120* (interpreting similarly worded provisions of former School Code); *see also Educ. Code §§ 44242.5(c)(3)(B), 44246*]. Moreover, such a hearing would appear to be mandatory because of the rule that a teacher may not be deprived of his or her teaching credential for immoral or unprofessional conduct absent evidence that he or she is unfit to teach [*see Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 218 n.4, 225, 82 Cal. Rptr. 175, 461 P.2d 375* ; *cf. Purifoy v. State Bd. of Educ. (1973) 30 Cal. App. 3d 187, 194, 106 Cal. Rptr. 201* (distinguishing automatic revocation provisions of former Educ. Code § 13207 (*now see Educ. Code § 44425*) under which no hearing is required)].

[5] Committee of Credentials Procedure--Investigation

The CTC may assign to the Committee of Credentials administrative duties as it may see fit relating to adverse actions concerning applicants and credential holders [*Educ. Code § 44243(a)*; *see Educ. Code § 44243(b)* (CTC to supervise committee and provide statements of policy relative to committee operation and procedures as it deems appropriate)]. Each allegation of an act or omission by an applicant for, or holder of, a credential for which he or she may be subject to an adverse action shall be presented to the Committee of Credentials [*Educ. Code § 44242.5(a)*]. An "adverse action" in this context means the denial of an application for a credential, a private admonition, a public reproval of a credential holder, or the suspension or revocation of a credential [*Educ. Code § 44000.5*].

The committee has jurisdiction to commence an investigation on receipt of any of the following [*Educ. Code § 44242.5(b)*]:

(1) Official records of the Department of Justice, of any law enforcement agency, of any state or federal court, and of any other agency of California [*see Gov. Code § 11000*].

(2) An affidavit or declaration signed by person or persons with personal knowledge of the acts alleged to constitute misconduct.

(3) A statement from an employer notifying the CTC that, as a result of, or while an allegation of misconduct is pending, a credential holder has been dismissed, nonreelected, suspended for more than 10 days, or placed pursuant to a final adverse employment action on unpaid administrative leave for more than 10 days, or has resigned or otherwise left employment [*see Educ. Code § 44242.5(b)(3)(B)* (employer must provide such notice to CTC not later than 30 days after employee's dismissal, nonreelection, suspension, placement on unpaid administrative leave, resignation, or departure from employment)].

(4) A notice from an employer that a complaint was filed with the school district alleging sexual misconduct by a credential holder. Results of an investigation by the committee based on this paragraph shall not be considered for action by the committee unless there is evidence presented to the committee in the form of a written or oral declaration under penalty of perjury that confirms the personal knowledge of the declarant regarding the acts alleged to constitute misconduct.

(5) A notice from a school district, employer, public agency, or testing administrator of a violation of *Educ. Code §§ 44420, 44421.1, 44421.5*, or *44439*.

(6) An affirmative response, or failure to disclose information that would constitute an affirmative response, on any application submitted to the CTC as to any conviction, adverse action on, or denial of, any license, or pending investigation into any criminal allegation or pending investigation of any noncriminal allegation of misconduct by a

governmental licensing entity.

[6] Formal Review

No later than six months after the commencement of the committee's initial review, the committee ordinarily must conduct the formal review [*Educ. Code § 44244(b)(1)*]. However, the chair of the CTC may grant the committee an extension of time, not exceeding six months, if the committee demonstrates that additional time is necessary to complete its investigation or determination, as described in subdivision (b) [*Educ. Code § 44244(c)*]. The formal review must determine either that no adverse action will be taken or that the allegations are sufficient to cause the application or credential to be subject to adverse action [*Educ. Code § 44244(b)(1)*].

The committee has jurisdiction to commence a formal review on receipt of any of the following [*Educ. Code § 44242.5(d)*]:

(1) Official records of any state or federal court that reflect a conviction or plea, including a plea of nolo contendere, to any criminal offense, or official records of any state court that adjudge a juvenile to be a dependent of the court [*see Welf. & Inst. Code § 300*] due to allegations of sexual misconduct or physical abuse by a credential holder or applicant. However, the committee's authority to conduct a formal review of these allegations does not relieve the CTC from the confidentiality provisions, notice, and due process requirements applicable to such judicial records [*see Welf. & Inst. Code § 827*].

(2) An affidavit or declaration signed by a person or persons with personal knowledge of the acts alleged to constitute misconduct.

(3) A statement from an employer notifying the CTC that, as a result of, or while an allegation of misconduct is pending, a credential holder has been dismissed, nonreelected, suspended for more than 10 days, or placed pursuant to a final adverse employment action on unpaid administrative leave for more than 10 days, or has resigned or otherwise left employment [*see Educ. Code § 44242.5(b)(3)(A)*; *see also Educ. Code § 44242.5(b)(3)(B)*; (employer must provide such notice to CTC not later than 30 days after employee's dismissal, nonreelection, suspension, placement on unpaid administrative leave, resignation, or departure from employment)].

(4) Official records of any governmental licensing entity that reflect an administrative proceeding or investigation, otherwise authorized by law or regulation, that has become final.

(5) A notice from a school district, employer, public agency, or testing administrator of a violation of *Educ. Code §§ 44420*, *44421.1*, *44421.5*, or *44439* [*see Educ. Code § 44242.5(b)(5)*].

(6) An affirmative response, or failure to disclose information that would constitute an affirmative response, on any application submitted to the CTC as to any conviction, adverse action on, or denial of, any license, or pending investigation into any criminal allegation or pending investigation of any noncriminal allegation of misconduct by a governmental licensing entity [*see Educ. Code § 44242.5(b)(6)*].

On the commencement of the formal review, the committee must investigate all alleged misconduct and the circumstances in mitigation and aggravation. The investigation must include, but is not limited to, all of the following [*Educ. Code § 44242.5(a)*]:

(1) Investigation of the fitness and competence of the applicant or credential holder to perform the duties authorized by the credential for which he or she has applied or that he or she presently holds.

(2) Preparation of a summary of the applicable law, a summary of the facts, contested and uncontested, and a summary

of any circumstances in aggravation or mitigation of the allegation.

(3) Determination of probable cause for an adverse action on the credential. If the allegation is for unprofessional or immoral conduct, the committee must permit the employer of the credential holder to be present while testimony is taken. If the allegation of unprofessional or immoral conduct involves sexual abuse, the employer must be examined for any relevant evidence relating to the sexual abuse.

All testimony before the committee must be verified under penalty of perjury by oath or affirmation. The chair of the committee may administer the oath or affirmation. The chair may designate staff to administer the oath or affirmation for statements taken during the investigation of allegations of misconduct [*Educ. Code § 44244(b)(2)*].

[7] Notice to Applicant or Certificate Holder

At least 30 days prior to any formal review, the committee must notify the applicant or certificate holder of the specific allegations of misconduct that make the application or credential subject to adverse action. The notification must be in ordinary and concise language and must set forth the acts or omissions charged and the statutes or rules violated. Supplemental allegations of misconduct must be sent to the holder or applicant at least 30 days prior to the formal review. The portions of the investigation of the original or supplemental allegations that constitute the basis for the allegations must be open to inspection and copying by the holder or applicant and his or her attorney. The statement of the allegations must inform the applicant or holder that the allegations, if true, are sufficient to cause his or her application or credential to be subject to adverse action [*Educ. Code § 44244(a)*].

[8] Decision

If the committee determines that probable cause for an adverse action does not exist, the committee must terminate the investigation [*Educ. Code § 44242.5(c)(3)(A)*]. If the committee determines that probable cause for an adverse action on the credential exists, on receipt of a request from the applicant or credential holder [*see Educ. Code § 44244.1*], the CTC must initiate an adjudicatory hearing [*see Gov. Code § 11500 et seq.*] by filing an accusation or statement of issues [*Educ. Code § 44242.5(c)(3)(B)*]. For a discussion and forms relating to administrative hearings conducted pursuant to *Gov. Code § 11500 et seq.* , see Ch. 473, *Public Agency Adjudication* , through Ch. 473H, *Alternative Procedures for Agency Decisions* .

On completion of its investigation, the committee must report its actions and recommendations to the CTC, including its findings as to probable cause, and if probable cause exists, its recommendations as to the appropriate adverse action [*Educ. Code § 44242.5(e)(1)*]. The findings may not contain any information that reveals the identity of persons other than the person who is the subject of the investigation [*Educ. Code § 44242.5(e)(3)*]. The findings must be available, on request, to the employing or last known employing school district [*Educ. Code § 44242.5(e)(2)*]. Also, if adverse action is recommended by the committee and the credential holder has not filed a timely appeal of the recommendation [*see Educ. Code § 44244.1*], the committee's findings must be available, on a request made within five years of the date of the committee's recommendations, to a school district providing verification that the credential holder has applied for employment in the district [*Educ. Code § 44242.5(e)(2)*]. The findings must, for all purposes, remain confidential and limited to school district personnel in a direct supervisory capacity in relation to the person investigated. Any person who otherwise releases findings received from the committee or the CTC, absent a verified release signed by the person who is the subject of the investigation, is guilty of a misdemeanor [*Educ. Code § 44242.5(e)(2)*].

A copy of the written recommendation of the committee must be delivered to the credential holder or applicant personally or sent to him or her by certified mail within 14 days after the formal review, together with specific information relative to any appeal rights to which the credential holder or applicant is entitled [*Educ. Code § 44244(d)*].

[9] Hearing by County Board of Education

Whenever the holder of a credential issued by the State Bd. of Educ. or the Commission is charged with immoral or unprofessional conduct, evident unfitness for service, or persistent defiance of and refusal to obey the laws regulating the duties of his or her position, the Commission, in its discretion, after notifying the person charged of its intention to do so, may require the county board of education of the county in which the person charged is serving or last served to give notice of and conduct a hearing of the charges. The hearing must be conducted in the manner prescribed by law for the hearing of charges for private admonition, or for the revocation or suspension of a certificate by a county board of education [*Educ. Code § 44422*; *see § 512.17[2]*]. It is not clear whether such a hearing by the county board of education is in addition to or in lieu of a hearing by the Commission conducted in accordance with *Gov. Code §§ 11500-11528* [*see Educ. Code §§ 44242.5(c), 44246*].

After the hearing, the county board of education must report to the Commission its findings and a summary of the evidence, and make a definite recommendation concerning the revocation or suspension of the credential. On receipt of a copy of the findings, summary of evidence, and recommendation, the Commission may suspend or revoke the credential for the causes stated, or order the charges dismissed [*Educ. Code § 44422*].

[10] Judicial Review of Revocation or Suspension

A decision to suspend or revoke a teaching credential is reviewable in a mandate proceeding [*see Educ. Code § 44246*; *Gov. Code § 11523*]. In such a proceeding, the trial court must exercise its independent judgment on the evidence, and the appellate court must sustain the decision of the trial court if there is any credible, competent evidence to support its findings [*see Tringham v. State Board of Education (1958) 50 Cal. 2d 507, 508, 326 P.2d 850]* .

For discussion and forms relating to judicial review of administrative decisions made pursuant to an adjudicatory hearing, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* . For a form of petition for writ of mandate to review a decision of the commission to revoke or suspend a credential, *see § 512.160*.

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§ 512.17 Revocation or Suspension of Certificate by County Board of Education

[1] Grounds

County boards of education may revoke or suspend the certificates granted by them for immoral or unprofessional conduct [*see* discussion in *§ 512.16[3][b]*], evident unfitness for teaching, or persistent defiance of and refusal to obey the laws regulating the duties of teachers [*Educ. Code § 44427*].

[2] Notice and Hearing

No certificate may be revoked or suspended, except on written request of its holder, until after a hearing before the county board of education, and then only on the affirmative vote of at least four members of the board [*Educ. Code § 44428*]. All charges of immoral or unprofessional conduct, evident unfitness for teaching, or persistent defiance of and refusal to obey the laws relating to the duties of teachers must be presented to the board in writing and verified under oath [*Educ. Code § 44429*].

Notice of the time of hearing and a full and complete copy of the charges must be furnished to the accused at least 10 days before the hearing [*Educ. Code § 44430*]. The accused must be given a fair and impartial hearing and must have the right to be represented by counsel [*Educ. Code § 44431*]. The hearing is governed and conducted by the rules of the board [*Educ. Code § 44432*].

[3] Unauthorized Departure From Service

Any teacher employed by a school board of trustees for a specified time who leaves school before expiration of the time without the written consent of the trustees is guilty of unprofessional conduct. The county board of education may, on receiving notice of the fact, suspend the certificate of the teacher for a period of one year [*Educ. Code § 44433*].

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§ 512.18 Mandatory Revocation of Certification Documents

[1] Conviction of Crime

On final conviction of the holder of any credential issued by the State Bd. of Educ. or the CTC, or the holder of any certificate issued by a county board of education, of a violation, or attempted violation, of certain designated Penal Code sections, the CTC or county board of education must forthwith revoke the credential or certificate [*Educ. Code §§ 44424(a), 44435*; *see Educ. Code § 44346.1*; *see also Educ. Code § 44424(b)* (plea of nolo contendere to listed crimes results in suspension pending CTC's final disposition regarding credential); *but see Educ. Code § 44424(d)* (credential not to be revoked solely on basis of conviction of violent or serious felony if holder has obtained certificate of rehabilitation and pardon under *Penal Code § 4852.01 et seq.*); *Gebremicael v. California Comm'n on Teacher Credentialing (2004) 118 Cal. App. 4th 1477, 1481-1489, 13 Cal. Rptr. 3d 777* (felony conviction that has been reduced to misdemeanor under *Penal Code § 17(b)(3)* becomes misdemeanor for all purposes and therefore is not ground for denial of credential under *Educ. Code § 44346.1*)].

Furthermore, whenever the holder of a certification document issued by the State Board of Education, the CTC, or a county board of education is convicted of a sex offense (as defined in *Educ. Code § 44010*) or a controlled substance offense (as defined in *Educ. Code § 44011*), the CTC or county board of education must forthwith suspend the document. If the conviction is reversed and the holder is acquitted of the offense in a new trial or the charges against him or her are dismissed, the CTC or board must forthwith terminate the suspension of the document. When the conviction becomes final or when imposition of sentence is suspended, the CTC or board must forthwith revoke the document [*Educ. Code §§ 44425, 44436*].

Revocation of certification documents on conviction of designated sex or narcotics offenses pursuant to *Educ. Code § 44425* is automatic and mandatory and the CTC is not required to hold a hearing prior to such revocation [*see DiGenova v. State Board of Education (1955) 45 Cal. 2d 255, 259-260, 288 P.2d 862]* . The mandatory revocation provisions of *Educ. Code § 44425* do not violate equal protection or due process [*Purifoy v. State Bd. of Educ. (1973) 30 Cal. App. 3d 187, 190-198, 106 Cal. Rptr. 201]* .

[2] Sexual Psychopaths

Whenever the holder of a certification document issued by the State Board of Education, the CTC, or a county board of education has been determined to be a sexual psychopath under the provisions of *Welf. & Inst. Code §§ 6300-6330* or under similar provisions of law of any other state, the CTC or county board of education must forthwith suspend the certification document. If the determination is reversed and the holder is determined in a new proceeding not to be a sexual psychopath or the proceeding to determine whether he or she is a sexual psychopath is dismissed, the CTC or board must forthwith terminate the suspension of the document. When the determination becomes final, the CTC or board must forthwith revoke the document [*Educ. Code §§ 44426, 44437*].

Welf. & Inst. Code §§ 6300-6330 were repealed by the legislature in 1981 [*see* Stats. 1981, ch. 828, § 2]. Because the references in *Educ. Code §§ 44426* and *44437* are specific to these repealed provisions, the continuing validity of the mandatory revocation requirements is questionable.

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45-512 California Forms of Pleading and Practice--Annotated § 512.19

§ 512.19 Classification of Certificated Employees

The Education Code classifies certificated employees into four types: permanent, probationary, substitute, and temporary. An employee's rights with respect to termination of employment depend on his or her classification. Under the statutory classification system, permanent and probationary teachers have positions of a settled and continuing nature, and are protected against arbitrary dismissal by the requirement of notice and a hearing before termination. By contrast, substitute and temporary teachers fill the short range needs of the school district and may be summarily released absent an infringement of constitutional or contractual rights [*Balen v. Peralta Junior College Dist. (1974) 11 Cal. 3d 821, 826, 114 Cal. Rptr. 589, 523 P.2d 629* ; *see* discussions in *§ 512.64[4]*, *§ 512.64[5]*, and *§ 512.32*].

The classification of a certificated employee depends on the position he or she occupies, and a school district may not determine a teacher's classification based on the type of credential or certification he or she has. For example, if a certificated employee occupies a position the Education Code defines as tempo rary, he or she is a temporary employee; if it is not a position that requires temporary classification (or permanent or substitute), he or she is a probationary employee [*California Teachers Assn. v. Vallejo City Unified School Dist. (2007) 149 Cal. App. 4th 135, 150, 56 Cal. Rptr. 3d 712* (*Educ. Code § 44915* mandates that teachers be classified as probationary employees if they are not permanent and do not fall within one of narrowly defined classes of temporary employees); *Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist. (2006) 145 Cal. App. 4th 1260, 1299, 52 Cal. Rptr. 3d 486* (Educ. Code grants school districts no discretion to deviate from statutory classification scheme)].

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45-512 California Forms of Pleading and Practice--Annotated § 512.20

§ 512.20 Permanent (Tenured) Employees

[1] Attainment of Tenure

[a] Large School District

Every employee of a school district of any type or class that has an average daily attendance of 250 pupils or more who, after having been employed by the district for two complete consecutive school years in a position or positions requiring certification qualifications, is reelected for the next school year to a position requiring certification qualifications, must be classified as and become a permanent employee of the district at the commencement of the succeeding school year [*Educ. Code § 44929.21(b)* (applicable to probationary employees whose probationary period commenced during 1983-1984 fiscal year or thereafter); *see Vasquez v. Happy Valley Union Sch. Dist. (2008)159 Cal. App. 4th 969, 985-986, 72 Cal. Rptr. 3d 15* (timely notice of non-reelection for third school year prevents teacher from attaining permanent status, even if teacher ultimately works for district during portion of third year)]. The decision to grant tenure lies within the discretion of the governing board, and it may be denied for any lawful reason regardless of the sufficiency of the cause [*McFarland Unified School Dist. v. Public Employment Relations Bd. (1991) 228 Cal. App. 3d 166, 169, 279 Cal. Rptr. 26, 11 Cal. Rptr. 2d 405* (but holding that PERB may order reinstatement of probationary teacher dismissed for engaging in protected labor activities, even if reinstatement results in teacher receiving tenure)]. No statement of reasons or hearing is required [*Grimsley v. Board of Trustees (1987) 189 Cal. App. 3d 1440, 1444-1448, 235 Cal. Rptr. 85* ; *see Bellflower Education Assn. v. Bellflower Unified School Dist. (1991) 228 Cal. App. 3d 805, 279 Cal. Rptr. 179]* .

The governing board must notify the employee, on or before March 15 of the employee's second complete consecutive school year of employment by the district in a position or positions requiring certification qualifications, of the decision to reelect or not reelect him or her to such a position for the next succeeding school year [*Educ. Code § 44929.21(b)*]. The notice must be given by personal service or some other method that imparts actual notice [*Hoschler v. Sacramento City Unified Sch. Dist. (2007) 149 Cal. App. 4th 258, 263-264, 269, 57 Cal. Rptr. 3d 115* (because *Educ. Code § 44929.21(b)* does not prescribe method of service and previous versions of the statute allowing service by mail were omitted in subsequent versions, personal service is contemplated)]. If the governing board does not give this notice on or before March 15, the employee is deemed reelected for the next succeeding school year [*Educ. Code § 44929.21(b)* (applicable to probationary employees whose probationary period commenced during 1983-1984 fiscal

year or thereafter)]. However, the March 15 notice need not be given if the governing board has elected to proceed with termination for cause [*Zhigulina v. Board of Education (1989) 207 Cal. App. 3d 159, 161-162, 254 Cal. Rptr. 728* ; *see Educ. Code § 44948.3* (dismissal of probationary employee for cause); *see also § 512.29*].

For the purpose of calculating the two-year probationary period, the employee's status as a probationary employee begins not on the teaching credential validity date, but on the date stated in probationary contract with the employing school district. Thus, if a teacher serving under an emergency permit accepts a new contract as a probationary teacher during the school year, the teacher's probationary status begins on execution of the new contract, even if the validity date of the teacher's credential preceded the beginning of the school year [*Fine v. Los Angeles Unified Sch. Dist. (2004) 116 Cal. App. 4th 1070, 1076-1080, 10 Cal. Rptr. 3d 876* (teacher serving under emergency permit continues to serve under that permit, and under agreed contract, until teacher is issued credential and registers it with school district)].

The probationary period is mandatory. A district may not waive it and grant tenure before the teacher has completed the period [*Fleice v. Chualar Union Elementary School Dist. (1988) 206 Cal. App. 3d 886, 889-893, 254 Cal. Rptr. 54]* .

Procedures relating to the evaluation of probationary teachers preparatory to the granting of tenure may be the proper subject of a collective bargaining agreement under *Gov. Code § 3543.2*. However, the tenure decision remains within the unfettered discretion of the school board. An arbitrator under the collective bargaining agreement may not order reinstatement of a probationary teacher, either to extended probationary status or to tenured status, as a remedy for any violation of the established procedures [*Bellflower Education Assn. v. Bellflower Unified School Dist. (1991) 228 Cal. App. 3d 805, 808-813, 279 Cal. Rptr. 179* (limiting arbitrator's remedy to "cease and desist" order); *Fontana Teachers Assn. v. Fontana Unified School Dist. (1988) 201 Cal. App. 3d 1517, 1524-1526, 247 Cal. Rptr. 761* (calling arbitration of dismissal of probationary teacher "pointless")].

A full-time employee holding a position in which some or all of the assigned duties require certification qualifications for the statutory period is entitled to full-time permanent status in the certificated position, notwithstanding that some of the assigned duties do not require certification qualifications [*see Holbrook v. Board of Educ. (1951) 37 Cal. 2d 316, 319-321, 333, 231 P.2d 853]* .

[b] Small School District

Every employee of a school district of any type or class that has an average daily attendance of less than 250 pupils, who, after having been employed by the district for three complete consecutive school years in a position or positions requiring certification qualifications, is reelected for the next succeeding school year to a position requiring certification qualifications, may be classified by the governing board of the district as a permanent employee of the district. If the board does not so classify him or her, the employee does not attain permanent status and may be reelected thereafter, from year to year, without becoming a permanent employee until the classification is made [*Educ. Code § 44929.23(a)*].

A governing board that elects to dismiss probationary employees under *Educ. Code § 44948.2* (*see § 512.30[1]*) must classify as a permanent employee any probationary employee who, after being employed for two complete school years in a position requiring certification qualifications, is reelected for the next succeeding school year to such a position. Any probationary employee who has been employed by the district for two or more consecutive years on the date of that election in a position requiring certification qualifications must be classified as a permanent employee [*Educ. Code § 44929.23(b)*]. If the election is made, *Educ. Code § 44929.21* [*see § 512.20[1][a]*], including its notice requirements, applies to the district [*Educ. Code § 44929.23(b)*].

The governing board of a school district that employs in a position requiring certification qualifications any person who has become a permanent certificated employee in any other school district, may employ the person as a permanent certificated employee [*Educ. Code § 44929.28*].

[2] Computation of Service Time

For purposes of computing the service time required for the attainment of permanent status, a probationary employee who, in any one school year, has served for at least 75 percent of the number of days during which the regular schools of the district in which he or she is employed are maintained is deemed to have served a complete school year. With respect to evening schools, 75 percent of the number of days during which the evening schools of the district are in session is deemed to be a complete school year [*Educ. Code § 44908*]. This provision has also been construed as applying to a teacher who has taught at least 75 percent of the hours required of a full-time teacher during the school year, even though he or she has not taught 75 percent of the days of the school year [*see Vittal v. Long Beach Unified School Dist. (1970) 8 Cal. App. 3d 112, 119-121, 87 Cal. Rptr. 319]* . However, an approved leave of absence during the probationary period shall not be construed as a break in the continuity of service required for classification of the employee as permanent under *Educ. Code § 44975* [*Griego v. Los Angeles Unified School District (1994) 28 Cal. App. 4th 515, 519-521, 33 Cal. Rptr. 2d 556]* .

Not included in computing the service time required for attainment of permanent status are:

- Service as an instructor at a regional occupation center, unless the employee is a regularly credentialed teacher who has been employed to teach in the regular educational programs of the school district and subsequently assigned as an instructor in a regional occupational center or program [*Educ. Code § 44910*; *see Reis v. Biggs Unified Sch. Dist. (2005) 126 Cal. App. 4th 809, 816-821, 24 Cal. Rptr. 3d 393* (teacher who retains part-time regular teaching position, and is assigned additional part-time regional occupation center teaching position, is not "subsequently assigned" to regional occupation center for purposes of *Educ. Code § 44910*); *Sullivan v. Calistoga Joint Unified School Dist. (1991) 228 Cal. App. 3d 1313, 1318, 279 Cal. Rptr. 529]* ;

- Service under a provisional credential [*Educ. Code § 44911*; *see California Teachers Assn. v. Vallejo City Unified School Dist. (2007) 149 Cal. App. 4th 135, 155, 56 Cal. Rptr. 3d 712* (unless matters of tenure are involved, Educ. Code does not restrict provisionally credentialed teachers from enjoying rights afforded to their fully credentialed colleagues of same classification)];

- Service under a credential authorizing service only as a teacher of basic military drill [*Educ. Code § 44912*]; and

- Summer school employment [*Educ. Code § 44913*].

Also, time spent teaching under an emergency teaching credential may not be counted in computing an employee's progress toward permanent status, unless the employee is credentialed in another state and demonstrates adequate basic skills proficiency pending successful completion of the California Basic Educational Skills Test (CBEST) [*Culbertson v. San Gabriel Unified Sch. Dist. (2004) 121 Cal. App. 4th 1392, 1397-1399, 18 Cal. Rptr. 3d 234* (service under "Emergency Long Term Single Subject Teaching Permit" may not be included in computing service required for classification as permanent employee); *Smith v. Governing Bd. of Elk Grove Unified Sch. Dist. (2004) 120 Cal. App. 4th 563, 567-569, 16 Cal. Rptr. 3d 1* (service under "Emergency Education Specialist Instruction Permit" may not be included in computing service required for classification as permanent employee); *Summerfield v. Windsor Unified Sch. Dist. (2002) 95 Cal. App. 4th 1026, 1030-1035, 116 Cal. Rptr. 2d 233* (emergency teaching credential issued under *Educ. Code § 44300* is "provisional teaching credential" for purposes of *Educ. Code § 44911*, which excludes time spent teaching under provisional credential in computation of service time required for attainment of permanent status); *see Educ. Code § 44252* (CBEST requirement)].

An employee's service in a position requiring certification in a program or project conducted under contract with a public or private agency, or in a categorically funded project that is not required by federal or state statutes, generally is

not included in computing the service time for attainment of permanent status. However, one year of such service may be counted if (1) the employee has served in that position (pursuant to *Educ. Code § 44909*) for at least 75 percent of the number of days the regular schools of the district are maintained, and (2) the employee is subsequently employed as a probationary employee in a position requiring certification qualifications [*Educ. Code § 44909*; *Schnee v. Alameda Unified School Dist. (2004) 125 Cal. App. 4th 555, 560-565, 22 Cal. Rptr. 3d 800]* .

If an employee of a school district has served as a probationary employee of the district in a position requiring certification qualifications for one complete school year, and in the year immediately preceding the probationary service has served as a substitute employee, or as a substitute and probationary employee, for at least 75 percent of the number of days the regular schools of the district were maintained, the governing board of the district may count the year the teacher served as a substitute, or served as a substitute and probationary employee, as one year of the probationary period that the employee is required by law to serve as a condition to being classified as a permanent employee of the district [*Educ. Code § 44914*].

Under certain conditions, a probationary year served under a university internship credential [*see Educ. Code § 44450 et seq.* (Teacher Education Internship Act of 1967)] may count toward the attainment of tenure. Specifically, if a person has completed a university teaching internship program and obtained a clear credential, the last year of teaching under the university internship credential counts toward tenure if the person is employed for the next complete school year under the clear credential by the same school district that employed him or her in the last year of internship [*Educ. Code § 44466*]. Thus, at the completion of the first year under the clear credential, the person will attain tenure unless the school district gives timely notice of its decision not to reelect him or her [*Peoples v. San Diego Unified Sch. Dist. (2006) 138 Cal. App. 4th 463, 468-472, 41 Cal. Rptr. 3d 383* ; *see Educ. Code § 44929.21(b)*].

[3] Scope of Tenure

[a] In General

A tenured school teacher (that is, one who has attained permanent status) has a vested right to permanent employment within the scope of the certification document under which tenure was acquired. Tenure does not, however, bestow on a school teacher any vested right to teach at a specific school or to teach a specific grade level of students within a school. The school district may assign a teacher to any position within the scope of his or her certificate according to the needs of the district, subject only to a requirement of reasonableness [*Adelt v. Richmond School Dist. (1967) 250 Cal. App. 2d 149, 152, 58 Cal. Rptr. 151]* .

[b] Multiple Credentials

If an employee is authorized to render service in more than one type of position for which certification qualifications are required, either by virtue of his or her possession of one certification document authorizing service in two or more certificated positions, or by virtue of his or her possession of separate certification documents authorizing service in two or more positions, or any combination thereof, then, on satisfying all other requirements prescribed by law, the employee acquires permanent status as follows [*Educ. Code § 44894(b)*]:

(1) If the employee is authorized to render service as a classroom teacher, he or she acquires permanent status as a classroom teacher; or

(2) If the employee is not authorized to render service as a classroom teacher, he or she acquires permanent status below the administrative or supervisory level as a staff employee with multiple qualifications. The employee's right to serve in one or more of the positions for which he or she is qualified to serve is subject to the power of assignment of the school district governing board.

Thus, for example, an employee who holds both teaching and counseling certificates acquires permanent status as a classroom teacher only, regardless of the length of time served as a counselor and regardless of which position was held by the employee at the completion of the probationary period. Such an employee may be reassigned from a counseling position to a teaching position without notice or hearing, subject only to the requirement of reasonableness [*Thompson v. Modesto City High School Dist. (1977) 19 Cal. 3d 620, 626, 139 Cal. Rptr. 603, 566 P.2d 237* ; *Netwig v. Huntington Beach Union High School Dist. (1975) 52 Cal. App. 3d 529, 532, 125 Cal. Rptr. 170]* .

[c] Administrative or Supervisory Positions

A person employed in an administrative or supervisory position requiring certification qualifications in a school district having an average daily attendance of 250 pupils or more attains permanent status as a classroom teacher on completing the probationary period, including any time served as a classroom teacher. Classification as a permanent employee is discretionary in a district having an average daily attendance of less than 250 pupils [*Educ. Code § 44897*]. A permanent employee who is advanced from a teaching position to an administrative or supervisory position, or who is assigned any special or other type of work, or who is given a special classification or designation requiring certification qualifications, retains his or her permanent classification as a classroom teacher [*Educ. Code § 44893*; *see Educ. Code § 44895*].

In general, school administrators attain no tenure in their status as administrators [*Jefferson v. Compton Unified School Dist. (1993) 14 Cal. App. 4th 32, 38, 17 Cal. Rptr. 2d 474* ; *Hentschke v. Sink (1973) 34 Cal. App. 3d 19, 22, 109 Cal. Rptr. 549]* . Administrative and supervisory personnel may be removed from their positions and reassigned to other positions within the scope of the certificate under which tenure was attained for any reason satisfactory to the school board, without a hearing [*Jefferson v. Compton Unified School Dist. (1993) 14 Cal. App. 4th 32, 38-39, 17 Cal. Rptr. 2d 474* ; *Whisman v. San Francisco Unified Sch. Dist. (1978) 86 Cal. App. 3d 782, 791-792, 150 Cal. Rptr. 548* ; *Hentschke v. Sink (1973) 34 Cal. App. 3d 19, 22, 109 Cal. Rptr. 549* ; *see McFall v. Madera Unified School Dist. (1990) 222 Cal. App. 3d 1228, 1234-1235, 272 Cal. Rptr. 345]* .

If, however, a person employed in an administrative or supervisory position requiring certification qualifications is transferred to a teaching position, the governing board of the school district must, on request, furnish him or her with a written statement of the reasons for the transfer. If the reasons include incompetence, a performance evaluation of the person must have been completed not more than 60 days prior to the giving of the notice of transfer [*Educ. Code § 44896*; *see Educ. Code §§ 44660-44665* (employee performance evaluations)].

Incompetence is not defined in the statute, and it is unclear to what extent the district's dissatisfaction with the employee's performance as an administrator is a charge of incompetence. One court has found the term neither vague nor uncertain and refused to treat a district's dissatisfaction with certain aspects of job performance as a charge of incompetence [*see Quirk v. Board of Education (1988) 199 Cal. App. 3d 729, 734, 244 Cal. Rptr. 924* (board thought that principal, although "competent" administrator, did not possess type of leadership style necessary to deal with problems at particular school)]. Another court accepted without elaborate analysis that a list of 30 reasons for transfer, apparently involving numerous instances of dissatisfaction with job performance, constituted a charge of incompetence despite the fact that the term was not expressly used in the list [*Hahn v. Board of Education (1988) 205 Cal. App. 3d 744, 747, 750, 252 Cal. Rptr. 471* (board thought that administrator lacked willingness to maintain professional demeanor with teachers, parents, and staff involved in special education program)].

The remedy for a failure to properly evaluate before transfer is not, however, reinstatement in the administrative position. The employee is only entitled to a proper evaluation and to compensation for any diminution in salary suffered as a result of the transfer, up to the time when the evaluation is completed [*Jefferson v. Compton Unified School Dist. (1993) 14 Cal. App. 4th 32, 40, 17 Cal. Rptr. 2d 474* ; *Hahn v. Board of Education (1988) 205 Cal. App. 3d 744, 750-752, 754, 252 Cal. Rptr. 471]* . Moreover, the failure to perform the evaluation does not prevent the school district from reassigning an employee for reasons other than incompetency [*Jefferson v. Compton Unified School Dist. (1993)*

14 Cal. App. 4th 32, 40, 17 Cal. Rptr. 2d 474] .

A governing board may, by local regulation, expand the rights of administrators to retain their positions beyond those provided in the Education Code. If these regulations are incorporated by reference into the administrator's contract, the administrator is entitled to the protection of the regulations during the term of the contract [*see Jones v. Palm Springs Unified School Dist. (1985) 170 Cal. App. 3d 518, 527-528, 216 Cal. Rptr. 75]* . However, the protections may not apply to nonrenewal of the contract at the end of its term unless they expressly so provide [*see McFall v. Madera Unified School Dist. (1990) 222 Cal. App. 3d 1228, 1235-1236, 272 Cal. Rptr. 345]* . Moreover, unless incorporated in an administrator's contract, a governing board's past practice of recognizing such expanded rights does not give the administrator a constitutionally protected property right to continue in the administrative position [*see Bernstein v. Lopez (9th Cir. 2003) 321 F.3d 903, 905-907]* .

With certain statutory exceptions, if an administrative or supervisory employee is to be released or transferred from his or her position for the next school year, notice must be given by March 15. Notice must be by registered mail, or must be actually signed by the employee prior to the determinative date [*Educ. Code § 44951*; *see Ellerbroek v. Saddleback Valley Unified School Dist. (1981) 125 Cal. App. 3d 348, 366-367, 177 Cal. Rptr. 910]* . This notice requirement is jurisdictional, and strict compliance is required [*Hahn v. Board of Education (1988) 205 Cal. App. 3d 744, 751-752, 252 Cal. Rptr. 471* ; *Hoyme v. Board of Education (1980) 107 Cal. App. 3d 449, 452, 165 Cal. Rptr. 737* ; *but see Gilliam v. Moreno Valley Unified School District (1996) 48 Cal. App. 4th 518, 520-521, 55 Cal. Rptr. 2d 695* (notice requirements of *Educ. Code § 44951* do not apply to transfer of administrator within same classification)]. However, at least one court of appeal has held that the March notice requirement of *Educ. Code § 44951* does not apply when an administrative or supervisory employee is reassigned for cause [*see Jefferson v. Compton Unified School Dist. (1993) 14 Cal. App. 4th 32, 39, 17 Cal. Rptr. 2d 474]* .

If notice is not timely given or properly served, the governing board is no longer free to change the employee's assignment at its pleasure [*Barton v. Governing Board (1976) 60 Cal. App. 3d 476, 479, 131 Cal. Rptr. 455]* . Reassignment is ineffective, and the employee is entitled to reinstatement [*Hahn v. Board of Education (1988) 205 Cal. App. 3d 744, 751, 252 Cal. Rptr. 471]* . However, a change in assignment may be effected after the notice date has passed on a showing of cause [*see Ellerbroek v. Saddleback Valley Unified School Dist. (1981) 125 Cal. App. 3d 348, 365, 177 Cal. Rptr. 910]* .

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45-512 California Forms of Pleading and Practice--Annotated § 512.21

§ 512.21 Probationary Employees

[1] In General

The governing board of a school district must classify as probationary employees those persons who have been employed for the school year in positions requiring certification qualifications but who have not been classified as permanent employees or as substitute employees [*Educ. Code § 44915*]. In districts having an average daily attendance of more than 250 pupils, probationary status lasts for two years, after which time the teacher obtains tenure (permanent employee status) if reemployed for a third year [*see Educ. Code § 44929.21(b)*, discussed in *§ 512.20[1][a]*].

First and second-year probationary employees may be dismissed during the school year only for unsatisfactory performance or for cause [*see Educ. Code § 44948.3*, discussed in *§ 512.29*]. However, probationary teachers have no statutory or due process right to reemployment for the succeeding school year [*Grimsley v. Board of Trustees (1987) 189 Cal. App. 3d 1440, 1444-1452, 235 Cal. Rptr. 85]* . The final determination about rehiring probationary teachers lies within the discretion of the governing board, and reemployment may be denied for any lawful reason regardless of the sufficiency of the cause [*McFarland Unified School Dist. v. Public Employment Relations Bd. (1991) 228 Cal. App. 3d 166, 169, 279 Cal. Rptr. 26, 11 Cal. Rptr. 2d 405* (but holding that dismissal for engaging in protected labor activities is not for lawful reason)].

Furthermore, the California Supreme Court has held that *Educ. Code § 44929.21(b)* preempts any collective bargaining agreement provision purporting to give probationary teachers greater procedural protections (for example, 30 days' notice of decision not to reelect or right to hearing on non-reelection) than those specified by the statute [*Board of Education v. Round Valley Teachers Assn. (1996) 13 Cal. 4th 269, 284-287, 52 Cal. Rptr. 2d 115, 914 P.2d 193]* . Rather, Educ. Code § 44949.21(b) vests the school district with exclusive authority over whether to rehire probationary teachers at the end of their second year of employment [*Board of Education v. Round Valley Teachers Assn. (1996) 13 Cal. 4th 269, 287, 52 Cal. Rptr. 2d 115, 914 P.2d 193* ; *Sunnyvale Unified Sch. Dist. v. Jacobs (2009) 171 Cal. App. 4th 168, 179-183, 89 Cal. Rptr. 3d 546* (school district's allegedly retaliatory decision not to reelect probationary teacher may not be made subject to collectively bargained arbitration procedures)].

The governing board must give notice of its decision not to reemploy a second-year probationary teacher on or before

March 15 of the second year [*Educ. Code § 44929.21(b)*, discussed in *§ 512.20[1][a]*]. Notice of a decision not to reemploy a first-year probationary teacher for a second year may be given at any reasonable time before the end of the first year [*see Grimsley v. Board of Trustees (1987) 189 Cal. App. 3d 1440, 1447-1448, 235 Cal. Rptr. 85* (noting that late notice might be deemed unreasonable if employee relied on satisfactory performance evaluations in not seeking other employment)].

[2] Reclassification of Temporary and Substitute Employees to Probationary Status

Except in districts with an average daily attendance of over 400,000 [*see Educ. Code § 44918(f)*], any employee classified as a substitute or temporary employee who serves during one school year for at least 75 percent of the number of days during which the regular schools of the district were maintained in that school year and who has performed the duties normally required of a certificated employee of the school district is deemed to have served a complete school year as a probationary employee if he or she is employed as a probationary employee for the following school year [*Educ. Code § 44918(a)*]. Any such employee must be reemployed for the following school year to fill any vacant positions in the school district for which he or she is certified and qualified to serve unless the teacher is given notice of nonreelection for the next succeeding year before the end of the school year [*Educ. Code § 44918(b)*; *see Educ. Code § 44954(b)*, discussed in *§ 512.32*]. This provision also applies to temporary employees who were hired under *Educ. Code § 44920* and who have fulfilled the 75-percent requirement of *Educ. Code § 44918* [*Taylor v. Board of Trustees (1984) 36 Cal. 3d 500, 502, 204 Cal. Rptr. 711, 683 P.2d 710* ; *Royster v. Cushman (1989) 213 Cal. App. 3d 65, 69, 261 Cal. Rptr. 458]* . If the number of substitute and temporary teachers qualified to be reemployed as probationary teachers for the subsequent school year under *Educ. Code § 44918* exceeds the number of vacant positions, the school district is not required to fill the vacant positions on the basis of seniority [*Fair v. Fountain Valley School Dist. (1979) 90 Cal. App. 3d 180, 187-188, 153 Cal. Rptr. 56]* .

A temporary employee who is given notice of nonreelection after serving 75 percent of the school year, but who nevertheless has served as a temporary or substitute certificated employee in the district for 75 percent of the year for two consecutive years, must receive first priority if the district fills a vacant position at the grade level at which the employee served during either year. In the case of a departmentalized program, the employee must have taught in the subject matter in which the vacant position occurs [*Educ. Code § 44918(c)*].

Educ. Code § 44918 requires only actual performance of the duties of a certificated employee, not satisfactory performance. A temporary or substitute employee who is performing unsatisfactorily should be dismissed before he or she completes 75 percent of the instructional school year of a second consecutive year [*see Kalamaras v. Albany Unified School Dist. (1991) 226 Cal. App. 3d 1571, 1575-1580, 277 Cal. Rptr. 577* ; *see also § 512.32*].

Those employees classified as substitutes who are employed to serve in an on-call status to replace absent regular employees on a day-to-day basis are not entitled to reemployment rights under *Educ. Code § 44918* [*Educ. Code § 44918(d)*].

Permanent and probationary employees dismissed under *Educ. Code § 44955* (reduction in number of employees due to decline in average daily attendance, decline in attendance due to termination of interdistrict tuition agreement, modification of curriculum required by state law, or reduction of a particular service) have, during the period of preferred right to reemployment, prior rights to any vacant position in which they are qualified to serve that are superior to those rights afforded under *Educ. Code § 44918* to temporary and substitute personnel who have become probationary employees [*Educ. Code § 44918(e)*].

Any person employed for one complete school year as a temporary employee must be classified as a probationary employee if he or she is reemployed for the following school year in a vacant position requiring certification qualifications, and the previous year's employment as a temporary employee must be deemed one year's employment as a probationary employee for purposes of acquiring permanent status [*Educ. Code §§ 44917, 44920*; *see Fine v. Los*

Angeles Unified Sch. Dist. (2004) 116 Cal. App. 4th 1070, 1080-1082, 10 Cal. Rptr. 3d 876 (teacher serving under emergency permit does not qualify as temporary employee for this purpose)].

A "vacant position" means a position in which the employee is qualified to serve and which is not filled by a permanent or probationary employee. The term does not include a position that would be filled by a permanent or probationary employee except for the fact that such employee is on leave [*Educ. Code § 44920*].

If a school district hires a certificated person as a temporary employee, the employee must receive, at the time of initial employment during each academic year, a written statement clearly indicating the temporary nature of the employment and the length of time for which the person is being employed [*see Educ. Code § 44916*]. For this purpose, "the time of initial employment" is the certificated employee's first day of paid service for the school district [*Kavanaugh v. West Sonoma County High Sch. Dist. (2003) 29 Cal. 4th 911, 924-926, 129 Cal. Rptr. 2d 811, 62 P.3d 54* (rejecting argument that "time of initial employment" refers to time when school district's governing board formally approves employee's hiring)]. If a statement indicating the temporary nature of the employment is not received on or before that day, the certificated employee shall be deemed to be a probationary employee of the school district, unless employed with permanent status [*Educ. Code § 44916*; *see California Teachers Assn. v. Governing Board (1987) 195 Cal. App. 3d 285, 292-293, 240 Cal. Rptr. 549* (teacher hired under "Contract of Temporary Employment" for less than semester in one year, and then rehired for entire following school year, as entitled to probationary classification in absence of written statement)].

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§ 512.22 Substitute Employees

Educ. Code § 44917 provides that except as provided in *Educ. Code §§ 44888* and *44920* (reclassification of substitute employees as probationary employees), governing boards of school districts must classify as substitute employees those persons employed in positions requiring certification qualifications to fill positions of regularly employed persons absent from service. After September 1 of any school year, the governing board of a school district may employ for the remainder of the school year in substitute status any otherwise qualified person who consents to be employed in a position for which no regular employee is available, including persons retired from service under the State Teacher's Retirement System. However, the governing board must demonstrate inability to acquire the services of a qualified regular employee to the satisfaction of the Commission on Teacher Credentialing. Counsel should note that the cross reference to *Educ. Code § 44888* in *Educ. Code § 44917* is apparently erroneous as there is presently no section numbered 44888 in the Education Code.

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45-512 California Forms of Pleading and Practice--Annotated § 512.23

§ 512.23 Temporary Employees

[1] Generally

The governing board of a school district must classify the following persons as temporary employees:

(1) Persons requiring certification qualifications, other than substitute employees, who are employed to serve from day to day during the first three school months of any school term to teach temporary classes that will not exist after the first three school months of any school term, or to perform any other duties that do not last longer than the first three school months of a school term, or to teach in special day and evening classes for adults or in schools of migratory population for not more than four school months of any school term. If the classes or duties continue beyond this period, the certificated employee, unless a permanent employee, must be classified as a probationary employee. The school year may be divided into not more than two terms for purposes of this provision [*Educ. Code § 44919(a)*].

(2) Persons, other than substitute employees, who are employed to serve in a limited assignment supervising student athletic activities. Such an assignment must first, however, be made available to teachers presently employed by the district. Such service is not included in computing the service required to attain classification as a permanent employee [*Educ. Code § 44919(b)*].

In any district, the governing board may, to prevent the stoppage of school district business when an actual emergency arises and persons are not immediately available for probationary classification, make an appointment to a position on a temporary basis for a period not to exceed 20 working days. The person so appointed is deemed to be a temporary employee who is employed to serve from day to day. Service by a person in such an appointment on a temporary basis is not included in computing the service required to attain classification as a permanent employee [*Educ. Code § 44919(c)*].

[2] Limited Hiring Preference for Credentialed Teachers Employed by District

Education Code § 44919(b) requires a governing board to give a limited employment preference to credentialed teachers presently employed by the school district when filling limited-duty assignments of athletic coach [*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist. (1997) 14 Cal. 4th 627, 652-653, 59 Cal. Rptr. 2d 671,*

927 P.2d 1175] . The statutory language directing that such positions "first be made available to teachers presently employed by the district" evinces a legislative intent that such teachers "have some tangible advantage in the hiring process not shared by walk-on candidates" [*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist. (1997) 14 Cal. 4th 627, 633-635, 59 Cal. Rptr. 2d 671, 927 P.2d 1175]* . However, the Legislature's policy decision that governing boards of individual districts have power over matters of interscholastic athletics means that presently employed credentialed teachers do not have a right of first refusal of limited-duty athletic coach assignments. Rather, individual districts retain discretion over the hiring of athletic coaches; they may establish specific qualifications and evaluate whether candidates meet those qualifications [*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist. (1997) 14 Cal. 4th 627, 639-640, 59 Cal. Rptr. 2d 671, 927 P.2d 1175]* . Accordingly, if a credentialed teacher presently employed the district meets the established local qualifications, he or she is entitled to the hiring preference, not a guarantee [*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist. (1997) 14 Cal. 4th 627, 643-644, 59 Cal. Rptr. 2d 671, 927 P.2d 1175]* .

[3] Employment of Temporary Employees to Fill Vacancies Caused by Leaves of Absence or Illnesses

Notwithstanding the provisions of *Educ. Code §§ 44917* and *44919*, the governing board of a school district may employ as a teacher for a complete school year, but for not less than one semester unless the date of rendering first paid service occurs during the second semester and prior to March 15, any person holding appropriate certification documents, and may classify the person as a temporary employee. The employment of such a person must be based on the need for additional certificated employees during a particular semester or year because a certificated employee has been granted leave for a semester or year, or is experiencing long-term illness, and must be limited to the number of persons necessary to fill that need, as determined by the governing board [*Educ. Code § 44920*].

The governing board need not assign an employee hired pursuant to *Educ. Code § 44920* to the classroom of a particular permanent or probationary teacher whose absence (due to leave or illness) necessitated the hiring, in order to classify the teacher hired as a temporary employee. All that is required is that the number of temporary teachers so hired not exceed the total number of permanent and probationary employees on leave at any one time [*see Santa Barbara Fed'n of Teachers v. Santa Barbara High School Dist. (1977) 76 Cal. App. 3d 223, 229, 231-233, 142 Cal. Rptr. 749* ; *Paulus v. Bd. of Trustees (1976) 64 Cal. App. 3d 59, 62-63, 134 Cal. Rptr. 220]* .

[4] Employment of Temporary Employees for First Semester Only

Notwithstanding *Educ. Code § 44919*, the governing board of a unified or high school district may employ, and classify as temporary employees, persons requiring certification qualifications for the first semester only, whenever the district expects a reduction in student enrollment during the second semester due to students completing graduation requirements at midyear. The number of persons so employed must be limited to requirements based on the anticipated reduced enrollment as determined by the governing board. Persons so employed who are continued in employment beyond the first semester are deemed probationary employees for the entire school year [*Educ. Code § 44921*].

Any such employee must be reemployed for the following semester or school year to fill any vacant position in the school district for which the employee is certified, in accordance with *Educ. Code §§ 44845* and *44846* (general provisions governing priority of reemployment). A "vacant position" is one in which the employee is qualified to serve and which is not filled by a permanent or probationary employee. The term does not include a position that would be filled by a permanent or probationary employee except for the fact that such employee is on leave [*Educ. Code § 44921*; *see also* discussion in *§ 512.21[2]*].

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§ 512.24 Effect of Reorganization of District on Classification

The division, uniting, unionization, or consolidation of any school district, or any change in the school district boundaries or organization, does not affect the classification of certificated employees already employed by any school district affected. Such employees retain the same status, including time served as probationary employees, that they had prior to the reorganization [*see Educ. Code § 44902*].

If a school district that has an average daily attendance of less than 250 pupils is unionized, unified, united, or consolidated with another district in which the average daily attendance was, or as a result of the unionization, unification, uniting, or consolidation becomes, 250 or more pupils, then the regular three-year probationary period [*see* discussion in *§ 512.20*] is deemed to have commenced at the beginning of the employee's first complete year of consecutive employment by the school district having an average daily attendance of less than 250 pupils. Every certificated employee who has been employed for three or more complete consecutive school years by a district having an average daily attendance of less than 250 pupils must, immediately on employment in a certificated position following unionization, unification, uniting, or consolidation with the larger school district, be classified as a permanent employee [*Educ. Code § 44903*].

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§ 512.25 Mandate Proceeding to Compel Reclassification

Mandate is an appropriate remedy for an employee seeking reclassification as a permanent or probationary employee [*see, e.g., Campbell v. Graham-Armstrong (1973) 9 Cal. 3d 482, 485-486, 107 Cal. Rptr. 777, 509 P.2d 689* ; *Middaugh v. Board of Trustees (1975) 45 Cal. App. 3d 776, 781, 119 Cal. Rptr. 826]* .

For discussion and forms relating to mandate proceedings generally, see Ch. 358, *Mandate and Prohibition* . For forms of petitions for writs of mandate to compel reclassification of a certificated employee, *see §§ 512.169* and *512.170*.

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§ 512.26 General Principles Applicable to Dismissal or Suspension

Under the Education Code, permanent and probationary teachers are entitled to certain procedural protections against arbitrary dismissal or suspension [*see Educ. Code §§ 44932-44948.5*; *Balen v. Peralta Junior College Dist. (1974) 11 Cal. 3d 821, 826, 114 Cal. Rptr. 589, 523 P.2d 629]* . A school district's unilateral termination of a permanent or probationary teacher's employment is governed by these statutory provisions, rather than by general contract law [*see Pennel v. Pond Union School Dist. (1973) 29 Cal. App. 3d 832, 838, 105 Cal. Rptr. 817]* . Furthermore, an employee who is subject to dismissal only for cause has a property interest in continued employment that is entitled to constitutional protection [*Shields v. Poway Unified School Dist. (1998) 63 Cal. App. 4th 955, 959, 74 Cal. Rptr. 2d 391* ; *Mendoza v. Regents of University of California (1978) 78 Cal. App. 3d 168, 174-175, 144 Cal. Rptr. 117]* . Statutes that have as their object the termination of a permanent employee's right of continued employment must be strictly construed [*Shields v. Poway Unified School Dist. (1998) 63 Cal. App. 4th 955, 959, 74 Cal. Rptr. 2d 391* ; *Tuffli v. Governing Board (1995) 30 Cal. App. 4th 1398, 1404, 36 Cal. Rptr. 2d 433]* . Thus, unless the school district follows the statutory procedures for dismissal or suspension, its action in dismissing or suspending a permanent or probationary employee is illegal, and the employee is entitled to be reinstated in his or her position with full salary from the date of dismissal or suspension [*see Mass v. Board of Education (1964) 61 Cal. 2d 612, 617-618, 630, 39 Cal. Rptr. 739, 394 P.2d 579* ; *Pennel v. Pond Union School Dist. (1973) 29 Cal. App. 3d 832, 839, 105 Cal. Rptr. 817* ; *Matteson v. State Bd. of Educ. (1943) 57 Cal. App. 2d 991, 1000, 136 P.2d 120* ; *see also* discussion in *§ 512.28[9]*].

Suspension of a teaching credential, voluntary or otherwise, does not automatically deprive an individual of the right to continued public employment, nor does it relieve a school district from complying with the due process requirements of notice and the opportunity for a hearing prior to dismissal embodied in *Educ. Code § 44934 et seq.* During the period of suspension, the tenured employee's status as a permanent employee remains unaffected. Therefore, cause for dismissal of a suspended permanent employee must be established after adequate notice and opportunity for a hearing [*Educ. Code §§ 44934, 44935, 44936, 44937, 44944*; *Shields v. Poway Unified School Dist. (1998) 63 Cal. App. 4th 955, 958-962, 74 Cal. Rptr. 2d 391]* .

However, the California Supreme Court has held that probationary teachers do not possess the same due process rights as permanent teachers, and pursuant to *Educ. Code § 44929.21(b)*, school districts may simply decline to "reelect" (as opposed to "dismiss") probationary teachers without showing grounds for cause or following the procedures required

for a dismissal of permanent teachers [*Board of Education v. Round Valley Teachers Assn. (1996) 13 Cal. 4th 269, 284-287, 52 Cal. Rptr. 2d 115, 914 P.2d 193]* . The court also held that *Educ. Code § 44929.21(b)* preempts any collective bargaining agreement purporting to provide greater due process rights to probationary teachers than those afforded by the code [*Board of Education v. Round Valley Teachers Assn. (1996) 13 Cal. 4th 269, 287, 52 Cal. Rptr. 2d 115, 914 P.2d 193* ; *see Sunnyvale Unified Sch. Dist. v. Jacobs (2009) 171 Cal. App. 4th 168, 179-183, 89 Cal. Rptr. 3d 546* (school district's allegedly retaliatory decision not to reelect probationary teacher may not be made subject to collectively bargained arbitration procedures)]. Similarly, statutory provisions for the preferential rehiring of teachers who have been laid off for economic reasons [*see Educ. Code §§ 44955, 44957*] do not prevent a school district from validly determining not to reelect a probationary teacher under *Educ. Code § 44929.21(b)* [*California Teachers Assn. v. Mendocino Unified Sch. Dist. (2001) 92 Cal. App. 4th 522, 526-528, 111 Cal. Rptr. 2d 879]* . Thus, although a school district must follow the layoff statutes when it releases a probationary employee for economic reasons, it may thereafter choose not to reelect that employee for other reasons, such as his or her lack of a full or clear teaching credential [*California Teachers Assn. v. Vallejo City Unified School Dist. (2007) 149 Cal. App. 4th 135, 157* & n11, *56 Cal. Rptr. 3d 712]* .

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§ 512.27 Constitutional Restraints on Dismissal

A public school teacher may not be dismissed from employment for the exercise of constitutional rights absent a showing that the restraints imposed on those rights are justified by a compelling public interest [*Bekiaris v. Board of Education (1972) 6 Cal. 3d 575, 585-586, 100 Cal. Rptr. 16, 493 P.2d 480]* . Generally, a teacher's right to speak is constitutionally protected as long as it does not result in any disruption or impairment of discipline or materially interfere with school activities [*Adcock v. Board of Educ. (1973) 10 Cal. 3d 60, 65, 109 Cal. Rptr. 676, 513 P.2d 900]* . In the absence of actual disruption, disciplinary action is improper when a teacher espouses his or her unpopular views in a polite but forceful manner, in an appropriate forum for the airing of different views on controversial issues [*see* *Adcock v. Board of Educ. (1973) 10 Cal. 3d 60, 68-69, 109 Cal. Rptr. 676, 513 P.2d 900]* . However, a school which reprimands a science teacher for protesting a requirement that he teach evolution does not violate the teacher's rights under the *establishment clause of the First Amendment*. The school district may also restrict a teacher's conversations with students on religious matters during the school day and on school property [*Peloza v. Capistrano Unified School District (9th Cir. 1994) 37 F. 3d 517, 521-522]* .

The refusal by a hearing officer and school board to consider evidence that a teacher was dismissed for the exercise of constitutional rights whose limitation was not justified by a compelling public interest constitutes legal error that invalidates a dismissal [*Bekiaris v. Board of Education (1972) 6 Cal. 3d 575, 587-588, 100 Cal. Rptr. 16, 493 P.2d 480]* . When reviewing the dismissal of a teacher in a mandate proceeding, the trial court must make an independent assessment of the evidence on the question of whether the true reason for the dismissal was the teacher's exercise of constitutional rights [*Bekiaris v. Board of Educ. (1972) 6 Cal. 3d 575, 593, 100 Cal. Rptr. 16, 493 P.2d 480]* .

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§ 512.28 Dismissal or Suspension of Permanent Employees

[1] Grounds

A permanent employee may be dismissed only for one or more of the following causes [*Educ. Code § 44932(a)*]:

(1) Immoral or unprofessional conduct (discussed *below*);

(2) Commission, or aiding or advocating the commission, of acts of criminal syndicalism, as prohibited by Stats. 1919, ch. 188 or any amendment thereof;

(3) Dishonesty (discussed *below*);

(4) Unsatisfactory performance (discussed *below*);

(5) Evident unfitness for service (discussed in *§ 512.28[2]*);

(6) Physical or mental condition rendering the employee unfit to instruct or associate with children;

(7) Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the employing school district (discussed *below*);

(8) Conviction of a felony or of any crime involving moral turpitude (discussed *below*);

(9) Violation of *Educ. Code § 51530* (prohibition against teaching or advocation of communism in public schools for purpose of indoctrinating students) or any conduct specified in *Gov. Code § 1028* (knowing membership in Communist Party or any organization advocating forceful overthrow of government as sufficient cause for dismissal of public employee) (discussed *below*);

(10) Violation of any provision in former *Educ. Code §§ 7001-7007* (relating to knowing membership of public school employees in Communist Party) (discussed *below*);

(11) Knowing membership by the employee in the Communist Party (discussed *below*);

(12) Alcoholism or other drug abuse that makes the employee unfit to instruct or associate with children.

A permanent employee may be dismissed or suspended on grounds of unprofessional conduct consisting of acts or omissions other than those specified in *Educ. Code § 44932*. However any such charge must specify instances of behavior deemed to constitute unprofessional conduct [*Educ. Code § 44933*]. A dismissal for unprofessional conduct under *Educ. Code § 44933* must be based on acts or omissions other than those supporting dismissal under *Educ. Code § 44932(a)* [*Perez v Commission on Professional Competence (1983) 149 Cal. App. 3d 1167, 1172, 197 Cal. Rptr. 390]* .

Counsel should note that *Educ. Code §§ 7001-7007*, which are referred to in *Educ. Code § 44932(a)(10)*, were repealed by the Legislature in 1981 [*see* Stats. 1981, ch. 470, § 11].

A particular act or omission of a teacher may constitute several different causes for dismissal under *Educ. Code § 44932(a)*, such as unprofessional conduct, evident unfitness for service, and persistent violation of school rules [*see Board of Education v. Swan (1953) 41 Cal. 2d 546, 550-551, 261 P.2d 261]* .

The governing board of a school district may suspend a permanent certificated employee or, in a school district with an average daily attendance of less than 250 pupils, a probationary employee, without pay for a specific period of time on grounds of unprofessional conduct pursuant to the procedures specified in *Educ. Code §§ 44933-44937*, *44943*, and *44944*. This authorization is not applicable to any school district that has adopted a collective bargaining agreement pursuant to *Gov. Code § 3543.2* [*Educ. Code § 44932(b)*].

[2] Immoral or Unprofessional Conduct; Unfitness to Teach

[a] In General

A permanent teacher may not be dismissed on grounds of immoral or unprofessional conduct unless his or her conduct indicates unfitness to teach [*Board of Educ. v. Jack M. (1977) 19 Cal. 3d 691, 696-697, 139 Cal. Rptr. 700, 566 P.2d 602* ; *see* *Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 225, 82 Cal. Rptr. 175, 461 P.2d 375* ; *West Valley-Mission Community College Dist. v. Concepcion (1993) 16 Cal. App. 4th 1766, 1773-1774, 21 Cal. Rptr. 2d 5* ; *see also* discussion in *§§ 512.16* and *512.16[3][b]*]. Unfitness to teach is evaluated under the so-called *Morrison* standards [*see* *Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 82 Cal. Rptr. 175, 461 P.2d 375]* . In *Morrison*, the California Supreme Court held that an individual may be removed from the teaching profession only on a showing that retention poses a significant danger of harm to either students, school employees, or others who might be affected by his or her actions as a teacher [*Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 235, 82 Cal. Rptr. 175, 461 P.2d 375]* . In determining whether a teacher's conduct indicates unfitness to teach, the governing body may consider such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of a recurrence, and the extent to which disciplinary action may inflict an adverse impact or chilling effect on the constitutional rights of the teacher involved or other teachers [*Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 229, 82 Cal. Rptr. 175, 461 P.2d 375* ; *Governing Board v. Haar (1994) 28 Cal. App. 4th 369, 383-385, 33 Cal. Rptr. 2d 744* ; *West Valley-Mission Community College Dist. v. Concepcion (1993) 16 Cal. App. 4th 1766, 1774, 21 Cal. Rptr. 2d 5* ; *see Perez v Commission on Professional Competence (1983) 149 Cal. App. 3d 1167, 1173, 197 Cal. Rptr. 390]* . The

ultimate inquiry is whether the teacher's future classroom performance and overall impact on his or her students is likely to meet the standards of the school district employing the teacher [*Oakland Unified Sch. Dist. v. Olicker (1972) 25 Cal. App. 3d 1098, 1109, 102 Cal. Rptr. 421]* .

Other courts have recently recast the *Morrison* factors to include the following: (1) the likelihood of recurrence of the questioned conduct; (2) the extenuating or aggravating circumstances, if any; (3) the effect of notoriety and publicity; (4) any impairment of teacher-student relationships; (5) any disruption of educational process; (6) motive; and (7) the proximity or remoteness in time of the conduct [*Bevli v. Brisco (1989) 211 Cal. App. 3d 986, 991, 260 Cal. Rptr. 57* ; *Bassett Unified School Dist. v. Commission on Professional Competence (1988) 201 Cal. App. 3d 1444, 1453, 247 Cal. Rptr. 865]* . This fitness-to-teach standard makes specific the kind of conduct required of teachers in this regard and clarifies the term "unprofessional conduct," so that the term is not unconstitutionally vague [*Perez v Commission on Professional Competence (1983) 149 Cal. App. 3d 1167, 1174, 197 Cal. Rptr. 390]* .

Commission of a sex offense does not demonstrate unfitness to teach as a matter of law [*see* *Board of Educ. v. Jack M. (1977) 19 Cal. 3d 691, 700-704, 139 Cal. Rptr. 700, 566 P.2d 602]* . However, sexual misconduct may justify dismissal on grounds of immoral conduct under the facts of a particular case [*see, e.g.,* *Governing Board v. Metcalf (1974) 36 Cal. App. 3d 546, 550-551, 111 Cal. Rptr. 724* ; *Bd. of Trustees v. Stubblefield (1971) 16 Cal. App. 3d 820, 824-827, 94 Cal. Rptr. 318]* . Acquittal of a teacher in criminal proceedings for commission of a sex offense does not preclude a subsequent dismissal of the teacher for immoral conduct pursuant to *Educ. Code § 44932(a)(1)* based on the same act [*Board of Educ. v. Calderon (1973) 35 Cal. App. 3d 490, 493-496, 110 Cal. Rptr. 916]* .

Possession of marijuana or other narcotics does not by itself, constitute immoral conduct as a matter of law justifying dismissal of a permanent teacher. The question of whether or not an offense relating to the possession of prohibited substances constitutes immoral conduct presents an issue of fact to be determined in light of all of the surrounding facts and circumstances [*Von Durjais v. Bd. of Trustees (1978) 83 Cal. App. 3d 681, 688, 148 Cal. Rptr. 192* ; *see, e.g., West Valley-Mission Community College Dist. v. Concepcion (1993) 16 Cal. App. 4th 1766, 1775-1778, 21 Cal. Rptr. 2d 5* (interpreting similarly worded provisions of *Educ. Code § 87732* governing dismissal of community college instructors; under facts of case, substantial evidence supported trial court's finding that teacher's participation in cocaine dealing demonstrated unfitness to teach); *Comings v. State Bd. of Educ. (1972) 23 Cal. App. 3d 94, 105-106, 100 Cal. Rptr. 73]* . It should be noted, however, that alcoholism or other drug abuse that makes the employee unfit to instruct or associate with children is a separate cause for dismissal under *Educ. Code § 44932(a)* [*see Educ. Code § 44932(a)(12)*].

Immoral conduct is not necessarily limited to conduct involving sex or narcotics offenses. For example, the falsification of student attendance records by a teacher has been held to constitute immoral conduct justifying the teacher's dismissal [*Board of Educ. v. Weiland (1960) 179 Cal. App. 2d 808, 811-812, 4 Cal. Rptr. 286]* .

[b] Evident Unfitness for Service

Evident unfitness for service is a separate ground for dismissal, apart from immoral or unprofessional conduct [*see Educ. Code § 44932(a)(1), (5)*]. Because immoral or unprofessional conduct requires a showing of unfitness to teach, the two grounds substantially overlap, at the least, and, in the view of some courts, may have merged into a single ground [*see* *Bevli v. Brisco (1989) 211 Cal. App. 3d 986, 991, 260 Cal. Rptr. 57* ; *Oakland Unified Sch. Dist. v. Olicker (1972) 25 Cal. App. 3d 1098, 1108, 102 Cal. Rptr. 421]* .

Nevertheless, other courts have found evident unfitness for service still to be a separate and unique ground for dismissal. Under this view, evident unfitness for service means clearly not fit, not adapted to, or unsuitable for teaching, ordinarily because of temperamental defects or inadequacies. Unlike unprofessional conduct, evident unfitness for service connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district [*see* *Woodland Joint Unified School Dist. v. Commission on Professional Competence (1992) 2 Cal. App. 4th 1429, 1442-1445, 4 Cal. Rptr. 2d 227* (and cases cited therein); *see*

also § 512.25[2][c]].

Under both views, the *Morrison* factors [*see § 512.28[2]*] must be analyzed [*Woodland Joint Unified School Dist. v. Commission on Professional Competence (1992) 2 Cal. App. 4th 1429, 1445, 4 Cal. Rptr. 2d 227* ; *Bevli v. Brisco (1989) 211 Cal. App. 3d 986, 991, 260 Cal. Rptr. 57]* . Nevertheless, under the view that unprofessional conduct and evident unfitness for service are distinct, the conclusion that a teacher is unfit under the *Morrison* criteria is only the threshold point of inquiry. The next step is to determine whether the unfitness is "evident," that is, whether the offensive conduct is caused by a defect in temperament [*Woodland Joint Unified School Dist. v. Commission on Professional Competence (1992) 2 Cal. App. 4th 1429, 1445, 4 Cal. Rptr. 2d 227]* .

[c] Unprofessional Conduct; Notice Requirement

The governing board of a school district may not act on any charges of unprofessional conduct [*see Educ. Code § 48932(a)(1)*] unless, at least 45 calendar days prior to the date of the filing, the board or its authorized representative has given the employee against whom the charge is filed written notice of the unprofessional conduct, specifying the nature the conduct alleged to constitute unprofessional conduct with specific instances of behavior and with sufficient particularity to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. The notice must include the evaluation made pursuant to *Educ. Code § 44660 et seq.* (employee performance evaluations), if applicable to the employee [*Educ. Code § 44938(a)*]. The term "unprofessional conduct" as used in *Educ. Code § 44938* refers to and means the unprofessional conduct particularly specified as a cause for dismissal or suspension in *Educ. Code §§ 44932* and *44933* and does not include any other cause for dismissal specified in *Educ. Code § 44932* [*Educ. Code § 44938(c)*]. A district "acts on" a charge of unprofessional conduct by suspending a teacher from employment, as well as by dismissing the teacher [*Crowl v. Commission on Professional Competence (1990) 225 Cal. App. 3d 334, 342-347, 275 Cal. Rptr. 86]* .

The same conduct may constitute both unprofessional conduct and another ground for dismissal [*Board of Education v. Swan (1953) 41 Cal. 2d 546, 551, 261 P.2d 261* , overruled on other grounds in *Bekiaris v. Board of Education (1972) 6 Cal. 3d 575, 100 Cal. Rptr. 16, 493 P.2d 480* ; *Woodland Joint Unified School Dist. v. Commission on Professional Competence (1992) 2 Cal. App. 4th 1429, 1444-1445, 4 Cal. Rptr. 2d 227]* . In these cases, there is some uncertainty as to whether the notice need be given. Apparently, in the majority's view, the notice is not required to dismiss if the district elects to proceed under a ground set forth in *Educ. Code § 44932* other than unprofessional conduct [*Woodland Joint Unified School Dist. v. Commission on Professional Competence (1992) 2 Cal. App. 4th 1429, 1446-1448, 4 Cal. Rptr. 2d 227* (unprofessional conduct is lesser-included form of evident unfitness for service; no notice required to proceed solely on latter ground because, under court's definition of evident unfitness, teacher is incapable of correcting behavior); *see also Pittsburg Unified School Dist. v. Commission on Professional Competence (1983) 146 Cal. App. 3d 964, 974, 194 Cal. Rptr. 672]* . Nevertheless, there is some authority for the proposition that the district ought not to be able to avoid the notice requirement by means of the particular label chosen if the essence of the charge is unprofessional conduct [*see Livermore Valley Joint Unified Sch. Dist. v. Feinberg (1974) 37 Cal. App. 3d 920, 922, 112 Cal. Rptr. 923* ; *see also Woodland Joint Unified School Dist. v. Commission on Professional Competence (1992) 2 Cal. App. 4th 1429, 1461, 4 Cal. Rptr. 2d 227* (opinion of Blease, Acting P.J., dissenting)].

The notice requirement of *Educ. Code § 44938(a)* is jurisdictional, and any action taken without notice is invalid [*Woodland Joint Unified School Dist. v. Commission on Professional Competence (1992) 2 Cal. App. 4th 1429, 1446, 4 Cal. Rptr. 2d 227]* . In contrast, the portion of the statute that pertains to the opportunity to correct behavior is not jurisdictional, but merely an evidentiary consideration [*Crowl v. Commission on Professional Competence (1990) 225 Cal. App. 3d 334, 348-349, 275 Cal. Rptr. 86* ; *Blake v. Commission of Professional Competence (1989) 212 Cal. App. 3d 513, 517, 260 Cal. Rptr. 690]* . Thus, the teacher's inability to take advantage of the opportunity because of illness or disability does not deprive the Commission on Judicial Competence of jurisdiction to proceed on the charge. Nevertheless, the failure to provide the teacher with the opportunity to correct his or her deficiencies may constitute a defect in due process [*Blake v. Commission of Professional Competence (1989) 212 Cal. App. 3d 513, 517-518, 260*

Cal. Rptr. 690 ; *see* *Tarquin v. Commission on Professional Competence (1978) 84 Cal. App. 3d 251, 148 Cal. Rptr. 522* (teacher transferred to nonclassroom position immediately after given notice)]. Further, if the evidence establishes that the teacher has remedied the conduct during the 45-day period, the teacher may not be suspended based on prior acts of unprofessional conduct [*Crowl v. Commission on Professional Competence (1990) 225 Cal. App. 3d 334, 349-352, 275 Cal. Rptr. 86* (not reaching issue of whether teacher may demonstrate remediation simply by refraining from unprofessional conduct for 45 days, because district had stipulated that teacher had remedied his conduct)].

For a form of allegation of failure to comply with *Educ. Code § 44938(a)* to be included in a petition for writ of mandate to review dismissal of a permanent teacher, see *§ 512.165*.

[d] Dishonesty

Not every falsehood constitutes dishonesty as a ground for discipline [*Fontana Unified School Dist. v. Burman (1988) 45 Cal. 3d 208, 220 n.12, 246 Cal. Rptr. 733, 753 P.2d 689]* . A permanent teacher may not be dismissed on grounds of dishonesty [*see Educ. Code § 44932(a)(3)*] unless his or her conduct indicates unfitness to teach [*Bassett Unified School Dist. v. Commission on Professional Competence (1988) 201 Cal. App. 3d 1444, 1453-1454, 247 Cal. Rptr. 865]* . For discussion of unfitness to teach, see *§ 512.28[2]*.

[e] Unsatisfactory Performance; Notice Requirement

The governing board of a school district may not act on any charges of unsatisfactory performance [*see Educ. Code § 44932(a)(4)*] unless, at least 90 calendar days prior to the date of the filing, the board or its authorized representative has given the employee against whom the charge is filed written notice of the unsatisfactory performance. The governing board may, however, act during the time period composed of the last one fourth of the school days it has scheduled for purposes of computing apportionments in any fiscal year if, prior to the beginning of that time period, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unsatisfactory performance. In any case, the notice must specify the nature of the conduct alleged to constitute unsatisfactory performance and must specify instances of behavior with sufficient particularity to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. The notice must include an evaluation made pursuant to *Educ. Code §§ 44660-44665* (employee performance evaluations), if applicable to the employee [*Educ. Code § 44938(b)*]. However, the failure of a district to adopt the uniform written guidelines called for by *Educ. Code § 44660* does not deprive a district of jurisdiction to dismiss a teacher for incompetency under *Educ. Code § 44938* [*California Teachers Assn. v. Governing Board (1983) 144 Cal. App. 3d 27, 33-36, 192 Cal. Rptr. 358* , decided prior to 1995 legislation, which amended *Educ. Code § 44932(a)(4)* by changing "incompetency" to "unsatisfactory performance"].

The term "incompetency," as used in *Educ. Code § 44938*, refers only to the unsatisfactory performance particularly specified as a cause for dismissal in *Educ. Code § 44932(a)(4)*, and does not include any other cause for dismissal specified in *Educ. Code § 44932* [*Educ. Code § 44938(c)*]. Thus, the failure by a school board to comply with the provisions of *Educ. Code § 44938* does not preclude the board from seeking dismissal of a teacher on grounds other than unsatisfactory performance (for example, evident unfitness for service) [*Tarquin v. Commission on Professional Competence (1978) 84 Cal. App. 3d 251, 260, 148 Cal. Rptr. 522]* .

The purpose of former *Educ. Code § 44938* (*now see Educ. Code § 44938(b)(1)*) is to give a permanent teacher 90 days to correct the deficiencies alleged to constitute unsatisfactory performance. If the school district deprives the teacher of this opportunity by transferring him or her to a nonteaching position prior to the expiration of 90 days after service of notice under former *Educ. Code § 44938* (*now see Educ. Code § 44938(b)(1)*), the district lacks jurisdiction to proceed against the teacher on charges of unsatisfactory performance [*Tarquin v. Commission on Professional Competence (1978) 84 Cal. App. 3d 251, 257-259, 148 Cal. Rptr. 522]* .

For a form of allegation of failure to comply with *Educ. Code § 44938(b)* to be included in a petition for writ of mandate to review dismissal of a permanent teacher, see *§ 512.164*.

[f] Physical or Mental Condition; Contagious Diseases

A permanent employee may be dismissed on the ground of a physical or mental disability that renders him or her unfit to instruct or associate with children [*Educ. Code § 44932(a)(6)*; *see also Educ. Code § 44942* (suspension or transfer of certificated employee on ground of mental illness), discussed in *§ 512.35*]. However, disabled persons are protected from employment discrimination by the Rehabilitation Act of 1973 (Act) [*see 29 U.S.C.S. § 794*]. Under this Act, recipients of federal funds are prohibited from discriminating against otherwise qualified persons in employment solely on the basis of handicap [*29 U.S.C.S. § 794*]. Disabled individuals are also protected from employment discrimination by the Americans With Disabilities Act (*42 U.S.C.S. § 12101 et seq.*) and by the California Fair Employment and Housing Act [*see Gov. Code §§ 12926(i), (k), 12940(a)*; *2 Cal. Code Reg. § 7293.6*].

In the employment context, an otherwise qualified person under the Rehabilitation Act is one who, with reasonable accommodation, can perform the essential functions of the job in question [*45 C.F.R. § 84.3*(*l*)(1)]. Accommodation is not reasonable if it either imposes undue financial and administrative burdens or requires a fundamental alteration in the nature of the program [*Southeastern Community College v. Davis (1979) 442 U.S. 397, 410-413, 99 S. Ct. 2361, 60 L. Ed. 2d 980]* .

Persons with contagious diseases are disabled within the meaning of the Rehabilitation Act and, therefore, afforded its protections [*School Board of Nassau County v. Arline (1987) 480 U.S. 273, 280-286, 107 S. Ct. 1123, 94 L. Ed. 2d 307* (tuberculosis)]. However, a person who poses a significant risk of communicating an infectious disease to others in the workplace is not otherwise qualified for the job if reasonable accommodation will not eliminate the risk [*School Board of Nassau County v. Arline (1987) 480 U.S. 273, 280-286 n.16, 107 S. Ct. 1123, 94 L. Ed. 2d 307]* . Inquiry is required based on reasonable medical judgment, given the state of medical knowledge, about (1) the nature of the risk, that is, how the disease is transmitted; (2) the duration of the risk, that is, how long the carrier is infectious; (3) the severity of the risk, that is, the potential harm to third parties; and (4) the probabilities that the disease will be transmitted. In making these findings, the court ordinarily should defer to the reasonable medical judgment of public health officials [*School Board of Nassau County v. Arline (1987) 480 U.S. 273, 280-286, 107 S. Ct. 1123, 94 L. Ed. 2d 307]* .

A person who has tested positive for Acquired Immunity Deficiency Syndrome (AIDS) is a disabled person under the Act [*Chalk v. U.S. Dist. Court Cent. Dist. of California (9th Cir. 1988) 840 F.2d 701, 705 n.6* ; *accord*, *Raytheon Co. v. Fair Employment & Housing Com. (1989) 212 Cal. App. 3d 1242, 1250, 1252, 261 Cal. Rptr. 197* (decided under Fair Employment and Housing Act)]. The Ninth Circuit Court of Appeals has noted that the overwhelming consensus of medical opinion is that there is no evidence that demonstrates any appreciable risk of transmitting the human immunodeficiency virus (HIV), the viral agent that causes AIDS, under circumstances likely to occur in the ordinary school setting. Therefore, the court held that a teacher with AIDS who was reassigned to nonclassroom duty amply demonstrated a strong possibility of success on the merits in proving that his rights under the Rehabilitation Act had been violated [*Chalk v. U.S. Dist. Court Cent. Dist. of California (9th Cir. 1988) 840 F.2d 701, 704-709* (reversing denial of preliminary injunction and ordering teacher returned to classroom pending trial)].

For discussion and forms relating to employment discrimination, see Ch. 115, *Civil Rights: Employment Discrimination* . For comprehensive discussion of equal employment opportunity laws, including prohibitions on discrimination against disabled individuals, see K. Wilcox, ed., California Employment Law, chs. 40-44 (Matthew Bender).

If a school district applies to the State Teachers' Retirement System (STRS) for a disability benefit for a teacher, and the STRS finds the teacher not to be disabled, the teacher must be reinstated to his or her former position [*Educ. Code § 44986.1*]. If the teacher applies and is denied, the finding is a prima facie statement of recovery, giving rise to the

district's duty either to reinstate him or her or to hold a competency or dismissal hearing [*Raven v. Oakland Unified School Dist. (1989) 213 Cal. App. 3d 1347, 1358, 262 Cal. Rptr. 354]* .

[g] Persistent Violation of School Laws or Rules

A permanent teacher may not be dismissed for violating school laws or rules unless the violations are persistent [*see Educ. Code § 44932(a)(7)*; Governing Bd. of the Oakdale Union School Dist. v. Seaman (1972) 28 Cal. App. 3d 77, 81-82, 104 Cal. Rptr. 64, 66]. Thus, a single violation of a school board regulation prohibiting absence without leave does not justify dismissal of a permanent teacher, at least if the violation is not accompanied by an attitude of continuous insubordination, even though the single violation results in an absence of several days [*Governing Bd. of the Oakdale Union School Dist. v. Seaman (1972) 28 Cal. App. 3d 77, 82-83, 104 Cal. Rptr. 64]* .

A permanent teacher may not be dismissed for refusal to obey an order that is invalid. Insubordination as a ground for dismissal may be rightfully predicated only on refusal to obey an order that a superior officer is entitled to give and to have obeyed [*see Pasadena Unified School Dist. v. Commission on Professional Competence (1977) 20 Cal. 3d 309, 314, 314 n.7, 142 Cal. Rptr. 439, 572 P.2d 53]* .

[h] Conviction of Crime

A permanent teacher may not be dismissed under *Educ. Code § 44932(a)(8)* for conviction of a felony or other crime unless the felony or other crime involves moral turpitude [*Bd. of Trustees v. Judge (1975) 50 Cal. App. 3d 920, 925-926, 123 Cal. Rptr. 830* (also holding that cultivation of marijuana is not offense involving moral turpitude as matter of law)]. Conviction of certain crimes, however, results in automatic revocation of certification documents, regardless of whether or not the particular offense involved moral turpitude [*see Educ. Code §§ 44424, 44425, 44435, 44436*; *see also* discussion in *§ 512.18[1]*].

[i] Communist or Subversive Affiliations

No teacher giving instruction in any school, or on any property belonging to any agencies included in the public school system, may advocate or teach communism with the intent to indoctrinate or to inculcate in the mind of any pupil a preference for communism [*Educ. Code § 51530*]. For purposes of *Educ. Code § 51530*, communism is a political theory that states that the presently existing government of the United States or of California should be changed by force, violence, or other unconstitutional means to a totalitarian dictatorship that is based on the principles of communism as expounded by Marx, Lenin, and Stalin [*Educ. Code § 51530*]. A violation of *Educ. Code § 51530* is grounds for dismissal of a permanent employee [*see Educ. Code § 44932(a)(9)*]. Furthermore, *Educ. Code § 44932(a)(11)* provides that knowing membership in the Communist Party is grounds for dismissal.

Counsel representing the school district should exercise caution in using these provisions as bases for instituting dismissal proceedings because they may be held unconstitutional in light of the opinions of the *United States Supreme Court in Keyishian v. Bd. of Regents (1967) 385 U.S. 589, 606-610, 87 S. Ct. 675, 17 L. Ed. 2d 629* and the *California Supreme Court in Vogel v. County of Los Angeles (1967) 68 Cal. 2d 18, 22-24, 64 Cal. Rptr. 409, 434 P.2d 961* , holding that public employment may not constitutionally be denied for mere membership in a subversive organization, absent a showing of intent by the member to further its unlawful aims. For a further discussion of the constitutional limits on discipline of public school teachers, see *§ 512.27*.

[3] Notice of Charges

On filing with the governing board of a school district of written charges, duly signed and verified by the person filing them, or on a written statement of charges formulated by the governing board, charging that there exists cause, as specified in *Educ. Code § 44932* or *44933*, for the dismissal or suspension of a permanent employee of the district, the board may, on majority vote, give notice to the employee of its intention to dismiss or suspend him or her within 30

days from the date of service of the notice unless the employee demands a hearing [*Educ. Code § 44934*]. Suspension proceedings may be initiated pursuant to *Educ. Code § 44934* only if the governing board has not adopted a collective bargaining agreement pursuant to *Gov. Code § 3543.2* [*Educ. Code § 44934*].

Any written statement of charges of unprofessional conduct or unsatisfactory performance must specify instances of behavior and the acts or omissions constituting the charge so that the teacher will be able to prepare his or her defense. If applicable, the statement must state the statutes and rules that the teacher is alleged to have violated, but it must also set forth the facts relevant to each occasion of alleged unprofessional conduct or incompetency.

The notice given pursuant to *Educ. Code § 44934* must not be given between May 15 and September 15 in any year. It must be in writing and served on the employee personally or by United States registered mail addressed to his or her last known address. A copy of the charges filed, containing the information required by *Gov. Code § 11503* (requiring specification of any statutes and rules allegedly violated and statement of charges setting forth alleged acts and omissions in ordinary and concise language), together with a copy of the provisions of *Educ. Code §§ 44930-44988*, must be attached to the notice [*Educ. Code § 44936*].

[4] Time Limit on Demand for Hearing; Governing Board's Response

If the employee does not demand a hearing by filing a written request for hearing with the governing board, he or she may be dismissed or suspended without pay for a specific period of time at the expiration of the 30-day period [*Educ. Code § 44937*]. When any employee who has been served with notice of the governing board's intention to dismiss or suspend him or her demands a hearing, the governing board has the option of either rescinding its action or scheduling a hearing on the matter [*Educ. Code § 44943*].

If the employee makes a timely demand for a hearing, the governing board cannot terminate the employee without conducting the hearing, even if the termination is based on the long-term suspension of the employee's teaching credential. For example, in a case in which a permanent, tenured teacher's credential had been suspended for 10 years due to allegations of sexual misconduct, and the employing school district had notified the teacher of its intention to terminate the teacher's employment, the district could not refuse the teacher's request for a pretermination hearing [*Shields v. Poway Unified School Dist. (1998) 63 Cal. App. 4th 955, 958-962, 74 Cal. Rptr. 2d 391* (permanent, tenured teacher has property interest in continued employment that is entitled to constitutional protection through procedural due process)].

Because the governing board of a school district is a "legislative body" of a "local agency" subject to the Ralph M. Brown Act [*Gov. Code §§ 54951, 54952*; *see Gov. Code § 54950 et seq.*], the employee will be entitled to demand an open hearing on the charges [*Bell v. Vista Unified Sch. Dist. (2000) 82 Cal. App. 4th 672, 682, 98 Cal. Rptr. 2d 263]* . The Brown Act's general requirement of open meetings is subject to a "personnel exception," under which the board may hold closed meetings to consider the appointment, employment, evaluation of performance, discipline, or dismissal of a public employee [*Gov. Code § 54957(b)*; *Kolter v. Commission on Prof'l Competence of L.A. Unified Sch. Dist. (2009) 170 Cal. App. 4th 1346, 1352, 88 Cal. Rptr. 3d 620* (personnel exception applies, and governing board may hold closed session, when governing board will consider or deliberate whether charges justify dismissal or disciplinary action, but will not conduct evidentiary hearing); *Duval v. Board of Trs. (2001) 93 Cal. App. 4th 902, 909-910, 113 Cal. Rptr. 2d 517* ("evaluation of performance" may include preliminary matters such as selection of criteria and establishment of process for evaluation, and post-evaluation action finding it satisfactory)]. However, the personnel exception is inapplicable when the board is conducting an evidentiary hearing on specific complaints or charges against an employee with potential disciplinary consequences [*Bell v. Vista Unified Sch. Dist. (2000) 82 Cal. App. 4th 672, 682-684, 98 Cal. Rptr. 2d 263]* .

[5] Immediate Suspension for Certain Charges

[a] Charges

If a permanent employee has been charged in writing with (1) immoral conduct, (2) conviction of a felony or of any crime involving moral turpitude, (3) incompetency due to mental disability, (4) willful refusal to perform regular assignments, as prescribed by reasonable rules and regulations of the employing school district, (5) violation of *Educ. Code § 51530, (6)* knowing membership in the Communist Party, or (7) violation of any of the provisions of *Educ. Code §§ 7001-7007*, the governing board may, if it deems the action necessary, immediately suspend the employee from his or her duties, and give the employee notice of the suspension and of its intention to dismiss him or her within 30 days after service of the notice, unless he or she demands a hearing [*Educ. Code § 44939*]. *Educ. Code § 44939* applies only to certificated or credentialed employees. Thus, an employee whose credential has lapsed must be suspended immediately without regard to the procedures in this section [*Stewart v. Acalanes Union High Sch. Dist. (1989) 209 Cal. App. 3d 1142, 1147-1148, 257 Cal. Rptr. 692* ; *see Educ. Code § 45034* (prohibiting drawing pay warrant to uncredentialed person employed in position requiring credential)].

Counsel should note that *Educ. Code §§ 7001-7007*, which are referred to in *Educ. Code § 44939*, were repealed by the Legislature in 1981 [*see* Stats. 1981, ch. 470, § 11].

[b] Time for Giving Notice of Suspension

The notice of suspension and intention to dismiss given pursuant to *Educ. Code § 44939* must be in writing and served on the employee personally or by United States registered mail addressed to the employee's last known address. A copy of the charges filed, containing the information required by *Gov. Code § 11503* (requiring specification of any statutes and rules allegedly violated and statement of charges setting forth alleged acts and omissions in ordinary and concise language), together with a copy of the provisions of *Educ. Code §§ 44930-44988* must be attached to the notice. If the employee does not demand a hearing with the 30-day period, he or she may be dismissed at the expiration of 30 days after service of the notice [*Educ. Code § 44941*].

Unlike notice given pursuant to *Educ. Code §§ 44934* and *44936* [*see § 512.28[3]*], notice given pursuant to *Educ. Code § 44939* may be given between May 15 and September 15, or at any other time during the school year [*compare Educ. Code § 44936 with Educ. Code § 44941*]. However, a school board may not dismiss a permanent teacher on grounds contained only in *Educ. Code § 44932* by giving notice after the May 15 deadline prescribed in *Educ. Code § 44936*, notwithstanding that the teacher is, at the same time, given notice of immediate suspension and intention to dismiss for grounds specified in *Educ. Code § 44939* [*Board of Educ. v. Commission on Professional Competence (1976) 61 Cal. App. 3d 664, 668, 132 Cal. Rptr. 516]* .

[c] Payment of Salary During Suspension

If the permanent employee is suspended on charges of knowing membership in the Communist Party or for any violation of *Educ. Code § 7001, 7002, 7003, 7006, 7007*, or *51530*, he or she may, within 10 days after service on him or her of notice of such suspension, file a written, verified denial of the charges. In such event, if the employee demands a hearing within the 30-day period, he or she will continue to be paid his or her regular salary during the period of the suspension until the entry of the decision of the Commission on Professional Competence, provided that the employee furnishes to the school district a suitable bond or other security acceptable to the governing board, as a guarantee that the employee will repay to the district the amount of salary paid to him or her during the suspension in case the decision of the Commission on Professional Competence is to dismiss the employee. If it is determined that the employee may not be dismissed, the school board must reimburse the employee for the cost of the bond [*Educ. Code § 44939*].

Counsel should note that *Educ. Code §§ 7001-7003, 7006*, and *7007*, which are referred to in the second paragraph of *Educ. Code § 44939*, were repealed by the Legislature in 1981 [*see* Stats. 1981, ch. 470, § 11].

[6] Hearing Procedure

[a] Time for Hearing

In the event a hearing is requested by the employee, the hearing must be commenced within 60 days from the date of the employee's demand for a hearing. If any continuance is granted pursuant to *Gov. Code § 11524*, the time limitation for commencement of the hearing must be extended for a period of time equal to such continuance. The extension may not, however, include any period of time attributable to an unlawful refusal by either party to allow the discovery provided for in *Educ. Code §§ 44944* [*Educ. Code § 44944(a)*; *see* discussion in *§ 512.28[6][d]*]. The parties may stipulate that the hearing will commence merely as a ceremonial formality within the 60-day limit, with no evidence being presented until the hearing reconvenes beyond the 60-day limit [*Wilmot v. Commission on Professional Competence (1998) 64 Cal. App. 4th 1130, 1139-1148, 75 Cal. Rptr. 2d 656* ("the parties may 'stipulate that the necessary ceremonial has been observed' and may thereby satisfy the 60-day requirement")].

[b] Conduct of Hearing Before Commission on Professional Competence

The hearing must be initiated and conducted, and a decision must be made, in accordance with *Gov. Code § 11500-11528*; the Commission on Professional Competence has all the power granted to an agency under those sections [*Educ. Code § 44944(a)*; *see* discussion in *§ 512.28[6][e]*]. For a discussion and forms relating to administrative hearings conducted pursuant to *Gov. Code §§ 11500-11528*, see Ch. 473, *Public Agency Adjudication* , through Ch. 473H, *Alternative Procedures for Agency Decisions* .

[c] Right to Counsel

The governing board and the employee have the right to be represented by counsel at the hearing [*Educ. Code § 44944(c)*].

[d] Discovery Rights

The right of discovery of the parties in a hearing conducted pursuant to *Educ. Code § 44944* is not limited to matters set forth in *Gov. Code § 11507.6* (scope of discovery in administrative proceedings), but includes the rights and duties of any party to a civil action brought in a superior court. Notwithstanding any provision to the contrary, and except for the taking of oral depositions, no discovery may occur later than 30 calendar days after the employee is served with a copy of the accusation pursuant to *Gov. Code § 11505*. In all cases, discovery must be completed prior to seven calendar days before the date on which the hearing commences [*Educ. Code § 44944(a)*].

If the right of discovery is denied by either the employee or the governing board, all the remedies in *Code Civ. Proc. § 2023.010 et seq.* are available to the party seeking discovery [*Educ. Code § 44944(a)*]. The court of proper jurisdiction to entertain a motion to compel discovery is the superior court of the county in which the hearing will be held [*Educ. Code § 44944(a)*].

The time periods in *Educ. Code § 44944*, *Gov. Code § 11500 et seq.*, and *Code Civ. Proc. § 2016.010 et seq.* must not be applied so as to deny discovery in a hearing conducted pursuant to *Educ. Code § 44944*. The superior court of the county in which the hearing will be held may, on motion of the party seeking discovery, suspend the hearing so as to comply with this requirement [*Educ. Code § 44944(a)*].

For a discussion and forms relating to discovery in civil actions, see Chs. 190- 200, *Discovery* .

[e] Commission on Professional Competence

The hearing provided for in *Educ. Code § 44944* must be conducted by a Commission on Professional Competence

(hereinafter referred to as the "CPC"). One member of the CPC is selected by the employee, one member is selected by the governing board, and one member must be an administrative law judge of the Office of Administrative Hearings who must be the chairman and a voting member of the CPC. The administrative law judge is responsible for assuring that the legal rights of the parties are protected at the hearing [*Educ. Code § 44944(b)*].

If either the governing board or the employee fails for any reason to select a CPC member at least seven calendar days prior to the date of the hearing, the failure constitutes a waiver of the right to selection, and the county board of education or its specific designee must immediately make the selection. If, however, the county board of education is also the governing board of the school district or has been granted the powers of a governing board by statute, the selection must be made by the Superintendent of Public Instruction who must be reimbursed by the school district for all costs incident to the selection [*Educ. Code § 44944(b)*].

The member selected by the governing board and the member selected by the employee must not be related to the employee and must not be employees of the district initiating the dismissal. Each member must hold a currently valid credential and have at least five years experience within the past ten years in the employee's discipline [*Educ. Code § 44944(b)*].

[f] Place of Hearing

The hearing provided for in *Educ. Code § 44944* must be conducted in a place selected by agreement among the members of the CPC. In the absence of such agreement, the place must be selected by the administrative law judge [*Educ. Code § 44944(f)*].

[g] Evidence Admissible

No witness may be permitted to testify at the hearing except on oath or affirmation. No testimony may be given or evidence introduced relating to matters that occurred more than four years prior to the date of the filing of the notice of intention to dismiss. Evidence of records regularly kept by the governing board may be introduced, but no decision relating to the dismissal or suspension of any employee may be made based on charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice [*Educ. Code § 44944(a)*]. This four-year limit is subject to equitable exceptions, however. For example, an employee may be equitably estopped from asserting the four-year limit if the employee's own conduct induced the school district or governing board to delay the filing of the notice of intent to dismiss or suspend the employee [*Atwater Elementary Sch. Dist. v. California Dep't of Gen. Servs. (2007) 41 Cal. 4th 227, 235-238, 59 Cal. Rptr. 3d 233, 158 P.3d 794]* .

Evidence of criminal misconduct seized by law enforcement officers in violation of the constitutional prohibition against unreasonable searches and seizure is admissible at the hearing [*see Governing Bd. v. Metcalf (1974) 36 Cal. App. 3d 546, 551, 111 Cal. Rptr. 724]* .

The employee is entitled to present any defense to termination, including constitutional and civil rights defenses, at the hearing [*Takahashi v. Board of Education (1988) 202 Cal. App. 3d 1464, 1484-1485, 249 Cal. Rptr. 578* ; *see Bekiaris v. Board of Education (1972) 6 Cal. 3d 575, 592, 100 Cal. Rptr. 16, 493 P.2d 480* ; *see also Gov. Code § 11506*]. Furthermore, if the employee fails to present all possible defenses, he or she may be precluded from doing so in a later civil action by principles of res judicata and collateral estoppel [*see Takahashi v. Board of Education (1988) 202 Cal. App. 3d 1464, 1481-1485, 249 Cal. Rptr. 578]* . For further discussion, see *§ 512.28[8]*.

[h] Decision of Commission on Professional Competence

The decision of the CPC must be made by a majority vote and the CPC must prepare a written decision containing findings of fact, determinations of issues, and a disposition, which must be, solely, (1) that the employee should be

dismissed, (2) that the employee should be suspended for a specific period of time without pay, or (3) that the employee should not be dismissed or suspended [*Educ. Code § 44944(c)*]. The CPC may base its decision on the preponderance-of-the-evidence standard of proof [*Gardner v. Commission on Professional Competence (1985) 164 Cal. App. 3d 1035, 1039-1040, 210 Cal. Rptr. 795]* .

The CPC has no power to dispose of the charge of dismissal by imposing probation, or other alternative sanctions. The imposition of suspension pursuant to (2) above is available only in a suspension proceeding authorized pursuant to *Educ. Code § 44932(b)* or *44933* [*Educ. Code § 44944(c)*]. However, if the district seeks only dismissal and not suspension, the CPC has the discretion to find that cause for discipline exists without approving dismissal if it is not persuaded that the offense is serious enough to warrant dismissal. The school district may avoid the all-or-nothing result by seeking suspension instead of or in addition to dismissal [*Fontana Unified School Dist. v. Burman (1988) 45 Cal. 3d 208, 220, 221-222, 246 Cal. Rptr. 733, 753 P.2d 689]* .

The decision of the CPC that the employee should not be dismissed or suspended may not be based on nonsubstantive procedural errors committed by the school district or governing board unless the errors are prejudicial. The decision of the CPC is deemed to be the final decision of the governing board [*Educ. Code § 44944(c)*].

[i] Expenses of Hearing Before Commission on Professional Competence

Educ. Code § 44944(e) provides that if the CPC determines that the employee should not be dismissed or suspended, the governing board must pay the expenses of the hearing, including the cost of the administrative law judge, any compensation of CPC members for service during summer recess or vacation periods [*see Educ. Code § 44944(d)(2)*] the reasonable expenses (as determined by the administrative law judge) of the CPC member selected by the governing board and the member selected by the employee (including, but not limited to, payments or obligations incurred for travel, meals, and lodging), the cost of any substitute members, and reasonable attorney fees incurred by the employee.

The Supreme Court has held a cost-sharing provision of *Educ. Code § 44944(e)* unconstitutional on its face. That provision required a teacher who requested a hearing on his or her threatened suspension or dismissal, but who did not ultimately prevail (either at the administrative level or after judicial review), to pay half the cost of the administrative law judge. The Court explained that, since the provision's application was not limited to frivolous hearing requests, it impermissibly chilled teachers' constitutional right to a pretermination opportunity to be heard. Any legitimate interest the state may have in conserving administrative resources or discouraging hearings that result in an administrative or judicial decision against a teacher is outweighed by the teacher's strong interest in presenting his or her side of the case and in invoking the discretion of an adjudicator [*California Teachers Assn. v. State (1999) 20 Cal. 4th 327, 345-357, 84 Cal. Rptr. 2d 425, 975 P.2d 622]* .

[7] Judicial Review of Commission on Professional Competence Decision

The decision of the CPC may, on petition of either the governing board or the employee, be reviewed by a court of competent jurisdiction in the same manner as a decision made by a hearing officer under *Gov. Code §§ 11500-11528*, that is, by petition for a writ of mandate [*see Gov. Code § 11523*; *Code Civ. Proc. § 1094.5*; *see also* Ch. 474, *Availability of Judicial Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* . The court, on review, must exercise its independent judgment on the evidence. The proceeding must be set for hearing at the earliest possible date and must take precedence over all other cases, except older matters of the same character and matters to which special precedence is given by law [*Educ. Code § 44945*].

For a form of petition for writ of mandate to review the decision of a CPC dismissing a permanent employee, *see § 512.161*. For examples of allegations to be included in such a petition, *see §§ 512.162 -512.165*

[8] Effect of Judgment in Mandate Proceeding on Future Civil Action

A terminated employee must succeed in having the administrative determination set aside on mandate as a condition precedent to bringing a tort action based on the termination [*City of Fresno v. Superior Court (1987) 188 Cal. App. 3d 1484, 1488-1493, 234 Cal. Rptr. 136* ; *see Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 469, 131 Cal. Rptr. 90, 551 P.2d 410* ; see also *§ 512.28[7]*]. However, a contractual right to employment is a single primary right, and a wrongful termination of that employment gives rise to a single cause of action [*Takahashi v. Board of Education (1988) 202 Cal. App. 3d 1464, 1474-1475, 249 Cal. Rptr. 578* ; *see Takahashi v. Bd. of Trustees of Livingston (9th Cir. 1986) 783 F.2d 848, 851]* . Therefore, principles of res judicata and collateral estoppel prohibit the raising of any defense to termination for the first time in a subsequent civil action. All legal theories on which it is alleged that the termination was unlawful must be asserted at the administrative hearing and on review by mandate, including violations of procedures set forth in the Education Code, civil rights violations, other constitutional violations, and contract and tort theories [*Takahashi v. Board of Education (1988) 202 Cal. App. 3d 1464, 1481-1485, 249 Cal. Rptr. 578]* .

The interaction of these rules essentially means that the question of liability for wrongful termination under any theory of law is to be decided pursuant to a petition for a writ of mandate [*see Code Civ. Proc. § 1090* (disputed issues of fact may be tried by jury)]. If on mandate it is determined that the termination was contrary to law, the employee may then bring a civil action for damages [*Takahashi v. Board of Education (1988) 202 Cal. App. 3d 1464, 1476-1477, 249 Cal. Rptr. 578* ; *City of Fresno v. Superior Court (1987) 188 Cal. App. 3d 1484, 1489-1490, 234 Cal. Rptr. 136]* . The statute of limitations for this action is tolled during the period that the employee-plaintiff is exhausting administrative remedies by seeking mandate [*see Campbell v. Graham-Armstrong (1973) 9 Cal. 3d 482, 490, 107 Cal. Rptr. 777, 509 P.2d 689]* . Presumably, the school district would be precluded by principles of res judicata and collateral estoppel from relitigating the lawfulness of the termination in the second action.

Other conditions precedent to the bringing of a civil action for damages should be satisfied in a timely manner when the employee first becomes aware of the potential right of action. For example, a claim against the school district should be filed within the applicable time periods as required by the Government Claims Act [*see Gov. Code § 911.2*; *see also City of Stockton v. Superior Court (Dec. 3, 2007) 42 Cal. 4th 730, 2007 Cal. LEXIS 13743, at *19-*20* ("Henceforth, we will refer to [*Gov. Code § 810 et seq.*] as the Government Claims Act," rather than "Tort Claims Act," because it applies to contract claims as well as tort claims)]. Also, an administrative complaint alleging civil rights violations must be filed with the Department of Fair Employment and Housing within the applicable time period as required by the Fair Employment and Housing Act [*Takahashi v. Board of Education (1988) 202 Cal. App. 3d 1464, 1478-1481, 249 Cal. Rptr. 578* ; *see Gov. Code § 12960*].

For further discussion of these matters, see Ch. 474, *Availability of Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* , Ch. 115, *Civil Rights: Employment Discrimination* , Ch. 249, *Employment Law: Termination and Discipline* , Ch. 345, *Limitation of Actions* , Ch. 464, *Public Entities and Officers: California Tort Claims Act* , and Ch. 491, *Res Judicata* .

[9] Reinstatement and Back Salary

If the employee has been suspended pending the hearing in the dismissal proceeding, he or she must be reinstated within five days after a decision in his or her favor and must be paid his or her full salary by the governing board for the period of suspension [*Educ. Code § 44946*], including retirement benefits [*Mass v. Board of Education (1964) 61 Cal. 2d 612, 623, 39 Cal. Rptr. 739, 394 P.2d 579* ; *see Raven v. Oakland Unified School Dist. (1989) 213 Cal. App. 3d 1347, 1367, 262 Cal. Rptr. 354* (in case of refusal to reinstate after disability leave, back pay awarded from date of formal denial of request for reinstatement)]. In addition, the prevailing employee is entitled to prejudgment interest on each salary payment from the date of accrual to the entry of judgment [*Mass v. Board of Educ. (1964) 61 Cal. 2d 612, 624, 39 Cal. Rptr. 739, 394 P.2d 579* ; *see Civ. Code § 3287(a)*].

The measure of recovery of a wrongfully discharged employee is the amount of salary that he or she would have earned, plus other benefits, less the amount that the employer proves the employee has earned or might have earned from other employment [*Bevli v. Brisco (1989) 211 Cal. App. 3d 986, 994, 260 Cal. Rptr. 57* ; *see* *Mass v. Board of Educ. (1964) 61 Cal. 2d 612, 627-628, 39 Cal. Rptr. 739, 394 P.2d 579]* . The governing board is not entitled to deduct any amounts from backpay owed for periods during which the teacher was unable to return to work; however, workers' compensation benefits received because of an inability to return to the classroom setting as a teacher may be taken into account. Earnings from night or weekend work that are not inconsistent with school employment are not to be set off against any back pay award [*Bevli v. Brisco (1989) 211 Cal. App. 3d 986, 994, 260 Cal. Rptr. 57* ; *Raven v. Oakland Unified School Dist. (1989) 213 Cal. App. 3d 1347, 1367-1368, 262 Cal. Rptr. 354]* .

If a permanent employee is suspended without pay pursuant to *Educ. Code § 44939* [*see* discussion in *§ 512.28[5]*] and later cleared of the charges that were the basis of the suspension, the employee is entitled to recover back salary for the period of the suspension, notwithstanding that he or she is ultimately dismissed on other grounds [*Von Durjais v. Bd. of Trustees (1978) 83 Cal. App. 3d 681, 686-687, 148 Cal. Rptr. 192* ; *Board of Educ. v. Commission on Professional Competence (1976) 61 Cal. App. 3d 664, 669-670, 132 Cal. Rptr. 516]* .

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45-512 California Forms of Pleading and Practice--Annotated § 512.29

§ 512.29 Dismissal or Suspension of Probationary Employees in Large School District

[1] Grounds

First and second year probationary employees may be dismissed during the school year for unsatisfactory performance determined pursuant to *Educ. Code §§ 44660-44665* (performance evaluations), or for cause pursuant to *Educ. Code § 44932* [*Educ. Code § 44948.3(a)*]. The governing board may suspend a probationary employee for a specified period of time without pay as an alternative to dismissal pursuant to *Educ. Code § 44948.3* [*Educ. Code § 44948.3(b)*].

Educ. Code § 44948.3 applies only to dismissal or suspension during the school year. It does not provide any rights with regard to reemployment for the succeeding school year [*Grimsley v. Board of Trustees (1987) 189 Cal. App. 3d 1440, 1446, 235 Cal. Rptr. 85* ; *see § 512.21*].

Educ. Code § 44948.3 applies only to employees whose probationary period commenced during the 1983-1984 fiscal year or any fiscal year thereafter, and does not apply to probationary employees in a school district having an average daily attendance of less than 250 pupils [*Educ. Code § 44948.3(c)*; *but see Educ. Code § 44948.2* (small school district may elect to dismiss under *Educ. Code § 44948.3*)]. For discussion of the procedures applicable to dismissal of probationary employees in districts with less than 250 pupils, see *§ 512.30*.

[2] Notice Required

The superintendent of the school district or the superintendent's designee must give the employee written notice of dismissal 30 days prior to the dismissal, and, in the case of second-year probationary employees, the notice must be given not later than March 15. The notice must include a statement of the reasons for the dismissal and notice of the opportunity to appeal. If the dismissal is for unsatisfactory performance, a copy of the evaluation conducted pursuant to *Educ. Code § 44664* must accompany the written notice [*Educ. Code § 44948.3(a)(1)*; *see Achene v. Pierce Joint Unified Sch. Dist. (2009) 176 Cal. App. 4th 757, 769-771, 97 Cal. Rptr. 3d 899* (classroom observation report stating that employee needed to "refine" her performance, and lacking any indication that employee's performance was unsatisfactory or that she would be dismissed if she did not make the recommended refinements, did not constitute sufficient notice of unsatisfactory performance under *Educ. Code § 44664(b)*)].

If the cause for dismissal is unprofessional conduct or unsatisfactory performance [*see Educ. Code §§ 44932(a)(1), (4), 44938(c)*], the school district must also have sent the employee a previous written notice specifying the nature of the unprofessional conduct or unsatisfactory performance, with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. This previous notice must include a copy of the evaluation conducted pursuant to *Educ. Code § 44664* [*Educ. Code § 44938(a),(b)*]. If the cause for dismissal is unprofessional conduct, this previous notice must have been given at least 45 calendar days before the notice of dismissal described in the preceding paragraph [*Educ. Code § 44938(a)*]. If the cause is unsatisfactory performance, this previous notice ordinarily must have been given at least 90 calendar days before the notice of dismissal described in the preceding paragraph [*Educ. Code § 44938(b)*; *see Achene v. Pierce Joint Unified Sch. Dist. (2009) 176 Cal. App. 4th 757, 766-768, 97 Cal. Rptr. 3d 899* (because *Educ. Code § 44938* specifies procedure for dismissal for cause under *Educ. Code § 44932*, it also applies to dismissal for unsatisfactory performance of probationary teacher under *Educ. Code § 44948.3(a)*, which incorporates procedures applicable to dismissal for cause under *Educ. Code § 44932*)].

[3] Hearing Procedure

Within 15 days of receipt of the notice of dismissal, the employee may submit a written request for a hearing to the governing board. The failure of an employee to request a hearing this time period constitutes a waiver of the right to a hearing. The governing board may establish procedures for the appointment of an administrative law judge to conduct the hearing and submit a recommended decision to the board [*Educ. Code § 44948.3(a)(2)*].

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§ 512.30 Dismissal or Suspension of Probationary Employees in Small School District

[1] During School Year

Probationary employees who are employed in a school district having an average daily attendance of less than 250 pupils (hereinafter referred to as a "small school district") may be dismissed during the school year for cause only, as in the case of permanent employees [*Educ. Code § 44948(a)*]. *Educ. Code § 44948* has been interpreted by the courts as giving probationary employees dismissed during the school year the same procedural protections applicable to the dismissal of permanent employees [*Pennel v. Pond Union School Dist. (1973) 29 Cal. App. 3d 832, 839, 105 Cal. Rptr. 817* ; *see* discussion in *§ 512.28*]. A probationary employee is dismissed during the school year, within the meaning of *Educ. Code § 44948*, if he or she is prohibited from meeting with his or her classes or performing any other professional services for the rest of the school year, notwithstanding that the school district pays his or her salary for the rest of the year [*Lunderville v. Emery Unified School Dist. (1968) 262 Cal. App. 2d 459, 462-464, 68 Cal. Rptr. 768]* .

The governing board of a small school district may elect to dismiss probationary employees during the school year for cause under *Educ. Code § 44948.3* (otherwise applicable only to larger school districts; *see § 512.29*). Once a district has made such an election, it may only dismiss probationary certificated employees during the school year under *Educ. Code § 44948.2* [*Educ. Code § 44948.2*].

A probationary employee in a small school district may also be dismissed or suspended on grounds of unprofessional conduct consisting of acts or omissions other than those specified in *Educ. Code § 44932*, but any such charge must specify instances of behavior deemed to constitute unprofessional conduct [*see Educ. Code § 44933*]. Such an employee may also be suspended without pay by the governing board of a school district for a specific period of time on grounds of unprofessional conduct pursuant to the procedures specified in Educ. Code §§ 44933-44937, 44943, 44944. This authorization does not, however, apply to any school district that has adopted a collective bargaining agreement pursuant to *Gov. Code § 3543.2(b)* [*Educ. Code § 44932(b)*].

[2] At End of School Year for Reasons Other Than Those Specified in Educ. Code § 44955

[a] Initial Notice

A probationary employee who is employed by a small school district must be notified in writing by the superintendent of the school district or his or her designee (or the clerk or secretary of the governing board if the district has no superintendent) if it has been recommended that the employee not be reemployed for the ensuing school year for reasons other than those specified in *Educ. Code § 44955* (pertaining to reduction of number of permanent and probationary employees for fiscal reasons). The notice must state the reasons for the recommendation that the employee not be reemployed. It must be given to both the employee and the governing board no later than March 15, and before final notice by the governing board that the employee's services will not be required for the following year. If, however, the employee has been employed by the district for less than 45 days on March 15, the giving of such notice may be deferred until the 45th day of employment, and all other time periods and deadline dates prescribed by *Educ. Code § 44948.5* must be coextensively extended [*Educ. Code § 44948.5(b)*].

Until the employee has requested a hearing as provided in *Educ. Code § 44948.5(c)* [*see* discussion in *§ 512.33[3][b]*] or has waived his or her right to a hearing, the notice and the reasons therefor are confidential and must not be divulged by any person except as necessary in the performance of duties. Violation of the requirement of confidentiality does not, however, of itself affect the validity of any hearing conducted pursuant to *Educ. Code § 44948.5* [*Educ. Code § 44948.5(b)*].

[b] Grounds for Refusal to Rehire

The governing board's determination not to reemploy a probationary employee pursuant to *Educ. Code § 44948.5* for the ensuing school year must be for cause only. The determination of the governing board as to the sufficiency of the cause is conclusive, but the cause must relate solely to the welfare of the schools and the pupils thereof [*Educ. Code § 44948.5(e)*]. The question of whether or not a particular cause relates solely to the welfare of the school and its pupils is a question of law for the reviewing court, not the school board, to decide [*Lindros v. Governing Bd. of The Torrance Unified School Dist. (1973) 9 Cal. 3d 524, 533-534, 108 Cal. Rptr. 185, 510 P.2d 361 , cert. denied, 414 U.S. 1112, 94 S. Ct. 842, 38 L. Ed. 2d 739* ; *Bekiaris v. Board of Education (1972) 6 Cal. 3d 575, 587, 589, 100 Cal. Rptr. 16, 493 P.2d 480* (decided under former *Educ. Code § 44949(d)*)].

Age and obesity, by themselves, have been held not to constitute causes that relate solely to the welfare of the school and its pupils justifying dismissal of a probationary employee [*see Blodgett v. Board of Trustees (1971) 20 Cal. App. 3d 183, 190-193, 97 Cal. Rptr. 406* ; *Thornton v. Board of Trustees (1968) 262 Cal. App. 2d 761, 765-766, 68 Cal. Rptr. 842]* . By contrast, failure to satisfactorily perform classroom duties, and lack of self-restraint and tact in dealing with coworkers, pupils, and parents have been held to be matters that clearly relate to the welfare of the school and its pupils [*see Turner v. Board of Trustees (1976) 16 Cal. 3d 818, 827-828, 129 Cal. Rptr. 443, 548 P.2d 1115* ; *Griggs v. Board of Trustees (1964) 61 Cal. 2d 93, 97, 37 Cal. Rptr. 194, 389 P.2d 722]* . The failure to pass a competency examination in the field in which the probationary teacher was employed, when passing the examination was a condition of the employment contract, has also been held to be sufficient cause for not reemploying probationary teachers under former *Educ. Code § 44949(d)* (*now see Educ. Code § 44948.5(e)*) [*Alba v. Los Angeles Unified School Dist. (1983) 140 Cal. App. 3d 997, 1009, 189 Cal. Rptr. 897]* .

[c] Request for Hearing

The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing school year. Failure to do so constitutes a waiver of the right to a hearing [*Educ. Code § 44948.5(c)*]. The hearing request procedures of *Educ. Code § 44948.5(c)* are substantially the same as those provided in *Educ. Code § 44949(b)* for refusal to rehire for reasons specified in *Educ. Code § 44955* [*see* discussion in § 512.3[3][b]].

[d] Conduct of Hearing and Decision by Administrative Law Judge and Governing Board

The provisions of *Educ. Code § 44948.5(d)* governing the conduct of the hearing and the decision by the administrative

law judge and governing board are the same as those provided in *Educ. Code § 44949(c)* [*see Educ. Code § 44948.5(d)*; *see also* discussion in *§§ 512.33[3][c]* and *[d]*].

[e] Expenses of Hearing

All expenses of the hearing, including the cost of the administrative law judge, must be paid by the governing board from the district funds [*Educ. Code § 44948.5(d)*].

[f] Final Notice of Dismissal

The governing board must give final notice to the probationary employee that his or her services will not be required for the ensuing year no later than May 15 [*Educ. Code § 44948.5(f)*]. If the board fails to do so, the employee must be deemed reemployed for the ensuing school year [*Educ. Code § 44948.5(i)*; *see Rutherford v. Bd. of Trustees (1974) 37 Cal. App. 3d 775, 779-781, 112 Cal. Rptr. 560* ; *Stewart v. San Mateo Junior College Dist. (1974) 37 Cal. App. 3d 345, 347-348, 112 Cal. Rptr. 272]* . The purpose of the May 15 deadline is to give a teacher whose employment will be ended at the end of the school year timely notice of the fact so that he or she will have a fair opportunity to seek other employment in his or her profession during the coming school year [*Stewart v. San Mateo Junior College Dist. (1974) 37 Cal. App. 3d 345, 348, 112 Cal. Rptr. 272* (decided under former *Educ. Code § 44949(c)*]. If, however, the school board notifies the employee of its decision not to reemploy him or her prior to May 15, but the decision is reversed because of a legal error in the hearing proceeding, the employee's remedy is a new hearing rather than automatic reinstatement, notwithstanding that a new hearing would make final notice of the board's decision before May 15 impossible [*see Lucas v. Board of Education (1975) 13 Cal. 3d 674, 681-683, 119 Cal. Rptr. 462, 532 P.2d 110]* .

If the governing board notifies a probationary employee that his or her services will not be required for the ensuing year, the board must, within 10 days after delivery to it of the employee's written request, provide the employee with a statement of its reasons for not reemploying him or her for the ensuing school year [*Educ. Code § 44948.5(g)*]. Any notice or request is deemed sufficient if it is delivered in person to the employee to whom it is directed or if it is deposited in the United States registered mail, postage prepaid, and addressed to the last known address of the employee [*Educ. Code § 44948.5(h)*].

[g] Effect of Continuance

If, after a request for hearing made pursuant to *Educ. Code § 44948.5(c)*, any continuance is granted pursuant to *Gov. Code § 11524*, the dates prescribed in *Educ. Code § 44948.5(d)* (deadline for submission of proposed decision), (e) (effective date of final decision), (f), and (i) (deadline for giving final notice of decision not to reemploy) that occur on or after the date of the granting of the continuance are extended for a period of time equal to the length of the continuance [*Educ. Code § 44948.5(j)*]. Thus, for example, if the employee procures a continuance for discovery purposes, the deadline for giving the employee final notice that he or she will not be rehired is extended beyond May 15 for a period equal to the length of the continuance [*see Grzeskowiak v. Bd. of Trustees (1976) 62 Cal. App. 3d 131, 135-136, 132 Cal. Rptr. 918]* .

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§ 512.31 Judicial Review of Governing Board Decisions Regarding Dismissal of Probationary Employees

The decision of a governing board not to reemploy a probationary employee is reviewable in a mandate proceeding [*see Blodgett v. Board of Trustees (1971) 20 Cal. App. 3d 183, 190, 97 Cal. Rptr. 406* ; *Thornton v. Board of Trustees (1968) 262 Cal. App. 2d 761, 763, 68 Cal. Rptr. 842]* . However, in *Board of Education v. Round Valley Teachers Assn. (1996) 13 Cal. 4th 269, 52 Cal. Rptr. 2d 115, 914 P.2d 193* , the California Supreme Court distinguished between a "dismissal for cause" pursuant to *Educ. Code §§ 44932 et seq., 44941 et seq.*, and *44948 et seq.*, and a "decision against reelection" pursuant to *Educ. Code § 44929.21(b)*. Accordingly, Section 44929.21(b) permits a school district to decline reelection of a probationary teacher at the end of the second year without showing grounds for cause or otherwise allowing any procedural redress. Furthermore, Section 44929.21(b) grants the district exclusive discretion over reelection and preempts any collective bargaining agreement purporting to provide greater due process rights to probationary teachers [*Board of Education v. Round Valley Teachers Assn. (1996) 13 Cal. 4th 269, 284-287, 52 Cal. Rptr. 2d 115, 914 P.2d 193* ; *see Sunnyvale Unified Sch. Dist. v. Jacobs (2009) 171 Cal. App. 4th 168, 179-183, 89 Cal. Rptr. 3d 546* (school district's allegedly retaliatory decision not to reelect probationary teacher may not be made subject to collectively bargained arbitration procedures)].

For a discussion and forms relating to judicial review of administrative hearings by writ of mandate, see Ch. 474, *Availability of Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* . For a form of petition for writ of mandate to review the decision of a governing board not to reemploy a probationary employee, see *§ 512.166*.

Unlike permanent teachers, probationary teachers have no vested right to be rehired for the succeeding school year. Thus, in a mandate proceeding to review the decision of a school board not to rehire a probationary teacher, the reviewing court must accept the school board's findings of fact if supported by substantial evidence and may not exercise its independent judgment on the evidence [*Turner v. Board of Trustees (1976) 16 Cal. 3d 818, 824-827, 129 Cal. Rptr. 443, 548 P.2d 1115* (disapproving *Young v. Governing Bd. (1974) 40 Cal. App. 3d 769, 115 Cal. Rptr. 456* , to the extent it is inconsistent)].

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45-512 California Forms of Pleading and Practice--Annotated § 512.32

§ 512.32 Dismissal of Temporary and Substitute Employees

The governing board of a school district may dismiss substitute employees at any time at the pleasure of the board [*Educ. Code § 44953*]. The board may release temporary certificated employees at its pleasure until the employee has served 75 percent of the number of days during which the regular schools of the district are maintained [*Educ. Code § 44954(a)*]. After that time, the employee may be dismissed only on notification before the end of the school year of the district's decision not to reelect the employee for the next succeeding year [*Educ. Code § 44954(b)*; *but see Educ. Code § 44920* (certain employees as permitted to be classified as temporary for an entire school year or semester) and discussion in *§ 512.23*]. If the notice is not given, the employee must be reemployed for the following school year to fill any vacant positions in the district [*Educ. Code § 44918(b)*; *see § 512.21[2]*].

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§ 512.33 Reduction of Number of Employees

[1] When Authorized

The governing board of a school district may, if it deems such action necessary, reduce the number of permanent and probationary employees whenever any of the following apply [*Educ. Code § 44955(a)*]:

(1) The average daily attendance in all of the schools of the district for the first six months in which school is in session declines below the corresponding period of either of the previous two school years;

(2) A particular kind of service is to be reduced or discontinued not later than the beginning of the following school year;

(3) The governing board determines that attendance in the district will decline in the following year as a result of the termination of an interdistrict tuition agreement as defined in *Educ. Code § 46304*; or

(4) The amendment of state law requires the modification of curriculum.

In any of these situations, the governing board may terminate the services of not more than a corresponding percentage of the certificated employees, permanent as well as probationary, at the close of the school year [*Educ. Code § 44955(b)*]. In determining the number of certificated employees who may be terminated pursuant to *Educ. Code § 44955(b)*, the board must consider attrition in the form of retirements, resignations, and deaths occurring within the computation period, but not the number of employees who are merely on leaves of absence for the subsequent school year [*Campbell Elementary Teachers Assn. v. Abbott (1978) 76 Cal. App. 3d 796, 809-810, 143 Cal. Rptr. 281]* .

In addition, *Educ. Code § 44955.5* permits a governing board to terminate the services of any permanent or probationary certificated employees of the district (including employees holding a position that requires an administrative or supervisory credential) if, during the time period between five days after enactment of the Budget Act and August 15 of the fiscal year to which the Budget Act applies, the governing board determines that its total revenue limit per unit of average daily attendance for the fiscal year of that Budget Act has not increased by at least 2 percent

and if, in the opinion of the governing board, it is therefore necessary to decrease the number of permanent employees in the district. In that case, the termination must follow the procedures in *Educ. Code §§ 44951* and *44955* [*see §§ 512.20[3][c]* and *512.33* et seq.]. However, notwithstanding those sections, the terminations will follow a schedule of notice and hearing adopted by the governing board [*Educ. Code § 44955.5(a)*; *see Educ. Code § 44955.5(b)* (statute inoperative from July 1, 2002, through July 1, 2003)].

[2] Seniority Rights

Except as otherwise provided by statute, a permanent employee's services may not be terminated under the provisions of *Educ. Code § 44955(b)* while any probationary employee, or any other employee with less seniority, is retained to render a service that the permanent employee is certificated and competent to render [*Educ. Code § 44955(b)*]. However, a full-time employee may not be displaced by a part-time employee with greater seniority [*Hildebrandt v. St. Helena Unified Sch. Dist. (2009) 172 Cal. App. 4th 334, 339-346, 90 Cal. Rptr. 3d 855]* .

As between employees who first rendered paid service to the district on the same date, the governing board must determine the order of termination solely on the basis of the needs of the district and its students. On request of any employee whose order of termination is so determined, the governing board must furnish a written statement of the specific criteria used in determining the order of termination and the application of the criteria in ranking each employee relative to other employees in the group no later than five days before the commencement of the hearing held pursuant to *Educ. Code § 44949*. The requirement that the board provide such a written statement must not be interpreted to give the employee any other legal right or interest that would not exist without such a requirement [*Educ. Code § 44955(b)*].

The governing board shall make assignments and reassignments in such a manner that the employees shall be retained to render any service that their seniority and qualifications entitle them to render. However, prior to assigning or reassigning any certificated employee to teach a subject that he or she has not previously taught and for which he or she does not have a teaching credential or that is not within the employee's major area of postsecondary study or the equivalent thereof, the governing board shall require the employee to pass a subject matter competency test in the appropriate subject [*Educ. Code § 44955(c)*].

Notwithstanding *Educ. Code § 44955(b)*, a school district may deviate from terminating a certificated employee in order of seniority for either of the following reasons [*Educ. Code § 44955(d)*]:

(1) The district demonstrates a specific need for personnel to teach a specific course or course of study or to provide services authorized by a services credential with a specialization in either pupil personnel services or health for a school nurse, and the certificated employee has special training and experience necessary to teach that course or course of study or to provide those services that others with more seniority do not possess [*see Bledsoe v. Biggs Unified Sch. Dist. (2008) 170 Cal. App. 4th 127, 138, 88 Cal. Rptr. 3d 13* (district's demonstration of its specific "needs" is not required to be evidenced by formal, written policies, course or job descriptions, or program requirements); or

(2) For purposes of maintaining or achieving compliance with constitutional requirements related to equal protection of the laws.

[3] Procedure

[a] Initial Notice

An employee must be notified in writing by the superintendent of the school district or his or her designee (or the clerk or secretary of the governing board if the district has no superintendent) if it has been recommended that the employee not be reemployed for the ensuing school year for the reasons specified in *Educ. Code § 44955*. The notice must state the reasons for the recommendation that the employee not be reemployed. It must be given to both the employee and the

governing board no later than March 15 and before final notice by the governing board that the employee's services will not be required for the following year [*Educ. Code § 44949(a)*].

Until the employee has requested a hearing as provided in *Educ. Code § 44949(b)* [*see* discussion in *§ 512.33[3][b]*] or has waived his or her right to a hearing, the notice and the reasons for it are confidential and must not be divulged by any person except as necessary in the performance of duties. Violation of the requirement of confidentiality does not, however, of itself affect the validity of any hearing conducted pursuant to *Educ. Code § 44949* [*Educ. Code § 44949(a)*].

[b] Request for Hearing

The employee may request a hearing to determine if there is cause for not reemploying him or her for the ensuing year. A request for a hearing must be in writing and must be delivered to the person who sent the notice pursuant to *Educ. Code § 44949(a)* [*see* discussion in *§ 512.33[3][a]*] on or before a date specified in the notice, which must not be less than seven days after the date on which notice is served on the employee. Failure to request a hearing on or before the date specified in the notice constitutes a waiver by the employee of his or her right to a hearing. The notice provided for in *Educ. Code § 44949(a)* must advise the employee of all of this information [*Educ. Code § 44949(b)*].

[c] Conduct of Hearing

In the event a hearing is requested by the employee, the proceeding must be conducted and a decision made in accordance with *Gov. Code §§ 11500-11528*, and the governing board has all the power granted to an agency therein, except for the following [*Educ. Code § 44949(c)*].

(1) The employee must file his or her notice of defense, if any, within five days after service on him or her of the accusation and the accusation must notify the employee of the five-day period;

(2) The discovery authorized by *Gov. Code § 11507.6* is available only if it is requested within 15 days after service of the accusation, and the notice required by *Gov. Code § 11505* must so indicate; and

(3) The hearing must be conducted by a an administrative law judge who must prepare a proposed decision, containing findings of fact and a determination as to whether or not the charges sustained by the evidence are related to the welfare of the schools and the pupils thereof.

For a discussion and forms relating to administrative hearings conducted pursuant to *Gov. Code §§ 11500-11528*, see Ch. 473, *Public Agency Adjudication* , through Ch. 473H, *Alternative Procedures for Agency Decisions* .

[d] Decisions of Administrative Law Judge and Governing Board

The proposed decision of the administrative law judge must be prepared for the governing board and must contain a determination as to the sufficiency of the cause for nonreemployment and a recommendation as to disposition; however, the governing board must make the final determination as to sufficiency of the cause and disposition. None of the findings, recommendations, or determinations contained in the proposed decision are binding on the governing board. Nonsubstantive procedural errors committed by the school district or governing board of the school district do not constitute cause for dismissing the charges unless the errors are prejudicial [*Educ. Code § 44949(c)*].

Copies of the proposed decision must be submitted to the governing board and to the employee on or before May 7 of the year in which the proceeding is commenced [*Educ. Code § 44949(c)*]. If the governing board decides not to adopt the proposed decision of the administrative law judge, its own decision to dismiss the employee must be in writing and contain findings of fact and a determination of the issues [*see* *Lucas v. Board of Education (1975) 13 Cal. 3d 674*,

678, 119 Cal. Rptr. 462, 532 P.2d 110] .

[e] Expenses of Hearing

All expenses of the hearing conducted under *Educ. Code § 44949*, including the cost of the administrative law judge, must be paid by the governing board from the district funds [*Educ. Code § 44949(c)*].

[f] Effect of Continuance

If, after request for hearing pursuant to *Educ. Code § 44949(b)*, any continuance is granted under *Gov. Code § 11524*, the dates prescribed in *Educ. Code § 44949(c)* (final date for submitting copy of proposed decision) that occur on or after the date of granting the continuance and the date prescribed in *Educ. Code § 44955(c)* that occurs after the date of granting the continuance shall be extended for a period of time equal to the continuance [*Educ. Code § 44949(e)*].

[g] Final Notice of Termination of Services; Effect of Failure to Give Notice and Hearing

Notice of termination of employment pursuant to *Educ. Code § 44955(b)* must be given before May 15 in the manner prescribed by *Educ. Code § 44949* [*see* discussion in *§ 512.33[3][h]*]. The services of these employees must be terminated in the inverse order in which they were employed, as determined by the board in accordance with the provisions of *Educ. Code §§ 44844* and *44845* [*Educ. Code § 44955(c)*; *but see* discussion in *§ 512.33[2]*]. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in *Educ. Code § 44949*, he or she must be deemed reemployed for the ensuing school year [*Educ. Code § 44955(c)*].

[h] Sufficiency of Notice

Any notice shall be deemed sufficient when it is delivered in person to the employee to whom it is directed, or when it is deposited in the United States registered mail, postage prepaid and addressed to the last known address of the employee [*Educ. Code § 44949(d)*].

[4] Reemployment Rights

Permanent and probationary employees who are terminated pursuant to *Educ. Code § 44955* have certain preferred rights to reemployment which are set forth in *Educ. Code §§ 44956-44958*. Notwithstanding these preferences, however, the school district may validly determine not to reelect a probationary employee under *Educ. Code § 44929.21(b)* [*California Teachers Assn. v. Mendocino Unified Sch. Dist. (2001) 92 Cal. App. 4th 522, 526-528, 111 Cal. Rptr. 2d 879* ; *see § 512.26*].

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§ 512.34 Compulsory Leaves of Absence for Employees Charged With Criminal Offenses

Compulsory leaves of absence for certificated employees charged with specified criminal offenses are governed by *Educ. Code §§ 44940* and *44940.5*. Offenses for which compulsory leaves of absence may be imposed are divided into "mandatory leave of absence offenses" and "optional leave of absence offenses" [*see Educ. Code § 44940(a), (b)*]. A mandatory leave of absence offense means (1) any sex offense as defined in *Educ. Code § 44010*; or *(2)* any offense involving aiding or abetting the unlawful sale, use, or exchange to minors of controlled substances listed in Schedule I, II, or III, as contained in *Health & Safety Code §§ 11054, 11055*, and *11056*, with the exception of marijuana, mescaline, peyote, or tetrahydrocannabinols [*Educ. Code § 44940(a)*]. An optional leave of absence offense means (1) any controlled substance offense as defined in *Educ. Code §§ 44011* or *87011*; (2) a violation or attempted violation of *Penal Code § 187* (murder); or (3) a violation or attempted violation of *Health & Safety Code §§ 11357-11361, 11363, 11364*, or *11370.1*, insofar as those sections relate to any controlled substances except marijuana, mescaline, peyote, or tetrahydrocannabinols [*Educ. Code § 44940(b)*]. An employee is deemed to be "charged with" one of these offenses if he or she is charged with the specified offense by complaint, information, or indictment filed in a court of competent jurisdiction [*see Educ. Code § 44940(a), (b)*]. If an employee is charged with an offense deemed to fall into both the mandatory and optional leave of absence categories, as defined in *Educ. Code § 44940(a)* and *(b)*, the offense is treated as a mandatory leave of absence offense for purposes of *Educ. Code § 44940* [*Educ. Code § 44940(e)(1)*].

Whenever any certificated employee is charged with a mandatory leave of absence offense, as defined in *Educ. Code § 44940(a)*, the governing board of the school district must immediately place the employee on compulsory leave of absence for not more than 10 days after the date of entry of judgment in the proceedings. The employee's teaching or service credential will automatically be suspended for the same period of time [*Educ. Code § 44940(d), (e)(2)* (school district to forward copy of complaint, information, or indictment to Commission on Teacher Credentialing)]. Whenever a certificated employee is charged with an optional leave of absence offense, as defined in *Educ. Code § 44940(b)*, the governing board of the school district may immediately place the employee on compulsory leave of absence in accordance with the procedures in *Educ. Code §§ 44940* and *44940.5* [*Educ. Code § 44940(e)(1)*].

The governing board may extend the compulsory leave of absence of the employee beyond the initial period specified in *Educ. Code § 44940* by giving notice to the employee within 10 days after the entry of judgment in the criminal proceedings that the employee will be dismissed at the expiration of 30 days from the date of service of the notice

unless he or she demands a hearing as provided in *Educ. Code §§ 44930-44988* [*Educ. Code § 44940.5(a)*].

Any employee placed on compulsory leave of absence pursuant to *Educ. Code §§ 44940* and *44940.5* must be paid his or her regular salary during the period of the compulsory leave of absence if he or she furnishes to the school district a suitable bond, or other security acceptable to the governing board, as a guarantee that the employee will repay to the school district the amount of salary so paid to him or her during the compulsory leave of absence in case the employee is convicted of the charges, or fails or refuses to return to service following an acquittal of the offense or dismissal of the charges. If the employee is acquitted of the offense, or the charges against the employee are dismissed, the school district must reimburse the employee for the cost of the bond on his or her return to service in the school district [*Educ. Code § 44940.5(b)*]. If the employee does not elect to furnish the bond or other security, and if the employee is acquitted of the offense, or the charges against him or her are dismissed without his or her guilt being established, the school board must pay the employee his or her full compensation for the period of the compulsory leave of absence on his or her return to service in the school district [*Educ. Code § 44940.5(c)*]. If the charges against the employee are dismissed as a result of the employee's successful completion of a drug diversion program, on the employee's return to service in the school district the employee may elect to have the district pay the employee any accrued leave, and differential pay [*see Educ. Code §§ 44977, 45195, 45196*], for up to the length of the employee's compulsory leave of absence [*Educ. Code § 44940.5(c)*]. Back pay is to be reduced by the amount of any other compensation that the teacher earned during the period of compulsory leave [*Unzueta v. Ocean View School Dist. (1992) 6 Cal. App. 4th 1689, 1693-1700, 8 Cal. Rptr. 2d 614]* .

Any action taken by a governing board pursuant to *Educ. Code § 44940.5* must be reported immediately to the Commission on Teacher Credentialing. The Commission must give priority to the investigation and resolution of such cases [*Educ. Code § 44940.5(d)*].

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§ 512.35 Suspension or Transfer for Mental Illness

Any certificated employee may be suspended or transferred to other duties by the governing board if the board has reasonable cause to believe that the employee is suffering from mental illness of such a degree as to render him or her incompetent to perform his or her duties [*Educ. Code § 44942(a)*]. The refusal to reinstate a teacher following voluntary leave for mental illness constitutes a suspension triggering the rights provided by *Educ. Code § 44942* if the teacher presents medical evidence that he or she is capable of returning to employment [*see Raven v. Oakland Unified School Dist. (1989) 213 Cal. App. 3d 1347, 1356, 262 Cal. Rptr. 354]* . The district has the burden of proving the employee's mental incompetence [*Raven v. Oakland Unified School Dist. (1989) 213 Cal. App. 3d 1347, 1359, 262 Cal. Rptr. 354]* .

The governing board must immediately give to the employee suspended or transferred a written statement of the facts giving rise to the board's belief and an opportunity to appear before the board within 10 days to explain or refute the charges [*Educ. Code § 44942(b)*]. If, after the employee's appearance or refusal to appear, the board decides to continue the suspension or transfer, it must offer the employee, in writing, the opportunity to be examined by a panel of three persons who are either psychiatrists or psychologists (but at least one of whom must be a psychiatrist), in accordance with *Educ. Code § 44942(c)*. The examination and report of the panel must be conducted in accordance with *Educ. Code § 44942(d)*.

If a majority of the panel concludes that the employee should be permitted to return to his or her duties, no written record of the suspension or of the determination of the panel may be retained, and any written record concerning the employee must appear in all respects as it did before the suspension was made [*Educ. Code § 44942(e)*]. If a majority of the panel finds in its report that the employee is suffering from mental illness of such a degree as to render him or her incompetent to perform his or her duties, the governing board may, on receipt of the report, place the employee on mandatory leave of absence for sickness for a period not to exceed two years, during which period the employee is entitled to sick leave, hospital, and medical benefits that accrued to him or her during his or her employment by the governing board [*Educ. Code § 44942(f)*].

The governing board may not require the employee to submit to a program of psychological tests or to submit to additional examinations by the panel once the first examination has been completed. If the panel fails after its first

examination to make an express finding that the employee is suffering from a mental illness of such a degree as to render him or her incapable of performing his or her duties, the governing board must treat this failure as a finding that no such incapacitating mental illness exists, and must reinstate the employee to his or her position, with full salary and benefits. Because *Educ. Code § 44942* does not contemplate any other ground for suspension other than incapacitating mental illness, the panel need not make a separate determination as to whether or not the employee should be returned to work once it has determined whether the existence of an incapacitating mental illness can be established [*Buchan v. Las Virgenes Unified School Dist. (1981) 124 Cal. App. 3d 1088, 1096-1099, 177 Cal. Rptr. 788]* .

An employee who is placed on mandatory sick leave for mental disability may demand a hearing in superior court pursuant to *Educ. Code § 44942(g)*. If the court finds that the employee was not, at the time of the suspension, incompetent to perform his or her assigned duties and should not have been placed on mandatory sick leave, the employee must immediately be reinstated to the same or a substantially similar position with full back salary, and any written record of the suspension or transfer or any report of the panel must be destroyed [*Educ. Code § 44942(h)*].

If the court confirms the placing of the employee on mandatory sick leave, or if the employee does not request a hearing, the governing board must, on written request of the employee made not earlier than six months nor later than two years after the date the employee was placed on mandatory sick leave, convene a new panel of three persons who are either psychiatrists or psychologists (but at least one of whom must be a psychiatrist) to review the original conclusion of the board. If the original conclusion is not changed by the new panel as a result of the review, the employee must be continued on the mandatory sick leave. When the employee's total period of absence exceeds two years, the governing board must either rescind its action and reinstate the employee to the same or a substantially similar position, or serve the employee with a notice of intention to dismiss him or her [*Educ. Code § 44942(i)*]. If a majority of the new panel concludes in its report, or any subsequent review thereof, that the suspended employee or employee on mandatory sick leave should be permitted to return to his or her duties, or if the court so concludes, the governing board must take immediate action to restore the employee to the position from which he or she was suspended or transferred, or to a substantially similar position [*Educ. Code § 44942(j)*].

Every hearing and action by or before the governing board under *Educ. Code § 44942* must be conducted in executive session. No decision, action, or occurrence involved in the proceeding may be made public unless the employee so requests in writing [*Educ. Code § 44942(k)*].

An employee who is suspended or refused reinstatement without the required procedures is entitled to back pay from the time that the hearing rights are triggered either by suspension or denial of reinstatement. Setoff of retirement system or workers' compensation permanent disability benefits is proper if the benefits were awarded on a finding that the employee could not return to work [*see Bevli v. Brisco (1989) 211 Cal. App. 3d 986, 994, 260 Cal. Rptr. 57* (termination on other grounds); *Kalinowski v. Board of Education (1979) 90 Cal. App. 3d 245, 250-251, 153 Cal. Rptr. 178* (suspension)]. For further discussion of the right to back pay and the computation of the amount, see *§ 512.28[9]*.

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§ 512.36 Notice of Intent to Return to Teaching Position

A teacher in a school district having an average daily attendance of less than 2,500 must, by May 15 of each year, inform the district whether he or she intends to return to a teaching position for the following school year [*Educ. Code § 44832(a), (c)*]. This requirement does not apply to employees who are notified pursuant to *Educ. Code § 44955* (*see § 512.33[1]*) [*Educ. Code § 44832(a)*]. The district and the exclusive bargaining representative may agree to include provisions regarding the required notice in any collective bargaining agreement applying to classroom teachers [*Educ. Code § 44832(b)*].

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§ 512.37 Resignations

The governing board of a school district must accept the resignation of any employee and fix the time when the resignation takes effect, which generally must be no later than the close of the school year in which the resignation has been received by the board [*Educ. Code § 44930(a)*]. However, the employee and the governing board may agree that the resignation will be accepted as a mutually agreed date not later than two years beyond the close of the school year during which board receivers the resignation [*Educ. Code § 44930(b)*]. In any event, resignations that are required of school teachers for the purpose of evading the tenure statutes are without effect [*Mitchell v. Board of Trustees (1935) 5 Cal. App. 2d 64, 67-68, 42 P.2d 397]* , and resignations procured by the board through the exercise of undue influence may be rescinded [*see Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 130-135, 54 Cal. Rptr. 533]* .

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§ 512.38 Reemployment After Resignation

If a permanent certificated employee resigns and then is reemployed within 39 months by the same district, the governing board must, disregarding the break in service, classify him or her as, and restore to him or her all of the rights, benefits, and burdens of, a permanent employee [*Educ. Code § 44931*]. This statute requires that the district give a reemployed teacher salary-schedule credit for all years of service with the district prior to resignation [*Dixon v. Board of Trustees (1989) 216 Cal. App. 3d 1269, 1281-1286, 265 Cal. Rptr. 511* ; *see § 512.39[2]*]. However, the teacher does not regain his or her original hiring date for seniority purposes [*Educ. Code § 44848*; *see San Jose Teachers Assn. v. Allen (1983) 144 Cal. App. 3d 627, 641, 192 Cal. Rptr. 710]* .

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§ 512.39 Salaries of Certificated Employees

[1] Generally

The governing board of a school district must fix and order paid the compensation of persons employed by the board in public school service requiring certification qualifications unless otherwise prescribed by law [*Educ. Code § 45022*].

[2] Salary Schedules

[a] Uniformity Requirement

The governing board of each school district must adopt and cause to be printed and made available to each certificated employee a schedule of salaries to be paid [*Educ. Code § 45023*]. Each person employed by a district in a position requiring certification qualifications, except a person employed in a position requiring an administrative or supervisory credential, must be classified on the salary schedule on the basis of uniform allowance for years of training and years of experience, except if the school district and the employees' exclusive representative negotiate and mutually agree to a salary schedule based on other criteria [*Educ. Code § 45028(a)*; *see Educ. Code § 45028(e)* (public school employers and teachers' exclusive representatives are encouraged to recognize teacher contributions to improving pupil achievement, provide incentives to teachers to accept teaching assignments in areas of highest need, and recognize relevant professional experience on the salary schedule in lieu of units and degrees or in lieu of teaching experience)]. Employees must not be placed in different classifications on the schedule, or paid different salaries, solely on the basis of the respective grade levels in which the employees serve [*Educ. Code § 45028(a)*].

All certificated employees, regardless of their date of hire, must be classified for salary purposes, and the classification must proceed wholly on a uniform basis for years of training and experience, except if the school district and the employees' exclusive representative negotiate and mutually agree to a salary schedule based on other criteria. Disparate treatment of teachers hired before and after the effective date of *Educ. Code § 45028* is not permitted [*California Teachers Assn. v. Governing Board (1991) 229 Cal. App. 3d 695, 701, 280 Cal. Rptr. 286]* .

Under the requirement of *Educ. Code § 45028* that employees be classified on the salary schedule on the basis of a uniform allowance for years of training and experience, a school district must make a credit allowance for teaching

experience outside the district available to all employees on a uniform basis, and may not make the availability of the credit contingent on the teacher's seniority within the system [*see Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified School Dist. (1978) 21 Cal. 3d 650, 660-661, 147 Cal. Rptr. 359, 580 P.2d 1155] . Educ. Code § 45028* does not, however, preclude a school district from adopting a pay incentive program that conditions advancement to the next salary step on the satisfactoriness of the previous year's service, provided that such a program is uniformly applied to all teachers in the district [*Mayer v. Bd. of Trustees (1980) 106 Cal. App. 3d 476, 487-496, 165 Cal. Rptr. 655* ; *see Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified School Dist. (1978) 21 Cal. 3d 650, 661 n.6, 147 Cal. Rptr. 359, 580 P.2d 1155* (dictum)].

A district may not establish a system that considers years of training as a salary factor to the exclusion of years of experience. A district may not penalize teachers who fail to acquire additional training by freezing future salary increases despite acquisition of additional years of experience [*California Teachers Assn. v. Governing Board (1991) 229 Cal. App. 3d 695, 702-703, 280 Cal. Rptr. 286* ; *Wygant v. Victor Valley Joint Union High School Dist. (1985) 168 Cal. App. 3d 319, 329, 214 Cal. Rptr. 205]* . Nor may a district limit the number of classification advances for training that a teacher may obtain to one per year. Such a limitation creates a lack of uniformity among teachers with the same training and experience based on the amount of time it takes a teacher to achieve the level of training [*California Teachers Assn. v. Governing Board (1991) 229 Cal. App. 3d 695, 703-704, 280 Cal. Rptr. 286]* .

In no case may the governing board of a school district draw orders for the salary of any teacher in violation of *Educ. Code § 45028*, nor may any superintendent draw any requisition for the salary of any teacher in violation thereof. *Educ. Code § 45028* does not apply to teachers of special day and evening classes in elementary schools, teachers of special classes for elementary pupils, teachers of special day and evening high school classes, and substitute teachers [*Educ. Code § 45028*]. It is not a violation of the uniformity requirement for a school district, with the agreement of the certificated employees' exclusive representative, if any, to grant any employee who is hired after a locally specified date differential credit for prior years of experience or prior units of credit for purposes of initial placement on the district's salary schedule [*Educ. Code § 45028(b)*].

[b] Effect of Collective Bargaining Agreement

A district and the exclusive bargaining representative of its certificated employees must, on the request of either, meet and negotiate regarding the payment of additional compensation based on criteria other than training and years of experience [*Educ. Code § 45028(a)*; *see Educ. Code § 45028(e)* (public school employers and teachers' exclusive representatives are encouraged to recognize teacher contributions to improving pupil achievement, provide incentives to teachers to accept teaching assignments in areas of highest need, and recognize relevant professional experience on the salary schedule in lieu of units and degrees or in lieu of teaching experience)]. If the parties do not reach mutual agreement, then the training and experience criteria of § 45028(a) apply [*Gov. Code § 3543.2(e)*]. However, *Gov. Code § 3543.2(e)* does not provide blanket authority for the parties to a collective bargaining agreement to deviate from *Educ. Code § 45028* in any manner they choose. Years of training and years of experience are the only criteria allowable in setting base salaries. *Gov. Code § 3543.2(d), (e)* then allows for collective bargaining on additional compensation. However, there must be some particularized bargained-for criteria, other than years of training and years of experience, to support disparate pay between teachers with like training and experience [*California Teachers' Assn. v. Livingston Union School Dist. (1990) 219 Cal. App. 3d 1503, 1522-1523, 269 Cal. Rptr. 160* ; *San Francisco Classroom Teachers Assn. v. San Francisco Unified School Dist. (1987) 196 Cal. App. 3d 627, 635, 242 Cal. Rptr. 352* ; *see California Teachers Assn. v. Governing Board (1991) 229 Cal. App. 3d 695, 704-705, 280 Cal. Rptr. 286* ; *see also § 512.39[4][b]*]. Thus, if teacher salary schedules are based solely on education and experience, with no other criteria established by the applicable collective bargaining agreement, the salary schedules must be *wholly* uniform, and teachers with the same education and experience must receive the same salary [*Adair v. Stockton Unified Sch. Dist. (2008) 162 Cal. App. 4th 1436, 1444-1447, 77 Cal. Rptr. 3d 62*].

Under *Gov. Code § 3543.2(d)*, a negotiated one-time payment to teachers does not violate the uniform pay requirement

of *Educ. Code § 45028* if at least one criterion on which the payment is based is neither years of training nor years of experience. For example, a school district may make a one-time payment of 3 percent of base salary limited to teachers who returned to work for a specified school year or retired at the end of the preceding school year [*California Teachers Assn. v. Governing Bd. of Hilmar Unified Sch. Dist. (2002) 95 Cal. App. 4th 183, 189-197, 115 Cal. Rptr. 2d 323* (exclusion of teachers who left district's employment without retiring constituted criterion other than years of training or years of experience)].

[3] Increase or Decrease in Salary

The governing board of a school district may, at any time during the school year, increase the salaries of persons employed by the district in positions requiring certification qualification, and such an increase is effective on any date ordered by the governing board [*Educ. Code § 45032*]. A governing board may reduce the salary of a teacher with whom it has contracted in previous years to teach at a higher salary, if it does so in the exercise of reasonable discretion and before the beginning of the school year [*Brown v. Hanford Elementary School Bd. (1968) 263 Cal. App. 2d 170, 174, 69 Cal. Rptr. 154]* . The board may not, however, lower salaries fixed by the salary schedule after the beginning of the school year [*A.B.C. Federation of Teachers v. A.B.C. Unified Sch Dist. (1977) 75 Cal. App. 3d 332, 337-338, 142 Cal. Rptr. 111]* . Also, the governing board may not decrease the annual salary of any certificated employee for failure to meet any requirement of the district that the person complete additional educational units, courses of study, or work in any college or university or any equivalent thereof [*Educ. Code § 45033*].

[4] Mandate Proceeding for Recovery of Salary

[a] Generally

A petition for a writ of mandate is the appropriate remedy for a teacher to recover salary due from a school district [*A.B.C. Fed'n of Teachers v. A.B.C. Unified School Dist. (1977) 75 Cal. App. 3d 332, 340-342, 142 Cal. Rptr. 111]* .

[b] PERB Jurisdiction

If a teacher's claim for salary is based on the criteria established under *Educ. Code § 45028* and the district's defense is that disparity was collectively bargained for as authorized by *Gov. Code § 3543.2(d), (e)* (district and employees' representative may agree on additional compensation based on other criteria [*see* discussion in *§ 512.39[2]*]), one court has held that an arguable unfair labor practice is alleged that may violate the Educational Employment Relations Act (EERA) [*see Gov. Code § 3540 et seq.*]. In such a case, the teacher must exhaust appropriate administrative remedies before the Public Employment Relations Board (PERB) [*McCammon v. Los Angeles Unified School Dist. (1987) 195 Cal. App. 3d 661, 664-665, 241 Cal. Rptr. 1* ; *see Gov. Code § 3541.5*]. However, other courts have rejected, questioned, and limited any such rule.

It has been held that exclusive PERB jurisdiction does not lie if the collective bargaining agreement predates July 28, 1983, the effective date of *Gov. Code § 3543.2(d)*, because prior to that date, there was no authority for agreements that varied from *Educ. Code § 45028* [*United Teachers of Ukiah v. Board of Education (1988) 201 Cal. App. 3d 632, 639, 251 Cal. Rptr. 499* ; *see Educ. Code § 44924* (discussed in *§ 512.40*); *see also Dixon v. Board of Trustees (1989) 216 Cal. App. 3d 1269, 1280, 265 Cal. Rptr. 511]* . As for collective bargaining agreements negotiated on or after July 28, 1983, it has been held that PERB does not have exclusive jurisdiction over salary schedule placement disputes if the collective bargaining agreement and *Educ. Code § 45028* are not in conflict over where the teacher should be placed on the salary schedule. Further, a placement on the salary schedule that violates any provision of the Education Code other than *Educ. Code § 45028* is not within the exclusive jurisdiction of PERB by reason of being included in a collective bargaining agreement because the authority to collectively bargain over salary criteria under *Gov. Code § 3543.2(d)* does not include the right to violate any other provision of the Education Code [*Dixon v. Board of Trustees (1989) 216 Cal. App. 3d 1269, 1280-1281, 265 Cal. Rptr. 511]* .

A third court has rejected PERB jurisdiction entirely, even if compensation policies that deviate from *Educ. Code § 45028* are contained in a post-July 28, 1983 collective bargaining agreement. In the view of this court, *Gov. Code § 3543.2(d)* permits parties to collectively bargain for such a deviation only under limited circumstances [*see § 512.39[2][b]*]. Whether a particular collective bargaining agreement provides appropriate criteria to deviate is not a labor-practice issue within the jurisdiction of PERB, but simply a question of whether the Education Code has been violated [*California Teachers' Assn. v. Livingston Union School Dist. (1990) 219 Cal. App. 3d 1503, 1510-1526, 269 Cal. Rptr. 160* (noting that a failure to meet and confer on additional criteria, as required by *Gov. Code § 3543.2(d)*, might be an unfair labor practice)].

For full discussion of the EERA, see Zerger, Janiak, Johnson, and Kay, California Public Sector Labor Relations (Matthew Bender). For a discussion and forms relating to mandate proceedings generally, see Ch. 358, *Mandate and Prohibition* . For a form of petition for writ of mandate to compel a school district to pay salary owing to a teacher, see *§ 512.171*.

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§ 512.40 Waiver of Employment Rights as Void

Except as provided in *Educ. Code § 44937* (relating to the waiver of a hearing in dismissal or suspension proceedings initiated under *Educ. Code § 44934*) and *Educ. Code § 44956* (waiver of reemployment rights by terminated permanent employee), any contract or agreement, express or implied, made by any employee to waive the benefits of *Educ. Code § 44800 et seq.* (setting forth employment rights), or any part thereof, is null and void [*Educ. Code § 44924*]. This nonwaiver provision applies to collective bargaining agreements [*see California Teachers Assn. v. Governing Board (1991) 229 Cal. App. 3d 695, 704-705, 280 Cal. Rptr. 286* ; *Raven v. Oakland Unified School Dist. (1989) 213 Cal. App. 3d 1347, 1357, 262 Cal. Rptr. 354* ; *California Teachers' Ass'n v. Parlier Unified School Dist. (1984) 157 Cal. App. 3d 174, 183, 204 Cal. Rptr. 20* ; *see also Gov. Code § 3540* (Education Code prevails over conflicting provision of collective bargaining agreement)]. For discussion of the relationship between collective bargaining agreements and provisions of the Education Code, see Zerger, Janiak, Johnson, and Kay, California Public Sector Labor Relations, Chs. 11, 16, and 35 (Matthew Bender).

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[Reserved]

§§ 512.41[Reserved]

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§ 512.60 California Points and Authorities

For memoranda of points and authorities for use in actions involving civil service employees, see California Points and Authorities, Ch. 36, *Civil Service* (Matthew Bender)

For memoranda of points and authorities for use in mandate proceedings generally, see California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender)

For memoranda of points and authorities for use in mandate proceedings to review an administrative decision made as the result of an adjudicatory hearing, see California Points and Authorities, Ch. 195, *Public Administrative Law* (Matthew Bender)

For memoranda of points and authorities for use in mandate proceedings involving certificated employees of school districts, see California Points and Authorities, Ch. 210, *Schools* , Pt. II (Matthew Bender)

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§ 512.61 State Constitution

Minimum salary of full-time public school teachers. *Cal. Const., art. IX, § 6*

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§ 512.62 State Statutes

[1] Basic Skills Proficiency Examination

Requirement of passing basic skills proficiency examination for initial issuance of credential and exemptions. *Educ. Code § 44252(b)*

Requirement of taking basic skills proficiency test when applying for approved credential program. *Educ. Code § 44252(f)*

Deferral of basic skills proficiency test because of illness, family death, or another similar and justifiable personal reason. *Educ. Code § 44252.8*

Requirement of passing basic skills proficiency examination for employment and exemptions. *Educ. Code § 44830(b)*

[2] Certification Documents; Issuance, Denial, Revocation, Suspension

Establishment of Commission on Teacher Credentialing. *Educ. Code §§ 44210-44236*

Establishment of Committee of Credentials. *Educ. Code §§ 44240-44242*

Procedure of Commission on Teacher Credentialing and Committee of Credentials for denial, suspension, or revocation of credentials. *Educ. Code §§ 44242.5-44247*

Bilingual and cross-cultural competence certificates. *Educ. Code §§ 44253.5, 44253.7, 52178-52178.4, 56362.7*

Issuance and registration of certificates. *Educ. Code §§ 44330-44332.5*

Grounds for denial of application for issuance or renewal of credentials. *Educ. Code §§ 44345, 44346*

Penalties for submission of fraudulent documents. *Educ. Code §§ 44360-44362*

Revocation or suspension of credential by Commission on Teacher Credentialing. *Educ. Code §§ 44420-44426, 44439*

Revocation or suspension of certificate by county board of education. *Educ. Code §§ 44427-44437*

Certification of language development specialists. *Educ. Code §§ 44475-44481*

[3] Classification of Certificated Employees

Classification of permanent employees. *Educ. Code § 44929.20 et seq.*

Scope of permanent status. *Educ. Code §§ 44893-44897, 44929.26, 44929.27*

Effect of reorganization of school district on classification. *Educ. Code §§ 44902-44904*

Computation of service time required for permanent status. *Educ. Code §§ 44908-44914*

Classification of probationary employees. *Educ. Code §§ 44915, 44916*

Classification of substitute employees. *Educ. Code § 44917*

Reclassification of temporary and substitute employees as probationary. *Educ. Code § 44918*

Classification of temporary employees. *Educ. Code §§ 44919-44921*

[4] Communist or Subversive Activities

Prohibition against teaching or advocating communism in public schools with intent to indoctrinate or create a preference in mind of any student for communism. *Educ. Code § 51530*

[5] Definitions

Position requiring certification qualifications. *Educ. Code § 44001*

Credential. *Educ. Code § 44002*

Life diploma. *Educ. Code § 44003*

Certificate. *Educ. Code § 44004*

Certificated person. *Educ. Code § 44006*

Certification document. *Educ. Code § 44007*

Conviction of crime. *Educ. Code § 44009*

Sex offense. *Educ. Code § 44010*

Controlled substances. *Educ. Code § 44011*

[6] Dismissal or Suspension of Certificated Employees

[a] Permanent Employees

Grounds for suspension. *Educ. Code §§ 44932, 44933*

Notice of charges and intent to dismiss. *Educ. Code § 44934*

Service of notice of intent to dismiss. *Educ. Code § 44936*

Demand for hearing and waiver. *Educ. Code § 44937*

Advance notice of charges of incompetency or unprofessional conduct as required. *Educ. Code § 44938*

Immediate suspension and hearing on certain charges for dismissal of permanent employee. *Educ. Code § 44939*

Compulsory leave of absence for employees charged with certain crimes. *Educ. Code §§ 44940, 44940.5*

Notice of suspension and intent to dismiss. *Educ. Code § 44941*

Suspension or transfer of employee for mental illness. *Educ. Code § 44942*

Governing board action on request for hearing. *Educ. Code § 44943*

Conduct of hearing by Commission on Professional Competence. *Educ. Code § 44944*

Judicial review. *Educ. Code § 44945*

Reinstatement and back salary. *Educ. Code § 44946*

[b] Probationary Employees

Grounds for suspension without pay of probationary employee in small school district. *Educ. Code §§ 44932(b), 44933*

Dismissal or suspension during school year of probationary employees employed prior to 1983-1984 or in small school district. *Educ. Code § 44948*

Dismissal or suspension during school year of probationary employees employed during or after 1983-1984 fiscal year. *Educ. Code § 44948.3*

Nonreemployment of probationary employees employed prior to 1983-1984 or in small school district; notice and hearing procedure. *Educ. Code § 44948.5*

[c] Substitute and Temporary Employees

Dismissal of substitute employees. *Educ. Code § 44953*

Dismissal of temporary employees. *Educ. Code § 44954*

[7] Employment of Certificated Persons

Employment of certificated persons. *Educ. Code §§ 44830, 44831*

Automatic declining of continued employment. *Educ. Code § 44842*

Minimum age for certificated employment. *Educ. Code § 44862*

Waiver of benefits of *Educ. Code §§ 44800-45060* as null and void. *Educ. Code § 44924*

Resignations. *Educ. Code § 44930*

Leaves of absence and sick leave. *Educ. Code § 44930 et seq.*

[8] Layoffs

Reduction in number of permanent employees due to decline in average daily attendance, decline in attendance due to termination of interdistrict tuition agreement, modification of curriculum required by state law, or reduction or elimination of particular service; procedure and notice. *Educ. Code § 44955(b)*

Notice and procedure for layoffs. *Educ. Code § 44949*

Reduction of number of permanent and probationary certificated employees during period between five days after enactment of Budget Act and August 15 of fiscal year to which Budget Act applies permitted when governing board determines that its total revenue limit per unit of average daily attendance for fiscal year has not increased by at least 2 percent and that it is therefore necessary to decrease number of employees. *Educ. Code § 44955.5*

Rights of terminated permanent employees (provision inoperative from July 1, 2002, through July 1, 2003). *Educ. Code § 44956*

Effect of employment in administrative position on seniority rights. *Educ. Code § 44956.5*

Rights of terminated probationary employees. *Educ. Code §§ 44957, 44958*

[9] Miscellaneous Provisions

Mandate proceedings. *Code Civ. Proc. §§ 1084-1097, 1107-1110b*

Prohibition of discrimination with regard to educational benefits, programs, and employment on basis of disability, gender, nationality, race or ethnicity, religion, sexual orientation, or any characteristic listed in *Penal Code § 422.55* definition of "hate crimes." *Educ. Code § 220 et seq.*

Classified employees. *Educ. Code § 45100 et seq.*

Exchange of certificated school district or county office of education employees with credentialed private sector teacher. *Educ. Code §§ 44929.1-44929.16*

Educational labor relations. *Gov. Code §§ 3540-3549.3*

Administrative hearing procedure. *Gov. Code §§ 11500-11528*

[10] Salaries of Certificated Employees

Governing board as required to fix and pay salaries. *Educ. Code § 45022*

Adoption and printing of salary schedules. *Educ. Code § 45023*

Classification of salary schedule on basis of uniform allowance for years of training and experience as required. *Educ. Code § 45028*

Governing board power to increase salaries. *Educ. Code § 45032*

Prohibition against decrease in salary for failure to meet additional educational requirements. *Educ. Code § 45033*

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§ 512.63 Administrative Regulations

Certificated personnel. *5 Cal. Code Reg §§ 5500-5722*

Credentials and institutions preparing candidates for credentials. *5 Cal. Code Reg §§ 6000-6699*

Rules of Commission on Teacher Credentialing governing issuance, denial, suspension, and revocation of credentials. *5 Cal. Code Reg. § 80001 et seq.*

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§ 512.64 Decisions

[1] Certification Documents; Denial, Revocation, Suspension

[a] Grounds

Revocation of married woman's life diploma as justified on grounds of unfitness to teach where evidence showed that she had engaged in oral copulation with three men, none of whom were her husband, in presence of strangers in semi-public atmosphere of club party and where there was expert testimony that she was unfit to teach. *Pettit v. State Bd. of Education (1973) 10 Cal. 3d 29, 34-36, 109 Cal. Rptr. 665, 513 P.2d 889*

Revocation of certification documents for "immoral or unprofessional conduct" or "acts involving moral turpitude" as improper under former Educ. Code § 13202 (now *Educ. Code § 44421*) unless such conduct indicates unfitness to teach; statute as not unconstitutional when so interpreted. *Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 225-235, 82 Cal. Rptr. 175, 461 P.2d 375*

Record showing bare fact of teacher's arrest and conviction for possession of marijuana, without any further evidence of teacher's unfitness to teach, as insufficient to justify revocation of certification documents. *Comings v. State Bd. of Educ. (1972) 23 Cal. App. 3d 94, 104-105, 100 Cal. Rptr. 73*

Revocation of teaching credential as proper where teacher engaged in homosexual conduct in public view in public rest-room. *Moser v. State Bd. of Educ. (1972) 22 Cal. App. 3d 988, 989-992, 101 Cal. Rptr. 86*

Denial of life diploma as proper where teacher had series of criminal convictions for public offenses involving the use of alcohol which demonstrated his unfitness to teach. *Watson v. State Bd. of Educ. (1971) 22 Cal. App. 3d 559, 563-565, 99 Cal. Rptr. 468*

Revocation of teaching credential and denial of new credential as proper where substantial evidence in form of medical testimony demonstrated appellant was unfit to teach because of her mental illness. *Alford v. Department of Educ. (1970) 13 Cal. App. 3d 884, 888-889, 91 Cal. Rptr. 843*

[b] Procedure

Standard of review in mandate proceeding to review revocation of credential. *Tringham v. State Board of Education (1958) 50 Cal. 2d 507, 508, 326 P.2d 850*

State Board of Education as not required to hold hearing prior to revoking credentials under former Educ. Code § 12756 (later Educ. Code § 13207, now *Educ. Code § 44425*) for conviction of certain sex offenses; such provision as not violating due process or equal protection. *DiGenova v. State Board of Education (1955) 45 Cal. 2d 255, 259-260, 262, 288 P.2d 862* ; *Purifoy v. State Bd. of Educ. (1973) 30 Cal. App. 3d 187, 190-198, 106 Cal. Rptr. 201*

State Board of Education as under mandatory duty under former Educ. Code § 13130 (now *Educ. Code § 44346*) to deny application for issuance of credential by any applicant who has been convicted of certain designated sex offenses, without holding a hearing; such provision as not violating equal protection or due process. *Vogulkin v. State Board of Education (1961) 194 Cal. App. 2d 424, 429-433, 15 Cal. Rptr. 335*

[2] Classification

[a] Permanent Employees

School principals as not securing tenure in that capacity; failure of principal to accept assignment as classroom teacher as constituting insubordination which justifies dismissal. *Board of Education v. Swan (1953) 41 Cal. 2d 546, 555-556, 261 P.2d 261*

School superintendent, contract employee, is not entitled to constitutional or statutory due process rights to position as superintendent, but is entitled to due process rights granted to contract employees by school board in its rules and regulations, including predemotion rights. *Jones v. Palm Springs Unified School Dist. (1985) 170 Cal. App. 3d 518, 523-529, 216 Cal. Rptr. 75*

Teacher whose permanent employee status was disputed by school board was entitled to writ of mandate to direct recognition of status without first having to exhaust administrative remedies. *California Teachers' Assn. v. Governing Board (1983) 145 Cal. App. 3d 735, 749, 193 Cal. Rptr. 650*

Reemployment of permanent certificated employee within 39 months after resignation restores all individual rights, benefits, and burdens of permanent employee except original hiring date for seniority purposes. *San Jose Teachers Assn. v. Allen (1983) 144 Cal. App. 3d 627, 631, 192 Cal. Rptr. 710*

Educ. Code § 44850.1 precludes tenure in principal position notwithstanding county charter provision purporting to make position permanent after three years. *LaBelle v. San Francisco Unified School Dist. (1983) 140 Cal. App. 3d 292, 299-300, 189 Cal. Rptr. 530*

Charter provisions, ordinances, and regulations relating to schools as subject to preemption by conflicting state laws; rights acquired under such provisions as not vested. *Whisman v. San Francisco Unified Sch. Dist. (1978) 86 Cal. App. 3d 782, 789-790, 794-795, 150 Cal. Rptr. 548*

Supervisory personnel reassigned to other positions within scope of certificate under which tenure acquired as not entitled to notice and hearing; procedural protections of *Educ. Code § 44955* as applicable only to dismissals, not reassignments. *Whisman v. San Francisco Unified Sch. Dist. (1978) 86 Cal. App. 3d 782, 791-792, 150 Cal. Rptr. 548*

Unlike classroom teachers, school administrators attain no tenure in status as administrators; school board as permitted

to remove administrator for any reason satisfactory to it, without hearing, subject to requirement that administrator be furnished, on request, with statement of reasons for reassignment to different status. *Hentschke v. Sink (1973) 34 Cal. App. 3d 19, 22, 109 Cal. Rptr. 549*

Probationary teacher's right to be classified as permanent teacher as automatically renewed each year in which teacher is in position of having taught complete school year for previous three years; three-year statute of limitations of *Code Civ. Proc. § 338(a)* as applicable to mandamus proceeding by teacher seeking classification as permanent employee. *Vittal v. Long Beach Unified School Dist. (1970) 8 Cal. App. 3d 112, 121-122, 87 Cal. Rptr. 319*

[b] Probationary Employees

Unless statutory mandate compels otherwise, position of teacher as created and fixed by terms of employment contract; where contract between teacher and district classifies teacher as substitute, teacher as not attaining probationary status merely because she is subsequently assigned to teach classes of teacher who resigned from her position for remainder of school year. *Rutley v. Belmont Elementary School Dist. (1973) 31 Cal. App. 3d 702, 705-706, 107 Cal. Rptr. 671*

[c] Temporary Employees

Community college teacher hired on temporary basis pursuant to *Educ. Code § 87482.5* but assigned to work in excess of 60 percent of full-time hours for more than two semesters or three quarters in three-year period is entitled to automatic reclassification as contract employee. *Stryker v. Antelope Valley Community College Dist. (2002) 100 Cal. App. 4th 324, 329-338*

Community college district employee hired on temporary basis pursuant to *Educ. Code § 87482.5* to teach not more than 60 percent of full-time hours is not entitled to automatic reclassification to contract employee status, and such reclassification is prohibited when employee's service as substitute is on day-to-day basis. *Balasubramanian v. San Diego Community College Dist. (2000) 80 Cal. App. 4th 977, 982-985, 95 Cal. Rptr. 2d 837*

Temporary bilingual teacher teaching under waiver of bilingual credential requirement pursuant to *Educ. Code § 52178* is not entitled to reemployment under *Educ. Code § 44918* over newly hired credentialed bilingual teacher if temporary teacher has not complied with progress requirements required for waiver. *Royster v. Cushman (1989) 213 Cal. App. 3d 65, 69-71, 261 Cal. Rptr. 458*

[3] Constitutional Rights

[a] First Amendment Rights

School that reprimands science teacher for protesting requirement that he teach evolution does not violate teacher's rights under *establishment clause of First Amendment*; school district may also restrict teacher's conversations with students on religious matters during school day and on school property. *Peloza v. Capistrano Unified School District (9th Cir. 1994) 37 F. 3d 517, 521-522*

Nature of teacher's constitutional right to speak. *Adcock v. Board of Educ. (1973) 10 Cal. 3d 60, 65, 68-69, 109 Cal. Rptr. 676, 513 P.2d 900*

Refusal by hearing officer and school board to consider evidence that teacher was dismissed for exercise of constitutional rights whose limitation was not justified by compelling public interest as constituting legal error. *Bekiaris v. Board of Education (1972) 6 Cal. 3d 575, 587-588, 100 Cal. Rptr. 16, 493 P.2d 480*

When reviewing dismissal of a teacher by way of petition for writ of mandate, trial court as required to make independent assessment of evidence on question whether true reason for dismissal was teacher's exercise of constitutional rights. *Bekiaris v. Board of Education (1972) 6 Cal. 3d 575, 593, 100 Cal. Rptr. 16, 493 P.2d 480*

Public employer is prohibited from disciplining or discharging public employee for expressive conduct protected by *U.S. Const., amends. I, XIV*; however, whether employee's conduct is deemed protected speech depends on balancing of interests of employer and employee, and therefore antiwar demonstration speech by college professor that resulted in disruption, materially interfered with school activities, and impaired discipline was not protected by constitutional prohibition. *Franklin v. Leland Stan. Junior University (1985) 172 Cal. App. 3d 322, 336, 342, 218 Cal. Rptr. 228*

Trial court's refusal to order teacher reinstated was not erroneous even though there was testimony that letter written by teacher, which was partially protected by *U.S. Const., amend. I*, was factor in decision to deny teacher's reassignment because judge could have found that nonprotected areas of letter were only areas affecting decision, and judge could accept testimony that same decision would have been made despite existence of letter. *Shimoyama v. Board of Education (1981) 120 Cal. App. 3d 517, 524-527, 174 Cal. Rptr. 748*

[b] Due Process

Teacher does not have constitutionally protected liberty interest in additional assignment as baseball coach and, therefore, district's failure to renew one-year coaching contract was not actionable under *42 U.S.C.S. § 1983* (deprivation of civil rights); nonrenewal was also permissible under *Educ. Code § 44923* (additional assignment given to tenured full-time employee is terminable at any time). *Lagos v. Modesto City Schools Dist. (9th Cir. 1988) 843 F.2d 347, 348, 349-350*

Teacher's denial of reassignment as football coach by principal who was given sole discretion by school district to make decision on hiring or firing coach was not denial of due process because those in state executive and administrative positions routinely have responsibility of appointment and dismissal, subject to review only by electorate or their administrative superiors, and there is no authority to indicate that coaches are in different category. *Shimoyama v. Board of Education (1981) 120 Cal. App. 3d 517, 527-529, 174 Cal. Rptr. 748*

[4] Dismissal of Permanent Employees

[a] Generally

Equitable exceptions may limit application of *Educ. Code § 44944(a)*, which provides that school district may not dismiss or suspend permanent, certificated employee based on charges or evidence relating to matters occurring more than four years prior to filing of notice of intent to dismiss or suspend employee; thus, employee may be equitably estopped from asserting four-year limit if employee's own conduct induced school district to delay filing of notice of intent to dismiss or suspend employee. *Atwater Elementary Sch. Dist. v. California Dep't of Gen. Servs. (2007) 41 Cal. 4th 227, 235-238, 59 Cal. Rptr. 3d 233, 158 P.3d 794*

School board as not permitted to dismiss permanent teacher unless it complies with statutory procedures for dismissal; teacher failing to renew credential as not automatically forfeiting permanent status. *Mass v. Board of Educ. (1964) 61 Cal. 2d 612, 617-620, 39 Cal. Rptr. 739, 394 P.2d 579*

School district's substantial compliance with former *Educ. Code § 44938* (*now see Educ. Code § 44938(a)*) and Stull Act (*Educ. Code §§ 44660-44665*) satisfies statutory requirements for notice of intent to dismiss certificated teacher. *Governing Board v. Commission on Professional Competence (1985) 171 Cal. App. 3d 324, 333-334, 217 Cal. Rptr.*

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School board's unilateral termination of a teacher's contract by reason of teacher's behavior during school year as governed by Education Code provisions relating to dismissal of teachers, rather than by general contract law. *Pennel v. Pond Union School Dist. (1973) 29 Cal. App. 3d 832, 838, 105 Cal. Rptr. 817*

[b] Attorney's Fees

Attorney's fees in certificated employee dismissal proceedings by school district are governed by *Educ. Code § 44944(e)* rather than by *Gov. Code § 800*. *Fontana Unified School Dist. v. Burman (1988) 45 Cal. 3d 208, 225, 246 Cal. Rptr. 733, 753 P.2d 689* ; *Forker v. Board of Trustees (1984) 160 Cal. App. 3d 13, 21, 206 Cal. Rptr. 303*

Employee who prevails in judicial review of commission decision is entitled to attorney's fees, as well as to costs under *Code Civ. Proc. § 1032(b)*. *Fontana Unified School Dist. v. Burman (1988) 45 Cal. 3d 208, 225, 246 Cal. Rptr. 733, 753 P.2d 689*

Teacher who successfully defends against dismissal action is entitled to attorney's fees under *Educ. Code § 44944(e)*, even though teacher's legal fees were paid under group legal plan provided by teachers association. *Forker v. Board of Trustees (1984) 160 Cal. App. 3d 13, 21, 206 Cal. Rptr. 303* ; *Russell v. Thermalito Union School Dist. (1981) 115 Cal. App. 3d 880, 883-884, 176 Cal. Rptr. 1*

[c] Discovery

Teacher in dismissal proceeding under *Educ. Code § 44944* does not have privilege accorded criminal defendant to refuse to appear as witness and testify; thus, trial court abuses discretion in refusing to grant school district's petition for order compelling teacher to appear at deposition and to produce certain documents. *San Francisco Unified School Dist. v. Superior Court (1981) 116 Cal. App. 3d 231, 234-236, 172 Cal. Rptr. 42*

[d] Grounds

[i] Conviction of Crime

Health & Safety Code § 11361.7(b) as depriving school board of authority to dismiss permanent teacher because of arrest for, or conviction of, possession of marijuana occurring prior to January 1, 1976. *Governing Board v. Mann (1977) 18 Cal. 3d 819, 826-828, 135 Cal. Rptr. 526, 558 P.2d 1*

Offense of cultivation of marijuana as not involving moral turpitude as matter of law. *Board of Trustees v. Judge (1975) 50 Cal. App. 3d 920, 923-925, 123 Cal. Rptr. 830*

[ii] Evident Unfitness for Service

Finding of trial court that permanent teacher's use of supplementary reading and discussion materials containing obscene words did not justify dismissal on grounds of immoral conduct and evident unfitness for service as supported by substantial evidence. *Board of Trustees v. Metzger (1972) 8 Cal. 3d 206, 210-212, 104 Cal. Rptr. 452, 501 P.2d 1172*

Frequency and duration of teacher's absences are not sole criteria in determining evident unfitness to teach pursuant to former *Educ. Code § 44932(e)* (*now see Educ. Code § 44932(a)(5)*), and trial court finding that teacher was unfit was

not supported by evidence that consisted of stipulation that absences were for reasons considered legitimate under school district policy. *San Dieguito Union High School Dist. v. Commission on Professional Competence (1982) 135 Cal. App. 3d 278, 286-287, 185 Cal. Rptr. 203*

Teacher's distribution of materials written by students containing obscene and vulgar language, without more, as not constituting evident unfitness for service justifying her dismissal as matter of law. *Oakland Unified School Dist. v. Olicker (1972) 25 Cal. App. 3d 1098, 1109-1111, 102 Cal. Rptr. 421*

Trial court finding that teacher's dismissal was justified on grounds of evident unfitness for service as supported by substantial evidence where record showed that teacher had repeatedly used vulgar language and gestures during classes and had torn out a loudspeaker in the classroom. *Palo Verde etc. School Dist. v. Hensey (1970) 9 Cal. App. 3d 967, 969-976, 88 Cal. Rptr. 570*

[iii] Immoral Conduct

Commission of a public sex offense as not demonstrating unfitness to teach per se and as not justifying dismissal of permanent teacher on grounds of immoral conduct. *Board of Educ. v Jack M. (1977) 19 Cal. 3d 691, 700-704, 139 Cal. Rptr. 700, 566 P.2d 602*

Employee who has been summarily dismissed for conviction of sex offense has right to due process review of dismissal when conviction has been reversed and charges dismissed. *Tuffli v. Governing Board (1994) 30 Cal. App. 4th 1398, 1408-1409, 36 Cal. Rptr. 2d 433*

Viewed in its entirety, teacher's conduct of (1) while dressed as Santa Claus, inducing students to sit on his lap so that he might hug and kiss them, (2) rubbing student's thigh, (3) tightly hugging a student, and (4) holding student's hand until she pushed away constitutes immoral conducting warranting immediate suspension and dismissal without written notice of specific charges under *Educ. Code § 44939*. *Governing Board v. Haar (1994) 28 Cal. App. 4th 369, 379-385, 33 Cal. Rptr. 2d 744*

Trial court finding that probationary teacher's dismissal justified on grounds of immoral conduct as supported by substantial evidence where evidence showed that teacher had filed affidavit, later made public, admitting that she used marijuana with beneficial effects, claiming that laws prohibiting its use were unconstitutional, and advocating their change, and where there was testimony concerning her unfitness to teach. *Governing Bd. v. Brennan (1971) 18 Cal. App. 3d 396, 401-402, 95 Cal. Rptr. 712*

Dismissal of permanent teacher on grounds of immoral conduct and evident unfitness as justified where teacher discovered in compromising position with female student in his car while parked on public street and, when discovered, verbally and physically assaulted peace officer and fled from scene at high speed. *Board of Trustees v. Stubblefield (1971) 16 Cal. App. 3d 820, 824-827, 94 Cal. Rptr. 318*

[iv] Unsatisfactory Performance

Concept of incompetency does not invoke subjective analysis of individual conduct; absence in record of dismissal proceedings of empirical standards for measuring competency did not defeat educational commission's decision to dismiss teacher when decision was based on specific facts, such as teacher's failure to teach basis skills or maintain classroom discipline. *Perez v. Commission on Professional Competence (1983) 149 Cal. App. 3d 1167, 1176, 197 Cal. Rptr. 390* (incompetency construed under *Educ. Code § 48917*, which was amended in 1995 to change "incompetency" to "unsatisfactory performance")

Failure of district to adopt uniform written guidelines as required by *Educ. Code § 44660* does not deprive district of jurisdiction to dismiss teacher for incompetency under *Educ. Code § 44938*. *California Teachers Assn. v. Governing Board (1983) 144 Cal. App. 3d 27, 33-36, 192 Cal. Rptr. 358* (incompetency construed under *Educ. Code § 48917,* which was amended in 1995 to change "incompetency" to "unsatisfactory performance")

[v] Persistent Violation of or Refusal to Obey School Laws or Rules

Failure to supply lesson plans for substitute teachers during numerous intermittent absences totaling 21 percent of all work days over four-year period constituted substantial evidence of violations that were stubborn and continuing, and therefore persistent. *San Dieguito Union High School Dist. v. Commission on Professional Competence (1985) 174 Cal. App. 3d 1176, 1183, 220 Cal. Rptr. 351*

In determining whether or not violations were persistent, trial court correctly considers (1) likelihood of recurrence of questioned conduct, (2) extenuating or aggravating circumstances, (3) effect of notoriety and publicity, (4) impairment of teacher-student relationships, (5) disruption of education process, (6) motive, and (7) proximity or remoteness in time of conduct. *San Dieguito Union High School Dist. v. Commission on Professional Competence (1985) 174 Cal. App. 3d 1176, 1183, 220 Cal. Rptr. 351* (applying seven criteria outlined in *Morrison v. State Board of Education (1969) 1 Cal. 3d 214, 229, 82 Cal. Rptr. 175, 461 P.2d 375*)

Board improperly dismissed teacher under *Educ. Code § 44932(a)(7)* for repeatedly refusing to admit agreement with principal's assertion that teacher needed improvement in two areas, because difference of opinion and continual debate between teacher and principal cannot reasonably be transformed into "persistent" violation of rules. *Bourland v. Commission on Professional Competence (1985) 174 Cal. App. 3d 317, 320-321, 219 Cal. Rptr. 906*

Teacher's failure to obey school district rules by not preparing adequate and timely lesson plans for substitutes in two of 16 instances did not demonstrate willfulness as matter of law. *San Dieguito Union High School Dist. v. Commission on Professional Competence (1982) 135 Cal. App. 3d 278, 287-288, 185 Cal. Rptr. 203*

[vi] Physical or Mental Disability

Exclusive-remedy principle of workers' compensation law do not deprive employee receiving workers' compensation benefits for mental disability of due process rights provided in Education Code regarding reinstatement. *Raven v. Oakland Unified School Dist. (1989) 213 Cal. App. 3d 1347, 1363-1366, 262 Cal. Rptr. 354*

[e] Notice of Unprofessional Conduct

Plaintiff had no cause to complain of violation of 90-day notice requirement for filing charges of unprofessional conduct under former *Educ. Code § 44938* (*now see Educ. Code § 44938(a), 45* days notice for charges of unprofessional conduct and *Educ. Code § 44938(b), 90* days notice for charges of incompetency) when charge of unprofessional conduct was dismissed at hearing. *Pittsburg Unified School Dist. v. Commission on Professional Competence (1983) 146 Cal. App. 3d 964, 974, 194 Cal. Rptr. 672*

[f] Pretermination Hearing

Cost-sharing provision of *Educ. Code § 44944(e)* (requiring teacher who requested hearing on threatened suspension or dismissal, but who did not ultimately prevail, to pay half of cost of administrative law judge) is unconstitutional on its face. *California Teachers Assn. v. State (1999) 20 Cal. 4th 327, 345-357, 84 Cal. Rptr. 2d 425, 975 P.2d 622*

Governing board of school district is required by Ralph M. Brown Act, *Gov. Code § 54950 et seq.* , to conduct open proceedings when it hears specific complaints or charges against the employee with potential disciplinary consequences. *Bell v. Vista Unified Sch. Dist. (2000) 82 Cal. App. 4th 672, 682-684, 98 Cal. Rptr. 2d 263*

Permanent, tenured teacher has constitutional right to procedural due process before termination of employment for cause; thus, even if permanent, tenured teacher's credential has been suspended for 10 years due to allegations of sexual misconduct, and employing school district has notified teacher of its intention to terminate teacher's employment, district cannot refuse teacher's timely request for pretermination hearing under *Educ. Code § 44934 et seq.*. *Shields v. Poway Unified School Dist. (1998) 63 Cal. App. 4th 955, 958-962, 74 Cal. Rptr. 2d 391*

[g] Judicial Review

CPC is not indispensable party, within meaning of *Code Civ. Proc. § 389(a)*, to administrative mandamus proceeding brought by school district to challenge commission's decision that employee's dismissal was unwarranted. *Fontana Unified School Dist. v. Burman (1988) 45 Cal. 3d 208, 224, 246 Cal. Rptr. 733, 753 P.2d 689*

Factual finding of Commission on Professional Competence, which is professional body with experience and expertise in area of determining fitness to teach, made after extensive factual hearing with opportunity to see, hear, and evaluate veracity of witnesses, that cause was not established to discharge teacher for unfitness to teach and persistent refusal to obey district rules, was entitled to substantial weight in "independent judgment" hearing before superior court. *San Dieguito Union High School Dist. v. Commission on Professional Competence (1982) 135 Cal. App. 3d 278, 288, 185 Cal. Rptr. 203*

[5] Dismissal of Probationary Employees

[a] During School Year

Former Educ. Code § 13442 (now *Educ. Code § 44948*) as giving probationary teachers, employed prior to 1983-1984 fiscal year or in small school district, during school year same procedural protections applicable to dismissal of permanent teachers; where school board failed to follow required statutory procedure for terminating teacher's employment during school year, its action in dismissing teacher as nullity. *Pennel v. Pond Union School Dist. (1973) 29 Cal. App. 3d 832, 839, 105 Cal. Rptr. 817*

[b] End of School Year

[i] Generally

School district governing board may hold closed session on matters of performance evaluation and dismissal of probationary teacher; teacher's right to request open session under *Gov. Code § 54957* applies only if board is hearing specific complaints or charges against teacher. *Fischer v. Los Angeles Unified Sch. Dist. (1999) 70 Cal. App. 4th 87, 95-98, 82 Cal. Rptr. 2d 452*

Educ. Code § 44882(b), allowing dismissal without cause, without notice, and without any redress by hearing or appeal, applies to first-year probationary teachers notified of nonreelection for second school year without statement of reasons. *Grimsley v. Board of Trustees (1987) 189 Cal. App. 3d 1440, 1447-1448, 235 Cal. Rptr. 85*

Probationary teacher wrongfully denied employment for particular year as entitled to recover back pay for that year, but

not reinstatement for subsequent year. *Tarquino v. Franklin-McKinley School Dist. (1979) 88 Cal. App. 3d 832, 836, 152 Cal. Rptr. 108*

[ii] Grounds

Teacher's reading to class of short story containing a vulgar expression as part of lesson as not constituting cause for refusal to reemploy which relates solely to welfare of school and its pupils under facts of case. *Lindros v. Governing Bd. of The Torrance Unified School Dist. (1973) 9 Cal. 3d 524, 535-538, 108 Cal. Rptr. 185, 510 P.2d 361 , cert. denied, 414 U.S. 1112, 94 S Ct 842, 38 L Ed2d 739*

Failure to pass competency examination in subject as required by employment contract was sufficient grounds for failure to rehire probationary teacher. *Alba v. Los Angeles Unified School Dist. (1983) 140 Cal. App. 3d 997, 1009, 189 Cal. Rptr. 897*

[iii] Judicial Reviews

Right of probationary teacher to be rehired for succeeding year as not vested; in mandate proceeding to review decision of school board not to rehire probationary teacher, court as required to accept fact findings of school board if supported by substantial evidence. *Turner v. Board of Trustees (1976) 16 Cal. 3d 818, 824-827, 129 Cal. Rptr. 443, 548 P.2d 1115* (disapproving *Young v. Governing Bd. (1974) 40 Cal. App. 3d 769, 115 Cal. Rptr. 456* to the extent it is inconsistent)

[iv] Notice

Where school board fails to follow procedure for dismissing probationary teacher under former Educ. Code § 13443 (now *Educ. Code § 44948.5*), remedy as being new hearing rather than automatic reinstatement, notwithstanding that new hearing would make final notice of board's decision not to reemploy teacher before May 15 impossible. *Lucas v. Board of Education (1975) 13 Cal. 3d 674, 681-683, 119 Cal. Rptr. 462, 532 P.2d 110*

Under former Educ. Code § 13447(h) (now *Educ. Code §§ 44948.5(i), 44955(c)*), probationary teacher as deemed reemployed for subsequent year unless final notice of board's decision not to reemploy given on or before May 15 of preceding year; notice provision as mandatory. *Rutherford v. Board of Trustees (1974) 37 Cal. App. 3d 775, 779-781, 112 Cal. Rptr. 560* ; *Stewart v. San Mateo Junior College Dist. (1974) 37 Cal. App. 3d 345, 347-348, 112 Cal. Rptr. 272*

[6] Layoffs

[a] In General

When exercising its discretion under *Educ. Code § 44956* with regard to rehiring tenured employees on layoff status, school district is not permitted to impose hiring requirements on laid-off employees that are different from those imposed on continuing status employees in filling open job position. *Martin v. Kentfield School District (1983) 35 Cal. 3d 294, 300-301, 197 Cal. Rptr. 570, 673 P.2d 240*

Educ. Code § 44956 is intended to provide terminated school employees with same rights they would have had they been retained by school district; terminated teacher is entitled to new position over retained teacher with less seniority. *Poppers v. Tamalpais Union High School Dist. (1986) 184 Cal. App. 3d 399, 404-407, 229 Cal. Rptr. 77*

Validly laid off employee retain same employment rights as if no lay off had intervened; employee's reinstatement is not subject to requirement not imposed on other employees who continued in service. *Forker v. Board of Trustees (1984) 160 Cal. App. 3d 13, 18-20, 206 Cal. Rptr. 303*

In deciding whether to reduce or discontinue particular kind of service pursuant to *Educ. Code § 44955*, school district is entitled to consider its financial circumstances, and has discretion to determine necessary and proper extent to which a particular kind of service may be reduced, subject to minimum level required by law. *San Jose Teachers Assn. v. Allen (1983) 144 Cal. App. 3d 627, 636, 638, 192 Cal. Rptr. 710*

In making decision not to rehire certified employees due to reduction of particular kinds of services, school district is not required to consider positively assured attrition occurring between date of preliminary notice not to rehire and final notice in determining number of employees to be terminated. *San Jose Teachers Assn. v. Allen (1983) 144 Cal. App. 3d 627, 630, 192 Cal. Rptr. 710*

Educ. Code § 44955 does not permit monolingual teachers to be discharged in favor of junior bilingual teachers when the latter are not employed to teach classes in formal bilingual program; bilingual ability of teachers is not a criterion for evaluation of competency. *Alexander v. Board of Trustees (1983) 139 Cal. App. 3d 567, 575-576, 188 Cal. Rptr. 705*

Pursuant to former *Educ. Code § 44955* (*now see Educ. Code § 44955(b)*), school district is permitted to retain certificated administrators while dismissing certificated employees with more seniority since, under that section, an administrator may be retained just as any other employee holding a special credential or needed skill, if those credentials and competency are not shared by more senior employee. *Santa Clara Federation of Teachers v. Governing Board (1981) 116 Cal. App. 3d 831, 842-843, 172 Cal. Rptr. 312* ; *Moreland Teachers Assn. v. Kurze (1980) 109 Cal. App. 3d 648, 655, 167 Cal. Rptr. 343*

March 15 notice specifying both statutory grounds for termination of employment pursuant to *Educ. Code § 44955* (providing for reduction of number of certificated employees due to decline in average daily attendance or reduction in particular service) was sufficiently specific. *Santa Clara Federation of Teachers v. Governing Board (1981) 116 Cal. App. 3d 831, 841, 172 Cal. Rptr. 312* ; *Moreland Teachers Assn. v. Kurze (1980) 109 Cal. App. 3d 648, 653, 167 Cal. Rptr. 343*

In determining number of teachers to be dismissed by reason of decline in average daily attendance, school board as required to consider number of teachers who had departed system during the computation period. *Burgess v. Board of Education (1974) 41 Cal. App. 3d 571, 578-579, 116 Cal. Rptr. 183*

Where school board acts to reduce number of employees pursuant to former Educ. Code § 13447 (now *Educ. Code § 44955(b)*), board as without power to terminate teachers for any reason not specified in initial March 15 notice of intention to terminate. *Karbach v. Board of Educ. (1974) 39 Cal. App. 3d 355, 363, 114 Cal. Rptr. 84*

[b] Notice

Preliminary notice pursuant to *Educ. Code §§ 44949(a)* and *44955* recommending termination of certain certified employees because of reduction in particular kinds of services is sufficiently specific if it designates categories of services to be reduced or discontinued even though specific positions to be eliminated are not specified. *San Jose Teachers Assn. v. Allen (1983) 144 Cal. App. 3d 627, 630, 192 Cal. Rptr. 710*

[7] Mental Illness

Governing board must treat lack of express finding by psychiatric panel after examination pursuant to *Educ. Code §*

44942(c) that employee is suffering from mental illness of such degree as to render him or her incompetent to perform duties as finding that employee is not suffering from such mental illness; governing board is not permitted to require psychological testing or additional examinations after one examination has been conducted. *Buchan v. Las Virgenes Unified School Dist. (1981) 124 Cal. App. 3d 1088, 1096, 1098, 177 Cal. Rptr. 788*

[8] Preferential Hiring

Preferential reemployment rights granted to certain substitute and temporary teachers under *Educ. Code § 44918* apply to teachers hired as temporaries under the provisions of *Educ. Code § 44920*. *Taylor v. Board of Trustees (1984) 36 Cal. 3d 500, 502, 507, 204 Cal. Rptr. 711, 683 P.2d 710*

[9] Resignations

Former Educ. Code § 13260 (renumbered *Educ. Code § 44842*) as giving governing board discretionary authority to determine whether failure by permanent teacher to notify board of intention to remain by statutory deadline should constitute declining of employment; school district as abusing discretion where board had taken no action to employ a replacement teacher prior to teacher's notice that he intended to continue and where district did not suffer any other prejudice, detriment, harm, or injury whatsoever as a result of teacher's inadvertent failure to return contract by deadline date. *California Teachers Ass'n v. Governing Bd. (1977) 70 Cal. App. 3d 833, 842-843, 139 Cal. Rptr. 155*

Resignations required of school teachers and accepted as subterfuge in attempt to evade tenure statutes as without effect. *Mitchell v. Board of Trustees (1935) 5 Cal. App. 2d 64, 67-68, 42 P.2d 397*

[10] Salaries

Proper remedy for *Educ. Code § 45028* violation is reclassification of all affected teachers to afford them full credit for all prior teaching experience, rather than mere backpay for period of violation or downward reclassification of favorably treated teachers who already had vested rights to their salaries. *United Teachers of Ukiah v. Board of Education (1988) 201 Cal. App. 3d 632, 644, 644 n.10, 251 Cal. Rptr. 499*

Salary schedule that subclassifies top "experience" classification violated *Educ. Code § 45028* when it distinguished among equally highly trained teachers with equal seniority, who had served district equal number of years, solely on basis of order in which years of training and years of service accrued. *San Francisco Classroom Teachers Assn. v. San Francisco Unified School Dist. (1987) 196 Cal. App. 3d 627, 633-634, 242 Cal. Rptr. 352*

Statute of limitations barring claim for earned but unpaid salary does not bar teacher from receiving retirement service credits under *State Teachers' Retirement System. California Teachers Assn. v. Governing Board (1985) 169 Cal. App. 3d 35, 41-45, 214 Cal. Rptr. 777*

School district's professional growth policy, which denied credit for years of experience as teacher based on failure to obtain certain number of specified professional growth units, violated *Educ. Code § 45028*, which requires salary classification of employees to be based on uniform allowance for years of training and years of experience. *Wygant v. Victor Valley Joint Union High School Dist. (1985) 168 Cal. App. 3d 319, 326, 330, 214 Cal. Rptr. 205* (construing *Educ. Code § 45028* prior to effective date of *Gov. Code § 3543.2(d)*, which allows school and representative to negotiate regarding payment of additional compensation based on criteria other than years of training and experience)

School district rule governing salary advancement of certificated teachers, which limited teacher who advanced on salary schedule from one column to next on attainment of higher educational level to a one-step increase for experience,

even though teacher had additional years of experience and new column had steps for those additional years of experience, violated *Educ. Code § 45028*, which requires that each person employed by district in position requiring certification qualifications be classified on salary schedule on basis of uniform allowance for years of training and years of experience. *California Teachers Assn. v. Board of Education (1982) 129 Cal. App. 3d 826, 828, 181 Cal. Rptr. 432*

Teacher's application for and receipt of disability benefits as not by itself effecting retirement or termination of previous employment status or of right to reinstatement. *Kalinowski v. Board of Education (1979) 90 Cal. App. 3d 245 249-250, 153 Cal. Rptr. 178*

School district as estopped from recovering alleged overpayments to school teachers where necessary elements of estoppel present. *Shoban v. Board of Trustees (1969) 276 Cal. App. 2d 534, 544, 81 Cal. Rptr. 112*

School district as generally entitled to recover erroneous overpayment of salary from teachers. *Aebli v. Board of Educ. (1944) 62 Cal. App. 2d 706, 725-727, 145 P.2d 601*

[11] Sick Leave--Differential Compensation

Under *Educ. Code § 44977*, five months of differential-pay sick leave (certificated employee's regular salary less amount actually paid to substitute teacher in his or her absence) is available "per illness or accident," not for each resulting injury, so teacher who suffers multiple injuries in single accident is entitled to only one differential-pay period for that accident. *Veguez v. Governing Bd. of Long Beach Unified School Dist. (2005) 127 Cal. App. 4th 406, 418-420, 25 Cal. Rptr. 3d 526*

Five-month period for differential pay pursuant to *Educ. Code § 44977* begins to run immediately after exhaustion of teacher's 10 days of current annual sick leave, rather than after exhaustion of accumulated sick leave. *Napa Valley Educators' Assn. v. Napa Valley Unified School Dist. (1987) 194 Cal. App. 3d 243, 247, 239 Cal. Rptr. 395*

Teacher has statutory right (*Educ. Code §§ 44977, 44978*) to differential compensation for any absence of five months or less, commencing immediately on exhaustion of all sick leave. *California Teachers' Ass'n v. Parlier Unified School Dist. (1984) 157 Cal. App. 3d 174, 178-182, 204 Cal. Rptr. 20*

[12] Waiver of Employment Rights as Void

Portion of collective bargaining agreement which conflicted with *Educ. Code § 44977* by creating conditions on right to receive sick leave benefits under that section were nullified by *Educ. Code § 44924*. *Jefferson Classroom Teachers Assn. v. Jefferson Elementary School Dist. (1982) 137 Cal. App. 3d 993, 999-1000, 187 Cal. Rptr. 542*

California Forms of Pleading and Practice--Annotated

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45-512 California Forms of Pleading and Practice--Annotated § 512.65

§ 512.65 Attorney General Opinions

Payment of one-time bonus to certificated employees under bargaining agreement is permissible even when based on criteria other than those set forth in *Educ. Code § 45028*. *69 Ops. Cal. Att'y Gen. 268 (1986)*

Governing board as not required to obtain consent of teacher prior to assignment within scope of credential under which teacher is teaching; Commission for Teacher Preparation and Licensing [*now* Commission on Teacher Credentialing] as without authority to hear and resolve disputes or promulgate regulations relating to assignment of teachers. *61 Ops. Cal. Att'y Gen. 353 (1978)*

Destruction by school board of derogatory material in personnel file of teacher. *58 Ops. Cal. Att'y Gen. 422 (1975)*

Authority of school board regarding personal necessity leave. *56 Ops. Cal. Att'y Gen. 473 (1973)*

Grant of immunity from prosecution under *Penal Code § 1324* as not prohibiting Committee of Credentials from taking civil action to revoke credentials. *55 Ops. Cal. Att'y Gen. 289 (1972)*

Transfer of tenured teacher from regular reaching program of district to program of correctional institution administered by district's adult school division without teacher's consent as prohibited. *41 Ops. Cal. Att'y Gen. 175 (1963)*

Procedure of State Board of Education regarding denial of application for reinstatement of credential. *40 Ops. Cal. Att'y Gen. 256 (1962)*

Right of State Board of Education to deny or revoke credential for knowing membership in Communist Party; power to delegate investigatory duties to Committee of Credentials; power to question applicant or holder. *37 Ops. Cal. Att'y Gen. 201 (1961)*

Finding that teacher committed acts constituting crime as able to be based solely on record of conviction of crime. 34

Ops Cal. Attry Gen 34 (1959)

Notwithstanding terms of contract stating teacher's position is "part-time," teacher who actually teaches full-time as required to be paid minimum salary established by law. *26 Ops. Cal. Att'y Gen. 27 (1955)*

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§ 512.66 Law Reviews

Note, *School District's Restraint on Public Comment by Employees: A First Amendment Infringement, 15 Golden Gate U.L. Rev. 211 (1985)*

Johnson, *The Scope of Injunction in California Public School Employee Strikes, 17 U.S.F. L. Rev. 203 (1983)*

Wenkart, *Dismissal of California Public School Employees Engaged in Union Activity, 22 Santa Clara L. Rev. 1133 (1982)*

Comment, *The Impact of Collective Bargaining on California Education Code Laws Governing Teacher Tenure, Evaluations, and Dismissal, 11 Pacific L.J. 799 (1980)*

Comment, *The Part-Time Teacher and Tenure in California, 10 Golden Gate L. Rev. 765 (1980)*

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§ 512.67 Text References

California Public Sector Labor Relations (Matthew Bender)

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[Reserved]

§§ 512.68[Reserved]

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A. In General

45-512 California Forms of Pleading and Practice--Annotated § 512.80

§ 512.80 Scope of Checklists

NOTE:

These procedural checklists are intended to provide a brief chronological summary of the procedures applicable to the denial, suspension, or revocation of teaching credentials and the dismissal of permanent and probationary certificated employees. The procedures are set forth in more detail in § 512.10 et seq.

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[Reserved]

§§ 512.81[Reserved]

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B. Denial, Revocation, Or Suspension Of Credential

45-512 California Forms of Pleading and Practice--Annotated § 512.100

§ 512.100 Investigation by Committee of Credentials

1. Investigation into fitness of applicant or holder, or presentation of allegations to committee [*Educ. Code § 44242.5(a)*].

2. No later than six months after commencement of committee's initial review, committee ordinarily must conduct formal review to determine either that no adverse action will be taken or that allegations are sufficient to cause application or credential to be subject to adverse action [*Educ. Code § 44244(b)(1)*].

3. At least 30 days prior to any formal review, committee must notify applicant or certificate holder of specific allegations of misconduct; statement of allegations must inform applicant or holder that allegations, if true, are sufficient to cause his or her application or credential to be subject to adverse action [*Educ. Code § 44244(a)*].

4. If committee determines that probable cause for adverse action does not exist, committee must terminate investigation [*Educ. Code § 44242.5(c)(3)(A)*]; if committee determines that probable cause for adverse action on credential exists, on receipt of request from applicant or credential holder [*see Educ. Code § 44244.1*], CTC must initiate adjudicatory hearing [*see Gov. Code § 11500 et seq.*] by filing an accusation or statement of issues [*Educ. Code § 44242.5(c)(3)(B)*].

5. Committee must report its actions and recommendations to CTC, including its findings as to probable cause, and if probable cause exists, its recommendations as to appropriate adverse action [*Educ. Code § 44242.5(e)(1)*].

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B. Denial, Revocation, Or Suspension Of Credential

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§ 512.101 Adjudicatory Hearing

1. Adjudicatory hearing is conducted by Commission on Teacher Credentialing in accordance with *Gov. Code §§ 11500-11528*, and Commission has all powers granted therein [*Educ. Code §§ 44242.5(c)(3)(B)*, *44246*; *see* Ch. 473, *Public Agency Adjudication* , through Ch. 473H, *Alternative Procedures for Agency Decisions*].

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B. Denial, Revocation, Or Suspension Of Credential

45-512 California Forms of Pleading and Practice--Annotated § 512.102

§ 512.102 Judicial Review

1. Procedure: Petition for writ of mandate [*see Gov. Code § 11523*; *Code Civ. Proc. § 1094.5*]. See *§ 512.160*.

2. Standard of review:

a. Suspension or revocation: Independent judgment test [*see Tringham v. State Board of Education (1958) 50 Cal. 2d 507, 508, 326 P.2d 850]* .

b. Denial of application: No cases on point, but substantial evidence test is apparently applicable [*cf. Bixby v. Pierno (1971) 4 Cal. 3d 130, 146, 93 Cal. Rptr. 234, 481 P.2d 242]* .

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[Reserved]

§§ 512.103[Reserved]

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C. Dismissal Or Suspension Of Certificated Employees

45-512 California Forms of Pleading and Practice--Annotated § 512.120

§ 512.120 Permanent Employees

1. Causes.

a. Dismissal only for one or more of causes listed in *Educ. Code § 44932(a)* or *44933* [*see § 512.28[1]*].

b. Suspension without pay for specified period of time for unprofessional conduct pursuant to *Educ. Code § 44932(b)*.

2. Notice of Dismissal.

NOTE:
If the cause for dismissal is unprofessional conduct or unsatisfactory performance [*see Educ. Code §§ 44932(a)(1), (4), 44938(c)*], the school district must also have sent the employee a previous written notice specifying the nature of the unprofessional conduct or unsatisfactory performance, with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. This previous notice must include a copy of the evaluation conducted pursuant to *Educ. Code § 44664* [*Educ. Code § 44938(a), (b)*]. If the cause for dismissal is unprofessional conduct, this previous notice must have been given at least 45 calendar days before the notice of dismissal described below [*Educ. Code § 44938(a)*]. If the cause is unsatisfactory performance, this previous notice ordinarily must have been given at least 90 calendar days before the notice of dismissal described below [*Educ. Code § 44938(b)*].

a. Time:
(1) For grounds specified in *Educ. Code § 44932* may not be given between May 15 and September 15 [*Educ. Code § 44936*].

(2) For immediate suspension and dismissal for grounds specified in *Educ. Code § 44939*, may be given at any time [*see Educ. Code § 44941*].

b. Contents [*Educ. Code §§ 44934, 44936, 44941*]:

(1) Notice of charges against employee.

(2) Information required by *Gov. Code § 11503*.

(3) Copy of provisions of *Educ. Code §§ 44930-44988*.

(4) Intention of governing board to dismiss or suspend employee within 30 days unless employee demands hearing.

3. Hearing.

a. Demand for hearing and response by governing board:

(1) Employee response: Must demand hearing in writing within 30 days after notice is served, or hearing is deemed waived and employee may be dismissed or suspended without pay [*Educ. Code § 44937*].

(2) If employee demands hearing, governing board may either rescind its action or schedule hearing [*Educ. Code § 44943*].

b. Time for hearing: Within 60 days after employee's demand [*Educ. Code § 44944(a)*].

c. Conduct of hearing: Hearing is conducted by a Commission on Professional Competence in accordance with *Gov. Code §§ 11500-11528*, and Commission on Professional Competence has all powers of an agency granted therein [*Educ. Code § 44944(a), (b)*; *see* Ch. 473, *Public Agency Adjudication* , through Ch. 473H, *Alternative Procedures for Agency Decisions*].

d. Discovery rights: See discussion in *§ 512.28[6][d]*.

e. Place of hearing: Place selected by agreement among members of Commission on Professional Competence or, in absence of agreement, place selected by administrative law judge [*Educ. Code § 44944(f)*].

f. Decision by majority vote of Commission on Professional Competence [*Educ. Code § 44944(c)*] must contain:

(1) Findings of fact.

(2) Determination of issues.

(3) Disposition which must be:
(a) That employee be dismissed,

(b) That employee be suspended for specific period of time without pay, or

(c) That employee not be dismissed.

g. Expenses of hearing: if Commission on Professional Competence determines that employee should not be dismissed or suspended, governing board must pay expenses of hearing, including following [*Educ. Code § 44944(e)*]:

NOTE:

The Supreme Court has held a cost-sharing provision of *Educ. Code § 44944(e)* unconstitutional on its face. That provision required a teacher who requested a hearing on his or her threatened suspension or dismissal, but who did not ultimately prevail (either at the administrative level or after judicial review), to pay half the cost of the administrative law judge [*California Teachers Assn. v. State (1999) 20 Cal. 4th 327, 345-357, 84 Cal. Rptr. 2d 425, 975 P.2d 622]* . See discussion in *§ 512.28[6][i]*.

(1) Cost of administrative law judge.

(2) Compensation of Commission on Professional Competence members for service during summer recess or vacation periods [*see Educ. Code § 44944(d)(2)*].

(3) Reasonable expenses (as determined by administrative law judge) of Commission on Professional Competence members, including, but not limited to, payments or obligations incurred for travel, meals, and lodging.

(4) Cost of any substitute members of Commission on Professional Competence.

(5) Reasonable attorney fees incurred by employee.

h. Judicial review:

(1) Procedure: Petition for writ of mandate [*Educ. Code § 44945*; *Gov. Code § 11523*; *Code Civ. Proc. § 1094.5*]. See *§ 512.161*.

(2) Standard of review: Independent judgment test [*Educ. Code § 44945*].

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45-512 California Forms of Pleading and Practice--Annotated § 512.121

§ 512.121 Probationary Employees

1. Employed during or after 1983-1984 fiscal year [*Educ. Code § 44948.3(c)*].

a. Grounds for dismissal or suspension without pay [*Educ. Code § 44948.3(a), (b)*]:
(1) Unsatisfactory performance determined pursuant to *Educ. Code §§ 44660-44665*.

(2) Cause pursuant to *Educ. Code § 44932*.

b. Notice of Dismissal.

NOTE:
If the cause for dismissal is unprofessional conduct or unsatisfactory performance [*see Educ. Code §§ 44932(a)(1), (4), 44938(c)*], the school district must also have sent the employee a previous written notice specifying the nature of the unprofessional conduct or unsatisfactory performance, with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his or her faults and overcome the grounds for the charge. This previous notice must include a copy of the evaluation conducted pursuant to *Educ. Code § 44664* [*Educ. Code § 44938(a), (b)*]. If the cause for dismissal is unprofessional conduct, this previous notice must have been given at least 45 calendar days before the notice of dismissal described below [*Educ. Code § 44938(a)*]. If the cause is unsatisfactory performance, this previous notice ordinarily must have been given at least 90 calendar days before the notice of dismissal described below [*Educ. Code § 44938(b)*; *see Achene v. Pierce Joint Unified Sch. Dist. (2009) 176 Cal. App. 4th 757, 766-768, 97 Cal. Rptr. 3d 899* (because *Educ. Code § 44938* specifies procedure for dismissal for cause under *Educ. Code § 44932*, it also applies to dismissal for unsatisfactory performance of probationary teacher under *Educ. Code § 44948.3(a)*, which incorporates procedures applicable to dismissal for cause under *Educ. Code § 44932*)].

(1) Time [*Educ. Code § 44948.3(a)(1)*]:

(a) 30 days prior to dismissal or suspension.

(b) For second year probationary employees, must given no later than March 15.

(2) Contents [*Educ. Code § 44948.3(a)(1)*]:

(a) Statement of reasons for dismissal or suspension.

(b) Notice of opportunity to appeal.

(c) If dismissal or suspension is for unsatisfactory performance, a copy of evaluation conducted pursuant to *Educ. Code § 44664*.

c. Request for hearing: Written request must be submitted by employee within 15 days of receipt of notice of dismissal or right to hearing is waived [*Educ. Code § 44948.3(a)(2)*].

d. Hearing procedure: Established by governing board [*see Educ. Code § 44948.3(a)(2)*].

2. Employed prior to 1983-1984 fiscal year or in small school district.

a. During School Year.

(1) Dismissal: Causes and procedure same as for dismissal of permanent employees [*see Educ. Code § 44948(a)*; *Pennel v. Pond Union School Dist. (1973) 29 Cal. App. 3d 832, 839, 105 Cal. Rptr. 817* ; *see also § 512.120*]. Pursuant to 1991 legislation, small school district may elect to dismiss probationary employees during school year under *Educ. Code § 44948.3* [*see* Paragraph 1, *above*].

(2) Suspension without pay.
(a) Employees hired prior to 1983-1984 fiscal year: Causes and procedure same as for suspension of permanent employees [*see Educ. Code § 44948(a)*; *Pennel v. Pond Union School Dist. (1973) 29 Cal. App. 3d 832, 839, 105 Cal. Rptr. 817* ; *see also § 512.120*].

(b) Small school districts.
(i) Procedure: Same as for dismissal or suspension of permanent employees [*see Educ. Code § 44932(b)*].

(ii) Grounds: Unprofessional conduct, including acts or omissions other than those listed in *Educ. Code § 44932* [*see Educ. Code § 44932(b), 44933*].

b. At end of school year:

(1) Cause: Sufficiency of cause is to be determined by governing board, but cause must relate solely to welfare of schools and pupils thereof [*Educ. Code § 44948.5(e)*].

(2) Notice.

(a) Initial notice [*Educ. Code § 44948.5*]:
(i) Time: Before March 15.

(ii) Contents:

(A) Statement that it has been recommended that employee not be reemployed for ensuing school year, and reasons therefor.

(B) Notice of right to hearing if demanded in writing on or before the date specified in the notice (which must not be less than seven days after service of the notice).

(b) Final notice: After hearing procedures of *Educ. Code § 44948.5* have been complied with, final notice to employee that his or her services will not be required for ensuing school year must be given on or before May 15. Failure to so notify employee results in employee being deemed reemployed for the ensuing school year [*see Educ. Code § 44948.5(f), (i)*; *see also* discussion in *§ 512.30[2][f]*].

(c) Expenses of hearing: Paid by governing board [*Educ. Code § 44948.5(d)*].

(3) Proposed decision of administrative law judge [*Educ. Code § 44948.5(d)*]:

(a) Time: Copies must be delivered to employee and to governing board by May 7.

(b) Contents: Must contain findings of fact, determination as to sufficiency of cause and whether it relates to welfare of school and its pupils, and recommended disposition.

(c) Effect: Recommended decision of administrative law judge is not binding on governing board.

(4) Decision of governing board: Board may either

(a) Adopt administrative law judge's decision, or

(b) Reject administrative law judge's decision and prepare its own, which must be in writing and contain findings of fact and a determination of issues [*see Lucas v. Board of Education (1975) 13 Cal. 3d 674, 678, 119 Cal. Rptr. 462, 532 P.2d 110]* .

3. Judicial review.

(a) Procedure: Petition for writ of mandate [*Gov. Code § 11523*; *Code Civ. Proc. § 1094.5*; *see Blodgett v. Board of Trustees (1971) 20 Cal. App. 3d 183, 190, 97 Cal. Rptr. 406]* . See *§ 512.166*.

(b) Standard of review: Substantial evidence test [*Turner v. Board of Trustees (1976) 16 Cal. 3d 818, 824-827, 129 Cal. Rptr. 443, 548 P.2d 1115]* .

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45-512 California Forms of Pleading and Practice--Annotated §§ 512.122-512.139

[Reserved]

§§ 512.122[Reserved]

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D. Reduction Of Number Of Certificated Employees

45-512 California Forms of Pleading and Practice--Annotated § 512.140

§ 512.140 Grounds

For discussion of grounds for reducing number of permanent and probationary certificated employees under *Educ. Code § 44955(b)*, see *§ 512.33[1]*.

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45-512 California Forms of Pleading and Practice--Annotated § 512.141

§ 512.141 Procedure

1. Notice.

a. Initial notice [*Educ. Code § 44949(a), (b)*]:
(1) Time: Before March 15.

(2) Contents:
(a) Statement that it has been recommended that employee not be reemployed for ensuing school year, and reasons therefor.

(b) Notice of right to hearing if demanded in writing on or before the date specified in the notice (which must not be less than seven days after service of the notice).

b. Final notice: After hearing procedures of *Educ. Code § 44949* have been complied with, final notice to employee that his or her services will be terminated for ensuing school year must be given on or before May 15. Failure to provide notices and right to hearing set forth in *Educ. Code § 44949* results in employee being deemed reemployed for the ensuing school year [*see Educ. Code § 44955(c)*; *see also § 512.33[3][g]*.

c. Expenses of hearing: Paid by governing board [*Educ. Code § 44949(c)*].

2. Proposed decision of administrative law judge [*Educ. Code § 44949(c)*].

a. Time: Copies must be delivered to employee and to governing board by May 7.

b. Contents: Must contain findings of fact, determination as to sufficiency of cause and whether it relates to welfare of school and its pupils, and recommended disposition.

c. Effect: Recommended decision of administrative law judge is not binding on governing board.

3. Decision of governing board: Board may either

a. Adopt administrative law judge's decision, or

b. Reject administrative law judge's decision and prepare its own, which must be in writing and contain findings of fact and a determination of issues [*see* *Lucas v. Board of Education (1975) 13 Cal. 3d 674, 678, 119 Cal. Rptr. 462, 532 P.2d 110]* .

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[Reserved]

§§ 512.142[Reserved]

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PART V. FORMS

45-512 California Forms of Pleading and Practice--Annotated § 512.160

§ 512.160 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Commission on Teacher Credentialing [Educ. Code § 44246]--Denial, Suspension, or Revocation of Credential or Life Diploma

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Commission on Teacher Credentialing [Educ. Code § 44246]--Denial, Suspension, or Revocation of Credential or Life Diploma

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name* (*s*)],	)	PETITION FOR WRIT
Respondent(s)[,]	)	OF MANDATE
[_____ (*name* (*s*)), Real	)	[*Code Civ. Proc. § 1094.5*]
Party (Parties) in Interest].	)	
	)	
	)	

Petitioner respectfully represents:

1. Petitioner is, and at all times herein mentioned was, a resident of _____ County, California.

[*EITHER, if petitioner seeks review of revocation or suspension of credential*]

2. Petitioner is now, and at all times herein mentioned was, the holder of a valid _____ [*identify type of credential or life diploma held, e.g.,* teaching credential], authorizing him/her to _____ [*describe services authorized by credential or life diploma, e.g.,* teach mathematics in all public secondary schools in the State of California], duly issued by the _____ [State Board of Education *or* respondent Commission on Teacher Credentialing].

[*OR, if petitioner seeks review of denial of credential*]

2. Petitioner meets all of the qualifications for a _____ [*describe type of certification document applied for, e.g.,* teaching credential] established by law. On or about _____, [*date*], petitioner applied to respondent Commission on Teacher Credentialing for a _____ [*describe type of certification document applied for, as above*] in compliance with all statutes and administrative regulations governing such an application.

3. Respondent Commission on Teacher Credentialing is an administrative agency of the State of California charged by law with the duty of implementing the provisions of *Sections 44200 through 44354 of the Education Code*, of establishing and promulgating standards and procedures for certifying educational personnel as qualified for a license to practice in the public schools of California, and of supporting, facilitating, and delineating functions and programs of preparation for the teaching profession. Respondent Committee of Credentials is an administrative agency whose members are appointed by respondent Commission on Teacher Credentialing and which is charged by law with the performance of such duties as are assigned to it by respondent commission relating to the granting, issuance, suspension, and revocation of credentials and life diplomas.

4. Under *Sections 44242.5*, *44243*, *44244*, and *44246 of the Education Code*, respondents have discretion to determine the facts concerning whether or not a ground exists for _____ [denying an application for a _____ (credential *or* life diploma) *or* suspending or revoking a _____ (credential *or* life diploma)], and particularly whether _____ [*specify alleged facts constituting ground for denial, suspension, or revocation of credential, e.g.,* the _____ (applicant for *or* holder of) a _____ (credential *or* life diploma) has committed an act involving moral turpitude]. Pursuant to *Sections 44242.5* and *44246 of the Education Code*, *Sections 11500 through 11528 of the Government Code*, and the decisional law of this state, respondent Commission on Teacher Credentialing is required to hold a hearing and take evidence in its proceedings for the determination of those facts.

5. On _____ [*date*], at _____ [*specify meeting place*], a hearing was held to receive evidence on the issue of whether or not a ground exists for _____ [denial of petitioner's application for a _____ (credential *or* life diploma) *or* _____ (suspension *or* revocation) of the _____ (credential *or* life diploma) which petitioner then held and which was then in full force and effect]. Petitioner attended the hearing.

6. On _____ [*date*], petitioner received respondent commission's decision and order _____ [denying petitioner's application for a _____ (credential *or* life diploma) *or* _____ (suspending *or* revoking) petitioner's _____ (credential *or* life diploma)] on the ground that _____ [*specify ground for action, e.g.,* petitioner had committed an act involving moral turpitude]. [*If appropriate, allege application for reconsideration and adverse result* .] A copy of the notice of decision is attached hereto as Exhibit A and made a part hereof.

7. _____ [A verbatim transcript of the record of the hearing, containing the evidence received, is attached hereto as Exhibit B and made a part hereof *or* The substance of the evidence received at the hearing is as

follows: _____ (*describe substance of evidence*)].

8. Respondent commission's decision and order are invalid for the following reasons: _____ [*in subparagraphs which follow, state reasons why decision is invalid, e.g.,*

a. The administrative law judge found that _____ (*state all findings*). Respondent commission does not have authority to _____ (deny petitioner's application *or* _____ (revoke *or* suspend) petitioner's _____ (credential *or* life diploma)) based on any of these findings in that such findings do not constitute _____ (*specify statutory ground for action taken, e.g.,* an act involving moral turpitude) or any other ground for _____ (denial *or* suspension *or* revocation) of a _____ (credential *or* life diploma).

b. The evidence received at the hearing does not support the findings for the following reasons: _____ (*specify*).

c. _____ (*In this and following subparagraphs, allege any other reasons for invalidity of decision under Code Civ. Proc. § 1094.5,* such as action by respondent without or in excess of authority, denial of a fair hearing, or abuse of discretion as established by a failure to proceed as required by law or failure of the findings to support the decisions. For examples of such allegations, see the petition for writ of mandate to review an administrative decision in the Ch. 474C, *Procedures in Reviewing Agency Decisions, §§ 474C.90, 474C.91*)].

[9. *If appropriate, add:* Petitioner has the following relevant evidence that was not produced at the hearing: _____ (*describe evidence completely*). This evidence could not be produced at the hearing because _____ (*specify reason why, in the exercise of reasonable diligence, petitioner could not produce evidence and why, if appropriate, evidence could not be produced on reconsideration*). This evidence tends to show that _____ (*state what evidence will prove*).]

[10. *If attorney's fees are claimed under Gov. Code § 800, add:* As an incident of bringing and maintaining this proceeding, petitioner has become, and is, obligated personally to pay to his/her counsel _____ (*name*), attorney's fees _____ (exceeding $7,500 *or* in the sum of $_____).]

11. Petitioner has exhausted all his/her administrative remedies, as alleged above, and the decision of respondent has become final insofar as respondent is presently concerned.

12. Petitioner has no plain, speedy, or adequate remedy in the ordinary course of law in that the law provides no other means whereby petitioner can require respondent to set aside its decision.

WHEREFORE, petitioner prays judgment as follows:

[1. *If alternative writ procedure is used:* For an alternative writ of mandate directing respondent to set aside its decision and order of _____(*date*), _____ (denying petitioner's application for issuance of a _____ (*specify nature of certification document applied for, e.g.,* teaching credential) and to _____ (reconsider whether petitioner is entitled to receive a _____ (*specify nature of document applied for, as above*), as applied for, *or* issue petitioner a _____ (*specify nature of document applied for, as above*), as applied for, *or* _____ (revoking *or* suspending) petitioner's _____ (*specify type of certification document held by petitioner, e.g.,* teaching credential) and to reinstate petitioner's _____ (*specify type of document held by petitioner, as above*) as it existed before that order was issued), or in the alternative to show cause why a peremptory writ of mandate to the same effect should not be issued;]

[2. *If petitioner seeks a stay of operation of administrative order or decision pending judgment, state:* For an order restraining respondent from giving effect to its order of _____ (*date*), _____ (*specify effect of order, e.g.,* revoking petitioner's teaching credential) until further order of the court and to show cause why operation of that order should not be stayed pending judgment in this proceeding;]

3. For a peremptory writ of mandate _____ [*set out terms of proposed peremptory writ at length as in Paragraph 1 of this prayer, omitting words relating to order to show cause*];

[4. For reasonable attorney's fees, in addition to any other relief granted or other costs awarded;]

5. For costs of suit herein incurred [*add, if appropriate:*, including $_____ for preparation of the administrative record]; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

CAUTION:

This petition must be verified [*Code Civ. Proc. § 1086*]. Proof of service of a copy of the petition on each respondent and real party in interest must accompany the petition when it is offered for filing (except when, in its discretion and for good cause, the court has granted the application for the writ ex parte) [*Code Civ. Proc. § 1107*]. However, in a trial court, if no alternative writ is sought, proof of service of a copy of the petition need not accompany the application for the writ at the time of filing, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*]. Points and authorities also customarily accompany a petition for writ of mandate filed in superior court, although they do not appear to be expressly required by statute.

[2] Use of Form

[a] In General

This form is a petition for a writ of mandate for use by an aggrieved applicant for, or holder of, a credential or life diploma to obtain judicial review of an administrative decision by the Commission on Teacher Credentialing to deny, suspend, or revoke the credential or life diploma. This petition is to be used where the decision to deny, suspend, or revoke the document is the result of an evidentiary hearing required by law [*see Code Civ. Proc. § 1094.5*; *see also* discussion in § 516.160[4]]. For a complete discussion of petitions for writs of mandate to review administrative decisions, see Ch. 474, *Availability of Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* .

The petitioner may proceed by either the alternative writ procedure or the noticed application procedure, as described below.

[b] Alternative Writ Procedure

If petitioner proceeds by the alternative writ procedure, he or she should prepare a petition, an order for issuance of an alternative writ (if local rules or practice so require), and an alternative writ of mandate. He or she must serve a copy of the petition on each respondent and real party in interest, and file the petition along with proof of service [*see Code Civ. Proc. § 1107*]. At the time of filing the petition, the alternative writ is deposited, but not filed, with the clerk of the court. Five days after the filing of the petition, the court must examine the papers on file and either issue or decline to issue the alternative writ. During the five-day period, the respondent or real party in interest may file a memorandum of points and authorities in opposition to the issuance of the writ, and serve a copy of the memorandum on the petitioner [*see Code Civ. Proc. § 1107*]. If the court decides to issue the alternative writ, the judge either signs the order for issuance or signs the writ itself. A copy of the writ is then served on respondent and real party in interest in the same manner as a summons [*see Code Civ. Proc. § 1096*]. The alternative writ commands the respondent to either do the specified act or to appear at a time and place specified in the writ and show cause why a peremptory writ of mandate ordering respondent to do the act should not be issued [*see Code Civ. Proc. § 1087*].

For a form of alternative writ of mandate, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[c] Noticed Application Procedure

If petitioner follows the noticed application procedure, he or she should prepare a petition and a notice fixing a time (at least 10 days after the notice) and place for hearing the petition [*see Code Civ. Proc. § 1088*]. Copies of these papers are then served on the respondent and real party in interest and the petition and notice are then filed along with proof of service [*see Code Civ. Proc. § 1107*]. However, if proof of service is not filed with the petition pursuant to *Code Civ. Proc. § 1088.5*, copies of these papers may be filed and served in the same manner as in an ordinary civil action [*Code Civ. Proc. § 1107*; *see Code Civ. Proc. § 1088.5*]. Respondent or real party in interest may file points and authorities in opposition to the petition within five days after the filing of the petition [*see Code Civ. Proc. § 1107*]. If the petition is filed in the trial court pursuant to *Code Civ. Proc. § 1088.5*, the respondent has 30 days to answer or otherwise respond after service of the petition when a record of the proceeding to be reviewed has been filed with the petition or when no record is required, or has 30 days to answer or otherwise respond following receipt of a copy of the record if a record has been requested pursuant to *Gov. Code § 11523* or otherwise, and the record has not been filed with the petition [*Code Civ. Proc. § 1089.5*]. No alternative writ is issued under the noticed application procedure. Instead, the court hears the petition and respondent's answer, if any, on the date fixed by the notice for the hearing. If the court determines that issuance of a writ of mandate is proper, it issues, or orders issued, the peremptory writ [*see Code Civ. Proc. §§ 1086, 1088, 1089, 1094*].

For a form of notice of application for a writ of mandate, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[3] Allegations

The petition alleges:

- Petitioner's capacity and residence (Paragraph 1).

- Petitioner's beneficial interest in the respondent's decision to deny, suspend, or revoke his or her credential or life diploma, and thus in the issuance of the writ [*Code Civ. Proc. § 1086*] (Paragraph 2).

- Capacity of respondents (Paragraph 3).

- The discretionary authority of respondents Commission on Teacher Credentialing and Committee of Credentials to determine whether grounds exist to deny, suspend, or revoke a credential or life diploma [*Code Civ. Proc. § 1094.5(a)*; *see Educ. Code §§ 44242.5, 44243, 44244, 44246*] (Paragraph 4).

- That a hearing is required to be held and evidence taken [*Code Civ. Proc. § 1094.5(a)*; *see Educ. Code §§ 44242.5, 44246*; *Gov. Code §§ 11500-11528*; *Matteson v. State Bd. of Educ. (1943) 57 Cal. App. 2d 991, 998, 136 P.2d 120] (Paragraph 4)* .

- Facts regarding the holding of the hearing (Paragraphs 5-7).

- Reasons for the invalidity of the decision [*Code Civ. Proc. § 1094.5(b)*; *see* discussion in *§ 512.160[5]*] (Paragraph 8).

- Where appropriate, the nature of any additional, relevant evidence that could not, in the exercise of reasonable diligence, have been produced at the administrative hearing [*Code Civ. Proc. § 1094.5(e)*] (Paragraph 9).

- Where appropriate, the amount of attorney's fees claimed under *Gov. Code § 800* [*see* discussion in *§ 512.160[6]*] (Paragraph 10).

- Exhaustion of administrative remedies [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 291-296, 109 P.2d 942] (Paragraph 11)* .

- Petitioner's lack of a plain, speedy, or adequate remedy in the ordinary course of law [*Code Civ. Proc. § 1086*] (Paragraph 12).

For a complete discussion of the essential allegations of a petition for writ of mandate to review an administrative decision, see *Ch. 474C, Procedures in Reviewing Agency Decisions, § 474C.90[5]*.

[4] Evidentiary Hearing Required

This petition is for review of an administrative decision pursuant to *Code Civ. Proc. § 1094.5*. One of the prerequisites to the maintenance of a mandate proceeding under that section is that there be a requirement in law that a hearing be held and that evidence be taken by the administrative agency [*Code Civ. Proc. § 1094.5(a)*; *see* Paragraph 4]. Thus, this procedure may not be used to review the denial of an application for a credential pursuant to *Educ. Code § 44346* (mandatory denial of credential on conviction of certain crimes) or the revocation of a credential pursuant to *Educ. Code § 44424* or *44425* (mandatory revocation of credential on conviction of certain crimes), for which no hearing is required by law [*see DiGenova v. State Board of Education (1955) 45 Cal. 2d 255, 259-260, 288 P.2d 862* ; *Vogulkin v. State Board of Education (1961) 194 Cal. App. 2d 424, 428-429, 15 Cal. Rptr. 335]* . However, a decision to deny a

credential pursuant to *Educ. Code § 44345* (discretionary denial of credential for certain grounds) or to revoke or suspend a credential under *Educ. Code § 44422* (discretionary revocation or suspension of credential for certain grounds) is reviewable under *Code Civ. Proc. § 1094.5* because an evidentiary hearing is required in such cases [*see Educ. Code §§ 44242.5(b), 44246, 44422*; *Matteson v. State Bd. of Educ. (1943) 57 Cal. App. 2d 991, 998, 136 P.2d 120* ; *see also* discussions in *§§ 512.15[2]* and *512.16[4]*].

[5] Invalidity of Decision

The decision of an administrative agency made as a result of an evidentiary hearing required by law may be invalid under *Code Civ. Proc. § 1094.5* for any of the following reasons [*Code Civ. Proc. § 1094.5(b)*; *see* Paragraph 8]:

(1) The agency proceeded without, or in excess of, jurisdiction, as, for example, when respondent denies, suspends, or revokes petitioner's credential for reasons other than those prescribed by law;

(2) Petitioner was denied a fair trial; or

(3) The agency abused its discretion in one of the following ways: (a) it did not proceed in the manner required by law; (b) the decision is not supported by the findings resulting from the administrative hearing; or (c) the findings are not supported by the evidence received at the hearing.

[6] Attorney's Fees

In any civil action to appeal or review the award, finding, or other determination of any administrative proceedings under the Government Code or under any other provision of state law, except actions by the State Board of Control, if it is shown that the award, finding, or other determination of the proceeding was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his or her official capacity, the prevailing complainant may collect reasonable attorney's fees, computed at $100 per hour but not to exceed $7,500, from the public entity, if he or she is personally obligated to pay such fees, in addition to any other relief granted or other costs awarded [*Gov. Code § 800*; *see* Paragraph 10].

[7] Venue

Venue in a mandate proceeding brought under *Code Civ. Proc. § 1094.5* is governed by *Code Civ. Proc. § 393(b)* [*Lynch v. Superior Court (1970) 7 Cal. App. 3d 929, 930-931, 86 Cal. Rptr. 925]* . *Code Civ. Proc. § 393(b)* provides that the county in which the cause of action, or some part thereof, arose is the proper county for the trial of an action against a public officer or person especially appointed to execute his or her duties for an act done by him or her by virtue of the public office, or against a person who does anything touching the duties of the public officer by the officer's command or in his or her aid.

[8] Time for Filing Petition

Where judicial review pursuant to *Code Civ. Proc. § 1094.5* is sought of a decision made pursuant to a proceeding conducted under *Gov. Code §§ 11500-11528* (governing administrative hearings), the petition for writ of mandate must be filed within 30 days after the last day on which reconsideration can be ordered [*Gov. Code § 11523*; *see Gov. Code § 11521*]. The limitation period does not begin to run until a copy of the administrative decision has been delivered or mailed to the petitioner [*Koons v. Placer Hills Union Sch. Dist. (1976) 61 Cal. App. 3d 484, 490, 132 Cal. Rptr. 243]* .

[9] Verification

A petition for writ of mandate must be verified [*Code Civ. Proc. § 1086*].

[10] Cross References

For discussion and forms relating to procedures for conducting administrative trials pursuant to *Gov. Code § 11500 et seq.*, see Ch. 473, *Public Agency Adjudication* , through Ch. 473H, *Alternative Procedures for Agency Decisions*

For discussion and alternate forms of captions and introductions, see ch. 108, *Captions and Introductions*

For discussion and forms relating to mandate proceedings generally, see Ch. 358, *Mandate and Prohibition*

For discussion and forms relating to mandate proceedings under *Code Civ. Proc. § 1094.5* for review of administrative decisions, see Ch. 474C, *Procedures in Reviewing Agency Decisions*

For discussion and alternate forms of verification, see Ch. 572, *Verification*

[11] State Statutes

Issuance of writ of mandate generally. *Code Civ. Proc. §§ 1084-1086*

Form of writ. *Code Civ. Proc. § 1087*

Alternative writ and notice procedure. *Code Civ. Proc. § 1088*

Answer to alternative writ or notice. *Code Civ. Proc. § 1089*

Writ of mandate to determine validity of administrative decision made as result of evidentiary hearing required by law. *Code Civ. Proc. § 1094.5*

Service of writ. *Code Civ. Proc. § 1096*

Proof of service of petition; opposing points and authorities. *Code Civ. Proc. § 1107*

Procedure of Commission on Teacher Credentialing and Committee of Credentials relating to denial, suspension, or revocation of credentials. *Educ. Code §§ 44242-44247*

Denial of application for credential. *Educ. Code §§ 44345, 44346, 44439*

Revocation or suspension of certification document. *Educ. Code § 44420 et seq.*

Judicial review of proceedings conducted under *Gov. Code §§ 11500-11528* by petition for writ of mandate. *Gov. Code § 11523*

[12] Decisions

In mandate proceeding to review administrative decision revoking teaching credential, trial court as under duty to exercise independent judgment on evidence; appellate court as required to sustain trial court decision if any credible, competent evidence supports its findings. *Tringham v. State Board of Education (1958) 50 Cal. 2d 507, 508, 326 P.2d 850*

Aggrieved party as required to exhaust all administrative remedies as prerequisite to maintaining mandate proceeding to review denial of issuance of credential. *Pete v. State Bd. of Educ. (1956) 144 Cal. App. 2d 38, 39-42, 300 P.2d 147*

Requirement of notice and hearing prior to deprivation of teaching credential. *Matteson v. State Bd. of Educ. (1943) 57 Cal. App. 2d 991, 998, 136 P.2d 120*

[13] Text References

California Administrative Mandamus (Cal CEB 2000)

Witkin, California Procedure (2d ed), Vol. 5, *Extraordinary Writs*, §§ 223-243

California Forms of Pleading and Practice--Annotated

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Volume 45: Schools: Certification thru Service of Summons and Papers-Chs. 512-519
Chapter 512 SCHOOLS: CERTIFICATION, DISMISSAL, AND RELATED EMPLOYMENT ISSUES
PART V. FORMS

45-512 California Forms of Pleading and Practice--Annotated § 512.161

§ 512.161 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Commission on Professional Competence [Educ. Code § 44945]--Dismissal of Permanent Employee

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Commission on Professional Competence [Educ. Code § 44945]--Dismissal of Permanent Employee

[*Caption. See § 512.160.*]

Petitioner respectfully represents:

1. [*Capacity and residence of petitioner. See § 512.160, Paragraph 1.*]

2. At all times herein mentioned, petitioner was a duly certificated permanent employee of real party in interest _____ School District.

3. Respondent Commission on Professional Competence is an administrative body duly constituted in accordance with *Section 44944 of the Education Code* and charged by law with the duty of conducting a hearing to determine whether real party in interest _____ School District may dismiss petitioner from his/her position as a certificated permanent employee of real party in interest.

4. Real party in interest _____ School District is, and at all times herein mentioned was, a school district, duly organized and existing under the laws of the State of California. Real parties in interest _____ [*names*] are the duly elected or appointed, qualified, and acting members of the _____ [*title of governing board of district, e.g.,* Board of Education] of real party in interest _____ School District. Real parties in interest have an interest which is directly affected by this proceeding in that they initiated the proceeding for dismissal of petitioner from his/her employment by real party in interest _____ School District which is the subject of this petition.

5. Under *Section 44944 of the Education Code*, respondent Commission on Professional Competence has discretion to determine the facts concerning whether or not cause exists for dismissal of a permanent certificated employee from his/her position with real party in interest _____ School District, and particularly whether _____ [*specify alleged facts constituting ground for dismissal, e.g.,* a permanent employee has engaged in immoral or unprofessional conduct]. Pursuant to *Section 44944 of the Education Code*, and *Sections 11500 through 11528 of the Government Code*, respondent Commission on Professional Competence is required to conduct a hearing and take evidence in its proceedings for the determination of those facts.

6. On or about _____ [*date*], the governing board of real party in interest _____ School District notified petitioner of its intention to dismiss petitioner from his/her position with real party in interest _____ School District on the ground that _____ [*specify alleged cause for dismissal, e.g.,* petitioner was guilty of immoral conduct and evident unfitness for service]. [A copy of that notice is attached hereto as Exhibit A and made a part hereof.] Thereafter, on _____ [*date*], within 30 days following service of the notice, petitioner filed a written request for a hearing with the governing board pursuant to *Sections 44937* and *44943 of the Education Code*.

7. On _____ [*date*], at _____ [*specify meeting place*], a hearing was held to receive evidence on the issue of whether or not cause exists to dismiss petitioner from his/her position as a certificated permanent employee of the real party in interest _____ School District. Petitioner attended that hearing.

8. On _____ [*date*], petitioner received respondent Commission on Professional Competence's decision and order that petitioner should be dismissed from his/her permanent position as a certificated permanent employee of _____ School District on the ground that _____ [*specify ground for action, e.g.,* petitioner was guilty of immoral conduct]. [*If appropriate, allege application for reconsideration and adverse result.*] [A copy of the notice of decision is attached hereto as Exhibit B and made a part hereof.]

9. [*Attachment of verbatim transcript of hearing or summary of substance of evidence received at hearing. See § 512.160, Paragraph 7.*]

10. The decision and order of respondent Commission on Professional Competence are invalid for the following reasons: _____ [*in subparagraphs which follow, state reasons why decision is invalid, e.g.,*

a. Respondent Commission on Professional Competence found that _____ (*state all findings*). Respondent and real parties in interest do not have authority to dismiss petitioner based on any of these findings in that _____ (*specify reasons why findings do not support decision, e.g.,* such findings do not constitute immoral conduct or any other cause for dismissal alleged by real parties in interest).

b. The evidence received at the hearing does not support the findings for the following reasons: _____ (*specify*).

c. _____ (*In this and following subparagraphs, allege any other reasons for invalidity of decision under Code Civ. Proc. § 1094.5, such as action by respondent without or in excess of authority, denial of a fair hearing, or abuse of discretion as established by a failure to proceed as required by law or failure of the findings to support the decision. For examples of such allegations, see the petitions for writ of mandate to review an administrative decision in the Ch. 474C, Procedures in Reviewing Agency Decisions, §§ 474C.90, 474C.91*)].

[11. *If appropriate, allege existence of additional relevant evidence that petitioner could not, in the exercise of reasonable diligence, have produced at the hearing. See § 512.160, Paragraph 9.*]

12. Pursuant to *Section 44944 of the Education Code*, petitioner is entitled to recover expenses, including reasonable attorney's fees, incurred by him/her in this proceeding.

13. [*Exhaustion of administrative remedies. See § 512.160, Paragraph 11*].

14. [*Lack of plain, speedy, or adequate remedy in ordinary course of law. See § 512.160, Paragraph 12*].

WHEREFORE, petitioner prays judgment as follows:

[1. *If alternative writ procedure is used:* For an alternative writ of mandate directing respondent to set aside its decision and order of _____ (*date*), that petitioner should be dismissed from his/her position as a certificated permanent employee of real party in interest _____ School District and to _____ (reconsider whether cause exists for petitioner's dismissal *or* enter a decision ordering that petitioner not be dismissed, and that petitioner be reinstated in his/her position and paid back salary, plus interest at the legal rate, from _____ [*date*], or in the alternative to show cause why a peremptory writ of mandate to the same effect should not be issued;]

[2. *If petitioner seeks a stay of operation of administrative order or decision pending judgment, state:* For an order restraining respondent from giving effect to its order of _____ [*date*], that petitioner be dismissed until further order of the court and to show cause why operation of that order should not be stayed pending judgment in this proceeding;]

3. For a peremptory writ of mandate _____ [*set out terms of proposed peremptory writ at length as in Paragraph 1 of this prayer, omitting words relating to order to show cause*];

[4. For reasonable attorney's fees, in addition to any other relief granted or other costs awarded;]

5. For costs of suit herein incurred [*if appropriate, add:*, including $_____ for preparation of the administrative record]; and

6. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 512.160.*]

CAUTION:

This petition must be verified [*Code Civ. Proc. § 1086*]. Proof of service of a copy of the petition on each respondent and real party in interest must accompany the petition when it is offered for filing (except when, in its discretion and for good cause, the court has granted the application for the writ ex parte) [*Code Civ. Proc. § 1107*]. However, in a trial court, if no alternative writ is sought, proof of service of a copy of the petition need not accompany the application for the writ at the time of filing, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*]. Points and authorities also customarily accompany a petition for writ of mandate filed in superior court, although they do not appear to be expressly required by statute.

[2] Use of Form

[a] In General

This form is a petition for a writ of mandate for use by a certificated permanent employee of a public school district to obtain judicial review of an administrative decision by a Commission on Professional Competence that the employee should be dismissed. The employee may proceed by either the alternative writ procedure or the noticed application procedure, as discussed in *§ 512.160[2][b]* and *[c]*. For a complete discussion of petitions for writs of mandate to review administrative decisions, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[b] Related Uses

In an appropriate case, this form may be adapted for use when a permanent certificated employee has been suspended without pay for a specific period of time [*see Educ. Code §§ 44932(b), 44933*].

[3] Allegations

The petition alleges:

- Petitioner's status as a permanent employee, and thus his or her beneficial interest in the issuance of the writ [*see Code Civ. Proc. § 1086*] (Paragraph 2).

- Capacity of respondents and real parties in interest (Paragraphs 3, 4).

- Respondent's discretion to determine whether or not cause exists for dismissal, and requirement in law that an evidentiary hearing be held [*Code Civ. Proc. § 1094.5(a)*; *see Educ. Code § 44944*] (Paragraph 5).

- Notice of intention to dismiss by governing board and demand for hearing by petitioner [*Educ. Code §§ 44934, 44937, 44943*] (Paragraph 6).

- Facts regarding holding of the hearing (Paragraphs 7-9).

- Reasons for invalidity of the decision [*Code Civ. Proc. § 1094.5(b)*] (Paragraph 10).

The allegations in this petition which consist of cross references to allegations contained in other forms are set forth in the Comments to those *forms in §§ 512.160[3], 512.161[3], 512.166[3], 512.167[3], 512.168[3], 512.169[3],* and *512.170[3]*.

[4] Attorney's Fees

Gov. Code § 800 (providing that complainant who prevails in civil action to review determination of administrative proceeding may recover reasonable attorney's fees, computed at $100 per hour, but not exceeding $7,500, if determination is found to be arbitrary or capricious) does not apply to proceedings to dismiss a permanent certificated employee under *Educ. Code § 44944*. Attorney's fees in such proceedings are governed instead by *Educ. Code § 44944(e)* which provides, in part, that if the Commission on Professional Competence determines that the employee should not be dismissed, the governing board of the school district must pay the expenses of the hearing, including reasonable attorney's fees incurred by the employee [*Board of Educ. v. Commission on Professional Competence (1980) 102 Cal. App. 3d 555, 562-563, 162 Cal. Rptr. 590* ; *see California Teachers Assn. v. State (1999) 20 Cal. 4th 327, 345-357, 84 Cal. Rptr. 2d 425, 975 P.2d 622* (invalidating portion of *Educ. Code § 44944(e)* that would have required teacher who did not ultimately prevail (either at the administrative level or after judicial review), to share cost

of hearing)]. Although *Educ. Code § 44944(e)* does not specifically refer to attorney's fees in a mandate proceeding to judicially review the dismissal of a permanent employee, the courts have held that a permanent employee who prevails in such a mandate proceeding is entitled to reasonable attorney's fees [*see Board of Educ. v. Commission on Professional Competence (1980) 102 Cal. App. 3d 555, 565-566, 162 Cal. Rptr. 590* ; *De Groat v. Newark Unified School Dist. (1976) 62 Cal. App. 3d 538, 542, 133 Cal. Rptr. 225]* .

[5] Cross References

For a petition for writ of mandate to review an administrative decision to dismiss a civil service employee, see Ch. 118, *Civil Service*

[6] California Points and Authorities

For memoranda of points and authorities in support of a petition for writ of mandate to review the dismissal of a permanent certificated employee of a school district, see California Points and Authorities, Ch. 210, *Schools* , Pt. II (Matthew Bender)

[7] State Statutes

Causes for dismissal or suspension without pay of permanent certificated employee. *Educ. Code §§ 44932, 44933*

Charges and notice of intention to dismiss or suspend permanent employee. *Educ. Code § 44934*

Request for hearing and waiver. *Educ. Code § 44937*

Board action on demand for hearing. *Educ. Code § 44943*

Conduct of hearing by Commission on Professional Competence. *Educ. Code § 44944*

Judicial review of decision of Commission on Professional Competence. *Educ. Code § 44945*

Reinstatement and payment of back salary. *Educ. Code § 44946*

[8] Decisions

School board as not permitted to dismiss permanent teacher unless it complies with statutory procedures for dismissal. *Mass v. Board of Educ. (1964) 61 Cal. 2d 612, 617-618, 39 Cal. Rptr. 739, 394 P.2d 579*

Where permanent teacher is suspended pending hearing in dismissal proceeding, and decision is in his favor, teacher as entitled to full salary, including participation in retirement benefits, for period of suspension. *Mass v. Board of Educ. (1964) 61 Cal. 2d 612, 623, 39 Cal. Rptr. 739, 394 P.2d 579*

In mandamus proceeding to compel reinstatement of permanent teacher, prevailing teacher as entitled to prejudgment interest on each salary payment from the date of accrual to the entry of judgment. *Mass v. Board of Educ. (1964) 61 Cal. 2d 612, 624, 39 Cal. Rptr. 739, 394 P.2d 579*

School district's substantial compliance with *former Educ. Code § 44938* (*now see Educ. Code § 44938(a)*) and Stull

Act (*Educ. Code §§ 44660-44665*) satisfied statutory requirements for notice of intent to dismiss certificated teacher. *Governing Board v. Commission on Professional Competence (1985) 171 Cal. App. 3d 324, 333-334, 217 Cal. Rptr. 457*

When action of local school board in dismissing permanent teacher was illegal, teacher as entitled to be restored to position with full salary from date of dismissal. *Matteson v. State Bd. of Educ. (1943) 57 Cal. App. 2d 991, 1000, 136 P.2d 120*

[9] Cross References

For a related form, see *§ 512.160*.

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45-512 California Forms of Pleading and Practice--Annotated § 512.162

§ 512.162 Allegation--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Commission on Professional Competence to Dismiss Permanent Employee [Educ. Code § 44945]--Failure to Follow Statutory Dismissal Procedure [Code Civ. Proc. § 1094.5(a); Educ. Code §§ 44932-44947].

[1] FORM Allegation--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Commission on Professional Competence to Dismiss Permanent Employee [Educ. Code § 44945]--Failure to Follow Statutory Dismissal Procedure [Code Civ. Proc. § 1094.5(a); Educ. Code §§ 44932-44947].

Respondent Commission on Professional Competence [and real parties in interest] failed to proceed as required by law in that _____ [*specify failure to follow particular statutory procedure, e.g.,* notice of cause for dismissal under *Section 44932(a) of the Education Code* and intention to dismiss petitioner was given to petitioner on _____ (*date*), which is between May 15 and September 15, and therefore in violation of *Section 44936 of the Education Code*].

[2] Use of Form

This allegation is for use in a petition for writ of mandate to review the administrative decision of a Commission on Professional Competence to dismiss a permanent certificated employee. It may be inserted as a subparagraph of Paragraph 10 in *see § 512.161*. With appropriate modifications, this allegation may also be included in a petition for writ of mandate to review the determination of the governing board of a school district not to reemploy a probationary teacher for the ensuing school year [*see § 512.166*].

For forms of allegations that the school district dismissed petitioner for unsatisfactory performance or unprofessional conduct without giving petitioner previous notice and an opportunity to correct his or her deficiencies as required by *Educ. Code § 44938, see §§ 512.164* and *512.165*.

[3] Failure to Follow Statutory Procedure

This allegation alleges that respondent failed to proceed as required by law. Failure by an administrative agency to

proceed in the manner required by law establishes abuse of discretion which may invalidate an administrative decision [*see Code Civ. Proc. § 1094.5(a)*]. When the governing board of a school district fails to follow the statutory procedures required by law for dismissal of a teacher, any subsequent dismissal is invalid [*see Mass v. Board of Educ. (1964) 61 Cal. 2d 612, 617-618, 39 Cal. Rptr. 739, 394 P.2d 579* ; *Pennel v. Pond Union School Dist. (1973) 29 Cal. App. 3d 832, 838-839, 105 Cal. Rptr. 817]* . For a discussion of the statutory procedures for dismissal of a permanent employee, see *§ 512.28*.

[4] Cross References

For related forms, see *§§ 512.160* and *512.161*.

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45-512 California Forms of Pleading and Practice--Annotated § 512.163

§ 512.163 Allegation--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Commission on Professional Competence to Dismiss Permanent Employee [Educ. Code § 44945]--On Ground of Immoral or Unprofessional Conduct [Educ. Code § 44932(a)(1)]--Failure to Show Lack of Fitness to Teach

[1] FORM Allegation--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Commission on Professional Competence to Dismiss Permanent Employee [Educ. Code § 44945]--On Ground of Immoral or Unprofessional Conduct [Educ. Code § 44932(a)(1)]--Failure to Show Lack of Fitness to Teach

Respondent Commission on Professional Competence ordered that petitioner be dismissed on the ground that he/she was guilty of _____ [immoral *or* unprofessional *or both*] conduct. Respondent has no authority to dismiss petitioner on this ground because _____ [it made no finding that petitioner was unfit to teach by reason of his/her alleged conduct *or* the evidence received at the hearing is not sufficient to support a finding that petitioner is unfit to teach in that _____ (*specify*) *or* the findings made by respondent as a result of the hearing do not demonstrate that petitioner is unfit to teach in that _____ (*specify*)].

[2] Use of Form

This allegation is for use in a petition for writ of mandate to review the administrative decision of a Commission on Professional Competence to dismiss a permanent certificated employee. It may be inserted as a subparagraph of Paragraph 10 in *see § 512.161*. It alleges that respondent was without authority to dismiss petitioner for immoral or unprofessional conduct because of the failure to show that petitioner is unfit to teach. A permanent teacher may not be dismissed on grounds of immoral or unprofessional conduct unless his or her conduct indicates unfitness to teach [*Board of Educ. v. Jack M. (1977) 19 Cal. 3d 691, 696-697, 139 Cal. Rptr. 700, 566 P.2d 602* ; *see* discussion in *§ 512.16*].

This allegation may be adapted for use when respondent was without authority to suspend without pay a permanent certificated employee, or a probationary employee in a school district with an average daily attendance of less than 250 pupils, for unprofessional conduct under *Educ. Code §§ 44932, 44933*.

[3] Cross References

For related forms, *see §§ 512.160* and *512.161*.

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45-512 California Forms of Pleading and Practice--Annotated § 512.164

§ 512.164 Allegation--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Commission on Professional Competence to Dismiss Permanent Employee [Educ. Code § 44945]--On Ground of Unsatisfactory Performance [Educ. Code § 44932(a), (4)]--Failure to Give Notice and Opportunity to Correct Faults [Educ. Code § 44938(b)]

[1] FORM Allegation--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Commission on Professional Competence to Dismiss Permanent Employee [Educ. Code § 44945]--On Ground of Unsatisfactory Performance [Educ. Code § 44932(a), (4)]--Failure to Give Notice and Opportunity to Correct Faults [Educ. Code § 44938(b)]

Respondent Commission on Professional Competence ordered that petitioner be dismissed on the ground that he/she was guilty of unsatisfactory performance. Respondent had no authority to dismiss petitioner on this ground because [the evidence received at the hearing showed that] the governing board of real party in interest _____ School District _____ [failed to give petitioner written notice of the nature of the alleged unsatisfactory performance that was the alleged ground for petitioner's dismissal, as required by *Section 44938(b) of the Education Code*, _____ (at least 90 calendar days prior to filing of the written charges *or* prior to the beginning of the time period composed of the last one-fourth of the school days the governing board has scheduled for purposes of computing apportionments in the fiscal year) *or* served petitioner with notice of the nature of the alleged unsatisfactory performance pursuant to *Section 44938(b) of the Education Code* on _____ [*date*]. Thereafter, on _____ [*date*], less than 90 calendar days after service of the notice, petitioner was transferred to a nonteaching position, thereby depriving petitioner of the opportunity to correct his/her faults and overcome the grounds for the charges].

[2] Use of Form

This allegation is for use in a petition for writ of mandate to review the administrative decision of a Commission on Professional Competence to dismiss a permanent certificated employee. It may be inserted as a subparagraph of Paragraph 10 in § 512.161. It alleges that respondent was without authority to dismiss petitioner on the ground of unsatisfactory performance because of the failure of the governing board of the school district to provide petitioner with advance notice of the nature of the charges and an opportunity to correct his or her faults and overcome the charges as required by *Educ. Code § 44938(b)* [*see* discussion in *§ 512.28[2][e]*].

[3] Cross References

For related forms, see *§§ 512.160 -512.162*.

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45-512 California Forms of Pleading and Practice--Annotated § 512.165

§ 512.165 Allegation--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Commission on Professional Competence to Dismiss Permanent Employee [Educ. Code § 44945]--On Ground of Unprofessional Conduct [Educ. Code § 44932(a)(1), 44933]--Failure to Give Notice and Opportunity to Correct Faults [Educ. Code § 44938(a)]

[1] FORM Allegation--For Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Commission on Professional Competence to Dismiss Permanent Employee [Educ. Code § 44945]--On Ground of Unprofessional Conduct [Educ. Code § 44932(a)(1), 44933]--Failure to Give Notice and Opportunity to Correct Faults [Educ. Code § 44938(a)]

Respondent Commission on Professional Competence ordered that petitioner be dismissed on the ground that he/she was guilty of unprofessional conduct. Respondent had no authority to dismiss petitioner on this ground because [the evidence received at the hearing showed that] the governing board of real party in interest _____ School District _____ [failed to give petitioner written notice of the nature of the alleged unprofessional conduct at least 45 calendar days prior to the filing of the charges that were the alleged ground for petitioner's dismissal, as required by *Section 44938(a) of the Education Code or* served petitioner with notice of the nature of the alleged unprofessional conduct pursuant to *Section 44938(a) of the Education Code* on _____ [*date*]. Thereafter, on _____ [*date*], less than 45 calendar days after service of the notice, petitioner was transferred to a nonteaching position, thereby depriving petitioner of the opportunity to correct his/her faults and overcome the grounds for the charges].

[2] Use of Form

This allegation is for use in a petition for writ of mandate to review the administrative decision of a Commission on Professional Competence to dismiss a permanent certificated employee. It may be inserted as a subparagraph of Paragraph 10 in § 512.161. It alleges that respondent was without authority to dismiss petitioner on the ground of unprofessional conduct because of the failure of the governing board of the school district to provide petitioner with advance notice of the nature of the charges and an opportunity to correct his or her faults and overcome the charges as required by *Educ. Code § 44938(a)* [*see* discussion in *§ 512.28[2][c]*].

This allegation may be adopted for use when respondent was without authority to suspend either a permanent

certificated employee or a probationary employee in a school district with an average daily attendance of less than 250 pupils, for unprofessional conduct under *Educ. Code § 44932, 44933*, but only if the governing board has not adopted a collective bargaining agreement pursuant to *Gov. Code § 3543.2*.

[3] Decisions

Trial court as required to exercise its independent judgment when reviewing decision of *Commission on Professional Competence. Pittsburg Unified School Dist. v. Commission on Professional Competence (1983) 146 Cal. App. 3d 964, 976, 194 Cal. Rptr. 672*

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45-512 California Forms of Pleading and Practice--Annotated § 512.166

§ 512.166 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Governing Board of School District--Nonreemployment of Probationary Employee Employed Prior to 1983-1984 Fiscal Year or in Small School District for Subsequent School Year [Educ. Code § 44948.5]

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Governing Board of School District--Nonreemployment of Probationary Employee Employed Prior to 1983-1984 Fiscal Year or in Small School District for Subsequent School Year [Educ. Code § 44948.5]

[*Caption. See § 512.160.*]

Petitioner respectfully represents:

1. [*Capacity and residence of petitioner. See § 512.160, Paragraph 1.*]

2. At all times herein mentioned, petitioner was a duly certificated probationary employee of _____ School District.

[*EITHER*]

3. Petitioner was hired and his/her probationary period commenced on _____ [*date*]. This date was prior to the 1983-1984 fiscal year.

[*OR*]

3. _____ School District has an average daily attendance of less that 250 pupils.

4. Respondent _____ [*title of governing board, e.g.,* Board of Education of the _____ School District] is the duly constituted governing board of the _____ School District. _____ School District is, and at all times herein mentioned was, a school district, duly organized and existing under the laws of the State of California.

5. Under *Section 44948.5 of the Education Code*, respondent _____ [*title of governing board of district, e.g.,* Board of Education of the _____ School District] has discretion to determine the facts concerning whether or not cause exists to not reemploy a probationary certificated employee for the ensuing school year for reasons other than those specified in *Section 44955 of the Education Code* and whether such cause relates solely to the welfare of the schools and the pupils thereof. Pursuant to *Section 44948.5 of the Education Code*, and *Sections 11500 through 11528 of the Government Code*, respondent is required to con duct a hearing and take evidence in its proceedings for the determination of those facts.

6. On or about _____ [*date*], respondent notified petitioner that it had been recommended that petitioner not be reemployed for the ensuing school year _____- _____. [A copy of the notice is attached hereto as Exhibit A and made a part hereof.] Thereafter, on _____ [*date*], petitioner filed a timely written request for a hearing with respondent in accordance with *Section 44948.5(c) of the Education Code*.

7. On _____ [*date*], at _____ [*specify meeting place*], a hearing was held to receive evidence on the issue of whether or not cause exists to not reemploy petitioner as a certificated probationary employee for the ensuing school year _____- _____. Petitioner attended the hearing.

8. On _____ [*date*], petitioner received respondent's final decision and determination that (1) petitioner not be reemployed for the ensuing school year _____- _____ on the ground that _____ [*specify ground for respondent's action*] and (2) that this constitutes a cause for not reemploying petitioner which is related solely to the welfare of the schools and the pupils thereof. [*If appropriate, allege application for reconsideration and adverse result.*] [A copy of the notice of decision is attached hereto as Exhibit B and made a part hereof.]

9. [*Attachment of verbatim transcript of hearing or summary of substance of evidence received at hearing. See § 512.160, Paragraph 7.*]

10. Respondent's decision and order are invalid for the following reasons: _____ [*in subparagraphs which follow, state reasons why decision is invalid, e.g.,*

a. Respondent found that _____ (*state all findings*). Respondent does not have authority to not reemploy petitioner based on any of these findings in that such findings do not constitute cause for nonreemployment which is solely related to the welfare of the schools and the pupils thereof.

b. Respondent failed to proceed in the manner required by law in terminating petitioner's employment in that respondent failed to give petitioner final notice of its determination not to reemploy him/her prior to May 15, in violation of *Section 44948.5(f) of the Education Code*. Pursuant to *Section 44948.5(i) of the Education Code*, petitioner must therefore be deemed reemployed for the ensuing school year _____- _____.

c. The evidence received at the hearing does not support the findings for the following reasons: _____ (*specify*).

[d. _____ (*In this and following subparagraphs, allege any other reasons for invalidity of the*

decision under Code Civ. Proc. § 1094.5, such as action by respondent without or in excess of authority, denial of a fair hearing, and abuse of discretion as established by a failure to proceed as required by law or failure of the findings to support the decision. For examples of such allegations, see the petitions for writ of mandate to review administrative decision in Ch. 474C, Procedures in Reviewing Agency Decisions, §§ 474C.90, 474C.91)].

[11. *If appropriate, allege existence of additional relevant evidence that petitioner could not, in the exercise of reasonable diligence, have produced at the hearing. See § 512.160, Paragraph 9.*]

[12. *If petitioner seeks attorney's fees pursuant to Gov. Code § 800, allege amount of attorney's fees incurred. See § 512.160, Paragraph 10.*]

13. [*Exhaustion of administrative remedies. See § 512.160, Paragraph 11*].

14. [*Lack of plain, speedy, or adequate remedy in ordinary course of law. See § 512.160, Paragraph 12*].

WHEREFORE, petitioner prays judgment as follows:

[1. *If alternative writ procedure is used:* For an alternative writ of mandate directing respondent to set aside its decision and order of _____ [*date*], that petitioner should not be reemployed for the ensuing school year _____- _____ and to _____ (reconsider whether cause exists for not reemploying petitioner for the ensuing school year _____- _____ *or* enter a decision ordering that petitioner be reemployed by _____ School District for the ensuing school year _____- _____, or in the alternative to show cause why a peremptory writ of mandate to the same effect should not be issued;]

[2. *If petitioner seeks a stay of operation of administrative order or decision pending judgment, state:* For an order restraining respondent from giving effect to its order of _____ (*date*), that petitioner not be reemployed for the ensuing school year _____- _____) until further order of the court and to show cause why operation of that order should not be stayed pending judgment in this proceeding;]

3. For a peremptory writ of mandate _____ [*set out terms of proposed peremptory writ at length as in Paragraph 1 of this prayer, omitting words relating to order to show cause*];

[4. For reasonable attorney's fees, in addition to any other relief granted or other costs awarded;]

5. For costs of suit herein incurred [*if appropriate, add:*, including $_____ for preparation of the administrative record]; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 512.160.*]

CAUTION:

This petition must be verified [*Code Civ. Proc. § 1086*]. Proof of service of a copy of the petition on each respondent and real party in interest must accompany the petition when it is offered for filing (except when, in its discretion and for good cause, the court has granted the application for the writ ex parte) [*Code Civ. Proc. § 1107*]. However, in a trial court, if no alternative writ is sought, proof of service of a copy of the petition need not accompany the application for the writ at the time of filing, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*]. Points and authorities also customarily accompany a petition for writ of mandate filed in superior court, although they do not appear to be expressly required by statute.

[2] Use of Form

This form is a petition for writ of mandate for use by a probationary employee employed prior to the 1983-1984 fiscal year in a public school district or employed in a small public school district (that is, one having an average daily attendance of less than 250 pupils) to obtain judicial review of an administrative decision by the governing board of the district not to reemploy the employee for the ensuing school year. The employee may proceed by either the alternative writ procedure or the noticed motion procedure, as discussed in *§ 512.160[2][b], [c]*. For a complete discussion of petitions for writs of mandate to review administrative decisions, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[3] Allegations

The petition alleges:

- Petitioner's status as a probationary employee, and thus his or her beneficial interest in the issuance of the writ [*see Code Civ. Proc. § 1086*] (Paragraph 2).

- Petitioner's employment by the school district prior to the 1983-1984 fiscal year or by a small public school district (i.e., one having an average daily attendance of less than 250 pupils) [*Educ. Code § 44948.5(a)*] (Paragraph 3).

- Capacity of respondent school board (Paragraph 4).

- Respondent's discretionary authority to determine whether or not cause exists for not reemploying petitioner and the requirement in law that respondent hold an evidentiary hearing [*Code Civ. Proc. § 1094.5(a)*; *see Educ. Code § 44948.5*] (Paragraph 5).

- Service of notice of intention not to reemploy petitioner and demand for hearing by petitioner [*see Educ. Code § 44948.5(b), (c)*] (Paragraph 6).

- Facts regarding holding of the hearing (Paragraphs 7-9).

- Reasons for the invalidity of the decision [*Code Civ. Proc. § 1094.5(b)*] (Paragraph 10); including:

  - Lack of cause related to the welfare of the school and its pupils [*Educ. Code § 44948.5(e)*; *see* discussion in *§ 512.30[2][b]*] (Paragraph 10, subparagraph a).

  - Failure by respondent to give petitioner final notice of nonreemployment by May 15 [*Educ. Code § 44948.5(g), (i)*; *see* discussion in *§ 512.30[2][f]*] (Paragraph 10,

subparagraph b); and

- Failure of the evidence to support the findings [*Code Civ. Proc. § 1094.5(b)*] (Paragraph 10, subparagraph c).

The allegations in the petition which consist of cross references to allegations contained in other forms are *set forth in §§ 512.160[3], 512.161[3], 512.166[3], 512.67[3], 512.168[3], 512.169[3],* and *512.170[3]*.

[4] Statute of Limitations

The 30-day statute of limitations for judicial review of administrative proceedings contained in *Gov. Code § 11523* is applicable to review of proceedings to dismiss a probationary teacher under *Educ. Code § 44948.5*. The limitation period commences to run on the date the decision is mailed or delivered [*Koons v. Placer Hills Union Sch. Dist. (1976) 61 Cal. App. 3d 484, 489, 490, 132 Cal. Rptr. 243]* .

[5] California Points and Authorities

For memoranda of points and authorities supporting a petition for writ of mandate to review the decision of a school district's governing board not to reemploy a probationary employee for the ensuing school year, see California Points and Authorities, Ch. 210, *Schools* , Pt. II

[6] State Statutes

Procedure for dismissal of probationary employee employed prior to 1983-1984 fiscal year or in small public school district at end of school year. *Educ. Code § 44948.5*

[7] Decisions

District's failure to issue findings of fact and conclusions of law as required by former *Educ. Code § 44949(c)* (now see *Educ. Code § 44948.5(d)* as potentially harmless when only one ground, known to teacher, was basis for failure to rehire. *Alba v. Los Angeles Unified School Dist. (1983) 140 Cal. App. 3d 997, 1007-1008, 189 Cal. Rptr. 897*

Right of probationary teacher to be rehired for succeeding year as not vested; in mandate proceeding to review decision of school board not to rehire teacher, court as required to accept fact findings of school board if supported by substantial evidence. *Turner v. Board of Trustees (1976) 16 Cal. 3d 818, 824-827, 129 Cal. Rptr. 443, 548 P.2d 1115* (disapproving *Young v. Governing Bd. (1974) 40 Cal. App. 3d 769, 115 Cal. Rptr. 456* to extent it is inconsistent)

Question whether or not cause for refusal to rehire probationary teacher relates solely to welfare of school and its pupils as question of law for courts to determine. *Lindros v. Governing Bd. of The Torrance Unified School Dist. (1973) 9 Cal. 3d 524, 533-534, 108 Cal. Rptr. 185, 510 P.2d 361 , cert. denied 414 U.S. 1112, 94 S. Ct. 842, 38 L. Ed. 2d 739* ; *Bekiaris v. Board of Education (1972) 6 Cal. 3d 575, 587, 589, 100 Cal. Rptr. 16, 493 P.2d 480*

Under former Educ. Code § 13443(h) (now *Educ. Code § 44948.5(i)*), probationary teacher as deemed reemployed for subsequent school year un less final notice of board's decision not to reemploy is given on or before May 15 of preceding school year; notice provision as mandatory. *Rutherford v. Board of Trustees (1974) 37 Cal. App. 3d 775, 779-781, 112 Cal. Rptr. 560* ; *Stewart v. San Mateo Junior College Dist. (1974) 37 Cal. App. 3d 345, 347-348, 112 Cal. Rptr. 272*

Former Educ. Code § 13443 (now *Educ. Code § 44948.5*) requiring notice and hearing prior to dismissal of probationary teachers as applicable to all school districts, regardless of size. *Shaughnessy v. Wilsona School Dist. (1972) 29 Cal. App. 3d 742, 745-749, 105 Cal. Rptr. 707*

Mandate proceeding as appropriate remedy for probationary teacher wrongfully denied reemployment for ensuing school year. *Blodgett v. Board of Trustees (1971) 20 Cal. App. 3d 183, 190, 97 Cal. Rptr. 406* ; *Thornton v. Board of Trustees (1968) 262 Cal. App. 2d 761, 763, 68 Cal. Rptr. 842*

[8] Cross References

For related forms, see *§§ 512.160* and *512.161*.

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45-512 California Forms of Pleading and Practice--Annotated § 512.167

§ 512.167 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Governing Board of School District--Dismissal of Probationary Employee Whose Probationary Period Commenced During or After 1983-1984 Fiscal Year [Educ. Code § 44948.3]

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Governing Board of School District--Dismissal of Probationary Employee Whose Probationary Period Commenced During or After 1983-1984 Fiscal Year [Educ. Code § 44948.3]

[*Caption. See § 512.160.*]

Petitioner respectfully represents:

1. [*Capacity and residence of petitioner. See § 512.160, Paragraph 1.*]

2. [*Petitioner's employment as probationary employee. See § 512.166, Paragraph 2.*]

3. Petitioner was hired and his/her probationary period commenced on _____ [*date*]. This date was _____ [during *or* after] the 1983-1984 fiscal year.

4. [*Capacity of respondent governing board of school district.*]

5. Under *Section 44948.3(a) of the Education Code*, respondent _____ [*title of governing board of school district, e.g.,* Board of Education of the _____ School District] has discretion to determine the facts concerning whether or not a probationary certificated employee should be dismissed for unsatisfactory performance, as determined pursuant to *Sections 44660 through 44665 of the Education Code*, or for cause, pursuant to *Section 44932 of the Education Code*. Pursuant to *Section 44948.3(a)(2) of the Education Code*, respondent is required to conduct a hearing and take evidence in its proceedings for determination of those facts.

6. On or about _____ [*date*], respondent notified petitioner that he/she would be dismissed, effective _____ [*date*]. [A copy of the notice is attached hereto as Exhibit A and made a part hereof by reference.] Thereafter, on _____ [*date*], petitioner submitted to respondent a timely written request for a hearing pursuant to *Section 44948.3 of the Education Code*.

7. On _____ [*date*], at _____ [*specify meeting place*], a hearing was held to receive evidence on the issue of whether or not petitioner should be dismissed. Petitioner attended the hearing.

8. On _____ [*date*], petitioner received respondent's final decision and determination that petitioner should be dismissed on the following ground(s): _____ [*specify, e.g.*, unsatisfactory performance]. [*If appropriate, allege application for reconsideration and adverse result.*] [A copy of the notice of decision is attached hereto as Exhibit B and made a part hereof.]

9. [*Attachment of verbatim transcript of hearing or summary of substance of evidence received at hearing. See § 512.160, Paragraph 7.*]

10. Respondent's decision and order are invalid for the following reasons: _____ [*in subparagraphs which follow, state reasons why decision is invalid under Code Civ. Proc. § 1094.5, such as action by respondent without or in excess of authority, denial of a fair hearing, and abuse of discretion as established by failure to proceed as required by law, failure of the findings to support the decision, and failure of the evidence to support the findings. For examples of such allegations, see the petition for writ of mandate to review an administrative decision in Ch. 474C, Procedures in Reviewing Agency Decisions*].

[11. *If appropriate, allege existence of additional relevant evidence that petitioner could not, in the exercise of reasonable diligence, have produced at the hearing. See § 512.160, Paragraph 9.*]

[12. *If petitioner seeks attorney's fees pursuant to Gov. Code § 800, allege amount of attorney's fees incurred. See § 512.160, Paragraph 10.*]

12. [*Exhaustion of administrative remedies. See § 512.160, Paragraph 11.*]

13. [*Lack of plain, speedy, or adequate remedy in ordinary course of law. See § 512.160, Paragraph 12.*]

WHEREFORE, petitioner prays judgment as follows;

[1. *If alternative writ procedure is used:* For an alternative writ of mandate directing respondent to set aside its decision and order of _____ (*date*), that petitioner should be dismissed and to _____ (reconsider whether cause exists for dismissing petitioner *or* enter a decision ordering that petitioner not be dismissed and that he/she be reinstated in his/her position and paid back salary, plus interest at the legal rate, from _____ [*date*]), or in the alternative to show cause why a peremptory writ of mandate to the same effect should not be issued;]

[2. *If petitioner seeks a stay of operation of administrative order or decision pending judgment, state:* For an order restraining respondent from giving effect to its order of the court and to show cause why operation of that order should not be stayed pending judgment in this proceeding;]

3. For a peremptory writ of mandate _____ [*set out terms of proposed peremptory writ at length as in Paragraph 1 of this prayer, omitting words relating to order to show cause*];

[4. For reasonable attorney's fees, in addition to any other relief granted or other costs awarded;]

5. For costs of suit herein incurred [*if appropriate, add:*, including $_____ for preparation of the administrative record];

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 512.160.*]

CAUTION:

This petition must be verified [*Code Civ. Proc. § 1086*]. Proof of service of a copy of the petition must accompany the petition when it is offered for filing (except when, in its discretion and for good cause, the court has granted the application for the writ ex parte) [*Code Civ. Proc. § 1107*]. However, in a trial court, if no alternative writ is sought, proof of service of a copy of the petition need not accompany the application for the writ at the time of filing, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

[2] Use of Form

[a] In General

This form is a petition for a writ of mandate for use by a certificated probationary employee (in a district with an average daily attendance of 250 or more pupils) whose probationary period commenced during or after the 1983-1984 fiscal year to obtain judicial review of an administrative decision by the governing board of the district to dismiss the employee pursuant to *Educ. Code § 44948.3*. The employee may proceed by either the alternative writ procedure or the noticed motion procedure, as discussed in *§ 512.160[2][b], [c]*. For complete discussion of petitions for writs of mandate to review administrative decisions, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[b] Related Use

With appropriate modifications, this petition may be used when the governing board has suspended a probationary employee for a specific period of time without pay, as authorized by *Educ. Code § 44948.3(b)*.

[3] Allegations

This petition alleges:

- Petitioner's status as a probationary employee whose probationary period commenced during or after the 1983-1984 fiscal year [*see Educ. Code § 44948.3(c)*], and thus his or her beneficial interest in the issuance of the writ [*see Code Civ. Proc. § 1086*] (Paragraphs 2, 3).

- Respondent's discretionary authority to determine whether cause exists for dismissing petitioner and the requirement in law that respondent hold an evidentiary hearing [*Code Civ. Proc. § 1094.5(a)*; *see*

Educ. Code § 44948.3(a)] (Paragraph 5).

- Service of notice of dismissal and petitioner's written demand for a hearing [*Educ. Code § 44948.3(a)*] (Paragraph 6).

- Facts pertaining to conduct of the hearing (Paragraphs 7-9).

- Reasons for invalidity of the governing board's decision [*Code Civ. Proc. § 1094.5(b)*] (Paragraph 10).

The allegations in this petition that consist of cross references to allegations contained in other forms are *set forth in §§ 512.160[3], 512.161[3], 512.166[3], 512.167[3], 512.168[3], 512.169[3]*, and *512.170[3]*.

[4] State Statutes

Dismissal or suspension of probationary employee whose probationary period commenced during or after 1983-1984 fiscal year. *Educ. Code § 44948.3*

[5] Cross References

For related forms, see *§§ 512.160, 512.161*, and *512.166*.

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Volume 45: Schools: Certification thru Service of Summons and Papers-Chs. 512-519
Chapter 512 SCHOOLS: CERTIFICATION, DISMISSAL, AND RELATED EMPLOYMENT ISSUES
PART V. FORMS

45-512 California Forms of Pleading and Practice--Annotated § 512.168

§ 512.168 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Governing Board of School District--Termination of Services Due to Reduction of Number of Certificated Employees [Educ. Code §§ 44949, 44955]

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5; Gov. Code § 11523] of Governing Board of School District--Termination of Services Due to Reduction of Number of Certificated Employees [Educ. Code §§ 44949, 44955]

[*Caption. See § 512.160*]

Petitioner respectfully represents:

1. [*Capacity and residence of petitioner. See § 512.160, Paragraph 1.*]

2. At all times herein mentioned, petitioner was a duly certificated _____ [permanent *or* probationary] employee of _____ School District.

3. Respondent _____ [*title of governing board, e.g.,* Board of Education of the _____ School District] is the duly constituted governing board of the _____ School District. _____ School District is, and at all times herein mentioned was, a school district, duly organized and existing under the laws of the State of California.

4. Under *Section 44949 of the Education Code*, respondent _____ [*title of governing board of district, e.g.,* Board of Education of the _____ School District] has discretion to determine the facts concerning whether or not a certificated employee's services should be terminated for the ensuing school year due to reduction in the number of certificated employees for the reasons specified in *Section 44955(b) of the Education Code*. Pursuant to Sections 44949(b), (c) and *44955(c) of the Education Code*, and *Sections 11500 through 11528 of the Government Code*, respondent is required to conduct a hearing and take evidence in its proceedings for the determination of those facts.

5. On or about _____ [*date*], respondent notified petitioner that it had been recommended that petitioner's services be terminated for the ensuing school year _____- _____ for the reasons specified in *Section 44955 of the Education Code* [A copy of the notice is attached hereto as Exhibit A and made a part hereof.] Thereafter, on _____ [*date*], petitioner filed a timely written request for a hearing with respondent in accordance with *Section 44949(b) of the Education Code*.

6. On _____ [*date*], at _____ [*specify meeting place*], a hearing was held to receive evidence on the issue of whether or not petitioner's services should be terminated for the ensuing school year _____- _____. Petitioner attended the hearing.

7. On _____ [*date*], petitioner received notice of the termination of his/her services for the ensuing school year _____- _____ for the reason that _____ [*specify the reason for terminating petitioner's services under Educ. Code § 44955, e.g.,* a decline in average daily attendance from the corresponding period of the previous school year had made it necessary to terminate the services of a corresponding percentage of probationary and permanent employees, and petitioner had less seniority than any of the employees whose services were retained]. [*If appropriate, allege application for reconsideration and adverse result.*] [A copy of the notice is attached hereto as Exhibit _____ and made a part hereof.]

8. [*Attachment of verbatim transcript of hearing or summary of substance of evidence received at hearing. See § 512.160, Paragraph 7.*]

9. Respondent's decision and order are invalid because _____ [*specify reasons for invalidity of decision, e.g.,*

a. Respondent failed to proceed in the manner required by law in terminating petitioner's employment in that respondent failed to give petitioner final notice of its determination not to reemploy him/her prior to May 15, in violation of *Section 44955(c) of the Education Code*. Pursuant to *Section 44955(c) of the Education Code*, petitioner must therefor be deemed reemployed for the ensuing school year _____- _____.

b. The evidence received at the hearing does not support the findings for the following reasons: (*specify*).

c. _____ (*In this and following subparagraphs, allege any other reasons for invalidity of the decision under Code Civ. Proc. § 1094.5, such as action by respondent without or in excess of authority, denial of a fair hearing, and abuse of discretion as established by a failure to proceed as required by law or failure of the findings to support the decision. For examples of such allegations, see the petition for writ of mandate to review administrative decision in Ch. 474C, Procedures in Reviewing Agency Decisions, §§ 474C.90, 474C.91*)].

[10. *If appropriate, allege existence of additional relevant evidence that petitioner could not, in the exercise of reasonable diligence, have produced at the hearing. See § 512.160, Paragraph 9.*]

[11. *If petitioner seeks attorney's fees pursuant to Gov. Code § 800, allege amount of attorney's fees incurred. See § 512.160, Paragraph 10.*]

12. [*Exhaustion of administrative remedies. See § 512.160, Paragraph 11*].

13. [*Lack of plain, speedy, or adequate remedy in ordinary course of law. See § 512.160, Paragraph 12*].

WHEREFORE, petitioner prays judgment as follows:

[1. *If alternative writ procedure is used:* For an alternative writ of mandate directing respondent to set aside its decision and order of _____ (*date*), that petitioner's services be terminated for the ensuing school year _____- _____ and to _____ (reconsider whether cause exists for terminating petitioner's services for the ensuing school year _____- _____ *or* enter a decision ordering that petitioner be reemployed by _____ School District for the ensuing school year _____- _____), or in the alternative to show cause why a peremptory writ of mandate to the same effect should not be issued;]

[2. *If petitioner seeks a stay of operation of administrative order or decision pending judgment, state:* For an order restraining respondent from giving effect to its order of _____ (*date*), that petitioner's services be terminated for the ensuing school year _____- _____ until further order of the court and to show cause why operation of that order should not be stayed pending judgment in this proceeding;]

3. For a peremptory writ of mandate _____ [*set out terms of proposed peremptory writ at length as in Paragraph 1 of this prayer, omitting words relating to order to show cause*];

[4. For reasonable attorney's fees, in addition to any other relief granted or other costs awarded;]

5. For costs of suit herein incurred [*if appropriate, add:*, including $_____ for preparation of the administrative record]; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 512.160*].

CAUTION:

This petition must be verified [*Code Civ. Proc. § 1086*]. Proof of service of a copy of the petition on each respondent and real party in interest must accompany the petition when it is offered for filing (except when, in its discretion and for good cause, the court has granted the application for the writ ex parte) [*Code Civ. Proc. § 1107*]. However, in a trial court, if no alternative writ is sought, proof of service of a copy of the petition need not accompany the application for the writ at the time of filing, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*]. Points and authorities also customarily accompany a petition for writ of mandate filed in superior court, although they do not appear to be expressly required by statute.

[2] Use of Form

This form is a petition for writ of mandate for use by a probationary or permanent employee of a public school district to obtain judicial review of an administrative decision by the governing board of the district to terminate the employee's services for the ensuing school year due to a reduction in the number of certificated employees for the reasons specified

in *Educ. Code § 44955*. The employee may proceed by either the alternative writ procedure or the noticed motion procedure, as discussed in *§ 512.160[2][b], [c]*. For a complete discussion of petitions for writs of mandate to review administrative decisions, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

[3] Allegations

The petition alleges:

- Petitioner's status as a probationary or permanent employee, and thus his or her beneficial interest in the issuance of the writ [*see Code Civ. Proc. § 1086*] (Paragraph 2).

- Capacity of respondent school board (Paragraph 3).

- Respondent's discretionary authority to determine whether or not cause exists for terminating petitioner's services pursuant to *Educ. Code § 44955* and the requirement in law that respondent hold an evidentiary hearing [*Code Civ. Proc. § 1094.5(a)*; *see Educ. Code §§ 44949, 44955*] (Paragraph 4).

- Service of notice of intention not to reemploy petitioner and demand for hearing by petitioner [*see Educ. Code § 44949(a), (b)*] (Paragraph 5).

- Facts regarding holding of the hearing (Paragraphs 6-8).

- Reasons for the invalidity of the decision [*Code Civ. Proc. § 1094.5(b)*; *Educ. Code §§ 44949, 44955*] (Paragraph 9), including:

  - Failure by respondent to give petitioner final notice of nonreemployment by May 15 [*Educ. Code § 44955(c)*; *see* discussion in *§ 512.30[2][f]*] (Paragraph 9, subparagraph a); and

  - Failure of the evidence to support the findings [*Code Civ. Proc. § 1094.5(b)*] (Paragraph 9, subparagraph b).

The allegations in the petition which consist of cross references to allegations contained in other forms are *set forth in §§ 512.160[3], 512.161[3], 512.166[3], 512.167[3], 512.168[3], 512.169[3]*, and *512.170[3]*.

[4] State Statutes

Procedure for terminating employee's services at end of school year for reasons specified in *Educ. Code § 44955*. *Educ. Code § 44949*

Reduction of number of permanent and probationary certificated employees. *Educ. Code § 44955*

[5] Cross References

For related forms, see *§§ 512.160, 512.161*, and *512.166*.

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Chapter 512 SCHOOLS: CERTIFICATION, DISMISSAL, AND RELATED EMPLOYMENT ISSUES
PART V. FORMS

45-512 California Forms of Pleading and Practice--Annotated § 512.169

§ 512.169 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Recognition of Permanent Status of School District Employee [Educ. Code § 44929.21]

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Recognition of Permanent Status of School District Employee [Educ. Code § 44929.21]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION FOR WRIT OF MANDATE
_____ [*names*],	)	[*Code Civ. Proc. §§ 1085, 1086*]
Respondents.	)	
	)	
	)	

Petitioner respectfully represents:

1. [*Capacity and residence of petitioner. See § 512.160, Paragraph 1.*]

2. Petitioner is, and at all times herein mentioned was, a duly certificated public school employee, holding _____ [*describe certification documents*].

3. Respondent _____ [*name*] School District is, and at all times herein mentioned was, a school district, duly organized and existing under the laws of the State of California. Respondent _____ [*title of governing board, e.g.,* Board of Education of the _____ School District] is the duly constituted and acting governing board of respondent _____ [*name*] School District.

4. At all times herein mentioned, respondent _____ School District had an average daily attendance equal to or in excess of 250 pupils.

[*EITHER, for probationary employees whose probationary period commenced during the 1983-1984 or subsequent fiscal years*]

5. On or about _____ [*date*], and prior to the commencement of the school year _____- _____, petitioner was employed by respondent _____ School District for the school year _____- _____ as _____ [*describe position, e.g.,* a teacher of mathematics at _____ School], which is a position requiring certification qualifications. Petitioner served in this position during the entire school year _____- _____ and was at all times during the school year classified by respondent _____ [*title of governing board*] as a probationary employee of respondent _____ School District. Thereafter, petitioner was duly reelected and reemployed by respondent _____ [*title of governing board*] as a probationary employee in this position for the next school year _____- _____. Petitioner served in this position during the whole of the above-mentioned school year, and was duly classified as a probationary employee of respondent _____ School District during the whole of the above-mentioned school year.

6. Thereafter, petitioner was reemployed by respondent _____ [*title of governing board*] for a third consecutive year, the school year _____- _____, and became a permanent employee of respondent _____ School District by operation of law under the provisions of *Section 44929.21(b) of the Education Code*. Ever since then, petitioner has been a permanent employee of respondent _____ School District, entitled to serve and serving as such in the schools of the district.

[*OR, for probationary employees whose probationary period commenced prior to the 1983-1984 fiscal year*]

5. On or about _____ [*date*], and prior to the commencement of the school year _____- _____, petitioner was employed by respondent _____ [*name*] School District for the school year _____- _____ as _____ [*describe position, e.g.,* a teacher of mathematics at _____ School], which is a position requiring certification qualifications. Petitioner served in this position during the entire school year _____- _____ and was at all times during the school year classified by respondent _____ [*title of governing board*] as a probationary employee of respondent _____ School District. Thereafter, petitioner was duly reelected and reemployed by respondent _____ [*title of governing board*] as a probationary employee in this position for each of the next two consecutive school years, _____- _____ and _____- _____. Petitioner served in this position during the whole of each of the above-mentioned school years, and was duly classified as a probationary employee of respondent _____ School District during the whole of each of the above-mentioned school years.

6. Thereafter, petitioner was reemployed by respondent _____ [*title of governing board*] for a fourth consecutive year, the school year _____- _____, and became a permanent employee of respondent _____ School District by operation of law under the provisions of *Section 44929.21(a) of the Education Code*. Petitioner has ever since been a permanent employee of respondent _____ School District, entitled to serve and serving as such in the schools of the district.

[*CONTINUE*]

7. _____ [*Allege failure by respondents to recognize petitioner's status as permanent employee, e.g.,* On or about _____, (*date*), respondent _____ (*title of governing board*) notified petitioner that it did not recognize his/her status as a permanent employee of _____ School District, and that it intended to dismiss petitioner without holding a hearing. Thereafter, respondents proceeded to dismiss petitioner from his/her position without complying with any of the provisions of *Sections 44932 through 44946 of the Education Code*, and refused to permit petitioner to serve as permanent certificated employee of _____ School District for the school year _____- _____].

8. _____ [*Allege demand by petitioner that respondent recognize his/her permanent status, e.g.,* On _____ (*date*), the first day that certificated employees were required to report for duty and assignment for the school year _____- _____, petitioner duly reported to the appropriate official of respondent _____ School District, presented himself/herself, and demanded that he/she be permitted to serve and perform the services which he/she is certificated to perform for the school year _____- _____. Respondents refused, and continue to refuse, to recognize petitioner's status as permanent employee of respondent _____ School District and refuse to permit petitioner to serve as a certificated employee of the district].

9. Petitioner has no plain, speedy, or adequate remedy in the ordinary course of law in that _____ [*specify, e.g.,* no other remedy is provided by the law to compel respondents to reinstate petitioner and recognize his/her status as a permanent certificated employee of respondent _____ School District].

WHEREFORE, petitioner prays judgment as follows:

[1. *If alternative writ procedure is used:* For an alternative writ of mandate directing respondents to forthwith recognize petitioner's status as a full-time permanent certificated employee of respondent _____ School District, from and after _____ (*date*), and _____ (*specify other appropriate relief, e.g.,* to reinstate petitioner in his/her position and employment as permanent employee of respondent _____ School District, assigning him/her to active teaching duties, and to fix petitioner's salary according to his/her proper salary classification in accordance with the salary schedule of respondents for the school year _____- _____), or in the alternative to show cause why a peremptory writ of mandate to the same effect should not be issued;]

2. For a peremptory writ of mandate _____ [*set out terms of proposed peremptory writ at length as in Paragraph 1 of this prayer, omitting words relating to order to show cause*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 512.160.*]

CAUTION:

This petition must be verified [*Code Civ. Proc. § 1086*]. Proof of service of a copy of the petition on each respondent and real party in interest must accompany the petition when it is offered for filing (except when, in its discretion and for good cause, the court has granted the application for the writ ex parte) [*Code Civ. Proc. § 1107*]. However, in a trial court, if no alternative writ is sought, proof of service of a copy of the petition need not accompany the application for the writ at the time of filing, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*]. Points and authorities also customarily accompany a petition for writ of mandate filed in superior court, although they do not appear to be expressly required by statute.

[2] Use of Form

This form is a petition for a writ of mandate pursuant to *Code Civ. Proc. §§ 1085* and *1086* to compel the governing board of a school district with an average daily attendance of 250 or more pupils to recognize that an employee has attained permanent status. It may be used where the school district has attempted to discharge the employee without following the procedures applicable to the dismissal of a permanent employee, or in other situations where the school district has failed to accord the employee the rights of a permanent employee.

The employee may proceed by either the alternative writ procedure or the noticed application procedure, as discussed in *§ 512.160[2][b], [c]*. For a discussion of mandate proceedings generally and a form of alternative writ of mandate, see Ch. 358, *Mandate and Prohibition* .

[3] Allegations

The petition alleges:

- Respondent's capacity as a school district (Paragraph 3);

- Average daily attendance for the school district of 250 or more pupils [*Educ. Code § 44929.21*] (Paragraph 4);

- Petitioner's service as a probationary certificated employee for the applicable number of consecutive complete school years under *Educ. Code § 44929.21(a)* or *(b)* (Paragraph 5);

- Petitioner's reemployment for the next consecutive school year and attainment of permanent status, and hence his or her beneficial interest in issuance of the writ [*see Code Civ. Proc. § 1086*; *Educ. Code § 44929.21(a), (b)*] (Paragraph 6);

- Refusal by respondent to recognize petitioner's right to permanent employment [*see Code Civ. Proc. § 1085*] (Paragraph 7);

- Demand by petitioner and refusal by respondent to recognize petitioner's rights (Paragraph 8); and

- Petitioner's lack of a plain, speedy, or adequate remedy in the ordinary course of law [*Code Civ. Proc. § 1086*] (Paragraph 9).

[4] Ordinary Mandate

Because an employee's right to be classified as a permanent employee under *Educ. Code § 44929.21* (former *Educ.*

Code § 44882) is automatic, and not the result of a hearing or any other administrative proceeding [*see Vittal v. Long Beach Unified School Dist. (1970) 8 Cal. App. 3d 112, 118, 87 Cal. Rptr. 319]* , ordinary mandate under *Code Civ. Proc. §§ 1085* and *1086* is the appropriate remedy for a teacher seeking to compel a school district to recognize his or her permanent status, rather than administrative mandate under *Code Civ. Proc. § 1094.5* [*see Code Civ. Proc. § 1094.5(a)*]. A teacher who has attained permanent status may seek a writ of mandate to compel the district to recognize his or her status without exhausting any administrative remedy [*see Middaugh v. Board of Trustees (1975) 45 Cal. App. 3d 776, 781, 119 Cal. Rptr. 826* ; *Code Civ. Proc. § 1094.5(a)*].

[5] Statute of Limitations

A mandate proceeding by a teacher seeking classification as a permanent employee is governed by the three-year limitation period of *Code Civ. Proc. § 338(a)* for actions on liability created by statute, other than a penalty or forfeiture [*Vittal v. Long Beach Unified School Dist. (1970) 8 Cal. App. 3d 112, 121-122, 87 Cal. Rptr. 319]* .

[6] Cross References

For a discussion, procedural checklist, and forms relating to ordinary mandate proceedings, see Ch. 358, *Mandate and Prohibition*

For a related form, see *§ 512.160*.

[7] California Points and Authorities

For a memorandum of points and authorities supporting a petition for writ of mandate to compel a school district to recognize the permanent status of a certificated employee, see California Points and Authorities, Ch. 210, *Schools* , Pt. II

[8] State Statutes

Mandatory classification of permanent employees. *Educ. Code § 44929.21*

Discretionary classification of permanent employees. *Educ. Code §§ 44929.22, 44929.23*

[9] Decisions

When requirements for permanent status contained in Education Code are met, attainment of permanent status as automatic; application by teacher and affirmative action by school board as unnecessary to attainment of permanent status. *Vittal v. Long Beach Unified School Dist. (1970) 8 Cal. App. 3d 112, 118, 87 Cal. Rptr. 319*

Probationary teacher's right to be classified as permanent teacher as automatically renewed each year in which teacher is in position of having taught the complete year for the previous three years; three-year limitation period of *Code Civ. Proc. § 338(a)* as applicable to mandate proceeding by teacher seeking classification as permanent employee. *Vittal v. Long Beach Unified School Dist. (1970) 8 Cal. App. 3d 112, 121-122, 87 Cal. Rptr. 319*

Tenured teacher as having vested right to continued permanent employment within scope of certificate under which tenure is attained. *Adelt v. Richmond School Dist. (1967) 250 Cal. App. 2d 149, 152, 58 Cal. Rptr. 151*

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45-512 California Forms of Pleading and Practice--Annotated § 512.170

§ 512.170 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel School District to Reemploy and Reclassify Employee as Probationary [Educ. Code § 44918]

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel School District to Reemploy and Reclassify Employee as Probationary [Educ. Code § 44918]

[*Caption. See § 512.169.*]

Petitioner respectfully represents:

1. [*Capacity and residence of petitioner. See § 512.160, Paragraph 1.*]

2. [*Certification qualifications of petitioner. See § 512.169, Paragraph 2.*]

3. [*Capacity of respondent school district and governing board. See § 512.169, Paragraph 3.*]

4. On or about _____ [*date*], petitioner was employed by respondent _____ School District for the school year _____ - _____, as _____ [*describe position*], which is a position requiring certification qualifications. Petitioner served in this position for _____ days during the school year _____ - _____, which is _____ [equal to *or* in excess of] 75 percent of the number of days that the regular schools of respondent _____School District were maintained in the school year _____ - _____. Petitioner performed all the duties normally required of such a certificated employee of the district. At all times during the school year _____ - _____, petitioner was classified by respondent _____ [*title of governing board*] as a _____ [temporary *or* substitute] certificated employee of respondent _____ School District. At no time prior to the end of the school year did petitioner receive any notice of nonreelection for the next succeeding school year under *Education Code Section 44954(b)*.

5. Petitioner is informed and believes and thereon alleges that at the commencement of the following school year, _____ - _____, respondent had available _____ [*number*] vacant positions in which petitioner was qualified to serve by virtue of his/her possession of the appropriate certification documents plus his/her completion of the appropriate academic preparation and experience. Petitioner is further informed and believes and thereon alleges that none of these vacant positions would have been filled by another permanent or probationary employee of respondent _____ School District except for the fact that such employee was on a leave of absence.

6. Under the provisions of *Section 44918 of the Education Code*, petitioner is entitled to be reemployed by respondent _____ [*name*] School District in one of the above-described vacant positions f or the school year _____- _____. Petitioner is further entitled to have his/her previous year's service as a _____ [temporary *or* substitute] employee, as described above, deemed one complete year of service as a probationary employee of respondent _____ School District.

7. _____ [*Allege demand by petitioner that he/she be reemployed and reclassified and refusal by respondents to comply, e.g.,* On _____ [*date*], the first day that certificated employees were required to report for duty and assignment for the school year _____- _____, petitioner duly reported to the appropriate official of respondent _____ School District, presented himself/herself, and demanded that he/she be permitted to serve as a certificated probationary employee of respondent _____ School District for the school year _____- _____, and that he/she be assigned to active duties within the scope of his/her certification documents. Respondents refused, and continue to refuse, to reemploy petitioner as a certificated probationary employee (, or in any other certificated position,) for the school year _____- _____; respondents also refused, and continue to refuse, to classify petitioner as a probationary employee for the school year _____- _____].

8. [*Lack of a plain, speedy, or adequate remedy in the ordinary course of law. See § 512.169, Paragraph 9.*]

WHEREFORE, petitioner prays judgment as follows:

[1. *If alternative writ procedure is used:* For an alternative writ of mandate directing respondents to forthwith reemploy petitioner as a probationary certificated employee for the school year _____- _____, to reclassify petitioner as a probationary employee for the previous school year _____- _____, and to assign petitioner to active duties in a position within the scope of his/her certification documents and qualifications, or in the alternative to show cause why a peremptory writ of mandate to the same effect should not be issued;]

2. For a peremptory writ of mandate _____ [*set out terms of proposed peremptory writ at length as in Paragraph 1 of this prayer, omitting words relating to order to show cause*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 512.160.*]

CAUTION:

This petition must be verified [*Code Civ. Proc. § 1086*]. Proof of service of a copy of the petition on each respondent and real party in interest must accompany the petition when it is offered for filing (except when, in its discretion and for good cause, the court has granted the application for the writ ex parte) [*Code Civ. Proc. § 1107*]. However, in a trial court, if no alternative writ is sought, proof of service of a copy of the petition need not accompany the application for the writ at the time of filing, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*]. Points and authorities also customarily accompany a petition for writ of mandate filed in superior court, although they do not appear to be expressly required by statute.

[2] Use of Form

This form is a petition for a writ of mandate pursuant to *Code Civ. Proc. §§ 1085* and *1086* to compel the governing board of a school district to reemploy a temporary or substitute employee who has served for more than 75 percent of the days of the previous school year and to reclassify such employee as a probationary employee of the district [*see Educ. Code § 44918*; *see also* discussion in *§ 512.21[2]*]. The employee may proceed by either the alternative writ procedure or the noticed application procedure, as discussed in *§ 512.160[2][b], [c]*. For a discussion, procedural checklist, and forms relating to ordinary mandate proceedings, see Ch. 358, *Mandate and Prohibition* .

[3] Allegations

The petition alleges:

- Petitioner's employment during previous school year as temporary or substitute employee and service for at least 75 percent of school days [*Educ. Code § 44918*] (Paragraph 4);

- Availability of vacant positions for subsequent school year [*Educ. Code § 44918*] (Paragraph 5);

- Petitioner's right to be reemployed in one of vacant positions and to be reclassified as a probationary employee, and thus his or her beneficial interest in the issuance of the writ [*Educ. Code § 44918*; *see Code Civ. Proc. § 1086*] (Paragraph 6); and

- Demand by petitioner and refusal by respondent to reemploy and reclassify petitioner for subsequent school year [*see Code Civ. Proc. § 1085*] (Paragraph 7).

The allegations in the petition which consist of cross references to allegations contained in other forms are *set forth in §§ 512.160[3], 512.161[3], 512.166[3], 512.168[3], 512.169[3],* and *512.170[3].*

[4] State Statutes

Reclassification of temporary and substitute employees as probationary employees. *Educ. Code § 44918*

[5] Decisions

Reemployment of temporary employees eligible under terms of *Educ. Code § 44918* as clear, present, and usually ministerial duty for which writ of mandate can issue. *Taylor v. Board of Trustees (1984) 36 Cal. 3d 500, 507, 204 Cal. Rptr. 711, 683 P.2d 710*

Employee otherwise qualified under terms of *Educ. Code § 44918* need not be hired for vacant probationary position only if he or she does not hold appropriate credential or if he or she lacks both appropriate academic preparation and experience in subject matter. *Taylor v. Board of Trustees (1984) 36 Cal. 3d 500, 509, 204 Cal. Rptr. 711, 683 P.2d 710*

Mandate as appropriate remedy for teachers seeking reclassification as probationary employees. *Campbell v. Graham-Armstrong (1973) 9 Cal. 3d 482, 485-486, 107 Cal. Rptr. 777, 509 P.2d 689*

Substitute teacher's claim for backpay and fringe benefits in mandate proceeding under *Educ. Code § 44918* as not subject to claim presentation requirement of Government Claims Act (*Gov. Code § 810 et seq.*) because relief is incidental to request for reemployment and, therefore, falls within scope of *Gov. Code § 905(c)* (exception for public employee's claim for salary or wages). *Eureka Teacher's Assn. v. Board of Education (1988) 202 Cal. App. 3d 469, 474-476, 247 Cal. Rptr. 790*

Teachers' association, as exclusive bargaining representative, as having standing under *Gov. Code § 3543.8* to sue on behalf of all members of teachers' bargaining unit, including nonpaying members, for enforcement of *Educ. Code § 44918*. *Anaheim Elementary Ed. Assn. v. Board of Education (1986) 179 Cal. App. 3d 1153, 1159, 225 Cal. Rptr. 468*

Where number of substitute and temporary teachers qualified to be reemployed as probationary teachers for subsequent school year under *Educ. Code § 44918* exceeds number of vacant positions, school district as not required to fill available positions on basis of seniority. *Fair v. Fountain Valley School Dist. (1979) 90 Cal. App. 3d 180, 187-188, 153 Cal. Rptr. 56*

Doctrine of laches as applicable to action by teacher seeking reclassification as probationary teacher. *American Fed'n of Teachers v. Board of Educ. (1977) 77 Cal. App. 3d 100, 108-109, 143 Cal. Rptr. 264*

[6] Cross References

For related forms, see *§§ 512.160* and *512.169*.

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Chapter 512 SCHOOLS: CERTIFICATION, DISMISSAL, AND RELATED EMPLOYMENT ISSUES
PART V. FORMS

45-512 California Forms of Pleading and Practice--Annotated § 512.171

§ 512.171 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Payment of Lawful Salary by Governing Board to School District Employee

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Payment of Lawful Salary by Governing Board to School District Employee

[*Caption. See § 512.169.*]

Petitioner respectfully represents:

1. [*Capacity and residence of petitioner. See § 512.160, Paragraph 1.*]

2. [*Certification qualifications of petitioner. See § 512.169, Paragraph 2.*]

3. [*Capacity of respondent school district and governing board. See § 512.169, Paragraph 3.*]

4. _____ [*Allege facts concerning petitioner's employment, e.g.,* On or about _____ (*date*), and prior to the commencement of the school year _____- _____, petitioner was employed by respondent _____ School District for the school year _____- _____ as a _____ (*describe position*), which is a position requiring certification qualifications. Petitioner served in this position during the entire school year _____- _____, performing all duties required by such position, and was at all times during the school year classified as a _____ (*specify classification, e.g.,* probationary) employee of respondent _____ School District by respondent _____ (*title of governing board*). Thereafter, petitioner was duly reelected and reemployed by respondent _____ School District for each of the next succeeding school years: _____ (*list years*). Petitioner served in this position during each of the above-mentioned school years, performing all duties required by the position, and was duly classified as a _____ (*specify, e.g.,* probationary) employee by respondent _____ (*title of governing board*) during the whole of each of such school years. Petitioner is currently employed by respondent

_____ School District in such position].

5. The actual rate of salary paid to petitioner during each of the above-mentioned school years was as follows: _____ [*specify*].

6. On or about _____ [*date*], respondent _____ [*title of governing board*] adopted a salary schedule and policy memorandum for certificated employees of respondent _____ School District for the school year _____- _____, which provided that _____ [*set forth pertinent provisions of salary schedule and policy memorandum*]. [Copies of the above-described salary schedule and policy memorandum are attached hereto as Exhibits A and B and made a part hereof.]

7. The above-described salary schedule and policy memorandum of respondents are illegal in that _____ [*specify reasons for illegality, e.g.,* the salary schedule makes an allowance for years of experience that is not uniformly applied to all certificated employees of respondent _____ School District and was not negotiated and mutually agreed to between the certificated employees' exclusive bargaining representative and _____ School District, violating *Section 45028 of the Education Code* in that _____ (*specify*)].

8. Petitioner is lawfully entitled to receive the following rate of salary: _____ [*allege rate of pay to which petitioner is entitled*] and is entitled to $_____ in back salary, computed as follows: _____ [*specify manner of computing back salary*].

9. Petitioner has no plain, speedy, or adequate remedy in the ordinary course of law in that no other remedy than mandate is provided by law to compel the payment of proper salary by a public entity to a public employee.

WHEREFORE, petitioner prays judgment as follows:

[1. *If alternative writ procedure is used:* For an alternative writ of mandate directing respondents to forthwith vacate their salary schedule and policy memorandum decision of _____ (*date*), and to establish a new salary schedule and policy memorandum as follows: _____ (*specify*), and to pay petitioner his/her lawful salary in accordance with such new schedule and policy and to pay him/her back salary in the amount of $_____ or, in the alternative, to show cause why a peremptory writ of mandate to the same effect should not be issued;]

2. For a peremptory writ of mandate _____ [*set out terms or proposed peremptory writ at length as in Paragraph 1 of this prayer, omitting words relating to order to show cause*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Verification. See § 512.160.*]

CAUTION:

This petition must be verified [*Code Civ. Proc. § 1086*]. Proof of service of a copy of the petition on each respondent and real party in interest must accompany the petition when it is offered for filing (except when, in its discretion and for good cause, the court has granted the application for the writ ex parte) [*Code Civ. Proc. § 1107*]. However, in a trial court, if no alternative writ is sought, proof of service of a copy of the petition need not accompany the application for the writ at the time of filing, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*]. Points and authorities also customarily accompany a petition for writ of mandate filed in superior court, although they do not appear to be expressly required by statute.

[2] Use of Form

This form is a petition for a writ of mandate to compel the governing board of a school district to pay a certificated employee his or her proper salary in accordance with law, which requires that covered employees be classified either on a salary schedule based on uniform allowance for years of training and years of experience or on other criteria mutually negotiated between the covered employees' exclusive bargaining representative and the school district. The employee may proceed by either the alternative writ procedure or the noticed application procedure, as discussed in *§ 512.160[2][b], [c]*. For a discussion and forms relating to mandate proceedings generally, see Ch. 358, *Mandate and Prohibition* .

[3] Cross References

For a form of petition for writ of mandate to compel a public entity to pay a civil service employee at the lawful prevailing rate, see Ch. 118, *Civil Service*

For related forms, see *§§ 512.160* and *512.169*.

[4] California Points and Authorities

For memoranda of points and authorities in support of a petition for writ of mandate to compel a school district to pay a certificated employee his or her lawful salary, see California Points and Authorities, Ch. 210, *Schools* , pt. II.

[5] State Statutes

Salaries of certificated employees. *Educ. Code §§ 45022-45060*

Salary criteria negotiated between certificated employees' exclusive bargaining representative and district. *Gov. Code § 3543.2(e)*.

[6] Decisions

Teacher's incorrect placement on salary table enshrined in collective bargaining agreement constitutes unfair labor practice, and, therefore, claim is subject to exclusive jurisdiction of *Public Employment Relations Board. McCammon*

v. Los Angeles Unified School Dist. (1987) 195 Cal. App. 3d 661, 664-665, 241 Cal. Rptr. 1

Mandate as appropriate remedy for school teacher to recover salary due from school district. *A.B.C. Federation of Teachers v. A.B.C. Unified Sch Dist. (1977) 75 Cal. App. 3d 332, 340-342, 142 Cal. Rptr. 111*

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45-513 California Forms of Pleading and Practice--Annotated 513.syn

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[e] Conduct of Due Process Hearing

[f] Attorney's Fees

[g] Judicial Review

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[iii] Confidentiality of Information

[iv] Scope of Review

[v] Relief Available

[vi] Education in English

§ 513.34 Freedom of Expression

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[2] Oral Speech

[3] Use of School Facilities

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[6] Underground Publications

[7] School Library and Instructional Materials

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§ 513.36 Sexual Harassment

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[1] Use of Suspension

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction

[6] Venue

[7] Appointment of Guardian ad Litem

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[9] Exhaustion of Administrative Remedies

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[13] Cross References

[14] Federal Statutes

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§ 513.91 Complaint for Declaratory [Code Civ. Proc. § 1060] and Injunctive Relief [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527]--By Public School Student Against School Officials--Denial of Freedom of Speech [U.S. Const., amends. I, XIV; 42 U.S.C. § 1983; Cal. Const., art. I, § 2(a); Educ. Code § 48907]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Cross References

[6] Federal Constitution

[7] State Constitution

[8] Federal Statutes

[9] State Statutes

[10] Decisions

§ 513.92 Complaint [Fed. R. Civ. P., Rule 7] in United States District Court for Damages for Discrimination under Title IX of Education Amendments of 1972 [20 U.S.C. § 1681 et seq.] for Sexual Harassment by Teacher or Fellow Student

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 513.93 Complaint [Fed. R. Civ. P., Rule 7] in United States District Court for Damages--by Public School Student Against School Officials--Hostile Racial Educational Environment [42 U.S.C. § 2000d]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 513.94 Complaint [Fed. R. Civ. P., Rule 7] in United States District Court for Damages--by Public School Student Against School Officials--Unlawful Search and Seizure U.S. Const., amends. IV, XIV; 42 U.S.C. § 1983]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 513.95 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Governing Board of School District and County Board of Education [Educ. Code §§ 48918, 48924]--Expulsion of Public School Student

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

[5] California Points and Authorities

[6] State Statutes

[7] Decisions

[8] Law Reviews

[9] Text References

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Chapter 513 SCHOOLS: STUDENT RIGHTS AND RESPONSIBILITIES
PART I. SCOPE

45-513 California Forms of Pleading and Practice--Annotated § 513.01

§ 513.01 Scope of Chapter

This chapter discusses and contains forms for use in actions involving public elementary and secondary schools. Excluded from coverage are public postsecondary educational institutions, such as community colleges, and private schools.

This chapter starts with a discussion regarding the public school system and school districts generally. It also discusses constitutional limitations on public school finance, and on racial segregation in public schools [*see § 513.10* et seq.].

This chapter then discusses the rights and responsibilities of students in the public elementary and secondary school system, including the general right to a public education, the right of disabled children to free appropriate special education, the student's constitutional and statutory rights of freedom of expression and religion, sexual harassment of a student, and school searches. Also discussed are the grounds and procedures for discipline of students [*see § 513.30* et seq.].

This chapter also contains forms of complaints for declaratory and injunctive relief to compel school officials to provide a disabled student with a free appropriate public education [*see § 513.90*] and to enjoin school officials from interfering with a student's right to freedom of expression [*see § 513.91*]. It also contains complaints for damages by a student based on sexual harassment by a teacher or fellow student [*see § 513.92*], based on a hostile racial educational environment [*see § 513.93*], and based on violation of the *Fourteenth Amendment of the federal constitution* based on unreasonable search and seizure [*see § 513.94*]. This chapter also contains a form of petition for writ of mandate to obtain judicial review of an expulsion order [*see § 513.95*].

For discussion and forms relating to school employee certification, dismissal, and other related employment issues, see Ch. 512, *Schools: Certification, Dismissal, and Related Employment Issues* .

For discussion and forms relating to student injuries, see Ch. 514, *Schools: Injuries to Students* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawAdministration & OperationSchool DistrictsGeneral OverviewEducation LawCivil LiabilityGeneral OverviewEducation LawDiscriminationGeneral OverviewEducation LawReligion in SchoolsGeneral OverviewEducation LawStudentsDisciplinary ProceedingsGeneral OverviewEducation LawStudentsRight to EducationEducation LawStudentsSearch & SeizureRemediesEducation LawStudentsSpeechGeneral Overview

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45-513 California Forms of Pleading and Practice--Annotated § 513.02

§ 513.02 Cross References

For discussion and forms relating to the constitutional right to freedom of assembly, see Ch. 59, *Assemblies, Meetings, and Demonstrations*

For discussion and forms relating to discrimination in government-funded programs and activities, see Ch. 112, *Civil Rights: Government-Funded Programs and Activities* .

For discussion and forms relating to the federal post-Civil War civil rights statutes (*e.g., 42 U.S.C. § 1983,* which prohibits any action under color of state law that subjects an individual to deprivation of any rights, privileges, or immunities secured by federal constitution and laws), see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

For discussion and forms relating to the civil rights of prisoners, see Ch. 114, *Civil Rights: Prisoners' Rights* .

For discussion and forms relating to employment discrimination, see Ch. 115, *Civil Rights: Employment Discrimination* .

For discussion and forms relating to discrimination in business establishments, see Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

For discussion and forms relating to housing discrimination, see Ch. 117, *Civil Rights: Housing Discrimination* .

For discussion and forms relating to interference with civil rights by threats, intimidation, coercion, or violence (e.g., "hate crimes"), see Ch. 117A, *Civil Rights: Interference with Civil Rights by Threats, Intimidation, Coercion, or Violence* .

For discussion and forms for use in bringing class actions, see Ch. 120, *Class Actions* .

For discussion and forms for use in actions for declaratory relief, see Ch. 182, *Declaratory Relief* .

For discussion and forms relating to actions for injunctive relief, see Ch. 303, *Injunctions* .

For discussion and forms relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition* .

For discussion and forms relating to tort actions by and against minors, see Ch. 364, *Minors: Tort Actions* .

For a discussion of parental liability for the misconduct of a child, see Ch. 394, *Parent and Child* .

For discussion and forms relating to tort actions against public entities and officers, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil Rights LawGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of AssemblyTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral OverviewTortsVicarious LiabilityFamily MembersChildren & Parents

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45-513 California Forms of Pleading and Practice--Annotated §§ 513.03-513.09

[Reserved]

§§ 513.03[Reserved]

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Chapter 513 SCHOOLS: STUDENT RIGHTS AND RESPONSIBILITIES
PART II. LEGAL BACKGROUND
A. Public School System

45-513 California Forms of Pleading and Practice--Annotated § 513.10

§ 513.10 Governing Law

The public education system of California is provided for and governed by the provisions of *Cal. Const., art. IX, §§ 1-16*. Other state constitutional provisions specifically applicable to public education are *Cal. Const., art. I, § 7(a)* (providing that the obligations of school officials with respect to pupil school assignment and transportation under the California Constitution do not exceed those imposed by *U.S. Const., amend. XIV*), *Cal. Const., art. XIII, § 21* (providing for an annual tax levy by local school districts), and *Cal. Const., art. XVI, § 5* (prohibiting the expenditure of public funds for religious or secular institutions or purposes).

Detailed statutory provisions governing public and private education are set out in the Education Code. The code contains general provisions governing all public and private education [*Educ. Code § 1 et seq.*], provisions governing elementary and secondary education [*Educ. Code § 33000 et seq.*], and provisions governing postsecondary education [*Educ. Code § 66000 et seq.*].

Provisions governing state administration of public elementary and secondary education are set forth in *Educ. Code § 33000 et seq.* School districts and their governing boards are governed by *Educ. Code § 35000 et seq.* School operations and facilities are governed by *Educ. Code § 37060 et seq.* School district finance is governed by *Educ. Code §§ 14000 et seq.* and *41000 et seq.* Provisions governing school district employees are set forth in *Educ. Code § 44000 et seq.* Provisions relating to pupil admission, attendance, discipline, rights, records, health, safety, and counseling are set forth in *Educ. Code § 46000 et seq.* Instructional programs and materials are governed by *Educ. Code § 51000 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawAdministration & OperationBoards of Elementary & Secondary SchoolsGeneral OverviewEducation LawAdministration & OperationSchool DistrictsGeneral OverviewEducation LawAdministration & OperationTransportationEducation LawDiscriminationEqual Educational OpportunitiesCoverageEducation LawFundingLevies & Taxes

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A. Public School System

45-513 California Forms of Pleading and Practice--Annotated § 513.11

§ 513.11 Public School System

[1] Power of State

Public education in California is an obligation that the state assumed by the adoption of its state Constitution [*Butt v. State of California (1992) 4 Cal. 4th 668, 680, 15 Cal. Rptr. 2d 480, 842 P.2d 1240]* . The California Constitution declares that because a general diffusion of knowledge and intelligence is essential to the preservation of the rights and liberties of the people, the Legislature must encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement [*Cal. Const., art. IX, § 1*]. The Legislature is therefore directed to provide for a system of common schools by which a free school is maintained and supported in each district for at least six months of every year [*Cal. Const., art. IX, § 5*; *see § 513.31*].

The public school system of California includes all kindergarten, elementary, secondary, and technical schools, and all state colleges, that are established in accordance with law. It also includes the school districts and other agencies authorized to maintain the schools and colleges. No school, college, or other part of the public school system may be transferred, directly or indirectly, from the system or placed under the jurisdiction of any authority other than one included within the public school system [*Cal. Const., art. IX, § 6*].

Management and control of the public school system is a matter of state, not local, care and supervision [*Butt v. State of California (1992) 4 Cal. 4th 668, 681, 15 Cal. Rptr. 2d 480, 842 P.2d 1240]* . The power of the Legislature in school matters is plenary and subject only to constitutional restrictions [*Hall v. Taft (1956) 47 Cal. 2d 177, 180-181, 302 P.2d 574* ; *Mountain View School Dist. v. City Council (1959) 168 Cal. App. 2d 89, 97, 335 P.2d 957]* . The supervisory power over public education is an exclusive state function that may not be delegated to any other agency [*Piper v. Big Pine School Dist. (1924) 193 Cal. 664, 669, 226 P. 926]* .

[2] Purpose of System

According to the Education Code, each child is a unique person with unique needs. The purpose of the state educational system is to enable each child to develop all of his or her own potential [*Educ. Code § 33080*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawSeparation of PowersConstitutional ControlsGeneral OverviewEducation LawStudentsRight to EducationGovernmentsState & Territorial GovernmentsLegislatures

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PART II. LEGAL BACKGROUND
A. Public School System

45-513 California Forms of Pleading and Practice--Annotated § 513.12

§ 513.12 School Districts

[1] Power of Legislature to Create, Alter, and Dissolve

The system of public schools is administered through local school districts created by the Legislature. Nevertheless, it is a single system, applicable to all the common schools [*Butt v. State of California (1992) 4 Cal. 4th 668, 680, 15 Cal. Rptr. 2d 480, 842 P.2d 1240]* .

The Legislature has the power, by general law, to provide for the incorporation and organization of school districts, high school districts, and community college districts of every kind and class and to classify these districts. The Legislature may authorize the governing boards of all school districts to initiate and carry on any programs or activities or otherwise to act in any manner that is not in conflict with the laws and purposes for which school districts are established [*Cal. Const., art. IX, § 14*].

The Legislature has plenary power over school districts. It may create, divide, alter, or abolish school districts at its pleasure, without the necessity of a local election, and it may delegate this power to a local government unit [*Butt v. State of California (1992) 4 Cal. 4th 668, 681, 15 Cal. Rptr. 2d 480, 842 P.2d 1240* (93 D.O.S. 39, 43); *Tinsley v. Palo Alto Unified School Dist. (1979) 91 Cal. App. 3d 871, 904 , 154 Cal. Rptr. 591]* . A school district has no vested right in its own continued existence and may not challenge the Legislature's basic power to abolish the district. However, the district does have standing to litigate the constitutionality of the means selected by the Legislature for the district's abolition [*Alta Loma School Dist. v. San Bernardino County Com. (1981) 124 Cal. App. 3d 542, 549, 177 Cal. Rptr. 506]* .

[2] Nature and Powers

A school district is an agency of the state for local operation of the state school system [*Butt v. State of California (1992) 4 Cal. 4th 668, 681, 15 Cal. Rptr. 2d 480, 842 P.2d 1240* ; *Town of Atherton v. Superior Court (1958) 159 Cal. App. 2d 417, 421, 324 P.2d 328]* and is an independent and separate government agency distinct from the county, city, or town in which it is geographically situated [*Gould v. Richmond School Dist. (1943) 58 Cal. App. 2d 497, 502, 136 P.2d 864]* . Although it exercises a portion of the state's powers of government, a school district is a separate public

entity and is not the state or part of the state itself. A school district may not act on behalf of the state unless authorized to do so by statute [*Johnson v. San Diego Unified School Dist. (1990) 217 Cal. App. 3d 692, 698-699, 266 Cal. Rptr. 187* ; *Gonzales v. State of California (1972) 29 Cal. App. 3d 585, 590, 592, 105 Cal. Rptr. 804]* . Thus, employees of a school district are not state employees, and the state is not liable for the acts of a school district under agency law or under a general theory of respondeat superior [*First Interstate Bank v. State of California (1987) 197 Cal. App. 3d 627, 633, 243 Cal. Rptr. 8* ; *Gonzales v. State of California (1972) 29 Cal. App. 3d 585, 591, 105 Cal. Rptr. 804* ; *see Johnson v. San Diego Unified School Dist. (1990) 217 Cal. App. 3d 692, 699-700, 266 Cal. Rptr. 187* (filing tort claim with state rather than with local school district does not constitute substantial compliance with the California Tort Claims Act, discussed in Ch. 514, *Schools: Injuries to Students*)]. However, the Ninth Circuit Court of Appeals held that California school districts are state agencies for purposes of *U.S. Const., amend. XI*, and are entitled to the immunity from suit in federal court provided by the *11th Amendment* [*Belanger v. Madera Unified School Dist. (9th Cir. 1992) 963 F.2d 248, 254 , cert. denied, 507 U.S. 919]* .

School districts, by statutory provision, act through school boards, and the authority of the districts is measured by the authority statutorily conferred on the boards [*Johnson v. San Diego Unified School Dist. (1990) 217 Cal. App. 3d 692, 699, 266 Cal. Rptr. 187]* . However, a school district, including the county superintendent of schools and the county board of education, may initiate and carry on any program or activity or otherwise act in any manner that is not in conflict with any law or with the purposes for which school districts are established [*Educ. Code §§ 35160, 35160.2*]. A school district may not, however, set additional terms or conditions on school attendance that frustrate rights created by statute [*Burton v. Board of Educ. (1977) 71 Cal. App. 3d 52, 58, 139 Cal. Rptr. 383]* .

[3] Applicability of Local Regulations

Because the public school system is a matter of statewide supervision and concern [*see §§ 513.11, 513.12[1]*] state legislative enactments thereon control over attempted regulation by local government units [*Hall v. Taft (1956) 47 Cal. 2d 177, 181, 302 P.2d 574* ; *Town of Atherton v. Superior Court (1958) 159 Cal. App. 2d 417, 421, 324 P.2d 328]* . Thus, for example, school districts are not subject to city garbage collection regulations [*City of Santa Ana v. Board of Educ. (1967) 255 Cal. App. 2d 178, 179-180, 62 Cal. Rptr. 863]* , and school district acts and resolutions are not subject to referendum by local voters [*Board of Education v. Superior Court (1979) 93 Cal. App. 3d 578, 581-582, 155 Cal. Rptr. 839]* .

Although, as noted above, school districts are generally not subject to local regulation, the Legislature has provided an exception to this general rule in the case of city and county building and zoning ordinances. Such ordinances are applicable to all local state agencies, including school districts [*see Gov. Code §§ 53090, 53091*; *City of Santa Clara v. Santa Clara Unified School Dist. (1971) 22 Cal. App. 3d 152, 158, 99 Cal. Rptr. 212]* . The governing board of a school district may, however, by a two-thirds vote, render a city or county zoning ordinance inapplicable to a proposed use of its property for classroom purposes. If the governing board takes such action, the city or county may seek judicial review of the action in superior court. If the court finds that the governing board's action was arbitrary or capricious, it must declare the action void, and the zoning ordinance in question will be applicable to the school district's proposed use of its property [*see Gov. Code § 53094*; *see City of Santa Cruz v. Santa Cruz Schools Bd. of Education (1989) 210 Cal. App. 3d 1, 7-9, 258 Cal. Rptr. 101* ("nonclassroom facility" is one not directly used for or related to student instruction; athletic field serves important educational purpose and thus is classroom facility); *see also People ex rel. Cooper v. Rancho Santiago College (1990) 226 Cal. App. 3d 1281, 1286, 277 Cal. Rptr. 69* (swap meet in parking lot is not classroom activity, regardless of fact that proceeds fund instructional program)].

School districts are, however, required to comply with city or county ordinances [*Gov. Code § 53097*]:

- Regulating drainage improvements and conditions;
- Regulating road improvements and conditions, or

- Requiring review and approval of grading plans as these ordinance provisions relate to the design and construction of onsite improvements that affect drainage, road conditions, or grading.

School districts are required to give consideration to the specific requirements and conditions of city and county ordinances relating to the design and construction of off-site improvements. If the school district chooses not to comply with those ordinances, the city and county are not liable for any injury or damage to property resulting from the noncompliance [*Gov. Code § 53097*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawSeparation of PowersLegislative ControlsScope of Delegated AuthorityEducation LawAdministration & OperationSchool DistrictsGeneral OverviewEducation LawAdministration & OperationSchool DistrictsAlterationEducation LawAdministration & OperationSchool DistrictsCreationEducation LawImmunitiesSchool District ImmunityReal Property LawZoning & Land UseOrdinances

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45-513 California Forms of Pleading and Practice--Annotated § 513.13

§ 513.13 Compulsory Education

[1] In General

Each person between the ages of 6 and 18 years not exempted under the provisions of *Educ. Code § 48200 et seq.* or *48400 et seq.* [*see § 513.13[4]*] is subject to compulsory full-time education [*Educ. Code § 48200*]. In addition, each person between the ages of 16 and 18 years who is not exempted under the provisions of *Educ. Code §§ 48400-48454* must attend special continuation education classes maintained by the governing board of the high school district in which he or she resides or by a neighboring district for not less than four hours per week during the regularly established annual school term [*Educ. Code § 48400*].

Each person subject to compulsory full-time education or compulsory continuation education must attend the public full-time day schools or continuation school or classes for the full school day as established by the governing board of the school district in which the parent or legal guardian of the pupil resides [*Educ. Code § 48200*; *but see Educ. Code §§ 48204* (certain allowable interdistrict attendance), 48207 (hospital's school district if temporarily disabled)]. The parent, legal guardian, or other person having control of a person subject to compulsory full-time education or compulsory continuation education must send the pupil to such school for the designated time [*Educ. Code § 48200*].

Any pupil subject to compulsory full-time education or to compulsory continuation education who is absent from school without a valid excuse for more than three days or tardy in excess of 30 minutes on each of more than three days in one school year is a truant [*Educ. Code § 48260*]. Pupils who are habitually truant are subject to juvenile court proceedings [*see Educ. Code §§ 48262, 48263, 48267-48271*]. The parent, guardian, or other person having control or charge of any pupil who fails to comply with the compulsory education laws is subject to criminal penalties [*see Educ. Code §§ 48293, 48454*]. The segregated condition of schools is no defense to a prosecution for violation of the compulsory education laws [*People v. Serna (1977) 71 Cal. App. 3d 229, 232-233, 139 Cal. Rptr. 426]* .

[2] Constitutionality

The constitutionality of California's compulsory education law has been upheld as not violating due process and equal protection rights of parents [*People v. Turner (1953) 121 Cal. App. 2d Supp. 861, 865-867 , 263 P.2d 685 , appeal*

dismissed, 347 U.S. 972, 74 S. Ct. 785, 98 L. Ed. 1112 (1954)] .

Although the state has the power to require all children to attend some school, it may not constitutionally force children to accept public instruction only [*Pierce v. Society of Sisters (1925) 268 U.S. 510, 534-535, 45 S. Ct. 571, 69 L. Ed. 1070* ; *see Roman Catholic etc. Corp. v. Piedmont (1955) 45 Cal. 2d 325, 330, 289 P.2d 438]* . However, California's compulsory education law is not open to constitutional attack on this ground because it specifically exempts pupils from mandatory public school attendance who are attending private full-time day schools that meet certain minimum standards [*see Educ. Code § 48222*].

That the state's power to require compulsory education in public or private schools is subject to constitutional scrutiny when it impinges on the right to free exercise of religion guaranteed by *U.S. Const., amend. I* [*see Wisconsin v. Yoder (1972) 406 U.S. 205, 213-215, 234-236, 92 S. Ct. 1526, 32 L. Ed. 2d 15* (further holding that Wisconsin's compulsory education laws could not constitutionally be applied to certain persons of Amish faith)].

[3] Exclusions

Children under six years of age are excluded from attending public schools, except as otherwise provided by the Education Code [*Educ. Code § 48210*; *see Educ. Code §§ 48000-48011* (exception for kindergarten)]. In addition, the governing board of a school district may exclude from attendance at school any child whose physical or mental disabilities are such as to cause his or her attendance to be inimical to the welfare of other pupils [*Educ. Code § 48212*].

The governing board is not required to send prior notice of an exclusion to the pupil's parent or guardian in the following circumstances [*Educ. Code § 48213*]:

- If the pupil is excluded from attendance pursuant to *Health & Safety Code § 120230*, relating to the exclusion of students residing where any contagious, infectious, or communicable disease exists or has recently existed, and who is subject to strict isolation or quarantine of contact.

- If the pupil is excluded from attendance pursuant to *Educ. Code § 49451*, regarding exclusion of a child whose parent has not consented to a physical examination of the child.

- If a principal or his or her designee determines that the continued presence of the child would constitute a clear and present danger to the life, safety, or health of a pupil or school personnel.

However, the governing board must send a notice of the exclusion as soon as is reasonably possible after the exclusion [*Educ. Code § 48213*]. For discussion of removal of students for disciplinary reasons, see *§§ 513.38, 513.40*.

The federal Rehabilitation Act of 1974, which prohibits recipients of federal funds from discriminating against "otherwise qualified" handicapped persons [*see 29 U.S.C. § 794*], provides additional limitations on the power of school districts to exclude children who have contagious diseases from the public schools. Persons with contagious diseases are handicapped within the meaning of the Act [*see School Board of Nassau County v. Arline (1987) 480 U.S. 273, 289, 107 S. Ct. 1123, 94 L. Ed. 2d 307* (involving tuberculosis)].

For example, a child who has tested positive for Acquired Immunity Deficiency Syndrome (AIDS) was held to be a handicapped person within the meaning of the Act [*Thomas v. Atascadero Unified School Dist. (C.D. Cal. 1987) 662 F. Supp. 376, 383]* . A child who has tested positive for AIDS must be placed in the regular educational environment unless it is demonstrated that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily [*45 C.F.R. § 84.34(a)*]. Exclusion cannot be based on the ground that the child poses a risk of transmission of the AIDS virus to others in the school environment solely because of the existence of the disease or the presence of antibodies for the disease in the child's blood [*Thomas v. Atascadero Unified School*

Dist. (C.D. Cal. 1987) 662 F. Supp. 376, 382 ; *see also Phipps v. Saddleback Valley Unified School Dist. (1988) 204 Cal. App. 3d 1110, 1115-1119, 251 Cal. Rptr. 720* (upholding permanent injunction against school district from excluding child with AIDS from public school)].

[4] Exemptions

Certain classes of persons are exempt from compulsory full-time education and from compulsory continuation education [*see Educ. Code §§ 48220 et seq., 48410*]. Unlike the provisions of the Education Code that provide for exclusions from public education, the exemption provisions merely excuse those who seek to be excused from compliance with the compulsory education requirements. The exemption provisions do not authorize a school district to initiate an action to remove a child from school over the parents' objection [*see Abella v. Riverside Unified School Dist. (1976) 65 Cal. App. 3d 153, 160-165, 135 Cal. Rptr. 177]* .

California statutes permit home schooling as a species of private school education, which is exempted from compulsory education laws, but the statutory permission to home school may constitutionally be overridden in order to protect the safety of a child who has been declared dependent [*Jonathan L. v. Superior Court (2008) 165 Cal. App. 4th 1074, 1088-1105, 81 Cal. Rptr. 3d 571*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawAttendanceCompulsory EducationEducation LawAttendanceExemptionsEducation LawAttendanceMandatory AttendanceEducation LawAttendanceTruancyEducation LawDiscriminationDisability DiscriminationRehabilitation ActProtected Individuals

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§ 513.14 School District Finance

The California Constitution provides for the establishment of a state school fund from state revenues that must be apportioned in its entirety each fiscal year, in a manner provided by the Legislature, to school districts and other agencies for the support of the public schools [*see Cal. Const., art. IX, § 6*]. The Constitution also directs the Legislature to provide for an annual tax levy by school districts that is sufficient to produce for each district annual revenues determined by the district's governing board to be necessary for its schools and district functions [*Cal. Const., art. XIII, § 21*]. The provision for a local school tax does not, however, constitutionally mandate a school finance system in which school district expenditures are a function of the assessed valuation of taxable property in the district per unit of average daily attendance. Such a system, in effect, makes the availability of educational opportunity dependent on the taxable wealth of the school district and, in the absence of justification by a compelling state interest, violates the equal protection provisions of *Cal. Const., art. I, § 7(a)* [*Serrano v. Priest (1976) 18 Cal. 3d 728, 768-775, 135 Cal. Rptr. 345, 557 P.2d 929 , cert. denied sub nom., Clowes v. Serrano 432 U.S. 907 (1977)]* . Therefore, the Legislature funds California's public schools by a system that relies on local property tax revenues, state equalizing payments, and categorical aid for targeted categories of children with needs that require special attention [*see Butt v. State of California (1992) 4 Cal. 4th 668, 679 n.11, 15 Cal. Rptr. 2d 480, 842 P.2d 1240* ; *see also Belanger v. Madera Unified School Dist. (9th Cir. 1992) 963 F. 2d 248, 251-252 , cert. denied, 507 U.S. 919]* .

Proposition 13, passed in 1978, further restricts the way in which school districts may levy special assessments. Special assessments must be approved by two-thirds vote of the qualified electors of the district and cannot be based on the value of the real property [Cal. Const., art. XIIIA, § 4; *see Arvin Union School Dist. v Ross (1985) 176 Cal. App. 3d 189, 198-200, 221 Cal. Rptr. 720* (district override assessments under former *Educ. Code § 42244* (repealed July 24, 1979) are not permissible special district assessments because based on value of real property)]. Subject to this constitutional limitation from Proposition 13, a school district may impose qualified special taxes pursuant to procedures established in the Government Code [*Gov. Code § 50079*; *see Gov. Code §§ 50075-50077.5* (procedures)].

The statutory provisions governing school finance are set forth in *Educ. Code §§ 14000-14240* and *41000-43002*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawFundingGeneral OverviewEducation LawFundingLevies & TaxesTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral Overview

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45-513 California Forms of Pleading and Practice--Annotated § 513.15

§ 513.15 Racial Segregation

[1] Obligation to Desegregate

The segregation of school children into separate schools because of their race constitutes a denial of equal protection of the laws under both the United States and California Constitutions [*Brown v. Board of Educ. of Topeka (1954) 347 U.S. 483, 493-495, 74 S. Ct. 686, 98 L. Ed. 873* ("Brown I"); *Jackson v. Pasadena City School Dist. (1963) 59 Cal. 2d 876, 880, 31 Cal. Rptr. 606, 382 P.2d 878]* . Such racial segregation violates equal protection of the laws even though the physical facilities and methods of instruction in the several schools may be equal, because separate educational facilities are inherently unequal [*Brown v. Board of Educ. of Topeka (1954) 347 U.S. 483, 495, 74 S. Ct. 686, 98 L. Ed. 873* ("Brown I"); *see Jackson v. Pasadena City School Dist. (1963) 59 Cal. 2d 876, 880, 31 Cal. Rptr. 606, 382 P.2d 878]* . School officials are therefore required to desegregate unconstitutionally segregated schools with all deliberate speed [*Brown v. Board of Educ. of Topeka (1955) 349 U.S. 294, 301, 75 S. Ct. 753, 99 L. Ed. 1083, 71 Ohio Law Abs. 584* ("Brown II")].

The concept of race may still be employed if its use is found necessary to repair injuries inflicted on persons because of race [*Freeman v. Pitts (1992) 503 U.S. 467, 494, 112 S. Ct. 1430, 118 L. Ed. 2d 108* ; *Ho by Ho v. San Francisco Unified School Dist. (9th Cir. 1998) 147 F.3d 854, 864]* . However, racial balancing cannot be the objective unless the balancing is shown to be necessary to correct the effects of government action of a racist character [*Freeman v. Pitts (1992) 503 U.S. 467, 494, 112 S. Ct. 1430, 118 L. Ed. 2d 108* ; *Ho by Ho v. San Francisco Unified School Dist. (9th Cir. 1998) 147 F.3d 854, 865]* . When a governmental body defends racial quotas, the burden of justification falls on the government. A generalized assertion of past discrimination and present effects does not meet that burden [*City of Richmond v. J.A. Croson Co. (1989) 488 U.S. 469, 498, 109 S. Ct. 706, 102 L. Ed. 2d 854* ; *Ho by Ho v. San Francisco Unified School Dist. (9th Cir. 1998) 147 F.3d 854, 865]* .

However, the racial and ethnic balancing component of a school district's open-transfer policy promulgated under *Educ. Code § 35160.5*, in which white student open enrollment transfers out of a specific high school and non-white student transfers into a school are limited to a one-for-one basis, violates Proposition 209, *Cal. Const., art. I, § 31*. On the other hand, a general recognition of the demographics of neighborhoods in student assignments without classifying students

by race by looking at a student's residential neighborhood and considering average household income in the neighborhood, the average education level of adults residing in the neighborhood, and the racial composition of the neighborhood as a whole and giving every student within a given neighborhood the same treatment regardless of race does not discriminate against or grant preferential treatment to any individual or group on the basis of race in violation of *Cal. Const., art. I, § 31* [*American Civil Rights Foundation v. Berkeley Unified School Dist. (2009) 172 Cal. App. 4th 207, 216-222, 90 Cal. Rptr. 3d 789]* . Further, while the federal Constitution prohibits a school district from acting to segregate schools, there is no federal constitutional mandate necessitating the implementation of a proactive program of integration, and such a plan is not required by the federal *equal protection clause* [*Crawford v. Huntington Beach Union High Sch. Dist. (2002) 98 Cal. App. 4th 1275, 1279-1285, 121 Cal. Rptr. 2d 96]* . When a school district voluntarily adopts a student assignment plan that relies on race to determine which public schools certain children may attend, the district must show that the plan is necessary under the strict scrutiny standard of equal protection analysis [*see* *Parents Involved in Community Schools v. Seattle School Dist. No. 1 (2007) 551 U.S. 701, 127 S. Ct. 2738, 2751-2768, 168 L. Ed. 2d 508* (under strict scrutiny analysis, school districts did not carry burden of showing ends they sought justified classifying individual students on basis of their race and discriminating among them on that basis)].

[2] Judicial Remedies

In enforcing the obligation of school districts to eliminate racial segregation, the court's function is to ascertain whether or not a school board has initiated a course of action to alleviate the effects of segregation in its schools and has made reasonable progress toward that goal. If the court finds that the board has not done so, it must intervene to protect the rights of minority students [*Crawford v. Board of Educ. (1976) 17 Cal. 3d 280, 302-307, 130 Cal. Rptr. 724, 551 P.2d 28]* . However, judicial power to correct racial segregation may be exercised only on the basis of a constitutional violation, and the nature of the violation determines the scope of the remedy [*Swann v. Charlotte-Mecklenburg Bd. of Educ. (1971) 402 U.S. 1, 16, 91 S. Ct. 1267, 28 L. Ed. 2d 554* ; *see* *Diaz v. San Jose Unified School Dist (9th Cir. 1988) 861 F.2d 591, 595-597* (considering issues such as magnet schools, freedom of choice, and disproportionate burdens in review of desegregation plan)].

Generally, the constitutional command to desegregate schools does not require that every school in a school district reflect the racial composition of the district as a whole [*Swann v. Charlotte-Mecklenburg Bd. of Educ. (1971) 402 U.S. 1, 24, 91 S. Ct. 1267, 28 L. Ed. 2d 554* ; *Crawford v. Board of Educ. (1976) 17 Cal. 3d 280, 302, 130 Cal. Rptr. 724, 551 P.2d 28]* . School districts need only take reasonable and feasible steps to eliminate segregated schools, that is, schools in which the minority student enrollment is so disproportionate as to realistically isolate minority students from other students and thus deprive minority students of an integrated educational experience [*Crawford v. Board of Educ. (1976) 17 Cal. 3d 280, 303, 130 Cal. Rptr. 724, 551 P.2d 28]* . Mathematical racial quotas may, however, be used by the court as a starting point in the process of shaping a remedy [*Swann v. Charlotte-Mecklenburg Bd. of Educ. (1971) 402 U.S. 1, 25, 91 S. Ct. 1267, 28 L. Ed. 2d 554]* .

A court may require a school district to levy taxes at a level sufficient to fund a court-ordered desegregation plan and then enjoin the operation of state laws that prevent the district from exercising its taxing power [*State of Missouri v. Jenkins (1990) 495 U.S. 33, 55-58, 110 S. Ct. 1651, 109 L. Ed. 2d 31]* . In California, limited state funding is available to reimburse a school district for the cost of implementing a desegregation plan [*see* Educ. Code § 422.47.3; *see also San Francisco NAACP v. San Francisco U. School D. (9th Cir. 1990) 896 F.2d 412]* .

[3] Discriminatory Intent

[a] United States Constitution

Under *U.S. Const., amend. XIV*, a plaintiff seeking to establish a denial of equal protection on the basis of racial discrimination must prove a discriminatory purpose on the part of public officials [*Washington v. Davis (1976) 426 U.S. 229, 239-240, 96 S. Ct. 2040, 48 L. Ed. 2d 597]* . Thus, in a school desegregation case, the plaintiff must show not

only that segregated schooling exists, but also that it was brought about or maintained by intentional state action [*see Columbus Bd. of Educ. v. Penick (1979) 443 U.S. 449, 464, 99 S. Ct. 2941, 61 L. Ed. 2d 666]* . Moreover, under the federal equal protection provision, a court may not order a remedy embracing more than one school district to correct a constitutional violation found to exist in only one school district absent a showing that racially discriminatory acts of that district or of the state have been a substantial cause of interdistrict segregation [*Milliken v. Bradley (1974) 418 U.S. 717, 744-745, 94 S. Ct. 3112, 41 L. Ed. 2d 1069]* .

[b] California Constitution

The California Supreme Court held that under the equal protection provisions of the California Constitution [*Cal. Const., art. I, § 7(a)*], school boards bear an obligation to take reasonably feasible steps to alleviate all racial segregation in public schools, regardless of whether such segregation is de jure (i.e., the result of deliberately discriminatory actions and policies) or de facto [Crawford v. Board of *Educ. (1976) 17 Cal. 3d 280, 289-302, 130 Cal. Rptr. 724, 551 P.2d 28* ; *Jackson v. Pasadena City School Dist. (1963) 59 Cal. 2d 876, 881, 31 Cal. Rptr. 606, 382 P.2d 878]* . A court of appeal held that the California Constitution authorizes judicial remedies to eliminate interdistrict segregation where feasible [*see Tinsley v. Palo Alto Unified School Dist. (1979) 91 Cal. App. 3d 871, 899-907, 154 Cal. Rptr. 591]* .

Subsequent to these decisions, however, California voters approved an amendment to *Cal. Const., art. I, § 7(a)* which provides that nothing in the California Constitution "imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the *Equal Protection Clause of the Fourteenth Amendment to the United States Constitution* with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the *Equal Protection Clause of the 14th Amendment to the United States Constitution*, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the *Equal Protection Clause of the 14th Amendment of the United States Constitution*."

The apparent effect of the amendment to *Cal. Const., art. I, § 7(a)* is to partly overrule the holdings of *Crawford* and *Tinsley* by prohibiting the use of pupil school assignment and mandatory busing to correct de facto racial segregation, and by eliminating interdistrict remedies except where there is a showing that de jure segregation in one district was a substantial cause of de facto segregation in another district or that the district boundaries were drawn by the state with a discriminatory purpose, as required by the *Milliken* decision. The amendment requires those seeking interdistrict busing or pupil assignment to show de jure segregation and meet *Milliken* standards. Remedies other than pupil assignment and transportation are still available to cure alleged de facto segregation, and requests for other forms of relief, such as requiring a school district to adopt a reasonably feasible plan to alleviate racially segregated schools, are still within the authority of the state courts to impose [*Tinsley v. Superior Court (1983) 150 Cal. App. 3d 90, 99-100, 109-110, 197 Cal. Rptr. 643]* . For a further discussion and criticism of the amendment, see Comment, "California's Anti-Busing Amendment: A Perspective on the Now Unequal *Equal Protection Clause*," *10 Golden Gate L Rev 611 (1980)*. The amendment was upheld by the United States Supreme Court as not violative of the equal protection provisions of *U.S. Const., amend. XIV*, or of any other constitutional requirement or federal law [*Crawford v. Los Angeles Board of Education (1982) 458 U.S. 527, 102 S. Ct. 3211, 73 L. Ed. 2d 948, 955-961* ; *see Tinsley v. Superior Court (1983) 150 Cal. App. 3d 90, 100, 197 Cal. Rptr. 643]* .

Subsequently, a California court of appeal held that the rationale in *Crawford* was applicable to the contention that the amendment impermissibly encouraged or sanctioned racial segregation in schools. The California Supreme Court denied hearing. The court of appeal stated that although state courts may be able to freely determine the scope and meaning of the amendment, *Crawford* gave total approval to the constitutionality of the amendment and that approval was binding on state courts. The court of appeal noted that techniques other than busing and school reassignment were

still within the authority of state courts to impose to cure alleged de facto segregation [*see Tinsley v. Superior Court (1983) 150 Cal. App. 3d 90, 102-104, 109, 197 Cal. Rptr. 643]* .

[4] Statutory Restrictions on Pupil Transportation and School Assignment

Educ. Code § 35350 prohibits governing boards from requiring any student or pupil to be transported for any purpose or reason without the written permission of his or her parent or guardian. *Educ. Code § 35351* provides that no pupil may be assigned to or required to attend a particular school because of the characteristics listed in *Educ. Code § 220* (disability, gender, nationality, race or ethnicity, religion, sexual orientation). The former provision has been construed as doing no more than giving the parent the right to reject compulsory busing by the school district and to choose some other more convenient means of transportation [*San Francisco Unified School Dist. v. Johnson (1971) 3 Cal. 3d 937, 946, 92 Cal. Rptr. 309, 479 P.2d 669 , cert. denied sub nom. Fehlhaber v. San Francisco Unified School Dist. 401 U.S. 1012 (1972)]* . Both provisions have been held unconstitutional to the extent that they purport to restrict the use of pupil reassignment to correct unconstitutional racial segregation [*see Santa Barbara Sch. Dist. v. Superior Court (1975) 13 Cal. 3d 315, 324-328, 118 Cal. Rptr. 637, 530 P.2d 605* ; *San Francisco Unified School Dist. v. Johnson (1971) 3 Cal. 3d 937, 954-959, 92 Cal. Rptr. 309, 479 P.2d 669 , cert. denied sub nom. Fehlhaber v. San Francisco Unified School Dist. 401 U.S. 1012 (1972)]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawEqual ProtectionRaceEducation LawDiscriminationRacial DiscriminationDesegregationInvoluntary Student PlacementEducation LawDiscriminationRacial DiscriminationDesegregationRacial ImbalanceEducation LawDiscriminationRacial DiscriminationDesegregationRemediesEducation LawDiscriminationRacial DiscriminationEqual Protection

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45-513 California Forms of Pleading and Practice--Annotated § 513.16

§ 513.16 Parent's Right to Control Over Sexual Information Provided to Children

Parents do not have a constitutional right to control the upbringing of their children by introducing them to matters of and relating to sex in accordance with their personal and religious values and beliefs. There is no specific right in parents to determine when and how their children are exposed to sexually explicit subject matter, and there is no such right encompassed within their fundamental due process right to control their children's upbringing and their constitutional right to privacy to make intimate familial decisions [*Fields v. Palmdale Sch. Dist. (9th Cir. 2005) 427 F.3d 1197, 1203-1208* ; *see Troxel v. Granville (2000) 530 U.S. 57, 66 , 120 S. Ct. 2054, 147 L. Ed. 2d 49* (plurality opinion) (*due process clause of Fourteenth Amendment* protects fundamental right of parents to make decisions concerning care, custody, and control of their children); *Pierce v. Society of Sisters (1925) 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070* (state has power reasonably to regulate all schools; inspect, supervise, and examine schools, teachers, and pupils; require all children of proper age to attend some school, teachers to be of good moral character and patriotic disposition, certain studies plainly essential to good citizenship be taught, and nothing be taught which is manifestly inimical to public welfare); *Meyer v. Nebraska (1923) 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042* ; *see also Runyon v. McCrary (1976) 427 U.S. 160, 177, 96 S. Ct. 2586, 49 L. Ed. 2d 415* (no parental right to educate children in private segregated schools); *Norwood v. Harrison (1973) 413 U.S. 455, 461-462, 93 S. Ct. 2804, 37 L. Ed. 2d 723* (discussing limited scope of *Pierce); Wisconsin v. Yoder (1972) 406 U.S. 205, 239, 92 S. Ct. 1526, 32 L. Ed. 2d 15* (White, J., concurring) (*Pierce* right lends no support to contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge child needs to be productive and happy member of society)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawSubstantive Due ProcessPrivacyPersonal DecisionsEducation LawInstructionCurriculaParental AuthorityFamily LawParental Duties & RightsConsentEducationGovernmentsState & Territorial GovernmentsPolice Power

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45-513 California Forms of Pleading and Practice--Annotated § 513.17

§ 513.17 Discrimination

Educ. Code § 220 prohibits discrimination based on disability, gender, nationality, race or ethnicity, religion, sexual orientation, or any other characteristic contained in the definition of hate crimes in *Penal Code § 422.55* in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid [for discussion of racial segregation in public schools, *see § 513.15*].

One listed characteristic upon which discrimination is prohibited is sexual orientation. To prevail on a claim under Section 220 for peer sexual orientation harassment, a plaintiff must show each of the following [*Donovan v. Poway Unif. School Dist. (2008) 167 Cal. App. 4th 567, 84 Cal. Rptr. 3d 285* ; for discussion of sexual harassment under federal law, *see § 513.36*]:

- He or she suffered severe, pervasive, and offensive harassment that effectively deprived the plaintiff of the right of equal access to educational benefits and opportunities.
- The school district had actual knowledge of the harassment.
- The school district acted with deliberate indifference in the face of such knowledge.

The elements of liability in connection with students' equal protection claims against school officials are the same elements that apply in an action under Title IX of the Education Amendments of 1972 for money damages, which also govern a private suit for damages under Section 220 [*Donovan v. Poway Unif. School Dist. (2008) 167 Cal. App. 4th 567, 596-608, 84 Cal. Rptr. 3d 285]* .

Money damages are available in a private enforcement action under section 220 [*Donovan v. Poway Unif. School Dist. (2008) 167 Cal. App. 4th 567, 592-596, 84 Cal. Rptr. 3d 285* , citing *Educ. Code § 262.3(b)*].

The federal Equal Educational Opportunities Act of 1974 prohibits states from denying equal educational opportunity to an individual on account of the individual's race, color, sex, or national origin by, inter alia, an educational agency's

failure to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs [*20 U.S.C. § 1703(f)*]. By simply requiring a state to take appropriate action to overcome language barriers without specifying particular actions a state must take, Congress intended to leave state and local educational authorities a substantial amount of latitude in choosing the programs and techniques to use to meet their obligations under the Act [*Horne v. Flores (2009) -- U.S. --, 129 S. Ct. 2579, 2589, 2597, 174 L. Ed. 2d 406* ; *Castaneda v. Pickard (5th Cir. 1981) 648 F.2d 989, 1009]* .

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[Reserved]

§§ 513.18[Reserved]

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45-513 California Forms of Pleading and Practice--Annotated § 513.30

§ 513.30 Governing Statutes

Provisions governing special education are set forth in *Educ. Code § 56000 et seq.* Federal provisions governing aid to states for the provision of special education are contained in *20 U.S.C. § 1401 et seq.*

The right of public school students in California to freedom of speech is governed by *Educ. Code §§ 48907, 48950*.

Suspension and expulsion of students is governed by *Educ. Code § 48900 et seq.* Corporal punishment is governed by *Educ. Code §§ 49000* and *49001*. The duty of students to comply with school regulations, to pursue the required course of study, and to submit to the authority of the teachers is set forth in *Educ. Code § 48908*.

Federal provisions relating to sexual harassment in violation of Title IX of the Education Amendments of 1972 are set forth in *20 U.S.C. § 1681 et seq.*. Search and seizure of students in public schools is governed by *U.S. Const., amends. IV, XIV*, as enforced through actions brought under *42 U.S.C. § 1983*, and by *Cal. Const., art. I, § 13*. For discussion of Section 1983, see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawCivil LiabilityCivil Rights Act of 1871Education LawDiscriminationEqual Educational OpportunitiesCoverageEducation LawStudentsDiscipline MethodsCorporal PunishmentEducation LawStudentsDiscipline MethodsExpulsionsEducation LawStudentsDiscipline MethodsSuspensionsEducation LawStudentsSearch & SeizureGeneral OverviewEducation LawStudentsSpeechGeneral Overview

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§ 513.31 Right to Free Public Education

The opportunity to attend and receive instruction in the public schools is a legal right that is enforceable by the same means as any other legal right [*Piper v. Big Pine School Dist. (1924) 193 Cal. 664, 669-670, 226 P. 926* ; *Ward v. Flood (1874) 48 Cal. 36, 50]* . Public education is a fundamental right under the equal protection provisions of the California Constitution [*Butt v. State of California (1992) 4 Cal. 4th 668, 678-680, 15 Cal. Rptr. 2d 480, 842 P.2d 1240* ; *Serrano v. Priest (1976) 18 Cal. 3d 728, 765-766, 135 Cal. Rptr. 345, 557 P.2d 929* , *cert. denied sub nom., Clowes v. Serrano 432 U.S. 907 (1977)* ; *see Serrano v. Priest (1971) 5 Cal. 3d 584, 596 n.11, 604-610, 96 Cal. Rptr. 601, 487 P.2d 1241]* .

The California Constitution makes public education uniquely a fundamental concern of the state [*see § 513.11[1]*]. It prohibits maintenance and operation of the public school system in a way that denies basic educational equality to the students of particular districts. The state itself bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity [*Butt v. State of California (1992) 4 Cal. 4th 668, 685, 15 Cal. Rptr. 2d 480, 842 P.2d 1240]* . This right to equality of educational opportunity requires that the state's schools be funded in such a way that the quality of education does not depend on the wealth of the local school district [*see Serrano v. Priest (1971) 5 Cal. 3d 584, 595, 96 Cal. Rptr. 601 . 487 P.2d 1241 (Serrano I)* ; *see also Serrano v. Priest (1976) 18 Cal. 3d 728, 768-775, 135 Cal. Rptr. 345, 557 P.2d 929 (Serrano II)]* . Further, the state must intervene if a local district's fiscal problems would otherwise deny its students basic educational equality, unless the state can demonstrate a compelling reason not to do so [*Butt v. State of California (1992) 4 Cal. 4th 668, 678-679, 692, 15 Cal. Rptr. 2d 480, 842 P.2d 1240* (affirming trial court injunction that required state to loan additional funds to keep local school district open and operating for full scheduled number of school days, even though district board had exhausted funds provided under state's equalizing school financing formula); *see § 513.14*].

The California Constitutional *equal protection clause* also establishes rights of students in areas other than school funding. For example, the state may not condition the availability of public education on compliance with an unconstitutionally vague standard of conduct, nor may it deprive a child of the opportunity of a public education without due process, including notice of the grounds for denial and an opportunity to be heard [*see Abella v. Riverside*

Unified School Dist. (1976) 65 Cal. App. 3d 153, 168-169, 135 Cal. Rptr. 177 ; *Myers v. Arcata etc. School Dist. (1969) 269 Cal. App. 2d 549, 560, 75 Cal. Rptr. 68]* . In light of the importance of education to society and to the individual, the courts must unsympathetically examine any action of a public body that has the effect of depriving children of the opportunity to obtain an education [*Manjares v. Newton (1966) 64 Cal. 2d 365, 375-376, 49 Cal. Rptr. 805, 411 P.2d 901]* .

Cal. Const., art. IX, § 5, requires the state to maintain and support a *free* school in each district for at least six months of every year. The free school guarantee extends not only to classes, but also to extracurricular activities that are educational in character, such as athletic, music, and drama programs [*Hartzell v. Connell (1984) 35 Cal. 3d 899, 904-913, 201 Cal. Rptr. 601, 679 P.2d 35]* . It does not, however, extend to school transportation, which is deemed not to be an educational activity but a supplemental service [*Arcadia Unified School Dist. v. State Dept. of Education (1992) 2 Cal. 4th 251, 259-265, 5 Cal. Rptr. 2d 545, 825 P.2d 438]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawEqual ProtectionScope of ProtectionEducation LawDiscriminationEqual Educational OpportunitiesCoverageEducation LawFundingAllocationEducation LawStudentsEqual ProtectionEducation LawStudentsRight to Education

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§ 513.32 Educational Malpractice

Although courts have said that children have a "right" to an education at public expense, students have generally been unsuccessful in their attempts to hold schools and teachers liable for "educational malpractice," that is, for failure to use reasonable care to give a student a suitable or minimally acceptable education. There is no cause of action for damages if a school negligently fails to provide proper remedial education [*Peter W. v. San Francisco Unified Sch. Dist. (1976) 60 Cal. App. 3d 814, 817-825, 131 Cal. Rptr. 854]* , or if a school places a student in a class for mentally disabled students although the school knows or should have known the student in question was not mentally retarded [*Smith v. Alameda County Social Services Agency (1979) 90 Cal. App. 3d 929, 941-942, 153 Cal. Rptr. 712]* . Nor is there a cause of action for negligence in failing to comply with special education program requirements [*Keech v. Berkeley Unified School Dist. (1984) 162 Cal. App. 3d 464, 468-469, 210 Cal. Rptr. 7]* .

On the other hand, certain facts may constitute a cause of action for appropriate relief (such as injunction) to assure students of getting a minimally acceptable education in the future. For example, a school may be enjoined from placing students in classes for mentally retarded students on the basis of their scores on culturally biased IQ tests, if the consequence of the use of such criteria creates racial imbalance in the composition of such classes [*see Larry P. by Lucille P. v. Riles (9th Cir. 1984) 793 F.2d 969, 982-984* ; *P. v. Riles (N.D. Cal. 1972) 343 F. Supp. 1306, 1315]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawCivil LiabilityEducational Malpractice

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45-513 California Forms of Pleading and Practice--Annotated § 513.33

§ 513.33 Special Education

[1] Right to Free Appropriate Public Education

To assist states and localities in providing for the education of disabled children, Congress has enacted the Individuals with Disabilities Education Act (IDEA; *20 U.S.C. § 1400 et seq.*). The IDEA was intended by Congress to do all of the following [*20 U.S.C. § 1400(d)*]:

- Ensure that all children with disabilities have available to them a free appropriate public education emphasizing special education and related services designed to meet their unique needs and to prepare them for further education, employment, and independent living.

- Ensure that the rights of children with disabilities and the parents of such children are protected.

- Assist states, localities, educational service agencies, and federal agencies to provide for the education of all children with disabilities.

- Assist states in implementing statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families.

- Ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services.

- Assess and ensure the effectiveness of efforts to educate children with disabilities.

However, in enacting the IDEA, Congress did not intend to create a federal claim for every activity or type of conduct that may impede an individual's ability to take advantage of the educational opportunities [*Armstrong v. Alicante (E.D.*

Cal. 1999) 44 F. Supp. 2d 1087, 1089] .

After examining the states' progress under IDEA, in 1997, Congress found that substantial gains had been made in the area of special education but that more needed to be done to guarantee children with disabilities adequate access to appropriate services. The 1997 Amendments to the IDEA were intended to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education [*see* S. Rep. No. 105-17, p. 5 (1997)]. Consistent with that goal, the Amendments preserved the Act's purpose of providing a "free appropriate public education" (FAPE) to all children with disabilities [*Forest Grove School Dist. v. T. A. (2009) -- U.S. --, 129 S. Ct. 2484, 2491-2492, 174 L. Ed. 2d 168]* .

The term "free appropriate public education" means special education and related services that [*20 U.S.C. § 1401(9)*; *see* 45 C.F.R. § 121a.4]:

- Have been provided at public expense, under public supervision and direction, and without charge;
- Meet the standards of the state educational agency;
- Include an appropriate preschool, elementary, or secondary school education in the state involved; and
- Are provided in conformity with the individualized education program required under *20 U.S.C. § 1414(d).*

"Related services" means transportation, and developmental, corrective, and other supportive services required to assist a child with a disability to benefit from special education, including the early identification and assessment of disabling conditions in children. Supportive services may also include speech-language pathology and audiology services; psychological services; physical and occupational therapy; recreation, including therapeutic recreation; social work services; counseling services, including rehabilitation counseling; orientation and mobility services; and medical services. However, medical services must be for diagnostic and evaluation purposes only [*20 U.S.C. § 1401(26)*]. The IDEA contains no explicit definition of "medical services" [*see Cedar Rapids Community School District v. Garret F. (1999) 526 U.S. 66, 119 S. Ct. 992, 143 L. Ed. 2d 154* (school district required to provide ventilator-dependent student continuous one-on-one nursing services student required during school hours in order to remain in school); *Irving Independent School Dist. v. Tatro (1984) 468 U.S. 883, 888-892, 104 S. Ct. 3371, 82 L. Ed. 2d 664* (services that may be provided by school nurse are not excluded medical services); *Clovis Unified v. Office of Administrative Hearings (9th Cir. 1990) 903 F.2d 635, 638, 641, 647* (cost of residential treatment program in psychiatric hospital is excluded medical service, notwithstanding fact that treatment was required for child to benefit from educational program)]. Preventing illegal drug use is not the type of supportive services contemplated by the IDEA [*Armstrong v. Alicante (E.D. Cal. 1999) 44 F. Supp. 2d 1087, 1089]* .

Schools under the IDEA include residential schools [*see 20 U.S.C. § 1401(6), (27)*]. If placement in a public or private residential program is necessary to provide special education and related services to a disabled child, the program, including nonmedical care and room and board, must be at no cost to parents of the child [*34 C.F.R. § 300.302*; *see Clovis Unified v. Office of Administrative Hearings (9th Cir. 1990) 903 F.2d 635, 641, 647* (rejecting acute psychiatric hospital as such a "residential program," despite provision of some educational services as part of program)].

When a public school fails to provide a "free appropriate public education" (FAPE), and a child's parents place the child in an appropriate private school without the school district's consent, a court may require the district to reimburse the parents for the cost of the private education [*see School Comm. of Burlington v. Department of Ed. of Mass. (1985) 471 U.S. 359, 370, 105 S. Ct. 1996, 85 L. Ed. 2d 385]* . The IDEA Amendments of 1997 [111 Stat. 37] do not categorically prohibit reimbursement for private education costs if a child has not previously received special education

and related services under the authority of a public agency [*Forest Grove School Dist. v. T. A. (2009) -- U.S. --, 129 S. Ct. 2484, 2491-2496, 174 L. Ed. 2d 168* ; see *20 U.S.C. § 1412(a)(10)(C)(ii)*]. When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district's opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child's private education is warranted [*Forest Grove School Dist. v. T. A. (2009) -- U.S. --, 129 S. Ct. 2484, 2496, 174 L. Ed. 2d 168]* .

The IDEA requires states to provide some measure of special education and related services to disabled children in private schools [*see 20 U.S.C. § 1412(a)(10)(A), (C)*; *34 C.F.R. §§ 300.403-300.452*]. Services may be provided to children with disabilities on the premises of parochial schools to the extent consistent with law [*20 U.S.C. § 1412(a)(10)(A)(ii)(I), (II)*], but need not be provided on site at a private school [*WJM ex rel. KDM v. Reedsport Sch. Dist. (9th Cir. 1999) 196 F.3d 1046]* .

A state satisfies the requirement of providing a disabled child with a free appropriate public education by providing personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction. Instruction and services must be provided at public expense, must meet the state's educational standards, must approximate the grade levels used in the state's regular education, and must comport with the child's individualized educational program. In addition, the individualized education program and the personalized instruction should be formulated in accordance with the requirements of the IDEA and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade [*Board of Education v. Rowley (1982) 458 U.S. 176, 203, 102 S. Ct. 3034, 73 L. Ed. 2d 690* (also holding that provision of sign language interpreter not required when student performs better than average child in class, is advancing easily from grade to grade, and is receiving personalized instruction and related services calculated by school administrators to meet student's educational needs)].

Under the IDEA, each state desiring to receive federal funds must meet certain conditions and establish procedures for protecting the rights of children with disabilities and their parents [*see 20 U.S.C. §§ 1411-1420*; 45 C.F.R. § 121a.110 et seq.]. To comply with the IDEA, the California Legislature has enacted *Educ. Code § 56000 et seq.*, which extends to all individuals with exceptional needs the right to participate in a free appropriate public education [*Educ. Code § 56000*; *see Educ. Code § 56040*].

"Individuals with exceptional needs" are persons [*Educ. Code § 56026(a)-(d)*]:

- Who are identified by an individualized education program team as children with a disability as that phrase is defined in former *20 U.S.C. § 1401(a)(3)*;

- Whose impairment requires instruction, services, or both that cannot be provided with modification of the regular school program;

- Who come within one of the age categories set forth in *Educ. Code § 56026(c)*; and

- Who meet eligibility criteria set forth in regulations adopted by the board, including, but not limited to, those adopted pursuant to *Educ. Code § 56333 et seq.*

Unless they are disabled within the meaning of *Educ. Code § 56026(a)-(d)*, pupils whose educational needs are due primarily to the following are not individuals with exceptional needs [*Educ. Code § 56026(e)*]:

- Limited English proficiency.

- A lack of instruction in reading or mathematics.

- Temporary physical disabilities.
- Social maladjustment.
- Environmental, cultural, or economic factors.

State standards that impose a greater duty to educate handicapped children, if not inconsistent with federal standards, are enforceable in federal court under the IDEA [*Union School Dist. v. Smith (9th Cir. 1994) 15 F.3d 1519, 1524 , cert. denied, 513 U.S. 965]* . Thus, for example, California's statutory scheme mandating that handicapped three- to five-year-old students may, when appropriate, be placed in a program that only provides designed instruction and services without simultaneous special education [*see Educ. Code §§ 56026, 56361, 56441.11(b)*] is not inconsistent with the IDEA. It is therefore enforceable in the federal courts [*Union School Dist. v. Smith (9th Cir. 1994) 15 F.3d 1519, 1527 , cert. denied, 513 U.S. 965]* .

An employee of a school district, county office of education, or a special education local planning area may not directly or indirectly use or attempt to use the official authority or influence of the employee, as defined in *Educ. Code § 56046(e)(2)*, for the purpose of intimidating, threatening, coercing, or attempting to intimidate, threaten, or coerce any person for the purpose of interfering with the action of that person at any time, to assist a parent or guardian of a pupil with exceptional needs to obtain services or accommodations for that pupil [*Educ. Code § 56046(a)*]. For these purposes, services or accommodations includes information that would assist a parent or guardian to obtain a free appropriate education for his or her child as guaranteed by the federal Individuals with Disabilities Education Act [*20 U.S.C. § 1400 et seq.*], or other services or accommodations guaranteed by the federal Rehabilitation Act [*29 U.S.C. § 794*] and the federal Americans with Disabilities Act [*42 U.S.C. § 12101 et seq.*], as well as under state laws regarding individuals with exceptional needs [*Educ. Code § 56046(e)(1)*].

Section 504 of the Rehabilitation Act of 1973 as amended requires that disabled individuals not be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity that receives federal funds [*29 U.S.C. § 794*]. The United States Department of Education regulations implementing § 504 include a requirement that disabled children in schools receiving federal funds be provided a "free appropriate public education" (FAPE) [*34 C.F.R. § 104.33*]. The regulations define "appropriate education" as regular or special education and related aids and services designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons and based on adherence to procedures that satisfy the requirements of *34 C.F.R. §§ 104.34, 104.35*, and *104.36* [*34 C.F.R. § 104.33(a), (b)*].

Section 504 establishes an implied private right of action allowing victims of prohibited discrimination, exclusion, or denial of benefits to seek the full panoply of remedies, including equitable relief and compensatory damages [*Mark H. v. Lemahieu (9th Cir. 2008) 513 F.3d 922, 930, 935* ; *Greater L.A. Council on Deafness, Inc. v. Zolin (9th Cir. 1987) 812 F.2d 1103, 1107* ; *see also Barnes v. Gorman (2002) 536 U.S. 181, 189, 122 S. Ct. 2097, 153 L. Ed. 2d 230 (2002)*]. Whether a plaintiff can bring an action to enforce § 504 regulations depends on whether those regulations come within the § 504 implied right of action [*Mark H. v. Lemahieu (9th Cir. 2008) 513 F.3d 922, 935-939*]. Punitive damages are not available under § 504 [*Barnes v. Gorman (2002) 536 U.S. 181, 189, 122 S. Ct. 2097, 153 L. Ed. 2d 230 (2002)* ; *Mark H. v. Lemahieu (9th Cir. 2008) 513 F.3d 922, 930*].

The FAPE requirements in the IDEA and in the § 504 regulations are overlapping but different. While the IDEA focuses on the provision of appropriate public education to disabled children, the Rehabilitation Act of 1973 more broadly addresses the provision of state services to disabled individuals. The IDEA contains a statutory FAPE provision and allows private causes of action only for prospective relief. Section 504 contains a broadly worded prohibition on discrimination against, exclusion of, and denial of benefits for disabled individuals, under which the federal Department of Education has promulgated regulations containing a FAPE requirement worded somewhat differently from the IDEA

FAPE requirement. Section 504 can be privately enforced to provide, in addition to prospective relief, compensatory but not punitive damages for past violations [*Mark H. v. Lemahieu (9th Cir. 2008) 513 F.3d 922, 928-930*]. The availability of injunctive relief under the IDEA does not preclude suits for damages under § 504 for government actions that violate both statutes; thus, the availability of relief under the IDEA does not limit the availability of a damages remedy under § 504 for failure to provide the FAPE independently required by § 504 and its implementing regulations [*Mark H. v. Lemahieu (9th Cir. 2008) 513 F.3d 922, 932-935*].

[2] Assessment of Educational Needs

Generally, each local public educational agency operating a special education program is required to actively and systematically seek out all individuals with exceptional needs, 21 years old or younger, who reside within the agency's jurisdiction [*see Educ. Code § 56300*]. Before an individual with exceptional needs can be placed in a special education program, the agency must conduct an individual assessment of his or her educational needs [*see Educ. Code § 56320*]. The parents or guardians of a pupil referred for initial assessment, or of a pupil already identified as an individual with exceptional needs, must be afforded an opportunity to participate in meetings with regard to the identification, assessment, and educational placement of the pupil, pursuant to *Educ. Code §§ 56342.5* and *56341.5(b), (c)*, and with regard to the provision of a free appropriate public education, as provided in *34 C.F.R. § 300.501* [*Educ. Code § 56304*]. Whenever an assessment for the development or revision of the individualized education program is to be conducted, the parent or guardian of the pupil must be given, in writing, a proposed assessment plan within 15 days of the referral for assessment not counting days between the pupil's regular school sessions or terms or days of school vacation in excess of five schooldays from the date of receiving the referral, unless the parent or guardian agrees, in writing, to an extension. In any event, the assessment plan must be developed within 10 days after the commencement of the subsequent regular school year or the pupil's regular school term as determined by each district's school calendar for each pupil for whom a referral has been made 10 days or less before the end of the regular school year. In the case of pupil school vacations, the 15-day time recommences on the date the pupil's regular schooldays reconvene [*Educ. Code § 56321(a)*; *but see Keech v. Berkeley Unified School Dist. (1984) 162 Cal. App. 3d 464, 468-469, 210 Cal. Rptr. 7* (school district's failure to comply with time requirement does not support action in negligence)]. A copy of the notice of a parent's or guardian's rights must be attached to the assessment plan. A written explanation of all the procedural safeguards under the Individuals with Disabilities Education Act [*20 U.S.C. § 1400 et seq.*], and the rights and procedures contained in *Educ. Code § 56500 et seq.*, must be included in the notice of a parent's or guardian's rights, including information on (1) the procedures for requesting an informal meeting, prehearing mediation conference, mediation conference, or due process hearing; (2) the timelines for completing each process; (3) whether the process is optional; and (4) the type of representative who may be invited to participate [*Educ. Code § 56321(a)*].

The proposed assessment plan must (1) be in language easily understood by the general public; (2) be provided in the native language of the parent or guardian or other mode of communication used by the parent or guardian, unless to do so is clearly not feasible; (3) explain the types of assessments to be conducted; and (4) state that no individualized education program will result from the assessment without the consent of the parent [*Educ. Code § 56321(b)*].

A parent or guardian has the right to obtain, at public expense, an independent educational assessment of the pupil from qualified specialists, as defined by the board's regulations, if the parent or guardian disagrees with an assessment obtained by the public education agency, in accordance with *34 C.F.R. § 300.502*. A parent or guardian is entitled to only one independent educational assessment at public expense each time the public education agency conducts an assessment with which the parent or guardian disagrees. If a public education agency observed the pupil in conducting its educational assessment, or if its assessment procedures make it permissible to have in-class observation of a pupil, an equivalent opportunity applies to an independent educational assessment of the pupil in the pupil's current educational placement and setting, and observation of an educational placement and setting, if any, proposed by the public education agency, regardless of whether the independent educational assessment is initiated before or after the filing of a due process hearing proceeding [*Educ. Code § 56329(b)*]. The public education agency may initiate a due process hearing in accordance with *Educ. Code § 56500 et seq.* [*see § 513.33[5]*] to show that its assessment is appropriate. If

the final decision resulting from the due process hearing is that the assessment is appropriate, the parent or guardian still has the right for an independent educational assessment, but not at public expense [*Educ. Code § 56329(c)*]. If the parent or guardian obtains an independent educational assessment at private expense, the results of the assessment will be considered by the public education agency with regard to the provision of free, appropriate public education to the child, and may be presented as evidence at a due process hearing under *Educ. Code § 56500 et seq.* regarding the child [*Educ. Code § 56329(c)*]. If a public education agency observed the pupil in conducting its assessment, or if its assessment procedures make it permissible to have in-class observation of a pupil, an equivalent opportunity applies to an independent educational assessment of the pupil in the pupil's current educational placement and setting, and observation of an educational placement and setting, if any, proposed by the public education agency, regardless of whether the independent educational assessment is initiated before or after the filing of a due process hearing proceeding [*Educ. Code § 56329(c)*].

On completion of the administration of tests and other assessment materials, an individualized education program team meeting, including the parent or guardian and his or her representatives, must be scheduled pursuant to *Educ. Code § 56341*, to determine whether the pupil is an individual with exceptional needs as defined in *Educ. Code § 56026*, and to discuss the assessment, the educational recommendations, and the reasons for the recommendations [*Educ. Code § 56329(a)(1)*]. In making a determination of eligibility, a pupil may not be determined to be an individual with exceptional needs if the determinant factor for the determination is any of the following [*Educ. Code § 56329(a)(2)*; *see 20 U.S.C. § 1414(b)(5)*; *34 C.F.R. § 300.306(b)*]:

- Lack of appropriate instruction in reading, including the essential components of reading instruction as defined in *20 U.S.C. § 6368(3)*.
- Lack of instruction in mathematics.
- Limited-English proficiency.
- If the pupil does not otherwise meet the eligibility criteria under *34 C.F.R. § 300.8(a)*.

A copy of the assessment report and the documentation of determination of eligibility must be given to the parent or guardian [*Educ. Code § 56329(a)(3)*].

If a parent or guardian proposes a publicly financed placement of the pupil in a nonpublic school, the public education agency must have an opportunity to observe the proposed placement and the pupil in the proposed placement, if the pupil has already been unilaterally placed in the nonpublic school by the parent or guardian. Any such observation must only be of the pupil who is the subject of the observation and may not include the observation or assessment of any other pupil in the proposed placement. The observation or assessment by a public education agency of a pupil other than the pupil who is the subject of the observation may be conducted, if at all, only with the consent of the parent or guardian. The results of an observation or assessment of another pupil without permission is inadmissible in any due process or judicial proceeding regarding the free appropriate public education of that other pupil [*Educ. Code § 56329(d)*].

As part of the assessment plan given to parents pursuant to *Educ. Code § 56321*, the parent of the pupil must be provided with written notice that, on completion of administration of tests and other assessment materials, an individualized education program team meeting, including the parent and his or her representatives, will be scheduled pursuant to *Educ. Code § 56341* to determine whether the pupil is an individual with exceptional needs as defined in *Educ. Code § 56026*; and to discuss the assessment, the educational recommendations, and the reasons for these recommendations. A copy of the assessment report and the documentation of determination of eligibility must be given to the parent [*Educ. Code § 56329(a)*].

[3] Individualized Education Program

Each local educational agency must initiate and conduct meetings for the purposes of developing, reviewing, and revising the individualized education program of each individual with exceptional needs in accordance with *34 C.F.R. § 300.323(c)* [*Educ. Code § 56340*]. The meetings must be conducted and an individualized program developed in accordance with *Educ. Code §§ 56341-56347*.

[4] Parental Consent Required

Written parental consent must be obtained before any assessment of the pupil is conducted, unless the public education agency prevails in a due process hearing relating to the assessment or placement [*Educ. Code § 56506(e)*; *see Educ. Code § 56321(c)*; *see also § 513.33[5]*]. Informed parental consent need not be obtained in the case of a reassessment of the pupil if the local educational agency can demonstrate it has taken reasonable measures to obtain consent and the pupil's parent has failed to respond [*Educ. Code § 56506(e)*; *see 34 C.F.R. § 300.505(c)*]. In accordance with *34 C.F.R. § 300.300(d)(1)*, parental consent is not required before reviewing existing data as part of an assessment or reassessment, or before administering a test or other assessment that is administered to all children, unless before administration of that test or assessment, consent is required of the parents of all the children [*Educ. Code § 56321(e)*].

Furthermore, written parental consent under *Educ. Code § 56321* must be obtained before the pupil is placed in a special education program [*Educ. Code § 56506(f)*]. Although there is some confusion in the statutes, it appears that a parent's refusal to consent to the pupil's educational placement, as opposed to assessment, may not be challenged by the public education agency in a due process hearing [*compare Educ. Code § 56506(e) with Educ. Code § 56506(f)*; *see also Educ. Code § 56501(a)(1)-(4)*, as amended by Stats. 1980, ch. 1353, § 68, to eliminate parent's refusal to consent to educational placement as situation when due process hearing procedures may be invoked].

Consent for initial assessment may not be construed as consent for initial placement or initial provision of special education and related services to an individual with exceptional needs, pursuant to *20 U.S.C. § 1414(a)(1)(D)(i)(I)* [*Educ. Code § 56321(d)*].

If the child is a ward of the state and is not residing with his or her parent, the agency must make reasonable efforts to obtain the informed consent from the parent, as defined in *Educ. Code § 56028*, for an initial assessment to determine whether the child is an individual with exceptional needs [*Educ. Code § 56321.1*; *see 20 U.S.C. § 1414(a)(1)(D)(iii)*].

[5] Procedural Safeguards

[a] Mandated by IDEA

Any state or local education agency receiving funds under IDEA must establish and maintain procedures in accordance with *20 U.S.C. § 1415* to assure that disabled children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies [*20 U.S.C. § 1415(a)*]. Any state law that is inconsistent with the federally mandated procedures is superseded by the federal law [*Hacienda La Puente Unified School District Los Angeles v. Honig (9th Cir. 1992) 976 F.2d 487, 492-493* ; *San Francisco Unified School Dist. v. State of California (1982) 131 Cal. App. 3d 54, 65, 182 Cal. Rptr. 525]* .

In compliance with IDEA, *Educ. Code § 56500 et seq.* prescribe the applicable due process procedures. These procedures extend to the parent, as broadly defined under *Educ. Code § 56028*, and to the public education agency involved. They also extend to the pupil under certain limited circumstances [*Educ. Code § 56501(a)*]. The parent and the agency may initiate due process hearing procedures under any of the following circumstances [*Educ. Code § 56501(a)*]:

- There is a proposal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free appropriate public education to the child;

- There is a refusal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free appropriate public education to the child;

- The parent refuses to consent to an assessment of the child; or

- There is a disagreement between a parent or guardian and a district, special education local plan area, or county office regarding the availability of a program appropriate for the child, including the question of financial responsibility, as specified in *34 C.F.R. § 300.148*.

The due process hearing procedures include, but are not limited to [*Educ. Code § 56501(b)*]:

- The right to examine pupil records under *Educ. Code § 56504* [*see § 513.33[5][b]*];

- The right to a mediation conference under *Educ. Code § 56500.3*, including the right to request mediation at any point during the hearing process [*see § 513.33[5][d]*];

- The right to request a mediation conference at any point during the hearing process; and

- The right to a fair and impartial administrative hearing at the state level, before a person knowledgeable in the laws governing special education and administrative hearings who is under contract with the Department of Education, under *Educ. Code § 56505* [*see § 513.33[5][e]*].

Even though a child has not previously been identified as disabled, his or her alleged disability may be raised in an IDEA administrative due process hearing [*Hacienda La Puente Unified School District Los Angeles v. Honig (9th Cir. 1992) 976 F.2d 487, 492]* .

When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when the services provided to a disabled child fall significantly short of those required by the IEP [*Van Duyn v. Baker School District (9th Cir. 2007) 481 F.3d 770, 779-780]* .

[b] Right to Examine Records

The parent has the right and opportunity to examine all school records of the child and to receive copies under *Educ. Code §§ 49065* and *56504* within five business days after a request is made by the parent, either orally or in writing. A public education agency may charge no more than the actual cost of reproducing such records, but, if this cost effectively prevents the parent from exercising the right to receive copies of the records, the copies must be reproduced at no charge to the parent [*Educ. Code § 56504*].

[c] Initiation of Hearing Procedure

A request for a due process hearing arising under *Educ. Code § 56501(a)* must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request [*Educ. Code § 56505*(*l*).] However, this time period does not apply to a parent if the parent was prevented from requesting the due process hearing due to either of the following [*Educ. Code § 56505*(*l*); *see 20 U.S.C. § 1415(f)(3)(D)*]:

- Specific misrepresentations by the local educational agency that it had solved the problem forming

the basis of the due process hearing request.

- The withholding of information by the local educational agency from the parent that was required under this part to be provided to the parent.

All requests for a due process hearing must be filed with the superintendent [*Educ. Code § 56502(a)*; *see 34 C.F.R. § 300.508(a), (b)*]. The superintendent must develop a model form to assist parents and guardians in filing a request for due process that is in accordance with *34 C.F.R. § 300.509* [*Educ. Code § 56502(b)*]. The party initiating a due process hearing by filing a written request with the superintendent, or the attorney representing the initiating party, must provide the other party to the hearing with a copy of the request at the same time as the request is filed with the superintendent [*Educ. Code § 56502(c)(1)*]. The due process hearing request notice must remain confidential [*Educ. Code § 56502(c)(1)*].

The due process hearing request must include all of the following [*Educ. Code § 56502(c)(1)*; *see 20 U.S.C. § 1415(b)(7)(A)*; *see also Educ. Code § 56502(c)(2)* (party may not have due process hearing until party or attorney representing party files request for meeting requirements listed in *Educ. Code § 56502(c)(1)*)]:

- The name of the child, the address of the residence of the child, or available contact information in the case of a homeless child, and the name of the school the child is attending.

- In the case of a homeless child or youth within the meaning of *42 U.S.C. § 11434a(2)* (McKinney-Vento Homeless Assistance Act), available contact information for the child and the name of the school the child is attending.

- A description of the nature of the child's problem relating to the proposed initiation or change, including facts relating to the problem.

- A proposed resolution of the problem to the extent known and available to the party at the time.

The due process hearing request notice required by *20 U.S.C. § 1415(b)(7)(A)* will be deemed to be sufficient unless the party receiving the notice notifies the due process hearing officer and the other party in writing that the receiving party believes the due process hearing request notice has not met the notice requirements. The party providing a hearing officer notification must provide the notification within 15 days of receiving the due process hearing request notice. Within five days of receipt of the notification, the hearing officer must make a determination on the face of the notice of whether the notification meets the requirements of *20 U.S.C. § 1415(b)(7)(A)* and immediately notify the parties in writing of the determination [*Educ. Code § 56502(d)(1)*].

The response to the due process hearing request notice must be made within 10 days of receiving the request notice [*Educ. Code § 56502(d)(2)*; *see 20 U.S.C. § 1415(c)(2)(B)*]. A party may amend a due process hearing request notice only if the other party consents in writing to the amendment and is given the opportunity to resolve the hearing issue through a meeting held pursuant to *20 U.S.C. § 1415(f)(1)(B)*, or the due process hearing officer grants permission. However, the hearing officer may only grant permission at any time not later than five days before a due process hearing occurs. The applicable timeline for a due process hearing under *Educ. Code § 56500 et seq.* recommences at the time the party files an amended notice, including the timeline under *20 U.S.C. § 1415(f)(1)(B)* [*Educ. Code § 56502(e)*].

The superintendent must take steps to ensure that within 45 days after receiving the written hearing request the hearing is immediately commenced and completed, including, any mediation requested at any point during the hearing process pursuant to *Educ. Code § 56501(b)(2)*, and a final administrative decision is rendered, unless a continuance has been granted under *Educ. Code § 56505* [*Educ. Code § 56502(f)*]. Notwithstanding any procedure set forth in *Educ. Code § 56500 et seq.*, a public education agency and a parent or guardian may, if the party initiating the hearing so chooses,

meet informally to resolve any issue or issues relating to the identification, assessment, or education and placement of the child, or the provision of a free, appropriate public education to the child, to the satisfaction of both parties before the hearing. The informal meeting will be conducted by the district superintendent, county superintendent, or director of the public education agency or his or her designee. Any designee must have the authority to resolve the issue or issues [*Educ. Code § 56502(g)*].

Operative until October 9, 2006, any request for a due process hearing arising under *Educ. Code § 56501(a)* must be filed within three years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. A party initiating a request for a due process hearing on and after October 7, 2005, may file the request within the two-year statute of limitations provision in *20 U.S.C. § 1415(b)(6)(B)*. A party may file a request within the three-year statute of limitations provision of *Educ. Code § 56505*(*l*) until October 9, 2006, but must, in accordance with *Educ. Code § 56501.5*, participate in a mediation conference conducted pursuant to *Educ. Code § 56500 et seq.* in an effort to resolve the due process hearing issue [*Educ. Code § 56505*(*l*) (operative until October 9, 2006)]. Effective October 10, 2006, any request for a due process hearing arising under *Educ. Code § 56501(a)* must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request [*Educ. Code § 56505*(*l*) (operative October 10, 2005)].

In accordance with *20 U.S.C. § 1415(f)(3)(D)*, the time period specified in *Educ. Code § 56505*(*l*) does not apply to a parent if the parent was prevented from requesting the due process hearing due to either of the following [*Educ. Code § 56505*(*l*)]:

- Specific misrepresentations by the local educational agency that it had solved the problem forming the basis of the due process hearing request.

- The local educational agency's withholding of information from the parent that was required under this part to be provided to the parent.

Educ. Code § 56500 et seq., in accordance with *20 U.S.C. § 1415(o)*, does not preclude a parent from filing a separate due process hearing request on an issue separate from a due process hearing request already filed [*Educ. Code § 56509*].

On receipt by the superintendent of a written request by the parent or guardian or public education agency, the superintendent or his or her designee or designees must immediately notify, in writing, all parties of the request for the hearing and the scheduled date for the hearing. The notice must advise all parties of all their rights relating to procedural safeguards [*Educ. Code § 56502(h)*]. The superintendent or his or her designee must provide both parties with a list of persons and organizations within the geographical area that can provide free or reduced cost representation or other assistance in preparing for the due process hearing. This list must include a brief description of the requirement to qualify for the services. The superintendent or his or her designee has complete discretion in determining which individuals or groups are included on the list [*Educ. Code § 56502(h)*].

The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the notice filed under *Educ. Code § 56502*, unless the other party agrees otherwise [*Educ. Code § 56502(i)*; *see 20 U.S.C. § 1415(f)(3)(B)*].

[d] Mediation

The right to a formal due process hearing does not preclude the parties from agreeing to a mediation conference or resolving their dispute in an informal, nonadversarial manner [*Educ. Code § 56503*]. Before the hearing, the public education agency and a parent may, if the party initiating the hearing so chooses, meet informally to resolve any issues relating to the identification, assessment, or education and placement of the child or to the provision of a free appropriate public education to the child, to the satisfaction of both parties. The informal meeting must be conducted by

the district superintendent, the county superintendent, or the director of the public education agency or his or her designee. Any designee must have the authority to resolve the issues [*Educ. Code § 56502(g)*].

It is the Legislature's intent that parties to special education disputes be encouraged to seek resolution through mediation before filing a request for a due process hearing [*Educ. Code § 56500.3(a)*]. However, requesting or participating in a mediation conference is not a prerequisite to requesting a hearing [*Educ. Code § 56500.3(c)*].

All requests for a mediation conference must be filed with the superintendent. The party initiating the conference must provide the other party with a copy of the request at the same time the request is filed [*Educ. Code § 56500.3(d)*]. The conference must be scheduled within 15 days of receipt by the superintendent, and must be completed within 30 days after receipt of the request unless both parties agree to an extension of time [*Educ. Code § 56500.3(e)*]. It must be held at a time and place reasonably convenient to the parent and pupil [*Educ. Code § 56500.3(h)*; *see 34 C.F.R. § 300.506(b)(5)*]. The parties may meet informally, at the request of the initiating party, to resolve any issues before the conference [*Educ. Code § 56500.3(j)*].

The mediation conference must be conducted by a person who is knowledgeable in the laws and regulations governing special education and who is under contract with the department [*Educ. Code § 56500.3(d)*; *see Educ. Code § 56504.5*]. The mediator must also be knowledgeable in the process of reconciling differences in a nonadversarial manner [*Educ. Code § 56500.3(d)*]. The mediation conference is conducted in accordance with regulations adopted by the board [*Educ. Code § 56500.3(i)*]. The process is to be informal and conducted in a nonadversarial atmosphere to resolve the issues to the satisfaction of both parties. Therefore, attorneys or other independent contractors used to provide legal advocacy services may not attend or otherwise participate [*Educ. Code § 56500.3(a)*]. Nevertheless, a parent who is also an attorney is not excluded. Further, any party may be accompanied and advised by a nonattorney representative and may consult an attorney before or after the conference [*Educ. Code § 56500.3(b)*].

In accordance with *20 U.S.C. § 1415(e)(2)(F)*, if a resolution is reached that resolves the due process issue through the mediation process, the parties will execute a legally binding written agreement that sets forth the resolution and does the following [*Educ. Code § 56500.3(f)*]:

- States that all discussions that occurred during the mediation process will be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.

- Is signed by both the parent and the representative of the public education agency who has the authority to bind the agency.

- Is enforceable in any state court of competent jurisdiction or in a federal district court of the United States.

If the mediation conference fails to resolve the issues to the satisfaction of all parties, the party who requested mediation may file for a state-level hearing under *Educ. Code § 56505*. The mediator may assist the parties in specifying any unresolved issues to be included in the hearing request [*Educ. Code § 56500.3(g)*].

A party may still request a mediation conference even though a request for a state-level hearing is filed or even if a hearing has commenced [*Educ. Code § 56503*]. However, once a hearing has been requested, a mediation conference may be scheduled only if both parties agree to mediate and are willing to extend the 45-day limit for issuing a hearing decision for a period equal to the length of the mediation process. The limitation on the period of extension is not applicable if the parties agree to take the hearing off the calendar. Attorneys and advocates are permitted to participate in mediation conferences that are scheduled after the filing of a request for a hearing [*Educ. Code § 56501(b)(2)*].

Pursuant to *34 C.F.R. § 300.506(b)(3)*, and to encourage the use of mediation, the state bears the cost of the mediation

process, including any meetings described in *34 C.F.R. § 300.506(d)* [*Educ. Code § 56500.3(e)*].

The procedures and rights regarding mediation must be included in the notice of parent rights attached to the pupil's assessment plan [*Educ. Code § 56500.3(k)*; *see Educ. Code § 56321*, discussed in *§ 513.33[4]*].

[e] Conduct of Due Process Hearing

The state-level due process hearing must be conducted, in accordance with regulations adopted by the State Board of Education, by a person knowledgeable in the laws governing special education and administrative hearings who has satisfactorily completed training [*Educ. Code § 56505(a), (c)*; *see Educ. Code § 56504.5*]. The hearing officer must encourage the parties to consider the option of mediation as an alternative to a hearing [*Educ. Code § 56505(c)*]. The hearing must be held at a time and place that is reasonably convenient to the parent and pupil [*Educ. Code § 56505(b)*].

Any party to the hearing must be afforded the following rights, consistent with state and federal statutes and regulations [*Educ. Code § 56505(e)*]:

- The right to be accompanied and advised by counsel and by individuals with special knowledge or training relating to the problems of individuals with exceptional needs;

- The right to present evidence, written arguments, and oral arguments;

- The right to confront, cross examine, and compel the attendance of witnesses;

- The right to a written or, at the option of the parents or guardians, electronic verbatim record of the hearing;

- The right to written or, at the option of the parents, electronic findings of fact and decisions [*see 20 U.S.C. §§ 1415(h)(4), 1417(c)*]. The record of the hearing and the findings of fact and decisions will be provided at no cost to parents or guardians in accordance with *34 C.F.R. § 300.512(c)(3)*;

- The right to be informed by the other parties to the hearing, at least 10 days before the hearing, as to what those parties believe are the issues to be decided at the hearing and their proposed resolution of those issues. On the request of a parent not represented by an attorney, the agency responsible for conducting hearings must provide a mediator to assist the parent in identifying the issues and the proposed resolution of the issues;

- The right to receive from other parties to the hearing, at least five business days before the hearing, a copy of all documents and a list of all witnesses the parties intend to present at the hearing, and the general area of their testimony; and all assessments completed by that date and recommendations based on the assessments that the parties intend to use at the hearing; and

- The right to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing [*see 34 C.F.R. § 300.512(d)(3)*].

The findings of fact and decisions will be made available to the public after any personally identifiable information has been deleted consistent with the confidentiality requirements of *20 U.S.C. § 1417(c)* and will be transmitted to the Advisory Commission on Special Education pursuant to *20 U.S.C. § 1415(h)(4)* [*Educ. Code § 56505(e)(5)*].

During the pendency of the hearing proceedings, including the actual state-level hearing or judicial proceeding regarding a due process hearing, the pupil must remain in his or her present placement, except as provided in *34 C.F.R.*

§ 300.533, unless the public agency and the parent agree otherwise [*Educ. Code § 56505(d)*; *34 C.F.R. § 300.518(a)*; *see 20 U.S.C. § 1415(j), (k)(4)*]. A pupil applying for initial admission to a public school must, with the consent of his or her parent or guardian, be placed in the public school program until all proceedings have been completed [*Educ. Code § 56505(d)*]. If the decision of a hearing officer in a due process hearing or a state review official in an administrative appeal agrees with the pupil's parent or guardian that a change of placement is appropriate, that placement will be treated as an agreement between the state or local agency and the parent or guardian [*Educ. Code § 56505(d)*; *see 34 C.F.R. § 300.518(d)*].

20 U.S.C. § 1415(j) creates a presumption in favor of the child's current educational placement that school officials can overcome only by showing that maintaining the child in the current placement is substantially likely to result in injury either to the child or to others [*see Honig v. Doe (1988) 484 U.S. 305, 328, 108 S. Ct. 592, 98 L. Ed. 2d 686* (construing former *20 U.S.C. § 1415(e)(3)*, similar to current *20 U.S.C. § 1415(j)*)]. However, a preliminary injunction to maintain the educational status quo of a disabled child need not always be automatically granted. The court will apply traditional preliminary injunction factors, including a showing of irreparable harm and a likelihood of success on the merits [*Johnson ex rel. Johnson v. Special Educ. Hearing Office (9th Cir. 2002) 287 F.3d 1176, 1180]* .

However, a parent's violation of *20 U.S.C. § 1415(k)* by placing the child in a private school without the consent of local school authorities during the pendency of the hearing proceedings does not waive the parents' right to reimbursement for expenses from the private placement. Nevertheless, the parents assume a risk in violating *20 U.S.C. § 1415(k)*: If the court ultimately determines the proposed individualized educational program was appropriate, the parents are barred from reimbursement for any period during which their child's placement violates *20 U.S.C. § 1415(k)* [*see School Committee of Burlington v. Department of Education (1985) 471 U.S. 359, 371-374, 105 S. Ct. 1996, 85 L. Ed. 2d 385* (construing former *20 U.S.C. § 1415(e)(3)*)].

By contrast, if the court determines that the proposed individualized educational program is inappropriate, a parent is not barred from reimbursement, even though the parent violates *20 U.S.C. § 1415(k)* by placing the child in a private school that does not meet the *20 U.S.C. § 1401(9)* definition of a "free appropriate public education." The requirements of *20 U.S.C. § 1401(9)* do not apply to parental placements [*see Florence County Sch. Dist. Four v. Carter by & Through Carter (1993) 510 U.S. 7, 12-13, 114 S. Ct. 361* (construing former *20 U.S.C. § 1401(a)(18)*, similar to current *20 U.S.C. § 1401(9)*)].

If either party intends to be represented by counsel at the hearing, notice of that intent must be given to the other party at least 10 days before the hearing. The failure to provide the notice is good cause for a continuance [*Educ. Code § 56507(a)*].

The hearing officer may do any of the following during the hearing [*Educ. Code § 56505.1*]:

- Question a witness on the record before any of the parties question the witness;

- With the consent of both parties, request that conflicting experts discuss an issue or issues with each other while on the record;

- Visit the proposed placement site or sites if the physical attributes of the site are at issue;

- Call a witness to testify at the hearing if all parties consent to the witness giving testimony or the hearing is continued for at least five days after the witness is identified and before the witness testifies;

- Order that an impartial assessment of the pupil be conducted for purposes of the hearing and continue the hearing until the assessment has been completed;

- Bar introduction of any documents or the testimony of any witnesses not disclosed to the hearing officer at least five business days before the hearing and bar introduction of any documents or the testimony of any witnesses at the hearing without the consent of the other party not disclosed to the parties at least five business days before the hearing pursuant to *Educ. Code § 56505(e)(7)*;

- In decisions relating to the provision of related services by other public agencies, call as witnesses independent medical specialists qualified to present evidence in the area of the pupil's medical disability; and

- Set a reasonable limit on the length of the hearing after consideration of all of the following:

  (1) The issues to be heard;

  (2) The complexity of the facts to be proven;

  (3) The ability of the parties and their representatives, if any, to present their respective cases; and

  (4) The estimate of the parties as to the time needed to present their respective cases.

The cost of any assessment or evidence obtained by an impartial assessment or through independent medical specialists must be included in the contract between the department and the organization or entity conducting the hearing [*Educ. Code § 56505.1*]. The burden of proof in an administrative due process hearing challenging an individualized education plan is on the party seeking relief. Thus, for example, the burden of persuasion was on the child, as represented by his parents, when the parents believed their child's IEP was inappropriate, and they requested an impartial due process hearing [*Schaffer v. Weast (2005) 546 U.S. 49, 126 S. Ct. 528, 533-537, 163 L. Ed. 2d 387]* .

The decision of a due process hearing officer must be made on substantive grounds based on a determination of whether the child received a free appropriate public education [*Educ. Code § 56505(f)(1)*; *see 20 U.S.C. § 1415(f)(3)(E)*]. In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a free appropriate public education only if the procedural violation did any of the following [*Educ. Code § 56505(f)(2)*]:

- Impeded the child's right to a free appropriate public education.

- Significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child.

- Caused a deprivation of educational benefits.

The hearing conducted pursuant to *Educ. Code § 56505* must be completed and a written, reasoned decision, including the reasons for any nonpublic, nonsectarian school placement, the provision of nonpublic, nonsectarian agency services, or the reimbursement for the placement or services, taking into account the requirements of *Educ. Code § 56365(a)*, must be mailed to all parties to the hearing within 45 days from the expiration of the 30-day period pursuant to *Educ. Code § 56501.5(c)* [*Educ. Code § 56505(f)(3)*]. Either party to the hearing may request the hearing officer to grant an extension. The extension must be granted on a showing of good cause. Any extension extends the time for rendering a final administrative decision for a period only equal to the length of the extension [*Educ. Code § 56505(f)(3)*]. *Educ. Code § 56505(f)* does not preclude a due process hearing officer from ordering a local educational agency to comply with procedural requirements under *Educ. Code § 56500 et seq.* [*Educ. Code § 56505(f)(4)*].

Educ. Code § 56505(f) does not alter the burden of proof required in a due process hearing, or prevent a hearing officer

from ordering a compensatory remedy for an individual with exceptional needs [*Educ. Code § 56505(g)*]. The decision must indicate the extent to which each party prevailed on each issue heard and decided, including issues involving other public agencies named as parties to the hearing [*Educ. Code § 56507(d)*].

In a hearing conducted pursuant to *Educ. Code § 56505*, the hearing officer may not base a decision solely on nonsubstantive procedural errors, unless the hearing officer finds that the nonsubstantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the pupil's parent or guardian to participate in the formulation process of the individualized education program [*Educ. Code § 56505(j)*].

In decisions relating to the placement of individuals with exceptional needs, the person conducting the state hearing must consider cost in addition to all other factors that are considered [*Educ. Code § 56505(i)*]. A hearing officer may not render a decision that results in the placement of an individual with exceptional needs in a nonpublic, nonsectarian school, or that results in a service for an individual with exceptional needs provided by a nonpublic, nonsectarian agency, if the school or agency has not been certified under *Educ. Code § 56366.1* [*Educ. Code § 56505.2(a)*]. The hearing officer must consider *Educ. Code §§ 56365*, *56366*, and *56366.1* during a due process hearing concerning an issue of placement of an individual with exceptional needs in a nonpublic, nonsectarian school, or services for an individual with exceptional needs provided by a nonpublic, nonsectarian agency [*Educ. Code § 56505.2(b)*].

The hearing conducted under *Educ. Code § 56505* is the final administrative determination and is binding on all parties [*Educ. Code § 56505(h)*]. However, the parties are not precluded from exercising the right to appeal the decision to a state court of competent jurisdiction. An appeal must be made within 90 days of receipt of the decision. During the pendency of any administrative or judicial proceeding conducted under *Educ. Code § 56500 et seq.*, unless the public education agency and the parents of the child agree otherwise, the child involved in the hearing must remain in his or her present educational placement [*Educ. Code § 56505(k)*; *see § 513.33[5][g]*]. An aggrieved party may also exercise the right to bring a civil action in a district court of the United States without regard to the amount in controversy [*Educ. Code § 56505(k)*; *see 34 C.F.R. § 300.516*].

[f] Attorney's Fees

An award of reasonable attorney's fees to the prevailing parent, guardian, or pupil may only be made either with the agreement of the parties following the conclusion of the administrative hearing process or by a court of competent jurisdiction under the IDEA [*Educ. Code § 56507(b)(1)*; *see 20 U.S.C. § 1415(i)(3)*]. The "degree of success" standard articulated by the U.S. Supreme Court in *Hensley v. Eckerhart (1983) 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40* , for attorney's fees awards under *42 U.S.C. § 1988*, applies to attorney's fees awards under the IDEA. Thus, the "significant issue" test under IDEA is only the first step in a fee award analysis. Passing the significant issue test merely makes a plaintiff eligible for a fee award as a prevailing party; it does not mandate recovery of all fees. Partial success may result in a partial fee award [*Aguirre v. Los Angeles Unified School Dist. (9th Cir. 2006) 461 F.3d 1114, 1117-1121* ; *see Ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes, § 113.17[2]*, for discussion of attorney's fees awards under *42 U.S.C. § 1988*].

The court, in its discretion, may award reasonable attorney's fees as part of the costs to a prevailing party that is a state educational agency or local educational agency in the following circumstances [*Educ. Code § 56507(b)(2)*; *see 20 U.S.C. § 1415(i)(3)*]:

- Against the attorney of a parent who files a due process hearing request or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation.

- Against the attorney of a parent, or against the parent, if the parent's due process hearing request or subsequent cause of action was presented for any improper purpose, such as to harass, to cause

unnecessary delay, or to needlessly increase the cost of litigation.

The IDEA provides that in any action or proceeding brought under *20 U.S.C. § 1415* (*see § 513.40[16]*), the court in its discretion may award reasonable attorney fees as part of the costs to the parents of a child with a disability who is the prevailing party [*20 U.S.C. § 1415(i)(3)(B)* (as amended by Pub. L. 105-17, effective June 4, 1997)]. There is a split of authority at the federal district court of appeals level as to whether *20 U.S.C. § 1415* supports an independent civil action for fees by a party who has prevailed at the administrative level. The Ninth Circuit has aligned with the majority, which construes Section 1415 to support the independent action [*see Kletzelman v. Capistrano Unified School Dist. (9th Cir. 1996) 91 F.3d 68, 70* ; *McSomebodies v. Burlingame Elementary School Dist. (9th Cir. 1989) 897 F.2d 974* (construing former *20 U.S.C. § 1415(e)(4)(B)*); *see also Lucht v. Molalla River School Dist. (9th Cir. 2000) 225 F.3d 1023* (district court has jurisdiction over case in which fees are sought although liability is established outside district court proceeding itself; prevailing at state's Complaint Resolution Procedure (CRP) entitles parents to attorney's fees)].

Parents and pupils may be the prevailing party for attorney's fees purposes under the IDEA even if the pupil is not denied a free and appropriate public education [*see Weissburg v. Lancaster School Dist. (9th Cir. 2010) 591 F.3d 1255, 1258-1260* (administrative law judge's conclusion that school district misclassified pupil as mentally retarded rather than autistic qualified parents for attorney's fees under IDEA as prevailing party, even though pupil was not denied FAPE since he received instruction by qualified teacher, because change in disability classification legally entitled pupil to instruction by teachers qualified to teach students with both mental retardation and autism and before decision, school district refused to recognize his classification as autistic, and thus his legal right to such instruction)].

The Ninth Circuit has adopted a bright-line rule prohibiting attorney's fees for attorney-parents who provide legal services for their own child in proceedings brought under the IDEA [*Ford v. Long Beach Unified Sch. Dist. (9th Cir. 2006) 461 F.3d 1087, 1090-1091]* . However, more distant relatives, such as grandparents, who are attorneys and litigate IDEA actions may be entitled to attorney's fees, so long as they are not the pupil's legal guardian or acting in place of the pupil's natural or adoptive parent [*Weissburg v. Lancaster School Dist. (9th Cir. 2010) 591 F.3d 1255, 1260-1261* (parents were eligible for attorney's fees under IDEA because pupil's paternal grandmother, who was practicing attorney and not his legal guardian or acting in place of his natural or adoptive parent, represented him)].

However, the attorney's fees provision in IDEA does not authorize prevailing parents to recover fees for services rendered by experts in IDEA actions [*Arlington Central School Dist. Bd. of Educ. v. Murphy (2006) 548 U.S. 291, 126 S. Ct. 2455, 165 L. Ed. 2d 526*].

[g] Judicial Review

[i] Proper Court

A party aggrieved by the findings and decision made pursuant to the state hearing procedure may bring a civil action to review the decision in any state court of competent jurisdiction or in a United States district court, without regard to the amount in controversy [*20 U.S.C. § 1415(i)(2)(A)*]. The party seeking judicial relief must exhaust all state administrative remedies prior to bringing an action under *20 U.S.C. § 1415(i)(2)(A)* [*see Hoeft v. Tucson Unified Sch. Dist. (9th Cir. 1992) 967 F.2d 1298, 1303* (construing former *20 U.S.C. § 1415(e)(2), now 20 U.S.C. § 1415(i)(2)(A)*)]. However, exhaustion is not required if it would be futile or would offer inadequate relief [*see Honig v. Doe (1988) 484 U.S. 305, 326-327, 108 S. Ct. 592, 98 L. Ed. 2d 686* (construing former *20 U.S.C. § 1415(e)(2), now 20 U.S.C. § 1415(i)(2)(A)*)], or if the agency has adopted a policy or has pursued a practice of general applicability that is contrary to the law [*see Hoeft v. Tucson Unified Sch. Dist. (9th Cir. 1992) 967 F.2d 1298, 1303-1304* (construing former *20 U.S.C. § 1415(e)(2), now 20 U.S.C. § 1415(i)(2)(A)*)]. The party alleging futility or inadequacy of IDEA procedures bears the burden of proof [*see Hoeft v. Tucson Unified Sch. Dist. (9th Cir. 1992) 967 F.2d 1298, 1303* (construing former *20 U.S.C. § 1415(e)(2), now 20 U.S.C. § 1415(i)(2)(A)*)]. A disabled student seeking monetary damages only, which is a type of relief not available under the IDEA, is not required to exhaust administrative remedies before bringing an action

under, for example, *42 U.S.C. § 1983, 29 U.S.C. § 794* (Rehabilitation Act), or *42 U.S.C. § 12101 et seq.* (Americans with Disabilities Act) [*Witte by Witte v. Clark County Sch. Dist. (9th Cir. 1999) 197 F.3d 1271]* .

[ii] Time to Bring Action

The action must be brought within three years of accrual, measured from the time when the parent or other representative of the child knew, or had reason to know, of the facts underlying the cause of action. The statute of limitations is not tolled during the minority of the child. Thus, representatives of disabled children must promptly assert the children's educational rights [*Alexopulos v. San Francisco Unified School Dist. (9th Cir. 1987) 817 F.2d 551, 555-556* ; *see Code Civ. Proc. § 338(a)*].

However, Fed. R. *Civ. Proc. 3* controls when an action that arises under federal law is "commenced" for purposes of tolling the statute of limitations borrowed from state law. Thus, federal procedural rules thereafter govern the action when there is a federal rule to apply. Since Fed. R. *Civ. Proc. 4(m)* provides a time limit for service of process, a federal court borrowing a state's time period for filing suit brought under federal law should not also borrow the state's time limits for serving the complaint [*S.J. v. Issaquah Sch. Dist. No. 411 (9th Cir. 2006) 470 F.3d 1288, 1289, 1290-1293* (IDEA action was timely commenced for purposes of tolling borrowed statute of limitations when it was filed within 30 days and timely served under Fed. R. *Civ. Proc. 4(m)*)].

[iii] Standard of Review

The standard of review in cases involving the IDEA is different from the standard normally employed by federal courts reviewing decisions of administrative agencies. The IDEA allows federal courts to receive evidence in addition to that put forth at the administrative hearing and to weigh the additional evidence equally [*see 20 U.S.C. § 1415(i)(2)(C)*]. Appellate courts give less deference normally to the Administrative Law Judge's (ALJ's) findings of fact. However, complete de novo review is inappropriate; the courts must defer to the states' specialized knowledge and experience by giving due weight to the decisions of the states' administrative bodies [*Ms. S. ex rel. G v. Vashon Island School District (9th Cir. 2003) 337 F.3d 1115, 1126* ; *Amanda J. v. Clark County Sch. Dist. (9th Cir. 2001) 267 F.3d 877, 882 n.1*]. The due weight to be given is within the appellate court's discretion [*Ms. S. ex rel. G v. Vashon Island School District (9th Cir. 2003) 337 F.3d 1115, 1126-1127* ; *Union Sch. Dist. v. B. Smith (9th Cir. 1994) 15 F.3d 1519, 1524]* . For example, factual determinations afforded due weight would include the ALJ's finding as to the following [*Ms. S. ex rel. G v. Vashon Island School District (9th Cir. 2003) 337 F.3d 1115, 1127* ; Clyde K. v. Puyallup Sch. Dist., No. 3 *(9th Cir. 1994) 35 F.3d 1396, 1401]* :

- The academic benefits a student would have received from a mainstream placement;
- The non-academic benefits a student would have received from a mainstream placement;
- The effects a student's presence would have had on mainstream teachers and students; and
- The cost of educating the student in a mainstream classroom.

The district court may review the ALJ's findings and make its own factual determinations, after granting the ALJ's findings due weight, on a preponderance of the evidence. The district court's factual findings, even when based on the written record of administrative proceedings, are reviewed for clear error [*Ms. S. ex rel. G v. Vashon Island School District (9th Cir. 2003) 337 F.3d 1115, 1127* ; *Amanda J. v. Clark County Sch. Dist. (9th Cir. 2001) 267 F.3d 877, 887* ; *but see Ojai Unified Sch. Dist. v. Jackson (9th Cir. 1993) 4 F.3d 1467, 1473* (appellate court grants only due weight to factual findings of ALJ, even if district court relied on administrative proceedings for its own findings)].

The conclusion of both the ALJ and the district court as to whether a student's placement under the IDEA constitutes a

free appropriate public education is a legal conclusion reviewed de novo [*Ms. S. ex rel. G v. Vashon Island School District (9th Cir. 2003) 337 F.3d 1115, 1127* ; *Amanda J. v. Clark County Sch. Dist. (9th Cir. 2001) 267 F.3d 877, 889 n.11* ; *Seattle Sch. Dist., No. 1, v. B.S. (9th Cir. 1996) 82 F.3d 1493, 1499* ; *Clyde K. v. Puyallup Sch. Dist., No. 3 (9th Cir. 1994) 35 F.3d 1396, 1401]* .

[iv] Burden of Proof

At the administrative hearing, the school district has the burden of proving that it complied with the IDEA [*Ms. S. ex rel. G v. Vashon Island School District (9th Cir. 2003) 337 F.3d 1115, 1127* ; *Clyde K. v. Puyallup Sch. Dist., No. 3 (9th Cir. 1994) 35 F.3d 1396, 1398]* . In the district court and on appellate review, however, the burden of proof is on the party challenging the administrative ruling [*Ms. S. ex rel. G v. Vashon Island School District (9th Cir. 2003) 337 F.3d 1115, 1127]* .

[v] Representation of Child

When parents and their child, dissatisfied with the outcome of the due process hearing, seek review in a United States District Court, the parents on their own behalf may proceed in court unrepresented by counsel even though they are not trained or licensed as attorneys. The IDEA accords to parents rights of their own that can be vindicated in court proceedings, which are not limited to certain procedural and reimbursement-related matters [*Winkelman v. Parma City Sch. Dist. (2007)550U.S.516, 127 S. Ct. 1994, 1999-2006, 167 L. Ed. 2d 904]* .

[vi] Standing

In order to have standing to bring an action in court under the IDEA, a party must be "aggrieved" [*see 20 U.S.C. § 1415(i)(2)(A)*]. Parties are aggrieved under the IDEA only if they meet both of the following criteria [*Levina v. San Luis Coastal Unified School Dist. (9th Cir. 2007) 514 F.3d 866, 868*]:

- They have suffered an injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical.

- They are denied relief they affirmatively requested.

[h] Exhaustion of Administrative Remedies

[i] In General

Before bringing suit for violation of the IDEA, a complainant must normally exhaust the due process hearing procedures required by *20 U.S.C. § 1415* [*see Porter v. Bd. of Trustees of Manhattan Beach Unif. Schl. Dist. (9th Cir. 2002) 307 F.3d 1064, 1069* (parents exhausted California's due process procedure and received order in their favor)]. The exhaustion requirement is not, however, a rigid one. Parents need not exhaust the procedures in *20 U.S.C. § 1415* when resort to the administrative process would be either futile or inadequate [*Porter v. Bd. of Trustees of Manhattan Beach Unif. Schl. Dist. (9th Cir. 2002) 307 F.3d 1064, 1069-1070]* . A parent also need not exhaust administrative remedies when suing for the parent's own emotional distress caused by a school district's failure to accommodate the child and implement the child's individual education plan, because the IDEA provides remedies including educational services for a child, not an adequate remedy for the parent [*see Blanchard v. Morton Sch. Dist. (9th Cir. 2005) 420 F.3d 918, 920-922]* . Further, the IDEA does not require exhaustion of a state's statutory complaint resolution procedure ("CRP") in addition to exhaustion of the due process hearing system before filing suit for violations of the IDEA [*Porter v. Bd. of Trustees of Manhattan Beach Unif. Schl. Dist. (9th Cir. 2002) 307 F.3d 1064, 1071-1074]* .

On the other hand, in an action under the Americans with Disabilities Act [*42 U.S.C. § 12101 et seq.*], Rehabilitation Act [*29 U.S.C. § 794*], and state anti-discrimination statutes, brought against county and local educational authorities

based on alleged discrimination against children who were part of a special education program, the students sufficiently exhausted administrative remedies under the IDEA by pursuing a complaint resolution procedure to completion [*Christopher S. v. Stanislaus County Office of Educ. (9th Cir. 2004) 384 F.3d 1205, 1209-1214]* . By contrast, an action by parents and a student under *42 U.S.C. § 1983* and *§ 504* of the Rehabilitation Act of 1973 based on conflicts between the plaintiffs and the school district over the student's IEP was properly dismissed because the plaintiffs failed to exhaust administrative remedies [*Kutasi v. Las Virgenes Unified Sch. Dist. (2007) 494 F.3d 1162, 1167-1170]* .

[ii] Placement Pending Review

During the pendency of the proceeding, unless the state or district and the parents or guardian otherwise agree, the child must remain in his or her then-current educational placement [*20 U.S.C. § 1415(j)*]. For purposes of this "stay put" provision, the current educational placement is typically the placement described in the child's most recently implemented Individualized Education Program (IEP) [*Johnson ex rel. Johnson v. Special Educ. Hearing Office (9th Cir. 2002) 287 F.3d 1176, 1180]* . If applying for initial admission to a public school, the child must, with the consent of the parents or guardian, be placed in the public school program until the proceedings have been completed [*20 U.S.C. § 1415(j*); *see Clovis Unified v. Office of Administrative Hearings (9th Cir. 1990) 903 F.2d 635, 640-641* ("stay put" provisions apply, at district's expense, during review after parents have received favorable determination by hearing officer, even if subsequently reversed on review)].

[iii] Confidentiality of Information

The confidentiality of personally identifiable information about individuals with exceptional needs is governed and protected in accordance with *20 U.S.C. §§ 1412(a)(8), 1417(c)*, and *34* C.F.R. § 300.1 et seq., including *34 C.F.R. § 300.611 et seq.*, including the following [*Educ. Code § 56515(a)*; *see Educ. Code § 49060*]:

- Notice to parents.
- Access rights and records of access.
- Records on more than one child.
- Lists of types and locations of information.
- Parental consent regarding the disclosure of personally identifiable information.
- Fees.
- Amendment of records at parent's request.
- Opportunity for a hearing.
- Result of hearing.
- Hearing procedures.
- Consent.
- Destruction of information.
- Children's privacy rights.

- Enforcement.

- Disciplinary information about an individual with exceptional needs.

"Personally identifiable," as used in this context, includes all of the following information [*Educ. Code § 56515(b)*; *see 34 C.F.R. § 300.500(b)(3)*]:

- The name of the child, the child's parent, or other family member.

- The child's address.

- A personal identifier, including, but not limited to, the child's social security number, a pupil number, a list of personal characteristics, or other information that would make it possible to identify the child with reasonable certainty.

In accordance with *34 C.F.R. § 300.622*, parental consent must be obtained before personally identifiable information is disclosed to the parties, other than officials of participating agencies [*see 34 C.F.R. § 300.622(b)(1)*], unless the information is contained in education records, and the disclosure is authorized without parental consent [*Educ. Code § 56515(c)(1)*; *see 34 C.F.R. § 99.1 et seq.*]. Parental consent is not required before personally identifiable information is released to officials of participating agencies for purposes of meeting a requirement *Educ. Code § 56000 et seq.* or 34 C.F.R. § 300.1 et seq. [*Educ. Code § 56515(c)(1)*]. However, parental consent, or the consent of an eligible child who has reached the age of 18 years, must be obtained before personally identifiable information is released to officials of participating agencies providing or paying for transition services in accordance with *34 C.F.R. § 300.321(b)(3)* [*Educ. Code § 56515(c)(2)*]. If a child is enrolled, or is going to enroll in a private school not located in the local educational agency of the residence of the parent, parental consent must be obtained before any personally identifiable information about the child is released between officials in the local educational agency where the private school is located and officials in the local educational agency of the residence of the parent [*Educ. Code § 56515(c)(3)*].

[iv] Scope of Review

In an action brought under *20 U.S.C. § 1415(i)(2)*, the court must receive the records of the administrative proceedings, hear additional evidence at the request of a party, and make an independent decision based on the preponderance of the evidence [*20 U.S.C. § 1415(i)(2)(C)*]. A court's inquiry in suits brought under *20 U.S.C. § 1415(i)(2)* is twofold:

- Whether the state has complied with the procedures set forth in IDEA; and

- Whether the individualized educational program developed through IDEA procedures is reasonably calculated to enable the child to receive educational benefits.

If these requirements are met, the state has complied with the obligations imposed by Congress. The courts cannot require more [*Board of Education v. Rowley (1982) 458 U.S. 176, 206-207, 102 S. Ct. 3034, 73 L. Ed. 2d 690* (refusing to find that courts have only limited authority to review for state compliance with IDEA, while cautioning courts to avoid imposing their view of preferable educational methods on states; construing former *20 U.S.C. § 1400 et seq.*); *but see In re John K. (1985) 170 Cal. App. 3d 783, 216 Cal. Rptr. 557* (*Rowley* two-step inquiry not entirely appropriate when question is one of fiscal responsibility for student's residential placement, and there is no dispute as to whether trial court substituted its own notions of sound educational policy for those of school authorities)].

The Ninth Circuit has interpreted the "independent decision based on the preponderance of the evidence" language in *20 U.S.C. § 1415(i)(2)(C)* as calling for de novo review [*County of San Diego v. California Special Educ. Hearing Office*

(9th Cir. 1996) 93 F.3d 1458, 1466 (court reviews de novo appropriateness of administrative decisions regarding special education placement under *IDEA); Union School Dist. v. Smith (9th Cir. 1994) 15 F.3d 1519, 1524 , cert. denied, 513 U.S. 965]* . However, both reviewing courts and district courts must give deference to the state hearing officer's findings, particularly when those findings are thorough and careful. Courts also must give due weight to judgments of education policy when reviewing state hearings. Courts should not substitute their own notions of sound educational policy for those of the school authorities they review [*Union School Dist. v. Smith (9th Cir. 1994) 15 F.3d 1519, 1524 , cert. denied, 513 U.S. 965* ; *Seattle School Dist., No. 1 v. B.S. (9th Cir. 1996) 82 F.3d 1493, 1499]* .

[v] Relief Available

Once a court holds that a public placement violated the IDEA, the court may grant the relief the court determines appropriate [*20 U.S.C. § 1415(i)(2)(C)(iii)*]. The court has broad discretion in fashioning relief that is appropriate in light of the purposes of the IDEA. Appropriate relief is not limited in form. Thus, for example, the IDEA allows reimbursement to parents for their expenditures on private special education for a child if the court determines that private placement, rather than a proposed individualized educational program, is proper under the IDEA [*School Committee of Burlington v. Department of Education (1985) 471 U.S. 359, 369-371, 105 S. Ct. 1996, 85 L. Ed. 2d 385* (reimbursement is not the same as damages)].

Equitable considerations are also relevant in fashioning relief. Courts fashioning discretionary equitable relief under the IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement is inappropriate if the court determines the cost of the private education was unreasonable [*Florence County School Dist. Four v. Carter By and Through Carter (1993) 510 U.S. 7, 15-16, 114 S. Ct. 361, 126 L. Ed. 2d 284]* .

However, money damages are not available under the IDEA for the pain and suffering of a disabled child [*Witte ex rel. Witte v. Clark County Sch. Dist. (9th Cir. 1999) 197 F.3d 1271, 1275*]. Further, *42 U.S.C. § 1983* does not create a cause of action for money damages under the IDEA for the lost earnings and suffering of a parent pursuing IDEA relief [*Blanchard v. Morton Sch. Dist. (9th Cir. 2007) 504 F.3d 771, 773-774*].

A state is not immune under *U.S. Const., amend. XI* from suit in federal court for violations of the IDEA that occur in whole or part after October 30, 1990 [*20 U.S.C. § 1403(a), (c)*; *Porter v. Bd. of Trustees of Manhattan Beach Unif. Schl. Dist. (9th Cir. 2002) 307 F.3d 1064, 1074]* . In a suit against a state for a violation of the IDEA, remedies, including remedies both at law and in equity, are available to the same extent as those remedies are available for the same violations in a suit against a public entity other than a state [*20 U.S.C. § 1403(b)*]. Thus, pursuant to *20 U.S.C. § 1403*, Congress has unequivocally expressed its intent to abrogate state immunity from suit under the IDEA for violations that occur in whole or part after October 30, 1990 [*see Hayes v. Commission on State Mandates (1992) 11 Cal. App. 4th 1564, 1588 n.13, 15 Cal. Rptr. 2d 547* (Congress' intent to enforce *Fourteenth Amendment* in enacting IDEA has been made clear); *compare Dellmuth v. Muth (1989) 491 U.S. 223, 232, 109 S. Ct. 2397, 105 L. Ed. 2d 181* (former *20 U.S.C. § 1400 et seq.* failed to evince unmistakably clear intention to abrogate states' *Eleventh Amendment* immunity from suit)].

In an action or proceeding brought under the IDEA, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party [*20 U.S.C. § 1415(i)(3)(B)*; *see 20 U.S.C. § 1415(i)(3)(D)(ii)* (award of attorneys' fees relating to meeting of IEP Team)]. Fees awarded under the attorney fees provisions of the IDEA must be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. Courts may not use a bonus or multiplier in calculating the fees awarded under the IDEA [*20 U.S.C. § 1415(i)(3)(C)*].

Congress intended *20 U.S.C. § 1415(i)(3)(B)* to be interpreted consistent with fee provisions under *42 U.S.C. § 1988* and Title VII of the Civil Rights Act of 1964 [*Abu-Sahyun v. Palo Alto Unified School Dist. (9th Cir. 1988) 843 F.2d*

1250, 1251 , citing S. Rep. No. 99-112, 99th Cong., 2d Sess., reprinted in 1986 U.S. Code Cong. & Admin. News 1798, 1803-1805; for detailed discussion of fee provisions in *42 U.S.C. § 1988* and Title VII, including numerous "Practice Tips," *see Ch. 113, Civil Rights: The Post-Civil War Civil Rights Statutes, § 113.17*, and Wilcox, *California Employment Law, Ch. 43, Civil Actions Under Equal Employment Opportunity Laws, § 43.10[9][f]*, respectively]. As a result, courts have held that a district court's discretion to deny a request for attorneys' fees under the IDEA is narrow [*Kletzelman v. Capistrano Unified School Dist. (9th Cir. 1996) 91 F.3d 68, 70* ; *Abu-Sahyun v. Palo Alto Unified Sch. Dist. (9th Cir. 1988) 843 F.2d 1250, 1252]* .

For the purpose of awarding attorneys' fees, a prevailing party is one that succeeds on any significant issue in litigation that achieves some of the benefit the parties sought in bringing suit [*Hensley v. Eckerhart (1983) 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40* ; *Kletzelman v. Capistrano Unified School Dist. (9th Cir. 1996) 91 F.3d 68, 70]* . At a minimum, to be considered a prevailing party, the plaintiff must be able to point to a resolution of the dispute that changes the legal relationship between itself and the defendant [*Texas Teachers v. Garland School Dist. (1989) 489 U.S. 782, 792, 109 S. Ct. 1486, 103 L. Ed. 2d 866]* . If the plaintiff's success on a legal claim can be characterized as purely technical or de minimis, the plaintiff may not recover fees as a prevailing party. There must be a causal link between the litigation brought and the outcome gained [*Texas Teachers v. Garland School Dist. (1989) 489 U.S. 782, 792, 109 S. Ct. 1486, 103 L. Ed. 2d 866* ; *Kletzelman v. Capistrano Unified School Dist. (9th Cir. 1996) 91 F.3d 68, 71]* .

However, the court must reduce the amount of attorneys' fees awarded under *20 U.S.C. § 1415* if the court finds any of the following [*20 U.S.C. § 1415(i)(3)(F)*]:

- The parent or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy.

- The amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience.

- The time spent and legal services furnished were excessive considering the nature of the action or proceeding.

- The attorney representing the parent did not provide the appropriate information to the school district in the due process complaint in accordance with *20 U.S.C. § 1415(b)(7)*.

The attorney fee reduction provisions of *20 U.S.C. § 1415(i)(3)(F)* do not apply in an action or proceeding in which the court finds that the state or local educational agency unreasonably protracted the final resolution of the action or proceeding, or that there was a violation of *20 U.S.C. § 1415* [*20 U.S.C. § 1415(i)(3)(G)*].

In addition, the court may not award attorneys' fees or order related costs reimbursed in an action or proceeding under *20 U.S.C. § 1415* for services performed after the time of a written offer of settlement to a parent if all of the following are true [*20 U.S.C. § 1415(i)(3)(D)(i)*]:

- The offer is made within the time prescribed by *Fed. R. Civ. P. 68* or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

- The offer is not accepted within 10 days; and

- The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

However, despite the provisions of *20 U.S.C. § 1415(i)(3)(D)*, an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer [*20 U.S.C. § 1415(i)(3)(E)*].

For a form of complaint for use in an action for an injunction, declaratory relief, and damages under *20 U.S.C. § 1415*, see *§ 513.90*.

[vi] Education in English

Educ. Code § 300 et seq. requires children in California's public schools who are of "Limited English Proficiency" (LEP) to be taught only in English. This requirement is subject to the right of the parents of each affected child to seek a waiver from the requirement of English-only instruction [*Educ. Code § 310 et seq.*]. *Educ. Code § 300 et seq.* on their face do not violate the federal *equal protection clause* (*U.S. Const., amend. XIV, § 1*) [*Valeria G. v. Davis (9th Cir. 2002) 307 F.3d 1036, 1039-1042* (Proposition 227 did not unconstitutionally restructure political process by placing decision-making over bilingual education, and only bilingual education, at state-wide level)]. *Educ. Code § 320*, which allows parents to sue and hold personally liable a teacher, administrator, or official who willfully and repeatedly refuses to implement the English-only requirement is sufficiently clear so as not to violate the *First* and *Fourteenth Amendments* by being void for vagueness [*California Teachers Ass'n v. State Board of Education (9th Cir. 2001) 263 F.3d 888]* .

Local school districts may not apply under *Educ. Code § 33050* to the State Board of Education for waivers from program requirements of the Education Code not enumerated in § 33050. *Educ. Code § 300 et seq.* guarantee that LEP students receive educational instruction in the English language, and English immersion programs are provided to facilitate their transition into English-only classes, and vests parents of LEP students with the sole right to seek a waiver from the Chapter's provision requiring English-only instruction for their own children [*MacLaughlin v. State Board of Educ. (1999) 75 Cal. App. 4th 196, 89 Cal. Rptr. 2d 295]* .

The English Learner and Immigrant Pupil Federal Conformity Act [*Educ. Code § 430 et seq.*] was enacted by the California Legislature to ensure that instructional services are provided to pupils with limited English proficiency in conformity with federal requirements designed to ensure that all pupils have reasonable access to educational opportunities that are necessary for the pupils to achieve at high levels in English and in the other core curriculum areas of instruction. The Act is declaratory of Title III of the federal No Child Left Behind Act of 2001 [*20 U.S.C. § 6801 et seq.*] and is intended to assist local education agencies in understanding the requirements and funding formulas to provide allowable services. The requirements of *Educ. Code § 430 et seq.* apply only to local educational agencies receiving federal funds under Title III of the federal No Child Left Behind Act of 2001 [*Educ. Code § 430*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawDiscriminationIndividuals With Disabilities Education ActAssessment & IdentificationEducation LawDiscriminationIndividuals With Disabilities Education ActCoverageEducation LawDiscriminationIndividuals With Disabilities Education ActEnforcementEducation LawDiscriminationIndividuals With Disabilities Education ActIndividualized Educational ProgramsDevelopmentEducation LawDiscriminationIndividuals With Disabilities Education ActProcedural SafeguardsEducation LawStudentsBilingual Students

California Forms of Pleading and Practice--Annotated

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PART II. LEGAL BACKGROUND
B. Student Rights and Responsibilities

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§ 513.34 Freedom of Expression

[1] In General

Public school students, like other persons, have constitutional rights to freedom of speech and expression [*U.S. Const., amend. I*; *Cal. Const., art. I, § 2(a)*] that they do not shed at the schoolhouse gate [*Tinker v. Des Moines Community School Dist. (1969) 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731]* . However, the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings [Bethel School Dist. No. 403 v. *Fraser (1986) 478 U.S. 675, 682, 106 S. Ct. 3159, 92 L. Ed. 2d 549]* . To justify restriction of a particular expression of opinion, school officials must show that the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school. In determining whether regulation of speech violates students' *First Amendment* rights, courts look at the totality of the relevant facts, that is, at the students' actions as well as the circumstances confronting the school officials that might reasonably portend disruption [*LaVine v. Blaine School Dist. (9th Cir. 2001) 257 F.3d 981, 989* (applicable to regulation of speech that falls into the third category of student speech, that governed by *Tinker v. Des Moines Community School Dist. (1969) 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731*); *see below*]. However, the court should not use the public concern standard from the government employment context for determining whether the *First Amendment* protects student speech. The proper standard is that articulated in *Tinker v. Des Moines Community School District* [*Pinard v. Clatskanie Sch. Dist. 6J (9th Cir. 2006) 467 F.3d 755, 765-768*].

Schools must achieve a balance between protecting the safety and well-being of students and respecting the students' constitutional rights [*LaVine v. Blaine School Dist. (9th Cir. 2001) 257 F.3d 981, 987* (schools cannot expel students just because they are "loners," wear black, and play video games)]. A school need not tolerate student speech that is inconsistent with its basic educational mission [*LaVine v. Blaine School Dist. (9th Cir. 2001) 257 F.3d 981, 988]* . On the other hand, a desire merely to avoid the discomfort and unpleasantness that accompany expression of an unpopular viewpoint is not sufficient to justify a prohibition of speech [*Tinker v. Des Moines Community School Dist. (1969) 393 U.S. 503, 509, 512-513, 89 S. Ct. 733, 21 L. Ed. 2d 731]* .

There are three distinct areas of student speech, each of which is governed by a different United States Supreme Court

precedent [*LaVine v. Blaine School Dist. (9th Cir. 2001) 257 F.3d 981, 988-989* ; *Chandler v. McMinnville School Dist. (9th Cir. 1992) 978 F.2d 524, 529]* :

- Vulgar, lewd, obscene, and plainly offensive speech, governed by Bethel School Dist. No. 403 v. *Fraser (1986) 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549* .

- School-sponsored speech, governed by *Hazelwood School Dist. v. Kuhlmeier (1988) 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592* .

- Speech falling into neither of these categories, governed by *Tinker v. Des Moines Community School Dist. (1969) 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731* .

Schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use [*Frederick v. Morse (2007)551U.S.393127 S. Ct. 2618, 2625-2629, 168 L. Ed. 2d 290]* . Public schools may restrict student speech that intrudes on the rights of other students or collides with the rights of other students to be secure and to be let alone. Vulgar, lewd, obscene, indecent, and plainly offensive speech by definition, may well impinge on the rights of other students, even if the speaker does not directly accost individual students with his or her remarks [*Harper v. Poway Unif. School Dist. (9th Cir. 2006) 445 F.3d 1166, 1177-1178* (upholding prohibition of wearing t-shirt condemning and denigrating other students on basis of their sexual orientation), quoting *Tinker v. Des Moines Community School Dist. (1969) 393 U.S. 503, 508, 509, 89 S. Ct. 733, 21 L. Ed. 2d 731* ; *Chandler v. McMinnville School Dist. (9th Cir. 1992) 978 F.2d 524, 529]* . Other speech capable of causing psychological injury may also be restricted [*Harper v. Poway Unif. School Dist. (9th Cir. 2006) 445 F.3d 1166, 1178]* .

The protection of the right of free speech and press provided by *Cal. Const., art. I, § 2(a)*, has been construed as more definitive and inclusive that the *U.S. Const., amend I* [*Wilson v. Superior Court (1975) 13 Cal. 3d 652, 658, 119 Cal. Rptr. 468, 532 P.2d 116]* . Also, in California, the scope of a student's rights to free expression in the school setting are fixed by statute in certain areas [*see Educ. Code §§ 48907, 48950*]. In some instances, the statutory scope of students' rights is more expansive than the constitutional scope. The comparative scope of constitutional and statutory protection is discussed in *§ 513.34[3]*. For a form of complaint for use in an action to enjoin school officials from interfering with a student's right to freedom of expression under federal and state constitutional and statutory standards, see *§ 513.91*.

By statute in California, school districts may not make or enforce any rule subjecting any high school pupil to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, if engaged in off campus, is protected from government restriction by the *First Amendment* or by *Cal. Const., art. I, § 2* [*Educ. Code § 48950(a)*].

[2] Oral Speech

Students in public schools cannot be punished merely for expressing their personal views on the school premises unless school authorities have reason to believe that the expression will substantially interfere with the work of the school or impinge on the rights of other students [*Hazelwood School District v. Kuhlmeier (1988) 484 U.S. 260, 266, 108 S. Ct. 562, 98 L. Ed. 2d 592* ; *Tinker v. Des Moines Community School Dist. (1969) 393 U.S. 503, 509, 512-513, 89 S.Ct. 733, 21 L. Ed. 2d 731]* . However, an appropriate function of public school education is to prohibit the use of vulgar and offensive terms in public discourse. Offensive forms of expression may be prohibited even in the making of what the speaker considers to be a political point. Therefore, the determination of what manner of speech in the classroom or in a school assembly is inappropriate properly rests with school authorities [Bethel School Dist. No. 403 v. *Fraser (1986) 478 U.S. 675, 682-683, 106 S. Ct. 3159, 92 L. Ed. 2d 549* (involving obscene language at school assembly)].

The parameters of what is offensive within this rule are not settled. The Supreme Court's opinion stressed the right of

the schools to protect children from exposure to sexually explicit, indecent, or lewd speech [*see* Bethel School Dist. No. 403 v. *Fraser (1986) 478 U.S. 675, 684, 106 S. Ct. 3159, 92 L. Ed. 2d 549]* . It also reaffirmed the need to tolerate divergent political and religious views, even if the views expressed may be unpopular. However, the Court also stated that the sensibilities of other students must be taken into account. The undoubted freedom to advocate unpopular and controversial views in schools must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior [*see* Bethel School Dist. No. 403 v. *Fraser (1986) 478 U.S. 675, 681, 106 S. Ct. 3159, 92 L. Ed. 2d 549]* .

The scope of protection of oral speech under the California Constitution has also not been directly addressed [*see Leeb v. DeLong (1988) 198 Cal. App. 3d 47, 54-55, 243 Cal. Rptr. 494* , discussed in *§ 513.34[5*] (noting that student publications are entitled to greater protection under California Constitution than under *U.S. Const., amend. I*)]. By statute, public school students are generally afforded the right to exercise freedom of speech, subject to reasonable time, place, and manner regulation [*see Educ. Code §§ 48907, 48950*]. However, expression that is libelous, slanderous or obscene is prohibited. "Material" that so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations or a substantial disruption of the orderly operation of the school is also prohibited [*Educ. Code § 48907(a)*]. Each governing board of a school district and each county board of education may adopt rules and regulations in the form of a written publications code, which must include reasonable provisions for the time, place, and manner of conducting such activities within its respective jurisdiction [*Educ. Code § 48907(b)*].

A pupil who is enrolled in a school at the time that the school has made or enforced a rule in violation of students' statutory right to freedom of expression [*see Educ. Code § 48950(a)*, discussed in [1], *above*] may commence a civil action to obtain appropriate injunctive and declaratory relief. Attorney's fees may also be awarded if the plaintiff prevails [*Educ. Code § 48950(b)*].

[3] Use of School Facilities

[a] In General

Public schools do not possess all of the attributes of streets, parks, and other traditional public forums that have been used for purposes of assembly, communicating thoughts, and discussing public questions. Therefore, school facilities may be deemed to be public forums only if school authorities have, by policy or practice, opened those facilities for indiscriminate use by the general public or by some segment of the public such as student organizations. If the facilities instead have been reserved for other intended purposes, communicative or otherwise, no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse [*Hazelwood School District v. Kuhlmeier (1988) 484 U.S. 260, 267, 108 S. Ct. 562, 98 L. Ed. 2d 592]* .

With regard to access by the public, for purposes of the *First Amendment*, a school district may restrict school property in its use to educational activities. Thus, for example, the district may exclude filming of movies by motion picture studios *[80 Ops. Cal. Atty. Gen. 155, 159 (1997)]* . Even if the district has previously allowed rental of school facilities to motion picture studios solely for the purpose of enhancing revenues, thus not acting with the purpose of providing a public forum for expressive activity, the district may deny permission to film certain movies based solely on content so long as the district's actions are reasonably related to legitimate pedagogical concerns *[80 Ops. Cal. Atty. Gen. 155, 169 (1997)]* . In addition, a school's administration may constitutionally limit access to outsiders, regardless of their message or purpose, to prevent disruption [*see Reeves v. Rocklin Unified School Dist. (2003) 109 Cal. App. 4th 652, 660-666, 135 Cal. Rptr. 2d 213* (high school administration could deny access to school by members of group wishing to distribute anti-abortion, pro-abstinence literature to students before classes)].

[b] Equal Access Act

It is unlawful for any public secondary school that receives federal financial assistance and that has a limited open forum to deny equal access or a fair opportunity to, or to discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings [*20 U.S.C. § 4071(a)* (Equal Access Act)]. A school has a limited open forum if it grants an offering to or opportunity for one or more non-curriculum-related student groups to meet on school premises during noninstructional time [*20 U.S.C. § 4071(b)*]. The meaning of "limited open forum" under the Act is not the same as the doctrine of "limited public forum," which is a judicially created concept used in the constitutional analysis of free speech cases [*Westside Community Schools v. Mergens (1990) 496 U.S. 226, 242-243, 110 S. Ct. 2356, 110 L. Ed. 2d 191]* .

The Act sets forth certain "triggers" for its applicability. It applies only if the school in question satisfies each of the following [*Prince v. Jacoby (9th Cir. 2002) 303 F.3d 1074, 1079]* :

- The school is a public secondary school;
- The school receives federal funding; and
- The school has established a "limited open forum" by allowing other "noncurriculum" groups to meet on school premises.

Once it is established that a secondary school receives federal funds and has created a limited open forum, a student organization denied access must demonstrate a denial of equal access, or fair opportunity, or discrimination based on the content of the speech at its meetings to prevail [*Truth v. Grohe (9th Cir. 2007) 499 F.3d 999, 1009-1012* (no violation where religious club denied access because of discriminatory membership criteria rather than content of speech at meetings)].

A "noncurriculum related" group is one that does not directly relate to the body of courses offered by the school. A student group directly relates to the school's curriculum if the subject matter of the group is actually taught or will soon be taught in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit [*Westside Community Schools v. Mergens (1990) 496 U.S. 226, 239-240, 110 S. Ct. 2356, 110 L. Ed. 2d 191]* .

Schools are deemed to offer a fair opportunity to students who wish to conduct a meeting within a limited open forum if the school uniformly provides all of the following [*20 U.S.C. § 4071(c)*]:

- The meeting is voluntary and student initiated.
- There is no sponsorship of the meeting by the school, the government, or its agents or employees.
- Employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity.
- The meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school.
- Nonschool persons may not direct, conduct, control, or regularly attend activities of the student groups.

For further discussion of the use of school facilities for religious purposes, see *§ 513.35*.

[4] Dress and Appearance

If there is empirical evidence that an aspect of a student's dress or appearance has a disruptive effect within a school, a governing body may prohibit it. However, any dress code or policy must not be so vague and standardless that it leaves uncertainty as to the conduct it prohibits or lacks legally fixed standards as to what is prohibited and what is not [*Myers v. Arcata etc. School Dist. (1969) 269 Cal App. 2d 549, 558-560, 75 Cal. Rptr. 68]* . Under this standard, a policy prohibiting students from having beards has been upheld [*see Akin v. Board of Education (1968) 262 Cal. App. 2d 161, 169]* , but a policy prohibiting "extreme" hairstyles has been rejected for vagueness [*see Myers v. Arcata etc. School Dist. (1969) 269 Cal App. 2d 549, 559-561, 75 Cal. Rptr. 68]* .

The wearing of buttons, badges, and other insignia is expressly protected by statute in California [*Educ. Code § 48907(a*); *see Tinker v. Des Moines Independent Community School Dist. (1969) 393 U.S. 503, 506-513, 89 S. Ct. 733, 21 L. Ed. 2d 731* (*U.S. Const., amend. I*, protects student's right to wear armband as political statement)]. This statutory right appears to be subject to the qualification that the item not be obscene or libelous [*see Educ. Code § 48907(a*); *compare* Bethel School Dist. No. 403 v. *Fraser (1986) 478 U.S. 675, 682, 106 S. Ct. 3159, 92 L. Ed. 2d 549* (dicta suggesting that students do not have constitutional right to wear clothing bearing obscenity), *with Cohen v. California (1971) 403 U.S. 15, 22-26, 91 S. Ct. 1780, 29 L. Ed. 2d 284* (adult may not be prohibited from wearing clothing bearing obscenity)]. The right may also be subject to the limitation that "material" that so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations or the substantial disruption of the orderly operation of the school is prohibited [*see Educ. Code § 48907(a)*]. It is not clear whether buttons, badges, and other insignia may be such "material."

The governing board of a school district may adopt or rescind a reasonable dress code policy requiring pupils to wear a schoolwide uniform or prohibiting pupils from wearing "gang-related apparel" if the governing board of the school district approves a plan that may be initiated by an individual school's principal, staff, and parents and determines that the policy is necessary for the health and safety of the school environment. Individual schools may include the policy as part of its school safety plan under *Educ. Code § 32281* [*Educ. Code § 35183(b)*]. A dress code policy requiring pupils to wear a uniform cannot be implemented with less than six months' notice to parents and the availability of resources to assist economically disadvantaged pupils [*Educ. Code § 35183(d)*]. The governing board must also provide a method whereby parents can choose not to have their children comply with a school uniform policy [*Educ. Code § 35183(e)*]. Any adopted policy must include a provision that no pupil will be penalized academically or otherwise discriminated against or denied attendance if the pupil's parents choose not to have the pupil comply with the school uniform policy [*Educ. Code § 35183(f)*]. Any policy may not preclude pupils participating in a nationally recognized youth organization from wearing organization uniforms on days the organization has a scheduled meeting [*Educ. Code § 35183(g)*]. School sites must allow articles of sun-protective clothing for outdoor use during the school day, including, but not limited to, hats. Each schoolsite may set a policy related to the type of sun-protective clothing pupils will be allowed to use outdoors, and specific clothing and hats determined by the district or schoolsite to be gang-related or inappropriate apparel may be prohibited by the dress code policy [*Educ. Code § 35183.5(a)*]. Each schoolsite must allow pupils the use of sunscreen during the school day without a physician's note or prescription and may set a policy related to the use of sunscreen by pupils during the school day [*Educ. Code § 35183.5(b)*].

A mandatory dress policy, sometimes referred to as a school uniform policy, adopted by a public school in an effort to focus student attention and reduce conflict can survive constitutional scrutiny. For example, a policy prohibiting students from displaying any printed messages on their clothing save for the school logo may not necessarily unconstitutionally restrict students' rights to engage in pure speech while in school, unconstitutionally restrict students' rights to engage in expressive conduct, or require students to unconstitutionally engage in compelled speech, so long as the policies are viewpoint- and content-neutral. Unless they restrict speech on the basis of content, school uniform policies will implicate the *First Amendment* only insofar as they place content-neutral restrictions on students' pure

speech and place incidental restrictions on students' expressive conduct, and the appropriate level of scrutiny is thus intermediate scrutiny. Thus, if a school district's school uniform policies advance important government interests unrelated to the suppression of free speech in ways that effect as minimal a restriction on students' free expression as possible, the policies should be upheld [*Jacobs v. Clark County Sch. Dist. (9th Cir. 2008) 526 F.3d 419, 427-435*].

[5] Official Student Publications and Activities

Under *U.S. Const., amend. I*, there is a fundamental difference between the toleration and the affirmative promotion of student expression [*Hazelwood School District v. Kuhlmeier (1988) 484 U.S. 260, 270-271, 108 S. Ct. 562, 98 L. Ed. 2d 592]* . The latter question concerns educators' authority over school-sponsored publications and other expressive activities that may reasonably be perceived as bearing the imprimatur of the school. Educators are entitled to exercise greater control over this second form of student expression. They are entitled to exercise editorial control over the style and content of school-sponsored expressive activities as long as their actions are reasonably related to legitimate pedagogical concerns [*Hazelwood School District v. Kuhlmeier (1988) 484 U.S. 260, 273, 108 S. Ct. 562, 98 L. Ed. 2d 592]* .

Under California statute, students are entitled to freedom of the press, including, subject to certain limitations, the right of freedom of expression in official publications, whether or not the publications are supported financially by the school [*Educ. Code § 48907(a)*]. Official school publications are material produced by students in journalism, newspaper, yearbook, or writing classes and distributed to the student body, either free or for a fee [*Educ. Code § 48907(e)*].

Student expression in official publications that is obscene or libelous is prohibited. Material that so incites students as to create a clear and present danger of the commission of unlawful acts on school premises, the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school is also prohibited [*Educ. Code § 48907(e)*; *see Smith v. Novato Unif. School Dist. (2007) 150 Cal. App. 4th 1439, 1454-1459, 59 Cal. Rptr. 3d 508* (controversial student editorial on immigration was protected speech under *Educ. Code § 48907* because student author did not intend to cause disruption of school)].

Student editors of official school publications are responsible for assigning and editing the news, editorial, and feature content of their publications, subject to these limitations. However, it is the responsibility of a faculty adviser within a school to supervise the production of the student staff, to maintain professional standards of English and journalism, and to enforce the statutory limitations on student expression [*Educ. Code § 48907(c)*]. There may be no prior restraint of material prepared for official school publications other than material that violates the statutory standards. School officials have the burden of showing justification without undue delay prior to any limitation of student expression [*Educ. Code § 48907(d)*].

The right of a school district to control the content of school-sponsored publications is more limited under the California statute than under *U.S. Const., amend. I*. Under *U.S. Const., amend. I*, the district need show only a "legitimate pedagogical concern" [*see Hazelwood School District v. Kuhlmeier (1988) 484 U.S. 260, 273, 108 S. Ct. 562, 98 L. Ed. 2d 592]* . Under California law, editorial control is vested in student editors alone, subject to prohibitions on material that falls into one of the narrowly drawn statutory categories [*Leeb v. DeLong (1988) 198 Cal. App. 3d 47, 54, 243 Cal. Rptr. 494* ; *see Educ. Code § 48907(e)*].

The limitations in the California statute have been held to meet the standards of the free-press rights set forth in *Cal. Const., art. I, § 2*, at least to the extent that they are designed to protect a school district from potential tort liability. However, the terms "libelous" and "slanderous" in the statute must be narrowly construed to take applicable privileges and rules concerning public figures into account. Any decision to impose prior restraint for potential defamation must, at a minimum, be based on a good faith and objectively rational determination of the probable effect of the challenged material, that is, that it contains a false statement (or one that cannot be proved to be true) that is likely to harm the reputation of another or to hold that person up to shame, ridicule, or humiliation. It is not enough that a lawsuit is

threatened, because freedom of the press may not hinge on the subjective pique of an offended prospective plaintiff. There must be a clear chance of prevailing in a tort action against the school district [*Leeb v. DeLong (1988) 198 Cal. App. 3d 47, 60-62, 243 Cal. Rptr. 494]* .

[6] Underground Publications

The United States Supreme Court has not directly addressed the scope of *First Amendment* protection for non-school-sponsored or "underground" publications disseminated on public school premises [*cf.* *Papish v. University of Missouri (1973) 410 U.S. 667, 93 S. Ct. 1197, 35 L. Ed. 2d 618* (finding *First Amendment* protection for contents of underground newspaper disseminated on university campus)]. However, the Ninth Circuit Court of Appeals has held that student distribution of non-school-sponsored material cannot be subjected to regulation on the basis of undifferentiated fears of possible disturbances or embarrassment to school officials. The court struck down a policy of requiring prior submission for approval of such material as overbroad and in violation of *First Amendment* rights. The holding was limited to attempts to control content and does not prohibit reasonable time, place, and manner regulation of distribution [*Burch v. Barker (9th Cir. 1988) 861 F.2d 1149, 1159]* .

The California Supreme Court construed a substantially similar former state statute as not permitting any form of prior restraint over non-school-sponsored publications [*Bright v. Los Angeles Unified School Dist. (1976) 18 Cal. 3d 450, 465-466, 134 Cal. Rptr. 639, 556 P.2d 1090* ; *see* former *Educ. Code § 48916*]. In dicta in a footnote, one California appellate court stated that a school district may not ban privately produced student publications under *Educ. Code § 48907* [*Leeb v. DeLong (1988) 198 Cal. App. 3d 47, 57 n.6, 243 Cal. Rptr. 494]* .

Educ. Code § 48907 protects the right of students to distribute printed materials or petitions, but this right could be construed as subject to the same limitations as apply to official school publications. One court has held that the distribution on school property of materials advertising the existence and meeting time of a religious study group is in violation of constitutional provisions prohibiting the establishment of religion [*Perumal v. Saddleback Valley Unified School Dist. (1988) 198 Cal. App. 3d 64, 68-75, 243 Cal. Rptr. 545* ; *see U.S. Const., amend. I*; *Cal. Const., art. I, §§ 4, 24, art. XVI, § 5*; *see also § 513.35*].

[7] School Library and Instructional Materials

The United States Supreme Court has yet to reach a majority opinion as to the scope of *First Amendment* protection for materials in a school library. In 1982, four justices essentially took the position that the selection of materials for a school library was a matter to be left wholly to the discretion of school officials and was not subject to federal judicial review [*Board of Education v. Pico (1982) 457 U.S. 853, 885-897, 102 S. Ct. 2799, 73 L. Ed. 2d 435* (opinions of Burger, ch. J., Powell, J., Rehnquist, J., and O'Connor, J.)]. Five justices accepted the right of the federal judiciary to review the acts of school officials in removing library books for *First Amendment* violations, but were unable to agree on the applicable standards that courts should employ in review [*Board of Education v. Pico (1982) 457 U.S. 853, 855-884, 102 S. Ct. 2799, 73 L. Ed. 2d 435* (opinions of Brennan, J., joined by Marshall, J., Stevens, J., and in part by Blackman, J.; Blackman, J.; and White, J.)]. At least four justices were of the opinion that local school boards have a substantial legitimate role to play in the determination of school library content, but may not remove books simply because they dislike the ideas contained in the books. These justices were of the opinion that school boards could remove vulgar books and books that were "educationally unsuitable." They also rejected any *First Amendment* protection for the decision as to what books to place in the library in the first instance, as opposed to the removal of books already in the library [*Board of Education v. Pico (1982) 457 U.S. 853, 872-875, 102 S. Ct. 2799, 73 L. Ed. 2d 435* (opinion of Brennan, J., joined by Marshall, J., Stevens, J., and Blackman, J.)]. The fifth justice stated only that the case should be remanded for trial on the issue of the reason for the board's removal of the books and refused to express an opinion as to the scope of *First Amendment* protection [*Board of Education v. Pico (1982) 457 U.S. 853, 883-884, 102 S. Ct. 2799, 73 L. Ed. 2d 435* (opinion of White, J.)].

The Ninth Circuit has held that courts may not ban books or other literary works from school curricula on the basis of their content, even when the works are accused of being racist in whole or in part [*Monteiro v. Tempe Union High School District (9th Cir. 1998) 158 F.3d 1022, 1028-1032* (excluding from holding and analysis educational material subject to prohibitions of religion clauses of *U.S. Const., Amend. I*)]. Ruling on whether a parent's complaint seeking removal of allegedly racially discriminatory books from a high school's mandatory curriculum stated a cause of action under *42 U.S.C. § 1983* based on the *Equal Protection Clause of the United States Constitution*, the court found that attaching civil liability on the basis of the assignment of a book and requiring removal of literary works from the classroom, would severely restrict a student's right to receive material that the school board or other educational authority determines to be of legitimate educational value, and that when a school board identifies information that it believes to be a useful part of a student's education, the student has the right to receive the information [*Monteiro v. Tempe Union High School District (9th Cir. 1998) 158 F.3d 1022, 1028-1029* (complaint sought to bar assignment of *The Adventures of Huckleberry Finn* by Mark Twain and *A Rose for Emily* by William Faulkner based on use of word "nigger" as racially discriminatory and encouraging racial discrimination and harassment of African-American students)]. Allowing the complaint to go forward would inevitably lead many school districts to "buy their peace" by avoiding the use of books or other materials that express messages or simply use terms that could be argued to cause harm to a group of students [*Monteiro v. Tempe Union High School District (9th Cir. 1998) 158 F.3d 1022, 1029]* , and a school board attempting to remove books from its curriculum on the ground that the works might offend would likely be vulnerable to *First Amendment* actions brought by students wishing to study those books, and possibly teachers, as well [*Monteiro v. Tempe Union High School District (9th Cir. 1998) 158 F.3d 1022, 1030]* . Important countervailing considerations that (1) books and words can hurt, particularly racist epithets; (2) some of the most lauded works of literature convey, explicitly or more subtly, messages of racism and sexism, or other ideas that if accepted blindly would serve to maintain or promote the invidious inequalities that exist in our world today, the younger a person is, the more likely it is that those messages will help form that person's thinking, and the feelings of minority students, especially younger ones, are extremely vulnerable when it comes to books that are racist or have racist overtones; and (3) American society has all too often failed to afford its African-American citizens the equal treatment that the *Fourteenth Amendment* requires, particularly in the area of public education, do not outweigh the *First Amendment* considerations [*Monteiro v. Tempe Union High School District (9th Cir. 1998) 158 F.3d 1022, 1031-1032]* .

One California court has accepted the relevance of motive in a case involving removal of certain materials from the school curriculum. The court held that curriculum decisions will survive a *First Amendment* challenge as long as the decision is reasonably related to legitimate educational concerns. However, school officials are precluded from imposing a pall of orthodoxy on classroom instruction, which implicates the state in the propagation of a particular religious or ideological viewpoint. Therefore, a curriculum decision may not be motivated by an intent to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion [*McCarthy v. Fletcher (1989) 207 Cal. App. 3d 130, 140, 146, 254 Cal. Rptr. 714]* .

Whether school library and instructional materials are protected by the California Constitution or statute appears to have not yet been addressed by any California appellate court [*see Cal. Const., art. I, § 2*; *Educ. Code § 48907*]. By statute, the governing board of any school district may exclude from schools and school libraries, all books, publications, or papers of a sectarian, partisan, or denominational character [*Educ. Code § 18111*; *see § 513.35*].

Once it is established that a secondary school receives federal funds and has created a limited open forum, a student organization denied access must demonstrate a denial of equal access, or fair opportunity, or discrimination based on the content of the speech at its meetings to prevail [*Truth v. Grohe (9th Cir. 2007) 499 F.3d 999, 1009-1012* (no violation where religious club denied access because of discriminatory membership criteria rather than content of speech at meetings)].

[8] Associational Rights

Students enjoy some degree of *First Amendment* protection for associating with others and against "forced-inclusion,"

i.e., against being forced to associate with those with whom students may not wish to associate [*see Truth v. Grohe (9th Cir. 2007) 499 F.3d 999, 1012-1015* (religious club failed to show that denial of recognition based on its general membership restrictions to those professing belief burdened *First Amendment* interest, which was threshold inquiry)].

Students have some rights to associate with each other. However, associational activities need not be tolerated when they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education [*Healy v. James (1972) 408 U.S. 169, 181-182, 184, 189, 92 S. Ct. 2338, 33 L. Ed. 2d 266* (denial of official recognition to group of college students desiring to form local chapter of Students for a Democratic Society implicated cognizable *First Amendment* associational interest, but if district court on remand found there was evidence to support conclusion that local chapter posed substantial threat of material disruption, decision to deny official recognition should be affirmed)].

Incidental infringements on students' associational rights may be proper, so long as the school's reason for denying official recognition is directed at an organization's activities, rather than its philosophy [*Healy v. James (1972) 408 U.S. 169, 188, 92 S. Ct. 2338, 33 L. Ed. 2d 266]* . To determine whether a campus rule that incidentally burdens expressive rights is permissible under the *First Amendment*, courts apply a four-part test [*Healy v. James (1972) 408 U.S. 169, 189 n.20, 92 S. Ct. 2338, 33 L. Ed. 2d 266* ; *United States v. O'Brien (1968) 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968)]* :

- The rule is within the constitutional power of the Government.
- The rule furthers an important or substantial governmental interest.
- The governmental interest is unrelated to the suppression of free expression.
- The incidental restriction on alleged *First Amendment* freedoms is no greater than is essential to the furtherance of that interest.

Thus, for example, a high school club failed to establish that its policy of excluding persons who did not share Christian values from its general membership had any expressive content, thus also failing to show the required incidental infringement of a *First Amendment* interest [*see Truth v. Grohe (9th Cir. 2007) 499 F.3d 999, 1013]* .

Students also enjoy some rights against forced inclusion, *i.e.*, a regulation imposing a Hobson's choice on a student organization: include unwanted members or disband [*Truth v. Grohe (9th Cir. 2007) 499 F.3d 999, 1013-1015* ; *see BSA v. Dale (2000) 530 U.S. 640, 653, 120 S. Ct. 2446, 147 L. Ed. 2d 554* (state non-discrimination law requiring organization to admit gay-rights activist violated *First Amendment* because it forced organization to send message conflicting with sincerely held views of organization); *California Democratic Party v. Jones (2000) 530 U.S. 567, 577, 120 S. Ct. 2402, 147 L. Ed. 2d 502* (state primary law violated *First Amendment* because it forced political parties to associate with, have their nominees and their positions determined by, those who, at best, refused to affiliate with party, and, at worst, expressly affiliated with rival); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston (1995) 515 U.S. 557, 559, 575, 115 S. Ct. 2338, 132 L. Ed. 2d 487* (state law violated *First Amendment* because it required parade organizers to allow gay, lesbian, and bisexual contingent to march in parade); *Democratic Party of the United States v. Wisconsin ex rel. La Follette (1981) 450 U.S. 107, 125-126, 101 S. Ct. 1010, 67 L. Ed. 2d 82* (overturning on *First Amendment* grounds state law effectively requiring national political party, in violation of party's rules, to allow non-party members to participate in selection of party's presidential nominee); *cf. Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (2006) 547 U.S. 47, 126 S. Ct. 1297, 1312, 164 L. Ed. 2d 156* (upholding Solomon Amendment against challenge on ground military recruiters required to be admitted to law schools come onto campus for limited purpose of trying to hire students, not become members of school's expressive association); *Roberts v. United States Jaycees (1984) 468 U.S. 609, 627-629, 104 S. Ct. 3244, 82 L. Ed. 2d 462* (upholding against *First Amendment* challenge state law requiring national organization to admit women as voting members in part because

organization already invited women to share group's views and philosophy and to participate in much of its training and community activities)]. In forced-inclusion scenarios, courts apply strict scrutiny, asking whether the organization's freedom of expressive association could be overridden by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms [*Truth v. Grohe (9th Cir. 2007) 499 F.3d 999, 1014]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechForumsEducation LawLibrariesRemoval of MaterialsEducation LawStudentsSpeechGeneral OverviewEducation LawStudentsSpeechPublicationsEducation LawStudentsSpeechPure Speech & Expression

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§ 513.35 Freedom of Religion

[1] Constitutional Protections and Limitations

Both the Federal and California Constitutions prohibit any law respecting an establishment of religion [*U.S. Const., amend. I*; *Cal. Const., art. I, § 4*]. The California Constitution also specifically forbids the appropriation or granting of public funds or property for the aid or support of any religious creed, church, or sectarian purpose [*Cal. Const., art. XVI, § 5*; *but see Cal. Const., art. XVI, § 3* (permitting public aid to private institutions for certain limited purposes)]. Furthermore, no public money may be appropriated for the support of any sectarian or denominational school or of any school not under the exclusive control of the officers of the public schools, and no sectarian or denominational doctrine may be taught in the public schools of the state [*Cal. Const., art. IX, § 8*].

The United States Supreme Court's construction of the *First Amendment establishment clause* has, as admitted by Justice White, "sacrificed clarity and predictability for flexibility" [*Committee for Public Education v. Regan (1980) 444 U.S. 646, 662, 100 S. Ct. 840, 63 L. Ed. 2d 94]* . Cases are analyzed in terms of a three-part test. State action violates the *establishment clause* if it fails to satisfy any of these conditions: (1) it must have a secular purpose; (2) it must neither advance nor inhibit religion; and (3) it must not foster an excessive governmental entanglement with religion [*Lemon v. Kurtzman (1971) 403 U.S. 602, 612-613, 91 S. Ct. 2105, 29 L. Ed. 2d 745]* .

Impermissible state action designed to promote religion has been found in the following cases [*see Perumal v. Saddleback Valley Unified School Dist. (1988) 198 Cal. App. 3d 64, 83 n.13, 243 Cal. Rptr. 545]* :

- A statutory requirement that "creation science" be taught in conjunction with the teaching of evolution [*Edwards v. Aguillard (1987) 482 U.S. 578, 107 S. Ct. 2573, 96 L. Ed. 2d 510]* .

- A moment of silence in public schools for meditation or voluntary prayer [*Wallace v. Jaffree (1985) 472 U.S. 38, 105 S. Ct. 2479, 86 L. Ed. 2d 29]* .

- The required posting of the Ten Commandments in public classrooms [*Stone v. Graham (1980)*

449 U.S. 39, 101 S. Ct. 192, 66 L. Ed. 2d 199] .

- A state prohibition on the teaching of evolution [*Epperson v. Arkansas (1968) 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228]* .

- A requirement that each school day begin with bible reading [*Abington School Dist. v. Schempp (1963) 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844]* .

- The recital of prayer in the classroom [*Engel v. Vitale (1962) 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601]* .

- Prayer at graduation ceremonies [*Lee v. Weisman (1992) 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467* ; *see Sands v. Morongo Unified School Dist. (1991) 53 Cal. 3d 863, 884, 918, 281 Cal. Rptr. 34, 809 P.2d 809* (also construing federal *establishment clause*); *Bennett v. Livermore Unified School Dist. (1987) 193 Cal. App. 3d 1012, 1016-1017, 238 Cal. Rptr. 819* (same result under state constitution)].

- The use of religious school teachers in the public school curriculum [*McCollum v. Board of Education (1948) 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649]* .

The following cases have rejected *establishment clause* challenges to school activities that allegedly promoted religion:

- A statute authorizing public schools to lend textbooks free of charge to parochial school students [*Board of Education v. Allen (1968) 392 U.S. 236, 88 S. Ct. 1923, 20 L. Ed. 2d 1060* ; *but see California Teachers Assn. v. Riles (1981) 29 Cal. 3d 794, 812, 176 Cal. Rptr. 300, 632 P.2d 953* (holding that practice violates California Constitution)].

- Providing release time from school to attend religious instruction or services [*Zorach v. Clauson (1952) 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954* ; *see Educ. Code § 46014* (release time authorized in California)].

- Expending public funds for the transportation of students to parochial schools [*Everson v. Board of Education (1947) 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711* ; *see Bowker v. Baker (1956) 73 Cal. App. 2d 653, 666-667* (reaching same result under California Constitution)].

- Distribution of federal funds to state and local governments as part of a longstanding school aid program known as Chapter 2, which in turn lend educational materials and equipment to public and private schools, many of which are religiously affiliated [*Mitchell v. Helms (2000) 530 U.S. 793, 120 S. Ct. 2530, 2540, 147 L. Ed. 2d 660]* .

- A state statute and school district policy requiring teacher-led recitation of the Pledge of Allegiance by students in public schools, but not compelling students to participate, and the Pledge itself [*Newdow v. Rio Linda Union Sch. Dist. (9th Cir. 2010) 597 F.3d 1007, 1017-1042]* .

The right to conduct religious activities on school property is more restricted under the California Constitution than under *U.S. Const., amend. I* [*Perumal v. Saddleback Valley Unified School Dist. (1988) 198 Cal. App. 3d 64, 68, 243 Cal. Rptr. 545* ; *see Cal. Const. art. I, §§ 4, 24, art. XVI, § 5*]. Public schools may engage in no official involvement, whatever its form, that has the direct, immediate, and substantial effect of promoting religious purposes [*California Educational Facilities Authority v. Priest (1974) 12 Cal. 3d 593, 605 n.12, 116 Cal. Rptr. 361, 526 P.2d 513]* .

This California constitutional limitation has been held to prohibit the use of school property for meetings by a voluntary bible study club [*see Johnson v. Huntington Beach Union High Sch. Dist. (1977) 68 Cal. App. 3d 1, 16, 137 Cal. Rptr. 43 , cert. denied, 434 U.S. 877]* . It has also been extended to apparently prohibit lunchtime or recess congregations of students to practice religion, at least in a situation in which the students identify themselves as a group and disseminate advertising on school property of their existence and meeting times [*Perumal v. Saddleback Valley Unified School Dist. (1988) 198 Cal. App. 3d 64, 68-75, 243 Cal. Rptr. 545]* . In so holding, the court did not discuss the statutory right of students to distribute printed materials as an element of their right to freedom of expression, which suggests that the scope of this right is constitutionally limited with regard to religious materials [*see Educ. Code § 48907* (discussed in *§ 513.34[6*]); *see also Perumal v. Saddleback Valley Unified School Dist. (1988) 198 Cal. App. 3d 64, 78-82, 243 Cal. Rptr. 545* (dissenting opinion analyzing as freedom-of-expression case rather than simply as establishment-of-religion case)].

[2] Federal Equal Access Act

Schools may be required, under the federal Equal Access Act (EAA) [*20 U.S.C. §§ 4071-4074*], to permit religious groups to use school premises for purposes that were previously found to violate the California Constitution. The EAA provides that a public secondary school that receives federal assistance and has a "limited open forum" may not deny equal access to the forum to students who wish to conduct religious meetings [*20 U.S.C. § 4071(a)*]. The provisions of the EAA are *set forth in § 513.34[3]*. The United States Supreme Court, without a majority opinion on the point, held that the EAA does not violate the *establishment clause of the United States Constitution* [*Westside Community Schools v. Mergens (1990) 496 U.S. 226, 247-253, 260-262, 263-269, 110 S. Ct. 2356, 110 L. Ed. 2d 191]* .

The EAA expressly limits participation by school officials at religious meetings, which must be held during noninstructional time [*20 U.S.C. § 4071(b), (c)(2), (3)*]. The EAA therefore avoids the problems of the students' emulation of teachers as role models and mandatory attendance requirements. The school bears the responsibility for taking whatever further steps are necessary to make clear to all students that recognition of a religious club does not reflect endorsement of the views of the club's participants [*see Westside Community Schools v. Mergens (1990) 496 U.S. 226, 250, 269, 110 S. Ct. 2356, 110 L. Ed. 2d 191]* .

Under the supremacy clause of the United States Constitution, a right created by a federal statute is supreme to a right under a state constitution [*see* U.S. Const., art. VI, *cl. 2; Garnett v. Renton School Dist. No. 403 (9th Cir. 1993) 987 F.2d 641, 644-646 (EAA preempts Washington state constitutional law contrary to it) , cert. denied, 510 U.S. 819]* . Thus, the holdings of *Johnson v. Huntington Beach Union High Sch. Dist. (1977) 68 Cal. App. 3d 1, 137 Cal. Rptr. 43* , and *Perumal v. Saddleback Valley Unified School Dist. (1988) 198 Cal. App. 3d 64, 243 Cal. Rptr. 545* , prohibiting the use of school premises by religious groups, may be reversed by the United States Supreme Court's construction of the EAA. However, nothing in the EAA may be construed to authorize a public entity to influence the form or content of any prayer or other religious activity or to require any person to participate in prayer or other religious activity [*20 U.S.C. § 4071(d)(1), (2)*].

Nothing in the Education Code may be construed to prevent, or exclude from the public schools, references to religion or references to or the use of religious literature, dance, music, theater, and visual arts or other things having a religious significance when the references or uses do not constitute instruction in religious principles or aid to any religious sect, church, creed, or sectarian purpose, and when the references or uses are incidental to or illustrative of matters properly included in the course of study [*Educ. Code § 51511*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of ReligionEstablishment of ReligionEducation LawReligion in SchoolsEstablishment Clause ProtectionsEducation LawReligion in SchoolsFacilities UseEducation

LawReligion in SchoolsPrayer & Related Activities

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§ 513.36 Sexual Harassment

[1] Liability Under Title IX

Title IX of the Education Amendments, *20 U.S.C. § 1681 et seq.*, provides that no person may be excluded, on the basis of sex, from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance [*20 U.S.C. § 1681(a)*; *see Davis v. Monroe County Board of Education (1999) 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839]* . There is a private right of action under Title IX, and money damages are available in these suits. Actionable discrimination under Title IX includes sexual harassment [*Gebser v. Lago Vista Independent School District (1998) 524 U.S. 274, 281, 118 S. Ct. 1989, 141 L. Ed. 2d 277* ; *Franklin v. Gwinnett County Public Schools (1992) 503 U.S. 60, 74-75, 112 S. Ct. 1028, 117 L. Ed. 2d 208* ; *see Davis v. Monroe County Board of Education (1999) 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839]* .

A recipient of federal funds may be liable in damages under Title IX only for its own misconduct, and that conduct must exclude participation in, deny the benefits of, or subject a person to discrimination under a program or an activity. Damages liability under Title IX is coextensive with the government's enforcement power against the funding recipient and does not extend to parties outside the scope of the enforcement power [*Davis v. Monroe County Board of Education (1999) 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839]* . For the liability of a school district or board of education for the harassment of students by teachers or by other students, see *§§ 513.39[2]*, and *§ 513.36[3]*, respectively.

Qualified immunity is not a defense to school officials when the duty imposed on school officials by Title IX of the Education Amendments of 1972, *20 U.S.C. § 1681 et seq.*, to prevent sexual harassment of students was clearly established at the time the harassment occurred [*Oona, R.S. v. McCaffrey (9th Cir. 1998) 143 F.3d 473* , *cert. denied, 526 U.S. 1154 (1999)* (no qualified immunity for school officials for failure to remedy sexual harassment both as inappropriate conduct by student teacher and as hostile environment created by other students, where United States Supreme Court had decided *Franklin v. Gwinnett County Public Schools*, recognizing sexual harassment as actionable discrimination under Title IX before conduct occurred)].

[2] By Teacher

In *Gebser v. Lago Vista Independent School Dist. (1998) 524 U.S. 274, 118 S. Ct. 1989, 141 L. Ed. 2d 277* , the United States Supreme Court held that Title IX of the Education Amendments of 1972, *20 U.S.C. § 1681*, unquestionably places on funding recipient's the duty not to permit teacher-student harassment in schools. In determining the standard under which to determine liability, however, the Court held that agency principles may not be used to impute liability under Title IX to a recipient of federal education funds such as a school district for the misconduct of its teachers. Further, a school district will not be liable under Title IX for what amounts to a negligence standard, *i.e.* for a failure to react to harassment of which it knew or should have known. The recipient of federal education funds may only be liable in damages under Title IX when it is deliberately indifferent to known acts of sexual harassment by a teacher; liability arises from an official decision by the recipient not to remedy a violation. The Court imposed this high standard in *Gebser* to eliminate any risk that the funding recipient would be found liable in damages for its employees' independent actions, rather than for its own official decisions [*Davis v. Monroe County Board of Education (1999) 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839]* .

For a form complaint alleging sexual harassment by a teacher or fellow student in violation of Title IX, see *§ 513.92*.

[3] By Other Student

In *Davis v. Monroe County Board of Education (1999) 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839* , the United States Supreme Court held that under Title IX of the Education Amendments of 1972, *20 U.S.C. § 1681 et seq.*, a private right of action may lie against a recipient of Title IX funding, such as a school board, in cases of "student-on-student" harassment. However, liability will lie only under the following circumstances [*Davis v. Monroe County Board of Education (1999) 526 U.S. 629, 650, 119 S. Ct. 1661, 143 L. Ed. 2d. 839]* :

- The funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities;

- The harasser is under the school's disciplinary authority; and

- The harassment is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.

In *Davis*, the Court applied the standard of deliberate indifference to known acts of harassment it had previously articulated in *Gebser v. Lago Vista Independent School Dist (1998) 524 U.S. 274, 118 S. Ct. 1989, 141 L. Ed. 2d 277* , for cases based on sexual harassment of a student by a teacher [*see § 513.36[2]*]. Liability for damages is limited to circumstances in which the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs, such as when the misconduct occurs during school hours and on school grounds, as in the facts alleged in *Davis* [*Davis v. Monroe County Board of Education (1999) 526 U.S. 629, 645, 119 S. Ct. 1661, 143 L. Ed. 2d 839]* .

The funding recipient's response to the harassment or the lack of a response must be clearly unreasonable in light of the known circumstances. The response need not necessarily be expulsion of every student accused of sexual misconduct in all circumstances [*Davis v. Monroe County Board of Education (1999) 526 U.S. 629, 648-650, 119 S. Ct. 1661, 143 L. Ed. 2d 839]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawDiscriminationGender & Sex DiscriminationSexual HarassmentEducation LawDiscriminationGender & Sex DiscriminationTitle IXCoverageEducation LawDiscriminationGender & Sex DiscriminationTitle IXProtected

IndividualsEducation LawDiscriminationGender & Sex DiscriminationTitle IXRemedies

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§ 513.37 Searches of Students

The *Fourth Amendment* prohibition of unreasonable searches and seizures applies to searches conducted by public school officials [*Vernonia School Dist. 47J v. Acton (1995) 515 U.S. 646, 652, 115 S. Ct. 2386, 132 L. Ed. 2d 564* ; *New Jersey v. T.L.O. (1985) 469 U.S. 325, 336-337, 105 S. Ct. 733, 83 L. Ed. 2d 720]* . The state constitutional prohibition of unreasonable searches and seizures in *Cal. Const., art. I, § 13* also applies to public school officials [*In re William G. (1985) 40 Cal. 3d 550, 558-561, 221 Cal. Rptr. 118, 709 P.2d 1287]* . However, public school students' rights against unreasonable search and seizure are different than elsewhere in that the inquiry into whether the search is reasonable or unreasonable may not disregard schools' custodial and tutelary responsibility for students [*Vernonia School Dist. v. Action (1995) 515 U.S. 646, 656, 115 S. Ct. 2386, 132 L. Ed. 2d 564]* . Further, the broad authority of school administrators over student behavior, school safety, and the learning environment requires that school officials have the power to stop a minor student to ask questions or conduct an investigation even in the absence of reasonable suspicion, so long as the authority is not exercised in an arbitrary, capricious, or harassing manner [*In re Randy G. (2001) 26 Cal. 4th 556, 110 Cal. Rptr. 2d 516, 28 P.3d 239]* .

In conducting searches of students, school officials must act reasonably [*Vernonia School Dist. 47J v. Acton (1995) 515 U.S. 646, 652-653, 115 S. Ct. 2386, 132 L. Ed. 2d 564* ; *New Jersey v. T.L.O. (1985) 469 U.S. 325, 333-342, 105 S. Ct. 733, 83 L. Ed. 2d 720]* . The standard for determining reasonableness under both federal and state constitutions is less than probable cause [*New Jersey v. T.L.O. (1985) 469 U.S. 325, 333-342, 105 S. Ct. 733, 83 L. Ed. 2d 720* ; *In re William G. (1985) 40 Cal. 3d 550, 562, 221 Cal. Rptr. 118, 709 P.2d 1287]* . They need not obtain a warrant before searching a student under their authority, since a warrant requirement would unduly interfere with swift and informal disciplinary procedures needed in a school context [Vernonia School Dist. 47J v. *Acton (1995) 515 U.S. 646, 653, 115 S. Ct. 2386, 132 L. Ed. 2d 564* ; *New Jersey v. T.L.O. (1985) 469 U.S. 325, 340-341, 105 S. Ct. 733, 83 L. Ed. 2d 720* ; *In re William G. (1985) 40 Cal. 3d 550, 564-565, 221 Cal. Rptr. 118, 709 P.2d 1287]* . A warrantless school search will be justified when school officials have reasonable grounds for suspecting the search will yield evidence the student has violated or is violating either the law or school rules, and when the measures adopted for the search are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction [*New Jersey v. T.L.O. (1985) 469 U.S. 325, 333-342, 105 S. Ct. 733, 83 L. Ed. 2d 720* (search based on individualized suspicion of wrongdoing by student)]. The indignity of a search does not outlaw it, but it does

implicate the requirement that the search as actually conducted be reasonably related in scope to the circumstances that justified the interference in the first place [*Safford Unified School Dist. v. Redding (2009) -- U.S. --, 129 S. Ct. 2633, 2642, 174 L. Ed. 2d 354* ; *see* *New Jersey v. T.L.O. (1985) 469 U.S. 325, 341, 105 S. Ct. 733, 83 L. Ed. 2d 720]* . The scope will be permissible when it is not excessively intrusive in light of the age and sex of the student and the nature of the infraction [*Safford Unified School Dist. v. Redding (2009) -- U.S. --, 129 S. Ct. 2633, 2642, 174 L. Ed. 2d 354* (content of suspicion failed to match degree of intrusion)].

A search of any one student need not be based on individualized suspicion if the search is otherwise reasonable [*Smith v. McGlothlin (9th Cir. 1997) 119 F.3d 786* (school official who ordered search of group of high school students suspected of smoking near campus that led to discovery of one student's possession of knives entitled to qualified immunity since at time, search was not clearly improper, and, in fact, search without individualized suspicion was proper); *see also* *Vernonia School Dist. 47J v. Acton (1995) 515 U.S. 646, 663-665, 115 S. Ct. 2386, 132 L. Ed. 2d 564* (policy of random urinanalysis of high school students participating in interscholastic athletic programs not violation of *Fourth Amendment*); *People v. Alexander B. (1990) 220 Cal. App. 3d 1572, 1577-1578, 270 Cal. Rptr. 342* (student search is reasonable when suspicion focused on group of five or six rather than defendant alone)].

A school official ordering or conducting a search of a student may be entitled to qualified immunity in an action brought against the official for violation of the student's rights under *42 U.S.C. § 1983* even if the student's rights are violated by the search if there is reason to question the clarity with which the right was established [*Safford Unified School Dist. v. Redding (2009) -- U.S. --, 129 S. Ct. 2633, 2643-2644, 174 L. Ed. 2d 354* ; for discussion of qualified immunity for government officials in § 1983 actions generally, *see* Ch. 113, *Civil Rights: The Post Civil-War Civil Rights Statutes*].

The *Fourth Amendment* also applies to searches and seizures of students at schools by officials other than school officials, such as child protective services caseworkers [*see* *Greene v. Camreta (9th Cir. 2009) 588 F.3d 1011, 1022-1030* (warrantless, in-school interview of suspected child abuse victim was unreasonable seizure violating child's *Fourth Amendment* rights)]. The general law of search warrants applies to child abuse investigations, so that once the police have initiated a criminal investigation into alleged abuse in the home, responsible officials must provide procedural protections appropriate to the criminal context, including for in-school interviews of the alleged victims, at least where there is direct involvement of law enforcement in an in-school seizure and interrogation of a suspected child abuse victim [*Greene v. Camreta (9th Cir. 2009) 588 F.3d 1011, 1030]* . Prior to the Ninth Circuit's articulation of this rule, a child protective services officer and a law enforcement officer involved in an in-school seizure and interrogation were entitled to qualified immunity, because Ninth Circuit precedent did not clearly establish that an in-school seizure of a student suspected of being a victim of child sexual abuse could be subject to traditional *Fourth Amendment* protections [*Greene v. Camreta (9th Cir. 2009) 588 F.3d 1011, 1030-1033]* .

For a form of complaint for violation of a student's rights by unlawful search and seizure in violation of *U.S. Const., amends. IV* and *XIV*, brought against school officials and employees under *42 U.S.C. § 1983*, see *§ 513.94*. For detailed coverage of *42 U.S.C. § 1983*, including Practice Tips and sample complaints, see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureSearch & SeizureWarrantless SearchesSchool SearchesEducation LawStudentsSearch & SeizureReasonablenessEducation LawStudentsSearch & SeizureRemediesEducation LawStudentsSearch & SeizureScope of ProtectionEducation LawStudentsSearch & SeizureSearch Warrants

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§ 513.38 Student Discipline

[1] Authority of Public Schools

Subject to constitutional and statutory limitations, school districts have authority to maintain discipline in the schools and to suspend or expel any pupil for refusing or neglecting to obey school rules and regulations or for other misconduct [*Abella v. Riverside Unified School Dist. (1976) 65 Cal. App. 3d 153, 167, 135 Cal. Rptr. 177* ; *see Educ. Code § 35291*; *see also Educ. Code § 35291.5(a)* (school districts required to adopt rules; time and participation requirements)]. Public school teachers have the duty of enforcing school regulations and of holding pupils to strict account for their conduct on the way to and from school, on the playground, and during recess [*see Educ. Code §§ 44805, 44807*]. All pupils must comply with school regulations and submit to the authority of teachers [*Educ. Code § 48908*].

Educ. Code § 48900 et seq., governing suspension and expulsion of pupils, also applies to pupils attending the California School for the Blind and the two California Schools for the Deaf, which are referred to as the "state special schools" [*Educ. Code § 48927(a)*]. Pupils in the state special schools have the same due process procedural protections afforded to pupils in the public school districts of the state [*Educ. Code § 48927(c)*].

[2] Constitutional Limitations

As noted previously, education at public expense is a fundamental right under the California Constitution [*see § 513.31*]. Having established a right to public education, the state may not withdraw that right on grounds of misconduct without affording the student due process [*Goss v. Lopez (1975) 419 U.S. 565, 574, 95 S. Ct. 729, 42 L. Ed. 2d 725]* . Due process requires, at the very minimum, that students threatened with removal from school receive notice of the grounds for their removal and an opportunity to be heard [*Abella v. Riverside Unified School Dist. (1976) 65 Cal. App. 3d 153, 169, 135 Cal. Rptr. 177]* . Notice may take a simple form, however, such as the proscription of certain behavior in a school disciplinary rule that sufficiently notifies a student that engaging in that behavior could subject the student to sanctions [Bethel School Dist. No. 403 v. *Fraser (1986) 478 U.S. 675, 686, 106 S. Ct. 3159, 92 L. Ed. 2d 549]* . The grounds for discipline may not be unconstitutionally vague and standardless [*see Abella v. Riverside Unified School Dist. (1976) 65 Cal. App. 3d 153, 169-170, 135 Cal. Rptr. 177* ; *Myers v. Arcata etc. School Dist. (1969) 269 Cal. App. 2d 549, 559-560, 561, 75 Cal. Rptr. 68]* . Generally, however, the requirements of due process are

less rigid in the case of student suspension for a limited period of time fixed by law than in the case of student expulsion or indefinite suspension [*see Charles S. v. Board of Education (1971) 20 Cal. App. 3d 83, 91, 97 Cal. Rptr. 422 , appeal dismissed, 405 U.S. 1005 (1972)]* . For example, two days' suspension does not rise to the level of a penal sanction calling for the full panoply of federal procedural due process protections applicable to a criminal prosecution [*Bethel School Dist. No. 403 v. Fraser (1986) 478 U.S. 675, 686, 106 S. Ct. 3159, 92 L. Ed. 2d 549]* .

The use of force as part of student discipline short of expulsion or suspension is constitutionally limited by the *Fourth Amendment* protection against unreasonable search and seizure [*Doe v. Haw. Dep't of Educ. (9th Cir. 2003) 334 F.3d 906, 908-909]* .

[3] Grounds for Discipline

A pupil may not be suspended from school or recommended for expulsion unless the superintendent or principal of the school in which the pupil is enrolled determines that the pupil has committed one of the following acts [*Educ. Code § 48900*]:

(a) Caused, attempted to cause, or threatened to cause physical injury to another person, or willfully used force or violence on another person, except in self-defense;

(b) Possessed, sold, or otherwise furnished any firearm, knife, explosive, or other dangerous object unless, in the case of possession of any such object, the pupil had obtained written permission from a certificated school employee that is concurred in by the principal or the designee of the principal;

(c) Unlawfully possessed, used, sold, or otherwise furnished, or been under the influence of, any controlled substance (as listed in *Health & Safety Code §§ 11053-11058*), alcoholic beverage, or intoxicant of any kind;

(d) Unlawfully offered, arranged, or negotiated to sell any controlled substance listed in *Health & Safety Code §§ 11503-11058*, an alcoholic beverage, or an intoxicant of any kind, and then sold, delivered, or otherwise furnished to any person another liquid, substance, or material and represented the liquid, substance, or material as a controlled substance, alcoholic beverage, or intoxicant;

(e) Committed or attempted to commit robbery or extortion;

(f) Caused or attempted to cause damage to school property or private property;

(g) Stolen or attempted to steal school property or private property;

(h) Possessed or used tobacco or any products containing tobacco or nicotine products, including, but not limited to, cigarettes, cigars, miniature cigars, clove cigarettes, smokeless tobacco, snuff, chew packets, and betel; however, a pupil is not prohibited from using or possessing his or her own prescription products [*see also Educ. Code § 48901* (no smoking or using tobacco or tobacco products by students on school grounds)];

(i) Committed an obscene act or engaged in habitual profanity or vulgarity;

(j) Unlawfully possessed or unlawfully offered, arranged, or negotiated to sell, any drug paraphernalia, as defined in *Health & Safety Code § 11014.5*;

(k) Disrupted school activities or otherwise willfully defied the valid authority of supervisors, teachers,

administrators, school officials, or other school personnel engaged in the performance of their duties;

(l) Knowingly received stolen school property or private property;

(m) Possessed an imitation firearm as defined in *Educ. Code § 48900(m)*;

(n) Committed or attempted to commit a sexual assault as defined in *Penal Code §§ 261, 266c, 286, 288, 288a*, or *289*, or committed a sexual battery as defined in *Penal Code § 243.4*;

(o) Harassed, threatened, or intimidated a pupil who is a complaining witness or witness in a school disciplinary proceeding for the purpose of either preventing that pupil from being a witness or of retaliating against that pupil for being a witness, or both;

(p) Unlawfully offered, arranged to sell, negotiated to sell, or sold the prescription drug Soma;

(q) Engaged in, or attempted to engage in, hazing as defined in *Educ. Code § 48900(q)*; or

(r) Engaged in an act of bullying, including, but not limited to, bullying committed by means of an electronic act [*see Educ. Code § 32261(f), (g)*], directed specifically toward a pupil or school personnel.

As used in *Educ. Code § 48900*, "school property" includes, but is not limited to, electronic files and databases [*Educ. Code 48900(u)*].

A pupil may not be suspended or expelled for any of the acts enumerated in *Educ. Code § 48900* unless the act is related to school activity or school attendance occurring within a school under the jurisdiction of the superintendent or principal or occurring within any other school district [*Educ. Code § 48900(s)*; *see Fremont Union High Sch. Dist. v. Santa Clara County Board of Education (Matthew G.) (1991) 235 Cal. App. 3d 1182, 1185-1188, 286 Cal. Rptr. 915* (expulsion proper if conduct was at school site other than student's own school; construing former *Educ. Code § 48900*, similar to current *Educ. Code § 48900(s)*)]. A pupil may be suspended or expelled for acts enumerated in *Educ. Code § 48900* that are related to school activity or attendance, and that occur at any time, including, but not limited to, any of the following [*Educ. Code § 48900(s)*]:

- While on school grounds.
- While going to or coming from school.
- During the lunch period whether on or off the campus.
- During, or while going to or coming from, a school sponsored activity.

A pupil who aids or abets, as defined in *Penal Code § 31*, the infliction or attempted infliction of physical injury to another, may be suspended, but not expelled, except that a pupil adjudged by a juvenile court to have committed, as an aider and abettor, a crime of physical violence in which the victim suffered great bodily injury or serious bodily injury, is subject to recommendation for expulsion [*Educ. Code § 48900(t)*].

A superintendent or principal may use his or her discretion to provide alternatives to suspension or expulsion, including, but not limited to, counseling and an anger management program, for a pupil subject to discipline under *Educ. Code § 48900* [*Educ. Code § 48900(v)*]. It is the intent of the Legislature that alternatives be imposed against a pupil who is truant, tardy, or otherwise absent from school activities [*Educ. Code § 48900(w)*].

In addition to the grounds specified under *Educ. Code §§ 48900* and *48900.2*, a pupil (in grade 4 or higher) may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has committed sexual harassment [*Educ. Code § 48900.2*; *see Educ. Code § 212.5* ("sexual harassment" defined under Education Code); for the liability of a school district or board of education for damages for sexual harassment of one student by another, *see § 513.36[3]*]. The conduct must be considered by a reasonable person of the same gender as the victim to be sufficiently severe or pervasive to have a negative impact on the individual's academic performance or to create an intimidating, hostile, or offensive educational environment [Educ. Code § 49000.2; *see also Educ. Code § 231.5* (requirement that school districts develop and disseminate policy on sexual harassment)].

In addition to the grounds specified in *Educ. Code §§ 48900-48900.4*, a pupil in grades 4 to 12 may be suspended from school or recommended for expulsion if the superintendent or the principal of the school in which the pupil is enrolled determines that the pupil has caused, attempted to cause, threatened to cause, or participated in an act of, hate violence, as defined in *Educ. Code § 233(e)* [*see Educ. Code § 48900.3* (referring to former *Educ. Code § 33032.5(e)*, though that section was renumbered as *Educ. Code § 233* effective January 1, 1999)]. A pupil may also be suspended or recommended for expulsion from school if the superintendent or principal of the school in which the pupil is enrolled determines the pupil intentionally engaged in harassment, threats, or intimidation directed against school district personnel or pupils, that is sufficiently severe or pervasive to have the actual and reasonably expected effect of materially disrupting classwork, creating substantial disorder, and invading the rights of either school personnel or pupils by creating an intimidating or hostile educational environment [*Educ. Code § 48900.4*]. Pupils in grades 4 or higher may also be suspended from school or recommended for expulsion if the superintendent or principal of the school in which the pupil is enrolled determines the pupil made terroristic threats, as defined in *Educ. Code § 48900.7(b)*, against school officials or school property, or both [*Educ. Code § 48900.7(a)*].

The grounds listed in *Educ. Code § 48900*, along with the grounds listed for expulsion in *Educ. Code §§ 48900.2*, *48900.3*, and *48900.4*, establish the exclusive grounds for which a student may be suspended or expelled [*Educ. Code § 48900*; *T.H. v. San Diego Unified School Dist. (2004) 122 Cal. App. 4th 1267, 1276, 19 Cal. Rptr. 3d 532]* .

As part of or instead of disciplinary action prescribed by *Educ. Code § 48900 et seq.*, the principal of a school, the principal's designee, the superintendent of schools, or the governing board may require a pupil to perform community service on school grounds or, with written permission of the pupil's parent or guardian, off school grounds, during the pupil's nonschool hours. Community service may include, but is not limited to, work performed in the community or on school grounds in any of the following areas [*Educ. Code § 48900.6*]:

- Outdoor beautification;
- Community or campus betterment; and
- Teacher, peer, or youth assistance programs.

The community service option, however, does not apply if a pupil has been suspended, pending expulsion, in accordance with *Educ. Code § 48915*. However, the option does apply if the recommended expulsion is not implemented or is, itself, suspended by stipulation or other administrative action [*Educ. Code § 48900.6*].

For purposes of parental notification, and for reporting expulsion or suspension offenses to the State Department of Education, each school district must specifically identify, by offense committed, in all appropriate official pupil records each suspension or expulsion of the pupil for committing any of the offenses in *Educ. Code §§ 48900*, *48900.2*, *48900.3*, *48900.4*, *48900.7*, or *Educ. Code § 48915* [*Educ. Code § 48900.8*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawStudentsDisciplinary ProceedingsGeneral OverviewEducation LawStudentsDisciplinary ProceedingsDue ProcessEducation LawStudentsDiscipline MethodsExpulsionsEducation LawStudentsDiscipline MethodsSuspensionsEducation LawStudentsMisconductGeneral Overview

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§ 513.39 Suspension Procedure

[1] Use of Suspension

Suspension may be imposed only if other means of correction fail to bring about proper conduct; however, a pupil, including an individual with exceptional needs as defined in *Educ. Code § 56026*, may be suspended for any of the reasons enumerated in *Educ. Code § 48900* [*see § 513.38[3]*] on a first offense if the principal or superintendent of schools determines that the pupil violated *Educ. Code § 48900(a), (b), (c), (d)*, or *(e)* or that the pupil's presence causes a danger to persons or property or threatens to disrupt the instructional process [*Educ. Code § 48900.5*].

[2] By Teacher

A teacher may suspend any pupil from his or her class for any of the acts enumerated in *Educ. Code § 48900* [*see § 513.38[3]*] for the day of the suspension and the day immediately following. The teacher must immediately report the suspension to the principal of the school and send the pupil to the principal or the principal's designee for appropriate action. If that action requires the continued presence of the pupil at the school site, the pupil must be under appropriate supervision as defined in policies and related regulations adopted by the governing board of the school district. As soon as possible, the teacher must ask the parent or guardian of the pupil to attend a parent-teacher conference regarding the suspension. If practicable, a school counselor or a school psychologist may attend the conference. A school administrator must also attend the conference if the teacher or the parent or guardian so requests. The pupil may not be returned to the class from which he or she was suspended during the period of the suspension without the concurrence of the teacher of the class and the principal [*Educ. Code § 48910(a)*]. A pupil suspended from a class may also not be placed in another regular class during the period of suspension. However, if the pupil is assigned to more than one class per day, this restriction applies only to other regular classes scheduled at the same time as the class from which the pupil was suspended [*Educ. Code § 48910(b)*].

In addition to suspending a pupil from the class, a teacher may refer a pupil, for any of the acts enumerated in *Educ. Code § 48900*, to the principal or the principal's designee for consideration of suspension from the school [*Educ. Code § 48910(c)*].

Each school district may adopt a policy under which teachers can provide that the pupil's parent or guardian attend a portion of a school day in the class from which his or her child or ward was suspended, if the suspension was for reasons specified in *Educ. Code § 48900(i)* (obscene act or habitual profanity or vulgarity) or (k) (disruption of school activities or willful defiance of valid authority) [*Educ. Code § 48900.1(a)*]. The policy must take into account reasonable factors that may prevent compliance with a notice to attend, and the attendance of the parent or guardian is limited to the class from which the pupil was suspended [*Educ. Code § 48900.1(a)*]. The legislation applies only to a parent or guardian who is actually living with the pupil [*Educ. Code § 48900.1(c)*].

Parents and guardians must be notified of the district's policy before its implementation. The teacher must apply the policy uniformly to all pupils in the classroom [*Educ. Code § 48900.1(b)*]. The parent or guardian must receive a written notice stating that his or her attendance is pursuant to law [*Educ. Code § 48900.1(c)*]. The notice may specify that the parent or guardian's attendance be on the day in which the pupil is scheduled to return to class or within a reasonable period of time thereafter [*Educ. Code § 48900.1(d)*].

The parent or guardian should give reasonable notice to his or her employer that it will be necessary to take time off from work to appear in the child's or ward's school in response to a request made under *Educ. Code § 48900.1*. If this notice is given, no employer may discharge or in any manner discriminate against an employee for taking time off to appear in the school [*Lab. Code § 230.7(a)*]. Any employee who is threatened with discharge or is discharged, demoted, suspended, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because the employee has taken time off to appear in school under *Educ. Code § 48900.1* is entitled to reinstatement and reimbursement for lost wages and work benefits caused by those acts of the employer [*Lab. Code § 230.7(b)*].

For discussion of wrongful termination of employment generally, see Ch. 249, *Employment Law: Termination and Discipline* .

[3] By Principal or Superintendent

The principal of the school, his or her designee, or the superintendent may suspend a pupil from the school for any of the reasons enumerated in *Educ. Code § 48900* [*see § 513.38[3]*], and pursuant to *Educ. Code § 48900.5*, for no more than five consecutive school days [*Educ. Code § 48911(a)*]. *Educ. Code § 48911* is not an exception to, nor does it place any limitation on, *Educ. Code § 48903*, which governs the total length of time for which a pupil may be suspended [*Educ. Code § 48911*; *see § 513.39[5]*].

Suspension by the principal, the principal's designee, or the superintendent must be preceded by an informal conference that is conducted by the principal, the principal's designee, or the superintendent of schools between the pupil and, whenever practicable, the teacher, supervisor, or school employee who referred the pupil to the principal, the principal's designee, or the superintendent of schools. At the conference, the pupil must be informed of the reason for the disciplinary action and the evidence against him or her and must be given the opportunity to present his or her version and evidence in his or her defense [*Educ. Code § 48911(b)*]. A principal, the principal's designee, or the superintendent of schools may suspend a pupil without affording the pupil an opportunity for a conference only if the principal, the principal's designee, or the superintendent of schools determines that an emergency situation exists. The term "emergency situation" means a situation determined by the principal, the principal's designee, or the superintendent of schools to constitute a clear and present danger to the lives, safety, or health of pupils or school personnel. If a pupil is suspended without a conference prior to the suspension, both the parent (or guardian) and pupil must be notified of the pupil's right to such a conference and the pupil's right to return to school for this purpose. The conference must be held within two school days unless the pupil waives this right or is physically unable to attend for any reason including, but not limited to, hospitalization or incarceration, in which case the conference must be held as soon as the pupil is physically able to return to school for the conference [*Educ. Code § 48911(c)*].

At the time of suspension, a school employee must make a reasonable effort to contact the pupil's parent or guardian in person or by telephone. Whenever a pupil is suspended from school, the parent or guardian must be notified in writing of the suspension [*Educ. Code § 48911(d)*].

A school employee is required to report the suspension of the pupil, including the cause for the suspension, to the governing board of the school district or to the district superintendent in accordance with the regulations of the governing board [*Educ. Code § 48911(e)*].

The parent or guardian of any pupil must respond without delay to any request from school officials to attend a conference regarding his or her child's behavior. However, no penalties may be imposed on a pupil for failure of the pupil's parent or guardian to attend such a conference, nor may a reinstatement of the suspended pupil be contingent on the attendance at the conference by the pupil's parent or guardian [*Educ. Code § 48911(f)*].

An individual with exceptional needs, as defined in *Educ. Code § 56026*, may be suspended from school in accordance with *20 U.S.C. § 1415(k)*, the discipline provisions in *34 C.F.R. § 300.530 et seq.*, and provisions of *Educ. Code § 48900 et seq.* that do not conflict with federal law and regulations [*Educ. Code § 48915.5(a)*]. A free appropriate public education for individuals with exceptional needs suspended from school must be in accordance with *20 U.S.C. § 1412(a)(1)* and *34 C.F.R. § 300.530(d)* [*Educ. Code § 48915.5(b)*]. The site principal of a contracting nonpublic, nonsectarian school providing services to individuals with exceptional needs under *Educ. Code §§ 56365* and *56366* has the same duties and responsibilities with respect to the suspension of pupils with previously identified exceptional needs prescribed for the suspension of pupils under *Educ. Code § 48911* [*Educ. Code § 48911.5*].

[4] By Governing Board

The governing board may suspend a pupil from school for any of the acts enumerated in *Educ. Code § 48900* [*Educ. Code § 48912(a)*].

Notwithstanding the provisions of *Educ. Code § 35145* and *Gov. Code § 54950*, the governing board of a school district, when considering the suspension or a disciplinary or any other action except expulsion against any pupil, shall, unless a request has been made to the contrary, hold closed sessions if a public hearing on the question would lead to the giving out of information concerning a school pupil that would be in violation of *Educ. Code §§ 49073-49078* [*Educ. Code § 48912(b)*].

Before calling a closed session to consider these matters, the governing board shall, in writing, by registered or certified mail or by personal service, notify the pupil and the pupil's parent or guardian, or the pupil if the pupil is an adult, of the intent of the governing board to call and hold a closed session. Unless the pupil or the pupil's parent or guardian shall, in writing, within 48 hours after receipt of the written notice of the board's intention, request that the hearing be held as a public meeting, the hearing to consider these matters shall be conducted by the governing board in closed session. In the event that a written request is served on the clerk or secretary of the governing board, the meeting shall be public, except that any discussion at that meeting that may be in conflict with the right to privacy of any pupil other than the pupil requesting the public meeting shall be in closed session [*Educ. Code § 48912(c)*].

The governing board of a school district may also suspend a pupil enrolled in a continuation school or class if any acts enumerated in *Educ. Code § 48900* occurred. Such a suspension must meet the requirements of *Educ. Code § 48915* [*Educ. Code 48912.5*; for discussion of requirements of *Educ. Code § 48915*, *see § 513.40[1]*].

[5] Total Length of Suspensions

Except as provided in *Educ. Code §§ 48911(g)* (suspension of students attending a continuation school) and 48912, a pupil may not be suspended from school for more than 20 school days in any one school year. However, if a pupil is

transferred to or enrolled in another regular school, an opportunity school or class, or a continuation education school or class, for adjustment purposes, the total number of school days that the pupil may be suspended may not exceed 30 days in any school year [*Educ. Code § 48903*]. The governing board may suspend a pupil from school for any number of school days within the limits prescribed by *Educ. Code § 48903* [*Educ. Code § 48912(a)*]. The governing board of a school district may suspend a pupil enrolled in a continuation school or class for a period not longer than the remainder of the semester [*Educ. Code § 48912.5*].

[6] Extension of Suspension Pending Expulsion Proceedings

If expulsion from any school or suspension for the balance of the semester from a continuation school is being processed by the governing board, the school district superintendent or other person designated by him or her in writing may extend the suspension until the governing board renders a decision in the action. However, an extension may be granted only if the superintendent or his or her designee has determined, following a meeting in which the pupil and the pupil's parent or guardian are invited to participate, that the presence of the pupil at the school or in an alternative school placement would cause a danger to persons or property or a threat of disrupting the instructional process. If the pupil or the pupil's parent or guardian has requested a meeting to challenge the original suspension pursuant to *Educ. Code § 48914*, the purpose of the meeting shall be to decide on the extension of the suspension order under *Educ. Code § 48911* and may be held in conjunction with the initial meeting on the merits of the suspension [*Educ. Code § 48911(g)*].

[7] Parental Meeting With Superintendent

Each school district is authorized to establish a policy that permits school officials to conduct a meeting with the parent or guardian of a suspended pupil to discuss the causes, the duration, the school policy involved, and other matters pertinent to the suspension [*Educ. Code § 48914*].

[8] Completion of Work Missed

The teacher of any class from which a pupil is suspended may require the suspended pupil to complete any assignments and tests missed during the suspension [*Educ. Code § 48913*].

[9] Judicial Review

Review of a suspension by writ of mandate and subsequent appeal has been allowed in a case that presented questions of continuing public interest likely to recur [*Gordon J. v. Santa Ana Unified School Dist. (1984) 162 Cal. App. 3d 530, 533, 208 Cal. Rptr. 657* (question of role of the exclusionary rule in high school disciplinary proceedings)]. The appeal was allowed against a motion to dismiss as moot. At the time of appeal, the student was eligible to return to the high school and arguably suffered no actual interruption of his academic career because he had been permitted to attend a high school in another district during the period of his suspension from the subject school [*Gordon J. v. Santa Ana Unified School Dist. (1984) 162 Cal. App. 3d 530, 532-533, 208 Cal. Rptr. 657]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Forms of Pleading and Practice--Annotated

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PART II. LEGAL BACKGROUND
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§ 513.40 Expulsion Procedure

[1] Use of Expulsion

Unless the principal or superintendent finds, and so reports in writing to the governing board, that expulsion is inappropriate due to the particular circumstance, which must be set out in the report of the incident, the principal or the superintendent of schools must recommend a pupil's expulsion for any of the following acts [*Educ. Code § 48915(a)*]:

- Causing serious physical injury to another person except in self-defense.

- Possession of any knife, as defined in *Educ. Code § 48915(g)*, or other dangerous object of no reasonable use to the pupil at school or at a school activity off school grounds.

- Unlawful sale of any controlled substance, as defined in *Health & Safety Code § 11053 et seq.*, except for the first offense for the sale of not more than one avoirdupois ounce of marijuana, other than concentrated cannabis.

- Robbery or extortion.

- Assault or battery, as defined in *Penal Code §§ 240, 242*, on any school employee.

On recommendation by the principal, superintendent of schools, or a hearing officer or administrative panel appointed under *Educ. Code § 48918*, the governing board may order a pupil expelled on finding the pupil committed an act listed in *Educ. Code § 48915(a)* or in *Educ. Code § 48900(a)-(e)*, based on a finding of one or both of the following [*Educ. Code § 48915(b)*]:

- Other means of correction are not feasible or have repeatedly failed to bring about proper conduct; and/or

- Due to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others.

The principal or superintendent of schools must immediately suspend, under *Educ. Code § 48911*, and must recommend expulsion of a pupil the principal or superintendent determines has committed any of the following acts at school or at a school activity off school grounds [*Educ. Code § 48915(c)*]:

- Possessing, selling, or otherwise furnishing a firearm, only if the possession is verified by a school district employee, unless the pupil had obtained prior written permission to possess the firearm from a certificated school employee, in which the principal or a designee of the principal concurred.

- Brandishing a knife, as defined in *Educ. Code § 48915(g)*, at another person.

- Unlawfully selling a controlled substance listed in *Health & Safety Code § 11053 et seq.*

- Committing or attempting to commit a sexual assault or committing a battery, as defined in *Educ. Code § 48900(n)*.

- Possession of an explosive, as defined in *Educ. Code § 48915(h)*.

Under *Educ. Code § 48900* and *Educ. Code § 48915*, "possession" of a firearm for purposes of expulsion means the pupil knowingly and voluntarily has direct control over a firearm, unless the pupil has the permission of school officials to possess the firearm or the possession is brief and solely for the purpose of disposing of the firearm, such as handing it to school officials *[80 Ops. Cal. Att'y Gen. 91 (1997)]* .

The governing board must order the pupil expelled on finding the pupil committed an act listed in *Educ. Code § 48915(c)* and refer the pupil to a program of study meeting all of the following conditions [*Educ. Code § 48915(d)*]:

- The program is appropriately prepared to accommodate pupils exhibiting discipline problems.

- The program is not provided at a comprehensive middle, junior, or senior high school, or at any elementary school.

- The program is not housed at the schoolsite attended by the pupil at the time of suspension.

On recommendation by the principal, superintendent of schools, or a hearing officer or administrative panel appointed pursuant to *Educ. Code § 48918(d)*, the governing board may order a pupil expelled on finding that the pupil violated *Educ. Code § 48900(f)-(m), 48900.2, 48900.3*, or *48900.4*, and that other means of correction are not feasible or have repeatedly failed to bring about proper conduct or, because of the nature of the violation, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others [*Educ. Code § 48915(e)*].

In *Educ. Code § 48915*, the Legislature specified the circumstances for triggering an expulsion hearing and the findings that must be made at these hearings, and grouped those circumstances into the following three primary categories [*T.H. v. San Diego Unified School Dist. (2004) 122 Cal. App. 4th 1267, 1277-1278, 19 Cal. Rptr. 3d 532]* :

- With regard to very serious offenses, the principal or superintendent of schools must recommend expulsion of a pupil he or she determines has committed acts at school or at a school activity off school grounds specified in *Educ. Code § 48915(c)*. If the governing board finds a student committed one of these offenses, the school board must order expulsion [*Educ. Code § 48915(c)*].

- With regard to the net level of expulsion offenses, the principal or superintendent of schools must recommend expulsion, unless the principal or superintendent finds expulsion inappropriate due to the particular circumstance, for the acts listed in *Educ. Code § 48915(a)*. With respect to these offenses, a school board cannot expel a student unless it also finds either (1) that other means of correction are not feasible or have repeatedly failed to bring about proper conduct, or (2) due to the nature of the act, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others [*Educ. Code § 48915(b)(1), (2)*].

- With regard to the remaining statutory expulsion offenses, the Legislature did not provide a mandatory or presumptive referral requirement. Instead, on recommendation by the principal, superintendent of schools, or a hearing officer or administrative panel, the governing board may order a pupil expelled on finding that the pupil violated the identified statutory expulsion ground [*Educ. Code § 48915(e)*]. With respect to these offenses, a student cannot be expelled unless it is found that either (1) other means of correction are not feasible or have repeatedly failed to bring about proper conduct, or (2) due to the nature of the violation, the presence of the pupil causes a continuing danger to the physical safety of the pupil or others [*Educ. Code § 48915(e)(1), (2)*]. Additionally, with regard to certain of these offenses, an expulsion may be ordered only if the student committed the act at school or during a school activity [*see Educ. Code § 48915(e)*].

The governing board must refer a pupil who has been expelled pursuant to *Educ. Code § 48915(b)* or *(e)* to a program of study meeting all of the conditions specified in *Educ. Code § 48915(d)*. With regard to a pupil expelled under *Educ. Code § 48915(e)*, if the superintendent certifies that an alternative program of study is not available at a site away from a comprehensive middle, junior, or senior high school, or an elementary school, and the only option for placement is at another comprehensive middle, junior, or senior high school, or another elementary school, the pupil may be referred to a program of study provided at a comprehensive middle, junior, or senior high school or elementary school [*Educ. Code § 48915(f)*].

[2] Expulsion of Pupil With Previously Identified Exceptional Needs

An individual with exceptional needs, as defined in *Educ. Code § 56026*, may be expelled from school in accordance with *20 U.S.C. § 1415(k)*, the discipline provisions in *34 C.F.R. § 300.530 et seq.*, and provisions of *Educ. Code § 48900 et seq.* that do not conflict with federal law and regulations [*Educ. Code § 48915.5(a)*]. A free appropriate public education for individuals with exceptional needs expelled from school must be in accordance with *20 U.S.C. § 1412(a)(1)* and *34 C.F.R. § 300.530(d)* [*Educ. Code § 48915.5(b)*].

If an individual with exceptional needs is excluded from schoolbus transportation, the pupil is entitled to be provided with an alternative form of transportation at no cost to the pupil or parent or guardian provided that transportation is specified in the pupil's individualized education program [*Educ. Code § 48915.5(c)*].

[3] Length of Expulsion

An expulsion order must remain in effect until such time as the governing board may, in the manner prescribed in *Educ. Code § 48900 et seq.*, order the readmission of a pupil. Except for pupils who have been expelled for acts listed in *Educ. Code § 48915(c)* [*see § 513.40[1]*], at the time an expulsion of a pupil is ordered, the governing board must set a date, not later than the last day of the semester following the semester in which the expulsion occurred, when the pupil may apply for readmission to a school maintained by the district. The governing board is not required to readmit the pupil [*Educ. Code § 48916*]. If the pupil is expelled for reasons relating to controlled substances or alcohol, the governing board may require, with the consent of the pupil's parent or guardian, that the pupil enroll in a county-supported drug rehabilitation program before returning to school [*Educ. Code § 48916.5*].

[4] Establishment of Rules and Regulations

The governing board of each school district must establish rules and regulations governing procedures for the expulsion of pupils. These procedures must include, but are not limited to, those set forth in *Educ. Code § 48918(a)-(k)* [*Educ. Code § 48918*; *see § 513.40[5]*].

Educ. Code § 48918 sets forth detailed and extensive mandatory procedures a school district must follow before the district may expel a student who has committed one of the identified expulsion offenses [*T.H. v. San Diego Unified School Dist. (2004) 122 Cal. App. 4th 1267, 1276, 19 Cal. Rptr. 3d 532]* . A school district's adoption of rules governing expulsions under a "zero tolerance" policy that required the principal or designee to immediately suspend and recommend for expulsion a pupil that had committed specified acts at school or at a school activity off school grounds did not violate state law by eliminating a principal's statutory discretion to decide not to recommend a student for an expulsion hearing. There are no provisions in the Education Code requiring a district to provide a principal with the authority to dismiss an expulsion charge if (1) the principal found the student had committed the expulsion offense, (2) the stricter recommendation procedures did not infringe on the student's statutory rights to an objective and fair expulsion procedure, and (3) the mandatory recommendation requirements did not preclude the principal from expressing his or her own views as to whether expulsion was appropriate [*T.H. v. San Diego Unified School Dist. (2004) 122 Cal. App. 4th 1267, 1281-1285, 19 Cal. Rptr. 3d 532]* . The rules also did not violate a student's federal and state due process rights, because (1) the rule provided required procedural protections to students, (2) a student is not constitutionally entitled to notice of the scope of a principal's authority vis-a-vis the governing school board, and (3) inconsistencies within the district's rules with regard to whether the principal or superintendent could recommend expulsion for offenses not included in the provisions of the Education Code did not create an inevitable due process violation [*T.H. v. San Diego Unified School Dist. (2004) 122 Cal. App. 4th 1267, 1285-1287, 19 Cal. Rptr. 3d 532]* .

[5] Right to Notice and Hearing

In the context of student disciplinary proceedings in which expulsion is sought, the basic requirements for due process are prior notice and a hearing [*Dornes v. Lindsey (C.D. Cal. 1998) 18 F. Supp. 2d 1086, 1089* (plaintiff given notice and hearing conducted properly under California Education Code)]. However, brief suspensions may be made without a prior hearing [Black Coalition v. Portland School District No. 1 *(9th Cir. 1973) 484 F.2d 1040, 1044* ; *Dornes v. Lindsey (C.D. Cal. 1998) 18 F. Supp. 2d 1086, 1089]* . The pupil is entitled to a hearing to determine whether the pupil should be expelled. An expulsion hearing must be held within 30 school days of the date the principal or the superintendent of schools determines that the pupil has committed any of the acts enumerated in *Educ. Code § 48900* [*see § 513.38[3]*], unless the pupil requests in writing that the hearing be postponed. The pupil is entitled to at least one postponement for a period of not more than 30 calendar days of an expulsion hearing. Any additional postponement may be granted at the discretion of the governing board [*Educ. Code § 48918(a)*].

During the regular school year, if it is impracticable for the governing board to comply with the time requirements for conducting an expulsion hearing under *Educ. Code § 48918(a)*, the superintendent of schools or his or her designee may, for good cause, extend the time period for holding the hearing for an additional five schooldays. If it is impracticable for the governing board to comply with the time requirements for conducting an expulsion hearing under *Educ. Code § 48918(a)* due to a summer recess in governing board meetings of more than two weeks, the days during the recess period do not count as schooldays in meeting the time requirements. Days not counted as schooldays in meeting the time requirements for an expulsion hearing because of a summer recess of governing board meetings cannot exceed 20 schooldays as defined in *Educ. Code § 48925(c)*. Unless the pupil requests in writing that the expulsion hearing be postponed, the hearing must be held no later than 20 calendar days prior to the first day of school for the school year [*Educ. Code § 48918(a)*].

Reasons for the extension must be included as a part of the record at the time the expulsion hearing is conducted. On the commencement of the hearing, all matters will be pursued and conducted with reasonable diligence and shall be

concluded without any unnecessary delay [*Educ. Code § 48918(a)*]. The provisions of former *Educ. Code § 48914(a)* (now see *Educ. Code § 48918(a)*) were mandatory rather than directory, and a failure to comply with the time requirements invalidated the expulsion [*Garcia v. Los Angeles County Bd. of Education (1981) 123 Cal. App. 3d 807, 813, 177 Cal. Rptr. 29]* . It would appear that this would still be true of the time requirements in *Educ. Code § 48918(a)*, though this can not be stated with certainty since the time requirements in the new statute have been changed.

Written notice of the hearing must be forwarded to the pupil at least 10 calendar days prior to the date of the hearing. The notice must include the following [*Educ. Code § 48918(b)*]:

- The date and place of the hearing.
- A statement of the specific facts and charges on which the proposed expulsion is based.
- A copy of the disciplinary rules of the district that relate to the alleged violation.
- A notice of the parent's, guardian's, or pupil's obligation under *Educ. Code § 48915.1(b)* to inform another school district in which enrollment is sought of the expulsion (*see § 513.40[17]*).
- A notice of the opportunity of the pupil and his or her parent or guardian to:
  - Appear in person or employ and be represented by counsel legal counsel or a nonattorney advisor. Legal counsel is an attorney or lawyer admitted to the practice of law in California and an active member of the State Bar of California; a nonattorney advisor is an individual who is not an attorney or lawyer, but who is familiar with the facts of the case, and has been selected by the pupil or pupil's parent or guardian to provide assistance at the hearing. However, *Educ. Code § 48918* does not require a pupil or pupil's parent or guardian to be represented by counsel or an advisor at the hearing.
  - Inspect and obtain copies of all documents to be used at the hearing.
  - Confront and question all witnesses who testify at the hearing.
  - Question all other evidence presented.
  - Present oral and documentary evidence, including witnesses, on the pupil's behalf.

In a hearing in which a pupil is alleged to have committed or attempted to commit a sexual assault or sexual battery as specified in *Educ. Code § 48900(n)*, a complaining witness must be given five days' notice before being called to testify, and is entitled to have up to two adult support persons, including, but not limited to, a parent, guardian, or legal counsel, present during the testimony. Before a complaining witness testifies, support persons must be admonished that the hearing is confidential. Nothing in *Educ. Code § 48918(b)* precludes the person presiding over the expulsion hearing from removing a support person the presiding person finds disrupting the hearing. If one or both of the support persons is also a witness, the provisions of *Penal Code § 868.5* must be followed for the hearing [*Educ. Code § 48918(b)*].

[6] Conduct of Hearing

Notwithstanding Gov. Code § 54593 and *Educ. Code § 35145*, the governing board must conduct a hearing to consider the expulsion of a pupil in a session closed to the public unless the pupil requests, in writing, at least five days prior to the date of the hearing, that the hearing be conducted at a public meeting. Whether an expulsion hearing is conducted in closed or public session, the governing board may meet in closed session for the purpose of deliberating and

determining if the pupil should be expelled. If the governing board or the hearing officer or administrative panel, appointed under *Educ. Code § 48918(d)* to conduct the hearing, admits any other person to a closed deliberation session, the parent or guardian of the pupil, the pupil, and the counsel of the pupil must also be allowed to attend the closed deliberations. If the hearing is to be conducted at a public meeting, and there is a charge of committing or attempting to commit a sexual assault or committing a sexual battery as defined in *Educ. Code § 48900(n)*, a complaining witness has the right to have his or her testimony heard in a session closed to the public when testifying at a public meeting would threaten serious psychological harm to the complaining witness and there are no alternative procedures to avoid the threatened harm, including, but not limited to, videotaped deposition or contemporaneous examination in another place communicated to the hearing room by means of closed-circuit television [*Educ. Code § 48918(c)*].

Instead of conducting an expulsion hearing itself, the governing board of any school district may contract with the county hearing officer, or with the Office of Administrative Hearings of the State of California pursuant to *Educ. Code § 35207* and *Gov. Code § 27720 et seq.*, for a hearing officer to conduct the hearing, or the board may appoint an impartial administrative panel of three or more certificated persons, none of whom is a member of the board or employed on the staff of the school in which the pupil is enrolled. The hearing must be conducted in accordance with all of the procedures established under *Educ. Code § 48918* [*Educ. Code § 48918(d)*].

Within three school days after the hearing, the hearing officer or administrative panel must determine whether to recommend the expulsion of the pupil to the governing board. If the hearing officer or administrative panel decides not to recommend expulsion, the expulsion proceedings are terminated and the pupil must be immediately reinstated and permitted to return to a classroom instructional program, any other instructional program, a rehabilitation program, or any combination of these programs. Placement in one or more of these programs must be made by the superintendent of schools or the superintendent's designee after consultation with the school district personnel, including the pupil's teachers, and the pupil's parent or guardian. The decision not to recommend expulsion is final [*Educ. Code § 48918(e)*].

If the hearing officer or administrative panel recommends expulsion, findings of fact in support of the recommendation must be prepared and submitted to the governing board. All findings of fact and recommendations must be based solely on the evidence adduced at the hearing. If the governing board accepts the recommendation calling for expulsion, acceptance must be based either on a review of the findings of fact and recommendations submitted by the hearing officer or panel, or on the results of any supplementary hearing conducted pursuant to *Educ. Code § 48918* that the governing board may order. The decision of the governing board to expel a pupil must be based on substantial evidence relevant to the charges adduced at the expulsion hearing or hearings. Except as provided in *Educ. Code § 48918*, no decision to expel may be based solely on hearsay evidence. The governing board or the hearing officer or administrative panel may, on a finding that good cause exists, determine that the disclosure of either the identity of a witness or the testimony of the witness at the hearing would subject the witness to an unreasonable risk of psychological or physical harm. Upon that determination, the testimony of the witness may be presented at the hearing in the form of sworn declarations which can be examined only by the governing board or the hearing officer or administrative panel. Copies of these sworn declarations edited to delete the name and identity of the witness, must be made available to the pupil [*Educ. Code § 48918(f)*; *see John A. v. San Bernardino City Unified School District (1982) 33 Cal. 3d 301, 307-308, 187 Cal. Rptr. 472, 654 P.2d 242* ; *Dornes v. Lindsey (C.D. Cal. 1998) 18 F. Supp. 2d 1086, 1090* (reliance in some instances on students' statements and reports in lieu of live testimony does not constitute due process violation; where revelation of name of student witness or requiring student to testify could subject student to risk, statements and reports of students may be relied on in lieu of live testimony, and students' names do not have to be revealed)].

A record of the hearing must be made which may be maintained by any means, including electronic recording, so long as a reasonably accurate and complete written transcription of the proceedings can be made [*Educ. Code § 48918(g)*]. Technical rules of evidence do not apply to an expulsion hearing, but relevant evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. A decision of the governing board to expel must be supported by substantial evidence showing that the

pupil committed any of the acts enumerated in *Educ. Code § 48900* [*Educ. Code § 48918(h)*].

In hearings including an allegation of committing or attempting to commit a sexual assault or committing a sexual battery (as defined in *Educ. Code § 48900(n)*), evidence of specific instances of a complaining witness' prior sexual conduct are presumed inadmissible and may not be heard absent a determination by the person conducting the hearing that extraordinary circumstances exist requiring the evidence to be heard. Before that determination is made, the complaining witness must be given notice and an opportunity to oppose the introduction of the evidence. In the hearing on the admissibility of the evidence, the complaining witness is entitled to be represented by a parent, guardian, legal counsel, or another support person. Reputation or opinion evidence regarding the sexual behavior of the complaining witness is not admissible for any purpose [*Educ. Code § 48918(h)*].

Before the hearing begins, the governing board may issue subpoenas at the request of either the superintendent or the superintendent's designee or the pupil, for the personal appearance of percipient witnesses. After the hearing has begun, the governing board or the hearing officer or administrative panel may, on request of either the county superintendent of schools or the superintendent's designee or the pupil, issue subpoenas. All subpoenas must be issued in accordance with *Code Civ. Proc. §§ 1985, 1985.1, 1985.2*. Enforcement of subpoenas must be in accordance with *Gov. Code § 11455.20* [*Educ. Code § 48918(i)(1)*; *see Woodbury v. Brown-Dempsey (2003) 108 Cal. App. 4th 421, 430-439, 134 Cal. Rptr. 2d 124* (school board did not have mandatory duty under *Educ. Code § 48918(i)(1)* to issue subpoenas for witnesses that students to be expelled sought to attend disciplinary hearing)]. Any objection raised by the superintendent of schools or the superintendent's designee or the pupil to the issuance of subpoenas may be considered by the governing board in closed session, or in open session, if requested by the pupil before the meeting. Any decision by the governing board in response to an objection to the issuance of subpoenas is final and binding [*Educ. Code § 48918(i)(2)*]. If the governing board, hearing officer, or administrative panel determines, in accordance with *Educ. Code § 48918(f)* that a percipient witness would be subject to an unreasonable risk of harm by testifying at the hearing, a subpoena may not be issued to compel the personal attendance of that witness at the hearing. However, that witness may be compelled to testify by means of a sworn declaration as provided in *Educ. Code § 48918(f)* [*Educ. Code § 48918(i)(3)*]. Service of process will be extended to all parts of the state and served in accordance with *Code Civ. Proc. § 1987*. All witnesses appearing pursuant to subpoena, other than the parties or officers or employees of the state or political subdivision, receive fees, and all witnesses appearing pursuant to subpoena, except the parties, receive mileage in the same amount and under the same circumstances as witnesses in civil actions in a superior court. Fees and mileage are paid by the party at whose request the witness is subpoenaed [*Educ. Code § 48918(i)(4)*; for discussion of witness fees in civil actions generally, *see* Ch. 535, *Subpoena*].

In addition to any other immunity, any testimony provided by a pupil witness in an expulsion hearing conducted under *Educ. Code § 48900 et seq.* is expressly deemed to be a privileged publication or broadcast protected by *Civ. Code § 47(b)* [*Educ. Code § 48918.6*]. For discussion of *Civ. Code § 47(b)*, see Ch. 340, *Libel and Slander* .

[7] Final Decision to Expel

Whether an expulsion hearing is conducted by the governing board or before a hearing officer or administrative panel, a final action to expel may be taken only by the governing board in a public session. Written notice of any decision to expel or to suspend the enforcement of an expulsion order during a period of probation must be sent by the superintendent of schools or his or her designee to the pupil or to his or her parent or guardian. This notice must be accompanied by all of the following notices [*Educ. Code § 48918(j)*; *see § 513.40[9], [17]*]:

- Notice of the right to appeal the expulsion to the county board of education.

- Notice of the education alternative placement to be provided to the pupil during the time of expulsion.

- Notice of the obligation of the parent, guardian, or pupil under *Educ. Code § 48915.1(b)*, on the pupil's enrollment in a new school district, to inform that district of the pupil's expulsion.

A decision of the governing board whether to expel a pupil must be made within 10 school days following the conclusion of the hearing, unless the pupil requests in writing that the decision be postponed. If the hearing is held by a hearing officer or an administrative panel, or if the district governing board does not meet on a weekly basis, the governing board must make its decision within 40 school days after the pupil's removal from the pupil's school of attendance for the incident for which the recommendation for expulsion is made by the principal or superintendent, unless the pupil requests in writing that the decision be postponed [*Educ. Code § 48918(a)*; *see § 513.40[5]*].

The governing board must maintain a record of each expulsion, including the cause for it. Records of expulsions are a nonprivileged, disclosable public record. The expulsion order and the causes for it are recorded in the pupil's mandatory interim record and forwarded to any school in which the pupil subsequently enrolls on receipt of a request for the pupil's school records from the admitting school [*Educ. Code § 48918(k)*]. The pupil's name and the offense committed must be disclosed to the public when the governing board orders the pupil expelled *[80 Ops. Cal. Att'y Gen. 85 (1997)]* .

[8] Suspension of Expulsion Order

A governing board, on voting to expel a pupil, may suspend the enforcement of the expulsion order for a period of not more than one calendar year [*Educ. Code § 48917(a)*]. A school district may suspend enforcement of an expulsion order even if the pupil committed an offense listed in *Educ. Code § 48915(c)*, for which expulsion must be ordered under *Educ. Code § 48915(d) [80 Ops. Cal. Att'y Gen. 85 (1997)* ; for discussion of offenses for which expulsion must be ordered, see *§ 513.40[1]*]. The governing board's criteria for suspending the enforcement of an expulsion order must be applied equally to all pupils, including individuals with exceptional needs as defined in *Educ. Code § 56026* [*Educ. Code § 48917(b)*; *see § 513.40[2]*]. During the expulsion order's suspension period, the pupil is on probationary status [*Educ. Code § 48917(c)*].

As a condition of the suspension, the board may assign the pupil to a school, class, or program that is deemed appropriate for the rehabilitation of the pupil [*Educ. Code § 48917(a)*]. The rehabilitation program may provide for involvement of a parent or guardian, but a parent's or guardian's refusal to participate in the rehabilitation program is not to be considered in the governing board's determination as to whether the pupil has satisfactorily completed the rehabilitation program [*Educ. Code § 48917(a)*].

The governing board may revoke the suspension of an expulsion order under *Educ. Code § 48917* on the pupil's commission of any of the acts enumerated in *Educ. Code § 48900* or for any violation of the district's rules and regulations governing pupil conduct. On revocation of the suspension of an expulsion order, a pupil may be expelled under the terms of the original expulsion order [*Educ. Code § 48917(d)*].

On satisfactory completion of the rehabilitation assignment of a pupil, the pupil must be reinstated by the governing board in a school of the district. On reinstatement, the governing board may also order the expungement of any or all records of the expulsion proceedings [*Educ. Code § 48917(e)*].

A decision of the governing board to suspend an expulsion order does not affect the time period and requirements for filing an appeal of the expulsion order with the county board of education required under *Educ. Code § 48919*. Any appeal must be filed within 30 days of the original vote of the governing board [*Educ. Code § 48917(f)*].

[9] Right to Appeal to County Board of Education

Within 30 days following the decision by a governing board to expel a pupil, the pupil or the pupil's parent or guardian may appeal the decision to the county board of education, which must hold a hearing and render a decision. The board

of education, or in a class 1 or class 2 county a hearing officer or impartial administrative panel, must hold the hearing within 20 school days following the filing of the formal request under *Educ. Code § 48919*. If the county board of education hears the appeal without a hearing conducted pursuant to *Educ. Code § 48919.5*, the board must render a decision within three school days of the hearing conducted under *Educ. Code § 48920*, unless the pupil requests a postponement [*Educ. Code § 48919*].

A county board of education in a class 1 or class 2 county may elect to have appeals under *Educ. Code § 48919* heard by a hearing officer or by an impartial administrative panel appointed by the board [*Educ. Code § 48919.5(a)*; *see Educ. Code § 48919.5(e)(1)-(3)* (definition of class 1 and class 2 counties)]. The hearing officer or impartial administrative panel must prepare a recommended decision, including findings or conclusions required for the decision, for a final decision by the county board of education [*Educ. Code § 48919.5(b)*]. A hearing officer or an impartial administrative panel in a class 1 or class 2 county is also required to hold the hearing within the 20-school-day period.

The period within which an appeal is to be filed is determined from the date a governing board votes to expel, even if enforcement of the expulsion action is suspended and the pupil is placed on probation pursuant to *Educ. Code § 48917*. A pupil who fails to appeal the original action of the board within the prescribed time may not subsequently appeal a decision of the board to revoke probation and impose the original order of expulsion [*Educ. Code § 48919*].

[10] Regulations Establishing Procedures for Expulsion Appeals

The county board of education must adopt rules and regulations establishing procedures for expulsion appeals conducted under *Educ. Code § 48919*. The adopted rules and regulations must include, but need not be limited to, the following [*Educ. Code § 48919*]:

- The requirements for filing a notice of appeal;
- The setting of a hearing date;
- The furnishing of notice to the pupil and the governing board regarding the appeal;
- The furnishing of a copy of the expulsion hearing record to the county board of education;
- Procedures for the conduct of the hearing; and
- The preservation of the record of the appeal.

If the county board of education in a class 1 or class 2 county elects to use the hearing procedures in *Educ. Code § 48919.5*, the board must adopt rules and regulations establishing procedures for expulsion appeals under that statute [*Educ. Code § 48919*; *see Educ. Code § 48919.5(e)(1)-(3)* (definition of class 1 and class 2 counties)].

[11] Obtaining Documents Required for Appeal

The pupil may submit a written request for a copy of the written transcripts and supporting documents from the school district simultaneously with the filing of the notice of appeal with the county board of education. The school district must provide the pupil with the transcriptions, supporting documents, and records within 10 school days following the pupil's written request. On receipt of the records, the pupil must immediately file suitable copies of these records with the county board of education [*Educ. Code § 48919*; *see § 513.40[12]*].

[12] Hearing of Appeal by County Board

Notwithstanding the provisions of *Educ. Code § 35145* and *Gov. Code § 54950*, the county board of education must hear an appeal of an expulsion order in closed session unless the pupil's guardian requests that the hearing be a public meeting. Such a request must be made in writing at least five days before the date of the hearing. If the submission of a request for a public meeting is timely, the county board of education must honor the request. Whether the hearing is conducted in closed or public session, the county board may meet in closed session for the purpose of deliberations. If the county board admits any representative of the pupil or the school district, the board must, at the same time, admit representatives from the opposing party [*Educ. Code § 48920*].

The county board of education must determine the appeal on the basis of the record of the hearing before the governing board of the district, together with such applicable documentation or regulations as may be ordered. Unless a de novo proceeding is granted as provided in *Educ. Code § 48923* [*see § 513.40[15]*], no evidence other than that contained in the record of the proceedings of the governing board may be heard by the county board [*Educ. Code § 48921*].

The pupil has the responsibility of submitting a written transcript of the hearing for review by the county board. The pupil must bear the cost of the transcript except in the following circumstances [*Educ. Code § 48921*]:

- When the pupil's parent or guardian certifies to the school district that he or she cannot reasonably afford the cost of the transcript because of limited income or exceptional necessary expenses, or both; or

- In a case in which the county board reverses the decision of the local governing board, the county board must require that the local board reimburse the pupil for the cost of the transcript.

[13] Hearing of Appeal by Hearing Officer or Administrative Panel

A county board of education in a class 1 or class 2 county may have a hearing officer pursuant to *Gov. Code § 27720 et seq.*, or an impartial administrative panel of three or more certificated persons appointed by the county board of education, hear appeals filed under *Educ. Code § 48919* [*Educ. Code § 48919.5(a)*; *see Educ. Code § 48919.5(e)(1)-(3)* (definition of class 1 and class 2 counties)]. However, members of an impartial administrative panel may not be employees or members of the governing board of the school district from which the pupil filing the appeal was expelled. Nor may the hearing officer or any member of the administrative panel hearing a pupil's appeal have served as the hearing officer or as a member of the administrative panel that conducted the pupil's expulsion hearing [*Educ. Code § 48919.5(a)*].

A hearing officer or impartial administrative panel may not issue a final order after conducting a hearing pursuant to *Educ. Code § 48919.5*. Rather, the hearing officer or administrative panel must prepare a recommended decision, including any findings or conclusions required for that decision, and submit the recommendation and the record to the county board of education within three school days of hearing the appeal [*Educ. Code § 48919.5(b)*]. Within 10 school days of receiving the recommended decision of the hearing officer or the impartial administrative panel, the county board of education must review the decision and the record and render a final order of the board [*Educ. Code § 48919.5(d)*]. The procedural requirements of *Educ. Code §§ 48919*, *48920*, *48921*, *48922*, *48923*, and *48925* are applicable to a hearing conducted pursuant to *Educ. Code § 48919.5* [*Educ. Code § 48919.5(c)*; for discussion of review by county board, *see § 513.40[14]*].

[14] Scope of Review by County Board

The review by the county board of the decision of the governing board is limited to the following questions [*Educ. Code § 48922(a)*]:

- Whether the governing board acted without or in excess of its jurisdiction;

- Whether or not there was a fair hearing before the governing board;
- Whether or not there was a prejudicial abuse of discretion in the hearing; or
- Whether or not there is relevant and material evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the governing board.

A proceeding without or in excess of jurisdiction, as used in *Educ. Code § 48922(a)*, includes, but is not limited to, (1) a situation when an expulsion hearing is not commenced within the time periods prescribed by *Educ. Code §§ 48900-48925, (2)* a situation when an expulsion order is not based on the acts enumerated in *Educ. Code § 48900,* or *(3)* a situation involving acts not related to school activity or attendance [*Educ. Code § 48922(b)*].

An abuse of discretion, for purposes of *Educ. Code § 48922*, is established if (1) school officials have not met the procedural requirements of *Educ. Code §§ 48900-48925, (2)* the decision to expel a pupil is not supported by the findings prescribed by *Educ. Code § 48915*, or *(3)* the findings are not supported by the evidence [*Educ. Code 48922(c)*].

A county board of education may not reverse the decision of a governing board to expel a pupil based on a finding of an abuse of discretion unless the county board of education also determines that the abuse of discretion was prejudicial [*Educ. Code § 48922*].

[15] Decision by County Board

If the county board finds that relevant and material evidence exists which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the governing board, it may either (1) remand the matter to the governing board for reconsideration and order the pupil reinstated pending the reconsideration, or (2) grant a hearing de novo on reasonable notice to the pupil and to the governing board to be conducted in accordance with the procedures set forth in *Educ. Code § 48919* [*Educ. Code § 48923(a)*].

If the county board determines that the decision of the governing board is not supported by the findings required by *Educ. Code § 48915*, but evidence supporting the required findings exists in the record of the proceedings, the county board must remand the matter to the governing board for adoption of the required findings. The remand for adoption and inclusion of the required findings will not result in an additional hearing under *Educ. Code § 48918*, except that final action to expel the pupil based on the revised findings of fact must meet all requirements of *Educ. Code § 48918(j)* and *(k)* [*Educ. Code § 48923(b)*].

In all other cases, the county board must enter an order either affirming or reversing the decision of the governing board. In any case in which the county board enters a decision reversing the local board, the county board may direct the local board to expunge the record of the pupil and the records of the district of any references to the expulsion action, and the expulsion will be deemed not to have occurred [*Educ. Code § 48923(c)*].

The decision of the county board of education is final and binding on the pupil and on the governing board of the school district. The pupil and the governing board must be notified of the final order of the county board, in writing, either by personal service or by certified mail. The order becomes final when rendered [*Educ. Code § 48924*].

[16] Judicial Review

An expulsion order is apparently reviewable by petition for administrative mandamus under *Code Civ. Proc. § 1094.5* [*see, e.g., Miller v. Dailey (1902) 136 Cal. 212, 214-220, 68 P. 1029* ; *Fremont Union High School District v. Santa*

Clara County Board of Education (1991) 235 Cal. App. 3d 1182, 286 Cal. Rptr. 915 ; *Noonan v. Green (1969) 276 Cal. App. 2d 25, 26-31, 80 Cal. Rptr. 513* ; *Myers v. Arcata etc. School Dist. (1969) 269 Cal. App. 2d 549, 552, 563, 75 Cal. Rptr. 68]* . The expelled student must, however, exhaust his or her administrative remedies, including appeal to the county board of education, before instituting a mandate proceeding [*see Noonan v. Green (1969) 276 Cal. App. 2d 25, 29-31, 80 Cal. Rptr. 513]* . For a discussion and forms relating to administrative mandate proceedings, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

For a form of petition for writ of mandate to review an expulsion order, see *§ 513.95*.

[17] Enrollment in Different School District After Expulsion

[a] In General

If the governing board receives a request for enrollment from a pupil who has been expelled from another school district for an act other than those described in *Educ. Code § 48915(a)* [*see § 513.40[1]*], the board must hold a hearing, conducted according to the rules and regulations governing expulsion procedures, as set forth in *Educ. Code § 48918*, to determine whether the applicant poses a continuing danger either to the pupils or employees of the enrolling school district [*Educ. Code § 48915.1(a)*; *see §§ 513.40[5], [6]*]. The enrolling school district may request information regarding the applicant's expulsion from his or her former school district, and the district receiving the request must respond within five working days [*Educ. Code § 48915.1(a)*].

On enrollment in a new district, the expelled pupil's parent or guardian (or the pupil if he or she is emancipated or of legal age) must inform the receiving district of his or her status with the previous district. If this information is not provided to the receiving district and the district later determines that the pupil was expelled from the previous school, the lack of compliance must be recorded and discussed at the hearing [*Educ. Code § 48915.1(b)*].

If after a hearing, the board determines that the pupil poses a potential danger to the pupils or employees of the enrolling district, it may deny enrollment for the remainder of the expulsion period [*Educ. Code § 48915.1(c)*]. If the board determines that the pupil does not pose such a danger, the board must permit the pupil to enroll, provided that the pupil satisfies the residency requirements set forth in *Educ. Code § 48200* or can enroll by interdistrict agreement [*Educ. Code § 48915.1(e)*]. The governing board may also consider the options of denying or permitting enrollment, or permitting conditional enrollment in a regular school program or another educational program [*Educ. Code § 48915.1(d)*].

A pupil expelled from school for any of the offenses listed in *Educ. Code § 48915(a)* will not be permitted to enroll in any other school or school district during the period of expulsion, unless it is a county community school, a juvenile court school, or a community day school [*Educ. Code § 48915.2(a)*; *see also Educ. Code § 1980 et seq.* (community schools) and *Educ. Code § 48645 et seq.* (juvenile court schools)]. After a determination, pursuant to a hearing under *Educ. Code § 48918*, that an individual expelled from another school district for an offense listed in *Educ. Code § 48915(a)* does not pose a danger to the pupils or employees of the school district, the governing board may permit the individual to enroll in the school district after the term of expulsion, if the pupil has established legal residence in the school district, or if the pupil is enrolled in the school pursuant to an interdistrict agreement [*Educ. Code § 48915.2(b)*].

[b] Disclosure of Expulsion Records

Under *Educ. Code § 49076*, a school district is not authorized to permit access to pupil records to any person without written parental consent or under judicial order with certain exceptions. However, records of expulsions, which school boards are required to keep, are a non-privileged, disclosable public record [*Educ. Code § 48918*; *see 80 Ops. Cal. Atty. Gen. 85, 91 (1997)* (school board's public action to expel student must include student's name and reason for expulsion, and this information must be included in school district responses to requests from public for expulsion records)]. The

federal Family Educational Rights and Privacy Act (FERPA) provides for the privacy of education records, defined as documents containing information directly related to a student or maintained by an educational agency or institution [*20 U.S.C. § 1232g(a)(4)(A)*]. FERPA preempts *Educ. Code § 48918* in that § 48918 requires the public disclosure of student expulsion records while FERPA conditions the receipt of federal funds on protecting students and their parents from disclosure of this very type of record [*Rim of the World Unif. Schl. Dist. v. Superior Court (2003) 104 Cal. App. 4th 1393, 1396-1399, 129 Cal. Rptr. 2d 11]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawStudentsDisciplinary ProceedingsAppeals & ReviewsEducation LawStudentsDisciplinary ProceedingsDecisionsEducation LawStudentsDisciplinary ProceedingsDue ProcessEducation LawStudentsDisciplinary ProceedingsNoticeEducation LawStudentsDiscipline MethodsExpulsions

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§ 513.41 Corporal Punishment

The protection against corporal punishment extends to children while they are under the control of the public schools [*Educ. Code § 49000*]. No person employed by or engaged in a public school may inflict, or cause to be inflicted, corporal punishment on a pupil. Every resolution, bylaw, rule, ordinance, or other act or authority permitting or authorizing the infliction of corporal punishment on a pupil attending a public school is void and unenforceable [*Educ. Code § 49001(b)*].

For purposes of *Educ. Code § 49001*, "corporal punishment" means the willful infliction of, or willfully causing the infliction of, physical pain on a pupil. An amount of force that is reasonable and necessary for a person employed by or engaged in a public school to quell a disturbance threatening physical injury to persons or damage to property, for purposes of self-defense, or to obtain possession of weapons or other dangerous objects within the control of the pupil, is not and may not be construed to be corporal punishment within the meaning and intent of *Educ. Code § 49001*. Physical pain or discomfort caused by athletic competition or other such recreational activity, voluntarily engaged in by the pupil, is not and may not be construed to be corporal punishment within the meaning and intent of *Educ. Code § 49001* [*Educ. Code § 49001(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawStudentsDiscipline MethodsCorporal Punishment

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§ 513.42 Parental Liability for Student Misconduct

Notwithstanding *Civ. Code § 1714.1*, the parent or guardian of any minor whose willful misconduct results in injury or death to any pupil or any person employed by or performing volunteer work for a school district or private school, or who willfully cuts, defaces, or otherwise injures any real or personal property belonging to a school district or private school or any personal property of any school employee is liable for all damages so caused by the minor. The parent's or guardian's liability, however, may not exceed $10,000. The parent or guardian of a minor is also liable for any school property loaned to a minor that is not returned on demand of a school employee authorized to make the demand [*Educ. Code § 48904(a)*]. For a further discussion of parental liability for the willful misconduct of minors, see Ch. 394, *Parent and Child* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawStudentsMisconductGeneral OverviewFamily LawFamily Relationships & TortsTort LiabilityChild TortsTortsVicarious LiabilityFamily MembersChildren & Parents

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[Reserved]

§§ 513.43[Reserved]

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§ 513.60 California Points and Authorities

For memoranda of points and authorities for use in civil rights actions, see California Points and Authorities, Ch. 35, *Civil Rights* (Matthew Bender)

For memoranda of points and authorities for use in class actions, see California Points and Authorities, Ch. 41, *Class and Representative Actions* (Matthew Bender)

For memoranda of points and authorities for use in actions for declaratory relief, see California Points and Authorities, Ch. 67, *Declaratory Relief* (Matthew Bender)

For memoranda of points and authorities for use in actions for injunctive relief, see California Points and Authorities, Ch. 116, *Injunctions* (Matthew Bender)

For memoranda of points and authorities for use in mandate proceedings, see California Points and Authorities, Ch. 150, *Mandate and Prohibition* (Matthew Bender)

For memoranda of points and authorities for use in actions against public entities and officers generally, see California Points and Authorities, Ch. 196, *Public Entities* (Matthew Bender)

For memoranda of points and authorities for use in a mandate proceeding to review the expulsion of a pupil from a public school, see California Points and Authorities, Ch. 210, *Schools* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil

Rights LawPractice & ProcedureGeneral Overview

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45-513 California Forms of Pleading and Practice--Annotated § 513.61

§ 513.61 Federal Constitution

Freedoms of speech, assembly, and press. *U.S. Const., amend. I*

Right to due process and equal protection of laws. *U.S. Const., amend. XIV*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of AssemblyConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of FreedomConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionConstitutional LawSubstantive Due ProcessScope of ProtectionConstitutional LawEqual ProtectionScope of Protection

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45-513 California Forms of Pleading and Practice--Annotated § 513.62

§ 513.62 State Constitution

Freedoms of speech and press. *Cal. Const., art. I, § 2(a)*

Right to due process and equal protection of laws. *Cal. Const., art. I, § 7(a)*

Rights guaranteed by California Constitution as not dependent on those guaranteed by United States Constitution. *Cal. Const., art. I, § 24*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of AssemblyConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of FreedomConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionConstitutional LawSubstantive Due ProcessScope of ProtectionConstitutional LawEqual ProtectionScope of ProtectionConstitutional LawState Constitutional Operation

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§ 513.63 Federal Statutes

Individuals with Disabilities Education Act. *20 U.S.C. § 1400 et seq.*

Procedural safeguards for disabled children and their parents. *20 U.S.C. § 1415*

Federal Equal Access Act. *20 U.S.C. § 4071*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawDiscriminationIndividuals With Disabilities Education ActGeneral OverviewEducation LawDiscriminationIndividuals With Disabilities Education ActProcedural SafeguardsEducation LawReligion in SchoolsFacilities Use

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45-513 California Forms of Pleading and Practice--Annotated § 513.64

§ 513.64 State Statutes

[1] Rights and Duties Generally

Prohibition of discrimination on basis of disability, gender, nationality, race or ethnicity, religion, sexual orientation, or any basis contained in prohibition of hate crimes set forth in *Penal Code § 422.55*, with regard to educational benefits, programs, financial aid, or employment. *Educ. Code §§ 220-230*

Pupil's right to refuse to participate in educational project involving harmful or destructive use of animals. *Educ. Code §§ 32255-32255.6*

Liability of principal or designee for damages caused by false and reckless report to parents of student's alcohol or drug abuse. *Educ. Code § 44049*

Teachers' duty to enforce school regulations. *Educ. Code § 44805*

Teachers' duty to hold pupils to strict account for conduct. *Educ. Code § 44807*

Principal, principal's designee, or any other person reporting known or suspected act described in *Educ. Code § 48902(a)* (violation of *Pen. Code 245*) or *Educ. Code § 48902(b)* (violation of *Educ. Code § 48900(c), (d)*) is not civilly or criminally liable as result of making any report authorized by *Educ. Code § 48900 et seq.* unless it can be proven that false report was made and person knew report was false or report was made with reckless disregard for its truth or falsity. *Educ. Code § 48902(d)*

Parental liability for willful pupil misconduct. *Educ. Code §§ 48904, 48905*

Withholding of grades, diploma, or transcripts until pupil or parent pays for damages to school employee or property. *Educ. Code §§ 48904(b), 48904.3*

Right of public school students to freedom of speech. *Educ. Code § 48907*

Students' duty to comply with school regulations, pursue required course of study, and submit to authority of teachers. *Educ. Code § 48908*

Student organizations. *Educ. Code §§ 48930-48938*

Access to and privacy of pupil records. *Educ. Code §§ 49060-49078*

Adoption of maximum weight standards for textbooks used by pupils in elementary and secondary schools. *Educ. Code § 49415*

Equal access of all students to technological educational programs. *Educ. Code §§ 51006, 51007*

[2] Special Education

Individual instruction for certain hospitalized, temporarily disabled children. *Educ. Code §§ 48206.3-48208*

Expulsion procedure. *Educ. Code § 48915.5*

Right of individuals with exceptional needs to free appropriate public education. *Educ. Code §§ 56000, 56040*

Definitions. *Educ. Code §§ 56020-56033*

Administration of special education programs. *Educ. Code § 56100 et seq.*

Elements of local plans. *Educ. Code §§ 56200-56243*

Identification and referral of individuals with exceptional needs. *Educ. Code §§ 56300-56303*

Assessment. *Educ. Code §§ 56320-56329*

Development and review of individualized education program. *Educ. Code §§ 56340-56347, 56380, 56381*

Implementation of plan and services required as part of plan. *Educ. Code §§ 56360-56393*

Procedural safeguards. *Educ. Code §§ 56500-56506*

Confidentiality of information. *Educ. Code § 56515*

Funding of special education programs. *Educ. Code §§ 56700-56830*

[3] Student Discipline

Adoption of rules for government and discipline of schools in school district. *Educ. Code §§ 35291-35291.7*

Grounds for suspension or expulsion. *Educ. Code §§ 48900, 48900.2, 48900.3, 48900.4, 48900.7, 48915(a)*

Teacher's authority to request classroom attendance of parent or guardian of pupil suspended for specified acts. *Educ.*

Code § 48900.1

Suspension procedure. *Educ. Code §§ 48911, 48911.5, 48914*

Expulsion procedure. *Educ. Code §§ 48911.5, 48915.5, 48918*

Appeal of expulsion order to county board of education. *Educ. Code §§ 48919-48924*

With regard to suspension and expulsion, pupils in California School for the Blind and two California Schools for the Deaf have same due process procedural protections afforded to pupils in California public school districts. *Educ. Code § 48927(c)*

Penalty for assault or battery committed on school property or against teachers and other specified school employees. *Penal Code §§ 241.2, 241.3, 241.6, 243.2, 243.3, 243.6*

Corporal punishment. *Educ. Code §§ 49000, 49001*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawCivil LiabilityGeneral OverviewEducation LawDiscriminationGeneral OverviewEducation LawDiscriminationEqual Educational OpportunitiesGeneral OverviewEducation LawFaculty & StaffDutiesGeneral OverviewEducation LawStudentsDisciplinary ProceedingsGeneral Overview

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§ 513.65 Federal Regulations

Assistance to states for education of handicapped children. 45 C.F.R. §§ 121a.1-121a.754

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawDiscriminationIndividuals With Disabilities Education ActFundingEducation LawStudentsStudent RecordsGeneral OverviewPublic Health & Welfare LawSocial ServicesDisabled & Elderly PersonsEducation & TrainingGeneral Overview

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§ 513.66 State Regulations

Pupil records. *5 Cal. Code Reg. §§ 50, 51, 400-450*

Special education and handicapped children. *5 Cal. Code Reg. § 3000 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawDiscriminationGender & Sex DiscriminationSexual HarassmentEducation LawDiscriminationIndividuals With Disabilities Education ActEnforcementEducation LawStudentsSearch & SeizureGeneral Overview

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45-513 California Forms of Pleading and Practice--Annotated § 513.67

§ 513.67 Decisions

[1] Educational Malpractice

School district's failure to comply with time requirements in assessment of student referred to special education was not negligence. *Keech v. Berkeley Unified School Dist. (1984) 162 Cal. App. 3d 464, 468-469, 210 Cal. Rptr. 7*

Person claiming to have been inadequately educated by public school system has no cause of action in tort against public school authorities; school officials are under no actionable duty of care to educate students adequately. *Peter W. v. San Francisco Unified Sch. Dist. (1976) 60 Cal. App. 3d 814, 817, 825, 131 Cal. Rptr. 854*

In action by student club against school district for violation of club member's rights under Federal Equal Access Act (FEAA) [*20 U.S.C. § 4071*] by refusing to grant club rights enjoyed by other clubs permitted to meet on campus, trial court erred in granting school district summary judgment, holding that other clubs were curriculum related, when court's finding that other clubs' provision of community service to satisfy graduation requirement established curriculum relatedness was erroneous, since community service clubs are at best only marginally related to usual high school curriculum so that making participation in clubs satisfy graduation requirement did not transform clubs into scholastic endeavors; and when evidence of inclusion of units in curriculum on subject of community service was insufficient to establish that no triable issue of material fact existed as to curriculum relatedness of service clubs at issue or of excluded club under community service criteria, since school district presented no evidence as to whether or to what extent teachers actually taught subject of community service in classroom; further, FEAA requires only that on-campus meetings of student groups be student initiated, so that initiation of club itself by faculty did not offend. *FEAA. Van Schoick v. Saddleback Valley Unified School Dist. (2001) 87 Cal. App. 4th 522, 104 Cal. Rptr. 2d 562*

[2] Freedom of Expression

School officials did not violate *First Amendment* by confiscating pro-drug banner at school-sanctioned and school-supervised event held offsite and suspending student responsible for it. Morse v. Frederick (2007) 551U.S.393,

127 S. Ct. 2618, 2625-2629, 168 L. Ed. 2d 290

School prohibition of use of lewd, indecent, vulgar, or offensive speech or conduct by students in public discourse was not prohibited by *U.S. Const., amend. I.* Bethel School Dist. No. 403 v. *Fraser (1986) 478 U.S. 675, 685-686, 106 S. Ct. 3159, 92 L. Ed. 2d 549*

Students and teachers do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. *Tinker v. Des Moines Community School Dist. (1969) 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731*

School administrator did not violate high school student's *First Amendment* free expression rights by requiring musical numbers to be played at high school graduations to be secular in nature, thus requiring student to select musical piece other than Ave Maria to play at graduation, where, although instrumental performance of Ave Maria was protected speech under *First Amendment*, school district's restriction was constitutionally permissible within context given that district was acting to avoid repeat of earlier controversy by prohibiting any reference to religion at its graduation ceremonies and district's policies regarding religious musical performances evidenced desire to remain neutral with regard to all religions. *Nurre v. Whitehead (9th Cir. 2009) 580 F.3d 1087, 1092-1095*

Middle school students who walked out of school to participate in protests against immigration legislation failed to raise triable issue as to claim that school principal violated their *First Amendment* rights by disciplining them for leaving school without permission, where, although there was no evidence students gave speeches, discussed matters of immigration reform, or carried placards or signs conveying their messages during walkout, reasonable jury could have concluded students were engaging in expressive conduct, but where students did not have retaliation claim based on threats of discipline for *First Amendment* activity because principal's threat was itself based upon lawful consequences and was not actually administered, and where disciplining students for walking out of school did not violate their *First Amendment* rights because they were punished for disruption caused by leaving campus without permission, not for expressive activity and school's anti-truancy policy was content-neutral rule furthering important interest unrelated to suppression of expression, which was narrowly tailored to government's legitimate interests in enforcing compulsory education, keeping minors safe from influences of street, maximizing school funding based on attendance, and limiting potential liability for negligent failure to supervise truant student properly. Even assuming students had shown they engaged in constitutionally protected activity, their claim would have failed because they failed to show that principal's actions had retaliatory motive. *Corales v. Bennett (9th Cir. 2009) 567 F.3d 554, 562-569*

School district's viewpoint- and content-neutral uniform dress policies did not violate students' *First Amendment* free expression rights, where district's articulated interests in increasing student achievement, promoting safety, and enhancing a positive school environment qualified as important sufficiently to withstand intermediate scrutiny, district's interests were unrelated to suppression of free expression, and policies did not restrict speech more than necessary. Policies did not infringe on students' *First Amendment* rights by compelling students to express support for conformity, with which some students disagreed, where school did not force student to communicate any message, including expressing support for conformity or community affiliation, simply by requiring student to wear clothes mandated by its uniform policy. *Jacobs v. Clark County Sch. Dist. (9th Cir. 2008) 526 F.3d 419, 427-438*

High school did not violate Equal Access Act by denying recognition to religious club based on discriminatory membership criteria rather than on content of speech at meetings. Club also failed to show denial of recognition based on its general membership restrictions burdened *First Amendment* interest prohibiting forced inclusion. *Truth v. Grohe (9th Cir. 2007) 499 F.3d 999, 1009-1015*

Under standard articulated in *Tinker v. Des Moines Independent Community School District (1969) 393 U.S. 503, 514, 89 S. Ct. 733, 21 L. Ed. 2d 731* , high school varsity basketball students' petition requesting that coach resign and complaints against coach were protected speech because they could not reasonably have led school officials to forecast substantial disruption of or material interference with school activity. However, students' refusal to board bus to play in

game was not protected by *First Amendment* because, even if expressive conduct, it substantially disrupted and materially interfered with operation of the varsity boys basketball program. On remand to district court for consideration of students' claims of retaliation for exercise of speech, court was required to determine whether students offered evidence from which reasonable jury could conclude petition and complaints against coach were substantial or motivating factor in decision to suspend them permanently from basketball team, because if so, defendants would not be entitled to summary judgment unless they could show they would have imposed permanent suspension even in absence of petition and complaints against coach. *Pinard v. Clatskanie Sch. Dist. 6J (9th Cir. 2006) 467 F.3d 755, 763-771*

Petition and complaints by members of high school basketball team against their coach were protected speech because they could not reasonably have led school officials to forecast substantial disruption of or material interference with school activity. However, students' refusal to board bus to play in out-of-town game was not protected by *First Amendment*. Even if expressive conduct, it substantially disrupted and materially interfered with operation of varsity boys' basketball program. Remand of claim of retaliation based on suspension from basketball team was required for district court to determine whether team members offered evidence from which reasonable jury could conclude petition and complaints against coach were substantial or motivating factor in decision to suspend them permanently from team, not simply boycott of game. *Pinard v. Clatskanie School Dist. 6J (9th Cir. 2006) 446 F.3d 964, 972-979* .

Public high school could prohibit student from wearing T-shirt with message condemning and denigrating other students on basis of their sexual orientation without violating *First Amendment*. Evidence was sufficient to permit school officials to reasonably find that wearing of T-shirt collided with rights of other students in most fundamental way. *Harper v. Poway Unif. School Dist. (9th Cir. 2006) 445 F.3d 1166, 1185-1191*

School officials were properly granted qualified immunity and did not violate student's *First Amendment* rights by allowing references to God as they related to student's own beliefs but censoring sectarian, proselytizing portions of speech he gave at his high school graduation ceremony, and rejecting "disclaimer" stating that views of student speakers did not represent views of school district but allowing student to hand out copies of full text of his proposed draft speech just outside graduation ceremony site, when school officials' acts were necessary to avoid violating *Establishment Clause* to avoid appearance of government sponsorship of religion and because allowing speech would have had impermissibly coercive effect on dissenters, requiring them to participate in religious practice even by their silence. *Lassonde v. Pleasanton Unif. Schl. Dist. (9th Cir. 2003) 320 F.3d 979, 982-985*

Under totality of facts, high school did not violate student's *First Amendment* expression rights by temporarily expelling student based on poem which school officials perceived as implied threat of violent harm to himself and others, when, even though content of poem was factor in their decision, school officials had duty to prevent potential violence on campus to student himself or to other students and when officials decided not to allow student to attend class, they were aware of substantial number of facts that in isolation would probably not have warranted their response, but in combination gave them reasonable basis for their actions, including student's previous suicidal ideations, previous domestic dispute when student was forced to move out of family home, pressure placed on student by family to rescind charges filed against his father as result of domestic dispute, that student had broken up with his girlfriend and was reportedly stalking her, several disciplinary problems in past at least one of which involved some violence, and that he had been absent from school in three days before turning in poem to his English teacher; when poem itself was filled with imagery of violent death and suicide, which at its most mild interpretation appeared to be "cry for help"; and when this occurred against backdrop of recent actual school shootings. However, placement and retention in student's file of negative documentation did violate his rights, when letter was written and placed in file after perceived threat had subsided and student had returned to classes. *LaVine v. Blaine School Dist. (9th Cir. 2001) 257 F.3d 981*

Controversial student editorial on immigration was protected speech under *Educ. Code § 48907*, where there was no evidence student-author intended to cause substantial disruption of school, as opposed to other action, such as enforcement of immigration laws. School district did not violate *Educ. Code § 48907* by holding meetings providing opportunity for protestors to express their reactions or by sending letter disavowing author's viewpoint, but did violate §

48907 by announcing that editorial was not protected speech, which was likely to chill future speech. *Smith v. Novato Unif. School Dist. (2007) 150 Cal. App. 4th 1439, 1454-1465, 59 Cal. Rptr. 3d 508*

High school administration could deny access to school by members of group wishing to distribute anti-abortion, pro-abstinence literature to students before classes, because school campuses are not public fora, and statutes and school district procedures focused on maintenance of peaceful, nonconfrontational environment for educational activities and school administration acted reasonably in determining that group's presence on campus would disrupt that atmosphere. *Reeves v. Rocklin Unified School Dist. (2003) 109 Cal. App. 4th 652, 660-666, 135 Cal. Rptr. 2d 213*

Official school publications are limited forum in which the state has compelling interest in prior restraint of profanity. *Lopez v. Tulare Joint Union High School District (1995) 34 Cal. App. 4th 1302, 1328-1330, 40 Cal. Rptr. 2d 762*

Hair style, without more, is not per se expression of speech within protection of *First Amendment*; under *Fourteenth Amendment*, student hairstyle regulation need only be justified by some reasonable relationship between legitimate educational concerns of school administration and controlling male hair length and style. *Montalvo v. Madera Unified School Dist. Bd. of Educ. (1971) 21 Cal. App. 3d 323, 334-335, 98 Cal. Rptr. 593*

First Amendment does not guarantee student right to hold on-campus rallies when evidence showed that similar rallies in past had substantially disrupted educational process and when school provided readily available forum in which to exercise right of free speech. *Lipkis v. Caveney (1971) 19 Cal. App. 3d 383, 385-387, 96 Cal. Rptr. 779*

[3] Freedom of Religion

Federal government's distribution of funds to state and local governmental agencies as part of longstanding school aid program known as Chapter 2, which in turn lend educational materials and equipment to public and private schools, many of which are religiously affiliated, does not violate *Establishment Clause*, where Chapter 2 has undisputed secular purpose, and where Chapter 2 neither results in religious indoctrination by government nor defines its recipients by reference to religion. *Mitchell v. Helms (2000) 530 U.S. 793, 120 S. Ct. 2530, 2540, 147 L. Ed. 2d 660*

State statute and school district policy requiring teacher-led recitation of Pledge of Allegiance by students in public schools, but not compelling students to participate, and Pledge itself, did not constitute establishment of religion prohibited by United States Constitution, where there was no excessive entanglement with religion, primary effect was neither to advance nor inhibit religion, and Congress' purpose in enacting Pledge was patriotic, not to try to impress religious doctrine upon anyone; where Pledge did not violate Endorsement Test, i.e., did not have purpose or effect of endorsing, favoring, or promoting religion; where recitation of Pledge in public school classroom did not unconstitutionally coerce objecting students into affirming belief in God; and where "under God" was added as description of "one Nation" primarily to reinforce idea that U.S. was founded upon concept of limited government, in stark contrast to unlimited power exercised by communist governments. *Newdow v. Ria Lindo Union Sch. Dist. (9th Cir. 2010) 597 F.3d 1007, 1017-1042*

School district's policy requiring musical numbers to be played at high school graduations to be secular in nature, requiring student to select musical piece other than Ave Maria to play at graduation, did not violate student's *Establishment Clause* rights to be free from hostility to religion, where district prohibited performance of Ave Maria in effort to avoid conflict with *Establishment Clause*; where reasonable person, informed as to history of district's prohibition on performance, would understand that action had secular effect of maintaining neutrality and ensuring district's continued compliance with *Establishment Clause*; and where policy did not create either administrative or political entanglement with religion. *Nurre v. Whitehead (9th Cir. 2009) 580 F.3d 1087, 1095-1098*

Public high school could prohibit student from wearing T-shirt with message condemning and denigrating other

students on basis of their sexual orientation without violating *First Amendment*. Restriction regarding T-shirt did not impose substantial burden on free exercise of student's religious beliefs, and school had compelling interest in providing proper educational environment for students and its actions were narrowly tailored to achieve that end. Also, there was no evidence school's actions were based on other than entirely secular and legitimate aim of protecting rights of students and promoting tolerant and safe learning environment and no evidence school authorities sought to coerce or encourage student to participate in some other religion or to adopt state-supported or other religious faith. *Harper v. Poway Unif. School Dist. (9th Cir. 2006) 445 F.3d 1166, 1186-1191*

School district's policy of treating after school religious groups differently than non-religious groups violated federal Equal Access Act when access to student body association funding, yearbook, public address system, and bulletin boards is required by the Act. Act did not similarly encompass policy's restriction of religious group's access to student/staff time, school supplies, vehicles, or AV equipment, but such policy violated *First Amendment*, when, while not required to grant student clubs access to these benefits, school had chosen to do so and may not deny access to some groups without compelling government interest that is narrowly drawn to achieve that end, and when district's restriction on access to facilities was based purely on religious group's religious viewpoint in violation of *First Amendment*, and when requiring that district grant religious groups access would ensure neutrality rather than violate *Establishment Clause*. *Prince v. Jacoby (9th Cir. 2002) 303 F.3d 1074, 1078-1094*

Oregon regulation precluding school district from providing special education services to student at sectarian school does not violate federal constitution's guarantee of free exercise of religion or prohibition of establishment of religion. *WJM ex rel. KDM v. Reedsport Sch. Dist. (9th Cir. 1999) 196 F.3d 1046*

Granting official school recognition under Federal Equal Access Act (FEAA) [*20 U.S.C. § 4071*] of student club with avowed aim of having Christian presence on campus and influencing others into Christian faith would not result in violation of either federal constitutional *establishment clause* or its state constitutional analog, when merely granting club same privileges enjoyed by all other campus clubs offends neither federal nor state constitution; when involvement of teachers with club does not tip *establishment clause* balance against club since their involvement occurs off campus and only nonparticipating faculty member would be involved on campus so that students would not be exposed to teachers' involvement in club, which would make unlikely that club's on-campus meetings would convey message of state approval or endorsement of religion; and when FEAA was carefully crafted to ensure against possibility that religious group's access to public high school's campus would offend *establishment clause*, and full compliance by club with provisions of FEAA is small price to pay for cost of admission to campus. *Van Schoick v. Saddleback Valley Unified School Dist. (2001) 87 Cal. App. 4th 522, 532, 104 Cal. Rptr. 2d 562*

School district's rejection of sign proffered by private party containing Ten Commandments in response to district's fund raising campaign did not violate party's free exercise rights under *Cal. Const., art. I, § 4*, when party's freedom to worship was not inhibited and when private party is not free to impose religious beliefs on children in educational arena. *DiLoreto v. Board of Educ. of Downey Unif. Sch. Dist. (1999) 74 Cal. App. 4th 267, 278-279, 87 Cal. Rptr. 2d 791*

[4] Right to Public Education

California statutes permitted home schooling as species of private school education exempted from compulsory education laws, but for family with history of dependency court proceedings involving charges of physical abuse, neglect, and failure to prevent sexual abuse, dependency court erred in declining to issue order that two youngest children be sent to private or public school after they were declared dependent due to abuse and neglect of their siblings, where statutory permission to home school could be constitutionally be overridden to protect safety of children. *Jonathan L. v. Superior Court (2008) 165 Cal. App. 4th 1074, 1088-1105, 81 Cal. Rptr. 3d 571*

Education is fundamental interest for purposes of state constitutional provisions guaranteeing equal protection of the

laws. *Serrano v. Priest (1976) 18 Cal. 3d 728, 765-766, 135 Cal. Rptr. 345, 557 P.2d 929 , cert. denied sub nom. Clowes v. Serrano 432 U.S. 907 (1977)* ; *see Serrano v. Priest (1971) 5 Cal. 3d 584, 596 n.11, 604-610, 96 Cal. Rptr. 601, 487 P.2d 1241*

Refusal by school board to furnish transportation is abuse of discretion when failure to provide transportation would totally deprive minor plaintiffs of opportunity to attend school, and when school was in sound fiscal position to meet additional expenses of providing such transportation. *Manjares v. Newton (1966) 64 Cal. 2d 365, 373-376, 49 Cal. Rptr. 805, 411 P.2d 901*

Opportunity to attend and receive instruction at public schools is enforceable legal right. *Piper v. Big Pine School Dist. (1924) 193 Cal. 664, 669-670, 226 P. 926* ; *Ward v. Flood (1874) 48 Cal. 36, 50*

Right to participate in interscholastic athletics is not fundamental right entitled to strict scrutiny review on equal protection, but rather is tested by rational basis standard, despite fact that public education itself is fundamental right under *California Constitution. Steffes v. California Interscholastic Federation (1986) 176 Cal. App. 3d 739, 748, 222 Cal. Rptr. 355* ; *see California Interscholastic Federation v. Jones (1988) 197 Cal. App. 3d 751, 754, 757-758, 243 Cal. Rptr. 271* (CIF rule restricting student's eligibility for interscholastic athletics to eight semesters is constitutional under rational basis test)

Residency requirement for admission into public schools [*Educ. Code § 48200*] that operated to exclude child of parents admitted into United States on nonimmigrant, nonresident visas was constitutional since it applied uniformly to all persons, regardless of alienage or citizenship. *Anselmo v. Glendale Unified School District (1981) 124 Cal. App. 3d 520, 522, 523, 177 Cal. Rptr. 427*

[5] Search and Seizure

Thirteen-year-old student's *Fourth Amendment* right was violated when she was subjected to search of her bra and underpants by school officials acting on reasonable suspicion she had brought forbidden prescription and over-the-counter drugs to school, where there were no reasons to suspect drugs presented danger or were concealed in her underwear; however, because there was reason to question clarity with which right was established, officials who ordered and conducted unconstitutional search were entitled to qualified immunity from liability. *Safford Unified School Dist. v. Redding (2009) -- U.S. --, 129 S. Ct. 2633, 2639-2644, 174 L. Ed. 2d 354*

Warrant and finding of probable cause are unnecessary in public school context because such requirements would unduly interfere with maintenance of swift and informal disciplinary procedures needed. Board of Education of Independent School District No. 92 of *Bd. of Educ. v. Earls (2002) 536 U.S. 822, 122 S. Ct. 2559, 2564, 153 L. Ed. 2d 735* ; Vernonia School Dist. 47J v. *Acton (1995) 515 U.S. 646, 653, 115 S. Ct. 2386, 132 L. Ed. 2d 564*

Public school district's policy of suspicionless drug testing as requirement for participation in extra-curricular activities was constitutional, when student's privacy interest is limited in public school environment in which state is responsible for maintaining discipline, health, and safety, when manner in which production of urine sample is monitored was negligible intrusion and test results were kept confidential, and when testing students who participate in extracurricular activities is reasonably effective means of addressing school district's legitimate concerns in preventing, deterring, and detecting drug use. Board of Education of Independent School District No. 92 of *Bd. of Educ. v. Earls (2002) 536 U.S. 822, 122 S. Ct. 2559, 2566-2569, 153 L. Ed. 2d 735*

Suspicionless drug testing of athletes as requirement of participation is constitutional. *Vernonia School Dist. 47J v. Acton (1995) 515 U.S. 646, 657-665, 115 S. Ct. 2386, 132 L. Ed. 2d 564*

Child protective services officer's decision to seize and interrogate suspected child abuse victim at school with law enforcement officer present, in absence of warrant, court order, exigent circumstances, or parental consent, violated child's *Fourth Amendment* rights, where general law of search warrants applied to child abuse investigations; where, with direct involvement of law enforcement in in-school seizure and interrogation, child was not seized for some special need beyond normal need for law enforcement. *Greene v. Camreta (9th Cir. 2009) 588 F.3d 1011, 1022-1030*

High school teacher's opening of student's purse to find identification document so she could write referral for student's disruptive behavior without any suspicion student had engaged or was engaging in any proscribed activity justifying search and for which there was no suspicion student had knife or other prohibited item in her purse justifying teacher opening it was unreasonable search and evidence of knife would be suppressed in prosecution of student for carrying knife on school grounds, when student's disruptive behavior in class did not authorize school official to rummage through student's personal belongings, and when student did not refuse request to produce identification. *In re Lisa G. (2004) 125 Cal. App. 4th 801, 805-808, 23 Cal. Rptr. 3d 163*

[6] Sexual Harassment

Under Title IX of Education Amendments of 1972, *20 U.S.C. § 1681 et seq.*, private right of action may lie against a recipient of Title IX funding, such as school board, in cases of "student-on-student" harassment when (1) recipient acts with deliberate indifference to known acts of harassment in its programs or activities, (2) harasser is under school's disciplinary authority, and (3) harassment is so severe, pervasive, and objectively offensive that it effectively bars victim's access to educational opportunity or benefit. *Davis v. Monroe County Board of Education (1999) 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839*

District court properly granted summary judgment to college in student's action under Title IX on ground that college was not deliberately indifferent, when, on receiving actual knowledge of alleged sexual harassment of student by teacher, college provided student with counselors to assist her in documenting and presenting her case before school's committee on sexual harassment, provided her with one-on-one counseling sessions, instructed teacher against whom harassment was alleged to avoid contact with student alleging harassment, conducted hearing, concluded that teacher had sexually harassed student, and imposed number of disciplinary sanctions on teacher; lengthy delay between date of initial complaint and hearing did not constitute deliberate indifference because there were valid reasons for delay, including administrative hurdles, such as formation of sexual harassment hearing committee, student had difficulty retaining counsel, and student had relocated. *Oden v. Northern Marianas College (9th Cir. 2002) 284 F.3d 1058*

Although trial court erred in instructing jury under *Educ. Code § 220* on claim by public students who suffered severe, pervasive, and offensive peer sexual orientation harassment while attending high school, including death threats, being spit on, physical violence and threats of physical violence, vandalism to personal property, and being subject to antigay epithets, by applying negligence principles derived from California Fair Employment and Housing Act (FEHA), instead of the more stringent elements of liability derived from Title IX of the Education Amendments of 1972, where Legislature intended Title IX's elements to govern action under § 220, record contained sufficient evidence to support jury's findings that students suffered violations of *Educ. Code § 220* in school officials' and district's acting with deliberate indifference to antigay harassment to which students were subject by their peers. *Donovan v. Poway Unif. School Dist. (2008) 167 Cal. App. 4th 567, 592-619, 84 Cal. Rptr. 3d 285*

[7] Special Education

IDEA Amendments of 1997 did not categorically prohibit reimbursement for private education costs if child had not previously received special education and related services under authority of public agency. *Forest Grove School Dist. v. T. A. (2009) -- U.S. --, 129 S. Ct. 2484, 2491-2496, 174 L. Ed. 2d 168*

Parents may seek review of due process hearing in United States District Court on their own behalf, unrepresented by counsel even though they are not trained or licensed as attorneys, because IDEA accords to parents rights of their own that can be vindicated in court proceedings, which are not limited to procedural and reimbursement-related matters. *Winkelman v. Parma City Sch. Dist. (2007) 550 U.S. 516, 127 S. Ct. 1994, 1999-2006, 167 L. Ed. 2d 904*

Attorney's fees provision in IDEA does not authorize prevailing parents to recover fees for services rendered by experts in IDEA actions. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy (2006) 548 U.S. 291, 126 S. Ct. 2455, 165 L. Ed. 526, 538*

Burden of proof in administrative due process hearing challenging individualized education plan is on party seeking relief. Thus, burden of persuasion was on child, as represented by his parents, when parents believed child's IEP was inappropriate, and they requested impartial due process hearing. *Schaffer v. Weast (2005) 546 U.S. 49, 126 S. Ct. 528, 533-537, 163 L. Ed. 2d 387*

Under requirement of providing "related services" under IDEA, school district must provide ventilator-dependent student continuous one-on-one nursing services student required during school hours in order to remain in school. *Cedar Rapids Community School District v. Garret F. (1999) 526 U.S. 66, 119 S. Ct. 992, 143 L. Ed. 2d 154*

Appropriate relief under former *20 U.S.C. § 1415(e)(2)* (*now see 20 U.S.C. § 1415(i)(2)*) is not limited in form and includes reimbursement to parents for private special education expenditures if court determines that private placement, rather than proposed individualized educational program, is proper under IDEA; parents' violation of *20 U.S.C. § 1415(e)(3)* by placing child in private school without consent of local school authorities during pendency of hearing proceedings was not waiver of rights under former *20 U.S.C. § 1415(e)(2)* (*now see 20 U.S.C. § 1415(i)(2)*). *Burlington School Comm. v. Massachusetts Dept. of Ed. (1985) 471 U.S. 359, 369-374, 105 S. Ct. 1996, 85 L. Ed. 2d 385*

Whenever remedy under § 504 of Rehabilitation Act [*29 U.S.C. § 794*] is provided with more clarity and precision under former Education of the Handicapped Act (now known as Individuals with Disabilities Education Act) [*20 U.S.C. § 1400 et seq.*], plaintiff is not allowed to circumvent or enlarge on remedies available under EHA by resort to § 504. *Smith v. Robinson (1984) 468 U.S. 992, 1018, 104 S. Ct. 3457, 82 L. Ed. 2d 746*

IDEA [*20 U.S.C. § 1400 et seq.*] requires states receiving federal funding to provide all handicapped children with free appropriate public education, including related services such as supportive services as may be required to assist handicapped child to benefit from special education. *Irving Independent School Dist. v. Tatro (1984) 468 U.S. 883, 889, 104 S. Ct. 3371, 82 L. Ed. 2d 664*

Court's inquiry in suit under *20 U.S.C. § 1415(i)(2)* is twofold: (1) whether state has complied with procedures set forth in IDEA, and (2) whether individualized educational program developed through IDEA's procedures is reasonably calculated to enable child to receive educational benefits; state complies with obligations imposed by Congress if these requirements are met. *Board of Education v. Rowley (1982) 458 U.S. 176, 206-207, 102 S. Ct. 3034, 73 L. Ed. 2d 690*

District court properly dismissed action brought by mother on behalf of autistic student for negligence, outrage, and violations of *42 U.S.C. § 1983* predicated on student's constitutional rights and statutory rights under IDEA for lack of subject matter jurisdiction based on mother's failure to exhaust her administrative remedies before coming into federal court, where mother sought relief for injuries caused by administration of disciplinary measures as part of larger educational strategy, which could have been redressed to some degree by IDEA's administrative procedures. *Payne v. Peninsula Sch. Dist. (9th Cir. 2010) 598 F.3d 1123, 1126-1128*

School district failed to provide pupil student of average intelligence that district had diagnosed with learning disabilities in first grade with free appropriate public education in eighth, ninth and tenth grades and was required to

reimburse parents for three years of private school tuition and attorney's fees, where school district erroneously concluded that 1997 amendment to IDEA drastically changed free appropriate public education standard and proper standard to determine whether disabled child received free appropriate public education was "educational benefit" standard set forth by Supreme Court in *Rowley*. District did fail to confer free appropriate public education based on procedural violations involving district's "pre-meeting meeting," where there was no evidence district made program decisions at preparatory meeting, parents actively participated in individualized educational program formulation process, and district changed various aspects of program based on recommendations of parents and psychologist. District did not commit procedural violation of IDEA by not specifying teaching methodologies in pupil's individualized educational programs, where district's determination and ALJ's finding that teachers needed flexibility in teaching methodologies because there was not single methodology that would always be effective was entitled to deference. District court erred in concluding that district committed procedural violation by not specifying minutes of instruction to be devoted to each service in individualized educational program, where amount of time to be devoted to services was appropriate to specific services provided, and even if district did commit procedural violation by failing to specify minutes, it did not result in denial of free appropriate public education. Plaintiffs failed to exhaust claim that district violated IDEA procedurally in regards to transition services by failing to raise argument in administrative complaint or due process hearing. *J. L. v. Mercer Island Sch. Dist. (9th Cir. 2010) 592 F.3d 938, 946-954*

Administrative law judge's conclusion that school district misclassified pupil as mentally retarded rather than autistic qualified parents for attorney's fees under IDEA as prevailing party, even though pupil was not denied FAPE since he received instruction by qualified teacher, where change in disability classification legally entitled pupil to instruction by teachers qualified to teach students with both mental retardation and autism, and before decision, school district refused to recognize his classification as autistic, and thus his legal right to such instruction. Further, parents were entitled to attorney's fees even though pupil was represented by his paternal grandmother, who was practicing attorney, where grandmother was not his legal guardian or acting in place of his natural or adoptive parent. *Weissburg v. Lancaster School Dist. (9th Cir. 2010) 591 F.3d 1255, 1258-1261*

District court did not abuse its discretion by denying reimbursement for private school tuition to parents of student diagnosed with attention deficit hyperactivity disorder who was eligible for services under IDEA, where district court properly reviewed state hearing officer's decision to grant partial reimbursement de novo giving his determinations due weight; and where substantial evidence supported district court's conclusion that placement at residential facility was not necessary to provide special education and related services, and it was child's "risky behaviors" outside of school that prompted her parents to enroll her in residential facility. *Ashland School District v. Parents of Student R.J. (9th Cir. 2009) 588 F.3d 1004, 1010-1011*

District court properly reversed hearing officer's award of reimbursement to parents for residential placement of their child after conducting independent review of record and determining that parents were not entitled to reimbursement for expenses associated with residential placement either before or after they provided school district with notice, where district court properly reviewed state hearing officer's award of reimbursement de novo and adequately responded to hearing officer's conclusions, and where district court was not required to give deference to hearing officer's conclusions. District court properly considered high cost of residential treatment after concluding that much of cost of medical care in residential placement expenses was unrelated to educational needs, and properly found that after giving parents 23-page pamphlet explaining their rights and obligations under IDEA, including their obligation to give notice before unilaterally transferring child to residential educational setting, district was not obligated to remind them of this obligation once it knew they were considering residential placement; and ample evidence supported district court's conclusion that residential placement was necessitated by medical, rather than educational, concerns. Although hearing officer's decision was delayed, parent's entitlement to relief under IDEA "stay put" provision was properly reduced, where delay was not unreasonable based on numerous motions and briefs parties filed, as well as voluminous record. *Ashland School District v. Parents of Student E.H. (9th Cir. 2009) 587 F.3d 1175, 1181-1188*

District court erred by reversing state administrative agency's finding that procedural violation of IDEA amounted to

harmless error, where district court failed to properly consider whether school district's policy of limiting parents' classroom observational opportunities to 20 minutes was harmless because parents nevertheless had full opportunity to participate in process to fashion appropriate educational plan for their child with help from informed and knowledgeable expert; and where there was no evidence supporting finding that parents' right to participate was significantly affected. District court properly denied "stay put" order requiring school district to reimburse parents for continuing education expenses beyond that covered in its original order, where private program chosen by parents alone did not qualify as "current education placement" under IDEA. *L. M. v. Capistrano Unified School Dist. (9th Cir. 2009) 556 F.3d 900, 909-913*

School district committed procedural violation when it did not inform parents and children of its impending evaluations of children, which deprived children of free appropriate public education, and parents were entitled to full reimbursement for private evaluations of children, which they reasonably sought when they were not told district would conduct evaluations of their children, because their refusal to share information did not harm district, which had to obtain its own evaluation, and their refusal to share information had no connection to district's violation of IDEA's notice provisions. District court did not abuse its discretion in refusing to grant parents reimbursement for services for which they paid during delay in evaluating children, where district had to provide services only upon determination of eligibility and had no obligation to provide services until after evaluations. State's 45-school-day timeline was not an inconsistent interpretation of IDEA's reasonable timeliness requirement but did not provide school districts with safe harbor, where, regardless of compliance with state regulatory requirement, IDEA required that districts act within reasonable time to evaluate potentially disabled children; 110-day delay, which occurred during summer vacation and complied with state regulation, was reasonable, where administrative delay was needed to promote effective test results, it made sense to allow district degree of leeway during summer vacation. District conducted proper evaluation even though it did not test children for autism before it finalized IEPs, where district could not effectively administer autism tests until after test administrators had gotten to know children, so that evaluations qualified as initial evaluations under IDEA; initial IEPs were reasonably calculated to provide children with educational benefits even though they did not address autism, where children received educational benefits while district pursued autism eligibility determinations. District was capable of implementing later IEPs, where IDEA did not require district to employ behavior analyst, and district had personnel capable of implementing *IEPs. JG v. Douglas County School Dist. (9th Cir. 2008) 552 F.3d 786, 793-802*

Elementary school district violated IDEA by failing to meet its procedural obligation to evaluate child to determine whether he was autistic, where district's failure to meet its obligation to evaluate child in all areas of suspected disability, including whether he was autistic, was procedural error that denied him FAPE. However, district court did not apply incorrect standard in employing "regression/recoupment" standard in determining that child was not entitled to extended school services, as opposed to a multi-faceted inquiry, as purportedly required by state law, and it was reasonable for hearing officer to rely on testimony of district's witnesses because they had observed child's school performance. *N.B. v. Hellgate Elementary Sch. Dist. (9th Cir. 2008) 541 F.3d 1202, 1207-1213*

Dismissal of father's action under IDEA against state department of education without prejudice did not confer prevailing party status on defendant for purposes of attorneys' fees award under IDEA, where dismissal without prejudice did not constitute judgment on merits, and where dismissal without prejudice did not alter legal relationship of parties because defendant remained subject to risk of re-filing. *Oscar v. Alaska Dep't of Educ. & Early Dev. (9th Cir. 2008) 541 F.3d 978, 981-982*

District court erred by reversing state administrative agency's finding that procedural violation of IDEA amounted to harmless error, where district court failed to properly consider whether parents' right to participate was significantly affected, i.e., whether district's policy of limiting parents' classroom observational opportunities to 20 minutes was harmless because parents nevertheless had full opportunity to participate in process to fashion appropriate educational plan with help from informed and knowledgeable expert; and where there was no evidence to support finding that parents' right to participate was significantly affected. However, district court properly denied "stay put" order, where

parents could not argue they prevailed in their procedural challenge to IEP, or that district court determined that child's privately funded educational services were appropriate. *L.M. v. Capistrano Unified Sch. Dist. (9th Cir. 2008) 538 F.3d 1261, 1267-1271*

In action by parents individually and as guardians ad litem for their autistic daughters against state education department for alleged violations of IDEA and § 504 of Rehabilitation Act of 1973 as amended [*29 U.S.C. § 794*], Ninth Circuit would not decide whether plaintiffs alleged privately enforceable cause of action for damages, where, although injunctive relief was available under IDEA, monetary damages were not; and where, although FAPE requirements in IDEA and in § 504 regulations requiring FAPE were overlapping but different, availability of relief under IDEA did not limit availability of damages remedy under § 504 FAPE regulations, and § 504 provided private right of action for damages, parents did not specify which § 504 regulations they believed were violated and which supported privately enforceable cause of action. *Mark H. v. Lemahieu (9th Cir. 2008) 513 F.3d 922, 928-930, 932-940*

After school district filed administrative complaint against mother when she refused to consent to Individualized Education Plan for her son, and administrative hearing officer dismissed complaint without prejudice, mother lacked standing to pursue action in federal district court under *20 U.S.C. § 1415(i)(2)(A)* claiming hearing officer erred in failing to dismiss with prejudice and in failing to identify her as prevailing party, where mother did not suffer injury in fact because her injuries were speculative, and where mother did not affirmatively request relief because school district had filed administrative complaint and when hearing officer dismissed matter without prejudice, it merely restored status quo. *Levina v. San Luis Coastal Unified School Dist. (9th Cir. 2007) 514 F.3d 866, 868-869*

Mother was not entitled to damages to compensate her for lost income and emotional distress she experienced during her ultimately successful efforts to obtain benefits for her son under Individuals with Disabilities Education Act, because *42 U.S.C. § 1983* did not create cause of action for money damages under IDEA for lost earnings and suffering of parent pursuing IDEA relief. Further, because mother was not qualified individual with disability, her claim was not cognizable under either title II of the Americans with Disabilities Act of 1990 [*42 U.S.C. § 12132*], or § 504 of Rehabilitation Act of 1973 [*29 U.S.C. § 794(a)*; *see 29 U.S.C. § 705(20)*]. *Blanchard v. Morton Sch. Dist. (9th Cir. 2007) 504 F.3d 771, 773-774*

After 1997 amendments, IDEA no longer requires presence of child's current regular education teacher on IEP team, so failure to include both child's past or current regular education teacher and current special education teacher was not procedural error; however, failure to include special education teacher or provider on team who actually taught child was procedural violation of IDEA. Procedural error was harmless, however, where child did not qualify for IDEA relief. *R.B. v. Napa Valley Unified Sch. Dist. (9th Cir. 2007) 496 F.3d 932, 937-947*

Action by parents and autistic student brought under *42 U.S.C. § 1983* and *§ 504* of Rehabilitation Act of 1973, based on conflicts between plaintiffs and school district over student's IEP, was properly dismissed for failure to exhaust administrative remedies, where plaintiffs alleged injuries that could be redressed to some degree by IDEA's administrative procedures and remedies. *Kutasi v. Las Virgenes Unified Sch. Dist. (9th Cir. 2007) 494 F.3d 1162, 1167-1170*

Because hearing officer determined that student was deprived of free and appropriate public education and eligible for special education, student was prevailing party entitled to award of attorney's fees even though school had started assessment process during course of proceedings and hearing officer purportedly limited his determination of eligibility to specific time period preceding issuance of his opinion, where hearing officer's limitation did not mean there were no significant aspects of order that were judicially enforceable, thus altering legal relationship of parties, and where student's victory was not *de minimis* or technical. *Parent V.S. v. Los Gatos-Saratoga Joint Union High School Dist. (9th Cir. 2007) 484 F.3d 1230, 1233-1234*

In action under IDEA for reimbursement for private school education parents obtained for child after withdrawing her

from public school system, district court's acceptance of hearing officer's determination that child was not legally entitled to receive publicly funded special education was not clear error, where district court did not clearly err in determining that child was not legally entitled to special education based on specific learning disability, because any existing severe discrepancy between ability and achievement appeared correctable in regular classroom; and where district court did not clearly err in determining child was not legally entitled to special education based on other health impairment in form of seizure disorder or attention deficit disorder, because it was reasonable for hearing officer to conclude that any impairment could be accommodated in general classroom. *Hood v. Encinitas Union Sch. Dist. (9th Cir. 2007) 482 F.3d 1175, 1180-1186* (reprinted a amended *Hood v. Encinitas Union Sch. Dist. (9th Cir. 2007) 486 F.3d 1099*)

School district's failure to implement portions of severely autistic student's IEP in transition from elementary to middle school did not violate either procedural or substantive requirements of IDEA, where school district's failures were not material, with exception of math instructions shortfall, which was remedied in response to ALJ's order, because failures did not fall significantly short of those required by IEP. However, because student did partially prevail, he was to that extent entitled to reasonable attorney's fees for relevant work done at administrative hearing level, but not for his mother, who acted as one of his attorneys in proceedings. *Van Duyn v. Baker School District (9th Cir. 2007) 481 F.3d 770, 779-784*

District court's dismissal of claims under Individuals with Disabilities Education Act for failure to serve timely complaint was error, where although district court properly applied state's statute of limitations because IDEA had no statute of limitations at time, district court improperly applied state rule that complaint had to be served within 30 days of service of final order by state administrative agency, which plaintiff conceded he did not do, because Fed. R. *Civ. Proc. 3* controlled when action arising under federal law was commenced for purposes of tolling statute of limitations borrowed from state law, and Fed. R. *Civ. Proc. 4(m)* provided time limit for service of process with which plaintiff had complied. *S.J. v. Issaquah Sch. Dist. No. 411 (9th Cir. 2006) 470 F.3d 1288, 1289, 1290-1293*

Attorney's fees awarded under IDEA [*20 U.S.C. § 1415*] are governed by standards set forth by U.S. Supreme Court in *Hensley v. Eckerhart (1983) 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40* and its progeny for fee awards under *42 U.S.C. § 1988*. Thus, although district court's partial attorney's fees award to mother may ultimately prove consistent with *Hensley*, award would be vacated and remanded to district court when it did not appear from record that court applied *Hensley* because it did not consider mother's degree of success. *Aguirre v. Los Angeles Unified School Dist. (9th Cir. 2006) 461 F.3d 1114, 1117-1121* Mother whose conflict with school district about education of her son was resolved by settlement agreement signed only by parties was not entitled to attorney's fees and costs under *20 U.S.C. § 1415(i)(3)(B)*, because mother was not prevailing party. Although through IDEA, mother secured some special education benefits for her child from district and so met first prong of test for prevailing party by achieving material alteration of legal relationship of parties, there was nothing in record that could be construed as judicial sanction of settlement agreement. *P.N. v. Seattle School Dist. No. 1 (9th Cir. 2006) 458 F.3d 983, 985-991*

School district fulfilled its duty under IDEA by notifying student's mother it was her obligation to remove earwax from son's ear or have it removed by medical professional as condition for completion of audiology test, so there was no procedural violation when mother failed to have wax removed and test was not completed. No procedural violation in failure to assess double vision or optic nerve damage, when consultant found student's vision was not hindering his education. Failure to include and consider all available information from people knowledgeable about student in development of individualized education plan (IEP) did not violate IDEA, when IEP was developed for student as result of his records, observations, assessments by qualified individuals and participation by his parents, and qualified administrator conducted thorough hearing to review individual education plan, and largely approved of proposal but supplemented plan with further goals. District did not violate IDEA's procedures when it conducted suitable functional behavioral assessment and subsequently proposed behavior intervention plan, when IEP team and parents had opportunity to discuss plan when it was proposed, and mother exercised her rights by contesting plan and then challenging plan through statutory procedures. Failure to assess student in Korean, his primary language, did not violate

IDEA, when five assessments were at issue, mother consented to assessment plan specifying speech and language assessment be conducted in English, occupational therapy, physical therapy and vision assessments were nonverbal, and psychological assessment was largely nonverbal; Korean interpreter was present during verbal portions but direct verbal cues were not given in Korean, because hearing officer agreed with psychologist that giving Korean cues would have disturbed validity of test. District did not fail to provide adequate support services to allow student to meet proposed educational goals by not providing related therapy services, when evidence did not conclusively demonstrate related therapy services were necessary to ensure student received some educational benefit. Hearing officer and district court did not abuse discretion by awarding compensatory education services in form of individualized instruction for teachers addressing implementation of IEP's self-help goals and objectives. District court did not abuse its discretion in not awarding attorney's fees to parents by finding district prevailed on all significant issues and parents prevailed only on some minor issues. *Park v. Anaheim Union High Sch. Dist. (9th Cir. 2006) 444 F.3d 1149, 1154-1157*

District court erred in dismissing for failure to exhaust administrative remedies mother's action for emotional distress based on school district's failure to accommodate her child's special education needs and implement his individualized education plan, when remedies available under IDEA included educational services for disabled children, but did not provide adequate remedy for mother. *Blanchard v. Morton Sch. Dist. (9th Cir. 2005) 420 F.3d 918, 920-922*

School district's failure to include regular education teacher on team that prepared individualized education program (IEP) for student with disability, when there was possibility that student would be placed in integrated classroom, rendered IEP invalid. Failure to include regular education teacher on team significantly deviated from procedural requirements of IDEA that at least one regular education teacher be included in development of IEP for student with disability pursuant to *20 U.S.C. § 1414(d)(1)(B)(ii)*. Further, critical structural defect in constitution of IEP team precluded court from considering whether IEP developed without inclusion of at least one regular education teacher was reasonably calculated to enable student with disability to receive free and appropriate public education. *M.L. v. Federal Way School Dist. (9th Cir. 2004) 387 F.3d 1101, 1108*

In action under Americans With Disabilities Act, Rehabilitation Act, and state anti-discrimination statutes, against county and local educational authorities based on alleged discrimination against autistic children who were part of special education program by giving them shorter school day, students sufficiently exhausted administrative remedies under IDEA by pursuing complaint resolution procedure to completion, when requiring each autistic student to seek due process hearing would not further purposes of exhaustion or Congressional intent behind IDEA scheme. *Christopher S. v. Stanislaus County Office of Educ. (9th Cir. 2004) 384 F.3d 1205, 1209-1214*

School district's failure to include regular education teacher on individualized educational placement team when there was possibility child might be included in regular education classroom was procedural violation of IDEA, but since violation did not result in loss of educational opportunity, failure to include teacher on team did not violate IDEA. By articulating academic expectation that kindergarten students will learn to read, district did not determine placement based on rigid policy or criteria. District did not violate IDEA's mainstreaming requirement by placing child in self-contained classroom, when record showed there would be little to no benefit to placing child in regular education classroom, and program offered in self-contained classroom would offer him substantial benefits in all developmental areas. Although teacher can be deliberately indifferent to teasing of disabled child and teasing can be so severe that child can derive no benefit from services offered by school district so that child has been denied FAPE, record did not support conclusion that either teacher or district were deliberately indifferent to any teasing or that teasing denied child educational opportunity. *M.L. v. Federal Way School District (9th Cir. 2003) 341 F.3d 1052, 1062-1072*

School district's efforts to serve educational interests of student disabled by Down's Syndrome by temporary individualized educational placement (IEP) in special classroom complied with substantive and procedural requirements of IDEA. District provided meaningful opportunity for mother to participate in IEP process, developed IEP plan to best of its ability after mother and district could not come to a consensus about IEP, and afforded mother two due process hearings to establish validity of its proposed plan, so that district did not violate *34 C.F.R. § 300.345*. Because

implementation of student's last agreed-on IEP in district from which she transferred would have been impossible in new district, and because explicitly temporary and malleable nature of placement that district offered approximated last agreed-on IEP as closely as possible, district abided by "stay-put" provisions of IDEA during pendency of due process hearing. Because student was not enrolled in any district at time of scheduled meetings and was home-schooled entirely for preceding year, mother's presence as student's then-current home-school teacher sufficed to meet requirement in *20 U.S.C.S § 1401(a)(2)*. Finally, in light of flexible and temporary nature of IEP, district's interim placement was substantively proper and provided for mainstreaming to extent appropriate. *Ms. S. ex rel. G v. Vashon Island School District (9th Cir. 2003) 337 F.3d 1115, 1129-1138*

School district violated IDEA's procedural mandates in its development of severely hearing-impaired child's Individual Education Plan (IEP), and thereby denied child free appropriate public education, by not including either representative from special school child had attended for preceding three years and was currently attending or child's parents at meeting at which IEP was developed. Trial court properly awarded parents cost of tuition at special school to which parents sent child during that school year. Shapiro v. Paradise Valley Unif. Schl. Dist. No. 69 *(9th Cir. 2003) 317 F.3d 1072, 1076-1080*

District court properly held that state's hearing officer correctly ruled assessment that child was not learning disabled child was adequate assessment under *20 U.S.C. § 1414* despite lack of administering traditional IQ test as part of assessment, when state regulation requires only "standardized tests" only if valid for particular student, and if not, alternative measures are to be spelled out in assessment plan, when school district administered six standardized tests to child, complying with literal requirement that it use standardized tests if applicable, and when district used alternative measures to evaluate intellectual ability rather than relying on traditional standardized IQ tests, including interviews, observations, parent-teacher reports, review of records and tests of specific skills and parents signed and approved plan. *Ford v. Long Beach Unified School District (9th Cir. 2002) 291 F.3d 1086*

District court properly denied preliminary injunction sought by autistic child under *20 U.S.C. § 1415(j)* to modify "stay put" order by state Special Education Hearing Office to retain services provided by IFSP rather than IEP as ordered by state, when school district that became responsible for child's education argued persuasively that it could meet requirements of stay put provision by providing comparable educational placement rather than what child was receiving under IFSP by analogizing district's responsibilities to child to its responsibilities to incoming transfer student as dictated by California law, and Hearing Office's order preserved tutors, goals, and plan child used in his IFSP but only changed plan supervisors, so that child could not show irreparable harm and likelihood of success on merits. *Johnson ex rel. Johnson v. Special Educ. Hearing Office (9th Cir. 2002) 287 F.3d 1176*

School district's failure to give parents of autistic child copies of evaluations indicating possibility of autism and need for further psychiatric evaluations when district learned of possible diagnosis violated procedural requirements of IDEA by preventing parents from fully and effectively participating in creation of individualized education program (IEP) for child and making it impossible to design IEP that addressed unique needs as autistic child so as to deny her free appropriate public education; district court erred by according greater deference to credibility determinations of State Review Officer than to those of Hearing Officer in applying due weight standard. *Amanda J. v. Clark County School Dist. (9th Cir. 2001) 267 F.3d 877, 881-882*

Parents of autistic son entitled to special education benefits under IDEA, who prevailed at state Complaint Resolution Procedure (CRP) on complaints of violations of IDEA as result of which school district held several Individualized Education Program (IEP) meetings attended by parents represented by counsel, resulting in revised IEP for their son in compliance with IDEA, were properly awarded attorney's fees in separate district court action, where district court has jurisdiction over case in which fees are sought even though liability is established outside district proceeding itself; plaintiff parents were prevailing party; CRP is "proceeding brought under" *20 U.S.C. § 1415*, entitled prevailing party to attorney's fees under *20 U.S.C. § 1415(i)(3)(B)*; and where *20 U.S.C.§ 1415(i)(3)(D)(ii)* does not preclude parents from recovering fees for attorney's attendance at IEP meetings convened as result of *CRP. Lucht v. Molalla River School*

Dist. (9th Cir. 2000) 225 F.3d 1023

Providing vision specialist to vision-impaired student off site rather than at parochial school that student attended did not violate *IDEA. KDM v. Reedsport Schl. Dist. (9th Cir. 1999) 196 F.3d 1046*

An award of compensatory education equal to time lost while school district denied IDEA [*20 U.S.C. § 1400 et seq.*] benefits to student is equitable, not contractual, remedy; if student has suffered no ultimate harm and has graduated high school before age 21, court is not required to award compensatory education. Parents of Student W. v. Puyallup School Dist. 3 *(9th Cir. 1994) 31 F.3d 1489, 1497*

IDEA [*20 U.S.C. § 1400 et seq.*] includes physical safety of students as part of appropriate public education; state is required to make such reasonable adjustments as are necessary to make school for blind and multi-handicapped students as safe for them as other state schools are for their nonhandicapped students. *Students of Cal. School for the Blind v. Honig (9th Cir. 1984) 736 F.2d 538, 545-547*

Exhaustion of state administrative remedies before institution of action under *20 U.S.C. § 1415(i)(2)* is not required when exhaustion of such remedies would be futile. *Monahan v. Nebraska (D. Neb. 1980) 491 F. Supp. 1074, 1086* ; *Loughran v. Flanders (D. Conn. 1979) 470 F. Supp. 110, 112*

Former Education for All Handicapped Children Act of 1975 (now known as Individuals With Disabilities Act) [*20 U.S.C. § 1401 et seq.*] provides specific procedural safeguards that must be adopted by states receiving funds thereunder and that supercede any inconsistent state law. *Monahan v. Nebraska (D. Neb. 1980) 491 F. Supp. 1074, 1086, 1091* ; *Vogel v. School Bd. of Montrose R-14 School Dist. (W.D. Mo. 1980) 491 F. Supp. 989, 991 n.1, 993*

20 U.S.C. § 1415 permits educational agency to suspend for short but not indefinite period of time a handicapped student who is danger to herself on emergency basis without following procedural safeguards of that section. *Sherry v. New York State Educ. Dep't. (W.D.N.Y. 1979) 479 F. Supp. 1328, 1337*

When parents accepted school district's eligibility finding but challenged proposed placement, and when district made eligibility and placement decisions based on its expert's observation of child in present setting, *i.e.*, private school, but refused to allow parents' expert to observe placement proposed by district, parents had statutory right to have their expert testify at administrative hearing, thus, ipso facto were entitled to have their expert observe proposed placement before participating in administrative hearing at which propriety of proposed placement would be determined. There were no administrative remedies to exhaust, because purpose of *Educ. Code § 56329(b)* was to permit independent observation before hearing was held so student and his parents were in position to challenge proposed placement at hearing. Finally, child's right to have his expert observe district's proposed placement was not contingent on his exercise of right to conduct expensive and time-consuming independent educational assessment. *Benjamin G. v. California Special Educ. Hearing Office (2005) 131 Cal. App. 4th 875, 880-884, 32 Cal. Rptr. 3d 366*

Parents' unilateral placement in private school rather than juvenile system facility of teenager with history of truancy and juvenile offenses was done under exceptional circumstances, including bad faith on part of respondents, excusing application of "stay put" provision of *20 U.S.C. § 1415(j)* and entitled parents to reimbursement for teenager's private educational costs, because respondents failed to undertake diagnostic reassessment and latest placement was woefully inadequate and inappropriate in light of teenager's history of educational handicap, despite fact that teenager's problems were formidable and extremely difficult for diagnosis and treatment. *In re John K. (1985) 170 Cal. App. 3d 783, 795-798, 216 Cal. Rptr. 557*

Educ. Code §§ 56000-56369 was designed to provide substantive and procedural educational rights to emotionally and mentally handicapped children and their parents and to relieve damage to those individuals and society resulting from denial of full educational opportunities; statutes not designed to protect parents of emotionally or mentally handicapped

child from monetary expenses incurred in providing medical, psychological, or related services for child during assessment time. *Keech v. Berkeley Unified School Dist. (1984) 162 Cal. App. 3d 464, 468-469, 210 Cal. Rptr. 7*

"Stay put" provision of *Educ. Code § 56505(d)* requiring that student remain in current placement pending hearing on right to special education did not preclude reimbursement of parents for unilateral placement when parents placed student in private school after administrative hearing erroneously denied special placement. *Byrnes v. Riles (1984) 157 Cal. App. 3d 1170, 1180, 204 Cal. Rptr. 100*

Damages are appropriate relief under *20 U.S.C. § 1415(i)(2)*, authorizing court to grant appropriate relief for improper denial of special education, when student has fully complied with state "stay put" requirements set out in *Educ. Code § 56505(d)*, but attorney's fees are not justified when district did not act arbitrarily or capriciously and district's behavior did not amount to discrimination against student. *Byrnes v. Riles (1984) 157 Cal. App. 3d 1170, 1180, 204 Cal. Rptr. 100*

Witnesses and parties germane to determining which agency should pay for special educational services for student are not necessary for due process hearing under *Educ. Code § 56505*, which is forum for deciding single issue of whether student is entitled to services. *Nevada County Office of Education v. Riles (1983) 149 Cal. App. 3d 767, 774-775, 197 Cal. Rptr. 152*

"Stay put" provision of *20 U.S.C. § 1415(j)* (pupil must remain in present placement pending hearing on child's free appropriate public education unless educational agency and parents agree) proscribes unilateral action by parents in absence of justifying circumstances and does not entitle parents to reimbursement for costs of unilateral placement prior to determination that placement appropriate. *Newport-Mesa Unified School Dist. v. Hubert (1982) 132 Cal. App. 3d 724, 730-735, 183 Cal. Rptr. 334*

On review from judgment granting school district's peremptory writ of mandate setting aside state Department of Education's decision that child required full-time residential educational program, appellate court was precluded from determining appropriate method of reviewing department's decision because school district waived right to appeal on issue by accepting benefits of judgment, and because child and department are not "aggrieved" parties under *20 U.S.C. § 1415(i)(2)* and did not suffer prejudice from use of mandamus action. *San Francisco Unified School Dist. v. State of California (1982) 131 Cal. App. 3d 54, 64-65, 182 Cal. Rptr. 525* (dictum stating that review of administrative decision should be limited to civil action under *20 U.S.C. § 1415(e)(2)*, precluding use of state administrative mandate remedy under *Code Civ. Proc. § 1094.5*)

Substantial evidence in form of expert testimony supported hearing officer's finding that child's emotional problems adversely affected his ability to learn and thus justify requiring individualized education program; although preference for "mainstreaming" established in EAHCA, substantial evidence that child's home life was major factor in his learning disability as supporting finding that residential placement was appropriate and necessary. *San Francisco Unified School Dist. v. State of California (1982) 131 Cal. App. 3d 54, 70-71, 182 Cal. Rptr. 525*

Appeal from judgment setting aside state Department of Education's decision that child required full-time residential educational program did not result in enforcement of important right affecting public interest so as to justify recovery of attorney's fees on private attorney general theory, but restitution of tuition costs for child's placement was appropriate in interests of justice. *San Francisco Unified School Dist. v. State of California (1982) 131 Cal. App. 3d 54, 71-72, 182 Cal. Rptr. 525*

[8] Student Discipline

Two days' suspension did not rise to level of penal sanction calling for full panoply of federal procedural due process

protections applicable to criminal prosecution. Bethel School Dist. No. 403 v. *Fraser (1986) 478 U.S. 675, 686, 106 S. Ct. 3159, 92 L. Ed. 2d 549*

School disciplinary rule proscribing obscene language and prespeech admonitions of teachers give adequate warning to student that his lewd speech could subject him to sanctions. Bethel School Dist. No. 403 v. *Fraser (1986) 478 U.S. 675, 686, 106 S. Ct. 3159, 92 L. Ed. 2d 549*

School board's interpretation of its rules was not to be relitigated under *42 U.S.C. § 1983*. *Bd. of Education of Rogers, Arkansas v. McCluskey (1982) 458 U.S. 966, 102 S. Ct. 3469, 73 L. Ed. 2d 1273, 1277*

State having established right to public education as not permitted to withdraw that right for misconduct without due process. *Goss v. Lopez (1975) 419 U.S. 565, 574, 95 S. Ct. 729, 42 L. Ed. 2d 725*

Pre-school teacher was not entitled to qualified immunity for seizure of preschooler who had been diagnosed with tuberous sclerosis and who suffered from non-verbal autism and her alleged slapping, forced participation in self-beating and slamming, where preschooler posed no danger to anyone nor was he disruptive in classroom, and at young age and suffering from significant and serious disabilities, he was even more vulnerable than average pre-school child, so that teacher used excessive force in violation of preschooler's *Fourth Amendment* rights; and where at time of alleged abuse, right of public school students to be free from excessive force imposed by their teachers was uncontroverted. Complaint also sufficiently alleged that school officials were individually liable under *42 U.S.C. § 1983* for their inaction in training, supervision and control of teacher and that officials showed reckless and callous indifference to preschooler's rights by permitting teacher to continue to work with preschooler, knowing she posed safety risk to children, and by not reporting or remediating alleged abuse when they became aware of it. *Preschooler II v. Clark County Sch. Bd. of Trustees (9th Cir. 2007) 479 F.3d 1175, 1180-1183*

Vice principal was not entitled to qualified immunity in second-grade student's action under *42 U.S.C. § 1983*, based on vice principal's having taped student's head to tree as discipline for fighting and refusing to stand quietly against wall as punishment, when student's *Fourth Amendment* right to be free from unreasonable seizure and protected from use of excessive force extended to seizure by or at direction of school officials and being held to tree with tape for five minutes was restraint on student's liberty and constituted seizure within meaning of *Fourth Amendment's* prohibition against unreasonable search and seizure, and when student's right to be free from excessive force at hands of teachers employed by state was clearly established. *Doe v. Hawaii Dept. of Education (9th Cir. 2003) 334 F.3d 906, 908-910*

Educ. Code § 48915, insofar as it compels suspension and mandates recommendation of expulsion for certain offenses, constitutes "higher level of service" under Cal. Const. art. XIIIB, § 6, and imposes reimbursable state mandate for all resulting hearing costs, even costs attributable to procedures required by federal law. *San Diego Unified Sch. Dist. v. Commission on State Mandates (2004) 33 Cal. 4th 859, 867-890, 16 Cal. Rptr. 3d 466, 94 P.3d 589*

Reliance by disciplinary panel in school expulsion hearing on statements and reports rather than on testimony by witnesses is improper when evidence is conflicting and there is no showing that witnesses were unavailable or that disclosure of their identity and presence would subject witnesses to significant and specific risk of harm. *John A. v. San Bernardino City Unified School Dist. (1982) 33 Cal. 3d 301, 308, 187 Cal. Rptr. 472, 654 P.2d 242*

Presence of district teachers on disciplinary hearing panel deprived student subjected to expulsion hearing of neither an impartial hearing panel nor due process. *John A. v. San Bernardino City Unified School Dist. (1982) 33 Cal. 3d 301, 308-309, 187 Cal. Rptr. 472, 654 P.2d 242*

Notice to student facing expulsion does not require that student be informed of availability of free legal assistance. *John A. v. San Bernardino City Unified School Dist. (1982) 33 Cal. 3d 301, 309-310, 187 Cal. Rptr. 472, 654 P.2d 242*

School district's "zero tolerance" policy governing expulsions, which required principal or designee to immediately suspend and recommend for expulsion pupil who committed specified acts at school or school activity off school grounds did not violate state law by eliminating principal's statutory discretion to decide not to recommend student for expulsion hearing. No provisions in Education Code require district to provide principal with authority to dismiss expulsion charge if (1) principal found student had committed offense, (2) stricter recommendation procedures did not infringe on student's statutory rights to objective and fair expulsion procedure, and (3) mandatory recommendation requirements did not preclude principal from expressing own views as to whether expulsion was appropriate in particular case. Rules did not violate due process rights, when (1) rule provided required procedural protections, (2) student was not constitutionally entitled to notice of scope of principal's authority vis-a-vis governing school board, and (3) inconsistencies in rules with regard to whether principal or superintendent could recommend expulsion for offenses not included in Education Code provisions did not create inevitable due process violation. *T.H. v. San Diego Unified School Dist. (2004) 122 Cal. App. 4th 1267, 1281-1287, 19 Cal. Rptr. 3d 532*

Under *Educ. Code § 48918(i)(1)*, school board trustees did not have mandatory duty to subpoena witnesses requested by students to be expelled, because by using "may" rather than "shall," § 48918(i)(1) vests school boards with discretion to issue subpoenas in expulsion proceedings, and legislative history and purpose of legislation indicate intent to make issuance of subpoenas matter of discretion. Although in adopting blanket policy never to issue subpoenas trustees abdicated their discretion, rather than exercising it, in refusing to issue subpoenas in this case, trustees did not act arbitrarily or abuse discretion, because students named many witnesses and claimed they were "percipient" witnesses to events at issue, but backed up these claims with nothing other than bald assertion, and entire conduct of proceedings on students' behalf exposed their advocate's manifest purposes, *i.e.*, delay, obstruction, obfuscation, disruption, and harassment. *Woodbury v. Brown-Dempsey (2003) 108 Cal. App. 4th 421, 430-439, 134 Cal. Rptr. 2d 124*

In *42 U.S.C. § 1983* action arising from suspension of male high school student for five days based on sexual harassment of female student by touching or grabbing her buttocks, trial court erred in deciding suspended student was denied due process under federal and state constitutional law, state Education Code, and school district regulations, where, when facing temporary short-term suspension, student has minimal procedural due process rights, including right to hearing, and informal meeting between school official and student or between official and student and his parents has been held to comport with due process, and where student was informed about complaints against him and given opportunity to respond to them. Further, there was no violation of suspension procedures in *Educ. Code § 48911(b)*, requiring that suspension be preceded by informal conference between principal and student, which occurred, student could be suspended for first offense under *Educ. Code § 48900.5*, and there was no violation of Administrative Regulation 5144.1, authorizing first-time expulsion for variety of acts not including acts for which student was suspended, because suspension is justified under state law even when grounds for suspension are not expressly stated under school rules. *Granowitz v. Redlands Unified School Dist. (2003) 105 Cal. App. 4th 349, 354-359, 129 Cal. Rptr. 2d 410*

Alleged violations of suspension and expulsion provisions of *Educ. Code §§ 48900, 48911*, and *48918* do not constitute tort for purposes of action under *Gov. Code § 815.6* (breach of mandatory duty imposed by enactment), or for purposes of action in negligence for breach of implied duty of care created by statute, because provisions were not designed to protect students and their parents from money damages resulting from "educational" injuries. *Tirpak v. Los Angeles Unified School Dist. (1986) 187 Cal. App. 3d 639, 643, 646, 232 Cal. Rptr. 61*

"Physical, behavioral, or emotional disorder which prevents or renders inadvisable attendance at school" is unconstitutionally vague when used as sole ground for involuntary exclusion from public school. *Abella v. Riverside Unified School Dist. (1976) 65 Cal. App. 3d 153, 169-170, 135 Cal. Rptr. 177*

Due process requirements for suspension of students for limited period. *Charles S. v. Board of Education (1971) 20 Cal. App. 3d 83, 94, 97 Cal. Rptr. 422 , appeal dismissed, 405 U.S. 1005 (1972)*

[9] Racial Segregation

Student assignment policy aiming to achieve social diversity by using neighborhood demographics when assigning students to schools that did not use racial classifications or consider individual student's race at all when assigning student to school, but looked at student's residential neighborhood and considered average household income in neighborhood, average education level of adults residing in neighborhood, and racial composition of neighborhood as whole and gave every student within given neighborhood same treatment regardless of his or her individual race, did not violate *Cal. Const., art. I, § 31(a)*, where including general recognition of demographics of neighborhoods in student assignments without classifying student by race did not discriminate against or grant preferential treatment to any individual or group on the basis of race. *American Civil Rights Foundation v. Berkeley Unified School Dist. (2009) 172 Cal. App. 4th 207, 216-222, 90 Cal. Rptr. 3d 789*

"Magnet" and "Permit with Transportation" programs of California public school district did not violate Proposition 209 [*Cal. Const., art. I, § 31*], prohibiting discrimination against or preferential treatment in favor of any individual or group on basis of race, ethnicity, or national origin in operation of public education, on ground that programs took into account student's race or ethnicity in determining admission, where Proposition 209 expressly exempts from its reach court-ordered integration plans in existence prior to its effective date and programs were part of existing court-ordered integration plan approved and implemented prior to effective date of Proposition 209. *American Civil Rights Foundation v. Los Angeles Unified School Dist. (2008) 169 Cal. App. 4th 436, 449-452, 86 Cal. Rptr. 3d 754*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawCivil LiabilityEducational MalpracticeEducation LawDiscriminationGender & Sex DiscriminationSexual HarassmentEducation LawDiscriminationIndividuals With Disabilities Education ActEnforcementEducation LawStudentsDisciplinary ProceedingsGeneral OverviewEducation LawStudentsSearch & SeizureGeneral OverviewEducation LawStudentsSpeechGeneral Overview

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§ 513.68 Attorney General Opinions

Members of news media may not attend child's individualized education program meeting as observers even though their attendance has consent of child's parents. *02 Ops. Cal. Att'y Gen. 406 (2002)*

School district may deny all applications for pupil admissions based on parent's employment within district when reason for denial is that district's school facilities are overcrowded at relevant grade level. District that has admitted elementary school pupil on basis of parent's employment within district and has entered into interdistrict transfer agreement based on child care needs of pupil may not deny pupil continued attendance at school within district because of overcrowded school facilities at relevant grade level. District may deny applications for interdistrict attendance agreements based on child care needs of pupil when reason for denial is that district's school facilities are overcrowded at relevant grade level. *01 Ops. Cal. Att'y Gen. 316 (2001)*

Under state and federal law, school district may release videotape of one student's assault on another student on school bus, which was recorded on videotape, to district attorney to determine whether criminal charges should be filed, juvenile justice proceedings instituted or some alternative program considered in dealing with assault without subpoena, court order, or parents' consent. *01 Ops. Cal. Att'y Gen. 209 (2001)*

Public high school administrators may not implement a policy requiring on unannounced, random, and neutral basis that pupils vacate classroom leaving personal belongings behind for sniffing by canines trained in drug detection, with students away from immediate vicinity of canines at all times, and under which, if canine's behavior indicated presence of drugs, school administrators would search pupil's personal belongings without pupil's consent. *83 Ops. Cal. Att'y Gen. 257 (2000)*

Extent of public school district's obligation to provide special education programs to child with disabilities who has been voluntarily enrolled by parent in private school. *83 Ops. Cal. Att'y Gen. 132 (2000)*

"Possession" of firearm for purposes of expulsion under *Educ. Code §§ 48900, 48915* is pupil's knowing and voluntary

direct control over firearm unless pupil has permission of school officials to possess firearm or possession is brief and solely for purpose of disposing of firearm, such as handing it to school officials. *80 Ops. Cal. Att'y Gen. 91 (1997)*

School district may suspend enforcement of expulsion order even if pupil committed offense listed in *Educ. Code § 48915(c)*, for which expulsion must be ordered under *Educ. Code § 48915(d)*. Pupil's name and offense committed must be disclosed to public when governing board orders expulsion. *80 Ops. Cal. Att'y Gen. 85 (1997)*

Former *Educ. Code § 48909(b)* (*now see Educ. Code § 48904(b)*), authorizing withholding of certain student records, is not operative in context of interdistrict transfer by student in view of *Educ. Code § 49068*, which requires such record transfer when student transfers to another district, even though student has damaged school property or has failed to return a book or to pay fees. *64 Ops. Cal. Att'y Gen. 867 (1981)*

School district not having opportunity classes or schools is permitted to transfer students under age 16 years to continuation schools for disciplinary reasons. *54 Ops. Cal. Att'y Gen. 262 (1971)*

Governing board of school district is without authority to exclude pupils from public schools solely by reason of their married status. *39 Ops. Cal. Att'y Gen. 256 (1962)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawAdministration & OperationBoards of Elementary & Secondary SchoolsRecordsEducation LawAttendanceGeneral OverviewEducation LawDiscriminationIndividuals With Disabilities Education ActIndividualized Educational ProgramsIEP MeetingsEducation LawStudentsDisciplinary ProceedingsGeneral OverviewEducation LawStudentsMisconductWeaponsEducation LawStudentsSearch & SeizureDog Sniff SearchesEducation LawStudentsStudent RecordsDisclosure & Release

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§ 513.69 Law Reviews

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Comment, *Protecting Children With AIDS Against Arbitrary Exclusion from School, 74 Cal. L. Rev. 1373 (1986)*

Note, *The Exclusionary Rule in the Public School Administrative Disciplinary Proceeding: Answering the Question After New Jersey v. T.L.O., 37 Hastings L.J. 1133 (1986)*

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Note, *Tinker Goes to the Theater: Student First Amendment Rights and High School Theatrical Productions in Seyfried v. Walton, 11 Hastings Const. L.Q. 247 (1984)*

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Comment, *The Court and the Classroom, 11 Santa Clara L. Rev. 72 (1970)*

Note, *Constitutional Law: First Amendment Right of Association for High School Student--Robinson v. Sacramento City Unified Sch. Dist. (Cal. App. 1966), 55 Cal. L. Rev. 911 (1967)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawCivil LiabilityEducational MalpracticeEducation LawDiscriminationIndividuals With Disabilities Education ActGeneral OverviewEducation LawReligion in SchoolsGeneral OverviewEducation LawStudentsDisciplinary ProceedingsGeneral OverviewEducation LawStudentsDiscipline MethodsCorporal PunishmentEducation LawStudentsSpeechGeneral Overview

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[Reserved]

§§ 513.70[Reserved]

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45-513 California Forms of Pleading and Practice--Annotated § 513.90

§ 513.90 Complaint for Injunctive Relief [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527], Declaratory Relief [Code Civ. Proc. § 1060], and Damages [Civ. Code § 3333]--By Disabled Pupil and by Parent Against School District and, if Applicable, Other Public Education Agency--Failure to Provide Free Appropriate Public Education [20 U.S.C. § 1415(i)(2); Educ. Code § 56500 et seq.]

[1] FORM Complaint for Injunctive Relief [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527], Declaratory Relief [Code Civ. Proc. § 1060], and Damages [Civ. Code § 3333]--By Disabled Pupil and by Parent Against School District and, if Applicable, Other Public Education Agency--Failure to Provide Free Appropriate Public Education [20 U.S.C. § 1415(i)(2); Educ. Code § 56500 et seq.]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name of child*],	)	
[a minor, by _____ (*name*),	)	
his/her Guardian ad Litem,] and	)	
_____ [*name of parent*],	)	NO. _____
Plaintiffs,	)	COMPLAINT FOR PRELIMINARY AND PER-
vs.	)	MANENT INJUNCTION[, DECLARATORY RE-
_____ [*name(s)*],	)	LIEF AND DAMAGES]
Defendants.	)	
	)	
	)	

Plaintiffs _____ [*names*], allege:

Plaintiff _____ [*name of child*] [, a minor, through his/her guardian ad litem,] and plaintiff _____ [*name of parent*] allege:

[1. *If pupil is a minor, allege:* For purposes of this action, _____ (*name*) was appointed by the above-entitled court, and now is, guardian ad litem of plaintiff _____ (*name of child*), a minor.]

2. Plaintiff _____ [*name of parent*] is, and at all times herein mentioned was, a resident of _____ County, California, and the _____ [parent *or* legal guardian] of plaintiff _____ [*name of child*].

3. Plaintiff _____ [*name of child*] is, and at all times herein mentioned was, a resident of _____ County, California [, and a pupil duly enrolled in _____ (*describe educational program*) at _____ School, which is maintained and operated by defendant _____ School District].

4. Plaintiff _____ [*name of child*] is an individual with exceptional needs, within the meaning of *Education Code Section 56026*, in that _____ [*allege fact showing that (1) plaintiff has been identified by an individualized education program team as a child with a disability as defined by applicable federal law [Educ. Code § 56026(a)], (2) plaintiff requires instruction or services, or both, that cannot be provided with modification of the regular school program, (3) plaintiff is within one of the age groups specified in Educ. Code § 56026(c), and (4) plaintiff meets the eligibility requirements set forth in regulations of the State Board of Education*].

5. Defendant _____ School District is, and at all times herein mentioned was, a school district duly organized and existing under the laws of the State of California.

6. _____ [*If a public education agency other than the school district is responsible for administering special education programs in the geographical region under Educ. Code § 56170, allege name and capacity of that agency.*]

7. Under *Education Code Section 56000 et seq.* and Title *20, United States Code, Section 1400 et seq.*, defendant(s) _____ [*name(s)*] has/have a duty to provide plaintiff _____ [*name of child*] with a free public education and related services appropriate to his/her unique needs. Plaintiff _____ [*name of chid*] has a right to receive such education and services at no cost to himself/herself or to his/her parents.

8. Defendant(s) has/have failed and refused, and continues/continue to fail and refuse, to perform its/their duty to provide plaintiff _____ [*name of child*] with a free appropriate public education and related services in that _____ [*specify manner in which defendants have failed to comply with their duty to provide a free appropriate public education, including, if appropriate, specific violations of any applicable federal or state statutes and regulations*].

9. On _____ [*date*], plaintiffs filed a request for a hearing with the Superintendent of Public Instruction under *Education Code Section 56502*, for the purpose of determining the appropriateness of the education and services then being provided to plaintiff _____ [*name of child*] by defendant(s), and requesting the following relief: _____ [*specify relief requested*].

10. _____ [No party requested a prehearing mediation conference in this matter *or* On _____ (*date*), a mediation conference was held in this matter under *Education Code Section 56500.3*, which failed to resolve the dispute between the parties to their mutual satisfaction. (The mediator's written specification of unresolved issues is attached as Exhibit _____ to this complaint and made a part hereof.)]

11. On _____ [*date*], at _____ [*place of hearing*], a hearing was held under *Education Code Section 56505*, before _____ [*name*], a hearing officer, under contract with the

Department of Education, to consider the appropriateness of the education and services being provided to plaintiff _____ [*name of child*] by defendant(s). All parties attended the hearing. A verbatim transcript of the hearing is attached hereto as Exhibit _____ and made a part hereof.

12. On _____ [*date*], plaintiffs received the hearing officer's decision and order denying plaintiffs the relief requested.

13. The decision of the hearing officer is [erroneous and] invalid in that _____ [*specify all substantive and procedural grounds for invalidity of the decision*].

14. Under Title *20, United States Code, Section 1415(i)(2)*, this court has jurisdiction to review the record of the proceedings before the hearing officer, to hear any additional evidence presented by the parties, and to grant all appropriate relief based on the preponderance of the evidence.

15. Unless and until enjoined by order of this court, the wrongful failure and refusal of defendant(s) to provide plaintiff _____ [*name of child*] with a free appropriate public education to which he/she is entitled under state and federal law will cause great and irreparable injury to plaintiffs in that _____ [*allege specific facts constituting great and irreparable injury*].

16. Plaintiffs have no adequate remedy at law for the injuries that are currently being suffered and that will be suffered in the future in that _____ [*specify, e.g.,* it will be impossible for plaintiffs to calculate the precise amount of damage they will suffer if defendant is not enjoined from failing and refusing to provide plaintiff _____ (*name of child*) with a free appropriate public education].

17. _____ [*Allege damages, if any, e.g.,* As a proximate result of defendant's (defendants') wrongful conduct and violation of duty, plaintiffs have been damaged in the sum of $_____, in that _____ (*specify, e.g.,* plaintiff _____ (*name of parent*) has been required to expend this amount for private special instruction and other services for plaintiff _____ (*name of child*), which instruction and services should have been provided to plaintiff _____ (*name of child*) by defendant(s), at no cost to plaintiffs). (Plaintiffs will be further damaged in like manner so long as defendant's (defendants') conduct continues. The full amount of such damage is not now known to plaintiffs, and plaintiffs will amend this complaint to state such amount when the same becomes known to them, or on proof thereof).]

18. _____ [*If declaratory relief is sought, add:* An actual controversy has arisen and now exists between plaintiffs and defendant(s) concerning their respective rights and duties in that plaintiffs contend _____ (*allege plaintiffs' contentions as to legal consequences of facts alleged in preceding paragraphs*), whereas defendant(s) disputes/dispute these contentions and contend that _____ (*specify defendant's/defendants' contentions*). Plaintiffs desire a judicial determination of their rights and duties and a declaration as to _____ (*specify, e.g.,* whether plaintiff _____ (*name of child*) is entitled to receive the following instruction and services from defendant(s) at no cost to plaintiffs: _____ (*specify*)). A judicial declaration is necessary and appropriate at this time under the circumstances in order that plaintiffs may ascertain their rights and duties _____ (*specify, e.g.,* with respect to the obligation of defendant(s) to provide the above-described instruction and services). _____ (*Allege any financial, educational, or other burden being caused plaintiffs by the unsettled state of affairs*).]

19. Under Title *20, United States Code, Section 1415(j)*, plaintiff _____ [*name of child*] _____ [is entitled to remain in his/her current educational placement in _____ (*describe educational program*) at _____ School *or* is entitled to be placed in _____ (*describe public school special education program*)], pending the completion of this action.

WHEREFORE, plaintiffs pray judgment against defendant[s, and each of them,] as follows:

1. For an order requiring defendant(s) to show cause, if any, why it/they should not be enjoined, as hereinafter set forth, during the pendency of this action;

2. For a preliminary injunction enjoining defendant(s) and its/their agents and employees, and all persons acting under, in concert with, or for it/them, from _____ [removing plaintiff _____ (*name of child*) from his/her current educational placement in _____ (*describe program*) *or* failing or refusing to place plaintiff _____ (*name of child*) in _____ (*describe public school special education program*)], during the pendency of this action;

3. For a permanent injunction enjoining defendant(s) and its/their agents and employees, and all persons acting under, in concert with, or for it/them, from _____ [*specify particular actions, policies, procedures, etc. to be prohibited*];

4. For a permanent injunction requiring defendant(s) and its/their agents and employees, and all persons acting under, in concert with, or for it/them, to _____ [*specify particular actions, policies, procedures, etc., to be compelled*];

[5. For damages in the sum of $_____, plus damages in such further sums as may be sustained and as are ascertained before final judgment herein;]

[6. For a judicial declaration that _____ (*state the determination that the court is requested to render*);]

7. For attorney's fees as authorized by Title *20, United States Code, Section 1415(i)(3)(B)*;

8. For costs of suit herein incurred; and

9. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am [one of] the plaintiff(s) in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

CAUTION:

Unless counsel will be filing affidavits (or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*]) in support of the allegations of this complaint, this complaint must be verified [*see Code Civ. Proc. § 527(a)*], and counsel must take care to plead evidentiary facts that would entitle plaintiff to injunctive relief [*see E. H. Renzel v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan G. Co. v. San Juan R. etc. Assn. (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* .

[2] Use of Form

This form of complaint is for use by a pupil with a disability and his or her parent or guardian in an action under *20 U.S.C. § 1415* to obtain appropriate judicial relief if the school district or other responsible public education agency has not fulfilled its duty to provide the pupil with a free appropriate public education.

[3] Allegations

This complaint alleges:

(1) Appointment of a guardian ad litem for the minor plaintiff, if appropriate [*Code Civ. Proc. § 372*] (Paragraph 1);

(2) Capacity and residence of plaintiffs (Paragraphs 2, 3);

(3) Minor plaintiff's status as an individual with exceptional needs [*see Educ. Code § 56026*] (Paragraph 4);

(4) Capacity of defendants (Paragraphs 5, 6);

(5) Minor plaintiff's right to a free appropriate public education and related services and defendants' duty to provide the education and services [*see Educ. Code §§ 56000, 56001, 56040, 56140, 56170*; *20 U.S.C. § 1401 et seq.*] (Paragraph 7);

(6) Defendants' breach of duty to provide such education and services (Paragraph 8);

(7) Exhaustion of state administrative hearing remedy and adverse result [*Honig v. Doe (1988) 484 U.S. 305, 326-327, 108 S. Ct. 592, 98 L. Ed. 2d 686* ; *Hoeft v. Tucson Unified Sch. Dist. (9th Cir. 1992) 967 F.2d 1298, 1303* ; *see Educ. Code §§ 56500-56507*; *20 U.S.C. § 1415*] (Paragraphs 9-13);

(8) Right to judicial relief [*20 U.S.C. § 1415(i)(2)*] (Paragraph 14);

(9) Great and irreparable injury unless defendants are enjoined [*see Code Civ. Proc. § 526(a)(2)*] (Paragraph 15);

(10) Inadequate remedy at law [*see Civ. Code § 3422(1), (2)*; *Code Civ. Proc. § 526(a)(4), (5)*] (Paragraph 16);

(11) Amount and nature of damages, if any [*see Civ. Code § 3333*] (Paragraph 17);

(12) Right to declaratory relief [*see Code Civ. Proc. §§ 1060, 1061*] (Paragraph 18); and

(13) Minor plaintiff's right to remain in his or her current educational placement or, if making initial application for admission to public schools, to be placed in the public school program, pending

completion of the proceeding [*20 U.S.C. § 1415(j)*] (Paragraph 19).

[4] Verification

If plaintiff is seeking a preliminary injunction, the complaint must be verified, unless the plaintiff files affidavits with the complaint showing that sufficient grounds exist for issuance of the preliminary injunction [*see Code Civ. Proc. § 527(a)*]. If a preliminary injunction is not sought, the complaint need not be verified. A school district or other public agency need not file a verified answer to a verified complaint [*see Code Civ. Proc. § 446*]; however, verification of the complaint precludes a general denial [*Code Civ. Proc. § 431.30(d)*].

[5] Jurisdiction

An action under *20 U.S.C. § 1415(i)(2)* may be brought in any state court of competent jurisdiction. Such actions may also be brought in a United States district court, which has jurisdiction of such actions regardless of the amount in controversy [*20 U.S.C. § 1415(i)(2)(A)*]. For forms of jurisdictional allegations for use in actions brought in federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

[6] Venue

If an action under *20 U.S.C. § 1415* is brought in a superior court, venue is apparently proper in either the county in which the cause, or some part thereof, arose [*see Code Civ. Proc. § 393(b)* (actions against public officer or person especially appointed to execute his or her duties, for act done by him or her by virtue of the public office)] or the county in which the local public education agency is situated [*see Code Civ. Proc. § 394(a)* (actions against county, city and county, city, or local agency)].

[7] Appointment of Guardian ad Litem

When a minor, an incompetent person, or a person for whom a conservator has been appointed is a party to a civil action, the court in which the action is pending must appoint a guardian ad litem to appear for him or her [*Code Civ. Proc. § 372*; *see* Paragraph 1]. For a discussion and forms relating to the appointment of a guardian ad litem, see Ch. 291, *Guardians Ad Litem* .

[8] Parent as Party

Under both federal and state law, procedural safeguards, including the right to a due process hearing, extend to both the handicapped pupil and his or her parent or guardian [*20 U.S.C. § 1415(a), (h)*; *Educ. Code § 56501(a)*]. The right to bring a civil action under *20 U.S.C. § 1415* specifically extends to *any party* aggrieved by the findings and decision made pursuant to the state due process hearing procedure [*20 U.S.C. § 1415(i)(2)(A)*; *see Educ. Code § 56505(k)*]. Thus, a parent or guardian is a proper party to a civil action under *20 U.S.C. § 1415*.

[9] Exhaustion of Administrative Remedies

A party seeking judicial relief under *20 U.S.C. § 1415* must exhaust all state administrative remedies and procedures prior to bringing such an action, unless to do so would be futile. Therefore, the complaint should allege facts showing either that the state administrative remedies have been exhausted or that exhaustion of such remedies would be futile [*see Honig v. Doe (1988) 108 S. Ct. 592, 98 L. Ed. 2d 686* ; *Hoeft v. Tucson Unified Sch. Dist. (9th Cir. 1992) 967 F.2d 1298, 1303* (exhaustion required unless it would be futile or offer inadequate relief, or agency has adopted policy or pursued practice of general applicability contrary to law); *see also* Paragraphs 9-13].

[10] Remedies Available

In an action under *20 U.S.C. § 1415*, the court has the power to grant such relief as it determines is appropriate [*20 U.S.C. § 1415(i)(2)(C)(iii)*]. Usually, the relief granted will consist of injunctive or declaratory relief, or both [*see, e.g., Sherry v. New York State Educ. Dep't. (W.D.N.Y. 1979) 479 F. Supp. 1328, 1331, 1339]* . In addition, some federal courts have held that compensatory damages may be awarded if appropriate [*Boxall v. Sequoia Union High School Dist. (N.D. Cal. 1979) 464 F. Supp. 1104, 1112]* . For further discussion, see *§ 513.33[5][g]*.

[11] Attorney's Fees

The court, in its discretion, may award reasonable attorney fees as part of the costs to the parents of a child with a disability who is the prevailing party [*20 U.S.C. § 1415(i)(3)(B)*]. Congress intended *20 U.S.C. § 1415(i)(3)(B)* to be interpreted consistent with fee provisions under *42 U.S.C. § 1988* and Title VII of the Civil Rights Act of 1964 [*Abu-Sahyun v. Palo Alto Unified School Dist. (9th Cir. 1988) 843 F.2d 1250, 1251* , citing S. Rep. No. 99-112, 99th Cong., 2d Sess., reprinted in 1986 U.S. Code Cong. & Admin. News 1798, 1803-1805]. For further discussion of attorney fees under IDEA, see *§ 513.33[5][f]*; for discussion of fee provisions in *42 U.S.C. § 1988* and Title VII, see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

[12] Statute of Limitations

The IDEA does not specify a statute of limitations. Reviewing courts apply the most closely analogous state statute of limitations, unless it would undermine the policies underlying the IDEA. In determining the most analogous state statute of limitations, courts look to whether the scope of judicial proceedings available to a plaintiff under the state act is similar to the review available under the IDEA [Livingston School Dist. Nos. 4 and 1 v. *Keenan (9th Cir. 1996) 82 F.3d 912, 915]* . Concluding that a civil action under the IDEA challenging an administrative hearing officer's decision after a due process hearing is more analogous to judicial review of an administrative appeal than to an action on a liability created by statute, the Ninth Circuit has applied the forum state's broadly-applicable statute of limitations for judicial review of administrative decisions [*see* Livingston School Dist. Nos. 4 and 1 v. *Keenan (9th Cir. 1996) 82 F.3d 912, 916-918* (applying Montana Administrative Procedure Act's 30-day statute of limitations for judicial review of administrative decisions); *but see Alexopulos v. San Francisco Unified School Dist. (9th Cir. 1987) 817 F.2d 551* (applying California's three-year limitations period for statutory causes of action for liabilities created by statute to plaintiffs' respective IDEA action in case not involving challenge to administrative hearing officer's decision following due process hearing)]. Under California law, an "appeal" must be made within 90 days of receipt of the hearing decision [*Educ. Code § 56505(k)*]. In the absence of any authority to the contrary, counsel should assume that this short limitation period will be held to apply to a civil action brought under *20 U.S.C. § 1415*.

[13] Cross References

For alternative forms of allegations of capacity and residence, see Ch. 20, *Allegations Commonly Used* .

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions* .

For alternative forms of allegations of damages, see Ch. 177, *Damages*

For alternative forms of complaints for declaratory relief, see Ch. 182, *Declaratory Relief*

For discussion and forms relating to the appointment of guardians ad litem, see Ch. 291, *Guardians Ad Litem*

For alternative forms of complaint for injunctive relief, see Ch. 303, *Injunctions*

[14] Federal Statutes

Procedural safeguards for handicapped children and their parents. *20 U.S.C. § 1415*

Civil action to review state administrative decision concerning the provision of a free appropriate public education to disabled children. *20 U.S.C. § 1415(i)(2)*

[15] State Statutes

Injunctive relief. *Civ. Code § 3422*; *Code Civ. Proc. §§ 525, 526, 527*

Declaratory relief. *Code Civ. Proc. §§ 1060, 1061*

Procedural safeguards for individuals with exceptional needs and their parents or guardians. *Educ. Code §§ 56500-56507*

[16] Decisions

20 U.S.C. § 1415(j) prohibits school officials from unilaterally excluding child from class pending review proceedings because of dangerous conduct by that child if it is the child's inability to conform his or her conduct to socially acceptable norms renders him or her handicapped. *Honig v. Doe (1988) 484 U.S. 305, 323-328, 108 S. Ct. 592, 98 L. Ed. 2d 686*

20 U.S.C. § 1415(j) creates presumption in favor of child's current educational placement, which school officials can overcome only by showing that maintaining current placement is substantially likely to result in injury either to that child or to others; school officials entitled to seek injunctive relief under *20 U.S.C. § 1415(e)(2)* in appropriate cases. *Honig v. Doe (1988) 484 U.S. 305, 326-328, 108 S. Ct. 592, 98 L. Ed. 2d 686*

Appropriate relief under *20 U.S.C. § 1415(i)(2)* not limited in form and may include reimbursement to parents for private special education expenditures if court determines that private placement, rather than proposed IEP, is proper under IDEA. *Burlington School Comm. v. Department of Education (1985) 471 U.S. 359, 369-370, 105 S. Ct. 1996, 85 L. Ed. 2d 385*

Court's inquiry in suit under *20 U.S.C. § 1415(i)(2)* is twofold: (1) whether state has complied with procedures set forth in IDEA, and (2) whether individualized educational program developed through IDEA's procedures is reasonably calculated to enable child to receive educational benefits; state complies with obligations imposed by Congress if these requirements are met. *Board of Education v. Rowley (1982) 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690, 712*

Preliminary injunction to maintain educational status quo of disabled child under *20 U.S.C. § 1415(j)* need not always be automatically granted; court will apply traditional preliminary injunction factors, including showing of irreparable harm and likelihood of success on merits. *Johnson ex rel. Johnson v. Special Educ. Hearing Office (9th Cir. 2002) 287 F.3d 1176, 1180*

Availability of relief under IDEA bars plaintiffs from seeking similar relief with added bonus of attorney's fees under "and laws" provision of *42 U.S.C. § 1983*. *Doe v. Maher (9th Cir. 1986) 795 F.2d 787, 790*

IDEA provides specific procedural safeguards that must be adopted by states receiving federal funds under it; state law inconsistent with federally mandated procedures superseded by *IDEA. Monahan v. Nebraska (D. Neb. 1980) 491 F. Supp. 1074, 1086, 1091* ; *Vogel v. School Bd. of Montrose R-14 School Dist. (W.D. Mo. 1980) 491 F. Supp. 989, 991 n.1, 993*

Failure to initiate due process procedures of *20 U.S.C. § 1415* as excused if parents unilaterally placed teenager in private school rather than juvenile system facility, and parents entitled to recover educational costs in administrative proceeding, as well as attorney's fees under *Gov. Code § 800*, because respondents failed to undertake diagnostic reassessment of teenager and latest placement at juvenile facility was woefully inadequate and inappropriate in light of teenager's educational handicap, despite fact that teenager's problems were formidable and extremely difficult for diagnosis and treatment. *In re John K. (1985) 170 Cal. App. 3d 783, 795-798, 216 Cal. Rptr. 557*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawDiscriminationDisability DiscriminationGeneral OverviewEducation LawDiscriminationEqual Educational OpportunitiesEnforcementEducation LawDiscriminationIndividuals With Disabilities Education ActEnforcementEducation LawStudentsRight to Education

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Volume 45: Schools: Certification thru Service of Summons and Papers-Chs. 512-519
Chapter 513 SCHOOLS: STUDENT RIGHTS AND RESPONSIBILITIES
PART IV. FORMS
A. Student Rights and Responsibilities

45-513 California Forms of Pleading and Practice--Annotated § 513.91

§ 513.91 Complaint for Declaratory [Code Civ. Proc. § 1060] and Injunctive Relief [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527]--By Public School Student Against School Officials--Denial of Freedom of Speech [U.S. Const., amends. I, XIV; 42 U.S.C. § 1983; Cal. Const., art. I, § 2(a); Educ. Code § 48907]

[1] FORM Complaint for Declaratory [Code Civ. Proc. § 1060] and Injunctive Relief [Civ. Code § 3422; Code Civ. Proc. §§ 526, 527]--By Public School Student Against School Officials--Denial of Freedom of Speech [U.S. Const., amends. I, XIV; 42 U.S.C. § 1983; Cal. Const., art. I, § 2(a); Educ. Code § 48907]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], [a minor,	)	
by _____ (*name*),	)	
his/her Guardian ad litem,]	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DECLARATORY AND IN-
vs.	)	JUNCTIVE RELIEF
_____ [*names*],	)	[*U.S. Const., amends. I, XIV*; *42 U.S.C. § 1983*; *Cal. Const., art. I, § 2(a)*; *Educ. Code § 48907*]
Defendants.	)	
	)	
	)	

Plaintiff _____ [*name*] [, a minor, through his/her guardian ad litem,] alleges:

[1. *Appointment of guardian ad litem, if appropriate. See § 513.90, Paragraph 1.*]

2. Plaintiff is, and at all times herein mentioned was, a resident of _____ County, California, and a

pupil duly enrolled in _____ School, which is maintained and operated by defendant _____ School District.

3. Defendant _____ School District is, and at all times herein mentioned was, a school district duly organized and existing under the laws of the State of California.

4. _____ [*Allege capacity of individual defendants, e.g.,* Defendants _____ (*names*) are the duly qualified, elected, and acting members of _____ (*title of governing board, e.g.,* the Board of Education of the _____ School District), which is the governing board of defendant _____ School District. Defendant _____ (*name*) is the principal of _____ School and an employee of defendant _____ School District]. In doing the things hereinafter mentioned, these defendants acted under color of their authority and under the color of the customs and usages of defendant _____ [*name of school district*] and pursuant to the official policies of defendant _____ [*name of school district*] as enacted and adopted by _____ [*specify, e.g.,* the governing board] acting under color of its authority as such.

5. On or about _____ [*date*], _____ [*describe circumstances surrounding alleged deprivation of freedom of speech, e.g.,* defendants _____ (*names*), acting in their capacity as the governing board of defendant _____ School District, adopted and promulgated a school district regulation, a copy of which is attached hereto as Exhibit A and made a part hereof, which provides, in pertinent part that _____ (*specify, e.g.,* all students of _____ School District are prohibited from wearing any badge or button bearing a political message or slogan while on school property during school hours)].

6. _____ [*Further describe alleged deprivation of freedom of speech, e.g.,* On or about _____ (*date*), while lawfully on the premises of _____ School for the purpose of attending classes therein, plaintiff was wearing a political campaign button bearing the following inscription: _____ (*set forth precise words*). Thereafter, defendant _____ (*name of school official*), acting pursuant to the above-described school district regulation, ordered plaintiff to remove the above-described button or, in the alternative, to leave the school premises until plaintiff was willing to comply with the regulation described above. When plaintiff refused to do either, defendant _____ (*name of school official*) further stated that plaintiff would be suspended from school unless he/she complied with the above order, whereupon plaintiff left the premises of the school].

7. _____ [*Allege violation of constitutional and statutory right to freedom of speech, e.g.,* The above-described school district regulation denies plaintiff his/her right of freedom of speech and expression as guaranteed by the *First* and *Fourteenth Amendments of the United States Constitution, Section 2(a) of Article I of the California Constitution*, and *Section 48907 of the Education Code*, both on its face and as applied to plaintiff, and is unconstitutionally vague and overbroad (in that _____ (*specify*))].

8. [*Allege facts showing exhaustion of any available administrative remedies*].

9. Unless and until enjoined by order of this court, defendants will continue to _____ [*specify conduct, e.g.,* enforce the above-described school district regulation], thereby causing plaintiff great and irreparable injury in that plaintiff will thereby be deprived of his/her rights to freedom of speech and expression under the *First* and *Fourteenth Amendments of the United States Constitution, Section 2(a) of Article I of the California Constitution*, and *Section 48907 of the Education Code*, as hereinabove alleged.

10. Plaintiff has no adequate remedy at law for the injuries suffered, and to be suffered in the future, in that _____ [*allege facts showing inadequacy of legal remedy, e.g.,* it is impossible for plaintiff to calculate a sum of money damages that will compensate him/her for the loss of his/her rights to freedom of speech and

expression].

11. An actual controversy has arisen and now exists between plaintiff and defendants concerning their respective rights and duties in that plaintiff contends _____ [*specify plaintiff's contentions as to legal consequences of the facts alleged, e.g.,* that the above-described school district regulation is invalid and unenforceable, both on its face and as applied to plaintiff, because it deprives plaintiff of his/her rights of freedom of speech and expression under the *First* and *Fourteenth Amendments of the United States Constitution*, *Section 2(a) of Article I of the California Constitution*, and *Section 48907 of the Education Code*. Plaintiff further contends that defendants have no right, pursuant to the above-described regulation or otherwise, to prevent plaintiff from wearing the above-described political campaign button or any other such button while attending school or to harass, threaten, intimidate, discourage, discriminate against, discipline, or otherwise punish plaintiff for wearing such a button to school]. Defendants, dispute these contentions, however, and contend that _____ [*specify defendant's contentions, e.g.,* the above-described school district regulation is a reasonable regulation of the time, place, and manner of expression].

12. Plaintiff desires a judicial determination of his/her rights and duties and a declaration as to _____ [*specify, e.g.,* whether the above-described school district regulation is invalid and unenforceable as violative of plaintiff's rights of free speech and expression under the *First* and *Fourteenth Amendments of the United States Constitution*, *Section 2(a) of Article I of the California Constitution*, and *Section 48907 of the Education Code*, either on its face or as applied to plaintiff, or both].

13. A judicial declaration is necessary and appropriate at this time under the circumstances in order that plaintiff may ascertain his/her rights and duties _____ [*specify, e.g.,* with respect to his/her right to wear political campaign buttons while attending classes on school property]. _____ [*Allege any financial, educational, or other burden caused plaintiff by the unsettled state of affairs*].

14. By reason of defendants' acts and conduct as herein alleged, plaintiff was deprived of his/her rights, privileges, and immunities secured to him/her by the *First Amendment of the Constitution of the United States*, all in violation of Title *42 of the United States Code*, *Section 1983*.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For an order requiring defendants to show cause, if any, why they should not be enjoined, as hereinafter set forth, during the pendency of this action;

2. For a preliminary injunction and a permanent injunction enjoining defendants, and each of them, and their agents, servants, and employees, and all persons acting under, in concert with, or for them from _____ [*specify acts to be enjoined, e.g.,* (1) enforcing the above-described school district regulation in any manner whatsoever, and (2) threatening, harassing, intimidating, discouraging, punishing, discriminating against, or disciplining plaintiff for violating the above-described school district regulation or for the use, display, creation, or wearing of the political campaign button described hereinabove, or any other similar political campaign button];

3. For a judicial declaration that _____ [*state determination that court is requested to make, e.g.,* the above-described school district regulation is unconstitutional, invalid, void, and unenforceable, both on its face and as applied to plaintiff];

4. For costs of suit herein incurred;

5. For reasonable attorneys' fees as authorized by Title *42 United States Code*, *Section 1988(b)*; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification. See § 513.90.*]

CAUTION:

Unless counsel will be filing affidavits (or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*]) in support of the allegations of this complaint, the complaint must be verified [*see Code Civ. Proc. § 527(a)*], and counsel must take care to plead evidentiary facts that would entitle plaintiff to injunctive relief [*see E. H. Renzel v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan Ridge Mut. Water Ass'n (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* .

[2] Use of Form

This form of complaint is for use by a public school student in an action to enjoin school officials from engaging in conduct that violates the student's rights of free speech and expression under *U.S. Const., amends. I* and *XIV*; *Cal. Const., art. I, § 2(a)*; and *Educ. Code § 48907*. The complaint also contains allegations and a prayer for declaratory relief. The complaint also alleges a count under *42 U.S.C. § 1983* for deprivation of federal constitutional rights under color of law, which gives rise to a right to attorneys' fees under *42 U.S.C. § 1988(b)*.

[3] Allegations

This complaint alleges in pertinent part: (1) capacities of the parties (Paragraphs 2-4); (2) conduct by defendants violating plaintiff's rights of free speech and expression [*see U.S. Const., amends. I* and *XIV*; *42 U.S.C. § 1983*; *Cal. Const., art. I, § 2(a)*; *Educ. Code § 48907*] (Paragraphs 5-7); (3) exhaustion of administrative remedies [*see Pan Pacific Properties, Inc. v. County of Santa Cruz (1978) 81 Cal. App. 3d 244, 249-251, 146 Cal. Rptr. 428]* (Paragraph 8); (4) great and irreparable injury [*see Code Civ. Proc. § 526(a)(1)*] (Paragraph 9); (5) inadequacy of legal remedy [*see Civ. Code § 3422(1), (2)*; *Code Civ. Proc. § 526(a)(4), (5)*] (Paragraph 10); (6) right to declaratory relief [*see Code Civ. Proc. §§ 1060, 1061*] (Paragraphs 11-13); and (7) deprivation of constitutional rights under color of law [*see 42 U.S.C. § 1983*] (Paragraphs 4, 14).

[4] Verification

See discussion in *§ 513.90[4]*.

[5] Cross References

For forms of complaints for declaratory and injunctive relief to enjoin public officials from denying the constitutional right to freedom of assembly, see Ch. 61, *Assemblies and Meetings* .

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions* .

For discussion of actions brought under *42 U.S.C. § 1983* for deprivation of constitutional rights under color of law, see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

For alternative forms of complaints for declaratory relief, see Ch. 182, *Declaratory Relief*

For discussion and forms relating to the appointment of guardians ad litem, see Ch. 291, *Guardians Ad Litem*

For alternative forms of complaint for injunctive relief, see Ch. 303, *Injunctions*

[6] Federal Constitution

Right to freedom of speech. *U.S. Const., amends. I, XIV*

[7] State Constitution

Right to freedom of speech. *Cal. Const., art. I, § 2(a)*

[8] Federal Statutes

Liability, in action at law or equity, of persons acting under color of law for deprivation of a citizen's constitutional rights. *42 U.S.C. § 1983*

Attorneys' fees as recoverable in any action or proceeding to enforce *42 U.S.C. § 1983. 42 U.S.C. § 1988(b)*

[9] State Statutes

Right of public school students to freedom of speech. *Educ. Code § 48907*

[10] Decisions

School prohibition of use of lewd, indecent, vulgar, or offensive speech or conduct by students in public discourse not prohibited by *U.S. Const., amend. I.* Bethel School Dist. No. 403 v. *Fraser (1986) 478 U.S. 675, 683-685, 106 S. Ct. 3159, 92 L. Ed. 2d 549, 558-560*

Federal constitutional rights of public school students not automatically coextensive with rights of adults in other settings; *First Amendment* gives high school student classroom right to wear armband, but not to wear obscene tee-shirt; does not follow that simply because use of offensive form of expression may not be prohibited to adults making what speaker considers political point, same latitude must be permitted to public school children. *Bethel School Dist. No. 403 v. Fraser (1986) 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 2d 549, 558*

Students and teachers do not shed their constitutional rights to freedom of speech and expression at the schoolhouse gate; showing that forbidden speech conduct would materially and substantially interfere with requirements of appropriate discipline in the operation of school required to justify prohibition of particular expression of opinion by school officials. *Tinker v. Des Moines Community School Dist. (1969) 393 U.S. 503, 506, 509, 512-513, 89 S. Ct. 733, 21 L. Ed. 2d 731*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsFreedom of SpeechExpressive ConductEducation LawCivil LiabilityCivil Rights Act of 1871Education LawStudentsSpeechPolitical & Symbolic Speech

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Volume 45: Schools: Certification thru Service of Summons and Papers-Chs. 512-519
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45-513 California Forms of Pleading and Practice--Annotated § 513.92

§ 513.92 Complaint [Fed. R. Civ. P., Rule 7] in United States District Court for Damages for Discrimination under Title IX of Education Amendments of 1972 [20 U.S.C. § 1681 et seq.] for Sexual Harassment by Teacher or Fellow Student

[1] FORM Complaint [Fed. R. Civ. P., Rule 7] in United States District Court for Damages for Discrimination under Title IX of Education Amendments of 1972 [20 U.S.C. § 1681 et seq.] for Sexual Harassment by Teacher or Fellow Student

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF
CALIFORNIA, _____ DIVISION

_____ [*name*],	)	Civil Action, File No. _____
Plaintiff,	)	COMPLAINT AND
vs.	)	DEMAND FOR JURY
_____ [*name*],	)	TRIAL
Defendant(s).	)	(Violation of Title IX of Education
	)	Amendments of 1972)
	)	

Plaintiff alleges:

1. This is an action for violation of Title IX of the Education Amendments of 1972, *20 U.S.C. § 1681 et seq.* for discrimination on the basis of sex based on sexual harassment of plaintiff which excluded plaintiff from participation in, denied plaintiff the benefits of, and/or subjected plaintiff to discrimination under an education program or activity of

defendant. Defendant is a recipient of federal financial assistance for purposes of Title IX of the Education Amendments of 1972, *20 U.S.C. § 1681 et seq.* Jurisdiction of the subject matter of this action is established in this court under Title *28 of the United States Code, Section 1343*.

2. At all times herein mentioned, plaintiff was, and now is, a _____ [citizen or person within the jurisdiction] of the United States, residing at _____ [*street address*], _____ County, California, who, at times herein relevant, was a student at _____ [*specify name and location of educational institution plaintiff attended, e.g.,* Lagunitas Elementary School, a public school located in Marin County, California].

3. At all times hereinafter mentioned, defendant _____ [*name*] was _____ [*specify capacity, e.g.,* a school district *or* county board of education], and a recipient of federal financial assistance.

4. [*Describe actions by sexual harasser that form the basis of the action, e.g.*, From about _____ (*date*), to _____ (*date*), plaintiff was subject to sexual harassment by _____ (*name of person who sexually harassed plaintiff*), who is/was _____ [*allege if the harasser was a teacher or fellow student*], in that _____ (*name of harasser*) performed the following acts: _____ (*specify acts of harassment, e.g.,* _____ (*On various dates during the period of* _____ (*date*) to _____ (*date*), _____ (*name of harasser*) attempted to touch plaintiff's breasts and genital area and made vulgar statements of a sexually provocative nature to plaintiff, _____ (*name of harasser*) rubbed his/her body against plaintiff many times in a sexually suggestive and often aggressive manner, _____ (*name of harasser*) effectively prevented plaintiff from attending physical education class over this period by acting in a sexually manner toward plaintiff, *etc.*]. The acts of _____ [*name of harasser*] interfered with plaintiff's ability to attend school and perform her studies and activities.

5. Throughout the period of _____ [*date*], to _____ [*date*], plaintiff [*add if appropriate* and plaintiff's mother *and/or* father *or name of other adult*] reported each of the incidents described in Paragraph _____ to _____ [*describe persons and capacity of those persons to whom plaintiff reported the sexually harassing conduct, e.g.* Richard Simon, plaintiff's classroom teacher, and Frances Newman, plaintiff's physical education teacher, at all times herein relevant, and John Jones, the principal of Lagunitas Elementary School at all times herein relevant]. _____ [*Allege facts showing defendant's deliberate indifference to the acts of harassment, e.g.* Notwithstanding these reports no disciplinary action was taken against _____ (*name of teacher or fellow student who harassed plaintiff*). Further, at not time herein relevant, despite plaintiff's requests and the request of her parents, was plaintiff allowed to change seats in her class or to change to a different physical education class so as to be physically removed from proximity with _____ (*name of harasser*). Also, at all times herein relevant, defendant had not instructed its personnel on how to respond to sexual harassment of students by teachers or fellow students and had not established a policy on the issue of teacher or "student-on-student" sexual harassment.] The deliberate indifference of defendant to _____ [*specify, e.g.,* the acts of _____ (*name of harasser*) and defendant's failure to have and implement a policy concerning sexual harassment of students by teachers and/or fellow students excluded plaintiff from participation in, denied plaintiff the benefits of, and/or subjected plaintiff to discrimination on the basis of sex].

6. As a proximate result of defendants' action against plaintiff, as alleged above, plaintiff has been harmed in that plaintiff _____ [*specify damages incurred, e.g.*], all to his/her damage _____ [in the amount of $_____ *or* in an amount according to proof] [*add if appropriate*, and incurred medical expenses _____ (in the amount of $_____ *or* in an amount according to proof)].

[7. The above-recited actions of defendant in excluding plaintiff from participation in, denying plaintiff the benefits of, and/or subjecting plaintiff to discrimination on the basis of sex in violation of Title IX of the Education Amendments of

1972. were done with evil motive or intent, or with reckless or callous indifference to plaintiff's rights.]

WHEREFORE, plaintiff request judgment as follows against defendant:

1. For general damages _____ [in the amount of $_____ *or* in an amount according to proof];

[2. For medical expenses _____ (in the amount of $_____ *or* in an amount according to proof);]

[3. For punitive damages in an amount appropriate to punish defendants for their wrongful conduct and set an example for others;].

4. For reasonable attorney's fees pursuant to Title *42 of the United States Code, Section 1988(b)*;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court deems proper.

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

DEMAND FOR JURY TRIAL

The plaintiff in the above-entitled action requests a trial by jury as provided by *Amendment VII of the United States Constitution* and by *Rule 38 of the Federal Rules of Civil Procedure.*

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

State of California)
[City and] County of _____)) ss.

_____ [*Name*], being duly sworn, deposes, and says:

He/She is the plaintiff in the above-entitled action. He/She has read the foregoing complaint and knows the contents thereof. The same is true of his/her own knowledge [, except as to matters therein stated on information and belief, and

as to those matters he/she believes it to be true].

_____ [*signature of plaintiff*]

Subscribed and sworn to before me this _____ day of _____ [*date*].

_____ [*signature*]
Notary Public-California
[City and] County of _____
My commission expires _____ [*date*]

[*notary seal*]

[2] Use of Form

This form of complaint is for use by a plaintiff in an action under Title IX of the Education Amendments of 1972, *20 U.S.C. § 1681*, for damages for sexual harassment by a teacher or fellow student.

[3] Allegations

The complaint alleges:

- The federal court's jurisdiction of the action (Paragraph 1) [*Fed. R. Civ. P., Rule 8(a)*].

- Defendant's status as a recipient of federal educational funding assistance and thus subject to Title IX (Paragraphs 1, 3).

- Plaintiff's status as a student and the educational institution plaintiff attends (Paragraph 2).

- Facts showing the nature of the acts of sexual harassment perpetrated against plaintiff by a teacher or fellow student (Paragraph 4).

- Plaintiff's acts and/or the acts of others in making the acts of sexual harassment alleged in paragraph 3 known to defendant and defendant's deliberate indifference to the acts of sexual harassment (Paragraph 5).

- Actual damages incurred by the plaintiff (Paragraph 6).

- The exclusion of plaintiff from participation in, denial of the benefits of, and/or subjection of plaintiff to discrimination under an educational program or activity receiving federal financial assistance in violation of Title IX (Paragraph 7).

The complaint is based on the allegations made in *Davis v. Monroe County Board of Education (1999) 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839* , in which the United States Supreme Court recognized a right of action for damages under Title IX for "student-on-student" sexual harassment. In *Gebser v. Lago Vista Independent School Dist (1998) 524 U.S. 274, 118 S. Ct. 1989, 141 L. Ed. 2d 277* , the Court recognized a right of action for damages under Title IX for sexual harassment of a student by a teacher. In both cases, the plaintiff/student must show that the recipient of federal education funding assistance, such as a school district or a county board of education, was deliberately indifferent to acts of sexual harassment made known to it; see discussion in *§ 513.36*.

[4] Cross References

For additional forms of jurisdictional allegations for complaints in federal courts, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawDiscriminationGender & Sex DiscriminationSexual HarassmentEducation LawDiscriminationGender & Sex DiscriminationTitle IXRemedies

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Volume 45: Schools: Certification thru Service of Summons and Papers-Chs. 512-519
Chapter 513 SCHOOLS: STUDENT RIGHTS AND RESPONSIBILITIES
PART IV. FORMS
A. Student Rights and Responsibilities

45-513 California Forms of Pleading and Practice--Annotated § 513.93

§ 513.93 Complaint [Fed. R. Civ. P., Rule 7] in United States District Court for Damages--by Public School Student Against School Officials--Hostile Racial Educational Environment [42 U.S.C. § 2000d]

[1] FORM Complaint [Fed. R. Civ. P., Rule 7] in United States District Court for Damages--by Public School Student Against School Officials--Hostile Racial Educational Environment [42 U.S.C. § 2000d]

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF
CALIFORNIA, _____ DIVISION

_____ [*name*],	)	
Plaintiff,	)	Civil Action, File No. _____
vs.	)	COMPLAINT AND
_____ [*name*],	)	DEMAND FOR JURY
Defendant(s).	)	TRIAL
	)	(Violation of *42 U.S.C. § 2000d*)
	)	

Plaintiff alleges:

1. This is an action for violation of Title VI of the Civil Rights Act of 1964, *42 U.S.C. § 2000d*, for discrimination based on race based on a hostile racial educational environment which excluded plaintiff from participation in, denied plaintiff the benefits of, and/or subjected plaintiff to discrimination under a program or activity receiving federal financial assistance. Defendant is a recipient of federal financial assistance for purposes of Title VI of the Civil Rights Act of 1964, *42 U.S.C. § 2000d*.

2. At all times herein mentioned, plaintiff was, and now is, a _____ [citizen *or* person within the jurisdiction] of the United States, residing at _____ [*street address*], _____ County, California, who, at times herein relevant, was a student at _____ [*specify name and location of educational institution plaintiff attended, e.g.* Sir Francis Drake High School, a public school located in Marin County, California].

3. At all times hereinafter mentioned, defendant _____ [*name*] was _____ [*specify capacity, e.g.,* a school district or county board of education], and a recipient of federal financial assistance.

4. Beginning on or about _____ [*date*], plaintiff was subject to a racially hostile educational environment at _____ [*name of school, e.g.,* Sir Francis Drake High School], in that _____ [*specify acts by fellow students creating racially hostile educational environment, e.g.,* fellow students repeatedly addressed plaintiff with a racial epithet ("nigger"), and plaintiff and other African-American students were subject to the appearance of racially offensive graffiti on classroom and other school walls].

5. Throughout the period of _____ [*date*] to _____ [*date*], plaintiff [*add if appropriate* and _____ (plaintiff's mother *and/or* father *or name of other adult*)] informed _____ [*specify names and capacities of officials of defendant school district to whom incidents were reported, e.g.,* Richard Simon, plaintiff's English teacher at all times herein relevant, Frances Newman, plaintiff's physical education teacher at all times herein relevant, and John Jones, the principal of Sir Francis Drake High School at all times herein relevant] of the racially offensive conduct by other students to which plaintiff was subject described in Paragraph _____. _____ [*Allege facts showing defendant's deliberate indifference to acts creating hostile racial educational environment, e.g.,* Notwithstanding the reports of racially offensive conduct by plaintiff (and _____ (plaintiff's mother *and/or* father *or name of other adult*), at no time did any officials or employees of defendant school district acknowledge the racially offensive conduct directed at plaintiff and other students described in Paragraph _____, attempt to discover the identities of the students responsible for that conduct, or take any disciplinary or other action to attempt to stop the racially offensive conduct from occurring]. The deliberate indifference of defendant to the racially offensive conduct directed at plaintiff and other students [*add if appropriate,* and defendant's failure to have and implement a policy concerning racial harassment] or the creation of a hostile racial educational environment by fellow students excluded plaintiff from participation in, denied plaintiff the benefits of, and/or subjected plaintiff to discrimination on the basis of race.

6. Jurisdiction of the subject matter of this action is established in this court under Title *28 of the United States Code, Section 1343*.

7. As a proximate result of defendants' action against plaintiff, as alleged above, plaintiff has been harmed in that plaintiff _____ [*specify damages incurred, e.g.,*], all to his/her damage _____ [in the amount of $_____ *or* in an amount according to proof] [*add if appropriate,* and incurred medical expenses _____ (in the amount of $_____ *or* in an amount according to proof)].

[8. The above-recited actions of defendants in excluding plaintiff from participation in, denying plaintiff the benefits of, and/or subjecting plaintiff to discrimination on the basis of race in violation of Title VI of the Civil Rights of 1964, were done with evil motive or intent, or with reckless or callous indifference to plaintiff's rights.]

WHEREFORE, plaintiff request judgment as follows against defendant:

1. For general damages _____ [in the amount of $_____ *or* in an amount according to proof];

[2. For medical expenses _____ (in the amount of $_____ *or* in an amount according

to proof);]

[3. For punitive damages in an amount appropriate to punish defendants for their wrongful conduct and set an example for others;].

4. For reasonable attorney's fees pursuant to Title *42 of the United States Code, Section 1988(b)*;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court deems proper.

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

DEMAND FOR JURY TRIAL

The plaintiff in the above-entitled action requests a trial by jury as provided by *Amendment VII of the United States Constitution* and by *Rule 38 of the Federal Rules of Civil Procedure.*

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

State of California)
[City and] County of _____) ss.
)

_____

_____ [*Name*], being duly sworn, deposes, and says:

He/She is the plaintiff in the above-entitled action. He/She has read the foregoing complaint and knows the contents thereof. The same is true of his/her own knowledge [, except as to matters therein stated on information and belief, and as to those matters he/she believes it to be true].

_____ [*signature of plaintiff*]

Subscribed and sworn to before me this _____ day of _____ [*date*].

_____ [*signature*]

Notary Public-California
[City and] County of _____
My commission expires _____ [*date*]

[*notary seal*]

[2] Use of Form

This form of complaint is for use by a plaintiff in an action under *42 U.S.C. § 2000d* for damages for discrimination on the basis of race in violation of Title VI of the Civil Rights Act of 1964, based a hostile racial educational environment by fellow students.

[3] Allegations

The complaint alleges:

- Plaintiff's status as a student and the educational institution plaintiff attends (Paragraph 2).

- Defendants' status as a school district and recipient of federal educational funding assistance so as to be subject to Title VI of the Civil Rights Act of 1964 (Paragraphs 1, 3).

- Facts showing the nature of the acts of racially offensive conduct directed at plaintiff and other students (Paragraph 4).

- Plaintiff's acts and/or the acts of others in making the acts of racially offensive conduct alleged in Paragraph 4 known to defendant and defendant's deliberate indifference to the racially offensive acts (Paragraph 5).

- The federal court's jurisdiction of the action (Paragraph 6) [*Fed. R. Civ. P., Rule 8(a)*].

- Actual damages incurred by the plaintiff (Paragraph 7).

- The exclusion of plaintiff from participation in, denial of the benefits of, and/or subjection of plaintiff to discrimination on the basis of race in violation of Title VI of the Civil Rights Act of 1964 by a recipient of federal educational assistance funding (Paragraph 8).

The complaint is based on the allegations in the complaint in *Monteiro v. Tempe Union High School District (9th Cir. 1998) 158 F.3d 1022* for violation of Title VI of the Civil Rights Act of 1964, *42 U.S.C. § 2000d*, which were found sufficient by the Ninth Circuit to state a cause of action.

[4] Cross References

For forms of complaints under *42 U.S.C. § 1983* generally, see Ch. 113, *Civil Rights : The Post-Civil War Civil Rights Statutes*

For additional forms of jurisdictional allegations for complaints in federal courts, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawDiscriminationRacial DiscriminationEqual ProtectionEducation LawDiscriminationRacial DiscriminationRacial HarassmentEducation LawDiscriminationRacial DiscriminationTitle VIRemedies

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Volume 45: Schools: Certification thru Service of Summons and Papers-Chs. 512-519
Chapter 513 SCHOOLS: STUDENT RIGHTS AND RESPONSIBILITIES
PART IV. FORMS
A. Student Rights and Responsibilities

45-513 California Forms of Pleading and Practice--Annotated § 513.94

§ 513.94 Complaint [Fed. R. Civ. P., Rule 7] in United States District Court for Damages--by Public School Student Against School Officials--Unlawful Search and Seizure U.S. Const., amends. IV, XIV; 42 U.S.C. § 1983]

[1] FORM Complaint [Fed. R. Civ. P., Rule 7] in United States District Court for Damages--by Public School Student Against School Officials--Unlawful Search and Seizure U.S. Const., amends. IV, XIV; 42 U.S.C. § 1983]

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF
CALIFORNIA, _____ DIVISION

_____ [*name*],	)	
Plaintiff,	)	Civil Action, File No. _____
vs.	)	COMPLAINT AND
_____ [*name*],	)	DEMAND FOR JURY
Defendant(s).	)	TRIAL
	)	(Violation of *U.S. Const., amends. IV, XIV*; *42 U.S.C.*
	)	*§ 1983*)

Plaintiff alleges:

1. Jurisdiction: This is an action for violation of *42 U.S.C. § 1983* for violation of the Fourth and Fourteen Amendments of the United States Constitution, protecting United States citizens against unlawful search and seizure. Jurisdiction of the subject matter of this action is established in this court under Title *28 of the United States Code, Section 1343*.

2. At all times herein mentioned, plaintiff was, and now is, a _____ [citizen *or* person within the jurisdiction] of the United States, residing at _____ [*street address*], _____ County,

California, who, at times herein relevant, was a student at _____ [*specify name and location of educational institution plaintiff attended*].

3. At all times hereinafter mentioned, defendant _____ [*name*] was _____ [*specify capacity,, e.g.,* the vice principal at _____ (*name of school*]. [*If more than one defendant, add:* At all times hereinafter mentioned, defendant _____ (*name*) was _____ (*specify capacity, e.g.,* a teacher at _____ (*name of school*))].

4. [*Describe actions by defendant that form the basis of the action, e.g.,* On or about _____ (*date*), plaintiff was subject to a search of her person by defendant _____ (*name of person who searched plaintiff*), who at all times relevant was _____ (*e.g.,* a teacher at _____ (*name of school*)), on the orders of defendant _____ (*name and capacity of person who ordered search*). At the time of the search, neither defendant _____ (*name of person who searched plaintiff*), nor defendant _____ (*name of person who ordered search*) gave plaintiff or any other student a reason for the conduct of the search].

5. At no time before or during the time of the search was plaintiff engaged in any conduct that could have given rise to or have been reasonably construed by any school officials or employees to give rise to reasonable grounds for the search. Further, at no time before or during the time of the search was plaintiff associated with any other student or students who were engaged in any conduct that could have given rise to or have been reasonably construed by any school officials or employees to give rise to reasonable grounds for the search.

6. As a proximate result of defendants' action against plaintiff, as alleged above, plaintiff has been harmed in that plaintiff _____ [*specify damages incurred, e.g.*], all to his/her damage _____ [in the amount of $_____ *or* in an amount according to proof] [*add if appropriate*, and incurred medical expenses _____ (in the amount of $_____ *or* in an amount according to proof)].

[7. The above-recited actions of defendants in ordering the search of and/or searching plaintiff were done with evil motive or intent, or with reckless or callous indifference to plaintiff's rights.]

WHEREFORE, plaintiff request judgment as follows against defendant:

1. For general damages _____ [in the amount of $_____ *or* in an amount according to proof];

[2. For medical expenses _____ (in the amount of $_____ *or* in an amount according to proof);]

[3. For punitive damages in an amount appropriate to punish defendants for their wrongful conduct and set an example for others;].

4. For reasonable attorney's fees pursuant to Title *42 of the United States Code, Section 1988(b)*;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court deems proper.

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

DEMAND FOR JURY TRIAL

The plaintiff in the above-entitled action requests a trial by jury as provided by *Amendment VII of the United States Constitution* and by *Rule 38 of the Federal Rules of Civil Procedure.*

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

State of California)
[City and] County of _____)) ss.
_____

_____ [*Name*], being duly sworn, deposes, and says:

He/She is the plaintiff in the above-entitled action. He/She has read the foregoing complaint and knows the contents thereof. The same is true of his/her own knowledge [, except as to matters therein stated on information and belief, and as to those matters he/she believes it to be true].

_____ [*signature of plaintiff*]

Subscribed and sworn to before me this _____ day of _____ [*date*].

_____ [*signature*]
Notary Public-California
[City and] County of _____
My commission expires _____ [*date*]

[*notary seal*]

[2] Use of Form

This form of complaint is for use by a plaintiff in an action under *42 U.S.C. § 1983* for damages for unlawful search and seizure of a public school student by a school official or employee in violation of *U.S. Const., amends. IV, XIV*.

[3] Allegations

The complaint alleges:

- The federal court's jurisdiction of the action (Paragraph 1) [*Fed. R. Civ. P., Rule 8(a)*].
- Plaintiff's status as a student and the educational institution plaintiff attends (Paragraph 2).
- Defendants' status as school officials or employees (Paragraph 3).
- Facts showing the nature of the search of plaintiff performed and/or ordered by a school employee or official (Paragraph 4).
- The fact that nothing about Plaintiff's conduct or the conduct of other students with whom Plaintiff associated gave rise to reasonable grounds for the search (Paragraph 5).
- Actual damages incurred by the plaintiff (Paragraph 6).

For discussion of searches of students by school officials or employees, see *§ 513.37*.

[4] Cross References

For forms of complaints under *42 U.S.C. § 1983* generally, see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*

For additional forms of jurisdictional allegations for complaints in federal courts, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawCivil LiabilityCivil Rights Act of 1871Education LawStudentsSearch & SeizureRemedies

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Volume 45: Schools: Certification thru Service of Summons and Papers-Chs. 512-519
Chapter 513 SCHOOLS: STUDENT RIGHTS AND RESPONSIBILITIES
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A. Student Rights and Responsibilities

45-513 California Forms of Pleading and Practice--Annotated § 513.95

§ 513.95 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Governing Board of School District and County Board of Education [Educ. Code §§ 48918, 48924]--Expulsion of Public School Student

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Review Administrative Decision [Code Civ. Proc. § 1094.5] of Governing Board of School District and County Board of Education [Educ. Code §§ 48918, 48924]--Expulsion of Public School Student

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name of pupil*]	)	
[, a minor, by _____ (*name*),	)	
his/her Guardian ad Litem], Petitioner,	)	NO. _____
vs.	)	PETITION FOR WRIT OF MANDATE
_____ [*names*],	)	
Respondents.	)	
	)	

Petitioner _____ [*name of pupil*] [, a minor, through his/her guardian ad litem,] respectfully represents:

[1. For purposes of this action, _____ (*name*) was appointed by the above-entitled court, and now is, guardian ad litem of petitioner _____ (*name of pupil*)].

2. Petitioner _____ [*name of pupil*] is, and at all times herein mentioned was, a resident of _____ County, California, and a pupil duly enrolled at _____ School, which is operated and maintained by respondent _____ School District.

3. Respondent _____ School District is, and at all times herein mentioned was, a school district duly organized and existing under the laws of the State of California.

4. Respondent _____ [*title of governing board, e.g.,* Board of Trustees of the _____ School District] is the duly constituted governing board of respondent _____ School District.

5. _____ [*Allege names and capacities of all individual respondents, e.g.,* Respondents _____ (*names*) are the duly qualified, elected or appointed, and acting members of respondent _____ (*title of governing board, e.g.,* Board of Trustees of the _____ School District). Respondent _____ (*name*) is, and at all times herein mentioned was, _____ (*allege capacity of any other individual respondent, e.g.,* principal of _____ School, and a duly certificated employee of respondent _____ School District)].

6. Under *Section 48918(d) of the Education Code*, respondent _____ [*title of governing board, e.g.,* Board of Trustees of the _____ School District] has discretion to determine whether cause exists to expel a pupil of the district, or to delegate such authority to a county hearing officer, a hearing officer of the State Office of Administrative Hearings, or an impartial administrative panel of three or more certificated persons, none of whom may be members of the Board or employed on the staff of the school in which the pupil is enrolled. Pursuant to *Section 48918(d) of the Education Code*, respondent board or its delegate is required to conduct a hearing and take evidence in its proceedings for the determination of the facts.

7. On or about _____ [*date*], respondents served petitioner with written notice, pursuant to *Section 48918(b) of the Education Code*, that the expulsion of petitioner _____ [*name of pupil*] from school had been recommended on the ground that _____ [*specify alleged grounds for expulsion*], and setting a date for a hearing on whether petitioner _____ [*name of pupil*] should be expelled. A copy of the notice is attached hereto as Exhibit A and made a part hereof.

8. On _____ [*date*], a hearing was held before _____ [respondent _____ (*title of governing board, as in preceding paragraphs*) *or* an administrative _____ (hearing officer *or* panel) appointed by respondent _____ (*title of governing board*) pursuant to *Section 48918(d) of the Education Code*] to receive evidence on the issue of whether petitioner _____ [*name of pupil*] should be expelled from school. Petitioner attended the hearing. On _____ [*date*], petitioner received respondent board's final decision and determination that petitioner _____ [*name of pupil*] should be expelled on the ground that _____ [*specify ground for action*]. [*If appropriate, allege application for reconsideration and adverse result.*] A copy of the notice of decision is attached hereto as Exhibit B and made a part hereof.

9. A verbatim transcript of the record of the hearing before the _____ [respondent _____ (*title of governing board*) *or* administrative _____ (hearing officer *or* panel)], containing the evidence received, is attached hereto as Exhibit C and made a part hereof.

10. On _____ [*date*], within 30 days following the decision of respondent _____ [*title of governing board*], _____ [petitioner *or* his/her _____ (parent *or* guardian)] appealed the decision to respondent _____ County Board of Education pursuant to *Section 48919 of the Education Code*. On _____ [*date*], a hearing of the appeal was held before _____ [respondent County Board of Education *or* a hearing officer *or* an impartial administrative panel] pursuant to *Sections 48919-48921 of the Education Code*. Petitioner attended this hearing. On _____ [*date*], respondent _____ County Board of Education made a final decision affirming the decision of respondent _____ [*title of governing board*] to expel petitioner. On _____ [*date*], petitioner received a copy of the decision of respondent _____

County Board of Education affirming petitioner's expulsion. [A copy of the decision of respondent _____ County Board of Education is attached hereto as Exhibit D and made a part hereof.]

11. The decision(s) of respondent _____ [*title of governing board*] [and respondent _____ County Board of Education] _____ [is *or* are] invalid for the following reasons: _____ [*in subparagraphs that follow, state reasons why decision is invalid, e.g.,*

a. _____ (Respondent Board *or* The hearing officer *or* The administrative panel) found that _____ (*state all findings*). Respondent _____ (*title of governing board*) does not have authority to expel petitioner in that such findings do not constitute any of the grounds for expulsion set forth in *Sections 48900, 48900.2, 48900.4,* or *48900.7 of the Education Code*.

b. The evidence received at the hearing does not support the findings for the following reasons: _____ (*specify*).

[c. _____ (*In this and following subparagraphs, allege any other reasons for invalidity of decision under Code Civ. Proc. § 1094.5, such as action by respondent without or in excess of authority, denial of a fair hearing, or abuse of discretion as established by failure to proceed as required by law, failure of the findings to support the decision, and failure of the evidence to support the findings. For examples of such allegations, see the petition for writ of mandate to review an administrative decision in Ch. 474C, Procedures in Reviewing Agency Decisions, §§ 474C.90, 474C.91*).]

[12. *If appropriate, allege existence of additional relevant evidence that petitioner could not, in the exercise of reasonable diligence, have produced at the hearing. See § 512.160, Paragraph* 9.]

[13. *If petitioner seek attorney's fees pursuant to Gov. Code § 800, allege amount of attorney's fees incurred. See § 512.160, Paragraph 10*.]

14. [*Exhaustion of administrative remedies. See § 512.160, Paragraph 11*].

15. [*Lack of plain, speedy, or adequate remedy in ordinary course of law. See § 512.160, Paragraph 12*].

WHEREFORE, petitioner prays judgment as follows:

[1. *If alternative writ procedure is used:* For an alternative writ of mandate directing respondent _____ (*title of governing board*) to set aside its decision and order of _____ [*date*], expelling petitioner from _____School, to reinstate petitioner as a pupil at _____ School, and to order expunged any mention of the expulsion proceedings from any records or files respecting petitioner which are maintained by respondent _____ School District, or any of its agents, employees, or officers, or in the alternative to show cause why a peremptory writ of mandate to the same effect should not be issued;]

[2. *If petitioner seeks a stay of operation of administrative order or decision pending judgment, state:* For an order restraining respondent from giving effect to its order of _____ (*date*), _____ (*specify effect of order, e.g.,* expelling petitioner from _____ School) until further order of the court and to show cause why operation of that order should not be stayed pending judgment in this proceeding;]

3. For a peremptory writ of mandate _____ [*set out terms of proposed peremptory writ at length as in Paragraph 1 of this prayer, omitting words relating to order to show cause*];

[4. For reasonable attorney's fees, in addition to any other relief granted or other costs awarded;]

5. For costs of suit herein incurred [*add, if appropriate:*, including $_____ for preparation of the administrative record]; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioners _____ [*name*]

VERIFICATION

I, _____ [*name*], am [guardian ad litem for] the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

CAUTION:

This petition must be verified [*Code Civ. Proc. § 1086*]. Proof of service of a copy of the petition on each respondent and real party in interest must accompany the petition when it is offered for filing (except when, in its discretion and for good cause, the court has granted the application for the writ ex parte) [*Code Civ. Proc. § 1107*]. However, in a trial court, if no alternative writ is sought, proof of service of a copy of the petition need not accompany the application for the writ at the time of filing, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*]. Points and authorities also customarily accompany a petition for writ of mandate filed in superior court, although they are not expressly required by statute.

[2] Use of Form

This form of petition for a writ of mandate is for use by a public school student to obtain judicial review of an administrative decision by the governing board of a school district expelling the student from school. For a complete discussion of mandate proceedings to review administrative decisions, see Ch. 474, *Availabitlity of Judicial Review of Agency Decisions* , Ch. 474C, *Procedures in Reviewing Agency Decisions* . The petitioner may proceed by either the alternative writ procedure or the noticed application procedure, as discussed in *§ 512.160[2]*.

[3] Allegations

The petition alleges: (1) appointment of a guardian ad litem if the pupil is a minor [*Code Civ. Proc. § 372*] (Paragraph 1); (2) capacities and residences of parties (Paragraphs 2-5); (3) petitioner's status as a pupil (thus, his or her beneficial interest in issuance of the writ [*see Code Civ. Proc. § 1086*]) (Paragraph 2); (4) discretionary authority of respondent governing board or its delegate to determine whether petitioner should be expelled [*Code Civ. Proc. § 1094.5(a)*; *see Educ. Code § 48918*] (Paragraph 6); (5) legal requirement that a hearing be held and evidence be taken [*Code Civ. Proc. § 1094.5(a)*; *see Educ. Code § 48918*] (Paragraph 6); (6) facts concerning the holding of the hearing (Paragraphs 7-9);

(7) appeal to county board of education and adverse result [*see Educ. Code §§ 48919-48924*] (Paragraph 10); (8) reasons for invalidity of decision [*Code Civ. Proc. § 1094.5(b)*; *see § 512.160*] (Paragraph 11); (9) existence of any additional relevant evidence which could not, with due diligence, have been produced at the hearing [*Code Civ. Proc. § 1094.5(e)*] (Paragraph 12); (10) if appropriate, the amount of attorney's fees claimed under *Gov. Code § 800* [*see § 512.160*] (Paragraph 13); (11) exhaustion of administrative remedies [*Noonan v. Green (1969) 276 Cal. App. 2d 25, 29-31, 80 Cal. Rptr. 513]* (Paragraph 14); and (12) lack of a plain, speedy, or adequate remedy in the ordinary course of law [*Code Civ. Proc. § 1086*] (Paragraph 15).

For a complete discussion of the essential allegations of a petition for writ of mandate to review an administrative adjudicatory decision, see Ch. 474C, *Procedures in Reviewing Agency Decisions*, § 474C.90[5].

[4] Cross References

For alternative forms of allegations of capacity and residence, see Ch. 20, *Allegations Commonly Used* .

For discussion and alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions* .

For discussion and forms relating to mandate proceedings generally, see Ch. 358, *Mandate and Prohibition* .

For discussion and forms relating to mandate proceedings to review administrative adjudicatory decisions, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* .

For discussion and alternative forms of verification, see Ch. 572, *Verification* .

[5] California Points and Authorities

For points and authorities supporting a petition for writ of mandate to review the decision to expel a public school pupil, see California Points and Authorities, Ch. 210, *Schools*

[6] State Statutes

Mandate proceedings generally. *Code Civ. Proc. §§ 1084-1089*

Writ of mandate to determine validity of administrative decision made as result of evidentiary hearing required by law. *Code Civ. Proc. § 1094.5*

Service of writ. *Code Civ. Proc. § 1096*

Proof of service; opposing points and authorities. *Code Civ. Proc. § 1107*

Permissible grounds for expulsion. *Educ. Code §§ 48900, 48900.2, 48900.3, 48900.4, 48900.7, 48915(a)*

Procedure for expulsion of public school pupils. *Educ. Code §§ 48915, 48918*

Appeal of expulsion order to county board of education. *Educ. Code §§ 48919-48924*

[7] Decisions

Two-day suspension did not rise to level of penal sanction calling for full panoply of federal procedural due process protections applicable in criminal prosecution; school disciplinary rule proscribing obscene language and pre-speech admonitions of teachers gave adequate warning to student that his lewd speech could subject him to sanctions. Bethel School Dist. No. 403 v. *Fraser (1986) 478 U.S. 675, 686, 106 S. Ct. 3159, 92 L. Ed. 2d 549*

Authority of school district to maintain discipline in schools and to suspend or expel pupils for refusing or neglecting to obey school rules or for other misconduct, subject to constitutional and statutory limits. *Abella v. Riverside Unified School Dist. (1976) 65 Cal. App. 3d 153, 167, 135 Cal. Rptr. 177*

Pupil expelled from school as required to exhaust administrative appellate remedy prior to bringing mandate proceeding for judicial review of expulsion. *Noonan v. Green (1969) 276 Cal. App. 2d 25, 29-31, 80 Cal. Rptr. 513*

[8] Law Reviews

Boone, "Expulsion in California Public High Schools--Due Process a Decade After Dixon," *8 San Diego L Rev 333 (1971)*

[9] Text References

California Administrative Mandamus (Cal CEB 2000)

Witkin, California Procedure, Vol. 8, *Extraordinary Writs*, §§ 295-331 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusEducation LawCivil LiabilityGeneral OverviewEducation LawStudentsDisciplinary ProceedingsAppeals & ReviewsEducation LawStudentsDiscipline MethodsExpulsions

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Chapter 514 SCHOOLS: INJURIES TO STUDENTS

45-514 California Forms of Pleading and Practice--Annotated 514.syn

§ 514.syn Synopsis to Chapter 514: SCHOOLS: INJURIES TO STUDENTS

§ 514.01 Scope of Chapter

§ 514.02 Cross References

§§ 514.03-514.09 [Reserved]

§ 514.10 Governing Statutes

§ 514.11 Right to Safe Schools

§ 514.12 Liability for Acts or Omissions of School District Employees

[1] Generally

[2] Duty to Supervise Students

[3] Injuries to Students Not on School Property

[4] Off-Campus Injury Resulting From Negligent On-Campus Supervision

[5] No Duty to Protect Third-Party from Off-Campus Injury Absent Knowledge of Dangerous Student

[6] Defamation Liability for Reporting Threats

§ 514.13 Liability for Dangerous Condition of School Property

§ 514.14 Immunity for Hazardous Recreational Activity

§ 514.15 Immunity for Asbestos-Related Injuries

§ 514.16 Liability for Negligence of Independent Contractors

§ 514.17 Liability for Failure to Discharge Mandatory Duty

§ 514.18 Presentation of Written Claim to School District as Prerequisite to Action for Damages; Time Limits

§ 514.19 Punitive Damages Prohibited

§ 514.20 Defenses Available to School District and Employees

§§ 514.21-514.39 [Reserved]

§ 514.40 California Points and Authorities

§ 514.41 State Statutes

[1] Claims and Actions

[2] Liability of School Districts

[a] Generally

[b] Dangerous Condition of School Property

[3] Liability of School Employees

§ 514.42 Administrative Regulations

§ 514.43 Decisions

[1] Claims and Actions Against School Districts

[2] Dangerous Conditions

[3] Independent Contractors

[4] Injuries to Parents

[5] Negligent Supervision

[a] Generally

[b] Off-Campus Injury

§ 514.44 Attorney General Opinions

§ 514.45 Law Reviews

§ 514.46 Text References

§§ 514.47-514.59 [Reserved]

§ 514.60 Complaint for Damages [Civ. Code § 3333] for Personal Injuries--Against Public School District and Employees--By Injured Student--Negligent Supervision of Students [Civ. Code § 1714(a); Gov. Code §§ 815.2,

820]--General Form

[1] FORM

[2] Use of Form

[3] Allegations

[4] Presentation of Written Claim as Prerequisite to Action for Damages

[5] Appointment of Guardian ad Litem

[6] Venue

[7] Statute of Limitations

[8] Verification

[9] Specifying Amount of Damages

[10] Cross References

[11] State Statutes

[12] Decisions

§ 514.61 Allegation--Negligent Supervision of Students--By School District and Employees [Gov. Code §§ 815.2, 820]--Failure to Prevent Unauthorized Departure From School Grounds

[1] FORM

[2] Use of Form

[3] Decisions

[4] Law Reviews

[5] Cross References

§ 514.62 Complaint for Damages [Civ. Code § 3333] for Personal Injuries--Against Public School District, Employees, and Independent Contractor--By Injured Student--Negligence of Independent Contractor [Civ. Code § 1714(a); Gov. Code § 815.4] and Dangerous Condition of School Property [Gov. Code §§ 835, 840.2]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

[5] State Statutes

[6] Decisions

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PART I. SCOPE

45-514 California Forms of Pleading and Practice--Annotated § 514.01

§ 514.01 Scope of Chapter

This chapter discusses the liability of public school districts and their employees for injuries to students caused by the negligent or wrongful acts of school district employees or by the dangerous condition of school property [*see § 514.10* et seq.].

It includes forms of a complaint for damages for personal injuries to a student as a result of negligent supervision by school personnel [*see § 514.60*], an allegation of negligent failure by school employees to prevent the unauthorized departure of a student from the school grounds during the school day [*see § 514.61*], and a complaint for damages for personal injuries to a student based on the dangerous condition of school property and on the negligence of an independent contractor of the school district [*see § 514.62*].

For discussion of the public school system and school districts generally, including limitations on public school finance and racial segregation, see *Ch. 513, Schools: Student Rights and Responsibilities, § 513.10* et seq.

For discussion and forms relating to student rights and responsibilities, see Ch. 513, *Schools: Student Rights and Responsibilities* .

For discussion and forms relating to school employee certification, dismissal, and other related employment issues, see Ch. 512, *Schools: Certifcation, Dismissal, and Related Employment Issues* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawCivil LiabilityGeneral OverviewEducation LawCivil LiabilityInjuries on School PropertyEducation LawCivil LiabilityNegligenceTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesSchools

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45-514 California Forms of Pleading and Practice--Annotated § 514.02

§ 514.02 Cross References

For discussion and forms relating to actions for assault and battery, see Ch. 58, *Assault and Battery*

For discussion and forms relating to wrongful death and survival actions, see Ch. 181, *Death and Survival Actions*

For discussion and forms relating to liability for injuries incurred in games, sports, and athletics, see Ch. 273, *Games, Sports, and Athletics*

For discussion and forms relating to the appointment of guardians ad litem, see Ch. 291, *Guardians Ad Litem*

For discussion and forms relating to tort actions by minors and the compromise of a minor's claims, see Ch. 364, *Minors: Tort Actions*

For discussion and forms relating to negligence actions, see Ch. 380, *Negligence*

For discussion and forms relating to tort actions against and between a parent and child, see Ch. 394, *Parent and Child*

For discussion and forms relating to premises liability, see Ch. 421, *Premises Liability*

For discussion and forms relating to claims and actions against public entities and employees and the tort liability of public entities and employees, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

For discussion and forms relating to personal injury actions involving falls, see Ch. 525, *Slip and Fall*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawCivil LiabilityInjuries of Student AthletesFamily LawFamily Relationships & TortsGeneral

OverviewFamily LawGuardiansAppointmentTortsIntentional TortsAssault & BatteryElements of AssaultTortsNegligenceActionsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityActivities & ConditionsSlip & Fall InjuriesGeneral OverviewTortsPublic Entity LiabilityImmunityGeneral OverviewTortsWrongful Death & Survival ActionsGeneral OverviewTortsWrongful Death & Survival ActionsSurvival Actions

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[Reserved]

§§ 514.03[Reserved]

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45-514 California Forms of Pleading and Practice--Annotated § 514.10

§ 514.10 Governing Statutes

The tort liability of public entities and employees generally is governed by *Gov. Code § 810 et seq.* A "public entity" includes the state, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state [*Gov. Code § 811.2*]. A public school district is a public entity within the meaning of *Gov. Code § 811.2* [*see Wright v. Compton Unified Sch. Dist. (1975) 46 Cal. App. 3d 177, 181, 120 Cal. Rptr. 115]* .

The liability of school districts for injuries to students participating in school-sponsored field trips is governed by *Educ. Code § 35330*. The duty of teachers to control the conduct of students outside the classroom is set forth in *Educ. Code § 44807*. The liability of school districts and their employees for the conduct or safety of students when they are not on school property is governed by *Educ. Code §§ 44808-44808.5*. A school district employee's tort liability for defamation for stating that a specific student or other specified person has made a threat to commit violence or potential violence on the school grounds involving the use of a firearm or other deadly or dangerous weapon is governed by *Civ. Code § 48.8*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawCivil LiabilityGeneral OverviewEducation LawCivil LiabilityDefamationEducation LawCivil LiabilitySupervision of StudentsTortsPublic Entity LiabilityLiabilityGeneral Overview

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45-514 California Forms of Pleading and Practice--Annotated § 514.11

§ 514.11 Right to Safe Schools

Cal. Const. art. I, § 28(c), provides that all students and staff of public primary, elementary, junior high, and senior high schools have the inalienable right to attend campuses that are safe, secure, and peaceful. All school districts must comply with *Cal. Const. art. I, § 28(c)*, and are prohibited from taking official actions that violate or contravene its provisions. However, *Cal. Const. art. I, § 28(c)*, does not establish an affirmative duty to act on the part of school districts. Further, it does not provide any remedies for violations, and does not create a private cause of action for damages [*Clausing v. San Francisco Unified Sch. Dist. (1990) 221 Cal. App. 3d 1224, 1235-1238, 271 Cal. Rptr. 72* ; *see In re Latasha W. (1998) 60 Cal. App. 4th 1524, 70 Cal. Rptr. 2d 886* (random metal detector weapon searches of high school students did not violate student's *Fourth Amendment* right to be free from unreasonable searches and seizures, where needs of school district to keep weapons off campus, as embodied in *Cal. Const. art. I, § 28*, was substantial, no system of more suspicion-intense searches was workable, and searches were minimally intrusive); *Leger v. Stockton Unified Sch. Dist. (1988) 202 Cal. App. 3d 1448, 1453-1457, 249 Cal. Rptr. 688]* .

The School Safety and Violence Prevention Act, which was enacted in 1999, is a statewide program administered by the Superintendent of Public Instruction. It was the intent of the legislature that public schools serving pupils in grades 8 to 12, inclusive, have access to supplemental funds to establish programs and strategies that promote school safety and emphasize violence prevention among children and youth in the public schools [*Educ. Code § 32228(a)*]. School sites receiving these funds must accomplish all of the following goals [*Educ. Code § 32228(c)*]:

- Teach pupils techniques for resolving conflicts without violence;

- Train school staff and administrators to support and promote conflict resolution and mediation techniques for resolving conflicts between and among pupils;

- Reduce incidents of violence at the school site with an emphasis on prevention and early detection; and

- Provide age-appropriate instruction in domestic violence prevention, dating violence prevention, and interpersonal violence prevention.

The administration of this funding program is governed by *Educ. Code § 32228.1 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureSearch & SeizureWarrantless SearchesSchool SearchesEducation LawAdministration & OperationSafetyGeneral OverviewEducation LawCivil LiabilityGeneral OverviewEducation LawStudentsSearch & SeizureScope of Protection

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45-514 California Forms of Pleading and Practice--Annotated § 514.12

§ 514.12 Liability for Acts or Omissions of School District Employees

[1] Generally

Like all public entities, a school district is not liable for any injury, except as provided by statute [*Gov. Code § 815*]. A school district is liable for any injury proximately caused by an act or omission of its employee within the scope of his or her employment if the act or omission would have given rise to a cause of action against that employee. If, however, the employee is immune from liability, so is the school district [*Gov. Code § 815.2*]. For a further discussion and forms relating to the liabilities and immunities of public entities and employees in general, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

When students have been sexually molested by teachers, school districts have been sued on the theory that the employing school district can be held vicariously liable for the teacher's acts under the doctrine of respondeat superior. Most courts have found no liability on the part of the school district in such cases, on the grounds that such acts are outside the scope of employment [*John R. v. Oakland Unified Sch. Dist. (1989) 48 Cal. 3d 438, 447-452, 256 Cal. Rptr. 766, 769 P.2d 948* ; *Kimberly M. v. Los Angeles Unified Sch. Dist. (1989) 215 Cal. App. 3d 545, 547-549, 263 Cal. Rptr. 612]* . However, school districts may be held liable for negligent hiring and supervision of teachers by school district employees who knew or should have known of a teacher's prior sexual misconduct toward students [*Virginia G. v. ABC Unified Sch. Dist. (1993) 15 Cal. App. 4th 1848, 1854-1855, 19 Cal. Rptr. 2d 671]* . It should be noted that while a school district may be directly liable under such circumstances, the district cannot logically be allocated 100 percent of the fault, with no fault allocated to the offending teacher, since the district's conduct only becomes wrongful in the context of the teacher's wrongful acts of abuse [*Ortega v. Pajaro Valley Unified Sch. Dist. (1998) 64 Cal. App. 4th 1023, 1057-1058, 75 Cal. Rptr. 2d 777]* . For general discussion of an employer's liability for its employee's torts, see Ch. 248, *Employer's Liability for Employee's Torts* .

[2] Duty to Supervise Students

Although school authorities are not insurers of the physical safety of students, they are under a duty at all times to supervise the conduct of students on school grounds and to enforce those rules and regulations necessary for their protection. In carrying out this duty, school personnel are held to that degree of care which a person of ordinary prudence, charged with comparable duties, would exercise under the same circumstances. Either a total lack of

supervision or ineffective supervision may constitute a lack of ordinary care on the part of those responsible for student supervision [*Dailey v. Los Angeles Unified Sch. Dist. (1970) 2 Cal. 3d 741, 747, 87 Cal. Rptr. 376, 470 P.2d 360* ; *Aaris v. Las Virgenes Unified Sch. Dist. (1998) 64 Cal. App. 4th 1112, 1118-1119, 75 Cal. Rptr. 2d 801]* . Under *Gov. Code § 815.2(a)*, a school district is vicariously liable for injuries proximately caused by the negligent failure of its employees to adequately supervise student conduct [*Dailey v. Los Angeles Unified Sch. Dist. (1970) 2 Cal. 3d 741, 747, 87 Cal. Rptr. 376, 470 P.2d 360]* .

In addition, pursuant to *Educ. Code § 44807*, every teacher in the public schools must hold pupils to a strict account for their conduct on the way to and from school, on the playgrounds, or during recess. For example, this statutory duty is breached when a child is injured in a clod fight during school recess [*Lucas v. Fresno Unified Sch. Dist. (1993) 14 Cal. App. 4th 866, 872-873, 18 Cal. Rptr. 2d 79]* , or when a high school student is injured in an unsupervised slap boxing match [*Dailey v. Los Angeles Unified Sch. Dist. (1970) 2 Cal. 3d 741, 747, 87 Cal. Rptr. 376, 470 P.2d 360]* . However, a school district did not breach its statutory duty under *Educ. Code § 44807* to supervise a cheerleader injured while practicing a gymnastic stunt that occurred during supervision and training by her coach, though the coach urged the cheerleaders to practice and perfect the stunt, with which they had little experience [*Aaris v. Las Virgenes Unified Sch. Dist. (1998) 64 Cal. App. 4th 1112, 1119-1120, 75 Cal. Rptr. 2d 801]* .

The mere fact that some third party is the immediate actor in causing the injury does not of itself absolve a school district from liability if it was negligent in failing to provide adequate supervision [*Hoyem v. Manhattan Beach City School Dist. (1978) 22 Cal. 3d 508, 521, 150 Cal. Rptr. 1, 585 P.2d 851* ; *Charonnat v. San Francisco Unified Sch. Dist. (1943) 56 Cal. App. 2d 840, 846, 133 P.2d 643]* . Thus, willful misconduct or boisterous behavior by the injured student or another student does not necessarily relieve the school district of liability, since the duty to supervise is necessary in part because of the tendency of students to engage in aggressive and impulsive behavior which exposes them and their peers to the risk of serious physical harm [*Dailey v. Los Angeles Unified Sch. Dist. (1970) 2 Cal. 3d 741, 748, 87 Cal. Rptr. 376, 470 P.2d 360* ; *Beck v. San Francisco Unified Sch. Dist. (1964) 225 Cal. App. 2d 503, 508-509, 37 Cal. Rptr. 471]* .

A school should also consider the special vulnerability of special-needs students when monitoring the school grounds, as these students are more susceptible to victimization by other students. For example, if a school district allows a hidden area to be maintained on campus without taking adequate steps to prevent access by students, the foreseeability of that area being used to inflict injury on a special-needs student may be imputed to the district even without proof of prior incidents of victimization taking place in that hidden area [*Jennifer C. v. Los Angeles Unified School Dist. (2008) 168 Cal. App. 4th 1320, 1328-1329, 86 Cal. Rptr. 3d 274*].

Adequacy of supervision and proximate causation are generally considered questions of fact that the jury must decide [*see, e.g.,* *Beck v. San Francisco Unified Sch. Dist. (1964) 225 Cal. App. 2d 503, 508-509, 37 Cal. Rptr. 471* ; *Ziegler v. Santa Cruz City High Sch. Dist. (1959) 168 Cal. App. 2d 277, 284-286, 335 P.2d 709]* . The occurrence of similar incidents may be relevant to the existence of a duty to protect students against similar injuries [*see* *Dailey v. Los Angeles Unified Sch. Dist. (1970) 2 Cal. 3d 741, 752 n.8, 87 Cal. Rptr. 376, 470 P.2d 360]* .

A school district is not under a general duty to supervise the conduct of persons who come onto school property when school is not in session for purposes unrelated to school activities and functions [*see* *Bartell v. Palos Verdes Peninsula Sch. Dist. (1978) 83 Cal. App. 3d 492, 498-500, 147 Cal. Rptr. 898]* .

For a form of complaint against a school district and its employees for damages proximately caused by negligent supervision, *see § 514.60*.

[3] Injuries to Students Not on School Property

Notwithstanding any other provision of the Education Code, no school district, city or county board of education,

county superintendent of schools, or officer or employee of such district or board is responsible or in any way liable for the conduct or safety of any pupil of the public schools at any time when the pupil is not on school property unless the district, board, or person has done any of the following [*Educ. Code § 44808*]:

- Undertaken to provide transportation for the pupil to and from the school premises.
- Undertaken a school-sponsored activity off the school premises.
- Otherwise specifically assumed such responsibility or liability.
- Failed to exercise reasonable care under the circumstances.

The phrase "failed to exercise reasonable care under the circumstances" has been construed to modify the preceding phrases, which set forth the circumstances in which a duty to provide for the safety and conduct of a pupil arises by virtue of a specific assumption of obligation. Therefore, this portion of *Educ. Code § 44808* does not create any independent duty of care in the absence of some specific assumption of a duty to provide for a pupil's safety and conduct off campus [*Cerna v. City of Oakland (2008) 161 Cal. App. 4th 1340, 1357, 75 Cal. Rptr. 3d 168* ; *Torsiello v. Oakland Unified Sch. Dist. (1987) 197 Cal. App. 3d 41, 47-49, 242 Cal. Rptr. 752]* . For example, the court of appeal has held that a school district has no duty to students, who are waiting after school for their parents to pick them up, to protect them from injuries that occur off-campus on a public street that is not under the school district's control, at least if the injury does not result from the school district's on-campus negligence and the district has not undertaken any specific responsibilities to supervise or protect those students [*Guerrero v. South Bay Union Sch. Dist. (2003) 114 Cal. App. 4th 264, 269-270, 7 Cal. Rptr. 3d 509* ; *but see Eric M. v. Cajon Valley Union School Dist. (2009) 174 Cal. App. 4th 285, 299, 95 Cal. Rptr. 3d 428* (triable issue of fact as to whether school violated duty to supervise 6-year-old child who boarded then disembarked from school bus unattended and was struck by car off school property while walking home)].

In the event of such a specific undertaking, the district or board is liable or responsible for the safety or conduct of any pupil only while the pupil is or should be under the immediate and direct supervision of an employee of the district or board [*Educ. Code § 44808*; *see, e.g., Ramirez v. Long Beach Unified Sch. Dist. (2002) 105 Cal. App. 4th 182, 190, 129 Cal. Rptr. 2d 128* (school district that encouraged students to participate in camp that school did not supervise was not liable under *Educ. Code § 44808* for student's death at camp)]. Thus, a school district is under no actionable duty to supervise or provide for the protection of students on their way to or from school unless it has undertaken to provide transportation for them [*Gilbert v. Sacramento Unified Sch. Dist. (1968) 258 Cal. App. 2d 505, 508-510, 65 Cal. Rptr. 913* ; *Kerwin v. County of San Mateo (1959) 176 Cal. App. 2d 304, 307, 1 Cal. Rptr. 437]* . Similarly, a school district is not liable for injuries sustained as a result of its failure to provide transportation or its failure to assign a pupil to a particular school within the district [*Girard v. Monrovia City Sch. Dist. (1953) 121 Cal. App. 2d 737, 743-744, 264 P.2d 115* ; *but see Manjares v. Newton (1966) 64 Cal. 2d 365, 373-375, 49 Cal. Rptr. 805, 411 P.2d 901* (school district may be required to provide transportation when failure to do so would effectively prevent student from attending school at all)].

If, however, the school district does provide transportation, it is under a duty to provide a reasonably safe system [*Raymond v. Paradise Unified Sch. Dist. (1963) 218 Cal. App. 2d 1, 9, 31 Cal. Rptr. 847* ; *see Farley v. El Tejon Unified Sch. Dist. (1990) 225 Cal. App. 3d 371, 377-379, 274 Cal. Rptr. 780* (in wrongful death action brought after 8-year-old boy was killed while crossing road after being dropped off by school bus, determination of whether defendant exercised reasonable care as required by *Educ. Code § 44808* was question of fact); *see also Veh. Code § 22112* (schoolbus driver's duties of flashing red signal lights and stop signal arm and escorting pupils across highway)]. As noted above, however, liability will only be imposed if, at the time of the injury, the student was or should have been under the direct supervision of a school employee [*Bassett v. Lakeside Inn, Inc. (2006) 140 Cal. App. 4th 863, 872, 44 Cal. Rptr. 3d 827* (district not liable to student killed by drunk driver off school property on way to school bus stop

because student was not and should not have been under school supervision)].

Unless circumstances indicate that it is unreasonable not to do so, school authorities need not determine the safety of the surrounding neighborhood before dismissing students from school [*see Brownell v. Los Angeles Unified Sch. Dist. (1992) 4 Cal. App. 4th 787, 795-796, 5 Cal. Rptr. 2d 756]* . Thus, school authorities were not liable for negligent supervision because they dismissed students without first ascertaining that there were no gang members on nearby streets, when a student was then shot and wounded by gang members on a public street adjacent to school property [*see Brownell v. Los Angeles Unified Sch. Dist. (1992) 4 Cal. App. 4th 787, 794-798, 5 Cal. Rptr. 2d 756]* . Schools have no duty to engage in a visual inspection for gang activity, absent either (1) any specific indication of a real and imminent gang-related threat at a particular time and place or (2) prior incidents reflecting not necessarily a specific type of harm but that the possibility of harm in the form of an assault is foreseeable [*Brownell v. Los Angeles Unified Sch. Dist. (1992) 4 Cal. App. 4th 787, 797, 5 Cal. Rptr. 2d 756]* .

All persons who participate in "field trips or excursions" conducted by a school district are deemed to have waived all claims against the district, a charter school, or the state for injury, accident, illness, or death occurring during or because of the field trip or excursion [*Educ. Code § 35330(d)*]. This provision has been held to apply only to field trips or excursions in which students are not required to participate [*Wolfe v. Dublin Unified Sch. Dist. (1997) 56 Cal. App. 4th 126, 135, 65 Cal. Rptr. 2d 280* ; *Castro v. Los Angeles Bd. of Educ. (1976) 54 Cal. App. 3d 232, 235-236, 126 Cal. Rptr. 537]* . If the activity is one that requires attendance and for which attendance credit may be given, then the district is liable under *Educ. Code § 44808* for the safety of the pupil while the pupil is or should be under the direct supervision of an employee of the district. Students who are off the school's property for required school purposes are entitled to the same safeguards as those who are on school property, within supervisorial limits [*see Castro v. Los Angeles Bd. of Educ. (1976) 54 Cal. App. 3d 232, 235-236, 126 Cal. Rptr. 537]* . However, students who participate in non-required trips or excursions, though possibly in furtherance of their education but not as required attendance, are effectively on their own; the voluntary nature of the event absolves the district of liability [*Wolfe v. Dublin Unified Sch. Dist. (1997) 56 Cal. App. 4th 126, 135, 65 Cal. Rptr. 2d 280* (affirming summary judgment in school district's favor); *see Castro v. Los Angeles Bd. of Educ. (1976) 54 Cal. App. 3d 232, 235-236, 126 Cal. Rptr. 537* (reversing order sustaining demurrer in wrongful death action against school district)].

The court of appeal has reached a similar result under *Educ. Code § 87706* and *5* Cal. Code Reg. § 55450, provisions analogous to *Educ. Code §§ 35330, 44808* that govern the liability of community college districts. In that case, the court held that the more specific immunity provision applied to the facts and controlled the outcome, although the court disagreed that the voluntary nature of a student's participation was material to the analysis [*Barnhart v. Cabrillo Cmty. Coll. (1999) 76 Cal. App. 4th 818, 827-829, 90 Cal. Rptr. 2d 709]* .

The court of appeal has held that the field trip immunity of *Educ. Code § 35330* applies to school district employees acting in the course and scope of employment, even though school district employees are not explicitly included in the language of the statute [*Casterson v. Superior Court (2002) 101 Cal. App. 4th 177, 189, 123 Cal. Rptr. 2d 637]* . According to the court, a contrary conclusion would effectively destroy the immunity of the school district, because the district would be vicariously liable for the employee's conduct under *Gov. Code § 815.2(a)* [*Casterson v. Superior Court (2002) 101 Cal. App. 4th 177, 180, 123 Cal. Rptr. 2d 637* ; *see Gov. Code § 815.2(a)*].

The governing board of a school district may permit the pupils enrolled at any high school to leave the school grounds during lunch hour. Neither the school district nor any officer or employee thereof is liable for the conduct or safety of any pupil who has left the school grounds pursuant to such permission [*Educ. Code § 44808.5*].

[4] Off-Campus Injury Resulting From Negligent On-Campus Supervision

The duty or lack of duty to supervise the conduct of students who are off campus must be distinguished from the recognized duty of school officials to supervise students when they are on school property [§ 514.12[2]]. When school

officials negligently fail to provide adequate supervision of students while they are on school property, the fact that the resulting injury to the student occurs off campus does not relieve the district from liability [*Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 514-518, 150 Cal. Rptr. 1, 585 P.2d 851* ; *Satariano v. Sleight (1942) 54 Cal. App. 2d 278, 284, 129 P.2d 35]* . Thus, for example, a school district may be held liable for off-campus injuries that are proximately caused by its failure to exercise reasonable care in supervising students so as to prevent their unauthorized departure from the school grounds [*Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 514, 150 Cal. Rptr. 1, 585 P.2d 851]* .

For a form of allegation of negligent failure to prevent a student from leaving school without permission, *see § 514.61*.

[5] No Duty to Protect Third-Party from Off-Campus Injury Absent Knowledge of Dangerous Student

The duty to supervise students under a school's care is primarily designed to protect the students themselves from injury. It does not extend to nonstudents who are injured by a student off school premises, at least when the school neither knew nor had reason to know that the particular student posed a danger [*Hoff v. Vacaville Unified Sch. Dist. (1998) 19 Cal. 4th 925, 934-937, 80 Cal. Rptr. 2d 811, 968 P.2d 522]* . Thus, in one case a school district owed no duty to a third party who was injured across the street from a school parking lot when struck by a student driving in a reckless manner away from an unsupervised school parking lot. In that particular case, the school considered the student to be responsible and had no reason to know that he would drive his car away from the lot in a reckless manner [*Hoff v. Vacaville Unified Sch. Dist. (1998) 19 Cal. 4th 925, 934-937, 80 Cal. Rptr. 2d 811, 968 P.2d 522]* .

In that case, the Supreme Court also rejected the argument that liability could be predicated on *Educ. Code § 44807*, because that statute was designed to protect students rather than members of the general public who were not on school property. The Court also rejected an argument based on *Educ. Code § 44808*, finding that the school had not specifically assumed responsibility for the student's off-campus conduct at the parking lot at issue merely by providing supervision at another parking lot [*Hoff v. Vacaville Unified Sch. Dist. (1998) 19 Cal. 4th 925, 938-940, 80 Cal. Rptr. 2d 811, 968 P.2d 522* ; *see § 514.12[3]*].

[6] Defamation Liability for Reporting Threats

A communication by any person to a school principal, or a communication by a student attending the school to the student's teacher or to a school counselor or school nurse and any report of that communication to the school principal, stating that a specific student or other specified person has made a threat to commit violence or potential violence on the school grounds involving the use of a firearm or other deadly or dangerous weapon, is a communication on a matter of public concern. It does not subject the person making the statement to liability for defamation unless there is clear and convincing evidence that the communication or report was made with knowledge of its falsity or with reckless disregard for the truth or falsity of the communication [*Civ. Code § 48.8*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawCivil LiabilityDefamationEducation LawCivil LiabilityNegligenceEducation LawCivil LiabilitySupervision of StudentsEducation LawImmunitiesSchool District ImmunityTortsPublic Entity LiabilityLiabilityGeneral Overview

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45-514 California Forms of Pleading and Practice--Annotated § 514.13

§ 514.13 Liability for Dangerous Condition of School Property

Except as provided by statute, a school district, like other public entities, is liable for injury caused by a dangerous condition of its property if the plaintiff establishes the following [*Gov. Code § 835*]:

- The property was in a dangerous condition at the time of the injury;
- The injury was proximately caused by the dangerous condition;
- The dangerous condition created a reasonably foreseeable risk of the kind of injury that was incurred; and
- Either (a) a negligent or wrongful act or omission of an employee of the school district within the scope of his or her employment created the dangerous condition, or (b) the public entity had actual or constructive notice under *Gov. Code § 835.2* of the dangerous condition a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

A "dangerous condition" is a condition of property that creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury when the property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used [*Gov. Code § 830(a)*; *see Gov. Code § 830.2*]. A condition of school property that is not inherently dangerous but merely allows access to school property at times when no school personnel are present to supervise the conduct of persons on the premises is not a dangerous condition within the meaning of *Gov. Code §§ 830* and *835* [*Bartell v. Palos Verdes Peninsula Sch. Dist. (1978) 83 Cal. App. 3d 492, 496-498, 147 Cal. Rptr. 898]* .

However, a dangerous condition on school property may exist even though the condition is dangerous only by reason of a condition that exists on adjacent property over which the school has no control. In one case, for example, a school district was liable to a student who was struck by a car while crossing a dangerous crosswalk on an adjacent city street. The school district's liability was based on the district's placement of an entrance gate adjacent to the crosswalk, encouraging students to cross at that crosswalk even though the district was aware that the crosswalk, which had no

lights or stop signs, was at a heavily traveled intersection [*Joyce v. Simi Valley Unified Sch. Dist. (2003) 110 Cal. App. 4th 292, 298-300, 1 Cal. Rptr. 3d 712* ; *see also* *Bonanno v. Central Contra Costa Transit Auth. (2003) 30 Cal. 4th 139, 144, 132 Cal. Rptr. 2d 341, 65 P.3d 807]* .

For a further discussion and forms relating to the liability of public entities and employees for dangerous conditions of public property, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawCivil LiabilityInjuries at School CrossingsEducation LawCivil LiabilityInjuries on School PropertyTortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesSchoolsTortsPublic Entity LiabilityLiabilityGeneral Overview

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§ 514.14 Immunity for Hazardous Recreational Activity

As a public entity, a school district is immune from liability for any damage or injury to property or persons arising out of a hazardous recreational activity conducted on the property of the school district [*see Gov. Code § 831.7(a)*]. "Hazardous recreational activity" means a recreational activity that creates a substantial, as distinguished from a minor, trivial, or insignificant, risk of injury to a participant or a spectator [*Gov. Code § 831.7(b)*]. Under *Gov. Code § 831.7*, the district is immune from liability to any person who participates in the hazardous recreational activity, who assists a participant, or to any spectator who knew or reasonably should have known that the activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to leave, failed to do so [*Gov. Code § 831.7(a)*].

"Hazardous recreational activity" is further defined to mean the following [*Gov. Code § 831.7(b)(1)-(3)*]:

- Water contact activities, except diving, in places where or at a time when lifeguards are not provided and reasonable warning thereof has been given or the injured party should reasonably have known that there was no lifeguard provided at that time;

- Any form of diving into water from other than a diving board or diving platform, or at any place or from any structure where diving is prohibited and reasonable warning therof has been given; and

- Animal riding, including equestrian competition, archery, bicycle racing or jumping, boating, cross-country and downhill skiing, hang gliding, kayaking, motorized vehicle racing, off-road motorcycling or four-wheel driving of any kind, orienteering, pistol and rifle shooting, rock climbing, rocketeering, rodeo, spelunking, sky diving, sport parachuting, body contact sports (that is, sports in which it is reasonably foreseeable that there will be rough bodily contact with one or more participants), surfing, trampolining, tree climbing, tree rope swinging, water skiing, white water rafting, and wind surfing.

There are specified exceptions to this immunity, such as gross negligence by the school district or its employee that proximately causes the injury [*Gov. Code § 831.7(c)(5)*]. For a further discussion of this immunity, see Ch. 464, *Public*

Entities and Officers: California Tort Claims Act .

School districts, including colleges, have been denied immunity from liability under *Gov. Code § 831.7* for injuries to students engaged in school-sponsored athletic practices under the negligent supervision of school personnel, based on the conclusion that these activities are part of the educational mission of the school and therefore not considered "recreational" [*Avila v. Citrus Cmty. Coll. Dist. (2006) 38 Cal. 4th 148, 159-160, 41 Cal. Rptr. 3d 299, 131 P.3d 383* (community college was not immune under statute for injury to intercollegiate baseball player sustained during game); *Iverson v. Muroc Unified Sch. Dist. (1995) 32 Cal. App. 4th 218, 227, 38 Cal. Rptr. 2d 35* (body contact sport performed during required physical education class was not "recreational"); *Acosta v. Los Angeles Unified Sch. Dist. (1995) 31 Cal. App. 4th 471, 477-478, 37 Cal. Rptr. 2d 171* (school district has duty of reasonable supervision). However, a school district may be relieved from liability by the common-law doctrine of primary assumption of risk for an injury sustained by a student during a supervised extracurricular sports activity, if the injury was among the normal risks inherent in the sports activity [*Avila v. Citrus Cmty. Coll. Dist. (2006) 38 Cal. 4th 148, 163-165, 41 Cal. Rptr. 3d 299, 131 P.3d 383* (primary assumption of risk protected community college from liability to intercollegiate baseball player who was struck by pitch, perhaps intentionally, because risk was inherent in game); *Lilley v. Elk Grove Unified Sch. Dist. (1998) 68 Cal. App. 4th 939, 943-946, 80 Cal. Rptr. 2d 638* (rejecting argument that *Educ. Code § 44807* precluded application of primary assumption of risk doctrine to injury sustained in supervised extracurricular sports participation)]. For a discussion of primary assumption of risk, see Ch. 380, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawCivil LiabilityInjuries in Physical Education ClassesEducation LawCivil LiabilityInjuries of Student AthletesEducation LawCivil LiabilityInjuries on School PropertyEducation LawCivil LiabilitySupervision of StudentsEducation LawImmunitiesSchool District ImmunityTortsPremises Liability & PropertyGeneral Premises LiabilityActivities & ConditionsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSports FacilitiesTortsPublic Entity LiabilityImmunityGeneral Overview

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§ 514.15 Immunity for Asbestos-Related Injuries

A school district and its officers, directors, or employees have no civil liability in any civil action for injury, disease, death, or economic loss arising out of exposure on or after January 1, 1989, to asbestos contained in buildings owned, leased, or otherwise used by a school district, except on proof that the injury, disease, death, or economic loss was caused by the negligence of the school district, its officers, directors, or employees [*Gov. Code § 905.5*; for forms relating to negligence by public entities and public employees, *see* Ch. 464, *Public Entities and Officers: California Tort Claims Act*]. Notwithstanding *Gov. Code § 815.6* (public entity's liability on failure to discharge mandatory duty) and *Evid. Code § 669* (presumption of failure to exercise due care), no presumption of negligence applies to any action under *Gov. Code § 905.5* [*Gov. Code § 905.5*].

Gov. Code § 905.5 applies only to actions against school districts. It does not apply to any other action, including, but not limited to, actions against a manufacturer, contractor, or any person who makes, sells, distributes, furnishes, or installs asbestos-containing materials. *Gov. Code § 905.5* does not affect, alter, or otherwise modify the law pertaining to workers' compensation claims. Nor does it affect the right of a school district or its officers, directors, or employees to seek indemnification [*Gov. Code § 905.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawAdministration & OperationPropertyEquipment & FacilitiesEducation LawCivil LiabilityInjuries on School PropertyEducation LawImmunitiesSchool District ImmunityEnvironmental LawHazardous Wastes & Toxic SubstancesAsbestosGeneral OverviewReal Property LawEnvironmental RegulationIndoor Air & Water QualityTortsPublic Entity LiabilityImmunityGeneral Overview

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§ 514.16 Liability for Negligence of Independent Contractors

Like other public entities, a school district is liable for any injury proximately caused by a tortious act or omission of an independent contractor of the school district to the same extent that the district would be liable if it were a private person [*Gov. Code § 815.4*]. Thus, a school district is liable for the negligent failure of an independent contractor to construct or maintain buildings or install permanent fixtures in a reasonably safe condition [*see O'Gan v. King City Joint Union High Sch. Dist. (1970) 3 Cal. App. 3d 641, 646, 83 Cal. Rptr. 795]* . The school district's potential vicarious liability under *Gov. Code § 815.4* for the negligence of its independent contractors is broader than its liability for dangerous conditions under *Gov. Code § 835* because there is no requirement of either tortious conduct on the part of the district's employees or notice of the condition on the part of the district [*O'Gan v. King City Joint Union High Sch. Dist. (1970) 3 Cal. App. 3d 641, 646-647, 83 Cal. Rptr. 795]* .

For a form of complaint for damages against a school district and its employees and independent contractors for the negligence of the independent contractor and for the dangerous condition of school property, *see § 514.62*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawAdministration & OperationPropertyConstruction & RepairEducation LawCivil LiabilityInjuries on School PropertyEducation LawCivil LiabilityNegligenceTortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsGeneral OverviewTortsVicarious LiabilityIndependent ContractorsOwners & Possessors of Real Property

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§ 514.17 Liability for Failure to Discharge Mandatory Duty

When a public entity, such as a school district, is under a mandatory duty imposed by an enactment [*see Gov. Code § 810.6* ("enactment" defined as constitutional provision, statute, charter provision, ordinance, or regulation)] that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty, unless the entity establishes that it exercised reasonable diligence to discharge the duty [*Gov. Code § 815.6*]. For further discussion and a complaint alleging failure by a public entity to discharge a mandatory statutory duty, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

The obligation imposed on school districts by various provisions of the Education Code to adequately educate students is not a mandatory duty imposed by an enactment designed to protect against the risk of a particular kind of injury within the meaning of *Gov. Code § 815.6*. Thus, the violation of those provisions by a school district imposes no liability under *Gov. Code § 815.6* [*Rodriguez v. Inglewood Unified Sch. Dist. (1986) 186 Cal. App. 3d 707, 721, 230 Cal. Rptr. 823* ; *Peter W. v. San Francisco Unified Sch. Dist. (1976) 60 Cal. App. 3d 814, 826-827, 131 Cal. Rptr. 854* ; *see also* Ch. 513, *Schools: Student Rights and Responsibilities*]. Similarly, there is no basis for liability under *Gov. Code § 815.6* when a school district violates certain suspension and expulsion provisions of the Education Code (*Educ. Code §§ 48900, 48911, 48918*), because those provisions were not designed to protect students and their parents from money damages resulting from "educational" injuries [*Tirpak v. Los Angeles Unified Sch. Dist. (1986) 187 Cal. App. 3d 639, 643, 232 Cal. Rptr. 61]* . Additionally, *Gov. Code § 815.6* provides no basis for liability for violations of *Educ. Code §§ 49000* and *49001*, which prohibit corporal punishment, in that those sections do not create any mandatory, affirmative duty on the part of public schools or districts to take action or carry out measures to ensure that students are never subjected to corporal punishment by teachers [*Clausing v. San Francisco Unified Sch. Dist. (1990) 221 Cal. App. 3d 1224, 1239-1240, 271 Cal. Rptr. 72]* . For discussion of *Educ. Code §§ 49000* and *49001*, see Ch. 513, *Schools: Student Rights and Responsibilities* .

Although one court of appeal opinion held that the statutory duty to investigate a teacher's background and deny employment to those convicted of a sex offense could not be used to support a private right of action under *Gov. Code § 815.6* [*State of California v. Superior Court (1992) 8 Cal. App. 4th 954, 958, 10 Cal. Rptr. 2d 527* ; *see Educ. Code § 44346(a)(2)*; *Gov. Code § 815.6*], the California Supreme Court has subsequently rejected, in a different context, the rationale employed to reach that conclusion [*Haggis v. City of Los Angeles (2000) 22 Cal. 4th 490, 500 n.2, 93 Cal.*

Rptr. 2d 327, 993 P.2d 983 (application of *Gov. Code § 815.6* does not depend on whether Legislature intended underlying statute to create private right of action)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawCivil LiabilityGeneral OverviewEducation LawStudentsDiscipline MethodsCorporal PunishmentEducation LawStudentsDiscipline MethodsExpulsionsEducation LawStudentsDiscipline MethodsSuspensionsTortsPublic Entity LiabilityLiabilityGeneral Overview

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§ 514.18 Presentation of Written Claim to School District as Prerequisite to Action for Damages; Time Limits

A written claim relating to a cause of action for death or personal injury must be presented to the school district in accordance with *Gov. Code §§ 900-915.4* not later than six months after accrual of the cause of action [*see Gov. Code §§ 905, 910, 911.2*]. The claim must be presented to the school district. Presentation of the claim to the State Board of Control will not suffice. Although a school district is a state agency, it is a local public entity under the claim-filing requirement of the Tort Claims Act because it is not a state agency for which tort claims are paid by warrants issued by the controller. Potential liability for a claim for personal injuries rests with the school district, not the state [*Johnson v. San Diego Unified Sch. Dist. (1990) 217 Cal. App. 3d 692, 699-700, 266 Cal. Rptr. 187]* .

The governing board of the district must act on the claim (by allowing it or rejecting it in whole or in part) within 45 days after presentation of the claim. If the claim is amended, the board must act on the claim within 45 days after filing of the amended claim. If the board fails or refuses to act on the claim within this time, the claim is deemed rejected on the 45th day [*Gov. Code § 912.4*; *see Gov. Code § 912.6*]. Notice of the action taken on the claim must be given to the claimant in a form prescribed by statute [*see Gov. Code § 913*].

An injured party may apply in writing for leave to present a claim after six months following accrual of the cause of action if the application is presented to the school district within a reasonable time not exceeding one year after the accrual of the cause of action and states the reason for the delay in presenting the claim [*Gov. Code § 911.4*]. If the governing board does not grant or deny the application within 45 days after it is presented, the application is deemed denied on the 45th day [*Gov. Code § 911.6*]. If the application is denied, the claimant may petition the court for an order relieving him or her from the necessity of filing a claim prior to maintaining an action against the district [*see Gov. Code § 946.6*].

Except as provided in *Gov. Code § 946.4* (agency's failure to file statement required by *Gov. Code § 53051*) and *Gov. Code § 946.6* (judicial relief from claim requirement), no suit for money or damages may be brought against a school district on a cause of action for which a written claim is required to be presented under *Gov. Code §§ 910-915.4* until such a claim has been presented to the district and has been acted on or deemed rejected by the governing board of the district [*Gov. Code § 945.4*]. Any such suit against a school district must be commenced [*Gov. Code § 945.6(a)*]:

- If written notice of the board's action on the claim is given in accordance with *Gov. Code § 913*, not later than six months after the date such notice is personally delivered or deposited in the mail; or

- If written notice is not given in accordance with *Gov. Code § 913*, within two years after accrual of the cause of action.

For a further discussion and forms relating to the presentation of written claims to public entities, see *§ 514.14* and Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawCivil LiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationActual NoticeTortsPublic Entity LiabilityLiabilityClaim PresentationContent & FormTortsPublic Entity LiabilityLiabilityClaim PresentationTime LimitationsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural Requirements

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§ 514.19 Punitive Damages Prohibited

Notwithstanding any other provision of law, a school district, like other public entities, is not liable for exemplary or punitive damages [*Gov. Code § 818*]. For a discussion of other immunities of public entities and employees, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesPunitive DamagesEducation LawImmunitiesSchool District ImmunityTortsDamagesPunitive DamagesAvailabilityGovernmental EntitiesTortsPublic Entity LiabilityImmunityGeneral Overview

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§ 514.20 Defenses Available to School District and Employees

The liability of a school district and its employees, like that of other public entities and their employees, is subject to any defense that would be available if the district or its employee was a private person [*Gov. Code §§ 815(b), 820(b)*]. In addition, school districts and their employees are entitled to certain immunities from tort liability which are applicable to public entities and employees generally. For a discussion of these immunities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawImmunitiesSchool District ImmunityTortsPublic Entity LiabilityImmunityGeneral Overview

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[Reserved]

§§ 514.21[Reserved]

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§ 514.40 California Points and Authorities

For memoranda of points and authorities relating to tort claims and actions against public entities, see California Points and Authorities, Ch. 196, *Public Entities* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral Overview

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45-514 California Forms of Pleading and Practice--Annotated § 514.41

§ 514.41 State Statutes

[1] Claims and Actions

Claims against public entities. *Gov. Code §§ 900-935.6*

Actions against public entities and employees. *Gov. Code §§ 940-960.8*

[2] Liability of School Districts

[a] Generally

Waiver of claims against school district, charter school, and state for injury, accident, illness, or death occurring during or because of school-sponsored field trip or excursion. *Educ. Code § 35330*

Liability of school district, officers, and employees for safety and conduct of pupils when not on school property. *Educ. Code §§ 44808-44808.5*

Definitions under Tort Claims Act [*Gov. Code §§ 810-996.6*]. *Gov. Code §§ 810-811.8*

Liability generally. *Gov. Code § 815*

Liability for injury proximately caused by torts of employees within scope of employment. *Gov. Code § 815.2*

Liability for injury caused by independent contractor. *Gov. Code § 815.4*

Liability for failure to discharge mandatory statutory duty. *Gov. Code § 815.6*

Immunities. *Gov. Code §§ 818-818.8*

[b] Dangerous Condition of School Property

Definitions and general provisions relating to dangerous conditions. *Gov. Code §§ 830-831.8*

Immunity and exceptions for hazardous recreational activities conducted on school property. *Gov. Code § 831.7*

Liability for dangerous conditions. *Gov. Code § 835*

Actual or constructive notice of dangerous condition. *Gov. Code § 835.2*

Reasonableness as defense. *Gov. Code § 835.4*

Immunity for asbestos-related injuries. *Gov. Code § 905.5*

[3] Liability of School Employees

No liability for defamation for reporting threats without clear and convincing evidence that report made with knowledge of falsity or with reckless disregard for truth or falsity. *Civ. Code § 48.8*

Teachers as required to hold pupils to strict account for conduct on their way to and from school, on playgrounds, and during recess. *Educ. Code § 44807*

Liability of employees generally. *Gov. Code § 820*

Immunities of employees generally. *Gov. Code §§ 820.2-822.2*

Indemnification of and by employees. *Gov. Code §§ 825-825.6*

Immunity and exceptions for hazardous recreational activities conducted on school property. *Gov. Code § 831.7*

Liability and immunities for dangerous conditions generally. *Gov. Code § 840*

Liability for dangerous conditions of public property. *Gov. Code § 840.2*

Actual or constructive notice of dangerous condition. *Gov. Code § 840.4*

Reasonableness as defense. *Gov. Code § 840.6*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawCivil LiabilityGeneral OverviewEducation LawCivil LiabilityDefamationEducation LawCivil LiabilityInjuries on School PropertyEducation LawCivil LiabilityReleasesEducation LawCivil LiabilitySupervision of StudentsEducation LawImmunitiesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty off PremisesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesSchoolsTortsPublic Entity LiabilityImmunityGeneral OverviewTortsPublic Entity LiabilityLiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsGeneral OverviewTortsVicarious LiabilityEmployersActivities & ConditionsGeneral Overview

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45-514 California Forms of Pleading and Practice--Annotated § 514.42

§ 514.42 Administrative Regulations

Health and safety of pupils. *5 Cal. Code Reg §§ 550-632*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawAdministration & OperationSafetyGeneral OverviewEducation LawStudentsCounseling & Health ServicesGeneral Overview

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45-514 California Forms of Pleading and Practice--Annotated § 514.43

§ 514.43 Decisions

[1] Claims and Actions Against School Districts

Parents whose child was expelled from junior high school without due process hearing as entitled to enforce claim for attorneys fees expended in administrative hearing that led to child's reinstatement under Individuals with Disabilities Education Act [*20 U.S.C.S. § 1415*] without having to comply with *Gov. Code § 905*, because claims statute does not apply to actions enforcing federal rights. *Hacienda La Puente Sch. Dist. v. Honig (9th. Cir. 1992) 976 F.2d 487, 495-496*

Under circumstances, trial court as abusing discretion in failing to grant minor's request under *Gov. Code § 946.6(c)(2)* for relief from obligation of filing claim with school district prior to maintaining action against it. *Williams v. Mariposa County Unified Sch. Dist. (1978) 82 Cal. App. 3d 843, 849-852, 147 Cal. Rptr. 452*

Minor as permitted to file action against school district within 30 days after court makes order relieving minor from obligation to file written claim against district under *Gov. Code § 946.6*, notwithstanding fact that statute of limitations applicable to personal injury actions generally had previously expired. *Brown v. Huntington Beach Union HIgh Sch. Dist. (1971) 15 Cal. App. 3d 640, 642, 93 Cal. Rptr. 417*

Claim presented to city as not satisfying statutory requirements for presentation of claim to board of education of school district where, by statute, the school district, and not the city, was liable for any judgment against the school district arising out of the claim. *Jackson v. Board of Educ. (1967) 250 Cal. App. 2d 856, 857-859, 58 Cal. Rptr. 763*

[2] Dangerous Conditions

School district as liable under *Gov. Code § 835* for dangerous condition on public property when school children were struck and injured by car while waiting to be picked up after school; school parking lot was very congested and there was no barrier between lot and sidewalk where children waited to be picked up after school by parents. *Constantinescu v. Conejo Valley Unified Sch. Dist. (1993) 16 Cal. App. 4th 1466, 1474-1476, 20 Cal. Rptr. 2d 734*

Where alleged condition of school property (unlocked gate and broken fence) was not inherently dangerous but merely allowed access to school grounds where decedent engaged in dangerous game, plaintiff as failing to plead dangerous condition of public property within meaning of *Gov. Code §§ 830* and *835*. *Bartell v. Palos Verdes Peninsula Sch. Dist. (1978) 83 Cal. App. 3d 492, 496-498, 147 Cal. Rptr. 898*

[3] Independent Contractors

School district as liable under *Gov. Code § 815.4* for negligent failure of independent contractor to construct or maintain buildings in reasonably safe condition. *O'Gan v. King City Joint Union High Sch. Dist. (1970) 3 Cal. App. 3d 641, 646-647, 83 Cal. Rptr. 795*

[4] Injuries to Parents

Teacher's disclosure of student's fatal disease to his classmates as not giving rise to any cause of action against the school district for shock and mental distress caused to student's parents. *Wynne v. Orcutt Union Sch. Dist. (1971) 17 Cal. App. 3d 1108, 1110-1111, 95 Cal. Rptr. 458*

[5] Negligent Supervision

[a] Generally

School district's duty to supervise students; standard of care; vicarious liability of school district for failure to adequately supervise. *Dailey v. Los Angeles Unified Sch. Dist. (1970) 2 Cal. 3d 741, 747, 87 Cal. Rptr. 376, 470 P.2d 360*

Fact that student's injuries and death were result of boisterous behavior ("slap boxing") engaged in by him and fellow student as not precluding finding of negligent supervision by school district. *Dailey v. Los Angeles Unified Sch. Dist. (1970) 2 Cal. 3d 741, 748, 87 Cal. Rptr. 376, 470 P.2d 360*

School district liable for sexual assault of special education student by another student in unsupervised restroom before start of classes because district had knowledge of assailant's disciplinary history and special needs of victim. *M. W. v. Panama Buena Vista Union Sch. Dist. (2003) 110 Cal. App. 4th 508, 520-521, 1 Cal. Rptr. 3d 673*

School district not liable for failing to protect student from injuries caused by another student during fight, despite fact that student who caused injuries had been in trouble before; no aspect of assailant's prior conduct bore any relation to plaintiff, there was no indication that assailant even knew plaintiff before attack, and fight arose suddenly during lunch break, immediately after school monitor had passed through area in which fight occurred. *Thompson v. Sacramento City Unified Sch. Dist. (2003) 107 Cal. App. 4th 1352, 1369-1372, 132 Cal. Rptr. 2d 748*

School district was entitled to summary judgment on claim that it failed to protect student from injuries caused by another student during fight, despite fact that student who caused injuries had been in trouble before; no aspect of assailant's prior conduct bore any relation to plaintiff, there was no indication that assailant even knew plaintiff before attack, and fight arose suddenly during lunch break, immediately after school monitor had passed through area in which fight occurred. *Thompson v. Sacramento City Unified Sch. Dist. (2003) 107 Cal. App. 4th 1352, 1369-1372, 132 Cal. Rptr. 2d 748*

Educ. Code § 44807 as creating duty on part of school district to supervise students on school playground such that

school district could not rely on implied assumption of risk doctrine to avoid liability on summary judgment for injuries caused to plaintiff school child who was struck in the eye by a dirt clod thrown by fellow student during recess. *Lucas v. Fresno Unified Sch. Dist. (1993) 14 Cal. App. 4th 866, 871-873, 18 Cal. Rptr. 2d 79*

School district as not under general duty to supervise and control conduct of all persons on premises at all times apart from school-related activities and functions that require persons to be on school grounds. *Bartell v. Palos Verdes Peninsula Sch. Dist. (1978) 83 Cal. App. 3d 492, 498-500, 147 Cal. Rptr. 898*

Willful misconduct of student as not in itself sufficient to relieve school district of liability for injuries to another student; questions of adequacy of supervision and proximate cause as questions of fact properly left to jury. *Beck v. San Francisco Unified Sch. Dist. (1964) 225 Cal. App. 2d 503, 508-509, 37 Cal. Rptr. 471*

Where student died from injuries sustained when he fell from railing at school, question of whether school district was liable for negligently failing to supervise area and warn students not to sit on railing as question of fact for jury. *Ziegler v. Santa Cruz City High Sch. Dist. (1959) 168 Cal. App. 2d 277, 284-286, 335 P.2d 709*

Mere fact that some third party is immediate cause of injury as not of itself absolving school district from liability if it negligently failed to provide adequate supervision. *Charonnat v. San Francisco Unified Sch. Dist. (1943) 56 Cal. App. 2d 840, 846, 133 P.2d 643*

[b] Off-Campus Injury

School district's duty to exercise ordinary care in supervising students while on school premises as including duty to exercise ordinary care to keep students on campus during school hours; district as liable for student injuries which are proximately caused by district's failure to exercise such care, notwithstanding that injury occurs off campus. *Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 513-520, 150 Cal. Rptr. 1, 585 P.2d 851*

Instructors of adult education truck driving course that expressly and properly undertook to supervise off-campus project involving loading of bleachers onto flatbed truck owed duty of care to provide immediate and direct supervision, especially given that goal of project was to teach students how to load truck properly. *Patterson v. Sacramento City Unified School Dist. (2007) 155 Cal. App. 4th 821, 831-832, 66 Cal. Rptr. 3d 337*

Educ. Code § 44808 protected school district from liability for off-campus injury to student who fell off van being driven by coach, because injury was not incurred during school-sponsored or school-sanctioned activity. *Mosley v. San Bernardino City Unified Sch. Dist. (2005) 134 Cal. App. 4th 1260, 1264-1265, 36 Cal. Rptr. 3d 724*

Educ. Code § 44807 (duty to hold pupils to strict account for their conduct on their way to and from school) as creating no duty to stop and investigate activities of students when their conduct does not manifest some degree of impropriety. *Torsiello v. Oakland Unified Sch. Dist. (1987) 197 Cal. App. 3d 41, 45-46, 242 Cal. Rptr. 752*

Where busy high school loading area was used as bus stop for elementary school children, school district as under duty as matter of law to provide adequate supervisory measures to protect children using the bus loading zone. *Raymond v. Paradise Unified Sch. Dist. (1963) 218 Cal. App. 2d 1, 10-11, 31 Cal. Rptr. 847*

Duty of school district to supervise students during school hours as not ceasing merely because students must cross a public street in going from class to class. *Satariano v. Sleight (1942) 54 Cal. App. 2d 278, 284, 129 P.2d 35*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawCivil LiabilityInjuries at School CrossingsEducation LawCivil LiabilityInjuries on School PropertyEducation LawCivil LiabilityNegligenceEducation LawCivil LiabilitySupervision of StudentsEducation LawDiscriminationIndividuals With Disabilities Education ActRemediesTortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesSchoolsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsProcedural Requirements

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§ 514.44 Attorney General Opinions

Disclosure by school district of information about sex offender in community. *82 Ops. Cal. Att'y Gen. 20 (1999)*

Liability of school district for injuries to pupils while going to and from places of worship under released-time program. *2 Ops. Cal. Att'y Gen. 160 (1943)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawCivil LiabilityInjuries at School Crossings

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§ 514.45 Law Reviews

Note, *The Modern Concept of Duty: "Hoyem v. Manhattan Beach City School District" and School District Liability for Injuries to Truants, 30 Hastings L.J. 1893 (1979)*

Case Note, *Negligence--School District Liable For Truant's Injuries If District's Negligent Supervision Is the Proximate Cause of Such Injures, 19 Santa Clara L. Rev. 1125 (1979)*

Seitz, *Legal Responsibility Under Tort Law of School Personnel and School Districts as Regards Negligent Conduct Towards Pupils, 15 Hastings L.J. 495 (1964)*

Note, *Negligence Liability of Schoolteachers in California, 15 Hastings L.J. 567 (1964)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Education LawCivil LiabilityNegligenceEducation LawCivil LiabilitySupervision of Students

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45-514 California Forms of Pleading and Practice--Annotated § 514.46

§ 514.46 Text References

Witkin, California Procedure, Vol. 3, *Actions,* §§ 223 et seq., Vol. 4, *Pleading,* 577 et seq. (4th ed. 1996)

Witkin, Summary of California Law, Vol. 5, *Torts,* §§ 166 et seq., 324, 327 et seq. (10th ed. 2005)

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[Reserved]

§§ 514.47[Reserved]

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PART IV. FORMS

45-514 California Forms of Pleading and Practice--Annotated § 514.60

§ 514.60 Complaint for Damages [Civ. Code § 3333] for Personal Injuries--Against Public School District and Employees--By Injured Student--Negligent Supervision of Students [Civ. Code § 1714(a); Gov. Code §§ 815.2, 820]--General Form

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries--Against Public School District and Employees--By Injured Student--Negligent Supervision of Students [Civ. Code § 1714(a); Gov. Code §§ 815.2, 820]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], [a minor,	)	
by _____ (*name*),	)	NO. _____
his/her Guardian ad Litem,]	)	COMPLAINT FOR DAMAGES
Plaintiff,	)	(Negligence)
vs.	)	[Amount demanded _____
_____ [*names*],	)	(exceeds *or* does not exceed) $10,000]
Defendants.	)	[LIMITED CIVIL CASE]
	)	
	)	

Plaintiff [, through his/her guardian ad litem,] alleges:

[1. *If appropriate, allege:* On or about _____ (*date*), _____ (*name*) was appointed guardian ad litem of plaintiff _____ (*name*), a minor of the age of _____ years, by order of the above-entitled court, and is now the qualified and acting guardian ad litem of plaintiff for purposes of this action.]

2. Defendant _____ [*name of school district*] is, and at all times herein mentioned was, a school district duly organized and existing under the laws of the State of California.

3. _____ School is, and at all times herein mentioned was, a school facility operated by and under the management and control of defendant _____ [*name of school district*], its governing board, officers, and employees, and located in _____ [*city*], _____ County, California.

4. At all times herein mentioned, defendant(s) _____ [*name(s) of teacher(s) or other school employee(s)*] _____ [was *or* were] [an] employee(s) of defendant _____ [*name of school district*], and in doing the acts hereinafter described, _____ [was *or* were] acting within the scope of his/her/their employment.

5. At all times herein mentioned, plaintiff _____ [*name*] was a resident of _____ County, California and a student duly enrolled at _____ School.

[6. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1- _____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by the negligence of these defendants.]

[7. (Plaintiff is informed and believes and thereon alleges that) [A]t all times herein mentioned, each of the defendants sued herein as DOES 1- _____, inclusive, was the agent and employee of each of the remaining defendants and was at all times acting within the purpose and scope of such agency and employment.]

8. On or about _____ [*date*], _____ [*describe how injury occurred, e.g.,* plaintiff was on the premises of _____ School for the purpose of attending classes there. While eating lunch in the cafeteria of _____ School, plaintiff, without provocation of any kind on his/her part, was attacked and struck by students _____ (*names*) and other unknown students and was knocked to the ground, proximately causing the injuries hereinafter alleged].

9. Defendants _____ [*name of school district*] and _____ [*name(s) of teacher(s) or other school employee(s)*], and each of them, had a duty at all times to supervise the conduct of students on the grounds of _____ School and to enforce those rules and regulations necessary for the protection of the students of _____ School. In particular, defendants had a duty to _____ [*specify, e.g.,* supervise the conduct of students in the cafeteria of _____ School during the lunch period and exercise ordinary care to protect students from the type of attack described above].

10. Defendants _____ [*name of school district*] and _____ [*name(s) of teacher(s) or other school employee(s)*], and each of them, were negligent and careless in that _____ [*allege nature of negligent supervision, e.g.,* they failed to exercise ordinary care in supervising the conduct of students in the cafeteria of _____ School during the lunch period so as to prevent the type of attack herein alleged. Prior to occurrence of the injuries herein alleged, defendants had actual and constructive notice that fights, beatings, and attacks such as have been alleged herein had occurred before, and were likely to occur again, in the absence of adequate supervision; defendants were negligent and careless in that having such knowledge they nevertheless failed to use ordinary care in the supervision of students during the lunch hour and failed to provide adequate supervision or any supervision at all].

11. As a proximate result of the negligence and carelessness of defendants, and each of them, plaintiff was hurt and

injured in his/her health, strength, and activity, sustaining injury to his/her body and shock and injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has suffered general damages.

12. As a further proximate result of the negligence and carelessness of defendants, and each of them, plaintiff has incurred, and will continue to incur, medical and related expenses.

[13. *If damages for lost earning capacity sought, allege:* As a further proximate result of the negligence and carelessness of defendants, and each of them, plaintiff's earning capacity has been greatly impaired, both in the past and at present.]

14. On or about _____ [*date*], plaintiff presented to _____ [*name of school district*] by _____ [delivering *or* mailing] to the _____ [clerk *or* secretary *or* auditor] thereof, a written claim for the injuries, disability, losses, and damages suffered and incurred by him/her by reason of the above-described occurrence, all in compliance with the requirements of *Sections 900 through 915.4 of the Government Code*. A copy of the claim is attached hereto as Exhibit A and made a part hereof.

15. On or about _____ [*date*], _____ [*name of school district*] _____ [rejected the claim in its entirety *or* allowed the claim in the amount of $_____ and rejected it as to the remainder *or* failed to act on the claim within the period of 45 days after its presentation, and the claim was thus deemed rejected, under the provisions of *Section 912.4 of the Government Code*, at the expiration of the 45-day period].

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. [For loss of earnings and earning capacity according to proof];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein

alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form is a complaint for use in an action by a student to recover damages for personal injuries sustained as a result of negligent supervision by a public school district and its employees. With appropriate modifications, the allegations of the complaint may be used in a complaint by the student's heirs for wrongful death, if the injuries sustained by the student resulted in his or her death. For forms of complaints for wrongful death, see Ch. 181, *Death and Survival Actions* .

If some third person, other than the school district or its employees, is directly responsible for plaintiff's injuries, counsel may also include a separate cause of action against that person directly. For instance, in the factual example provided in the form, plaintiff's counsel might insert a second cause of action for assault or battery against the students who attacked plaintiff. If the third party was negligently responsible for plaintiff's injuries, counsel might insert a separate cause of action against the third party based on negligence. For forms of complaints based on assault, battery, and negligence, see Ch. 58, *Assault and Battery* , and Ch. 380, *Negligence* .

[3] Allegations

This complaint alleges:

- Appointment of a guardian ad litem, if appropriate (Paragraph 1) [*see Code Civ. Proc. §§ 372-373.5*].

- Capacity and residence of the parties (Paragraphs 2, 4, 5).

- Management and control of school grounds by defendant school district (Paragraph 3).

- Fictitious name allegations, where appropriate (Paragraphs 6, 7).

- A description of how the injury occurred (Paragraph 8).

- Defendant's duty to exercise ordinary care in supervising students on the school grounds and its negligent failure to do so (Paragraphs 9, 10) [*see, e.g., Dailey v. Los Angeles Unified Sch. Dist. (1970) 2 Cal. 3d 741, 747, 87 Cal. Rptr. 376, 470 P.2d 360* ; *Taylor v. Oakland Scavenger Co. (1941) 17 Cal. 2d 594, 600, 110 P.2d 1044]* .

- Proximate causation of general damages and special damages in the form of medical expenses and, where appropriate, lost earning capacity (Paragraphs 11-13).

- Presentation of a written claim to the school district in accordance with *Gov. Code §§ 900-915.4* and rejection of the claim by the school district (Paragraphs 14, 15) [*see Gov. Code § 945.4*; *Dujardin v. Ventura County Gen. Hosp. (1977) 69 Cal. App. 3d 350, 355, 138 Cal. Rptr. 20]* .

[4] Presentation of Written Claim as Prerequisite to Action for Damages

Generally, no action for damages may be commenced against a public school district on a cause of action for which a written claim is required to be presented under *Gov. Code §§ 900-915.4* until the claim has been presented to the district and has been acted on by its governing board or has been deemed to be rejected by its governing board [*Gov. Code § 945.4*]. The claim must be presented to the school district. Presentation of the claim to the State Board of Control will not suffice [*Johnson v. San Diego Unified Sch. Dist. (1990) 217 Cal. App. 3d 692, 699-700, 266 Cal. Rptr. 187]* . Timely compliance with the claim filing requirements and rejection of the claim by the school district must be pleaded in a complaint in order to state a cause of action [*see Dujardin v. Ventura County Gen. Hosp. (1977) 69 Cal. App. 3d 350, 355, 138 Cal. Rptr. 20]* .

Presentation of a written claim is not a prerequisite to maintaining an action against the school district if the school district has failed to file an accurate statement pertaining to the district in the Roster of Public Agencies in the office of the Secretary of State, as required by *Gov. Code § 53051*, or if the court has made an order relieving plaintiff from the requirement of filing a claim pursuant to *Gov. Code § 946.6* [*Gov. Code § 945.4*; *see Gov. Code §§ 946.4, 946.6*].

For a further discussion of and a procedural checklist and forms relating to the presentation of written claims to public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[5] Appointment of Guardian ad Litem

When a minor is a party to an action, the minor must appear by a guardian ad litem appointed by the court in which the action or proceeding is pending, or by a judge thereof [*Code Civ. Proc. § 372(a)*]. For a discussion of and forms relating to the appointment of a guardian ad litem, see Ch. 291, *Guardians ad Litem* .

[6] Venue

In an action against a local public entity, such as a school district, for personal injuries, the proper place for trial of the action is the county in which the entity is situated [*Code Civ. Proc. § 394(a)*].

[7] Statute of Limitations

Any suit brought against a public school district on a cause of action for which a claim is required to be presented in accordance with *Gov. Code §§ 900-915.4* must be commenced [*Gov. Code § 945.6(a)*]:

- If written notice of the district's action on the claim is given in accordance with *Gov. Code § 913*, not later than six months after the date such notice is personally delivered or deposited in the mail; or

- If written notice is not given in accordance with *Gov. Code § 913*, within two years from the accrual of the cause of action.

[8] Verification

A public entity need not verify its answer even though the complaint is verified [*see Code Civ. Proc. § 446*]. The verification of a complaint against a public entity does, however, preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*].

[9] Specifying Amount of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual

or punitive damages demanded for this cause of action [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(a)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[10] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For forms of complaints for use in assault and battery actions, see Ch. 58, *Assault and Battery*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For a discussion of and forms for use in wrongful death and survival actions, see Ch. 181, *Death and Survival Actions*

For a discussion of and forms relating to the appointment of a guardian ad litem, see Ch. 291, *Guardians ad Litem*

For alternative forms of complaints for use in negligence actions, see Ch. 380, *Negligence*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* , and Ch. 572, *Verification*

For discussion and forms relating to the presentation of written claims to public entities, and forms of affirmative defenses and alternative forms of complaints for use in actions against public entities and employees, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

[11] State Statutes

Liability of public entity for act or omission of employee acting within scope of employment. *Gov. Code § 815.2*

Public employee as liable for injury caused by his or her acts or omissions to same extent as private person. *Gov. Code § 820*

Presentation of claim in accordance with *Gov. Code §§ 900-915.4* and rejection by governing board of public entity as prerequisite to action against entity for damages. *Gov. Code § 945.4*

[12] Decisions

Duty to supervise students; standard of care. *Dailey v. Los Angeles Unified Sch. Dist. (1970) 2 Cal. 3d 741, 747, 87 Cal. Rptr. 376, 470 P.2d 360*

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Volume 45: Schools: Certification thru Service of Summons and Papers-Chs. 512-519
Chapter 514 SCHOOLS: INJURIES TO STUDENTS
PART IV. FORMS

45-514 California Forms of Pleading and Practice--Annotated § 514.61

§ 514.61 Allegation--Negligent Supervision of Students--By School District and Employees [Gov. Code §§ 815.2, 820]--Failure to Prevent Unauthorized Departure From School Grounds

[1] FORM Allegation--Negligent Supervision of Students--By School District and Employees [Gov. Code §§ 815.2, 820]--Failure to Prevent Unauthorized Departure From School Grounds

1. On or about _____ [*date*], plaintiff left the grounds of _____ School before the regular hour for the closing of school, and without the approval or permission of the principal of _____ School or other appropriate school official. Thereafter, plaintiff _____ [*describe how injury occurred, e.g.,* while crossing a public street adjacent to _____ School, was struck by a motor vehicle that was negligently and carelessly operated by defendant _____ [*name*] and was thrown to the ground, proximately causing the injuries hereinafter described].

2. Defendants _____ [*name of school district*] and _____ [*name(s) of teacher(s) or other school employee(s)*], and each of them, had a duty at all times to supervise the conduct of students on the grounds of _____ School and to enforce rules and regulations necessary for their protection, and particularly to exercise ordinary care to prevent students from leaving the premises of _____ School before the regular hour for the closing of school without permission of the principal or other appropriate school official.

3. Defendants _____ [*name of school district*] and _____ [*name(s) of teacher(s) or other school employee(s)*], and each of them, were negligent and careless in that they failed to exercise ordinary care in supervising students so as to prevent them from leaving the grounds of _____ School before the regular hour for the closing of school without permission of the principal or other appropriate school official.

[2] Use of Form

These allegations are for use in a complaint for damages by a student against a public school district and its employees for personal injuries sustained as a result of the negligent failure of the district's employees to adequately supervise its students. It alleges a failure by the district and its employees to exercise ordinary care to prevent students from leaving the school grounds before the close of the school day without the permission of the appropriate school officials. When such negligence proximately causes injury to a student, the school district is liable for the injury [*see Hoyem v.*

Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 514-519, 150 Cal. Rptr. 1, 585 P.2d 851] .

Paragraphs 1-3 of this form may be inserted in lieu of Paragraphs 9-11 of the *form in § 514.60*.

[3] Decisions

School district's duty to exercise ordinary care in supervising students while on school premises as including duty to exercise ordinary care to prevent students from leaving school premises during school hours without permission of school officials; district as liable for student's off-campus injuries which are proximately caused by failure to exercise to such care. *Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 513-520, 150 Cal. Rptr. 1, 585 P.2d 851*

[4] Law Reviews

Note, *The Modern Concept of Duty: "Hoyem v. Manhattan Beach City School District" and School District Liability for Injuries to Truants* , *30 Hastings L.J. 1893 (1979)*

[5] Cross References

For a related form, see *§ 514.60*

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45-514 California Forms of Pleading and Practice--Annotated § 514.62

§ 514.62 Complaint for Damages [Civ. Code § 3333] for Personal Injuries--Against Public School District, Employees, and Independent Contractor--By Injured Student--Negligence of Independent Contractor [Civ. Code § 1714(a); Gov. Code § 815.4] and Dangerous Condition of School Property [Gov. Code §§ 835, 840.2]

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries--Against Public School District, Employees, and Independent Contractor--By Injured Student--Negligence of Independent Contractor [Civ. Code § 1714(a); Gov. Code § 815.4] and Dangerous Condition of School Property [Gov. Code §§ 835, 840.2]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], [a minor,	)	
by _____ (*name*),	)	NO. _____
his/her Guardian ad Litem,]	)	COMPLAINT FOR DAMAGES
Plaintiff,	)	(Negligence; Dangerous Condition of Public Prop-
vs.	)	erty)
_____ [*names*],	)	[Amount demanded _____
Defendants.	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff [, through his/her guardian ad litem,] alleges:

FIRST CAUSE OF ACTION
(Dangerous Condition of Public Property)

[1. *Appointment of guardian ad litem, if plantiff is minor. See § 514.60, Paragraph 1.*]

[2. *Capacity of defendant school district. See § 514.60, Paragraph 2.*]

[3. *Management and control of school facility by defendant school district. See § 514.60, Paragraph 3.*]

[4. *Capacity of defendant school employee(s) and allegation of action within scope of employment. See § 514.60, Paragraph 4.*]

[5. *Capacity of plaintiff as student. See § 514.60, Paragraph 5.*]

[6., 7. *Fictitious name allegations, if appropriate. See § 514.60, Paragraph 6, 7.*]

8. On the premises of _____ School, there is, and at all times herein mentioned was, _____ [*describe portion of property where dangerous condition is located, e.g.,* a gymnasium, which is the property of defendant _____ [*name of school district*], and which contains a stairwell with steps constructed of concrete and steel, and a metal handrail adjacent to the stairwell and attached to the walls thereof].

9. On _____ [*date*], and prior thereto, the above-described property was in a dangerous condition, which created a substantial risk of the type of injury hereinafter alleged when the property was used with due care in a manner in which it was reasonably foreseeable that such property would be used, in that _____ [*specify, e.g.,* the steps in the above-described stairwell were wet and slippery and the handrail attached to the walls thereof was inadequately attached to the wall to sustain the force placed on such handrail when used in a normal manner].

[*EITHER*]

10. On or about _____ [*date*], [defendant] _____ [*name of school employee*], acting within the scope of his/her employment by defendant _____ [*name of school district*], negligently and carelessly _____ [*specify, e.g.,* spilled water on the steps of the above-described stairwell and failed to clean it up or post an adequate warning of the condition], which negligence created the dangerous condition described above. [*If school employee is a defendant, add:* (Plaintiff is informed and believes and thereon alleges that) [D]efendant _____ (*name of school employee*) had the authority and funds and other means immediately available to take alternative action which would not have created the dangerous condition described above.]

[*AND/OR*]

10. Defendant(s) _____[*name(s)*] had _____ [actual knowledge of the existence of the above-described condition and knew or should have known of its dangerous character *or* constructive notice of the dangerous condition described above, in that the condition had existed for a sufficient period of time, at least _____ (*specify period of time*), and was of such an obvious nature that defendant(s), in the exercise of due care should have discovered the condition and its dangerous character], for a sufficient period of time prior to _____[*date*], to have taken measures to protect against the dangerous condition. [*If school employee is defendant, add:* Defendant(s) _____ (*name(s) of school employee(s)*) had the authority and it was his/her/their responsibility to (inspect the above-described property or to see that inspections were made to determine whether dangerous conditions existed in the property and to) take adequate measures to protect against the dangerous

condition at the expense of the public entity and the funds and other means for doing so were immediately available to him/her/them.]

[*CONTINUE*]

11. On or about _____ [*date*], _____ [*describe how injury occurred, e.g.,* while plaintiff was lawfully on the above-described property for the purpose of attending classes therein, and as a proximate result of the above-described dangerous condition, plaintiff slipped and fell on the wet stairs causing the injuries to plaintiff hereinafter alleged].

12. As a proximate result of the dangerous condition of defendant _____'s [*name of school district*] property, plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her body and shock and injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has suffered general damages.

13. As a further proximate result of the dangerous condition of defendant _____'s [*name of school district*] property, plaintiff has incurred, and will continue to incur, medical and related expenses.

[14. *If damages for lost earning capacity are sought, allege:* As a further proximate result of the dangerous condition on defendant _____'s (*name of school district*) property, plaintiff's earning capacity has been greatly impaired, both in the past and at present.]

[15., 16. *Presentation of written claim by plaintiff and rejection by school district. See § 514.60, Paragraphs 14, 15.*]

SECOND CAUSE OF ACTION
(Negligence)

1. Plaintiff refers to Paragraphs 1 through 8, inclusive, and Paragraphs 15 and 16 of his/her First Cause of Action herein, and by reference makes them a part hereof.

2. [Plaintiff is informed and believes and thereon alleges that] [D]efendant _____ [*name of school district*] employed defendant _____ [*name*] as an independent contractor to _____ [*specify purposes for which independent contractor was employed, e.g.,* construct the above-described gymnasium at _____ School, including the stairwell, steps, and handrail, as described above, which are located therein].

3. On or about _____ [*date*], _____ [*name of independent contractor*] _____ [*describe negligence of independent contractor, e.g.,* constructed the above-described gymnasium in such a negligent and careless manner that it was not in a reasonably safe condition in that the handrail on the above-described stairs was not adequately and properly attached to the wall of the stairwell, and the surfaces of the stairs were constructed of an unreasonably unsafe and slippery material].

4. On or about _____ [*date*], _____ [*describe how injury occurred, e.g.,* while plaintiff was descending the above-described stairs in the gymnasium of _____ School and leaning on the handrail, the above-described handrail came loose, which caused plaintiff to slip and fall down the stairs, proximately causing the injuries described hereinafter].

[5-7. *Proximate causation of damages. See § 514.60, Paragraphs 11-13.*]

[*Prayer. See § 514.60.*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 514.60.*]

[2] Use of Form

This form is a complaint for use in an action by a student against a school district, its employees, and independent contractors to recover damages for personal injuries sustained on school property. The first cause of action is based on the liability of a school district, as a public entity, and of its employees for a dangerous condition of school property [*see Gov. Code §§ 835, 840.2*]. The second cause of action is based on the vicarious liability of a school district for the negligence of its independent contractor in constructing and maintaining school buildings [*see Gov. Code § 815.4*; *O'Gan v. King City Joint Union High Sch. Dist. (1970) 3 Cal. App. 3d 641, 646-647, 83 Cal. Rptr. 795]* .

With appropriate modifications, the allegations of this complaint may be used in a complaint by the student's heirs for wrongful death, where the injuries sustained by the student resulted in his or her death. For forms of complaints for use in wrongful death actions, see Ch. 181, *Death and Survival Actions* .

[3] Allegations

The first cause of action of this complaint alleges:

- The existence of a dangerous condition on school property, which condition existed at the time of the injury (Paragraphs 8, 9) [*see Gov. Code §§ 830(a), 835, 840.2*].

- Negligence of an employee of the school district which created the dangerous condition, or actual or constructive notice of the dangerous condition by the district and its employees prior to the occurrence of the injury, or both, as appropriate (Paragraph 10) [*Gov. Code §§ 835, 835.2, 840.2, 840.4*].

- Proximate causation of the injury to plaintiff and resulting special and general damages (Paragraphs 11-14) [*Gov. Code §§ 835, 840.2*].

The second cause of action incorporates by reference the pertinent allegations of the first cause of action and further alleges:

- Employment by the school district of an independent contractor (Paragraph 2).

- Negligence on the part of the independent contractor (Paragraph 3) [*see Gov. Code § 825.4*; *O'Gan v. King City Joint Union High Sch. Dist. (1970) 3 Cal. App. 3d 641, 646-647, 83 Cal. Rptr. 795]* .

- Description of how plaintiff's injury occurred (Paragraph 4).

[4] Cross References

For forms of complaints and affirmative defenses for use in actions against public entities and employees based on dangerous conditions of public property, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

For a related form, see *§ 514.60*

[5] State Statutes

Liability of public entity for torts of independent contractor. *Gov. Code § 815.4*

Liability of public entity for dangerous condition of public property. *Gov. Code § 835*

Actual or constructive notice of dangerous condition by public entity. *Gov. Code § 835.2*

Liability of public employee for dangerous condition of public property. *Gov. Code § 840.2*

Actual or constructive notice of dangerous condition by public employee. *Gov. Code § 840.4*

Immunity for asbestos-related injuries. *Gov. Code § 905.5*

[6] Decisions

School district as liable for negligent failure of its independent contractor to construct or maintain school buildings in reasonably safe condition. *O'Gan v. King City Joint Union High Sch. Dist. (1970) 3 Cal. App. 3d 641, 646-647, 83 Cal. Rptr. 795*

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Chapter 515 SECURITIES AND FRANCHISE REGULATION

45-515 California Forms of Pleading and Practice--Annotated 515.syn

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[1] Preemption by Federal Law

[2] Good Cause Required for Discontinuing Franchise

[3] Right to Counsel

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[5] Notification of Franchisor's Withdrawal

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[3] Successor's Assumption of Franchise

[4] Franchisor's Requirements for Designation

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[1] FORM

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[5] Cross References

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[1] FORM

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[1] FORM

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[1] FORM

[2] Use of Form

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[1] FORM

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[3] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Text References

[6] Cross References

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

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[3] Cross References

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[2] Use of Form

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[d] Scienter Required to Prove Criminal Violation of Corp. Code § 25110

[e] Statute of Limitations

[7] Text References

[8] Cross References

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

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[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Administrative Regulations

[6] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

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[3] State Statutes

[4] Administrative Regulations

[5] Cross References

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[1] FORM

[2] Use of Form

[3] State Statutes

[4] Federal Statutes

[5] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

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[2] Use of Form

[3] Doctrine of In Pari Delicto

[4] Decisions

[5] Text References

[6] Cross References

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[1] FORM

[2] Use of Form

[3] State Statutes

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[5] Cross References

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[1] FORM

[2] Use of Form

[3] Allegations

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[5] Statute of Limitations

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[2] Use of Form

[3] Allegations

[4] Statute of Limitations

[5] Cross References

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[1] FORM

[2] Use of Form

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[4] Cross References

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[1] FORM

[2] Use of Form

[3] Management's Inability to Demand Corporate Contribution

[4] Cross References

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[1] FORM

[2] Use of Form

[3] State Statutes

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[1] FORM

[2] Use of Form

[3] Asserting Interpleader by Cross Complaint

[4] Statute of Limitations

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[6] Cross References

[7] California Legal Forms

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[5] Statute of Limitations

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[3] Allegations

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[6] Text References

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[1] FORM

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[4] State Statutes

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[7] Text References

[8] Cross References

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[3] State Statutes

[4] Text References

[5] Cross References

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[1] FORM

[2] Use of Form

[3] Text References

[4] Cross References

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[1] FORM

[2] Use of Form

[3] Administrative Regulation

[4] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Decisions

[6] Text References

[7] Cross References

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[1] FORM

[2] Use of Form

[3] Defense of Plaintiff's Knowledge as to Misrepresented Facts

[4] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

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[3] Reliance on Rule, Form, Order, or Opinion

[4] Cross References

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[1] FORM

[2] Use of Form

[3] Decisions

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[1] FORM

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[3] Allegations

[4] State Statutes

[5] Text References

[6] Cross References

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Remedy Under Franchise Relations Act

[5] State Statutes

[6] Decisions

[7] Cross References

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[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Cross References

§ 515.501 Complaint for Damages [Civ. Code § 3300] for Disallowing Petroleum Products Franchisee's Successor-in-Interest Designation of Bus. & Prof. Code § 21140.6(l)--Failure to Honor Successor's Election to Operate Franchise--By Franchisee's Successor Against Franchisor

[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Cross References

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[3] Allegations

[4] Injunctive Relief and Damages for Grantor's Acting on Dealership Matters With Bias and Prejudice

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[1] FORM

[2] Use of Form

[3] Allegations

[4] State Statutes

[5] Administrative Regulations

[6] Cross References

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Remedies

[5] Jurisdiction

[6] Cross References

California Forms of Pleading and Practice--Annotated

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Chapter 515 SECURITIES AND FRANCHISE REGULATION
PART I. SCOPE

45-515 California Forms of Pleading and Practice--Annotated § 515.01

§ 515.01 Scope of Chapter

This chapter covers regulation of all securities transactions under the Corporate Securities Law of 1968 (*Corp. Code § 25000 et seq.*), whether in the form of offers or sales of corporate securities or in the form of general investments. It also covers the regulation of securities broker-dealers [*see § 515.10* et seq.]. The following forms are included:

- A complaint, and allegations that may be used in the complaint, by securities purchasers for damages for manipulation of the securities market [*see §§ 515.400 -515.404*].

- Complaints by purchasers for rescission and damages, with allegations regarding joint and several liability, for material misrepresentation, and affirmative defenses for use in those actions [*see §§ 515.405 -515.412*].

- Complaints by a purchaser or seller, or the issuer, for damages against an "insider" who obtained an advantage by having undisclosed material information concerning a security transaction, with affirmative defenses for use in the action [*see §§ 515.413 -515.417*].

- Complaints and allegations by purchasers for rescission and damages for violation of securities qualification requirements or regulatory conditions, and affirmative defenses that may be asserted in such actions [*see §§ 515.418 -515.426*].

- A complaint for indemnity by a corporation against controlling persons [*see § 515.427*].

- A complaint for contribution among defendants, with defenses that may be asserted in such actions [*see §§ 515.428 -515.430*].

- A general affirmative defense for securities violations based on compliance with official guidelines [*see § 515.432*].

- A complaint for damages based on breach of contract by a purchaser against a stockbroker for failure

to deliver shares purchased [*see § 515.433*].

This chapter also covers the federal preemption provisions of the National Securities Markets Improvement Act of 1996 and the effect of those provisions on the qualification of securities offerings in California [*see § 515.11* et seq.].

The extensive regulation of securities under federal law is not discussed in this part. For a full discussion of federal law, regulations, and actions under the 1933 federal act, see Sowards, Federal Securities Act--Analysis, Procedures and Forms (Matthew Bender). The federal courts have exclusive jurisdiction of matters under the 1934 act, and for a full discussion of federal law, regulations, and actions under that act, see Gadsby, Federal Securities Exchange Act of 1934 (Matthew Bender).

For discussion and forms relating to liabilities that may accrue based on acts committed or omitted in the course of the issuance of shares and thereafter, see Ch. 162, *Corporations: Issuance of Shares* , and Ch. 163, *Corporations: Transfers of Shares* .

This chapter also discusses the regulation of the sale of franchises or franchise investments under the Franchise Investment Law [*Corp. Code § 31000 et seq.*; *see § 515.450* et seq.]. Included are forms for a complaint, allegations, and defenses for use in a franchisee's rescission or damage action based on a violation of the requirements for, or a material representation made in, the registration of a franchise or the securing of a seasoned franchisor exemption [*see §§ 515.450 -515.454*]; a complaint and defenses for use in an action based on a material misrepresentation in the offer or sale of a franchise [*see §§ 515.455 -515.457*]; an allegation of injury for use by a subfranchisor who is in the position of a franchisee [*see § 515.458*]; general defenses to complaints for rescission or damages when the defendant has sent an approved notice acknowledging violation of the law [*see § 515.459*], has complied with regulatory provisions [*see § 515.460*], or is alleged to be jointly and severally liable for a violation of which he or she had no knowledge [*see § 515.461*]; and a complaint for injunction or damages for a franchisor's violation of a franchisee's trade association rights [*see § 515.462*].

This chapter also discusses the Franchise Relations Act [*Bus. & Prof. Code §§ 20000-20041*] which governs the renewal, transfer, and termination of franchises other than particular franchises involving petroleum products or new motor vehicles [*see § 515.480* et seq.]. It contains a complaint for damages on behalf of a franchisee whose franchise has been improperly terminated or has not been renewed [*see § 515.480*]. This part does not discuss Chapter 28 of Division 8 of the Business and Professions Code (*Bus. & Prof. Code § 22900 et seq.*), which governs manufacturers' and suppliers' relations with retail equipment dealers.

This chapter also covers regulatory legislation dealing with petroleum products franchises, which normally consist of service station dealerships [*see § 515.500* et seq.]. Forms in this chapter include a class action complaint by franchisees for treble damages for violation of *Bus. & Prof. Code §§ 21140.2* and *21140.4*, which regulate dealing with outside suppliers [*see § 515.500*], and a complaint for damages for failure of the franchisor to comply with *Bus. & Prof. Code § 21140.6(l)*, which allows a franchisee to have a successor in interest [*see § 515.501*].

This chapter also deals with franchises in the form of new motor vehicle dealerships [*see § 515.520* et seq.]. It includes a form for use by a franchisee before the New Motor Vehicle Board in protesting a franchisor's establishing of an additional or relocating an existing motor vehicle dealership [*see § 515.520*].

This chapter also discusses statutory provisions prohibiting discrimination in the granting, transfer, or discontinuance of franchises or dealerships [*see § 515.540* et seq.]. It includes a complaint for use by dealers in a class action for injunctive relief and damages against a dealership grantor who has refused to grant or permit the transfer of dealerships on discriminatory grounds or who has discontinued dealerships on those grounds [*see § 515.540*].

This chapter also covers seller assisted marketing plans, a type of investment device substantially similar to but formally

different from a security or franchise [*see § 515.560* et seq.]. It includes a complaint for rescission, damages, and punitive damages by a purchaser of the plan against the seller for misrepresentation in the sale [*see § 515.560*].

This chapter also discusses the regulation of business relations between independent dealers, manufacturers, distributors, and wholesalers of agricultural, construction, utility, industrial, mining, outdoor power, forestry, and lawn and garden equipment [*Bus. & Prof. Code § 22900 et seq.*; *see § 515.210* et seq.]. It includes a complaint for use by a dealer against a supplier for damages sustained as a result of the supplier's improper termination or failure to renew a dealer contract [*see § 515.580*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesAssignments & TransfersBusiness & Corporate LawDistributorships & FranchisesRemediesEquitable ReliefBusiness & Corporate LawDistributorships & FranchisesTerminationsGeneral OverviewEnergy & Utilities LawOil IndustryGasoline Dealers & DistributorsSecurities LawBlue Sky LawsGeneral OverviewSecurities LawBlue Sky LawsCivil LiabilityGeneral OverviewSecurities LawBlue Sky LawsFederal PreemptionSecurities LawRegulation of Securities MarketsGeneral Overview

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§ 515.02 Cross References

For discussion and forms regarding compelling arbitration, including the arbitrability of claims against securities brokers under state and federal laws, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

For discussion and forms related to damages in actions based on deceptive advertising and unfair or deceptive trade practices, see Ch. 14, *Advertising* , Ch. 504, *Sales: Consumers Legal Remedies Act* , and Ch. 565, *Unfair Competition* .

For discussion of the duties owed by brokers to their clients other than under the securities laws, see Ch. 103, *Brokers* .

For discussion and forms relating to causes of action for discrimination and infringement of civil rights generally, see Ch. 112, *Civil Rights: Government-Funded Programs and Activities* .

For forms for use in actions involving conversion of securities by stockbrokers, see Ch. 150, *Conversion* .

For discussion of aspects of director's duties and disclosure obligations in regard to corporate mergers, see Ch. 167, *Corporations: Directors* , and Ch. 169, *Corporations Reorganizations* .

For discussion of fraud and constructive fraud or breach of fiduciary duty as defenses and grounds for avoidance of contracts, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

For discussion and forms relating to fraud generally, see Ch. 269, *Fraud and Deceit* .

For forms relating to actions in federal court under the federal Securities Act of 1933 and the federal Securities Exchange Act of 1934, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

For discussion and forms relating to licensing and premises liability of petroleum products businesses, see Ch. 274, *Garages and Gas Stations* .

For discussion and forms related to the enforcement of liens in general, see Ch. 342, *Liens and Wage Preferences* .

For discussion and forms relating to the sale of goods under Division 2 of the Commercial Code, see Ch. 500, *Sales: Sales Under the Commercial Code* .

For discussion and forms relating to secured transactions under Division 9 of the Commercial Code, see Ch. 503, *Sales: Secured Transactions* .

For discussion and a form relating to actions by an independent wholesale sales representative pursuant to *Civ. Code § 1738.10 et seq.*, see Ch. 505, *Sales: Independent Wholesale Sales Representatives Contractual Relations Act* .

For discussion and forms relating to unfair business practices and restraints of trade, see Ch. 565, *Unfair Competition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationGeneral OverviewBusiness & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsArbitrabilityCivil Rights LawGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)General OverviewReal Property LawNonmortgage LiensGeneral OverviewSecurities LawLiabilityGeneral OverviewSecurities LawLiabilityAdvisers, Brokers & DealersGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesGeneral Overview

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[Reserved]

§§ 515.03[Reserved]

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§ 515.10 Governing Law

[1] California

Both the federal and state governments regulate the entire area of securities transactions because of the significant policy interest at each level of authority in protecting the public from investment fraud. However, state regulation is subject to the federal preemption of state authority over certain securities offerings [*see § 515.11*].

These transactions are governed in California by the Corporate Securities Law of 1968 [*Corp. Code § 25000 et seq.*]. The law is administered through the Department of Corporations by the Commissioner of Corporations [*Corp. Code § 25600 et seq.*]. Departmental rules for processing transactions are contained in *10 Cal. Code Reg. § 260.000 et seq.*.

[2] Waiver of Statutory Compliance

Any condition, stipulation, or provision purporting to bind any person acquiring any security to waive compliance with any provision of the Corporate Securities Law of 1968 or any rules or orders promulgated under that law is void [*Corp. Code § 25701*].

[3] Federal

Transactions at the federal level with respect to issuance of securities are governed primarily under the Securities Act of 1933 [*15 U.S.C. § 77a et seq.*], and with respect to secondary trading in securities are governed primarily under the Securities Exchange Act of 1934 [*15 U.S.C. § 78a et seq.*], with implementation as to special kinds of securities through certain related legislation. Administration of the federal requirements is effected mainly through the Securities and Exchange Commission [*15 U.S.C. §§ 77b(5), 77s, 78b(15), 78d, 78w*], whose regulations are collected in Title 17 of the Code of Federal Regulations [*see 17 C.F.R. §§ 230.100 et seq., 240.0-1 et seq.*].

State courts have concurrent jurisdiction with federal courts under the 1933 act, and a suit commenced in a state court is not subject to federal removal [*15 U.S.C. § 77v(a)*]. The Class Action Fairness Act of 2005, which permits in general the removal to federal court of high-dollar class actions involving diverse parties [*see 28 U.S.C. §§ 1332(d), 1453(b)*;

see also Ch. 120, Class Actions, § 120.13[1]; *Ch. 265, Federal Courts: Jurisdiction and Removal, § 265.15[6][a]*], does not supersede the specific bar of *15 U.S.C. § 77v(a)* against removal of cases arising under the Securities Act of 1933 [*Luther v. Countrywide Home Loans Serv'g LP (9th Cir. 2008) 533 F.3d 1031, 1032, 1034*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Securities LawAdditional Offerings & the Securities Exchange Act of 1934General OverviewSecurities LawBlue Sky LawsGeneral OverviewSecurities LawBlue Sky LawsFederal PreemptionSecurities LawInitial Public Offerings & the Securities Act of 1933General Overview

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§ 515.11 Federal Preemption of State Securities Regulation

[1] 1996 Legislation

The National Securities Markets Improvement Act of 1996 (Improvement Act) [Pub. L. No. 102-290, 110 Stat. 3416 (H.R. 3005)], which took effect on October 11, 1996, made significant changes to the Securities Act of 1933 [*15 U.S.C. § 77a et seq.*], the Securities Exchange Act of 1934 [*15 U.S.C. § 78a et seq.*], the Investment Company Act of 1940 [15 U.S.C. § 801-1 et seq.], and the Investment Advisers Act of 1940 [*15 U.S.C. § 80b-1 et seq.*]. Most significant to California practice is the Improvement Act's prohibition against state regulation of certain issuers and transactions by means of federal preemption in many areas of securities regulation that formerly were subject to dual regulation by the states under blue sky laws and by the SEC or other federal agencies.

[2] Extent of Federal Preemption

Section 18(a) of the Securities Act of 1933 [*15 U.S.C. § 77r*], as amended by the Improvement Act, provides that no state may prohibit an offering or sale in the state, impose additional disclosure requirements, impose "merit" standards, require the registration or qualification of a security or transaction, or prohibit or limit the use of any offering document prepared on behalf of the issuer in an offering (including proxy statements and reports to shareholders required to be filed under Section 15A of the 1934 Act [*15 U.S.C. § 78o-3*] unless the issuer is incorporated in the state) if the security offered is a "covered" security [*15 U.S.C. § 77r(a)*; *see § 515.11[4]*]. However, the states may continue to impose notice filing requirements and filing fees, and to investigate and bring enforcement actions for fraud or unlawful conduct by a broker and dealer.

In various releases issued in response to the Improvement Act, the Department of Corporations has noted that the California Constitution provides that a state administrative agency has no power to declare a state statute unenforceable on the basis that federal law prohibits the enforcement of the statute, unless an appellate court has made a determination that the enforcement of the statute is prohibited by federal law or regulations [*Cal. Const., art. III, § 3.5*; see Dept. Corps. Release Nos. 101-C, 102-C, 103-C, 104-C].

California's legislative response to the Improvement Act in the form of conforming amendments, was made in 1997 [*see*

Stats. 1997, ch. 391]. Those statutory changes are incorporated throughout this chapter. For extensive coverage of the Improvement Act and its interaction with California securities laws, see Marsh & Volk, Practice Under the California Securities Laws, Ch. 3A, *Federal Preemption of State Securities Regulation* (Matthew Bender).

[3] Continued State Authority With Respect to Fraud Enforcement Actions

Notwithstanding the preemption of state regulation of securities offerings, the securities commission of any state retains jurisdiction under the laws of that state to investigate and bring enforcement actions with respect to fraud or deceit, or unlawful conduct by a broker or dealer, in connection with securities or securities transactions [*15 U.S.C. § 77r(c)(1)*; *see, e.g., Capital Research & Management Co. v. Brown (2007) 147 Cal. App. 4th 58, 61, 67, 53 Cal. Rptr. 3d 770* (California Attorney General could pursue injunctive relief and penalties against covered security's investment advisor and wholesale broker-dealer who allegedly made inaccurate or inadequate representations to purchasers)].

[4] Definition of "Covered Security"

[a] Nationally Traded Securities

Since the definition of "covered security" determines whether or not the federal preemption applies, that definition is set forth in some detail below.

A "covered security" for purposes of the Improvement Act includes a security that is listed, or authorized for listing, on the New York Stock Exchange, on the NYSE Amex (formerly known as the American Stock Exchange), on the NASDAQ Global Market (formerly known as the National Market System of the NASDAQ Stock Market), on any successor to those entities, or on a national securities exchange (or tier or segment of such an exchange) that has listing standards that the SEC determines by rule are substantially similar to the listing standards of the exchanges listed above [*15 U.S.C. § 77r(b)(1)(A), (B)*]. A security of the same issuer that is equal in seniority or is a senior security [*see 15 U.S.C. § 77r(d)(4)* (definition)] to the securities just described also is a "covered security" [*15 U.S.C. § 77r(b)(1)(C)*] (note that the exchange name changes are not yet reflected in the statutory language); *see also Marsh & Volk, Practice Under the California Securities Laws, Ch. 3A, Federal Preemption of State Securities Regulation, § 3A.04[1]* for discussion].

Since the California Corporations Commissioner has certified the New York Stock Exchange and the (former) American Stock Exchange (renamed "NYSE Amex LLC") [*see* Dept. of Corps. Release No. 27-C (Mar. 4, 1972); *see also Marsh & Volk, Practice Under the California Securities Laws, Ch. 3A, Federal Preemption of State Securities Regulation, § 3A.04[1]*], as well as the and the NASDAQ Capital Market of the NASDAQ Stock Market LLC [*see* Dept. of Corps. Release No. 87-C (revised) (Aug. 17, 2009)] pursuant to *Corp. Code § 25100(o)*, the federal preemption is irrelevant in California with respect to those listed securities, which are already exempt by California law.

[b] Registered Investment Companies

A security is a "covered security" if it is a security issued by an investment company that is registered, or that has filed a registration statement, under the Investment Company Act of 1940 [*15 U.S.C. § 77r(b)(2)*; *see 15 U.S.C. § 80a-1 et seq.*].

[c] Sales to Qualified Purchasers

A security is a "covered security" with respect to its offer or sale to qualified purchasers as defined by the SEC by rule. In prescribing such a rule, the Commission may define the term "qualified purchaser" differently with respect to different categories of securities, consistent with the public interest and the protection of investors [*15 U.S.C. § 77r(b)(3)*].

[d] Certain Exempt Offerings

A security is a "covered security" with respect to a transaction that is exempt from registration under the Securities Act of 1933 pursuant to any of the following:

- Section 4(1) [*15 U.S.C. § 77d(1)*] (transactions by any person other than an issuer, underwriter or dealer) or Section 4(3) [*15 U.S.C. § 77d(3)*] (with certain exemptions, transactions by a dealer), if the issuer files reports with the SEC pursuant to Section 13 or 15(d) of the 1934 Act [*15 U.S.C. § 77r(b)(4)(A)*; *see 15 U.S.C. §§ 78m, 78o(d)*].

- Section 4(4) [*15 U.S.C. § 77d(4)*] (certain brokers' transactions executed on a customer's order) [*15 U.S.C. § 77r(b)(4)(B)*].

- Section 3(a) [*15 U.S.C. § 77c(a)*] (which exempts a large number of securities, including those of various governmental entities, commercial paper, charitable organizations, etc.), other than the offer of sale of a security that is exempt from registration pursuant to Section 3(a)(4), (10), or (11) [*15 U.S.C. § 77c(a)(4), (10), (11)*] (securities of charitable organizations, exchanges of securities for bona fide outstanding securities, and intrastate exemption). However, a municipal security that is exempt from registration pursuant to Section 3(a)(2) [*15 U.S.C. § 77c(a)(2)*] is not a covered security with respect to its offer or sale in the state in which the issuer of that security is located [*15 U.S.C. § 77r(b)(4)(C)*].

- SEC rules or regulations issued under Section 4(2) [*15 U.S.C. § 77d(2)*] (transactions by an issuer not involving any public offering), except that this restriction on state action does not prohibit a state from imposing notice filing requirements that are substantially similar to those required by rule or regulation under that section that were in effect on September 1, 1996 [*15 U.S.C. § 77r(b)(4)(D)*].

A transaction must actually qualify for a registration exemption in order for the subject security to be a "covered security." Filing of the necessary documents and payment of the required fees are not sufficient, since an exemption-based "covered security" under the Improvement Act is a security in "a transaction that *is exempt* from registration" [*15 U.S.C. § 77r(b)(4)* (emphasis added); *Consolidated Management Group, LLC v. Department of Corps. (2008) 162 Cal. App. 4th 598, 607-608, 75 Cal. Rptr. 3d 795*].

[5] Additional Effects of Improvement Act

[a] Investment Companies

The Improvement Act preempts all state regulation of investment companies that are registered under the Investment Company Act of 1940 [*15 U.S.C. § 77r(a), (b)(2)*; *see 15 U.S.C. § 80a-1 et seq.*].

[b] Broker-Dealers

The Improvement Act does not prevent a state from requiring the registration of broker-dealers in any circumstances, but it does severely restrict the scope of state regulation of on broker-dealers. Section 15(a)(h) of the 1934 Act [*15 U.S.C. § 78o(h)*], as added by the Improvement Act, provides that a state may not "establish capital, custody, margin, financial responsibility, making and keeping records, bonding, or financial or operational reporting requirements for brokers, dealers, municipal securities dealers, government securities brokers, or government securities dealers that differ from, or are in addition to, the requirements in those areas established under this title [the 1934 Act]" [*15 U.S.C. § 78o(h)(1)*]. Since these are most, if not all, of the areas in which broker-dealers are regulated, this provision effectively prohibits states from imposing any regulation on broker-dealers that is inconsistent with or in addition to that imposed by the SEC.

[c] Investment Advisers

The Improvement Act divides the state and federal authority to regulate investment advisers between the states and the federal government based upon the size of assets under management by the investment advisers. The statute requires registration under the federal Investment Advisers Act of 1940 [*15 U.S.C. § 80b-1 et seq.*] of an investment adviser who has more than $25 million under management, or is an investment adviser to a registered investment company under the Investment Company Act of 1940 [*15 U.S.C. § 80a-1 et seq.*], and exempts all other investment advisers from such registration [*15 U.S.C. § 80b-3(a)(1)*].

Investment advisers that are exempted from federal regulation are left to regulation by the state authorities, and the states are prohibited from requiring the registration of advisers that are required to be registered under the 1940 Act.

Legal Topics:

For related research and practice materials, see the following legal topics:
Securities LawBlue Sky LawsFederal PreemptionSecurities LawBlue Sky LawsRegistration of Agents, Broker-Dealers & Investment AdvisersSecurities LawInitial Public Offerings & the Securities Act of 1933DefinitionsSecuritySecurities LawInvestment AdvisersExemptions, Recordkeeping & RegistrationSecurities LawInvestment CompaniesActivitiesSecurities LawRegulation of Securities MarketsRegistration & Regulation of Brokers & Dealers

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§ 515.12 Class Action Lawsuits Involving Nationally Traded Securities

[1] Federal Standards Affecting State Actions

Following passage of the Private Securities Litigation Reform Act of 1995 [P.L. 104-67, 109 Stat. 737 (December 22, 1995)], which sought to reduce the number of frivolous class action suits in federal court, a number of securities class action lawsuits shifted from federal to state courts. To prevent state private securities class action lawsuits alleging fraud from being used to frustrate the objectives of that Act, in 1998 Congress enacted national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of state securities regulators and not changing the current treatment of individual lawsuits [P.L. 105-353, 112 Stat. 3227, §§ 1, 2]. As discussed below, the Securities Litigation Uniform Standards Act of 1998 amended the Securities Act of 1933 and the Securities Exchange Act of 1934. For further coverage of that Act, see Marsh & Volk, Practice Under the California Securities Laws (Matthew Bender).

[2] Class Action Limitations

Under the Securities Litigation Uniform Standards Act of 1998, no covered class action based on the statutory or common law of any state or subdivision thereof may be maintained in any state or federal court by any private party alleging either an untrue statement or omission of a material fact in connection with the purchase or sale of a "covered security," or that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security [*15 U.S.C. §§ 77p(b)*, 78bb(f)(1); *see, e.g., Falkowski v. Imation Corp. (9th Cir. 2003) 320 F.3d 905, 906* (state law fraud claims relating to employee stock options were preempted by SLUSA; alleged fraud took place "in connection with" purchase or sale of "covered security")].

The term "covered class action" means a single lawsuit in which either [*15 U.S.C. §§ 77p(f)(2), 78bb(f)(5)(B)*]:

- Damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

- One or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members.

"Covered class action" also means a group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which damages are sought on behalf of more than 50 persons, and the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose. The term does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation [*15 U.S.C. §§ 77p(f)(2), 78bb(f)(5)(B)*].

The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) of the Securities Act of 1933 (listed and national market system securities, senior securities, and securities of federally registered investment companies) [*15 U.S.C. § 77r(b)(1), (2)*; *see § 515.11[4]*] at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred. However, the term does not include any debt security that is exempt from registration under the Securities Act of 1933 pursuant to rules issued by the Commission under section 4(2) [*see 15 U.S.C. § 77d(2)*] of that Act [*15 U.S.C. §§ 77p(f)(3), 78bb(f)(5)(E)*].

Any covered class action brought in any state court, involving a covered security, is removable to the U.S. district court for the district in which the action is pending, and in that court the action will be subject to the prohibition discussed above [*15 U.S.C. §§ 77p(c), 78bb(f)(2)*]. Since an action that is not precluded as discussed above is not removable, it follows that if the federal court determines that the action is not thus precluded, then the court has no jurisdiction to reach the merits, and the proper course is to remand the case to the state court [*Kircher v. Putnam Funds Trust (2006) 547 U.S. 633, 644, 126 S. Ct. 2145, 165 L. Ed. 2d 92]* .

[3] Exceptions

Notwithstanding the general prohibition discussed in [2], *above*, a covered class action based on the statutory or common law of the state in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a state or federal court by a private party if it is in one of two categories [*15 U.S.C. §§ 77p(d)(1)(A), 78bb(f)(3)(A)(i)*]:

- Actions involving the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer [*15 U.S.C. §§ 77p(d)(1)(B)(i), 78bb(f)(3)(A)(ii)(I)*].

- Actions involving any recommendation, position, or other communication with respect to the sale of securities of the issuer, if the communication (1) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer and (2) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights [*15 U.S.C. §§ 77p(d)(1)(B)(ii), 78bb(f)(3)(A)(ii)(II)*; *e.g.,* Madden v. Cowen Co. (9th Cir. 2009) 556 F.3d 786, 793-794 (action for negligent representation and professional negligence, based on California law, against investment bank which, acting on behalf of California corporation, made communication to its shareholders in form of "fairness opinion" letter concerning shareholders' impending decision on how to respond to exchange offer for that corporation's shares)].

Some of the ambiguity in the statutory language describing the second category of excepted actions, as stated above, has been resolved by judicial construction. Plainly, the statute allows a shareholder to bring a covered class action under

state law against any "issuer" that has made certain communications regarding the sale of its "securities," and those securities need not be the "covered securit[ies]" referred to in the preclusionary language of *15 U.S.C. §§ 77p(b)* and *78bb(f)(1)* discussed in [2], above [Madden v. Cowen Co. (9th Cir. 2009) 556 F.3d 786, 794-795]. Further, as a matter of common sense, the requirement for a material communication to be made "on behalf of" the issuer refers to a communication made by any individual or entity to the issuer's shareholders and in the interest of, or as a representative of, the issuer. There is no reason to suppose that the statute refers to communications made only by certain persons such as officers, directors, and employees of the issuer [Madden v. Cowen Co. (9th Cir. 2009) 556 F.3d 786, 796-797] .

A state or political subdivision or a state pension plan may bring an action involving a covered security on its own behalf, or as a member of a class comprised solely of other states, political subdivisions, or state pension plans that are named plaintiffs and have authorized participation in such an action [*15 U.S.C. §§ 77p(d)(2), 78bb(f)(3)(B)*].

If an action has been removed to the U.S. district court pursuant to *15 U.S.C. § 77p(c)* or *78bb(f)(2)* [see [2], above], and the federal court determines that the action may be maintained in the state court pursuant to one of the exceptions described above, then the federal court must remand the action to the state court [*15 U.S.C. §§ 77p(d)(4), 78bb(f)(3)(D)*; Madden v. Cowen Co. (9th Cir. 2009) 556 F.3d 786, 793] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureClass ActionsGeneral OverviewSecurities LawBlue Sky LawsFederal PreemptionSecurities LawInitial Public Offerings & the Securities Act of 1933DefinitionsSecuritySecurities LawLiabilityPrivate Securities LitigationGeneral OverviewSecurities LawLiabilityPrivate Securities LitigationFederal Preemption

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§ 515.13 Definitions

[1] "Securities"

The term "securities" includes, in general, any interest or instrument commonly known as a "security." This takes on such familiar forms as the following [*Corp. Code § 25019*; *cf. 15 U.S.C. § 77b(1)*]:

- Stock, including (a) transferable shares, and (b) treasury stock.
- Evidence of indebtedness, including (a) notes, (b) bonds, (c) debentures, and (d) collateral trust certificates.
- Membership, whether in an incorporated or unincorporated association.
- Preorganization certificate or subscription.
- Voting trust certificate.
- Certificate of deposit for securities.
- Beneficial interest or other security issued in connection with a funded employee's pension, profit sharing, stock bonus, or similar benefit plan.
- Investment contract.
- Viatical settlement contract [*see Corp. Code § 25023(a)*; former *Ins. Code § 10113.1(a)(1)* (repealed 2009; successor section defines arrangement as "life settlement contract"); *see § 515.14[5][n]*] or fractionalized or pooled interest therein.

- Life settlement contract or fractionalized or pooled interest therein [*see Corp. Code § 25023(a)* (definition); *see § 515.14[7]*].

- Certificate of interest or participation in any (1) profit-sharing agreement, or (2) oil, gas, or mining title or lease, or in payment out of production under such a title or lease.

- Any certificate or interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing.

- Interest in a limited liability company and any class or series of interests in a limited liability company.

Whether something is to be considered a security within the meaning of the Corporate Securities Law is a question of fact to be determined in each case, bearing in mind that the general purpose of that law is to protect the public against the imposition of unsubstantial, unlawful, and fraudulent stock and investment schemes and the securities based on them [*People v. Syde (1951) 37 Cal. 2d 765, 768, 235 P.2d 601* ; *Consolidated Management Group, LLC v. Department of Corps. (2008) 162 Cal. App. 4th 598, 609, 75 Cal. Rptr. 3d 795* ; *Moreland v. Department of Corps. (1987) 194 Cal. App. 3d 506, 512, 239 Cal. Rptr. 558* ; *People v. Schock (1984) 152 Cal. App. 3d 379, 385, 199 Cal. Rptr. 327*].

Regardless of the form the security may take, it need not be shown by a written document [*Corp. Code § 25019*].

The term "security" does not include (1) any beneficial interest in a voluntary inter vivos trust not created for the purpose of carrying on a business or solely for voting purposes; (2) a beneficial interest in a testamentary trust; or (3) an insurance or endowment policy or annuity contract under which locally admitted insurers promise to pay monetary sums at some designated time or times [*Corp. Code § 25019*].

"Security" also does not include any franchise subject to registration under the Franchise Investment Law [*Corp. Code §§ 31000-31516*], or exempted from registration by Commissioner's rule [*see Corp. Code § 31100*] or under the "seasoned franchisor" exemption [*see Corp. Code § 31101*] of that law [*see Corp. Code § 25019*].

[2] Refinement of Term "Security"

[a] Risk Capital Approach

The statutory definition of "security" is designed, in part, to protect the public against spurious schemes to attract risk capital. Therefore, a court is required to look through the form of a particular transaction to its substance [*Silver Hills Country Club v. Sobieski (1961) 55 Cal. 2d 811, 813, 815, 13 Cal. Rptr. 186, 361 P.2d 906* ; *People ex rel. Bender v. Wind River Mining Project (1990) 219 Cal. App. 3d 1390, 1399-1400, 269 Cal. Rptr. 106* ; *see United Housing Foundation, Inc. v. Forman (1975) 421 U.S. 837, 847-848, 95 S. Ct. 2051, 44 L. Ed. 2d 621* (stating that even use of the word "stock" does not necessarily mean "security" under federal law's substantially similar definition of "security" but that, although name given to instrument is not dispositive, it is also not wholly irrelevant)].

In this respect, profit to the supplier of capital is not the test of what is a security. Rather, the law affords those who risk their capital at least a fair chance of realizing their objective in a legitimate venture, whether or not they expect a return on their capital in one form or another [*Silver Hills Country Club v. Sobieski (1961) 55 Cal. 2d 811, 813, 815, 13 Cal. Rptr. 186, 361 P.2d 906* (construing former *Corp. Code § 25008* in finding "memberships" in "recreational club" which were being sold to raise capital to develop business enterprise for profits, were securities); see also *Clejan v. Reisman (1970) 5 Cal. App. 3d 224, 233, 84 Cal. Rptr. 897]* .

The "risk capital" test announced in *Silver Hills Country Club v. Sobieski (1961) 55 Cal. 2d 811, 13 Cal. Rptr. 186* is the test generally employed by California courts in assessing the elusive concept of the meaning of security [*People v. Schock (1984) 152 Cal. App. 3d 379, 389, 199 Cal. Rptr. 327* ; *but see People v. Smith (1989) 215 Cal. App. 3d 230, 236-238, 263 Cal. Rptr. 684* ("indiscriminate public offering" element not necessary in every context; for instance, criminal liability for violation of *Corp. Code § 25401* may be imposed even if security was not offered to public)]. The "risk capital" test requires consideration of the following factors [*Moreland v. Department of Corporations (1987) 194 Cal. App. 3d 506, 519, 239 Cal. Rptr. 558* ; *Leyva v. Superior Court (1985) 164 Cal. App. 3d 462, 470, 210 Cal. Rptr. 545]* :

- Whether funds are being raised for a business venture or enterprise;
- Whether the transaction is offered indiscriminately to the public at large;
- Whether investors are substantially powerless to effect the success of the enterprise; and
- Whether the investors' money is substantially at risk because it is inadequately secured.

[b] Investment Contract Approach

The definition of a security under state and federal law includes both an "investment contract" and "any instrument commonly known as a 'security' " [*see Corp. Code § 25019*; *15 U.S.C. § 77b(1)*; *see also § 515.211*]. The United States Supreme Court has taken the position that there is no distinction between these two forms of securities for purposes of distinguishing a securities transaction from other kinds of commercial dealings, and therefore defines a security as an investment contract [*United Housing Foundation, Inc. v. Forman (1975) 421 U.S. 837, 852, 95 S. Ct. 2051, 44 L. Ed. 2d 621]* .

California apparently has not considered the terms coequal, since it continues to employ the risk capital approach in some cases [*see § 515.13[2][a]*]. Nevertheless, since *Corp. Code § 25019* is derived from *15 U.S.C. § 77b* and since an investment contract is one form of security under California law [*see Corp. Code § 25019*], federal cases defining an investment contract under federal law have been cited by California courts as persuasive authority for defining an investment contract under California law [*see* Moreland v. Department of Corporations (1987) Cal. App. 3d 506, 512, *239 Cal. Rptr. 558* ; *People v. Park (1978) 87 Cal. App. 3d 550, 563, 151 Cal. Rptr. 146]* .

Federal cases, and California courts that have followed these cases, have defined an investment contract to mean a contract, transaction, or scheme whereby a person invests his or her money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party [Moreland v. Department of Corporations (1987) Cal. App. 3d 506, 513, *239 Cal. Rptr. 558* ; *see Securities Exch. Comm'n v. W.J. Howey Co. (1945) 328 U.S. 293, 298-299, 66 S. Ct. 1100, 90 L. Ed. 1244* ; *SEC v. R.G. Reynolds Enters. (9th Cir. 1991) 952 F.2d 1125, 1130-1131, 1133-1135* (gold program based on pooling of investors' funds to finance construction of plant that would refine ore purchased by investors was investment contract); *People v. Park (1978) 87 Cal. App. 3d 550, 563, 151 Cal. Rptr. 146]* . It is immaterial whether the shares in the enterprise are evidenced by formal certificates or by nominal interests in the physical assets employed in the enterprise [*see Securities Exch. Comm'n v. W.J. Howey Co. (1945) 328 U.S. 293, 298-299, 66 S. Ct. 1100, 90 L. Ed. 1244* ; *SEC v. Goldfield Deep Mines Co. of Nevada (9th Cir. 1985) 758 F.2d 459, 461-464* (agreement for participation in mining operation by purchase of units of 18 tons of ore as "security")].

The Ninth Circuit distills the *Howey* definition into a three part test requiring (1) an investment of money, (2) in a common enterprise, (3) with an expectation of profits to be produced by the efforts of others. The expectation of profits to be produced by the efforts of others involves two distinct concepts: an expectation of profits and an expectation that the profits will result from the efforts of a person other than the investor. The investment-of-money part of the test requires that the investor must have committed assets to the common enterprise in such a manner as to become subject

to the risk of financial loss [*Warfield v. Alaniz (9th Cir. 2009) 569 F.3d 1015, 1020-1021* (charitable gift annuity contracts, under which individuals handed over money and liquid assets in exchange for promise of regular lifetime payments and promise that any surplus existing at individual's death would go to his or her chosen charity, were investment contracts)].

The most essential consistency in the cases that have considered the meaning of investment contract is the emphasis on whether or not the investor has substantial power to affect the success of the enterprise. When success requires professional or managerial skill on the investor's part, and he or she has authority corresponding with this responsibility, the investment is not a security within the meaning of the state or federal securities act. When the investor is relatively uninformed and unskilled and then turns over his or her money to others, essentially depending on their representation, honesty, and skill in managing it, the transaction is an investment contract [*Securities & Exch. Comm'n v. Glenn W. Turner Enterprises, Inc. (D Ore 1972) 348 F. Supp. 766, 774* ; *see People v. Park (1978) 87 Cal. App. 3d 550, 563, 151 Cal. Rptr. 146* (condominium development as investment contract); *see also Tomei v. Fairline Feeding Corp. (1977) 67 Cal. App. 3d 394, 398-399, 137 Cal. Rptr. 656* ; *People v. Witzerman (1972) 29 Cal. App. 3d 169, 178, 105 Cal. Rptr. 284* (both cases construing cattle care agreements as investment contracts); *but see United Housing Foundation, Inc. v. Forman (1975) 421 U.S. 837, 849, 858, 95 S. Ct. 2051, 44 L. Ed. 2d 621* (failing to follow district court's language in *Glenn W. Turner, above,* but stating that investment contract is present when return on investment is prospect that attracts investor as opposed to situation when one purchases either commodity for personal consumption or living quarters for personal use)].

The United States Supreme Court has held that an investment scheme promising a fixed rate of return can be an "investment contract" and thus a "security" subject to the federal securities laws [*SEC v. Edwards (2004) 540 U.S. 389, 124 S. Ct. 892, 157 L. Ed. 2d 813, 822* (involving scheme in which investors bought pay phones for fixed price and leased them back to seller for fixed monthly payment pursuant to leaseback and management agreement, resulting in 14 percent annual return)]. The court found that under the *Howey* test [*see SEC v. W.J. Howey (1946) 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244* , discussed *above*] for determining whether a particular scheme is an investment contract, there was no reason to distinguish between promises of fixed returns and promises of variable returns. Furthermore, the fact that purchasers had a contractual entitlement to a return did not mean that the return was not also expect to come "solely from the efforts of others" under that test [*SEC v. Edwards (2004) 540 U.S. 389, 124 S. Ct. 892, 157 L. Ed. 2d 813, 822]* .

[3] "Offer" and "Sale"

An "offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest therein for value [*Corp. Code § 25017(b)*]. A "sale" or "sell" includes every contract of sale of, contract to sell, or disposition of, a security or interest therein for value. These concepts of sale include exchange of securities as well as changes in the rights, preferences, privileges, or restrictions of or on outstanding securities [*Corp. Code § 25017(a)*]. The defined terms do not include the following: (1) bona fide secured transactions in, or loans of, outstanding securities; (2) stock dividends of common stock payable in shares of that stock when it is the only voting class outstanding, as provided in *Corp. Code § 25017(f)(2)*; and *(3)* acts incident to certain judicially approved transactions or reorganizations in which securities are issued and exchanged [*see Corp. Code § 25017(f)*; *cf. 15 U.S.C. § 77b(a)(3)*].

In addition to these three statutory exclusions, a California court has held that the transfer of corporate stock as part of the division of community property in a divorce settlement is not to be treated as a "sale" of those securities for purposes of California's securities laws [*see D'Elia v. D'Elia (1997) 58 Cal. App. 4th 415, 423-424, 68 Cal. Rptr. 2d 324* (citing *Corp. Code § 25017*)].

[4] Marketing Personnel

[a] "Broker-Dealer" Under California Law

A securities "broker-dealer" is any person engaged in the business of effecting transactions in securities in California for the account of another or for his or her own account. "Broker-dealer" also includes a person engaged in the regular business of issuing or guaranteeing options with regard to securities not of its own issue [*Corp. Code § 25004(a)*; *see Corp. Code § 25019* (defining security)]. However, "broker-dealer" does *not* include any of the following [*Corp. Code § 25004(a)*]:

- Any other issuer;
- An agent who is an employee of a broker-dealer or issuer;
- A bank, trust company, or savings and loan association;
- Any person insofar as he or she buys or sells securities for his or her own account, either individually or in some fiduciary capacity, but not as a part of a regular business;
- A person who has no place of business in California if he or she effects transactions in California exclusively with (1) the issuers of securities involved in the transactions or (2) other broker-dealers;
- A broker licensed by the Real Estate Commissioner of California when engaged in transactions in securities exempted under *Corp. Code § 25100(f)* (interests in subdivisions or real estate developments) or *Corp. Code § 25100(p)* (notes secured by real property) or in securities the issuance of which is subject to authorization by the Real Estate Commissioner of California or in transactions exempted by *Corp. Code § 25102(e)* (debt securities that are not offered publicly); or
- An exchange certified by the Commissioner of Corporations when it is issuing or guaranteeing options.

An agent is an employee of a broker-dealer for these purposes when the agent is employed by or associated with the broker-dealer under all of the following conditions [*Corp. Code § 25004(b)*]:

- The agent is subject to the supervision and control of the broker-dealer;
- The agent performs under the name, authority, and marketing policies of the broker-dealer;
- The agent discloses to investors the identity of the broker-dealer; and
- The agent is reported pursuant to *Corp. Code § 25210(c)* and rules adopted thereunder.

[b] "Agent" Under California Law

An "agent" is any individual, other than a broker-dealer or a partner of a licensed broker-dealer, who represents a broker-dealer or who for compensation represents an issuer in effecting or attempting to effect purchases or sales of securities in California [*Corp. Code § 25003(a)*]. "Agent" does not include an individual who has no place of business in California if he or she effects transactions in California only with broker-dealers; nor does it include an individual who only represents an issuer in effecting transactions in the following exempted securities [*Corp. Code § 25003(b)*]:

- Domestic or foreign government securities [*see Corp. Code § 25100(a), (b)*];
- Securities the issuance of which is subject to authorization by the Insurance Commissioner, the

Public Utilities Commission, or the Real Estate Commissioner [*see Corp. Code § 25100(e)*];

- Interests in subdivisions or real estate developments [*see Corp. Code § 25100(f)*];
- Mutual capital certificates or savings accounts [*see Corp. Code § 25100(g)*];
- Nonprofit corporation securities [*see Corp. Code § 25100(j)*];
- Life income contracts of qualified issuers [*see Corp. Code § 25100(k)*];
- Short term commercial paper that is not offered to the public in amounts of less than $25,000 to any one purchaser [*see Corp. Code § 25100(l)*]; or
- Issuer transactions that are exempted under *Corp. Code § 25102*.

"Agent" also does not include an associated person of a broker or dealer effecting transactions described in Section 15(h)(3) of the Securities Exchange Act of 1934, subject to the provisions of Section 15(h)(2) of that act [*Corp. Code § 25003(c)*; *see 15 U.S.C. § 78o(h)*].

An officer or director of a broker-dealer or issuer, or an individual occupying a similar status or performing similar functions, is an agent only if he or she otherwise comes within the definition of agent and receives compensation specifically related to purchases or sales of securities [*Corp. Code § 25003(d)*].

[c] "Investment Adviser" Under California Law

An "investment adviser," with certain exceptions, is someone who, for compensation, engages in the business of advising others, directly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities; or the investment adviser, for compensation and as part of a regular business, publishes analyses or reports concerning securities [*Corp. Code § 25009(a)*]. "Investment adviser" also includes, with some exceptions, any person who uses the title "financial planner" and who, for compensation, engages in the business, principally or as part of another business, of advising others as described above [*Corp. Code § 25009(b)*]. "Investment adviser" does not include persons excepted from the definition of "investment adviser" by Section 202(a)(11) of the federal Investment Advisers Act of 1940 [*15 U.S.C. § 80a-1 et seq.*]. However, with regard to those persons, the Commissioner may investigate and bring enforcement actions with respect to fraud and deceit, including fraud and deceit under *Corp. Code § 25235* and any rules adopted under that section [*Corp. Code § 25009.1*]. An "underwriter" agrees with an issuer or other person on whose behalf a distribution of securities is to be made either to purchase them for distribution, to distribute them for or on behalf of those parties, or to manage or supervise the distribution [*Corp. Code § 25022*].

[5] "Investment Adviser Representative"

An "investment adviser representative" or "associated person of an investment adviser" means any partner, officer, director, or other individual (except clerical or ministerial personnel) who is employed by, associated with, or subject to the supervision and control of an investment adviser that has obtained (or is required to obtain) a certificate in California and who does any of the following [*Corp. Code 25009.5(a)*]:

- Makes any recommendations or otherwise renders advice regarding securities;
- Manages accounts or portfolios of clients;

- Determines which recommendation or advice regarding securities should be given;
- Solicits, offers, or negotiates for the sale or sells investment advisory services; or
- Supervises employees who perform any of the above.

With respect to an investment adviser subject to *Corp. Code § 25230.1* (persons subject to notice rather than certification requirements), the term means a person defined as an investment adviser representative by SEC Rule 303A-3 [*17 C.F.R. § 275.203A-3*] and who has a place of business in California [*Corp. Code § 25009.5(b)*].

[a] California Regulation

The Commissioner of Corporations has responsibility for licensing marketing personnel and policing professional offering and selling activities. Broker-dealers must be certificated unless exempt; agents for broker-dealers or issuers also must comply with the commissioner's sales regulations [*Corp. Code § 25210*; *see* Dept. of Corp. Release No. 119-C (Oct. 22, 2008) (broker-dealer licensure requirements for officers and directors of issuers)]. Investment advisers must be certificated as well, unless exempt or not subject to certification [*Corp. Code § 25230(a)*; *see Corp. Code § 25230.1*]. A person registered under Section 203 of the Investment Advisers Act of 1940 is not subject to certification. However, such an investment adviser may not conduct business in California unless the person has less than six clients [*see Corp. Code § 25202(a)*] or has complied with notice filing requirements [*Corp. Code § 25230.1*; *see* Dept. of Corp. Release No. 109-C (Dec. 18, 1997) (form for notice)]. By rule of the Commissioner, certain aliens are not eligible for an investment adviser certificate [*10 Cal. Code Reg. §§ 250.60, 250.61*; *see Corp. Code § 25231*].

[b] Definitions Under Federal Law

Marketing personnel do not necessarily have the same designations under the federal securities laws. Under federal laws, a "dealer" may be an agent, broker, or principal handling securities issued by another person under the 1933 Act [*see 15 U.S.C. § 77b(a)(12)*], whereas, under the 1934 act, a "dealer" only buys or sells for personal account [*see 15 U.S.C. § 78c(a)(5)*] and a "broker" (not defined at all under the 1933 act) effects securities transactions for the account of others [*see 15 U.S.C. § 78c(a)(4)*]. An "investment adviser" is one under contract who regularly advises as to the desirability of securities transactions or who may determine which securities are to be purchased or sold, with various exceptions [*see 15 U.S.C. §§ 78c(a)(20), 80a-2(a)(20)*].

An "underwriter" is one who, with certain exceptions, has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security. Such a person may participate or have a direct or indirect participation in any such undertaking or the underwriting of any such undertaking [*see 15 U.S.C. §§ 77b(11), 78c(a)(20), 80a-2(a)(40)*]. Unlike California law, the federal definition includes individual investors who are not professionals in the securities business, if they are found to act as links in a chain of transactions through which securities move from an issuer to the public [*see 17 C.F.R. § 230.144* (preliminary note)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Securities LawAdditional Offerings & the Securities Exchange Act of 1934DefinitionsSecuritySecurities LawBlue Sky LawsInvestment Contracts & StocksSecurities LawBlue Sky LawsOffer & SaleSecurities LawBlue Sky LawsRegistration of Agents, Broker-Dealers & Investment AdvisersSecurities LawInitial Public Offerings & the Securities Act of 1933DefinitionsSecuritySecurities LawInvestment AdvisersDefinitions

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Volume 45: Schools: Certification thru Service of Summons and Papers-Chs. 512-519
Chapter 515 SECURITIES AND FRANCHISE REGULATION
PART II. LEGAL BACKGROUND
A. Securities Regulation

45-515 California Forms of Pleading and Practice--Annotated § 515.14

§ 515.14 Qualification of Offers and Sales in California

[1] Requirement

All offers and sales of securities in California must first be authorized and approved through a process of qualification with the Commissioner of Corporations unless, either by the nature of the security itself or by the contemplated or actual disposition of the security, the transactions are expressly exempted by law or not subject to qualification [*see Corp. Code §§ 25110, 25120, 25130*]. The term "qualification" is not defined but refers to completion of the prescribed processing system by the Department of Corporations. The term is used indiscriminately in the statutes and regulations as well as by the commentators for a process affecting either "securities" or "transactions" therein [*see, e.g., Corp. Code §§ 25110, 25111*; *cf. Corp. Code § 25120*; *10 Cal. Code Reg. § 260.103*; *see also* Ballantine & Sterling, California Corporation Laws, Ch. 21, *Corporate Securities* (Matthew Bender)].

The following discussion summarizes the requirements for, and exceptions from, qualification. A more detailed discussion of matters pertaining to issuance of equity or debt securities, and to processing securities for qualification with the Commissioner of Corporations, or arranging for exempt status of securities transactions, is discussed in California Legal Forms, Chs. 6 through 6J (Matthew Bender).

[2] When California Law Applies

An offer or sale of a security is made in California, and thus subject to state law, when (1) an offer to sell is made in California, (2) an offer to buy is accepted in California, or (3) if both seller and purchaser are domiciled in California, the security is delivered to the purchaser in California [*Corp. Code § 25008(a)*]. An offer to buy or a purchase of a security is made in California when an offer to buy is made in California or an offer to sell is accepted in California, or the security is delivered to the purchaser in California if both seller and purchaser are domiciled in California [*Corp. Code § 25008(a)*]. Offers to sell or buy (or sales or purchases) are also made in California when they either originate in California or are directed to California by the offeror and received at the place to which they are directed. Offers are accepted in California when acceptance is communicated to the offeror in California [*Corp. Code § 25008(a), (b)*].

Acceptance is communicated to an offeror in California when the offeree directs it to the offeror in California,

reasonably believing the offeror to be in California, and it is received where directed. A security is delivered to the purchaser in California when the certificate or other evidence of the security is directed to the purchaser in California and received where directed [*Corp. Code § 25008(b)*].

Offers are not made in California merely because a publisher circulates or there is circulated on the publisher's behalf any bona fide newspaper or other publication of general, regular, and paid circulation that has had more than two thirds of its circulation outside of California during the past 12 months. Likewise, offers are not made in California because a radio or television program originates outside the state but is received in California [*Corp. Code § 25008(c)*].

[3] Issuer and Nonissuer Transactions

[a] Distinctions

The offer or sale of securities may take place through either an issuer [*see Corp. Code §§ 25110, 25120*] or a nonissuer [*see Corp. Code § 25130*] transaction. The "issuer" is the person or entity that issues, or proposes to issue, a security [*Corp. Code § 25010*]. A "nonissuer transaction" is one not directly or indirectly for the benefit of the issuer. A transaction is indirectly for the benefit of the issuer if any portion of the purchase price of any securities involved in the transaction will be received indirectly by the issuer [*Corp. Code § 25011*].

[b] Qualification of Securities in Issuer Transactions

Issuer transactions (other than recapitalizations and reorganizations [*see Corp. Code § 25120*]) may be qualified in any of the following ways [*Corp. Code § 25110*]:

- Securities for which a registration statement has been filed under the federal Securities Act of 1933 in connection with the same offering may be qualified by coordination under the procedures set forth in *Corp. Code § 25111(b), (c)* [*see Corp. Code § 25111*];

- Securities issued by persons who are issuers of securities registered under the Securities Exchange Act of 1934 [*see* 15 U.S.C. § 78] or by persons registered under the Investment Company Act of 1940 [*see 15 U.S.C. § 80a-8*], a related law dealing with mutual fund issuers, may be qualified by a "notification" procedure if they are ineligible under the coordination procedure [*see Corp. Code § 25112*];

- All securities, whether or not eligible for the coordination or notification procedures, may be qualified by permit [*see Corp. Code § 25113*]; and

- Securities of an open-end investment company or a unit investment trust previously qualified by coordination may be qualified by providing certain information and documents as specified in *Corp. Code § 25111(d)(1), (2)* [*see Corp. Code § 25111*].

An offer or sale of any of these securities is not qualified if the manner of the offer or sale differs from, exceeds the scope of, or fails to conform with, either (1) a material term or condition of qualification as set forth in the permit or qualification order or (2) a material representation regarding the manner of offering that is set forth in the application for qualification [*Corp. Code § 25110*].

Securities offered or sold in connection with recapitalizations or reorganizations--that is, transactions involving changes in the rights, preferences, privileges, or restrictions of or on outstanding securities; or in any exchange of securities by the issuer with its existing security holders exclusively; in any exchange in connection with any merger, consolidation, or purchase of assets for stock issuance; or in an entity conversion transaction [*see* Corp. Code § 25001.1

(definition)]--must be qualified by permit [*see Corp. Code §§ 25120, 25121*].

[c] Processing Nonissuer Transactions

Securities of nonissuer transactions must be qualified under the coordination procedure available for certain issuer transactions when eligible. Otherwise, they must be qualified by a notification procedure, except that securities offered pursuant to the federal "Regulation A" exemption [*see 17 C.F.R. §§ 230.251-230.264*] must qualify under the regular permit procedure [*Corp. Code § 25131(a)*].

[4] Securities and Transactions Not Subject to Qualification

[a] In General

In response to the preemptive effect of the National Securities Markets Improvement Act of 1996 [*see* P.L. 104-290, 110 Stat. 3416 (H.R. 3005); *see also § 515.11*], conforming California legislation was enacted in 1997 to set forth securities and transactions that are not subject to *Corp. Code §§ 25110, 25120,* and *25130* [*see* Stats. 1997, ch. 391]. This legislation, and its interaction with the 1996 federal legislation, is discussed under the subheadings immediately below.

[b] "Covered Securities"

A security defined as a "covered security" under Section 18(b)(1) of the Securities Act of 1933 [*see 15 U.S.C. § 77r(b)(1)*] is not subject to *Corp. Code §§ 25110, 25120,* and *25130* [*Corp. Code § 25100.1(a)*]. Those securities are listed in § 515.11[4].

In addition, a security issued by an investment company that is registered or has filed a registration statement under the Investment Company Act of 1940 [*see 15 U.S.C. § 80a-1 et seq.*] that is defined as a "covered security" pursuant to Section 18(b)(2) of the Securities Act of 1933 [*see 15 U.S.C. § 77r(b)(2)*] is not subject to *Corp. Code §§ 25110, 25120,* and *25130* if, prior to any offer or sale in California, all of the following are filed with or paid to the Commissioner [*Corp. Code § 25100.1(b)(1)*]:

- A notice consisting of all documents that are part of a federal registration statement filed with the SEC pursuant to the Securities Act of 1993 (or a form prescribed by the Commissioner in lieu of the notice), and that a consent to service of process is on file or attached to the notice [*see* Dept. of Corp. Release No. 109-C (Dec. 18, 1997) (Uniform Form NF developed by the North American Securities Administrators Association is acceptable for filing)].

- A report of the value of securities covered that are offered or sold in California, as necessary to compute fees.

- The notice filing fee set forth in *Corp. Code § 25608.1(a)*. That fee is $200 plus one fifth of one percent of the aggregate value of the securities sought to be sold in California, up to a maximum aggregate free of $2,500 [*Corp. Code § 25608.1(a)*]. The maximum fee that may be levied on a filing pursuant to *Corp. Code § 25100.1(b)* applies, unless the Commissioner sets the fees below the maximum level at the beginning of the fiscal year [*Corp. Code § 25608.2(b)*; *see Corp. Code § 25608.3* (Commissioner may set any fee under *Corp. Code § 25608.1* at an amount below maximum)].

Furthermore, if any offer or sale is to be made pursuant to Section 18(b)(2) of the Securities Act of 1933 [*15 U.S.C. § 77r(b)(2)*] and *Corp. Code § 25100.1(b)* more than 12 months after the date the notice was filed, the issuer must file another notice and pay the fee set forth in *Corp. Code § 25608.1(a)* [*Corp. Code § 25100.1(b)(2)*].

[c] Securities Sold in Transactions Exempt From Federal Registration

A security that is offered or sold in a transaction that is exempt from registration under Section 4(1) or Section 4(3) of the Securities Act of 1933 [*15 U.S.C. § 77d(1)*] pursuant to Section 18(b)(4)(A) of that act [*15 U.S.C. § 77r(b)(4)(A)*] is not subject to *Corp. Code §§ 25110, 25120,* and *25130* if the issuer, other than a foreign (other country) issuer, files the required reports with the SEC pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 [*Corp. Code § 25101.1(a)*; *15 U.S.C. § 78a et seq.*; *see 15 U.S.C. §§ 78m, 78o(d)*].

A security of a foreign (other country) issuer that avails itself of the exemption from registration under Section 12(g)(3) of the Securities and Exchange Act of 1934 is subject to the qualification requirements of *Corp. Code §§ 25110, 25120,* and *25130,* unless the issuer is a reporting company under that Act and files the required reports under Section 12 or 15(d) of that Act [*Corp. Code § 25101.1(b)*; *see 15 U.S.C. § 78m, 78o(d)*].

[d] Offers and Sales to Qualified Purchasers

Any offer or sale of a security to a "qualified purchaser" as defined by SEC rule pursuant to Section 18(b)(3) of the Securities Act of 1933 [*15 U.S.C. § 77r(b)(3)*] is not subject to *Corp. Code §§ 25110, 25120,* and *25130* if all of the following are met [*Corp. Code § 25102.1(a)*]:

- A notice is filed with the Commissioner prior to an offer in California, along with any documents filed with the SEC in annual or periodic reports that the Commissioner by rule or order deems appropriate [*see* Dept. of Corps. Release No. 109-C (Dec. 18, 1997) (no notice proposed as SEC has not yet adopted rule under Section 18(b)(3))].

- A consent to service of process [*see Corp. Code § 25165*] is filed with the notice.

- Payment of the notice filing fee set forth in *Corp. Code § 25608.1(b)* is made. That fee is $600 [*Corp. Code § 25608.1(b)*]. The maximum fee that may be levied on a filing pursuant to *Corp. Code § 25102.1(a)* applies, unless the Commissioner sets the fees below the maximum level at the beginning of the fiscal year [*Corp. Code § 25608.2*; *see Corp. Code § 25608.3* (Commissioner may set any fee under *Corp. Code § 25608.1* at an amount below maximum)].

Any offer and sale of a security with respect to a transaction that is exempt from registration under Section 4(4) of the Securities Act of 1933 pursuant to Section 18(b)(A) and (B) of that act is not subject to *Corp. Code §§ 25110, 25120,* and *25130* [*Corp. Code § 25102.1(b)*].

Any offer or sale of a security with respect to a transaction that is exempt from registration under the Securities Act of 1933 pursuant to Section 18(b)(4)(C) of that act is not subject to *Corp. Code §§ 25110, 25120,* and *25130* [*Corp. Code § 25102.1(c)*].

These requirements do not apply to securities offered and sold to the class of investors or in the transactions described in *Corp. Code § 25102(d), (g), (i),* and *(k),* or to the class of investors or in the transactions described in *Corp. Code § 25104(c), (d), (e),* and *(f).*

Any offer or sale of a security with respect to a transaction that is exempt from registration under the Securities Act of 1933 pursuant to Section 18(b)(4)(D) of that act [*15 U.S.C. § 77r(b)(4)(D)*] is not subject to *Corp. Code §§ 25110, 25120,* and *25130* if all the following requirements are met [*Corp. Code § 25102.1(d)*; *Consolidated Management Group, LLC v. Department of Corps. (2008) 162 Cal. App. 4th 598, 608 n.2, 75 Cal. Rptr. 3d 795* (statute refers to security in transaction that "is exempt," which plainly means actually exempt; merely filing documents and paying fees in order to obtain exemption is not sufficient)]:

- A notice in the form of a copy of the completed Form D [*17 C.F.R. § 239.500*] filed with the SEC is filed with the Commissioner within 15 days of the first sale in California, along with documents filed with the SEC in annual or periodic reports that the Commissioner by rule or order deems appropriate [*see* Dept. of Corps. Release No. 109-C (Dec. 18, 1997) (also requiring letter of transmittal)]. (The commissioner may allow for a notice in the form of the electronic transmission of the information in Form D.)

- A consent to service of process [*see Corp. Code § 25165*] is filed with the notice.

- Payment of the notice filing fee set forth in *Corp. Code § 25608.1(c)* is made. The statutory fee is $300 [*see Corp. Code § 25608.1(c)*; *see also Corp. Code § 25608.3* (Commissioner may set any fee under *Corp. Code § 25608.1* at an amount below maximum); Dept. of Corps. Release No. 115-C (Revised May 28, 2004)]. The maximum fee that may be levied on a filing pursuant to *Corp. Code § 25102.1(d)* applies, unless the Commissioner sets the fees below the maximum level at the beginning of the fiscal year [*Corp. Code § 25608.2*].

Notwithstanding the above, an issuer may file an application for qualification by coordination, notification, or permit pursuant to *Corp. Code § 25111, 25112, 25113, 25121, 25131,* or 24142 [*Corp. Code § 25102.1(e)*].

[5] Exemption From Qualification

[a] Scope

There is a large body of exemptions from qualification requirements. Exemption does not remove the security entirely from corporate security regulation but only from the need to obtain qualification for offers or sales [*see* Corp. Code §§ 25100-25105; *see also § 515.422*]. Thus, persons involved in securities transactions still remain subject to antifraud provisions and liable to certain civil actions or for criminal violations under the law [*see Corp. Code §§ 25400-25504.2, 25540-25542*].

For a complete list of the California securities exemptions, see *California Legal Forms, Ch. 6, Securities Regulation Issues, § 6.200* (Matthew Bender).

[b] Securities Exempted

Illustrative of securities exempt from all qualification provisions are those of institutions that are heavily regulated by other governmental agencies (such as public securities, securities of foreign countries with which the United States maintains diplomatic relations, and securities issued or guaranteed by state and federal banks and savings and loans), those of nonprofit organizations (except debt securities), those listed or approved for listing on a national securities exchange, and those which constitute single notes to single entities (that is, not being part of a series of notes of equal priority or a note in which beneficial interests are sold to more than one person or entity) secured by real property [*see Corp. Code § 25100(a)-(j), (o)-(t)*].

[c] "Rollup" Transactions

A "rollup" transaction is a transaction, or a series of transactions, that directly or indirectly through acquisition or otherwise involves the combination or reorganization of any rollup participant and that meets certain requirements [*Corp. Code § 25014.6*]. A "rollup participant" is a finite-life limited partnership, which is a limited partnership that (1) operates as a conduit for investors to participate in the ownership of assets for a limited time, (2) has a policy or purpose of distributing to investors substantially all proceeds from the sale, financing, or refinancing of assets, whether for the term of the partnership or after an initial period, rather than reinvesting those proceeds in the business, and (3) is not

excluded under *Corp. Code § 25014.6(b)*. A rollup participant does not include a partnership registered under the Investment Company Act of 1940 or a business development company as defined in *15 U.S.C. § 80a-2(a)(48)* [*Corp. Code § 25014.5*].

Certain reorganization and recapitalization transactions involving mainly securities holders with addresses outside California are exempt from qualification in California [*see Corp. Code § 25103(c), (d)*; *discussion under § 515.14[7][b]*]. This exemption does not extend to a rollup transaction [*Corp. Code § 25103(c)*].

Certain rollup transactions are "eligible" rollup transactions [*see Corp. Code § 25014.7*]. The exemption for securities listed or approved for listing on a national securities exchange [*see Corp. Code § 25100(o)*; *discussion under § 515.14[5][b]*] does not apply to securities listed or approved in a rollup transaction unless it is an eligible rollup transaction [*Corp. Code § 25100(o)*].

[d] Issuer Transactions Exempted

There is a wide range of exempt issuer transactions [*see Corp. Code § 25102*]. Some of the more frequently encountered kinds are briefly described below.

[e] Private Presale Offers

An offer (but not a sale) that does not involve a public offering, and the execution and delivery of an agreement for the sale of securities pursuant to the offer, are exempt. The agreement must contain a cautionary legend prescribed by statute. No part of the purchase price may be paid or received and no securities may be issued until the sale is qualified [*Corp. Code § 25102(a)*].

No public offering is involved in the above-described transaction if an offer is made to not more than 35 persons. This number of offerees is exclusive of any institutional investors and affiliates, officers, and directors of the issuer [*10 Cal. Code Reg. § 260.102.1*; *see Corp. Code § 25102(i)*; *10 Cal. Code Reg. §§ 260.102.10, 260.102.12-260.102.14* (describing and defining institutional investors and affiliates); *see also § 515.14[5][h]*]. A husband and wife (together with any trustee or custodian acting for the account of their minor children) are counted as one person, as is a partnership, corporation, or other organization not specifically formed for the purpose of purchasing the security offered in reliance on this exemption [*10 Cal. Code Reg. § 260.102.1*].

[f] Private Debt Transaction

An offer or sale of any evidence of indebtedness, whether secured or unsecured, and any guarantee thereof, in a transaction not involving any public offering, is exempt [*Corp. Code § 25102(e)*; *see 10 Cal. Code Reg. § 260.102.3* (excluding certain convertible debt securities from scope of exemption)]. Similarly, any offer or sale of conditional sales agreements, equipment trust certificates, or certificates of interest or participation in them, or partial assignments of them, covering the purchase of railroad rolling stock or equipment or the purchase of motor vehicles, aircraft, or parts for them, in a transaction not involving a public offering, is exempt [*Corp. Code § 25102(g)*]. For purposes of these two exemptions, an offer or sale does not involve a public offering if offers are not made to more than 25 persons and sales are not consummated to more than 10 such persons, and if all the offerees either have a preexisting personal relationship with the offeror, its partners, officers, directors, or controlling persons, or have sufficient business or financial experience to be assumed to be able to protect their own interests in regard to the transaction [*10 Cal. Code Reg. § 260.102.2*].

[g] Unadvertised Offers or Sales of Securities Sold to No More Than 35 Persons

An offer or sale of any security, if not made to a pension or profit-sharing trust of the issuer, is exempt if the transaction meets each of the following requirements [*Corp. Code § 25102(f)*]:

- Sales of the security are not made to more than 35 persons, including persons outside California. The number of purchasers is calculated by excluding any of the institutional investors described in *Corp. Code § 25102(i)*, any officer, director, or affiliate of the issuer, or manager (as appointed or elected by the members) if the issuer is a limited liability company, and any other purchaser whom the commissioner designates by rule [*see 10 Cal. Code Reg. § 260.102.13* (excluded purchasers)]. A husband and wife (together with any trustee or custodian acting for the account of their minor children) are counted as one person, as is a partnership, corporation, or other organization not specifically formed for the purpose of purchasing the security offered in reliance on this exemption.

- All purchasers either have a preexisting personal or business relationship with the offeror or any of its partners, officers, directors, or controlling persons, or managers (as appointed or elected by the members) if the offeror is a limited liability company, or by reason of their business or financial experience, or the business or financial experience of their professional advisors who are unaffiliated with, and who are not compensated by, the issuer or any affiliate or selling agent of the issuer, directly or indirectly, could be reasonably assumed to have the capacity to protect their own interests in connection with the transaction [*see 10 Cal. Code Reg. § 260.102.12(c)-(i)* (defining purchaser, relationship, controlling person, partners, professional advisors, unaffiliated, and affiliate)].

- Each purchaser states that the purchase is for the purchaser's own account (or a trust account if the purchaser is a trustee) and not with a view to or for sale in connection with any distribution of the security.

- The offer and sale of the security is not accomplished by the publication of any advertisement [*see 10 Cal. Code Reg. § 260.102.12(j)* (defining publication of advertising)].

The issuer must file a notice of transaction under this exemption with the commissioner [*Corp. Code § 25102(f)(4)*; *10 Cal. Code Reg. § 260.102.14* (notice must be filed electronically unless issuer claims hardship exemption); *see* Dept. Corps. Release 116-C (July 1, 2005))]. Failure to file the notice, or failure to file it within the time specified by the commissioner's rule, does not affect the availability of this exemption, but within 15 business days after discovery of the failure to file the notice or after demand by the commissioner, whichever occurs first, the issuer must file the notice and pay a fee equal to that payable had the transaction been qualified under *Corp. Code § 25110* [*Corp. Code § 25102(f)(4)*].

[h] Institutional Investor Transactions

An offer or sale is exempt if it is made to a bank, savings and loan association, trust company, insurance company, registered investment company, pension or profit-sharing trust (except one belonging to the issuer, a self-employed individual retirement plan, or individual retirement account), or such other institutional investor, governmental agency, or instrumentality as the commissioner may designate by rule. The exemption is available whether the purchaser is acting for itself or as trustee. The exemption also includes certain corporations with outstanding securities registered under federal authority in designated situations in which the corporation will own the entire, outstanding capital stock of the issuer of the securities after the offer or sale [*Corp. Code § 25102(i)*]. The commissioner has designated as institutional investors certain nonprofit organizations and corporations of certain prescribed financial proportions [*see 10 Cal. Code Reg. § 260.102.10*].

[i] Noncontributory Employee Stock Plans

Any offer or sale of a stock to a pension, profit-sharing, stock bonus, or employee stock ownership plan is exempt if (1) the plan meets the requirements for qualification under *I.R.C. § 401*, and *(2)* the employees are not required or permitted

individually to make any contributions to the plan. This exemption is not affected by whether the stock is contributed to the plan, purchased from the issuer with contributions by the issuer or an affiliate of the issuer, or purchased from the issuer with funds borrowed from the issuer, an affiliate of the issuer, or any other lender [*Corp. Code § 25102(m)*].

[j] Small Offering Exemption

An offer or sale of voting common stock by a corporation incorporated in any state is exempt if, immediately after the proposed sale and issuance, there will be only one class of stock of the corporation outstanding, that is owned beneficially by no more than 35 persons. However, a number of additional requirements must be met concerning the following: (1) the prohibition on advertising and selling expenses, (2) the nature of the consideration to be received for the shares and prohibition of promotional consideration, (3) the filing of a prescribed form of notice signed by an active member of the State Bar of California and accompanied by an irrevocable consent to service, and (4) each purchaser's representation that the purchase is made only for the purchaser's own account (or a trust account if the purchaser is a trustee), and not with a view to or for sale in connection with any distribution of the stock [*Corp. Code § 25102(h)*; *see 10 Cal. Code Reg. §§ 260.102.8*, *260.102.9* (form of notice and proof of mailing), 260.102.11 (advances and loans in connection with offering)]. Failure to file the notice, or failure to file it within the time specified by the commissioner's rule, does not affect the availability of this exemption, but within 15 business days after discovery of the failure to file the notice or after demand by the commissioner, whichever occurs first, the issuer must file the notice and pay a fee equal to that payable had the transaction been qualified under *Corp. Code § 25110* [*Corp. Code § 25102(h)(4)*]. "Selling expenses" means commissions, discounts, or other compensation paid to any person as remuneration for selling the securities [*10 Cal. Code Reg. § 260.102.7*].

All securities held by a husband and wife, whether or not jointly, are considered to be owned by one person; but all securities held by a corporation that has issued stock under the exemption are considered to be held by the shareholders to whom it has issued that stock [*Corp. Code § 25102(h)*]. Securities held by a partnership or joint venture are considered to be owned beneficially by each of its partners or joint venturers. Securities held by a trustee are considered to be owned beneficially by each of the beneficiaries, present, future, and contingent, of the trust. However, a future or contingent beneficiary is disregarded if he or she is an ancestor, descendant, or spouse of a present beneficiary, or a custodian or trustee for his or her account. In determining the number of beneficial owners, the provisions of *Corp. Code § 158* (defining "close corporation") are not controlling, and reference should be made instead to *Corp. Code § 25102(h)* and *10* Cal. Code Reg. § 260.102.5 [*10 Cal. Code Reg. § 260.102.5*].

Debt securities are not a "class of stock." However, a corporation does not have "only one class of stock" outstanding if, at the time its shares are issued, there exists or is presently intended to be executed a shareholders' agreement pursuant to which any rights, preferences, privileges, or restrictions enumerated in *Corp. Code § 25103(e)* [*see § 515.14[7][b]*] are or would be modified as to any shares or the holders thereof in a way that does not apply to all outstanding shares [*10 Cal. Code Reg. § 260.102.4*].

[k] Qualified Purchaser Limited Public Offering Exemption

An offer or sale of any security in a transaction, other than an offer or sale of a security in a rollup transaction [*see Corp. Code § 25014.6* ("rollup transaction" defined)], is exempt if the issuer is either a California corporation or a foreign corporation subject to *Corp. Code § 2115* or any other form of business entity including, without limitation, a California partnership or trust, but excluding a "blind pool" issuer or an investment company subject to the Investment Company Act of 1940 [*Corp. Code § 25102(n)(1)*]. However, additional requirements must be met concerning all of the following [*see Corp. Code § 25102(n)(2)-(7)*; *see also 10 Cal. Code Reg. §§ 260.102.16-260.102.18*]:

- Disclosure;
- Types of qualified purchasers to whom securities may be sold;

- The restriction that securities must be purchased only for the purchaser's own account (or for a trust account if the purchaser is a trustee) and not for sale in connection with a distribution of securities;

- The general announcement of the proposed offering; and

- The filing of a notice of this transaction with the Commissioner of Corporations.

[l] Securities Issued Pursuant to Option or Purchase Plan

An offer or sale of any security issued by a corporation or LLC pursuant to a purchase plan or agreement, or issued by a corporation or LLC pursuant to an option plan or agreement, is exempt, at the time of issuance or grant, if the security is exempt from registration under the Securities Act of 1933 pursuant to *17 C.F.R. 230.701* [*Corp. Code § 25102(o)*].

The exemption is subject to three conditions. First, the offering must be exempt from registration under the Securities Act of 1933 pursuant to Rule 701 dealing with compensatory benefit plans. The latter exemption is in turn subject to a number of conditions. The most important to the use of Rule 701 are the requirement that the issuer be a non-reporting company under the 1934 Act (and not an investment company), a quantity limitation on the amount of stock issued pursuant to Rule 701 ranging from $500,000 to $5,000,000, and a limitation of the aggregate offering price and the number of options outstanding to 15 percent of the total assets of the issuer or 15 percent of the total number of outstanding securities of the class being offered. Second, the terms of any stock option or purchase plan must comply with the substantive and disclosure requirements contained in the applicable provisions of the rules [*see 10 Cal. Code Reg. §§ 260.140.41, 260.140.42, 260.140.45, 260.140.46*]. Third, the issuer must file a notice of the transaction no later than 30 days after the initial issuance of any security in California [*see Corp. Code § 25008*] under the plan in accordance with rules adopted by the Commissioner [*see 10 Cal. Code Reg. § 260.102.19*]. The notice must be accompanied by the filing fee specified in *Corp. Code § 25608(y)* [*Corp. Code § 25102(o)*; *see Corp. Code § 25608.3* (Commissioner may set fee at amount below statutory maximum)]. The failure to file a notice of transaction, or the failure to file that notice within the specified time, however, will not affect the availability of the exemption. Within 15 business days after discovery of the failure to file the notice or after demand by the commissioner, whichever occurs first, an issuer that has failed to file the notice must file it and pay the commissioner a fee equal to the maximum aggregate fee payable had the transaction been qualified under *Corp. Code § 25110* [*Corp. Code § 25102(o)*].

Offers and sales exempt under this subdivision are deemed to be part of a single, discrete offering and are not subject to integration with any other offering or sale, whether qualified as an issuer transaction [*see Corp. Code § 25100 et seq.*], otherwise exempt, or not subject to qualification [*Corp. Code § 25102(o)*].

[m] Sale by Person Licensed Under Capital Access Company Law

A transaction is exempt from *Corp. Code § 25110* when it is an offer or sale of nonredeemable securities to accredited investors [*Corp. Code § 28031* (definition)] by a person licensed under the Capital Access Company Law [*see Corp. Code § 28000 et seq.*]. All nonredeemable securities must be evidenced by certificates that have stamped or printed prominently on their face a legend in a form to be prescribed by rule or order of the Commissioner restricting transfer of the securities in the manner as the rule or order provides [*Corp. Code § 25102(p)*].

[n] Sale of Viatical or Life Settlement Contracts

The listed categories of securities subject to the Corporate Securities Law includes "viatical settlement contracts" as defined in *Ins. Code § 10113.1* and "life settlement contracts," defined as an agreement, other than a viatical settlement contract, for the purchase, sale, assignment, transfer, devise, or bequest of any portion of the death benefit or ownership of a life insurance policy or certificate for consideration that is less than the expected death benefit of the life insurance

policy or certificate [*Corp. Code §§ 25019, 25023(a)*], with specified exceptions [*Corp. Code § 25023(b)*]. Effective January 1, 2010, however, the Insurance Code no longer covers viatical settlement contracts as such, and henceforth regulates only life settlement contracts as now defined in a version of *Ins. Code § 10113.1* that supersedes the version referenced in the Corporate Securities Law [*see Ins. Code § 10113.1(k)*; *see also* Stats. 2009, ch. 343]. The Corporate Securities Law was not amended to reflect that change. Therefore, insofar as it governs viatical settlement contracts as discussed below, it is unclear whether the Corporate Securities Law continues to apply to contracts formerly defined in *Ins. Code § 10113.1* as such; and, while it continues to apply to a life settlement contract as defined in *Corp. Code § 25023*, the Legislature has not indicated whether the Corporate Securities Law applies also to contracts defined as "life settlement contracts" in the current version of *Ins. Code § 10113.1*.

An offer or sale of any viatical or life settlement contract or fractionalized or pooled interest therein is exempt if the transaction meets certain criteria [*Corp. Code § 25102(q)*]. A "viatical settlement contract" is an agreement entered into between a person owning a life insurance policy upon the life of a person with a catastrophic or life-threatening illness or condition and another person by which the policy owner receives compensation or anything of value less than the death benefits of the insurance policy in return for an assignment, transfer, sale, devise, or bequest of the death benefits or ownership of the insurance policy, but does not include an assignment of a life insurance policy to a licensed lending institution or credit union as collateral for a loan [*Corp. Code § 25023(a)*; former *Ins. Code § 10113.1(a)(1)* (repealed eff. 1/1/2010)]. A "life settlement contract" is an agreement, other than a viatical settlement contract, for the purchase, sale, assignment, transfer, devise, or bequest of any portion of the death benefit or ownership of a life insurance policy or certificate for consideration that is less than the expected death benefit of the life insurance policy or certificate [*Corp. Code § 25023(a)*]. These terms do not include any of the following [*Corp. Code § 25023(b)*]:

- The assignment, transfer, sale, devise, or bequest of a death benefit, life insurance policy, or certificate of insurance by the insured or the original owner to any person if it is not accompanied by the publication of any advertisement and is not effected by or through a broker-dealer [*see Corp. Code § 25004*].

- The assignment of a life insurance policy to a bank, savings bank, savings association, credit union, or other lender (whether or not licensed) as collateral for a loan, or to a stop-loss insurer or reinsurer.

- The exercise of accelerated benefits pursuant to the terms of a life insurance policy issued in accordance with the insurance laws of California.

- The assignment, transfer, sale, devise, or bequest of any undivided death benefit, life insurance policy, or certificate of insurance by an entity licensed pursuant to *Ins. Code § 10113.2* [*but see* 2009 Stats., ch. 343, §§ 4, 5 (version of *Ins. Code § 10113.2* referenced in Corporations Code is repealed and replaced with new version effective 1/1/2010; Insurance Code no longer regulates viatical settlements)], or a viatical or life settlement provider licensed from another state, to one individual or entity, provided that the individual or entity represents that it is purchasing for its own account (or trust account, if the entity is a trustee) and not with a view to or for sale in connection with a distribution of the individual death benefit, life insurance policy, or certificate of insurance.

The transaction must meet all of the following criteria in order for the exemption to apply [*Corp. Code § 25102(q)*]:

- Sales of securities are made only to qualified purchasers, or other persons the issuer reasonably believes after reasonable inquiry to be qualified purchasers [*see Corp. Code § 25102(q)(1)* (defining "qualified purchasers")].

- Each purchaser represents that the purchaser is purchasing for that purchaser's own account (or trust account, if the purchaser is a trustee) and not with a view to or for sale in connection with a distribution

of the security [*Corp. Code § 25102(q)(2)*].

- Each natural person purchaser, including a corporation, partnership, or other organization specifically formed by natural persons for the purpose of acquiring the securities offered by the issuer, receives certain written information at least five business days before securities are sold to (or a commitment to purchase is accepted from) the purchaser [*see Corp. Code § 25102(q)(3)* (list of required information)].

In addition to any other rights provided under the Corporate Securities Law, including rescission or damages for misrepresentation [*see, e.g., Corp. Code § 25501*; *see also § 515.246[13]*], a person who purchases a viatical or life settlement contract, or a fractionalized or pooled interest therein, may rescind or cancel the purchase for any reason, at any time before seven calendar days after the date the person remits the required consideration to the issuer or the issuer's agent [*Corp. Code § 25508.5*].

[o] Sale of Series of Notes Secured by Real Property

A transaction is exempt from *Corp. Code § 25110* when it is the sale of a series of notes secured directly by an interest in the same real property, or the sale of undivided interests in a note secured directly by real property equivalent to a series transaction that complies with all of the provisions of *Bus. & Prof. Code § 10237 et seq.* (imposing notice and advertising requirements on certain sales to 10 or fewer persons by or through a real estate agent) [*Corp. Code § 25102.5*]. A licensed real estate broker who engages in the offer and sale of notes secured directly by real property of various makers, which are a series of notes or notes in which undivided interests are offered and sold, will be deemed to be the issuer of these notes and undivided interests if the notes of the various makers are offered and sold pursuant to a plan or arrangement that is common to the various makers with respect to documentation and loan standards and that include provisions for servicing these notes on behalf of purchasers [*Corp. Code § 25102.5*].

[p] Recapitalizations and Reorganizations

There are also many kinds of exempt issuer transactions involving recapitalizations and reorganizations [*Corp. Code § 25103*].

Generally, negotiations, or an agreement, prior to general solicitation of approval by the holders of equity securities, and subject to that approval, of a change in the rights, preferences, privileges, or restrictions of or on outstanding securities, a merger, consolidation, or a sale of assets in consideration of the issuance of securities, or an entity conversion transaction [*see* Corp. Code § 25001.1 (definition)] is exempt [*Corp. Code § 25103(a)*]. Any change in the rights, preferences, privileges, or restrictions of or on outstanding securities or any entity conversion transaction [*see* Corp. Code § 25001.1 (definition)] is also exempt unless the holders of at least 25 percent of the outstanding shares or units of any class of securities that will be directly or indirectly affected substantially and adversely by the change or transaction have addresses in California according to the issuer's records [*Corp. Code § 25103(b)*]. An "entity conversion transaction" is a conversion pursuant to *Corp. Code § 1151, 1157, 15677.2, 15677.8, 15911.02, 15911.08, 16902, 16908, 17540.2*, or *17540.8* (covering corporations, limited partnerships, partnerships, and LLCs, respectively), or a conversion that occurs entirely out of state, unless the interests in the entity resulting from the conversion to be held by the equity holders of the entity being converted as a result of the conversion are not securities [*Corp. Code § 25005.1*]. For purposes of *Corp. Code §§ 25103* and *25120*, an entity conversion transaction is not a change in the rights, preferences, privileges, or restrictions of or on outstanding securities or an exchange of securities by the issuer with its existing security holders exclusively [*Corp. Code § 25005.1*].

For purposes of *Corp. Code § 25103(b)* and *(c)* (mergers, except "rollup transactions" defined in *Corp. Code § 25014.6* or excluded from that definition by *Corp. Code § 25014.6(b)(5)* or *(6)*), any securities held to the knowledge of the issuer in the names of broker-dealers, and any securities controlled by any one person who controls directly or indirectly

50 percent or more of the outstanding securities of that class, are not considered outstanding. Whether or not 25 percent of the outstanding securities are held by persons having addresses in California is determined as of the record date for the determination of the security holders entitled to vote on or consent to the action involved, if such approval is required, or if not, as of the date of directors' approval of the action [*Corp. Code § 25103(d)*].

Any such changes in securities incidents also are not exempt in the case of certain changes enumerated in *Corp. Code § 25103(e)* (such as in dividend rights or redemption provisions) that materially and adversely affect any class of shareholders [*Corp. Code § 25103(e)*]. Stock splits or reverse stock splits, except as provided in *Corp. Code § 25103(f),* are also exempt [*Corp. Code § 25103(f)*; *see Corp. Code § 25103(e)*; *10 Cal. Code Reg. §§ 260.103.2, 260.103.5*].

Any change in the rights of outstanding debt securities is exempt, except those changes enumerated in *Corp. Code § 25103(g)* (such as changing the rights to interest thereon) which substantially and adversely affect any class of securities [*Corp. Code § 25103(g)*].

An exchange incident to a merger, consolidation, or sale of assets (other than a "rollup transaction" as defined in *Corp. Code § 25014.6*) in consideration of the issuance of equity securities of another entity or any entity conversion transaction [*see* Corp. Code § 25001.1 (definition)] is exempt if the exchange or entity conversion transaction, had it involved the issuance of a security in a transaction subject to *Corp. Code § 25110* (rather than *Corp. Code § 25120*), would have been exempt from qualification by *Corp. Code § 25102(f)* (without giving effect to *Corp. Code § 25102(f)(3)*, regarding purchaser representations), and *either* of the following sets of conditions apply [*Corp. Code § 25103(h)*]:

- (i) Not less than 75 percent of the outstanding equity securities of each constituent or converting entity entitled to vote on the proposed transaction voted in favor of the transaction, (ii) not more than 10 percent of the outstanding equity securities of each constituent or converting entity entitled to vote on the proposed transaction voted against the transaction, and (iii) each constituent or converting entity whose security holders are entitled to vote on the proposed transaction is subject to a state statute that has provisions for dissenters' rights for holders of equity securities entitled to vote on the proposed transaction that do not vote in favor of or voted against the transaction; or

- (i) The transaction is solely for the purposes of changing the issuer's state of incorporation or organization, or form of organization, (ii) all the securities of the same class or series, unless all the security holders of the class or series consent, are treated equally, and (iii) the holders of nonredeemable voting equity securities receive nonredeemable voting equity securities.

Any exchange of securities in connection with any merger or consolidation or sale of corporate assets in consideration wholly or in part of the issuance of securities or any entity conversion transaction [*see Corp. Code § 25005.1*] under or pursuant to a plan of reorganization that, under the Bankruptcy Code, has been confirmed or is subject to confirmation by court decree or order, is an exempt transaction [*Corp. Code § 25103(i)*].

The Commissioner, by rule, may require the acquiring or surviving entity to file a notice of transaction [*see 10 Cal. Code Reg. § 260.103.6*; *see also Corp. Code § 25608(z)* (filing fee); *see Corp. Code § 25608.3* (Commissioner may set fee at amount below statutory maximum)]. Failure to file the notice or to file it within the time specified by the rule, however, will not affect the availability of the exemption. An acquiring or surviving entity that fails to file the notice as provided by rule of the Commissioner, within 15 business days after demand by the Commissioner, must file the notice and pay a fee equal to the fee payable had the transaction been qualified under *Corp. Code § 25110* or *25120* [*Corp. Code § 25103(h)*].

[q] Nonissuer Transactions Exempted

Exempt nonissuer transactions are listed in *Corp. Code § 25104*. They include privately arranged sales of securities by owners thereof for their own accounts, and sales in the course of business by creditors holding them as loan security [*see Corp. Code § 25104(a), (e)*].

[6] Burden of Proof

In any proceeding under the corporate securities laws, the burden of proving an exemption or an exception from a definition is on the person claiming it [*Corp. Code § 25163*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsBurdens of ProofAllocationInsurance LawLife InsuranceViatical SettlementsSecurities LawBlue Sky LawsAdministration & EnforcementSecurities LawBlue Sky LawsExcluded TransactionsSecurities LawBlue Sky LawsExempt Nonissuer & Resale TransactionsSecurities LawBlue Sky LawsExempted IssuersSecurities LawBlue Sky LawsOffer & Sale

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§ 515.15 Securities Broker-Dealers

[1] License Requirement

Subject to the preemption provisions of the National Securities Markets Improvement Act of 1996 ("the Improvement Act," Pub. L. No. 102-290, 110 Stat. 3416 (H.R. 3005)) [*see § 515.11[1]* and *§ 515.11[5][b]*], unless exempted by *Corp. Code §§ 25200-25208*, a broker-dealer must not effect any transaction in, or induce or attempt to induce the purchase or sale of, any security in California without first obtaining a certificate from the Corporations Commissioner [*Corp. Code § 25210(a)*; *see* Dept. of Corp. Release No. 119-C (Oct. 22, 2008) (broker-dealer licensure requirements for officers and directors of issuers)]. The Commissioner is empowered to promulgate rules establishing exemptions from the certificate requirements [*Corp. Code § 25204*; *see 10 Cal. Code Reg. § 260.200 et seq.*]. In addition, under the Commissioner's rules, certain aliens are not eligible to receive a broker-dealer certificate [*10 Cal. Code Reg. §§ 250.60, 250.61*; *see Corp. Code § 25211*].

A person who purchases a security from or sells a security to a broker-dealer that is required to be licensed and has not, at the time of the sale or purchase, applied for and secured from the Commissioner a certificate [*see Corp. Code § 25200 et seq.*] that is in effect at the time of the sale or purchase authorizing that broker-dealer to act in that capacity, may bring an action for rescission of the sale or purchase. If the plaintiff or the defendant no longer owns the security, the plaintiff may bring an action for damages [*Corp. Code § 25501.5(a)(1)*; *see § 515.23*].

Any person acting on behalf of a broker-dealer or on behalf of an issuer must comply with the commissioner's regulations relating to agents before effecting any transaction in, or inducing or attempting to induce the purchase or sale of, any security in California [*Corp. Code § 25210(b)*]. Upon the filing of a notice of (1) the employment or transfer of an agent for a broker-dealer, (2) an amendment to the information filed by the agent at the time of employment or transfer, and (3) the termination of employment of the agent from the broker-dealer, the Commissioner will review the disciplinary histories of agents, consistent with *Corp. Code § 25213* (grounds for censure) [*Corp. Code § 25210(c)*].

The provisions of the Corporate Securities Law requiring a stockbroker to first secure a license are designed to protect

the public against unscrupulous operators [*see, e.g., Corp. Code § 25221* (criminal background checks of broker-dealer job applicants)]. Thus, a contract employing a broker to sell corporate stock is void when the broker is not licensed, and the broker is not allowed to recover his or her commission [*Rhode v. Bartholomew (1949) 94 Cal. App. 2d 272, 282, 210 P.2d 768]* .

Corp. Code § 25210 does not apply to an agent of an issuer when engaged in transactions exempt by *Corp. Code § 25102(q)* (viatical or life settlement contracts) [*see § 515.14[5][n]*], provided that the agent is a life agent licensed in California or in the purchaser's state of domicile [*Corp. Code § 25209*].

[2] Interaction of Securities Broker-Dealer and Real Estate Broker Licensing Requirements

Securities broker-dealers licensed under federal or California law are not subject to California real estate licensing requirements [*Bus. & Prof. Code § 10000 et seq.*] in connection with "any transaction that involves the sale, lease, or exchange of a business opportunity" [*Bus. & Prof. Code § 10008.5*]. However, the phrase "any transaction involving the sale, lease, or exchange of a business opportunity" does not include any of the acts described in *Bus. & Prof. Code § 10131* (which generally describes acts relating to real property sales, lease, or mortgage transactions) or *Bus. & Prof. Code § 10131.2* [*see* Ch. 103, *Brokers*] (which applies to persons who charge an advance fee for promoting the sale or lease of real property or of a business opportunity by advance fee listing, advertisement, or other offering, and certain related activities), if the substance of the transaction is to transfer, sell, lease, or exchange an interest in real property for the purpose of evading the real estate licensing requirements [*Bus. & Prof. Code § 10008.5*].

"Business opportunity" includes the sale or lease of a business and goodwill of an existing business enterprise or opportunity [*Bus. & Prof. Code § 10030*]. "Business opportunity" has been held to encompasses any transfer of ownership of an entire ongoing business in corporate form, whether accomplished by transfer of all the corporate stock or by transfer of all assets [*All Points Traders, Inc. v. Barrington Associates (1989) 211 Cal. App. 3d 723, 731, 259 Cal. Rptr. 780]* .

Bus. & Prof. Code § 10008.5 apparently was enacted in response to *All Points Traders, Inc. v. Barrington Associates (1989) 211 Cal. App. 3d 723, 259 Cal. Rptr. 780* , which held that the fact that a transaction might be subject to the securities licensing laws was irrelevant to the determination of whether or not a real estate broker's license was required [*All Points Traders, Inc. v. Barrington Associates (1989) 211 Cal. App. 3d 723, 734-735, 259 Cal. Rptr. 780* (denying commission relating to sale of business to investment banker because it had no real estate broker's license; investment banker's claim that it was exempt from broker-dealer licensing requirements by *10 Cal. Code Reg. § 260.204.5* was uncontested)]. The statement of legislative intent provides that *Bus. & Prof. Code § 10008.5* was enacted to clarify existing law regarding licensing requirements and to restore and clarify the basis for practice by which both licensed real estate brokers and licensed securities broker-dealers may participate in transactions involving business opportunities without unnecessary duplicate licensing requirements [1989 Stats., ch. 1116, § 8]. Case law has long provided that a licensed real estate broker may recover any commission due on the sale of a business without a securities broker's license even when that sale involves the transfer of stock if the transfer of stock is only incidental to the transaction [*see, e.g.,* *Lyons v. Stevenson (1977) 65 Cal. App. 3d 595, 603, 135 Cal. Rptr. 457* ; *Weber v. Jorgensen (1971) 16 Cal. App. 3d 74, 77, 82-83, 93 Cal. Rptr. 668* (transfer of stock was only incidental to sale of real and personal property, licenses, and permits comprising business opportunity and stock transfer agreement was drafted and handled by attorney, not by broker); *Stoll v. Mallory (1959) 173 Cal. App. 2d 694, 696, 699, 343 P.2d 970* (decision to effect sale of business by transfer of stock was not made until after broker brought parties together); *but see Owen v. Off (1951) 36 Cal. 2d 751, 753, 227 P.2d 457* (real estate broker without securities broker license who was engaged to sell building denied recovery of commission after seller decided to effect transaction by selling stock of corporation that owned building)].

Similarly, the rules of the Corporations Commissioner exempt licensed real estate brokers from the securities broker licensing requirement with respect to transactions initiated in good faith as sales of real estate or existing businesses that

changed to securities transactions not due to the broker's recommendation or advice. This exemption can only be used for one transaction every 12 months [*10 Cal. Code Reg. § 260.204.1*].

A real estate broker licensed by the California Real Estate Commissioner is not considered a broker-dealer within the securities law definition and thus is not required to hold a broker-dealer's license in order to engage in transactions in securities exempted under *Corp. Code § 25100(f)* (interests in subdivisions or real estate developments) or *Corp. Code § 25100(p)* (notes secured by real property), or in securities the issuance of which is subject to authorization by the Real Estate Commissioner of California, or in transactions exempted by *Corp. Code § 25102(e)* (debt securities that are not offered publicly) [*see Corp. Code § 25004(a)(6)* (exclusion from definition of broker-dealer)]. A real estate broker licensed by the California Real Estate Commissioner is exempt from the securities broker-dealer licensing requirements when engaged in transactions in any interest in any general or limited partnership, joint venture, unincorporated association, or similar organization (but not a corporation) owned beneficially by no more than 100 persons and formed for the sole purpose of, and engaged solely in, investment in or gain from an interest in real property, including, but not limited to, a sale, exchange, trade, or development. An interest held by a husband and wife is considered held by one person for purposes of this provision [*Corp. Code § 25206*].

[3] Duties

[a] Fiduciary Duty

The fiduciary duty of a stockbroker to his or her client requires the broker to exercise the utmost good faith and integrity [*Blankenheim v. E.F. Hutton & Co. (1990) 217 Cal. App. 3d 1463, 1475, 266 Cal. Rptr. 593* ; *Duffy v. Cavalier (1989) 215 Cal. App. 3d 1517, 1531, 264 Cal. Rptr. 740* ; *Twomey v. Mitchum, Jones & Templeton, Inc. (1968) 262 Cal. App. 2d 690, 708-709, 69 Cal. Rptr. 222]* . The stockbroker-client relationship is fiduciary in nature regardless of whether the customer is a sophisticated investor or not [*Duffy v. Cavalier (1989) 215 Cal. App. 3d 1517, 1533, 264 Cal. Rptr. 740]* , and regardless of whether the broker actually controls the account. The scope or extent of the broker's fiduciary duty varies, however, depending on the facts of the particular case [*Petersen v. Securities Settlement Corp. (1991) 226 Cal. App. 3d 1445, 1456, 277 Cal. Rptr. 468* ; *Duffy v. Cavalier (1989) 215 Cal. App. 3d 1517, 1534-1536, 264 Cal. Rptr. 740* (describing *Caravan Mobile Home Sales v. Lehman Bros. Kuhn Loeb (9th Cir. 1985) 769 F.2d 561, 567* , and Leboce, S. A. v. Merrill Lynch, Pierce, Fenner, etc. *(9th Cir. 1983) 709 F.2d 605, 607-608* , as involving relatively narrow scope of agency and duty)].

[b] When Broker Controls Account

Although a stockbroker may be obliged merely to carry out his or her customer's stated objectives when the broker is acting merely as an agent to carry out purchases or sales selected by the customer, with or without the broker's recommendation, when the customer invariably follows the broker's recommendations, the broker controls the account [*Duffy v. Cavalier (1989) 215 Cal. App. 3d 1517, 1522-1534, 264 Cal. Rptr. 740* (when broker's authority to select investments is formalized, account is referred to as "discretionary"); *Twomey v. Mitchum, Jones & Templeton, Inc. (1968) 262 Cal. App. 2d 690, 719, 69 Cal. Rptr. 222]* .

Whether or not the customer and the broker refer to the account as a discretionary account, if the broker is the controlling factor in the transactions for all practical purposes, the broker's fiduciary duty obligates him or her to determine the customer's actual financial situation and needs [*Duffy v. Cavalier (1989) 215 Cal. App. 3d 1517, 1531-1532, 1537-1538, 264 Cal. Rptr. 740* ; *Twomey v. Mitchum, Jones & Templeton, Inc. (1968) 262 Cal. App. 2d 690, 719, 69 Cal. Rptr. 222]* . If, based on the customer's actual financial situation and needs, it would be improper and unsuitable to carry out the customer's expressed objectives, the broker has the further obligation (1) to make sure that the customer understands the investment risks in the light of his or her actual financial situation; (2) to inform the customer that no speculative investments are suitable if the customer persists in wanting to engage in speculative transactions without the broker's being persuaded that the customer is able to bear the financial risks involved; and (3)

to completely refrain from soliciting the customer's purchase of any speculative securities that the broker considers to be beyond the customer's risk threshold. As long as these duties are met, if the customer nevertheless insists on purchasing speculative securities, the stockbroker is not barred from advising the customer about various speculative securities and purchasing for the customer those securities that the customer selects [*Duffy v. Cavalier (1989) 215 Cal. App. 3d 1517, 1532, 1538-1539, 264 Cal. Rptr. 740* ; *Twomey v. Mitchum, Jones & Templeton, Inc. (1968) 262 Cal. App. 2d 690, 721, 69 Cal. Rptr. 222]* .

Sometimes, the foregoing obligations require a stockbroker to make an independent determination regarding the customer's resources or sophistication. For instance, when a trustee of a profit-sharing trust fund approached a stockbroker to invest fund assets in options, which are highly speculative, the broker had the obligation to investigate the nature and amount of funds sought to be invested before soliciting or recommending any speculative investments and to refrain from soliciting transactions when it became apparent that they would be inappropriate [*Duffy v. Cavalier (1989) 215 Cal. App. 3d 1517, 1532, 1538-1540, 264 Cal. Rptr. 740]* .

[c] When Broker Is Limited to Clearing and Trading Functions

A broker's duty does not always extend to providing investment advice. For instance, a "clearing broker," that is, a broker that has a contractual relationship with the stockbroker and the investor but will only execute orders on the primary broker's instruction, whose contractual obligations are limited to clearing and trading functions, and who has no direct contact with the investor and makes no specific representations to the investor, does not owe a duty to investigate the suitability of stocks the primary broker recommends [*Petersen v. Securities Settlement Corp. (1991) 226 Cal. App. 3d 1445, 1453-1457, 277 Cal. Rptr. 468* ; *Mars v. Wedbush Morgan Securities, Inc. (1991) 231 Cal. App. 3d 1608, 1614-1615, 283 Cal. Rptr. 238]* .

Restatement (Second) of Torts § 551(2)(e) would require disclosure by any broker who knew that an investor was about to enter into a transaction under a mistaken belief about the transaction if the investor, because of the relationship with the broker, the customs of the trade, or other objective circumstances, would reasonably expect disclosure of the facts [*Petersen v. Securities Settlement Corp. (1991) 226 Cal. App. 3d 1445, 1457-1458, 277 Cal. Rptr. 468* (clearing broker had no knowledge that plaintiff was ignorant of important fact; contract between clearing broker and primary broker specifically prohibited clearing broker from giving investment advice)].

[d] No Special Relationship Justifying Tort Damages

Even though the relationship between investor and stockbroker is fiduciary in nature, it is generally motivated by the investor's desire to make profits, and thus is not a special relationship that entitles the investor to tort damages for breach of the implied covenant of good faith and fair dealing [*Trustees of Capital Wholesale Electric etc. Fund v. Shearson Lehman Brothers, Inc. (1990) 221 Cal. App. 3d 617, 623-625, 270 Cal. Rptr. 566]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesCare, Good Faith & Reasonable SkillGeneral OverviewReal Property LawBrokersDiscipline, Licensing & RegulationSecurities LawBlue Sky LawsCivil LiabilityGeneral OverviewSecurities LawBlue Sky LawsCivil LiabilityRescission & RestitutionSecurities LawBlue Sky LawsRegistration of Agents, Broker-Dealers & Investment Advisers

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§ 515.16 Administrative Enforcement

[1] Powers of Commissioner

The Commissioner of Corporations has broad powers affecting securities. The Commissioner may bring an action for injunction, receivership, or other appropriate ancillary relief, and an action on behalf of the state for civil penalty, in the case of violations of the law [*see Corp. Code §§ 25530, 25535*; *see also Corp. Code § 25530.1* (prohibitions that may be imposed in *Corp. Code § 25530* proceeding)]. The Commissioner also may bring an action in federal court for violation of the federal Commodities Exchange Act [*see Corp. Code § 25536(a)*], may hold investigations and conduct hearings regarding possible violations by persons who issue or trade securities [*see Corp. Code § 25531*], and may issue desist and refrain orders if a security, which is subject to qualification, is being sold without having been qualified, or if a security not subject to qualification [*see Corp. Code §§ 25100.1, 25101.1, 25102.1*] is being sold without meeting applicable notice requirements [*see Corp. Code § 25532*]. The Commissioner may also issue desist and refrain orders if in the Commissioner's opinion, a person has violated or is violating *Corp. Code § 25401* (misrepresentation of material fact) [*Corp. Code § 25532(c)*].

The Commissioner also may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, any underwritten securities offering that is automatically qualified or qualified by administrative application, or may suspend or revoke any permit when qualification is achieved by the issuance of a permit, if the Commissioner finds that (1) the order is in the public interest and (2) the proposed plan of business of the issuer or the proposed issuance or sale of securities is not fair, just, or equitable, that the issuer does not intend to transact its business fairly and honestly, or the securities proposed to be issued or the method to be used in issuing them will tend to work a fraud on the purchaser [*Corp. Code § 25140(a)(1)*]. The Commissioner may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, any securities offering that is not underwritten and that was automatically qualified or qualified by administrative application unless the Commissioner finds (1) that the stop order is not in the public interest, and (2) that the proposed plan of business of the applicant or the proposed issuance of securities is fair, just, and equitable, that the issuer intends to transact its business fairly and honestly, and that the securities that the issuer proposes to issue or the method to be used in issuing them will not work a fraud on the purchaser of those securities [*Corp. Code § 25140(a)(2)*].

The Commissioner may refuse to issue a permit for a security (other than a security issued as part of a recapitalization or reorganization) unless he or she finds that the proposed plan of business of the applicant and the proposed issuance of securities are fair, just, and equitable, that the applicant intends to transact its business fairly and honestly, and that the securities which it proposes to issue, and the methods to be used by it in issuing them, will work a fraud on the purchaser of a security [*Corp. Code § 25140(b)*].

The Commissioner may refuse to issue a permit for a security issued in connection with a recapitalization or reorganization unless he or she finds that the proposed plan of recapitalization on reorganization and the proposed issuance of the securities are fair, just, and equitable to all security holders affected [*Corp. Code § 25140(c)*].

The Commissioner has the additional power to summarily postpone or suspend the effectiveness of any qualification pending final determination of any proceeding he or she may bring under *Corp. Code §§ 25140-25151*. Notice must be given of the summary action, after which a hearing may be requested [*Corp. Code § 25143(a)*].

[2] Review of Administrative Actions

All major decisions and orders of the Commissioner of Corporations are subject to an administrative hearing under the Administrative Procedure Act [*see Gov. Code §§ 11500-11528*]. Stop orders affecting qualification are reviewable under the regular administrative hearing procedure. If qualification consists of the issuance of a permit rather than occurring automatically through the filing process, the applicant must request the hearing, which then will be held on notice within 20 business days unless the permit is first issued [*Corp. Code § 25143(b)*]. Desist and refrain orders issued against transactions that are believed to have evaded qualification requirements also are reviewable by this administrative procedure, on request, and those orders are automatically rescinded unless the hearing is held within 15 business days (or a longer period agreed upon by the parties) [*Corp. Code § 25532(d)*], as is the case with orders against advertising [*Corp. Code § 25302*]. Actions taken against licensed marketing personnel are reviewable in a similar manner [*see Corp. Code §§ 25215, 25220, 25233*], as is the case with orders against advertising [*Corp. Code § 25302*].

For procedure and forms applicable to administrative hearings generally, see Ch. 471B, *Licensing by Public Agencies* , and Ch. 473, *Public Agency Adjudication* , et seq.

In addition, the Department of Corporations has its own informal hearing procedure. Hearings held in connection with exchanges of securities are special departmental reviews [*see Corp. Code § 25142*]. Otherwise, the person entitled to a regular administrative hearing may arrange, with the consent of the Commissioner of Corporations, to have a hearing conducted before the Department of Corporations by an independent hearing officer [*Corp. Code § 25702*]. This hearing commences with the serving by the Department of Corporations of a notice of hearing stating the facts, the issues, and the time and place of hearing, after which the hearing proceeds according to an order [*see 10 Cal. Code Reg. §§ 250.17-250.25*].

Every final order, decision, license, or other official act of the Commissioner of Corporations is subject to judicial review [*Corp. Code § 25609*]. For procedure and forms applicable to review of administrative hearings, see Ch. 474, *Availability of Judicial Review of Agency Decisions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingGeneral OverviewAdministrative LawAgency AdjudicationReview of Initial DecisionsAdministrative LawJudicial ReviewReviewabilityGeneral OverviewSecurities LawBlue Sky LawsAdministration & Enforcement

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§ 515.17 Civil Remedies

In addition to extensive administrative powers for enforcing the Corporate Securities Act of 1968, the act provides a large number of civil remedies for statutory liabilities that may be privately enforced. These liabilities include the prohibition against market manipulation [*see § 515.18*], material misrepresentations in the offering or selling of any security [*see § 515.19*], violations of provisions regulating the qualification and issuance of securities [*see § 515.21[1]*], and the prohibition against insider trading [*see § 515.22[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Securities LawBlue Sky LawsCivil LiabilityGeneral Overview

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§ 515.18 Liability for Market Manipulation

It is unlawful to engage, directly or indirectly, in certain designated acts of market manipulation in California [*Corp. Code § 25400*; *see §§ 515.400 -515.404*]. These acts are discussed below.

[1] Wash Sales

A person may not do any of the following, for the purpose of creating a false or misleading appearance of active trading in any security, or a false or misleading appearance with respect to the market for any security [*Corp. Code § 25400(a)*; *see §§ 515.400, 515.401*]:

- Effect any transaction in a security which involves no change in the beneficial ownership thereof;

- Enter an order or orders for the purchase of any security with the knowledge that an order or orders of substantially the same size, at substantially the same time and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties; or

- Enter an order or orders for the sale of any security with the knowledge that an order or orders of substantially the same size, at substantially the same time and at substantially the same price, for the purchase of any such security, has been or will be entered by or for the same or different parties.

[2] Illusory Market

A person may not effect, alone or with one or more other persons, a series of transactions in any security either creating actual or apparent active trading in the security or raising or depressing the price of the security for the purpose of inducing the purchase or sale of the security by others [*Corp. Code § 25400(b)*; *see § 515.402*].

[3] Tipster Sheet

A person who is a broker-dealer or other person selling or offering for sale or purchasing or offering to purchase the

security may not induce the purchase or sale of any security by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any one or more persons conducted for the purpose of raising or depressing the price of that security [*Corp. Code § 25400(c)*; *see § 515.403*].

[4] False or Misleading Statements

If the person is a broker-dealer or other person selling or offering for sale or purchasing or offering to purchase the security, that person may not make, for the purpose of inducing the purchase or sale of the security by others, any statement which either (1) was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, or (2) omitted to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. The person must have known or had reasonable ground to believe the statement was false or misleading [*Corp. Code § 25400(d)*; *see § 515.404*].

The California Supreme Court has construed *Corp. Code §§ 25400(d)* and *25500* to find that the remedy provided in those sections is not limited to transactions made in California. The language of *Corp. Code § 25400* which proscribes certain actions "in this state" simply describes the location in which the proscribed conduct must occur [*Diamond Multimedia Systems, Inc. v. Superior Court (1999) 19 Cal. 4th 1036, 1046, 1064, 80 Cal. Rptr. 2d 828, 968 P.2d 539* , *cert. denied, 527 U.S. 1003* (noting that Securities Litigation Uniform Standards Act of 1998, which preempts certain state class actions [P.L. 105-353, 112 Stat. 3227; *see 15 U.S.C. §§ 77p, 78bb*], was inapplicable to pending actions and thus had no impact on this case)]. The Court has also held that liability for market manipulation is not limited to sellers and buyers of corporate stock, or to corporations or broker-dealers, but extends to individuals and to the purchase and sale of securities for which there is no open market [*StorMedia Inc. v. Superior Court (1999) 20 Cal. 4th 449, 457-461, 84 Cal. Rptr. 2d 843, 976 P.2d 214]* . Furthermore, no actual sale is necessary to find a violation of *Corp. Code § 25400(d)*, and that subdivision does not require that the intent or purpose be to induce a particular buyer to purchase the stock [*StorMedia Inc. v. Superior Court (1999) 20 Cal. 4th 449, 461-463, 84 Cal. Rptr. 2d 843, 976 P.2d 214* (privity is not required)].

Corp. Code §§ 25400(d) and *25500*, however, apply only to defendants who were engaged in market activity at the time of making misrepresentations. Defendants must both (1) sell or offer to sell or buy or offer to buy a security, and (2) make misleading statements for the purpose of inducing the purchase or sale of a security, in order to be liable under *Corp. Code § 25500* [*Kamen v. Lindly (2001) 94 Cal. App. 4th 197, 205-206, 114 Cal. Rptr. 2d 127* (trial court properly sustained defendants' demurrers on basis that plaintiffs failed to allege that defendants engaged in both activities); *see Murphy v. BDO Seidman, LLP (2003) 113 Cal. App. 4th 687, 705-706, 6 Cal. Rptr. 3d 770* (aggrieved investors failed to state cause of action because defendant accountants who prepared allegedly misleading financial statements did not buy or sell, or offer to buy or sell, stock)].

[5] Tipster Hireling

A person, for a consideration received directly or indirectly from a broker-dealer or other person selling or offering for sale or purchasing or offering to purchase the security, may not induce the purchase or sale of any security by the circulation or dissemination of information to the effect that the price of the security will or is likely to rise or fall because of the market operations of any one or more persons conducted for the purpose of raising or depressing the price of the security [*Corp. Code § 25400(e)*; *see § 515.403*].

[6] Civil Liability for Manipulation

Anyone who willfully participates in an act or transaction constituting proscribed market manipulation is liable to anyone else who purchases or sells any security at a price that was affected by the event for the damages sustained

thereby [*Corp. Code § 25500*; *see California Amplifier, Inc. v. RLI Ins. Co. (2001) 94 Cal. App. 4th 102, 106, 116-117, 113 Cal. Rptr. 2d 915* (liability under *Corp. Code § 25500* requires "willful act" within meaning of *Ins. Code § 533*, which precludes coverage under directors and officers liability insurance for losses caused by a willful act of insured)].

The damages that may be recovered are the difference between the price at which the other person purchased or sold securities and the market value which the securities would have had at the time of the purchase or sale in the absence of the manipulative activity, plus interest at the legal rate [*Corp. Code § 25500*]. Because there is no reference in *Corp. Code § 25500* to any date other than the date of the pertinent transaction, prejudgment interest accrues from that date [*OCM Principal Opportunities Fund v. CIBC World Markets Corp. (2007) 157 Cal. App. 4th 835, 883 n.32, 68 Cal. Rptr. 3d 828*].

[7] Limitation of Actions for Manipulation

An action to enforce liability for proscribed market manipulation must be brought before the expiration of five years after the act or transaction constituting the violation, or before the expiration of two years after discovery by the plaintiff of the facts constituting the violation, whichever period expires first [*Corp. Code § 25506(b)*; *but see Corp. Code § 25506(a)* (shorter periods for actions commenced before 2005)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawTrade Practices & Unfair CompetitionState RegulationCoverageGovernmentsLegislationStatutes of LimitationsTime LimitationsSecurities LawBlue Sky LawsBlue Sky FraudGeneral OverviewSecurities LawBlue Sky LawsCivil LiabilityGeneral OverviewSecurities LawBlue Sky LawsOffer & Sale

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Volume 45: Schools: Certification thru Service of Summons and Papers-Chs. 512-519
Chapter 515 SECURITIES AND FRANCHISE REGULATION
PART II. LEGAL BACKGROUND
A. Securities Regulation

45-515 California Forms of Pleading and Practice--Annotated § 515.19

§ 515.19 Liability for Material Misrepresentation

[1] Untruth or Omission

It is unlawful for anyone to offer or sell, or to buy or offer to buy, a security in California by means of a written or oral communication which (1) includes an untrue statement of a material fact, or (2) omits to state a material fact necessary to make the statements made, in the light of the circumstances under which they were made, not misleading [*Corp. Code § 25401*]. The prohibition against untrue statements or material omissions in *Corp. Code § 25401* does not create a strict liability offense. Rather, knowledge of the falsity or misleading nature of a statement or of the materiality of an omission, or criminal negligence in failing to investigate and discover them, are elements of the criminal offense described in *Corp. Code § 25401* [*People v. Simon (1995) 9 Cal. 4th 493, 522, 37 Cal. Rptr. 2d 278, 886 P.2d 1271* (defendant solicited investments in limited partnerships but did not advise investors of transfers of funds among partnerships because defendant believed that, as general partner, he had authority to make such transfers)].

Anyone who violates *Corp. Code § 25401* is liable to the plaintiff, who may sue either for rescission or for damages if the plaintiff or the defendant, as the case may be, no longer owns the security [*Corp. Code § 25501*; *see §§ 515.405, 515.406*].

Liability requires privity between the plaintiff and the defendant [*Corp. Code § 25501* ("[a]ny person who violates Section 25401 shall be *liable to the person who purchases a security from him or sells a security to him,* who may sue either for rescission or for damages" [emphasis added]); *Apollo Capital Fund LLC v. Roth Capital Partners (2007) 158 Cal. App. 4th 226, 252-254, 70 Cal. Rptr. 3d 199* (broker-dealer that was placement agent for issuing company in securities offering had no fiduciary duty to investors who were not broker-dealer's customers and so could not be liable to them under *Corp. Code § 25501*, but broker-dealer could be liable to any customer who bought those securities through customer's account with broker-dealer)].

[2] Rescission for Misrepresentation

In a suit for recission [*see § 515.405*], a purchaser may recover the consideration paid for the security, plus interest at the legal rate, less the amount of any income received on the security, on tender thereof. A rescinding seller may recover

the security, on tender of the consideration paid for the security plus interest at the legal rate, less the amount of any income received by the defendant on the security. Tender may be made at any time before entry of judgment [*Corp. Code § 25501*].

[3] Damages for Misrepresentation

In a suit for damages [*see § 515.406*], a purchaser may recover the amount equal to the difference between (1) the price at which the security was bought, plus interest at the legal rate from the date of purchase, and (2) the value of the security at the time it was disposed of by the plaintiff plus the amount of any income received on the security by the plaintiff. A seller may recover the amount equal to the difference between (1) the value of the security at the time of filing of the complaint plus the amount of any income received by the defendant on the security, and (2) the price at which the security was sold plus interest at the legal rate from date of sale [*Corp. Code § 25501*].

[4] Limitation of Actions for Misrepresentation

An action to enforce liability based on a purchase or sale effected by means of a material misrepresentation must be brought before the expiration of five years after the act or transaction constituting the violation, or before the expiration of two years after discovery by the plaintiff of the facts constituting the violation, whichever period expires first [*Corp. Code § 25506(b)*; *but see Corp. Code § 25506(a)* (shorter periods for actions commenced before 2005)].

With respect to commencement of the limitation period "after discovery by the plaintiff of the facts," *Corp. Code § 25506* imposes a notice-inquiry standard. The limitation period starts when the plaintiff knows the facts constituting the violation or when the circumstances would suggest to an investor of ordinary intelligence the possibility of having been defrauded [*Deveny v. Entropin, Inc. (2006) 139 Cal. App. 4th 408, 423, 428-429, 42 Cal. Rptr. 3d 807* ; *contra, Eisenbaum v. Western Energy Resources, Inc. (1990) 218 Cal. App. 3d 314, 325-326, 267 Cal. Rptr. 5* (same court's construction of identical language in *Corp. Code § 25507*, distinguished in *Deveny; see § 515.21[5]*)].

[5] Affirmative Defenses

[a] Plaintiff's Knowledge of Misrepresentation

A defendant alleged to have sold a security to or purchased a security from a plaintiff by means of material misrepresentation is not liable if he or she is able to prove that the plaintiff knew the facts concerning the untruth or omission involved [*Corp. Code § 25501*; *see § 515.408*].

[b] Defendant's Ignorance of Misrepresentation

A defendant alleged to have effected a securities transaction by means of a material misrepresentation may avoid liability by proving that he or she exercised reasonable care and did not know of the untrue representation or omission, or that even if the defendant had exercised reasonable care, he or she still would not have known of the misrepresentation [*Corp. Code § 25501*; *see § 515.409*].

[6] Liability of Management Principals or Persons Who Materially Aid in Violation

Joint and several liability attaches to the following [*Corp. Code § 25504*]; *see § 515.405*:

- Anyone who directly or indirectly controls a person liable for material misrepresentation under *Corp. Code § 25501*.

- Any partner in a firm so liable.

- Any principal executive officer or director of a corporation so liable.
- Anyone occupying a similar status or performing similar functions.
- Any employee of a person so liable who materially aids in the act or transaction constituting the violation.
- Any broker-dealer or agent who gives similar aid.

Such a person is liable with and to the same extent as any person liable under *Corp. Code § 25501* unless the person who is alleged to be liable under *Corp. Code § 25504* had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist [*Corp. Code § 25504*]. See *§ 515.409* for an affirmative defense based on such lack of knowledge.

The test under *Corp. Code § 25504* is the same as that under federal securities laws (*15 U.S.C. §§ 77o, 78t*); therefore, federal cases are persuasive authority in this area [*Durham v. Kelly (9th Cir. 1987) 810 F.2d 1500, 1505* (addressing claims under both state and federal law)].

[a] Limitation of Actions for Liability of Principals and Aides

No action may be maintained to enforce any joint or several liability as described above [*see § 515.19[6]*] unless the action is brought within the limitation periods applicable to bringing actions against the primary defendants in such situations [*Corp. Code §§ 25506, 25507*; *see § 515.19[4]*].

[b] Defense Based on Principal's or Aide's Ignorance

No joint or several liability may be imposed on a management principal or aide if he or she had no knowledge of, or reasonable grounds to believe in the existence of, the facts by reason of which the liability is alleged to exist [*Corp. Code § 25504*; *see § 515.430*].

[7] Joint and Several Liability of Materially Assisting Persons

Anyone who, with intent to deceive or defraud, materially assists another in making a material misrepresentation in the offer or sale of securities [*see Corp. Code § 25401*], is jointly and severally liable with the person primarily responsible [*see Corp. Code §§ 25501, 25503*] for the violation [*Corp. Code § 25504.1*; *see § 515.246[13]*]. The same limitation of actions applicable to suits against management principals and aides [*see § 515.19[6][a]*] is applicable against materially assisting persons [*see Corp. Code §§ 25506, 25507*].

The requirement for imposition of aider and abettor liability under *Corp. Code § 25504.1* is stricter than that required under federal law. *Corp. Code § 25504.1* requires the aider or abettor to have an intent to deceive or defraud, whereas federal law only requires that the aider or abettor have actual knowledge of the primary wrong and substantially assist in furthering it [*Orloff v. Allman (9th Cir. 1987) 819 F.2d 904, 907-908]* .

[8] Joint and Several Liability of Experts

Professional experts may be jointly and severally liable for injuries resulting from material misrepresentation made in connection with a securities transaction [*see Corp. Code § 25501*; *see also § 515.406*]. A professional expert includes any accountant, engineer, appraiser, or other person whose profession gives authority to a statement made thereby [*Corp. Code § 25504.2(a)*] including, without limitation, an actuary, assayer, attorney, financial analyst, geologist, investment adviser, mineralogist, petrologist, or tax consultant, and any firm or other organization or association

engaged in the practice of any such profession [*10 Cal. Code Reg. § 260.504.2.1(a)*].

The professional must have given written consent to be, and have been, named in a prospectus or offering circular distributed in connection with the offer or sale of securities as having prepared or certified in that capacity either any part of the document or any written report or valuation which is distributed with or referred to in the document [*Corp. Code § 25504.2(a)*]. The expert will be deemed to have prepared or certified only those portions of the violative documents which are expressly stated with the expert's written consent to have been made on his or her authority [*Corp. Code § 25504.2(c)*].

In order for the expert to be held jointly and severally liable for a material misrepresentation, the part of the document prepared or certified, or the report or valuation distributed or referred to therein, must include an untrue statement of a material fact, or must omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. Additionally, the person asserting the liability must have acquired a security described in the document in reliance on the untrue statement, or, if a material omission was made, in reliance on that part of the document or on the report or valuation without notice of the omission [*Corp. Code § 25504.2(a)(1), (2)*].

[a] Limitation of Actions for Experts' Liability

No action may be maintained to enforce liability against professional experts as described above on a joint and several basis unless brought within one year after the discovery of the facts constituting the violation, or after that discovery should have been made by the exercise of reasonable diligence. In no event may an action be brought more than three years after the act or transaction constituting the violation [*Corp. Code § 25506.1*].

[b] Defense Based on Expert's Belief in Representations

An accountant, engineer, appraiser, or other professional person will not be held liable as provided in *Corp. Code § 25504.2(a)* if he or she is able to sustain the burden of proof as to a reasonable belief in the accuracy of the representations made. The expert must have had reasonable ground to believe, after reasonable investigation, and must have believed at the time of consenting to the use of his or her name that the statements so included in the part of the document, or in the report or valuation, were true, and that there was no omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading [*Corp. Code § 25504.2(b)(1)*; *see § 515.411*].

[c] Defense Based on Inaccurate Reflection of the Expert's Opinion

An accountant, engineer, appraiser, or other professional person will not be held liable jointly and severally for a material misrepresentation if he or she is able to sustain the burden of proof as to the fact that the document in question did not accurately reflect his or her views. The part of the document in question must not fairly represent the defendant's statement as an expert, or must not be a fair extract from that person's report or valuation as an expert [*Corp. Code § 25504.2(b)(2)*; *see § 515.412*].

[d] Defense Based on Expert's Filing of Disclaimer of Report

An accountant, engineer, appraiser, or other professional person will not be held liable jointly and severally for a material misrepresentation if he or she is able to sustain the burden of proof as to the fact that he or she filed an appropriate disclaimer of the document, report, or valuation in question. Prior to the acquisition of the security by the person asserting the liability, the expert must have advised the issuer and the Commissioner of Corporations, in writing, that the expert would not be responsible for the part of the document, report, or valuation in question [*Corp. Code § 25504.2(b)(3)*; *see § 515.413*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsSecurities LawBlue Sky LawsBlue Sky FraudDefensesSecurities LawBlue Sky LawsBlue Sky FraudElements of ProofSecurities LawBlue Sky LawsBlue Sky FraudStatutes of LimitationsSecurities LawBlue Sky LawsCivil LiabilityGeneral OverviewSecurities LawBlue Sky LawsCivil LiabilityRescission & RestitutionSecurities LawBlue Sky LawsOffer & Sale

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45-515 California Forms of Pleading and Practice--Annotated § 515.20

§ 515.20 Holder's Action for Fraud or Negligent Misrepresentation

A plaintiff may bring a "holder's action" (a cause of action by persons wrongfully induced to hold, rather than purchase or sell, stock) for fraud or negligent misrepresentation. In *Small v. Fritz Companies, Inc.* [*Small v. Fritz Companies, Inc. (2003) 30 Cal. 4th 167, 171, 132 Cal. Rptr. 2d 490, 65 P.3d 1255]* , a stockholder filed an action claiming that defendant corporation and its officers sent its stockholders a fraudulent quarterly financial report that grossly overreported earnings and profits. The plaintiff alleged that when the fraud was discovered, the price of the corporate stock dropped sharply, causing injury to stockholders like himself. The court concluded that California law should allow such an action, as it has long acknowledged that if the effect of a misrepresentation is to induce persons not to take action and they are damaged as a result, they have a cause of action for fraud or negligent misrepresentation. That conclusion does not expand the tort of common law fraud, but simply applies long-established legal principles to the factual setting of misrepresentations that induce stockholders to hold onto their stock [*Small v. Fritz Companies, Inc. (2003) 30 Cal. 4th 167, 171, 132 Cal. Rptr. 2d 490, 65 P.3d 1255]* . The court noted that persons who hold stock in reliance upon misrepresentations are totally dependent for redress upon state common law causes of action. They have no remedy under either federal *Rule 10b-5* [*see 17 C.F.R. § 240.10b-5*] or California's Corporate Securities Law [*see Corp. Code § 25000 et seq.*] because those provisions are limited to suits by buyers or sellers of securities [*Small v. Fritz Companies, Inc. (2003) 30 Cal. 4th 167, 180, 132 Cal. Rptr. 2d 490, 65 P.3d 1255]* . However, the court also held that the holder's cause of action is limited to stockholders who can make a bona fide showing of actual reliance on the misrepresentation [*Small v. Fritz Companies, Inc. (2003) 30 Cal. 4th 167, 171, 132 Cal. Rptr. 2d 490, 65 P.3d 1255* (finding that plaintiff failed to plead element of actual reliance with sufficient specificity to meet that requirement, and remanding with directions to grant plaintiff leave to amend complaint); *see Murphy v. BDO Seidman, LLP (2003) 113 Cal. App. 4th 687, 701-702, 6 Cal. Rptr. 3d 770* (citing *Small* for proposition that holding stock can be actionable reliance, and following its guidance in directing trial court to grant appellants leave to amend to specify how many shares they would have sold and when they would have sold them)].

For detailed discussion of common law actions for fraud and negligent misrepresentation, see Ch. 269, *Fraud and Deceit* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Securities LawBlue Sky LawsCivil LiabilityGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudElementsTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationElements

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45-515 California Forms of Pleading and Practice--Annotated § 515.21

§ 515.21 Liability for Regulatory Violations

[1] Types of Liability

Civil liability also may be imposed based on the violation of any one of certain statutes pertaining to securities regulation administered by the Commissioner of Corporations, or the violation of certain regulatory requirements made pursuant to the following statutes [*Corp. Code § 25503*; *see §§ 515.419 -515.422*]:

- *Corp. Code § 25110* (qualification of issuer transactions other than under *Corp. Code § 25120*) [*see §§ 515.419, 515.420*; *see also Apollo Capital Fund LLC v. Roth Capital Partners (2007) 158 Cal. App. 4th 226, 250-252, 70 Cal. Rptr. 3d 199* (investors' cause of action arising from sale of securities not qualified in accordance with state law requirements was not preempted by federal law)];

- *Corp. Code § 25130* (qualification of nonissuer transactions) [*see §§ 515.419, 515.420*];

- *Corp. Code § 25133* (requirements under escrow or certain legend conditions imposed on stock by the commissioner);

- Condition of qualification under *Corp. Code §§ 25110-25115* (qualification procedures for issuer transactions other than under *Corp. Code § 25120*) imposed pursuant to *Corp. Code § 25141* (conditions permitted to be imposed by the commissioner) [*see § 515.422*];

- Order suspending trading issued pursuant to *Corp. Code § 25219* (commissioner's ability to summarily suspend trading on exchanges or over-the-counter trading for certain periods); and

- With respect to recapitalization and reorganization types of issuer transactions:

    - *Corp. Code § 25120* (qualification) [*see § 515.421*];

- Condition of qualification under *Corp. Code §§ 25120-25122* (qualification procedures) imposed pursuant to *Corp. Code § 25141* (conditions permitted to be imposed by commissioner) [*see § 515.422*].

[2] Rescission for Violation

With respect to regulatory violations, except those involving recapitalizations and reorganizations, the plaintiff may rescind the transaction by tendering the securities at any time before entry of judgment and recover the consideration paid for the security with interest at the legal rate, less the amount of any income received therefrom. The plaintiff must take damages in lieu of the consideration if the consideration is no longer capable of being returned, which damages must be equal to the value of the consideration plus interest at the legal rate from the date of purchase [*Corp. Code § 25503*; *see § 515.419*].

[3] Damages When Rescission Unavailable

With respect to regulatory violations, except those specifying recapitalizations and reorganizations, the plaintiff must accept damages if he or she no longer owns the security involved. If the original consideration is recoverable, plaintiff receives the difference between (1) the purchase price plus interest at the legal rate from the date of purchase, and (2) the value of the security at the time it was disposed of by plaintiff plus the amount of any income received therefrom by the plaintiff. If the consideration is incapable of being returned, plaintiff receives the difference between (1) the value of the consideration given for the security plus interest at the legal rate from the date of purchase, and (2) the value of the security at the time it was disposed of by the plaintiff plus the amount of any income received therefrom by plaintiff [*Corp. Code § 25503*; *see § 515.420*].

[4] Damages When Recapitalization or Reorganization Involved

When an action for failure to qualify or comply with a condition of a recapitalization or reorganization is involved, plaintiff may recover the difference between (1) the value of the consideration received by the defendant seller, and (2) the value of the security at the time it was received by the plaintiff buyer, with interest thereon at the legal rate from the date of purchase [*Corp. Code § 25503*; *see § 515.421*].

[5] Limitation of Actions for Violations

An action for violation of the regulatory requirements must be brought before the expiration of two years after the violation on which it is based, or the expiration of one year after the discovery by the plaintiff of the facts constituting the violation, whichever expires first [*Corp. Code § 25507(a)*].

By its plain language, *Corp. Code § 25507(a)* requires actual knowledge, not just "inquiry notice," even if the plaintiff and defendant do not have a fiduciary relationship [*Eisenbaum v. Western Energy Resources, Inc. (1990) 218 Cal. App. 3d 314, 325-326, 267 Cal. Rptr. 5]* ; *but see Deveny v. Entropin, Inc. (2006) 139 Cal. App. 4th 408, 422-423, 42 Cal. Rptr. 3d 807* (distinguishing *Eisenbaum* and reaching opposite conclusion about construction of identical language in *Corp. Code § 25506*, discussed in *§ 515.19[4]*). When there is a fiduciary relationship, the plaintiff is entitled to rely on statements by defendant that the offering is qualified or exempt from qualification [*Eisenbaum v. Western Energy Resources, Inc. (1990) 218 Cal. App. 3d 314, 326, 267 Cal. Rptr. 5* ; *Sherman v. Lloyd (1986) 181 Cal. App. 3d 693, 700, 226 Cal. Rptr. 495]* . Plaintiff's right to relief is statutory, and the doctrine of unclean hands does not enter into the situation. Thus, the fact that the buyer, a California resident, was told by defendant to use an out-of-state address does not place the buyer in pari delicto or foreclose the right to rescission [*Eisenbaum v. Western Energy Resources, Inc. (1990) 218 Cal. App. 3d 314, 326-327, 267 Cal. Rptr. 5]* .

[6] Defense Based on Qualification of Securities Prior to Receipt of Consideration

No person is liable under the civil remedy provisions for violation of qualification requirements [*see Corp. Code §§ 25110, 25120, 25130*] if the sale of the security is qualified prior to the payment or receipt of any part of the consideration for the security sold. This defense is available even though an offer to sell or a contract of sale may have been made or entered into without qualification. This defense does not apply to complaints for violations of conditions on qualification imposed by the Commissioner of Corporations or of suspension of trading thereby [*Corp. Code § 25503*; *see § 515.426*].

[7] Defense Based on Written Repurchase Offer

No buyer may commence an action for the above-described regulatory violations or may attempt to impose joint or several liability therefor if, before the suit is commenced, the buyer has received a special offer prescribed by statute but has failed to accept it in writing within the specified time after its receipt. The offer must be in writing, approved as to form by the Commissioner of Corporations, and must contain the following [*Corp. Code § 25507(b)*; *see § 515.428*]:

- A statement of how liability may have arisen under *Corp. Code § 25503*;

- An offer either to repurchase the security for a cash price payable on delivery of the security, to pay the buyer an amount in cash equal in either case to the amount recoverable by the buyer in accordance with *Corp. Code § 25503*, or to rescind the transaction by putting the parties back in the same position as before the transaction;

- A provision permitting the offer to be accepted by the buyer at any time within a specified period of not less than 30 days after the date the offer was received, unless the buyer has previously rejected it;

- The provisions of *Corp. Code § 25507(b)* (setting forth requirements); and

- Other information the commissioner may require by rule or order.

Pursuant to *Corp. Code § 25507(d)*, the Commissioner of Corporations has promulgated *10 Cal. Code Reg. § 260.507*, which imposes certain conditions on approval of the rectifying offer. These conditions may require [*Corp. Code § 25507(c)*]:

- That equivalent and concurrent offers be made to all other investors similarly affected;

- That the offer be conditioned on the issuer not being disabled from business by reason of acceptances of such offers;

- That the offer be made within a specified time after approval;

- That a rejected offer will not act as a bar to action in a case in which the offeree did not pay money or the offer is of rescission and the offeree would not recover damages equivalent to that allowed by statute [*see Corp. Code § 25503*] or the parties would not be placed in the same position as before the transaction; or

- That the offeror file a report concerning the proceedings involving the offer and related legal compliance. A prescribed form of irrevocable consent to service of process on the Commissioner on behalf of the offeror must be filed with the Commissioner, unless one is already on file in connection with a qualification [*see Corp. Code § 25507(d)*].

[8] Joint and Several Liability of Offering Principals and Underwriters

Anyone on whose behalf an offering is made, and any underwriter of the offering (whether on a best efforts or a firm commitment basis) is jointly and severally liable for regulating violations [*see § 515.21[1]*]. In no event, however, is an underwriter liable for damages in excess of the total price at which the securities underwritten and distributed thereby to the public were offered to the public. This limitation on damages does not apply if the underwriter has knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interest in the underwriting [*Corp. Code § 25503*; *see § 515.419*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsSecurities LawBlue Sky LawsAdministration & EnforcementSecurities LawBlue Sky LawsCivil LiabilityGeneral OverviewSecurities LawBlue Sky LawsCivil LiabilityRescission & RestitutionTortsProcedureMultiple DefendantsJoint & Several Liability

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45-515 California Forms of Pleading and Practice--Annotated § 515.22

§ 515.22 Liability for Insider Trading

[1] Prohibited Acts

It is unlawful for an issuer or anyone who is an officer, director, or controlling person, or any other person whose relationship to the issuer gives him or her personal access, directly or indirectly, to material information about the issuer not generally available to the public, to purchase or sell any security of the issuer in California at a time when he or she knows material information about the issuer gained from the relationship that would significantly affect the market price of that security and that is not generally available to the public, and that the insider knows is not intended to be so available [*Corp. Code § 25402*]. For purposes of *Corp. Code § 25402*, an issuer or person described in that section will not be deemed to have purchased or sold an issuer's security at a time when that person knows material information about the issuer if the issuer or person demonstrates that the purchase or sale of the issuer's security was in accordance with Rule 10b5-1(c) promulgated under the Securities Exchange Act of 1934 [*10 Cal. Code Reg. 260.402*; *see 17 C.F.R. § 240.10b5-1(c)* (providing affirmative defense to allegations of insider trading under federal securities laws); *see also* Ballantine & Sterling, California Corporation Laws, Ch. 21, *Corporate Securities* , § 466.05 (Matthew Bender)].

[2] Civil Liability to Purchaser or Seller for Insider Dealings

Anyone who violates the insider trading prohibition contained in *Corp. Code § 25402* is liable for damages to the person who purchases a security from, or sells a security to, the insider [*Corp. Code § 25502*; *see § 515.413*]. Damages are equal to the difference between the price at which the security was purchased or sold and the market value that the security would have had at the time of the transaction if the information known to the defendant had been publicly disseminated prior to that time, and a reasonable time had elapsed for the market to absorb the information. Interest also is awarded at the legal rate [*Corp. Code § 25502*].

[3] Civil Liability to Issuer for Insider Dealings

Any person other than the issuer who violates *Corp. Code § 25402* with respect to securities issued by a corporation that has total assets in excess of $1 million and a class of equity security held of record by 500 or more persons is liable to the corporate issuer of the security purchased or sold in violation of *Corp. Code § 25402* for treble damages. The

measure of damages before trebling is the difference between the price at which the security was purchased or sold and the market value that the security would have had at the time of the purchase or sale if the information known to the defendant had been publicly disseminated prior to that time and a reasonable time had elapsed for the market to absorb that information [*Corp. Code § 25502.5(a), (d)*; *see § 515.413*.1]. The amount recoverable by the issuer under *Corp. Code § 25502.5(a)* is reduced by any amount paid by the defendant in a proceeding brought by the Securities and Exchange Commission with respect to the same transaction or transactions under the federal Insider Trading Sanctions Act of 1984 (*15 U.S.C. §§ 78a, 78c, 78o, 78t, 78u, 78ff*) or any other act. The reduction applies regardless of whether the amount was paid pursuant to a judgment or settlement or paid before or after the filing of an action by the plaintiff against the defendant [*Corp. Code § 25502.5(b)*]. If a proceeding has been commenced by the SEC but has not been finally resolved, the court hearing the action under *Corp. Code § 25502.5* must delay entering a judgment for the plaintiff until the SEC proceeding is resolved [*Corp. Code § 25502.5(b)*].

The action under *Corp. Code § 25502.5* can be brought by the corporate issuer or as a derivative action. The corporation or plaintiff may recover reasonable costs and attorney's fees [*see Corp. Code § 25502.5(a)*]. If a shareholder of the issuer alleges to its board that there has been a violation compensable under *Corp. Code § 25502.5*, the board must consider the allegation in good faith. If the allegation involves misconduct by a director, that director is not entitled to vote on any matter involving the allegation; however, that director may still be counted in determining the presence of a quorum at a meeting of the board or a committee of the board [*Corp. Code § 25502.5(c)*].

[4] Limitation of Actions Against Insiders

For proceedings commencing before January 1, 2005, no action is available for insider trading unless brought before the expiration of four years after the act or transaction constituting the violation, or the expiration of one year after the discovery by the plaintiff of the facts constituting the violation, whichever expires first [*Corp. Code § 25506(a)*]. For proceedings commencing on or after January 1, 2005, no such action is available unless brought before the expiration of five years after the act or transaction constituting the violation, or the expiration of two years after discovery by the plaintiff of the facts constituting the violation, whichever expires first [*Corp. Code § 25506(b)*].

[5] Defense of Belief of Plaintiff's Informed Status

It is not unlawful for an insider to trade in securities of the issuer corporation in violation of the insider trading activity prescribed by statute if the insider has reason to believe that the person selling to or buying from him or her is also in possession of the information [*see Corp. Code § 25402*, and *see § 515.416*].

[6] Defense of Plaintiff's Actual Informed Status

An insider is not liable for prohibited insider trading if he or she is able to prove that the plaintiff knew the information the nondisclosure of which was the basis for which the action was instituted [*see Corp. Code § 25502*, and *see § 515.417*].

[7] Defense of Plaintiff's Commitment to Transaction

There is no liability on the part of an insider who otherwise engages in prohibited insider trading if the insider is able to prove that the plaintiff would have purchased or sold the securities at the same price even if the insider information had been revealed to the plaintiff [*Corp. Code § 25502*; *see § 515.418*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsSecurities LawBlue Sky LawsCivil LiabilityGeneral OverviewSecurities LawBlue Sky LawsOffer & SaleSecurities LawLiabilitySecurities Exchange Act of 1934

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45-515 California Forms of Pleading and Practice--Annotated § 515.23

§ 515.23 Broker-Dealer's Liability for Failure to Obtain License Before Sale

A person who purchases a security from or sells a security to a broker-dealer that is required to be licensed and has not, at the time of the sale or purchase, applied for and secured from the Commissioner a certificate [*see Corp. Code § 25200 et seq.*] that is in effect at the time of the sale or purchase authorizing that broker-dealer to act in that capacity, may bring an action for rescission of the sale or purchase or, if the plaintiff or the defendant no longer owns the security, an action for damages [*Corp. Code § 25501.5(a)(1)*; *see § 515.434*]. On rescission and tender of the security, a purchaser may recover the consideration paid for the security plus interest at the legal rate, less the amount of any income received on the security [*Corp. Code § 25501.5(a)(2)*]. Upon rescission and tender of the consideration paid for the security plus interest at the legal rate, a seller may recover the security plus the amount of any income received by the defendant on the security [*Corp. Code § 25501.5(a)(3)*].

Damages recoverable by a purchaser will be an amount equal to the difference between the following [*Corp. Code § 25501.5(a)(4)*]:

- The price at which the security was bought plus interest at the legal rate from the date of purchase; and

- The value of the security at the time it was disposed of by the plaintiff plus the amount of any income received on the security by the plaintiff.

Damages recoverable by a seller will be an amount equal to the difference between the following [*Corp. Code § 25501.5(a)(5)*]:

- The value of the security at the time of the filing of the complaint plus the amount of any income received by the defendant on the security; and

- The price at which the security was sold plus interest at the legal rate from the date of sale.

A tender of a security or of consideration paid for a security plus interest may be made at any time before entry of judgment [*Corp. Code § 25501.5(a)(6)*]. The court, in its discretion, may award reasonable attorney's fees and costs to a prevailing plaintiff [*Corp. Code § 25501.5(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Securities LawBlue Sky LawsCivil LiabilityGeneral OverviewSecurities LawBlue Sky LawsCivil LiabilityRescission & RestitutionSecurities LawBlue Sky LawsRegistration of Agents, Broker-Dealers & Investment Advisers

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45-515 California Forms of Pleading and Practice--Annotated § 515.24

§ 515.24 Liability for Unlawful Alteration of Records or Making Untrue Statement

It is unlawful for any person to knowingly alter, destroy, mutilate, conceal, cover up, falsify, or make a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the administration or enforcement of the Corporate Securities Law [*Corp. Code § 25404(a)*]. It is also unlawful for any person to knowingly make an untrue statement to the Commissioner during the course of licensing, investigation, or examination, with the intent to impede, obstruct, or influence the administration or enforcement of any provision of the Corporate Securities Law of 1968 [*Corp. Code § 25404(b)*]. Note, however, that these sections do not form the basis for any civil liability, since they do not explicitly provide for such liability [*see Corp. Code § 25510* (no civil liability arises by implication)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Securities LawBlue Sky LawsAdministration & EnforcementSecurities LawBlue Sky LawsCivil LiabilityGeneral Overview

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45-515 California Forms of Pleading and Practice--Annotated § 515.25

§ 515.25 Liability on Securities Issuer's Bond

[1] Prohibited Acts

Corp. Code § 25216 prohibits broker-dealers and agents from engaging is specified practices. These practices include effecting any transaction in, or inducing or attempting to induce the purchase or sale of, any security in California by means of any manipulative, deceptive, or other fraudulent scheme, device, or contrivance as defined by rule [*Corp. Code § 25216(a)*; *see 10 Cal. Code Reg. §§ 260.216-260.216.7*]. Similarly, no broker-dealer or agent may effect any transaction in, or induce or attempt to induce the purchase or sale of, any security in California in connection with which the broker-dealer or agent engages in any fraudulent, deceptive, or manipulative act or practice or makes any fictitious quotation as defined by rule [*Corp. Code § 25216(b)*; *see 10 Cal. Code Reg. §§ 260.216.8-260.216.11, 260.216.16*].

In addition, no broker-dealer or agent may effect any transaction in, or induce or attempt to induce the purchase or sale of, any security in California in contravention of such rules as the Commissioner may prescribe as necessary or appropriate in the public interest or for the protection of investors to provide safeguards with respect to the financial responsibility of broker-dealers [*Corp. Code § 25216(c)*; *see 10 Cal. Code Reg. §§ 260.216.12, 260.216.12.1*].

Finally, no broker-dealer or agent may effect or attempt to effect in California, in contravention of such rules as the Commissioner may prescribe as necessary or appropriate in the public interest or for the protection of investors, specified transactions involving puts, calls, straddles, or other options or privileges [*see Corp. Code § 25216(d)*].

[2] Bond Requirement

The Commissioner, by rule, may require any issuer who employs agents in connection with any security or transaction not exempted by *Corp. Code §§ 25100-25105* to post a surety bond in an amount not exceeding $10,000, conditioned that the issuer will comply with the provisions of *Corp. Code § 25216* and the rules and orders issued thereunder. The bond, unless previously canceled, must cover the entire period during which the qualification is in effect. If a deposit in lieu of a bond is made pursuant to *Code Civ. Proc. § 995.710* (for deposits with Secretary of State, available only before January 1, 1999), the deposit may include an appropriate deposit of securities. No suit may be maintained to enforce any

liability on the bond unless brought within two years after the contract of sale or other act on which the suit is based [*Corp. Code § 25216(e)*; *see 10 Cal. Code Reg. § 260.216.15* (bond requirement and deposits in lieu of bond)].

The Bond and Undertaking Law (*Code Civ. Proc. §§ 995.010-996.560*) applies to bonds given pursuant to California statute except to the extent that the statute prescribes a different rule or is inconsistent [*Code Civ. Proc. § 995.020(a)*]. For discussion and forms relating to statutory bonds and deposits in lieu of bond, see Ch. 538, *Suretyship, Bonds, and Undertakings* . For a complaint in interpleader under *Code Civ. Proc. § 386* that may be used by the surety when claims against the bond exceed $10,000, *see § 515.432*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Securities LawBlue Sky LawsAdministration & EnforcementSecurities LawBlue Sky LawsBlue Sky FraudGeneral OverviewSecurities LawBlue Sky LawsCivil LiabilityGeneral OverviewSecurities LawBlue Sky LawsRegistration of Agents, Broker-Dealers & Investment Advisers

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45-515 California Forms of Pleading and Practice--Annotated § 515.26

§ 515.26 Service of Process on Commissioner

Every applicant for qualification of the sale of securities or every person filing an application or a notice under *Corp. Code §§ 25100.1*, *25101*, *25102.1* and *25230.1* (securities and transactions not subject to qualification) or request for or notice of exemption from qualification, other than a California corporation or California-licensed broker-dealer, must have on file or submit a consent to service of process appointing the Commissioner of Corporations as attorney for receipt of service in any noncriminal suit arising under the securities legislation. Service is made by leaving a copy of the process in the Department of Corporations office, but is not effective unless the plaintiff (who may be the Commissioner of Corporations) forthwith sends notice and a copy to the defendant at the last address on file therefor, and the plaintiff's affidavit of compliance is filed on or before the return day for process [*Corp. Code § 25165*]. The same requirement applies to applicants for a certificate as to a broker-dealer or as an investment adviser and every investment adviser subject to *Corp. Code § 25230.1* (persons subject to notice but not certification requirements), other than a California corporation [*Corp. Code § 25240*].

In any case, anyone, including a nonresident, who engages in conduct prohibited or made actionable under the Corporate Securities Law of 1968 or any rule or order thereunder, whether or not he or she has filed a consent to service, thereby, in effect, "appoints" the Commissioner of Corporations his or her attorney for purposes of receiving service, whenever personal jurisdiction cannot be otherwise obtained; service is made in the same manner as when a consent is on file [*Corp. Code § 25550*]. However, it is important to make certain in such instances that attempts to obtain personal jurisdiction have been exhaustive, such as through court-ordered personal service on the Secretary of State on behalf of a local corporation [*see Corp. Code § 1702*] or on behalf of a foreign corporation doing business here [*see Corp. Code § 2111*; *see also* Ch. 518, *Service of Summons and Papers*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeService of ProcessMethodsService Upon AgentsSecurities LawBlue Sky LawsAdministration & Enforcement

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45-515 California Forms of Pleading and Practice--Annotated § 515.27

§ 515.27 Survival of Actions

Every cause of action for civil liability under the Corporate Securities Law of 1968 survives the death of any person who might have been a plaintiff or defendant [*Corp. Code § 25509*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Securities LawBlue Sky LawsCivil LiabilityGeneral OverviewTortsWrongful Death & Survival ActionsSurvival Actions

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45-515 California Forms of Pleading and Practice--Annotated § 515.28

§ 515.28 Criminal Liability

It is a crime to willfully violate any provision of the Corporate Securities Law of 1968 [*Corp. Code § 25540*]; to willfully employ, directly or indirectly, any device, scheme, or artifice to defraud in connection with the offer, purchase, or sale of any security; or to willfully engage, directly or indirectly, in any act, practice, or course of business which operates or would operate as a fraud or deceit on any person in connection with the offer, purchase, or sale of any security [*Corp. Code § 25541*]. The term "willfully," as used in *Corp. Code § 25540*, simply implies a purpose or willingness to commit the act or to make the omission in question. It does not require any intent to violate the law or to injure another person or to acquire any advantage. The California definition of "willfully" does not encompass guilty knowledge or criminal negligence, even under statutes patterned after or using language identical to federal statutes or regulations that do require guilty knowledge [*People v. Baumgart (1990) 218 Cal. App. 3d 1207, 1219-1222, 267 Cal. Rptr. 534* ; *People v. Johnson (1989) 213 Cal. App. 3d 1369, 1374-1376, 262 Cal. Rptr. 366]* .

Thus, criminal liability exists for violation of the various qualification requirements or proceedings not in conformity with the terms of qualification--such as filing untruthful applications [*see Corp. Code § 25166*]; or for violations of conditions imposed on distributions by the Commissioner of Corporations--such as reselling securities in violation of legend restrictions imprinted thereon [*see Corp. Code § 25133*]. Broker-dealers, agents, and investment advisers, and persons operating in similar capacities, are also subject to various regulations concerning appropriate market conduct [*see Corp. Code 25243, 25243.5, 25245, 25246*].

A court may order a defendant found guilty of criminal violations of *Corp. Code §§ 25110* and *25540* (selling securities without a permit) to make restitution if (1) restitution would serve a rehabilitative purpose, (2) the amount of restitution is supported by the factual record, and (3) defendant's conduct caused the victim's loss [*People v. Baumgart (1990) 218 Cal. App. 3d 1207, 1222-1223, 267 Cal. Rptr. 534]* . *Corp. Code §§ 25110* and *25540* are "strict liability" offenses in the sense that it does not matter whether defendant knew a permit was required. Nevertheless, when there is a finding by the court that the defendant had a culpable state of mind, the rehabilitative function may be served [*People v. Baumgart (1990) 218 Cal. App. 3d 1207, 1222-1224, 267 Cal. Rptr. 534]* . The causation element is established if defendant's solicitation of the victim was a cause of the loss. The lack of permit does not have to be the proximate cause of the loss. If the defendant's solicitation was a cause of the victim's loss, the fact that fraud or mismanagement by

others also caused the loss does not invalidate a restitution order [*People v. Baumgart (1990) 218 Cal. App. 3d 1207, 1222-1224, 267 Cal. Rptr. 534]* . Similarly, a defendant found guilty of criminal violations of *Corp. Code §§ 25110* and *25540* may be ordered to make restitution of the full amount lost even though other people had a hand in causing the loss [*see People v. Baumgart (1990) 218 Cal. App. 3d 1207, 1222-1224, 267 Cal. Rptr. 534* (dicta, inasmuch as defendant was only required to make restitution equal to 30 percent of losses)].

Violation of rules or orders promulgated by the Commissioner of Corporations is not punishable by imprisonment if the defendant proves he or she had no knowledge of such matters [*Corp. Code § 25540*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesFraudSecurities FraudGeneral OverviewCriminal Law & ProcedureCriminal OffensesFraudSecurities FraudElementsCriminal Law & ProcedureCriminal OffensesFraudSecurities FraudPenaltiesSecurities LawBlue Sky LawsAdministration & EnforcementSecurities LawBlue Sky LawsBlue Sky FraudGeneral Overview

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45-515 California Forms of Pleading and Practice--Annotated § 515.29

§ 515.29 Nonliability for Good-Faith Compliance With Commissioner Rule

No liability, civil or criminal, lies for any act done or omitted in good faith in conformity with any rule, form, permit, order, or written interpretative opinion of the Commissioner of Corporations, or any opinion of the Attorney General, whether or not the rule or order is subsequently modified or invalidated [*Corp. Code § 25700*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureDefensesIgnorance & Mistake of LawSecurities LawBlue Sky LawsAdministration & EnforcementSecurities LawBlue Sky LawsBlue Sky FraudDefensesSecurities LawBlue Sky LawsCivil LiabilityGeneral Overview

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45-515 California Forms of Pleading and Practice--Annotated §§ 515.30-515.49

[Reserved]

§§ 515.30[Reserved]

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45-515 California Forms of Pleading and Practice--Annotated § 515.50

§ 515.50 Governing Law

[1] California

Investments in franchises are governed in California by the Franchise Investment Law [*Corp. Code § 31000 et seq.*]. If a franchise is subject to registration under the Franchise Investment Law or exempted from such registration either by rule of the Commissioner of Corporations [*see Corp. Code § 31100*] or under the seasoned franchisor exemption [*see Corp. Code § 31101*], it is not subject to the Corporate Securities Law of 1968 [*Corp. Code § 25019*; *see People v. Kline (1980) 110 Cal. App. 3d 587, 168 Cal. Rptr. 185]* . The Franchise Investment Law is administered through the Department of Corporations by the Commissioner of Corporations [*see Corp. Code § 31502*]. Departmental rules for processing franchise investments are contained in the California Code of Regulations [*10 Cal. Code Reg. §§ 310.002-310.005*].

Commercial loans made by franchisors (and subfranchisors) to current or prospective franchisees for the acquisition, construction, operation, development, equipping, expansion, contraction, consolidation, merger, recapitalization, reorganization, or termination of a franchised business are regulated by *Fin. Code § 22063* [*see § 515.65[1]*].

[2] Federal

Federal cases in the past have found some franchises to be investment contracts and hence securities subject to regulation by the Securities and Exchange Commission [*see, e.g., Lino v. City Inv. Co. (3rd Cir. [NJ] 1973) 487 F.2d 689, 692]* . The Federal Trade Commission, however, has since assumed supervision of franchise sales through its power to prohibit unfair or deceptive acts or practices under the Federal Trade Commission Act [*see 15 U.S.C. § 45*; *16 C.F.R. §§ 436.1-436.3*]. Although the commission's regulations are beyond the scope of this chapter, generally, they require a franchisor [*see 16 C.F.R. § 436.2(c)*] or franchise broker [*see 16 C.F.R. § 436.2(j)*], unless exempted, to furnish a prospective franchisee [*see 16 C.F.R. § 436.2(d)*] certain prescribed information in a writing at the earlier of the "time for making disclosures" [*see 16 C.F.R. § 436.2(g)*] or the first "personal meeting" [*see 16 C.F.R. § 436.1(a)*]. The regulations do not apply unless the franchise is advertised, offered, licensed, contracted, sold, or otherwise is promoted in or affects interstate commerce [*16 C.F.R. § 436.1*].

The following are also regulated under federal law:

- Oral, written, and visual representations that concern sales, income, or profits of existing or potential outlets [*see 16 C.F.R. § 436.1(b)-(e)*] or that contradict information contained in required disclosures [*see 16 C.F.R. § 436.1(f)*].

- The furnishing of the franchise agreement and related documents to the franchisee [*see 16 C.F.R. § 436.1(g)*].

- The franchisor's return of all refunds or deposits when required to do so in disclosures made to the franchisee [*see 16 C.F.R. § 436.1(h)*].

[3] Attempt to Waive Compliance Under California Law

Corp. Code § 31512 provides that any condition, stipulation, or provision purporting to bind anyone acquiring a franchise to waive compliance with any provision of the Franchise Investment Law or any rule or order thereunder is void. *Corp. Code § 31512*, however, has been held invalid as violating the Supremacy Clause of the United States Constitution to the extent that it requires judicial consideration of claims and resultant refusal to enforce an arbitration clause in a franchise agreement or related contract [*Southland Corp. v Keating (1984) 465 U.S. 1, 10, 104 S. Ct. 852, 79 L. Ed. 2d 1* (overruling *Keating v. Superior Court (1982) 31 Cal. 3d 584, 183 Cal. Rptr. 360, 645 P.2d 1192*)].

[4] Exclusivity of Liability Provisions of Franchise Investment Law

Except as explicitly provided under the civil liability statutes of the Franchise Investment Law, no civil liability in favor of any private party arises against any person by implication from or as a result of the violation of any provision of that law or any rule or order thereunder. However, nothing in the civil liability sections limits any liability that would exist by virtue of any other statute or under common law if this law were not in effect [*Corp. Code § 31306*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawFederal Trade Commission ActGeneral OverviewAntitrust & Trade LawFederal Trade Commission ActCoverageAntitrust & Trade LawTrade Practices & Unfair CompetitionFederal Trade Commission ActBusiness & Corporate LawDistributorships & FranchisesBusiness OpportunitiesBusiness & Corporate LawDistributorships & FranchisesCauses of ActionGeneral OverviewConstitutional LawSupremacy ClauseFederal PreemptionContracts LawTypes of ContractsInvestment ContractsSecurities LawAdditional Offerings & the Securities Exchange Act of 1934DefinitionsSecuritySecurities LawBlue Sky LawsInvestment Contracts & Stocks

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§ 515.51 Definitions Under Franchise Investment Law

[1] "Franchise"

A "franchise" is any contract or agreement to which the following apply [*Corp. Code § 31005(a)*; *see* Commissioner of Corporations Release No. 3-F (revised 1994)]:

- The franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by the franchisor;

- The operation of the business is substantially associated with franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and

- The franchisee is required to pay, directly or indirectly, a franchise fee.

The presence of a prescribed marketing plan is considered crucial to the concept of a franchise. The Commissioner of Corporations has stated that the following elements in an agreement, alone or together, may suggest the presence of a marketing plan [*see* Commissioner of Corporations Release No. 3-F (revised 1994)]:

- Prescribing or limiting resale prices.

- Restricting the use of advertising or a mail order business.

- Requiring display racks.

- Giving detailed directions and advice concerning operating techniques.

- Assigning exclusive territory.
- Providing for uniformity or distinctiveness of appearance.
- Limiting sale of competitive products.
- Limiting use of products.
- Requiring approval of advertising and signs.
- Prohibiting and engaging in other activities.
- Providing training sessions.
- Assigning a contract.
- Using a manual.
- Providing trade secrets.

It is not a condition to the definition of a franchise that there be a fully prescribed, realized, detailed marketing plan or system at the time of the offer or sale; otherwise, a franchisor could circumvent the registration provisions of the Franchise Investment Law by selling or offering to sell a franchise but omitting a marketing plan or system until after the sale [*see People v. Kline (1980) 110 Cal. App. 3d 587, 594-595, 168 Cal. Rptr. 185* (upholding the commissioner's guidelines in 1974 version of Release No. 3-F)].

Neither the Franchise Investment Law nor any decision of the Commissioner of Corporations defines or interprets the phrase "offering, selling, or distributing goods or services" [*see Corp. Code § 31005(a)(1)*]. One court has construed this phrase liberally, finding that it evidences an intention to designate alternative or separate categories. Thus, parties who could not enter into binding contracts or pass title to goods nevertheless were held to be franchisees. By operating independent businesses through which they solicited orders, demonstrated products, solved customer problems, installed the franchisor's systems, maintained contact with existing customers, generated new business, and provided ongoing service to customers, they were more than simply sales representatives [*Gentis v. Safeguard Business Systems (1998) 60 Cal. App. 4th 1294, 1304-1305, 71 Cal. Rptr. 2d 122]* .

[2] Nonprofit Retailers' Cooperatives Excluded

For purposes of *Corp. Code §§ 31000-31516*, the term "franchise" does not include a nonprofit organization operated on a cooperative basis by and for independent retailers that wholesales goods and services primarily to its member retailers and in which all of the following are applicable [*Corp. Code § 31005(c)*]:

- Control and ownership of each member is substantially equal;
- Membership is limited to those who will avail themselves of the services furnished by the organization;
- Transfer of ownership is prohibited or limited;
- Capital investment receives no return;

- Substantially equal benefits pass to members on the basis of patronage of the organization;

- Members are not personally liable for obligations of the organization in the absence of a direct undertaking or authorization by them;

- Services of the organization are furnished primarily for the use of the members;

- Each member and prospective member is provided with an offering circular that complies with the specifications of *Corp. Code § 31111* (*discussed under § 515.53[3]*); and

- No part of the receipts, income, or profit of the organization is paid to any profitmaking entity, except for arms-length payments for necessary goods and services, and members are not required to purchase goods or services from any designated profitmaking entity.

The nonprofit organization is subject to an action for rescission or damages under *Civ. Code § 3343.7* if the organization fraudulently induces the plaintiff to join the organization [*Corp. Code § 31005(d)*]. Under *Civ. Code § 3343.7*, "fraudulently induced" includes the failure to disclose all information required under *Corp. Code § 31005(c)(8)* or *31111*, unless the defendant proves that the plaintiff know the facts concerning the untruth or omission or that the defendant exercised reasonable care and did not know (or, if the defendant had exercised reasonable care, would not have known) of the untruth or omission [*Civ. Code § 3343.7*]. The plaintiff is entitled to rescission of a membership contract entered into, or for damages sustained, as a consequence of being fraudulently induced to join the organization [*Civ. Code § 3343.7*].

[3] "Area Franchise"

The term "franchise" also includes (except as specifically stated otherwise in the law) an "area franchise" and a "subfranchise" [*Corp. Code § 31010*; § 515.51[8] for a definition of that term]. An area franchise is any franchise between a franchisor and a franchisee whereby the franchisee is granted the right to operate more than one unit within a specified geographic area [*Corp. Code § 31008*].

[4] Petroleum Products Franchises

The term "franchise" also includes a contract between (1) a refiner and either a distributor or a retailer, or (2) a distributor and either another distributor or a retailer. In either instance the refiner or distributor authorizes or permits the distributor or retailer to use a trademark in connection with the sale, consignment, or distribution of motor fuel. The trademark is owned or controlled by the refiner, or by a refiner that supplies motor fuel to the distributor that authorizes or permits its use [*Corp. Code § 31005(b)(1), (2)*].

The term "franchise" includes a contract under which a retailer or distributor is authorized or permitted to occupy leased marketing premises, which are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark. The trademark is owned or controlled by the refiner, or by a refiner that supplies motor fuel to the distributor that authorizes or permits the occupancy. The term includes a contract pertaining to the supply of motor fuel to be sold, consigned, or distributed under a trademark owned or controlled by a refiner, or under certain contracts existing continuously from an earlier time. The term includes the unexpired portion of franchise properly transferred or assigned [*see 15 U.S.C. § 2801(1)(B)*].

The availability of an exemption from registration requirements for seasoned petroleum franchisors is *discussed under § 515.54[2]*. For discussion of other special regulatory law applicable to petroleum products franchises, see *§ 515.110* et seq.

[5] "Franchisor" and "Franchisee"

A "franchisor" is the one who grants a franchise [*Corp. Code § 31007*], and the "franchisee" is the one to whom the franchise is granted [*Corp. Code § 31006*].

[6] "Franchise Fee"

A "franchise fee" is any fee or charge that a franchisee or subfranchisor is required to pay or agrees to pay for the right to enter into a business under a franchise agreement. The term includes any payment for goods and services. It does not include the purchase, or agreement to purchase, goods at a bona fide wholesale price if no obligation is imposed on the purchaser to buy or pay for a quantity of the goods in excess of that which a reasonable businessperson normally would purchase by way of starting--or maintaining a going--inventory or supply. Nor does the term include the payment of a reasonable service charge to the issuer of a credit card by an establishment accepting or honoring the card, nor amounts paid to a trading stamp company [*see Bus. & Prof. Code § 17750*] by one issuing such stamps in connection with the retail sale of merchandise or service [*Corp. Code § 31011*].

The franchise law defines a franchise fee as a fee paid for the right to do business. A person is not a franchisee if the person does not invest anything in return for the right to enter into business with or for a so-called franchisor, makes no required contribution of capital, makes no unrecoverable investment in the so-called franchisor, is not required to purchase any inventory, is not required to purchase services from the so-called franchisor in order to become a dealer, and places none of his or her own funds, even the de minimis amounts required under the franchise law, at risk in exchange for a dealership. Ordinary business expenses paid during the course of business cannot be counted as a franchise fee [*Thueson v. U Haul Internat., Inc. (2006) 144 Cal. App. 4th 664, 676, 50 Cal. Rptr. 3d 669]* .

Examples of franchise fees, in the opinion of the Commissioner of Corporations, include the following [*see* Commissioner of Corporations Release No. 3-F (revised 1994)]:

- A performance guarantee or deposit.
- A deposit of money.
- An initial or set-up fee.
- A fee for advertising.
- A nonrefundable bookkeeping charge.
- A payment for training and school expenses.
- A royalty or percentage of gross receipts.
- Charges for sales kits, brochures, programs, forms, decals, shirts, displays, and announcements.
- A rental or lease fee.
- Payment for services, such as consulting or management fees.

[7] "Offers" and "Sales"

"Sale" or "sell" under the Franchise Investment Law includes every contract or agreement of sale of, contract to sell, or

disposition of, a franchise or interest therein for value. "Offer" or "offer to sell" includes every attempt to dispose of, or any solicitation of an offer to buy, a franchise or interest therein for value. These terms do not include the renewal or extension of an existing franchise if there is no interruption in the operation of the franchised business by the franchisee. However, a material modification of an existing franchise, whether on renewal or otherwise, does constitute a sale [*Corp. Code § 31018*].

[8] "Subfranchise"

The term "subfranchise" means any contract or agreement between a franchisor and a subfranchisor whereby the subfranchisor is granted the right, for consideration given in whole or in part for that right, to sell or negotiate the sale of franchises in the name or in behalf of the franchisor. A contract or agreement that is a franchise does not become a subfranchise merely because under its terms a person is granted the right to receive compensation for referral to a franchisor or subfranchisor or to receive compensation for action as a sales representative on their behalf [*Corp. Code § 31008.5*]. If an agreement with a distributor constitutes a franchise, the distributor's agreement granting to a sub-distributor the right to appoint lower level sub-distributors for a consideration is a subfranchise, which is also subject to the registration requirement of *Corp. Code § 31110*. Thus, the same agreement may constitute both a franchise and a subfranchise, which means that a person may be both a franchisee and a subfranchisor under the same agreement. However, the definition of subfranchise does not require the subfranchisor to also be a franchisee and the agreement constituting a subfranchise may be a totally separate and independent agreement [*see* Commissioner of Corporations Release No. 3-F (revised 1994)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesBusiness OpportunitiesBusiness & Corporate LawDistributorships & FranchisesFranchise RelationshipsGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesFranchise RelationshipsElementsBusiness & Corporate LawDistributorships & FranchisesFranchise RelationshipsFranchise AgreementsBusiness & Corporate LawDistributorships & FranchisesFranchise RelationshipsFranchise FeesEnergy & Utilities LawOil IndustryFranchising & Marketing

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§ 515.52 Purpose of Franchise Investment Law

The purpose of the Franchise Investment Law [*Corp. Code § 31000*] is to provide each prospective franchisee with the information necessary to make an intelligent decision regarding the franchises being offered. The law is also designed to prohibit the sale of a franchise if it would lead to fraud or a likelihood that the franchisor's promises would not be fulfilled, and to protect the franchisor and franchisee by providing a better understanding of the business relationship between the franchisor and franchisee [*Corp. Code § 31001*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 515.53 Registration of Offers and Sales in California

[1] Requirement

It is necessary to register a franchise before offering or selling it in California, unless the franchise is exempt from registration [*Corp. Code § 31110*; *see § 515.54*]. If the offer or sale of the franchise is made in California, a choice of some other law in the franchise agreement will not render California's Franchise Investment Law inapplicable. The choice of law provision will only govern construction and interpretation of the franchise agreement [*Dollar Systems v. Avcar Leasing Systems (9th Cir. 1989) 890 F.2d 165, 171* (applying California law)].

[2] When California Law Applies

An offer or sale of a franchise is made in California when (1) an offer to sell is made in California, (2) an offer to buy is accepted in California, or (3) if the franchisee is domiciled in California, the franchised business is or will be operated in California [*Corp. Code § 31013(a)*].

An offer to sell is made in California when the offer either originates in California or is directed into California by the offeror and received at the place to which it is directed [*Corp. Code § 31013(b)*]. For example, the sale of a franchise to a nonresident franchisee to operate entirely outside California was "sold in California" because negotiations and execution of the agreement occurred in California and payments were made in California [*Dollar Systems v. Avcar Leasing Systems (9th Cir. 1989) 890 F.2d 165, 171-172* (applying California law)]. An offer to sell is accepted in California when acceptance is communicated to the offeror in California. Acceptance is communicated when the offeree directs it to the offeror in California, reasonably believing that person to be in California, and it is received at the place to which it is directed [*Corp. Code § 31013(b)*]. An offer to sell is not made in California merely because the publisher circulates (or on whose behalf there is circulated) in California a bona fide newspaper or other publication of general, regular, and paid circulation that has had more than two thirds of its circulation outside California during the past 12 months. Nor is such an offer made in California merely because a radio or television program originating outside California is received in California [*Corp. Code § 31013(c)*].

[3] Registration Procedure

Registration of an offer is made by filing an application with the Commissioner of Corporations on the Uniform Franchise Registration Application (of the North American Securities Administrators Association, Inc.), as identified, modified, and supplemented by rule of the commissioner [*Corp. Code § 31111(a)*; *10 Cal. Code Reg. § 310.111* ("Uniform Franchise Registration Application" means information required from applicant in accordance with the Uniform Franchise Disclosure Document Guidelines, as adopted by NASAA in 2007)]. The application must be accompanied by the proposed offering prospectus, which must contain the material information disclosed in the application [*Corp. Code § 31114*].

[4] Notification of Material Change

A franchisor must notify the commissioner promptly in writing, by an application to amend the registration, of any material change in the information contained in the application as originally submitted, amended, or renewed [*Corp. Code § 31123*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 515.54 Exemption From Registration

[1] Seasoned Franchisors

Offers and sales of franchises by seasoned franchisors, as described below, are exempted from the registration and related requirements of the Franchise Investment Law if the franchisor meets certain net worth, experience, disclosure, and notice filing requirements. A franchisor (and, when necessary, a parent corporation that owns at least 80 percent of the franchisor) must have a net worth, according to its financial statements for the fiscal year just ended, or in the case of audited statements, ended within 15 months of the fiscal year end date, of either (1) not less than $5 million on a consolidated basis according to an audited financial statement; or (2) not less than $1 million if its parent has a net worth of not less than $5 million according to audited financial statements of the franchisor and the parent; or (3) not less than $1 million according to its unaudited financial statement if its parent (a) has a net worth on a consolidated basis of not less than $5 million according to its audited financial statements and (b) unconditionally guarantees to assume the franchisor's duties and obligation under the franchise agreement [*Corp. Code § 31101(a)*].

To satisfy the experience requirements, the franchisor or a parent corporation that owns at least 80 percent of the franchisor must have complied with one or more of the following conditions throughout the five-year period immediately preceding the offer and sale of the franchise [*Corp. Code § 31101(b)*]:

- The franchisor has had at least 25 franchisees conducting business that is the subject of the franchise.
- The franchisor has conducted business that is the subject of the franchise.
- The parent has had at least 25 franchisees conducting business that is the subject of the franchise.
- The parent has conducted business that is the subject of the franchise.

The exemption criteria are met by compliance with one of the preceding conditions during part of the five-year period

and one or more of those conditions during the balance of the period [*Corp. Code § 31101(b)*].

The franchisor must also make certain required disclosures in writing to each prospective franchisee at least 10 business days prior to either the franchisee's execution of any binding franchise or other agreement or to the receipt of any consideration. The disclosures must include basic information identifying the franchisor, its business background, a copy of the franchise agreement, fees or payments to come from the franchisee, conditions for effectively terminating the franchise, required purchases and limitations on merchandising, details of financing arrangements, documentation of projected franchise earnings, and a statement as to the exclusivity of the franchise territory [*Corp. Code § 31101(c)(1)*]. The franchisor must also provide the prospective franchisee with copies of the financial statements used to meet the net worth criteria for the exemption and, if applicable, a copy of the unconditional guarantee required by *Corp. Code § 31101(a)(3)* [*Corp. Code § 31101(c)(1)(O), (P)*].

Finally, the franchisor must file a notice of exemption with the commissioner and pay the fee required by *Corp. Code § 31500(f)* prior to an offer or sale of a franchise in California during any calendar year in which one or more franchises are sold, excluding any material modification [*Corp. Code § 31101(d*); *see also Corp. Code § 31101(c)(2)* (requirements of material modification of existing franchise)].

If there is to be a material modification of an existing franchise, the seasoned franchisor must disclose information in writing to each franchisee concerning the specific sections of the franchise agreement proposed to be modified and any additional information that may be required by rule or by order by of the commissioner. Agreement to the modifications is not binding on the franchisee if, within 10 business days after receipt of the writing identifying the material modifications (that is, after the writing is delivered to the franchisee), the franchisee notifies the franchisor in writing that the franchise agreement is rescinded. The franchisee's notice of rescission is effective when delivered to the franchisor or when deposited in the mail, postage prepaid, addressed to the franchisor in accordance with any notice provisions in the franchise agreement, or when delivered or mailed to a person designated in the agreement to receive notices for the franchisor [*Corp. Code § 31101(c)(2)*].

[2] Seasoned Petroleum Products Franchisors

There is a special registration exemption for a seasoned petroleum corporation or distributor [§ 515.51[4]]. A "seasoned petroleum products franchisor" is a wholesale distributor or marketer of petroleum products who has been doing business continuously for the past five years and who neither requires an advance of funds in the nature of a fee or lease for such franchise agreements nor engages in the production or refining of petroleum. The franchisor must also comply with the requirements applicable to other seasoned franchisors under *Corp. Code § 31101(c)* and *(d)* [*Corp. Code § 31104(a), (b)*; *see § 515.54[1]*].

A "wholesale distributor" or "marketer" is an entity that, for wholesale, purchases or receives through transfer, or obtains, by consignment or otherwise, refined petroleum products and resells or otherwise transfers the products without substantially changing their form to other purchasers. An "advance of funds" is a fee or lease for a franchise agreement. The term does not include rent for the possession or use, or both, of premises or property, the purchase of inventory for resale or supplies, utility deposits, and other consideration or expenditures for the formation or operation, or both, of a wholesale distributor or marketer entity [*Corp. Code § 31104(c)*].

[3] Resale by Franchisee or Subfranchisor

The offer or sale of a franchise by a franchisee for the franchisee's own account, or the offer or sale of an entire area franchise owned by a subfranchisor for the subfranchisor's own account, is exempt from registration if the sale is not effected by or through a franchisor. A sale is not considered effected by or through a franchisor merely because a franchisor has a right to approve or disapprove a different franchisee [*Corp. Code § 31102*]. Sale by the franchisee of all the shares in a particular franchise--although the franchisee also owned all the shares of the franchisor and the

franchisor facilitated the sale but did not receive itself any proceeds of the sale--has been construed as a sale by the franchisee exempt from registration under the Franchise Investment Law [*see Fox v. Ehrmantraut (1980) 28 Cal. 3d 127, 142, 167 Cal. Rptr. 595, 615 P.2d 1383]* .

[4] Other Statutory Exemptions

Franchise registration requirements do not apply to bank credit card plans by regulated banks or certain of their holding companies or bank subsidiaries [*Corp. Code § 31103*]. Those requirements also do not apply to any offer, sale, or other transfer of a franchise (or any interest) to a non-California resident if all locations from which sales, leases, or other transactions between the franchised business and its customers are made, or goods or services are distributed, are physically located outside of California [*Corp. Code § 31105*]. An exemption from franchise registration requirements also applies to a prospective franchisee with financial and operational experience in a similar business [*Corp. Code § 31106*]. Certain offers (but not sales) by a franchisor during pendency of an application for renewal or amendment are exempt [*Corp. Code § 31107*].

An offer or sale of a franchise is also exempt from franchise registration requirements if the franchise involves the adding of a new product or service line to the existing business of a prospective franchisee, and all of the following requirements are met [*Corp. Code § 31108*]:

- The prospective franchisee has been engaged for at least the last 24 months before the sale in a business offering substantially similar products or services.

- The new product or service is substantially similar to that of the prospective franchisee's existing business.

- The franchised business is to be operated from the same business location as the prospective franchisee's existing business.

- At the time of the agreement establishing the franchise relationship, the parties anticipated in good faith that sales will not represent more than 20 percent of the total sales in dollar volume of the franchisee on an annual basis.

- The prospective franchisee is not controlled by the franchisor.

- The franchisor files a notice of exemption and pays the required fee [*see Corp. Code § 31500(f)*] before an offer or sale of the franchise in California during any calendar year in which one or more of those franchises are sold.

An offer or sale of a franchise to experienced purchasers is also exempt from franchise registration requirements if all of following requirements are met [*Corp. Code § 31109*]:

- Every purchaser of the franchise is either a partner, executive officer, or director of the franchisor; an entity with total assets exceeding $5,000,000; a natural person whose net worth exceeds $1,000,000; a natural person whose gross income exceeds $300,000; or an entity in which all equity owners meet one of the above conditions.

- Every purchaser has knowledge and experience in financial and business matters, with the capacity to evaluate the merits and risks of the franchise investment.

- Every purchaser purchases the franchise for the purchaser's own account.

- The immediate cash payment required from a natural person does not exceed 10 percent of that person's net worth.

- The franchisor files a notice of exemption and pays the required fee [*see Corp. Code § 31500(f)*] before an offer or sale of the franchise in California during any calendar year in which one or more these franchises are sold.

Also exempted from registration requirements is the offer and sale of a franchise registered under *Corp. Code §§ 31111, 31121*, or *31123* on terms different from the terms of the offered registered if the prospective franchisee receives information regarding each material negotiated term [*see Corp. Code § 31109.1*].

For a detailed discussion of these exemptions, see Marsh & Volk, *Practice Under the California Securities Laws, Ch. 40, Registration of Franchises Under the California Investment Franchise Law, § 40.05* (Matthew Bender).

[5] Exemptions by Rule of Commissioner

The commissioner may also exempt by rule franchise transactions that are found to be not comprehended within the purposes of the Franchise Investment Law and their registration is found not necessary or appropriate in the public interest or for the protection of investors [*Corp. Code § 31100*]. Under this power, the commissioner has exempted offerings that would require registration only because of a franchise fee which does not exceed a prescribed annual fee [*10 Cal. Code Reg. § 310.011*] or payments for equipment or fixtures that do not exceed prescribed annual charges if the charges are no more than competitive costs for the items [*10 Cal. Code Reg. § 310.011.1*].

Negotiated sales are also exempted by the commissioner from the ordinary registration requirements. "Negotiated sales" are sales to franchisees with sufficient business or financial experience to protect their own interests on terms that have been specially negotiated after an initial offer is registered by the filing of the application pursuant to *Corp. Code § 31111*. Even then, specified items, such as fees and territories, cannot differ from those in the registered offer unless the franchisee (1) has a net worth of at least $1 million (excluding home, home furnishings, and automobiles), or (2) an annual income of $200,000 in the preceding two years and anticpates annual income of $200,000 in the current year, or (3) owned at least 50 percent of a business of the type subject to the offer during the 36 months immediately preceding the offer. There are other specific certifications and legends that must be included in the registered offer in order to qualify for the negotiated sale exemption, and a notice of negotiated sale, in a form specified by the commissioner, must be filed with the commissioner within 15 business days after such a sale is consummated [*10 Cal. Code Reg. § 310.100.2*].

The commissioner also has granted an exemption from registration for any communication made through the Internet, World Wide Web, or any other similar proprietary or common carrier electronic delivery system, of an offer to sell a franchise ("Internet offer"), provided all of the following conditions are met [*10 Cal. Code Reg. § 310.100.3(a)*]:

- The Internet offer indicates, directly or indirectly, that the franchise is not being offered to the residents of the State of California.

- The internet offer is not otherwise directed to any person in California by or on behalf of the franchisor or anyone acting with the franchisor's knowledge.

- No franchises are sold in California by or on behalf of the franchisor until the offering has been registered under the Franchise Investment Law and declared effective, and the Uniform Franchise Offering Circular (UFOC) has been delivered to the offeree before the sale and in compliance with the Franchise Investment Law.

Reliance on an exemption from registration under this rule does not preclude a franchisor from relying on any other exemption provided under the Franchise Investment Law or the rules promulgated thereunder [*10 Cal. Code Reg. § 310.100.3(b)*].

[6] Burden of Proof

In any proceeding under the Franchise Investment Law, the burden of proving an exemption or exception from a definition is on the person claiming it [*Corp. Code § 31153*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesBusiness OpportunitiesBusiness & Corporate LawDistributorships & FranchisesFranchise RelationshipsGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureRequirementsEnergy & Utilities LawOil IndustryFranchising & MarketingEvidenceProcedural ConsiderationsBurdens of ProofAllocation

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§ 515.55 Regulation of Franchise Sales

[1] Presale Delivery of Offering Circular

A franchise that must be registered may not be sold in California unless the prospective franchisee is first provided with a copy of the offering circular, together with a copy of all proposed agreements relating to the sale. These papers must be delivered at least 14 days before the franchisee's execution of any binding franchise or other agreement, or 14 days before receipt of any consideration, whichever first occurs [*Corp. Code § 31119(a)*]. Nothing in the Franchise Investment Law will be construed to prevent a franchisor from providing copies of the offering circular documents to prospective franchisees through electronic means pursuant to any requirements or conditions that may be imposed by rule or order of the commissioner [*Corp. Code § 31119(b)*].

A franchisor may provide copies of the offering circular documents to prospective franchisees through electronic means pursuant to any requirements or conditions that may be imposed by rule or order of the commissioner [*Corp. Code § 31119(b)*].

[2] Disclosure Exemption for Sophisticated Investors

Effective January 1, 2005, any offer or sale of a franchise is exempt from the disclosure provisions of the Franchise Investment Law under a "sophisticated investor" exemption [*see Corp. Code § 31110 et seq.*] if it meets all of the requirements set out below [*Corp. Code § 31109*].

Each and every purchaser of the franchise must be one of the following:

- An entity, all of the equity owners of which are persons or entities described in the following four items [*Corp. Code § 31109(a)(5)*].

- Any partner, executive officer, or director of the franchisor, or any executive officer of its corporate general partner if the franchisor is a partnership, or any manager if the franchisor is a limited liability

company [*Corp. Code § 31109(a)(1)*].

- Any natural person whose net worth, or joint net worth with the person's spouse, exceeds $1,000,000 at the time of purchase of the franchise, excluding the value of the person's personal residence, any and all retirement or pension plan accounts or benefits, home furnishings, and automobiles [*Corp. Code § 31109(a)(3)*].

- Any natural person whose gross income exceeds $300,000 per year in each of the two most recent years, or whose joint gross income with the person's spouse exceeds $500,000 per year in each of those years, and who reasonably expects to reach the same income level in the current year [*Corp. Code § 31109(a)(4)*].

- Any entity with total assets exceeding $5,000,000 according to its most recent financial statements and not specifically formed for the purpose of acquiring the franchise offered [*Corp. Code § 31109(a)(2)*].

The financial statements referred to in the preceding item must meet both of the following requirements [*Corp. Code § 31109(a)(2)*]:

- Be prepared as of a date not more than 90 days before the earlier of either the date on which the first prospective purchaser signs any binding franchise or other agreement with the franchisor in connection with the award of the franchise, or the date on which the franchisor receives any consideration from the first prospective purchaser in connection with the award of the franchise.

- Be prepared in accordance with either (1) generally accepted accounting principles and, if the entity has consolidated subsidiaries, on a consolidated basis, or (2) the rules and requirements of the Securities and Exchange Commission, whether or not required by law to be prepared in accordance with those rules and requirements.

For purposes of the foregoing tests, "entity" means an organization described in *I.R.C. § 501(c)(3)*, a corporation, a Massachusetts or similar business trust, a limited liability company, or a partnership [*Corp. Code § 31109(a)(2)*]. For discussion of how a court may be expected to deal with the reference to generally accepted accounting principles, see *Ch. 165, Corporations: Corporate Records and Reports, § 165.25[2]*.

Each and every purchaser of the franchise must have knowledge and experience in financial and business matters, either alone or with professional advisers of the purchaser who are unaffiliated with, and not directly or indirectly compensated by, the franchisor or an affiliate or selling agent of the franchisor, such that the franchisor reasonably believes, based on reasonable inquiry before the sale, that each and every purchaser has the capacity to evaluate the merits and risks of, and protect their own interests in, the franchise investment [*Corp. Code § 31109(b)*].

Each and every purchaser of the franchise must purchase the franchise for the purchaser's own account, or a trust account if the purchaser is a trustee, for the purpose of conducting the business as a franchise and not with a view to, or for a sale in connection with, any resale or distribution of the franchise or any interest in the franchise [*Corp. Code § 31109(c)*].

The immediate cash payment required from a purchaser of the franchise who is a natural person, on the purchase of the franchise, must not exceed 10 percent of that person's net worth or joint net worth with the person's spouse, exclusive of the person's personal residence, any and all retirement or pension accounts or benefits, home furnishings, and automobiles [*Corp. Code § 31109(d)*].

The franchisor must file with the commissioner a notice of exemption and pay a prescribed fee before any offer or sale of a franchise in California for which the exemption is claimed during any calendar year in which one or more franchises are sold, excluding any material modification [*Corp. Code § 31109(e)*].

No franchisor or any of its officers, directors, employees, or agents may form, organize, engage, or assist any person to purchase a franchise for resale or distribution to avoid the registration disclosure requirements of the Franchise Investment Law [*Corp. Code § 31109(f)*].

[3] Alternative Disclosure for Variance From Registered Terms

The offer and sale of a registered franchise on terms different from the terms of the offer registered under *Corp. Code § 31111, 31121,* or *31123* is exempt from the disclosure provisions of the Franchise Investment Law [*see Corp. Code § 31110 et seq.*] if all of the following requirements are met [*Corp. Code § 31109.1(a)*]. The franchisor must certify or declare in an appendix to its application for renewal that it has complied with all of the requirements set out below, in the event this exemption is claimed [*Corp. Code § 31109.1(a)(3)*].

The initial offer must be the offer registered under *Corp. Code § 31111, 31121,* or *31123* [*Corp. Code § 31109.1(a)(1)*].

The prospective franchisee must receive all of the following in a separate written appendix to the offering circular [*Corp. Code § 31109.1(a)(2)*]:

- A summary description of each material negotiated term that was negotiated by the franchisor for a California franchise during the 12-month period ending in the calendar month immediately preceding the month in which the negotiated offer or sale is made under Section 31109.1.

- A statement indicating that copies of the negotiated terms are available on written request.

- The name, telephone number, and address of the representative of the franchisor to whom requests for a copy of the negotiated terms may be obtained.

The commissioner may prescribe by rule or order the format and content of the summary description of the negotiated terms [*Corp. Code § 31109.1(c)*].

The negotiated terms, on the whole, must confer additional benefits on the franchisee [*Corp. Code § 31109.1(a)(4)*].

The franchisor must provide a copy of the negotiated terms described above to the prospective franchisee within five business days following the request of the franchisee [*Corp. Code § 31109.1(b)*].

The franchisor must maintain copies of all material negotiated terms for which this exemption is claimed for a period of five years from the effective date of the first agreement containing the relevant negotiated term. "Material" means that a reasonable franchisee would view the terms as important in negotiating the franchise. On the commissioner's request, the franchisor must make the copies available to the commissioner for review [*Corp. Code § 31109.1(c), (d)*].

[4] Franchise Modification

Except as discussed below, it is unlawful to solicit the agreement of a franchisee to a proposed material modification of an existing franchise without first delivering to the franchisee a written disclosure as the commissioner may prescribe. The delivery must be made five business days prior to the execution of any binding agreement by the franchisee to the modification; otherwise, the disclosure must state that the franchisee, by written notice mailed or delivered to the franchisor or a specified agent within not less than five business days following the execution of the agreement, may

rescind the agreement to the proposed modification [*Corp. Code § 31125(b)*].

Any modification of a franchise agreement with an existing franchisee of a franchisor is exempt from the disclosure provisions of the Franchise Investment Law [*see Corp. Code § 31110 et seq.*] if the modification is offered on a voluntary basis and does not substantially and adversely impact the franchisee's rights, benefits, privileges, duties, obligations, or responsibilities under the franchise agreement [*Corp. Code § 31125(d)*].

Any modification of a franchise agreement with an existing franchisee of a franchisor is exempt from those disclosure provisions if all of the following requirements are met [*Corp. Code § 31125(c)*]:

- The franchisee must receive the complete written modification at least five business days before the execution of a binding agreement, or providing that the franchisee, by written notice mailed or delivered to the franchisor or a specified agent of the franchisor within not less than five business days following the execution of the agreement, may rescind the agreement to the material modification [*Corp. Code § 31125(c)(1)*].

- The agreement must not be executed within 12 months after the date of the franchise agreement [*Corp. Code § 31125(c)(1)(A)*].

- The modification must not waive any right of the franchisee under the Franchise Relations Act [*see Bus. & Prof. Code § 20000 et seq.*]; however, the modification may include a general release of all known and unknown claims by a party to the modification [*Corp. Code § 31125(c)(1)(B)*].

- The modification must meet one of the following tests [*Corp. Code § 31125(c)(2)*]:

  - The proposed modification is in connection with the resolution of a bona fide dispute between the franchisor and the franchisee or the resolution of a claimed or actual franchisee or franchisor default, and the modification is not applied on a franchise system-wide basis at or about the time the modification is executed. A modification will not be deemed to be made on a franchise system-wide basis if it is offered on a voluntary basis to fewer than 25 percent of the franchisor's California franchises within any 12-month period [*Corp. Code § 31125(c)(2)(A)*; *see Corp. Code § 31125(e)* (definition of "California franchise")]; or

  - The proposed modification is offered on a voluntary basis to fewer than 25 percent of the franchisor's California franchises within any 12-month period, provided each franchisee is given a right to rescind the modification agreement if the modification is not made in compliance with the first three requirements above [*Corp. Code § 31125(c)(2)(B)*].

A franchisor must not make modifications in consecutive years for the purpose of evading the 25 percent requirements set forth above [*Corp. Code § 31125(f)*]. "California franchise" for these purposes means either (1) an existing franchise of a franchisee with any location in California from which sales, leases, or other transactions between the franchised business and its customers are made or goods or services are distributed, or (2) an existing franchise of a franchisee that is a resident of California and that owns, controls, or has an equity interest in the franchise [*Corp. Code § 31125(e)*]. Further, any modification of a franchise agreement with an existing franchise of a franchisee will be exempted from the provisions of *Corp. Code § 31110 et seq.* if the modification is offered on a voluntary basis and does not substantially and adversely impact the franchisee's rights, benefits, privileges, duties, obligations, or responsibilities under the franchise agreement [*Corp. Code § 31125(d)*].

[5] Marketing Personnel

The only persons entitled to effect sales of franchises in California are the people identified in an application for registration of a franchise, licensed real estate brokers or salespersons, and licensed securities broker-dealers or regulated agents [*Corp. Code § 31210*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesBusiness OpportunitiesBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureRequirements

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45-515 California Forms of Pleading and Practice--Annotated § 515.56

§ 515.56 Duties of the Commissioner of Corporations

[1] Administrative Processing

Supervision and regulation of franchise investments is handled by the Commissioner of Corporations [*see Corp. Code §§ 31004, 31502*] through the Department of Corporations [*see § 515.16*]. The commissioner may impose escrow or impound conditions after an application for registration has been made if the commissioner finds that these conditions are required because the applicant has failed to demonstrate adequate financial arrangements for providing real estate, improvements, equipment, inventory, training, or other items promised. At the franchisor's option, a surety bond may be furnished instead [*Corp. Code § 31113*]. Registration becomes effective automatically after a prescribed interval unless the commissioner has issued a stop order [*Corp. Code §§ 31115, 31116*].

For a detailed discussion of the administrative processing of a franchise offering, along with appropriate implementing forms, see California Legal Forms, Ch. 51, *Franchise Agreements*, and Ch. 51A, *Franchise Registration* (Matthew Bender).

[2] Enforcement

The commissioner has broad powers to enforce the provisions of the Franchise Investment Law. The commissioner may impose protective restrictions on offerings [*Corp. Code § 31113*], carry out investigative hearings [*Corp. Code § 31401*], initiate injunctive proceedings, including claims for ancillary relief, such as restitution and disgorgement or damages on behalf of injured persons [*Corp. Code § 31400*], and issue stop orders denying, suspending, or revoking the effectiveness of any registration [*Corp. Code § 31115*]. The commissioner may issue desist and refrain orders whenever the commissioner, on inspection or investigation, based on a complaint or otherwise, has cause to believe that a person is violating any provision of the Franchise Investment Law or any rule or order promulgated pursuant to that law [*Corp. Code § 31406(a)*]. This is specifically authorized with respect to persons who effect or attempt to effect franchise sales without being properly identified in an application on file with the commissioner or being properly licensed [*Corp. Code §§ 31210, 31211*], or without having either registered the franchise [*Corp. Code § 31402*] or complied with the conditions for exemption [*Corp. Code § 31403*] when such registration or compliance is required in the commissioner's

opinion.

The commissioner may assess, and obtain a judgment for, an administrative penalty whenever the commissioner issues a desist and refrain order to a person who is violating any provision of the Franchise Investment Law or any rule or order promulgated pursuant to that law [*Corp. Code § 31406(a), (e)*].

If, after examination or investigation, the commissioner has reasonable grounds to believe that any person is conducting business in violation of any provision of the Franchise Investment Law or related rule or order binding on it, the commissioner may, by written order addressed to the person, direct the discontinuance of the violation [*Corp. Code § 31407(a)*].

To enhance the efficient administration and enforcement of the Franchise Investment Law, it is the intent of the Legislature that the commissioner maintain a risk-based process of reviewing franchise applications. That process involves reviewing application information representing the greatest risk to prospective franchisees in accordance with *Corp. Code § 31115*, with emphasis on risks associated with the franchisor's financial condition and compliance record, and significant deficiencies with the franchisor's application [*Corp. Code § 31001.1(a), (b)*].

If the commissioner determines it is in the public interest, the commissioner may include in any administrative action brought under the Franchise Investment Law (including a stop order) a claim for ancillary relief, including, but not limited to, a claim for rescission, restitution or disgorgement, or damages on behalf of the persons injured by the act or practice constituting the subject matter of the action. An administrative law judge has jurisdiction to award additional relief. The person affected may be required to attend remedial education, as directed by the commissioner [*Corp. Code § 31408(a)*].

[3] Review of Administrative Acts

Franchisors may by written request call for a hearing on any stop order within 15 days after receiving notice of an action; otherwise, it remains in effect until modified or vacated [*Corp. Code § 31117*]. Similar action may be taken with respect to advertising cited as fraudulent [*Corp. Code § 31157*]. If a desist and refrain order has issued, a hearing must be commenced within 15 days of written request by the franchisor (unless postponed by consent) or else the orders are rescinded. All such hearings are by regular administrative tribunal, although the parties may mutually arrange a hearing before the Department of Corporations by an independent hearing officer instead. After such a hearing, the franchisor is not entitled to any further administrative remedy [*Corp. Code § 31513*]. All final acts of the Commissioner of Corporations are subject to judicial review [*Corp. Code § 31501*].

For procedure and forms applicable to administrative hearing and review, see Ch. 473, *Public Agency Adjudication* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesBusiness OpportunitiesBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureEnforcementBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureRequirements

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§ 515.57 Violation of Commissioner's Regulatory Requirements

It is unlawful for any person to violate any order of the Commissioner of Corporations or to violate any condition to the effectiveness of a registration of an offer or sale of a franchise [*Corp. Code § 31203*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesBusiness OpportunitiesBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureEnforcement

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45-515 California Forms of Pleading and Practice--Annotated § 515.58

§ 515.58 Material Misrepresentations Under Franchise Investment Law

[1] Generally

Material misrepresentation in connection with the registering of a franchise, securing an exemption from registration, or offering or selling a franchise are prohibited under the Franchise Investment Law. Liability for these forms of misrepresentation as well as the various defenses and limitations periods that apply to them are discussed in *§ 515.59*.

[2] Misrepresentation in Documents Filed With Commissioner

It is unlawful for any person to do any of the following [*Corp. Code § 31200*; *see § 515.53*; for a discussion of the ambiguity of this provision, *see § 515.452*]:

- Willfully make any untrue statement of a material fact in any application, notice, or report filed with the Commissioner of Corporations under the Franchise Investment Law;

- Willfully omit to state in any such application, notice, or report any material fact which is required to be stated therein; or

- Fail to notify the commissioner of any material change as required by *Corp. Code § 31123*.

[3] Misrepresentation in Offers or Sales

It is unlawful for any person to offer or sell a franchise in California by means of any written or oral communication not listed in *Corp. Code § 31200* [*see § 515.58[1]*] which includes an untrue statement of a material fact or omits a material fact that is necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading [*Corp. Code § 31201*].

[4] Misrepresentation in Seasoned Franchisor's Disclosures

It is unlawful for any person to willfully make any untrue statement of a material fact in any statement required to be disclosed in writing pursuant to the disclosure requirements for seasoned franchisor exemptions under *Corp. Code § 31101* [*see § 515.54[1]*] or to willfully omit to state in any such statement any material fact which is required to be stated therein [*Corp. Code § 31202*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesBusiness OpportunitiesBusiness & Corporate LawDistributorships & FranchisesCauses of ActionFraud & MisrepresentationBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureEnforcement

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45-515 California Forms of Pleading and Practice--Annotated § 515.59

§ 515.59 Liability for Violation of Registration or Exemption Requirements

[1] Generally

Any person who offers or sells a franchise (1) in violation of any provision of the Franchise Investment Law that provides an exemption from all or any of the disclosure provisions of that law [*see Corp. Code § 31110 et seq.*; *discussion under § 515.55*], or (2) in violation of the following registration or exemption requirements is liable to the franchisee or subfranchisor. The plaintiff may sue for damages caused by the violation, and, if the violation is willful, the franchisee may also sue for rescission. The particular statutory violations are the following [*Corp. Code § 31300*; *see Neptune Society Corp. v. Longanecker (1987) 194 Cal. App. 3d 1233, 1244-1245, 240 Cal. Rptr. 117* (sufficient evidence that violation was willful)]:

- *Corp. Code § 31101* [*see § 515.54[1]*, and *see § 515.450*].
- *Corp. Code § 31110* [*see § 515.53*, and *see § 515.450*].
- *Corp. Code § 31119* [*see § 515.55*].
- *Corp. Code § 31200* [*see § 515.58[2]*, and *see § 515.451*].
- *Corp. Code § 31202* [*see § 515.58[3]*, and *see § 515.451*].

If the offer or sale of the franchise is made in California, a choice of some other law in the franchise agreement will not render California's Franchise Investment Law inapplicable, and thus does not defeat the franchisee's right to rescission. The choice of law provision only governs construction and interpretation of the franchise agreement [*Dollar Systems v. Avcar Leasing Systems (9th Cir. 1989) 890 F.2d 165, 171* (applying California law)].

The term "willful" as used in *Corp. Code § 31300* means an act that is committed knowingly and intentionally. There is

no requirement of a showing of an intent to violate the law, an evil motive, or a purpose to gain undue advantage. Good faith or reasonable care are not defenses to willfulness under *Corp. Code § 31300*, except to a limited extent in the case of violations of *Corp. Code §§ 31200* and *31202* [*Dollar Systems v. Avcar Leasing Systems (9th Cir. 1989) 890 F.2d 165, 172-173* (applying California law); *see People v. Gonda (1982) 138 Cal. App. 3d 774, 779, 188 Cal. Rptr. 295* (similar construction of "willful" under criminal provision, *Corp. Code § 31410*)]. In cases of violations of *Corp. Code §§ 31200* and *31202*, the defendant may prove that plaintiff knew the facts concerning the omission or untruth, or that the defendant exercised reasonable care and did not know, or if the defendant had exercised reasonable care, would not have known, of the untruth or omission [*Corp. Code § 31300*; *Dollar Systems v. Avcar Leasing Systems (9th Cir. 1989) 890 F.2d 165, 172]* . Thus, violations of *Corp. Code §§ 31101, 31110, 31119* (for example, a failure to file notice of exemption or to register the offering or a failure to disclose material facts concerning the franchisor) are willful even if the defendant did not know the requirements of the California law [*Dollar Systems v. Avcar Leasing Systems (9th Cir. 1989) 890 F.2d 165, 172-173]* .

[2] Limitation on Actions for Registration or Exemption Violations

An action may not be maintained to enforce any liability created under *Corp. Code § 31300* (liability for violation of registration or exemption requirements) unless it is brought within the following time limits: (1) the expiration of four years after the act or transaction constituting the violation; (2) the expiration of one year after the discovery by the plaintiff of the fact constituting the violation; or (3) 90 days after delivery to the franchisee of a written notice disclosing any violation of *Corp. Code § 31110* [*see § 515.53*] or 31200 [*see § 515.58[2]*], if the notice is in a form approved by the Commissioner of Corporations, whichever limitations period first expires [*Corp. Code § 31303*; *see People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc. (2002) 95 Cal. App. 4th 709, 723-725, 116 Cal. Rptr. 2d 497* (claims for violations of *Corp. Code § 31300* were barred by four-year statute; *Corp. Code § 31306* constitutes an express statement of unequivocal legislative intent that statute of limitations provisions in *Corp. Code § 31303* are to be the sole controlling limits on time for filing suit under the Franchise Investment Law, and therefore delayed discovery or tolling rules did not apply to franchisees' causes of action)].

Like all statute of limitations defenses, the defense of *Corp. Code § 31303* must be affirmatively pleaded or it is waived [*Neptune Society Corp. v. Longanecker (1987) 194 Cal. App. 3d 1233, 1243-1244, 240 Cal. Rptr. 117]* .

[3] Defense of Plaintiff's Knowledge

The defendant is not liable in an action for material misrepresentation in documents filed with the commissioner [*see Corp. Code § 31200*] or in required seasoned franchisor exemption disclosures [*see Corp. Code § 31202*] if he or she is able to prove that the plaintiff knew the facts concerning the untruth or omission [*Corp. Code § 31300*; *see § 515.456*].

[4] Defense of Defendant's Ignorance

The defendant also is not liable in an action for material misrepresentation in connection with registration or exemption requirements [*see Corp. Code §§ 31200, 31202*; *see also § 515.59[2]*] if it can be proved that he or she exercised reasonable care and did not know, or, if he or she had exercised reasonable care, would not have known of the untruth or omission [*Corp. Code § 31300*; *see § 515.457*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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DamagesBusiness & Corporate LawDistributorships & FranchisesRemediesEquitable ReliefGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 515.60 Liability for Misrepresentation in Franchise Transactions

[1] Generally

Any person who offers or sells a franchise in California by means of a material misrepresentation [*see Corp. Code § 31201* and *discussion under § 515.58[2]*] is liable for damages to any person who, not knowing or having cause to believe that the statement was false or misleading, purchased a franchise while relying on the statement [*Corp. Code § 31301*].

[2] Limitation on Actions for Misrepresentation in Transactions

An action may not be maintained to enforce any liability created under *Corp. Code § 31301* (liability for misrepresentation in franchise transactions) unless it is brought within the first of following time limits to expire [*Corp. Code § 31304*; *see People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc. (2002) 95 Cal. App. 4th 709, 723-725, 116 Cal. Rptr. 2d 497* (claims for *Corp. Code § 31201* violations were barred by two-year statute; *Corp. Code § 31306* constitutes an express statement of unequivocal legislative intent that statute of limitations provisions in *Corp. Code § 31304* are to be the sole controlling limits on time for filing suit under the Franchise Investment Law, and therefore delayed discovery or tolling rules did not apply to franchisees' causes of action)]:

- The expiration of two years after the violation on which it is based;

- The expiration of one year after the discovery by the plaintiff of the facts constituting the violation; or

- 90 days after delivery to the franchisee of a written notice disclosing any violation of *Corp. Code § 31201* [*see § 515.58[2]*] or *Corp. Code § 31202* [*see § 515.58[4]*], if the notice is in a form approved by the Commissioner of Corporations.

[3] Defenses to Transaction Misrepresentation

The defendant is not liable in an action for material misrepresentation in a franchise transaction if he or she is able to prove either plaintiff's awareness of the misrepresentation [*see § 515.59[2]*] or defendant's lack of awareness of the misrepresentation [*see § 515.58[4]*] in the same manner as these defenses are available in an action based on a misrepresentation in connection with registration or exemption requirements [*Corp. Code § 31301*; *see Corp. Code § 31300*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesBusiness OpportunitiesBusiness & Corporate LawDistributorships & FranchisesCauses of ActionFraud & MisrepresentationBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureRequirementsGovernmentsLegislationStatutes of LimitationsTime Limitations

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45-515 California Forms of Pleading and Practice--Annotated § 515.61

§ 515.61 Joint and Several Liability of Management Principals and Materially Aiding Personnel for Violations

The following persons are jointly and severally liable with and to the same extent as persons originally liable for particular violations under the Franchise Investment Law [*Corp. Code § 31302*]:

- Every person who directly or indirectly controls a person liable under *Corp. Code § 31300* (liability for violation of registration or exemption requirements) or *Corp. Code § 31301* (liability for misrepresentation in franchise transactions).

- Every partner in a firm so liable.

- Every principal executive officer or director of a corporation so liable.

- Every person occupying a similar status or performing similar functions as the person so liable.

- Every employee of a person so liable who materially aids in the act or transaction constituting the violation [*see Courtney v. Waring (1987) 191 Cal. App. 3d 1434, 1440-1442, 237 Cal. Rptr. 233* (causes of action stated as to vice president and director, controlling person, and vice president)].

The language "with and to the same extent" as the actual seller in *Corp. Code § 31302* is not applied literally. Imposition of secondary liability under *Corp. Code § 31302* does not require that a plaintiff successfully sue the franchise seller. Plaintiff is only required to establish that the seller could have been liable under *Corp. Code §§ 31201* and *31301* [*Courtney v. Waring (1987) 191 Cal. App. 3d 1434, 1441-1442, 237 Cal. Rptr. 233* (literal seller was bankrupt and had been dismissed from action)]. For a complaint for damages based on *Corp. Code §§ 31201, 31301, see § 515.455*.

Joint or several liability may not be imposed on any person who had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist [*Corp. Code § 31302*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesBusiness OpportunitiesBusiness & Corporate LawDistributorships & FranchisesCauses of ActionGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureEnforcementTortsProcedureMultiple DefendantsJoint & Several Liability

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45-515 California Forms of Pleading and Practice--Annotated § 515.62

§ 515.62 Infringement of Franchisee's Right to Join Trade Association

[1] Generally

A franchisor, directly or indirectly, through any officer, agent, or employee, may not restrict or inhibit the right of franchisees to join a trade association. The franchisor may also not prohibit the right of free association among franchisees for any lawful purposes [*Corp. Code § 31220*].

A franchisor who violates these provisions may be sued for temporary and permanent injunctive relief and for damages, if any, as well as for the costs of suit, including reasonable attorney's fees. The plaintiff is not required to allege or prove that actual damages have been suffered in order to obtain injunctive relief [*Corp. Code § 31302.5(a)*]. Liability is civil only; a violation of the statutory prohibitions is not a crime [*see Corp. Code § 31220*].

[2] Jurisdiction and Venue

A suit against a franchisor for interfering with the franchisee's right of association is to be brought in the superior court. The action may be commenced either in the county in which the defendant resides or in the county in which a franchise affected by the violation does business [*Corp. Code § 31302.5(a)*].

[3] Limitation of Actions for Right of Association

An action to enforce any liability for the franchisor's violation of the franchisee's rights of association may not be maintained unless brought before (1) the expiration of two years after the violation on which it is based, or (2) the expiration of one year after the plaintiff's discovery of the facts constituting the violation, whichever occurs first [*Corp. Code § 31302.5(b)*].

Legal Topics:

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

Business & Corporate LawDistributorships & FranchisesCauses of ActionGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesFranchise RelationshipsGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRemediesGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRemediesCompensatory DamagesBusiness & Corporate LawDistributorships & FranchisesRemediesCosts & Attorney FeesBusiness & Corporate LawDistributorships & FranchisesRemediesInjunctive Relief

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45-515 California Forms of Pleading and Practice--Annotated § 515.63

§ 515.63 Service of Process on Commissioners

Every applicant for registration, other than a California corporation, California limited partnership, or California limited liability company, must file with the Commissioner a consent to service for purposes of appointing the Commissioner as attorney for receipt of service of process in any civil action arising under the Franchise Investment Law [*Corp. Code § 31155*]. Whether or not such a consent has been filed, service may be made on the Commissioner against anyone alleged to have engaged in conduct prohibited under the law if personal jurisdiction cannot be obtained otherwise. Service may be made in either event by leaving a copy of the process with the Commissioner which is effective only after (1) notice of the service and a copy of the process is sent to the defendant by registered or certified mail at his or her last known address, or other steps reasonably calculated to give actual notice are taken, and (2) an affidavit of compliance is filed with the court prior to return of the service or within such further time as is allowed by the court [*Corp. Code § 31420*; *see Thomson v. Anderson (2003) 113 Cal. App. 4th 258, 262-263, 267-268, 6 Cal. Rptr. 3d 262* (*Corp. Code § 31420* does not create independent basis for personal jurisdiction for claims arising under Franchise Investment Law)]. For further discussion and forms for use in serving the summons, see Ch. 518, *Service of Summons and Papers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesCauses of ActionGeneral OverviewCivil ProceduresPleading & PracticeService of ProcessMethodsMailCivil ProceduresPleading & PracticeService of ProcessMethodsService Upon Agents

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45-515 California Forms of Pleading and Practice--Annotated § 515.64

§ 515.64 Survival of Actions

Every cause of action under the civil liability sections of the Franchise Investment Law survives the death of any person who might have been a plaintiff or defendant [*Corp. Code § 31305*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesCauses of ActionGeneral OverviewTortsWrongful Death & Survival ActionsSurvival Actions

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45-515 California Forms of Pleading and Practice--Annotated § 515.65

§ 515.65 Criminal Liability

[1] Generally

It is a crime to willfully violate any provision of the Franchise Investment Law or any rule or order thereunder, punishable by fine and/or imprisonment. Imprisonment is not permitted if the defendant can prove having had no knowledge of the law, rule, or order [*Corp. Code § 31410*]. It is also a crime to willfully employ, directly or indirectly, any device, scheme, or artifice to defraud in connection with the offer or sale of any franchise. Similarly, it is a crime willfully to engage, directly or indirectly, in any act, practice, or course of business which operates or would operate as a fraud or deceit on anyone in connection with the offer, purchase, or sale of a franchise [*Corp. Code § 31411*]. These provisions do not limit the power of the state to punish any person for conduct constituting a crime under any other statute [*Corp. Code § 31412*].

[2] Regulation of Franchise Loans

Commercial loans made by franchisors (and subfranchisors) to current or prospective franchisees for the acquisition, construction, operation, development, equipping, expansion, contraction, consolidation, merger, recapitalization, reorganization, or termination of a franchised business are exempt from regulation under the Finance Lenders Law [*see Fin. Code § 22000 et seq.*], provided the requirements below are met [*see Fin. Code § 22063(a)*, *(b)(8)*; *see also Fin. Code § 22063(b)(1)-(7)* (definitions)]. If the requirements are met, the loan is subject to the implied covenant of good faith and fair dealing under *Civ. Code § 1655* (stipulations that are necessary to make a contract reasonable, or conformable to usage, are implied as to matters about which the contract manifests no contrary intention) [*Fin. Code § 22063(b)(8)(D)*]. Nothing in *Fin. Code § 22063* is intended to abrogate or diminish the application of any other laws that are designed to protect borrowers, including, but not limited to, laws pertaining to licensing, unfair competition, usury, and conflicts of interest [*Fin. Code § 22063(d)*].

The franchisor or subfranchisor making the franchise loan must comply with all applicable federal and state franchise disclosure and registration laws, regulations, rules and orders, including, but not limited to, the Franchise Investment Law [*see Corp. Code § 31000 et seq.*] and the FTC's rule on disclosure requirements and prohibitions concerning

franchising and business-opportunity ventures [*see 16 C.F.R. § 436.1 et seq.*], in connection with the offer or sale of any franchise, area franchise, or subfranchise to which the franchise loan relates [*Fin. Code § 22063(b)(8)(A)*].

The proceeds of the franchise loan must be intended by the borrower for use primarily for other than personal, family, or household purposes [*Fin. Code § 22063(b)(8)(B)*]. The lending franchisor or subfranchisor may rely on any written statement of intended purposes by the borrower. The statement may be a separate statement signed by the borrower or may be contained in another document signed by the borrower. The lending franchisor or subfranchisor is not required to ascertain that the proceeds of a franchise loan are used in accordance with the statement of intended purposes [*Fin. Code § 22063(c)*].

The loan, if secured, must be secured solely by the assets of the franchised business to which the franchise loan relates. Property used by the borrower primarily for personal, family, or household purposes, including the borrower's personal residence, must not be taken as security for the loan [*Fin. Code § 22063(b)(8)(C)*].

The lending franchisor or subfranchisor must fully and clearly disclose to the borrower, at or before the time the loan is made, the rates of interest, charges, and costs of the loan [*Fin. Code § 22063(b)(8)(E)*].

Presumably, if the foregoing requirements are not met, the franchisor or subfranchisor making a franchise loan is subject to regulation under the Finance Lenders Law. For discussion of that law, see California Legal Forms, Ch. 102B, *Pawnbrokers, Finance Lenders, and Secondhand Goods Dealers* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesBusiness OpportunitiesBusiness & Corporate LawDistributorships & FranchisesCauses of ActionFraud & MisrepresentationBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureEnforcementCriminal Law & ProcedureCriminal OffensesFraudGeneral Overview

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[Reserved]

§§ 515.66[Reserved]

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45-515 California Forms of Pleading and Practice--Annotated § 515.80

§ 515.80 Governing Statutes

The Franchise Relations Act, which governs the proper termination, transfer, or nonrenewal of most franchises in California, is contained in *Bus. & Prof. Code §§ 20000-20041*. Provisions applicable to petroleum products franchises are discussed in *§ 515.110* et seq., and those provisions applicable to new motor vehicle dealerships are discussed, in *§ 515.130* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesAssignments & TransfersBusiness & Corporate LawDistributorships & FranchisesTerminationsGeneral OverviewEnergy & Utilities LawOil IndustryFranchising & Marketing

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45-515 California Forms of Pleading and Practice--Annotated § 515.81

§ 515.81 Definitions

[1] "Franchise"

The term "franchise" is used under the Franchise Relations Act exactly as it is used under the Franchise Investment Law [*see Corp. Code § 31005*, discussed in *§ 515.51*] except that under the Franchise Relations Act the term does not include any franchise governed by the federal Petroleum Marketing Practice Act (that is, franchises involving motor fuel refiners, distributors, and retailers) [*Bus. & Prof. Code § 20001(d)(1)*; *see 15 U.S.C. § 2801*]. In addition, the term does not include lease departments, licenses, or concessions at or with a general merchandise retail establishment which are incidental and ancillary to the general commercial operation of the retail establishment by amounting to less than 10 percent of the establishment's sales [*Bus. & Prof. Code § 20001(d)(2)*]. The term always includes an "area franchise" [*Bus. & Prof. Code § 20006*; *cf. Corp. Code § 31010*, discussed in *§ 515.51[3]*].

A contract is a franchise and governed by the Franchise Relations Act if the three following conditions are met [*Boat & Motor Mart v. Sea Ray Boats, Inc. (9th Cir. 1987) 825 F.2d 1285, 1288]* :

- A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by the franchisor;

- The operation of the franchisee's business pursuant to the plan or system is substantially associated with the franchisor's trademark, service mark, name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and

- The franchisee is required to pay, directly or indirectly, a franchise fee.

A mere promise to sell aggressively is held by the Corporation Commissioner's guidelines [*see* Commissioner of Corporation's Release No. 3-F (rev. 1994)] to be too vague to constitute a marketing plan under the first criteria [*see Boat & Motor Mart v. Sea Ray Boats, Inc. (9th Cir. 1987) 825 F.2d 1285, 1289* (finding substantial direction by

franchisor)].

The Commissioner of Corporations' regulations, releases, guidelines, and interpretive opinions under the Franchise Investment Law, regarding whether or not an agreement constitutes a franchise within the meaning of that law, are prima facie evidence of the scope and extent of coverage of the definition of franchise under the Franchise Relations Act [*Bus. & Prof. Code § 20009*; *see § 515.51[1]*].

[2] Parties to Franchise

A "franchisor" [*Bus. & Prof. Code § 20003*; *see Corp. Code § 31007*], "franchisee" [*Bus. & Prof. Code § 20002*; *see Corp. Code § 31006*], "area franchise" [*Bus. & Prof. Code § 20004*; *see Corp. Code § 31008*], "subfranchisor" [*Bus. & Prof. Code § 20005*; *see Corp. Code § 31009*] and "person" [*Bus. & Prof. Code § 20008*; *see Corp. Code § 31015*] are defined exactly as the terms are defined under the Franchise Investment Law [*see § 515.51[1]*].

[3] "Franchise Fee"

A "franchise fee" is defined exactly as the term is defined under the Franchise Investment Law [*see Corp. Code § 31011*, discussed in *§ 515.51[6]*] except that the term excludes (1) the payment, directly or indirectly, of a franchise fee which, on an annual basis, does not exceed the sum of $100; and (2) the payment of a sum not exceeding $1,000 annually on account of the purchase price or rental of fixtures, equipment, or other tangible property to be utilized in, and necessary for, the operation of the franchised business, if the price or rental so charged does not exceed the cost which would be incurred by the franchisee acquiring the items from other persons or in the open market [*Bus. & Prof. Code § 20007*].

[4] Nonprofit Retailers' Cooperatives Also Excluded

Also excluded from the definition of franchise for purposes of the Franchise Relations Act is a nonprofit organization operated on a cooperative basis by and for independent retailers that wholesales goods and services primarily to its member retailers, if all of the following are applicable [*Bus. & Prof. Code § 20001(d)(3)*]:

- Control and ownership of each member is substantially equal.
- Membership is limited to those who will use the services furnished by the organization.
- Transfer of ownership is prohibited or limited.
- Capital investment receives no return.
- Substantially equal benefits pass to members on the basis of patronage of the organization.
- Members are not personally liable for obligations of the organization in the absence of a direct undertaking or authorization by them.
- Services of the organization are furnished primarily for the use of the members.
- Each member and prospective member is provided with an offering circular that complies with the specifications of *Corp. Code § 31111* (discussed in *§ 515.53[3]*).
- No part of the receipts, income, or profit of the organization are paid to any profit-making entity, except for arms-length payments for necessary goods and services, and members are not required to

purchase goods or services from any designated profit-making entity.

- The nonprofit organization is subject to an action for rescission or damages under *Civ. Code § 3343.7* if the organization fraudulently induces the plaintiff to join the organization. Under *Civ. Code § 3343.7*, "fraudulently induced" includes the failure to disclose all information required under *Corp. Code § 31005(c)(8)* or *31111*, unless the defendant proves that the plaintiff knew the facts concerning the untruth or omission or that the defendant exercised reasonable care and did not know (or if the defendant had exercised reasonable care would not have known) of the untruth or omission [*Civ. Code § 3343.7*]. Plaintiff is entitled to rescission of a membership contract entered into, or for damages sustained, as a consequence of being fraudulently induced to join the organization [*Civ. Code § 3343.7*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 515.82 Applicability of Franchise Relations Act

The Franchise Relations Act applies to any franchise if either the franchisee is domiciled in California or the franchised business is or has been operated in California [*Bus. & Prof. Code § 20015*]. The act also applies to franchises granted or renewed after January 1, 1981, or to franchises of an indefinite duration which may be terminated by the franchisee or franchisor without cause [*Bus. & Prof. Code § 20041*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesCauses of ActionChoice of LawBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureEnforcement

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§ 515.83 Termination of Franchise

[1] Good Cause With Notice to Comply

A franchisor may not terminate a franchise prior to the expiration of its term except for good cause and as otherwise provided under the Franchise Relations Act. Good cause includes, but is not limited to, the failure of the franchisee to comply with any lawful requirement of the franchise agreement after being given notice and a reasonable opportunity to cure the failure. This period in no event needs to be more than 30 days [*Bus. & Prof. Code § 20020*].

[2] Cause for Immediate Termination

Immediate notice of termination without an opportunity to cure is deemed reasonable if one of the following events listed under the Franchise Relations Act occurs during the period in which the franchise is in effect, and is relevant to the franchise [*Bus. & Prof. Code § 20021*]:

- Either (1) the franchisee or the business to which the franchise relates is declared bankrupt or is judicially determined to be insolvent, (2) all or a substantial part of the assets of the bankrupt franchisee are assigned to or for the benefit of any creditor, or (3) the franchisee admits inability to pay debts as they come due;

- The franchisee abandons the franchise by failing to operate the business for five consecutive days during which it is required to be operated under the franchise terms, unless the failure to operate is due to fire, flood, earthquake, or other similar causes beyond the franchisee's control. A shorter period may be substituted if, after which, under the facts and circumstances, it is not unreasonable for the franchisor to conclude that the franchisee does not intend to continue to operate the franchise;

- The franchisor and franchisee agree in writing to terminate the franchise;

- The franchisee makes any material misrepresentations relating to the acquisition of the franchise

business or engages in conduct which reflects materially and unfavorably on the operation and reputation of the franchise business or system;

- The franchisee fails, for a period of 10 days after notification of noncompliance, to comply with any federal, state, or local law or regulation applicable to the operation of the franchise;

- The franchisee, after curing any failure in response to a notice [*Bus. & Prof. Code § 20020*] of noncompliance with lawful requirements of the franchise agreement, engages in the same acts of noncompliance whether or not these acts of noncompliance were corrected after notice;

- The franchisee repeatedly fails to comply with one or more requirements of the franchise, whether or not the acts of noncompliance were corrected after notice;

- Either (1) the franchised business or business premises of the franchise are seized, taken over, or foreclosed by a government official in the exercise of official duties, or by a creditor, lienholder, or lessor (a final judgment against the franchisee, however, must have remained unsatisfied for 30 days unless a supersedeas or other appeal bond has been filed) or (2) a levy of execution is made on the license granted by the franchise agreement or on any property used in the franchised business, and the levy is not discharged within five days;

- The franchisee is convicted of a felony or any other criminal misconduct which is relevant to the operation of the franchise;

- The franchisee fails to pay any franchise fees or other amounts due the franchisor or its affiliate within five days after receiving written notice that those fees are overdue; or

- The franchisor makes a reasonable determination that continued operation of the franchise by the franchisee will result in an imminent danger to public health or safety.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesTerminationsGood CauseBusiness & Corporate LawDistributorships & FranchisesTerminationsGrounds for TerminationBusiness & Corporate LawDistributorships & FranchisesTerminationsNotice RequirementsBusiness & Corporate LawDistributorships & FranchisesTerminationsOpportunity to Cure

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§ 515.84 Transfers

For a reasonable time after the death of a franchisee or majority shareholder of a franchisee, a franchisor may not deny the surviving spouse, heirs, or estate of the deceased franchisee or majority shareholder of the franchisee the opportunity to participate in the ownership of the franchise under a valid franchise agreement. During that time, the surviving spouse, heirs, or estate of the deceased must either satisfy all of the then current qualifications for a purchaser of a franchise or sell, transfer, or assign the franchise to a person who satisfies the franchisor's then current standards for new franchisees. The surviving spouse, heirs, or estate of the deceased must maintain all standards and obligations of the franchise in order to retain these rights [*Bus. & Prof. Code § 20027(a)*].

A franchisor may, however, after receipt of a bona fide offer to purchase the franchise by a proposed purchaser of the franchise, exercise the right of first refusal [*Bus. & Prof. Code § 20027(b)*].

These rules do not apply to any agreement or contract in effect prior to January 1, 1984, except an agreement or contract of an indefinite duration, and do not apply to any bequest or intestate succession that took effect prior to January 1, 1984 [*Bus. & Prof. Code § 20027(c)*].

Legal Topics:

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

[1] Notice and Necessary Conditions

A franchisor may not fail to renew a franchise unless the franchisor has provided the franchisee at least 180 days prior written notice of intention not to renew. In addition, at least one of several designated nonrenewal conditions must be present, as discussed below [*Bus. & Prof. Code § 20025*]. When one of these conditions must exist for a designated period of time, a franchisor may offer or agree, before expiration of the current franchise term, to extend the term of the franchise in order to satisfy the particular period [*see Bus. & Prof. Code § 20026*].

A franchise agreement providing that the franchisee waives any claim for damages arising out of the franchisor's failure to give the 180-day notice required by *Bus. & Prof. Code § 20025* has been upheld on the ground that it would be valid unless the Franchise Relations Act or some other California law created a right to damages. The only remedies provided are the resale rights [*see Bus. & Prof. Code § 20025(a)*] and the requirement of the Franchise Relations Act that the franchisor repurchase the franchise's inventory [*see Bus. & Prof. Code § 20035*], which the franchisor did in this case [*Boat & Motor Mart v. Sea Ray Boats, Inc. (9th Cir. 1987) 825 F.2d 1285, 1290-1292* (also holding agreement not unconscionable as it was short, there was no opportunity for surprise, and franchisee knew agreement might not be renewed and that it waived damages)].

[2] Resale Condition

During the 180 days prior to expiration of the franchise, as one condition for nonrenewal, the franchisor may permit the franchisee to sell the business to a purchaser meeting the franchisor's then current requirements for granting new franchises. If the franchisor is not granting a significant number of new franchises, the purchaser may meet the then current requirements for granting renewal franchises [*Bus. & Prof. Code § 20025(a)*].

[3] Condition Requiring Waiver of Clause Not to Compete

A franchisor may refuse to renew a franchise when it is not for the purpose of converting the franchisee's business

premises to operation by employees or agents of the franchisor for the latter's own account (although a franchisor may still exercise a right of first refusal to purchase the franchisee's business) if on expiration of the franchise, the franchisor must agree not to seek to enforce any covenant of the nonrenewed franchisee not to compete with the franchisor or any franchisees of the franchisor [*Bus. & Prof. Code § 20025(b)*]. However, it is doubtful such a covenant would ever be enforceable [*see Scott v. Snelling and Snelling, Inc. (N.D. Cal. 1990) 732 F. Supp. 1034, 1040-1046* (*discussed under § 515.89*; refusing to enforce covenant not to compete after termination by franchisee and implying that such a covenant would not be enforceable after nonrenewal either)].

[4] Termination Condition

A franchisor may refuse to renew a franchise if any of the statutory grounds for terminating a franchise under *Bus. & Prof. Code §§ 20020* and *20021* exist [*Bus. & Prof. Code § 20025(c)*; *see § 515.83*].

[5] Agreement Condition

If the franchisee and the franchisor agree not to renew the franchise, the franchisor may refuse to renew the franchise [*Bus. & Prof. Code § 20025(d)*].

[6] Fair Withdrawal Condition

If the franchisor withdraws from distributing its products or services through franchises in the geographic market served by the franchisee, the franchisor may refuse to renew the franchise. On expiration of the franchise, the franchisor must agree not to seek to enforce any covenant of the nonrenewed franchisee not to compete with the franchisor or franchisees of the franchisor. The failure to renew must not be for the purpose of converting the business conducted by the franchisee pursuant to the franchise agreement to operation by employees or agents of the franchisor for the latter's own account [*Bus. & Prof. Code § 20025(e)(1), (2)*]. In addition, if the franchisor has determined to sell, transfer, or assign its interest in the marketing premises occupied by the franchisee, (1) the franchisor must offer the franchisee a right of first refusal if it has received a bona fide offer from someone else to purchase the franchisor's interest in the premises (the offer must be made during the 180-day period after a notice of intent not to renew has been made, and it must be of at least 30 days duration); or (2) a purchaser, transferee, or assignee of the franchisor's interest in one or more other controlled marketing premises must offer the franchisee a franchise in good faith and on substantially the same terms and conditions currently being offered by that person to other franchisees [*Bus. & Prof. Code § 20025(e)(3)*].

[7] Condition of Failure to Agree to Changes or Addenda

A franchisor may refuse to renew a franchise if the franchisor and franchisee are unable to agree to changes or additions to the terms and conditions of the franchise agreement. The changes or additions must be such as would result in renewal of the franchise agreement on substantially the same terms and conditions on which the franchisor is currently customarily granting renewal franchises. If the franchisor is not currently granting a significant number of renewal franchises, the terms and conditions should be those on which the franchisor is currently customarily granting original franchises. The franchisor may give the franchisee written notice of a date, which should be at least 30 days from the date of the notice, on or before which a proposed written agreement of the terms and conditions of the renewal franchise must be accepted in writing by the franchisee. If the notice is given not less than 180 days before the end of the franchise term, it may state that in the event of failure of such acceptance by the franchisee, the notice is to be deemed a notice of intention not to renew at the end of the franchise term [*Bus. & Prof. Code § 20025(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesCauses of ActionCovenants Not to CompeteBusiness &

Corporate LawDistributorships & FranchisesFranchise RelationshipsFranchise AgreementsBusiness & Corporate LawDistributorships & FranchisesRemediesGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesTerminationsGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesTerminationsGrounds for TerminationBusiness & Corporate LawDistributorships & FranchisesTerminationsNotice RequirementsContracts LawFormationRights of First Refusal

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§ 515.86 Notice Procedure

Any notice of termination or nonrenewal required under the Franchise Relations Act must be in writing. It must be posted by registered, certified, or other receipted mail, or else personally delivered or delivered by a telegram, to the franchisee. The notice must contain a statement of intent to terminate or not to renew the franchise, the reasons therefor, and the effective date of the termination, nonrenewal, or expiration [*Bus. & Prof. Code § 20030*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 515.87 Obligation on Improper Termination or Nonrenewal

[1] Generally

If the franchisor terminates or fails to renew the franchise other than in accordance with the provisions of the Franchise Relations Act, the franchisor must offer to repurchase from the franchisee the latter's resalable current inventory which meets the franchisor's current standards as required by the franchise agreement or commercial practice and held for use or sale in the franchised business. The offered price must be the lower of the fair wholesale market value or the price paid by the franchisee. The franchisor need not offer to purchase personalized items which have no value to the franchisor in the business being franchised [*Bus. & Prof. Code § 20035*].

The franchisor may offset, against any repurchase offer made under the act, those sums owed the franchisor or its subsidiaries by the franchisee pursuant to the franchise or to any ancillary agreement [*Bus. & Prof. Code § 20036*].

[2] Other Remedies

Unless otherwise expressly provided under the Franchise Relations Act, nothing in the act prevents the franchisee from suing under any other law [*Bus. & Prof. Code § 20037*]. Although, nothing presently in the act expressly provides for any suit to enforce its provisions [*see* Comments to *see § 515.480*], a California appellate court has held that the repurchase of inventory is not the exclusive remedy for wrongful termination of a franchise pursuant to *Bus. & Prof. Code § 20035* [*JRS Prods., Inc. v. Matsushita Elec. Corp. of Am. (2004) 115 Cal. App. 4th 168, 178, 8 Cal. Rptr. 3d 840* (plaintiff could pursue its breach of contract claim against franchisor for wrongful termination of franchise agreement)].

A provision in a franchise agreement under which the franchisee waives claims for damages arising out of the franchisor's failure to comply with the Act may be upheld [*see Boat & Motor Mart v. Sea Ray Boats, Inc. (9th Cir. 1987) 825 F.2d 1285, 1290-1292* (also holding agreement not unconscionable since it was short, there was no opportunity for surprise, and franchisee knew agreement might not be renewed and that it waived damages)].

Legal Topics:

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

The Franchise Relations Act is not intended to limit the right of the franchisor and franchisee to agree, either before or after a dispute has arisen, to binding arbitration of claims under the act. The standards to be applied in the arbitration must not be less than the requirements specified in the act. Any arbitrators employed must be chosen from a list of impartial arbitrators supplied by the American Arbitration Association or by some other impartial person [*Bus. & Prof. Code § 20040*; *see generally* Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*].

To the extent that a franchise agreement is a contract of adhesion, it may be subject to the California Supreme Court's holding in *Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100* , which held that in some cases in California, class-action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class-action litigation or the right to class-wide arbitration [*see* discussion of this case in Ch. 140, *Contracts*, § 140.25[2][a]]. Therefore, in an appropriate case, a ban on class-wide arbitration under a franchise agreement may be unenforceable [*Independent Ass'n of Mailbox Ctr. Owners, Inc. v. Superior Court(2005) 133 Cal. App. 4th 396, 410-411*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesAlternative Dispute ResolutionBusiness & Corporate LawDistributorships & FranchisesFranchise RelationshipsFranchise AgreementsContracts LawContract Conditions & ProvisionsArbitration Clauses

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§ 515.89 Covenants Not to Compete

Covenants not to compete, even those with temporal and geographic limitations, after termination of a franchise term are void and unenforceable against the former franchisees under *Bus. & Prof. Code § 16600* [*Scott v. Snelling and Snelling, Inc. (N.D. Cal. 1990) 732 F. Supp. 1034, 1040-1046* (failure to so specify in Corp. Code § 20020 did not imply exemption from *Bus. & Prof. Code § 16600*); for discussion of *Bus. & Prof. Code § 16600* and covenants not to compete, *see* Ch. 565, *Unfair Competition*]. *Bus. & Prof. Code § 16600* is such a strong policy interest of California that it will govern the validity of a noncompetition clause in a franchise agreement that provides it is to be governed by the law of another state [*Scott v. Snelling and Snelling, Inc. (N.D. Cal. 1990) 732 F. Supp. 1034, 1039-1041* (relying on *Frame v. Merrill, Lynch, Pierce, Fenner & Smith, Inc. (1971) 20 Cal. App. 3d 668, 672-674, 97 Cal. Rptr. 811*)]. Whether or not customer lists, forms, or other aspects of the franchised business constitute trade secrets, which would be entitled to protection, is a question that must be determined on a case by case basis. A customer list that was developed by franchisees through their own efforts, personal knowledge, and business contacts is not entitled to protection as a trade secret [*Scott v. Snelling and Snelling, Inc. (N.D. Cal. 1990) 732 F. Supp. 1034, 1044-1045]* . Trade secrets are discussed in Ch. 565, *Unfair Competition* .

Legal Topics:

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PART II. LEGAL BACKGROUND
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[Reserved]

§§ 515.90[Reserved]

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45-515 California Forms of Pleading and Practice--Annotated § 515.110

§ 515.110 Governing Statutes

Several different acts and regulations apply to petroleum products franchises. The federal Petroleum Marketing Practices Act (PMPA), which preempts any state law in its specific area of concern of termination and nonrenewal of franchises [*see 15 U.S.C. § 2806(a)*], is codified in *15 U.S.C. §§ 2801-2806*. Related California provisions appear in *Bus. & Prof. Code §§ 20999-20999.4*. Trade practice provisions affecting the franchisee's ability to procure supplies from outside sources are found in *Bus. & Prof. Code §§ 21140-21140.4*. Designation of a franchisee's successor in interest, and implementing procedures, are governed by *Bus. & Prof. Code § 21140.6*. Business hours legislation is covered in *Bus. & Prof. Code §§ 21150* and *21150.1*. Transfers of franchises are regulated under *Bus. & Prof. Code §§ 21148-21149*.

Legal Topics:

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45-515 California Forms of Pleading and Practice--Annotated § 515.111

§ 515.111 Federal Law of Franchisor's Termination or Nonrenewal of Franchise

[1] Preemption of State Termination or Nonrenewal Provisions

The federal Petroleum Marketing Practices Act states that, to the extent any of its provisions apply to nonrenewal or termination of any franchise relationship, or the furnishing of notification with respect thereto, no state or local law or regulation applicable to renewals, terminations, or notice may be enacted, promulgated, or continued in effect unless it is the same as the applicable federal provision. This preemption also applies to any remedy or penalty for violations of state or local measure [*15 U.S.C. § 2806(a)(1)*]. The PMPA also states that no state may adopt, enforce, or continue in effect any state or local law or regulation that requires a payment for the goodwill of a franchise on the termination of a franchise or on the nonrenewal of a franchise relationship [*15 U.S.C. § 2806(a)(2)*]. In 1981, the California Legislature amended state provisions governing petroleum franchises to change the definitions of "franchise," and related terms, to conform to the definitions of those terms under federal law [*see Bus. & Prof. Code §§ 20999, 21140, 21150*; *Corp. Code §§ 31005, 31005.5*; and discussions in *§§ 515.111[3][a]* and *515.112*].

State laws governing petroleum product franchises are not the only state statutes preempted by the PMPA. California's Franchise Investment Law (*Corp. Code § 31000 et seq.*) and *Bus. & Prof. Code § 17200*, relating to unfair business practices, are also preempted to the extent that they cannot be relied on to enjoin or prohibit a franchise termination, or the nonrenewal of a franchise, that would be proper under the PMPA [*Exxon Corp. v. Miro (DC Cal. 1983) 555 F. Supp. 234, 237-238* ; *California Arco Distributors, Inc. v. Atlantic Richfield Co. (1984) 158 Cal. App. 3d 349, 364, 204 Cal. Rptr. 743]* . Similarly, preemption extends to California common law and tort theories, such as claims for damages for violation of the covenant of good faith and fair dealing, fraud, and interference with prospective economic advantage. Whenever the essence of the franchisee's claims is the termination of the franchise, state common law and tort theories are preempted. One reason for the preemption is to avoid conflict between the PMPA provisions and state law regarding exemplary damages, determination by a jury or the court of entitlement to exemplary damages [*see 15 U.S.C. § 2805(d)(2)*], and attorney's and expert witness fees [*see 15 U.S.C. § 2805(d)(3)*; *Mobil Oil Corp. v. Superior Court (1987) 189 Cal. App. 3d 485, 488-490, 234 Cal. Rptr. 482]* .

[2] Laws Governing Assignment Not Totally Preempted

The federal law does not authorize any transfers or assignments of franchises, or prohibit any such transactions, that may be authorized by provisions of franchises themselves or by applicable state laws governing these transactions without regard to franchise provisions [*15 U.S.C. § 2806(b)(1)*]. By *15 U.S.C. § 2806(b)*, Congress did not intend either to authorize or to prohibit franchise assignments but, as a general rule, left the matter to state law [*Humboldt Oil Co. v. Exxon Co, U.S.A. (9th Cir. 1987) 823 F.2d 373, 375* ; *Prestin v. Mobil Oil Corp. (9th Cir. 1984) 741 F.2d 268, 270* (*15 U.S.C. § 2806(b)* renumbered without change by Pub. L. No. 103-371, § 5, 108 Stat. 3485); *now see 15 U.S.C. § 2806(b)(1)*; *see Forty-Niner Truck Plaza, Inc. v. Union Oil Co. (1997) 58 Cal. App. 4th 1261, 1276-1278, 68 Cal. Rptr. 2d 532* (*Bus. & Prof. Code § 20999.25(a)* is not preempted by *PMPA); California Service Station etc. Assn. v. Union Oil Co. (1991) 232 Cal. App. 3d 44, 51-53, 283 Cal. Rptr. 279* (specifically holding that former *Bus. & Prof. Code § 21148(a)(3)* is not preempted by PMPA)]. Federal law does not prohibit any state from specifying the terms and conditions under which any franchise or franchise relationship may be transferred to the designated successor of a franchisee on the death of the franchisee [*15 U.S.C. § 2806(b)(2)*].

Nevertheless, a state law regarding assignment cannot be applied to frustrate federal objectives. This applies often in the so-called "cure" area. A franchisee cannot avoid the consequences of his or her own conduct that gave rise to a notice of termination or nonrenewal by assigning the franchise after having been notified of the franchisor's intent to terminate or not to renew. For instance, a franchisee who is convicted of a felony that provides grounds for termination under *15 U.S.C. § 2802(b)(2)(C), (c)(12)* cannot assign the franchise to a corporation that he or she controls or to a third party with whom the franchisee has an agreement allowing him or her to continue to operate the business [*Humboldt Oil Co. v. Exxon Co, U.S.A. (9th Cir. 1987) 823 F.2d 373, 375* ; *Atlantic Richfield Co. v. Guerami (9th Cir. 1987) 820 F.2d 280, 282-283]* . A franchisee who has received notice of termination based on station closings and failure to pay the franchisor for gasoline cannot file a petition in bankruptcy and rely on *11 U.S.C. § 365(f)* (debtor's right to assume and assign executory portion of contract or lease) to allow assignment [*In re Herbert (9th Cir. 1986) 806 F.2d 889, 893-895]* .

When the assignment is allowed under California law, a franchisor can refuse consent to an assignment or sublease only when it has a good faith reasonable objection to it [*Prestin v. Mobil Oil Corp. (9th Cir. 1984) 741 F.2d 268, 270-273* (considering franchise entered into before effective date of *Bus. & Prof. Code § 21148, discussed under § 515.116[1]*)].

Once the assignment of an unexpired portion of a regular franchise is achieved, the resulting franchise is not a trial franchise as defined in *15 U.S.C. § 2803(b)(1)*, and the franchisor is subject to the more stringent requirements regarding nonrenewal and termination applicable to regular franchises [*see 15 U.S.C. § 2803(b)(2)*]. Thus, although the PMPA permits a franchisor to require a franchisee who has not previously been a party to a franchise with the franchisor to accept a trial franchise in certain instances, it specifically excludes assignments of existing franchises from that requirement, leaving the regulation of assignments and transfers to state law [*California Service Station etc. Assn. v Union Oil Co. (1991) 232 Cal. App. 3d 44, 51-53, 283 Cal. Rptr. 279]* .

[3] Definitions

[a] "Franchise"

A "franchise" is a contract between (1) a refiner and either a distributor or a retailer, or (2) a distributor and either another distributor or a retailer. In either instance, the refiner or distributor authorizes or permits the distributor or retailer to use a trademark in connection with the sale, consignment, or distribution of motor fuel. The trademark is owned or controlled by the refiner, or by a refiner that supplies motor fuel to the distributor that authorizes or permits its use [*15 U.S.C. § 2801(1)(A)*].

The term "franchise" includes a contract under which a retailer or distributor is authorized or permitted to occupy leased marketing premises that are to be employed in connection with the sale, consignment, or distribution of motor fuel

under a trademark. The trademark is owned or controlled by the refiner, or by a refiner that supplies motor fuel to the distributor, who authorizes or permits the occupancy. The term includes a contract pertaining to the supply of motor fuel to be sold, consigned, or distributed under a trademark owned or controlled by a refiner, or under certain contracts existing continuously from an earlier time. The term includes the unexpired portion of franchise properly transferred or assigned [*see 15 U.S.C. § 2801(1)(B)*].

[b] Franchise Parties and Relationship

A "franchisor" is a refiner or distributor who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel [*15 U.S.C. § 2801(3)*]. A "franchisee" is a retailer or distributor who is so authorized or permitted [*15 U.S.C. § 2801(4)*]. The concept of a "trademark" includes a trade name, service mark, or any identifying symbol or name [*15 U.S.C. § 2801(11)*]. A "franchise relationship" is the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and franchisee resulting from the marketing of motor fuel under a franchise [*15 U.S.C. § 2801(2)*].

[c] Marketing Parties and Product

A "refiner" is anyone engaged in the refining of crude oil to produce motor fuel, including any affiliate of such a person [*15 U.S.C. § 2801(5)*]. A "retailer" is one who purchases motor fuel for sale to the general public for ultimate consumption [*15 U.S.C. § 2801(7)*]. A "distributor" is someone, or an affiliate of someone, who purchases motor fuel for sale, consignment, or distribution to another. Alternatively, a "distributor" may be one who receives motor fuel on consignment for consignment or distribution to another's own fuel accounts or to accounts of another's supplier; but this designation does not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, the supplier [*15 U.S.C. § 2801(6)*]. "Motor fuel" refers to gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways [*15 U.S.C. § 2801(12)*].

[4] Grounds for Interrupting Franchise

Under the PMPA, motor fuel franchisors may not terminate a franchise (entered into or renewed after June 19, 1978) or fail to renew a franchise relationship, except under prescribed conditions, which require proper notification [*see 15 U.S.C. § 2804*], and under permissible grounds. These grounds include the following: (1) the franchisee's failure to comply with reasonable and material franchise provisions or failure to exert good faith efforts to carry out these provisions; (2) the occurrence of an event such as fraud, criminal conduct, bankruptcy, the franchisee's being severely disabled for at least three months, resulting in an inability to run the operation; (3) an agreement between the parties under certain protective conditions; and (4) the franchisor's withdrawal from the market area. Additional grounds for nonrenewal include the inability of the parties to agree on changes, numerous customer complaints to the franchisor, and the failure to operate the franchise in a clean, safe, and healthful manner [*see 15 U.S.C. § 2802(b), (c)*].

Some grounds for termination require a determination that the franchise relationship has actually been undermined, whereas others do not. For instance, if the ground for termination is a breach of contract under *15 U.S.C. § 2802(b)(2)(A)*, the nature and effect of the alleged contractual breach would determine whether grounds existed for termination of the franchise [*Khorenian v. Union Oil Co. (9th Cir. 1985) 761 F.2d 533, 536]* . If, however, the ground for termination were the franchisee's conviction of a felony involving moral turpitude, no determination of actual undermining would be required because the PMPA specifies that conviction of a felony involving moral turpitude is sufficient ground for termination of the franchise [*15 U.S.C. § 2802(b)(2)(C), (c)(12)*; *Atlantic Richfield Co. v. Guerami (9th Cir. 1987) 820 F.2d 280, 282-283]* .

A franchisee cannot recover for constructive *termination* under the PMPA if the franchisor's allegedly wrongful conduct did not compel the franchisee to abandon its franchise. The PMPA prohibits only franchisor conduct that has the effect

of ending a franchise. A necessary element of any constructive termination claim under the PMPA is that the complained-of conduct forced an end to the franchisee's use of the franchisor's trademark, purchase of the franchisor's fuel, or occupation of the franchisor's service station. A franchisee may not maintain a claim for constructive *nonrenewal* under the PMPA after the franchisee signs and then operates under a renewal agreement with the franchisor, even if the franchisee signs "under protest" because of unfair and coercive conduct by the franchisor. The franchisee may pursue state-law remedies for the franchisor's wrongful conduct [*Mac's Shell Serv. v. Shell Oil Prods. Co. LLC (2010) -- U.S. --, 130 S. Ct. 1251, 176 L. Ed. 2d 36, 2010 U.S. LEXIS 2203, at *6, *13, *23-*24, *27, *31]* .

[5] Franchises Excepted From Nonrenewal Restrictions

Federal regulation of franchise renewals does not apply to "trial franchises" (which involve first-time franchisees of the franchisor in an initial contract period for up to one year) or "interim franchises" (which are continuations for up to three years of franchises that were not renewed because the franchisor withdrew from the market area) [*15 U.S.C. § 2803*].

[6] Liability

If the franchisor fails to comply with federal termination or nonrenewal requirements, the franchisee may maintain a civil action, without regard to the amount in controversy, in the United States District Court for the area in which the franchisor has its principal place of business or the franchisee does business. The action must be commenced within one year after the date of the termination or nonrenewal, or the date of the failure to comply with the applicable requirements, whichever occurs later [*15 U.S.C. § 2805(a)*].

The court must grant a preliminary injunction in the action if (1) the franchisee shows that there has been a termination or nonrenewal and that serious questions on the merits exist for litigation, and (2) the court finds that the franchisee would suffer greater hardship than the franchisor without such relief [*15 U.S.C. § 2805(b)(2)*]. This standard for preliminary injunction under *15 U.S.C. § 2805(b)(2)* is more liberal than the general requirements for preliminary injunction. *Fed. R. Civ. P., Rule 65* (irreparable harm), is not applicable. The franchisee need only show (1) that it will suffer greater hardship from nonissuance of a preliminary injunction than the franchisor will from issuance, and (2) that the franchisee has a reasonable chance of success on the merits [*Khorenian v. Union Oil Co. (9th Cir. 1985) 761 F.2d 533, 535-536]* .

The franchisor may avoid injunction on certain grounds of economic detriment. The court may require that the franchisee post a bond. Injunctive relief may be denied, however, if the action is commenced after periods of time recognized in the statute as posing too great a delay [*15 U.S.C. § 2805(b)(3), (e)(1)*].

Burdens of proof and producing evidence are specially set out by law [*15 U.S.C. § 2805(c)*]. The franchisee may recover actual and court-imposed punitive damages as well as attorney and expert witness fees. Even if the franchisor has been able to avoid injunction, damages and expenses are still available [*15 U.S.C. § 2805(d), (e)(2)*; *see Union Oil v. O'Riley (1990) 226 Cal. App. 3d 199, 214-215, 276 Cal. Rptr. 483* (upholding $40,000 punitive damage award on grounds that defendant acted in willful disregard of notice requirements, created indebtedness by delivering oil while franchisee was in hospital, and in fact was retaliating for franchisee's complaints)].

No franchisor may require, as a condition of entering into or renewing the franchise relationship, that a franchisee release or waive any right that the franchisee has under the PMPA, any other federal law, or any applicable state law [*15 U.S.C. § 2805(f)(1)*]. Further, no provision of any franchise will be valid or enforceable if the provision specifies that the interpretation or enforcement of the franchise will be governed by the law of any state other than the state in which the franchisee has its principal place of business [*15 U.S.C. § 2805(f)(2)*].

[7] Concurrent State and Federal Jurisdiction

State courts have concurrent jurisdiction with federal courts over PMPA claims [*Union Oil v. O'Riley (1990) 226 Cal. App. 3d 199, 204, 276 Cal. Rptr. 483]* . This position is at odds with earlier holdings in *Rustom v. Atlantic Richfield Co. (D.C. Cal. 1985) 618 F. Supp. 210* , and *Niakan v. Samaan (1988) 199 Cal. App. 3d 716, 245 Cal. Rptr. 24* . Nevertheless, it seems to reflect the intention of the United States Supreme Court in vacating the previous state court judgment of dismissal in *O'Riley* and remanding the case for further consideration in light of *Tafflin v. Levitt (1990) 493 U.S. 455, 110 S. Ct.792, 107 L. Ed. 2d 887* , which held that state courts had concurrent jurisdiction over RICO suits (Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C. § 1961 et seq.*) [*Union Oil v. O'Riley (1990) 226 Cal. App. 3d 199, 202, 204, 276 Cal. Rptr. 483]* .

The grant of federal jurisdiction in *15 U.S.C. § 2805(a)* is permissive, not mandatory. The presumption of concurrent jurisdiction is not to be lightly discarded, and random comments in the congressional discussion about federal judges and actions in district court are not sufficient to overcome the presumption of concurrent jurisdiction. Nor do desire for uniformity or reference in the PMPA to federal rules of procedure create a clear incompatibility with federal interests or necessitate a finding that Congress meant only federal courts to rule on PMPA matters [*Union Oil v. O'Riley (1990) 226 Cal. App. 3d 199, 204, 276 Cal. Rptr. 483]* .

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45-515 California Forms of Pleading and Practice--Annotated § 515.112

§ 515.112 Definitions Applicable to California Petroleum Franchises

The definitions applicable to California legislation governing the termination, cancellation, and nonrenewal of petroleum products franchises, a petroleum products franchisee's dealings with outside suppliers, the right to designate a successor in interest and transfer the franchise, and hours of business are the same as those that apply to the federal Petroleum marketing Practices Act, discussed in *§ 515.111[3][a]* [*compare 15 U.S.C. § 2801 with Bus. & Prof. Code §§ 20999* (termination, cancellation, and nonrenewal of franchise), 21140 (franchisee's dealings with outside suppliers and designation of successor in interest), 21150 (franchisee's hours of business and operation)].

California statute broadens the definition of the term "fuel" to include gasoline, diesel, gasohol, or aviation fuel, in contrast to the more limited definition of fuel as motor fuel under federal law [*compare Bus. & Prof. Code §§ 20999(l), 21140(k), 21150(k) with 15 U.S.C. § 2801(12)*]. In addition, California defines "marketing premises" to mean, in the case of any franchise, premises that, under such franchises, are to be employed by the franchisee in connection with the sale, consignment, or distribution of fuel [*Bus. & Prof. Code §§ 20999(h), 21140(g), 21150(g)*], and "leased marketing premises" to mean marketing premises owned, leased, or in any way controlled by a franchisor and that the franchisee is authorized or permitted by the franchise to employ in connection with the sale, consignment, or distribution of fuel [*Bus. & Prof. Code §§ 20999(i), 21140(h), 21150(h)*]. "Contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year are prima facie evidence of an agreement to deliver those levels [*Bus. & Prof. Code §§ 20999(j), 21140(i), 21150(i)*].

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45-515 California Forms of Pleading and Practice--Annotated § 515.113

§ 515.113 California Law of Termination, Cancellation, or Nonrenewal of Petroleum Products Franchises

[1] Preemption by Federal Law

The federal Petroleum Marketing Practices Act expressly provides for preemption of state legislation or regulation purporting to govern in identical areas of concern [*15 U.S.C. § 2806(a)(1)*; *see § 515.111*].

[2] Good Cause Required for Discontinuing Franchise

A franchisor may not terminate, cancel, or fail to or refuse to renew an existing franchise without good cause, notwithstanding the terms of the franchise [*Bus. & Prof. Code § 20999.1*]. This provision only prevents a franchisor from discontinuing a franchise when the franchise agreement gives the franchisor the right to do so on a ground other than that which constitutes good cause as discussed below. If the agreement terminates by its own terms, however, the provision does not apply. That is, discontinuance must be for good cause as specified in *Bus. & Prof. Code § 20999.1* if the franchisee is given some right of renewal or, in the case of termination or cancellation, the franchisor has canceled or terminated the franchise prior to the date of its expiration as provided in the agreement [*see Witt v. Union Oil Co. (1979) 99 Cal. App. 3d 435, 438-439, 160 Cal. Rptr. 285]* .

Good cause is limited to particular subject matter. It exists if the gasoline dealer or petroleum distributor failed to comply with essential and reasonable requirements of the franchise agreement. It is present also if either the distributor or dealer failed to act in good faith in carrying out the terms of the franchise [*Bus. & Prof. Code § 20999.1(a), (b)*].

Good cause also exists if the franchisor is withdrawing from the marketing location of a gasoline dealer's franchise. However, the franchisor must pay the dealer the current wholesale market value for all qualifying equipment and supplies purchased by the dealer from the franchisor or from an affiliate thereof. The phrase "qualifying equipment and supplies" means all equipment and supplies purchased by the gasoline dealer from the franchisor, or an affiliate thereof, that are (1) free and clear of all liens, security interests, and other encumbrances, (2) valued on a first-in, first-out basis, and (3) evidenced by receipted invoices. Additionally, these goods must (1) be in first-class and resalable condition, (2) remain in the original packages or containers, (3) bear the original labels and trademarks, and (4) display no evidence of

deterioration. This form of good cause is pertinent only to franchises entered into or renewed on or after January 1, 1979 [*Bus. & Prof. Code § 20999.1(c)*].

Although *Bus. & Prof. Code § 20999.1(d)* also provides that good cause may arise for other legitimate business reasons (except that a termination or cancellation of a franchise for the purpose of enabling the petroleum distributor or manufacturer to assume operation of the distributor's or gasoline dealer's business shall not be considered to be a legitimate business reason, unless the gasoline dealer or distributor is paid reasonable compensation for the value of the franchise, including a reasonable amount for goodwill), this provision has been held to be preempted by *15 U.S.C. § 2802(b)(2)(C)* because it is not the same as the PMPA, and therefore it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [*California Arco Distributors, Inc. v. Atlantic Richfield Co. (1984) 158 Cal. App. 3d 349, 360-363, 204 Cal. Rptr. 743* ; *but see* concurrence in *E. S. Bills, Inc. v. Tzucanow (1985) 38 Cal. 3d 824, 835-838, 215 Cal. Rptr. 278, 700 P.2d 1280* (claiming *Bus. & Prof. Code § 20999.1* is valid)].

[3] Right to Counsel

A petroleum distributor may not deny to any present or prospective gasoline dealer the right to be accompanied by counsel or a personal representative to any meeting held between the parties for the purpose of negotiating the terms of a franchise [*Bus. & Prof. Code § 20999.2*].

[4] Liability

Anyone who violates the termination, cancellation, or nonrenewal requirements pertaining to petroleum products franchises may be sued in the superior court in the county in which either the defendant resides or a franchise affected by the violation does business. Suit may be for temporary and permanent injunctive relief as well as for damages, if any, and the costs of suit [*Bus. & Prof. Code § 20999.3(a)*]. The proceeding must be brought within two years after the violation on which it is based or one year after the plaintiff's discovery of the facts constituting the violation, whichever occurs first [*Bus. & Prof. Code § 20999.3(b)*].

[5] Notification of Franchisor's Withdrawal

When a franchisor intends to withdraw from marketing fuel through retail and distribution outlets in the relevant geographic market area, the franchisor shall promptly submit notification to the Governor, together with a plan describing the schedule and conditions of withdrawal [*Bus. & Prof. Code § 20999.4*].

[6] Unlawful Detainer Action by Franchisor Against Franchisee

Except as provided in *Code Civ. Proc. § 1166a*, in any action for unlawful detainer brought by a petroleum distributor against a gasoline dealer, possession will not be restored to the petroleum distributor unless the court in the unlawful detainer action determines that the petroleum distributor had good cause under *Bus. & Prof. Code § 20999.1* to terminate, cancel, or refuse to renew the franchise of the gasoline dealer. In any action for unlawful detainer brought by a petroleum distributor against a gasoline dealer, the court may, at the time of request by either party, require the tenant to make rental payments into the court for the lessor at the contract rate, pending the resolution of the action [*Code Civ. Proc. § 1174(a)*]. However, at least the "other legitimate business reason" grounds of termination under *Bus. & Prof. Code § 20999.1(d)* seems to be preempted by the PMPA [*California Arco Distributors, Inc. v. Atlantic Richfield Co. (1984) 158 Cal. App. 3d 349, 360-363, 204 Cal. Rptr. 743* (holding *Bus. & Prof. Code § 20999.1(d)* preempted by *15 U.S.C. § 2802(b)(2)(C)*; *but see* concurrence in *E. S. Bills, Inc. v. Tzucanow (1985) 38 Cal. 3d 824, 835-838, 215 Cal. Rptr. 278, 700 P.2d 1280* (claiming *Bus. & Prof. Code § 20999.1* is valid)]. In a case in which the PMPA is clearly inapplicable, a trial court's exclusion of evidence crucial to defendant's ability to disprove the good cause requisite to a judgment for plaintiff under *Code Civ. Proc. § 1174(a)* and *Bus. & Prof. Code § 20999.1* is grounds for reversal [*E. S. Bills, Inc. v. Tzucanow (1985) 38 Cal. 3d 824, 828, 835, 215 Cal. Rptr. 278, 700 P.2d 1280]* . *Code Civ. Proc. § 1166a* relates to obtaining immediate possession; for discussion, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

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45-515 California Forms of Pleading and Practice--Annotated § 515.114

§ 515.114 Regulation of Petroleum Products Franchisee's Dealings With Outside Suppliers

[1] Definitions

The definitions of "franchise," "franchisor," "franchisee," "trademark," "refiner," "retailer," and "distributor," for purposes of regulating dealings between franchisees and suppliers other than their franchisors, conform with the definitions provided under the federal Petroleum Marketing Practices Act [Bus. & Prof. Code § 21140; *15 U.S.C. § 2801*; *see § 515.211*]. In addition, for purposes of regulating these dealings, California provides the following definitions [*Bus. & Prof. Code § 21140(g)-(i), (k), (l)*]:

- "Marketing premises" are premises that under the franchise are to be employed by the franchisee in connection with the sale, consignment, or distribution of fuel.

- "Leased marketing premises" are premises owned, leased, or controlled by a franchisor, that the franchisee is authorized or permitted by franchise to employ.

- A "contract" is any oral or written agreement.

- "Fuel" is gasoline, diesel, gasohol, or aviation fuel.

- An "affiliate" is any person who, other than by franchise, controls, is controlled by, or is under common control with, any other person.

[2] When Franchisee May Resort to Outside Suppliers

Notwithstanding the terms of the franchise, a franchisee is not precluded from purchasing fuel from any available source if the franchisor is unable or refuses to supply the franchisee with fuel. Failure to deliver contracted, agreed on, or requested quantities of fuel within 72 hours of the specified contract time, agreement, or request constitutes an inability or refusal to supply the franchisee. However, nondelivery of such products by the franchisor due to accident,

fire, theft, or other similar acts does not constitute an inability or refusal to supply the franchisee. Additionally, the legislation does not permit a franchisee to purchase more fuel than may be allowed by any federal statute or regulation [*Bus. & Prof. Code § 21140.1*].

[3] Notice Requirements

Requests for deliveries of petroleum products may be telephoned to the franchisor. However, when the franchisee intends to seek these products from another supplier because the franchisor is unable or refuses to supply the products, a written request for the products must be made to the franchisor at least 48 hours before desired delivery. Once such notice has been given and the franchisor fails to deliver the products as contracted, agreed on, or requested, no further written request is required from the franchisee until such time as the franchisor notifies the franchisee in writing that the former is prepared to deliver contracted, agreed on, or requested quantities of the products [*Bus. & Prof. Code § 21140.1*].

[4] Disclosure to Consumer

If the franchisee sells petroleum products supplied from a source other than the franchisor, the franchisee must post a sign prominently disclosing this fact to the public on each pump dispensing the particular product so purchased. The sign may not be smaller than 8 inches by 10 inches, with letters no less than three inches in height [*Bus. & Prof. Code § 21140.1*].

[5] Prohibited Tie-in Requirements

It is illegal for a petroleum products franchisor to require a franchisee to purchase only those tires, batteries, motor oil, and other automotive accessories sold by the franchisor. A franchised retail gasoline dealer may sell any such accessories available to the dealer for retail sale [*Bus. & Prof. Code § 21140.2*].

[6] Civil Penalty

The franchisor's executive officer, representative, or agent who negotiates any contract in violation of the provisions governing a franchisee's outside dealings for petroleum products and automotive accessories, or who otherwise coerces a franchisee in violation of such provisions is liable for a civil penalty of up to $100,000 for each offense. The action may be brought by the attorney general, district attorney, county counsel, or city attorney [*Bus. & Prof. Code § 21140.3*].

[7] Civil Liability

Anyone injured in his or her business or property by reason of a violation of the provisions regulating franchisees' outside dealings for petroleum products may sue in any proper court in the county where the defendant or any agent of the defendant resides or is found, or where service may be obtained, without respect to the amount in controversy. Recovery is for treble damages sustained plus costs and attorney's fees. The action must be brought within four years after the cause of action accrues [*Bus. & Prof. Code § 21140.4*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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45-515 California Forms of Pleading and Practice--Annotated § 515.115

§ 515.115 Right of Franchisee to Designate Successor in Interest

[1] Definitions

The definitions applicable to the law allowing a petroleum products franchisee to designate a successor in interest to take over the franchise operation after the franchisee's death are the same as those *found in § 515.114[1]*.

[2] Designation of Successor

It is unlawful to include in a franchise agreement, on or after January 1, 1980, any term which provides for the termination of the franchise by the franchisor on the death of the franchisee if the latter, prior to his or her demise, designates a successor in interest in a form prescribed by and delivered to the franchisor [*Bus. & Prof. Code § 21140.6(a)*]. The "successor in interest" is restricted to either a surviving spouse or adult child of the franchisee who, at the time of the franchisee's death, meets the reasonable qualifications then being required of dealers by the franchisor for the operation of service stations [*Bus. & Prof. Code § 21140.6(b)*]. The designated successor provisions do not apply to a "trial franchise" as defined in the Petroleum Marketing Practices Act [*Bus. & Prof. Code § 21140.6(c)*; *see 15 U.S.C. § 2803(b)*; *see also § 515.111[5]*].

[3] Successor's Assumption of Franchise

The designated successor in interest must be allowed 21 days after the franchisee's death to give written notice of his or her election to assume and operate the franchise. The notification should contain such information regarding business experience and creditworthiness as is reasonably required by the franchisor. The successor should offer to assume the franchise in writing three business days after the election and must commence operation of the franchise within 10 days after it has been assumed [*Bus. & Prof. Code § 21140.6(d)*].

[4] Franchisor's Requirements for Designation

The franchisor may require a franchisee who desires to designate a successor in interest to deposit with the franchisor at

the time of designation a sum that would be reasonably estimated to be necessary to compensate the franchisor for rent for a period of 21 days. The deposit is intended to compensate the franchisor if the designee, during the 21-day period after the franchisee's death, fails to assume the franchise obligation. Any unearned portion of the deposit resulting from an earlier assumption of the responsibility, or from the franchisor's temporary operation of the facility during that time period, must be refunded to the estate or legal representative of the deceased franchisee. In addition to the deposit, the franchisor may require a franchisee desiring to designate a successor to arrange for the discharge or performance of other franchise obligations, such as insurance--but excluding any obligation to be open to the public--for a period of up to 21 days after the franchisee's demise [*Bus. & Prof. Code § 21140.6(e)*].

[5] Nature of Interest Devolving

Bus. & Prof. Code § 21140.6, entitling a franchisee to designate a successor in interest, does not entitle the successor to a greater or lesser franchise than existed in the name of the deceased franchisee at the time of death. This section also neither expands nor diminishes the rights of the franchisor or the franchisee under federal or state law [*see Bus. & Prof. Code § 21140.6(f)*]. All actions to be performed by the franchisor or successor in interest must be done in a reasonable time in each instance [*Bus. & Prof. Code § 21140.6(h)*].

[6] Procedure as Between Alternate Successors

The franchisee may designate a primary and one alternate successor in interest. The alternate, if one is designated, has no rights under the protective legislation in the event of any exercise of rights by the primary successor. If the alternate desires to assume and operate the franchise in the event the primary successsor fails to do so, the alternate must give notice of the election and otherwise comply with the requirements incumbent on the primary successor in giving notice and assuming the franchise [*Bus. & Prof. Code § 21140.6(g)*; *see Bus. & Prof. Code § 21140.6(d)*].

[7] Interim Procedure Preceding Successor's Assumption of Franchise

The franchise may not be operated by anyone following the death of the franchisee until all parts of the franchise have been expressly assumed as provided in *Bus. & Prof. Code § 21140.6*. Assumption includes, but is not limited to, such items as leases, products agreement, loaned equipment agreement, federal and state environmental law compliance agreements, licensing, and tax permits. This prohibition does not prevent the franchisor from operating the franchise for his or her own account, nor does it prevent any operation the franchisor agrees to in writing otherwise [*Bus. & Prof. Code § 21140.6(i)*].

If the franchisor elects to operate the franchise for his or her own account, it is without obligation or duty to the heirs or estate of the deceased franchisee or to the successor in interest. The franchisor, however, must account to the heirs or the deceased franchisee's estate for the inapplicable portion of any prepaid rent or other sums prepaid to the franchisor, and for any physical inventory salvaged from the franchise and used or sold by the franchisor [*Bus. & Prof. Code § 21140.6(j)*]. Similarly, if the successor in interest assumes the franchise and there has been no intervening operation thereof by the franchisor, the successor must account to the heirs or estate of the deceased franchisee for the value or other disposition of personal property of the franchisee located at or related to the franchise [*Bus. & Prof. Code § 21140.6(k)*].

[8] Liability

Although *Bus. & Prof. Code § 21140.6* does not specifically provide for an action for violation of the successor in interest requirements, it does state that liability for failure to comply with the requirements is limited to regular contract damages as provided in *Civ. Code § 3300*--that is, the amount which will compensate the aggrieved party for all the detriment proximately caused by the breach of obligation, or which, in the ordinary course of things, would be likely to result therefrom. It also provides that an action must be commenced within one year after the cause of action accrues [*Bus. & Prof. Code § 21140.6(l)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesAssignments & TransfersBusiness & Corporate LawDistributorships & FranchisesCauses of ActionGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRemediesCompensatory DamagesEnergy & Utilities LawOil IndustryFranchising & MarketingGovernmentsLegislationStatutes of LimitationsTime Limitations

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45-515 California Forms of Pleading and Practice--Annotated § 515.116

§ 515.116 Petroleum Products Franchisee's Ability to Transfer Franchises

[1] Franchises Affected

Bus. & Prof. Code §§ 21148-21149 restrict the ability of the franchisor to withhold consent to a proposed sale of a petroleum products franchise by the franchisee, if the franchise was entered into after 1980 [Stats. 1980, ch. 698, § 4; *see Kreisher v. Mobil Oil Corp. (1988) 198 Cal. App. 3d 389, 403-405, 243 Cal. Rptr. 662* (Corp. Code § 21148 not retroactive; statute did not require franchisor to consent to assignment of lease executed in 1980, for term commencing January 1, 1981)]. The definitions applicable to this legislation are the same as those discussed in *§ 515.211*.

[2] Restrictions on Franchisor's Withholding Consent

Notwithstanding the terms of the petroleum products franchise, generally the franchisor may not withhold consent to the sale, transfer, or assignment of the franchise by the franchisee to someone else. Statutory exemptions to this general rule permit the franchisor to withhold consent if the franchisor demonstrates in writing to the franchisee, within 45 days of receiving the application or required paperwork, any of five conditions. The franchisor may withhold consent if the proposed purchaser either has less business experience and training or less financial resources than are normally required by the franchisor of prospective franchisees or does not satisfy the then-current, uniformly applied requirements, if any, of the franchisor applicable to prospective franchisees [*Bus. & Prof. Code § 21148(a)(1)-(3)*; *see California Service Station etc. Assn. v Union Oil Co. (1991) 232 Cal. App. 3d 44, 51-53, 283 Cal. Rptr. 279* (provision regarding satisfaction of then-current uniform requirements, is not preempted by PMPA)]. Consent may also be refused if the purchaser operates a franchise under an agreement with a different franchisor, and the then-current, uniformly applied requirements of the franchisor, if any, preclude operating franchises of other franchisors [Corp. Code § 21148(a)(4)]. Finally, consent may be withheld if the franchisee has not offered the proposed transaction in writing to the franchisor on the same terms and conditions as those offered to the proposed purchaser, and allowed the franchisor at least 30 days prior to the proposed transaction in which to accept or decline the offer [*Bus. & Prof. Code § 21148(a)(5)*].

Notwithstanding the terms of any franchise, a franchisor may not withhold its consent to the sale, transfer, or

assignment of the franchise by the franchisee to another person for the purposes of diminishing the market value of the franchise [Corp. Code § 21148(b)]. Further, notwithstanding the terms of any franchise, a franchisor may not withhold its consent to the sale, transfer, or assignment of the franchise by the franchisee to another person because that other person is of foreign origin or is non-English speaking, as long as the prospective franchisee is able to adequately able to communicate with the franchisor and the appropriate federal, state, and local governmental agencies concerning matters of management, operations, environmental compliance, and public safety [Corp. Code § 21148(c)].

A franchisor's "uniformly applied requirements" allowing three-year franchises with renewal options to franchisees who had previously held a franchise with the franchisor but only allowing one-year franchises terminable at any time for any reason to persons who had not previously held one of its franchises was found to violate *Bus. & Prof. Code § 21148*. The effect of the franchisor's policy was to prevent franchisees from selling or assigning the unexpired portions of their franchises to anyone except persons who were or had previously been franchisees of the same franchisor [*California Service Station etc. Assn. v Union Oil Co. (1991) 232 Cal. App. 3d 44, 56, 283 Cal. Rptr. 279* (further implementation of franchisor's practice enjoined under *Bus. & Prof. Code § 17204*)].

These exceptions do not apply in the care of a sale, transfer, or assignment of the franchise to a corporation in which the franchisee has a controlling interest if the franchisee offers in writing to guarantee personally the corporation's performance of its obligations under the franchise [*Bus. & Prof. Code § 21149*].

[3] Transfer Fee

If the franchisor consents to the sale, transfer, or assignment of the petroleum products franchise to a prospective purchaser, the franchisor may require the franchisee to pay a transfer fee to the franchisor. The amount of this fee must be reasonable when compared to the sale price of the franchise, and it may not be required in an effort to frustrate the proposed sale [*Bus. & Prof. Code § 21148(d)*].

Legal Topics:

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

§§ 515.117[Reserved]

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§ 515.130 Governing Law

The subject of new motor dealership franchises in California is covered in *Veh. Code §§ 331-331.3, 507*, and *3060-3069*. Administrative regulations of the New Motor Vehicle Board are contained in *13 Cal. Code Reg. §§ 585-592*. California law also regulates recreational vehicle franchises in *Veh. Code §§ 331.3* (definition), 11713.22, and 11713.23 [*see* discussion in *§ 515.150*].

Federal law also gives a franchise automobile dealer a remedy of civil suit in federal court when an automobile manufacturer or distributor engaged in interstate commerce fails to act in good faith in performing or complying with any term of the franchise or in terminating, cancelling, or not renewing the franchise [*see 15 U.S.C. § 1221*; *see generally 15 U.S.C. §§ 1221-1225*]. Federal law does not invalidate any provision of state law except when there is a direct conflict between the two laws [*see 15 U.S.C. § 1225*]. Presently, there appears to be no such conflict between federal and California law.

Legal Topics:

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

[1] "Franchise"

A new motor vehicle dealership franchise is a written agreement between two or more persons having all of the following conditions [*Veh. Code § 331(a)*]:

- A commercial relationship of definite duration or continuing indefinite duration [*Veh. Code § 331(a)(1)*].

- The franchisee is granted the right to offer for sale or lease, or to sell or lease at retail, new motor vehicles or new trailers subject to identification pursuant to *Veh. Code § 5014.1* manufactured or distributed by the franchisor, or the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities [*Veh. Code § 331(a)(2)*].

- The franchisee constitutes a component of the franchisor's distribution system [*Veh. Code § 331(a)(3)*].

- The operation of the franchisee's business is substantially associated with the franchisor's trademark, trade name, advertising, or other commercial symbol designating the franchisor [*Veh. Code § 331(a)(4)*].

- The operation of a portion of the franchisee's business substantially depends on the franchisor for a continued supply of new vehicles, parts, or accessories [*Veh. Code § 331(a)(5)*].

The term "franchise" does *not* include an agreement entered into by a manufacturer or distributor and a person who [*Veh. Code § 331(b)*]:

- Is authorized to perform warranty repairs and service on vehicles manufactured or distributed by the

manufacturer or distributor;

- Is not a new motor vehicle dealer franchisee of the manufacturer or distributor; and

- Has a repair and service facility not located within the relevant market area of a new motor vehicle dealer franchisee of the manufacturer or distributor.

[2] Franchise Parties

The franchisor is a manufacturer, assembler, or distributor of new motor vehicles subject to registration under the Vehicle Code or new off-highway motorcycles [*see Veh. Code § 436* (definition)], new all-terrain vehicles [*see Veh. Code § 111* (definition)], or new trailers subject to identification pursuant to *Veh. Code § 5014.1*, who grants the franchise [*Veh. Code § 331.2*]. The franchisee receives new motor vehicles, new off-highway motorcycles, new all-terrain vehicles, or new trailers subject to identification pursuant to *Veh. Code § 5014.1* from the franchisor and offers them for sale or lease at retail, or sells or leases them at retail, or is granted the right to perform authorized warranty repairs and service or the right to perform any combination of these activities [*Veh. Code § 331.1*].

[3] "Relevant Market Area"

The "relevant market area" involved in new motor vehicle franchising is any area within a radius of 10 miles from the site of a potential new dealership [*Veh. Code § 507*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 515.132 Applicability and Administration of New Motor Vehicle Dealership Franchise Legislation

The special legislation governing new motor vehicle dealership franchises applies to all such dealership franchises regardless of when a franchise was established [*Veh. Code § 3069*].

The legislation is administered through the New Motor Vehicle Board (contained in the Department of Motor Vehicles), which hears disputes over licensing within the motor vehicle industry, disposes of complaints concerning licensee practices, and hears and considers protests presented by new motor vehicle dealership franchisees [*Veh. Code § 3050(b)-(d)*].

In response to court decisions holding the composition of the Board to be an unconstitutional denial of due process in disputes between dealers and new car manufacturers, and in protests regarding termination, establishment, or relocation of dealerships, even when the dealers did not participate as voting members because of a substantial probability of bias, the powers of the dealer members of the board were redefined effective September 29, 1985 [*see Nissan Motor Corp. v. New Motor Vehicle Bd. (1984) 153 Cal. App. 3d 109, 113, 202 Cal. Rptr. 1* (any decision of improperly constituted board is void); *see also University Ford Chrysler-Plymouth,Inc. v. New Motor Vehicle Bd. (1986) 179 Cal. App. 3d 796, 804-806, 224 Cal. Rptr. 908* (policy of new vehicle dealer board members, implemented after *Nissan* decision, to automatically recuse themselves from participation, hearing, commenting on, or advising on dealer-manufacturer disputes as not curing unconstitutionality in statute as amended in 1979); *Chevrolet Motor Division v. New Motor Vehicle Bd. (1983) 146 Cal. App. 3d 533, 539, 541, 194 Cal. Rptr. 270* ; *but see American Isuzu Motors, Inc. v. New Motor Vehicle Bd. (1986) 186 Cal. App. 3d 464, 469-473, 230 Cal. Rptr. 769* (upholding decision of board heard under voluntary recusal policy as no prejudice shown)]. Since then, members of the board who are new motor vehicle dealers cannot participate in, hear, comment, advise other members on, or decide (1) any matter considered by the board pursuant to *Veh. Code § 11700 et seq.* (licensing) that involves a dispute between a franchisee and a franchisor [*Veh. Code § 3050(c)*], or (2) any matter involving a protest filed pursuant to *Veh. Code § 3060 et seq.* (termination, establishment, or relocation of dealerships, delivery, preparation, and warranty obligations) [*Veh. Code §§ 3050(d), 3066(d)* (allowing participation upon stipulation of all parties to protest); *see British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd. (1987) 194 Cal. App. 3d 81, 87-89, 239 Cal. Rptr. 280* (recusal and nonparticipation of four

dealer members as sufficient to protect distributor's due process rights)].

The New Motor Vehicle Board may also mediate, arbitrate, or otherwise resolve any honest difference of opinion between any member of the public and any new motor vehicle dealer, manufacturer, manufacturer branch, distributor branch, or representative [*Veh. Code § 3050(c)*; *but see Tovas v. American Honda Motor Co. (1997) 57 Cal. App. 4th 506, 509, 67 Cal. Rptr. 2d 145* ; *Hardin Oldsmobile v. New Motor Vehicle Board (1997) 52 Cal. App. 4th 585, 598, 60 Cal. Rptr. 2d 583* ; *discussed under § 515.142[1]*]. Third-party dispute resolution processes used to resolve disputes between buyers and manufacturers relating to the manufacturer's failure, after reasonable attempts at repair, to conform a new motor vehicle to express warranties are discusssed in Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* and Ch. 502, *Sales: Warranties.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesAlternative Dispute ResolutionBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureEnforcement

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§ 515.133 Procedure for Terminating or Refusing to Continue Franchise

Notwithstanding *Bus. & Prof. Code § 20999.1* or the terms of the franchise, a new motor vehicle franchisor may not terminate or refuse to continue an existing franchise unless all of the following conditions are met [*see Veh. Code § 3060(a)*]:

First, the franchisee and the New Motor Vehicle Board must have received written notice from the franchisor. The notice must be received at least 60 days before its effective date and must set forth specific grounds for terminating or refusing to continue. The notice is effective, however, if it is received 15 days before its effective date and if (1) an ownership or an interest in the franchise is transferred without the consent of the franchisor, as long as the consent was not unreasonably withheld; (2) the franchisee made a misrepresentation in applying for the franchise; (3) the franchisee is insolvent or bankruptcy or receivership proceedings have been commenced by or against the franchisee; (4) the franchisee engages in an unfair business practice after having been warned thereof; or (5) the motor vehicle dealer failed to conduct its customary sales and service operations during its customary hours of business for seven consecutive business days, giving rise to a good faith belief on the part of the franchisor that the motor vehicle dealer is in fact going out of business, except when this failure to conduct sales and service operations was due to circumstances beyond the direct control of the motor vehicle dealer or by order of the Department of Motor Vehicles [*Veh. Code § 3060(a)(1)*].

Second, if the franchisee files a protest with the board within 30 days after receiving a 60-day notice or within 30 days after the end of any appeal procedure provided by the franchisor, or 10 days after a 15-day notice, or within 10 days after the end of any appeal procedure provided by the franchisor, the board must hold a hearing, as provided in *Veh. Code § 3066*, after advising the franchisor that a protest has been filed, and it must find that there is good cause for terminating or refusing to continue the franchise [*Veh. Code § 3060(a)(2)*]. The 10-day or 15-day period within which the franchisee must file a protest does not begin until the manufacturer or distributor has sent proper notices of termination to both the dealer and the board. Thus, in a case in which no notice was given to the board and the notice to the dealer did not give a reason for the termination, a protest filed more than a year from the date of termination was considered timely [*British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd. (1987) 194 Cal. App. 3d 81, 93-94, 239 Cal. Rptr. 280]* .

Third, the franchisor must receive the written consent of the franchisee, or the appropriate period for filing a protest must have elapsed [*Veh. Code § 3060(a)(3)*; *see British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd. (1987) 194 Cal. App. 3d 81, 93-94, 239 Cal. Rptr. 280* (defective notice does not trigger period for filing protest)].

If a franchise has expired by its terms and without an express agreement between the dealer and the manufacturer to extend it, the court will look to the conduct of the parties to determine if there is an implied extension. Sending notice of termination during a period not covered an express extension has been held to manifest an agreement to continue the franchise beyond its stated expiration date [*British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd. (1987) 194 Cal. App. 3d 81, 91-92, 239 Cal. Rptr. 280]* .

If the franchisee files a protest pursuant to *Veh. Code § 3060* and the undisputed facts show good cause for termination of the franchise, the New Motor Vehicle Board has implied authority to dismiss the protest [*Duarte & Witting, Inc. v. New Motor Vehicle Board (2002) 104 Cal. App. 4th 626, 637, 128 Cal. Rptr. 2d 501* (although Board did not have express statutory authority to dismiss, purpose of Board and goal of administrative efficiency supported conclusion that Board had implied authority to dismiss protest when undisputed facts demonstrated good cause for franchise termination as matter of law and afforded no basis for preventing termination of franchise)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 515.134 Modification or Replacement of Franchise

The franchisor must not modify or replace a franchise with a succeeding franchise without adequate written notice [*see Veh. Code § 3060(b)(2)* (contents of notice)], or within 10 days after the end of any appeal procedure provided by the franchisor if that action would substantially affect the franchisee's sales or service obligations or investment. Notice must be given to the board and to each affected franchisee at least 60 days in advance of the action being taken [*Veh. Code § 3060(b)(1)*].

Within 30 days of receipt of the notice, or within 30 days after the end of any appeal procedure provided by the franchisor, a franchisee may file a protest with the board. The modification or replacement does not become effective until the board finds that there is good cause for that action. However, if a replacement franchise is the successor franchise to an expiring or expired term franchise, the prior franchise continues in effect until resolution of the protest by the board. If there are multiple protests, hearings are consolidated to expedite disposition of the issue [*Veh. Code § 3060(b)(1)*].

If a dealership agreement grants the franchisee an exclusive, nonmodifiable trading area beyond its statutory "relevant market area," and the franchisor seeks to establish another dealership within the exclusive trading area, the encroachment may constitute a modification of the franchise that would entitle the dealer to protest under *Veh. Code § 3060* [*Ri-Joyce, Inc. v. New Motor Vehicle Bd. (1992) 2 Cal. App. 4th 445, 456, 3 Cal. Rptr. 2d 546]* . The dealership agreement in *Ri-Joyce* provided that the franchisor could establish a new dealership "near" the franchisee's existing one, but only if (1) the franchisor's business expectations were not being fulfilled, (2) the franchisor determined that it would be in the best interests of itself or its customers to do so, (3) it gave the dealer 60 days' notice of the intended action, and (4) during the 60 days, had discussed reasonable alternatives with the dealer. The term "near" was not defined, but could reasonably be interpreted (as urged by the dealer) to extend beyond the statutory relevant market area into a community (Petaluma) previously served by the dealer (Santa Rosa) and from which it derived a significant portion of its business. When a dealership agreement is reasonably susceptible to the meaning urged by the dealer, the Board must hear and consider the dealer's extrinsic evidence to determine what rights are granted by the agreement and whether the franchisor's action constitutes a modification. If the Board finds a modification, it would have to proceed with further

consideration of the protest, determining whether the agreement's requirements were met in good faith [*Ri-Joyce, Inc. v. New Motor Vehicle Bd. (1992) 2 Cal. App. 4th 445, 457-458, 3 Cal. Rptr. 2d 546]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 515.135 Criteria for Board's Disposition of Issue of Discontinuation or Alteration of Franchise

The first step in evaluating a protested modification is to determine what rights were granted under the franchise agreement. Within the meaning of *Veh. Code § 3060* a franchise is a written agreement subject to the normal rules relating to interpretation of contracts [*see Ri-Joyce, Inc. v. New Motor Vehicle Bd. (1992) 2 Cal. App. 4th 445, 458, 3 Cal. Rptr. 2d 546* (*discussed under § 515.134* with respect to whether establishment of new dealership outside statutory relevant market area may be modification under particular agreement, thus entitling dealer to protest)].

In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board takes into consideration the existing circumstances including any of the following [*Veh. Code § 3061*]:

- The amount of business transacted by the franchisee as compared to the business available to the franchisee.
- The investment necessarily made and obligations incurred by the franchisee.
- The permanence of the investment.
- The effect on the public welfare.
- Adequacy of the franchisee's facilities, equipment, parts, and personnel.
- Adequacy of services to the public.
- Fulfillment of warranty obligations by the franchisee.
- The franchisee's compliance with the terms of the franchise.

- Any similar relevant circumstances.

The board, however, is not required to take evidence on each of the listed factors. For example, if a franchise is terminated because the manufacturer stops making the product, a dealer's proof that it has performed its obligations will not avoid termination [*Duarte & Witting, Inc. v. New Motor Vehicle Board (2002) 104 Cal. App. 4th 626, 642-643, 128 Cal. Rptr. 2d 501* (board did not commit prejudicial abuse of discretion by refusing to conduct hearing on good cause factors in *Veh. Code § 3061*)].

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§ 515.136 Establishment of Additional Dealership or Relocation of Existing One

A franchisor sometimes seeks to enter into a franchise establishing an additional motor vehicle dealership or a satellite warranty facility [*see Veh. Code § 3062(e)(1), (2)* (definitions of motor vehicle dealership and satellite warranty facility); *see also § 515.137*] within a relevant market area where the same line-make is already represented, or relocating an existing dealership. Except for nominal relocations, the franchisor first is required to notify, in writing, the board and each franchisee in that line-make in the relevant market area of the franchisor's intention to establish an additional dealership or to relocate an existing one within or into that area [*Veh. Code § 3062(a)(1)*].

Any franchisee required to be given the notice may file with the board a protest to the proposed action within 20 days of receiving the notice or within 20 days after the end of any appeal procedure provided by the franchisor. If within this time a franchisee files with the board a request for additional time to file a protest, the board or its executive director, upon a showing of good cause, may grant an additional 10 days to file the protest. The board then informs the franchisor of the timely protest, the required hearing, and the automatic hold placed on the proposed action until the hearing. The board also will caution the franchisor that the action cannot take place at all if the board determines that there is good cause for not permitting the proposed establishment or relocation of the dealership. Hearings may be consolidated in the event of multiple protests [*Veh. Code § 3062(a)(1)*; *see New Motor Vehicle Bd. v. Orrin W. Fox Co. (1978) 439 U.S. 96, 108, 99 S. Ct. 403, 58 L. Ed. 2d 361* ; *Chrysler Corp. v. New Motor Vehicle Bd. (1979) 89 Cal. App. 3d 1034, 1041, 1043, 153 Cal. Rptr. 135* (holding *Veh. Code § 3062* to be constitutional)].

Nothing in the New Motor Vehicle Board Act prevents a franchisor from reserving for itself, in a dealership agreement, an unqualified right to establish a new dealership. If a franchisor has reserved that right, the franchisee is not entitled to object to the establishment of the new dealership beyond its relevant market area, that is, more than 10 miles away [*Ri-Joyce, Inc. v. New Motor Vehicle Bd. (1992) 2 Cal. App. 4th 445, 456, 3 Cal. Rptr. 2d 546* (construing the holding in *BMW of North America, Inc. v. New Motor Vehicle Bd. (1984) 162 Cal. App. 3d 980, 991, 209 Cal. Rptr. 50*)]. On the other hand, if the dealership agreement grants the franchisee an exclusive, nonmodifiable trading area beyond its statutory "relevant market area," and the franchisor seeks to establish another dealership within the exclusive trading area, the encroachment may constitute a modification of the franchise, which would entitle the dealer to protest under

Veh. Code § 3060 [*Ri-Joyce, Inc. v. New Motor Vehicle Bd. (1992) 2 Cal. App. 4th 445, 456, 3 Cal. Rptr. 2d 546* ; *see § 515.134*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 515.137 Establishment of Satellite Warranty Facility or Relocation of Existing One

If a franchisee seeks to enter into a franchise that authorizes a satellite warranty facility [*see Veh. Code § 3062(e)(2)* (definition)] to be established at, or relocated to, a proposed location which is within two miles of any dealership of the same line-make, the franchisor must first give written notice [*see Veh. Code § 3062(a)(3)* (contents of notice)] of the intention to establish or relocate a satellite warranty facility at the proposed location to the board and each franchisee operating a dealership of the same line-make within two miles of the proposed location [*Veh. Code § 3062(a)(2)*]. Within 20 days of receiving the notice or 20 days after the end of any appeal procedure provided by the franchisor, any franchisee required to be given the notice may file with the board a protest to the establishing or relocating of the satellite warranty facility. If within this time the franchisee files with the board a request for additional time to file a protest, an additional 10 days to file may be granted upon a showing of good cause. When such a protest is filed, the board must inform the franchisor that a timely protest has been filed, that a hearing is required, and that the franchisor must not establish or relocate the proposed satellite warranty facility until the board has held the hearing, nor thereafter if the board has determined that there is good cause for not permitting the satellite warranty facility. If multiple protests are filed, hearings may be consolidated to expedite the disposition of the issue [*Veh. Code § 3062(a)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 515.138 Criteria for Board Disposition of Issue of Establishment or Relocation

The board determines whether good cause has been established for not entering into or relocating an additional franchise for the same line-make by considering the following circumstances [*Veh. Code § 3063*]:

- Permanence of the investment and its effect on the vehicle business and the consuming public.
- Whether the investment is injurious to the public welfare.
- Adequacy of present competition and consumer care (including sales and service facilities, equipment, supply of vehicle parts, and qualified service personnel).
- Desirability of increased competition.
- Any other circumstances.

These standards suggest that the board balance (1) the dealers' interest in maintaining viable businesses, (2) the manufacturer's interest in promoting sales, and (3) the public's interest in adequate competition and convenient service [*see Piano v. California ex rel. New Motor Vehicle Bd. (1980) 103 Cal. App. 3d 412, 417, 418, 163 Cal. Rptr. 41]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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45-515 California Forms of Pleading and Practice--Annotated § 515.139

§ 515.139 Delivery and Preparation

[1] Franchisor's Requirements as to Franchisee's Obligations

The franchisor must specify to the franchisee the delivery and preparation obligations of the latter prior to delivery of new motor vehicles to retail buyers. These obligations constitute the franchisee's only responsibility to the franchisor for product liability; however, they do not affect in any way the franchisee's responsibility for product liability between the purchaser and either the franchisee or franchisor. The franchisor must file a copy of the obligations with the board [*Veh. Code § 3064(a)*].

On delivery of the vehicle, the franchisee needs to give a copy of the delivery and preparation obligations to the purchaser, along with a written certification that the franchisee has fulfilled such obligations [*Veh. Code § 3064(b)*].

[2] Franchisor's Schedule of Compensation for Franchisee's Performance

The franchisor must draft a schedule of compensation to be paid to franchisees for the work and services they will be required to perform in connection with their obligations. The franchisor must file the schedule with the board. The compensation set forth on the schedule then constitutes the actual compensation to be remitted to the franchisee for performing these obligations [*Veh. Code § 3064(a)*].

The schedule of compensation must be reasonable and is subject to the approval of the board when a franchisee files a notice of protest with such body. In determining the reasonableness of the schedule, the board considers all relevant circumstances, including, but not limited to, the time required to perform each function that the dealer is obligated to perform, and the appropriate labor rate [*Veh. Code § 3064(a)*].

Legal Topics:

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§ 515.140 Warranty Work

[1] Compensation Schedule and Franchisee's Protest to Board

Similar provisions exist for warranty agreements [*Veh. Code § 3065*] and warranty incentive programs [*Veh. Code § 3065.1*]. The provisions applicable to warranty incentive programs are discussed below. With respect to warranty agreements, a franchisor must properly fulfill every warranty agreement it makes. It must compensate each of its franchisees adequately and fairly for labor and parts used when the franchisee has fulfilled warranty obligations of repair and servicing. A copy of the warranty reimbursement schedule or formula must be filed with the board. The schedule or formula must be reasonable with respect to the time and compensation allowed the franchisee for the warranty work and all other conditions of such obligation. The reasonableness of the schedule or formula is subject to the board's determination when a notice of protest is filed by a franchisee [*Veh. Code § 3065(a)*]. The Board has jurisdiction over all aspects of Section 3065 and its implementation. *Veh. Code § 3050(c)* grants the Board authority to consider any matter involving warranty reimbursement practices, including a petition seeking an order that the franchisor cease and desist making statements that formed the basis for a slander action. The statements alleged to have been made by the franchisor after an audit were that it was "pulling the franchise" because it had found evidence of "massive warranty fraud" that "hit a new record" [*Mathew Zaheri Corp. v. Mitsubishi Motor Sales (1993) 17 Cal. App. 4th 288, 291-295, 21 Cal. Rptr. 2d 325]* .

In determining the adequacy and fairness of the compensation, the franchisee's effective labor rate charged to its various retail customers may be considered along with other relevant criteria [*Veh. Code § 3065(b)*].

[2] Franchisee's Claim for Defective Parts or Warranty Compensation

The franchisee may make a claim on the franchisor that a particular part is defective. The claim must be approved or disapproved within 30 days after it is received by the franchisor. Any claim not specifically disapproved in writing within 30 days from receipt by the franchisor will be deemed approved on the 30th day. If the claim is disapproved, the franchisee who submitted it must be notified in writing within the required 30-day period. The notice needs to state the specific grounds on which the disapproval is based [*Veh. Code § 3065(d)*]. The franchisor may disallow a claim for a

defective part, alleging that the part is, in fact, not defective. In such a case the part must be returned to the franchisee at the expense of the franchisor, or else the franchisee must be reimbursed for the cost of the part, at the option of the franchisor [*Veh. Code § 3065(c)*].

A franchisor can disapprove a claim for warranty compensation only for good cause, such as performance of nonwarranty repairs, lack of material documentation, or fraud [*Veh. Code § 3065(e)*].

[3] Time for Payments, Audits, and Chargebacks

All claims made by franchisees for labor and parts must be paid within 30 days following approval by the franchisor. In individual instances failure to approve or pay within the specified time limits for reasons beyond the franchisor's reasonable control is not a violation of the governing law [*Veh. Code § 3065(d)*].

A franchisor may conduct audits of franchisee warranty records on a reasonable basis, and for a period of 12 months after a claim is paid or credit issued [*Veh. Code § 3065(e)*]. Any chargeback to a franchisee for warranty parts or service compensation must be made within 90 days of the completion of the audit. If a franchisee submitted a false claim with intent to defraud the franchisor, a longer period for audit and any resulting chargeback may be permitted if the franchisor obtains an order from the board [*Veh. Code § 3065(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 515.141 Claims Under Warranty Incentive Programs

The provisions governing warranty incentive programs [*Veh. Code § 3065.1*] are the same as, or substantially similar to, those governing warranty agreements in the following ways:

- All claims made by a franchisee for payment under the terms of a franchisor incentive program must be either approved or disapproved within 30 days after receipt by the franchisor [*Veh. Code § 3065.1(a)*].

- A claim for payment under the terms of a franchisor incentive program can be disapproved only for good cause, such as ineligibility under the terms of the incentive program, lack of material documentation, or fraud [*Veh. Code § 3065.1(b)*].

- When any claim is disapproved, the franchisor must notify the franchisee writing of its disapproval within the required (30-day) period, and each notice must state the specific grounds on which the disapproval is based [*Veh. Code § 3065.1(a)*].

- An approved claim must be paid within 30 days following approval [*Veh. Code § 3065.1(a)*].

- Any claim not specifically disapproved in writing within 30 days from receipt is deemed approved on the 30th day [*Veh. Code § 3065.1(a)*].

- Failure to approve or pay a claim under an incentive program within the above specified time limits, in individual instances for reasons beyond the reasonable control of the franchisor, does not constitute a violation of the governing law [*Veh. Code § 3065.1(a)*].

Following the disapproval of a claim for payment under the terms of a franchisor incentive program, a franchisee has one year from receipt of the notice of disapproval in which to appeal the disapproval to the franchisor and file a protest with the board [*Veh. Code § 3065.1(a)*].

The franchisor may audit the franchisee's incentive records on a reasonable basis for a period of 18 months after a claim is paid or credit issued [*Veh. Code § 3065.1(b)*; *see Veh. Code § 3065(e)* (12 months for warranty agreement)]. Following the audit, the franchisor has 90 days within which to make chargeback, except that a longer period applies if the franchisee submitted a false claim with the intent to defraud the franchisor, and the franchisor obtains an order from the board [*Veh. Code § 3065.1(b)*; *see Veh. Code § 3065(e)* (same rule applies to warranty agreements)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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45-515 California Forms of Pleading and Practice--Annotated § 515.142

§ 515.142 Board Hearing Procedure and Review of Decisions

[1] Grant of Authority

Veh. Code § 3050(c) grants the New Motor Vehicle Board authority to consider any matter concerning the activities or practices of any persons holding licenses as new motor vehicle dealer and/or manufacturer [*Mathew Zaheri Corp. v. Mitsubishi Motor Sales (1993) 17 Cal. App. 4th 288, 295, 21 Cal. Rptr. 2d 325* ; *see Duarte & Witting, Inc. v. New Motor Vehicle Board (2002) 104 Cal. App. 4th 626, 637, 128 Cal. Rptr. 2d 501* (when Board had subject matter jurisdiction over dispute but lacked authority to grant any remedy when franchise termination was due to discontinuation of product line, Board had implied authority to dismiss franchisee's protest)]. The Board, however, is a quasi-judicial administrative agency of limited jurisdiction. It does not have plenary authority to resolve any and all disputes which may arise between a franchisor and a franchisee [*Ri-Joyce, Inc. v. New Motor Vehicle Bd. (1992) 2 Cal. App. 4th 445, 455, 3 Cal. Rptr. 2d 546]* . The jurisdiction of the Board is limited to consideration and resolution of only a circumscribed domain of matters. Thus, one court has held that the New Motor Vehicles Board's assertion of jurisdiction over a dealer's state statutory and common-law claims arising out of allegations of the manufacturer's misdealing violated the judicial powers clause of California Constitution [*Hardin Oldsmobile v. New Motor Vehicle Board (1997) 52 Cal. App. 4th 585, 598, 60 Cal. Rptr. 2d 583]* . Another court, after examining the legislative history of *Veh. Code § 3050(c)*, has held that a cause of action for contractual interference based on tortious business practices independent of any franchise agreement, brought by a nonsignatory to a franchise agreement with Honda, is not the type of claim over which that section gives the Board jurisdiction [*Tovas v. American Honda Motor Co. (1997) 57 Cal. App. 4th 506, 509, 521, 67 Cal. Rptr. 2d 145]* .

Further, *Veh. Code § 3050(e)* provides that the courts have jurisdiction over all common law and statutory claims originally cognizable in the courts, and that for those claims a party may initiate an action directly in any court of competent jurisdiction. Thus, in a case in which a manufacturer demurred to a dealers's complaint which consisted entirely of common law claims, on the basis of the dealer's failure to exhaust its administrative remedies, the court of appeal held that the trial court erred in sustaining the demurrer and dismissing the action [*South Bay Creditors Trust v. General Motors Acceptance Corporation (1999) 69 Cal. App. 4th 1068, 1079-1080, 82 Cal. Rptr. 2d 1* (finding that

Legislature never intended Board to be exclusive arbiter of all disputes between new motor vehicle dealers and manufacturers)]. The court also held that the trial court's referral of the case to the Board under the doctrine of primary jurisdiction was inappropriate because the factual issues and common law claims raised by nothing the complaint were not beyond the usual competence of the courts [*South Bay Creditors Trust v. General Motors Acceptance Corporation (1999) 69 Cal. App. 4th 1068, 1081-1082, 82 Cal. Rptr. 2d 1* (referral was also inconsistent with court's dismissal of action)].

The procedure for drafting and filing protests, setting the hearing date, and hearing on the protest is set out in *13 Cal. Code Reg. §§ 583-598*. Either party is entitled to seek judicial review of final decisions of the board. Filing for such review is permitted up to 45 days from the date on which the final order of the board is made public and delivered to the parties personally or sent to them by registered mail [*Veh. Code § 3068*].

[2] Judicial Review

Judicial review is by way of administrative mandate under *Code Civ. Proc. § 1094.5* [*see* Ch. 474, *Availability of Judicial Review of Agency Decisions*]. The trial court hearing the petition for the writ performs essentially an appellate function. Unless there is a fundamental right at issue, the trial court cannot reweigh the evidence, but only determines whether there was substantial evidence to support the board's decision [*Champion Motorcycles, Inc. v. New Motor Vehicle Bd. (1988) 200 Cal. App. 3d 819, 823-825, 246 Cal. Rptr. 325* ; *British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd. (1987) 194 Cal. App. 3d 81, 90-92, 239 Cal. Rptr. 280]* . The right to terminate or modify a dealership, to add a new dealership, or to choose one's business associations, even though related to freedom of contract and freedom of association, involves merely the preservation of an economic interest, not a fundamental vested right [*Champion Motorcycles, Inc. v. New Motor Vehicle Bd. (1988) 200 Cal. App. 3d 819, 823-825, 246 Cal. Rptr. 325* ; *British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd. (1987) 194 Cal. App. 3d 81, 90, 239 Cal. Rptr. 280]* .

Legal Topics:

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

§§ 515.143[Reserved]

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§ 515.150 Recreational Vehicle Franchise

[1] Definition

A "recreational vehicle franchise" is a written agreement between two or more persons for a commercial relationship of definite duration or continuing indefinite duration, in which the franchisee is granted the right to offer for sale or lease, or to sell or lease at retail, new recreational vehicles [*see Health & Safety Code § 18010(a)* (definition)] that are manufactured or distributed by the franchisor, or the right to perform authorized warranty repairs and service, or the right to perform any combination of these activities [*Veh. Code § 331.3*].

[2] Delivery of Agreement to Dealer

When parties mutually agree to enter into a recreational vehicle franchise, it is unlawful and a violation of the Vehicle Code for a manufacturer, manufacturer branch, distributor, or distributor branch licensed under the Vehicle Code to fail or refuse to provide a recreational vehicle dealer with a written recreational vehicle franchise that complies with the requirements of *Veh. Code § 331.3* [*Veh. Code § 11713.22(a)*]. Notwithstanding *Veh. Code § 331.3*, the agreement must include, but not be limited to, provisions regarding dealership transfer, dealership termination, sales territory, and reimbursement for costs incurred by the dealer for work related to the manufacturer's warranty for each line-make of recreational vehicle covered by the agreement [*Veh. Code § 11713.22(b)*].

These requirements do not extend to an agreement with a dealer who deals exclusively in truck campers [*Veh. Code § 11713.22(c)*].

[3] Franchise Agreement Is Necessary

A recreational vehicle manufacturer, manufacturer branch, distributor, or distributor branch licensed under the Vehicle Code may not sell a new recreational vehicle in California to or through a recreational vehicle dealer without having first entered into a written recreational vehicle franchise, with that recreational vehicle dealer, that complies with the requirements of *Veh. Code § 331.3* and has been signed by both parties [*Veh. Code § 11713.23(a)*]. A recreational

vehicle dealer may not sell a new recreational vehicle in California without having first entered into a written recreational vehicle franchise, with a recreational vehicle manufacturer, manufacturer branch, distributor, or distributor branch licensed under the Vehicle Code, that complies with the requirements of *Veh. Code § 331.3* and has been signed by both parties [*Veh. Code § 11713.23(b)*].

Beginning January 1, 2009, a recreational vehicle manufacturer, manufacturer branch, distributor, or distributor branch may not ship a new recreational vehicle to a recreational dealer without a recreational vehicle franchise that has been signed by both parties [*Veh. Code § 11713.23(c)(1)*]. On or after January 1, 2009, a recreational vehicle dealer also may not receive a new recreational vehicle from a recreational vehicle manufacturer, manufacturer branch, distributor, or distributor branch without a recreational vehicle franchise that has been signed by both parties [*Veh. Code § 11713.23(c)(2)*]. Any new recreational vehicle inventory that was bought by a recreational vehicle dealer, or shipped by a manufacturer, manufacturer branch, distributor, or distributor branch, before January 1, 2009, may be sold at any time without a recreational vehicle franchise [*Veh. Code § 11713.23(d)*].

These requirements do not extend to an agreement with a dealer who deals exclusively in truck campers [*Veh. Code § 11713.23(e)*].

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45-515 California Forms of Pleading and Practice--Annotated §§ 515.151-515.159

[Reserved]

§§ 515.151[Reserved]

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§ 515.160 Governing Statutes

Legislation prohibiting discrimination in the area of franchises and dealerships is contained specifically in the California Fair Dealership Law, *Civ. Code §§ 80-86*, as well as in *Civ. Code § 51.8*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesCauses of ActionGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesFranchise RelationshipsGeneral OverviewCivil Rights LawPrivate Discrimination

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45-515 California Forms of Pleading and Practice--Annotated § 515.161

§ 515.161 Fair Dealership Law

[1] Purpose and Policies

The California Fair Dealership Law [*Civ. Code § 80*] is designed to prohibit unlawful discrimination in the granting, sale, transfer, bequest, termination, and nonrenewal of dealerships. The requirements of the law may not be varied by contract or agreement and any portion of a contract or agreement purporting to do so is void and unenforceable. The law is to be liberally construed and applied to promote its underlying purposes and policies [*Civ. Code § 82*].

[2] Definitions

[a] "Dealership"

A "dealership" under the Fair Dealership Law is a contract or agreement, either express or implied, oral or written, between two or more persons (a) under which a person is granted the right to sell or distribute goods or services or to use a trade name, trademark, service mark, logotype, or advertising or other commercial symbol and (b) in which there is a community of interest in the business of offering, selling, or distributing goods or services at wholesale or retail, by lease, agreement, or otherwise. A "community of interest" is a continuing financial interest between the grantor and grantee in the operation of the dealership or the marketing of the goods or services [*Civ. Code § 81(b), (d)*].

[b] Dealership Parties and Relationship

A "grantor" is the person who sells, leases, or otherwise transfers a dealership [*Civ. Code § 81(c)*]; a "grant" is a sale, lease, or transfer of any kind [*Civ. Code § 81(f)*]; and a "dealer" is the grantee of a dealership situated in California [*Civ. Code § 81(e)*]. A grantor or grantee may be a natural person, partnership, joint venture, corporation, limited liability company, or other entity [*Civ. Code § 81(a)*].

[3] Prohibitions on Discriminatory Acts

The following actions are prohibited under the Fair Dealership Law, whether taken directly or indirectly:

- The grantor's refusal to grant a dealership to any person because of any characteristic listed or defined in *Civ. Code § 51(b), (e)* ("Unruh Civil Rights Act"); that is, sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation (including a perception that a person has, or is associated with someone who has or is perceived to have, any particular characteristic or characteristics within the listed categories) [*Civ. Code § 83*].

- The grantor's termination, cancellation, or refusal to renew a dealership agreement for these reasons [*Civ. Code § 84*].

- The grantor's or the dealer's refusal to make or consent to an assignment, sale, transfer, or bequest of a dealership to any person because of these characteristics of that person (this does not create any such right in a dealer to assign, sell, transfer, or bequeath a dealership if the right did not exist prior to the effective date of this law, January 1, 1981) [*Civ. Code § 85*].

[4] Liability

Although the California Fair Dealership Law does not specifically provide for a cause of action for damages whenever a franchisor violates its provisions, it does provide that the prevailing party in any action based on a violation of the law is entitled to recover reasonable attorney's fees and court costs [*Civ. Code § 86*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesCauses of ActionGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesFranchise RelationshipsGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRemediesCosts & Attorney FeesCivil Rights LawPrivate Discrimination

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45-515 California Forms of Pleading and Practice--Annotated § 515.162

§ 515.162 Civil Rights Legislation Covering Franchises Generally

[1] Scope of Nondiscriminatory Provisions

No franchisor may discriminate in the granting of franchises solely on account of the sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation of the franchisee and the composition of a neighborhood or geographic area reflecting any of those characteristics in which the franchise is located [*Civ. Code §§ 51(b), 51.8(a)*; *see Civ. Code § 51(e)* (definitions)].

The preceding prohibitions do not prohibit a franchisor from granting a franchise to prospective franchisees as part of a program or programs to make franchises available to persons lacking the capital, training, business experience, or other qualifications ordinarily required of franchisees, or any other affirmative action program adopted by the franchisor [*Civ. Code § 51.8(a)*].

The anti-discrimination mandate does not require any construction, alteration, or repair, whether structural or otherwise, or modification of any sort whatsoever, beyond whatever construction, alteration, repair, or modification is otherwise required by other provisions of law, as to any new or existing establishment, facility, building, improvement, or any other structure. Nor does the anti-discrimination mandate augment, restrict, or alter in any way the authority of the state architect to require construction, alteration, repair, or modifications that the state architect otherwise possesses pursuant to other laws [*Civ. Code § 51.8(b)*].

[2] Liability

No remedial provision in *Civ. Code § 43 et seq.* (concerning personal rights) creates any liability for damages based on a violation of *Civ. Code § 51.8*. The remedy for an aggrieved franchisee, therefore, is an action for appropriate equitable relief, such as an injunction to restrain and prevent a violation of the statute.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesCauses of ActionGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesFranchise RelationshipsGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRemediesInjunctive ReliefCivil Rights LawPrivate Discrimination

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45-515 California Forms of Pleading and Practice--Annotated §§ 515.163-515.179

[Reserved]

§§ 515.163[Reserved]

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45-515 California Forms of Pleading and Practice--Annotated § 515.180

§ 515.180 Governing Statutes

The regulation of seller assisted marketing plans is governed by *Civ. Code § 1812.200 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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45-515 California Forms of Pleading and Practice--Annotated § 515.181

§ 515.181 Purpose of Regulatory Legislation

The California Legislature has found that purchasers of "seller assisted marketing plans," often connected with the sale of vending machines, racks, or work-at-home paraphernalia, are frequently inexperienced in business matters, many of them elderly, who use their life savings to purchase the plan in hope of supplementing retirement income or present salary. The initial payment is usually in the form of a purchase of overpriced equipment or products. Because of significant losses suffered in the past and the resulting impact on local economy, the Legislature has provided disclosure procedures to be followed by the seller to allow the purchaser to make a more informed decision as to the purchase of the plan, as well as to safeguard against deceit and financial hardship and to enhance competition and fair dealing in such sales. The legislation, which also prohibits misleading representations and unfair contract terms, is to be construed liberally toward such ends [*Civ. Code § 1812.200*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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45-515 California Forms of Pleading and Practice--Annotated § 515.182

§ 515.182 Definitions

[1] "Seller Assisted Marketing Plan"

A "seller assisted marketing plan" is any sale, lease, or offer to sell or lease any product, equipment, supplies, or services, requires a total initial payment exceeding $500, but requires an initial cash payment of less than $50,000, that will aid, or be used by or on behalf of, a purchaser in connection with or incidental to beginning, maintaining, or operating a business. The seller of the plan must advertise or in some other manner solicit the purchase or lease of the plan and represent that (1) the purchaser will, is likely to, or can earn an amount in excess of the initial participation payment; (2) a market exists for the product, equipment, supplies, or services, or any product marketed by the user of the product, equipment, supplies, or services sold or leased or offered for sale or lease to the purchaser by the seller, including any tangible or intangible item or service the purchaser made, produced, fabricated, grew, bred, modified, or developed using, in whole or in part, such product, equipment, supplies, or services; or (3) that the seller will, or is likely to, buy back any product made, produced, fabricated, grown, or bred by the purchaser using, in whole or in part, the matters initially involved in the sale or lease, or offered thereof [*Civ. Code § 1812.201(a)*].

A seller assisted marketing plan does not include any of the following [*Civ. Code § 1812.201(b)*]:

- A qualified or exempt security [*see Corp. Code § 25019*];

- A franchise, whether registered or exempt from registration under the Franchise Investment Law [*Corp. Code § 31000 et seq.*];

- Any transaction in which either seller or purchaser, lessor or lessee, is licensed pursuant to, and the transaction is governed by, the Real Estate Law [*see Bus. & Prof. Code § 10000*].

- A license granted by a general merchandise retailer allowing the licensee to sell goods, equipment, supplies, products, or services to the general public under the retailer's trademark, trade name, or service

mark, if (1) the general merchandise retailer has been doing business in California continually for five years prior to the grant; (2) the general merchandise retailer sells diverse kinds of goods, equipment, supplies, products, or services; (3) the general merchandise retailer also sells the same goods, equipment, supplies, products, or services directly to the general public; and (4) during the previous 12 months, the general merchandise retailer's direct sales of the same goods, equipment, supplies, products, or services to the public accounted for at least 50 percent of its yearly sales of those things made under the retailer's trademark, trade name, or service mark.

- A newspaper distribution system [*see Rev. & Tax. Code § 6362*].

- A sale or lease to an existing or beginning business enterprise that also sells or leases equipment, products, or supplies, or performs services that are not supplied by the seller and that the purchaser does not utilize with the items or services supplied by the seller, and the equipment products, supplies, or services not supplied by the seller account for more than 25 percent of the purchaser's gross sales.

- The sale in the entirety of an ongoing business, that is, a business that for at least six months prior to the sale has been operated from a given specific location, has been open for business to the general public, and has had all equipment and supplies necessary for operating the business at that location; the sale must be of the entire "ongoing business" and not merely a portion of the ongoing business.

- A sale or lease, or offer thereof, to a purchaser who has for at least six months previously bought products, supplies, services, or equipment sold under the same trademark or trade name, or that were produced by the seller, and who has received on resale of such items or services an amount which is at least equal to the amount of the initial payment.

- The renewal or extension of an existing seller assisted marketing plan contract.

- A product distributorship that meets each of the following requirements:

    - The seller sells products to the purchaser for resale by the purchaser, and it is reasonably contemplated that substantially all of the purchaser's sales of the product will be at wholesale;

    - The agreement between the parties does not require that the purchaser pay the seller, or any person associated with the seller (i.e., a person, including an individual or a business entity, controlling, controlled by, or under the same control as the seller), a fee or any other payment for the right to enter into the agreement, and does not require the purchaser to buy a minimum or specified quantity of the products, or to buy products for a minimum or specified period of time;

    - The seller is a corporation, partnership, limited liability company, joint venture, or any other business entity;

    - The seller has a net worth (which may be determined on a consolidated basis if the seller is a subsidiary of another business entity that is permitted by generally accepted accounting standards to prepare financial statements on a consolidated basis and that business entity absolutely and irrevocably agrees in writing to guarantee the seller's obligations to the purchaser) of at least $10,000,000 according to audited financial statements of the seller done during the 18 months preceding the date of the initial sale of products to the purchaser; and the seller's net worth is verified by a certification to the

Attorney General from an independent certified public accountant that the audited financial statement reflects a net worth of at least $10,000,000, provided within 30 days following receipt of a written request from the Attorney General;

- The seller grants the purchaser a license to use a trademark that is registered under federal law; and

- It is not an agreement or arrangement encouraging a distributor to recruit others to participate in the program and compensating the distributor for recruiting others into the program or for sales made by others recruited into the program.

[2] "Seller"

The "seller" is the person who sells or leases, or offers to sell or lease, a seller assisted marketing plan. To be a seller, one must have sold or leased, or represent or imply that he or she has sold or leased, whether in California or elsewhere, at least five plans within 24 months prior to the solicitation. Otherwise, the seller must intend, or represent or imply an intent, to sell or lease, whether here or elsewhere, at least five plans within 12 months following the solicitation. The seller is the person to whom the purchaser becomes contractually obligated. The term "seller" does not include a licensed real estate broker or salesperson engaging in the sale or lease of a "business opportunity" [*see Bus. & Prof. Code § 10030*] under the Real Estate Law [*Civ. Code § 1812.201(d)*].

[3] "Purchaser"

The "purchaser" is the person who is solicited to become obligated, or who does become so, under a seller assisted marketing plan [*Civ. Code § 1812.201(e)*].

[4] Business Items

"Equipment" includes machines, all electrical devices, video or audio devices, molds, display racks, vending machines, coin-operated game machines, machines which dispense products, and display units of all kinds [*Civ. Code § 1812.201(f)*]. "Supplies" includes any and all materials used to produce, grow, breed, or make any product or item [*Civ. Code § 1812.201(g)*]. A "product" includes any tangible chattel, including food or living animals, that the purchaser intends to (1) sell or lease; (2) use to perform a service; (3) resell or attempt to resell to the seller; or (4) provide or attempt to provide to the seller, or person whom the seller suggests the buyer contact, so that the seller or other person directly or indirectly assisting the buyer in disposing of the product might resell the product to the general public [*Civ. Code § 1812.201(h)*]. "Services" include any assistance, guidance, direction, work, labor, or services provided by the seller to initiate or maintain a business [*Civ. Code § 1812.201(i)*].

[5] "Contract"

The "seller assisted marketing plan contract" (or "contract") is any contract or agreement that obligates a purchaser to a seller [*Civ. Code § 1812.201(j)*].

[6] Financing Terms

The "initial payment" is the total amount the purchaser is obligated to pay to the seller under the terms of the plan contract prior to or at the time of delivery of the equipment, supplies, products, or services, or within six months of the purchaser commencing operation of the plan. If the contract sets forth a specific total sale price for purchase of the plan that is to be paid partially as a downpayment and then in specific monthly payments, the "initial payment" is the entire total sale price [*Civ. Code § 1812.201(k)*]. The "initial cash payment" or "downpayment" is the portion of the initial payment which the purchaser is obligated to pay to the seller prior to, or at the time of, delivery of the above items or

services. It does not include any amount financed, or for which financing is to be obtained, by the seller, or financing which the seller assists in obtaining [*Civ. Code § 1812.201(l)*]. References to "buy-back" or "secured investment" are considered to be representations that imply that the purchaser's initial payment is protected from loss [*see Civ. Code § 1812.201(m)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 515.183 Jurisdiction of Plan Transactions

An offer to sell or to lease a seller-assisted marketing plan occurs in California whenever the offer is made in California, the purchaser resides in California at the time of the offer, or the offer either originates in California or is directed by the seller or lessor to California and received at the place to which directed. A sale or lease of such a plan occurs in California whenever the offer to sell or to lease is accepted in California, the purchaser resides in California at the time of the sale, or the acceptance is communicated to a seller situated in California [*Civ. Code § 1812.202*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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45-515 California Forms of Pleading and Practice--Annotated § 515.184

§ 515.184 "Buy-Back" Representations

[1] Restrictions on Use in Solicitation

A seller must not use the phrase "buy-back" or "secured investment" or similar phrase orally or in writing when soliciting, offering, leasing, or selling a plan if (1) the "security" is the value of the equipment, supplies, products, or services supplied by the seller to the purchaser [*Civ. Code § 1812.204(a)*]; or (2) if there are any restrictions or qualifications whatsoever preventing or limiting a purchaser from being able to invoke the "buy-back" or "secured" portion of the plan contract at any time the purchaser so desires during the one-year period following the contract date. On invocation of a "buy-back" or "security" provision, the purchaser is entitled to have returned, at minimum, the full amount of the initial payment, less the "amount actually received" from the operation of the plan. This latter amount is either that which the seller actually paid the purchaser for a product resold to the seller, or the money the purchaser received for use of the product or services, less what the purchaser paid (1) for placing the product or services at a particular location and (2) to obtain other items needed to sell, or develop in some manner, the item that the purchaser intends to sell or otherwise dispose of [*Civ. Code § 1812.204(b)*].

[2] Bond or Trust Account Requirements

The seller may not represent that a purchaser's initial payment is "secured" in any way or to any degree, or that the seller is providing a "buy-back" arrangement unless the seller has, as provided in *Civ. Code § 1812.214(b)*, obtained a surety bond issued by a surety company admitted in California, or established a trust account at a federally insured bank or a savings and loan located in California [*Civ. Code § 1812.204(c)*]. The bond or trust account required must be in favor of the State of California for the benefit of any person who is damaged by any violation of *Civ. Code §§ 1812.200-1812.221* or by the seller's breach of a seller assisted marketing contract or of any obligation arising from that contract [*Civ. Code § 1812.214(b)(2)*], and must be in an amount equal to the total amount of the "initial payment" portion of all seller assisted marketing plan contracts the seller has entered into during the previous year or $300,000, whichever is less, but in no case less than $50,000 [*Civ. Code § 1812.214(b)(4)*]. Any person claiming against the trust account for a violation of *Civ. Code §§ 1812.200-1812.221* may maintain an action at law against the seller and the trustee. The surety or trustee is only liable for actual damages, not for the punitive damages permitted under *Civ. Code §*

1812.218. The aggregate liability of the trustee to all persons damaged by a seller's violation may in no event exceed the amount of the trust account [*Civ. Code § 1812.214(b)(3)*]. For additional discussion of enforcement of statutory surety bonds, see Ch. 538, *Suretyship, Bonds, and Undertakings* . Note, however, that when the seller has elected to maintain a trust account in lieu of a bond, the person asserting a claim against the trust, in lieu of the provisions of *Code Civ. Proc. § 996.430*, must establish a claim by furnishing evidence of a money judgment and evidence that the claimant is a person described in *Civ. Code § 1812.214* to the Attorney General [*see Civ. Code § 1812.221(a)*].

Legal Topics:

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45-515 California Forms of Pleading and Practice--Annotated § 515.185

§ 515.185 Earnings Representations

The seller is not allowed to represent that the seller assisted marketing plan provides income or earning potential of any kind unless the seller has data to substantiate such a claim. The data must be based on the experiences of at least 10 purchasers of the offered plan, and be disclosed to the purchaser at the time the claim is made, if made in person, or at the time of the first in-person communication, if the claim is made in writing or over the telephone. At the time the data is disclosed, it must be left with the purchaser [*Civ. Code § 1812.204(d)*].

The data the seller leaves must at least disclose (1) the time the seller has been selling the particular plan being offered, and (2) the number of purchasers and percentage of total purchasers from the seller that the seller knows to have made at least the same sales, income, or profits as represented [*Civ. Code § 1812.204(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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45-515 California Forms of Pleading and Practice--Annotated § 515.186

§ 515.186 Trademark Restrictions

The seller is not entitled to use the trademark, service mark, trade name, logotype, advertising, or other commercial symbol of any business which does not either control the ownership interest in the seller or accept responsibility for all representations made by the seller in regard to the seller assisted marketing plan. An exception is made if the nature of the seller's relationship to the other business entity is set forth immediately adjacent to that business's commercial symbol, in type size equal to or larger than that used to depict the symbol. If a member of a trade association, the seller may use the logo or registration mark of that group in advertisements and materials [*Civ. Code § 1812.204(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationBusiness & Corporate LawDistributorships & FranchisesBusiness OpportunitiesTrademark LawProtection of RightsGeneral Overview

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45-515 California Forms of Pleading and Practice--Annotated § 515.187

§ 515.187 Advertising Restrictions

The seller must not place, or cause to be placed, any advertisement for a seller assisted marketing plan that does not include the actual business name of the seller. If the name differs from that under which the plan is operated, the seller must also include the latter name. The street address of the principal place of business of the seller must also be included [*Civ. Code § 1812.204(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 515.188 Disclosure Requirements

The seller, or his or her representative, must provide a document to the potential purchaser in the first in-person communication or in the first written response to an inquiry from the latter, whichever occurs first. The document must provide data about the selling company, the initial payment to be paid, services to be provided, potential earnings, and the nature of any "buyback" or "secured" arrangement [*see Civ. Code § 1812.205*]. At least 48 hours before execution of the seller assisted marketing plan, or 48 hours prior to the receipt of any consideration, whichever occurs first, the seller, or his or her representative, must also provide to the prospective purchaser a written information sheet disclosing the management team behind the plan, any history of business violations and bankruptcies thereof, the seller's experience in selling such plans, information as to any required bond, a copy of a recent financial statement, as updated, and an unexecuted copy of the plan contract. The contract may be combined with the first required disclosure form, together to be titled "DISCLOSURES REQUIRED BY CALIFORNIA LAW," if they can satisfy the information and time obligations of each disclosure requirement [*see Civ. Code § 1812.206*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 515.189 Plan Contract Requirements

[1] Drafting and Presenting

Each contract for sale or lease of a seller assisted marketing plan in California must be in writing and is subject to all statutory requirements governing such plans. A copy of the fully completed contract and all other documents requiring the purchaser's signature must be given to the purchaser at the time of signing [*Civ. Code § 1812.207*]. The plan contract must set forth information as required by law pertaining to payments, the seller's services and business entity information, dates and places of delivery, and the identity of the supplier, of products, equipment, or supplies to be furnished the purchaser, the nature of any "buy-back" or "security" arrangement if one has been represented during solicitation, and appropriate notices as to cancellation and voidability provisions [*see Civ. Code § 1812.209*]. In addition, if an escrow account is required by *Civ. Code § 1812.210(b)* (*discussed under § 515.189[4]*) because the purchaser has to make more than 20 percent of the initial payment before delivery of the equipment, supplies, or products or services to be furnished under the terms of the contract, the contract must disclose the name and address of the escrow holder, as well as the institution, branch, and account number of the escrow account [*Civ. Code § 1812.209(a)*].

[2] Cancellation Rights

The purchaser has the right to cancel a seller assisted marketing plan contract for any reason, and at any time, within three business days of the date the parties sign it. Notice of the right to cancel, along with proper procedure therefor, is contained within the plan contract, both as prescribed by law [*see Civ. Code § 1812.208*]. Written notice of cancellation may be mailed or delivered to the seller. The seller must return all sums paid by the purchaser within five business days of receipt of the notice. By five business days after receipt of those sums, the purchaser must make available, at his or her address or at the place at which they were caused to be located, all products, equipment, or supplies provided to the purchaser under the contract. The seller may also demand that these items be made available at the time the purchaser receives full repayment by cash, money order, or certified check [*Civ. Code § 1812.209(b)*].

[3] Defenses Against Assignees

Any assignee of a plan contract or the seller's rights is subject to all equities, rights, and defenses of the purchaser against the seller [*Civ. Code § 1812.211*]. A seller assisted marketing plan contract may also not require or entail the execution of any notes or series of notes by the purchaser that, when separately negotiated, will cut off as to third parties any right or defense the purchaser may have against the seller [*Civ. Code § 1812.210(a)*].

[4] Payment Restrictions

The plan may not require a downpayment of more than 20 percent of the initial payment amount. The plan contract payment schedule must not provide for the seller to receive more than this percentage before delivery of equipment, supplies, or products unless all sums paid in excess thereof are placed in escrow, as provided in *Civ. Code § 1812.214(c)*. Funds placed in an escrow account must not be released until the purchaser notifies the escrow holder in writing of the delivery within the time limits set forth in the plan contract. Notification of delivery by the purchaser to the escrow holder must not be unreasonably withheld [*Civ. Code § 1812.210(b)*].

The escrow holder must be independent of the seller and cannot release the funds without written notification from the purchaser [*Civ. Code § 1812.214(c)(1)*]. The escrow holder may be joined in an action against the seller by any person claiming against against the escrow account. The escrow holder is only liable for actual damages, not for punitive damages permitted by *Civ. Code § 1812.218*. The escrow holder's aggregate liability to all persons damaged by a seller's violations may not exceed the amount of the escrow account [*Civ. Code § 1812.214(c)(3)*].

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§ 515.190 Other Seller Requirements

The seller may not make or authorize the making of reference to its compliance with the requirements for seller assisted marketing plans in *Civ. Code § 1812.200 et seq.* [*Civ. Code § 1812.212*]. The seller also must maintain a complete set of books, records, and accounts of sales of seller assisted marketing plans for at least four years [*Civ. Code § 1812.213*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 515.191 Consent to Service on Secretary of State

If the seller is not a California corporation, it must file with the Attorney General an irrevocable consent appointing the Secretary of State to act as the seller's attorney to receive service on the seller, or his or her successor, executor, or administrator, in any noncriminal action arising out of a local seller assisted marketing plan transaction. The plaintiff who takes advantage of this service provision forthwith must send to the defendant or respondent seller a notice that such service was made and a copy of the process. The papers must be sent by first class mail to the last address of the defendant or respondent on file with the Secretary of State. The plaintiff's affidavit of compliance with these service requirements must be filed in the case on or before the return date of the process, if any, or within such further time as the court allows [*Civ. Code § 1812.214(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 515.192 Voidability of Plan Contract

[1] Purchaser's Right

The purchaser may elect to render the contract voidable under the circumstances described below. These rights are cumulative to all others given under the law governing seller assisted marketing contracts or in any other law [*Civ. Code § 1812.215*].

[2] Voiding for Misrepresentation or Noncompliance With Law

A purchaser may elect to avoid a plan contract if the seller uses any untrue or misleading statement to sell or lease the plan or fails to provide or file [*Civ. Code § 1812.203*] the disclosure documents or to disclose the information required therein, or if the plan contract does not comply with requirements of the governing law. This election must be made within one year of the date of the contract by sending written notice to the seller, at which time the contract becomes unenforceable by the seller or any assignee thereof as contrary to public policy. The purchaser is entitled to receive all sums paid to the seller when he or she is able to return all equipment, supplies, or products delivered by the seller. If this return is not possible, the purchaser is entitled to receive all sums paid less the fair market value at the time of delivery of the items not returned after their delivery. On receipt of the money, the purchaser must make available to the seller at the purchaser's address or at the places they are located at the time of the above notice, the matters received from the seller [*Civ. Code § 1812.215(a)*].

However, if the seller inadvertently has failed to make any of the required disclosures, or the contract inadvertently fails to comply with requirements of the governing law, the seller may cure the defect by providing the correct disclosure statements or contract. At the time of providing the correct versions the seller also must inform the purchaser in writing that because of the seller's error, the purchaser has an additional 15-day period after receipt of the correct disclosures or contract within which to cancel and receive full return of all moneys paid in exchange for the return of whatever equipment, supplies, or products the purchaser has. If he or she has not canceled within 15 days after receipt of the correct papers, the purchaser may not exercise the right thereafter to void the contract automatically on the grounds of noncompliance with the disclosure or contract requirements [*Civ. Code § 1812.215(a)*].

[3] Voiding for Nondelivery

If the seller fails to deliver the equipment, supplies, or product within 30 days of the delivery date stated in the contract for any reason other than one that was beyond the control of the seller, at the purchaser's election and on written notice to the seller, the contract becomes voidable by the purchaser and unenforceable by the seller or seller's assignee as contrary to public policy. The election may be made at any time prior to actual delivery of the commodities or within 30 days after delivery [*Civ. Code § 1812.215(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 515.193 Policy Against Waiver of Rights by Purchaser

A waiver by the purchaser of the provisions of the law governing seller assisted marketing plans is deemed contrary to public policy and is void and unenforceable. In addition, any attempt by a seller to have the purchaser waive any such rights is a violation of the provisions regulating seller assisted marketing plans [*Civ. Code § 1812.216*].

Legal Topics:

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

In addition to the possible criminal actions that may be brought against a seller, agent, or independent contractor, any purchaser injured by a violation of the law governing seller assisted marketing plans, or by the seller's breach of a plan contract or of any obligation arising from the sale or lease of a plan, may bring any action for actual damages plus reasonable attorney's fees and costs. The judgment may not award less than the amount of the initial payment, provided the purchaser is able to return all the equipment, supplies, or products delivered by the seller. If a complete return cannot be made, the minimum award may be no less than the amount of the initial payment less the fair market value at the time of delivery of the commodities that cannot be returned although actually delivered. The award may include punitive damages if the trial court deems it proper [*Civ. Code § 1812.218*].

Remedies provided for violating the law pertaining to seller assisted marketing plans or for conduct proscribed by any provision thereof are cumulative to any other procedures or remedies for any violation or conduct provided for in any other law. No other statutory or common law rights of any public official or any other person may be limited by the statutes governing seller assisted marketing plans. Any common law or statutory cause of action that exists for an activity proscribed by the statutes governing seller assisted marketing plans may be asserted independently by the purchaser for the remedies provided by that other law [*Civ. Code § 1812.219*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 515.195 Burden of Proof

In any proceeding involving *Civ. Code §§ 1812.200-1812.221*, governing seller assisted marketing plan contracts, the burden of proving an exemption or an exception from a definition is on the person claiming it [*Civ. Code § 1812.216(b)*].

Legal Topics:

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

§§ 515.196[Reserved]

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§ 515.210 Governing Statutes

[1] Purpose

The Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers Act [*Bus. & Prof. Code §§ 22900-22927*] ("Act") regulates the business relations between equipment suppliers and dealers. The Act's statement of legislative intent recognizes that the retail distribution, sales, and rental of agricultural, construction, utility, industrial, mining, outdoor power, forestry, and lawn and garden equipment, utilizing independent dealers operating under contract with the supplier, vitally affects the general economy of the state, the public interest, and the public welfare [*Bus. & Prof. Code § 22900*]. The Act therefore prohibits certain coercive or discriminatory practices by suppliers [*see Bus. & Prof. Code § 22902*; §§ 515.211, 515.212], sets forth requirements for supplier termination of both single-line and non single-line dealer contracts [*see Bus. & Prof. Code §§ 22903-22903.2*; §§ 515.214, 515.215], regulates the approval and rejection of warranty claims [*see Bus. & Prof. Code § 22903.3*; § 515.220], and provides for return or repurchase of inventory [*see* Bus. & Prof. Code §§ 22904, 22905; §§ 515.213, 515.216-215.219].

[2] Application to Equipment "Suppliers" and "Dealers"

For purposes of the Act, a "supplier" is any person engaged in the business of manufacturing, assembly or wholesale distribution of equipment or repair parts, and any successor in interest [*see Bus. & Prof. Code § 22901(v)* (definition); *see also Bus. & Prof. Code § 22901(s)* (repair parts defined)].

A "dealer" is any person primarily engaged in the retail sale of equipment, and does not include a "franchisee" as defined in *Veh. Code § 331.1* or a "new motor vehicle dealer" as defined in *Veh. Code § 426* [*see Bus. & Prof. Code § 22901(f)* (definition)].

"Equipment" includes all-terrain vehicles and other machinery, equipment, implements, or attachments used in connection with certain landscaping, agricultural, livestock, and industrial activities [*see Bus. & Prof. Code § 22901(j)* (definition)]. Self-propelled vehicles designed primarily for the transportation of persons or property on a street or highway are specifically excluded from the definition of equipment [*Bus. & Prof. Code § 22901(j)(2)*].

The Act contains numerous definitions of additional terms [*see Bus. & Prof. Code § 22901*], which are incorporated into the applicable discussions below.

[3] Effective Date

The Act applies to dealer contracts [*see Bus. & Prof. Code § 22901(g)* (definition)] in effect on October 7, 2005, that have no expiration date and that are continuing contracts, and all other dealer contracts entered into or renewed on or after that date [*Bus. & Prof. Code § 22927*; *see* 2005 Stats., ch. 712, § 25, 26 (urgency statute)]. The prior version of the law applied to dealer agreements in effect on January 1, 1993, that had no expiration date and were continuing agreements, and to all other dealer agreements entered into or renewed on or after January 1, 1993 [*see* former *Bus. & Prof. Code § 22927*].

Legal Topics:

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§ 515.211 Prohibited Transactions by Suppliers

[1] In General

The statutory provisions regulating the retail distribution, sales, and rental of agricultural, construction, utility, industrial, mining, outdoor power, forestry, and lawn and garden equipment by independent dealers operating under contract with suppliers contain a number of specific prohibitions that are designed to prevent a supplier from imposing new or increased conditions on a dealer than those set forth in the original dealer agreement between the parties [*see Bus. & Prof. Code § 22902*]. These prohibitions are discussed in the following subsections. A dealer has a cause of action for any damages sustained as a result of a supplier's violation of any of these prohibitions [*Bus. & Prof. Code § 22925*; *see § 515.220*; *see also § 515.580*].

[2] Requiring Optional Equipment

A supplier is prohibited from compelling any dealer to order or accept delivery of any equipment or parts that the dealer has not voluntarily ordered, except as required by any applicable law or unless the equipment or repair parts are safety features required by the supplier [*Bus. & Prof. Code § 22902(a)*].

[3] Requiring Supplemental contract

A supplier may not coerce or compel any dealer to enter into any contract, whether written or oral, or amend an existing dealer contract with the supplier unless that contract or amendment is imposed on all other similarly situated dealers in the state [*Bus. & Prof. Code § 22902(b)*].

[4] Refusing to Deliver Equipment

A supplier may not refuse to deliver to any dealer, in reasonable quantities and within a reasonable time after receipt of the dealer's order, equipment covered by the dealer contract specifically advertised or represented by the supplier to be available for immediate delivery or on an agreed-upon delivery date. The failure to deliver that equipment is excused if

the failure is due to reasonable restrictions on the extension of credit by the supplier to the dealer, any breach of or default under the agreement by the dealer, an act of God, a work stoppage or delay due to a strike or labor difficulty, a bona fide shortage of materials, a freight embargo, or a business decision by the supplier to limit the production volume of the equipment if written notice is provided to the dealer within 30 days of that decision, other cause over which the supplier has no control [*Bus. & Prof. Code § 22902(c)*].

[5] Terminating or Failing to Renew Dealer Contract Without Cause

A supplier may not terminate, cancel, or fail to renew a dealer contract or materially change the competitive circumstances of a dealer contract without good cause [*Bus. & Prof. Code § 22902(d)*; *see Bus. & Prof. Code § 22901(l)* (defining "good cause"), and *discussion under §§ 515.214, 515.215*].

[6] Conditioning Renewal of Dealer Contract on Renovations or New Dealership Site

A supplier may not condition the renewal or extension of a dealer contract on a dealer's completing substantial renovation of the dealer's place of business or on acquiring new or additional space to serve as the dealer's place of business unless the supplier provides at least one year's written notice of the condition. The written notice must state all grounds supporting the condition. Not less than two years time must be provided for the dealer to complete the renovation or acquisition after the one year's notice period has expired [*Bus. & Prof. Code § 22902(e)*].

[7] Discriminating in Pricing

A supplier may not discriminate, directly or indirectly, in prices charged between different dealers with respect to purchases of equipment or repair parts of like grade and quality and identical brand, when the effect of that discrimination may be to substantially lessen competition, tend to create a monopoly in any line of commerce, or injure, destroy, or prevent competition with any dealer who either grants or knowingly receives the benefit of the discrimination. However, different prices may be charged if (1) the differences are due to differences in the cost of manufacture, sale, or delivery of the equipment or repair parts, or (2) the supplier can show that its lower price was made in good faith to meet an equally low price of a competitor and the lower price was made available to other dealers, or (3) the differences are related to the volume of equipment purchased by dealers if the supplier offers all other similarly situated dealers the same volume program [*Bus. & Prof. Code § 22902(f)*].

[8] Preventing Changes in Dealership's Capital Structure

A supplier may not prevent, by contract or otherwise, any dealer from changing its capital structure, ownership, or the means by which the dealership is financed. Any change in capital structure made by dealer must at all times meet any reasonable capital standards imposed by the supplier or as otherwise agreed to between the dealer and the supplier and imposed on similarly situated dealers. In addition, any change in capital structure made by an dealer may not result in a change in the controlling interest in the executive management, the board of directors, or any guarantors of the dealership [*Bus. & Prof. Code § 22902(g)*; *see Bus. & Prof. Code § 22901(h)* ("dealership" defined)].

[9] Requiring Dealer to Execute Release of Liability

A supplier may not require a dealer to agree to a release, assignment, novation, waiver, or estoppel that would relieve any person from liability imposed by the provisions of *Bus. & Prof. Code § 22900 et seq.* [*Bus. & Prof. Code § 22902(i)*].

[10] Withholding Consent to Transfers of Dealership Interests

A supplier may not prevent, by contract or otherwise, any dealer or any officer, member, partner, or stockholder of an dealer from selling or transferring any part of their interest in a dealership [*see Bus. & Prof. Code § 22901(h)*

("dealership" defined)] to any other party. However, no dealer, officer, partner, member, or stockholder has the right to sell, transfer, or assign the dealership itself or the management or control of the dealership without the written consent of the supplier. [*Bus. & Prof. Code § 22902(h)*].

[11] Requiring Purchase of Goods

A supplier may not require any dealer to purchase goods or services as a condition of the sale by the supplier to the dealer of any equipment, repair parts, or other goods or services. However, a supplier may require the dealer to purchase repair parts, special tools, and training reasonably necessary to maintain the safe operation or quality of operation in the field of any equipment offered for sale by the dealer [*Bus. & Prof. Code § 22902(j)*].

[12] Coercing Refusal of Competition

A supplier may not coerce any dealer into a refusal to purchase equipment manufactured by another supplier [*Bus. & Prof. Code § 22902(k)*].

[13] Penalizing Purchase From Competitor

A supplier may not penalize any dealer that purchases equipment or repair parts for sale manufactured by another supplier [*Bus. & Prof. Code § 22902(l)*].

[14] Discriminating Between Dealers

A supplier may not discriminate, directly or indirectly, between dealers of the same product line in filling an order placed by a dealer for retail sale or lease of equipment under a dealer contract [*Bus. & Prof. Code § 22902(l)*].

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§ 515.212 Provisions Limiting Competition

Nothing in *Bus. & Prof. § 22900 et seq.* permits the offering or enforcement of a provision in a dealer contract that requires a dealer to comply with a minimum price-fixing provision or any other provision to limit competition. A provision in a dealer contract providing for exclusive territorial rights and its corresponding provisions will not be prohibited [*Bus. & Prof. Code § 22902.5*].

Legal Topics:

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§ 515.213 Annual Surplus Parts Inventory Return Program

[1] Return Period

Every supplier must establish a return program that allows its dealers an opportunity to return a portion of their surplus parts inventory for credit each year [*Bus. & Prof. Code § 22904*; *see Bus. & Prof. Code § 22901(n)* ("inventory" defined as equipment, repair parts, data-processing hardware or software, and specialized service or repair parts)]. This parts return program is voluntary on the dealers' part, who can choose not to participate in any given year [*Bus. & Prof. Code § 22904(f)*].

The specified procedure is for the supplier to notify its dealers of a time period each year during which they may submit their surplus parts list and return their surplus parts to the supplier. The designated return period must run for at least 90 days for each dealer. A supplier may choose to designate a different period of time for each dealer to return surplus parts [*Bus. & Prof. Code § 22904(a)*]. If a supplier has not notified dealer of a specific time period in which to return surplus parts within the preceding 12 months, the supplier must authorize and allow the dealer to return surplus parts within 60 days after receiving a request from the dealer to do so [*Bus. & Prof. Code § 22904(b)*].

[2] Return Authority

A supplier must allow surplus parts return authority equal to 10 percent of the total dollar value of parts purchased by the dealer from the supplier during the 12-month period immediately preceding the notification to the dealer by the supplier of the surplus parts return program, or the month the dealer's return request is made, whichever is applicable. [*Bus. & Prof. Code § 22904(c)*].

[3] Covered Parts

Returned parts must be in new and unused condition and must have been purchased by the dealer form the supplier to whom they are returned. Obsolete and superseded parts may be returned if listed in the supplier's current returnable parts list or if those parts have not been the subject of the supplier's parts return program by the time the equipment

dealer is notified of or requests a return period, whichever is applicable [*Bus. & Prof. Code § 22904(d)*].

[4] Credit Amount

The minimum credit that must be allowed for returned parts is 95 percent of the current net parts cost as listed in the supplier's current returnable parts list at the time the equipment dealer is notified of or requests a return period [*Bus. & Prof. Code § 22904(e)*].

[5] Outstanding Balance

If an outstanding balance is owed to the supplier, the supplier may credit the dealer's account within 30 days after the supplier's receipt of the dealer's returned parts. If no balance exists, the supplier must pay the dealer within 30 days after the supplier's receipt of the dealer's returned parts. If a supplier refuses to credit the dealer's account or pay the dealer for returned parts covered by this section within 30 days of the supplier's receipt of returned parts, the supplier will be liable for 110 percent of the total current net parts cost, plus interest at the statutory rate from the payment due date until the date of payment, and actual costs for any court or arbitration proceeding, including costs for attorney's fees and arbitrators [*Bus. & Prof. Code § 22904(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesGeneral OverviewContracts LawSales of GoodsPerformanceBuyer's Rights

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Volume 45: Schools: Certification thru Service of Summons and Papers-Chs. 512-519
Chapter 515 SECURITIES AND FRANCHISE REGULATION
PART II. LEGAL BACKGROUND
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7. Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers

45-515 California Forms of Pleading and Practice--Annotated § 515.214

§ 515.214 Terminating Contracts Between Non Single-Line Dealers and Non Single-Line Suppliers

[1] Good Cause Required

The discussion in this section applies only to dealer contracts between dealers who are *not* single-line dealers and suppliers who are *not* single-line suppliers [*Bus & Prof. Code § 22903(a)*; *see Bus. & Prof. Code § 22901(t), (u)* (definitions); *see also § 515.215[1]*, for definition of those terms].

A supplier may not, directly or through an officer, agent, or employee, terminate, cancel, fail to renew, or materially change the competitive circumstances of a dealer contract without good cause [*Bus. & Prof. Code § 22903(c)*; *see Bus. & Prof. Code § 22901(w)* ("terminate" defined)]. "Good cause" means failure by a dealer to comply with the requirements imposed on the dealer by the dealer contract, if those requirements are not different from those requirements imposed on other similarly situated dealers in this state [*Bus. & Prof. Code § 22901(l)*]. In addition to that definition, "good cause" exists whenever the dealer has taken any of the following actions [*Bus & Prof. Code § 22903(c)*]:

- Transferred a controlling ownership interest in the dealership without the consent of the supplier, who may not unreasonably withhold consent [*Bus & Prof. Code § 22903(c)(1)*].

- Made a material misrepresentation or falsification of any record [*Bus & Prof. Code § 22903(c)(2)*].

- Filed a voluntary petition in bankruptcy or had an involuntary petition in bankruptcy filed against them that has not been dismissed within 60 days following the filing, or became insolvent or placed in receivership [*Bus & Prof. Code § 22903(c)(3)*].

- Pled guilty to or been convicted of a felony involving an act of moral turpitude [*Bus & Prof. Code § 22903(c)(4)*].

- Failed to operate in the normal course of business for seven consecutive business days without the consent of the supplier or have terminated the business [*Bus & Prof. Code § 22903(c)(5)*].

- Relocated or established a new or additional equipment dealer's place of business without the supplier's consent [*Bus & Prof. Code § 22903(c)(6)*].

- Materially defaulted under any chattel mortgage or other security agreement between the dealer and the supplier, or there has been a revocation of any guarantee of the dealer's present or future obligations to the supplier. However, good cause does not exist if a person revokes any guarantee in connection with or following the transfer of that person's entire ownership interest in the dealer unless the supplier requires that person to execute a new guarantee of the dealer's present or future obligations in connection with that transfer of ownership interest [*Bus & Prof. Code § 22903(c)(7)*].

- Failed to satisfy any payment obligation as it became due and payable to the supplier, failed to promptly account to the supplier for any equipment sales proceeds, or failed to hold those proceeds in trust for the benefit of the supplier [*Bus & Prof. Code § 22903(c)(8)*].

- Engaged in conduct that is injurious or detrimental to any of the following [*Bus. & Prof. Code § 22903(c)(9)*]:

  - The dealer's customers (including but not limited to excessive pricing, misleading advertising, failure to provide service and replacement parts, and failure to perform warranty obligations).

  - The public welfare.

  - The representation or reputation of the supplier's product.

- Consistently failed to meet building and housekeeping requirements, or failed to provide adequate sales, service, or parts personnel commensurate with the dealer contract [*Bus. & Prof. Code § 22903(c)(10)*].

- Consistently failed to comply with the applicable licensing laws pertaining to the products and services being represented for and on the supplier's behalf [*Bus. & Prof. Code § 22903(c)(11)*].

- Consistently failed to meet and maintain the supplier's requirements for reasonable standards and performance objectives, if the supplier has given the dealer reasonable standards and performance objectives that are based on the manufacturer's experience in other comparable market areas [*Bus. & Prof. Code § 22903(c)(12)*].

The last four categories above are subject to special notice requirements, as discussed in [2] and [3], *below* [*see Bus & Prof. Code § 22903(b), (d)*].

[2] Written 180-Day Notice

Except when the grounds for termination of a dealer contract are those set forth in *Bus. & Prof. Code § 22903(c)(1)-(8)* [*see* [1], *above*], or the consistent failure to meet a supplier's requirements [*see Bus. & Prof. Code § 22903(c)(12)*; *see also* [1], *above*], a supplier must give the dealer 180 days written notice of the supplier's intent to terminate the dealer contract. The notice must include all reasons constituting good cause for the termination and must provide the dealer with 60 days to cure any claimed deficiency. If the deficiency is cured within 60 days to the satisfaction of the supplier,

which must be determined in good faith, the notice of termination will be void [*Bus. & Prof. Code § 22903(b)*].

[3] Special Rules for Consistent Failure to Meet Supplier's Requirements

Except as discussed *below* [*see Bus. & Prof. Code § 22903(d)*], a supplier may not terminate a dealer contract based on a failure to meet the supplier's requirements [*Bus. & Prof. Code § 22903(c)(12)*; *see* [1], *above*] unless the supplier gives the dealer notice of that action at least one year before the effective date of that action. If the dealer achieves the supplier's requirements for reasonable standards or performance objectives before the expiration of the one-year notice period, the notice will be void and the dealer contract will continue in full force and effect [*Bus. & Prof. Code § 22903(a)*].

Notwithstanding *Bus. & Prof. Code § 22903(c)* [discussed in [1], *above*], if the sales, service, rental, and repair of a supplier's product represents the lesser of 10 percent or $350,000 of the dealer's total gross annual revenue that includes, but is not limited to, the sales, service, rental, or repair, for each dealer location, the supplier may terminate a dealer contract based on *Bus & Prof. Code § 22903(c)(12)* [*see* [1], *above*] upon providing the dealer with notice of that action at least 180 days before the effective date of the action. If the dealer achieves the supplier's requirements for reasonable standards or performance objectives within 60 days of receipt of the termination notice, the notice will be void and the dealer contract will remain in effect [*Bus. & Prof. Code § 22903(d)*].

Notwithstanding a dealer contract that provides for exclusivity during the term of the contract, a supplier may begin contract negotiations with a potential replacement dealer 60 days prior to the expiration of the notice period that has been provided *Bus. & Prof. Code § 22903(b)* or *(d)* if the dealer failed to achieve the supplier's requirements for reasonable standards or performance objectives within 60 days of receipt of the termination notice. A replacement dealer, however, may not conduct operations with a supplier during the term of a dealer contract [*Bus. & Prof. Code § 22903(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesTerminationsGood CauseBusiness & Corporate LawDistributorships & FranchisesTerminationsGrounds for TerminationBusiness & Corporate LawDistributorships & FranchisesTerminationsNotice Requirements

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45-515 California Forms of Pleading and Practice--Annotated § 515.215

§ 515.215 Terminating Contracts Between Single-Line Dealers and Single-Line Suppliers

[1] Applicable Terms

Special requirements, discussed in this section, apply to dealer contracts between a single-line dealer and its single-line supplier [*Bus. & Prof. Code § 22903.2(a)*].

"Single-line dealer" means a dealer that has (1) purchased construction, industrial, forestry and mining equipment from a single supplier constituting 75 percent of the dealer's new equipment, calculated on the basis of net cost; and (2) a total annual average sales volume in excess of $40,000,000 for the three calendar years immediately preceding the applicable determination date. The sales threshold, however, will be increased each year by an amount equal to the current sales threshold multiplied by the percentage increase in the index from January 1 of the immediately preceding year to January 1 of the current year [*Bus. & Prof. Code § 22901(t)*]. "Index" means the United States Department of Labor, Bureau of Labor Statistics purchase price index for construction machinery series identification number pcu333120333120, or any successor index measuring substantially similar information [*Bus. & Prof. Code § 22901(m)*].

"Single-line supplier" means the supplier that is selling the single-line dealer construction, industrial, forestry and mining equipment constituting 75 percent of the dealer's new equipment [*Bus. & Prof. Code § 22901(u)*].

[2] Good Cause Required

No supplier may terminate a dealer contract without good cause [*Bus. & Prof. Code § 22903.2(b)*]. "Terminate" means to terminate, cancel, fail to renew, or materially change the competitive circumstances of a dealer contract [*Bus. & Prof. Code § 22901(w)*].

"Good cause" is the failure by a dealer to comply with the requirements imposed on the dealer by the dealer contract, if those requirements are not different from those requirements imposed on other similarly situated dealers in this state [*Bus. & Prof. Code § 22901(l)*]. In addition, good cause exists whenever any of the following applies [*Bus. & Prof. Code § 22903.2(b)*]:

- There has been a closeout or sale of 65 percent or more of the dealer's assets related to the equipment business or there has been a commencement of a dissolution or liquidation of the dealer [*see Bus. & Prof. Code § 22903.2(f)* (dealer assets do not include land or buildings)].

- The dealer has changed its principal place of business or added additional locations without prior approval of the supplier, which may not be unreasonably withheld.

- The dealer has materially defaulted under a chattel mortgage or other security agreement between the dealer and the supplier, or there has been a revocation or discontinuance of a guarantee of a present or future obligation of the dealer to the supplier.

- The dealer has failed to operate in the normal course of business for seven consecutive days, without the consent of the supplier, or has otherwise abandoned the business.

- The dealer has pleaded guilty to or has been convicted of a felony involving an act of moral turpitude.

- The dealer has transferred an interest in the dealership [*see Bus. & Prof. Code § 22901(h)* ("dealership" defined)], or a person with a substantial interest in the ownership or control of the dealership, including an individual, proprietor, partner or major shareholder [*see Bus. & Prof. Code § 22901(o)* ("major shareholder" defined)], has withdrawn from the dealership or died, or a substantial reduction has occurred in the interest of a partner or major shareholder in the dealership. However, good cause does not exist if the supplier has consented to an action described in this paragraph.

[3] Written 90-Day Notice

Except as otherwise provided, a supplier must provide a dealer with at least 90 days written notice of termination. The notice must state all reasons constituting good cause for termination and must state that the dealer has 60 days in which to cure any claimed deficiency. If the deficiency is cured within 60 days, the notice will be void. Notwithstanding the above, if the good cause for termination is due to the dealer's failure to meet or maintain the supplier's requirements for market penetration, a reasonable period of time must have existed in which the supplier has worked with the dealer to gain the desired market share. The notice and right to cure provisions under this subdivision will not apply if the reason for termination is for any reason set forth in *Bus. & Prof. Code § 22903.2(b)* [*Bus. & Prof. Code § 22903.2(c)*; *see* [1], *above*].

[4] Dealer's Death

If a dealer dies, a supplier will have 90 days in which to consider and make a determination on a request by a family member to enter into a new dealer contract to operate the dealership. "Family member" means a spouse, parent, sibling, child, son-in-law, daughter-in-law, and lineal descendent, including those by adoption [*Bus. & Prof. Code § 22901(k)*]. If the supplier determines that the requesting family member is not acceptable, the supplier must provide the family member with a written notice of its determination with the stated reasons for rejection. This provision does not entitle an heir, personal representative, or family member to operate a dealership without specific written consent of the supplier [*Bus. & Prof. Code § 22903.2(d)*].

However, if a supplier and dealer have previously executed an agreement concerning succession rights prior to the dealer's death, and if that agreement is still in effect, the agreement will be observed even if it designated someone other than the surviving spouse or heirs of the decedent as the successor [*Bus. & Prof. Code § 22903.2(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesTerminationsGood CauseBusiness & Corporate LawDistributorships & FranchisesTerminationsGrounds for TerminationBusiness & Corporate LawDistributorships & FranchisesTerminationsNotice Requirements

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45-515 California Forms of Pleading and Practice--Annotated § 515.216

§ 515.216 Repurchase Requirements When Dealer Contract Is Canceled or Not Renewed

[1] Computers and Data Processing Equipment

Whenever a dealer contract is terminated by cancellation or nonrenewal, the supplier is obligated to repurchase much of the equipment dealer's property used in carrying on the business. The supplier is obligated to repurchase or assume the lease on any specific data processing hardware that the supplier required the equipment dealer to purchase under the dealer contract, including computer systems equipment required and approved by the supplier. The fair market value of property subject to repurchase will be deemed to be equal to the acquisition cost, including any shipping, handling, and set-up fees, less straight line depreciation of that acquisition cost over three years. If the dealer purchased data processing hardware or software that exceeded the supplier's minimum requirements, the acquisition cost of that data processing hardware or software will be deemed to be the acquisition cost of hardware or software of similar quality that did not exceed the minimum requirements of the supplier [*Bus. & Prof. Code § 22905(a)*].

[2] Few Equipment

When a dealer agreement is canceled or not renewed, the supplier is obligated to repurchase the equipment dealer's equipment and inventory. The supplier must pay a sum equal to 100 percent of the net equipment cost [*see Bus. & Prof. Code § 22901(q)* (definition)] of all new, unsold, undamaged, and complete equipment [*Bus. & Prof. Code § 22905(b)*].

[3] Demonstrators

The supplier must pay a sum equal to 100 percent of the net equipment cost [*see Bus. & Prof. Code § 22901(q)* (definition)] of all unsold, undamaged demonstrators, less depreciation due to usage of those demonstrators. "Demonstrator" means equipment in a dealer's inventory that has not been sold, but has had its usage demonstrated to potential customers, either without charge or pursuant to a short-term rental agreement, with the intent of encouraging the potential customer to purchase the equipment [*Bus. & Prof. Code § 22901(i)*]. The depreciation adjustment will be based on published industry rental rates to the extent those rates are available. For these purposes, demonstrators, with hour meters that have less than 50 hours of use will be considered new, unsold equipment subject to repurchase under

this section [*Bus. & Prof. Code § 22905(c)*].

[4] Equipment Used in Incentive Programs

The supplier must pay a sum equal to 100 percent of the net equipment cost [*see Bus. & Prof. Code § 22901(q)* (definition)] of all unsold and undamaged equipment used in a manufacturer created incentive program [*see Bus. & Prof. Code § 22901(p)* (definition)], less depreciation due to usage and bonus or volume incentive received by the dealer for the equipment. The depreciation adjustment must be based on published industry rental rates to the extent these rates are available. For these purposes, equipment with hour meters used in a manufacturer created incentive program with less than 50 hours of use will be considered new, unsold equipment subject to repurchase [*Bus. & Prof. Code § 22905(d)*].

[5] Repair Parts

The supplier must pay a sum equal to 95 percent of the current net parts costs [*see Bus. & Prof. Code § 22901(e)* (definition)] on new, unsold, undamaged repair parts that had previously been purchased from the supplier and held by the dealer on the date that the dealer contract terminates or expires [*Bus. & Prof. Code § 22905(e)*]. "Repair parts" are all parts and products related to the service or repair of equipment, including superseded parts [*Bus. & Prof. Code § 22901(s)*].

The supplier also must pay the dealer five percent of the current net parts cost on all new, unused, and undamaged repair parts returned, to cover the cost of handling, packing, and loading of those parts for return to the supplier. The dealer may allow the supplier to perform the handling, packing, and loading of parts instead of receiving the five percent payment for these services. When the supplier is chosen to perform these services, the dealer must make available to the supplier, at the dealer's address or at the places at which it is located, all equipment previously purchased by the dealer expires [*Bus. & Prof. Code § 22905(f)*].

[6] Specialized Equipment or Repair Tools

The supplier must pay a sum equal to 75 percent of the net equipment cost [*see Bus. & Prof. Code § 22901(q)* (definition)], including shipping, handling, and set-up fees, of all specialized equipment or repair tools previously purchased pursuant to requirements of the supplier prior to the date of the applicable notification of termination or nonrenewal of the dealer contract. The specialized equipment or repair tools must be unique to the supplier's product line and must be complete and in operating condition [*Bus. & Prof. Code § 22905(g)*].

[7] Payment and Allowance of Credit

Upon the payment or allowance of credit to the dealer's account of the required sums, the title to all inventory purchased will pass to the supplier making payment, and the supplier will be entitled to the possession of the inventory. All payments or allowances of credit due to dealers must be paid or credited within 90 days after receipt by the supplier of property required to be repurchased. Any payments or allowances of credit due to dealers that are not paid within the 90-day period will accrue interest at the statutory rate. The supplier may withhold payments due during the period of time in which the dealer fails to comply with its contractual obligations to remove any signage indicating that the dealer is an authorized dealer of the supplier [*Bus. & Prof. Code § 22905(h)*].

[8] Shipping Costs

The supplier and dealer must each pay 50 percent of the costs of freight to ship equipment to the nearest retail outlet or to ship repair parts to the nearest supplier distribution center [*Bus. & Prof. Code § 22905(i)*].

[9] Exclusions

When a dealer agreement is canceled or not renewed, the supplier is not required to repurchase the following items from the equipment dealer [*Bus. & Prof. Code § 22905(j)*]:

- Any repair part that is in a broken or damaged package. However, the supplier will be required to repurchase a repair part in a broken or damaged package, for a repurchase price that is equal to 85 percent of the current net parts cost for the repair part, if the aggregate current price for the entire package of repair parts is $75 or higher.

- Any repair part that, because of its condition, cannot be resold as a new part without reconditioning.

- Any inventory for which the equipment dealer is unable to furnish evidences satisfactory to the suppliers of clear title, free and clear of all claims, liens, and encumbrances.

- Any inventory that the dealer desires to keep, if the dealer has a contractual right to do so.

- Any equipment or repair parts that are is not in new, unsold, undamaged, complete condition, subject to the provisions of the Act relating to demonstrators [*see § 515.216[3]*].

- Any equipment or repair parts acquired by the dealer from any source other than the supplier, unless the equipment or repair parts were ordered from, or invoiced to the dealer by, the supplier

- Any equipment or repair parts that are not returned to the supplier within 90 days after the latter of (1) the effective date of termination of a dealer contract, or (2) the date the dealer receives from the supplier all information, documents, or supporting materials required by the supplier to comply with the supplier's return policy. However, this does not apply to a dealer if the supplier did not give the dealer notice of the 90-day deadline at the time the applicable notice of termination was sent to the dealer.

[10] Supplier's Liability for Failure to Repurchase

If any supplier fails or refuses to repurchase any inventory within 90 days after termination of a dealer contract, the supplier becomes liable for 110 percent of the current net equipment cost of the inventory, plus any freight charges paid by the dealer, interest accrued at the statutory rate from the date of shipment to the supplier, until the date of payment, and 5 percent for handling, packing, and loading, and actual costs for any court or arbitration proceedings, including costs for attorney's fees and arbitrators [*Bus. & Prof. Code § 22905(k)*].

[11] Lien Against Inventory

Notwithstanding any provision to the contrary in the Commercial Code, the dealer retains a first and prior lien against all inventory returned by the dealer to the supplier until the dealer has paid all amounts owed by the supplier for the repurchase of inventory required [*Bus. & Prof. Code § 22905(l)*].

[12] Security Interests

Bus. & Prof. Code § 22905 will not be construed to affect any security interest that the supplier may have in the inventory of the dealer, and any repurchase will not be subject to the provisions of the bulk sales law [*see Com. Code § 6101 et seq.*; *Bus. & Prof. Code § 22901(b)*] or to the claims of any secured or unsecured creditors of the supplier or any assignee of the supplier until such time as the dealer has received full payment or credit [*Bus. & Prof. Code § 22905(m)*].

[13] Cancellation to Avoid Payment

The dealer may not cancel a dealer contract to avoid a payment obligation to the supplier for equipment or parts [*Bus. & Prof. Code § 22905(n)*].

[14] Multiple Business Locations

If a dealer has more than one business location covered by the same dealer contract, the repurchase requirements will apply only to the repurchase of a dealer's inventory obtained from the supplier or the supplier's distributor by the particular business location or locations involved in the dealer contract termination and will not apply to any other business locations covered by the same contract [*Bus. & Prof. Code § 22905(o)*].

[15] When Supplier's Product Is Limited

If a supplier's product represents the lesser of 10 percent or $350,000 of the dealer's total gross annual revenue that includes, but is not limited to, the sales, service, rental, or repair for each dealer location, then the supplier must repurchase the inventory only if a dealer contract is canceled or not renewed by the dealer for any of the following reasons [*Bus. & Prof. Code § 22905(p)*]:

- The supplier consistently failed to provide adequate product support for the type and use of the product, which includes, but is not limited to, technical assistance, operators and repair manuals, and parts lists and diagrams.

- The supplier consistently failed to provide adequate training, required by the supplier, for maintenance, repair, or usage of the supplier's product.

- The supplier consistently failed to provide marketing and marketing support for the supplier's product if marketing is a requirement of the dealer contract.

- The supplier's product is defective and breaches the implied warranty of merchantability as defined in *Civ. Code § 1791.1*.

- The supplier consistently failed to meet its warranty obligations to the dealer.

- The supplier abandons the market thereby failing to provide parts and services necessary for a dealer to perform warranty obligations.

- The supplier engaged in conduct that is injurious or detrimental to the dealer's customers, the public welfare, or the reputation of the dealer.

- The supplier made a material misrepresentation or falsification of any record.

- The supplier violated any provision of *Bus. & Prof. Code § 22900 et seq.*

Notwithstanding the above provisions, nothing in *Bus. & Prof. Code § 22905* will be construed to limit the supplier's responsibility to repurchase a dealer's inventory when the supplier cancels or fails to renew a dealer contract [*Bus. & Prof. Code § 22905(q)*].

Legal Topics:

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

Business & Corporate LawDistributorships & FranchisesCauses of ActionBreach of ContractBusiness & Corporate LawDistributorships & FranchisesRemediesGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRemediesCompensatory DamagesBusiness & Corporate LawDistributorships & FranchisesRemediesCosts & Attorney FeesBusiness & Corporate LawDistributorships & FranchisesTerminationsGeneral Overview

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45-515 California Forms of Pleading and Practice--Annotated § 515.217

§ 515.217 Dealer's Lien for Repurchase Amount

[1] Scope of Lien

A dealer is entitled to establish a lien for the repurchase amount for returned equipment and for the costs of enforcing the lien for sums that remain unpaid after a dealer agreement is canceled or not renewed [*see Bus. & Prof. Code §§ 22905, 22906(b)*; *see also Bus & Prof. Code § 22905(b)-(f)* (calculation of repurchase amount)]. The amount of charges secured by the lien may not exceed the reasonable or agreed-on charges for the equipment specified in *Bus. & Prof. Code § 22905* [*Bus. & Prof. Code § 22906(d)*]. The lien attaches to the proceeds of any sale of the equipment returned for repurchase [*Bus. & Prof. Code § 22906(c)*]. Repurchase liens are subject to Division 9 of the Commercial Code, except as otherwise provided [*Bus. & Prof. Code § 22922(a)*; *see Bus. & Prof. Code § 22922(e)*].

For further discussion of Division 9 of the Commercial Code, see Ch. 503, *Sales: Secured Transactions* .

For the purposes of *Bus. & Prof. Code § 22900 et seq.*, as used in Division 9 of the Commercial Code (*Com. Code § 9101 et seq.*), the following terms have the following meanings [*Bus. & Prof. Code § 22922(b)*]:

- "Secured party" refers to the dealer, lien creditor, lien claimant, or assignee.
- "Debtor" refers to the supplier, lien debtor, or debtor.
- "Collateral" refers to the equipment subject to the lien discussed here.

A security agreement is not necessary to make an equipment repurchase lien created under *Bus. & Prof. Code § 22900 et seq.* enforceable [*Bus. & Prof. Code § 22922(c)*]. Nor does an equipment repurchase lien created under *Bus. & Prof. Code § 22900 et seq.* continue in the repurchased equipment following the disposition of that equipment [*Bus. & Prof. Code § 22922(d)*].

The right of a dealer to enforce the lien created under *Bus. & Prof. Code § 22900 et seq.* is governed by *Bus. & Prof. Code § 22900 et seq.* and not by Chapter 6 (*Com. Code § 9601 et seq.*) of Division 9 of the Commercial Code [*Bus. & Prof. Code § 22922(e)*].

[2] Formalities

[a] Notice of Lien

A dealer is not entitled to establish a lien pursuant to *Bus. & Prof. Code § 22900 et seq.* unless the lien claimant (the dealer) first sends a written notice of lien to the lien debtor (the supplier) by certified mail that states all of the following [*Bus. & Prof. Code § 22906(a)*]:

- The payment of the reasonable or agreed-on charges is more than 90 days overdue. This requirement does not apply to equipment subject to repurchase that was returned to the supplier after the return of other equipment for which payment is overdue.

- The amount of the reasonable or agreed-on charges that are overdue.

- The lien debtor has the following three alternatives:

  - Allow the lien to be filed;

  - Enter into a consensual security interest in the proceeds pursuant to the Commercial Code; or

  - Pay the reasonable or agreed-on charges that are overdue.

- A notice to the lien debtor that (1) he or she has 10 days from receipt of the notice to select an alternative, to notify the lien claimant of the alternative selected, to satisfy all of the requirements of the selected alternative, and that (2) the lien claimant may file a notice of claim of lien at any time thereafter if the lien debtor does not comply with these instructions. Only the part of the notice referred to in clause (1) needs to be in 10-point type or bolder [*Bus. & Prof. Code § 22906(b)(4)*].

The notice of lien remains in effect, and no new notice of claim of lien is required in order to maintain the lien, as long as the dealer remains unpaid for the amounts secured by the lien [*Bus. & Prof. Code § 22907*].

[b] Perfection of Lien by Filing Notice of Claim

After sending the lien debtor a written notice of lien, a dealer may proceed to perfect the lien by filing a notice of claim of lien with the Secretary of State [*Bus. & Prof. Code § 22908*]. A notice of claim of lien must contain all of the following information [*Bus. & Prof. Code § 22909*]:

- The name and address of the lien claimant.

- The name and address of the lien debtor.

- The location to which the equipment was returned.

- A statement that payment of the reasonable or agreed-on charges is more than 90 days overdue.

- The amount of the reasonable or agreed-on charges that are overdue.

- A statement, signed under penalty of perjury, that the lien claimant sent a notice of lien to the lien debtor, that more than 10 days have elapsed since the notice was received by the lien debtor, and that the lien debtor has not complied with the instructions contained in the notice of lien.

- A statement that the lien claimant has an equipment repurchase lien having complied with the notice requirements.

A notice of claim of lien may be signed by the lien claimant or by a person authorized by the claimant [*Bus. & Prof. Code § 22910*].

[C] Use of Amended Financing Statement

A notice of claim of lien must be filed on the form prescribed by the Secretary of State pursuant to *Com. Code § 9502* [*Bus. & Prof. Code § 22911*; *see also Bus. & Prof. Code § 22923* (Secretary of State may adopt regulations and prescribe necessary forms)]. The standard form must be completed in its entirety with the following changes [*Bus. & Prof. Code § 22911(a)-(d)*]:

- The lien claimant may be identified either as a lien claimant or as a secured party.

- The form must be signed by the lien claimant and need not be signed by the lien debtor.

- The description of the collateral must be the information required by *Bus. & Prof. Code § 22909(c)-(e), (g)* for the notice of claim of lien (set forth in [6]; *above*) must be inserted.

- A separately signed statement containing the information required by *Bus. & Prof. Code § 22909(f)* for the notice of claim of lien (set forth in item [6], *above*) must be attached to the form.

For discussion of filing financing statements, see Ch. 503, *Sales: Secured Transactions* . For additional discussion and a sample financing statement (Form UCC-1), see *California Legal Forms, Ch. 42, Secured Transactions, § 42.211* (Matthew Bender).

[d] Filing Notice of Claim With Secretary of State

A notice of claim of lien is filed, indexed, and marked in the Secretary of State's office in the same manner as a financing statement [*Bus. & Prof. Code § 22912*; *see Com. Code §§ 9516, 9519*]. For the purpose of the Secretary of State's index and for the purpose of issuing a certificate disclosing financing statement information, the Secretary of State must identify a notice of claim of lien as a financing statement [*Bus. & Prof. Code § 22914*; *see Com. Code §§ 9516, 9519, 9523, 9528*].

For further discussion of filing financing statements, procedures in the Secretary of State's office, and requests for financing statement information, see Ch. 503, *Sales: Secured Transactions* ; see also California Legal Forms, Ch. 42, *Secured Transactions* (Matthew Bender).

[e] Notice of Claim to Lien Debtor After Filing

The lien claimant must provide written notice of the claim of lien to the lien debtor within 10 days of filing the lien with the Secretary of State [*Bus. & Prof. Code § 22913*].

[3] Request for Lien Information

The public has a right to obtain a certificate from the Secretary of State identifying whether there is a lien on file and any notice of claim of lien naming a particular debtor, and if so, giving the date and time when each notice was filed and the names and addresses of each lienholder [*Bus. & Prof. Code § 22916*]. The public also has a right to obtain a copy of any notice of an equipment repurchase lien, including notices affecting the notices from the Secretary of State [*Bus. & Prof. Code § 22917*]. The Secretary of State may impose a fee for providing the certificate or copies [*Bus. & Prof. Code §§ 22916, 22917*; *see Com. Code §§ 9523, 9525* (permissible fees)].

For a sample request for information (Form UCC-11) pursuant to Division 9 of the Commercial Code, see California Legal Forms, Ch. 42, *Secured Transactions* (Matthew Bender).

[4] Priority of Lien

A lien created under *Bus. & Prof. Code § 22900* ranks in priority with conflicting security interests according to the time it is filed with the Secretary of State [*Bus. & Prof. Code § 22915(a)*]. The lien has the same priority as a security interest perfected by filing a financing statement as of the date the notice of claim of lien was filed with the Secretary of State [*Bus. & Prof. Code § 22915(b)*].

The lien does not have priority over labor claims for wages and salaries for personal services that were provided by any employee to any lien debtor in connection with the equipment or the proceeds of its sale that is subject to the lien [*Bus. & Prof. Code § 22915(c)*].

[5] Assignment or Transfer of Lien

An equipment repurchase lien is assignable or transferable by the lien holder, with full rights of enforcement [*Bus. & Prof. Code § 22921(a)*]. The lienholder must file a statement of assignment or transfer with the Secretary of State's office in the same manner as prescribed in *Com. Code § 9514* [*Bus. & Prof. Code § 22921(b)*]. For further discussion of filing under Division 9 of the Commercial Code, see Ch. 503, *Sales: Secured Transactions* .

[6] Termination of Lien

When a lien claimant receives payment for the total amount secured by the lien, he or she must send the lien debtor a statement relinquishing the security interest under the notice of claim of lien. The claim of lien must be identified by the date, the names of the parties, and the file number. If the lienholder of record fails to send a termination statement within 10 days of receiving full payment, he or she is liable to the debtor for all actual damages the debtor suffers due to the failure to do so. If the failure to send the termination statement is in bad faith, the lienholder also is liable for a penalty of $100 [*Bus. & Prof. Code § 22920(a)*].

The filing officer for the Secretary of State's office must mark each termination statement with the date and time of filing and index the statement under the name of the lien debtor and under the file number of the original lien. If the filing officer has an electronic microfilm or other photographic record of the lien and related filings, he or she may remove and destroy the originals after receipt of the termination statement. If the filing officer does not have a microfilm or other photographic record, he or she may remove and destroy the originals after one year from the receipt of the termination statement [*Bus. & Prof. Code § 22920(b)*].

For a sample termination statement (Form UCC-3) pursuant to Division 9 of the Commercial Code, see *California Legal Forms, Ch. 42, Secured Transactions, § 42.214* (Matthew Bender).

[7] Foreclosure

A lien claimant may foreclose on an equipment repurchase lien only in an action to recover the reasonable or agreed-on

charges. The final judgment is enforceable under the Enforcement of Judgments Law (*Code Civ. Proc. § 680.010 et seq.*) [*Bus. & Prof. Code § 22919*; *see* Ch. 254, *Executions and Enforcement of Judgments*].

A lien claimant must provide written notice to secured creditors at least 30 days prior to enforcing the claim of lien. For these purposes, a "secured creditors" means any entity named as a secured party in the financing statement filed with regard to the debtor and that covers returned equipment [*Bus. & Prof. Code § 22918*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesCauses of ActionBreach of ContractBusiness & Corporate LawDistributorships & FranchisesRemediesGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesTerminationsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)Application & ConstructionDefinitionsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)Attachment of Security InterestsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsTermination StatementsCommercial Law (UCC)Secured Transactions (Article 9)PriorityLiens

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45-515 California Forms of Pleading and Practice--Annotated § 515.218

§ 515.218 Inventory Repurchase on Death of Dealer

In the event of the death or incapacity of a dealer, the heirs or the executor have the option of requiring the supplier to repurchase the inventory from the estate as if the supplier had terminated the dealer contract and the inventory repurchase provisions were applicable [*Bus. & Prof. Code § 22924(a)*; *see Bus. & Prof. Code § 22905*; *see also Bus. & Prof. Code § 22901(n)* ("inventory" defined as equipment, repair parts, data-processing hardware or software, and specialized service or repair parts)]. This provision specifically applies only to an owner, an equal or majority partner, or the majority stockholder of a corporation operating as a dealer. The heirs or the executor have 180 days following the equipment dealer's death to exercise this option, and they are not entitled to operate the dealership beyond that period without the supplier's consent [*Bus. & Prof. Code § 22924(a)*].

The inventory need not be repurchased if the heirs or the executor and the supplier enter into a new dealer agreement. In addition, the inventory need not be repurchased if a successor to the dealer is established under *Bus. & Prof. Code § 22903.1*; *see § 515.218* [*Bus. & Prof. Code § 22924(a)*]. These procedures are subject to any provisions in the dealer contract pertaining to the dealer's death or to succession rights to the extent that they are not inconsistent [*Bus. & Prof. Code § 22924(a)*].

The right of the heirs or the executor to require a supplier to repurchase the inventory on a dealer's death is supplemental to any agreement between the dealer and the supplier covering the return of equipment, attachments, and repair parts. If the option is exercised, the supplier has the right to charge back discounts previously paid or credited to the equipment dealer's account on previous inventory purchases. In addition, any inventory repurchase under these provisions is not subject to the bulk sales law [*Bus. & Prof. Code § 22924(b)*; *see* Ch. 270, *Fraudulent Conveyances*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesRemediesGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesTerminationsGeneral OverviewContracts LawSales of GoodsDamages &

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45-515 California Forms of Pleading and Practice--Annotated § 515.219

§ 515.219 Sale or Transfer of Business of Non-Single-Line Dealer

Special requirements, discussed in this section, apply to a sale or transfer of a business when a contract is between a dealer who is *not* a single-line dealer and a supplier who is *not* a single-line supplier [*Bus. & Prof. Code § 22903.1(a)*; *see Bus. & Prof. Code § 22901(t), (u)* (definitions); *see also § 515.215*].

If a supplier has contractual authority to approve or deny a request for a sale or transfer of a dealer's business or an equity ownership interest in the business, the supplier must approve or deny the request within 60 days after receiving a written request from the dealer. If the supplier has neither approved nor denied the request within the 60-day period, the request will be deemed approved. The dealer's request must include reasonable financial information, personal background, character references, and work history information for the acquiring persons. If a supplier denies a such a request, the supplier must provide the dealer with a written notice of the denial that states the reasons for the denial. A supplier may only deny a request based on the failure of the proposed transferees to meet the reasonable requirements consistently imposed by the supplier in determining approval of transfers or approvals of new dealers [*Bus. & Prof. Code § 22903.1(b)*].

If a dealer dies and the supplier has contractual authority to approve or deny a request for the sale or transfer of the dealer's business or an equity ownership interest in the business, the dealer's estate or other person with authority to transfer the dealer's assets will have 180 days to submit to the supplier a written request for a sale or transfer of that business or equity ownership interest. If the request is timely submitted, the supplier must approve or deny that request in accordance with *Bus. & Prof. Code § 22903.1(b)*. Any attempt by a supplier to terminate the dealer contract as a result of the death of a dealer will be delayed until there has been compliance with the terms of this section or the 180-day period has expired, as applicable [*Bus. & Prof. Code § 22903.1(c)*].

Nonetheless, if a supplier and dealer executed an agreement concerning succession rights prior to the dealer's death, and if the agreement is still in effect, the agreement will be observed even if it designated someone other than the surviving spouse or heirs of the decedent as the successor [*Bus. & Prof. Code § 22903.1(d)*].

A supplier may withhold consent to a transfer of an interest in a dealership if, with due regard to regional market conditions and distribution economies, the dealer's area of responsibility or trade area does not afford sufficient sales potential to reasonably support a dealer. In any dispute between a supplier and dealer under this subdivision, the supplier will bear the burden of proving that the dealer's area of responsibility or trade area does not afford sufficient sales potential to reasonably support a dealer [*Bus. & Prof. Code § 22903.1(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesAssignments & TransfersBusiness & Corporate LawDistributorships & FranchisesBusiness Opportunities

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45-515 California Forms of Pleading and Practice--Annotated § 515.220

§ 515.220 Warranty Claims

[1] Approval or Rejection by Supplier

If a dealer submits a warranty claim [*see Bus. & Prof. Code § 22901(c)* ("claim" defined)] to a supplier while the dealer contract is in effect or within 60 days after the termination of the dealer contract, and if the claim is for work performed before the termination or expiration of the dealer contract, the supplier must approve or reject that warranty claim by written notice to the dealer within 45 days after the supplier's receipt of the warranty claim. If the supplier approves the warranty claim, the supplier must pay the dealer or credit the dealer's account the entire amount owed with respect to the claim within 30 days of approval. If the supplier rejects the warranty claim, the supplier must give the dealer written or electronic notice of the grounds for rejection. These reasons must be consistent with the supplier's reason for rejecting the warranty claims of other dealers, both in terms and manner of enforcement. If the supplier does not provide the dealer with grounds for rejection, the claim will be deemed to be approved [*Bus. & Prof. Code § 22903.3(a)*].

[2] Resubmission of Claim by Dealer

Any claim that is not approved by the supplier based upon the dealer's failure to properly follow the procedural or technical requirements for submission of the warranty claim may be resubmitted in proper form by the dealer within 30 days of receipt of the supplier's rejection notification [*Bus. & Prof. Code § 22903.3(b)*].

[3] Performance of Warranty Work

Warranty work performed by the dealer must be compensated in accordance with the reasonable and customary amount of time required to complete the work, expressed in hours and fractions multiplied by the dealer's established customer hourly retail labor rate, which must have been made known previously to the supplier. Parts used in warranty repair work must be reimbursed at the current net parts cost plus 15 percent and the cost of freight. For these purposes, "established customer hourly retail labor rate" means the lowest posted customer in-shop retail labor rate for the six months preceding the claim [*Bus. & Prof. Code § 22903.3(c)*].

[4] Supplier's Written Policies and Procedures

The requirements of *Bus. & Prof. Code § 22903.3(a), (b),* and *(c)* [*see § 515.220[1] -[3]*] apply to all warranty claims submitted by a dealer to a supplier when the dealer has complied with the supplier's reasonable written policies and procedures for warranty reimbursement. A supplier's warranty reimbursement policies and procedures will be deemed unreasonable to the extent they conflict with any of the provisions of this section [*Bus. & Prof. Code § 22903.3(f)*].

[5] Alternate Terms and Conditions

A dealer may choose to accept alternate reimbursement terms and conditions instead of those discussed in *§ 515.220[1] -[3]* if there is a written dealer contract between the supplier and the dealer that requires the supplier to compensate the dealer for warranty labor costs either as (1) a discount in the pricing of the equipment to the dealer; or (2) a lump-sum payment to the dealer that is made to the dealer within 90 days of the sale of the supplier's new equipment. If these requirements are met and alternate terms and conditions are in place, the requirements discussed in *§ 515.220[1] -[3]* do not apply and the alternate terms and conditions are enforceable. However, the supplier's obligation to reimburse the dealer for parts in accordance with *Bus. & Prof. Code § 22903.3(c)* is unaffected in any case [*Bus. & Prof. Code § 22903.3(g)*].

[6] Work Performed at Supplier's Request

Any repair work or installation of replacement parts with respect to the dealer's equipment in inventory or equipment of the dealer's customers at the request of the supplier, including work performed pursuant to a product improvement program, will be deemed to create a warranty claim for which the dealer must be paid [*Bus. & Prof. Code § 22903.3(d)*].

[7] Audit of Warranty Claims

A supplier may audit warranty claims submitted by its dealers for a period of up to one year. If the audit reveals an amount was misrepresented by the supplier, the supplier may charge its dealers the amount shown by the audit to be misrepresented. If a warranty claim is misrepresented, then subsequent warranty claims submitted within the two-year period ending with the date of the audit may be audited. However, a supplier may not audit a warranty claim more than once [*Bus. & Prof. Code § 22903.3(e)*].

[8] Supplier's Nonpayment of Dealer's Claim

If a supplier fails or refuses to pay for warranty work covered under *Bus. & Prof. Code § 22903.3* within 30 days of the supplier's approval of the dealer's claim, the supplier will be liable for 110 percent of the total claim, plus interest at the statutory rate from the payment due date until the date of payment, and actual costs for any court or arbitration proceeding, including costs for attorney's fees and arbitrators [*Bus. & Prof. Code § 22903.3(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesCauses of ActionBreach of ContractBusiness & Corporate LawDistributorships & FranchisesRemediesCosts & Attorney FeesBusiness & Corporate LawDistributorships & FranchisesRemediesPunitive DamagesContracts LawBreachCauses of ActionBreach of WarrantyContracts LawSales of GoodsWarrantiesGeneral Overview

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45-515 California Forms of Pleading and Practice--Annotated § 515.221

§ 515.221 Action by Dealer for Violations by Supplier

Any dealer may bring an action against a supplier in any court of competent jurisdiction for damages sustained by the dealer as a consequence of the supplier's violation of any provision of *Bus. & Prof. Code § 22900 et seq.*, together with costs and reasonable attorney's fees. A dealer may also be granted injunctive relief against unlawful termination, cancellation, nonrenewal, and change in competitive circumstances. These remedies are not exclusive, and are in addition to any other remedies permitted by law. The actions authorized under *Bus. & Prof. Code § 22900 et seq.* also are not intended to affect current law pertaining to product liability actions [*Bus. & Prof. Code § 22925*; *see* Ch. 460, *Products Liability*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesCauses of ActionBreach of ContractBusiness & Corporate LawDistributorships & FranchisesRemediesCompensatory DamagesBusiness & Corporate LawDistributorships & FranchisesRemediesCosts & Attorney FeesBusiness & Corporate LawDistributorships & FranchisesRemediesInjunctive ReliefContracts LawSales of GoodsDamages & RemediesBuyer's Damages & RemediesGeneral Overview

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§ 515.222 Choice of Law or Forum

A provision in any contract or agreement with respect to a supplier that requires jurisdiction or venue or forum outside of California or that requires the application of the laws of another state is void with respect to a claim otherwise enforceable under *Bus. & Prof. Code § 22900 et seq.* [*Bus. & Prof. Code § 22927*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesCauses of ActionChoice of LawContracts LawContract Conditions & ProvisionsForum Selection Clauses

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[Reserved]

§§ 515.223[Reserved]

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45-515 California Forms of Pleading and Practice--Annotated § 515.240

§ 515.240 Forms of Discovery

For interrogatories relating to securities regulation, see Bender's Forms of Discovery (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesFormSecurities LawBlue Sky LawsAdministration & Enforcement

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45-515 California Forms of Pleading and Practice--Annotated § 515.241

§ 515.241 California Legal Forms

For transactional forms relating to issuance and qualification of corporate securities, see California Legal Forms, Chs. 6 through 6J (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Securities LawBlue Sky LawsAdministration & Enforcement

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45-515 California Forms of Pleading and Practice--Annotated § 515.242

§ 515.242 Federal Statutes

Securities Act of 1933. *15 U.S.C. §§ 77a-77aa*

Trust Indenture Act of 1939. *15 U.S.C. §§ 77aaa-77bbbb*

Securities Exchange Act of 1934. *15 U.S.C. §§ 78a-78kk*

Insider Trading and Securities Fraud Enforcement Act of 1988. *15 U.S.C. §§ 78c, 78o, 78t-1, 78u, 78u-1, 78ff, 78kk, 80b-4a*

National Securities Markets Improvement Act of 1996. P.L. 102-290, 110 Stat. 3416 (H.R. 3005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawFederal ActsTrust Indenture ActSecurities LawAdditional Offerings & the Securities Exchange Act of 1934General OverviewSecurities LawInitial Public Offerings & the Securities Act of 1933General OverviewSecurities LawLiabilitySecurities Exchange Act of 1934 ActionsInsider TradingGeneral OverviewSecurities LawRegulation of Securities MarketsGeneral OverviewSecurities LawTrust IndenturesGeneral Overview

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45-515 California Forms of Pleading and Practice--Annotated § 515.243

§ 515.243 State Statutes

Telephonic sellers; exemption for sellers of certain securities. *Bus. & Prof. Code §§ 17511 et seq., 17511.1(e)(16)*

Treble penalty in action by or on behalf of senior citizens or disabled person for deceptive or unfair acts, practices, or methods of competition. *Civ. Code § 3345*

Financial planners, investment advisors, and specified others are held to standard of expert; liability for return of compensation and damages; specified exception include persons licensed under Investment Advisors Act of 1940, Corporate Securities Law of 1968, California Commodity Law, Insurance Law, and Real Estate Law. *Civ. Code § 3372*

Contract for sale of security enforceable whether or not there is writing, even if contract not capable of performance within one year of its making. *Com. Code § 8113* (effective January 1, 1997)

Definitions. *Corp. Code § 25000 et seq.*

Qualification of sale of securities. *Corp. Code § 25100 et seq.*

Regulation of agents, broker-dealers, and investment advisers. *Corp. Code § 25200 et seq.*

Advertising securities. *Corp. Code § 25300 et seq.*

Fraudulent and prohibited practices. *Corp. Code § 25400 et seq.*

Enforcement and liabilities. *Corp. Code § 25500 et seq.*

Departmental hearing. *Corp. Code § 25702*

Prohibitions and disclosure requirements relating to sale of securities in retail branch of savings and loan associations. *Fin. Code § 4980 et seq.*

Trust or special purpose entity that is used to apply for and initiate issuance of life insurance policies for investors, when no beneficiary of that trust or entity has insurable interest in lives being insured, violates insurable interest laws and prohibition against wagering on life; device, scheme, or artifice designed to give appearance of insurable interest when there is no legitimate insurable interest violates insurable interest laws. *Ins. Code § 10110.1(d), (e)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Securities LawBlue Sky LawsAdministration & EnforcementSecurities LawBlue Sky LawsBlue Sky FraudGeneral OverviewSecurities LawBlue Sky LawsCivil LiabilityGeneral OverviewSecurities LawBlue Sky LawsOffer & SaleSecurities LawBlue Sky LawsRegistration of Agents, Broker-Dealers & Investment Advisers

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45-515 California Forms of Pleading and Practice--Annotated § 515.244

§ 515.244 Federal Administrative Regulations

Practice under Securities Act of 1933. *17 C.F.R. § 230.100 et seq.*

Practice under Securities Exchange Act of 1934. *17 C.F.R. § 240.0-1 et seq.*

Practice under Trust Indenture Act of 1939. *17 C.F.R. § 260.0-1 et seq.*

Accounting practice under federal securities laws. *17 C.F.R. § 210.1-01 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawFederal ActsTrust Indenture ActSecurities LawAdditional Offerings & the Securities Exchange Act of 1934General OverviewSecurities LawInitial Public Offerings & the Securities Act of 1933General OverviewSecurities LawTrust IndenturesGeneral Overview

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45-515 California Forms of Pleading and Practice--Annotated § 515.245

§ 515.245 California Administrative Regulations and Releases

General regulations promulgated by of Commissioner of Corporations. *10 Cal. Code Reg. § 250.1 et seq.*

Administrative hearings before Department of Corporations. *10 Cal. Code Reg. § 250.17 et seq.*

Rules of Commissioner of Corporations relating to corporate securities. *10 Cal. Code Reg. § 260.000 et seq.*

Guidelines for determining when securities are being "offered to the public." Commissioner of Corporations Release No. 5-C (1969)

Repurchase offers. Commissioner of Corporations Release No. 36-C (Rev 1975)

Broker-dealer licensure requirements for officers and directors of issuers. Commissioner of Corporations Release No. 119-C (Oct. 22, 2008)

Legal Topics:

For related research and practice materials, see the following legal topics:
Securities LawBlue Sky LawsAdministration & Enforcement

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45-515 California Forms of Pleading and Practice--Annotated § 515.246

§ 515.246 Decisions

[1] Burden of Proof--Duty of Clearing Broker

Fraud cause of action not stated against clearing broker for fraud based on conduct of primary broker because clearing broker was agent of primary broker and did not exercise any control over primary broker. *Mars v. Wedbush Morgan Securities, Inc. (1991) 231 Cal. App. 3d 1608, 1616, 283 Cal. Rptr. 238*

[2] Burden of Proof--Duty of Stockbroker

Broker not permitted to sell customer's stock or to use it for broker's own purposes except as authorized by customer or permitted by law. *Edwards v. Jenkins (1932) 214 Cal. 713, 720, 7 P.2d 702* (holding unauthorized sale to be conversion)

California cities and local agencies that deposited funds with Orange County Treasurer for investment in statutory investment trust which then collapsed pleaded facts sufficient to state causes of action on direct claims for relief against securities and financial broker; trust beneficiaries were entitled to assert claims of fraud, conspiracy to defraud, negligent misrepresentation, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, receiving stolen property, and violations of RICO directly against broker. *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1998) 68 Cal. App. 4th 445, 486, 80 Cal. Rptr. 2d 329*

In investors' action against stockbroker for negligent misrepresentation, justifiability of reliance was question of fact; grant of summary judgment in favor of broker based on disclosures in offering memoranda was error when investors alleged misrepresentations regarding matters not addressed by memoranda and not necessarily inconsistent with disclosures in memoranda. *Blankenheim v. E. F. Hutton & Co. (1990) 217 Cal. App. 3d 1463, 1474-1475, 266 Cal. Rptr. 593*

As matter of public policy, *Civ. Code § 1668* renders hold-harmless agreement void in action by investor against

stockbroker for negligent misrepresentation. *Blankenheim v. E. F. Hutton & Co. (1990) 217 Cal. App. 3d 1463, 1472-1473, 266 Cal. Rptr. 593*

Impact of state action for common law breach of stockbroker's fiduciary duty to clients, who were trustees of profit-sharing trust investing trust funds, on trust or its administration was too tenuous, remote, and peripheral for action to be preempted by ERISA (*29 U.S.C. § 1001 et seq.*). *Duffy v. Cavalier (1989) 215 Cal. App. 3d 1517, 1529, 264 Cal. Rptr. 740*

[3] Choice of Laws

Criminal liability for violation of *Corp. Code § 25401* may be imposed even if security was not offered to public. *People v. Smith (1989) 215 Cal. App. 3d 230, 236-238, 263 Cal. Rptr. 684* (distinguishing definition of security used in *People v. Schock (1984) 152 Cal. App. 3d 379, 382, 385, 199 Cal. Rptr. 327* , and *People v. Miller (1987) 192 Cal. App. 3d 1505, 1507, 1510, 238 Cal. Rptr. 168* , which included "indiscriminate public offering" element)

Penal Code § 1203.4 prohibits imposition of criminal liability for violation of *Corp. Code § 25401* based on failure to disclose offeror's principal's felony conviction that was reduced to misdemeanor. *People v. Smith (1989) 215 Cal. App. 3d 230, 238-239, 263 Cal. Rptr. 684*

Privity between issuer and investor not necessary for imposition of criminal liability under *Corp. Code §§ 25110* (selling unregistered securities) and 25401 (false representations); thus, maker of notes secured by interests in trust deeds who misrepresented value of properties securing notes to mortgage broker was liable, although only mortgage company dealt with ultimate investors. *People v. Miller (1987) 192 Cal. App. 3d 1505, 1511-1512, 238 Cal. Rptr. 168*

Plaintiff required to establish "scienter" in making claim under Securities Exchange Act of 1934, § 10(b) (*15 U.S.C. § 78j(b)*, relating to manipulative or deceptive devices employed in purchase or sale of registered securities), and punitive damages not recoverable, whereas cause of action under state law for negligent misrepresentation required showing of negligence only, and punitive damages recoverable under *Civ. Code § 3294* in certain actions. *Schneider v. Vennard (1986) 183 Cal. App. 3d 1340, 1348, 228 Cal. Rptr. 800*

[4] Common Law Actions

California law allows cause of action for fraud or negligent misrepresentation by persons wrongfully induced to hold stock instead of selling it; cause of action is limited to stockholders who can make bona fide showing of actual reliance upon misrepresentations. *Small v. Fritz Companies, Inc. (2003) 132 Cal. Rptr. 2d 490, 65 P.3d 1255*

Complaint sufficiently alleged common law fraud and negligent misrepresentation claims against broker-dealer based on both oral misrepresentations and written misrepresentations in offering documents, relating to repayment of bridge notes from preferred-stock offering and status of that offering. *Apollo Capital Fund LLC v. Roth Capital Partners (2007) 158 Cal. App. 4th 226, 240-243, 70 Cal. Rptr. 3d 199*

[5] Damages

Damages for stockbroker's breach of fiduciary duty are measured by value of securities at time of unauthorized transactions or unsuitable investment, plus amount those securities would have earned if retained, less amount of cash and securities withdrawn by client. *Hobbs v. Eichler (1985) 164 Cal. App. 3d 174, 197, 210 Cal. Rptr. 387* ; *Twomey v. Mitchum, Jones & Templeton, Inc. (1968) 262 Cal. App. 2d 690, 730, 69 Cal. Rptr. 222*

[6] Definition of Security

Sales of interests in joint ventures for oil and gas exploration were transactions in "securities" because purported venturers, although experienced in business affairs generally, had insufficient experience in oil and gas exploration to participate in those ventures in any meaningful way except as passive investors; Ninth Circuit's "investment contract" test applied in *Holden v. Hagopian (9th Cir. 1992) 978 F.2d 1115, 1119* (whether investors had experience in business generally), and developed in earlier cases [*see generally § 515.246[10][f]*] was rejected, and court elected to follow Fifth Circuit's test based on *Williamson v. Tucker (5th Cir. 1981) 645 F.2d 404* (whether investors had experience in particular kind of business in which capital was being invested). *Consolidated Management Group, LLC v. Department of Corps. (2008) 162 Cal. App. 4th 598, 610-612, 75 Cal. Rptr. 3d 795*

Gold production agreements and gold delivery agreements, which promised delivery of gold in 15 months from ore that was to be mined with unique, experimental, and untested process financed by sale of agreements, was security. *People ex rel. Bender v. Wind River Mining Project (1990) 219 Cal. App. 3d 1390, 1401-1406, 269 Cal. Rptr. 106* (distinguishing scheme in *Moreland v. Department of Corporations (1987) 194 Cal. App. 3d 506, 516-523, 239 Cal. Rptr. 558* , in which gold had already been mined and assayed)

Proper jury instruction for definition of security; judge's function was to instruct regarding definition of security and jury's was to determine whether particular piece of paper meets that definition. *People v. Smith (1989) 215 Cal. App. 3d 230, 236, 263 Cal. Rptr. 684*

Gold ore sales contract and refining contract was not security under *Corp. Code § 25019* "risk capital" test because they involve no contribution of risk capital to business enterprise and investor is adequately secured. *Moreland v. Department of Corporations (1987) 194 Cal. App. 3d 506, 522-524, 239 Cal. Rptr. 558*

"Risk capital" factors are whether (1) funds are being raised for business venture, (2) transaction is offered indiscriminately to public at large, (3) investors do not control success of enterprise, and (4) investors' money is substantially at risk because it is inadequately secured. *Moreland v. Department of Corporations (1987) 194 Cal. App. 3d 506, 519, 239 Cal. Rptr. 558* ; *Leyva v. Superior Court (1985) 164 Cal. App. 3d 462, 470, 210 Cal. Rptr. 545*

Gold ore sales contract and refining contract was marketable commodity, not security, under federal criteria, because there was no common enterprise and expected profits would come not from efforts of others, but from fluctuations in price of gold. *Moreland v. Department of Corporations (1987) 194 Cal. App. 3d 506, 518-519, 239 Cal. Rptr. 558*

Federal law was persuasive in interpreting *Corp. Code § 25019*, defining security; three elements required of security under federal test are (1) investment of money, (2) in common enterprise, (3) with profits to come solely from efforts of others. *Moreland v. Department of Corporations (1987) 194 Cal. App. 3d 506, 512-513, 239 Cal. Rptr. 558*

Applying federal standard, fractional interest in promissory note and related deeds of trust constituted securities within the meaning of *Corp. Code § 25019*. *People v. Miller (1987) 192 Cal. App. 3d 1505, 1511, 238 Cal. Rptr. 168* ; *People v. Schock (1984) 152 Cal. App. 3d 379, 389, 199 Cal. Rptr. 327*

Corp. Code § 25019 not to be literally construed so as to make every note security; each situation to be determined on its own facts; fractional interest in note secured by deed of trust not shown to be security under either California "risk capital" or federal test when no evidence was submitted that plaintiff relied on management ability, skill, services, or solvency or that collateral was inadequate. *Leyva v. Superior Court (1985) 164 Cal. App. 3d 462, 470, 474-475, 210 Cal. Rptr. 545*

Test generally employed by California courts in assessing elusive concept of meaning of security is "risk capital" test

announced in *Silver Hills Country Club v. Sobieski (1961) 55 Cal. 2d 811, 13 Cal. Rptr. 186* . *People v. Schock (1984) 152 Cal. App. 3d 379, 389, 199 Cal. Rptr. 327*

15 U.S.C. § 77b(1) is source of definition of "security" under *Corp. Code § 25019*. *People v. Coster (1984) 151 Cal. App. 3d 1188, 1193, 199 Cal. Rptr. 253*

Transaction is investment contract and within meaning of "security" under *Corp. Code § 25019* when investor is relatively uninformed and unskilled and turns money over to others, essentially depending on their representations and their honesty and skill in managing it. *People v. Coster (1984) 151 Cal. App. 3d 1188, 1194, 199 Cal. Rptr. 253*

Transaction in form of loans evidenced by unsecured promissory notes providing for payment of interest and portion of business's gross income was within regulatory purpose of Corporate Securities Law since defendant received "risk capital" in return for notes. *People v. Coster (1984) 151 Cal. App. 3d 1188, 1195, 199 Cal. Rptr. 253*

[7] Evidence

In action brought to recover for mismanagement of securities account, evidence indicated contributory negligence on part of plaintiff when it showed plaintiff did not even examine confirmation slips sent her, she admitted she usually did not examine slips, and she stated she did not always open monthly statements sent her. *Fortenberry v. Weber (1971) 18 Cal. App. 3d 213, 222, 95 Cal. Rptr. 834*

Defendant stockbrokers acted improperly, fraudulently, in breach of fiduciary relationship, and negligently in performance of their fiduciary duties in handling plaintiff's investment account when plaintiff's evidence established that defendants took over for her account management and control of funds and securities entrusted to them, and thus owed plaintiff duty to ascertain her financial situation and needs. *Twomey v. Mitchum, Jones & Templeton (1968) 262 Cal. App. 2d 690, 720, 69 Cal. Rptr. 222*

[8] Nature of Offer

Writing signed by defendant agreeing to transfer shares of corporation when other party constructed and completed prototype franchise building was offer to sell securities regardless of whether accompanied by consideration or whether other party accepted by performance. *People v. Kline (1980) 110 Cal. App. 3d 587, 596, 168 Cal. Rptr. 185*

[9] Exempt Transactions

[a] Nonpublic Offerings

Defendant failed to carry burden of proving exemption from qualification requirement on contention that securities were involved in private offering when evidence disclosed no limit was placed on number of persons who could invest, there appeared to be no relationship between issuer and offerees nor among offerees, offeror or agents thereof initiated transactions, and investors revealed no expertise or sophistication. *People v. Skelton (1980) 109 Cal. App. 3d 691, 725, 167 Cal. Rptr. 636*

Private offering not demonstrated when there was mere showing of occasional meetings without demonstrating true nature of relationship between them, there was no showing that investors were sophisticated, and there was no showing that developer made requisite data available to investors to enable them to make intelligent investment decisions. *People v. Park (1980) 87 Cal. App. 3d 550, 565, 151 Cal. Rptr. 146*

Offering and sale of demand notes in connection with mobile home community development was public offering rather than private one. *People v. Humphreys (1970) 4 Cal. App. 3d 693, 697-698, 84 Cal. Rptr. 496* (conviction of selling securities without license affirmed)

[b] Partnerships or Joint Ventures

Joint venture exemption to permit requirement of California Corporate Securities Law was inapplicable to sale of interest in oil and gas drilling leases when parties never intended to create joint venture and when only one party made decisions most affecting ultimate success or failure of enterprise. *Parvin v. Davis Oil Co. (9th Cir. 1979) 655 F.2d 901, 904*

Exemption of former *Corp. Code § 25102(f)* as it existed prior to November 1, 1981, was only available to bona fide partnership; because bona fide partnership is not established unless each partner has right to determine membership of all other partners, limited partnership in which limited partners did not know each other was not entitled to exemption. *Sherman v. Lloyd (1986) 181 Cal. App. 3d 693, 700-701, 226 Cal. Rptr. 495*

Limited partnership interest is security when it so qualifies under "risk capital" test; neither short-term relationship with offeree nor offeree's investment sophistication was sufficient to bring limited partnership interest within nonpublic transaction exemption of *Corp. Code § 25102(f).* *People v. Graham (1985) 163 Cal. App. 3d 1159, 1168-1169, 1174, 210 Cal. Rptr. 318*

Neither partnership nor joint venture exemption from qualification was present when parties agreed only with respect to sharing of profits but made no provisions as to distribution of losses; when investors were accorded no right at all to participate in management or to exercise control over enterprise; and when no evidence that by investing specific sum in project either investors or developer intended to create joint venture or partnership. *People v. Park (1980) 87 Cal. App. 3d 550, 564, 151 Cal. Rptr. 146*

Agreement with defendant cattle handler to invest plaintiff's funds in cattle purchase and maintenance, all of which defendant would take care of, was not exempt partnership or joint venture arrangement because (1) it did not purport to be one, (2) defendant--who did not take profits but received service fees and financing percentages--did not participate in losses, and (3) it was apparently not a nonpublic offering in that about 100 others had entered into such agreements with defendant in past two years. *Tomei v. Fairline Feeding Corp. (1977) 67 Cal. App. 3d 394, 401-402, 137 Cal. Rptr. 656*

[c] Nonissuer Transactions

Sale of ongoing incorporated business by owner advertising sale of that business is exempt from qualification requirement when transfer of securities is merely incidental to sale of business. *Fox v. Ehrmantraut (1980) 28 Cal. 3d 127, 138, 167 Cal. Rptr. 595, 615 P.2d 1383* (construing *Corp. Code § 25104(a)(1)*)

[10] Federal Law

[a] Aiding and Abetting Rule 10b-5 Violation

Private plaintiff lacks standing to maintain aiding-and-abetting suit under *Rule 10b-5* because *15 U.S.C. 78j(b)* prohibits only making of material misstatement or omission or commission of manipulative act, not aiding and abetting those violations. *Central Bank v. First Interstate Bank (1994) 511 U.S. 164, 114 S. Ct. 1439, 1445-1448, 128 L. Ed. 2d 119 , superseded by statute as stated in 552 U.S. 148* ; *In re Glenfed, Inc. (9th Cir. 1995) 60 F.3d 591, 592* ; *but*

see 15 U.S.C. § 78t(e) (congressional response to Central Bank case directs prosecution of aiders and abettors by the SEC, but does not create private right of action against aiders and abettors; *see also Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc. (2008) 552 U.S. 148, 162-163, 128 S. Ct. 761, 169 L. Ed 2d 627*

Plaintiff has no private right of action for conspiracy liability under Rule 10 [*see 15 U.S.C. 78j*] because Supreme Court's holding in *Central Bank v. First Interstate (1994) 511 U.S. 164, 114 S. Ct. 1439, 128 L. Ed. 2d 119* (*see entry, above*) that language of Rule 10b confers no private right of action for aiding and abetting precludes any such action for conspiracy liability. *In re Glenfed, Inc. (9th Cir. 1995) 60 F.3d 591, 592*

[b] Brokers and Broker's Duties

Stockbroker's conduct in selling customer's securities and using proceeds for stockbroker's own benefit, without customer's knowledge or consent, was "in connection with purchase or sale of any security" within meaning of § 10(b) of Securities Exchange Act and SEC *Rule 10b-5* [*15 U.S.C. § 78j(b)*; *17 C.F.R. § 240.10b-5*]. *SEC v. Zandford (2002) 535 U.S. 813, 122 S. Ct. 1899, 1906, 153 L.Ed. 2d 1*

Bank holding company was permitted, under Bank Holding Company Act [*see 12 U.S.C. § 1843(c)(8)*], to acquire subsidiary engaged in retail securities brokerage business; retail securities brokerage business was not barred by § 20 of Glass-Steagall Act (former *12 U.S.C. § 377*, repealed 1999), which prohibited issue, flotation, underwriting, public sale, or distribution of securities by bank or bank affiliate when no investment advice was provided and purchases and sales were for account of customer. *Securities Ind. Assn. v. Fed. Reserve Bd. (1984) 468 U.S. 207, 214-221, 104 S. Ct. 3003, 82 L. Ed. 2d 158*

Agent of seller was seller for purposes of imposing liability under *15 U.S.C. § 77l(1)* (misstatements or omissions in prospectus), even though agent did not solicit customers, but waited until customers initiated contact, if agent's participation in sale was substantial factor in transaction and agent received commission. *Harelson v. Miller Financial Corp. (9th Cir. 1988) 854 F.2d 1141, 1142*

Brokerage firm was liable for employee broker's fraud in inducing securities purchase under federal law, for failure to provide reasonable supervision and training, and under California law, for acts of its agent performed within scope of agent's authority. *Seymour v. Summa Vista Cinema, Inc. (9th Cir. 1987) 809 F.2d 1385, 1388*

Punitive damage award against brokerage firm whose employee broker defrauded securities purchasers was proper for firm's own malice as evidenced by its failure to investigate prior suits against broker for similar conduct in reckless disregard of rights of others and failure to supervise, or on basis of firm's ratification of broker's acts, by failure to act when it knew of broker's fraudulent activity. *Seymour v. Summa Vista Cinema, Inc. (9th Cir. 1987) 809 F.2d 1385, 1388*

Fraud liability is not imposed simply because one is led to make unprofitable investment. *Vucinich v. Paine, Webber, Jackson & Curtis, Inc. (9th Cir. 1986) 803 F.2d 454, 460*

Broker's failure to explain short selling to client in way that client could understand was both reckless violation of SEC Commission *Rule 10b-5* (*17 C.F.R. § 240.10b-5*) and constructive fraud under *Civ. Code § 1575(1)*; explanation was required to include debtor nature of short seller's position and responsibility for margin calls and dividends, including fact that dividend responsibility would erode client's position, and that short selling is normally what is meant by phrase "capital gains objective." *Vucinich v. Paine, Webber, Jackson & Curtis, Inc. (9th Cir. 1986) 803 F.2d 454, 460*

Under federal securities law, when client has nondiscretionary account, agency relationship arises when client places order and terminates when transaction is complete and broker has no continuing obligation to advise clients of

information that affects their securities; in absence of showing that broker exercised control over account or acted as investment counselor, account was nondiscretionary. *Caravan Mobile Home Sales v. Lehman Bros. Kuhn Loeb (9th Cir. 1985) 769 F.2d 561, 567* (comparing standard under California law which requires showing that broker "for all practical purposes" controls account)

Duty owed by broker under SEC *Rule 10b-5* is determined by several factors including relationship, relative access to information, benefit derived from relationship by broker, broker's awareness of client's reliance on him or her, and broker's activity in initiating transactions at issue; under California law, statute of limitations for broker's fraud is tolled by broker's reassuring client on concerns relevant to claimed misrepresentations. *Vucinich v. Paine, Webber, Jackson & Curtis, Inc. (9th Cir. 1984) 739 F.2d 1434, 1435-1436*

Confidentiality clause in settlement agreement that prohibited securities customer from discussing dealer's misconduct with regulatory authorities was void and unenforceable as violation of public policy; rules of National Association of Securities Dealers (now known as Financial Industry Regulatory Authority, or FINRA) are valid source of public policy so as to allow court to void contract that is contrary to them. *Cariveau v. Halferty (2000) 83 Cal. App. 4th 126, 138, 99 Cal. Rptr. 2d 417*

[c] Class Action Limitations

State law fraud claims relating to employee stock options were preempted by Securities Litigation Uniform Standards Act of 1998; alleged fraud took place "in connection with" purchase or sale of "covered security." *Falkowski v. Imation Corp. (9th Cir. 2003) 320 F.3d 905, 906*

[d] Contribution Among Defendants

SEC allowed to recover investor funds traced to "nominal defendant" to collect proceeds that resulted from underlying fraud. *SEC v. Colello (1998) 139 F.3d 674, 676-677*

Section 10(b) of Securities Exchange Act of 1934 [*15 U.S.C. § 78j(b)*] and SEC *Rule 10b-5* establishes implied right of contribution for nonsettling defendant in civil action; defendants' shares of damages is apportioned in accordance with their relative culpability, rather than pro rata. *Smith v. Mulvaney (9th Cir. 1987) 827 F.2d 558, 560-561*

[e] Criminal Penalties

Criminal liability under § 10(b) of Securities Exchange Act may be predicated on "misappropriation theory," which outlaws trading on basis of nonpublic information by corporate "outsider" in breach of duty owed to source of information, and complements "classical theory" which targets corporate insider's breach of duty to shareholders with whom insider transacts. *United States v. O'Hagan (1997) 521 U.S. 642, 649, 117 S. Ct. 2199, 138 L. Ed. 2d 724* (holding that person who trades in securities for personal profit, using confidential information misappropriated in breach of fiduciary duty to source of information, is guilty of violating § 10(b) and *Rule 10b-5*)

Criminal conviction for violation of § 10(b) of Securities Exchange Act of 1934 [*15 U.S.C. § 78j(b)*] affirmed because court was evenly divided on issue of whether person defrauded must be one who traded in securities. *Carpenter v. United States (1987) 484 U.S. 19, 108 S. Ct. 316, 98 L. Ed. 2d 275, 282*

Newspaper's interest in prepublication confidentiality of contents and publication schedule of column is property right within meaning of federal mail and wire fraud statutes [*18 U.S.C. §§ 1341, 1343*] sufficient to sustain conviction against writer and "tippee" for disclosure in furtherance of investment scheme. *Carpenter v. United States (1987) 484 U.S.*

19, 108 S. Ct. 316, 98 L. Ed. 2d 275, 283-285

Even if one is ignorant of regulation and has pleaded guilty, conviction for violation of *17 C.F.R. § 240.14e-3* (willfully engaging in fraudulent, deceptive, or manipulative act) on basis of insider trading is crime involving moral turpitude. *Chadwick v. State Bar (1989) 49 Cal. 3d 103, 110-111, 260 Cal. Rptr. 538, 776 P.2d 240*

[f] Definition of Security

Investment scheme promising fixed rate of return can be "investment contract" and thus "security" subject to federal securities laws; fact that purchasers had contractual entitlement to return did not mean that return was not also expected to come solely from efforts of others. *SEC v. Edwards (2004) 540 U.S. 389, 124 S. Ct. 892, 157 L. Ed. 2d 813, 822*

In determining whether note is security, first test is so-called "family resemblance" test developed by Second Circuit; if that test is not determinative, four criteria must be considered: (1) whether parties' motivation was for investment or commercial purposes; (2) plan of distribution used; (3) expectations of investing public; (4) whether application of securities laws is unnecessary due to some other regulatory scheme. *Reves v. Ernst & Young (1990) 494 U.S. 56, 63-67, 110 S. Ct. 945, 108 L. Ed. 2d 47*

Unsecured, uninsured demand notes sold by agricultural cooperative to raise capital for general business needs were securities when purchasers were motivated to earn profit in form of interest, advertising referred to them as investments, and they were sold to broad segment of public. *Reves v. Ernst & Young (1990) 494 U.S. 56, 70-73, 110 S. Ct. 945, 108 L. Ed. 2d 47*

Exclusion from definition of security of notes maturing less than nine months from time of issuance [*15 U.S.C. § 78c(a)(10)*] was not applicable to unsecured, uninsured demand notes when parties did not contemplate that demand would be made within statutory period. *Reves v. Ernst & Young (1990) 494 U.S. 56, 72-73, 110 S. Ct. 945, 108 L. Ed. 2d 47*

Sale of 50 percent or 100 percent of stock of closely held business was "security" within meaning of Securities Exchange Acts of 1933 and 1934 so as to allow defrauded purchaser antifraud remedies of Acts; when instrument is stock, court need not look to economic substance of transaction to determine if it is "security"; sale of business doctrine, which would compel contrary result, was abrogated in sale of traditional stock of closely held corporation. *Gould v. Ruefenacht (1985) 471 U.S. 701, 703-706, 105 S. Ct. 2308, 85 L. Ed. 2d 708* ; *Landreth Timber Co. v. Landreth (1985) 471 U.S. 681, 685-692, 694-697, 105 S. Ct. 2297, 85 L. Ed. 2d 692*

Commercial paper is security; trial court had to determine whether bank's selling of commercial paper of its corporate customers was "underwriting" within prohibition of *12 U.S.C. § 24* para. 7 and *12 U.S.C. § 378(a)(1)*. *Securities Ind. Assn. v. Fed. Reserve Bd. (1984) 468 U.S. 137, 139-140, 148-160, 104 S. Ct. 2979, 82 L. Ed. 2d 107*

Single, unique agreement, negotiated "one-on-one" between two parties that is not ordinarily considered to be security and that was not designed to be publicly traded was not security under federal securities law. *Marine Bank v. Weaver (1982) 455 U.S. 551, 560, 102 S. Ct. 1220, 71 L. Ed. 2d 409* (certificate of deposit issued by domestic bank); *Mace Neufeld Productions v. Orion Pictures Corp. (9th Cir. 1988) 860 F.2d 944, 946* (production and profit-sharing agreement)

Based on factors set forth in *Reves v. Ernst & Young*, discussed *above*, promissory notes did not bear sufficiently strong family resemblance to judicially created list of non-securities, nor did they warrant addition of new category to list. *SEC v. J.T. Wallenbrock (9th Cir. 2002) 313 F.3d 532, 537*

Under family resemblance test set forth in *Reves v. Ernst & Young*, promissory notes in question did not resemble either bank character loan or commercial loan to maintain business operations, so as to fall outside 1934 Act; court declined to add additional category additional category to list of non-securities. *McNabb v. SEC (9th Cir. 2002) 298 F.3d 1126, 1131-1133*

Question of fact exists as to whether partnership investment contract for jojoba farming is security; factors enunciated in *Williamson v. Tucker (5th Cir. 1981) 645 F.2d 404* , *Hocking v. Dubois (9th Cir. 1989) 885 F.2d 1449* , was key to "control" element of *Howey* test: (1) agreement affords so little legal responsibility and authority to investing partners as to place them in position of limited partners, (2) investing partners' sophistication and expertise in business affairs is such that they are incapable of intelligently exercising their partnership powers, or (3) investing partners are so dependent on some unique entrepreneurial or managerial ability of promoter that they cannot exercise meaningful partnership powers. *Koch v. Hankins (9th Cir. 1990) 928 F.2d 1471, 1478*

"Risk capital" test enunciated in *Great Western Bank & Trust v. Kotz (9th Cir. 1976) 532 F.2d 1252, 1255* , is not applied when it is clear from context of underlying transaction that no "security" is involved. *Danner v. Himmelfarb (9th Cir. 1988) 858 F.2d 515, 521-522*

Note secured by deed of trust on real property and given in exchange for sale of peso deposits in Mexican bank was not security when payee initiated transaction to circumvent Mexican currency regulations and realize on pesos "trapped" in *Mexico. Danner v. Himmelfarb (9th Cir. 1988) 858 F.2d 515, 522*

Expectation that profits would be derived solely from managerial efforts of others was not proper criteria; investment is security if undeniably significant or essential managerial efforts are expected to be rendered other than by investor. *Deutsch Energy Co. v. Mazur (9th Cir. 1987) 813 F.2d 1567, 1569*

Purchaser of oil lease rights who had sufficient general business experience to exercise managerial powers under lease agreements was not able to turn leases into investments by delegating managerial discretion to seller. *Deutsch Energy Co. v. Mazur (9th Cir. 1987) 813 F.2d 1567, 1570*

Discretionary commodities trading account is not security or investment contract under Securities Act of 1933 definition because there is no common enterprise between investor and promoter. *Lopez v. Dean Witter Reynolds (9th Cir. 1986) 805 F.2d 880, 884-885*

Partner's interest in general partnership was not security under federal law because general partner participated fully in management. *Stone v. Millstein (9th Cir. 1986) 804 F.2d 1434, 1439*

Prepayment plan for purchase of gold coins was not security under federal securities laws (*15 U.S.C. §§ 77b(1), 78c(a)(10)*) because buyer's profit would not come solely from efforts of others but primarily from fluctuations in world price of gold. *SEC v. Belmont Reid & Co., Inc. (9th Cir. 1986) 794 F.2d 1388, 1390-1391*

Dismissal not proper because allegations that plaintiffs purchased fractional interests in oil and gas rights and entered into management agreement providing for defendants to manage their interests raised triable issue of fact as to whether plaintiffs contributed risk capital subject to entrepreneurial and management efforts as would constitute security. *Simon Oil Co., Ltd. v. Norman (9th Cir. 1986) 789 F.2d 780, 781-782*

In determining whether notes are securities, central distinction was whether transaction more resembles investment or commercial lending situation; notes secured by assignments of beneficial interests in third party notes and deeds of trust were securities when choice of collateral was made by borrowers, each lender's contribution was small compared to total amount borrowed, foreclosure right was not likely to be enforced due to limited size of individual lender's investment, and very little could actually be negotiated by lenders. *Underhill v. Royal (9th Cir. 1985) 769 F.2d 1426,*

1430-1431 ; *but see* *Reves v. Ernst & Young (1990) 494 U.S. 56, 64, 110 S. Ct. 945, 108 L. Ed. 2d 47* (characterizing *Underhill*'s approach as substantially similar to so-called *Howey* test (*SEC v. W. J. Howey Co. (1946) 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244*) and disapproving application of *Howey* test to notes)

Certificate of deposit issued by foreign bank is not "security" within meaning of federal securities acts. *Wolf v. Banco Nacional de Mexico, S. A. (9th Cir. 1984) 739 F.2d 1458, 1463-1464*

[g] Jurisdiction

15 U.S.C. § 78aa authorizes nationwide service of process and confers personal jurisdiction over resident defendants in any district; minimum contacts of nonresident defendant with any district or actions outside United States that cause sufficient foreseeable consequences in United States are basis for personal jurisdiction over nonresident defendants. *Securities Investor Protection Corp. v. Vigman (9th Cir. 1985) 764 F.2d 1309, 1315-1316*

[h] Material Misrepresentation

Company that sold option to buy stock while secretly intending never to honor option violated § 10b-5, which prohibits using any manipulative or deceptive device or contrivance in connection with purchase or sale of any security; option to purchase stock constituted "security," oral agreement to purchase did not preclude 10b-5 claim, and sale of option with secret intent not to honor it related to value of security purchase and therefore violated § 10b-5. *The Wharf (Holdings) Limited v. United International Holdings, Inc. (2001) 532 U.S. 588, 590, 121 S. Ct. 1776, 1780-1782, 149 L. Ed. 2d 845*

Conclusionary terms, statements of reasons, opinions, and beliefs in proxy statement soliciting merger understood to rest on factual basis that justifies them as accurate, absence of which renders them misleading. *Virginia Bankshares, Inc. v. Sandberg (1991) 501 U.S. 1083, 111 S. Ct. 2749, 115 L. Ed. 2d 929, 945-947*

Directors' disbelief or undisclosed belief or motivation was insufficient to sustain action under § 14(a) of Securities Exchange Act of 1934 (proxy solicitation; *15 U.S.C. § 78n(a)*); fact that some accurate facts are included did not save misleading conclusion from being material unless inconsistency would exhaust misleading conclusions's capacity to influence reasonable shareholder. *Virginia Bankshares, Inc. v. Sandberg (1991) 501 U.S. 1083, 111 S. Ct. 2749, 115 L. Ed. 2d 929, 947-948*

In civil SEC *Rule 10b-5* (*15 U.S.C. § 78j(b)*) fraud actions, standard of materiality was same standard applied in proxy context: omitted, withheld, or misrepresented fact is material if substantial likelihood exists that reasonable shareholder would consider it important in deciding how to act, in that disclosure would have been viewed by reasonable investor as having significantly altered total mix of information available. *Basic Incorporated v. Levinson (1988) 485 U.S. 224, 108 S. Ct. 978, 99 L. Ed. 2d 194, 208-209, 214, 219-220*

In civil SEC *Rule 10b-5* fraud actions, materiality of preliminary merger negotiations is dependent on probability that transaction will be consummated and on significance of merger to issuer; thus, materiality of preliminary merger negotiations is question of fact to be determined on case by case basis; factors to be considered include size of companies involved, indicia of interest of board members, whether investment banks have become involved, whether directors' resolution has been passed, and potential for stock involved to command premium in excess of market value. *Basic Incorporated v. Levinson (1988) 485 U.S. 224, 108 S. Ct. 978, 99 L. Ed. 2d 194, 212-214, 220*

In civil SEC *Rule 10b-5* fraud actions relating to disclosure of preliminary merger negotiations, "agreement-in-principle" standard of materiality (no disclosure required until agreement-in-principle exists as to price and structure) is abrogated for artificially excluding from definition of materiality information that would otherwise be significant to trading decision of reasonable investor. *Basic Incorporated v. Levinson (1988) 485 U.S. 224, 108 S. Ct.*

978, 99 L. Ed. 2d 194, 212, 220

In civil SEC *Rule 10b-5* fraud actions relating to disclosure of preliminary merger negotiations, rule that negotiations become material by virtue of statement denying their existence is abrogated; falsity or incompleteness of statement is not sufficient to confer materiality on otherwise insignificant fact. *Basic Incorporated v. Levinson (1988) 485 U.S. 224, 108 S. Ct. 978, 99 L. Ed. 2d 194, 212, 220*

In civil SEC *Rule 10b-5* fraud action relating to false denials of preliminary merger negotiations, investors entitled to rely on rebuttable presumption of reliance under "fraud on the market" theory, which assumes that market system develops price on basis of all available information; thus, market price reflects false information, whether or not known to investor, and has effectively defrauded investor as much as direct reliance would; severance of link between false information and price paid or received by plaintiff or between false information and plaintiff's decision to trade will rebut presumption of reliance. *Basic Incorporated v. Levinson (1988) 485 U.S. 224, 108 S. Ct. 978, 99 L. Ed. 2d 194, 215-219, 220, 220* (three judges not participating; four judges concurring; two judges dissenting); *see In re Apple Computer Securities Litigation (9th Cir. 1989) 886 F.2d 1109, 1113, 1119* (fraud on market theory and its effect on plaintiff's burden of proof)

Attorney who undertakes to make representations to prospective purchasers of securities is under obligation, imposed by Section 10(b) [*15 U.S.C. § 78j(b)*], to tell truth about those securities; that he or she may have attorney-client relationship with seller of those securities is irrelevant under Section 10(b). *Thompson v. Paul (9th Cir. 2008) 547 F.3d 1055, 1063*

Allegations of seriously mishandled audit, which set out compelling case of negligence or even gross negligence, were insufficient to plead scienter under heightened pleading requirements of Private Securities Litigation Reform Act [*15 U.S.C. § 78u-4(b)(2)*]. *DSAM Global Value Fund v. Altris Software, Inc. (9th Cir. 2002) 288 F.3d 385, 390-391*

Rule 10b-5 and Rule 14e-3 (which governs fraud in connection with tender offers) prohibit only misleading and untrue statements, not statements that are incomplete; thus to survive motion to dismiss, complaint must specify reasons why statements were misleading or untrue, not simply why statements were incomplete; corporation's press releases were not misleading under applicable standards. *Brody v. Transitional Hospitals Corporation (9th Cir. 2002) 280 F.3d 997, 1006-1007*

Failure to disclose any intent to engage in short sales of stock did not support claim of securities fraud in violation of *Rule 10b-5*; short sales executed in accordance with SEC rules and regulations not only are lawful, but do not distort markets or create a false impression of supply and demand because they are legitimate transactions with real buyers on the other side of the sale who are betting that the stock's price will rise. *GFL Advantage Fund, Ltd. v. Colkitt (3rd Cir. 2001) 272 F.3d 189, 212-214*

With respect to whether CEO who, with scienter, signs SEC filing containing misrepresentations "makes statement" so as to be liable as primary violator under § 10(b), district court erred in granting CEO judgment as a matter of law; demonstration of possible motive combined with red flags of company's financial condition were sufficient to withstand motion for judgment as a matter of law on issue of scienter. *Howard v. Everex Systems, Inc. (9th Cir. 2000) 228 F. 3d 1057, 1063-1065*

Company's failure to disclose disagreement with largest customer regarding effect of early repayment of loan by company did not violate securities laws when there was no evidence that company had agreed to or could be forced to pay off loan, and any possible negative effect resulting from information which company allegedly failed to disclose regarding its contractual relationship, rights, and duties was at most speculative and uncertain. *Abromson v. American Pacific Corp. (9th Cir. 1997) 114 F.3d 898, 902-903*

Ninth Circuit has adopted "bespeaks caution" doctrine, holding that if precise cautionary language directly addresses itself to future projections, estimates, or forecasts in a prospectus, the projections will not give rise to a claim of securities fraud in violation of *15 U.S.C. § 78j(b)*. *In re Worlds of Wonder Securities Litigation (9th Cir. 1995) 35 F.3d 1407, 1414-1415*

Corporation's failure to disclose identity of potential buyer of subsidiary was material but not misleading and, thus, not actionable omission under *15 U.S.C. § 78j(b)* because shareholder knew he did not know name of potential buyer but nonetheless chose to sell securities back to issuer; issuer's disclosure that it knew name of potential buyer (but would not identify potential buyer) was sufficient, particularly in light of shareholder's considerable sophistication. *McCormick v. Fund American Companies, Inc. (9th Cir. 1994) 26 F.3d 869, 879-880*

Bank's deliberate failure to recognize problem loans, thus knowingly understating its loan reserve, constituted omission or misrepresentation of material fact actionable under *15 U.S.C. § 78j(b)*; bank's act not dismissable as mere internal mismanagement, unsound business practices, or poor accounting judgment. *In re Wells Fargo Securities Litigation (9th Cir. 1993) 12 F.3d 922, 926* .

Seller's use of false identity when selling securities through brokerage firm under name of former client, without disclosure that securities were issued by corporation in which seller was officer and director, did not constitute securities fraud in violation of *15 U.S.C. § 78j(b)* because misrepresentation and omission were not material. *U.S. v. Bingham (9th Cir. 1993) 992 F.2d 975, 976-977*

Investor's sophistication did not preclude his or her reliance on "fraud-on-the-market" theory of action and was not sufficient, in context of motion for summary judgment, to rebut presumption of reliance; sophisticated investors are as entitled to rely on the fraud-on-the-market theory as anyone else. *Hanon v. Dataproducts Corp. (9th Cir. 1992) 976 F.2d 497, 506-507*

In "fraud on market" case, plaintiff not required to show actual reliance on particular misrepresentation or omission; plaintiff only required to show reliance on integrity of stock price established by market; investor's reliance on market equivalent to reliance on statements made to market or nondisclosure of material information. *In re Convergent Technologies Securities Lit. (9th Cir. 1991) 948 F.2d 507, 512 n.2*

Company required to discuss factors that would cause reported financial information not to be necessarily indicative of future financial operating results in its annual 10-K filing; company not required to do so in quarterly report to shareholders. *In re Convergent Technologies Securities Lit. (9th Cir. 1991) 948 F.2d 507, 514*

Ordinarily materiality and scienter fact-specific issues that should be left to trier of fact; but when plaintiff could only prove those elements of case and no others, grant of summary judgment for defendants is proper. *In re Apple Computer Securities Litigation (9th Cir. 1989) 886 F.2d 1109, 1113, 1119*

Projections and general expressions of optimism may be actionable; each such statement contains three implied factual assertions, inaccuracy of which is actionable. *In re Apple Computer Securities Litigation (9th Cir. 1989) 886 F.2d 1109, 1113*

Under fraud on market theory, defendants' failure to disclose material information is excused if that information has been made credibly available to market by other sources; credibility of other sources is to be compared to impact of statements by insiders; only in rare case will intense and sustained focus by press on risks of product in development excuse unqualified exuberance of insiders and their failure to disclose problems with project. *In re Apple Computer Securities Litigation (9th Cir. 1989) 886 F.2d 1109, 1115-1116*

Materiality of alleged misrepresentation and reasonableness of purchaser's reliance on it not to be considered in

isolation but in context of entire presentation and other misrepresentations, if any; thus, oral assurance that investment was "sure thing" was actionable and grant of summary judgment for seller was error. *Casella v. Webb (9th Cir. 1989) 883 F.2d 805, 808*

No civil SEC *Rule 10b-5* cause of action was stated against law firm that issued opinion regarding marketability of title to real property purchased by issuer because law firm had no duty to disclose to investors that issuer paid inflated price for property or that another client of law firm had investment in property. *Roberts v. Peat, Marwick, Mitchell & Co. (9th Cir. 1988) 857 F.2d 646, 653-654*

Fact is material if its existence or nonexistence is matter to which reasonable person would attach importance in determining his or her course of action with respect to transaction; materiality is mixed question of law and fact. *Toombs v. Leone (9th Cir. 1985) 777 F.2d 465, 469* ; *Caravan Mobile Home Sales v. Lehman Bros. Kuhn Loeb (9th Cir. 1985) 769 F.2d 561, 565*

Failure to receive financial information is not material when investment predates commencement of business in view of investor's testimony that fact that business was new was not material consideration in his decision to invest. *Toombs v. Leone (9th Cir. 1985) 777 F.2d 465, 469*

Omission to state whether fishing boats would be leased or purchased was not material when investor testified it was not issue for him when he decided to invest. *Toombs v. Leone (9th Cir. 1985) 777 F.2d 465, 469*

Decision made after close of offering to fish for shrimp rather than for red snapper, lobster, and conch as stated in offering summary was not material to decision to invest since materiality must be determined in light of facts existing at time of nondisclosure or misinformation. *Toombs v. Leone (9th Cir. 1985) 777 F.2d 465, 469*

State securities and fraud claims are subject to same test of materiality as federal securities claims. *Toombs v. Leone (9th Cir. 1985) 777 F.2d 465, 470*

At time of plaintiff's purchases neither inventory build-up, intention to sell two profitable subsidiaries, nor reclassification of oil reserves from proven to unproven and downward valuation of reserves was material; materiality is not to be determined by hindsight. *Caravan Mobile Home Sales v. Lehman Bros. Kuhn Loeb (9th Cir. 1985) 769 F.2d 561, 565-567*

Summary judgment on issue of materiality is only proper when court has engaged in meticulous and well articulated analysis of each item of withheld or misrepresented information and reasonable minds could not differ as determination of materiality. *Caravan Mobile Home Sales v. Lehman Bros. Kuhn Loeb (9th Cir. 1985) 769 F.2d 561, 565*

Allegedly false statements concerning computer product bugs and problems were not actionable as matter of law because they were already known to investors; omission is materially misleading in fraud-on-the-market case only if information has not already entered market. *In re Sybase, Inc. Securities Litigation (N.D. Cal. 1999) 48 F. Supp. 2d 958, 961-962*

[i] Procedural Requirements for Pleading Fraud

Complaint was sufficient, under heightened pleading standard of Private Securities Litigation Reform Act, in alleging facts showing that company and three top executives intentionally or with deliberate recklessness withheld reports of adverse effects of and lawsuits concerning pharmaceutical product that was responsible for the company's remarkable sales increase. Siracusano v. Matrixx Initiatives, Inc. (9th Cir. 2009) 585 F.3d 1167, 1183

Drawing inference that facts crucial to company's "core operations" (or to particular important transaction) were known by company's key officers is permissible, but that cannot alone be sufficient except in unusual circumstances, to support conclusion that complaint raises strong inference of scienter and so satisfies heightened pleading standard of *Private Securities Litigation Reform Act. South Ferry LP v. Killinger (9th Cir. 2008) 542 F.3d 776, 784-785*

Third amended complaint alleging securities fraud class action was properly dismissed with prejudice; although complaint exceeded 370 pages, allegations ultimately failed to meet exacting requirements of Private Securities Litigation Reform Act--that is, strong implication that defendant acted with intent to deceive, manipulate, or defraud, and specification of what statements by defendant were misleading and why--as well as ordinary standards for pleading loss causation. *Metzler Inv. GMBH v. Corinthian Colleges, Inc. (9th Cir. 2008) 534 F.3d 1068, 1090-1091*

Complaint alleging securities fraud was improperly dismissed with prejudice, for failure to plead "false statements" with particularity and to satisfy scienter requirement pursuant to heightened pleading requirements of *Private Securities Litigation Reform Act. Eminence Capital, LLC v. Aspeon, Inc. (9th Cir. 2003) 316 F.3d 1048, 1051*

Dismissal with prejudice of complaint alleging securities fraud, for failure to plead "false statements" with particularity and to satisfy scienter requirement pursuant to heightened pleading requirements of Private Securities Litigation Reform Act, reversed. *Eminence Capital, LLC v. Aspeon, Inc. (9th Cir. 2003) 316 F.3d 1048, 1051*

Allegations in securities fraud class action did not meet heightened pleading requirements of Private Securities Litigation Reform Act [*15 U.S.C. § 78u-4(b)(1), (2)*] because they were not sufficiently particularized and did not raise "strong inference" that misleading statements were made knowingly or with deliberate recklessness. *Fischer v. Vantive Corp.(In re Vantive Corp. Secs. Litig. (9th Cir. 2002) 283 F.3d 1079, 1085*

Allegations of securities fraud did not raise strong enough inference to meet heightened pleading requirements of Private Securities Litigation Reform Act; calling executives bad managers or forecasters does not plead fraud unless it can be shown they knew or were deliberately reckless in disregarding misleading nature of their forecasts. *Ronconi v. Larkin (9th Cir. 2001) 253 F.3d 423, 437*

Dismissal of complaint alleging corporate securities fraud for failure to satisfy requirements of Rule 9(b) [*see Fed. R. Civ. P., Rule 9(b)*] was correct when none of complaint's factual allegations satisfied Rule 9(b)'s requirement that complaint aver with particularity "circumstances constituting fraud"; complaint did not allege with sufficient particularity details about existence of alleged "non-public confidential information" that revealed "true facts" that were inconsistent with various statements by defendants. *Yourish v. California Amplifier (9th Cir. 2000) 191 F.3d 983, 994-998*

Although plaintiff may satisfy rule requiring that fraud be pleaded with particularity in corporate securities fraud case [*see Fed. R. Civ. P., Rule 9(b)*] through reliance on presumption that allegedly false and misleading group published information complained of is collective action of officers and directors, if outside directors are named, complaint must allege that they had some kind of operational involvement or special relationship with corporation, such as participating in its daily activities or preparing or communicating group information. *In re Glenfed, Inc. (9th Cir. 1995) 60 F.3d 591, 593*

Plaintiff may satisfy rule requiring that fraud be pleaded with particularity in securities fraud case [*see Fed. R. Civ. P., Rule 9(b)*] by alleging necessary condition of mind of actor without setting forth circumstances from which condition may be inferred; rule does not mandate that facts giving rise to either strong inference or some inference of fraudulent intent be set forth. *In re Glenfed, Inc. Securities Litigation (9th Cir. 1995) 42 F.3d 1541, 1546-1547*

[j] Racketeer Influenced and Corrupt Organizations Act (RICO)

President and sole shareholder of closely held corporation that promoted boxing matches was a "person" distinct from the "enterprise" for purposes of liability under *18 U.S.C. § 1962(c)*; incorporation's basic purpose is to create distinct legal entity with rights, obligations, powers, and privileges different from those of natural individuals who created it, who own it, or whom it employs. *Cedric Kushner Promotions, Ltd. v. King (2001) 533 U.S. 158, 164-165, 121 S. Ct. 2087, 150 L. Ed. 2d 198*

Section 107 of Private Securities Litigation Reform Act, eliminating conduct actionable as fraud in purchase or sale of securities as predicate for civil claims under RICO, could not be applied retroactively to bar civil RICO claims filed after Act's effective date based on conduct occurring before effective date. *Scott v. Boos (9th Cir. 2000) 215 F.3d 940, 941-942*

One fraudulent scheme or one criminal episode is sufficient "pattern of racketeering" if it involves two or more predicate acts that are (1) not isolated events, (2) separate in time, and (3) in furtherance of single criminal scheme; purchasers of savings and loan association's stock stated civil RICO cause of action (*18 U.S.C. § 1964*) against all but newest director and attorney of issuer based on misrepresentations in annual reports, offering circulars, press releases, and conversations over 14-month period. *Blake v. Dierdorff (9th Cir. 1988) 856 F.2d 1365, 1368, 1369-1371* (directors), 1371-1372 (attorney)

When fraudulent statements are made in "group-published information," such as prospectuses, registration statements, annual reports, or press releases, presumption of collective action is applicable to satisfy federal requirement that fraud be specifically pleaded. *Blake v. Dierdorff (9th Cir. 1988) 856 F.2d 1365, 1369*

No civil RICO cause of action was stated against issuer's accountants or accounting firm when all actions taken by accountants and information learned by them were in furtherance of single audit, which thus constituted only one predicate act. *Blake v. Dierdorff (9th Cir. 1988) 856 F.2d 1365, 1371*

Complaint of California cities and local agencies that deposited funds with Orange County Treasurer for investment in statutory investment trust which then collapsed sufficiently alleged conduct in breach of duties owed directly to appellants by broker under federal RICO statutes. *City of Atascadero v. Merrill Lynch, Pierce, Fenner Smith, Inc. (1998) 68 Cal. App. 4th 445, 484&485, 80 Cal. Rptr. 2d 329*

[k] Remedies

Minority shareholder whose vote is not required by law or bylaw to authorize transaction (merger) was unable to show causation of damages recoverable in implied private right of action under § 14(a) of Securites Exchange Act of 1934 (*15 U.S.C. § 78n(a)*). *Virginia Bankshares, Inc. v. Sandberg (1991) 501 U.S. 1083, 111 S. Ct. 2749, 115 L. Ed. 2d 929, 951-955*

Since deterrence as well as restoration of investor to status quo ante is purpose of Securities Act of 1933, rescissionary damages for fraud under *15 U.S.C. § 77 l*(2) was not to be subject to deduction for income tax saved by investor because of investment; actual damage limitation of *15 U.S.C. § 78bb(a)* did not authorize reduction of amount of rescissionary damages for violation of § 10(b) of Securities Act of 1933 (*15 U.S.C. § 78j(b)*) by amount of income tax saved by investor because of investment; because income tax impact was not measured only by actual amount of limited partners' investment but by their proportionate shares of nonrecourse loans to partnership, this result was possibly not applicable to other types of investment. *Randall v. Loftsgaarden (1986) 478 U.S. 647, 649-667, 106 S. Ct. 3143, 92 L. Ed. 2d 525*

Tippees who traded on misrepresented material nonpublic information not barred from recovering losses in civil action

against broker and corporate insider tippers; pari delicto defense was inapplicable because (1) plaintiffs' culpability was much less than defendants', and (2) private civil suits are important for enforcement of securities laws and protection of investing public. B. Eichler, H. Richards, Inc. v. *Berner (1985) 472 U.S. 299, 310-319, 105 S. Ct. 2622, 86 L. Ed. 2d 215*

Cancellation of hostile takeover tender offer and finalization of agreement based on negotiation and "friendlier" offer did not involve misrepresentation, deception, or nondisclosure sufficient to establish a cause of action under *15 U.S.C. § 78n(e)*; "manipulation" as used in *15 U.S.C. § 78n(e)* as requires intentional or willful conduct designed to deceive. *Schreiber v. Burlington Northern, Inc. (1985) 472 U.S. 1, 12-13, 105 S. Ct. 2458, 86 L. Ed. 2d 1*

Broker-dealer tippee's actions in passing on to investor's information received from insider that corporation's assets were overvalued due to fraud was not violation of antifraud provisions of *15 U.S.C. §§ 77q(a), 78j(b)*; tippee had no fiduciary duty to shareholders and no derivative duty from insider/tipper who received no personal benefit from revealing information and was motivated only to expose fraud. *Dirks v. SEC (1983) 463 U.S. 646, 648, 661, 103 S. Ct. 3255, 77 L. Ed. 2d 911*

Under *15 U.S.C. § 77 l*(2), purchaser is entitled to rescission without showing that misrepresentation was cause of economic loss. *Casella v. Webb (9th Cir. 1989) 883 F.2d 805, 808-809*

If ICC has approved tender offer and merger [*see 49 U.S.C. § 11341(a)*], transaction is exempt from attack under all other laws and no cause of action can be stated against directors of railroad for dishonesty or obtaining too low price; result not altered because merger was accomplished through voting trust. *Deutsch v. Flannery (9th Cir. 1989) 883 F.2d 60, 62-63*

Federal law overrides choice of law provision in trust indenture agreement; subsequent purchasers were not automatically assigned causes of action from original purchasers who relied on misleading statements or omissions in offering materials; cause of action is personal to purchaser who relied. *In re Nucorp Energy Securities Litigation (9th Cir. 1985) 772 F.2d 1486, 1489-1490*

Redress under Section 10(b) of Securities Exchange Act of 1934 (15 U.S.C. § 78) that proscribes use of any deceptive or manipulative device "in connection with the purchase or sales of any security" is also available when there is sale of security and fraud "touches" sale. *Arrington v. Merrill Lynch, Pierce, Fenner & Smith (9th Cir. 1981) 651 F.2d 615, 619*

[l] Standing

Shareholder who brought derivative action for short swing profits taken by insiders [*see* § 16(b) of Securities Exchange Act of 34 (*15 U.S.C. § 78p(b)*)] not deprived of standing by merger in which plaintiff's shares were exchanged for those of parent corporation. *Gollust v. Mendell (1991) 501 U.S. 115, 111 S. Ct. 2173, 115 L. Ed. 2d 109, 122*

State law governs federal derivative action; federal court may not require demand if demand would be excused as futile under state law. *Kamen v. Kemper Financial Services, Inc. (1991) 500 U.S. 90, 111 S. Ct. 1711, 114 L. Ed. 2d 152, 172* (action under Investment Securities Act of 1940 (*15 U.S.C. § 80a-1 et seq.*) remanded for determination whether plaintiff had adequately pleaded futility)

Investors whose trades occurred two months after corporation's repurchase did not satisfy judicially-created contemporaneous trading "standing" requirement applicable to insider trading claims; there is no distinction between *Rule 10b-5* and Rule 14e-3 (which governs fraud in connection with tender offers) regarding need for contemporaneous trading allegation. *Brody v. Transitional Hospitals Corporation (9th Cir. 2002) 280 F.3d 997, 1001-1003, 1005*

Former shareholder who exchanges stock for contingent rights to receive stock has standing to sue as purchaser of stock for purposes of § 10(b) of the Securities Exchange Act of 1934 and *Rule 10b-5*. *Griggs v. Pace American Group Inc. (9th Cir. 1999) 170 F.3d 877, 880* (adopting rule that attachment of contingency to contractual right to receive stock does not remove that right from coverage of federal securities laws)

Subscribers and dealers who failed to show fraud "in connection with" purchase or sale of securities had no standing to bring § 10(b) class action suit against corporation issuing securities. *Cohen v. Stratosphere Corp. (9th Cir. 1997) 115 F.3d 695, 703*

[m] Statute of Limitations

Amendment to Securities and Exchange Act permitting reinstatement on motion of any action begun on or before June 19, 1991 (date of Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson (1991) 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321*), but dismissed after that date as time barred, if action would have been timely filed under applicable law on or before June 19, 1992, is unconstitutional to extent it requires federal courts to reopen final judgments entered before its enactment because it violates separation of powers doctrine. *Plaut v. Spendthrift Farm, Inc. (1995) 514 U.S. 211, 115 S. Ct. 1447, 1452-1453, 131 L. Ed. 2d 328, 342*

Usual rule that when Congress fails to provide statute of limitations, federal cause of action "borrows" state limitation is not applicable to private 10b-5 claims [*see 15 U.S.C. § 78j(b)*, which does not create cause of action]; 10b-5 claims must be commenced within one year after discovery of facts constituting violation and within three years of violation. *Lampf v. Gilbertson (1991) 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321, 331-334, 336*

Equitable tolling doctrine is inconsistent with "1- and-3-year" limitation for 10b-5 claims and thus is inapplicable; action was barred even though plaintiffs could not have known until IRS changed its position that investment did not qualify for tax benefit as represented in offering materials. *Lampf v. Gilbertson (1991) 501 U.S. 350, 111 S. Ct. 2773, 115 L. Ed. 2d 321, 336*

Because press article's general skepticism about company's future prospects would not have led reasonable investor to investigate possibility of fraud, regardless of whether actual discovery or inquiry notice was used as governing standard, limitations period had not run when plaintiffs filed their suit. *Berry v. Valence Technology, Inc. (9th Cir. 1999) 175 F.3d 699, 703-706*

Civil enforcement actions brought by Securities and Exchange Commission not subject to one-year/three-year limitation period adopted for private fraud actions brought under *15 U.S.C. § 78j(b)*. *SEC v. Rind (9th Cir. 1993) 991 F.2d 1486, 1489-1490*

Amendment to Securities and Exchange Act permitting reinstatement of securities fraud actions pending on date new statute of limitation became effective [*see 15 U.S.C. § 78aa-1*] not unconstitutional because Congress changed underlying substantive law and did not violate either Separation of Powers doctrine, *Due Process clause of 5th Amendment*, or *Equal Protection clause*. *Gray v. First Winthrop Corp. (9th Cir. 1993) 989 F.2d 1564, 1569-1570, 1572-1574* ; *but see* *Plaut v. Spendthrift Farm, Inc. (1995) 514 U.S. 211, 115 S. Ct. 1447, 1452-1453, 131 L. Ed. 2d 328, 342* , *above*

Statute of limitations against seller's agent who was deemed seller for purposes of liability for violation of *15 U.S.C. § 77 l*(1) begins to run when agent ceases to participate in sale, here, when buyer's check was forwarded to seller. *Harelson v. Miller Financial Corp. (9th Cir. 1988) 854 F.2d 1141, 1142*

Although pendency of class action tolls limitation period for all asserted members of class, not just for intervenors, limitation period not tolled with respect to subsequent federal securities class action by class members; class member's subsequent individual action not barred because limitation period was tolled during pendency of prior class action. *Robbin v. Fluor Corp. (9th Cir. 1987) 835 F.2d 213, 214-215* ; note that the result under California law may be contrary [*see Jolly v. Eli Lilly & Co. (1988) 44 Cal. 3d 1103, 1121-1122, 245 Cal. Rptr. 658, 751 P.2d 923* (declining to apply *American Pipe & Construction Co. v. Utah (1974) 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713* , on which *Robbin* was based, to "mass tort" action)]

[10A] Federal Preemption of State Law

Federal law creating national system for clearance and settlement of securities transactions [*see 15 U.S.C. § 78q-1*] does not reflect Congressional intent to occupy field of clearing and settling securities transactions to exclusion of state law; however, claims based on state law and asserted against entities carrying out that federal law would be preempted if in conflict with Congressional intent. *Whistler Invs., Inc. v. Depository Trust Clearing Corp. (9th Cir. 2008) 539 F.3d 1159, 1165-1166*

State law fraud claims relating to employee stock options were preempted by Securities Litigation Uniform Standards Act of 1998; alleged fraud took place "in connection with" purchase or sale of "covered security." *Falkowski v. Imation Corp. (9th Cir. 2003) 320 F.3d 905, 906*

Federal securities law preempted state law claims of securities brokers' customers who challenged nondisclosure of receipt of "order flow payments" from brokers through whom purchase and sale orders were executed. *McKey v. Charles Schwab & Co. (1998) 67 Cal. App. 4th 731, 741-742, 79 Cal. Rptr. 2d 213*

State action for breach of broker's common law fiduciary duty to trustees of profit-sharing trust, who invested trust funds, had impact on trust or its administration that was too tenuous, remote, and peripheral for action to be preempted by ERISA [*29 U.S.C. § 1001 et seq.*)]. *Duffy v. Cavalier (1989) 215 Cal. App. 3d 1517, 1529, 264 Cal. Rptr. 740*

[11] Fiduciary Duties

Because of fiduciary relationship of securities broker and client, constructive fraud was shown in inducement into entire agreement, as well as arbitration clause, causing arbitration agreement to be unenforceable. *Ford v. Shearson Lehman American Express, Inc. (1986) 180 Cal. App. 3d 1011, 1020, 1027, 225 Cal. Rptr. 895*

Relationship between stockbroker and principal is fiduciary in nature and imposes on broker duty of acting in highest good faith toward principal; obligation of diligent and faithful service is same as that imposed on trustee [*Civ. Code § 2322*]. *Twomey v. Mitchum, Jones & Templeton, Inc. (1968) 262 Cal. App. 2d 690, 709, 69 Cal. Rptr. 222* (decided under prior version of *Civ. Code § 2322*; *now see Civ. Code § 2322(c)*, which imposes duties set forth in *Prob. Code §§ 16002, 16004, 16005*, and *16009*)

One who induced unsophisticated persons to invest money in various ventures in his name assumed fiduciary status as investment advisor, trustee of commodities accounts, managing partner of mining venture, and securities broker-dealer; fiduciary's material misrepresentations to induce investors not to withdraw their funds, failure to disclose significant risks, and failure to register securities were not only statutory violations [*see Corp. Code §§ 25110, 25401*] but also constructive fraud, which supports award of punitive damages. *Stokes v. Henson (1990) 217 Cal. App. 3d 187, 194-197, 265 Cal. Rptr. 836*

[12] Jurisdiction

National Association of Securities Dealers (now known as Financial Industry Regulatory Authority, or FINRA) was protected by absolute immunity against claims by trader in secondary limited partnership market alleging improprieties arising out of NASD's attempted disciplinary actions against it. *Partnership Exch. Sec. Co. v. NASD (9th Cir. 1999) 169 F.3d 606, 608*

Claims against National Association of Securities Dealers (now known as Financial Industry Regulatory Authority, or FINRA) for temporarily de-listing and suspending trading in stock on opening day of public offering, although articulated in terms of state law, were properly removed to federal district that had subject matter jurisdiction; NASD, as self-regulatory organization, was entitled to regulatory immunity from claims when acting under aegis of Securities Exchange Act's delegated authority. *Sparta Surgical Corp. v. NASD, Inc. (9th Cir. 1998) 159 F.3d 1209, 1212-1215*

State courts have concurrent jurisdiction with federal courts over suits arising under Securities Act of 1933 (*15 U.S.C. § 77a et seq.*). *Lakewood Bank & Trust Co. v. Superior Court (1982) 129 Cal. App. 3d 463, 468, 180 Cal. Rptr. 914*

Nationwide service of process provisions of Securities Act of 1933, § 22(a) (*15 U.S.C. § 77v(a)*), and similar section of Securities Exchange Act of 1934 (*15 U.S.C. § 78a et seq.*) confer personal jurisdiction over defendant for pendant state law claims only after court has obtained subject matter jurisdiction on a federal issue and can justify entertaining state claims in interest of judicial economy. *Lakewood Bank & Trust Co. v. Superior Court (1982) 129 Cal. App. 3d 463, 470, 180 Cal. Rptr. 914* ; *accord, Danner v. Himmelfarb (9th Cir. 1988) 858 F.2d 515, 521-522* (upholding dismissal of state claims after entry of summary judgment for defendant because note was not security within meaning of federal securities laws and there was no independent basis for jurisdiction)

California court may obtain jurisdiction over out-of-state defendant pursuant to Securities Act of 1933, § 22(a) (*15 U.S.C. § 77v(a)*), authorizing extraterritorial service of process, only if it can be shown that claim against out-of-state defendant is either brought to enforce any liability or duty created by Securities Act of 1933 or is fundamentally derived from and dependent on such a claim. *Lakewood Bank & Trust Co. v. Superior Court (1982) 129 Cal. App. 3d 463, 470-471, 180 Cal. Rptr. 914*

Claims that are fundamentally derived from, and dependent on, suits to enforce liability or duty created by Securities Act of 1933 are limited to claims against parties who actually are involved in either offer or sale of security. *Lakewood Bank & Trust Co. v. Superior Court (1982) 129 Cal. App. 3d 463, 472-473, 180 Cal. Rptr. 914*

State court has jurisdiction over claim under Securities Exchange Act of 1934 and/or regulations promulgated thereunder only if claim is asserted in addition to state claims and is based on common law; federal jurisdiction is exclusive only as to action that goes beyond common law rights that state court could have fully adjudicated prior to passage of *Act. Twomey v. Mitchum, Jones & Templeton, Inc. (1968) 262 Cal. App. 2d 690, 704-706, 69 Cal. Rptr. 222* (*see 15 U.S.C. §§ 78aa, 78bb(a)*)

[13] Liability for Material Misrepresentation

Under California law, partnership relation, and thus fiduciary duty of disclosure, terminates on formation of contract for sale of partnership interest; contract was formed when selling partner communicates to buying partner acceptance of offer to purchase; after formation of contract, matters affecting value of interest sold were not required to be disclosed. *Stone v. Millstein (9th Cir. 1986) 804 F.2d 1434, 1437-1438*

State securities and fraud claims are subject to same test of materiality as federal securities claims. *Toombs v. Leone (9th Cir. 1985) 777 F.2d 465, 470*

Anti-SLAPP motion to strike cause of action under *Corp. Code § 25400(d)* based on misrepresentation was properly denied when former owners of common stock alleged that defendant publishers of market research reports on plaintiffs' company engaged in concerted wrongful actions to depress price of common stock for their financial benefit, and plaintiffs provided prima facie evidence that defendants willfully participated in scheme by participating in development and publication of false statements concerning company, concealing their role in obtaining negative tenor and content of published reports, and delaying publication to facilitate other defendants' establishment of short positions in that stock. *Overstock.com, Inc. v. Gradient Analytics, Inc. (2007) 151 Cal. App. 4th 688, 717, 61 Cal. Rptr. 3d 29*

Directors of corporation targeted for takeover have no duty to disclose merger negotiations to shareholders until agreement in principle has been reached, even though withdrawal from prior agreement in principle and termination of earlier merger negotiations had been publicly announced. *Eldridge v. Tymshare, Inc. (1986) 186 Cal. App. 3d 767, 772-776, 230 Cal. Rptr. 815* ; *but see Basic Incorporated v. Levinson (1988) 485 U.S. 224, 108 S. Ct. 978, 99 L. Ed. 2d 194, 212-214, 220* (probably applicable to abrogate agreement-in-principle standard under California law; cases listed in § 515.246[10][h])

Misrepresentation or concealment of fact was not material; reliance on statement or omission in connection with tender offer was not required. *Lynch v. Cook (1983) 148 Cal. App. 3d 1072, 1087-1088, 196 Cal. Rptr. 544*

[14] Marketing Personnel--Licensing

In determining whether person involved in particular transaction was subject to business opportunity licensing requirement, crucial question is not whether transaction met statutory definition of business opportunity [*see Bus. & Prof. Code § 10030*], but whether person "[sold] or offer[ed] to sell, [bought] or offer[ed] to buy, solicit[ed] prospective sellers or purchasers of, solicit[ed] or obtain[ed] listings of, or negotiate[d] the purchase, sale or exchange of" business opportunity [*see Bus. & Prof. Code § 10131*]--in other words, inquiry should be focused on person's actions in attempting to create business relationship, not on form that business relationship ultimately took: for example, person would come within statute if he or she solicited or negotiated purchase or sale of business opportunity, but would not come within statute if he or she solicited or negotiated different kind of transaction, even if transaction ultimately was consummated as purchase or sale of business opportunity. *Nein v. HostPro, Inc. (2009) 174 Cal. App. 4th 833, 848, 95 Cal. Rptr. 3d 34*

"Business opportunity" as used in *Bus. & Prof. Code § 10030* encompasses any transfer of ownership of entire ongoing business in corporate form, whether by transfer of all stock or all assets, and thus person negotiating transaction is required to have real estate broker's license. *All Points Traders, Inc. v. Barrington Associates (1989) 211 Cal. App. 3d 723, 731, 734, 259 Cal. Rptr. 780* ; *but see Bus. & Prof. Code § 10008.5* (providing that real estate and business opportunity broker licensing requirements do not apply to person licensed as security broker); *see also* Stats. 1989, ch. 1116, § 8 (statement of legislative intent that rights and obligations of parties in *All Points Traders* not be affected)

Provisions of Corporate Securities Act [*Corp. Code § 25000 et seq.*] requiring stockbroker to first secure license [former *Corp. Code § 25700*; *now see Corp. Code § 25210*] are designed to protect public against unscrupulous operators; contract employing broker to sell corporate stock is void if broker is not licensed to sell and broker as not allowed to recover commission. *Rhode v. Bartholomew (1949) 94 Cal. App. 2d 272, 282, 210 P.2d 768*

Person who negotiates for securities on behalf of purchaser as being broker-dealer required to be licensed, since inducing purchase or sale of securities [*see Corp. Code § 25210*] is business of effecting transactions therein [*see Corp. Code § 25004*] and is not area excluded from licensing requirements of securities law. *Nationwide Investment Corp. v. California Funeral Serv., Inc. (1974) 40 Cal. App. 3d 494, 502, 114 Cal. Rptr. 77*

Licensing provisions of securities law cover all persons acting as broker-dealers or agents even though securities in

which they deal may be exempted from qualification provisions. *Nationwide Investment Corp. v. California Funeral Serv., Inc. (1974) 40 Cal. App. 3d 494, 503, 114 Cal. Rptr. 77*

[15] Punitive Damages

Punitive damage award against brokerage firm whose employee broker defrauded securities purchasers was proper for firm's own malice, as evidenced by its failure to investigate prior suits against broker for similar conduct in reckless disregard of rights of others and failure to supervise, or on basis of firm's ratification of broker' acts by failure to act when it knew of broker's fraudulent activity. *Seymour v. Summa Vista Cinema, Inc. (9th Cir. 1987) 809 F.2d 1385, 1388* (decided under *Civ. Code § 3294* before 1987 amendment)

Punitive damages of $220,000, equal to 2.3 times compensatory award or one percent of stock brokerage firm's net worth, were appropriate when individual broker's conduct was ratified and approved by managing agent, and churning (over 500 unauthorized transactions in six-year period) was so egregious that capital was turned over six times per year. *Hobbs v. Eichler (1985) 164 Cal. App. 3d 174, 192-196, 210 Cal. Rptr. 387*

[16] Purpose of Securities Laws

Primary purpose of California securities law is to afford to those who risk their capital at least fair chance of realizing their objectives. *People v. Miller (1987) 192 Cal. App. 3d 1505, 1510, 238 Cal. Rptr. 168*

[17] Rescission

Rescission of securities transaction is available under *Civ. Code § 1689*, for instance, when agreement required stock purchaser to make tender offer for outstanding shares held by minority interests at price no less than price paid to seller, and, if it acquired 80 percent of outstanding shares, to adjust price paid to seller to reflect price paid to offerees; purchaser's failure to make tender offer is breach of contract and failure of consideration; whether failure of consideration was sufficiently material to allow seller to rescind as question of fact. *FDIC v. Air Florida System, Inc. (9th Cir. 1987) 822 F.2d 833, 839-840*

[18] Securities Exempt

Fractionalizing of promissory notes is no different than issuance of promissory that is one of series of notes secured by same real property; therefore, it is not exempt from securities regulation under *Corp. Code § 25100(e)*. *People v. Schock (1984) 152 Cal. App. 3d 379, 389, 199 Cal. Rptr. 327*

[19] Statute of Limitations

Under California law, statute of limitations for broker's fraud was tolled by broker's reassuring client on concerns relevant to claimed misrepresentations. *Vucinich v. Paine, Webber, Jackson & Curtis, Inc. (9th Cir. 1986) 803 F.2d 454, 460*

Civil liability under Securities Act of 1933 [*15 U.S.C. §§ 77 l*(1), 77m] for use of mails or other instrumentality of interestate commerce for sale, delivery, or offer to sell unregistered security is subject to one year limitation of *15 U.S.C. § 77m* from date of last sales-related activity; complaint as required to allege facts demonstrating compliance with statute of limitation. *Toombs v. Leone (9th Cir. 1985) 777 F.2d 465, 468*

Six-year period established by Municipal Securities Rulemaking Board for arbitration of claim for reclamation (rescission) of transaction involving stolen bearer bonds commences on seller's refusal of demand for reclamation, not on date of theft, so claim for arbitration was timely filed and confirmation of award was proper. *Citibank v. Crowell, Weedon & Co. (1992) 4 Cal. App. 4th 844, 848-850, 5 Cal. Rptr. 2d 906*

[20] Unlawful Competition Law Inapplicable

In action by investors alleging they were defrauded by "pyramid" or "Ponzi" scheme orchestrated by foreign brokerage houses from which they purchased shares of stock, trial court did not err in holding that *Bus. & Prof. Code § 17200* does not apply to securities transactions. *Bowen v. Ziasun Techs., Inc. (2004) 116 Cal. App. 4th 777, 786-787, 11 Cal. Rptr. 3d 522*

[21] Waiver of Statutory Compliance with California Law

Right of buyer of securities in California to have California law apply to future dispute arising out of transaction is "provision" within meaning of *Corp. Code § 25701* and is not subject to waiver or evasion by stipulation of parties to securities transaction; therefore choice of law provision in agreement violated *Corp. Code § 25701*. *Hall v. Superior Court (1983) 150 Cal. App. 3d 411, 418, 197 Cal. Rptr. 757*

Legal Topics:

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

Corp. Code § 31512 violates Supremacy Clause of U.S. Constitution when applied to preclude arbitration as required by contract arbitration clause. *Southland Corp. v. Keating (1984) 465 U.S. 1, 10, 104 S. Ct. 852, 79 L. Ed. 2d 1 , overruling Keating v. Superior Court (1982) 31 Cal. 3d 584, 183 Cal. Rptr. 360, 645 P.2d 1192*

Grant of exclusive territory required to be expressly set forth in contract and will not be implied; right to use franchisor's trademark and trade dress at particular location do not amount to grant of exclusive territory; thus, franchisor did not breach agreement by establishing company stores in same market area. *Eichman v. Fotomat Corp. (9th Cir. 1989) 880 F.2d 149, 163-164* (determining pendent state claim)

Corp. Code § 31306 constitutes express statement of unequivocal legislative intent that statute of limitations provisions in *Corp. Code §§ 31303, 31304* are to be sole controlling limits on time for filing suit under Franchise Investment Law; thus delayed discovery or tolling rules did not apply to franchisees' causes of action. *People ex rel. Department of Corporations v. Speedee Oil Change Systems, Inc. (2002) 95 Cal. App. 4th 709, 723-725, 116 Cal. Rptr. 2d 497*

Requirement, in definition of franchise, that franchisee is granted right to engage in business of "offering, selling, or distributing goods or services" [*see Corp. Code § 31005(a)(1)*] construed liberally to find that parties who could not enter into binding contracts or pass title to goods nonetheless were franchisees. *Gentis v. Safeguard Business Systems (1998) 60 Cal. App. 4th 1294, 1304-1305, 71 Cal. Rptr. 2d 122*

Requirement, in definition of franchise, that operation of franchisee's business must be substantially associated with franchisor's mark, name, or symbol [*Corp. Code § 31005(a)(2)*] met when employer contracts for establishment and operation of employees' cafeteria by corporation whose business is constructing cafeteria facilities, licensing operation to individuals who pay license fees, and monitoring and provisioning licensees' operations, even though licensees' customers never see corporation's mark, name, or symbol used in association with licensees' operation of cafeterias. *Kim v. Servosnax, Inc. (1992) 10 Cal. App. 4th 1346, 1356-1358, 13 Cal. Rptr. 2d 422*

Under evidence and agreement at issue, franchisor was not liable to broker for commission on sale of franchise owned by third party. *Klinger v. Realty World Corp. (1987) 196 Cal. App. 3d 1549, 1552-1553, 242 Cal. Rptr. 592*

Cause of action for legal malpractice was stated by franchisees against attorneys who prepared false or misleading prospectus, knowing it would be shown to prospective franchisees and used to induce them to purchase franchises. *Courtney v. Waring (1987) 191 Cal. App. 3d 1434, 1443-1444, 237 Cal. Rptr. 233*

Violations of Franchise Investment Law do not have effect of continuing life of franchise that the franchisor is seeking to terminate and thus are not relevant to issue of possession after franchise terminated. *Mobil Oil Corp. v. Handley (1978) 76 Cal. App. 3d 956, 963-964, 143 Cal. Rptr. 321* (franchised petroleum dealer evicted from service station premises)

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§ 515.264 Law Reviews

Root, *The Meaning of "Franchise" Under the California Franchise Investment Law: A Definition in Search of a Concept*, *30 McGeorge L. Rev. 1163 (1999)*

Note, *Vylene Enterprises v. Naugles: Remedies for Franchisor Encroachment*, *27 Sw. U. L. Rev. 353 (1997)*

Laufer, *The Safe Way to Terminate a Franchise* (Part 2), 41(3) Prac. Law. 63 (1995)

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Cantor, *The Federal and State Regulation of Franchises* (Part 2), 27(7) Prac. Law. 77 (1981)

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Augustine & Hrusoff, *Franchise Regulation*, *21 Hastings L.J. 1347 (1970)*

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Marsh & Volk, *Practice Under the California Securities Laws, Ch. 40, Registration of Franchises Under the California Investment Franchise Law, §§ 40.01 -40.22* (Matthew Bender)

Glickman, Franchising, Ch. 13, *Litigation and Dispute Settlement* (Matthew Bender)

Witkin, Summary of California Law, Vol. 9, *Corporations*, §§ 287, 288, 289 (9th ed, 1989)

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[Reserved]

§§ 515.266[Reserved]

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§ 515.280 State Statutes--Franchise Relations Act

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Inapplicability to federal regulated petroleum products franchises. *Bus. & Prof. Code § 20001(d)*

Nonwaivability of provisions. *Bus. & Prof. Code § 20010*

Jurisdiction. *Bus. & Prof. Code § 20015*

Termination of franchises. *Bus. & Prof. Code §§ 20020, 20021*

Nonrenewal of franchises. *Bus. & Prof. Code §§ 20025, 20026*

Notice requirements. *Bus. & Prof. Code § 20030*

Repurchase offers. *Bus. & Prof. Code §§ 20035-20037*

Arbitration. *Bus. & Prof. Code § 20040*

Applicability of law. *Bus. & Prof. Code § 20041*

Inapplicability to new motor vehicle dealerships. *Bus. & Prof. Code § 20042*

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§ 515.281 Decisions

[1] Antitrust Applications

Even if lease was illegal tie-in, action was barred by four-year limitation of *15 U.S.C. § 15b*; new overt act was required to apply continuing violation theory to lease commenced more than four years prior to action; mere acceptance of rent by franchisor did not constitute overt act. *Eichman v. Fotomat Corp. (9th Cir. 1989) 880 F.2d 149, 160*

Allegation that franchisor's unstated policy was to terminate any franchisee who bought equipment package from another entity insufficient force or leverage to establish tying violation. *Murphy v. Business Cards Tomorrow, Inc. (9th Cir. 1988) 854 F.2d 1202, 1204* (overruled on other grounds in *Townsend v. Holman Consulting Corp. (9th Cir. 1990) 929 F.2d 1358, 1363)*

[2] Arbitration

Parties who entered into franchise agreement that specified Oklahoma forum for arbitration, when offering circular pointed out that California law requires California forum for franchise agreement dispute resolution, never clearly agreed to Oklahoma forum; district court therefore erred in enforcing forum selection clause of franchise agreement. *Laxmi Investments LLC v. Golf USA (9th Cir. 2000) 193 F.3d 1095, 1097*

When franchisee, resisting petition to compel arbitration on issue of franchisee's right to rescind franchise agreement, contends that there was no meeting of minds as to arbitration provision in franchise agreement, and franchisee submits evidence supporting that contention, court has authority to determine whether parties in fact made agreement to arbitrate. *Winter v. Window Fashions Professionals, Inc. (2008) 166 Cal. App. 4th 943, 948-949, 83 Cal. Rptr. 3d 89*

Franchisor was entitled to preliminary injunction, pursuant to *Code Civ. Proc. § 1281.8*, to prevent franchisee from continuing to use franchise trademark and continuing to operate as rightful franchisee during pendency of arbitration of

dispute between parties as to whether franchise agreement was rightfully terminated by franchisor. *Jay Bharat Devs., Inc. v. Minidis (2008) 167 Cal. App. 4th 437, 446-447, 84 Cal. Rptr. 3d 267*

When (1) license agreement provided for arbitration and related lease did not, (2) franchisee and franchisor were parties to pending class action regarding license agreement, and (3) grounds for franchisor's termination of lease were alleged breaches of same provisions of license agreement that were subject of class action, arbitration of unlawful detainer action was required to be compelled, but arbitration had to be stayed under *Code Civ. Proc. § 1281.2(c)* until resolution of class action to avoid conflicting rulings. *Pioneer Take Out Corp. v. Bhavsar (1989) 209 Cal. App. 3d 1353, 1357-1358, 257 Cal. Rptr. 749*

[3] Franchisor's Breach of Agreement

When contract at issue gave franchisor sole option and discretion to relocate franchisee's kiosk, franchisor did not breach agreement in refusing to allow franchisee to relocate on request. *Eichman v. Fotomat Corp. (9th Cir. 1989) 880 F.2d 149, 164* (determining pendent state claim)

When franchisor unilaterally terminated subfranchise agreement and franchisee (as subfranchisor) sued for breach of contract, evidence was sufficient to support award for lost franchise fees and expenses incurred trying to set up subfranchisees; evidence, however, was insufficient to support award for lost profits or cause of action for intentional interference with prospective economic advantage. *Parlour Enters., Inc. v. Kirin Group, Inc. (2007) 152 Cal. App. 4th 281, 283-284*

Repurchase of inventory is not exclusive remedy for wrongful termination of franchise pursuant to *Bus. & Prof. Code § 20035*; plaintiff can pursue breach of contract claim against franchisor for wrongful termination of franchise agreement. *JRS Prods., Inc. v. Matsushita Elec. Corp. of Am. (2004) 115 Cal. App. 4th 168, 178, 8 Cal. Rptr. 3d 840*

[4] Tort Damages

Without evidence that would support inference that decline in franchisee's sales was caused by franchisor's company stores in same area, franchisee failed to establish cause of action for intentional interference with prospective business advantage. *Eichman v. Fotomat Corp. (9th Cir. 1989) 871 F.2d 784, 801* (determining pendent state claim)

Franchisor-franchisee relationship was not fiduciary in nature, nor characterized by elements of public interest or adhesion; thus, California law regarding breach of the covenant of good faith and fair dealing and tortious termination of contract did not extend to termination of distributorship and franchise agreement. *Eichman v. Fotomat Corp. (9th Cir. 1989) 871 F.2d 784, 803* (determining pendent state claim); *Premier Wine & Spirits v. E & J Gallo Winery (9th Cir. 1988) 846 F.2d 537, 540* (diversity action; plaintiff had abandoned its claims under California Franchise Relations Act)

Franchise Relations Act did not impose fiduciary duties on franchisor; far from being traditional trustee, franchisor was free to make pricing and distribution decisions for its own benefit; no duty of good faith and fair dealing was imposed on franchisor for failure to renew franchise. *Boat & Motor Mart v. Sea Ray Boats, Inc. (9th Cir. 1987) 825 F.2d 1285, 1292*

Franchisor that wrongfully terminated franchise without good cause was liable to franchisee for breach of contract, not intentional interference with prospective economic advantage; essential nature of claim was breach of contract, which cannot be transmuted into tort liability by claim that breach interfered with franchisee's business. *JRS Prods., Inc. v. Matsushita Elec. Corp. of Am. (2004) 115 Cal. App. 4th 168, 183, 8 Cal. Rptr. 3d 840*

No tort cause of action existed for breach of agreement in violation of public policy (refusal to make repairs in retaliation for franchisee's reporting underground gasoline leaks to authorities and failing to comply with defendant's pricing policies). *Harris v. Atlantic Richfield Co. (1993) 14 Cal. App. 4th 70, 82, 17 Cal. Rptr. 2d 649*

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Protected franchise relationships. *15 U.S.C. § 2802*

Exclusion of trial and interim franchises. *15 U.S.C. § 2803*

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Enforcement provisions. *15 U.S.C. § 2805*

Preemptive or other relationship to state law. *15 U.S.C. § 2806*

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§ 515.301 State Statutes

Termination and nonrenewal of petroleum products franchises. *Bus. & Prof. Code § 20999 et seq.*

Franchisee's recourse to outside suppliers. *Bus. & Prof. Code §§ 21140-21140.4*

Franchisee's designation of successor in interest. *Bus. & Prof. Code § 21140.6*

Franchisee transfers. *Bus. & Prof. Code §§ 21148, 21149*

Franchisee's ability to do late-hour business. *Bus. & Prof. Code §§ 21150, 21150.1*

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§ 515.302 Decisions

[1] Attorney's Fees

Trade association that obtained declaratory relief and injunction against franchisor's discriminatory policy under *Bus. & Prof. Code § 17204* was not entitled to attorney's fees pursuant to *Bus. & Prof. Code § 21140.4* because it never established that it was damaged. *California Service Station etc. Assn. v Union Oil Co. (1991) 232 Cal. App. 3d 44, 58-59, 283 Cal. Rptr. 279*

[2] State Claims

Although there is disparity of bargaining power between gasoline refiners and franchise distributors, relationship is based on commercial contract undertaken for profit; thus California law regarding breach of covenant of good faith and fair dealing does not extend to alleged constructive termination of franchise occasioned by elimination of credit card program and imposition of harsher payment terms on franchisees. *Little Oil. Co., Inc. v. Atlantic Richfield Co. (9th Cir. 1988) 852 F.2d 441, 446-447*

[3] Termination or Nonrenewal Under Petroleum Marketing Practices Act

Franchisor, acting pursuant to *15 U.S.C. § 2802(b)(3)(D)* to withdraw from market, properly declined to renew franchise agreement having term of three or more years and decided to sell premises because (1) that determination was made by franchisor in good faith and in normal course of business, and (2) before selling premises, franchisor offered franchisee right of first refusal of at least 45 days duration of offer, made by another, to purchase franchisor's interest in premises. *BP W. Coast Prods. LLC v. May (9th Cir. 2006) 447 F.3d 658, 663-665* (in absence of some evidence of bad faith in initial decision-making to sell facilities, court is precluded from second-guessing franchisor's economic determination to withdraw from market and sell facilities)

Legislative intent behind *15 U.S.C. § 2802(b)(2)(C)* and *(c)(4)*, allowing termination of franchise because of franchisor's loss of possession of service-station premises on expiration of ground lease, was thwarted when franchisor gave required notice of termination on that ground while actually intending to keep possession so as to operate service station directly instead of through franchisee, and franchisor manipulated negotiations with ground lessor and with franchisee to produce that result. *Mustang Mktg., Inc. v. Chevron Prods. Co. (9th Cir. 2005) 406 F.3d 600, 609-610*

Franchisor's withdrawal from market complied with PMPA timing requirements and transfer to trust rather than successor for financing purposes did not violate PMPA provisions [*15 U.S.C. 2802(b)(2)(E)*]; because this was a market withdrawal involving the termination of franchise agreements, state and federal law were not in conflict and the PMPA rather than *Bus. & Prof. Code § 20999.25(a)* controlled. *Unocal Corp. v. Kaabipour (9th Cir. 1999) 177 F.3d 755, 768-771*

To be sufficient for termination under *15 U.S.C. § 2802(b)(2)(C), (c)(10)*, willful adulteration, mislabeling, or misbranding must involve voluntary action, done either with intentional disregard of, or plain indifference to, requirements of franchise agreement; willfulness not established by franchisee's purchase of gasoline from third party when franchisee asked third party to supply ARCO gasoline and gasoline supplied by third party was for most part either ARCO gasoline or gasoline that met ARCO's standards. *Retsieg Corp. v. ARCO Petroleum Products Co. (9th. Cir. 1989) 870 F.2d 1495, 1498-1499*

Question of whether circumstances made it unreasonable for franchisor to give 90 days' notice of termination was mixed question of law and fact; when city had revoked conditional use permit for mini-mart because of franchisee's failure, over six-month period, to comply with conditions of permit, 12 days notice of termination was sufficient. *Abujudeh v. Mobil Oil Corp. (9th Cir. 1988) 841 F.2d 310, 311-312*

Termination of franchise under 28 U.S.C. § 2802(b)(2)(C), (c)(12) was proper when franchisee was convicted of felony involving moral turpitude (possession of heroin for sale); attempted assignment of franchise to corporation controlled by individual franchisee was not effective under *Bus. & Prof. Code § 21149* without either franchisor's consent or franchisee's guarantee of assignor's performance. *Atlantic Richfield Co. v. Guerami (9th Cir. 1987) 820 F.2d 280, 282-283*

Termination of franchise held by corporate franchisee was proper under 28 U.S.C. § 2802(b)(2)(C), (c)(12) when franchisee's sole shareholder was convicted of felony involving moral turpitude; *Bus. & Prof. Code § 21148*, which gives franchisee right to assign, was preempted in this situation to prevent frustration of termination that would be proper under federal scheme. *Humboldt Oil Co. v. Exxon Co., U.S.A. (9th Cir. 1982) 695 F.2d 386, 389* (vacating injunction); *Humboldt Oil Co. v. Exxon Co., U.S.A. (9th Cir. 1987) 823 F.2d 373, 375* (reversing judgment for franchisee)

Summary adjudication that franchisor had duty to make offers of sale to franchisees, as required by federal Petroleum Marketing Practices Act, did not convert franchisees into "vendees in possession" so as to relieve them of duty to pay rent during pendency of litigation; franchisees were remaining lessees until binding contracts of sale exist; if sales consummated, franchisees entitled to credit against purchase price equal to rents paid during period sale was wrongfully delayed by franchisor. *Abadjian v. Superior Court (1985) 168 Cal. App. 3d 363, 372-374, 214 Cal. Rptr. 234*

[4] Transfer of Franchise Under State Law

Lessor gas companies violated *Bus. & Prof. Code § 20999.25(a)* by relinquishing title, possession, and control of gas stations to LLP without offering lessees a chance to purchase the stations; LLP was "another person" under that statute, even though it was owned and controlled by gas companies, and oil companies' contribution of assets to LLP was "sale,

transfer, or assignment" under that statute. *Abrahim & Sons Enterprises v. Equilon Enters., LLC (2002) 292 F.3d 958, 963-964*

Bus. & Prof. Code § 20999.25(a) requiring franchisor considering sale to make offer or provide right of first refusal to franchisee is not preempted by PMPA. *Forty-Niner Truck Plaza, Inc. v. Union Oil Co. (1997) 58 Cal. App. 4th 1261, 1276-1278, 68 Cal. Rptr. 2d 532*

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"Dealer." *Veh. Code §§ 285, 286*

"Distributor." *Veh. Code § 296*

"Distributor branch." *Veh. Code § 297*

"Franchise." *Veh. Code § 331*

"Franchisee." *Veh. Code § 331.1*

"Franchisor." *Veh. Code § 331.2*

"Manufacturer branch." *Veh. Code § 389*

"New motor vehicle dealer." *Veh. Code § 426*

"Vehicle manufacturer." *Veh. Code § 672*

Jurisdiction of New Motor Vehicle Board. *Veh. Code § 3050(d)*

Termination or nonrenewal of franchises. *Veh. Code §§ 3060, 3061*

Establishing additional or relocating dealerships. *Veh. Code §§ 3062, 3063*

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4. Trade Practices And Termination Or Nonrenewal Of New Motor Vehicle Dealerships

45-515 California Forms of Pleading and Practice--Annotated § 515.323

§ 515.323 Decisions

[1] Administrative Due Process

Recusal and nonparticipation of four dealer members held sufficient to protect distributor's due process rights. *British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd. (1987) 194 Cal. App. 3d 81, 87-89, 239 Cal. Rptr. 280*

Absent evidence that public members of board had any financial or personal interest in outcome, mere interaction between public members and dealer members on other board business was insufficient to raise presumption of bias. *American Isuzu Motors, Inc. v. New Motor Vehicle Bd. (1986) 186 Cal. App. 3d 464, 472-473, 230 Cal. Rptr. 769* (matter heard under voluntary recusal policy)

Without showing that hearing officer shared financial stake of dealer members of board or had own financial interest in outcome, dealer members' participation in selection of hearing officer did not result in denial of due process. *American Isuzu Motors, Inc. v. New Motor Vehicle Bd. (1986) 186 Cal. App. 3d 464, 472-473, 230 Cal. Rptr. 769* (matter heard under voluntary recusal policy)

[2] Breach of Agreement

When dealership agreement listed three addresses as dealership location, moving showroom from one listed address to another was not breach of agreement. *American Isuzu Motors, Inc. v. New Motor Vehicle Bd. (1986) 186 Cal. App. 3d 464, 475-476, 230 Cal. Rptr. 769*

[3] Conditions of Dealership

Manufacturer's requirement that dealers do warranty repair work to maintain franchise was not illegal tying

arrangement under federal antitrust law because dealers are sellers of allegedly tied product (repair work), not buyers. *49er Chevrolet, Inc. v. General Motors Corp. (9th Cir. 1986) 803 F.2d 1463, 1469*

[4] Consolidation of Protests

Consolidation requirement of *Veh. Code § 3060(c)* [*see now Veh. Code § 3060(b)(1)*] was only applicable to concurrent protests filed by different franchisees and not to successive protests from same franchisee. *Sonoma Subaru, Inc. v. New Motor Vehicle Bd. (1987) 189 Cal. App. 3d 13, 25-26, 234 Cal. Rptr. 226*

[5] Implied Extension of Franchise Term

When franchise has expired by its terms and without express agreement to extend it, court determined from conduct of the parties whether there is implied extension; sending notice of termination manifested implied agreement to continue franchise beyond its stated expiration date. *British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd. (1987) 194 Cal. App. 3d 81, 91-92, 239 Cal. Rptr. 280*

[6] Interpretation of Agreements

Dealership agreement did not require dealer to maintain separate showroom even though original letter of intent required one, because final agreement specifically superseded all prior agreements, understandings of parties. *American Isuzu Motors, Inc. v. New Motor Vehicle Bd. (1986) 186 Cal. App. 3d 464, 474-475, 230 Cal. Rptr. 769*

[7] Jurisdiction of New Motor Vehicle Board

Purpose of New Motor Vehicle Board and goal of administrative efficiency support conclusion that Board had implied authority to dismiss protest when undisputed facts demonstrated good cause for franchise termination as matter of law and afford no basis for preventing termination of franchise. *Duarte & Witting, Inc. v. New Motor Vehicle Board (2002) 104 Cal. App. 4th 626, 637, 128 Cal. Rptr. 2d 501*

Trial court erred in sustaining manufacturer's demurrer to dealers's complaint, which consisted entirely of common law claims, on basis of failure to exhaust its administrative remedies; *Veh. Code § 3050(e)* provides that courts have jurisdiction over all common law and statutory claims originally cognizable in courts and that for those claims a party may initiate action directly in any court of competent jurisdiction. *South Bay Creditors Trust v. General Motors Acceptance Corporation (1999) 69 Cal. App. 4th 1068, 1079-1080, 82 Cal. Rptr. 2d 1*

In breach of contract action against automobile manufacturer for unreasonable refusal to approve buyer for dealership, dealer was not required to exhaust administrative remedies, even if claim was within New Motor Vehicle Board's statutory authority; existence of Board's authority under *Veh. Code § 11713.3* does not subject claim to exhaustion requirement. *Kemp v. Nissan Motor Corp. (1997) 57 Cal. App. 4th 1527, 1529-1530, 67 Cal. Rptr. 2d 794*

New Motor Vehicle Board does not have jurisdiction pursuant to *Veh. Code § 3050(c)* over cause of action for contractual interference based on tortious business practices independent of any franchise agreement, brought by nonsignatory to franchise agreement with *Honda. Tovas v. American Honda Motor Co. (1997) 57 Cal. App. 4th 506, 509, 521, 67 Cal. Rptr. 2d 145*

New Motor Vehicle Board's assertion of jurisdiction over dealer's state statutory and common-law claims arising out of allegations of manufacturer's misdealing violated judicial powers clause of *California Constitution. Hardin*

Oldsmobile v. New Motor Vehicle Board (1997) 52 Cal. App. 4th 585, 593, 598, 60 Cal. Rptr. 2d 583 (disagreeing with holding in *Yamaha Motor Corp. v. Superior Court (1986) 185 Cal. App. 3d 1232, 230 Cal. Rptr. 382 , below*)

Jurisdiction of New Motor Vehicle Board under *Veh. Code § 3050(c)(2)* as extending to dealer's claim that manufacturer wrongfully terminated dealer's franchise and dealer's claim for damages arising from manufacturer's allegedly wrongful allocation of vehicles among its dealers. *Ray Fladeboe Lincoln-Mercury, Inc. v. New Motor Vehicle Bd. (1992) 10 Cal. App. 4th 51, 53-56, 12 Cal. Rptr. 2d 598*

In action against former franchisee by its creditor, franchisee's cross complaint against franchisor as barred for failure to exhaust administrative remedies. *Yamaha Motor Corp. v. Superior Court (1987) 195 Cal. App. 3d 652, 659-660, 240 Cal. Rptr. 806* (franchisee had dismissed protest with prejudice)

In action against former franchisee by its creditor, franchisee's cross complaint against franchisor for breach of contract, breach of implied covenant of good faith and fair dealing, fraud, negligent misrepresentation, interference with business relations, and unlawful restraint of trade was within jurisdiction of New Motor Vehicle Board because most conduct complained of was within scope of *Veh. Code §§ 11713.2* and *11713.3* or related to termination of franchise. *Yamaha Motor Corp. v. Superior Court (1987) 195 Cal. App. 3d 652, 657-660, 240 Cal. Rptr. 806*

Administrative mandate properly denied for failure of car dealer to protest termination of its franchise before New Motor Vehicle Board within 10 days of receipt of termination notice pursuant to *Veh. Code § 3060(b)* [*see now Veh. Code § 3060(a)(2)*]; implication of good cause exception to 10-day requirement would frustrate Legislative intent and statutory scheme. *Sonoma Subaru, Inc. v. New Motor Vehicle Bd. (1987) 189 Cal. App. 3d 13, 20-22, 234 Cal. Rptr. 226*

Dealer's claim that manufacturer breached implied covenant of good faith and fair dealing by abandonment of advertising and promotion was within jurisdiction of New Motor Vehicle Board under *Veh. Code § 3050(c)*; thus, dealer required to exhaust administrative remedies before New Motor Vehicle Board. *Yamaha Motor Corp. v. Superior Court (1986) 185 Cal. App. 3d 1232, 1242-1243, 230 Cal. Rptr. 382*

[8] Modification of Dealership

Under dealership agreement that reserved to franchisor unqualified right to establish new dealership's, dealer was not entitled under *Veh. Code § 3062* to protest establishment of new dealership 15.2 miles away, beyond statutory 10-mile "relevant market area"; nor did that establishment constitute modification of franchise within meaning of *Veh. Code § 3060*. *BMW of North America, Inc. v. New Motor Vehicle Bd. (1984) 162 Cal. App. 3d 980, 989-994, 209 Cal. Rptr. 50* ; *cf. Ri-Joyce, Inc. v. New Motor Vehicle Bd. (1992) 2 Cal. App. 4th 445, 3 Cal. Rptr. 2d 546* (discussed in *§ 515.134* different outcome under different type of agreement)

[9] Notice of Termination

Notice that did not state reason for termination and was not sent to Board but only to dealer did not trigger period within which protest could be filed. *British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd. (1987) 194 Cal. App. 3d 81, 93-94, 239 Cal. Rptr. 280*

Notice not defective and no denial of due process for failure to state that dealer had 10 days to file protest; fact that notice said dealer had right to protest and must act promptly was sufficient. *Sonoma Subaru, Inc. v. New Motor Vehicle Bd. (1987) 189 Cal. App. 3d 13, 23-24, 234 Cal. Rptr. 226*

Notice not defective, no denial of due process, and not misleading for proximity of notice of right to file protest and of

notice of 15-day period within which to cure default or suffer termination; notice was clear that 15-day period applied to time to cure default, not to time to file protest. *Sonoma Subaru, Inc. v. New Motor Vehicle Bd. (1987) 189 Cal. App. 3d 13, 24-25, 234 Cal. Rptr. 226*

Manufacturer not permitted to raise at hearing additional grounds for termination not specified in notice of termination; *Veh. Code § 3060(a)* requires notice of specific grounds for termination. *American Isuzu Motors, Inc. v. New Motor Vehicle Bd. (1986) 186 Cal. App. 3d 464, 476-477, 230 Cal. Rptr. 769*

Manufacturer's failure to give notice of its modification and establishment of new franchise as required by *Veh. Code §§ 3060, 3062* did not divest New Motor Vehicle Board of jurisdiction to determine dealer's protest. *Yamaha Motor Corp. v. Superior Court (1986) 185 Cal. App. 3d 1232, 1240, 230 Cal. Rptr. 382*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsRight to HearingDue ProcessBusiness & Corporate LawDistributorships & FranchisesGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesCauses of ActionBreach of ContractBusiness & Corporate LawDistributorships & FranchisesFranchise RelationshipsFranchise AgreementsBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureEnforcement

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§ 515.324 Text References

Glickman, Franchising, Ch. 13, *Litigation and Dispute Settlement*, § 13.03[2] (federal Automobile Dealer's Franchise Act)

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesCauses of ActionGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureEnforcement

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45-515 California Forms of Pleading and Practice--Annotated §§ 515.325-515.339

[Reserved]

§§ 515.325[Reserved]

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5. Dealership Discrimination

45-515 California Forms of Pleading and Practice--Annotated § 515.340

§ 515.340 State Statutes

[1] Civil Rights Protection for Franchisees

Discrimination against franchisee and location of franchise. *Civ. Code § 51.8*

[2] Fair Dealership Law

Definitions. *Civ. Code § 81*

Purposes and policies. *Civ. Code § 82*

Discrimination prohibited in dealership transactions. *Civ. Code §§ 83-85*

Recovery of attorney's fees. *Civ. Code § 86*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesCauses of ActionGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRemediesCosts & Attorney FeesCivil Rights LawPrivate Discrimination

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5. Dealership Discrimination

45-515 California Forms of Pleading and Practice--Annotated §§ 515.341-515.359

[Reserved]

§§ 515.341[Reserved]

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6. Seller Assisted Marketing Plans

45-515 California Forms of Pleading and Practice--Annotated § 515.360

§ 515.360 State Statutes

Telephonic sellers; exemption for sellers of seller assisted marketing plan. *Bus. & Prof. Code §§ 17511 et seq., 17511.1(c)(6)*

Purposes of seller assisted marketing plan laws. *Civ. Code § 1812.200*

Definitions under seller assisted marketing plan laws. *Civ. Code § 1812.201*

Jurisdiction of offers or sales of plans. *Civ. Code § 1812.202*

Filing of disclosure statements. *Civ. Code § 1812.203*

Restrictions on representations in offers or sales. *Civ. Code § 1812.204*

Bond requirements for certain representations. *Civ. Code §§ 1812.204(c), 1812.214(b)*

Required disclosures and information to be presented to purchasers. *Civ. Code §§ 1812.205, 1812.206*

Requirements of seller assisted marketing plan contracts. *Civ. Code §§ 1812.207-1812.210*

Assignee rights. *Civ. Code § 1812.211*

Recordkeeping by sellers. *Civ. Code § 1812.213*

Consent to service on plan sellers. *Civ. Code § 1812.214(a)*

Voidability of seller assisted marketing plan contracts. *Civ. Code § 1812.215*

Nonwaivability of legislative provisions. *Civ. Code § 1812.216(a)*

Burden of proving exception or exemption. *Civ. Code § 1812.216(b)*

Criminal offenses. *Civ. Code § 1812.217*

Civil liabilities. *Civ. Code §§ 1812.218, 1812.219*

Claims against trust deposit made in lieu of bond. *Civ. Code § 1812.221*

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationBusiness & Corporate LawDistributorships & FranchisesBusiness OpportunitiesBusiness & Corporate LawDistributorships & FranchisesCauses of ActionGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRegistration & DisclosureGeneral Overview

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45-515 California Forms of Pleading and Practice--Annotated § 515.361

§ 515.361 Decisions

Business operation meeting definition of seller assisted marketing plan [*Civ. Code § 1812.201(a)*] not exempted because arrangement was also for sale of partnership interests. *People v. Mott (1983) 140 Cal. App. 3d 394, 400-401, 189 Cal. Rptr. 589*

Knowledge of disclosure requirements [*Civ. Code §§ 1812.203, 1812.205*] not necessary for criminal liability [*Civ. Code § 1812.217*]. *People v. Mott (1983) 140 Cal. App. 3d 394, 402-403, 189 Cal. Rptr. 589*

Legal Topics:

For related research and practice materials, see the following legal topics:
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45-515 California Forms of Pleading and Practice--Annotated §§ 515.362-515.379

[Reserved]

§§ 515.362[Reserved]

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45-515 California Forms of Pleading and Practice--Annotated § 515.380

§ 515.380 California Legal Forms

For a transaction guide and forms relating to financing statements and secured transactions under Division 9 of the Commercial Code, see California Legal Forms, Ch. 42, *Secured Transactions* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsGeneral Overview

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7. Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers

45-515 California Forms of Pleading and Practice--Annotated § 515.381

§ 515.381 State Statutes

Legislative intent of Act. *Bus. & Prof. Code § 22900*

Definitions. *Bus. & Prof. Code § 22901*

Supplier violations. *Bus. & Prof. Code § 22902*

Price-fixing provisions prohibited. *Bus. & Prof. Code § 22902.5*

Termination of contract between non single-line dealer and non single-line supplier. *Bus. & Prof. Code § 22903*

Supplier's approval or denial of transfer of interest by dealer who is not single-line dealer. *Bus. & Prof. Code § 22903.1*

Termination of contract between single-line dealer and single-line supplier. *Bus. & Prof. Code § 22903.2*

supplier's approval or denial of dealer's warranty claim. *Bus. & Prof. Code § 22903.3*

Annual surplus parts return program. *Bus. & Prof. Code § 22904*

Inventory repurchase requirements. *Bus. & Prof. Code § 22905*

Equipment repurchase liens. *Bus. & Prof. Code §§ 22906-22923*

Inventory repurchase on death of dealer. *Bus. & Prof. Code § 22924*

Dealer's remedies in action against supplier for violation of act. *Bus. & Prof. Code § 22925*

Severability of Act's provisions. *Bus. & Prof. Code § 22926*

Application of act to new dealer contracts and to specified existing dealer contracts; validity of provisions for choice of law or forum. *Bus. & Prof. Code § 22927*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesCauses of ActionBreach of ContractBusiness & Corporate LawDistributorships & FranchisesCauses of ActionRestraints of TradeBusiness & Corporate LawDistributorships & FranchisesTerminationsGeneral OverviewContracts LawSales of GoodsWarrantiesGeneral Overview

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45-515 California Forms of Pleading and Practice--Annotated § 515.382

§ 515.382 Decisions

California Equipment Dealers Act applied to nonrenewal of international distributor agreement, even though decision not to renew was made outside California; no unstated geographical limitations prevented application to case; Act can be applied to out of state dealer through choice of law provision. *Gravquick v. Trimble (9th Cir. 2003) 323 F.3d 1219, 1222-1223*

Legal Topics:

For related research and practice materials, see the following legal topics:
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45-515 California Forms of Pleading and Practice--Annotated §§ 515.383-515.399

[Reserved]

§§ 515.383[Reserved]

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PART IV. FORMS
A. Securities Regulation

45-515 California Forms of Pleading and Practice--Annotated § 515.400

§ 515.400 Complaint for Damages [Corp. Code § 25500] for Manipulation of Market Price of Securities [Corp. Code § 25400]--By Purchaser or Seller at Affected Price Against Manipulating Party--Fraudulent "Wash Sale" Transaction Failing to Effect Change in Beneficial Ownership [Corp. Code § 25400(a)(1)]

[1] FORM Complaint for Damages [Corp. Code § 25500] for Manipulation of Market Price of Securities [Corp. Code § 25400]--By Purchaser or Seller at Affected Price Against Manipulating Party--Fraudulent "Wash Sale" Transaction Failing to Effect Change in Beneficial Ownership [Corp. Code § 25400(a)(1)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR
vs.	)	DAMAGES
_____ [*name*],	)	(Manipulation of Market Price of Securities)
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant is, and at all times herein mentioned was, a securities _____ [broker-dealer *or* agent] duly licensed by the Commissioner of Corporations to effect security transactions in this state, and conducting his/her business in _____ County, California.

1. Defendant is, and at all times herein mentioned was, a corporation, duly organized and existing under the laws of _____ [the State of California, with its principal place of business in _____

County *or* the State of _____, authorized to transact and transacting business in the State of California with its principal office for the transaction of business in this state in _____ County].

1. Defendant is, and at all times herein mentioned was, a resident of _____ County, California [*or state other capacity and residence of defendant*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I- _____, inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

3. On or about _____ [*date*], in _____ [*specify locality*], California, defendant effected a transaction in securities consisting of _____ [*describe security, e.g.*, the common stock of X Corporation] in which a total of _____ [*number*] _____ [shares *or other security*] of these securities were sold by _____ [*name of seller*] to _____ [*name of buyer*] for a series of prices ranging from $_____ to $_____ per _____ [share *or other security*]. These transactions involved no change in the beneficial ownership of the securities in that _____ [*describe continuing beneficial identity, e.g.*, the purchasing party was then, and is now, a wholly owned subsidiary of the selling party].

4. Defendant _____ [willfully performed *or* participated in] the above acts, which constitute, in effect, "wash sales" for the purpose of creating a false or misleading appearance _____ [of active trading *or* with respect to the market for these securities].

5. On or about _____ [*date*], plaintiff _____ [purchased from *or* sold to] _____ [*name*] _____ [*number*] _____ [shares *or other security*] of the above securities for a price of $_____ per _____ [share *or other security*] and a total price of $_____. That price was affected by the above-described acts of defendant. The market value these securities would have had at the time of plaintiff's _____ [purchase *or* sale] in the absence of the above-described acts of defendant is $_____ per _____ [share *or other security*].

6. As a result of defendant's acts with regard to these securities, plaintiff has sustained damages in the amount of the difference between the price plaintiff _____ [received *or* paid] for these securities, and the amount plaintiff would have _____ [received *or* paid] as the market price in the absence of defendant's acts, which difference is the sum of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____;

2. For interest on this sum at the legal rate;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

This complaint is for use in an action for injuries caused by market manipulation involving a securities transaction effected with no change in beneficial ownership [*see Corp. Code §§ 25400(a)(1), 25500*]. This is a version of the "wash sale," in which market activity at one end of a transaction is designed to be canceled or "washed" out at the other end [*see* Marsh & Volk, *Practice Under the California Securities Laws, § 14.05[2][c]* (Matthew Bender)]. For a discussion of this form of market manipulation, see *§ 515.18[1]*.

[3] Allegations

This complaint alleges the following:

- Capacity and residence of defendant (Paragraph 1).
- Fictitious names of defendants (Paragraph 2).
- Defendant's effecting of a securities transaction in which no change in beneficial ownership of the securities took place (Paragraph 3) [*Corp. Code § 25400(a)(1)*].
- Defendant's willful performance of such an act in order to create the appearance of trading or of a market (Paragraph 4).
- Plaintiff's injury therefrom by making a transaction in those securities at a time when the price was affected by defendant's act to plaintiff's detriment (Paragraph 5).
- The amount of damages sustained, being the difference between the purchase or sale price and the market price that otherwise would have prevailed at the time of plaintiff's transaction (Paragraph 6) [*see Corp. Code § 25500*].

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[5] State Statutes

Fraudulent market manipulation. *Corp. Code § 25400(a)*

Liability and damages for market manipulation. *Corp. Code § 25500*

Limitation of actions for market manipulation. *Corp. Code § 25506*

[6] Administrative Regulations

Regulation of broker-dealers and agents. *10 Cal. Code Reg. §§ 260.216-260.218.6*

[7] Text References

Ballantine & Sterling, California Corporation Laws, Ch. 21, § 463.05 (Matthew Bender)

Marsh & Volk, *Practice Under the California Securities Laws, Ch. 14, § 14.05* (Matthew Bender)

Witkin, Summary of California Law, Vol. 9, *Corporations*, § 298 (9th ed. 1989)

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45-515 California Forms of Pleading and Practice--Annotated § 515.401

§ 515.401 Allegation--Entry of Transaction Order Contemplating Substantially Identical Entry of "Wash Sale" [Corp. Code § 25400(a)(2), (3)]

[1] FORM Allegation--Entry of Transaction Order Contemplating Substantially Identical Entry of "Wash Sale" [Corp. Code § 25400(a)(2), (3)]

On or about _____ [*date*], in _____ [*specify locality*], California, defendant entered orders for the _____ [purchase *or* sale] of a total of _____ [*number*] _____ [shares *or other security*] of _____ [*describe security, e.g.,* the common stock of X Corporation] at the price of $_____ per _____ [share *or other security*]. Those orders were entered with the knowledge that orders of substantially the same size, at substantially the same time, and at substantially the same price, for the _____ [sale *or* purchase, *that is, the reverse of defendant's transaction*] of these securities _____ [had been *or* would be] entered by or for _____ [the same *or* different] party (parties). The latter orders were in fact entered on or about _____ [*list any dates for related transactions*] for a total of _____ [*number*] _____ [shares *or other security*] sold by _____ [*seller*] to _____ [*buyer*] at the price of $_____ per _____ [share *or other security*]. [The relationship of the parties of the latter transaction to those of the former transaction is _____ (*specify, e.g.,* the former parties are corporations controlled by the latter parties).]

[2] Use of Form

This allegation may be substituted for Paragraph 3 of § 515.400 in an action for injuries caused by market manipulation involving a defendant's entering of one or more orders for securities purchased or sold with the knowledge that a substantially similar transaction was also being effected [*see Corp. Code § 25400(a)(2), (3)*]. For a discussion of this particular type of market fraud, see *§ 515.18[1]*.

[3] Cross References

For a related form, *see § 515.400*

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PART IV. FORMS
A. Securities Regulation

45-515 California Forms of Pleading and Practice--Annotated § 515.402

§ 515.402 Allegations--Manipulative Trading to Induce Transactions [Corp. Code § 25400(b)]

[1] FORM Allegations--Manipulative Trading to Induce Transactions [Corp. Code § 25400(b)]

1. On or about _____ [*date*], at _____ [*specify locality*], California, defendant effected _____ [with one or more other persons *or list names*], a series of transactions in securities consisting of _____ [*describe security, e.g.,* the preferred stock of Y Corporation] in which a total of _____ [*number*] _____ [shares *or other security*] of those securities were sold [by _____ (*seller*) to _____ (*buyer*)] _____ [at a price of $_____ per _____ (share *or other security*) *or* for a series of prices ranging from $_____ to $_____ per _____ (share *or other security*)]. Those transactions _____ [created _____ (actual *or* apparent) active trading in those securities *or* _____ (raised *or* depressed) the price of those securities].

2. Defendant [willfully performed *or* participated in] the above acts, which constitute manipulative trading activity for the purpose of inducing the _____ [purchase *or* sale] of those securities by others.

[2] Use of Form

These allegations may be substituted for Paragraphs 3 and 4, respectively, of § 515.400, in an action for injuries caused by market manipulation in which defendant directly or indirectly effected a series of transactions designed to give the illusion of an active market in the securities [*see* Marsh & Volk, *Practice Under the California Securities Laws, § 14.05[2][d]* (Matthew Bender)]. For discussion of this particular type of market fraud, see *§ 515.18[2],* and the illusory market transaction described in Paragraph (b).

[3] State Statutes

Fraudulent market manipulation by inducing purchases of securities. *Corp. Code § 25400(b)*

[4] Cross References

For a related form, *see § 515.400*

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45-515 California Forms of Pleading and Practice--Annotated § 515.403

§ 515.403 Allegations--Dissemination of Manipulative "Tipster" Information [Corp. Code § 25400(c), (e)]

[1] FORM Allegations--Dissemination of Manipulative "Tipster" Information [Corp. Code § 25400(c), (e)] [*EITHER, if defendant is offering or selling security*]

1. On or about _____ [*date*], at _____ [*specify locality*], California, defendant, as a _____ [broker-dealer *or other person*], _____ [sold *or* offered to sell *or* purchased *or* offered to purchase] a total of _____ [*number*] _____ [shares *or other security*] of _____ [*describe security, e.g.,* the Class A common stock of Z Company] [_____ (to *or* from) _____ (plaintiff *or other persons*)] at the price of $_____ per _____ [share *or other security*]. In conjunction with those transactions, defendant _____ [circulated *or* disseminated] [, in the form of _____ (*describe, e.g.,* a personal letter), a true copy of which is attached hereto as Exhibit A and made a part hereof,] information to the effect that the price of those securities _____ [would *or* was likely to] _____ [rise *or* fall] because of market operations of _____ [*names, or* certain persons (then active in the market),] that were being conducted for the purpose of _____ [raising *or* depressing] the price of those securities.

1. On or about _____ [*date*], _____ [*name of third party*], as a _____ [broker-dealer *or other person, e.g.,* direct agent of the Q Investment Institute] _____ [sold *or* offered to sell *or* purchased *or* offered to purchase] a total of _____ [*number*] _____ [shares *or other security*] of _____ [*describe security, e.g.,* October _____ (*year*) stock warrants of the R Company] [_____ (to *or* from) _____ (plaintiff *or other persons*)] at the price of $_____ per _____ [share *or other security*]. _____ [At the same time *or give date*], and in conjunction with the above transaction, defendant received from _____ [*name of above third party*], directly or indirectly, a consideration [in the form of _____ (*describe or give amount*)]. For such consideration, defendant circulated and disseminated information in _____ [*specify locality*], California, [in the form of _____ (*describe, e.g.,* a business newsletter), a true copy of which is

attached as Exhibit A and incorporated by reference,] to the effect that the price of those securities _____ [would *or* was likely to] _____ [rise *or* fall] because of market operations of _____ [*names, or* certain persons (defendant represented as being then active in the market),] that were being conducted for the purpose of _____ [raising *or* depressing] the price of those securities.

2. Defendant _____ [willfully performed *or* participated in] those acts of dissemination and circulation of the information, which constituted in effect an investment market _____ ["tipster sheet" *or* "tip"] and induced the purchase or sale of those securities by others.

[2] Use of Form

These allegations may be substituted for Paragraphs 3 and 4, respectively, of § 515.400 in an action for injuries as a result of the promulgation of "tipster" information in the marketplace which induces transactions in the securities involved [*see Corp. Code § 25400(c)*].

As described in Paragraph 1 of the above form, defendant may be either a market professional or a trader offering or selling the particular securities involved, but requiring no separate consideration for promulgating the tipster information, or any person who has promulgated the tipster information for a consideration received from another market professional or trader in the securities involved.

Both alternatives in the form are for use in a case involving variations of the type of market fraud known as "tipster" dissemination, in which information is spread that the market will react upwards or downwards because of certain trader conduct designed to achieve that effect [*see* Marsh & Volk, *Practice Under the California Securities Laws, § 14.05[2][c]* (Matthew Bender)]. For discussions of this particular type of market fraud, see *§ 515.18[3], [5]*.

[3] State Statutes

Improper circulation of "tipster" information to induce securities transactions. *Corp. Code § 25400(c), (e)*

[4] Cross References

For a related form, *see § 515.400*

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45-515 California Forms of Pleading and Practice--Annotated § 515.404

§ 515.404 Allegations--False or Misleading Statement to Manipulate Market [Corp. Code § 25400(d)]

[1] FORM Allegations--False or Misleading Statement to Manipulate Market [Corp. Code § 25400(d)]

1. On or about _____ [*date*], defendant, as a _____ [broker-dealer *or other person*] _____ [sold *or* offered to sell *or* purchased *or* offered to purchase] a total of _____ [*number*] _____ [shares *or other security*] of _____ [*describe security, e.g.,* the 6 percent cumulative preferred notes, due January _____ [*date*], of A Industries] [_____ (to *or* from) _____ (plaintiff *or other persons*)] at the price of $_____ per _____ [share *or other security*]. In conjunction with those transactions, defendant, in _____ [*specify locality*], California, in the form of _____ [*describe, e.g.,* a proxy statement], [a true copy of which is attached as Exhibit A and incorporated by reference,] _____ [made the statement (at page _____) *or* made a statement to the effect] that _____ [*recite substance of statement, e.g.,* A Industries had been awarded a million-dollar federal contract *or quote statement verbatim*]. This statement _____ [was, at the time and in the light of the circumstances under which it was made, false or misleading with respect to the material fact that *or* omitted to state the material fact--which was necessary in order to make the statement made, in the light of the circumstances under which it was made, not misleading--that] _____ [*set out material fact, e.g.,* the contract was conditional on approval of the State of _____, which was never given].

2. Defendant knew, or had reasonable ground to believe, that the above statement made was false or misleading [in that _____ (*specify, e.g.,* defendant had read, or had a copy of, the government contract referred to, which contained reference to such qualifying conditions)]. Defendant willfully _____ [made *or* participated in the making of], the _____ [false *or* misleading] statement for the purpose of inducing the _____ [purchase *or* sale] of those securities by others.

[2] Use of Form

These allegations may be substituted for Paragraphs 3 and 4, respectively, of § 515.400, in an action for injuries caused by a market trader making false or misleading statements for the purpose of inducing transactions in securities [*see*

Corp. Code § 25400(d)]. In contrast to the complaint for rescission in § 515.405, in which the defendant is alleged to have made a material misrepresentation in order to induce a particular transaction, in these allegations, which are designed to be included in a complaint for damages, defendant is alleged to have made the misrepresentation in order to induce a purchase or sale in the security. It is not necessary to allege that defendant made the misrepresentation to induce plaintiff to make the purchase or sale but, also unlike *see § 515.405*, it is necessary to allege that defendant knew or has reason to know of the misrepresentation.

For a discussion of this particular type of market fraud, see *§ 515.18[4]* [*see also* Marsh & Volk, *Practice Under the California Securities Laws, Ch. 14, Civil Liabilities, § 14.05[2][d]* (Matthew Bender)].

[3] Corp. Code § 25400(d) Requirements

The California Supreme Court has construed *Corp. Code §§ 25400(d)* and *25500* to find that the remedy provided in those sections is not limited to transactions made in California. The language of *Corp. Code § 25400* which proscribes certain actions "in this state" simply describes the location in which the proscribed conduct must occur [*Diamond Multimedia Systems, Inc. v. Superior Court (1999) 19 Cal. 4th 1036, 1064, 80 Cal. Rptr. 2d 828, 968 P.2d 539 , cert. denied, 144 L. Ed. 2d 235* (noting that Securities Litigation Uniform Standards Act of 1998, which preempts certain state class actions [P.L. 105-353, 112 Stat. 3227 (S. 1260)], was inapplicable to pending actions and thus had no impact on this case)].

Liability for market manipulation is not limited to sellers and buyers of corporate stock, or to corporations or broker-dealers, but extends to individuals and to the purchase and sale of securities for which there is no open market [*StorMedia Inc. v. Superior Court (1999) 20 Cal. 4th 449, 457-461, 84 Cal. Rptr. 2d 843, 976 P.2d 214]* . Furthermore, no actual sale is necessary to find a violation of *Corp. Code § 25400(d)*, and that subdivision does not require that the intent or purpose be to induce a particular buyer to purchase the stock [*StorMedia Inc. v. Superior Court (1999) 20 Cal. 4th 449, 461-463, 84 Cal. Rptr. 2d 843, 976 P.2d 214* (privity is not required)].

Corp. Code §§ 25400(d) and *25500*, however, apply only to defendants who were *engaged in market activity* at the time of making misrepresentations. Defendants must both sell or offer to sell or buy or offer to buy a security, *and* make misleading statements for the purpose of inducing the purchase or sale of a security, in order to be liable under *Corp. Code § 25500* [*Kamen v. Lindly (2001) 94 Cal. App. 4th 197, 205-206, 114 Cal. Rptr. 2d 127* (trial court properly sustained defendants' demurrers on basis that plaintiffs failed to allege that defendants engaged in both activities); *see Murphy v. BDO Seidman, LLP (2003) 113 Cal. App. 4th 687, 705-706, 6 Cal. Rptr. 3d 770* (aggrieved investors failed to state cause of action because defendant accountants who prepared allegedly misleading financial statements did not buy or sell, or offer to buy or sell, stock)].

Liability under *Corp. Code § 25500* requires a "willful act" within the meaning of *Ins. Code § 533*, which precludes coverage under directors and officers liability insurance for losses caused by the willful act of the insured; only persons who willfully, not merely recklessly, violate *Corp. Code § 25400(d)* can be liable for damages [*California Amplifier, Inc. (2001) 94 Cal. App. 4th 102, 106, 116-117, 113 Cal. Rptr. 2d 915]* .

[4] State Statutes

Liability for false or misleading statements made to manipulate transactions in securities. *Corp. Code § 25400(d)*

[5] Decisions

Stockbroker and brokerage firm not ostensible agents of "clearing broker" (broker that has contractual relationship with stock broker and investor and maintains account in client's name, but only executes orders on instructions of

stockbroker and makes no specific representations to investor); thus, clearing agent has no liability under *Corp. Code §§ 25400(d), 25401* or for breach of agency agreement or fraud based on stockbroker's inappropriate investment recommendations. *Petersen v. Securities Settlement Corp. (1991) 226 Cal. App. 3d 1445, 1452-1453, 277 Cal. Rptr. 468*

[6] Cross References

For forms and discussion of common law fraud, see Ch. 269, *Fraud and Deceit*

For related forms, *see §§ 515.400* and *515.405*.

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45-515 California Forms of Pleading and Practice--Annotated § 515.405

§ 515.405 Complaint for Rescission [Corp. Code § 25501] of Securities Transaction Made Through Material Misrepresentation [Corp. Code § 25401]--By Purchaser or Seller

[1] FORM Complaint for Rescission [Corp. Code § 25501] of Securities Transaction Made Through Material Misrepresentation [Corp. Code § 25401]--By Purchaser or Seller

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR
Plaintiff,	)	RESCISSION OF
vs.	)	PURCHASE
_____ [*name*],	)	(Material
Defendant.	)	Misrepresentation in
	)	Securities Transaction)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Material Misrepresentation)

1. [*Capacity and residence of defendant. See § 515.400, Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 515.400, Paragraph 2.*]

3. On or about _____ [*date*], defendant, in _____ [*specify locality*], California, _____ [offered and sold to *or* offered to buy and bought from] plaintiff a total of _____ [*number*] _____ [shares *or other security*] of _____ [*describe security, e.g.,* the common stock of X Corporation] at the price of $_____ per _____ [share *or other security*] for a total price of $_____. That transaction was made by means of a[n] _____ [written *or* oral] communication in the form of _____ [*describe, e.g.,* a prospectus], which _____ [included an untrue statement of a material fact *or* omitted to state a material fact necessary in order to make the statements made in that communication, in the light of the circumstances under which they were made, not misleading]. The communication [at page _____] recited that _____ [*restate or quote, e.g.,* the company doubled its profit for the year _____]. The communication _____ [was untrue in that *or* omitted to state that] _____ [*true material fact, e.g.,* the change in the company's profit was due to a change from the cash to the accrual method of accounting]. [A true copy of such communication is attached as Exhibit A and incorporated by reference.]

4. As a result of the material misrepresentation, plaintiff is entitled to rescind the above-described _____ [purchase *or* sale].

[*EITHER, if plaintiff was purchaser*]

5. Plaintiff _____ [tenders *or* before entry of judgment will tender] to defendant _____ [*number*] _____ [shares *or other security*] of the above-described securities as purchased from defendant and on which to date plaintiff has received $_____ as total income.

[*OR, if plaintiff was seller*]

5. Plaintiff _____ [tenders *or* before entry of judgment will tender] to defendant $_____ as the consideration paid to plaintiff for the security, plus $_____, the amount of interest at the legal rate to date of tender, less $_____, the amount representing the income received by defendant to date on the security.

SECOND CAUSE OF ACTION
(Joint and Several Liability of Management Principals or Materially Aiding Personnel)

6. Plaintiff sets forth by reference as though fully set forth below each and every allegation of Paragraphs 1-4 of the First Cause of Action.

7. Defendant _____ [*name*] is, and at all times herein mentioned was, _____ [*allege appropriate capacity and residence of joint defendant; see § 515.400, Paragraph 1*].

8. Defendant was, at the time of the acts alleged herein, _____

[*EITHER*]

a person who, directly or indirectly, controlled _____ [*name of primary defendant*] in that _____ [*describe control, e.g.,* he/she owned the largest single block of stock of such company, consisting of _____ percent of the common stock],

[*OR*]

a principal member of the management of _____ [*name of primary defendant*] in that he/she was _____ [a partner in such firm *or* president *or other principal executive officer or* a director of the corporation *or* _____, a person occupying a similar status to, or performing similar functions of, _____ (*specify executive officer or director, e.g.,* the president of a corporation) of that organization],

[*OR*]

_____ [an employee of _____ (*name of primary defendant*) *or* a broker-dealer *or* a securities agent] who materially aided in the _____ [act *or* transaction] constituting the violation hereinafter complained of, in that he/she _____ [*describe act*].

THIRD CAUSE OF ACTION
(Joint and Several Liability of Materially Assisting Persons)

9. Plaintiff sets forth by reference as though fully set forth below each and every allegation of Paragraphs 1-4 of the First Cause of Action.

10. Defendant _____ [*name*] is, and at all times herein mentioned was, _____ [*allege capacity and residence of joint defendant; see § 515.400, Paragraph 1*.]

11. At the time of the acts alleged herein, this defendant materially assisted in the _____ [*identify nature of offense*] in that _____ [*describe act*].

12. Defendant _____ [*name*] acted with intent to deceive or defraud.

FOURTH CAUSE OF ACTION
(Joint and Several Liability of Experts)

13. Plaintiff sets forth by reference as though fully set forth below each and every allegation of Paragraphs 1-4 of the First Cause of Action.

14. Defendant _____ [*name*] is, and at all times herein mentioned was, _____ [*allege capacity, if appropriate, and residence; see § 515.400, Paragraph 1*]. At all times herein mentioned, defendant, as a _____ [*describe professional capacity, e.g.,* accountant *or* engineer *or* appraiser], was a person whose profession gave authority to a statement made by him/her.

15. Pursuant to *Title 10, Section 260.504.2.2 of the California Code of Regulations*, this defendant gave written consent to be and was named in a[n] _____ [prospectus *or* offering circular] distributed in connection with the securities herein described as having _____ [prepared *or* certified] in his/her professional capacity

_____ [_____ (*identify part of document, e.g.,* Part V, "Financial History" *or* a written _____ (report *or* valuation) entitled _____ (*name of writing*) which was _____ (distributed with *or* referred to in) the document].

16. The _____ [document so _____ (prepared *or* certified) *or* _____ (report *or* valuation) so _____ (distributed *or* referred to)] _____ [included an untrue statement of a material fact *or* omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading]. The _____ [document *or* writing] [at page _____] recited that _____[*restate misrepresentation*]. This statement _____ [was untrue in that *or* omitted to state that] _____ [*describe misrepresentation from Paragraph 3 of First Cause of Action*]. [A true copy of the _____ (document *or* writing) is attached as Exhibit B and incorporated by reference.]

17. Plaintiff acquired the securities described herein and in that document in reliance on the _____ [untrue statement *or* _____ (part of the document *or* writing) without notice of the omission].

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

[*EITHER, if plaintiff is purchaser*]

1. For rescission of the purchase and restitution of $_____ as original consideration paid for the securities, less $_____, which plaintiff received on the security;

[*OR, if plaintiff is seller*]

1. For rescission of the sale and recovery of the securities;

[2. *If plaintiff is purchaser, add* For interest on the original consideration at the legal rate from _____ (*date of purchase*);]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 515.400.*]

[2] Use of Form

This complaint is for use in an action for rescission of a purchase or sale of securities when the purchase or sale was made by means of an oral or written misrepresentation of a material fact [*see Corp. Code §§ 25401, 25501*].

The possible defendants include the following [*see Corp. Code § 25504.2*]:

- The person who sold or purchased the security from the plaintiff (First Cause of Action) [*see Corp. Code § 25501*].

- A person who indirectly or directly controls the purchaser or seller or one who occupies the status, or performs the functions, of a partner, principal executive officer, or director of a firm exercising such control (Second Cause of Action) [*see Corp. Code § 25504*].

- Any broker-dealer or agent who materially aided in the misrepresentation (Second Cause of Action) [*see Corp. Code § 25504*].

- Any person who materially assisted in the violation with intent to deceive or defraud (Third Cause of Action) [*see Corp. Code § 25504.1*].

- Any person whose profession gives authority to a statement which contained a misrepresentation and on which the plaintiff relied if (a) the statement was made in a prospectus or offering circular and (b) the professional consented to be named and was named in the prospectus or circular (Fourth Cause of Action) [*see Corp. Code § 25504.2*].

For a discussion of material misrepresentation, see *§ 515.246[13]*, and note particularly the discussion under § 515.49[2] [*see also Marsh & Volk, Practice Under the California Securities Laws, Ch. 14, Civil Liabilities, § 14.03* (Matthew Bender)].

[3] Elements of Various Claims

[a] First Cause of Action

The First Cause of Action in this form is based on *Corp. Code §§ 25401* and *25501*, which impose liability for rescission (or damages, as in *§ 515.406*, if the plaintiff or defendant, as the case may be, no longer owns the security), if the purchase or sale was accomplished by use of a written or oral communication that included an untrue statement of material fact or an omission that, in the light of the circumstances, was misleading [*see Corp. Code § 25401*]. The ordinary elements of inducement and reliance are not necessary allegations in the First Cause of Action [*see* discussion in *§ 515.19[1]*].

[b] Second Cause of Action

The Second Cause of Action is based on *Corp. Code §§ 25501* and *25504*. *Corp. Code § 25504* extends liability under *Corp. Code § 25501* to every person who directly or indirectly controls a person who is liable under *Corp. Code § 25501* or *25503*. That includes the following [*see Corp. Code § 25504*; *see, e.g., Apollo Capital Fund LLC v. Roth Capital Partners (2007) 158 Cal. App. 4th 226, 255-256, 70 Cal. Rptr. 3d 199* (complaint alleged facts sufficient to support liability of broker-dealer under *Corp. Code § 25504*)]:

- Every partner in a firm that is so liable.

- Every executive officer or director of a corporation so liable and every person occupying a similar status or performing a similar function.

- An employee of a person so liable, or a broker-dealer or agent, but only if the employee or broker-dealer or agent materially aided in the act or transaction constituting the violation of *Corp. Code § 25501* (which is alleged in the First Cause of Action).

To state the claim set out in the Second Cause of Action, the plaintiff must allege that the defendant either was in control of a person who is liable under *Corp. Code § 25501* (or *Corp. Code § 25503*)--liability of a controlled person under any other code section would not be sufficient--or was one of the related persons described above; and the plaintiff must allege further that the plaintiff and the person liable under *Corp. Code § 25501*--not the plaintiff and the defendant who was in control or was a related person--were in privity as parties to a sale of securities (which is stated in the First Cause of Action) [*Bains v. Moores (2009) 172 Cal. App. 4th 445, 479, 91 Cal. Rptr. 3d 309* (complaint charging vicarious liability under *Corp. Code § 25504* was demurrable for failure to allege liability under applicable code section and failure to allege required privity)].

A controlling person or related person described above is jointly and severally liable with, and to the same extent as, defendants charged in the First Cause of Action, unless the controlling or related person who is allegedly liable had no knowledge of or reasonable grounds to believe in the existence of the facts by reason of which the liability is alleged to exist [*Corp. Code § 25504*, discussed in *§ 515.19[6]*]. See *§ 515.409* for an affirmative defense based on such lack of knowledge.

[c] Third Cause of Action

The Third Cause of Action is based on *Corp. Code §§ 25401* and *25504.1*. *Corp. Code § 25504.1* extends liability under *Corp. Code § 25501* to every person who materially assisted in the violation (of *Corp. Code § 25401*, for purposes of the form) with intent deceive or defraud. Thus, this is the first cause of action in the form to require the allegation that a defendant acted with intent to deceive or defraud (Paragraph 12). Such a person or entity is jointly and severally liable with any other person who is liable for the violation [*Corp. Code § 25504.1*; *see, e.g.,* *Apollo Capital Fund LLC v. Roth Capital Partners (2007) 158 Cal. App. 4th 226, 257, 70 Cal. Rptr. 3d 199* (complaint alleged facts sufficient to support liability of broker-dealer under *Corp. Code § 25504*)].

[d] Fourth Cause of Action

The Fourth Cause of Action is based on *Corp. Code § 25504.2*, which extends liability under *Corp. Code § 25501* (arising for purposes of this form from a violation of *Corp. Code § 25401*) to "experts," such as accountants, engineers, appraisers, whose name and statements appear in, or are referred to in, a prospectus or offering circular distributed in connection with the transaction [*see Corp. Code § 25504.2*, discussed in the Introduction, beginning at § 515.19[8]]. To impose liability on experts under *Corp. Code § 25504.2*, the document or statement must include an untrue statement of material fact or omit a material fact necessary to make the statements that were made not misleading, in light of the circumstances (Paragraph 16) [*Corp. Code § 25504.2(a)(1)*]; and, the person seeking to impose liability under *Corp. Code § 25504.2* must have acquired the security in reliance on the untrue statement or omission (Paragraph 17) [*Corp. Code § 25504.2(a)(2)*].

Corp. Code § 25504.2(b) provides specific defenses to these experts. Those defenses are discussed in *§ 515.19[8][b]* et seq. and are the basis for the affirmative defenses in §§ 515.410-515.412.

There is a one-year limitation period (from discovery of facts constituting the violation) for imposition of lability on experts under *Corp. Code § 25504.2* [*see Corp. Code § 25506.1*, discussed in *§ 515.19[8][a]*].

[4] State Statutes

Prohibition against material misrepresentation in securities transactions. *Corp. Code § 25401*

Liability and damages for misrepresentation. *Corp. Code § 25501*

Joint and several liability of management principal and materially aiding personnel. *Corp. Code § 25504*

Joint and several liability of materially assisting persons. *Corp. Code § 25504.1*

Joint and several liability of professional experts who authenticate material misrepresentation. *Corp. Code § 25504.2*

Statute of limitations on misrepresentation action. *Corp. Code § 25506*

Statute of limitations on joint and several liability of experts for material misrepresentation. *Corp. Code § 25506.1*

[5] Administrative Regulations

Regulation of expert's consent to documents, reports, and statements. *10 Cal. Code Reg. §§ 260.504.2-260.504.2.4*

[6] Decisions

[a] In General

Elements of criminal offense described in *Corp. Code § 25401* include knowledge of falsity or misleading nature of statement or of materiality of omission, or criminal negligence in failing to investigate and discover them. *People v. Simon (1995) 9 Cal. 4th 493, 522, 37 Cal. Rptr. 2d 278, 886 P.2d 1271* (defendant solicited investments in limited partnerships but did not advise investors of transfers of funds among partnerships because defendant believed that, as general partner, he had authority to make such transfers)

Award of interest under *Corp. Code § 25501* to successful purchaser who is granted rescission based on fraudulent misrepresentation is not discretionary but mandatory. *Boam v. Trident Financial Corp. (1992) 6 Cal. App. 4th 738, 744-746, 8 Cal. Rptr. 2d 177*

Misrepresentation or concealment of fact was not material. *Lynch v. Cook (1983) 148 Cal. App. 3d 1072, 1087-1088, 196 Cal. Rptr. 544 , disapproved on other grounds, In re Marriage of Arceneaux (1990) 51 Cal. 3d 1130, 1137, 275 Cal. Rptr. 797, 800 P.2d 1227*

Reliance on statement or omission in connection with the tender offer not required. *Lynch v. Cook (1983) 148 Cal. App. 3d 1072, 1087-1088, 196 Cal. Rptr. 544 , disapproved on other grounds, In re Marriage of Arceneaux (1990) 51 Cal. 3d 1130, 1137, 275 Cal. Rptr. 797, 800 P.2d 1227* ; *Bowden v. Robinson (1977) 67 Cal. App. 3d 705, 715, 136 Cal. Rptr. 871*

[b] Aider and Abettor Liability

Statement of claim of aiding and abetting securities fraud requires pleading (1) existence of independent primary wrong, (2) actual knowledge or reckless disregard by alleged aider and abettor of wrong and of his or her role in furthering it, and (3) substantial assistance in wrong. *Levine v. Diamanthuset (9th Cir. 1991) 950 F.2d 1478, 1483*

Cause of action for aider and abettor liability stated against accounting firm who knew that memoranda it aided in preparing were false and did not disclose that fact, and when plaintiffs alleged they relied on accounting firm's reputation in deciding to invest and would not have invested if accounting firm had disclosed fraud. *Roberts v. Peat, Marwick, Mitchell & Co. (9th Cir. 1988) 857 F.2d 646, 652-653*

To be secondarily liable in securities fraud action, aider and abettor is required to have actual knowledge of wrong and

of his or her role in furthering it and must substantially assist in wrongdoing; negligence insufficient for imposition of aider and abettor liability, but silence is sufficient; cause of action for aider and abettor liability stated against accountant who failed to include in tax opinion fact that defendant corporation had been suspended for failure to pay California franchise taxes. *DCD Programs, Ltd. v. Leighton (9th Cir. 1987) 833 F.2d 183, 188-189*

Under federal securities law, aider's or abettor's actual knowledge of primary wrong and substantial assistance in furthering it required to establish liability; *Corp. Code § 25504.1* standard stricter and requiring aider or abettor to have intent to deceive or defraud. *Orloff v. Allman (9th Cir. 1987) 819 F.2d 904, 907-908*

Defendant's status as spouse of culpable individual and director of corporation that offered securities pursuant to allegedly fraudulent scheme was not sufficient for imposition of aider and abettor liability under federal law. *Durham v. Kelly (9th Cir. 1987) 810 F.2d 1500, 1505*

[c] Alter Ego Liability

To impose alter ego liability on corporate president in federal securities case by piercing corporate veil, president still required to have requisite mental state. *Orloff v. Allman (9th Cir. 1987) 819 F.2d 904, 908*

Alter ego liability not to be imposed on corporate president under California law in securities case by piercing corporate veil merely because president wished to limit liability when there is no abuse of corporate form, such as undercapitalization. *Orloff v. Allman (9th Cir. 1987) 819 F.2d 904, 908-909*

[d] Controlling Person Liability

Determination of who is controlling person for purposes of liability under *15 U.S.C. § 78t* is generally "intensely factual question"; director is not automatically liable as controlling person; control commonly rests with group of persons, such as members of corporation's management. *Arthur Children's Trust v. Keim (9th Cir. 1993) 994 F.2d 1390, 1396-1397*

As matter of law, once facts establish relationship between registered broker-dealer and its representative, broker-dealer is controlling person under *15 U.S.C. § 78t(a)* with respect to its registered representatives. *Hollinger v. Titan Capital Corp. (9th Cir. 1990) 914 F.2d 1564, 1574*

In context of registered broker-dealer and its representative, once plaintiff establishes that broker-dealer is "controlling person," burden of proof under *15 U.S.C. § 78t(a)* shifts to broker-dealer to prove its good faith. *Hollinger v. Titan Capital Corp. (9th Cir. 1990) 914 F.2d 1564, 1575* (without deciding whether "power and influence" test articulated in *Buhler v. Audio Leasing Corp. (9th Cir. 1987) 807 F.2d 833, 835-836* , and *Christoffel v. E.F. Hutton & Co. (9th Cir. 1978) 588 F. 2d 665, 668-669* , still applies to relationships other than broker-dealer/representative)

General council's licensing and promotion of ministers not sufficient control for imposition of secondary liability under *15 U.S.C. § 78t(a)* for alleged fraudulent construction fund share issuance by local church. *Kersh v. General Council of Assemblies of God (9th Cir. 1986) 804 F.2d 546, 549*

Broker-dealer has no common law duty to supervise sales by registered representative of investments in which broker-dealer has no economic interest to persons who are not customers of broker-dealer, when registered representative is not broker-dealer's employee, registered representative has no actual or apparent authority to sell investment, and broker had no notice of and did not benefit from transaction. *Asplund v. Selected Investments in Financial Equities, Inc. (2000) 86 Cal. App. 4th 26, 29, 103 Cal. Rptr. 2d 34*

[e] Federal Law

[i] Liability as Seller

Not only one who passes title, but those who solicit purchase may be liable as "seller" [*see 15 U.S.C. § 77 l*(a)(1), (2)] if their solicitation is motivated by desire to serve their own or securities owner's financial interest; "substantial factor" is not proper test of solicitation because it fails to distinguish between those who solicit and those whose efforts are merely collateral to offer or sale. *Pinter v. Dahl (1988) 486 U.S. 622, 641655, 108 S. Ct. 2063, 100 L. Ed. 2d 658* (liability under *15 U.S.C. § 77 l*(1)); *Moore v. Kayport Package Exp., Inc. (9th Cir. 1989) 885 F.2d 531, 535-536* (liability under *15 U.S.C. § 77 l*(2))

Efforts of lawyers and accountants must be directed toward producing sale rather than merely providing professional services in order for them to be liable as seller under *15 U.S.C. § 77 l*(1). *Pinter v. Dahl (1988) 486 U.S. 622, 651, 108 S. Ct. 2063, 100 L. Ed. 2d 658* (dicta)

No cause of action stated under *15 U.S.C. § 77 l*(2) against lawyers and accountants who drafted prospectuses and promotional materials when there was no allegation that they played any role in soliciting purchases. *Moore v. Kayport Package Exp., Inc. (9th Cir. 1989) 885 F.2d 531, 536*

[ii] Right to Rescission

Buyer's right of rescission under *15 U.S.C. § 77 l*(a)(2) against seller who makes material misrepresentation or omission by means of prospectus does not extend to private contract of sale because term "prospectus" is confined to documents related to public offerings [*see 15 U.S.C. § 77c* ("prospectus" defined)]. *Gustafson v. Alloyd Co. (1995) 513 U.S. 561, 115 S. Ct. 1061, 1067-1068, 131 L. Ed. 2d 1, 12-13*

Under *15 U.S.C. § 77 l*(2), purchaser entitled to rescission without showing that misrepresentation was cause of economic loss. *Casella v. Webb (9th Cir. 1989) 883 F.2d 805, 808-809*

Under *15 U.S.C. § 77 l*(2), seller may be charged with constructive knowledge of falsity, but not purchaser; purchaser who did not read prospective entitled to rely on oral misrepresentation that was contrary to statements in prospectus and is not required to prove due diligence but only actual ignorance of true facts. *Casella v. Webb (9th Cir. 1989) 883 F.2d 805, 809*

[f] Statute of Limitations

Corp. Code § 25506 imposes notice-inquiry standard: limitation period starts when plaintiff knows facts constituting violation or when circumstances would suggest, to investor of ordinary intelligence, possibility of having been defrauded. *Deveny v. Entropin, Inc. (2006) 139 Cal. App. 4th 408, 423, 428-429, 42 Cal. Rptr. 3d 807*

Action for rescission based on violation of *Corp. Code § 25401* governed by four-year limitation of *Corp. Code § 25506*. *Stokes v. Henson (1990) 217 Cal. App. 3d 187, 193 n.4, 265 Cal. Rptr. 836*

[7] Text References

Ballantine & Sterling, California Corporation Laws, Ch. 21, *Corporate Securities* , §§ 463.03, 463.06 (Matthew Bender)

Marsh & Volk, *Practice Under the California Securities Laws, Ch. 14, Civil Liabilities, § 14.03* (Matthew Bender)

Witkin, Summary of California Law, Vol. 9, *Corporations*, § 299 (9th ed. 1989)

[8] Cross References

For a related form, *see § 515.400* and Comments and References to §§ 515.404, 515.407, and 515.418

For forms and discussion of common law fraud generally, see Ch. 269, *Fraud and Deceit*

For forms and discussion applicable to actions for rescission generally, see Ch. 490, *Rescission and Restitution*

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45-515 California Forms of Pleading and Practice--Annotated § 515.406

§ 515.406 Complaint for Damages for Securities Transaction Made Through Material Misrepresentation [Corp. Code § 25401]--By Purchaser or Seller

[1] FORM Complaint for Damages for Securities Transaction Made Through Material Misrepresentation [Corp. Code § 25401]--By Purchaser or Seller

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
	)	(Material Misrepresentation in Securities Transaction)
_____ [*name*],	)	[Amount demanded _____
[and DOES I through _____],	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Material Misrepresentation)

1. [*Capacity and residence of defendant. See § 515.400, Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 515.400, Paragraph 2.*]

3. [*Transaction as based on false or misleading statement. See § 515.405, Paragraph 3.*]

4. [Plaintiff is informed and believes and thereon alleges that] [O]n or about _____ [*date*], _____ [plaintiff *if plaintiff was purchaser or* defendant *if defendant was purchaser*] _____ [*specify how security was disposed of, e.g.,* sold the security to _____ (*name*) for $_____ per share].

5. As a result of defendant's material misrepresentation as alleged herein, defendant is liable to plaintiff, who is entitled, in lieu of rescission, to sue for damages as a result of _____ [plaintiff's *or* defendant's] disposition of the security.

[*EITHER, if plaintiff is purchaser*]

6. The value of the securities at the time plaintiff disposed of them was _____ [*specify, e.g.,* $_____ per share]. Plaintiff has received $_____ in income from those securities.

[*OR, if plaintiff is seller*]

6. The value of the securities at the time of the filing of the complaint herein was _____ [*specify, e.g.,* $_____ per share]. To the time of resale, _____ [*specify disposition, e.g.,* defendant had received $_____ in income from those securities].

SECOND CAUSE OF ACTION
(Joint and Several Liability of Management Principals or Materially Aiding Personnel)

7. Plaintiff sets forth by reference as though fully set forth below each and every allegation of Paragraphs 1-6 of the First Cause of Action.

8, 9. [*Named defendant as management principal or material aide. See § 515.405, Second Cause of Action, Paragraphs 7, 8.*]

THIRD CAUSE OF ACTION
(Joint and Several Liability of Materially Assisting Persons)

10. [*Incorporation of First Cause of Action. See Second Cause of Action, Paragraph 7.*]

11-13. [*Named defendant as materially assisting person. See § 515.405, Third Cause of Action, Paragraphs 10-12.*]

FOURTH CAUSE OF ACTION
(Joint and Several Liability of Experts)

14. [*Incorporation of First Cause of Action. See Second Cause of Action, Paragraph 10.*]

15-18. [*Named defendant as liable expert. See § 515.405, Fourth Cause of Action, Paragraphs 14-17.*]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

[*EITHER*]

1. [*If plaintiff is purchaser:* For damages in the amount equal to the difference between:

a. the price at which the securities were bought, plus interest at the legal rate from the date of purchase; and

b. the value of the securities at the time they were disposed of by plaintiff, plus the amount of any income received by plaintiff thereon];

[*OR*]

1. [*If plaintiff is seller:* For damages in the amount equal to the difference between:

a. the value of the securities at the time of filing of the complaint herein, plus the amount of any income received on the securities by defendant; and

b. the price at which the securities were sold, plus interest at the legal rate from the date of sale];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 515.400.*]

[2] Use of Form

This complaint is for use in an action for damages for the purchase or sale of securities effected by means of misrepresentation of a material fact [*see Corp. Code §§ 25401, 25501*]. For a discussion of the cause of action for damages for this type of injury, see *§ 515.19[3]*. If plaintiff or defendant was the purchaser of the securities, and still retains the securities then plaintiff's remedy is a complaint for rescission as set out in *see § 515.405*.

[3] Allegations

This complaint alleges that defendant is liable to plaintiff for the misrepresentation, but is liable only for damages since the securities have been resold (Paragraphs 4, 5), and further alleges the value of the securities at the time of their disposal, along with an accounting of any income received thereon to that time (Paragraph 6) [*see Corp. Code § 25501*].

[4] Decisions

Failure of prospectus to state that some types of mergers could be accomplished without approval of preferred shares being offered or that common stock could be delisted, resulting in destruction of value of conversion rights of preferred shares being offered, was neither material nor misleading. *Insurance Underwriters Clearing House, Inc. v. Natomas Co. (1986) 184 Cal. App. 3d 1520, 1526-1530, 228 Cal. Rptr. 449*

Issue of materiality, on which reasonable minds cannot differ, may be resolved as matter of law; fact is material if reasonable investor would consider it in reaching investment decision; in connection with purchase and sale of stock, disclosure of preliminary merger negotiations not required and immaterial as matter of law. *Insurance Underwriters Clearing House, Inc. v. Natomas Co. (1986) 184 Cal. App. 3d 1520, 1526-1528, 228 Cal. Rptr. 449* ; *but see Basic Incorporated v. Levinson (1988) 485 U.S. 224, 108 S. Ct. 978, 99 L. Ed. 2d 194, 212-214, 220* (probably applicable to abrogate agreement-in-principle standard under California law)

Under some circumstances, risk of demisting sufficiently material to require disclosure in offering prospectus; however, if no merger is being contemplated and no appreciable risk of demisting exists at time of offering, mere possibility of future demisting as not sufficiently material to require disclosure. *Insurance Underwriters Clearing House, Inc. v. Natomas Co. (1986) 184 Cal. App. 3d 1520, 1528-1530, 228 Cal. Rptr. 449*

[5] Cross References

For a related form, *see § 515.405*

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45-515 California Forms of Pleading and Practice--Annotated § 515.407

§ 515.407 Affirmative Defense to Complaint for Material Misrepresentation--Plaintiff's Knowledge of Facts Behind Misrepresentation [Corp. Code § 25501]

[1] FORM Affirmative Defense to Complaint for Material Misrepresentation--Plaintiff's Knowledge of Facts Behind Misrepresentation [Corp. Code § 25501]

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

Plaintiff knew the facts concerning the alleged _____ [untrue statement *or* omission] ascribed to defendant's communication in connection with the _____ [purchase *or* sale] of the described securities _____ [to *or* from] plaintiff, in that _____ [*describe occasion of knowledge, e.g.,* defendant, on or about _____ [*date*], and prior to the transaction, explained to plaintiff in private conference, with a special audit report as exhibit, all accounting discrepancies in the prospectus].

[2] Use of Form

This affirmative defense is for use in an answer to a complaint for rescission [*see § 515.405*] or damages [*see § 515.406*] alleging securities transaction effected by means of material misrepresentation when the plaintiff knew the actual facts behind the misrepresentation [*see Corp. Code § 25501*]. For a discussion of this defense, see *§ 515.19[5][a]*.

[3] Cross References

For a related form, *see § 515.405*

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45-515 California Forms of Pleading and Practice--Annotated § 515.408

§ 515.408 Affirmative Defense to Complaint for Material Misrepresentation--Defendant's Exercise of Care as to, and Lack of Knowledge of, Misrepresentation [Corp. Code § 25501]

[1] FORM Affirmative Defense to Complaint for Material Misrepresentation--Defendant's Exercise of Care as to, and Lack of Knowledge of, Misrepresentation [Corp. Code § 25501]
[*EITHER*]

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. Defendant exercised reasonable care with respect to the making of the statements described in the complaint in connection with the transaction with plaintiff, in that _____ [*describe care with respect to plaintiff's specific allegations, e.g.,* defendant reasonably relied exclusively on the certified audit report of _____ (*name*), which omitted any reference to change in the accounting practice of the X Company]. As a result, defendant did not know of the alleged _____ [untruth *or* omission].

[2. In any case, even] [I]f defendant had [not] exercised reasonable care with respect to the making of the statements described in the complaint in connection with the transaction with plaintiff, defendant would not have known of the alleged _____ [untrue statement *or* omission] because _____ [*explain, e.g.,* the only published reports which could have revealed facts supportive or corrective of defendant's statements, and on which defendant or any market professional would or should have relied, did not reveal the _____ [falsity of the statement *or* omission)].

[2] Use of Form

This affirmative defense is for use in an answer to an action for rescission [*see § 515.405*] or for damages [*see § 515.406*] for material misrepresentation in a securities transaction, where the defendant exercised reasonable care but was unaware of the misrepresentation, or where the exercise of reasonable care would have been of no avail [*see Corp. Code § 25501*]. For discussion of this defense, see *§ 515.59[4]*.

[3] Cross References

For a related form, *see § 515.405*

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45-515 California Forms of Pleading and Practice--Annotated § 515.409

§ 515.409 Affirmative Defense to Joint and Several Liability of Management Principals or Aides--Defendant Was Without Knowledge or Belief [Corp. Code § 25504]

[1] FORM Affirmative Defense to Joint and Several Liability of Management Principals or Aides--Defendant Was Without Knowledge or Belief [Corp. Code § 25504]

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

Defendant _____ [*name of answering joint defendant*] had no knowledge of or reasonable grounds to believe in the existence of the _____ [*describe alleged material representation or violation of qualification requirement or regulatory condition*] alleged in Paragraph _____ of plaintiff's complaint, in that _____ [*explain lack of knowledge or grounds, e.g.,* defendant reasonably believed that the state qualification of the securities by coordination with their federal registration would become automatically effective at the same time as would the federal registration, whereas in fact in this case the securities were not eligible for state qualification because they had not been on file with the Commissioner of Corporations for 10 days].

[2] Use of Form

This defense is for use in an answer to a complaint for rescission [*see § 515.405,* Second Cause of Action] or damages [*see § 515.406*] based on a material misrepresentation in a security transaction or on violation of securities qualification requirements or a condition imposed by the commissioner [*see §§ 515.407 -515.421*] in which joint and several liability is alleged against defendant as a management principal or one of the materially aiding personnel in the offending transaction [*see § 515.425*]. The form alleges that the defendant did not know of or could not reasonably be expected to believe in the existence of the facts constituting the misrepresentation or violation [*see Corp. Code § 25504*; *see § 515.19[6][b]*].

[3] Cross References

For a related form, *see § 515.405*.

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45-515 California Forms of Pleading and Practice--Annotated § 515.410

§ 515.410 Affirmative Defense to Allegation of Expert's Joint and Several Liability for Material Misrepresentation--Reasonable Belief in Accuracy of Representations [Corp. Code § 25504.2(b)(1)]

[1] FORM Affirmative Defense to Allegation of Expert's Joint and Several Liability for Material Misrepresentation--Reasonable Belief in Accuracy of Representations [Corp. Code § 25504.2(b)(1)]

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

Defendant, after reasonable investigation, had reasonable ground to believe, and did believe, at the time defendant consented to the use of defendant's name, that the statements cited in the complaint herein and included in the particular _____ [document *or* report *or* valuation] therein cited, were true, and that there was no omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading [, in that _____ (*describe further circumstances of such belief, if appropriate*)].

[2] Use of Form

This affirmative defense may be used in an answer to a complaint for rescission [*see § 515.405*, Second Cause of Action] or damages [*see § 515.406*] based on a material representation in a sale of a security in which a professional expert is named as having consented to the use of his or her name in a prospectus or offering circular containing a report by the expert which included the misrepresentation [*see § 515.405*]. The basis of the defense is the expert's reasonable belief in the accuracy of the representations he or she made [*see Corp. Code § 25504.2(b)(1)*].

For a discussion of this defense, see *§ 515.19[8][b]*.

[3] Cross References

For a related form, *see § 515.405*

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45-515 California Forms of Pleading and Practice--Annotated § 515.411

§ 515.411 Affirmative Defenses to Allegation of Expert's Joint and Several Liability for Material Misrepresentation--Document Not Accurate Reflection of Expert's Views [Corp. Code § 25504.2(b)(2)].

[1] FORM Affirmative Defenses to Allegation of Expert's Joint and Several Liability for Material Misrepresentation--Document Not Accurate Reflection of Expert's Views [Corp. Code § 25504.2(b)(2)].
[*EITHER*]

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

The part of the document cited in the complaint herein did not a fairly represent defendant's statement as an expert.
[*OR*]

The part of the document cited in the complaint herein was not a fair _____ [copy of *or* extract from] defendant's _____ [report *or* valuation].

[2] Use of Form

This affirmative defense may be used in an answer to a complaint for rescission [*see § 515.405*, Second Cause of Action] or damages [*see § 515.406*] charging a professional expert with responsibility for material misrepresentation in a document or report contained in a prospectus or offering circular when the document in question is not an accurate reflection of the expert's views [*see Corp. Code § 25504.2(b)(2)*].

For a discussion of this defense, see *§ 515.19[8][c]*.

[3] Cross References

For a related form, *see § 515.405*

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45-515 California Forms of Pleading and Practice--Annotated § 515.412

§ 515.412 Affirmative Defense to Allegation of Expert's Joint and Several Liability for Material Misrepresentation--Expert Filed Disclaimer [Corp. Code § 25504.2(b)(3)]

[1] FORM Affirmative Defense to Allegation of Expert's Joint and Several Liability for Material Misrepresentation--Expert Filed Disclaimer [Corp. Code § 25504.2(b)(3)]

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

Prior to the plaintiff's acquisition of the security, as described in the complaint herein, defendant advised _____ [*name of issuer*], as the issuer of such security, and the Commissioner of Corporations, in writing, that defendant would not be responsible for such _____ [part of the document *or* report *or* valuation]. A true copy of the defendant's disclaimer is attached as Exhibit 1 and made a part hereof.

[2] Use of Form

This affirmative defense may be used in an answer to a complaint for rescission [*see § 515.405*, Second Cause of Action] or damages [*see § 515.406*] charging a professional expert with responsibility for a material misrepresentation in a document, or report, or valuation contained in a prospectus or offering circular when the expert had properly filed a disclaimer of the document, report, or valuation in question [*see Corp. Code § 25504.2(b)(3)*].

For a discussion of this defense, see *§ 515.19[8][d]*.

[3] Cross References

For a related form, *see § 515.405*

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45-515 California Forms of Pleading and Practice--Annotated § 515.413

§ 515.413 Complaint for Damages [Corp. Code § 25502] for Securities Transaction--By Purchaser or Seller Against Corporate "Insider" Having Advantage of Undisclosed Material Information [Corp. Code § 25402]

[1] FORM Complaint for Damages [Corp. Code § 25502] for Securities Transaction--By Purchaser or Seller Against Corporate "Insider" Having Advantage of Undisclosed Material Information [Corp. Code § 25402]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	COMPLAINT FOR
_____ [*name*],	)	DAMAGES
Plaintiff,	)	(Advantage of Undisclosed
vs.	)	Material Information by
_____ [*name*],	)	Corporate "Insider" in
Defendant.	)	_____ (Purchase *or*
	)	Sale) of Securities)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 515.400, Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 515.400, Paragraph 2.*]

3. On _____ [*date*], in _____ [*specify locality*], California, defendant _____ [sold to *or* purchased from] plaintiff securities consisting of a total of _____ [*number*] _____ [shares *or other security*] of _____ [*describe securities, e.g.,* the preferred stock] of _____ for $_____ per _____ [share *or other security*] and a total price of $_____. At that time _____ [defendant was the issuer of the securities *or* defendant was _____ (an officer *or* a director *or* a controlling person) of the issuer of the securities *or if defendant was not an issuer, officer, director, or controlling person* defendant's relationship to the issuer gave him/her direct or indirect access to material information about the issuer not generally available to the public, in that defendant was _____ (*describe position, e.g.,* the holder of 11 percent of the outstanding common stock)].

4. At the time of the above-described securities transaction with plaintiff, defendant knew certain then current material information about the issuer, information gained from defendant's relationship to the issuer, which would significantly affect the market price of the securities involved. That information was to the effect that _____ [*describe information, e.g.,* the issuer was about to be publicly charged with fraud by the Commissioner of Corporations]. This material information was not then generally available to the public, and defendant knew at that time that it was not intended to be so available.

5. The market value that the securities would have had at the time plaintiff _____ [purchased *or* sold] them _____ [from *or* to] defendant, if the information known to defendant had been publicly disseminated prior to the time of the securities transaction here involved and a reasonable time had elapsed for the market to absorb the information, is $_____ per _____ [share *or other security*].

6. As a result of defendant's acts in the transaction, defendant is liable to plaintiff for damages in the amount of $_____, the difference between what plaintiff _____ [paid *or* received] on the transaction and the market value alleged above in Paragraph 5.

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____;

2. For interest at the legal rate;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

This complaint is for use by the person who purchased securities from or sold the securities to the "insider" in an action for damages against a corporate "insider" who sold to or purchased from plaintiff a security at a time when he or she knew material information about the issuer that was gained from his or her "insider" relationship and that defendant knew was not in fact and was not intended to be generally available [*see Corp. Code §§ 25402, 25502*]. For a discussion of this cause of action, see *§ 515.22* [*see* Marsh & Volk, *Practice Under the California Securities Laws, § 14.04* (Matthew Bender)]. For a complaint for use by the issuer of the securities traded in violation of *Corp. Code § 25402,*

see § 515.413.1.

[3] Allegations

This complaint alleges, in part, the following:

- Plaintiff's purchase from or sale to defendant of securities of the corporation in which defendant's relationship to the issuer gave him or her direct or indirect access to material information about the issuer not generally available to the public (Paragraph 3).

- Defendant's then current knowledge, gained from the relationship, of inside matters not generally disclosed to the public that would have significantly affected the price (Paragraph 4) [*see Corp. Code § 25402*].

- The market value the securities would have had if the knowledge had been widely known (Paragraph 5).

- Defendant's liability for the difference of which defendant has had the advantage (Paragraph 6) [*see Corp. Code § 25502*].

[4] State Statutes

Prohibited insider trading activity. *Corp. Code § 25402*

Liability and damages for insider trading. *Corp. Code § 25502*

Statute of limitations on insider actions. *Corp. Code § 25506*

[5] Text References

Ballantine & Sterling, California Securities Laws, Ch. 21, § 466.05 (Matthew Bender)

Marsh & Volk, *Practice Under the California Securities Laws, Ch. 14, § 14.04* (Matthew Bender)

Witkin, Summary of California Law, Vol. 9, *Corporations, § 300* (9th ed. 1989)

[6] Cross References

For related forms, *see §§ 515.400* and *515.415*- 17.

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45-515 California Forms of Pleading and Practice--Annotated § 515.414

§ 515.414 Complaint for Treble Damages [Corp. Code § 25502.5] for Securities Transaction--By Issuer Against "Insider" Having Advantage of Undisclosed Information [Corp. Code § 25402]

[1] FORM Complaint for Treble Damages [Corp. Code § 25502.5] for Securities Transaction--By Issuer Against "Insider" Having Advantage of Undisclosed Information [Corp. Code § 25402]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
	)	NO. _____
vs.	)	COMPLAINT FOR TREBLE DAMAGES
	)	("Insider Trading")
_____ [*name*],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant(s).	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

1. Plaintiff is a corporation duly organized and existing under the laws of the State of _____ [*specify, e.g.,* California], with its principal place of business in _____ [*specify, e. g.,* County, California *or allege other capacity of plaintiff issuer*]. Plaintiff has total assets worth in excess of one million dollars ($1,000,000), and has _____ [*specify, e.g.,* outstanding common shares *or* a class of equity securities] held of record by more than 500 persons.

2. [*Capacity and residence of defendant. See § 515.400, Paragraph 1.*]

3. [*Fictitious name allegation, if appropriate. See § 515.400, Paragraph 2.*]

4. On _____ [*date*], in _____ [*specify locality*], California, defendant _____ [sold *or* purchased] _____ [*number*] of _____ [shares *or other security*] of plaintiff's _____ [*describe securities, e. g.,* common stock] for $_____ per _____ [share *or other security*], for a total transaction price of $_____.
[*EITHER*]

5. At the time of the transaction complained of, defendant was _____ [an officer *or* a director *or* a controlling person] of plaintiff.
[*OR*]

5. At the time of the transaction complained of, defendant was _____ [*specify relationship, e.g.,* a physician and scientist under contract to plaintiff to develop a drug for use in the treatment of Acquired Immune Deficiency Syndrome]. Defendant's relationship to plaintiff gave him/her direct or indirect access to material information about plaintiff that was not generally available to the public.
[*CONTINUE*]

6. At the time of the transaction complained of, defendant knew certain then current information about plaintiff that defendant had gained from his/her relationship to plaintiff. The information concerned the fact that _____ [*specify, e.g.,* plaintiff was about to announce that it had received approval from the Federal Drug Administration to market the drug]. This information would significantly affect the market price of the securities involved and was not then generally available to the public. Defendant knew that the information was not intended to be available to the public.

7. If the information known to defendant had been publicly disseminated prior to the time of the transaction complained of and a reasonable time had elapsed for the market to absorb that information, at the time of the transaction complained of the securities involved would have had a market value of $_____ per _____ [share *or other security*].

8. [*Damages. See § 515.413, Paragraph 6.*]

[9. No proceeding has been commenced against defendant by the Securities and Exchange Commission under the federal Insider Trading Sanctions Act of 1984 (Sections 78a, 78c, 78o, 78t, 78u, and 78ff of Title 15 of the United States Code) or any other act with respect to the transaction that is the subject of this complaint.

[10. As a result of proceedings commenced against defendant by the Securities and Exchange Commission on account of the transaction that is the subject of this complaint, defendant has paid the sum of $_____.]

[11. A proceeding has been commenced against defendant by the Securities and Exchange Commission under _____ (*specify, e.g.,* the federal Insider Trading Sanctions Act of 1984 (Sections 78a, 78c, 78o, 78t, 78u, and 78ff of Title 15 of the United States Code) with respect to the transaction that is the subject of this complaint, but at the time of the filing of this complaint, no sums had been paid by defendant on account of that proceeding.]

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the sum of $_____, and that said sum be trebled;

2. For its reasonable attorney's fees;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 515.400.*]

[2] Use of Form

This form is for use in an action by an issuer of securities against an insider who traded on insider information about the issuer in violation of *Corp. Code § 25402*. Treble damages may be recovered by the issuer if it has over $1 million in assets and over 500 record holders of a class of equity securities [*Corp. Code § 25502.5*; *see* discussion in *§ 515.22[3]*]. However, the trebled amount will be reduced by any sums paid by the defendant in proceedings commenced by the Securities and Exchange Commission on account of the same transaction [*Corp. Code § 25502.5(b)*].

The action may be brought by or on behalf of the issuer [*see Corp. Code § 25502.5*]. For a general complaint containing allegations that may be used to plead an action for recovery under *Corp. Code § 25502.5* as a derivative action, see Ch. 167, *Corporations: Directors and Management* .

[3] Allegations

This complaint alleges:

- Plaintiff's capacity as an issuer of the size required by *Corp. Code § 25502.5(d)* (Paragraph 1).

- The specifics of defendant's sale or purchase of plaintiff's securities in California [*see Corp. Code § 25402*] (Paragraph 4).

- The particulars of defendant's status as an insider within the meaning of *Corp. Code § 25402* (alternative Paragraphs 5).

- Defendant's knowledge of information that was not available to the general public and that had a significant impact on the market price of the securities traded, as well as defendant's knowledge that the information was not intended to be available to the public, all as required by *Corp. Code § 25402* to constitute the offense of "insider trading" (Paragraph 6).

- The market price the securities would have had if the insider information had been available to the public sufficiently in advance of the transaction to allow the market to absorb the information (Paragraph 7) [*Corp. Code § 25502.5(a)*].

Paragraphs 9-11 are optional paragraphs addressing the reduction in damages that a defendant would be entitled to under *Corp. Code § 25502.5(b)* if he or she had paid a judgment or settlement arising from an SEC proceeding regarding the same transaction [*see Corp. Code § 25502.5(b)*].

[4] Cross References

For a related form, *see § 515.413*

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45-515 California Forms of Pleading and Practice--Annotated § 515.415

§ 515.415 Affirmative Defense--Defendant's Belief That Plaintiff Was Informed as to Undisclosed Matters Regarding Securities [Corp. Code § 25402]

[1] FORM Affirmative Defense--Defendant's Belief That Plaintiff Was Informed as to Undisclosed Matters Regarding Securities [Corp. Code § 25402]

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

At the time of defendant's _____ [sale to *or* purchase from] plaintiff of the securities alleged herein, defendant had reason to believe, and did believe, that plaintiff was also in possession of the [alleged] specific material information, in that _____ [*describe basis for reasons, e.g.,* plaintiff was the private accountant and longtime confidant of _____ (*name*), treasurer of the issuer company, and defendant had been given to understand by both persons that such officer routinely shared all inside information of the company with plaintiff].

[2] Use of Form

This affirmative defense is for use in an answer to an action for damages based on prohibited trading in the securities of a corporation by one of its insiders [*see § 515.413*] when the defendant reasonably believed the plaintiff was fully informed of the material information about the issuer [*see Corp. Code § 25502*]. For a discussion of this defense, see *§ 515.22[5]*.

[3] Cross References

For a related form, *see § 515.413*

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45-515 California Forms of Pleading and Practice--Annotated § 515.416

§ 515.416 Affirmative Defense--Plaintiff's Knowledge of Material Information Regarding Securities Not Publicly Disclosed [Corp. Code § 25502]

[1] FORM Affirmative Defense--Plaintiff's Knowledge of Material Information Regarding Securities Not Publicly Disclosed [Corp. Code § 25502]

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

At the time of defendant's _____ [sale to *or* purchase from] plaintiff of the securities referred to, plaintiff knew that _____ [*describe material information referred to in complaint, e.g.,* _____ (name of company) was momentarily going to be pub licly charged with fraud by the Commissioner of Corporations], because _____ [*give basis for plaintiff's knowledge, e.g.,* after consulting with a reputable investment house on or about _____ (*date*), plaintiff had been advised against a securities transaction such as the one here for the reason that _____ (*name of company*) would probably be charged with fraud within a week].

[2] Use of Form

This affirmative defense is for use in an answer to a complaint for damages for prohibited insider trading [*see § 515.413*] where the plaintiff was in fact an equally informed person [*see Corp. Code § 25502*]. For a discussion of this defense, see *§ 515.22[6]*.

[3] Cross References

For a related form, *see § 515.413*

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45-515 California Forms of Pleading and Practice--Annotated § 515.417

§ 515.417 Affirmative Defense--Price of Securities Transaction Unaffected by Undisclosed Information [Corp. Code § 25502]

[1] FORM Affirmative Defense--Price of Securities Transaction Unaffected by Undisclosed Information [Corp. Code § 25502]

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

At the time of defendant's _____ [sale to *or* purchase from] plaintiff of the securities alleged herein, plaintiff would have consummated the transaction at the same price even if the material information above described had been revealed to him/her, because _____ [*reason for plaintiff's adherence to trade, e.g.,* he/she had intended to buy defendant's shares in the company regardless of the amount of the company's financial assets, in order to obtain effective control of the company as a source of supply of materials for plaintiff's business].

[2] Use of Form

This affirmative defense is for use in an answer to an action for damages for prohibited insider trading [*see § 515.413*] if the plaintiff would have sold or purchased the securities even if the material misrepresentation had been revealed to him or her [*Corp. Code § 25502*]. For a discussion of this defense, see *§ 515.22[7]*.

[3] Cross References

For a related form, *see § 515.413*

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45-515 California Forms of Pleading and Practice--Annotated § 515.418

§ 515.418 Complaint for Rescission of Sale of Securities Not Qualified for Sale and Restitution of Consideration Paid [Corp. Code § 25503]--Issuer or Nonissuer Transaction (Except Recapitalization or Reorganization) [Corp. Code §§ 25110, 25130]--By Purchaser Against Seller

[1] FORM Complaint for Rescission of Sale of Securities Not Qualified for Sale and Restitution of Consideration Paid [Corp. Code § 25503]--Issuer or Nonissuer Transaction (Except Recapitalization or Reorganization) [Corp. Code §§ 25110, 25130]--By Purchaser Against Seller

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR
Plaintiff,	)	RESCISSION AND
vs.	)	RESTITUTION
_____ [*name* (*s*)],	)	(Sale of Securities in
Defendant(s).	)	Violation of Qualification
	)	Requirements)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Qualification Violation)

1. [*Capacity and residence of defendant. See § 515.400, Paragraph 1* .]

2. [*Fictitious name allegation, if appropriate. See § 515.400, Paragraph 2* .]

3. On or about _____ [*date*], defendant offered and sold to plaintiff a total of _____ [*number*] _____ [shares *or other security*] of _____ [*describe security, e.g.,* the common stock of X Corporation] _____ [*describe consideration, e.g.,* at the price of $_____ per _____ (share *or other security*) for a total price of $_____]. Defendant was _____ [*if sale was an issuer transaction* the issuer *or if a nonissuer transaction* a broker-dealer *or specify other person*] engaged in the secondary trading of such securities.

[*EITHER, if was actually unqualified*]

4. This sale constituted _____ [an issuer transaction in that it _____ (*specify, e.g.,* was part of an initial offering of stock for capitalization purposes) *or* a nonissuer transaction in that it was _____ (*specify, e.g.,* not directly or indirectly consummated for the benefit of the issuer of the securities, and no portion of the purchase price would be received in any fashion by the issuer)]. Nevertheless, at the time of plaintiff's acquisition the sale was subject to qualification, was not exempt from qualification, and was not [and to date of this complaint has not been,] qualified as any kind of securities transaction with the Commissioner of Corporations.
[*OR, if sale was unqualified by virtue of variance from qualification permit, application, or order*]

4. This sale constituted an issuer transaction in that it _____ [*specify, e.g.,* was part of an initial offering of stock for capitalization purposes]. At the time of plaintiff's acquisition, the sale was nominally qualified in that _____ [*specify, e.g.,* a qualification permit had been issued by the Commissioner in accordance with the provisions of Corporations Code Section _____]. However, the sale in fact is not qualified within the meaning of *Corporations Code Section 25110* because _____ [*specify, e.g.,* there is a material variance between the statements made in the _____ (*specify, e.g.,* _____application for qualification that defendant's operations would be profitable from the beginning), and the true fact that _____ (*specify, e.g.,* it is unlikely that defendant will achieve profits in the initial four years of its operations)].
[*CONTINUE*]

5. As a result of the above-described acts, defendant is liable to plaintiff, who is entitled to, and hereby does, rescind the above-described purchase. Plaintiff _____ [herewith tenders *or* before entry of judgment will tender] to defendant _____ [*number*] _____ [shares *or other security*] of the above-described securities as purchased from defendant and on which to date plaintiff has received $_____ as total income.

[6. Plaintiff is informed and believes that the consideration given for the securities herein is not capable of being returned in that _____ (*explain, e.g.,* defendant forfeited it as security for an unpaid loan to _____ (*name of lender*) on or about _____ (*date*)). The value of the consideration plaintiff transferred to defendant was $_____.]

SECOND CAUSE OF ACTION
(Joint and Several Liability of Offering Principal or Underwriter)

7. Plaintiff sets forth by reference as though fully set forth below each and every allegation of Paragraphs 1-6 of the First Cause of Action.

8. Defendant _____ [*name*] is, and at all time herein mentioned was, _____ [*allege appropriate capacity and residence of joint defendant as shown in see § 515.400, Paragraph 1*].

9. This defendant was, at the time of the acts alleged herein, _____ [the person on whose behalf the offering of the herein described sale of securities to plaintiff was made *or* an underwriter of the offering of the herein-described sale of securities to plaintiff on a _____ (firm commitment *or* best efforts) basis].

10. [*If defendant is underwriter who received a disproportionately greater benefit for acting as underwriter, add* In connection with such capacity, defendant _____ (*name*) knowingly received from the issuer for acting as an underwriter of the below-described securities some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interest in the underwriting, in that _____ (*describe benefit, e.g.,* defendant received an extra block of the common stock initially offered of approximately 500 shares as his own holding or for resale at his option), by virtue of which such defendant's liability is not restricted to the total price at which the underwritten securities were offered to the public].

THIRD CAUSE OF ACTION
(Joint and Several Liability of Management Principals or Materially Aiding Personnel)

11. [*Incorporation of First Cause of Action. See Second Cause of Action, supra, Paragraph 7.*]

12, 13. [*Named defendant as management principal or material aide. See § 515.405, Second Cause of Action, Paragraphs 7, 8.*]

FOURTH CAUSE OF ACTION
(Joint and Several Liability of Materially Assisting Persons)

14. [*Incorporation of First Cause of Action. See Second Cause of Action, Paragraph 7.*]

15-17. [*Named defendant as materially assisting person. See § 515.405, Third Cause of Action, Paragraphs 10-12.*]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For rescission of the purchase and recovery of $_____ [*or describe other matter*] as [the value of] the original consideration paid for the securities [less $_____, the amount of income received on the security];

2. For interest on [the value of] the original consideration at the legal rate [from the date of purchase and transfer of the consideration];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 515.400* .]

[2] Use of Form

This form of complaint is for use in an action to rescind a purchase of securities made in an issuer or nonissuer transaction and recover the purchase price if the securities are subject to qualification, not exempt from qualification, and have not been qualified [*see Corp. Code § 25503* (discussed in *§ 515.21*)]. A security may be "unqualified" within the meaning of *Corp. Code § 25110* (issuer transactions only), if the manner of the offer or sale differs from, exceeds the scope of, or fails to conform with, either (1) a material term or condition of qualification as set forth in the permit or qualification order or (2) a material representation regarding the manner of offering that is set forth in the application for qualification [*Corp. Code § 25110*]. The second alternative Paragraph 4 is for use in that situation.

The form may not be used to rescind an issuer transaction that is in the form of recapitalizations or reorganizations; for a complaint for rescission of such a transaction, see *§ 515.420*.

For a discussion of regulatory violations alleged in the complaint, see *§ 515.21*. For a description of the causes of action brought under this complaint, see *§ 515.21[1]* [*see* Marsh & Volk, *Practice Under the California Securities Laws, § 14.06[1]* (Matthew Bender)].

The Second, Third, and Fourth Causes of Action are for joint and several liability of particular persons for the violation specified in the First Cause of Action. For discussion of joint and several liability of offering principals and underwriters under the Second Cause of Action, see *§ 515.21[8]* [*see* Marsh & Volk, *Practice Under the California Securities Laws, § 14.06[3][a], [b]* (Matthew Bender)]. For discussion of joint and several liability of management principals and materially aiding personnel under the Third Cause of Action, and for such liability of materially assisting persons under the Fourth Cause of Action, see *§ 515.61* [*see* Marsh & Volk, *Practice Under the California Securities Laws, § 14.06[3][c]* (Matthew Bender)].

If plaintiff has resold or otherwise no longer retains the securities, the appropriate action is for damages [*see § 515.419*].

[3] Allegations

The complaint alleges in the First Cause of Action the following:

- The offer and sale to plaintiff of securities by the issuer or secondary trader (Paragraph 3).

- The fact that the transaction was an issuer or nonissuer one but that the securities were subject to qualification, were not exempt from qualification, and had not been qualified (first alternative Paragraph 4), or that the transaction was a nominally qualified issuer transaction, but was not in fact qualified within the meaning of *Corp. Code § 25110* (second alternative Paragraph 4).

- Plaintiff therefore rescinds the sale by proper tender of the securities, with an accounting of income received thereon (Paragraph 5).

- The value of plaintiff's consideration if it was nonmonetary and cannot be returned [*see Corp. Code § 25503*].

The subsequent causes of action allege joint and several liability of particular persons by alleging the circumstances of their relationship to the securites transaction described in the First Cause of Action. The Second Cause of Action alleges, in part, the following: (1) the defendant was an offering principal or an underwriter (Paragraph 3); and (2) if

relevant, that the underwriting defendant's role was such that the underwriter is not entitled to the protection of the ceiling on liability which is normally restricted to the underwritten figure [*see Corp. Code § 25503*].

The applicable limitation period under *Corp. Code § 25507(a)* is discussed in *§ 515.21[5]*.

[4] State Statutes

Requirement of qualification of issuer transactions. *Corp. Code § 25110*

Requirement of qualification of nonissuer transactions. *Corp. Code § 25130*

Liability for failure to qualify securities. *Corp. Code § 25503*

Joint and several liability of management principals and materially aiding personnel. *Corp. Code § 25504*

Joint and several liability of materially assisting persons. *Corp. Code § 25504.1*

Statute of limitations on actions for failure to qualify securities. *Corp. Code § 25507*

[5] Administrative Regulations

Qualification procedures. *10 Cal. Code Reg. §§ 260.110-260.131*

Standards for exercise of authority of Commissioner of Corporations. *10 Cal. Code Reg. §§ 260.140-260.140.139*

Promotional share conditions. *10 Cal. Code Reg. §§ 260.141-260.141.3*

Transfer restriction conditions. *10 Cal. Code Reg. §§ 260.141.10-260.141.15*

Impound conditions. *10 Cal. Code Reg. §§ 260.141.20-260.141.27*

[6] Decisions

[a] Exemptions From Registration

Exemption of former *Corp. Code § 25102(f)* as it existed prior to November 1, 1981, was only available to bona fide partnership; because bona fide partnership is not established unless each partner has right to determine membership of all other partners, limited partnership in which limited partners did not know each other was not entitled to exemption. *Sherman v. Lloyd (1986) 181 Cal. App. 3d 693, 700-701, 226 Cal. Rptr. 495*

[b] Joint Liability of Responsible Individuals

Control person liability under *15 U.S.C. § 77o* and under *Corp. Code § 25504* are substantially the same; to establish controlling person liability controlled entity must be liable and alleged controlling person must have controlled that entity. *Underhill v. Royal (9th Cir. 1985) 769 F.2d 1426, 1433*

Controlling person not liable if he or she had no knowledge of, or reasonable grounds to believe in, existence of facts by reason of which liability exists; alleged controlling person has burden of proof of this defense; given radio and

newspaper advertising throughout San Diego area over 5-year period, verdict for investors supported by evidence despite controlling person's claim of lack of knowledge of sales to nonresidents which would make intrastate offering exemption from federal registration requirements unavailable. *Underhill v. Royal (9th Cir. 1985) 769 F.2d 1426, 1433-1434*

Verdict for investors supported by evidence despite controlling person's claim of reliance on advice of counsel that offering was exempt from California registration requirements when controlling person was aware that Corporations Department had raised questions as to exemption and liability was founded on facts that fostered those doubts. *Underhill v. Royal (9th Cir. 1985) 769 F.2d 1426, 1433-1434*

Liability of affiliated corporate mortgage broker for violations of federal securities laws by franchisee which sold unregistered securities was supported by evidence that advertisements and newsletters used only affiliate/franchisor's name, that both corporations were founded and controlled by same person, and use of franchisor's trade name and mark; liability for California violations established without finding of privity since defendant never offered instruction on privity. *Underhill v. Royal (9th Cir. 1985) 769 F.2d 1426, 1434-1435*

When all funds of limited partnership in which plaintiff invested were invested by general partner in second limited partnership, both partnerships were liable under to plaintiff under *Corp. Code § 25503*, and general partners of both partnerships and officer, director, and major shareholder of corporate general partner of second partnership were jointly and severally liable under *Corp. Code § 25504*, but accounting firm of first partnership was not liable because it had no other connection to transaction. *Sherman v. Lloyd (1986) 181 Cal. App. 3d 693, 703, 226 Cal. Rptr. 495*

[c] Punitive Damages

One who induced unsophisticated persons to invest money in various ventures in his or her name assumes fiduciary status as investment advisor, trustee of commodities accounts, managing partner of mining venture, and securities broker-dealer; fiduciary's material misrepresentations to induce investors not to withdraw their funds, failure to disclose significant risks, and failure to register securities were not only statutory violations [*see Corp. Code §§ 25110, 25401*] but also constructive fraud, which supports award of punitive damages. *Stokes v. Henson (1990) 217 Cal. App. 3d 187, 194-197, 265 Cal. Rptr. 836*

[d] Scienter Required to Prove Criminal Violation of Corp. Code § 25110

Defendant is not guilty of selling unregistered security in violation of *Corp. Code § 25110* if there is reasonable doubt that defendant knew that security was not exempt from regulation or reasonable doubt that defendant was criminally negligent in failing to know that security was not exempt; however, lack of knowledge that security is not exempt, or lack of criminal negligence, is affirmative defense, on which trial court must instruct only if defendant presents enough evidence to raise reasonable doubt. *People v. Salas (2006) 37 Cal. 4th 967, 981, 982, 38 Cal. Rptr. 3d 624, 127 P.3d 40*

[e] Statute of Limitations

Action for rescission based on violation of *Corp. Code § 25110* is governed by two-year limitation of *Corp. Code § 25503*. *Stokes v. Henson (1990) 217 Cal. App. 3d 187, 193 n.4, 265 Cal. Rptr. 836*

When all funds of limited partnership in which plaintiff invested were invested by general partner in second limited partnership, limitation period commences on discovery that offering violated registration requirements rather than at time plaintiff learned of two-tier arrangement; defendant general partner was fiduciary of plaintiff limited partner

because of partnership relationship, thus plaintiff was entitled to rely on defendant's assurances that two-tier structure was in compliance with securities law. *Sherman v. Lloyd (1986) 181 Cal. App. 3d 693, 700, 226 Cal. Rptr. 495*

[7] Text References

Ballantine & Sterling, California Corporation Laws, Ch. 21, *Corporate Securities*, § 463.02 (Matthew Bender)

Marsh & Volk, *Practice Under the California Securities Laws, Ch. 14, Civil Liabilities, § 14.06* (Matthew Bender)

Witkin, Summary of California Law, Vol. 9, *Corporations*, § 245 (9th ed. 1989)

[8] Cross References

For related forms, *see §§ 515.400* and *515.420*- 22.

For general forms and discussion of rescission, see Ch. 490, *Rescission and Restitution*

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45-515 California Forms of Pleading and Practice--Annotated § 515.419

§ 515.419 Complaint for Damages for Sale of Securities Not Qualified for Sale [Corp. Code § 25503]--Issuer or Nonissuer Transaction (Except Recapitalization or Reorganization) [Corp. Code §§ 25110, 25130]--By Purchaser Against Seller

[1] FORM Complaint for Damages for Sale of Securities Not Qualified for Sale [Corp. Code § 25503]--Issuer or Nonissuer Transaction (Except Recapitalization or Reorganization) [Corp. Code §§ 25110, 25130]--By Purchaser Against Seller

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
	)	(Sale of Securities Not Qualified for Sale)
_____ [*name*],	)	[Amount demanded _____
[and DOES I through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendants.	)	[LIMITED CIVIL CASE]
	)	
	)	

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Qualification Violation)

1. [*Capacity and residence of defendant. See § 515.400, Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 515.400, Paragraph 2.*]

3. [*Sale to plaintiff by defendant in particular relationship to securities. See § 515.418, Paragraph 3.*]

4. [*Status of transaction as not qualified. See § 515.418, Paragraph 4.*]

5. As a result of the above-described acts, defendant is liable to plaintiff for damages in lieu of rescission since plaintiff no longer owns the securities. The value of the securities at the time plaintiff disposed of them was $_____ per share. Plaintiff had received $_____ in income from the securities.

6. [*Value of consideration given if defendant is unable to return. See § 515.418, Paragraph 6.*]

SECOND CAUSE OF ACTION
(Joint and Several Liability of Offering Principals or Underwriters)

7. Plaintiff sets forth by reference as though fully set forth below each and every allegation of Paragraphs 1-6 of the First Cause of Action.

8-10. [*Named defendant as offering principal or underwriter. See § 515.418, Second Cause of Action, Paragraphs 2-4.*]

THIRD CAUSE OF ACTION
(Joint and Several Liability of Management Principals or Materially Aiding Personnel)

11. [*Incorporation of First Cause of Action. See Second Cause of Action, Paragraph 7.*]

12, 13. [*Named defendant as management principal or materially aiding personnel. See § 515.406, Second Cause of Action, Paragraphs 2, 3.*]

FOURTH CAUSE OF ACTION
(Joint and Several Liability of Materially Assisting Persons)

1. [*Incorporation of First Cause of Action. See Second Cause of Action, Paragraph 7.*]

2-4. [*Named defendant as materially assisting person. See § 515.406, Third Cause of Action, Paragraphs 2-4.*]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For damages in the amount equal to the difference between:

a. the amount of $_____ as _____ [the purchase price *or* the value of original consideration] plus interest at the legal rate from the date of purchase; and

b. the value of the security at the time it was disposed of by plaintiff plus the amount of any income received thereon by plaintiff;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 515.400* .]

[2] Use of Form

This form of complaint is for use in an action for damages resulting from a purchase of securities made in an issuer or nonissuer transaction, when the securities had not been qualified and plaintiff sold the securities prior to filing the complaint [*see Corp. Code § 25503*]. If plaintiff still owns the security, rescission is the proper remedy [*see § 515.418*]. In any case, if the transaction was in the form of recapitalizations or reorganizations, the complaint in § 515.420 should be used.

For a discussion of an action for damages for a regulatory violation, see *§ 515.21[3]*.

[3] Allegations

The complaint alleges, in the First Cause of Action, defendant's liability, defendant's inability to rescind because of disposition of the securities, and an accounting of the value of the securities at the time of transfer and of any income received thereon [*see Corp. Code § 25503*].

[4] Cross References

For a related form, *see § 515.418*

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45-515 California Forms of Pleading and Practice--Annotated § 515.420

§ 515.420 Complaint for Damages for Sale of Securities Not Qualified for Sale [Corp. Code § 25503]--Recapitalization or Reorganization Issuer Transaction [Corp. Code § 25120]--By Purchaser Against Seller

[1] FORM Complaint for Damages for Sale of Securities Not Qualified for Sale [Corp. Code § 25503]--Recapitalization or Reorganization Issuer Transaction [Corp. Code § 25120]--By Purchaser Against Seller [*Caption, introduction. See § 515.419.*]

FIRST CAUSE OF ACTION
(Qualification Violation)

1. [*Capacity and residence of defendant. See § 515.400, Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 515.400, Paragraph 2.*]

3. On or about _____ [*date*], defendant offered and sold to plaintiff a total of _____ [*number*] _____ [shares *or other security*] of _____ [*describe security, e.g.,* the 6 percent cumulative preferred stock of A Corporation] in exchange for a total of _____ [*number*] _____ [shares *or other security*] of _____ [*describe security, e.g.,* the common stock of B Corporation] from plaintiff, at the rate of _____ [*number*] _____ [shares *or other security*] of the former for _____ [*number*] _____ [shares *or other security*] of the latter. Defendant was the issuer of the securities being sold [as well as those being received in exchange].

4. That sale constituted an issuer transaction in the form of a _____ [recapitalization *or* reorganization] in that it represented _____ [*describe business purpose, e.g.,* an exchange of securities in connection with the merger of the issuer A Corporation and B Corporation]. Nevertheless, at the time of plaintiff's acquisition, that sale was subject to qualification, was not exempt from qualification, and was not [, and to

date of this complaint that sale has not been,] qualified as any kind of securities transaction with the Commissioner of Corporations.

5. As a result of the above-described failure to qualify the securities, defendant is liable for damages. The value of the consideration received by defendant in the above-described transaction was $_____. The value of such securities at the time they were received by plaintiff was $_____.

SECOND CAUSE OF ACTION
(Joint and Several Liability of Offering Principals and Underwriters)

6. Plaintiff sets forth by reference as though fully set forth below each and every allegation of Paragraphs 1-5 of the First Cause of Action.

7-9. [*Named defendant as offering principal or underwriter. See § 515.418, Second Cause of Action, Paragraphs 2-4.*]

THIRD CAUSE OF ACTION
(Joint and Several Liability of Management Principals or Materially Aiding Personnel)

10. [*Incorporation of First Cause of Action. See Second Cause of Action, supra, Paragraph 6.*]

11, 12. [*Named Defendant as management principal or material aide. See § 515.405, Second Cause of Action, Paragraphs 2, 3.*]

FOURTH CAUSE OF ACTION
(Joint and Several Liability of Materially Assisting Persons)

13. [*Incorporation of First Cause of Action. See Second Cause of Action, Paragraph 6.*]

14-16. [*Named defendant as materially assisting person. See § 515.405, Third Cause of Action, Paragraphs 2-4.*]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For damages in the amount of $_____, being the difference between:

a. the value of the consideration received from plaintiff; and

b. the value of the securities at the time they were received by plaintiff;

2. For interest thereon at the legal rate from the date of purchase;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 515.400* .]

[2] Use of Form

This form of complaint is for use in an action for damages resulting from failure to qualify the sale of securities involved in an issuer transaction that is in the form of a recapitalization or reorganization [*see Corp. Code § 25503*]. Actions based on violation of qualification requirements involving other issuer transactions or involving nonissuer transactions are provided for in Forms 18 (for rescission) and 19 (for damages).

For further discussion of violation of qualifications involving a recapitalization or reorganization, see *§ 515.21[1]* and *[4]*.

[3] Allegations

The complaint alleges in the First Cause of Action, in pertinent part, the following [*see Corp. Code § 25503*]:

- The sale of securities to plaintiff in the form of an exchange of securities (Paragraph 3);
- That the sale constituted a recapitalization or reorganization that was not qualified (Paragraph 4); and
- Defendant's liability to plaintiff, and an accounting of the value of the securities and consideration given therefor.

[4] State Statutes

Requirement for qualification of recapitalizations and reorganizations. *Corp. Code § 25120*

[5] Administrative Regulations

Regulation of recapitalizations and reorganizations. *10 Cal. Code Reg. §§ 260.140.60-260.140.63*

[6] Cross References

For related forms, *see §§ 515.418* and *515.419*.

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45-515 California Forms of Pleading and Practice--Annotated § 515.421

§ 515.421 Allegation for Use in Complaint for Violation of Qualification Requirements--Rescission for Damages for Sale of Securities in Violation of Condition Imposed by Commissioner of Corporations [Corp. Code § 25503] Respecting Qualification [Corp. Code § 25141]

[1] FORM Allegation for Use in Complaint for Violation of Qualification Requirements--Rescission for Damages for Sale of Securities in Violation of Condition Imposed by Commissioner of Corporations [Corp. Code § 25503] Respecting Qualification [Corp. Code § 25141]

That sale constituted a[n] _____ [issuer transaction *or* nonissuer transaction *or* issuer transaction in the form of a _____ (recapitalization *or* reorganization) in that _____ [*describe: for issuer transaction, see § 515.419, Paragraph 4; for nonissuer transaction, see § 515.420, Paragraph 4*]. At the time of that sale the Commissioner of Corporations had, and there remained in effect, certain conditions with respect to the offer and sale of those securities, that provided that _____ [*describe, e.g.,* those securities were not to be transferred without bearing a legend restricting their transferability, and were not to be transferred without the prior written consent of the commissioner]. A true copy of these conditions affecting the securities is attached as Exhibit A and made a part hereof. However, defendant failed to comply with these conditions in the above-described sale in that _____ [*describe, e.g.,* the commissioner never reviewed or consented to the sale to plaintiff].

[2] Use of Form

This allegation may be substituted for Paragraph 4 of either of the complaints in Forms 18 or 19, as appropriate, to be used in an action for rescission or damages in the case of an issuer or nonissuer transaction, or of the complaint in § 515.420 to be used in an action for damages, for the violation of any condition of qualification or transfer of securities imposed by the Commissioner of Corporations [*see Corp. Code § 25503*]. For discussion of violation of the commissioner's conditions on qualification, see *§ 515.21[1]*.

[3] Cross References

For related forms, *see §§ 515.418 -515.420*.

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45-515 California Forms of Pleading and Practice--Annotated § 515.422

§ 515.422 Affirmative Defense to Complaint for Qualification Violations--Security or Transaction Was Exempt From Qualification Requirements [Corp. Code §§ 25110, 25120, 25130]

[1] FORM Affirmative Defense to Complaint for Qualification Violations--Security or Transaction Was Exempt From Qualification Requirements [Corp. Code §§ 25110, 25120, 25130]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

The _____ [security *if exempted under Corp. Code § 25100 or 25101 or Corp. Code § 25100* or *25101* transaction *if exempted under Corp. Code §§ 25102-25105 Corp. Code* §§ 25102-25105] here involved was exempt from all qualification requirements under Section _____ [*appropriate number, e.g.,* 25104(e)] of the Corporations Code in that _____ [*describe nature of security or transaction revealing character of exemption, e.g.,* defendant having received the security on _____ (*date*), from _____ (*name*) to secure a debt from such person of $_____ covered under a note of the same date, and such person having defaulted on the note at its maturity on _____ (*date*), defendant as a bona fide secured party sold the securities herein to plaintiff in the ordinary course of defendant's business in order to liquidate this bona fide debt].

[2] Use of Form

This affirmative defense is for use in an answer to a complaint for rescission or damages for the sale of a security in violation of qualification requirements [*see §§ 515.418 -515.420*], when the defendant contends that because of the nature of the securities or of the transaction involved, the sale was exempted from qualification requirements [*see Corp. Code §§ 25110, 25120, 25130*]. For a discussion of exemptions from qualification requirements, see *§ 515.14[5]*.

[3] State Statutes

Exempt issuer securities. *Corp. Code § 25100*

Exempt nonissuer securities. *Corp. Code § 25101*

Exempt issuer transactions. *Corp. Code § 25102*

Exempt reorganizations and recapitalizations. *Corp. Code § 25103*

Exempt nonissuer transactions. *Corp. Code § 25104*

Exempt transactions under commissioner's rule. *Corp. Code § 25105*

Exemption from qualification of issuer transactions. *Corp. Code § 25110*

Exemption from qualification of issuer transaction in form of recapitalization or reorganization. *Corp. Code § 25120*

Exemption from qualification of nonissuer transactions. *Corp. Code § 25130*

[4] Administrative Regulations

Exemptions from qualification. *10 Cal. Code Reg. § 260.100 et seq.*

[5] Cross References

For a related form, *see § 515.418*

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45-515 California Forms of Pleading and Practice--Annotated § 515.423

§ 515.423 Affirmative Defense to Complaint for Violation of Qualification Requirements--Security or Transaction Was Not Subject to Qualification [Corp. Code §§ 25110, 25120, 25130]

[1] FORM Affirmative Defense to Complaint for Violation of Qualification Requirements--Security or Transaction Was Not Subject to Qualification [Corp. Code §§ 25110, 25120, 25130]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

The _____ [*if not subject to qualification under Corp. Code § 25100.1 or 25101.1:* security *or, if not subject to qualification under Corp. Code § 25102.1:* transaction] involved was not subject to qualification requirements pursuant to _____ [*state appropriate statute, e.g., Corporations Code Section 25100.1*] in that _____ [*describe nature of security or transaction meeting requirements of statutory provision, e.g.,* it was a covered security under the Securities Act of 1933].

[2] Use of Form

This form of affirmative defense is for use in an answer to a complaint for rescission or damages for the sale of a security in violation of qualification requirements [*see* Forms 18-20] when the defendant contends that because of the nature of the securities or the transaction involved, the sale was not subject to qualification [*see Corp. Code §§ 25110, 25120, 25130*]. For a discussion of securities and transactions not subject to qualification, see *§ 515.14[4]*.

[3] State Statutes

Securities not subject to qualification. *Corp. Code §§ 25100.1, 25101.1*

Transactions not subject to qualification. *Corp. Code § 25102.1*

[4] Federal Statutes

Federal preemption of state securities regulation. *15 U.S.C. § 77r*

[5] Cross References

For a related form, *see § 515.418*

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45-515 California Forms of Pleading and Practice--Annotated § 515.424

§ 515.424 Affirmative Defense [Code Civ. Proc. § 431.30(b)] to Complaint for Violation of Qualification Requirements--Qualification of Sale of Securities Prior to Payment Therefor [Corp. Code § 25503]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)] to Complaint for Violation of Qualification Requirements--Qualification of Sale of Securities Prior to Payment Therefor [Corp. Code § 25503]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

On or about _____ [*date*], the offer and sale of the securities herein described in connection with the _____ [issuer transaction (in the form of a _____ (recapitalization *or* reorganization)) *or* nonissuer transaction] alleged in the complaint was qualified with the Commissioner of Corporations prior to payment by plaintiff or receipt by defendant from plaintiff of any part of the consideration of the securities sold.

[2] Use of Form

This affirmative defense is for use in answer to a complaint for rescission or damages for the sale of a security in violation of qualification requirements [*see §§ 515.418 -515.420*] when the security was qualified prior to receipt of any part of the consideration even though an offer to sell or a contract for sale may have been made or entered into without qualification [*see Corp. Code § 25503*].

For a discussion of the defense, see *§ 515.21[6]*.

[3] Cross References

For a related form, *see § 515.418*

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45-515 California Forms of Pleading and Practice--Annotated § 515.425

§ 515.425 Affirmative Defense to Complaint for Violation of Qualification Requirements--Plaintiff in Position of Being Equally in the Wrong (in Pari Delicto) [Civ. Code § 3524] With Defendant

[1] FORM Affirmative Defense to Complaint for Violation of Qualification Requirements--Plaintiff in Position of Being Equally in the Wrong (in Pari Delicto) [Civ. Code § 3524] With Defendant

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

Plaintiff was equally in the wrong (in pari delicto) with defendant in the [alleged] _____ [failure to qualify the securities transaction here involved *or* sale of securities here involved for which the qualification was without effectiveness] in that _____ [*describe plaintiff's acts, e.g.,* plaintiff, a sophisticated investor of many years, insisted defendant issue stock to him/her without attempting to qualify it and assured him/her that, in plaintiff's informed experience, qualification was unnecessary because the offering was in his/her opinion exempt under the law]. Under there circumstances plaintiff may not interpose the law between the parties to this transaction on the alleged point of failure to observe requirements of qualification of securities.

[2] Use of Form

This affirmative defense is for use in an answer to a complaint for violation of qualification requirements [*see §§ 515.418 -515.420*] where the defendant contends that the plaintiff was in the wrong equally with the defendant.

[3] Doctrine of In Pari Delicto

The defense that the plaintiff was in pari delicto (or equally in the wrong) with defendant in failing to qualify a particular security had been well established under the securities law as it existed prior to the Corporate Securities Law of 1968. The defense was not a statutory one and applied only when defendant had clearly established that plaintiff was as responsible as defendant for the violation [*see Wells v. Comstock (1956) 46 Cal. 2d 528, 531-532, 297 P.2d 961* ; *see also Smith v. Turner (1965) 238 Cal. App. 2d 141, 149-153, 47 Cal. Rptr. 582]* . It is unclear whether or not the

defense continues to apply in an action based on a violation of the qualification requirements under the Corporate Securities Law of 1968. However, there does not appear to have been any substantive change in the law preventing the raising of such a defense. The doctrine is a basic tenet of the common law and is incorporated in the maxim of jurisprudence that provides that the law does not interpose between those who are equally in the wrong [*see Civ. Code § 3524*; Marsh & Volk, *Practice Under the California Securities Laws, Ch.14, § 14.06[5]*; *see also Civ. Code §§ 3515-3517*].

[4] Decisions

Where plaintiff foreign bank tried to collect for losses under agreement whereby defendant underwriter agreed to bear them if plaintiff funded entire investment, which funding was in violation of federal requirements applicable to plaintiff as "broker" but not to defendant as "customer," there was no basis for exception to in pari delicto doctrine although plaintiff may otherwise have acted in good faith and defendant reprehensibly. *UFITEC, S.A., v. Carter (1977) 20 Cal. 3d 238, 250, 142 Cal. Rptr. 279, 571 P.2d 990*

[5] Text References

Ballantine & Sterling, California Corporation Laws, Ch. 21, *Corporate Securities* , § 463.02

Marsh & Volk, *Practice Under the California Securities Laws, Ch. 14, § 14.06*

[6] Cross References

For a related form, *see § 515.418*

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45-515 California Forms of Pleading and Practice--Annotated § 515.426

§ 515.426 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Complaint for Violation of Qualification Requirements--Approved Written Offer Was Sent to Rectify Violation [Corp. Code § 25507(b), (c)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Complaint for Violation of Qualification Requirements--Approved Written Offer Was Sent to Rectify Violation [Corp. Code § 25507(b), (c)]

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. Prior to commencement of the action herein, and on or about _____ [*date*], plaintiff received from _____ [defendant *or name of other person who sent offer*] a written offer, the form of which was approved by the Commissioner of Corporations [and complied with all conditions required thereby].

2. This offer stated the manner in which liability may have arisen with regard to any alleged violation of *Section 25503 of the Corporations Code*. The writing offered to _____ [repurchase the securities for the cash price of $_____, payable on delivery of the security *or describe offer of rescission or damages*]. The writing specified the offer could be accepted by plaintiff at any time within a specified period of not less than 30 days after the date of receipt unless rejected earlier during that period by plaintiff. The writing set forth the provisions of *Section 25507(b) of the Corporations Code* and contained all other information required by the Commissioner of Corporations. A true copy of the written offer is attached hereto as Exhibit 1 and made a part hereof.

3. Plaintiff failed to accept this offer within the specified period after receipt thereof.

[2] Use of Form

This affirmative defense may be used in answer to a complaint for damages for the sale of a security in violation of qualification requirements or regulatory conditions pertaining to the security (or in violation of a condition imposed in connection with the suspension of trading) [*see §§ 515.418 -515.421*] where the defendant or others similarly situated have sent the plaintiff an officially approved form of written offer to rectify the violation which was not accepted in the prescribed time period [*see Corp. Code § 25507(b), (c)*]. For a discussion of this defense, see *§ 515.21[7]*.

[3] State Statutes

Offer to repurchase as defense to violation of qualification requirements or regulatory condition. *Corp. Code § 25507(b), (c)*

[4] Administrative Regulations and Releases

Form of application for approval of repurchase offer (including guidelines for offer). *10 Cal. Code Reg. § 260.507*

Repurchase offers. Commissioner of Corporations Release No. 36-C (Rev. 1975)

[5] Cross References

For a related form, *see § 515.418*

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45-515 California Forms of Pleading and Practice--Annotated § 515.427

§ 515.427 Complaint for Indemnity [Corp. Code § 25505] for Willful Violation of Securities Law--By Corporation Against Controlling Personnel

[1] FORM Complaint for Indemnity [Corp. Code § 25505] for Willful Violation of Securities Law--By Corporation Against Controlling Personnel

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR
vs.	)	INDEMNITY
_____ [*name*],	)	(Violation of Corporate
Defendant(s).	)	Securities Law)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of _____ [California, with its principal place of business in _____ County *or* the State of _____, authorized to transact and transacting business in the State of California with its principal office in this state in _____ County *or other residence of defendant corporation*].

2. [*Capacity and residence of defendant(s). See § 515.400, Paragraph 1* .]

3. [*Fictitious name allegation, if appropriate. See § 515.400, Paragraph 2* .]

4. On _____ [*date*], defendant was _____ [the _____ (*specify a principal executive officer, e.g.,* president) *or* a director *or* a controlling person] of plaintiff corporation, in that _____ [he/she had been _____ (elected *or* appointed) to such position by _____ (the Board of Directors *or* the stockholders *or specify other*) on _____ (*date*), *or* he/she was _____ (*explain manner of control, e.g.,* the holder of 60 percent of the common stock of plaintiff)]. On the date first mentioned, defendant _____ [*describe violation of securities law, e.g.,* prepared a proxy statement to accompany the proposed reorganization of plaintiff through an exchange of all outstanding 6 percent cumulative preferred stock, which contained liquidation preference rights, for issue of a newly created Class B of common stock. A copy of that prospectus is attached as Exhibit A and incorporated by reference. The prospectus contained an untrue statement of a material fact in that it recited that the exchange was necessary or else a particular new proposed bank loan could not go through. In truth it was a matter in indifference to the bank whether or not the liquidation preference was removed. Plaintiff corporation then sold such securities in _____ (*specify locality*), California, on _____ (*date*)].

5. Defendant's acts as described above were willful and resulted in _____ [*specify nature of violation, e.g.,* the offer and sale of the securities of plaintiff corporation by means of a material misrepresentation].

6. On _____ [*date*], in an action entitled _____, filed in the _____ [*name*] Court, Action No. _____, judgment was rendered against plaintiff herein for _____ [*specify, e.g.,* selling such exchange securities by means of the false statement] in the prospectus alleged above. Plaintiff's liability is a direct result of defendant's unlawful acts. A copy of that judgment is attached as Exhibit B and incorporated by reference. [In addition, on _____ (*date*), plaintiff notified defendant by written notice of this action pending against it and therein requested defendant to take charge of the defense, which defendant refused to do. A copy of this request is attached as Exhibit C and incorporated by reference.]

7. As a result of such judgment, plaintiff has become immediately liable for the sum of $_____, consisting of _____ [*specify liability, e.g.,* $_____ in damages, $_____ as costs of that action, plus interest at the legal rate]. [In addition, the defense of this action cost plaintiff $_____ in attorney's fees.] For all such liability, plaintiff is entitled to indemnification from defendant.

WHEREFORE, plaintiff prays judgment as follows:

1. For indemnification in the sum of $_____;

2. For interest on this sum at the legal rate;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper[, including additional attorney's fees as described above when they become known].

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 515.400.*]

[2] Use of Form

This complaint may be used in an action for indemnification by a corporation which is liable under any provision of civil liability under the Corporate Securities Law of 1968 against any of its principal executive officers, directors, or controlling persons whose willful violation of any provision of that law gave rise to plaintiff's liability [*see Corp. Code § 25505*].

For further discussion, see Marsh & Volk, *Practice Under the California Securities Laws, § 14.07[1]* (Matthew Bender).

[3] Allegations

This complaint alleges, in part [*see Corp. Code § 25505*]:

- The capacity of the plaintiff corporation (Paragraph 1).
- Defendant's identity as a principal executive officer, a director, or a controlling person and his or her wrongful act (Paragraph 4).
- The willfulness of defendant's act (Paragraph 5).
- Plaintiff's liability for defendant's wrongful act.
- The amount of plaintiff's liability (Paragraph 7) [*see Corp. Code § 25505*].

[4] Indemnification of Corporation

A corporation found liable under any of the special civil actions featured in the preceding forms in this chapter has a statutory right of indemnification against any of its principal executive officers, directors, and controlling persons whose willful violation of provisions of the Corporate Securities Law of 1968 gave rise to such liability [*Corp. Code § 25505*]. The statute specifies that the indemnification arises when the corporation is "liable" and that indemnification lies for willful acts giving rise to that "liability" [*see Corp. Code § 25505*]. It is not clear, however, to what extent this statutorily imposed obligation for indemnification automatically follows the law of contractual indemnification. Under the rules of contractual indemnification, an indemnification for "liability" (as against indemnification for claims or demands, damages, or costs), arises when the plaintiff is held liable for payments; the plaintiff need not first have made payment before seeking indemnification [*see Civ. Code § 2778(1), (2)*]. The person indemnifying also is obliged to defend on the plaintiff's request [*see Civ. Code § 2778(4)*].

It has been recognized in this state that even though liability arises from a statute, the liability at the same time may be contractual in nature. Contracts may be made or evidenced by a statute and by conduct ensuing thereon [*County of San Luis Obispo v. Gage (1903) 139 Cal. 398, 406, 73 P. 174]* . Thus, a person who is a principal executive officer, director, or controlling person and who willfully violates the securities law, which violation results in the corporation's liability, may be said to be in an implied contractual relationship of indemnitor to the corporation by statute. For a full discussion of the various obligations of an indemnitor for liability under an express or implied contract of indemnity, including entitlement to attorney's fees and other defense costs, see Ch. 300, *Indemnity and Contribution* .

[5] Statute of Limitations

An action to enforce any right of indemnification created by *Corp. Code § 25505* must be brought before the expiration

of one year after final judgment based on the liability for which the right of indemnification exists [*Corp. Code § 25508*].

[6] California Points and Authorities

For forms of memoranda of points and authorities relating to implied indemnity, see California Points and Authorities, Ch. 115, *Indemnity and Contribution*

[7] Decisions

Federal securities law [Section 10(b) of Securities Exchange Act of 1934 (*15 U.S.C. § 78j(b)*) and SEC *Rule 10b-5*] do not define right of contribution between persons liable or potentially liable as defendants in civil action; however, judicially created implied right of contribution approved. *Musick, Peeler v. Wausau Ins. (1993) 508 U.S. 286, 113 S. Ct. 2085, 124 L. Ed. 2d 194, 200, 202-205*

Right of contribution under federal securities law [Section 10(b) of Securities Exchange Act of 1934 (*15 U.S.C. § 78j(b)*) and SEC *Rule 10b-5*] is judicially created right requiring damages to be apportioned in accordance with defendants' relative culpability, rather than pro rata. *Smith v. Mulvaney (9th Cir. 1987) 827 F.2d 558, 560-561*

[8] Text References

Ballantine & Sterling, California Corporation Laws, § 463.07 (Matthew Bender)

Marsh & Volk, *Practice Under the California Securities Laws, Ch. 14, § 14.07* (Matthew Bender)

[9] Cross References

For a related form, *see § 515.400*

For forms for complaints relating to implied indemnity, see Ch. 300, *Indemnity and Contribution*

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45-515 California Forms of Pleading and Practice--Annotated § 515.428

§ 515.428 Complaint for Contribution [Corp. Code § 25505] for Liability for Violation of Corporate Securities Law of 1968--By Adjudged Tortfeasor Against Unadjudged Joint Tortfeasor

[1] FORM Complaint for Contribution [Corp. Code § 25505] for Liability for Violation of Corporate Securities Law of 1968--By Adjudged Tortfeasor Against Unadjudged Joint Tortfeasor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR
vs.	)	CONTRIBUTION
_____ [*name*],	)	(Violation of Corporate
Defendant(s).	)	Securities Law of 1968)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 515.400, Paragraph 1* .]

2. [*Fictitious name allegation, if appropriate. See § 515.400, Paragraph 2* .]

3. On _____ [*date*], defendant was _____ [*specify position related to liability, e.g.,* a broker-dealer acting jointly with plaintiff as underwriter of the _____ (*name*) Corporation's new offering of 6 percent debentures by virtue of an express agreement between the corporation and plaintiff and defendant

as its underwriters. A true copy of the agreement is attached as Exhibit A and incorporated by reference].

4. On _____ [that date *or specify other date*] plaintiff and defendant _____ [*describe violation of securities law, e.g.,* mutually prepared, disseminated, and circulated a "tipster" sheet containing information to the effect that the price of the debentures was about to rise rapidly because of the market operations of certain persons related to those underwriters conducted for the purpose of raising the price of the securities. These acts of plaintiff and defendant were committed willfully and unlawfully in _____ (*specify locality*), California, to induce purchases of such securities].

5. On _____ [*date*], in an action entitled _____, filed in the _____ [*name*] Court, Action No. _____, judgment was rendered against plaintiff herein for commission of the above acts. [A _____ (true *or* certified) copy of that judgment is attached as Exhibit B and incorporated by reference.] As a result of such judgment, plaintiff herein became liable for the entire judgment rendered in the sum of $_____, consisting of _____ [*describe, e.g.,* $_____ in damages, $_____ as costs of such action, plus interest at the legal rate].

6. Because defendant is similarly liable, plaintiff is entitled to contribution from defendant based on defendant's proportionate share of the adjudged total liability in the above-described action. This liability amounts to _____ [*proportion, e.g.,* one-half] of plaintiff's liability, or the amount of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For contribution in the sum of $_____;

2. For interest on this sum at the legal rate;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 515.400.*]

[2] Use of Form

This complaint is for use in an action for contribution by a person who has been adjudged liable for violation of the civil liability provisions of the Corporate Securities Law of 1968 against another person similarly liable but who was not named in the previous action [*see Corp. Code § 25505*].

All persons liable under the civil liability provisions of the Corporate Securities Law of 1968 have a right of contribution against all other persons similarly liable, based on each person's proportionate share of the total liability [*Corp. Code § 25505*]. This complaint is a separate action for contribution [*see Corp. Code § 25508, discussed under § 515.433[5]*] available when defendant is alleged to be with plaintiff but was not named in the underlying action. If the parties are joint defendants, a motion for contribution should be made at the end of the original action when one defendant has overpaid his or her portion of the judgment [*see Code Civ. Proc. § 875*].

For further discussion, see Marsh & Volk, *Practice Under the California Securities Laws, § 14.07[3]* (Matthew Bender).

[3] Allegations

This complaint alleges:

- The act committed by plaintiff and defendant in violation of the securities law (Paragraph 4).
- The fact of plaintiff's liability for such act and the established amount thereof (Paragraph 5).
- The similar liability of defendant in a proportionate amount for which plaintiff is entitled to contribution (Paragraph 6) [*see Corp. Code § 25505*].

[4] Statute of Limitations

An action maintained to enforce any right of contribution created by *Corp. Code § 25505* must be brought before the expiration of one year after final judgment based on the liability for which the right of contribution exists [*Corp. Code § 25508*].

[5] Cross References

For a related form, *see § 515.400*

For forms for seeking contribution against joint tortfeasors by motion made at the end of an action against joint defendants, see Ch. 300, *Indemnity and Contribution*

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45-515 California Forms of Pleading and Practice--Annotated § 515.429

§ 515.429 Affirmative Defense to Complaint for Contribution--Plaintiff Was Willful Violator of Securities Law and Defendant was Negligent Violator [Corp. Code § 25505]

[1] FORM Affirmative Defense to Complaint for Contribution--Plaintiff Was Willful Violator of Securities Law and Defendant was Negligent Violator [Corp. Code § 25505]

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

Plaintiff's violation of the securities law at issue herein, which gave rise to the liability for which plaintiff seeks contribution herein, was willful in nature in that _____ [*describe willfulness, e.g.,* plaintiff was a director of the _____ (*name of parent*) Corporation, the securities of which plaintiff and defendant had mutually arranged to sell to _____ (*name of subsidiary*) Corporation; and plaintiff knew that _____ (*name of parent*) Corporation wholly owned the beneficial interest of the outstanding common stock of _____ (*name of subsidiary*) Corporation, rendering the transaction contemplated, and then consummated, a "wash sale"]. Defendant's own violation of the securities law in the same instance, however, was merely negligent in that _____ [*describe negligence, e.g.,* he/she did not know, nor should have known, that the facts would give rise to the "wash sale" but, instead, reasonably relied on plaintiff, who initiated the illegal sale of the security interests in violation of the law].

[2] Use of Form

This affirmative defense may be used in an answer to a complaint for contribution based on the mutual liability of plaintiff and defendant for a violation of the securities law [*see § 515.427*], when defendant contends the plaintiff was a willful violator of the law whereas defendant was only guilty of a negligent breach [*see Corp. Code § 25505*].

[3] Willful Violator as Having No Contribution Right Against Negligent Violator

No person whose willful violation of any provision of the Corporate Securities Law of 1968 that has given rise to any liability has any right of contribution against any other person guilty merely of a negligent violation [*Corp. Code §*

25505].

[4] Cross References

For a related form, *see § 515.428*

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45-515 California Forms of Pleading and Practice--Annotated § 515.430

§ 515.430 Affirmative Defense to Complaint for Contribution--Plaintiff Was Willful Violator of Securities Law and Principal Executive Officer, Director, or Contracting Person of Defendant Corporation [Corp. Code § 25505]

[1] FORM Affirmative Defense to Complaint for Contribution--Plaintiff Was Willful Violator of Securities Law and Principal Executive Officer, Director, or Contracting Person of Defendant Corporation [Corp. Code § 25505]

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

Plaintiff's violation of the securities law which gave rise to the liability for which he/she seeks contribution herein was willful in nature in that _____ [*describe willfulness, e.g.,* he/she had supplied all information to the attorneys who drafted defendant corporation's application for qualification of the securities herein, and knew he/she had failed to honestly supply on such form the information that he/she had been the subject of a recent investigation hearing before the Securities and Exchange Commission. Plaintiff knew that such omitted information was required on this form by the Commissioner of Corporations. By failing to draft the application properly, the effectiveness of the later qualification by notification of the securities here involved was suspended by the Commissioner just before the time of the transaction which constituted the violation herein of the securities law]. At the time of the willful acts plaintiff was _____ [a principal executive officer *or* a director *or* a controlling person] of defendant corporation [in that plaintiff _____ (*describe position, e.g.,* was the president *or* held 60 percent of the common stock *or other*) of the company].

[2] Use of Form

This affirmative defense is for use in an answer to a complaint for contribution based on the plaintiff's and defendant's mutual liability for a violation of the Corporate Securities Law of 1968 [*see § 515.427*] where plaintiff's liability is willful and defendant is the corporation of which the plaintiff was a principal executive officer, a director, or a controlling member [*see Corp. Code § 25505*].

[3] Management's Inability to Demand Corporate Contribution

No principal executive officer, director, or controlling person of a corporation whose willful violation has given rise to any liability under the securities law may have any right of contribution against such corporation [*Corp. Code § 25505*].

[4] Cross References

For a related form, *see § 515.428*

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45-515 California Forms of Pleading and Practice--Annotated § 515.431

§ 515.431 Affirmative Defense--Defendant's Acts Regarding Securities Conformed to Written Opinion of Commissioner of Corporations or Attorney General [Corp. Code § 25700]

[1] FORM Affirmative Defense--Defendant's Acts Regarding Securities Conformed to Written Opinion of Commissioner of Corporations or Attorney General [Corp. Code § 25700]

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

The matters complained of herein and attributed to defendant as allegedly wrongful acts _____ [done *or* omitted] were _____ [performed *or* abstained from] in good faith by defendant in conformity with _____ [a rule *or* contents of a form *or* a permit *or if promulgated by Commissioner of Corporations,* an order *or if promulgated by Commissioner of Corporations or Attorney General* a written interpretive opinion] of the _____ [Commissioner of Corporations *or* Attorney General] of the State of California, issued on _____ [*date*], entitled _____, and _____ [contained at _____ (*cite source*) *and/or* a true copy of which is attached as Exhibit A and incorporated by reference]. That _____ [*specify issuance*] was to the effect that _____ [*describe portion to which defendant's behavior conformed*]. [This opinion had been requested by defendant on _____ (*date*), with respect to the matters herein involved and had been issued expressly for defendant's particular situation.]

[2] Use of Form

This affirmative defense is for use in the answer to any complaint seeking liability under the provisions of the Corporate Securities Law of 1968 when the defendant's acts or omissions conformed in good faith to an official issuance of the Commissioner of Corporations or the Attorney General [*see Corp. Code § 25700*]. For discussion of this defense, see *§ 515.29*.

[3] State Statutes

Nonliability for reliance on official issuance of Commissioner of Corporations or Attorney General. *Corp. Code § 25700*

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45-515 California Forms of Pleading and Practice--Annotated § 515.432

§ 515.432 Complaint in Interpleader [Code Civ. Proc. § 386(b)] by Surety Against Claimants--On Security Issuer's Statutory Bond [Corp. Code § 25216(e)]

[1] FORM Complaint in Interpleader [Code Civ. Proc. § 386(b)] by Surety Against Claimants--On Security Issuer's Statutory Bond [Corp. Code § 25216(e)]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
	)	NO. _____
vs.	)	COMPLAINT IN INTERPLEADER
	)	[Amount demanded _____
_____ [*name*],	)	(exceeds *or* does not exceed) $10,000]
[and DOES I through _____,]	)	[LIMITED CIVIL CASE]
Defendants.	)	
	)	
	)	

Plaintiff alleges:

1. At all times herein mentioned plaintiff _____ [*name of surety*] was, and now is, a corporation duly organized and existing under the laws of the State of _____ [*specify state*], authorized to engage and engaged in the surety insurance business in the State of California, with its principal place of business at _____ [*street address and if any, city*], _____ County, California.

2. Defendant _____ [*name*] is, and at all times herein mentioned was, a resident of

_____County, California, residing at _____ [*street address and if any, city*]; defendant _____ [*name*] is, and at all times herein mentioned was, a resident of _____ County, California, residing at _____ [*street address and if any, city*]; [*continue to allege any additional defendants claiming against the bond*].

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I- _____, inclusive, and therefore sues these defendants by these fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously-named defendants has a claim on the bond herein described.]

4. At all times herein mentioned, _____ [*name of principal*] was [*specify capacity if other than individual, e.g.*, a corporation duly organized under and by virtue of the laws of the State of _____ (*specify state*), and was] an issuer employing agents in California in connection with a _____ [security *or* transaction] qualified under Section _____ of the Corporations Code.

5. On or about _____ [*date*], plaintiff, as surety, and _____ [*name of principal*], as principal, made, executed, and delivered to the California Commissioner of Corporations, an issuer's bond No. _____ in the amount of $10,000, conditioned as required by law, and particularly by the provisions of *Section 25216 of the Corporations Code* of the State of California. The bond was in effect from _____ [*date*], until _____ [*date*], when it was canceled.

6. By the provisions of the bond and of *Section 25216 of the Corporations Code*, the total aggregate liability of plaintiff, as surety, under the bond is limited to the sum of $10,000.

7. Each of the defendants asserts a claim against plaintiff on the bond for loss or damage claimed to have been suffered as a result of the wrongful acts of _____ [*name of principal*], as a securities issuer, during the period the bond was in effect and as a result of the failure of _____ [*name of principal*] to honestly and faithfully perform its obligations and undertakings under the Corporate Securities Law of 1968. These claims are as follows: _____ [*specify in separately lettered subparagraphs the name of each claimant together with the nature and amount of each claim*].

8. Plaintiff cannot ascertain _____ [the validity of the defendants' respective claims *or* what part, if any, of the amount of plaintiff's obligation should be paid to each defendant *or both if appropriate*]. By reason of these multiple and potentially conflicting claims, plaintiff is in doubt as to which of the defendants, if _____ [either *or* any], it should pay and how the total amount of plaintiff's liability on the bond should be equitably distributed _____ [between *or* among] the defendants if the total number of valid claims exceeds the total amount of plaintiff's obligation.

9. Because of defendants' claims, plaintiff will suffer irreparable injury, possibly will be subject to judgments in excess of its obligation under the bond, and will be subjected to a multiplicity of actions and extensive litigation unless the defendants are required to interplead in this action and are restrained from instituting any other proceedings against plaintiff.

[10. Plaintiff has, at the time of filing this complaint, deposited with the clerk of this Court the sum of $10,000, which is the amount of its obligation under the bond.]

11. Plaintiff has incurred an obligation to pay reasonable attorney's fees and costs in this action.

WHEREFORE, plaintiff prays judgment as follows:

1. That defendants, and each of them, be ordered to interplead and litigate their respective claims against _____ [*name of principal*] and to the sums that plaintiff may be obligated to pay the defendants, or _____ [each *or* either] of them, under the bond;

2. That defendants, and each of them, be enjoined from instituting or prosecuting any action against plaintiff by reason of its issuer's bond furnished on behalf of _____ [*name of principal*], as principal, except to come into this action, and to set up their respective claims against said bond;

3. That [on delivering $10,000 to the clerk of this Court,] plaintiff be discharged from all liability to any of the defendants with respect to the bond;

4. For reasonable attorney's fees and costs, to be paid _____ [out of the sum heretofore deposited by plaintiff with the court clerk *or* subtracted from any amounts plaintiff may be required to pay on its obligation under the bond], as the Court may direct; and

5. For such other and further relief as the court may deem proper.

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

CAUTION:

A complaint seeking a temporary restraining order or preliminary injunctive relief must either be verified or be accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan G. Co. v. San Juan R. etc. Assn. (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* . For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order or preliminary injunction, see Ch. 314, *Interpleader* , and Ch. 303, *Injunctions* .

[2] Use of Form

This form is for use by a surety on a securities issuer's statutory bond to require all claimants on the bond to interplead in the action so that the liability of the surety on the bond can be adjudicated in one action [*Code Civ. Proc. § 386*; *Corp. Code § 25216(e)*]. The bond is required to be in the amount of $10,000 and to stipulate that the issuer will comply with the provisions of *Corp. Code § 25216* and with the rules and orders issued thereunder [*Corp. Code § 25216(e)*; *10 Cal. Code Reg. § 260.216.15*].

Attorney's fees and costs may be allowed to the plaintiff in interpleader out of the amount in dispute that is deposited with the court [*see Code Civ. Proc. § 386.6*].

[3] Asserting Interpleader by Cross Complaint

If the surety has been made a defendant in an action brought on one or more of the claims, the surety may file a cross complaint in interpleader. If counsel modifies this form for use as a cross complaint, the cross complaint must be verified [*Code Civ. Proc. § 386(b)*; for further discussion of interpleader, and proceeding by cross complaint, see Ch.

314, *Interpleader*].

[4] Statute of Limitations

No suit may be maintained to enforce any liability on the bond unless brought within two years after the contract of sale or other act on which the suit is based [*Corp. Code § 25216(e)*].

[5] Allegations

This complaint alleges:

- The plaintiff's capacity (Paragraph 1);
- The residence of the defendants (Paragraph 3); the principal's capacity as a securities issuer (Paragraph 4);
- The execution, amount, and conditions of the bond (Paragraphs 5, 6);
- Breach of the condition of the bond and multiple claims in excess of the amount of plaintiff's liability on the bond (Paragraphs 7, 8) [*Corp. Code § 25216(e)*];
- The plaintiff's exposure to multiple judgments in excess of its liability (Paragraph 9) [*Code Civ. Proc. § 386(b)*]; and
- Incurrence of attorney's fees and costs in interpleading (Paragraph 11) [*Code Civ. Proc. § 386.6*].

The form also includes optional allegations to include fictitious defendants (Paragraph 2) [*see Code Civ. Proc. § 474*; for further discussion, see Ch. 20, *Allegations Commonly Used*] and to indicate that the amount of the liability on the bond has been deposited with the clerk of the court (Paragraph 10) [*see Code Civ. Proc. § 386(c)*].

[6] Cross References

For alternative allegations of defendant's capacity, see Ch. 20, *Allegations Commonly Used*

For discussion and additional forms relating to interpleader, see Ch. 314, *Interpleader*

[7] California Legal Forms

For a securities bond issued under *Corp. Code § 25216(e)* and *10* Cal. Code Reg. § 260.216.15(a), see *California Legal Forms, Ch. 6H, Qualification of Securities, § 6H.273* (Matthew Bender)

[8] State Statutes

Action in interpleader when amount of money involved does not exceed $25,000 is limited civil case. *Code Civ. Proc. § 86(a)(2)*

Complaint in interpleader. *Code Civ. Proc. § 386(b)*

Effect of depositing funds at time of filing complaint in interpleader. *Code Civ. Proc. § 386(c)*

Order restraining parties to action from instituting or further prosecuting any other proceedings. *Code Civ. Proc. § 386(f)*

Allowance of costs and attorney's fees in action for interpleader. *Code Civ. Proc. § 386.6*

Recovery of costs and attorney's fees in interpleader. *Code Civ. Proc. § 386.6*

"Issuer" defined. *Corp. Code § 25010*

Bond on filing for security issuer's certificate. *Corp. Code § 25216(e)*

Statute of limitations on action on security issuer's bond. *Corp. Code § 25216(e)*

[9] State Administrative Regulations

Bond required to be in amount of $10,000. *10 Cal. Code Reg. § 260.216.15*

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45-515 California Forms of Pleading and Practice--Annotated § 515.433

§ 515.433 Complaint for Damages Based on Breach of Contract [Civ. Code § 3300]--By Purchaser Against Stockbroker--Failure to Deliver Some or All of Shares Purchased

[1] FORM Complaint for Damages Based on Breach of Contract [Civ. Code § 3300]--By Purchaser Against Stockbroker--Failure to Deliver Some or All of Shares Purchased

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s)*],	)	COMPLAINT FOR DAMAGES
[and DOES I through _____],	)	(Breach of Contract)
Defendant(s).	)	
	)	
	)	

Plaintiff alleges:

1. [*Fictitious name allegation, if appropriate. See § 515.400, Paragraph 2.*]

2. On or about _____ [*date*], plaintiff purchased from defendant stockbroker _____ [*quantity*] shares of _____ [*issuer and type of stock, e.g.,* Acme Typewriter Co. Class A common] stock for the sum of $_____. On that day plaintiff paid defendant stockbroker that sum, and defendant receipted for the sum in writing and agreed in writing to deliver those shares to plaintiff.

3. Thereafter, defendant stockbroker _____ [failed to deliver to plaintiff any of the agreed-upon shares

or delivered to plaintiff only _____ (*number*) shares, and failed to deliver to plaintiff the balance of _____ (*number*) shares]. Defendant still refuses to deliver to plaintiff the [balance of] the agreed-on shares although demand has been made on defendant to deliver those shares to plaintiff. The reasonable market value of the [undelivered] shares on the date that defendant should have delivered them to plaintiff was $_____ per share, for a total value of $_____.

4. By reason of defendant's breach of his/her/its agreement with plaintiff, plaintiff has been damaged in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages in the sum of $_____.

2. For costs of suit herein incurred.

3. For such other and further relief as the court may deem proper.

_____ [*firm name*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Use of Form

This complaint may be used in an action by a purchaser of stock against a stockbroker for damages based on breach of contract when the broker has failed to deliver to the purchaser some or all of the shares purchased.

For forms to use in actions involving conversion of securities by stockbrokers, see Ch. 150, *Conversion* .

For an overview of the licensing, regulation, and basic duties of securities broker-dealers under California and federal law, see *§ 515.13[4][a]*. For detailed discussion of securities broker dealers, see Marsh & Volk, Practice Under the California Securities Laws, Ch. 13, *Regulation of Agents, Broker-Dealers, and Investment Advisers* (Matthew Bender).

[3] Burden of Proof

The burden of proof of a contract for purchase of stock is on the plaintiff purchaser [*Bandoni v. Walston (1947) 79 Cal. App. 2d 178, 184-185, 179 P.2d 365]* .

[4] Statute of Frauds

A contract or modification of a contract for the sale or purchase of a security is enforceable whether or not there is a writing signed or a record authenticated by the party against whom enforcement is sought, even if the contract or modification is not capable of performance within one year of its making [*Com. Code § 8113* (effective January 1, 1997)].

[5] Statute of Limitations

The two-year statute of limitations under *Code Civ. Proc. § 339(1)* applies to actions against stockbrokers for their carelessness and negligence [*Twomey v. Mitchum, Jones & Templeton, Inc. (1968) 262 Cal. App. 2d 690, 724, 69 Cal. Rptr. 222]* .

[6] Decisions

Complaint charging defendant with exercising dominion over property inconsistent with ownership of plaintiff sets forth good cause of action for conversion when no special demurrer for uncertainty is interposed. *Haigler v. Donnelly (1941) 18 Cal. 2d 674, 681, 117 P.2d 331*

Stockbroker, having executed customer's order for purchase of securities, was required to deliver securities to customer on receipt of his advances for prices and his commissions whenever he called for them; customer was entitled to have securities maintained in situation in which they were available for delivery to him on tender and demand. *Edwards v. Jenkins (1932) 214 Cal. 713, 720, 7 P.2d 702*

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A. Securities Regulation

45-515 California Forms of Pleading and Practice--Annotated § 515.434

§ 515.434 Complaint for Rescission of Sale of Securities or Damages--Unlicensed Broker-Dealer [Corp. Code § 25501.5]

[1] FORM Complaint for Rescission of Sale of Securities or Damages--Unlicensed Broker-Dealer [Corp. Code § 25501.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff, vs.	)	NO. _____
_____ [*name*(*s*)],	)	COMPLAINT FOR (RESCISSION *or* DAMAGES)
Defendant.	)	[Amount demanded (exceeds *or* does not exceed)
	)	$10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 515.400, Paragraph 1*.]

2. [*Fictitious name allegation, if appropriate. See § 515.400, Paragraph 2*.]

3. On or about _____ [*date*], _____ [plaintiff *or* defendant] offered and sold to _____ [defendant *or* plaintiff] a total of _____ [*number*] shares of _____ [*describe securities, e.g.,* the common stock of X Corporation] _____ [*describe consideration, e.g.,* at the price of $_____ per share for a total price of $_____].

4. At the time of sale and purchase, defendant was required to be licensed as a broker-dealer, but had not applied for and secured from the Commissioner of Corporations a certificate under *Corporations Code Section 25200* authorizing defendant to act in that capacity.
[*EITHER, in action for rescission of sale:*]

5. As a result of the above-described acts, defendant is liable to plaintiff, who is entitled to, and hereby does, rescind the above-described purchase. Plaintiff _____ [herewith tenders *or* will tender before entry of judgment] to defendant _____ [(*number*) shares of the above-described securities *or* $_____, the consideration paid for the security plus interest at the legal rate].
[*OR, if security is no longer owned:*]

5. As a result of the above-described acts, defendant is liable to plaintiff, who has been damaged in the sum of $_____.
[*CONTINUE with the following:*]

WHEREFORE, plaintiff prays judgment against defendant as follows:
[*EITHER, in action for rescission of sale:*]

1. _____, [$_____, the consideration paid for the security plus interest at the legal rate, less the amount of any income received on the security *or* The security plus the amount of any income received by defendant on the security].
[*OR, in action for damages by purchaser:*]

1. $_____, the difference between the price at which the security was bought plus interest at the legal rate from date of purchase, and the value of the security at the time it was disposed of by plaintiff plus amount of any income received on the security by plaintiff.
[*OR, in action for damages by seller:*]

1. $_____, the difference between the value of the security at the time of filing the complaint plus the amount of any income received by defendant on the security, and the price at which security was sold plus interest at the legal rate from date of sale.

2. Because defendant _____ [*name of unlicensed broker-dealer*] caused injury or damage to _____ [*name of plaintiff*] as a result of performing services for which a license is required under [*Corp. Code § 25210 et seq. or Corp. Code § 25230 et seq.*], plaintiff is entitled to treble damages as provided by *Code of Civil Procedure Section 1029.8*.

3. For costs of suit and reasonable attorney's fees.

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
_____ [*signature*]
_____ [*typed name*]
Attorney for plaintiff _____ [*name*]

[2] Use of Form

This form of complaint is for use in an action for damages or rescission of a purchase or sale of securities made by a broker-dealer who was unlicensed at the time of that purchase or sale. It may be used by either a purchaser or seller.

The cause of action set forth in this form is authorized by *Corp. Code § 25501.5(a)*. For discussion of that section, see Broker-Dealer's Liability for Failure to Obtain License Before Sale, in the Introduction to this Part. For further coverage, see Marsh & Volk, Practice Under the California Securities Laws, Ch. 14, *Civil Liabilities* (Matthew Bender).

[3] Allegations

The complaint alleges:

- The purchase or sale by or to plaintiff of securities by defendant broker-dealer (Paragraph 3).

- The fact that defendant was required to be licensed but did not have a certificate in effect at the time of purchase or sale authorizing defendant to act in that capacity (Paragraph 4).

- If the securities are still owned, the fact that plaintiff rescinds the sale by proper tender of the securities or the consideration paid for the securities (Paragraph 5).

[4] Damages Recoverable

In addition to the damages recoverable under *Corp. Code § 25501.5(a)(2)-(5)*, as set forth in this form, the court in its discretion may award reasonable attorney's fees and costs to a prevailing plaintiff under that section [*Corp. Code § 25501.5(b)*]. Furthermore, *Code Civ. Proc. § 1029.8* provides that any unlicensed person who causes injury or damage to another person as a result of providing goods or performing services for which a license is required under *Corp. Code § 25210 et seq.* or *Corp. Code § 25230 et seq.* will be liable to the injured person for treble the amount of damages assessed in a civil action in any court having proper jurisdiction [*Code Civ. Proc. § 1029.8(a)*].

[5] State Statutes

Certificate requirement for broker-dealer. *Corp. Code § 25210*

Action for rescission or damages against unlicensed broker-dealer. *Corp. Code § 25501.5*

Treble damages available. *Code Civ. Proc. § 1029.8*

[6] Text References

Ballantine & Sterling, California Corporation Laws, Ch. 21, *Corporate Securities* , § 466.05B. (Matthew Bender)

Marsh & Volk, Practice Under the California Securities Laws, Ch. 13, *Regulation of Agents, Broker-Dealers, and Investment Advisers* , Ch. 14, *Civil Liabilities* (Matthew Bender)

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[Reserved]

§§ 515.435[Reserved]

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B. Franchise Regulation
1. Offer And Sale Under The Franchise Investment Law

45-515 California Forms of Pleading and Practice--Annotated § 515.450

§ 515.450 Complaint for Damages or Rescission of Sale of Franchise [Corp. Code § 31300]--Failure to Register Franchise Offer [Corp. Code § 31110] or Properly Exercise Seasoned Franchisor Exemption [Corp. Code § 31101]--By Franchisee Against Seller

[1] FORM Complaint for Damages or Rescission of Sale of Franchise [Corp. Code § 31300]--Failure to Register Franchise Offer [Corp. Code § 31110] or Properly Exercise Seasoned Franchisor Exemption [Corp. Code § 31101]--By Franchisee Against Seller

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	COMPLAINT FOR _____
_____ [*name*],	)	[RESCISSION *or*
Plaintiff,	)	DAMAGES]
vs.	)	(Failure to _____
_____ [*name* (*s*)],	)	[Register Franchise *or*
Defendant(s).	)	Properly Exercise
	)	Exemption Privilege])
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:
FIRST CAUSE OF ACTION
(Failure to _____ [Register *or* Secure Exemption])

1. [*Capacity and residence of defendant. See § 515.400, Paragraph 1.*]

2. [*Fictitious names of defendants, if appropriate. See § 515.400, Paragraph 2.*]

3. On or about _____ [*date*], at _____, California, defendant offered [and sold] to plaintiff a franchise for _____ [*name of franchise business*], of which defendant was the _____ [franchisor *or, if purchased from one holding an area franchise,* subfranchisor (for the area of _____) *or* previous franchisee making the offer (and sale) on the account of _____ (*name of franchisor or subfranchisor*), the _____ (franchisor *or* subfranchisor)] for a fee of $_____. By the terms of the franchise agreement, plaintiff was given the right to engage in the business of _____ [offering *or* selling *or* distributing] _____ [*specify goods or services involved*] under a marketing plan or system prescribed in substantial part by defendant [_____ (on account of *or* in the name of *or* on behalf of) _____ (*name of franchisor*), the franchisor], whereby the operation of plaintiff's business pursuant to that plan or system would be substantially associated with the _____ [trademark *or other commercial symbol*] designated by _____ [defendant *or* the franchisor (or its affiliate)]. A true copy of the franchise agreement is attached as Exhibit A and incorporated by reference.
[EITHER, *if defendant failed to register franchise:*]

4. Defendant [willfully] failed to register the franchise offer with the Commissioner of Corporations at the time of the offer [and sale] to plaintiff [, and it has not been registered at any time prior to the filing of this complaint].
[OR, *if defendant failed to comply with seasonal Franchiser exemption requirements*]

4. At the time of the offer [and sale] of the franchise to plaintiff, defendant [willfully] had not complied properly with the exemption from registration of franchises applicable to large, seasoned franchisors in that _____ [*specify, e.g.,* defendant (willfully) did not disclose to plaintiff in writing at least 48 hours prior to plaintiff's execution of a binding franchise agreement the information required by *Section 31101(c) of the Corporations Code*]; nor was defendant's franchise offering registered at that time [, or at any time subsequent thereto].

5. [*If rescission is requested, allege* Plaintiff herewith tenders to defendant all materials constituting the grant of the franchise, consisting of _____ (*describe papers, e.g.,* an agreement entitled Franchise Agreement attached to this complaint as Exhibit A), and on which defendant has to date received $_____ as net profit].

6. [*If damages are requested, allege* Defendant's violation of the requirements of the Franchise Investment Law as described above proximately caused plaintiff damages in that _____ (*describe damages*)].
SECOND CAUSE OF ACTION
(Joint and Several Liability of Defendant _____[*name*]

7. Plaintiff incorporates by reference as though fully set forth below each and every allegation of Paragraphs 1-6 of the First Cause of Action.

8. Defendant _____ [*name*] is, and at all times herein mentioned was, _____ [*allege appropriate capacity and residence of joint defendant as shown in see § 515.400, Paragraph 1*] and was, at the time of the acts alleged herein, _____ [*select one of the following:*]
[*EITHER*]

a person who, directly or indirectly, controlled _____ [*name of primary defendant*] in that _____ [*describe control, e.g.,* he/she held the largest single block of stock of that company,

consisting of _____ percent of the common stock].
[*OR*]

a principal member of management of _____ [*name of primary defendant*] in that _____ [*position, e.g.,* he/she was a partner in such firm *or* president *or other principal executive officer or* a director of that corporation *or* _____ (*a person occupying a similar status to, or performing similar functions of, the foregoing*) of that organization].
[*OR*]

an employee of _____ [*name of primary defendant*], who materially aided in the act or transaction constituting the violation hereinabove complained of, in that such defendant _____ [*describe act, e.g.,* insisted on, and caused, the continuing sale of franchises during the time he/she was aware the Commissioner of Corporations had issued a hearing under the stop order on the sale hereinabove described].

WHEREFORE, plaintiff prays judgment against defendant(s)[, and each of them,] as follows:

1. [*If for rescission, add* For rescission of the franchise agreement and restitution of the sum of $_____, which represents the fee paid to defendant as consideration for the franchise, with interest thereon at the legal rate, less the sum of $_____ received by plaintiff as net profit on that franchise];

2. [*If for damages, add* For $_____ as damages, with interest at the legal rate];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 515.400.*]

[2] Use of Form

This complaint is for use in an action for rescission or damages, or both, against a defendant who has offered or sold a franchise in violation of the provisions of the seasoned franchisor exemption [*see Corp. Code § 31101*] or the registration requirement [*see Corp. Code §§ 31110, 31300*]. For an allegation that may be incorporated in the foregoing form to allege a material misrepresentation in registration filings or disclosure materials required to be submitted in obtaining the seasoned franchisor exemption or in requesting approval of the franchise offer, *see § 515.451*.

For discussion of liability for violation of the requirement to properly secure a seasoned franchisor's exemption from registration or for violation of the requirement to register a franchise, see *§ 515.59*.

The second cause of action identifies particular defendants as being either management principals of the defendant or personnel of the defendant who materially aided in the violation alleged in the First Cause of Action, and who, therefore, are jointly and severally liable with the defendant franchise-offeror [*see Corp. Code § 31302*]. For discussion of such liability, see *§ 515.61*.

[3] Allegations

The First Cause of Action in the complaint alleges:

- The capacity and residence of the defendant (Paragraph 1).
- Fictitious names, if any, of defendants (Paragraph 2).
- The offer and sale of the franchise (Paragraph 3).
- The failure to either register the franchise offering or properly employ the procedures for the seasoned franchisor exemption (if rescission is re quested, the willfulness of the action should be alleged) (Paragraph 4).
- If rescission is requested, the tender of the franchise, with an accounting of income earned to date (Paragraph 5).
- If damages are requested either in lieu of or in addition to rescission, the damages proximately caused (Paragraph 6) [*see Corp. Code § 31300*].

The second cause of action alleges that the named defendant was a management principal of the defendant or one of defendant's personnel who materially aided in the violation, thus subjecting such defendant to joint and several liability with the defendant in the first cause of action [*see Corp. Code § 31302*].

[4] State Statutes

Seasoned franchisor exemption from registration. *Corp. Code § 31101*

Registration requirements for franchises. *Corp. Code § 31110*

Rescission or damages for registration or exemption violations or misrepresentation in connection therewith. *Corp. Code § 31300*

Joint and several liability of management principals and materially aiding personnel. *Corp. Code § 31302*

Statute of limitations on registration and related misrepresentation violations. *Corp. Code § 31303*

[5] Administrative Regulations

Registration and exemptions from registration of offers and sales of franchises. *10 Cal. Code Reg. § 310.002 et seq.*

[6] Decisions

"Willful" as used in *Corp. Code § 31300* refers to act that is committed knowingly and intentionally; no showing of intent to violate law, evil motive, or purpose to gain undue advantage is required; good faith or reasonable care are not defenses to "willfulness" of violations of *Corp. Code §§ 31101, 31110,* and *31119.* *Dollar Systems v. Avcar Leasing Systems (9th Cir. 1989) 890 F.2d 165, 172-173*

If offer or sale of franchise is made in California, choice of some other law in franchise agreement does not defeat franchisee's right to rescission. *Dollar Systems v. Avcar Leasing Systems (9th Cir. 1989) 890 F.2d 165, 171* (applying

California law)

Proof that principal knew that business was franchise, and referred to it as franchise, and that attorney had advised against franchising because of amount of paperwork required was sufficient to establish that failure to register was willful violation. *Neptune Society Corp. v. Longanecker (1987) 194 Cal. App. 3d 1233, 1244-1245, 240 Cal. Rptr. 117*

Sale for fee, without registration, of business substantially associated with seller's commercial symbol, which seller represents will constitute franchise and include marketing plan or system to be prescribed in substantial part by seller, was unlawful sale of unregistered franchise. *People v. Kline (1980) 110 Cal. App. 3d 587, 595, 168 Cal. Rptr. 185*

[7] Text References

Marsh & Volk, *Practice Under the California Securities Laws, Ch. 40, Registration of Franchises Under the California Investment Franchise Law, §§ 40.05 -40.13, 40.17* (Matthew Bender)

Witkin, Summary of California Law, Vol. 9, *Corporations*, § 286 (9th ed. 1989)

[8] Cross References

For related forms, *see §§ 515.400, 515.451*, and 52.

For forms relating to rescission generally, see Ch. 490, *Rescission and Restitution*

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45-515 California Forms of Pleading and Practice--Annotated § 515.451

§ 515.451 Allegation for Use in Complaint for Rescission or Damages Arising Out of Sale of Franchise--Franchisor's Material Misrepresentation in Registration Application [Corp. Code § 31200] or Seasoned Franchisor Exemption Disclosure [Corp. Code § 31202]

[1] FORM Allegation for Use in Complaint for Rescission or Damages Arising Out of Sale of Franchise--Franchisor's Material Misrepresentation in Registration Application [Corp. Code § 31200] or Seasoned Franchisor Exemption Disclosure [Corp. Code § 31202]

1. Defendant made the sale by _____ [registering the franchise offer with the Commissioner of Corporations *or* exercising of the seasoned franchisor exemption from formal registration of the franchise offer with the Commissioner of Corporations]. In so doing, defendant _____ [*if registration involved* filed a _____ (notice *or* report) as part of an application for registration *or, if exemption is involved* provided defendant with a written disclosure in the form of _____ (*describe, e.g.,* an offering brochure)], in which defendant willfully _____ [made an untrue statement of a material fact *or* omitted to state a material fact required to be stated therein]. The material fact, as it should have been stated, was that _____ [*describe, e.g.,* any franchise could be terminated by _____ (*year*) if at least 50 franchises were not in operation at that time]; whereas defendant, by its _____ [statement *or* omission] [appearing at page _____] _____ [*describe effect of fraudulent disclosure, e.g.,* made it appear that termination of any franchise was not dependent on the number of other franchises in operation at any time]. A true copy of defendant's _____ [application _____ (including the notice in issue *or* including the report in issue) *or* written disclosure to defendant] is attached as Exhibit _____ and incorporated by reference.

[2] Use of Form

This allegation may be substituted for Paragraph 4 of § 515.450 (complaint for rescission or damages arising out of sale of a franchise) if the violation consisted of a willful act of material misrepresentation made in filings with the Commissioner of Corporations [*see Corp. Code § 31200*] or in written disclosures made in connection with processing of the seasoned franchisor exemption [*see Corp. Code §§ 31202, 31300*].

For a discussion of liability for misrepresentation in filings with the commissioner or in securing an exemption, see the discussion in *§ 515.59*.

[3] State Statutes

Misrepresentation in franchise filings with Commissioner of Corporations. *Corp. Code § 31200*

Misrepresentation in processing seasoned franchisor exemption. *Corp. Code § 31202*

[4] Text References

Marsh & Volk, *Practice Under the California Securities Laws, Ch. 40, Registration of Franchises Under the California Franchise Investment Law, § 40.16[1]* (Matthew Bender)

[5] Cross References

For a related form, *see § 515.450*

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45-515 California Forms of Pleading and Practice--Annotated § 515.452

§ 515.452 Allegation for Use in Complaint for Rescission or Damages Arising Out of Sale of Franchise--Materially Changed Offering of Which Commissioner of Corporations Was Not Notified [Corp. Code §§ 31123, 31200]

[1] FORM Allegation for Use in Complaint for Rescission or Damages Arising Out of Sale of Franchise--Materially Changed Offering of Which Commissioner of Corporations Was Not Notified [Corp. Code §§ 31123, 31200]

1. On or about _____ [*date*], defendant registered the offering of such franchise[, which was thereafter _____ (amended *or* renewed) on _____ (*date*),] with the Commissioner of Corporations. However, subsequent to the registration [and subsequent processing as described above], and prior to and during the time of the offer and sale of the franchise to plaintiff, there was a material change in the information contained in the registration filing as originally _____ [submitted *or* amended *or* renewed], in that _____ [*describe material change, e.g.,* the franchise agreements no longer contained exclusive rights within the counties in which they were located], whereas [in the latest filing on record,] in the registered offering at the time of the sale _____ [*describe matter before change, e.g.,* these exclusive county franchises were granted as a matter of course to each purchasing franchisee]. Nevertheless, at the time of the change and until the time of sale to plaintiff [and the date of this complaint], defendant [willfully] failed to give notification of such material change to the Commissioner of Corporations, as required by law, in an application to amend the registration.

[2] Use of Form

This allegation may be substituted for Paragraph 4 of § 515.450 when a franchisee seeks rescission or damages for sale of a franchise on the ground that a material change in the nature of a registered offering was made of which the Commissioner of Corporations was not properly notified [*see Corp. Code § 31200*; *see also § 515.53[4]*].

Corp. Code § 31200 provides that "[i]t is unlawful for any person willfully to make any untrue statement of a material fact in any application, notice or report filed with the commissioner under [The Franchise Investment Law], or willfully to omit to state in any such application, notice, or report any material fact which is required to be stated therein, or fail

to notify the commissioner of any material change as required by [*Corp. Code § 31123*]." In declaring illegal the failure to notify the commissioner of a material change in a registered offering, the Legislature appears to have inadvertently omitted the word "to," and it may have inadvertently omitted the word "willfully." Since it is not otherwise clear that the Legislature intended to distinguish between the first two types of proscribed activities in *Corp. Code § 31200* (willfully making an untrue statement of material fact and willfully omitting material fact) from a failure to notify the commissioner of a material change, the better practice appears to be to plead the willfulness of the failure to notify.

For a discussion of this type of offense as constituting liability for registration violations, see *§ 515.59*.

[3] Text References

Marsh & Volk, *Practice Under the California Securities Laws, Ch. 40, Registration Under the California Franchise Investment Law, § 40.14* (Matthew Bender)

[4] Cross References

For related forms, *see §§ 515.450* and *515.451*.

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45-515 California Forms of Pleading and Practice--Annotated § 515.453

§ 515.453 Affirmative Defense to Complaint for Failure to Register Franchise--Offer Was Exempt From Registration by Virtue of Proper Exercise of Seasoned Franchisor Exemption [Corp. Code § 31101]

[1] FORM Affirmative Defense to Complaint for Failure to Register Franchise--Offer Was Exempt From Registration by Virtue of Proper Exercise of Seasoned Franchisor Exemption [Corp. Code § 31101]

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

The franchise offer involved here was exempt from all registration requirements under the Franchise Investment Law; and defendant qualified the offer and sale for the exemption allowed by *Section 31101 of the Corporations Code*in the following manner:

(a) At the time of the offer, defendant satisfied the net worth requirement of Paragraph (a) of *Section 31101 of the Corporations Code*because _____ [*describe how net worth qualification was met, e.g.,* defendant's net worth, as shown on its audited financial statement for the fiscal year ended December 31, 1990, was $12,546,000]. That financial statement is part of Exhibit "A" attached and incorporated by reference;

(b) At the time of the offer, defendant satisfied the experience requirement of Paragraph (b) of *Section 31101 of the Corporations Code* because _____ [*describe how experience qualification was met, e.g.,* defendant has had over 300 franchisees continuously since 1971];

(c) Defendant satisfied the disclosure requirements of Paragraph (c) of *Section 31101 of the Corporations Code* by delivering to plaintiff on or about _____ [*date*], which was more than 10 business days prior to the execution by plaintiff of any binding franchise or other agreement and more than 10 business days prior to the receipt by defendant of any consideration paid by plaintiff, a written _____ [*describe, e.g.,* offering circular], a true copy of which is attached, marked exhibit "A" and incorporated by reference, containing all the information required to be disclosed; and

(d) Prior to the offer and sale defendant satisfied requirement of Paragraph (d) of *Section 31101 of the Corporations Code* by filing Notice of Exemption Under *Section 31101 Corporations Code* with the Department of Corporations and paying the related fee. A true copy of that notice [and receipt] is attached, marked as Exhibit "B" and incorporated by reference.

[2] Use of Form

This affirmative defense is for use in an answer to a complaint for damages or rescission of a franchise agreement based on the failure to register a franchise offer [*see § 515.450*] when the defendant has complied with the requirements for exemption from registration set out for seasoned franchisors [*see Corp. Code § 31101*; *see § 515.54[1]*].

This defense would not be required in an answer to a complaint for rescission or damages based on the franchisor's failure to follow the seasoned franchisor exemption requirements (also included in *see § 515.450*). In that situation, denial of the allegation alleging the particular failure to qualify for the exemption [*see, e.g., § 515.450*, second alternative Paragraph 4] would be sufficient.

[3] Administrative Regulation

Form for notice of exemption under *Corp. Code § 31101*; instructions for filing. *10 Cal. Code Reg. § 310.101*

Form for offering circular. *10 Cal. Code Reg. § 310.114.1*

[4] Cross References

For a related form, *see § 515.450*

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PART IV. FORMS
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1. Offer And Sale Under The Franchise Investment Law

45-515 California Forms of Pleading and Practice--Annotated § 515.454

§ 515.454 Affirmative Defense to Complaint for Rescission or Damages Based on Failure to Register Franchise--Franchise Offer Was Exempt From Registration Because Franchise Was Sold by Franchisee or Subfranchisor for Own Account [Corp. Code § 31102]

[1] FORM Affirmative Defense to Complaint for Rescission or Damages Based on Failure to Register Franchise--Franchise Offer Was Exempt From Registration Because Franchise Was Sold by Franchisee or Subfranchisor for Own Account [Corp. Code § 31102]

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

The [area] franchise offer that is the subject of plaintiff's complaint herein was exempt from all registration requirements under the Franchise Investment Law in that the sale was for _____ [a franchise *or* an entire area franchise] of which defendant was the previous _____ [franchisee *or, if area franchise,* subfranchisor]. The sale was made strictly for defendant's own account, and was not effected in any way by or through the franchisor [, notwithstanding the fact that the franchisor had or exercised any right to approve or disapprove the particular transferee].

[2] Use of Form

This affirmative defense is for use in an answer to a complaint for damages or rescission of a franchise agreement based on the franchisor's failure to register a franchise offer [*see § 515.450*] when the defendant was a franchisee reselling a franchise, or a subfranchisor reselling a subfranchise, for his or her own account [*see Corp. Code § 31102* and discussion in *§ 515.54[3]*].

[3] Cross References

For a related form, *see § 515.450*

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45-515 California Forms of Pleading and Practice--Annotated § 515.455

§ 515.455 Complaint for Damages [Corp. Code § 31301]--Purchase of Franchise Based on Reliance on Material Misrepresentation [Corp. Code § 31201]--By Franchisee Against Seller

[1] FORM Complaint for Damages [Corp. Code § 31301]--Purchase of Franchise Based on Reliance on Material Misrepresentation [Corp. Code § 31201]--By Franchisee Against Seller

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR
Plaintiff,	)	DAMAGES
vs.	)	(Purchase of Franchise
_____ [*name*],	)	Based on Reliance on
Defendant.	)	Material
	)	Misrepresentation)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Material Misrepresentation)

1. [*Capacity and residence of defendant. See § 515.400, Paragraph 1.*]

2. [*Fictitious name allegation, if appropriate. See § 515.400, Paragraph 2.*]

3. [*Sale to plaintiff by defendant of particular franchise. See § 515.450, First Cause of Action, Paragraph 3.*]

4. Such offer and sale by defendant to plaintiff was made by means of a[n] _____ [written *or* oral] communication in the form of _____ [*describe form, e.g.,* an offering prospectus, *that is, form must be other than an application, notice, or report filed with the commissioner*] which _____ [included an untrue statement of a material fact *or* omitted to state a material fact necessary in order to make the statements made in such communication, in the light of the circumstances under which they were made, not misleading]. The communication [at page _____] recited that _____ [*restate or quote, e.g.,* the franchisee could learn the business quickly while on the job]. The communication _____ [was untrue in that *or* omitted to state that] _____ [*state true material fact, e.g.,* the franchisee must, in order to learn the business, spend up to six months in training at the franchisor's master business in _____ (*city*), and hire one of the franchisor's special managers at a salary of $_____ to run plaintiff's franchise during that six months]. [A true copy of this communication is attached as Exhibit A and incorporated by reference.]

5. Plaintiff _____ [read *or* heard] this communication prior to the time of sale and purchased such franchise in direct reliance on the statements therein. Plaintiff, at the time of purchase, did not know and had no cause to believe that the statement in question in such communication was false or misleading.

6. As a result of defendant's material misrepresentation described above, plaintiff has sustained damages in the amount of $_____, consisting of _____ [*describe damages, e.g.,* the salary plaintiff was obligated to pay franchisor's manager during plaintiff's training period in _____ (*city*) while his/her franchise was operated in this county, plus plaintiff's living expenses of $_____ during such stay in _____ (*city*), consisting of _____ (*specify*)].

SECOND CAUSE OF ACTION
(Joint and Several Liability)

7. Plaintiff incorporates by reference as though fully set forth below each and every allegation of Paragraphs 1-6 of the First Cause of Action.

8. [*Joint and several liability of principal of defendant named in First Cause of Action or materially aiding employee. See § 515.450, Second Cause of Action, Paragraph 8.*]

WHEREFORE, plaintiff prays judgment against defendant(s) [, and each of them,] as follows:

1. For damages in the sum of $_____;

2. For interest thereon at the legal rate;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 515.400.*]

[2] Use of Form

This complaint is for use in an action for damages caused a franchisee in purchasing a franchise in reliance on a material misrepresentation of the seller [*see Corp. Code § 31201*]. For a discussion of this form of liability, see *§ 515.60*.

The Second Cause of Action is for joint and several liability of management principals of the defendant or personnel of the defendant who materially aided in the violation described in the first cause of action [*see Corp. Code § 31302*].

[3] Allegations

The first cause of action in this complaint alleges, in part, the following:

- The selling of a franchise by means of a material misrepresentation (Paragraph 4) [*see Corp. Code § 31201*].

- Plaintiff's detrimental reliance on the misrepresentation and lack of knowledge that the representation was false or misleading (Paragraph 5).

- Resulting damages to plaintiff (Paragraph 6) [*see Corp. Code § 31301*]

The Second Cause of Action alleges that the named defendant was a management principal of defendant or one of its personnel who materially aided in the violation, thus rendering that defendant jointly and severally liable for the offense described in the First Cause of Action [*see Corp. Code § 31302*].

Anyone who violates *Corp. Code § 31201* by making a material misrepresentation is liable in damages to anyone who does not know or have cause to believe that the statement made was false or misleading and who, while relying on the statement, purchased a franchise [*Corp. Code § 31301*]. Since the liability of any violator of *Corp. Code § 31201* is thus contingent on an aggrieved person's not knowing or having cause to believe that the misrepresentation was false or misleading, it appears that plaintiff should allege and prove such a lack of knowledge (*see* Paragraph 5). However, the Franchise Investment Law also provides that as an affirmative defense to the plaintiff's cause of action, defendant may prove that the plaintiff knew the facts concerning the untruth or omission [*see Corp. Code § 31301*; *see § 515.456*]. This affirmative defense evidently should be used if the defendant seeks to introduce evidence to show that the plaintiff actually knew what the true facts were. This defense would not have to be alleged if defendant seeks to introduce evidence to show only that plaintiff did not believe the misrepresentation since a denial of the allegation would seem to be sufficient.

[4] State Statutes

Misrepresentation in offers and sales of franchises. *Corp. Code § 31201*

Liability for misrepresentation in offers and sales. *Corp. Code § 31301*

Statute of limitations for misrepresentation in offers and sales. *Corp. Code § 31303*

[5] Decisions

Proof that principal materially aided act that was violation (failure to register) and knew that business was franchise, referred to it as franchise, and knew that attorney had advised regarding requirements of franchising was sufficient to impose personal liability. *Neptune Society Corp. v. Longanecker (1987) 194 Cal. App. 3d 1233, 1247, 240 Cal. Rptr. 117*

Cause of action for legal malpractice was stated by franchisees against attorneys who prepared false or misleading prospectus, knowing it would be shown to prospective franchisees and used to induce them to purchase franchises. *Courtney v. Waring (1987) 191 Cal. App. 3d 1434, 1443-1444, 237 Cal. Rptr. 233*

Plaintiff not required to sue literal seller in order to establish liability of management and aiding personnel under *Corp. Code § 31302*; plaintiff only required to establish that seller could have been liable under *Corp. Code § 31201* and *31301*. *Courtney v. Waring (1987) 191 Cal. App. 3d 1434, 1441-1442, 237 Cal. Rptr. 233* (literal seller was bankrupt and had been dismissed from action)

[6] Text References

Marsh & Volk, *Practice Under the California Securities Laws, Ch. 40, Registration of Franchises Under the California Investment Franchise Law, § 40.16[1]* (Matthew Bender)

[7] Cross References

For a related form, *see § 515.450*

For forms relating generally to an action for rescission, see Ch. 490, *Rescission and Restitution*

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45-515 California Forms of Pleading and Practice--Annotated § 515.456

§ 515.456 Affirmative Defense [Code Civ. Proc. § 41.30(b)(2)] to Complaint for Material Misrepresentation--Plaintiff Knew of Facts Concerning Misrepresentation [Corp. Code §§ 31300, 31301]

[1] FORM Affirmative Defense [Code Civ. Proc. § 41.30(b)(2)] to Complaint for Material Misrepresentation--Plaintiff Knew of Facts Concerning Misrepresentation [Corp. Code §§ 31300, 31301]

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

Plaintiff knew the facts concerning the alleged _____ [untruth *or* omission] ascribed to defendant's _____ [registration filings *or* disclosure materials *or* communication] in connection with the sale of the described franchise to plaintiff, in that _____ [*describe, e.g.,* prior to accepting the franchise offer plaintiff had been reliably informed of defendant's training program for franchisees, including the fact that new franchisees are required to train for a six-month period during which a special manager would conduct the franchisee's business for the fees alleged in plaintiff's complaint].

CAUTION:

A federal court in affirming a judgment for rescission and damages has interpreted *Corp. Code § 31300* to mean that the defenses enumerated in that section are not available in the case of violations of *Corp. Code § 31101, 31110,* or *31119,* but only in the case of violations of *Corp. Code § 31200* or *31202* [*Dollar Systems v. Avcar Leasing Systems (9th Cir. 1989) 890 F.2d 165, 172* ; *see* discussion in *§ 515.457*].

[2] Use of Form

This affirmative defense is for use in an answer to a complaint for damages or for rescission of a franchise agreement based on a material misrepresentation made in a franchise registration filing or a required seasoned franchisor exemption disclosure [*see §§ 515.450, 515.451*] or in connection with the sale of a franchise [*see § 515.455*] when the plaintiff knew the facts concerning the untrue representation or omission [*see Corp. Code §§ 31300, 31301*]. For

discussions of this defense, see *§§ 515.59[3]* and *515.60[3]*.

[3] Defense of Plaintiff's Knowledge as to Misrepresented Facts

The defendant is not liable for a material misrepresentation made in any filings with the commissioner, in disclosures required for obtaining a seasoned franchisor exemption, or in offers and sales of franchises, if he or she is able to prove that the plaintiff knew the facts concerning the untruth or omission [*Corp. Code §§ 31300, 31301*]. It appears that this defense should be raised in the answer as new matter, since denial of an allegation in the complaint that the plaintiff did not know the representation was false is not sufficient to show that plaintiff knew what the true facts were.

[4] Cross References

For a related form, *see § 515.455*

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45-515 California Forms of Pleading and Practice--Annotated § 515.457

§ 515.457 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Complaint for Material Misrepresentation--Defendant's Exercise of Care as to, and Lack of Knowledge of, Misrepresentation [Corp. Code §§ 31300, 31301]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Complaint for Material Misrepresentation--Defendant's Exercise of Care as to, and Lack of Knowledge of, Misrepresentation [Corp. Code §§ 31300, 31301]
[*EITHER*]

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

Defendant exercised reasonable care with respect to the making of the statements described in plaintiff's complaint concerning the _____ [registration filings *or* disclosure materials *or* offer and sale to plaintiff of the franchise], in that _____ [*describe, e.g.,* defendant cross checked the information behind the representations from diverse sources that should have known the facts independently of one another]. As a result, defendant did not know of the alleged _____ [untruth *or* omission].

If the defendant had exercised reasonable care with respect to the making of the statements described in the complaint in connection with the _____ [registration filings *or* disclosure materials *or* offer and sale to plaintiff of the franchise], defendant would not have known of the alleged _____ [untruth *or* omission] because _____ [*explain, e.g.,* the error in accounting originated with the independent accounting firm that drafted the financial statements for the franchisor in this matter, and was it carried forward from several years before in the accounting firm's annual reporting, so that no one could have discovered the inaccuracy from the financial information itself].

CAUTION:
A federal court in affirming a judgment for rescission and damages has interpreted *Corp. Code § 31300* to mean that the "reasonable care defense" or defendant's lack of knowledge is not available in the case

of violations of *Corp. Code § 31101*, *31110*, or *31119*, but that this defense is limited to violations of *Corp. Code § 31200* or *31202* [*Dollar Systems v. Avcar Leasing Systems (9th Cir. 1989) 890 F.2d 165, 172]* .

[2] Use of Form

This affirmative defense is for use in an answer to a complaint for damages or rescission of a franchise agreement based on a material misrepresentation made in a franchise registration filing or a required seasoned franchisor exemption disclosure [*see §§ 515.450, 515.451*] or in connection with the sale of a franchise [*see § 515.455*] when the defendant in the exercise of reasonable care did not know, or would not have known, of the untruth or omission [*see Corp. Code §§ 31300, 31301*]. For discussions of this defense, see *§§ 515.59[4]* and *515.60[3]*.

The specific violations involved in the case referred to in the CAUTION, *above* [*Dollar Systems v. Avcar Leasing Systems (9th Cir. 1989) 890 F.2d 165, 172]* , were:

- The franchisor's failure to register the offering.

- Failure to file a notice of exemption.

- Failure to disclose certain actions against it and its principals, some of which were specifically required by *10 Cal. Code Reg. § 310.114.1* to be disclosed.

- Failure of the disclosure to contain certain financial information required by *10 Cal. Code Reg. § 310.111.2*.

Defendant's argument focused on whether its conduct was willful within the meaning of *Corp. Code § 31300*. The court's statement that the defenses enumerated in *Corp. Code § 31300* are only available in cases involving violations of *Corp. Code §§ 31200* and *31202* was made in the context of reasoning that a willful violation did not require a finding that defendant knew it was violating the law. The fact that it knew that it had not registered or filed a notice of exemption and the fact that it knew what it did not disclose were sufficient [*Dollar Systems v. Avcar Leasing Systems (9th Cir. 1989) 890 F.2d 165, 172]* . Thus, the defense provided by this form may not be available to the extent that the material misrepresentations involve the failure to disclose items required to be disclosed by *Corp. Code §§ 31101* or *31119* or related regulations.

[3] Cross References

For a related form, *see § 515.455*

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45-515 California Forms of Pleading and Practice--Annotated § 515.458

§ 515.458 Allegation for Use in Complaint for Damages or Rescission of Franchise Agreement Based on Registration Violation or Misrepresentation--Improper Offer and Sale of Area Franchise--By Subfranchisor Against Seller

[1] FORM Allegation for Use in Complaint for Damages or Rescission of Franchise Agreement Based on Registration Violation or Misrepresentation--Improper Offer and Sale of Area Franchise--By Subfranchisor Against Seller

On or about _____ [*date*], defendant offered and sold an area franchise to plaintiff for _____ [*name of franchise business*], of which defendant was the _____ [franchisor *or* previous subfranchisor *or describe licensed status of seller*] for a consideration of $_____. Defendant thereby granted to plaintiff the right as a subfranchisor to sell or negotiate the sale of franchises of the defendant _____ [in the name *or* on behalf] of _____ [the defendant *or other*] as franchisor [in the area of _____ (*describe geographical area*)]. A true copy of the franchise agreement is attached hereto as Exhibit A and incorporated by reference.

[2] Use of Form

This allegation may be substituted for Paragraph 3 of the complaint for rescission or damages for violation of franchise regulations or seasoned franchisor exemption requirements [*see § 515.450*; *see also §§ 515.451, 515.452*] or for damages suffered when a franchise is purchased based on material misrepresentation [*see § 515.455*], when the franchise being offered and sold was an area franchise and the plaintiff is the subfranchisor of the franchise [*see § 515.51[3]*].

[3] Cross References

For related forms, *see §§ 515.450, 515.455*.

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45-515 California Forms of Pleading and Practice--Annotated § 515.459

§ 515.459 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Complaint for Rescission of Franchise Agreement or for Damages Based on Registration Violation or Misrepresentation--Defendant Sent Approved Written Notice of Violation of Franchise Investment Law [Corp. Code §§ 31303, 31304]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Complaint for Rescission of Franchise Agreement or for Damages Based on Registration Violation or Misrepresentation--Defendant Sent Approved Written Notice of Violation of Franchise Investment Law [Corp. Code §§ 31303, 31304]

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

More than 90 days prior to commencement of the action herein, and on or about _____ [*date*], _____ [defendant *or specify other party*] delivered to plaintiff a written notice disclosing the violation of the Franchise Investment Law complained of herein, stating in effect that _____ [*give substance of notice, e.g.,* defendant as franchisor had failed to register the franchise offering under which the sale of the franchise had been made to plaintiff through an improper attempt to exercise the seasoned franchisor exemption from registration]. The form of this notice had first been approved by the Commissioner of Corporations. A true copy of this notice is attached as Exhibit 1 and incorporated by reference.

[2] Use of Form

This affirmative defense based on a special statute of limitations may be used in an answer to a complaint for damages or rescission of a franchise agreement based on a violation under the Franchise Investment Law pertaining to registration, failure to obtain a seasoned franchisor exemption, or to a misrepresentation in the offer or sale of a franchise. The defendant first must have delivered to the plaintiff an officially approved form of notice advising plaintiff of a violation of *Corp. Code §§ 31110* (registration requirement), 31200 (misrepresentation in filed documents), 31201 (misrepresentation in a franchise transaction), or 31202 (misrepresentation in required exemption disclosures), after which the plaintiff must have failed to bring the action within 90 days [*see Corp. Code §§ 31303, 31304*]. For discussions of the limitations on these particular kinds of actions, see *§§ 515.59[2]* and *515.60[2]*.

[3] Cross References

For related forms, *see §§ 515.450, 515.455*.

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§ 515.460 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Complaint for Damages or Rescission of Franchise Agreement Based on Registration or Exemption Violation or Misrepresentation--Defendant's Acts Regarding Franchise in Conformity With Written Opinion of Commissioner of Corporations or Attorney General [Corp. Code § 31511]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Complaint for Damages or Rescission of Franchise Agreement Based on Registration or Exemption Violation or Misrepresentation--Defendant's Acts Regarding Franchise in Conformity With Written Opinion of Commissioner of Corporations or Attorney General [Corp. Code § 31511]

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

The matters complained of herein and attributed to defendant as wrongfully _____ [done *or* omitted] were _____ [performed *or* abstained from] in good faith by defendant in conformity with _____ [a rule *or* the contents of a form *or* a permit *or if promulgated by Commissioner of Corporations* an order *or promulgated by Commissioner of Corporations or Attorney General* a written interpretive opinion] of the _____ [Commissioner of Corporations *or* Attorney General] of the State of California, as issued on _____ [*date*], entitled _____, and _____ [contained at _____ (*cite source*) *or* a true copy of which is attached as Exhibit 1 and incorporated by reference]. This _____ [*specify official issuance, e.g.,* order] was to the effect that _____ [*describe relevant portion*]. [The opinion had been requested by defendant on _____ [*date*], in respect to the matters herein involved and had been issued expressly for defendant's particular situation.]

[2] Use of Form

This affirmative defense is for use in an answer to a complaint for damages or rescission of a franchise agreement based on any violation of the Franchise Investment Law when the defendant's acts or omissions conformed to the official

guidelines of the Commissioner of Corporations or the Attorney General [*see Corp. Code § 31511*].

[3] Reliance on Rule, Form, Order, or Opinion

There is no liability under the Franchise Investment Law for any act done or omitted in good-faith conformity with either (1) any rule, form, order, or written interpretive opinion of the Commissioner of Corporations or (2) any opinion of the Attorney General. Such reliance constitutes a defense even if the rule, form, order, or written interpretive opinion is later amended, rescinded, or determined by judicial or other authority to be invalid for any reason [*Corp. Code § 31511*]. Although *Corp. Code § 31511* includes "any opinion of the Attorney General," it is unlikely that an informal, oral opinion, such as an informal conversation with a deputy Attorney General, is sufficient.

[4] Cross References

For a related form, *see § 515.400*

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45-515 California Forms of Pleading and Practice--Annotated § 515.461

§ 515.461 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Allegation of Joint and Several Liability for Franchise Investment Law Violation--Defendant Did Not Know or Believe in Existence of Violation [Corp. Code § 31302]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Allegation of Joint and Several Liability for Franchise Investment Law Violation--Defendant Did Not Know or Believe in Existence of Violation [Corp. Code § 31302]

AS A [(*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

Defendant _____ [*name of answering joint defendant*] had no _____ [knowledge *or* reasonable grounds to believe in the existence] of the facts alleged in the complaint, and therefore is not liable for any violation in the transaction between defendant _____ [*name of primary defendant*] and plaintiff by means of a _____ [material misrepresentation *or* sale to plaintiff of a franchise not appropriately processed before the Commissioner of Corporations] in that _____ [*explain lack of knowledge or grounds for reasonable belief*].

[2] Use of Form

This affirmative defense may be used in an answer to a complaint for damages or rescission of a franchise agreement based on a violation of the Franchise Investment Law [*see §§ 515.450, 515.455,* Second Cause of Action] in which the defendant is alleged to be jointly and severally liable with the primary defendant but where the defendant had no knowledge or basis for belief in the facts behind the cause of action [*see Corp. Code § 31302*]. For a description of this defense, see *§ 515.61*.

[3] Decisions

Officer seeking to avoid personal liability on basis of no knowledge exception of *Corp. Code § 31302* has burden of proving it; when only evidence was that officer was present at time offer was made, imposition of personal liability was proper. *Neptune Society Corp. v. Longanecker (1987) 194 Cal. App. 3d 1233, 1247-1248, 240 Cal. Rptr. 117*

When violation of franchise law has been established by franchisees as to fraudulent sales of franchises without required registration and disclosure, burden of proof is on individual officers of franchisor to prove their exemption from liability through proof of their lack of knowledge of acts giving rise to liability. *Spahn v. Guild Industries Corp. (1979) 94 Cal. App. 3d 143, 158, 156 Cal. Rptr. 375* ; *Eastwood v. Froehlich (1976) 60 Cal. App. 3d 523, 531, 131 Cal. Rptr. 577*

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45-515 California Forms of Pleading and Practice--Annotated § 515.462

§ 515.462 Complaint for Injunction or Damages for Interference With Right of Franchisee to Join Trade Association [Corp. Code § 31302.5(a)]--By Franchisee Against Franchisor

[1] FORM Complaint for Injunction or Damages for Interference With Right of Franchisee to Join Trade Association [Corp. Code § 31302.5(a)]--By Franchisee Against Franchisor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR
vs.	)	_____ [INJUNCTION
_____ [*name*],	)	*or* DAMAGES]
Defendant.	)	(Interference with Right
	)	of Franchisee to Join
	)	Trade Association)
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 515.400, Paragraph 1.*]

2. [*Fictitious names of defendants. See § 515.400, Paragraph 2.*]

3. [*If county of filing complaint is not residence of defendant, add* The franchise of plaintiff that is affected by the below-described violation of defendant does business in _____ County (*county in which complaint is*

filed)].

4. [*Sale to plaintiff by defendant of particular franchise. See § 515.450, First Cause of Action, Paragraph 3.*]

5. While the franchise agreement has remained in effect, defendant has _____ [prohibited the right of free association among the plaintiff and other franchisees of defendant for lawful purposes *or* _____ (restricted *or* inhibited) the right of plaintiff as franchisee to join a trade association], in that defendant _____ [*describe offense, e.g.,* through his/her various officers, agents, and employees has threatened to withhold all new supplies from plaintiff should plaintiff alone or with others attempt to form an association of franchisees for purposes of developing better business practices and a better bargaining position with defendant *or* issued by letter a statement of company policy forbidding the joining of trade associations, a true copy of which is attached hereto as Exhibit B and incorporated by reference. Through various officers, agents, and employees of defendant's company, defendant has threatened to cancel the franchise if plaintiff violates that policy].

6. [*If plaintiff seeks preliminary injunctive relief, add* Plaintiff nevertheless _____ (is in the process of (forming and) joining *or* belongs to) a trade association of _____ (franchisees of the defendant company *or other prohibited association*) in direct opposition to the _____ (restrictions *or* inhibiting actions *or* prohibitions) of defendant, in that _____ (*describe, e.g.,* plaintiff has assisted in having incorporated a nonprofit association of those franchisees for the purposes of promoting better franchise business practices and dealings with defendant).

7. [Plaintiff has (or will have) suffered damages on account of defendant's above-described violation of plaintiff's rights of free association above-described including consulting of counsel and taking various legal and business steps to cope with defendant's repressive measures in that regard (including _____ (*describe, e.g.,* retaining attorneys to negotiate with defendant for free trade association of defendant's franchisees, and to organize and negotiate with various other franchisees)). _____ (These damages amount to $_____ *or* The exact amount of these damages cannot be ascertained at this time. Plaintiff will amend this complaint to state these damages when ascertained)].

8. Plaintiff has incurred reasonable attorney's fees in this matter in the amount of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For a [preliminary and] permanent injunction prohibiting defendant during the entire period of the franchise with plaintiff, or in any renewal or continuation of any kind thereafter, through any officer, agent, or employee, from directly or indirectly interfering, restricting, inhibiting, or prohibiting in any way the right of plaintiff from entering into or remaining in free association with any trade association or other association for lawful purposes, and from taking any retaliatory action of any sort in franchise dealings with plaintiff;

2. [For damages incurred as a result of defendant's actions to prevent _____ (trade *or* lawful) association of plaintiff (in the amount of $_____)];

3. For reasonable attorney's fees [in the amount of $_____];

4. For costs of suit herein incurred; and

5. For any other and further relief that the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

[*Verification. See § 515.400.*]

CAUTION:
If preliminary and permanent injunctions are sought, counsel should prepare the complaint either by filing affidavits (or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*]) in support of the allegations in the complaint or by pleading evidentiary facts which would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1 ; San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* and verifying the complaint [*see Code Civ. Proc. § 527*].

[2] Use of Form

This complaint is for use in an action by a franchisee to enjoin the franchisor from interfering with the franchisee's right to engage in any sort of trade association activity and to obtain damages for that interference [*see Corp. Code § 31302.5(a)*]. For a discussion of the franchisee's rights of association, see *§ 515.62*.

[3] Allegations

This complaint alleges, in part, the following:

- Facts showing that show that venue is in the county in which plaintiff's franchise is located when the county is not defendant's residence (Paragraph 3) [*see Corp. Code § 31302.5(a)*].

- Defendant's interference with the plaintiff's right to free association (Paragraph 5) [*see Corp. Code § 31220*].

- Plaintiff's present trade association activity, if preliminary relief is sought (Paragraph 6).

- Damages resulting from defendant's actions, if damages are sought (Paragraph 7).

- Reasonable attorney's fees (Paragraph 8) [*see Corp. Code § 31302.5(a)*].

[4] State Statutes

Injunctive relief generally. *Code Civ. Proc. §§ 526, 527*

Right of franchisees to join trade association or freely associate. *Corp. Code § 31220*

Liability for violation of franchisee's rights of association. *Corp. Code § 31302.5*

[5] Text References

Marsh & Volk, *Practice Under the California Securities Laws, Ch. 40, Registration of Franchises Under the California Investment Franchise Law, § 40.16[3]* (Matthew Bender)

[6] Cross References

For a related form, *see § 515.400*

For discussion and forms relating to injunctive relief, see Ch. 303, *Injunctions*

For discussion and forms relating to proper joinder of plaintiffs and class actions, see Ch. 395, *Parties*

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Chapter 515 SECURITIES AND FRANCHISE REGULATION
PART IV. FORMS
B. Franchise Regulation
1. Offer And Sale Under The Franchise Investment Law

45-515 California Forms of Pleading and Practice--Annotated §§ 515.463-515.479

[Reserved]

§§ 515.463[Reserved]

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PART IV. FORMS
B. Franchise Regulation
2. Termination, Transfer, Or Nonrenewal Generally Under The Franchise Relations Act

45-515 California Forms of Pleading and Practice--Annotated § 515.480

§ 515.480 Complaint for Damages for Failure to Comply With Franchise Relations Act in Terminating or Not Renewing Franchise [Bus. & Prof. Code § 20035]--By Franchisee Against Franchisor

[1] FORM Complaint for Damages for Failure to Comply With Franchise Relations Act in Terminating or Not Renewing Franchise [Bus. & Prof. Code § 20035]--By Franchisee Against Franchisor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR
Plaintiff,	)	DAMAGES
vs.	)	(Improper _____
_____ [*name*],	)	[Termination *or*
Defendant.	)	Nonrenewal] of Franchise)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*If franchise business was not operated in California, add:* Plaintiff is, and at all times mentioned herein was, domiciled in and a resident of _____ County, California (*or allege other capacity and residence of plaintiff*).

2. [*Capacity and residence of defendant. See § 515.400, Paragraph 1* .]

3. [*Fictitious names of defendants, if appropriate. See § 515.400, Paragraph 2* .]

4. On or about _____ [*date*], defendant as franchisor of _____ [*name of business*] granted to plaintiff a franchise to conduct business of such enterprise at _____ [*specify location in California if plaintiff not otherwise domiciled here*]. A true copy of the franchise agreement is attached as Exhibit A and incorporated by reference. Plaintiff continuously conducted the business of the franchise from that time until the time of the event described herein [through (successive) renewal(s) of the franchise agreement].

5. On or about _____, [*date*], defendant _____ [terminated *or* refused to renew] the franchise and thereafter refused to supply and service plaintiff's business as called for under the franchise agreement [and ordered plaintiff off the premises leased to plaintiff under the franchise arrangement]. That _____[termination *or* nonrenewal] was improper under _____ Business and Professions Code Section in that _____ [*specify reasons; if termination, e.g.,* good cause did not exist for the termination *or* defendant failed to send plaintiff proper notice of termination, affording a reasonable opportunity to cure any cited default *or* no cause existed for immediate termination without opportunity to cure default *or if nonrenewal, e.g.,* defendant failed to provide plaintiff with proper notice 180 days prior to the intended nonrenewal of the franchise *or* no statutory ground existed which permitted defendant to refuse to renew the franchise].

6. In _____ [terminating *or* failing to renew] the franchise in accordance with the provisions of the Franchise Relations Act, *Business and Professions Code Sections 20000-20041*, defendant was obligated but failed to [properly] offer to repurchase from plaintiff the resalable current inventory of the franchise that met defendant's then present standards that was held for use or sale in plaintiff's business. The fair repurchase price of the inventory would have been $_____, representing _____ [the fair wholesale market value thereof *or* the price paid by plaintiff therefor], less the amount of $_____ as sums owing defendant or subsidiaries thereof by plaintiff.

7. In addition, plaintiff has suffered damages resulting from defendant's improper _____ [termination *or* nonrenewal] of the franchise by _____ [*specify, e.g.,* having to store the inventory and close down the business] in the amount of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the amount of $_____;

2. For interest thereon at the legal rate from _____ [*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
[*Verification, if desired. See § 515.400.*]

[2] Use of Form

This complaint is for use in an action by a franchisee for the type of relief available under the Franchise Relations Act from a franchisor who improperly has terminated or failed to renew an existing franchise [*see Bus. & Prof. Code § 20035*]. For discussions of proper grounds and procedure for termination or nonrenewal of franchise, and a franchisor's obligations on failure to comply, see § 518.80 et seq.

[3] Allegations

This complaint alleges, in part:

- Plaintiff's domicile in California (if franchise was not conducted here) (Paragraph 1) [*see Bus. & Prof. Code § 20015*].

- The existence of the franchise contract (Paragraph 4).

- Improper termination or nonrenewal of the franchise by defendant (Paragraph 5).

- Defendant's failure to repurchase plaintiff's inventory, and the amount owing therefor (Paragraph 6) [*see Bus. & Prof. Code § 20035*].

- Any consequential damages resulting from defendant's act (Paragraph 7) [*see Civ. Code § 3300*].

[4] Remedy Under Franchise Relations Act

The Franchise Relations Act does not explicitly provide a form of civil liability to a franchisee if a franchisor violates the provisions of the act. Instead, the act merely provides that the failure of a franchisor to terminate [*see Bus. & Prof. Code § 20020*] or to fail to renew [*see Bus. & Prof. Code § 20025*] a franchise, other than in accordance with the legislative requirements, obligates the franchisor to make a prescribed type of repurchase offer to the franchisee [*see Bus. & Prof. Code § 20035*, discussed in *§ 515.87*]. *Bus. & Prof. Code § 20035* indirectly refers to this obligation as a "liability" on the franchisor's part since, as a limitation on the items required to be covered in the repurchase offer, the statute states that the franchisor "shall not be liable" for offering to buy certain personalized items of the franchisee. The act further provides that, except as expressly provided in the act, nothing in the legislation abrogates the right of a franchisee "to sue under any other law" [*Bus. & Prof. Code § 20037*].

The repurchase of inventory is not the exclusive remedy for wrongful termination of a franchise pursuant to *Bus. & Prof. Code § 20035*, and a franchisee can pursue its breach of contract claim against a franchisor for wrongful termination of a franchise agreement [*JRS Prods., Inc. v. Matsushita Elec. Corp. of Am. (2004) 115 Cal. App. 4th 168, 178, 8 Cal. Rptr. 3d 840* (complaint for termination of franchise without good cause sounds in contract, not tort, and therefore awards of compensatory and punitive damage for intentional interference with prospective economic advantage are impermissible)].

The Franchise Relations Act thus has given the franchisor two alternatives: either the franchisor complies with the provisions as to termination or nonrenewal of franchises or else the franchisor consequently is bound by the particular terms of a repurchase offer as imposed by statute. If the franchisor fails to make the binding offer, the franchisee should be able to sue for any damages resulting from the failure of the franchisor to make the statutory purchase offer.

[5] State Statutes

Liability to make repurchase offer for improper termination or nonrenewal of franchise. *Bus. & Prof. Code § 20035*

[6] Decisions

Repurchase of inventory is not exclusive remedy for wrongful termination of franchise pursuant to *Bus. & Prof. Code § 20035*; plaintiff can pursue breach of contract claim against franchisor for wrongful termination of franchise agreement. *JRS Prods., Inc. v. Matsushita Elec. Corp. of Am. (2004) 115 Cal. App. 4th 168, 178, 8 Cal. Rptr. 3d 840*

Franchisor that wrongfully terminated franchise without good cause was liable to franchisee for breach of contract, not intentional interference with prospective economic advantage; essential nature of claim was breach of contract, which cannot be transmuted into tort liability by claim that breach interfered with franchisee's business. *JRS Prods., Inc. v. Matsushita Elec. Corp. of Am. (2004) 115 Cal. App. 4th 168, 183, 8 Cal. Rptr. 3d 840*

Distributorship agreement is governed by *Com. Code § 2207(2)*, so that attorney's fee provisions in invoices between manufacturer and distributor are additional term of dealership agreement. *Boyd v. Oscar Fisher Co. (1989) 210 Cal. App. 3d 368, 378-379, 258 Cal. Rptr. 473*

[7] Cross References

For a related form, *see § 515.400*

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B. Franchise Regulation
2. Termination, Transfer, Or Nonrenewal Generally Under The Franchise Relations Act

45-515 California Forms of Pleading and Practice--Annotated §§ 515.481-515.499

[Reserved]

§§ 515.481[Reserved]

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3. Trade Practices And Termination Or Nonrenewal Of Petroleum Products Franchises

45-515 California Forms of Pleading and Practice--Annotated § 515.500

§ 515.500 Complaint for Treble Damages Based on Franchisor's Prohibiting Petroleum Products Franchisee to Deal With Outside Suppliers [Bus. & Prof. Code § 21140.4]--Requiring Franchisee to Purchase Franchisor's Automotive Accessories [Bus. & Prof. Code § 21140.2]--By Franchisee Against Franchisor

[1] FORM Complaint for Treble Damages Based on Franchisor's Prohibiting Petroleum Products Franchisee to Deal With Outside Suppliers [Bus. & Prof. Code § 21140.4]--Requiring Franchisee to Purchase Franchisor's Automotive Accessories [Bus. & Prof. Code § 21140.2]--By Franchisee Against Franchisor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR
Plaintiff,	)	TREBLE DAMAGES
vs.	)	(Petroleum Products
_____ [*name*],	)	Franchisor's Prohibiting
Defendant.	)	Franchisee's Dealings with
	)	Outside Suppliers)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 515.400, Paragraph 1.*]

2. [*Fictitious names of defendants, if appropriate. See § 515.400, Paragraph 2.*]

3. On or about _____ [*date*], defendant petroleum _____ [refiner *or* distributor] as franchisor of _____ [*name of business or of petroleum products*] granted to plaintiff a franchise to become a gasoline dealer of defendant's business at _____ [*state location*]. A true copy of the franchise agreement is attached as Exhibit A and incorporated by reference. [Plaintiff continuously has conducted that franchise business to the present time.]

4. During the existence of plaintiff's franchise, defendant has required plaintiff to purchase only those _____ [*describe automotive accessories, e.g.,* tires *or* batteries *or* motor oil] which are sold by defendant, in addition to the petroleum products defendant supplies plaintiff under the terms of the franchise agreement. Defendant has effected this requirement by _____ [*describe, e.g.,* including a provision in the franchise contract by which plaintiff is required to make purchases of such items exclusively from defendant, on penalty that the franchise will be terminated if the requirement is not complied with, a true copy of which provision is attached as Exhibit B and incorporated by reference *or* refusing to supply plaintiff with any or all amounts of petroleum products unless plaintiff purchases prescribed amount of defendant's accessories and those of no other supplier].

5. Plaintiff has been injured in his/her business and property by reason of defendant's violation of law in requiring such tie-in automotive accessory purchases, in that _____ [*describe type of injury, e.g.,* plaintiff has been forced to comply with defendant's demands and carry only defendant's automotive accessories as described above and has been denied free access to cheaper competitive products, with consequent greater profits to plaintiff and greater savings to consumers, and a more available supply to meet consumer demand and the challenge of competition in this area *or specify individual injuries*]. The amount of those damages is _____ [$_____ *or* not ascertainable at this time but this complaint will be amended to state those damages when they become known], and for which injury plaintiff is entitled to three times the amount of those damages.

6. Plaintiff has incurred reasonable attorney's fees in this matter [in the amount of $_____].

WHEREFORE, plaintiff prays judgment as follows:

1. For treble the amount of damages found to be due to plaintiff in this matter [, or $_____];

2. For reasonable attorney's fees in the amount _____ [of $_____ *or* to be determined];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 515.400.*]

[2] Use of Form

This complaint is for use in an action for treble damages against a petroleum products franchisor who has required the plaintiff franchisee to purchase the franchisor's automotive accessories in violation of the provisions of *Bus. & Prof.*

Code § 21140.2. For discussion of ability of franchisees to purchase accessories anywhere, see the discussion in *§ 515.114[5]*.

[3] Allegations

This complaint alleges, in part:

- The granting of the petroleum products franchise (Paragraph 3).

- Defendant's requirement that plaintiff purchase tie-in automotive accessories along with its petroleum products (Paragraph 4) [*see Bus. & Prof. Code § 21140.2*].

- Damages resulting from defendant's act in violation of trade practice regulation, for which plaintiff is entitled to treble damages (Paragraph 5).

- Reasonable attorney's fees (Paragraph 6) [*see Bus. & Prof. Code § 21140.4*].

[4] State Statutes

Improper tie-in requirements in petroleum products franchises. *Bus. & Prof. Code § 21140.2*

Liability, damages, venue, and limitations for improper tie-in requirement. *Bus. & Prof. Code § 21140.4*

[5] Cross References

For a related form, *see § 515.400*

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45-515 California Forms of Pleading and Practice--Annotated § 515.501

§ 515.501 Complaint for Damages [Civ. Code § 3300] for Disallowing Petroleum Products Franchisee's Successor-in-Interest Designation of Bus. & Prof. Code § 21140.6(l)--Failure to Honor Successor's Election to Operate Franchise--By Franchisee's Successor Against Franchisor

[1] FORM Complaint for Damages [Civ. Code § 3300] for Disallowing Petroleum Products Franchisee's Successor-in-Interest Designation of Bus. & Prof. Code § 21140.6(l)--Failure to Honor Successor's Election to Operate Franchise--By Franchisee's Successor Against Franchisor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Action for Petroleum Products Franchisor's Disal-
_____ [*name*],	)	lowing Franchisee's Designation of
Defendant.	)	Successor in Interest)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 515.400, Paragraph 1.*]

2. [*Fictitious names of defendants, if appropriate. See § 515.400, Paragraph 2.*]

3. On or about _____ [*date*], _____ [*name*], plaintiff's predecessor-in-interest, received from defendant as franchisor of _____ [*name of business*], a franchise to carry and sell petroleum products of such defendant at _____ [*location*] for a term of _____ [*duration*]. A true copy of the franchise agreement is attached hereto as Exhibit A and made a part hereof.

4. On or about _____ [*date*], _____ [*name of predecessor*] designated plaintiff, who was his/her _____ [spouse *or* adult child], as his/her successor in interest on a form provided by defendant and delivered to defendant after it was completed. [_____ (At the same time *or* On or about _____ (*date*)), _____ (*name of predecessor*) also deposited with defendant(, at the latter's request,) the amount of $_____ as a sum estimated to be necessary to compensate defendant for rent for a period of 21 days after _____'s (*name of predecessor*) death, and also, at the defendant's request, _____ (*describe compliance with defendant's other requirements for designation which were necessary for the discharge or performance of other franchise obligations, such as insurance provisions*).]

5. On or about _____ [*date*], _____ [*name of predecessor*] died. On or about _____ [*date*], and within 21 days of his/her death, plaintiff gave written notice to defendant of plaintiff's election to assume and operate the franchise. [In response to defendant's request, this notice fully described plaintiff's business background and credit-worthy qualifications.] Plaintiff satisfied the reasonable qualifications defendant then required of franchise dealers for the operation of service stations. A true copy of that notice is attached as Exhibit B and incorporated by reference.

6. On or about _____ [*date*], within three business days after giving defendant the above-described notice, plaintiff wrote to defendant, offering to assume the franchise [and indicating his/her readiness to commence operation of the franchise within _____ (10 *or specify shorter time*) days after plaintiff assumed the franchise]. A true copy of that offer is attached as Exhibit C and incorporated by reference.

7. However, defendant, on or about _____ [*date*], rejected plaintiff's bid to assume operation of the franchise and take over the franchise as the successor in interest of _____ [*name of predecessor*], and ever since has prevented plaintiff from assuming operation of the franchise [but has _____ (itself assumed the operation of the franchise *or* granted the franchise to a third party, who has assumed the operation thereof *or describe other*)].

8. Plaintiff has been damaged by the refusal of defendant to allow assumption of the franchise as successor in interest, in that _____ [*specify, e.g.,* plaintiff, who always comanaged the franchise with _____ (*name of predecessor*), would have been able to continue to earn the type of profit the franchise had been producing at a continual and steady growth rate of $_____ for the ensuing _____ (*number*) years remaining under the franchise, an amount which the franchise has continued to earn to the date of the filing of this complaint]. [Additionally, plaintiff has been damaged in that _____ (*describe foreseeably consequential damages*).]

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the amount of $_____;

[2. For consequential damages in the amount of $_____;]

3. For interest at the legal rate [on all amounts of damages in the form of earnings on profits that plaintiff would have earned had he/she been permitted to assume operation of the franchise];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

This complaint is for use in an action by a plaintiff who was designated as the successor in interest of a petroleum products franchise against a defendant franchisor who wrongfully failed to honor the plaintiff's right to assume operation of the business [*see Bus. & Prof. Code § 21140.6(l)*]. For a discussion of the rights of a successor in interest who was designated by a predecessor franchisee to assume the franchise after the predecessor died, see the discussion in *§ 515.115*.

[3] Allegations

This complaint alleges, in part:

- The grant of the original franchise to a predecessor and the terms of the franchise (Paragraph 3).

- The predecessor's proper designation of plaintiff as the successor in interest (Paragraph 4) [*see Bus. & Prof. Code § 21140.6(a)-(c), (e)*].

- Plaintiff's notification to defendant of his or her election to assume and operate the franchise (Paragraph 5).

- Plaintiff's offer to assume the business after making the election (Paragraph 6) [*see Bus. & Prof. Code § 21140.6(d)*].

- Defendant's rejection of plaintiff's bid and refusal to allow plaintiff's assumption of the franchise (Paragraph 7).

- The damages resulting from defendant's act (Para graph 8) [*see Bus. & Prof. Code § 21140.6(l)* (providing that the damages that may be recovered are those specified in *Civ. Code § 3300* for breach of contract)].

[4] State Statutes

Franchisee's right to designate successor in interest, and latter's ability to assume franchise on predecessor's demise. *Bus. & Prof. Code § 21140.6*

Liability in damages and limitations period for failure to comply with successor in interest provisions. *Bus. & Prof. Code § 21140.6(l)*

[5] Cross References

For a related form, *see § 515.500*

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45-515 California Forms of Pleading and Practice--Annotated §§ 515.502-515.519

[Reserved]

§§ 515.502[Reserved]

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B. Franchise Regulation
4. Trade Practices And Termination Or Nonrenewal Of New Motor Vehicle Dealerships

45-515 California Forms of Pleading and Practice--Annotated § 515.520

§ 515.520 Protest to New Motor Vehicle Board [13 Cal. Code Reg. § 583] Against Establishment of Additional, or Relocation of Existing, Motor Vehicle Dealership or Satellite Warranty Facility [Veh. Code § 3062]--By Franchisee Against Franchisor

[1] FORM Protest to New Motor Vehicle Board [13 Cal. Code Reg. § 583] Against Establishment of Additional, or Relocation of Existing, Motor Vehicle Dealership or Satellite Warranty Facility [Veh. Code § 3062]--By Franchisee Against Franchisor

NEW MOTOR VEHICLE BOARD
_____ [*name and state bar number of attorney*]
_____ [*office address, or residence, if no office*]
_____ [*mailing address if different from above*]
_____ [*telephone number*]

_____ [*name*],	)	
Protestant,	)	
	)	NO. _____
vs.	)	PROTEST
	)	(_____ [Establishment of
_____ [*name*],	)	Additional *or* Relocation of Existing] Motor Vehicle
Respondent.	)	Dealership [*or* Satellite Warranty Facility])
	)	
	)	

Protestant alleges:

1. The name of respondent is _____. His/Her/Its address is _____. Respondent _____ [is *or* is not] the holder of license No. _____ issued to him/her/it as a _____ [manufacturer *or* manufacturer branch *or* distributor *or* distributor branch].

2. The mailing address and telephone number of protestant is _____. The name, state bar number, mailing address, and telephone number of protestant's attorney are set out in the top left-hand corner of the cover page of this protest and is hereby incorporated by reference.

3. On or about _____ [*date*], protestant became a franchisee of a new motor vehicle dealership at _____ [*street address*] in the line-make of _____ [*describe make of vehicle(s)*] by a grant from respondent, who was and is, as the _____ [manufacturer *or* assembler *or* distributor] of such line-make, the franchisor. Protestant ever since this date has remained in good standing as a franchisee under such franchise. A true copy of the franchise agreement is attached as Exhibit A and incorporated by reference. [Under the term of the franchise agreement, protestant was and is to remain the exclusive dealer in such line-make in an area with a radius of _____ (*state figure up to 10*) miles from its present location].
[*EITHER, for motor vehicle dealership*]

4. On or about _____ [*date*], respondent served written notice on protestant that he/she/it sought to _____ [enter into a franchise establishing an additional *or* relocate an existing] motor vehicle dealership in the line-make in the relevant market area in which petitioner was and is currently representing the same line-make _____ [as described above in Paragraph 3 *or* consisting of _____ (*describe the line represented by petitioner*)].
[*OR, for satellite warranty facility*]

4. On or about _____ [*date*], respondent served written notice on protestant that he/she/it sought to enter into a franchise that authorizes a satellite warranty facility to be _____ [established *or* relocated to] within two miles of where petitioner was and is currently operating a dealership in the same line-make _____ [as described above in Paragraph 3 *or* consisting of _____ (*describe the line represented by petitioner*)].
[*CONTINUE as part of the same paragraph*]

A true copy of this notice is attached as Exhibit B and incorporated by reference. [This notice provided a time of _____ days in which protestant might appeal; the time for appeal expired on _____ (*date*). Protestant did make a formal appeal to respondent within this period but respondent failed and refused to alter his/her/its intention to proceed as specified in the notice.] The specific grounds of respondent's notice of intent to _____ [establish *or* relocate] the franchise are as follows: _____ [*briefly enumerate franchisor's grounds in separate subparagraphs*].

5. Good cause does not exist for this board to permit the _____ [establishment *or* relocation] of the _____ [motor vehicle dealership *or* satellite warranty facility], in that _____ [*enumerate reasons and factual contentions in response to the specific grounds set forth in franchisor's notice to show the adverse effect on the permanence of franchisee's investment, the effect on business and consumers in the industry, the public welfare, and the competition and consumer care* (*including facilities, equipment, parts, and sales and service personnel*)].

6. Attached and incorporated by reference are the following exhibits to support this protest: _____ [*list photographic, documentary, or similar physical evidence with appropriate description sufficient to identify them and explain their relevancy. If helpful, these exhibits should also be referred to in Paragraph 5, e.g.,* exhibit C: _____ (*describe, e.g.,* a map showing the availability of new motor vehicle dealers within the relevant market area herein described and the line-makes represented thereby, and showing access routes to all

neighborhoods and the population of the area)].

7. Protestant _____ [desires *or* does not desire] to appear before the board in a hearing on this protest.

8. Protestant estimates that _____ days will be required to complete the hearing on the protest herein.

[9. Protestant requests a prehearing conference.]

WHEREFORE, protestant prays that this board determine there is good cause for not permitting the _____ [establishment *or* relocation] of the _____ [dealership *or* satellite warranty facility] protested in this matter.
Dated: _____.

_____ [*signature*]
_____ [*typed name of protestant*]
Protestant
_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Protestant

[2] Use of Form

This protest form is for use in a proceeding on a protest before the New Motor Vehicle Board brought by a new motor vehicle dealer against its franchisor, manufacturer, or distributor, who intends to establish an additional dealership or satellite warranty facility, or to relocate an existing one [*see Veh. Code § 3062*]. For a discussion of a protest on these grounds, see the discussion §§ 515.136 and 515.134.

Under a franchise agreement that grants the dealer an exclusive, nonmodifiable trading area beyond its statutory "relevant market area," the establishment of another dealership within that exclusive trading area may constitute a modification of the franchise that would entitle the dealer to protest under *Veh. Code § 3060* [*Ri-Joyce, Inc. v. New Motor Vehicle Bd. (1992) 2 Cal. App. 4th 445, 456, 3 Cal. Rptr. 2d 546* ; *see* discussion in *§ 515.134*].

[3] Allegations

This protest alleges the following:

- Respondent's name, address, and status as licensee (Paragraph 1) [*see 13 Cal. Code Reg. § 595*].

- Mailing address and identifying data of the protestant and of the protestant's attorney, if any (Paragraph 2) [*see 13 Cal. Code Reg. §§ 585(d), 595*].

- Status of protestant as franchisee of respondent franchisor (Paragraph 3).

- Respondent's notification to protestant of intent to establish or relocate dealership or satellite warranty facility (Paragraph 4).

- Existence of good cause for not allowing respondent to establish or relocate dealership or satellite warranty facility (Paragraph 5) [*see Veh. Code §§ 3062, 3063*; *13 Cal. Code Reg. § 585(b)*].

- Listing of exhibits supporting evidence (Paragraph 6) [*see 13 Cal. Code Reg. § 585(c)*].

- Protestant's desire to appear or not to appear before the board (Paragraph 7) [*see 13 Cal. Code Reg. § 585(e)*].

- Estimate of the number of days required to complete hearing (Paragraph 8) [*see 13 Cal. Code Reg. § 585(f)*].

- Request for a prehearing conference if one is desired (Paragraph 9) [*see 13 Cal. Code Reg. § 585(g)*].

The protest concludes with the signatures of both the protestant and the protestant's attorney [*see 13 Cal. Code Reg. § 597*].

[4] Protest Preparation--Drafting and Serving Protest

Protests must be written and signed by the franchisee or the franchisee's attorney [*13 Cal. Code Reg. § 583*]. A copy must be served on the franchisor, and proof of such service must accompany the official filing [*13 Cal. Code Reg. § 584*]. The protest should set forth in clear and concise language the franchisee's factual contentions. The franchisee may submit, as exhibits to the protest, photographic, documentary, or similar physical evidence relevant to the matter in support of the protest [*13 Cal. Code Reg. § 585(c)*]. The exhibits should be described sufficiently to identify them and to explain their relevancy [*13 Cal. Code Reg. § 585(c)*]. The protest should clearly reflect the name, mailing address, and telephone number of the franchisee and of any attorney or authorized agent. All correspondence with the franchisee and notices to the franchisee thereafter must be addressed to that address, if the franchisee represents himself or herself, or to the address of the attorney or agent, if the franchisee is represented by an attorney or agent. [*13 Cal. Code Reg. § 585(d)*]. The franchisee should indicate whether or not he or she desires to appear before the board [*13 Cal. Code Reg. § 585(e)*].

The board has no preprinted forms for protests. Protests should be prepared in the manner of any type of document submitted to the board [10 Cal. Code Reg. § 583; *see 13 Cal. Code Reg. §§ 593-598*].

[5] Filing Protest

Protests involving entering into a franchise establishing an additional dealer ship or a satellite warranty facility, or relocating an existing one have to be filed, unless an extension is otherwise granted on request, within 20 days of receiving notice of such an action, or within 20 days after the end of any appeal procedure the franchisor has provided [*Veh. Code § 3062(a)*]. If, within this time, the franchisee files with the board a request for additional time to file, an additional 10 days may be granted on a showing of good cause [*Veh. Code § 3062(a)*]. Filing occurs on the date the board's executive director receives the protest or on the date of its certified or registered mailing [*13 Cal. Code Reg. § 585(a)*]. The franchisee should set forth in the protest an estimate of the number of days required to complete the hearing, and a request for a prehearing conference, if desired [*13 Cal. Code Reg. § 585(f), (g)*].

[6] Respondent's Notice of Appearance

The respondent must file a notice of appearance with the board within 15 days of receipt of the protest. Failure to file a timely notice of appearance will result in the proceedings being suspended until the notice if filed. The notice must contain language indicating whether the party desires to appear at the hearing for purposes of submitting evidence and oral argument, and whether the respondent contends that the protest was submitted in a timely manner [*13 Cal. Code Reg. § 585.1*].

[7] Administrative Regulations

Contents of protest. *13 Cal. Code Reg. §§ 583, 585*

Format of protest. *13 Cal. Code Reg. §§ 593-598* (defining "papers," size of paper, pagination, etc., format of first and last pages, conformance of copies, and acceptance of nonconforming papers for good cause)

Time of filing. *13 Cal. Code Reg. § 585*

Respondent's notice of appearance. 10 Cal. Code Reg. § 585.1

Schedules of compensation for preparation and delivery obligations and warranty reimbursement schedules. *13 Cal. Code Reg. § 586*

Stipulation of fact. *13 Cal. Code Reg. § 587*

Deliberations of board. *13 Cal. Code Reg. § 588*

Failure to appear. *13 Cal. Code Reg. § 589*

Hearings by board and hearing officer. *13 Cal. Code Reg. § 590*

Notice of hearing. *13 Cal. Code Reg. § 591*

Continuances. *13 Cal. Code Reg. § 592*

Briefs filed with board required to contain copies of decisions other than those from official reporter. 10 Cal. Code Reg. § 593.2

[8] Decisions

When New Motor Vehicle Board had subject matter jurisdiction over dispute but lacked authority to grant any remedy when franchise termination was due to discontinuation of product line, Board had implied authority to dismiss franchisee's protest. *Duarte & Witting, Inc. v. New Motor Vehicle Board (2002) 104 Cal. App. 4th 626, 637, 128 Cal. Rptr. 2d 501*

Protest filed one year after termination was timely when notice of termination did not state reason for termination and was not sent to Board but only to dealer. *British Motor Car Distributors, Ltd. v. New Motor Vehicle Bd. (1987) 194 Cal. App. 3d 81, 93-94, 239 Cal. Rptr. 280*

Dealer's claim that manufacturer breached implied covenant of good faith and fair dealing by refusing to supply new model motorcycle and by establishing new dealerships in same geographic area to handle that model is claim regarding modification of franchise agreement; thus, dealer was required to exhaust administrative remedies before New Motor Vehicle Board. *Yamaha Motor Corp. v. Superior Court (1986) 185 Cal. App. 3d 1232, 1238-1242, 230 Cal. Rptr. 382*

Manufacturer's failure to give notice of its modification and establishment of new franchise as required by *Veh. Code §§ 3060, 3062* is not waiver of its right to insist that dealer exhaust administrative remedies; purpose of notice is to establish time within which dealer may protest; when no notice is filed, no time limit is placed on dealer's right to protest. *Yamaha Motor Corp. v. Superior Court (1986) 185 Cal. App. 3d 1232, 1239-1240, 230 Cal. Rptr. 382*

Manufacturer's failure to give notice of its modification and establishment of new franchise as required by *Veh. Code §§ 3060, 3062* does not divest New Motor Vehicle Board of jurisdiction to determine dealer's protest. *Yamaha Motor Corp. v. Superior Court (1986) 185 Cal. App. 3d 1232, 1240, 230 Cal. Rptr. 382*

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Volume 45: Schools: Certification thru Service of Summons and Papers-Chs. 512-519
Chapter 515 SECURITIES AND FRANCHISE REGULATION
PART IV. FORMS
B. Franchise Regulation
4. Trade Practices And Termination Or Nonrenewal Of New Motor Vehicle Dealerships

45-515 California Forms of Pleading and Practice--Annotated §§ 515.521-515.539

[Reserved]

§§ 515.521[Reserved]

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Chapter 515 SECURITIES AND FRANCHISE REGULATION
PART IV. FORMS
B. Franchise Regulation
5. Dealership Discrimination

45-515 California Forms of Pleading and Practice--Annotated § 515.540

§ 515.540 Complaint for Injunction and Damages Under Fair Dealership Law for Discrimination for Refusal to Consent to Transfer of Dealership [Civ. Code § 86]--By Dealer and Prospective Dealer Against Grantor

[1] FORM Complaint for Injunction and Damages Under Fair Dealership Law for Discrimination for Refusal to Consent to Transfer of Dealership [Civ. Code § 86]--By Dealer and Prospective Dealer Against Grantor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiffs,	)	NO. _____
vs.	)	COMPLAINT FOR INJUNCTION AND DAM-
_____ [*name*],	)	AGES
Defendant.	)	(Discrimination Prohibited
	)	by Fair Dealership Law)
	)	

_____

Plaintiffs allege:

1. [*Capacity and residence of defendant. See § 515.400, Paragraph 1.*]

2. [*Fictitious names of defendants, if appropriate. See § 515.400, Paragraph 2.*]

3. On or about _____ [*date*], defendant granted to _____ [*name of transferor*], a dealership to conduct the business of _____ [*name of franchisor*] at _____ [*location*]. A true copy of the dealership contract is attached as Exhibit A and incorporated by reference. From such time and to the time of the filing of this complaint plaintiff dealer has been operating such franchise.

4. On or about _____ [*date*], _____ [*name of transferor*] and _____ [*name of transferee*] agreed to transfer the dealership to _____ [*name of transferee*]. On or about _____ [*date*], both plaintiffs applied to defendant for consent to the transfer of the dealership as agreed to between the plaintiffs in compliance with the requirements of the dealership contract that defendant's prior written consent be obtained for any such transfer. On or about _____ [*date*], defendant _____ [refused to consent to that transfer *or* refused and failed to further entertain the application for consent to transfer] and ever since has failed and refused to consent to transfer as requested by the plaintiffs.

5. Defendant has so failed and refused to consent to transfer of the dealership herein because of _____'s [*name of transferee*] _____ [*specify characteristic(s) listed or defined in Civ. Code § 51(b),(e):* sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, *or* sexual orientation]. [Defendant further threatens to _____ (terminate *or* refuse to renew) _____'s (*name of transferor*) dealership in order to prevent or repress the possibility of the transfer.] [_____ (*Name of transferee*) has remained at all times herein mentioned qualified in every respect according to defendant's current standards for prospective dealers and ready to take transfer of the dealership.]

6. Each plaintiff will suffer great and irreparable injury without adequate compensation at law unless defendant is restrained from acting out of discrimination as herein alleged in _____ [*specify, e.g.,* _____ (terminating *or* failing to renew) plaintiff dealer's dealership, and in] refusing to consent to the transfer of the dealership to _____ [*name of prospective dealer*].

7. Each of the plaintiffs has or will have suffered damages by reason of defendant's refusal to consent to the transfer requested by plaintiffs in that _____ [*specify, e.g.,* plaintiff _____ (*name of transferor*) has expended time and funds on acquiring a transferee and will be required to expend further funds to acquire a replacement transferee. He/She would have realized $_____ from the transfer of the franchise. Plaintiff _____ (*name of transferee*) has spent time and funds in acquiring this franchise opportunity and will have to spend further time and funds to acquire a replacement. He/She would have realized a franchise opportunity of future earnings and of present value over the transfer price of approximately $_____]. _____ [The total amount of these damages is $_____ *or* Plaintiffs, and each of them, are unable to determine the exact amount of these damages at this time, but will amend this complaint to state these damages when the exact amount is ascertained].

8. [*Attorney's fees. See § 515.500, Paragraph 6.*]

WHEREFORE, plaintiffs, and each of them, pray judgment as follows:

1. For a permanent injunction prohibiting defendant from acting on the basis of the discrimination alleged herein [in terminating or failing to renew the dealership of plaintiff _____ (*name of transferor*)] and in refusing to consent to the transfer of the dealership to plaintiff _____ [*name of transferee*];

2. For damages as a result of defendant's actions in preventing plaintiff _____ [*name of transferor*] and plaintiff _____ [*name of transferee*] dealer from consummating transfer of the dealership, and for further damages for losses therefrom if injunctive relief is not awarded to either plaintiff [, and for the termination or nonrenewal of plaintiff former dealers' dealerships on the basis of bias and prejudice as herein alleged].

3. For reasonable attorney's fees [in the amount of $_____];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 515.400.*]

CAUTION:
If preliminary and permanent injunctions are sought in the foregoing complaint, counsel should either file affidavits (or declarations under penalty of perjury [*Code Civ. Proc. § 2015.5*]) in support of the allegations in the complaint or take care to plead evidentiary facts which would entitle plaintiff to the relief sought [*see E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* and have the complaint verified [*see Code Civ. Proc. § 527*].

[2] Use of Form

This complaint is for use in an action by a franchisee and a prospective franchisee against a dealership grantor who has refused to permit the transfer of the franchise because of any characteristic listed or defined in *Civ. Code § 51(b)* or *(e)*; that is, sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status, or sexual orientation (including a perception that a person has, or is associated with someone who has or is perceived to have, any particular characteristic or characteristics within the listed categories) [*see Civ. Code § 85*]. The complaint is for injunction, possibly to prevent retaliatory action by the defendant against the existing dealer, but in any event to prevent the grantor from unreasonably withholding consent and for damages for the improper refusal [*see Civ. Code §§ 85, 86*]. For a discussion of the relief and remedies available against grantors for discrimination in the grant, transfer, or termination of dealerships, see the discussion in *§ 515.340[2]*.

[3] Allegations

The complaint alleges, in part, the following [*see Civ. Code § 86*]:

- The granting of the dealership to the present dealer (Paragraph 3).
- The application of the present and prospective dealers to defendant for consent to a transfer of the dealership, and defendant's refusal (Paragraph 4).
- Discrimination as the basis of defendant's refusal and any threatened retaliatory action by defendant in support of the refusal (Paragraph 5).
- The need for injunctive relief (Paragraph 6) [*see Code Civ. Proc. § 526*].
- Damages resulting from defendant's actions (Paragraph 7).
- Reasonable attorney's fees (Paragraph 8).

[4] Injunctive Relief and Damages for Grantor's Acting on Dealership Matters With Bias and Prejudice

The California Fair Dealership Law states that it is intended to be liberally construed and applied in order to promote its

underlying purposes and policies [*see Civ. Code § 82*], and mentions the possibility of a court awarding both "relief" and "remedy" [*see Civ. Code § 86*]. It therefore appears that injunctive relief may be requested to prevent the grantor from discontinuing any existing franchise on the basis of bias or prejudice, as well as to prevent the grantor from refusing to grant dealerships or to allow transfer of existing dealerships on such grounds in the future [*see Civ. Code §§ 83-85*].

[5] State Statutes

California Fair Dealership Law. *Civ. Code §§ 81-86*

Liability for discriminating in grant, transfer, or discontinuance of dealerships. *Civ. Code § 86*

Injunctive relief requested. *Code Civ. Proc. § 526*

[6] Decisions

Complaint alleging on information and belief and declaration by widow, not party to contract, regarding her expectations as to survivability of dealership, as insufficient for injunction. *San Francisco Newspaper Printing Co. v. Superior Court (1985) 170 Cal. App. 3d 438, 441-442, 216 Cal. Rptr. 462*

Widow's community property interest in dealership as not giving her standing to continue business when dealership contract between deceased and newspaper agency clearly specified it was nonassignable. *San Francisco Newspaper Printing Co. v. Superior Court (1985) 170 Cal. App. 3d 438, 443, 216 Cal. Rptr. 462*

Dealership contract as one of adhesion and so enforceable unless unconscionable or not within reasonable expectation of weaker party; nonassignment clause as not unconscionable; agreement as clear, unambiguous, and not susceptible of reasonable expectation of assignability or survival. *San Francisco Newspaper Printing Co. v. Superior Court (1985) 170 Cal. App. 3d 438, 442-444, 216 Cal. Rptr. 462*

[7] Cross References

For a related form, *see § 515.400*

For a discussion and forms for civil rights actions generally, see Ch. 112, *Civil Rights: Government-Funded Programs and Activities*

For discussion and forms for injunctive relief generally, see Ch. 303, *Injunctions*

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45-515 California Forms of Pleading and Practice--Annotated §§ 515.541-515.559

[Reserved]

§§ 515.541[Reserved]

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Chapter 515 SECURITIES AND FRANCHISE REGULATION
PART IV. FORMS
B. Franchise Regulation
6. Seller Assisted Marketing Plans

45-515 California Forms of Pleading and Practice--Annotated § 515.560

§ 515.560 Complaint for Rescission, Damages, and Punitive Damages for Violation of Seller Assisted Marketing Plan Provisions [Civ. Code § 1812.218]--Misrepresentation in Selling Plan [Civ. Code § 1812.215(a)]--By Purchaser Against Seller, Surety or Trustee [Civ. Code § 1812.214(b)], and Escrow Holder [Civ. Code § 1812.214(c)]

[1] FORM Complaint for Rescission, Damages, and Punitive Damages for Violation of Seller Assisted Marketing Plan Provisions [Civ. Code § 1812.218]--Misrepresentation in Selling Plan [Civ. Code § 1812.215(a)]--By Purchaser Against Seller, Surety or Trustee [Civ. Code § 1812.214(b)], and Escrow Holder [Civ. Code § 1812.214(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
	)	NO. _____
vs.	)	COMPLAINT FOR RESCISSION AND DAMAGES
	)	(Violation of Seller Assisted Marketing Plan Provi-
_____ [*name*],	)	sions)
[and _____ (*name(s) of*	)	[Amount demanded _____
surety or trustee, and/or escrow holder), (a California	)	(exceeds *or* does not exceed) $10,000]
Corporation,)]	)	[LIMITED CIVIL CASE]
Defendant(s).	)	
	)	

_____

Plaintiff alleges:

1. Defendant _____ [*name of seller*] is _____ [*allege residence and capacity. See §*

515.400, Paragraph 1], and is the primary defendant herein whose acts as defendant are described below.

[2. Defendant _____ (*name of trustee or surety*) is, and at all times herein mentioned was, a corporation organized and existing under the laws of _____ (the United States *or* the state of _____ (California *or other state; if other state, continue:* authorized to transact, and transacting, intrastate business in California)), with its principal place of business (in California) in _____County, and authorized to transact and transacting business in California as a _____ (surety *or* trustee) (*or allege other capacity and residence of defendant as appropriate*).]

[3. Defendant _____ (*name of escrow holder*) is, and at all times herein mentioned was, a corporation organized and existing under the laws of the state of _____ (California *or other state; if other state, continue:* authorized to transact, and transacting, intrastate business in California), with its principal place of business (in California) in _____County, and licensed to transact and transacting business in California as an escrow holder (*or allege other capacity and residence of defendant as appropriate*).]

4. [*Fictitious names of defendants, if appropriate. See § 515.400, Paragraph 2.*]

[5. On or about _____ (*date*), _____ (defendant _____ (*name of surety*) issued its bond number _____ (*number*) *or* defendant seller established a trust account, number _____ (*number*) with _____ (*name and address of trustee*) as trustee). The _____ (bond *or* trust account) was made out in favor of the State of California for the benefit of anyone damaged by any violation by the primary defendant of the seller assisted marketing plan laws of this state or by such defendant's breach of any plan, contract, or obligation arising therefrom, and also directly in favor of any person damaged by such practices of the primary defendant herein. A true copy of the _____ (bond *or* terms and provisions of such trust account) is attached as Exhibit A and incorporated by reference.]

6. On or about _____ [*date*], at _____, California, defendant offered to sell to plaintiff a seller assisted marketing plan consisting of _____ [*describe plan and brand name, if any, e.g.,* the _____ (*name*) system for distributing and stationing machines vending audiovisual critiques of current dining and entertainment available in local business districts to passerby foot traffic]. In making this offer and in negotiations with plaintiff thereafter, defendant made certain _____ [untrue *or* misleading] statements in that defendant stated _____ [orally *or* in writing *or* within disclosure materials submitted to plaintiff] that _____ [*describe statement, e.g.,* the plan was an immediate buy-back investment if plaintiff was not satisfied]. The statement was _____ [untrue *or* misleading] in that _____ [*explain, e.g.,* the buy-back provision only became effective after plaintiff put the required amount of $_____ into the business and devoted one year's efforts to it].

7. On or about _____ [*date*], plaintiff purchased the seller assisted marketing plan from defendant for $_____ (*total sale price*). A true copy of the contract and agreement is attached marked Exhibit B and incorporated by reference. The purchase price was required to be paid by plaintiff as follows: _____ [*specify payment schedule (see Civ. Code § 1812.201(k), (l), defining "initial payment," "initial cash payment," and "downpayment"), e.g., Civ. Code § 1812.201(k), (l)* an initial cash payment of $2,500 was required at the time the contract was executed, and the remainder of the price was to be paid in six monthly installments of $1,000, beginning _____ (*date*)]. [*If relevant (see Civ. Code § 1812.209(a), requiring escrow if more than 20 percent of initial payment is required before delivery of goods, equipment, supplies, etc. by seller), continue: Civ. Code § 1812.209(a)* The contract further provided that the first delivery of equipment and supplies would be made by defendant on or before _____ (*date*)]. Plaintiff paid the $_____ directly to defendant on _____ [*date*].

[8. The contract states that escrow account number _____ (*number*) was established at the branch of

defendant _____ (*name of escrow holder*) _____, _____ (*street address and city*) in accordance with *Sections 1812.210(b)* and *1812.214(c) of the Civil Code* to receive payments in excess of 20 percent of the initial payment that were required by defendant seller to be made by plaintiff prior to delivery of the equipment, supplies, products, or services to be furnished under the contract. On _____ (*date(s)*), plaintiff _____ (*allege payments made to that account, e.g.,* made three equal payments of $_____ each into that account). _____ (Plaintiff never authorized any disbursements from that account *or specify disbursements authorized, e.g.,* On _____ (*date*), plaintiff authorized a $_____ disbursement from that account).]

9. On or about _____ [*specify date within one year from date of the contract*], plaintiff discovered the plan had been sold to him/her through the misrepresentation described above, when _____ [*describe discovery or effect of misrepresentation, e.g.,* plaintiff failed to make a profit and suffered losses in operating the marketing plan and demanded that defendant repurchase such plan as represented. Defendant refused to buy back the plan until plaintiff had invested $_____ in the business and spent a year attempting to develop it]. Plaintiff thereupon served written notice on defendant that plaintiff was electing to void the contract, and offered therein to immediately return _____ [all *or* the remaining] equipment, supplies, and products delivered to plaintiff by defendant under the plan at _____ [*location(s)*] in return for all sums paid to defendant [seller, and to the escrow account,] by plaintiff [less the fair market value at the time of their receipt by plaintiff of items not returnable, which is $_____]. A true copy of that notice is attached as Exhibit C and incorporated by reference.

10. Defendant failed and refused to return the sums described above to plaintiff or to receive the items plaintiff tendered for return, and still so fails and refuses although plaintiff still tenders all such items for return to defendant. A list of items for return is attached as Exhibit D and incorporated by reference [, containing also an accounting of those items that cannot be returned, with the fair market value of each such item].

11. Plaintiff has been further damaged in that _____ [*describe consequential damages, e.g.,* plaintiff has incurred, and still incurs, charges for storage of equipment and supplies at various locations, and must continue to pay for licenses of particular vending machines that cannot be disengaged although not operating. The approximate amount of such damages is $_____].

[12. *If punitive damages are sought against primary defendant seller, add:* Defendant's making of the _____ (untrue *or* misleading) statements described in Paragraph 6 constituted an intentional _____ (misrepresentation, *or* deceit, *or* concealment) of a material fact known to the defendant with the intent on defendant's part of thereby depriving plaintiff of property and legal rights (and of otherwise causing plaintiff injury) thereby entitling plaintiff to punitive or exemplary damages.]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For damages in the amount of $_____, representing the return of all sums paid to defendant [less the fair market value of all equipment, supplies, or products that cannot be returned to defendant], after receipt of which plaintiff will deliver all equipment, supplies, and products [deliverable] to defendant _____ [*describe*];

2. For interest thereon at the legal rate from _____ [*date of notification of election to rescind*];

[3. For consequential damages consisting of _____ (*specify*) in the amount of $ _____;]

[4. For punitive or exemplary damages;]

5. For reasonable attorney's fees;

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification. See § 515.400.*]

[2] Use of Form

This complaint is for use in an action for rescission, damages, and punitive damages based on misrepresentation practiced in the sale to plaintiff of a seller assisted marketing plan [*see Civ. Code §§ 1812.215(a), 1812.218*]. For a discussion of the actionability of misrepresentation in the sale of a seller assisted marketing plan and damages lying thereon, see the § 515.192[2]. If the seller made any buy-back representations, a bond or trust account would have been required, so that plaintiff would be able to join the surety or trustee for damages other than punitive for any violation of the seller assisted marketing plan legislation [*see Civ. Code §§ 1812.204(c), 1812.214(b)*]. For a discussion of bond or trust account requirements, see *§ 515.184[2]*.

In addition, if plaintiff was required to pay more than 20 percent of the initial payment [*see Civ. Code § 1812.201(k)* (defining "initial payment", discussed in *§ 515.182[6]*)] before delivery of the equipment, supplies, or products or services to be furnished under the terms of the contract, the excess payments would have to be made into an escrow account, to be disbursed to the seller only on plaintiff's written notification to the escrow holder [*Civ. Code § 1812.209(a)*]. If there were funds left in the escrow account, the escrow holder may be joined as a defendant, although the escrow holder is only liable only for actual damages, not punitive damages, and the escrow account holder's aggregate liability to all persons damaged by a seller's violations is limited to the amount of the escrow account [*Civ. Code § 1812.214(c)(3)*].

The form may be modified to allege a cause of action against a defendant who leased a seller assisted marketing plan to the plaintiff. It also may be used against a defendant who failed to provide plaintiff, or to file with the Attorney General, certain disclosure documents or failed to comply with the legal requirements for a plan contract [*see Civ. Code § 1812.215(a)*].

[3] Allegations

This complaint alleges, in part, the following:

- Capacity and residence of defendant seller, defendant surety or trustee, and defendant escrow holder (Paragraphs 1-3).

- Availability of any surety bond or trust account for damages proved in the action (Paragraph 5) [*see Civ. Code § 1812.214(b)*].

- Defendant's act of misrepresentation in selling the plan to plaintiff (Paragraph 6) [*see Civ. Code § 1812.215(a)*].

- Sale of the plan to plaintiff and the terms of that sale (Paragraph 7), including an escrow account involved (Paragraph 8).

- Discovery of the misrepresentation and election to void the plan contract and tender items for return (Paragraph 9) [*see Civ. Code § 1812.215(a)*].

- Defendant's failure to act on the rescission (Paragraph 10).

- Consequential damages, if appropriate (Paragraph 11).

- If appropriate, the fact that the seller's misrepresentation was intentional, entitling plaintiff to punitive damages (Paragraph 12) [*see Civ. Code §§ 1812.218, 3294(a), (c)(3)*].

Attorney's fees are provided by statute [*Civ. Code § 1812.218*] and need not be alleged. A successful plaintiff may recover them as costs under any of the procedures set forth in *Code Civ. Proc. § 1033.5(c)(5)*, which is discussed in Ch. 174, *Costs and Attorney's Fees* .

To protect personal privacy and other legitimate interests, parties and their attorneys must not include financial account numbers, or must redact such numbers if their inclusion is necessary, in all pleadings and other papers filed in the court's public file, whether filed in paper or electronic form, unless otherwise provided by law or ordered by the court [*Cal. Rules of Ct., Rule 1.20(b)*]. However, it is not clear whether "financial account" would include an escrow account.

[4] State Statutes

Voidability of seller assisted marketing plan contract for misrepresentation in offer or sale; procedure for voiding contract. *Civ. Code § 1812.215(a)*

Action for violation of seller assisted marketing plan laws. *Civ. Code § 1812.218*

Claims against trust deposit made in lieu of bond. *Civ. Code § 1812.221*

Punitive damages. *Civ. Code § 3294*

[5] Administrative Regulations

Attorney General's approved form of seller assisted marketing plan surety bond. 11 Cal. Code Reg. § 63.6 (unpublished; consult Business Law Section of Attorney General's Office)

[6] Cross References

For a related form, *see § 515.400*

For discussion of exemplary damages, see Ch. 177, *Damages*

For discussion and forms relating to rescission, see Ch. 490, *Rescission and Restitution*

For discussion and forms relating to suretyship, see Ch. 538, *Suretyship, Bonds, and Undertakings*

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Volume 45: Schools: Certification thru Service of Summons and Papers-Chs. 512-519
Chapter 515 SECURITIES AND FRANCHISE REGULATION
PART IV. FORMS
B. Franchise Regulation
6. Seller Assisted Marketing Plans

45-515 California Forms of Pleading and Practice--Annotated §§ 515.561-515.579

[Reserved]

§§ 515.561[Reserved]

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Chapter 515 SECURITIES AND FRANCHISE REGULATION
PART IV. FORMS
B. Franchise Regulation
7. Fair Practices of Equipment Manufacturers, Distributors, Wholesalers, and Dealers

45-515 California Forms of Pleading and Practice--Annotated § 515.580

§ 515.580 Complaint for Damages for Failure to Comply With Statutory Requirements in Terminating or Not Renewing Dealer Contract [Bus. & Prof. Code §§ 22902, 22903, 22903.2, 22905, 22925]--By Dealer Against Supplier

[1] FORM Complaint for Damages for Failure to Comply With Statutory Requirements in Terminating or Not Renewing Dealer Agreement [Bus. & Prof. Code §§ 22902, 22903, 22905, 22925]--By Equipment Dealer Against Supplier

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
	)	(Improper _____ (Termination *or*
_____ [*name*],	)	Nonrenewal) of Dealer Contract)
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. Plaintiff is, and at all times mentioned herein was, domiciled in and a resident of _____ County, California [*or allege other capacity and residence of plaintiff*].

2. [*Capacity and residence of defendant. See § 515.400, Paragraph 1.*]

3. [*Fictitious names of defendants, if appropriate. See § 515.400, Paragraph 2.*]

4. Defendant _____ [*name*] is a supplier engaged in the _____ [manufacturing *and/or* assembly *and/or* wholesale distribution] of _____ [*describe equipment, e.g.,* machinery used for industrial applications]

5. On or about _____ [*date*], defendant, as the supplier of _____ [*describe equipment, e.g.,* machinery used for industrial applications], entered into a dealer contract with plaintiff to conduct the business of retail sales of that equipment at _____ [*specify location*]. A true copy of the dealer contract is attached as Exhibit A and incorporated by reference. Plaintiff continuously conducted the business of selling the supplier's equipment at retail from that time until the time of the event described in this complaint[, including through (successive) renewal(s) of the dealer contract].

6. On or about _____ [*date*], defendant _____ [terminated *or* refused to renew] the dealer contract and thereafter refused to supply and service plaintiff's business as called for under the dealer contract. This _____ [termination *or* nonrenewal] was improper under Business and Professions Code Section(s) _____ [*specify, e.g.,* 22902(d), 22903, 22903.2 and 22905] in that _____ [*specify reasons, e.g.,* good cause did not exist for the _____ (termination *or* nonrenewal) *or* defendant failed to provide plaintiff with proper notice prior to the intended _____ (termination *or* nonrenewal) of the dealer contract, and thus did not afford plaintiff at least 60 days in which to cure any claimed deficiency].

7. In _____ [terminating *or* failing to renew] the dealer contract in accordance with the provisions of *Business and Professions Code Sections 22900-22927,* defendant was obligated but failed to offer _____ [to assume the lease *or* to repurchase] from plaintiff the property used by plaintiff in carrying on the business under the dealer contract including, but not limited to, _____ [*specify property, e.g.,* computer systems equipment required and approved by defendant and data processing hardware required by defendant]. The fair repurchase price of the computer systems equipment, data processing hardware, and specialized repair tools would have been $_____, representing the fair market value of the computer systems equipment and data processing hardware.

8. Defendant was also obligated but failed to offer to repurchase plaintiff's equipment, consisting of _____ [*specify equipment, e.g.,* all new, unsold, undamaged, and complete equipment]. The fair repurchase price of plaintiff's equipment would have been $_____, representing 100 percent of net cost.

9. Defendant was also obligated but failed to offer to repurchase plaintiff's inventory, consisting of _____ [*specify inventory, e.g.,* all new, unsold, and undamaged repair parts that had previously been purchased from defendant and were held by plaintiff on the date of contract termination]. The fair repurchase price of plaintiff's inventory would have been $_____, representing 95 percent of the current net cost of the inventory.

[10. *Add if plaintiff was not compensated for packing and returning repair parts:* Defendant was also obligated but failed to pay plaintiff $_____ for returned parts, representing 5 percent of the current net cost on the new, unused, and undamaged repair parts that plaintiff returned to defendant.]

[11. *Add if plaintiff was not compensated for unsold demonstrators*: Defendant was also obligated but failed to pay plaintiff $_____ for unsold, undamaged demonstrators. The sum due was equal to 100 percent of the net equipment cost of all unsold, undamaged demonstrators, less depreciation due to usage of those demonstrators.]

[12. *Add if plaintiff was not compensated for equipment used in a manufacturer created incentive program*: Defendant was also obligated but failed to pay plaintiff $_____ for all unsold and undamaged equipment used in a manufacturer created incentive program. The sum due was equal to 100 percent of the net cost of that equipment, less depreciation due to usage and bonus or volume incentive received by the dealer for the equipment.]

[13. *Add if plaintiff was not compensated for specialized equipment or repair tools previously purchased pursuant to defendant's requirements prior to termination:* Defendant was also obligated but failed to pay plaintiff $_____ for all specialized equipment or repair tools previously purchased pursuant to defendant's requirements prior to termination, which were unique to defendant's product line. The sum due was equal to 75 percent of the net cost, including shipping, handling, and setup fees of those tools which were in complete and operating condition.]

14. In addition to the damages specified above, plaintiff has suffered damages resulting from defendant's improper _____ [termination *or* nonrenewal] of the dealer contract by _____ [*specify, e.g.,* incurring freight charges; having to handle, pack, and load the inventory; having to store the inventory; and closing down the business], in the amount of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the amount of $_____;

2. For interest thereon at the legal rate from _____ [*date*];

3. For costs of suit herein incurred;

4. For attorney's fees; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 515.400.*]

[2] Use of Form

This complaint is for use in an action by a dealer for the type of relief available under *Bus. & Prof. Code § 22900 et seq.* from a supplier who has improperly terminated or failed to renew an existing dealer contract [*see Bus. & Prof. Code §§ 22902, 22903, 22903.2, 22905, 22925*]. For a discussion of this and other violations that may be grounds for an action by an equipment dealer against a supplier, see *§§ 515.211, 515.212, 515.214,* and *§ 515.215* et seq.

[3] Allegations

This complaint alleges, in part:

- Plaintiff's domicile in California (Paragraph 1).
- Capacity and residence of defendant (Paragraph 2).

- Fictitious names of defendants, if appropriate (Paragraph 3) [*Code Civ. Proc. § 474*].

- The nature of defendant's business as a supplier of equipment (Paragraph 4) [*see Bus. & Prof. Code § 22901(j)(1), (v)*].

- The existence of the dealer contract (Paragraph 5).

- The improper termination or nonrenewal of the dealer contract (Paragraph 6) [*see Bus. & Prof. Code §§ 22902(d), 22903, 22903.2*].

- Defendant's failure to repurchase plaintiff's business machinery, equipment, and inventory, and the amount owing therefor (Paragraphs 7-13) [*see Bus. & Prof. Code § 22905(a)-(g)*].

- Any consequential damages resulting from defendant's act (Paragraph 14) [*see Bus. & Prof. Code § 22925*].

[4] Remedies

A dealer may bring an action against a supplier in any court of competent jurisdiction for damages sustained by the dealer as a consequence of the supplier's violation of any provision of *Bus. & Prof. Code § 22900 et seq.* The dealer may also recover costs and reasonable attorney's fees [*Bus. & Prof. Code § 22925*].

The dealer may also be granted injunctive relief against unlawful termination, cancellation, nonrenewal, and change in competitive circumstances [*Bus. & Prof. Code § 22925*]. For sample allegations for injunctive relief against dealership discrimination, *see § 515.540*. For discussion and general forms for complaints for injunctive relief, see Ch. 303, *Injunctions* .

These remedies are not exclusive, and are in addition to any other remedies permitted by law. They also do not affect current law pertaining to product liability actions [*Bus. & Prof. Code § 22925*; *see* Ch. 460, *Products Liability*].

A supplier is also obligated to repurchase any business machinery, equipment, and inventory pursuant to *Bus. & Prof. Code § 22905* after canceling or failing to renew an existing dealer agreement. For discussion of these obligations, see *§ 515.215*.

A dealer also is entitled to establish a lien for the repurchase charges for returned equipment and for the costs of enforcing the lien for amounts that remain unpaid under a repurchase agreement entered into when a dealer agreement is canceled or not renewed [*see Bus. & Prof. Code §§ 22905, 22906(b)*]. For discussion of the creation, perfection, and enforcement of this lien, see *§ 515.216*.

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case *Cal. Const. art VI, § 10*; *Code Civ. Proc. §§ 85, 86*.

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the first paper must state whether the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[6] Cross References

For a related form, *see § 515.400*

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[RESERVED]

Chapter 516[RESERVED]

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Chapter 517 SELF-SERVICE STORAGE FACILITIES

45-517 California Forms of Pleading and Practice--Annotated 517.syn

§ 517.syn Synopsis to Chapter 517: SELF-SERVICE STORAGE FACILITIES

§ 517.01 Scope of Chapter

§ 517.02 Cross References

§§ 517.03-517.09 [Reserved]

§ 517.10 Governing Statutes

§ 517.11 Definitions

[1] Self-Service Storage Facility

[2] Owner

[3] Occupant

[4] Rental Agreement

[5] Personal Property

[6] Last Known Address

§ 517.12 Self-Service Storage Facility Contracts

§ 517.13 Individual Storage Containers

[1] Definition

[2] Transportation Not Subject to Public Utility Regulation

[3] Pickup and Delivery

[4] Transportation at Company's Expense

[5] Authority of Public Utility Commission

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§ 517.14 Lien on Stored Personal Property

[1] Scope of Lien

[2] Vehicles and Vessels

[3] Preliminary Lien Notice

[4] Attachment

[5] Notice of Lien Sale

[6] Declaration in Opposition to Lien Sale

§ 517.15 Lien Sale

[1] When Available

[2] Advertisement

[3] Security Interest Claims

[4] Presale Redemption

[5] Conduct and Disposition of Proceeds

§ 517.16 Action to Enforce Lien

[1] Procedures

[2] Sale to Enforce Judgment

§ 517.17 Rights of Good Faith Purchaser

§ 517.18 Household and Personal Property of Military Service Members

§§ 517.19-517.29 [Reserved]

§ 517.30 Related Matthew Bender Publications

§ 517.31 State Statutes

[1] In General

[2] Definitions

[3] Lien on Stored Personal Property

[a] In General

[b] Notices and Declarations

[c] Sale

[4] Self-Service Storage Facility Contracts

§ 517.32 Decisions

§§ 517.33-517.49 [Reserved]

§ 517.50 Complaint by Owner of Self-Service Storage Facility Against Occupant to Foreclose Lien on Personal Property [Bus. & Prof. Code § 21700 et seq.]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Summons and Service

[6] Time for Response

[7] Enforcement

[8] Cross References

§ 517.51 Summons--Storage Lien Enforcement--Judicial Council Form [Judicial Council Form SUM-140]

[1] FORM

[2] Use of Form

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Chapter 517 SELF-SERVICE STORAGE FACILITIES
PART I. SCOPE

45-517 California Forms of Pleading and Practice--Annotated § 517.01

§ 517.01 Scope of Chapter

This chapter discusses agreements for the rental or lease of storage space in self-service storage facilities, as well as attachment and enforcement of liens on personal property stored at these facilities for rent, labor, or other charges incurred pursuant to rental agreements.

The chapter includes a complaint for use by an owner of a self-service storage facility against an occupant of the facility to foreclose an owner's lien for unpaid rent and other charges on personal property located at the facility [*see § 517.50*] and a summons adopted for mandatory use by the Judicial Council [*see § 517.51*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral Overview

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PART I. SCOPE

45-517 California Forms of Pleading and Practice--Annotated § 517.02

§ 517.02 Cross References

- For discussion and forms relating to warehouses and warehouse receipts, see *Ch. 213, Documents of Title, § 213.50* et seq.

- For discussion and forms relating to bailments of personal property, see Ch. 93, *Bailments* . Bailments for hire, also referred to as hirings, are *covered in Ch. 413, Personal Property Leases, § 413.30* et seq.

- For discussion and forms relating to personal property leases under the Commercial Code, see *Ch. 413, Personal Property Leases, § 413.50* et seq.

- For discussion and forms for use by a landlord in giving notice regarding disposition of property on the landlord's premises, see Ch. 332, *Landlord and Tenant: The Tenancy*

- For discussion and forms relating to enforcement of liens generally, see Ch. 342, *Liens and Wage Preferences*

- For discussion and forms relating to lost or unclaimed property, see Ch. 355, *Lost and Unclaimed Property*

- For discussion and forms relating to actions arising from transactions secured by personal property, see Ch. 503, *Sales: Secured Transactions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)Warehouse ReceiptsGeneral OverviewCommercial Law (UCC)Secured Transactions (Article 9)General OverviewContracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsPersonal PropertyReal Property LawNonmortgage LiensGeneral Overview

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45-517 California Forms of Pleading and Practice--Annotated §§ 517.03-517.09

[Reserved]

§§ 517.03[Reserved]

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PART II. LEGAL BACKGROUND

45-517 California Forms of Pleading and Practice--Annotated § 517.10

§ 517.10 Governing Statutes

Self-service storage facilities are governed by the California Self-Service Storage Facility Act (*Bus. & Prof. Code § 21700 et seq.*).

The Act does not apply to garages or other storage areas in private residences, nor does it apply to warehouses or public utilities as defined in *Pub. Util. Code § 216*. If the owner of a storage facility issues a warehouse receipt, bill of lading, or other document of title for the personal property stored, the rights and obligations of both the owner and the occupant are governed by *Com. Code § 7101 et seq.*, and the Self-Storage Facility Act does not apply [*Bus. & Prof. Code § 21701(a)*; for discussion of *Com. Code § 7101 et seq., see Ch. 213, Documents of Title, § 213.70* et seq.].

The Self-Service Storage Facility Act applies to rental agreements entered into, extended, or renewed after January 1, 1982 [*Bus. & Prof. Code § 21714*]. All rental agreements entered into prior to that date, and not extended or renewed thereafter, as well as the rights, duties, and interests flowing from those agreements, remain valid, and may be enforced or terminated in accordance with their terms or as permitted by any other California statute or law [*Bus. & Prof. Code § 21715*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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PART II. LEGAL BACKGROUND

45-517 California Forms of Pleading and Practice--Annotated § 517.11

§ 517.11 Definitions

[1] Self-Service Storage Facility

The term "self-service storage facility" means real property designed and used for the purpose of renting or leasing individual storage space to occupants who are to have access to the space for the purpose of storing and removing personal property, or for storing individual storage containers [*see § 517.13*] provided to occupants who have exclusive use of the container for the purpose of storing and removing personal property, whether or not the individual storage containers are transported pursuant to *Bus. & Prof. Code § 21701.1* [*discussed under § 517.13*].

"Self-service storage facility" does not include a garage or other storage area in a private residence. No occupant may use a self-service storage facility for residential purposes [*Bus. & Prof. Code § 21701(a)*].

A self-service storage facility is not a warehouse and is not a public utility as defined in *Pub. Util. Code § 216*. If an owner issues a warehouse receipt, bill of lading, or other document of title for the personal property stored, the owner and the occupant are subject to Division 7 of the Commercial Code [*Com. Code § 7101 et seq.*], and the Self-Service Storage Facility Act does not apply [*Bus. & Prof. Code § 21701(a)*].

An owner of a self-service storage facility when renting or leasing individual storage spaces to occupants, who are to have access to the space for the purpose of storing or removing personal property, is a commercial landlord and does not have care, custody, or control of the occupants' stored personal property [Stats. 1998 ch. 45, § 3 (declaration of legislative intent)].

[2] Owner

The term "owner" as used in the Self-Service Storage Facility Act means the owner, operator, lessor, or sublessor of a self-service storage facility, his or her agent, or any other person authorized by him or her to manage the facility, or to receive rent from an occupant under a rental agreement, whether or not the person has a real estate license [*Bus. & Prof. Code § 21701(b)*].

[3] Occupant

The term "occupant" as used in the Self-Service Storage Facility Act means a person, or his or her sublessee, successor, or assign, who is entitled to the use of the storage space at a self-service storage facility under a rental agreement, to the exclusion of others [*Bus. & Prof. Code § 21701(c)*].

[4] Rental Agreement

The term "rental agreement" as used in the Self-Service Storage Facility Act means any written agreement or lease that establishes or modifies the terms, conditions, rules, or any other provision concerning the use and occupancy of a self-service storage facility [*Bus. & Prof. Code § 21701(d)*].

Rental agreements under the Act do not involve the delivery of a thing to another for some special purpose or object, to be held in conformity with the objects or purposes of delivery, and thus do not constitute contracts of bailment [*compare Bus. & Prof. Code § 21701(a),(d)* (defining self-service storage facility and rental agreement) *with Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 850, 88 Cal. Rptr. 39* (defining bailment)]. For discussion and forms relating to bailment of personal property, see Ch. 93, *Bailments* .

[5] Personal Property

The term "personal property" as used in the Self-Service Storage Facility Act means movable property not affixed to land, including goods, merchandise, furniture, and household items [*Bus. & Prof. Code § 21701(e)*].

[6] Last Known Address

The term "last known address" as used in the Self-Service Storage Facility Act means the address provided by the occupant in the latest rental agreement, or the address provided by the occupant in a subsequent written notice of a change of address [*Bus. & Prof. Code § 21701(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral Overview

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45-517 California Forms of Pleading and Practice--Annotated § 517.12

§ 517.12 Self-Service Storage Facility Contracts

A contract for the rental or lease of individual storage space in a self-service storage facility must be in writing. In addition to the provisions otherwise required or permitted by law to be included, the contract must contain a statement that the occupant's property will be subject to a claim of lien and may be sold to satisfy the lien if the rent or other charges due remain unpaid for 14 consecutive days. The contract must also state that actions relating to these liens are authorized by the Self-Service Storage Facility Act [*Bus. & Prof. Code § 21712(a)*].

The rental agreement must request and provide space for the occupant to give the name and address of another person to whom preliminary lien notices and subsequent notices required by the Self-Service Storage Facility Act may be sent. If the agreement does not so provide, the Self-Service Storage Facility Act does not apply, and liens authorized by the Act will not attach. An occupant's failure to provide an alternative address, however, does not affect an owner's remedies under the Act or any other provision of law [*Bus. & Prof. Code § 21712(b)*].

The Self-Service Storage Facility Act may not be construed to impair or affect the rights of the parties to a rental agreement to create additional rights, duties, and obligations in and by virtue of the agreement. The rights provided by the Act are in addition to all other rights provided by law to a creditor against his or her debtor [*Bus. & Prof. Code § 21713*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsStatutes of Frauds

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45-517 California Forms of Pleading and Practice--Annotated § 517.13

§ 517.13 Individual Storage Containers

[1] Definition

The term "individual storage container" means a container that meets all of the following requirements [*Bus. & Prof. Code § 21701.1(d)*]:

- It is fully enclosed and locked.
- It contains not less than 100 cubic feet and not more than 1,100 cubic feet.
- It is constructed out of a durable material appropriate for repeated use. A box constructed out of cardboard or a similar material is not an individual storage container.

[2] Transportation Not Subject to Public Utility Regulation

The owner or operator of a self-service storage facility, or a household goods carrier, may, for a fee, transport individual storage containers to and from a self-service storage facility that he or she owns or operates. This transportation activity, whether performed by an owner, operator, or carrier, is not transportation for compensation or hire as a business of used household goods, and is not subject to regulation under Public Utilities Code Chapter 7 (commencing with *Pub. Util. Code § 5101*), if the following requirements are met [*Bus. & Prof. Code § 21701.1(a)*]:

- The fee charged to deliver an empty individual storage container to a customer and to transport the loaded container to a self-service storage facility, or the fee charged to return a loaded individual storage container from a self-service storage facility to the customer must not exceed $100 [*Bus. & Prof. Code § 21701.1(a)(1)*].
- The owner, operator, or carrier, or any affiliate of the owner, operator, or carrier, must not load, pack, or otherwise handle the contents of the container [*Bus. & Prof. Code § 21701.1(a)(2)*].
- The owner, operator, or carrier must be registered under *Veh. Code § 34620 et seq.* or must hold a

permit under *Pub. Util. Code § 5101 et seq.* [*Bus. & Prof. Code § 21701.1(a)(3)*].

- The owner, operator, or carrier must maintain cargo insurance in the amount of at least $20,000 per shipment. Proof of cargo insurance coverage must be maintained on file and presented to the Department of Motor Vehicles or Public Utilities Commission on written request [*Bus. & Prof. Code § 21701.1(a)(4)*].

- Not later than the time the empty individual storage container is delivered to the customer, the company must provide the customer with an informational brochure containing the following information about loading the container [*Bus. & Prof. Code § 21701.1(a)(6)*]:

  - Packing and loading tips to minimize damage in transit;

  - A suggestion that the customer should make an inventory of the items as they are loaded and should keep any other record (for example, photographs or a video recording) that may assist in any subsequent claims processing;

  - A list of items that are impermissible to pack in the container (for example, flammable items); and

  - A list of items that are not recommended to be packed in view of foreseeable hazards inherent in the company's handling of the containers and in view of any limitation of liability contained in the rental agreement.

- The owner, operator, or carrier must disclose to the customer in advance the following information regarding the container transfer service offered, in a written document separate from others furnished at the time of disclosure [*Bus. & Prof. Code § 21701.1(a)(5)*]:

  - A detailed description of the transfer service, including a commitment to use best efforts to place the container in an appropriate location designated by the customer;

  - The dimensions and construction of the individual storage containers used;

  - The unit charge, if any, for the container transfer service, in addition to the storage charge or any other fees under the rental agreement;

  - The availability of delivery or pickup by the customer of his or her goods at the self-service storage facility;

  - The maximum allowable distance, measured from the self-service storage facility, for the initial pickup and final delivery of the loaded container;

  - The precise terms of the company's right to move a container from the initial storage location at its own discretion, and a statement that the customer will not be required to pay additional charges with respect to that transfer; and

  - Conspicuous disclosure, in boldface text, of the allocation of responsibility for the risk of loss or damage to the customer's goods, including any disclaimer of the company's liability, and the procedure for presenting any claim regarding loss or damage to the company.

The customer must receive the disclosure of terms and conditions along with the rental agreement at least 72 hours before delivery of the empty individual storage container; however, the customer may, in writing, knowingly and voluntarily waive that receipt. The company must record in a writing, which must be retained for at least six months after the end of the rental, the time and method of delivery of the information, any waiver made by the customer, and the times and dates of initial pickup and redelivery of the containerized goods [*Bus. & Prof. Code § 21701.1(a)(5)*].

[3] Pickup and Delivery

Pickup and delivery of the individual storage containers must be on dates agreed to by the customer and the company. If the company requires the customer to be physically present at the time of pickup, the company must be at the customer's premises prepared to perform the service not more than four hours later than the agreed-upon time, and in the event of a preventable breach of that obligation by the company, the customer is entitled to receive a penalty of $50 from the company and to elect rescission of the rental agreement without liability [*Bus. & Prof. Code § 21701.1(b)*].

[4] Transportation at Company's Expense

No charge may be assessed with respect to any movement of the container between self-service storage facilities by the company at its own discretion, nor for the delivery of a container to a customer's premises if the customer advises the company, at least 24 hours before the agreed time of container drop-off, orally or in writing, that he or she is rescinding the request for service [*Bus. & Prof. Code § 21701.1(c)*].

[5] Authority of Public Utility Commission

Nothing in *Bus. & Prof. Code § 21701.1* limits the authority of the Public Utilities Commission to investigate and commence an appropriate enforcement action against any person transporting household goods in individual storage containers in a manner other than that described in *Bus. & Prof. Code § 21701.1* [*Bus. & Prof. Code § 21701.1(e)*].

[6] Operation Under Authority of Household Goods Permit

Bus. & Prof. Code § 21701.1, which describes the transportation activities that may be provided without a household goods carrier permit, is not intended to limit the ability of an owner or operator of a self-service storage facility to otherwise transport household goods under the authority of a household goods carrier permit [Stats. 1998, ch. 45, § 3 (declaration of legislative intent)]. Thus, an owner or operator who holds such a permit may operate freely under that permit, and is not required to rely on the provisions of the Self-Storage Facility Act discussed above.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsLease AgreementsGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthorityEnergy & Utilities LawTransportation & PipelinesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral Overview

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45-517 California Forms of Pleading and Practice--Annotated § 517.14

§ 517.14 Lien on Stored Personal Property

[1] Scope of Lien

The owner of a self-service storage facility and his or her heirs, executors, administrators, successors, and assigns have a lien on all personal property located at a self-service storage facility for rent, labor, late-payment fees, or other charges, present or future, incurred pursuant to the rental agreement, and for expenses necessary for the preservation, sale, or disposition of personal property subject to the provisions of the Self-Service Storage Facility Act [*Bus. & Prof. Code § 21702*].

[2] Vehicles and Vessels

Any lien on a vehicle or vessel subject to registration or identification under the Vehicle Code that has attached and is set forth in the documents of title to the vehicle or vessel has priority over a lien created pursuant to the Self-Service Storage Facility Act [*Bus. & Prof. Code § 21702.5(a)*].

A lien created pursuant to the Self-Service Storage Facility Act on a vehicle or vessel subject to registration and identification under the Vehicle Code must be enforced in accordance with the provisions of *Civ. Code § 3071* (vehicles) or *Harb. & Nav. Code § 503* (vessels), and not as prescribed by *Bus. & Prof. Code §§ 21705-21711*, except that actions to enforce a lien may be conducted as provided in *Bus. & Prof. Code § 21710*[*Bus. & Prof. Code § 21702.5(b)*; for discussion of actions pursuant to *Bus. & Prof. Code § 21710, see § 517.16, below*].

The proceeds from a lien sale must be disposed of pursuant to *Civ. Code § 3073* (vehicles) or *Harb. & Nav. Code § 507.5* (vessels) [*Bus. & Prof. Code § 21702.5(d)*].

A lien created pursuant to the Self-Service Storage Act on a vehicle or vessel subject to registration and identification under the Vehicle Code may not include any charges for rent, labor, or other services incurred pursuant to the rental agreement, that accrue more than 60 days after the date the lien attaches pursuant to *Bus. & Prof. Code § 21705*, and before application is made for authorization to conduct the lien sale pursuant to the requirements of *Civ. Code § 3071*(vehicles) or *Harb. & Nav. Code § 503*(vessels) [*Bus. & Prof. Code § 21702.5(c)*].

[3] Preliminary Lien Notice

If any part of the rent or other charges due from an occupant remain unpaid for 14 consecutive days, an owner may terminate the occupant's right to use of the storage space by sending a preliminary lien notice to the occupant's last known address, and to the alternative address specified in the rental contract pursuant to *Bus. & Prof. Code § 21712(b)*, by certified, or by regular first-class mail if the owner obtains a certificate of mailing indicating the date the notice was mailed [*Bus. & Prof. Code § 21703*]. Although certified mail is more expensive, it may be more advantageous to the owner to use this method because the owner's right to remove property from the space accrues more quickly when certified mail is used [*see Bus. & Prof. Code § 21705(a),(b)*, discussed in [4], *below*].

The preliminary lien notice must contain all of the following:

- An itemized statement of the owner's claim showing the sums due at the time of the preliminary lien notice and the date when the sums became due [*Bus. & Prof. Code § 21703(a)*].

- A statement that the occupant's right to use the storage space will terminate on a specified date not less than 14 days after the mailing of the notice unless the occupant pays all sums due prior to that date [*Bus. & Prof. Code § 21703(b)*].

- A notice that the occupant may be denied access to the storage space after the termination date if the sums are not paid, and that an owner's lien, as provided for in *Bus. & Prof. Code § 21702*, may be imposed thereafter [*Bus. & Prof. Code § 21703(c)*].

- The name, street address, and telephone number of the owner, or his or her designated agent, whom the occupant may contact to respond to the notice [*Bus. & Prof. Code § 21703(d)*].

A preliminary lien notice form that satisfies the requirements of *Bus. & Prof. Code § 21703* is set forth in *Bus. & Prof. Code § 21704*.

[4] Attachment

If a preliminary lien notice [*see Bus. & Prof. Code § 21703*] has been sent as specified in [3], *above*, and the total sum due has not been paid as of the date specified in the preliminary lien notice as the termination date, a lien attaches as of that date [*Bus. & Prof. Code § 21705(a),(b)*]. The owner may then enter the space and deny the occupant access to it [*Bus. & Prof. Code § 21705(a)(1),(2),(b)*]. If the preliminary lien notice was sent by certified mail and the total sum due was not paid as of the termination date, the owner may also remove any property found in the space to a place of safekeeping [*Bus. & Prof. Code § 21705(a)(3)*]. If the preliminary lien notice was sent by regular first class mail with a certificate of mailing, the owner still may enter the space and deny the owner access to it if the total sum due has not been paid as of the termination date, but may not remove the occupant's property until at least 14 days after the termination date, during which time the occupant may regain full use of the space by paying the full lien amount [*Bus. & Prof. Code § 21705(b)*]. In either case, the owner must then send the occupant a Notice of Lien Sale and a blank Declaration in Opposition to Lien Sale [*Bus. & Prof. Code § 21705(c)*; *see* [5] and [6], *below*].

[5] Notice of Lien Sale

When a lien attaches pursuant to *Bus. & Prof. Code § 21705* [*see* [4], *above*] the owner must send to the occupant, addressed to the occupant's last known address, and to the alternative address provided in the rental contract, by certified mail, postage prepaid, a notice of lien sale [*Bus. & Prof. Code § 21705(c)(1)*]. The notice of lien sale must state the following:

- That the occupant's right to use the storage space has terminated and that the occupant no longer has access to the stored property [*Bus. & Prof. Code § 21705(c)(1)(A)*];

- That the stored property is subject to a lien, and the amount of the lien [*Bus. & Prof. Code § 21705(c)(1)(B)*];

- That the property will be sold to satisfy the lien after a specified date that is not less than 14 days from the date the notice was mailed, unless the amount of the lien is paid or the occupant executes under penalty of perjury and returns by certified mail a declaration in opposition to the lien sale in the form prescribed by *Bus. & Prof. Code § 21705(c)(2)* [*Bus. & Prof. Code § 21705(c)(1)(C)*; *see* [6], *below*]; and

- That any proceeds of the sale in excess of the lien amount and costs of sale will be retained by the owner and may be reclaimed by the occupant, or claimed by another person, at any time for a period of one year from the sale and that after one year the proceeds will escheat to the county [*Bus. & Prof. Code § 21705(c)(1)(D)*].

For a notice of lien sale, *see California Legal Forms, Ch. 54A, Storage of Goods, § 54A.222* (Matthew Bender).

[6] Declaration in Opposition to Lien Sale

In addition to the notice of lien sale, on attachment of the lien, the owner must send the occupant, addressed to the occupant's last known address and to the alternative address provided in the rental contract, by certified mail, postage prepaid, a blank declaration in opposition to the lien sale [*Bus. & Prof. Code § 21705(c)(2)*].

A declaration form is set forth in *Bus. & Prof. Code § 21705(c)(2)*, and generally requires the occupant to declare under penalty of perjury receipt of the notice of lien sale, opposition to the lien sale, his or her address, and that he or she understands that the lienholder may file an action in court, and if the action results in a judgment for the lienholder, that the occupant may be liable for court costs [*Bus. & Prof. Code § 21705(c)(2)*]. For a declaration in opposition to a lien sale, *see California Legal Forms, Ch. 54A, Storage of Goods, § 54A.223* (Matthew Bender).

If a declaration in opposition to the lien sale, executed under penalty of perjury, is not received prior to the date of sale set forth in the notice of lien sale, the owner may sell the property [*Bus. & Prof. Code § 21706*; *see § 517.15, below*]. If a declaration in opposition to the lien sale is received prior to the date set forth in the notice of lien sale, the owner may enforce the lien in an action pursuant to *Bus. & Prof. Code § 21710*[*Bus. & Prof. Code § 21710*; *see § 517.16, below*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral Overview

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§ 517.15 Lien Sale

[1] When Available

Once an owner's lien has attached, and if a declaration in opposition to the lien sale, executed under penalty of perjury, is not received prior to the date of sale set forth in the notice of lien sale, the owner of a self-service storage facility may sell the property. The sale is subject to the provisions of *Bus. & Prof. Code § 21708*, relating to security interest claims, and *Bus. & Prof. Code § 21709*, relating to pre-sale redemption [*Bus. & Prof. Code § 21706*; *see* [3] and [4] *below*]. Additionally, the sale must comply with the requirements of *Bus. & Prof. Code § 21707* [*Bus. & Prof. Code § 21706*; *see* [2] and [5], *below*].

[2] Advertisement

After the expiration of the time given in the notice of lien sale, pursuant to *Bus. & Prof. Code § 21705(a)*, an advertisement of the lien sale must be published once a week for two weeks consecutively in a newspaper of general circulation published in the judicial district in which the sale is to be held. The advertisement must include a general description of the goods, the name of the person on whose account they are being stored, the space number of the occupant, and the name and location of the storage facility. If there is no newspaper of general circulation published in the judicial district in which the sale is to be held, the advertisement must be posted at least 10 days before the sale in at least six conspicuous places in the neighborhood of the proposed sale [Bus. & Prof. Code § 21707(a)]. For an advertisement of lien sale, *see California Legal Forms, Ch. 54A, Storage of Goods, § 54A.224* (Matthew Bender).

[3] Security Interest Claims

If no declaration of opposition to the lien sale is executed and returned by the occupant, any person who has a perfected interest under *Com. Code § 9101 et seq.* may claim any personal property subject to that security interest and subject to a lien pursuant to the Self-Service Storage Facility Act by paying the total amount due, as specified in the preliminary lien notice, for the storage of the property. On payment of the total amount due, the owner must deliver possession of the particular property subject to the security interest to the person who paid the total amount due [*Bus. & Prof. Code § 21708*]. The owner is not liable to any person for any action taken pursuant to *Bus. & Prof. Code § 21708* if the owner has fully complied with the requirements of *Bus. & Prof. Code §§ 21704-21705*, relating to notices [*Bus. & Prof. Code*

§ 21708].

[4] Presale Redemption

Prior to a lien sale authorized pursuant to *Bus. & Prof. Code § 21706*, any person claiming a right to the goods may pay the amount necessary to satisfy the lien and reasonable expenses incurred for particular actions taken pursuant to the Self-Service Storage Facility Act. Under these circumstances, the goods may not be sold, and must be retained by the owner subject to the terms of the Self-Service Storage Facility Act pending a court order directing a particular disposition of the property [*Bus. & Prof. Code § 21709*].

[5] Conduct and Disposition of Proceeds

A lien sale must be conducted in a commercially reasonable manner, and, after deducting the amount of the lien and costs of sale, the owner must retain any excess proceeds of the sale on the occupant's behalf. The occupant, or any other person having a court order or other judicial process against the property, may claim the excess proceeds, or a portion thereof sufficient to satisfy the particular claim, at any time within one year of the date of sale. Thereafter, the owner must pay any remaining excess proceeds to the treasury of the county in which the sale was held [*Bus. & Prof. Code § 21707(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawNonmortgage LiensGeneral Overview

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45-517 California Forms of Pleading and Practice--Annotated § 517.16

§ 517.16 Action to Enforce Lien

[1] Procedures

If a declaration in opposition to the lien sale is received prior to the date set forth in the notice of lien sale, the owner may enforce the lien in an action commenced by filing a verified complaint setting forth the facts on which the claim of lien is based. The summons and complaint may be served by certified mail, postage prepaid, addressed to the occupant at his or her last known address, in which case service will be deemed completed on the fifth day after the mailing, or in any other manner authorized by *Code Civ. Proc. § 413.10 et seq.* [*Bus. & Prof. Code § 21710(a)*; *see generally* Ch. 518, *Service of Summons and Papers*].

The occupant has 10 days in which to respond to the complaint after service of the summons is completed, and this period may be extended for good cause [*Bus. & Prof. Code § 21710(b)*]. If the occupant does not respond to the complaint by answer or demurrer within the time allowed after service is completed, the clerk, or the judge if there is no clerk, on application of the owner, will enter the default of the occupant. The owner may then apply to the court for judgment in the amount of the lien, including costs [*Bus. & Prof. Code § 21710(c)*; *see generally* Ch. 205, *Defaults and Default Judgments*].

[2] Sale to Enforce Judgment

An owner may sell the property to enforce a judgment in his, her, or its favor entered in an action on a lien authorized by the Self-Service Storage Facility Act. The sale must be conducted in a commercially reasonable manner, and must take place 10 days or more from the entry of judgment, unless within that time period, or at any time prior to the sale, the occupant pays the owner the full amount of the judgment [*Bus. & Prof. Code § 21710(d)*]. Enforcement of the judgment may be stayed, pending appeal, if the occupant posts a bond in an amount one and one-half times the amount of the judgment. If the occupant posts a bond, the property may be released to him or her [*Bus. & Prof. Code § 21710(e)*].

Legal Topics:

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

Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewContracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral Overview

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45-517 California Forms of Pleading and Practice--Annotated § 517.17

§ 517.17 Rights of Good Faith Purchaser

A purchaser in good faith of goods sold to enforce a lien or a judgment entered on the lien in favor of the owner on goods stored at a self-service storage facility takes the goods free of all rights of persons against whom the lien was claimed. A good faith purchaser takes the property free of these rights, despite noncompliance by the owner of the storage facility with the requirements of the Self-Service Storage Facility Act [*Bus. & Prof. Code § 21711*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSales of GoodsTitle, Creditors & Good Faith PurchasersPassing of TitleContracts LawTypes of ContractsBona Fide PurchasersContracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral Overview

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§ 517.18 Household and Personal Property of Military Service Members

Under the Servicemembers Civil Relief Act [*see 50 U.S.C. App. § 501 et seq.*] and similar California law [*see Mil. & Vet. Code § 400 et seq.*], no person may exercise any right to foreclose or enforce any lien for storage of household goods, furniture, or personal effects of a member [*see 50 U.S.C. App. § 511(1)*] of the uniformed services [*see 10 U.S.C. § 101(a)(5)* (definition)] or the national guard or military reserve [*see Mil. & Vet. Code § 400(a)*] during his or her period of military service [*see 50 U.S.C. § 511(1)-(3)*; *Mil. & Vet. Code § 400(b)* (active service or active duty)], and for 90 days after that period, except on an order previously granted by a court on application and a return made and approved by the court. In that proceeding the court may, after hearing, in its discretion on its own motion, and must on application to it by a service member or some person on his or her behalf, unless in the opinion of the court the ability of the defendant to pay the storage charges due is not materially affected by reason of his or her military service, stay the proceedings as provided in the governing law and make whatever other disposition of the case is equitable to conserve the interest of all parties [*50 U.S.C. App. § 537(b)*; *Mil. & Vet. Code § 409.1(b)*].

Dependents of a service member are entitled to the benefits accorded to service members under the foregoing provisions, on application to a court for the benefits, unless in the opinion of the court the ability of the dependents to comply with the terms of the storage contract has not been materially impaired by reason of the military service of the person on whom the applicants are dependent [*50 U.S.C. App. § 538*; *Mil. & Vet. Code § 409.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsLease AgreementsGeneral OverviewMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief ActReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral Overview

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[Reserved]

§§ 517.19[Reserved]

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45-517 California Forms of Pleading and Practice--Annotated § 517.30

§ 517.30 Related Matthew Bender Publications

For discussion and forms relating to the storage of goods generally, and under the California Self-Service Storage Facility Act, *see* California Legal Forms, Ch. 54A, *Storage of Goods* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral Overview

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45-517 California Forms of Pleading and Practice--Annotated § 517.31

§ 517.31 State Statutes

[1] In General

California Self-Service Storage Facility Act. *Bus. & Prof. Code § 21700 et seq.*

[2] Definitions

Self-service storage facility. *Bus. & Prof. Code § 21701(a)*

Owner. *Bus. & Prof. Code § 21701(b)*

Occupant. *Bus. & Prof. Code § 21701(c)*

Rental agreement. *Bus. & Prof. Code § 21701(d)*

[3] Lien on Stored Personal Property

[a] In General

Owner's lien authorized. *Bus. & Prof. Code § 21702*

Vehicles and vessels. *Bus. & Prof. Code § 21702.5*

Attachment. *Bus. & Prof. Code § 21705*

Action by owner to enforce lien is authorized on receipt of declaration in opposition to lien sale. *Bus. & Prof. Code § 21710*

[b] Notices and Declarations

Preliminary lien notice is required to terminate occupant's right to use of storage space for unpaid rent or charges; contents of notice. *Bus. & Prof. Code § 21703*

Form of preliminary lien notice. *Bus. & Prof. Code § 21704*

Blank declaration in opposition to lien sale is required to be sent to occupant by owner on attachment of lien; form. *Bus. & Prof. Code § 21705*

Notice of lien sale is required to be sent to occupant by owner on attachment of lien; contents. *Bus. & Prof. Code § 21705*

[c] Sale

Authorization to enforce lien. *Bus. & Prof. Code § 21706*

Advertisement. *Bus. & Prof. Code § 21707(a)*

Conduct and disposition of proceeds. *Bus. & Prof. Code § 21707(b)*

Security interest claims. *Bus. & Prof. Code § 21708*

Presale redemption. *Bus. & Prof. Code § 21709*

Authorization to enforce judgment in favor of owner entered in action on lien. *Bus. & Prof. Code § 21710(d)*

Rights of good faith purchaser. *Bus. & Prof. Code § 21711*

[4] Self-Service Storage Facility Contracts

Requirements. *Bus. & Prof. Code § 21712*

Self-Service Storage Facility Act does not impair or affect rights of parties to rental agreement to create additional rights, duties and obligations. *Bus. & Prof. Code § 21713*

Self-Service Storage Facility Act applies only to agreements entered into, extended, or renewed after January 1, 1982. *Bus. & Prof. Code §§ 21714, 21715*

Legal Topics:

For related research and practice materials, see the following legal topics:
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45-517 California Forms of Pleading and Practice--Annotated § 517.32

§ 517.32 Decisions

California Self-Service Storage Facility Act [*Bus. & Prof. Code § 21700 et seq.*] permits rental agreements to be construed as leases, rather than licenses, even though Act provides expedited remedy against occupants of self-storage units who are delinquent in rent. *In re Safeguard Self-Storage Trust (9th Cir. 1993) 2 F.3d 967, 970-971*

In event of occupant's bankruptcy, bankruptcy court could apply *Civ. Code § 1980 et seq.* (governing disposition of personal property remaining on rented premises at termination of tenancy) in determining whether occupant's property in storage unit could be sold by storage facility owner to collect overdue rent after owner had notice of bankruptcy. *Ozenne v. Bendon (In re Ozenne) (Bankr. 9th Cir. 2006) 337 B.R. 214, 219*

Self-storage agreement controls by placing its lock on occupant's unit after it was vandalized and requesting occupant to inspect unit for stolen items and to replace lock with one of occupant's (as required by contract), owner did not become involuntary bailee [*see Civ. Code § 1815*] and was not liable for subsequent theft of items from unit. *Sackett v. Public Storage Management (1990) 222 Cal. App. 3d 1088, 1089, 1092-1093, 272 Cal. Rptr. 284*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawEstate PropertyGeneral OverviewContracts LawTypes of ContractsBailmentsContracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral Overview

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45-517 California Forms of Pleading and Practice--Annotated §§ 517.33-517.49

[Reserved]

§§ 517.33[Reserved]

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§ 517.50 Complaint by Owner of Self-Service Storage Facility Against Occupant to Foreclose Lien on Personal Property [Bus. & Prof. Code § 21700 et seq.]

[1] FORM Complaint by Owner of Self-Service Storage Facility Against Occupant to Foreclose Lien on Personal Property [Bus. & Prof. Code § 21700 et seq.]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO FORECLOSE LIEN ON PER-
_____ [*name*],	)	SONAL PROPERTY
[and DOES I through _____,]	)	(Self-Service Storage Facility)
Defendant(s).	)	[Amount demanded _____ (exceeds
	)	*or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Plaintiff is the _____ [*specify capacity as self-service storage facility owner as defined in Bus. & Prof. Code § 21701(b), e.g.,* owner and operator] of a self-service storage facility, as defined in *Business and Professions Code Section 21701(a)*, commonly referred to as _____[*specify name and street address of self-service storage facility*], _____ County, California ("the facility").

2. Defendant(s) is/are, and at all times mentioned in this complaint was/were, _____ [a resident *or* residents] of _____ County, California.

[3. *Fictitious name allegation, if appropriate, e.g.,* Plaintiff is ignorant of the true names and capacities of defendants

sued herein as DOES I- _____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of such fictitiously named defendants claims an interest in the property sought to be sold in this proceeding or is indebted to plaintiff on the obligation described in this complaint.)]

[4. *Agency allegation, if appropriate, e.g.,* At all times herein mentioned defendant _____ (*name*) was authorized and empowered by defendant _____ (*principal*) to act and did act as the agent of defendant _____(*principal*), and each and all of the things herein alleged to have been done by him/her were done in the capacity of and as agent for defendant _____ (*principal*).]

5. On or about _____ [*date*], plaintiff and defendant(s) entered into _____ [a written *or* an oral] agreement ("the agreement"), by the terms of which plaintiff rented storage space _____ [*identify storage space, e.g.,* unit 123] ("the storage space"), to defendant(s) _____ [*describe nature of tenancy, e.g.,* for a term of one year] at the agreed rental of $_____ per _____ [*specify, e.g.,* month] payable _____ [*specify, e.g.,* in advance on the first day of each month], commencing on _____ [*date*]. [A copy of the rental agreement is attached as Exhibit A and incorporated herein by reference.]

6. Pursuant to the terms of the rental agreement, defendant(s) was/were entitled to use of the storage space to the exclusion of others, and was/were _____ [an occupant *or* occupants] of the facility as defined by *Business and Professions Code Section 21701(c).*

7. Defendant(s) took possession of the storage space on _____ [*date*].

8. Plaintiff has duly performed all of the conditions of the rental agreement to be performed on his/her/its part.

9. Rent has accrued and is unpaid under the rental agreement for the months of _____ [*month*], _____ [*year*] to _____[*month*], _____ [*year*], in the total sum of $_____. [Additional charges for _____ (*specify e.g.,* security fees) have accrued and are unpaid pursuant to the rental agreement in the sum of $_____.]

10. On _____ [*date*], pursuant to the requirements of *Business and Professions Code Section 21703*, plaintiff mailed a preliminary lien notice to defendant(s) at the address _____ [provided by him/her/them in the rental agreement *or* provided by him/her/them to plaintiff in a written notice of change of address dated _____. (A copy of the notice of change of address is attached as Exhibit B and incorporated by reference.)]. Pursuant to *Business and Professions Code Section 21703*, plaintiff also mailed the preliminary lien notice to the alternative address specified by defendant(s) in the rental agreement. A copy of the preliminary lien notice is attached as Exhibit C and incorporated herein by reference.

11. Pursuant to *Business and Professions Code Section 21703(b)*, the preliminary lien notice provided that the right(s) of defendant(s) to use the storage space would terminate on _____ [*specify termination date set forth in preliminary lien notice*] if defendant(s) did not pay all sums due plaintiff prior to that date.

12. As of _____ [*specify termination date set forth in preliminary lien notice*], the sums described in the preliminary lien notice as due and owing had not been paid, and plaintiff _____ [*specify actions taken by plaintiff pursuant to Bus. & Prof. Code § 21705, e.g.,* denied defendants access to the storage space and removed the property therein to a place of safe keeping].

[13. In removing and preserving the property plaintiff has incurred expenses in the amount of $_____.]

14. Pursuant to *Business and Professions Code Section 21700 et seq.*, plaintiff has a lien in the amount of $_____ [*specify total amount of rent and charges owed, and all expenses incurred in removing property and preserving it in a place of safekeeping*] on the property stored in the storage space by defendant(s).

15. On _____ [*specify termination date set forth in preliminary lien notice*], plaintiff mailed to defendant(s), at the address _____ [provided by him/her/them in the rental agreement *or* provided by him/her/them to plaintiff in a written notice of change of address dated _____], and to the alternative address specified by defendant(s) in the rental agreement, a Notice of Lien Sale and blank Declaration in Opposition to Lien Sale, as required pursuant to *Section 21705 of the Business and Professions Code*. Copies of the Notice of Lien Sale and blank Declaration in Opposition to Lien Sale are attached as Exhibits D and E and incorporated herein by reference.

16. On _____ [*date*], plaintiff received a Declaration in Opposition to Lien Sale, executed by defendant(s) under penalty of perjury. A copy of the executed Declaration in Opposition to Lien Sale is attached as Exhibit F and incorporated herein by reference.

17. The rental agreement provides for the payment of attorney's fees to the prevailing party in any action brought to enforce the terms of the agreement. The sum of $_____ is a reasonable attorney's fee to allow plaintiff for the commencement and prosecution of this action.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For $_____ as the amount of the lien;

2. That the lien be foreclosed;

3. That the property be ordered sold for payment of the lien and that the lien be paid from the proceeds of the sale;

4. For reasonable attorney's fees in the amount of $_____;

5. For costs of suit incurred herein; and

6. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____[*signature*]

[2] Use of Form

The complaint in [1], *above*, is for use by the owner of a self-service storage facility against an occupant of the facility to enforce an owner's lien for rent or other charges on personal property stored at the self-service storage facility [*see Bus. & Prof. Code § 21710*].

This form is based in part on a form contributed by Paul S. Rudder of Rudder, Liebersbach & Mohun of Mammoth Lakes, California.

[3] Allegations

This form alleges:

- Plaintiff's capacity as an owner as defined in *Bus. & Prof. Code § 21701(b)* of a self-service storage facility (Paragraph 1).

- The name and address of the self-service storage facility (Paragraph 1).

- Defendant's or defendants' residence(s) (Paragraph 2).

- An optional allegation as to fictitiously named defendants (Optional Paragraph 3) [*see Code Civ. Proc. § 474*].

- An optional allegation for use when agents were acting for defendant (Optional Paragraph 4) [*see Civ. Code §§ 2318, 2319*].

- The agreement between plaintiff and defendant for rental of the storage space (Paragraph 5).

- Defendant's capacity as an occupant as defined in *Bus. & Prof. Code § 21701(c)* (Paragraph 6).

- Defendant's possession of the storage space (Paragraph 7).

- Performance by plaintiff of all conditions of the rental agreement to be performed on his, her, or its part (Paragraph 8).

- The amount of unpaid, accrued rent and other charges owed plaintiff by defendant (Paragraph 9).

- That plaintiff mailed defendant a preliminary lien notice pursuant to *Bus. & Prof. Code § 21703*, and the date that the notice was mailed (Paragraph 10).

- The termination date as set forth in the preliminary lien notice (Paragraph 11).

- That as of the termination date the sums owed had not been paid, and the actions taken by plaintiff pursuant to *Bus. & Prof. Code 21705* (Paragraph 12).

- An optional paragraph for use when plaintiff has incurred expenses in removing and preserving the property (Optional Paragraph 13).

- That plaintiff has a lien on the property pursuant to *Bus. & Prof. Code § 21700 et seq.*, and the amount of the lien (Paragraph 14).

- That plaintiff mailed defendant a Notice of Lien Sale and blank Declaration in Opposition to Lien Sale, as required by *Bus. & Prof. Code § 21705*, and the date of mailing (Paragraph 15).

- That plaintiff received an executed Declaration in Opposition to Lien Sale, and the date of receipt (Paragraph 16).

- An optional allegation for use when the rental agreement provides for payment of attorney's fees (Paragraph 17).

[4] Verification

A complaint that seeks to enforce an owner's lien authorized by *Bus. & Prof. Code § 21702* for unpaid rent or other charges on personal property located at a self-service storage facility must be verified [*Bus. & Prof. Code § 21710(a)*].

[5] Summons and Service

For the mandatory Judicial Council summons form for use in actions to enforce storage liens [Judicial Council Form SUM-140], see *§ 517.51*.

The summons and complaint may be served by certified mail, postage prepaid, addressed to the defendant(s) at the address provided in the rental agreement or in a subsequent written notice of change of address. Service is deemed completed on the fifth day after the mailing, or in any other manner authorized by *Code Civ. Proc. § 413.10 et seq.* [*Bus. & Prof. Code § 21710(a)*; *see generally* Ch. 518, *Service of Summons and Papers*].

[6] Time for Response

The defendant has 10 days within which to respond to the complaint after service of the summons is completed; this time may be extended for good cause [*Bus. & Prof. Code § 21710(b)*]. If the defendant does not respond by answer or demurrer within the time allowed after service is completed, the clerk, or the judge if there is no clerk, on application of the plaintiff, will enter the defendant's default, and the plaintiff may apply to the court for judgment in the amount of the lien, including costs [*Bus. & Prof. Code § 21710(c)*; *see generally* Ch. 205, *Defaults and Default Judgments*].

[7] Enforcement

The plaintiff may enforce a judgment entered in an action on a lien authorized by *Bus. & Prof. Code § 21700 et seq.* by a sale of the property. The sale must be conducted in a commercially reasonable manner, and must take place 10 days or more from the entry of judgment, unless within that time period, or at any time prior to the sale, the occupant pays the owner the full amount of the judgment [*Bus. & Prof. Code § 21710(d)*]. Enforcement of the judgment may be stayed, pending appeal, if the occupant posts a bond in an amount one and one-half times the amount of the judgment. If the occupant posts a bond, the property may be released to him or her [*Bus. & Prof. Code § 21710(e)*].

[8] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, *see* Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, § 177.140* et seq.

For discussion and forms relating to FAX filing and service of papers, see Ch. 264, *Fax Filing and Service of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For discussion and forms relating to actions for recovery of rent, see Ch. 332, *Landlord and Tenant: The Tenancy*

For discussion and forms relating to enforcement of liens generally, see Ch. 342, *Liens and Wage Preferences*

For alternative forms for prayers, see Ch. 420, *Prayers*

For forms for allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms for verification, see Ch. 572, *Verification*

California Forms of Pleading and Practice--Annotated

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Volume 45: Schools: Certification thru Service of Summons and Papers-Chs. 512-519
Chapter 517 SELF-SERVICE STORAGE FACILITIES
PART IV. FORMS

45-517 California Forms of Pleading and Practice--Annotated § 517.51

§ 517.51 Summons--Storage Lien Enforcement--Judicial Council Form [Judicial Council Form SUM-140]

[1] FORM Summons--Storage Lien Enforcement--Judicial Council Form [Judicial Council Form SUM-140]

Click here to view image.

[2] Use of Form

The summons illustrated in [1], *above*, is a reproduction of a form adopted by the Judicial Council for use in a civil action to enforce a storage lien on personal property [*see § 517.50*]. Use of this form, when applicable is mandatory [*see Gov. Code § 68511*; *Cal. Rules of Ct., Rule 1.31*; Judicial Council Form SUM-140].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

For additional discussion regarding the service of summons and complaint in this type of action, see *§ 517.50[5]*. For general discussion of completion of the standard Judicial Council summons forms generally, see *Ch. 517, Service of Summons and Papers, § 518.70*. For discussion and forms relating to proof of service of the summons in civil actions generally, see Ch. 518, *Service of Summons and Papers* .

California Forms of Pleading and Practice--Annotated

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Volume 45: Schools: Certification thru Service of Summons and Papers-Chs. 512-519
Chapter 518 SERVICE OF SUMMONS AND PAPERS

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Chapter 518 SERVICE OF SUMMONS AND PAPERS
PART I. SCOPE

45-518 California Forms of Pleading and Practice--Annotated § 518.01

§ 518.01 Scope of Chapter

This chapter discusses the requirements for the service of summons in civil actions generally under *Code Civ. Proc. §§ 410.10-418.10* and in those special proceedings whose governing statutes incorporate the rules of practice set forth in Part Two of the Code of Civil Procedure (*Code Civ. Proc. §§ 410.10-418.10*), such as, *Fam. Code § 2331* and *Code Civ. Proc. § 1167* (unlawful detainer) [*see § 518.10* et seq.]. The chapter includes checklists for service and filing proof of service of summons [*see § 518.60*] and for responding to summons [*see § 518.61*]. The chapter also contains the following forms relating to summons:

- Judicial Council approved forms of summonses and proofs of service [*see §§ 518.70 -518.73*].
- Forms of applications for orders and of orders relating to service of summons [*see §§ 518.74, 518.75*].
- Form of declarations for return of summons when the defendant could not be served because he or she could not be found [*see § 518.76*].
- Form of declaration of mailing of summons and complaint pursuant to an order for service by publication [*see § 518.78*].

This chapter also discusses service of papers and pleadings during the pendency of civil actions under *Code Civ. Proc. §§ 465* and *1010-1020* [*see § 518.30* et seq.] and provides a procedural checklist for serving papers under those sections [*see § 518.62*]. It includes forms of declaration of proof of service in the following ways:

- By personal service [*see §§ 518.90, 518.92*].
- By service using first-class mail [*see §§ 518.91, 518.92*].
- By overnight delivery [*see § 518.92*].

- By messenger service [*see § 518.92*].
- By facsimile [*see § 518.92*].
- By e-mail/electronic transmission [*see § 518.92*].
- By mail using an attorney's certificate in lieu of an affidavit or declaration [*see § 518.93*].

This chapter also discusses the authorization of and requirements for electronic filing and service of documents under *Code Civ. Proc. § 1010.6* and *Cal. Rules of Ct., Rule 2.250 et seq.* [*see § 518.40* et seq.].

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§ 518.02 Cross References

- For discussion, a procedural checklist, and forms relating to service under *Code Civ. Proc. § 1005*, see Ch. 372, *Motions and Orders* .

- For discussion and forms relating to service by fax transmission, see Ch. 264, *Fax Filing and Service of Papers* .

- For discussion of additional methods of serving foreign and domestic limited partnerships, see Ch. 405, *Partnerships: Actions Between Limited Partners or Partnerships and Third Parties* .

- For discussion and forms of notices of motion to quash service of summons for lack of personal jurisdiction and motions to stay or dismiss an action on the ground of inconvenient forum, see Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* .

- For discussion and forms relating to notices of appearances and waivers of service of summons, see Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* .

- For discussion and forms relating to involuntary dismissal for failure to complete service and return of summons within the mandatory time period, see Ch. 212, *Dismissal* .

- For a discussion of motions to set aside void judgments (*Code Civ. Proc. § 473(d)*), including those that are void for lack of personal jurisdiction over the defendant, as well as other provisions relating to relief from defaults and default judgments, see Ch. 489, *Relief From Judgments and Orders* .

- Specific provisions and forms that apply to service of summons and papers in particular situations are covered in the following chapters:

  - For forms of notice of service, declarations of service outside California in action against nonresident motorist, see *Ch. 83, Automobiles: Bringing the Action, § 83.164* et

seq.

- For discussion of the manner of serving papers to bring a party into contempt [*see Code Civ. Proc. §§ 1209-1222*], see Ch. 135, *Contempt* .

- For forms of summonses used in dissolution of marriage, legal separation, and declaration of nullity proceedings, see Ch. 221, *Dissolution of Marriage: Procedure* .

- For forms of summonses used in joint debtor proceedings after judgment, see Ch. 254, *Executions and Enforcement of Judgments* .

- For forms of summonses used in unlawful detainer proceedings, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

- For service of probate notices, see Ch. 447, *Probate: Statutory Notice Requirements* .

- For discussion of the manner of serving subpoenas, see Ch. 535, *Subpoena* .

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§ 518.03 Governing Law

The form, contents, issuance, service, and return of summons are governed generally by *Code Civ. Proc. §§ 412.10-417.40*. A number of special provisions in other parts of the Code of Civil Procedure and in other codes relate to the following:

- The contents of the summons and of any required attachments [*see, e.g., Code Civ. Proc. §§ 460.5, 460.7* (defamation actions), 751.05, 751.07 (action to reestablish destroyed land records), 861.1 (validation action), 990, 991 (proceeding after judgment against joint debtor), 1167, 1167.3 (proceeding in unlawful or forcible detainer or forcible entry); *Veh. Code § 17462* (action against nonresident motorist); *Civ. Code § 4503*;], or providing that the form and contents of the summons shall be as in civil actions generally [*see, e.g., Code Civ. Proc. §§ 872.310(a)* (partition action), 1250.120(a) (eminent domain proceeding)];

- Manners of service [*see, e.g., Code Civ. Proc. §§ 751.06, 751.08* (publication and posting, respectively, in action to reestablish destroyed land records), 861 (publication in validation action), 872.310, 872.320, 872.330 (service generally, service by publication, and limitations on service by publication, respectively, in partition action), 1250.120-1250.130 (service by publication and posting in eminent domain proceeding)];

- Particular persons or entities on whom summons is to be served [*see, e.g., Bus. & Prof. Code §§ 10151.5* (nonresident real estate licensees), 11007 (nonresident subdividers); *Corp. Code §§ 1701-1702, 2011* (domestic corporations); *Corp. Code §§ 2110-2111, 2114* (foreign corporations); *Corp. Code § 15627* (foreign and domestic limited partnerships governed by California Revised Limited Partnership Act); *Corp. Code § 15800* (foreign partnerships, with specified exceptions), *Corp. Code § 15901.16* (foreign and domestic limited partnerships governed by Uniform Limited Partnership Act of 2008); *Corp. Code § 16959* (registered limited liability partnership whose principal office not in state and foreign limited liability partnership); *Corp. Code § 18200 et seq.* (unincorporated associations); *Gov. Code §§ 960.2, 960.3* (public entities); *Ins. Code § 12931* (reciprocal and nonresident insurers); *Veh. Code §§ 17451, 17454, 17455* (nonresident motorists); *Pub. Util. Code § 21414* (nonresident aircraft

operators); *Harb. & Nav. Code § 601* (nonresident boat owners); *Code Civ. Proc. §§ 474* (fictitiously named defendants), 1018 (foreign corporations, nonresidents, or absent residents incurring tax liability in California), 1250.140 (eminent domain proceeding against state)]; and

- Proof of service [*see, e.g., Code Civ. Proc. §§ 2010, 2011* (publication); *Veh. Code § 17456* (actions against nonresident motorists)].

The mandatory or discretionary dismissal of an action for failure to serve and return the summons within specified periods after the action is commenced against a defendant is governed by *Code Civ. Proc. §§ 583.210-583.250* and *583.410-583.430*.

In cases proceeding under the Trial Court Delay Reduction Act of 1986 (*Gov. Code § 68600 et seq.*), local rules affect deadlines for service and return of summons. For further discussion of these rules, see *§ 518.22[2]*.

Service of pleadings [*see Code Civ. Proc. § 422.10*] subsequent to the complaint is required by *Code Civ. Proc. § 465* and service of notices of motion and papers by *Code Civ. Proc. § 1010*. The manners in which papers may be served are set forth in *Code Civ. Proc. §§ 1011-1020*.

Code Civ. Proc. § 1010.6(a) authorizes trial courts to adopt local rules for electronic filing and service of documents subject to rules adopted by the Judicial Council under *Code Civ. Proc. § 1010.6(b)*. Any trial court local rules so adopted are subject to enumerated conditions set out in *Code Civ. Proc. § 1010.6(a)*. The Judicial Council has adopted uniform, statewide rules of court addressing electronic filing and service [*Cal. Rules of Ct., Rule 2.250 et seq.*].

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[Reserved]

§§ 518.04[Reserved]

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§ 518.10 "Summons" Defined

A summons is the process or notice [*see Code Civ. Proc. § 17(b)(6)*; *Gov. Code §§ 22, 26660*] by which a court acquires jurisdiction over the person of a defendant or cross defendant and over the subject of the action [*Code Civ. Proc. § 410.50*; *see also Harrington v. Superior Court (1924) 194 Cal. 185, 189, 228 P. 15* ; *Pinon v. Pollard (1945) 69 Cal. App. 2d 129, 133, 158 P.2d 254]* . By its service, the court presumably also acquires jurisdiction over the person of the plaintiff. Although this is not expressly stated in *Code Civ. Proc. § 410.50*, it is implied, and it was expressly provided in former *Code Civ. Proc. § 416* [*see Mungia v. Superior Court (1964) 225 Cal. App. 2d 280, 284, 37 Cal. Rptr. 285* ; *Apartments, Inc. v. Trott (1959) 172 Cal. App. 2d 7, 14, 342 P.2d 32]* , the predecessor to *Code Civ. Proc. § 410.50*. The Judicial Council, in its Official Comment to *Code Civ. Proc. § 410.50*, has indicated that no change in the prior law was intended.

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45-518 California Forms of Pleading and Practice--Annotated § 518.11

§ 518.11 Procedural Due Process Requirement

The *Fourteenth Amendment to the United States Constitution* provides that no state shall deprive any person of life, liberty, or property, without due process of law [*U.S. Const., amend. XIV, § 1*]. This prohibition has been construed to mean that no person shall be deprived of life, liberty, or property without first having received notice of the claim or charge against the person and an opportunity to be heard in opposition to it. Thus, the American Law Institute has provided that a state may not exercise judicial jurisdiction over a person, although the person is subject to its judicial jurisdiction, unless a reasonable method is employed to give the person notice of the action and unless the person is afforded a reasonable opportunity to be heard [Restatement (Second) Conflict of Laws § 25]. This prohibition has been referred to as "procedural due process" to distinguish it from "substantive due process" (which goes to the power of the state's legislative branch to enact laws).

In California, notice of the claim against a defendant in a civil action is given by the service of a summons on the person [*see Code Civ. Proc. §§ 412.20, 413.10-416.90*; *see also §§ 518.10, 518.15*]. The nature of the claim against the defendant is set forth in the complaint that accompanies the summons [*see Code Civ. Proc. §§ 415.10-415.45*]. Mere knowledge by a defendant of plaintiff's suit is neither equivalent to nor a substitute for adequate service of summons and complaint [*Kuchins v. Hawes (1990) 226 Cal. App. 3d 535, 540, 276 Cal. Rptr. 281]* .

A defendant who makes a general appearance forfeits any objection to personal jurisdiction based on defective service, even when the defendant does not know at the time that such an objection is available. Any rule that a general appearance does not waive objections to service unless the waiver is knowing and intelligent would exalt form over substance; a defendant who has actual knowledge of the action and who has submitted to the authority of the court should not be able to assert a violation of rules that exist only to bring about such knowledge and submission [*Fireman's Fund Ins. Co. v. Sparks Construction (2004) 114 Cal. App. 4th 1135, 1148, 8 Cal. Rptr. 3d 446]* .

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§ 518.12 Persons Immune to Service of Summons or Suit

Various constitutional and statutory provisions provide that specified persons are immune to service of summons at specified times or for specified periods, or both, or immune to suit altogether. For a discussion of these provisions and of the persons coming within them, see Ch. 323, *Jurisdiction: Personal* .

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45-518 California Forms of Pleading and Practice--Annotated § 518.13

§ 518.13 Acquisition of In Personam Jurisdiction

[1] By Service of Summons or General Appearance

Except as otherwise provided by statute, the court in which an action is pending has jurisdiction over a party from the time summons is served on him or her as provided by *Code Civ. Proc. §§ 413.10-417.40*. A general appearance is equivalent to personal service of summons on that party [*Code Civ. Proc. § 410.50(a)*]. For what constitutes a general appearance, as well as the distinction between general and special appearances, see Ch. 323, *Jurisdiction: Personal* .

Once the court obtains jurisdiction court over the parties, jurisdiction over the parties and the subject matter of the action continues throughout subsequent proceedings in the action [*Code Civ. Proc. § 410.50(b)*; *see also Code Civ. Proc. § 410.60* (jurisdiction over trustees and stockholders or members of corporation that has forfeited its charter or right to do business or has dissolved); *Code Civ. Proc. § 410.70* (jurisdiction of court to proceed against defendant or defendants served in action on contract against two or more defendants jointly, jointly and severally, or severally liable on a contract)].

[2] Minimum Contacts Requirement

For a California court to acquire personal jurisdiction over a defendant served outside this state, the defendant must have certain minimum contacts with this state so that "maintenance of the action does not offend traditional notions of fair play and substantial justice" as that requirementis construed primarily by the United States Supreme Court [*see International Shoe Co. v. Washington (1945) 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95* (leading case); *Kulko v. California Superior Court (1979) 436 U.S. 84, 91-92, 98 S. Ct. 1690, 56 L. Ed. 2d 132]* . That is, the exercise of jurisdiction by the court must not be inconsistent with the due process requirements of the constitution of this state or of the United States [*Code Civ. Proc. § 410.10*].

For a more detailed discussion of the minimum contacts requirement as it impacts on the court's jurisdiction over the person of a defendant or cross defendant, see Ch. 323, *Jurisdiction: Personal* .

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§ 518.14 Issuance of Summons and Amended Summons

[1] Issuance by Clerk and Court's Retention of Original Summons

After payment of the applicable fees [*see Gov. Code §§ 70611, 70613*], the plaintiff or cross complainant may have the clerk issue one or more summonses for any defendant [*Code Civ. Proc. § 412.10*]. The clerk must keep each original summons in the court records and provide a copy of each summons issued to the plaintiff who requested issuance of the summons [*Code Civ. Proc. § 412.10*].

Amendments to *Code Civ. Proc. § 412.10* effective January 1, 2006, deleted the requirement of giving the plaintiff the original summons, and deleted the requirement that the summons be returned or a declaration of lost summons be filed with the court [2005 Stats. 300].

The clerk's issuance of a summons is a routine ministerial duty when the filing of a complaint and payment of fees [*Maginn v. City of Glendale (1999) 72 Cal. App. 4th 1102, 1107, 85 Cal. Rptr. 2d 639]* .

A court may not issue a summons by fax because a court may not issue by fax any document intended to carry the original seal of the court [*see Cal. Rules of Ct., Rule 2.300(b)*].

For discussion of the court's power to issue an electronic summons, see *518.14[2], below.*

The California Judicial Council has adopted mandatory forms for summons in a civil action depending on the type of action or procedure:

- SUM-100, Summons
- SUM-110, Summons--Cross-Complaint
- SUM-120, Summons (Joint Debtor)

- SUM-130, Summons--Unlawful Detainer--Eviction
- SUM-140, Summons--Storage Lien Enforcement

For an illustration of SUM-100, Summons, see *§ 518.70*. For an illustration of SUM-110, Summons--Cross-Complaint, see *§ 518.70A*. For a checklist for use by a plaintiff in preparing and serving summons, see *§ 518.60*.

[2] Electronic Summons

Trial courts are authorized to adopt local rules permitting electronic filing and service of documents subject to rules adopted by the Judicial Council pursuant to *Code Civ. Proc. § 1010.6(b)* and the conditions set forth in *Code Civ. Proc. § 1010.6(a)* [*Code Civ. Proc. § 1010.6(a)*; *Cal. Rules of Ct., Rule 2.259(f)*]. If a trial court enacts such local rules, on the electronic filing of a complaint, petition, or other document that must be served with a summons, the trial court, upon request of the party filing the action, must issue a summons with the court seal and the case number, and the court must keep the summons in its records and may electronically transmit a copy of the summons to the requesting party [*Code Civ. Proc. § 1010.6(a)(5)*; *Cal. Rules of Ct., Rule 2.259(f)(2)*].

If the trial court plans to electronically transmit a summons to the party filing a complaint, the court must immediately on receipt of the complaint notify the attorney or party that a summons will be electronically transmitted to the electronic address given by the person filing the complaint [*Code Civ. Proc. § 1010.6(a)(5)*].

Personal service of the printed form of an electronic summons has the same legal effect as personal service of an original summons [*Code Civ. Proc. § 1010.6(a)(5)*; *Cal. Rules of Ct., Rule 2.259(f)(3)*].

For further discussion of electronic filing, see *§ 518.40* et seq.

[3] Multiple Copies Available

Under *Code Civ. Proc. § 412.10*, any number of copied summonses may be issued. Hence, if a summons is lost before service, counsel may simply have a new copy issued.

[4] Amended Summons

Once jurisdiction over a defendant is obtained by service of a copy of the summons and a copy of the complaint, amendment of the complaint does not require either a new summons or a new service of summons upon the defendant; the amended complaint alone is served, usually upon the defendant's attorney [*see* Judicial Council Comment to *Code Civ. Proc. § 412.10*]; but, if the complaint is amended before any service, an amended summons that refers to the amended complaint should be issued and served with a copy of the amended complaint [*see* Judicial Council Comment to *Code Civ. Proc. § 412.10*; *Dowling v. Comerford (1893) 99 Cal. 204, 206, 33 P. 853* ; *Koeper v. Koeper (1954) 125 Cal. App. 2d 118, 119, 269 P.2d 905]* . However, if an amendment adds a new party defendant, an amended or new summons naming that party as a defendant must be issued and served upon the new defendant, since no jurisdiction would be obtained by serving the defendant with a copy of the summons that does not name the defendant [*see* Judicial Council Comment to *Code Civ. Proc. § 412.10*; *Baldwin v. Foster (1910) 157 Cal. 643, 647, 108 P. 714* ; *W.H. Marston Co. v. Kochritz (1926) 80 Cal. App. 352, 361, 251 P. 959]* . Section 412.10 permits the plaintiff, or in appropriate cases a cross complainant, to secure, as a matter of course, the issuance of such amended summons [*see* Judicial Council Comment to *Code Civ. Proc. § 412.10*; *cf. Fed. R. Civ. P., Rule 4(h)*].

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§ 518.15 Service of Summons

[1] Governing Statutes

The service of summons is governed by Chapter 4, Title 5, Part Two, of the Code of Civil Procedure [*Code Civ. Proc. §§ 413.10-417.40*].

Code Civ. Proc. § 413.10 provides that, except as otherwise provided by statute, a summons is served as follows:

> (a) Within California as provided by Chapter 4;
>
> (b) Outside California but within the United States, as provided by Chapter 4, or as prescribed by the law of the place where the person is served; or
>
> (c) Outside the United States, as provided in Chapter 4 or as directed by the court in which the action is pending, or, if the court before or after service finds that the service is reasonably calculated to give actual notice, as prescribed by the law of the place where the person is served or as directed by the foreign authority in response to a letter rogatory. These rules are subject to the provisions of the Convention on the "Service Abroad of Judicial and Extrajudicial Documents" in Civil or Commercial Matters (Hague Service Convention) [*see § 518.16[9]*].

The prefatory phrase, "Except as otherwise provided by statute," as used in *Code Civ. Proc. § 413.10*, would seem to make it clear that the methods of service prescribed in the section may be used in all civil actions, even when another statute prescribes a special method of service, unless the other statute expressly prohibits use of the general statutes or conditions their use on court approval. Some of the special statutes expressly refer to the general statutes [*see, e.g., Corp. Code §§ 1700, 2011(c)* (domestic corporations), 2110.1 (foreign corporations)], though others merely prescribe a special method or methods of service without indicating that the general methods may also be used. In those cases, use of the general methods of service would appear to be available at the attorney's option [*see* discussion in Li, Attorney's Guide to California Jurisdiction and Process, § 1.17 (Cal. C.E.B. 1970)].

[2] In Case Not Covered by Statute

When no provision is made for service of summons, or when the statutory procedure cannot wholly or partly be followed in a particular action, the court in which the action is pending may direct that summons be served in a manner that is reasonably calculated to give actual notice to the party to be served and that proof of service be made as prescribed by the court [*Code Civ. Proc. § 413.30*; *see also Code Civ. Proc. § 187* (implied powers of court); Li, Attorney's Guide to California Jurisdiction and Process, § 1.19 (Cal. C.E.B. 1970)].

[3] By Whom Made

[a] Qualifications

A summons may be served by any person who is at least 18 years of age and not a party to the action [*Code Civ. Proc. § 414.10*], and hence may be served by a party's attorney [Sheehan v. All Persons, etc. *(1926) 80 Cal. App. 393, 398, 252 P. 337]* .

Various code provisions, however, expressly authorize or require service by specified persons. For example, *Gov. Code § 26665* provides that process in civil actions or proceedings may be served by any duly qualified and acting marshal or sheriff of any county in the state, subject to the Code of Civil Procedure [*see also Gov. Code § 26608* (service by sheriffs)].

In any action or proceeding in which the sheriff is a party, the coroner is required to discharge the duties of sheriff [*Gov. Code § 27469*]. This includes execution of the process or orders in the action or proceeding [*Code Civ. Proc. § 262.6*], though, in an action against a sheriff, all process and orders may be served by any United States citizen over the age of 18 [*Code Civ. Proc. § 262.7*]. In addition, process and orders in an action or proceeding may be executed by a person residing in the county who is designated by the court or the judge thereof and denominated an elisor, in the following cases [*Code Civ. Proc. § 262.8*]:

- When the sheriff and coroner are both parties;
- When either of these officers is a party, and the process is against the other; or
- When either of these officers is a party, and there is a vacancy in the office of the other, or when it appears by affidavit (or declaration [*Code Civ. Proc. § 2015.5*]), to the satisfaction of the court in which the proceeding is pending or the judge thereof, that both of these officers are disqualified or by reason of any bias, prejudice, or other cause would not act promptly or impartially.

[b] Registered Process Servers

Registered process servers are governed by *Bus. & Prof. Code §§ 22350-22360*. Generally, any nonexcepted person who makes more than 10 services of process in California during one calendar year, for specific compensation or in expectation of specific compensation, where that compensation is directly attributable to the service of process, must file and maintain a verified certificate of registration as a process server with the county clerk of the county in which he or she resides or has his or her principal place of business. Similarly, any corporation or partnership that derives or expects to derive compensation from service of process within California must also file and maintain a verified certificate of registration as a process server with the county clerk of the county in which the corporation or partnership has its principal place of business [*Bus. & Prof. Code § 22350(a)*].

The following are excepted from the filing requirement [*Bus. & Prof. Code § 22350(b)*]:

- Any sheriff, marshal, or government employee acting in the course of his or her employment.

- An attorney or his or her employees, when serving process related to cases for which the attorney is providing legal services.

- A person specially appointed by a court to serve its process.

- A licensed private investigator or his or her employees.

- A professional photocopier registered under *Bus. & Prof. Code § 22450* whose only service of process relates to subpoenas for the production of records, which subpoenas specify that the records be copied by that professional photocopier.

Any service of summons that complies with the provisions of the Code of Civil Procedure is not, however, rendered invalid or ineffective because it was made by a person in violation of *Bus. & Prof. Code § 22350 et seq.* [*Code Civ. Proc. § 413.40*].

[4] Time for Service of Summons

By statute, a summons and complaint must be served upon a defendant within three years after the action is commenced (i.e. the complaint is filed) [*Code Civ. Proc. § 583.210(a)*]; and proof of service of the summons must be filed within 60 days after the time the summons and complaint must be served upon a defendant [*Code Civ. Proc. § 583.210(b)*]. However, Trial Court Delay Reduction rules require the summons and complaint generally to be served on all named defendants and filed with the court within 60 days after the complaint is filed [*Cal. Rules of Ct., Rule 3.110(b)*]. When the complaint is amended to add a defendant, the added defendant must be served and proof of service must be filed within 30 days after the filing of the amended complaint [*Cal. Rules of Ct., Rule 3.110(b)*].

The time limits of *Cal. Rules of Ct, Rule 3.110(b)* apply to the service of pleadings in civil cases except for unlawful detainer actions, proceedings under the Family Code, and other proceedings for which different service requirements are prescribed by law [*Cal. Rules of Ct., Rule 3.110(a)*]. Check for local rules that may adjust filing requirements.

Additionally, the 60-day service requirement of *Cal. Rules of Ct., Rule 3.110(b)* does not apply to collections cases, as defined in *Cal. Rules of Ct., Rule 3.740(a)* [*Cal. Rules of Ct., Rule 3.740(c)(1)*]. A "collections case" is an action for recovery of not more than $25,000, exclusive of interest and attorney fees, arising from a credit transaction for property, services, or money. The action may not seek [*Cal Rules of Ct., Rule 3.740(a)*]:

- Tort damages.

- Punitive damages.

- Recovery of real property.

- Recovery of personal property.

- Prejudgment writ of attachment.

The complaint in a collections case must be served on all named defendants, and proofs of service on those defendants must be filed, or the plaintiff must obtain an order for publication of the summons, within 180 days after the filing of the complaint [*Cal Rules of Ct., Rule 3.740(d)*]. If proofs of service on all defendants are not filed or the plaintiff has not obtained an order for publication of the summons within 180 days after the filing of the complaint, the court may issue

an order to show cause why reasonable monetary sanctions should not be imposed. If proofs of service on all defendants are filed or an order for publication of the summons is filed at least 10 court days before the order to show cause hearing, the court must continue the hearing to 360 days after the filing of the complaint [*Cal Rules of Ct., Rule 3.740(e)*].

A cross-complaint against a party who has appeared in the action must be accompanied by proof of service of the cross-complaint at the time it is filed. If the cross-complaint adds new parties, the cross-complaint must be served on all parties and proofs of service on the new parties must be filed within 30 days of the filing of the cross-complaint [*Cal. Rules of Ct., Rule 3.110(c)*].

The court, on its own motion or on the application of a party, may extend or otherwise modify the times provided in *Cal. Rules of Ct., Rule 3.110(b)-(d)*; and an application for a court order extending the time to serve a pleading must be filed before the time for service has elapsed. The application must be accompanied by a declaration showing why service has not been completed, documenting the efforts that have been made to complete service, and specifying the date by which service is proposed to be completed [*Cal. Rules of Ct., Rule 3.110(e)*].

For discussion of moving to dismiss for failure to timely serve and file summons and complaint, see *§ 518.22*.

California Forms of Pleading and Practice--Annotated

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Volume 45: Schools: Certification thru Service of Summons and Papers-Chs. 512-519
Chapter 518 SERVICE OF SUMMONS AND PAPERS
PART II. LEGAL BACKGROUND
A. Service of Summons

45-518 California Forms of Pleading and Practice--Annotated § 518.16

§ 518.16 Manners of Serving Summons

[1] Hand Delivery

A summons may be served by personal delivery, that is, hand delivery of a copy of the summons and a copy of the complaint to the person to be served. Service of a summons in this manner is deemed complete at the time of delivery [*Code Civ. Proc. § 415.10*].

Personal service usually contemplates actual delivery of a copy of the summons and a copy of the complaint to the person to be served. The person on whom service is sought, however, is not permitted to deny personal service on the ground of lack of delivery by merely declining to take the document offered, when, under the circumstances, it would be obvious to a reasonable person that personal service was being attempted. In such a case, service may be made by merely depositing the process in some appropriate place where it would be most likely to come to the attention of the person being served [*Crescendo Corp. v. Shelted, Inc. (1968) 267 Cal. App. 2d 209, 212, 72 Cal. Rptr. 776]* .

Personal service of a printed form of an electronic summons issued under local court rule adopted pursuant to *Code Civ. Proc. § 1010.6* has the samelegal effect as personal service of an original summons [*Code Civ. Proc. § 1010.6(a)(5)*; *Cal. Rules of Ct., Rule 2.259*]. For discussion of the issuance of electronic summons, see *§ 518.47*.

[2] Substituted Service

[a] Term "Constructive Service" Distinguished

The terms "substituted service" and "constructive service" are sometimes used interchangeably. Strictly speaking, however, constructive service consists of service by publication or posting (discussed at [6], *below*), whereas substituted service consists of delivery of a copy of the summons and a copy of the complaint to a person other than the defendant who is authorized by the defendant, or by law, to receive service on defendant's behalf. *Code Civ. Proc. § 416.90*, for example, provides that a summons may be served on a person not otherwise specified in *Code Civ. Proc. §§ 416.10-416.80* (persons to be served) by delivering a copy of the summons and a copy of the complaint to that person or to a person authorized by him or her to receive service or process. Service on the agent under this section constitutes

substituted service on the defendant [*see Warner Bros. Records, Inc. v. Golden West Music Sales (1974) 36 Cal. App. 3d 1012, 1018, 112 Cal. Rptr. 71]* . For determining who is a proper agent for acceptance of service on behalf of a defendant, a specific appointment is not required, but the principal-agent relationship must be close and enduring enough to make it highly probable the defendant will receive actual notice [*Summers v. McClanahan (2006) 140 Cal. App. 4th 403, 412, 44 Cal. Rptr. 3d 338* (service on actor's personal manager did not comport with statutory requirements despite defendant having actual notice of complaint)].

[b] Statutes Authorizing Substituted Service

In addition there are a number of other statutes in the Code of Civil Procedure and other codes authorizing service on behalf of a specified defendant to be made on, among others, the Secretary of State, the Commissioner of Corporations, the Director of Motor Vehicles, The Department of Real Estate, and the Insurance Commissioner.

Examples of such statutes are:

- *Bus. & Prof. Code § 10151.5* (nonresident real estate licensee).
- *Bus. & Prof. Code § 11007* (nonresident subdivider).
- *Corp. Code §§ 1702, 2011(b)* (domestic corporation).
- *Corp. Code §§ 2111, 2114(b)* (foreign corporation).
- *Corp. Code § 15800* (foreign partnership).
- *Corp. Code § 25550* (violator of Corporate Securities Law).
- *Corp. Code § 31420* (Franchise Investment Law).
- *Gov. Code §§ 960.2, 960.3, 53051* (public entity).
- *Veh. Code §§ 17451, 17454, 17455* (nonresident motorist).
- *Prob. Code § 8574* (nonresident executor).
- *Ins. Code § 12931* (reciprocal and nonresident insurers).

These statutes are all discussed at *§ 518.17*.

Substituted service is also recognized in relation to gated communities [*see Bein v. Brechtel-Jochim Group, Inc. (1992) 6 Cal. App. 4th 1387, 1393, 8 Cal. Rptr. 2d 351* ; *see also § 518.18[2]*].

To obtain in personam jurisdiction through any form of substituted service, strict compliance with the statutory procedures is required, and the applicable statutes are strictly construed. The form of substituted service utilized must be reasonably calculated to give an interested party actual notice of the proceedings and an opportunity to be heard, so that traditional notions of fair play and substantial justice implicit in due process are satisfied [*Zirbes v. Stratton (1986) 187 Cal. App. 3d 1407, 1416, 232 Cal. Rptr. 653* (involving substituted service, but using "substituted" and "constructive" interchangeably); *compare* Zirbes *with Stafford v. Mach (1998) 64 Cal. App. 4th 1174, 1183, 75 Cal. Rptr. 2d 809* (involving substituted service under *Code Civ. Proc. § 415.20*; pre-1969 service of process statutes requiring strict and exact compliance have now been more liberally construed to effectuate service if actual notice has

been received by defendant)].

[3] Combination Service

[a] Business and Public Entities

In certain situations, a combination of substituted service and service by mail may be used in lieu of personal delivery to effect service of the summons. Thus, in lieu of personal delivery of the papers to the person to be served as specified in *Code Civ. Proc. §§ 416.10* (corporations), 416.20 (dissolved corporations or corporations having forfeited their charter or right to do business), 416.30 (joint stock companies), 416.40 (unincorporated associations and partnerships), and 416.50 (public entities), all discussed at *§ 518.18[1] -[6]*, the summons may be served by leaving a copy of the summons and complaint during usual office hours in his or her office or, if no physical address is known, at his/her usual mailing address, other than a U.S Postal Service post office box, with the person who is apparently in charge thereof, and by thereafter mailing a copy of the summons and complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left. When service is effected by leaving a copy of the summons and complaint at a mailing address, it must be left with a person at least 18 years of age, who must be informed of the contents thereof [*Code Civ. Proc. § 415.20(a)*].

Service of a summons in this manner is deemed complete on the 10th day after the mailing [*Code Civ. Proc. § 415.20(a)*].

A defendant will not be permitted to defeat service by rendering physical service impossible. The purpose of *Code Civ. Proc. § 415.20* is to permit service to be completed on a good faith attempt at physical service on a responsible person, plus actual notification of the action by mailing thesummons and complaint to the appropriate party [*Khourie, Crew & Jaeger v. Sabek, Inc. (1990) 220 Cal. App. 3d 1009, 1013, 269 Cal. Rptr. 687]* .

ILLUSTRATION:

Combination Service on Corporation Held Effective. A process server attempting service on a domestic corporation (1) went to the defendant's place of business, during usual business hours, and, finding the door locked, rang the bell; (2) a woman responded but refused to unlock the door or tell the server her name and said she would not accept the papers; (3) the server told the woman he was leaving the papers outside the door and did so as she watched him; and (4) the server thereafter mailed a copy of the complaint and summons to the defendant at its place of business. Is this sufficient to effect service? Yes. The process server provided actual notice of the documents to the person apparently in charge of the office and, prevented by the person from leaving them inside the office, left them on the other side of the office door. No more is required to effect service other than to mail a copy of the summons and complaint to defendant, which the process server did, and the service therefore became complete 10 days after the mailing [*Khourie, Crew & Jaeger v. Sabek, Inc. (1990) 220 Cal. App. 3d 1009, 1012-1014, 269 Cal. Rptr. 687]* .

[b] Individuals

[i] Generally

If a copy of the summons and complaint cannot with reasonable diligence be delivered personally to the person to be served as specified in *Code Civ. Proc. §§ 416.60* (minors), 416.70 (persons other than minors having a guardian, conservator, or similar fiduciary appointed), 416.80 (candidates for public office), or 416.90 (persons not otherwise specified), the summons may be served by leaving a copy of the summons and complaint at one of the following locations [*Code Civ. Proc. § 415.20(b)*]:

- The person's dwelling house.

- The person's usual place of abode.
- The person's usual place of business.
- The person's usual mailing address other than a U.S. Postal Service post office box.

The terms "dwelling house" and "usual place of abode" take their meaning from the federal rules. The meaning of these terms is not clearly defined in the abstract but must be answered with the notice requirements of due process in mind [*Zirbes v. Stratton (1986) 187 Cal. App. 3d 1407, 1416-1417, 232 Cal. Rptr. 653* (home of parents of party not party's abode when party maintained household elsewhere)].

The papers must be left in the presence of a competent member of the household or a person apparently in charge of the office, place of business,or usual mailing address, who is at least 18 years of age and who must be informed of contents of the papers served [*Code Civ. Proc. § 415.20(b)*].

Thereafter, a copy of the summons and of the complaint must be mailed, by first-class mail, postage prepaid, to the person to be served at the place where the copies of the papers were left [*Code Civ. Proc. § 415.20(b)*].

Service in this manner is deemed complete on the 10th day after mailing [*Code Civ. Proc. § 415.20(b)*].

The plain language of *Code Civ. Proc. § 415.20(b)* authorizes substitute service at a defendant's usual mailing address, which can include a private/commercial post office box [*Ellard v. Conway (2001) 94 Cal. App. 4th 540, 546, 114 Cal. Rptr. 2d 399]* .

[ii] Reasonable Diligence

Service under *Code Civ. Proc. § 415.20(b)* is available only as indicated in [i], *above*, after plaintiff has exercised reasonable diligence in attempting to effect personal service [*Evartt v. Superior Court (1979) 89 Cal. App. 3d 795, 799-802* ; *see* *Stafford v. Mach (1988) 64 Cal. App. 4th 1174, 1182, 75 Cal. Rptr. 2d 809* (reasonable diligence requirement to permit substituted service ordinarily should be satisfied when personal service has been attempted two or three times)].

As a condition of establishing that the party to be served cannot with reasonable diligence be served in another manner specified in this article, the court may not require that a search be conducted of public databases where access by a registered process server to residential addresses is prohibited by law or by published policy of the agency providing the database, including, but not limited to, voter registration rolls and records of the department of motor vehicles [*Code Civ. Proc. § 415.50(e)*].

On a motion to quash service of summons served under *Code Civ. Proc. § 415.20(b)*, the burden is on plaintiff to show that reasonable diligence to effect personal service was exercised; however, no single formula or mode of search can be said to constitute reasonable diligence in every case and each case must, therefore, be judged on its own facts [*Evartt v. Superior Court (1979) 89 Cal. App. 3d 795, 801, 152 Cal. Rptr. 836* (holding reasonable diligence under facts of case was not exercised and issuing writ of mandate directing trial court to vacate its order denying defendant's motion to quash service)].

Whether or not there has been reasonable diligence should be liberally construed to effectuate service and uphold jurisdiction of the court if actual notice has been received by the defendant [*Espindola v. Nunez (1988) 199 Cal. App. 3d 1389, 1391, 245 Cal. Rptr. 596* (reasonable diligence was shown when process server served wife and left husband's copy of summons and complaint with her on fourth attempt to serve husband and wife defendants at their home);

Burchett v. City of Newport Beach (1995) 33 Cal. App. 4th 1472, 1477-1478 , 40 Cal. Rptr. 2d 1 (service quashed when plaintiffs exercised no diligence whatsoever)].

[4] Mail and Acknowledgment of Receipt

[a] Procedure

The summons may also be served by mail. This is done by sending a copy of the summons and a copy of the complaint, together with two copies of the notice and acknowledgment of receipt specified in *Code Civ. Proc. § 415.30(b)*, discussed below, and a return envelope, postage prepaid, addressed to the sender, by first-class mail or airmail, postage prepaid, to the person to be served [*Code Civ. Proc. § 415.30(a)*]. If summons is to be served outside the United States, the return postage may be prepaid at the post office.

A post office box is a sufficient address for *Code Civ. Proc. § 415.30* service when the plaintiff knows the person to be served is receiving mail at that address [*Transamerica Title Ins. Co. v. Hendrix (1995) 34 Cal. App. 4th 740, 744-746, 40 Cal. Rptr. 2d 614* (*Code Civ. Proc. § 415.50* service by publication not authorized when plaintiff knew of post office box and did not attempt service by mail)].

The notice and acknowledgment of receipt of summons sent must be substantially in the form prescribed by *Code Civ. Proc. § 415.30(b)*, though a notice of acknowledgment of receipt in form approved by the Judicial Council [*see § 518.73*] is deemed to comply with the section [*Code Civ. Proc. § 415.30(e)*].

[b] When Service Is Complete

Service of summons by mail is deemed complete on the date a written acknowledgment of receipt is executed, if the acknowledgment is thereafter returned to the sender [*Code Civ. Proc. § 415.30(c)*]. The written acknowledgment of receipt may be on the Judicial Council's approved form [*see § 518.73*] or on any other form satisfactory to the court [*Code Civ. Proc. § 417.10(a)*].

A person so served who fails to complete and return an acknowledgment within 20 days from the date it was mailed will be liable for reasonable expenses thereafter incurred in serving or attempting to serve the person by another permitted method. The court in which the action is pending, on motion, with or without notice, must, except for good cause shown, award the party making service such expenses whether or not that party is otherwise entitled to recover costs in the action [*Code Civ. Proc. § 415.30(d)*].

When the summons is served by mail, the provisions of *Code Civ. Proc. § 1013* extending the time for exercising a right or doing an act do notextend any time specified in the foregoing paragraph or the time in which the defendant must file a responsive pleading [*Code Civ. Proc. § 413.20*].

[5] Certified or Registered Mail (Outside California)

The summons may be served on a person outside California by sending a copy of the summons and a copy of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt [*Code Civ. Proc. § 415.40*].

Service by return receipt first-class mail pursuant to *Code Civ. Proc. § 415.40* is deemed complete on the 10th day after mailing [*Code Civ. Proc. § 415.40*] and the time extensions of *Code Civ. Proc. § 1013* do not apply [*Code Civ. Proc. § 413.20*]. Effective service by mail on a defendant outside the state does not require an executed acknowledgment of receipt [*Bolkiah v. Superior Court (1999) 74 Cal. App. 4th 984, 1000, 88 Cal. Rptr. 2d 540]* . Read together, *Code Civ. Proc. §§ 415.40* and *417.20* permit completion of service by mail when the return receipt is signed by a person so authorized by the defendant, and evidence that a mailed summons actually reached the individual to be served is

sufficient to establish valid service, and thus to establish substantial compliance, even if the summons was signed for by someone who did not have the authority to do so [*Cruz v. Fagor America, Inc. (2007) 146 Cal. App. 4th 488, 499-500, 52 Cal. Rptr. 3d 862]* . For requirements of proof of service concerning service under *Code Civ. Proc. § 415.40*, see *§ 518.20[4][a]*.

The summons may be served on a person outside the United States as provided in *Code Civ. Proc. §§ 413.10-417.40* or as directed by the court in which the action is pending or, if the court before or after service finds that the service is reasonably calculated to give actual notice, as prescribed by the law of the place where the person is served or as directed by the foreign authority in response to a letter rogatory. These rules are subject to the provisions of the Convention on the "Service Abroad of Judicial and Extrajudicial Documents" in Civil or Commercial Matters (Hague Service Convention) [*Code Civ. Proc. § 413.10(c)*; *see also* [9], *below*].

[6] Publication (Constructive Service)

[a] Affidavit for Service by Publication

The summons may be served by publication if, on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) the following facts appear to the satisfaction of the court in which the action is pending [*Code Civ. Proc. § 415.50(a)*]:

(1) That the party to be served cannot with reasonable diligence be served in any of the following manners:

(a) Hand delivery under *Code Civ. Proc. § 415.10* [*see* [1], *above*];

(b) Combination service under *Code Civ. Proc. § 415.20* [*see* [3], *above*];

(c) Mail and acknowledgment service under *Code Civ. Proc. § 415.30* [*see* [4], *above*]; or

(d) First-class mail to a person outside California with return receipt required under *Code Civ. Proc. § 415.40* [*see* [5], *above*]; and

(2) That either

(a) A cause of action exists against the party on whom service is to be made or the party is a necessary or proper party to the action; or

(b) The party to be served has or claims an interest in real or personal property in California that is subject to the jurisdiction of the court or the relief demanded in the action consists wholly or in part in excluding the party from any interest in that property.

For forms of application and order for service by publication, see *§ 518.74*.

[b] Order for Service by Publication

On a proper application and showing [*see § 518.74[1]*], the court will order that the summons be published in a named newspaper published in California that is most likely to give actual notice to the party to be served. If the party to be served resides or is located out of this state, the court may also order the summons to be published in a named newspaper outside this state that is most likely to give actual notice to that party [*Code Civ. Proc. § 415.50(b)*]. The court will also direct that a copy of the summons and a copy of the complaint be forthwith mailed to the party if the party's address is ascertained before the time prescribed for publication of summons expires. Except as otherwise

provided by statute, the publication is made as provided in *Gov. Code § 6064* (once a week for four successive weeks), unless the court in its discretion orders publication for a longer period [*Code Civ. Proc. § 415.50(b)*; *see § 518.74[2]*].

Notwithstanding an order for publication, the summons may be served in another manner authorized by "this chapter," that is, by *Code Civ. Proc. §§ 413.10-417.40*, in which event the service supersedes any published summons [*Code Civ. Proc. § 415.50(d)*].

[c] Completion of Service by Publication

Service of summons by publication is deemed complete as provided in *Gov. Code § 6064* [*Code Civ. Proc. § 415.50(c)*].

If service is to be by publication, the publication must be completed before the expiration of the three year mandatory dismissal period for service of summons [*see Watts v. Crawford (1995) 10 Cal. 4th 743, 761, 42 Cal. Rptr. 2d 81, 896 P.2d 807* (disapproving *Quaranta v. Merlini (1987) 192 Cal. App. 3d 22, 237 Cal. Rptr. 179*); *Perez v. Smith (1993) 19 Cal. App. 4th 1595, 1599-1600, 24 Cal. Rptr. 2d 186* ; *see Code Civ. Proc. §§ 583.210, 583.250*].

[d] Service of Statement of Damages by Publication

If a party has not appeared in an action, a statement of damages must be served in the same manner as a summons before a default may be taken [*Code Civ. Proc. § 425.11(c), (d)*]; this provision applies even where a summons was served by publication. Once a party obtains a court order allowing service of the summons and complaint by publication, a separate order is not necessary to also simultaneously serve the statement of damages by publication [*Anastos v. Lee (2004) 118 Cal. App. 4th 1314, 1318, 13 Cal. Rptr. 3d 716]* .

[7] Unlawful Detainer Proceeding

The summons in a proceeding for unlawful detainer, forcible entry, or forcible detainer must be served and returned in the same manner as a summons in a civil action [*Code Civ. Proc. § 1167*], that is, in the manner provided in *Code Civ. Proc. §§ 413.10-417.40*. These sections include provisions specifically authorizing service of summons in certain unlawful detainer proceedings by a combination of posting the premises and mailing [*Code Civ. Proc. § 415.45*] or by certified mail [*Code Civ. Proc. § 415.47*]. For further discussion and a form of summons for use in unlawful detainer proceedings, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

[8] Transmitted by Telegraph

A summons may be transmitted by telegraph for service anywhere. The telegraphic copy may be served by the officer or person to whom it is sent for that purpose and returned by that person in the same manner and with the same effect as the original could have been had it been delivered to him or her. The officer or person serving the summons has the same authority and is subject to the same liabilities as if the copy were the original. The telegraph operator need not telegraph a description of the seal or any word or device on it, but the seal may be expressed in the telegraphic copy by the letters "L.S." (locus sigilli, Latin for place of the seal), or by the word "seal" [*Code Civ. Proc. § 1017*].

[9] In Foreign Country

[a] Convention on Service Abroad

[i] Existence of and Signatories to Convention

The rules for service of summons outside the United States are subject to the provisions of the Convention on the "Service Abroad of Judicial and Extrajudicial Documents" in Civil or Commercial Matters (Hague Service Convention)

[*Code Civ. Proc. § 413.10(c)*].

In addition to the United States, the signatories include the following as of 1995:

- Antigua and Barbuda
- Barbados
- Belgium
- Botswana
- Canada
- China
- Cyprus
- Czech Republic
- Denmark
- Egypt
- Finland
- France
- Germany
- Greece
- Ireland
- Israel
- Italy
- Japan
- Luxembourg
- Malawi
- Netherlands
- Norway
- Pakistan

- Portugal
- Seychelles
- Slovak Republic
- Spain
- Sweden
- Turkey
- United Kingdom

Through the United Kingdom the treaty extends to many British territories, including Bermuda, British Virgin Islands, and Fiji.

On the part of the United States, the treaty covers service in all of the states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands. The treaty is binding on the states pursuant to U.S. Const., art. VI, *cl. 2.*A state court may not assume jurisdiction in a case when to do so would violate the treaty [*Shoei Kako Co. v. Superior Court (1973) 33 Cal. App. 3d 808, 819, 109 Cal. Rptr. 402* ; *see also Code Civ. Proc. § 413.10(c)*].

[Ii] Determining When Convention Governs

If the address of the person to be served is known, a summons may be served on that person in certain foreign countries pursuant to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters [20 U.S.T. 361; for text and accompanying declarations of signatories, *see* 28 U.S.C.A., Fed. R. Civ. P., following Rule 4, after Notes of the Advisory Committee on Rules in annual pocket part].

Service through the Hague Service Convention provides the exclusive means of service on a foreign national whose foreign address is known [*Code Civ. Proc. § 413.10(c)*; *Kott v. Superior Court (1996) 45 Cal. App. 4th 1126, 1130, 53 Cal. Rptr. 2d 215* ; *see also Suzuki Motor Co. v. Superior Court (1988) 200 Cal. App. 3d 1476, 1484, 249 Cal. Rptr. 376* ; *Dr. Ing H.C.F. Porsche A.G. v. Superior Court (1981) 123 Cal. App. 3d 755, 760, 177 Cal. Rptr. 155]* .

If the person's address is unknown, the Convention does not apply and service by publication in California is appropriate [People v. Parcel No. 056-500-09 *(1997) 58 Cal. App. 4th 120, 125, 68 Cal. Rptr. 2d 51* (service by publication upheld); *Kott v. Superior Court (1996) 45 Cal. App. 4th 1126, 1130-1131, 53 Cal. Rptr. 2d 215* (service by publication improper due to lack of diligence in determining defendant's address); *see Code Civ. Proc. § 415.50*]. For discussion of service by publication, see [6], *above*.

ILLUSTRATION:

Diligence Required in Determining Defendant's Status and Address. At the start of the case, plaintiff apparently believed the individual defendant was an employee of a corporate defendant with offices in Beverly Hills. When plaintiff attempted to serve the individual defendant at the corporate office, the process server was told that the individual defendant was not available there and was not eligible for substituted service. Nevertheless, plaintiff's process server left a copy of the summons and complaint at the corporate office in Beverly Hills, mailed a copy to the individual defendant at that address, and filed an affidavit of due diligence. The individual defendant filed a motion to quash, at which point counsel for both the corporate and individual defendants explained that the individual defendant was not an employee of the corporate defendant, but rather the agent of a firm consulting to

the corporate defendant, and a Canadian national. The motion to quash was granted, but then plaintiff sought to serve the individual defendant by publication in Los Angeles on the basis of an investigation that found no address, telephone listing, motor vehicle registration, voter registration, or record of property ownership for the individual defendant in Los Angeles County. The court issued an order for service by publication of summons in the Los Angeles Daily Journal. Defendants' counsel sought to quash that service. Were plaintiff's attempts to locate defendant sufficient to support service in Los Angeles by publication? No. After plaintiff learned the individual defendant was a Canadian national, it made no attempt to locate defendant in Canada, nor did it inquire of defendants' counsel as to the location of the individual defendant or if counsel was authorized to accept service. The individual defendant's address remained unknown to plaintiff because plaintiff ignored obvious avenues of obtaining that information [*Kott v. Superior Court (1996) 45 Cal. App. 4th 1126, 1131-1133, 53 Cal. Rptr. 2d 215]* .

[b] Service Under Convention

[i] Procedure Specified

Service may be effected pursuant to the treaty by the following procedure:

(1) Obtain three or more copies of the "Request for Service Abroad of Judicial or Extrajudicial Documents" and of the "Summary of the Document to Be Served" from any office of the United States Marshal. These are forms prescribed by the treaty.

(2) Fill out both forms in triplicate.

(a) If English is not the official language, or one of the official languages, of the country in which service will be made, complete two sets of forms, one in English, the other in the appropriate foreign language [*see Julen v. Larson (1972) 25 Cal. App. 3d 325, 328-330, 101 Cal. Rptr. 796]* . Label each form at the top as a translation (e.g., "English Translation" and, if the other is translated into French, "Traducion Francaise"). The reverse side of the request form is a blank "Certificate" to be completed by the process server in the foreign country.

(b) The request form calls for the identity and address of the applicant and the identity of the receiving authority in the foreign country, to whom the local process server forwards the request and accompanying forms and papers.

(c) The treaty's signatories have each designated a Central Authority to receive requests for service coming from other contracting states. These are contained in the signatories' accompanying declarations to the treaty and are set forth in 28 U.S.C.A., Fed. R. Civ. P., following Rule 4, after Notes of the Advisory Committee on Rules in the annual pocket part. The name and address of the appropriate receiving authority may also be obtained from the office of the United States Marshal or from the United States Department of Justice. Some sheriffs may also be able to provide this information.

(3) If English is not the official language, or one of the official languages, of the country in which service will be made, have the summons and complaint translated into the appropriate foreign language [*see Julen v. Larson (1972) 25 Cal. App. 3d 325, 328-330, 101 Cal. Rptr. 796]* . Two copies will be needed.

(4) Deliver the completed forms, copies of the summons and complaint, and translations, if any, all in

duplicate, to the appropriate receiving authority in the foreign country or to the local process server, with a request that they be forwarded to the receiving authority in the foreign country as provided in the treaty. Eventually, the certificate on the reverse side of the request form should be returned, showing that service was or was not effected.

Failure to comply with the Convention renders the service void, even if the defendant has actual notice of the lawsuit [*Floveyor Internat., Ltd. v. Superior Court (1997) 59 Cal. App. 4th 789, 794, 69 Cal. Rptr. 2d 457]* .

[ii] Article 10 Alternatives

Article 10 of the treaty provides that, if the state of destination does not object, "the present Convention" shall not interfere with any of the following:

(a) The freedom to send judicial documents by postal channels directly to persons abroad;

(b) The freedom of judicial officers, officials, or other competent persons of the state of origin to effect service of judicial documents directly through the judicial officers, officials, or other competent persons of the state of destination; or

(c) The freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials, or other competent persons of the state of destination.

Article 10(a) of the Convention allows service of process by mail; permitting service by mail under article 10(a) is consistent with the logic and structure of the Convention itself, with the interpretative materials on the issue, including the report of the Commission, Handbook, and State Department, is consistent with the understanding of some of the signatories, and also furthers the Convention's primary purpose of establishing a uniform, simple, and efficient system for establishing service abroad. Allowing service of process by mail, so long as the signatory does not object, promotes a smooth and efficient international legal system [*Denlinger v. Chinadotcom Corp. (2003) 110 Cal. App. 4th 1396, 2 Cal. Rptr. 3d 530]* .

The United Kingdom has objected to Article 10 paragraph (c) in a statement that ambiguously referred also to paragraph (b). The objection regarding "service through official channels" was intended to apply to documents from an embassy or consular official, and does not invalidate service under paragraph (b) through "other competent persons of the State of destination" [*see* *Balcom v. Hiller (1996) 46 Cal. App. 4th 1758, 1762, 54 Cal. Rptr. 2d 536* (upholding service in United Kingdom by person who did so in manner authorized by law of United Kingdom)].

For a discussion of article 10 of the Convention and its effect on service by mail outside the United States under the provisions of *Code Civ. Proc. §§ 413.10(c), 415.30,* and *415.40,* see *Honda Motor Co. v. Superior Court (1992) 10 Cal. App. 4th 1043, 1049, 12 Cal. Rptr. 2d 861* (attempted service on Japanese defendant by certified mail as insufficient under *Hague Convention); Suzuki Motor Co. v. Superior Court (1988) 200 Cal. App. 3d 1476, 1484, 249 Cal. Rptr. 376* (service of process on Japanese defendants by registered mail as not authorized by treaty); and *Shoei Kako Co. v. Superior Court (1973) 33 Cal. App. 3d 808, 821-824, 109 Cal. Rptr. 402* . See also [5], *above*.

[c] Service Under Foreign Service Immunities Act

The Foreign Services Immunity Act (FSIA) (*28 U.S.C.S. § 1602 et seq.*) is the sole basis for obtaining jurisdiction over a "foreign state," its "political subdivisions" and "agencies or instrumentalities" [*Bolkiah v. Superior Court (1999) 74 Cal. App. 4th 984, 992, 88 Cal. Rptr. 2d 540]* .

Service of process on a sovereign state or its political subdivisions must comply strictly with the requirements of *28*

U.S.C.S. § 1608(a), which provides for service of process through diplomatic channels unless the parties have a separate prior arrangement for service [*Bolkiah v. Superior Court (1999) 74 Cal. App. 4th 984, 993, 993 n.1, 88 Cal. Rptr. 2d 540]* .

The FSIA's requirements for service of process on an "agent or instrumentality of a foreign state" is less stringent under *28 U.S.C.S. § 1608(b)(3)* and may be adequate if reasonably calculated to give actual notice. The weight of authority recognizes that an individual can qualify as an "agent or instrumentality of a foreign state" if he or she is an official of a foreign state and is sued in his or her official capacity [*Bolkiah v. Superior Court (1999) 74 Cal. App. 4th 984, 994-995, 88 Cal. Rptr. 2d 540]* .

Because of Congress's different treatment between the sovereign state itself and its agents or instrumentalities, several courts have held service of process on entities falling within the latter category is adequate if the plaintiff substantially complies with the service requirements of *28 U.S.C.S. § 1608(b),* which does not require service through diplomatic channels [*Bolkiah v. Superior Court (1999) 74 Cal. App. 4th 984, 994-995, 88 Cal. Rptr. 2d 540]* . In any event, when serving process on an "agent or instrumentality of a foreign state" the requirements of *28 U.S.C.S. § 1608(b)(3)* should be strictly followed to avoid any successful argument being sustained as to defective service of process.

California Forms of Pleading and Practice--Annotated

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Volume 45: Schools: Certification thru Service of Summons and Papers-Chs. 512-519
Chapter 518 SERVICE OF SUMMONS AND PAPERS
PART II. LEGAL BACKGROUND
A. Service of Summons

45-518 California Forms of Pleading and Practice--Annotated § 518.17

§ 518.17 Service on Particular Defendants

[1] Active Corporation

[a] Under Code of Civil Procedure

Code Civ. Proc. § 416.10 provides several methods for serving corporations. Section 416.10 governs both domestic and foreign corporations [*see Gibble v. Car-Lene Research, Inc. (1998) 67 Cal. App. 4th 295, 303, 78 Cal. Rptr. 2d 892]* .

Under *Code Civ. Proc. § 416.10*, a summons may be served on a corporation by delivering a copy of the summons and the complaint as follows:

- To the person designated as the agent for service of process pursuant to any provision in *Corp. Code § 202, 1502, 2105*, or *2107* (or by former Corp. Code §§ 3301-3303 (domestic corporations) or 6500-6504 (foreign corporations) as in effect on December 31, 1976, with respect to corporations to which they remain applicable (*see Corp. Code §§ 2302, 2317*; *see also* [b][iii], *below*) [*Code Civ. Proc. § 416.10(a)*; *see Workman v. Superior Court (1986) 176 Cal. App. 3d 493, 499, 222 Cal. Rptr. 69* (*Code Civ. Proc. § 416.10*, requiring service of summons and complaint on corporation to be personally on person designated as agent for service of process, officer, or person authorized by corporation to receive service of process, does not apply to nonjudicial arbitration proceedings)].

- To the president chief executive officer or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a controller or chief financial officer a general manager, or a person authorized by the corporation to receive service of process [*Code Civ. Proc. § 416.10(b)*; *see also Pasadena Medi-Center Associates v. Superior Court (1973) 9 Cal. 3d 773, 777-782, 108 Cal. Rptr. 828, 511 P.2d 1180* (service on ostensible, rather than official, secretary-treasurer of corporation held sufficient); *Gibble v. Car-Lene Research, Inc. (1998) 67 Cal. App. 4th 295, 313-313, 308, 78 Cal. Rptr. 2d 892* (service on manager of regional office with ostensible authority to accept it); *but see Dill v. Berquist Construction Co. (1994) 24 Cal. App. 4th 1426, 1436-1439, 29 Cal. Rptr. 2d 746* (service on foreign corporation as ineffective to strictly or substantially

comply with service requirements of *Code Civ. Proc. §§ 415.40* and *416.10* through signature of "agent" of corporation on receipt of summons when no evidence was presented that individual was agent for service of process)].

- If the corporation is a bank, to a cashier or assistant cashier or to a person specified in Paragraph (1) or (2), *above* [*Code Civ. Proc. § 416.10(c)*].

- If authorized by any provision in *Corp. Code § 1701, 1702, 2110,* or *2111* (or former Corp. Code §§ 3301-3303 (domestic corporations) or 6500-6504 (foreign corporations) as in effect on December 31, 1976, with respect to corporations to which they remain applicable [*see Corp. Code §§ 2302, 2317*; *see also* [b][iii], *below*]), as provided by that provision [*Code Civ. Proc. § 416.10(d)*; *see* [b][i], [ii], *below*; *see also § 518.75*].

[b] Under Corporations Code

[i] Domestic Corporation

Code Civ. Proc. § 416.10(d) authorizes service of process on a domestic corporation (that is, one formed under California law [*Corp. Code § 167*]) in any manner provided in *Corp. Code §§ 1701* and *1702*. This authorization is repeated in *Corp. Code § 1700* which provides that process may be served on domestic corporations as provided in *Corp. Code §§ 1701* and *1702* as well as according to the provisions of *Code Civ. Proc. §§ 413.10-417.40*.

Corp. Code § 1701 provides that hand delivery of a copy of any process against a corporation to any natural person designated by it as agent or, if a corporate agent has been designated, to any person named in the latest certificate of the corporate agent, filed pursuant to *Corp. Code § 1505*, at the corporate agent's office shall constitute valid service on the corporation.

Corp. Code § 1702(a) authorizes substituted service on a domestic corporation by hand delivery of the process to the Secretary of State, or to an assistant or deputy secretary of state, in the following situations:

- The agent for service of process has resigned and has not been replaced;

- The agent designated cannot with reasonable diligence be found at the address designated for personally delivering the process; or

- No agent has been designated.

This form of substituted service requires a court order made on application (affidavit or declaration [*Code Civ. Proc. § 2015.5*]) showing to the court's satisfaction the existence of the conditions specified in the section [*see § 518.75*]. *Corp. Code § 1702(a)* further provides that service in this manner is deemed complete on the 10th day after delivery of the process to the Secretary of State.

Section 1702 suggests that a party is under no duty to attempt substituted service of a corporation through the Secretary of State unless service cannot, with reasonable diligence, be accomplished pursuant to either *Code Civ. Proc. § 416.10* or *416.20* [*Gibble v. Car-Lene Research, Inc. (1998) 67 Cal. App. 4th 295, 311-312, 78 Cal. Rptr. 2d 892* (party should, and arguably must, first attempt service on both the officers and agents enumerated in *Code Civ. Proc. § 416.10 (b), (c)*, and on a trustee pursuant to *Code Civ. Proc. § 416.20*, before resorting to Secretary of State service)].

The court order pursuant to *Corp. Code § 1702(a)*, that service of process be made on the corporation by delivery to the Secretary of State, may be an order of a court of another state or of any federal court if the suit, action, or proceeding

has been filed in that court [*Corp. Code § 1702(d)*].

On receipt of the process and payment of the required fee, the Secretary of State must give the corporation notice of the service by forwarding to it at its principal executive office, by registered, or certified [*Corp. Code § 113*], return receipt mail, the copy of the process. If the Secretary of State's records do not disclose an address for the corporation's principal executive office, the Secretary of State must forward the copy in the same manner to the last designated agent for service of process who has not resigned. If the agent has resigned and has not been replaced and the Secretary of State's records do not disclose an address for the corporation's principal executive office, no action need be taken by the Secretary of State [*Corp. Code § 1702(b)*].

The Secretary of State is required to keep a record of all process so served on him or her, including the time of service and his or her action with reference to it. The Secretary's certificate, under his or her official seal, certifying to the receipt of process, the giving of notice of the process to the corporation, and the forwarding of the process as stated above is competent and prima facie evidence of the matters stated in the certificate [*Corp. Code § 1702(c)*].

[ii] Foreign Corporation

Code Civ. Proc. § 416.10(d) authorizes service on a foreign corporation in any manner provided by *Corp. Code §§ 2110* and *2111*. A foreign corporation actually doing business in California is amenable to service in California whether or not it has registered to do business pursuant to California law [*Raynolds v. Volkswagenwerk Aktiengesellschaft (1969) 275 Cal. App. 2d 997, 1001-1002, 80 Cal. Rptr. 610]* or whether or not the extent of its contacts with California require it to register [*Raynolds v. Volkswagenwerk Aktiengesellschaft (1969) 275 Cal. App. 2d 997, 1003, 80 Cal. Rptr. 610]* .

A foreign corporation is, generally, any corporation other than a domestic corporation, but, as used in the Corporations Code, the term in certain cases [*Corp. Code § 171*].

- Includes a foreign association [defined in *Corp. Code § 170*] and
- Excludes a corporation or association chartered under federal laws.

This authorization is substantially repeated in *Corp. Code § 2110.1* which provides that process may be served on a foreign corporation as provided in *Corp. Code § 2100 et seq.* as well as in accordance with the provisions of *Code Civ. Proc. § 413.10 et seq.*

Hand delivery of any process against a foreign corporation constitutes valid service if delivered to any of the following [*Corp. Code § 2110*]:

- An officer of the corporation or its general manager in this state, or if the corporation is a bank to a cashier or an assistant cashier.
- An natural person designated by it as agent for the service of process.
- If the corporation has designated a corporate agent, to any person named in the latest certificate of corporate agent, filed pursuant to *Corp. Code § 1505*.

A copy of that statement and designation, or a copy of the latest statement filed under *Corp. Code § 2117*, certified by the Secretary of State, is sufficient evidence of the appointment of an agent for the service of process [*Corp. Code § 2110*].

Corp. Code § 2111(a) authorizes substituted service on a foreign corporation by personal delivery of the process to the Secretary of State, or to an assistant or deputy secretary of state, in the following situations:

- The agent designated for service of process is a natural person and cannot be found with due diligence at the address stated in the designation.

- The designated agent is a corporation and no person can be found with due diligence to whom the delivery authorized by *Corp. Code § 2110* may be made for the purpose of delivery to the corporate agent.

- The agent designated is no longer authorized to act.

- No agent has been designated.

This form of substituted service also requires a court order made on application (affidavit or declaration [*Code Civ. Proc. § 2015.5*]) showing to the court's satisfaction the existence of the conditions specified in thesection [*see § 518.75*]. Service in this manner is deemed complete on the 10th day after delivery of the process to the Secretary of State [*Corp. Code § 2111(a)*].

On receipt of the process, order, and required fee, the Secretary of State must forthwith give notice to the corporation of the service by forwarding, by registered or certified [*Corp. Code § 113*], return receipt mail, a copy of the process and order to the address specified in the order, if the corporation has not filed the statement required by *Corp. Code § 2105* for it to obtain a certificate of qualification to transact business in this state, or to the two stated addresses of the corporation set forth in the latest statement filed under *Corp. Code § 2105* or *2117*, or if only one address is set forth in the latest statement, to the sole stated address of the corporation [*Corp. Code § 2111(b)*].

The Secretary of State is required to keep a record of all process so served on him or her, including the time of service and his or her action with respect to it. The Secretary of State's certificate, under his or her official seal, certifying to the receipt of process, the giving of notice thereof to the corporation, and the forwarding of the process as stated above, is competent and prima facie evidence of the matters stated in the certificate [*Corp. Code § 2111(c)*].

A foreign corporation which has transacted intrastate business and has thereafter withdrawn from business in this state may be served with process in the manner provided in *Corp. Code §§ 2110* and *2111* in any action brought in this state arising out of such business, whether or not the corporation has ever complied with the requirements of *Corp. Code §§ 2100-2116*, governing foreign corporations transacting intrastate business [*Corp. Code § 2114(a)*].

A foreign corporation that has surrendered its right to transact intrastate business pursuant to *Corp. Code § 2112* or *2113* may be served with process in any action on a liability or an obligation incurred in this state before the surrender by delivery of the process to the Secretary of State, or to an assistant or deputy secretary of state, pursuant to *Corp. Code § 2111*, but no court order authorizing the service is required. The process must be mailed in the manner prescribed in *Corp. Code § 2111(b)*, except that it must be sent to the address to which the process is authorized to be sent in the certificate of surrender or to the address of the surviving domestic corporation in the case of a surrender under *Corp. Code § 2113* [*Corp. Code § 2114(b)*].

[iii] Applicability of Prior Law

Corp. Code §§ 2300-2319 contain the transition provisions between the former General Corporation Law [former *Corp. Code §§ 100-6804*, repealed by Stats. 1975, ch. 682, operative January 1, 1977], referred to as "the prior law," and the new General Corporation Law [*Corp. Code §§ 100-2319*], referred to as "the new law." These sections provide, in part, that when any corporate agent for service of process has been designated prior to the effective date of the new

law and such designation of agent included a name of a city, town, or village in which the corporate agent maintained an office, service on the agent may be effected at any office of the agent set forth in the certificate of the corporate agent filed pursuant to *Corp. Code § 1505* of the new law or filed pursuant to Corp. Code § 3301.5, 3301.6, 6403.5, or 6403.6 of the prior law, whether or not the office is in that city, town, or village [*Corp. Code § 2317*].

[1A] Suspended Domestic Corporation

Under *Rev. & Tax. Code § 23301*, the powers of a domestic corporation are suspended, not dissolved, due to its failure to pay taxes. A suspended corporation may be sued, and service of process on a suspended corporation is effected in the same manner as service on a corporation that is not suspended [*Grell v. Laci Le Beau Corp. (1999) 73 Cal. App. 4th 1300, 1306, 87 Cal. Rptr. 2d 358]* . Thus, a domestic corporation that has been suspended by the Secretary of State for failure to file appropriate tax returns may be validly served under *Code Civ. Proc. § 416.10* when the corporation continues to operate as an ongoing business during the period of suspension and has no designated agent for process [*Gibble v. Car-Lene Research, Inc. (1998) 67 Cal. App. 4th 295, 302-303, 308, 78 Cal. Rptr. 2d 892]* .

Code Civ. Proc. § 416.20 is not the exclusive means of serving a suspended domestic corporation. At most, *Code Civ. Proc. § 416.20* provides a permissible alternative to *Code Civ. Proc. § 416.10* for service of process on such corporations, on the theory that a suspension is equivalent to a forfeiture of the corporation's right to do business, which is a dubious proposition. It is also possible, however, to construe *Code Civ. Proc. § 416.20* as not applying to a domestic corporation unless it is in receivership or has dissolved [*Gibble v. Car-Lene Research, Inc. (1998) 67 Cal. App. 4th 295, 305, 308-310, 78 Cal. Rptr. 2d 892]* .

[2] Defunct Corporation

A summons may be served on a corporation that has forfeited its charter or right to do business, or has dissolved, by delivering a copy of the summons and a copy of the complaint as follows:

- To a person who is a trustee of the corporation and of its stockholders or members [*Code Civ. Proc. § 416.20(a)*]; or

- When authorized by any provision in *Corp. Code § 2011* or *2114* (or former Corp. Code §§ 3301-3303 (domestic corporations) or 6500-6504 (foreign corporations) as in effect on December 31, 1976, with respect to corporations to which they remain applicable [*see Corp. Code §§ 2302, 2317*; *see also* [1][b][iii], *above*]) as provided by *Corp. Code § 2317* [*Code Civ. Proc. § 416.20(b)*].

Corp. Code § 2011 provides for actions against the dissolved corporation to the extent of its undistributed assets, or if the corporation's assets have been distributed to shareholders, against shareholders to a limited extent [*see Corp. Code § 2011*]. For discussion, including the method of serving summons under Section 2011(b), see Ch. 170, *Corporations: Dissolution and Winding Up*.

Corp. Code § 2114 applies to foreign corporations qualified to transact intrastate business. Section 2114 provides that when such a corporation has had its right to transact intrastate business forfeited by the Franchise Tax Board pursuant to the Corporation Tax Law [*Rev. & Tax. Code § 23001 et seq.*] it may be served with process in the manner set forth in *Corp. Code §§ 2110* and *2111* [*see* [1][b][ii], *above*], as if the right to transact intrastate business had not been forfeited [*Corp. Code § 2114(c)*].

[3] Joint Stock Company or Association

A summons may be served on a joint stock company or association by delivering a copy of the summons and a copy of the complaint as provided in *Code Civ. Proc. § 416.10* (ongoing company or association [*see* [1][b][i], [ii], *above*]) or

416.20 (defunct company or association [*see* [2], *above*]) [*Code Civ. Proc. § 416.30*].

[4] Unincorporated Association or Partnership

[a] In General

A summons may be served on an unincorporated association, including a partnership, by delivering a copy of the summons and a copy of the complaint as follows:

- If the association is a general or limited partnership, to the person designated as agent for service of process in a statement filed with the Secretary of State or to a general partner or the general manager of the partnership [*Code Civ. Proc. § 416.40(a)*];

- If the association is not a general or limited partnership, to the person designated as agent for service of process in a statement filed with the Secretary of State or to the president or other head of the association, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a general manager, or a person authorized by the association to receive service of process [*Code Civ. Proc. § 416.40(b)*];

- When authorized by *Corp. Code § 18220* as provided by that section [*Code Civ. Proc. § 416.40(c)*].

For discussion of additional methods of serving foreign and domestic limited partnerships, see Ch. 405, *Partnerships: Actions Between Limited Partners or Partnerships and Third Parties* .

[b] Association Domiciled Outside California

Corp. Code § 15800 requires partnerships domiciled outside California and having no regular place of business in California to file a statement in the office of the Secretary of State in accordance with *Corp. Code § 16309* designating a natural person or corporation as the partnership's agent on whom process may be served. This requirement does not apply to a foreign limited partnership subject to *Corp. Code § 15611 et seq.* or *Corp. Code § 15900 et seq.*, or to a commercial or banking partnership established and transacting business outside the United States [*Corp. Code § 15800(a)*]. Process may be served in the manner provided in *Corp. Code § 16310(b)* on the designated person [*Corp. Code § 15800(b)*]. Under *Corp. Code § 24003(e)*, service is made by hand delivery to the agent designated, if a natural person, or, if the agent is a corporation, to any person named in the corporate agent's last certificate, filed pursuant to *Corp. Code § 1505*, at the corporate agent's office [*Corp. Code § 24003(e)*].

[c] Service Through Secretary of State

Service may be made by personal delivery to the Secretary of State, Assistant Secretary of State, or a Deputy Secretary of State in the following circumstances [*Corp. Code § 15800(b)*]:

- The partnership has not designated an agent.

- A natural person designated as agent cannot be found.

- No person can be found with due diligence to whom the delivery authorized by Section 16310(b) may be made for the purpose of delivery to the corporate agent.

- The agent is no longer authorized to act.

The process (one copy of the summons and one copy of the complaint) must be accompanied by a written statement,

signed by the party seeking service or by the party's attorney, setting forth the last known address of the partnership. The Secretary of State must in this event forward the process to the partnership by registered, or certified [*Corp. Code § 8*], return receipt mail at the address given in the written statement [*Corp. Code § 15800(b)*]. Though not required by statute, an additional copy of each paper should be delivered to the Secretary of State for his or her files.

Service on the person designated, or personal delivery of the process and statement of address together with the service fee of $50 to the Secretary of State or an assistant or deputy secretary of state is a valid service on the partnership. The partnership so served is required to appear within 30 days after service on the person designated or within 30 days after delivery of the process to the Secretary of State or an assistant or deputy secretary of state [*Corp. Code § 15800(c)*; *Gov. Code § 12197* (amount of fee)].

[d] Court-Ordered Service on Member

Corp. Code § 18220 provides that, if designation of an agent for the purpose of service has not been made as provided in *Corp. Code § 18200* or if the agent designated cannot with reasonable diligence be found at the address specified in the index referred to in *Corp. Code § 18205* for hand delivery of the process, and it is shown by affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) to the satisfaction of a court or judge that process against an unincorporated association cannot be served with reasonable diligence on the designated agent by hand or the unincorporated association in the manner provided in *Code Civ. Proc. §§ 415.10*, *415.20(a)*, or *415.30*, the court or judge may make an order that service be made on the unincorporated association by delivering a copy of the process (that is, summons and complaint) to one or more of the association's members designated in the order and by mailing a copy of the process to the association at its last known address. Though not expressly required by the statute (unless it is deemed included in the meaning of the word "process"), the better practice is to include a copy of the court order with each copy of the summons and complaint served. Service in this manner constitutes personal service on the unincorporated association [*Corp. Code § 18220*].

[4.1] Registered Limited Liability Partnership Whose Principal Office Is Not in State or Foreign Limited Liability Partnership

[a] Designation of Agent

Each registered limited liability partnership whose principal office is not in California and each foreign limited liability partnership registered under *Corp. Code § 16959* must designate as its agent for service of process any natural person or a domestic or foreign corporation entitled to be designated as agent for the service of process pursuant to *Corp Code § 1505* [*Corp. Code § 16962(a)*].

[b] On Whom Service Can Be Made

In addition to service that may be made as provided in *Code Civ. Proc. § 416.40* [*see* [4][a], *above*], delivery by hand of a copy of any process against a registered limited liability partnership or foreign limited liability partnership registered under *Corp. Code § 16959* to any natural person designated by it as agent, or if a corporate agent has been designated, to any person named in the latest certificate of the corporate agent filed pursuant to *Corp. Code § 1505* at the office of that corporate agent constitutes valid service on the registered limited liability partnership or foreign limited liability partnership [*Corp. Code § 16962(b)*].

[c] Court Ordered Service on Secretary Of State

If an agent for the purpose of service of process has resigned and has not been replaced or if the agent designated cannot with reasonable diligence be found at the address designated for personally delivering the process, or if no agent has been designated, and it is shown by affidavit (or declaration [*see Code Civ. Proc. § 2015.5*]) to the court's satisfaction that process against a registered limited liability partnership or foreign limited liability partnership required to be

registered under *Corp. Code § 16959* cannot be served with reasonable diligence on the designated agent by hand in the manner provided in *Code Civ. Proc. §§ 415.10*, *415.20(a)*, or *415.30(a)* or on the registered limited liability partnership or foreign limited liability partnership in the manner provided in *Code Civ. Proc. § 416.40*, the court may order that the service be made on the registered limited liability partnership or foreign limited liability partnership by delivering by hand to the Secretary of State, or to any person employed in the Secretary of State's office in the capacity of assistant or deputy, one copy of the process for each defendant to be served, together with a copy of the order authorizing that service and a $50 fee. If the court makes that order, the Secretary of State or the assistant or deputy who receives the process, is required to accept the process. Service in this manner is deemed complete on the 10th day after delivery of the process to the Secretary of State [*Corp. Code § 16962(c)*; *Gov. Code § 12197(b)* (amount of fee)].

The order under *Corp. Code § 16962(c)*, that service of process be made on the registered limited liability partnership or foreign limited liability partnership by delivery to the Secretary of State, may be a court order of a court of another state, or of any federal court, if the suit, action, or proceeding has been filed in that court [*Corp. Code § 16962(f)*].

The Secretary of State, on the receipt of the copy of process and the fee, must give notice of the service of process to the registered limited liability partnership or foreign limited liability partnership registered under *Corp Code § 16959* at its principal executive office, by forwarding to that office, by registered mail with request for return receipt, the copy of the process or, if the records of the Secretary of State do not disclose an address for that principal executive office, by forwarding the copy in the same manner to the last designated agent for service of process who has not resigned. If the agent for service of process has resigned and has not been replaced and the records of the Secretary of State do not disclose an address for its principal executive office, no action need be taken by the Secretary of State [*Corp. Code § 16962(d)*].

[d] Secretary of State's Certificate as Evidence

The Secretary of State must keep a record of all process served on the Secretary of State under *Corp Code § 16962* and must record therein thetime of service and the Secretary of State's action with reference thereto. The certificate of the Secretary of State, under the Secretary of State's official seal, certifying to the receipt of process, the giving of notice thereof to the registered limited liability partnership or foreign limited liability partnership, and the forwarding of the process pursuant to *Corp. Code § 16962* is competent and prima facie evidence of the matters stated therein [*Corp. Code § 16962(e)*].

[5] Limited Liability Company

[a] Service on Agent

In addition to the procedures provided in *Code of Civ. Proc. § 413.10 et seq.*, process may be served on limited liability companies and foreign limited liability companies as provided in *Corp. Code § 17061* [*Corp. Code § 17061(a)*].

A limited liability company or foreign limited liability company may be served by personal service of a copy of any process against the company by the following methods of delivery [*Corp. Code § 17061(b)*; *see Corp. Code § 17061(d)(1)* (designation of agent)]:

- Either, to any individual designated by it as agent

- Or, if the designated agent is a corporation, to any person named in the latest certificate of the corporate agent filed pursuant to *Corp. Code § 1505* at the corporate agent's office.

No change in the address of the agent for service of process or appointment of a new agent for service of process is effective until an amendment to the statement described in *Corp. Code § 17060* is filed with the Secretary of State [

Corp. Code § 17061(b)].

In the case of a foreign limited liability company that has appointed the Secretary of State as agent for service of process by reason of *Corp. Code § 17456(d)* (regarding cause of action arising out of transaction in this state by company without registration), process (i.e., summons and complaint) must be delivered by hand to the Secretary of State, or to any person employed in the capacity of assistant or deputy, and must include one copy of the process for each defendant to be served, together with a copy of the court order authorizing the service and the fee for it. The order shall set forth the address to which the process shall be sent by the Secretary of State [*Corp. Code § 17061(b)*].

[b] Agent Has Resigned or Cannot Be Found

If an agent for service of process has resigned and has not been replaced or if the designated agent cannot with reasonable diligence be found at the address designated for personal delivery of the process, and it is shown by affidavit to the satisfaction of the court that process against a limitedliability company or foreign limited liability company cannot be served with reasonable diligence on the designated agent by hand in the manner provided in *Code Civ. Proc. §§ 415.10*, *415.20(a)*, or *415.30(a)*, the court may order that the service shall be made on the company by delivering by hand to the Secretary of State, or to any person employed in the Secretary of State's office in the capacity of assistant or deputy, one copy of the process for each defendant to be served, together with a copy of the order authorizing the service. Service in this manner shall be deemed complete on the 10th day after delivery of the process to the Secretary of State [*Corp. Code § 17061(c)(1)*].

On receiving the copy of process and the required fee, the Secretary of State will forward the copy of the process to the limited liability company or foreign limited liability company, at its principal executive office by registered mail with request for return receipt [*Corp. Code § 17061(c)(2)*].

The Secretary of State keeps a record of all process served on the Secretary of State under the Beverly-Killea Limited Liability Company Act, including the time of service and the action taken by the Secretary. A certificate under the Secretary of State's official seal, certifying to the receipt of process, the giving of notice to the limited liability company or foreign limited liability company, and the forwarding of the process pursuant to *Corp. Code § 17061*, constitutes competent and prima facie evidence of the service of process [*Corp. Code § 17061(c)(3)*].

[c] Members Consent to Service

Members of limited liability companies may consent in writing to be subject to the jurisdiction of courts or to arbitration [*see Corp. Code § 17061(h)*; *see also Corp. Code § 17001(x)* (member defined)]. Along with that consent, a member may consent to be served with legal process in the manner prescribed in a written operating agreement or other writing [*Corp. Code § 17061(h)*].

[5A] Business Organization When Form Unknown

When the defendant is a "business organization, form unknown," summons may be served by *Code Civ. Proc. § 415.95(a)*]:

- Leaving a copy of the summons and complaint, during usual office hours, with the person who is apparently in charge of the office of that business organization; and

- Thereafter mailing a copy of the summons and complaint by first-class mail, postage prepaid, to the person served at the place where a copy of the summons and complaint was left.

Service of summons in this manner is complete on the 10th day after mailing. Service of summons under *Code Civ.*

Proc. § 415.95(a) is not valid for a corporation with a registered agent for service of process listed withthe Secretary of State [*Code Civ. Proc. § 415.95(b)*]. Service of summons on these corporations must follow statutes directing personal or combination service [*see Code Civ. Proc. §§ 415.20, 416.10, 416.20*].

[6] Public Entity

[a] Service on Clerk, Attorney General, Officer, or Other Agency Directors

A summons may be served on a public entity by delivering a copy of the summons and a copy of the complaint to the clerk, secretary, president, presiding officer, or other head of its governing body [*Code Civ. Proc. § 416.50(a)*]. The term "public entity," as used in *Code Civ. Proc. § 416.50*, includes the state and any office, department, division, bureau, board, commission, or agency of the state, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in this state [*Code Civ. Proc. § 416.50(b)*].

Except as provided in *Gov. Code §§ 811.9, 955.6, 955.8*, and *955.9*, service of summons in all actions on claims against the state must be made on the Attorney General [*Gov. Code § 955.4*]. In actions for the taking or damaging of private property for public use arising out of work done by the Department of Transportation, service of summons must be made on the Attorney General or the Director of Transportation [*Gov. Code § 955.6*]. In actions for the taking or damaging of private property for public use on claims arising out of work done by the Department of Water Resources, service of summons must be made on the Attorney General or the Director of Water Resources [*Gov. Code § 955.6*].

For a complete discussion and forms for tort actions against public entities, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

The names and addresses of the officers of public entities may be obtained from the "Roster of Public Agencies" maintained by the Secretary of State and County Clerk [*see Gov. Code §§ 53050, 53051*; *see also Hovd v. Hayward Unified Sch. Dist. (1977) 74 Cal. App. 3d 470, 472, 141 Cal. Rptr. 527* (inapplicability of *Gov. Code § 53051(a)* to subdivisions of public agency)].

Service of process may be made in conformity with the information contained in the statement in the Roster of Public Agencies pertaining to the particular public agency which is on file at the time of the service. Service in this manner, if otherwise made in compliance with law, constitutes personal service on the public agency [*Gov. Code § 960.8*].

[b] If Appropriate Officer Cannot Be Ascertained

If it is shown by affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) to the satisfaction of the court or judge that the facts required by *Gov. Code § 53051* have not been placed on the Roster of Public Agencies, or have been misstated, thus preventing service of summons, the court or judge may make an order that service of process be made on the public agency [*Gov. Code §§ 960.2, 960.3(a)*] by leaving two copies of the process (that is, summons and complaint) for each public agency defendant to be served, together with two copies of the order authorizing such service, in the Secretary of State's office in Sacramento or by sending the copies to that office by certified or registered mail, addressee only, return receipt requested [*Gov. Code § 960.3(b)*]. An additional copy of each paper should also be delivered to the Secretary of State at the same time for his or her files, though this is not required by statute.

Service in this latter method is effective as of the day the return receipt is received from the Secretary of State's office [*Gov. Code § 960.3(b)(2)*].A $50 fee for each public agency on which service is to be so made is required to be paid by plaintiff [*Gov. Code § 960.3(d)*]. Service in this manner is declared to constitute personal service on the public agency [*Gov. Code § 960.3(c)*].

On receipt of the process, the Secretary of State is required to serve it by forwarding a copy of it by registered return receipt mail to the public agency's governing body at its principal office in this state. If only a county address is disclosed by the Secretary of State's records, then the process must be mailed to the county seat, addressed to the public agency in care of the county clerk, or it may be mailed to any address for the public agency specified in the court order. If it is mailed in care of the county clerk, the county clerk must promptly send it to the public agency at its address within the county if known or, if unknown, cause it to be posted at the county courthouse for 30 days.

If no address for the agency is disclosed by the Secretary of State's records, the Secretary of State must mail a copy of the process to the county clerk of either the county in which the transaction or occurrence took place or the county in which the agency's real property is situated, and the county clerk in turn must promptly send it to the public agency at its address within the county if known or, if unknown, must cause it to be posted at the county courthouse for 30 days. The Secretary of State must also, on receipt of the process, immediately forward to the Attorney General a copy of all papers served on him or her. The Attorney General, on receipt of the process, may locate the responsible officers of the public agency involved, and the governing body of the agency may relieve the Attorney General of any further responsibility and may designate any other attorneys to defend the action or take any other action it may determine [*Gov. Code § 960.4*].

[7] Minor

A summons may be served on a minor by delivering a copy of the summons and a copy of the complaint to the minor's parent, guardian, conservator, or similar fiduciary, or, if no such person can be found with reasonable diligence, to any person having the care or control of the minor or with whom the minor resides or by whom the minor is employed, and to the minor if he or she is at least 12 years of age [*Code Civ. Proc. § 416.60*; see also *Miller v. Superior Court (1961) 56 Cal. 2d 49, 51-53, 13 Cal. Rptr. 673, 362 P.2d 497]* .

[8] Person Other Than Minor for Whom Guardian, Conservator, or Similar Fiduciary Has Been Appointed

A summons may be served on a person, other than a minor, for whom a guardian, conservator, or similar fiduciary has been appointed by delivering a copy of the summons and a copy of the complaint to the person's guardian, conservator, or similar fiduciary and to the person. For good cause shown, the court in which the action is pending may dispense with delivery to the person [*Code Civ. Proc. § 416.70*].

[9] Candidate for Public Office

A summons may be served on a candidate for public office when authorized and as provided by *Elec. Code § 12* [*Code Civ. Proc. § 416.80*].

[10] Persons Not Otherwise Specified

A summons may be served on a person not otherwise specified in *Code of Civil Procedure sections 416.10-416.80* [*see* [1]-[9], *above*] by delivering a copy of the summons and a copy of the complaint to that person or to anyone authorized by that person to receive service of process [*Code Civ. Proc. § 416.90*].

The specific appointment of an agent to receive service of process on behalf of another under *Code Civ. Proc. § 416.90* is not required. The principal-agent relationship must, however, be close and enduring enough to make it highly probable that the defendant will receive actual notice if it is served on the agent [*Warner Bros. Records, Inc. v. Golden West Music Sales (1974) 36 Cal. App. 3d 1012, 1017, 112 Cal. Rptr. 71* ; *but see Summers v. McClanahan (2006) 140 Cal. App. 4th 403, 412, 44 Cal. Rptr. 3d 338* (service on actor's personal manager did not comport with statutory requirements despite defendant having actual notice of complaint)].

[11] Resident Motorist

[a] Consent to Service in or Outside of California

The acceptance by a California resident of a certificate of ownership or a certificate of registration of any motor vehicle, or the renewal of such certificate, issued under the laws of California, or the acceptance or retention by a California resident of a California driver's license, constitutes a consent by the resident that in any action brought in a California court on a cause of action arising in California out of the ownership or operation of the owned or registered vehicle, or the operation of any motor vehicle by the licensed resident, the summons may be served on the resident in or out of California, whether or not he or she is then a California resident [*Veh. Code §§ 17459, 17460*; *see Ostrus v. Price (1978) 82 Cal. App. 3d 518, 524, 146 Cal. Rptr. 922]* .

[b] Manner of Service on Resident Outside California

Veh. Code § 17461 provides that if summons is served outside California pursuant to the resident's *Veh. Code § 17459* or *17460* consent, it may be served and proof of service made in the manner provided by *Veh. Code §§ 17454-17456* for service of summons on a nonresident (*see* [12][b], *below*), or it may be served pursuant to *Code Civ. Proc. §§ 413.10-417.40*. *Veh. Code § 17462* provides that a person served outside California shall have 60 days in which to appear in the action in which the summons was issued.

Code Civ. Proc. § 415.40 authorizes service of summons on a person outside California in any manner provided by *Code Civ. Proc. §§ 415.10-415.50*, discussed at *§ 518.16*, or by sending a copy of the summons and a copy of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt. It provides that service of summons by this form of mail is deemed complete on the 10th day after such mailing. The section does not otherwise extend the time within which a responsive pleading must be filed after service is deemed complete. That time in civil actions is 30 days under *Code Civ. Proc. § 412.20(a)(3)*. The time extensions set forth in *Code Civ. Proc. § 1013*, relating to service by mail, do not apply to service of the summons by mail [*Code Civ. Proc. § 413.20*]. The 30-day provision [*Code Civ. Proc. § 412.20(a)(3)*] also applies to service under *Code Civ. Proc. §§ 415.10* (personal service, that is, hand delivery), 415.20 (combination service), and 415.30 (service by mail and acknowledgment of receipt), all discussed at *§ 518.16*. Each of these statutes specifies the time when service in the manner provided in the statute is deemed complete.

Service may be made on a person outside California under either *Code Civ. Proc. § 415.40* or the Vehicle Code provisions. If made under Code *Civ. Proc. § 415.40*, the defendant has 30 days to respond by virtue of *Code Civ. Proc. § 412.20(a)(3)*; if made under the Vehicle Code provisions, the defendant has 60 days to respond by virtue of *Veh. Code § 17462* [*see Anderson v. Sherman (1981) 125 Cal. App. 3d 228, 237, 178 Cal. Rptr. 38* (involving nonresidents; finding the two schemes for service to be compatible alternatives)].

[12] Nonresident Motorist

[a] Consent to Service

Operation of a motor vehicle in this state by a nonresident or by a nonresident's agent, or ownership by a nonresident of a motor vehicle operated in this state by any person with the nonresident's express or implied permission is equivalent to an appointment of the California Director of Motor Vehicles as the nonresident's attorney on whom process may be served in any action or proceeding against the nonresident growing out of any accident or collision resulting from the operation of the motor vehicle in California [*Veh. Code § 17451*; *see Veh. Code § 17450*; *see also Miller v. Superior Court (1961) 195 Cal. App. 2d 779, 788, 16 Cal. Rptr. 36]* . The appointment is irrevocable and binding on the nonresident's executor or administrator [*Veh. Code §§ 17451, 17453*]. If the nonresident dies before commencement of the action, service of process is made on the nonresident's executor or administrator in the same manner and on the same notice as is provided in the case of a nonresident. If the nonresident dies after the action is commenced, the court will allow the action to be continued against the executor or administrator on motion with such notice as the court

deems proper [*Veh. Code § 17452*].

[b] Manner of Service on Nonresident Motorist

[i] Vehicle Code Provisions

Veh. Code § 17454 provides that service of process on a nonresident motorist is made by leaving one copy of the summons and one copy of the complaint in the hands of the Director of Motor Vehicles or in his or her office in Sacramento or by mailing the copy of the summons and complaint by certified or registered mail, addressee only, return receipt requested, to the office of the Director of Motor Vehicles in Sacramento. Service is effective as of the day the return receipt is received from the director's office. A fee of $2 for each nonresident to be served must be paid to the Director at the time of service of the copy of the summons and complaint. Such service is sufficient service on the nonresident subject to compliance with *Veh. Code § 17455*, which provides that notice of service on the Department of Motor Vehicles, a copy of the summons, and a copy of the complaint must be forthwith sent by registered mail by either the plaintiff or by the plaintiff's attorney to the defendant. An additional copy of each paper should be delivered with the required copies to the Director of Motor Vehicles, though this is not required by statute.

Veh. Code § 17455 also provides that personal service of the notice and a copy of the summons and a copy of the complaint on the defendant wherever found outside this state is the equivalent of service by mail.

In the event of service by mail, proof of compliance with *Veh. Code § 17455* must be made by affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) of the plaintiff or the plaintiff's attorney showing the mailing, together with the return receipt bearing the signature of the defendant. The affidavit or declaration and the receipt must be appended to the original summons, and the summons must be filed with the court that issued the summons within such time as the court may allow for the return of the summons. In the event of personal service outside this state, compliance with *Veh. Code § 17455* may be provided by the return of any duly constituted public officer, qualified to serve like process of and in the state or jurisdiction where the defendant is found, showing service to have been made. The return must be appended to the original summons which must be filed as set forth above [*Veh. Code § 17456*].

If service is made under the Vehicle Code provisions, the defendant has 60 days to respond [*Veh. Code § 17462*].

[ii] Code of Civil Procedure Provisions

Notwithstanding the Vehicle Code provisions, *Code Civ. Proc. § 415.40* authorizes service of summons on a person outside this state in any manner provided by *Code Civ. Proc. §§ 415.10-415.50* or by sending a copy of the summons and a copy of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt, and provides that service of summons by that form of mail is deemed complete on the 10th day after the mailing.

If service is made under *Code Civ. Proc. § 415.40*, the defendant has 30 days to respond by virtue of *Code Civ. Proc. § 412.20(a)(3)* as opposed to the 60 days the defendant has to respond if he or she is served under the Vehicle Code provisions [*Veh. Code § 17462*; *see Anderson v. Sherman (1981) 125 Cal. App. 3d 228, 237, 178 Cal. Rptr. 38* (upholding default judgment based on shorter period for responding when service is under Code of Civil Procedure)].

[13] Nonresident Executor or Administrator

When a nonresident personal representative accepts appointment, the acceptance is equivalent to and constitutes his or her irrevocable and binding appointment of the Secretary of State to be his or her attorney for the purpose of service. If the nonresident personal representative should die, the appointment will also apply to his or her personal representative [*Prob. Code § 8572(a)*]. Under the appointment, service of process and service of notices of motion under *Code Civ. Proc. § 377.41* to continue actions pending at the time of the decedent's death may be made on the Secretary of State in any action or proceeding against the nonresident personal representative that concerns the estate, or is founded on or

arises out of acts or omissions in his or her capacity as nonresident personal representative [*Prob. Code § 8572(b)*)].

Service is made by delivering to and leaving with the Secretary of State two copies of the summons and complaint or notice of motion and either of the following [*Prob. Code § 8574(a)*]:

- A copy of the statement of permanent address, which *Prob. Code § 8573* requires the nonresident personal representative to sign and file with the court; or

- If no statement of permanent address has been filed, a copy of the letters issued to the nonresident personal representative and a written statement, signed by the party or attorney of the party seeking service, that sets forth an address for use by the Secretary of State.

The Secretary of State must promptly mail by registered mail (or certified mail under *Prob. Code § 5*) one copy of the summons and complaint or notice of motion to the nonresident personal representative at the address shown on the statement delivered to the Secretary of State [*Prob. Code § 8574(b)*].

Personal service on the nonresident personal representative wherever found is the equivalent of service on the Secretary of State under *Prob. Code § 8574* [*Prob. Code § 8574(c)*].

Service made under *Prob. Code § 8574* has the same legal force and validity as if made personally in California [*Prob. Code § 8576(a)*]. The manner of proving compliance with *Prob. Code § 8574* is set forth in *Prob. Code § 8575*.

Notwithstanding the foregoing provisions, *Code Civ. Proc. § 415.40* authorizes service of summons on a person outside this state in any manner provided by *Code Civ. Proc. §§ 415.10-415.50* or by sending a copy of the summons and a copy of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt, and provides that service of summons by that form of mail is deemed complete on the 10th day after mailing.

[14] Nonresident Insurer

Service of process, notices, or other papers described in or referred to by the following Insurance Code sections may be made on the Insurance Commissioner as provided by *Ins. Code § 12931* [*Ins. Code § 12931(b)*]:

- *Ins. Code § 1452* (actions against reciprocal or interinsurance exchanges).

- *Ins. Code § 1605* (actions against admitted foreign or alien insurers).

- *Ins. Code § 1612* (actions against nonadmitted insurers).

- *Ins. Code §§ 11104, 11105* (actions against admitted and formerly admitted fraternal benefit societies).

Service is made by delivering to the Insurance Commissioner or to his or her deputy two copies of the summons and complaint for each person or party defendant so served accompanied by the required payment for each person or party [*Ins. Code § 12931(a)*]. The commissioner is required to promptly mail one of the copies to the defendant or person to be served by certified mail (or registered mail if addressed to an area outside the United States where certified mail is not available). The envelope will be addressed, in the case of a licensee, to his or her last principal place of business known to the commissioner by his or her official records, or, in the case of a nonadmitted insurer, to its last principal place of business known to the commissioner from national directories, reference books, or other reliable information available in the commissioner's office [*Ins. Code § 12931(c)*].

Service in this manner is valid and gives the court jurisdiction over the person of a nonadmitted or unauthorized defendant, provided that both of the following apply [*Ins. Code § 12931(d)*]:

- Plaintiff or plaintiff's attorney, within 10 days after delivery of the process to the Insurance Commissioner, sends by certified mail (or by registered mail if addressed to an area outside the United States where certified mail service is not available) a notice of the service and a copy of the process to the defendant at its last known principal place of business; and

- The receipt of the defendant or defendant's agent, showing the name of the sender and the name and address of the addressee-defendant, and the affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) of the plaintiff or plaintiff's attorney showing compliance with *Ins. Code § 12931*, are filed with the clerk of the court in which the action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

Ins. Code § 12931(f) provides that nothing in *Ins. Code § 12931* shall limit the right to serve process on any insurer in any other manner permitted by law. Other manners of service permitted by law include service under *Code Civ. Proc. § 415.40*, which authorizes service on persons outside California by return receipt mail [*see § 518.16[5]*], and in any other manner provided by *Code Civ. Proc. §§ 415.10-415.50* [*see § 518.16[1] -[6]*].

[15] Nonresident Real Estate Licensee or Subdivider

Every nonresident applicant for a real estate license must, along with his or her application, file with the Real Estate Commissioner an irrevocable consent to service on the Department of Real Estate in the event personal service cannot be made in California after the exercise of due diligence [*Bus. & Prof. Code § 10151.5*].

Every nonresident subdivider must file with the Department of Real Estate, together with a *Bus. & Prof. Code § 11010* questionnaire, an irrevocable consent to service on the Secretary of State in the event personal service cannot be made in California after the exercise of due diligence [*Bus. & Prof. Code §§ 11007, 11010*]. *Bus. & Prof. Code § 11007* provides for the application, insofar as possible, of *Code Civ. Proc. § 1018*, relating to service on the Secretary of State. *Code Civ. Proc. § 1018*, however, has been repealed [*see* Stats. 1999, ch. 1000, § 12].

In any event, despite the foregoing provisions, *Code Civ. Proc. § 415.40* authorizes service of summons on a person outside California in any manner provided by *Code Civ. Proc. §§ 415.10-415.50* or by sending, by first-class mail, postage prepaid, requiring a return receipt, a copy of the summons and a copy of the complaint to the person to be served and provides that service of summons by that form of mail is deemed complete on the 10th day after mailing [*see § 518.16[1] -[6]*].

[16] Under Securities and Franchise Investment Laws

[a] Consent to Service on Commissioner

Corp. Code § 25102 exempts certain transactions from the provisions of *Corp. Code § 25110*, which requires qualification of the sale of securities in issuer transactions. Included in the exemption is the offer or sale of voting common stock by a corporation incorporated in any state if immediately after the proposed sale and issuance of stock there will be only one class of stock outstanding that is owned beneficially by no more than 35 persons and specified requirements are met [*Corp. Code § 25102(h)*]. One of the conditions that must, in the case of a non-California corporation, be met is the filing of an irrevocable consent appointing the Commissioner of Corporations as issuer's attorney to receive service of process in any noncriminal action or proceeding against the corporation or its successor that arises under the Corporate Securities Law or any rule or order thereunder after the consent has been filed, with the same force and validity as if served personally on the issuer [*Corp. Code § 25102(h)(4)*].

Every applicant for qualification of the sale of securities under the Corporate Securities Law (*Corp. Code § 25000 et seq.*) and every person filing an application or request for or notice of an exemption from qualification, other than a California corporation or a person licensed as a broker-dealer in this state, and every applicant for a certificate as an agent [defined in *Corp. Code § 25003*], a broker-dealer [defined in *Corp. Code § 25004*], or investment adviser [defined in *Corp. Code § 25009*], other than a California corporation, must file with the Commissioner of Corporations an irrevocable consent appointing the commissioner as attorney to receive service of process in any noncriminal action or proceeding against the person filing the consent or the person's successor, executor, or administrator, that arises under the Corporate Securities Law or any rule or order thereunder after the consent has been filed, with the same force and validity as if personally served on the person who filed the consent [*Corp. Code §§ 25165, 25240*; *see also Corp. Code §§ 25211(a), (b)(3)* (application for broker-dealer certificate), 25231 (application for investment adviser certificate)].

A similar provision applies to an applicant, other than a California corporation, for registration of an offer to sell franchises under the Franchise Investment Law set forth as *Corp. Code § 31000 et seq.* [*Corp. Code § 31155*].

[b] Service on Commissioner

Service under the foregoing provisions may be made by leaving a copy of the process in the commissioner's office, but it is not effective unless both of the following conditions are met [*Corp. Code §§ 25102(h)(4), 25165, 25240, 31155*]:

- The plaintiff, who may be the commissioner in an action or proceeding instituted by him or her, forthwith sends notice of the service and a copy of the process by registered or certified mail to the defendant or respondent at its last known address on file with the commissioner; and

- The plaintiff's affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) of compliance with the code provision governing service is filed in the case on or before the return day of the process, if any, or within the further time as the court allows.

[c] Equivalents to Appointment of Commissioner

Engaging in conduct prohibited or made actionable by the Corporate Securities Law or any rule or order thereunder by any person, including a nonresident of this state, whether or not the person has filed a consent to service of process under *Corp. Code § 25102(h), 25165*, or *25240*, as the case may be, is, if jurisdiction over the person cannot otherwise be obtained in this state, considered equivalent to the person's appointment of the Commissioner of Corporations as attorney to receive service of process in any noncriminal action or proceeding against the person or the person's successor, executor, or administrator which grows out of that conduct and which is brought under the Corporate Securities Law or any rule or order thereunder. Such service has the same force and validity as if the person had been personally served. Service in such case may be made by leaving a copy of the process in the commissioner's office, but it is not effective unless both of the following conditions are met [*Corp. Code § 25550*]:

- The plaintiff, who may be the commissioner in an action or proceeding instituted by him or her, forthwith sends notice of the service and a copy of the process by registered or certified mail to the defendant or respondent at his, her, or its last known address or takes other steps which are reasonably calculated to give actual notice; and

- The plaintiff's affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) of compliance with the foregoing provisions is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

Corp. Code § 31420 contains similar provisions for service in actions or proceedings arising out of a violation of the

Franchise Investment Law [*Corp. Code § 31000 et seq.*].

[d] Other Methods of Service

None of the above-cited sections of the Corporations Code excludes service of process pursuant to *Code Civ. Proc. §§ 413.10-417.40*. Consequently, it would appear that service outside California in such a case may be made in accordance with the provisions of *Code Civ. Proc. § 415.40*. That section authorizes service in any manner provided in *Code Civ. Proc. § 415.10 et seq.* [*see §§ 518.16[1] -[6]*] or by sending a copy of the summons and a copy of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt and provides that service of summons by that form of mail is deemed complete on the 10th day after such mailing.

[17] Incarcerated Individual

Service directed to a person who is incarcerated within any institution in California is made to the sheriff or jailer, and may be served by any person who may lawfully serve process [*Penal Code § 4013(b)*]. The sheriff or jailer served with a paper in a judicial proceeding must forthwith deliver it to the prisoner, with a note thereon of the time of its service, and neglect to do so makes the sheriff or jailer liable to the prisoner for all damages occasioned thereby [*Penal Code § 4013(a)*].

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Chapter 518 SERVICE OF SUMMONS AND PAPERS
PART II. LEGAL BACKGROUND
A. Service of Summons

45-518 California Forms of Pleading and Practice--Annotated § 518.18

§ 518.18 Service at Gated Community

[1] Access to Community

Notwithstanding any other provision of law, *Code Civ. Proc. § 415.21* allows process servers access to gated communities for a reasonable period of time for the purpose of performing lawful service of process or service of a subpoena [*Code Civ. Proc. § 415.21(a)*]. This authority only applies to a gated community that is staffed at the time service of process is attempted by a guard or other security personnel assigned to control access to the community [*Code Civ. Proc. § 415.21(b)*].

To gain access, the process server must identify to the guard the person or persons to be served, display a current driver's license or other identification and one of the following [*Code Civ. Proc. § 415.21(a)*]:

- A badge or other confirmation that the individual is acting in his or her capacity as a representative of a county sheriff or marshal.

- Evidence of current registration as a process server pursuant to *Bus. & Prof. Code § 22350 et seq.*

[2] Substituted Service on Guard

The Legislature expressly declared that the enactment of Section 415.21 was not intended to abrogate or modify the holding of *Bein v. Brechtel-Jochim Group, Inc. (1992) 6 Cal. App. 4th 1387, 1393, 8 Cal. Rptr. 2d 351* [Stats. 1994, ch. 691, § 2]. Under *Bein*, a residential gate guard, who denies a process server access to a gated community in which the person to be served resides, is considered a competent member of the household and a person apparently in charge of a corporate office, for purposes of substituted service under *Code Civ. Proc. § 415.20*. Litigants have the right to choose their abodes; they do not have the right to control who may sue or serve them by denying physical access [*Bein v. Brechtel-Jochim Group, Inc. (1992) 6 Cal. App. 4th 1387, 1393, 8 Cal. Rptr. 2d 351]* .

For general discussion of substituted service, see *§ 518.16[2]*.

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45-518 California Forms of Pleading and Practice--Annotated § 518.19

§ 518.19 Ascertaining Defendant's Military Status at Time of Service of Summons

The Servicemembers Civil Relief Act (formerly known as the Soldiers' and Sailors' Civil Relief Act of 1940) provides that before entering a default judgment, the plaintiff must file with the court an affidavit stating whether or not the defendant is in military service and showing necessary facts to support the affidavit [*see 50 U.S.C. App. § 521*]. If the plaintiff is unable to determine whether or not the defendant is in military service, that information must be stated in the affidavit. If, based upon the affidavits filed, the court is unable to determine whether the defendant is in military service, the court, before entering a default judgment, may require that additional procedural requirements be satisfied to protect the interests of defendants who may be unable to appear because of active military service.

State statutes parallel the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940, providing additional protections for members of the National Guard and reservists of the United States Military Reserve called to active duty [*Mil. & Vet. Code § 400 et seq.*]. Under the state statutes, before a default judgment may be taken, a plaintiff must file a declaration showing the defendant is not a member of the National Guard or reservist of the United States Military Reserve called to active duty [*Mil. & Vet. Code § 402(a)*]. Ascertaining the defendant's military status is also important for other issues of the case since the state statutes provide additional protections for continuances, attachments, and a host of actions such as unlawful detainer, debt collection, family law, proceedings, and foreclosure [*see Mil. & Vet. Code § 400 et seq.*].

When the defendant is personally known to the plaintiff, this requirement poses no problem because the plaintiff can fill out the necessary declaration based on personal knowledge. If the defendant is not personally known to the plaintiff, however, it is usually easiest to obtain the necessary information by requesting that the process server ascertain the defendant's military status at the time that he or she serves the defendant with the summons and complaint, when service is accomplished by hand delivery. When that request is made to a sheriff or marshal, that officer must complete a declaration regarding the facts ascertained concerning defendant's military status [*see Gov. Code §§ 26608.1, 71265*].

Thus, before arranging for service of summons, plaintiff's counsel should always consider the advisability of requesting that the process server determine the defendant's military status, so that his or her declaration can be used, if needed, in the event that defendant defaults. Note that most counties charge an additional fee for this service when it is requested.

Moreover, some counties have their own preprinted forms of certificate or declaration for use by officers serving process, but others may require that plaintiff's counsel provide a declaration that may be filled out by the process server.

The following cross references show the breadth of how a defendant's military status may effect the case at hand:

- For discussion of how a party's military service may affect family law proceedings and declaration requirements, see Ch. 12A, *Adoptions: Termination of Parent* ; Ch. 221, *Dissolution of Marriage: Procedure* ; and Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* .

- For an application for a stay of attachment involving a person in military service, see Ch. 62, *Attachment* .

- For an declaration for a stay of attachment involving a person in military service, see Ch. 62, *Attachment* , Form 19.

- For a complaint for unlawful retaliation by a lender, creditor, or other person against a person who received a stay or postponement because of military service, see *Ch. 129, Consumer Credit Reporting, § 129.150*.

- For discussion and an application for a stay of a pending action or proceeding based on military service, see *Ch. 136, Continuances, §§ 136.20[2], 136.78A.*

- For discussion and a plaintiff's declaration under penalty of perjury setting forth facts showing that the defendant is not in the military service prior to entry of default judgment, see *Ch. 205, Defaults and Default Judgments, §§ 205.25[5], 205.92 -205.94*.

- For an application for a stay of execution of a judgment or order involving a person in military service, see Ch. 254, *Executions and Enforcement of Judgments* .

- For an application for a stay of garnishment involving a person in military service, see Ch. 276, *Garnishment* .

- For a defendant's notice of admitting service of summons and complaint, waiving further notice, and waiving rights under the Soliders' and Sailors' Civil Relief Act and similar state statutes, see *Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances, § 323.173*.

- For a lessee's notice of termination of a lease due to the lessee's military service, see *Ch. 332, Landlord and Tenant: The Tenancy, § 332.71A.*

- For a stay of eviction in an unlawful detainer proceeding during a period of military service, see *Ch. 333, Landlord and Tenant: Eviction Actions, § 333.111*.

- For an application for relief against the enforcement of a fine or penalty against a person in military service when the penalty was incurred, see Ch. 489, *Relief From Judgment or Order* .

- For a service member's application for relief from judgment, supporting declaration and order, see *Ch. 489, Relief From Judgments and Orders, § 489.411*.

- For detailed discussion of relief under the Soldier's and Sailors' Civil Relief Act and related California legislation, see *Ch. 501, Sales: Retail Installment Contracts; § 501.60* et seq.

- For an application for stay of enforcement of pre-existing obligation during the period of the applicant's military service, see *Ch. 501, Sales: Retail Installment Contracts, § 501.300*.

- For an application (motion) for temporary relief from an obligation on the ground that the person is or was in active military service after entering into the obligation, see *Ch. 501, Sales: Retail Installment Contracts, § 501.301*.

- For an affirmative defense to an action on an interest-bearing obligation on the ground that the annual rate of interest may not exceed 6 percent per year during the period of the defendant's military service, see *Ch. 501, Sales: Retail Installment Contracts, § 501.302*.

- For an application (motion) in an action on a contract for the purchase of personal property for a stay of proceedings on the ground that the defendant is on active military service see *Ch. 501, Sales: Retail Installment Contracts, § 501.303*.

- For an application for a stay during military service in an action to enforce a security interest in real or personal property, see *Ch. 503, Sales: Secured Transactions, § 503.113*.

- For a petition for a stay of foreclosure proceedings and relief from an installment contract, mortgage, or trust deed for the purchase of real property by an active member of the military service, see *Ch 555, Trust Deeds and Real Property Mortgages, § 555.139A*.

- For an application for a stay of proceedings to collect real property taxes or assessments by an active member of the military service, see Ch 555, *Trust Deeds and Real Property Mortgages*, § 555.139B.

- For an order staying foreclosure proceedings in relation to an obligation secured by a mortgage or trust deed on real property for an active member of the military service, see Ch 555, *Trust Deeds and Real Property Mortgages*, § 555.139C.

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§ 518.20 Proof of Service

[1] Governing Statutes

The following statutes govern proof of service of summons:

- *Code Civ. Proc. § 413.30* (court order).
- *Code Civ. Proc. § 417.10* (service in California).
- *Code Civ. Proc. § 417.20* (service outside California).
- *Code Civ. Proc. § 417.30* (return of service).
- *Code Civ. Proc. § 417.40* (service by registered process server).
- *Code Civ. Proc. § 2009* (use of affidavit to prove service of summons).
- *Code Civ. Proc. §§ 2010* and *2011* (proof of publication).
- *Code Civ. Proc. § 2015.3* (certificate of a sheriff or marshal has same force and effect as his or her affidavit).
- *Code Civ. Proc. § 2015.5* (use of declaration under penalty of perjury in lieu of affidavit).

Other statutes that relate to specific actions or special proceedings or to particular classes of defendants may impose requirements on the proof of service in addition to or in lieu of those required by the above-cited statutes [*see, e.g., § 518.17*]. For proof of service in a foreign country made under the "Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters" treaty, see *§ 518.16[9]*.

[2] Judicial Council Forms

The Judicial Council has adopted a mandatory proof of service of summons form [*see § 518.72*] for use in civil actions and proceedings [*see Cal. Rules of Ct., Rule 1.31*; Judicial Council Form POS-010]; for illustration, [*see § 518.72*]. The Judicial Council Forms for summons [SUM-100, SUM-110, SUM-120, SUM-130, SUM-140] all reference Judicial Council Form POS-010 for use as proof of service of summons.

In addition, a form for proof of service of a summons and complaint prepared entirely by word processor, typewriter, or similar process may be used for proof of service of a summons and complaint in any action or proceeding in lieu of the printed Judicial Council proof of service of summons form, if the form adheres to certain format requirements [*see Cal. Rules of Ct., Rule 2.150(a)*; *see also § 518.72[4]*].

[3] Within California

[a] In General

In addition to the requirements for proof of service made in the ways discussed at [b]-[f], *below*, proof of service may also be made by the written admission of the party served [*Code Civ. Proc. § 417.10(d)*].

If the defendant was fictitiously designated in the complaint and so served, the affidavit, declaration, or certificate of service must state the fictitious name under which the defendant was served and the fact that notice of identity was given by endorsement on the summons served and the fact that the notice of identity was given by endorsement on the copy of the summons served [*Code Civ. Proc. § 474*].

To satisfy the requirements of *Code Civ. Proc. § 474*, a summons must notify the recipient that he or she was sued as a fictitiously named defendant [*Carol Gilbert, Inc. v. Haller (2009) 179 Cal. App. 4th 852, 857, 101 Cal. Rptr. 3d 843]* .

To support a finding of substantial compliance with the statutory requirements for service of process requires three preconditions. First, there must have been some degree of compliance with the offended statutory requirements. Second, the objective nature and circumstances of the attempted service must have made it highly probable that it would impart the same notice as full compliance. Finally, it must in fact have imparted such notice, or at least sufficient notice to put the defendant on his or her defense. In this regard, it is not enough that the process inform the defendant of the fact of a lawsuit, or even of a lawsuit in which his or her name appears; due process requires notice of the duty to defend [*Carol Gilbert, Inc. v. Haller (2009) 179 Cal. App. 4th 852, 865-866, 101 Cal. Rptr. 3d 843]* .

[b] Personal Service or Combination Service

If the summons and complaint were served in California under *Code Civ. Proc. § 415.10* (personal delivery) or 415.20 (combination of substituted service and service by mail), proof of service is made by the affidavit (or declaration [*Code Civ. Proc. § 2015.5*]), or, if service was made by a sheriff or marshal, by the certificate [*Code Civ. Proc. § 2015.3*], of the person who made the service. The affidavit, declaration, or certificate must show the following [*Code Civ. Proc. § 417.10(a)*]:

- The time (date and hour), place, and manner of service.
- Facts showing that service was made in accordance with law [*see § 518.70*].
- The name of the person to whom a copy of the summons and a copy of the complaint were delivered. If the person was served under afictitious name, this includes the requirements of *Code Civ. Proc. § 474*, discussed at [a], *above*.

- If appropriate, the title of the person served and the capacity in which he or she was served, and that the notice required by *Code Civ. Proc. § 412.30* (action against corporation, unincorporated association, or partnership) appeared on the copy of the summons served, if in fact it did appear.

In the case of combination service [*Code Civ. Proc. § 415.20*; *see § 518.16[3]*], the affidavit, certificate, or declaration must also show the mailing of an additional copy of the summons and additional copy of the complaint to the person or entity served. If combination service was made on an individual [*see § 518.16[3][b]*], the same or another affidavit or declaration must also show that personal service could not have been made with reasonable diligence [*Code Civ. Proc. §§ 415.20(b), 417.10(a)*].

[c] Service by Mail and Acknowledgment of Receipt

If the summons and complaint were served under *Code Civ. Proc. § 415.30* (service by mail and acknowledgment of receipt), proof of service is made in the manner set forth in [b], *above*, specifying the time (date) and place of mailing, the kind of mail utilized (postage prepaid, first class mail or airmail), and the address to which the mail was sent [*Code Civ. Proc. §§ 415.30(a), 417.10(a)*].

In addition, the acknowledgment of receipt of summons in the form provided by that section [*see § 518.73*] or other written acknowledgment of receipt of summons satisfactory to the court must be attached to the proof of service [*Code Civ. Proc. § 417.10(a)*].

[d] Service by Publication

If service was made by publication under *Code Civ. Proc. § 415.50*, proof of service may require two affidavits or declarations [*Code Civ. Proc. § 417.10(b)*]:

- The affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) of the publisher or printer, or of the publisher's or printer's foreman or clerk, showing the time and place of publication [*Code Civ. Proc. § 2010*]; and

- If the address of the party being served is ascertained before publication is completed, an affidavit or declaration showing the time and place a copy of the summons and a copy of the complaint were mailed to the party to be served [*Code Civ. Proc. § 415.50(b)*; *see § 518.78*].

The publisher's or printer's affidavit or declaration must be annexed to a copy of the document published, specifying the times when, and the paper in which, the publication was made [*Code Civ. Proc. § 2010*] and filed with the court [*Code Civ. Proc. § 2011*].

[e] Service in Unlawful Detainer Action

If the proceeding is in unlawful detainer and service was made by posting pursuant to *Code Civ. Proc. § 415.45*, proof of service is made by the affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) of the person who posted the premises, showing the time and place of posting, and an affidavit or declaration showing the time and place copies of the summons and complaint were mailed to the party to be served, if in fact mailed [*Code Civ. Proc. § 417.10(e)*].

[f] Service Under Other California Statute

If service was made pursuant to a California statute other than those discussed at [a]-[e], *above*, proof of service is made in the manner prescribed by that statute or, if no manner is prescribed, in the manner prescribed by *Code Civ. Proc. § 417.10* for proof of a similar manner of service [*Code Civ. Proc. § 417.10(c)*].

[4] Outside California

[a] Under California Service Statute

If summons was served outside California in a manner specified by a California statute, proof of service is made in the manner prescribed in *Code Civ. Proc. § 417.10* [*see* [3], *above*].

If service is made outside California by mail pursuant to *Code Civ. Proc. § 415.40* [*see § 518.16[5]*], proof of service must strictly comply with the requirements of *Code Civ. Proc. § 417.20(a)* [*Bolkiah v. Superior Court (1999) 74 Cal. App. 4th 984, 1001, 88 Cal. Rptr. 2d 540]* . The proof of service must include evidence satisfactory to the court establishing actual delivery to the person to be served, either by a signed return receipt or other evidence [*Code Civ. Proc. § 417.20(a)*; *see Bolkiah v. Superior Court (1999) 74 Cal. App. 4th 984, 1001, 88 Cal. Rptr. 2d 540* (sufficient "other evidence" to assure court that defendants received "actual delivery" of summons and complaint within meaning of *Code Civ. Proc. § 417.20(a)*); *see also Stamps v. Superior Court (1971) 14 Cal. App. 3d 108, 110-111, 92 Cal. Rptr. 151* (receipt returned marked "unclaimed" and without signature is not evidence of delivery)].

[b] Service in Unlawful Detainer Proceeding

If the proceeding is in unlawful detainer and service was made by posting pursuant to *Code Civ. Proc. § 415.45*, proof of service is made by the affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) of the person who posted the premises, showing the time and place of posting, and an affidavit or declaration showing the time and place copies of the summons and of the complaint were mailed to the party to be served, if in fact mailed [*Code Civ. Proc. § 417.20(e)*].

[c] Service Pursuant to Court Order

If service was made outside California pursuant to court order, as provided in *Code Civ. Proc. § 413.10(c)* or *413.30*, proof of service is made in the manner prescribed in the order [*Code Civ. Proc. §§ 413.30, 417.20(b)*].

When service is made as provided in *Code Civ. Proc. § 413.10(b)* (outside California but within United States) or 413.10(c) (outside United States), subject to any additional requirements that may be imposed by the court in which the action is pending, proof of service may be made in the manner prescribed by the law of the place where the person was served for proof of service in an action in its courts of general jurisdiction [*Code Civ. Proc. § 417.20(c)*].

[d] Written Admission

Proof of service outside California may also be made by the written admission of the party served [*Code Civ. Proc. § 417.20(d)*].

[5] By Registered Process Server

Any proof of service which is signed by a person registered under *Bus. & Prof. Code § 22350 et seq.* or by his or her employee or independent contractor must indicate the county in which he or she is registered and the number assigned to him or her pursuant to *Bus. & Prof. Code § 22355* [*Bus. & Prof. Code § 22360*; *see § 518.70*].

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§ 518.21 Filing Proof of Service and Presumptions

[1] Filing Requirement

After a summons has been served on a person, proof of service of the summons as provided in *Code Civ. Proc. § 417.10* or *417.20* must be filed, unless the defendant has previously made a general appearance [*Code Civ. Proc. § 417.30*]. Proof of service of the summons must be filed within 60 days after the time the summons and complaint must be served upon a defendant [*Code Civ. Proc. § 583.210(b)*].

Amendments to the Code, effective January 1, 2006, deleted the requirement of giving the plaintiff the original summons, and deleted the requirement that the summons be returned or a declaration of lost summons be filed with the court [2005 Stats. 300].

[2] Presumptions

The filing of a proof of service creates a rebuttable presumption that the service was proper. The presumption arises, however, only if the proof of service complies with the applicable statutory requirements [*FloveyorInternat., Ltd. v. Superior Court (1997) 59 Cal. App. 4th 789, 795, 69 Cal. Rptr. 2d 457]* .

The return of service of a process server registered pursuant to *Bus. & Prof. Code § 22350 et seq.* establishes a presumption, affecting the burden of producing evidence, of the facts stated in the return [*Evid. Code § 647*].

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45-518 California Forms of Pleading and Practice--Annotated § 518.22

§ 518.22 Dismissal of Action for Failure to Serve Summons or File Proof of Service

[1] Generally

The summons and complaint must be served on a defendant within three years after the action is commenced against the defendant. An action is commenced at the time the complaint is filed [*Code Civ. Proc. § 583.210(a)*]. In addition, proof of service of the summons must be filed within 60 days after the time the summons and complaint must be served upon a defendant [*Code Civ. Proc. § 583.210(b)*]. For when the time limit for service does not apply, see *Code Civ. Proc. § 583.220*. Periods excluded from the time limits are set forth in *Code Civ. Proc. § 583.240*. If service is not made and returned within the required time periods, dismissal of the action is mandated by *Code Civ. Proc. § 583.250*.

Moreover, pursuant to *Code Civ. Proc. §§ 583.410-583.430*, a court, in its discretion, may, on its own motion or the motion of the defendant, dismiss an action if it appears appropriate under the circumstances when service is not made within two years after the action is commenced against the defendant [*Code Civ. Proc. §§ 583.410(a), 583.420(a)(1), (b)*]. The term "service," as used in the foregoing provision, includes return of summons [*Code Civ. Proc. § 583.110(f)*].

For further discussion and forms for use by a defendant to secure dismissal of an action for plaintiff's failure to serve and return the summons within the times specified, see Ch. 212, *Dismissal* .

[2] Effect of Trial Delay Reduction Programs

Local rules enacted to implement the Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*) may affect the availability of involuntary dismissal based on failure to effect service. The rules generally require that service of the complaint be completed and proof of service filed with the court 60 days after the filing of the complaint [*see, e.g.,* San Diego Co. Super. Ct. Rules, Div. II, Rule 2.1.5; *see also Gov. Code § 68616(a)*]. Courts have the authority to dismiss an action to enforce delay reduction programs if less severe sanctions apparently would not be effective, after taking into account the effect of previous sanctions or previous lack of compliance in the case [*see Code Civ. Proc. § 583.150* (authority of court to dismiss action pursuant to local rule); *Gov. Code § 68608(b)*]. Consequently, if the plaintiff has failed to meet the local deadline for service of the complaint, it appears the action may be dismissed for failure to complete service, notwithstanding the fact that the three-year or two-year period of *Code Civ. Proc. § 583.210* or

583.420 has not elapsed for mandatory or discretionary dismissal [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 7.13].

For further coverage of the act and local delay reduction rules, see Ch. 552, *Trial Court Delay Reduction* . For discussion of dismissal as a sanction under trial court delay rules, see Ch. 510, *Sanctions* .

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§ 518.23 Bad Faith Service and Filing of Complaints and Cross Complaints

Filing a complaint or other pleading may result in the imposition of sanctions if the pleading is frivolous, lacking evidentiary support, or intended to harass the other party [*see Code Civ. Proc. § 128.7(b), (c)* (sanctions for frivolous tactics in actions commenced in 1995 through 2005 unless the legislature changes the ending date; for discussion, *see* Ch. 510, *Sanctions*)].

For actions filed before that period, bad faith actions or tactics that are frivolous or merely intended to cause delay may result in sanctions [*see Code Civ. Proc. § 128.5*]. "Actions or tactics" include the filing and service of a complaint or cross complaint, but filing without service is excluded [*Code Civ. Proc. § 128.5(b)(1)*].

For further discussion, see Ch. 510, *Sanctions* .

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[Reserved]

§§ 518.24[Reserved]

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45-518 California Forms of Pleading and Practice--Annotated § 518.30

§ 518.30 List of Parties and Addresses

[1] First-Named Plaintiff's Duties to Maintain and Furnish

If more than two parties have appeared in a case and are represented by different counsel, the plaintiff named first in the complaint must do the following [*Cal. Rules of Ct., Rules 3.254, 3.1103(b)*]:

- Maintain a current list of the parties and the address for service of notice on each party; and
- Furnish a copy of the list on request to any party or the court.

[2] Duties of All Parties

Each party must do the following [*Cal. Rules of Ct., Rule 3.254*]:

- Furnish the first-named plaintiff with its current address for service of notice when it first appears in the action;
- Furnish the first-named plaintiff with any changes in its address for service of notice; and
- If it serves an order, notice, or pleading on a party who has not yet appeared in the action, serve a copy of the list at the same time as the order, notice or pleading is served.

In addition, a party or attorney whose address changes while the action is pending must serve on all parties and file written notice of change of address [*Cal Rules of Ct., Rules 3.1103(b), 2.200*].

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45-518 California Forms of Pleading and Practice--Annotated § 518.31

§ 518.31 Filing and Service

[1] In General

All pleadings subsequent to the complaint must be filed with the clerk of the court in which the action or proceeding is pending, or with the judge if there is no clerk, and copies must be served on the adverse party or the adverse party's attorney [*Code Civ. Proc. § 465*; *see § 518.34[2]*]. Filing and service may be accomplished in the manners discussed below [*see § 518.34*] or by facsimile transmission, which is the subject of Ch. 264, *Fax Filing and Service of Papers*.

In the case of a cross complaint, the cross complainant must serve a copy of the most recently amended complaint and any answers on cross defendants who have not previously appeared [*Cal. Rules of Ct., Rules 3.222*].

Cal. Rules of Ct., Rule 3.110(c) requires that a cross complaint against a party who has appeared in the action be accompanied by proof of service of the cross complaint at the time it is filed; if the cross complaint adds new parties, the cross complaint must be served on all parties and proofs of service on the new parties must be filed within thirty days of the filing of the cross-complaint.

Cal. Rules of Ct., Rule 3.221(a) requires that each court must make available to the plaintiff, at the time of filing of the complaint, an ADR information package that includes specified information. *Cal. Rules of Ct., Rule 3.221(c)* requires that each plaintiff must serve a copy of the ADR information package on each defendant along with the complaint, and each cross complainant must serve a copy of the ADR information package on any new parties to the action along with the cross complaint.

Notices must be in writing, and the notice of a motion, other than for a new trial, must state when, and the grounds on which, it will be made,and the papers, if any, on which it is to be based. If the paper has not previously been served on the party to be notified and was not filed by that party, a copy of it must accompany the notice [*Code Civ. Proc. § 1010*]. For discussion of papers that are not to be filed, see *§ 518.32*.

As used in the Cal. Rules of Ct., unless a statute or rule provides for a different method for filing or service, a

requirement to serve and file a document means a copy of the document must be served on the attorney for each party separately represented, on each self-represented party, and on any other person or entity when required by statute, rule, or court order, and that the document and a proof of service of the document must be filed with the court [*Cal. Rules of Ct., Rule 1.21(b)*].

[2] Except in Case of Default

No bill of exceptions, notice of appeal, or other notice or paper, other than amendments to the pleadings or an amended pleading, need be served on any party whose default has been duly entered or who has not appeared in the action or proceeding [*Code Civ. Proc. § 1010*; *see also Code Civ. Proc. § 1014*].

A defendant appears in an action when he or she proceeds in the following ways [*Code Civ. Proc. § 1014*]:

- Answers;
- Demurs;
- Files a notice of motion to strike;
- Files a notice of motion to transfer pursuant to *Code Civ. Proc. § 396b*;
- Files a notice of motion for reclassification pursuant to *Code Civ. Proc. § 403.040*;
- Gives plaintiff written notice of appearance; or
- When an attorney gives notice of appearance for the defendant.

After appearance, a defendant or defendant's attorney is entitled to notice of all subsequent proceedings of which notice is required to be given [*Code Civ. Proc. § 1014*].

[3] Drop Box for Filing Documents

Whenever a clerk's office filing counter is closed at any time between 8:30 a.m. and 4:00 p.m. on a court day, the court must provide a drop box for depositing documents to be filed with the clerk; a court may provide a drop box during other times [*Cal. Rules of Ct., Rule 2.210(a)*].

Any document deposited in a court's drop box up to and including 4:00 p.m. on a court day is deemed to have been deposited for filing on that day [*Cal. Rules of Ct., Rule 2.210(b)*]. A court may provide for same-day filing of a document deposited in its drop box after 4:00 p.m. on a court day. If so, the court must give notice of the deadline for same-day filing of a document deposited in its drop box [*Cal. Rules of Ct., Rule 2.210(b)*].

Any document deposited in a court's drop box is deemed to have been deposited for filing on the next court day if [*Cal. Rules of Ct., Rule 2.210(c)*]:

(1) It is deposited on a court day after 4:00 p.m. or after the deadline for same-day filing if a court provides for a later time, or

(2) It is deposited on a judicial holiday.

A court must have a means of determining whether a document was deposited in the drop box by 4:00 p.m., or after the

deadline for same-day filing if a court provides for a later time, on a court day [*Cal. Rules of Ct., Rule 2.210(d)*].

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§ 518.32 Limitations on Filing of Papers

[1] Papers That Will Not Be Filed

The following papers, whether offered separately or as attachments to other documents, may not be filed unless they are offered as relevant to the determination of an issue in a law and motion proceeding or other hearing or unless they are ordered filed for good cause [*Cal. Rules of Ct., Rule 3.250(a)*]:

(1) Subpoena.

(2) Subpoena duces tecum.

(3) Deposition notice, and response.

(4) Notice to consumer or employee and objection.

(5) Notice of intention to record testimony by audio tape or videotape.

(6) Agreement to set or extend time for deposition, agreement to extend time for response to discovery requests, and notice of these agreements.

(7) Declaration for additional discovery.

(8) Agreement for physical and mental examinations.

(9) Demand for delivery of medical reports, and response.

(10) Stipulation to enlarge the scope of [*sic*] number of discovery requests from that specified by statute, and notice of the stipulation.

(11) Demand for bill of particulars or an accounting, and response.

(12) Request for statement of damages, and response, unless it is accompanied by a request to enter default and is the notice of special and general damages.

(13) Demand for jury trial, unless it is submitted pursuant to former *Code Civ. Proc. §§ 631(4)* or *631.01(a)(4), (b)* (*now see Code Civ. Proc. § 631(d)(4)*) or is included in the at-issue memorandum.

(14) Notice of deposit of jury fees.

(15) Notice to produce party, agent, or tangible things before a court, and response.

(16) Offer to compromise, unless accompanied by an original proof of acceptance and a written judgment for the court's signature and entry of judgment.

The word "papers" includes printed forms furnished by the clerk, but does not include notices filed and served by the clerk [*Cal. Rules of Ct., Rule 3.250(c)*].

[2] Duty to Retain Originals of Unfiled Papers

Unless the paper served is a response, the party who serves a paper listed under [1], *above*, must retain the original with the original proof of service affixed. The original of a response must be served, and it must be retained by the person on whom it is served. All original papers must be retained until six months after final disposition of the case, unless the court, on motion of any party and for good cause shown, orders the original papers preserved for a longer period [*Cal. Rules of Ct., Rules 3.250(b)*].

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45-518 California Forms of Pleading and Practice--Annotated § 518.33

§ 518.33 Time for Service and Computing "Court Days"

The time for serving copies of papers generally is same as the time for filing the originals [*see, e.g., Code Civ. Proc § 1005(b)* (moving papers to be served and filed at least 16 court days before hearing; extension of time for service by mail, facsimile transmission, or overnight delivery)].

The amount of time required to notice various motions or serve court documents depends on the procedure sought [*see, e.g., Code Civ. Proc. § 437c(a)* (notice of motion for summary judgement must be served 75 days before hearing on the motion); *Code Civ. Proc. § 1005(b)* (motion to quash service of summons must be served 16 days before hearing)] or the documents issued (*see e.g., Code Civ. Proc. § 537(d)(2)* (temporary restraining order must be served within 5 days)]. Review the specific statutes for time requirements and exceptions peculiar to the procedure sought. For discussion of how the manner of service affects the amount of time to serve papers, see *§ 518.34*. For discussion of how to shorten or extend time for service of papers, in general, see Ch. 524, *Shortening and Extension of Time* .

Counsel should consult local rules for additional requirements relating to service of papers [*see, e.g.,* Sacramento Co. Super. Ct. Rules, Rule 3.03(B), (C) (opposition and reply papers to be served by means to ensure receipt by opposing counsel no later than one court day of filing on penalty of sanctions or court's discretion not to consider document)].

Depending on statute or rule of court, service may be based on either calendar days or court days. Calendar days are determined using a standard calendar, and the time in which an act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded [*Code Civ. Proc. § 12*].

A "court day" may be defined as any day in which the court is not closed due to a judicial holiday [*see Code Civ. Proc. § 133, 134*]. While courts of justice may be held and business transacted on any day, [*Code Civ. Proc. § 133*], courts must be closed for the transaction of judicial business on judicial holidays, for all but the following purposes [*Code Civ. Proc. § 134(a), (b)*]:

- To give, upon request, instructions to a deliberating jury.

- To receive a verdict or discharge a jury.
- For arraignments in criminal actions.
- For Saturday Small Claims court sessions.
- For injunctions and writs of prohibition, which may be issued and served on any day.

The fact that a court is open on a judicial holiday cannot make that day a nonholiday for purposes of computing the time required for the conduct of any proceeding nor for the performance of any act [*Code Civ. Proc. § 134(d)*].

The term "holiday" includes Saturday [*Code Civ. Proc. § 12a*] and Sunday [*Code Civ. Proc. § 12a, Gov. Code § 6700(a)*]. It also includes holidays specified in *Gov. Code § 6700*, as adjusted for weekends pursuant to *Gov. Code § 6701* [*Code Civ. Proc. § 12a, Gov. Code § 6700(b), (d)-(e), (g)-(o)*]:

- January 1st.
- February 12th (Lincoln Day).
- The third Monday in February (Presidents Day).
- The last Monday in May (Memorial Day).
- July 4th.
- The first Monday in September (Labor Day).
- September 9th (Admission Day).
- The second Monday in October (Columbus Day).
- November 11th (Veterans Day).
- December 25th.
- Good Friday from 12 noon to 3:00 p.m.
- Every day appointed by the President or Governor for a public fast, thanksgiving, or holiday.

Two holidays listed in *Gov. Code § 6700* are excluded from the definition of holiday in *Code Civ. Proc. § 12a*. They are [*Code Civ. Proc. § 12a*; *Gov. Code § 6700(c), (f)*]:

- The third Monday in January (Dr. Martin Luther King, Jr. Day).
- March 31st (Cesar Chavez Day).

In addition, if any city, county, or state office, other than a branch office, is closed for the whole of a day, that day is considered a holiday as to the business of that office for computing time under *Code Civ. Proc. § 12a* [*Code Civ. Proc. § 12b*; *see Code Civ. Proc. § 12a, discussed under § 345.17[1]*]. Although *Code Civ. Proc. § 12b* does not define

"branch office," the ordinary definition would include outlying districts of a superior court. Thus, when local rule permitted the filing of a complaint in either the west district or the downtown central district, the downtown courthouse as well as the west district courthouse would have to have been closed before Section 12b could apply to give the plaintiff an additional day to file the complaint [*Bennett v. Suncloud (1997) 56 Cal. App. 4th 91, 98-99, 65 Cal. Rptr. 2d 80* (factual issue sufficient to overcome demurrer was raised as to whether central district courthouse was closed due to Northridge earthquake)].

If a day appointed for the holding or sitting of a court, or to which it is adjourned, falls on a judicial holiday, it is deemed appointed for or adjourned to the next day [*Code Civ. Proc. § 134(d)*].

A court may designate one or more departments to remain open on a judicial holiday or at any hours of the day or night [*Code Civ. Proc. § 134(c)*], however these courts are still judicial holidays for purposes of computing the time required for the conduct of any proceeding or for the performance of any act [*Code Civ. Proc. § 134(d)*]; and any paper lodged with the court during that time must be filed by the court on the next non-judicial holiday if the document meets the filing criteria [*Code Civ. Proc. § 134(d)*].

Discussion of county holiday having the same effect as a judicial holiday, *see 57 Op. Atty. Gen. Cal. 641* .

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§ 518.34 Manner of Service

[1] In General

Notices and other papers are served in the manner prescribed by Chapter 5, Part Two, Title 14 of the Code of Civil Procedure [*Code Civ. Proc. §§ 1010-1020*] when not otherwise provided by the code [*Code Civ. Proc. § 1010*].

[2] Service on Party or Attorney

If a party has an attorney in the action or proceeding, the service of papers, when required, must be on the attorney instead of on the party,except for service of subpoenas, writs, and other process issued in the suit and of papers to bring the party into contempt [*Code Civ. Proc. § 1015*; *Cal. Rules of Ct., Rule 1.21(a)*; *see also Code Civ. Proc. § 1016*].

If the sole attorney for a party is removed or suspended from practice, the party has no attorney within the meaning of the foregoing provision [*Code Civ. Proc. § 1015*].

If the sole attorney for a party has no known office in this state, notices and papers may be served by leaving a copy of each of them with the court clerk, or with the judge if there is no clerk, unless the attorney has filed in the cause an address where notices and papers may be served on him or her, in which event they may be served at such place [*Code Civ. Proc. § 1015*].

[3] Service on Nonresident, Nonrepresented Party Who Has Appeared

When a plaintiff or a defendant who has appeared resides out of California and has no attorney in the action or proceeding, the service may be made on the clerk or on the judge if there is no clerk [*Code Civ. Proc. § 1015*].

[4] Personal Service

The service may be personal by hand-delivering a copy of the required notice or paper to the person to be served or to the person's attorney [*Code Civ. Proc. § 1011*].

[5] Substituted Service on Absent Attorney

Service may be made at the attorney's office by leaving papers to be served in an envelope or package clearly labeled to identify the attorney being served with a receptionist or with a person having charge of the office. If there is no one in the office with whom the notice or papers may be left for purposes of *Code Civ. Proc. § 1011(a)* at the time service is to be effected, service may be made by leaving the papers between 9:00 A.M. and 5:00 P.M. in a conspicuous place in the office [*Code Civ. Proc. § 1011(a)*].

If the office is not open, service may be made by leaving the papers at the attorney's residence, if it is in the same county as the attorney's office, with a person who is at least 18 years old. If the attorney's residence is not known or it is not in the same county as the attorney's office, or if it is in the same county but it is not open or a person 18 years of age or older cannot be found at the attorney's residence, then, service may be made by mailing the papers to the attorney at the attorney's office [*Code Civ. Proc. § 1011(a)*].

If neither the attorney's office nor residence is known, service may be made by delivering the notice or papers to the address of the attorney or party of record as designated on the court papers, or by delivering thenotice or papers to the court clerk, for the attorney [*Code Civ. Proc. § 1011(a)*; for a similar provision governing service of summons, *see Code Civ. Proc. § 415.20(a)*]. For requirements of mail service, see [7][a], *below*.

[6] Substituted Service and Service by Mail on Party

If service is to be made on a party, it must be made in the manner specifically provided in particular cases, or, if there is no specific provision, service may be made by leaving the papers to be served at the party's residence between 8:00 A.M. and 6:00 P.M. with some person at least 18 years of age. If no such person can be found at the residence between those hours, the papers may be served by mail, and, if the party's residence is not known, the papers may be served by delivering them to the court clerk, for the party [*Code Civ. Proc. § 1011(b)*; for a similar provision governing service of summons, *see Code Civ. Proc. § 415.20(b)*].

When service is made on the clerk or judge because a party's address is unknown, the papers must be enclosed in an envelope addressed to the party in care of the clerk or the judge. The back of the envelope must state the following [*Cal. Rules of Ct., Rule 3.252*]:

- Service is being made under *Code of Civil Procedure section 1011(b)* on a party whose residence address is unknown.
- Name of the party whose address is unknown.
- Case name and number.

[7] Service by Other Methods

[a] By Mail

In addition to the service by mail provisions of *Code Civ. Proc. § 1011*, service may be made by mail when the person to be served resides or has his or her office at a place where mail is delivered or where the person making the service and the person on whom it is to be made reside or have their offices in different places between which there is a regular communication by mail [*Code Civ. Proc. § 1012*].

Successful service by mail requires strict compliance with all statutory requirements; failure to comply deprives a court of jurisdiction to act [*see Lee v. Placer Title Co. (1994) 28 Cal. App. 4th 503, 511, 33 Cal. Rptr. 2d 572]* . This

requirement applies to mailings by the court clerk as well as to mailings by parties [*see Lee v. Placer Title Co. (1994) 28 Cal. App. 4th 503, 508, 33 Cal. Rptr. 2d 572]* . For example, dismissal of an action was void when the court clerk did not mail notice of dismissal to plaintiffs' counsel's current address on file in the cause, as required by *Code Civ. Proc. § 1013(a)*, but to an old address [*see Lee v. Placer Title Co. (1994) 28 Cal. App. 4th 503, 509-511, 33 Cal. Rptr. 2d 572]* .

In case of service by mail, the notice or other paper must be deposited in the United States Post Office, a mail box, subpost office, substation, mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope with postage paid. The envelope must be addressed to the person to be served at his or her office address as last given on any document that he or she has filed in the cause and served on the party making service or otherwise at his or her place of residence [*Code Civ. Proc. § 1013(a)*; *see also Code Civ. Proc. § 1011(a)*].

Any notice required by law, other than a notice required to be given to a party to an action or to the party's attorney, the service of which is not governed by *Code Civ. Proc. §§ 1010-1019* and which is not otherwise specifically provided for by law, may be given by sending it by registered (or certified [*Code Civ. Proc. § 11*]) return-receipt mail, with proper postage prepaid, addressed to the addressee's last known address. The production of a returned receipt purporting to be signed by the addressee creates a disputable presumption that the notice was received by the person to whom it was required to be sent [*Code Civ. Proc. § 1020*]. *Code Civ. Proc. § 1020* is *permissive*; where a notice is required to be sent by mail, compliance with the mailing requirement *may* be satisfied by sending the notice by registered mail with a return receipt requested [*Bear Creek Master Assn. v. Edwards (2005) 130 Cal App. 4th 1470, 1486, 31 Cal. Rptr. 3d 337]* . *Code Civ. Proc. § 1020* does not *require* mailed notices to be sent by registered mail. Likewise, while a signed return receipt *may* create a rebuttable presumption that the notice was received, the absence of such a signed return receipt does not negate any other presumptions concerning mailed items, and a party cannot defeat notice by a willful failure to accept certified mail [*Bear Creek Master Assn. v. Edwards (2005) 130 Cal App. 4th 1470, 1486, 31 Cal. Rptr. 3d 337]* .

[b] By Express Mail or Overnight Delivery

In case of service by express mail, the notice or other paper must be deposited in a post office, mailbox, subpost office, substation, mail chute, or other like facility regularly maintained by the United States Postal Service for receipt of express mail, in a sealed envelope, with express mail postage paid, addressed to the person on whom it is to be served at the office address as last given by that person on any document filed in the cause and served on the party making service by express mail; otherwise, it should be addressed to the party's place of residence [*Code Civ. Proc. § 1013(c)*].

In case of service by another method providing for overnight delivery, the notice or other paper must be deposited in a box or other facility regularly maintained by the express service carrier or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person onwhom it is to be served at the office address as last given by that person on any document filed in the cause and served on the party making service; otherwise, it should be addressed to the party's place of residence [*Code Civ. Proc. § 1013(c)*].

[c] By Facsimile Transmission

Service by facsimile transmission is permitted only if the parties agree and a written confirmation of that agreement is made [*Code Civ. Proc. § 1013(e)*; *Cal. Rules of Ct., Rule 2.306(c)*]. The Judicial Council has adopted rules implementing the service of documents by facsimile transmission [*see Code Civ. Proc. § 1013(e)*; *Cal. Rules of Ct., Rule 2.300 et seq.*].

In case of service by facsimile transmission, the notice or other paper must be transmitted to a facsimile machine maintained by the person on whom it is served at the facsimile machine telephone number as last given by that person

on any document that he or she has filed in the cause and served on the party making the service [*Code Civ. Proc. § 1013(e)*; *Cal. Rules of Ct., Rule 2.306(d)*].

For further discussion of and forms relating to service by facsimile transmission, see Ch. 264, *Fax Filing and Service of Papers* .

[c.1] By Electronic Service

In actions in courts in which electronic service is authorized, when notice may be served by mail, express mail, overnight delivery, or facsimile transmission, electronic service of the notice and any accompanying documents may be authorized when a party has agreed to accept service electronically in that action [*Code Civ. Proc. § 1010.6(a)(6)*; *Cal. Rules of Ct., Rule 2.260*; *but see Insyst v. Applied Materials, Inc. (2009) 170 Cal. App. 4th 1129, 1140, 88 Cal. Rptr. 3d 808* (attorneys were notified by an electronic service provider that a judgment had been electronically filed, and they were given instructions for accessing the document on the Internet, including a hyperlink that led to a document description that included another hyperlink that opened a file-stamped copy of the judgment; in finding that this electronic notification did not trigger the 60-day time period for filing a notice of appeal, the Sixth District Court of Appeal found that neither *Code Civ. Proc. § 1010.6* nor its implementing rules "authorize[] serving a document by giving a party notice of where he or she may find it. ... We do not regard an e-mail explanation of where to electronically locate a judgment as the equivalent of the electronic transmission of the document.")].

For discussion of the requirements and obligations of electronic service, see *§ 518.48*.

[d] When Service Is Complete and Extension of Time

[i] Service by Mail

Service by mail is complete at the time the paper to be served is deposited in the mail as described at [a], *above*. However, any period of notice and any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which period or date is prescribed by statute or rule of court, is extended by the following periods when service is by mail [*Code Civ. Proc. § 1013(a)*]:

- Five calendar days, if the place of address and of mailing are both within California.

- Ten calendar days if either the place of mailing or of address is outside California but within the United States.

- Twenty calendar days if either the place of mailing or of address is outside the United States.

Exceptions to these extensions of time are discussed at [e], *below*.

[ii] Service by Express Mail or Overnight Delivery

Service by express mail or another form of overnight delivery is complete at the time of the deposit, but any period of notice and any right or duty to do any act or to make any response within any period or on a date certain after the service of the document served by express mail or other method of overnight delivery is be extended by two court days [*Code Civ Proc. § 1013(c)*].

Exceptions to this extension of time are discussed at [e], *below*.

[iii] Service by Facsimile Transmission

Service by facsimile transmission is complete at the time of transmission [*Code Civ. Proc. § 1013(e)*; *but see Cal. Rules of Ct., Rule 2.306(e)* (service complete on receipt of entire document by the receiving party's fax machine)]. Nevertheless, any period of notice and any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which period or date is prescribed by statute or rule of court, is extended by two court days [*Code Civ. Proc. § 1013(e)*].

Exceptions to this extension of time are discussed at [e], *below*.

[iv] Electronic Service

Electronic service is complete at the time of transmission, but any period of notice or any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, shall be extended after service by electronic transmission by two court days [*Code Civ. Proc. § 1010.6(a)(6)*; *Cal. Rules of Ct., Rule 2.260(e)(1)*, (2)]. *Code Civ. Proc. § 1010.6(a)(6)* provides for some exceptions to this extension and also states that the extension applies in the absence of a specific exception provided for by any other statute or rule of court [*Code Civ. Proc. § 1010.6(a)(6)*; *Cal. Rules of Ct., Rule 2.260(e)(3)*, (4)].

For discussion of the exceptions and the relationship of section 1010.6 with *Code Civ. Proc. § 1005(b)*, see *§ 518.48[3]*.

[e] When Code Civ. Proc. § 1013 Extension of Time Inapplicable

The extensions provided when service is by mail, express mail or other overnight delivery, or facsimile transmission apply unless a specific exception is provided by statute or rule of court [*Code Civ. Proc. § 1013(a), (c)*,(e)]. By the terms of Section 1013, the extensions do not apply to the time for taking the following actions [*Code Civ. Proc. § 1013(a), (c), (e)*]:

- Filing notice of intention to move for new trial [*see Code Civ. Proc. § 659*].
- Filing notice of intention to move to vacate judgment pursuant to *Code Civ. Proc. § 663a*.
- Filing notice of appeal.

The Section 1013 extensions do not apply to a notice of motion, papers opposing a notice of motion, or reply papers governed by *Code Civ. Proc. § 1005*, which has its own extension provision that parallels the extensions provided for in *Code Civ. Proc. § 1013* [*compare Code Civ. Proc. § 1005(b) with Code Civ. Proc. § 1013(a), (c), (e)*]. The motions to which Section 1005 applies are listed in *Code Civ. Proc. § 1005(a)*. Section 1005 specifically provides that the Section 1013 time extensions do not apply to a notice of motion, papers opposing a notice of motion, or reply papers governed by Section 1005 [*Code Civ. Proc. § 1005(b)*].

For discussion of *Code Civ. Proc. § 1005* and the proceedings to which it applies, see Ch. 372, *Motions and Orders* .

Since Section 1013 only applies when the relevant time limit begins to run from the service of a document to which a response is directed [*Citicorp N. Am., Inc. v. Superior Court (1989) 213 Cal. App. 3d 563, 567, 261 Cal. Rptr. 668]* , where the time period is commenced by an act other than service, it does not operate to extend the filing deadline [*Camper v. Workers' Comp. Appeals Bd. (1992) 3 Cal. 4th 679, 684, 12 Cal. Rptr. 2d 101, 836 P.2d 888* ; *Dep't of Indus. Relations v. Atl. Baking Co., Inc. (2001) 89 Cal. App. 4th 891, 895, 108 Cal. Rptr. 2d 44* ; *San Mateo Fed'n of Teachers v. Pub. Employment Relations Bd. (1994) 28 Cal. App. 4th 150, 152, 33 Cal. Rptr. 2d 387* ; *Citicorp N. Am., Inc. v. Superior Court (1989) 213 Cal. App. 3d 563, 567, 261 Cal. Rptr. 668* ; *Cole v. Los Angeles Unified Sch. Dist. (1986) 177 Cal. App. 3d 1, 4, 222 Cal. Rptr. 426]* .

Section 1013 also does not apply to jurisdictional deadlines [*Dep't of Indus. Relations v. Atl. Baking Co., Inc. (2001) 89 Cal. App. 4th 891, 895, 108 Cal. Rptr. 2d 44* (Section 1013 does not apply to petition for writ of mandate from order issued by Labor Commissioner)].

[f] Notation on Papers Served by Other Methods

Papers served by mail, facsimile transmission, or overnight delivery should either bear a notation of the date and place of deposit or transmission, or be accompanied by an unsigned copy of the affidavit or declaration [*Code Civ. Proc. § 2015.5*] or certificate of mailing [*Code Civ. Proc. § 1013(b), (d), (f)*]. This requirement is directory, not mandatory [*Code Civ. Proc. § 1013(g)*].

[8] Service by Telegraph

Any writ or order in any civil suit or proceeding and all other papers requiring service may be transmitted by telegraph for service in any place. The telegraphic copy of the writ, order, or paper so transmitted may be served or executed by the officer or person to whom it is sent for that purpose, and returned by him or her, if any return is required, in the same manner, and with the same force and effect in all respects, as the original document might be if delivered to him or her. The officer or person serving or executing the same has the same authority, and is subject to the same liabilities, as if the copy were the original. The original, if a writ or order, must also be filed in the court from which it was issued, and a certified copy must be preserved in the telegraph office from which it was sent. In sending it, the operator may use either the original or the certified copy for that purpose. Whenever any document to be sent by telegraph bears a seal, either private or official, it is not necessary for the operator in sending it to telegraph a description of the seal or any words or device on it, but the seal may be expressed in the telegraphic copy by the letters "L.S." (locus sigilli, that is, place of the seal) or by the word "seal" [*Code Civ. Proc. § 1017*].

[9] Service in Foreign Country

A paper may be served on a person in a foreign country in the manner a summons is served pursuant to the "Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters" [20 U.S.T. 361]. For further discussion, see *§ 518.16[9]*.

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§ 518.35 When Service by Mail by Court Clerk Is Complete

When the clerk makes service of process by mail, the clerk's certificate of mailing will state, among other things, the date and place of deposit in the mail and that the envelope was sealed and deposited in the mail with the postage fully prepaid [*see Code Civ. Proc. § 1013a(4)*]. This form of proof of service is sufficient for service of process in which the clerk or deputy clerk signing the certificate places the document for collection and mailing on the date shown on the proof of service, so as to cause it to be mailed in an envelope so sealed and addressed on that date following standard court practices [*see Code Civ. Proc. § 1013a(4)*].

When service has been made by the clerk pursuant to *Code Civ. Proc. § 1013a(4)*, a party served may move the court to deem that the service was complete on the date of the postage cancellation or postage meter imprint as shown on the envelope if that date is more than one day after the date of deposit for mailing contained in the certificate. The court is to grant the motion if it finds good cause [*see Code Civ. Proc. § 1013a(4)*].

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§ 518.36 Proof of Service

As used in the Cal. Rules of Ct., proof of service means a declaration stating that service has been made as provided in *Cal. Rules of Ct., Rule 1.21(a)* and *(b)*. If the proof of service names attorneys for separately represented parties, it must also state which party or parties each of the attorneys served is representing [*Cal. Rules of Ct., Rule 1.21(c)*].

Proof of service by mail may be made in the following ways:

- By a nonattorney as described under *Code Civ. Proc. § 1013a(1)* or *(3)* [for forms, *see § 518.91*].
- By an attorney as prescribed by *Code Civ. Proc. § 1013a(2)* [for a form, *see § 518.93*].
- By a clerk of a court of record as prescribed by *Code Civ. Proc. § 1013a(4)*.

Although not specifically authorized by state, proof of service by messenger, express mail or other form of overnight delivery [*see § 518.34[7][b]*], facsimile transmission [*see § 518.34[7][c]*], or electronic service [*see § 518.34[7][d]*], may be made by declaration by an attorney or nonattorney. For an optional Judicial Council form containing the elements for proof of service using one of these methods, see *§ 518.92*.

Code Civ. Proc. §§ 1010-1020 do not provide for proof of service by personal, that is, hand delivery or by substituted service, although such service is authorized by *Code Civ. Proc. § 1011*. The practice, however, has been to prove such service by affidavit [*Code Civ. Proc. § 2009*] or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*] of the person making the service or by the written acknowledgment of the person served [*cf. Code Civ. Proc. §§ 417.10(d), 417.20(d)* (service of summons)]. For an optional Judicial Council form containing the elements for proof of personal service, see *§ 518.90*. When service is personally made by an attorney of record, proof of service is usually made by the certificate of the attorney [*cf. Code Civ. Proc. § 1013a(2)* (proof of service by mail)].

Courts have consistently concluded that listing the city and state where the documents were placed in the United States mail is sufficient to satisfy the requirements of *Code Civ. Proc. § 1013a* regarding the place of deposit in the mail [

Him v. City and County of San Francisco (2005) 133 Cal. App. 4th 437, 443-444, 34 Cal. Rptr. 3d 838] .

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§ 518.37 Defects in Service or Notice

Any objection to defects in the manner or proof of service or in a notice of motion must be made in the trial court and cannot normally be raised for the first time on appeal [*see Peers v. Stoll (1939) 32 Cal. App. 2d 511, 512, 90 P.2d 119* (notice of motion), disapproved on other grounds, *Butcher v. Brouwer (1942) 21 Cal. 2d 354, 358, 132 P.2d 205]* . Moreover, these defects are waived by contesting a motion on the merits without objection [*see Thieme v. Commercial Lighting & Maintenance Co. (1960) 177 Cal. App. 2d 575, 576, 2 Cal. Rptr. 382* ; *Otsuka v. Balangue (1949) 92 Cal. App. 2d 788, 792, 208 P.2d 65* ; *see also Andre v. General Dynamics, Inc. (1974) 43 Cal. App. 3d 839, 842, 118 Cal. Rptr. 95* ; *Farrar v. McCormick (1972) 25 Cal. App. 3d 701, 705, 102 Cal. Rptr. 190]* , although an appearance in oppositionto a motion for the limited purpose of objecting to the sufficiency of the notice does not constitute a waiver of the defect [*Bohn v. Bohn (1913) 164 Cal. 532, 539, 129 P. 981]* . In addition, the granting of a motion required to be made on notice that was not noticed at all is a ground, on motion, for vacating the resultant order [*Harris v. Board of Education (1957) 152 Cal. App. 2d 677, 680, 313 P.2d 212* ; *see also Maguire v. Collier (1975) 49 Cal. App. 3d 309, 314, 122 Cal. Rptr. 510* ; *Farrar v. McCormick (1972) 25 Cal. App. 3d 701, 705, 102 Cal. Rptr. 190* ; *Armstead v. Jackson (1929) 100 Cal. App. 725, 729, 280 P. 1028]* .

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[Reserved]

§§ 518.38[Reserved]

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45-518 California Forms of Pleading and Practice--Annotated § 518.40

§ 518.40 Adoption of Local Rules Under Code Civ. Proc. § 1010.6 and Statewide Uniform Rules of Court for Electronic Filing and Service

Effective January 1, 2000, a trial court may adopt local rules permitting electronic filing and service of documents, subject to rules the Judicial Council has adopted pursuant to *Code Civ. Proc. § 1010.6(b)* [*see Cal. Rules of Ct., Rule 2.250 et seq.*], and the conditions specified in *Code Civ. Proc. § 1010.6(a)* [*Civ. Proc. § 1010.6(a)*]. The rules set forth in *Cal. Rules of Ct., Rule 2.250 et seq.* must be construed to authorize and permit filing and service by electronic means to the extent feasible [*Cal. Rules of Ct., Rule 2.251*].

The Legislature's intent in enacting the act is to [Stats. 1999, Ch. 514, § 3]:

- Provide for the eventual standardization of electronic filing and service procedures on a statewide level, and

- Provide that a court shall not adopt an electronic filing procedure that requires a litigant or attorney to possess specialized, cumbersome or expensive equipment or software to utilize the electronic filing system.

Effective January 1, 2003, as required by *Code Civ. Proc. § 1010.6(b), Cal. Rules of Ct., Rule 2.250 et seq.* to govern electronic filing and service of documents in the superior court. Additionally, as required by *Code Civ. Proc. § 1010.6(b)*, the statewide uniform rules of court provide policies on vendor contracts, privacy, and access to public records [*see Cal. Rules of Ct., Rules 2.254-2.256*].

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45-518 California Forms of Pleading and Practice--Annotated § 518.41

§ 518.41 Legal Effect of Electronically Filed Document

[1] Same as Original Paper Document

A document that is filed electronically in accordance with the Judicial Council rules has the same legal effect as an original paper document [*Code Civ. Proc. § 1010.6(a)(1)*; *Cal. Rules of Ct., Rule 2.252(e)(1)*].

[2] No Effect on Filing Deadline

Filing a document electronically does not alter any filing deadline [*Cal. Rules of Ct., Rule 2.252(e)(2)*].

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45-518 California Forms of Pleading and Practice--Annotated § 518.42

§ 518.42 Documents That May Be Filed Electronically

[1] General Rule

A court may permit electronic filing of a document in any action or proceeding unless the Judicial Council rules for electronic filing [*Cal. Rules of Ct., Rule 2.250 et seq.*] or other legal authority expressly prohibit electronic filing [*Cal. Rules of Ct., Rule 2.252(a)*].

A document is a pleading, a paper, a declaration, an exhibit, or another filing submitted by a party or by an agent of a party on the party's behalf. A document may be in paper or electronic form [*Cal. Rules of Ct., Rule 2.250(2)*]. Electronic filing is the electronic transmission to a court of a document in electronic form [*Cal. Rules of Ct., Rule 2.250(4)*].

[2] Original Documents

In a proceeding that requires the filing of an original document, an electronic filer may file a scanned copy of a document if the original document is then filed with the court within 10 calendar days [*Cal. Rules of Ct., Rule 2.252(b)*]. Electronic filer is defined as a party filing a document in electronic form with the court [*Cal. Rules of Ct., Rule 2.250(3)*].

[3] Orders and Judgments

The court may electronically file any notice, order, minute order, judgment, or other document prepared by the court [*Cal. Rules of Ct., Rule 2.252(d)*].

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45-518 California Forms of Pleading and Practice--Annotated § 518.43

§ 518.43 Court Order Requiring Electronic Filing and Service in Special Cases

The court may, on the motion of any party or on its own motion, after finding that such an order would not cause undue hardship or significant prejudice to any party, order all parties in any class action, a consolidated action, a group of actions, a coordinated action, or an action that is complex under *Cal. Rules of Ct., Rule 3.403* to:

- Serve all documents electronically, except when personal service is required by statute or rule [*Cal. Rules of Ct., Rule 2.253(a)(1)*];
- File all documents electronically [*Cal. Rules of Ct., Rule 2.253(a)(2)*]; or
- Serve and file all documents electronically, except when personal service is required by statute or rule [*Cal. Rules of Ct., Rule 2.253(a)(3)*].

The court's order may also provide that:

- Documents previously filed in paper form may be resubmitted in electronic form [*Cal. Rules of Ct., Rule 2.253(b)(1)*]; and
- When the court sends confirmation of filing to all parties, receipt of the confirmation constitutes service of the filing if the filed document is available electronically [*Cal. Rules of Ct., Rule 2.253(b)(2)*].

When it is not feasible for a party to convert a document to electronic form by scanning, imaging, or another means, a court may allow that party to serve, file, or serve and file the document in paper form [*Cal. Rules of Ct., Rule 2.253(c)*].

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45-518 California Forms of Pleading and Practice--Annotated § 518.44

§ 518.44 Requirements and Options for Courts Accepting Electronically Filed Documents

[1] Internet-Accessible System

A court that orders electronic filing must allow for filing over the Internet by means designed to ensure the security and integrity of a transmission [*Cal. Rules of Ct., Rule 2.254(a)(1)*]. The court may make an exception to Internet transmission if doing so facilitates the management of a particular action or proceeding and does not cause undue prejudice to a party [*Cal. Rules of Ct., Rule 2.254(a)(2)*].

[2] Publication of Electronic Filing Requirements

A court that permits electronic filing must publish, in both electronic and print formats, the court's electronic filing requirements [*Cal. Rules of Ct., Rule 2.254(b)*].

[3] Problems With System

If a court is aware of a problem that impedes or precludes electronic filing during the court's regular filing hours, it must promptly take reasonable steps to provide notice of the problem [*Cal. Rules of Ct., Rule 2.254(c)*].

[4] Public Access to Electronically Filed Documents

Except as provided in *Cal. Rules of Ct., Rules 2.500-2.506* (Public Access to Electronic Trial Court Records), and electronically filed document is a public document at the time it is filed unless it is sealed under *Cal. Rules of Ct., Rule 2.551(b)* or made confidential by law [*Cal. Rules of Ct., Rule 2.254(d)*].

[5] Option of Contracting with Electronic Filing Service Providers

[a] Right to Contract and Provisions

A court may contract with one or more electronic filing service providers to furnish and maintain an electronic filing

system for the court [*Cal. Rules of Ct., Rule 2.255(a)(1)*]. If the court contracts with an electronic filing service provider, it may require electronic filters to transmit the documents to the provider [*Cal. Rules of Ct., Rule 2.255(a)(2)*]. If there is a single provider or in-house system, it must accept filing from other electronicfiling service providers to the extent it is compatible with them [*Cal. Rules of Ct., Rule 2.255(a)(3)*].

The court's contract with an electronic filing service provider may allow the provider to charge electronic filers a reasonable fee in addition to the court's filing fee; and the contract may also allow the electronic filing service provider to make other reasonable requirements for the use of the electronic filing system [*Cal. Rules of Ct., Rule 2.255(b)*].

[b] Transmission of Filing to Court

An electronic filing service provider must promptly transmit any electronic filing, with the applicable filing fee, to the court [*Cal. Rules of Ct., Rule 2.255(c)*].

[c] Confirmation of Receipt and Filing of Document

An electronic filing service provider must [*Cal. Rules of Ct., Rule 2.255(d)(1)*, (2)]:

- Promptly send to an electronic filer confirmation of the receipt of any document that the filer has transmitted to the provider for filing with the court.

- Send its confirmation to the filer's electronic notification address and indicate the date and time of the receipt in accordance with *Cal. Rules of Ct., Rule 2.259(a)*.

After reviewing the documents, the court must [*Cal. Rules of Ct., Rule 2.255(d)(3)*]:

- Promptly transmit to the provider and the electronic filer the court's confirmation of filing or notice of rejection of filing in accordance with *Cal. Rules of Ct., Rule 2.259*.

For discussion of the court's confirmation requirements when no electronic service provider is involved, see *§ 518.46*.

[d] Ownership of Information

Any contract between a court and an electronic filing service provider must acknowledge that the court is the owner of the contents of the filing system and has the exclusive right to control its use [*Cal. Rules of Ct., Rule 2.255(e)*].

[e] Technical Standards

The Advisory Committee Comment issued with the adoption of *Cal. Rules of Ct., Rule 2.255* states: "The Court Technology Advisory Committee recommends that electronic filing service providers comply with the technical standards specified on the California Courts Web site at www.courtinfo.ca.gov/programs/efiling. The committee anticipates thatthese rules may be amended to require compliance with the California Electronic Filing Technical Standards once the standards are sufficiently developed."

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§ 518.45 Responsibilities of Persons Filing Electronic Documents

[1] Definitions

An electronic filer is a party filing a document in electronic form with the court [*Cal. Rules of Ct., Rule 2.250(3)*], by an agent, or through an electronic filing service provider. A document is a pleading, a paper, a declaration, an exhibit, or another filing submitted by a party or by an agent of a party on the party's behalf. A document may be in paper or electronic form [*Cal. Rules of Ct., Rule 2.250(2)*]. Electronic filing is the electronic transmission to a court of a document in electronic form [*Cal. Rules of Ct., Rule 2.250(4)*]. Regular filing hours are the hours during which a court accepts documents for filing [*Cal. Rules of Ct., Rule 2.250(7)*].

An electronic filing service provider is a person or entity that receives an electronic filing from a party for retransmission to the court. In submission of filings the electronic filing service provider does so on behalf of the electronic filer and not as an agent of the court [*Cal. Rules of Ct., Rule 2.250(5)*].

Electronic notification address of a party means the electronic address at or through which the party has authorized electronic service [*Cal. Rules of Ct., Rule 2.250(8)*].

Practice Tip:
The electronic filing of any document with the court indicates that a party accepts electronic service from other parties and the court, with service to any electronic notification address furnished to the court. [*Cal. Rules of Ct., Rule 2.260(a)(2)(B)*]. Be sure to consider the consequences of this election and to assure proper monitoring of all electronic notification address furnished to the court. For discussion of electronic service, see *§ 518.48*.

[2] Conditions of Filing

An electronic filer agrees to, and must [*Cal. Rules of Ct., Rule 2.256(a)(1)-(5)*]:

- Comply with any court requirements designed to ensure the integrity of electronic filing and to

protect sensitive personal information;

- Furnish information the court requires for case processing;

- Take all reasonable steps to ensure that the filing does not contain computer code, including viruses, that might be harmful to the court's electronic filing system and to other users of that system;

- Furnish one or more electronic notification addresses, in the manner specified by the court, at which the electronic agrees to accept service; and

- Immediately provide the court and parties with any change to his or her electronic notification addresses.

[3] Format of Electronically Filed Documents

A document that is filed electronically with the court must be in a format specified by the court unless it cannot be created in that format [*Cal. Rules of Ct., Rule 2.256(b)*]. The format adopted by a court must meet the following requirements [*Cal. Rules of Ct., Rule 2.256(b)*]:

- The software for creating and reading documents must be in the public domain or generally available at a reasonable cost.

- The printing of documents must not result in the loss of document content, format, or appearance.

[4] Signature Requirements

[a] Documents Under Penalty of Perjury

When a document to be filed requires the signature under penalty of perjury of any person, the document is deemed signed by that person if filed electronically and if a printed form of the document has been signed by that person prior to, or on the same day as, the date of filing [*Code Civ. Proc. § 1010.6(a)(2)(B)*]. *Cal. Rules of Ct., Rule 2.257(a)(1)* provides that the document is deemed signed if the signature on the printed form of the document is signed *before* filing. By electronically filing the document, the electronic filer indicates that he or she has complied with *Cal. Rules of Ct., Rule 2.257(a)(1)* and that the original, signed document is available for review and copying at the request of the court or any party [*Cal. Rules of Ct., Rule 2.257(a)(2)*; *see also Code Civ. Proc. § 1010.6(a)(2)(B)* (act of filing represents compliance with that section)].

Practice Tip:
While *Code Civ. Proc. § 1010.6(a)(2)(B)* specifically provides that the signing of the original document may occur prior to, or on the same day as, the date of filing, the prudent practice is to assure the signature on the printed form before electronically filing the document to comply with *Cal. Rules of Ct., Rule 2.257(a)*, and to avoid the situation where the signatory is unable or unwilling to sign the printed form, that day, after the electronic document is filed.

The attorney or person filing the document must maintain the printed form of the document bearing the original signature and make it available for review and copying on the request of the court or any party to the action or proceeding in which it is filed [*Code Civ. Proc. § 1010.6(a)(2)(B)*]. At any time after the document is filed, any other party may serve a demand for production of the original signed document; and the demand must be served on all other parties but need not be filed with the court [*Cal. Rules of Ct., Rule 2.257(a)(3)*]. Within five days of service of the demand, the party on whom the demand is made must make the original signed document available for review and copying by all other parties [*Cal. Rules of Ct., Rule 2.257(a)(4)*].

[b] Document Not Under Penalty of Perjury

If a document does not require a signature under penalty of perjury, the document is deemed signed by the party if the document is filed electronically [*Cal. Rules of Ct., Rule 2.257(b)*].

[c] Documents Requiring Signatures of Opposing Parties

When a document to be filed electronically, such as a stipulation, requires the signatures of opposing parties, the following procedures apply [*Cal. Rules of Ct., Rule 2.257(c)(1)-(3)*]:

- The party filing the document must obtain the signatures of all parties on a printed form of the document.

- The party filing the document must maintain the original, signed document and must make it available for review and copying as provided in *Cal. Rules of Ct., Rule 2.257(a)(2)*.

- By electronically filing the document, the electronic filer indicates that all parties have signed the document and that the filer has the signed original in his or her possession.

[d] Digital Signatures

A party is not required to use a digital signature on an electronically filed document [*Cal. Rules of Ct., Rule 2.257(d)*].

[e] Electronic Judicial Signatures

If a document requires a signature by a court or a judicial officer, the document may be electronically signed in any manner permitted by law [*Cal. Rules of Ct., Rule 2.257(e)*].

[5] Filing Fees

[a] Payment of Fees

A court may permit the use of credit card, debit cards, electronic funds transfers, or debit accounts for the payment of filing fees associated with electronic filing, as provided in *Gov. Code § 6159* and *Cal. Rules of Ct., Rule 10.820* or otherwise applicable law; and a court may authorize other methods of payment [*Cal. Rules of Ct., Rule 2.258(a)*].

[b] Waiver of Fees

Eligible persons may seek a waiver of court fees and costs, as provided in *Gov. Code §§ 68630-68641*, *Cal. Rules of Ct., Rule 2.252(c)*, and Title 3, Division *2 of the Rules of Court* [*Cal. Rules of Ct., Rule 2.258(b)*]. A court must permit electronic filing of an application for waiver of court fees and costs in any proceeding in which the court accepts electronic filing [*Code Civ. Proc. § 1010.6(a)(7)*; *Cal. Rules of Ct., Rule 2.252(c)*]. The court is not required to waive a filing fee that is not otherwise waivable [*Code Civ. Proc. § 1010.6(a)(7)*].

For discussion of waiving court fees because of a person's financial condition, see *Ch. 174, Costs and Attorney's Fees, § 174.110* et seq.

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§ 518.46 Actions by Court on Receipt of Electronic Filing

[1] Confirmation of Receipt and Filing of Document

A court receiving a document submitted electronically must promptly send the electronic filer a confirmation of receipt of the document, indicating the date and time of the receipt [*Code Civ. Proc. § 1010.6(a)(4)*; *Cal. Rules of Ct., Rule 2.259(a)(1)*]. If the document complies with filing requirements and all required filing fees have been paid, the court must promptly send the electronic filer confirmation that the document has been filed [*Code Civ. Proc. § 1010.6(a)(4)*; *Cal. Rules of Ct., Rule 2.259(a)(1)*]. A document is considered received at the date and time the confirmation of receipt is created [*Cal. Rules of Ct., Rule 2.259(a)*].

The filing confirmation must indicate the date and time of the filing and is proof that the document was filed on the date and time specified [*Cal. Rules of Ct., Rule 2.259(a)(2)*]. The confirmation must also specify [*Cal. Rules of Ct., Rule 2.259(a)(2)*]:

- Any transaction number associated with the filing;
- The titles of the documents as filed by the court; and
- The fee assessed for the filing.

The court is also required to [*Cal. Rules of Ct., Rule 2.259(a)(3)*]:

- Send its confirmation to the electronic filer at the electronic notification address the filer furnished to the court in accordance with *Cal. Rules of Ct., Rule 2.256(a)(4)*.
- Maintain a record of its confirmation of receipt and filing.

In the absence of confirmation of receipt and filing, there is no presumption that the court received and filed the

document [*Cal. Rules of Ct., Rule 2.259(a)(3)*]. Verification of the receipt and filing of any document by the court is the responsibility of the electronic filer [*Cal. Rules of Ct., Rule 2.259(a)(3)*].

[2] Notice of Rejection of Document for Filing

If a document is not filed by the clerk because it does not comply with applicable filing requirements or because the required filing fee has not been paid, the court must promptly send notice to the electronic filer, andthe notice must set forth the reasons the document was rejected for filing [*Cal. Rules of Ct., Rule 2.259(b)*].

[3] Court Business Hours and Delayed Delivery

A document that is filed electronically with the court after the close of business is considered to been filed on the next court day; and "close of business" means 5 p.m. or any other time on a court day, as defined by *Code Civ. Proc. § 133,* at which the court stops accepting documents for filing at its filing counter [*Code Civ. Proc. § 1010.6(a)(3)*; *Cal. Rules of Ct., Rules 2.250(1), 2.259(c)*]. A court must provide notice of its close-of-business time electronically and may give this notice in any manner it deems appropriate [*Cal. Rules of Ct., Rule 2.250(3)*].

If a technical problem with respect to a court's electronic filing system precludes the court from accepting an electronic filing during its regular filing hours on a particular day, and the electronic filer demonstrates the he or she attempted to file on that day, the court must deem the filing received on that day; however this provision does not apply to the complaint or any other initial pleading in an action or proceeding [*Cal. Rules of Ct., Rule 2.259(d)*]. "Regular filing hours" means the hours during which a court accepts documents for filing [*Cal. Rules of Ct., Rule 2.250(7)*].

[4] Endorsement

The court's endorsement of a document electronically filed must contain the following [*Cal. Rules of Ct., Rule 2.259(e)(1)*]:

> "Electronically filed by Superior Court of California, County of _____, on _____, [date], _____ [name of the court clerk]"

The endorsement has the same force and effect as a manually affixed endorsement stamp with the signature and initials of the court clerk [*Cal. Rules of Ct., Rule 2.259(e)(2)*].

A complaint or initial pleading in an action or proceeding that is filed and endorsed electronically may be printed and served on the defendant or respondent in the same manner as if it had been filed in paper form [*Cal. Rules of Ct., Rule 2.259(e)(3)*].

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§ 518.47 Issuance of Electronic Summons

On the electronic filing of a complaint, a petition, or another document that must be served with a summons, the court may transmit a summons to the electronic filer [*Code Civ. Proc. § 1010.6(a)(5)*; *Cal. Rules of Ct., Rule 2.259(f)(1)*]. The summons must contain an image of the court's seal and the assigned case number [*Code Civ. Proc. § 1010.6(a)(5)*; *Cal. Rules of Ct., Rule 2.259(f)(2)*]. Personal service of the printed form of an electronic summons has the same legal effect as personal service of an original summons [*Code Civ. Proc. § 1010.6(a)(5)*; *Cal. Rules of Ct., Rule 2.259(f)(3)*].

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§ 518.48 Electronic Service

[1] Applicability and Election

When a notice may be served by mail, express mail, overnight delivery, or facsimile transmission, electronic service of the notice and any accompanying documents is permitted when authorized by the California Rules of Court [*Code Civ. Proc. § 1010.6(a)(6)*; *Cal. Rules of Ct., Rule 2.260(a)(1)*].

A party indicates that the party agrees to accept electronic service by either [*Cal. Rules of Ct., Rule 2.260(a)(2)*]:

- Filing and serving a notice that the party accepts electronic service; and the notice must include the electronic notification addresses at which the party agrees to accept service; or

- Electronically filing any document with the court; and by the act of electronically filing, the party agrees to accept service at any electronic notification address the party has furnished to the court in accordance with *Cal. Rules of Ct., Rule 2.256(a)(4)*.

Effective January 1, 2010, the Judicial Council approved five optional forms to assist persons filing documents electronically with the courts and providing proof of electronic service:

- The Consent to Electronic Service and Notice of Electronic Notification Address form (form EFS-005) provides a means for a party to state its consent to electronic service and provide its electronic notification address to the court and other parties under *Cal. Rules of Ct., Rule 2.260(a)* [see *§ 518.94*].

- The Notice of Change of Electronic Notification Address form (form EFS-010) provides a means for parties to give notice of a change in electronic notification address under Rule 2.260(d) [see *§ 518.95*].

- The Proof of Electronic Service (form POS-050/EFS-050) is designed to be used by persons serving documents electronically to show proof of service. The one-page form contains all the information and

statements required on proofs of electronic service under *Cal. Rules of Ct., Rule 2.260(f)* [see *§ 518.96*].

- The Attachment to Proof of Electronic Service (Documents Served) (form POS-050(D)/EFS-050(D)) provides a means for persons using the Proof of Electronic Service form to list additional documents served [see *§ 518.96*].

- The Attachment to Proof of Electronic Service (Persons Served) (form POS-050(P)/EFS-050(P)) provides a means for persons using the Proof of Electronic Service form to identify additional parties served and indicate the dates and times of service [see *§ 518.96*].

Additionally, the Judicial Council revised POS-040, the current multipurpose proof of service form, to reflect an amendment to *Cal. Rules of Ct., Rule 2.260(f)(1)(D)* [see *§ 518.92*].

[2] When Service is Complete

Electronic service is complete at the time of transmission [*Code Civ. Proc. § 1010.6(a)(6)*; *Cal. Rules of Ct., Rule 2.260(e)(1)*].

Although electronic service is complete at the time of transmission, any period of notice or any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which time period or date is prescribed by statute or rule of court, shall be extended after service by electronic transmission by two court days [*Code Civ. Proc. § 1010.6(a)(6)*; *Cal. Rules of Ct., Rule 2.260(e)(2)*]. This extension does not apply to extend the time for filing the following [*Code Civ. Proc. § 1010.6(a)(6)*; *Cal. Rules of Ct., Rule 2.260(e)(3)*]:

- Notice of intention to move for new trial.

- Notice of intention to move to vacate judgment pursuant to *Code Civ. Proc. § 663a*.

- Notice of appeal.

This extension applies in the absence of a specific exception provided for by any other statute or rule of court [*Code Civ. Proc. § 1010.6(a)(6)*].

Service that occurs after the close of business is considered to have occurred on the next court day [*Cal. Rules of Ct., Rule 2.260(e)(4)*]. "Close of business" means 5 p.m. or any other time on a court day, as defined by *Code Civ. Proc. § 133*, at which the court stops accepting documents for filing at its filing counter [*Code Civ. Proc. § 1010.6(a)(3)*; *Cal. Rules of Ct., Rules 2.250(1), 2.254(c)*].

[3] Extension of Time for Motion Papers Subject to Code Civ. Proc. § 1005

Under *Code Civ. Proc. § 1005(b)*, all moving and supporting papers must be filed and served at least 16 court days before the hearing. The 16-day period is extended by varying amounts if service is by mail, facsimile transmission, or overnight delivery [*Code Civ. Proc. § 1005(b)*]. Section 1005(b) additionally requires opposing papers to be filed at least 9 court days, and reply papers at least five court days before the hearing. Section 1005(b) does not provide for any extension of the time periods it establishes for opposition and reply papers.

Section 1005(b) does provides that *Code Civ. Proc. § 1013*, which extends the time within which a right may be exercised or an act may be done when papers are served by mail, fax, or overnight delivery does not apply to a notice of motion, opposition papers, or reply papers governed by *Code Civ. Proc. § 1005*. However, *Code Civ. Proc. § 1005(b)* is silent as to extensions under *Code Civ. Proc. § 1010.6*. Particularly given the language of section 1010.6(a)(6) that the

extension under section 1010.6(a)(6) applies in the absence of a specific exception provided for by another statute or rule of court, *Code Civ. Proc. § 1010.6(a)(6)* may be construed to extend the times provided in *Code Civ. Proc. § 1005(b)*.

[4] Proof of Service

Proof of electronic service may be any of the methods provided in *Code Civ. Proc. § 1013a*, except that proof of service must state all of the following [*Cal. Rules of Ct., Rule 2.260(f)(1)(A)-(D)*]:

- The electronic notification address of the person making the service, in addition to that person's residence or business address.

- The date and time of the electronic service, in place of the date and place of deposit in the mail.

- The name and electronic notification address of the person served, in place of that person's name and address as shown on the envelope.

- That the document was served electronically, in place of the statement that the envelope was sealed and deposited in the mail with postage fully prepaid.

Proof of service may be in electronic form and may be filed electronically with the court [*Cal. Rules of Ct., Rule 2.260(f)(2)*]. In accordance with *Cal. Rules of Ct., Rule 3.1300(c)*, proof of service of the moving papers must be filed at least five calendar days before the hearing [*Cal. Rules of Ct., Rule 2.260(f)(3)*].

The party filing the proof of service must maintain the printed form of the document bearing the declarant's original signature and must make the document available for review and copying on the request of the courtor any party to the action or proceeding in which it is filed, in accordance with *Cal. Rules of Ct., Rule 2.257(a)* [*Cal. Rules of Ct., Rule 2.260(c)(4)*].

For the Judicial Council's optional Proof of Electronic Service (form POS-050/EFS-050), Attachment to Proof of Electronic Service (Documents Served) (form POS-050 (D)/EFS-050(D)), and Attachment to Proof of Electronic Service (Persons Served) (form POS-050 (P)/EFS-050(P)), see *§ 518.96*.

[5] Change of Electronic Notification Address

A party whose electronic notification address changes while the action or proceeding is pending must promptly file a notice of change of address with the court electronically and must serve this notice on all parties or their attorneys of record [*Cal. Rules of Ct., Rule 2.260(d)(1)*].

An electronic notification address is presumed valid for a party if the party files electronic documents with the court from that address and has not filed and served notice that the address is no longer valid [*Cal. Rules of Ct., Rule 2.260(d)(2)*].

For the Judicial Council's optional Notice of Change of Electronic Notification Address form (form EFS-010), see *§ 518.95*.

[6] Electronic Service by Court

A court may electronically serve any notice, order, judgment, or other document prepared by the court in the same manner that parties may serve documents by electronic service [*Cal. Rules of Ct., Rule 2.260(e)*].

In *Insyst v. Applied Materials, Inc. (2009) 170 Cal. App. 4th 1129, 1140, 88 Cal. Rptr. 3d 808* , attorneys were notified by an electronic service provider that a judgment had been electronically filed, and they were given instructions for accessing the document on the Internet, including a hyperlink that led to a document description that included another hyperlink that opened a file-stamped copy of the judgment. In finding that this electronic notification did not trigger the 60-day time period for filing a notice of appeal, the Sixth District Court of Appeal found that neither *Code Civ. Proc. § 1010.6* nor its implementing rules "authorize[] serving a document by giving a party notice of where he or she may find it. ... We do not regard an e-mail explanation of where to electronically locate a judgment as the equivalent of the electronic transmission of the document."

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[Reserved]

§ 518.49[Reserved]

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§ 518.50 Federal Treaties

Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters. 20 U.S.T. 361

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§ 518.51 State Statutes

[1] Appearance

General appearance as equivalent to service of summons. *Code Civ. Proc. § 410.50(a)*

[2] Civil Action

Commenced by filing of complaint. *Code Civ. Proc. §§ 350, 411.10*

[3] Manner in Which Summons May Be Served

Service pursuant to laws of sister state or foreign country where defendant is served. *Code Civ. Proc. § 413.10(b), (c)*

Service may be specified in court order if no statute provides manner. *Code Civ. Proc. § 413.30*

By hand. *Code Civ. Proc. § 415.10*

By combination of substituted service and service by mail. *Code Civ. Proc. § 415.20*

By mail and acknowledgment of service. *Code Civ. Proc. § 415.30*

By return receipt first-class prepaid mail outside *California. Code Civ. Proc. § 415.40*

By posting on premises in unlawful detainer proceeding and mailing process to defendant. *Code Civ. Proc. § 415.45*

By mail in unlawful detainer proceeding after notice of nonabandonment of leased real property. *Code Civ. Proc. § 415.47*

By publication of summons (constructive service) and mailing process. *Code Civ. Proc. § 415.50*

[4] Proof of Service of Summons

Pursuant to court order. *Code Civ. Proc. § 413.30*

Proof of publication and filing. *Code Civ. Proc. §§ 417.10(b), 2010, 2011*

In *California. Code Civ. Proc. § 417.10*

Outside *California. Code Civ. Proc. § 417.20*

Of registered process server. *Code Civ. Proc. § 417.40*

Affidavit to prove service. *Code Civ. Proc. § 2009*

Certificate of sheriff or marshal as having same force and effect as his or her affidavit. *Code Civ. Proc. § 2015.3*

Declaration under penalty of perjury in lieu of affidavit. *Code Civ. Proc. § 2015.5*

[5] Return of Service of Summons

Requirement that summons be returned to court with proof of service. *Code Civ. Proc. § 417.30(a)*

Procedure if summons is lost after service, but before return. *Code Civ. Proc. § 417.30(b)*

[6] Sanctions

Sanctions for bad faith frivolous or delaying tactics in actions filed before January 1, 1995. *Code Civ. Proc. § 128.5*

Sanctions for filing frivolous or unsupported paper or filing paper for delay or to harass party in actions commenced on or after January 1, 1995. *Code Civ. Proc. § 128.7*

[7] Service of Papers Other Than Summons and Complaint

Service of papers other than summons and complaint. *Code Civ. Proc. §§ 465, 1010, 1016*

Extensions of time when service is by mail, fax, overnight delivery, or electronic. *Code Civ. Proc. §§ 1005(b), 1010.6(b), 1013*

Electronic filing and service. *Code Civ. Proc. § 1010.6(b)*

Manner of service. *Code Civ. Proc. §§ 1010.6, 1011-1013, 1020*

Proof of service by mail. *Code Civ. Proc. § 1013a*

Proof of service of papers by affidavit. *Code Civ. Proc. §§ 1013a(1), (3), 2009*

"Appearance" defined. *Code Civ. Proc. § 1014*

Person to be served. *Code Civ. Proc. § 1015*

Transmittal of papers by telegraph. *Code Civ. Proc. § 1017*

Declaration under penalty of perjury in lieu of affidavit. *Code Civ. Proc. § 2015.5*

Presumption that letter correctly addressed and properly mailed has been received in ordinary course of mail. *Evid. Code § 641*

[8] Service of Summons Generally

Inapplicability of time extensions specified in *Code Civ. Proc. § 1013* to service of summons by mail. *Code Civ. Proc. § 413.20*

Validity of service by nonregistered process server. *Code Civ. Proc. § 413.40*

Who may serve. *Code Civ. Proc. § 414.10*; *see also Code Civ. Proc. §§ 262.6-262.8*; *Gov. Code §§ 26608, 26665*

Mandatory and discretionary dismissal of action for three-year or two-year delay, respectively, in service and return of summons. *Code Civ. Proc. §§ 583.210, 583.420*

Service of electronically issued summons. *Code Civ. Proc. § 1010.6(a)(5)*

Transmission of summons by telegraph for service. *Code Civ. Proc. § 1017*

Recovery in action of costs for service of process. *Code Civ. Proc. § 1033.5(a)(4)*

[9] Service on Particular Defendants

Nonresident contact lens seller. *Bus. & Prof. Code § 2546.4*

Nonresident real estate licensee or subdivider. *Bus. & Prof. Code §§ 10151.5, 11007*

Telephonic sellers. *Bus. & Prof. Code § 17511.6*

Manner of service inside and outside *California. Code Civ. Proc. §§ 413.10, 415.10-415.50*

Manner of service if not provided by law. *Code Civ. Proc. § 413.30*

Active corporation. *Code Civ. Proc. § 416.10*; *Corp. Code §§ 1702, 2011, 2204* (domestic corporation), 2110, 2111, 2114 (foreign corporation)

Defunct corporation. *Code Civ. Proc. § 416.20*; *Corp. Code §§ 2011, 2114(c)*

Joint stock company. *Code Civ. Proc. § 416.30*

Unincorporated association or partnership. *Code Civ. Proc. § 416.40*; *Corp. Code § 15627* (foreign and domestic limited partnerships governed by California Revised Limited Partnership Act); *Corp. Code § 15800* (foreign partnerships, with specified exceptions), *Corp. Code § 15901.16* (foreign and domestic limited partnerships governed by Uniform Limited Partnership Act of 2008); *Corp. Code §§ 24003-24007* (unincorporated association or partnership)

Public entity. *Code Civ. Proc. § 416.50*; *Gov. Code §§ 955.4, 960.2-960.4, 53051*

Minor. *Code Civ. Proc. § 416.60*

Person other than minor for whom guardian, conservator, or similar fiduciary has been appointed. *Code Civ. Proc. § 416.70*

Candidate for political office. *Code Civ. Proc. § 416.80*; *Elec. Code § 12*

Person not otherwise specified in *Code Civ. Proc. §§ 416.10-416.80*. *Code Civ. Proc. § 416.90*

Defendant in defamation action. *Code Civ. Proc. §§ 460.5, 460.7*

Fictitiously named defendant. *Code Civ. Proc. § 474*

"Shall" as mandatory and "may" as permissive in Corporations Code. *Corp. Code § 15*

Under Corporate Securities Law. *Corp. Code §§ 25165, 25240, 25550*

Under Franchise Investment Law. *Corp. Code §§ 31155, 31420*

California State Lottery. *Gov. Code § 8880.72*

Licensed farm labor contractor unavailable for service. *Lab. Code § 1684(a)(1)(C)*

Nonresident watercraft operator. *Harb. & Nav. Code §§ 600-609*

Nonresident insurer. *Ins. Code §§ 1452, 1605, 1612, 11105, 12931*

Nonresident executor, administrator, or administrator with will annexed. *Prob. Code §§ 8572-8577*

Public entity in action by contractor for relief from bid. *Pub. Contract Code § 5102*

Director and Department of Motor Vehicles. *Veh. Code § 24.5*

Owner of closed driving school or traffic violator school; operators and instructors who no longer reside at address filed with DMV. *Veh. Code §§ 11111.2, 11217.5*

Vehicle verifier who no longer resides at address filed with DMV. *Veh. Code § 11302.2*

Owner of closed automobile dismantling business who has failed to notify DMV of another address where service of process may be made. *Veh. Code § 11513(b)*

Lessor-retailer of automobiles who has closed business without informing DMV of another address where service of

process may be made. *Veh. Code § 11610(c)*

Dealer, manufacturer, remanufacturer, distributor, or transporter who has closed business without informing DMV of another address where service of process may be made. *Veh. Code § 11712(c)*

Currently or previously licensed automobile salesperson who has not informed DMV of current address. *Veh. Code § 11812(d)*

Nonresident motorist. *Veh. Code §§ 17451-17456*

Resident motorist served outside state. *Veh. Code §§ 17459-17461*

[10] Summons

Defined. *Code Civ. Proc. § 17(b)(6)*; *Gov. Code §§ 22, 26660*

Format and content. *Code Civ. Proc. §§ 153(b), 412.20, 412.30, 474*

Issuance of summons on payment of fees. *Code Civ. Proc. § 412.10*

Restraining orders in summons in actions for marital dissolution, legal separation, annulment, and to restrain domestic violence. *Code Civ. Proc. § 412.21(a), (c)*

Restraining orders in summons in actions under Uniform Parentage Act (*Civ. Code §§ 7000-7021*). *Code Civ. Proc. § 412.21(b), (c)*

In action to establish lost record of title to land. *Code Civ. Proc. §§ 751.05-751.07*

In validation action. *Code Civ. Proc. § 861.1*

In joint debtor proceeding. *Code Civ. Proc. §§ 990, 991*

Issuance of electronic summons. *Code Civ. Proc. § 1010.6*

In unlawful detainer proceeding. *Code Civ. Proc. § 1167*

In condemnation proceeding. *Code Civ. Proc. § 1250.120*

Restraining orders in summons in actions for marital dissolution, legal separation, or annulment. *Fam. Code § 231 et seq.*

Restraining orders in summons in actions under Uniform Parentage Act (*Fam. Code § 7600 et seq.*). *Fam. Code § 231(b) et seq.*

In proceeding for dissolution of marriage or legal separation. *Fam. Code § 2331*

In action against out-of-state motorist. *Veh. Code § 17462*

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§ 518.52 California Rules of Court

Particular papers not to be filed unless offered as relevant to determination of issue in law and motion proceeding or unless ordered to be filed for good cause. *Cal. Rules of Ct., Rule 3.250*

Service of papers on clerk or judge when party's address is unknown. *Cal. Rules of Ct., Rule 3.252*

Service and filing of notice of change of address. *Cal. Rules of Ct., Rule 2.200*

Duties with respect to maintaining and furnishing current list of parties and their addresses for service of notice. *Cal. Rules of Ct., Rule 3.254*

Facsimile filing and serving of documents other than summons. *Cal. Rules of Ct., Rule 2.300 et seq.*

Electronic filing of documents and service. *Cal. Rules of Ct., Rule 2.250 et seq.*

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§ 518.53 Decisions

[1] Abuse of Process

Knowing execution of false declaration of service is actionable abuse of process. *Kappel v. Bartlett (1988) 200 Cal. App. 3d 1457, 1463-1467, 246 Cal. Rptr. 815*

[2] Action for Unpaid Taxes

In county's action for unpaid taxes, service on taxpayer is not effective without evidence tending to show that taxpayer was California resident on date cause of action for unpaid taxes arose. *Ward v. Superior Court (1970) 10 Cal. App. 3d 1, 4, 88 Cal. Rptr. 726*

[3] Civil Action Pending Workers' Compensation Case

Proper procedure if plaintiff in civil damage action against third-party tortfeasor desires to await outcome of related workers' compensation cases before trying civil matter is to serve summons within reasonable time after complaint is filed and, if necessary, to apply for continuance in bringing case to trial. *Black Bros. Co. v. Superior Court (1968) 265 Cal. App. 2d 501, 509, 71 Cal. Rptr. 344* , disapproved on other grounds, *Denham v. Superior Court (1970) 2 Cal. 3d 557, 563, 86 Cal. Rptr. 65, 468 P.2d 193*

[4] Foreign Corporations

Service on foreign corporation can be made only in manner and form authorized by statute. *Cannon v. American Hydrocarbon Corp. (1970) 4 Cal. App. 3d 639, 646, 84 Cal. Rptr. 575*

[5] Process

"Process" defined. *In re Baker (1916) 32 Cal. App. 320, 323-324, 162 P. 922*

[6] Proof of Service

Jurisdiction does not depend on proof of service but on fact that service was made. *Vail v. Jones (1930) 209 Cal. 251, 255, 287 P. 99* ; *City & County of San Francisco v. Carraro (1963) 220 Cal. App. 2d 509, 518, 33 Cal. Rptr. 696* ; *Otsuka v. Balangue (1949) 92 Cal. App. 2d 788, 791, 208 P.2d 65*

Gov. Code § 915.2 does not mandate strict compliance with the proof of service requirements of *Code Civ. Proc. § 1013a*. Instead, it provides that proof maybe made in compliance with that statute. Also, even where proof of service must conform to the requisites of Section 1013a, only substantial compliance is required. Courts have consistently concluded that listing the city and state where the documents were placed in the U.S. mail is sufficient to satisfy the requirements of section 1013a. [*Him v. City and County of San Francisco (2005) 133 Cal. App. 4th 437, 443, 34 Cal. Rptr. 3d 838]* .

Proof of service by mail on out-of-state defendants must strictly comply with requirements of *Code Civ. Proc. § 417.20(a)*. *Bolkiah v. Superior Court (1999) 74 Cal. App. 4th 984, 1001, 88 Cal. Rptr. 2d 540*

Filing proof of service creates rebuttable presumption that service was proper, but only if proof of service complies with applicable statutory requirements. *Floveyor Internat., Ltd. v. Superior Court (1997) 59 Cal. App. 4th 789, 795, 69 Cal. Rptr. 2d 457*

Failure to follow requirement of former *Code Civ. Proc. § 410* (*now see Code Civ. Proc. § 417.10*) that certificate of service recite that summons and complaint served on defendant contained notice that defendant was served in multiple capacity does not deprive trial court of jurisdiction to enter default judgment when service was otherwise valid. *Willen v. Boggs (1971) 21 Cal. App. 3d 520, 523-524, 97 Cal. Rptr. 917*

[7] Service of Papers Other Than Summons

[a] By Mail

Code Civ. Proc. § 1020 does not *require* mailed notices to be sent by registered mail. Likewise, while a signed return receipt *may* create a rebuttable presumption that the notice was received, the absence of such a signed return receipt does not negate any other presumptions concerning mailed items, and a party cannot defeat notice by a willful failure to accept certified mail. *Bear Creek Master Assn. v. Edwards (2005) 130 Cal App. 4th 1470, 1486, 31 Cal. Rptr. 3d 337*

The provisions of *Code Civ. Proc. § 1013(a)* apply to the 10-day notice requirement set forth in *Code Civ. Proc. § 998(b)*, which requires that a section 998 offer be served not less than 10 days prior to the commencement of trial, therefore a mailed 998 offer must be mailed at least 15 days prior to commencement of trial. *Lecuyer v. Sunset Trails Apartments (2004) 120 Cal. App. 4th 920, 927, 16 Cal. Rptr. 3d 169*

Under former *Welf. & Inst. Code § 337*, notice of jurisdictional and dispositional hearings must be made personally or by certified mail, return receipt requested. Neither service by first-class mail nor by leaving a telephone message constitutes adequate service under California law. In *Re Alyssa F. (2003) 112 Cal. App. 4th 846, 854, 6 Cal. Rptr. 3d 1*

Successful service by mail requires strict compliance with statute; thus, effective service requires strict compliance with *Code Civ. Proc. §§ 1012, 1013, 1013(a)*. *Silver v. McNamee (1999) 69 Cal. App. 4th 269, 279, 81 Cal. Rptr. 2d 445* (service by mail of *Code Civ. Proc. § 364* notice)

Proof of service by mail was fatally defective when first affidavit did not state address to which request for trial de novo had been mailed and second affidavit, which did state address, was prepared 11 months after mailingand did not explain how affiant had recalled that address. *Dobrick v. Hathaway (1984) 160 Cal. App. 3d 913, 921-922, 207 Cal. Rptr. 50*

Strict compliance with section governing service by mail is required. *Valley Vista Land Co. v. Nipomo Water & Sewer Co. (1967) 255 Cal. App. 2d 172, 174, 63 Cal. Rptr. 78*

Notice by mail entails physical act of depositing written notice in mail box. *Bird v. McGuire (1963) 216 Cal. App. 2d 702, 715, 31 Cal. Rptr. 386*

Service on defendant of notice of motion for judgment on pleadings may be made by mail when defendant has no attorney of record. *Batchelor v. Finn (1959) 169 Cal. App. 2d 410, 425, 337 P.2d 545, 341 P.2d 803, 346 P.2d 795*

Burden of proof of service by mail is not on sender. *Caldwell v. Geldreich (1955) 137 Cal. App. 2d 78, 81, 289 P.2d 832*

Mere fact that person to be served with document may not have received it does not establish that affidavit of mailing is false. *Miller v. Cortese (1955) 136 Cal. App. 2d 47, 48, 288 P.2d 297*

[b] By Service on Attorney

Service on attorney discharged by client constitutes service on client when client failed to comply with *Code Civ. Proc. §§ 284* and *285* in discharging attorney. *Forslund v. Forslund (1964) 225 Cal. App. 2d 476, 488, 37 Cal. Rptr. 489*

Notice to attorney is notice to client. *Mindess v. Goodman (1962) 199 Cal. App. 2d 566, 570, 18 Cal. Rptr. 909*

[c] Service of Deposition Subpoena

As between *Code Civ. Proc. § 1987.5* (requiring that in the case of a subpoena duces tecum requiring appearance and the production of matters and things at the taking of a deposition, the subpoena is not valid unless a copy of the affidavit upon which the subpoena is based and the designation of the materials to be produced, as set forth in the subpoena, is attached to the notice of taking the deposition served upon each party or its attorney) and *Code Civ. Proc. § 2020.510(b)* (providing that a deposition subpoena commanding the attendance and the testimony of the deponent, as well as the production of business records, documents, or tangible things, does not need to be accompanied by an affidavit or declaration showing good cause for the production of the documents and things designated), the latter controls. Thus, service of a deposition subpoena on a nonparty witness is effective despite the absence of a supporting affidavit or declaration. *Terry v. SLICO (2009) 175 Cal. App. 4th 352, 355, 95 Cal. Rptr. 3d 900*

[8] Service of Process

A finding of substantial compliance with the statutory requirements for service of process requires three preconditions. First, there must have been some degree of compliance with the offended statutory requirements. Second, the objective nature and circumstances of the attempted service must have made it highly probable that it would impart the same notice as full compliance. Finally, it must in fact have imparted such notice, or at least sufficient notice to put the defendant on his or her defense. In this regard, it is not enough that the process inform the defendant of the fact of a lawsuit, or even of a lawsuit in which his or her name appears; due process requires notice of the duty to defend.

Carol Gilbert, Inc. v. Haller (2009) 179 Cal. App. 4th 852, 865-866, 101 Cal. Rptr. 3d 843

Service on a defendant's personal manager was not upheld on the theory a close connection between the defendant manager where it was highly probable that defendant would receive actual notice of the service of process on the manager. An actual notice rule would create a standardless free-for-all in which defendants would bring motions to quash service claiming they never received actual notice and, in many cases, plaintiffs would be unable to prove otherwise. In addition, such a rule would put a premium on defendants developing creative ways of evading service thereby thwarting the fundamental principle disputes should be resolved in courts, on the merits. *Summers v. McClanahan (2006) 140 Cal. App. 4th 403, 415, 44 Cal. Rptr. 3d 338*

Strict compliance with statutes governing service of process not required; in deciding whether service valid, statutory provisions regarding service of process should be liberally construed to effectuate service and uphold jurisdiction of court if defendant received actual notice; thus, substantial compliance sufficient; service on person who was ostensibly, even if not actually, corporate officer sufficient under *Code Civ. Proc. § 416.10*. *Gibble v. Car-Lene Research, Inc. (1998) 67 Cal. App. 4th 295, 313, 78 Cal. Rptr. 2d 892*

California jurisdiction generally requires strict statutory compliance with requirements for service of original process. *In re Abrams (1980) 108 Cal. App. 3d 685, 693-694, 166 Cal. Rptr. 749*

No requirement that summons be served with temporary restraining order. *Chrysler Credit Corp. v. Waegele (1972) 29 Cal. App. 3d 681, 687-689, 105 Cal. Rptr. 914*

[9] Service of Summons by Hand

When attempted manual delivery of summons is sufficient. *In re Abrams (1980) 108 Cal. App. 3d 685, 694-695, 166 Cal. Rptr. 749* ; *Crescendo Corp. v. Shelted, Inc. (1968) 267 Cal. App. 2d 209, 212, 72 Cal. Rptr. 776* ; *Sternbeck v. Buck (1957) 148 Cal. App. 2d 829, 833, 307 P.2d 970*

[10] Service of Summons by Mail

Read together, *Code Civ. Proc. §§ 415.40* and *417.20* permit completion of service by mail when the return receipt is signed by a person so authorized by the defendant. The personal signature of the defendant is not required. Evidence that a mailed summons actually reached the individual to be served is sufficient to establish valid service, and thus to establish substantial compliance, even if the summons was signed for by someone who did not have the authority to do so. The Legislature has determined that plaintiffs may serve foreign individuals and entities by mail and has incorporated significant safeguards into the process to create a process that is reasonably calculated to provide notice to defendants. The fact that the internal mail handling procedures of a company may have resulted in the misplacement of documents that the evidence establishes were delivered to the company is not a sufficient excuse. *Cruz v. Fagor America, Inc. (2007) 146 Cal. App. 4th 488, 499-500, 52 Cal. Rptr. 3d 862*

Service by mail does not constitute personal service. *People ex rel. Cranston v. Bonelli (1971) 15 Cal. App. 3d 129, 132, 92 Cal. Rptr. 828*

[11] Service of Summons by Publication

[a] In General

Nonresident defendant served by publication has 30 days from date of last publication of summons within which to appear in action. *Whealton v. Whealton (1967) 67 Cal. 2d 656, 659, 63 Cal. Rptr. 291, 432 P.2d 979*

Sufficiency of affidavit for order for publication. *Vorburg v. Vorburg (1941) 18 Cal. 2d 794, 797, 117 P.2d 875* (defendant cannot be found within state); *Langley v. Zurich Gen. A. & L. Ins. Co (1933) 219 Cal. 101, 105, 25 P.2d 418* (defendant conceals self to avoid service); *Bell v. McDermoth (1926) 198 Cal. 594, 598-600, 246 P. 805* (defendant departed state); *Bender v. Hutton (1911) 160 Cal. 372, 373, 117 P. 322* (nonresident defendant)

Once a party obtains a court order allowing service of the summons and complaint by publication, a separate order is not necessary to also simultaneously serve a statement of damages by publication before taking a default. *Anastos v. Lee (2004) 118 Cal. App. 4th 1314, 1318, 13 Cal. Rptr. 3d 716*

Compliance with statutory conditions for constructive service is jurisdictional; person not designated by own name is not proper party. *Sousa v. Freitas (1970) 10 Cal. App. 3d 660, 667, 89 Cal. Rptr. 485*

[b] Showing of Diligence Required

Plaintiff's failure to use reasonable diligence to locate out-of-state defendant under Hawaii statute comparable to *Code Civ. Proc. § 415.50* was established when plaintiff resorted only to phone directory when it could have examined county clerk's fictitious name file or contacted codefendant's counsel. *Donel, Inc. v. Badalian (1978) 87 Cal. App. 3d 327, 333-334, 150 Cal. Rptr. 855*

Civ. Code § 235(b) requires showing of due diligence to locate and serve parent in proceeding to declare child free from parental control as prerequisite to order for service on parent by publication. *In re Beebe (1974) 40 Cal. App. 3d 643, 646, 115 Cal. Rptr. 322*

Affidavits devoid of averments of facts showing that diligence was exercised to make service are not sufficient, and orders for service by publication based on such affidavits are beyond jurisdiction of court and void. *Batte v. Bandy (1958) 165 Cal. App. 2d 527, 534, 332 P.2d 439*

[12] Service of Summons on Sister State

Validity of service of process on sister state and its university pursuant to *Veh. Code §§ 17450-17463*, providing for service of process on nonresidents who operated vehicles on highways of California. *Hall v. University of Nevada (1972) 8 Cal. 3d 522, 524-526, 105 Cal. Rptr. 355, 503 P.2d 1363 , cert. denied, 414 U.S. 820, 94 S. Ct. 114, 38 L. Ed. 2d 52 (1973)* ; *see also Hall v. University of Nevada (1977) 74 Cal. App. 3d 280, 284, 141 Cal. Rptr. 439 , aff'd sub nom. Nevada v. Hall (1978) 440 U.S. 410, 99 S. Ct. 1182, 59 L. Ed. 2d 416*

[13] Substituted Service

The plain language of *Code Civ. Proc. § 415.20(b)* authorizes substitute service at a defendant's usual mailing address, which can include a private/commercial post office box. *Ellard v. Conway (2001) 94 Cal. App. 4th 540, 114 Cal. Rptr. 2d 399*

Party is under no duty to attempt substituted service of corporation through Secretary of State unless service cannot, with reasonable diligence, be accomplished pursuant to either *Code Civ. Proc. § 416.10* or *416.20*; *Corp Code § 1702* suggests that party serving process on corporation that failed to designate agent for service of process should, and arguably must, first attempt service on both offices and agents enumerated in *Code Civ. Proc. § 416.10(b), (c),* and on

trustee pursuant to *Code Civ. Proc. § 416.20,* before resorting to Secretary of State service; only if it can show that it cannot accomplish service by one of these methods is party required to seek assistance of court and Secretary of State in obtaining jurisdiction over corporate defendant. *Gibble v. Car-Lene Research, Inc. (1998) 67 Cal. App. 4th 295, 311-312, 78 Cal. Rptr. 2d 892*

Reasonable diligence requirement to permit substituted service ordinarily should be satisfied when personal service has been attempted two or three times; if form of substituted service is reasonably calculated to give interested party actual notice of proceedings and opportunity to be heard, traditional notions of fair play substantial justice implicit in due process are satisfied; pre-1969 service of process statutes requiring strict and exact compliance have now been more liberally construed to effectuate service if actual notice has been received by defendant. *Stafford v. Mach (1998) 64 Cal. App. 4th 1174, 1182-1183, 75 Cal. Rptr. 2d 809*

Substituted service is ineffective if service was effectuated at address having no connection to party alleged to be served. *Corcoran v. Arouh (1994) 24 Cal. App. 4th 310, 315, 29 Cal. Rptr. 2d 326*

To obtain in personam jurisdiction through any form of substituted service, strict compliance with statutory procedures is required; to be constitution ally sound, form of substituted service must be reasonably calculated to give interested party actual notice of proceedings and opportunity to be heard so that traditional notions of fair play and substantial justice implicit in due process are satisfied. *Zirbes v. Stratton (1986) 187 Cal. App. 3d 1407, 1416, 232 Cal. Rptr. 653*

Substituted service under former Corp. Code § 6408 (*now see Corp. Code § 2111*) in action for breach of license agreement is not proper if corporation's transactions in California were interstate rather than intrastate. *U.S. Cap & Closure, Inc. v. Superior Court (1968) 265 Cal. App. 2d 408, 409-413, 71 Cal. Rptr. 184*

[14] Substituted Service Combined With Service by Mail

Sufficiency of service of summons in compliance with *Code Civ. Proc. § 415.20(a)* when summons and complaint were left with person apparentlyin charge of the common reception room serving corporate defendant's office during usual office hours, and plaintiff later mailed copy of same papers to same place. *Ludka v. Memory Magnetics International (1972) 25 Cal. App. 3d 316, 319-321, 101 Cal. Rptr. 615*

[15] Summons

The Foreign Money-Judgments Act does not exempt compliance with the procedures applicable to civil actions, including service of a summons. Compliance with the statutory procedures for service of process is essential to establish personal jurisdiction. *Renoir v. Redstar Corp. (2004) 123 Cal. App. 4th 1145, 1152*

Minor variances, such as designation of defendant in complaint by misspelled or otherwise erroneous names, that are carried over to summons will not defeat jurisdiction when service is otherwise properly made and person served is aware that he or she is person named as defendant in erroneous manner; minor variances may be corrected by amended return. *Billings v. Edwards (1979) 91 Cal. App. 3d 826, 831, 154 Cal. Rptr. 453*

Requirement that statutes prescribing form of summons must be substantially observed. *Community Redevelopment Agency v. Superior Court (1967) 248 Cal. App. 2d 164, 170-173, 56 Cal. Rptr. 201*

[16] Tortious Service

Allegations that defendants caused service of civil process on plaintiff by pounding on front door of plaintiff's home at

midnight in loud and boisterous manner (in spite of fact that home was unlit and equipped with functioning doorbell) thereby awakening plaintiff, his family, and his neighborhood and that defendants had not attempted service previously and had no reason to believe service could not be effected at reasonable time and manner states cause of action for intentional infliction of emotional distress. *Golden v. Dungan (1971) 20 Cal. App. 3d 295, 310, 97 Cal. Rptr. 577*

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Weisbaum, *The Hague Service Convention and Code Civ. Proc. Section 413.10* , 47 L.A. Bar B. 390 (1972)

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[Reserved]

§§ 518.56[Reserved]

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§ 518.60 Plaintiff's Checklist for Service and Return of Summons

[1] Preliminary Determinations

☐ For each defendant to be served, determine:

☐ Name, or names.

☐ Business and residence address, and times at which defendant is likely to be at each address.

☐ Defendant's status and the capacity in which defendant will be served [*see § 518.17*]. Consider the following:

☐ A minor [*see § 518.17[7]*].

☐ An incompetent or other person for whom a guardian, conservator, or similar fiduciary has been appointed [*see § 518.17[8]*].

☐ An active domestic corporation or joint stock company [*see § 518.17[1][b], [3]*].

☐ An active foreign corporation or joint stock company [*see § 518.17[1][b], [3]*].

☐ A corporation that has dissolved or forfeited its charter or right to do business [*see § 518.17[2]*].

☐ An unincorporated association or partnership [*see § 518.17[4]*].

☐ A limited liability company [*see § 518.17[5]*].

☐ A public entity [*see § 518.17[6]*].

☐ A candidate for public office [*see § 518.17[9]*].

☐ A resident motorist to be served outside of California [*see § 518.17[11][b]*].

☐ A nonresident motorist [*see § 518.17[12]*].

☐ A nonresident executor or administrator [*see § 518.17[13]*].

☐ A nonresident insurer [*see § 518.17[14]*].

☐ A nonresident real estate licensee or subdivider [*see § 518.17[15]*].

☐ A nonresident watercraft owner or operator [*see § 518.17[16]*].

☐ A nonresident aircraft owner or operator [*see § 518.17[17]*].

☐ A nonresident or absent tax debtor [*see § 518.17[18]*].

☐ An issuer (other than a California corporation) of securities qualified or required to be qualified under the Corporate Securities Law (*Corp. Code § 25000 et seq.* [*see § 518.17[16]*].

☐ An offeror or seller of franchises registered or required to be registered under the Franchise Investment Law (*Corp. Code § 31000 et seq.* [*see § 518.17[16]*].

☐ Whether defendant resides in a gated community [*see § 518.18*].

☐ Whether defendant is incarcerated; and if so, the jailer or sheriff to which service of process is to be directed [*Penal Code § 4013*; *see § 518.17[17]*].

☐ Whether defendant has appointed an agent for service of process.

☐ If defendant is a corporation, or other business or public entity, the name, title, and business address of the officers authorized to accept service for the corporation or other business or public entity.

☐ Whether defendant is likely to be serving in the military at the time of service of process, or whether the process server should seek to determine defendant's military status at the time of service [*see § 518.19*].

☐ Whether attorney, if known, is authorized to accept service for defendant.

☐ Determine manner of service most likely to be effective. Consider the following:

☐ Hand delivery [*Code Civ. Proc. § 415.10*]; see *§ 518.16[1]*.

☐ Is defendant likely to acknowledge receipt of summons and complaint by mail [*Code Civ. Proc. § 415.30(c)*]? For discussion and form, see *§§ 518.16[4], 518.73*.

☐ Is defendant likely to sign receipt for certified or registered mail [*see Code Civ. Proc. § 415.40*, discussed at *§ 518.16[5]*]? This is effective outside of California and possibly outside the United States [*see Code Civ. Proc. § 413.10(b), (c)*, discussed at *§ 518.16[9]*].

☐ If defendant is one of the following, does it maintain an office where there is likely to be someone to accept service of process during normal business hours [*see* Code Civ. Proc. § 414.20(a), discussed at *§ 518.16[3][a]*]?

☐ A corporation, active or dissolved [*Code Civ. Proc. § 416.10* or *416.20*].

☐ A joint stock company [*Code Civ. Proc. § 416.30*].

☐ An unincorporated association [*Code Civ. Proc. § 416.40*].

☐ A public entity [*Code Civ. Proc. § 416.50*].

☐ If an individual defendant will probably not be amenable to personal service, is there likely to be someone competent toreceive service at the defendant's dwelling house, usual place of abode, usual place of business, or mailing address (other than a post office box) [*see* Code Civ. Proc. § 414.20(b), discussed at *§ 518.16[3][b]*]?

☐ If action is one for unlawful detainer, forcible entry, or forcible detainer [*Code Civ. Proc. §§ 415.45, 415.47, 1167*], see *§ 518.16[7]* and Ch. 333, *Landlord and Tenant: Eviction Actions* .

☐ Service by telegraph [*see Code Civ. Proc. § 1017*, discussed at *§ 518.16[8]*].

☐ Whether service will be governed by the Hague Service Convention [*see Code Civ. Proc. §*

413.10(c), discussed at *§ 518.16[9]*].

☐ Determine whether a court order will be necessary. Consider the following provisions:

☐ *Code Civ. Proc. § 415.50*, regarding publication [*see § 518.16[6*] for discussion and § 518.74 for forms of application and order for service by publication].

☐ *Code Civ. Proc. § 416.70*, dispensing with service on person (other than minor) for whom guardian, conservator, or similar fiduciary has been appointed [*see Code Civ. Proc. § 416.70*, discussed at *§ 518.16[8]*].

☐ *Corp. Code § 1702*, governing service on domestic corporation or joint stock company and discussed at *§ 518.17[1][b][i]* and *[3]* [*Code Civ. Proc. §§ 416.10*, *416.20*, *416.30*; for forms of application and order for service pursuant to *Corp. Code § 1702*, *see § 518.75*].

☐ *Corp. Code § 2111* or *2114*, regarding service on foreign corporation or joint stock company, discussed at *§ 518.17[1][b][ii]*, *[3]* [*Code Civ. Proc. §§ 416.10*, *416.20*, *416.30*; for forms of application and order for service pursuant to *Corp. Code § 2111*, *see § 518.75*].

☐ *Corp. Code § 18220*, regarding service on unincorporated association that has not appointed an agent for service of process or whose agent cannot be found, as discussed at *§ 518.17[4][d]* [*see also Code Civ. Proc. § 416.40*].

☐ *Corp. Code § 16962*, regarding service on registered limited liability partnership whose principal office is not in State or on foreign limited liability partnership, discussed at *§ 518.17*[4.1][c].

☐ *Corp. Code § 17061(b)*, regarding service on a foreign limited liability company that has appointed the Secretary of State as its agent for service of process, as discussed at *§ 518.17[5][a]*.

☐ *Corp. Code § 17061(c)*, regarding service on a limited liability company whose agent has resigned or cannot be found, as discussed at *§ 518.17[5][b]*.

☐ *Gov. Code § 960.3*, regarding service on public entity whose appropriate officer for service of process cannot be ascertained, as discussed at *§ 518.17[6][b]*.

☐ Decide who will serve the summons and complaint, discussed at *§ 518.15[3]*.

☐ Determine amount of fees required for issuance of summons and for process server or other entity that will aid in service.

[2] Preparation of Papers

☐ Determine which summons to use [*see § 518.70[3][a]*]:

☐ Summons for general use [*see* Judicial Council Form SUM-100; for illustration, *see § 518.70*].

☐ Summons for cross-complaint [*see* Judicial Council Form SUM-110; for illustration, *see § 518.70A*].

☐ Summons (Joint Debtor) [Judicial Council Form SUM-120].

☐ Summons (Unlawful Detainer) [Judicial Council Form SUM-130; *see* Ch. 333, *Landlord and Tenant: Eviction Actions*].

☐ Summons (Family Law) [*Fam. Code § 231 et seq.* (summons required to include specified temporary restraining orders in certain domestic relations and paternity proceedings); *See* Judicial Council Form FL-110 *see* Ch. 221, *Dissolution of Marriage: Procdure*].

☐ Summons (Joinder) [*See* Judicial Council Form FL-375; *see* Ch. 221 *Dissolution of Marriage: Procedure*].

☐ Prepare summons [*see § 518.70*].

☐ If notice and acknowledgment of service will be used, prepare original and one copy for mailing to each person to be served, and two or more office copies for each person to be served [*see § 518.73*].

☐ If an application for order is necessary, prepare the application, with as many supporting declarations as are necessary [*see, e.g., §§ 518.74, 518.75*].

☐ The original of the application and supporting declaration(s) should be filed with the court and copies served on any party who has appeared in the action. Additional office copies should be retained as desired. The proposed form of order should be submitted with the application. For specifics required to support the various types of orders likely to be applied for, see the following:

☐ For discussion regarding service by publication [*Code Civ. Proc. § 415.50*], see *§ 518.16[6]*. For forms of application and order for service by publication, see *§ 518.74*.

☐ For discussion of an order dispensing with service on person (other than minor) for whom guardian, conservator, or similar fiduciary has been appointed [*Code Civ. Proc. § 416.70*; *see § 518.17[8]*].

☐ For discussion of service pursuant to *Corp. Code § 1702*, on a domestic corporation or joint stock company [*Code Civ. Proc. §§ 416.10, 416.20, 416.30*], see *§ 518.17[1][b][i], [3]*. For forms of application and order for service pursuant to *Corp.*

Code § 1702, see *§ 518.75*.

☐ For discussion of service pursuant to *Corp. Code § 2111* or *2114*, on a foreign corporation or joint stock company [*Code Civ. Proc. §§ 416.10, 416.20, 416.30*], see *§ 518.17[1][b][ii], [3]*. For forms of application and order for service pursuant to *Corp. Code § 2111*, see *§ 518.75*.

☐ For discussion of service pursuant to *Corp. Code § 18220*, on an unincorporated association that has not appointed an agent for service of process or whose agent cannot be found, see *§ 518.17[4][d]* [*see also Code Civ. Proc. § 416.40*].

☐ For discussion of service pursuant to *Corp. Code § 17061(b)*, on a foreign limited liability that has appointed the Secretary of State as its agent for service of process, see *§ 518.17[5][a]*.

☐ For discussion of service pursuant to *Corp. Code § 17061(c)*, on a limited liability whose agent has resigned or cannot be found, see *§ 518.17[5][b]*.

☐ For discussion of service pursuant to *Gov. Code § 960.3*, on a public entity whose appropriate officer for service of process cannot be ascertained, see *§ 518.17[6][b]*.

☐ For discussion of service pursuant to *Bus. & Prof. Code § 10151.5*, on a nonresident real estate licensee, see *§ 518.17[15]*.

☐ For discussion of service pursuant to *Bus. & Prof. Code § 11007*, on a nonresident subdivider, see *§ 518.17[15]*.

☐ In any of the instances listed below, when process will be made through the Secretary of State, prepare the statements required by the specific statute authorizing service in that manner. Generally, prepare an original for delivery with process to the Secretary of State, an office copy, and additional copies, as desired, of the statements required as follows:

☐ For service under *Corp. Code § 15800* on foreign partnership [*see § 518.17[4][c]*].

☐ For service under *Prob. Code § 8574* on nonresident personal representative [*see § 518.17[13]*].

☐ For service under *Corp. Code § 16962(c)* on registered limited liability partnership whose principal office is not in State or on foreign limited liability partnership [*see § 518.17*[4.1][c]].

☐ Additional notices of service are required to complete service in the following instances pursuant to the particular statutory scheme. Generally, prepare an original of the notice of service for filing, a copy to

be sent with the copy of summons and the copy of the complaint by certified or registered mail to defendant, an office copy, and additional copies, as desired.

☐ If defendant is a nonresident motorist, and service was made on the Director of Motor Vehicles pursuant to *Veh. Code § 17454*, notice of service will be required by *Veh. Code § 17455*, discussed at *§ 518.17[12][b][i]*.

☐ If defendant is a nonresident insurer and service was made by delivery to the Insurance Commissioner, notice of service will be required by *Ins. Code § 12931(d)*, discussed at *§ 518.17[14]*.

[3] Issuance and Service of Summons

☐ Present originals and copies of the summons to the clerk of the court in which the action is commenced, so that the clerk, after payment of all applicable fees, will issue the summonses.

NOTE:
The summons ordinarily is presented to the clerk for issuance at the time the complaint is filed. Counsel will at that time concurrently present all of the original summonses as well as the copies to the clerk. The clerk will sign and seal [*Code Civ. Proc. §§ 412.20(a), 153(b)*] the originals, insert the case number, conform the copies, retain the original summons for the court file, and return the copies to counsel [*Code Civ. Proc. § 412.10*].

CAUTION: Local rules enacted to implement the Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*) may require that service of the complaint be completed and proof of service filed with the court 60 days after the filing of the complaint. Failure to meet this time limit may result involuntary dismissal [*see Gov. Code § 68616(a)*]. For discussion, see *§ 518.22[2]* and Ch. 552, *Trial Court Delay Reduction* . Failure to serve the summons and complaint and return summons within two years may result in discretionary dismissal [*Code Civ. Proc. § 583.420*]. Dismissal is mandatory if the complaint and summons are not served and the summons returned within three years [*Code Civ. Proc. §§ 583.210, 583.250*]. For further discussion, see *§ 518.22[1]* and Ch. 212 *Dismissal* .

☐ Have summons served. Often this involves delivering one summons and one copy of the complaint for each person to be served, to the sheriff, marshal, process server, Secretary of State, or other entity, together with a form of proof of service which the person serving the process will complete and return to counsel.

☐ If service is by hand delivery to the individual or entity being served, or to its designated agent, use the procedure described at § 518.16[1] [*Code Civ. Proc. § 415.30*], having marked the summons appropriately as discussed at *§ 518.70[4][g]*. See also *§ 518.19*, regarding need to have process server determine defendant's military status.

☐ If service is to be made on a person living in a gated community, use the procedure described at § 518.18 to gain entry or to make substituted service on the guard [*Code Civ. Proc. § 415.21*].

☐ If service is to be made on a defendant who is incarcerated, use the procedure described at § 518.17[17] to make service on the sheriff or jailer [*Penal Code § 4013*].

☐ If service is to be made by mail and acknowledgment of receipt, use the procedure described at § 518.16[4] and the form set forth at § 518.73 [*Code Civ. Proc. § 415.30*].

☐ If combination service will be made on a legal entity, use the procedure described at § 518.16[3][a] [*Code Civ. Proc. § 415.20(a)*].

☐ If combination service will be made on an individual who could not, with reasonable diligence, be personally served, use the procedure described at § 518.16[3][b] [*Code Civ. Proc. § 415.20(b)*].

☐ If service will be made on a defendant outside California by return-receipt, first-class mail, use the procedure described at § 518.16[5] [*Code Civ. Proc. § 415.40*].

☐ If service is to be made by publication, use the procedure described at § 518.74[2][d] [*Code Civ. Proc. § 415.50*; *see also §§ 518.16[6], 518.78* (form of proof of mailing)].

☐ If substituted service is to be made on a domestic corporation or joint stock company, by delivery of process to the Secretary of State under *Corp. Code § 1702, 2011(b)*, or *2011(c)*, use the procedure discussed at *§ 518.75[2][c][i]* [*see also § 518.17[1][b][i], [3]*].

☐ If substituted service is to be made on a foreign corporation or joint stock company, by delivery of process to the Secretary of State under *Corp. Code § 2111* or *2114*, use the procedure discussed at *§ 518.75[2][c][ii]* [*see also § 518.17[1*][b][ii], [3]].

☐ If substituted service is to be made on a foreign partnership, by delivery of process to the Secretary of State under *Corp. Code § 15800*, use the procedure discussed at *§ 518.17[4][c]*.

☐ If substituted service is to be made on an unincorporated association, by court-ordered service on a member pursuant to *Corp. Code § 24007*, use the procedure discussed at *§ 518.17[4][d]*.

☐ If substituted service is to be made on a foreign limited liability company that has designated the Secretary of State as its agent for service of process under *Corp. Code § 17061(b)*, use the procedure discussed at *§ 518.17[5][a]*.

☐ If substituted service is to be made on a domestic or foreign limited liability company whose agent has resigned or cannot be found [*Corp. Code § 17061(c)*], use the

procedure discussed at *§ 518.17[5][b]*.

☐ If service is to be made on a member of a limited liability who has consented to be served in the manner provided by the operating or other agreement [*Corp. Code § 17061(h)*], use the procedure set forth in the agreement [*see also § 518.17[5][c]*].

☐ If substituted service is to be made on a registered limited liability partnership whose principal office is not in the State or on a foreign limited liability partnership by delivery to the Secretary of State when the conditions in *Corp. Code § 16962(c)* exist, use the procedure discussed at *§ 518.17*[4.1][c].

☐ If substituted service is to be made on a public entity when the appropriate officer for service cannot be ascertained [*Gov. Code § 960.3*], use the procedure discussed at *§ 518.17[6][b]*.

☐ If substituted service is to be made on a nonresident or absent resident motorist by delivery to the Director of Motor Vehicles [*Veh. Code §§ 17454, 17455*], use the procedure discussed at *§ 518.17[12][b][i]*.

☐ If substituted service is to be made on a nonresident executor or administrator by delivery to the Secretary of State pursuant to *Prob. Code § 8574*, use the procedure discussed at *§ 518.17[13]*.

☐ If substituted service is to be made on a nonresident insurer by delivery to the Insurance Commissioner, followed by certified mailing pursuant to *Ins. Code § 12391*, use the procedure discussed at *§ 518.17[14]*.

☐ If substituted service is to be made on a nonresident issuer of securities qualified or required to be qualified under the Corporate Securities Law (*Corp. Code § 25000 et seq.*) by delivery to the Commissioner of Corporations and registered or certified mail pursuant to *Corp. Code §§ 25102(h)(4), 25165, 25240*, use the procedure discussed at *§ 518.17[16][b]*.

☐ If substituted service is to be made on a nonresident or absent resident who has engaged in conduct prohibited or made actionable by the Corporate Securities Law (*Corp. Code § 25000 et seq.*) by delivery to the Commissioner of Corporations and registered or certified mail pursuant to *Corp. Code § 25550*, use the procedure discussed at *§ 518.17[16][c]*.

☐ If substituted service is to be made on a nonresident seller or offeror of franchises registered or required to be registered under the Franchise Investment Law (*Corp. Code § 31000 et seq.*) by delivery to the Commissioner of Corporations and registered or certified mail pursuant to *Corp. Code § 31155*, use the procedure discussed at *§ 518.17[16][b]*.

☐ If substituted service is to be made on a nonresident or absent resident who has

violated the Franchise Investment Law (*Corp. Code § 31000 et seq.*) by delivery to the Commissioner of Corporations and registered or certified mail pursuant to *Corp. Code § 31420*, use the procedure discussed at *§ 518.17[16][c]*.

[4] Proof of Service

☐ Prepare proofs of service and review proofs of service prepared by others [for an illustration of Judicial Council Form POS-010, Proof of Service of Summons, *see § 518.72*].

☐ For personal or combination service on an individual [*Code Civ. Proc. §§ 415.10, 415.20(b), 416.90*], use the form of certificate at § 518.72, and ensure that it sets forth the elements discussed at *§ 518.20[3][a], [b]*.

☐ In the case of combination service on an individual [*see § 518.16[3][b]*], a declaration of diligence must be attached [*Code Civ. Proc. §§ 415.20(b), 417.10(a)*].

☐ For personal or combination service [*Code Civ. Proc. §§ 415.10, 415.20(a)*] on an active corporation [*Code Civ. Proc. § 416.10*], defunct corporation [*Code Civ. Proc. § 416.20*], joint stock company [*Code Civ. Proc. § 416.30*], or unincorporated association or partnership [*Code Civ. Proc. § 416.40*], use the form of certificate at § 518.72, and ensure that it sets forth the elements discussed at *§ 518.20[3][a], [b]*.

☐ For personal or combination service [*Code Civ. Proc. §§ 415.10, 415.20(a)*] on a public entity [*Code Civ. Proc. § 416.50*], use the form of certificate at § 518.72, and ensure that it sets forth the elements discussed at *§ 518.20[3][a], [b]*.

☐ For service by mail and acknowledgment of receipt [*Code Civ. Proc. § 415.30*], use the form of certificate at § 518.72, and ensure that it sets forth the elements discussed at *§ 518.20[3][a] -[c]*.

☐ For service outside California by first-class, prepaid mail [*Code Civ. Proc. § 415.40*], use the form of certificate at § 518.72, and ensure that it sets forth the elements discussed at *§ 518.20[3][a], [b], [4][a]*, and that the return receipt or other evidence of delivery is attached as required by *Code Civ. Proc. § 417.20(a)*.

☐ For service outside California but within the United States pursuant to *Code Civ. Proc. § 413.10(b)* or outside the United States pursuant to *Code Civ. Proc. § 413.10(c)*, subject to any other or additional requirements imposed by the court, use the form of certificate at § 518.72, and ensure that it sets forth the elements discussed at *§ 518.20[3][a], [b], [4][a], [c]*, unless other or additional requirements are prescribed by the law of the place where the person was served or the court order [*Code Civ. Proc. § 417.20(b), (c)*].

☐ For service by publication [*Code Civ. Proc. § 415.50*] use the form of certificate at § 518.72, and ensure that it and its attached declaration(s) sets forth the elements discussed at *§ 518.20[3][d]* [*Code Civ. Proc. § 417.10(b)*; for a form of declaration of mailing pursuant to an order for publication, *see § 518.78*].

[5] Filing Proof of Service

☐ Attach the original of each affidavit, declaration, or certificate of proof service to the copy of the summons issued by the court.

☐ If there was a copy of summons for each person to be served, the original of the affidavit, declaration, or certificate of proof of service prepared for each summons, will be attached to the summons to which it applies.

☐ Deliver, for filing, the proof of service of summonses with attachments to the clerk of the court in which the action is pending [*see Code Civ. Proc. § 417.30(a)*].

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PART IV. PROCEDURAL CHECKLISTS

45-518 California Forms of Pleading and Practice--Annotated § 518.61

§ 518.61 Defendant's Checklist for Responding to Service of Summons

[1] Preliminary Determinations

☐ Determine the following facts:

☐ Date, time, place, and manner in which summons was served on client.

☐ All facts surrounding the cause of action, including where it arose and the names and addresses of witnesses, if any, sufficient to determine:

☐ Which allegations of the complaint are true and which are not.

☐ Whether any affirmative defenses exist.

☐ Whether any cross actions exist.

☐ Determine whether the court obtained jurisdiction over the defendant by the service of summons [*see Code Civ. Proc. § 410.10*; *see* Ch. 323, *Jurisdiction: Personal*]:

☐ Whether service was properly effected on the defendant; and

☐ Whether there is a proper basis of jurisdiction existing between defendant and this state [*see Code Civ. Proc. § 410.10*].

CAUTION:
If jurisdiction has not been obtained, and counsel intends to file a noticed motion to quash service on the

ground of lack of personal jurisdiction [*Code Civ. Proc. § 418.10(a)(1)*], no paper may be filed in the action or proceeding other than the notice of motion to quash, except as authorized by *Code Civ. Proc. § 418.10* and the supporting affidavit [*Code Civ. Proc. § 2009*] or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*] and memorandum [*Cal. Rules of Ct., Rules 3.1100, 3.1113*]. For discussion, see Ch. 323, *Jurisdiction: Personal* .

☐ Determine whether the action should be stayed or dismissed on the ground of inconvenient forum [*Code Civ. Proc. § 418.10(a)(2)*; *see* Ch. 323, *Jurisdiction: Personal*].

☐ Determine whether action is subject to dismissal for delay in prosecution under *Code Civ. Proc. § 583.110 et seq.* [*Code Civ. Proc. § 418.10(a)(3)*; *see* Ch. 212, *Dismissal*].

☐ Whether any other actions are pending between the same parties for the same cause. If so, consider how to raise the issue:

☐ By demurrer [*Code Civ. Proc. § 430.10(c)*], invoking judicial notice [*Code Civ. Proc. §§ 430.30(a), 430.70*] of the other pending action [*Evid. Code § 452(d)*; for procedure and forms, *see* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*].

☐ By affirmative defense in the answer [*Code Civ. Proc. §§ 430.10(c), 430.30(b), 431.30(b)(2)*].

☐ Determine whether the action is barred by the doctrine of res judicata. If so, consider how to raise the issue:

☐ By demurrer [*Code Civ. Proc. § 430.10(e)* (failure to state a cause of action)], invoking judicial notice [*Code Civ. Proc. §§ 430.30(a), 430.70*] of the prior action [*Evid. Code § 452(d)*; for procedure and forms, *see* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* ; for memoranda of points and authorities, *see* California Points and Authorities , Ch. 71, *Demurrers and Motions for Judgment on the Pleadings*].

☐ By affirmative defense in the answer [*Code Civ. Proc. §§ 430.10(e), 430.30(b), 431.30(b)(2)*].

☐ By motion for summary judgment [*Code Civ. Proc. § 437c*; for procedure and forms, *see* Ch. 537, *Summary Judgment ;* for memoranda of points and authorities, *see* California Points and Authorities , Ch. 221, *Summary Judgments*].forms, *see* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* ; for

☐ Determine when defendant must file a responsive pleading or motion extending time to plead to avoid the entry of default. The periods within which defendant must appear are as follows:

☐ Personal service [*see Code Civ. Proc. §§ 415.10, 430.40*]:

☐ Within 30 days from the date the copy of the summons and copy of the complaint were served on defendant.

☐ Substituted service [*see Code Civ. Proc. §§ 415.20, 430.40*]:

☐ Within 40 days from the date the copy of the summons and the copy of the complaint were mailed.

☐ Service by mail and acknowledgment of receipt [*see Code Civ. Proc. §§ 415.30, 430.40*]:

☐ Within 30 days from the date the acknowledgment of service is executed, if it is then returned to the sender.

☐ Service by publication [*see Code Civ. Proc. §§ 415.50*. 430.40; *Gov. Code § 6064*]:

☐ Within 30 days after the last date of publication.

☐ Service by first-class mail, postage prepaid, outside California [*see Code Civ. Proc. §§ 415.40, 430.40*]:

☐ Within 40 days after date of mailing.

☐ If the defendant was served pursuant to some statute other than the foregoing, see discussion of the specific statutes at § 518.17.

[2] Preparation of Papers

☐ Prepare one of the following:

☐ A responsive pleading (answer or demurrer), in at least three copies (original for filing, copy for service on plaintiff, and office copy); and

☐ If a demurrer is prepared, the supporting memorandum of points and authorities and the notice of hearing [*see Cal. Rules of Ct., Rules 3.1100, 3.1113(a), 3.1320(b)*], in the same number of copies as the demurrer [*see* Ch. 26, *Answers* ; Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*]; or

☐ One of the following motions, in at least three copies (original for filing, copy for service and plaintiff, and office copy), and, in the same number of copies, the supporting affidavit [*Code Civ. Proc. § 2009*] or declaration [*Code Civ. Proc. § 2015.5*], if any, and the memorandum of points and authorities [*see Cal. Rules of Ct., Rules 3.1100, 3.1113(a)*]:

☐ A motion to strike [*see Code Civ. Proc. § 435*; Ch. 375, *Motions to Strike: Pleadings*; Ch. 376, *Motions to Strike: anti-SLAPP*].

☐ A motion to transfer pursuant to *Code Civ. Proc. § 396b*.

☐ A motion to quash service of summons pursuant to *Code Civ. Proc. § 418.10(a)(1)* [*see* Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances*].

☐ A motion to stay or dismiss the action for inconvenient forum pursuant to *Code Civ. Proc. § 418.10(a)(2)* [*see* Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances*].

☐ A motion to dismiss for delay in prosecution pursuant to *Code Civ. Proc. § 418.10(a)(3)* [*see Code Civ. Proc. §§ 418.10(d), 585* (relating to entry of default); Ch. 212, *Dismissal*].

☐ Prepare the certificate, affidavit, or declaration of service [*see § 518.62*].

☐ If a demurrer or related motion is prepared, attach the originals of the demurrer, memorandum of points and authorities, and notice of hearing or the originals of the notice of motion, supporting affidavit or declaration, if any, and memorandum of points and authorities together. The copies of these documents should also be attached to make three sets. Local court rule may require that these papers appear under a single cover, in which case the demurrer or notice of motion, in its caption, to the right of the title of the case, will list all three papers.

[3] Service of Papers

☐ Serve a copy of the answer and/or demurrer or motions (and accompanying papers) listed above on counsel for plaintiff [*Code Civ. Proc. §§ 465, 1015*], either by mail [*Code Civ. Proc. § 1013*] or as provided in *Code Civ. Proc. § 1011* [*see §§ 518.30 -518.36, 518.62*].

[4] Filing of Papers

☐ Deliver, for filing, the originals of the papers served to the clerk of the court in which the action is pending.

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45-518 California Forms of Pleading and Practice--Annotated § 518.62

§ 518.62 Checklist for Filing and Service of Papers Other Than Summons

[1] Preliminary Determinations

☐ Determine governing statute or statutes; consider:

☐ Specific statute governing procedure [*see* specific titles throughout this publication].

☐ *Code Civ. Proc. § 1005* with respect to any proceeding under the Code of Civil Procedure in which notice is required and no other time or method is prescribed by law or by court or judge [*see Code Civ. Proc. § 1005(a)*; for a checklist, *see Ch. 372, Motions and Orders, § 372.50* et seq.].

☐ *Code Civ. Proc. § 1013* with respect to any other notice or paper [*Code Civ. Proc. § 1010*; continue with this checklist].

☐ Determine method of service to be used:

☐ Personal service [*see Code Civ. Proc. § 1011*].

☐ Mail [*see Code Civ. Proc. § 1012*], taking into consideration extension of notice period [*see Code Civ. Proc. § 1013(a)* (*see* exceptions to extension, listed below)]:

☐ Five calendar days, if the place of address and of mailing are both within California.

☐ Ten calendar days if either the place of mailing or of address is outside California but within the United States.

☐ Twenty calendar days if either the place of mailing or of address is outside the United States.

☐ Express Mail or other overnight service, taking into consideration two court day extension of notice period [*see Code Civ. Proc. § 1013(c)* (*see* exceptions to extension, listed below)].

☐ Fax, if parties have agreed to fax filing, taking into consideration two court day extension of notice period [*see Code Civ. Proc. § 1013(e)* (*see* exceptions to extension, listed below)].

☐ Electronic service, if authorized by court rule and party has agreed to accept electronic service, taking into consideration two court day extension of notice period [*Code Civ. Proc. § 1010.6(a)(6)*; *Cal. Rules of Ct., Rule 2.260(e)(2)* (*see* exceptions to extension, listed below)].

☐ Exceptions to extension of time [*Code Civ. Proc. § 1010.6(a)(6), 1013(a), (c), (e)*; *Cal. Rules of Ct., Rule 2.260(e)(3)*]:

☐ Notice of intention to move for new trial.

☐ Notice of intention to move to vacate judgment pursuant to *Code Civ. Proc. § 663a*.

☐ Notice of appeal.

☐ Consider whether to seek shorter or longer notice period [*see* Ch. 524, *Shortening and Extension of Time*].

[2] Preparation of Papers

☐ Prepare the pleading, notice, or other paper or papers to be served in at least three copies [*Code Civ. Proc. §§ 465, 1010, 1014*, discussed at *§ 518.31*]:

☐ Original for filing.

☐ One copy for service on adverse party.

☐ Copy for any other party who has appeared in action and is entitled to notice.

☐ Office copy.

☐ Prepare proof of service in the same number of copies [*see Code Civ. Proc. § 1013(b)*, discussed at

§ 518.34[7][f]; *see also § 518.36*], whether service is:

☐ By mail [*Code Civ. Proc. § 1013a*]:

☐ Directly deposited in United States Mail by person other than attorney [for a form of declaration, *see § 518.90*].

☐ Deposited in ordinary course of business's mailing practice by person other than attorney [for a form of declaration, *see § 518.91*].

☐ By attorney [for a form of certificate, *see § 518.92*].

☐ By Express Mail overnight delivery [*see Code Civ. Proc. § 1013(c)*, for a form of declaration *see § 518.93*].

☐ By overnight delivery by express service carrier [*Code Civ. Proc. § 1013(c)*, for a form of declaration, *see § 518.94*].

[3] Service of Papers

☐ Place the copy of the pleading, notice, or other paper to be served, either together with an unsigned copy of the proof of service or bearing a notation of the date and place of mailing [*Code Civ. Proc. § 1013(b)*], in an envelope addressed to the person to be served. Seal the envelope, stamp it, and post it in the mail [*see Code Civ. Proc. § 1012*, discussed at *§ 518.34[7][a]*].

[4] Filing of Papers

☐ Deliver for filing the original or a true copy of the pleading, notice, or other paper, together with the original of the proof of service, to the clerk of the court in which the action or proceeding is pending [*see Code Civ. Proc. §§ 465, 1010*, discussed at *§ 518.31[1]*].

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45-518 California Forms of Pleading and Practice--Annotated §§ 518.63-518.69

[Reserved]

§§ 518.63[Reserved]

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A. Service of Summons

45-518 California Forms of Pleading and Practice--Annotated § 518.70

§ 518.70 Summons [Code Civ. Proc. §§ 412.20, 465]--Judicial Council Form SUM-100

[1] FORM Summons [Code Civ. Proc. §§ 412.20(a), 412.30, 474] With Proof of Service [Code Civ. Proc. § 417.10]--Judicial Council Form [Code Civ. Proc. § 412.20(c); Gov. Code § 68511]--General Summons [Judicial Council Form 982(a)(9)]--Judicial Council Form SUM-100

Click here to view image.

[2] Use of Form

The form of summons illustrated in [1], *above* (with attached proof of service, discussed at [3], [4], *below*), is a reproduction of the form prescribed by the Judicial Council for use in a civil action [*see Code Civ. Proc. § 412.20(c)*; Judicial Council Form SUM-100]. Use of the form of summons when applicable is mandatory [*see Gov. Code § 68511*; *Cal. Rules of Ct., Rule 1.30*; *see also Clark v. Palmer (1891) 90 Cal. 504, 506-507, 27 P. 375* ; *Lyman v. Milton (1872) 44 Cal. 630, 634-635* (statutory form of summons as mandatory)].

[3] Judicial Council Summons Forms

[a] Six Summons Forms

The Judicial Council has adopted five additional specialized summons forms in addition to the summons for general use that is illustrated in [1], *above* [Judicial Council Form SUM-100]:

- Summons (Joint Debtor), used for enforcing a judgment against a joint debtor who was not a party to the action underlying the judgment [Judicial Council Form SUM-120; *see Ch. 254, Executions and Enforcement of Judgments, § 254.340* et seq.];

- Summons (Unlawful Detainer), used in unlawful detainer proceedings [Judicial Council Form SUM-130; *see* Ch. 333, *Landlord and Tenant: Eviction Actions*];

- Summons (Storage Lien Enforcement), for use to enforce a storage lien under *Bus. & Prof. Code § 21710* and *Code Civ. Proc. §§ 412.20, 465* [Judicial Council Form SUM-140; *see Ch. 517, Self-Service Storage Facilities, § 517.51*];

- Summons (Family Law), used in proceedings for dissolution of marriage, nullity of marriage, or separation and in proceedings under the Uniform Parentage Act [*Fam. Code § 231 et seq.* (inclusion of temporary restraining orders in summons in these proceedings); *see* Ch. 221, *Dissolution of Marriage: Procedure*];

- Summons (Joinder), used to bring a third party into a family law proceeding [*see* Ch. 221 *Dissolution of Marriage: Procedure*].

[b] Additional Party Attachment

The Judicial Council has also adopted a form of Additional Parties Attachment that may be attached to any summons on which there is not room to list all parties [*see* Judicial Council Form SUM-200(A); for an illustration of the form, *see § 518.71*].

[4] General Summons Form Contents

[a] Overview

Except as otherwise required by statute, a summons must be directed to the defendant, signed by the court clerk (or judge [*Code Civ. Proc. § 167*]), and issued under the seal of the court in which the action is pending [*Code Civ. Proc. § 412.20(a)*; *see also Code Civ. Proc. § 153(b)*, requiring that summons be sealed].

The required contents of the summons are set forth in *Code Civ. Proc. §§ 412.20, 412.30, 474*.

Service of summons is governed generally by *Code Civ. Proc. §§ 413.10-416.90* [*see §§ 518.15, 518.17*].

Proof of service and return of the summons are governed generally by *Code Civ. Proc. §§ 413.30, 417.10-417.40, 2009, 2010, 2011, 2015.3, 2015.5* [*see §§ 518.20 -518.21, 518.76 -518.78*].

[b] Names of Parties

The summons must contain the names of the parties to the action [*Code Civ. Proc. § 412.20(a)(2)*].

Every plaintiff and defendant, including fictitiously named defendants [*Code Civ. Proc. § 474*], must be named in the title of the case. Hence, the title of the case as it appears in the summons is the same as that in the complaint.

[c] Title and Number of Case

Although it will not be assigned until the complaint is filed and the summons is issued, the case number must be inserted in the appropriate box of the Judicial Council form.

[d] Title and Address of Court

The Judicial Council approved forms require the title of the court, including, if applicable, the name of any municipal court district or title of any branch court [*see also Code Civ. Proc. § 412.20(a)(1)*].

The post office and street address of the court or branch of the court must be included in the summons.

[e] Directions, Legends, and Warnings

The Judicial Council form of summons contains the notice to defendant, the legend indicating "YOU ARE BEING SUED," and the warning the defendant must file a response with the court within 30 days after being served with the summons [*Code Civ. Proc. § 412.20(a)(3), (6), (b), (c)*]. The form also contains a reminder advising the defendant he or she may want to seek the advice of an attorney [*Code Civ. Proc. § 412.20(a)(5)*]. The foregoing appear in English and in Spanish [*see Code Civ. Proc. § 412.20(b)*].

[f] Plaintiff or Plaintiff's Attorney

The summons must contain the name, address, and telephone number of the plaintiff's attorney, or if the plaintiff does not have an attorney, the plaintiff's own name, address, and telephone number.

[g] Capacity in Which Defendant Is Served

The plaintiff must indicate on the face of the summons the capacity or capacities in which the defendant is served [*see Code Civ. Proc. §§ 413.10-416.90*; *see also § 518.17*].

If service is made on a person in two capacities, for instance as an individual and on behalf of a corporation or unincorporated association, the notice on the summons must indicate that service is being made on that person as an individual as well as on behalf of the corporation or unincorporated association. If that notice does not appear on the copy of the summons served, no default may be taken against the corporation or unincorporated association or against the person individually served [*Code Civ. Proc. § 412.30*]. The requirements of *Code Civ. Proc. § 412.30* are mandatory so that service on a corporation of a summons which fails to comply substantially with this section is ineffective [*Tresway Aero, Inc. v. Superior Court (1971) 5 Cal. 3d 431, 435, 96 Cal. Rptr. 571, 487 P.2d 1211* ; *Schering Corp. v. Superior Court (1975) 52 Cal. App. 3d 737, 741, 125 Cal. Rptr. 337]* . The process server's oral statements to the person served of the fact omitted from the summons does not cure the failure of the summons to contain the notice [*Schering Corp. v. Superior Court (1975) 52 Cal. App. 3d 737, 741, 125 Cal. Rptr. 337]* .

Similarly, when a person is served as a fictitiously named defendant, that notice on the summons must be checked and completed. No default or default judgment may be taken against such defendant unless the proper notice appears [*Code Civ. Proc. § 474*]. Compliance with *Code Civ. Proc. § 474* is mandatory; if the provisions are not complied with, the court acquires no jurisdiction over the fictitiously named defendant [*Armstrong v. Superior Court (1956) 144 Cal. App. 2d 420, 424, 301 P.2d 51* ; see also *National Union Fire Ins. Co. v. Superior Court (1966) 247 Cal. App. 2d 326, 328-329, 247 Cal. App. 2d 326, 329, 55 Cal. Rptr. 574* ; *see also Nissan v. Barton (1970) 4 Cal. App. 3d 76, 81, 84 Cal. Rptr. 36]* .

[5] Number of Copies of Summons

Counsel will ordinarily prepare (for filing with proof of service) one original summons for each defendant or person to be served. The code makes no distinction between the original and any subsequent or "alias" summons. Hence, subsequent or additional summonses will be issued against any defendant on plaintiff's request [*Code Civ. Proc. § 412.10*].

Counsel will also need a copies for service or each defendant, and as many office copies and additional copies as desired.

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1-518 California Forms of Pleading and Practice--Annotated § 518.70A

§ 518.70A Summons--Cross-Complaint--Judicial Council Form SUM-110

[1] FORM Summons--Cross-Complaint--Judicial Council Form SUM-110

Click here to view image.

[2] Use of Form

The form in [1], *above*, is used as a summons for a cross complaint. This form is approved for mandatory use by the Judicial Council of California effective January 1, 2009 [*Cal. Rules of Ct., Rule 1.31*].

For discussion on service of summons for a cross complaint, see *Ch. 123, Complaints and Cross-Complaints, § 123.33*. For related form of proof of service, see *§ 518.72*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

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45-518 California Forms of Pleading and Practice--Annotated § 518.71

§ 518.71 Additional Parties Attachment to Summons--Judicial Council Form [Judicial Council Form SUM-200(A)]

[1] FORM Additional Parties Attachment to Summons--Judicial Council Form [Judicial Council Form SUM-200(A)]

Click here to view image.

[2] Use of Form

The form reproduced at [1], *above*, is an illustration of the form adopted by the Judicial Council for mandatory use as an attachment to any summons in civil actions and proceedings if space does not permit the listing of all parties on the summons [Judicial Council Form SUM-200(A)].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Filling Out Form

The short title of the case (normally written as the last name of plaintiff vs. last name of defendant) and case number of the action or proceeding should be set forth in the top two boxes. The appropriate box should be checked to indicate the type of party for which additional names are listed. Only one box should be checked; a separate attachment page should be used for each type of party.

If this form is used, the following statement must appear in the plaintiff or defendant box on the summons: "Additional Parties Attachment form is attached."

At the bottom of the form, the page number and the total number of pages should be set forth.

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45-518 California Forms of Pleading and Practice--Annotated § 518.72

§ 518.72 Proof of Service of Summons [Code Civ. Proc. §§ 412.10-412.40]--Judicial Council Form POS-010

[1] FORM Proof of Service of Summons [Code Civ. Proc. §§ 412.10-412.40]--Judicial Council Form POS-010

Click here to view image.

[2] Use of Form

The form reproduced at [1], *above*, is the form adopted by the Judicial Council for mandatory use to prove service of summons in civil actions and proceedings [Judicial Council Form POS-010]. The form was adopted to comply with the legislative mandate that all proof of *personal* service shall be made on a form adopted by the Judicial Council [*see Code Civ. Proc. § 417.10(f)*]. However, the form is for use in all civil cases, regardless of the manner of service, although additional requirements may have to be met, as, for example, when service is made by posting the premises or by publication. For discussion of proving service by publication, see *Code Civ. Proc. §§ 417.10(b), 2010, 2011*; also see *§ 518.16[6]*. For discussion of proving service by posting, see *Code Civ. Proc. § 417.10(e)*.

Although the use of the form in [1], *above*, is mandatory, a form for proof of service of a summons and complaint prepared entirely by word processor, typewriter, or similar process may be used for proof of service of summons and complaint in any action or proceeding in lieu of the printed Judicial Council proof of service of summons form if certain format requirements are followed [*Cal. Rules of Ct., Rule 2.150(a)*; *see* [4], *below*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Filling Out Form

[a] Block Heading

The name, address, phone number, and state bar number of the party's attorney, or of the party if appearing in propria

persona, should be set forth in the first box of the block heading.

The name of the court (including its judicial district and branch name) should be set forth in the second box, and the short title of the case (normally last name of plaintiff vs. last name of defendant), in the third box.

If an order to show cause was served with the complaint and summons, the date, time, and department or division where the hearing will be held should, if required by local court rule, be set forth in the bottom boxes of the block heading. The case number should be inserted in the final box.

[b] Body of Form

[i] Paragraphs 1 and 2

Paragraph 1 affirms the person serving process satisfies the age and nonparty requirements.

In Paragraph 2, check the boxes indicating the documents served. At a minimum, the Complaint box should be checked because service of summons requires service of both summons and complaint [*see Code Civ. Proc. §§ 414.10-415.95*]. A plaintiff or cross-complainant must serve an Alternative Dispute Resolution (ADR) package along with the complaint [*Cal. Rules of Ct., Rule 3.221(c)*]. The court provides the package at the time the complaint is filed [*Cal. Rules of Ct., Rule 3.221(a)*]. Also indicate whether other documents are served, such as an injunction or order to show cause.

[ii] Paragraph 3

Paragraph 3a requires insertion of the name of the party served as shown on the documents served.

In Paragraph 3b, the first box should be checked if the party specified in Paragraph 3b was actually served. If any other person was served, the second box should be checked and the name of that person and his or her title or relationship to the party should be specified. For example, if the party named was a corporation and the papers were served on an officer of the corporation, the officer's name and title should be listed in Paragraph 3b.

[iii] Paragraph 4

Paragraph 4 requires insertion of the address of the person on whom the documents were served or to whom they were delivered.

[iv] Paragraph 5

Paragraph 5 covers the manner of service.

For detailed discussion of different manners of serving summons, see *§ 518.16*.

Box 5a should be checked if service or delivery was made in person.

Box 5b and the appropriate boxes under it (boxes (1) through (5)) should be checked if service was made by a combination of substituted service and service by mail as authorized by *Code Civ. Proc. § 415.20*.

A declaration of diligence must be attached if service is made pursuant to *Code Civ. Proc. § 415.20(b)*, that is if service is made by leaving copy at party's dwelling, business, or usual mailing address (other than a United States Postal Service post office box) with competent member of householdor person apparently in charge and by mailing of another copy [*see § 518.16[3][b]*].

Box 5c and the appropriate boxes under it (boxes (1)-(4)) should be checked if service was by mail pursuant to *Code Civ. Proc. § 415.30* or *415.40*. Note that if service was made under *Code Civ. Proc. § 415.30* [*see § 518.16[4]*], the proof of service must include the acknowledgment of receipt of summons or other written acknowledgment of receipt of summons satisfactory to the court [*Code Civ. Proc. § 417.10(a)*; *see § 518.73*]. If service was made under *Code Civ. Proc. § 415.40* [*see § 518.16[5]*], proof of service must include evidence satisfactory to the court establishing actual delivery to the person to be served, by a signed return receipt or other evidence [*Code Civ. Proc. § 417.20(a)*].

Box 5d should be checked when a statute requires or directs a court to order the mailing of the summons and complaint to the defendant in addition to some other manner of service, such as service by publication under *Code Civ. Proc. § 415.50* or service by posting in unlawful detainer proceeding under *Code Civ. Proc. § 415.45* [*see Code Civ. Proc. § 417.10(b), (e)* (proof of service by publication and posting)]. When the mailing is in addition to some other manner of service, Box 3e also should be checked and the manner of service and authorizing code section should be inserted. Box 3e should be checked alone if service was in some other manner than as covered by the form and mailing of the complaint and summons was not required; the code section authorizing that form of service should also be cited. For example, if service was by certified mail under *Code Civ. Proc. § 415.47* (relating to abandoned real property), Box 3e should be checked and "Certified mail under *Code Civ. Proc. § 415.47*" should be inserted.

[v] Paragraphs 6 and 7

Paragraph 6 indicates how service was made on particular defendants. For detailed discussion of how service is made of different defendants, see *§ 518.17*.

With respect to Paragraph 7, any proof of service signed by a registered process server or by his or her employee or independent contractor must indicate the county in which the server is registered and the number assigned to the server pursuant to *Bus. & Prof. Code § 22355* [*Code Civ. Proc. § 417.40*; *see* Paragraph 5(d)(1)-(3)].

[vi] Paragraphs 8 and 9

Paragraph 8 should be checked if the summons was served by anyone other than a California sheriff or marshal.

Paragraph 9 should be checked if service was by a California sheriff or marshal.

[vii] Date

The date that the proof of service was executed should be inserted on the dateline, and the person who made service should sign his or her name above the signature line.

[4] Computer-Generated or Typewritten Alternative Form

Notwithstanding the adoption of mandatory Judicial Council Form POS-010 reproduced at [1], *above*, mandatory, a form for proof of service of a summons and complaint prepared entirely by word processor, typewriter, or similar process may be used for proof of service of a summons and complaint in any action or proceeding in lieu of the printed Judicial Council proof of service of summons form, if certain format requirements are adhered to [*see Cal. Rules of Ct., Rule 2.150(a)*]. These conditions are as follows [*Cal. Rules of Ct., Rule 2.150(a)*]:

1. The requirements of *Cal. Rules of Ct., Rule 2.100* (format of papers filed in trial courts) applies except as otherwise provided in Rule 3.714, but numbered lines are not required.

2. The left, right, and bottom margins of the proof of service must be at least one-half inch. The top margin must be at least three-quarters of an inch. The typeface must be Times, Courier, Arial, or an equivalent roman typeface not smaller than 9 points. Text must be single-spaced, and a blank line must

precede each main numbered item.

3. The title and all the text of form POS-010 that is not accompanied by a checkbox must be copied word for word except for instructions, which must not be copied. All the relevant text that is optional (that is, accompanied by a checkbox) must be copied word for word except that the checkboxes must not be copied.

4. The Judicial Council number of the Proof of Service of Summons must be typed as follows either in the left margin of the first page opposite the last line of text or at the bottom of each page: "Judicial Council form POS-010."

5. The text of form POS-010 must be copied in the same order as is appears on the printed form using the same item numbers. A declaration of diligence may be attached to the proof of service or inserted as item 5b(5).

6. Areas marked "For Court Use" must be copied in the same general locations and occupy approximately the same amount of space as on the printed form.

7. The telephone number of the attorney or party must appear flush with the left margin and below the attorney's or party's address.

8. The name of the court must be flush with the left margin. The address of the court is not required.

9. Material that would have been typed onto the printed form must be typed with each line indented three inches from the left margin.

The act of filing a computer-generated or typewritten form under *Cal. Rules of Ct., Rule 2.150* constitutes a certification by a the party or attorney filing the form that the form it complies with Rule 2.150 and is a true and correct copy of the form to the extent required by that rule [*Cal. Rules of Ct., Rule 2.150(b)*].

[5] Filing

After a summons has been served on a person, proof of service of the summons must be filed, unless the defendant has previously made a general appearance [*Code Civ. Proc. § 417.30*]. Proof of service of the summons must be filed within 60 days after the time the summons and complaint must be served upon a defendant [*Code Civ. Proc. § 583.210(b)*], in order to implement the Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*) [*see, e.g.,* San Diego Co. Super. Ct. Rules, Div. II, Rule 2.1.5; *see also Gov. Code § 68616(a)*; discussion at *§ 518.22[2]*].

Code Civ. Proc. § 1014 defines acts that constitute an appearance [*see § 518.31[2]*]. For discussion of what constitutes a general appearance, see *Ch. 323, Jurisdiction: Personal Jurisdiction, Inconvenient Forum and Appearances, § 323.60* et seq.

[6] Number of Copies

Unless the proof of service is prepared by someone else, signed, and returned to counsel, prepare the proof of service (affidavit, declaration, or certificate) in two copies (original for filing and office copy). For discussion of return of summons, see *§ 518.21*.

California Forms of Pleading and Practice--Annotated

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Volume 45: Schools: Certification thru Service of Summons and Papers-Chs. 512-519
Chapter 518 SERVICE OF SUMMONS AND PAPERS
PART V. FORMS
A. Service of Summons

45-518 California Forms of Pleading and Practice--Annotated § 518.73

§ 518.73 Notice of Service of Summons by Mail and Acknowledgment of Receipt [Code Civ. Proc. § 415.30(a)]--Judicial Council Form POS-015

[1] FORM Notice of Service of Summons by Mail and Acknowledgment of Receipt [Code Civ. Proc. § 415.30(a)]--Judicial Council Form POS-015]

Click here to view image.

[2] Source and Use of Form

The Notice and Acknowledgment of Receipt reproduced at [1], *above*, is the form prescribed by the Judicial Council for use when the summons is served by mail pursuant to *Code Civ. Proc. § 415.30* [Judicial Council Form POS-015].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

If service is made by mail pursuant to *Code Civ. Proc. § 415.30* [*see § 518.16[4], [5]*], proof of service must include the acknowledgment of receipt of summons in the form provided by that statute or other written acknowledgment of receipt of summons satisfactory to the court [*Code Civ. Proc. § 417.10(a)*].

Code Civ. Proc. § 415.30(b) sets forth a form of notice and requires that the notice and acknowledgment be in substantially that form. *Code Civ. Proc. § 415.30(e)*, however, provides that a notice or acknowledgment of receipt in the form approved by the Judicial Council is deemed to comply with this section. Use of the Judicial Council form when applicable is mandatory [*Gov. Code § 68511*; *Cal. Rules of Ct., Rule 1.30(b)*].

For the form of proof of service, see *§ 518.72*

[3] Failure of Person Served to Acknowledge Receipt

The failure to complete and return the acknowledgment form (or other written form of acknowledgment satisfactory to the court) within 20 days from the date the papers were mailed renders the person served liable to the serving party for reasonable expenses thereafter incurred in serving or attempting to serve the person by another method permitted by law. Except for good cause shown, the court in which the action is pending is required, on motion with or without notice, to award the party those expenses whether or not the party is otherwise entitled to recover costs in the action [*Code Civ. Proc. § 415.30(d)*].

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Chapter 518 SERVICE OF SUMMONS AND PAPERS
PART V. FORMS
A. Service of Summons

45-518 California Forms of Pleading and Practice--Annotated § 518.74

§ 518.74 Proceedings for Publication of Summons [Code Civ. Proc. § 415.50]

[1] Application for Order--General Form [Code Civ. Proc. § 415.50(a)]

[a] FORM Proceedings for Publication of Summons [Code Civ. Proc. § 415.50]--Application for Order--General Form [Code Civ. Proc. § 415.50(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs. _____ [*name*],	)	EX PARTE APPLICATION FOR ORDER FOR
Defendant.	)	PUBLICATION OF SUMMONS
	)	
	)	

_____

Application is hereby made for an order directing that summons in this action be served on defendant _____ [*name*], hereinafter referred to as "defendant," by publication of the summons in _____ [*name of newspaper*], which is a newspaper of general circulation in this state and is most likely to give defendant actual notice of the pendency of this action because _____ [*state reasons*]. In support of this application the undersigned states:

1. The complaint, which is for _____ [*specify*], was filed on _____ [*date*], and summons was duly issued on _____ [*date*].

[*EITHER*]

2. As shown by the _____ [affidavit *or* declaration] of _____ [*specify, e.g.*, plaintiff] attached hereto as Exhibit A and made a part hereof, a cause of action for _____ [*specify*] exists in favor of plaintiff against defendant for _____ [*specify*], based on _____ [*specify*].

[*OR*]

2. As shown by the _____ [affidavit *or* declaration] of _____ [*specify, e.g.*, plaintiff] attached hereto as Exhibit A and made a part hereof, defendant is a _____ [necessary *or* proper] party to this action in that _____ [*specify*].

[*OR*]

2. As shown by the _____ [affidavit *or* declaration] of _____ [*specify, e.g.*, plaintiff] attached hereto as Exhibit A and made a part hereof, defendant _____ [has *or* claims] the following interest in the _____ [*describe property*], which is _____ [situated *or* located] inthis state at _____ [*specify place*] and is subject to the jurisdiction of this court: _____ [*describe interest*].

[*OR*]

2. As shown by the _____ [affidavit *or* declaration] of _____ [*specify, e.g.*, plaintiff] attached hereto as Exhibit A and made a part hereof, the relief demanded in this action consists _____ [wholly *or* in part] of excluding defendant from any interest in the _____ [*describe property*], which is _____ [situated *or* located] in this state at _____ [*specify place*] and is subject to the jurisdiction of this court, in that _____ [*describe interest and relief sought*].

[*CONTINUE*]

3. The undersigned has made the following efforts to learn defendant's whereabouts: _____ [*state in detail acts done and date and result of each; these acts should include ascertaining identity and address of defendant's relatives, friends, last known landlord, if any, last known employer, if any, and other persons likely to know defendant's whereabouts, checking with these persons, examining of the latest city directory, phone directory, tax rolls, and voters register, and any attempts made by person signing this application to serve the defendant or to have defendant served*].

[4. As shown by the _____ (affidavit *or* declaration *or* certificate) of _____ (*name*), a _____ (registered process server *or* (deputy) _____ (sheriff *or* marshal) *or describe other person*), hereinafter referred to as "process server," which is attached hereto as Exhibit B and made a part hereof, attempts to serve defendant with process in this action were made by the process server at the places, on the dates, and at the times indicated, and were unsuccessful.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
Attorney for Plaintiff

[b] Use of Form

The form set forth in [a], *above*, is for use in securing an order for publication of a summons [*see* [2][a], *below*] when defendant's whereabouts are unknown and defendant has no known or fixed location where service can be effected in a manner specified in *Code Civ. Proc. §§ 415.10-415.40*.

[c] Local Forms

Some trial courts, for example Los Angeles Superior Court, provide their own preprinted form of application for an order for publication. When acourt has its own form, that form should, of course, be used. Blank copies may be obtained in that case from the court clerk's office.

[d] Procedure

While practice may vary from court to court, the normal procedure appears to be for counsel to present the original of the application and order to a judge at chambers for his or her signature [*see Code Civ. Proc. § 166(a)(1)*]. If the judge signs the order, the originals of the application and order will be filed and the copies conformed and returned to counsel. Counsel will then deliver a conformed copy of the order together with the summons to the newspaper which is to publish it. On completion of publication, the newspaper will prepare and file with the court a proof of service [*see Code Civ. Proc. §§ 417.10(b), 2010, 2011*].

[e] Caption

Application for the order is made by affidavit [*Code Civ. Proc. § 415.50(a)*] or, as in the foregoing form, by a declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]. The application will be entitled "EX PARTE APPLICATION FOR ORDER FOR PUBLICATION OF SUMMONS" [*see Cal. Rules of Ct., Rule 2.111(6)*]. Except for this title, the caption will conform to the caption on papers previously filed in the case.

[f] Showing Required

The application for the order must, to the court's satisfaction, satisfy the following conditions:

- Establish the exercise of reasonable diligence in attempting to serve the defendant by the other methods of service specified in *Code Civ. Proc. §§ 415.10-415.40* (Paragraphs 3 and 4) [*see also* [g], *below*]; and

- Show that (Paragraph 2) [*Code Civ. Proc. § 415.50(a)*].

  - A cause of action exists against the defendant;

  - The defendant is a necessary or proper party to the action;

  - The defendant has or claims an interest in real or personal property in this state that is subject to the jurisdiction of the court; or

  - The relief demanded in the action consists wholly or in part in excluding the defendant from any interest in such property.

Local court rules may require a showing of other or additional facts and should be consulted before the application for the order is drafted [*see Sanford v. Smith (1970) 11 Cal. App. 3d 991, 1001, 90 Cal. Rptr. 256* (approving Los Angeles County Superior Court rule on scope and content of application)].

The statutory conditions on which service of summons by publication depends to obtain jurisdiction must be strictly observed; otherwise, the court has no power to render a judgment [*Bank of America v. Carr (1956) 138 Cal. App. 2d 727, 737, 292 P.2d 587]* .

[g] Reasonable Diligence

"Reasonable diligence" denotes a thorough, systematic investigation and inquiry conducted in good faith by the plaintiff or by the plaintiff's agent or attorney. A number of honest attempts to learn the defendant's whereabouts or address by questioning defendant's relatives, friends, acquaintances, and employer and by investigation of appropriate city and phone directories, the voters register, and the property index in the assessor's office near defendant's last known location are generally sufficient. These are likely sources of information and must be searched before resorting to service by publication. The affidavit for publication must show in detail the probative facts establishing a sincere desire and thorough search to locate the defendant, including dates and any attempts made to serve the defendant by another method of service [*see* Li, Attorney's Guide to California Jurisdiction and Process, § 1.25 (Cal. C.E.B. 1970)].

As a condition of establishing that the party to be served cannot with reasonable diligence be served in another manner specified in this article, the court may not require that a search be conducted of public databases where access by a registered process server to residential addresses is prohibited by law or by published policy of the agency providing the database, including, but not limited to, voter registration rolls and records of the department of motor vehicles [*Code Civ. Proc. § 415.50(e)*].

[h] Statement of Facts

As already indicated, the facts establishing the right to an order for publication must be shown by affidavit [*Code Civ. Proc. § 415.50(a)*]. An affidavit is one of the modes in which the testimony of a witness can be taken [*see Code Civ. Proc. §§ 2002(1), 2003*]. Hence, the facts stated in the affidavit must usually be within the personal knowledge of the affiant and be matters to which he or she is competent to testify. For example, the fact that a cause of action exists against the person to be served [*Code Civ. Proc. § 415.50(a)(1)* (requiring that a cause of action exist before service by publication)] may not be established by reference to the complaint which has been verified on information and belief by plaintiff's counsel. That verification is no substitute for the sworn statement of facts which *Code Civ. Proc. § 415.50(a)* requires of the affiant. For the purpose of service by publication, the existence of a cause of action is a jurisdictional fact. Accordingly, an affidavit in proper form is a jurisdictional basis of the order for publication, and the affidavit must contain a statement of some fact that would be legal evidence, having some appreciable tendency to make the jurisdictional fact appear, for the judge to act on before heor she has any jurisdiction to make the order. Unless the affidavit contains some such evidence tending to establish every material jurisdictional fact, the judge has no legal authority to be satisfied, and, if he or she makes the order, the act is without jurisdiction and all proceedings based on it are void [*Harris v. Cavasso (1977) 68 Cal. App. 3d 723, 726-727, 137 Cal. Rptr. 410]* .

The facts may, of course, be established by a declaration under penalty of perjury instead of an affidavit [*Code Civ. Proc. § 2015.5*] or, when it is executed by a sheriff or marshal, by a certificate [*Code Civ. Proc. § 2015.3*]. But, in any case, probative facts within the personal knowledge (not hearsay) of the affiant, declarant, or certifier, as the case may be, must normally be stated [*see Ricketson v. Richardson (1864) 26 Cal. 149, 153* ; *Sanford v. Smith (1970) 11 Cal. App. 3d 991, 998-1000, 90 Cal. Rptr. 256* ; *Miller v. Superior Court (1961) 195 Cal. App. 2d 779, 783, 16 Cal. Rptr. 36]* . However, in appropriate situations statements may be made on information and belief. For example, a statement as to the defendant's out-of-state residence would be sufficient, so long as the facts on which the statement is based are set forth [*see Davis-Heller-Pearce Co. v. Ramont (1924) 66 Cal. App. 778, 780, 226 P. 972]* .

[i] Multiple Affidavits

Since the facts set forth in the affidavits or declarations must normally be within the personal knowledge of the affiant or declarant, if some of the facts are known to plaintiff, for example, and others to plaintiff's attorney or to someone else which, taken together, would establish the required showing, a separate affidavit or declaration for each person should be prepared and executed by the affiant or declarant having personal knowledge of the particular facts. That is, under various circumstances, multiple affidavits or declarations are appropriate. For example, the plaintiff would normally make the affidavit or declaration as to the cause of action; the process server would make the affidavit, declaration, or (if the process server is a deputy sheriff or marshal) the certificate that the defendant could not be found and personally served; the person who made the inquiries and searches locate defendant would make the affidavit or declaration as to those inquiries and searches, and so forth [*see* Li, Attorney's Guide to California Jurisdiction and Process, § 1.25 (Cal. C.E.B. 1970)].

[2] Order for Publication--General Form [Code Civ. Proc. § 415.50(b)]

[a] FORM Proceedings for Publication of Summons [Code Civ. Proc. § 415.50]--Order for Publication--General Form [Code Civ. Proc. § 415.50(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs. _____ [*name*],	)	ORDER FOR PUBLICATION OF SUMMONS
Defendant.	)	
	)	
	)	

_____

On reading and filing the evidence consisting of plaintiff's application and _____ [affidavit *or* declaration] for this order [and the _____ (affidavit(s) *or* declaration(s) *or* certificate(s) *or combination of these*) of _____ (*name(s)*), attached to and incorporated by reference in the application], and it satisfactorily appearing to me therefrom that defendant _____ [*name*], hereinafter referred to as "defendant," cannot with reasonable diligence be served in any other manner specified in *Sections 415.10 through 415.40 of the Code of Civil Procedure*, and that

[*EITHER*]

a cause of action exists in favor of plaintiff against defendant.

[*OR*]

defendant is a _____ [necessary *or* proper] party to this action

[*OR*]

defendant _____ [has *or* claims] an interest in the _____ [*describe property*] which is _____ [situated *or* located] in this state and is subject to the jurisdiction of this court

[*OR*]

the relief demanded in this action consists _____ [wholly *or* in part] in excluding defendant from any interest in the _____ [*describe property*], which is _____ [situated *or* located] in this state and is subject to the jurisdiction of this court.

[*CONTINUE*]

IT IS ORDERED that the summons be served by publication in _____ [*name*], a newspaper of general circulation published in _____, California, hereby designated as the newspaper most likely togive defendant actual notice of the action, and that the publication be made once a week for four successive weeks.

[*ADD, if defendant resides or is located out of state*]

IT IS FURTHER ORDERED that the summons be served by publication in _____[*name*], a newspaper of general circulation published in _____, _____ [*city, state*], hereby designated as the newspaper in that state most likely to give defendant actual notice of the action, and that the publication be made once a week for four successive weeks.

[*CONTINUE*]

IT IS FURTHER ORDERED that a copy of the summons, a copy of the complaint, and a copy of this order be forthwith mailed to defendant if his/her address is ascertained before expiration of the time herein prescribed for publication of summons.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[b] Use of Form

The form of order in [a], *above*, is for use when the court grants an order allowing service of summons by publication. Local courts often provide printed forms of orders for publication of summons, copies of which can be obtained from the clerk's office. If none is provided, the order may be drafted using this general form, stating the appropriate grounds for the order. An order for publication of summons is jurisdictional [*McKeon v. Superior Court of San Francisco (1927) 81 Cal. App. 720, 721-722, 254 P. 944]* .

[c] Contents of Court Order

When the required showing is made to the court's satisfaction, the court will order that the summons be published in the named newspaper, published in this state, that is most likely to give actual notice to the party to be served and will direct that a copy of the summons and a copy of the complaint be forthwith mailed to the party if his or her address is ascertained before expiration of the time prescribed for publication of the summons. Except as otherwise provided by statute, the publication must be made as provided by *Gov. Code § 6064* (once a week for four successive weeks), unless the court in its discretion orders publication for a longer period [*Code Civ. Proc. § 415.50(b)*].

If the party to be served resides or is located out of this state, the court may also order the summons to be published in a named newspaper outside this state that is most likely to give actual notice to that party [*Code Civ. Proc. § 415.50(b)*].

The attempts at personal service, search, execution of the affidavits, declarations, or certificates, and the court's order for publication mustfollow in reasonably quick succession so that they all relate to conditions existing at the time of publication [Li, Attorney's Guide to California Jurisdiction and Process (Cal. C.E.B. 1970), § 1.25].

[d] Accomplishing Service by Publication

Deliver the original and one copy of the summons, together with a copy of the court order for publication, to the newspaper in which the summons is to be published. In addition, mail a copy of the summons, of the complaint, and of the order for publication to the party to be served if his or her address is ascertained before expiration of the time prescribed for publication of summons [*Code Civ. Proc. § 415.50(b)*; for a form of proof of this mailing, *see § 518.78*].

[e] When Service Is Complete

Service of summons by publication is deemed complete as provided in *Gov. Code § 6064* [*Code Civ. Proc. § 415.50(c)*]. *Gov. Code § 6064* provides that the period of notice commences with the 1st day of publication and terminates at the end of the 28th day, including the first day.

[f] Service in Another Manner

Notwithstanding an order for publication, a summons may be served in another manner authorized by the code, in which event such service supersedes any published summons [*Code Civ. Proc. § 415.50(d)*].

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45-518 California Forms of Pleading and Practice--Annotated § 518.75

§ 518.75 Proceedings to Serve Summons on Corporation by Delivery of Process to Secretary of State [Code Civ. Proc. § 416.10(d); Corp. Code §§ 1702(a) (Domestic Corporation), 2111(a) (Foreign Corporation)]

[1] Application for Order

[a] FORM Proceedings to Serve Summons on Corporation by Delivery of Process to Secretary of State [Code Civ. Proc. § 416.10(d); Corp. Code §§ 1702(a) (Domestic Corporation), 2111(a) (Foreign Corporation)]--Application for Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs. _____ [*name*],	)	NO. _____
a _____ [*state or country of incor-*	)	EX PARTE APPLICATION FOR ORDER DIR-
poration] Corporation,	)	ECTING SERVICE OF SUMMONS ON DEFEND-
Defendant.	)	ANT CORPORATION BY DELIVERY OF PRO-
	)	CESS TO SECRETARY OF STATE

_____

Application is hereby made for an order directing that process in this action be served on defendant _____ [*name*], hereinafter referred to as "defendant," by personally delivering to the Secretary of State of California, or to an assistant or deputy secretary of state, _____ [one copy *or* two copies] of the summons and complaint, together with _____ [one copy *or* two copies] of the order herein requested. In support of this application, the undersigned states:

1. The complaint in this action, which is for _____ [*specify*], was filed on _____ [*date*], and summons was duly issued on _____ [*date*].

2. Defendant is/was a corporation organized and existing under the laws of _____ [*state or country*] [and authorized to do business in California (as a bank)], with its principal place of business in this state located at _____ [*address*]. [On or about _____ (*date*), defendant, as shown by the Certificate of the Secretary of State of California which is attached hereto as Exhibit A and made a part hereof, _____ (forfeited its _____ (charter *or* right to do business in California) for _____ (*specify ground for forfeiture*) *or* was dissolved (by order of the _____ Court of _____, in a proceeding entitled _____, number _____. A certified copy of the court's judgment is attached hereto as Exhibit B and made a part hereof)].

[*EITHER*]

3. As shown by the Certificate of the Secretary of State of California, which is attached hereto as Exhibit C and made a part hereof, _____ [defendant has failed to designate an agent for service of process *or* defendant's designated agent for service of process, _____ (*name*), has resigned and has not been replaced *or* defendant's designated agent for service of process, _____ (*name*), is no longer authorized to act for the defendant].

[*OR*]

3. As shown by the Certificate of the Secretary of State of California, which is attached hereto as Exhibit C and made a part hereof, defendant has designated _____ [*name*], a _____ [natural person, whose designated _____ (business *or* residence) address is _____ (*specify*), *or* _____ (*name*), a corporation] as its agent for service of process. [*If agent is a corporation, add:* The corporate agent's certificate on file in the Secretary of State's office, a certified copy of which is attached hereto as Exhibit D and made a part hereof, sets forth as the address(es) of its office(s) in this state where any corporation designating it as agent for service of process may be served. It designates the following named employees at (each) office to whom the corporate agent authorizes delivery of a copy of any such process: _____ (*specify*). The agent's certificate contains its consent that delivery of process to any such person at the office where the person is employed shall constitute delivery of any such copy to it, as such agent.]

[*CONTINUE*]

4. Plaintiff has been unable to effect service of process on defendant by delivery of a copy of the summons and complaint [to defendant's designated agent for service of process in any manner specified by *Section 415.10, 415.20, Subdivision (a)*, or *415.30, Subdivision (a), of the Code of Civil Procedure* or] to any of the [other] persons listed in Section _____ [416.10, Subdivisions (a) and (b), of the Code of Civil Procedure *or 416.20, Subdivision (a), of the Code of Civil Procedure or 2110 of the California Corporations Code*], although plaintiff has made diligent efforts to do so as follows: _____ [*specify efforts made and results within personal knowledge of person signing this application; if any such efforts or results are not within personal knowledge of such person, an affidavit or declaration of person having such knowledge should be executed, attached to this application, and incorporated in this application by reference*].

[5. The (name and title of the person to whom and) address to which the process is to be sent by the Secretary of State

is/are as follows: _____ (*specify*).]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
Attorney for Plaintiff

[b] Use of Form

The form in [1], *above*, is for use in securing a court order that service of summons on a domestic or foreign corporation be made by delivery of the process to the Secretary of State [*Corp. Code §§ 1702(a), 2111(a)*].

[c] Application for Order

Application for the order is made by affidavit [*Corp. Code §§ 1702(a), 2111(a)*] or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]. For the requirement that affidavits set forth probative facts to which the affiant is competent to testify, see *§ 518.74[1][h], [i]*. The application should be entitled "EX PARTE APPLICATION FOR ORDER DIRECTING SERVICE OF SUMMONS ON DEFENDANT CORPORATION BY DELIVERY OF PROCESS TO SECRETARY OF STATE" [*see Cal. Rules of Ct., Rule 2.111(6)*]. Except for the title of the paper, the caption will conform to the caption on papers previously filed in the case.

[d] Procedure

Although practice may vary from court to court, the normal procedure appears to be for counsel to present the original of the application and of the order [*see* [2], *below*] to a judge at chambers for his or her signature [*see Code Civ. Proc. § 166(a)(1)*]. If the judge signs the order, the originals of the application and order will be filed and the copies conformed and returned to counsel. Counsel will then deliver the required copy or copies of the order and process, together with the required fee, to an assistant or deputy in the Secretary of State's office in person or have them personally so delivered.

The certificate of the Secretary of State, under his or her official se al, certifying to the receipt of process, the giving of notice thereof to the corporation, and the forwarding of the process is competent and prima facie evidence of the matters stated in it [*Corp. Code §§ 1702(c), 2111(c)*].

[e] Showing Required

[i] Domestic Corporation

Service on a domestic corporation by delivery of process to the Secretary of State is authorized by *Corp. Code § 1702(a)* [*see also Code Civ. Proc. § 416.10(d)*], which provides that if the agent for service of process has resigned and not been replaced, or if the agent cannot with reasonable diligence be found at the address designated for service, or if no agent hasbeen designated, and it is shown by affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) to the court's satisfaction that process cannot be served with reasonable diligence on the designated agent as provided in *Code Civ. Proc. § 415.10* (personal delivery), 415.20(a) (combination of substituted service and service by mail), or 415.30(a) (service by mail and acknowledgment of receipt), or on the corporation in the manner provided in *Code Civ. Proc. § 416.10(a)-(c)* (service on agent or officer) or 416.20 (service on defunct corporation), the court may order that service be made on the corporation by hand delivery to the Secretary of State, or to an assistant or deputy secretary of state, of one copy of the process for each defendant to be served, together with a copy of the court order. Service in this manner is deemed complete on the 10th day after the process is delivered to the Secretary of State [*Corp. Code § 1702(a)*].

[ii] Foreign Corporation

Service on a foreign corporation by delivery of process to the Secretary of State is authorized by *Corp. Code § 2111(a)* [*see also Code Civ. Proc. § 416.10(d)*], which provides that if the agent designated for the service of process is a natural person and cannot be found with due diligence at the address stated in the designation or if the agent is a corporation and no person can with due diligence be found to whom the delivery authorized by *Corp. Code § 2110* (corporate officer or general manager, or, in case of bank, cashier or assistant cashier, or agent designated for service of process) can be found after diligent search and it is so shown by affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) to the court's satisfaction, the court may order that service be made by personal delivery to the Secretary of State, or to an assistant or deputy secretary of state, of two copies of the process together with two copies of the court order. If, however, the corporation to be served has not filed the statement required by *Corp. Code § 2105* (to obtain certificate of qualification), only one copy of the process and order need be delivered, but the order must include an address to which the process shall be sent by the Secretary of State. Service in this manner is deemed complete on the 10th day after delivery of the process to the Secretary of State [*Corp. Code § 2111(a)*].

For further discussion, see *§ 518.17[1] -[3]*.

[2] Order

[a] FORM Proceedings to Serve Summons on Corporation by Delivery of Process to Secretary of State [Code Civ. Proc. § 416.10(d); Corp. Code §§ 1702(a) (Domestic Corporation), 2111(a) (Foreign Corporation)]--Order

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs. _____ [*name*],	)	NO. _____
a _____ [*state or country of incor-*	)	ORDER DIRECTING SERVICE OF SUMMONS
poration] Corporation,	)	ON DEFENDANT CORPORATION BY DELIV-
Defendant.	)	ERY OF PROCESS TO SECRETARY OF STATE
	)	

_____

[*EITHER (domestic corporation)*]

On reading and filing the evidence consisting of plaintiff's application and _____ [affidavit *or* declaration] for this order [and the _____ (affidavit(s) *or* declaration(s) *or* certificate(s) *or combination of these*) of _____ (*name(s)*), attached to and incorporated by reference in the application,] and it satisfactorily appearing to me therefrom that defendant _____ [*name*] is a domestic corporation and that _____ [defendant has failed to designate an agent for service of process *or* defendant's designated agent for service of process, _____ (*name*), has resigned and has not been replaced *or* defendant's designated agent for service of process, _____ (*name*), cannot with reasonable diligence be found at _____ (*address*), which is the address designated for personal delivery of the process] and process against defendant corporation cannot be served with reasonable diligence on [defendant's designated agent for service of process in the manner provided in *Section 415.10, 415.20, Subdivision (a)*, or *415.30, Subdivision (a), of the Code of*

Civil Procedure or on] defendant in the manner provided in Section _____ [416.10, Subdivisions (a) and (b) *or* 416.10, Subdivisions (a) and (c) *or* 416.20, Subdivision (a)], of the Code of Civil Procedure,

[*OR (foreign corporation)*]

On reading and filing the evidence consisting of plaintiff's application and _____ [affidavit *or* declaration] for this order [and the _____ (affidavit(s) *or* declaration(s) *or* certificate(s) *or combination of these*) of _____ (*name(s)*), attached to and incorporated by reference in the application,] and it satisfactorily appearing to me therefrom that defendant _____ [*name*] is a foreign corporation and that _____ [defendant has failed to designate an agent for service of process *or* defendant's designated agent for service of process, _____ (*name*), is no longer authorized to act for the defendant *or* defendant's designated agent for service of process is a natural person, _____ (*name*), and cannot with due diligence be found at _____ (*address*), which is the address stated in the designation *or* defendant's designated agent for service of process is a corporation, _____ (*name*), and no person can be found with due diligence to whom the delivery authorized by *Section 2110 of the California Corporations Code* can be made for the purpose of delivery to such corporate agent,] and none of the officers or agents of the corporation specified in *Section 2110 of the California Corporations Code* can be found after diligent search,

[*CONTINUE*]

IT IS ORDERED that service on defendant _____ [*name*] be made by personal delivery to the Secretary of State of California, or to an assistant or deputy secretary of state, of _____ [one copy *or* two copies] of the summons and complaint, together with _____ [one copy *or* two copies] of this order.

[IT IS FURTHER ORDERED that the (name and title of the person to whom, and the) address to which the process and order are to be sent by the Secretary of State _____ (is *or* are) as follows: _____ (*specify*).]
Dated: _____.

_____ [*signature*]
Judge of the _____Superior Court

[b] Use of Form

The order in [a], *above*, is for use in conjunction with the application in [1], *above*, to effect service on a domestic or foreign corporation by delivery of process to the Secretary of State [*see Corp. Code §§ 1702* (domestic corporation), 2111, 2114(a)-(c) (foreign corporation)]. An order for service on a domestic corporation in this manner may properly be issued by a court outside of California or by a federal court if the suit, action, or proceeding is filed in that court [*Corp. Code § 1702(d)*].

[c] Delivery to Secretary of State

[i] Domestic Corporation

To effect service by delivery of process to the Secretary of State under *Corp. Code § 1702, 2011(b)*, or *2011(c)*, hand deliver [*Corp. Code § 1702(a)*] one copy of the summons, together with one copy of the complaint and one copy of the court order authorizing the service, and therequired fee, to the Secretary of State or to an assistant or deputy secretary of state. Although not required by statute, an additional copy of each paper should be delivered to the Secretary of State for

his or her files. Service in this manner is deemed complete on the 10th day after delivery of the process to the Secretary of State [*Corp. Code §§ 1702(a), 2011(b)*].

[ii] Foreign Corporation

To accomplish service on a foreign corporation by delivery of process to the Secretary of State under *Corp. Code § 2111(a), 2114(a), 2114(b),* or *2114(c),* personally deliver [*Corp. Code §§ 2111(a), 2114(a)-(c)*] to the Secretary of State or to an assistant or deputy secretary of state two copies of the summons, together with two copies of the complaint, two copies of the court order authorizing service, and the required fee.

Only one copy of each of these papers need be delivered if the defendant has not filed the statement required by *Corp. Code § 2105* (designation of agent and consent to service of process on agent or Secretary of State). Although not required by statute, an additional copy of each paper should be delivered to the Secretary of State for his or her files. Service in this manner is deemed complete on the 10th day after delivery of the process to the Secretary of State [*Corp. Code §§ 2111(a), 2114(a)-(c)*].

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45-518 California Forms of Pleading and Practice--Annotated § 518.76

§ 518.76 Return of Summons Unserved Because of Inability to Find Defendant--Declaration by One Other Than Law Enforcement

[1] FORM Return of Summons Unserved Because of Inability to Find Defendant--Declaration by One Other Than Law Enforcement

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs. _____ [*name*],	)	RETURN OF SUMMONS UNSERVED
Defendant.	)	
	)	
	)	

_____

I, _____ [*name*], declare:

I am _____ [not a registered California process server *or* exempt under *Section 22350(b) of the Business and Professions Code* from registration as a California process server *or* a process server duly registered in _____ County, California, registration number _____ *or* an _____ (employee *or* independent contractor) of _____ (*name*), who is a process server duly registered in _____ County, California, registration number _____].

I am, and at all times herein mentioned was, over the age of 18 and not a party to the above-entitled action. I received the attached summons on _____ [*date*], for service on the above-named defendant. I was instructed to serve the defendant as follows: _____ [*state*]. I made the following attempts to effect service with the following results: _____ [*describe, giving dates, times, and places*]. [In addition, I have made the following searches and inquiries to locate the defendant but have been unable to find him/her or to learn of his/her whereabouts: _____ (*describe, giving dates, times, and places*).] I have, therefore, been unable to serve the summons on the defendant.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is for use by a person other than a sheriff or marshal to return the summons unserved because of the inability to locatethe defendant [*see Code Civ. Proc. § 417.40* (requirements of proof of service by registered process server)]. For discussion of process servers, see *§ 518.15*.

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45-518 California Forms of Pleading and Practice--Annotated § 518.77

[Reserved]

§ 518.77[Reserved]

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45-518 California Forms of Pleading and Practice--Annotated § 518.78

§ 518.78 Declaration of Mailing of Copy of Summons, of Complaint, and of Order for Publication to Defendant Pursuant to Order for Publication of Summons [Code Civ. Proc. § 417.10(b)]

[1] FORM Declaration of Mailing of Copy of Summons, of Complaint, and of Order for Publication to Defendant Pursuant to Order for Publication of Summons [Code Civ. Proc. § 417.10(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs. _____ [*name*],	)	DECLARATION OF MAILING OF SUMMONS
Defendant.	)	AND COMPLAINT PURSUANT TO ORDER FOR
	)	PUBLICATION OF SUMMONS
	)	

_____

I, _____ [*name*], declare:

I am, and at all times herein mentioned was, over the age of 18 and not a party to the above-entitled action. My _____ [residence *or* business] address is _____ [*specify*] and I am _____ [a resident of *or* employed in] _____ County, California [*county where mailing occurred*].

On _____ [*date*], I deposited a true and correct copy of the Complaint for _____ [*e.g.*

, damages] herein filed, a true and correct copy of the Summons, and a true and correct copy of the order for publication issued in this action in the United States mail in _____ [*city*], California, in a sealed envelope, with postage fully prepaid, addressed to the defendant as follows: _____ [*state full name and address of defendant as they appeared on the envelope*].

[At that time there was regular delivery of United States mail between the places of deposit and address.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is for use to prove mailing of copies of the following documents pursuant to a court order for service by publication [*see Code Civ. Proc. §§ 415.50, 417.10(b)*, discussed at *§§ 518.16[6], 518.20*]:

- The summons.
- The complaint.
- The order for publication to defendant.

The cited sections do not prescribe the contents of the affidavit (or declaration [*Code Civ. Proc. § 2015.5*]), other than that it must show "the time and place a copy of the summons and of the complaint were mailed to the party to be served" [*Code Civ. Proc. § 417.10(b)*]. Consequently, the provisions of *Code Civ. Proc. § 1013a*, relating to service of papers by mail [*see §§ 518.90 -518.93*], are usually followed.

For a form of proof of service by mail executed by a member of the California Bar, see *§ 518.92*.

[3] Proof of Service by Publication

Proof of service of a summons by publication is governed by *Code Civ. Proc. §§ 417.10(b), 2010, 2011*, as discussed at *§ 518.20[3]*]. The proof of publication is normally prepared by the printer or publisher.

[4] Filing

Both the proof of publication provided by the publisher and the proof of mailing must be filed with the court. When following the provision of *Code Civ. Proc. § 1013a*, relating to proof of service by mail, it is sufficient for the proof of service set forth the exact title of the document served and filed [*Code Civ. Proc. § 1013a*]. Thus, the proof of mailing of a copy of the summons and a copy of the complaint, pursuant to the court's direction in its order for publication, carrying its own caption, may be filed without copies of the summons and complaint attached to it. The publisher's or printer's affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) of publication, on the other hand, is required to be annexed to a copy of the document published [*Code Civ. Proc. § 2010*] which is then filed [*Code Civ. Proc. § 2011*].

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45-518 California Forms of Pleading and Practice--Annotated §§ 518.79-518.89

[Reserved]

§§ 518.79[Reserved]

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B. Proof of Service of Papers Other Than Summons

45-518 California Forms of Pleading and Practice--Annotated § 518.90

§ 518.90 Proof of Personal Service--Civil [Code Civ. Proc. § 1011]--Judicial Council Form POS-020; Judicial Council Form POS-020(D); Judicial Council Form POS-020(P)

[1] FORM Proof of Personal Service--Civil [Code Civ. Proc. § 1011]--Judicial Council Form POS-020; Judicial Council Form POS-020(D); Judicial Council Form POS-020(P)

Click here to view image.

[2] Use of Form

The Proof of Personal Service--Civil, Judicial Council Form POS-020 reproduced at [1], *above*, is the form prescribed by the Judicial Council for use when a person at least 18 years of age or older personally serves documents other than a summons and complaint. This form should not be used for proof of service of a summons and complaint; for that purpose, use Proof of Service of Summons (form POS-010) [*see § 518.72*].

The Attachment to Proof of Personal Service--Civil (Documents Served), Judicial Council Form POS-020(D) is the form prescribed by the Judicial Council for listing the documents served when there is insufficient space to list the documents served on Judicial Council Form POS-020. The Attachment to Proof of Personal Service--Civil (Persons Served), Judicial Council Form POS-020(P) is the form prescribed by the Judicial Council for listing the persons served when there is insufficient space to list the persons served on Judicial Council Form POS-020.

These forms are optional and may be used by parties and must be accepted for filing by all courts [*Cal. Rules of Ct., Rule 1.35*].

Another set of optional Judicial Council forms that may be used in lieu of the above forms for personal service are Proof of Service--Civil, Judicial Council Form POS-040, Attachment to Proof of Service--Civil (Documents Served), Judicial Council Form POS-040(D) and Attachment to Proof of Service--Civil (Persons Served), Judicial Council Form POS-040(P). This alternative set of proof of service forms are a catch-all set of forms that allow the person filing out the primary form to select from one of six forms of service: (1) personal service; (2) messenger service; (3) by mail; (4) by facsimile; (5) by overnight delivery; or (6) by e-mail/electronic service. If using this alternative set of forms for personal

service, select the appropriate boxes on Judicial Council Form POS-040 indicating personal service.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Cross References

For reproductions of the optional alternative set of proof of service forms that include personal service, Proof of Service--Civil, Judicial Council Form POS-040, Attachment to Proof of Service--Civil (Documents Served), Judicial Council Form POS-040(D) and Attachment to Proof of Service--Civil (Persons Served), Judicial Council Form POS-040(P), see *§ 518.92*.

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45-518 California Forms of Pleading and Practice--Annotated § 518.91

§ 518.91 Proof of Service by First-Class Mail--Civil [Code Civ. Proc. § 1013, 1013a]--Judicial Council Form POS-030; Judicial Council Form POS-030(D); Judicial Council Form POS-030(P)

[1] FORM Proof of Service by First-Class Mail--Civil [Code Civ. Proc. § 1013, 1013a]--Judicial Council Form POS-030; Judicial Council Form POS-030(D); Judicial Council Form POS-030(P)

Click here to view image.

[2] Use of Form

The Proof of Service by First-Class Mail--Civil, Judicial Council Form POS-030, reproduced at [1], *above*, is the form prescribed by the Judicial Council for use when a person at least 18 years of age or older serves documents other than a summons and complaint by first-class mail. This form should not be used for proof of service of a summons and complaint; for that purpose, use Proof of Service of Summons (form POS-010) (*see § 518.72*).

The Attachment to Proof of Service by First-Class Mail--Civil (Documents Served), Judicial Council Form POS-030(D) is the form prescribed by the Judicial Council for listing the documents served when there is insufficient space to list the documents served on Judicial Council Form POS-030. The Attachment to Proof of Service by First-Class Mail--Civil (Persons Served), Judicial Council Form POS-030(P) is the form prescribed by the Judicial Council for listing the persons served when there is insufficient space to list the persons served on Judicial Council Form POS-030.

These forms are optional and may be used by parties and must be accepted for filing by all courts [*Cal. Rules of Ct., Rule 1.35*].

Another set of optional Judicial Council forms that may be used in lieu of the above forms for proof of service by mail are Proof of Service--Civil, Judicial Council Form POS-040, Attachment to Proof of Service--Civil (Documents Served), Judicial Council Form POS-040(D) and Attachment to Proof of Service--Civil (Persons Served), Judicial Council Form POS-040(P). This alternative set of proof of service forms are a catch-all set of forms that allow the person filing out the primary form to select from one of six forms of service: (1) personal service; (2) messenger service; (3) by mail; (4) by facsimile; (5) by overnight delivery; or (6) by e-mail/electronic service. If using this

alternative set of forms for service by mail, select the appropriate boxes on Judicial Council Form POS-040 indicating service by mail.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Attorney's Certificate

In lieu of above form, an attorney who is an active member of the State Bar may execute a certificate of proof of service by mail without the requirement of being made by affidavit or under declaration of penalty of perjury [*Code Civ. Proc. § 1013a(2)*; *see § 518.93*].

[4] Presumption of Receipt

There is a presumption that a correctly addressed and properly mailed letter is received in ordinary course of mail [*Evid. Code § 641*].

[5] Presumption of Invalidity

On motion of a party served, service that was made pursuant to *Code Civ. Proc. § 1013a(3)* (placing the envelope for collection and mailing following ordinary business practices rather than depositing the sealed envelope with the United States Postal Service) is presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit form mailing contained in the affidavit [*Code Civ. Proc. § 1013a(3)*].

[6] Cross References

For a certificate of proof of service of papers by mail by an active member of the state bar, see *§ 518.93*.

For reproductions of the optional alternative set of proof of service forms that include service by mail, Proof of Service--Civil, Judicial Council Form POS-040, Attachment to Proof of Service--Civil (Documents Served), Judicial Council Form POS-040(D) and Attachment to Proof of Service--Civil (Persons Served), Judicial Council Form POS-040(P), see *§ 518.92*.

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45-518 California Forms of Pleading and Practice--Annotated § 518.92

§ 518.92 Proof of Service By Personal Service, Mail, Overnight Delivery, Messenger Service, Facsimile, or E-Mail/Electronic Transmission [Code Civ. Proc. §§ 1011, 1013, 1013a, 2015.5]--Judicial Council Form POS-040; Judicial Form POS-040(D); Judicial Council Form POS-040(P)

[1] FORM Proof of Service By Personal Service, Mail, Overnight Delivery, Messenger Service, Facsimile, or E-Mail/Electronic Transmission [Code Civ. Proc. §§ 1011, 1013, 1013a, 2015.5]--Judicial Council Form POS-040; Judicial Form POS-040(D); Judicial Council Form POS-040(P)

Click here to view image.

Click here to view image.

[2] Use of Form

The Proof of Service--Civil, Judicial Council Form POS-040, reproduced at [1], *above*, is the form prescribed by the Judicial Council for proof of service using one of six methods of service: (1) personal service; (2) messenger service; (3) by mail; (4) by facsimile; (5) by overnight delivery; or (6) by e-mail/electronic service. This form should not be used for proof of service of a summons and complaint; for that purpose, use Proof of Service of Summons (form POS-010) (*see § 518.72*).

This form is a catch-all form in that it includes both the elements of personal service and service by mail that are already addressed in Proof of Personal Service, Judicial Council Form POS-020 and Proof of Service by First-Class Mail--Civil, Judicial Council Form POS-030; and, it adds the elements required for the four other methods of service listed above. It would appear the better practice is to use the more specific forms for personal service and service by mail when using those methods, and to use this form when method of service is by messenger service, by facsimile, by overnight delivery, or by e-mail/electronic service.

The Attachment to Proof of Service by First-Class Mail--Civil (Documents Served), Judicial Council Form POS-040(D) is the form prescribed by the Judicial Council for listing the documents served when there is insufficient space to list the documents served on Judicial Council Form POS-040. The Attachment to Proof of Service by First-Class Mail--Civil

(Persons Served), Judicial Council Form POS-040(P) is the form prescribed by the Judicial Council for listing the persons served when there is insufficient space to list the persons served on Judicial Council Form POS-040.

These forms are optional and may be used by parties and must be accepted for filing by all courts [*Cal. Rules of Ct., Rule 1.35*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Service by Express Mail, Overnight Delivery, or Facsimile Transmission

Papers served by express mail, overnight delivery, or facsimile transmission involve the same extension by two court days of any prescribed period within which to exercise any right or duty to any act as is provided for service by express mail or another form of overnight delivery [*see Code Civ. Proc. § 1013(c), (e), (f); Cal. Rules of Ct., Rule 2.300 et seq.*].

[4] Service by E-Mail or Electronic Transmission

Code Civ. Proc. § 1005 is silent as to whether service by e-mail or electronic transmission extends by two court days any prescribed period within which to exercise any right or duty to any act; however, *Code Civ. Proc. § 1010.6(a)(6)* might be construed to extend the times provided by *Code Civ. Proc. § 1005(b)* [*see § 518.48[3]*].

[5] Cross References

For reproductions of the optional alternative forms for personal service, Proof of Personal Service--Civil, Judicial Council Form POS-020, Attachment to Proof of Personal Service--Civil (Documents Served), Judicial Council Form POS-020(D) and Attachment to Proof of Personal Service--Civil (Persons Served), Judicial Council Form POS-020(P), see *§ 518.90*.

For reproductions of the optional alternative forms for service by mail, Proof of Service by First-Class Mail--Civil, Judicial Council Form POS-030, Attachment to Proof of Service by First-Class Mail--Civil (Documents Served), Judicial Council Form POS-030(D) and Attachment to Proof of Service First-Class Mail--Civil (Persons Served), Judicial Council Form POS-020(P), see *§ 518.91*.

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45-518 California Forms of Pleading and Practice--Annotated § 518.93

§ 518.93 Proof of Service of Papers by Mail--Certificate by Active Member of State Bar [Code Civ. Proc. § 1013a(2)]

[1] FORM Proof of Service of Papers by Mail--Certificate by Active Member of State Bar [Code Civ. Proc. § 1013a(2)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ATTORNEY'S CERTIFICATE OF SERVICE BY
Defendant.	)	MAIL
	)	
	)	

_____

I, _____ [*name*], certify:

I am, and at all times mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is _____ [*specify address*].

I served the _____ [*set forth exact title of document(s) served*] on _____ [*date*], by depositing _____ [a copy *or* _____ (*number*) copies] of _____ [the document *or* each of these papers] in the United States mail [at _____ (*location*)] in _____ [*city*], _____ County, California, in a sealed envelope, with postage fully prepaid, addressed to _____ [*state full name and address of addressee as they appeared on the envelope*], who is/are the [attorney(s) of record for the] _____ [plaintiff *or* defendant *or* petitioner *or*

respondent *or other*] in the above-entitled cause. [At that time there was regular delivery of United States mail between the place of deposit and place of address.]
Dated: _____.

_____ [*signature*]
_____ [*name*]

[2] Use of Form

The form in [1], *above*, is for use to prove service of one or more papers by an active member of the State Bar [*Code Civ. Proc. § 1013a(2)*]. It should be noted that an attorney's certificate of service is not required to be made by affidavit or otherwise sworn to and, hence, is not executed "under penalty of perjury." That is, the provisions of *Code Civ. Proc. § 2015.5* do not apply to such a certificate, which is merely an unsworn statement of the service [*cf. Code Civ. Proc. § 2015.3* (certificate of sheriff or marshal as having same force as affidavit)].

Nevertheless, a willfully false proof of service would constitute a violation of the attorney's oath to discharge the duties of an attorney to the best of his or her knowledge and ability [*Bus. & Prof. Code § 6067*] and of the duty not to mislead the judge or any judicial officer by an artifice or false statement of fact or law [*Bus. & Prof. Code § 6068(d)*] and, hence, would subject the attorney to possible suspension or disbarment [*Bus. & Prof. Code § 6103*].

[3] Contents

The certificate of service must set forth the exact title of the document served and filed in the cause. It must also show the following [*Code Civ. Proc. § 1013a(2)*]:

- The name and business address of the person making the service.
- That he or she is an active member of the State Bar of California and is not a party to the cause.
- The date and place of deposit in the mail.
- The name and address of the person served as shown on the envelope.
- That the envelope was sealed and deposited in the mail with the postage on it fully prepaid [*see also Evid. Code § 641* (presumption that correctly addressed and properly mailed letter is received in ordinary course of mail)].

California Forms of Pleading and Practice--Annotated

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Volume 45: Schools: Certification thru Service of Summons and Papers-Chs. 512-519
Chapter 518 SERVICE OF SUMMONS AND PAPERS
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45-518 California Forms of Pleading and Practice--Annotated § 518.94

§ 518.94 Consent to Electronic Service and Notice of Electronic Notification Address [Cal. Rules of Ct., Rule 2.260(a)]--Judicial Council Form EFS-005

[1] FORM

Click here to view image.

[2] Use of Form

The form in [1], *above*, provides a means for a party to state its consent to electronic service and provide its electronic notification address to the court and other parties under *Cal. Rules of Ct., Rule 2.260(a)*.

This form is an illustrative reproduction of Cal. Judicial Council Form EFS-005, adopted by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.35*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Cross References

For a Notice of Change of Electronic Notification Address form, see *§ 518.95*. For a Proof of Electronic Service, Attachment to Proof of Electronic Service (Documents Served), and Attachment to Proof of Electronic Service (Persons Served), see *§ 518.96*.

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45-518 California Forms of Pleading and Practice--Annotated § 518.95

§ 518.95 Notice of Change of Electronic Notification Address [Rules of Ct., Rule 2.260(d)]--Judicial Council Form EFS-010

[1] FORM

Click here to view image.

[2] Use of Form

The form in [1], *above*, provides a means for a party to give notice of a change in electronic notification address under *Cal. Rules of Ct., Rule 2.260(d)*.

This form is an illustrative reproduction of Cal. Judicial Council Form EFS-010, adopted by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.35*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Cross References

For a Consent to Electronic Service and Notice of Electronic Notification Address form, see *§ 518.94*. For a Proof of Electronic Service, Attachment to Proof of Electronic Service (Documents Served), and Attachment to Proof of Electronic Service (Persons Served), see *§ 518.96*.

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C. Optional Electronic Service Forms

45-518 California Forms of Pleading and Practice--Annotated § 518.96

§ 518.96 Proof of Electronic Service [Cal. Rules of Ct., Rule 2.260(f)]--Judicial Council Form POS-050/EFS-050; Judicial Council Form POS-050 (D)/EFS-050(D); Judicial Council Form POS-050 (P)/EFS-050(P)

[1] FORM

Click here to view image.

Click here to view image.

Click here to view image.

[2] Use of Form

The forms in [1], *above*, provide a means for a person serving documents electronically to show proof of service. Form POS-050/EFS-050 is a one-page form that contains all the information and statements required on proofs of electronic service under *Cal. Rules of Ct., Rule 2.260(f)*. Form POS-050(D)/EFS-050(D) provides a means for persons using the Proof of Electronic Service form to list additional documents served, and Form POS-050(P)/EFS-050(P) provides a means for persons using the Proof of Electronic Service form to identify additional parties served and indicate the dates and times of service.

These forms are illustrative reproductions of Cal. Judicial Council Forms adopted by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.35*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Cross References

For a Consent to Electronic Service and Notice of Electronic Notification Address form, see *§ 518.94*. For a Notice of Change of Electronic Notification Address form, see *§ 518.95*.

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Chapter 519 [RESERVED]

45-519 California Forms of Pleading and Practice--Annotated Chapter 519

[RESERVED]

Chapter 519[RESERVED]

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Volume 46: Settlement and Release thru Subpoena Chs. 520-535
Chapter 520 SETTLEMENT AND RELEASE

46-520 California Forms of Pleading and Practice--Annotated 520.syn

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[2] Use of Form

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[2] Use of Form

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Volume 46: Settlement and Release thru Subpoena Chs. 520-535
Chapter 520 SETTLEMENT AND RELEASE
PART I. SCOPE

46-520 California Forms of Pleading and Practice--Annotated § 520.01

§ 520.01 Scope of Chapter

This chapter discusses and contains forms for use in entering into and pleading a compromise and settlement agreement in an action. Included are forms for use in making an offer to compromise after commencement of an action [*§§ 520.110, 520.110A, 520.111*], forms for pleading a compromise or tender of money due as an affirmative defense [§§ 520.112, *520.113*], a form for notice of settlement that is required to be given to the court or arbitrator [*see § 520.114*], and a form for a motion to enter judgment pursuant to a settlement [*see § 520.115*].

This chapter also discusses the discharge of a preexisting legal obligation by release. It contains a form for a general release [*see § 520.130*], a form for an affirmative defense to a general release [*see § 520.131*], and a form for an affirmative defense to the release of one of several joint tortfeasors [*see § 520.132*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsOffers of JudgmentGeneral OverviewCivil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewContracts LawTypes of ContractsReleasesContracts LawTypes of ContractsSettlement AgreementsTortsProcedureSettlementsGeneral OverviewTortsProcedureSettlementsEnforcementTortsProcedureSettlementsMultipartiesGeneral OverviewTortsProcedureSettlementsOffersTortsProcedureSettlementsReleasesGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsSettlements

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46-520 California Forms of Pleading and Practice--Annotated § 520.02

§ 520.02 Cross References

For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions*

For discussion and forms for use in settling a dispute by accord and satisfaction, see Ch. 6, *Accord and Satisfaction*

For discussion and forms relating to accounts stated, see Ch. 8, *Accounts Stated and Open Accounts*

For discussion and forms relating to settlement agreements arising from mediation, see Ch. 31, *Mediation*

For discussion and forms relating to dismissal pursuant to settlement on appeal, or stipulated reversal of the trial court judgment pursuant to settlement on appeal, see Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal*

For discussion and form relating to required notice of settlement on appeal, see Ch. 51, *Appeal: Hearing and Decision*

For a discussion of the authority of an attorney to bind a client by an agreement, see *Ch. 72, Attorney Practice and Ethics, § 72.190* et seq.

For a discussion and forms relating to the settlement of insured motorist claims, see Ch. 88, *Automobiles: Automobile Insurance*

For discussion and forms relating to the cancellation of written instruments, see Ch. 107, *Cancellation of Instruments*

For discussion of settlements in class actions, see Ch. 120, *Class Actions*

For discussion and forms relating to novation and modification, as alternate methods of extinguishing a contractual obligation, see Ch. 140, *Contracts*

For discussions of the effect of tenders before commencement and offers to compromise on costs, see *Ch. 174, Costs and Attorney's Fees, § 174.10* et seq.

For discussion and forms of defense to contract actions based on mistake, fraud, or undue influence, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*

For a discussion and forms relating to final settlement offers in eminent domain proceedings, see *Ch. 247, Eminent Domain, § 247.10* et seq.

For discussion and forms relating to contribution and indemnity among joint nontort obligors and multiple tortfeasors, see *Ch. 300, Indemnity and Contribution, § 300.30 et seq. and § 300.60* et seq.

For a discussion of the effect of settlement by a joint tortfeasor on the right to comparative indemnity, see *Ch. 300, Indemnity and Contribution, § 300.90* et seq.

For discussion and forms relating to the effect of a release, dismissal, or covenant not to sue, under *Code Civ. Proc. § 877*, on contribution and equitable indemnity among multiple tortfeasors, see Ch. 300, *Indemnity and Contribution*

For a discussion and forms relating to the effect of settlements on the comparative indemnity rights of tortfeasors and the contribution rights of nontort obligors and discussion and forms regarding judicial determination of the good faith of a settlement pursuant to *Code Civ. Proc. § 877.6*, see *Ch. 300, Indemnity and Contribution, § 300.60* et seq.

For a discussion and forms for use in obtaining a judgment by stipulation, see *Ch. 318, Judgments, § 318.40* et seq.

For a discussion of the effect of settlement on the disposition of jury fees deposited with the court, see Ch. 322, *Juries and Jury Selection*

For a discussion of the effect of settlement on a lis pendens filed in an action, see Ch. 348, *Lis Pendens*

For discussion of releases from liability for future negligence, also known as exculpatory releases, see Ch. 380, *Negligence*

For a discussion of the requirements of *Civ. Code § 56.105* in the settlement of a medical malpractice action, see Ch. 415, *Physicians: Medical Malpractice*

For a discussion and forms relating to settlement conferences, see Ch. 425, *Pretrial Proceedings*

For discussion and forms relating to settlement of an administrative adjudicatory proceeding under the Administrative Procedures Act, see Ch. 473C, *Prehearing Procedures in Agency Adjudications*

For discussion and forms relating to rescission and restitution, see Ch. 490, *Rescission and Restitution*

For discussion of the release of a security interest in all or part of the collateral covered by a filed financing statement, see Ch. 500, *Sales and Secured Transactions*

For discussion of the liability of a surety to a creditor who, without the assent of the surety, may have released the principal, see Ch. 538, *Suretyship, Bonds, and Undertakings*

For discussion and forms relating to the effect of a plaintiff's receipt of workers' compensation benefits on settlement, see Ch. 577, *Workers' Compensation*

For discussion and forms relating to the compromise of claims for workers' compensation benefits and the release of the employers and their insurance carriers from liability, see Ch. 577, *Workers' Compensation*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsConsent DecreesCivil ProcedureAppealsStipulated ReversalsContracts LawPerformanceAccord & SatisfactionContracts LawTypes of ContractsSettlement AgreementsInsurance LawMotor Vehicle InsuranceObligationsSettlementsReal Property LawEminent Domain ProceedingsProcedureTortsProcedureSettlementsGeneral OverviewTortsProcedureSettlementsMultipartiesGeneral OverviewTortsProcedureSettlementsMultipartiesContributionTortsProcedureSettlementsMultipartiesIndemnityTortsProcedureSettlemen
OverviewWorkers' Compensation & SSDIAdministrative ProceedingsSettlements

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Chapter 520 SETTLEMENT AND RELEASE
PART I. SCOPE

46-520 California Forms of Pleading and Practice--Annotated §§ 520.03-520.09

[Reserved]

§§ 520.03[Reserved]

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PART II. LEGAL BACKGROUND
A. Settlement

46-520 California Forms of Pleading and Practice--Annotated § 520.10

§ 520.10 Governing Law

Provisions governing compromise and settlement agreements are contained in *Code Civ. Proc. §§ 877, 877.5, 877.6,* and *998*. The tender of money due before commencement of an action is governed by *Code Civ. Proc. § 1025*. Compromise and settlement agreements are also governed by the legal principles applicable to contracts in general [*see § 520.13*]. The notice required to be filed with the court and given to arbitrators or other court-connected ADR neutral involved in the case of a settlement is governed by *Cal. Rules of Ct., Rule 3.1385*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureSettlementsGeneral OverviewContracts LawTypes of ContractsSettlement AgreementsTortsProcedureSettlementsGeneral Overview

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A. Settlement

46-520 California Forms of Pleading and Practice--Annotated § 520.11

§ 520.11 Settlement With Authority of Attorney

An attorney must be specifically authorized to settle and compromise a claim, and has no implied or ostensible authority to bind his or her client to a compromise settlement of pending litigation merely on the basis of his or her employment [*Navrides v. Zurich Ins. Co. (1971) 5 Cal. 3d 698, 702 n.1, 97 Cal. Rptr. 309, 488 P.2d 637* ; *Bice v. Stevens (1958) 160 Cal. App. 2d 222, 231-232, 325 P.2d 244*]. However, a client is bound by an unauthorized settlement if the client accepts the benefits of the settlement or otherwise ratifies the settlement agreement [*Navrides v. Zurich Ins. Co. (1971) 5 Cal. 3d 698, 704, 97 Cal. Rptr. 309, 488 P.2d 637* (action to enforce agreement constituted ratification); *Villa v. Cole (1992) 4 Cal. App. 4th 1327, 1336-1337, 6 Cal. Rptr. 2d 644* (accepting benefits of agreement constituted ratification); *City of Fresno v. Baboian (1975) 52 Cal. App. 3d 753, 758-760, 125 Cal. Rptr. 332*]. Further, a rebuttable presumption exists that an attorney has the authority to compromise the client's action that he or she is prosecuting [*Gagnon Co. Inc. v. Nevada Desert Inn (1955) 45 Cal. 2d 448, 460-461, 289 P.2d 466*]. For further discussion of the authority of an attorney, see Ch. 72, *Attorney Practice and Ethics* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActContracts & ConveyancesGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewContracts LawTypes of ContractsSettlement AgreementsLegal EthicsClient RelationsGeneral Overview

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PART II. LEGAL BACKGROUND
A. Settlement

46-520 California Forms of Pleading and Practice--Annotated § 520.12

§ 520.12 Settlement Without Attorney

Litigants may enter into settlements without the concurrence of their attorneys of record. A contrary rule would countervail the public policy that favors settlement of litigation. If there are no elements of fraud, coercion, or overreaching and both parties freely and with full understanding of their rights to the advice of counsel wish to negotiate a settlement without the involvement of their attorneys, they may do so [*In re Marriage of Hasso (1991) 229 Cal. App. 3d 1174, 1184-1185, 280 Cal. Rptr. 919*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSelf-RepresentationRight to Self-RepresentationCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewContracts LawTypes of ContractsSettlement Agreements

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46-520 California Forms of Pleading and Practice--Annotated § 520.13

§ 520.13 Settlement Agreement as Contract

Compromise and settlement agreements are governed by the legal principles applicable to contracts in general [*Folsom v. Butte County Assn. of Governments (1982) 32 Cal. 3d 668, 677, 186 Cal. Rptr. 589, 652 P.2d 437* ; *Vaillette v. Fireman's Fund Ins. Co. (1994) 18 Cal. App. 4th 680, 686, 22 Cal. Rptr. 2d 807* ; *In re Marriage of Hasso (1991) 229 Cal. App. 3d 1174, 1180, 280 Cal. Rptr. 919* ; *Distefano v. Hall (1968) 263 Cal. App. 2d 380, 385, 69 Cal. Rptr. 691*]. The agreement must be supported by sufficient consideration [*Tooley v. Parker (1942) 51 Cal. App. 2d 542, 549-551, 125 P.2d 66* ; *see Gill v. Southern Pac. Co. (1916) 174 Cal. 84, 88, 161 P. 1153*]. However, if a claim is compromised in good faith, it is not essential that the claim be a valid or subsisting obligation [*California Viking Sprinkler Co. v. Pacific Indem. Co. (1963) 213 Cal. App. 2d 844, 854, 29 Cal. Rptr. 194*].

Settlement agreements are subject to any applicable statute of frauds [*Nicholson v. Barab (1991) 233 Cal. App. 3d 1671, 1681-1683, 285 Cal. Rptr. 441* ; *but see Kohn v. Jaymar-Ruby, Inc. (1994) 23 Cal. App. 4th 1530, 1534-1535, 28 Cal. Rptr. 2d 780* (refusing to apply statute of frauds to bar enforcement under *Code Civ. Proc. § 664.6*); *see § 520.21[1]*]. For further discussion of contractual enforcement of settlement agreements, see *§ 520.21*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewContracts LawTypes of ContractsSettlement Agreements

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A. Settlement

46-520 California Forms of Pleading and Practice--Annotated § 520.14

§ 520.14 Offer to Compromise Pursuant to Code Civ. Proc. § 998

[1] In General

Under *Code Civ. Proc. § 998*, any party may serve an offer in writing on any other party to the action to allow judgment to be taken or an award to be taken in accordance with the terms and conditions stated at that time [*Code Civ. Proc. § 998(b)*]. A statutory offer of compromise need not contain any magic language, so long as it is clear the offer, which must be written, is made under *Code Civ. Proc. § 998* and, if accepted, will result in the entry of judgment or an alternative final disposition of the action legally equivalent to a judgment. In the absence of a specific alternative disposition stated in the written offer, a Section 998 offer that does no more than refer to the statute and proposes finally "to settle the case" against a particular defendant for a specified sum will, if accepted, result in a judgment being taken against the offeree by the court [*Berg v. Darden (2004) 120 Cal. App. 4th 721, 731-732, 15 Cal. Rptr. 3d 829*].

The written offer must include a statement of the offer, containing the terms and conditions of the judgment or award, and a provision allowing the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted [*Code Civ. Proc. § 998(b)*]. In addition, the offer must remain open for the statutorily designated period set forth in *Code Civ. Proc. § 998(b)(2)* ("prior to trial or ... within 30 days after it is made, whichever occurs first") [*Marina Glencoe, L.P. v. Neue Sentimental Film AG (2008) 168 Cal. App. 4th 874, 880, 85 Cal. Rptr. 3d 800*].

The Judicial Council has promulgated a standard form (Judicial Council Form CIV-090) for optional use by plaintiffs for offers to compromise under *Code Civ. Proc. § 998*. The form includes space for acceptance of the offer by the defendant. The Judicial Council form may be used only in civil actions involving a single plaintiff and a single defendant, and the offer and acceptance must involve a money judgment. The court will file the offer and acceptance only if it is accompanied by a judgment prepared for the court's signature and entry of judgment. For an illustration of Form CIV-090, *see § 520.110A*. For forms for judgment and entry of judgment, *see* Ch. 318, *Judgments* .

The offer must be served not less than 10 days before the commencement of trial or arbitration under *Code Civ. Proc. §§ 1281, 1295* (agreement to arbitrate and arbitration of medical services contract, respectively) [*Code Civ. Proc. § 998(b)*]. The provisions of *Code Civ. Proc. § 1013(a)* apply to the 10-day notice requirement in *Code Civ. Proc. §*

998(b); thus, if the offer is served by mail, it must be served not less than 15 days before commencement of the trial or arbitration [*Lecuyer v. Sunset Trails Apartments (2004) 120 Cal. App. 4th 920, 925-927, 16 Cal. Rptr. 3d 169*]. Formal proof of service, or a certificate of mailing is one method by which the date of service may be established. However, formal proof of service is not required. It is sufficient proof of mailing offer served by mail bears a notation of the date and place of mailing [*Berg v. Darden (2004) 120 Cal. App. 4th 721, 733, 15 Cal. Rptr. 3d 829* ; *see Code Civ. Proc. § 1013(b)*]. For purposes of *Code Civ. Proc. § 998(b)*, a trial or arbitration is deemed to be actually commenced at the beginning of the opening statement of the plaintiff or counsel and, if there is no opening statement, at the time the oath or affirmation is administered to the first witness or with the introduction of any evidence [*Code Civ. Proc. § 998(b)(3)*].

A party who makes an erroneous Section 998 offer may obtain relief pursuant to the discretionary relief provision of *Code Civ. Proc. § 473(b)*. Thus, for example, in typing up a Section 998 offer to compromise, an attorney's legal assistant typed the word "against" instead of the phrase "in favor of," and as a result, the document mistakenly offered to settle the matter for a judgment against the attorney's client. The party making the offer was entitled to relief after the opposing party accepted [*Zamora v. Clayborn Contr. Group, Inc. (2002) 28 Cal. 4th 249, 121 Cal. Rptr. 2d 187, 47 P.3d 1056*].

Judicial arbitration does not constitute a "trial" for the purposes of *Code Civ. Proc. § 998* [*Nott v. Superior Court (1988) 204 Cal. App. 3d 1102, 1106-1108, 251 Cal. Rptr. 842*].

If the offer is rejected, the costs allowed under *Code Civ. Proc. §§ 1031* and *1032* will be withheld or augmented as provided in *Code Civ. Proc. § 998* [*Code Civ. Proc. § 998(a)*]. Items of costs that are allowable under *Code Civ. Proc. § 1032* are set forth in *Code Civ. Proc. § 1033.5* [*see Ch. 174, Costs and Attorney's Fees, § 174.10* et seq.]. Note that both attorney's fees authorized by statute or bylaw and those recoverable under a contract are now considered to be costs [*Code Civ. Proc. § 1033.5(a)(10)*]. Thus, if an offer under *Code Civ. Proc. § 998* is not accepted, it may affect the plaintiff's right to prejudgment interest and the apportionment of the costs of trial with the nonaccepting party recovering less or paying more costs, depending on the circumstances [*see Civ. Code § 3291*; *Code Civ. Proc. § 998(a), (c)-(e)*; *see also §§ 520.14[6], [7], [8], 520.110, 520.111*].

In interpreting a Section 998 offer, general contract principles apply when they neither conflict with nor defeat the statute's purpose of encouraging the settlement of lawsuits prior to trial [*T.M. Cobb Co. v. Superior Court (1984) 36 Cal. 3d 273* ; *Elite Show Services, Inc. v. Staffpro, Inc. (2004) 119 Cal. App. 4th 263, 268, 14 Cal. Rptr. 3d 184*]. Under California law, a contract is enforceable if it is sufficiently definite that a court can ascertain the parties' obligations and determine whether those obligations have been performed or breached [*Elite Show Services, Inc. v. Staffpro, Inc. (2004) 119 Cal. App. 4th 263, 268, 14 Cal. Rptr. 3d 184* ; *Ersa Grae Corp. v. Fluor Corp. (1991) 1 Cal. App. 4th 613, 623, 2 Cal. Rptr. 2d 288*]. The issue of whether a settlement offer is sufficiently certain to be enforceable involves a question of law, which an appellate court reviews de novo [*Elite Show Services, Inc. v. Staffpro, Inc. (2004) 119 Cal. App. 4th 263, 268, 14 Cal. Rptr. 3d 184]* .

[2] Joint Offers

[a] Definition

A joint offer to compromise is one made either by a single party to multiple parties or by multiple parties to a single party. A joint offer to compromise served on any other party or on each of several other parties to an action must be unconditional [*Hutchins v. Waters (1975) 51 Cal. App. 3d 69, 72-74, 123 Cal. Rptr. 819* (defendant made offer under *Code Civ. Proc. § 998* for aggregate sum with apportionment between plaintiffs but conditioned it on acceptance by both plaintiffs)].

[b] Offers by or to Multiple Plaintiffs

A joint offer to compromise made by a single defendant to multiple plaintiffs is a nullity if it fails to designate the amount offered to each plaintiff [*Randles v. Lowry (1970) 4 Cal. App. 3d 68, 74, 84 Cal. Rptr. 321* (discussing former *Code Civ. Proc. § 997*); *see Meissner v. Paulson (1989) 212 Cal. App. 3d 785, 791, 260 Cal. Rptr. 826* (as matter of law, only offer made to single plaintiff, without need for allocation or acceptance by other plaintiffs, qualifies as valid *Section 998* offer); *see also Burch v. Children's Hospital of Orange County Thrift Stores, Inc. (2003) 109 Cal. App. 4th 537, 544, 135 Cal. Rptr. 2d 404* (single lump sum offer to multiple plaintiffs requiring them to agree to apportionment among themselves is not valid); *Palmer v. Schindler Elevator Corp. (2003) 108 Cal. App. 4th 154, 157, 133 Cal. Rptr. 2d 339* (to be effective, offer to multiple parties must be explicitly apportioned among parties to whom offer is made so each offeree may accept or reject offer individually)].

Under the general rule, an offer made by multiple plaintiffs is null unless the amount demanded is apportioned among all plaintiffs so that it may be determined with regard to each plaintiff whether the amount awarded after trial was more favorable [*Hurlbut v. Sonora Community Hospital (1989) 207 Cal. App. 3d 388, 409-410, 254 Cal. Rptr. 840*]. However, a Section 998 offer made to a married couple asserting damage to a singular interest in community property does not have to be allocated between the husband and wife, and is not inherently conditional on acceptance by both [*Vick v. DaCorsi (2003) 110 Cal. App. 4th 206, 209-213, 1 Cal. Rptr. 3d 626*]. Further, one court refused to apply this rule mechanically under circumstances in which the sole plaintiff whose claim was tried was awarded damages in excess of the joint Section 998 offer [*Fortman v. Hemco, Inc. (1989) 211 Cal. App. 3d 241, 262-263, 259 Cal. Rptr. 311* (joint offer of $1 million; verdict for sole plaintiff in excess of $23 million)].

There also appears to be a split of authority regarding the applicability of this rule to a wrongful death action. One court refused to find an unsegregated offer made by multiple heir-plaintiffs to be invalid because, in a wrongful death action, there is a single verdict to be compared to the single offer [*Stallman v. Bell (1991) 235 Cal. App. 3d 740, 745-747, 286 Cal. Rptr. 755*]. This court stated that the proper procedure is for the court to apportion, in a separate proceeding, the amount awarded in the verdict among the various plaintiffs [*see Canavin v. Pacific Southwest Airlines (1983) 148 Cal. App. 3d 512, 529-530, 196 Cal. Rptr. 82*]. Another court has found such an offer void under the view that a wrongful death action is not a joint cause of action, but merely involves compulsory joinder of the separate causes of each heir-plaintiff [*Gilman v. Beverly California Corp. (1991) 231 Cal. App. 3d 121, 124-126, 283 Cal. Rptr. 17*]. Another court has stated that a wrongful death defendant can settle with either all or some heirs. According to this court, when the claims of all heirs are encompassed in a lump-sum settlement, the court has authority to apportion the settlement, and, if the settlement is with less than all known heirs, the defendant waives the right to face only a single wrongful death action and the non-settling heirs may continue to pursue the action against the defendant [*Smith v. Premier Alliance Ins. Co. (1995) 41 Cal. App. 4th 691, 698, 48 Cal. Rptr. 2d 461*]. For further discussion of the nature of a wrongful death action, see Ch. 181, *Death and Survival Actions* .

When an offer to multiple plaintiffs does not involve money, such as an offer to settle for waiver of costs, the court will imply that the offer is conditioned on acceptance by all plaintiffs so that the offer is void [*Menees v. Andrews (2004) 122 Cal. App. 4th 1540, 1545-1546, 19 Cal. Rptr. 3d 664*].

[c] Offers by or to Multiple Defendants

Multiple defendants who are sued on a theory of joint and several liability may make a joint offer to compromise to a single plaintiff, with all defendants to be released on acceptance [*Santantonio v. Westinghouse Broadcasting Co. (1994) 25 Cal. App. 4th 102, 114-116, 30 Cal. Rptr. 2d 486* ; *Brown v. Nolan (1979) 98 Cal. App. 3d 445, 449-451, 159 Cal. Rptr. 469*]. However, the effect of Proposition 51's elimination of joint and several liability for noneconomic damages has yet to be addressed [*see Civ. Code § 1431.2(a)*, discussed in Ch. 300, *Indemnity and Contribution*]. It would seem that the amount of any joint and several judgment for economic damages would have to be added separately to each several-only judgment for noneconomic damages to determine whether the plaintiff obtained a more favorable judgment than the Section 998 offer [*see Civ. Code § 1431.2(a)*]. The sums would be compared to the offer

amount separately with regard to each defendant.

A plaintiff seeking damages against multiple defendants may make separate 998 offers to each defendant. In light of the principles of comparative indemnity and the effect of Proposition 51 on joint and several liability, the offer will not trigger the Section 998 penalties for nonacceptance unless it is sufficiently specific to determine the exact amount that the plaintiff is seeking from each defendant [*Taing v. Johnson Scaffolding Co. (1992) 9 Cal. App. 4th 579, 586, 11 Cal. Rptr. 2d 820*]. Thus, to be effective, an offer to multiple parties under *Section 998* must be explicitly apportioned among the parties to whom the offer is made so that each offeree may accept or reject the offer individually [*Burch v. Children's Hospital of Orange County Thrift Stores, Inc. (2003) 109 Cal. App. 4th 537, 544, 135 Cal. Rptr. 2d 404* (in general, *Section 998* offer to multiple parties is valid only if it is expressly apportioned among them and not conditioned on acceptance by all of them); *Palmer v. Schindler Elevator Corp. (2003) 108 Cal. App. 4th 154, 157, 133 Cal. Rptr. 2d 339* (offer to three defendants jointly and severally was defective)].

The plaintiff may also make a Section 998 offer to fewer than all of the defendants. The offer as to any particular defendant may take into account that defendant's liability for the conduct of other defendants through principles of vicarious liability [*see* *Lakin v. Watkins Associated Industries (1993) 6 Cal. 4th 644, 658 n.9, 25 Cal. Rptr. 2d 109, 863 P.2d 179* ; *Bihun v. AT&T Information Systems, Inc. (1993) 13 Cal. App. 4th 976, 1000-1001, 16 Cal. Rptr. 2d 787* (both involving Section 998 offers made to employer based on conduct of both employer and employee for which employer was also liable under principle of respondeat superior); *see also § 520.16*].

[3] Acceptance of Offer

Any acceptance of an offer to compromise pursuant to *Code Civ. Proc. § 998*, whether made on the document containing the offer or on a separate document of acceptance, must be in writing and signed by counsel for the accepting party or, if not represented by counsel, by the accepting party [*Code Civ. Proc. § 998(b)*].

If an offer to compromise pursuant to *Code Civ. Proc. § 998* is accepted, the offer, with proof of acceptance, must be filed, and the clerk or the judge must enter judgment accordingly [*Code Civ. Proc. § 998(b)(1)*]. In the case of an arbitration, the offer with proof of acceptance must be filed with the arbitrator or arbitrators who must promptly render an award accordingly [*Code Civ. Proc. § 998(b)(1)*]. A judgment or award so entered is deemed to be a compromise settlement [*Code Civ. Proc. § 998(f)*]. It operates as a bar to the reopening of the original controversy [*see* *County of Los Angeles v. Law Bldg. Corp. (1967) 254 Cal. App. 2d 848, 853, 62 Cal. Rptr. 542* (compromise agreement resulting in dismissal); *Klinker v. Klinker (1955) 132 Cal. App. 2d 687, 695, 283 P.2d 83* (judgment by stipulation); *see* Ch. 491, *Res Judicata*]. Although evidence of the offer is inadmissible for proving liability for the claim that the offer is an attempt to compromise, evidence of the offer may be admissible to prove other issues such as the bad faith of the offeror [*see* *White v. Western Title Ins. Co. (1985) 40 Cal. 3d 870, 888-889, 221 Cal. Rptr. 509, 710 P.2d 309*]. A qualified acceptance of the offer is considered a counteroffer [*Glende Motor Co. v. Superior Court (1984) 159 Cal. App. 3d 389, 393-398, 205 Cal. Rptr. 682 , disapproved on other grounds*, *Poster v. Southern Cal. Rapid Transit Dist. (1990) 52 Cal. 3d 266, 270-272, 276 Cal. Rptr. 321, 801 P.2d 1072*].

Section 998 does not expressly require service of an acceptance. Under general contract principles, an acceptance of an offer must be communicated to the offeror to become effective, and consent is deemed to be fully communicated as soon as the party accepting a proposal has put his or her acceptance in the course of transmission to the proposer [*Civ. Code § 1582*; *see* *Drouin v. Fleetwood Enterprises (1985) 163 Cal. App. 3d 486, 491, 209 Cal. Rptr. 623*]. Any mode of communicating acceptance is appropriate, unless a specific mode is prescribed in the offer itself [*Civ. Code § 1582*; *Hofer v. Young (1995) 38 Cal. App. 4th 52, 56-57, 45 Cal. Rptr. 2d 27*]. Contract law requires that the acceptance be communicated in a clear and unequivocal fashion [*Gray v. Stewart (2002) 97 Cal. App. 4th 1394, 1397, 119 Cal. Rptr. 2d 217*]. Prior to the amendment of *Code Civ. Proc. § 998* effective January 1, 2006, requiring that acceptance of a Section 998 offer be in writing and signed, courts held that an undisputed oral acceptance of a Section 998 offer followed by written proof of acceptance was permitted unless the offer required another mode of acceptance. However,

a purported oral acceptance evidenced by written notice of acceptance that included an additional term not present in a Section 998 offer did not communicate an absolute and unequivocal acceptance of the offer as required by *Civil Code § 1585* [*Bias v. Wright (2002) 103 Cal. App. 4th 811, 817-821, 127 Cal. Rptr. 2d 137*].

ILLUSTRATION:

Acceptance by Fax Valid Even Though Fax Service Not Permitted by Local Rule. Plaintiff served a Section 998 offer on defendants by mail. Two days before the 35-day time limit, defendants faxed and mailed a letter accepting the offer. In sending the letter, however, defendants put the wrong zip code on the envelope, and the letter did not arrive within the time limit. Further, service by fax is not allowed in defendants' county. After receiving the faxed acceptance, plaintiff's counsel mailed and faxed a revocation of the offer stating that plaintiff rejected the faxed acceptance. Was the acceptance effective even though service by fax was not allowed under local rules of court? Yes. Section 998 does not require that an acceptance be served, therefore statutory restraints on fax service do not apply. According to general principles of contract law, the section 998 offer was deemed accepted on dispatch. Moreover, because the defendants communicated their acceptance within the required time period, it is irrelevant that the confirming letter was misdirected and arrived after the limit [*Hofer v. Young (1995) 38 Cal. App. 4th 52, 56-57, 45 Cal. Rptr. 2d 27*].

Code Civ. Proc. § 998 does not require service of the acceptance. Further, filing proof of acceptance after an attempted revocation of the offer does not affect the validity of an acceptance made before the offer is revoked, since that section does not dictate when proof of acceptance must be filed [*Gray v. Stewart (2002) 97 Cal. App. 4th 1394, 1397-1398, 119 Cal. Rptr. 2d 217]* .

[4] Expiration of Offer

If an offer to compromise is not accepted prior to trial or within 30 days after it is made, whichever occurs first, it must be deemed withdrawn and cannot be given in evidence in the trial [*Code Civ. Proc. § 998(b)(2)*]. For these purposes, a trial or arbitration is deemed to be actually commenced at the beginning of the opening statement of the plaintiff or counsel, and if there is no opening statement, at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence [*Code Civ. Proc. § 998(b)(3)*]. The 30-day period is extended five days by *Code Civ. Proc. § 1013* if the offer is served by mail [*Poster v. Southern Cal. Rapid Transit Dist. (1990) 52 Cal. 3d 266, 272-275, 276 Cal. Rptr. 321, 801 P.2d 1072*].

[5] Revocation or Rejection of Offer

Code Civ. Proc. § 998 is silent on a number of issues, including what constitutes acceptance, whether an offer may be revoked before it expires under the terms of the statute, and what effect a counteroffer has on the viability of the offer. Because the settlement and compromise process encompassed by *Code Civ. Proc. § 998* is contractual, the courts have referred to general contract principles to interpret the gaps in the statutory language [*see One Star, Inc. v. Staar Surgical Co. (2009) 179 Cal. App. 4th 1082, 1089-1090, 102 Cal. Rptr. 3d 195]* . However, contract law does not necessarily resolve all the gaps in the language of *Code Civ. Proc. § 998*. Courts properly apply contract principles only to the extent that they do not conflict with the statute nor undermine its purpose of encouraging settlement [*Guzman v. Visalia Community Bank (1999) 71 Cal. App. 4th 1370, 1375, 84 Cal. Rptr. 2d 581*]. On the one hand, for example, the Supreme Court determined that the policy reflected in *Code Civ. Proc. § 998* is best promoted by applying contract law so as to permit an offeror to make an express revocation of an offer before it expires under terms of the statute. Revocable settlement offers promote the public policy of compensating injured parties because newly discovered evidence may indicate greater culpability than originally thought, and the offeror will not be bound to an inadequate compromise [*T.M. Cobb Co. v. Superior Court (1984) 36 Cal. 3d 273, 280-282, 204 Cal. Rptr. 143, 682 P.2d 338* ; *One Star, Inc. v. Staar Surgical Co. (2009) 179 Cal. App. 4th 1082, 1090-1091, 102 Cal Rptr. 3d 195* ; *see also Estate of Watts (1984) 162 Cal. App. 3d 1160, 1162-1165, 208 Cal. Rptr. 846* (offer of defendant to compromise terminated by

plaintiff offeree's death under general contract principles)].

Similarly, courts have applied contract principles in holding that an unexpired but still unaccepted Section 998 offer is necessarily revoked by a subsequent, different offer [*Palmer v. Schindler Elevator Corp. (2003) 108 Cal. App. 4th 154, 157, 133 Cal. Rptr. 2d 339* ; *Distefano v. Hall (1968) 263 Cal. App. 2d 380, 385, 69 Cal. Rptr. 691* ; *see T.M. Cobb Co. v. Superior Court (1984) 36 Cal. 3d 273, 279, 204 Cal. Rptr. 143, 682 P.2d 338* (approving rule of *Distefano*)]. This is true even if the subsequent offer is defective [*Palmer v. Schindler Elevator Corp. (2003) 108 Cal. App. 4th 154, 157-159, 133 Cal. Rptr. 2d 339*]. If a Section 998 offer is withdrawn by a party before its statutory expiration, the withdrawing party's right to cost shifting under Section 998 is determined by the last rejected Section 998 offer [*One Star, Inc. v. Staar Surgical Co. (2009) 179 Cal. App. 4th 1082, 1093-1094, 102 Cal. Rptr. 3d 195]* .

In other respects, however, courts have rejected contract principles in favor of more "bright line" rules. For example, the Supreme Court held that an offeree's counteroffer does not terminate the original offer. The offeree may negotiate for other terms during the 30-day period, and still accept the original offer unless it is expressly revoked by the offeror [*Poster v. Southern Cal. Rapid Transit Dist. (1990) 52 Cal. 3d 266, 270-272, 276 Cal. Rptr. 321, 801 P.2d 1072*]. The Court, in so ruling, reasoned that applying the normal contract principle, that a counteroffer operates as a rejection of the offer, would not only be inconsistent with the purpose of *Code Civ. Proc. § 998* of encouraging settlements, but would also result in significant and undesirable uncertainty requiring constant resolution of the factual question of whether a particular communication constituted a counteroffer or merely an inquiry into the possibility of different terms [*Poster v. Southern Cal. Rapid Transit Dist. (1990) 52 Cal. 3d 266, 271-272, 276 Cal. Rptr. 321, 801 P.2d 1072*].

Citing this reasoning in *Poster*, one court of appeal rejected the application of normal contract principles with respect to what constitutes an offeree's rejection of a Section 998 offer, adopting instead another bright line rule. The court ruled that, absent an *unequivocal* rejection of a Section 998 offer, the offer remains effective and may be accepted until it has been revoked or has expired under the terms of the statute [*Guzman v. Visalia Community Bank (1999) 71 Cal. App. 4th 1370, 1378, 84 Cal. Rptr. 2d 581*]. Thus, an offeree's communication that merely criticizes or disparages a Section 998 offer, without expressly rejecting it, does not operate as a rejection that terminates the offer, notwithstanding contrary contract principles [*Guzman v. Visalia Community Bank (1999) 71 Cal. App. 4th 1370, 1376-1378, 84 Cal. Rptr. 2d 581*].

Along these same lines, another court of appeal held that communications made during judicial arbitration, which do not constitute an express rejection or an express revocation of a Section 998 offer, do not terminate the offer, and if that offer has not yet expired under the statute it may still be accepted by the offeree following such arbitration [*Nott v. Superior Court (1988) 204 Cal. App. 3d 1102, 1108-1109, 251 Cal. Rptr. 842*].

An offer unilaterally revoked before the expiration of the period specified by *Code Civ. Proc. § 998* forfeits its status as an offer under the remaining provisions of that section. Thus, for example, a Section 998 offer that is unilaterally revoked before the expiration of the statutory period does not trigger the cost shifting provisions of *Code Civ. Proc. § 998* [*Marcey v. Romero (2007) 148 Cal. App. 4th 1211, 1215-1217, 56 Cal. Rptr. 3d 402]* .

[6] Effect of Defendant's Offer on Costs

If an offer made by a defendant (or cross defendant) under *Code Civ. Proc. § 998* is not accepted and the plaintiff (or cross complainant) fails to obtain a more favorable judgment or award, the plaintiff does not recover his or her postoffer costs and must pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the service of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary preparation of the defendant's case for trial or arbitration, or presentation of defendant's case during trial or arbitration, or both [*Code Civ. Proc. § 998(c)(1)*; *see Code Civ. Proc. § 998(f)* ("plaintiff" includes cross

complainant and "defendant" includes cross defendant)].

If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the costs under *Code Civ. Proc. § 998,* from the time of the offer, are deducted from any damages awarded in favor of the plaintiff. If the costs awarded to the defendant exceed plaintiff's damages, the net amount is awarded to the defendant and judgment or award is entered accordingly [*Code Civ. Proc. § 998(e)*; *see Ch. 174, Costs and Attorney's Fees, § 174.10* et seq.].

[7] Effect of Offer on Cost of Expert Witness Services

[a] In General

Although expert witness fees not ordered by the court are generally not recoverable as costs [*Code Civ. Proc. § 1033.5(b)(1)*], *Code Civ. Proc. § 998(c)(1)* expressly authorizes augmentation of recoverable costs to include expert witness fees as within the court's discretion when plaintiff rejects defendant's offer and then fails to obtain a more favorable judgment or award [*People ex rel. Lockyer v. Fremont General Corp. (2001) 89 Cal. App. 4th 1260, 1264-1265, 108 Cal. Rptr. 2d 127*]. It is not against public policy to award defendant expert witness fees in an action for civil penalties, restitution or injunctive relief brought by the Attorney General pursuant to *Bus. & Prof. Code §§ 17200, 17500* [*People ex rel. Lockyer v. Fremont General Corp. (2001) 89 Cal. App. 4th 1260, 1265-1267, 108 Cal. Rptr. 2d 127*]. However, this case was decided before the effective date of *Code Civ. Proc. § 998(g)(2)* (January 1, 2002) which provides the 998 offers do not apply in enforcement actions brought in the name of the state of California by the attorney general, a district attorney, or a city attorney acting as a public prosecutor [*Code Civ. Proc. § 998(g)(2)*].

The costs for services of expert witnesses, whether recoverable by the plaintiff or defendant after a rejected 998 offer, may not exceed those specified in *Gov. Code § 68092.5* [*Code Civ. Proc. § 998(h)*; *see Evers v. Cornelson (1984) 163 Cal. App. 3d 310, 314-320, 209 Cal. Rptr. 497* (discussing scope of recoverable expenses for expert witnesses under *Code Civ. Proc. § 998*)]. This reference means that any fees charged for trial time may not exceed the expert's normal rate [*Santantonio v. Westinghouse Broadcasting Co. (1994) 25 Cal. App. 4th 102, 123, 30 Cal. Rptr. 2d 486*]. Police officers are considered expert witnesses [*Code Civ. Proc. § 998(f)*]. Fees are not assessed with regard to a witness who testifies both as a percipient witness and an expert [*Stiles v. Estate of Ryan (1985) 173 Cal. App. 3d 1057, 1067, 219 Cal. Rptr. 647*].

The award and amount of expert witness costs to either plaintiff or defendant is within the discretion of the court and will be set aside only for abuse of discretion [*Santantonio v. Westinghouse Broadcasting Co. (1994) 25 Cal. App. 4th 102, 121, 30 Cal. Rptr. 2d 486* ; *Brake v. Beech Aircraft Corp. (1986) 184 Cal. App. 3d 930, 940, 229 Cal. Rptr. 336*]. If there are multiple parties and expert costs are to be assessed against only one of them, it is within the court's discretion to award only a proportionate share [*see Santantonio v. Westinghouse Broadcasting Co. (1994) 25 Cal. App. 4th 102, 124-125, 30 Cal. Rptr. 2d 486*]. It has been noted, in dicta, that the court may consider a party's ability to pay in exercising its discretion with regard to expert costs [*see Santantonio v. Westinghouse Broadcasting Co. (1994) 25 Cal. App. 4th 102, 125 n.7, 30 Cal. Rptr. 2d 486*].

[b] Recovery by Plaintiff

If a defendant does not accept an offer made by the plaintiff and subsequently fails to obtain a more favorable judgment or award in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover the costs of the services of expert witnesses (other than regular employees of any party) actually incurred and reasonably necessary in preparation of the plaintiff's case for trial or arbitration, or presentation of plaintiff's case during trial or arbitration, or both, in addition to the other allowable costs [*Code Civ. Proc. § 998(d)*; *see Weisman v. Blue Shield of California (1984) 163 Cal. App. 3d 61, 68, 209 Cal. Rptr. 169*].

[8] Effect of Plaintiff's Offer on Prejudgment Interest in Personal Injury Action Under Civ. Code § 3291

[a] Recovery by Plaintiff

If a plaintiff makes a *Code Civ. Proc. § 998* offer that the defendant does not accept prior to trial or within 30 days, whichever occurs first, and then obtains a more favorable judgment, the plaintiff is entitled to prejudgment interest under *Civ. Code § 3291* in addition to costs. *Civ. Code § 3291* has a narrower application than *Code Civ. Proc. § 998*. It applies only in actions brought to recover damages for personal injury, whether by negligence or by willful intent and whether the injury was fatal or otherwise [*Civ. Code § 3291*]. However, the *Civ. Code § 3291* is pre-empted in actions brought under the Federal Employers Liability Act [*Lund v. San Joaquin Valley Railroad (2003) 31 Cal. 4th 1, 13-15, 1 Cal. Rptr. 3d 412, 71 P.3d 770*].

The purpose of awarding prejudgment interest under *Civ. Code § 3291* is to encourage settlements by creating a risk of increased cost to the defendant [*Gutierrez v. State Ranch Services (1983) 150 Cal. App. 3d 83, 88, 198 Cal. Rptr. 16* (rejecting retroactive application to offers made prior to January 1, 1983)]. There is no requirement that the complaint include a separate prayer for prejudgment interest [*Lakin v. Watkins Associated Industries (1993) 6 Cal. 4th 644, 662 n.12, 25 Cal. Rptr. 2d 109, 863 P.2d 179*]. The award is not considered to be in the nature of additional damages [*Mendez v. Kurten (1985) 170 Cal. App. 3d 481, 486, 215 Cal. Rptr. 924*].

The award is mandatory if the conditions of the statute are met, even if the defendant ultimately offers to settle for an amount that exceeds the judgment [*Morin v. ABA Recovery Service, Inc. (1987) 195 Cal. App. 3d 200, 205-207, 240 Cal. Rptr. 509*]. The plaintiff bears the burden of proving entitlement to prejudgment interest [*Morin v. ABA Recovery Service, Inc. (1987) 195 Cal. App. 3d 200, 207-212, 240 Cal. Rptr. 509* ; *see* *Lakin v. Watkins Associated Industries (1993) 6 Cal. 4th 644, 657-662, 25 Cal. Rptr. 2d 109, 863 P.2d 179*].

A judgment does not operate to terminate rights to prejudgment interest under Code of *Civ. § 998* and *Civ. Code § 3291*, when that judgment is later vacated and a new trial is held [*Saakyan v. Modern Auto, Inc. (2002) 103 Cal. App. 4th 383, 389-392, 126 Cal. Rptr. 2d 674*].

[b] Definition of Personal Injury Action

Whether a claim is one for "personal injury" within the meaning of the statute depends on the nature of the action, not on the damages sought [*Holmes v. General Dynamics Corp. (1993) 17 Cal. App. 4th 1418, 1435-1437, 22 Cal. Rptr. 2d 172*]. The scope of the term is broader than "bodily injury," but does not encompass all actions sounding in tort. Actions that essentially involve invasion of a property right are not within the statute, even though damages for incidental emotional distress may be recoverable [*Gourley v. State Farm Mutual Automobile Insurance Co., (1991) 279 Cal. Rptr. 307, 806 P.2d 1342* .] It does encompass claims of emotional distress that are not merely incidental to an invasion of a property interest [*Lakin v. Watkins Associated Industries (1993) 6 Cal. 4th 644, 657 n.8, 25 Cal. Rptr. 2d 109, 863 P.2d 179* .] Under this distinction, prejudgment interest has been allowed, for example, on claims for defamation [*O'Hara v. Storer Communications, Inc. (1991) 231 Cal. App. 3d 1101, 1117-1119, 282 Cal. Rptr. 712*] and denied on claims for bad-faith insurance practices [*Gourley v. State Farm Mutual Automobile Insurance Co. (1991) 279 Cal. Rptr. 307, 806 P.2d 1342*] and wrongful termination in violation of public policy [*Holmes v. General Dynamics Corp. (1993) 17 Cal. App. 4th 1418, 1435-1437, 22 Cal. Rptr. 2d 172*]. The statute has been held to apply to actions brought on a strict products liability theory [*Fortman v. Hemco, Inc. (1989) 211 Cal. App. 3d 241, 262, 259 Cal. Rptr. 311*].

[c] Allocation of Award in Mixed Action

If a judgment awards both personal injury and other damages, prejudgment interest may be awarded only on the personal injury portion. A plaintiff who seeks recovery both for personal injury and other injury bears the burden of

proving what portion of the judgment constitutes damages for personal injury [*Lakin v. Watkins Associated Industries (1993) 6 Cal. 4th 644, 661, 25 Cal. Rptr. 2d 109, 863 P.2d 179*]. Special jury findings should be requested in order to allocate the damages awarded among the various injuries [*Morin v. ABA Recovery Service, Inc. (1987) 195 Cal. App. 3d 200, 211-212, 240 Cal. Rptr. 509*]. Interest is computed only on the part of the judgment that represents compensatory damages for personal injury; interest is not computed on any punitive damages that are awarded [*Lakin v. Watkins Associated Industries (1993) 6 Cal. 4th 644, 662-664, 25 Cal. Rptr. 2d 109, 863 P.2d 179*].

[d] Calculation of Amount of Prejudgment Interest

Prejudgment interest is awarded at the legal rate of 10 percent per annum, calculated from the date of the plaintiff's first *Section 998* offer that is exceeded by the judgment [*Civ. Code § 3291*]. When there are two successive unaccepted Section 998 offers tendered by a successful plaintiff in personal injury litigation and that plaintiff subsequently recovers a judgment in excess of either offer, the prejudgment interest awarded pursuant to *Civ. Code § 3291* begins from the date of the first offer [*Ray v. Goodman (2006) 142 Cal. App. 4th 83, 87-92, 47 Cal. Rptr. 3d 659]* .

Interest accrues until the judgment is satisfied [*Civ. Code § 3291*]. The 10-percent interest rate of *Civ. Code § 3291* is not combined with the 10-percent interest rate of *Code Civ. Proc. § 685.010(a)* (judgment bears 10-percent rate of interest from date judgment rendered) to give a combined interest rate of 20 percent, but instead is applied separately or conjunctively with *Code Civ. Proc. § 685.010(a)* to permit recovery of no more than a 10-percent rate of interest for the covered time period [*Mendez v. Kurten (1985) 170 Cal. App. 3d 481, 487, 215 Cal. Rptr. 924* (applied separately or conjunctively so as not to offend *Cal. Const., art. XV, § 1*)].

[e] Effect of Policy-Limit Offer by Insurer

An insurer may, if authorized by appropriate policy language, terminate any obligation to pay prejudgment interest assessed against its insured under *Civ. Code § 3291* by making an offer to settle for the policy limits. There is no requirement that the insurer show a reasonable possibility that the policy-limits offer will be accepted [*State Farm Mut. Auto. Ins. Co. v. Crane (1990) 217 Cal. App. 3d 1127, 1134-1138, 266 Cal. Rptr. 422*].

[f] Application During Arbitration

In addition to proceedings in court, *Civ. Code § 3291* has been held to apply to offers made and judgments entered in cases resolved by judicial arbitration [*Wagy v. Brown (1994) 24 Cal. App. 4th 1, 8-10, 29 Cal. Rptr. 2d 48* ; *Joyce v. Black (1990) 217 Cal. App. 3d 318, 322-323, 266 Cal. Rptr. 8*]. It has been held not to apply to cases resolved by contractual arbitration [*Woodard v. Southern Cal. Permanente Medical Group (1985) 171 Cal. App. 3d 656, 665-666, 217 Cal. Rptr. 514*]. By its terms, the statute does not apply to a public entity or to a public employee for an act or omission within the scope of employment [*Civ. Code § 3291*].

[9] Determination of Whether More Favorable Judgment Was Obtained

[a] Post Offer Costs Excluded

In determining whether the plaintiff obtains a more favorable judgment, the court or arbitrator must exclude the postoffer costs [*Code Civ. Proc. § 998(c)(2)(A)*].

The Legislature's intent in enacting *Code Civ. Proc. § 998(c)(2)(A)* was to supersede the holding in *Encinitas Plaza Real v. Knight (1989) 209 Cal. App. 3d 996, 1001, 1003, 257 Cal. Rptr. 646* , that attorney's fees awarded to the prevailing party were not costs for purposes of Section 998 but were a part of the judgment [*Code Civ. Proc. § 998(c)(2)(B)*].

[b] Joint Offers

In the case of an offer made by or to multiple parties, whether a party has obtained a more favorable judgment may require that a joint offer be properly apportioned among the parties [*see Hurlbut v. Sonora Community Hospital (1989) 207 Cal. App. 3d 388, 409-410, 254 Cal. Rptr. 840*]. For further discussion of joint offers, see *§ 520.14[2]*.

[c] Structured Settlements

Offers that are completely or partially in the form of a structured settlement are neither expressly authorized nor prohibited by the statute [*see Code Civ. Proc. § 998*]. However, such an offer, if it is made, involves valuation problems. The offeror bears the burden of proving that the present value of the payments called for under the offer is less or more than the amount obtained at trial [*Hurlbut v. Sonora Community Hospital (1989) 207 Cal. App. 3d 388, 408-409, 254 Cal. Rptr. 840* ; *see Atkins v. Strayhorn (1990) 223 Cal. App. 3d 1380, 1398-1399, 273 Cal. Rptr. 231*].

[10] Post Offer Debt Payments in Action on Debt

In a contract action on a debt, when the defendant makes a Section 998 offer that is not accepted, and then afterwards makes a voluntary payment on the debt that is the subject of the action, this payment to plaintiff must be included with any judgment awarded in plaintiff's favor, when determining whether or not the judgment is less favorable than the settlement offer for purposes of awarding post offer costs under *Code Civ. Proc. § 998* [*Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co. (1999) 73 Cal. App. 4th 324, 334-335, 86 Cal. Rptr. 2d 398*]. For example, in *Mesa Forest Products*, defendant in a contract action on a debt made a settlement offer to plaintiff of $62,690. After the offer expired, the defendant made a voluntary and unilateral payment on the debt in the amount of $62,690. The jury, after having been appraised of defendant's $62,690 payment, awarded plaintiff damages of only $13,205. Defendant argued that it was entitled to post offer costs and fees because the offer exceeded this award. The trial court, however, compared the amount of the offer not just with the amount of the award, but with the amount of the sum of the award, plaintiff's pre-offer costs, and the defendant's payment, the last of which the jury had applied to offset the damages it awarded to plaintiff. As this total exceeded the unaccepted offer, the trial court ruled that plaintiff, rather than defendant, was entitled to recover post offer costs and fees. The court of appeal agreed, reasoning that to hold otherwise would lead to absurd results contrary to the purpose underlying *Code Civ. Proc. § 998* [*Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co. (1999) 73 Cal. App. 4th 324, 334-335, 86 Cal. Rptr. 2d 398*].

[11] Post-Offer Payments Not Under Contract

Post-offer payments by a non-prevailing party who made the Section 998 offer to the prevailing party can be properly included in the determination of whether the prevailing party obtained a more favorable recovery, even when the action is not on a contract. For example, a condominium owner was found to have obtained a recovery more favorable than the Section 998 offer made by the homeowner's association she sued for failure to properly maintain the common areas, resulting in damage to her unit. She sued for damages and declaratory relief. The association admitted its liability and agreed to perform its obligations. After making the Section 998 offer, which the owner refused, the association paid her sums of money for a variety of things. The trial court specifically added that sum to the jury's award to determine that the award was more favorable than the offer. The court of appeal agreed with the trial court's analysis and held that when a Section 998 offer includes a nonmonetary component, the offer must be evaluated in light of all the terms and conditions attached to it, not just the monetary component, in order to determine whether the plaintiff has received a more favorable judgment. When the reverse is true, i.e., the offer contains only a monetary offer but the relief recovered is both monetary and nonmonetary, the trial court must also consider the offer in light of the totality of the recovery [*Arias v. Katella Townhouse Homeowners Assn., Inc. (2005) 127 Cal. App. 4th 847, 853-856, 26 Cal. Rptr. 3d 113*].

[12] Post-Offer Prejudgment Interest

Prejudgment interest accruing after an Section 998 offer has been made is excluded from the judgment when determining whether the plaintiff obtained a judgment more favorable than the defendant's offer under *Code Civ. Proc.*

§ 998 [*Bodell Construction Co. v. Trustees of the California State University (1998) 62 Cal. App. 4th 1508, 1523-1527, 73 Cal. Rptr. 2d 450*].

[13] Determination if Offer Made in Good Faith

[a] Reasonableness of Offer

Offers made under *Code Civ. Proc. § 998* are subject to a good faith requirement [*Barba v. Perez (2008) 166 Cal. App. 4th 444, 450-451, 82 Cal. Rptr. 3d 715* (court can determine good faith of offer made before answer is filed); *Elrod v. Oregon Cummins Diesel, Inc. (1987) 195 Cal. App. 3d 692, 698, 241 Cal. Rptr. 108*]. Thus, if a party makes an unreasonable settlement offer that is rejected, even if the offeree fails to obtain a more favorable judgment, the offeror is barred from claiming costs from the offeree under *Code Civ. Proc. § 998* [*see* *Elrod v. Oregon Cummins Diesel, Inc. (1987) 195 Cal. App. 3d 692, 698-699, 241 Cal. Rptr. 108*].

The reasonableness of a settlement offer is evaluated in light of the circumstances existing at the time the offer is made and is a matter left to the discretion of the trial court [*Elrod v. Oregon Cummins Diesel, Inc. (1987) 195 Cal. App. 3d 692, 699-700, 241 Cal. Rptr. 108*].

A judgment that is more favorable than the offer is prima facie evidence that the offer was reasonable. The burden is on the offeree to prove unreasonableness [*Santantonio v. Westinghouse Broadcasting Co. (1994) 25 Cal. App. 4th 102, 117, 30 Cal. Rptr. 2d 486*]

[b] Measuring Reasonableness of Defendant's Offer

Two objective tests must be satisfied to determine whether a defendant's offer is reasonable. The first test is premised on information that was known or reasonably should have been known by the defendant. The court evaluates whether, based on such information, the defendant's offer represents a reasonable prediction of the amount of money, if any, defendant would have to pay plaintiff following a trial. The second test is premised on information known, or that should have been known, by the plaintiff [*Elrod v. Oregon Cummins Diesel, Inc. (1987) 195 Cal. App. 3d 692, 699, 241 Cal. Rptr. 108*].

[c] Measuring Reasonableness of Plaintiff's Offer

Although no California court has stated the test for determining the reasonableness of a plaintiff's settlement offer under *Code Civ. Proc. § 998*, it seems likely that courts will apply the two-part objective test used for defendants' offers. Thus, a court will determine whether the plaintiff objectively knew or should have known that his or her settlement offer was reasonable. Then, the court will determine whether or not the defendant knew or should have known the information on which the plaintiff's settlement offer was made.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsOffers of JudgmentCounteroffersCivil ProcedureSettlementsOffers of JudgmentMaking of OffersCivil ProcedureSettlementsOffers of JudgmentRejectionsCivil ProcedureSettlementsOffers of JudgmentTime LimitationsCivil ProcedureSettlementsOffers of JudgmentWithdrawalsTortsProcedureSettlementsOffers

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§ 520.15 Exceptions to Code Civ. Proc. § 998 and Civ. Code § 3291

[1] Eminent Domain Actions

The procedure for offers to compromise does not apply to an offer made by a plaintiff in an eminent domain proceeding [*Code Civ. Proc. § 998(g)(1)*].

[2] Inverse Condemnation

Code of Civil Procedure section 998 does not authorize an award of costs against an inverse condemnation plaintiff that obtains a judgment less favorable than the public entity's settlement offer, in an action in which the plaintiff shows that the governmental entity had interfered with the plaintiff's use of its property [*Orpheum Bldg. Co. v. San Francisco Bay Area Rapid Transit Dist. (1978) 80 Cal. App. 3d 863, 878, 146 Cal. Rptr. 5*], because an award of costs against a party whose property was taken or damaged by a governmental entity would reduce the just compensation mandated by the California Constitution [*Goebel v. City of Santa Barbara (2001) 92 Cal. App. 4th 549, 559, 111 Cal. Rptr. 2d 901*]. However, when the court determines there was no taking or damage by the governmental entity, there is no constitutional bar to assessing costs against an unsuccessful inverse condemnation plaintiff, and no policy reason to excuse the plaintiff from the operation of section 998 [*Goebel v. City of Santa Barbara (2001) 92 Cal. App. 4th 549, 559-560, 111 Cal. Rptr. 2d 901*].

[3] Family Law Act

Code of Civil Procedure section 998 does not apply to proceedings under the Family Law Act [*In re Marriage of Green (1989) 213 Cal. App. 3d 14, 23-24, 261 Cal. Rptr. 294*].

[4] Enforcement Actions

Code Civ. Proc. § 998(g)(2) specifically excludes any enforcement action brought in the name of the people of the State of California by the Attorney General, a district attorney, or city attorney, acting as public prosecutor, from the provisions of section 998 [*Civ. Code § 998(g)(2)*]. However, before the January 1, 2002, effective date of this exception,

the court held that it is not against public policy to award defendant expert witness fees in an action for civil penalties, restitution or injunctive relief brought by the Attorney General pursuant to *Bus. & Prof. Code §§ 17200, 17500* [*People ex rel. Lockyer v. Fremont General Corp. (2001) 89 Cal. App. 4th 1260, 1265-1267, 108 Cal. Rptr. 2d 127*].

[5] Arbitration

It has been held that *Code Civ. Proc. § 998* and *Civ. Code § 3291* do not apply to arbitration [*Woodard v. Southern Cal. Permanente Medical Group (1985) 171 Cal. App. 3d 656, 665-666, 217 Cal. Rptr. 514*]. However, this rule has been limited to judgments entered after contractual arbitration; the statutes have been held to apply to judgments entered after judicial arbitration proceedings [*Wagy v. Brown (1994) 24 Cal. App. 4th 1, 8-10, 29 Cal. Rptr. 2d 48* ; *Joyce v. Black (1990) 217 Cal. App. 3d 318, 322-323, 266 Cal. Rptr. 8* ; *see also § 520.14[8]*. For discussion of arbitration fees and expenses, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* , Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* , and Ch. 34, *Contractual Arbitration: Judical Review* .

[6] Relinquishment of Additional Claims

Costs may not be shifted under *Code Civ. Proc. § 998* if the settlement offer requires relinquishment of claims in addition to those contained in the complaint that is the basis of the litigation being settled. For example, if a defendant in a personal injury case offers a plaintiff a particular amount on the condition that the plaintiff release the defendant, its attorneys, and its insurance carrier from liability for bad faith or any other causes of action related to the injury, the plaintiff rejects the offer, and the jury awards plaintiff less than the offered amount, the offer is ineffective to shift costs to the plaintiff [*Valentino v. Elliott Sav-On Gas, Inc. (1988) 201 Cal. App. 3d 692, 701, 247 Cal. Rptr. 483*]. However, the requirement of a general release as part of the settlement does not defeat an award of costs under *Code Civ. Proc. § 998* [*Linthicum v. Butterfield (2009) 175 Cal. App. 4th 259, 271-272, 95 Cal. Rptr. 3d 538]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsOffers of JudgmentGeneral OverviewTortsProcedureSettlementsOffers

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§ 520.16 Settlement With Less Than All Joint Codefendants

[1] In General

If a settlement is entered into in good faith between the plaintiff and one or more, but less than all, tortfeasors claimed to be liable for the same tort or coobligors mutually subject to contribution rights, it has the following effects: (1) it does not discharge any other party from liability to the plaintiff unless its terms so provide [*Code Civ. Proc. § 877(a)*]; (2) it reduces the claims against other parties in the amount stipulated in the settlement or in the amount of consideration paid for it, whichever is the greater [*Code Civ. Proc. § 877(a)*]; and (3) it discharges the settling defendant from all liability for any "contribution" to any other party [*Code Civ. Proc. § 877(b)*; *see Goodman v. Lozano (2010) 47 Cal. 4th 1327, 1333, 104 Cal. Rptr. 3d 219, 223 P.3d 77* ; *American Motorcycle Assn. v. Superior Court (1978) 20 Cal. 3d 578, 604, 146 Cal. Rptr. 182, 578 P.2d 899* (extending meaning of term "contribution" to encompass judicially created doctrine of comparative or equitable indemnity)]. *Code Civ. Proc. § 877* does not apply to coobligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves [*Code Civ. Proc. § 877(c)*]. Nor does it apply to contract debts on contracts entered into before January 1, 1988 [*Code Civ. Proc. § 877(d)*].

As used in *Code Civ. Proc. § 877*, the "claims" that are reduced as to the remaining tortfeasors, due to a settlement with another tortfeasor, ordinarily do not encompass costs awarded to the prevailing party after the issue of liability has been determined, unless the settlement so specified [*Reed v. Wilson (1999) 73 Cal. App. 4th 439, 441, 86 Cal. Rptr. 2d 510*].

Some courts allow a nonsettling defendant to introduce a settlement into evidence, and then instruct the jury to reduce any verdict against the nonsettling defendant by the amount paid in settlement [*see Helling v. Lew (1972) 28 Cal. App. 3d 434, 440, 104 Cal. Rptr. 789*]. Other courts inform the jury of a settlement, but also instruct the jury that the jury's award of damages should be made without considering any amount that the plaintiff may have received in settlement and that after the jury has returned a verdict, the judge will make the proper deduction from the award of damages [*CACI No. 3926*; *see also BAJI No. 14.64*]. Still other courts take the view that the presentation of evidence concerning the amount or fact of settlement to the jury is confusing and can lead to abuse in argument [*Shepherd v. Walley (1972) 28 Cal. App. 3d 1079, 1083, 105 Cal. Rptr. 387*], and these courts reduce the verdict award by the amount paid in

settlement before entering judgment on the verdict [*Syverson v. Heitmann (1985) 171 Cal. App. 3d 106, 111, 214 Cal. Rptr. 581* ; *see also Brawley v. J.C. Interiors, Inc. (2008) 161 Cal. App. 4th 1126, 1133-1134, 74 Cal. Rptr. 3d 832*].

When each party sues the other for breach of contract, and each party is found by the jury to have breached the contract, the proper procedure for the court is to offset the jury's damages award findings against each other, just as the court would do if there had been no settlement, and to then apply the settlement credit to any net amount of damages for which the nonsettling defendant would have been liable if there had been no settlement [*Brawley v. J.C. Interiors, Inc. (2008) 161 Cal. App. 4th 1126, 1134, 74 Cal. Rptr. 3d 832*].

For further discussion of the effect of good faith settlements, including discussion of the standards and procedures for making the good faith determination, see *Ch. 300, Indemnity and Contribution, § 300.60* et seq.

[2] Interaction With Proposition 51

The effect of a settlement on the liabilities of nonsettling defendants and on indemnity and contribution rights are affected by the Fair Responsibility Act of 1986 (Proposition 51), which abolished the rule of joint and several liability for certain "noneconomic" damages [*see Civ. Code §§ 1431.1-1431.5*]. Proposition 51 is discussed in *Ch. 300, Indemnity and Contribution, § 300.60* et seq. Many of the issues surrounding the interaction of Proposition 51 and settlements are unresolved. For discussion of these issues, see N. Levy, M. Golden & L. Sacks, eds., California Torts, Ch. 74 (Matthew Bender).

[3] Sliding Scale Recovery Agreement

[a] Initial Requirements

When an agreement or covenant is made that provides for a sliding scale recovery agreement between one or more, but not all, alleged defendant tortfeasors and the plaintiff or plaintiffs, the following must be done:

> (1) The parties entering into any such agreement or covenant must promptly inform the court in which the action is pending of the existence of the agreement or covenant and its terms and provisions; and
>
> (2) If the action is tried before a jury and a defendant party to the agreement is called as a witness at trial, the court must, on motion of a party, disclose to the jury the existence and content of the agreement or covenant, unless the court finds that the disclosure will create substantial danger of undue prejudice, of confusing the issue, or of misleading the jury [*Code Civ. Proc. § 877.5(a)*].

The amended version of *Code Civ. Proc. § 877.5*, enacted in 1987, which applies to actions based on acts or omissions occurring on or after January 1, 1988 [1987 Cal. Stats, ch. 1202, § 2], provides that the information disclosed to the jury must be no more than necessary to inform the jury of the possibility that the agreement may bias the testimony of the witness [*Code Civ. Proc. § 877.5(a)(2)*].

[b] Definition

As used in *Code Civ. Proc. § 877.5(a)*, a "sliding scale recovery agreement" is an agreement or covenant between a plaintiff or plaintiffs and one or more, but not all, alleged tortfeasor defendants that limits the liability of the agreeing tortfeasor defendants to an amount that is dependent on the amount of recovery that the plaintiff is able to recover from the nonagreeing defendant or defendants. This includes, but is not limited to, agreements within the scope of *Code Civ. Proc. § 877*, and an agreement in the form of a loan from the agreeing tortfeasor defendant or defendants to the plaintiff or plaintiffs that is repayable in whole or in part from the recovery against the nonagreeing tortfeasor defendant or defendants [*Code Civ. Proc. § 877.5(b)*].

[c] Notice of Intent

In actions based on acts or omissions occurring on or after January 1, 1988, no sliding scale agreement is effective unless, at least 72 hours before entering into the agreement, a notice of intent to enter an agreement has been served on all nonsignatory alleged defendant tortfeasors [*Code Civ. Proc. § 877.5(c)*]. On a showing of good cause, the court or a judge of the court may allow a shorter time. The failure to comply with these notice requirements does not constitute good cause to delay commencement of trial [*Code Civ. Proc. § 877.5(c)*].

For a discussion of the validity of sliding-scale agreements, or "Mary Carter" agreements as they are commonly referred to, see *Ch. 300, Indemnity and Contribution, § 300.60* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsReleases From LiabilityMary Carter AgreementsTortsProcedureMultiple DefendantsContributionGeneral OverviewTortsProcedureSettlementsMultipartiesGeneral OverviewTortsProcedureSettlementsMultipartiesPartial Settlements

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§ 520.17 Communication of Settlement Offer to Client

An attorney must communicate promptly to his or her client all amounts, terms, and conditions of any written offer of settlement made by or on behalf of an opposing party. The term "client" includes a person employing the attorney who possesses the authority to accept an offer of settlement or, in a class action, who is a representative of the class [*Bus. & Prof. Code § 6103.5(a)*; *Cal. Rules Prof. Conduct, Rule 3-510*]. Any oral offer of settlement made to a client in a civil matter should also be communicated to the client if it constitutes a significant development in the case [*see Cal. Rules Prof. Conduct, Rules 3-500, 3-510*; *see also Ch. 72, Attorney Practice and Ethics, § 72.270* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
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46-520 California Forms of Pleading and Practice--Annotated § 520.18

§ 520.18 Notice to Court and Arbitrator of Settlement

If an entire case is settled, each plaintiff or other party seeking affirmative relief must immediately file written notice of the settlement with the court and serve the notice on all parties and any arbitrator or other court-connected ADR neutral involved in the case. Each plaintiff or other party seeking affirmative relief must also immediately give oral notice to all of them if a hearing, conference, or trial is scheduled to take place within 10 days [*Cal. Rules of Ct., Rule 3.1385(a)(1)*].

If the plaintiff or other party seeking affirmative relief does not notify an arbitrator or other court-connected ADR neutral involved in the case of a settlement at least two days before a scheduled hearing or session with that arbitrator or neutral, the court may order the party to compensate the arbitrator or other neutral for the scheduled hearing time. The amount of compensation ordered by the court must not exceed the maximum amount of compensation the arbitrator would be entitled to receive for service as an arbitrator under *Code Civ. Proc. § 1141.18(b)* or that the neutral would have been entitled to receive for service as a neutral at the scheduled hearing or session [*Cal. Rules of Ct., Rule 3.1385(a)(2)*].

The Judicial Council has adopted Form CM-200 for mandatory use as the Notice of Settlement. For an illustrative reproduction of the form, see *§ 520.114*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureSettlementsGeneral OverviewCivil ProcedurePretrial MattersGeneral OverviewContracts LawTypes of ContractsSettlement Agreements

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§ 520.19 Mandatory Request for Dismissal

Unless a settlement is conditional or involves the compromise of the claim of a minor or person with a disability, each plaintiff or other party seeking affirmative relief must serve and file a request for dismissal of the entire case within 45 days after the date of settlement of the case. If the plaintiff or other party required to serve and file the request does not do so, the court must dismiss the entire case 45 days after it receives notice of settlement unless good cause is shown why the case should not be dismissed [*Cal. Rules of Ct., Rule 3.1385(b)*].

If the settlement agreement conditions dismissal on the satisfactory completion of specified terms that are not to be performed within 45 days of the settlement, the notice of conditional settlement served and filed by each plaintiff or other party seeking affirmative relief must specify the date by which the dismissal is to be filed. If the plaintiff or other party required to serve and file a request for dismissal within 45 days after the dismissal date specified in the notice does not do so, the court must dismiss the entire case unless good cause is shown why the case should not be dismissed [*Cal. Rules of Ct., Rule 3.1385(c)*].

If the settlement of the case involves the compromise of the claim of a minor or person with a disability, the court may not hold an order to show cause hearing before the court has held a hearing to approve the settlement, provided the parties have filed appropriate papers to seek court approval of the settlement [*Cal. Rules of Ct., Rule 3.1385(d)*].

If a party who has served and filed a notice of settlement under *Cal. Rules of Ct., Rule 3.1385(a)* determines that the case cannot be dismissed within the prescribed 45 days, that party must serve and file a notice and a supporting declaration advising the court of that party's inability to dismiss the case within the prescribed time, showing good cause for its inability to do so, and proposing an alternative date for dismissal. The notice and a supporting declaration must be served and filed at least five court days before the time for requesting dismissal has elapsed. If good cause is shown, the court must continue the matter to allow additional time to complete the settlement. The court may take other actions that may be appropriate for the proper management and disposition of the case [*Cal. Rules of Ct., Rule 3.1385(e)*].

For discussion and forms relating to filing of a voluntary dismissal before trial, see Ch. 212, *Dismissal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsNoticesGeneral OverviewCivil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewContracts LawTypes of ContractsSettlement Agreements

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Chapter 520 SETTLEMENT AND RELEASE
PART II. LEGAL BACKGROUND
A. Settlement

46-520 California Forms of Pleading and Practice--Annotated § 520.20

§ 520.20 Enforcement of Settlement Agreement

Settlement agreements are contracts and are governed by the legal principles applicable to contracts in general [*Nicholson v. Barab (1991) 233 Cal. App. 3d 1671, 1681, 285 Cal. Rptr. 441*]. Thus, a settlement may be enforced as any other contract, including by way of an equitable action for specific performance [*Gopal v. Yoshikawa (1983) 147 Cal. App. 3d 128, 132, 195 Cal. Rptr. 36* ; *see also Barndt v. County of Los Angeles (1989) 211 Cal. App. 3d 397, 403-406, 259 Cal. Rptr. 372* (provisions in settlement agreement requiring that party be reinstated to employment are not specifically enforceable)]. For further discussion and forms, see Ch. 528, *Specific Performance* .

Unless a writing is required by a statute of frauds, oral settlement agreements are enforceable in the same manner as oral agreements in general. If the party proves the oral settlement agreement by substantial evidence and the defendant proffers no valid defense, a court will enter judgment enforcing the oral agreement [*see Ryan v. Garcia (1994) 27 Cal. App. 4th 1006, 1009, 33 Cal. Rptr. 2d 158*]. Settlement agreements are not exempt from the statutes of frauds if one would otherwise apply [*Nicholson v. Barab (1991) 233 Cal. App. 3d 1671, 1681-1683, 285 Cal. Rptr. 441* (*Civ. Code § 1624* applies to settlement agreement for sale of real property); *see Texaco, Inc. v. Ponsoldt (9th Cir. 1991) 939 F.2d 794, 800-801* (considering divisibility of settlement agreement partially within statute of frauds); *Pietrobon v. Libarle (2006) 137 Cal. App. 4th 992, 998-999, 40 Cal. Rptr. 3d 718* (statute of frauds did not render settlement agreement invalid, even though agreement by its terms was not to be performed within one year from making and defendant did not sign agreement, where defendant agreed to terms of settlement on record of settlement hearing and affirmed agreement and its terms in his testimony at trial of action to enforce agreement; *see also § 520.21*].

A variety of statutes of limitation apply to actions to enforce settlement agreements, depending on the facts. In one case, the four-year statute of limitations for a written contract [*Code Civ. Proc. § 337*] applied, even though the defendant had not signed the settlement agreement drafted by his attorney, because defendant had agreed to the specific terms in open court at the settlement proceeding. Further, at trial, defendant admitted that he had agreed to the settlement and reaffirmed that the terms to which he had agreed were those set forth in the written settlement agreement prepared by his attorney [*Pietrobon v. Libarle (2006) 137 Cal. App. 4th 992, 997-998, 40 Cal. Rptr. 3d 718* ; *see also Amen v. Merced County Title Co. (1962) 58 Cal. 2d 528, 25 Cal. Rptr. 65, 375 P.2d 33* (when party has agreed to writing, there is no reason to invoke two-year statute of limitations applicable to oral agreements; four-year statute of limitations,

unlike statute of frauds, does not require writing be signed by party to be charged)].

In addition to contractual remedies, some settlements may be enforced by a special motion under *Code Civ. Proc. § 664.6*, by which disputes of fact may be resolved [*see Skulnick v. Roberts Express, Inc. (1992) 2 Cal. App. 4th 884, 889, 3 Cal. Rptr. 2d 597*]. For further discussion, see *§ 520.21*. However, *Code Civ. Proc. § 664.6* does not apply when the underlying matter has been dismissed and the parties did not request that the court retain jurisdiction either in a writing signed by both parties themselves, or orally before the court at the time of the stipulated settlement as provided in *Code Civ. Proc. § 664.6* [*Pietrobon v. Libarle (2006) 137 Cal. App. 4th 992, 996, 40 Cal. Rptr. 3d 718* ; *Wackeen v. Malis (2002) 97 Cal. App. 4th 429, 433, 118 Cal. Rptr. 2d 502]* . In that situation, the party seeking to enforce the agreement is left to pursue enforcement of the settlement agreement by means of a separate action. It is worthy of note, however, that matters such as statutes of limitation and the ability to bring an absent litigant back into court make enforcement of a settlement agreement under *Code Civ. Proc. § 664.6* preferable to a separate suit [*Pietrobon v. Libarle (2006) 137 Cal. App. 4th 992, 996* -997, *40 Cal. Rptr. 3d 718* ; *Wackeen v. Malis (2002) 97 Cal. App. 4th 429, 441, 118 Cal. Rptr. 2d 502]* .

Settlement may also be enforced by a motion for summary judgment under *Code Civ. Proc. § 437c* [*see Kilpatrick v. Beebe (1990) 219 Cal. App. 3d 1527, 1529-1530, 269 Cal. Rptr. 52* (enactment of *Code Civ. Proc. § 664.6* did not preclude enforcement of oral, out-of-court settlement agreement by summary judgment motion)]. However, summary judgment is precluded if there are disputed facts [*see Hastings v. Matlock (1980) 107 Cal. App. 3d 876, 882-883, 166 Cal. Rptr. 229*]. For further discussion of summary judgment, see Ch. 537, *Summary Judgment* .

Settlement may also be raised as an affirmative defense [*see Thompson v. Williams (1989) 211 Cal. App. 3d 566, 571, 259 Cal. Rptr. 518*]. For discussion, see *§§ 520.22* and *520.23*, and Ch. 26, *Answers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementBreach of Contract ActionsContracts LawTypes of ContractsSettlement Agreements

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§ 520.21 Motion Under Code Civ. Proc. § 664.6

[1] Nature of Motion

If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court may entertain a motion to enter judgment pursuant to the terms of the settlement [*Code Civ. Proc. § 664.6*]. Under *Code Civ. Proc. § 664.6*, a party who agrees to a settlement in writing outside the presence of the court may enforce it against a party who agreed to the same settlement orally before the court [*1538 Cahuenga Partners, LLC v. Turmeko Properties, Inc. (2009) 176 Cal. App. 4th 139, 143, 97 Cal. Rptr. 3d 552* (*Code Civ. Proc. § 664.6* does not require that party to be bound consent to settlement "on the record," only that party consent to it "orally before the court"); *Elyaoudayan v. Hoffman (2003) 104 Cal. App. 4th 1421, 129 Cal. Rptr. 2d 41*]. For a form for a motion to enter judgment under *Code Civ. Proc. § 664.6*, *see § 520.115*.

Code Civ. Proc. § 664.6 provides a summary procedure by which the trial court can specifically enforce an agreement settling pending litigation without the need of a second lawsuit [*Timney v. Lin (2003) 106 Cal. App. 4th 1121, 1125, 131 Cal. Rptr. 2d 387* ; *Kirby v. Southern Cal. Edison Co. (2000) 78 Cal. App. 4th 840, 843, 93 Cal. Rptr. 2d 223*]. For *Code Civ. Proc. § 664.6* to apply, however, there must be pending litigation; it will not apply to a settlement reached before a lawsuit is filed [*Kirby v. Southern Cal. Edison Co. (2000) 78 Cal. App. 4th 840, 844-846, 93 Cal. Rptr.2d 223* ; *see also Housing Group v. United Nat. Ins. Co. (2001) 90 Cal. App. 4th 1106, 109 Cal. Rptr. 2d 497* (parties engaged in private dispute resolution may not stipulate to appointment of judicial referee or judge pro tempore to secure settlement enforceable under *Code Civ. Proc. § 664.6* unless they seek reference in pending litigation)]. *Code Civ. Proc. § 664.6* does not apply in an ordinary civil action after a judgment, unrelated to the alleged settlement and therefore containing no provision for continuing jurisdiction to enforce it, has been entered and has become final in the sense that the time for appeal has passed [*Walton v. Mueller (2009) 180 Cal. App. 4th 161, 171-172, 102 Cal. Rptr. 3d 605]* .

If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement [*Code Civ. Proc. § 664.6*]. The latter provision, added by amendment effective January 1, 1994, is a change from prior law, under which the court had no subject matter jurisdiction to entertain a

motion if the action had been dismissed pursuant to the agreement [*see Viejo Bancorp, Inc. v. Wood (1989) 217 Cal. App. 3d 200, 206-208, 265 Cal. Rptr. 620* ; *but see Basinger v. Rogers & Wells (1990) 220 Cal. App. 3d 16, 21-23, 269 Cal. Rptr. 332* (noting that court could set aside voluntary dismissal under *Code Civ. Proc. § 473* on ground of mistake, inadvertence, surprise, or excusable neglect, and then enforce settlement)]. When the parties do not request continuing jurisdiction, the court has no subject matter jurisdiction on motions *Code Civ. Proc. § 664.6* once the suit has been dismissed. The parties' request for retention of jurisdiction must satisfy the same formalities that courts and the Legislature have imposed generally on Section 664.6 motions and the settlement agreements they seek to enforce, and the motion must be made prior to the dismissal of the suit. The request must be made orally before the court or in a signed writing, and it must be made by the parties, not by their attorneys, spouses or other agents. If after the suit has been dismissed, a party cannot present a request for retention of jurisdiction that meets all of these requirements, enforcement of the agreement must be left to a separate lawsuit [*Wackeen v. Malis (2002) 97 Cal. App. 4th 429, 433, 118 Cal. Rptr. 2d 502*].

On its face, *Code Civ. Proc. § 664.6* appears to provide a vehicle by which parties who have settled their litigation may move by stipulation to have judgment entered according to the terms of the settlement. The statute does not particularly suggest an adversary proceeding. However, sometimes parties appear to have reached an oral agreement at a judicially supervised settlement conference, but then are unable to later reduce the agreement to writing, perhaps because one party is attempting to renege on the settlement. In such a case, a Section 664.6 motion is often brought not by parties who are stipulating to a judgment, but by a party who wants to enforce the settlement against a party who now claims that there had been no sufficient meeting of the minds [*see, e.g., Datatronic Systems Corp. v. Speron, Inc. (1986) 176 Cal. App. 3d 1168, 1174-1175, 222 Cal. Rptr. 658*]. This use of the statute has generated a number of appellate opinions and some significant disagreements over its interpretation.

Code Civ. Proc. § 664.6 cannot be used to enforce a settlement signed by a party's agent, rather than the party itself, when the agent had sole and exclusive authority to settle claims on the party's behalf. The summary, expedited enforcement procedure afforded by *Code Civ. Proc. § 664.6* is available only when a settlement satisfies the statutory requirements designed to ensure the parties have actually consented to the terms of the settlement. A writing not signed by one of the parties does not satisfy *Code Civ. Proc. § 664.6* [*Gauss v. GAF Corp. (2002) 103 Cal. App. 4th 1110, 1112, 127 Cal. Rptr. 2d 370* (mass tort settlement silent as to extent of party's obligation could not be enforced under *§ 664.6*)].

Even though there is a strong public policy favoring settlement, *Code Civ. Proc. § 664.6* does not allow a court to endorse or enforce a provision in a settlement agreement or stipulation that is illegal, contrary to public policy, or unjust [*Timney v. Lin (2003) 106 Cal. App. 4th 1121, 1127, 131 Cal. Rptr. 2d 387*]. In addition, a judgment omitting material terms of the parties' settlement fails to accurately reflect their agreement and therefore fails to comply with *Code Civ. Proc. § 664.6* [*Hines v. Lukes (2008) 167 Cal. App. 4th 1174, 1185, 84 Cal. Rptr. 3d 689*].

[2] Determination That Settlement Is Binding

A Section 664.6 motion may be heard even if there is a dispute of fact regarding the alleged settlement provided that there is a sufficient meeting of the minds between the parties for the settlement to be binding [*In re Marriage of Assemi (1994) 7 Cal. 4th 896, 905, 30 Cal. Rptr. 2d 265, 872 P.2d 1190* ; *see Malouf Bros. v. Dixon (1991) 230 Cal. App. 3d 280, 283-284, 281 Cal. Rptr. 235*] In determining whether the parties entered into a binding settlement, the trial court should consider the following:

- Whether the material terms of the settlement were explicitly defined;

- Whether the supervising judicial officer questioned the parties regarding their understanding of the terms; and

- Whether the parties expressly acknowledged their understanding of, and agreement to be bound by, those terms.

In making these determinations, the court may consider declarations of the parties and their counsel, any transcript of the stipulation orally presented and recorded by a certified reporter, and any additional oral testimony [*In re Marriage of Assemi (1994) 7 Cal. 4th 896, 911, 30 Cal. Rptr. 2d 265, 872 P.2d 1190*]. The judge who presided over the settlement conference may also preside over the Section 664.6 hearing and rely on his or her own recollection [*see Kohn v. Jaymar-Ruby, Inc. (1994) 23 Cal. App. 4th 1530, 1533, 28 Cal. Rptr. 2d 780*]. The standard governing review of the trial court's determination is whether the court's ruling is supported by substantial evidence [*In re Marriage of Assemi (1994) 7 Cal. 4th 896, 911, 30 Cal. Rptr. 2d 265, 872 P.2d 1190* ; *Conservatorship of McElroy (2002) 104 Cal. App. 4th 536, 544, 128 Cal. Rptr. 2d 485* .

When enforcing a settlement under *Code Civ. Proc. § 664.6*, the court may not supply material terms not agreed to by the parties. The power to enforce a settlement agreement extends only to those terms actually agreed upon by the parties [*Weddington Productions, Inc. v. Flick (1998) 60 Cal. App. 4th 793, 817-819, 71 Cal. Rptr. 2d 265*]. In addition, a judgment omitting material terms of the parties' settlement fails to accurately reflect their agreement and therefore fails to comply with *Code Civ. Proc. § 664.6* [*Hines v. Lukes (2008) 167 Cal. App. 4th 1174, 1185, 84 Cal. Rptr. 3d 689*].

Leaving an unresolved term for future agreement is not invariably fatal, because a settlement may be enforceable under *Code Civ. Proc. § 664.6* if the parties agree the remaining issue will be decided by arbitration [*Lindsay v. Lewandowski (2006) 139 Cal. App. 4th 1618, 1623, 43 Cal. Rptr. 3d 846* ; *see Weddington Prods., Inc. v. Flick (1998) 60 Cal. App. 4th 793, 801, 71 Cal. Rptr. 2d 265* (parties theoretically could confer wide-ranging arbitration authority on arbitrator, even to extent of allowing arbitrator to write licensing agreement for them)]. However, the parties' agreement on the future means of resolution must be clear [*see, e.g., Lindsay v. Lewandowski (2006) 139 Cal. App. 4th 1618, 1622-1625, 43 Cal. Rptr. 3d 846* (stipulation for settlement was not enforceable under *Code Civ. Proc. § 664.6*, when court could not tell what parties meant when they provided for "binding mediation" of payment dispute)].

[3] Written Settlements

A written settlement agreement must be signed by the parties [*see Code Civ. Proc. § 664.6* ("if parties ... stipulate, in writing")]. The term "parties" in § 664.6 literally means the litigants personally and does not include the litigants' attorneys of record [*Levy v. Superior Court (1995) 10 Cal. 4th 578, 580, 586, 41 Cal. Rptr. 2d 878, 896 P.2d 171* (resolving conflicting decisions in the courts of appeals, *compare Diaz v. May (1993) 15 Cal. App. 4th 1268, 1273, 19 Cal. Rptr. 2d 409 with Nicholson v. Barab (1991) 285 Cal. Rptr. 441*); *Johnson v. Department of Corrections (1995) 38 Cal. App. 4th 1700, 1708, 45 Cal. Rptr. 2d 740* (applying *Levy* retroactively)]. Thus, for either a written or an oral settlement agreement to be enforceable, it must have been personally agreed to or signed by the litigant; an agreement entered only by the litigant's attorney is insufficient [*see Cortez v. Kenneally (1996) 44 Cal. App. 4th 523, 528, 51 Cal. Rptr. 2d 671*]. The written settlement agreement must be signed by both parties, not just the party to be charged, in order to be enforced [*Harris v. Rudin, Richman & Appel (1999) 74 Cal. App. 4th 299, 304-306, 87 Cal. Rptr. 2d 822*].

[4] Oral Settlements

An oral settlement must be made *before the court* [*Code Civ. Proc. § 664.6*]. However, *Code Civ. Proc. § 664.6* does not require that the party to be bound consent to the settlement "on the record," only that the party consent to it "orally before the court" [*1538 Cahuenga Partners, LLC v. Turmeko Properties, Inc. (2009) 176 Cal. App. 4th 139, 143, 97 Cal. Rptr. 3d 552*]. This requirement means that it must be at a judicially supervised proceeding [*Skulnick v. Roberts Express, Inc. (1992) 2 Cal. App. 4th 884, 889, 3 Cal. Rptr. 2d 597*]. The Calfornia Supreme Court has held that binding arbitration held before a retired judge according to the stipulation of the parties is such a proceeding and is "before the court" [*In re Marriage of Assemi (1994) 7 Cal. 4th 896, 906-910, 30 Cal. Rptr. 2d 265, 872 P.2d 1190*]. However, a deposition is not before the court, and a settlement placed on the record at a deposition may not be entered as a

stipulated judgment under *§ 664.6* [*City of Fresno v. Maroot (1987) 189 Cal. App. 3d 755, 762, 234 Cal. Rptr. 353* ; *Datatronic Systems Corp. v. Speron, Inc. (1986) 176 Cal. App. 3d 1168, 1173-1174, 222 Cal. Rptr. 658* ; *see* In re *Marriage of Assemi (1994) 7 Cal. 4th 896, 906, 30 Cal. Rptr. 2d 265, 872 P.2d 1190*].

There is a conflict of authority as to whether failure to comply with an applicable statute of frauds bars enforcement of an oral settlement agreement. It has been held that a statute of frauds is not a bar to enforcement under *Code Civ. Proc. 664.6* because judicial involvement ensures that the purpose behind the statute is fulfilled [*Kohn v. Jaymar-Ruby, Inc. (1994) 23 Cal. App. 4th 1530, 1534-1535, 28 Cal. Rptr. 2d 780* (involving alleged applicability of statute of frauds to confidentiality provision of agreement because it could not be performed in one year)]. However, another court has found that no policy considerations favor exempting judicially supervised settlement agreements from statutes of frauds and refused to enforce an oral settlement agreement that involved a transfer of real property [*Nicholson v. Barab (1991) 233 Cal. App. 3d 1671, 1683, 285 Cal. Rptr. 441*].

Disagreements between the parties can arise if they are unable to later reduce an oral agreement to writing, perhaps because one party was attempting to renege on the settlement [*see* discussion in *§ 520.21[1], [2]*]. A 1993 amendment to *Code Civ. Proc. § 664.6* attempted to resolve such problems by requiring parties to place an oral agreement *on the record* [*see* Stats. 1993, ch. 768], but this language has been repealed [Stats. 1994, ch. 587 § 7]. The court may consider oral testimony to resolve a conflict between the parties [*see* *In re Marriage of Assemi (1994) 7 Cal. 4th 896, 911, 30 Cal. Rptr. 2d 265, 872 P.2d 1190* ; *Casa de Valley View Owner's Assn. v. Stevenson (1985) 167 Cal. App. 3d 1182, 1189, 213 Cal. Rptr. 790*].

A nod of the head does not equate with oral consent. Unambiguous assent, expressed orally, *i.e.*, "uttered by the mouth or in words," is required for a settlement to be enforceable under *Code Civ. Proc. § 664.6* [*Conservatorship of McElroy (2002) 104 Cal. App. 4th 536, 550-551, 128 Cal. Rptr. 2d 485* , citing Webster's 3d New Int'l. Dict. (1993) p. 1585].

[5] Judgment Enforcing Settlement

Voluntary acceptance of any of the benefits of a settlement agreement precludes a party from subsequently appealing from the judgment enforcing the settlement [*Epstein v. DeDomenico (1990) 224 Cal. App. 3d 1243, 1246-1248, 274 Cal. Rptr. 521*].

A judge hearing a Section 664.6 motion may receive evidence, determine disputed facts, and enter the terms of a settlement agreement as a judgment. In ruling on a motion to enforce settlement, the judge necessarily has the power to resolve factual disputes relating to the agreement. For example, the judge has the power to extend a deadline for performance of the settlement agreement terms in favor of a party who is not at fault and against a party who is at fault. However, nothing in *Code Civ. Proc. § 664.6* authorizes a judge to create the material terms of a settlement, as opposed to deciding what terms the parties themselves previously agreed upon [*Hines v. Lukes (2008) 167 Cal. App. 4th 1174, 1185, 84 Cal. Rptr. 3d 689* (judgment omitting material terms of settlement failed to accurately reflect parties' agreement and therefore failed to comply with *Code Civ. Proc. § 664.6*); *Osumi v. Sutton (2007) 151 Cal. App. 4th 1355, 1359-1361, 60 Cal. Rptr. 3d 693]* .

For forms for use to bring a motion under *Code Civ. Proc. § 664.6* to enter judgment on a settlement agreement, see *Ch. 318, Judgments, § 318.40* et seq.

[6] Time for Motion

The courts of appeal are split on whether a motion under *Code Civ. Proc. § 664.6* to enforce the settlement must be brought within five years after the action is filed, to avoid dismissal of the pending litigation for want of prosecution [*see Code Civ. Proc. §§ 583.310-583.360* (dismissal for failure to bring matter to trial within five years after action

filed); *see* former *Code Civ. Proc. § 583(b)*]. Some courts have held that dismissal is not required and that an enforcement motion under *Code Civ. Proc. § 664.6* may be brought after five years [*Malouf Bros. v. Dixon (1991) 230 Cal. App. 3d 280, 284-285, 281 Cal. Rptr. 235* ; *Schiro v. Curci (1990) 220 Cal. App. 3d 840, 844-845, 269 Cal. Rptr. 639* ; *see Code Civ. Proc. § 583.340(c)*; *see also Brown & Bryant, Inc. v. Hartford Accident & Indemnity Co. (1994) 24 Cal. App. 4th 247, 252-256, 29 Cal. Rptr. 2d 144* (five-year period tolled during time when settlement was in effect even though condition precedent to dismissal never occurred); *Gorman v. Holte (1985) 164 Cal. App. 3d 984, 987-988, 211 Cal. Rptr. 34* (decided under prior law)].

However, another court has held to the contrary and required dismissal after five years despite the settlement agreement [*Varwig v. Leider (1985) 171 Cal. App. 3d 312, 315-316, 217 Cal. Rptr. 208* (decided under prior law)]. Under this view, if the pending litigation is dismissed pursuant to the five-year statutory limit, thus precluding a motion under *Code Civ. Proc. § 664.6*, the parties nevertheless retain their right to otherwise seek enforcement of the settlement agreement, which remains a contract governed by the general principles of contract law [*Varwig v. Leider (1985) 171 Cal. App. 3d 312, 316, 217 Cal. Rptr. 208*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsIncorporation in JudgmentsCivil ProcedureSettlementsSettlement AgreementsValidityContracts LawTypes of ContractsSettlement Agreements

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§ 520.22 Pleading Compromise and Settlement as Affirmative Defense

[1] In General

If a pleading sufficiently establishes a compromise and settlement of a controversy between parties, the compromise constitutes a valid defense to the action. A pleading sufficiently establishes a compromise if it alleges (1) a dispute in good faith over a legal claim, (2) offer and acceptance of the compromise, and (3) consideration [*Stub v. Belmont (1942) 20 Cal. 2d 208, 215-217, 124 P.2d 826* ; *see § 520.112*].

[2] Accord and Satisfaction

Accord and satisfaction may also be pleaded as an affirmative defense. There has been an accord and satisfaction of an unliquidated claim if all of the following conditions are satisfied [*Potter v. Pacific Coast Lumber Co. (1951) 37 Cal. 2d 592, 597, 234 P.2d 16* ; *Thompson v. Williams (1989) 211 Cal. App. 3d 566, 571, 259 Cal. Rptr. 518]* :

- There was a bona fide dispute between the parties;
- The debtor made it clear that acceptance of the amount tendered was subject to the condition that it was to be in full satisfaction of the creditor's claim;
- The creditor clearly understood, in accepting the amount tendered, that the debtor intended the remittance to constitute payment in full of the claim.

For a discussion and forms for use in settling a dispute by accord and satisfaction, see Ch. 6, *Accord and Satisfaction*.

[3] Pleading Tender in Action to Recover Money

In an action for the recovery of money only, the defendant may, as an affirmative defense, allege in the answer that before commencement of the action defendant had tendered to the plaintiff the full amount to which the plaintiff was entitled, and then deposit in court, for plaintiff, the amount so tendered. If the allegation is found to be true, the plaintiff

cannot recover costs, but must pay costs to the defendant [*Code Civ. Proc. § 1025*; *see § 520.113*]. The defendant may make a similar allegation in any action on a contract that specifically provides for an award of attorney's fees and costs incurred in enforcing the contract to one of the parties or to the prevailing party. If the allegation is found to be true, the defendant is deemed to be the prevailing party within the meaning of *Civ. Code § 1717*, whether or not he or she is the party specified in the contract, and is entitled to reasonable attorney's fees in addition to other costs [*see Civ. Code § 1717(a), (b)(2)*]. When the deposit has been made pursuant to *Civ. Code § 1717*, the court, on the application of any party to the action, must order the deposit to be invested in an insured, interest-bearing account. Interest on the amount is required to be allocated to the parties in the same proportion as the original funds are allocated [*Civ. Code § 1717(b)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewContracts LawPerformanceAccord & SatisfactionContracts LawTypes of ContractsSettlement Agreements

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§ 520.23 Supplemental Pleading and Trial of Separate Issue

If a compromise and settlement agreement has been entered into after the filing of a complaint or answer in an action, the plaintiff or defendant, respectively, may be allowed, on motion, to make a supplemental complaint or answer [*see Code Civ. Proc. § 464*; *see also* Ch. 21, *Amended and Supplemental Pleadings*]. If the issue of settlement has been properly pleaded, the issue may be separately determined pursuant to *Code Civ. Proc. § 597* in advance of any trial on the merits [*Hastings v. Matlock (1980) 107 Cal. App. 3d 876, 881, 883, 166 Cal. Rptr. 229* ; for discussion and forms relating to *Code Civ. Proc. § 597*, *see* Ch. 551, *Trial*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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46-520 California Forms of Pleading and Practice--Annotated § 520.24

§ 520.24 Rescinding or Opposing Enforcement of Settlement Agreement

A compromise and settlement agreement is subject to the general contract principles of rescission [*see Larsen v. Johannes (1970) 7 Cal. App. 3d 491, 503, 86 Cal. Rptr. 744* (mutual mistake as to legal effect of agreement); *Cilibrasi v. Reiter (1951) 103 Cal. App. 2d 397, 400, 229 P.2d 394* (fraud or overreaching); for discussion and forms relating to rescission, see Ch. 490, *Rescission and Restitution*]. However, a party must make an effort to rescind the agreement, including by offering to return any money received in consideration of the settlement [*see Myerchin v. Family Benefits, Inc. (2008) 162 Cal. App. 4th 1526, 1533-1537, 76 Cal. Rptr. 3d 816*]. For a general discussion of contract defenses that may be raised in opposition to the enforcement of a settlement agreement, see Ch. 140, *Contracts* .

An appropriate way to challenge a judgment entered pursuant to *Code Civ. Proc. § 998* is by a motion for relief under *Code Civ. Proc. § 473* [*Premium Commercial Services Corp. v. National Bank of California (1999) 72 Cal. App. 4th 1493, 1496, 86 Cal. Rptr. 2d 65*]. However, the judgment may not be vacated based on mistake or evidence of no intent, such as when a party forgets to include a cost provision in an offer to compromise [*Premium Commercial Services Corp. v. National Bank of California (1999) 72 Cal. App. 4th 1493, 1497, 86 Cal. Rptr. 2d 65*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsVoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsVoluntary DismissalsCourt OrdersGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsRescissionContracts LawTypes of ContractsSettlement Agreements

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46-520 California Forms of Pleading and Practice--Annotated § 520.25

§ 520.25 Effect of Settlement Negotiations on Statutory Time Limitations

Settlement negotiations may in some instances serve to estop a party from asserting the statute of limitations for filing a complaint [*see Muraoka v. Budget Rent-A-Car, Inc. (1984) 160 Cal. App. 3d 107, 116-118, 206 Cal. Rptr. 476*]. If negotiations continue after the complaint is filed, it has been held that they do not excuse the failure to effect service of summons within three years, as is required by *Code Civ. Proc. § 583.210* [*Lesko v. Superior Court (1982) 127 Cal. App. 3d 476, 485-487, 179 Cal. Rptr. 595*].

It has been held that the mandatory five-year period within which to bring the case to trial under *Code Civ. Proc. § 583.310* is tolled for the period during which a written settlement agreement is in effect, even if the case is never dismissed under the settlement because of the failure of a condition precedent [*Brown & Bryant, Inc. v. Hartford Accident & Indemnity Co. (1994) 24 Cal. App. 4th 247, 252-256, 29 Cal. Rptr. 2d 144*]. However, negotiations that fall short of producing an actual settlement agreement may not have the same tolling effect.

Legal Topics:

For related research and practice materials, see the following legal topics:
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46-520 California Forms of Pleading and Practice--Annotated § 520.26

§ 520.26 Settlement on Appeal

If the parties to an appeal reach settlement, they must provide immediate written notice to the appellate court [*Cal. Rules of Ct., Rule 8.244(a)(1)*; *see Huschke v. Slater (2008) 168 Cal. App. 4th 1153, 1160, 86 Cal. Rptr. 3d 187* (appellant, not respondent, has duty to file notice of settlement)]. For further discussion and a form for this notice, see *Ch. 45, Appeal: Motion Procedure, § 45.26*, and Ch. 51, *Appeal: Hearing and Decision*, §§ 51.12[1][d], 51.50. For discussion and forms relating to dismissal of an appeal pursuant to settlement, or stipulated reversal of the trial court judgment pursuant to settlement on appeal, see Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureAppealsStipulated ReversalsContracts LawTypes of ContractsSettlement Agreements

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[Reserved]

§§ 520.27[Reserved]

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46-520 California Forms of Pleading and Practice--Annotated § 520.40

§ 520.40 Governing Statutes

The requirements, effect, and coverage of a release are set forth in *Civ. Code §§ 1541-1543* and *Code Civ. Proc. § 877*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsReleases From LiabilityGeneral OverviewContracts LawTypes of ContractsReleasesTortsProcedureSettlementsReleasesGeneral Overview

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46-520 California Forms of Pleading and Practice--Annotated § 520.41

§ 520.41 Definitions

[1] Release

A release is the abandonment, relinquishment, or surrender of a known right or claim, by the person in whom it exists or to whom it accrues, to the person against whom it might have been demanded or enforced, operating to extinguish a cause of action [*Pellett v. Sonotone Corp. (1945) 26 Cal. 2d 705, 711, 160 P.2d 783* ; *Hastings v. Matlock (1980) 107 Cal. App. 3d 876, 882, 166 Cal. Rptr. 229* ; *see Civ. Code § 1541*].

[2] Releasor and Releasee

Under *Civ. Code §§ 1541-1543*, a "creditor" surrenders a claim by giving a release to the "debtor" [*see Civ. Code § 1541*]. Because a release may surrender a claim other than one based on a debt, this part uses a broader terminology: "releasor" designates the person who surrenders a claim, whereas "releasee" designates the person against whom that claim might have been enforced.

Legal Topics:

For related research and practice materials, see the following legal topics:
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46-520 California Forms of Pleading and Practice--Annotated § 520.42

§ 520.42 Covenant Not to Sue Distinguished

A covenant not to sue, as distinguished from a release, is not a present abandonment or relinquishment of a right or claim, but merely an agreement not to enforce an existing cause of action. Therefore, it does not have the effect of extinguishing a cause of action [*Pellett v. Sonotone Corp. (1945) 26 Cal. 2d 705, 711, 160 P.2d 783*].

The difference between a release and a covenant not to sue is essentially that the former extinguishes the underlying claim, while the latter is an agreement not to prosecute a suit on the underlying claim [*see Civ. Code § 1541*; *Mesler v. Bragg Management Co. (1985) 39 Cal. 3d 290, 298, 216 Cal. Rptr. 443, 702 P.2d 601*]. Practically, as between the parties to the agreement, there is no real distinction between a release and a covenant not to sue. The final result in either case is the same, that is, there is no further recovery from the settling defendant [*see Mesler v. Bragg Management Co. (1985) 39 Cal. 3d 290, 298, 216 Cal. Rptr. 443, 702 P.2d 601* (citing *Pellett v. Sonotone Corp. (1945) 26 Cal. 2d 705, 711, 160 P.2d 783*)].

The distinction between the two agreements was originally significant with respect to joint obligors who were not included in the release agreement. Under common law, a release of one joint obligor or tortfeasor was a release of all [*see, e.g., Prince v. Lynch (1869) 38 Cal. 528, 531*]. Covenants not to sue were developed to avoid this strict rule [*see Mesler v. Bragg Management Co. (1985) 39 Cal. 3d 290, 297-298, 216 Cal. Rptr. 443, 702 P.2d 601* ; *Pellett v. Sonotone Corp. (1945) 26 Cal. 2d 705, 711, 160 P.2d 783*]. This historical difference was effectively eliminated, however, by the abrogation of the strict common law rule under *Civ. Code § 1543* and *Code Civ. Proc. § 877* [*see Mesler v. Bragg Management Co. (1985) 39 Cal. 3d 290, 298, 216 Cal. Rptr. 443, 702 P.2d 601* ; *Lippert v. Bailey (1966) 241 Cal. App. 2d 376, 381, 50 Cal. Rptr. 478*]. For discussion of *Civ. Code § 1543* and *Code Civ. Proc. § 877*, see *§ 520.44[4]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsReleases From LiabilityCovenants Not to Sue

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§ 520.43 Interpretation of Release Agreements

The policy of the law is to encourage out of court settlements. To further this policy, the parties to a dispute should be encouraged to negotiate settlements and to enter into releases. In the absence of unfair conduct on the part of the releasee, the law should extend its protection to the stability of the transaction by holding the parties to the express terms of the release [*Casey v. Proctor (1963) 59 Cal. 2d 97, 111, 28 Cal. Rptr. 307, 378 P.2d 579*].

A release is a species of contract [*River Garden Farms, Inc. v. Superior Court (1972) 26 Cal. App. 3d 986, 1000, 103 Cal. Rptr. 498*]. Therefore, the general rules governing the interpretation and construction of contracts apply to releases [*see Jersey Island Dredging Co. v. Whitney (1906) 149 Cal. 269, 272-273, 86 P. 691* (construing release at bar under principles governing construction of contracts); *see also Civ. Code §§ 1635-1662* (rules governing interpretation of contracts)].

In ascertaining the legal effect of a release, one must look to the instrument itself to determine the intent of the parties [*Hofland v. Gustafson (1955) 282 P.2d 1039*]. Therefore, the intention that the instrument work as a release must be evidenced by the instrument [*Golden West Credit etc. Co. v. Wilson (1932) 119 Cal. App. 627, 637, 7 P.2d 345*]. If a release is ambiguous, in that it refers to another document or transaction, the court must construe the release together with all referenced documents or transactions to determine the intention of the parties [*Consumers Holding Co. v. County of Los Angeles (1962) 204 Cal. App. 2d 234, 241, 22 Cal. Rptr. 106*]. Extrinsic evidence of the parties' intentions may be admitted to show that the language of the release is reasonably susceptible to another interpretation and therefore ambiguous [*see Code Civ. Proc. § 1856*; *Pacific Gas & E. Co. v. G.W. Thomas Drayage etc. Co. (1968) 69 Cal. 2d 33, 37, 69 Cal. Rptr. 561, 442 P.2d 641* (the test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible)]. However, if there is no ambiguity in the express language of the release, extrinsic evidence is not admissible to prove a contrary intention of a party that was undisclosed during negotiations [*Edwards v. Comstock Insurance Co. (1988) 205 Cal. App. 3d 1164, 1167-1169, 252 Cal. Rptr. 807* (in uninsured motorist case in which insureds executed "release of all claims" with their insurer, parol evidence of undisclosed intention to retain right to bring bad faith action is inadmissible); *see also Lama v. Comcast Cablevision (1993) 14 Cal. App. 4th 59, 64, 17 Cal. Rptr. 2d 224* (plaintiff

released the defendant and "any other person, corporation, association or partnership" responsible for injuries arising from a car accident, and dismissed the action with prejudice; the court held that plaintiff's subsequent action against the defendant's employer alleging respondeat superior liability was barred because the release applied to the employer and the dismissal with prejudice was a common law retraxit that served as a judgment on the merits as to the defendant and the employer); *General Motors Corp. v. Superior Court (1993) 12 Cal. App. 4th 435, 441* , *15 Cal. Rptr. 2d 622* (in an action arising out of an automobile accident, the plain language of a general form release that released the owner of the vehicle that struck plaintiff's car and "all other persons, firms and corporations" also released General Motors from liability although it was not specifically named in the release; plaintiff presented no competent evidence to show that another meaning was intended by the parties)].

As with other contracts, releases are construed against those who draft them, and ambiguities in releases are construed against those who cause them to exist [*see* *Estate of O'Donnell (1978) 80 Cal. App. 3d 514, 519, 145 Cal. Rptr. 617*].

If a party insists on a strict interpretation of one part of a release, that party cannot complain if the entire release is literally construed [*see* *Bradbury v. Thomas (1933) 135 Cal. App. 435, 443, 27 P.2d 402*].

For discussion of the rules for interpreting contracts generally, see Ch. 140, *Contracts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 520.44 Effect of Release Agreement

[1] Cause of Action Extinguished

Absent fraud, deception, misrepresentation, duress or undue influence, a valid release, given by the releasor to the releasee, extinguishes the cause of action that is the subject of the release [*Skrbina v. Fleming Companies (1996) 45 Cal. App. 4th 1353, 1366, 53 Cal. Rptr. 2d 481* ; *see Civ. Code § 1541*; *Hastings v. Matlock (1980) 107 Cal. App. 3d 876, 882, 166 Cal. Rptr. 229*]. A valid release conclusively estops the parties from reviving and relitigating the claim released [*Faye v. Feldman (1954) 128 Cal. App. 2d 319, 328, 275 P.2d 121* (when person capable of reading and understanding release signs it, he or she is bound by its provisions and estopped from claiming they are contrary to his or her intentions or understanding)]. However, assent is necessary for the release to be binding; if it can be established that a party did not in reality assent to it, i.e., due to fraud or duress, the party is not estopped from claiming the release is not binding for want of assent [*Skrbina v. Fleming Companies (1996) 45 Cal. App. 4th 1353, 1366-1367, 53 Cal. Rptr. 2d 481*].

A release of one or more of a number of joint obligors does not extinguish the cause of action against the remaining joint obligors [*see Civ. Code § 1543*; *Code Civ. Proc. § 877*; for further discussion, *§ 520.44[4]*].

[2] Limitations on Effect of General Release

[a] Unknown Claims

A general release does not extend to claims that the creditor does not know or suspect to exist in his or her favor at the time of executing the release when those claims, if known by the creditor, would have materially affected the settlement with the debtor [*Civ. Code § 1542*]. The purpose of *Civ. Code § 1542* is to prevent the inadvertent barring of later-discovered claims by a boilerplate recital in the release [*Casey v. Proctor (1963) 59 Cal. 2d 97, 109, 28 Cal. Rptr. 307, 378 P.2d 579*]. It is not intended to prevent a releasor who understands the significance of the act from knowingly releasing all unknown claims [*Carmichael v. Industrial Acc. Com. (1965) 234 Cal. App. 2d 311, 314-315, 44 Cal. Rptr. 470* ; *see Perez v. Uline, Inc. (2007) 157 Cal. App. 4th 953, 958-959, 68 Cal. Rptr. 3d 872* (release of all claims arising from employment not required to contain waiver of *Civ. Code § 1542* because plaintiff understood he

was releasing claims arising under all statutes agreement referred to, even those he did not understand); *Winet v. Price (1992) 4 Cal. App. 4th 1159, 1166-1173, 6 Cal. Rptr. 2d 554*].

Whether a specific later-discovered claim was intended to be covered by a broad release can be a disputable issue of fact if the language of the release is reasonably susceptible to either interpretation [*Vega v. Western Employers Ins. Co. (1985) 170 Cal. App. 3d 922, 926-927, 216 Cal. Rptr. 592 , overruled in part on other grounds, Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal. 3d 287, 310, 250 Cal. Rptr. 116, 758 P.2d 58* ; *see Winet v. Price (1992) 4 Cal. App. 4th 1159, 1167, 6 Cal. Rptr. 2d 554*]. However, if the express language of the release unambiguously encompasses all unknown claims, the uncommunicated subjective intent of the releasor that unknown or unsuspected claims were not to be released does not raise a triable issue of fact [*Winet v. Price (1992) 4 Cal. App. 4th 1159, 1167, 1170-1171 n.7, 6 Cal. Rptr. 2d 554*].

In determining whether there is substantial evidence that a release of unknown claims was knowingly made, courts have considered the following [*Casey v. Proctor (1963) 59 Cal. 2d 97, 113, 28 Cal. Rptr. 307, 378 P.2d 579*]:

- The amount of consideration received compared with the risk of the existence of unknown injuries.
- The presence of bargaining and negotiation leading to the settlement.
- The closeness of the issue of liability.
- Whether the subject of personal injuries was discussed.
- The reasonableness of the contention that the injuries were, in fact, unknown at the time the release was executed.

[b] Release Given During Period of First Physical Confinement

A general release from a liability claim obtained from any person during the period of the first physical confinement, whether as an inpatient or outpatient, in a clinic or health facility defined in *Health & Safety Code §§ 1203* and *1250*, as a result of the injury alleged to have given rise to the claim and primarily for treatment of that injury, is presumed fraudulent if the release is executed within 15 days after the commencement of the confinement or prior to release from that confinement, whichever occurs first [*Bus. & Prof. Code § 6152(b)*].

[3] Exculpatory Release

As a general rule, a contract violates public policy if its object is to exempt a person from responsibility for his or her own fraud, willful injury to another's person or property, or violation of law [*Civ. Code § 1668 see Neubauer v. Goldfarb (2003) 108 Cal. App. 4th 47, 55-57, 133 Cal. Rptr. 2d 218* (waiver of corporate directors' and majority shareholders' fiduciary duties to minority shareholders in private close corporations is against public policy and contract provision in buy-sell agreement purporting to effect such a waiver is void)]. *Civ. Code § 1668* does not, however, invalidate a contract that seeks to release one from liability for future simple negligence or strict liability [*Hulsey v. Elsinore Parachute Center (1985) 168 Cal. App. 3d 333, 341-342, 214 Cal. Rptr. 194*]. Even a release agreement found to be a contract of adhesion is enforceable if it does not defeat the weaker party's reasonable expectations and is not unconscionable [*Hulsey v. Elsinore Parachute Center (1985) 168 Cal. App. 3d 333, 343-344, 214 Cal. Rptr. 194*]. A valid exculpatory release is a defense to negligence under the doctrine of express assumption of risk [*see, e.g., Coates v. Newhall Land & Farming, Inc. (1987) 191 Cal. App. 3d 1, 4, 236 Cal. Rptr. 181*]. For discussion of this defense, see Ch. 380, *Negligence* .

On the other hand, an agreement made in the context of sports or recreational programs or services, purporting to

release liability for future gross negligence, generally is unenforceable as a matter of public policy [*City of Santa Barbara v. Superior Court (2007) 41 Cal. 4th 747, 753-781, 62 Cal. Rptr. 3d 527, 161 P.3d 1095* (agreement purporting to release liability for future gross negligence committed against developmentally disabled child who participated in recreational camp designed for needs of such children violated public policy and was unenforceable)].

For a form for a release agreement designed for use as an exculpatory release of future claims, see California Legal Forms, Ch. 77, *Discharge of Obligations* (Matthew Bender).

[4] Release of Less Than All Joint Debtors, Tortfeasors, or Coobligors

Under *Civ. Code § 1543*, a release of one of two or more joint debtors does not extinguish the obligations of any of the others, unless they are mere guarantors; nor does it affect their right to contribution from the released debtor, except as provided under *Code Civ. Proc. § 877*. Federal common law in the Ninth Circuit generally mirrors the law of *Civ. Code § 1543* in that a release of one tortfeasor does not release all other joint tortfeasors absent an agreement to effect a release of any or all of the other tortfeasors [*see Avery v. U.S. (9th Cir. 1987) 829 F.2d 817, 819* (*Twentieth Century-Fox Film Corp. v. Winchester Drive-in Theatre, Inc. (9th Cir. 1965) 351 F.2d 925, 931 , cert. denied, 382 U.S. 1011 (1966)* , and *Undersea Eng. & Const. Co. v. International Tel. & Tel. Corp. (9th Cir. 1970) 429 F.2d 543, 551)*].

Code Civ. Proc. § 877 applies to any release (or to any dismissal or covenant not to sue or not to enforce judgment) that is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort or to one or more of a number of coobligors mutually subject to contribution rights. A release (or other instrument) of this type does not discharge any other such party from liability unless its terms so provide, but does reduce the claims against the others by the amount stipulated by the release or by the amount paid in consideration for the release, whichever is greater [*Code Civ. Proc. § 877(a)*]. In determining whether the "terms so provide," courts apply the same rules that govern any other contract [*Hess v. Ford Motor Co. (2002) 27 Cal. 4th 516, 524, 117 Cal. Rptr. 2d 220, 41 P.3d 46*]. In addition, it discharges the released party from all liability for any contribution to any other parties [*Code Civ. Proc. § 877(b)*].

Code Civ. Proc. § 877 does not apply to coobligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves [*Code Civ. Proc. § 877(c)*]. Nor does *Code Civ. Proc. § 877* apply to a release given to a coobligor on an alleged contract debt when the contract was made prior to January 1, 1988 [*Code Civ. Proc. § 877(d)*].

For discussion of the procedure under *Code Civ. Proc. § 877.6*, to determine whether a settlement made by release or other instrument has been made in "good faith" for purposes of *Code Civ. Proc. § 877*, see *Ch. 300, Indemnity and Contribution, § 300.130* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 520.45 Requirements for Formation of Valid Release

[1] In General

To be effective in extinguishing an obligation, a release agreement must be given by the releasor to the releasee either on new consideration or in writing with or without new consideration [*Civ. Code § 1541*].

For a form for a general written release, *see § 520.130*. For discussion of requirements applicable to the formation of a valid agreement generally, see Ch. 140, *Contracts* .

[2] Mutual Assent

As with any contract, all parties to be bound by the release must first assent to its terms [*Smith v. Occidental & Oriental S.S. Co. (1893) 99 Cal. 462, 470-471, 34 P. 84*]. If there is no actual assent to the release, then it never becomes effective [*Wheat v. Morse (1961) 197 Cal. App. 2d 203, 206, 17 Cal. Rptr. 226*].

Generally, a releasor who has no disability preventing him or her from reading a written release is bound by its clear provisions [*DuBois v. Sparrow (1979) 92 Cal. App. 3d 290, 298, 154 Cal. Rptr. 717*]. However, if the releasor was under a misapprehension, not due to releasor's own neglect, as to the nature or scope of the release, and if this misapprehension was induced by the misconduct of the releasee, then the release, regardless of how comprehensively worded, is binding only to the extent actually intended by the releasor [*Casey v. Proctor (1963) 59 Cal. 2d 97, 103, 28 Cal. Rptr. 307, 378 P.2d 579*]. For example, courts have held that a misapprehension as to the nature and scope of a release was not due to the neglect of the releasor when the releasor was unable to read the release, the release was presented to the releasor when he was still in the hospital suffering from injuries sustained in the accident, or the release was presented to the releasor within a few hours of the accident while she was still nervous and upset [*see* *Casey v. Proctor (1963) 59 Cal. 2d 97, 103 n. 2, 28 Cal. Rptr. 307, 378 P.2d 579*].

It is for the trier of fact to determine what the releasor understood to be covered by the release, and whether the releasor's understanding, which is different from the writing, was induced by the releasee. If the trier of fact finds that the releasee is responsible for a misconception, the release is ineffective to the extent that it purports to release claims

other than those understood by the releasor to be released [*Jordan v. Guerra (1943) 23 Cal. 2d 469, 475-476, 144 P.2d 349*].

[3] Necessity of Writing

Generally, a release need not be in writing [*see Civ. Code § 1541*; *see* *Hastings v. Matlock (1980) 107 Cal. App. 3d 876, 882, 166 Cal. Rptr. 229*]. If, however, the release agreement is subject to the statute of frauds, such as when it provides for the performance of a continuing obligation over a period of time in excess of one year, then it must be in writing to be valid [*see Civ. Code § 1624*; for discussion of contracts required to be in writing by the statute of frauds, *see* Ch. 530, *Statute of Frauds*].

An oral release agreement is required to be made on new consideration, whereas a written release may be made with or without new consideration [*Civ. Code § 1541*; *see* discussion in *§ 520.45[4]*]. Further, it appears that a disputed, unpleaded oral settlement and release agreement made out of court is not enforceable by motion [*see* *Hastings v. Matlock (1980) 107 Cal. App. 3d 876, 881-883, 166 Cal. Rptr. 229* (disputed, out of court, oral settlement is unenforceable by nonstatutory "speaking motion," even when motion is treated as one for summary judgment); *cf. Code Civ. Proc. § 664.6* (if parties to pending litigation stipulate to settlement before court, court may enter judgment on motion pursuant to terms of settlement agreement)].

For further discussion of requirements for drafting a written release agreement, see *§ 520.130*.

[4] Consideration

An oral release must be supported by new consideration [*Civ. Code § 1541*]. However, a written release may, but need not be, supported by consideration [*Civ. Code § 1541*; *Worthington v. State Bd. of Control (1968) 266 Cal. App. 2d 697, 699-700, 72 Cal. Rptr. 449*].

If the writing is unsupported by consideration, it must be plain and explicit, given for the express purpose of effecting a complete release of the obligation [Sheehan v. Atlanta Intern. Ins. Co. (9th Cir. [Cal] 1987) *812 F.2d 465, 470]* , and expressly showing the releasor's intent to extinguish the obligation [*Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 31 n. 7, 216 Cal. Rptr. 130, 702 P.2d 212*].

For discussion of the effect of insufficient or failure of consideration on the validity of a release, see *§ 520.48[2]*.

[5] Delivery

A written release, signed by the releasor, ordinarily is presently operative once it is delivered. Even though consideration may be required [*see* discussion in § 450.45[4]], the nonpayment of consideration at the time of signature and delivery does not affect the immediate operative effect of the instrument as a valid release [*Hofland v. Gustafson (1955) 132 Cal. App. 907, 282 P.2d 1039*].

[6] Conditions Affecting Operation of Release

A release may be subject to the occurrence of a condition precedent. When it is, the release is not operative for any purpose until the occurrence of the condition [*Johnson v. Pickwick Stages System (1930) 108 Cal. App. 279, 284, 291 P. 611*]. Thus, for example, if a party has been given, but has not exercised, an option to release another from liability, the release is inoperative if the option is not exercised [*see* *Johnson v. Pickwick Stages System (1930) 108 Cal. App. 279, 284, 291 P. 611*]. Similarly, if delivery of the release is subject to the occurrence of a condition precedent, delivery is not effective, and the release is not operative, until the condition occurs [*see* *Clark v. Child (1884) 66 Cal. 87, 90-91, 4 P. 1058*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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46-520 California Forms of Pleading and Practice--Annotated § 520.46

§ 520.46 Enforcement of Release Agreement

[1] Affirmative Defense

Because the effect of a release is to extinguish an obligation giving rise to a cause of action, it may be pleaded as an affirmative defense to an action based on the extinguished obligation [*see Pellett v. Sonotone Corp. (1945) 26 Cal. 2d 705, 711, 160 P.2d 783* ; *see also Landis v. Morrissey (1886) 69 Cal. 83, 86, 10 P. 258*] (stating that plea of release admits cause of action, but sets forth release subsequently executed)]. The pleading of a release agreement is the pleading of new matter [*Landis v. Morrissey (1886) 69 Cal. 83, 10 P. 258* . It must be expressly pleaded and proved [*Hastings v. Matlock (1980) 107 Cal. App. 3d 876, 882, 166 Cal. Rptr. 229]* . For forms for affirmative defenses, pleading the execution of a release agreement, see *§§ 520.131* and *520.132*.

When the operation of a release is subject to the occurrence of a condition precedent, the release cannot be pleaded as a bar to the underlying cause of action, because it is not operative until the occurrence of the condition. Thus, for example, if an option to exercise a release has been given, the release cannot be pleaded as a bar to the underlying cause of action unless the option has been exercised [*Johnson v. Pickwick Stages System (1930) 108 Cal. App. 279, 284, 291 P. 611* ; *see also* discussion in *§ 520.45[6]*].

On motion made, and granted at the discretion of the court, a release may be raised as an affirmative defense in a supplemental answer [*see Code Civ. Proc. § 464* (supplemental pleadings); *see Seehorn v. Big Meadows & Bodie Wagon Road Co. (1882) 60 Cal. 240, 250-2252* ; *see also Johnson v. Pickwick Stages System (1930) 108 Cal. App. 279, 281, 291 P. 611]* . The motion may be made and granted even after trial has begun on the underlying cause of action. Factors considered by a court in exercising its discretion whether to permit the raising of the defense in a supplemental answer are the existence of laches surrounding defendant's filing of the supple mental answer, as well the factual circumstances surrounding the transaction giving rise to the release [*see Seehorn v. Big Meadows & Bodie Wagon Road Co. (1882) 60 Cal. 240, 251-252* (trial court as abusing its discretion in denying motion to raise affirmative defense of release in supplemental answer absent laches and in view of facts surrounding settlement of case)]. For further discussion and forms relating to supplemental pleadings in general, see Ch. 21, *Amended and Supplemental Pleadings* .

[2] Action for Specific Performance or Declaratory Relief

A release may also be pleaded as a specifically performable settlement and release agreement. When pleaded in this manner the pleading must allege a definite, just, and reasonable contract, adequacy of consideration, and resultant breach [*Hastings v. Matlock (1980) 107 Cal. App. 3d 876, 882, 166 Cal. Rptr. 229*]. For discussion and forms relating to specific enforcement of contracts generally, see Ch. 528, *Specific Performance* .

In some circumstances, either the releasee or the releasor may bring an action under *Code Civ. Proc. § 1060* for a declaration of his or her rights under a release. The releasee may bring this type of action when, for example, the releasor has attempted an out-of-court rescission of the release and the releasee believes the attempted rescission is invalid [*see Union Pacific R.R. Co. v. Zimmer (1948) 87 Cal. App. 2d 524, 528, 197 P.2d 363* (validity of release decided under federal law)]. In a declaratory relief action under *Code Civ. Proc. § 1060*, the court may make a binding declaration of the rights and duties of the parties, including a declaration as to the validity of the release [*see Code Civ. Proc. § 1060*; *see Union Pacific R.R. Co. v. Zimmer (1948) 87 Cal. App. 2d 524, 528, 197 P.2d 363* (validity of release decided under federal law)]. For discussion and forms for use in seeking declaratory relief generally, see Ch. 182, *Declaratory Relief* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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46-520 California Forms of Pleading and Practice--Annotated § 520.47

§ 520.47 Opposing Enforcement of Release Agreement

[1] Generally

A releasor may challenge the validity of a release agreement on the same grounds as any contract [*see, e.g., Union Pacific R.R. Co. v. Zimmer (1948) 87 Cal. App. 2d 524, 529, 197 P.2d 363* (stating that release may be avoided on ground of mutual mistake); *Baird v. Pacific Electric Ry. Co. (1919) 39 Cal. App. 512, 514, 179 P. 449* (stating that defense of release may be controverted by evidence of fraud, mistake, undue influence, compromise, payment, estoppel, mental incompetency, and like defenses); for discussion of defenses to the enforcement of contracts generally, see, e.g., Ch. 140, *Contracts* , Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* , and Ch. 528, *Specific Performance*].

In an action on the underlying claim, a releasor may simply controvert the affirmative defense that a release precludes the claim [*see, e.g., Baird v. Pacific Electric Ry. Co. (1919) 39 Cal. App. 512, 514, 179 P. 449* ; *see also* discussion in *§ 520.47[3]*]. The releasor may, when appropriate, bring an action to cancel a void or voidable written release [*see Civ. Code § 3412*], an action to declare a release void [*see Code Civ. Proc. § 1060*; *see also* discussion in]; an action to reform a release agreement [see *Civ. Code § 3399*], or an action to rescind a voidable release [*see Civ. Code § 1692*; *see also § 520.48*]. For discussion and forms of complaint relating generally to the remedies of cancellation, declaratory relief, reformation, and rescission, see respectively Ch. 107, *Cancellation of Instruments* , Ch. 182, *Declaratory Relief* , Ch. 488, *Reformation of Instruments* , and Ch. 490, *Rescission and Restitution* .

[2] Burden of Proof

Generally, when a releasor challenges the validity of a release, he or she has the burden of proof on that issue [*see, e.g., Myers v. Carter (1963) 215 Cal. App. 2d 238, 242, 30 Cal. Rptr. 91* (burden of showing undue influence); *Chung v. Johnston (1954) 128 Cal. App. 2d 157, 164, 274 P.2d 922* (burden of showing fraud); *Castor v. Bernstein (1906) 2 Cal. App. 703, 708, 84 P. 244* (burden of showing want of consideration pursuant to *Civ. Code § 1615*)]. When, however, the challenged release was executed during the course of a trust relationship, the party relying on the release has the burden of showing that the release is just and fair, and that it is based on a true and correct settlement and on adequate consideration [*Smith v. Fidelity & Deposit Co. (1933) 130 Cal. App. 45, 56-57, 19 P.2d 1018*].

[3] Controverting Defense of Release

[a] Pleading Requirements

A releasor seeking to recover on the underlying claim need not, in the complaint, anticipate a defense of release [*Hoffman v. Sports Car Club of America (1986) 180 Cal. App. 3d 119, 125, 225 Cal. Rptr. 359* ; *see Code Civ. Proc. § 431.20(b)* (all allegations of affirmative matter in answer are deemed controverted)]. Therefore, in response to an affirmative defense of release raised in the answer, plaintiff releasor need only adduce proof at trial either taking issue with the truth of the release or avoiding the release by a showing that destroys its validity as a defense [*Thompson (1920) 183 Cal. 476, 480, 191 P. 927* ; *Hoffman v. Sports Car Club of America (1986) 180 Cal. App. 3d 119, 125, 225 Cal. Rptr. 359*].

[b] Separate Trial on Defense Before Trial on Underlying Claim

When an affirmative defense does not involve the merits of the plaintiff's cause of action, but sets up a bar to its prosecution, the court may, either on its own motion or on the motion of any party, proceed to trial of that defense before trial of any other issue in the case [*see Code Civ. Proc. § 597*]. This procedure applies to the defense of release raised in an answer [*see Hastings v. Matlock (1980) 107 Cal. App. 3d 876, 881, 166 Cal. Rptr. 229*]. For further discussion and forms relating to proceedings for a separate trial under *Code Civ. Proc. § 597, see Ch. 3, Abatement of Actions, § 3.110* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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46-520 California Forms of Pleading and Practice--Annotated § 520.48

§ 520.48 Rescission of Voidable Release

[1] Availability

A release agreement is subject to rescission in the same manner as other contracts [*Matthews v. A.T. & S.F. Ry. (1942) 54 Cal. App. 2d 549, 557, 129 P.2d 435*]. Rescission is necessary only with respect to a release that is voidable, rather than absolutely void [*see Garcia v. California Truck Co. (1920) 183 Cal. 767, 770, 192 P. 708*].

For discussion and forms relating to rescission generally, see Ch. 490, *Rescission and Restitution* .

[2] Grounds for Rescission

A contract may generally be rescinded mutually, by consent [*Civ. Code § 1689(a)*], or unilaterally, on specified grounds [*Civ. Code § 1689(b)*]. The chief grounds for unilateral rescission are those negating consent: when the rescinding party, or any party jointly contracting with the rescinding party, has given his or her consent by mistake, or when that consent was obtained by duress, menace, fraud, or undue influence [*Civ. Code § 1689(b)(1)*; *see, e.g., Carr v. Sacramento C.P. Co. (1917) 35 Cal. App. 439, 447, 170 P. 446* (release obtained by undue influence subject to rescission); for discussion and forms relating to factors negating contractual consent in general, *see* Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*].

Thus, for example, when a releasor knows that he or she is signing a release, but is fraudulently induced to do so, this fraud renders the release agreement voidable, not void, and rescission is necessary to avoid the agreement [*Bonacci v. Mass. Bonding & Ins. Co. (1943) 58 Cal. App. 2d 657, 664, 137 P.2d 487* ; *see Ford v. Shearson Lehman American Express, Inc. (1986) 180 Cal. App. 3d 1011, 1028, 225 Cal. Rptr. 895* (stating rule as applicable to contracts generally); for discussion of fraud rendering a release absolutely void, *see § 520.49*].

Similarly, a release may be rescinded for mutual mistake [*see O'Meara v. Haiden (1928) 204 Cal. 354, 358, 268 P. 334* ; *see also Civ. Code §§ 1576-1578* (defining mistake)]. A release may be rescinded for a unilateral mistake concerning its effect only if the mistake arose from an unrectified misrepresentation by one party of which the other was aware [*Larsen v. Johannes (1970) 7 Cal. App. 3d 491, 503, 86 Cal. Rptr. 744* ; *see Myers v. Carter (1963) 215 Cal.*

App. 2d 238, 241, 30 Cal. Rptr. 91]. Thus, a releasor cannot claim that he or she was mistaken about what was in a release when he or she failed to read it before signing it [*Hoffman v. Sports Car Club of America (1986) 180 Cal. App. 3d 119, 126, 225 Cal. Rptr. 359*].

Another ground for unilateral rescission is mental incompetence under *Civ. Code § 39* [*Civ. Code § 1689(b)(7)*], that is, when the rescinding party was of unsound mind, but not entirely without understanding, and made the contract before his or her incapacity was judicially determined [*see Civ. Code § 39*]. Thus, a releasor need not have been incompetent to make any kind of a contract or to transact any business, however simple; the test is whether he or she was mentally competent to deal with the particular subject with full understanding of his or her rights, such that he or she actually understood the nature, purpose, and effect of the release [*Carr v. Sacramento C.P. Co. (1917) 35 Cal. App. 439, 442, 170 P. 446* ; for discussion of mental incompetence rendering a release absolutely void, *see § 520.49*].

Still another basis for unilateral rescission is failure of consideration [*see Civ. Code § 1689(b)(2)-(4)*]. To justify rescission of a release, the failure must be substantial [*see Hofland v. Gustafson (1955) 132 Cal. App. 907, 909-910 282 P.2d 1039* (holding that delay in payment of consideration until several days after execution of release was not substantial failure of consideration and justified damages but not rescission)]. Moreover, a court will not set aside a written release merely because the consideration is inadequate, although this may be considered with other factors affecting its validity [*Moore v. Rogers (1958) 157 Cal. App. 2d 192, 197, 320 P.2d 524* ; *see also Civ. Code § 1541* (new consideration required to support oral, but not written, release); *Castor v. Bernstein (1906) 2 Cal. App. 703, 708, 84 P. 244* (rule under *Civ. Code § 1614*, that written instrument is presumptive evidence of consideration, applies to releases)].

For additional discussion relating to grounds for unilateral rescission generally, and forms of complaint for rescission based on these grounds, see Ch. 490, *Rescission and Restitution* .

[3] Notice and Restitution

To rescind a contract, a party who is free from duress, menace, undue influence, or disability, and who is aware of his or her right to rescind, must promptly, on discovering the ground justifying rescission, give notice of rescission to the other party. The rescinding party must also restore to the other party everything of value that he or she has received from that party under the contract or offer to make restitution on condition that the other party do likewise, unless the other party is unable or positively refuses to do so [*see Civ. Code § 1691*]. Notwithstanding this general rule, in the case of a release, no restitution need be made until an attack is made on the release, which usually does not occur until the releasor brings an action on the underlying claim and seeks to controvert the affirmative defense that the claim is barred by release [*see O'Meara v. Haiden (1928) 204 Cal. 354, 364, 268 P. 334*].

Restitution is required only if the releasor received something of value; if the releasor received nothing, he or she need give back nothing [*Gajanich v. Gregory (1931) 116 Cal. App. 622, 633-634, 3 P.2d 389*]. Additionally, the releasor need not restore or offer to restore in any of the following circumstances: when the releasor has received only that which has no value to either of the parties; when the releasor has merely received the individual promissory note of the releasee; when the release is absolutely void; when it clearly appears that the releasee could not possibly have been injuriously affected by a failure to restore; or when, without any fault of the releasor, there have been peculiar complications that make it impossible for the releasor to offer full restoration [*see Weger v. Rocha (1934) 138 Cal. App. 109, 117-118, 32 P.2d 417*].

For further discussion relating to notice and restitution requirements generally, see Ch. 490, *Rescission and Restitution* .

Legal Topics:

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

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§ 520.49 Nullifying Void Release

A void release need not be rescinded, because there is no contract to rescind [*see Garcia v. California Truck Co. (1920) 183 Cal. 767, 770, 192 P. 708* ; *see also Ford v. Shearson Lehman American Express, Inc. (1986) 180 Cal. App. 3d 1011, 1028, 225 Cal. Rptr. 895*]. Aside from controverting a defense of release on the ground that it is void, a releasor may also seek affirmative relief opposing its enforcement, either by having it cancelled or declared void [*see Civ. Code § 3412* (cancellation of void instrument); *Code Civ. Proc. § 1060* (declaratory relief); for further discussion and forms, see respectively Ch. 107, *Cancellation of Instruments* and Ch. 182, *Declaratory Relief*].

One circumstance that renders a release absolutely void is fraud in the inception, that is, when the releasor is tricked or deceived into signing a release that is different in terms and object from that which he or she has made and understands that he or she is executing [*see Meyer v. Haas (1899) 126 Cal. 560, 563, 58 P. 1042*]. In this case, the release is void because mutual assent is lacking, and it may be disregarded without resorting to rescission [*Ford v. Shearson Lehman American Express, Inc. (1986) 180 Cal. App. 3d 1011, 1028, 225 Cal. Rptr. 895*]. The releasor need not restore any consideration received, as he or she is not avoiding the release so much as showing that he or she never made a release [*Meyer v. Haas (1899) 126 Cal. 560, 563, 58 P. 1042* ; *cf.* discussion of fraud as basis for rescission in *520.48[2]*]. For discussion and forms relating to fraud negating contractual consent in general, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

Similarly, when a releasor is totally mentally incompetent at the time of executing the release, that release is absolutely void because there is no meeting of the minds and no contract is formed. Therefore, rescission and an offer of restoration of consideration are not necessary [*Backus v. Sessions (1941) 17 Cal. 2d 380, 384, 390, 110 P.2d 51* ; *cf.* discussion of mental incompetency as basis for rescission in § 520.48[2]].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 520.50 Ratification of Release

A release that is subject to rescission may nonetheless be ratified by the conduct of the releasor. For example, the releasor's acceptance of the benefits of a release agreement subsequent to an attempted rescission of the release can amount to a waiver of the right to assert the invalidity of the release and constitute a ratification of the terms of the release [*see Eustace v. Lynch (1941) 43 Cal. App. 2d 486, 491, 111 P.2d 372*]. There can be no ratification of a void agreement, however, when the person alleged to have made the ratification did not know what the agreement contained or all the facts when the alleged ratification occurred [*Backus v. Sessions (1941) 17 Cal. 2d 380, 385, 110 P.2d 51*].

Legal Topics:

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

§§ 520.51[Reserved]

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§ 520.70 California Torts

For a general discussion of settlement considerations in tort actions, see California Torts, Ch. 73, *Settlement and Release* (Matthew Bender) For discussion of structured settlements in tort actions, see California Torts, Ch. 75, *Structured Settlements* (Matthew Bender) For general discussion of the taxation of tort damages, see California Torts, Ch. 57, *Taxation of Tort Damages* (Matthew Bender)

Legal Topics:

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§ 520.71 California Legal Forms

For transactional forms relating to forms in this chapter, see California Legal Forms, Ch. 77, *Discharge of Obligations* (Matthew Bender)

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§ 520.72 State Statutes

Attorney's duty to communicate written offers of settlement to client; written offer of settlement or required communication of settlement offer is discoverable by either party in any action in which existence or communication of offer of settlement is factual issue. *Bus. & Prof. Code § 6103.5*

Effect of defendant's tender and of settlement pursuant to dismissal in action on contract providing for fees and costs. *Civ. Code § 1717(a), (b)(2)*

Authority of attorney to bind client in steps of action by entering agreement. *Code Civ. Proc. § 283*

Motion to enter judgment pursuant to terms of settlement. *Code Civ. Proc. § 664.6*

Effect of release, dismissal, or covenant not to sue or to enforce judgment given to joint tortfeasor. *Code Civ. Proc. § 877*

Disclosure in action of sliding scale recovery agreement. *Code Civ. Proc. § 877.5*

Determination of good faith of settlement entered into by plaintiff and one or more alleged joint tortfeasors. *Code Civ. Proc. § 877.6*

Offer to compromise pending action; effect of rejected offer on costs. *Code Civ. Proc. § 998*

Effect of defendant's tender to plaintiff of full amount due before commencement of action for recovery of money only. *Code Civ. Proc. § 1025*

Admissibility of evidence concerning offer and counteroffer of compromise. *Evid. Code § 1152*

Legal Topics:

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§ 520.73 Rules of Professional Conduct

Member of State Bar who represents two or more clients must obtain clients' informed written consent before entering into aggregate settlement of their claims. *Cal. Rules Prof. Conduct, Rule 3-310(D)*

Member of State Bar must communicate promptly to client all amounts, terms, and conditions of any written offer of settlement made to client in noncriminal matter. *Cal. Rules Prof. Conduct, Rule 3-510(A)(2), (B)*

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§ 520.74 California Rules of Court

Duty of plaintiff or other party seeking affirmative relief to give court and arbitrator written notice of settlement of case in superior court. *Cal. Rules of Ct., Rule 3.1385(a)*

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46-520 California Forms of Pleading and Practice--Annotated § 520.75

§ 520.75 Local Court Rules

[1] Alameda County

Court policy is to encourage settlement. Alameda Co. Unified Super. Ct. Rules, Rule 4.01(2)(A)

Duty of counsel to notify court of settlement reached before trial. Alameda Co. Super. Ct. Rules, Rule 4.3(3)(c), 4.15

[2] Los Angeles County

Return of deposited jury fees on settlement of case before commencement of trial. Los Angeles Co. Super. Ct. Rules, Rule 5.0(e)

Duty of each party seeking affirmative relief in action to notify court of settlement reached prior to trial. Los Angeles Co. Super. Ct. Rules, Rule 12.5

[3] San Bernardino County

Duty of counsel to notify court of settlement reached before trial. San Bernardino Co. Super. Ct. Rules, Rule 416

[4] San Diego County

Duty of each party seeking affirmative relief in action to notify court of settlement reached before trial. San Diego Co. Coordinated Rules, Rule 2.2.4

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46-520 California Forms of Pleading and Practice--Annotated § 520.76

§ 520.76 Decisions

[1] Generally

If Section 998 offer is withdrawn by party before its statutory expiration, withdrawing party's right to cost shifting under Section 998 is determined by last rejected Section 998 offer. *One Star, Inc. v. Staar Surgical Co. (2009) 179 Cal. App. 4th 1082, 1093-1094, 102 Cal. Rptr. 3d 195*

Plaintiff's allegations that no enforceable settlement has been reached constituted good cause under *Cal. Rules of Ct., Rule 3.1385(b)* and precluded trial court from dismissing medical malpractice action; only decision before court at Rule 3.1385 hearing was whether to dismiss case or restore it to civil active list. *Irvine v. Regents of Univ. of Calif. (2007) 149 Cal. App. 4th 994, 1000-1002, 57 Cal. Rptr. 3d 500*

In action for breach of contract and related causes of action, trial court erred in involuntarily dismissing action under former Cal. Rules of Ct., Rule 225(c) [*now see Cal. Rules of Court, Rule 3.1385*] on grounds that declarations filed by parties were too vague after parties had notified court that they had a settlement "in principle," meaning they had yet to fix its exact terms; settlement with open material terms is not a conditional settlement and because parties never entered into binding settlement, former Rule 225 did not apply. *Levitz v. The Warlocks (2007) 148 Cal. App. 4th 531, 534-536, 55 Cal. Rptr. 3d 800*

Trial court properly found that party to settlement agreement that required it as obligor to provide security bond for quarterly payments it was required to make was in default after security company that had furnished bond became insolvent and obligor failed to supply subsequent bond, when parties intended that bond security party's continuing obligation to make quarterly payments. The objective would be achieved only if during entire period, other parties could look to bond as source of payment in event of obligor's default and parties contemplated that bond would be valid until last payment had been made. Obligor selected surety and bore risk it might become insolvent, and even if parties' conflicting interpretations were equally plausible, court would still construe security provision in other party's favor because it was for their benefit. *Citizens for Goleta Valley v. HT Santa Barbara (2004) 117 Cal. App. 4th 1073, 1076-1077, 12 Cal. Rptr. 3d 249*

Settlement with car dealership that did not release dealers "assigns" did not release agency that financed car lease transaction or corporation to whom lease was assigned because their liability, if any, arose from their status as assignees of lease. *LaChapelle v. Toyota Motor Credit Corp. (2002) 102 Cal. App. 4th 977, 980-981, 126 Cal. Rptr. 2d 32*

Settlement is not required to be written; compromise settlement is governed by legal principles applicable to contracts generally and is decisive of rights of parties, serving to bar reopening of issues settled; absent fundamental defect in agreement itself, terms as binding on parties. *Gorman v. Holte (1985) 164 Cal. App. 3d 984, 989, 211 Cal. Rptr. 34*

Court is not able to force litigant to settle, but may order appearance and engagement in settlement negotiations. *City of El Monte v. Takei (1984) 158 Cal. App. 3d 244, 248, 204 Cal. Rptr. 559*

Compromise and release agreement determines rights of parties in dispute. *Burbank Studios v. Workers' Comp. Appeals Bd. (1982) 134 Cal. App. 3d 929, 935, 184 Cal. Rptr. 879*

Necessary elements of contract are required for compromise and release agreement to be effective. *Burbank Studios v. Workers' Comp. Appeals Bd. (1982) 134 Cal. App. 3d 929, 935, 184 Cal. Rptr. 879*

Law favors settlement of controversies. *Hilliger v. Golden (1980) 107 Cal. App. 3d 394, 398-401, 166 Cal. Rptr. 33*

Compromise distinguished from stipulation by existence of bona fide dispute between parties. *People ex rel. Dept. Pub. Wks. v. Amsden Corp. (1973) 33 Cal. App. 3d 83, 87, 109 Cal. Rptr. 1*

Compromise of claim is settlement of differences by mutual concessions and adjustment of conflicting claims, but does not include discussions or negotiations leading up to agreement. *Isaacson v. City of Oakland (1968) 263 Cal. App. 2d 414, 421, 69 Cal. Rptr. 379*

[2] Attorney's Fees

On motions to enforce settlement agreement, trial court did not err in refusing to award plaintiff interest from original closing date, or plaintiff's costs or attorney fees, when trial court's order to plaintiff to pay defendant's fees and costs was an implied finding that plaintiff was the breaching party. *Osumi v. Sutton (2007) 151 Cal. App. 4th 1355, 1360-1361, 60 Cal. Rptr. 3d 693*

In insolvency proceedings involving life insurance company, provisions in settlement agreements for payment of attorney's fees of various settling parties were not improperly approved by trial court when amounts in settlements were simply part of settlement package and were of no greater consequence than would have been provision for cash payment; so long as settlements overall are reasonable and to benefit of insolvency estate, trial court acts within its discretion in approving them. *In re Executive Life Ins. Co. (1995) 32 Cal. App. 4th 344, 399, 38 Cal. Rptr. 2d 453*

Attorney's fees were properly awarded to party granted specific performance of oral settlement agreement rescinding contract that included attorney's fee provision that did not limit attorney's fees to particular forms of action involving contract. *Hastings v. Matlock (1985) 171 Cal. App. 3d 826, 840-842, 217 Cal. Rptr. 856*

[3] Authority of Attorney

Attorney's stipulation to settlement is subject to court ordered enforcement without competent evidence of disputed issues of material fact. *Phelps v. Kozakar (1983) 146 Cal. App. 3d 1078, 1083, 194 Cal. Rptr. 872*

[4] Costs

Absent affirmative agreement of parties to contrary, trial court retains jurisdiction to award costs and attorney's fees although settlement agreement is filed. *Folsom v. Butte County Assn. of Governments (1982) 32 Cal. 3d 668, 679, 186 Cal. Rptr. 589, 652 P.2d 437*

[5] Dismissal of Codefendant

Codefendant was properly dismissed pursuant to settlement agreement which expressly released and discharged him despite fact that he was not present during negotiations and did not sign the agreement. *Golden Bear Forest Products, Inc. v. Misale (1982) 138 Cal. App. 3d 573, 575, 188 Cal. Rptr. 48*

[6] Enforcement of Compromise or Settlement Agreements

Federal district court has inherent power to enforce agreement in settlement of litigation before it, and enforcement power includes authority to award damages for failure to comply with settlement agreement. *TNT Marketing, Inc. v. Agresti (9th Cir. 1986) 796 F.2d 276, 278*

Code Civ. Proc. § 664.6 does not apply in ordinary civil action after judgment, unrelated to alleged settlement and therefore containing no provision for continuing jurisdiction to enforce it, has been entered and has become final in sense that time for appeal has passed. *Walton v. Mueller (2009) 180 Cal. App. 4th 161, 171-172, 102 Cal. Rptr. 3d 605*

Code Civ. Proc. § 664.6 does not require that party to be bound consent to settlement "on the record," only that party consent to it "orally before the court." *1538 Cahuenga Partners, LLC v. Turmeko Properties, Inc. (2009) 176 Cal. App. 4th 139, 143, 97 Cal. Rptr. 3d 552*

Judgment omitting material terms of parties' settlement failed to accurately reflect their agreement and therefore failed to comply with *Code Civ. Proc. § 664.6*. *Hines v. Lukes (2008) 167 Cal. App. 4th 1174, 1185, 84 Cal. Rptr. 3d 689*

Trial court properly entered summary judgment against plaintiff after he accepted settlement from defendant, even though defendant had negotiated settlement with plaintiff directly even after he retained counsel, where evidence was insufficient as matter of law to demonstrate that settlement agreement was product of duress, was unconscionable, or was rendered void or unenforceable as matter of public policy; and where plaintiff's failure to effect rescission of settlement agreement, including specifically his failure to notify defendant he was rescinding and to tender restoration of payments he received, precluded his attempt to avoid application of agreement to claims he asserted in his complaint. *Myerchin v. Family Benefits, Inc. (2008) 162 Cal. App. 4th 1526, 1533-1541, 76 Cal. Rptr. 3d 816*

On motions to enforce settlement agreement, trial court did not create material term of settlement or otherwise err when it extended closing date for real property transaction, when doing so was necessary in order to grant relief sought by both parties. *Osumi v. Sutton (2007) 151 Cal. App. 4th 1355, 1360-1361, 60 Cal. Rptr. 3d 693*

On motions to enforce settlement agreement, trial court did not err when it ordered plaintiff to sign purchase agreement incorporating revised counteroffer, because nothing in settlement agreement allowed plaintiff to document construction defect claims by making unchallenged evidence of alleged defects part of purchase agreement that was term of settlement. *Osumi v. Sutton (2007) 151 Cal. App. 4th 1355, 1360-1361, 60 Cal. Rptr. 3d 693*

In action by condominium owners against homeowners' association arising out of water damage to condominium,

settlement reached between one condominium owner and homeowners' association's insurer and one employee of outside management company could not be enforced under *Code Civ. Proc. § 664.6* because there was no evidence association gave insurer right to settle without association's consent and settlement prejudiced association's rights separate from payment by its insurer, because settlement limited association's ability to enforce CC&Rs for noncompliance by condominium owners in repairing water damage. *Elnekave v. Via Dolce Homeowners Assn. (2006) 142 Cal. App. 4th 1193, 1198-1200, 48 Cal. Rptr. 3d 663*

Stipulation for settlement was unenforceable under *Code Civ. Proc. § 664.6*, when, although leaving unresolved term for future agreement was not necessarily fatal because settlement could be enforceable if parties agreed remaining issue would be decided by arbitration, court could not tell what parties meant when they provided for "binding mediation" of payment dispute and it was clear parties did not regard binding mediation as equivalent of arbitration. *Lindsay v. Lewandowski (2006) 139 Cal. App. 4th 1618, 1622-1625, 43 Cal. Rptr. 3d 846*

In action to enforce settlement agreement, statute of frauds did not render agreement invalid, even though agreement by its terms was not to be performed within one year from making and defendant did not sign agreement drafted by his own attorney, when defendant agreed to terms of settlement on record of settlement hearing and affirmed agreement and its terms in his testimony at trial of action to enforce agreement. Four-year statute of limitations for a written contract [*Code Civ. Proc. § 337*] applied, even though defendant had not signed agreement, because defendant had agreed to specific terms in open court at settlement proceeding, and at trial, defendant admitted that he had agreed to settlement and reaffirmed that terms to which he had agreed were those set forth in written settlement agreement prepared by his attorney. *Code Civ. Proc. § 664.6* did not apply because underlying matter was dismissed and parties did not request that court retain jurisdiction either in writing signed by both parties themselves or orally before court at the time of stipulated settlement as provided in *Code Civ. Proc. § 664.6*. *Pietrobon v. Libarle (2006) 137 Cal. App. 4th 992, 996-998, 40 Cal. Rptr. 3d 718*

Trial court properly entered judgment enforcing settlement agreement under *Code Civ. Proc. § 664.6*, when defendants were all insured under policies giving insurers right to settle without defendants' consent and to bind defendants to settlement; court would not read case law to preclude enforcement pursuant to *Code Civ. Proc. § 664.6* of insurance-funded settlement reached by authorized insurance defense counsel or adjuster when carrier had contractual right to settle. *Fiege v. Cooke (2004) 125 Cal. App. 4th 1350, 1353-1355, 23 Cal. Rptr. 3d 496*

In action to enforce settlement agreement based on underlying action for specific performance of real estate sales contract, forfeiture of buyers' deposit as result of delay in delivering quitclaim deed, which caused sellers no cognizable damages, constituted illegal forfeiture provision that court could not enforce, even though parties declined to use term "liquidated damages" explicitly in contract, because legal effect of provision was to allow forfeiture for lateness without regard to any damage caused. *Timney v. Lin (2003) 106 Cal. App. 4th 1121, 1126-1128, 131 Cal. Rptr. 2d 387*

When some parties to litigation agreed to settlement orally before trial court and other parties agreed to settlement by signing written agreement which, although it included terms not part of oral agreement, shared same material terms, all parties demonstrated same degree of mature reflection and deliberate assent and agreement was enforceable under *Code Civ. Proc. § 664.6*. Oral agreement that parties would later sign written agreement did not affect enforceability of oral settlement under *Code Civ. Proc. § 664.6*. *Elyaoudayan v. Hoffman (2003) 104 Cal. App. 4th 1421, 129 Cal. Rptr. 2d 41*

Trial court's interpretation of party's nod as oral consent satisfying requirement *Code Civ. Proc. § 664.6* for enforcement of settlement agreement was error, when unambiguous assent, expressed orally, is required to minimize possibility of conflicting interpretations of settlement, and trial court did not question any party as to whether they understood settlement terms and were agreeing to be bound by them. *Conservatorship of McElroy (2002) 104 Cal. App. 4th 536, 550-551, 128 Cal. Rptr. 2d 485*

Mass tort settlements in asbestos-related cases could not be enforced against one corporate defendant under *Code Civ. Proc. § 664.6*, when defendant's agent signed settlement agreements but no corporate officer of defendant signed, and when agreements did not specify material term, i.e., what that defendant was obligated to pay. *Gauss v. GAF Corp. (2002) 103 Cal. App. 4th 1110, 127 Cal. Rptr. 2d 370*

Documents signed by plaintiffs but not defendants, which did not specify which defendant, if any, was responsible for making settlement payments to plaintiffs, were not enforceable as settlement agreements under *Code Civ. Proc. § 664.6*, because as drafted, documents were merely unilateral offers to settle and were revoked prior to their acceptance by defendants' tender of payment, and also were not signed by parties as required by *Code Civ. Proc. § 664.6*. *Sully-Miller Contracting Co. v. Gledson/Cashman Construction, Inc. (2002) 103 Cal. App. 4th 30, 126 Cal. Rptr. 2d 400*

Parties engaged in private dispute resolution may not stipulate to appointment of judicial referee or judge pro tempore to secure settlement enforceable under *Code Civ. Proc. § 664.6* unless reference is sought in pending litigation. *Housing Group v. United Nat. Ins. Co. (2001) 90 Cal. App. 4th 1106, 109 Cal. Rptr. 2d 497*

Code Civ. Proc. § 664.6 does not apply to enforce release agreement entered into more than five months before wrongful death action is filed, since at time plaintiff executed release, there was no pending litigation. *Kirby v. Southern Cal. Edison Co. (2000) 78 Cal. App. 4th 840, 93 Cal. Rptr. 2d 223*

Requirement of personal agreement by a party does not preclude enforcement of insurance-funded settlement reached by authorized insurance defense counsel or adjuster when carrier has contractual right to settle. *Robertson v. Chen (1996) 44 Cal. App. 4th 1290, 1295, 52 Cal. Rptr. 2d 264*

"Parties" in *Code Civ. Proc. § 664.6* means litigants themselves, so that for settlement agreement to be enforceable it must have been personally agreed to or signed by litigants. *Cortez v. Kenneally (1996) 44 Cal. App. 4th 523, 528, 51 Cal. Rptr. 2d 671*

Requirement that oral settlement agreement be before the court is not satisfied when agreement is before mediator who is not authorized by statute to act in quasi-judicial capacity. *Murphy v. Padilla (1996) 42 Cal. App. 4th 707, 714, 49 Cal. Rptr. 2d 722*

Direct party-litigant participation is required to enforce settlement agreements. *Murphy v. Padilla (1996) 42 Cal. App. 4th 707, 714, 49 Cal. Rptr. 2d 722*

Order approving compromise of minor's claim was binding on insurer when settlement agreement called for court to make binding determination of one outstanding issue to be used to complete otherwise stipulated disposition of claim. *Mohn v. Kohlruss (1987) 196 Cal. App. 3d 595, 598-599, 242 Cal. Rptr. 110*

Stipulation recited to court reporter at deposition hearing and later reduced to writing but not signed by one party was insufficient basis for judgment under *Code Civ. Proc. § 664.6* because oral stipulation must be entered into before court, and written stipulation must be signed by parties. *City of Fresno v. Maroot (1987) 189 Cal. App. 3d 755, 760-762, 234 Cal. Rptr. 353*

Entry of judgment pursuant to *Code Civ. Proc. § 664.6* (settlement agreement orally stipulated to before court) over objections of one party was proper when court's determination that parties entered into valid and binding settlement agreement in open court was supported by substantial evidence. *Estate of Dipinto (1986) 188 Cal. App. 3d 625, 629-630, 231 Cal. Rptr. 612*

When ruling on motion to compel enforcement of out-of-court settlement pursuant to *Code Civ. Proc. § 664.6*, trial

court was trier of fact and authorized to receive oral testimony or to determine motions on declarations alone; standard of appellate review is whether trial court's determination is supported by substantial evidence. *Fiore v. Alvord (1985) 182 Cal. App. 3d 561, 565-566, 221 Cal. Rptr. 400*

Code Civ. Proc. § 664.6 makes it unnecessary to file motion for summary judgment to enforce oral settlement agreement, even when material facts of purported agreement are in dispute; legislature endorsed use of "speaking motions" to enforce disputed agreements by enacting *Code Civ. Proc. § 664.6*. *Richardson v. Richardson (1986) 180 Cal. App. 3d 91, 96, 225 Cal. Rptr. 370*

"Parties" under *Code Civ. Proc. § 664.6*, which provides that parties may stipulate to settlement and entry of judgment, means individual litigant and his or her attorney acting on litigant's behalf; litigant is not required to be personally present at or to personally agree to settlement so long as attorney, in trial court's determination, had authority to settle. *Haldeman v. Boise Cascade (1985) 176 Cal. App. 3d 230, 233-234, 221 Cal. Rptr. 412*

Former *Code Civ. Proc. § 583(b)* (*now see Code Civ. Proc. §§ 583.310-583.360*), providing mandatory dismissal of action not brought to trial within five years after it is filed, was not applicable to enforcing settlement agreement. *Gorman v. Holte (1985) 164 Cal. App. 3d 984, 989, 211 Cal. Rptr. 34*

Oral agreements to compromise and settle lawsuits reached at judicially supervised settlement conferences are enforceable in several ways, including by motion pursuant to *Code Civ. Proc. § 664.6*, by motion for summary judgment, by separate suit in equity, or by amendment of pleadings to raise settlement as affirmative defense. *Gorman v. Holte (1985) 164 Cal. App. 3d 984, 989, 211 Cal. Rptr. 34*

Code Civ. Proc. § 664.6 authorizes what was formerly nonstatutory speaking motion and makes it applicable to oral or written settlement stipulations; motion for entry of judgment pursuant to settlement allowed under *Code Civ. Proc. § 664.6*. *Corkland v. Boscoe (1984) 156 Cal. App. 3d 989, 994-995, 203 Cal. Rptr. 356*

Motion for summary judgment is proper method to enforce pretrial settlement; granting of summary judgment is improper when triable issue of fact existed as to whether defendant's obligation under settlement agreement was conditioned on approval of written agreement. *Duran v. Duran (1983) 150 Cal. App. 3d 176, 179-180, 197 Cal. Rptr. 497*

Motion for order compelling enforcement of alleged settlement agreement is in effect motion for summary judgment and is improperly granted when it presents issue of material fact. *Nabi v. Laudermill (1982) 130 Cal. App. 3d 282, 284, 182 Cal. Rptr. 368* ; *Mancina v. Hoar (1982) 129 Cal. App. 3d 796, 797, 181 Cal. Rptr. 347*

[7] Offer to Compromise Pursuant to Code Civ. Proc. § 998

In action under Federal Employers Liability Act, trial court erroneously awarded plaintiff prejudgment interest under *Civ. Code § 3291*, because FELA preempts *Civ. Code § 3291*. *Lund v. San Joaquin Valley Railroad (2003) 31 Cal. 4th 1, 13-15, 1 Cal. Rptr. 3d 412, 71 P.3d 770*

In action for breach of contract, in which defendant filed a cross-complaint, trial court did not abuse its discretion in granting plaintiff relief to set aside judgment under *Code Civ. Proc. § 473(b)* based on typographic error in Section 998 offer plaintiff's counsel sent to defendant in which legal assistant mistakenly typed word "against" as opposed to phrase "in favor of" plaintiff, which was sent to defendant without being reviewed by plaintiff's counsel and which defendant accepted; trial court reasonably concluded that mistake made by plaintiff's counsel was excusable, even though counsel's failure to review document before sending it out was imprudent, when plaintiff was diligent in seeking relief and defendant was not prejudiced. *Zamora v. Clayborn Contr. Group, Inc. (2002) 28 Cal. 4th 249, 121 Cal. Rptr. 2d*

187, 47 P.3d 1056

Settlement offer made under *Code Civ. Proc. § 998* is revocable by offeror; settlement offer made under *Code Civ. Proc. § 998* does not create irrevocable option. *T.M. Cobb Co. v. Superior Court (1984) 36 Cal. 3d 273, 280-283, 204 Cal. Rptr. 143, 682 P.2d 338*

Amount of offer after suit commences is to include costs. *Spencer Kennelly, Ltd. v. Bk. of Amer. (1942) 19 Cal. 2d 586, 592, 122 P.2d 552*

Voluntary dismissal with prejudice is judgment for purposes of *Code Civ. Proc. § 998*. *Chinn v. KMR Property Management (2008) 166 Cal. App. 4th 175, 196, 82 Cal. Rptr. 3d 586*

No minimum period must elapse following commencement of suit for service of valid *Code Civ. Proc. § 998* offer. *Barba v. Perez (2008) 166 Cal. App. 4th 444, 450-451, 82 Cal. Rptr. 3d 715*

Offer must remain open for the statutorily designated period set forth in *Code Civ. Proc. § 998(b)(2)* in order to constitute proper offer under *Code Civ. Proc. § 998*. *Marina Glencoe, L.P. v. Neue Sentimental Film AG (2008) 168 Cal. App. 4th 874, 880, 85 Cal. Rptr. 3d 800*

After plaintiff unilaterally withdrew a Section 998 offer before statutory period for defendant to respond had lapsed, plaintiff was not entitled to seek costs after jury verdict, because a Section 998 offer that was unilaterally revoked before expiration of statutory period did not trigger cost shifting provisions of *Code. Civ. Proc. § 998*. *Marcey v. Romero (2007) 148 Cal. App. 4th 1211, 1215-1217, 56 Cal. Rptr. 3d 402*

In personal injury action, trial court erred in awarding plaintiff prejudgment interest from date of second Section 998 offer rather than date of first offer, when ultimate verdict was in excess of both offers. *Ray v. Goodman (2006) 142 Cal. App. 4th 83, 87-92, 47 Cal. Rptr. 3d 659*

Trial court erred in denying individual members of board of homeowners association award of expert witness fees pursuant to *Code Civ. Proc. § 998* on ground that association's insurer made Section 998 offers on behalf of individuals; litigant may recover attorney fees even though litigant has not paid for them out of his or her own pocket, and Section 998 contains no requirement that any particular person must have incurred expert witness fees, just that fees must have been actually incurred. *Skistimas v. Old World Owners Assn. (2005) 127 Cal. App. 4th 948, 951-953, 26 Cal. Rptr. 3d 319*

In action by condominium owner for damages and declaratory relief against homeowners association for failure to maintain common areas resulting in damage to her unit, trial court properly determined that owner obtained judgment more favorable than Section 998 offer made by association, which owner had refused, by including voluntary post-offer payments made by association to homeowner and value of association's agreement to make repairs in conformance with its legal obligations. *Arias v. Katella Townhouse Homeowners Assn., Inc. (2005) 127 Cal. App. 4th 847, 853-856, 26 Cal. Rptr. 3d 113*

Section 998 offer by defendant to two plaintiffs to settle action for waiver of costs did not confer liability for expert witness fees on plaintiffs after failing to prevail at trial, when offer was conditional because it was made in single document referring to plaintiffs in conjunctive, and notice of acceptance that accompanied offer again referred to plaintiffs in conjunctive and provided only one signature line, which was for attorney representing both of them. Legislative purpose of *Code Civ. Proc. § 998* is best served in multi-plaintiff cases by requiring that offers be separately prepared and served on individual plaintiffs, allowing each individual opportunity to accept individually. *Menees v. Andrews (2004) 122 Cal. App. 4th 1540, 1545-1546, 19 Cal. Rptr. 3d 664*

Service of Section 998 offer more than 10 but less than 15 days before trial was not timely because provisions of *Code Civ. Proc. § 1013(a)*, requiring additional five days for service by mail, apply to 10-day notice requirement in *Code Civ. Proc. § 998(b)*. *Lecuyer v. Sunset Trails Apartments (2004) 120 Cal. App. 4th 920, 925-927, 16 Cal. Rptr. 3d 169*

Plaintiff's offer under *Code Civ. Proc. § 998* to settle dental malpractice case for specified sum and specifying that if there was no acceptance of offer within 30 days, plaintiff would seek full panoply of Section 998 awards, including prejudgment interest starting from date of service and expert costs if she received greater sum from defendant at trial, was valid Section 998 offer and satisfied requirements of specificity and clarity, even though it did not specify method by which litigation would be finally resolved. *Berg v. Darden (2004) 120 Cal. App. 4th 721, 731-733, 15 Cal. Rptr. 3d 829*

Defendant's failure to specify dollar amount for attorney's fees in settlement offer under *Code Civ. Proc. § 998* did not render offer so uncertain as to be unenforceable, since many contracts contain provision authorizing prevailing party in litigation arising out of contract to recover reasonable attorney's fees from another party to contract, and no published authority has held that inclusion of provision renders contract uncertain or unenforceable, and when failure to specify dollar amount of reasonable fees would not have precluded court from ascertaining with reasonable certainty defendant's obligations under offer had plaintiff accepted offer because applicable statutory and rule provisions set forth procedure for determining amount of attorney's fees to be awarded pursuant to contractual provision, which did not leave matter open for parties' future agreement, nor did it create uncertainty rendering it unenforceable. Offer was not also uncertain because plaintiff would have been required to incur additional, nonrecoverable attorney's fees to bring motion to have court determine fee amount if parties could not reach agreement. *Elite Show Services, Inc. v. Staffpro, Inc. (2004) 119 Cal. App. 4th 263, 268-270, 14 Cal. Rptr. 3d 184*

Defendants' offer under *Code Civ. Proc. § 998* served on plaintiffs, who were married couple, to settle litigation between them for $35,000, which did not apportion settlement amount between plaintiffs, and which neither husband nor wife accepted, was valid and entitled defendants to recovery of expert witness fees when plaintiffs lost litigation, when plaintiff's suit arose out of their purchase of community property, they sued on choses in action which were community property, and their recovery would be community property; defendants could not allocate their settlement offer between husband and wife because they each had equal, undivided half-interest in causes of action for fraud and breach of contract and would have had equal, undivided half-interest in settlement proceeds; offer did not have to be accepted by both plaintiffs to be effective because *Fam. Code § 1100(a)* places management and control of the community personal property in either spouse. *Vick v. DaCorsi (2003) 110 Cal. App. 4th 206, 209-213, 1 Cal. Rptr. 3d 626*

Section 998 offer to multiple defendants was not valid because it was not apportioned among defendants and, as of time of the offer, under pleadings, defendants could have been found liable, but not jointly and severally liable, for full amount of the judgment under permissive user doctrine and Proposition 51. *Burch v. Children's Hospital of Orange County Thrift Stores, Inc. (2003) 109 Cal. App. 4th 537, 547-551, 135 Cal. Rptr. 2d 404*

Subsequent offer under *Code Civ. Proc. § 998* revoked prior offer, even though subsequent offer was defective because it was not explicitly apportioned among parties to whom offer was made, but was directed to all three defendants jointly and severally. *Palmer v. Schindler Elevator Corp. (2003) 108 Cal. App. 4th 154, 157-159, 133 Cal. Rptr. 2d 339*

Oral acceptance of offer followed by written proof of acceptance is permitted under *Code Civ. Proc. § 998* when offer does not specify a mode of communicating acceptance; however, defendant did not accept plaintiff's offer in timely, absolute and unqualified manner as required by *Code Civ. Proc. § 998*, when defendant's notice of acceptance, which contained provision that parties bear own costs, which did not appear in plaintiff's offer, actually set forth counteroffer, not acceptance, and did not constitute proof of acceptance under *Code Civ. Proc. § 998*. *Bias v. Wright (2002) 103 Cal. App. 4th 811, 127 Cal. Rptr. 2d 137*

In personal injury action arising from automobile accident, trial court erroneously held that jury verdict in first trial extinguished right plaintiffs acquired under *Code Civ. Proc. § 998* based on their statutory offers to compromise which were not accepted, and denied prejudgment interest and expert witness fees after second trial at which they prevailed, when effect of trial court's grant of new trial was to nullify first judgment with result that neither judgment entered after first trial nor special verdict upon which it was based, existed to extinguish any benefits that may have arisen under *Code Civ. Proc. § 998*. *Saakyan v. Modern Auto, Inc. (2002) 103 Cal. App. 4th 383, 389-392, 126 Cal. Rptr. 2d 674*

Section 998 settlement offer in medical malpractice action was not invalid when made jointly by husband and wife, when it was clear that bulk of $1 million offer was meant for husband because wife's recovery was limited to $250,000 on her cause of action, and jury awarded far greater amount than was requested in the Section 998 offer less the maximum that wife could have recovered. *Deocampo v. Ahn (2002) 101 Cal. App. 4th 758, 776-777, 125 Cal. Rptr. 2d 79*

Provision in Section 998 settlement offer that would allow plaintiffs, at their option, to vacate their offer or a resulting Section 998-based judgment did not invalidate offer; provision was intended simply to hold defendant to discovery representation that he only had $1 million in insurance coverage, and litigants have right to condition offer to compromise on accuracy of information supplied by offeree in discovery. *Deocampo v. Ahn (2002) 101 Cal. App. 4th 758, 778, 125 Cal. Rptr. 2d 79*

Section 998 offer to compromise for greater of $1 million or combined limits of defendant's policies that would provide defendant with coverage for plaintiff's claims was basic policy limit offer and was not vague as to amount requested, since actual total insurance coverage, if it differed from stated $1 million figure, was fact peculiarly within defendant's knowledge. *Deocampo v. Ahn (2002) 101 Cal. App. 4th 758, 779, 125 Cal. Rptr. 2d 79*

In personal injury action, trial court properly granted defendants' motion for summary judgment on grounds that action was barred by settlement, when defendants' unequivocal oral acceptance of plaintiff's written Section 998 offer before it was revoked was valid, *Code Civ. Proc. § 998* does not require service of acceptance, and fact that proof of acceptance was filed after attempted revocation did not affect validity of acceptance. *Gray v. Stewart (2002) 97 Cal. App. 4th 1394, 1397-1398, 119 Cal. Rptr. 2d 217*

In action by Attorney General in name of People for civil penalties, restitution and injunctive relief against life insurer and its parent company under *Bus. & Prof. Code §§ 17200, 17500*, trial court properly awarded parent company expert witness fees as costs after Attorney General rejected parent company's offer to settle pursuant to *Code Civ. Proc. § 998* and Attorney General failed to prove parent company's liability as life insurer's alter ego *People ex rel. Lockyer v. Fremont General Corp. (2001) 89 Cal. App. 4th 1260, 108 Cal. Rptr. 2d 127*

Prejudgment interest under *Civ. Code § 3291* and *Code Civ. Proc. § 998* applies to future periodic portion of judgment, and is calculated from date of plaintiff's first Section 998 offer. *Hrimnak v. Watkins (1995) 38 Cal. App. 4th 964, 980-981, 45 Cal. Rptr. 2d 514*

"Judgment" in *Code Civ. Proc. § 998(b)* contemplates that offer to compromise that is accepted will result in final disposition of underlying lawsuit; statute does not indicate intent to limit terms of compromise settlement or type of final disposition; compromise agreement calling for voluntary dismissal with prejudice satisfies requirement of *Code Civ. Proc. § 998*. *Goodstein v. Bank of San Pedro (1994) 27 Cal. App. 4th 899, 906, 32 Cal. Rptr. 2d 740*

Trial court is entitled to infer that defendant's settlement offer was not in good faith when jury concluded that defendant was directly liable for damages almost eight times greater than settlement offer and was, through joint and several liability, liable for damages more than 20 times greater than settlement offer. *Elrod v. Oregon Cummins Diesel, Inc. (1987) 195 Cal. App. 3d 692, 700-701, 241 Cal. Rptr. 108*

In action on contract providing for recovery of attorney's fees by prevailing party, when judgment is entered based on offer of compromise under *Code Civ. Proc. § 998*, prevailing party is entitled to recover attorney fees under *Civ. Code § 1717* as item of costs after judgment, even though compromise agreement is silent on costs and fees. *Lanyi v. Goldblum (1986) 177 Cal. App. 3d 181, 189, 223 Cal. Rptr. 32* ; *see also Rappenecker v. Sea-Land Service, Inc. (1979) 93 Cal. App. 3d 256, 261-264, 155 Cal. Rptr. 516* (costs)

Code Civ. Proc. § 998 (award costs of suit to offering party) and *Civ. Code § 3291* (interest on more favorable judgment secured by offering party) are inapplicable to arbitration proceedings. *Woodard v. Southern Cal. Permanente Medical Group (1985) 171 Cal. App. 3d 656, 666, 217 Cal. Rptr. 514*

Offer made under *Code Civ. Proc. § 998* is governed by principles of contract law; offer is withdrawn if acceptance not communicated within statutory period. *Drouin v. Fleetwood Enterprises (1985) 163 Cal. App. 3d 486, 491-492, 209 Cal. Rptr. 623*

Under *Code Civ. Proc. § 998*, when plaintiff rejected defendant's settlement offer and prevailed at trial, but failed to recover more favorable judgment, reduction in plaintiff's recoverable costs by amount of both defendant's and plaintiff's regular court costs incurred after time of offer was proper since provisions of *Code Civ. Proc. § 998* for recovery of costs from time of offer are mandatory. *Lafayette v. County of Los Angeles (1984) 162 Cal. App. 3d 547, 557, 208 Cal. Rptr. 668*

Qualified acceptance of a *Code Civ. Proc. § 998* settlement offer that contains terms or conditions materially different from those in original offer constitutes counter offer that terminates power of original offeree to accept settlement offer. *Glende Motor Co. v. Superior Court (1984) 159 Cal. App. 3d 389, 398, 205 Cal. Rptr. 682*

In personal injury action, former *Code Civ. Proc. § 998(g)* (*now see Code Civ. Proc. § 998(h)*) and *Gov. Code § 68092.5*, governing payment of costs by unsuccessful party who refused to compromise, restrict fees allowable to witness who testifies solely as to any expert opinion and trial court properly rejected claim for expert witness fees when witnesses were physicians whose testimony could have been compelled by simple subpoena. *Ellenberger v. Karr (1982) 127 Cal. App. 3d 423, 428, 179 Cal. Rptr. 583* (*Gov. Code § 68092.5* later amended to permit fees when witness testifies primarily as expert)

It is within discretion of trial court to disallow defendant's expert witness fees under *Code Civ. Proc. § 998(c)* if defendant's offer to compromise is unreasonable, unrealistic, and made with no expectation of its acceptance. *Pineda v. Los Angeles Turf Club, Inc. (1980) 112 Cal. App. 3d 53, 62-63, 169 Cal. Rptr. 66*

Plaintiff's recovery of costs not prohibited by acceptance of defendant's offer to allow judgment to be taken in "full compromise settlement" of claims. *Rappenecker v. Sea-Land Service, Inc. (1979) 93 Cal. App. 3d 256, 261-264, 155 Cal. Rptr. 516*

Compromise settlement without trial of prior action pursuant to stipulation for payment to truck driver, when stipulation included disclaimer as to liability and recited that merit of driver's claim was in dispute, did not preclude trial on merits involving party who was not party to compromise. *Clovis Ready Mix Co. v. Aetna Freight Lines (1972) 25 Cal. App. 3d 276, 285, 101 Cal. Rptr. 820*

Offer to compromise pursuant to former *Code Civ. Proc. § 997* made before second trial superseded higher offer made prior to first trial for purpose of recovering costs. *Distefano v. Hall (1968) 263 Cal. App. 2d 380, 384-385, 69 Cal. Rptr. 691*

[8] Satisfaction of Compromise or Settlement Judgments

Satisfaction of compromise settlement judgment entered under *Code Civ. Proc. § 998* did not discharge liability of defendants who were not parties to settlement agreement. *Milicevich v. Sacramento Medical Center (1984) 155 Cal. App. 3d 997, 1000-1007, 202 Cal. Rptr. 484*

[9] Settlement With One or More of Several Tortfeasors

To extent settlement is dictated by tactical advantage of removing deep-pocket defendant, it is not made in good faith consideration of the relevant liability of all parties. *Long Beach Memorial Medical Center v. Superior Court (2009) 172 Cal. App. 4th 865, 877, 91 Cal. Rptr. 3d 494*

Applying settlement credit pursuant to *Code Civ. Proc. § 877* in satisfaction of judgment is not modification of arbitration award on which judgment was based. *Wade v. Schrader (2008) 168 Cal. App. 4th 1039, 1045, 85 Cal. Rptr. 3d 865*

In contract action in which property owner sued contractor and contractor sued property owner, and in which other property owners settled with contractor, after jury determined that property owner's breach caused $32,551.52 in unmitigable damages to contractor, and that contractor's breach caused $19,800 in damages to property owner, trial court properly gave property owner credit for $100,000 settlement paid by former codefendants, which exceeded amount awarded by jury, and correctly determined that property owner therefore owed contractor nothing, but erred when it entered judgment in favor of property owner for $19,800, and should have entered judgment awarding nothing to either party, where, under *Code Civ. Proc. § 877(a)*, reversal of property owner's verdict for $19,800 did not result in double recovery to contractor because trial court's judgment awarding $19,800 to property owner and nothing to contractor gave contractor no recovery at all, and judgment appellate court instructed trial court to enter on remand, awarding nothing to either side, would still give contractor no recovery at all, and only recovery contractor obtained was settlement it received from property owner's former codefendants. *Brawley v. J.C. Interiors, Inc. (2008) 161 Cal. App. 4th 1126, 1132-1135, 74 Cal. Rptr. 3d 832*

After attorneys settled malpractice and negligent misrepresentation action against them by trust beneficiaries and obtained good faith settlement determination order pursuant to *Code Civ. Proc. § 877.6*, and, in separate probate proceeding, beneficiaries sought relief against trustee for dereliction of his trust duties, which dispute was settled, trial court erred in not granting summary judgment and summary adjudication to attorneys in action by trustee, whom attorneys had represented, for torts related to services provided trustee in connection with trusts, on grounds that claims were barred by good faith determination order, when good faith determination could bar claims of unnamed party; trustee and attorneys were joint tortfeasors; trustee's claims were either for indemnification or in effect for indemnification; and therefore, under *Code Civ. Proc. § 877.6*, good faith settlement barred the trustee's claims. *Gackstetter v. Frawley (2006) 135 Cal. App. 4th 1257, 1270-1279, 38 Cal. Rptr. 3d 333*

Determination of good faith settlement governed by *Code Civ. Proc. § 877.6* applies only to trial court, not to *Court of Appeal. Lopez v. Jarrett (2001) 89 Cal. App. 4th 1298, 106 Cal. Rptr. 2d 829*

Finding that settlement was in good faith under *Code Civ. Proc. § 877.6* as possible even though insurer for one of settling defendants arguably breached its "good faith" obligations by denying coverage and refusing to negotiate on behalf of one of nonsettling defendants; possible bad faith claim against insurer as irrelevant to issue of whether settling tortfeasor acted in good faith. *Rankin v. Curtis (1986) 183 Cal. App. 3d 939, 944-947, 228 Cal. Rptr. 753*

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Kornblum, *Expediting Settlement*, *35 Prac. Law. 15 (1989)*

Brazil, *Protecting the Confidentiality of Settlement Negotiations*, *39 Hastings L.J. 955 (1988)*

Comment, *The Changing Face of Mary Carter Agreements in California: The Aftermath of Abbott Ford and Proposition 51*, *16 Pepp. L. Rev. 795 (1988)*

Roberts, *The Relatively Insolvent Joint Tortfeasor and the Good Faith Settlement*, *20 Loy. L.A. L. Rev. 247 (1987)*

Charfoos and Christensen, *Negotiating Settlements*, 32(2) Prac. Law. 57 (1986)

Comment, *Alternative Dispute Resolution: Panacea or Anathema*, *99 Harv. L. Rev. 668 (1986)*

Comment, *California Code of Civil Procedure Sections 877, 877.5 and 877.6: The Settlement Game in the Ballpark That Tech-Bilt*, *13 Pepp. L. Rev. 823 (1986)*

Bergeisen, *How to Manage Litigation and Evaluate Outside Counsel*, 31(3) Prac. Law. 37 (1985)

Note, *The Impact of Collateral Estoppel on Postjudgment Settlements*, *15 Sw. U.L. Rev. 343 (1985)*

Note, *Revocation of Section 998 Offers: T.M. Cobb Co. v. Superior Court*, *19 U.S.F. L. Rev. 283 (1985)*

Roberts, *The "Good Faith" Settlement: An Accommodation of Competing Goals*, *17 Loy. L.A. L. Rev. 841 (1984)*

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Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, § 54, vol. 9, *Appeal*, §§ 145, 490-492 (4th ed. 1997)

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 211, 215; vol 2, *Insurance, § 28* (10th ed. 2005)

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§ 520.90 California Legal Forms

For additional forms for release, and related discussion, see California Legal Forms, Ch. 77, *Discharge of Obligations* (Matthew Bender)

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§ 520.91 California Torts

For discussion of releases in the context of settlement of tort actions, see Levy, Golden, and Sacks, California Torts, Ch. 73, *Settlement and Release*

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§ 520.92 State Statutes

General release executed during period of first physical confinement. *Bus. & Prof. Code § 6152(b)*

Obligation extinguished by release. *Civ. Code § 1541*

Claims not extinguished by release. *Civ. Code § 1542*

Effect of release on claims of joint debtors and right of contribution. *Civ. Code § 1543*

Liability of surety to creditor who may have released principal. *Civ. Code § 2824*

Trial on validity of release. *Code Civ. Proc. § 597*

Releases from and contribution among joint tortfeasors. *Code Civ. Proc. §§ 875-880*

Release of lien is required, for recording, to set forth name of obligor whose obligation is basis of lien being released. *Gov. Code § 27288.1*

Effect of employer's requirement that employee release wage claim. *Lab. Code § 206.5*

Consent not required for release of third-party tortfeasor for employee's injuries. *Lab. Code § 3859*

Consent of Worker's Compensation Appeals Board to employee's release of claim for injury or death. *Lab. Code §§ 5000, 5001*

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§ 520.93 Decisions

[1] Conditions Affecting Operation of Release

Act of State Board of Control employee in withholding appropriation made by Legislature to compensate private citizen injured while preventing crime [former *Penal Code §§ 13600-13603, now see Gov. Code §§ 13970-13974.1*] constituted unlawful condition to payment rendering release ineffective. *Worthington v. State Bd. of Control (1968) 266 Cal. App. 2d 697, 699-700, 72 Cal. Rptr. 449*

[2] Consideration for Release

Written release unsupported by consideration requires express showing of creditor's intent to extinguish obligation. *Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 31 n. 7, 216 Cal. Rptr. 130, 702 P.2d 212*

[3] Definition of Release

Definition and theory of release. *Pellett v. Sonotone Corp. (1945) 26 Cal. 2d 705, 711, 160 P.2d 783* ; *Hastings v. Matlock (1980) 107 Cal. App. 3d 876, 882, 166 Cal. Rptr. 229*

Definition of release under *Civ. Code § 1542*. *Sime v. Malouf (1949) 95 Cal. App. 2d 82, 108-110, 212 P.2d 946*

[4] Effect of Release

Application form signed by parents releasing city and its employees from liability for "any negligent act" related to child's participation in city's summer camp for developmentally disabled children violated public policy and was unenforceable to extent it released liability for future gross negligence. *City of Santa Barbara v. Superior Court (2007) 41 Cal. 4th 747, 753-781, 62 Cal. Rptr. 3d 527, 161 P.3d 1095*

Trial court erred in finding that release signed by plaintiff before beginning trail ride operated by stable did not bar action against stable based on negligence of employee leading ride, where release did not unambiguously exempt stable from liability for its own negligence or for any and all risks plaintiff encountered while using stable's facilities, and trial court not only improperly resolved ambiguity in favor of drafter, but ignored principle that release relieves defendant of consequences of its own negligence only if it does so in clear, unambiguous, and explicit language. *Cohen v. Five Brooks Stable (2008) 159 Cal. App. 4th 1476, 1484-1491*

Release agreement signed by employee regarding suspension of his employment following altercation with coworker was ambiguous about scope of waiver and question of whether release waived employee's right to bring discrimination action was question of fact, for which extrinsic evidence could be introduced to resolve ambiguity. *Butler v. Vons Cos., Inc. (2006) 140 Cal. App. 4th 943, 947-951, 45 Cal. Rptr. 3d 151*

Release signed by dog owner to have dog neutered was complete defense to action resulting from dog's death, when claims were within scope of release language and owner failed to show defendants' retention of dog because he was not neutered was unlawful so as to establish statutory duress which coerced owner to sign release. Release applied to claims of wrongful impoundment and detention, because claims sought recovery of general and special damages arising from dog's death, which owner waived by his agreement to release defendants from and against any and all claims arising from surgery on dog. Finally, agreement, voluntarily entered into, did not violate public policy. *Tarpy v. County of San Diego (2003) 110 Cal. App. 4th 267, 276-279, 1 Cal. Rptr. 3d 607*

Agreement for minority shareholder to sell stock back to majority shareholders could not release directors or majority shareholders from tort liability to seller on any claim based on their subsequent sale of company, which resulted in their receiving higher price for their shares than seller received. Agreement provided that seller would not sue merely because majority shareholders ultimately obtained more for their shares than seller received for his, but tort causes of action were not based on claim they breached duty to share ultimate proceeds from sale with him on a pro rata basis, but when that in negotiating purchase of minority shareholder's shares defendants breached their duties to disclose and not misrepresent all material facts bearing on value of shares at time he sold them. *Neubauer v. Goldfarb (2003) 108 Cal. App. 4th 47, 58-59, 133 Cal. Rptr. 2d 218*

Release conclusively estops party from reviving and relitigating claim released. *In re Mission Ins. Co. (1995) 41 Cal. App. 4th 828, 838, 48 Cal. Rptr. 2d 209*

Mere recital that protection of *Civ. Code § 1542* is waived, or that release covers unknown claims or unknown parties, does not control; whether releasor intended to discharge claims or parties is ultimately question of fact. *Vega v. Western Employers Ins. Co. (1985) 170 Cal. App. 3d 922, 927, 216 Cal. Rptr. 592 , overruled in part by Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal. 3d 287, 310, 250 Cal. Rptr. 116, 758 P.2d 58*

Release does not extend to claims not known or suspected to exist, and mere recital in release, that it covers unknown claims or that *Civ. Code § 1542* is waived, does not of itself bar assertion that bodily injuries were unknown; whether releasor actually intended to discharge claims is question of fact; and mere knowledge of some injury does not necessarily imply knowledge of extent thereof. *Grebe v. McDaniel (1968) 265 Cal. App. 2d 901, 903, 71 Cal. Rptr. 662*

[5] Requirements for Formation of Valid Release

Terms of release require mutual assent by all parties to release for release to be binding on them. *Smith v. Occidental and Oriental Steamship Co. (1893) 99 Cal. 462, 470-471, 34 P. 84*

Employment severance agreement could be enforced despite lack of waiver of *Civ. Code § 1542* providing that general release does not extend to claims creditor does not know or suspect to exist in his or her favor at time of executing release, which if known by him or her must have materially affected his or her settlement with debtor, where agreement stated plaintiff waived all claims existing as of date he signed agreement arising from or relating to his employment or termination of his employment and any claims arising under common law of contract, implied contract, tort, public policy, or statute, such as claims under specified legislative enactments, or any other federal or state law, statute, decision, order, policy or regulation establishing or relating to claims or rights of employees, including, but not limited to claims in tort or contract, based upon public policy, and any and all claims alleging breach of express or implied, or oral or written, contract, or alleging misrepresentation, defamation, interference with contract, or wrongful discharge, and plaintiff understood he was releasing claims arising under all statutes agreement referred to, even those he did not understand; and where nothing in *Civ. Code § 1542* required that it be designated in release or that party specifically waive its provisions. *Perez v. Uline (2007) 157 Cal. App. 4th 953, 958-959, 68 Cal. Rptr. 3d 872*

Agreement for sale of stock could not knowingly and intelligently waive any fiduciary duty directors or majority shareholders owed to seller, because waiver of corporate directors' and majority shareholders' fiduciary duties to minority shareholders in private close corporations is against public policy and contract provision in buy-sell agreement purporting to effect such waiver is void. Even if fiduciary duty validly could be waived, waiver required knowing and intelligent relinquishment of right, and triable issue of fact existed as to whether seller's purported waiver was fully informed. *Neubauer v. Goldfarb (2003) 108 Cal. App. 4th 47, 55-57, 133 Cal. Rptr. 2d 218*

Release is knowingly and voluntarily signed notwithstanding contention that signer was not told that release would affect certain claims. *Skrbina v. Fleming Companies (1996) 45 Cal. App. 4th 1353, 1367, 53 Cal. Rptr. 2d 481*

[6] Enforcement of Release

Absent laches, defendant may file supplemental answer setting up defense of release. *Seehorn v. Big Meadows & Bodie Wagon Road Co. (1882) 60 Cal. 240, 251*

[7] Interpretation of Release

Parol evidence of circumstances surrounding execution of release is admissible to place court in position of those whose language he or she must interpret. *Jersey Island Dredging Co. v. Whitney (1906) 149 Cal. 269, 273, 86 P. 691*

Release given by decedent was no bar to death action by heirs. *Earley v. Pacific Electric Ry. Co. (1917) 176 Cal. 79, 81-82, 167 P. 513*

In personal injury action by spectator against speedway owner for injuries suffered when speedway pit-area bleachers collapsed, trial court erred in finding that release of liability signed by plaintiff releasing defendant from all liability for any injuries sustained while on premises was complete defense because injury was reasonably related to purpose of release agreement. The purpose of release was not merely to give access to restricted areas of speedway, but to require releasee to assume risk of injury as result of being in close proximity to dangerous activity of automobile racing and any further risk that might result from activity of observing such a race. Plaintiff's express assumption of risk would cover all hazards related to automobile race and its observation, but release agreement did not contractually charge plaintiff with assuming risk of injury from defectively constructed or maintained bleachers. *Sweat v. Big Time Auto Racing, Inc. (2004) 117 Cal. App. 4th 1301, 1304-1308, 12 Cal. Rptr. 3d 678*

In action by skier against resort for negligence and premises liability based on fall, trial court erroneously granted defendant summary judgment based on release to which plaintiff agreed as part of season pass, which allowed plaintiff to use defendant's facilities Monday through Friday. The accident occurred on Sunday, for which plaintiff had bought

day pass which did not include a release, and defendant did not demonstrate that release necessarily applied to plaintiff's claim. *Solis v. Kirkwood Resort Co. (2001) 94 Cal. App. 4th 354, 360-364, 114 Cal. Rptr. 2d 265*

In carrying out de novo interpretation of release, appellate court's inquiry is whether release is broad enough in scope to cover activities in question, or whether activities were of type originally contemplated by parties in entering into release. *Paralift, Inc. v. Superior Court (1993) 23 Cal. App. 4th 748, 756, 29 Cal. Rptr. 2d 177*

[8] Joint Debtors, Tortfeasors, and Coobligors

In Ninth Circuit, release of one tortfeasor does not release all other joint tortfeasors, absent agreement to effect release of any or all other tortfeasors. *Avery v. U.S. (9th Cir. 1987) 829 F.2d 817, 819*

In action against automobile manufacturer based on automobile accident, extrinsic evidence presented at trial established as matter of law that inclusion of language in release of driver of other vehicle and his insurance company ostensibly releasing all third parties from liability was mutual mistake, when testimony of contracting parties to effect that release of manufacturer was not intended was relevant in describing their disclosed intentions; trial court properly removed issue of scope of release from jury so any error in judicially noticing that there had been judicial reformation judgment conforming release to parties' intentions was harmless. *Hess v. Ford Motor Co. (2002) 27 Cal. 4th 516, 117 Cal. Rptr. 2d 220, 41 P.3d 46*

Under *Code Civ. Proc. § 877*, plaintiff in tort action who sues one party as alter ego of subsidiary corporation can proceed against alleged alter ego after settlement with subsidiary. *Mesler v. Bragg Management Co. (1985) 39 Cal. 3d 290, 297-306, 216 Cal. Rptr. 443, 702 P.2d 601*

Settlement made in good faith under *Code Civ. Proc. §§ 877* and *877.6* bars claims against settling defendant for contribution or indemnity by other joint tortfeasors, including claims for total indemnity, partial indemnity and implied contractual indemnity. *Fullerton Redevelopment Agency v. Southern California Gas Co. (2010) 183 Cal. App. 4th 428, 432, 107 Cal. Rptr. 3d 396*

Due process requires that unnamed joint tortfeasor not be bound by good faith determination under *Code Civ. Proc. § 877.6*, when that tortfeasor's potential liability was known or reasonably should have been known to settling parties but he or she was not given opportunity to be heard at good faith determination. *Singer Co. v. Superior Court (1986) 179 Cal. App. 3d 875, 881, 890-895, 225 Cal. Rptr. 159*

When parties stipulate to fact and amount of prior settlement after verdict but before entry of judgment, defendant is entitled to judgment in amount that reflects credit for payment received by plaintiff in settlements from other tortfeasors prior to trial; when plaintiff's settlement completely offsets damages assessed against nonsettling joint tortfeasor, judgment is reduced to zero by operation of law, pursuant to *Code Civ. Proc. § 877*. *Syverson v. Heitmann (1985) 171 Cal. App. 3d 106, 110-112, 214 Cal. Rptr. 581*

Under *Code Civ. Proc. § 877.6*, good faith settlement by one or more joint tortfeasors that bars any other joint tortfeasor from claiming comparative indemnity against settling tortfeasors is available in commercial actions and not limited to personal injury actions. *Kohn v. Superior Court (1983) 142 Cal. App. 3d 323, 332, 191 Cal. Rptr. 78*

Requirement that settlement with released joint tortfeasor be in good faith is meant to insure that settling parties refrain from tortious or other wrongful conduct against nonsettling parties; failure of sliding scale agreements to achieve equitable apportionment or final settlement of litigation does not mean that good faith is absent. *Burlington Northern R.R. Co. v. Superior Court (1982) 137 Cal. App. 3d 942, 945-947, 187 Cal. Rptr. 376*

In action involving joint tortfeasors, settlement and release by plaintiff of one joint tortfeasor requires offset in trial judgment against nonsettling tortfeasor. *Knox v. County of Los Angeles (1980) 109 Cal. App. 3d 825, 832, 167 Cal. Rptr. 463*

Under *Code Civ. Proc. § 877*, release of agent before trial does not discharge principal from tort liability, even though sole basis alleged for recovery from principal is his vicarious liability for acts of agent. *Ritter v. Technicolor Corp. (1972) 27 Cal. App. 3d 152 153-155, 103 Cal. Rptr. 686*

Release executed by tort victim in violation of good faith requirement of *Code Civ. Proc. § 877* did not activate common law rule that release of one joint tortfeasor releases all, but rather permitted tortfeasor to invoke release's illegality, have it set aside, and seek damages from tort victim. *River Garden Farms, Inc. v. Superior Court (1972) 26 Cal. App. 3d 986, 999-1001, 103 Cal. Rptr. 498*

Effect of payment from one joint tortfeasor on amount of damages recoverable against other joint tortfeasor. *Steele v. Hash (1963) 212 Cal. App. 2d 1, 2-3, 27 Cal. Rptr. 853*

[9] Ratification of Release

Ratification of void release is not possible when person alleged to have ratified did not know what agreement contained or all the facts when alleged ratification occurred. *Backus v. Sessions (1941) 17 Cal. 2d 380, 385, 110 P.2d 51*

Rescindable release is subject to ratification by conduct of releasor. *Eustace v. Lynch (1941) 43 Cal. App. 2d 486, 491, 111 P.2d 372*

[10] Rescission of Voidable Release

Rescission is required of releases that are merely voidable, rather than void. *Garcia v. California Truck Co. (1920) 183 Cal. 767, 770, 192 P. 708*

In determining whether releasor was mentally competent to execute release, court properly receives evidence of releasor's mental condition both before and after execution of release. *Perkins v. Sunset Tel. and Tel. Co. (1909) 155 Cal. 712, 717, 103 P. 190*

Release is subject to rescission for same reasons as other contracts. *Matthews v. A.T. & S.F. Ry. (1942) 54 Cal. App. 2d 549, 557, 129 P.2d 435*

Circumstantial evidence is admissible to prove fraud in execution of release. *Wilson v. San Francisco O. T. Railways (1920) 48 Cal. App. 343, 348, 191 P. 975*

[11] Review

Appellate court is not required to consider or rule on validity of release that is neither framed by pleadings nor specially pleaded. *Hildebrand v. Stonecrest Corp. (1959) 174 Cal. App. 2d 158, 164, 169, 344 P.2d 378*

Generally when conflicting evidence is offered on existence of facts tending to negate consent to release, inferences to be drawn from these facts are for trier of fact, and resulting findings of fact are not to be disturbed on appeal. *Mathews v. Pacific Mut. Life Ins. Co. (1941) 47 Cal. App. 2d 424, 430, 118 P.2d 10*

[12] Summary Judgment

Mutual release supported summary judgment against owner as to claim against architect for negligent supervision of construction contract. *Larsen v. Johannes (1970) 7 Cal. App. 3d 491, 496-507, 86 Cal. Rptr. 744*

Release is sufficient to support summary judgment for releasee. *Grebe v. McDaniel (1968) 265 Cal. App. 2d 901, 902-904, 71 Cal. Rptr. 662*

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46-520 California Forms of Pleading and Practice--Annotated § 520.94

§ 520.94 Law Reviews

Comment, *Effect of the Personal Injury Release on Further Recovery in California, 42 Cal. L. Rev. 161 (1954)*

Note, *New Proposal for an Old Problem: Protect Victims of Unfair Releases, 1 Stan. L. Rev. 298 (1949)*

Note, *Releases: Partial Release of Tort Claims: Need for Legislation, 32 Cal. L. Rev. 101 (1944)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsReleases From LiabilityGeneral OverviewContracts LawTypes of ContractsReleasesTortsProcedureSettlementsReleasesGeneral Overview

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§ 520.95 Text References

Witkin, California Procedure, vol. 5, *Pleading*, §§ 1019, 1028 (4th ed. 1997)

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 946-949; vol. 2, *Insurance, § 253* (10th ed. 2005)

Legal Topics:

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

§§ 520.96[Reserved]

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46-520 California Forms of Pleading and Practice--Annotated § 520.110

§ 520.110 Plaintiff's or Defendant's Offer to Compromise Before Commencement of Trial [Code Civ. Proc. § 998]

[1] FORM Plaintiff's or Defendant's Offer to Compromise Before Commencement of Trial [Code Civ. Proc. § 998]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	[PLAINTIFF'S *or* DEFENDANT'S] OFFER TO
Defendant.	)	COMPROMISE
	)	
	)	

_____

TO _____ [*name and designation of party, e.g.,* JANE DOE, PLAINTIFF], AND TO _____ [*name*], HIS/HER ATTORNEY OF RECORD:

[*EITHER, if defendant is offering to compromise*]

Defendant, _____ [*name*], offers to have _____ [judgment *or* award] taken against himself/herself and for plaintiff, _____ [*name*], in the above-entitled action pursuant to *Section 998 of the Code of Civil Procedure* for the sum of $_____, _____ [each party to bear his/her own costs (and attorney's fees) *or* plus taxable costs incurred to date of judgment] [, and according to the

additional terms and conditions as follow: _____ (*specify*)].

[*OR, if plaintiff is offering to compromise*]

Plaintiff, _____ [*name*], offers to have _____ [judgment *or* award] taken against defendant, _____ [*name*], and for himself/herself in the above-entitled action pursuant to *Section 998 of the Code of Civil Procedure* for the sum of $_____, _____ [each party to bear his/her own costs (and attorney's fees) *or* plus taxable costs incurred to date of judgment] [, and according to the additional terms and conditions as follow: _____ (*specify*)].

[*CONTINUE*]

If you accept this offer, please date and sign the accompanying notice of acceptance, and file the offer and notice of acceptance in the above-entitled action prior to trial or within 30 days after the offer is made, whichever occurs first, or else it will be deemed withdrawn.
Dated: _____.

_____ [*signature*]
_____ [Plaintiff *or* Defendant]

_____ [*signature*]
Attorney for _____
[Plaintiff *or* Defendant]

Service on _____ [*date*], of the above offer to compromise is admitted.

_____ [*signature*]
Attorney for _____
[*specify party accepting service*]

[2] Use of Form

This form is an offer to compromise that may be served by any party on any other party to an action to allow judgment (or contractual arbitration award under *Code Civ. Proc. §§ 1281, 1296*) to be taken in accordance with the terms and conditions stated at that time [*Code Civ. Proc. § 998(b)*].

As an alternative to this form, optional Judicial Council Form CIV-090, illustrated in § 520.110, may be used in appropriate cases. Form CIV-090 may be used only in civil actions involving a single plaintiff and a single defendant, and the offer and acceptance must involve a money judgment. In other cases, an attorney-drafted form such as this one must be used.

The written offer must include a statement of the offer, containing the terms and conditions of the judgment or award, and a provision allowing the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted [*Code Civ. Proc. § 998(b)*].

If the offer is not accepted, the costs allowed under *Code Civ. Proc. §§ 1031* and *1032* (*see also Code Civ. Proc. §§ 1033-1034* and *Cal. Rules of Ct., Rules 3.1700 et seq.*) are to be withheld as provided in *Code Civ. Proc. § 998* [*see*

Code Civ. Proc. § 998(a)].

This form may be adapted for use by a cross complainant or cross defendant, as *Code Civ. Proc. § 998* applies to those parties as well [*see Code Civ. Proc. § 998(f)*].

If a personal injury plaintiff's offer is not accepted and the plaintiff obtains a more favorable judgment, the judgment must bear interest from the date of plaintiff's first offer pursuant to *Code Civ. Proc. § 998* which is exceeded by the judgment [*Civ. Code § 3291*].

The optional language referring to attorney's fees would be included only if there is some reason why the general rule that a party bears his or her own attorney's fees [*see Code Civ. Proc. § 1021*] would not apply, such as when a contract provision states otherwise [*see* discussion in Ch. 174, *Costs and Attorney's Fees*]. Note that if the offer is silent on attorney's fees, and the action was brought on a contract providing for recovery of attorney's fees by the prevailing party, the prevailing party may recover attorney's fees under *Civ. Code § 1717* as an item of costs after judgment [*Lanyi v. Goldblum (1986) 177 Cal. App. 3d 181, 189, 223 Cal. Rptr. 32*].

Similarly, when the accepted offer is silent on the issue of costs, the plaintiff may recover costs in addition to the specified amount of the written offer [*Rappenecker v. Sea-Land Service, Inc. (1979) 93 Cal. App. 3d 256, 261-264, 155 Cal. Rptr. 516*].

This form should include a place for the offeree to accept the offer or be accompanied by a notice of acceptance [*see § 520.111*; *see Code Civ. Proc. § 998(b)*]. The offeror may also request that the offeree prepare the acceptance form, with either party filing the offer with proof of acceptance to obtain a judgment. The acceptance provision may be combined with this form instead of using a separate notice.

For forms for captions for use in contractual arbitration proceedings, see Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* .

[3] Signatures

The offer should be signed by the offeror, as well as the offeror's attorney, in order to avoid problems concerning the attorney's authority to compromise a claim for the client [*see Code Civ. Proc. § 283*; *see also § 520.76[3]*, and *Ch. 72, Attorney Practice and Ethics, § 72.30* et seq.].

[4] Time and Manner of Service

An offer to compromise made pursuant to *Code Civ. Proc. § 998* must be served not less than 10 days prior to commencement of the trial or contractual arbitration under *Code Civ. Proc. §§ 1281, 1296* [*Code Civ. Proc. § 998(b)*]. According to *Code Civ. Proc. § 581(1)*, a trial or arbitration is deemed to be actually commenced at the beginning of the opening statement of the plaintiff or his or her counsel, and if there is no opening statement, then at the time of the administration of the oath or affirmation to the first witness, or of the introduction of any evidence [*Code Civ. Proc. § 998(b)(3)*].

The offer may be served on the party or attorney by personal service, substituted service, or mail [*Code Civ. Proc. §§ 1010-1013*]. Counsel should secure proof of service in case the offer is rejected and it later becomes necessary to establish the making of the offer in order to recover costs pursuant to *Code Civ. Proc. § 998(c), (d)* or *(e)*. This form contains an acknowledgment of service. The offeror can serve an extra copy of the form on the offeree to be signed and returned to the offeror. For forms and procedure relating to service and proof of service, see Ch. 518, *Service of Summons and Papers* .

[5] Cross References

For a discussion of the authority of an attorney to compromise a client's claim, see *Ch. 72, Attorney Practice and Ethics, § 72.30* et seq.

For a discussion of the effects of the acceptance or expiration of an offer to compromise, see *Ch. 174, Costs and Attorney's Fees, § 174.50* et seq.

For discussion of the right to prejudgment interest under *Civ. Code § 3291*, see *Ch. 177, Damages, § 177.40* et seq.

[6] State Statutes

Authority of any party to serve written offer on any other party to action to allow judgment to be taken in accordance with stated terms and conditions. *Code Civ. Proc. § 998(b), (f)*

[7] Decisions

If a Section 998 offer is withdrawn by party before its statutory expiration, withdrawing party's right to cost shifting under Section 998 is determined by last rejected Section 998 offer. *One Star, Inc. v. Staar Surgical Co. (2009) 179 Cal. App. 4th 1082, 1093-1094, 102 Cal. Rptr. 3d 195*

When judgment is entered based on *Code Civ. Proc. § 998* settlement offer in action brought on contract that provided for recovery of attorney's fees by prevailing party, attorney's fees may be recovered under *Civ. Code § 1717* as item of costs after judgment, even though settlement agreement is silent on costs and fees. *Lanyi v. Goldblum (1986) 177 Cal. App. 3d 181, 189, 223 Cal. Rptr. 32*

Settlement offer made under *Code Civ. Proc. § 998* is revocable by offeror; settlement offer made under *Code Civ. Proc. § 998* does not create irrevocable option. *T.M. Cobb Co. v. Superior Court (1984) 36 Cal. 3d 273, 280-283, 204 Cal. Rptr. 143, 682 P.2d 338*

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-520 California Forms of Pleading and Practice--Annotated § 520.110A

§ 520.110A Offer to Compromise and Acceptance Under Code Civ. Proc. § 998--Judicial Council Form CIV-090

[1] FORM Offer to Compromise and Acceptance Under Code Civ. Proc. § 998--Judicial Council Form CIV-090

Click here to view image.

[2] Use of Form

This form is an illustration of California Judicial Council Form CIV-090, which is for optional use by a plaintiff to make an offer to compromise under *Code Civ. Proc. § 998*. The form may be used only in civil actions involving a single plaintiff and a single defendant. The offer and acceptance must involve a money judgment. In other cases, a form such as that illustrated in § 520.110 should be used.

This form includes space for acceptance of the offer by the defendant. For an attorney-drafted form for a defendant's acceptance of a plaintiff's offer to compromise under *Code Civ. Proc. § 998*, see *§ 520.111*.

For general discussion of the use of a form for an offer to compromise under *Code Civ. Proc. § 998, see § 520.110[2]*. For time and manner of service, *see § 520.110[4]*.

The court will only file the offer and acceptance if accompanied by a judgment prepared for the court's signature and entry of judgment. For forms for judgment and entry of judgment, *see* Ch. 318, *Judgments* .

This form is available in an interactive, electronic format in *LexisNexis(R) Automated Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format is also available at *www.lexisone.com* at no charge.

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46-520 California Forms of Pleading and Practice--Annotated § 520.111

§ 520.111 Notice [Code Civ. Proc. § 1010] of Acceptance of Plaintiff's or Defendant's Offer to Compromise [Code Civ. Proc. § 998]

[1] FORM Notice [Code Civ. Proc. § 1010] of Acceptance of Plaintiff's or Defendant's Offer to Compromise [Code Civ. Proc. § 998]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF ACCEPTANCE OF OFFER TO COM-
Defendant.	)	PROMISE
	)	
	)	

_____

TO _____ [*name and designation of party, e.g.,* JOHN RAE, DEFENDANT], AND TO _____ [*name*], HIS/HER ATTORNEY OF RECORD:

[*EITHER, for plaintiff's acceptance of offer to compromise*]

NOTICE IS HEREBY GIVEN that plaintiff, _____ [*name*], accepts the offer made by defendant to have judgment taken against defendant and for plaintiff, _____ [*name*], in the above-entitled action for the sum of $_____, _____ [each party to bear his/her own costs (and attorney's fees)

or plus taxable costs incurred to date of judgment] [, and according to the additional terms and conditions as follow: _____ (*specify*)].

[*OR, for defendant's acceptance of offer to compromise*]

NOTICE IS HEREBY GIVEN that defendant, _____ [*name*], accepts the offer made by plaintiff to have judgment taken for plaintiff and against defendant, _____ [*name*], in the above-entitled action for the sum of $_____, _____ [each party to bear his/her own costs (and attorney's fees) *or* plus taxable costs incurred to date of judgment] [, and according to the additional terms and conditions as follow: _____ (*specify*)].
Dated: _____.

_____ [*signature*]
_____ [Plaintiff *or* Defendant]

_____ [*signature*]
Attorney for _____
[Plaintiff *or* Defendant]

[2] Use of Form

This form is a notice for use by a party who has received an offer to compromise to notify the offeror of his or her acceptance [*Code Civ. Proc. § 998(b)*]. This form may be adapted for use by a cross complainant or cross defendant, as *Code Civ. Proc. § 998* applies to those parties as well [*see Code Civ. Proc. § 998(f)*].

This form should be modified as appropriate if used in contractual arbitration proceedings. For forms for captions for use in those proceedings, see Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceeding* .

When the plaintiff uses optional Judicial Council Form CIV-090 [*see § 520.110A*] for an offer to compromise under *Code Civ. Proc. § 998*, that form contains a signature block for the defendant's acceptance of the offer, and use of a separate form such as this one is unnecessary in that case.

[3] Requirement of Writing and Signature

Any acceptance of an offer to compromise under *Code Civ. Proc. § 998*, whether made on the document containing the offer or on a separate document of acceptance, must be in writing and signed by counsel for the accepting party or, if not represented by counsel, by the accepting party [*Code Civ. Proc. § 998(b)*].

[4] Timing of Acceptance

An offer to compromise made pursuant to *Code Civ. Proc. § 998* must be accepted prior to trial or arbitration, or within 30 days after it is made, whichever occurs first, or else it is deemed withdrawn and cannot be given in evidence on trial or arbitration [*Code Civ. Proc. § 998(b)(2)*].

[5] Notice to Court

If an entire case in superior court is settled, each plaintiff or other party seeking affirmative relief must immediately file written notice of the settlement or other disposition with the court and serve the notice on all parties and any arbitrator or other court-connected ADR neutral involved in the case. Each plaintiff or other party seeking affirmative relief also

must immediately give oral notice to all of the above if a hearing, conference, or trial is scheduled to take place within 10 days [*Cal. Rules of Ct., Rule 3.1385(a)*]. For the Judicial Council form for a Notice of Settlement, which is required for use to notify the court and any arbitrator or court-connected ADR neutral, see *§ 520.114*.

[6] Obtaining Judgment or Arbitration Award

If the offer to compromise is accepted, the offer, with proof of acceptance, must be filed, and the clerk or the judge must enter judgment accordingly [*Code Civ. Proc. § 998(b)(1)*]. The offeree's signed notice of acceptance filed with the court should be sufficient proof of acceptance.

In the case of an arbitration, the offer of proof of acceptance must be filed with the arbitrator or arbitrators who promptly must render an award accordingly [*Code Civ. Proc. § 998(b)*].

For forms for judgments obtained by similar procedures, see Ch. 205, *Defaults and Default Judgments* , for forms for default judgments entered by clerk pursuant to *Code Civ. Proc. § 585(a)*, and Ch. 318, *Judgments*, § 318.40 et seq., for a form for a judgment entered by the clerk on a jury verdict pursuant to *Code Civ. Proc. § 664*.

[7] State Statutes

Acceptance of offer to compromise. *Code Civ. Proc. § 998(b)(1)*

[8] California Rules of Court

Duty of plaintiff or other party seeking affirmative relief to file with court and give any arbitrator or other court-connected ADR neutral written notice of settlement of case. *Cal. Rules of Ct., Rule 3.1385(a)*

[9] Cross References

For a related form, *see § 520.110*

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46-520 California Forms of Pleading and Practice--Annotated § 520.112

§ 520.112 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Compromise of Claim Before Suit by Acceptance of Defendant's Promise

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Compromise of Claim Before Suit by Acceptance of Defendant's Promise

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

1. On or about _____ [*date*], and before the filing of plaintiff's complaint in this action, plaintiff demanded from defendant _____ [the sum sued for in the complaint *or describe other property as appropriate*], and defendant refused to _____ [pay the sum *or* deliver the property] because a dispute existed between them as to the extent of defendant's obligation to plaintiff.

2. On _____ [*date*], plaintiff and defendant entered into a[n] _____ [oral *or* written] agreement in compromise of plaintiff's claim whereby defendant promised to _____ [pay the sum of $_____ *or* deliver the property described above] to plaintiff on or before _____ [*date*], and plaintiff promised to accept defendant's promise in full compromise and satisfaction of the claim. [*If written agreement, add:* A copy of the compromise agreement is attached hereto as Exhibit 1 and made a part hereof.]

3. The time for performance of defendant's promise has not expired.

[2] Use of Form

This form is for use as an affirmative defense [*see Code Civ. Proc. § 431.30(b)(2)*] in an answer to a complaint based on the breach of an obligation [*see Civ. Code §§ 1427, 1428*] which has been extinguished by an oral or written compromise and settlement agreement. A compromise and settlement agreement is either a form of accord and satisfaction, if the parties intended that the mere execution of the agreement without satisfaction not extinguish the underlying obligation [*see Stub v. Belmont (1942) 20 Cal. 2d 208, 217-218, 124 P.2d 826]* , or else it is a form of novation, if they intended its mere execution to extinguish the obligation [*see Armstrong v. Sacramento Valley R. Co. (1919) 179 Cal. 648, 651, 178 P. 516* ; *see also* Ch. 6, *Accord and Satisfaction*].

[3] Allegations

A pleading sufficiently establishes a compromise and settlement agreement if it alleges the following: (1) a dispute in good faith over a legal claim; (2) offer and acceptance of the compromise (Paragraph 2); and (3) consideration (Paragraph 2) [*Stub v. Belmont (1942) 20 Cal. 2d 208, 215-217, 124 P.2d 826]* .

[4] Cross References

For forms for use in pleading a written or oral accord and satisfaction as an affirmative defense to an action based on an alleged breach of an obligation, see Ch. 6, *Accord and Satisfaction*

For a general discussion of answers and forms for pleading affirmative defenses, see Ch. 26, *Answers*

For forms of affirmative defenses to contract actions generally, see Ch. 140, *Contracts*

[5] State Statutes

Accord and satisfaction. *Civ. Code §§ 1521-1525*

Pleading affirmative defense in answer. *Code Civ. Proc. § 431.30(b)(2)*

[6] Decisions

Agreement to accept debtor's promise in satisfaction of existing obligation as extinguishing obligation. *Silvers v. Grossman (1920) 183 Cal. 696, 699, 192 P. 534* ; *but see Gardiner v. Gaither (1958) 162 Cal. App. 2d 607, 619-621, 329 P.2d 22* (where court described acceptance of new promise as a novation)

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46-520 California Forms of Pleading and Practice--Annotated § 520.113

§ 520.113 Affirmative Defense [Code Civ. Proc. § 431.30]--Tender Before Commencement of Action of Full Amount Due Plaintiff and Deposit of That Amount in Court [Civ. Code § 1717; Code Civ. Proc. § 1025]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30]--Tender Before Commencement of Action of Full Amount Due Plaintiff and Deposit of That Amount in Court [Civ. Code § 1717; Code Civ. Proc. § 1025]

AS A SEPARATE AND AFFIRMATIVE DEFENSE TO PLAINTIFF'S REQUEST FOR COSTS, defendant alleges:

1. Before the commencement of the above-entitled action, defendant tendered to plaintiff the full amount to which plaintiff was entitled, in the sum of $_____.

2. Defendant herewith deposits in court for plaintiff the amount of $_____ so tendered.

[2] Use of Form

This form is for use as an affirmative defense [*see Code Civ. Proc. § 431.30(b)(2)*] in an answer to plaintiff's request for costs in an action for the recovery of money only, in which defendant alleges that before the commencement of the action he or she tendered to the plaintiff the full amount to which he or she was entitled, and thereon deposits in court, for plaintiff, the amount so tendered. If the allegation is found to be true, the plaintiff cannot recover costs, but must pay costs to the defendant [*Code Civ. Proc. § 1025*].

The allegation may also be used as an affirmative defense in any action on a contract providing for fees and costs to determine if the defendant is a prevailing party on the contract within the meaning of *Civ. Code § 1717* [*see Civ. Code § 1717(a), (b)(2)*; *see also § 520.22*].

[3] Cross References

For a discussion of the effect on payment of costs of defendant's tender before commencement, see Ch. 174, *Costs and Attorney's Fees*

[4] State Statutes

Effect of defendant's tender in action on contract providing for fees and costs. *Civ. Code § 1717(a), (b)(2)*

Pleading affirmative defense in answer. *Code Civ. Proc. § 431.30(b)(2)*

Effect on payment of costs of defendant's tender before commencement of action for recovery of money and subsequent deposit in court of tendered amount. *Code Civ. Proc. § 1025*

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46-520 California Forms of Pleading and Practice--Annotated § 520.114

§ 520.114 Notice of Settlement of Entire Case [Cal. Rules of Ct., Rule 225]--Judicial Council Form CM-200

[1] FORM Notice of Settlement of Entire Case [Cal. Rules of Ct., Rule 225]--Judicial Council Form CM-200

Click here to view image.

[2] Use of Form

This form is a reproduction of the Judicial Council form Notice of Settlement of Entire Case [Cal. Judicial Council Form CM-200], adopted by the Judicial Council for mandatory use [*Code Civ. Proc. § 706.120*; Cal. Rules of Ct., Appendix Rules 1.30 et seq.]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This notice must be filed immediately on settlement by each plaintiff or other party seeking affirmative relief and served on each party and any arbitrator or other court-connected ADR neutral involved in the case. Oral notice must be given if a hearing, conference or trial is scheduled to take place within 10 days [*Cal. Rules of Ct., Rule 3.1385(a)(1)*]. Failure to give timely notice to the arbitrator or court-connected ADR neutral may result in an order to compensate the arbitrator or ADR neutral for the scheduled hearing time [*Cal. Rules of Ct., Rule 3.1385(a)(2)*].

Cal. Rules of Ct., Rule 3.1385(b) governs when a request for dismissal must be filed, depending on whether the settlement is conditional or unconditional. For discussion of request for dismissal and conditional or unconditional settlement, see *§ 520.19*.

[3] California Rules of Court

Duty of plaintiff or other party seeking affirmative relief to file with court and give any arbitrator or other court-connected ADR neutral written notice of settlement. *Cal. Rules of Ct., Rule 3.1385(a)*

Dismissal after settlement. *Cal. Rules of Ct., Rule 3.1385(b), (c)*

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46-520 California Forms of Pleading and Practice--Annotated § 520.115

§ 520.115 Notice of Motion to Enter Judgment Pursuant to Settlement [Code Civ. Proc. § 664.6]

[1] FORM Notice of Motion to Enter Judgment Pursuant to Settlement [Code Civ. Proc. § 664.6]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR EN-
Plaintiff,	)	FORCEMENT OF SETTLEMENT
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff _____ (*name*)] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party, e.g.,* defendant] _____ [*name*] will, and hereby does, move for an order to enter judgment in accordance with the terms of the settlement entered into by _____ [*specify parties, e.g.,* plaintiff and defendant] on _____ [*date*] at _____ [*city*], California, a copy of which is attached as Exhibit "A" and incorporated herein. The motion will be made on the grounds that judgment may properly

be so entered to enforce the settlement pursuant to *Code Civ. Proc. § 664.6*.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name*(*s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

[2] Use of Form

This form of notice of motion is for use in requesting that the court enter judgment pursuant to the terms of a settlement. If parties to pending litigation stipulate for settlement of the case in a writing signed outside the presence of the court or orally before the court, the court, on motion, may enter judgment pursuant to the terms of the settlement [*Code Civ. Proc. § 664.6*]. For discussion, see *§ 520.21*.

A memorandum must accompany notices of motion in law and motion proceedings [*Cal. Rules of Ct., Rule 3.1113(a)*]. For general discussion and forms relating to memoranda, see Ch. 417, *Points and Authorities* .

[3] Cross References

For general discussion and forms relating to motions and orders, see Ch. 372, *Motions and Orders*

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[Reserved]

§§ 520.116[Reserved]

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46-520 California Forms of Pleading and Practice--Annotated § 520.130

§ 520.130 General Release Agreement [Civ. Code §§ 1541, 1542]

[1] FORM General Release Agreement [Civ. Code §§ 1541, 1542]

GENERAL RELEASE OF EXISTING CLAIMS

_____ [*Name of releasor*], _____ [*street address*], _____ [*city and state*], hereinafter referred to as "Releasor," and _____ [*name of releasee*], _____ [*street address*], _____ [*city and state*], hereinafter referred to as "Releasee," in consideration of the promises made herein, agree as follows:

1. Releasor has sustained _____ [injury *and/or* damages] arising out of

[*EITHER, if claims arise from contract*]

_____ [*describe transaction, e.g.,* a contract entered into between Releasor and Releasee] on _____ [*date*], at _____ [*city and state*], a copy of which is marked as Exhibit _____, attached hereto, and incorporated by reference herein.

[*OR, if claims arise from tort*]

_____ [*describe occurrence, e.g.,* an automobile accident] that occurred on _____ [*date*] in _____ [*city and state*].

[*ADD, if releasor has commenced an action against releasee based on transaction or occurrence giving rise to claims released*]

2. On _____ [*date*], Releasor filed an action in the _____ Court for the County of _____, California, case number _____, entitled _____. This action arose out of the _____ [occurrence *or* transaction] described in Paragraph 1.

[*CONTINUE*]

3. Releasor, on behalf of himself/herself, his/her heirs, executors, administrators, and assigns[, and in consideration of $ _____ paid to him/her by Releasee], hereby fully releases Releasee, his/her successors, and all other persons and associations, known or unknown, from all claims and causes of action by reason of any _____ [injury *and/or* damage] which _____ [has *or* have] been sustained, or may be sustained, as a result of the above-described _____ [transaction *or* occurrence].

[*ADD, if release extends to unknown claims*]

4. Releasor acknowledges and agrees that this release applies to all claims that Releasor may have against Releasee arising out of the above-described _____ [transaction *or* occurrence] for injuries, damages, or losses to Releasor's person and property, real or personal, whether those injuries, damages, or losses are known or unknown, foreseen or unforeseen, or patent or latent.

5. Releasor certifies that he/she has read *Section 1542 of the Civil Code*, set out below, and indicates that fact by signing his/her initials here: _____.

A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

6. Releasor hereby waives application of *Section 1542 of the Civil Code*.

7. Releasor understands and acknowledges that the significance and consequence of this waiver of *Section 1542 of the Civil Code* is that even if Releasor should eventually suffer additional damages arising out of the above-described _____ [transaction *or* occurrence], he/she will not be permitted to make any claim for those damages. Furthermore, Releasor acknowledges that he/she intends these consequences even as to claims for _____ [injury *and/or* damages] that may exist as of the date of this release but which Releasor does not know exist, and which, if known, would materially affect Releasor's decision to execute this release, regardless of whether Releasor's lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

[*CONTINUE*]

8. Releasor warrants and represents that in executing this release, he/she has relied on legal advice from the attorney of his/her choice, that the terms of this release and its consequences have been completely read and explained to Releasor by that attorney, and that Releasor fully understands the terms of this release.

9. Releasor acknowledges and represents that he/she has been apprised of all relevant information and data furnished by _____ [*name of expert*] and all other information relevant to his/her claim and this release, including, without limitation, _____ [*specify, e.g.*, future risks, complications, and costs]. Releasor further acknowledges and represents that, in executing this release, he/she has not relied on any inducements, promises, or

representations made by Releasee or any party representing or serving Releasee.

10. Releasor acknowledges and warrants that his/her execution of this release is free and voluntary. [Releasor further declares that at the time he/she executed this release, he/she was neither an inpatient nor an outpatient of a medical facility for treatment of the injury that gave rise to the claim to which this release relates.]

11. This release pertains to a disputed claim and does not constitute an admission of liability by Releasee for the above-described _____ [transaction *or* occurrence]

[*ADD, if Releasor will move to dismiss underlying cause of action*]

12. Releasor will prepare and file a request for dismissal with prejudice of the action described in Paragraph 2 by _____ [*date*].

READ THE ABOVE CAREFULLY BEFORE SIGNING

_____ [*date and place*]

_____ [*signature*]
Releasor

Declaration of Witness

I, _____ [*name*], certify that Releasor acknowledged in my presence that he/she had read and fully understood the meaning and consequences of the foregoing release, and signed it in my presence.

_____ [*date and place*]

_____ [*signature*]
[*Address of witness*]

Declaration of Releasor's Attorney

I, _____ [*name*], a member of the State Bar of California and attorney for Releasor, certify that I am satisfied that Releasor fully understands the effect, significance, and consequence of the release set forth above.

_____ [*date and place*]

_____ [*signature*]
Attorney for Releasor

[2] Use of Form

The foregoing form of general release is for use to release another party from liability arising out of an occurrence or transaction giving rise to a cause of action against that party. As such, a release is generally a part of most settlement

agreements.

The foregoing form may be adapted for use in securing a release from liability in either tort or contract actions (alternative Paragraphs 1). It includes optional language for use when the releasor has filed an action arising out of the facts giving rise to liability (Paragraph 2) and has agreed to file a dismissal of that action with prejudice (Paragraph 12). The form also includes optional language for use when the release extends to claims unknown at the time of executing the release (Paragraphs 4-7).

This form is only for use to release a party from liability for acts already committed and should not be adapted as an exculpatory release from liability arising from future acts [*see also* discussion in *§ 520.44[3]*].

For alternate forms of release agreements, see 14 California Legal Forms, Ch. 77, *Discharge of Obligations*.

[3] Drafting Requirements

[a] In General

A written release agreement may, but need not, recite new consideration for the release (Paragraph 3) [*Civ. Code § 1541*; for further discussion relating to the effect of a written release and when a written release is required, see *§ 520.45[3]*]. Otherwise, there is no particular form or set of words essential to the validity of a release [*Coats v. General Motors Corp. (1934) 3 Cal. App. 2d 340, 351, 39 P.2d 838]* . One court has suggested that sometimes "boiler plate" or stereotyped language is acceptable in a release, if the language is used appropriately, because the language has the value of frequent usage and general understanding, and may thus enhance the clarity of the release beyond doubt [*see Dart Industries Co. v. Westwood Chemical Co. (9th Cir. 1980) 649 F.2d 646, 648-649]* .

For additional discussion regarding drafting release agreements generally, see 14 California Legal Forms, Ch. 77, *Discharge of Obligations*.

[b] Exclusion of Specified Claims

When the claims subject to release involve two or more joint tortfeasors or coobligors, a release of one or more will not extinguish the claims against the others [*see Civ. Code § 1543*; *Code Civ. Proc. § 877*; for further discussion *see § 520.44[4]*]. In conformity with this statutory exception, the foregoing form may be modified to except from release any claims that the releasor may have against persons other than the releasee. It may also be modified to exclude only specified claims that the releasor may have against the releasee [*see Western Mortgage etc. Co. v. Gray (1932) 215 Cal. 191, 200-202, 8 P.2d 1016* (claims expressly excepted from release)].

For additional discussion and an alternate form of release agreement designed for use with one of several joint tortfeasors or coobligors, see 14 California Legal Forms, Ch. 77, *Discharge of Obligations*.

[c] Signature

To be effective, a written release must be signed by the releasor [*see Hofland v. Gustafson (1955), 282 P. 1039*]. This is expressly required if the release agreement is subject to the statute of frauds [*see Civ. Code § 1624* (agreement subject to statute of frauds required to be signed by party to be charged, or by party's agent)]. The releasee need not sign the release to make it legally binding on the parties to it, as long as the release shows on its face that it was not intended to be signed by the releasee [*Golden Bear Forest Products, Inc. v. Misale (1982) 138 Cal. App. 3d 573, 576, 188 Cal. Rptr. 48* ; *Hofland v. Gustafson (1955) 282 P.2d 1039*].

[4] Waiver of Protection of Civ. Code § 1542

A releasor may waive the prohibition of *Civ. Code § 1542* against the extension of a general release to claims which the releasor does not know or suspect to exist in his or her favor at the time of executing the release (optional Paragraphs 4-7) [*see* *Carmichael v. Industrial Acc. Com. (1965) 234 Cal. App. 2d 311, 314-315, 44 Cal. Rptr. 470*]. However, mere recital that the protection of *Civ. Code § 1542* is waived, or that the release covers unknown claims or unknown parties, is not controlling [*Leaf v. City of San Mateo (1980) 104 Cal. App. 3d 398, 411, 163 Cal. Rptr. 711*]. If the evidence, independent of the words of the release, indicates that the parties have consciously contracted in reference to unknown claims, the release is binding [*Casey v. Proctor (1963) 59 Cal. 2d 97, 109, 28 Cal. Rptr. 307, 378 P.2d 579*]. For further discussion of the effect of *Civ. Code § 1542*, see *§ 520.44[2][a]*.

[5] California Legal Forms

For additional forms of release and related discussion, see California Legal Forms, Ch. 77, *Discharge of Obligations*

For discussion and forms of releases executed by or on behalf of minors; *see* California Legal Forms, Ch. 100A, *Personal Affairs of Minors*; Ch. 100B, *Contracts and Employment of Minors*

[6] California Torts

For discussion of releases in the context of settlement of tort actions, see Levy, Golden & Sacks, California Torts, Ch. 73, *Settlement and Release* , Part A

[7] State Statutes

Obligations extinguished by release. *Civ. Code § 1541*

Claims not extinguished by release. *Civ. Code § 1542*

Release of one of two or more joint debtors. *Civ. Code § 1543*

Statute of frauds. *Civ. Code § 1624*

Effect of release of less than all tortfeasors or coobligors. *Code Civ. Proc. § 877*

[8] Decisions

Definition and theory of release. *Pellett v. Sonotone Corp. (1945) 26 Cal. 2d 705, 711, 160 P.2d 783*

Genuineness of releasee's signature as question of fact. *Castor v. Bernstein (1906) 2 Cal. App. 703, 706-707, 84 P. 244*

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Chapter 520 SETTLEMENT AND RELEASE
PART IV. FORMS
B. Release

46-520 California Forms of Pleading and Practice--Annotated § 520.131

§ 520.131 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--General Release [Civ. Code § 1541]

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--General Release [Civ. Code § 1541]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that on or about _____ [*date*], for a good and valuable consideration, plaintiff duly executed and delivered to defendant a general release in writing, in which plaintiff released defendant from all liability to plaintiff for any and all claims of plaintiff against defendant, including the alleged cause of action set forth in the complaint, that existed at the date of execution of the release, or that might thereafter arise against defendant for, and on account of, any thing or things done by defendant prior to the date of execution of the release. A copy of the release, marked as Exhibit _____, is attached and incorporated herein by reference.

[2] Use of Form

The foregoing form of allegation is for use in an answer to a complaint to raise the affirmative defense that the plaintiff has released defendant from all liability for the cause of action alleged in the complaint [*see Pellett v. Sonotone Corp. (1945) 26 Cal. 2d 705, 711, 160 P.2d 783*]. Under certain conditions, the defense of release may be raised in a supplemental answer, which may, in turn, be filed even after trial on the underlying cause of action has begun [*see Code Civ. Proc. § 464* (supplemental pleadings); *Seehorn v. Big Meadows & Bodie Wagon Road Co. (1882) 60 Cal. 240, 251-252*].

The defense of release admits the cause of action, but sets forth a subsequently executed release [*see Landis v. Morrissey (1886) 69 Cal. 83, 86, 10 P. 258* (dictum)]. The defense must be expressly pleaded and proved [*Hastings v. Matlock (1980) 107 Cal. App. 3d 876, 882, 166 Cal. Rptr. 229*].

For further discussion of raising the affirmative defense of release, see *§ 520.46[1]*. For discussion relating to answers generally, including general forms into which the foregoing affirmative defense allegation may be inserted, see Ch. 26, *Answers* .

[3] Alternate Form of Pleading Release

A release may also be pleaded as a specifically performable settlement and release agreement [*Hastings v. Matlock (1980) 107 Cal. App. 3d 876, 882, 166 Cal. Rptr. 229*]. For further discussion of this mode of pleading release, see *§ 520.46[2]*.

[4] Cross References

For discussion and forms relating to supplemental answers, see Ch. 21, *Amended and Supplemental Pleadings*

For discussion and forms relating to answers in general, see Ch. 26, *Answers*

[5] State Statutes

Obligations extinguished by release. *Civ. Code § 1541*

Affirmative defenses. *Code Civ. Proc. § 431.30(b)(2)*

Supplemental pleadings. *Code Civ. Proc. § 464*

[6] Decisions

When release is subject to occurrence of condition precedent, release as unable to be pleaded as bar to action until fulfillment of condition. *Johnson v. Pickwick Stages System (1930) 108 Cal. App. 279, 284, 291 P. 611*

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46-520 California Forms of Pleading and Practice--Annotated § 520.132

§ 520.132 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Release of Joint Tortfeasor or Coobligor for Amount Sufficient to Satisfy Entire Claim [Code Civ. Proc. § 877]

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Release of Joint Tortfeasor or Coobligor for Amount Sufficient to Satisfy Entire Claim [Code Civ. Proc. § 877]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. On or about _____ [*date*], plaintiff received from defendant _____ [*name of codefendant*] the sum of $ _____ in full settlement of any cause of action which plaintiff might have had against that defendant for any _____ [injuries *and/or* damages] sustained by him/her as alleged in the complaint. This sum equals or exceeds in value and amount all the _____ [damage *and/or* injury] sustained, or alleged to have been sustained, by plaintiff as set forth in the complaint.

2. At the time of receiving this payment, plaintiff executed and delivered to defendant _____ [*name of codefendant*] a release by which plaintiff released and forever discharged that defendant from all claims whatsoever arising out of the _____ [damages *and/or* injuries] alleged in the complaint to have been sustained by plaintiff. A copy of the release, marked as Exhibit _____, is attached and incorporated herein by reference.

[2] Use of Form

The foregoing form of allegation is for use in an answer to a complaint to raise the affirmative defense that the plaintiff is barred from further recovery because he or she has received, in consideration for the release of a codefendant, a sum that equals or exceeds the amount recoverable under the cause of action alleged in the complaint [*see Code Civ. Proc. § 877(a)*].

[3] Effect of Release of Less Than All Joint Tortfeasors or Coobligors

A release, given in good faith before verdict or judgment, to one or more of a number of tortfeasors claimed to be liable for the same tort, or to one or more other coobligors mutually subject to contribution rights, does not discharge any other such party from liability unless its terms so provide. It does, however, reduce the claims against the others in the amount stipulated by the release, or in the amount of the consideration paid for it, whichever is the greater [*see Code Civ. Proc. § 877(a)*]. For further discussion, see *§ 520.44[4]*.

[4] State Statutes

Effect of release of one or more of several tortfeasors or coobligors. *Code Civ. Proc. § 877*

[5] Decisions

Code Civ. Proc. § 877(a) as mandating that award against nonsettling joint tortfeasors be reduced only by present cash value of structured settlement calling for periodic future payments. *Franck v. Polaris E-Z Go Div. of Textron, Inc. (1984) 157 Cal. App. 3d 1107, 1120, 204 Cal. Rptr. 321*

[6] Cross References

For a related form, *see § 520.131*.

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[c] Limitation on Scope of Carrier's Liability

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[f] Period for Bringing Suit

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

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[1] FORM

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[1] FORM

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[1] FORM

[2] Use of Form

[3] When Charterer Has Liability

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Defense of Fellow Servants' Negligence

[4] Cross References

§ 522.180 Complaint for Damages [Civ. Code § 3333] for Maintenance and Cure--By Seaman Against Shipowner

[1] FORM

[2] Use of Form

[3] Allegations

§ 522.181 Complaint for Damages [Civ. Code § 3333] Under Jones Act [46 U.S.C.S. § 30104] for Wrongful Death of Seaman--By Personal Representative Against Shipowner

[1] FORM

[2] Use of Form

[3] Cross References

[4] Allegations

§ 522.182 Complaint for Damages [Civ. Code § 3333] for Wrongful Death of Longshoreman or Harbor Worker [33 U.S.C.S. §§ 905(b), 933]--By Personal Representative Against Shipowner or Other Third Party

[1] FORM

[2] Use of Form

§ 522.183 Complaint for Damages [Civ. Code § 3333] for Personal Injuries--By Passenger Against Shipowner

[1] FORM

[2] Use of Form

[3] Allegations

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§§ 522.185-522.199 [Reserved]

§ 522.200 Complaint for Damages [Civ. Code § 3300] for Breach of Written Contract for Payment of Freight--By Shipowner

[1] FORM

[2] Use of Form

[3] Allegations

[a] In General

[b] Identity and Capacity of Defendants

[c] Venue Facts

[d] Specification of Damages

[4] Recovery of Interest

[5] Verification

[6] Cross References

[7] Federal Statutes

[8] State Statutes

§ 522.201 Complaint [Fed. R. Civ. P., Rule 7] In Personam and In Rem [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C] for Freight Charges--By Shipowner--Against Cargo, Shippers, and Consignees

[1] FORM

[2] Use of Form

[3] Venue

[4] Allegations

[a] In General

[b] Jurisdictional Statement (Paragraph 1)

[c] Identification and Capacity of Parties (Paragraphs 2, 3)

[d] Fictitious Defendants (Paragraph 4)

[e] Presence of Property Within Judicial District (Paragraph 5)

[f] Description of Goods (Paragraph 6)

[g] Breach of Contract for Freight

[h] Existence of Maritime Lien (Paragraph 9)

[5] Process Against Cargo

[6] Execution or Stay of Process

[7] Relief From Arrest

[a] Prompt Hearing

[b] Immediate Sale of Seized Property

[8] Verification

[9] Federal Rules of Civil Procedure

[10] Text References

[11] Cross References

§ 522.202 Warrant [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C(3)] for Arrest of Cargo, Vessel, or Other Property

[1] FORM

[2] Use of Form

[3] Cross References

§ 522.203 Stipulation Between Shipowner and Shipper for Release of Cargo From Shipowner's Lien for Freight and Posting of Security for Judgment

[1] FORM

[2] Use of Form

[3] Contents

[4] Federal Statutes

[5] Text References

[6] Cross References

§ 522.204 Complaint [Fed. R. Civ. P., Rule 7] In Rem and In Personam for Property Damage--By Shipowner--Against Vessel and Other Shipowner--Collision

[1] FORM

[2] Use of Form

[3] Allegations

[4] Process Against Vessel

[a] Bond

[b] Costs of Seizure

[5] Prejudgment Interest

[6] Federal Statutes

[7] Decisions

[8] Text References

[9] Cross References

§ 522.205 Motion For Transfer of Custody of Vessel From United States Marshal To Marina--By Plaintiff

[1] FORM

[2] Use of Form

[3] Contents of Form

[4] Cross References

§ 522.206 Complaint for Damages--By Tow Owner--Against Tug Owner--Damage to Tow

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§§ 522.207-522.219 [Reserved]

§ 522.220 Complaint In Personam for Cargo Damage or Loss--By Shipper or Consignee

[1] FORM

[2] Use of Form

[3] Allegations

[a] Delivery of Cargo for Transportation (Paragraph 4)

[b] Damage or Loss (Paragraph 5)

[c] Notice of Loss or Damage (Paragraph 6)

[4] Cross References

§ 522.221 Affirmative Defense by Shipowner to Action for Damage to Cargo--Cargo Lost or Damaged Due to Perils of Sea [46 U.S.C.S. § 30701 note, § 4(2)(c); 46 U.S.C.S. § 30706(b)(1)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 522.222 Affirmative Defense by Shipowner to Action for Damage to or Loss of Cargo--Exoneration From Liability When Damage or Loss Caused by Fire [46 U.S.C.S. §§ 30504, 30701 note, § 4(2)(b)]

[1] FORM

[2] Use of Form

[3] Decisions

[4] Cross References

§ 522.223 Complaint [Fed. R. Civ. P., Rule 7] In Rem [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C] to Enforce Maritime Lien [46 U.S.C.S. § 31341 et seq.]--Against Vessel--For Supplies or Other Necessaries Furnished by Materialmen

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 522.224 Allegations for Use in Complaint [Fed. R. Civ. P., Rule 7] In Rem [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C] to Enforce Maritime Lien [46 U.S.C.S. § 31341 et seq.]--Against Vessel--To Recover Pilotage Fees

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 522.225 Allegations for Use in Complaint [Fed. R. Civ. P., Rule 7] In Rem [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C] to Enforce Maritime Lien [46 U.S.C.S. § 31341 et seq.]--Against Vessel--To Recover Salvage

[1] FORM

[2] Use of Form

[3] Cross References

§ 522.226 Allegation for Use in Complaint [Fed. R. Civ. P., Rule 7] In Rem [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C] to Enforce Maritime Lien [46 U.S.C.S. § 31341 et seq.]--Against Vessel--To Recover Towage Fees

[1] FORM

[2] Use of Form

[3] Cross References

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Chapter 522 SHIPS AND SHIPPING
PART I. SCOPE

46-522 California Forms of Pleading and Practice--Annotated § 522.01

§ 522.01 Scope of Chapter

This chapter discusses actions against shipowners for damages for personal injuries or wrongful death suffered by maritime employees or passengers [*see §§ 522.10 et seq., 522.30* et seq.]. Forms include complaints and allegations for use in complaints under the Jones Act [*46 U.S.C.S. app. § 688*] by an injured seaman against a shipowner [*see §§ 522.170 -522.173*] along with related affirmative defenses [§§ 522.174, 522.175], complaints by injured longshoremen or harbor workers as assigned to their employers, against third persons [*see §§ 522.176 -522.178*] with a related affirmative defense to such actions [*see § 522.179*], a complaint by a seaman against a shipowner for maintenance and cure from disablement [*see § 522.180*], complaints by personal representatives of maritime employees for wrongful death [§§ 522.181, 522.182], a complaint by a passenger against a shipowner for personal injuries [*see § 522.183*], and a complaint by the personal representative of an employee or passenger against a shipowner for wrongful death on the high seas [*see § 522.184*].

This chapter also discusses and contains forms for use in actions by shipowners to protect their property interests [*see § 522.50* et seq.]. Forms are provided for the following kinds of cases: (1) breach of contract for payment of freight for transportation of cargo [*see § 522.200* (state court complaint in personam), § 522.201 (federal complaint, combined in personam and in rem)]; (2) enforcement of maritime lien for freight [*see § 522.202* (warrant for arrest of cargo), § 522.203 (stipulation between shipowner and shipper for release of cargo from lien for freight and for posting of security)]; (3) property damage from collision between two vessels or a vessel and land object [*see § 522.204* (complaint in rem against vessel and in personam against owners), § 522.205 (motion to transfer custody of vessel from marshal to private marina)]; and (4) damages to a tow, such as a barge, during towage by tug [*see § 522.206* (complaint in state court)].

Shipowners' and carriers' defenses in actions by shippers for cargo damage are discussed in *§§ 522.70* et seq. Shipowners' actions for limitation of liability, which apply to both personal and property injuries, are discussed in *§ 522.10* et seq.

Actions for damages based on tort and breach of contract in cases involving the owner or operator of a recreational boat are discussed in Ch. 100, *Boats and Boating* .

This chapter also discusses and contains forms for use in actions against shipowners and carriers by shippers, seamen, and the holders of maritime liens to protect their property interests. Forms are provided for the following kinds of cases: damage to or loss of cargo [*see § 522.220* (state court complaint in personam), § 522.221 (shipowner's or carrier's affirmative defense of sea peril or other exonerating cause), § 522.222 (affirmative defense of fire)]; and enforcement of maritime liens for furnishing supplies and other necessaries [*see § 522.223* (federal court complaint in rem by materialmen), § 522.224 (allegations for use in complaint in rem for pilotage fees), § 522.225 (allegations for use in complaint in rem for salvage), § 522.226 (allegation for use in complaint in rem for towage fees)].

A shipowner's action to enforce a maritime lien for freight is discussed in *§ 522.52[2]*. Shipowners' actions for limitation of liability are discussed in the In General analysis because they apply to both personal injuries and property damage [*see § 522.10* et seq.].

Actions for damages based on tort and breach of contract involving the owner or operator of a recreational boat are discussed in Ch. 100, *Boats and Boating* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawCollisionsLiabilityLimitations on LiabilityAdmiralty LawMaritime LiensGeneral OverviewAdmiralty LawPersonal InjuriesDeath ActionsWrongful Death & SurvivalGeneral OverviewAdmiralty LawPersonal InjuriesMaritime Tort ActionsGeneral OverviewAdmiralty LawPersonal InjuriesMaritime Workers' ClaimsGeneral OverviewAdmiralty LawShippingCarrier Duties & ObligationsLimitations on LiabilityTortsTransportation TortsWatercraftGeneral OverviewTransportation LawWater TransportationGeneral Overview

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46-522 California Forms of Pleading and Practice--Annotated § 522.02

§ 522.02 Cross References

For a discussion of and forms involving claims by injured passengers against carriers, see Ch. 109, *Carriers*

For a discussion of and forms involving wrongful death generally, see Ch. 181, *Death and Survival Actions*

For general forms of captions and allegations in the United States District Court, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For a discussion of and forms relating to negligence actions generally, see Ch. 380, *Negligence*

For a general discussion of the Federal Employers' Liability Act (*45 U.S.C.S. § 51 et seq.*), see Ch. 485, *Railroads*

For discussion and forms relating to actions based on torts and breach of contract in cases involving the owner or operator of a boat that is owned and operated for recreation, see Ch. 100, *Boats and Boating*

For discussion and forms relating to an action to declare the rights and duties of coowners of a vessel, see Ch. 100, *Boats and Boating*

For discussion and forms relating to inland carriage of persons and freight, see Ch. 109, *Carriers*

For discussion of consignor or consignee liability to motor carrier for steamship storage and equipment rental charges caused by delay of consignor or consignee, see Ch. 109, *Carriers*

For discussion and forms relating to actions for recovering possession of personal property, see Ch. 119, *Claim and Delivery*

For discussion and forms relating to actions against marine insurers, see Ch. 308, *Insurance*

For discussion and forms for removal of an admiralty action from state court, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For a discussion of and forms for removal of admiralty actions from a state court, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For a discussion of and forms relating to nonmaritime liens and their enforcement in a state court, see Ch. 342, *Liens and Wage Preferences*

For a discussion of and forms relating to insurers' claims for subrogation for damaged or destroyed property, see Ch. 536, *Subrogation*

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPersonal InjuriesGeneral OverviewAdmiralty LawShippingCarrier Duties & ObligationsGeneral OverviewCivil ProcedurePleading & PracticeGeneral OverviewInsurance LawBusiness InsuranceMarine InsuranceGeneral OverviewInsurance LawClaims & ContractsSubrogationGeneral OverviewTortsNegligenceGeneral OverviewTortsTransportation TortsRail TransportationFederal Employers' Liability ActTortsTransportation TortsWatercraftGeneral OverviewTortsWrongful Death & Survival ActionsGeneral Overview

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46-522 California Forms of Pleading and Practice--Annotated §§ 522.03-522.09

[Reserved]

§§ 522.03[Reserved]

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46-522 California Forms of Pleading and Practice--Annotated § 522.10

§ 522.10 Governing Law

The rights of parties to actions based on commercial shipping transactions are governed by the substantive rules of federal maritime law, regardless of whether the plaintiff chooses a state or federal forum [*Intagliata v. Shipowners & Merchs. Towboat Co., Ltd. (1945) 26 Cal. 2d 365, 371, 159 P.2d 1]* . State law applies only to the extent that it does not render changes in the maritime law [*Madruga v. Superior Court (1954) 346 U.S. 556, 560, 561, 74 S. Ct. 298, 98 L. Ed. 290]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPractice & ProcedureFederal PreemptionAdmiralty LawShippingRegulations & StatutesGeneral OverviewTransportation LawWater TransportationGeneral OverviewTransportation LawWater TransportationState & Local Regulation

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A. In General

46-522 California Forms of Pleading and Practice--Annotated § 522.11

§ 522.11 Jurisdiction

The federal district courts have original jurisdiction, exclusive of state courts, of any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled [*28 U.S.C.S. § 1333*]. This savings clause preserves exclusive federal jurisdiction over actions in rem against a vessel or other maritime property, but permits state courts to establish concurrent jurisdiction in actions in personam based on a common law remedy [*Madruga v. Superior Court (1954) 346 U.S. 556, 560, 561, 74 S. Ct. 298, 98 L. Ed. 290*]. §§ 522.201, 522.204 and 522.224 are examples of federal in rem complaints. Admiralty jurisdiction and the choice of federal or state forum are discussed more extensively in Ch. 100, *Boats and Boating*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPractice & ProcedureJurisdictionAdmiralty LawPractice & ProcedureStatutory AuthorityCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsTrue in Rem ActionsCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsExclusive Jurisdiction

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46-522 California Forms of Pleading and Practice--Annotated § 522.12

§ 522.12 Limitation of Shipowner's Liability

[1] In General

Federal statutes limit a vessel owner's liability for any embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board the vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of the owner or owners. Under such circumstances, the owner's liability may not exceed the amount or value of his or her interest in the vessel and the freight then pending, except with respect to personal injuries [*46 U.S.C.S. § 30505(a), (b)*].

If the amount of a seagoing vessel owner's liability, as limited under the statute, is insufficient to pay all losses in full, and the portion of such amount applicable for payment of losses respecting loss of life or bodily injury is less than $420 per ton of the vessel's tonnage, such portion must be increased to an amount equal to $420 per ton. The increased amount is to be available only for the payment of losses for death or bodily injury. If the increased portion is insufficient to pay these losses in full, they must be paid therefrom in proportion to their respective amounts [*46 U.S.C.S. §§ 30506(a), (b), 30507(2)*].

The law excludes a number of vessels from the definition of "seagoing vessel" for purposes of creating the increased amount available for deaths or personal injuries. Among the vessels excluded are pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels, fish tender vessels, canal boats, scows, car floats, barges, lighters (boats used to carry cargo to and from ship and wharf), or nondescript vessels [*46 U.S.C.S. § 30506(a)*].

Additional provisions apply only to deaths or personal injuries. For example, separate limits of liability apply to claims for personal injury or death arising on distinct occasions [*46 U.S.C.S. § 30506(d)*]. In addition, in a claim for personal injury or death, the privity or knowledge of the master of a seagoing vessel or of the owner's superintendent or managing agent, at or prior to the commencement of each voyage, is imputed to the vessel owner [*46 U.S.C.S. § 30506(e)*].

The limitation of liability provisions are designed to assure some recovery to death and personal injury claimants by

establishing the per-ton fund. The statute limiting liability was not intended, however, to alter established admiralty concepts by allowing a limiting ship to avoid primary liability in a mutual-fault collision case at the expense of the non-limiting ship [*Oliver J. Olson & Co. v. American S.S. Marine Leopard (9th Cir. 1966) 356 F.2d 728, 737* (decided before United States Supreme Court overturned rule of equal contribution in cases of mutual fault); *see § 522.70* et seq]. Therefore, a seagoing vessel's owner will be liable if the collision was caused, at least in part, by the fault of the vessel. Furthermore, a fund must be created to pay the owner's portion of the damages if the amount, as limited, is insufficient according to the limitation of liability statute.

[2] Application to Charterers

A charterer will be deemed the owner of a vessel within the meaning of the limitation of liability statute whenever the charterer mans, supplies, and navigates the vessel at his or her own expense or by his or her own procurement [*46 U.S.C.S. § 30501*].

[3] Privity or Knowledge of Owner

The shipowner will not be allowed to benefit from the limitation of liability provisions if the loss, injury, or damage occurred within the owner's privity or knowledge [*46 U.S.C.S. § 30505(b)*]. The determination of privity or knowledge turns on the facts of individual cases. In particular, the courts have distinguished between corporate and individual shipowners in deciding whether or not to limit liability [*Coryell v. Phipps (1943) 317 U.S. 406, 411, 63 S. Ct. 291, 87 L. Ed. 363]* .

The requisite privity or knowledge can be attributed to a corporate owner only by the acts of its employees. The courts distinguish employees having sufficient managerial authority to bind the corporate owner from employees having no general powers of superintendence [*United States v. Standard Oil Co. of Cal. (9th Cir. 1974) 495 F.2d 911, 917]* .

A corporate shipowner is within privity or knowledge if the acts of negligence are committed by a managing officer or supervisory employee. The real test of supervision is not the official's title, but the scope of his or her authority. A managing officer is any person to whom the corporation has committed the general management or general superintendence of the whole or a particular part of its business [*Waterman S.S. Corp. v. Gay Cottons (9th Cir. 1969) 414 F.2d 724, 731]* . The same standards apply when the United States seeks limitation of liability based on the absence of privity or knowledge of its employees [*United States v. Standard Oil Co. of Cal. (9th Cir. 1974) 495 F.2d 911, 917]* .

Some courts have ruled, with respect to individual owners, that privity means some personal participation of the owner in the fault or negligence which caused or contributed to the loss or injury. Other cases have focused on the scope of authority delegated by an individual owner, inputing privity and knowledge when the delegation has been broad. The Supreme Court has not exclusively adopted either method of determining privity, but has noted only that privity and knowledge turn on the facts of particular cases [*Coryell v. Phipps (1943) 317 U.S. 406, 411, 63 S. Ct. 291, 87 L. Ed. 363]* .

The Ninth Circuit has refused to adopt a rule basing privity and knowledge solely on the delegation of authority, because it has been termed too encompassing and all-inclusive. Accordingly, in the Ninth Circuit, the privity determination turns on all facts of the particular case [*Admiral Towing Co. v. Woolen (9th Cir. 1961) 290 F.2d 641, 648]* . The owner, however, must show lack of both knowledge and the means of obtaining knowledge [*States S.S. Co. v. United States (9th Cir. 1957) 259 F.2d 458, 466]* . Furthermore, a shipowner cannot ignore something that a prudent inspection would disclose [*Waterman S.S. Corp. v. Gay Cottons (9th Cir. 1969) 414 F.2d 724, 739]* .

[4] Limitation of Liability as Defense

Although the federal statute limiting a shipowner's liability can be asserted as a defense in state court actions, the preferable procedure is an action in federal court seeking limitation of liability. By filing in federal court, the shipowner or charterer can resolve all claims surrounding a particular incident, and avoid a diversity of suits in different states [*Providence & N.Y. S.S. Co. v. Hill Mfg. Co. (1883) 109 U.S. 578, 594, 595, 3 S. Ct. 379, 27 L. Ed. 1038]* .

[5] Actions for Limitation of Liability

[a] In General

A vessel owner may petition a district court of competent jurisdiction for limitation of liability within six months after a claimant has given to or filed with the owner written notice of claim. The owner must deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the owner's interest in the vessel and freight, or approved security. As an alternative, the owner may transfer his or her interest in the vessel and freight to a trustee appointed by the court. In addition to either of the above acts, the owner must deposit such sums or approved security as the court may from time to time fix as necessary to carry out the statutory provisions. Finally, the plaintiff must give security for costs. On compliance with these requirements, all claims and proceedings against the owner with respect to the matter in question will cease [*46 U.S.C.S. § 30511*; Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule F(1)].

In a limitation of liability proceeding, the owner or charterer bears the burden of proving the absence of privity or knowledge [*Coryell v. Phipps (1943) 317 U.S. 406, 409, 63 S. Ct. 291, 87 L. Ed. 363* ; *Tug Ocean Prince, Inc. v. United States (2d Cir. 1978) 584 F.2d 1151, 1155* ; *see also § 522.12[2]*]. The lack of privity or knowledge need only be shown by a preponderance of the evidence [*Waterman S.S. Corp. v. Gay Cottons (9th Cir. 1969) 414 F.2d 724, 738]* .

[b] Injunction Against Other Actions

On application of the plaintiff, the court must enjoin the further prosecution of any action or proceeding against the plaintiff or his or her property with respect to any claim subject to limitation in the action [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule F(3)]. The issuance of an injunction is not necessary to stop proceedings in separate or independent suits, however, because the statue expressly obligates every other court to stop its proceedings when a suit is properly filed in district court. Yet, the injunction against actions already filed may prove useful in protecting the exclusiveness of the court's jurisdiction [*The San Pedro (1912) 223 U.S. 365, 372, 32 S. Ct. 275, 56 L. Ed. 473]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawCollisionsLiabilityLimitations on LiabilityAdmiralty LawPersonal InjuriesMaritime Tort ActionsGeneral OverviewAdmiralty LawShippingCarrier Duties & ObligationsLimitations on Liability

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46-522 California Forms of Pleading and Practice--Annotated §§ 522.13-522.29

[Reserved]

§§ 522.13[Reserved]

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46-522 California Forms of Pleading and Practice--Annotated § 522.30

§ 522.30 Governing Law

Federal statutes and case law control maritime torts [*see § 522.11*], but are supplemented in some instances by state law. The significant statutes include recovery for personal injuries or death of seamen under the Jones Act [*46 U.S.C.S. § 30104*], and of longshore and harbor workers under the Longshore and Harbor Workers' Compensation Act [*33 U.S.C.S. §§ 901 et seq.*], and recovery for wrongful death of passengers or seamen under the Death on the High Seas Act (DOHSA) [*46 U.S.C.S. § 30301 et seq.*]. The general liability of marine carriers to passengers is created by *46 U.S.C.S. § 30102* and *Harb. & Nav. Code §§ 420, 491(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPersonal InjuriesDeath ActionsDeath on the High Seas ActGeneral OverviewAdmiralty LawPersonal InjuriesMaritime Workers' ClaimsJones ActGeneral OverviewAdmiralty LawPersonal InjuriesMaritime Workers' ClaimsLongshore & Harbor Workers' Compensation ActTortsTransportation TortsWatercraftGeneral Overview

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46-522 California Forms of Pleading and Practice--Annotated § 522.31

§ 522.31 Jones Act

[1] Nature of Action

Under federal legislation commonly called the Jones Act, any seaman who suffers personal injury in the course of employment may, at his or her election, maintain an action for damages at law, with the right of trial by jury [*see §§ 522.170, 522.171* (First Cause of Action)]. In that action, all federal statutes that modify or extend the common law right or remedy in cases of personal injury to railway employees are applicable [*see § 522.31[6]*]. For death from personal injury, the personal representative of the seaman may maintain an action in the same manner as a living seaman's claim for injuries. The statutes affecting railway employees apply insofar as they confer or regulate the right of action for death [*see § 522.181*].

[2] Jurisdiction in Federal and State Courts

State courts have concurrent jurisdiction with federal courts to entertain and try actions pleaded pursuant to the Jones Act and the general maritime law [*Donaldson v. National Marine, Inc. (2005) 35 Cal. 4th 503, 510-511, 25 Cal. Rptr. 3d 584, 107 P.3d 254* ; *Baptiste v. Superior Court (1980) 106 Cal. App. 3d 87, 94, 164 Cal. Rptr. 789]* . Furthermore, the Federal Employers' Liability Act (FELA) expressly makes the jurisdiction of federal [*see § 522.170*] and state [*see § 522.171*] courts concurrent [*45 U.S.C.S. § 56*]. Finally, the jurisdiction of United States courts (state and federal) over a suit under the Jones Act does not depend on the place where the injury is sustained, but depends on the relation of the seaman's service to the operation of the vessel plying navigable waters. Thus, American courts will exercise jurisdiction over actions for injuries on ships flying the United States flag, even if the incident occurs on the high seas beyond territorial waters. [*Correia v. Van Camp Sea Food Co. (1953) 113 Cal. App. 2d 71, 75, 76, 248 P.2d 81]* .

So long as the Jones Act applies to a seaman's claims, the claim may not be dismissed on the ground of forum non conveniens [*Zipfel v. Halliburton Co. (9th Cir. 1987) 832 F.2d 1477, 1485-1487* ; *see also Nicol v. Gulf Fleet Supply Vessels, Inc. (5th Cir. 1984) 743 F.2d 289, 293* ; *Needham v. Phillips Petroleum Co. of Norway (10th Cir. 1983) 719 F.2d 1481, 1483* ; *Szumlicz v. Norwegian Am. Lines, Inc. (11th Cir. 1983) 698 F.2d 1192, 1195* ; *but see Cruz v. Maritime Co. of Philippines (2d Cir. 1983) 702 F.2d 47, 48]* .

[3] Venue

Prior to amendment effective in 2007, the Jones Act provided for venue in the judicial district in which the employer resides or principal place of business is located [*see* former *46 U.S.C.S. § 30104(b)*]. That separate venue provision has been eliminated, however, and the rule of venue for cases brought in federal court is apparently now the same as that under the Federal Employers Liability Act (FELA) [*see 45 U.S.C.S. § 51 et seq.*; *46 U.S.C.S. § 30104*]. Under the FELA, suit may be filed in a federal district court in the district of the residence of the defendant, in a district in which the cause of action arose, or in a district in which the defendant is doing business at the time the action is commenced [*45 U.S.C.S. § 56*].

The statute determines venue only for cases prosecuted in federal courts. Venue in state court actions must be decided according to state law [*Bainbridge v. Merchants & Miners Transp. Co. (1932) 287 U.S. 278, 280, 281, 53 S. Ct. 159, 77 L. Ed. 302]* .

An action for personal injury or wrongful death in California may be brought against an individual defendant in the county where the injury or death occurs or the county in which the defendant resides [*Code Civ. Proc. § 395(a)*]. A corporation or association may be sued in the county where the obligation or liability arises, or in the county of the corporation's principal place of business [*Code Civ. Proc. § 395.5*].

[4] Applicability of Federal Law

Federal substantive law applies to cases brought under the Jones Act and cases brought under general maritime law, regardless of whether the action is brought in a federal or state forum. This rule stems from the need for uniformity in maritime tort law, as well as the importance of protecting the rights of injured seamen. Thus, some obstacles traditionally posed by state law have been avoided. In this context, the California courts view their task as ascertaining and applying appropriate legal principles derived from the considerable body of federal maritime law that has developed in the United States [*Baptiste v. Superior Court (1980) 106 Cal. App. 3d 87, 94, 164 Cal. Rptr. 789]* .

[5] "Seaman" Plaintiff Defined

"Seaman" under the Jones Act is defined solely in terms of the employee's connection to a vessel in navigation; the employee's connection to a vessel, rather than the particular job, is determinative. Although the United States Supreme Court has not defined the required connection in all its details, it has held that a necessary element of the connection is that a seaman "perform the work of a vessel" [*McDermott Int'l v. Wilander (1991) 498 U.S. 337, 355, 111 S. Ct. 807, 112 L. Ed. 2d 866]* . In that regard, it is necessary that an employee's duties contribute to the function of the vessel or to the accomplishment of its mission [*McDermott Int'l v. Wilander (1991) 498 U.S. 337, 345-346, 111 S. Ct. 807, 112 L. Ed. 2d 866* ; *Offshore Co. v. Robison (5th Cir. 1959) 266 F.2d 769, 779]* . A seaman must have a connection to a vessel in navigation that is substantial in both duration and nature [*Chandris, Inc. v. Latsis (1995) 515 U.S. 347, 368, 115 S. Ct. 2172, 132 L. Ed. 2d 314* ; *Spears v. Kajima Eng'g & Constr., Inc. (2002) 101 Cal. App. 4th 466, 474, 124 Cal. Rptr. 2d 97]* . It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be one who does the ship's work [*McDermott Int'l v. Wilander (1991) 498 U.S. 337, 355, 111 S. Ct. 807, 112 L. Ed. 2d 866]* . Examples of employees who are seamen under the Jones Act include those who aid in navigation directly, as well as firemen, engineers, carpenters, surveyors, surgeons, coopers, cabin boys, waiters, and cooks [*see McDermott Int'l v. Wilander (1991) 498 U.S. 337, 344-345, 111 S. Ct. 807, 112 L. Ed. 2d 866* (quoting with approval 19th-century treatise's broad definition of "mariner")].

The Longshore and Harbor Workers' Compensation Act (LHWCA) [*33 U.S.C.S. § 901 et seq.*] and the Jones Act are mutually exclusive [*McDermott Int'l v. Wilander (1991) 498 U.S. 337, 347, 111 S. Ct. 807, 112 L. Ed. 2d 866* ; *see § 522.32*]. Inasmuch as the scope of the LHWCA is defined in part by the exclusion of an employee covered by the Jones Act--that is, a "master or member of a crew of any vessel" is not covered by the LHWCA--the scope of this exclusion is

an integral part of the definition of "seaman" under the Jones Act. In arriving at its definition, the Court therefore gleaned corresponding definitions with respect to both acts in light of the overall intent of Congress to create two distinct remedies for land-based (LHWCA) and sea-based (Jones Act) maritime employees [*McDermott Int'l v. Wilander (1991) 498 U.S. 337 347-355, 111 S. Ct. 807, 112 L. Ed. 2d 866]* .

The terms "member of a crew," and "seaman" are statutory terms, and their interpretation is a question of law. However, it is the court's duty to determine if there is a reasonable basis to support the jury's conclusion. If reasonable persons, applying the proper legal standard, could differ as to whether the employee was a "member of a crew," it is a question for the jury [*McDermott Int'l v. Wilander (1991) 498 U.S. 337, 356, 111 S. Ct. 807, 112 L. Ed. 2d 866]* . The inquiry into seaman status is of necessity fact-specific, and depends on the nature of the vessel, and the employee's precise relation to it. Nonetheless, summary judgment or a directed verdict is mandated if facts and the law will reasonably support only one conclusion [*McDermott Int'l v. Wilander (1991) 498 U.S. 337, 356, 111 S. Ct. 807, 112 L. Ed. 2d 866]* .

The United States Supreme Court has held that the inclusion of an occupation within the Longshore and Harbor Workers' Compensation Act (LHWCA) definition of "employee" [*33 U.S.C.S. § 902(3)*] does not necessarily preclude an employee who engages in that occupation from being a seaman under the Jones Act, because some maritime workers may in fact be Jones Act seaman performing a job specifically enumerated under the LHWCA [*Southwest Marine, Inc. v. Gizoni (1991) 502 U.S. 81, 112 S. Ct. 486, 116 L. Ed. 2d 405, 416]* . For example, an employee who works on floating marine platforms alongside vessels that are in port for purposes of repair, is not necessarily precluded from being termed a seaman with regard to injuries sustained while moving about the platform, even though a ship repairer is listed under the enumerated definitions of employee under the LHWCA. The United States Supreme Court stated that, although in some cases a ship repairer may lack the requisite connection to a vessel in navigation to qualify for seaman status, not all ship repairers lack that connection as a matter of law [*Southwest Marine, Inc. v. Gizoni (1991) 502 U.S. 81, 112 S. Ct. 486, 116 L. Ed. 2d 405, 416]* . Consequently, a maritime worker is limited to LHWCA remedies only if no genuine issue of fact exists as to whether the worker is a seaman under the Jones Act for purposes of the claim in question [*Southwest Marine, Inc. v. Gizoni (1991) 502 U.S. 81, 112 S. Ct. 486, 116 L. Ed. 2d 405, 416, 418* (issues of fact made trial court's grant of summary judgment improper); *see § 522.32[5]*].

The United States Supreme Court has rejected the contention that, if a maritime worker is arguably covered by the LHWCA, the district court should stay any Jones Act proceeding pending a final LHWCA administrative agency determination that the worker is, in fact, a "master or member of a crew" (and therefore excluded from LHWCA coverage). The Court found no indication in the LHWCA that Congress intended to preclude or stay traditional Jones Act suits in the district courts, finding instead that the LHWCA anticipated that such suits would be brought, and contains a limitations tolling provision for that purpose [*Southwest Marine, Inc. v. Gizoni (1991) 502 U.S. 81, 112 S. Ct. 486, 116 L. Ed. 2d 405, 417* ; *see 33 U.S.C.S. § 913(d)*]. Moreover, an employee who receives voluntary payments under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act, because the question of coverage has never actually been litigated [*see Southwest Marine, Inc. v. Gizoni (1991) 502 U.S. 81, 112 S. Ct. 486, 116 L. Ed. 2d 405, 418]* .

[6] Relationship to FELA Legislation

The references in the Jones Act to United States statutes applicable to railway employees [*see § 522.31[1]*] are to the Federal Employers' Liability Act (FELA) [*45 U.S.C.S. § 51 et seq.*], which governs recovery for personal injury and death of railroad workers. Congress intended to treat seamen and their land-based counterparts, railroad workers, as uniformly as possible. Accordingly, judicial interpretations of the FELA are generally regarded as persuasive authority in Jones Act litigation [*Baptiste v. Superior Court (1980) 106 Cal. App. 3d 87, 98-99, 164 Cal. Rptr. 789* ; *see § 522.31[12]*].

[7] Liability for Negligence or Defects

Under the FELA, an employer is liable in damages for injury to or death of an employee resulting in whole or in part from the negligence of any of the employer's officers, agents, or employees, or by reason of any defect or insufficiency, owing to its negligence, in any of its equipment, such as its engines, appliances, machinery, works, boats, or wharves [*45 U.S.C.S. § 51*]. The term "employer" includes any receiver or other person or corporation charged with the duty of the management and operation of the employer's business [*45 U.S.C.S. § 57*]. Nothing under the FELA limits the duty or liability of the employer or impairs the rights of its employees under any other federal law [*45 U.S.C.S. § 58*].

[8] Liberality of Approach to Negligence

After enactment in 1920, the Jones Act was extensively used by seamen to pursue negligence actions against their employers, because it provides for trial by jury and also affords a remedy not available under general maritime law, that of wrongful death. While these actions involve the basic elements of negligence (duty, breach, and proximate causation) it is not inaccurate to characterize them as subject to extremely liberal interpretations by the courts in favor of the seamen-litigants [*Baptiste v. Superior Court (1980) 106 Cal. App. 3d 87, 98, 164 Cal. Rptr. 789* ; *Williams v. Tide Water Associated Oil Co. (9th Cir. 1955) 227 F.2d 791, 794* ; *see also § 522.31[13]*].

[9] Liability to Seaman's Survivors

The Jones Act, through its incorporation of the FELA, provides that a seaman's right of action for injuries due to negligence survives to the seaman's personal representatives [*Miles v. Apex Marine Corp. (1990) 498 U.S. 19, 33, 111 S. Ct. 317, 112 L. Ed. 2d 275]* . The FELA provides, in the case of the death of an employee covered under the act, that the employer is liable in damages for the employee's death to the employee's personal representative for the benefit of the surviving widow or husband and children; if none, then of the employee's parents; and, if none, then of the next of kin dependent on the employee [*45 U.S.C.S. § 51*]. In cases of recovery by survivors, there may be only one recovery for the same injury [*45 U.S.C.S. § 59*].

[10] Defenses Not Available

[a] Contributory Negligence

In any action brought against a FELA employer for injuries or death, the employee's contributory negligence does not bar recovery; but the damages are diminished by the jury in proportion to the amount of negligence attributable to the employee. However, an employee is not considered guilty of contributory negligence when the employer's violation of any statute enacted or regulation or rule adopted for the safety of the employees contributed to the injury or death [*45 U.S.C.S. §§ 53, 54a*].

[b] Assumption of Risk

An employee under the FELA has not assumed the risks of his or her employment ifthe injury or death resulted in whole or in part from the negligence of any of the employer's officers, agents, or employees. Additionally, no employee has assumed the risks of employment if the employer's violation of a statute enacted or regulation or rule adopted for the safety of employees contributed to the injury or death [*45 U.S.C.S. §§ 54, 54a*].

[c] Employer's Ability to Limit Liability or Offset

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which would be to enable an employer to exempt itself from any liability created under the FELA, is void to that extent. However, in any action brought against the employer under or by virtue of any provisions of the FELA legislation, the employer may set off any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled to it on account of the injury or death involved [*45 U.S.C.S. § 55*].

[11] Limitation of Actions

Unless otherwise specified by law, a suit for recovery of damages for personal injury or death arising out of a maritime tort must be commenced within three years after the date the cause of action accrued [*46 U.S.C.S. § 30106*]. An action based on unseaworthiness falls within this provision because no other statute controls the time period for bringing suit [*see* [12], *below*].

[12] Unseaworthiness as Alternative Basis for Recovery

A further avenue to recovery for an injured seaman arises from the shipowner's duty to provide seamen with safe surroundings during their employment, that is, a seaworthy vessel. This duty is not based on statute but has developed over centuries through decisional admiralty and general maritime law. In recent times, the duty has expanded to the point where it is now considered a form of absolute liability [*Baptiste v. Superior Court (1980) 106 Cal. App. 3d 87, 99, 164 Cal. Rptr. 789* ; *see §§ 522.171* (Second Cause of Action), 522.173].

A party may pursue a general maritime claim for unseaworthiness, as well as a general negligence claim, even if the party does not qualify for seaman status under the more stringent standards of the Jones Act [*Freeze v. Lost Isle Partners (2002) 96 Cal. App. 4th 45, 51-52, 116 Cal. Rptr. 2d 520]* .

For further discussion of general maritime law, see *§ 522.35*.

[13] Liberality of Application of Doctrine

The California courts have commented that the demonstrated tendency of the United States Supreme Court has been to regard the Jones Act primarily as an addition to an even larger body of federal maritime law whenever FELA precedent would in some manner limit the liability imposed on a defendant shipowner. On those occasions the Court has called attention to the existence of an independent body of federal law, of which the Jones Act is only a part, and has not allowed the Jones Act to be utilized as a conduit through which limitations on liability could pass from land-based law such as FELA doctrines. Although there is considerable overlapping between Jones Act negligence and the doctrine of unseaworthiness, there is neither an authoritative precedent nor a reason of policy for imposing whatever limitations exist in Jones Act litigation on general federal admiralty law, from which the doctrine of unseaworthiness derives. Apparently, the United States Supreme Court continues to regard tort actions based on general admiralty law as the particular province of decisional law development and an area in which principles are applied with a liberal rather than a restraining hand [*Baptiste v. Superior Court (1980) 106 Cal. App. 3d 87, 103, 164 Cal. Rptr. 789]* . Moreover, absolute liability is imposed only for breach of a duty to furnish a vessel and appurtenances that are reasonably fit for their intended use by ordinary seamen; the duty does not require a perfect, accident-free ship that will withstand every imaginable peril of the sea [*Smith v. Marilyn M. Fishing, Inc. (1985) 173 Cal. App. 3d 453, 457-458, 219 Cal. Rptr. 57]* .

The concept of unseaworthiness is not limited to situations involving negligence or contractual obligation, but imposes liability regardless of fault for any deficiency in the ship's hull, equipment, or crew that renders the ship less than reasonably fit for its intended purposes [*see* *Waldron v. Moore-McCormack Lines, Inc. (1967) 386 U.S. 724, 726, 727, 87 S. Ct. 1410, 18 L. Ed. 2d 482]* .

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§ 522.32 Longshore and Harbor Workers' Compensation Act (LHWCA)

[1] Overlap With State Coverage

Prior to 1972, the Longshore and Harbor Workers' Compensation Act (LHWCA) [*33 U.S.C.S. § 901 et seq.*] was simply an effort to fill the gap in workers' compensation coverage, because the state compensation systems could not reach longshore workers injured seaward of the water's edge [*P. C. Pfeiffer Co. v. Ford (1979) 444 U.S. 69, 72, 100 S. Ct. 328, 62 L. Ed. 2d 225]* . States are constitutionally barred from applying their workers' compensation systems to maritime injuries, and thus interfering with the overriding federal policy of a uniform maritime law [*Southern Pac. Co. v. Jensen (1917) 244 U.S. 205, 216-218, 37 S. Ct. 524, 61 L. Ed. 1086]* . In 1972, the LHWCA was amended to include injuries occurring beyond the shoreline of the navigable waters of the nation, an area that had always been considered to be within the province of state compensation law. Presently, an injured employee may elect relief in this overlapping area of coverage [*see § 522.32[3]*] under either the federal or state compensation systems [*Sun Ship, Inc. v. Pennsylvania (1980) 447 U.S. 715, 716-718, 100 S. Ct. 2432, 65 L. Ed. 2d 458]* .

[2] Nature of Coverage

The LHWCA provides compensation for the death or disability of most private enterprise employees resulting from injuries occurring on navigable waters of the United States, including adjoining piers, wharves, dry docks, terminals, building ways, marine railways, or other adjoining areas customarily used by employers in loading, unloading, repairing, or building vessels [*33 U.S.C.S. § 903(a)*]. Coverage extends to accidental injuries or death arising out of and in the course of employment, as well as certain related occupational diseases or infections. The act also applies to injuries caused by willful acts of third persons directed against employees because of the employment [*33 U.S.C.S. § 902(2)*].

[3] Persons Covered

Employees covered by the LHWCA include persons engaged in maritime employment, longshore workers or other persons engaged in longshoring operations, and harbor workers, including ship repairers, shipbuilders, and shipbreakers. The act excludes the following individuals from coverage if they are covered under a state workers' compensation law [

33 U.S.C.S. § 902(3)]:

- Individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

- Individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

- Individuals employed by a marina who are not engaged in construction, replacement, or expansion of the marina (except for routine maintenance);

- Individuals who are employed by suppliers, transporters, or vendors, are temporarily doing business on the premises of a statutory employer, and who are not engaged in work normally performed by employees of a statutory employer;

- Aquaculture workers; or

- Individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length.

The LHWCA also excludes from coverage masters or members of a crew of any vessel, and any persons engaged by a master to load or unload or repair any small vessels under 18 tons, without regard to possible workers' compensation coverage [*33 U.S.C.S. § 902(3)*].

The reference of the LHWCA to longshore workers and any "other person engaged in longshoring operations" to describe persons engaged in maritime employment demonstrates that workers doing tasks traditionally performed by longshore workers are within the purview of the act as amended. The scope of maritime employment does not depend on the vagaries of union jurisdiction nor the assignment policies of the employer. Instead, the crucial factor is the nature of the activity to which a worker may be assigned. Persons moving cargo directly from ship to land transportation are engaged in maritime employment. A worker responsible for some portion of that activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process. Yet, coverage does not extend to all workers on the marine site. For instance, persons who only pick up stored cargo for further shipment are excluded [*P. C. Pfeiffer Co. v. Ford (1979) 444 U.S. 69, 82-83, 100 S. Ct. 328, 62 L. Ed. 2d 225]* . A welder working on a fixed offshore oil-drilling platform has also been held to be excluded from the LHWCA [*Herb's Welding, Inc. v. Gray (1985) 470 U.S. 414, 424-426, 105 S. Ct. 1421, 84 L. Ed. 2d 406* (nothing inherently marine in activity; not everyone on site satisfies status test)].

For discussion of whether a maritime worker may be a "seaman" under the Jones Act [*46 U.S.C.S. § 30104*], even though the occupation in question is enumerated under the LHWCA (for example, ship repairer), see *§§ 522.31[5]* and *522.32[5]*.

[4] Compensation Procedure

All employers are liable for and must secure the payment of compensation payable under the LHWCA. When the employer is a subcontractor, the contractor must be liable for and secure the payment of compensation to employees of the subcontractor unless the subcontractor has secured such payment. Compensation is payable irrespective of fault [*33 U.S.C.S. § 904*] except in certain instances of the employee's intoxication or willful intent to injure or kill himself or herself or another [*33 U.S.C.S. § 903(c)*]. The act provides for the timely furnishing of notice of injury or death [*see 33 U.S.C.S. § 912*] and filing of claims [*see 33 U.S.C.S. § 913*] and for a comprehensive program of determination and payment of expenses and compensation [*see 33 U.S.C.S. §§ 906-914*]. The statute creates a special procedure for paying claims [*see 33 U.S.C.S. §§ 919, 920*] and reviewing compensation orders [*see 33 U.S.C.S. § 921*].

An administrative law judge may grant or deny a claim for benefits under the LHWCA. If the claim is denied, the claimant may take an administrative appeal to the Benefits Review Board. The claimant must file a notice of appeal from the administrative law judge's compensation order within 30 days of the day the order is filed [*33 U.S.C.S. § 921(a)*]. The running of the 30-day period for the filing of the notice of appeal is triggered by the filing of the administrative law judge's compensation order as provided in *33 U.S.C.S. § 919*, which requires that the order be submitted to the Deputy Commissioner and sent to the parties by registered or certified mail. Service on the parties must be effected before a compensation order is deemed filed [*Nealon v. California Stevedore & Ballast Co. (9th Cir. 1993) 996 F.2d 966, 970-971]* .

Review from an adverse decision of the Benefits Review Board is by petition to the court. A petition for judicial review from a final determination of the Board must be filed within sixty days [*33 U.S.C.S. § 921(c)*]. The papers will not be regarded as filed until they are actually received by the clerk of the court [*Fed. Rules App. Proc., Rule 25(a)*]. The sixty-day filing period is a jurisdictional requirement, and if the petition is not received by the court of appeals within the filing period, the court lacks subject-matter jurisdiction [*Felt v. Director, Office of Workers' Comp. Programs (9th Cir. 1993) 11 F.3d 951, 952* (neither equitable tolling principles nor excusable neglect apply)].

[5] Exclusive Liability of Employer

The liability of the employer for compensation prescribed under the LHWCA is exclusive and in place of all other liability of the employer to the employee, or the employee's legal representative, spouse, parent, dependent, next of kin, or anyone otherwise entitled to recover damages from the employer at law or in admiralty because of the injury or death [*33 U.S.C.S. § 905(a)*]. For example, *33 U.S.C.S. § 905(a)* has been held to bar a wrongful death action brought by the parent of a deceased employee against an employer who was liable under the provisions of the LHWCA [*see Seide v. Bethlehem Steel Corp. (1985) 169 Cal. App. 3d 985, 989-990, 215 Cal. Rptr. 629]* .

If the employer fails to secure payment of compensation required by the LHWCA, the injured employee, or his or her legal representative in case death results from the injury, may choose between two modes of proceeding. Compensation may be claimed under the act, or an action may be maintained at law or in admiralty for damages. In an action, the defendant may not defend on the basis of negligence of a fellow servant, assumption of risk, or contributory negligence [*33 U.S.C.S. § 905(a)*].

A judicially recognized exception to the exclusive liability provision of *33 U.S.C.S. § 905(a)* is that an employee may bring an action to recover for injuries resulting from an intentional tort by his or her employer [*see Seide v. Bethlehem Steel Corp. (1985) 169 Cal. App. 3d 985, 989-990, 215 Cal. Rptr. 629]* .

A maritime worker who is arguably covered under the LHWCA is not precluded from bringing a Jones Act (*46 U.S.C.S. § 30104*) suit, nor is a Jones Act suit subject to a stay pending a final administrative determination under the LHWCA whether the worker is a "master or member of a crew" (and therefore excluded from coverage under the LHWCA) [*Southwest Marine, Inc. v. Gizoni (1991) 502 U.S. 81, 112 S. Ct. 486, 116 L. Ed. 2d 405, 417-418* (maritime worker on floating platforms, whose job involved ship repairing); *see § 522.31[5]*]. If the worker asserts "seaman" status under the Jones Act, and a genuine question of fact exists regarding that issue, it must be factually determined, and a Jones Act suit may proceed accordingly [*Southwest Marine, Inc. v. Gizoni (1991) 502 U.S. 81, 112 S. Ct. 486, 116 L. Ed. 2d 405, 417-418* ; *see § 522.31[5]*].

[6] Negligence of Third Parties

[a] When Employee's Rights Are Assigned to Employer

If the person entitled to recover under the LHWCA determines that someone other than the employer or those who work

for the employer is liable in damages, he or she need not elect whether to receive compensation under the act or to recover damages against the third person [*33 U.S.C.S. § 933(a)*; *see § 522.177*]. Acceptance of compensation under an award in a compensation order operates as an assignment to the employer of the right of the entitled person to recover damages against the third person, unless the employee or other entitled person commences an action against the third person within six months after the award [*see § 522.178*]. If the employer fails to commence an action against the third person within ninety days after the cause of action is assigned, the right to bring the action reverts to the person entitled to compensation [*33 U.S.C.S. § 933(b)*]. Payment of compensation into the fund on official determination that no one is entitled to receive compensation for the death of an employee who would otherwise be compensable under the statute [*see 33 U.S.C.S. § 944(c)(1)*] acts as an automatic assignment to the employer of the right of the legal representative of the deceased to recover damages against the third party [*33 U.S.C.S. § 933(c)*]. As an alternative to claiming subrogation rights under *33 U.S.C.S. § 933(b)*, an employer who has paid benefits to an employee injured by the negligence of a third party may bring an independent action against the tortfeasor under federal maritime law [*Stevedoring Services v. Prudential Lines, Inc. (1986) 181 Cal. App. 3d 154, 159, 226 Cal. Rptr. 225]* .

The employer may either bring suit [*see § 522.178*] or settle the case without suing. In either event, any amounts recovered by the employer must be distributed according to the LHWCA. The employer first retains an amount equal to expenses of the action, including a reasonable attorney's fee, the cost of medical benefits rendered, all amounts paid as compensation, and the present value of future amounts payable. The employer then retains one-fifth of the excess and pays over the remainder to the person entitled to compensation or to his or her personal representative [*33 U.S.C.S. § 933(d), (e)*].

[b] When Employee Sues

If the person entitled to recover under the LHWCA determines that someone other than the employer or those who work for the employer is liable in damages, the person has six months after the award of compensation within which to sue the third party [*33 U.S.C.S. § 933(a), (b)*; *see §§ 522.176, 522.182*]. If the person sues the third party, the employer is required to pay as compensation only any excess of the amount determined to be compensation due under the LHWCA over the net amount recovered against the third party. If the employee or his or her representative has settled with the third party for an amount less than is due under the act, the employer is responsible for the difference only if written approval of the settlement is obtained from the employer and the employer's insurance carrier before it is executed and filed on the appropriate form with the Secretary of Labor within 30 days [*33 U.S.C.S. § 933(g)(1)*]. Failure of the employee to obtain and file a prior, written employer approval, or the failure of the employee to inform the employer of any settlement or judgment against the third party, terminates any rights to compensation and medical benefits under the LHWCA, even if the employer has already made payments or acknowledged entitlement to benefits [*33 U.S.C.S. § 933(g)(2)*]. The forfeiture provision of *33 U.S.C.S. § 933(g)(2)* also applies to a worker whose employer, at the time the worker settles with a third party, is neither paying compensation to the worker nor is yet subject to an order to pay under the LHWCA [*Estate of Cowart v. Nicklos Drilling Co. (1992) 505 U.S. 469, 112 S. Ct. 2589, 120 L. Ed. 2d 379, 389]* .

[c] When Vessel Is Third Party

If the injury was caused by the negligence of a vessel, the employee, or anyone otherwise entitled to recover, may bring an action for damages against the vessel under *33 U.S.C.S. § 933*, the provision authorizing actions against third parties [*33 U.S.C.S. § 905(b)*; *see 33 U.S.C.S. § 933*; *see also § 522.176*]. "Vessel" refers to any vessel on which or in connection with which an employee suffers injury or death arising out of or in the course of his or her employment. The term also includes the vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member [*33 U.S.C.S. § 902(21)*].

If the injured person was employed to provide stevedoring services, no action lies if the injury was caused by the negligence of persons providing the same service. If the injured person was employed to provide shipbuilding,

repairing, or breaking services, and the injured person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no action lies against the employer in any capacity (including that of owner) or against other employees of the employer [*33 U.S.C.S. § 905(b)*].

The employer is not liable to the vessel for damages allowed under *33 U.S.C.S. § 905(b)*, directly or indirectly, and any agreements or warranties to the contrary are void [*33 U.S.C.S. § 905(b)*]. In enacting this provision, Congress denied to the vessel a cause of action for indemnity against the longshore worker's employer, in order to prevent a "circuity" of actions that would result in much greater liability for the employer than otherwise owed under then existing compensation schedules, and that would reduce the longshore worker's compensation by the cost of the ensuing litigation [*Streatch v. Associated Container Transp., Ltd. (C.D. Cal. 1975) 388 F. Supp. 935, 939]* .

The liability of the vessel under *33 U.S.C.S. § 905(b)* is not based on the warranty of seaworthiness or a breach of that warranty at the time the injury occurred [*33 U.S.C.S. § 905(b)*]. This provision, enacted in 1972, specifically removes a longshore worker's cause of action against the vessel based on any theory other than negligence [*Streatch v. Associated Container Transp., Ltd. (C.D. Cal. 1975) 388 F. Supp. 935, 939* ; *see § 522.35[3]*].

The remedy provided under *33 U.S.C.S. § 905(b)* is exclusive of all other remedies against the vessel except remedies available under *33 U.S.C.S. § 901 et seq.* [*33 U.S.C.S. § 905(b)*].

If the employer is also the shipowner, some federal courts allow a negligence action by the employee, whereas other courts hold the employer liable only for compensation, regardless of its breach of duties as a shipowner [*see, e.g., Baker v. Pacific Far E. Lines, Inc. (N.D. Cal. 1978) 451 F. Supp. 84, 93-96* (negligence action not allowed)].

[7] Duties of Shipowner Under LHWCA

The vessel or shipowner owes to the stevedore and its longshore employees the duty of exercising due care under the circumstances. This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able, by the exercise of reasonable care, to carry on its cargo operations with reasonable safety to persons and property. The exercise of care also includes warning the stevedore of any hazards on the ship or with respect to the equipment that are known to the vessel or shipowner, or should be known in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of its cargo operations, and that are not known by the stevedore and would not be obvious to or anticipated by the stevedore if it is reasonably competent in the performance of its work [*Marine Terminals v. Burnside Shipping Co. (1969) 394 U.S. 404, 415, 416 n.18, 89 S. Ct. 1144, 22 L. Ed. 2d 371* ; *see Scindia Steam Nav. Co. v. De Los Santos (1981) 451 U.S. 156, 166-167, 101 S. Ct. 1614, 68 L. Ed. 2d 1]* .

Generally, however, the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. Thus, the vessel owner is not liable to the longshore worker for injuries caused by dangers unknown to it and about which it had no duty to inform itself. This conclusion is plainly consistent with congressional intent to foreclose the faultless liability of the shipowner based on a theory of unseaworthiness or nondelegable duty. The shipowner, within limits, is entitled to rely on the stevedore and owes no duty to the longshore worker to inspect or supervise the cargo operations [*Scindia Steam Navigation Co. v. De Los Santos (1981) 451 U.S. 156, 172, 101 S. Ct. 1614, 68 L. Ed. 2d 1* ; *Dugas v. C. Brewer & Co. (1985) 165 Cal. App. 3d 203, 209, 211 Cal. Rptr. 573]* .

The duty of providing safety equipment is on the stevedore, and the stevedore is liable for injuries to workers that result from breach of that duty. The shipowner is liable only in the exceptional case. Further, a longshore worker may not bring a products-liability claim against the shipowner, because the shipowner may only be held liable when the injured longshore worker can prove that the shipowner is negligent. The shipowner gives no warranty that the vessel is free from defect [*Whitehill v. United States Lines, Inc. (1986) 177 Cal. App. 3d 1201, 1207-1208, 223 Cal. Rptr. 452* ; *but*

see Streatch v. Associated Container Transp., Ltd. (C.D. Cal. 1975) 388 F. Supp. 935, 939 (strict products liability action available if defendant shipowner is in business of providing product to public)].

A shipowner may be obligated to intervene in the stevedore's cargo operation when the owner learns that an apparently dangerous condition exists or has developed. If the condition presents an unreasonable risk of harm to longshore workers and the stevedoring company's judgment is improvident, the shipowner must perform any repairs necessary for the protection of longshore workers [*see Scindia Steam Navigation Co. v. De Los Santos (1981) 451 U.S. 156, 173-176, 101 S. Ct. 1614, 68 L. Ed. 2d 1* (dicta)].

Once unloading operations have begun, the shipowner can be held liable for injuries to the employees of the stevedore resulting from open and obvious dangers only if the shipowner had actual knowledge of the hazards, and should have realized that an unreasonable risk of harm to the longshore workers existed, but did not intervene to eliminate or neutralize the hazard [*Dugas v. C. Brewer & Co. (1985) 165 Cal. App. 3d 203, 210, 211 Cal. Rptr. 573]* .

A negligent shipowner's liability may be reduced but is not eliminated by the negligence of the stevedore or the longshore worker [*Dugas v. C. Brewer & Co. (1985) 165 Cal. App. 3d 203, 210, 211 Cal. Rptr. 573]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPersonal InjuriesMaritime Workers' ClaimsLongshore & Harbor Workers' Compensation ActWorkers' Compensation & SSDIMaritime Workers' ClaimsCompensabilityLongshore & Harbor Workers' Compensation ActGeneral OverviewWorkers' Compensation & SSDIMaritime Workers' ClaimsCompensabilityLongshore & Harbor Workers' Compensation ActAwardsGeneral OverviewWorkers' Compensation & SSDIMaritime Workers' ClaimsCompensabilityLongshore & Harbor Workers' Compensation ActAwardsHearings & ReviewWorkers' Compensation & SSDIMaritime Workers' ClaimsCompensabilityLongshore & Harbor Workers' Compensation ActCoverage & DefinitionsGeneral OverviewWorkers' Compensation & SSDIMaritime Workers' ClaimsCompensabilityLongshore & Harbor Workers' Compensation ActCoverage & DefinitionsStatus RequirementWorkers' Compensation & SSDIMaritime Workers' ClaimsCompensabilityLongshore & Harbor Workers' Compensation ActJudicial ReviewWorkers' Compensation & SSDIMaritime Workers' ClaimsCompensabilityLongshore & Harbor Workers' Compensation ActNegligenceWorkers' Compensation & SSDIThird Party ActionsSubrogation

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46-522 California Forms of Pleading and Practice--Annotated § 522.33

§ 522.33 Maintenance and Cure

[1] Nature of Remedy

The most basic remedy afforded an injured seaman is that of damages for "maintenance and cure" [*see § 522.180*]. The objective is primarily the same as that of land-based workers' compensation laws. The plaintiff seaman is almost always entitled to food, lodging, and medical care from the employer when the seaman is injured or becomes ill during the course of employment. This entitlement lasts until some type of stability has attached to his or her condition. However, maintenance and cure differs markedly from ordinary workers' compensation in that it is not the seaman's exclusive remedy when injured during the course of employment [*Baptiste v. Superior Court (1980) 106 Cal. App. 3d 87, 98, 164 Cal. Rptr. 789]* . For discussion of a seaman's other remedies, see *§§ 522.31*, *522.34*, and *522.35*.

A seaman's right to maintenance and cure arises under general maritime law. The obligation has been recognized consistently as an implied provision in contracts of marine employment. Wages constitute only one part of a ship's obligation to sailors, while maintenance and cure is another kind [*Gilliam v. California Employment Stabilization Comm'n (1955) 130 Cal. App. 2d 102, 111, 278 P.2d 528]* .

The obligation or liability for maintenance and cure is not predicated on the fault or negligence of the employer. Whether by traditional standards the employer is or is not responsible for the injury or sickness, he or she is liable for the expense of curing it as an incident of the maritime employer-employee relationship [*Da Silva v. Pacific King, Inc. (1987) 195 Cal. App. 3d 1, 11, 240 Cal. Rptr. 395* ; *Petersen v. Marine Transport Lines (1948) 36 Cal. App. 2d Supp. 927, 935, 194 P.2d 161* , *194 P.2d 161]* .

A seaman may recover punitive damages under general maritime law for a ship owner's willful and wanton failure to pay maintenance and cure, even if such damages might not be available in an action brought solely under the Jones Act [*Atl. Sounding Co. v. Townsend (2009) -- U.S. -- 129 S. Ct. 2139, 174 L. Ed. 2d 382, 398-400* ; *see § 522.31*].

[2] Extent of Statutory Recognition

Under a California statute, if a mate or seaman becomes sick or disabled during the voyage, without his or her fault, the

expense of furnishing the person with suitable medical advice, medicine, attendance, and other provision for his or her wants, must be borne by the vessel until the close of the voyage [*Harb. & Nav. Code § 873*]. However, maintenance and cure is in fact not a statutory obligation of the employer but is a common law liability; although maintenance and cure is the payment of a liability by an employer, it is not paid under what is commonly considered an employer's liability law [*Gilliam v. California Employment Stabilization Comm'n (1955) 130 Cal. App. 2d 102, 114, 278 P.2d 528]* . Nevertheless, the California statute appears to reaffirm, through codification of the common law, that portion of the employer's obligation for the disability during the remainder of the voyage [*see § 522.33[3]*].

[3] Breadth of Liability

The employer's responsibility for maintenance and cure extends beyond injuries sustained because of, or while engaged in, activities required by the seaman's employment [*Petersen v. Marine Transp. Lines (1948) 86 Cal. App. 2d Supp. 927, 935 , 194 P.2d 161]* . Thus, seamen have been said to be "in service" even while on shore leave. Shore leave has been described as an elemental necessity in the sailing of ships, a part of the business, as old as the art and not merely a personal diversion, a necessity in the maintenance of the crew's morale, without which the efficiency of the ship's operations would be seriously impaired [*Moss v. Alaska Packers Ass'n (1945) 70 Cal. App. 2d Supp. 857, 859, 160 P.2d 244*]. However, a seaman who does not live aboard ship but commutes to the ship is not generally "in service of" the ship after the hours of service have ended for the day [*Price v. Connolly-Pacific Co. (2008) 162 Cal. App. 4th 1210, 1221-1223, 76 Cal. Rptr. 3d 872* (seaman with permission to live in own camper parked on company property was not in service of ship when contracting disease from mosquito bite likely sustained after duty hours)].

[4] Unavailability of Most Defenses

So broad is the shipowner's obligation for maintenance and cure that negligence or acts short of probable misconduct on the seaman's part will not relieve the employer of the responsibility. Considerations of contributory negligence, the fellow servant rule, and assumption of risk are not relevant either. Only willful misbehavior or a deliberate indiscreet act suffices to deprive the seaman of protection. Classic examples are venereal disease and injuries received as a result of intoxication, although on occasion even the latter appear to have been qualified in recognition of the predisposition of sailors ashore [*Petersen v. Marine Transp. Lines (1948) 86 Cal. App. 2d Supp. 927, 935 , 194 P.2d 161]* .

Legal Topics:

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46-522 California Forms of Pleading and Practice--Annotated § 522.34

§ 522.34 Death on High Seas Act (DOHSA)

[1] Nature of Action

Under the Death on the High Seas Act (DOHSA) [*46 U.S.C.S. § 30301 et seq.*], whenever a person's death is caused by wrongful act, neglect, or default occurring on the high seas beyond three nautical miles from the shore of the United States, the personal representative may maintain a suit for damages in the federal courts, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or a dependent relative against the person or vessel responsible [*46 U.S.C.S. § 30302*; *see § 522.184*].

State courts have concurrent jurisdiction to hear DOHSA actions, making available to DOHSA beneficiaries a convenient forum for the decision of their wrongful death claims [*see 46 U.S.C.S. § 30308(a)*; *Offshore Logistics, Inc. v. Tallentire (1986) 477 U.S. 207, 221-222, 232, 106 S. Ct. 2485, 91 L. Ed. 2d 174* ; *Garofalo v. Princess Cruises, Inc. (2000) 85 Cal. App. 4th 1060, 1079-1085, 102 Cal. Rptr. 2d 754* (rejecting earlier court of appeals decision that state courts had no jurisdiction over DOHSA claims)]. The DOHSA does not affect state law regulating rights of action or remedies for death. Otherwise, however, state statutes are preempted by the DOHSA whenever it applies [*Offshore Logistics, Inc. v. Tallentire (1986) 477 U.S. 207, 232, 106 S. Ct. 2485, 91 L. Ed. 2d 174]* . So long as the injury occurring on the high seas is one cause of the death, the DOHSA provides the exclusive remedy, even if the high seas injury is not the sole cause of the death [*Garofalo v. Princess Cruises, Inc. (2000) 85 Cal. App. 4th 1060, 1079, 102 Cal. Rptr. 2d 754]* .

Furthermore, the DOHSA does not apply to waters within the territorial limits of a state [*46 U.S.C.S. § 30308(b)*; *Offshore Logistics, Inc. v. Tallentire (1986) 477 U.S. 207, 221, 106 S. Ct. 2485, 91 L. Ed. 2d 174]* . Thus, state courts may entertain causes of action and provide wrongful death remedies for accidents arising on territorial waters (less than three nautical miles from shore) [*46 U.S.C.S. § 30308(a)*; *Code Civ. Proc. § 377.60*; *Offshore Logistics, Inc. v. Tallentire (1986) 477 U.S. 207, 221, 106 S. Ct. 2485, 91 L. Ed. 2d 174]* . However, the courts have construed the term "high seas" to include all waters that are not the territorial waters of the United States. Therefore, the DOHSA applies to injuries that occur within the territorial waters of another nation, even if that body of water is an inland river or lake [*Beckett v. MasterCraft Boat Co. (2005) 126 Cal. App. 4th 1045, 1048-1049, 24 Cal. Rptr. 3d 490]* .

For a discussion of the federal nonstatutory remedy for deaths occurring within state territorial waters, see *§ 522.35*. For additional discussion of maritime wrongful-death actions see Ch. 100, *Boats and Boating* . For a discussion of and forms relating to state wrongful-death actions, see Ch. 181, *Death and Survival Actions* .

[2] Nature of Recovery

Wrongful death recovery under the DOHSA consists of fair compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought. It is apportioned among these plaintiffs by the court in proportion to the loss they may severally have suffered by reason of the decedent's death [*46 U.S.C.S. § 30303*].

[3] Unavailability of Defense of Contributory Negligence

In suits under the DOHSA, the fact that the decedent was guilty of contributory negligence does not bar recovery, but the court takes into consideration the degree of negligence attributable to the decedent and reduces the recovery accordingly [*46 U.S.C.S. § 30304*].

[4] Limitation of Actions

A suit for wrongful death on the high seas must be commenced within three years from the date the cause of action accrued [*46 U.S.C.S. § 30106*].

[5] Conversion of Pending Personal Injury Suit

If a person dies as a result of the wrongful act, neglect, or default during the pendency in admiralty court of a suit to recover damages for personal injuries in respect to the act, neglect, or default in question, the personal representative of the decedent may be substituted as a party and the suit may proceed as one for wrongful death on the high seas [*46 U.S.C.S. § 30305*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 522.35 General Maritime Law

[1] Creation of Common Law Remedy for Wrongful Death

To achieve uniformity under the existing statutory scheme, the United States Supreme Court held that an action lies under general maritime law for death caused by violation of maritime duties, such as the duty of seaworthiness [*Moragne v. States Marine Lines (1970) 398 U.S. 375, 401, 409, 90 S. Ct. 1772, 26 L. Ed. 2d 339* ; *see § 522.31[12]* regarding the duty of seaworthiness]. The Court noted that if the Jones Act and the Death on the High Seas Act (DOHSA) were construed to forbid recognition of a general maritime remedy for wrongful death within territorial waters, the following anomalies would occur: (1) in territorial waters, general maritime law would allow a remedy for unseaworthiness resulting in injury, but not for death; and (2) although the DOHSA allows a remedy for death resulting from unseaworthiness on the high seas, general maritime law would not allow that recovery for a similar death in territorial waters [*Miles v. Apex Marine Corp. (1990) 498 U.S. 19, 26-27, 111 S. Ct. 317, 112 L. Ed. 2d 275* ; *Moragne v. States Marine Lines (1970) 398 U.S. 375, 395, 90 S. Ct. 1772, 26 L. Ed. 2d 339]* .

Therefore, this remedy applies whether the act occurred on the high seas or in territorial waters [*see* *Miles v. Apex Marine Corp. (1990) 498 U.S. 19, 26, 29-30, 111 S. Ct. 317, 112 L. Ed. 2d 275]* . Although it applies to the death of a "true" seaman, it does not apply to the death of a longshore worker, because of superseding federal legislation barring that application [*Miles v. Apex Marine Corp. (1990) 498 U.S. 19, 28, 111 S. Ct. 317, 112 L. Ed. 2d 275* ; *see 33 U.S.C.S. § 905(b)*; *see also § 522.35[3]*].

Although the holding in *Moragne* technically addressed only claims brought for a violation of the duty of seaworthiness, the United States Supreme Court has subsequently ruled that the holding extends to negligence claims as well [*Norfolk Shipbuilding & Drydock Corp. v. Garris (2001) 532 U.S. 811, 121 S. Ct. 1927, 150 L. Ed. 2d 34, 43]* .

The United States Supreme Court has allowed recovery for loss of support, services, and society, and funeral expenses in a claim brought under general maritime law based on the death of a longshore worker within territorial waters [*Sea-Land Servs., Inc. v. Gaudet (1974) 414 U.S. 573, 584, 94 S. Ct. 806, 39 L. Ed. 2d 9]* . Loss of society provides compensation for loss of mutual benefits of the relationship, but not for mental anguish and grief [*Sea-Land Servs.,*

Inc. v. Gaudet (1974) 414 U.S. 573, 585 n.17, 94 S. Ct. 806, 39 L. Ed. 2d 9] . That case also allowed recovery for wrongful death despite recovery by decedent during lifetime for personal injuries [*Sea-Land Servs., Inc. v. Gaudet (1974) 414 U.S. 573, 583, 94 S. Ct. 806, 39 L. Ed. 2d 9]* . The Court subsequently emphasized that its holding applies only to a claim based on the death of a longshore worker that occurs in territorial waters [*Miles v. Apex Marine Corp. (1990) 498 U.S. 19, 30-31, 30 n.1, 111 S. Ct. 317, 112 L. Ed. 2d 275]* . Because of superseding federal legislation under the Longshore and Harbor Workers' Compensation Act [*33 U.S.C.S. § 905(b)*], *Sea-Land Services* is no longer applicable on its facts, because a longshore worker may no longer bring an action against a shipowner on the general maritime theory of unseaworthiness (although he or she may bring such an action on a negligence theory) [*Miles v. Apex Marine Corp. (1990) 498 U.S. 19, 30 n.1, 111 S. Ct. 317, 112 L. Ed. 2d 275]* . For further discussion, see *§ 522.35[3]*.

Subsequently, the United States Supreme Court held that damages in *Moragne*-type wrongful death actions brought for the death of a non-seafarer--that is, someone who was neither a seaman covered by the Jones Act nor a longshore worker--are subject to the application of state law [*Yamaha Motor Corp. v. Calhoun (1996) 516 U.S. 199, 202, 116 S. Ct. 619, 133 L. Ed. 2d 578]* . For a discussion of remedies afforded under California wrongful death law, see Ch. 181, *Death and Survival Actions* .

There is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act (*46 U.S.C.S. § 30104*) seaman, which is consistent with a uniform rule barring recovery for those damages for the wrongful death of a seaman, whether brought under the DOHSA (*46 U.S.C.S. § 30301 et seq.*), the Jones Act, or general maritime law [*Miles v. Apex Marine Corp. (1990) 498 U.S. 19, 30-33, 111 S. Ct. 317, 112 L. Ed. 2d 275]* . Moreover, in a general maritime action surviving the death of a seaman, the estate cannot recover damages for the decedent's lost future earnings [*Miles v. Apex Marine Corp. (1990) 498 U.S. 19, 33-37, 111 S. Ct. 317, 112 L. Ed. 2d 275]* .

For discussion of wrongful-death actions under the general maritime law with emphasis on jurisdictional issues and within the context of recreational boating, see Ch. 100, *Boats and Boating* .

[2] Beneficiaries Determined by Reference to Death on High Seas Act (DOHSA)

The class of beneficiaries in a claim for wrongful death based on general maritime law is determined by reference to the Death on the High Seas Act (DOHSA) [*46 U.S.C.S. § 30301 et seq.*] and the rule expressed by a majority of the state wrongful death schemes [*Skidmore v. Grueninger (5th Cir. 1975) 506 F.2d 716, 729 n.11* ; *see Moragne v. States Marine Lines (1970) 398 U.S. 375, 407-408, 90 S. Ct. 1772, 26 L. Ed. 2d 339* ; *see also § 522.34[1]*]. For example, by analogy to these statutory provisions, adult children, parents, and posthumous illegitimate children are included in the class of beneficiaries, but an intended spouse is not [*Skidmore v. Grueninger (5th Cir. 1975) 506 F.2d 716, 729 n.11* (adult children); *Hamilton v. Canal Barge Co. (E.D. La. 1975) 395 F. Supp. 978, 985-988* (remaining beneficiaries)].

[3] Inapplicability to Longshore and Harbor Workers

In 1972, the United States Congress amended *33 U.S.C.S. § 905(b)* to bar any recovery from shipowners for the death or injury of a longshore or harbor worker based on any cause of action other than negligence [*33 U.S.C.S. § 905(b)*; *Miles v. Apex Marine Corp. (1990) 498 U.S. 19, 28, 111 S. Ct. 317, 112 L. Ed. 2d 275]* . The purpose of this amendment is to place a longshore or harbor worker injured aboard a vessel in the same position as he or she would be if injured in nonmaritime employment ashore, insofar as bringing a third-party damage action (for example, an action against a party other than the employer) is concerned, and not to endow the employee with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness" [*see Streatch v. Associated Container Transp., Ltd. (C.D. Cal. 1975) 388 F. Supp. 935, 939* ; *see also* H.R. Rep. No. 1441, 92nd Cong., 2d Sess. (1972), reprinted in 1972 U.S. Code Cong. & Admin. News 4698, 4703]. This change was based on the conclusion that the "seaworthiness" concept was developed by the courts to protect seamen from the extreme hazards incident to their employment that frequently requires long sea voyages and duties of obedience to orders not generally

required of other workers; and that the rationale that justifies holding the vessel absolutely liable to seamen if the vessel is unseaworthy does not apply with equal force to longshore workers and other nonseamen working on board a vessel while it is still in port. In doing so, Congress stressed the adequacy of compensation remedies available to longshore and harbor workers under the simultaneously amended compensation provisions of the Longshore and Harbor Workers' Compensation Act [*see* H.R. Rep. No. 1441, 92nd Cong., 2d Sess. (1972), reprinted in 1972 U.S. Code Cong. & Admin. News 4698, 4703].

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§ 522.36 Liability to Passengers

Whenever a passenger sustains injury or if his or her baggage sustains damage, the master and the owner of the vessel, and the vessel are liable for the full amount of damage, if the incident occurred because of neglect or failure to comply with various federal safety laws applicable to vessels, or because of known defects or imperfections of the steaming apparatus or of the hull [*46 U.S.C.S. § 30102*; *see § 522.183*]. Moreover, any person sustaining loss or injury through the negligence or willful misconduct of any master, mate, engineer, or pilot, or the defendant's neglect or refusal to obey the laws governing the navigation of vessels, may also sue the master, mate, engineer, or pilot for damages [*46 U.S.C.S. § 30103*].

The DOHSA is not restricted to maritime employees; it provides for recovery whenever the death of a person is caused by wrongful act, neglect, or default on the high seas [*46 U.S.C.S. § 30302*].

For matters more properly within the jurisdiction of state law, California provides that a marine carrier (on the ocean or arms of the sea [*Civ. Code § 2087*]) is liable in like manner as an inland carrier except for loss or injury caused by the perils of the sea or fire [*Harb. & Nav. Code § 420*]. Perils of the sea include storms and waves; rocks, shoals, and rapids; other obstacles, though of human origin; changes of climate; the confinement necessary at sea; animals peculiar to the sea; and any other dangers peculiar to the sea [*Harb. & Nav. Code § 422*]. All vessels are liable for injuries caused by them to persons or property in California [*Harb. & Nav. Code § 491(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 522.37 Shipowner's Limitation of Liability for Personal Injuries

The owner of a vessel may institute proceedings to limit his or her liability for personal injuries suffered on or as a result of the vessel, if the injury was incurred without the owner's privity or knowledge [*46 U.S.C.S. §§ 30505(b), 30511, 185*; *see § 522.12*].

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[Reserved]

§§ 522.38[Reserved]

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§ 522.50 Governing Law

The rights of shipowners in actions based on commercial shipping transactions are governed by the substantive rules of federal maritime law, regardless of whether the plaintiff chooses a state or federal forum [*Intagliata v. Shipowners & Merchs. Towboat Co., Ltd. (1945) 26 Cal. 2d 365, 371, 159 P.2d 1]* . State law applies only to the extent that it does not conflict with the maritime law [*Madruga v. Superior Court (1954) 346 U.S. 556, 561, 74 S. Ct. 298, 98 L. Ed. 290]* . Admiralty jurisdiction and the choice of federal or state forum are discussed more extensively in Ch. 100, *Boats and Boating*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawMaritime ContractsGeneral OverviewAdmiralty LawPractice & ProcedureFederal PreemptionAdmiralty LawPractice & ProcedureForumAdmiralty LawShippingGeneral Overview

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§ 522.51 Definitions

Contracts of affreightment and bills of lading set forth the essential terms governing shipping transactions. The term "contract of affreightment" encompasses any agreement for the conveyance of persons or the carriage of property by vessels. A bill of lading is merely written acknowledgment that goods have been received by a vessel for shipment to a particular place. Normally, a bill of lading also states terms of carriage, making it both a receipt and a contract [*Pollard v. Vinton (1882) 105 U.S. 7, 8, 26 L. Ed. 998]* .

The term "freight" refers to the payment or charges for shipping goods. The term "cargo" means the goods being shipped. Under California law, however, the goods being shipped are referred to as freight, while freightage means payment or charges for shipment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawMaritime ContractsAffreightmentAdmiralty LawShippingBills of LadingGeneral OverviewTransportation LawCarrier Duties & LiabilitiesBills of Lading

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§ 522.52 Collection of Freight

[1] Action for Breach of Contract

If the shipper refuses payment of freight on delivery of the goods in accordance with the parties' contract, the shipowner can seek collection through an action for breach of contract. Such actions can be maintained in personam in state court or, because shipment contracts fall within maritime jurisdiction, in federal district court [*28 U.S.C.S. § 1333*; *Madruga v. Superior Court (1954) 346 U.S. 556, 560, 561, 74 S. Ct. 298, 98 L. Ed. 290]* .

[2] Maritime Liens

In addition to actions based on contract, a shipowner may collect freight charges by enforcement of maritime liens. A lien on the shipper's cargo arises when the owner of a vessel takes possession of the goods for shipment [*Hayes v. Campbell (1880) 55 Cal. 421, 423-426]* . Maritime liens do not depend on the parties' agreements for their existence, but arise independently, from the usages of commerce [*Bird of Paradise v. Heyneman (1867) 72 U.S. 545, 554-558, 18 L. Ed. 662]* .

The shipowner may retain the goods until freight is paid or file an action in rem against the cargo in federal court. The lien is possessory, however, and an owner should not release the cargo until after an action is filed or the shipper gives additional security [*Beverly Hills Nat'l Bank & Trust Co. v. Compania de Navegacione Almirante S.A. (9th Cir. 1971) 437 F.2d 301, 303, 304]* . Partial delivery of the goods will not defeat a lien on the remainder for the full amount of freight due [*Frothingham v. Jenkins (1850) 1 Cal. 42, 43-44]* .

The parties to a shipping transaction may modify or exclude the shipowner's lien in their contract or through their actions. In the absence of express words, the lien may be waived if the agreement contains stipulations inconsistent with the right, such as a provision that payment is due within two months after delivery of the goods [*Bird of Paradise v. Heyneman (1867) 72 U.S. 545, 554-558, 18 L. Ed. 662]* . In addition, the unconditional surrender of the goods without payment operates as a waiver of the shipowner's lien [*Beverly Hills Nat'l Bank & Trust Co. v. Compania de Navegacione Almirante S.A. (9th Cir. 1971) 437 F.2d 301, 303, 304* ; *see Eastern Transp. Co. v. United States (2d Cir.*

1947) 159 F.2d 349, 351] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawMaritime ContractsGeneral OverviewAdmiralty LawMaritime LiensDefensesAdmiralty LawMaritime LiensEnforcementAdmiralty LawMaritime LiensNatureGeneral OverviewAdmiralty LawMaritime LiensPriority & SourcesContractsGeneral Overview

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§ 522.53 Actions Based on Maritime Collisions

[1] Fault Requirements

Liability for damages from collisions between two ships or a ship and a stationary object arises from fault. When neither party to the collision is at fault, damages cannot be collected by one vessel from the other [*The "Clara" (1880) 102 U.S. 200, 203, 26 L. Ed. 145]* .

[2] Federal Navigational Rules

Detailed rules of navigation govern the actions of ships on navigable waters [*33 U.S.C.S. §§ 1601-1608, 2001*-2073]. On the high seas and connected waters navigable by seagoing vessels, the International Regulations for Preventing Collisions at Sea guide vessels' movements [*33 U.S.C.S. §§ 1601-1608*]. Another set of rules applies to navigation of all vessels on the inland waters of the United States, and to vessels of the United States on the Canadian waters of the Great Lakes to the extent that there is no conflict with Canadian law [*33 U.S.C.S. §§ 2001-2073*].

[3] California Navigational Rules

California rules of navigation [*Harb. & Nav. Code §§ 240-308*] apply to navigable waters of the United States and the state insofar as they are not in conflict with the admiralty and maritime jurisdiction and laws of the United States [*Harb. & Nav. Code § 240*]. In practice, federal rules concerning navigation on navigable waters will control except as they permit application of a special local law [*Intagliata v. Shipowners & Merchs. Towboat Co., Ltd. (1945) 26 Cal. 2d 365, 375, 159 P.2d 1]* .

[4] Determination of Fault--Pennsylvania Rule

Admiralty law imposes liability for damages from a collision on the ship whose fault causes the injury [*Pennsylvania v. Troop (1874) 86 U.S. 125, 136, 22 L. Ed. 148]* . The United States Supreme Court has established rules concerning imposition of fault when parties are in violation of the navigational statutes. The Court has held that when a ship at the

time of collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributing cause of the disaster. In such case, the ship must show not merely that the fault might not have been one of the causes, or that it was probably not, but that it could not have been a cause. If the ship's fault clearly had nothing to do with the disaster, it may be dismissed [*Pennsylvania v. Troop (1874) 86 U.S. 125, 136, 22 L. Ed. 148]* .

The purpose of the *Pennsylvania* rule was to enforce obedience to the mandate of safety statutes. It was also designed to simplify adjudication of collision cases [*Ishizaki Kisen Co., Ltd. v. United States (9th Cir. 1975) 510 F.2d 875, 879, 880]* . The *Pennsylvania* rule concerns only the question of whether an alleged statutory violation was one of the collision's causes. It does not exonerate a party whose negligence may also have been a cause of the disaster [*Crown Zellerbach Corp. v. Willamette-Western Corp. (9th Cir. 1975) 519 F.2d 1327, 1329]* .

The Ninth Circuit has consistently followed the *Pennsylvania* rule. The court, however, interprets the rule to mean that a ship in violation of statutory rules intended to prevent collisions must establish that the violation could not reasonably be held to have been the proximate cause of the collision. This view follows from the court's finding that the Supreme Court did not intend to establish a hard and fast rule that every vessel guilty of statutory fault must establish that the fault could not by any stretch of imagination have had any causal relation to the collision no matter how special, improbable, or remote [*States S.S. Co. v. Permanente S.S. Corp. (9th Cir. 1956) 231 F.2d 82, 86]* . The court also has ruled that the *Pennsylvania* burden is discharged by a clear and convincing showing of no proximate cause, and not by the stricter beyond-a-reasonable-doubt test [*Trinidad Corp. v. S.S. Keiyoh Maru (9th Cir. 1988) 845 F.2d 818, 825]* .

The *Pennsylvania* rule nevertheless proves frequently difficult, if not impossible, for violators to discharge [*Waterman S.S. Corp. v. Gay Cottons (9th Cir. 1969) 414 F.2d 724, 736 , modified, 419 F.2d 372]* . Until a change in 1975 by the United States Supreme Court, a vessel that could not satisfy the *Pennsylvania* burden would bear half of the damages even if its contribution to the accident was minimal [*United States v. Reliable Transfer Co. (1975) 421 U.S. 397, 411, 95 S. Ct. 1708, 44 L. Ed. 2d 251* (overruled rule of divided damages in collision cases); *see § 522.53[4]*)].

[5] Apportionment of Damages

[a] In General

If a vessel is solely at fault, it must bear its own damages as well as those of the faultless party [*The "Clara" (1880) 102 U.S. 200, 203 26 L. Ed. 145]* .

When two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage must be allocated among the parties in proportion to the comparative degree of their fault [*United States v. Reliable Transfer Co. (1975) 421 U.S. 397, 411, 95 S. Ct. 1708, 44 L. Ed. 2d 251]* . Under the previous rule of divided damages in collision cases, both parties' damages were added together and divided by two [*Sapphire v. Napoleon III (1874) 85 U.S. 51, 56, 21 L. Ed. 814* (describes computation of divided damages)]. According to the *Reliable* rule, damages will be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault [*United States v. Reliable Transfer Co. (1975) 421 U.S. 397, 411, 95 S. Ct. 1708, 44 L. Ed. 2d 251]* .

The *Reliable* rule applies to collisions between two vessels and also to contact between vessels and stationary objects (allisions).

[b] Major-Minor Fault Rule

The "major-minor fault" rule attempts to ease the burden on a vessel which is guilty of a minor violation in comparison with the neglect of the other party. Under such circumstances, the vessel guilty of minor fault benefits from a

presumption that the minor fault could not have been a cause of the collision. The party primarily at fault must bear all damages unless it can rebut the presumption of its responsibility by showing that the minor fault did in fact contribute as a proximate cause of the collision [*California v. Italian Motorship Ilice (9th Cir. 1976) 534 F.2d 836, 840]* . There is, however, some question as to the continued viability of this rule in light of the decision in *United States v. Reliable Transfer Co. (1975) 421 U.S. 397, 95 S. Ct. 1708, 44 L. Ed. 2d 251* ; *see § 522.53[4]*.

[6] Post-*Reliable* Application of Fault Rules

The decision in *Reliable* [*United States v. Reliable Transfer Co. (1975) 421 U.S. 397, 95 S. Ct. 1708, 44 L. Ed. 2d 251]* clearly overruled the holding in *Pennsylvania v. Troop (1874) 86 U.S. 125, 22 L. Ed. 148* , insofar as it relates to the principle of divided damages when two parties' fault contribute to a collision [*California v. Italian Motorship Ilice (9th Cir. 1976) 534 F.2d 836, 840* (dicta)]. Courts of appeal in two circuits have ruled, however, that the *Pennsylvania* rule pertaining to the burden on vessels in violation of statutes remains in force subsequent to *Reliable* [*Florida E. C. R. Co. v. Revilo Corp. (5th Cir. 1981) 637 F.2d 1060, 1067* ; *Tug Ocean Prince, Inc. v. United States (2d Cir. 1978) 584 F.2d 1151]* .

The Ninth Circuit has applied the *Pennsylvania* rule in post-*Reliable* cases, but has not directly discussed its viability. In a pre-*Reliable* decision, the court noted that a Japanese system of comparative fault, similar to the *Reliable* method of apportioning damages, might become frustrated by application of the rule [*see Ishizaki Kisen Co., Ltd. v. United States (9th Cir. 1975) 510 F.2d 875, 880]* . However, the Ninth Circuit discussed application of the *Pennsylvania* rule in a subsequent case applying the *Reliable* principle retroactively [*Crown Zellerbach Corp. v. Willamette-Western Corp. (9th Cir. 1975) 519 F.2d 1327, 1329]* .

The "major-minor fault" rule appears to have been overturned by the *Reliable* decision. The Second Circuit has ruled that cases applying the "major-minor fault" rule are no longer viable after *Reliable* and that damages must be apportioned even if one vessel is primarily responsible for the loss and the other is only slightly negligent. The court relied on the Supreme Court's disapproval of the rule as unfair because the primarily negligent party bears the entire burden even though another party shared the fault [*Getty Oil Co., Inc. v. S.S. Ponce De Leon (2d Cir. 1977) 555 F.2d 328, 333]* .

In dicta, the Ninth Circuit has discussed the "major-minor fault" rule subsequent to the *Reliable* decision, but has made no determination of its continued effect [*California v. Italian Motorship Ilice (9th Cir. 1976) 534 F.2d 836, 840]* .

[7] Joint and Several Liability

If two parties are at fault for damages to a third party, liability is joint and several; the injured party can recover wholly from one or the other, or partially from one and partially from the other [*see The Beaconsfield (1895) 158 U.S. 303, 307, 15 S. Ct. 860, 39 L. Ed 993* ; *The "Atlas" (1876) 93 U.S. 302, 315, 23 L. Ed. 863]* .

The rule of joint and several liability appears to be largely unchanged by the rule announced in *United States v. Reliable Transfer Co. (1975) 421 U.S. 397, 95 S. Ct. 1708, 44 L. Ed. 2d 251* [*see § 522.53[4]*]. In a later decision, the Supreme Court stated that the *Reliable* rule changed apportionment of liability from an equal division to a division on the basis of relative fault, but did not upset the rule that an injured party may recover for all loss from one of several joint tortfeasors [*Edmonds v. Compagnie Generale Transatlantique (1979) 443 U.S. 256, 271 n.30, 99 S. Ct. 2753, 61 L. Ed. 2d 521* ; *see also McDermott, Inc. v. AmClyde (1994) 511 U.S. 202, 207-208, 114 S. Ct. 1461, 128 L. Ed. 2d 148]* . This statement has been adopted and applied in a noncollision case [*Ebanks v. Great Lakes Dredge & Dock Co. (11th Cir. 1982) 688 F.2d 716, 720-722]* and would appear to be equally applicable in collision cases, although the issue has yet to be squarely decided by an appellate court in that context.

Although one joint tortfeasor may be severally liable for all damages, he or she may seek pro rata contribution or partial

indemnity from other joint tortfeasors [*Edmonds v. Compagnie Generale Transatlantique (1979) 443 U.S. 256, 271 n.30, 99 S. Ct. 2753, 61 L. Ed. 2d 521* ; *The "Juniata" (1876) 93 U.S. 337, 340, 23 L. Ed. 930* ; *Loose v. Offshore Navigation, Inc. (5th Cir. 1982) 670 F.2d 493, 500-502* ; *Petition of Bloomfield S.S. Co. (2d Cir. 1970) 422 F.2d 728, 734]* .

If a plaintiff sues one joint tortfeasor after settling with and releasing another, the nonsettling tortfeasor's liability is reduced by that amount of the total damages that is found to be attributable to the settling tortfeasor's proportionate share of liability, and the settling tortfeasor's liability is, in turn, extinguished [*Kizer v. Peter Kiewit Sons' Co. (N.D. Cal. 1980) 489 F. Supp. 835, 837-841]* . This rule differs from California law regarding the effect of settlement, which is discussed in Ch. 300, *Indemnity and Contribution* .

[8] Effects of Settlement

The United States Supreme Court has established the federal common law applicable to cases in which one or more defendants have settled with plaintiff, and held that the proper calculation of the liability of nonsettling defendants is based on the jury's allocation of proportionate responsibility; the Court rejected the alternative method of giving nonsettling defendants a credit for the dollar value of the settlement [*McDermott, Inc. v. AmClyde (1994) 511 U.S. 202, 217, 114 S. Ct. 1461, 128 L. Ed. 2d 148]* . The rejected method is that reflected in California law regarding the effect of settlement, which is discussed in Ch. 300, *Indemnity and Contribution* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawCollisionsLiabilityGeneral OverviewAdmiralty LawCollisionsLiabilityPresumptionsAdmiralty LawCollisionsPreventionRegulatory & Statutory DutiesGeneral OverviewAdmiralty LawCollisionsRemediesApportionmentAdmiralty LawCollisionsRemediesDamages

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§ 522.54 Partitioning Ownership Interests in Vessels

Federal and state courts have concurrent jurisdiction to partition ownership interests in ships [*28 U.S.C.S. § 1333*]. Actions against the vessel in rem must be brought in federal court, while state courts retain power to adjudicate such controversies when an action is prosecuted against the vessel owners in personam [*Madruga v. Superior Court of California (1954) 346 U.S. 556, 560, 74 S. Ct. 298, 98 L. Ed. 290]* . A state court action cannot necessarily dispose of the rights of any and all persons in the vessel, however, unless every person claiming an interest in the property happens to be made a party in the action. An in rem action, on the other hand, adjudicates the interests of all persons in the property [*Madruga v. Superior Court of California (1954) 346 U.S. 556, 561, 74 S. Ct. 298, 98 L. Ed. 290]* .

Accordingly, if the attorney is unsure whether or not there are any outstanding claims, an action should be prosecuted in federal court against the vessel in rem and against all known claimants in personam. Furthermore, the action must be brought in rem if any liens are outstanding against the vessel. Such liens would be considered maritime and therefore subject to the exclusive admiralty jurisdiction of federal courts [*Madruga v. Superior Court of California (1954) 346 U.S. 556, 560, 74 S. Ct. 298, 98 L. Ed. 290]* .

In California, partition actions are governed by *Code Civ. Proc. §§ 872.010-874.240*. For discussion and forms relating to partition actions in state court, see Ch. 397, *Partition* . The state court forms in Ch. 397, *Partition* , may easily be converted for use in a federal in rem action by adding an admiralty jurisdiction allegation, by stating that the vessel is or will be within the district during the pendency of the action, and by following other in rem procedures provided in the federal Supplemental Rules for Certain Admiralty and Maritime Claims [*see §§ 522.201 -522.205*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPractice & ProcedureAttachment & GarnishmentPartition, Petitory & Possessory ActionsAdmiralty LawPractice & ProcedureJurisdiction

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46-522 California Forms of Pleading and Practice--Annotated § 522.55

§ 522.55 Damages from Towage

Towage is the supplying of power by a tug or vessel to tow or draw another vessel. The vessel being towed is called the "tow" [*Stevens v. White City (1932) 285 U.S. 195, 200, 52 S. Ct. 347, 76 L. Ed. 699]* .

In an agreement of towage, the tow owner is responsible for its seaworthiness. The tug owner is not responsible for the proper stowage of cargo on a barge, an honest error of judgment on the part of the tug's master, or nonapparent unseaworthiness of the tow [*Nat G. Harrison Overseas Corp. v. American Tug Titan (5th 1975) 516 F.2d 89, 94]* .

The tug owner's primary responsibility is safe navigation. He or she must exercise such reasonable care and maritime skill as prudent navigators employ for the performance of similar service. Unlike the common carrier with respect to cargo, however, the tug does not act as an insurer or bailee of the vessel in tow [*Stevens v. White City (1932) 285 U.S. 195, 201, 202, 52 S. Ct. 347, 76 L. Ed. 699]* .

Suits against a tug for damages to a tow are based on negligence. The plaintiff must show that the loss was caused by a breach of the duty to exercise the skill of a prudent navigator. Unlike cases involving carriage of cargo, the fact that a tow was in good order when received by a tug and damaged when delivered does not raise any presumption of negligence [*Stevens v. White City (1932) 285 U.S. 195, 202, 52 S. Ct. 347, 76 L. Ed. 699]* .

Even though the tow owner bears the burden of proving the tug's negligence, the tug may be required to produce exculpatory evidence under certain circumstances. For instance, if an accident occurs during a deviation from the tug's course, it must show that the deviation was consistent with cautious and skillful management [*The Steamer Webb (1872) 81 U.S. 406, 414-415, 20 L. Ed. 774]* . In addition, on proof of grounding, the tug must provide evidence that the tug was operating within the designated channel and did not hit a known obstruction therein [*Mid-America Transp. Co., Inc. v. National Marine Serv., Inc. (8th Cir. 1974) 497 F.2d 776, 780 , aff'd, 526 F.2d 629 (1975)]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawTowageGeneral OverviewAdmiralty LawTowageContractsAdmiralty LawTowageDutiesAdmiralty LawTowageLiability

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[Reserved]

§§ 522.56[Reserved]

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46-522 California Forms of Pleading and Practice--Annotated § 522.70

§ 522.70 Governing Law

The rights of shippers, seamen, and holders of maritime liens are governed by the substantive rules of federal maritime law, regardless of whether the plaintiff chooses a state or a federal forum [*Intagliata v. Shipowners & Merchs. Towboat Co., Ltd. (1945) 26 Cal. 2d 365, 371, 159 P.2d 1]* . State law applies only to the extent that it does not render changes in the maritime law [*Madruga v. Superior Court (1954) 346 U.S. 556, 561, 74 S. Ct. 298, 98 L. Ed. 290]* . Admiralty jurisdiction and the choice of federal or state forum are discussed more extensively in Ch. 100, *Boats and Boating*.

Statutory law primarily controls the rights of shippers, seamen, and holders of maritime liens. The interests of shippers are governed by the Carriage of Goods by Sea Act (COGSA) [*46 U.S.C.S. § 30701* note] and the Harter Act [*46 U.S.C.S. § 30701 et seq.*]. Seamen's rights to wages are protected by federal and state statutes [*46 U.S.C.S. §§ 10301-10321* (foreign and intercoastal voyages), 10501-10509 (coastwise voyages), 10701-10711 (deceased seamen), 11101 et seq. (protection and relief of seamen); *Harb. & Nav. Code § 493*]. Finally, federal maritime lien law controls the creation of liens in favor of materialmen, tugs, pilots, seamen, and other persons furnishing services or supplies necessary for the shipping industry [*46 U.S.C.S. §§ 31305, 31341* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawMaritime ContractsGeneral OverviewAdmiralty LawMaritime LiensGeneral OverviewAdmiralty LawPersonal InjuriesMaritime Tort ActionsGeneral OverviewAdmiralty LawPractice & ProcedureFederal PreemptionAdmiralty LawShippingCarrier Duties & ObligationsGeneral Overview

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46-522 California Forms of Pleading and Practice--Annotated § 522.71

§ 522.71 Actions for Cargo Damage or Loss

[1] Who May Prosecute

An action for cargo damage or loss may be prosecuted by a shipper, consignee, holder of a negotiable (order) bill of lading or any other person demonstrating an ownership interest in the goods [*The Vaughan & Tel. (1872) 81 U.S. 258, 266, 20 L. Ed. 807* ; *The Thames (1872) 81 U.S. 98, 106, 20 L. Ed. 804]* .

[2] Types of Shipping Agreements

Usually, the conditions governing cargo damage are contained in a written agreement evidencing the shipping transaction. The contract may be a bill of lading which is also a receipt for the cargo, or a charter party.

A charter party is an agreement whereby the owner gives the charterer full capacity of the ship [*The Fri (2d Cir. 1907) 154 F. 333, 338]* . Such an agreement is a private contract of carriage and a bill of lading issued by the ship's master or by an agent of the owner operates merely as the receipt for the goods and as a document of title, passing the property of the goods. The provisions of the bill of lading do not vary the contract (charter party) between the shipowner and the charterer [*In re Marine Sulphur Queen (2d Cir. 1972) 460 F.2d 89, 103* ; *Romano v. West India Fruit & S.S. Co. (5th Cir. 1945) 151 F.2d 727, 730* ; *The Fri (2d Cir. 1907) 154 F. 333, 336-337]* .

The owner of a ship carrying the cargo of more than one shipper is called a common carrier, and the ship is referred to as a general ship [*Liverpool & Great W. Steam Co. v. Phenix Ins. Co. (1889) 129 U.S. 397, 437, 9 S. Ct. 469, 32 L. Ed. 788]* . A bill of lading issued by a common carrier is both a receipt for the goods and a contract between the parties [*Pollard v. Vinton (1882) 105 U.S. 7, 8, 26 L. Ed. 998]* .

[3] Laws Regulating Shipping Contracts

[a] In General

Shipowners and shippers must comply with several statutes that regulate commercial shipping transactions.

[b] Carriage of Goods by Sea Act (COGSA)

The Carriage of Goods by Sea Act (COGSA) [*46 U.S.C.S. § 30701* note] applies to every bill of lading or similar document of title that evidences a contract for the carriage of goods (excluding cargo carried on deck and live animals) by sea to or from ports of the United States in foreign trade [*46 U.S.C.S. § 30701* note, § 1(b), (c)].

In addition, the COGSA governs shipments between United States ports and carriage agreements not covered for some other reason (such as the carriage of cargo on deck) if the bill of lading contains an express statement making the COGSA's provisions applicable [*46 U.S.C.S. § 30701* note, § 13; *North River Ins. Co. v. Fed Sea/Fed Pac Line (9th Cir. 1981) 647 F.2d 985, 987]* . If incorporated by the parties, the COGSA becomes merely another contractual term to be construed with the entire agreement [*Commonwealth Petrochemicals v. Steam Ship Puerto Rico (4th Cir. 1979) 607 F.2d 322, 324-327]* .

The COGSA specifically excludes charter parties from its coverage [*46 U.S.C.S. § 30701* note, § 5]. Also, a bill of lading issued by the vessel owner to a charterer would not fall within the COGSA because it is not evidence of the parties' contract [*see 46 U.S.C.S. § 30701* note]. The bill of lading operates as a receipt and document of title under such circumstances, but the charter party is the contract of carriage [*In re Marine Sulphur Queen (2d Cir. 1972) 460 F.2d 89, 103]* .

Although charter parties are excluded, the act covers any bill of lading issued under or pursuant to a charter party from the moment at which such document regulates the relations between a carrier and holder of the bill [*46 U.S.C.S. § 30701* note, § 1(b)]. For example, if a charterer issues bills of lading to shippers instead of using the ship's entire carrying capacity, the bills of lading evidence a contract of carriage and must comply with the terms of the COGSA [*46 U.S.C.S. § 30701* note, § 5].

The statute covers only the period from the time when goods are loaded to the time when they are discharged from the ship [*46 U.S.C.S. § 30701* note, § 1(e)]. The parties may agree, however, to hold the carrier or the ship responsible for loss or damage prior to loading and subsequent to discharge of cargo [*46 U.S.C.S. § 30701* note, § 7].

[c] Harter Act

The Harter Act [*46 U.S.C.S. § 30701 et seq.*] was originally enacted prior to COGSA, and as now codified applies to the carriage of goods to or from any port in the United States [*46 U.S.C.S. § 30702(a)*]. However, the Harter Act has been almost completely superseded with respect to foreign trade by the COGSA [*Sunkist Growers, Inc. v. Adelaide Shipping Lines (9th Cir. 1979) 603 F.2d 1327, 1333]* . In addition, many bills of lading issued for transportation between ports within the United States include a provision making the COGSA applicable. Therefore, the Harter Act will generally apply only with respect to shipments between United States ports and only when the parties have not made the COGSA expressly applicable [*PPG Indus., Inc. v. Ashland Oil Co.-Thomas Petroleum Transit Div. (3d Cir. 1975) 527 F.2d 502, 505 , appeal on remand, 592 F.2d 138 (1978)*].

In contrast to the COGSA, the Harter Act applies to the periods prior to loading and subsequent to discharge of the goods up until delivery [*46 U.S.C.S. § 30704*; *The Monte Iciar (3d Cir. 1948) 167 F.2d 334, 336]* . The parties may contract to apply the COGSA during this period, but otherwise the Harter Act governs their rights [*46 U.S.C.S. § 30701* note, § 7; *46 U.S.C.S. § 30704*].

The period prior to loading begins when the goods are delivered and accepted by the carrier for transportation. The primary determinant in showing the beginning of this period is whether or not the cargo has become subjected to the ship's control. The issuance of bills of lading or dock receipts indicates that custody has taken place, but neither action

represents conclusive proof of acceptance for shipment [*Mackey v. United States (2d Cir. 1952) 197 F.2d 241, 242, 243]* .

The Harter Act's coverage of delivery comes into play as soon as the cargo has left the ship's tackle (when transportation is covered by the COGSA), and continues until the goods are properly delivered by depositing them on a fit wharf at the port of destination [*Isthmian S.S. Co. v. California Spray-Chem. Corp. (9th Cir. 1961) 290 F.2d 486, 488-490 , modified, 300 F.2d 41 (1962)]* .

[d] Federal Bills of Lading (Pomerene) Act

The Pomerene or Federal Bills of Lading Act [*49 U.S.C.S. § 80101 et seq.*] applies to bills of lading issued by any common carrier for the transportation of goods between ports within the United States (interstate) and between the United States and a foreign country [*49 U.S.C.S. § 80102*]. A common carrier issuing a bill of lading is generally liable for damages caused by nonreceipt of any part of the goods by the date shown in the bill or by failure of the goods to correspond with the description contained in the bill [*49 U.S.C.S. § 80113(a)*]. However, a common carrier issuing a bill of lading is not liable: (1) if the goods are loaded by the shipper; (2) the bill describes the goods in terms of marks or labels, or in a statement about kind, quantity, or condition, or is qualified by "contents or condition of contents of packages unknown," "said to contain," "shipper's weight, load, and count," or words of the same meaning; and (3) to the extent the carrier does not know whether any part of the goods were received or conform to the description [*49 U.S.C.S. § 80113(b)*]. In addition, a common carrier issuing a bill of lading is not liable for damages caused by improper loading if the shipper loads the goods and the bill contains the words "shipper's weight, load, and count," or words of the same meaning indicating that the shipper loaded the goods [*49 U.S.C.S. § 80113(c)*].

Although enacted later, the Pomerene Act did not repeal the Harter Act. The two acts may reasonably be read together as compatible legislation [*Mississippi Valley Barge Line Co. v. Inland Waterways Shippers Ass'n, Inc. (8th Cir. 1961) 289 F.2d 374, 382]* . Furthermore, the Carriage of Goods by Sea Act (COGSA) specifically provides in *46 U.S.C.S. § 30701* note, § 3(4), that it will not be construed as repealing or limiting the application of any part of the Bills of Lading Act. Therefore, attorneys should consider compliance with Pomerene's provisions when preparing an action under the COGSA or the Harter Act.

[e] California Law Regarding Cargo Damage Intrastate

As noted previously, federal maritime law supercedes state regulation of shipping transactions in interstate and foreign commerce [*Intagliata v. Shipowners & Merchs. Towboat Co., Ltd. (1945) 26 Cal. 2d 365, 371, 159 P.2d 1]* . California statutes recognize that the rights and duties peculiar to carriers by sea are defined by acts of Congress [*Civ. Code § 2088*; *Harb. & Nav. Code § 421*]. State law applies to fill the gaps in admiralty law, but only to the extent that it does not render changes [*Harb. & Nav. Code § 399*; *Madruga v. Superior Court (1954) 346 U.S. 556, 561, 74 S. Ct. 298, 98 L. Ed. 290]* .

The carriage of freight (refers to cargo in California) within the state of California is regulated by *Civ. Code §§ 2110-2144* and *Harb. & Nav. Code §§ 420-432*. Basically, a marine carrier bears the same liability as an inland carrier, except for loss or injury caused by perils of the sea or fire [*Harb. & Nav. Code § 420*]. The statute lists perils of the sea and prohibits the stowage of freight on deck unless it is usual to do so [*Harb. & Nav. Code §§ 422, 423*]. In addition, the law regulates jettison (throwing cargo overboard when necessary for the safety of the vessel or cargo) and general average loss (apportioning losses over the cargo) [*Harb. & Nav. Code §§ 425-432*]. Finally, the Civil Code specifies the place of delivery of freight, in the absence of contrary usage [*Civ. Code § 2119*].

Federal admiralty jurisdiction is determined by a two-part test, requiring a location on navigable waters and a sufficient relationship or nexus to maritime commerce [*Sisson v. Ruby (1990) 497 U.S. 358, 361, 364, 110 S. Ct. 2892, 111 L. Ed. 2d 292* ; *Executive Jet Aviation v. City of Cleveland (1972) 409 U.S. 249, 253, 261, 93 S. Ct. 493, 34 L. Ed. 2d*

454] . When the injury occurs on land, admiralty jurisdiction normally is not proper [*David Wright Charter Serv. of N.C., Inc. v. Wright (4th Cir. 1991) 925 F.2d 783, 785]* . Claims against terminal operators for damage to cargo while in storage awaiting shipment are governed by state law, rather than admiralty law. The booking of passage of cargo on a ship, followed by the turning over of the cargo to a terminal operator for storage pending shipment, creates a bailment or deposit between the cargo owner and the terminal operator under California law. *Civ. Code § 1840* limits the amount of damages recoverable for negligence by a depository or bailor to the declared value of the cargo [*Whitcombe v. Stevedoring Servs. of Am. (9th Cir. 1993) 2 F.3d 312, 314, 316]* .

For discussion of and forms for use in the liability of an inland carrier, see Ch. 109, *Carriers* .

[4] Actions Under Carriage of Goods by Sea Act (COGSA)

[a] Obligations of the Carrier

Under the Carriage of Goods by Sea Act (COGSA), after receiving goods for transportation, the carrier must issue, on demand of the shipper, a bill of lading which (1) shows the leading marks necessary for identification of the goods as furnished by the shipper before the loading starts, (2) states the number of cargo pieces or the quantity or weight, as furnished in writing by the shipper, and (3) notes the apparent order and condition of the goods [*46 U.S.C.S. § 30701* note, § 3(3)]. The carrier need not show any marks, number, quantity, or weight which he or she has reasonable ground for suspecting not accurately to represent the goods actually received, or which he or she has had no reasonable means of checking [*46 U.S.C.S. § 30701* note, § 3(3)(c)].

The COGSA also imposes affirmative duties with respect to the ship and cargo. Before and at the beginning of a voyage, the carrier must exercise due diligence to make the ship seaworthy as well as properly manned, equipped, and supplied. Furthermore, the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried must be made fit and safe for the reception, carriage, and preservation of cargo [*46 U.S.C.S. § 30701* note, § 3(1)]. Finally, the carrier must properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried [*46 U.S.C.S. § 30701* note, § 3(2)].

As an additional means of controlling contracts of carriage, the COGSA voids and nullifies any clause, covenant, or agreement relieving the carrier or the ship from liability for loss or damage to cargo arising from negligence, fault, or failure in any duties and obligations required by statute. Clauses which attempt to lessen the carrier's liability, except as provided in the statute, will also be disregarded [*46 U.S.C.S. § 30701* note, § 3(8)].

[b] Special Agreements Under Carriage of Goods by Sea Act (COGSA)

Under the Carriage of Goods by Sea Act (COGSA), the shipper and carrier may enter into any agreement embodying any terms, regardless of the statute's requirements, with respect to any particular goods. Although it employs broad language, this provision applies only to extraordinary shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement. Any stipulation regarding seaworthiness, however, must not be contrary to public policy [*46 U.S.C.S. § 30701* note, § 6].

[c] Limitation on Scope of Carrier's Liability

The COGSA relieves the carrier from liability for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence to make the ship seaworthy and to secure the proper personnel and equipment as specified with respect to the carrier's obligations [*46 U.S.C.S. § 30701* note, § 4(1)]. In addition, the statute exempts a carrier from liability for loss or damage arising or resulting from the following acts or events [*46 U.S.C.S. § 30701* note, § 4(2)]:

- Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;
- Fire, unless caused by the actual fault or privity of the carrier;
- Perils, dangers, and accidents of the sea or other navigable waters;
- Act of God;
- Act of war;
- Act of public enemies;
- Arrest or restraint of princes, rulers, or people, or seizure under legal process;
- Quarantine restrictions;
- Act or omission of the shipper or owner of the goods, his agent or representative;
- Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: provided that nothing herein contained be construed to relieve a carrier from responsibility for the carrier's own acts;
- Riots and civil commotions;
- Saving or attempting to save life or property at sea;
- Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;
- Insufficiency of packing;
- Insufficiency or inadequacy of marks; and
- Latent defects not discoverable by due diligence.

An umbrella provision excludes any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the carrier's agents or servants [*46 U.S.C.S. § 30701* note, § 4(2)(q)].

The burden of proof with respect to limitation of liability falls on the carrier or any person claiming the exemption. If the loss or damage results from unseaworthiness, the person claiming exemption must prove the exercise of due diligence [*46 U.S.C.S. § 30701* note, § 4(1)]. A person claiming exemption because of an act for which the carrier is not responsible must prove the absence of causation between the damage or loss and any fault or neglect of the carrier [*46 U.S.C.S. § 30701* note, § 4(2)(q)]. The burden is satisfied if these facts are shown by a preponderance of the evidence [*States Marine Corp. of Del. v. Producers Coop. Packing Co. (9th Cir. 1962) 310 F.2d 206, 212, 213]* .

[d] Limitation on Amount of Carrier's Liability

The COGSA provides that neither the carrier nor the ship may in any event be liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package, or in case of goods not shipped

in packages, per customary freight unit. The shipper can avoid this limitation if the nature and value of the goods have been declared before shipment and inserted in the bill of lading. Furthermore, the parties may agree on a different maximum amount so long as it does not fall below the $500 limitation. Regardless of the amount declared, the carrier will not be liable for more than the actual damage [*46 U.S.C.S. § 30701* note, § 4(5)].

When cargo is shipped within a sealed container, the container is not considered the package or customary freight unit to which the $500 limitation applies if the bill of lading lists the number of packages within the container, notwithstanding a provision in the bill of lading that seeks to limit liability by providing that where cargo is packed into containers, the number of the containers shall be considered the number of packages or units for the purpose of limiting liability. Such a contract definition of "package" is neither reasonable nor consistent with the language and purpose of the COSGA, which provides, in *46 U.S.C.S. § 30701* note, § 3(8), that any contract agreement lessening the statutory liability of the carrier is null and void [*All Pac. Trading v. Vessel M/V Hanjin Yosu (9th Cir. 1993) 7 F.3d 1427, 1433]* .

When the carrier seeks to limit its liability to $500, the shipper must be afforded a fair opportunity to declare a higher value for the cargo and pay a corresondingly higher shipping charge [*Pan Am. World Airways, Inc. v. California Stevedore & Ballast Co. (9th Cir. 1977) 559 F.2d 1173, 1176]* . Provisions in the bill of lading and the COGSA advising shippers of the carrier's limited liability are considered prima facie evidence of the opportunity to avoid the limitation, however, and the holder of a bill of lading (or shipper) must prove that a choice of declaring a higher liability did not in fact exist [*Tessler Bros. (B.C.) Ltd. v. Italpacific Line (9th Cir. 1974) 494 F.2d 438, 443* ; *see also Continental Ins. Co. v. Columbus Line, Inc. (2003) 107 Cal. App. 4th 1190, 1200, 133 Cal. Rptr. 2d 199* (reference in bill of lading incorporating COGSA, but not specifically noting $500 limitation was insufficient evidence, by itself, that shipper was denied opportunity to negotiate for greater limitation)].

Although the statute appears clear in limiting the carrier's liability to $500 per package, unlimited liability may be imposed if the carrier makes an unreasonable deviation during transit. The COGSA provides that any reasonable deviation, such as to save lives or property at sea, does not constitute a breach of the parties' contract. However, a deviation for the purpose of loading or unloading passengers or cargo is regarded prima facie as unreasonable [*46 U.S.C.S. § 30701* note, § 4(4)].

The United States Circuit Courts of Appeal do not treat the issue uniformly. The Fifth Circuit has ruled that an unreasonable deviation breaches the parties' contract, rendering the $500 limitation inapplicable and restoring the carrier's full liability as an insurer of the goods [*Spartus Corp. v. S/S Yafo (5th Cir. 1979) 590 F.2d 1310, 1315-1317]* . On the other hand, the Seventh Circuit has decided that the words "in any event" in *46 U.S.C.S. § 30701* note, § 4(5) mean that the $500 limitation applies regardless of an unreasonable deviation which breaches the contract [*Atlantic Mut. Ins. Co. v. Poseidon Schiffahrt (7th Cir. 1963) 313 F.2d 872, 874-875]* .

In the state courts of California, mere negligent conduct will not displace the $500 limitation on a carrier's liability under the COGSA. In dicta, the court of appeal has stated that even in the event of an unreasonable deviation, the statute places an invariable $500 per package limitation on the carrier's financial responsibility unless the shipper has declared a higher value in the bill of lading [*Varian Assocs. v. Compagnie Generale Transatlantique (1978) 85 Cal. App. 3d 369, 372-376, 149 Cal. Rptr. 534]* .

[e] Notice of Loss or Damage

Under the COGSA, the consignee or person entitled to delivery must give written notice of loss or damage and the general nature of such loss or damage to the carrier or his or her agent at the port of discharge before or at the time of the removal of the goods. If the loss or damage is not apparent, the notice must be given within three days of the delivery. The notice may be endorsed on the receipt for the goods given by the person taking delivery [*46 U.S.C.S. § 30701* note, § 3(6)].

If the notice is not given, removal of the goods is prima facie evidence of the carrier's delivery of the goods as they are described in the bill of lading. The failure to give notice does not affect or prejudice the shipper's right to bring suit within the allowable time period [*46 U.S.C.S. § 30701* note, § 3(6)].

[f] Period for Bringing Suit

Under the COGSA, suits for loss or damage to cargo must be brought within one year after delivery of the goods or the date when the goods should have been delivered. Otherwise, the carrier will be discharged from all liability [*46 U.S.C.S. § 30701* note, § 3(6)]. Loss or damage within the meaning of *46 U.S.C.S. § 30701* note, § 3(6), refers only to direct damage to cargo and not to imdemnity claims. Thus, a cause of action for indemnity, although it originates in the same loss or damages suffered by the cargo owner, does not have legal existence until the indemnitee has incurred a loss by paying the underlying claim or judgment [*U. S. Cold Storage of Cal. v. Matson Navigation Co. (1984) 162 Cal. App. 3d 1228, 1231-1232, 209 Cal. Rptr. 144]* .

The one-year statute of limitations cannot be avoided even if the carrier intentionally violates the parties' contract by stowing cargo on deck [*Francosteel Corp. v. N. V. Nederlandsch Amerikaansche, Stoomvart-Maatschappij (1967) 249 Cal. App. 2d 880, 902, 903, 57 Cal. Rptr. 867]* .

For a general form asserting the affirmative defense of expiration of the time period for bringing suit, see Ch. 345, *Limitation of Actions* .

[g] Elements of Shipper's Action

Under the COGSA, a shipper or consignee may establish a prima facie case against the carrier by showing that the cargo was delivered to the carrier in good condition but was damaged when discharged [*Nissho-Iwai Co. Ltd. v. M/T Stolt Lion (2d Cir. 1980) 617 F.2d 907, 911, 912]* . A bill of lading issued in accordance with the act's requirements constitutes prima facie evidence of the carrier's receipt of the goods as described therein [*46 U.S.C.S. § 30701* note, § 3(4)]. Therefore, if the bill of lading states that the cargo was received in apparent good order and the goods are damaged when discharged, the shipper or consignee has established his or her case.

Once the shipper presents a prima facie case, the carrier must show that the loss or damage arose from a cause for which the carrier is not liable, such as peril of the sea, and not from any negligence with respect to the cargo [*States Marine Corp. of Del. v. Producers Coop. Packing Co. (9th Cir. 1962) 310 F.2d 206, 212, 213]* . The shipper maintains the burden of showing that the carrier's negligence contributed to the loss or damage. If the shipper establishes negligence, the carrier must bear the entire loss (subject to the limitation on amount of liability) unless the carrier can segregate that part of the loss due to the excepted cause. Under such circumstances, the carrier will pay for only the amount which relates to the wrongful conduct [*Tri-Valley Packing Ass'n v. States Marine Corp. of Del. (9th Cir. 1962) 310 F.2d 891, 892, 893]* .

[5] Actions Under Harter Act

[a] Shipowner's Obligations and Liability

The Harter Act [*46 U.S.C.S. § 30701 et seq.*] requires a shipowner (or his or her agent) to issue bills of lading which contain basically the same information mandated by the COGSA [*46 U.S.C.S. § 30703(a), (b)*]. Instead of imposing positive obligations with respect to the cargo and ship, however, the Harter Act prohibits the inclusion of exculpatory clauses in bills of lading. The owner may not insert a provision excluding liability for loss or damage arising from negligence or fault in loading, stowage, custody, care, or proper delivery of cargo [*46 U.S.C.S. § 30704*]. In addition, the law forbids a clause which lessens, weakens, or avoids the shipowner's obligation to exercise due diligence in making the ship seaworthy and properly equipped, manned, and supplied [*46 U.S.C.S. § 30705(a)*].

If the owner exercises due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied, the vessel and owner are not responsible for loss or damage resulting from an error in navigation or management of the vessel [*46 U.S.C.S. § 30706(a)*]. In addition, without regard to the exercise of such due diligence, neither a carrier nor a vessel are liable for loss or damage arising from [*46 U.S.C.S. § 30706(b)*]:

- Dangers of the sea or other navigable waters.
- Acts of God, or public enemies.
- Any inherent defect, quality, or vice of the thing carried.
- Insufficiency of package.
- Seizure under legal process.
- Saving or attempting to save life or property at sea, or from any deviation in rendering such service.
- Any act or omission of the shipper or owner of the goods, or his or her agent or representative.

This list includes some but not all of the causes stated in the COGSA [*see 46 U.S.C.S. § 30701* note, § 4(2)].

The generally accepted definition of "perils of the sea" is fortuitous action of elements at sea, of such force as to overcome the strength of a well-found ship or usual precautions of good seamanship. The validity of the defense depends on the nature and cause of loss under the particular facts of the case, and the carrier has the burden of showing freedom from negligence [*Taisho Mar. & Fire Ins. Co. v. M/V Sea-Land Endurance (9th Cir. 1987) 815 F.2d 1270, 1272, 1275]* . Findings of unusually high winds and seas, rolling of ship, damage to ship, loss and damage of containers, and due diligence in making the vessel and cargo system seaworthy support the conclusion that cargo was lost because of perils of the sea [*Taisho Marine & Fire Ins. Co. v. M/V Sea-Land Endurance (9th Cir. 1987) 815 F.2d 1270, 1274]* .

[b] Period for Bringing Suit

The Harter Act provides no period within which suit must be instituted. Under such circumstances, admiralty law requires application of the doctrine of laches [*Young v. Key City (1872) 81 U.S. 653, 660, 20 L. Ed. 896]* .

[c] Elements of Shipper's Action

Under the Harter Act, a shipper's or consignee's prima facie case is established much the same as in an action under the COGSA, by showing that goods delivered for transportation in apparent good order were discharged in a damaged condition [*Caterpillar Overseas, S. A. v. The Expeditor (2d Cir. 1963) 318 F.2d 720, 724]* . The carrier bears the burden of proving a cause of the loss or damage that the statute recognizes as an excepted peril [*Schnell v. Vallescura (1934) 293 U.S. 296, 303, 304, 55 S. Ct. 194, 79 L. Ed. 373]* . The owner must also show that the vessel was seaworthy at the beginning of the voyage or that due diligence was used to make it seaworthy [*W.J. McCahan Sugar Refining Co. v. S.S. Wildcroft (1906) 201 U.S. 378, 386-390, 26 S. Ct. 467, 50 L. Ed. 794]* . If the owner cannot prove seaworthiness, the statute will not provide relief from liability, regardless of whether or not the defect is causally connected with the disaster creating the loss or damage [*May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft (The Isis) (1933) 290 U.S. 333, 350-354, 54 S. Ct. 162, 78 L. Ed. 348]* . Finally, if the cause of cargo damage falls within a statutory exception, the shipper bears the burden of proving the owner's negligence or other failure [*Schnell v. Vallescura (1934) 293 U.S. 296, 304, 305, 55 S. Ct. 194, 79 L. Ed. 373]* .

The tremendous burdens on both shipowner and shipper under the Harter Act have hampered its effectiveness and made the COGSA the preferable law under which to proceed [*Wirth Ltd. v. S/S Acadia Forest (5th Cir. 1976) 537 F.2d 1272, 1278 n.21*]. As discussed previously, however, the Harter Act will apply to all bills of lading for transportation between ports within the United States when the contract does incorporate the COGSA. In addition, the Harter provisions apply to the periods prior to loading and subsequent to discharge of the goods unless the parties have agreed to application of the COGSA during that period [*46 U.S.C.S. § 30701* note, §§ 7, 12].

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawCharterpartiesParty LiabilityCharterer LiabilityAdmiralty LawShippingBills of LadingConstruction & InterpretationAdmiralty LawShippingRegulations & StatutesGeneral OverviewAdmiralty LawShippingRegulations & StatutesCarriage of Goods by Sea ActGeneral OverviewAdmiralty LawShippingRegulations & StatutesHarter ActTransportation LawCarrier Duties & LiabilitiesGeneral Overview

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46-522 California Forms of Pleading and Practice--Annotated § 522.72

§ 522.72 Actions by Seamen for Wages

[1] Preferential Treatment and Enforcement Generally

Seamen's wages are strictly protected by state and federal statutes [*46 U.S.C.S. §§ 10301-10321* (foreign and intercoastal voyages), 10501-10509 (coastwise voyages), 10701-10711 (deceased seamen), 11101 et seq. (protection and relief of seamen); *Harb. & Nav. Code § 493*]. This preferential treatment is part of the traditional protection of seamen's rights by Congress [*Isbrandtsen Co. v. Johnson (1952) 343 U.S. 779, 782, 783, 72 S. Ct. 1011, 96 L. Ed. 1294]* .

A seaman's right to wages commences either at the time he or she begins work or at the time specified in the agreement for commencement of work or presence on board, whichever occurs first [*46 U.S.C.S. § 10313(a)*]. The right to wages must not be dependent on the earning of freight by the vessel [*46 U.S.C.S. § 10313(b)*]. In addition, a seaman may not forfeit his or her lien against the ship or be deprived of any remedy for the recovery of wages under any agreement other than one provided for under *46 U.S.C.S. § 10301 et seq.* Any stipulation in an agreement inconsistent with these provisions, or any stipulation by which a seaman consents to abandon either a right to wages if the ship is lost or a right in the nature of salvage, is void [*46 U.S.C.S. § 10317*].

A seaman's right to wages gives rise to a maritime lien, entitling the seaman to bring an action in rem against the vessel under federal maritime lien law [*46 U.S.C.S. § 31341 et seq.*; *see § 522.73[3][c]*]. A seaman's right to wages may also be enforced by an action in personam. For further discussion and forms of a complaint for wages, see Benedict on Admiralty (Matthew Bender).

[2] Deductions and Set-Offs Against Wages

Federal law strictly limits deductions that may be taken against seamen's wages. No wages due or accruing to any seaman are subject to attachment or arrestment from any court except for the support and maintenance of a wife and minor children [*46 U.S.C.S. § 11109(a)*]. A seaman may be required to forfeit a portion of his or her own wages as punishment for certain specific offenses, such as desertion [*46 U.S.C.S. § 11501*]. The shipowner must restrict

deductions and set-offs, however, to those recognized in the statutes as allowable for a seaman's derelictions in the performance of his or her duties [*Isbrandtsen Co. v. Johnson (1952) 343 U.S. 779, 787, 72 S. Ct. 1011, 96 L. Ed. 1294* (disallowed set-off for expenses in medical care and hospitalization of another crew member for injuries inflicted by the discharged seaman)]. In certain instances, payment of wages may take a form other than cash or a pay voucher [*American Foreign S.S. Co. v. Matise (1975) 423 U.S. 150, 160, 96 S. Ct. 410, 46 L. Ed. 2d 354* (payment in form of airline ticket for return to United States when owner not required to pay repatriation expenses)].

[3] Time of Payment

After five days have passed at the beginning of a voyage, a seaman is entitled to receive from the master, on demand, one half of the balance of unpaid wages earned at each port at which the ship loads or delivers cargo [*46 U.S.C.S. §§ 10313(e), 10504(a)*]. At the end of a foreign or intercoastal voyage, the balance of a seaman's wages due must be paid within 24 hours after the cargo has been discharged or within four days after the seaman has been discharged, whichever is earlier [*46 U.S.C.S. §§ 10301(a), 10313(f)*]. In either event, a seamen on such a voyage is entitled to receive one third of the wages due immediately after discharge [*46 U.S.C.S. § 10313(f)*; *see Thomas v. SS Santa Mercedes (9th Cir. 1978) 572 F.2d 1331, 1334, 1335* (purpose of latter provision is to provide seaman with funds to live on when he or she is left ashore, regardless of reason of discharge)]. In the case of a coastwise voyage, from one state to another nonadjoining state, the balance of wages due a seaman must be paid within two days after termination of the shipping agreement or when the seaman is discharged, whichever is earlier [*46 U.S.C.S. §§ 10501(a), 10504(b)*].

[4] Penalty for Late Payment

Every master or owner who refuses or neglects to make timely final payment without sufficient cause must pay the seaman a sum equal to two days pay for every day during which payment is delayed beyond the statutory period [*46 U.S.C.S. §§ 10313(g), 10504(c)*; *but see Petersen v. Interocean Ships, Inc. (9th Cir. 1987) 823 F.2d 334, 336-337* ("wages" under *46 U.S.C.S. § 10313* does not include "comp time" earnings)]. The penalty of double payment is mandatory if a shipowner withholds payment of wages without sufficient cause. The phrase "without sufficient cause" means more than the absence of a valid defense to the claim for wages. The delay in payment must be arbitrary or unreasonable. It is not unreasonable for a shipowner to withhold payment when the seaman does not abide by a reasonable precondition, such as putting the claim for wages in writing [*Larkins v. Hudson Waterways Corp. (9th Cir. 1981) 640 F.2d 997, 999, 1000]* . Once it has been determined that a wage penalty is due, however, the courts do not have discretion to limit the period during which the penalty is assessed [*Griffin v. Oceanic Contractors, Inc. (1982) 458 U.S. 564, 102 S. Ct. 3245, 73 L. Ed. 2d 973, 979-984]* .

[5] Prepayment of Process Fees by Seamen

Prepayment of the marshal's fee for seizing and maintaining custody over the vessel may present a formidable barrier for seamen seeking to collect their wages. The amount required by the marshal may be substantial and may have to be renewed if additional time is required. Counsel should check with the local United States Marshal to determine the amount of deposit required.

28 U.S.C.S. § 1921 requires an advance payment for the marshal's costs and subsequent periodic amounts during the course of the litigation. On the other hand, *28 U.S.C.S. § 1916* allows seamen to institute and prosecute suits and appeals for wages without prepayment of fees or costs, or the furnishing of security.

The two circuit courts of appeal that have addressed the conflict between these two provisions have not resolved the question uniformly. The Second Circuit Court of Appeals has ruled that the more specific exemption for seamen in *28 U.S.C.S. § 1916* controls suits against vessels for wages [*Thielebeule v. M/S Nordsee Pilot (2d Cir. 1971) 452 F.2d 1230, 1232, 1233]* . The Fifth Circuit, however, has given controlling authority to *28 U.S.C.S. § 1921* as the more recent enactment [*Araya v. McLelland (5th Cir. 1976) 525 F.2d 1194, 1196]* . The Ninth Circuit has not dealt with the

conflict. A federal district court decision from Washington followed the Fifth Circuit's reasoning, however, in upholding the prepayment requirement of *28 U.S.C.S. § 1921* [*Setera v. F/V Olympic (W.D. Wash. 1980) 491 F. Supp. 844, 845]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawMaritime ContractsGeneral OverviewAdmiralty LawMaritime LiensPriority & SourcesContractsWagesLabor & Employment LawWage & Hour LawsWage Payments

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§ 522.73 Actions to Enforce Maritime Liens

[1] Scope and Preemption

Federal maritime lien law [*46 U.S.C.S. §§ 31305, 31341* et seq.] grants a lien against a vessel in favor of any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries. The lien may be enforced by an action in rem, and a plaintiff need not allege or prove that credit was given to the vessel [*46 U.S.C.S. §§ 31301(4), 31342(a)*]. Because the existence of a maritime lien based on a breach of contract depends on a finding that the subject matter of the contract falls within the admiralty jurisdiction, the issue of admiralty jurisdiction may arise in such a case [*see Exxon Corp. v. Central Gulf Lines (1991) 500 U.S. 603, 608-612, 111 S. Ct. 2071, 114 L. Ed. 2d 649* (agency contracts are not per se excepted from admiralty jurisdiction in action brought to enforce maritime lien under former *46 U.S.C.S. § 971* (*now see 46 U.S.C.S. § 31342*); but Court did not decide whether plaintiff was entitled to maritime lien); *see generally* Ch. 100, *Boats and Boating*].

The maritime lien arises from the ship's need to obtain promptly supplies, repairs, and other services that facilitate its movement from place to place [*Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co. (1920) 254 U.S. 1, 8, 9, 41 S. Ct. 1, 65 L. Ed. 97]* . Furthermore, federal maritime lien law supersedes any state statute conferring a lien on a vessel to the extent that the statute establishes a claim to be enforced by a civil action in rem [*46 U.S.C.S. § 31307*; *see Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co. of Cal. (1940) 310 U.S. 268, 272, 60 S. Ct. 937, 84 L. Ed. 1197* (construing former Federal Maritime Lien Act)].

[2] Authority to Bind Vessel

[a] Presumed Authority

Federal maritime liew law lists persons presumed to have authority from the owner to procure services giving rise to a lien. The list includes the managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is entrusted [*46 U.S.C.S. § 31341(a)(3)*]. The phrase "management of the vessel" denotes direction and control for the purposes for which the vessel is used, as opposed to mere navigation of the ship [

Dampskibsselskabet Dannebrog v. Signal Oil & Gas Co. of Cal. (1940) 310 U.S. 268, 272, 60 S. Ct. 937, 84 L. Ed. 1197] . The chief officer of a vessel, second in command to the master, has been included within the definition of persons to whom management of the vessel is entrusted for purposes of binding the ship [*Atlantic & Gulf Stevedores v. M/V Grand Loyalty (5th Cir. 1979) 608 F.2d 197, 200]* .

[b] Officers and Agents of Charterer

Prior to 1972, materialmen often faced difficult problems enforcing liens against a vessel when it was operated under the terms of a charter party or contract. The law disallowed a lien when the furnisher knew or, by the exercise of due diligence, could have ascertained that, because of the terms of the charter party, the person ordering the supplies or services was without authority to bind the vessel. In effect, materialmen were precluded from asserting a lien when the charter agreement contained a provision, termed a "no lien" clause or proviso, not allowing the charterer to create a lien against the vessel [*United States v. Carver (1923) 260 U.S. 482, 488, 489, 43 S. Ct. 181, 67 L. Ed. 361]* .

At present, the law provides simply that officers and agents with presumed authority include the persons appointed by a charterer [*46 U.S.C.S. § 31341(a)(4)*]. No lien provisions are outlawed, and materialmen need not inquire into a person's authority to bind the ship for repairs, supplies, or services, beyond ascertaining the person's title [*Atlantic & Gulf Stevedores v. M/V Grand Loyalty (5th Cir. 1979) 608 F.2d 197, 201, 202]* .

[3] Services and Supplies Giving Rise to Lien

[a] In General

A person who provides necessaries to a vessel on the order of the owner or a person authorized by the owner has a maritime lien on the vessel [*46 U.S.C.S. § 31342(a)*]. The term "necessaries" includes repairs, supplies, towage, and the use of a dry dock or marine railway [*46 U.S.C.S. § 31304(4)*]. It also covers, for example, stevedoring services [Atlantic & Gulf Stevedores v. M/V Grand Loyalty *(5th Cir. 1979) 608 F.2d 197, 201]* . The term "necessaries" does not mean absolutely indispensable goods or services, but includes most goods or services that are convenient or useful to the vessel [*Ajubita v. S/S Peik (5th Cir. 1970) 428 F.2d 1345, 1346, 1347]* .

[b] Pilotage

Pilotage fees are paid to pilots for navigating vessels between ports and the open sea. Although pilotage falls within the scope of federal regulation under the Commerce Clause (U.S. *Const. art. I, § 8, cl. 3*), it is a local concern that may constitutionally be regulated by the states in the absence of any conflicting federal legislation [*Cooley v. Board of Wardens (1851) 53 U.S. 299, 319, 13 L. Ed. 996]* .

The federal government has assumed exclusive authority over the regulation of pilots on coastwise seagoing vessels that are not sailing on register but are either propelled by machinery and subject to inspection under *46 U.S.C.S. § 3101 et seq.* or are subject to inspection under *46 U.S.C.S. §§ 3701-3718* (carriage of liquid bulk dangerous cargoes) [*46 U.S.C.S. § 8502*]. Otherwise, pilots in the bays, rivers, harbors, and ports of the United States are left to state regulation [*46 U.S.C.S. § 8501*; *see Jackson v. Marine Exploration Co., Inc. (5th Cir. 1978) 583 F.2d 1336, 1340, 1341]* . California laws regulate pilotage of registered vessels to and from the ports in San Francisco, San Pablo, and Suisan Bays [*Harb. & Nav. Code § 1100 et seq.*]. The state statutes require registered vessels to obtain pilotage by licensed pilots within these bays, and mandate payment of fees whether or not a pilot is used [*Harb. & Nav. Code §§ 1125-1127*].

Pilotage fees fall within the definition of "necessaries" under federal maritime lien law, especially when required by state law [*Ajubita v. S/S Peik (5th Cir. 1970) 428 F.2d 1345, 1346, 1347]* . At least one court has enforced a lien in favor of a pilot whose services were offered but unlawfully refused [*Blair v. M/V Blue Spruce (D. Mass. 1971) 329 F. Supp. 178, 179]* . Arguably, the same type of lien would arise in California because a vessel must pay fees when

pilotage is required even if the services are refused [*Harb. & Nav. Code §§ 1125-1127*].

[c] Seamen's Wages

Seamen's wages are considered "necessaries" under federal law, thus giving rise to a lien against the vessel [*46 U.S.C.S. § 31342*; *see Bank of New Orleans & Trust Co. v. Oil Screw Tracy Marie (5th Cir. 1978) 580 F.2d 808]* . The lien for seamen's wages takes priority over other claims against the ship [*see 46 U.S.C.S. §§ 31301(5), 31326*; *see also International Paint Co., Inc. v. M/V Mission Viking (5th Cir. 1981) 637 F.2d 382, 385]* . So long as any part of the vessel remains in existence, the sailor is entitled to the proceeds as against all other persons claiming a lien [*The John G. Stevens (1898) 170 U.S. 113, 119, 18 S. Ct. 544, 42 L. Ed. 969]* . For additional discussion of seamen's wages, see *§ 522.72*.

[d] Salvage

Salvage is compensation allowed to a person who voluntarily assists a ship at sea, saving in whole or part the vessel or cargo from impending sea peril or recovering the property from actual peril or loss, as in the case of a shipwreck. A valid salvage claim requires three elements: (1) a marine peril; (2) service voluntarily rendered when not required as an existing duty or from a special contract; and (3) success in whole or part or contribution to success by the service [*The "Sabine" (1880) 101 U.S. 384, 25 L. Ed. 982]* .

A salvor's services give rise to a maritime lien against the ship for salvage [*46 U.S.C.S. §§ 31301(5), 31342*; Veverica v. Drill Barge Buccaneer No. 7 *(5th Cir. 1974) 488 F.2d 880, 883]* . The lien for salvage may be enforced by an action in rem against the salvaged vessel or property [*The "Sabine" (1880) 101 U.S. 384, 25 L. Ed. 982]* .

A suit to recover remuneration for rendering assistance or salvage services will not be maintainable if brought later than two years after the date when the assistance or salvage was rendered, unless within the period there was no reasonable opportunity for arresting the assisted or salved vessel within the court's jurisdiction [*46 U.S.C.S. § 80107(c)*]. For a general form for asserting the affirmative defense of expiration of the time period for bringing suit, see Ch. 345, *Limitation of Actions* .

[4] Waiver of Maritime Liens

The furnisher of repairs, supplies, or necessaries may waive the right to a lien by agreement or otherwise [*46 U.S.C.S. § 31305*]. An express renunciation of the lien in a contract or agreement will operate as a waiver, but such action is not necessary. Waiver may come about by reliance on specific security, such as a contract making the shipowner personally liable for the debt, instead of dependence on the lien. If the furnisher of supplies or services takes other and different security, he or she must stipulate for retention of the lien against the vessel in order to prevent waiver [*W. A. Marshall & Co. v. S.S. "President Arthur" (1929) 279 U.S. 564, 568-572, 49 S. Ct. 420, 73 L. Ed. 846]* .

[5] Enforcement of Maritime Liens

A lien arising under federal maritime lien law may be enforced by an action in rem against the vessel [*46 U.S.C.S. § 31342(a)(2)*; Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C(1)]. Furthermore, federal law states that it is not necessary to allege or prove that credit was given to the vessel [*46 U.S.C.S. § 31342(a)(3)*]. This provision creates a strong presumption that persons who furnish repairs, supplies, and other necessaries look to the credit of the vessel itself, as opposed to any personal guaranty by the owner [*Sasportes v. M/V Sol De Copacabana (5th Cir. 1978) 581 F.2d 1204, 1209]* . A person attacking the lien bears the burden of proving that the supplier relied solely on the owner's personal credit [*Point Landing, Inc. v. Alabama Dry Dock & Shipbuilding Co. (5th Cir. 1958) 261 F.2d 861, 867]* . A maritime lien arises unless it is affirmatively established that necessaries were furnished solely on the personal credit of the promising party [*Point Landing, Inc. v. Alabama Dry Dock & Shipbuilding Co. (5th Cir. 1958) 261 F.2d 861, 867* ; *The Astorian (9th Cir. 1932) 57 F.2d 85, 89, 90]* .

Legal Topics:

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

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§ 522.90 Federal Statutes

Jurisdiction in federal and state courts in admiralty and maritime actions. *28 U.S.C.S. § 1333*

Waiver of costs for seamen prosecuting certain suits. *28 U.S.C.S. § 1916*

Longshore and Harbor Workers' Compensation Act. *33 U.S.C.S. § 901 et seq.*

Federal Employers Liability Act. *45 U.S.C.S. §§ 51 et seq.*

Limitation of liability of vessel owners. *46 U.S.C.S. § 30501 et seq.*

Jones Act (seamen's recovery for personal injuries or death). *46 U.S.C.S. § 30104*

Admiralty and maritime jurisdiction described. *46 U.S.C.S. § 30101*

Suits in admiralty by or against vessels or cargoes of the United States. *46 U.S.C.S. § 30901 et seq.*

Death on the High Seas Act. *46 U.S.C.S. § 30301 et seq.*

Three-year statute of limitations for personal injury or death actions arising out of maritime tort, unless otherwise specified by law. *46 U.S.C.S. § 30106*

Suits in admiralty against United States for damages caused by public vessels or certain services. *46 U.S.C.S. § 31101 et seq.*

Carriage of passengers. *46 U.S.C.S. § 3501 et seq.*

Carriage of liquid bulk dangerous cargoes. *46 U.S.C.S. § 3701 et seq.*

Report and investigation of marine casualties. *46 U.S.C.S. §§ 6101-6307*

Unseaworthiness proceedings. *46 U.S.C.S. § 10901 et seq.*

Interstate Commerce Commission jurisdiction over water carriers. *49 U.S.C.S. §§ 10541-10544*

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For related research and practice materials, see the following legal topics:
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§ 522.91 State Statutes

Liability of marine carrier. *Harb. & Nav. Code § 420*

Liability of vessels for personal injuries. *Harb. & Nav. Code § 491(f)*

Maintenance and cure of seaman until close of voyage. *Harb. & Nav. Code § 873*

Legal Topics:

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

[1] Death on High Seas Act (DOHSA)

Federal court jurisdiction is concurrent with state jurisdiction to hear Death on High Seas Act (DOHSA former *46 U.S.C.S. app. § 761 et seq.*, now *46 U.S.C.S. § 30301 et seq.*) actions; however, state statutes are preempted by DOHSA whenever it applies. *Offshore Logistics, Inc. v. Tallentire (1986) 477 U.S. 207, 221-222, 106 S. Ct. 2485, 91 L. Ed. 2d 174*

Damages for loss of society under general maritime law are not recoverable in addition to damages set forth in Death on the High Seas Act (DOHSA former *46 U.S.C.S. app. § 761 et seq.*, now *46 U.S.C.S. § 30301 et seq.*) in action by decedent's survivors for wrongful death on high seas. *Mobil Oil Corp. v. Higginbotham (1978) 436 U.S. 618, 619, 98 S. Ct. 2010, 56 L. Ed. 2d 581*

Damages for pre-death pain and suffering under general maritime law are not recoverable because non-pecuniary damages are not available under Death on the High Seas Act (DOHSA), and court is not entitled to supplement Congress's remedy. *Saavedra v. Korean Air Lines Co., Ltd. (9th Cir. 1996) 93 F.3d 547, 554*

[2] Injuries to Seamen

State law regarding forum non conveniens is not preempted by federal law in state actions filed pursuant to Jones Act former *46 U.S.C.S. app. § 688*, now *46 U.S.C.S. § 30104* and "saving to suitors" clause of *28 U.S.C.S. § 1333(1)*. *American Dredging Co. v. Miller (1994) 510 U.S. 443, 114 S. Ct. 981, 127 L. Ed. 2d 285, 295*

Jones Act former *46 U.S.C.S. app. § 688*, now *46 U.S.C.S. § 30104* does not authorize seaman who is state employee to sue state in federal court. *Welch v. Department of Highways & Pub. Transp. (1987) 483 U.S. 468, 475-476, 107 S. Ct. 2941, 97 L. Ed. 2d 389*

LHWCA renders general contractor immune from tort liability, provided contractor has not failed to honor its statutory duty to secure compensation for subcontractor employees when subcontractor itself has not secured compensation. *Washington Metro. Transit Auth. v. Johnson (1984) 467 U.S. 925, 936-941, 104 S. Ct. 2827, 81 L. Ed. 2d 768*

Seaman who accepted remittitur "under protest" and reserved "right to appeal therefrom" is bound by that acceptance and not able to challenge remittitur on direct appeal. *Donovan v. Penn Shipping Co., Inc. (1977) 429 U.S. 648, 650, 97 S. Ct. 835, 51 L. Ed. 2d 112*

Personal injury action under Jones Act former *46 U.S.C.S. app. § 688*, now *46 U.S.C.S. § 30104* is not maintainable in rem against vessel because it does not give rise to maritime lien. *Plamals v. Pinar Del Rio (1928) 277 U.S. 151, 155-157, 48 S. Ct. 457, 72 L. Ed. 827*

In suit under Jones Act former *46 U.S.C.S. app. § 688*, now *46 U.S.C.S. § 30104*, claims of vessel's chief cook were not barred by "primary duty rule," because injury was not caused by his breach of duty that he consciously assumed as term of employment; he did not create, nor could he have controlled or eliminated, dangerous condition that caused his injury; injury resulted from momentary inattention to his own safety, not knowing breach of duty. *Bernard v. Maersk Lines, Ltd. (9th Cir. 1994) 22 F.3d 903, 907-908*

In suit under Jones Act former *46 U.S.C.S. app. § 688*, now *46 U.S.C.S. § 30104*, right to jury trial is option belonging only to plaintiff, not defendant; plaintiff is not able to establish right to jury trial (1) by reliance on defendant's erroneous request for jury trial, (2) under *Seventh Amendment of United States Constitution*, because of lack of diversity of citizenship, nor (3) as abuse of discretion or estoppel of defendants. *Craig v. Atlantic Richfield Co. (9th Cir. 1994) 19 F.3d 472, 476*

Unseaworthiness was established by injury to seaman caused by unsecured, open, hinged, steel hatch cover that fell on him as he ascended ladder, when obstacle kept hatch cover open ninety degrees; negligence under Jones Act former *46 U.S.C.S. app. § 688*, now *46 U.S.C.S. § 30104* was established by uncorroborated, but uncontroverted, testimony of seaman; award for diminished earning capacity was not excessive, when trial court took into consideration possibility that seaman's future employment would again be interrupted by periods of incarceration. *Havens v. F/T Polar Mist (9th Cir. 1993) 996 F.2d 215, 218-219*

If Jones Act applies to seaman's claims, court ss precluded from dismissing claim on ground of forum non conveniens. *Zipfel v. Halliburton Co. (9th Cir. 1987) 832 F.2d 1477, 1485-1487* ; *see also Nicol v. Gulf Fleet Supply Vessels, Inc. (5th Cir. 1984) 743 F.2d 289, 293* ; *Needham v. Phillips Petroleum Co. of Norway (10th Cir. 1983) 719 F.2d 1481, 1483* ; *Szumlicz v. Norwegian Am. Line (11th Cir. 1983) 698 F.2d 1192, 1195* ; *but see Cruz v. Maritime Co. of Philippines (2d Cir. 1983) 702 F.2d 47, 48*

Use of words "Jones Act and General Maritime Law" in title of cause of action do not invoke admiralty jurisdiction under *28 U.S.C.S. § 1333* when complaint expressly claims jurisdiction exclusively under Jones Act and *28 U.S.C.S. § 1331*. *Trentacosta v. Frontier Pacific Aircraft Industries, Inc. (9th Cir. 1987) 813 F.2d 1553, 1556*

Jones Act former *46 U.S.C.S. app. § 688*, now *46 U.S.C.S. § 30104* was applicable to maritime action brought by Syrian seaman injured while at port in United States on vessel of Greek registry and operated by Liberian corporation, based on evidence that vessel's owners were United States nationals, and that vessel had substantial and continuing contacts with United States and virtually none with *Liberia. Dalla v. Atlas Mar. Co. (9th Cir. 1985) 771 F.2d 1277, 1278-1279*

Jones Act former *46 U.S.C.S. app. § 688*, now *46 U.S.C.S. § 30104* was not applicable to suit brought by American citizen arising out of accident on high seas when vessel was Mexican, based in Mexico, and owners and shareholders were *Mexican. Bilyk v. Vessel Nair (9th Cir. 1985) 754 F.2d 1541, 1542-1545*

Under general rule in personal injury actions brought in admiralty (both under Jones Act former *46 U.S.C.S. app. § 688*, now *46 U.S.C.S. § 30104* and general maritime law) and under Federal Employers' Liability Act, contributory negligence is not complete bar to recovery, but operates to reduce amount of damages award. *Kopczynski v. Jacqueline (9th Cir. 1984) 742 F.2d 555, 558*

Punitive damages are not allowed on negligence claim based on Jones Act former *46 U.S.C.S. app. § 688*, now *46 U.S.C.S. § 30104*; damages under Jones Act are limited to pecuniary losses. *Kopczynski v. Jacqueline (9th Cir. 1984) 742 F.2d 555, 560-561*

Summary judgment with respect to claim under Jones Act former *46 U.S.C.S. app. § 688*, now *46 U.S.C.S. § 30104* for alleged injuries was erroneous when material issues of fact might exist; exclusion of demonstrative evidence was not abuse of discretion when ample and more reliable evidence admitted to show severity of injury. *Lies v. Farrell Lines, Inc. (9th Cir. 1981) 641 F.2d 765, 772, 773*

In combined action for negligence under Jones Act former *46 U.S.C.S. app. § 688*, now *46 U.S.C.S. § 30104* and for unseaworthiness under general admiralty law, trial judge is required to give negligence instruction if evidence will support submission of negligence issue to jury; failure to instruct on negligence is prejudicial error. *Mohn v. Marla Marie, Inc. (9th Cir. 1980) 625 F.2d 900, 901-902*

Plaintiff was not seaman under Jones Act because when accident occurred, he was at waterfront construction site working aboard derrick barge that was anchored to harbor bottom and secured by headline to shore. *Spears v. Kajima Eng'g & Constr., Inc. (2002) 101 Cal. App. 4th 466, 475-481, 124 Cal. Rptr. 2d 97*

Triable issue of fact as to whether plaintiff was seaman entitled to recovery under Jones Act; plaintiff was employed as pile driver on barge being used to build bridge over flood control channel, barge was moved several times weekly, barge was being moved by crane at time of accident, and plaintiff had responsibilities involved in movement of barge. *Gault v. Modern Cont'l/Roadway Constr. Co., Inc. Joint Venture (2002) 100 Cal. App. 4th 991, 999-1005, 123 Cal. Rptr. 2d 85*

Seaman's use of cigarettes, allegedly resulting in lung cancer, purchased on employer's vessel was not "in the course of his employment" for purposes of the Jones Act former *46 U.S.C.S. app. § 688*, now *46 U.S.C.S. § 30104*; substantial factor leading to death in unseaworthiness claim was not established by employers' on-board sale of cigarettes without warning label; summary judgment properly granted. *Tinsley v. American President Lines, Ltd. (1992) 6 Cal. App. 4th 562, 566-569, 8 Cal. Rptr. 2d 851*

Damages award is not inadequate as matter of law for lack of compensation for loss of future earnings; award for future medical expenses does not require implied finding that there was loss of future earnings. *Da Silva v. Pacific King, Inc. (1987) 195 Cal. App. 3d 1, 10-11, 240 Cal. Rptr. 395*

Violation of National Marine Fisheries Service (NMFS) regulation, enforcement of which had been suspended by NMFS pending reconsideration of its appropriateness, was not conscious disregard of safety of others sufficient to support punitive damages. *Da Silva v. Pacific King, Inc. (1987) 195 Cal. App. 3d 1, 7, 240 Cal. Rptr. 395*

Exclusive remedy provision of Workers' Compensation Act (*Lab. Code § 3601*) was inapplicable to county lifeguard and rescue boat lieutenant who sued county for damages under Jones Act former *46 U.S.C.S. app. § 688*, now *46 U.S.C.S. § 30104* because application of Workers' Compensation Act to maritime employment cases would materially prejudice uniformity of maritime law. *Hamilton v. County of Los Angeles (1982) 131 Cal. App. 3d 982, 986-992, 182 Cal. Rptr. 868*

County lifeguard/rescue boat lieutenant who received workers' compensation benefits was not barred or collaterally estopped from recovering against county employer under Jones Act or general maritime law; factors necessary to recover under state Workers' Compensation Act differ from factors necessary to determine whether or not plaintiff may recover under Jones Act or general maritime law. *Hamilton v. County of Los Angeles (1982) 131 Cal. App. 3d 982, 997-998, 182 Cal. Rptr. 868*

Punitive damages are not precluded under federal maritime law as matter of law. *Baptiste v. Superior Court (1980) 106 Cal. App. 3d 87, 104, 164 Cal. Rptr. 789*

Judgment for defendant notwithstanding verdict was improper when evidence would at least circumstantially justify jury finding that employer's negligence played some part, even though of slightest degree, in producing injury. *Catania v. Halcyon S.S. Co. (1974) 44 Cal. App. 3d 348, 356, 118 Cal. Rptr. 513*

Directed verdict was proper in action by seaman for personal injuries sustained on launch carrying seamen from shore to ship when no agency relationship shown between launch operator and shipowner defendant. *Bell v. Seatrain Lines, Inc. (1974) 40 Cal. App. 3d 16, 23, 24, 115 Cal. Rptr. 76*

Liability of shipowner for injuries incurred while employee attempting to open stuck valve. *Texaco, Inc. v. Petroleum Specialists Corp. (1973) 35 Cal. App. 3d 427, 434-439, 110 Cal. Rptr. 641*

Fact that widow received part of workmen's compensation award did not preclude assertion of her rights under Jones Act former *46 U.S.C.S. app. § 688*, now *46 U.S.C.S. § 30104*; applicability of maritime law in cases within maritime jurisdiction is exclusive, and thus Workmen's Compensation Appeals Board has no jurisdiction to award compensation in these cases. *De Court v. Beckman Instruments, Inc. (1973) 32 Cal. App. 3d 628, 632-635, 108 Cal. Rptr. 109*

Propriety of instruction that plaintiff was seaman as matter of law; refusal to furnish jury with "Present Value Table" in appendix to *BAJI No. 14.70* was not prejudicial. *Howard v. Global Marine, Inc. (1972) 28 Cal. App. 3d 809, 813-817, 105 Cal. Rptr. 50*

Shipowner was not under duty to provide seaman with safe means of going ashore and returning to his ship beyond ship's gangplank; shipowner had no duty to furnish transportation to and from ship to seamen granted shore leave when ship is anchored away from dock; seaman injured while on authorized shore leave was in service of his vessel for purpose of right to maintenance and cure. *Dixon v. Grace Lines, Inc. (1972) 27 Cal. App. 3d 278, 287-291, 103 Cal. Rptr. 595*

When special purpose vessel is being used for its designated purpose, injured worker is "seaman" and "member of the crew" within meaning of Jones Act former *46 U.S.C.S. app. § 688*, now *46 U.S.C.S. § 30104* if permanently assigned to vessel and work contributed to function of vessel or to accomplishment of its mission. *Soucie v. Trautwein Bros. (1969) 275 Cal. App. 2d 20, 25-26, 79 Cal. Rptr. 671*

Obligation of shipowner to seamen defined. *Bozanich v. Jo Ann Fisheries, Inc. (1969) 270 Cal. App. 2d 178, 186-192, 75 Cal. Rptr. 463*

[3] Longshore and Harbor Workers

Retiree's work-related hearing-loss claim is maintainable under scheduled benefits set forth in § 8(c)(13) of Longshore and Harbor Workers' Compensation Act [*33 U.S.C.S. § 908(c)(13)*], and not § 8(c)(23) [*33 U.S.C.S. § 908(c)(23)*], which applies to benefits provided retirees suffering from latent occupational diseases. *Bath Iron Works Corp. v. Director, OWCP, United States DOL (1993) 506 U.S. 153, 163-167, 113 S. Ct. 692, 121 L. Ed. 2d 619, 625*

Longshoreman's third-party action for personal injuries against negligent shipowner or other party is not maintainable after automatic assignment of right of action to employer 6 months following award of compensation, even though possible conflict of interest exists between employee and employer. *Rodriguez v. Compass Shipping Co. (1981) 451 U.S. 596, 603, 618, 101 S. Ct. 1945, 68 L. Ed. 2d 472* (decided before 1984 amendment of *33 U.S.C.S. § 933(b)*)

Permanently partially disabled employee entitled to compensation under LHWCA schedule establishing set amounts for specific injuries is not allowed to elect to receive larger recovery under provision that compensates for actual impairment of wage earning capacity caused by other injuries not specifically listed. *Potomac Elec. Power Co. v. Director, Office of Workers' Comp. Programs (1980) 449 U.S. 268, 270-271, 101 S. Ct. 509, 66 L. Ed. 2d 446*

Stevedore that has paid compensation benefits to injured longshoreman, though having lien therefor on longshoreman's subsequent recovery against shipowner under *33 U.S.C.S. § 933(e)*, does not have to reduce such lien by amount of longshoreman's costs in obtaining such recovery. *Bloomer v. Liberty Mut. Ins. Co. (1980) 445 U.S. 74, 85, 100 S. Ct. 925, 63 L. Ed. 2d 215*

Sixty-day period for filing petition for review with court of appeals from final determination of compensation order by Benefits Review Board is jurisdictional requirement; petition not regarded as filed until received by clerk of court, and if not received by court of appeals within filing period, court lacks subject-matter jurisdiction. *Felt v. Director, Office of Workers' Comp. Programs (9th Cir. 1993) 11 F.3d 951, 952*

Administrative officers lack authority to impose cost as sanction against claimant who in bad faith initiates or continues workers compensation proceeding under *Longshore & Harbor Workers' Compensation Act. Metropolitan Stevedore Co. v. Brickner (9th Cir. 1993) 11 F.3d 887, 890-891*

Vessel has duty to take necessary steps to protect longshoreworkers against open and obvious cargo hazards created by on--loading foreign stevedores, not just concealed cargo hazards. *Riggs v. Scindia Steam Navigation Co. (9th Cir. 1993) 8 F.3d 1442, 1447-1448*

Filing of compensation order is not complete until service of order on parties, to begin running of 30-day period for filing of notice of appeal from compensation order. *Nealon v. California Stevedore & Ballast Co. (9th Cir. 1993) 996 F.2d 966, 970-971*

In action brought by longshore workers against employer stevedore and its liability insurers for bad faith breach of contract, based on stevedore's conduct regarding longshore workers' negligence action against shipowner, federal admiralty jurisdiction was lacking, because insurance contracts forming basis of claim were not maritime in nature, in that they only indirectly connected with maritime commerce. *Simon v. Intercontinental Transp. (ICT) B.V. (9th Cir. 1989) 882 F.2d 1435, 1441-1444*

In proceeding under Longshore and Harbor Workers' Compensation Act, once longshore worker seeking permanent total disability benefits proves that work-related injury prevented him from performing his or her former job, burden shifts to employer to prove that suitable alternate work was available in community; to show job availability, employer is required to point to specific jobs that claimant can perform and not merely to point to general work that claimant may be physically able to perform. *Hairston v. Todd Shipyards Corp. (9th Cir. 1988) 849 F.2d 1194, 1196*

Veterans' disability benefits are neither claimed nor paid pursuant to Longshore and Harbor Workers' Compensation Act, workers' compensation law, or Jones Act former *46 U.S.C.S. app. § 688*, now *46 U.S.C.S. § 30104*, and thus are not included within "credit doctrine" as codified in *33 U.S.C.S. § 903(e)* (providing that amounts paid to employee for same injury, disability, or death under any other workers' compensation law or Jones Act must be credited against any liability under *LHWCA). Todd Shipyards Corp. v. Director, Office of Workers' Comp. Programs (9th Cir. 1988) 848*

F.2d 125, 127

Because statutory scheme of Longshore and Harbor Workers' Compensation Act and regulations clearly contemplate that Secretary or his or her delegate shall participate as matter of course in review proceedings under *33 U.S.C.S. § 921(c)*, Director of Office of Workers' Compensation Programs should be named in those proceedings as respondent, whether or not he or she supports order of Benefits Review Board. *Goldsmith v. Director, Office of Workers' Compensation Programs (9th Cir. 1988) 838 F.2d 1079, 1080*

Under *33 U.S.C.S. § 921(b)(3)*, Benefits Review Board reviews administrative law judge's findings of fact for support by substantial evidence in record as a whole, and court reviews board's decisions for adherence to statutory standard governing review of facts and errors of law. *Goldsmith v. Director, Office of Workers Compensation Programs (9th Cir. 1988) 838 F.2d 1079, 1080-1081*

Diver working on nonnavigable lake that does not constitute "situs" under *33 U.S.C.S. § 903(a)* was not within coverage of *LHWCA. Williams v. Director, Office of Workers' Comp. Programs (9th Cir. 1987) 825 F.2d 246, 247*

Injured longshoreman's action against shipowners based on theory that ship was negligently designed was foreclosed by LHWCA since generalized conclusions in complaint about causation constituted alternative way of saying vessel was unseaworthy, and under *29 U.S.C.S. § 905*, longshoreman's right to sue ship for unseaworthiness was abolished. *Bilderbeck v. World Wide Shipping Agency (9th Cir. 1985) 776 F.2d 817, 818-819*

Admiralty jurisdiction was conferred on suit brought by two longshoremen injured while loading car onto ramp of ship, thereby satisfying requirement of maritime locality and traditional maritime services or activities in furtherance of commerce. *Solano v. Beilby (9th Cir. 1985) 761 F.2d 1369, 1370-1372*

Primary responsibility for maintaining safe condition during cargo operations rests on stevedore; exception to stevedore's primary responsibility arises when shipowner (1) has actual or constructive knowledge of dangerous condition, (2) knows that longshoremen are continuing to work despite existence of unreasonable risk of harm, and (3) could not reasonably expect that stevedore would remedy situation. *Taylor v. Moram Agencies (9th Cir. 1984) 739 F.2d 1384, 1387-1388*

Shipowner who has turned over safe vessel and equipment has right to rely on stevedore to avoid exposing longshoremen to hazards of cargo operation; shipowner who is actively involved in cargo operation or who fails to exercise due care to avoid exposing longshoremen to hazards in area or from equipment under vessel's active control is exposed to liability. *Taylor v. Moram Agencies (9th Cir. 1984) 739 F.2d 1384, 1386-1387*

1972 amendments to Longshoremen's and Harbor Workers' Compensation Act eliminated action for unseaworthiness by both private and public longshoremen. *Normile v. Maritime Co. of Philippines (9th Cir. 1981) 643 F.2d 1380, 1382*

Vessel has duty to protect longshoremen against concealed dangers created by foreign stevedore that the vessel could, in the exercise of reasonable care, have corrected or warned of. *Turner v. Japan Lines, Ltd. (9th Cir. 1981) 651 F.2d 1300, 1304 , modified on other grounds, (9th Cir. 1983) 702 F.2d 752*

Time charterer was not liable to longshoreman who was injured while working in hold of vessel, when charter-party contract placed responsibility for maintenance and repair of deck gratings on vessel owner; charterer's right to inspect deck gratings did not create agency as to their maintenance. *Torres v. Cool Carriers A.B. (1993) 26 Cal. App. 4th 900, 907, 31 Cal. Rptr. 2d 790*

Employer possessed subrogation right to reimbursement from worker's net recovery from third party for full amount of compensation benefits already paid under LHWCA; employer was permitted to exercise right by intervening in worker's

lawsuit and asserting compensation lien that attaches to funds obtained by worker either by settlement or by judgment. *National Metal & Steel Corp. v. Colby Crane & Mfg. Co. (1988) 200 Cal. App. 3d 1111, 1117, 246 Cal. Rptr. 435*

By permitting worker's employer to file complaint in intervention against them, defendants in intervention did not agree to permit employer to recover automatically from them amounts paid in compensation benefits to worker's widow; agreement was limited to permitting employer to attempt to prove defendants' liability to worker and, if able to do so, to then recover amount of benefits paid to worker's widow. *National Metal & Steel Corp. v. Colby Crane & Mfg. Co. (1988) 200 Cal. App. 3d 1111, 1119-1120, 246 Cal. Rptr. 435*

In action by stevedore against shipowner to recover damages for personal injuries incurred during unloading operation, contentions pertaining to questions of fact, such as defendant's knowledge of defective conditions and proximate cause, were triable issues precluding summary judgment for defendant. *Dugas v. Brewer & Co. (1985) 165 Cal. App. 3d 203, 210-213, 211 Cal. Rptr. 573*

Shipowner is not liable to longshoreworkers for injuries caused by dangers unknown to owner and about which owner had no duty to become informed; but shipowner has duty to intervene and eliminate or neutralize hazard if owner knew of defect and knew that stevedore was continuing to use it. *Dugas v. Brewer & Co. (1985) 165 Cal. App. 3d 203, 210, 211 Cal. Rptr. 573*

Exclusiveness of liability provision of LHWCA precludes actions for indemnity or contribution against employer based on allegations of negligence by tortfeasors when employer has paid death benefits under LHWCA to ship repairman's survivors. *Graco, Inc. v. Colberg, Inc. (1984) 162 Cal. App. 3d 322, 329-333, 208 Cal. Rptr. 465*

Longshoremen are precluded from suing vessel under *Veh. Code § 17154*, which provides for vicarious liability of motor vehicle bailee, since *33 U.S.C.S. § 905(b)* provides longshoreman's exclusive remedy and eliminates vicarious liability of vessel. *Stance v. Jackson (1984) 155 Cal. App. 3d 838, 840-844, 202 Cal. Rptr. 480*

Section 905 of Longshoremen's and Harbor Worker's Act (pertaining to when employer not liable to vessel for injury to worker) is applicable only between vessel and stevedore, not between stevedore and wharf owner. *Crescent Wharf & Warehouse Co. v. City of Los Angeles (1982) 134 Cal. App. 3d 979, 982-983, 184 Cal. Rptr. 901*

Longshoreman's action for injuries was barred by laches when cause of action arose more than three years prior to enactment of statute of limitations for maritime torts [former *46 U.S.C.S. app. § 763a*, now *46 U.S.C.S. § 30106*]; trial court properly applyied one-year limitation period for negligence actions under former *Code Civ. Proc. § 340(3)* [*now see Code Civ. Proc. § 335.1* (two-year limitations period)], rather than three-year period under Jones Act former *46 U.S.C.S. app. § 688*, now *46 U.S.C.S. § 30104*. *Ponce v. Graceous Navigation, Inc. (1981) 126 Cal. App. 3d 823, 827-829, 179 Cal. Rptr. 164*

Shipowner sued by stevedore's employee, who was injured while working on vessel, was unable to demand indemnity from stevedore employer, who is liable to employee under *33 U.S.C.S. § 905*, because elimination from statute of doctrine of unseaworthiness precludes any reliance on warranty of workmanlike performance. *IT Corp. v. Superior Court (1978) 83 Cal. App. 3d 443, 451, 147 Cal. Rptr. 828* ; *see also Davis v. Chas. Kurz & Co., Inc. (9th Cir. 1973) 483 F.2d 184, 186-188*

Judicially created rule that shipowner can be held liable for damages not due to longshoreman's own negligence was not changed by 1972 amendments to *33 U.S.C.S. § 905* (*Longshoremen's and Harbor Workers' Compensation Act) Edmonds v. Compagnie Generale Transatlantique (1979) 443 U.S. 256, 263-264, 99 S. Ct. 2753, 61 L. Ed. 2d 521*

"Checker" and temporary laborer on stevedoring gang were both covered by *Longshoremen's and Harbor Workers' Compensation Act. Northeast Marine Terminal Co. v. Caputo (1977) 432 U.S. 249, 271, 273, 97 S. Ct. 2348, 53 L. Ed.*

2d 320

33 U.S.C.S. § 922 applies only to Deputy Commissioner's power to modify orders previously entered by him or her. *Intercounty Constr. Corp. v. Walter (1975) 422 U.S. 1, 10-12, 95 S. Ct. 2016, 44 L. Ed. 2d 643*

[4] Loss of Consortium

When pattern before injury was that seaman would go on two- or three-month fishing trips with two- or three-week intervals between trips, failure to award seaman's spouse damages for loss of consortium was not error; evidence was sufficient to support finding that there was no net loss of society, comfort, and conpanionship. *Da Silva v. Pacific King, Inc. (1987) 195 Cal. App. 3d 1, 12, 240 Cal. Rptr. 395*

[5] Maintenance and Cure

Shipowner's duty to furnish maintenance and cure continues from date seaman leaves ship to date when medical diagnosis is made that injury was permanent immediately after seaman's accident and therefore incurable. *Vella v. Ford Motor Co. (1975) 421 U.S. 1, 5, 95 S. Ct. 1381, 43 L. Ed. 2d 682*

Maintenance and cure is obligation of shipowner to care for seaman injured during course of maritime employment; attorney's fees are allowed only when failure to provide maintenance and cure was arbitrary, recalcitrant, or unreasonable. *Kopczynski v. Jacqueline (9th Cir. 1984) 742 F.2d 555, 559*

To be entitled to maintenance and cure, seaman is only required to show injury or illness while in service as seaman without willful misbehavior on his or her part; negligence of employer or unseaworthiness of vessel is not required to be established. *Da Silva v. Pacific King, Inc. (1987) 195 Cal. App. 3d 1, 11, 240 Cal. Rptr. 395*

Instruction that maintenance rate was $12 per day, which was amount established by collective bargaining agreement covering plaintiff and defendant, ws proper. *Da Silva v. Pacific King, Inc. (1987) 195 Cal. App. 3d 1, 8-9, 240 Cal. Rptr. 395*

[6] Warranty of Seaworthiness

Warranty of seaworthiness applies to condition of ship and gear and to fitness and competence of crew. *Boudoin v. Lykes S.S. Co. (1955) 348 U.S. 336, 339-340, 75 S. Ct. 382, 99 L. Ed. 354*

Scientific personnel not considered seamen and not entitled to benefit from doctrine of seaworthiness. *Craig v. M/V Peacock (9th Cir. 1985) 760 F.2d 953, 956*

When jury found defendants liable for breach of warranty of seaworthiness, any error in jury instruction that impaired plaintiff's negligence claim was harmless. *Da Silva v. Pacific King, Inc. (1987) 195 Cal. App. 3d 1, 6, 240 Cal. Rptr. 395*

In action for aggravation of seaman's preexisting back injury caused by unseaworthy condition, trial court properly instructed jury that "seaworthiness" doctrine imposes duty to furnish vessel, equipment, and work methods that are reasonably fit for seaman who is equal in disposition, physical condition, and seamanship to ordinary person in calling. *Smith v. Marilyn M. Fishing, Inc. (1985) 173 Cal. App. 3d 453, 457-461, 219 Cal. Rptr. 57*

Complaint based on injuries allegedly sustained as a result of unseaworthiness of ship is addressed to court sitting in

admiralty and is determined under federal maritime law. *Bozanich v. Jo Ann Fisheries, Inc. (1969) 270 Cal. App. 2d 178, 185, 75 Cal. Rptr. 463*

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§ 522.94 Law Reviews

Note, *Vessel Owner's Right to Rely on the Stevedore to Protect Longshoremen From Pre-Existing Obvious Dangers: An Analysis of the Taylor and Ollestad Decisions, 15 Golden Gate U. L. Rev. 1 (1985)*

Comment, *Unseaworthiness and Evidence of Subsequent Repairs, 19 Cal. W. L. Rev. 450 (1983)*

Comment, *Stre(a)tching the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 31 Hastings L.J. 473 (1979)*

Comment, *Punitive Damages in Admiralty for Bad Faith Refusal to Provide Maintenance and Cure: Robinson v. Pocahontas, Inc., 15 San Diego L. Rev. 309 (1978)*

Note, *Injured Longshoreman vs. the Shipowner after 1972: Business Invitees, Land-Based Standards, and Assumption of Risk, 28 Hastings L.J. 771 (1977)*

Cundick, *High Seas Intervention: Parameters of Unilateral Action,' 10 San Diego L. Rev. 514 (1973)*

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Comment, *Warranty of Seaworthiness--A Non-Seaman's Dilemma, 8 San Diego L. Rev. 734 (1971)*

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Comment, *Should "Maximum Cure" Be Retained as an Arbitrary Limit on Maintenance and Cure Liability?, 5 U.S.F. L. Rev. 105 (1970)*

Note, *Jones Act--Jurisdiction: Application to Alien Seamen and Shipowners. Hellenic Lines Ltd. v. Rhoditis (5th Cir. 1969), 58 Cal. L Rev. 491 (1970)*

Cook, *Death on Inland Waters, 18 Hastings L.J. 869 (1967)*

Comment, *The Ambiguous, Amphibious Employee: The Relationship Between the Longshoremen's Act and State Compensation Legislation, 18 Hastings L.J. 891 (1967)*

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2 C.J.S., *Admiralty,* §§ 1-18, 62-83

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32 Am. Jur. 2d, *Federal Employers' Liability and Compensation Acts,* §§ 39-115

70 Am. Jur. 2d, *Shipping,* §§ 195-235

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§ 522.110 Federal Constitution

Judicial power of United States extends to all cases of admiralty and maritime jurisdiction. U.S. *Const. art. III, § 2*

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§ 522.111 Federal Statutes

United States district courts have original jurisdiction, exclusive of state court, of civil cases of admiralty or maritime jurisdiction, saving to suitors all other remedies to which they are otherwise entitled. *28 U.S.C.S. § 1333*

International regulations for preventing collisions at sea. *33 U.S.C.S. §§ 1601-1608*

Inland navigational rules. *33 U.S.C.S. § 2001 et seq.*

Admiralty and maritime jurisdiction of United States extends to all cases of damage or injury, to person or property, caused by vessel on navigable water, notwithstanding that such damage or injury is done or consummated on land. *46 U.S.C.S. § 30101*

Suits in Admiralty Act. *46 U.S.C.S. § 30901 et seq.*

Carrige of Goods by Sea Act. *46 U.S.C.S. § 30701* note

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§ 522.112 State Statutes

Partition of real and personal property. *Code Civ. Proc. §§ 872.010-874.240*

Provisions of Harbors and Navigation Code are applicable insofar as not conflicting with federal law or admiralty and maritime jurisdiction. *Harb. & Nav. Code §§ 90, 240, 399, 406, 790*

State navigation rules are applicable insofar as not conflicting with admiralty and maritime jurisdiction and federal laws. *Harb. & Nav. Code § 240*

Navigation rules. *Harb. & Nav. Code §§ 240-308*

Pilots for San Pedro Bay are authorized to limit liability for performance of certain contracts. *Harb. & Nav. Code §§ 440-444*

Actions against vessels. *Harb. & Nav. Code §§ 490-505*

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawPractice & ProcedureFederal PreemptionAdmiralty LawPractice & ProcedureJurisdictionAdmiralty LawShippingCarrier Duties & ObligationsLimitations on Liability

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46-522 California Forms of Pleading and Practice--Annotated § 522.113

§ 522.113 Decisions

[1] Collection of Freight

Shipowner's lien is waived without express words to that effect when agreement contains stipulations inconsistent with exercise of the right. *Bird of Paradise v. Heyneman (1867) 72 U.S. 545, 554-558, 18 L. Ed. 662*

Lien for freight and demurrage arises and exists by force of law unless expressly waived by charter party. *Atlantic Richfield Co. v. Good Hope Refineries (5th Cir. 1979) 604 F.2d 865, 872*

Shipowner's lien for freight is discharged by unconditional delivery of cargo. *Beverly Hills Nat'l Bank & Trust Co. v. Compania de Navegacione Almirante S.A. (9th Cir. 1971) 437 F.2d 301, 303, 304* ; *Eastern Transp. Co. v. United States (2d Cir. 1947) 159 F.2d 349, 351*

Partial delivery of cargo does not defeat lien on remainder for entire freight. *Frothingham v. Jenkins (1850) 1 Cal. 42, 43, 44*

[2] Collisions

Mutual contribution to fault by two or more vessels requires allocation of damages among the parties in proportion to comparative degree of their fault. *United States v. Reliable Transfer Co. (1975) 421 U.S. 397, 411, 95 S. Ct. 1708, 44 L. Ed. 2d 251*

Violation of statutory rule intended to prevent collisions requires vessel to show its violation could not have been a contributing cause of collision. *Pennsylvania v. Troop (1874) 86 U.S. 125, 136, 22 L. Ed. 148*

Pennsylvania burden is discharged by clear and convincing showing of no proximate cause, and not by stricter

beyond-a-reasonable-doubt test. *Trinidad Corp. v. S.S. Keiyoh Maru (9th Cir. 1988) 845 F.2d 818, 825*

Evidence of industry custom is usable to support finding of negligence in collisions at sea when it does not completely contradict statutory rule of navigation. *Stevens v. F/V Bonnie Doon (9th Cir. 1981) 655 F.2d 206, 208*

Pennsylvania rule regarding burden of proof on vessels in violation of navigational statutes is applicable in post-*Reliable* case. *Moran Towing & Transp. Co. v. New York City (2d Cir. 1980) 620 F.2d 356, 358*

Pennsylvania rule was overruled only in so far as *Reliable* case abolished Mutual Fault-Equal Contribution Rule and substituted new rule requiring allocation of liability proportionately to comparative degree of fault. *Tug Ocean Prince, Inc. v. United States (2d Cir. 1978) 584 F.2d 1151, 1160*

Allocation of fault in collision case is question of fact subject to clearly erroneous test on appellate review. *Getty Oil Co. v. S.S. Ponce De Leon (2d Cir. 1977) 555 F.2d 328, 334*

Reliable rule of equitable division of damages as not applicable in cargo damage case when carrier unable to allocate fault. *Vana Trading Co. v. S.S. "Mette Skou" (2d Cir. 1977) 556 F.2d 100, 106* (carrier must bear entire loss)

Reliable rule is not applicable when one party solely responsible for loss (as opposed to mutual fault). *Cliff, Jr., Inc. v. M.V. Captain Will (5th Cir. 1976) 529 F.2d 1169*

Pennsylvania rule is not applicable when vessel has committed no statutory violation. *United States v. Joyce (9th Cir. 1975) 511 F.2d 1127, 1130*

Presumption of negligence on part of moving vessel arises when moored and stationary vessel struck. *Pacific Tow Boat Co. v. States Marine Corp. of Del. (9th Cir. 1960) 276 F.2d 745, 750*

All vessels-parties bear burden of proving that individual fault could not have been one of causes of collision. *States S.S. Co. v. Permanente S.S. Corp. (9th Cir. 1956) 231 F.2d 82, 88* s

City and shipowner were jointly and severally liable to third party for negligence of pilot who was furnished by city at shipowner's request under doctrine of respondeat superior. *Societa Per Azioni De Navigazione Italia v. City of Los Angeles (1982) 31 Cal. 3d 446, 461-462, 183 Cal. Rptr. 51, 645 P.2d 102*

City's port tariff ordinance allowing city to escape respondeat superior liability for negligence of harbor pilots and to secure full indemnification from shipowners was void because in conflict with Tort Claims Act (*Gov. Code §§ 810-996.6*). *Societa Per Azioni De Navigazione Italia v. City of Los Angeles (1982) 31 Cal. 3d 446, 462-465, 183 Cal. Rptr. 51, 645 P.2d 102*

[3] Partitioning Ownership Interests in Vessels

State courts are free to follow state partition laws. *Madruga v. Superior Court (1952) 40 Cal. 2d 65, 251 P.2d 1 , aff'd, (1954) 346 U.S. 556, 74 S. Ct. 298, 98 L. Ed. 290* (lower court decision not affirmed insofar as expressed federal policy of allowing actions by majority owners only)

[4] Damages From Towage

Contracts relieving tugs from all liability for negligence, including attempts to make pilots servants (employees) of the tow, were invalid. *Bisso v. Inland Waterways Corp. (1955) 349 U.S. 85, 75 S. Ct. 629, 99 L. Ed. 911*

Drifting of unmanned barge shortly after moored on delivery by tug presumptively established fault by tug in its duty to properly moor and shifted duty to produce evidence showing exercise of due care. *Pasco Mktg., Inc. v. Taylor Towing Serv., Inc. (8th Cir. 1977) 554 F.2d 808, 811*

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawCollisionsLiabilityBurdens of ProofAdmiralty LawCollisionsLiabilityPresumptionsAdmiralty LawCollisionsPreventionGeneral OverviewAdmiralty LawCollisionsRemediesApportionmentAdmiralty LawMaritime LiensGeneral OverviewAdmiralty LawMaritime LiensDefensesAdmiralty LawMaritime LiensDischargeAdmiralty LawMaritime LiensPriority & SourcesGeneral OverviewAdmiralty LawPractice & ProcedureAttachment & GarnishmentPartition, Petitory & Possessory ActionsAdmiralty LawTowageLiability

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§ 522.114 Law Reviews

Comment, *Loss of Use as an Item of Damages in Admiralty Collision Cases, 12 U.S.F. L. Rev. 311 (1978)*

Note, *Admiralty: Concurrent Jurisdiction Over Partition of Vessels, 6 Hastings L.J. 226 (1955)*

Note, *Admiralty: Partition of Ships: Concurrent Jurisdiction of State and Admiralty Courts, 42 Cal. L. Rev. 331 (1954)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawCollisionsRemediesDamagesAdmiralty LawPractice & ProcedureAttachment & GarnishmentPartition, Petitory & Possessory ActionsAdmiralty LawPractice & ProcedureJurisdiction

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§ 522.115 Text References

Benedict on Admiralty, §§ 21-23, 52 (Matthew Bender)

Moore's Federal Practice, Chs. 701-710 (Matthew Bender)

2 C.J.S., *Admiralty,* §§ 1-281

15 C.J.S., *Collision,* §§ 1-35, 157-212

55 C.J.S., *Maritime Liens,* §§ 1-104

65 C.J.S., *Navigable Waters,* §§ 1-54

80 C.J.S., *Shipping,* §§ 13-25, 160-170

2 Am. Jur. 2d, *Admiralty,* §§ 1-132

70 Am. Jur. 2d, *Shipping,* §§ 87-159, 242-414, 496-512

Legal Topics:

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

§§ 522.116[Reserved]

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46-522 California Forms of Pleading and Practice--Annotated § 522.130

§ 522.130 Federal Constitution

Power of Congress to regulate commerce. U.S. *Const. art. I, § 8, cl. 3*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawCongressional Duties & PowersCommerce ClauseGeneral Overview

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46-522 California Forms of Pleading and Practice--Annotated § 522.131

§ 522.131 Federal Statutes

Seamen allowed to sue for wages without prepayment of fees or costs. *28 U.S.C.S. § 1916*

Prepayment of marshal's costs in seizing and maintaining custody over vessel required. *28 U.S.C.S. § 1921*

Harter Act. *46 U.S.C.S. § 30701 et seq.*

Two-year statute of limitations for actions to recover salvage. *46 U.S.C.S. § 80107(c)*

Federal Maritime Commission regulation of carriage of goods by water in interstate commerce under Shipping Act of 1916. *46 U.S.C.S. § 40101 et seq.*

Carriage of Goods by Sea Act (COGSA). *46 U.S.C.S. § 30701* note

Federal Maritime Commission regulation of carriage of goods by water in foreign commerce. *46 U.S.C.S. § 40101 et seq.*

Duty of person in charge of vessel to render assistance to persons found at sea in danger of being lost. *46 U.S.C.S. § 2304*

Time of commencement of right to seamen's wages. *46 U.S.C.S. § 10313(a)*

Seamen's wages may not be made dependent on earning of freight by vessel. *46 U.S.C.S. § 10313(b)*

Time for payment of seamen's wages. *46 U.S.C.S. §§ 10313(e), (f), 10504(a),* (b)

Master's or shipowner's liability for payment of double wages to seamen. *46 U.S.C.S. §§ 10313(g), 10504(c)*

Seamen may not forfeit lien against ship for wages. *46 U.S.C.S. § 10317*

Payment for maintenance and return to the United States of seamen discharged on account of injury or illness. *46 U.S.C.S. § 10318(e)*

Seamen's wages are not subject to attachment, except for support of spouse or children. *46 U.S.C.S. § 11109*

Penalties for offenses by seamen. *46 U.S.C.S. § 11501*

Preferred maritime liens. *46 U.S.C.S. §§ 31301(5), 31326*

Maritime liens. *46 U.S.C.S. §§ 31305, 31341* et seq.

Federal Bills of Lading (Pomerene) Act. *49 U.S.C.S. § 80101 et seq.*

Interstate Commerce Commission jurisdiction over water carrier transportation. *49 U.S.C.S. §§ 10541-10544*

Interstate Commerce Commission regulation of carriage rates. *49 U.S.C.S. § 10701 et seq.*

Unreasonably discriminatory rates are prohibited under Interstate Commerce Act. *49 U.S.C.S. § 10741*

General operating requirements of carriers under Interstate Commerce Act. *49 U.S.C.S. § 11101 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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46-522 California Forms of Pleading and Practice--Annotated § 522.132

§ 522.132 State Statutes

Provisions of Harbors and Navigation Code are applicable insofar as not conflicting with federal law or admiralty and maritime jurisdiction. *Harb. & Nav. Code §§ 90, 240, 399, 406, 790*

Pilots for San Pedro Bay are authorized to limit liability for performance of certain contracts. *Harb. & Nav. Code §§ 440-444*

Liens against vessels. *Harb. & Nav. Code §§ 491-494*

Pilot is servant of vessel and its owner and operator; vessel or its owner or operator is not exempt from liability for property damage on ground that damage was result of fault of pilot. *Harb. & Nav. Code § 1134*

Legal Topics:

For related research and practice materials, see the following legal topics:
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46-522 California Forms of Pleading and Practice--Annotated § 522.133

§ 522.133 Federal Regulations

Department of State rules concerning discharge of seamen in foreign ports. 22 C.F.R. § 82.16

Responsibility of shipowner for relief and repatriation of seamen. 22 C.F.R. pt. 84

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46-522 California Forms of Pleading and Practice--Annotated § 522.134

§ 522.134 Decisions

[1] Actions by Seamen for Wages

Court is without discretion to limit period during which wage penalty for holding wages without sufficient cause pursuant to former *46 U.S.C.S. § 596* [*now see 46 U.S.C.S. §§ 10313(g), 10504(c)*] is assessed. *Griffin v. Oceanic Contractors, Inc. (1982) 458 U.S. 564, 569-577, 102 S. Ct. 3245, 73 L. Ed. 2d 973*

Seaman not required to exhaust grievance procedures contained in collective bargaining agreement before instituting federal court action to collect wages under former *46 U.S.C.S. § 596* [*now see 46 U.S.C.S. §§ 10313(g), 10504(c)*]. *U. S. Bulk Carriers v. Arguelles (1971) 400 U.S. 351, 356, 357, 91 S. Ct. 409, 27 L. Ed. 2d 456*

Seaman not able to recover "comp time" earnings under *46 U.S.C.S. § 10313*, because "comp time" earnings are not "wages" under meaning of statute. *Petersen v. Interocean Ships, Inc. (9th Cir. 1987) 823 F.2d 334, 336-337*

Advance for purchase of airline ticket is valid partial payment in kind of wages due. *Escobar v. S.S. Wash. Trader (9th Cir. 1981) 640 F.2d 1063, 1065, 1066*

[2] Actions for Cargo Damage or Loss

Limitation of liability provisions in COGSA former *46 U.S.C.S. app. § 1304*, now *46 U.S.C.S. § 30701* note, § 4 are not applicable to stevedore (loader and unloader of cargo in port) when bill of lading shows no clear intention of limitation. *Herd & Co. v. Krawill Mach. Corp. (1959) 359 U.S. 297, 301-308, 79 S. Ct. 766, 3 L. Ed. 2d 820*

Fire defense provisions of COGSA former *46 U.S.C.S. app. § 1304(2)(b)*, now *46 U.S.C.S. § 30701* note, § 4(2)(b) impose standard of personal due diligence on carrier. *Nissan Fire & Marine v. M/V Hyundai (9th Cir. 1996) 93 F.3d 641, 646*

Owners of cargo are parties to bills of lading, establishing relationship sufficient to support in personam claim against vessel owners, notwithstanding owners did not deliver cargo to vessel and did not receive bills of lading from vessel, where cargo was delivered to non-vessel-operating common carriers (NVOCCs), which delivered cargo in containers to vessel and received nonnegotiable bills of lading, and where bills of lading did not name any individual parties as "Merchant," and "Merchant" was defined only as "includ[ing] ... shipper, consignor, consignee, owner and receiver of the Goods and the Holder of this *Bill of Lading." All Pac. Trading v. Vessel M/V Hanjin Yosu (9th Cir. 1993) 7 F.3d 1427, 1433*

Claim against terminal operator for damage to cargo while in storage awaiting shipment was governed by state law rather than admiralty law; booking of passage of cargo on ship, followed by turning over of cargo to terminal operator for storage pending shipment, created bailment between cargo owner and terminal operator under California law; *Civ Code § 1840* limited amount of damages recoverable for negligence by depository or bailor to declared value of cargo. *Whitcombe v. Stevedoring Servs. of Am. (9th Cir. 1993) 2 F.3d 312, 314, 316*

Limitation of liability provisions in COGSA former *46 U.S.C.S. app. § 1304*, now *46 U.S.C.S. § 30701* note, § 4 are applicable to consignee whose cargo was damaged, where bill of lading effectively extended time period of $500 liability limit beyond discharge from ship, gave consignee fair opportunity to opt for higher liability limit, and extended package liability provisions to stevedore services company under Himalaya clause. *Mori Seiki USA, Inc. v. M.V. Alligator Triumph (9th Cir. 1993) 990 F.2d 444, 447-450*

In action arising from cargo damaged at sea, assertion of defense under Carriage of Goods by Sea Act former *46 U.S.C.S. app. § 1300 et seq.*, now *46 U.S.C.S. § 30701* note did not implicitly raise issue of misrepresentation in bill of lading. *Contact Lumber Co. v. P.T. Moges Shipping Co., Ltd. (9th Cir. 1990) 918 F.2d 1446, 1453*

Truckers' delivery receipts noting exceptions to condition of cargo picked up from shipping dock satisfied notice requirements under former *46 U.S.C.S. app. § 1303(6)* (now *46 U.S.C.S. § 30701* note, § 3(6)), absence of which would render acceptance of goods prima facie evidence of delivery in condition described in bill of lading. *Tokio Marine & Fire Ins. v. Vessel Sammi Aurora (9th Cir. 1990) 903 F.2d 1244, 1246*

In admiralty-law action by exporter against shipper for damage to cargo regarding first of two shipments, shipper as entitled to summary judgment on cross complaint for unpaid freight on second shipment, when exporter paid freight for first shipment, then declared goods were damaged because of negligent handling and refused payment on second shipment, which was delivered in good condition and paid for by buyer. *Genetics Int'l v. Cormorant Bulk Carriers, Inc. (9th Cir. 1989) 877 F.2d 806, 809*

Whether entity is intended beneficiary of Himalaya Clause (provision extending protections provided carrier to those employed by carrier) depends on contractual relation between party seeking protection and ocean carrier, as well as on nature of services performed compared to carrier's responsibilities under carriage contract. *Taisho Marine & Fire Ins. Co. v. Vessel Gladiolus (9th Cir. 1985) 762 F.2d 1364, 1367*

Foreign jurisdiction clause is valid when COGSA incorporated into contract for foreign carriage outside of ex proprio vigore coverage of either the *Harter Act or COGSA. North River Ins. Co. v. Fed Sea/Fed Pac Line (9th Cir. 1981) 647 F.2d 985, 989*

COGSA provision stating act applies when incorporated as a contractual term as fully as if automatically applicable former *46 U.S.C.S. app. § 1312*, now *46 U.S.C.S. § 30701* note, § 13 controls only when COGSA incorporated into domestic carriage contracts otherwise governed by the *Harter Act. North River Ins. Co. v. Fed Sea/Fed Pac Line (9th Cir. 1981) 647 F.2d 985, 988* (neither act automatically applicable because cargo carried on deck)

Pomerene Act was not applicable to private contracts of carriage. *T.J. Stevenson & Co., Inc. v. 81,193 Bags of Flour (5th Cir. 1980) 629 F.2d 338, 372*

Unreasonable deviation was not sufficient to breach parties' contract and render $500 limitation on carrier's liability former *46 U.S.C.S. app. § 1304(5)*, now *46 U.S.C.S. § 30701* note, § 4(5) inapplicable. *Rosenbruch v. American Export Isbrandtsen Lines, Inc. (2d Cir. 1976) 543 F.2d 967, 971*

Definition of ship for purposes of COGSA includes lighter aboard ship barges (barges loaded with cargo and carried by ships until discharged and towed into port). *Wirth Ltd. v. S/S Acadia Forest (5th Cir. 1976) 537 F.2d 1272, 1278*

Limitation of liability provisions in COGSA former *46 U.S.C.S. app. § 1304*, now *46 U.S.C.S. § 30701* note, § 4 extend to dry dock operator when provided in bill of lading. *Grace Line, Inc. v. Todd Shipyards Corp. (9th Cir. 1974) 500 F.2d 361, 370, 371*

Himalaya clause (provision extending protections provided carrier to those employed by carrier) in bill of lading is effective to extend COGSA $500 limitation former *46 U.S.C.S. app. § 1304(5)*, now *46 U.S.C.S. § 30701* note, § 4(5) to stevedore when clearly expressed as parties' intentions. *Tessler Bros. (B.C.) Ltd. v. Italpacific Line (9th Cir. 1974) 494 F.2d 438, 446, 447*

Establishment of shipper's prima facie case imposes burden on carrier to show excepted cause or freedom from negligence. *Daido Line v. Thomas P. Gonzalez Corp. (9th Cir. 1962) 299 F.2d 669, 671, 672*

Discharge of cargo within meaning of COGSA is complete when loading onto lighter (boat used to carry cargo to and from ship and wharf when ship not anchored at wharf) has been completed or while no other cargo is being loaded onto same lighter. *Hoegh Lines v. Green Truck Sales, Inc. (9th Cir. 1962) 298 F.2d 240, 242, 243*

Harter Act is not applicable to private contracts of carriage. *Koppers Conn. Coke Co. v. James McWilliams Blue Line, Inc. (2d Cir. 1937) 89 F.2d 865, 866*

Unreasonable deviation by carrier is breach of parties' contract rendering $500 limitation on carrier's liability former *46 U.S.C.S. app. § 1304(5)*, now *46 U.S.C.S. § 30701* note, § 4(5) not applicable. *Jones v. Flying Clipper (S.D.N.Y. 1953) 116 F. Supp. 386, 391*

[3] Actions to Enforce Maritime Liens

California statute imposing mandatory pilotage fees on registered vessels entering and leaving San Francisco Bay was valid regulation of commerce in absence of federal enactment pertaining to registered ships. *Anderson v. Pacific Coast S.S. Co. (1912) 225 U.S. 187, 202, 32 S. Ct. 626, 56 L. Ed. 1047*

Ownership of vessel by defendant was prerequisite to attachment, even though maritime lien may issue without ownership; "lease" was security instrument rather than true lease, for purposes of establishing "ownership" giving rise to attachment rights, when "lessor" does not have reversionary ownership interest in vessel. *Interpool Ltd. v. Char Yigh Marine (Panama) S.A. (9th Cir. 1989) 890 F.2d 1453, 1460*

Courts exercising admiralty jurisdiction have power to apply doctrine of equitable subordination to resolve priority disputes under former *46 U.S.C.S. §§ 951, 953* [*now see 46 U.S.C.S. §§ 31301(5), (6), 31325, 31326*]; equitable subordination requires that (1) claimant have engaged in inequitable conduct, (2) misconduct have resulted in injury to competing claimants or unfair advantage to claimant, and (3) subordination is not inconsistent with federal law. *Wardley Int'l Bank, Inc. v. Nasipit Bay Vessel (9th Cir. 1988) 841 F.2d 259, 263*

Preferred ship mortgage enjoys priority over all other claims against vessel except certain maritime liens and fees and costs imposed by court; preferred mortgage on foreign vessel is also subordinate to maritime liens for repairs, supplies, towage, use of drydock or marine railway, or other necessaries performed or supplied in United States. *United States v. Pacific Far E. Lines, Inc. (9th Cir. 1987) 809 F.2d 1435, 1438* ; *Mobil Sales & Supply Corp. v. Panamax Venus (9th Cir. 1986) 804 F.2d 541, 542*

In Ninth Circuit, grant of maritime lien under former *46 U.S.C.S. § 971* [*now see 46 U.S.C.S. § 31342*] requires that person claiming lien (1) have furnished repairs, supplies, or other necessaries (2) to any vessel (3) on order of vessel's owner or of person authorized by owner; Ninth Circuit has adopted narrow construction of "furnishing" requirement. *Foss Launch & Tug Co. v. Char Ching Shipping U.S.A. (9th Cir. 1987) 808 F.2d 697, 699, 701-703*

In action to enforce maritime lien as security for recovery of damages based on seamen's claim against vessels for aggregate amount of deferred wages and wage penalties, Congressional retroactive amendment of *46 U.S.C.S. § 10504* extinguished and prevented execution on seamen's lien for wage penalties. *Aguirre v. S.S. Sohio Intrepid (9th Cir. 1986) 801 F.2d 1185, 1190*

Under statutory presumption in favor of materialmen under former Federal Maritime Lien Act [*now see 46 U.S.C.S. §§ 31305, 31341* et seq.], subcontractor who supplied steel to vessel was entitled to lien if he or she relied on vessel for repayment rather than on primary contractor. Farwest Steel Corp. v. Barge Sea-Span 241 *(9th Cir. 1985) 769 F.2d 620, 623-624*

Salvage claim did not requirie saving by sole efforts of person seeking award of salvage. *West Coast Shipping Brokers Corp. v. Ferry "Chuchequero" (5th Cir. 1978) 582 F.2d 959, 960*

Seizure of vessel in rem before expiration of grace period for payment by owner waived lien for salvage. Veverica v. Drill Barge Buccaneer No. 7 *(5th Cir. 1974) 488 F.2d 880, 884*

Contractual salvage gave rise to lien under former Federal Maritime Lien Act [*now see 46 U.S.C.S. §§ 31305, 31341* et seq.]. Veverica v. Drill Barge Buccaneer No. 7 *(5th Cir. 1974) 488 F.2d 880, 883*

Stevedore's lien against freights of vessel extends to freights that vessel expects to earn during particular voyage for which services rendered. *Schirmer Stevedoring Co., Ltd. v. Seaboard Stevedoring Corp. (9th Cir. 1962) 306 F.2d 188, 192*

[4] Marshal's Costs

28 U.S.C.S. § 1921 prohibits federal magistrate in admiralty foreclosure action from precluding federal marshal from selling vessel at foreclosure sale simply to avoid payment of marshal's fee for conducting sale. *Bank of Am. v. M/V Executive (9th Cir. 1986) 797 F.2d 772, 774*

[5] Tariff Freight Charges

Private cause of action by carrier against shipper to collect tariff freight charges is impliedly provided for by former Shipping Act of 1916 [*now see 46 U.S.C.S. § 40101 et seq.*]. *Sea-Land Serv., Inc. v. Murrey & Son's Co. Inc. (9th Cir. 1987) 824 F.2d 740, 741 n.1, 742-744*

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawMaritime ContractsAffreightmentAdmiralty LawMaritime LiensEnforcementAdmiralty LawMaritime LiensPriority & SourcesContractsWagesAdmiralty LawShippingCarrier Duties & ObligationsCargo Care & StowageGeneral OverviewAdmiralty LawShippingRegulations & StatutesCarriage of Goods by Sea ActGeneral OverviewLabor & Employment LawWage & Hour LawsWage Payments

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Chapter 522 SHIPS AND SHIPPING
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2. Actions Against Shipowners and Carriers

46-522 California Forms of Pleading and Practice--Annotated § 522.135

§ 522.135 Law Reviews

Note, *Calculating and Allocating Salvage Liability, 99 Harv. L. Rev. 1896 (1986)*

Friedell, *The Deviating Ship, 32 Hastings L.J. 1535 (1981)*

Note, *Restitution for Life Salvage at Sea in the Wake of Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc., 30 Hastings L.J. 227 (1978)*

Allen, *The Expanding Scope of Federal Maritime Liens: A Critique of Blair v. M/V Blue Spruce, 9 U.S.F. L. Rev. 665 (1975)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawFinds & SalvageGeneral OverviewAdmiralty LawMaritime LiensGeneral OverviewAdmiralty LawShippingCarrier Duties & ObligationsDeviations

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46-522 California Forms of Pleading and Practice--Annotated § 522.136

§ 522.136 Text References

Benedict on Admiralty (Matthew Bender)

S. Sorkin, Goods in Transit (Matthew Bender)

2 Am. Jur. 2d, *Admiralty*

70 Am. Jur. 2d, *Shipping*, §§ 112-150, 195-206, 265-271, 292-308, 440-555, 560-562

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawGeneral OverviewAdmiralty LawShippingGeneral Overview

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46-522 California Forms of Pleading and Practice--Annotated §§ 522.137-522.149

[Reserved]

§§ 522.137[Reserved]

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PART IV. FORMS
A. Maritime Accidents or Disasters

46-522 California Forms of Pleading and Practice--Annotated § 522.150

§ 522.150 Complaint [Fed. R. Civ. P., Rule 7] for Limitation of Liability [46 U.S.C.S. § 30511; Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule F] for Claims Arising Out of Maritime Accident or Disaster

[1] FORM Complaint [Fed. R. Civ. P., Rule 7] for Exoneration From and/or Limitation of Liability [46 U.S.C.S. app. § 183; Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule F] for Claims Arising Out of Maritime Accident or Disaster

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

In the Matter of the Complaint of _____ [*name*], Plaintiff, Owner of the Vessel _____ [*name of vessel*].	)))))))	Civil Action No. _____ COMPLAINT FOR _____ LIMITATION OF] LIABILITY

1. This is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears [, and is an admiralty and maritime claim within the meaning of *Rule 9(h) of the Federal Rules of Civil Procedure*]. This complaint for limitation of liability for claims of maritime tort on navigable waters invokes the court's jurisdiction under *Section 1333 of Title 28 of the United States Code* Service and Section 30511 of the Title 46 of the United States Code Service.

2. Plaintiff is [a corporation duly organized and existing under the laws of the State of California, and] the owner and operator of the American merchant vessel _____ [*name*], having a gross tonnage of _____ [*specify*].

3. While on a voyage from _____ [*specify port*] to _____ [*specify port*], plaintiff's vessel _____ [*describe event which caused damage or injury, e.g.,* ran aground off the shores of California near Santa Barbara]. The voyage terminated on _____ [*date*], at _____ [*specify place*].

4. As a result of the _____ [*describe event which caused damage, e.g.,* grounding], _____ [*describe deaths, injuries, damages to or loss of property, e.g.,* passengers of the vessel were injured and its cargo was severely damaged].

[*EITHER*]

5. The vessel was damaged by the _____ [*describe event causing damage*] on _____ [*date*], at _____ [*specify place of event*], and [, on information and belief,] its value at the close of the voyage was $_____. [The amount of pending freight recovered or recoverable is $_____.]

[*OR*]

5. The vessel was _____ [lost *or* abandoned] on _____ [*date*], at _____ [*specify place of event*], as a result of the _____ [*describe event causing loss*] and the value of its wreckage, strippings, or proceeds is $_____. The wreckage, strippings, and proceeds are in the possession of _____ [*name*] at _____ [*specify location*]. [The amount of pending freight recovered or recoverable is $_____.]

6. Plaintiff has received _____ [written *and/or* oral] demands for _____ [damages to *and/or* loss of] property in the sum of $_____ [and demands for damages from _____ (personal injuries *and/or* death) in the sum of $_____].

[*EITHER*]

7. Plaintiff knows of no actions and proceedings involving claims from the _____ [*describe event causing damage or injury*] which are pending.

[*OR*]

7. Actions are pending against _____ [plaintiff *and/or* plaintiff's vessel] in _____ [*state court, case number, and parties, e.g.,* the Superior Court of California, County of San Francisco, Civil Action No. _____, _____ (*name*), Plaintiff, vs. _____ (*name*), Defendant].

[*EITHER*]

8. Plaintiff knows of no demands or unsatisfied liens or claims of lien, in contract or in tort, which have arisen as a result of the voyage, other than those stated in Paragraphs 6 and 7 of plaintiff's complaint.

[*OR*]

8. Additional _____ [demands *and/or* unsatisfied liens *and/or* claims of lien] arising on the voyage include _____ [*state additional demands, liens, or claims, e.g.,* the crew's lien against the vessel for wages and materialmen's liens for supplies furnished prior to the voyage, in the total sum of $_____].

9. The _____ [*describe event causing damage*] and all consequent damage, loss, injury, and destruction were occasioned without the privity, knowledge, fault, neglect, or want of due care on the part of the plaintiff. [At and prior to the time of the voyage, plaintiff exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped, and supplied.]

[10. A prior paramount lien against plaintiff's vessel exists for _____ (*state source of prior lien, e.g.,* a mortgage against the vessel, dated _____ [*date*], and filed of record in _____ (*place of recording*).]

[11. Since the voyage on which the claims sought to be limited arose, plaintiff's vessel has made (a) voyage(s) to _____ (*describe voyages, e.g.,* Japan and returned to the Port of San Francisco). The vessel has (not) sustained injury during the subsequent voyage(s).]

[12. Plaintiff's vessel _____ (did not incur liens during the subsequent voyage(s) *or* incurred the following liens during the subsequent voyage(s): _____ (*state names and addresses of lienors, so far as known, and amounts and causes of liens*).]

13. Plaintiff claims the benefit of limitation of liability as provided in Sections 30501-30512 of Title 46 of the United States Code Service. _____ [Plaintiff is filing with this complaint security for the value of his or her interest in the vessel _____ (*name*) and its pending freight *or* Plaintiff is transferring its interest in the vessel and pending freight to a trustee appointed by the court].

WHEREFORE, plaintiff prays:

1. For issuance of notice to all persons asserting claims with respect to which this complaint seeks limitation of liability and for publication of such notice as provided by law;

2. For judgment limiting plaintiff's liability for property damage to the value of plaintiff's interest in the _____ [vessel *or* wreckage, strippings, and proceeds of the vessel] and the pending freight subsequent to the _____ [*describe event causing loss*];

3. For judgment limiting plaintiff's liability for damages from _____ [personal injury *and/or* death] to the value of plaintiff's interest in the _____ [vessel *or* wreckage, strippings, and proceeds of the vessel] and the pending freight subsequent to the _____ [*describe event causing loss*];

4. For costs herein incurred; and

5. For such other and further relief as the court may deem just and proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

State of _____,)
County of _____,) ss.
)

_____ [*name*], being duly sworn, deposes and says:

I am [the _____ (*declarant's title*) of _____ (*name of corporation*),] the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof and the same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters I believe it to be true.

[The sources of my information and the grounds of my belief as to all matters not stated in the complaint to be alleged on my own knowledge are reports made to me by employees and the records of the corporation.]

_____ [*signature of declarant*]

Subscribed and sworn to before me this _____ day of _____ [*date*].

_____ [*signature*]
Notary Public

[*seal*]

[2] Use of Form

This complaint may be used for an action in federal district court by a shipowner or charterer seeking limitation of liability for claims surrounding a maritime accident or disaster. The complaint must be filed in a United States district court [*46 U.S.C.S. § 30511(a)*]. In addition, the shipowner may assert the federal limitation of liability statute as a defense in state court proceedings, but usually all claims arising from an incident cannot be settled satisfactorily by defending in state court [*see Providence & N.Y. S.S. Co. v. Hill Mfg. Co. (1883) 109 U.S. 578, 594-595, 3 S. Ct. 379, 27 L. Ed. 1038]* .

[3] Venue

The complaint must be filed in any district in which the vessel has been attached or arrested to answer for any claim for which plaintiff seeks limitation of liability. If the vessel has not been attached or arrested, the complaint may be filed in any district in which the owner has been sued with respect to a claim. When there has been neither attachment of the vessel nor a suit against the owner, the action may be instituted in the district where the vessel is located. The complaint may be filed in any district if no suit has been filed and the vessel is not located within any district [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule F(9)].

[4] Allegations

[a] Facts and Status (Paragraphs 2-8); Transfers and Liens (Paragraphs 10-12)

Paragraphs 2-8 are required by Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule F(2). Paragraphs 10-12 are mandated by the same rule when the plaintiff elects to transfer its interest in the vessel to a trustee instead of depositing a sum equal to the value of the vessel [*see 46 U.S.C.S. § 30511(b)(2)*].

[b] Jurisdictional Statement (Paragraph 1)

A complaint in federal court must contain a short and plain statement of the court's jurisdictional base [*Fed. R. Civ. P., Rule 8(a)*]. If a claim has another ground for federal jurisdiction, the complaint may use the language in brackets in Paragraph 1 to assure application of civil rules pertaining only to admiralty cases [*Fed. R. Civ. P., Rule 9(h)*].

[5] Notice to Claimants

After the complaint is filed and security posted, the court must issue notice to all persons asserting claims with respect to which the complaint seeks limitation, admonishing them to file their claims with the court clerk and to serve a copy on plaintiff's attorney on or before the date named in the notice. The date fixed in the notice must not be less than 30 days after issuance, but for cause shown the court may enlarge the time for filing claims [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule F(4)].

The notice must also be published in such newspaper or newspapers as the court may direct once a week for four successive weeks prior to the date fixed for filing claims. Not later than the day of second publication, the plaintiff must mail a copy of the notice to every person known to have made any claim against the vessel or the plaintiff [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule F(4)]. For an example of the required notice for publication, see *§ 522.151*.

[6] Verification

Verification of a complaint for limitation of liability is not required [*Fed. R. Civ. P., Rule 11(a)*]. A verified complaint, however, may be substituted for an affidavit as the basis for granting a preliminary injunction [*Fed. R. Civ. P., Rule 65*].

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46-522 California Forms of Pleading and Practice--Annotated § 522.151

§ 522.151 Notice to Claimants to File Claims [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule F(4)]--Against Shipowner Seeking Limitation of Liability

[1] FORM Notice to Claimants to File Claims [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule F(4)]--Against Shipowner Seeking Limitation of Liability

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

In the Matter of the Complaint of _____ [*name*], Plaintiff, Owner of the Vessel _____ [*name of vessel*].	))))))))	Civil Action No. _____ NOTICE OF ACTION BROUGHT FOR _____ LIMITATION OF] LIABILITY

Notice is given that _____ [*name*] [, a corporation,] has filed a complaint pursuant to Sections 30501-30512 of Title 46 of the United States Code Service, claiming the right to limitation of liability for all claims arising on the voyage of the _____ [*name or other designation of vessel*] from _____ [*specify port*] to _____ [*specify port*], which terminated on _____ [*date*].

All persons having claims must file them as provided in Federal Rules of Civil Procedure, Supplemental Rule F, with the clerk of this court, at the United States Courthouse, _____ [*address*], and serve a copy on the plaintiff's attorney, _____ [*name and address*], on or before _____ [*specify date that is not less than 30 days after issuance of notice*] or suffer default.

Any claimant desiring to contest the right of plaintiff to limitation of liability must file an answer to the complaint, as required by the Federal Rules of Civil Procedure, Supplemental Rule F, and serve a copy on plaintiff's attorney, unless the claim has included an answer.

_____ [*signature*]
United States Marshal

[2] Use of Form

This notice must be published in such newspapers as the court may direct once a week for four successive weeks prior to the date fixed for the filing of claims. Not later than the day of the second publication, plaintiff must also mail a copy of the notice to every person known to have made any claim against the vessel or plaintiff arising out of the voyage to which claims relate [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule F(4)].

[3] Contents of Form

The notice must state: (1) the voyage from which the limitation proceeding arises; (2) the requirements of filing and service of claims before a certain date, which must be at least 30 days after issuance of the notice; and (3) the obligation to file an answer if the claimant desires to contest the right to limitation of liability, unless the claim has included an answer [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule F(4), (5)].

[4] Cross References

For a related form, see *§ 522.150*

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46-522 California Forms of Pleading and Practice--Annotated § 522.152

§ 522.152 Injunction [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule F(3); Fed. R. Civ. P., Rule 65]--Against Prosecution of Another Action When Shipowner Has Commenced Action for Limitation of Liability [46 U.S.C.S. §§ 30505, 30511]

[1] FORM Injunction [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule F(3); Fed. R. Civ. P., Rule 65]--Against Prosecution of Another Action When Shipowner Has Commenced Action for Exoneration From and/or Limitation of Liability [46 U.S.C.S. app. §§ 183, 185]

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

In the Matter of the Complaint of _____ [*name*], Plaintiff, Owner of the Vessel _____ [*name of vessel*], _____	)))))	Civil Action No. _____ PRELIMINARY INJUNCTION

An _____ [application and verified complaint *or* affidavit and complaint] having been filed on _____ [*date*], by the plaintiff as the owner of the American merchant vessel, _____ [*name*], claiming limitation of liability in connection with the _____ [*describe event causing damage, loss, or injury, e.g.,* grounding] of the vessel at _____ [*specify place of event*] on _____ [*date*], and plaintiff having deposited approved security for the benefit of claimants, and having given security for costs; and

It being shown that _____ [*name*] has commenced an action against the plaintiff in the _____ [*name and district or county of court*], claiming damages for _____ [personal injuries *and/or* loss of property *and/or* injury to property] alleged to have arisen from the _____ [*describe event*] and further, that the claim by _____ [*name*] is subject to limitation in the action pending in this court,

IT IS HEREBY ORDERED, as follows:

1. The claimant, _____ [*name*], is enjoined from further prosecution of the action in the _____ [*name and district or county of court*], entitled _____ vs. _____;

2. This injunction will remain in effect until determination of the limitation proceeding now pending in this court; and

3. Notice of this injunction will be given to claimant, _____ [*name*], by serving a copy on his/her attorney.

_____ [*signature*]
Judge, United States District Court
_____ District of California

[2] Use of Form

This injunction may be obtained by the plaintiff to enjoin further prosecution of any action or proceeding with respect to a claim subject to limitation [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule F(3)]. Supplemental Rule F(3) provides only that the court "shall enjoin" another action on application of the plaintiff. The general Federal Rules of Civil Procedure also apply, except to the extent that they are inconsistent with these Supplemental Rules [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule A]. Thus, a verified complaint can support the issuance of a preliminary injunction [*Fed. R. Civ. P., Rule 65*].

[3] Cross References

For related forms, see *§§ 522.150, 522.151*

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[Reserved]

§§ 522.153[Reserved]

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B. Personal Injuries

46-522 California Forms of Pleading and Practice--Annotated § 522.170

§ 522.170 Complaint [Fed. R. Civ. P., Rules 7(a), 8(a)] for Damages for Personal Injuries Under Jones Act [46 U.S.C.S. § 30104]--By Seaman Against Shipowner--Federal Form

[1] FORM Complaint [Fed. R. Civ. P., Rules 7(a), 8(a)] for Damages for Personal Injuries Under Jones Act [46 U.S.C.S. app. § 688]--By Seaman Against Shipowner--Federal Form

UNITED STATES DISTRICT COURT,
_____ DISTRICT OF CALIFORNIA
_____ DIVISION

	)	
_____ [*name*],	)	Civil Action, File No. _____
Plaintiff,	)	COMPLAINT FOR
vs.	)	DAMAGES FOR
_____ [*name*],	)	PERSONAL INJURIES
Defendant.	)	(Jones Act and
	)	Unseaworthiness)
	)	

_____

1. This is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears. [*If the pleader wishes to invoke the distinctively maritime procedures referred to in Fed. R. Civ. P., Rule 9(h), add:* This is an admiralty or maritime claim within the meaning of *Rule 9(h) of the Federal Rules of Civil Procedure.*]

2. During all times herein mentioned defendant _____ [*name*] was the owner of the steamship

_____ [*name of vessel*] and used it in the transportation of _____ [*describe, e.g.,* freight for hire] by water in interstate and foreign commerce. _____ [Defendant resides in _____ (*city*), _____ County, California _____ *or allege capacity of defendant who is not an individual and other basis of venue as appropriate*].

3. On or about _____ [*date*], at _____ [*specify location*], plaintiff entered the employ of defendant as an able seaman on the steamship under seaman's articles of customary form for a voyage from the Port of _____ [*specify*] to the Port of _____ [*specify*] and return at a wage of $_____ per month and found, which is equal to a wage of $_____ per month as a shore worker.

4. On or about _____ [*date*], the steamship was about _____ [*number*] days out of the Port of _____ [*specify*] and was being navigated by the master and crew on the [return] voyage to the Port of _____ [*specify*]. The weather was _____ [*describe condition, e.g.,* fair and balmy], and the vessel was _____ [*describe general condition, e.g.,* apparently functioning normally]. However, defendant negligently _____ [*describe defendant's conduct, e.g.,* had permitted a master electrical switch box to be installed and maintained in a defective condition, knowing that plaintiff or any other crew member might have to operate its switches].

5. By reason of defendant's negligence in thus _____ [*briefly describe negligence described above, e.g.,* maintaining a defective switch box], and of the unseaworthiness of the steamship, plaintiff was _____ [*describe how injuries incurred, e.g.,* severely shocked and burned by electricity in attempting to operate the switch box for the normal purpose of shutting off lights in the galley after cleaning it for the day].

6. Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning and actually earning $_____ per day. By these injuries plaintiff has been made incapable of any gainful activity, has suffered great physical and mental pain, and has incurred expenses in the amount of $_____ for medicine, medical attendance, and hospitalization.

WHEREFORE plaintiff demands judgment against defendant in the sum of $_____ and costs [and for such other and further relief as the court may deem proper].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Source of Form

This form is, in part, modeled after Official Federal Forms 2(d) (allegations of jurisdiction), 9 (negligence), 14 (negligence under FELA), and 15 (complaint under Jones Act), exemplar forms officially prepared to accompany the Federal Rules of Civil Procedure [*see Fed. R. Civ. P., Rule 84* (official forms sufficient under the rules); *see also* Moore's Federal Rules Pamphlets (Matthew Bender)].

[3] Use of Form

The complaint may be used in a federal district court when a seaman is suing for both personal injuries resulting both from the shipowner's negligence and from the unseaworthiness of the vessel. The same type of complaint for a California state court is illustrated by the *form in § 522.171*, which may be consulted for alternatives in pleading,

including more specific damages allegations and a prayer for relief. For discussion of claims for injury or death of seamen, see *§ 522.31*.

[4] Jurisdiction

See *§ 522.11* for a discussion of admiralty and maritime jurisdiction in the federal courts.

[5] Pleading Admiralty Claims in Federal Courts

Cases cognizable in admiralty are governed under the Federal Rules of Civil Procedure in the same manner as other cases except when special procedures have been provided [*see Fed. R. Civ. P., Rule 1*]. A pleading that sets forth a claim for relief must contain a short and plain statement of the grounds of jurisdiction, a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment [*Fed. R. Civ. P., Rule 8(a)*].

When a claim for relief within the admiralty and maritime jurisdiction is also within the United States District Court jurisdiction on some other ground, it may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of *Fed. R. Civ. P., Rules 14(c)* (certain third-party practice), 38(e) (unavailability of trial by jury), 82 (not treated as "civil action" for purposes of venue), and the Supplemental Rules for Certain Admiralty and Maritime Claims.

If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not [*Fed. R. Civ. P., Rule 9(h)*]. Typically, a party may join against an opposing party, either as independent or as alternate claims, as many claims as he or she may have, including maritime claims [*Fed. R. Civ. P., Rule 18(a)*; *see Fed. R. Civ. P., Rule 8(e)(2)*].

Because an action under the Jones Act clearly falls within a federal court's admiralty jurisdiction, the additional bracketed information regarding *Fed. R. Civ. P., Rule 9(h)* need not be included in Paragraph 1 of the complaint if the complaint is based only on the Jones Act. If a claim has another ground for federal jurisdiction, the complaint may use the language in brackets to assure application of civil rules pertaining only to admiralty cases [*Fed. R. Civ. P., Rule 9(h)*].

[6] Costs

In all United States courts, seamen may institute and prosecute suits and appeals in their own names and for their own benefit for wages or salvage or the enforcement of laws enacted for their health or safety without prepaying fees or costs or furnishing security therefore [*28 U.S.C.S. § 1916*]. For discussion of the conflict between this provision and the statute mandating payment of marshal's fees [*28 U.S.C.S. § 1921*], see *§ 522.72[5]*.

[7] Demand for Jury Trial

Any party in federal court may demand a jury trial of any issue triable by jury by serving a written demand on the other parties any time after the commencement of the action but not later than 10 days after the service of the last pleading directed to that issue. The demand may be indorsed on a pleading of the party [*Fed. R. Civ. P., Rule 38(c)*].

The Jones Act specifically provides for jury trial on demand of the seaman/plaintiff [*46 U.S.C.S. § 30104*]. However, the defendant may not demand a jury trial on the claim [*Craig v. Atlantic Richfield Co. (9th Cir. 1994) 19 F.3d 472, 476* ; *see Fed. Rules Civ. Proc., Rule 38(e)* (rules pertaining to jury trial otherwise may not be construed to create right to trial by jury of issues in admiralty or maritime claim); *see also Fed. Rules Civ. Proc., Rule 9(h)*].

If a federal court has an independent basis of jurisdiction over cases involving admiralty claims, such as diversity of citizenship, both the defendant and the plaintiff have a right to demand a jury trial under the *Seventh Amendment of the*

United States Constitution, so long as the suit is one that could traditionally have been brought at common law [*Craig v. Atlantic Richfield Co. (9th Cir. 1994) 19 F.3d 472, 476]* .

A jury may be demanded by either party to a case of contract or tort in admiralty or maritime jurisdiction involving a vessel of substantial size engaged in traffic along the coasts or interior lakes and waters [*see 28 U.S.C.S. § 1873*].

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46-522 California Forms of Pleading and Practice--Annotated § 522.171

§ 522.171 Complaint for Damages [Civ. Code § 3333] for Personal Injuries Under Jones Act [46 U.S.C.S. § 30104] and Doctrine of Unseaworthiness--By Seaman Against Shipowner--General California Form

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries Under Jones Act [46 U.S.C.S. app. § 688] and Doctrine of Unseaworthiness--By Seaman Against Shipowner--General California Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR
vs.	)	DAMAGES FOR
_____ [*name*],	)	PERSONAL INJURIES
Defendant.	)	(Jones Act and
	)	Unseaworthiness)
	)	

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Jones Act)

1. _____ [Defendant _____ (*name*) is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California with its principal place of business in

(_____ (*city*)), _____ County *or allege other identity, capacity, and basis of venue, of defendant as appropriate*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint and insert their names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that such fictitiously named defendants are responsible in some manner for the occurrences herein alleged.]

3. During all times herein mentioned defendant was the owner of the vessel _____ [*name of vessel*] and used it in the transportation of _____ [*describe, e.g.,* freight for hire] by water in interstate and foreign commerce. [The vessel was regularly berthed at the Port of _____ (*specify*), and is registered in California as No. _____.]

4. [*Allege hiring as seaman for particular voyage. See § 522.170, Paragraph 3.*]

[*EITHER*]

5. [*Allege injurious condition on the high seas or tidal waters. See § 522.170, Paragraph 4.*]

[*OR, allege injurious condition in port*]

5. On or about _____ [*date*], the vessel was lying alongside _____ [*describe location, e.g.,* the dock at Pier 1 at the Port of _____ (*specify*), California]. Plaintiff was engaged in _____ [*describe ship's duties, e.g.,* swabbing down the promenade deck with regular cleaning apparatus]. However, defendant negligently _____ [*describe defendant's conduct, e.g.,* had affixed a large metal fan to the bottom of the deck above where plaintiff was working].

6. As a proximate result of defendant's negligence, plaintiff was _____ [*describe injuries, e.g.,* struck by the metal overhead fan which suddenly came loose from its boltings and dropped on plaintiff's back, causing plaintiff severe bodily injuries].

7. As a proximate result of defendant's negligence, plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has suffered general damages.

8. As a further proximate result of defendant's negligence, plaintiff has incurred, and will continue to incur, medical and related expenses.

9. As a further proximate result of defendant's negligence, plaintiff's earning capacity has been greatly impaired, both in the past and present.

SECOND CAUSE OF ACTION
(Unseaworthiness)

10. Plaintiff incorporates by reference, as though fully set forth below, each and every allegation of Paragraphs 1-4 and

6-9 of the First Cause of Action herein.

11. On or about _____ [*date*], while the vessel was lying alongside _____ [*describe location, e.g.,* the dock at Pier 1 at _____, California], plaintiff was engaged in _____ [*describe ship's duties, e.g.,* swabbing down the promenade deck with regular cleaning apparatus]. However, defendant failed to provide plaintiff with a seaworthy vessel on which to work in that _____ [*describe unseaworthy condition, e.g.,* a large metal fan affixed overhead of the portion of the deck on which plaintiff was working came loose, suddenly dropping on plaintiff]. As a result of the unseaworthiness of defendant's vessel, plaintiff suffered the severe bodily injuries alleged above.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages;

2. For damages for medical and related expenses;

3. For damages for lost earnings [both past and future];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This complaint is for use in a California court when a seaman is suing for personal injuries resulting from the shipowner's negligence under the federal Jones Act [*see 46 U.S.C.S. § 30104*]. It is joined with a second cause of action for unseaworthiness, a tort arising out of the general maritime law that is frequently coupled with the negligence count. There may, however, be instances in which a recovery would more easily fit under the doctrine of negligence or of unseaworthiness, and certain instances in which it might be had under one but not the other concept. A form for bringing the same types of causes of action in a federal court is *set out in § 522.170*.

[3] Allegations

This complaint alleges in the first cause of action: (1) identity and capacity of the defendant (Paragraph 1); (2) fictitious names of any unknown defendants (Paragraph 2); (3) description of the maritime nature of the setting of the injuries on the defendant's vessel, with possible specification of California contacts (Paragraph 3) [*see* Ch. 323, *Jurisdiction: Personal*]; (4) plaintiff's employment as a seaman (Paragraph 4); (5) the defendant's negligence (Paragraph 5); (6) plaintiff's resultant injuries (Paragraph 6); (7) damages to plaintiff (Paragraphs 7-9) [*see 46 U.S.C.S. § 30104*]; the complaint alleges in the second cause of action: The unseaworthiness of defendant's vessel, resulting in plaintiff's injuries (Paragraph 11) [*see Baptiste v. Superior Court (1980) 106 Cal. App. 3d 87, 99, 164 Cal. Rptr. 789]* .

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case in the superior court [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Pleading Alternative Cause of Unseaworthiness

It is common and acceptable practice for a plaintiff to plead both the Jones Act and the unseaworthiness doctrine and place both causes of action before the jury, although there is but one recovery. The distinctions between the two remedies have become largely obliterated; after several years of confusion in the courts, the two counts have come to be regarded as inseparable causes [*Baptiste v. Superior Court (1980) 106 Cal. App. 3d 87, 99, 164 Cal. Rptr. 789]* . For discussion of the Jones Act and unseaworthiness, see *§ 522.31*.

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46-522 California Forms of Pleading and Practice--Annotated § 522.172

§ 522.172 Allegation Under Jones Act [46 U.S.C.S. § 30104]--Seaman Injured on Wharf in Course of Employment

[1] FORM Allegation Under Jones Act [46 U.S.C.S. app. § 688]--Seaman Injured on Wharf in Course of Employment

On or about _____ [*date*], plaintiff was ordered by the master of the vessel to, and pursuant to such order did, proceed to the office of _____ [*stevedoring company*], who were the owners and operators of Pier No. _____, in the Port of _____ [*specify*]; while plaintiff was so proceeding, the _____ [*stevedoring company*] by and through its agents, servants, and employees, carelessly and negligently _____ [*describe negligence, e.g.,* owned, operated, maintained, and controlled a fork lift on the pier, so that the fork lift was caused to back into and strike plaintiff with great force and violence].

[2] Use of Form

This allegation may be substituted for Paragraph 4 of the *form in § 522.170* or Paragraph 5 of the *form in § 522.171*, if the seaman sues the shipowner under the Jones Act for personal injuries which occurred off the vessel.

[3] Cross References

For related forms, see *§§ 522.170, 522.171*

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46-522 California Forms of Pleading and Practice--Annotated § 522.173

§ 522.173 Allegation of Unseaworthiness--Aggravation of Injuries by Failure to Furnish Medical Attention While Aboard Ship

[1] FORM Allegation of Unseaworthiness--Aggravation of Injuries by Failure to Furnish Medical Attention While Aboard Ship

Defendant refused and neglected to furnish plaintiff with proper and necessary medical attention or assistance, and plaintiff was unable to obtain medical attention or assistance from any other source during the course of the vessel's voyage from _____ [*specify port*] to _____ [*specify port*]. As a proximate result of defendant's failure to so provide a seaworthy vessel, plaintiff's injuries, as described above, were seriously aggravated, and he/she was forced to suffer great pain and inconvenience all to his/her further damage in the sum of $_____.

[2] Use of Form

This allegation may be added to the *form in § 522.170* or the *form in § 522.171*, if the seaman sues the shipowner for personal injuries on the additional ground of unseaworthiness due to failure to furnish adequate medical attention during the voyage [*see Trovatten v. United States (E.D. Pa. 1972) 342 F. Supp. 866, 871]* .

[3] Cross References

For related forms, see *§§ 522.170, 522.171*

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46-522 California Forms of Pleading and Practice--Annotated § 522.174

§ 522.174 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action by Seaman--No Employment Relationship

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action by Seaman--No Employment Relationship

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

Plaintiff and defendant never entered into a contract of employment, nor in any way created an employer-employee relationship and did not maintain any such relationship during the time of the accident alleged in the complaint. Therefore, defendant is not liable for the alleged damages from plaintiff's _____ [injury *or* death].

[2] Use of Form

This affirmative defense may be used in an answer to a complaint brought by a seaman for personal injuries under the Jones Act or for unseaworthiness. It is for use by a defendant who maintains that a true employment relationship did not exist between the parties. In certain instances this defect to the cause of action may be obvious from the allegations of the complaint, in which event the point should be raised by demurrer [*see Code Civ. Proc. § 430.30(a)*].

[3] Cross References

For related forms, see *§§ 522.170, 522.171*

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46-522 California Forms of Pleading and Practice--Annotated § 522.175

§ 522.175 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action by Seaman--Nonownership of Vessel by Time Charterer

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action by Seaman--Nonownership of Vessel by Time Charterer

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

At the time of the accident alleged in the complaint, defendant _____ [*name*] was not the owner of _____ [*name, nationality, registry number, or other designation of vessel*]; there was no demise of the vessel to defendant; defendant was merely the time charterer of the vessel and as such neither possessed, managed, maintained, operated, nor controlled the vessel; and the master, officers, and crew of the vessel were employed by its owners. As a consequence of the foregoing, defendant owed no duty to plaintiff with respect to the matters and things alleged in the complaint [and in each cause of action thereof].

[2] Use of Form

This affirmative defense may be used in an answer to a complaint brought by a seaman for personal injuries under the Jones Act or for unseaworthiness. It is for use by a defendant who claims that he or she is not the shipowner but only a time charterer of the vessel in question.

[3] When Charterer Has Liability

Under a demise charter, the charterer is considered as having the duties of an owner in possession and could be held liable to certain maritime employees. A time charterer, in a sense, merely rents cargo space and does not have a corresponding liability. The charter for the particular leasing privileges involved may indicate which type of responsibility is to be imposed. Normally, a demise charter is not present if the owner retains control over manning, navigating, equipping, and maintaining the vessel [*see Apodoca v. Schiffahrtsgesellschaft De Vries & Co. (1962) 199 Cal. App. 2d 605, 608-610, 18 Cal. Rptr. 869]* . This principle is also recognized under the federal Limitation of Liability Act, which provides that a charterer who mans, supplies, and navigates a vessel at his or her own expense, or

by his or her own procurement, is to be deemed to be the owner of that vessel under the act [*46 U.S.C.S. § 30501*].

[4] Cross References

For related forms, see *§§ 522.170, 522.171*

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46-522 California Forms of Pleading and Practice--Annotated § 522.176

§ 522.176 Complaint for Damages [Civ. Code § 3333] for Personal Injuries--By Longshoreman or Harbor Worker Against Shipowner [33 U.S.C.S. §§ 905(b), 933]

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries--By Longshoreman or Harbor Worker Against Shipowner [33 U.S.C.S. §§ 905(b), 933]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR
vs.	)	DAMAGES
_____ [*name*],	)	(Longshoremen's and
Defendant.	)	Harbor Workers'
	)	Compensation Act)
	)	[*33 U.S.C.S. §§ 905(b), 933*;
	)	*Civ. Code § 3333*]
	)	

_____

Plaintiff alleges:

[1. *Capacity and identity of defendant and facts establishing venue, e.g., adapting see § 522.171, Paragraphs 1, 3.*]

[2. *Fictitious name allegations. See § 522.171, Paragraph 2.*]

3. On or about _____ [*date*], plaintiff's employer, _____ [*name of employer*], was engaged in rendering stevedoring services on and about the vessel _____ [*name of vessel*] then lying alongside the _____ [*describe location of vessel, e.g.,* the dock at Pier 1,] at the Port of _____ [*specify*], California, and plaintiff was employed as a _____ [longshoreman *or describe other worker*] on that site and at that time in performing such services on behalf of the employer.

4. Defendant failed to exercise due care under the circumstances toward plaintiff in that _____ [*describe breach of duty, e.g.,* defendant left a thick layer of grease lying in various places on the deck, including plaintiff's work area, which grease had been deposited as a result of a special cleaning operation of the night before]. Defendant thus failed to exercise ordinary care under the circumstances _____ [to have the ship and its equipment in such condition that plaintiff's employer, an expert and experienced stevedore, would be able, by the exercise of reasonable care, to carry on cargo operations with reasonable safety to persons and property *or* by not warning plaintiff's employer of hazards _____ (on the ship *or* with respect to the ship's equipment) that were known, or should have been known, to defendant in the exercise of reasonable care, and that were likely to be encountered by plaintiff's employer in the course of its cargo operations, but were not known by such employer and would not be obvious to or anticipated by it as a stevedore reasonably competent in the performance of its work].

5. As a proximate result of the dangerous condition and defendant's negligence, plaintiff was severely injured when _____ [*describe injurious incident, e.g.,* swinging a crate of cargo, he/she slipped on the layer of grease], thereby sustaining injuries as described below.

[6. *Plaintiff's damages. See § 522.171, Paragraphs 7-9.*]

[*Prayer. See § 522.171* .]
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 522.171* .]

[2] Use of Form

This complaint may be used to obtain damages in a California court by a longshoreman or harbor worker covered under the Longshoremen's and Harbor Workers' Compensation Act, who contends that injuries he or she suffered were caused by the negligence of a shipowner. With appropriate modification, this form may be used to state a claim for relief in the proper United States District Court. For allegations for use when the employee sues a third party other than the shipowner, see *§ 522.177*. For a discussion of procedures for suing third parties generally, see *§ 522.32[6]*.

[3] Allegations

This complaint alleges: (1) the nature of the work plaintiff's employer and plaintiff were performing on or about the vessel (Paragraph 3); (2) the failure of the defendant to exercise the due care owed to the plaintiff under the circumstances (Paragraph 4) [*see Marine Terminals v. Burnside Shipping Co. (1969) 394 U.S. 404, 415, 416 n.18, 89 S. Ct. 1144, 22 L. Ed. 2d 371* ; *Scindia Steam Navigation Co. v. De Los Santos (1981) 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed. 2d 1, 12]* ; and (3) plaintiff's resultant injury (Paragraph 5) [*see 33 U.S.C.S. § 905(b)*].

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46-522 California Forms of Pleading and Practice--Annotated § 522.177

§ 522.177 Allegations to Complaint for Personal Injuries--By Longshoreman or Harbor Worker Against Third Party Other Than Shipowner [33 U.S.C.S. § 933]

[1] FORM Allegations to Complaint for Personal Injuries--By Longshoreman or Harbor Worker Against Third Party Other Than Shipowner [33 U.S.C.S. § 933]

4. On or about _____ [*date*], defendant independently provided _____ [services to the vessel *or* plaintiff's employer with certain equipment and supplies with which to render services] consisting of _____ [*describe, e.g.,* a boom for loading and unloading cargo]. Defendant was negligent in providing such _____ [services *or* equipment] in that _____ [*describe carelessness, e.g.,* the boom was made defectively in that it contained unstable parts, causing the apparatus to rupture under normal strain].

5. As a proximate result of defendant's negligence, plaintiff was severely injured when _____ [*describe injurious incident, e.g.,* the boom snapped during its normal use by plaintiff and others during performance of their regular labors, falling on plaintiff and crushing him/her].

[2] Use of Form

This allegations may be substituted for Paragraphs 4 and 5 of the *form in § 522.176*, in a complaint by a longshoreman or harbor worker against a third party other than the shipowner for personal injuries [*see 33 U.S.C.S. § 933*].

[3] Cross References

For a related form, see *§ 522.176*

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46-522 California Forms of Pleading and Practice--Annotated § 522.178

§ 522.178 Complaint for Damages [Civ. Code § 3333] for Personal Injuries--By Employer on Behalf of Longshoreman or Harbor Worker Against Shipowner or Other Third Party [33 U.S.C.S. § 933]

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries--By Employer on Behalf of Longshoreman or Harbor Worker Against Shipowner or Other Third Party [33 U.S.C.S. § 933]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR
vs.	)	DAMAGES
_____ [*name*],	)	(Longshoremen's and
Defendant.	)	Harbor Workers'
	)	Compensation Act)
	)	[*33 U.S.C.S. § 933*; *Civ. Code § 3333*]
	)	

_____

Plaintiff alleges:

[1. *Capacity and identity of defendant and facts establishing venue, e.g., adapting see § 522.171, Paragraphs 1, 3.*]

[2. *Ficititious name allegation, if appropriate. See § 522.171, Paragraph 2.*]

3. Plaintiff is, and at all times herein has been, a corporation, duly organized and existing under the laws of the State of

_____ [*specify state*] [and authorized to transact business in the State of California], engaged in the business of providing and performing through its various personnel _____ [*describe services, e.g.,* stevedoring] services to vessels. Plaintiff employed the services of _____ [*name of injured employee*], (hereinafter referred to as "plaintiff's employee," from _____ [*date*], to _____ [the present time *or* _____ (*date*)] as a _____ [*specify, e.g.,* stevedore].

4. On or about _____ [*date*], plaintiff entered into a contract with _____ [defendant *or other party*] to provide _____ [*describe services, e.g.,* stevedoring] services on and about the vessel _____ [*name of vessel*] then lying alongside _____ [*describe location of vessel, e.g.,* the dock at Pier 1] at the Port of _____ [*specify*]. On or about _____ [*date*], plaintiff dispatched plaintiff's employee to such location to perform such services.

[*EITHER, if employee's injuries were caused by the shipowner*]

5. Defendant, however, failed to exercise due care under the circumstances toward plaintiff's employee in that _____ [*describe breach of duty, e.g.,* defendant left a large electric cable hanging down the side of a cabin and in contact with standing water on the deck as a result of an incomplete watch of the previous evening]. Defendant thus failed to exercise ordinary care under the circumstances _____ [to have the ship and its equipment in such condition that plaintiff, as an expert and experienced stevedore, would be able, by the exercise of reasonable care, to carry on its cargo operations with reasonable safety to persons and property *or* in not warning plaintiff of hazards _____ (on the ship *or* with respect to the ship's equipment) that were known, or that should have been known, to defendant in the exercise of reasonable care, and that were likely to be encountered by plaintiff in the course of its cargo operations, but were not known by plaintiff and would not be obvious to or anticipated by it as a stevedore reasonably competent in the performance of its work].

[*OR, if employee's injuries were caused by negligence of third party other than shipowner*]

5. On or about _____ [*date*], defendant, independently, provided _____ [services to the vessel *or* plaintiff's employer with certain equipment and supplies with which to render services] [consisting of _____ (*describe e.g.,* special detergent in barrels for both fumigating and washing the decks)]. Defendant was negligent in providing such _____ [services *or* equipment and supplies] in that _____ [*describe, e.g.,* the detergent mix had been compounded improperly with a substance that was poisonous to breathe, and the wind spread it around for plaintiff's employee and others to breathe].

[*EITHER, if employee's injuries were caused by shipowner*]

6. As a proximate result of the dangerous condition and defendant's negligence, plaintiff's employee was severely injured when _____ [*describe injurious incident, e.g.,* he/she had to pass through the passage where the cable was hidden in the water, and stepped onto the cable receiving a severe discharge of electrical force through his/her foot].

[*OR, if employee's injuries were caused by negligence of third party other than shipowner*]

6. As a proximate result of defendant's negligence, plaintiff's employee was severely injured when _____ [*describe injurious incident, e.g.,* the wind carried the poisonous fumes to plaintiff's employee

while he/she was working on the decks washed with the deleterious detergent, and he/she became violently ill from the effects thereof].

7. On or about _____ [*date*], plaintiff's employee received an award under a compensation order of _____ [*describe award*] under the Longshoremen's and Harbor Workers' Compensation Act. A true copy of the order is attached hereto as Exhibit A and made a part hereof. On or about _____ [*date*], plaintiff's employee accepted the compensation under the award in the compensation order as filed and failed to commence an action against defendant within six months after the award.

[*Prayer. See § 522.171.*]
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 522.171.*]

[2] Use of Form

This complaint may be used by an employer in an action for personal injuries to an employee longshoreman or harbor worker against a shipowner or other third party responsible for the employee's injuries. With appropriate modifications, it may be used in a claim of relief filed in federal court by such an employer plaintiff.

[3] Allegations

This complaint alleges: (1) plaintiff's business as a stevedore, ship builder and repairer, or similar enterprise, and its employment of the employee who was injured (Paragraph 3); (2) plaintiff's engagement to render its services to a particular vessel, and its employment of the injured employee in that operation (Paragraph 4); (3) the negligence of the defendant that led to the injury--if the defendant is the shipowner, alleging the same standard of negligence as is alleged when the employee sues the shipowner [*see 33 U.S.C.S. § 905(b)*; *see § 522.171*]; otherwise, alleging the negligence of another third party who either rendered services or sold supplies to the vessel or provided like matters to the plaintiff who used them in rendering services to the vessel [*see § 522.177*]; and in either instance, the resultant injury to plaintiff's employee (Paragraphs 5, 6); and (4) issuance of a compensation order on behalf of the employee and the employee's acceptance of the award and failure to sue defendant, which resulted in an assignment of the employee's claim to the plaintiff employer (Paragraph 7) [*see 33 U.S.C.S. § 933*; *see also § 522.32[6][a]*].

[4] Cross References

For related forms, see *§§ 522.176, 522.177*

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46-522 California Forms of Pleading and Practice--Annotated § 522.179

§ 522.179 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] of Shipowner to Complaint for Injuries by Longshoreman or Harbor Worker or Employer Thereof [33 U.S.C.S. §§ 905(b), 933]--Negligence of Fellow Servants

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] of Shipowner to Complaint for Injuries by Longshoreman or Harbor Worker or Employer Thereof [33 U.S.C.S. §§ 905(b), 933]--Negligence of Fellow Servants

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

_____ [Plaintiff was employed by defendant to provide _____ (stevedoring *or* shipbuilding *or* ship repair) services *or an admission to the same effect made earlier in the answer may be substituted for this allegation*]. The injury of which plaintiff complains was caused by the negligence of other persons engaged in providing the same services to the vessel as plaintiff was providing, in that _____ [*describe fellow servants' fault, e.g.,* although all stevedores had been strictly cautioned by defendant not to stand on cargo cartons, several of those stevedores working with plaintiff insisted that he/she stand on certain crates in order to accomplish his/her work and caused him/her to do so, as a result of which the injury described in the complaint occurred].

[2] Use of Form

This affirmative defense may be used by a shipowner in an answer to a complaint for personal injuries filed by a longshoreman or harbor worker [*see § 522.176*], when the basis for defending is the negligence of fellow servants. With appropriate modification, this defense may be used in answer to a claim for relief brought in federal court by a longshoreman or harbor worker against a shipowner for personal injuries.

[3] Defense of Fellow Servants' Negligence

Under the Longshoremen's and Harbor Workers' Compensation Act, when a vessel (including its owners or representatives [*see 33 U.S.C.S. § 902(21)*]) is sued by a longshoreman or harbor worker for negligence, the vessel may

resort to certain defenses denied to the employer. If the plaintiff was employed to perform stevedoring services, the action is not permitted if the injury was caused by the negligence of another stevedore. If the plaintiff was employed to provide shipbuilding, repairing, or breaking services, and the employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no action is permitted directly or indirectly against the employer in any capacity, including that as owner [*33 U.S.C.S. § 905(b)*].

[4] Cross References

For a related form, see *§ 522.176*

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46-522 California Forms of Pleading and Practice--Annotated § 522.180

§ 522.180 Complaint for Damages [Civ. Code § 3333] for Maintenance and Cure--By Seaman Against Shipowner

[1] FORM Complaint for Damages [Civ. Code § 3333] for Maintenance and Cure--By Seaman Against Shipowner

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR
_____ [*name*],	)	DAMAGES
Defendant.	)	(Maintenance and Cure of
	)	Seaman)
	)	

_____

Plaintiff alleges:

[1. *Capacity and identity of defendant. See § 522.171, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 522.171, Paragraph 2.*]

[3. *Defendant as vessel owner. See § 522.171, Paragraph 3.*]

[4. *Hiring of plaintiff as seaman. See § 522.170, Paragraph 3.*]

5. On or about _____ [*date*], while the vessel was _____ [*describe location, e.g.,* lying alongside the dock at Pier 1, at the Port of _____ (*specify*) *or* on the high seas some _____ miles off the coast of _____ (*state or country*)], plaintiff contracted and suffered a disabling condition, _____ [*describe, e.g.,* consisting of a high fever and an inability to remain ambulatory for extended periods].

6. Immediately prior to suffering this condition plaintiff was a strong, able-bodied person, capable of continuous, gainful employment in the occupation of _____ [*describe*]. By reason of this disabling condition, plaintiff _____ [has been caused to suffer great physical and mental pain and suffering *or describe condition more specifically*], has incurred [and will continue to incur] medical and related expenses [in the sum of $_____], and is unable [and will continue to be unable] to attend to his/her usual occupation as a _____ [*describe*]. [Defendant has contributed to plaintiff's maintenance the amount of $_____, up to and ending on or about _____ [*date*].]

WHEREFORE, plaintiff prays judgment against defendant, as follows:

1. For an amount representing plaintiff's maintenance until cure [in the sum of $_____];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 522.171.*]

[2] Use of Form

This complaint may be used in a California court when a seaman is suing for maintenance and cure resulting from contracting a disabling condition while in the ship's service. With appropriate modifications, it may be adapted for a claim brought in federal court [*see § 522.170*]. The cause of action for maintenance and cure is sometimes joined to a complaint for personal injuries [*see §§ 522.170, 522.171*].

For further discussion, see *§ 522.33*.

[3] Allegations

This complaint alleges: (1) contraction by the plaintiff of a disabling condition while in service on or to a ship (Paragraph 5); and (2) expenses incurred for treatment by plaintiff to the extent uncompensated by the defendant (Paragraph 6).

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Volume 46: Settlement and Release thru Subpoena Chs. 520-535
Chapter 522 SHIPS AND SHIPPING
PART IV. FORMS
B. Personal Injuries

46-522 California Forms of Pleading and Practice--Annotated § 522.181

§ 522.181 Complaint for Damages [Civ. Code § 3333] Under Jones Act [46 U.S.C.S. § 30104] for Wrongful Death of Seaman--By Personal Representative Against Shipowner

[1] FORM Complaint for Damages [Civ. Code § 3333] Under Jones Act [46 U.S.C.S. app. § 688] for Wrongful Death of Seaman--By Personal Representative Against Shipowner

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	
as _____	)	
[*specify capacity, e.g.,* Administrator (With the Will	)	NO. _____
Annexed) of the Estate *or* Executor of the Will] of	)	COMPLAINT FOR
_____ [*name*], Deceased,	)	DAMAGES FOR
Plaintiff,	)	WRONGFUL DEATH
vs.	)	OF SEAMAN
_____ [*name*],	)	
Defendant.	)	
	)	

Plaintiff alleges:

FIRST CAUSE OF ACTION

1. On or about _____ [*date*], plaintiff was issued letters _____ [*specify, e.g.,* of

administration of the estate (with the will annexed) *or* testamentary of the will] of _____ [*name*] deceased, by the Superior Court of California, County of _____.

2. Plaintiff is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased.

3. Plaintiff brings this action as specified under Section 30104 of Title 46 of the United States Code Service, commonly known as the Jones Act, for the death of the decedent as a result of personal injury suffered in the course of decedent's employment as a seaman, and for the benefit of the surviving _____ [spouse (and children) of *or* children of *or* parents of *or* next of kin dependent on] such decedent seaman.

4. The surviving relatives of decedent on whose behalf this action is brought are the following:

Name	Relationship
_____	_____
_____	_____
_____	_____

[5. *Capacity and identity of defendant. See § 522.171, Paragraph 1.*]

[6. *Fictitious name allegation, if appropriate. See § 522.171, Paragraph 2.*]

[7. *Defendant as vessel owner. See § 522.171, Paragraph 3.*]

[8. *Hiring of decedent. See § 522.176, Paragraph 3, changing term "plaintiff" to "decedent."*]

[9, 10. *Negligence of defendant and injury to decedent. See § 522.171, Paragraphs 6, 7, changing term "plaintiff" to "decedent."*]

11. As a proximate result of the defendant's negligence, decedent was _____ [*describe injuries, e.g.,* severely burned and hospitalized for several weeks], which injuries ultimately resulted in decedent's death on _____ [*date*], at _____ [*specify location*].

12. Prior to the death of decedent, the above-named relatives were [totally] dependent on decedent for _____ [*describe, e.g.,* financial support, for services of preservation and maintenance of family and home, for nurturing, training, and guiding the children, and for providing love, affection, care, attention, companionship, comfort, and protection through his/her society].

13. As a proximate result of the defendant's negligence described above and the resultant loss of decedent, decedent's relatives have sustained pecuniary loss stemming from the loss of support, services, and society of the decedent [in the sum of $_____].

14. As a further proximate result of the defendant's acts and the loss of decedent, decedent's relative _____ [*name*] has incurred funeral and burial expenses [in the sum of $_____, which is the reasonable value of such services].

SECOND CAUSE OF ACTION

15. Plaintiff incorporates by reference as though fully set forth below each and every allegation of Paragraphs 1-8 and 11-13 of the First Cause of Action herein.

[16. *Unseaworthiness of vessel as resulting in injuries. See § 522.171, Paragraph 11, or see § 522.173, changing term "plaintiff" to "decedent."*]

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages [in the sum of $_____];

2. For funeral and burial expenses for _____ [*name*], decedent's _____ [*specify relationship*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 522.171.*]

[2] Use of Form

This complaint may be brought by a personal representative on behalf of a seaman killed during the course of employment. The *form in § 522.182* is a similar form for use by the personal representative of a longshoreman or harbor worker. With appropriate modification, this form may be adapted to present a claim for relief in a federal court [*see § 522.170*]. For further discussion, see *§ 522.31[9]*.

[3] Cross References

For related forms, see *§§ 522.170, 522.171*

[4] Allegations

This complaint alleges in the first cause of action: (1) issuance of probate letters to the plaintiff's personal representative (Paragraph 1); (2) present qualification of plaintiff to bring suit on behalf of the decedent employee (Paragraph 2); (3) bringing of the present action under the Jones Act (Paragraph 3) [*see 46 U.S.C.S. § 30104*]; (4) the names and relationships of the relatives on whose behalf the action is being brought, and who are so entitled to have it brought (Paragraph 4); (5) decedent's death as a result of defendant's negligence (Paragraph 11); (6) dependency on the decedent by the survivors (Paragraph 12); (7) resultant damages to the survivors (Paragraph 13); and (8) additional expenses of funeral and burial (Paragraph 14). The second cause of action is for unseaworthiness of the vessel (Paragraphs 15, 16).

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Chapter 522 SHIPS AND SHIPPING
PART IV. FORMS
B. Personal Injuries

46-522 California Forms of Pleading and Practice--Annotated § 522.182

§ 522.182 Complaint for Damages [Civ. Code § 3333] for Wrongful Death of Longshoreman or Harbor Worker [33 U.S.C.S. §§ 905(b), 933]--By Personal Representative Against Shipowner or Other Third Party

[1] FORM Complaint for Damages [Civ. Code § 3333] for Wrongful Death of Longshoreman or Harbor Worker [33 U.S.C.S. §§ 905(b), 933]--By Personal Representative Against Shipowner or Other Third Party

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
as _____	)	
[*specify capacity, e.g.,* Administrator (With the Will	)	
Annexed) of the Estate *or* Excutor of the Will] of	)	NO. _____
_____ [*name*], Deceased,	)	COMPLAINT FOR DAMAGES FOR WRONGFUL
Plaintiff,	)	DEATH OF _____
vs.	)	[LONGSHOREMAN *or* HARBOR WORKER]
_____ [*name*],	)	[*33 U.S.C.S. §§ 905(b), 933*]
Defendant.	)	
	)	

_____

Plaintiff alleges:

[1. *Issuance of letters to plantiff as fiduciary. See § 522.181, Paragraph 1.*]

[2. *Plaintiff's capacity as personal representative of decedent's estate. See § 522.181, Pargraph 2.*]

3. Plaintiff brings this action as specified under Sections 905(b) and 933 of Title 33 of the United States Code Service, the Longshoremen's and Harbor Workers' Compensation Act, for the death of the decedent arising out of the course of

decedent's employment as a _____ [longshoreman *or* harbor worker], and for the benefit of the _____ [spouse *or* parent *or* dependent *or* next of kin *or other entitled person*] of such decedent.

[4. *Surviving relatives. See § 522.181, Paragraph 4.*]

[5. *Capacity and residence of defendant. See § 522.171, Paragraph 1.*]

[6. *Fictitious name allegation, if appropriate. See § 522.171, Paragraph 2.*]

[7. *Describe defendant, e.g., as shipowner. See § 522.171, Paragraph 3.*]

8. On or about _____ [*date*], decedent's employer, _____ [*name of employer*], was engaged in rendering stevedoring services on and about the vessel _____ [*name of vessel*] then lying alongside _____ [*describe location of vessel, e.g.,* the dock at Pier 1,] at the Port of _____ [*specify*], and decedent was employed as a _____ [longshoreman *or describe other type of worker*] on that site, and at that time was performing such services on behalf of the employer.

[*EITHER, if injury caused by negligence of shipowner*]

9. Defendant failed to exercise due care under the circumstances toward decedent employee in that _____ [*describe breach of duty, e.g.,* defendant left a thick layer of grease lying in various places on the deck, including decedent's work area]. Defendant thus failed to exercise ordinary care under the circumstances _____ [to have the ship and its equipment in such condition that decedent's employer, as an expert and experienced stevedore, would be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property *or* in not warning decedent's employer of hazards _____ (on the ship *or* with respect to the ship's equipment) that were known, or should have been known, to defendant in the exercise of reasonable care, and that were likely to be encountered by decedent's employer in the course of its cargo operations, but were not known by such employer and would not be obvious to or anticipated by it as a stevedore reasonably competent in the performance of its work].

[*OR, if injury caused by negligence of third party other than shipowner*]

9. On or about _____ [*date*], defendant independently provided _____ [services to the vessel *or* decedent's employer with certain equipment and supplies with which to render services] consisting of _____ [*describe, e.g.,* a boom for loading and unloading cargo]. Defendant was negligent in providing such _____ [services *or* equipment] in that _____ [*describe carelessness, e.g.,* the boom was made defectively in that it contained unstable parts, causing the apparatus to rupture under normal strain or normal hours of usage].

[*EITHER, if injuries caused by shipowner*]

10. As a proximate result of the dangerous condition and defendant's negligence, decedent was fatally injured when _____ [*describe injurious incident, e.g.,* swinging a crate of cargo, he/she slipped on the layer of grease], thereby sustaining injuries as described below.

[*OR, if injuries caused by negligence of third party other than shipowner*]

10. As a proximate result of defendant's negligence, decedent was fatally injured when _____ [*describe injurious incident, e.g.*, the wind carried the poisonous fumes to decedent while he/she was working on the decks washed with the deleterious detergent, and he/she became violently ill and died from the effects thereof].

[11-13. *Losses by decedent's survivors. See § 522.181, Paragraphs 12-14.*]

[*Prayer. See § 522.181.*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 522.171.*]

[2] Use of Form

This form is a complaint that may be brought by a personal representative on behalf of a longshore or harbor worker killed during the course of employment. A similar form for use by the personal representative of a seaman is *set out in § 522.181*. With appropriate modification, this form may be adapted to present a claim for relief in a federal court [*see § 522.170*]. For further discussion, see *§§ 522.32[5], 522.32[6], 522.170, 522.171, 522.176*, and *522.177*.

For a description of the allegations, see *§ 522.181[4]* regarding the first cause of action in that form.

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Chapter 522 SHIPS AND SHIPPING
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B. Personal Injuries

46-522 California Forms of Pleading and Practice--Annotated § 522.183

§ 522.183 Complaint for Damages [Civ. Code § 3333] for Personal Injuries--By Passenger Against Shipowner

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injuries--By Passenger Against Shipowner

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Personal Injuries to Ship's Passenger)
Defendant.	)	
	)	
	)	

Plaintiff alleges:

[1. *Capacity and identity of defendant. See § 522.171, Paragraph 1.*]

[2. *Fictitious name allegations, if appropriate. See § 522.171, Paragraph 2.*]

3. Defendant is now, at all times herein mentioned was, engaged in the business of operating passenger vessels, as common carriers for hire. In that capacity, defendant operated the _____ [*name, nationality, registry number, or other designation of vessel*].

4. On or about _____ [*date*], defendant, as a common carrier for hire, agreed to transport plaintiff from _____ [*specify port*] to _____ [*specify port*]. Pursuant to this agreement, plaintiff was assigned to an upper berth in Cabin No. _____ on the _____ [*describe, e.g.,*

Promenade] Deck of the vessel.

5. Defendant, acting through its agents, servants, and employees on the vessel, negligently _____ [*describe, e.g.,* failed to provide plaintiff with a safe, or any, means of ascending into and descending from the upper berth in his/her cabin] so that on or about _____ [*date*], while the vessel was _____ [on the high seas *or* in _____ (*specify port*)] _____ [*describe injurious incident, e.g.,* plaintiff used a curtain rod attached to the upper berth to assist him in descending from the berth, and the rod broke off, causing him to fall from the berth to the floor of the cabin, resulting in the injuries hereinafter set forth].

6. As a proximate result of defendant's neglect and default, plaintiff was severely injured in that _____ [*describe injuries, e.g.,* his knees were crushed, his hip was dislocated, and his elbows were fractured], leading plaintiff to suffer severe damages.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages;

2. For damages for past and future medical expenses according to proof;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification. See § 522.171.*]

[2] Use of Form

This complaint is for use by a passenger against a shipowner for personal injuries sustained while traveling on the defendant's vessel.

For discussion of liabilities to passengers on vessels, see *§ 522.36*.

[3] Allegations

This complaint alleges: (1) defendant's occupation as a common carrier (Paragraph 3); (2) defendant's arrangement to take plaintiff on the voyage (Paragraph 4); (3) defendant's breach of the duty of care to plaintiff resulting in plaintiff's injury (Paragraph 5); and (4) plaintiff's resultant damages (Paragraph 6).

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Chapter 522 SHIPS AND SHIPPING
PART IV. FORMS
B. Personal Injuries

46-522 California Forms of Pleading and Practice--Annotated § 522.184

§ 522.184 Complaint [Fed. R. Civ. P., Rule 7] for Wrongful Death of Passenger Under Death on the High Seas Act [46 U.S.C.S. § 30301 et seq.]--By Personal Representative of Passenger Against Shipowner

[1] FORM Complaint [Fed. R. Civ. P., Rule 7] for Wrongful Death of Passenger Under Death on the High Seas Act [46 U.S.C.S. app. §§ 761-768]--By Personal Representative of Passenger Against Shipowner

[*EITHER*]
UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION
[*OR*]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
as _____	)	
[*specify capacity, e.g.,* Administrator (With the Will	)	
Annexed) of the Estate *or* Executor of the Will] of	)	NO. _____
_____ [*name*], Deceased,	)	COMPLAINT FOR DAMAGES FOR WRONGFUL
Plaintiff,	)	DEATH
vs.	)	(Death on the High Seas Act)
_____ [*name*],	)	
Defendant.	)	
	)	

_____

[1. This action is instituted under the provisions of Section 30301 of Title 46 of the United States Code Service, commonly known and designated as the Death on the High Seas Act, over which the United States District Court has jurisdiction pursuant to Section 30302 of Title 46 of the United States Code Service. (This is an admiralty or maritime

claim within the meaning of *Rule 9(h) of the Federal Rules of Civil Procedure*.)]

[2. *Status of plaintiff. See § 522.181, Paragraph 1*.]

[3. *Capacity of plaintiff. See § 522.181, Paragraph 2*.]

4. Plaintiff brings this action in admiralty under Section 30302 of Title 46 of the United States Code Service, known as the Death on the High Seas Act, for the exclusive benefit of the decedent's _____ [spouse *or* parent *or* child *or* dependent relative] for the death of the decedent, which was caused by a wrongful act, neglect, or default occurring on the high seas, against the responsible _____ [person *or* corporation].

[5. *Identity of surviving relatives. See § 522.181, Paragraph 4*.]

[6. *Capacity and identity of defendant. See, e.g., see § 522.170*, Paragraph 2.]

7. Defendant, as a common carrier for hire, agreed to transport the decedent from _____ [*specify port*] to _____ [*specify port*]. Pursuant to that agreement decedent became a passenger on the vessel on or about _____ [*date*].

8. On or about _____ [*date*], while the vessel was on the high seas _____ days out of _____ [*specify port*], [at _____ longitude, _____ latitude,] and while decedent was on board the vessel as a passenger, _____ [*state facts showing marine disaster or accident, e.g.*, so far as is known, the vessel met with some disaster at sea as a result of which the vessel was lost or destroyed].

9. As a proximate result of the disaster, decedent was _____ [killed *or* so seriously injured that he/she died at the time of the disaster or shortly thereafter] [, together with _____ (all the *or* many) other persons on board the vessel].

[10. A quantity of the wreckage from the vessel was recovered floating on the waters of the _____ Ocean, _____ (at approximately _____ latitude and _____ longitude *or* _____ miles from _____ (*nearest land*), or more than three nautical miles from the nearest land) (, including various articles that had been in the possession of decedent). _____ (Neither the body of decedent nor that of any other person on board said vessel at the time of said disaster was recovered *or* Although various crew members and passengers of the vessel were rescued from the deck and surrounding waters, the body of decedent was not recovered).]

11. The death of decedent was caused proximately by the wrongful acts, neglect, or default of defendant, through its agents, servants, and employees, in causing or permitting the above-mentioned disaster. Such act, neglect, default, or carelessness would have entitled decedent, if he/she had not died, to maintain an action against and to recover damages from defendant in respect thereto.

[12. *Dependency of relatives on decedent. See § 522.181, Paragraph 12*.]

[13. *Damages to survivors. See § 522.181, Paragraph 13, changing word "negligence" to phrase "wrongful acts, neglect, or default."*]

14. [*Funeral and burial expenses. See § 522.181, Paragraph 14*.]

[*Prayer. See § 522.181*.]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 522.150.*]

[2] Use of Form

This complaint may be used in an action by the personal representative of a ship's passenger against the shipowner under the Death on the High Seas Act (DOHSA). This form may be adapted for use by the personal representative of a maritime employee as an alternative to the actions provided for in the *forms in §§ 522.181* and *522.182*.

The action may be brought in either federal district court or in a California state court, as federal court jurisdiction is concurrent with state jurisdiction to hear DOHSA actions, making available to DOHSA beneficiaries a convenient forum for the decision of their wrongful death claims [*46 U.S.C.S. § 30308(a)*; *Offshore Logistics, Inc. v. Tallentire (1986) 477 U.S. 207, 221, 232, 106 S. Ct. 2485, 91 L. Ed. 2d 174]* . However, DOHSA preempts state statutes whenever it applies [*Offshore Logistics, Inc. v. Tallentire (1986) 477 U.S. 207, 232, 106 S. Ct. 2485, 91 L. Ed. 2d 174]* .

If the death did not occur on the high seas but instead occurred within 3 nautical miles from shore, a wrongful death action based on state law may be brought in state court [*46 U.S.C.S. § 767*; *Offshore Logistics, Inc. v. Tallentire (1986) 477 U.S. 207, 221, 106 S. Ct. 2485, 91 L. Ed. 2d 174]* .

For discussion of recovery for wrongful death, see *§ 522.34*. For discussion and forms relating to state actions for wrongful death, see Ch. 181, *Death and Survival Actions* .

[3] Allegations

This complaint alleges: (1) the bringing of the action under the federal Death on the High Seas Act (Paragraph 4); (2) defendant's role as a common carrier of the decedent (Paragraph 7); (3) the ship's disaster at sea (Paragraph 8); (4) the resultant death of the decedent (Paragraph 9); (5) the debris evincing a shipwreck and/or the failure to recover decedent's body (Paragraph 10); and defendant's responsibility for the injury and death (Paragraph 11).

If the form is used to bring an action in federal court, it must allege the court's jurisdiction (Paragraph 1) [*Fed. R. Civ. P., Rule 8(a)*; see *Fed. R. Civ. P., Rule 9(h)* (allegation of admiralty jurisdiction when action combined with nonadmiralty claims)].

[4] Cross References

For related forms, see *§§ 522.170, 522.181, 522.182*

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46-522 California Forms of Pleading and Practice--Annotated §§ 522.185-522.199

[Reserved]

§§ 522.185[Reserved]

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Chapter 522 SHIPS AND SHIPPING
PART IV. FORMS
C. Property Interests
1. Actions by Shipowners

46-522 California Forms of Pleading and Practice--Annotated § 522.200

§ 522.200 Complaint for Damages [Civ. Code § 3300] for Breach of Written Contract for Payment of Freight--By Shipowner

[1] FORM Complaint for Damages [Civ. Code § 3300] for Breach of Written Contract for Payment of Freight--By Shipowner

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR
_____ [*name(s)*],	)	DAMAGES
[a Corporation]	)	(Breach of Contract)
Defendant(s).	)	[*Civ. Code § 3300*]
	)	
	)	

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a corporation, organized and existing under the laws of the State of California [with its principal place of business in (_____ [*city*],) _____ County *or allege other basis of venue as appropriate*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____ inclusive, and

therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

3. Attached hereto as Exhibit A and made a part hereof is an agreement, dated _____ [*date*], whereby defendant promised _____ [*state circumstances of payment, e.g.,* to fully pay freight in the amount of $_____ on receipt of goods for shipment by plaintiff, and that the freight was payable ship and/or cargo lost or not lost].

4. On or about _____ [*date*], a shipment of _____ [*describe goods*] _____ [owned by defendant *or* consigned to defendant] was recieved by plaintiff for tranportation from _____ [*specify place*] to _____ [*specify place*].

5. Plaintiff has performed all conditions, covenants, and promises required by the terms of the parties' contract.

6. There is now due and owing and unpaid the sum of $_____. [Defendant has _____ (refused *or* ignored) plaintiff's demand(s) for payment of freight.]

7. As a result of defendant's breach of contract, plaintiff has suffered damages in the amount of $_____.

WHEREFORE, plaintiff prays judgment against defendant [s, and each of them,] as follows:

1. For compensatory damages, in the sum of $_____;

2. For interest on the sum of $_____ from and after _____ [*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I beleive it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of complaint may be used by a shipowner to prosecute an action for breach of contract for freight in state court. Because contracts of affreightment and bills of lading are maritime contracts, the action falls within federal admiralty jurisdiction and can also be brought in federal district court [*Intagliata v. Shipowners & Merchs. Towboat Co., Ltd. (1945) 26 Cal. 2d 365, 371, 159 P.2d 1]* .

Some attorneys prefer to proceed in federal court so that an in personam action based on contract can be combined with an action in rem against the cargo to enforce the shipowner's maritime lien for freight [*see § 522.201*]. Such a proceeding would fall within the exclusive admiralty jurisdiction of federal courts [*Madruga v. Superior Court (1954) 346 U.S. 556, 560-561, 74 S. Ct. 298, 98 L. Ed. 290* ; Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C].

Whether the action is maintained in state or federal court, the substantive rules of federal maritime law will determine the rights of the parties [*Intagliata v. Shipowners & Merchs. Towboat Co., Ltd. (1945) 26 Cal. 2d 365, 371, 159 P.2d 1]* . State law would apply to fill the gaps in admiralty law, but only to the extent that it did not render changes in the maritime law [*Madruga v. Superior Court (1954) 346 U.S. 556, 561, 74 S. Ct. 298, 98 L. Ed. 290]* .

[3] Allegations

[a] In General

The complaint alleges (1) defendant's identity and capacity to be sued (Paragraph 1); (2) the existence of unknown defendants, if any (Paragraph 2); (3) the existence of the written contract (Paragraph 3); (4) the performance of all conditions by plaintiff (Paragraphs 4, 5); (5) the breach by defendant (Paragraph 6); and (6) the resulting damage to plaintiff (Paragraph 7) [*see Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377* ; *Acoustics, Inc. v. Trepte Constr. Co. (1971) 14 Cal. App. 3d 887, 913, 92 Cal. Rptr. 723]* . Paragraph 3 of the complaint notes that the parties' contract is written. If it cannot be ascertained from the pleading in contract actions whether the agreement is written or oral, the defendant may object by demurrer or answer [*Code Civ. Proc. § 430.10(g)*]. For additional discussion of contract actions, see Ch. 140, *Contracts* .

[b] Identity and Capacity of Defendants

The complaint alleges an action against a corporate defendant, which may be sued as provided in the Code of Civil Procedure [*Corp. Code § 105*]. When the defendant is not a natural person, the complaint should allege the defendant's identity as an existing entity against which the court's judgment will operate such as a corporation, a partnership, an unincorporated association, or a governmental agency [*see Tanner v. Best (1940) 40 Cal. App. 2d 442, 445, 104 P.2d 1084]* . For additional forms of pleading and a discussion of actions against defendants in other capacities, see Ch. 20, *Allegations Commonly Used* .

Conceivably a shipowner involved in a complicated action for freight may need to proceed against defendants who are unknown at the time of filing. The lack of knowledge must be stated in the complaint and the pleading amended on discovery of the defendant's name [*Code Civ. Proc. § 474*]. For further discussion and appropriate forms, see Ch. 20, *Allegations Commonly Used* (alternative forms of allegations for use under *Code Civ. Proc. § 474*) and Ch. 21, *Amended Supplemental Pleadings*

The caption must reflect the fact that a defendant is designated by a fictitious name [*Code Civ. Proc. § 422.40*]. For appropriate forms of captions, see Ch. 108, *Captions and Introductions* .

[c] Venue Facts

Paragraph 1 alleges venue in the county where defendant has its principal place of business. Corporations may also be sued in the county where the contract is made or is to be performed or where the obligation or liability arises, or the

breach occurs [*Code Civ. Proc. § 395.5*]. Venue need not be specifically pleaded, although often it is better practice to do so. The defendant always bears the burden of objecting against improper venue [*Code Civ. Proc. § 396b*]. Venue in actions against unincorporated associations is similar to venue for corporations [*Code Civ. Proc. § 395.2*].

[d] Specification of Damages

In an action to recover damages, other than for personal injury or wrongful death, the complaint (or cross complaint) must state the amount of damages demanded [*Code Civ. Proc. § 425.10(b)*].

[4] Recovery of Interest

Federal maritime law differs from state law on the issue of interest on damages for breach of contract. An admiralty court has discretion to award or deny prejudgment interest [*The Albert Dumois (1900) 177 U.S. 240, 254, 20 S. Ct. 595, 44 L. Ed. 751* ; *Van Nievelt Goudriaan Co's Stoomvart Maatschappij, N.V. v. Cargo & Tankship Mgmt. Corp. (2d Cir. 1970) 421 F.2d 1183, 1185]* . When damages are liquidated and based on breach of contract, the general rule favors allowing interest [*Van Nievelt Goudriaan Co's Stoomvart Maatschappij, N.V. v. Cargo & Tankship Mgmt. Corp. (2d Cir. 1970) 421 F.2d 1183, 1185]* . An award depends on the circumstances in each case [*Gardner v. Calvert (3d Cir. 1958) 253 F.2d 395]* .

In California, interest would be recoverable from the date of breach if the damages are certain or capable of being made certain [*Civ. Code § 3287(a)*]. Damages for unliquidated claims may not include interest for a period earlier than the date an action was filed [*Civ. Code § 3287(b)*; for additional discussion of interest in state court actions, see Ch. 177, *Damages*].

The circuit courts of appeal differ on the issue of postjudgment interest. Federal statutory law provides for the right to interest in civil cases at a rate allowed by state law from the date of entry of the judgment [*28 U.S.C.S. § 1961*]. In at least two circuits, courts have ruled that this rule applies in admiralty cases as well as in traditional civil litigation [*Gele v. Wilson (5th Cir. 1980) 616 F.2d 146, 148* ; *Kotsopoulos v. Asturia Shipping Co., S.A. (2d Cir. 1972) 467 F.2d 91, 95]* . These cases were decided after the admiralty and civil procedure rules merged in 1966. Previously, the Third Circuit ruled that the federal statute's use of a state's interest rate did not apply in admiralty cases because Congress had not created the same provision for maritime matters [*Gardner v. Calvert (3d Cir. 1958) 253 F.2d 395, 402-403]* .

Plaintiffs filing in state court on a maritime contract in which the damages are liquidated should request interest from the date of breach. Although the issue is not absolutely settled, the cases provide adequate grounds for the request.

[5] Verification

The form of verification shown here complies with the requirements of *Code Civ. Proc. §§ 446* and *2015.5*. Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case in the superior court [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[6] Cross References

For discussion and appropriate forms relating to identifying unknown defendants under *Code Civ. Proc. § 474*, see Ch. 20, *Allegations Commonly Used* , and Ch. 21, *Amended and Supplemental Pleadings*

For forms of captions to be used where a party is not a natural person suing in his or her own behalf, see Ch. 108,

Captions and Introductions

For discussion of the elements of a cause of action for damages based on breach of contract, see Ch. 140, *Contracts*

For alternative allegations of venue, see Ch. 571, *Venue*

For alternative forms of prayers and verification, see Ch. 420, *Prayers* , and Ch. 572, *Verification*

[7] Federal Statutes

Interest on judgments. *28 U.S.C.S. § 1961*

[8] State Statutes

Designation of agreement as written or oral or implied by conduct. *Code Civ. Proc. § 430.10(g)*

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Volume 46: Settlement and Release thru Subpoena Chs. 520-535
Chapter 522 SHIPS AND SHIPPING
PART IV. FORMS
C. Property Interests
1. Actions by Shipowners

46-522 California Forms of Pleading and Practice--Annotated § 522.201

§ 522.201 Complaint [Fed. R. Civ. P., Rule 7] In Personam and In Rem [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C] for Freight Charges--By Shipowner--Against Cargo, Shippers, and Consignees

[1] FORM Complaint [Fed. R. Civ. P., Rule 7] In Personam and In Rem [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C] for Freight Charges--By Shipowner--Against Cargo, Shippers, and Consignees

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
[a corporation,] as owner of the vessel	)	
_____ [*name of vessel*],	)	Civil Action No. _____
Plaintiff,	)	COMPLAINT
vs.	)	
Certain commercial cargo of the vessel	)	
_____ [*name*]; and	)	
_____ [*name*(*s*)], the	)	
_____ [shipper(s) *and/or* consign-ee(s) *and/or* owner(s)] of the commercial cargo,		
_____ [*repeat for other defendants as appropriate*]		
Defendant.		

_____

1. This is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears [, and is an admiralty and maritime claim within the meaning of *Rule 9(h) of the Federal Rules of Civil Procedure*].

2. Plaintiff is [a corporation duly organized and existing under the laws of the State of California, and] the owner and operator of the merchant vessel _____ [*name*].

[*EITHER*]

3. [On information and belief,] [D]efendant, _____ [*name of corporation*], is a corporation organized and existing under the laws of the State of _____ with an office and place of business at _____ [*specify address*].

[*OR*]

3. Defendant, _____ [*name of corporation*], is a corporation organized and existing under the laws of a foreign nation, the exact nature of the corporate structure of said corporation being unknown to plaintiff, with agents for the conduct of its business located within this district at _____.

[4. Defendants, DOES 1-_____, are corporations existing under the laws of a state of the United States or a country of the world (and defendant, John Doe, is an individual). Said defendants maintain some form of ownership in the cargo, as yet unascertained, and are being sued herein by fictitious names, their true names being unknown to plaintiff at this time. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

5. The commercial cargo of plaintiff's vessel is now within this district and the jurisdiction of this court and will remain here during the pendency of this action. The cargo will be delivered within the jurisdiction of this court to _____ [*name*], as bailee.

6. Attached hereto as Exhibit A and made a part hereof is a bill of lading issued by plaintiff to defendant acknowledging plaintiff's receipt of _____ [*describe goods with reasonable particularity*] on _____ [*date*], for shipment from _____ [*specify place*] to _____ [*specify place*].

7. In the bill of lading, defendant agreed _____ [*state circumstances of payment, e.g.,* to pay full freight to the point of discharge in the sum of $_____ on receipt of the goods for shipment by plaintiff. The freight was payable in full, either prior to transportation or at the destination, ship and/or cargo lost or not lost].

8. Defendant(s), _____ [shipper(s) *and/or* consignee(s) *and/or* owner(s)] of said commercial cargo, have [refused *or* ignored] plaintiff's demands for payment of freight due in the sum of $_____. Plaintiff has performed all obligations and conditions precedent required under the bill of lading embodying the parties' agreement.

9. Under maritime law, plaintiff maintains a lien for possession of defendant's cargo until freight charges are paid in full. Plaintiff claims a lien on said commercial cargo in the total amount of $_____.

WHEREFORE, plaintiff prays as follows:

1. For issuance of process against defendant cargo according to this court's practice in admiralty and maritime cases;

2. For condemnation and sale of defendant cargo to pay the amount due and owing to plaintiff with interest and costs;

3. For judgment against defendant(s) _____ [*name(s)*], _____ [consignee(s) *and/or* shipper(s) *and/or* owner(s)] for damages in the amount of $_____.

4. For such other and further relief as the court may deem just and proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification. See § 522.150.*]

CAUTION:
The complaint in an action in rem must be verified on oath or solemn affirmation [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C(2)].

[2] Use of Form

This form of complaint may be used for an action in rem and in personam in federal district court. Federal courts have exclusive jurisdiction over admiralty in rem actions against cargo, vessels, or other property [*Madruga v. Superior Court (1954) 346 U.S. 556, 560-561, 74 S. Ct. 298, 98 L. Ed. 290]* . Attorneys who wish to rely on the shipowner's maritime lien against the cargo as the basis of an action for freight must therefore proceed in federal court. The existence of an in rem cause of action does not, however, deprive a party of the alternative right to an action in personam based on the contract or debt [*see, e.g., F.T. Rounds v. Cloverport Foundry & Mach. Co. (1915) 237 U.S. 303, 307-308, 35 S. Ct. 596, 59 L. Ed. 966* ; Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C(1)]. Frequently, attorneys combine actions in rem and in personam in a federal court proceeding, instead of choosing between one or the other. For additional discussion of admiralty jurisdiction and the choice of state or federal forum, see Ch. 100, *Boats and Boating* .

A person proceeding in rem may alternatively proceed in personam with process of maritime attachment and garnishment [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C(1)]. Essentially the same provisions apply to both types of action. Process of attachment cannot be used against a defendant's goods or property, however, unless the defendant cannot be found within the district [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule B(1)].

[3] Venue

An action in rem must be filed in the district where the property that is the subject of the action is located [*see* Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rules C(2), E(3)(a)].

[4] Allegations

[a] In General

A complaint in rem must state the circumstances from which the claim arises with such particularity that the defendant

or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule E(2)].

[b] Jurisdictional Statement (Paragraph 1)

A complaint in federal court must contain a short and plain statement of the court's jurisdictional base [*Fed. R. Civ. P., Rule 8(a)*]. Because an in rem action falls within exclusive admiralty jurisdiction, the paragraph's additional, bracketed information regarding *Fed. R. Civ. P., Rule 9(h)*, need not be included. If a claim has another ground for federal jurisdiction, the complaint may use the language in brackets to assure application of civil rules pertaining only to admiralty cases [*Fed. R. Civ. P., Rule 9(h)*]. For additional discussion, see *§ 522.170*.

[c] Identification and Capacity of Parties (Paragraphs 2, 3)

In federal court, it is not necessary to state the capacity of a party to sue or be sued, except to the extent required to show the court's jurisdiction [*Fed. R. Civ. P., Rule 9(a)*]. The complaint alleges plaintiff's ownership of the vessel to show plaintiff's right to the maritime lien on the cargo.

The capacity of a corporation to sue or be sued depends on the law under which it was organized [*Fed. R. Civ. P., Rule 17(b)*]. Calfornia authorizes corporations to sue and be sued in accordance with the Code of Civil Procedure [*Corp. Code § 105*].

[d] Fictitious Defendants (Paragraph 4)

Attorneys should be very cautious about naming fictitious or unknown defendants in a federal court complaint. The Federal Rules of Civil Procedure neither authorize nor disapprove of such practice, but the Ninth Circuit Court of Appeals has ruled against the procedure on several occasions [*Craig v. United States (9th Cir. 1969) 413 F.2d 854, 856-857* ; *Sigurdson v. Del Guercio (9th Cir. 1956) 241 F.2d 480, 482]* . The court's primary objection has been the difficulty of determining the defendants' residences for purposes of jurisdiction in diversity cases [*Molnar v. National Broad. Co. (9th Cir. 1956) 231 F.2d 684, 685-687]* . Alleging "Doe" defendants has also been considered "dangerous" in federal question and admiralty cases [*Sigurdson v. Del Guercio (9th Cir. 1956) 241 F.2d 480, 482* ; *California Stevedore & Ballast Co. v. Pan-Atlantic S.S. Corp. (9th Cir. 1961) 291 F.2d 252, 253* (admiralty case in which court alludes to obstacles in naming fictitious defendants)]. On the other hand, one district court approved of the practice in admiralty suits because of the traditionally liberal pleading rules [*Phillips v. United States (N.D. Cal. 1955) 127 F. Supp. 912, 914-916]* .

In California state courts, plaintiffs are allowed to sue defendants who are unknown at the time of filing [*Code Civ. Proc. § 474*]. The state's permissive rule has not made federal courts more inclined to approve the procedure [*Molnar v. National Broad. Co. (9th Cir. 1956) 231 F.2d 684, 685-687]* . For additional discussion of the California rule, see *§ 522.200*.

[e] Presence of Property Within Judicial District (Paragraph 5)

The complaint for an action in rem must state that the property being sued is located within the district or will be there during the pendency of the action [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C(2)].

This form of complaint also states that the cargo will be delivered within the jurisdiction of the court to a bailee. Usually in actions against cargo for freight, the plaintiff will already maintain possession or some form of control over the goods, thereby facilitating execution of process on the property. For a discussion of process, see *§§ 522.201[5], 522.201[6], and 522.202 -522.205*.

[f] Description of Goods (Paragraph 6)

The complaint in an action in rem must describe the property that is the subject of the action with reasonable particularity [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C(2)]. The complaint should state what the property is and where it can be found, such as "1,000 bushels of wheat as cargo of *The Magnate* moored at pier 87 in Oakland, California."

[g] Breach of Contract for Freight

Paragraphs 6, 7, and 8 contain the allegations essential in a breach of contract action: (1) existence of the written contract; (2) performance of all the conditions by plaintiff; (3) the breach by defendant; and (4) damage to the plaintiff [*see Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 830, 69 Cal. Rptr. 321, 442 P.2d 377* ; *Acoustics, Inc. v. Trepte Constr. Co. (1971) 14 Cal. App. 3d 887, 913, 92 Cal. Rptr. 723]* .

[h] Existence of Maritime Lien (Paragraph 9)

An action in rem may be brought to enforce any maritime lien [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C(1)]. The shipowner's lien against the cargo for freight arises when the owner takes possession for transportation unless it is excluded by the parties' agreement. Usually the bill of lading or contract of affreightment will contain a provision recognizing the lien and possibly preserving its existence beyond delivery if payment is not due until a later time [*Bird of Paradise v. Heyneman (1867) 72 U.S. 545, 554-558, 18 L. Ed. 662]* .

[5] Process Against Cargo

The prayer requests process against the defendant cargo and an in personam judgment against the individual defendant or defendants based on breach of contract.

The verified complaint and any supporting papers shall be reviewed by the court and, if the conditions for an action in rem appear to exist, an order so stating and authorizing a warrant for the arrest of the property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant and deliver it to the marshal for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment. Supplemental process enforcing the court's order may be issued by the clerk on application without further order of the court. If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and warrant for the arrest and the plaintiff shall have the burden on a post-arrest hearing under Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule E(4)(f) (relating to procedure for release from arrest or attachment) to show that exigent circumstances existed [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C(3)]. Process in rem can be served only within the judicial district [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule E(3)(a)]. The marshal is required to execute process against tangible property by taking it into possession for safe custody, unless such action would be impracticable [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule E(4)(b)]. In such case, a copy of the process must be affixed to the property in a conspicuous place and a copy of the complaint and process left with the person having possession or his or her agent [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule E(4)(b)].

In actual practice, attorneys may be required to prepare and submit a warrant for arrest of the property [*see § 522.202*]. Service may be effected by any person, not a party, who is at least 18 years of age. At the request of the plaintiff, however, the court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer appointed by the court specially for that purpose. Such an appointment is mandatory when the plaintiff is authorized to proceed in forma pauperis pursuant to *28 U.S.C.S. § 1915* or as a seaman under *28 U.S.C.S. § 1916* [*Fed. R. Civ. P., Rule 4(c)(2)*]. In some districts, attorneys must obtain service of process by the sheriff or other

person authorized to execute process in state court actions, with the marshal's services being available only on court order. The court clerk should be consulted before filing to determine the appropriate local practice. For a form of proof of service, see Ch. 518, *Service of Summons and Papers* .

[6] Execution or Stay of Process

In an action for freight, the shipowner will usually retain possession of the cargo, turn it over to a bailee for safe keeping, or release it to the shipper in return for some other kind of security. Under these circumstances, execution of process will probably not be difficult. The plaintiff may want to have the issuance and delivery of process held in abeyance until the parties reach an agreement as to the immediate disposition of the property [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule E(3)(b)]. The parties may also stipulate to have process stayed or the property released pending resolution of the litigation [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule E(5)(a)].

After the clerk issues process, execution must be stayed or the property must be released if the defendant gives security in the form of a special bond. A special bond pertains to a specific in rem action and cannot be filed until after process in rem is issued [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule E(5)(a)]. In contrast, a general bond may be filed with respect to a vessel only, in anticipation of litigation. The defendant need not wait for issuance of process [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule E(5)(b); *see § 522.204[4]* regarding general bonds].

The parties may stipulate the amount and nature of the bond or security, or on their inability or refusal to do so, the court will set the terms [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule E(5)(a)].

Seized property may be released on approval by the marshal of a stipulation or bond signed by the party on whose behalf the property is being detained. Otherwise, that party must obtain a court order, which the clerk may grant as a matter of course on the giving of adequate security under the rules or applicable statute. In either event, all costs and charges for seizing and holding the property must be paid prior to its release [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rules E(4)(e), (5)(c); *28 U.S.C.S. § 1921*].

[7] Relief From Arrest

[a] Prompt Hearing

Any person claiming an interest in arrested property shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest should not be vacated or other relief granted consistent with the rules [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule E(4)(f)].

[b] Immediate Sale of Seized Property

Under certain circumstances the arrested cargo may be sold immediately and the proceeds paid into the registry of the court for disposal [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule E(9)]. The rule provides for such action under any of the following conditions: (1) if the property is perishable; (2) if the property is liable to deterioration, decay, or injury by being detained pending resolution of the action; (3) if the expense of keeping the property is excessive or disproportionate; or (4) if there is unreasonable delay in securing release of the property [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule E(9)].

[8] Verification

In an action in rem the complaint must be verified on oath or solemn affirmation [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C(2)].

[9] Federal Rules of Civil Procedure

Pleading admiralty and maritime claims. *Fed. R. Civ. P., Rule 9(h)*

Actions in rem. Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rules C, E

[10] Text References

Bender's Federal Practice Forms, Vol. 4, Pt. II, §§ 1-5, 8.2, 13 (Matthew Bender)

Benedict on Admiralty, §§ 183-190 (Matthew Bender)

Moore's Federal Practice, §§ 9.02, 702.02, 703.06[2], 704.02[3], 704.03[3], 705.04 (Matthew Bender)

[11] Cross References

For related forms, see *§§ 522.202 -522.205*

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Chapter 522 SHIPS AND SHIPPING
PART IV. FORMS
C. Property Interests
1. Actions by Shipowners

46-522 California Forms of Pleading and Practice--Annotated § 522.202

§ 522.202 Warrant [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C(3)] for Arrest of Cargo, Vessel, or Other Property

[1] FORM Warrant [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C(3)] for Arrest of Cargo, Vessel, or Other Property

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	Civil Action No. _____
_____ [*name(s) and/or*	)	WARRANT
description of property]	)	
Defendant(s)	)	
	)	
	)	

The President of the United States of America, to the Marshal of the United States for the _____ District of California--Greetings:

A complaint was filed in the United States District Court for the _____ District of California on

_____ [*date*], by _____ [*name of plaintiff*] against cargo of the vessel _____ [*name*], consisting of _____ [*describe cargo as in complaint*], in a _____ [*specify type of action, e.g.,* tort action], civil and maritime, in which the amount demanded is $_____ for the reasons and causes in the complaint, and requesting the usual process of this court in admiralty and maritime cases, and the condemnation and sale of the cargo for payment of the plaintiff's demands.

You are hereby ordered to attach the cargo and to retain it in your custody until further order of this court.

You are further ordered to make your return of service together with this writ.

Witness, the Honorable

_____

[*name*],

Judge of this court at

_____

[*city and county*]

in _____

[*district*],

this

_____

day of

_____

[*date*].

_____

Clerk

By _____ [*signature*]
Deputy Clerk

[2] Use of Form

This warrant must be used in conjunction with the *form in § 522.201* whenever an action in rem is filed against cargo, a vessel, or other property.

The warrant (writ) is signed by the judge and clerk of the court and commands the United States Marshal to take possession of the cargo, vessel, or property, pending further order of the court.

This writ should be submitted to the judge at the same time as the complaint is filed so that the signed warrant can be delivered to the United States Marshal along with the complaint. At least three copies of the warrant and the complaint should be provided to the marshal along with the originals. The originals are returned to the court, one copy of each is provided to the vessel or the person in charge of the vessel, and two copies are retained by the marshal.

One copy of the writ should be submitted for each individual, company, or corporation to be served. For service of process on an officer or agent of the United States Government, submit one copy of the writ for each officer or agent upon whom service is desired, plus an additional three writs for service on the Government of the United States.

[3] Cross References

For related forms, see *§§ 522.201* and *522.204*

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46-522 California Forms of Pleading and Practice--Annotated § 522.203

§ 522.203 Stipulation Between Shipowner and Shipper for Release of Cargo From Shipowner's Lien for Freight and Posting of Security for Judgment

[1] FORM Stipulation Between Shipowner and Shipper for Release of Cargo From Shipowner's Lien for Freight and Posting of Security for Judgment

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff,	)	Civil Action No. _____
vs.	)	STIPULATION FOR
_____ [*name(s)*],	)	RELEASE OF CARGO
Defendant(s).	)	[Fed. R. Civ. P., Supp. Rules for Certain Admiralty
	)	and Maritime Claims, Rules C, E(5)]
	)	

_____

IT IS HEREBY STIPULATED by and between plaintiff and defendant(s) through their respective counsel as follows:

1. Physical service of process on defendant cargo shall not be necessary. All cargo shall be deemed seized in this action without further steps by any party.

2. The cargo shall be released [into the custody of defendant _____ (*name*) *or* to the consignees of defendant _____ (*name*) entitled to delivery].

3. In consideration for release of the cargo, defendant shall post security with the court in the amount of $_____, representing the amount of freight due according to plaintiff's complaint.

4. The security posted by defendant shall be conditioned on answering the judgment of this court or any appellate court in the amount of the principal sum or less, with interest on that sum at the rate of 6 percent per annum while suit is pending.

5. The release of the cargo by plaintiff and posting of security by defendant shall not prejudice the claims of the parties or other claimants in the cargo or freight allegedly due for shipment.
Dated: _____.

_____ [*signature*]
Attorney for Plaintiff
_____ [*signature*]
Attorney for Defendant

[2] Use of Form

This form of stipulation for release of cargo may be used in actions in rem against cargo for freight. The form may be used in conjunction with the *form in § 522.201*, a federal in rem complaint against cargo for freight.

By stipulation, the parties can stay execution of process and agree for the posting of a bond as security by the defendant. Use of this stipulation in a shipowner's action against cargo will facilitate the proceedings because the marshal will not need to actually serve process on the goods and the defendant can obtain immediate possession from the plaintiff. If the property has already been seized, the parties may stipulate as to its release or the defendant individually may secure the property by posting security [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule E(5)].

If the property is not released within 10 days after process is executed, the plaintiff must give public notice of the action in a newspaper of general circulation [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C(4)].

Furthermore, if the parties wait until after the marshal has taken custody of the property before stipulating as to its release, all costs and charges of the court and its officers must be paid prior to the release. Otherwise, release may be obtained by court order (as a matter of course by the clerk) if security for costs is posted [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule E(5)(c)].

[3] Contents

The form states the elements necessary to bring the property before the court for purposes of the judicial proceeding and to release it to defendant to facilitate commerce. It provides for waiver of execution of process (Paragraph 1), release of the cargo (Paragraph 2), posting of security (Paragraph 3), and the conditioning of security on answering the court's judgment (Paragraph 4) [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule E(5)(a)]. Finally, the stipulation protects the plaintiff's lien for freight and the defendant's claim to the cargo by noting that the release does not prejudice these rights (Paragraph 5).

[4] Federal Statutes

Fees to be collected by United States marshals. *28 U.S.C.S. § 1921*

[5] Text References

Moore's Federal Practice, § 704.02 (Matthew Bender)

[6] Cross References

For related forms, see *§§ 522.201, 522.204*

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1. Actions by Shipowners

46-522 California Forms of Pleading and Practice--Annotated § 522.204

§ 522.204 Complaint [Fed. R. Civ. P., Rule 7] In Rem and In Personam for Property Damage--By Shipowner--Against Vessel and Other Shipowner--Collision

[1] FORM Complaint [Fed. R. Civ. P., Rule 7] In Rem and In Personam for Property Damage--By Shipowner--Against Vessel and Other Shipowner--Collision

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	Civil Action No. _____
The Motor Vessel _____ [*name*],	)	COMPLAINT
her Engines, Boats, Tackle, Apparel, and Furniture,	)	
and _____ [*name of owner*],	)	
Defendants.	)	

_____

[1. *Allegation of admiralty jurisdiction. See § 522.201, Paragraph 1*.]

2. [*Identity and capacity of plaintiff (to the extent necessary to show court's jurisdiction). See § 522.201, Paragraph 2*.]

[3. *Identity and capacity of defendant. See § 522.201, Paragraph 3*.]

[4. *Fictitious name allegation, if appropriate. See § 522.201, Paragraph 4.*]

5. The defendant vessel, _____ [*name*], _____ [is now within this district and the jurisdiction of this court and will remain here during the pendency of this action *or* will be within this district and the juridiction of this court during the pendency of this action].

6. On _____ [*date*], while on a voyage to _____ [*specify port*] from _____ [*specify port*], plaintiff's vessel and the defendant vessel collided. The collision occurred on _____ [*state the type of waters on which the impact occurred, e.g.,* the high seas].

7. At the time of collision, defendant vessel carried the flag of _____ and was owned and operated by defendant(s) _____ [*name(s)*], _____ [citizen(s) of *and/or* corporation(s) organized under the laws of] _____ [*name of country and/or state, as appropriate*]. Plaintiff's vessel operates under the flag of _____ [*name of country*].

8. The collision was not caused by any fault, negligence, or lack of due care on the part of plaintiff's vessel.

9. The collision occurred because of the negligence and fault of defendant, _____ [*name*], and of the officers, crew, agents, and associates of defendant's vessel.

10. At the time of the collision, defendant vessel was in violation of _____ [*specify set of navigational rules violated, e.g.,* the International Regulations for Preventing Collisions at Sea, Title 33 of United States Code Service, Sections 1601-1608] in the following particulars:

a. _____ [*List violations, e.g.,* Defendant vessel failed to keep a proper lookout;

b. Defendant vessel was navigated at an excessive speed continuously until the impact of collision].

11. As a proximate result of the collision and defendants' negligence, faults, and errors, plaintiff's vessel _____ [was severely damaged *or* was totally destroyed].

[*EITHER*]

12. Plaintiff has suffered damages in the amount of $_____.

[*OR*]

12. The total amount of damages, costs, and expenses cannot now be ascertained with certainty, but plaintiff is informed and believes that they will approximate the sum of $_____.

WHEREFORE, plaintiff prays as follows:

1. For issuance of process against defendant vessel, including the gear, engine, tackle, apparel, and furniture, according to this court's practice in admiralty and maritime cases;

2. For condemnation and sale of defendant vessel to pay the amount due and owing to plaintiff with interest from the date of the collision until judgment is satisfied and for costs of this action;

3. For judgment against defendant(s) _____ [*name(s)*] for damages in the amount of $_____;

4. For such other and further relief as the court may deem just and proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification. See § 522.150.*]

CAUTION:
The complaint in an action in rem must be verified on oath or solemn affirmation [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C(2)].

[2] Use of Form

This complaint may be used for an action in rem and in personam for damages against a vessel and its owner or owners in federal district court. If prosecuted in state court, the action based on a collision could only be brought in personam because of the exclusive federal admiralty jurisdiction over in rem actions [*Madruga v. Superior Court (1954) 346 U.S. 556, 560, 561, 74 S. Ct. 298, 98 L. Ed. 290* ; *see § 522.200[2]*].

This complaint should be used in conjunction with the *form in § 522.152*, a warrant for arrest of the property being sued. As written, the *form in § 522.152* pertains to the arrest of a vessel's cargo. It can be converted for use in an action against a vessel by merely replacing references to "cargo" with the words "vessel, including gear, engine, tackle, apparel, and furniture" or simply "vessel," as appropriate.

[3] Allegations

The complaint alleges: (1) admiralty jurisdiction (Paragraph 1); (2) identity and capacity of plaintiff and defendant(s) to the extent necessary to show the court's jurisdiction (Paragraphs 2, 3); (3) the existence of unknown defendants, if any (Paragraph 4); (4) the presence or future arrival of the vessel within the district (Paragraph 5); (5) the fact of collision (Paragraph 6); (6) the countries under which the vessels operate, for purposes of determining applicable law (Paragraph 7); (7) the absence of fault on the part of plaintiff's vessel (Paragraph 8); (8) the negligence of defendants, including statutory violations (Paragraphs 9, 10); (9) causation between defendants' negligence and plaintiff's damage (Paragraph 11); and (10) damages to the plaintiff (Paragraph 12) [*Ishizaki Kisen Co., Ltd. v. United States (9th Cir. 1975) 510 F.2d 875, 879, 880* ; *States S.S. Co. v. Permanente S.S. Corp. (9th Cir. 1956) 231 F.2d 82, 86-88]* .

[4] Process Against Vessel

[a] Bond

Process against a vessel proceeds in much the same manner as execution against cargo. The vessel owner, however, may file a general bond which protects the vessel from seizure in all or any actions that may be brought thereafter. The amount of the bond must be at least double the aggregate amount claimed by plaintiffs in all actions begun and pending and remain at that amount in order to protect the vessel from execution of process [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule E(5)(b)].

Thus the amount of the bond must be increased as additional claims are presented. The special bond or security discussed above in relation to an action against cargo applies only in a specific action after process is issued, in contrast to the general bond. If a special bond is given in a particular case, the liability on the general bond shall cease as to that case [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule E(5)(b)].

[b] Costs of Seizure

The Supplemental Rules for Certain Admiralty and Maritime Claims do not alter provisions of the United States Code Service relating to the expenses of seizing and keeping attached or arrested property [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule E(4)(e)]. When the plaintiff in an in rem action against a vessel seeks execution of process, the United States Marshal must be paid in advance a deposit to cover initial expenses for storage, moving, keeping, and other costs. Additional amounts must be paid as necessary during the course of the litigation [*28 U.S.C.S. § 1921*]. The plaintiff can avoid or reduce the marshal's fee by substituting another custodian, such as a boatyard [*see § 522.205*].

Before any seized property can be released under a stipulation or special bond, all costs and charges of the court and its officers must be paid [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule E(5)(c)]. Thus in order to save costs, plaintiff and defendant should attempt to stipulate as to disposal of the property pending a resolution of the dispute before process is executed. The *form in § 522.203* is a stipulation providing for the release of cargo in an action in rem. It can easily be converted for use in an action against a vessel by replacing references to "cargo" with the words "vessel, including gear, engine, tackle, apparel, and furniture" or simply "vessel," as appropriate.

[5] Prejudgment Interest

The complaint requests interest from the date of the collision forward. An award of prejudgment interest in admiralty cases is discretionary with the trial judge, but the discretion must be exercised with a view to the right of interest, barring exceptional circumstances. In collision cases, prejudgment interest is not a penalty but an element of compensation for the period after destruction when the owner has lost the use of the vessel. Exceptional circumstances justifying denial of interest include unwarranted delay by counsel and the absence of evidence proving loss of use [*Alkmeon Naviera, S.A. v. M/V "Marina L" (9th Cir. 1980) 633 F.2d 789, 797, 798]* .

[6] Federal Statutes

United States marshal's fees. *28 U.S.C.S. § 1921*

[7] Decisions

Law of common flag applies when both ships are of same registry. *Alkmeon Naviera, S.A. v. M/V "Marina L" (9th Cir. 1980) 633 F.2d 789, 793*

Law of place of collision applies when collision is in foreign territorial waters. *Ishizaki Kisen Co., Ltd. v. United States (9th Cir. 1975) 510 F.2d 875, 879*

[8] Text References

Moore's Federal Practice, Ch. 705 (Matthew Bender)

[9] Cross References

For related forms, see *§§ 522.201 -522.203*

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46-522 California Forms of Pleading and Practice--Annotated § 522.205

§ 522.205 Motion For Transfer of Custody of Vessel From United States Marshal To Marina--By Plaintiff

[1] FORM Motion For Transfer of Custody of Vessel From United States Marshal To Marina--By Plaintiff

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff,	)	Civil Action No. _____
vs.	)	MOTION TO
The Motor Vessel _____	)	TRANSFER CUSTODY
[*name*], her Engines, Boats, Tackle, Apparel, and	)	OF VESSEL AND
Furniture, and	)	NOTICE
_____ [*name of owner*],	)	
Defendants.	)	
	)	

The plaintiff moves the court to transfer custody of defendant vessel from the United States Marshal to _____ [*name of new custodian (marina or other facility)*] located at _____ [*address*]. In support of this motion, plaintiff states the following:

1. Defendant vessel is presently berthed at _____ [*specify boatyard*] [where it was seized by the

United States Marshal on _____ *date*)]. _____ [*Name*] has agreed to act as custodian of defendant vessel, until further order of this court, for a sum of $_____, including wharfage and routine services required for the safekeeping of the vessel.

2. _____ [*Name*] has adequate facilities and supervision for the proper safekeeping of defendant vessel, and has in effect adequate insurance to cover any liability for failure to do so.

[3. Defendant vessel must be moved to _____ [*specify place*] in order to effect the transfer of custody. _____ [*Name*] has agreed to perform the move and to provide insurance for loss, damage, or liability of the vessel during the movement, all for the sum of $_____.]

4. Plaintiff agrees to release the United States Marshal from any and all liability and responsibility for the care and custody of defendant vessel on surrender of possession to _____ [*name of substitute custodian*]. Plaintiff further agrees to hold the marshal harmless from any claims arising out of the custody of _____ [*name of substitute custodian*].

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

NOTICE

Please take notice that the above motion will be heard by this court at _____ [*street address*] on _____ [*day of week*], _____ [*date*], at _____ [*time*], or as soon thereafter as counsel may be heard.

_____ [*signature*]
Attorney for Plaintiff

CAUTION:

In the Northern District of California, each notice of motion must be accompanied by affidavits or declarations under penalty of perjury sufficient to support any material factual contentions, by an appropriate memorandum or brief, and by a copy of a proposed form of order [U.S. Dist. Ct., No. Dist. of Cal., Rule 220-2]. In the Southern District, a brief and complete memorandum of points and authorities must be served and filed [U.S. Dist. Ct., So. Dist. of Cal., Rule 220-8(a)].

[2] Use of Form

This form of motion may be used in any in rem action against a vessel. The substitution of a private boatyard or marina may save the plaintiff a portion of the marshal's fee for maintaining custody of the vessel [*28 U.S.C.S. § 1921* (requires advance deposit to U.S. Marshal for seizing and maintaining custody over vessel); *see § 522.72[5]*].

Local rules of court in both the Northern and Southern Districts of California permit this motion. If the order is presented before execution of process against the vessel, it could preclude costs of the initial seizure. The local rules do not expressly provide for a pre execution motion, but merely state that the notice must be given to the marshal and all parties who have appeared [U.S. Dist. Ct., No. Dist. of Cal., Rule 610-2(b), U.S. Dist. Ct., So. Dist. of Cal., Rule 310-2(b)(1)].

[3] Contents of Form

The form states (1) the amount to be charged by the new custodian (Paragraph 1); (2) the adequacy of the new custodian's facilities, supervision, and insurance coverage (Paragraph 2); (3) the necessity of moving the vessel and insurance coverage for the move, if a move is involved (Paragraph 3); and (4) release of the marshal from liability for custody of the vessel. The court's order allowing transfer of custody must fix fees to be charged and provide for their payment to the marshal in advance. If a move is involved, the judge may require the insurance referred to in Paragraph 3 [U.S. Dist. Ct., No. Dist. of Cal., Rule 610-2(b), U.S. Dist. Ct., So. Dist. of Cal., Rule 310-2(b)(1)].

[4] Cross References

For related forms, see *§§ 522.201*, *522.204*

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46-522 California Forms of Pleading and Practice--Annotated § 522.206

§ 522.206 Complaint for Damages--By Tow Owner--Against Tug Owner--Damage to Tow

[1] FORM Complaint for Damages--By Tow Owner--Against Tug Owner--Damage to Tow

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Negligence)
Defendant.	)	
	)	
	)	

Plaintiff alleges:

[1. *Capacity and residence of defendant. See § 522.200, Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 522.200, Paragraph 2.*]

3. Defendant _____ [*name*] is the owner of the tug _____ [*name of vessel*].

4. On _____ [*date*], defendant agreed to tow plaintiff's barge [, _____ (*name, if appropriate*),] with cargo, from _____ [*specify port*] to _____ [*specify port*].

5. On or about _____ [*date*], during the towage, plaintiff's barge sustained damages as follows:

_____ [*describe nature and location of damages*].

6. The damages to plaintiff's barge were caused by defendant's negligence in _____ [*state facts of negligence in navigation, e.g.*, straying off course and failing to adhere to the channel's navigational markers, resulting in collision between plaintiff's barge and floating logs and debris].

7. As the result of defendant's negligence, plaintiff has suffered damages to the barge in the sum of $_____.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For compensatory damages in the sum of $_____;

2. For interest on the sum of $_____ from and after the date of the accident;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 522.200.*]

[2] Use of Form

This complaint may be used in a state court in personam action for damages to a tow during towage. The tow owner may also maintain an action in rem against the tug in federal district court. The complaint could easily be adapted for use in federal court by adding allegations of admiralty jurisdiction and the presence, or expected presence, of the tug within the judicial district during the pendency of the action [*see §§ 522.201* and *522.204* regarding complaints in rem and in personam against cargo and a vessel].

Regardless of where the action is filed, the substantive rules of federal maritime law will govern the rights of the parties [*Intagliata v. Shipowners & Merchs. Towboat Co., Ltd. (1945) 26 Cal. 2d 365, 371, 159 P.2d 1]* . State law will apply, but only to the extent that it does not render changes in maritime law [*Madruga v. Superior Court (1954) 346 U.S. 556, 561, 74 S. Ct. 298, 98 L. Ed. 290]* .

[3] Allegations

The complaint alleges: (1) defendant's identity and capacity to be sued (Paragraph 1); (2) the existence of unknown defendants, if any (Paragraph 2) [*see Code Civ. Proc. § 474*]; (3) defendant's ownership of the tug and the agreement to tow plaintiff's barge (Paragraphs 3, 4); (4) damages to plaintiff's barge during the tow (Paragraph 5); (5) defendant's negligence which proximately caused the damages (Paragraph 6); and (6) the amount of plaintiff's damages [*Stevens v. White City (1932) 285 U.S. 195, 200-202, 52 S. Ct. 347, 76 L. Ed. 699]* .

[4] Cross References

For related forms, see *§§ 522.200, 522.201, 522.204*

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[Reserved]

§§ 522.207[Reserved]

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2. Actions Against Shipowners and Carriers

46-522 California Forms of Pleading and Practice--Annotated § 522.220

§ 522.220 Complaint In Personam for Cargo Damage or Loss--By Shipper or Consignee

[1] FORM Complaint In Personam for Cargo Damage or Loss--By Shipper or Consignee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Cargo _____ (Loss *or* Damage))
Defendant.	)	
	)	
	)	

Plaintiff alleges:

[1. *Identity and capacity of defendant. See § 522.200, Paragraph 1*].

[2. *Fictitious name allegation, if appropriate. See § 522.200, Paragraph 2.*]

3. On _____ [*date*], plaintiff delivered to defendant certain cargo consisting of _____ [*describe cargo, including number of cartons or freight units*] for transporation from the Port of _____ to _____ [*port of destination*].

4. Plaintiff delivered the cargo in apparent good order and condition, as evidenced by a bill of lading signed and issued by _____ [defendant *or* the authorized agent of defendant]. A true copy of the bill of lading is attached

hereto as Exhibit A and made a part hereof.

[*EITHER*]

5. On or about _____ [*date*], the cargo arrived in _____ [*state destination or point of discharge*] aboard the vessel _____ [*name*], and on discharge by _____ [defendant *or* defendant's agent] was not in good order and condition because _____ [*describe damage, e.g.,* of contact with sea water].

[*OR*]

5. Plaintiff's cargo was loaded aboard the vessel _____ [*name*], which left _____ [*port of embarkation*] on or about _____ [*date*]. _____ [On arrival of the vessel in _____ (*port of destination*), plaintiff's cargo was not found *or* The vessel and all cargo, including plaintiff's, was lost at sea]. Plaintiff's cargo has not been delivered.

[6. Plaintiff notified defendant of damages to the cargo _____ (by notation on the bill of lading attached as Exhibit A *or* by letter dated _____ [*date*], a copy of which is attached hereto as Exhibit B and made a part hereof).]

7. As a result of defendant's _____ [loss of *or* damage to] plaintiff's cargo, plaintiff has suffered damages in the sum of $_____.

8. Plaintiff has performed all conditions precedent required by the bill of lading attached as Exhibit A. [Defendant has _____ (refused *or* ignored) plaintiff's demands of payment for the cargo _____ (loss *or* damage).]

WHEREFORE, plaintiff prays judgment against defendant [s, and each of them,] as follows:

1. For compensatory damages, in the sum of $_____;

2. For interest on the sum of $_____ from and after _____ [*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 522.200.*]

[2] Use of Form

This complaint may be used to bring a state court action in personam against a shipowner or carrier for cargo damage or

loss. Generally, the rights of the parties will be controlled by the Carriage of Goods by Sea Act [*46 U.S.C.S. § 30701* note] or the Harter Act [*46 U.S.C.S. § 30701 et seq*].

An attorney may also file an in personam and in rem action combined, or either one individually, in federal district court. A complaint in rem against the vessel must be filed in federal court because of the exclusive admiralty jurisdiction over actions in rem [*Madruga v. Superior Court (1954) 346 U.S. 556, 561, 74 S. Ct. 298, 98 L. Ed. 290]* . The *forms in §§ 522.201* and *522.204* are examples of federal complaints in rem and in personam. The *form in § 522.204*, an action against a vessel in rem for damages arising out of a collision, can be adapted for use in a federal court action for cargo damage or loss by substitution of the factual allegations of loss or damage in this state court complaint for the factual allegations of negligence from collision in the *form in § 522.204*. The allegations, in the *form in § 522.204*, of admiralty jurisdiction and presence of the vessel within the judicial district, should be included in the cargo damage or loss complaint without changes.

For additional discussion of admiralty jurisdiction and choice of state or federal forum, see Ch. 100, *Boats and Boating* .

[3] Allegations

[a] Delivery of Cargo for Transportation (Paragraph 4)

The complaint alleges that the cargo was delivered to the defendant in apparent good order for transportation, as evidenced by the bill of lading. The bill of lading is both the receipt for delivery and the parties' contract when issued by a common carrier. The bill will note the condition of the cargo when received by the carrier [*46 U.S.C.S. § 30701* note, § 3(3); *46 U.S.C.S. § 30703(b), 1303(3)*]. For additional discussion of the nature of bills of lading, see *§ 522.71*.

Owners of cargo, as parties to bills of lading, had a relationship sufficient to support an in personam claim against the vessel owners, even though the owners did not deliver cargo to the vessel and did not receive bills of lading from the vessel, when the cargo was delivered to non-vessel-operating common carriers (NVOCCs), which delivered the cargo in containers to the vessel and received nonnegotiable bills of lading, and when the bills of lading did not name any individual parties as "the Merchant," and "Merchant" was defined only as "includ[ing] the shipper, consignor, consignee, owner and receiver of the Goods and the Holder of this Bill of Lading" [*All Pac. Trading, Inc. v. Vessel M/V Hanjin Yosu (9th Cir. 1993) 7 F.3d 1427, 1433]* .

[b] Damage or Loss (Paragraph 5)

Plaintiff's prima facie case will be established by showing that the cargo was damaged when discharged from the ship after being received for transportation in apparent good order [*Nissho-Iwai Co. Ltd. v. M/T Stolt Lion (2d Cir. 1980) 617 F.2d 907, 911, 912]* . Therefore, Paragraph 5 contains the allegation of loss or damage on discharge.

[c] Notice of Loss or Damage (Paragraph 6)

Paragraph 6 is optional because plaintiff need not give notice of the loss or damage in order to prosecute an action. If notice is not given, however, removal of the goods shall be prima facie evidence of delivery as described in the bill of lading [*46 U.S.C.S. § 30701* note, § 3(6)]. Thus if the cargo was in apparent good order when delivered to the carrier and no notice of loss or damage was given on removal after discharge, the bill of lading's statement would be rebuttable evidence of good order on discharge from the ship [*Blasser Bros. v. Northern Pan-Am. Line (5th Cir. 1980) 628 F.2d 376, 381]* .

[4] Cross References

For related forms, see *§§ 522.200, 522.201, 522.204*

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46-522 California Forms of Pleading and Practice--Annotated § 522.221

§ 522.221 Affirmative Defense by Shipowner to Action for Damage to Cargo--Cargo Lost or Damaged Due to Perils of Sea [46 U.S.C.S. § 30701 note, § 4(2)(c); 46 U.S.C.S. § 30706(b)(1)]

[1] FORM Affirmative Defense by Shipowner to Action for Damage to Cargo--Cargo Lost or Damaged Due to Perils of Sea [46 U.S.C.S. app. § 1304(2)(c)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. On or about _____ [*date*], the _____ [*name of vessel*] encountered _____ [*describe peril, e.g.,* a storm with high seas and winds of typhoon force] while transporting cargo between _____ [*specify place*] and _____ [*specify place*]. During the course of the storm, _____ [*describe events which caused cargo damage, e.g.,* hatches were torn off the main hold, allowing sea water to enter and damage a number of shipments, including those of the plaintiff].

2. Any loss or damage to the cargo was due to the perils and dangers of the sea for which this defendant is not liable or responsible under Section _____ [30701 note, § 4, or 30706] of Title 46 of the United States Code.

[2] Use of Form

This affirmative defense may be included by the defendant when claiming that any damage to or loss of the cargo was due to a cause for which the carrier is not held responsible under the Carriage of Goods by Sea Act or the Harter Act. *46 U.S.C.S. § 30706* refers to the Harter Act exemptions.

The same form may be used to assert any of the other statutory defenses, such as act of God, act of war, or riots and civil commotions [*46 U.S.C.S. § 30701* note, § 4(2); *46 U.S.C.S. § 30706(b)*]. The complete lists of exceptions are provided in §§ 522.71[4][c] and 522.71[5][a].

[3] Cross References

For related forms, see *§§ 522.200, 522.220*

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2. Actions Against Shipowners and Carriers

46-522 California Forms of Pleading and Practice--Annotated § 522.222

§ 522.222 Affirmative Defense by Shipowner to Action for Damage to or Loss of Cargo--Exoneration From Liability When Damage or Loss Caused by Fire [46 U.S.C.S. §§ 30504, 30701 note, § 4(2)(b)]

[1] FORM Affirmative Defense by Shipowner to Action for Damage to or Loss of Cargo--Exoneration From Liability When Damage or Loss Caused by Fire [46 U.S.C.S. app. §§ 182, 1304(2)(b)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. The _____ [damage *or* loss] enumerated in plaintiff's complaint resulted from a fire which occurred without the design or neglect of defendant. Defendant is exonerated from any and all liability for the alleged _____ [loss *or* damage] in accordance with Section _____ [30504 *and/or* 30701 note, § 4(2)(b),] of Title 46 of the United States Code Service.

[2] Use of Form

This affirmative defense may be used by the defendant in answering a complaint for loss or damage caused by fire. The fire statute [*46 U.S.C.S. § 30504*] exempts a vessel owner from liability for fire loss or damage unless caused by the design or neglect of such owner. The Carriage of Goods by Sea Act (COGSA) relieves the carrier and ship from responsibility for loss or damage arising or resulting from fire, unless caused by the actual fault or privity of the carrier [*46 U.S.C.S. § 30701* note, § 4(2)(b)].

Although these two statutes provide essentially the same benefit, the fire statute pertains to vessel owners, while the COGSA encompasses carriers. In order to rely on either exemption, the owner must exercise due diligence to make the vessel seaworthy and properly manned, equipped, and supplied as required by the COGSA [*In re Liberty Shipping Corp. (9th Cir. 1975) 509 F.2d 1249, 1251, 1252]* . Furthermore, the burden of showing the exercise of due diligence falls on the carrier [*46 U.S.C.S. § 30701* note, § 4(1)]. If the carrier's failure to exercise this obligation causes damage by fire, the fire exemptions cannot be invoked [*Sunkist Growers, Inc. v. Adelaide Shipping Lines (9th Cir. 1979) 603 F.2d*

1327, 1334-1341] .

[3] Decisions

Carrier's obligation under COGSA to exercise due diligence applies to master and those who manage ship, as well as to owners or charterers personally or those who act for them in a managerial capacity. *Sunkist Growers, Inc. v. Adelaide Shipping Lines (9th Cir. 1979) 603 F.2d 1327, 1341*

Provisions of fire statute and COGSA's fire exemption have essentially same meaning. Asbestos Corp. Ltd. v. Compagnie de Navigation Fraissinet et *Cyprien Fabre (2d Cir. 1973) 480 F.2d 669, 672*

[4] Cross References

For related forms, see *§§ 522.200, 522.220, 522.221*

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46-522 California Forms of Pleading and Practice--Annotated § 522.223

§ 522.223 Complaint [Fed. R. Civ. P., Rule 7] In Rem [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C] to Enforce Maritime Lien [46 U.S.C.S. § 31341 et seq.]--Against Vessel--For Supplies or Other Necessaries Furnished by Materialmen

[1] FORM Complaint [Fed. R. Civ. P., Rule 7] In Rem [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C] to Enforce Maritime Lien [46 U.S.C.S. § 31341 et seq.]--Against Vessel--For Supplies or Other Necessaries Furnished by Materialmen

UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF CALIFORNIA
_____ DIVISION

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	Civil Action No. _____
The Motor Vessel _____ [*name*],	)	COMPLAINT TO ENFORCE MARITIME LIEN
her Engines, Boats, Tackle, Apparel, Furniture, and	)	
Cargo,	)	
Defendant.	)	

_____

[1. *Allegation of admiralty jurisdiction. See § 522.201, Paragraph 1.*]

[2. *Allegation that vessel is within district and jurisdiction of court or will arrive during pendency of action. See § 522.204, Paragraph 5.*]

3. On _____ [*date*], plaintiff furnished the _____ [*specify name, nationality, registry number, or other designation of vessel*], docked at _____ [*port*], with _____ [materials *and/or* supplies *and/or* equipment] consisting of _____ [*describe*]. The _____ [materials *and/or* supplies *and/or* equipment], with an agreed value of $_____, were furnished to defendant vessel at the request of _____ [*name*], _____ [*specify job title, e.g.,* master] of the vessel.

4. Defendant vessel is indebted to plaintiff in the total sum of $_____, which remains due and owing [, although plaintiff has demanded payment].

5. Plaintiff claims a maritime lien against defendant vessel, her engines, tackle, boats, apparel, furniture, and cargo under *Title 46, Section 31341 et seq., of the United States Code* Service and under general maritime law.

WHEREFORE, plaintiff prays:

1. For issuance of process against defendant vessel, her engines, boats, tackle, apparel, furniture, and cargo according to this court's practice in admiralty and maritime cases;

2. For condemnation and sale of defendant vessel to pay the amount due and owing to plaintiff with interest and costs; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification. See § 522.150.*]

CAUTION:
The complaint in an action in rem must be verified on oath or solemn affirmation [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C(2)].

[2] Use of Form

This complaint may be used for an action in rem against a vessel in federal court. Federal courts have exclusive jurisdiction over admiralty actions in rem against vessels or other property [*Madruga v. Superior Court (1954) 346 U.S. 556, 560, 561, 74 S. Ct. 298, 98 L. Ed. 290]* . In the alternative, a plaintiff may file an action in personam against the person who ordered the supplies. The existence of the lien and an action in rem does not preclude an action in personam [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C(1); *see 46 U.S.C.S. § 31305*]. If an attorney doubts the validity of the lien for any reason, he or she should combine an action in rem against the vessel with an action in personam against its owner or person authorizing the supplies. For examples of combined actions against cargo and against a vessel, see *§§ 522.201* and *522.204*.

[3] Allegations

The complaint alleges: (1) admiralty jurisdiction (Paragraph 1); (2) the presence or future arrival of the vessel within the district (Paragraph 2); (3) the furnishing of supplies, materials and/or equipment on the order of the vessel's officer or agent (Paragraph 3); (4) the failure to pay, as agreed, for the goods furnished (Paragraph 4); and (5) the existence of

plantiff's lien against the vessel under *46 U.S.C.S. § 31341 et seq.* (Paragraph 5) [*Point Landing, Inc. v. Alabama Dry Dock & Shipbuilding Co. (5th Cir. 1958) 261 F.2d 861, 867]* . It is not necessary to allege or prove that credit was given to the vessel [*46 U.S.C.S. § 31342(a)(3)*].

[4] Cross References

For related forms, see *§§ 522.200 -522.205*

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46-522 California Forms of Pleading and Practice--Annotated § 522.224

§ 522.224 Allegations for Use in Complaint [Fed. R. Civ. P., Rule 7] In Rem [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C] to Enforce Maritime Lien [46 U.S.C.S. § 31341 et seq.]--Against Vessel--To Recover Pilotage Fees

[1] FORM Allegations for Use in Complaint [Fed. R. Civ. P., Rule 7] In Rem [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C] to Enforce Maritime Lien [46 U.S.C.S. § 31341 et seq.]--Against Vessel--To Recover Pilotage Fees

1. Plaintiff is a pilot duly licensed under the laws of the State of California.

[*EITHER*]

2. On _____ [*date*], at the request of the _____ [*specify title of officer*] of defendant vessel, plaintiff piloted the vessel from _____ [the high seas *or* the port of _____ (*specify*)] to _____ [the port of _____ (*specify*) *or* the high seas], for the agreed sum of $_____.

[*OR*]

2. On _____ [*date*], plaintiff offered to pilot defendant vessel, _____ [a registered vessel *or* a foreign vessel], from _____ [the high seas *or* the port of _____ (*specify*)] to _____ [the port of _____ (*specify*) *or* the high seas] for the sum of $_____. Plantiff's offer was refused by the _____ [*specify title of officer*] of defendant vessel, and _____ [the vessel proceeded without securing the services of a pilot *or* the vessel secured the services of a pilot subsequently offering pilotage].

[2] Use of Form

These allegations may be used by plaintiff in an action in rem to enforce a maritime lien for pilotage. They should be substituted for Paragraph 3 of the *form in § 522.223*. The alternative forms of Paragraph 2 of these allegations apply when pilotage is performed and payment refused or when the vessel refuses a tender of pilotage. For additional discussion, see *§ 522.73[3][b]*.

[3] State Statutes

Exclusive authority of licensed pilots to pilot vessels from high seas to ports on bays requiring pilotage and to pilot vessels within and along waters of those bays. *Harb. & Nav. Code § 1125*

Foreign vessels, vessels bound to or from foreign port, and vessels sailing under register between any port of Monterey Bay and Bays of San Francisco, San Pablo, and Suisun and any other port of United States are liable for pilotage. *Harb. & Nav. Code § 1127*

[4] Cross References

For related forms, see *§§ 522.200 -522.205, 522.223*

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46-522 California Forms of Pleading and Practice--Annotated § 522.225

§ 522.225 Allegations for Use in Complaint [Fed. R. Civ. P., Rule 7] In Rem [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C] to Enforce Maritime Lien [46 U.S.C.S. § 31341 et seq.]--Against Vessel--To Recover Salvage

[1] FORM Allegations for Use in Complaint [Fed. R. Civ. P., Rule 7] In Rem [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C] to Enforce Maritime Lien [46 U.S.C.S. § 31341 et seq.]--Against Vessel--To Recover Salvage

1. On _____ [*date*], plaintiff's vessel voluntarily rendered assistance to defendant vessel by _____ [*describe peril and assistance given, e.g.,* towing the stranded ship away from dangerous shoals and into the Port of San Francisco]. Defendant vessel _____ [was fully saved *or* partially saved] as a result of plaintiff's salvage services.

2. In salvaging defendant vessel, plaintiff incurred expenses in the sum of $_____ for _____ [*describe items of expense, e.g.,* additional fuel consumed, overtime wages of the crew, and damages to the towage equipment on plantiff's vessel].

[2] Use of Form

These allegations may be used by a plaintiff in an action in rem to enforce a maritime lien for salvage. They should be substituted for Paragraph 3 of the *form in § 522.223*. To present a valid claim for salvage, a plaintiff must show that, in the face of a marine peril, services were voluntarily rendered and resulted in at least partial success [*The "Sabine" (1880) 101 U.S. 384, 25 L. Ed. 982* ; *see § 522.73[3][d]*].

[3] Cross References

For related forms, see *§§ 522.200 -522.205, 522.223*

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46-522 California Forms of Pleading and Practice--Annotated § 522.226

§ 522.226 Allegation for Use in Complaint [Fed. R. Civ. P., Rule 7] In Rem [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C] to Enforce Maritime Lien [46 U.S.C.S. § 31341 et seq.]--Against Vessel--To Recover Towage Fees

[1] FORM Allegation for Use in Complaint [Fed. R. Civ. P., Rule 7] In Rem [Fed. R. Civ. P., Supp. Rules for Certain Admiralty & Mar. Claims, Rule C] to Enforce Maritime Lien [46 U.S.C.S. § 31341 et seq.]--Against Vessel--To Recover Towage Fees

1. On _____ [*date*], at the request of the _____ [*specify title of officer*] of defendant vessel, plaintiff provided towage services from _____ [*specify place*] to _____ [*specify place*] for the agreed sum of $_____.

[2] Use of Form

This allegation may be used by plaintiff in an action in rem to enforce a maritime lien for towage. It should be substituted for Paragraph 3 of the *form in § 522.223*. Federal maritime lien law specifies towage as a service giving rise to a lien against the vessel [*46 U.S.C.S. §§ 31301(4), 31342(a)(1)*].

[3] Cross References

For related forms, see *§§ 522.200 -522.205, 522.223*

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Chapter 524 SHORTENING AND EXTENSION OF TIME

46-524 California Forms of Pleading and Practice--Annotated 524.syn

§ 524.syn Synopsis to Chapter 524: SHORTENING AND EXTENSION OF TIME

§ 524.01 Scope of Chapter

§ 524.02 Cross References

§§ 524.03-524.09 [Reserved]

§ 524.10 Governing Law

[1] Generally

[2] Trial Court Delay Reduction Act

[a] Policy Against Continuances

[b] Limit on Stipulations to Extend Time

[c] Minimum Time Periods Allowed

§ 524.11 Computation of Time

§ 524.12 Shortening of Time

[1] By Noticed Motion

[2] By Ex Parte Application

[3] Under Other Provisions

§ 524.13 Extension of Time

[1] In General

[2] On Stipulation

[3] When Available

[4] To Plead

[5] Length of Extension

[6] Good Cause

[7] Not Usually a General Appearance

[8] Under Rules of Court

[9] By Service by Mail

[10] By Service by Overnight Delivery

[11] By Service by Facsimile Transmission

[12] For Legislator

[13] Procedures for Obtaining

[14] Appeals

[a] Filing Notice

[b] Filing Briefs

§§ 524.14-524.29 [Reserved]

§ 524.30 Related Texts From Matthew Bender

§ 524.31 State Statutes

[1] Determination of Time

[2] Extension or Shortening of Time for Discovery Procedures

[3] Extension as Not Constituting General Appearance

[4] General Provisions Relating to Extensions

[5] No Extension

[6] Specific Extensions

[7] Specific Orders Shortening Time

§ 524.32 California Rules of Court

[1] Appeals

[2] Trial Court Actions and Proceedings

§ 524.33 Decisions

[1] Discretion of Court to Extend Time

[2] Extension for Answering

[3] General Appearance May Result From Extension

[4] Service by Mail as Extending Time

[5] Shortening Time

§ 524.34 Text References

§§ 524.35-524.39 [Reserved]

§ 524.40 Checklist for Party Seeking Extension or Shortening of Time

[1] Preliminary Determinations

[2] By Stipulation

[3] By Ex Parte Application

[4] By Noticed Motion

§§ 524.41-524.49 [Reserved]

§ 524.50 Stipulation [Code Civ. Proc. § 283(1)] Extending Time to Perform Act [Code Civ. Proc. § 1054(b); Gov. Code § 68616(b)] to Date Certain

[1] FORM

[2] Use of Form

[3] Stipulations by Parties to Extend Time

[4] Cross References

§ 524.51 Stipulation [Code Civ. Proc. § 283(1)] Extending Time to Perform Act [Code Civ. Proc. § 1054(b)] for Open Extension of Time to Plead

[1] FORM

[2] Use of Form

§ 524.52 Ex Parte Application for Order Extending Time [Code Civ. Proc. §§ 1054, 1054.1]

[1] FORM

[2] Use of Form

[3] Time to Apply for Extension

[4] Length of Extension

[5] Extensions for Attorney Legislators

[6] Contents of Form

[7] Accompanying Papers

[8] Cross References

§ 524.53 Ex Parte Order Extending Time [Code Civ. Proc. §§ 1054, 1054.1]

[1] FORM

[2] Use of Form

[3] Filing and Service of Order

[4] Cross References

§ 524.53A Ex Parte Application for Extension of Time to Serve Pleading and Order Extending Time to Serve [Code Civ. Proc. § 1054; Cal. Rules of Ct., Rule 3.1200 et seq.]--Judicial Council Form CM-020

[1] FORM

[2] Use of Form

[3] Cross References

§ 524.54 Application and Declaration for Ex Parte Order Shortening Time for Service of Notice of Motion and Accompanying Papers [Code Civ. Proc. § 1005]

[1] FORM

[2] Use of Form

[3] Local Requirements

[4] Cross References

§ 524.55 Ex Parte Order Shortening Time for Service of Notice of Motion and Accompanying Papers [Code Civ. Proc. § 1005(b)]

[1] FORM

[2] Use of Form

§ 524.56 Ex Parte Order Granting Motion to Shorten Time for Serving Notice of Motion and Accompanying Papers--Los Angeles Superior Court [former Los Angeles Co. Super. Ct. Rules, Rule 9.36]

[1] FORM

[2] Use of Form

[3] Cross References

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Chapter 524 SHORTENING AND EXTENSION OF TIME
PART I. SCOPE

46-524 California Forms of Pleading and Practice--Annotated § 524.01

§ 524.01 Scope of Chapter

This chapter discusses the grounds, conditions, and procedures for obtaining either a shortening or extension of time [*see § 524.10* et seq.]. A Procedural Checklist [*see § 524.40*] and a Research Guide [*see § 524.30*] are included. The forms in this chapter are:

- Stipulations extending time [*see §§ 524.50, 524.51*].
- Ex parte application for an order extending time [*see § 524.52*].
- Order extending time [*see § 524.53*].
- Ex parte application for extension of time to serve pleadings and order extending time--Judicial Council Form CM-020 [*see § 524.53A*].
- Ex parte application for an order shortening time [*see § 524.54*].
- Orders shortening time [*see §§ 524.55, 524.56*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureDiscoveryGeneral OverviewCivil ProcedurePretrial MattersContinuances

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46-524 California Forms of Pleading and Practice--Annotated § 524.02

§ 524.02 Cross References

For forms of stipulation and order extending time for answer or demurrer, see Ch. 26, *Answers* .

For discussions, procedures, and forms involving extensions during the process of an appeal, see Ch. 46, *Appeal: Extending or Shortening Time* .

For discussions, procedures, and forms involving extensions of time to prepare transcripts, to file appellate briefs, and to petition for rehearing, see Ch. 42, *Appeal: Notice of Appeal* ; Ch. 44, *Appeal: Preparing and Filing the Record* ; Ch. 50, *Appeal: Briefs* ; Ch. 52, *Appeal: Rehearing* ; and generally see Ch. 46, *Appeal: Extending or Shortening Time* .

For a discussion of and forms for continuances to delay the time of trial or hearing, see Ch. 136, *Continuances* .

For a discussion of and forms for obtaining extensions and shortening of time in discovery proceedings, see Ch. 193, *Discovery: Depositions* , Ch. 194, *Discovery: Interrogatories* , Ch. 195, *Discovery: Inspection of Tangible Evidence* , Ch. 196, *Discovery: Requests for Admissions* .

For a discussion of and alternative forms for application and order shortening time for service of notice of motion and accompanying papers, see Ch. 372, *Motions and Orders* .

For a discussion of and forms for shortening time for relief from default in property actions and for a form for setting aside default judgment entered in violation of agreement extending time to answer, see Ch. 205, *Defaults and Default Judgments* , and Ch. 489, *Relief From Judgments and Orders* .

For a discussion of and forms for obtaining extensions and shortening of time in discovery proceedings, see Ch. 190, *Discovery: Scope, Regulation, and Timing* .

For a discussion of extensions of time under the dismissal statutes, see Ch. 212, *Dismissal* .

For a discussion of obtaining extensions or shortening of time relating to appeals in limited civil cases, and a form for

seeking extension of time, see *Ch. 345A, Limited Civil Cases, §§ 345A.56[2], 345A.58,* and *345A.120*.

For a form of stipulation and order extending time to file affidavit in support of motion for new trial, see Ch. 371, *Motions After Trial* .

For a form of stipulation extending time in which action may be brought to trial, see Ch. 551, *Trial* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeTime LimitationsCivil ProceduresPleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProceduresDiscoveryGeneral OverviewCivil ProceduresPretrial MattersContinuancesCivil ProceduresAppealsGeneral Overview

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46-524 California Forms of Pleading and Practice--Annotated §§ 524.03-524.09

[Reserved]

§§ 524.03[Reserved]

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PART II. LEGAL BACKGROUND

46-524 California Forms of Pleading and Practice--Annotated § 524.10

§ 524.10 Governing Law

[1] Generally

Code Civ. Proc. § 1054 is the general section governing extensions of time. *Code Civ. Proc. § 473(a)* governs extensions of time relating to answers and demurrers. *Code Civ. Proc. § 1005* governs extensions and shortening of time relating to notices of motion and *Code Civ. Proc. § 1013* provides for extensions of time when papers or notices, other than notices of motion, are served by mail, facsimile transmission, or overnight delivery. In the case of electronic service of a notice, *Code Civ. Proc. § 1010.6(a)(6)* governs the extension of time. *Code Civ. Proc. § 1054.1* governs extensions when an attorney of record is attending the Legislature while *Code Civ. Proc. § 595* governs postponements when an attorney, party, or witness is attending the Legislature.

California Rules of Court, Rules 2.20 and *3.1300*, govern shortening and extension of time before the trial courts. *California Rules of Court, Rule 8.50 et seq.* , governs shortening and extension of time before the California Supreme Court and courts of appeal.

[2] Trial Court Delay Reduction Act

[a] Policy Against Continuances

The trial courts in all California counties are required to implement delay reduction programs for limited civil cases [*Gov. Code §§ 68605.5, 68607, 68620(a)*]. Under *Gov. Code § 68607* the trial judge is given the responsibility to maintain control over the pace of litigation. This responsibility includes the duty, consistent with statute, to adopt and use a firm, consistent policy against continuances, to the maximum extent possible and reasonable, in all stages of the litigation [*Gov. Code § 68607(g)*].

[b] Limit on Stipulations to Extend Time

The Trial Court Delay Reduction Act expressly allows the parties to stipulate to extend the time to serve responsive pleadings by an additional 15 days after service of a complaint [*Gov. Code § 68616(b)*]. The act also allows the parties, within 30 days of service of the responsive pleadings, to stipulate to a single continuance not to exceed 30 days [*Gov.*

Code § 68616(d)].

Otherwise, local rules may provide that the parties cannot stipulate to extend deadlines except as expressly permitted. For example, a rule may provide that the parties cannot stipulate to modify, extend, or continue any deadline without the written approval of the judge [Orange Co. Super. Ct. Rules, Rule 453].

[c] Minimum Time Periods Allowed

Trial court delay reduction rules cannot require shorter time for service of notice of motion and other papers than is provided in *Code Civ. Proc. §§ 1005* and *1013*, and cannot shorten the time to plead after service of summons beyond the period provided under *Code Civ. Proc. 412.20*. These periods may only be shortened as provided in those sections [*Gov. Code § 68616(c)*; *see Code Civ. Proc. §§ 412.20* (time to plead after service of summons), 1005(b) (time for service of notice of motion and supporting and opposing papers), 1013 (time for service of papers other than notice of motion)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedurePleading & PracticeService of ProcessTime LimitationsExtensionsCivil ProcedureDiscoveryGeneral OverviewCivil ProcedurePretrial MattersContinuances

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46-524 California Forms of Pleading and Practice--Annotated § 524.11

§ 524.11 Computation of Time

The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded [*Code Civ. Proc. § 12*]. If the last day for the performance of any act provided or required by law to be performed within a specified period of time is a holiday, then such period is extended to and including the next day which is not a holiday [*Code Civ. Proc. § 12a*].

The term "holiday," for purposes of computation of time, includes every Saturday and Sunday and most holidays specified in *Gov. Code §§ 6700* and *6701* [*Code Civ. Proc. §§ 10, 12a*]. One holiday listed in *Gov. Code § 6700* but excluded from the meaning of "holiday" under *Code Civ. Proc. §§ 10* and *12a* is September 9, known as "Admission Day" [*Code Civ. Proc. §§ 10, 12a, 135*; *Gov. Code § 6700*]. Insofar as the business of any city, county, state, or public office other than a branch office is concerned, any day when the office is closed for the whole day is considered a holiday [*Code Civ. Proc. § 12b*].

For extensive discussion of distinguishing between calendar days and court days, computation of time, and effect of filing papers on certain days, see *§ 518.33*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeTime LimitationsCivil ProceduresPleading & PracticePleadingsTime LimitationsComputationCivil ProceduresAppealsReviewabilityTime Limitations

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46-524 California Forms of Pleading and Practice--Annotated § 524.12

§ 524.12 Shortening of Time

[1] By Noticed Motion

The court, or a judge thereof, may prescribe a time shorter than the 16 court days required for written notice of hearing on a motion [*Code Civ. Proc. § 1005(b)*].

A court cannot shorten the 75-day notice period required for a motion for summary judgment [*see Code Civ. Proc. § 437c(a)*], but the statute doesgives trial courts authority to shorten the 60-day period after the opposing party's general appearance to file the motion, and to shorten the 30-day period before the trial date for the hearing on the motion [*McMahon v. Superior Court (2003) 106 Cal. App. 4th 112, 115-118, 130 Cal. Rptr. 2d 407]* .

Any order obtained at a hearing of which insufficient notice has been given is void if the adverse party was not at the hearing [*Svistunoff v. Svistunoff (1952) 108 Cal. App. 2d 638, 641, 239 P.2d 650]* . However, any objection to the timeliness of notice is waived by an adverse party who appears at the hearing (and argues anything other than the sufficiency of the notice) [*Lacey v. Bertone (1949) 33 Cal. 2d 649, 651, 203 P.2d 755]* .

[2] By Ex Parte Application

Although it is technically possible to obtain an order shortening time pursuant to a noticed motion, the very nature of the order sought usually dictates that there will not be enough time to give 16 court days notice for the motion [*see Code Civ. Proc. § 1005*]. Therefore, of necessity, an order shortening time is usually obtained by an application for an ex parte order [for forms, *see §§ 524.54 -524.56*]. An application for an order shortening time must be supported by an affidavit or declaration showing good cause for the order [*Cal. Rules of Ct., Rule 3.1300(b)*].

[3] Under Other Provisions

There are also statutes providing for shortening time periods relating to other procedures. For example, the Civil Discovery Act [*Code Civ. Proc. § 2016.010 et seq.*], provides for shortening time periods relating to various procedures such as notice required before a deposition [see *Code Civ. Proc. § 2025.270*], time for responding to interrogatories [see *Code Civ. Proc. § 2030.260(a)*], time for responding to requests for production or entry [*see Code Civ. Proc. §*

2031.260(a)], and time for responding to requests for admissions [see *Code Civ. Proc. § 2033.250(a)*].

The required time periods for service of documents related to subpoenaing the personal records of a consumer or employment records may also be shortened [*see Code Civ. Proc. §§ 1985.3(h), 1985.6(g)*]. For further discussion, see Ch. 195, *Discovery: Inspection of Tangible Evidence* and Ch. 535, *Subpoena* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureDiscoveryGeneral Overview

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46-524 California Forms of Pleading and Practice--Annotated § 524.13

§ 524.13 Extension of Time

[1] In General

When an act to be done, as provided in the Code of Civil Procedure, relates to the pleadings in the action, the preparation of bills of exceptions, or of amendments to them, or the service of notices other than of appeal and of intention to move for a new trial, the time allowed therefor, unless otherwise expressly provided, may be extended, on good cause shown, by the judge of the court in which the action is pending, or by the judge who presided at the trial of that action. The extension must not exceed 30 days without the consent of the adverse party [*Code Civ. Proc. § 1054*].

The times provided in the Bond and Undertaking Law (*Code Civ. Proc. § 995.010 et seq.*), or in any other statute relating to a bond given in an action or proceeding, may be extended pursuant to *Code Civ. Proc. §§ 1054* and *1054.1* [*see Code Civ. Proc. § 995.050*].

[2] On Stipulation

In all cases set out in *Code Civ. Proc. § 1054* (*see* [1], *above*), an extension must be granted when all attorneys of record of parties who have appeared in the action agree in writing to the extension. Any extension granted pursuant to a stipulation by all attorneys of record of parties who have appeared in the action is not included in the computation of the 30-day limitation on extensions of time allowed by the court or judge [*Code Civ. Proc. § 1054*].

[3] When Available

The court may grant an extension only during the period of time within which the act must be done. An order extending time made after the statutory time for action has passed is void [*Coast Electric Service, Inc. v. Jensen (1931) 111 Cal. App. 124, 126, 295 P. 346]* . However, when the time for performance is not jurisdictional, as in the filing of a cost bill, relief may be granted for late filing under *Code Civ. Proc. § 473(b)*, based on mistake, inadvertence, surprise, or excusable neglect [*San Francisco Unified School Dist. v. Board of Nat'l Missions (1954) 129 Cal. App. 2d 236, 243, 276 P.2d 829]* .

[4] To Plead

The court may, in furtherance of justice, and on such terms as may be proper, enlarge the time for answer or demurrer and may, in its discretion, after notice to the adverse party, allow, on such terms as may be just, an answer to be made after the time limited by the Code of Civil Procedure [*Code Civ. Proc. § 473(a)*]. In the absence of a court order, a late answer or demurrer may be filed if no default has been entered, but it is subjectto the court's discretionary power to strike it on motion [*Buck v. Morrossis (1952) 114 Cal. App. 2d 461, 464-465, 250 P.2d 270]* .

[5] Length of Extension

An extension pursuant to *Code Civ. Proc. § 1054* for an act relating to the pleadings may not be granted for more than 30 days without the consent of the adverse party [*Code Civ. Proc. § 1054*]. *Code Civ. Proc. § 473(a)* contains no limit on the length of an extension to answer or demur [*see Code Civ. Proc. § 473(a)*]. However, other sections of the Code of Civil Procedure that provide for extensions, without limitations on the length of the extension, have been interpreted to be limited to the length of extension permitted by *Code Civ. Proc. § 1054* [*see Lewith v. Rehmke (1933) 217 Cal. 563, 565, 20 P.2d 687* (interpreting former *Code Civ. Proc. § 650* regarding extensions to prepare bills of exceptions); *see also Thelander v. Superior Court (1962) 58 Cal. 2d 811, 813, 26 Cal. Rptr. 643, 376 P.2d 571]* . Therefore, it appears that the *Code Civ. Proc. § 1054* limit on the length of an extension to perform an act relating to the pleadings would apply and would limit the length of a permissible extension to answer or demur under *Code Civ. Proc. § 473*.

An order extending time to plead more than 30 days without the adverse party's consent is void, although reliance on this void order can be urged as grounds for relief under *Code Civ. Proc. § 473* [*Kennedy v. Mulligan (1902) 136 Cal. 556, 557, 69 P. 291]* .

When all attorneys of record of parties who have appeared in the action agree in writing, the court must grant the extension [*Code Civ. Proc. § 1054*]. When the extension is pursuant to agreement, there evidently is no restriction on the length of the extension.

[6] Good Cause

Code Civ. Proc. § 473, although not requiring a showing of good cause for an order enlarging the time to answer or demur, does require that the order be in furtherance of justice. *Code Civ. Proc. § 1054*, on the other hand, does require a showing of good cause for an extension. Therefore, it is strongly recommended that an application for an order extending time under *Code Civ. Proc. § 473* as well as under *Code Civ. Proc. § 1054* include a declaration setting forth facts constituting good cause for the order [for a form including such a declaration, *see § 524.52*].

A precise definition of what constitutes "good cause" for an extension has not been dealt with in cases under *Code Civ. Proc. § 1054*. However, good cause in general has been defined as calling "for a factual exposition of a reasonable ground for the sought order. The good cause may be equated to a good reason for a party's failure to perform that specific requirement from which he seeks to be excused" [Waters v. Superior Court (1962) 58Cal. 2d 885, 893, *27 Cal. Rptr. 153, 377 P.2d 265* (good cause for relief from requirement of service of notice of deposition on unserved defendants)].

[7] Not Usually a General Appearance

An application to the court or a stipulation by the parties for an extension of time to plead is not a general appearance by the defendant [*Code Civ. Proc. § 418.10(d)*]. However, a stipulation extending the time "within which to appear" has been held to be a general appearance [*RCA Corp. v. Superior Court (1975) 47 Cal. App. 3d 1007, 1009-1010, 121 Cal. Rptr. 441]* . A stipulation that, in addition to extending time, also accepts service of the summons and complaint is held to be a general appearance [*General Ins. Co. v. Superior Court (1975) 15 Cal. 3d 449, 452-453, 124 Cal. Rptr. 745, 541 P.2d 289]* . For further discussion, see Ch. 212, *Dismissal* .

[8] Under Rules of Court

Unless otherwise provided by law, a court may extend or shorten the time within which a party must perform any act under the California Rules of Court [*Cal. Rules of Ct., Rule 1.10(c)*].

[9] By Service by Mail

In case of service by mail of notices or other papers, any period of notice and any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which period or date is prescribed by statute or rule of court, is extended by the following periods when service is by mail [*Code Civ. Proc. § 1013(a)*]:

- Five calendar days, if the place of address and of mailing are both within California.
- Ten calendar days if either the place of mailing or of address is outside California but within the United States.
- Twenty calendar days if either the place of mailing or of address is outside the United States.

These extensions apply unless a specific exception is provided by statute or rule of court [*Code Civ. Proc. § 1013(a)*]. By the terms of Section 1013, the extensions do not apply to the time for taking the following actions [*Code Civ. Proc. § 1013(a)*]:

- Filing notice of intention to move for new trial [*see Code Civ. Proc. § 659*].
- Filing notice of intention to move to vacate judgment pursuant to *Code Civ. Proc. § 663a*.
- Filing notice of appeal.

Code Civ. Proc. § 1013 extensions do not apply to notices of motion that are governed by *Code Civ. Proc. § 1005* [*Code Civ. Proc. § 1005(b)*; *see Code Civ. Proc. § 1005(a)* (listing motions subject to Section 1005)]. However, *Code Civ. Proc. § 1005(b)* requires a similar, although not identical, extension of the 16-court-day notice period when a notice of motion is served by mail. For discussion of extensions under section 1005(b), see Ch. 372, *Motions and Orders* .

Service by mail is complete when the notice or other paper is deposited in a post office, mail box, subpost office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at his or her office address as last given by him or her on any document that he or she has filed in the cause and served on the party making service by mail [*Code Civ. Proc. § 1013(a)*]. The addressee incurs the risk of the mail failing to reach him or her [*McKeon v. Sambrano (1927) 200 Cal. 739, 741, 255 P. 178]* . However, if the envelope containing the document to be served is improperly addressed, the result is the same as if no document were ever sent [*Triumph Precision Products, Inc. v. Insurance Co. of North America (1979) 91 Cal. App. 3d 362, 365, 154 Cal. Rptr. 120]* .

[10] By Service by Overnight Delivery

In case of service by Express Mail or another method of overnight delivery, any period of notice and any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which period or date is prescribed by statute or rule of court, is extended by two court days [*Code Civ. Proc. § 1013(e)*].

This extension applies unless a specific exception is provided by statute or rule of court [*Code Civ. Proc. § 1013(c)*]. By

the terms of Section 1013, the extensions do not apply to the time for taking the following actions [*Code Civ. Proc. § 1013(c)*]:

- Filing notice of intention to move for new trial [*see Code Civ. Proc. § 659*].
- Filing notice of intention to move to vacate judgment pursuant to *Code Civ. Proc. § 663a*.
- Filing notice of appeal.

Code Civ. Proc. § 1013 extensions do not apply to notices of motion that are governed by *Code Civ. Proc. § 1005* [*Code Civ. Proc. § 1005(b)*; *see Code Civ. Proc. § 1005(a)* (listing motions subject to Section 1005)]. However, Section 1005(b) provides for a two calendar day extension. For discussion of extensions under section 1005(b), see Ch. 372, *Motions and Orders* .

Service by Express Mail is complete when the notice or other paper is deposited in a post office, mailbox, sub-post office, substation, or mail chute, or other like facility regularly maintained by the United States PostalService for receipt of Express Mail, in a sealed envelope, with Express Mail postage paid, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service by Express Mail, otherwise at that party's place of residence [*Code Civ. Proc. § 1013(c)*].

Service by another method of overnight delivery is complete when the notice or other paper is deposited in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service, otherwise at that party's place of residence [*Code Civ. Proc. § 1013(c)*].

[11] By Service by Facsimile Transmission

In case of service by facsimile transmission (fax), any period of notice and any right or duty to do any act or make any response within any period or on a date certain after the service of the document, which period or date is prescribed by statute or rule of court, is extended by two court days [*Code Civ. Proc. § 1013(e)*].

This extension applies unless a specific exception is provided by statute or rule of court [*Code Civ. Proc. § 1013(e)*]. By the terms of Section 1013, the extensions do not apply to the time for taking the following actions [*Code Civ. Proc. § 1013(e)*]:

- Filing notice of intention to move for new trial [*see Code Civ. Proc. § 659*].
- Filing notice of intention to move to vacate judgment pursuant to *Code Civ. Proc. § 663a*.
- Filing notice of appeal.

Code Civ. Proc. § 1013 extensions do not apply to notices of motion that are governed by *Code Civ. Proc. § 1005* [*Code Civ. Proc. § 1005(b)*; *see Code Civ. Proc. § 1005(a)* (listing motions subject to Section 1005)]. However, Section 1005(b) provides for a two calendar day extension. For discussion of extensions under section 1005(b), see Ch. 372, *Motions and Orders* .

Service by fax is permitted only when the parties agree and a written confirmation of that agreement is made [*Code Civ. Proc. § 1013(e)*]. Service is complete at the time of transmission of the notice or other paper to a fax machine

maintained by the person on whom it is served at the fax machine telephone number as last given by that person on any document which he or she has filed in the cause and served on the party making the service [*Code Civ. Proc. § 1013(e)*].

[12] For Legislator

When an act to be done in any action or proceeding in any state court or before any state administrative agency, as provided by law or rule, relates to the pleadings in the action, the preparation of bills of exceptions, or of amendments to them, or the service of notices (other than of appeal, of intention to move for a new trial, and of intention to move to vacate a judgment), and when the act is not a motion for a judgment notwithstanding the verdict, the time allowed for the act, unless otherwise expressly provided, must be extended to a date certain when an attorney of record for the party applying for the extension is a member of the State Legislature and the Legislature is in session or in recess for less than 41 days or if the attorney is a member of a legislative committee that is meeting or is to meet within a period not exceeding the time reasonably necessary to enable the attorney to reach the committee meeting by the ordinary mode of travel. Any extension granted for this reason also extends, for the same period, the time for any ruling or proceeding or for the performance by any party of any act affected by the extension [*Code Civ. Proc. § 1054.1*].

The times provided in the Bond and Undertaking Law (*Code Civ. Proc. § 995.010 et seq.*), or in any other statute relating to a bond given in an action or proceeding, may be extended pursuant to *Code Civ. Proc. § 1054.1* [*see Code Civ. Proc. § 995.050*].

Whenever a member of the California Legislature is a party, principal witness, or attorney of record, the trial of any civil action or proceeding in a court, or of any administrative proceeding before a state board, or commissioner, or officer, or the hearing of any motion, demurrer, or other proceeding must be postponed to a date certain under circumstances and conditions similar to those specified in *Code Civ. Proc. § 1054.1* [*Code Civ. Proc. § 595*]. For a discussion of *Code Civ. Proc. § 595*, see the Introduction to Ch. 136, *Continuances.*

The extension under *Code Civ. Proc. § 1054.1* or the continuance under *Code Civ. Proc. § 595* must be to a date certain. The length of the extension or continuance depends on such factors as the date of final adjournment of the Legislature or the commencement of a recess of more than 40 days, the date of adjournment or recess of a committee meeting, or the place of trial or hearing relative to the place of the committee meeting [*see Code Civ. Proc. §§ 595, 1054.1*].

Although by their own terms *Code Civ. Proc. §§ 595* and *1054.1* require mandatory extensions unless a right to relief pendente lite in a paternity action or a right to invoke a provisional remedy would be abridged, they have been interpreted to allow the court discretion in determining whether its processes and order of business should be delayed. In exercising its discretion the court should consider the nature and urgency of the rights involved, whether the party seeking delay has or can secure other counsel to represent him or her for the particular step in the proceedings thenbefore the court, and whether the attorney who is a member of the Legislature was employed for no other purpose than to attempt delay [*Thurmond v. Superior Court (1967) 66 Cal. 2d 836, 839-840, 59 Cal. Rptr. 273, 427 P.2d 985]* .

[13] Procedures for Obtaining

Although it is technically possible to obtain an order extending time pursuant to a noticed motion, the very nature of the order sought usually dictates that there will not be enough time to give 15 days notice for such motion. Therefore, of necessity, an extension of time is usually obtained pursuant to stipulation or ex parte order.

An application for an ex parte order extending time must be made to the judge before whom the matter is pending. It must disclose the nature of the case and any previous extensions by stipulation or court order [*Cal. Rules of Ct., Rule 2.20(a), (b)*; for a form including these statements, *see § 524.52*]. After obtaining the order, it must be filed immediately and served within 24 hours or within such other time as may be fixed by the court [*Cal. Rules of Ct., Rule 2.20(c)*].

Prior to making an application for an ex parte order, counsel should always check local court rules for additional requirements.

[14] Appeals

[a] Filing Notice

The time for filing a notice of appeal is jurisdictional and no court may extend it, unless there is an appellate emergency declared under *Cal. Rules of Ct., Rule 8.66*, in which case the Chair of the Judicial Council may extend additional time ranging from 14 days to 60 days depending on the scope and duration of the appellate emergency [*Cal. Rules of Ct., Rules 8.104(b), 8.308(a)*]; *see Schisler v. Mitchell (1959) 174 Cal. App. 2d 27, 29, 344 P.2d 61]* . The time for filing an appeal is automatically extended, however, if a motion for new trial or a motion to vacate a judgment is pending, if an appeal is filed by another party, or if the last day to file the appeal falls on a holiday [*Cal. Rules of Ct., Rules 8.108, 8.60, 8.752, 8.767*; for further discussion of extensions for filing notice of appeal, *see* Ch. 42, *Appeal: Notice of Appeal*].

[b] Filing Briefs

Appellant's opening brief must be served and filed within 30 days after the record is filed in the reviewing court; the respondent's brief must be filed within 30 days after the appellant's brief is filed. By a stipulation filed with the reviewing court, the parties may extend each of these periods for not more than 60 days, and thereafter the time may be extended only bythe Chief Justice or the Presiding Justice, for good cause shown [*Cal. Rules of Ct., Rule 8.216(a)*].

An application for an extension of time to file a brief must be served and filed, although the Chief Justice or presiding justice may excuse advance service. The application must state facts showing good cause--or exceptional good cause, when required by the California Rules of Court--for granting the application, and must identify any previous application filed by any party [*Cal. Rules of Ct., Rule 8.50*]. For discussion of extensions for filing briefs, *see Ch. 50, Appeal: Briefs, § 50.16[4]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureAppealsBriefsCivil ProcedureAppealsReviewabilityTime Limitations

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[Reserved]

§§ 524.14[Reserved]

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46-524 California Forms of Pleading and Practice--Annotated § 524.30

§ 524.30 Related Texts From Matthew Bender

For memoranda relating to forms in this chapter, see California Points and Authorities , Ch. 212, *Shortening and Extension of Time*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 524.31 State Statutes

[1] Determination of Time

Designation of holidays. *Code Civ. Proc. § 10*

Computation of time. *Code Civ. Proc. § 12*

Extension if last day for performance is holiday. *Code Civ. Proc. § 12a*

Holiday as day when public office closed for whole day. *Code Civ. Proc. § 12b*

Time to respond to amended pleading as computed from date of notice of such amendment. *Code Civ. Proc. § 472*

Time to amend, following sustaining of demurrer, as running, in absence of waiver, from date of service of decision or order. *Code Civ. Proc. § 472b*

Time to amend pleading after order sustaining demurrer without leave to amend is reversed or otherwise remanded. *Code Civ. Proc. § 472b*

[2] Extension or Shortening of Time for Discovery Procedures

Notice of deposition. *Code Civ. Proc. § 2025(f)* (*Code Civ. Proc. § 2025.210 et seq.* operative July 1, 2005)

Written interrogatories. *Code Civ. Proc. § 2030(h), (i)* (*Code Civ. Proc. § 2030.210 et seq.* operative July 1, 2005)

Inspections of documents, things, and places. *Code Civ. Proc. § 2031(i), (j)* (*Code Civ. Proc. § 2031.010 et seq.* operative July 1, 2005)

Requests for admissions. *Code Civ. Proc. § 2033(h), (i)* (*Code Civ. Proc. § 2033.010 et seq.* operative July 1, 2005)

[3] Extension as Not Constituting General Appearance

Application to court or stipulation of parties for extension as not constituting general appearance. *Code Civ. Proc. § 418.10(d)*

[4] General Provisions Relating to Extensions

Extension when notice of motion served by mail, facsimile transmission, or overnight delivery. *Code Civ. Proc. § 1005(b)*

Extension when notice or other paper served by electronic service. *Code Civ. Proc. § 1010.6(a)(6)*

Extension when notice or other paper served by mail, facsimile transmission, or overnight delivery. *Code Civ. Proc. § 1013(a), (c), (e)*

Authority for judge to grant extensions not exceeding 30 days. *Code Civ. Proc. § 1054*

[5] No Extension

Code Civ. Proc. § 1013 as not extending response time to summons served by mail. *Code Civ. Proc. § 413.20*

Code Civ. Proc. § 1013 as not extending notice of trial requirements for unlawful detainer actions. *Code Civ. Proc. § 594*

No extensions to file notice of intention to move for new trial. *Code Civ. Proc. § 659*

Code Civ. Proc. § 1013 as not extending time to move to vacate or set aside judgment. *Code Civ. Proc. § 663a*

[6] Specific Extensions

Extensions following *Code Civ. Proc. § 418.10(a)* motions to quash service of summons, to stay or dismiss for inconvenient forum, or to dismiss for delay in prosecution. *Code Civ. Proc. § 418.10(b), (c)*

Extension by filing motion to strike. *Code Civ. Proc. § 435*

Court as having power to extend time for answer or demurrer. *Code Civ. Proc. § 473(a)*

Court as having power to extend period of attachment. *Code Civ. Proc. § 488.510*

Court as having power to postpone trial if amendment renders postponement necessary. *Code Civ. Proc. § 594a*

Postponement of trial or hearing when party, witness, or attorney member of Legislature. *Code Civ. Proc. § 595*

Mandatory postponement of trial, or hearing of motion or demurrer, for not more than 30 days on written stipulation of all parties. *Code Civ. Proc. § 595.2*

Extension to serve and file affidavits to be used in motion for new trial. *Code Civ. Proc. § 659a*

Extension of time in proceeding relating to bond or undertaking. *Code Civ. Proc. § 995.050*

Mandatory extension of time for act by attorney attending Legislature. *Code Civ. Proc. § 1054.1*

Extensions in unlawful detainer actions not to exceed 10 days. *Code Civ. Proc. § 1167.5*

[7] Specific Orders Shortening Time

Authority for court or judge to shorten time for notice of motion. *Code Civ. Proc. § 1005(b)*

Order shortening time relating to subpoena duces tecum of employment records. *Code Civ. Proc. § 1985.6(g)*

Orders shortening time relating to subpena duces tecum of personal consumer records. *Code Civ. Proc. § 1985.3(h)*

Order shortening time relating to subpoena duces tecum of employment records. *Code Civ. Proc. § 1985.6(g)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsComputationCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureDiscoveryGeneral OverviewCivil ProcedurePretrial MattersContinuances

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§ 524.32 California Rules of Court

[1] Appeals

Supreme Court and courts of appeal. *Cal. Rules of Ct., Rules 8.108, 8.134(b), 8.216(a), 8.264, 8.504, 8.512, 8.50, 8.60, 8.1005(d), 8.706*

Appeal to superior court. *Cal. Rules of Ct., Rules 8.703, 8.752, 8.755(b), 8.766, 8.767*

[2] Trial Court Actions and Proceedings

Power of court to extend time for requesting, preparing, objecting to, signing, and filing proposed findings of fact and conclusions of law, counter findings, and proposed judgment. *Cal. Rules of Ct., Rule 3.1590(m)*

Applications for extensions to be heard by judge before whom matter pending. *Cal. Rules of Ct., Rules 2.20(a)*

Applications for extensions to disclose nature of case and any previous extensions. *Cal. Rules of Ct., Rules 2.20(b)*

Orders extending time to be filed forthwith and served within 24 hours or within such other time as fixed by court. *Cal. Rules of Ct., Rules 2.20(c)*

Power of court to extend time for performance of any act required or permitted by Cal. Rules of Court. *Cal. Rules of Ct., Rules 5.15* (family law rules), 1.10(c)

Application for order shortening time in trial court required to be supported by affidavit or declaration showing good cause. *Cal. Rules of Ct., Rules 3.1100*.

Legal Topics:

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

[1] Discretion of Court to Extend Time

Extensions of time to plead under *Code Civ. Proc. § 1054* as being within sound discretion of court. *Lucci v. United Credit & Collection Co. (1934) 220 Cal. 492, 495, 31 P.2d 369*

Code Civ. Proc. § 1054 as giving court power to extend time to file cost bill. *Davis Lumber Co. v. Hubbell (1955) 137 Cal. App. 2d 148, 151, 290 P.2d 33*

[2] Extension for Answering

Court as having power under *Code Civ. Proc. §§ 472* and *473* to impose terms as condition of answering after expiration of time to do so. *Hayes v. Butler (1914) 25 Cal. App. 743, 745, 145 P. 553*

[3] General Appearance May Result From Extension

Written agreement extending time to plead and disclosing intent to submit to jurisdiction constituted general appearance. *General Ins. Co. v. Superior Court (1975) 15 Cal. 3d 449, 452-453, 124 Cal. Rptr. 745, 541 P.2d 289*

Seeking extension to plead as not constituting general appearance. *Busching v. Superior Court (1974) 12 Cal. 3d 44, 51, 115 Cal. Rptr. 241, 524 P.2d 369*

Stipulation with defendant's insurance carrier extending time to plead and not challenging service precluded dismissal under former *Code Civ. Proc. § 581a* (*now see Code Civ. Proc. § 583.110 et seq.*). *Knapp v. Superior Court (1978) 79 Cal. App. 3d 799, 803, 145 Cal. Rptr. 154*

Stipulation with defendant's insurance carrier extending time to plead was insufficient to constitute general appearance.

Woodruff v. McDonald's Restaurants (1977) 75 Cal. App. 3d 655, 657-658, 142 Cal. Rptr. 367

[4] Service by Mail as Extending Time

Extension of time under *Code Civ. Proc. § 1013(a)* is not applicable to *Lab. Code § 1160.8* (time limit for filing petitions for review of ALRB orders); section 1013(a) by its terms deals only with case of service by mail whereas *Lab. Code § 1160.8* requires that petition be filed within 30 days of issuance of board decision. *Mario Saikhon, Inc. v. Agricultural Labor Relations Bd. (1983) 140 Cal. App. 3d 581, 583, 189 Cal. Rptr. 632*

Code Civ. Proc. § 1013 as not extending time to file action under Tort Claims Act following deposit in mail of rejection of claim against public entity. *Smith v. City & County of San Francisco (1977) 68 Cal. App. 3d 227, 231-232, 137 Cal. Rptr. 146*

Code Civ. Proc. § 1013 as extending time to petition for mandate to review denial of motion to quash when denial of motion mailed to petitioner. *Shearer v. Superior Court (1977) 70 Cal. App. 3d 424, 426, 138 Cal. Rptr. 824*

Code Civ. Proc. § 1013 broadly interpreted as extending time to move for further responses to interrogatories served by mail. *California Accounts, Inc. v. Superior Court (1975) 50 Cal. App. 3d 483, 487, 123 Cal. Rptr. 304*

Code Civ. Proc. § 1013 as not extending time to file notice of appeal. *Nu-Way Associates, Inc. v. Keefe (1971) 15 Cal. App. 3d 926, 928, 93 Cal. Rptr. 614*

When service of notice properly made by mail pursuant to *Code Civ. Proc. § 1013*, risk of failure of mail is on addressee. *Meskell v. Culver City Unified School Dist. (1970) 12 Cal. App. 3d 1, 824, 90 Cal. Rptr. 381*

[5] Shortening Time

Court may not shorten the 75-day notice period required for a motion for summary judgment, but the statute does gives trial courts authority to shorten the 60-day period after the opposing party's general appearance to file the motion, and to shorten the 30-day period before the trial date for the hearing on the motion. *McMahon v. Superior Court (2003) 106 Cal. App. 4th 112, 115-118, 130 Cal. Rptr. 2d 407*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensions

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46-524 California Forms of Pleading and Practice--Annotated § 524.34

§ 524.34 Text References

California Civil Procedure Before Trial, Vol. 1, Ch. 9, *Noticed Motions,* §§ 9.49 et seq., 9.61 et seq. (Cal. C.E.B. 3d ed.)

Witkin, California Procedure, Vol. 4, *Pleading,* §§ 8-10; *Proceedings Without Trial,* §§ 15-19 (4th ed. 1997)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral Overview

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[Reserved]

§§ 524.35[Reserved]

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46-524 California Forms of Pleading and Practice--Annotated § 524.40

§ 524.40 Checklist for Party Seeking Extension or Shortening of Time

NOTE:

In actions conducted pursuant to the Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*), local rules may restrict the shortening and extension of time. For further discussion, see *§ 524.10[2]*.

[1] Preliminary Determinations

1. Determine necessity of extension or shortening of time. If service was or will be by mail, add the appropriate number of days if *Code Civ. Proc. § 1005(b)* or *1013(a)* apply.

a. If seeking extension, ascertain last date on which act can be performed.

b. If seeking shortening, ascertain when you need act performed.

2. Determine feasibility of extension.

The time to file certain notices and/or motions cannot be extended, for example, notice of appeal, notice of intention to move for new trial [*see Code Civ. Proc. §§ 659, 1054, 1054.1*].

3. Determine if opposing counsel will stipulate.

4. Determine necessity of seeking order shortening or extending time through ex parte application or noticed motion.

An extension must be obtained during the period within which the act for which the extension is sought must be performed [*Coast Electric Service, Inc. v. Jensen (1931) 111 Cal. App. 124, 126, 295 P. 346]* .

[2] By Stipulation

1. Obtain agreement of all opposing counsel to stipulate to extension or shortening [*see Code Civ. Proc. § 283* (power of attorney to enter into stipulation)].

2. Either confirm the agreement by letter to all counsel or prepare stipulation [for forms of stipulations, *see § 524.50*, *524.51*; for general discussion of and forms for stipulation, *see also* Ch. 533, *Stipulations*].

3. Have stipulation executed by all opposing counsel.

4. Prepare proof of service [*see* Ch. 518, *Service of Summons and Papers*].

5. Serve copies of stipulation and proof of service [*see* Ch. 518, *Service of Summons and Papers*].

6. File original stipulation and proof of service in court in which action is pending.

[3] By Ex Parte Application

NOTE:
Check local rules for possible additional requirements for obtaining ex parte order.

1. Prepare necessary papers including the following:

a. Application for ex parte order [Forms: §§ 524.52, 524.54].

b. Supporting declaration [Forms: §§ 524.52, 524.54], including the following:
(1) Statement of nature of case,

(2) Showing of good cause, and

(3) Statement of any previous extensions by stipulation or order [*Cal. Rules of Ct., Rules 2.20(b), 3.1300*].

c. Supporting points and authorities, if desired [*see* California Points and Authorities , Ch. 212, *Shortening and Extension of Time*].

d. Proposed order [Forms: §§ 524.53, 524.55, 524.56].

e. Any other necessary documents, for example, proposed notice of motion for which order shortening time is being sought, points and authorities, and, if appropriate, declaration supporting the noticed motion.

2. Present all necessary papers to judge before whom matter is pending [*Cal. Rules of Ct., Rule 2.20(a)*].

3. File the order immediately [*Cal. Rules of Ct., Rule 2.20(c)*].

4. Serve endorsed, filed copies of all documents, with copies of proof of service attached, on all other counsel within 24 hours or within such other time as fixed by the court [*Cal. Rules of Ct., Rule 2.20(c)*; *see also* Ch. 518, *Service of Summons and Papers*].

5. File original proof of service.

[4] By Noticed Motion

If counsel has adequate time and wishes to seek an order shortening or extending time through a noticed motion, follow the procedures for noticed motions set out in Ch. 372, *Motions and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticePleadingsTime LimitationsComputationCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedurePretrial MattersContinuances

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[Reserved]

§§ 524.41[Reserved]

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46-524 California Forms of Pleading and Practice--Annotated § 524.50

§ 524.50 Stipulation [Code Civ. Proc. § 283(1)] Extending Time to Perform Act [Code Civ. Proc. § 1054(b); Gov. Code § 68616(b)] to Date Certain

[1] FORM Stipulation [Code Civ. Proc. § 283(1)] Extending Time to Perform Act [Code Civ. Proc. § 1054(b); Gov. Code § 68616(b)] to Date Certain

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	STIPULATION EXTENDING TIME TO
Defendant.	)	_____ [*specify, e.g.,* PLEAD TO
	)	COMPLAINT]
	)	

[*EITHER, if more than one party has appeared in the action*]

IT IS HEREBY STIPULATED by and between the parties hereto through their respective undersigned attorneys that _____ [*specify party, e.g.,* defendant] _____ [*name*] shall have up to and including _____ [*date*], to _____ [*state act to be performed, e.g.,* file an answer or otherwise plead to the complaint herein].

[*OR, if only one party has appeared in the action*]

IT IS HEREBY STIPULATED by the undersigned attorney of record for plaintiff _____ [*name*] that _____ [*specify party, e.g.,* defendant] _____ [*name*] shall have up to and including _____ [*time*] on _____ [*date*], to _____ [*state act to be performed, e.g.,* file an answer or otherwise plead to the complaint herein].

[*ADD date line and signature block for the attorney of record of each party who has appeared in the action, e.g.*:]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant

[2] Use of Form

The form in [1], *above,* is for use by the parties to an action or proceeding to stipulate to an extension of time to a date certain to perform an act specified in *Code Civ. Proc. § 1054(a)* (authorizing the court to grant extensions not exceeding 30 days) [*see Code Civ. Proc. § 1054(b)* (extension of time for acts specified in section 1054(a) by stipulation of attorneys of record for all parties); *Gov. Code § 68616(b)* (stipulation to 15-day extension to respond to complaint); *see also Code Civ. Proc. § 283(1)* (attorney's power to bind client)]. The acts specified in *Code Civ. Proc. § 1054(a)* are those relating to the pleadings, preparation of bills of exceptions, or of amendments thereto, and to the service of notices other than a notice of appeal or of intention to move for a new trial.

CAUTION:

Neither an application for nor a stipulation granting an extension of time to plead is a general appearance [*Code Civ. Proc. § 418.10(d)*]. Similarly, a stipulation extending the three-year period within which summons must be served to avoid mandatory dismissal does not constitute a general appearance in action [*Code Civ. Proc. §§ 583.210(a), 583.220(a), 583.230(a)*]. However, any additional language in the stipulation inconsistent with a special appearance, for example, an agreement to accept service of the summons and complaint, may constitute a general appearance [*see General Ins. Co. v. Superior Court (1975) 15 Cal. 3d 449, 453, 124 Cal. Rptr. 745, 541 P.2d 289* ; *Busching v. Superior Court (1974) 12 Cal. 3d 44, 51, 115 Cal. Rptr. 241, 524 P.2d 369* ; for a discussion of general and special appearances and their effect, *see* Ch. 323, *Jurisdiction: Personal*].

Although the form is designed for use under *Code Civ. Proc. § 1054(b),* it may be used to extend time for the performance of an act to a date certain whenever a statute authorizes the parties to agree or to stipulate to an extension of time for performing a specific act.

[3] Stipulations by Parties to Extend Time

In all cases in which the court or judge is authorized by *Code Civ. Proc. § 1054(a)* to grant an extension of time, the extension of time shall be granted when all attorneys of record of parties who have appeared in the action agree in writing to the extension [*Code Civ. Proc. § 1054(b)*; for what constitutes an appearance generally, *see Code Civ. Proc. § 1014*; for the kinds of appearances and their effect, see discussion in Ch. 323, *Jurisdiction: Personal*]. Any extension of time grantedby stipulation of all the attorneys of record of parties who have appeared in the action is not included in the computation of the 30-day limitation on extensions of time allowed by the court or judge under *Code Civ. Proc. § 1054(a)* [*Code Civ. Proc. § 1054(b)*].

In addition to *Code Civ. Proc. § 1054*, a number of other statutes authorize extensions of time on stipulation of one or more of the parties [*see, e.g., Code Civ. Proc. §§ 583.230* (stipulation extending time for service of process), 583.330 (stipulation extending time within which action must be brought to trial to avoid dismissal)].

[4] Cross References

For discussion of the effect of the Trial Court Delay Reduction Act, see *§ 524.10[2]*

For references to discussions and forms for stipulations extending time to perform particular acts, see *§ 524.02*

For discussion and general forms of stipulations, see Ch. 533, *Stipulations*

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46-524 California Forms of Pleading and Practice--Annotated § 524.51

§ 524.51 Stipulation [Code Civ. Proc. § 283(1)] Extending Time to Perform Act [Code Civ. Proc. § 1054(b)] for Open Extension of Time to Plead

[1] FORM Stipulation [Code Civ. Proc. § 283(1)] Extending Time to Perform Act [Code Civ. Proc. § 1054(b)] for Open Extension of Time to Plead

[*Caption. See Form 1.*]

IT IS HEREBY STIPULATED by and between plaintiff _____ [*name*] and defendant _____ [*name*], through their respective undersigned attorneys of record, that _____ [*specify party, e.g.,* defendant] _____ [*name*] shall not be required to appear further and plead to the _____ [*specify title of pleading, e.g.,* complaint] on file herein until _____ [*number*] days after notice to appear and plead to the _____ [*specify pleading, e.g.,* complaint] has been served on _____'s [*specify party, e.g.,* defendant] attorney of record.

Further, it is stipulated that _____ [*specify party, e.g.,* defendant] waives such right as he/she may have, or may hereafter acquire, under and in accordance with the terms and provisions of *Sections 583.110-583.430 of the Code of Civil Procedure* to dismiss the above-entitled action by reason of any delay which is the product of this stipulation.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Defendant

[2] Use of Form

The form of stipulation in [1], *above*, is for use by the parties (1) to grant a defendant or cross defendant an open extension of time to file an answer or otherwise plead to the complaint or cross complaint, and (2) to waive any right the defendant or cross defendant might have or acquire to have the action dismissed under *Code Civ. Proc. §§ 583.110-583.430* for failure to prosecute [*see Code Civ. Proc. § 583.140* (principles of waiver and estoppel not abrogated or otherwise affected by *Code Civ. Proc. §§ 583.110-583.430*]; *General Ins. Co. v. Superior Court (1975) 15 Cal. 3d 449, 452-456, 124 Cal. Rptr. 745, 541 P.2d 289* (decided under former *Code Civ. Proc. §§ 581a, 583* [*now see Code Civ. Proc. §§ 583.110-583.430*])]. For a form of stipulation granting an extension of time to plead to a date certain, see *§ 524.50*.

Use of this form may not be appropriate in many actions. The Trial Court Delay Reduction Act gives the judge responsibility to assume and maintain control over the pace of litigation [*Gov. Code § 68607*]. Local rules may operate to preclude any open extension of time by requiring orders extending time to include a specific deadline. Other local requirements may also come into play. For example, in San Diego, if a party cannot make a timely general appearance within the time required by the Code of Civil Procedure, or within 15 days thereafter if the parties have stipulated to extend that time [*see Gov. Code § 68616(b)* (allowing for 15-day stipulation)], the responding party must file a Certificate of Inability to Respond, which constitutes a general appearance [San Diego Co. Super. Ct. Rules, Div. II, Rule 2.1.6].

Moreover, many attorneys do not grant open extensions because they prefer to have a date calendared for receipt of a responsive pleading. However, when the plaintiff or cross complainant does grant an open extension of time, it is suggested that this form, with its waiver provisions, be used to obviate the possibility that the extension might give the defendant or cross defendant an opportunity to make a motion to dismiss for want of prosecution under *Code Civ. Proc. §§ 583.110-583.430*. The stipulation need not be filed, but if it is not, it must be brought to the court's attention if relevant to a dismissal motion [*Code Civ. Proc. §§ 583.230(a), 583.330(a)*].

CAUTION:

Neither an application for nor a stipulation granting an extension of time to plead is a general appearance [*Code Civ. Proc. § 418.10(d)*]. However, any additional language in the stipulation inconsistent with a special appearance, for example, an agreement to accept service of the summons and complaint, may constitute a general appearance [*see General Ins. Co. v. Superior Court (1975) 15 Cal. 3d 449, 453, 124 Cal. Rptr. 745, 541 P.2d 289* ; for a discussion of general and special appearances and their effect, *see* Ch. 323, *Jurisdiction: Personal*].

For further discussion of stipulations extending time, see *§ 524.50[2]* et seq.

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46-524 California Forms of Pleading and Practice--Annotated § 524.52

§ 524.52 Ex Parte Application for Order Extending Time [Code Civ. Proc. §§ 1054, 1054.1]

[1] FORM Ex Parte Application for Order Extending Time [Code Civ. Proc. §§ 1054, 1054.1]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	EX PARTE APPLICATION FOR ORDER EX-
Defendant.	)	TENDING TIME TO _____ [*spe-*
	)	*cify, e.g.,* PLEAD TO COMPLAINT]
	)	

_____

_____ [*Specify party, e.g.,* Defendant] _____ [*name*], hereby applies for an order, pursuant to Section _____ [1054 *or* 1054.1] of the Code of Civil Procedure, extending the time in which he/she may _____ [*specify, e.g.,* answer or otherwise plead to the complaint on file herein] from _____ [*date*], to _____ [*date*], and in support thereof, the undersigned declares:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*specify moving party, e.g.,* defendant)].

2. This is an action for _____ [*specify nature of the case, e.g.,* breach of contract for the sale of a 1950 Mercedes automobile].

[*EITHER*]

3. _____ [*State facts showing good cause for extension of time, e.g.,* On _____ (*date*), defendant, _____ (*name*), retained me as counsel in this action after discharging previous counsel. Competent and adequate representation requires an extension of time to fully study the pleadings and papers filed in this action and to fully investigate the facts surrounding the alleged incident before deciding on and preparing the appropriate responsive pleading to the complaint].

[*OR, if declarant is member of Legislature*]

3. I am a duly elected member of the Legislature of the State of California as I am a _____ [member of the Assembly of the Legislature from the _____ District *or* Senator from the _____ District *or* Senator from _____ County *or other statement as appropriate*]. _____ [The Legislature will be in _____ (regular *or* extraordinary) session *or* the _____ Committee of the Legislature, of which I am a member, isholding a hearing at _____ (*city*),] beginning _____ [*date*].

4. _____ [*State that there have been no prior extensions or specify any prior extensions, e.g.,* Extensions totaling _____ days have previously been granted by stipulation of counsel and _____ days by order of the court].

5. In the absence of an order extending time, the _____ [*specify title of pleading or other document for which extension is sought, e.g.,* answer or other responsive pleading to the complaint] would have to be filed and served on or before _____ [*date*].

6. On _____ [*date*], I notified _____ [*name*], attorney for _____ [*specify party, e.g.,* plaintiff], by _____ [*manner of notification, e.g.,* telephone], that this _____ [*specify, e.g.,* application for ex parte order extending time to plead to complaint] would be made and he/she refused to agree to an extension to _____ [*date*].

7. On or about _____ [*date*], I _____ [informed defendant('s attorney) _____ (*name*) when and where the application would be made by _____ (*describe method, attaching and relevant documents as exhibits*) and he/she refused to agree to the proposed shortening of time *or* attempted to inform defendant and his/her attorney when and where the application would be made but was unable to do so in that _____ (*describe attempt, attaching any relevant documents as exhibits*) *or specify reasons why plaintiff should not be required to inform the defendant or his/her attorney*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above,* is for general use in making an ex parte application to the court for an extension of time under *Code Civ. Proc. § 1054* or *1054.1*. The order sought by this application is *set out in § 524.53* and may be integrated into this form along with a supporting memorandum, all of which would then be listed in the caption [for supporting memoranda see California Points and Authorities , Ch. 212, *Shortening and Extension of Time*]. Extensions of time to plead under *Code Civ. Proc. § 1054* are within the sound discretion of the court [*Lucci v. United Credit & Collection*

Co. (1934) 220 Cal. 492, 495, 31 P.2d 369] .

Code Civ. Proc. § 473(a) also provides the court with authority to extend the time for answer or demur. The court also has the power of to extend the time for performance of any act required or permitted by the California Rules of Court [*Cal. Rules of Ct., Rules 5.15* (family law rules), 1.10(c)]. This form may be adapted for use under those authorities.

Applications for extensions are to be heard by the judge before whom the matter is pending. [*Cal. Rules of Ct., Rule 2.20(a)*]. Judges may grant orders and writs on ex parte application in chambers [*Code Civ. Proc. § 166*]. Local rules should be consulted for the time and place to present ex parte applications [*see, e.g.,* San Francisco Uniform Local Ct. Rules, Rule 9.0].

[3] Time to Apply for Extension

The application for any necessary extensions should be made during the period within which the act may be performed. The court has the power to grant an extension only during this period [*see Coast Electric Service, Inc. v. Jensen (1931) 111 Cal. App. 124, 126, 295 P. 346* (time for serving memorandum of costs)]. An application made after that time would be subject to the requirements of *Code Civ. Proc. § 473* [*see Cornell Univ. Medical College v. Superior Court (1974) 38 Cal App. 3d 311, 314-315, 113 Cal. Rptr. 291]* .

[4] Length of Extension

If proceeding under *Code Civ. Proc. § 1054*, counsel should not seek an extension exceeding 30 days without the consent of the adverse party. Such an order would be void [*Kennedy v. Mulligan (1902) 136 Cal. 556, 557, 69 P. 291* ; *see Code Civ. Proc. § 1054(a)*].

[5] Extensions for Attorney Legislators

The Supreme Court has decided that *Code Civ. Proc. § 1054.1* is directory and not mandatory. It is to be applied subject to the discretion of the court as to whether its process and order of business should be delayed. Among the factors to be considered are [*Thurmond v. Superior Court (1967) 66 Cal. 2d 836, 839-840, 59 Cal. Rptr. 273, 427 P.2d 985]* :

- The nature and urgency of the rights involved.

- Whether the party seeking delay has or can secure other counsel to represent him or her for the particular step in the proceedings then before the court.

- Whether the attorney who is a member of the Legislature was employed for no other purpose than to attempt delay.

If proceeding under *Code Civ. Proc. § 1054.1*, the attorney-legislator may wish to add additional facts to the declaration to convince the court that these factors outlined in *Thurmond*, are not present.

[6] Contents of Form

Applications for orders extending time must disclose the nature of the case andwhat extensions, if any, have previously been granted by order of court or stipulation of counsel (Paragraphs 2, 4) [*Cal. Rules of Ct., Rule 2.20(b)*].

If seeking an extension pursuant to *Code Civ. Proc. § 1054*, a statement of facts showing good cause for the extension must also be included (Paragraph 3) [*Code Civ. Proc. § 1054*; for discussion, *see § 524.13[6]*].

It is good practice to clearly specify the act to be performed, the reasons supporting the application and to specify the

last day and hour by which the act is to be performed.

A party making an ex parte application for an order must notify all parties no later than 10:00 a.m. the court day before the ex parte appearance, absent a showing of exceptional circumstances [*Cal. Rules of Ct., Rule 3.1203(a)*], and the application must be accompanied by an affidavit or by declaration establishing one of the following [*Cal. Rules of Ct., Rule 3.1204(b)*]:

- That, within the applicable time period under *Cal. Rules of Ct., Rule 3.1203*, the applicant informed the opposing party when and where the application would be made; or

- That the applicant in good faith attempted to inform the opposing party but was unable to do so, specifying the efforts made to inform the opposing party; or

- That for reasons specified, the applicant should not be required to inform the opposing party.

If there has been an earlier application that was refused in whole or in part, any subsequent application of the same character or for the same relief, although made on an alleged different state of facts, must include a full disclosure of any previous applications and the court's actions [*Cal. Rules of Ct., Rule 3.1202(b)*].

For further discussion of and general forms based on Rule 3.1200 *et seq.*, see Ch. 372, *Motions and Orders* .

[7] Accompanying Papers

An ex parte application must be supported by a memorandum [*Cal. Rules of Ct., Rule 3.1201(4)*]. One exception to the memorandum requirement is if the application is made to extend the time to serve pleadings and the application is filed on Judicial Council Form CM-020 [*Cal. Rules of Ct., Rule 3.1114(a)(2)*; for form, *see § 524.53A*].

Any request for judicial notice must be made in a separate document listing the specific items for which notice is requested and must comply with the production and notice requirements of *Cal. Rules of Ct., Rule 3.1306(c)* [*Cal. Rules of Ct., Rule 3.1113(m)*].

[8] Cross References

For a discussion of and forms for applications and orders extending time for service and filing of an appellate brief, see Ch. 50, *Appeal: Briefs*

For a discussion of and forms for obtaining extensions in discovery proceedings, Ch. 193, *Discovery: Depositions*, Ch. 194, *Discovery: Interrogatories*, Ch. 195, *Discovery: Inspection of Tangible Evidence*, Ch. 196, *Discovery: Requests for Admissions*

For a discussion of and alternative forms for applications and orders shortening and extending time for service of notice of motion and accompanying papers, see Ch. 372, *Motions and Orders*

For memoranda relating to this form, see California Points and Authorities , Ch. 212, *Shortening and Extension of Time*

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46-524 California Forms of Pleading and Practice--Annotated § 524.53

§ 524.53 Ex Parte Order Extending Time [Code Civ. Proc. §§ 1054, 1054.1]

[1] FORM Ex Parte Order Extending Time [Code Civ. Proc. §§ 1054, 1054.1]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	EX PARTE ORDER
vs.	)	EXTENDING TIME TO
_____ [*name*],	)	_____ [*specify e.g.,*
Defendant.	)	PLEAD TO
	)	COMPLAINT]
	)	

_____

[*EITHER, for extension under Code Civ. Proc. § 1054*]

Application having been made by _____ [*specify party, e.g.,* defendant] and good cause appearing therefor,

[*OR, for extension under Code Civ. Proc. § 1054.1*]

Application having been made by _____ [*specify party, e.g.,* defendant] and proof having been made to the satisfaction of the court,

[*CONTINUE*]

IT IS ORDERED that _____'s [*specify party, e.g.,* defendant] application to extend time to _____ [*specify act, e.g.,* answer or otherwise plead to the complaint on file herein] be, and hereby is, granted, and such time is extended to _____ [*time*] on _____ [*date*].

This order shall be served on all parties by _____ [*time*], _____ [*date*].
Dated: _____.

_____ [*signature*]
_____ [*specify, e.g.,* Judge *or, if authorized,* Court Commissioner]

[2] Use of Form

The form in [1], *above,* is for use in granting a party's ex parte application for an order extending time. It is frequently attached to the application [for the form of application, *see § 524.52*].

[3] Filing and Service of Order

Orders extending time must be filed immediately and copies served within 24 hours after being made or within such other time as may be fixed by the court [*Cal. Rules of Ct., Rule 2.20(c)*].

[4] Cross References

For a form for an order extending time for answer or demurrer, see Ch. 26, *Answers*

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46-524 California Forms of Pleading and Practice--Annotated § 524.53A

§ 524.53A Ex Parte Application for Extension of Time to Serve Pleading and Order Extending Time to Serve [Code Civ. Proc. § 1054; Cal. Rules of Ct., Rule 3.1200 *et seq.*]--Judicial Council Form CM-020

[1] FORM Ex Parte Application for Extension of Time to Serve Pleadings and Order Extending Time to Serve [Code Civ. Proc. § 1054; Cal. Rules of Ct., Rule 3.1200 *et seq.*]--Judicial Council Form CM-020

Click here to view image.

[2] Use of Form

The application illustrated in [1], *above*, is a reproduction of a form adopted by the Judicial Council for use in making an ex parte application for an extension of time to serve a pleading. The form includes an order if the time is granted. Use of this form, when applicable, is optional [*see Gov. Code § 68511*; *Cal. Rules of Ct., Rule 1.35*; Judicial Council Form CM-020].

While an ex parte application generally must be supported by a memorandum [*see Cal. Rules of Ct., Rule 3.1201(4)*], filing of this application on the Judicial Council form negates the supporting memorandum requirement [*Cal. Rules of Ct., Rule 3.1114(a)(2)*]. If it would further the interest of justice, the party may submit, or the court may order, a supporting memorandum; and if so it must comply with *Cal. Rules of Ct., Rule 3.1113* [*Cal. Rules of Ct., Rule 3.1114(b)*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

For additional discussion on notice requirements of an ex parte application to extend time, see *§ 524.52*. For discussion of ex parte applications and notice requirements in general, see *Ch. 372, Motions and Orders, § 372.19*. For additional discussion regarding the service of papers generally, see Ch. 517, *Service of Summons and Papers* .

[3] Cross References

For a form of ex parte application for an order extending time for other than serving pleadings, see *§ 524.52*

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46-524 California Forms of Pleading and Practice--Annotated § 524.54

§ 524.54 Application and Declaration for Ex Parte Order Shortening Time for Service of Notice of Motion and Accompanying Papers [Code Civ. Proc. § 1005]

[1] FORM Application and Declaration for Ex Parte Order Shortening Time for Service of Notice of Motion and Accompanying Papers [Code Civ. Proc. § 1005]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	APPLICATION AND SUPPORTING DECLARA-
Defendant.	)	TION OF _____ [*name*] FOR EX
	)	PARTE ORDER SHORTENING TIME FOR SER-
	)	VICE OF NOTICE OF MOTION FOR
		_____ [*specify, e.g.,* ORDER
		COMPELLING FURTHER RESPONSE TO WRIT-
		TEN INTERROGATORIES] AND ACCOMPANY-
		ING PAPERS

_____

APPLICATION

I, _____ [*name*], hereby apply on behalf of _____ [*moving party, e.g.,* plaintiff] in the above-captioned matter, for an order, pursuant to *Code of Civil Procedure Section 1005(b),* shortening time for service of the attached notice of motion for _____ [*specify, e.g.,* order compelling further response to

written interrogatories] and supporting papers, to _____ days before the hearing.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*specify moving party, e.g.,* plaintiff)].

2. _____ [*State facts showing good cause for shortening time for notice of motion, e.g.,* This is an action for damages arising from an automobile accident. It is currently scheduled to commence trial on _____ [*date*].As more fully set forth in the attached motion and accompanying papers, defendant's responses to plaintiff's first set of interrogatories were evasive and nonresponsive. Plaintiff's accident reconstruction expert needs responsive answers to the subject interrogatories in order to conduct further tests. In the absence of an order shortening time, this motion to compel further answers to interrogatories will not be heard, nor will further answers be obtained in time for the necessary tests to be performed prior to trial].

3. On or about _____ [*date*], I _____ [informed defendant('s attorney) _____ (*name*) when and where the application would be made by _____ (*describe method, attaching and relevant documents as exhibits*) and he/she refused to agree to the proposed shortening of time *or* attempted to inform defendant and his/her attorney when and where the application would be made but was unable to do so in that _____ (*describe attempt, attaching any relevant documents as exhibits*) *or specify reasons why plaintiff should not be required to inform the defendant or his/her attorney*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

The form in [1], *above,* is for general use when applying to the court for an ex parte order shortening time for service of notice of a motion [*see Code Civ. Proc. § 1005(b)* (authority of court or judge to shorten time for notice of motion)]. The moving party normally attaches a proposed order [for a form, *see § 524.55*], the notice of motion, and supporting papers to the application. This form can be modified to seek an ex parte order shortening time for proceedings other than notice of motions.

Paragraph 3 of the Declaration sets out facts concerning ex parte application notice procedures required by *Cal. Rules of Ct., Rule 3.1200 et seq.* [For discussion, see *§ 524.52[5]*.

An application for an order shortening time in law and motion proceedings must be supported by an affidavit or declaration showing good cause for the order [*Cal. Rules of Ct., Rules 3.1100, 3.1103(b), 3.1300(6)*].

This form refers to notice under *Code Civ. Proc. § 1005(b)*, but may be adapted for use to shorten other periods [*see, e.g., Code Civ. Proc. § 1985.3(h)* (order shortening time for service of subpena duces tecum); *Code Civ. Proc. § 2025.270(d)*) (extension or shortening of time for notice of taking deposition)].

[3] Local Requirements

Local court rules should always be checked before preparation and presentation of ex parte applications [*see* Los Angeles Co. Super. Ct. Rules, Rule 9.9; San Francisco Uniform Local Ct. Rules, Rule 9].

[4] Cross References

For discussion of requirements relating to ex parte applications generally, see *§ 524.52[2]* et seq.

For a discussion of and forms for shortening time for relief from default in property actions, see Ch. 205, *Defaults and Default Judgments*

For a discussion of and alternative forms for application and order shortening time for service of notice of motion and accompanying papers and for an ex parte motion, see Ch. 372, *Motions and Orders*

For a discussion of and forms for obtaining orders shortening time in discovery proceedings, see Ch. 193, *Discovery: Depositions* , Ch. 194, *Discovery: Interrogatories* , Ch. 195, *Discovery: Inspection of Tangible Evidence* , Ch. 196, *Discovery: Requests for Admissions*

For memoranda relevant to this form, see California Points and Authorities, Ch. 212, *Shortening and Extension of Time*

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46-524 California Forms of Pleading and Practice--Annotated § 524.55

§ 524.55 Ex Parte Order Shortening Time for Service of Notice of Motion and Accompanying Papers [Code Civ. Proc. § 1005(b)]

[1] FORM Ex Parte Order Shortening Time for Service of Notice of Motion and Accompanying Papers [Code Civ. Proc. § 1005(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	EX PARTE ORDER SHORTENING TIME FOR
Defendant.	)	SERVICE OF NOTICE OF MOTION FOR
	)	_____ [*specify, e.g.,* ORDER
	)	COMPELLING FURTHER RESPONSE TO WRIT-
		TEN INTERROGATORIES] AND ACCOMPANY-
		ING PAPERS

_____

Application having been made by _____ [*specify party, e.g.,* plaintiff] with proof having been made to the satisfaction of the court, and good cause appearing therefor,

IT IS ORDERED that the application of _____ [*specify party, e.g.,* plaintiff], _____ [*name*], for an ex parte order shortening time for service of notice of motion for _____ [*specify, e.g.,* order compelling further response to written interrogatories] and accompanying papers is granted and the time of service of that notice of motion is shortened so that service by _____ [fax *or* personal delivery *or other manner*] to the office of the attorney for _____ [*specify party, e.g.,* defendant], _____ [*name*], by _____ [*time*], on _____ [*date*], is sufficient notice of the proceeding.

Dated: _____.

_____ [*signature*]
_____ [*specify, e.g.,* Judge *or, if authorized,* Court Commissioner]

[2] Use of Form

The form in [1], *above,* is for use in granting a party's application for an order shortening time for notice of motion. It is frequently attached, without its own caption, to the application and supporting declaration [for a form of application, *see § 524.54*], notice of motion, and accompanying papers.

For a form of ex parte order shortening time for notice of motion based on a form that was formerly required to be used in the Los Angeles County Superior Court, see *§ 524.56*.

An order shortening time for notice must designate a definite time within which notice must be served [*Howell v. Howell (1885) 66 Cal. 390, 391, 5 P. 681]* .

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46-524 California Forms of Pleading and Practice--Annotated § 524.56

§ 524.56 Ex Parte Order Granting Motion to Shorten Time for Serving Notice of Motion and Accompanying Papers--Los Angeles Superior Court [former Los Angeles Co. Super. Ct. Rules, Rule 9.36]

[1] FORM Ex Parte Order Granting Motion to Shorten Time for Serving Notice of Motion and Accompanying Papers--Los Angeles Superior Court [former Los Angeles Co. Super. Ct. Rules, Rule 9.36]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER SHORTENING TIME
_____ [*name*],	)	Hearing Department _____
Defendant.	)	
	)	
	)	

Good cause having been shown therefor,

IT IS ORDERED that the time of service of the foregoing _____ [*specify nature of notice and accompanying papers to be served*] is so shortened that service thereof by means of _____ [*specify, e.g.*, personal service no later than _____ o'clock on _____ [*date*], is adjudged to be sufficient notice of the proceeding mentioned therein.

IT IS FURTHER ORDERED that all papers in opposition must be filed in the Hearing Department by _____ o'clock on _____ [*date*], and served on opposing counsel by means of _____ [*specify, e.g.*, personal service or fax] by _____ o'clock on

_____ [*date*]. Proof of service of the motion and this order must be filed in the Hearing Department no later than _____ o'clock on _____ [*date*].

Opposition Papers must include the following notation on the first page, immediately below the date, time, and place of hearing:

"OPPOSITION FILED ON _____ [*date*],
PURSUANT TO EX PARTE OST
ISSUED ON _____ [*date of order*]."

IT IS FURTHER ORDERED as follows:
_____
_____
_____

Hearing: _____ [*date*] at _____ [*time*] in Department _____.
Dated: _____.

_____ [*signature*]
Judge/Commissioner

[2] Use of Form

The form in [1], *above*, was adapted from a form that was in the past the mandatory form of ex parte order shortening time in Los Angeles County (former Los Angeles Co. Super. Ct. Rules, Rule 9, Appen. B). Los Angeles no longer mandates a specific form.

[3] Cross References

For an alternative form of ex parte order shortening time, see *§ 524.55*

For an ex parte application to shorten time, see *§ 524.54*

For discussion of ex parte applications, see *§ 524.52[2]* et seq.

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46-525 California Forms of Pleading and Practice--Annotated 525.syn

§ 525.syn Synopsis to Chapter 525: SLIP AND FALL

§ 525.01 Scope of Chapter

§ 525.02 Cross References

§§ 525.03-525.09 [Reserved]

§ 525.10 Governing Law

§ 525.11 Standard of Care

[1] Reasonable Person Test

[2] Floors

[3] Carpets and Floor Mats

[4] Stairs

[5] Sidewalks

[6] Distinction Between Owner and Possessor

§ 525.12 Res Ipsa Loquitur Is Generally Unavailable

§§ 525.13through 525.29 [Reserved]

§ 525.30 Related Matthew Bender Publications

[1] California Points and Authorities

[2] Bender's Forms of Discovery

§ 525.31 State Statutes

§ 525.32 Decisions

[1] Architects

[2] Basis of Liability

[3] Floors

[4] Question of Fact

[5] Sidewalks

[6] Stairs

[7] Third Parties

[8] Warning

§ 525.33 Law Reviews

§ 525.34 Text References

§§ 525.35through 525.49 [Reserved]

§ 525.50 Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Premises--Fall on Item Left on Floor

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 525.51 Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Premises--Fall Resulting From Slippery Condition

[1] FORM

[2] Use of Form

[3] Cross References

§ 525.52 Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Premises--Fall Resulting From Deteriorated Condition of Premises

[1] FORM

[2] Use of Form

[3] Cross References

§ 525.53 Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Premises--Fall on Unmarked Obstruction

[1] FORM

[2] Use of Form

[3] Cross References

§ 525.54 Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Premises--Fall Down Steps of Unequal Height

[1] FORM

[2] Use of Form

[3] Cross References

§ 525.55 Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Premises--Fall Down Dimly Lit Steps

[1] FORM

[2] Use of Form

[3] Cross References

§ 525.56 Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Premises--Fall Down Steps With Loose Carpet

[1] FORM

[2] Use of Form

[3] Cross References

§ 525.57 Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Business Premises--Fall Resulting From Distracting Displays and/or Advertisements

[1] FORM

[2] Use of Form

[3] Cross References

§ 525.58 Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Spectator or Member of Audience Against Owner and/or Operator of Stadium/Coliseum/Theater--Fall Resulting From Overcrowded Conditions

[1] FORM

[2] Use of Form

[3] Cross References

§ 525.59 Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Architect/Designer--Fall Resulting From Defective Design and/or Supervision of Construction

[1] FORM

[2] Use of Form

[3] Cross References

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PART I. SCOPE

46-525 California Forms of Pleading and Practice--Annotated § 525.01

§ 525.01 Scope of Chapter

This chapter discusses and contains allegations for use in complaints alleging that the negligence of the owner, possessor, or architect of particular premises was the proximate cause of personal injuries plaintiff received in a slip and fall accident. It contains forms of specific allegations [*see §§ 525.50 -525.58*] for use in an action against an owner or possessor of premises who has created and/or failed to discover, correct, or warn of a dangerous condition on the premises which caused plaintiff to slip and fall. It also contains a form of allegation [*see § 525.59*] for use in a complaint against an architect and/or designer for the negligent design and/or supervision of the construction of the structural condition which caused plaintiff to slip and fall.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyGeneral Premises LiabilityActivities & ConditionsSlip & Fall InjuriesGeneral Overview

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46-525 California Forms of Pleading and Practice--Annotated § 525.02

§ 525.02 Cross References

For forms and discussions of the law that may be relevant to slip and fall cases in particular situations, see the following chapters:

- Ch. 16, *Airplanes and Airports*.
- Ch. 102, *Bridges*.
- Ch. 106, *Buses and Streetcars*.
- Ch. 110, *Churches and Religious Organizations*.
- Ch. 244, *Elevators and Escalators*.
- Ch. 246, *Emergency Vehicles*.
- Ch. 273, *Games, Sports, and Athletics*.
- Ch. 274, *Garages and Gas Stations*.
- Ch. 295, *Hospitals*.
- Ch. 297, *Hotels and Motels*.
- Ch. 334, *Landlord and Tenant: Claims for Damages*.
- Ch. 460, *Products Liability*.
- Ch. 464, *Public Entities and Officers: California Tort Claims Act*.

- Ch. 485, *Railroads*.
- Ch. 514, *Schools: Injuries to Students*.
- Ch. 522, *Ships and Shipping*.
- Ch. 544, *Taxicabs*.
- Ch. 547, *Theaters, Shows, and Amusement Places*.

For discussion and forms relating to premises liability generally, see Ch. 421, *Premises Liability* , and for discussion and forms relating to negligence generally, see Ch. 380, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyGeneral Premises LiabilityActivities & ConditionsSlip & Fall InjuriesGeneral Overview

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[Reserved]

§§ 525.03[Reserved]

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PART II. LEGAL BACKGROUND

46-525 California Forms of Pleading and Practice--Annotated § 525.10

§ 525.10 Governing Law

Slip and fall accidents, like other types of actions based on negligence, are governed by *Civ. Code § 1714(a)*. The leading case defining the rights and duties of landowners and possessors is *Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyGeneral Premises LiabilityGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityActivities & ConditionsSlip & Fall InjuriesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareGeneral Overview

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PART II. LEGAL BACKGROUND

46-525 California Forms of Pleading and Practice--Annotated § 525.11

§ 525.11 Standard of Care

[1] Reasonable Person Test

In accordance with *Civ. Code § 1714(a)*, the proper test to be applied to the liability of the possessor of land is whether, in the management of his or her property, the possessor has acted as a reasonable person in view of the probability of injury to others. Although the plaintiff's status as a trespasser, licensee, or invitee may, in the light of the facts giving rise to such status, have some bearing on the question of liability, the status is not determinative [*Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561* ; *see also* *Peterson v. Superior Court (1995) 10 Cal. 4th 1185, 1196-1197, 43 Cal. Rptr. 2d 836, 899 P.2d 905* (reiterating general principles of *Rowland* and other cases regarding negligence liability, while rejecting strict liability for injuries caused by latent defects in premises)].

The statutory standard of care required by *Civ. Code § 1714(a)* is the same as the standard of care traditionally required in cases where the plaintiff's status was that of an invitee [*Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 25, 77 Cal. Rptr. 914]* . Therefore, those decisions delineating the duties of a landowner or possessor toward his or her invitee are not abrogated by *Rowland v. Christian* [*Beauchamp v. Los Gatos Golf Course (1969) 273 Cal. App. 2d 20, 25, 77 Cal. Rptr. 914]* .

The possessor of land has a duty to correct or warn of known dangerous conditions [*Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561]* . The possessor also has a duty to make a reasonable inspection to discover dangerous conditions which are not known, and a plaintiff may use evidence of the lack of inspections within a reasonable length of time to prove circumstantially that the possessor had constructive knowledge of the defect with sufficient time to correct it [*Ortega v. Kmart Corp. (2001) 26 Cal. 4th 1200, 1212-1213, 114 Cal. Rptr. 2d 470, 36 P.3d 11* (jury question whether, considering all circumstances, lack of inspection is sufficient to support liability)]; [*Bridgman v. Safeway Stores, Inc. (1960) 53 Cal. 2d 443, 447, 2 Cal. Rptr. 146, 348 P.2d 696]* . However, the possessor is not required to warn of obvious dangers [*Curland v. Los Angeles County Fair Ass'n (1953) 118 Cal. App. 2d 691, 695, 258 P.2d 1063]* .

The court of appeal has specifically rejected the argument that a store may be liable if the store's use of a particular business model creates a greater risk that a particular hazard will arise more frequently, even though the store does not

have knowledge or constructive knowledge of the dangerous condition that actually caused the injury. In that case, for example, a department store was not liable to a patron who slipped on a french fry merely because the store leased space to a fast food restaurant and allowed patrons to take food and drink from the restaurant into the department store, absent a showing that the store knew or should have known of the french fry in time to prevent the injury [*Moore v. Wal-Mart Stores, Inc. (2003) 111 Cal. App. 4th 472, 478-479, 3 Cal. Rptr. 3d 813]* .

[2] Floors

An owner or possessor of property has the duty of keeping floors dry [*Tuttle v. Crawford (1936) 8 Cal. 2d 126, 133-134, 63 P.2d 1128* ; *Lamb v. Purity Store, Inc. (1932) 119 Cal. App. 690, 692, 7 P.2d 197]* and free from foreign substances [*see* *Ahern v. S.H. Kress & Co. (1950) 97 Cal. App. 2d 691, 699, 218 P.2d 108]* so that they are reasonably safe to traverse. The question of reasonable safety is closely related to the type of person expected to traverse the floor. It has been held that even the mere waxing of a floor may be negligent in some cases [*Cagle v. Bakersfield Med. Group (1952) 110 Cal. App. 2d 77, 81, 241 P.2d 1013]* . Whether a floor is so negligently maintained as to render the person responsible for its condition liable for damages is a question of fact [*Tuttle v. Crawford (1936) 8 Cal. 2d 126, 130, 63 P.2d 1128]* .

[3] Carpets and Floor Mats

The owner or possessor of property is liable for injuries resulting from unreasonably loose carpeting [*Sharpless v. Pantages (1918) 178 Cal. 122, 124, 172 P. 384]* or unsafe floor mats [*Blumberg v. M. & T., Inc. (1949) 34 Cal. 2d 226, 229, 209 P.2d 1]* .

[4] Stairs

The owner or possessor of premises is liable for injuries caused by dangerous or defective stairs [*Megee v. Fasulis (1944) 65 Cal. App. 2d 94, 103, 150 P.2d 281]* . Among the conditions found to be unreasonably dangerous are slippery stairs [*see* *Donohue v. San Francisco Hous. Auth. (1993) 16 Cal. App. 4th 658, 665, 20 Cal. Rptr. 2d 148* (wet concrete stairs without skid-resistant treads); *Rau v. Redwood City Woman's Club (1952) 111 Cal. App. 2d 546, 551-552, 245 P.2d 12]* , unlighted stairs [*see* *Ralph v. Clifton's Brookdale, Inc. (1948) 85 Cal. App. 2d 574, 576-577, 193 P.2d 511]* , stairs with different height steps [*King v. New Masonic Temple Assn.(1942) 51 Cal. App. 2d 512, 515-516, 125 P.2d 559]* , and defective bannisters [*Trainor v. Maus (1954) 126 Cal. App. 2d 295, 299, 271 P.2d 957]* .

[5] Sidewalks

Despite the existence of a statute requiring a property owner to keep adjacent sidewalks in repair [*Sts. & Hy. Code § 5610*], the courts have held that the property owner is not liable for injury caused by dangerous conditions that are not created by the owner's positive acts [*Jones v. Deeter (1984) 152 Cal. App. 3d 798, 803, 199 Cal. Rptr. 825* ; *Schaefer v. Lenahan (1944) 63 Cal. App. 2d 324, 326-332, 146 P.2d 929]* . However, if an abutting owner created the dangerous condition [*Lay v. Pacific Perforating Co. (1944) 62 Cal. App. 2d 233, 237, 144 P.2d 395]* , or if the dangerous condition was created for the special benefit and convenience of the abutting owner [*Daly v. Mathews (1942) 49 Cal. App. 2d 545, 548, 122 P.2d 81]* , the owner will be liable.

[6] Distinction Between Owner and Possessor

Common law holds the possessor of property primarily responsible for its safe condition. Possession is equated with occupancy plus control [*Low v. Sacramento (1970) 7 Cal. App. 3d 826, 831, 87 Cal. Rptr. 173]* . Control over property is defined as the power to prevent, remedy, or guard against the dangerous condition [*Fuller v. California (1975) 51 Cal. App. 3d 926, 947, 125 Cal. Rptr. 586]* . Thus, in determining liability and alleging a cause of action for slip and fall injuries, a crucial consideration is which party had control over the area where the accident occurred [

Schwartz v. Helms Bakery Ltd. (1967) 67 Cal. 2d 232, 239, 60 Cal. Rptr. 510, 430 P.2d 68] . Generally, this will be the party in possession of the property.

In limited circumstances, an owner not in possession may be liable for injuries on his or her premises. Thus, a landowner may be liable for injuries resulting from his or her failure to warn a tenant of a latent dangerous condition of which the owner had notice [*Hanson v. Luft (1962) 58 Cal. 2d 443, 445, 24 Cal. Rptr. 681, 374 P.2d 641]* , for breach of a convenant to repair [*see* *McNally v. Ward (1961) 192 Cal. App. 2d 871, 884, 14 Cal. Rptr. 260]* , for violation of a statute [*Finnegan v. Royal Realty Co. (1950) 35 Cal. 2d 409, 423, 218 P.2d 17]* , or for injuries occurring on a part of the property over which the owner retains control [*Sockett v. Gottlieb (1960) 187 Cal. App. 2d 760, 766, 9 Cal. Rptr. 831]* .

Thus, a slip and fall plaintiff would normally include the possessor of the property as a defendant, and, where there is a separate basis for liability, an owner not in possession of the property.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyGeneral Premises LiabilityActivities & ConditionsSlip & Fall InjuriesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsDuty to InspectTortsPremises Liability & PropertyGeneral Premises LiabilityDangerous ConditionsDuty to WarnTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty off PremisesSidewalks & StreetsTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesReasonable Care

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46-525 California Forms of Pleading and Practice--Annotated § 525.12

§ 525.12 Res Ipsa Loquitur Is Generally Unavailable

The Supreme Court has stated that experience teaches that slips and falls are not so likely to be the result of negligence that a presumption tothat effect is justified. The Court was unwilling to go so far as to say that res ipsa loquitur can never apply to a slip and fall, but noted that a slip and fall caused by a slippery object permits a res ipsa loquitur instruction only if the evidence shows that the object had been there long enough that the owner of the premises should have discovered and removed it [*see Brown v. Poway Unified School Dist. (1993) 4 Cal. 4th 820, 826-827, 15 Cal. Rptr. 2d 679, 843 P.2d 624* (res ipsa presumption inappropriate when delivery person slipped, and piece of luncheon meat was found on bottom of shoe; possible explanations that did not involve negligence were equally probable as those involving negligence)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceProofRes Ipsa LoquiturLimits on ApplicationTortsPremises Liability & PropertyGeneral Premises LiabilityActivities & ConditionsSlip & Fall InjuriesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityActivities & ConditionsSlip & Fall InjuriesElements

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[Reserved]

§§ 525.13[Reserved]

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46-525 California Forms of Pleading and Practice--Annotated § 525.30

§ 525.30 Related Matthew Bender Publications

[1] California Points and Authorities

For memoranda of points and authorities relating to forms in this chapter, see California Points and Authorities, Ch. 165, *Negligence* , and Ch. 178, *Premises Liability* (Matthew Bender)

[2] Bender's Forms of Discovery

For forms of interrogatories for use in slip and fall actions, see Bender's Forms of Discovery, Vol. 4, *Damages;* Vol. 7, *Negligence*, and Vol. 9, *Slip and Fall* and *Stairways and Steps*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsInterrogatoriesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityActivities & ConditionsSlip & Fall InjuriesGeneral Overview

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46-525 California Forms of Pleading and Practice--Annotated § 525.31

§ 525.31 State Statutes

Property owner's or possessor's liability to recreational users. *Civ. Code § 846*

Limitation on liability of landowner toward person injured or killed during commission of crime. *Civ. Code § 847*

Care and skill required in management of property. *Civ. Code § 1714(a)*

Procedure to require undertaking in action against architect or designer. *Code Civ. Proc. § 1029.5*

Liability of abutting owner for condition of sidewalk. *Sts. & Hy. Code § 5610*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityProfessional ServicesTortsPremises Liability & PropertyGeneral Premises LiabilityActivities & ConditionsCriminal ActivityTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty off PremisesSidewalks & StreetsTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesRecreational Use Statutes

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46-525 California Forms of Pleading and Practice--Annotated § 525.32

§ 525.32 Decisions

[1] Architects

Architect was liable for wrongful death resulting from failure to mention presence of high-voltage line in plans that called for excavation of footings. *Mallow v. Tucker, Sadler & Bennett, Architects & Eng'rs, Inc. (1966) 245 Cal. App. 2d 700, 702-703, 54 Cal. Rptr. 174*

Architect who plans and supervises construction work has duty to exercise ordinary care for protection of persons who foreseeably may be injured by architect's failure to do so, even though injury may occur after work has been accepted by person engaging architect's services. *Montijo v. Swift (1963) 219 Cal. App. 2d 351, 353, 33 Cal. Rptr. 133*

Architect was liable for negligent supervision of construction of sun deck. *Pieri v. Rosebrook (1954) 128 Cal. App. 2d 250, 257-258, 275 P.2d 67*

Architect who negligently supervises construction has liability that is separate and distinct from liability of party who negligently performs actual construction. *Alexander v. Hammarberg (1951) 103 Cal. App. 2d 872, 879-880, 884, 230 P.2d 399*

[2] Basis of Liability

Common law distinctions as to duty owed to guests, invitees, and trespassers abolished and liability predicated on ordinary negligence under Civ. Code§ 1714, which is civil law, not common law principle. *Rowland v. Christian (1968) 69 Cal. 2d 108, 112-120, 70 Cal. Rptr. 97, 443 P.2d 561*

Joint liability of city and adjacent landowner for injury caused by landowner's creation of dangerous condition of

sidewalk. *Peters v. City & County of San Francisco (1953) 41 Cal. 2d 419, 429, 260 P.2d 55*

Janitorial service was not liable for slip in parking lot because service contracted by owner to sweep lot and evidence showed that contract was performed to owner's satisfaction. *Cacciaguidi v. Elliott (1974) 39 Cal. App. 3d 261, 264-265, 114 Cal. Rptr. 93*

Abolishment of attractive nuisance doctrine in *California. Smith v. Americania Motor Lodge (1974) 39 Cal. App. 3d 1, 7, 113 Cal. Rptr. 771*

Trial court committed reversible error in refusing to instruct on general rule for liability for negligence pursuant to *Civ. Code § 1714* in tenant's action against landlord for injuries sustained in fall off stairway when handrail broke. *Brennan v. Cockrell Invs. Inc. (1973) 35 Cal. App. 3d 796, 800-802, 111 Cal. Rptr. 122*

Propriety of jury instruction on safety order set forth in California Code of Regulations in personal injury action by boy who tripped over edge of uncompleted parking lot structure; persons consensually on premises to which safety order applies also came within its protection; defense of assumption of risk was inapplicable because action based on violation of safety law intended to protect class of which plaintiff was member. *Cappa v. Oscar C. Holmes, Inc. (1972) 25 Cal. App. 3d 978, 981-984, 102 Cal. Rptr. 207*

Liability of grandmother in case in which 4-year-old boy ran out from underneath robe rack in store and tripped woman in lingerie department. *Costello v. Hart (1972) 23 Cal. App. 3d 898, 900-901, 100 Cal. Rptr. 554*

[3] Floors

Duty of store proprietor to inspect, discover, make safe and/or warn of dangerous condition on floor. *Bridgman v. Safeway Stores, Inc. (1960) 53 Cal. 2d 443, 446-447, 2 Cal. Rptr. 146, 348 P.2d 696*

Liability of owner of office building for injury caused by unsafe floor mats. *Blumberg v. M. & T., Inc. (1949) 34 Cal. 2d 226, 229, 209 P.2d 1*

Necessity of proprietor's exercising care to keep floors and aisles safe was increased because attention of persons shopping at markets is attracted by displays of products. *Tuttle v. Crawford (1936) 8 Cal. 2d 126, 130, 63 P.2d 1128* ; *Sparks v. Allen Northridge Mkt. (1959) 176 Cal. App. 2d 694, 699-700, 1 Cal. Rptr. 595*

Liability of theater for injury caused by loose carpets. *Sharpless v. Pantages (1918) 178 Cal. 122, 125, 172 P. 384*

In case involving plaintiff's slip on metal bracket left on store floor, trial court did not err in giving special jury instructions derived from valid case law, because instructions did not impose on defendant any duty other than reasonable care and did not negate plaintiff's comparative fault; instruction that store owners have duty to exercise ordinary care as not "unnecessarily to expose patron to danger or accident" did not permit jury to infer that owner may only avoid liability when exercising ordinary care to do what is necessary. *Craddock v. Kmart Corp. (2001) 89 Cal. App. 4th 1300, 1306-1308, 107 Cal. Rptr. 2d 881*

Plaintiff who fell while dancing on floor on which soap flakes had been applied and not thoroughly swept away was not barred from recovering for injuries from owner of premises and sponsor of dance; secondary assumption of risk applied because, despite risk of falling inherent in activity of social dancing, defendants had duty to use due care not to increase risk by making floor too slippery. *Bush v. Parents Without Partners (1993) 17 Cal. App. 4th 322, 329, 21 Cal. Rptr. 2d 178*

Obviousness of danger (planks, together with other equipment and supplies of painting contractor, stacked neatly in corner of hotel lobby) negated foreseeability of injury by defendant necessary to establish negligence and established negligence on part of plaintiff who tripped and fell. *Dixon v. St. Francis Hotel Corp. (1969) 271 Cal. App. 2d 739, 741, 77 Cal. Rptr. 201*

Store owner not liable to patron for slip and fall caused by broken bottle on floor because store owner had neither actual nor constructive knowledge of dangerous condition. *Romeo v. Jumbo Mkt. (1967) 247 Cal. App. 2d 817, 824, 56 Cal. Rptr. 26*

Duty of storekeeper not to wax floor so as to make it slippery enough to be dangerous to patrons. *Clayton v. J. C. Penney Co. (1960) 186 Cal. App. 2d 1, 6-7, 8 Cal. Rptr. 712*

People are not expected to constantly look at floor for possible dangers. *Shipman v. Norton (1957) 154 Cal. App. 2d 90, 93, 315 P.2d 906*

Liability of storekeeper for allowing trash on floor on which patron might slip and fall. *Goldsmith v. Mills (1955) 130 Cal. App. 2d 493, 496, 279 P.2d 51*

Duty of plaintiff to look where he or she is going, to observe that which is in plain sight, and to avoid obvious danger. *Curland v. Los Angeles County Fair Ass'n (1953) 118 Cal. App. 2d 691, 695, 258 P.2d 1063*

Negligence was established by slip and fall caused by vomit on floor adjacent to seat because exercise of ordinary care would have revealed its presence to theater; amount of time substance had remained on floor, clear visibility with flashlight, and frequency of vomiting in theater were factors indicating that ordinary care in maintaining safe conditions had not been exercised. *Travis v. Metropolitan Theatres Corp. (1949) 91 Cal. App. 2d 664, 668, 205 P.2d 475*

Slip and fall on theater restroom floor caused by water and paper towels was negligence because manager had knowledge of dangerous condition and provided neither remedy nor warning to plaintiff who had no knowledge of condition. *Newman v. Fox W. Coast Theatres (1948) 86 Cal. App. 2d 428, 432-433, 194 P.2d 706*

Duty of store owner to find and remove puddle from floor. *Ahern v. S.H. Kress & Co. (1950) 97 Cal. App. 2d 691, 699, 218 P.2d 108*

Duty of owner or possessor of property to keep floors reasonably dry. *Lamb v. Purity Store, Inc. (1932) 119 Cal. App. 690, 692, 7 P.2d 197*

[4] Question of Fact

Whether defective condition at grocery store existed long enough that it would have been discovered if owner exercised reasonable care was question forjury. *Bridgman v. Safeway Stores, Inc. (1960) 53 Cal. 2d 443, 447, 2 Cal. Rptr. 146, 348 P.2d 696*

[5] Sidewalks

Right of pedestrian to assume sidewalk in reasonably safe condition. *Peters v. City & County of San Francisco (1953) 41 Cal. 2d 419, 424, 260 P.2d 55*

Liability of city and adjoining property owner for injuries received by pedestrial in slip and fall on defective sidewalk. *Laurenzi v. Vranizan (1945) 25 Cal. 2d 806, 809-810, 155 P.2d 633*

Ordinance requiring abutting landowners to maintain public sidewalk created duty only to city, not to pedestrians; trial court's instructions on negligence per se doctrine were error. *Selger v. Steven Bros., Inc. (1990) 222 Cal. App. 3d 1585, 1590-1591, 272 Cal. Rptr. 544*

Owner of sidewalk dedicated to city was not liable for pedestrian's injury due to dangerous condition caused by roots of trees habitually maintained by city. *Jones v. Deeter (1984) 152 Cal. App. 3d 798, 803-806, 199 Cal. Rptr. 825*

Propriety of jury instruction setting forth care required of pedestrian on sidewalk and pedestrian's right to assume it to be in safe condition in action involving slipping on transparent oil or grease on floor of auto service center. *Milton v. Montgomery Ward & Co., Inc. (1973) 33 Cal. App. 3d 133, 141-142, 108 Cal. Rptr. 726*

Liability of restaurant owner to prospective patron who tripped over drainage berm in private walkway that served as one approach to back door of restaurant from adjacent public parking lot. *Ross v. Kirby (1967) 251 Cal. App. 2d 267, 270-271, 59 Cal. Rptr. 601*

Plaintiff's knowledge of slippery condition and failure to look where she was placing her feet constituted negligence. *Harris v. Trinity Lodge (1962) 202 Cal. App. 2d 41, 43, 20 Cal. Rptr. 348*

Sts. & Hy. Code § 5610, which requires landowner to maintain abutting sidewalks, does not create duty to party injured because of failure to maintain sidewalk. *Schaefer v. Lenahan (1944) 63 Cal. App. 2d 324, 327, 146 P.2d 929*

Liability of owner of abutting property to party injured by defect in sidewalk caused by abutting owner. *Lay v. Pacific Perforating Co. (1944) 62 Cal. App. 2d 233, 237, 144 P.2d 395*

Liability of owner of abutting property to party injured by defect in sidewalk created for special benefit and convenience of abutting owner. *Daly v. Mathews (1942) 49 Cal. App. 2d 545, 548, 122 P.2d 81*

Liability of restaurant owner for injuries suffered by pedestrian who fell into unguarded opening in sidewalk that led to owner's basement. *Rosella v. Paxinos (1930) 110 Cal. App. 299, 302, 294 P. 39*

[6] Stairs

Liability of apartment house owner for slips and falls in common stairways and hallways. *Harris v. Joffe (1946) 28 Cal. 2d 418, 423-424, 170 P.2d 454*

Proprietor had duty to use ordinary care to maintain carpet on steps in such condition that it would be safe for person to pass on them in ordinary manner; plaintiff's allegation of loose carpet causing foot to slip was sufficient to defeat motion of nonsuit. *Sharpless v. Pantages (1918) 178 Cal. 122, 124, 172 P. 384*

Airline not liable for negligent maintenance of stairway on premises that it did not own or lease at airport. *Marshall v. United Airlines (1973) 35 Cal. App. 3d 84, 87-91, 110 Cal. Rptr. 416*

Maintenance of unmarked step on a substantially unlighted patio constituted negligence. *Markewych v. Altshules (1967) 255 Cal. App. 2d 642, 645, 63 Cal. Rptr. 335*

Theater's rule requiring ushers to illuminate patrons' way was indicative of its recognition of standard of care required by dim lighting. *Beal v. Blumenfeld Theatres, Inc. (1960) 177 Cal. App. 2d 192, 194, 2 Cal. Rptr. 110* (reversing nonsuit in case in which patron tripped over hat on dimly lit steps)

Maintenance of 3-inch step or drop-off between porch and walkway, and of same material and color, constituted negligence. *Shipman v. Norton (1957) 154 Cal. App. 2d 90, 92-93, 315 P.2d 906*

Liability of possessor of property for injury caused by defective bannisters. *Trainor v. Maus (1954) 126 Cal. App. 2d 295, 299, 271 P.2d 957*

Liability of possessor of property for injury caused by slippery stairs. *Rau v. Redwood City Woman's Club (1952) 111 Cal. App. 2d 546, 551, 245 P.2d 12*

Liability of innkeeper for falls caused by failure to keep stairway well lighted. *Staudinger v. Whitlock (1952) 111 Cal. App. 2d 288, 292, 244 P.2d 414*

Liability of possessor of property for injury caused by unlighted stairs. *Ralph v. Clifton's Brookdale, Inc. (1948) 85 Cal. App. 2d 574, 576, 193 P.2d 511*

Duty of tavern owner to maintain stairs in safe condition. *Megee v. Fasulis (1944) 65 Cal. App. 2d 94, 103, 150 P.2d 281*

Maintenance of steps of unequal height constituted negligence. *King v. New Masonic Temple Assn. (1942) 51 Cal. App. 2d 512, 516, 125 P.2d 559*

Liability of hotel owner for maintaining hotel stairways in slippery condition. *Sommerfield v. Miratti (1942) 49 Cal. App. 2d 450, 453-454, 121 P.2d 746*

Theater maintaining parking lot for patrons was required to exercise reasonable care in providing for safety of patrons; maintenance of subsurface ramp with 6-inch retaining walls without warning or protection was substantial proof of negligence. *Martin v. Fox W. Coast Theatres Corp. (1940) 41 Cal. App. 2d 925, 929-930, 108 P.2d 29*

Liabilty of proprietor of sporting event for injuries to spectators caused by negligently maintained stairways. *Martin v. Angel City Baseball Ass'n (1935) 3 Cal. App. 2d 586, 589, 40 P.2d 287*

[7] Third Parties

Liability of possessor of land open to public for business purposes for negligent or intentional acts of third persons if possessor reasonably could have discovered those acts and protected public. *Hunter v. Mohawk Petroleum Corp. (1959) 51 Cal. 2d 439, 441, 334 P.2d 193*

Duty of owner of place of business open to public to exercise reasonable care to protect business invitees from danger from conduct of third persons on premises. *Morris v. Thogmartin (1973) 29 Cal. App. 3d 922, 925-926, 105 Cal. Rptr. 919*

Duty of owner of place of business to use reasonable care to protect patrons against negligent or wrongful acts of other patrons on premises if owner has reasonable cause to anticipate such acts and probability of resulting injury. *Sample v. Eaton (1956) 145 Cal. App. 2d 312, 316, 302 P.2d 431*

Liability of race track operator for injury to invitee from act of another invitee was based on operator's notice of prior conduct from which that injury might be anticipated. *Porter v. California Jockey Club, Inc. (1955) 134 Cal. App. 2d 158, 160, 285 P.2d 60*

[8] Warning

Although obviousness of water on sidewalk and driveway may have alleviated landowner's duty to warn of danger, triable issue existed as to whether landowner had other duties, such as duty to remedy. *Martinez v. Chippewa Enters., Inc. (2004) 121 Cal. App. 4th 1179, 1184-1185, 18 Cal. Rptr. 3d 152*

Theater operator required to use reasonable care to keep premises in reasonably safe condition and to give warning of concealed perils; operator not liable for injury resulting from obvious danger, such as wet sidewalk caused by rain. *Matherne v. Los Feliz Theatre (1942) 53 Cal. App. 2d 660, 665-666, 128 P.2d 59*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityProfessional ServicesTortsPremises Liability & PropertyGeneral Premises LiabilityActivities & ConditionsCriminal ActivityTortsPremises Liability & PropertyGeneral Premises LiabilityActivities & ConditionsSlip & Fall InjuriesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty off PremisesSidewalks & StreetsTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesReasonable Care

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§ 525.33 Law Reviews

Comment, *California Sidewalks: A Comprehensive Scheme for Determining Municipal and Abutter Liabilities, 31 Santa Clara L. Rev. 463 (1991)*

Ursin, *Strict Liability for Defective Business Premises--One Step Beyond Rowland and Greenman, 22 UCLA L. Rev. 820 (1975)*

Comment, *California Applies Negligence Principles in Determining Liability of a Land Occupier, 9 Santa Clara Lawyer 179 (1968)*

Comment, *Rowland v. Christian: New Protection Afforded a Social Guest, 3 U.S.F. L. Rev. 170 (1968)*

Comment, *Architect Tort Liability in Preparation of Plans and Specifications, 55 Cal. L. Rev. 1361 (1967)*

Note, *Torts: Negligence: Duty of an Operator of a Place of Amusement to Protect Patrons Against Acts of Third Persons, 6 UCLA L. Rev 494 (1959)*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityProfessional ServicesTortsPremises Liability & PropertyGeneral Premises LiabilityActivities & ConditionsCriminal ActivityTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty off PremisesSidewalks & StreetsTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesReasonable CareTortsPremises Liability & PropertyGeneral Premises

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§ 525.34 Text References

Witkin, Summary of California Law, Vol. 6, *Torts,* § 804, 805, 891 et seq. (9th ed. 1988)

6 Cal. Jur. 3d, *Architects, Engineers, and Surveyors,* §§ 30-32

5 Am. Jur. 2d, *Architects,* §§ 23-25

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsMalpractice & Professional LiabilityProfessional ServicesTortsPremises Liability & PropertyGeneral Premises LiabilityGeneral Overview

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§§ 525.35[Reserved]

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PART IV. FORMS

46-525 California Forms of Pleading and Practice--Annotated § 525.50

§ 525.50 Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Premises--Fall on Item Left on Floor

[1] FORM Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Premises--Fall on Item Left on Floor

1. At all times herein mentioned, defendant was in possession of and controlled [and owned] certain [business] premises at _____ [*street address and city*], _____ County, California.

2. On or about _____ [*date*], while plaintiff was _____ [*specify activity, e.g.,* shopping] at the above-described [business] premises of defendant, defendant so carelessly and negligently [owned,] controlled, inspected, and cleaned the premises as to allow a _____ [*specify substance plaintiff tripped over, e.g.,* broken ketchup bottle] to remain on the floor of the premises for an unreasonable period of time.

3. The dangerous condition was known, or in the exercise of ordinary and reasonable care would have been known, to defendant in adequate time for a reasonably prudent person to warn of, or clean up and make safe, the condition.

4. As a proximate result of the negligence of defendant, plaintiff slipped and fell while _____ [*specify activity, e.g.,* walking down the produce aisle in defendant's premises], sustaining severe injuries and damages as hereinafter alleged.

[2] Use of Form

These allegations are for use in a complaint for personal injury damages resulting from plaintiff's fall on an item negligently left on the floor.

[3] Allegations

Actionable negligence involves a legal duty to use due care, a breach of such legal duty, and the breach as the proximate

or legal cause of the resulting injury [*United States Liab. Ins. Co. v. Haidinger-Hayes, Inc. (1970) 1 Cal. 3d 586, 594, 83 Cal. Rptr. 418, 463 P.2d 770]* . In this form, Paragraphs 1 and 2 allege the facts from which the defendant's legal duty to use due care in the control of the premises arises; Paragraphs 2 and 3 allege defendant's breach of this duty; and Paragraph 4 alleges the breach as the proximate cause of the resulting injury.

A general form for the caption, additional general allegations, and prayer, which should be added to these allegations to complete the complaint, may be found in Ch. 421, *Premises Liability* .

[4] Cross References

For memoranda of points and authorities relating to this form, see California Points and Authorities, Ch. 165, *Negligence* , and Ch. 178, *Premises Liability* .

For forms of interrogatories for use in slip and fall actions, see Bender's Forms of Discovery, Vol. 4, *Damages;* Vol. 7, *Negligence;* and Vol. 9, *Slip and Fall* and *Stairways and Steps*.

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46-525 California Forms of Pleading and Practice--Annotated § 525.51

§ 525.51 Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Premises--Fall Resulting From Slippery Condition

[1] FORM Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Premises--Fall Resulting From Slippery Condition

1. [*Defendant's possession and/or ownership of premises. See § 525.50[1], Paragraph 1.*]

2. On or about _____ [*date*], while plaintiff was _____ [*specify activity, e.g.,* shopping] at the above-described [business] premises of defendant and was _____ [*specify, e.g.,* descending the stairway between the first floor and the basement], defendant so carelessly and negligently [owned,] controlled, inspected, and cleaned the _____ [*specify, e.g.,* stairway] as to allow _____ [*specify slippery condition, e.g.,* an accumulation of wax] to make the surface of the _____ [*specify, e.g.,* stairway] slippery and dangerous.

3. The slippery and dangerous condition was known, or in the exercise of ordinary and reasonable care would have been known, to defendant in adequate time for a reasonably prudent person to warn of, or make safe, the condition.

4. As a proximate result of the negligence of defendant, plaintiff slipped and fell while _____ [*specify, e.g.,* descending the stairway], sustaining severe injuries and damages as hereinafter alleged.

[2] Use of Form

These allegations are for use in a complaint against the owner or possessor of premises for damages resulting from the personal injuries plaintiff sustained in a fall which was proximately caused by defendant's negligently permitting slippery conditions to exist on the premises.

[3] Cross References

See also *§ 525.50*

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46-525 California Forms of Pleading and Practice--Annotated § 525.52

§ 525.52 Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Premises--Fall Resulting From Deteriorated Condition of Premises

[1] FORM Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Premises--Fall Resulting From Deteriorated Condition of Premises

1. [*Defendant's possession and/or ownership of premises. See § 525.50[1], Paragraph 1.*]

2. On or about _____ [*date*], while plaintiff was _____ [*specify activity, e.g.,* shopping] at the above-described [business] premises of defendant, defendant so carelessly and negligently [owned,] controlled, maintained, and inspected the premises so as to allow the _____ [*specify area, e.g.,* floor in the southeast corner] to reach such an advanced state of deterioration that it was unsafe for persons to _____ [*specify, e.g.,* walk on the floor].

3. The deteriorated and dangerous condition of _____ [*specify, e.g.,* the floor] was known, or in the exercise of ordinary and reasonable care would have been known, to defendant in adequate time for a reasonably prudent person to warn of, or to repair and make safe, the condition.

4. As a proximate result of the negligence of defendant, plaintiff fell _____ [*specify, e.g.,* through the floor] of the premises while _____ [*specify activity, e.g.,* walking from the jewelry department to the men's department], sustaining severe injuries and damages as hereinafter alleged.

[2] Use of Form

These allegations are for use in a complaint against the owner or possessor of premises for damages resulting from personal injuries the plaintiff sustained in a fall which was proximately caused by the defendant's negligently permitting a deteriorated condition to exist on the premises.

[3] Cross References

See also *§ 525.50*

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46-525 California Forms of Pleading and Practice--Annotated § 525.53

§ 525.53 Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Premises--Fall on Unmarked Obstruction

[1] FORM Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Premises--Fall on Unmarked Obstruction

1. [*Defendant's possession and/or ownership of premises. See § 525.50[1], Paragraph 1.*]

2. On or about _____ [*date*], at or about _____ [*time*], while plaintiff was _____ [*specify activity, e.g.,* walking through the courtyard to enter a friend's apartment] at the above-described [business] premises of defendant, defendant so carelessly and negligently [owned and] controlled the premises that _____ [*specify unmarked obstruction, e.g.,* a single unmarked and unpainted step or rise, made of the same material as the upper and lower portion of the courtyard, was situated near the middle of the courtyard].

3. The dangerous condition was known, or in the exercise of ordinary and reasonable care would have been known, to defendant in adequate time for a reasonably prudent person to have _____ [*specify, e.g.,* marked the step or rise, warned users of the courtyard of the dangerous and defective condition, or have taken other measures to make the step or rise safe.]

4. As a proximate result of the negligence of defendant, plaintiff slipped and fell while _____ [*specify activity, e.g.,* walking through the courtyard to enter a friend's apartment], sustaining severe injuries and damages as hereinafter alleged.

[2] Use of Form

These allegations are for use in a complaint against the owner or possessor of premises for personal damages resulting from injuries plaintiff sustained in a fall which was proximately caused by defendant's negligently permitting an unmarked obstruction to be present on the premises.

[3] Cross References

See also *§ 525.50*

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46-525 California Forms of Pleading and Practice--Annotated § 525.54

§ 525.54 Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Premises--Fall Down Steps of Unequal Height

[1] FORM Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Premises--Fall Down Steps of Unequal Height

1. [*Defendant's possession and/or ownership of premises. See § 525.50[1], Paragraph 1.*]

2. On or about _____ [*date*], while plaintiff was walking _____ [up *or* down] the stairs _____ [*specify location, e.g.,* between the first floor and basement of the above-described premises], defendant so carelessly and negligently [owned and] controlled the premises that _____ [*specify, e.g.,* the distance between the last step and the floor of the basement was greater than the vertical distance between the steps themselves].

3. The defective and dangerous condition was known, or in the exercise of ordinary and reasonable care would have been known, to defendant in adequate time for a reasonably prudent person would have _____ [*specify necessary construction to remedy defect, e.g.,* rebuilt the steps so that the distance between each step was uniform], warned users of the stairs of the dangerous and defective condition, or have taken other measures to make the stairs safe.

4. As a proximate result of the negligence of defendant, plaintiff slipped and fell while _____ [*specify, e.g.,* stepping from the last step of the stairs to the basement floor], sustaining severe injuries and damages as hereinafter alleged.

[2] Use of Form

These allegations are for use in a complaint against the owner or possessor of premises for damages resulting from plaintiff's fall down steps of unequal height on defendant's premises.

[3] Cross References

See also *§ 525.50*

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46-525 California Forms of Pleading and Practice--Annotated § 525.55

§ 525.55 Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Premises--Fall Down Dimly Lit Steps

[1] FORM Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Premises--Fall Down Dimly Lit Steps

1. [*Defendant's possession and/or ownership of premises. See § 525.50[1], Paragraph 1.*]

2. On or about _____ [*date*], while plaintiff was walking _____ [up *or* down] the stairs _____ [*specify location, e.g.,* leading from the theater auditorium to the lobby], defendant so carelessly and negligently [owned and] controlled, operated, maintained, and inspected the premises that _____ [*allege facts indicating defendant's negligence in not maintaining the steps in a reasonably safe condition, e.g.,* the light on the steps was so dim that plaintiff did not see a foreign object on one of the steps, stepped on the object, lost her footing, and fell down the remaining steps].

3. The defective and dangerous condition was known, or in the exercise of ordinary and reasonable care should have been known, to defendant in adequate time for a reasonably prudent person to have _____ [*specify acts that would have remedied the unsafe condition of the steps, e.g.,* installed additional lights on the steps].

4. As a proximate result of the negligence of defendant, plaintiff slipped and fell while _____ [*specify circumstances surrounding plaintiff's injury, e.g.,* stepping down the stairs on her way to the lobby], sustaining severe injuries and damages as hereinafter alleged.

[2] Use of Form

These allegations are for use in a complaint against the owner or possessor of premises for damages resulting from personal injuries the plaintiff sustained in a fall that was proximately caused by the defendant's negligently maintaining dim lighting on steps on the premises.

[3] Cross References

See also *§ 525.50*

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46-525 California Forms of Pleading and Practice--Annotated § 525.56

§ 525.56 Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Premises--Fall Down Steps With Loose Carpet

[1] FORM Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Premises--Fall Down Steps With Loose Carpet

1. [*Defendant's possession and/or ownership of premises. See § 525.50[1], Paragraph 1.*]

2. On or about _____ [*date*], while plaintiff was walking _____ [up *or* down] the stairs _____ [*specify location, e.g.,* leading from the theater auditorium to the lobby], defendant so carelessly and negligently [owned and] controlled, operated, maintained, and inspected the premises that _____ [*allege facts indicating defendant's negligence in not maintaining the steps in a reasonably safe condition, e.g.,* the carpeting on the steps was so loose that plaintiff's shoe was caught, his foot twisted, and he fell down].

3. The defective and dangerous condition was known, or in the exercise of ordinary and reasonable care should have been known, to defendant in adequate time for a reasonably prudent person to have _____ [*specify acts that would have remedied the unsafe condition of the steps, e.g.,* repaired the loose carpet].

4. As a proximate result of the negligence of defendant, plaintiff slipped and fell while _____ [*specify circumstances surrounding plaintiff's injury, e.g.,* descending the steps on his way out of the theater], sustaining severe injuries and damages as hereinafter alleged.

[2] Use of Form

These allegations are for use in a complaint against the owner or possessor of premises for damages resulting from personal injuries the plaintiff sustained in a fall that was proximately caused by the defendant's negligently maintaining steps on which the carpeting was loose.

[3] Cross References

See also *§ 525.50*

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46-525 California Forms of Pleading and Practice--Annotated § 525.57

§ 525.57 Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Business Premises--Fall Resulting From Distracting Displays and/or Advertisements

[1] FORM Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Owner or Possessor of Business Premises--Fall Resulting From Distracting Displays and/or Advertisements

1. [*Defendant's possession and/or ownership of premises. See § 525.50[1], Paragraph 1.*]

2. On or about _____ [*date*], while plaintiff was shopping _____ [*specify area of store, e.g.,* in the lingerie department on the fifth floor] at the above-described business premises of defendant, defendant so carelessly and negligently [owned,] controlled, displayed, and advertised its goods on the premises as to create a dangerous condition whereby the attention of customers such as plaintiff was likely to be distracted.

3. The dangerous and distracting condition was known, or in the exercise of ordinary and reasonable care would have been known, to defendant in adequate time for a reasonably prudent person to _____ [*specify, e.g.,* dismantle the display or move it to a safer area].

4. As a proximate result of the negligence of defendant, plaintiff was distracted and slipped and fell on _____ [*specify, e.g.,* the step separating the lingerie department from the bath department on the fifth floor] of the premises, sustaining severe injuries and damages as hereinafter alleged.

[2] Use of Form

These allegations are for use in a complaint against the owner or possessor of business premises for damages resulting from personal injuries plaintiff sustained in a fall proximately caused by defendant's negligent placement of distracting displays and/or advertisements. The allegations contained in this form may be combined with the allegations contained in other forms in this chapter when the conditions causing plaintiff's fall were aggravated by the presence of distracting displays or advertising.

[3] Cross References

See also *§ 525.50*

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46-525 California Forms of Pleading and Practice--Annotated § 525.58

§ 525.58 Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Spectator or Member of Audience Against Owner and/or Operator of Stadium/Coliseum/Theater--Fall Resulting From Overcrowded Conditions

[1] FORM Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--By Spectator or Member of Audience Against Owner and/or Operator of Stadium/Coliseum/Theater--Fall Resulting From Overcrowded Conditions

1. At all times herein mentioned, defendant was in possession of [and owned] and controlled, a certain _____ [coliseum *or* stadium *or* theater] located at _____ [*street address and city*], _____ County, California.

2. On or about _____ [*date*], while plaintiff was [*specify, e.g.,* entering] the above-described premises for the purposes of watching _____ [*specify, e.g.,* a boxing match], defendant so carelessly and negligently [owned and] controlled the premises that _____ [*specify, e.g.,* the large crowd to whom defendant had sold general admission tickets became unruly and pushed and shoved their way through the entrance attempting to obtain desireable seats for the event].

3. The dangerous condition was known, or in the exercise of ordinary and reasonable care would have been known, to defendant in adequate time for a reasonably prudent person to have _____ [*specify, e.g.,* sold reserved seats rather than general admission seats, hired adequate security forces, or taken other precautions to have prevented the dangerous condition from arising].

4. As a proximate result of the negligence of defendant, plaintiff was pushed and shoved and caused to fall while _____ [*specify, e.g.,* entering the entrance to the premises], sustaining severe injuries and damages as hereinafter alleged.

[2] Use of Form

These allegations are for use in a complaint against the owner and/or operator of a stadium, coliseum, or theater for damages resulting from personal injuries plaintiff sustained in a fall which was caused by overcrowded conditions.

[3] Cross References

See also *§ 525.50*

For a discussion of, and complaint forms relating to civil liability based on acts of intoxicated persons, see Ch. 19, *Alchoholic Beverages: Civil Liability* .

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46-525 California Forms of Pleading and Practice--Annotated § 525.59

§ 525.59 Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Architect/Designer--Fall Resulting From Defective Design and/or Supervision of Construction

[1] FORM Allegations for Use in Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injuries Based on Negligence [Civ. Code § 1714(a)]--Against Architect/Designer--Fall Resulting From Defective Design and/or Supervision of Construction

1. Prior to _____ [*date*], defendant drew and prepared certain plans and specifications for [, and supervised the construction of,] a building located at _____ [*street address and city*], _____ County, California. The building, its appurtenances, and particularly the _____ [*specify defectively designed or constructed part of building, e.g.,* stairway and attached handrail between the first floor and the basement,] were constructed in accordance with the plans and specifications prepared and drawn by defendant [, and constructed under defendant's supervision].

2. At all times herein mentioned, and particularly at the time defendant drew the plans and specifications [and supervised the construction,] defendant knew, or in the exercise of ordinary and reasonable care should have known, that _____ [*specify defect, e.g.,* having the handrail end two steps before the end of the stairway], as defendant's plans called for, would create a dangerous and unsafe condition for persons using the _____ [*specify, e.g.,* stairway].

3. As a proximate result of the negligence and carelessness of defendant, on or about _____ [*date*], while plaintiff was on the above-described premises and _____ [*specify activity, e.g.,* descending the stairway, when plaintiff's hand reached the end of the handrail, plaintiff assumed he/she had reached the end of the stairs, stepped forward,] and fell to the floor, sustaining severe injuries and damages as hereinafter alleged.

[2] Use of Form

These allegations are for use in a complaint against an architect or designer for damages resulting from personal injuries plaintiff sustained in a fall proximately caused by defendant's negligent design and/or supervision of construction of the premises.

[3] Cross References

See also *§ 525.50*

For a discussion of, and forms for use in, actions against architects for breach of contract or negligence, see Ch. 56, *Architects*

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Chapter 526 SMALL CLAIMS

46-526 California Forms of Pleading and Practice--Annotated 526.syn

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§§ 526.02-526.09 [Reserved]

§ 526.10 Governing Law

§§ 526.11-526.29 [Reserved]

§ 526.30 Definitions

§ 526.31 Organization and Purpose of Small Claims Courts

§ 526.32 Subject Matter Jurisdiction

[1] Monetary Limits on Claims

[a] In General

[b] Exception for Claims Against Guarantors

[c] Exhaustion of Administrative Remedies Required for Claims Against Department of Corrections and Rehabilitation or Division of Juvenile Facilities

[d] Waiver of Excess Amount of Demand

[e] Filing Restrictions on Claims Exceeding $2,500

[2] Effect of Joinder of Claims by Multiple Plaintiffs

[3] Effect of Splitting Cause of Action

[a] In General

[b] Effect Of Insured's Small Claims Action on Later Subrogation Action by Insurer

[4] Incidental Equitable Relief and Conditional Judgment

[5] Jurisdictional Transfer to Small Claims Court Not Authorized

§ 526.33 Venue

§ 526.34 Parties

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[2] Restrictions

[a] Assignee

[b] Corporation

[c] Other Entity

[d] Department of Corrections and Rehabilitation or Division of Juvenile Facilities

[3] Vexatious Litigants

§ 526.35 Legal Assistance

[1] Restriction on Attorneys

[2] Legal Advisors

[a] Individual Assistance Available to Litigants

[b] Notice of Availability

[c] Qualifications of Advisors and Conflict of Interest

§§ 526.36-526.49 [Reserved]

§ 526.50 Commencement of Action

[1] Filing of Claim

[2] Content of Claim

[3] Fees

[4] Designation of Parties

[a] Individual

[b] Partnership

[c] Unincorporated Association

[d] Minor or Incompetent

[e] Public Entities

[5] Obtaining Hearing Date

§ 526.51 Fictitious Business Name

[1] Declaration of Compliance With Laws

[2] Correct Legal Name of Defendant

§ 526.52 Service of Plaintiff's Claim and Ordering of Defendant's Appearance

[1] In General

[2] Substituted Service

[3] Service on Nonresident Motorist

[4] Service on Principal in Suretyship Action

[5] When Service Is Deemed Complete

§ 526.53 Defendant's Pleadings

[1] Answer Not Required

[2] Filing of Responsive Claim

[3] Cross Claim for More Than Jurisdictional Amount

[a] When Transferred

[b] Payment of Fees if Action Is Transferred

§ 526.54 Discovery Not Allowed

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§ 526.70 Hearings

[1] Informal Nature

[2] Temporary Judge

[a] Court-Appointed Temporary Judge

[b] Temporary Judge Requested by Parties

[3] Evidence

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[b] Use of Hearsay Evidence

[4] Investigation by Court

[5] Assistance in Presenting Claim or Defense

[6] Assistance by Interpreter

[7] Appearance by Representative

[a] For Proof of Account

[b] For Military Plaintiff

[c] For Incarcerated Party

[d] For Defendant Nonresident Owner of Real Property

[e] For Owner of Rental Real Property

[f] For Spouse

[8] Postponement

§ 526.71 Judgment

[1] In General

[2] Continuance for Resolution by Alternative Means

[3] Multiple Parties

[4] Notice of Judgment

[5] Costs

[6] Default Judgment

[7] No Collateral Estoppel Effect

§ 526.72 Judgment Resulting From Motor Vehicle Accident

[1] In General

[2] Determination Regarding Motor Vehicle Accident Required in Judgment

[3] Filing Notice With Department

[4] Notification of Suspension

[5] Termination of Suspension

[6] Immunity of Public Agency

§§ 526.73-526.89 [Reserved]

§ 526.90 Motions Generally

§ 526.91 Filing Fee for Motions

§ 526.92 Motion to Vacate Judgment

[1] Incorrect or Erroneous Legal Basis for Decision

[2] By Plaintiff Who Did Not Appear

[3] By Defaulting Defendant

[a] Lack of Appearance

[b] Improper Service

[c] Appeal From Denial of Motion

§ 526.93 Motion to Correct Error

§ 526.94 Appeal by Defendant or Cross Defendant

[1] Availability

[2] Notice of Appeal

[a] Time for Filing

[b] Contents

[3] Abandonment of Appeal

[4] Record on Appeal

[5] Filing Fee

[6] Setting for Trial

[7] Dismissal of Appeal

[a] By Request or Stipulation

[b] For Delay in Prosecution

[8] Plaintiff's Motions

[9] Compromise by Minor or Incompetent Person

[10] Hearing of Appeal

[a] Informal Procedures Apply

[b] Scope of Hearing

[i] Generally

[ii] Cross Claims

[iii] No Right to Jury Trial

[iv] Tentative Decision and Statement of Decision Not Required

[11] Judgment on Appeal

[12] Award of Costs on Appeal

[a] Fees and Expenses

[b] Bad Faith Appeal

[13] Review of Superior Court Judgment

§§ 526.95-526.109 [Reserved]

§ 526.110 Enforcement of Judgment

[1] Execution and Abstract of Judgment

[2] Automatic Suspension Pending Appeal

[3] Asset Questionnaire

[a] Duties of Judgment Debtor

[b] Sanctions for Willful Failure to File

§ 526.111 Satisfaction of Judgment

[1] Payment to Judgment Creditor

[2] Payment to Small Claims Court

[3] Installment Payments

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§ 526.130 State Statutes

[1] Appeal

[2] Appearance by Corporation or Party Suing Under Fictitious Business Name

[3] Assistance to Parties

[4] Claims by Assignees

[5] Commencement of Action

[6] County Government as Party to Small Claims Action

[7] Definitions

[8] Hearing and Disposition

[9] Judgment

[10] Jurisdiction

[11] Legal Name of Defendant Doing Business

[12] Payment of Judgment

[13] Rules and Procedures

[14] Scheduling of Sessions

[15] Venue

§ 526.131 California Rules of Court

[1] Appeal

[a] Dismissal or Abandonment

[b] Filing

[c] Trial on Appeal

[2] Assistance to Litigants

[3] Fictitious Business Names

[4] Joinder of Claims

[5] Judges

[6] Judgment

[7] Service of Claim on Defendant

[8] Venue Challenge

§ 526.132 Decisions

[1] Appeal

[2] Assignment

[3] Assistance to Parties

[4] Enforcement of Judgment

[5] Jurisdiction

§ 526.133 Law Reviews

§ 526.134 Text References

§§ 526.135-526.149 [Reserved]

§ 526.150 Information for the Small Claims Plaintiff [Code Civ. Proc. § 116.920(a); Cal. Judicial Council Form SC-100-INFO]

[1] FORM

[2] Use of Form

[3] Advisory Services

[4] Information for Defendant

§ 526.151 Plaintiff's Claim and ORDER to Go to Small Claims Court [Code Civ. Proc. §§ 116.220(a)(1), 116.310-116.330; Cal. Judicial Council Form SC-100]

[1] FORM

[2] Use of Form

[3] Filling in Form

[a] Title of Court

[b] Naming Parties

[c] Statement of Claim

[d] Demand for Payment

[e] Venue

[f] Attorney-Client Fee Dispute

[g] Claim Against Government Agency

[h] Number of Previous Small Claims

[4] Signature and Declaration

[5] Availability of Equitable Relief and Conditional Judgment

[6] Service and Filing

[7] State Statutes

§ 526.152 Attorney-Client Fee Dispute (Attachment to Plaintiff's Claim) [Code Civ. Proc. § 116.220(a)(4); Judicial Council Form SC-101]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 526.153 Proof of Service [Code Civ. Proc. §§ 415.10, 415.20; Judicial Council Form SC-104]

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

§ 526.154 Proof of Mailing After Substituted Service [Code Civ. Proc. §§ 116.340, 415.20; Cal. Judicial Council Form SC-104A]

[1] FORM

[2] Use of Form

§ 526.155 Declaration [Code Civ. Proc. § 2015.5] of Claimant's Fictitious Business Name [Code Civ. Proc. § 116.430(a); Judicial Council Form SC-103]

[1] FORM

[2] Use of Form

[3] State Statutes

§ 526.156 Small Claims Subpoena and Declaration [Code Civ. Proc. §§ 1985, 1986, 1987.5; Cal. Judicial Council Form SC-107]

[1] FORM

[2] Use of Form

[3] Issuance of Subpoena

[4] Filling in Form

[a] Identification of Court and Parties

[b] Order to Appear or Produce Documents or Things (Paragraph 1)

[c] Agreement With Subpoenaing Party (Paragraph 2)

[d] Witness Fees (Paragraph 3)

[e] Appearance or Production of Records in Lieu of Appearance (Paragraph 4)

[f] Supporting Declaration When Documents or Things Are Sought

[5] Notice to Custodian of Consumer or Employee Records

[6] Disobedience of Subpoena

[7] Proof of Service

[8] Cross References

[9] State Statutes

§ 526.157 Authorization to Appear [Code Civ. Proc. § 116.540; Judicial Council Form SC-109]

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

§ 526.158 Defendant's Claim and Order to Plaintiff [Code Civ. Proc. § 116.380; Judicial Council Form SC-120]

[1] FORM

[2] Use of Form

[3] Contents of Cross Claim

[4] Service and Filing

[5] State Statutes

[6] Cross Reference

§ 526.159 Defendant's Declaration [Code Civ. Proc. § 2015.5] Requesting That Small Claims Action Be Transferred to Another Court [Code Civ. Proc. § 116.390(a), (b)]

[1] FORM

[2] Use of Form

[3] Request to Transfer Claim

[a] By Filing Declaration

[b] Service of Declaration

[c] Order of Transfer

[4] Cross References

[5] Decisions

§ 526.160 Order of Small Claims Court Transferring Action Before Judgment to Another Court [Code Civ. Proc. § 116.390(c)]

[1] FORM

[2] Use of Form

[3] Cross Reference

§ 526.161 Request to Postpone Trial [Code Civ. Proc. § 116.570; Cal. Judicial Council Form SC-150]

[1] FORM

[2] Use of Form

§ 526.162 Order on Request to Postpone Trial [Code Civ. Proc. § 116.570; Cal. Judicial Council Form SC-152]

[1] FORM

[2] Use of Form

§ 526.163 Request to Amend Party Name Before Hearing (Small Claims) [Code Civ. Proc. §§ 116.560, 473; Judicial Council Form SC-114]

[1] FORM

[2] Use of Form

§ 526.164 Notice of Entry of Judgment [Code Civ. Proc. § 116.610(h), (i); Cal. Judicial Council Form SC-130]

[1] FORM

[2] Use of Form

[3] Acknowledgment of Satisfaction of Judgment

[4] Penalty for Failure to File Acknowledgment of Satisfaction of Judgment

[5] California Rules of Court

§ 526.164A Notice of Entry of Judgment [Code Civ. Proc. § 116.610(h),(i); Cal. Judicial Council Form SC-200]

[1] FORM

[2] Use of Form

§ 526.164B Acknowledgment of Satisfaction of Judgment [Code Civ. Proc. § 116.850; Cal. Judicial Council Form SC-290]

[1] FORM

[2] Use of Form

§ 526.165 Request to Pay Judgment to Court [Code Civ. Proc. § 116.860; Cal. Judicial Council Form SC-145]

[1] FORM

[2] Use of Form

[3] Accompanying Payment

[4] Partial Payment

[5] Notification and Payment of Judgment Creditor

[6] Related Forms

§ 526.166 Attorney-Client Fee Dispute (Attachment to Notice of Entry of Judgment) [Code Civ. Proc. §§ 116.220(a)(4); Cal. Judicial Council Form SC-132]

[1] FORM

[2] Use of Form

[3] Related Form

[4] State Statutes

§ 526.166A Decision on Attorney-Client Fee Dispute [Code Civ. Proc. § 116.220(a)(4); Cal. Judicial Council Form SC-202A]

[1] FORM

[2] Use of Form

§ 526.167 Request to Make Payments [Code Civ. Proc. § 116.620; Cal. Judicial Council Form SC-220]

[1] FORM

[2] Use of Form

§ 526.167A Response to Request to Make Payments [Code Civ. Proc. § 116.620; Cal. Judicial Council Form SC-221]

[1] FORM

[2] Use of Form

§ 526.167B Order on Request to Make Payments [Code Civ. Proc. § 116.620; Cal. Judicial Council Form SC-222]

[1] FORM

[2] Use of Form

§ 526.168 Judgment Debtor's Declaration [Code Civ. Proc. § 2015.5] of Full or Partial Payment to Judgment Creditor [Code Civ. Proc. § 116.850(d)(2)]

[1] FORM

[2] Use of Form

[3] Contents of Declaration

[4] Cross References

[5] State Statutes

§ 526.169 Request to Correct or Cancel Judgment and Answer [Cal. Judicial Council Form SC-108]

[1] FORM

[2] Use of Form

[3] Response to Request

[4] Cross References

[5] California Points and Authorities

[6] Decision

§ 526.170 Proceedings to Vacate Judgment [Code Civ. Proc. §§ 116.720, 116.730, 116.740; Cal. Judicial Council Form SC-135]--Notice of Motion and Declaration

[1] FORM

[2] Use of Form

[3] Motion by Plaintiff

[4] Motion by Defendant

[a] No Appearance After Proper Service

[b] No Appearance After Improper Service

[5] Filling in Form

[a] Title of Court and Case

[b] Notice

[c] Date, Time, and Place of Hearing (Paragraph 1)

[d] Motion (Paragraph 2)

[e] Date Judgment Was Entered (Paragraph 3)

[f] Date Party Learned of Entry of Judgment (Paragraph 4)

[g] Ground of Motion (Paragraph 5)

[6] Representations to Court (Paragraph 6)

[7] Decisions

[8] Cross Reference

§ 526.171 Request for Court Order and Answer [Cal. Judicial Council Form SC-105]

[1] FORM

[2] Use of Form

§ 526.172 Notice of Appeal [Code Civ. Proc. § 116.750; Cal. Judicial Council Form SC-140]

[1] FORM

[2] Use of Form

[3] Filing Notice of Appeal

[4] Defaulting Defendant

[5] Insurer of Defendant

[6] Filing Fee

[7] Procedure

[8] Decisions

[9] Cross Reference

§ 526.173 Proceedings for Award of Attorney's Fees and Costs for Bad Faith Appeal [Code Civ. Proc. § 116.790]--Notice of Motion and Declaration

[1] FORM

[2] Use of Form

[3] Notice Requirements

[4] Written Statement of Reasons for Resulting Order

§ 526.174 Judgment Debtor's Statement of Assets [Code Civ. Proc. § 116.830; Cal. Judicial Council Form SC-133]

[1] FORM

[2] Use of Form

[3] Deadlines for Completing Form

[4] Filling in Form

§ 526.175 Application and Order to Produce Statement of Assets and to Appear for Examination [Code Civ. Proc. §§ 116.830(d), 708.170(a); Cal. Judicial Council Form SC-134]

[1] FORM

[2] Use of Form

[3] Completing and Serving the Form

[4] Order and Hearing

§ 526.176 Proof of Service by Mail [Cal. Rules of Ct., Rule 3.2107; Cal. Judicial Council Form SC-112A]

[1] FORM

[2] Use of Form

California Forms of Pleading and Practice--Annotated

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Chapter 526 SMALL CLAIMS
PART I. SCOPE

46-526 California Forms of Pleading and Practice--Annotated § 526.01

§ 526.01 Scope of Chapter

This chapter discusses the scope of proceedings and the procedures used in small claims courts. It includes the following forms, most of which are Judicial Council forms adopted pursuant to *Code Civ. Proc. § 116.920(a)*:

- An information sheet to be used by a plaintiff in a small claims action [*see § 526.150*].
- Claims that may be asserted by a plaintiff [*see §§ 526.151, 526.152*] or a defendant [*see § 526.158*].
- Proof of service for any pleading [*see § 526.153*].
- Proof of mailing after substituted service [*see § 526.154*].
- A declaration by the claimant of compliance with the fictitious business name laws [*see § 526.155*].
- A subpoena for use in a small claims actions, together with a supporting declaration for use when the subpoenaing party seeks production by the witness of document or things [*see § 526.156*].
- A declaration of a person presenting or defending a claim on behalf of another person or entity [*see § 526.157*].
- A declaration that defendant has commenced an action against plaintiff in another court [*see § 526.159*].
- An order of a small claims court judge transferring the action to a higher court [*see § 526.160*].
- A request to postpone the trial [*see § 526.161*], and an order on the request [*see § 526.162*].
- A request to amend parties names [*see § 526.163*].

- Notice of entry of judgment [*see §§ 526.164, 526.164A, 526.166, 526.166A*].
- Acknowledgment of satisfaction of judgment [*see § 526.164B*].
- A request to pay the judgment to the court [*see § 526.165*].
- A request to make installment payments on a judgment [*see § 526.167*], a response to the request [*see § 526.167A*], and an order on the request [*see § 526.167B*].
- A declaration by judgment debtor of full or partial payment of judgment [*see § 526.168*].
- A request to correct or vacate a judgment [*see § 526.169*].
- A notice of motion and declaration to vacate the judgment [*see § 526.170*].
- A notice of motion and declaration to correct error [*see § 526.171*].
- A notice of an appeal [*see § 526.172*].
- A notice of motion and declaration to award attorney's fees for a bad faith appeal [*see § 526.173*].
- A judgment debtor's statement of assets [*see § 526.174*].
- An application and order to appear for examination [*see § 526.175*].
- Proof of service by mail [*see § 526.176*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureAppealsGeneral Overview

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[Reserved]

§§ 526.02[Reserved]

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46-526 California Forms of Pleading and Practice--Annotated § 526.10

§ 526.10 Governing Law

Small claims court proceedings are governed by *Code Civ. Proc. § 116.110 et seq.* and by *Cal. Rules of Ct., Rule 3.2100 et seq.* In addition, the small claims division of a superior court appears to be subject to the statutes governing civil actions generally [*Code Civ. Proc. § 307 et seq.*] to the extent those statutes are not inconsistent with *Code Civ. Proc. § 116.110 et seq.* The Judicial Council has provided forms for use in small claims court proceedings [*see* Cal. Rules of Ct., Appen. A].

Appeals of small claims cases to the appellate division of the superior court, including practice and procedure on appeal and the time and manner in which the record on appeal is to be prepared and filed, are governed by *Code Civ. Proc. §§ 116.710-116.730, 116.750-116.795*, and *Cal. Rules of Ct., Rule 8.950 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresAppealsGeneral OverviewGovernmentsCourtsSmall Claims Courts

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[Reserved]

§§ 526.11[Reserved]

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46-526 California Forms of Pleading and Practice--Annotated § 526.30

§ 526.30 Definitions

The following definitions apply in interpreting the provisions of *Code Civ. Proc. § 116.110 et seq.*, unless the context indicates otherwise [*Code Civ. Proc. § 116.130(a)-(k)*]:

- "Plaintiff" means the party who has filed a small claims action; the term includes a defendant who has filed a claim against a plaintiff.

- "Defendant" means the party against whom the plaintiff has filed a small claims action; the term includes a plaintiff against whom a defendant has filed a claim.

- "Judgment creditor" means the party, whether plaintiff or defendant, in whose favor a money judgment has been rendered.

- "Judgment debtor" means the party, whether plaintiff or defendant, against whom a money judgment has been rendered.

- "Person" means an individual, corporation, partnership, limited liability partnership, limited liability company, firm, association, or other entity.

- "Individual" means a natural person.

- "Party" means a plaintiff or defendant.

- "Motion" means a party's written request to the court for an order or other action; the term includes an informal written request to the court, such as a letter.

- "Declaration" means a written statement signed by an individual that includes the date and place of signing and a statement under penalty of perjury under the laws of California that its contents are true

and correct.

- "Good cause" means circumstances sufficient to justify the requested order or other action, as determined by the judge.

- "Mail" means first-class mail with postage fully prepaid, unless stated otherwise.

Legal Topics:

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

California Forms of Pleading and Practice--Annotated

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46-526 California Forms of Pleading and Practice--Annotated § 526.31

§ 526.31 Organization and Purpose of Small Claims Courts

In each superior court there is a small claims division (known as small claims court) in which small claims may be tried [*Code Civ. Proc. § 116.210*]. Small claims courts were created by the Legislature to hear cases involving small amounts of money in order to reduce wasteful and expensive litigation, to minimize the costs of trial, and to dispense speedy justice [*see Code Civ. Proc. § 116.120(b)*; *Hughes v. Municipal Court (1926) 200 Cal. 215, 218, 252 P. 575* ; *see also Leuschen v. Small Claims Court (1923) 191 Cal. 133, 138, 215 P. 391*]. The small claims court functions informally and quickly. Normal pleadings other than claim and notice are not required [*Code Civ. Proc. § 116.310*], and hearings and dispositions are informal [*Code Civ. Proc. § 116.510*]. There are no juries in the small claims court, and formal findings are not made on the issues [*see Sanderson v. Niemann (1941) 17 Cal. 2d 563, 573, 110 P.2d 1025*]. Small claims courts must operate to ensure that the convenience of individual parties and witnesses prevails, as much as possible, over the convenience of any other parties or witnesses [*Code Civ. Proc. § 116.120(d)*]. The Judicial Council has issued a form of information for plaintiffs in small claims actions, which summarizes the purpose of and procedures used in small claims court [*see § 526.150*].

The Legislature and courts have by statute and rule encouraged litigants to take advantage of the informality and expeditious nature of small claims proceedings [*but see Discover Bank v. Superior Court (2005) 36 Cal. 4th 148, 156* (individual small-claims litigation is not adequate substitute for class litigation to vindicate substantive consumer rights in context of credit-card issuer's alleged scheme to cheat cardholders by overcharging late fees)]. Thus, the court in a limited civil case has the discretion to deny to a prevailing plaintiff all or part of the costs to which that plaintiff would otherwise be entitled to recover, when the plaintiff recovers an amount less than the maximum jurisdictional amount of the small claims court, and the plaintiff moreover could have filed the action in small claims court but did not do [*Code Civ. Proc. § 1033(b)*; for further discussion, *see Ch. 174, Costs and Attorney's Fees, § 174.10* et seq.; for discussion of costs in small claims actions, *see* discussion in *§ 526.71[5]*].

A cause of action for malicious prosecution is not allowed to be based on the institution of small claims proceedings, since this could frustrate an informal means of resolving small disputes, inject elements of time, expense, and complexity that the small claims process was established to avoid, and require a prudent claimant to consult with an attorney before making use of a supposedly attorney-free method for settling disputes over small amounts [*Pace v.*

Hillcrest Motor Co. (1980) 101 Cal. App. 3d 476, 479, 161 Cal. Rptr. 662].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsCourtsCreation & OrganizationGovernmentsCourtsSmall Claims Courts

California Forms of Pleading and Practice--Annotated

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46-526 California Forms of Pleading and Practice--Annotated § 526.32

§ 526.32 Subject Matter Jurisdiction

[1] Monetary Limits on Claims

[a] In General

A small claims court generally has jurisdiction over any action for the recovery of money in which the demand does not exceed $7,500 if the action is brought by a natural person, or $5,000 if the claimant is other than a natural person [*Code. Civ. Proc. §§ 116.220(a)(1), 116.221*]. Lower monetary limits may apply if the defendant is a guarantor or if the plaintiff who has already filed, within the current calendar year, two small claims actions demanding more than $2,500 [*Code Civ. Proc. §§ 116.220(a)(1), (c), 116.221, 116.231(a)*; *see* [b], [e], *below*]. The small claims court's jurisdiction exists regardless of whether an action for the recovery of money is based on tort or on contract [*see Leuschen v. Small Claims Court (1923) 191 Cal. 133, 215 P. 391*].

The small claims courts also have jurisdiction over the following particular types of actions [*Code Civ. Proc. § 116.220(a)*], and retain jurisdiction until full payment and performance of any judgment or order in these actions [*Code Civ. Proc. § 116.220(b)*]:

- Claims to enforce payment of delinquent unsecured personal property taxes in an amount not to exceed $5,000, if the legality of the tax is not contested by the defendant and with the exception provided under *Code Civ. Proc. § 116.220(c)* (discussed in *§ 526.32[2]*) [*Code Civ. Proc. § 116.220(a)(2)*].

- Actions in which the plaintiff seeks a writ of possession under *Civ. Code §§ 1861.5* and *1861.10* (providing for the issuance of a writ of possession pursuant to an innkeepers' lien), if the amount of the demand does not exceed $5,000 [*Code Civ. Proc. § 116.220(a)(3)*]. For discussion and forms relating to an application for writ of possession under *Civ. Code § 1861.5*, *see* Ch. 297, *Hotels and Motels* .

- Actions to confirm, correct, or vacate a fee arbitration award not exceeding $5,000 between an attorney and client that is binding or has become binding; or to conduct a hearing de novo between an attorney and client after nonbinding arbitration of a fee disputeinvolving no more than $5,000 in

controversy, pursuant to *Bus. & Prof. Code § 6200 et seq.* [*Code Civ. Proc. § 116.220(a)(4)*]. For discussion of attorney-client fee arbitration, see *Ch. 72, Attorney Practice and Ethics, § 72.430* et seq.

- Actions for injunctive or other equitable relief only if a statute expressly authorizes a small claims court to award that relief [*Code Civ. Proc. § 116.220(a)(5)*].

The small claims courts also have express jurisdiction in actions under *Civ. Code § 1950.5* (for return of security deposit for rental of residential property) if the damages claimed, whether actual, statutory, or both, are otherwise within the jurisdictional amount of the small claims court [*Civ. Code § 1950.5(n)* (citing *Code Civ. Proc. §§ 116.220, 116.221*)]. For discussion and forms relating to actions under *Civ. Code § 1950.5*, see Ch. 334, *Landlord and Tenant: Damages Claims* .

Claims exceeding the jurisdictional amount may be brought when the excess amount is waived [*see discussion under § 526.32[1][d]*]. On the other hand, certain filing restrictions apply to larger monetary claims [*see § 526.32[1][e]*].

The small claims courts no longer have jurisdiction over unlawful detainer proceedings [*see* Stats. 1992, ch. 8, § 1]. For discussion and forms relating to unlawful detainer proceedings in general, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

[b] Exception for Claims Against Guarantors

An action brought by a natural person against the Registrar of the Contractors' State License Board, as the defendant guarantor, is subject to the same $7,500 small claims jurisdictional limit that applies to other actions brought by natural persons [*Code Civ. Proc. §§ 116.220(c)(1), 116.221*]. Special jurisdictional limits apply to other actions against defendant guarantors. Thus, for any action against a defendant guarantor (other than the Registrar of the Contractors' State License Board) that does not charge a fee for its guarantor or surety services, the small claims court has jurisdiction only if the amount of the demand does not exceed $2,500 [*Code Civ. Proc. § 116.220(c)(2)*]. For any action brought by a natural person against a defendant guarantor that charges a fee for its guarantor or surety services, the small claims court has jurisdiction only if the amount of the demand does not exceed $6,500 [*Code Civ. Proc. § 116.220(c)(3)*]. For any action brought by an entity other than a natural person against a defendant guarantor that charges a fee for its guarantor or surety services, or against the Registrar of the Contractors' State License Board as the defendant guarantor, the small claims court has jurisdiction only if the amount of the demand does not exceed $4,000 [*Code Civ. Proc. § 116.220(c)(4)*].

[c] Exhaustion of Administrative Remedies Required for Claims Against Department of Corrections and Rehabilitation or Division of Juvenile Facilities

Notwithstanding *Code Civ. Proc. § 116.220(a)*, in any action filed by a plaintiff who is incarcerated in a facility of the Department of Corrections and Rehabilitation [*see Penal Code § 5055*], the small claims court has jurisdiction over a defendant only if the plaintiff has alleged in the complaint that he or she has exhausted his or her administrative remedies against that department, including compliance with *Gov. Code §§ 905.2* and *905.4* (requiring presentation of written claim against state). The department's final administrative adjudication or determination of plaintiff's administrative claim may be attached to the complaint at the time of filing in lieu of that allegation [*Code Civ. Proc. § 116.220(e)*]. The department's representative [*see discussion under § 526.34[2][d]*] is not required to appear personally to challenge the plaintiff's compliance with the pleading requirements, but may submit pleadings or declarations to assert that challenge [*Code Civ. Proc. § 116.541(b)*].

In any action governed by *Code Civ. Proc. § 116.220(e)*, if the plaintiff fails to provide proof of compliance with that section (i.e., exhaustion of administrative remedies against the department), the judicial officer must, at his or her discretion, either dismiss the action or continue the action to give the plaintiff the opportunity to provide such proof [

Code Civ. Proc. § 116.220(f)].

For purposes of Gov. Code § 116.220, "department" includes an employee of a department against whom a claim has been filed under *Code Civ. Proc. § 116.110 et seq.* arising out of his or her duties as an employee of that department [*Code Civ. Proc. § 116.220(g)*].

For full discussion of procedures for filing pre-litigation claims against the State of California, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[d] Waiver of Excess Amount of Demand

In any case in which the lack of jurisdiction in small claims court is due solely to an excess in the amount of the demand, the excess may be waived, but any waiver shall not become operative until judgment [*Code Civ. Proc. § 116.220(d)*].

Once the plaintiff has elected to bring an action as a limited civil case, the action may not thereafter be transferred to the small claims court, even if the plaintiff waives any amount in his or her claim in excess of the maximum jurisdicitional amount of the small claims court [*see Rosenberg v. Superior Court (1998) 67 Cal. App. 4th 860, 869, 79 Cal. Rptr. 2d 365* and discussion in *§ 526.32[6]*].

[e] Filing Restrictions on Claims Exceeding $2,500

In general, no individual may file more than two small claims actions in which the demand exceeds $2,500, anywhere in California within any calendar year [*Code Civ. Proc. § 116.231(a)*]. If any demand exceeds $2,500, the party making the demand must file a declaration under penalty of perjury attesting to the fact that not more than two small claims actions in which the demand exceeded $2,500 have been filed by that party in California within the calendar year [*Code Civ. Proc. § 116.231(b)*; *see § 526.151*].

However, the above limitation on bringing small claims actions does not apply to filings in which the claim (the amount of the demand) does not exceed $5,000 that are filed by a city, county, city and county, or other public entity prescribed by statute [*see Code Civ. Proc. § 116.231(c), (d)*].Nevertheless, if any small claims action is filed by these public entities pursuant to *Code Civ. Proc. § 116.231*, and the defendant informs the court either in advance of the hearing by written notice or at the time of the hearing, that he or she is represented in the action by legal counsel,the action must be transferred out of the small claims division [*Code Civ. Proc. § 116.231(d)*]. This exception to the general filing limitation was enacted after a pilot project demonstrated the "efficacy of the removal of the limitation on the number of actions public agencies may file in the small claims courts on claims exceeding $2,500" [*Code Civ. Proc. § 116.231(c)*].

[2] Effect of Joinder of Claims by Multiple Plaintiffs

Generally, if there is a voluntary joinder of several plaintiffs who join separate claims against the defendant that arise out of the same transaction and if each claim is within the monetary limit of the court in which the action is filed, that court will have jurisdiction, even though the aggregate of the claims exceeds the monetary limit of the court [*Winrod v. Wolters (1903) 141 Cal. 399, 403, 74 P. 1037* ; *Colla v. Carmichael U--Drive Autos, Inc. (1930) 111 Cal. App. 784, 111 Cal. App. Supp. 784, 791-792, 294 P.378*]. Applying this rule to actions in small claims court, if there is a joinder of plaintiffs, each with a separate claim against defendant that does not exceed $5,000, the case is within the jurisdiction of the small claims division even though the total of all the plaintiffs' claims exceeds that amount [*City and County of San Francisco v. Small Claims Court (1983) 141 Cal. App. 3d 470, 477, 190 Cal. Rptr. 340*].

Nevertheless, if two or more plaintiffs claim a joint interest in the amount recovered, the total amount claimed by all the plaintiffs must not exceed the jurisdictional limits of the court [*see Frost v. Mighetto (1937) 22 Cal. App. 2d 612,*

615-616, 71 P.2d 932].

[3] Effect of Splitting Cause of Action

[a] In General

A single cause of action arising from the same set of facts should not be split to bring it within the jurisdiction of the small claims court, since, if the plaintiff attempts to bring another action for the balance of his or her claim, the defendant may plead the first action in abatement of the subsequent action [*see Wulfjen v. Dolton (1944) 24 Cal. 2d 891, 894, 151 P.2d 846* ; *see also Purcell v. Colonial Ins. Co. (1971) 20 Cal. App. 3d 807, 813, 97 Cal. Rptr. 874* ; Ch. 3, *Abatement of Actions*]. The defense, however, is not jurisdictional and may be waived if not asserted [*Williams v. Krumsiek (1952) 109 Cal. App. 2d 456, 460, 241 P.2d 40*].

[b] Effect Of Insured's Small Claims Action on Later Subrogation Action by Insurer

A policyholder's small claims judgment against the tortfeasor bars the insurance company from pursuing its subrogation action because the latter action is precluded by the res judicata effect of the rule against splitting a cause of action. Neither the insured nor the subrogee-insurer may sue again, notwithstanding the insured tort victim's failure to recover for all damages suffered in the first action [*Allstate Ins. Co. v. Mel Rapton, Inc. (2000) 77 Cal. App. 4th 901, 904-905, 913, 92 Cal. Rptr. 2d 151*]. In *Allstate,* for example, a buyer purchased an automobile from a dealer who had negligently repaired the vehicle's cigarette lighter. The buyer submitted an insurance claim after the vehicle caught fire, and the insurer, declaring the vehicle to be a total loss, paid the buyer $14,583.93 under the policy. The buyer subsenquently sued the dealer/seller in small claims court for the value of personal items lost in the fire that were not covered by the policy. A subsequent action against the dealer/seller, by the insurance company seeking subrogation for the amount paid to the buyer was barred by the buyer's small claims action [*see Allstate Ins. Co. v. Mel Rapton, Inc. (2000) 77 Cal. App. 4th 901, 905, 92 Cal. Rptr. 2d 151*].

When a tortfeasor's single act causes the plaintiff to suffer both personal injury and property damage, there are two causes of action. Thus, some jurisdictions have found that there is no impermissible splitting of a cause of action when an insurer brings an action to recover the amount it paid the insured for property damage and the insured brings a separate action for personal injuries [*Allstate Ins. Co. v. Mel Rapton, Inc. (2000) 77 Cal. App. 4th 901, 909, 92 Cal. Rptr. 2d 151* (citing authority from other jurisdictions)]. A separate cause of action does not arise, however, for each separate item of property damaged as a result of one tortious act [*Allstate Ins. Co. v. Mel Rapton, Inc. (2000) 77 Cal. App. 4th 901, 909, 92 Cal. Rptr. 2d 151* ; *see Holmes v. David H. Bricker, Inc. (1969) 70 Cal. 2d 786, 789, 76 Cal.Rptr. 431, 452 P.2d 647*]. Thus, an insurer's subrogation claim for property damage to a vehicle may be barred by a prior small claims action for property damages to personal property within the vehicle [*Allstate Ins. Co. v. Mel Rapton, Inc. (2000) 77 Cal. App. 4th 901, 909, 92 Cal. Rptr. 2d 151*].

An insurer may, however, include in its contract with the policyholder a clause prohibiting the policyholder from impairing the insurer's subrogation rights. In such a case, the insurer has the obligation to reiterate and explain this condition to the policyholder when it pays his or her insurance claim. The insurer may then agree to seek recovery of the policyholder's uninsured losses for him or her in connection with its subrogation claim, or require that the policyholder coordinate his or her action with the insurer's future legal action. If, despite this clear advisement, the insured pursues a small claims action, the insurer could resort to an action against the insured for impairment of its subrogation rights [*see Allstate Ins. Co.v. Mel Rapton, Inc. (2000) 77 Cal. App. 4th 901, 913, 92 Cal. Rptr. 2d 151* ; *State Farm Mut. Auto. Ins. Co. v. Davis (1981) 122 Cal. App. 3d Supp. 23, 176 Cal. Rptr. 517*]. If an insurer does not want to risk having to sue its insured or does not want to prevent him or her from recouping her uninsured losses in an expeditious and inexpensive small claims court action with a clause prohibiting the policyholder from impairing the insurer's subrogation rights, the insurer could file an action as a prophylactic measure at the time it reimburses the policyholder for his or her insured losses and then give the third party tortfeasor an open extension of time in which to

respond to the complaint. By doing so, it creates circumstances requiring the third party tortfeasor to object to the splitting of the cause of action at the time that policyholder files the small claims action. This is because the insurer's action provides a forum in which the claims could be consolidated or coordinated [*Allstate Ins. Co. v. Mel Rapton, Inc. (2000) 77 Cal. App. 4th 901, 913, 92 Cal. Rptr. 2d 151*].

[4] Incidental Equitable Relief and Conditional Judgment

In any action seeking relief authorized by *Code Civ. Proc. § 116.220(a)(1)-(4)* (discussed in [1][a], *above*), the court may grant equitable relief in the form of rescission, restitution, reformation, and specific performance in lieu of, or in addition to, money damages [*Code Civ. Proc. § 116.220(b)*; *see generally* Ch. 488, *Reformation of Instruments* , Ch. 490, *Rescission and Restitution* , and Ch. 528, *Specific Performance*]. In addition to equitable relief, the small claims court has authority to issue a conditional judgment in these actions [*Code Civ. Proc. § 116.220(b)*].

Aside from actions described in *Code Civ. Proc. § 116.220(a)(1)-(4)*, a small claims court may grant injunctive or other equitable relief only if a statute expressly authorizes the court to award that relief [*Code Civ. Proc. § 116.220(a)(5)*].

[5] Jurisdictional Transfer to Small Claims Court Not Authorized

Once a case is filed in superior court, it may not be transferred to small claims court, even if the plaintiff seeks the transfer and voluntarily agrees to waive damages in excess of the jurisdictional limit on small claims [*see Rosenberg v. Superior Court (1998) 67 Cal. App. 4th 860, 869, 79 Cal. Rptr. 2d 365*]. Although *Rosenberg* was decided in the context of a case filed in municipal court prior to the creation of unified superior courts [*Rosenberg v. Superior Court (1998) 67 Cal. App. 4th 860, 868 n.3, 79 Cal. Rptr. 2d 365* ; *see Cal. Const., art. VI, § 23* (abolition of municipal courts and unification within superior courts)], the result should be the same when an action is filed in superior court.

The only type of small claims transfer specifically authorized by statute is a transfer from small claims court to another court of competent jurisdiction, on the instigation of a defendant whose cross claim exceeds the small claims jurisdictional limit (generally, $7,500 if action is brought by natural person, or $5,000 if claimant is other than natural person) [*see Code Civ. Proc. § 116.390*; see also *Code Civ. Proc. §§ 116.220(a)(1), 116.221* and discussion in *§ 526.53[3]*]. Thus, there is no statutory authorization for a transfer from superior court to a small claims court. Under *Code Civ. Proc. § 396*, a transfer is permitted only when thetransferring court lacks subject matter jurisdiction. A superior court, however, does not lack subject matter jurisdiction over a claim merely because it also happens to be within the jurisdiction of the small claims court. Thus, a claimant may elect to seek recovery of an amount within the small claims court's jurisdiction by filing a case in either superior court or small claims court, but the superior court is not empowered by Section 396 to transfer the case to small claims court [*see Rosenberg v. Superior Court (1998) 67 Cal. App. 4th 860, 867, 79 Cal. Rptr. 2d 365]* .

In addition, although courts have inherent power to transfer cases and otherwise control their own calendars and dockets, this inherent power does not permit the transfer of a case from superior court to small claims court. The small claims court is not simply another division or department of the superior court for purposes of transfer, and the power of transfer is not absolute. A transfer must further the ends of justice, and justice is not served when an actively litigated superior court case is transferred to a small claims court [*see Rosenberg v. Superior Court (1998) 67 Cal. App. 4th 860, 867-868, 79 Cal. Rptr. 2d 365]* . The purpose of small claims--speedy and low-cost resolution--is accomplished only when a claim is initially filed in small claims court and is immediately subject to the abbreviated small claims procedures. Filing and litigating the claim in superior court first has the effect of preventing the kind of quick resolution for which small claims court is designed. Once a small claim has been litigated in superior court, it is impossible to go backward in time and process the claim through quick and informal means [*see Rosenberg v. Superior Court (1998) 67 Cal. App. 4th 860, 867-868, 79 Cal. Rptr. 2d 365]* .

A limited civil case may be reclassified as an unlimited civil case, and vice versa, on grounds of subject matter

jurisdiction [*see Code Civ. Proc. § 403.010 et seq.*]. There is, however, no statutory authorization for a jurisdictional reclassification of a limited civil case as a small claims case, just as there is none for the jurisdictional transfer of a limited civil case from superior court to a small claims court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionAmount in ControversyCivil ProcedureRemediesGeneral OverviewGovernmentsCourtsSmall Claims Courts

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46-526 California Forms of Pleading and Practice--Annotated § 526.33

§ 526.33 Venue

The venue of the action filed in the small claims court is the same as for other civil actions [*Code Civ. Proc. § 116.370(a)*] and is governed generally by *Code Civ. Proc. § 392 et seq.* (discussed in Ch. 571, *Venue*). Local court rules may prescribe the proper court locations for small claims actions [*Code Civ. Proc. § 116.370(a)*].

A defendant who wishes to challenge venue or court location may do so by writing to the court and mailing a copy to all parties without personally appearing at the hearing [*Code Civ. Proc. § 116.370(b)*; *Cal. Rules of Ct., Rule 3.2106*]. If the court denies the challenge and the defendant is not present, the hearing must be continued to another appropriate date, and the parties must be given notice of the venue determination and the hearing date [*Cal. Rules of Ct., Rule 3.2106*].

In all cases, including those in which the defendant does not either challenge venue or court location or appear at the hearing, the small claims court must inquire of the parties facts sufficient to determine whether venue or court location is proper and must make its determination accordingly [*Code Civ. Proc. § 116.370(c)*]. If the court determines that the action has not commenced in the proper venue, the court, on its own motion, must dismiss the action without prejudice unless all defendants are present and agree that the action may be heard [*Code Civ. Proc. § 116.370(c)(1)*]. If the court determines that the action was not commenced in the proper court location, the court may transfer the action to a proper location pursuant to local rule [*Code Civ. Proc. § 116.370(c)(1)*].

If the court determines that the action was commenced in the proper venue and court location, the court may hear the case if all parties are present. If the defendant challenged venue or court location, and all parties are not present, the court must postpone the hearing for at least 15 days and must notify all parties by mail of the court's decision and of the new hearing date, time, and place [*Code Civ. Proc. § 116.370(c)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueMotions to TransferGeneral OverviewGovernmentsCourtsSmall Claims Courts

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46-526 California Forms of Pleading and Practice--Annotated § 526.34

§ 526.34 Parties

[1] In General

Any person who is at least 18 years of age, or legally emancipated, and mentally competent may be a party to a small claims action [*Code Civ. Proc. § 116.410(a)*]. For this purpose "person" includes an individual (or natural person), corporation, partnership, limited liability partnership, limited liability company, firm, association, or other entity [*Code Civ. Proc. § 116.130(e), (f)*; *see also* discussion § 526.130[7]].

A person who is a minor or who is not competent may nonetheless appear by a guardian ad litem appointed by a judge of the court in which the action is filed [*Code Civ. Proc. § 116.410(b)*; *see Fam. Code § 6500* (minor is person under age 18); *see generally* Ch. 291, *Guardians ad Litem*].

Specific restrictions on the appearance by assignees, corporations, or other entities are discussed in *§ 526.34[2]*. For discussion of when a party may appear by a representative at the hearing, thereby waiving personal appearance, see *§ 526.70[7]*.

[2] Restrictions

[a] Assignee

The small claims statute prohibits the filing or prosecution of a claim by an assignee; only the original creditor may file or prosecute a claim in the small claims court [*Code Civ. Proc. § 116.420(a)*]. But an action may be filed or defended by (1) a trustee in bankruptcy in the exercise of the trustee's duties as trustee, or (2) the holder of a security agreement, retailinstallment contract, or lien contract subject to the Unruh Act (*Civ. Code § 1801 et seq.*) or the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*) purchased by the holder for his or her portfolio of investments, provided the holder is not an assignee for the purpose of collection [*Code Civ. Proc. § 116.420(b)*]. For discussion of the Rees-Levering and Unruh Acts, *see* Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* and Ch. 90, *Automobiles: Vehicle Leasing Act*].

In addition, the statutory prohibition on filing or maintaining a claim in small claims court by an assignee of the claim does not prevent the filing of a claim by a local government that is self-insured for purposes of workers' compensation and is seeking subrogation pursuant to *Lab. Code § 3852* [*Code Civ. Proc. § 116.420(c)*].

[b] Corporation

A corporation generally may appear and participate in a small claims action only through a regular employee or a duly appointed or elected officer or director who is employed, appointed, or elected for purposes other than the exclusive representation of the corporation in small claims court [*Code Civ. Proc. § 116.540(b)*]. In addition, if the corporation is an association created to manage a common interest development [*see Civ. Code § 1351*], it may appear and participate in a small claims action through an agent, a management company representative, or a bookkeeper who appears on behalf of that association [*Code Civ. Proc. § 116.540(b), (i)*].

Any individual representing a corporate plaintiff at the hearing of a small claims action is required to submit a declaration stating (1) that the person is authorized to appear for the corporation, (2) the basis for the person's authorization, and (3) that the person is not employed solely for the purpose of representing the corporation in the small claims court [*Code Civ. Proc. § 116.540(j)*].

If a corporation is a party to an appeal from a small claims action, the corporation may also appear before the superior court through an attorney at law [*see Code Civ. Proc. § 116.770(c)*].

[c] Other Entity

An entity that is not a natural person or a corporation may appear and participate in a small claims action only through a regular employee or a duly appointed or elected officer or director, or, in the case of a partnership, a partner, engaged for purposes other than solely representing the party in small claims court [*Code Civ. Proc. § 116.540(c)*].

The representative of a plaintiff entity that is not a natural person is required by the court to submit a declaration stating (1) that the individual is authorized to appear for the entity, (2) the basis for that authorization, and (3) that the person is not employed solely for the purpose of representing the entity in the small claims court [*Code Civ. Proc. § 116.540(j)*].

[d] Department of Corrections and Rehabilitation or Division of Juvenile Facilities

Notwithstanding *Code Civ. Proc. § 116.540* or any other provision of law, the Department of Corrections and Rehabilitation [*see Penal Code § 5055*] or the Department's Division of Juvenile Facilities [*see Penal Code § 6001*] may appear and participate in a small claims action through a regular employee who is employed or appointed for purposes other than solely representing that department in small claims court [*Code Civ. Proc. § 116.541(a)*].

At the hearing of a small claims action, the court must require any individual who is appearing as a representative of the Department of Corrections and Rehabilitation [*see Penal Code § 5055*] or the Department's Division of Juvenile Facilities [*see Penal Code § 6001*] under *Code Civ. Proc. § 116.541(a)* to file a declaration stating (1) that the individual is authorized to appear for the party, (2) the basis for that authorization, and (3) that the individual is not employed solely to represent the party in small claims court [*Code Civ. Proc. § 116.541(c)*]. Nothing in *Code Civ. Proc. § 116.541* operates or may be construed to authorize an attorney to participate in a small claims action, except as expressly authorized in *Code Civ. Proc. § 116.530* [*Code Civ. Proc. § 116.541(d)*; *see discussion under § 526.35*].

The foregoing provisions pertaining to the Department of Corrections and Rehabilitation and the Department's Division of Juvenile Facilities also apply to any employee of the Department or Division against whom a small claim has been filed arising out of his or her duties as an employee of the Department or Division [*Code Civ. Proc. § 116.541(e)*].

[3] Vexatious Litigants

An order entered pursuant to *Code Civ Proc. § 391.7* prohibiting a vexatious litigant from filing any new litigation in state courts without prior court approval does not apply to actions filed in small claims court, because small claims court is not a court of record [*Banks v. State of California (1993) 14 Cal. App. 4th 1147, 1149-1150, 18 Cal. Rptr. 2d 127* (construing *Code Civ. Proc. § 391(a)* definition of "litigation," which only refers to actions in a court of record); *see also* Ch. 573, *Vexatious Litigants*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedureSanctionsBaseless FilingsVexatious LitigantsGovernmentsCourtsSmall Claims Courts

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§ 526.35 Legal Assistance

[1] Restriction on Attorneys

No attorney at law or person other than the plaintiff and the defendant may take any part in the conduct or defense of a small claims action [*Code Civ. Proc. §§ 116.530(a), 116.540(a)*]. This rule does not apply if the attorney is appearing to maintain or defend an action (1) by or againsthimself or herself, (2) by or against a partnership in which he or she is a general partner and in which all the partners are attorneys, or (3) by or against a professional corporation of which he or she is an officer or a director and of which all other officers and directors are attorneys at law [*Code Civ. Proc. § 116.530(b)*].

This prohibition does not prevent an attorney from (1) providing advice to a party to a small claims action, either before or after the commencement of the action, (2) testifying to facts of which he or she has personal knowledge and about which he or she is competent to testify, (3) representing a party in an appeal to the superior court, and (4) representing a party in connection with the enforcement of a judgment [*Code Civ. Proc. § 116.530(c)*].

[2] Legal Advisors

[a] Individual Assistance Available to Litigants

Each county must provide individual assistance to small claims court litigants and potential litigants at no additional charge [*Code Civ. Proc. § 116.260*]. Within the legislative guidelines set forth in *Code Civ. Proc. § 116.940*, each county must establish its own particular advisory service. The advisors may be volunteers, but must be members of the State Bar, law students, paralegals, or persons experienced in resolving minor disputes and must be familiar with small claims court rules and procedures. The topics that individual personal advisory services may cover include preparation of small claims court filings, procedures, including procedures related to the conduct of the hearing, and information on the collection of small claims court judgments [*Code Civ. Proc. § 116.940(b)(1)*]. Advisors may not appear in court as advocates for any party [*Code Civ. Proc. § 116.940(e)*] and are not liable for any advice provided as a public service [*Code Civ. Proc. § 116.940(f)*; *Gov. Code § 818.9*].

In addition to the small claims advisors, the clerks of the small claims court are also available to assist individual litigants. A clerk is required to provide small claims forms and pamphlets, materials from the Department of Consumer Affairs, when available, and information about the small claims advisory service. The clerk must also answer the litigant's questions about filing and service of the claim, designation of the parties, scheduling of hearings, and similar matters [*Cal. Rules of Ct., Rule 3.2110*].

For discussion of when the court may appoint someone to assist a party present a claim or defense at the hearing, see the discussion in Assistance in Presenting Claim or Defense, *below.*

[b] Notice of Availability

The small claims court clerk is required to inform the parties orally or in writing (1) that an advisor is available to assist small claims litigants at no additional charge as provided in *Code Civ. Proc. §§ 116.260* and *116.940,* and *(2)* of the provisions of *Gov. Code § 818.9* (nonliability of advisors for advice given) [*Cal. Rules of Ct., Rule 3.2120(a)*].

[c] Qualifications of Advisors and Conflict of Interest

All small claims advisors must receive training from the county sufficient to ensure competence in the following areas: small claims court practice and procedure; alternative dispute resolution programs; consumer sales; vehicular sales, leasing, and repairs; credit and financing transactions; professional and occupational licensing; landlord-tenant law; and contract, warranty, tort, and negotiable instruments law [*Cal. Rules of Ct., Rule 3.2120(b)*]. In addition to this training, each county may establish additional qualifications for small claims advisors [*Cal. Rules of Ct., Rule 3.2120(c)*].

A small claims advisor is required to disclose any known direct or indirect relationship he or she may have with any party or witness in the action and must not disclose information obtained in the course of his or her duties or use the information for financial or other advantage [*Cal. Rules of Ct., Rule 3.2120(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewGovernmentsCourtsClerks of CourtGovernmentsCourtsCourt PersonnelGovernmentsCourtsSmall Claims Courts

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[Reserved]

§§ 526.36[Reserved]

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§ 526.50 Commencement of Action

[1] Filing of Claim

A plaintiff may commence an action in small claims court by filing a claim under oath with the clerk of the small claims court in person, by mail, by facsimile transmission if authorized by statute, or by electronic means as authorized by statute [*Code Civ. Proc. § 116.320(a)*; *see Code Civ. Proc. § 1010.5* (facsimile); *Code Civ. Proc. § 1010.6* (electronic filing)].

[2] Content of Claim

The claim must set forth the following [*Code Civ. Proc. § 116.320(b)*]:

- The name and address of the defendant, if known.

- The amount and basis of the claim. If the action is to enforce the payment of a debt, the claim must separately state the original debt, each payment credited to the debt, each fee and charge added to the debt, each payment credited against those fees and charges, all other debits or charges to the account, and an explanation of the nature of those fees, charges, debits, and all other credits to the debt, by source and amount [*Code Civ. Proc. § 116.222*].

- That the plaintiff, when possible, has demanded payment and, in applicable cases, the possession of the property.

- That the defendant has failed or refused to pay and, when applicable, has refused to surrender the property.

- That the plaintiff understands that the judgment on his or her claim will be conclusive without right of appeal.

As required by *Code Civ. Proc. § 116.320(b)*, the Judicial Council has approved of a form of claim and order for general use in small claims cases [*see § 526.151*]. Other requirements concerning the contents of plaintiff's claim are set out in the Comments to *see § 526.151*.

[3] Fees

The plaintiff must pay a filing fee. If the plaintiff has filed 12 or fewer other small claims in California within the previous 12 months, the amount of the fee depends on the amount of the claim. The filing fee is $30 if the demand is for $1,500 or less, $50 if the demand is for more than $1,500 but not more than $5,000, and $75 if the demand is for more than $5,000 [*Code Civ. Proc. § 116.230(b)*]. If, after filing a claim and paying the required fee, the plaintiff files an amendment or amended claim that increases the amount of the claim to a level that would have required a higher filing fee had the full claim been presented initially, the plaintiff must pay the difference when filing the amendment or amended claim [*Code Civ. Proc. § 116.230(d)*]. However, if an amendment reduces the plaintiff's claim to a level that would have required a lower filing fee than the plaintiff actually paid, the court will not reimburse the plaintiff [*Code Civ. Proc. § 116.230(d)(4)*].

If the plaintiff has filed more than 12 other small claims in California within the previous 12 months, the filing fee is a flat $100, regardless of the amount of the demand [*Code Civ. Proc. § 116.230(c)*]. The plaintiff must file a declaration with the claim, stating whether he or she has filed more than 12 other small claims within the previous 12 months [Code Civ. Proc. § 1116.230(e)].

In addition to the filing fee, the plaintiff must pay the court clerk a fee of $10 for each defendant to whom the clerk mails a copy of the claim [*Code Civ. Proc. § 116.232*; *see Code Civ. Proc. § 116.340*].

[4] Designation of Parties

[a] Individual

An individual party should be designated by his or her first name, middle initial, if any, and last name. A husband and wife may be designated as such.

[b] Partnership

A partnership may be designated by the name that it has assumed or by which it is known [*see Code Civ. Proc. § 369.5(a)*].

[c] Unincorporated Association

An unincorporated association may be designated by the name of the association [*see Code Civ. Proc. § 369.5(a)*].

[d] Minor or Incompetent

A mi nor or incompetent is designated by the name of the minor and the name of the guardian, for example, "John Doe, a minor, by Jane Doe, his guardian ad litem," or "general guardian," depending on the circumstances [*see Code Civ. Proc. §§ 372, 373*].

[e] Public Entities

A public entity is designated by its full name. The term "public entity" includes the state, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in this state [*Gov. Code § 811.2*]. An action may be brought against a public entity after a claim has been

filed and disallowed [*Gov. Code § 945.4*]. Generally, an action against a public entity must be commenced within six months after the claim has been acted on or rejected by the governing body of the public entity if written notice is given, or within two years from the accrual of the cause of action if written notice is not given [*Gov. Code § 945.6*; *see Gov. Code § 913*; *see generally* Ch. 464, *Public Entities and Officers: California Tort Claims Act*].

[5] Obtaining Hearing Date

When a claim is filed in small claims court, the clerk must schedule the case for hearing in accordance with the time requirements listed below and issue an order directing the parties to appear at the scheduled hearing with witnesses and documents to prove their claim or defense [*Code Civ. Proc. § 116.330(a)*]. The case must be scheduled for hearing no earlier than 20 days but not more than 70 days from the date of the order [*Code Civ. Proc. § 116.330(a)*].

In lieu of the method of setting the case for hearing described above, the clerk may do all of the following: (1) cause a copy of the claim to be mailed to the defendant by any form of mail providing for a return of receipt; (2) on receipt of proof that the claim was served, issue an order scheduling the case for hearing in accordance with the time requirements set out in the foregoing paragraph and direct the parties to appear at the scheduled hearing with witnesses and documents to prove their claim or defense; and (3) cause a copy of the order setting the case for hearing and directing the parties to appear to be served on the parties by any form of mail providing for a return receipt [*Code Civ. Proc. § 116.330(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewGovernmentsCourtsSmall Claims Courts

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§ 526.51 Fictitious Business Name

[1] Declaration of Compliance With Laws

If a plaintiff operates or does business under a fictitious business name and the claim relates to that business, the plaintiff must file with the claim a declaration stating that the plaintiff has complied with the fictitious business name laws by executing, filing, and publishing a fictitious business name statement as required [*Code Civ. Proc. § 116.430(a)*]. The declaration of compliance must be filed in each case the plaintiff files [Cal. *Rules of Ct., Rule 3.2100(a)*]. For the purposes of this requirement, "fictitious business name" means that which is described in *Bus. & Prof. Code § 17900*, and "fictitious business name statement" means that which is described in *Bus. & Prof. Code § 17913* [*Code Civ. Proc. § 116.430(c)*]. For a discussion of the fictitious business name laws, see *Ch. 20, Allegations Commonly Used, §§ 20.34 -20.36*.

The clerk must make the declaration of compliance available to the claimant in any one of the following ways: (1) the declaration may be on a separate form approved by the Judicial Council [*see § 526.155*]; (2) the approved Judicial Council form may be placed on the reverse of Plaintiff's Statement to the Clerk or on the back of any Judicial Council small claims form with only one side; or (3) the precise language of the declaration of compliance that appears on the approved Judicial Council form may be incorporated into the Plaintiff's Statement to the Clerk [*Cal. Rules of Ct., Rule 3.2100(b)*].

An action filed by a party who has failed to comply with the applicable fictitious business name laws by executing, filing, and publishing a fictitious business name statement as required shall be dismissed without prejudice [*Code Civ. Proc. § 116.430(b)*].

[2] Correct Legal Name of Defendant

Whenever a claim that is filed against a person operating or doing business under a fictitious business name relates to the defendant's business, the court shall inquire at the time of the hearing into the defendant's correct legal name and the name or names under which the defendant does business. If the correct legal name of the defendant, or the name actually used by the defendant, is other than the name stated on the claim, the court shall amend the claim to state the

correct legal name of the defendant and the name or names actually used by the defendant [*Code Civ. Proc. § 116.560(a)*].

Plaintiff may request the court at any time, whether before or after judgment, to amend the claim of the plaintiff or the judgment to include both the correct legal name and the actually used name or names of the defendant. On a showing of good cause, the court will amend the claim or judgment to state the correct legal name of the defendant and the name or names actually used by the defendant [*Code Civ. Proc. § 116.560(b)*; *see Code Civ. Proc. § 116.630*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesFictitious NamesGovernmentsCourtsSmall Claims Courts

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46-526 California Forms of Pleading and Practice--Annotated § 526.52

§ 526.52 Service of Plaintiff's Claim and Ordering of Defendant's Appearance

[1] In General

Service of the claim and order on the defendant may be made by substituted service [*see discussion under § 526.52[2]*] or by one of the following methods [*Code Civ. Proc. § 116.340(a)*]:

- The clerk may cause a copy of the claim and order to be mailed to defendant by any form of mail providing for a return receipt.

- The plaintiff may cause a copy of the claim and order to be delivered to defendant in person.

- Instead of serving the claim and order at the same time, the clerk may first have the claim served on the defendant by any form of mail providing for a return receipt. On receipt of proof of service by mail, the clerk may issue the order scheduling the hearing and have it served by any form of mail providing for a return receipt [*see Code Civ. Proc. § 116.330(b)*, discussed in *§ 526.50[5]*].

Generally, service must be made within California to be valid [*Code Civ. Proc. § 116.340(e)*]. An exception is provided for the personal service of a complaint relating to real property in California on the owner of record of that property, by any of the methods described above, when the owner resides in another state and has no lawfully designated agent in California for service of process [*Code Civ. Proc. § 116.340(f)*].

[2] Substituted Service

Service of the claim and order on the defendant may be made by substituted service, as provided in *Code Civ. Proc. § 415.20(a)* or *(b)* (substituted service of summons and complaint), without the need to attempt personal service on the defendant [*Code Civ. Proc. § 116.340(a)(3)*]. Even though *Code Civ. Proc. § 415.20(b)* requires that the plaintiff first use reasonable diligence to effect personal service on the defendant, no due diligence is required in a small claims court action [*see Cal. Rules of Ct., Rule 3.2100*].

Substituted service consists of any of the following:

- Leaving a copy of the claim during usual office hours in the defendant's office with a person who is apparently in charge, and then mailing another copy of the claim by first-class mail, postage prepaid, to the defendant at the place where the copy of the claim was left [*see Code Civ. Proc. § 415.20(a)*]. If the physical address of the defendant's office is not known, substituted service may be made by leaving a copy of the claim at the defendant's usual mailing address (other than a United States Postal Service post office box) with a person at least age 18, who must be informed of the contents of the delivery, and then mailing another copy of the claim by first-class mail, postage prepaid, to the defendant at the place where the copy of the claim was left [*Code Civ. Proc. § 415.20(a)*].

- Leaving a copy of the claim at defendant's dwelling house, usual place of abode, or place of business or usual mailing address (other than a United States Postal Service post office box) in the presence of a competent member of the household or a person who is apparently in charge and who is at least 18 years of age and has been informed of the contents of the claim, and then mailing another copy of theclaim to the defendant at the place where the copy of the claim was left [*see Code Civ. Proc. § 415.20(b)*]. For these purposes, substituted service may also be made at the office of the sheriff or marshal, who will deliver a copy of the claim and order to any person authorized by the defendant to receive service, as provided in *Code Civ. Proc. § 416.90*, who is at least 18 years of age, and thereafter mail a copy of the claim and order to the defendant's usual mailing address [*Code Civ. Proc. § 116.340(a)(3)*].

- If the defendant is a business organization of unknown form, leaving a copy of the claim during usual office hours with the person who is apparently in charge of the office of that business organization, and thereafter mailing a copy of the claim by first-class mail, postage prepaid, to the person to be served at the place where the copy of the claim was left [*Code Civ. Proc. § 415.95(a)*]. Service in this manner is not valid, however, for a corporation with a registered agent for service of process listed with the California Secretary of State [*Code Civ. Proc. § 415.95(b)*].

For further discussion of substituted service of a summons and complaint under *Code Civ. Proc. § 415.20(a)* and *(b)*, see Ch. 518, *Service of Summons and Papers* .

[3] Service on Nonresident Motorist

Service on the Director of the Department of Motor Vehicles, and notice to the defendant if made by any of the methods described in *Code Civ. Proc. § 116.340*, must satisfy the requirements of *Veh. Code § 17450 et seq.* regarding constructive service on a nonresident owner or operator of a motor vehicle involved in an accident in California [*Code Civ. Proc. § 116.340(e)*]. For further discussion and forms relating to these service requirements under the Vehicle Code, see Ch. 83, *Automobiles: Bringing the Action* .

[4] Service on Principal in Suretyship Action

In any action against a principal and his or her guarantor or surety under a guarantor or suretyship agreement, a reasonable attempt must be made to complete service on the principal. If service is not completed on the principal, the action must be transferred to the court of appropriate jurisdiction [*Code Civ. Proc. § 116.340(h)*]. For further discussion of suretyship contracts, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[5] When Service Is Deemed Complete

Service by either of the alternatives presented in *Code Civ. Proc. § 116.340(a)* (*discussed under § 526.171[3][a] above*) is deemed complete on the date that the defendant signs the mail return receipt, on the dateof personal service, or as

established by other competent evidence, whichever applies to the method of service utilized [*Code Civ. Proc. § 116.340(d)*].

When substituted service is made as provided in *Code Civ. Proc. §§ 415.20* or *415.95(a)*, it is deemed complete on the tenth day after mailing [*see Code Civ. Proc. §§ 116.340(d), 415.20, 415.95(a)*; *see also* discussion § 526.52[2]].

Service of the claim and order on defendant must be completed at least 15 days before the hearing date if defendant resides in the county in which the action is filed, or at least 20 days before the hearing date if defendant resides outside the county in which the action is filed [*Code Civ. Proc. § 116.340(b)*]. Proof of service of the claim and order scheduling the hearing must be filed with the small claims court at least five days before the hearing [*Code Civ. Proc. § 116.340(c)*]. For a form of proof of service, see *§ 526.153*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessMethodsMailCivil ProceduresPleading & PracticeService of ProcessMethodsPersonal DeliveryCivil ProceduresPleading & PracticeService of ProcessMethodsResidential ServiceCivil ProceduresPleading & PracticeService of ProcessMethodsService Upon AgentsGovernmentsCourtsSmall Claims Courts

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46-526 California Forms of Pleading and Practice--Annotated § 526.53

§ 526.53 Defendant's Pleadings

[1] Answer Not Required

A defendant may appear and oppose the plaintiff's claim without filing an answer [*see Code Civ. Proc. § 116.310(a)*].

[2] Filing of Responsive Claim

The defendant may file and serve a claim in the same small claims action in an amount not exceeding the jurisdictional limit stated in *Code Civ. Proc. §§ 116.220, 116.221,* and *116.231* (discussed in *§ 526.32 above*) [*Code Civ. Proc. § 116.360(a)*]. The claim does not have to relate to the same subject or event as the plaintiff's claim [*Code Civ Proc. § 116.360(a)*; *Cal. Rules of Ct., Rule 3.2104*]. The claim must be filed and served in the same manner provided for filing and serving a claim of the plaintiff under *Code Civ. Proc. §§ 116.330, 116.340* (*discussed under § 526.171[3][a] above*) [*Code Civ. Proc. § 116.360(b)*]. The defendant must cause a copy of the claim and order to be served on the plaintiff at least five days before the hearing date, unless the defendant was served 10 days or less before the hearing date, in which event the defendant must cause a copy of the defendant's claim and order to be served on the plaintiff at least one day before the hearing date [*Code Civ. Proc. § 116.360(c)*; *see § 526.158*].

[3] Cross Claim for More Than Jurisdictional Amount

[a] When Transferred

If the defendant has a claim against the plaintiff for an amount exceeding the jurisdiction of the small claims court and the claim relates to the contract, transaction, matter, or event that is the subject of the plaintiff's claim, the defendant may commence an action against the plaintiff in acourt of competent jurisdiction and request the small claims court to transfer the small claims action to that court [*Code Civ. Proc. § 116.390(a)*]. At or before the time set for the hearing of the action in small claims court, defendant may make the request by filing with the small claims court in which the plaintiff commenced the action a declaration stating the facts concerning the defendant's action against the plaintiff with a true copy of the complaint so filed by the defendant against the plaintiff. The defendant must cause a copy of the declaration and complaint to be personally delivered to plaintiff at or before the time set for the hearing of the small

claims action [*Code Civ. Proc. § 116.390(b)*; *see § 526.159*].

In ruling on a motion to transfer, the court may (1) render judgment on the small claims case prior to transfer, or (2) not render judgment on the small claims case and transfer the case, or (3) refuse to transfer the small claims case on the grounds that the ends of justice would not be served [*Code Civ. Proc. § 116.390(c)*; *see § 526.160*]. When the small claims court orders the action transferred, it must transfer all files and papers to the transferee court [*Code Civ. Proc. § 116.390(d)*]. If the small claims action is transferred before judgment, both actions must be tried together in the transferee court [*Code Civ. Proc. § 116.390(c)*].

If the plaintiff in the small claims action is a health care provider and the defendant has a counterclaim of malpractice that exceeds the jurisdictional amount in small claims court, the defendant has a right to a continuance of the small claims trial if it would be necessary to ensure compliance with *Code Civ. Proc. § 116.390* and with *Code Civ. Proc. § 364*, which requires a 90-day notice period prior to filing a complaint for professional negligence [*Clark v. Superior Court (1980) 113 Cal. App. 3d 865, 869, 169 Cal. Rptr. 898*].

[b] Payment of Fees if Action Is Transferred

The plaintiff in the small claims action is not required to pay to the clerk of the transferee court any transmittal, appearance, or filing fee unless plaintiff appears in the transferee court, in which event plaintiff is required to pay the filing fee and any other fee required of a defendant in the transferee court. Nevertheless, if the transferee court rules against the plaintiff in the action filed in that court, the court may award to the defendant in that action the costs incurred as a consequence of the transfer, including attorney's fees and filing fees [*Code Civ. Proc. § 116.390(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionAmount in ControversyCivil ProceduePleading & PracticePleadingsAnswersCivil ProceduePleading & PracticePleadingsCounterclaimsGeneral OverviewGovernmentsCourtsSmall Claims Courts

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46-526 California Forms of Pleading and Practice--Annotated § 526.54

§ 526.54 Discovery Not Allowed

Formal discovery procedures are not permitted in a small claims action. If the defendant appeals an adverse judgment [*see* discussion in *§ 526.94*], discovery is not permitted in the trial de novo in superior court [*Bruno v. Superior Court (1990) 219 Cal. App. 3d 1359, 1362-1363, 269 Cal. Rptr. 142*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewGovernmentsCourtsSmall Claims Courts

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46-526 California Forms of Pleading and Practice--Annotated §§ 526.55-526.69

[Reserved]

§§ 526.55[Reserved]

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46-526 California Forms of Pleading and Practice--Annotated § 526.70

§ 526.70 Hearings

[1] Informal Nature

The hearing and disposition of small claims actions are informal, the object being to dispense justice promptly, fairly, and inexpensively [*Code Civ. Proc. § 116.510*].

[2] Temporary Judge

[a] Court-Appointed Temporary Judge

With the consent of the parties who appear at the hearing, the court may order a small claims case to be heard by a temporary judge [*Code Civ. Proc. § 116.240(a)*]. If the court has appointed and assigned an attorney to serve as a temporary judge [*Cal. Rules of Ct., Rule 2.816(a)*], the court must give notice to each party of the following before the swearing-in of the first witness at the hearing [*Cal. Rules of Ct., Rule 2.816(b)*]:

- A temporary judge will be hearing the matters for that calendar.
- The temporary judge is a qualified member of the State Bar.
- The name of the temporary judge.
- The party that has a right to have the matter heard before a judge, commissioner, or referee of the court.

The court may give the foregoing notice by either of the following methods [*Cal. Rules of Ct., Rule 2.816(c)*]:

- A conspicuous sign posted inside or just outside the courtroom, accompanied by oral notification or notification by videotape or audiotape by a court officer on the day of the hearing.

- A written notice provided to each party.

After the foregoing notice has been given, a party may sign a written stipulation agreeing that the matter may be heard by the temporary judge [*Cal. Rules of Ct., Rule 2.816(d)(2)*]. Even without a written stipulation, however, a party will be deemed to have stipulated to the attorney serving as a temporary judge if the party fails to object to the matter being heard by the temporary judge before the temporary judge begins the proceeding [*Cal. Rules of Ct., Rule 2.816(d)(1)*].

The temporary judge is sworn and empowered to act until the final determination of the case [*Code Civ. Proc. § 116.240(a)*]. A party may, however, move to withdraw his or her stipulation to have the matter heard by the temporary judge if there is good cause for withdrawing the stipulation [*Cal. Rules of Ct., Rule 2.816(e)*]. A ruling by the temporary judge based on error of fact or law does not constitute good cause for withdrawing a stipulation [*Cal. Rules of Ct., Rule 2.816(e)(2)*].

The temporary judge must be an active or inactive member of the State Bar [*Code Civ. Proc. § 116.240(a)*]. To qualify for appointment as a temporary judge, an attorney generally must have been admitted to practice as a member of the State Bar of California for at least 10 years before the appointment [*Cal. Rules of Ct., Rule 2.812(a)* (for good cause, attorney who has been admitted to practice for at least 5 years may serve as temporary judge)]. The appointee must not have any disciplinary action pending; must not have been convicted of, or pled guilty or no contest to, a felony; must have satisfied certain educational and training requirements [*see Cal. Rules of Ct., Rules 2.812(c), 2.813(a)-(c)*]; must have completed a application form [*see Cal. Rules of Ct., Rule 10.744*]; must subscribe the oath of office; and must have satisfied any other conditions imposed by the court [*Cal. Rules of Ct., Rules 2.812(b), (d), (e), (g), 2.814*].

Prior to serving as a temporary judge in small claims court, on and after July1, 2006, and at least every three years thereafter, each temporary judge must take a course of study offered by the courts on ethics and substantive law under rules adopted by the Judicial Council [*see Cal. Rules of Ct., Rule 2.815*]. The course must include, but not be limited to, small-claims procedures and practices; state and federal consumer laws; vehicular sales, leasing, and repair; professional and occupational licensing; landlord-tenant law along with any applicable county-specific rent deposit law, credit and financing transactions, including the state and federal Fair Debt Collection Practices Acts, the federal Truth in Lending Act, the federal Fair Credit Billing Act, and the federal Electronic Fund Transfer Act; warranty law; tort law, contract law, including defenses to contracts and defenses to debts; negotiable instruments law; and other subjects deemed appropriate by the presiding judge based on local needs and conditions [*Code Civ. Proc. § 116.240(b)*; *see Cal. Rules of Ct., Rules 2.812(c)(3)(A), 2.813(c)*]. On substantive law, the courts may receive assistance from the Department of Consumer Affairs to the extent that the department is fiscally able to provide that assistance [*Code Civ. Proc. § 116.240(b)*].

For detailed coverage of court-appointed temporary judges in actions other than small-claims cases, see Ch. 317, *Judges*
.

[b] Temporary Judge Requested by Parties

The parties may request that the court designate a temporary judge selected by the parties to hear their small-claims case [*see Cal. Const., art. VI, § 21*]. The qualifications and procedures applicable to court-appointed temporary judges [*see Cal. Rules of Ct., Rules 2.810 et seq.*; *see also* [a], *above*] do not apply to temporary judges designated by the court at the parties' request [*Cal. Rules of Ct., Rule 2.810(a)*; *see* Cal. Rules of Ct., Rule 2.8(a)]. However, any temporary judge requested by the parties must be an active or inactive member of the State Bar [*Cal. Rules of Ct., Rule 2.810(a)*].

To request that an attorney be designated by the court to serve as a temporary judge, the parties must submit a written stipulation stating the name and office address of the member of the State Bar agreed on [*Cal. Rules of Ct., Rule 2.831(a)*]. The designation of a temporary judge by stipulation of the parties in a small-claims case is subject to the same requirements that apply to the designation of temporary judges generally [*see Cal. Rules of Ct., Rules 2.830 et seq.*

]. For detailed coverage of those procedures, see Ch. 317, *Judges* .

[3] Evidence

[a] Witnesses and Documents

The parties have the right to offer evidence by witnesses at the hearing or, with the permission of the court, at another time [*Code Civ. Proc. § 116.520(a)*]. On request, the clerk may issue subpoenas for the witnesses or documents plaintiff needs at the hearing [*see Code Civ. Proc. §§ 1985, 1986*; *see also § 526.150* (under What Happens at the Trial?)]. The requesting party must provide a declaration supporting the issuance of a subpoena duces tecum to compel the production of documents at the hearing [*see Code Civ. Proc. §§ 1985, 1987.5*]. For a form of subpoena for use in small claims actions, including a declaration for use when the subpoena seeks to compel the production of documents or things in addition to the witness' appearance, see *§ 526.156*. For further discussion and forms for use in compelling the attendance of witnesses and the production of physical evidence, see Ch. 535, *Subpoena* .

[b] Use of Hearsay Evidence

Hearsay evidence is generally admissible at the hearing. It is excludable only if it is not relevant [*see Evid. Code § 350*], its prejudicial effect outweighs its probative value [*see Evid. Code § 352*], or it is subject to anevidentiary privilege [*Houghtaling v. Superior Court (1993) 17 Cal. App. 4th 1128, 1131, 1137-1138, 21 Cal. Rptr. 2d 855*].

This rule applies even on a trial de novo in the superior court [*Houghtaling v. Superior Court (1993) 17 Cal. App. 4th 1128, 1139, 21 Cal. Rptr. 2d 855*], as discussed in *§ 526.70* et seq.

[4] Investigation by Court

In a small claims action the court may consult witnesses informally with or without notice to the parties [*Code Civ. Proc. § 116.520(c)*]. The court's authority does not extend to authorizing another person, such as the clerk, to hear evidence [*see Thompson v. Municipal Court (1958) 162 Cal. App. 2d 676, 678-679, 328 P.2d 514*].

[5] Assistance in Presenting Claim or Defense

If the court determines that a party cannot properly present his or her claim or defense and needs assistance, the court may in its discretion allow another individual to assist that party [*Code Civ. Proc. § 116.540(l)*].

[6] Assistance by Interpreter

If the court determines that a party does not speak or understand English sufficiently to comprehend the proceedings or to give testimony and needs assistance in so doing, the court may permit another individual (other than an attorney) to assist the party [*Code Civ. Proc. § 116.550(a)*].

Each small claims court must make a reasonable effort to maintain and make available to the parties a list of interpreters who are willing and able to aid the parties in the small claims court for no fee, or for a fee that is reasonable (considering the nature and complexity of the claim involved in the small claims court). The list must include interpreters for all languages that the court determines will require interpretation [*Code Civ. Proc. § 116.550(b)*]. Nevertheless, failure to comply with these requirements will not invalidate proceedings before the court [*Code Civ. Proc. § 116.550(c)*].

If a court interpreter or other competent interpreter is not available to aid a party, at the first hearing of the case the court must postpone the hearing one time only to allow the party the opportunity to obtain another individual (other than an attorney) to assist that party. Any additional continuances are at the court's disrection [*Code Civ. Proc. § 116.550(d)*].

If the party is indigent, the court may appoint an interpreter at public expense [*Gardiana v. Small Claims Court (1976) 59 Cal. App. 3d 412, 423-424, 130 Cal. Rptr. 675*].

[7] Appearance by Representative

[a] For Proof of Account

If a party is an individual doing business as a sole proprietorship, the party may appear and participate in a small claims action by a representative and without personally appearing if the following conditions are met [*Code Civ. Proc. § 116.540(d)*]:

(1) The claim can be proved or disputed by evidence of an account that constitutes a business record as defined in *Evid. Code § 1271* (writing as a record of an act, condition, or event) and there is no other issue of fact in the case; and

(2) The representative is a regular employee of the party for purposes other than solely representing the party in small claims actions and is qualified to testify to the identity and mode of preparation of the business record.

Any individual representing a party under *Code Civ. Proc. § 116.540(d)* is required to submit a declaration stating (1) that the person is authorized to appear for the party, (2) the basis for the person's authorization, and (3) that the person is not employed solely for the purpose of representing the party in the small claims court [*Code Civ. Proc. § 116.540(j)*; *see § 526.157*].

[b] For Military Plaintiff

A plaintiff is not required to appear in person, and may submit declarations to serve as evidence supporting his or her claim or to allow another individual (other than an attorney at law) to appear and participate on his or her behalf if (1) plaintiff is serving on active duty in the United States armed forces outside California, (2) plaintiff was assigned to his or her duty station after his or her claim arose, (3) the assignment is for more than six months, (4) the representative is serving without compensation, and (5) the representative has appeared in small claims actions on behalf of others no more than four times during the calendar year [*Code Civ. Proc. § 116.540(e)*; *see also Code Civ. Proc. § 116.540(m)*].

Any individual representing a party under *Code Civ. Proc. § 116.540(e)* is required to submit a declaration stating (1) that the person is authorized to appear for the party, (2) the basis for the person's authorization, (3) the representative is serving without compensation, and (4) the representative has appeared in small claims actions on behalf of others no more than four times during the calendar year [*Code Civ. Proc. § 116.540(j)*; *see § 526.157*].

In the same proceeding, the defendant may file a claim in an amount not to exceed the jurisdictional limit of the court, as provided in *Code Civ. Proc. §§ 116.220, 116.221,* and *116.231* [*Code Civ. Proc. § 116.540(e)*; *see* discussion in *§ 526.53*].

[c] For Incarcerated Party

A party who is incarcerated in a county jail, a facility of the Department of Corrections and Rehabilitation [*see Penal Code § 5055*] or the Department's Division of Juvenile Facilities [*see Penal Code § 6001*] is not required to appear in person, and may submit declarations to serve as evidence supporting his or her claim or may authorize another individual to appear and participate on his or her behalf if that individual is serving without compensation and has appeared in small claims actions on behalf of others no more than four times during the calendar year [*Code Civ. Proc. § 116.540(f)*; *see Code Civ. Proc. § 116.540(m)*].

Any individual representing a party under *Code Civ. Proc. § 116.540(f)* is required to submit a declaration making the

same statements as required of a person representing a plaintiff in the military [*Code Civ. Proc. § 116.540(j)*; *see § 526.157*; *see also* discussion of declaration requirements § 526.70[7][b]].

[d] For Defendant Nonresident Owner of Real Property

A defendant who is a nonresident owner of real property defending a claim relating to that property is not required to appear in person, and may submit (1) written declarations to serve as evidence supporting his or her defense, or (2) may allow another individual (other than an attorney at law) to appear and participate on his or her behalf if that individual is serving without compensation and has appeared in small claims actions on behalf of others no more than four times during the calendar year, (3) or both [*Code Civ. Proc. § 116.540(g)*; *see Code Civ. Proc. § 116.540(m)*].

Any individual representing a party under *Code Civ. Proc. § 116.540(g)* is required to submit a declaration making the same statements as required of a person representing a plaintiff in the military [*Code Civ. Proc. § 116.540(j)*; *see § 526.157*; *see also § 526.70[7][b]*].

[e] For Owner of Rental Real Property

A party who owns rental real property may appear and participate in a small claims action through a property agent under contract for management of that property if (1) the owner has retained the agent principally to manage the rental of that property and not principally to represent the owner in small claims court, and (2) the claim relates to the rental property [*Code Civ. Proc. § 116.540(h)*; *see § 526.157*].

[f] For Spouse

A husband or wife who sues or who is sued with his or her spouse may appear and participate on behalf of his or her spouse if (1) the claim is a joint claim, (2) the represented spouse has given his or her consent, and (3) the court determines that the interests of justice would be served [*Code Civ. Proc. § 116.540(k)*; *see § 526.157*].

[8] Postponement

Any party may submit a written request, in either letter form or on a form adopted or approved by the Judicial Council, to postpone a hearing date for good cause [*Code Civ. Proc. § 116.570(a)(1)* (Judicial Council has not adopted or approved a specific form for this procedure); *see Mil. & Vet. Code § 402(d)* (stay of proceedings while plaintiff or defendant is on military service)]. The request must be filed at least 10 days before the hearing date, unless the court determines that the requesting party has good cause to file the request at a later date [*Code Civ. Proc. § 116.570(a)(2)*]. On the date of making the written request, the requesting party must mail or personally deliver a copy to each of the other parties to the action [*Code Civ. Proc. § 116.570(a)(3)*]. The court must provide a prompt response by mail to the requesting party [*Code Civ. Proc. § 116.570(a)(5)*].

If the court finds that the interests of justice would be served by postponing the hearing, the court must postpone the hearing and notify all parties by mail of the new hearing date, time, and place [*Code Civ. Proc. § 116.570(a)(4)(A)*].

On one occasion, on the written request of a defendant guarantor, the court must postpone the hearing for at least 30 days, and the court must take this action without a hearing. This does not limit the court's discretion to grant a postponement in the interests of justice under *Code Civ. Proc. § 116.570(a)(4)(A)* discussed, *above* [*Code Civ. Proc. § 116.570(a)(4)(B)*].

If service of the claim and order on the defendant is not completed within the number of days before the hearing date required by *Code Civ. Proc. § 116.340(b)* (15 days if defendant resides in county in which action was filed; 20 days if defendant resides outside county) and the defendant has not personally appeared and has not requested a postponement, the court must postpone the hearing for at least 15 days. If such a postponement is ordered, the clerk must promptly

notify all parties by mail of the new hearing date, time, and place [*Code Civ. Proc. § 116.570(b)*]. The court also has inherent power to order postponements of hearings in appropriate circumstances [*Code Civ. Proc. § 116.570(c)*]. A fee of $10 is charged for the filing of a request for postponement and rescheduling after service, pursuant to *Code Civ. Proc. § 116.340*, has been made on the defendant [*Code Civ. Proc. § 116.570(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureTrialsBench TrialsGovernmentsCourtsSmall Claims CourtsGovernmentsCourtsSpecial Judges

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§ 526.71 Judgment

[1] In General

The court must give judgment for damages or equitable relief, or both damages and equitable relief, within the jurisdictional limits of *Code Civ. Proc. §§ 116.220, 116.221,* and *116.231*(*see* discussion in *§ 526.32*) and may make such orders as to time of payment or otherwise as the court deems just and equitable for resolution of the dispute [*Code Civ. Proc. § 116.610(a)*; Cal. Rules of Ct., Rule 3.210]. If specific property is referred to in the judgment, whether it is personal or real, tangible or intangible, the property must be identified with sufficient detail to permit efficient implementation or enforcement of the judgment [Cal. Rules of Ct., Rule 3.210].

[2] Continuance for Resolution by Alternative Means

The court may, at its discretion or on request of any party, continue the matter to a later date in order to permit the parties to attempt resolution by informal or alternative means [*Code Civ. Proc. § 116.610(b)*].

[3] Multiple Parties

If the defendant has filed a claim against the plaintiff or if the judgment is against two or more defendants, the judgment, and the statement of decision if one is rendered, must specify the basis for and the character and amount of the liability of each of the parties including, in the case of multiple judgment debtors, whether the liability of each is joint or several [*Code Civ. Proc. § 116.610(d)*].

In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper [*Code Civ. Proc. § 116.610(e)*].

[4] Notice of Judgment

When the court renders judgment, the clerk must promptly deliver or mail notice of entry of the judgment to the parties by first-class mail and must execute a certificate of personal delivery or mailing and place it in the file [*Code Civ. Proc.*

§ 116.610(h); *see Code Civ. Proc. § 116.130(k)* ("mail" defined); *Cal. Rules of Ct., Rule 8.954(b)*]. The notice of entry of judgment must be on a form approved or adopted by the Judicial Council [*Code Civ. Proc. § 116.610(i)*; §§ 526.164, 526.164A (alternative mandatory forms)].

[5] Costs

The prevailing party is entitled to recover most of the costs of the action, including the costs of service of the order for appearance of defendant [*Code Civ. Proc. § 116.610(g)(1)*]. However, the prevailing party may not recover any increment in the filing fee that was imposed as a result of that party having filed 12 or more small claims in the previous 12 months [*Code Civ. Proc. § 116.610(g)(2)*; *see Code Civ. Proc. § 116.230(b), (c)*; *see also § 526.50[3]*].

[6] Default Judgment

If the defendant fails to appear, the court must nevertheless require the plaintiff to present evidence to prove his or her claim [*Code Civ. Proc. § 116.520(b)*]. If the plaintiff is able to do so, the judge is to render judgment in favor of the plaintiff. The provisions governing small claims proceedings do not indicate any further requirements for entering a judgment against a defendant who did not appear at the hearing. However, small claims proceedings are subject to the general requirement that a default judgment cannot be entered unless the plaintiff has filed a declaration under penalty of perjury setting forth facts showing that the defendant is not in the military service [*Mil. & Vet. Code § 402(a)*; *see 50 U.S.C. App. § 521(b)* (Servicemembers Civil Relief Act)]. Local rules may establish guidelines for compliance with this requirement. For further discussion, see Ch. 205, *Defaults and Default Judgments* .

[7] No Collateral Estoppel Effect

Generally, neither a small claims court judgment nor a superior court judgment on appeal from a small claims court judgment has any collateral estoppel effect in a subsequent action or proceeding [*Rosse v. DeSoto Cab Co. (1995) 34 Cal. App. 4th 1047, 1053, 40 Cal. Rptr. 2d 680* ; *see Sanderson v. Niemann (1941) 17 Cal. 2d 563, 573-575, 110 P.2d 1025*]. The courts have reasoned that collateral estoppel ordinarily cannot be given to such judgments because of their informality and the absence of a transcribed record, formal findings, or a statement of decision, which ordinarily makes it impossible to determine which issues were actually litigated in the small claims action [*see Sanderson v. Niemann (1941) 17 Cal. 2d 563, 573-574, 110 P.2d 1025* ; *Rosse v. DeSoto Cab Co. (1995) 34 Cal. App. 4th 1047, 1051-1052, 40 Cal. Rptr. 2d 680*]. However, collateral estoppel may apply to prevent a small-claims plaintiff from relitigating an issue that was decided in small claims court, if the small-claims record is sufficiently clear to enable a court in a subsequent action to determine that the issue was actually litigated and expressly decided against the plaintiff in the small claims action [*Pitzen v. Superior Court (2004) 120 Cal. App. 4th 1374, 1378-1388, 16 Cal. Rptr. 3d 628*].

For full discussion of the doctrine of collateral estoppel or issue preclusion, see Ch. 491, *Res Judicata* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultDefault JudgmentsCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewGovernmentsCourtsSmall Claims Courts

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46-526 California Forms of Pleading and Practice--Annotated § 526.72

§ 526.72 Judgment Resulting From Motor Vehicle Accident

[1] In General

The judgment creditor may file with the Department of Motor Vehicles a notice requesting a suspension of the judgment debtor's privilege to operate a motor vehicle if a small claims judgment (1) was for $750 or less;(2) resulted from a motor vehicle accident occurring on a California highway caused by the defendant's operation of a motor vehicle; and (3) remained unsatisfied for more than 90 days after the judgment became final [*Code Civ. Proc. § 116.880(a)*]. The department must then suspend the judgment debtor's privilege to operate a motor vehicle for up to 90 days, absent satisfactory proof that the judgment has been satisfied [*see Code Civ. Proc. § 116.880(c), (e)*; *Veh. Code § 16370.5*].

Veh. Code § 16250 et seq. (regarding the suspension of the judgment debtor's privilege to operate a motor vehicle for failing to satisfy a judgment) applies if the judgment (1) was for damage to property in excess of $750 or for bodily injury to, or death of, any person in any amount, and (2) resulted from the operation of a motor vehicle on a California highway by the defendant or by any other person for whose conduct the defendant was liable, unless the liability resulted from the defendant's signing the application of a minor for a driver's license [*Code Civ. Proc. § 116.870*]. For discussion of the procedure under *Veh. Code § 16250 et seq.*, see Ch. 87A, *Automobiles: Post Trial* .

[2] Determination Regarding Motor Vehicle Accident Required in Judgment

The small claims court judgment must include a determination whether the judgment resulted from a motor vehicle accident on a California highway caused by the defendant's operation of a motor vehicle, or by the operation by some other individual of a motor vehicle registered in the defendant's name [*Code Civ. Proc. § 116.610(c)*]. The parties then receive notice of this determination as part of their notice of entry of judgment [*see Code Civ. Proc. § 116.610(c), (h)*; *see also §§ 526.164, 526.164A*].

[3] Filing Notice With Department

The notice filed by the judgment creditor with the Department of Motor Vehicles must state that the judgment has not

been satisfied and must be accompanied by (1) a fee set by the department, (2) the judgment of the court determining that the judgment resulted from a motor vehicle accident occurring on a California highway caused by the judgment debtor's operation of a motor vehicle, and (3) a declaration that the judgment has not been satisfied [*Code Civ. Proc. § 116.880(b)*].

At the time the notice is filed, the department must give the judgment creditor a copy of the notice, indicating the filing fee paid by the judgment creditor and including a space to be signed by the judgment creditor acknowledging payment of the judgment by the judgment debtor. The judgment creditor must mail (by first-class mail) or deliver a signed copy of the acknowledgment to the judgment debtor once the judgment is satisfied [*Code Civ. Proc. § 116.880(d)*; *see Code Civ. Proc. § 116.130(k)* ("mail" defined)].

[4] Notification of Suspension

On receipt of a notice given pursuant to *Code Civ. Proc. § 116.880*, the Department of Motor Vehicles must attempt to notify the judgment debtor by telephone, if possible, or else by certified mail that his or her privilege to operate a motor vehicle will be suspended for 90 days, beginning 20 days following receipt of notice by the department from the judgment creditor unless satisfactory proof, as provided in *Code Civ. Proc. § 116.880(e)*, is provided to the department before that date [*Code Civ. Proc. § 116.880(c)*; for discussion of proof under *Code Civ. Proc. § 116.880(e)*, § 526.72[5]]. If the proof is not received within this time, the department must suspend the judgment debtor's privilege to drive [*see Veh. Code § 16370.5*].

[5] Termination of Suspension

The Department of Motor Vehicles shall terminate the suspension of the judgment debtor's privilege to operate a motor vehicle at the end of 90 days [*Code Civ. Proc. § 116.880(e)(5)*]. The department shall otherwise terminate this suspension, or the suspension proceedings, on any of the following occurrences [*Code Civ. Proc. § 116.880(e)*]:

> (1) Receipt of proof that the outstanding small claims judgment filed against the judgment debtor has been satisfied, either (A) by a copy of the notice filed with the department, signed by the judgment creditor acknowledging satisfaction of judgment (*discussed under § 526.72[3] above*), or (B) by a declaration of the judgment debtor stating that the judgment has been satisfied;
>
> (2) Receipt of proof that a court-ordered payment schedule is being complied with by the judgment debtor;
>
> (3) Proof that the judgment debtor had insurance covering the accident sufficient to satisfy the judgment; or
>
> (4) A deposit with the department of the amount of the unsatisfied judgment if the judgment debtor presents proof satisfactory to the department of inability to locate the judgment creditor [*see also Veh. Code § 16377(d)*].

When the suspension has been terminated under one of the foregoing conditions, the action is final and may not be reinstituted [*Code Civ. Proc. § 116.880(f)*]. Whenever the suspension is terminated, the judgment debtor is required to pay a fee for reissuance of the license [*see Code Civ. Proc. § 116.880(f)*; *Veh. Code § 14904*].

[6] Immunity of Public Agency

No public agency is liable for any injury caused by the suspension, the termination of suspension, or the failure to suspend any person's privilegeto operate a motor vehicle as authorized by *Code Civ. Proc. § 116.880* [*Code Civ. Proc. §*

116.880(g)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewGovernmentsCourtsSmall Claims CourtsTransportation LawPrivate VehiclesOperator LicensesGeneral Overview

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46-526 California Forms of Pleading and Practice--Annotated §§ 526.73-526.89

[Reserved]

§§ 526.73[Reserved]

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46-526 California Forms of Pleading and Practice--Annotated § 526.90

§ 526.90 Motions Generally

A "motion" within the context of small claims actions means a party's written request to the court for an order or other action. The term includes an informal written request to the court such as a letter [*Code Civ. Proc. § 116.130(h)*]. For a form of notice of motion and supporting declaration, see *§ 526.171*.

Some common motions in small claims court that are discussed below, include a motion to vacate judgment brought by a party who has failed to appear [*see § 526.170*], a motion to correct error [*see § 526.171*], a motion for attorney's fees and costs for frivolous appeal [*see § 526.173*], and a motion for sanctions for willful failure to file debtor's asset statement [*see § 526.175*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewGovernmentsCourtsSmall Claims Courts

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46-526 California Forms of Pleading and Practice--Annotated § 526.91

§ 526.91 Filing Fee for Motions

The fee for the filing of any motion in small claims court matters is $14.

Legal Topics:

For related research and practice materials, see the following legal topics:
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46-526 California Forms of Pleading and Practice--Annotated § 526.92

§ 526.92 Motion to Vacate Judgment

[1] Incorrect or Erroneous Legal Basis for Decision

Any party may file a motion to vacate a judgment on the ground of an incorrect or erroneous legal basis for the decision [*Code Civ. Proc. § 116.725*]. A motion to set aside and vacate a judgment on the ground of an incorrect or erroneous legal basis for the decision may be made by the court on its own motion at any time, or by a party within 30 days after the clerk mails notice of entry of judgment to the parties [*Code Civ. Proc. § 116.725(a)*]. Each party may file only one motion to correct a clerical error [*see § 526.93*] or to set aside and vacate the judgment on the ground of an incorrect or erroneous legal basis for the decision [*Code Civ. Proc. § 116.725(b)*]. For a form of request to correct or vacate a judgment, see *§ 526.168*.5.

Code Civ. Proc. § 663 authorizes such motions generally for civil actions. For discussion of motions pursuant to *Code Civ. Proc. § 663*, see Ch. 371, *Motions After Trial* .

[2] By Plaintiff Who Did Not Appear

A plaintiff who did not appear at the hearing in the small claims court may file a motion to vacate the judgment with the clerk of the small claimscourt. The motion must be filed within 30 days after the clerk has mailed notice of entry of the judgment to the parties [*Code Civ. Proc. § 116.720(a)*]. The clerk must schedule the hearing on the motion to vacate for a date no earlier than 10 days after the clerk has mailed written notice of the date, time, and place of the hearing to the parties [*Code Civ. Proc. § 116.720(b)*]. For a form of motion to vacate a small claims judgment following plaintiff's failure to appear, see *§ 526.170*.

On a showing of good cause (circumstances sufficient to justify the requested action), the small claims court may grant the motion. If the defendant is not present, the court shall hear the motion in the defendant's absence [*Code Civ. Proc. § 116.720(c)*; *see Code Civ. Proc. § 116.130(j)* ("good cause" defined)].

If the motion is granted and if all parties are present and agree, the court may hear the case without rescheduling it. If the defendant is not present, the judge or clerk must reschedule the case and give notice in accordance with *Code Civ.*

Proc. § 116.330, which governs setting and notice of hearing after original filing of claim in small claims court (*see* discussion in *§ 526.50[5]*) [*Code Civ. Proc. § 116.720(d)*].

[3] By Defaulting Defendant

[a] Lack of Appearance

A defendant who did not appear at the hearing in the small claims court may file a motion to vacate the judgment with the clerk of the small claims court [*Code Civ. Proc. § 116.730(a)*; *see Mil. & Vet. Code § 402(d)* (reopening of judgment entered against defendant while on military service)]. This is the defendant's sole avenue of challenging the judgment because a defendant who did not appear at the hearing has no right to a direct appeal to the superior court [*see Code Civ. Proc. § 116.710(d)*]. If the small claims court denies the motion to vacate, however, the defendant may appeal the denial to the superior court [*see Code Civ. Proc. § 116.730(e)*]. Then, if that limited appeal is successful, the superior court may immediately hear the claims of all parties [*see Code Civ. Proc. § 116.730(f)*]. For discussion of appeal from denial of a motion to vacate, see *§ 526.92[3][c]*.

The motion to vacate must be filed within 30 days after the clerk has mailed notice of entry of the judgment to the parties [*Code Civ. Proc. § 116.730(a)*]. For a form of motion to vacate a small claims judgment after a defendant's default, see *§ 526.170*.

The defendant must appear at any hearing on the motion, or submit written justification for not appearing together with a declaration in support of the motion (*see § 526.170*) [*Code Civ. Proc. § 116.730(b)*].

On a showing of good cause (circumstances sufficient to justify the requested action), the court may grant the motion to vacate the judgment.If the plaintiff is not present, the court must hear the motion in the plaintiff's absence [*Code Civ. Proc. § 116.730(c)*; *see Code Civ. Proc. § 116.130(j)* ("good cause" defined)]. If the motion is granted and if all parties are present and agree, the court may hear the case without rescheduling it. If the plaintiff is not present, the judge or clerk must reschedule the case and give notice in accordance with *Code Civ. Proc. § 116.330* [*Code Civ. Proc. § 116.730(d)*].

[b] Improper Service

If the defendant was not properly served as required by *Code Civ. Proc. § 116.330* (*see* discussion in *§ 526.50[5]*) or by *Code Civ. Proc. § 116.340* (*see* discussion in *§ 526.52[1]*) and did not appear at the hearing in the small claims court, the defendant may file a motion to vacate the judgment with the clerk of the small claims court [*Code Civ. Proc. § 116.740(a)*]. This is the defendant's sole avenue of challenging the judgment because a defendant who did not appear at the hearing has no right to a direct appeal to the superior court [*see Code Civ. Proc. § 116.710(d)*, discussed in *§ 526.92[3][a]*]. The motion must be accompanied by a supporting declaration and must be filed within 180 days after defendant discovers or should have discovered that the judgment was entered against him or her [*Code Civ. Proc. § 116.740(a)*]. For a form of motion to vacate a small claims judgment, see *§ 526.170*.

The court may order that the enforcement of the judgment shall be suspended pending a hearing and determination of the motion to vacate the judgment [*Code Civ. Proc. § 116.740(b)*].

On a showing of good cause (circumstances sufficient to justify the requested action), the court may grant the motion to vacate the judgment. If the plaintiff is not present, the court must hear the motion in the plaintiff's absence [*Code Civ. Proc. § 116.740(c)*; *see Code Civ. Proc. §§ 116.130(j)* ("good cause" defined), 116.740(d) (*Code Civ. Proc. § 116.730(d)-(f)* applicable to motion to vacate for improper service)].

[c] Appeal From Denial of Motion

If the motion to vacate the judgment is denied, the defendant may appeal to the superior court only on the denial of the motion. The notice of appeal must be filed with the clerk of the small claims court within 10 days after the small claims court has mailed or delivered notice of the court's denial of the motion [*Code Civ. Proc. § 116.730(e)*].

If the superior court determines that the defendant's motion to vacate the judgment should have been granted, the superior court may hear the claims of all parties without rescheduling the matter provided that all parties are present and the defendant has previously complied with *Code Civ. Proc. § 116.710 et seq.*, which contain the requirements for bringing a direct appeal of a small claims judgment to the superior court, as wellas with the requirements for making a motion to vacate the small claims judgment in the small claims court. Alternatively, the court may order the case transferred to the small claims court for a hearing [*Code Civ. Proc. § 116.730(f)*]. For discussion of the procedure for bringing an appeal, see *§ 526.94[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsDefaultFailure to Pursue the CauseCivil ProcedurePretrial JudgmentsDefaultRelief From DefaultCivil ProcedureJudgmentsRelief From JudgmentMotions to VacateGovernmentsCourtsSmall Claims Courts

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46-526 California Forms of Pleading and Practice--Annotated § 526.93

§ 526.93 Motion to Correct Error

A party who discovers a mistake in the judgment as entered may file a request or motion to correct the clerical error [*see Code Civ. Proc. § 116.725*]. A motion to correct a clerical error in the judgment may be made by the court on its own motion at any time, or by a party within 30 days after the clerk mails notice of entry of judgment to the parties [*Code Civ. Proc. § 116.725(a)*]. Each party may file only one motion to correct a clerical error or to set aside and vacate the judgment on the ground of an incorrect or erroneous legal basis for the decision [*Code Civ. Proc. § 116.725(b)*; *see § 526.92[1]*]. The time for filing a notice of appeal is not extended by the filing of a request to correct a mistake or by virtue of any subsequent proceedings on the request, except that a new period for filing a notice of appeal begins on the delivery or mailing of notice of entry of any modified judgment [*Code of Civ. Proc. § 116.750(c)*]. For a form of motion to correct error and supporting declaration, see *§ 526.171*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesMistakeGovernmentsCourtsSmall Claims Courts

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46-526 California Forms of Pleading and Practice--Annotated § 526.94

§ 526.94 Appeal by Defendant or Cross Defendant

[1] Availability

The defendant, with respect to plaintiff's claim, and a plaintiff, with respect to a claim of the defendant, may appeal the judgment to the superior court in the county in which the action was heard [*Code Civ. Proc. § 116.710(b)*]. With respect to the plaintiff's claim, the insurer of the defendant may appeal the judgment to the superior court in the county in which the matter was heard if the judgment exceeds $2,500 and the insurer stipulates that its policy with the defendant covers the matter to which the judgment applies [*Code Civ. Proc. § 116.710(c)*]. An appeal from a judgment in a small claims action is taken by filing a notice of appeal with the clerk of the small claims court [*Code Civ. Proc. § 116.750(a)*; *see discussion under § 526.94[2]*].

A defendant who did not appear at the hearing has no right to appeal the judgment, but may file a motion to vacate the judgment in accordance with *Code Civ. Proc. § 116.730* or *116.740* (*discussed under § 526.92[3][a] above*), and also may appeal the denial of that motion [*Code Civ. Proc. § 116.710(d)* (discussed in *§ 526.92[3][c]*)].

The plaintiff in a small claims action has no right to appeal the judgment on the plaintiff's own claim, but a plaintiff who did not appear at the hearing may file a motion to vacate the judgment in accordance with Code *Civ. Proc. § 116.720* (*discussed under § 526.92 above*) [*Code Civ. Proc. § 116.710(a)*].

[2] Notice of Appeal

[a] Time for Filing

A notice of appeal must be filed no later than 30 days after the clerk has delivered or mailed notice of entry of the judgment to the parties. A notice of appeal filed after the 30-day period is ineffective for any purpose [*Code Civ. Proc. § 116.750(b)*]. The time for filing a notice of appeal is not extended by the filing of a request to correct a mistake or by virtue of any subsequent proceedings on that request, except that a new period for filing notice of appeal shall begin on the delivery or mailing of notice of entry of any modified judgment [*Code Civ. Proc. § 116.750(c)*].

If the notice of appeal is filed before the judgment is entered but after it is rendered, the notice of appeal is valid and deemed to have been filed immediately after entry of the judgment. A notice of appeal filed before the judgment was rendered but after the judge has announced an intended ruling may, in the discretion of the reviewing court for good cause, be treated as filed immediately after entry of the judgment [*Cal. Rules of Ct., Rule 8.954(c)*].

When a notice of appeal is filed, the clerk of the small claims court must promptly mail a notification of the filing of the notice to each other party at the party's last known address or to their attorneys of record [*Cal. Rules of Ct., Rule 8.954(b)*]. The notification must state the number and title of the action or proceeding and the date the notice of appeal was filed. In the event a party dies before the court gives notice, the mailing is a sufficient performance of the clerk's duty. The failure of the clerk to give notification of the filing of the notice of appeal does not extend the time for filing notice of appeal and does not affect the validity of the appeal [*Cal. Rules of Ct., Rule 8.954(b)*].

[b] Contents

A notice of appeal must be signed by the appellant or by the appellant's attorney. It is sufficient if it states in substance that the appellant appeals from either a specified judgment or, in the case of a defaulting defendant, the denial of a motion to vacate the judgment. A notice of appeal must be liberally construed [*Cal. Rules of Ct., Rule 8.954(a)*].

For a form of notice of appeal, see *§ 526.172*.

[3] Abandonment of Appeal

At any time before the file has been transmitted to the court assigned to hear the appeal, the appellant may file a written abandonment of theappeal, or the parties may file a stipulation for abandonment, in the office of the small claims court clerk [*Cal. Rules of Ct., Rule 8.963(a)*]. The filing of either document operates to dismiss the appeal and return the case to the small claims court [*Cal. Rules of Ct., Rule 8.963(a)*]. If an appellant files an abandonment of appeal, the small claims court clerk must immediately notify the adverse party or parties of the filing [*Cal. Rules of Ct., Rule 8.963(d)*].

[4] Record on Appeal

Within five days of the filing of the notice of appeal and the payment of any fees required by law, the clerk of the small claims court must transmit the file and all related papers, including the notice of appeal, to the clerk of the court assigned to hear the appeal [*Cal. Rules of Ct., Rule 8.957*; *see Code Civ. Proc. § 116.770(f)*].

[5] Filing Fee

The appealing party must pay a $75 fee for filing a notice of appeal [*Code Civ. Proc. § 116.760(a)*]. A party who does not appeal will not be charged any fee for filing any document relating to the appeal [*Code Civ. Proc. § 116.760(b)*].

[6] Setting for Trial

The clerk of the superior court must schedule the hearing for the earliest available time and mail written notice of the hearing to the parties at least 14 days prior to the time set for the hearing [*Code Civ. Proc. § 116.770(e)*]. Continuances of the trial in the superior court may be granted for good cause. A request for a continuance may be presented by one party or by stipulation. The court may grant a continuance not to exceed 30 days, but in a case of extreme hardship the court may grant a continuance exceeding 30 days [*Cal. Rules of Ct., Rule 8.960*].

[7] Dismissal of Appeal

[a] By Request or Stipulation

The superior court may dismiss an appeal filed in that court if the appellant files a written request or the parties file a stipulation with the clerk of the superior court [*Cal. Rules of Ct., Rule 8.963(d)*].

The clerk of the court assigned to hear the appeal must immediately notify the parties of any order of dismissal or of any judgment for defendant made by the court [*Cal. Rules of Ct., Rule 8.963(d)*]. The clerk must also transmit to the small claims court a copy of the order of dismissal and all original papers and exhibits that had been transmitted to the court assigned to hear the appeal. The small claims court will proceed with the case as if no appeal had been taken [*Cal. Rules of Ct., Rule 8.963(e)*].

[b] For Delay in Prosecution

The superior court may dismiss the appeal if the appealing party does not appear at the hearing or if the appeal is not heard within one year from the date of filing the notice of appeal with the clerk of the small claims court [*Code Civ. Proc. § 116.795(a)*; *see discussion under § 526.94[10]*].

Cal. Rules of Ct., Rule 8.963(c), provides guidance to the court in determining whether or not to dismiss the appeal after the one-year deadline. A dismissal cannot be ordered, nor judgment entered, if a written stipulation was in effect extending the time for trial or if the appellant shows that he or she exercised reasonable diligence in attempting to bring the case to trial [*Cal. Rules of Ct., Rule 8.963(c)*; for discussion of how the "reasonable diligence" standard is applied to dismissal of ordinary civil actions, *see* Ch. 212, *Dismissal*]. If, however, the case is not brought to trial within three years after the appeal is filed in the superior court, dismissal is mandatory [*Cal. Rules of Ct., Rule 8.963(c)*]. *Cal. Rules of Ct., Rule 8.963(c),* also requires mandatory dismissal if the case is not brought to trial within three years after the most recent order for a new trial is entered in the superior court. Apparently, however, the superior court has no power to grant a motion for a new trial [*see Code Civ. Proc. § 116.780(a)* ("final" judgment), discussed in *§ 526.94[13]*].

The clerk of the court assigned to hear the appeal must immediately notify the parties of any order of dismissal or of any judgment for defendant made by the court [*Cal. Rules of Ct., Rule 8.963(d)*]. The clerk must also transmit to the small claims court a copy of the order of dismissal and all original papers and exhibits that had been transmitted to the court assigned to hear the appeal. The small claims court will proceed with the case as if no appeal had been taken [*Cal. Rules of Ct., Rule 8.963(e)*].

In addition, for good cause and when necessary to achieve substantial justice between the parties, the superior court may award a party to an appeal reimbursement of up to $150 in attorney's fees and costs, and up to $150 for loss of earnings and certain other costs, actually and reasonably incurred in connection with the appeal [*Code Civ. Proc. § 116.780(c)*; for further discussion of costs on appeal, § 526.94[12]].

[8] Plaintiff's Motions

When a defendant has appealed a small claims judgment to superior court, the plaintiff may not move in superior court to dismiss the small claims action. The superior court has no jurisdiction to grant such a motion [*Acuna v. Gunderson Chevrolet, Inc. (1993) 19 Cal. App. 4th 1467, 1473, 24 Cal. Rptr. 2d 62*].

In addition, the plaintiff may not move to transfer and consolidate the appeal with another action pending in the superior court, although the defendant may make such a request if the defendant has commenced anaction against the plaintiff in the superior court [*Code Civ. Proc. § 116.390(b)*; *Acuna v. Gunderson Chevrolet, Inc. (1993) 19 Cal. App. 4th 1467, 1472-1473, 24 Cal. Rptr. 2d 62*].

[9] Compromise by Minor or Incompetent Person

Whenever the guardian of a minor or of an insane or incompetent person seeks approval of a proposed compromise of a

case on appeal in which a new trial has been ordered, the court assigned to hear the appeal may hear and determine if the proposed compromise is for the best interest of the ward [*Cal. Rules of Ct., Rule 8.963(f)*; for discussion of order for new trial, § 526.94[13]].

[10] Hearing of Appeal

[a] Informal Procedures Apply

The appeal to the superior court must consist of a new hearing before a judicial officer other than the judicial officer who heard the action in the small claims division [*Code Civ. Proc. § 116.770(a)*].

Code Civ. Proc. § 116.510 et seq., governing hearings in small claims court, apply to hearings on appeal in the superior court, except that attorneys may participate [*Code Civ. Proc. § 116.770(c)*; *see also* discussion of *Code Civ. Proc. § 116.510 et seq.* § 526.70].

The hearing on appeal must be conducted informally, the pretrial discovery procedures described in *Code Civ. Proc. § 2019(a)* (*Code Civ. Proc. § 2019.010* operative July 1, 2005) are not permitted, hearsay evidence is admissible as in small claims court [*Houghtaling v. Superior Court (1993) 17 Cal. App. 4th 1128, 1139, 21 Cal. Rptr. 2d 855* ; *see § 526.70[3][b]*], and no tentative decision or statement of decision is required [*Code Civ. Proc. § 116.770(b)*]. The court may allow parties, or attorneys representing parties, to conduct direct and cross examination, subject to the court's discretion to control the manner, mode, and duration of examination in keeping with informality and the circumstances [*Cal. Rules of Ct., Rule 8.966*].

[b] Scope of Hearing

[i] Generally

The scope of the hearing must include the claims of all parties who were parties to the small claims action at the time the notice of appeal was filed. The hearing must include the claims of a defendant that was heard in the small claims court [*Code Civ. Proc. § 116.770(d)*].

[ii] Cross Claims

The courts are split regarding the scope of the trial de novo in "criss-cross" cases in which both the plaintiff and the defendant assert claims.

The Third District court of appeal held that when the defendant has filed a claim against the plaintiff in the same action and lost to the plaintiff on both claims, the defendant cannot be awarded any affirmative relief on appeal, either directly or indirectly. The defendant may, however, be awarded an offset of the amount the defendant was unable to recover on his or her own claim [*Township Homes, Inc. v. Superior Court (1994) 22 Cal. App. 4th 1587, 1589, 1594-1595, 27 Cal. Rptr. 2d 852* (Third Appellate District, noting that 1990 amendments to small claims statutes abrogated contrary rule in *Anderson v. Superior Court (1990) 226 Cal. App. 3d 698, 700, 276 Cal. Rptr. 18*)]. In *Township Homes, Inc.*, a buyer filed a defendant's claim, alleging seller's failure to complete warranty repairs. The small claims court awarded seller $1,000 on its claim but ordered that buyer take nothing on hers. Buyer appealed and the superior court made an award in buyer's favor for $3,319, offset this award by $2,681 buyer owed seller for repairs, and made a net award to buyer of $638. Thus, the buyer/appellant, who had lost both her claim and the seller's claim and owed $1,000 in small claims court came out $638 ahead because she appealed for a trial de novo [*see* *Township Homes, Inc. v. Superior Court (1994) 22 Cal. App. 4th 1587, 1589, 1589-1590, 27 Cal. Rptr. 2d 852*]. In the court's opinion, to allow affirmative relief to a party who had not prevailed on its claim at the small claims hearing would "impermissibly negate the plain language of sections 116.130 and 116.710," (denying a "plaintiff" a right to appeal, and defining "plaintiff" as including a defendant who has filed a claim against a plaintiff).

The First District, on the other hand, held that if both sides have filed claims, either may appeal the other's claim and the superior court will fully retry all claims [*Linton v. Superior Court (1997) 53 Cal. App. 4th 1097, 1103* & n.7, 1106, *62 Cal. Rptr. 2d 202* (First Appellate District, criticizing *Township Homes, Inc.,* above, as applying "a rule with no statutory basis")]. In *Linton*, plaintiff tenants filed a small claims action against their landlord and the defendant landlord also filed a claim against the tenants. The small claims court entered judgment for $1,000 plus $21 costs for the plaintiffs, and an identical judgment for the defendant. The *plaintiffs* appealed, but the defendant did not. After trial de novo on the appeal, the superior court entered judgment of $1,000 plus $21 costs *in favor of the plaintiffs on their claim* and judgment in favor of the plaintiffs on defendant's claim against them. The court emphasized the language of *Code Civ. Proc. § 116.770(d)* enjoining the court "rehear the claim of a defendant" [*Linton v. Superior Court (1997) 53 Cal. App. 4th 1097, 1102* & n.6, 1104, *62 Cal. Rptr. 2d 202* ; *see also Universal City Nissan, Inc. v. Superior Court (1998) 65 Cal. App. 4th 203, 207-209, 75 Cal. Rptr. 2d 910* (Second Appellate District; agreeing with the court in *Linton* and noting that the Legislature, by its amendments to *Code Civ. Proc. § 116.770*, apparently intended to clarify its intent, misconstrued by courts such as that in *Township,* to permit full review of an unsuccessful claim or counterclaim)].

PRACTICE TIP:

Advising Small Claims Litigants of Possibility of Rehearing. Counsel should try to ascertain the position taken by the superior court in his or her county on the scope of claims to be examined when where there is an appeal in an action involving claims by both the plaintiff and defendant.

Until the disagreement by these courts on this fundamental issue is resolved by the Legislature or Supreme Court, in light of *Linton v. Superior Court*, above, counsel may wish to err on the side of caution, by advising clients that the filing of a cross claim *may* result in the rehearing of all claims in a superior court trial de novo when at least one of the parties appeal.

[iii] No Right to Jury Trial

There is no right to a jury trial in a de novo proceeding in superior court on appeal from a small claims action at law for money damages [*Code Civ. Proc. § 116.770(b)*; *Crouchman v. Superior Court (1988) 45 Cal. 3d 1167, 1171-1178, 248 Cal. Rptr. 626, 755 P.2d 1075* (also holding that there is no such right to a jury trial under either *Cal. Const., art. I, § 16*, or *Code Civ. Proc. § 592*)]. Nevertheless, prior to the 1992 amendment of *Code Civ. Proc. § 116.220*, which removed unlawful detainer from small claims jurisdiction, there existed a right to a jury trial in de novo proceeding in superior court on appeal from a small claims action for unlawful detainer, pursuant to *Code Civ. Proc. §§ 592* and *1171* [*Maldonado v. Superior Court (1984) 162 Cal. App. 3d 1259, 1262-1269, 209 Cal. Rptr. 199* ; *see also Crouchman v. Superior Court (1988) 45 Cal. 3d 1167, 1178-1180, 248 Cal. Rptr. 626, 755 P.2d 1075* (strictly limiting decision in *Maldonado* to its fact situation)].

[iv] Tentative Decision and Statement of Decision Not Required

On conclusion of the trial, the superior court is not required to give either a tentative decision or a statement of decision [*Code Civ. Proc. § 116.770(b)*].

[11] Judgment on Appeal

Except as specified in § 526.949[12], *below* , *Code Civ. Proc. § 116.610 et seq.*, which provide for the contents, notice, satisfaction, and amendment of judgments rendered in the small claims court, apply to judgments of the superior court after a hearing on appeal [*Code Civ. Proc. § 116.780(b)*; for discussion of these statutes, *see § 526.131[6]*].

A superior court judgment on appeal from a small claims court judgment has no collateral estoppel effect in a subsequent action or proceeding [*Rosse v. DeSoto Cab Co. (1995) 34 Cal. App. 4th 1047, 1053, 40 Cal. Rptr. 2d 680* ; *see discussion under § 526.71[7]*].

[12] Award of Costs on Appeal

[a] Fees and Expenses

The party who prevails after the hearing on appeal is entitled to the costs of the appeal [*see Code Civ. Proc. § 116.780(b)* (*Code Civ. Proc. § 116.610(g)* applies to judgments after hearing on appeal)]. In addition, for good cause and when necessary to achieve substantial justice between the parties, the superior court may award a party to an appeal reimbursement of up to $150 in attorney's fees and costs and up to $150 for loss of earnings and expenses of transportation and lodging, actually and reasonably incurred in connection with the appeal [*Code Civ. Proc. § 116.780(c)*]. For discussion of cost awards in ordinary civil actions generally, see *Ch. 174, Costs and Attorney's Fees, § 174.10* et seq. For discussion of the award of costs to a prevailing party on appeal in an ordinary civil action, see Ch. 53, *Appeal: Remittitur and Costs on Appeal* .

[b] Bad Faith Appeal

If the superior court finds that the appeal was without substantial merit and not based on good faith, but was intended to harass or delay the other party or to encourage the other party to abandon the claim, the court may, following a hearing on the matter, award the other party (a) attorney's fees actually and reasonably incurred in connection with the appeal not exceeding $1,000, and (b) any actual loss of earnings and any expenses of transportation and lodging actually and reasonably incurred in connection with the appeal not exceeding $1,000 [*Code Civ. Proc. § 116.790*].

The "without substantial merit" standard appears to be easier to satisfy than the standard applicable in ordinary civil appeals. Sanctions for a frivolous appeal under *Code Civ. Proc. § 907* are authorized if the appeal was prosecuted to harass or delay or if any attorney would reasonably agree that the appeal was totally and completely without merit [*see In re Marriage of Flaherty (1982) 31 Cal. 3d 637, 650, 183 Cal. Rptr. 508, 646 P.2d 179* ; *see also Cal. Rules of Ct., Rule 8.276*]. Nevertheless, *Code Civ. Proc. § 116.790* appears to require that the party seeking costs demonstrate both that the claim was without substantial merit and that the appellant acted with bad intent, whereas *Code Civ. Proc. § 907* only requires that either one or the other test be met [*see San Bernardino Community Hosp. v. Office of Statewide Health Planning & Dev. (1986) 187 Cal. App. 3d 457, 470, 231 Cal. Rptr. 673* (award was justified because sole purpose of appeal was delay, even though appeal presented colorable claim)]; for further discussion, *see* Ch. 49, *Appeal: Sanctions* .

For a form of motion for an award of attorney's fees for prosecution of a bad faith appeal, see *§ 526.173*.

[13] Review of Superior Court Judgment

The judgment of the superior court on appeal is final and may not be appealed [*Code Civ. Proc. § 116.780(a)*]. By this legislative mandate, the judgment is immune from virtually any postjudgment attack. In a proceeding designed to be a speedy resolution of disputes over relatively minor amounts of money, this immunity is the cost of finality [*ERA-Trotter Girouard Assoc. v. Superior Court (1996) 50 Cal. App. 4th 1851, 1854, 58 Cal. Rptr. 2d 381*].

Although certain rules of court governing small claims procedure contemplate the availability of a motion for new trial in the superior court after appeal from a small claims decision, these rules conflict with the "final judgment" provision of *Code Civ. Proc. § 116.780(a)*. Therefore motions for a new trial and motions to vacate the judgment are prohibited [*ERA-Trotter Girouard Assoc. v. Superior Court (1996) 50 Cal. App. 4th 1851, 1853-1854, 1856, 58 Cal. Rptr. 2d 381* (First Appellate District, criticizing contrary opinion in *Adamson v. Superior Court (1980) 113 Cal. App. 3d 505, 508-509, 169 Cal. Rptr. 866 (Fourth Appellate District)* ; *see also Eloby v. Superior Court (1978) 78 Cal. App. 3d 972, 975-976* ; *144 Cal. Rptr. 597* (First Appellate District, interpreting former Code Civ. Proc. § 118.1); *Cal. Rules of Ct., Rule 8.963(c), (f)* (referring to order for "new trial")].

Absolute finality does not exist, however. Whether a specific kind of procedure for review of a judgment is permitted depends on whether the small claims legislation was clearly intended to prevent it. For example, the superior court may entertain a motion for rehearing after a trial and judgment on appeal, on the ground that the court had made mistakes of law or of fact, because to do so is speedier and more economical than review by certification to the court of appeal or by extraordinary writ [*Adamson v. Superior Court (1980) 113 Cal. App. 3d 505, 506-509, 169 Cal. Rptr. 866*].

In addition, *ERA-Trotter Girouard Assoc., above*, assumed without deciding that a judge could entertain a motion to vacate or reconsider a judgment based on fundamental questions of fraud on the court or the court's action in excess of its juridiction [*ERA-Trotter Girouard Assoc. v. Superior Court (1996) 50 Cal. App. 4th 1851, 1857, 58 Cal. Rptr. 2d 381*].

Because statewide precedents can only be created by appellate courts, an appellate court is not foreclosed from reviewing important issues of law by utilization of an extraordinary writ [*Davis v. Superior Court (1980) 102 Cal. App. 3d 164, 167-168, 162 Cal. Rptr. 167* ; *see also Green v. Superior Court (1974) 10 Cal. 3d 616, 640, 111 Cal. Rptr. 704, 517 P.2d 1168* ; *Calvao v Superior Court (1988) 201 Cal. App. 3d 921, 922 n.1, 247 Cal. Rptr. 470*]. For example, a defendant in small claims appeal who is denied a crucial defense by the superior court may petition for a writ of mandate to entertain the defense if the superior court has abused its discretion [*Schweiger v. Superior Court (1970) 3 Cal. 3d 507, 517-518, 90 Cal. Rptr. 729, 476 P.2d 97*]. For discussion and forms relating to petitioning for a writ of mandate, see Ch. 358, *Mandate and Prohibition* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsCosts & Attorney FeesCivil ProcedureAppealsDismissals of AppealsGeneral OverviewCivil ProcedureAppealsRecords on AppealCivil ProcedureAppealsReviewabilityNotice of AppealCivil ProcedureAppealsReviewabilityTime LimitationsGovernmentsCourtsSmall Claims Courts

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46-526 California Forms of Pleading and Practice--Annotated §§ 526.95-526.109

[Reserved]

§§ 526.95[Reserved]

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46-526 California Forms of Pleading and Practice--Annotated § 526.110

§ 526.110 Enforcement of Judgment

[1] Execution and Abstract of Judgment

A judgment of a small claims court and a judgment of the superior court after a hearing on appeal may be enforced through ordinary proceedings pursuant to *Code Civ. Proc. §§ 680.010 et seq.* (enforcement of judgments generally) and 674 (abstract of judgment) [*Code Civ. Proc. § 116.820(a)*; for discussion of enforcement of judgments and abstract of judgments, see Ch. 254, *Executions and Enforcement of Judgments* , and Ch. 318, *Judgments*]. An appeal from a postjudgment enforcement order of the small claims court must be taken to the appellate division of the superior court [*General Elec. Capital Auto Fin. Servs., Inc. v. Appellate Div. of Superior Court (2001) 88 Cal. App. 4th 136, 138-145, 105 Cal. Rptr. 2d 552* (in absence of specific provision pertaining to postjudgment orders of small claims court, small claims case treated as limited civil case); *see Code Civ. Proc. § 904.2(b)* (appellate division of superior court has appellate jurisdiction to review postjudgment enforcement orders in limited civil cases)].

The clerk of the small claims court must charge and collect all fees associated with the enforcement of judgments [*Code Civ. Proc. § 116.820(b)*].

The prevailing party in any action is entitled to the costs of enforcing the judgment and accrued interest [*Code Civ. Proc. § 116.820(c)*].

[2] Automatic Suspension Pending Appeal

Enforcement of the judgment of a small claims court, including the issuance or recording of any abstract of the judgment, is automatically suspended, without the filing of a bond by the defendant, until expiration of the time for appeal [*Code Civ. Proc. § 116.810(a)*].

If an appeal is filed as provided in *Code Civ. Proc. §§ 116.710-116.750* (discussed in *§ 526.94 above*), enforcement of the judgment of the smallclaims court is suspended unless (1) the appeal is dismissed pursuant to *Code Civ. Proc. § 116.795* (one-year statute of limitation) or (2) the superior court determines that the small claims court properly denied the defendant's motion to vacate filed under *Code Civ. Proc. § 116.730* or *116.740*. In either of these events, the

judgment of the small claims court may be enforced [*Code Civ. Proc. § 116.810(b)*].

The scope of the suspension of enforcement under *Code Civ. Proc. § 116.810* and, unless otherwise ordered, of any suspension of enforcement ordered by the court includes any enforcement procedure described in *Code Civ. Proc. §§ 680.010 et seq.* (enforcement of judgments generally) and 674 (abstract of judgment) [*Code Civ. Proc. § 116.810(c)*].

[3] Asset Questionnaire

[a] Duties of Judgment Debtor

At the time judgment is rendered or notice of entry of judgment is mailed to the parties, the clerk must deliver or mail to the judgment debtor a Judicial Council form containing questions regarding the nature and location of any assets of the judgment debtor [*Code Civ. Proc. § 116.830(a)*; *see Code Civ. Proc. § 116.830(e)*; *see also § 526.174*]. The judgment debtor must complete the form and cause it to be delivered to the judgment creditor within 30 days after the clerk has mailed by first-class mail notice of entry of judgment unless the judgment has been satisfied [*Code Civ. Proc. § 116.830(b)*; *see Code Civ. Proc. § 116.130(k)* ("mail" defined)]. In the event a motion to vacate the judgment or a notice of appeal is filed, a judgment debtor must complete and deliver the form within 30 days after the clerk has delivered or mailed by first-class mail notice of denial of the motion to vacate or notice of dismissal of or entry of judgment on the appeal, whichever is applicable [*Code Civ. Proc. § 116.830(c)*].

[b] Sanctions for Willful Failure to File

In the event of a judgment debtor's willful failure to complete and deliver the asset questionnaire in accordance with the foregoing requirements, the judgment creditor may request the court to apply sanctions (including arrest and attorney's fees) as provided in *Code Civ. Proc. § 708.170* on contempt of court [*Code Civ. Proc. § 116.830(d)*]. For a Judicial Council form for use by the judgment creditor to make this request (Application and Order to Appear for Examination, SC-134), see *§ 526.175*. For futher discussion of *Code Civ. Proc. § 708.170*, see Ch. 254, *Executions and Enforcement of Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionDiscovery of AssetsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsAutomatic StaysGovernmentsCourtsSmall Claims Courts

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46-526 California Forms of Pleading and Practice--Annotated § 526.111

§ 526.111 Satisfaction of Judgment

[1] Payment to Judgment Creditor

The judgment debtor must pay the amount of the judgment either immediately or at the time and on the terms and conditions, including payment by installments, that the court may order [*Code Civ. Proc. § 116.620(a)*].

The judgment debtor may pay the small claims judgment directly to the judgment creditor [*see Code Civ. Proc. § 116.840(a)*]. If full payment of the judgment is made to the judgment creditor or to his or her assignee of record, then, immediately on receipt of payment, the judgment creditor or the assignee of record must file an acknowledgment of satisfaction of judgment [*Code Civ. Proc. § 116.850(a)*]. Any judgment creditor or assignee of record who, after receiving full payment of the judgment and written demand by the judgment debtor, fails without good cause (circumstances sufficient to justify the action) to execute and file an acknowledgment of satisfaction of the judgment with the clerk of the court in which the judgment is entered within 14 days after receiving the request is liable to the judgment debtor or the judgment debtor's grantees or heirs for all damages sustained by reason of the failure and, in addition, the sum of $50 [*Code Civ. Proc. § 116.850(b)*; *see Code Civ. Proc. § 116.130(j)* ("good cause" defined)].

At the judgment debtor's request, the clerk shall enter a satisfaction of judgment if the judgment debtor either (1) establishes a rebuttable presumption of full payment under *Code Civ. Proc. § 116.850(d)*, or *(2)* establishes a rebuttable presumption of partial payment under *Code Civ. Proc. § 116.850(d)* and complies with *Code Civ. Proc. § 116.860(c)* [*Code Civ. Proc. § 116.850(c)*].

A rebuttable presumption of full or partial payment of the judgment, whichever is applicable, is created if the judgment debtor files both of the following with the clerk of the court in which the judgment was entered [*Code Civ. Proc. § 116.850(d)*]:

(1) Either a canceled check or money order for the full or partial amount of the judgment written by the judgment debtor after judgment and made payable to and endorsed by the judgment creditor, or a cash receipt for the full or partial amount of the judgment written by the judgment debtor after judgment and signed by the judgment creditor; and

(2) A declaration [*see § 526.168*] stating that (A) the judgment debtor has made full or partial payment of the judgment including accrued interest and costs; (B) the judgment creditor has been requested to file an acknowledgment of satisfaction of the judgment and refuses to do so or refuses to accept subsequent payments, or the present address of the judgment creditor is unknown; and (C) the documents identified in andaccompanying the declaration constitute evidence of the judgment creditor's receipt of full or partial payment.

[2] Payment to Small Claims Court

In lieu of paying the small claims judgment directly to the judgment creditor, the judgment debtor may opt to make payment to the court in which the judgment was entered [*see Code Civ. Proc. § 116.840(a)*]. A judgment debtor who desires to make payment to the court in which the judgment was entered may file a request to make payment, which must be made on a form approved or adopted by the Judicial Council [*Code Civ. Proc. § 116.860(a)*; *see § 526.165*].

On the filing of the request to make payment and the payment to the clerk of the amount of the judgment and any accrued interest and costs after judgment, plus a $20 fee to cover administrative costs [*see Code Civ. Proc. § 116.860(h)*], the clerk must enter satisfaction of the judgment and shall remit payment to the judgment creditor as provided in *Code Civ. Proc. § 116.860(b)* [*Code Civ. Proc. § 116.860(b)*; *see Code Civ. Proc. § 116.860(f)* ("costs after judgment" consist of only those costs itemized in a memorandum of costs filed by the judgment creditor or otherwise authorized by the court)].

If partial payment of the judgment has been made to the judgment creditor and the judgment debtor files the declaration [*see § 526.168*] and evidence of partial payment described in *Code Civ. Proc. § 116.850(d)* (*see* discussion under *§ 526.111*), the clerk shall enter satisfaction of the judgment on receipt by the clerk of the balance owing on the judgment, including any accrued interest and costs after judgment, and the fee required by *Code Civ. Proc. § 116.860(h)* [*Code Civ. Proc. § 116.860(c)*]. If payment is made by means other than money order, certified or cashier's check, or cash, entry of satisfaction of the judgment shall be delayed for 30 days [*Code Civ. Proc. § 116.860(d)*].

The clerk shall notify the judgment creditor, at his or her last known address, that the judgment debtor has satisfied the judgment by making payment to the court. The notification shall explain the procedures that the judgment creditor has to follow to receive payment [*Code Civ. Proc. § 116.860(e)*].

Payments that remain unclaimed for three years will go to the superior court [*see Gov. Code § 68084.1*].

The board of supervisors shall set a fee, not to exceed the actual costs of administering this section, up to a maximum of $25, which shall be paid by the judgment debtor [*Code Civ. Proc. § 116.860(h)*].

[3] Installment Payments

The court may at any time for good cause (circumstances sufficient to justify the requested order), on motion by a party and notice by the clerkto all affected parties at their last known address, amend the terms and conditions for payment of the judgment to provide for payment by installment. The determination must be made without regard to the nature of the underlying debt and without regard to whether the moving party appeared before entry of the judgment [*Code Civ. Proc. § 116.620(b)*; *see Code Civ. Proc. § 116.130(j)* ("good cause" defined)].

In determining the terms and conditions of payment, the court may consider any factors that would be relevant to a claim of exemption under *Code Civ. Proc. § 703.010 et seq.* [*Code Civ. Proc. § 116.620(c)*]. For a form of request to pay a judgment in installments, see *§ 526.167*. For a response to the request, see *§ 526.167A*; for an order on the request, see *§ 526.167B*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesDeposits in CourtGovernmentsCourtsSmall Claims Courts

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46-526 California Forms of Pleading and Practice--Annotated §§ 526.112-526.129

[Reserved]

§§ 526.112[Reserved]

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§ 526.130 State Statutes

[1] Appeal

Judgment as conclusive on plaintiff who appeared; defendant as able to appeal adverse judgment. *Code Civ. Proc. § 116.710(a), (b)*

Right of insurer of defendant to appeal judgment. *Code Civ. Proc. § 116.710(c)*

No right to trial by jury on appeal. *Code Civ. Proc. § 116.770(b)*

Appearance of corporation on appeal in superior court through director, officer, employee, or attorney. *Code Civ. Proc. § 116.770(c)*; *see Code Civ. Proc. § 116.540(b)*

Rules of practice and procedure on appeal as prescribed by Judicial Council. *Code Civ. Proc. § 116.770(f)*

Judgment of superior court on appeal as final and not appealable. *Code Civ. Proc. § 116.780(a)*

[2] Appearance by Corporation or Party Suing Under Fictitious Business Name

Party filing claim in fictitious business name as required to affirm, under penalty of perjury, compliance with fictitious business name laws by executing, filing, and publishing fictitious business name statement pursuant to *Bus. & Prof. Code § 17913*; action filed by party lacking compliance with applicable fictitious business name laws as required to be dismissed without prejudice. *Code Civ. Proc. § 116.430(b)*

Appearance by corporation or other entity that is not natural person. *Code Civ. Proc. § 116.540(b), (c), (i)*

Representative of plaintiff corporation or other entity that is not natural person as required to affirm authorization to represent party under penalty of perjury. *Code Civ. Proc. § 116.540(j)*

[3] Assistance to Parties

Prohibition on attorneys representing parties in small claims actions. *Code Civ. Proc. §§ 116.530(a), 116.540(m)*

Assistance by representative of insurer. *Code Civ. Proc. § 116.531*

Assistance of parties by interpreters. *Code Civ. Proc. § 116.550(a)*

Small claims court as required to make reasonable effort to maintain a list of interpreters. *Code Civ. Proc. § 116.550(b)*

One continuance as required if interpreter is unavailable. *Code Civ. Proc. § 116.550(d)*

Legal advisors as permitted to assist parties but not permitted to appear in court. *Code Civ. Proc. § 116.940(e)*

[4] Claims by Assignees

Claims by assignees as not generally allowed. *Code Civ. Proc. § 116.420(a)*

[5] Commencement of Action

Fees for filing of claim. *Code Civ. Proc. § 116.230*

Action as commenced with filing of claim by plaintiff with clerk of small claims court. *Code Civ. Proc. § 116.320(a)*

[6] County Government as Party to Small Claims Action

County Board of Supervisors as permitted to authorize county officials who are not attorneys to initiate and conduct litigation in small claims court on behalf of county. *Gov. Code § 25203*

[7] Definitions

Plaintiff. *Code Civ. Proc. § 116.130(a)*

Defendant. *Code Civ. Proc. § 116.130(b)*

Judgment creditor. *Code Civ. Proc. § 116.130(c)*

Judgment debtor. *Code Civ. Proc. § 116.130(d)*

Person. *Code Civ. Proc. § 116.130(e)*

Individual. *Code Civ. Proc. § 116.130(f)*

Party. *Code Civ. Proc. § 116.130(g)*

Motion. *Code Civ. Proc. § 116.130(h)*

Declaration. *Code Civ. Proc. § 116.130(i)*

Good cause. *Code Civ. Proc. § 116.130(j)*

Mail. *Code Civ. Proc. § 116.130(k)*

[8] Hearing and Disposition

Hearing and disposition of small claims action as informal. *Code Civ. Proc. § 116.510*

Waiver of personal appearance by military plaintiff. *Code Civ. Proc. § 116.540(e)*

Waiver of personal appearance by incarcerated plaintiff. *Code Civ. Proc. § 116.540(f)*

Waiver of personal appearance by defendant nonresident owner of real property. *Code Civ. Proc. § 116.540(g)*

Appearance by spouse on joint claim. *Code Civ. Proc. § 116.540(k)*

Postponement of hearing. *Code Civ. Proc. § 116.570*

[9] Judgment

Court to make orders in rendering judgment that are just and equitable for the resolution of the dispute. *Code Civ. Proc. § 116.610(a)*

Property, personal or real or tangible or intangible, identified in detail in judgment. *Code Civ. Proc. § 116.610(e)*

Prevailing party's entitlement to costs. *Code Civ. Proc. §§ 116.610(g), 116.820(c)*

Enforcement of judgment. *Code Civ. Proc. §§ 116.810, 116.820(a)*

Clerk as to provide judgment debtor asset questionnaire in order to locate assets of judgment debtor. *Code Civ. Proc. § 116.830*

Requirement of filing of acknowledgment of satisfaction. *Code Civ. Proc. § 116.840(b)*; *see Code Civ. Proc. §§ 116.850(c), (d), 116.860(b)*

[10] Jurisdiction

General jurisdiction of small claims court over any action for recovery of money in which demand does not exceed $7,500 if action is brought by natural person, or $5,000 if claimant is other than natural person. *Code Civ. Proc. §§ 116.220(a)(1), 116.221*

Jurisdiction of small claims court as including action to confirm, correct, or vacate binding fee arbitration award not exceeding $5,000 between attorney and client, or to conduct de novo hearing between attorney and client after nonbinding arbitration of fee dispute involving no more than $5,000. *Code Civ. Proc. § 116.220(a)(4)*

Jurisdiction of small claims court over action for injunctive or other equitable relief only if statute expressly authorizes small claims court to award that relief. *Code Civ. Proc. § 116.220(a)(5)*

Retention of jurisdiction by small claims court until full payment and performance of any judgment or order. *Code Civ. Proc. § 116.220(b)*

Jurisdiction of small claims court to grant equitable relief and conditional judgment. *Code Civ. Proc. § 116.220(b)*

Special jurisdictional limits for small claims actions against guarantors. *Code Civ. Proc. § 116.220(c)*

Limitation on claims in excess of $2,500; no more than two within calendar year, except as to prescribed public entities, who may file claims without numeric limitation so long as each claim does not exceed $5,000. *Code Civ. Proc. § 116.231*

[11] Legal Name of Defendant Doing Business

Fictitious business name of defendant as required to conform to legal name of defendant in small claims action. *Code Civ. Proc. §§ 116.430-116.560*

[12] Payment of Judgment

Payment to judgment creditor; satisfaction of judgment. *Code Civ. Proc. §§ 116.840, 116.850*

Payment to small claims court; satisfaction of judgment. *Code Civ. Proc. §§ 116.840, 116.860*

[13] Rules and Procedures

Judicial Council as providing for practice and procedure and forms used in small claims proceedings. *Code Civ. Proc. § 116.920(a)*

[14] Scheduling of Sessions

Scheduling of small claim hearings. *Code Civ. Proc. § 116.250*

[15] Venue

Venue for small claims actions same as that in other civil actions. *Code Civ. Proc. § 116.370(a)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionAmount in ControversyCivil ProcedureVenueGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedurePartiesFictitious NamesCivil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureAppealsGeneral OverviewGovernmentsCourtsSmall Claims Courts

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46-526 California Forms of Pleading and Practice--Annotated § 526.131

§ 526.131 California Rules of Court

[1] Appeal

[a] Dismissal or Abandonment

Abandonment of appeal before file is transmitted to court assigned to hear appeal. *Cal. Rules of Ct., Rule 8.963(a)*

Dismissal of appeal on request or stipulation after file is transmitted to court assigned to hear appeal. *Cal. Rules of Ct., Rule 8.963(b)*

Dismissal of appeal for delay in bringing it to trial within one year, absent stipulation or showing of reasonable diligence, or within three years from filing of appeal or entry of order for new trial. *Cal. Rules of Ct., Rule 8.963(c)*

Notification by clerk to adverse parties of filing of abandonment of appeal or of dismissal for delay in prosecution. *Cal. Rules of Ct., Rule 8.963(d)*

Return of papers to small claims court after dismissal of appeal. *Cal. Rules of Ct., Rule 8.963(e)*

Hearing on proposed compromise by guardian of minor, insane, or incompetent person in case on appeal. *Cal. Rules of Ct., Rule 8.963(f)*

[b] Filing

Contents of notice of appeal from small claims judgment or denial of motion to vacate judgment. *Cal. Rules of Ct.,*

Rule 8.954(a)

Notification by clerk to other parties of filing of notice of appeal. *Cal. Rules of Ct., Rule 8.954(b)*

Validity of premature notice of appeal. *Cal. Rules of Ct., Rule 8.954(c)*

Transfer of record on appeal. *Cal. Rules of Ct., Rule 8.957*

[c] Trial on Appeal

Continuances of trial in superior court. *Cal. Rules of Ct., Rule 8.960*

[2] Assistance to Litigants

Clerk's duty to inform and assist small claims litigants. *Cal. Rules of Ct., Rule 3.2110*

Availability, training, and qualifications of small claims advisors. Cal. Rules of Ct., Rule 3.2121

[3] Fictitious Business Names

Filing of declaration of compliance with fictitious business name laws. *Cal. Rules of Ct., Rule 3.2100*

[4] Joinder of Claims

Defendant as permitted to file unrelated claim against plaintiff if claim is within jurisdictional limit. *Cal. Rules of Ct., Rule 3.2104*

[5] Judges

Qualifications, training, and appointment of temporary judges in small-claims cases. *Cal. Rules of Ct., Rule 2.810 et seq.*

[6] Judgment

Contents of small claims judgment. *Cal. Rules of Ct., Rule 3.2108*

[7] Service of Claim on Defendant

Due diligence as not required when substituted service is authorized by *Code Civ. Proc. § 116.340* or other provision of law. *Cal. Rules of Ct., Rule 3.2102*

[8] Venue Challenge

Defendant's written challenge to venue without making personal appearance; notice and setting of continued hearing when challenge is denied in defendant's absence. *Cal. Rules of Ct., Rule 3.2106*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureJoinder of Claims & RemediesClaimsCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureAppealsDismissals of AppealsGeneral OverviewCivil ProcedureAppealsReviewabilityNotice of AppealGovernmentsCourtsClerks of CourtGovernmentsCourtsSmall Claims CourtsGovernmentsCourtsSpecial Judges

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§ 526.132 Decisions

[1] Appeal

On appeal in superior court from small claims action at law for money damages, defendant not entitled to jury trial. *Crouchman v. Superior Court (1988) 45 Cal. 3d 1167, 1171-1179, 248 Cal. Rptr. 626, 755 P.2d 1075*

Right of plaintiff in small claims court action to appeal from judgment against him or her on cross complaint. *Skaff v. Small Claims Court (1968) 68 Cal. 2d 76, 79-81, 65 Cal. Rptr. 65*

Appellate division of superior court has appellate jurisdiction to review postjudgment enforcement orders entered by small claims court. *General Elec. Capital Auto Fin. Servs., Inc. v. Appellate Div. of Superior Court (2001) 88 Cal. App. 4th 136, 138-145, 105 Cal. Rptr. 2d 552*

Superior court has jurisdiction to award defendant who appeals small claims judgment in plaintiff's favor on both plaintiff's and defendant's claims an offset against plaintiff's award on appeal. *Township Homes, Inc. v. Superior Court (1994) 22 Cal. App. 4th 1587, 1589, 1594-1595, 27 Cal. Rptr. 2d 852*

Superior court is without jurisdiction to grant motion by plaintiff to dismiss small claims action when defendant has appealed; nor may plaintiff move to transfer and consolidate appeal with another action pending in superior court. *Acuna v. Gunderson Chevrolet, Inc. (1993) 19 Cal. App. 4th 1467, 1472-1473, 24 Cal. Rptr. 2d 62*

Hearsay evidence is admissible at small claims and de novo hearings, and excludable only if not relevant, its prejudicial effect outweighs its probative value, or it is subject to evidentiary privilege. *Houghtaling v. Superior Court (1993) 17 Cal. App. 4th 1128, 1131, 1137-1139, 21 Cal. Rptr. 2d 855*

Plaintiff electing to proceed in small claims court is finally bound by adverse judgment. *Cook v. Superior Court (1969) 274 Cal. App. 2d 675, 678, 79 Cal. Rptr. 285*

[2] Assignment

NOTE:

The following case was decided before 1994 legislation clarified that *Code Civ. Proc. § 116.420* does not prevent the filing of a claim in small claims court by a local government that is self-insured for purposes of workers' compensation and is seeking subrogation pursuant to *Lab. Code § 3852* [*Code Civ. Proc. § 116.420(c)*]. However, this statutory change appears confined to self-insured local governments only, as opposed to worker's compensation insurers in general.

Workers' compensation insurer is assignee within meaning of former *Code Civ. Proc. § 117.5* (*now see Code Civ. Proc. § 116.420*) and therefore unable to sue third-party tortfeasor in small claims court to recoup benefits paid to injured employee. *Allianz Insurance Co. v. Municipal Court (1981) 126 Cal. App. 3d 1043, 1046, 179 Cal. Rptr. 334*

[3] Assistance to Parties

Consultation with attorneys and other legal advisors and meetings to discuss strategy by group of individuals consolidating their small claims actions is constitutionally protected activity and as not violating former *Code Civ. Proc. § 117.4* (*now see Code Civ. Proc. § 116.530*; prohibiting attorney or other outside participation in filing or litigation of small claims actions). *City and County of San Francisco v. Small Claims Court (1983) 141 Cal. App. 3d 470, 478-479, 190 Cal. Rptr. 340*

Lay litigant in small claims court not expected to know to move for consolidation of two separate small claims actions against him and as not having waived right to make that motion. *Lekse v. Municipal Court (1982) 138 Cal. App. 3d 188, 192, 187 Cal. Rptr. 698*

Prohibition against appeal of decision of small claims court by plaintiff also prohibits issuance of extraordinary writ to review the judgment. *Parada v. Small Claims Court (1977) 70 Cal. App. 3d 766, 769, 139 Cal. Rptr. 87*

Defendant unschooled in law against whom default judgment entered and who may have been inadvertently misled by printed form or advice of clerk that appeal, rather than attempt to vacate default, was proper procedure as establishing right to relief from default. *Burley v. Stein (1974) 40 Cal. App. 3d 752, 761, 115 Cal. Rptr. 279* (decided under *Code Civ. Proc. § 473*; *now see Code Civ. Proc. § 116.710*)

Prohibition against appearance of attorneys to litigate matters in small claims courts is constitutional since parties wishing to appear by attorney may bring suit in higher court. *Prudential Ins. Co. v. Small Claims Court (1946) 76 Cal. App. 2d 379, 381-382, 173 P.2d 38*

[4] Enforcement of Judgment

Although small claims debtor examinations often occur informally, in hallway outside courtroom or in adjacent room, debtor examination is public, not private, proceeding from which public may not be excluded; judgment creditor may

seek to have debtor examination conducted before court or appointed referee, that is, licensed attorney. *Nebel v. Sulak (1999) 73 Cal. App. 4th 1363, 1369, 87 Cal. Rptr. 2d 385*

[5] Jurisdiction

Small claims court has jurisdiction to hear cases involving complex issues; legislative intent that small claims courts hear "minor civil disputes" as referring to monetary amount involved. *City and County of San Francisco v. Small Claims Court (1983) 141 Cal. App. 3d 470, 474-475, 190 Cal. Rptr. 340*

Superior court is without jurisdiction to consider appeal by defendant on his or her own cross complaint. *Davis v. Superior Court (1980) 102 Cal. App. 3d 164, 170, 162 Cal. Rptr. 167*

Workers' Compensation Appeals Board has exclusive jurisdiction to fix fees of medical witnesses in matters before board; small claims court has no jurisdiction over doctor's suit for additional compensation for consultation and hearing appearance service. *Workmen's Comp. Appeals Bd. v. Small Claims Court (1973) 35 Cal. App. 3d 643, 645-647, 111 Cal. Rptr. 6*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionAmount in ControversyCivil ProcedureCounselGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionState Court ReviewGovernmentsCourtsSmall Claims Courts

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§ 526.133 Law Reviews

Roodhouse, *Small Claims Court--What Should It Provide and How Well Does It Do So?* 51 Cal. St. B.J. 126 (1976)

Review of California Supreme Court 1972-1973, *Application of Procedural Due Process Standards to Small Claims Court Judgment Appeal Bond Requirement, 62 Cal. L. Rev. 421 (1974)*

Adams, *Defendant's Right to Counsel in Small Claims--Real or Fictional?* 45 Cal. St. B.J. 226 (1970)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas Bonds

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§ 526.134 Text References

Witkin, California Procedure, vol. 2, *Courts*, §§ 271-328 (4th ed. 1996)

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46-526 California Forms of Pleading and Practice--Annotated §§ 526.135-526.149

[Reserved]

§§ 526.135[Reserved]

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46-526 California Forms of Pleading and Practice--Annotated § 526.150

§ 526.150 Information for the Small Claims Plaintiff [Code Civ. Proc. § 116.920(a); Cal. Judicial Council Form SC-100-INFO]

[1] FORM Information for the Small Claims Plaintiff [Code Civ. Proc. § 116.920(a); Cal. Judicial Council Form SC-100-INFO]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Cal. Judicial Council Form SC-100-INFO, adopted by the Judicial Council for mandatory use [*see Cal. Rules of Ct., Rule 1.31*; *see also* Cal. Rules of Ct., Appen. A]. The purpose of the form is to explain the rules and procedures for bringing a small claims action and to provide general information about small claims court.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Advisory Services

Each county must provide free assistance in small claims cases [*Code Civ. Proc. §§ 116.260, 116.940*]. To assist in publicizing the availability of assistance services, the final paragraph of this form contains a blank space for the court to insert information about its local advisory program.

[4] Information for Defendant

Information for the defendant is provided in Cal. Judicial Council Form SC-100, Plaintiff's Claim and ORDER to Go to Small Claims Court. For an illustrative reproduction of that form, see *§ 526.151*.

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46-526 California Forms of Pleading and Practice--Annotated § 526.151

§ 526.151 Plaintiff's Claim and ORDER to Go to Small Claims Court [Code Civ. Proc. §§ 116.220(a)(1), 116.310-116.330; Cal. Judicial Council Form SC-100]

[1] FORM Plaintiff's Claim and ORDER to Go to Small Claims Court [Code Civ. Proc. §§ 116.220(a)(1), 116.310-116.330; Cal. Judicial Council Form SC-100]

Click here to view image.

[2] Use of Form

This form is a reproduction of Cal. Judicial Council Form SC-100, Plaintiff's Claim and ORDER to Go to Small Claims Court [*see* Cal. Rules of Ct., Appen. A]. The form is for use by a plaintiff to commence a small claims court action for monetary relief pursuant to *Code Civ. Proc. § 116.220(a)*; it sets out the event or transaction giving rise to plaintiff's claim and directs the defendant to appear at the hearing if he or she does not agree with the claim [*see Code Civ. Proc. § 116.320(b)* (authorizing adoption of form)]. The jurisdictional limit for monetary relief in small claims actions is generally $5,000 ($7,500 for an action brought by a natural person), with specified exceptions [*Code Civ. Proc. §§ 116.220, 116.221*; for further discussion, *see § 526.32*].

Use of this form is mandatory [*see Cal. Rules of Ct., Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form, under "**Instructions for the person suing**," contains an outdated reference to former Cal. Judicial Council Form SC-150 for general information about the plaintiff's rights in small claims court. Effective July 1, 2010, general information for the small claims plaintiff is provided in Cal. Judicial Council Form SC-100-INFO; for an illustrative reproduction of that form, see *§ 526.150[1]*.

[3] Filling in Form

[a] Title of Court

The blank space near the top of the form is for the title, that is, the name and address, of the court [*see Cal. Rules of Ct., Rule 2.111(3)*]. This information may be preprinted on the forms provided by the small claims court clerk. But, if it is not and the space is blank, the name and address of the court should be typed in.

[b] Naming Parties

Paragraphs 1 and 3 of the form require the names and addresses of up to two plaintiffs and two defendants. If there are additional plaintiffs or defendants, they should be listed on the form entitled Other Plaintiffs or Defendants (Cal. Judicial Council Form SC-100A), which is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, and which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

If the plaintiff operates or does business under a fictitious business name and the claim relates to that business, the plaintiff must also provide the business name statement number on this form and attach Cal. Judicial Council Form SC-103 [*see § 526.155*].

[c] Statement of Claim

Paragraph 3 requires the plaintiff to state the amount and basis of the claim [*Code Civ. Proc. § 116.320(b)(2)*]. If the action is to enforce the payment of a debt, the claim must separately state the original debt, each payment credited to the debt, each fee and charge added to the debt, each payment credited against those fees and charges, all other debits or charges to the account, and an explanation of the nature of those fees, charges, debits, and all other credits to the debt, by source and amount [*Code Civ. Proc. § 116.222*]. For discussion of amounts that may be claimed in a small claims action, see *§ 526.32*.

[d] Demand for Payment

If the plaintiff has not demanded that the defendant pay the money claimed, Paragraph 4 requires the plaintiff to explain why a demand was not made [*Code Civ. Proc. § 116.320(b)(3), (4)*].

[e] Venue

The venue of actions filed in the small claims court is governed by the same statute as other civil actions [*Code Civ. Proc. § 116.370(a)*; *see* Ch. 571, *Venue*]. Local court rules may prescribe the proper court locations for small claims actions [*Code Civ. Proc. § 116.370(a)*]. Although there is no statutory requirement that the plaintiff's claim show that it is filed in a proper court, Paragraph 5 of this form does require that plaintiff indicate the basis for venue.

[f] Attorney-Client Fee Dispute

If the claim is about an attorney-client fee dispute, the plaintiff should so state in Paragraph 7. Also, if the fee dispute has been arbitrated, the plaintiff should attach Judicial Council Form SC-101 [*see § 526.152*].

[g] Claim Against Government Agency

If the claim is against a government agency, the plaintiff must state in Paragraph 8 that the requisite written claim was presented to the agency first. For further discussion see *§ 526.50[4][e]*. For more detailed discussion and forms relating to tort claim procedures against public agencies, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[h] Number of Previous Small Claims

Paragraph 9 requires the plaintiff to state if the plaintiff has filed more than 12 other small claims within the preceding 12 months. This information is necessary for the calculation of the filing fee [*Code Civ. Proc. § 116.230*].

[4] Signature and Declaration

By dating and signing the claim, plaintiff declares under penalty of perjury that all the statements in the claim are true and correct [*see Code Civ. Proc. §§ 116.320(a), 2015.5*].

[5] Availability of Equitable Relief and Conditional Judgment

In any action brought pursuant to *Code Civ. Proc. § 116.220(a)(1)-(4)*, the court may grant equitable relief in the form of rescission, restitution, reformation, and specific performance in lieu of or in addition to money damages [*Code Civ. Proc. § 116.220(b)*; *see generally* Ch. 488, *Reformation of Instruments* , Ch. 490, *Rescission and Restitution* , Ch. 528, *Specific Performance*]. The small claims court also has authority to issue a conditional judgment [*Code Civ. Proc. § 116.220(b)*].

Aside from actions described in *Code Civ. Proc. § 116.220(a)(1)-(4)*, a small claims court may grant injunctive or other equitable relief only if a statute expressly authorizes the court to award that relief [*Code Civ. Proc. § 116.220(a)(5)*].

[6] Service and Filing

The action is commenced by the plaintiff filing the form with the clerk of the small claims court and paying the filing fee [*Code Civ. Proc. §§ 116.230, 116.320(a)*]. Filing may be accomplished in person, by mail, by facsimile transmission if authorized by statute, or by electronic means as authorized by statute [*Code Civ. Proc. § 116.320(a)*; *see Code Civ. Proc. § 1010.5* (facsimile); *Code Civ. Proc. § 1010.6* (electronic filing)]. For the manners in which the form may be served on the defendant, see *§ 526.52*.

[7] State Statutes

Filing of claim and service on defendant. *Code Civ. Proc. §§ 116.330, 116.340*.

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46-526 California Forms of Pleading and Practice--Annotated § 526.152

§ 526.152 Attorney-Client Fee Dispute (Attachment to Plaintiff's Claim) [Code Civ. Proc. § 116.220(a)(4); Judicial Council Form SC-101]

[1] FORM Attorney-Client Fee Dispute (Attachment to Plaintiff's Claim) [Code Civ. Proc. § 116.220(a)(4); Judicial Council Form SC-101]

Click here to view image.

[2] Use of Form

This form is a reproduction of the Judicial Council Form SC-101, Attorney-Client Fee Dispute (Attachment to Plaintiff's Claim) [*see* Cal. Rules of Ct., Appen. A]. The form is for use by a plaintiff as an attachment to Plaintiff's Claim and Order to Defendant [*see § 526.151*] in those cases in which plaintiff seeks to confirm, correct or vacate an attorney fee arbitration award not exceeding $5,000 that is binding or has become binding [*Code Civ. Proc. § 116.220(a)(4)*]. It may also be used in cases in which plaintiff seeks a hearing de novo after a nonbinding attorney fee arbitration award not exceeding $5,000 [*Code Civ. Proc. § 116.220(a)(4)*]. In either situation, the $5,000 limit is increased to $7,500 if the plaintiff is a natural person [*Code Civ. Proc. § 116.221*].

In either situation, the form is used following arbitration of a dispute between an attorney and his or her client concerning fees and costs charged to the client by the attorney for professional services rendered. This fee-dispute arbitration is mandatory when requested by the client, and otherwise voluntary for the client unless the client has previously agreed in writing to submit to the arbitration; it is conducted by the State Bar or by a local bar association or lawyer referral service, pursuant to the provisions of *Bus. & Prof. Code § 6200 et seq.* and State Bar rules adopted in accordance with these provisions [*Bus. & Prof. Code §§ 6200, 6201*]. For detailed discussion and forms relating to this fee arbitration procedure, see *Ch. 72, Attorney Practice and Ethics, § 72.430* et seq., "Fee Collection," Subpart C, "Arbitration and Mediation of Fee Disputes."

Use of this form is mandatory [*see Cal. Rules of Ct., Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] State Statutes

$7,500 limit for small claims by natural person. *Code Civ. Proc. § 116.221*

Filing of claim and service on defendant. *Code Civ. Proc. §§ 116.330, 116.340*

Jurisdiction of small claims court over attorney-client fee arbitration awards. *Code Civ. Proc. § 116.220(a)(4)*

Arbitration of attorney-client fee disputes. *Bus. & Prof. Code § 6200 et seq.*

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46-526 California Forms of Pleading and Practice--Annotated § 526.153

§ 526.153 Proof of Service [Code Civ. Proc. §§ 415.10, 415.20; Judicial Council Form SC-104]

[1] FORM Proof of Service [Code Civ. Proc. §§ 415.10, 415.20; Judicial Council Form SC-104]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Judicial Council Form SC-104, the Proof of Service form approved by the Judicial Council for use in a small claims action [*see Code Civ. Proc. §§ 415.10, 415.20*] by a party to prove service on another party of any of the enumerated documents. Proof of service of the claim and order scheduling the hearing must be filed with the small claims court at least five days before the hearing [*Code Civ. Proc. § 116.340(c)*].

Use of the form is optional [*see Cal. Rules of Ct., Rule 1.35*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis[(R)] Automated California Judicial Council Forms*, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

An explanation of the purpose and methods of service is available in Judicial Council Forms SC-104B (What Is Proof of Service?) and SC-104C (How to Serve a Business or Public Entity).

For a form of proof of service of documents that are allowed to be served by mail (Judicial Council Form SC-112A), see *§ 526.176*.

[3] Cross References

For discussion of related statutes governing service generally, see Ch. 518, *Service of Summons and Papers*

[4] State Statutes

Proof of service. *Code Civ. Proc. §§ 417.10-417.30*

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46-526 California Forms of Pleading and Practice--Annotated § 526.154

§ 526.154 Proof of Mailing After Substituted Service [Code Civ. Proc. §§ 116.340, 415.20; Cal. Judicial Council Form SC-104A]

[1] FORM Proof of Mailing After Substituted Service [Code Civ. Proc. §§ 116.340, 415.20; Cal. Judicial Council Form SC-104A]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Cal. Judicial Council Form SC-104A, approved by the Judicial Council for optional use as proof of mailing after substituted service in a small claims case [*see Code Civ. Proc. §§ 116.340, 415.20*; *Cal. Rules of Ct., Rule 1.35*; *see also* Cal. Rules of Ct., Appen. A]. If this form is used, it should be attached to Judicial Council Form SC-104 (Proof of Service) [*see § 526.153, above*].

Substituted service involves (1) the delivery of the documents to a person other than the party to be served, with (2) a subsequent mailing of the documents to the party [*see Code Civ. Proc. § 415.20*; *see* discussion in *§ 526.52[2*]; *see also* Ch. 518, *Service of Summons and Papers*]. This form is necessary to prove mailing only if the person who mailed the documents was not the same person who delivered the documents. If the same person performed both functions, then he or she can prove mailing by filling in the appropriate information on the proof of service form (Judicial Council Form SC-104) [*see § 526.153*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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46-526 California Forms of Pleading and Practice--Annotated § 526.155

§ 526.155 Declaration [Code Civ. Proc. § 2015.5] of Claimant's Fictitious Business Name [Code Civ. Proc. § 116.430(a); Judicial Council Form SC-103]

[1] FORM Declaration [Code Civ. Proc. § 2015.5] of Claimant's Fictitious Business Name [Code Civ. Proc. § 116.430(a); Judicial Council Form SC-103]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of the Judicial Council Form SC-103, Fictitious Business Name Declaration [*see* Cal. Rules of Ct., Appen. A].

The form is for use by a small claims plaintiff (or by a defendant who files a claim against plaintiff) doing business under a fictitious business name to advise the court that he or she has published and filed a fictitious business name statement in compliance with the fictitious business name statutes (*Bus. & Prof. Code § 17900 et seq.*) [*see Code Civ. Proc. § 116.430(a)*; *Cal. Rules of Ct., Rule 3.2100*; *see also* discussion in *§ 526.51*]. The small claims plaintiff doing business under a fictitious business name may be an individual, a partnership, an unincorporated association, a corporation, or a limited liability company [*Bus. & Prof. Code § 17900(a)*].

Use of the form is optional, although some form of declaration in compliance with *Cal. Rules of Ct., Rule 3.2100(a)* must be filed [*Cal. Rules of Ct., Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] State Statutes

"Fictitious business name" defined. *Bus. & Prof. Code § 17900*

Fictitious business name statement. *Bus. & Prof. Code § 17913*

Actions barred until fictitious business name statement has been executed, filed, and published. *Bus. & Prof. Code § 17918*

Action filed by party who lacks standing under *Bus. & Prof. Code § 17918* as required to be dismissed without prejudice. *Code Civ. Proc. § 116.430(b)*

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46-526 California Forms of Pleading and Practice--Annotated § 526.156

§ 526.156 Small Claims Subpoena and Declaration [Code Civ. Proc. §§ 1985, 1986, 1987.5; Cal. Judicial Council Form SC-107]

[1] FORM Small Claims Subpoena and Declaration [Code Civ. Proc. §§ 1985, 1986, 1987.5; Cal. Judicial Council Form SC-107]

Click here to view image.

[2] Use of Form

This form is an illustrative, filled-in reproduction of Cal. Judicial Council Form SC-107, Small Claims Subpoena and Declaration [*see* Cal. Rules of Ct., Appen. A], which is for use by a party to a small claims action to compel the attendance and testimony of a non-party witness at a small claims hearing, or to compel the production by that witness of documents or things, or both [*see Code Civ. Proc. §§ 1985, 1986* and discussion in *§ 526.70[3][a]*; for detailed discussion and forms relating to subpoenas and subpoenas duces tecum generally, *see also* Ch. 535, *Subpoena*].

Use of the form is mandatory [*see Cal. Rules of Ct., Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Issuance of Subpoena

The subpoena may be obtained from the clerk of the court [*Code Civ. Proc. §§ 1985(c), 1986(a)*].

[4] Filling in Form

[a] Identification of Court and Parties

For the manner of filling in the name and address of the court, and the names of the parties, see the Comments to *see § 526.151*.

[b] Order to Appear or Produce Documents or Things (Paragraph 1)

The name, address, and telephone number of the witness, to the extent known, must be filled in under "THE PEOPLE OF THE STATE OF CALIFORNIA, TO."

Paragraph 1 directs the witness to appear at a particular time and place unless the appearance is excused under Paragraph 4(b), discussed in *§ 526.156[4][e]*, or the witness makes an agreement otherwise with the person named in *§ 526.156[4][c]* [*see Code Civ. Proc. §§ 1985(a), 1985.1*].

[c] Agreement With Subpoenaing Party (Paragraph 2)

In Paragraph 2, the subpoenaing party must fill in his or her own name and telephone number. This paragraph is included to comply with thenotice required by *Code Civ. Proc. § 1985.2*, to inform the witness that, in lieu of appearance or production at the time and place specified, he or she make an agreement with the subpoenaing party for some alternate means of complying with the subpoena [*see Code Civ. Proc. § 1985.1*].

[d] Witness Fees (Paragraph 3)

Paragraph 3 is designed to satisfy the requirement that any witness subpoenaed in a civil or administrative action must be given written notice that he or she may be entitled to receive witness and mileage fees [*see Code Civ. Proc. § 2065*]. For further discussion regarding these fees, see *Ch. 535, Subpoena, §§ 535.18, 535.19*.

[e] Appearance or Production of Records in Lieu of Appearance (Paragraph 4)

Paragraphs 4(a) and 4(b) are mutually exclusive, and only one is to be checked by the subpoenaing party. Paragraph 4(a) is checked when personal appearance by the witness or custodian is required.

Paragraph 4(b) is checked when, alternatively, the subpoenaing party does not require personal appearance but only that the witness or custodian of records mail or deliver copies of all the records described in the attached declaration (page two of the form), in compliance with *Evid. Code § 1560 et seq.* Paragraph 4(b) provides the witness or custodian with instructions for delivering the required copies. For detailed discussion relating to the procedures relating to the production of records or copies of records in lieu of appearance by the witness, *see Ch. 535, Subpoena, § 535.20[1]*.

[f] Supporting Declaration When Documents or Things Are Sought

A subpoena duces tecum, or a subpoena that seeks to compel the non-party witness to produce documents or things in addition to appearing and testifying, must be accompanied by a copy of an affidavit or declaration that shows good cause for the production of the matters and things described in the subpoena duces tecum and that sets forth their materiality to the issues involved in the case [*Code Civ. Proc. § 1985(b)*]. The declaration on page two of the form is provided for this purpose.

In Paragraph 1 of page two, the subpoenaing party states his or her role in the action by checking the appropriate box. In Paragraph 2, 3, and 4 of page two, the subpoenaing party must, under penalty of perjury, specify in detail the documents or things over which the witness has possession or control and which are to be produced, specify their materiality to the issues involved in the action, and provide reasons that establish good cause for their production [*see Code Civ. Proc. § 1985(b)*]. The documents or other things should be described with such certainty that the person producing the records is reasonably apprised of what is required [*see McClatchy Newspapers v. Superior Court (1945) 26 Cal. 2d 386, 398, 159 P.2d 944* ; *Nelson v. Superior Court (1937) 9 Cal. 2d 729, 732, 73 P.2d 232*]. Identification may be considered inadequate when the books and documents sought are designated by or included within an "omnibus description" [*see Pacific Auto. Ins. Co. v. Superior Court (1969) 273 Cal. App. 2d 61, 68-69, 77 Cal. Rptr. 836]* . For further discussion, see *Ch. 535, Subpoena, § 535.16*.

[5] Notice to Custodian of Consumer or Employee Records

Paragraph 5 on the first page of the form provides notice to the witness that, if he or she is the custodian of consumer or employee records sought under *Code Civ. Proc. § 1985.3* or *1985.6*, and he or she has been served by the consumer or employee with a motion to quash the subpoena or with an objection, then the witness is not to produce the records unless and until directed to do so by a court order or agreement between the parties, witness, and consumer or employee [*see Code Civ. Proc. §§ 1985.3(g), 1985.6(f)*; for detailed discussion and forms relating to the procedures for production of consumer or employee records, *see Ch. 535, Subpoena, §§ 535.21[7], [8], 535.69, 535.74*].

[6] Disobedience of Subpoena

A notice at the bottom of the first page of the form states that disobedience of a subpoena may be punished as contempt [*see Code Civ. Proc. § 1991*] and that the person disobeying the subpoena will also be liable for a $500 penalty and all damages resulting from his or her failure to obey [*see Code Civ. Proc. § 1992*].

[7] Proof of Service

Page three of the form contains a proof of service to be filled in by the server after service is made.

[8] Cross References

For a discussion and forms relating to declarations generally, see Ch. 15, *Affidavits, Certificates, and Declarations*

For a discussion and forms for use in compelling the attendance of witnesses and the production of physical evidence generally, see Ch. 535, *Subpoena*

[9] State Statutes

Subpoenas and subpoenas duces tecum, in general. *Code Civ. Proc. §§ 1985-1997*

Affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) required for subpoena duces tecum. *Code Civ. Proc. §§ 1985, 1987.5*

Witness fees and mileage. *Gov. Code § 68093*

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46-526 California Forms of Pleading and Practice--Annotated § 526.157

§ 526.157 Authorization to Appear [Code Civ. Proc. § 116.540; Judicial Council Form SC-109]

[1] FORM Authorization to Appear [Code Civ. Proc. § 116.540; Judicial Council Form SC-109]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Cal. Judicial Council Form SC-109, which is a declaration by a person who is appearing in a small claims action on behalf of another person or entity. Generally, a plaintiff or defendant in a small claims action must appear personally [*Code Civ. Proc. § 116.540(a)*; Cal. Rules of Ct., Appen. A]. However, as indicated by the options presented in this form, the following persons and entities may under certain conditions appear through a representative: a corporation, a sole proprietorship, a government agency or other public entity, a serviceperson on active duty outside California, an inmate, a nonresident owner of California real property that is a defendant in small claims court, and an owner of rental property [*Code Civ. Proc. § 116.540(b)-(i)*]. Also, a married person who has been sued jointly with his or her spouse may consent to be represented by the spouse if the court finds that to be in the interests of justice [*Code Civ. Proc. § 116.540(k)*]. Finally, the court has discretion to allow a nonparty to assist an individual party who cannot properly present his or her claim and needs assistance [*Code Civ. Proc. § 116.540(l)*].

The statutory authorization for representation in small claims court generally does not permit representation by attorneys. An attorney may appear in small claims court only if (1) he or she is a named party; or (2) he or she is representing a legal partnership or corporation of which he or she is a general partner, officer, or director, and then only if all of the partners, directors, and officers are also attorneys [*Code Civ. Proc. §§ 116.530(a), (b), 116.540(m)*].

Generally, a person who is appearing in a representative capacity must file a declaration stating (1) that he or she is authorized to appear for the party, and (2) the basis for the authorization. The declaration must also set forth the prerequisites required by statute for the person to represent the particular party involved [*Code Civ. Proc. § 116.540(j)*]. This form reflects the appropriate statutory requirements for representation of each kind of party.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council*

Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Cross References

For a discussion and forms relating to declarations generally, see Ch. 15, *Affidavits, Certificates, and Declarations*

[4] State Statutes

Prosecution or defense of small claims actions by attorneys. *Code Civ. Proc. § 116.530*

Requirements for appearance in small claims actions by individuals other than parties. *Code Civ. Proc. § 116.540*

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46-526 California Forms of Pleading and Practice--Annotated § 526.158

§ 526.158 Defendant's Claim and Order to Plaintiff [Code Civ. Proc. § 116.380; Judicial Council Form SC-120]

[1] FORM Defendant's Claim and Order to Plaintiff [Code Civ. Proc. § 116.380; Judicial Council Form SC-120]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of the Judicial Council Form SC-120, Defendant's Claim and Order to Go to Small Claims Court [*see* Cal. Rules of Ct., Appen. A], and is for use by a defendant to file a cross claim within the jurisdictional limit of the small claims court against the plaintiff in a pending small claims action [*see Code Civ. Proc. § 116.360*]. Note that the compulsory cross complaint statute (*Code Civ. Proc. § 426.30*) is not applicable to small claims actions [*see Code Civ. Proc. § 426.60(b)*].

For the discussion of the procedure the defendant may follow if his or her claim is for an amount in excess of the jurisdiction of the small claims court and the defendant does not wish to waive recovery of the excess of the claim, see discussion in *§ 526.53[3]*. For a form of declaration that defendant files in the small claims court if he or she files an action on his or her claim against the plaintiff in a court of competent jurisdiction, see *§ 526.159*.

Use of this form is mandatory. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form, under "**Instructions for the person suing**," contains an outdated reference to former Cal. Judicial Council Form SC-150 for general information about a claimant's rights in small claims court. Effective July 1, 2010, that general information is provided in Cal. Judicial Council Form SC-100-INFO; for an illustrative reproduction of that form, see *§ 526.150[1]*.

If there are more than two plaintiffs or two defendants, they should be listed on the form entitled Other Plaintiffs or Defendants (Cal. Judicial Council Form SC-120A).

[3] Contents of Cross Claim

The required contents of the claim are prescribed by *Code Civ. Proc. § 116.320(b), (c)* [*see Code Civ. Proc. § 116.130(a)*]. That is, the required contents of the defendant's claim against the plaintiff are the same as those of the plaintiff against the defendant. Thus, contents of the foregoing form are substantially the same (except for the statement of venue) as those of plaintiff's claim set forth in *see § 526.151*. For the manner of filling in the form and the defendant's representations to the court, see *§ 526.151*.

[4] Service and Filing

The defendant files the form with the clerk of the small claims court in person, by mail, by facsimile transmission if authorized by statute, or by electronic means as authorized by statute [*Code Civ. Proc. §§ 116.320(a), 116.360(b)*; *see Code Civ. Proc. § 1010.5* (facsimile); *Code Civ. Proc. § 1010.6* (electronic filing)]. The defendant must serve a copy of the claim and order on the plaintiff at least 5 days before the hearing date, unless the defendant was served 10 days or less before the hearing date, in which event the defendant must serve a copy of the defendant's claim and order on the plaintiff at least one day before the hearing date [*Code Civ. Proc. § 116.360(c)*].

Service of defendant's claim and order is accomplished by (1) the clerk mailing a copy to the plaintiff by any form of mail providing for return receipt; (2) the defendant causing a copy to be delivered to the plaintiff in person; (3) the defendant using substituted service as provided in *Code Civ. Proc. § 415.20(a)* or *(b)* without the need to attempt personal service on the plaintiff; or (4) the clerk's mailing a copy of the claim to plaintiff by any form of mail providing for a return receipt and, on receipt of proof that the claim was delivered, issuing and serving an order on the plaintiff by any form of mail providing for a return receipt [*Code Civ. Proc. §§ 116.330(b), 116.340(a), 116.360(b)*; *see Code Civ. Proc. § 116.130(a), (b)* and discussion in *§ 526.52[1]*]. No answer by plaintiff to defendant's claim is required.

[5] State Statutes

Judgment of small claims court as conclusive of defendant's claim. *Code Civ. Proc. § 116.710(a)*; *see Code Civ. Proc. § 116.130(a)*.

[6] Cross Reference

See also Comments and References to § 526.151.

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46-526 California Forms of Pleading and Practice--Annotated § 526.159

§ 526.159 Defendant's Declaration [Code Civ. Proc. § 2015.5] Requesting That Small Claims Action Be Transferred to Another Court [Code Civ. Proc. § 116.390(a), (b)]

[1] FORM Defendant's Declaration [Code Civ. Proc. § 2015.5] Requesting That Small Claims Action Be Transferred to Another Court [Code Civ. Proc. § 116.390(a), (b)]

_____ Superior Court, Small Claims Division
_____ Judicial District
_____ County, California
_____ [*Address and telephone number of Court*]

_____ [*name*],	)	
_____ [*address*],	)	
Plaintiff,	)	NO. _____
vs.	)	DECLARATION
_____ [*name*],	)	OF _____ [*name*]
_____ [*address*],	)	(Small Claims)
Defendant.	)	
	)	
	)	

I, _____ [*name*], declare:

1. I am the defendant in the above-entitled action, which is set for hearing on _____ [*date*].

2. I have a claim against the plaintiff in excess of _____ [$7,500 *or other limit on small claims jurisdiction based on circumstances of case, as provided by Code Civ. Proc. §§ 116.220, 116.221, 116.231*]. This claim

relates to the _____ [contract *and/or* transaction *and/or* matter *and/or* event] that is the subject of the plaintiff's claim, in that _____ [*state facts showing relationship between defendant's action and plaintiff's claim*].

3. On _____ [*date*], I filed a complaint in the _____ Court in _____ County, asserting that claim against the plaintiff.

4. A true copy of the complaint is attached hereto.

5. I request that the above-entitled action be transferred to the _____ Court in _____ County. [The ends of justice would be served by transferring the above-entitled action before judgment because _____ (*state reasons supporting prejudgment transfer*).]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

This form of declaration is for use by a defendant in a small claims action to request the small claims court to transfer the action to another court of competent jurisdiction in which defendant has filed a related claim [*see Code Civ. Proc. § 116.390(a), (b)*].

[3] Request to Transfer Claim

[a] By Filing Declaration

If the defendant has a claim against the plaintiff in an amount exceeding the court's jurisdictional limit (generally, $7,500 if the defendant is a natural person, or $5,000 if the defendant is other than a natural person), or has brought more than two claims over $2,500 in one calendar year, and defendant's current claim relates to the contract, transaction, matter, or event that is the subject of the plaintiff's claim, the defendant may commence an action against the plaintiff in a court of competent jurisdiction and request the small claims court to transfer the action to that court [*Code Civ. Proc. § 116.390(a)*; *see Code Civ. Proc. §§ 116.220, 116.231*]. The defendant makes the request by filing with the small claims court in which the plaintiff commenced the action, at or before the time set for the hearing of that action, a declaration stating the facts concerning the defendant's action against the plaintiff with a true copy of the complaint so filed by the defendant [*Code Civ. Proc. § 116.390(b)*].

[b] Service of Declaration

The defendant must cause a copy of the declaration and complaint to be personally delivered to the plaintiff at or before the time set for the hearing of the small claims action [*Code Civ. Proc. § 116.390(b)*].

[c] Order of Transfer

In ruling on a motion to transfer, the court may (1) render judgment on the small claims case prior to transfer, or (2) not render judgment on the small claims case and transfer the case, or (3) refuse to transfer the small claims case on the grounds that the ends of justice would not be served.When the small claims court orders the action transferred, it shall transmit all files and papers to the transferee court [*Code Civ. Proc. § 116.390(d)*]. If the small claims action is transferred prior to judgment, both actions shall be tried together in the transferee court [*Code Civ. Proc. § 116.390(c)*]. For a form of order, see *§ 526.160*.

[4] Cross References

For a discussion and forms relating to declarations generally, see Ch. 15, *Affidavits, Certificates, and Declarations*

[5] Decisions

Statutory provisions as permitting, though not requiring, defendant to obtain transfer of action out of small claims court when defendant has claim against plaintiff exceeding small claims jurisdiction. *Thompson v. Chew Quan (1959) 167 Cal. App. 2d Supp. 825, 826-827, 334 P.2d 1074*

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46-526 California Forms of Pleading and Practice--Annotated § 526.160

§ 526.160 Order of Small Claims Court Transferring Action Before Judgment to Another Court [Code Civ. Proc. § 116.390(c)]

[1] FORM Order of Small Claims Court Transferring Action Before Judgment to Another Court [Code Civ. Proc. § 116.390(c)]

[*Caption. See § 526.159.*]

Whereas _____ [*name*], defendant in the above-entitled action, has filed in this court, on _____ [*date*], a declaration under penalty of perjury stating that he/she has commenced an action against the plaintiff in an amount in excess of the small claims jurisdiction of this court, and that the claim relates to the _____ [contract *and/or* transaction *and/or* matter *and/or* event] that is the subject of plaintiff's claim.

IT IS HEREBY ORDERED that this action, and all papers on file in this action, be transferred to the _____ Court in _____ County for final determination.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order of a small claims court judge transferring the small claims court action to a higher court may be used when the defendant in a small claims action commences an action against plaintiff that exceeds the jurisdictional limit of the small claims court and relates to the contract, transaction, matter, or event of the plaintiff's claim. The small claims court must transmit all files and papers in the small claims action to the transferee court [*Code Civ. Proc. § 116.390(a), (c), (d)*].

[3] Cross Reference

See also Comments and References to § 526.159

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46-526 California Forms of Pleading and Practice--Annotated § 526.161

§ 526.161 Request to Postpone Trial [Code Civ. Proc. § 116.570; Cal. Judicial Council Form SC-150]

[1] FORM Request to Postpone Trial [Code Civ. Proc. § 116.570; Cal. Judicial Council Form SC-150]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Cal. Judicial Council Form SC-150, adopted by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.35*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is to be filed and served by any party who wishes to postpone or reschedule a small-claims trial [*see Code Civ. Proc. § 116.570*]. Filing of the request must be made at least 10 days before the date set for trial [*Code Civ. Proc. § 116.570(a)(2)*].

For a related form, see *§ 526.162* (Order on Request to Postpone Trial).

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46-526 California Forms of Pleading and Practice--Annotated § 526.162

§ 526.162 Order on Request to Postpone Trial [Code Civ. Proc. § 116.570; Cal. Judicial Council Form SC-152]

[1] FORM Order on Request to Postpone Trial [Code Civ. Proc. § 116.570; Cal. Judicial Council Form SC-152]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Cal. Judicial Council Form SC-152, adopted by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.35*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form will be used by the court to grant or deny a party's request to postpone or reschedule a small-claims trial [*see Code Civ. Proc. § 116.570*].

For a related form, see *§ 526.161* (Request To Postpone Trial).

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46-526 California Forms of Pleading and Practice--Annotated § 526.163

§ 526.163 Request to Amend Party Name Before Hearing (Small Claims) [Code Civ. Proc. §§ 116.560, 473; Judicial Council Form SC-114]

[1] FORM Request to Amend Party Name Before Hearing (Small Claims) [Code Civ. Proc. §§ 116.560, 473; Judicial Council Form SC-114]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Cal. Judicial Council Form SC-114, approved by the Judicial Council for optional use in requesting that the claim in a small claims case be amended to reflect the parties' correct names [*see Code Civ. Proc. § 116.560*; *Cal. Rules of Ct., Rule 1.35*; *see also* Cal. Rules of Ct., Appen. A]. In general, a party may move for such an amendment at any time before or after judgment [*Code Civ. Proc. §§ 116.560(b), 116.630*]. For further discussion of amendments to correct parties' names, see the discussion in *§ 526.51*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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46-526 California Forms of Pleading and Practice--Annotated § 526.164

§ 526.164 Notice of Entry of Judgment [Code Civ. Proc. § 116.610(h), (i); Cal. Judicial Council Form SC-130]

[1] FORM Notice of Entry of Judgment [Code Civ. Proc. § 116.610(h), (i); Cal. Judicial Council Form SC-130]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction Cal. Judicial Council Form SC-130, Notice of Entry of Judgment [*see Code Civ. Proc. § 116.610(h), (i)*; *see also* Cal. Rules of Ct., Appen. A]. Except for the Acknowledgment of Satisfaction of Judgment (discussed *below*) at the bottom of the reverse side of the form, the form is filled out by the clerk of the small claims court who will mail a copy of it to each party [*see Code Civ. Proc. § 116.610(h)*]. The form is used to notify the parties in a small claims action of the court's judgment. The form also contains on its reverse side information as to the postjudgment rights and obligations of the parties and of additional procedures that may be available to vacate or cancel or to enforce the judgment [*see Code Civ. Proc. §§ 116.710-116.860*].

This form has been adopted by the Judicial Council for alternative mandatory use [*see Cal. Rules of Ct., Rule 1.31*; *see also* Cal. Rules of Ct., Appen. A]. For the other alternative form, see *§ 526.164A*.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Acknowledgment of Satisfaction of Judgment

The Acknowledgment of Satisfaction of Judgment on the reverse side of the form of Notice of Entry of Judgment is to be filled out by the judgment creditor or his or her assignee of record and filed with the clerk of the small claims court immediately on receipt of full payment of the judgment [*Code Civ. Proc. § 116.850(a)*]. The satisfaction of judgment form, however, is to be used only if an abstract of judgment has not been filed. If an abstract of judgment has been recorded, acknowledgment of satisfaction of the judgment by execution or other means must be filed in the manner provided in *Code Civ. Proc. § 697.400* and must contain the information required by *Code Civ. Proc. § 724.060* or

724.100. For further discussion of these provisions, and a Judicial Council form of acknowledgment of satisfaction of judgment for use where an abstract of judgment was recorded, see Ch. 318, *Judgments* .

As an alternative to the Acknowledgment of Satisfaction of Judgment appearing in this form, the judgment creditor may use Cal. Judicial Council Form SC-290 to acknowledge satisfaction of the judgment [*see § 526.164B*].

[4] Penalty for Failure to File Acknowledgment of Satisfaction of Judgment

Any judgment creditor or assignee of record who, after receiving full payment of the judgment and written demand by the judgment debtor, fails without good cause to execute and file an acknowledgment of satisfaction of the judgment with the clerk of the court in which the judgment is entered within 14 days after receiving the request is liable to the judgment debtor or the judgment debtor's grantees or heirs for all damages sustained byreason of the failure and, in addition, the sum of $50 [*Code Civ. Proc. § 116.850(b)*].

[5] California Rules of Court

Filing notice of appeal and procedure on appeal. *Cal. Rules of Ct., Rule 8.950 et seq.*

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46-526 California Forms of Pleading and Practice--Annotated § 526.164A

§ 526.164A Notice of Entry of Judgment [Code Civ. Proc. § 116.610(h),(i); Cal. Judicial Council Form SC-200]

[1] FORM Notice of Entry of Judgment [Code Civ. Proc. § 116.610(h),(i); Cal. Judicial Council Form SC-200]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Cal. Judicial Council Form SC-200, to be used by the court clerk to provide notice of entry of the small-claims judgment. This form has been adopted by the Judicial Council for alternative mandatory use [*see Cal. Rules of Ct., Rule 1.31*; *see also* Cal. Rules of Ct., Appen. A]. For the other alternative form, see *§ 526.164*.

The last two pages of this form reproduce the contents of Cal. Judicial Council Form SC-200-INFO, which provides information about the parties' obligations and options after the small-claims court has decided their case.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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46-526 California Forms of Pleading and Practice--Annotated § 526.164B

§ 526.164B Acknowledgment of Satisfaction of Judgment [Code Civ. Proc. § 116.850; Cal. Judicial Council Form SC-290]

[1] FORM Acknowledgment of Satisfaction of Judgment [Code Civ. Proc. § 116.850; Cal. Judicial Council Form SC-290]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Cal. Judicial Council Form SC-290, which may be used by the judgment creditor to acknowledge satisfaction of a small-claims judgment. This form has been adopted by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.35*; *see also* Cal. Rules of Ct., Appen. A]. The second page of the form contains instructions for the judgment creditor.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

As an alternative to this form, if the court clerk uses Cal. Judicial Council Form SC-130 for the Notice of Entry of Judgment, the judgment creditor may use the Acknowledgment of Satisfaction of Judgment appearing at the end of that form [*see § 526.164*].

An acknowledgment of satisfaction of the judgment must be filed by the judgment creditor (or his or her assignee of record) with the clerk of the small claims court immediately on receipt of full payment of the judgment [*Code Civ. Proc. § 116.850(a)*]. This Acknowledgment of Satisfaction of Judgment form, however, is to be used only if an abstract of judgment has not been recorded. If an abstract of judgment has been recorded, acknowledgment of satisfaction of the judgment by execution or other means must be filed in the manner provided in *Code Civ. Proc. § 697.400* and must contain the information required by *Code Civ. Proc. § 724.060* or *Code Civ. Proc. § 724.100*. For further discussion of these provisions, and a Judicial Council form of acknowledgment of satisfaction of judgment for use when an abstract of judgment was recorded, see Ch. 318, *Judgments* .

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46-526 California Forms of Pleading and Practice--Annotated § 526.165

§ 526.165 Request to Pay Judgment to Court [Code Civ. Proc. § 116.860; Cal. Judicial Council Form SC-145]

[1] FORM Request to Pay Judgment to Court [Code Civ. Proc. § 116.860; Cal. Judicial Council Form SC-145]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of the Judicial Council Form SC-145, Request to Pay Judgment to Court [*see* Cal. Rules of Ct., Appen. A]. It is for use by a judgment debtor to pay a small claims judgment directly to the court in which the judgment was entered and thereby to obtain a satisfaction of judgment [*see Code Civ. Proc. § 116.860*].

Use of the form is mandatory [*see Cal. Rules of Ct., Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Accompanying Payment

The judgment debtor should mail or deliver to the court the completed form, together with an estimated payment that includes the amount of the small claims judgment, a $20 fee to cover administrative costs, and interest accruing at an annual rate of 10 percent from the date the judgment was entered [*Code Civ. Proc. § 116.860(b), (h)*; *see Code Civ. Proc. § 685.010* (interest rate)]. The court clerk will calculate and fill in the total payment owed on page two of the foregoing form. If the judgment debtor does not receive a notice of satisfaction of judgment within a reasonable time, he or she should contact the court to determine whether his or her payment was sufficient to satisfy the total payment owed as calculated by the court.

When payment is made by any means other than money order, certified or cashier's check, or cash, entry of satisfaction of judgment will be delayed for a period of 30 days [*Code Civ. Proc. § 116.860(d)*].

[4] Partial Payment

If the judgment debtor has already paid a portion of the judgment to the judgment creditor, the debtor should fill out Paragraph 5 and submit the balance owing on the judgment, plus costs, interest, and the court fee [*Code Civ. Proc. § 116.860(c)*]. The debtor must also attach to the foregoing form copies showing both sides of the check or money order with which he or she made partial payment to the judgment creditor or showing a dated cash receipt signed by the judgment creditor [*see Code Civ. Proc. § 116.850(d)(1)*]. Additionally, the judgment debtor must file a declaration [*see § 526.168*] in order to raise the required rebuttable presumption of partial payment to have a satisfaction of judgment filed by the clerk [*see Code Civ. Proc. §§ 116.850(d)(2), 116.860(c)*].

[5] Notification and Payment of Judgment Creditor

On receiving the form, together with the judgment debtor's payment of the total owed to the judgment creditor, the clerk will mail the form to the judgment creditor, indicating that the judgment debtor has satisfied the judgment by making payment to the court [*see Code Civ. Proc. § 116.860(e)*]. The judgment creditor will receive the funds after mailing or delivering to the court clerk the Judgment Creditor's Request for Funds that appears at the end of the form.

[6] Related Forms

For notice of entry of judgment, see *§§ 526.164, 526.164A*

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46-526 California Forms of Pleading and Practice--Annotated § 526.166

§ 526.166 Attorney-Client Fee Dispute (Attachment to Notice of Entry of Judgment) [Code Civ. Proc. §§ 116.220(a)(4); Cal. Judicial Council Form SC-132]

[1] FORM Attorney-Client Fee Dispute (Attachment to Notice of Entry of Judgment) [Code Civ. Proc. §§ 116.220(a)(4); Cal. Judicial Council Form SC-132]

Click here to view image.

[2] Use of Form

This form is a reproduction of the Judicial Council Form SC-132, Attorney-Client Fee Dispute (Attachment to Plaintiff's Claim) [*see* Cal. Rules of Ct., Appen. A; *see also § 526.151*]. The form is for use by the court as an attachment to Notice of Entry of Judgment in those cases in which plaintiff seeks to confirm, correct or vacate an attorney fee arbitration award not exceeding $5,000 that is binding or has become binding [*Code Civ. Proc. 116.220(a)(4)*]. It may also be used in cases in which plaintiff seeks a hearing de novo after a nonbinding attorney fee arbitration award not exceeding $5,000 [*Code Civ. Proc. 116.220(a)(4)*; *Bus. & Prof. Code § 6200 et seq.*].

Use of this form is mandatory if Judicial Council Form SC-130 (*see § 526.164*) is used for the Notice of Entry of Judgment [*see Cal. Rules of Ct., Rule 1.31*; *see also* Cal. Rules of Ct., Appen. A]. However, if Judicial Council Form SC-200 is used for the Notice of Entry of Judgment [*see § 526.164A*], then judicial Council Form SC-202A should be used as the attachment instead [*see § 526.166A*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Related Form

For a discussion of small claims court actions seeking to confirm, correct, or vacate a binding attorney fee arbitration award and actions seeking de novo hearing of nonbinding attorney fee arbitration awards, see *§ 526.152*.

[4] State Statutes

Jurisdiction of small claims court over attorney-client fee arbitration awards. *Code Civ. Proc. §§ 116.220(a)(4)*

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46-526 California Forms of Pleading and Practice--Annotated § 526.166A

§ 526.166A Decision on Attorney-Client Fee Dispute [Code Civ. Proc. § 116.220(a)(4); Cal. Judicial Council Form SC-202A]

[1] FORM Decision on Attorney-Client Fee Dispute [Code Civ. Proc. § 116.220(a)(4); Cal. Judicial Council Form SC-202A]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Cal. Judicial Council Form SC-202A, to be used as an attachment to the Notice of Entry of Judgment in a case in which the plaintiff sought to confirm, correct, or vacate a binding attorney's fee arbitration award not exceeding $5,000 [*Code Civ. Proc. § 116.220(a)(4)*]. It may also be used if the plaintiff sought a de novo hearing after nonbinding fee arbitration award not exceeding $5,000 [*Code Civ. Proc. § 116.220(a)(4)*; *Bus. & Prof. Code § 6200 et seq.*].

Use of this form is mandatory if Judicial Council Form SC-200 (*see § 526.164A*) is used for the Notice of Entry of Judgment [*see Cal. Rules of Ct., Rule 1.31*; *see also* Cal. Rules of Ct., Appen. A]. However, if Judicial Council Form SC-130 is used for the Notice of Entry of Judgment [*see § 526.164*], then judicial Council Form SC-132 should be used as the attachment instead [*see § 526.166*].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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46-526 California Forms of Pleading and Practice--Annotated § 526.167

§ 526.167 Request to Make Payments [Code Civ. Proc. § 116.620; Cal. Judicial Council Form SC-220]

[1] FORM Request to Make Payments [Code Civ. Proc. § 116.620; Cal. Judicial Council Form SC-220]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Cal. Judicial Council Form SC-220, adopted by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.35*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is to be filed by a judgment debtor who wishes to request permission to pay a small-claims judgment in installments. After filing, the court clerk will mail copies of the form to all other parties [*Cal. Rules of Ct., Rule 3.2107(b)*]. The second page of this form is a reproduction of the contents of Cal. Judicial Council Form SC-220-INFO, which provides information about payments in small-claims cases and the procedure for obtaining permission to make installment payments.

For related forms, see *§ 526.167A* (Response to Request to Make Payments) and § 526.167B (Order on Request to Make Payments).

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46-526 California Forms of Pleading and Practice--Annotated § 526.167A

§ 526.167A Response to Request to Make Payments [Code Civ. Proc. § 116.620; Cal. Judicial Council Form SC-221]

[1] FORM Response to Request to Make Payments [Code Civ. Proc. § 116.620; Cal. Judicial Council Form SC-221]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Cal. Judicial Council Form SC-221, adopted by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.35*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form is for use by a judgment creditor to respond to the judgment debtor's request for permission to pay a small-claims judgment in installments. The response must be filed within 10 days after the clerk mails the request [*Cal. Rules of Ct., Rule 3.2107(b)*]. The judgment creditor may obtain information about installment payments, including procedural guidance, in Cal. Judicial Council Form SC-220-INFO, the contents of which are reproduced on the second page of the request form, Cal. Judicial Council Form SC-220.

For related forms, see *§ 526.167* (Request to Make Payments) and § 526.167B (Order on Request to Make Payments).

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46-526 California Forms of Pleading and Practice--Annotated § 526.167B

§ 526.167B Order on Request to Make Payments [Code Civ. Proc. § 116.620; Cal. Judicial Council Form SC-222]

[1] FORM Order on Request to Make Payments [Code Civ. Proc. § 116.620; Cal. Judicial Council Form SC-222]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Cal. Judicial Council Form SC-221, adopted by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.35*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

This form will be used by the court to enter its order on a judgment debtor's request for permission to pay a small-claims judgment in installments. If the request is granted, the order will specify the terms of payment.

For related forms, see *§ 526.167* (Request to Make Payments) and § 526.167A (Response to Request to Make Payments).

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46-526 California Forms of Pleading and Practice--Annotated § 526.168

§ 526.168 Judgment Debtor's Declaration [Code Civ. Proc. § 2015.5] of Full or Partial Payment to Judgment Creditor [Code Civ. Proc. § 116.850(d)(2)]

[1] FORM Judgment Debtor's Declaration [Code Civ. Proc. § 2015.5] of Full or Partial Payment to Judgment Creditor [Code Civ. Proc. § 116.850(d)(2)]

_____ Superior Court, Small Claims Division
_____ Judicial District
_____ County, California
_____ [*Address and telephone number of Court*]

_____ [*name*],	)	
_____ [*address*],	)	
Plaintiff,	)	NO. _____
vs.	)	DECLARATION
_____ [*name*],	)	OF _____ [*name*]
_____ [*address*],	)	(Small Claims)
Defendant.	)	
	)	
	)	

_____

I, _____ [*name*], declare:

1. I have made _____ [full *or* partial] payment of the judgment including accrued interest and costs to the judgment creditor _____ [*name of judgment creditor*].

[*EITHER*]

2. The judgment creditor has been requested to file an acknowledgment of satisfaction of the judgment and refuses to do so.

[*OR*]

2. The judgment creditor refuses to accept subsequent payments.

[*OR*]

2. The present address of the judgment creditor is unknown.

[*CONTINUE*]

3. The attached _____ [*list attached document(s), e.g.,* canceled check *and/or* money order *and/or* or cash receipt] constitute evidence of the judgment creditor's receipt of _____ [full *or* partial] payment.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]

[2] Use of Form

This form of declaration is for use by a judgment debtor who has made full or partial payment of the judgment to the judgment creditor [*see Code Civ. Proc. § 116.850(d)*]. A judgment debtor who has made full payment of the judgment to the judgment creditor will file this form with the clerk of the small claims court in order to have a satisfaction of judgment entered by the clerk [*see Code Civ. Proc. § 116.850(c)*]. A judgment debtor who has made partial payment of the judgment to the judgment creditor will file this form with the clerk of the small claims court in order to have a satisfaction of judgment entered on receipt by the clerk of the balance owing on the judgment [*see Code Civ. Proc. §§ 116.850(c), 116.860(c)*; *see also* discussion § 526.111].

This form should also be used in conjunction with *§ 526.165* when the judgment debtor has made a partial payment.

[3] Contents of Declaration

The contents of the declaration will create a rebuttable presumption of full or partial payment of the judgment [*see Code Civ. Proc. § 116.850(d)*]. Paragraph 1 states that the judgment debtor has made full or partial payment of the judgment including accrued interest and costs. Alternative Paragraphs 2 state the three factual situations required for a finding of a rebuttable presumption. Paragragh 3 sets out the documents identified in and accompanying the declaration that constitute evidence of the judgment creditor's receipt of full or partial payment [*Code Civ. Proc. § 116.850(d)(2)*; *see Code Civ. Proc. § 116.850(d)(1)*].

[4] Cross References

For a discussion and forms relating to declarations generally, see Ch. 15, *Affidavits, Certificates, and Declarations*

[5] State Statutes

Judgment creditor defined. *Code Civ. Proc. § 116.130(c)*

Judgment debtor defined. *Code Civ. Proc. § 116.130(d)*

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46-526 California Forms of Pleading and Practice--Annotated § 526.169

§ 526.169 Request to Correct or Cancel Judgment and Answer [Cal. Judicial Council Form SC-108]

[1] FORM Request to Correct or Cancel Judgment and Answer [Cal. Judicial Council Form SC-108]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Judicial Council Form SC-108, Request to Correct or Cancel Judgment and Answer. It is for use by either the plaintiff or defendant to move to correct a clerical error in a judgment or to vacate a judgment on the ground that the legal basis for the decision is incorrect or erroneous [*see Code Civ. Proc. § 116.725*]. Page 2 of this form may be used by any other party to file an answer to the request.

In ruling on the request, the court may use Judicial Council Form SC-108A, Order on Request to Correct or Cancel Judgment.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Response to Request

A party served this request may file a response with the court within 15 days and serve a copy on the opposing party [*see* Paragraph 5].

[4] Cross References

For discussion and forms for moving to vacate a judgment in superior court under *Code Civ. Proc. § 663*, including on the ground of an incorrect or erroneous legal basis, see *Ch. 371, Motions After Trial, § 371.90* et seq.

[5] California Points and Authorities

For memoranda of points and authorities in support of and opposition to a motion to vacate a judgment and enter a different judgment pursuant to *Code Civ. Proc. § 663*, see California Points and Authorities, Ch. 155, *Motions After Trial* , Pt. III (Matthew Bender)

[6] Decision

Motion to vacate judgment disallowing costs and enter judgment awarding statutorily authorized costs. *Gibson v. Hammang (1904) 145 Cal. 454, 456, 78 P. 953* (superior court action)

Motion to vacate judgment when court's legal conclusions are inconsistent with uncontroverted facts showing intention of parties. *Swanson v. Wheeler (1952) 112 Cal. App. 2d 43, 44-45, 245 P.2d 699* (superior court action)

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46-526 California Forms of Pleading and Practice--Annotated § 526.170

§ 526.170 Proceedings to Vacate Judgment [Code Civ. Proc. §§ 116.720, 116.730, 116.740; Cal. Judicial Council Form SC-135]--Notice of Motion and Declaration

[1] FORM Proceedings to Vacate Judgment [Code Civ. Proc. §§ 116.720, 116.730, 116.740; Cal. Judicial Council Form SC-135]--Notice of Motion and Declaration

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of the Judicial Council Form SC-135, Notice of Motion to Vacate Judgment and Declaration [Cal. Rules of Ct., Appen. A], and is for use by either the plaintiff or the defendant to move to vacate a judgment entered after the moving party failed to appear at the hearing of plaintiff's claim [*see Code Civ. Proc. §§ 116.720-116.740*].

Use of the form is optional [*see Cal. Rules of Ct., Rule 1.35*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Motion by Plaintiff

A plaintiff who did not appear at the hearing in the small claims court may file a motion to vacate the judgment with the clerk of the small claims court. The motion must be filed within 30 days after the clerk has mailed notice of entry of the judgment to the parties [*see §§ 526.164, 526.164A*]. The clerk must schedule the hearing on the motion to vacate for a date no earlier than 10 days after the clerk has mailed written notice of the date, time, and place of the hearing to the parties [*Code Civ. Proc. § 116.720(b)*].

On a showing of good cause, the small claims court may grant the motion. If the defendant is not present, the court must hear the motion in the defendant's absence [*Code Civ. Proc. § 116.720(c)*].

If the motion is granted and if all parties are present and agree, the court may hear the case without rescheduling it. If the defendant is not present, the judge or clerk shall reschedule the case and give notice in accordance with *Code Civ. Proc. § 116.330* (*see* discussion in *§ 526.52*) [*Code Civ. Proc. § 116.720(d)*].

[4] Motion by Defendant

[a] No Appearance After Proper Service

A defendant who did not appear at the hearing in the small claims court may file a motion to vacate the judgment with the clerk of the small claims court. The motion must be filed within 30 days after the clerk has mailed notice of entry of the judgment [*see §§ 526.164, 526.164A*] to the parties.

The defendant must appear at any hearing on the motion or submit written justification for not appearing together with a declaration in support of the motion [*Code Civ. Proc. § 116.730(b)*].

On a showing of good cause, the court may grant the motion to vacate the judgment. If the plaintiff is not present, the court must hear the motion in the plaintiff's absence [*Code Civ. Proc. § 116.730(c)*]. If the motion is granted and if all parties are present and agree, the court may hear the case without rescheduling it. If the plaintiff is not present, the judge or clerk shall reschedule the case and give notice in accordance with *Code Civ. Proc. § 116.330* [*Code Civ. Proc. § 116.730(d)*].

If the motion is denied, the defendant may appeal to the superior court only on the denial of the motion to vacate the judgment. The defendant must file the notice of appeal with the clerk of the small claims court within 10 days after the small claims court has mailed or delivered notice of the court's denial of the motion to vacate the judgment [*Code Civ. Proc. § 116.730(e)*; *see Code Civ. Proc. § 116.710(d)*; *see also § 526.172*].

If the superior court determines that the defendant's motion to vacate the judgment should have been granted, the superior court may hear the claims of all parties without rescheduling the matter, provided that all parties are present and the defendant has previously complied with *Code Civ. Proc. § 116.710 et seq.* Alternatively, the court may order the case transferred to the small claims court for a hearing [*Code Civ. Proc. § 116.730(f)*].

[b] No Appearance After Improper Service

If the defendant was not properly served with plaintiff's claim [*see § 526.151*] as required by *Code Civ. Proc. § 116.330* or *116.340* (*see* discussion in *§ 526.52[1]*) and did not appear at the hearing in the small claims court, the defendant may file a motion to vacate the judgment with the clerk of the small claims court. The motion must be accompanied by a supporting declaration, and shall be filed within 180 days after the defendant discovers or should have discovered that judgment was entered against him or her [*Code Civ. Proc. § 116.740(a)*; *see Code Civ. Proc. § 116.710(d)*].

The court may order that the enforcement of the judgment must be suspended pending a hearing and determination of the motion to vacate the judgment [*Code Civ. Proc. § 116.740(b)*].

On a showing of good cause, the court may grant the motion to vacate the judgment. If the plaintiff is not present the court must hear the motion in the plaintiff's absence [*Code Civ. Proc. § 116.740(c)*].

Code Civ. Proc. § 116.730(d)-(f) also apply to this motion by defendant [*Code Civ. Proc. § 116.740(c)*; *see § 526.94*].

[5] Filling in Form

[a] Title of Court and Case

For the manner of filling in the name and address of the court and the names of the parties, see the Comments to *see § 526.151*.

[b] Notice

The name of the opposing party should be typed in to the right of "NOTICE TO (Name)," since that is the party being notified that review of the judgment is being sought.

[c] Date, Time, and Place of Hearing (Paragraph 1)

This information is normally filled in by the small claims court clerk at the time the notice of motion is filed.

[d] Motion (Paragraph 2)

The motion is for an order vacating the judgment and is set forth in layman's terms in Paragraph 2. This paragraph also sets forth the matters on which the motion (request) is based.

[e] Date Judgment Was Entered (Paragraph 3)

The date the judgment was entered should be set forth.

[f] Date Party Learned of Entry of Judgment (Paragraph 4)

The date the appealing party learned that judgment had been entered should be set forth. This date is normally the date on which the party received the clerk's notice of entry of judgment.

[g] Ground of Motion (Paragraph 5)

The box in Paragraph 5a should be checked and the reason for the failure to appear typed in. The box in Paragraph 5b should be checked when a ground other than the party's failure to appear exists for vacating the judgment. The facts establishing the ground should be set out.

[6] Representations to Court (Paragraph 6)

The moving party is required, by signing the form, to declare under penalty of perjury that he or she understands the things that must be brought to the hearing on the motion to support the granting of the motion.

The clerk will collect a $20 fee for the filing of a motion to vacate [*Code Civ. Proc. § 116.745*].

[7] Decisions

Defaulting defendant as required initially to appeal denial of motion to vacate judgment. *Miller v. Superior Court (1979) 92 Cal. App. 3d 29, 31, 154 Cal. Rptr. 491*

[8] Cross Reference

For notice of appeal, see *§ 526.172*

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46-526 California Forms of Pleading and Practice--Annotated § 526.171

§ 526.171 Request for Court Order and Answer [Cal. Judicial Council Form SC-105]

[1] FORM Request for Court Order and Answer [Cal. Judicial Council Form SC-105]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Judicial Council Form SC-105, Request for Court Order and Answer. It is for use by any party to request that the court make a pretrial or post-trial order in a small claims case. Page 2 of this form may be used by any other party to file an answer to the request for an order.

In ruling on the request for an order, the court may use Judicial Council Form SC-105A, Order on Request for Court Order.

Use of the form is optional [*see Cal. Rules of Ct., Rule 1.35*; *see also* Cal. Rules of Ct., Appen. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

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46-526 California Forms of Pleading and Practice--Annotated § 526.172

§ 526.172 Notice of Appeal [Code Civ. Proc. § 116.750; Cal. Judicial Council Form SC-140]

[1] FORM Notice of Appeal [Code Civ. Proc. § 116.750; Cal. Judicial Council Form SC-140]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of the Judicial Council Form SC-140, Notice of Appeal [*see* Cal. Rules of Ct., Appen. A]. The filed form is completed by the clerk of the small claims court who will mail a copy of it to the nonappealing party [*see Cal. Rules of Ct., Rule 8.954(b)*; *see also Code Civ. Proc. § 116.710*; *Skaff v. Small Claims Court (1968) 68 Cal. 2d 76, 80-81, 65 Cal. Rptr. 65, 435 P.2d 825* (availability of right to appeal)].

Use of this form is optional [*see Cal. Rules of Ct., Rule 1.35*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Filing Notice of Appeal

An appeal from a small claims court judgment is taken by filing a notice of appeal with the clerk of the small claims court [*Code Civ. Proc. § 116.750(a)*]. The notice must be filed no later than 30 days after the clerk has delivered or mailed notice of entry of judgment. A notice of appeal filed after the 30-day period is ineffective for any purpose [*Code Civ. Proc. § 116.750(b)*]. The time for filing a notice of appeal is not extended by the filing of a request to correct a mistake or by virtue of any subsequent proceedings on that request, except that a new period for filing notice of appeal shall begin on the delivery or mailing of notice of entry of any modified judgment [*Code Civ. Proc. § 116.750(c)*].

The notice must be signed by the appellant or by the appellant's attorney and is sufficient if it states in substance that the appellant appeals from a specified judgment or, in the case of a defaulting defendant (discussed *below*), from the denial of a motion to vacate the judgment [*Cal. Rules of Ct., Rule 8.954(a)*].

[4] Defaulting Defendant

A defendant who did not appear at the small claims hearing may not file a notice of appeal, but may file a motion in the small claims court to vacate the judgment [*see Code Civ. Proc. § 116.710(d)*; *see also § 526.170*]. In that event, a notice of appeal (appealing the denial of the motion to vacate only) may be filed within 10 days after the clerk has mailed or delivered notice of the court's denial of a motion to vacate the judgment [*Code Civ. Proc. § 116.730(e)*].

[5] Insurer of Defendant

With respect to plaintiff's claim, the insurer of defendant may appeal the judgment to the superior court in the county in which the matter was heard if the judgment exceeds $2,500 and the insurer stipulates that its policy with the defendant covers the matter to which the judgment applies [*Code Civ. Proc. § 116.710(c)*].

[6] Filing Fee

The appealing party must pay a $75 fee for filing a notice of appeal [*Code Civ. Proc. § 116.760(a)*]. A party who does not appeal will not be charged any fee for filing any document relating to the appeal [*Code Civ. Proc. § 116.760(b)*].

[7] Procedure

The procedure for (1) filing the record on appeal; (2) setting for trial; and (3) dismissal, abandonment, and judgment are covered generally by *Code Civ. Proc. §§ 116.750-116.795*. The appeal in the superior court consists of a new hearing before a judicial officer other than the judicial officer who heard the action in the small claims division [*Code Civ. Proc. § 116.770(a)*]. The trial is conducted informally except that attorneys may participate [*Code Civ. Proc. § 116.770(b), (c)*; *see Code Civ. Proc. § 116.510*]. Neither a trial by jury nor the pretrial discovery procedures described in *Code Civ. Proc. § 2019(a)* (*Code Civ. Proc. § 2019.010* operative July 1, 2005) are permitted [*Code Civ. Proc. § 116.770(b)*]. The judgment of the superior court is final and is not appealable [*Code Civ. Proc. § 116.780(a)*]; however, it may, in an appropriate case, be reviewed by extraordinary writ [*see § 526.94[13]*]. *Code Civ. Proc. §§ 116.610-116.630* (small claims court judgments) applies to judgments of the superior court after a hearing on appeal [*Code Civ. Proc. § 116.780(b)*], except that, for good cause and when necessary to achieve substantial justice between the parties, the superior court may award a party to an appeal reimbursement of up to $150 in attorney's fees and costs and up to $150 for loss of earnings and expenses of transportation and lodging, actually and reasonably incurred in connection with the appeal [*Code Civ. Proc. § 116.780(c)*].

[8] Decisions

Right of appeal by plaintiff from adverse judgment on cross claim. *Skaff v. Small Claims Court (1968) 68 Cal. 2d 76, 79-81, 65 Cal. Rptr. 65, 435 P.2d 825*

No right of appeal by defendant from adverse judgment on cross claim. *Davis v. Superior Court (1980) 102 Cal. App. 3d 164, 168, 162 Cal. Rptr. 167*

[9] Cross Reference

For a related Form, *see § 526.170*

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Chapter 526 SMALL CLAIMS
PART IV. FORMS

46-526 California Forms of Pleading and Practice--Annotated § 526.173

§ 526.173 Proceedings for Award of Attorney's Fees and Costs for Bad Faith Appeal [Code Civ. Proc. § 116.790]--Notice of Motion and Declaration

[1] FORM Proceedings for Award of Attorney's Fees and Costs for Bad Faith Appeal [Code Civ. Proc. § 116.790]--Notice of Motion and Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE OF MOTION AND MOTION FOR OR-
_____ [*name*],	)	DER AWARDING ATTORNEY'S FEES AND
Defendant.	)	COSTS, SUPPORTING DECLARATION OF
	)	_____ [*name*], AND SUPPORTING
	)	MEMORANDUM
		Date: _____
		Time: _____
		Location: _____

_____

To _____ [Plaintiff *or* Defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [plaintiff *or* defendant] will, and hereby does, move for an order directing that _____ [defendant *or* plaintiff] pay to _____ [plaintiff *or* defendant] attorney's fees in the amount of $_____ [*specify amount of no more than $1,000*] and loss of earnings, transportation, and lodging costs in the amount of $_____ [*specify amount of no more than $1,000*]. The motion will be made on

the ground that _____ [defendant's *or* plaintiff's] appeal in the above-entitled action was without substantial merit and not based on good faith, but was intended to harass or delay _____ [plaintiff *or* defendant] or to encourage _____ [plaintiff *or* defendant] to abandon his/her claim.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (plaintiff *or* defendant)].

2. The appeal filed by _____ [*identify party or party's attorney against whom the motion is directed, e.g.,* _____ (*name*), attorney for _____ (defendant *or* plaintiff) in the above-entitled action,] on _____ [*date*], had no substantial merit, as is demonstrated in Paragraph(s) _____ [*specify*] of the memorandum of points and authorities that accompanies this notice of motion and declaration.

3. _____ [*Identify party or party's attorney against whom the motion is directed, e.g.,* _____ (*Name*), attorney for _____ (defendant *or* plaintiff),] prosecuted the appeal in bad faith in that [he/she knew or should have known of the legal authorities cited in the accompanying memorandum of points and authorities, which demonstrates that the appeal filed by him/her in the above-entitled action had no substantial merit. Furthermore,] _____ [*set out facts demonstrating that the appeal was intended to harass or delay the other party or to encourage the other party to abandon the claim, e.g.,* _____ (*name*), attorney for _____ (defendant *or* plaintiff), stated to me in telephone conversations on or about _____ (*date(s)*), that his/her client would "never pay" my client and wanted to "make an example out of" my client].

4. As a result of and in connection with this bad faith appeal, _____ [plaintiff *or* defendant] has actually and reasonably incurred attorney's fees in the sum of [at least] $_____ [*specify amount of no more than $1,000*] and has incurred an actual loss of earnings and has actually and reasonably incurred expenses for transportation and lodging of [at least] $_____ [*specify amount no more than $1,000*], as follows: _____ [*itemize services rendered by attorney and loss of earnings, transportation, and lodging costs actually and reasonably incurred*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: _____.

_____ [*signature*]
_____ [*typed name*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion.*]

[2] Use of Form

This notice of motion and supporting declaration is for use by a party who seeks to recover attorney's fees and expenses incurred as a result of the other party's bad faith appeal of a small claims judgment. The superior court may award the party attorney's fees of up to, but not exceeding, $1,000 and loss of earnings and transportation and lodging expenses up to, but not exceeding, $1,000 if the court finds, following a hearing, that the appeal was without substantial merit and not based on good faith but was intended to harass or delay the other party or to encourage the other party to abandon his or her claim [*Code Civ. Proc. § 116.790*].

A memorandum in support of the motion must be filed and served with the notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; see *Code Civ. Proc. §§ 1005(b), 1010*]. Counsel should use the memorandum to demonstrate that the defendant's legal grounds for appeal had no substantial legal merit [*see Code Civ. Proc. § 116.790*]. For further discussion of the showing required to justify an attorney's fees award, see *§ 526.94[12]*.

[3] Notice Requirements

Code Civ. Proc. § 116.790 does not specify any requisite notice period. If the notice is given by a noticed motion, the notice period specified by *Code Civ. Proc. § 1005* should be followed [*see Code Civ. Proc. § 1005(b)* (effective January 1, 1005, at least 16 court days' notice required for most motions)]. For discussion of notice of motions and motions in general, see Ch. 372, *Motions and Orders* .

[4] Written Statement of Reasons for Resulting Order

Although *Code Civ. Proc. § 116.790* does not expressly require that an order awarding attorney's fees recite in detail the circumstances justifying the order, due process apparently requires a statement of reasons justifying the sanctions [*see Hearst v. Ferrante (1987) 189 Cal. App. 3d 201, 204, 234 Cal. Rptr. 385* (written reasons are required to support award of attorney's fees after setting aside default based on mistake, inadvertence, surprise, or excusable neglect under *Code Civ. Proc. § 473*)].

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46-526 California Forms of Pleading and Practice--Annotated § 526.174

§ 526.174 Judgment Debtor's Statement of Assets [Code Civ. Proc. § 116.830; Cal. Judicial Council Form SC-133]

[1] FORM Judgment Debtor's Statement of Assets [Code Civ. Proc. § 116.830; Cal. Judicial Council Form SC-133]

Click here to view image.

[2] Use of Form

This form is an illustrative, filled-in reproduction of Cal. Judicial Council Form SC-133, Judgment Debtor's Statement of Assets [*see also* Cal. Rules of Ct., Appen. A; *see Code Civ. Proc. § 116.830(e)*]. The form is delivered to the judgment debtor by the court clerk at the time judgment is rendered or is mailed to the judgment debtor with the notice of entry of judgment [*Code Civ. Proc. § 116.830(a)*].

Use of the form is optional [*see Cal. Rules of Ct., Rule 1.35*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Deadlines for Completing Form

Within 30 days after the clerk has mailed notice of entry of the judgment, unless the judgment has been satisfied, the judgment debtor shall complete the form and cause it to be delivered to the judgment creditor [*Code Civ. Proc. § 116.830(b)*]. In the event a motion is made to vacate the judgment or a notice of appeal is filed, the form must be completed within 30 days after the clerk has delivered or mailed notice of denial of the motion to vacate or notice of dismissal of or entry of judgment on the appeal, whichever is applicable [*Code Civ. Proc. § 116.830(c)*]. Willful failure to complete and return the form may result in the imposition of sanctions as provided in *Code Civ. Proc. § 708.170* (failure of person to appear for examination) on the request of the judgment creditor [*see Code Civ. Proc. § 116.830(d)*; *see also § 526.175*].

[4] Filling in Form

The information required by the form is self-explanatory. Property exempt from execution and procedures for claiming the exemption are set forth in *Code Civ. Proc. §§ 703.010-703.140* [*see Ch. 254, Executions and Enforcement of Judgments*].

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46-526 California Forms of Pleading and Practice--Annotated § 526.175

§ 526.175 Application and Order to Produce Statement of Assets and to Appear for Examination [Code Civ. Proc. §§ 116.830(d), 708.170(a); Cal. Judicial Council Form SC-134]

[1] FORM Application and Order to Produce Statement of Assets and to Appear for Examination [Code Civ. Proc. §§ 116.830(d), 708.170(a); Cal. Judicial Council Form SC-134]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Cal. Judicial Council Form SC-134, Application and Order to Produce Statement of Assets and to Appear for Examination. When a judgment debtor willfully fails to pay the judgment or file the Judgment Debtor's Statement of Assets [*see § 526.174*] as required by *Code Civ. Proc. § 116.830(b)* or *(c)*, the judgment creditor may use this form to make the request provided for under *Code Civ. Proc. § 116.830(d)*, that is, request that the court apply the sanctions provided for in *Code Civ. Proc. § 708.170* (*discussed under § 526.175[4]*). The use of this form in making a request under *Code Civ. Proc. § 116.830(d)* is mandatory [*Cal. Rules of Ct., Rule 1.31*; *see also* Cal. Rules of Ct., Appen. A].

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Completing and Serving the Form

To make this request under *Code Civ. Proc. § 116.830(d)*, the judgment creditor fills out the application portion of the form, presents the form to the clerk and pays the fee. The clerk sets a hearing date in the order portion of the form, and returns the original and one copy to the judgment creditor. The judgment creditor must then have the form served personally on the judgment debtor by a sheriff, marshall, or registered process server at least 10 calendar days before the hearing date, and file proof of service with the court [*see* the Instructions for Judgment Creditor, printed as page two of the form (note that the page two, containing only these instructions, need not be filed and served)]. For a proof of service form, see *§ 526.153*.

[4] Order and Hearing

The order portion requires that the judgment debtor do either of the following:

- Pay the judgment, with costs and interest, before the hearing date set by the order.

- Appear with a completed Statement of Assets (*see § 526.174*), and explain why the Statement of Assets was not completed within the required time and otherwise answer questions about income and assets.

If the judgment debtor does not pay the judgment before the hearing date, the judgment creditor must attend the hearing [*see* the Instructions for Judgment Creditor, printed as page two of the form].

If the judgment debtor fails either to pay or appear at the hearing, the court may issue a warrant to have him or her brought before the court to answer for the failure to appear, and may punish the judgment debtor for contempt, or the court may issue a warrant for the arrest of the judgment debtor [*Code Civ. Proc. § 708.170(a)(1)*; see *Code Civ. Proc. § 1993*].

If the judgment debtor's failure to appear is without good cause, the court must award the judgment creditor reasonable attorney's fees incurred in this examination proceeding. This award against the judgment debtor becomes a part of the principal amount of the judgment [*Code Civ. Proc. § 708.170(a)(2)*; *see also* discussion in *Ch. 254, Executions and Enforcements of Judgments, § 254.180* et seq.]. Thus, when the judgment creditor attends the hearing, he or she should be prepared to present to court a memorandum detailing any attorney's fees incurred in the proceedings, to provide the court with a basis for an award of fees under *Code Civ. Proc. § 708.170(a)(2)* if it should later determine that the judgment debtor's failure to appear was without good cause.

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46-526 California Forms of Pleading and Practice--Annotated § 526.176

§ 526.176 Proof of Service by Mail [Cal. Rules of Ct., Rule 3.2107; Cal. Judicial Council Form SC-112A]

[1] FORM Proof of Service by Mail [Cal. Rules of Ct., Rule 3.2107; Cal. Judicial Council Form SC-112A]

Click here to view image.

[2] Use of Form

This form is an illustrative reproduction of Cal. Judicial Council Form SC-112A, which may be used to prove service of any document allowed to be served by mail. This form has been adopted by the Judicial Council for optional use [*see Cal. Rules of Ct., Rule 1.35*; *see also* Cal. Rules of Ct., Appen. A]. The second page of the form contains instructions for accomplishing service and filing the proof of service.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Service by mail is not permitted for the Plaintiff's Claim and ORDER to Go to Small Claims Court (Cal. Judicial Council Form SC-100; *see § 526.151*) or for the Defendant's Claim and ORDER to Go to Small Claims Court (Cal. Judicial Council Form SC-120; *see § 526.158*). Service of those pleadings must be accomplished by personal service, substituted service, or mailing by the clerk of the small claims court [*Code Civ. Proc. §§ 116.340(a), 116.360(b)*]. For discussion of service of these pleadings, see *§ 526.52*. For a form for proof of service of these pleadings (Cal. Judicial Council Form SC-104), see *§ 526.153*.

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Chapter 527 SOCIAL SERVICES

46-527 California Forms of Pleading and Practice--Annotated 527.syn

§ 527.syn Synopsis to Chapter 527: SOCIAL SERVICES

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§ 527.31 "Department," "Director," and "Recipient" Defined

§ 527.32 State Hearing Procedure

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[4] Position Statement

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§ 527.33 Equitable Estoppel

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§ 527.50 Petition for Writ of Administrative Mandate

§ 527.51 Standard of Review

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§ 527.60 Administrative Remedy Unavailable or Inadequate

§ 527.61 Relief Available to Class

§ 527.62 Jurisdiction

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§ 527.70 Related Matthew Bender Publications

§ 527.71 Federal Statutes

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[3] Judicial Proceedings

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§ 527.76 Decisions

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[a] Federally Assisted Programs

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§ 527.77 Attorney General Opinions

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§ 527.90 Petition for Writ of Mandate to Review State Hearing Decision

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Filing of Petition

[6] Attorney's Fees and Costs

[7] Interest

[8] Filing of Record

[9] Memorandum

[10] Scope of Review

§ 527.91 Alternative Writ of Mandate

[1] FORM

[2] Use of Form

§ 527.92 Class Action Complaint for Declaratory Relief to Declare Regulation Invalid and Petition for Writ of Mandate to Compel Benefit Payments

[1] FORM

[2] Use of Form

[3] Caption

[4] Allegations

[a] Class Action

[b] Complaint for Declaratory Relief

[c] Petition for Writ of Mandate

[5] Verification

[6] Jurisdiction

[7] Statute of Limitations for Ordinary Writ of Mandate

[8] Amount of Recovery

[9] Award of Attorney's Fees

[10] Points and Authorities

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PART I. SCOPE

46-527 California Forms of Pleading and Practice--Annotated § 527.01

§ 527.01 Scope of Chapter

This chapter discusses the law relating to public social services in California and the remedies available to dissatisfied applicants and recipients, including:

- The procedure for statutory hearings before the State Department of Social Services or the State Department of Health Services [*see § 527.30* et seq.].

- Judicial review of state hearing decisions and other types of actions that can be brought to enforce the rights of applicants for and recipients of social services [*see § 527.50* et seq.].

General principles relating to social services are also discussed services [*see § 527.10* et seq.].

The chapter also contains the following forms:

- Form of petition for a writ of mandate to review a state hearing decision [*see § 527.90*].

- Form of petition for an alternative writ of mandate [*see § 527.91*].

- Form of complaint for declaratory relief and petition for a writ of mandate [*see § 527.91*].

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PART I. SCOPE

46-527 California Forms of Pleading and Practice--Annotated § 527.02

§ 527.02 Cross References

Related chapters in this publication include the following:

- For discussion, forms, and general allegations for use in class actions, see Ch. 120, *Class Actions* .

- For discussion and forms relating to proceedings *in forma pauperis*, see *Ch. 174, Costs and Attorney's Fees, § 174.110* et seq. Copies of Judicial Council forms for use in proceedings *in forma pauperis*, suitable for reproduction, are available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

- For discussion and general forms relating to proceedings for writ of mandate, see Ch. 358, *Mandate and Prohibition* .

- For discussion and forms relating to actions involving public entities for failure to discharge their mandatory duties, see Ch. 464, *Public Entities and Officers: California tort Claims Act*, § 464.40 et seq.

- For discussion and forms relating to review of administrative trials, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

- For forms and procedure relating to unemployment insurance, see Ch. 564, *Unemployment and Disability Insurance* .

For discussion and forms relating to federal retirement, survivor, and disability benefits, including the federally administered Supplemental Security Income (S.S.I.) benefit for aged, blind, or disabled citizens, see Social Security Practice Guide (Matthew Bender).

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46-527 California Forms of Pleading and Practice--Annotated §§ 527.03-527.09

[Reserved]

§§ 527.03[Reserved]

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Chapter 527 SOCIAL SERVICES
PART II. LEGAL BACKGROUND
A. General Principles Related to Administration of Social Services

46-527 California Forms of Pleading and Practice--Annotated § 527.10

§ 527.10 Governing Statutes

The federal Social Security Act, which provides federal funds for state public assistance programs, is set forth in *42 U.S.C. § 301 et seq.*

California public social services law is set forth in *Welf. & Inst. Code § 10000 et seq.* State hearings are governed by *Welf. & Inst. Code § 10950 et seq.* Aid and medical assistance programs, which receive funds under the federal Social Security Act, are covered by *Welf. & Inst. Code § 11000 et seq.*

Judicial review of state hearing decisions is governed by *Welf. & Inst. Code § 10962* and *Code Civ. Proc. § 1094.5*.

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PART II. LEGAL BACKGROUND
A. General Principles Related to Administration of Social Services

46-527 California Forms of Pleading and Practice--Annotated § 527.11

§ 527.11 Definitions

The following statutory definitions apply to terms used in this chapter:

- "Aid" means financial assistance provided to or in behalf of needy persons under the terms of *Welf. & Inst. Code § 10000 et seq.*, including direct money payments and vendor payments [*Welf. & Inst. Code § 10052*].

- "County department" means the county agency designated by the board of supervisors, or by such other authority as may be provided in the county charter, as responsible for the administration of public social services [*Welf. & Inst. Code § 10058*].

- "County director" means the director or other chief executive of the county department [*Welf. & Inst. Code § 10059*].

- "Public assistance" and "public assistance programs" mean those public social services programs provided for in *Welf. & Inst. Code § 11000 et seq.* [*Welf. & Inst. Code § 10061*].

- "Public social services" means those activities and functions of state and local government administered or supervised by the State Department of Social Services or the State Department of Health Services that are involved in providing aid or services, or both, including health care services and medical assistance, to those people of the state who, because of their economic circumstances or social conditions, are in need of and may benefit by that aid or those services [*Welf. & Inst. Code § 10051*].

- "Regulations" include, but are not limited to, standards of eligibility for aid and services, procedures necessary for the proper and efficient administration of public social services, and standards regarding conditions that must be met by agencies or individuals subject to licensing or supervision by the State Department of Social Services or the State Department of Health Services [*Welf. & Inst. Code § 10060*].

"Services" means those activities and functions performed by the social work staff and related personnel of the State Department of Social Services and county departments with or in behalf of individuals or families that are directed toward the improvement of the capabilities of those individuals or families to maintain or achieve a sound family life, rehabilitation, self-care, and economic independence [*Welf. & Inst. Code § 10053*].

A "state hearing" is a hearing pursuant to *Welf. & Inst. Code § 10950* before either the State Department of Social Services or the State Department of Health Services, available either to a recipient of public assistance prior to suspension, reduction, discontinuation, or termination of assistance [*see Welf. & Inst. Code § 10950*; *45 C.F.R. § 205.10(a)(6)(i)(A)*; *see also Goldberg v. Kelly (1970) 397 U.S. 254, 267-271, 90 S. Ct. 1011, 25 L. Ed. 2d 287* ; *In re Darlene T. (2008) 163 Cal. App. 4th 929, 939, 78 Cal. Rptr. 3d 119*] or to an applicant for public assistance on denial of assistance [*see Welf. & Inst. Code § 10950*; *45 C.F.R. § 205.10(a)(5)*]. Prior to its 1991 amendment, this hearing was known as and referred to in both statutory and case law as a "fair" hearing [*see* former *Welf. & Inst. Code § 10950*; *see also § 527.32[1]*]. Effective January 1, 1992, the hearing is statutorily denominated a "state" hearing [*Welf. & Inst. Code § 10950*, as amended by Stats. 1991, ch. 820, § 6]. State hearing procedure is *discussed under § 527.30* et seq.

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§ 527.12 Relationship of Federal and California Law

The federal Social Security Act provides federal funds for various public assistance programs [*see 42 U.S.C. §§ 601 et seq.* (grants to states for aid and services to needy families with children and for child-welfare services), *42 U.S.C. §§ 1381-1383c* (supplemental security income for aged, blind, and disabled), *42 U.S.C. §§ 1396-1396s* (grants to states for medical assistance programs), *42 U.S.C. §§ 1397-1397e* (grants to states for services)].

The California public social services acts were adopted or amended for the purpose of operating in harmony with the federal system in order to obtain federal assistance in providing aid to needy persons [*Pearson v. State Social Welfare Bd. (1960) 54 Cal. 2d 184, 214, 5 Cal. Rptr. 553, 353 P.2d 33* ; *Newbold v. Social Welfare Bd. (1946) 76 Cal. App. 2d 844, 847, 174 P.2d 482]* .

Since the state assistance programs involve federal subsidies, they are subject to reasonable federal regulations. Under both the federal and state acts, administrative boards are empowered to promulgate rules, regulations, and administrative interpretations affecting these programs. These regulations should be harmonized, whenever possible, within the statutory limits established, in order to carry out the cooperative public purpose and law of both sovereigns [*Pearson v. State Social Welfare Bd. (1960) 54 Cal. 2d 184, 215, 5 Cal. Rptr. 553, 353 P.2d 33]* .

It is the public policy of the state to establish and maintain conformity between the state law and the requirements of the federal act to facilitate the receipt of grants-in-aid in support of the state public assistance program [*Pearson v. State Social Welfare Bd. (1960) 54 Cal. 2d 184, 189, 5 Cal. Rptr. 553, 353 P.2d 33]* . Thus, if the United States Department of Health and Human Services issues a formal ruling that any section of the Welfare and Institutions Code relating to public assistance cannot be given effect without causing California's plan to be out of conformity with federal requirements, that section becomes inoperative to the extent of its nonconformity with federal requirements [*Welf. & Inst. Code § 11003*].

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§ 527.13 Types of Aid

[1] Public Assistance Programs

Aid is provided to needy persons in California under the aid and medical assistance programs provided for in *Welf. & Inst. Code § 11000 et seq.* These programs receive federal funds and must therefore be administered in conformity with federal regulations [*see Vaessen v. Woods (1984) 35 Cal. 3d 749, 751, 756-764, 200 Cal. Rptr. 893, 677 P.2d 1183* ; *Pearson v. State Social Welfare Bd. (1960) 54 Cal. 2d 184, 189, 5 Cal. Rptr. 553, 353 P.2d 33* ; *see also discussion under § 527.12*].

Public assistance programs for which the federal government defrays a large portion of the cost, such as those provided for in *Welf. & Inst. Code § 11000 et seq.*, which are administered by the county under the supervision of the state, are sometimes referred to as "categorical" assistance programs [*see Rogers v. Detrich (1976) 58 Cal. App. 3d 90, 99, 128 Cal. Rptr. 261]* .

Benefits under the State Supplementary Program for the Aged, Blind, and Disabled [*Welf. & Inst. Code § 12000 et seq.*] are paid through federal, rather than state, administration [*see Rogers v. Detrich (1976) 58 Cal. App. 3d 90, 94 n.3, 128 Cal. Rptr. 261]* . For detailed discussion and forms relating to the federally administered Supplemental Security Income program (S.S.I.), see Social Security Practice Guide, ch. 25, *Supplemental Security Income* (Matthew Bender).

[2] County Aid

Every county is required to relieve and support all incompetent, poor, and indigent persons and those incapacitated by age, disease, or accident, who lawfully reside in the county and are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions [*Welf. & Inst. Code § 17000*]. Aid provided by the counties through county funds is referred to as "general assistance" [*see Mooney v. Pickett (1971) 4 Cal. 3d 669, 671, 94 Cal. Rptr. 279, 483 P.2d 1231* ; *Watkins v. County of Alameda (2009) 177 Cal. App. 4th 320, 329, 98 Cal. Rptr. 3d 847*].

No state or federal funds are provided for this purpose, and the counties are not required to grant any specific type of

relief or to pay any specific amount of money [*County of Los Angeles v. Department of Social Welfare (1953) 41 Cal. 2d 455, 458, 260 P.2d 41]* . The county has a broad discretion to determine eligibility for, the type and amount of, and conditions to be attached to indigent relief [*Mooney v. Pickett (1971) 4 Cal. 3d 669, 678, 94 Cal. Rptr. 279, 483 P.2d 1231* ; *County of Los Angeles v. Department of Social Welfare (1953) 41 Cal. 2d 455, 458, 260 P.2d 41; Alford v. County of San Diego (2007) 151 Cal. App. 4th 16, 32, 59 Cal. Rptr. 3d 596 (flat income cap eligibility standard that does not consider individual's ability to pay all or part of subsistence medical care is not permitted)]* .

Despite this broad discretion, to determine the level of general assistance to be paid, counties must conduct studies of what is needed for minimum subsistence, because the general assistance level must be justified by and based on evidence of the actual cost of minimum subsistence in the county. Minimum subsistence, at the least, must include allocations for housing, food, utilities, clothing, transportation, and medical care [*Scates v. Rydingsword (1991) 229 Cal. App. 3d 1085, 1089, 280 Cal. Rptr. 544* ; *Whitfield v. Board of Supervisors (1991) 227 Cal. App. 3d 451, 457, 460-461, 277 Cal. Rptr. 815* ; *Boehm v. Superior Court (1986) 178 Cal. App. 3d 494, 499-502, 223 Cal. Rptr. 716* (appeal after remand)].

However, the requirement for conducting studies of what is needed for minimum subsistence appears to have been limited. *Welf. & Inst. Code § 17000.5*, which sets 62 percent of the federal poverty level as a sufficient standard of aid, has been held to be the legislative equivalent of repealing the requirement for a factual study of what amount is needed for minimum subsistence (*Boehm* study). Any county that meets the 62 percent requirement has by definition provided minimum subsistence needs [*Oberlander v. County of Contra Costa (1992) 11 Cal. App. 4th 535, 542, 15 Cal. Rptr. 2d 182]* . In addition, the effect of *Welf. & Inst. Code § 17001.5* has been held to permit a county to reduce general assistance aid to groups of unrelated adults living together, and so long as reductions do not exceed percentages set forth in the statute, the county need not conduct a *Boehm* study as to the sufficiency of its aid levels [*Oberlander v. County of Contra Costa (1992) 11 Cal. App. 4th 535, 543, 15 Cal. Rptr. 2d 182]* .

Furthermore, to be valid under the general relief statutes, the county's regulations must be consistent with the statutes and reasonably necessary to effectuate the statutory purpose [*see* *Nelson v. Board of Supervisors (1987) 190 Cal. App. 3d 25, 31, 235 Cal. Rptr. 305]* .

The Department of Social Services and the Department of Health Services have no power to supervise or control the administration of indigent relief provided by the counties and have no jurisdiction to consider complaints relating to the adequacy of the relief [*see* *County of Los Angeles v. Department of Social Welfare (1953) 41 Cal. 2d 455, 459, 260 P.2d 41* ; *Welf. & Inst. Code § 10950* (state hearing procedure not applicable to recipient of aid exclusively financed by county funds); *see also* discussion in *§ 527.13[2]*].

Because no federal funds are provided to the counties for general assistance, federal regulations are not applicable to the administration of county aid. However, the procedures established by the counties must satisfy the constitutional requirements of procedural due process [*see* *Goldberg v. Kelly (1970) 397 U.S. 254, 269-270, 90 S. Ct. 1011, 25 L. Ed. 2d 287* ; *Griffeth v. Detrich (9th Cir. 1979) 603 F.2d 118, 120-122* , *cert. denied*, *445 U.S. 970]* . These constitutional requirements are discussed in *§ 527.15*.

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§ 527.14 Administration of Public Social Services

[1] Supervision by State

The State Department of Social Services is designated as the single state agency with full power to supervise every phase of the administration of all public social services except health care services and medical assistance, for which grants-in-aid are received from the United States government or made by the state in order to secure full compliance with the applicable provisions of state and federal laws [*Welf. & Inst. Code § 10600*].

Similarly, the State Department of Health Services is designated as the agency with the same supervisory power over health care services and medical assistance [*Welf. & Inst. Code § 10740*].

Each single state agency responsible for administering federal funds can delegate specific responsibilities to other state agencies through interagency agreements, provided these plans are approved by the federal government (i.e. the state controller's office has performed Medi-Cal audits for the California Dept. of Health Services) [*RCJ Medical Services, Inc. v. Bonta (2001) 91 Cal. App. 4th 986, 1008, 91 Cal. App. 4th 986]* .

The State Department of Social Services must advise public officers regarding the administration of public social services by public agencies throughout the state, and must supervise the administration of state public social services, except health care services and medical assistance, to all persons receiving or eligible to receive state public social services [*Welf. & Inst. Code § 10603*]. The State Department of Health Services must perform the same functions with regard to health care services and medical assistance [*Welf. & Inst. Code § 10742*].

In administering any funds appropriated or made available for disbursement through the counties for welfare purposes, the State Department of Social Services must do both of the following [*Welf. & Inst. Code § 10604*]:

- Require, as a condition for receiving grants-in-aid, that the county bear the proportion of the total expense of furnishing aid that is fixed by relevant law.

- Establish lawful regulations fixing statewide standards for the administration of all state or federally assisted public social services, except health care services and medical assistance, that define and control the conditions under which these public social services may be granted or refused. All regulations established by the department are binding on the boards of supervisors and the county departments.

The State Department of Health Services must similarly establish regulations relating to health care services and medical assistance, which are also binding on the boards of supervisors and the county departments [*Welf. & Inst. Code § 10743*].

The Director of the State Department of Social Services and the Director of the State Department of Health Services may invoke sanctions against counties that fail to comply either with code provisions or department regulations relating to public social services [*see Welf. & Inst. Code §§ 10605, 10744*].

[2] Administration by County

Subject to the provisions of *Welf. & Inst. Code §§ 11050* (contract for state administration) and 12000 et seq. (federal administration of state supplementary program), the administration of public social services in each of the counties of the state is a county function and responsibility, and therefore rests on the boards of supervisors in the respective counties pursuant to the applicable laws, and, in the case of public social services for which federal or state funds are provided, is subject to the regulations of the State Department of Social Services and the State Department of Health Services [*Welf. & Inst. Code § 10800*].

For the purpose of providing for and carrying out this function and responsibility, the board of supervisors of each county, or any other agency that is otherwise provided by county charter, must establish a county department, unless otherwise provided by the county charter. The county department is the county agency for the administration of public social services and for the promotion of public understanding of the public social services provided under the Welfare and Institutions Code and the problems with which they deal [*Welf. & Inst. Code § 10800*]. The county department must carry out its responsibilities in accordance with the regulations of the State Department of Social Services and the State Department of Health Services [*Welf. & Inst. Code § 10809*].

For a discussion of the powers of the county in the administration of general assistance, which is financed solely by county funds, see the *discussion under § 527.13[2]*.

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§ 527.15 Availability of Regulations and Information

The Director of the State Department of Social Services and the Director of the State Department of Health Services are authorized to adopt regulations, orders, or standards of general application to implement, interpret, or make specific the law enforced by their respective departments [*Welf. & Inst. Code §§ 10554, 10725*]. The regulations need not be printed in the California Code of Regulations or California Administrative Register if they are included in the publications of the department [*Welf. & Inst. Code §§ 10554, 10725*].

The State Department of Social Services and the State Department of Health Services must publish and make available, at no cost to the public, all of their respective rules and regulations relating to the government of the department and any form of public assistance or health care services or medical assistance for which state aid is granted to the counties or over the administration of which the department has supervision [*Welf. & Inst. Code §§ 10606, 10745*].

Each department must also provide, at no cost, any subscription service that is necessary to assure prompt receipt of all additions and amendments to the rules and regulations [*Welf. & Inst. Code §§ 10606, 10745*]. The State Department of Social Services must also provide a similar subscription service for the digests of state hearing decisions compiled under *Welf. & Inst. Code § 10964* [*Welf. & Inst. Code § 10606*].

Copies of all laws relating to any form of public social service for which state aid is granted to counties, and over the administration of which the State Department of Social Services or State Department of Health Services has supervision, and copies of all bulletins and rules and regulations of each department must be made available to the public and for public inspection during regular office hours at each county office administering such aid and in each local or regional office of each department [*Welf. & Inst. Code §§ 10608, 10747*].

The board of supervisors of each county, or any other agency authorized by county charter, must adopt standards of aid and care for general assistance provided to the indigent and dependent poor of the county [*Welf. & Inst. Code § 17001*; *see Pettye v. City And County of San Francisco (2004) 118 Cal. App. 4th 233, 243-248, 12 Cal. Rptr. 3d 798* (voters may amend general assistance standards through initiative process)]. The standards for general assistance promulgated by a county pursuant to *Welf. & Inst. Code § 17001* must be open to public inspection under the provisions of the

California Public Records Act [*see Gov. Code § 6250 et seq.*; *55 Ops. Cal. Att'y Gen. 67 (1972)]* .

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§ 527.16 Due Process Requirements

[1] Pre-Termination Hearing

Under the *due process clause of the Fourteenth Amendment*, a recipient of welfare benefits under either state or federal law is entitled to an evidentiary hearing before his or her benefits can be terminated [*Goldberg v. Kelly (1970) 397 U.S. 254, 269-270, 90 S. Ct. 1011, 25 L. Ed. 2d 287* ; *Wheeler v. Montgomery (1970) 397 U.S. 280, 281-282, 90 S. Ct. 1026, 25 L. Ed. 2d 307* ; *McCullough v. Terzian (1970) 2 Cal. 3d 647, 654, 87 Cal. Rptr. 195, 470 P.2d 4]* .

Procedural due process includes the following requirements [*Goldberg v. Kelly (1970) 397 U.S. 254, 267-271, 90 S. Ct. 1011, 25 L. Ed. 2d 287]* :

- Timely and adequate notice detailing the reasons for the proposed termination.
- An opportunity for the recipient to confront and cross-examine adverse witnesses.
- An opportunity to present arguments and evidence orally.
- Allowing the recipient to retain counsel.
- An impartial decisionmaker.
- A statement by the decisionmaker indicating the reasons for his or her determination and the evidence relied on in making that decision.

The pre-termination hearing need not take the form of a judicial or quasi-judicial trial if a statutory fair hearing procedure provides a full administrative review [*see* *Goldberg v. Kelly (1970) 397 U.S. 254, 267, 90 S. Ct. 1011, 25 L. Ed. 2d 287* ; *McCullough v. Terzian (1970) 2 Cal. 3d 647, 656-657, 87 Cal. Rptr. 195, 470 P.2d 4]* . Furthermore, no preliminary hearing is necessary if the state continues to pay benefits until after the fair hearing is concluded [

Goldberg v. Kelly (1970) 397 U.S. 254, 267 n.14, 90 S. Ct. 1011, 25 L. Ed. 2d 287] .

These due process requirements are now included in federal regulations which set forth standards for hearings provided to recipients of benefits under federally assisted state programs [*see 45 C.F.R. § 205.10*]. Under these regulations, if the recipient makes a timely request for a hearing, assistance may not be suspended, reduced, discontinued, or terminated (but is subject to recovery by the agency if its action is sustained) until a decision is rendered after a hearing, unless a determination is made at the hearing that the sole issue is one of state or federal law or policy, or a change in state or federal law, and not one of incorrect grant computation [*see 45 C.F.R. § 205.10(a)(6)(i)(A)*; *see also 45 C.F.R. § 205.10(a)(16)* (final administrative action to be taken within 90 days of request for hearing)].

Fair hearing procedures in California are governed by *Welf. & Inst. Code § 10950 et seq.* These provisions are discussed further in Part B, § 527.30 et seq.

[2] Hearing on Denial of Application for Aid

An applicant for aid under federally assisted state programs is also entitled to a state hearing if his or her application is denied [*Welf. & Inst. Code § 10950*; *45 C.F.R. § 205.10(a)(5)*; *see § 527.30* et seq.].

The Welfare and Institutions Code does not provide for a hearing for an applicant whose application for general assistance, which is not federally funded, has been denied [*see Welf. & Inst. Code §§ 10950, 17001 et seq.*]. However, a federal court of appeal has held that an applicant for general assistance has an expectation of benefits that is a property interest under *U.S. Const., amend. XIV*, and that county procedures regarding applications for general assistance must therefore satisfy due process requirements established by the United States Supreme Court [*Griffeth v. Detrich (9th Cir. 1979) 603 F.2d 118, 120-122 , cert. denied, 445 U.S. 970]* . For a discussion of these due process requirements, see [1], *above*.

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[Reserved]

§§ 527.17[Reserved]

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§ 527.30 Procedures Do Not Apply to County or Federally Administered Aid

The discussion in this Subpart relates to the procedure for state hearings before the State Department of Social Services or the State Department of Health Services, based on requests for such hearings by applicants for or recipients of public social services.

The statutory procedures do not apply to the state supplementary program for the aged, blind, and disabled [*see Welf. & Inst. Code § 12000 et seq.*]. This Supplemental Security Income (S.S.I.) program, adopted pursuant to Title XVI of the Social Security Act (*42 U.S.C. § 1381 et seq.*), is federally administered. For detailed discussion and forms relating to S.S.I. benefits, see Social Security Practice Guide, ch. 25, *Supplemental Security Income* (Matthew Bender).

These procedures also do not apply to applicants or recipients of aid exclusively financed by county funds or of aid under the state supplementary program for the aged, blind, and disabled [*see Welf. & Inst. Code § 10950*]. Aid exclusively financed by county funds is administered in accordance with procedures established by the county [*see Welf. & Inst. Code § 17000 et seq.*; *see also § 527.13[2]*].

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§ 527.31 "Department," "Director," and "Recipient" Defined

Statutory definitions relevant to this Subpart include the following:

- "Department" means the State Department of Social Services [*Welf. & Inst. Code § 10054*].

- "Director" means the Director of Social Services [*Welf. & Inst.Code § 10055*].

- "Recipient" as used in this part means an applicant for or recipient of any public social service, *except* aid exclusively financed by county funds (*see § 527.13[2]*) or aid administered pursuant to *Welf. & Inst. Code § 12000 et seq.* (S.S.I. program for aged, blind, and disabled; *see § 527.13[1]*) or aid administered under *Welf. & Inst. Code § 18350 et seq.* (state-funded payments to residential care providers for 24-hour out-of-home care for seriously emotionally disturbed children) [*Welf. & Inst. Code § 10950*].

Additional statutory definitions that may apply, *e.g.*, "state hearing," are *set out in § 527.11*.

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§ 527.32 State Hearing Procedure

[1] Opportunity for State Hearing

An applicant for or recipient of public social services who has filed a request for a state hearing with the state department that administers the service must be accorded an opportunity for that hearing [*Welf. & Inst. Code § 10950*; *see In re Darlene T. (2008) 163 Cal. App. 4th 929, 939, 78 Cal. Rptr. 3d 119*].

The "state hearing" was, before 1992, known as a "fair hearing" in statutory and case law [*see* former *Welf. & Inst. Code § 10950*; *see also, e.g., County of Santa Clara v. Support, Inc. (1979) 89 Cal. App. 3d 687, 704, 152 Cal. Rptr 754]* . "Fair hearing" was a term of art set forth in former *Welf. & Inst. Code § 10950* with roots in federal welfare law governing the procedural aspects of the termination of public assistance benefits [*see Goldberg v. Kelly (1970) 397 U.S. 254, 257 n.3, 266-267, 267 n.14, 90 S. Ct. 1011, 25 L. Ed. 2d 287* ; *McCullough v. Terzian (1970) 2 Cal. 3d 647, 650, 87 Cal. Rptr. 195, 470 P.2d 4]* . Effective January 1, 1992, the "fair" hearing was statutorily renamed as "state" hearing [*Welf. & Inst. Code § 10950*, as amended by Stats. 1991, ch. 820, § 6]. For the statutory definition of "state" hearing, see *§ 527.11*.

Regardless of whether the hearing is known as a "fair" hearing or a "state" hearing, the procedural due process requirements of *Goldberg v. Kelly* [*Goldberg v. Kelly (1970) 397 U.S. 254, 267-271, 90 S. Ct. 1011, 25 L. Ed. 2d 287]* still apply. These requirements are discussed in *§ 527.16*.

Hearings under *Welf. & Inst. Code § 10950* are not available to an individual who is neither a current recipient nor a current applicant for welfare benefits and who is seeking to contest child support determinations by a district attorney's office rather than contesting welfare payment determinations by a county welfare department [*Pereira-Goodman v. Anderson (1997) 54 Cal. App. 4th 864, 865-866, 63 Cal. Rptr. 2d 197]* .

[2] Filing Request for Hearing

A request for a state hearing may be filed under any of the following conditions [*Welf. & Inst. Code § 10950*]:

- The applicant or recipient is dissatisfied with any action of the county department relating to his or her application for or receipt of public social services.

- His or her application is not acted on with reasonable promptness.

- A person who desires to apply for public social services is refused the opportunity to submit an application and is dissatisfied with the refusal.

The request for a state hearing may be filed in person or through an authorized representative, without filing a claim with the board of supervisors [*Welf. & Inst. Code § 10950*]. Forms for requesting a state hearing and for designating an authorized representative may be obtained from the county department.

There is no right to a state hearing in either of the following cases [*Welf. & Inst. Code § 10950*]:

- State or federal law requires automatic grant adjustments for classes of recipients, unless the reason for an individual request is incorrect grant computation.

- The sole issue is a federal or state law requiring an automatic change in services or medical assistance that adversely affects some or all recipients.

If rights not determined at the time of death accrue to the estate of an applicant or recipient, the legal representative or an heir of a deceased applicant or recipient may file a request for a hearing in behalf of the decedent's estate [*Welf. & Inst. Code § 10965*].

A request for a state hearing must be filed within 90 days after the order or action complained of [*Welf. & Inst. Code § 10951*].

[3] Setting Hearing and Giving Notice

The department must set the hearing to commence within 30 working days after the request is filed and, at least 10 days prior to the hearing, must give all parties concerned written notice of the time and place of the hearing [*Welf. & Inst. Code § 10952*].

Those cases in which aid is not being provided pending the outcome of the hearing must be given priority when setting and deciding cases. However, the priority may not be construed to permit or excuse any failure to render decisions within the time allowed by federal and state law [*Welf. & Inst. Code § 10950*].

[4] Position Statement

If regulations require a public or private agency to write a position statement concerning the issues in question in a state hearing or if the agency chooses to develop such a statement, not less than two working days prior to the date of a hearing provided for pursuant to *Welf. & Inst. Code § 10950 et seq.*, the agency must make a copy of the agency's position statement on the forthcoming hearing available, at the county welfare department, to the applicant or recipient requesting a state hearing. The agency is required to comply with these provisions only if the agency has received a 10-day notice of the date and time of the scheduled hearing [*Welf. & Inst. Code § 10952.5*].

If the agency does not make the position statement available within the two-working-day time period, or if the agency decides to modify the position statement, the hearing must be postponed on the request of the applicant or recipient, provided that an applicant or recipient agrees to waive the right to obtain a decision on the hearing within the deadline that would otherwise be applicable under regulations. A postponement granted because the agency has not made the

position statement available within the two-working-day time frame is deemed a postponement for good cause for purposes of determining eligibility to any applicable benefits pending disposition of the hearing [*Welf. & Inst. Code § 10952.5*].

For the purposes of *Welf. & Inst. Code § 10952.5*, "public or private agency" does not include the State Department of Health Services.

[5] Person to Conduct Hearing

For the purposes of administering health care services and medical assistance, the State Director of Health Services has those powers and duties conferred on the Director of Social Services by *Welf. & Inst. Code § 10950 et seq.* to conduct state hearings in order to secure approval of a state plan under the applicable provisions of federal law. The State Director of Health Services may contract with the State Department of Social Services for the provision of state hearings in accordance with *Welf. & Inst. Code § 10950 et seq.* [*Welf. & Inst. Code § 10950*].

The hearing must be conducted by administrative law judges employed by the department, unless the director orders that the hearing will be conducted by himself or herself [*Welf. & Inst. Code § 10953*]. The director may, however, contract with the Office of Administrative Hearings to conduct hearings [*Welf. & Inst. Code § 10953*].

The director has authority to appoint the department's administrative law judges as provided in *Welf. & Inst. Code § 10555* (appointment of department assistants and employees). Each administrative law judge must be admitted to the practice of law in California, and must possess any other qualifications prescribed by the State Personnel Board. Anyone in the office of the chief referee who was employed by the department as a hearing officer prior to the effective date of *Welf. & Inst. Code § 10953.5* (July 17, 1986) is deemed to be an administrative law judge [*Welf. & Inst. Code § 10953.5*].

The director or administrative law judge, in conducting the hearing, has all of the powers and authority conferred on the head of a state department by *Gov. Code § 11180 et seq.* for conducting investigations and hearings, such as the powers to administer oaths and to subpoena witnesses [*Welf. & Inst. Code § 10954*].

Gov. Code § 11500 et seq. (administrative adjudications) does not apply to hearings under *Welf. & Inst. Code § 10950 et seq.* [*Welf. & Inst. Code § 10953*].

[6] Conduct of Hearing

[a] Appearance by Applicant

At the hearing, the applicant or recipient may appear in person with legal counsel of his or her own choosing, or in person without counsel [*Welf. & Inst. Code § 10955*].

[b] Appearance by County

The county may appear with legal counsel. The county's legal counsel can be either the county counsel or the district attorney, even in a county in which there is a county counsel. The district attorney's participation at the hearing does not exceed his or her prosecutorial functions and, in fact, is in aid of and auxiliary to the enforcement of the criminal law [*Rauber v. Herman (1991) 229 Cal. App. 3d 942, 949-952, 280 Cal. Rptr. 785]* . Furthermore, the presence of the district attorney at the hearing as the county's legal representative does not, in and of itself, have a chilling effect on the assertion of an applicant's or recipient's rights so as to deprive the applicant or recipient of due process of law [*Rauber v. Herman (1991) 229 Cal. App. 3d 942, 952-953, 280 Cal. Rptr. 785]* .

When appropriate, it appears that the county may be represented by counsel other than the county counsel or the district

attorney [*see Rauber v. Herman (1991) 229 Cal. App. 3d 942, 949, 280 Cal. Rptr. 785]* .

[c] Recording of Proceedings

The proceedings at the hearing must be reported by a phonographic reporter or otherwise perpetuated by mechanical, electronic, or other means capable of reproduction or transcription [*Welf. & Inst. Code § 10956*].

[d] Testimony, Procedure, and Evidence

All testimony must be submitted under oath or affirmation. The person conducting the hearing is not bound by the rules of procedure or evidence applicable in judicial proceedings [*Welf. & Inst. Code § 10955*]. However, communications between an applicant or recipient and the representative authorized by *Welf. & Inst. Code § 10950* are confidential and privileged, even if the representative is not an attorney [*Welfare Rights Organization v. Crisan (1983) 33 Cal. 3d 766, 772, 190 Cal. Rptr. 919, 661 P.2d 1073]* .

[e] Impartial and Informal Hearing

The hearing must be conducted in an impartial and informal manner in order to encourage free and open discussion by the participants [*Welf. & Inst. Code § 10955*]. Conducting the hearing in this manner does not, however, require a nonadversarial, confidential setting in which the applicant or recipient need not anticipate any strong challenge or opposition to his or her story or assertions of fact. Each party is, for example, permitted to confront and cross examine witnesses [*Rauber v. Herman (1991) 229 Cal. App. 3d 942, 953, 280 Cal. Rptr. 785]* .

[f] Issues to Be Determined

The issues at the hearing must be limited to those issues that are reasonably related to the request for hearing, or other issues identified by either party that they have agreed, prior to or at the hearing, to discuss. All of those issues must be addressed in the hearing decisions [*Welf. & Inst. Code § 10958.1*].

At the time of the hearing, the recipient has a right to raise the adequacy of the county's notice of action as an issue. If the administrative law judge determines that adequate notice was provided, the recipient must agree to discuss the substantive issue or issues, or the case will be dismissed. If the administrative law judge determines that adequate notice was not provided, the case will be postponed unless the recipient waives the adequate notice requirement, and agrees to discuss the substantive issue or issues at the hearing. If the notice was not adequate, and involved termination or reduction of aid, retroactive action must be taken by the county to reinstate any aid that is pending [*Welf. & Inst. Code § 10967*].

[g] Continuances

On good cause shown, the person conducting the hearing may continue the hearing for a period no longer than 30 days. When the refusal of a county to accept a signed application for aid or services is an issue, the director may require the county to accept the application, and may continue the case until the results of the investigation have been reported to him or her [*Welf. & Inst. Code § 10957*].

[h] Commencement of Payments

In any case in which aid is awarded by the director or his or her designee, the payments must commence at the time indicated by the director or his or her designee [*Welf. & Inst. Code § 10957*].

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§ 527.33 Equitable Estoppel

An applicant for or recipient of public social services may raise the defense of equitable estoppel in a state hearing, and the Department of Social Services may consider the defense when it is raised [*see Lentz v. McMahon (1989) 49 Cal. 3d 393, 402-404, 261 Cal. Rptr. 310, 777 P.2d 83]* . Administrative application of equitable estoppel in a state hearing does not constitute a prohibited exercise of judicial power within the meaning of *Cal. Const., art. III, § 3,* or *Cal. Const., art. VI, § 1* [*Lentz v. McMahon (1989) 49 Cal. 3d 393, 406, 261 Cal. Rptr. 310, 777 P.2d 83]* .

The defense may be available if a county welfare official has made a representation to the recipient or applicant that the official knew or should have known to be false and the recipient has relied on this representation to his or her injury [*see Lentz v. McMahon (1989) 49 Cal. 3d 393, 398-399, 261 Cal. Rptr. 310, 777 P.2d 83]* .

In determining whether to apply equitable estoppel, an agency balances the injustice that would result from a failure to uphold an estoppel against the effect on public interest or policy that would result from the raising of an estoppel [*see Lentz v. McMahon (1989) 49 Cal. 3d 393, 400-401, 261 Cal. Rptr. 310, 777 P.2d 83]* .

Estoppel against a county welfare agency may be appropriate, for example, when a government agent has negligently or intentionally caused a claimant to fail to comply with a procedural precondition to eligibility, and the failure to invoke estoppel would cause great hardship to the claimant [*Lentz v. McMahon (1989) 49 Cal. 3d 393, 401-402, 261 Cal. Rptr. 310, 777 P.2d 83]* .

The existence of estoppel is largely a question of fact, although the policy concerns that must be conducted in a case of estoppel against the government are in part a question of law [*Lentz v. McMahon (1989) 49 Cal. 3d 393, 403, 261 Cal. Rptr. 310, 777 P.2d 83]* .

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§ 527.34 Process of Decision

[1] Decision by Administrative Law Judge or Director

[a] Filing of Proposed Decision

If the hearing is conducted by an administrative law judge, he or she must prepare, in writing and in a format that may be adopted as the director's decision, a fair, impartial, and independent proposed decision [*Welf. & Inst. Code § 10958*]. The administrative law judge is not required to set forth any specific findings in the decision [*Oldham v. Kizer (1991) 235 Cal. App. 3d 1046, 1070, 1 Cal. Rptr. 2d 195* ; *see Welf. & Inst. Code § 10958*].

The absence of a requirement that findings be set forth extends to decisions in hearings to determine eligibility for Medi-Cal benefits, even though Medi-Cal is administered in accordance with the plan set forth under Title XIX of the Social Security Act, *42 U.S.C. § 1396 et seq.*, and even though Social Security Administration policy requires that findings be set forth in decisions in hearings to determine eligibility for Social Security benefits. Because the policy is not contained in a statute made applicable to state programs under Title XIX, it does not preempt state law governing practice and procedure in the administration of entitlement programs. Courts have declined to impose a findings requirement on decisions in state hearings under *Welf. & Inst. Code § 10950 et seq.* precisely because there is no state or federal statute or regulation requiring findings. Judicial preference has been to leave it to the Legislature, the Department of Social Services, or the Department of Health Services to promulgate such a requirement [*Oldham v. Kizer (1991) 235 Cal. App. 3d 1046, 1069-1070, 1 Cal. Rptr. 2d 195]* .

On approving the hearing decision, the department's chief administrative law judge must file a copy of the proposed decision with the director within 75 days after the conclusion of the hearing [*Welf. & Inst. Code § 10958*].

[b] Action on Proposed Decision by Director

Within 30 days after the department has received a copy of the administrative law judge's proposed decision, the director may do any of the following [*Welf. & Inst. Code § 10959*]:

- Adopt the decision in its entirety.

- Decide the matter himself or herself on the basis of the record, including the transcript, with or without taking additional evidence.

- Order a further hearing to be conducted by himself or herself or another administrative law judge on behalf of the director.

Failure of the director to adopt the proposed decision, decide the matter himself or herself on the record, or order a further hearing within the 30 days is deemed an affirmation of the proposed decision [*Welf. & Inst. Code § 10959*].

A further hearing is a new hearing on all or some of the issues raised in the previous hearing. The further hearing can include the introduction of new evidence or can be limited to a reconsideration of the evidence presented at the previous hearing. The term "further hearing," as used in *Welf. & Inst. Code § 10959* since the 1986 *amendment* [*see* Stats. 1986, ch. 415, § 8, effective July 17, 1986], is interchangeable with the term "rehearing" as used in *Welf. & Inst. Code § 10959* before the 1986 amendment [*Oldham v. Kizer (1991) 235 Cal. App. 3d 1046, 1061, 1 Cal. Rptr. 2d 195]* .

Welf. & Inst. Code § 10959 places no limitation on the number of further hearings the director can order after receiving an administrative law judge's proposed decision. Furthermore, *Welf. & Inst. Code § 10959* does not set standards defining when the director can order a further hearing [*see Welf. & Inst. Code § 10959*; *see also Chatterjee v. Kizer (1991) 231 Cal. App. 3d 1348, 1359, 283 Cal. Rptr. 60]* . Therefore, the statute allows the director to repeatedly order further hearings in a search for an administrative law judge who would rule adversely to an applicant or recipient, such as by denying an application for benefits [*Chatterjee v. Kizer (1991) 231 Cal. App. 3d 1348, 1360, 283 Cal. Rptr. 60]* . However, the fact that Welf. & Inst. Code § 10959 effectively permits the director to go on a fishing expedition for administrative law judges who will write decisions denying benefits has been held insufficient to render the statute unconstitutionally violative of due process.

The statute has withstood attack on due process grounds for two reasons. First, the lack of restrictions on the number of further hearings that can be ordered, or the reasons for ordering them, does not confer on the director any additional power to reject an administrative law judge's decision than the director already has, inasmuch as *Welf. & Inst. Code § 10959* empowers the director to reject an administrative law judge's decision and decide the matter himself or herself. Second, it appears that the director's repeated ordering of further hearings and failure to render a decision within a reasonable time would be subject to judicial review by administrative mandate under *Code Civ. Proc. § 1094.5*. Thus, *Welf. & Inst. Code § 10959* does not delegate unlimited power to the director without any means for review of the exercise of that power [*Chatterjee v. Kizer (1991) 231 Cal. App. 3d 1348, 1360-1361, 283 Cal. Rptr. 60* (affirming trial court's denial of application for Medi-Cal disability benefits)].

[2] Delegation to Administrative Law Judge to Adopt Final Decision

In addition to any other delegation powers granted to the director under law, the director may delegate his or her powers to adopt final decisions under *Welf. & Inst. Code § 10959 et seq.* to all administrative law judges within specified ranges in the department, in the types of cases deemed appropriate by the director. The authority to adopt final decisions must not be contingent on the outcome of the judge's resolution of the case or issue, or on the identity of a particular administrative law judge. The defined areas of delegation must be published by the department after interested groups, such as the Coalition of California Welfare Rights Organizations, legal aid societies, and the County Welfare Directors Association, have had a reasonable amount of time to review and comment [*Welf. & Inst. Code § 10966(a)*].

Notwithstanding any other provisions of *Welf. & Inst. Code § 10959 et seq.*, decisions rendered by the administrative law judges under the authority of *Welf. & Inst. Code § 10966* must be treated, for all purposes, as the decision of the director. The affected county, recipient, or applicant has the right to request a rehearing pursuant to *Welf. & Inst. Code §*

10960, and the right to petition for judicial review pursuant to *Welf. & Inst. Code § 10962* [*Welf. & Inst. Code § 10966(b)*].

If the director chooses to exercise the authority to delegate his or her powers to adopt final decisions to administrative law judges, the delegation must be in writing. Any delegation instrument must be a public record available at all times, including the time of hearing, from each administrative law judge to whom the authority was delegated. The written delegation instrument must include both of the following [*Welf. & Inst. Code § 10966(c)*]:

- A specification of the administrative law judges that are authorized to render final decisions on the director's behalf, including the effective date of the authorization.

- A specification of the types of cases or issues that are subject to the director's delegation of final authority.

The written delegation may include any other implementation instructions that the director determines are necessary for the effective implementation of *Welf. & Inst. Code § 10966* [*Welf. & Inst. Code § 10966(c)*].

Decisions rendered by administrative law judges pursuant to *Welf. & Inst. Code § 10966* must be fair, impartial, independent, in writing, and in a format prescribed by the Chief Administrative Law Judge [*Welf. & Inst. Code § 10966(d)*].

If the director decides the matter, a copy of his or her decision must be served on the applicant or recipient and on the affected county [*Welf. & Inst. Code § 10959*]. If the director's decision differs materially from the proposed decision of the administrative law judge, a copy of that proposed decision must also be served on the applicant or recipient and on the affected county [*Welf. & Inst. Code § 10959*]. If a further hearing is ordered, it must be conducted in the same manner and within the same time limits specified for the original hearing [*Welf. & Inst. Code § 10959*].

The county director must comply with and execute every decision of the director [*Welf. & Inst. Code § 10963*].

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§ 527.35 Request for Rehearing

Within 30 days after receiving the proposed decision of an administrative law judge adopted by the director, a final decision rendered by an administrative law judge, or a decision issued by the director, the affected county, applicant, or recipient may file a request with the director for a rehearing [*Welf. & Inst. Code § 10960*].

The director must immediately serve a copy of the request on the other party to the hearing. Within five days after the service, the other party may file with the director a written statement supporting or objecting to the request. The director must grant or deny the request no earlier than the 5th nor later than the 35th working day after receiving it. If the director grants the request, the rehearing must be conducted in the same manner and subject to the same time limits as the original hearing [*Welf. & Inst. Code § 10960*].

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§ 527.36 Payment of Award

The decision of the director need not specify the amount of the award to be paid unless the amount of the award is in issue. If the decision is in favor of the applicant or recipient, the county department must pay to the applicant or recipient the amount of aid the director finds he or she is entitled to receive pursuant to the director's decision, or must grant the services that he or she is entitled to receive, without establishing present need [*Welf. & Inst. Code § 10961*]. Payment must commence as of the date the person was first entitled to aid [*Welf. & Inst. Code § 10961*].

The award must be determined no later than 30 days following the date the hearing decision is received by the county or 30 days from the date the additional information needed for compliance with the decision is provided to the county. After the award is made, the county and the claimant must be notified by the department of its determination regarding the county's compliance with the decision [*Welf. & Inst. Code § 10961*].

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[Reserved]

§§ 527.37[Reserved]

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§ 527.50 Petition for Writ of Administrative Mandate

With regard to "state hearings" discussed in Subpart B, § 527.30 et seq., the applicant, recipient, or affected county, within one year after receiving notice of the director's final decision on the state hearing, may file a petition for writ of administrative mandate with the superior court, under the provisions of *Code Civ. Proc. § 1094.5*, praying for a review of the entire proceedings in the matter, on questions of law involved in the case [*Welf. & Inst. Code § 10962*; *see In re Darlene T. (2008) 163 Cal. App. 4th 929, 939, 78 Cal. Rptr. 3d 119* ; for a form of petition, *see § 527.90*; *see also § 527.31* (defining "director" and "recipient")].

Such review, if granted, is the exclusive remedy available to the applicant, recipient, or county for review of the director's decisions.

The director must be the sole respondent in the proceedings [*Welf. & Inst. Code § 10962*]. Immediately on being served, the director must serve a copy of the petition on the other party entitled to judicial review. That party has the right to intervene in the proceedings [*Welf. & Inst. Code § 10962*].

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§ 527.51 Standard of Review

[1] In General

Both *Code Civ. Proc. § 1094.5* and *Welf. & Inst. Code § 10962* leave to the courts the establishment of standards for deciding which cases require independent judgment review and which require substantial evidence review [*Frink v. Prod (1982) 31 Cal. 3d 166, 180, 181 Cal. Rptr. 893, 643 P.2d 476* (application for benefits; overruling and disapproving cases cited therein to the extent they are inconsistent with the opinion); *Cooper v. Kizer (1991) 230 Cal. App. 3d 1291, 1296, 282 Cal. Rptr. 492]* .

For further discussion of both the independent judgment and substantial evidence standards of review, see Ch. 474 et seq., *Availability of Judicial Review of Agency Decisions*.

[2] Independent Judgment Test

The proper standard for the trial court's review of the administrative decision denying an application for or terminating a recipient's receipt of welfare benefits is the independent judgment test [*Frink v. Prod (1982) 31 Cal. 3d 166, 180, 181 Cal. Rptr. 893, 643 P.2d 476* (application for benefits); *Harlow v. Carleson (1976) 16 Cal. 3d 731, 734, 129 Cal. Rptr. 298, 548 P.2d 698* (termination of benefits)].

The proper standard for the trial court's review of the administrative decision denying an application for Medi-Cal disability benefits is also the independent judgment test [*see, e.g.,* *Chatterjee v. Kizer (1991) 231 Cal. App. 3d 1348, 1357-1358, 283 Cal. Rptr. 60* ; *Cooper v. Kizer (1991) 230 Cal. App. 3d 1291, 1299, 282 Cal. Rptr. 492]* . The independent judgment test is the appropriate standard of trial court review because the right to receive welfare and disability benefits is a vested, fundamental right [*Frink v. Prod (1982) 31 Cal. 3d 166, 180, 181 Cal. Rptr. 893, 643 P.2d 476* (application for benefits); *Harlow v. Carleson (1976) 16 Cal. 3d 731, 734, 129 Cal. Rptr. 298, 548 P.2d 698* (termination of benefits); *Cooper v. Kizer (1991) 230 Cal. App. 3d 1291, 1298, 282 Cal. Rptr. 492* (application for benefits)].

In the case of an applicant's right to receive benefits, the degree to which the right is vested may not be overwhelming, but the degree to which the right is fundamental is overwhelming. Nevertheless, the court is required only to weigh the degree to which the right is vested and fundamental [*Frink v. Prod (1982) 31 Cal. 3d 166, 180, 181 Cal. Rptr. 893, 643 P.2d 476* (application for benefits)].

The independent judgment test requires the trial court to reconsider the evidence and make its own independent findings of fact [*see, e.g.,* *Harlow v. Carleson (1976) 16 Cal. 3d 731, 734, 129 Cal. Rptr. 298, 548 P.2d 698* ; *Chatterjee v. Kizer (1991) 231 Cal. App. 3d 1348, 1358, 283 Cal. Rptr. 60]* . Abuse of discretion is established if the trial court determines that the findings are not supported by the weight of the evidence [*Anthony v. Kizer (1991) 230 Cal. App. 3d 990, 993, 281 Cal. Rptr. 516]* .

[3] Substantial Evidence Rule

On appeal, the appellate court's review of the trial court's judgment is governed by the substantial evidence rule. The appellate court is thus required to determine whether the findings and judgment of the trial court are supported by substantial, credible, and competent evidence. All conflicts in the evidence must be resolved and all inferences drawn in favor of the judgment. However, the appellate court is not bound by the trial court's determination of questions of law. On questions of law, the appellate court can make its own independent determination of whether the correct legal principles were applied in the trial court [*Chatterjee v. Kizer (1991) 231 Cal. App. 3d 1348, 1358, 283 Cal. Rptr. 60* ; *Anthony v. Kizer (1991) 230 Cal. App. 3d 990, 993, 281 Cal. Rptr. 516]* .

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§ 527.52 Award of Attorney's Fees

If, on review, the applicant or recipient obtains a decision in his or her favor, he or she is entitled to reasonable attorney's fees and costs [*Welf. & Inst. Code § 10962*].

However, it has been held that *Welf. & Inst. Code § 10962*, which provides a means by which welfare applicants and recipients may enforce their rights, does not contemplate an award of attorney's fees in a case in which review of a ruling in favor of the recipient is sought in order to obtain a more favorable legal precedent [*Le Blanc v. Swoap (1976) 16 Cal. 3d 741, 743, 129 Cal. Rptr. 304, 548 P.2d 704]* .

For example, when the director files a petition with the Supreme Court solely to adjudicate an abstract legal question regarding the applicable scope of review after the recipient has prevailed in the court of appeal, the recipient is not entitled to attorney's fees, since the purpose of *Welf. & Inst. Code § 10962* would not be served by an award of attorney's fees to a recipient whose rights were already secure [*Le Blanc v. Swoap (1976) 16 Cal. 3d 741, 743, 129 Cal. Rptr. 304, 548 P.2d 704]* .

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§ 527.53 Amount of Recovery

The trial court that issues the writ of mandate has the power to order that the payment of benefits be made retroactive if the circumstances so warrant [*Tripp v. Swoap (1976) 17 Cal. 3d 671, 677, 131 Cal. Rptr. 789, 552 P.2d 749* (overruled on other grounds in *Frink v. Prod (1982) 31 Cal. 3d 166, 180, 181 Cal. Rptr. 893, 643 P.2d 476*); *Blackburn v. Sarsfield (1981) 125 Cal. App. 3d 143, 151, 178 Cal. Rptr. 15]* . In such a case, the recipient is also entitled to an award of prejudgment interest at the legal rate from the time each payment became due [*Tripp v. Swoap (1976) 17 Cal. 3d 671, 685, 131 Cal. Rptr. 789* , P.2d 749 (overruled on other grounds in *Frink v. Prod (1982) 31 Cal. 3d 166, 180, 181 Cal. Rptr. 893, 643 P.2d 476*)].

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§ 527.60 Administrative Remedy Unavailable or Inadequate

A dissatisfied individual applicant or recipient of public social services is provided with an administrative remedy through the statutory state hearing procedure [*see Welf. & Inst. Code § 10950 et seq.*; *see also § 527.30* et seq.].

Administrative mandate under *Code Civ. Proc. § 1094.5* is the exclusive remedy by which an applicant or recipient dissatisfied with a state hearing decision may obtain judicial review [*Welf. & Inst. Code § 10962*; *see In re Darlene T. (2008) 163 Cal. App. 4th 929, 939, 78 Cal. Rptr. 3d 119* ; *see also discussion under § 527.50*].

Thus, for example, if an invalid welfare regulation is applied or enforced in a statutory state hearing, the individual applicant or recipient may seek judicial review only by administrative mandamus pursuant to *Code Civ. Proc. § 1094.5* [*see Woods v. Superior Court (1981) 28 Cal. 3d 668, 682, 170 Cal. Rptr. 484, 620 P.2d 1032* ; *Granneman v. Myers (1981) 115 Cal. App. 3d 846, 849, 171 Cal. Rptr. 583]* .

However, if the administrative state hearing procedure with judicial review by administrative mandate as provided by *Welf. & Inst. Code § 10950 et seq.* is unavailable or inadequate, an action to obtain judicial relief may be brought by persons dissatisfied with public social services without exhausting an administrative remedy [*Ramos v. County of Madera (1971) 4 Cal. 3d 685, 691, 94 Cal. Rptr. 421, 484 P.2d 93* ; *Diaz v. Quitoriano (1969) 268 Cal. App. 2d 807, 812, 74 Cal. Rptr. 358]* .

For example, recipients of public assistance properly filed a class action seeking injunctive and declaratory relief for the class and damages for individually named plaintiffs and did not fail to exhaust their administrative remedies, since the state hearing procedure [*Welf. & Inst. Code § 10950 et seq.*] contemplates grants of aid or services to individuals but does not provide for class relief or damage claims [*Ramos v. County of Madera (1971) 4 Cal. 3d 685, 691, 94 Cal. Rptr. 421, 484 P.2d 93]* . A proceeding in administrative mandate would also be available [*Chatterjee v. Kizer (1991) 231 Cal. App. 3d 1348, 1360, 283 Cal. Rptr. 60* (noting availability of remedy and positing its applicability to review hypothetical case in which director repeatedly orders further hearings under *Welf. & Inst Code § 10959* and fails to render state hearing decision within reasonable time)].

Additionally, although the rights of a particular individual applicant or recipient may be determined by a state hearing decision or by judicial review of a state hearing decision by administrative mandate, the determination has no binding effect on the rights of other applicants or recipients. A class action, on the other hand, may yield a decree that can be availed of by every member of the represented class, present and future [*Diaz v. Quitoriano (1969) 268 Cal. App. 2d 807, 812, 74 Cal. Rptr. 358* ; *see § 527.61*, Relief Available to Class, *below*].

Interested persons who are not entitled to state hearings because they are neither applicants for nor recipients of public social service benefits, but who otherwise have standing to complain, still may challenge invalid regulations by traditional mandamus pursuant to *Code Civ. Proc. § 1085* or by an action for declaratory relief pursuant to *Code Civ. Proc. § 1060* [*Woods v. Superior Court (1981) 28 Cal. 3d 668, 682, 170 Cal. Rptr. 484, 620 P.2d 1032* ; *see California Association for Health Services at Home v. State Department of Health Services (2007) 148 Cal. App. 4th 696, 705-707, 56 Cal. Rptr. 3d 102* ; *Gov. Code § 11350* (action for declaratory relief by interested person challenging validity of administrative regulation); *California Homeless & Housing Coalition v. Anderson (1995) 31 Cal. App. 4th 450, 458-459, 37 Cal. Rptr. 2d 639]* .

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§ 527.61 Relief Available to Class

A class action by welfare applicants or recipients should request whatever type of relief is necessary to enforce or protect the rights of the class in light of the facts of the case. Therefore, an action may seek declaratory [*Code Civ. Proc. § 1060*] or injunctive [*Code Civ. Proc. § 525*] relief, mandamus [*Code Civ. Proc. § 1085*], or a combination of remedies [*see, e.g., Vaessen v. Woods (1984) 35 Cal. 3d 749, 753-754, 764, 200 Cal. Rptr. 893, 677 P.2d 1183* (writ of mandate and injunctive relief); *Ramos v. County of Madera (1971) 4 Cal. 3d 685, 94 Cal. Rptr. 421, 484 P.2d 93* (declaratory and injunctive relief); *Oliva v. Swoap (1976) 59 Cal. App. 3d 130, 130 Cal. Rptr. 411* (declaratory and injunctive relief and writ of mandate)].

A petition for writ of traditional mandate under *Code Civ. Proc. § 1085* is often an appropriate device by which a class of welfare applicants or recipients may enforce their rights existing under state or federal law, since this type of mandate may be used to compel state or county welfare officials to act in accordance with state or federal law [*see, e.g., Committee to Defend Reproductive Rights v. Myers (1981) 29 Cal. 3d 252, 172 Cal. Rptr. 866, 625 P.2d 779* (mandate to bar enforcement of unconstitutional budget act provisions restricting Medi-Cal funding of abortions); *Green v. Obledo (1981) 29 Cal. 3d 126, 172 Cal. Rptr. 206, 624 P.2d 256* (mandate to compel deduction of certain expenses in calculation of benefits in accordance with federal law and to obtain retroactive relief for benefits wrongfully withheld); *Mooney v. Pickett (1971) 4 Cal. 3d 669, 94 Cal. Rptr. 279, 483 P.2d 1231* (mandate to order county director not to deny general assistance on sole and exclusive ground of employability); *Lowry v. Obledo (1980) 111 Cal. App. 3d 14, 169 Cal. Rptr. 732* (mandate to compel recalculation of benefits in accordance with state and federal laws); *Rogers v. Detrich (1976) 58 Cal. App. 3d 90, 128 Cal. Rptr. 261* (mandate to order county directors to determine eligibility for and amount of general assistance in accordance with state statute and to make redeterminations and retroactive payments)].

This remedy should be distinguished from a writ of administrative mandate under *Code Civ. Proc. § 1094.5*, which is used to inquire into the validity of a final administrative order after completion of the administrative appeals process [*Lowry v. Obledo (1980) 111 Cal. App. 3d 14, 25, 169 Cal. Rptr. 732]* . A writ of administrative mandate pursuant to *Code Civ. Proc. § 1094.5* is the appropriate mechanism to use in having a state hearing decision set aside [*see Welf. &*

Inst. Code § 10962; *see also discussion under § 527.50*].

A writ of mandate under *Code Civ. Proc. § 1085*, on the other hand, provides the traditional mandamus action to compel the performance of an act that the law specially enjoins as a duty resulting from an office. Both forms of mandate may be sought in the same action when an individually named plaintiff seeks an administrative writ for review of his or her adverse state hearing decision and a traditional writ on behalf of a class [*see, e.g., Green v. Obledo (1981) 29 Cal. 3d 126, 172 Cal. Rptr. 206, 624 P.2d 256]* .

For a general discussion of these forms of relief, see Ch. 182, *Declaratory Relief* , Ch. 303, Injunctions, and Ch. 358, *Mandate and Prohibition* .

For a form combining a complaint for declaratory relief and a petition for a writ of traditional mandate, see *§ 527.92*.

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§ 527.62 Jurisdiction

[1] State Court

The proper court in which an action challenging public social service legislation, regulations, or practices should be brought depends on the relief sought. For example, an original action for declaratory relief must be brought in superior court [*Code Civ. Proc. § 1060*]. Injunctive relief may be granted by the court in which an action is brought, or by a judge of the court [*Code Civ. Proc. § 525*].

Superior courts also have general equity jurisdiction to grant provisional and permanent injunctive relief since they have original jurisdiction in all causes except those given by statute to other trial courts [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. § 525*].

A writ of mandate may be issued by any court, except a municipal, to any inferior tribunal, corporation, board, or person [*Code Civ. Proc. § 1085*; *see, e.g., Green v. Obledo (1981) 29 Cal. 3d 126, 172 Cal. Rptr. 206, 624 P.2d 256* (appeal of judgment in class action for writ of mandate and declaratory relief brought in superior court); *Mooney v. Pickett (1971) 4 Cal. 3d 669, 94 Cal. Rptr. 279, 483 P.2d 1231* (original action in mandamus in *Supreme Court); Rogers v. Detrich (1976) 58 Cal. App. 3d 90, 128 Cal. Rptr. 261* (petition for writ of mandate brought in court of appeal)].

[2] Federal Court

Persons who litigate issues involving public social services may also be able to invoke federal court jurisdiction [*see, e.g., Griffeth v. Detrich (9th Cir. 1979) 603 F.2d 118 , cert. denied, 445 U.S. 970* (class action by general assistance applicants under *42 U.S.C. § 1983*); *Bracco v. Lackner (N.D. Cal. 1978) 462 F. Supp. 436* (suit by Medi-Cal beneficiaries under *28 U.S.C. § 1331* and *42 U.S.C. § 1983*)].

Although the Federal Social Security Act (*42 U.S.C. § 301 et seq.*) affords no private right of action against a state, *42 U.S.C. § 1983*, which provides that anyone who, under color of state law, deprives another of rights, privileges, or

immunities secured by the Constitution and laws shall be liable to the injured party, encompasses violations of federal statutory as well as constitutional law [*State of Maine v. Thiboutot (1980) 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 555, 559-560]* . A suit alleging a violation of constitutional or federal statutory law may therefore be brought in federal district court, if the jurisdictional requirements are satisfied, under *28 U.S.C. § 1331* (federal question jurisdiction) or *28 U.S.C. § 1343(a)(3), (4)* (jurisdictional counterpart to *42 U.S.C. § 1983*). For further discussion, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

For a discussion of actions involving the deprivation of civil rights brought under *42 U.S.C. § 1983* and other Post-Civil War civil rights statutes, see Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes* .

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[Reserved]

§§ 527.63[Reserved]

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§ 527.70 Related Matthew Bender Publications

For memoranda of points and authorities relating to petitions for writs of mandate, that may issue to compel performance of a ministerial act or mandatory duty when there is clear legal right in the person seeking relief, a corresponding duty in the defendant, and lack of any other adequate remedy, pursuant to *Code Civ. Proc. §§ 1085, 1086*, See California Points and Authorites, ch. 150, *Mandate and Prohibition* (Matthew Bender)

For memoranda of points and authorities relating to review of a final administrative adjudicative order or decision pursuant to *Code Civ. Proc. § 1094.5*, see California Points and Authorites, ch. 195, *Public Administrative Law* (Matthew Bender)

For discussion and forms relating to federal retirement, survivor, and disability benefits, including the federally administered Supplemental Security Income (S.S.I.) benefit for aged, blind, or disabled citizens, see Social Security Practice Guide, ch. 25, *Supplemental Security Income* (Matthew Bender)

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§ 527.71 Federal Statutes

Grants to states for aid and services to needy families with children (AFDC) and for child welfare services. *42 U.S.C. § 601 et seq.*

Supplemental security income for aged, blind, and disabled. *42 U.S.C. § 1381 et seq.*

Grants to states for medical assistance programs. *42 U.S.C. § 1396 et seq.*

Grants to states for services. *42 U.S.C. § 1397 et seq.*

Low income housing assistance. *42 U.S.C. § 1437 et seq.*

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§ 527.72 State Statutes

[1] Public Social Services

Aging and long term care. *Health & Safety Code §§ 1280, 1325 et seq.*; *Welf. & Inst. Code § 9101 et seq.*

Definitions and general provisions relating to public social services. *Welf. & Inst. Code § 10000 et seq.*

Fiscal provisions. *Welf. & Inst. Code § 10100 et seq.*

Social service administration. *Welf. & Inst. Code § 10500 et seq.*

General provisions regarding aid and medical assistance. *Welf. & Inst. Code § 11000 et seq.*

Family Economic Security Act. *Welf. & Inst. Code § 11200 et seq.*

State supplementary program for aged, blind, and disabled. *Welf. & Inst. Code § 12000 et seq.*

Emergency payments and special circumstances for aged, blind, and disabled. *Welf. & Inst. Code § 12500 et seq.*

Loans to blind persons. *Welf. & Inst. Code § 13000*

Nonmedical care facilities. *Welf. & Inst. Code § 13900 et seq.*

Basic health care. *Welf. & Inst. Code § 14000 et seq.*

Medi-Cal benefits. *Welf. & Inst. Code § 14131 et seq.*

Medi-Cal open drug formulary and therapeutic drug utilization review. *Welf. & Inst. Code §§ 14195-14196.1*

Prepaid health plans. *Welf. & Inst. Code § 14200 et seq.*

Family planning. *Welf. & Inst. Code §§ 14500-14508*; *see Health & Safety Code § 1570.2 et seq.*

Adult day health care programs. *Welf. & Inst. Code § 14520 et seq.*

Alternative methods of Medi-Cal management. *Welf. & Inst. Code § 14600 et seq.*

Financial provisions regarding aid and medical assistance. *Welf. & Inst. Code § 15000 et seq.*

Supportive care organizations. *Welf. & Inst. Code § 15300 et seq.*

Supplemental food program. *Welf. & Inst. Code § 15500 et seq.*

Reports to county protective agency regarding abuse of elderly and other dependent adults. *Welf. & Inst. Code § 15600 et seq.*

Adult protective services. *Welf. & Inst. Code §§ 15750-15754*

Services for the care of children. *Welf. & Inst. Code § 16100 et seq.*

County aid and relief to indigents. *Welf. & Inst. Code § 17000 et seq.*

County preventative support services to unemployed and displaced workers; when county may contract for services with contracting agencies. *Welf. & Inst. Code §§ 17500, 17501*

Miscellaneous public social provisions. *Welf. & Inst. Code § 18000 et seq.*

Twenty-four-hour out-of-home care for seriously emotionally disturbed children. *Welf. & Inst. Code §§ 18350-18355*

[2] State Hearing Procedure

Opportunity for state hearing. *Welf. & Inst. Code § 10950*

Time for filing request. *Welf. & Inst. Code § 10951*

Setting hearing and notice. *Welf. & Inst. Code § 10952*

Position statement. Welf. & Inst. Code § 10952.2

Conduct of hearing. *Welf. & Inst. Code §§ 10953-10955*

Appointment and qualifications of administrative law judges. *Welf. & Inst. Code § 10953.5*

Perpetuation of proceedings. *Welf. & Inst. Code § 10956*

Continuance of hearing. *Welf. & Inst. Code § 10957*

Commencement of payments. *Welf. & Inst. Code § 10957*

Procedure for proposed decision of administrative law judge. *Welf. & Inst. Code § 10958*

Action on receipt of proposed decision by director. *Welf. & Inst. Code § 10959*

Request for rehearing. *Welf. & Inst. Code § 10960*

Decision of director. *Welf. & Inst. Code § 10961*

Request for hearing on behalf of decedent's estate. *Welf. & Inst. Code § 10965*

Provisions of law relating to public assistance programs as to be fairly and equitably construed. *Welf. & Inst. Code § 11000*

[3] Judicial Proceedings

Class actions. *Code Civ. Proc. § 382*

Writ of mandate. *Code Civ. Proc. § 1084 et seq.*

Ordinary writ of mandate. *Code Civ. Proc. §§ 1085, 1086*

Writ of mandate to review final administrative decision. *Code Civ. Proc. § 1094.5*

Judicial review of state hearing decision. *Welf. & Inst. Code § 10962*

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§ 527.73 Federal Administrative Regulations

Housing assistance payment programs established by Section 8 of United States Housing Act of 1937 (*42 U.S.C. § 1437 et seq.*). *24 C.F.R. § 880.101 et seq.*

General administration of public assistance programs. *45 C.F.R. § 205.5 et seq.*

Application, determination of eligibility, and furnishing assistance for public assistance programs. *45 C.F.R. § 206.10*

Work incentive programs for AFDC recipients. 45 C.F.R. § 224.0 et seq.

Special provisions applicable to AFDC. 45 C.F.R. § 232.1 et seq.

Coverage and conditions of eligibility in financial assistance programs. *45 C.F.R. § 233.10 et seq.*

Financial assistance to individuals. *45 C.F.R. § 234.11 et seq.*

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§ 527.74 State Administrative Regulations

Medi-Cal regulations. *22 Cal. Code Reg. § 50000 et seq.*

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§ 527.75 Local Court Rules

[1] Los Angeles County

Prerogative writs. Los Angeles Co. Super. Ct. Rules, Rule 9.31

[2] Sacramento County

Prerogative writs. Sacramento Co. Super. Ct. Rules, Rule 2.01

[3] San Diego County

Prerogative writs. San Diego Co. Super. Ct. Rules, Div. II, Rule 8.1

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§ 527.76 Decisions

[1] Public Social Services

[a] Federally Assisted Programs

Food Stamp Act provision, that no household is eligible to participate in program during time that any member of household is on strike or to receive increased allotment of food stamps because of decrease in income of striking member, is constitutional. *Lyng v. Automobile Workers (1988) 485 U.S. 360, 108 S. Ct. 1184, 99 L. Ed. 2d 380, 386-393*

Pursuant to 24 C.F.R. § 882.209(d)(1), governing period of time in which eligible family must find suitable private housing and landlord willing to rent it under rent-assistance program established under *42 U.S.C. § 1437 et seq.* and providing that certificate of family participation expires after 60 days unless, within that time, family submits request for lease approval, 60-day period is tolled when timely request for lease approval is submitted to public housing agency and remains tolled until notification that request is approved or denied. *Baggett v. Housing Authority (1987) 195 Cal. App. 3d 383, 385, 389-390, 240 Cal. Rptr. 640*

Welf. & Inst. Code § 11250.4, prohibiting strikers from collecting AFDC benefits, applies to joint federal-state program and not state-only program, which provides aid to all families with unemployed parents (former *Welf. & Inst. Code § 11201(a)(2)*). *Reyna v. McMahon (1986) 180 Cal. App. 3d 220, 226, 225 Cal. Rptr. 405*

[b] Public Assistance Programs

Program for aid to needy families with dependent children as created by *Welf. & Inst. Code § 11200 et seq.* to participate in federal funding authorized by *42 U.S.C. § 601 et seq.*; program is thus conditioned on compliance with applicable federal statutes and regulations, although state retains broad discretion in determining eligibility for and amounts of aid. *Vaessen v. Woods (1984) 35 Cal. 3d 749, 754-755, 200 Cal. Rptr. 893, 677 P.2d 1183*

California public social services acts were adopted or amended for the purpose of operating in harmony with the federal system in order to obtain federal assistance in providing aid to needy persons. *Pearson v. State Social Welfare Bd. (1960) 54 Cal. 2d 184, 214, 5 Cal. Rptr. 553, 353 P.2d 33* ; *Newbold v. Social Welfare Bd. (1946) 76 Cal. App. 2d 844, 847, 174 P.2d 482*

CalWORKs "completion rule" [*Welf. & Inst. Code § 11253*] violates the Americans with Disabilities Act [*42 U.S.C. § 12101 et seq.*], when it is applied to cut off assistance to disabled children who, due to their disability, may not be reasonably expected to complete high school by the age of 19. *Fry v. Saenz (2002) 98 Cal. App. 4th 256, 261, 120 Cal. Rptr. 2d 30*

Emergency payments under *Welf. & Inst. Code § 12500 et seq.* to Supplemental Security Income recipients for "unmet shelter needs" are not available unless shelter needs result from special circumstances created by some nonrecurring event or change in circumstances. *Thornton v. Carlson (1992) 4 Cal. App. 4th 1249, 1256, 6 Cal. Rptr. 2d 375*

Equal protection clause of California Constitution (*Cal. Const., art. I, § 7*) does not require that needs of undocumented alien children be taken into account when determining amount of initial public assistance grant to family units in which citizen children reside with their undocumented siblings. *Blanco v. McMahon (1988) 198 Cal. App. 3d 473, 475-479, 243 Cal. Rptr. 736*

In absence of statute imposing liability, public assistance recipient is free from liability for repayment of grants legitimately obtained. *Webb v. Swoap (1974) 40 Cal. App. 3d 191, 195-197, 114 Cal. Rptr. 897*

[c] General Assistance Programs

County has broad discretion to determine eligibility for, type and amount of, and conditions to be attached to indigent relief. *Mooney v. Pickett (1971) 4 Cal. 3d 669, 678, 94 Cal. Rptr. 279, 483 P.2d 1231* ; *County of Los Angeles v. Department of Social Welfare (1953) 41 Cal. 2d 455, 458, 260 P.2d 41*

Los Angeles County's Home Call Visitation Program as a prerequisite to receiving welfare benefits is constitutional and does not conflict with state law. *Smith v. Los Angeles County Board of Supervisors (2002) 104 Cal. App. 4th 1104, 1115-1124, 128 Cal. Rptr. 2d 700*

Welf. & Inst. Code §§ 10000, 17000, 17001 do not require counties to adopt regulations setting written standards governing waiting times for receipt of medical care provided to indigents by counties. *Tailfeather v. Board of Supervisors of Los Angeles County (1996) 48 Cal. App. 4th 1223, 1227, 56 Cal. Rptr. 2d 255*

Welf & Inst. Code § 17300 limits scope of "legally responsible relatives" to spouses and parents of minor children, therefore, resolution of county board of supervisors that establishes lower general assistance payments for parents who live with their adult children and adult children who live with their parents exceeded the board's authority. *Freitas v. County of Contra Costa (1994) 28 Cal. App. 4th 163, 173, 33 Cal Rptr. 2d 406*

Minimum-subsistence-needs study (*Boehm* study) is not required prior to reduction or termination of emergency assistance that is separate from general assistance. *Scates v. Rydingsword (1991) 229 Cal. App. 3d 1085, 1102-1103, 280 Cal. Rptr. 544*

Federal lump-sum rule, requiring that lump sum received by family be treated as income, does not apply to families receiving federal AFDC-FG benefits. *Shaw v. McMahon (1990) 219 Cal. App. 3d 973, 979, 982, 268 Cal. Rptr. 535*

Former *Welf. & Inst. Code § 5709* imposes absolute limit on county mental health obligations, notwithstanding duties

of county, under *Welf. & Inst. Code § 17000*, to provide hospital and medical services to indigent residents and, under *Welf. & Inst. Code § 10000*, to provide services promptly and humanely to needy. *Board of Supervisors v. Superior Court (1989) 207 Cal. App. 3d 552, 559-563, 564, 254 Cal. Rptr. 905*

State is permitted to adopt and apply different eligibility standards for state-only and federal recipients of AFDC without violating *equal protection clause of Constitution*; status of person qualifying under state eligibility standard is different from that of person qualifying under federal standard, and, thus, those persons may be treated differently without violating equal protection. *Shaw v. McMahon (1987) 197 Cal. App. 3d 417, 429, 243 Cal. Rptr. 26*

County violates mandatory duty to support indigent residents under *Welf. & Inst. Code § 17000* by denying general relief benefits to any recipient not obtaining valid address within 60 days. *Nelson v. Board of Supervisors (1987) 190 Cal. App. 3d 25, 32, 235 Cal. Rptr. 305*

State is required to continue payments of Medi-Cal benefits to terminated AFDC recipients pending state's determination of recipients' eligibility for Medi-Cal benefits under nonautomatic categories. *Edwards v. Myers (1985) 167 Cal. App. 3d 1070, 1076, 213 Cal. Rptr. 737*

[d] Medi-Cal and Medicaid Generally

A county may seek reimbursement from the Commission on State Mandates under Cal. Const., art. XIIIB, § 6, for costs of providing health care services for medically indigent adults who are excluded from Medi-Cal coverage by action of the legislature. *County of San Diego v. State of California (1997) 15 Cal. 4th 68, 75-76, 61 Cal. Rptr. 2d 134, 931 P.2d 312*

California participates in the federal Medicaid program thorough the Medi-Cal program. The State Department of Health Care Services is the state agency charged with administering Medi-Cal in accordance with the state plan. *Mission Hospital Regional Medical Center v. Shewry (2008) 168 Cal. App. 4th 460, 474, 85 Cal. Rptr. 3d 639*

Medicaid is a program through which the federal government provides financial assistance to qualified participating states for furnishing medical assistance to the poor. California participates in Medicaid through the Medi-Cal program. When a provider provides services to Medi-Cal beneficiaries it is reimbursed for its allowable costs, including indirect costs such as certain employee health benefit payments. *Oroville Hospital v. Department of Health Services (2006) 146 Cal. App. 4th 468, 471-472, 52 Cal. Rptr. 3d 695*

A treating physician's determination that a particular drug is medically necessary is a factor that the State Department of Health Service must consider in reviewing treatment authorization requests, although it is not controlling. The Department may place appropriate limitations on the use of medications, but it may not ignore the physician's determination just because the prior authorization criteria do not list it as a factor. *Paleski v. State Department of Health Services (2006) 144 Cal. App. 4th 713, 738, 51 Cal. Rptr. 3d 28*

State Department of Health Services published prior authorization criteria for drugs provided by Medi-Cal were exempt from requirements of *Administrative Procedure Act. Paleski v. State Dept. of Health Services (2006) 144 Cal. App. 4th 713, 729, 51 Cal. Rptr. 3d 28*

Writ of mandate issued pursuant to *Code of Civ. Proc. § 1085* directing the Department of Health to adopt and implement procedures to ensure that Medi-Cal recipients entitled to reimbursement for covered services obtained during the retroactivity period are promptly reimbursed. *Conlan v. Bonta (2002) 102 Cal. App. 4th 745, 753754, 764, 125 Cal. Rptr. 2d 788*

Legislature has by statute authorized coverage for durable medical equipment, and the Department of Health Services lacks the authority to restrict the scope of that coverage. *Blue v. Bonta (2002) 99 Cal. App. 4th 980, 990993, 121 Cal. Rptr. 2d 483*

Statutes of limitation under *Code Civ. Proc. § 338(a)* do not apply to administrative determinations by Department of Health Services as to monetary amounts of reimbursement paid to hospital for medical assistance provided to patients under Medi-Cal program. *Little Company of Mary Hospital v. Belshe (1997) 53 Cal. App. 4th 325, 328-329, 61 Cal. Rptr. 2d 626*

Department of Health may require applicants for restricted Medi-Cal benefits to declare under penalty of perjury whether they are United States citizens or nationals and whether they have satisfactory immigration status, under *Welf. & Inst. Code §§ 14007.5(e), 14011.2*. *Crespin v. Coye (1994) 27 Cal. App. 4th 700, 707, 34 Cal. Rptr. 2d 10*

Under Medicaid Act (*42 U.S.C. § 1396 et seq.*), states as having considerable discretion in designing their Medicaid programs, and as being authorized to establish standards for individual physicians to use in determining what services are appropriate in particular case. *Ruth v. Kizer (1992) 8 Cal. App. 4th 380, 386, 10 Cal. Rptr. 2d 274*

Welf. & Inst. Code § 14100.2 as not entitling hospital to inspect county health department's records relating to patient's eligibility for Medi-Cal benefits. *Department of Health Services v. Superior Court (1991) 232 Cal. App. 3d 776, 782-783, 283 Cal. Rptr. 546*

Director of Department of Health Services lacks authority to eliminate Medicaid coverage for specific services enumerated in schedule of benefits (*Welf. & Inst. Code § 14132*) on basis of fiscal considerations. *Jackson v. Stockdale (1989) 215 Cal. App. 3d 1503, 1515-1516, 264 Cal. Rptr. 525*

State Department of Health Services is required to follow federal regulations governing termination, suspension, or reduction of Medicaid services. *Frank v. Kizer (1989) 213 Cal. App. 3d 919, 920, 261 Cal. Rptr. 882*

Requiring prior authorization, that is, approval by a department consultant of a specified medical service in advance of the rendition of that service based on a determination of medical necessity (*Welf. & Inst. Code § 14133(a)*), is consistent with federal law, which specifically allows individual states to place appropriate limits on a service based on utilization control procedures (*see 42 U.S.C. § 1396a(a)(30)*; *42 C.F.R. § 440.230(d)*). *Cowan v. Myers (1986) 187 Cal. App. 3d 968, 983, 987, 232 Cal. Rptr. 299*

State is permitted to place generic limit on Medicaid services based on judgment as to degree of medical necessity for those services, so long as it does not discriminate on basis of specific medical condition that occasions the need. *Cowan v. Myers (1986) 187 Cal. App. 3d 968, 979-980, 232 Cal. Rptr. 299*

Federal Medicaid Act (*42 U.S.C. § 1396 et seq.*) requires participating states to provide qualified individuals with financial assistance in five general categories of services: (1) inpatient hospital services, (2) outpatient hospital services, (3) laboratory and X-ray services, (4) skilled nursing facility services, and (5) physician services (*42 U.S.C. § 1396d(a)*). *Cowan v. Myers (1986) 187 Cal. App. 3d 968, 973, 977, 232 Cal. Rptr. 299*

Medi-Cal provisions limiting health services to those "medically necessary to prevent significant illness, to alleviate severe pain, to protect life, or to prevent significant disability" (*Welf. & Inst. Code §§ 14059.5, 14133.3*) are consistent with federal law. *Cowan v. Myers (1986) 187 Cal. App. 3d 968, 973, 980, 983, 232 Cal. Rptr. 299*

Two levels of judgment as to medical necessity exists in statutory scheme: (1) macrodecision by Legislature that only certain kinds of medical assistance are deemed sufficiently necessary to come under coverage of its plan, and (2) microdecision of physician that condition of patient warrants administering type of medical assistance made available

by that plan. *Cowan v. Myers (1986) 187 Cal. App. 3d 968, 973, 980, 232 Cal. Rptr. 299*

[e] Construction and Enforcement of Statutes

Laws governing welfare programs are required to be liberally interpreted and actively enforced. *Thornton v. Carlson (1992) 4 Cal. App. 4th 1249, 1258, 6 Cal. Rptr. 2d 375* ; *Robbins v. Superior Court (1985) 38 Cal. 3d 199, 208, 211 Cal. Rptr. 398, 695 P.2d 695* ; *Hansen v. Department of Social Services (1987) 193 Cal. App. 3d 283, 291, 238 Cal. Rptr. 232*

Even though state is not required to participate in AFDC program, once it chooses to participate, state is required to administer state plan in conformity with federal laws and regulations governing program; state regulations are invalid and unenforceable to extent they conflict or are incompatible with federal regulations governing program. *Morales v. McMahon (1990) 223 Cal. App. 3d 184, 186, 189, 272 Cal. Rptr. 688*

[f] Promulgation of Regulations

Emergency regulations may properly be adopted without following rulemaking procedures otherwise mandated by Administrative Procedure Act in order to implement immediately controlling provisions of Personal Responsibility Act (*16 U.S.C. § 1601 et. seq.*) that prohibit disbursement of welfare benefits for prenatal care for illegal aliens. *Doe v. Wilson (1997) 57 Cal. App. 4th 296, 312, 313, 67 Cal. Rptr. 2d 187*

Department of Health Services is required to follow rulemaking procedures set forth in Administrative Procedure Act (*Gov. Code § 11340 et seq.*); rule not adopted in substantial compliance with these procedures is unenforceable. *Union of American Physicians & Dentists v. Kizer (1990) 223 Cal. App. 3d 490, 496-497, 272 Cal. Rptr. 886* ; *Grier v. Kizer (1990) 219 Cal. App. 3d 422, 431-432, 268 Cal. Rptr. 244*

[g] Interpretation of Regulations

Proviso or clause in regulation beginning with word "unless" means exception or condition subsequent rather than a condition precedent. *Baggett v. Housing Authority (1987) 195 Cal. App. 3d 383, 389, 240 Cal. Rptr. 640*

Interpretation of regulation, like interpretation of statute, is question of law and, although agency's interpretation of its own regulation obviously deserves great weight, ultimate resolution of such legal questions rests with courts. *Baggett v. Housing Authority (1987) 195 Cal. App. 3d 383, 387, 240 Cal. Rptr. 640*

[h] Due Process Requirements

When mass change in Food Stamp Program occurs, notice requirements to recipients are met by individual notice informing them of change; notice of precise impact of change on individual recipient is not required. *Atkins v. Parker (1985) 472 U.S. 115, 105 S. Ct. 2520, 86 L. Ed. 2d 81, 91*

Nursing homes' decisions to discharge or transfer Medicaid patients to lower level of care does not involve state action and thus does not violate rights secured by *Fourteenth Amendment due process clause*. *Blum v. Yaretsky (1982) 457 U.S. 991, 102 S. Ct. 2777, 73 L. Ed. 2d 534, 551*

Welfare recipient is entitled to evidentiary hearing before benefits may be terminated. *Goldberg v. Kelly (1970) 397 U.S. 254, 269-270, 90 S. Ct. 1011, 25 L. Ed. 2d 287* ; *Wheeler v. Montgomery (1970) 397 U.S. 280, 281-282, 90 S. Ct.*

1026, 25 L. Ed. 2d 307 ; *McCullough v. Terzian (1970) 2 Cal. 3d 647, 654, 87 Cal. Rptr. 195, 470 P.2d 4*

Applicant for general assistance has expectation of benefits which is property interest under *U.S. Const., amend. XIV*; county procedures regarding applications are required to satisfy due process requirements. *Griffeth v. Detrich (9th Cir. 1979) 603 F.2d 118, 120-122 , cert. denied, 445 U.S. 970*

Regulations allowing summary termination of aid pending fair hearing when appeal raises only issues of policy are denial of due process. *Yee-Litt v. Richardson (N.D. Cal. 1973) 353 F. Supp. 996, 1000-1001 , aff'd mem. sub nom., Carleson v. Yee-Litt (1973) 412 U.S. 924, 93 S. Ct. 2753, 37 L. Ed. 2d 152*

Termination of public assistance benefits granted under *42 U.S.C. § 601 et seq.* (aid to families with dependent children) is required to be preceded by adequate notice and opportunity for recipient to challenge proposed action. *Vaessen v. Woods (1984) 35 Cal. 3d 749, 757, 200 Cal. Rptr. 893, 677 P.2d 1183*

Welfare authorities are not constitutionally required to give notice of reduction or termination of benefits in Spanish to recipients known to be literate in Spanish but not in *English. Guerrero v. Carleson (1973) 9 Cal. 3d 808, 810-817, 109 Cal. Rptr. 201, 512 P.2d 833 , cert. denied, 414 U.S. 1137, 94 S. Ct. 883, 38 L. Ed. 2d 762*

State law exempts the State Department of Health Service's published drug criteria from the APA [*see Welf. & Inst. Code § 14105.395(a), (c)*] but requires compliance with the Medi-Cal Act's notice and comment provisions [*Welf. & Inst. Code § 14105.395(b), (c)*]. *Paleski v. State Department of Health Services (2006) 144 Cal. App. 4th 713, 717-723, 51 Cal. Rptr. 3d 28*

State Department of Health Services published prior authorization criteria for drugs provided by Medi-Cal were exempt from requirements of *Administrative Procedure Act. Paleski v. State Dept. of Health Services (2006) 144 Cal. App. 4th 713, 729, 51 Cal. Rptr. 3d 28*

Before issuing order conditioning future AFDC benefits on participation in workfare program or initiation of job search, court is required to provide AFDC recipient with timely notice of family law procedure through which recipient's benefits may be reduced or lost; court's failure to provide timely notice is violation of recipient's due process rights. *Anderson v. Superior Court (1989) 213 Cal. App. 3d 1321, 1331, 262 Cal. Rptr. 405*

County's failure to provide knowledgeable caseworker in attendance at pretermination hearing involving general assistance recipients' alleged failure to comply with work program constituted denial of recipients' rights of confrontation and cross examination. *Jennings v. Jones (1985) 165 Cal. App. 3d 1083, 1091, 212 Cal. Rptr. 134*

County's termination of general assistance to recipients who fail to request hearing within two days of receiving termination notice violates due process under *California and United States Constitutions. Boehm v. County of Merced (1985) 163 Cal. App. 3d 447, 455-456, 209 Cal. Rptr. 530*

Emergency assistance granted prior to final determination of applicant's eligibility for aid does not create fundamental interest which requires evidentiary hearing before denial of application and termination of emergency assistance. *Jackson v. Carleson (1974) 39 Cal. App. 3d 12, 16, 113 Cal. Rptr. 890*

[2] State Hearing Procedure

State hearing is appropriate forum for determining applicability of equitable estoppel defense. *Lentz v. McMahon (1989) 49 Cal. 3d 393, 407, 261 Cal. Rptr. 310, 777 P.2d 83*

Communications between claimant and representative authorized by *Welf. & Inst. Code § 10950* are confidential and privileged, even in case of nonattorney representative. *Welfare Rights Organization v. Crisan (1983) 33 Cal. 3d 766, 772, 190 Cal. Rptr. 919, 661 P.2d 1073*

State hearing decision under *Welf. & Inst. Code § 10950 et seq.* exonerating recipient of welfare fraud collaterally estops district attorney from pursuing criminal action against recipient for same alleged misconduct. *People v. Sims (1982) 32 Cal. 3d 468, 489-490, 186 Cal. Rptr. 77, 651 P.2d 321*

Welf. & Inst. Code § 10959 does not unconstitutionally violate due process for allowing director to order unlimited further hearings after receipt of administrative law judge's proposed decision and for failing to set standards defining when further hearings can be ordered. *Chatterjee v. Kizer (1991) 231 Cal. App. 3d 1348, 1358-1361, 283 Cal. Rptr. 60*

State hearing procedures of *Welf. & Inst. Code § 10950 et seq.* are consistent with federal due process right of AFDC recipients to evidentiary hearing before benefits are terminated or demand for restitution of overpayments is made. *Rauber v. Herman (1991) 229 Cal. App. 3d 942, 949, 280 Cal. Rptr. 785*

Medicaid recipients has right to hearing prior to any state action resulting in suspension, reduction, discontinuance, or termination of assistance. *Cowan v. Myers (1986) 187 Cal. App. 3d 968, 986, 232 Cal. Rptr. 299*

State regulation requiring that request for hearing be filed within 10 days of date notice of discontinuance or reduction in aid is mailed in order to avoid termination or alteration of benefits pending administrative hearing is invalid insofar as it requires that request for hearing must occur at any time sooner than effective date of contemplated action in order to ensure aid being paid pending hearing, in view of definition of "timely notice" in *45 C.F.R. § 205.10*, which focuses on date action becomes effective, and fact that under state regulation recipient of aid has 90 days from date of notice to make request for hearing. *Ortiz v. Woods (1982) 129 Cal. App. 3d 672, 674, 676-680, 181 Cal. Rptr. 209*

Right to state hearing under *Welf. & Inst. Code § 10950* is limited to action by the county welfare department and applicable only to applicants or recipients of aid, not to former recipients. *County of Santa Clara v. Support, Inc. (1979) 89 Cal. App. 3d 687, 704, 152 Cal. Rptr. 754*

State hearing pursuant to *Welf. & Inst. Code § 10950* is not required prior to discharge hearing by civil service commission alleging receipt of AFDC overpayments by employee of county department of public social services. *Rivera v. Los Angeles County Civil Serv. Comm'n (1979) 87 Cal. App. 3d 1001, 1006, 151 Cal. Rptr. 480*

Federal regulation requiring "final administrative action" within 90 days from request for state hearing as not requiring completion of any rehearing authorized under state law. *Westfall v. Swoap (1976) 58 Cal. App. 3d 109, 116, 129 Cal. Rptr. 750*

Federal regulation requiring "final administrative action" within 90 days from request for state hearing as mandating prompt administrative action but not foreclosing late administrative action. *Westfall v. Swoap (1976) 58 Cal. App. 3d 109, 118, 129 Cal. Rptr. 750*

[3] Judicial Proceedings

[a] Judicial Review of Administrative Decisions

[i] Exhaustion of Administrative Remedies

Exhaustion requirement is inapplicable to class action filed by welfare recipients seeking injunctive and declaratory

relief for class and damages for individuals. *Ramos v. County of Madera (1971) 4 Cal. 3d 685, 691, 94 Cal. Rptr. 421, 484 P.2d 93*

Party generally required to exhaust administrative remedies before filing court action. *In re Darlene T. (2008) 163 Cal. App. 4th 929, 939, 78 Cal. Rptr. 3d 119*

Exhaustion requirement is inapplicable to administrative mandate proceeding instituted by applicant or recipient before director has rendered state hearing decision when administrative remedy is unavailable or inadequate. *Chatterjee v. Kizer (1991) 231 Cal. App. 3d 1348, 1360, 283 Cal. Rptr. 60*

Exhaustion requirement inapplicable when right to state hearing pursuant to *Welf. & Inst. Code § 10950* is denied because sole issue is federal or state law requiring automatic change in services or medical assistance, even when change adversely affects some or all recipients. *Cowan v. Myers (1986) 187 Cal. App. 3d 968, 975-976, 232 Cal. Rptr. 299*

Exhaustion requirement is inapplicable to welfare recipients seeking declaratory and injunctive relief and mandate to establish illegality of grant adjustments and to prohibit recoupment of overpayments. *Oliva v. Swoap (1976) 59 Cal. App. 3d 130, 134-136, 130 Cal. Rptr 411*

[ii] Standard of Review

Independent judgment test is proper standard for trial court's review of administrative decision denying application for welfare benefits. *Frink v. Prod (1982) 31 Cal. 3d 166, 171-180, 181 Cal. Rptr. 893, 643 P.2d 476* (overruling and disapproving cases cited therein, to degree inconsistent with opinion)

Plaintiff is entitled to challenge validity of welfare regulation both as an individual filing action for writ of administrative mandate after receiving adverse state hearing decision and as member of class filing class action for writ of traditional mandate. *Green v. Obledo (1981) 29 Cal. 3d 126, 143 n.12, 172 Cal. Rptr. 206, 624 P.2d 256*

Independent judgment test is proper standard for trial court's review of administrative decision that terminates welfare benefits. *Harlow v. Carleson (1976) 16 Cal. 3d 731, 734-737, 129 Cal. Rptr. 298, 548 P.2d 698*

In reviewing agency action under enabling statute, court may find abuse of discretion when: (1) administrative action under attack has, in effect, altered or amended statute or enlarged or impaired its scope; (2) there is failure to exercise discretion; or (3) agency has engaged in unjustified, unreasonable delay in implementation of statutory commands. *Grimes v. State Dept. of Social Services (1999) 70 Cal. App. 4th 1065, 1073, 83 Cal. Rptr. 2d 203* (trial court erred by affirming agency denial of request by close friend of physically handicapped person for family member licensing exemption under California Community Care Facilities Act)

While trial court exercises its independent judgment in reviewing decisions concerning grant or denial of treatment authorization request for Medi-Cal coverage of prescription medication, appellate court as confined to inquiring whether trial court's finding are supported by substantial evidence. *Holmes v. Kizer (1992) 11 Cal. App. 4th 395, 400-401, 13 Cal. Rptr. 2d 746*

Substantial evidence test is proper standard for appellate court's review of trial court's judgment, except for resolution of questions of law when facts are undisputed. *Chatterjee v. Kizer (1991) 231 Cal. App. 3d 1348, 1358, 283 Cal. Rptr. 60* ; *Anthony v. Kizer (1991) 230 Cal. App. 3d 990, 993, 281 Cal. Rptr. 516*

Independent judgment test is proper standard for trial court's review of administrative decision denying application for

Medi-Cal disability benefits. *Chatterjee v. Kizer (1991) 231 Cal. App. 3d 1348, 1357-1358, 283 Cal. Rptr. 60* ; *Cooper v. Kizer (1991) 230 Cal. App. 3d 1291, 1299, 282 Cal. Rptr. 492*

Statutory construction is question of law that appellate court may resolve independently of trial court's decision. *Anthony v. Kizer (1991) 230 Cal. App. 3d 990, 993, 281 Cal. Rptr. 516*

[iii] Attorney's Fees

Welf. & Inst. Code § 10962 does not contemplate award of attorney's fees in case in which review is sought of ruling in favor of recipient only in order to obtain a more favorable legal precedent. *Le Blanc v. Swoap (1976) 16 Cal. 3d 741, 743, 129 Cal. Rptr. 304, 548 P.2d 704*

Public assistance recipient is entitled to attorney's fees on appeal from denial of writ in mandamus proceeding to compel county's compliance with state hearing decision of Department of Benefit Payments because enforcement of appellant's rights confers important benefit on general public. *Blackburn v. Sarsfield (1981) 125 Cal. App. 3d 143, 150-151, 178 Cal. Rptr. 15*

Individual entitled to attorney's fees under *Welf. & Inst. Code § 10962* is not forfeiting fees because successfully representing class as well as own interests. *Hypolite v. Carleson (1975) 52 Cal. App. 3d 566, 587, 125 Cal. Rptr. 221*

Welfare recipients who successfully intervene in judicial proceedings brought to review decision of director is entitled to attorney's fees under *Welf. & Inst. Code § 10962*. *County of Humboldt v. Swoap (1975) 51 Cal. App. 3d 442, 445, 124 Cal. Rptr. 510*

Public assistance recipient is entitled to attorney's fees under *Welf. & Inst. Code § 10962* in action for writ of mandate to compel director to render state hearing decision. *Silberman v. Swoap (1975) 50 Cal. App. 3d 568, 571, 123 Cal. Rptr. 456*

Attorney's fees under *Welf. & Inst. Code § 10962* is available to legal services organization that rendered services at no charge to client. *Horn v. Swoap (1974) 41 Cal. App. 3d 375, 383-384, 116 Cal. Rptr 113* ; *Trout v. Carleson (1974) 37 Cal. App. 3d 337, 342-343, 112 Cal. Rptr. 282*

[b] Other Judicial Actions

Welfare recipients involved in dispute concerning only part of regulation has standing to challenge regulation in its entirety, since question is one of public right and object is to procure enforcement of public duty. *Green v. Obledo (1981) 29 Cal. 3d 126, 144, 172 Cal. Rptr. 206, 624 P.2d 256*

Interested persons who are not entitled to state hearings because they are neither applicants for nor recipients of public social service benefits, but who otherwise have standing to complain, may challenge invalid regulations by traditional mandamus pursuant to *Code Civ. Proc. § 1085*. *California Association for Health Services at Home v. State Department of Health Services (2007) 148 Cal. App. 4th 696, 705-707, 56 Cal. Rptr. 3d 102*

Preliminary injunction was proper to enjoin county from implementing plan reducing cash grants to indigent residents by deeming health care in county medical facilities to be "in-kind aid," and by crediting portion of its cost against county's obligation to provide general assistance to indigents under *Welf. & Inst. Code § 17000*, because "aid" as in *Welf. & Inst. Code § 17000.5* does not include medical care. *Gardner v. County of Los Angeles (1995) 34 Cal. App. 4th 200, 204-205, 40 Cal. Rptr. 2d 271*

Decree sought by class action is unavailable through administrative appeal since administrative decision regarding individual applicant not binding on the rights of future applicants. *Diaz v. Quitoriano (1969) 268 Cal. App. 2d 807, 812, 74 Cal. Rptr. 358*

[c] Amount of Recovery

Recipient of welfare benefits adjudged entitled both to retroactive payment of benefits pursuant to statutory obligation of the state and to award of prejudgment interest at legal rate from the time each payment becomes due. *Tripp v. Swoap (1976) 17 Cal. 3d 671, 685, 131 Cal. Rptr. 789, 552 P.2d 749* (overruled on other grounds in *Frink v. Prod (1982) 31 Cal. 3d 166, 180, 181 Cal. Rptr. 893, 643 P.2d 476*); *Ferreira v. Swoap (1976) 62 Cal. App. 3d 875, 883-884, 133 Cal. Rptr. 449* (disapproved on other grounds in *Frink v. Prod (1982) 31 Cal. 3d 166, 180, 181 Cal. Rptr. 893, 643 P.2d 476*)

Power of trial court that issues writ of mandate includes power to order that payments of benefits be made retroactive when circumstances so warrant. *Tripp v. Swoap (1976) 17 Cal. 3d 671, 677, 131 Cal. Rptr. 789, 552 P.2d 749* (overruled on other grounds in *Frink v. Prod (1982) 31 Cal. 3d 166, 180, 181 Cal. Rptr. 893, 643 P.2d 476*)

Ruling that general retroactive assistance benefits could not be awarded on class basis is error. *Gonzales v. Jones (1981) 116 Cal. App. 3d 978, 984-985, 171 Cal. Rptr. 567*

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§ 527.77 Attorney General Opinions

County is not obligated to reimburse private medical facility for emergency services furnished to indigent adult resident of county who is state hospital patient. *68 Ops. Cal. Att'y Gen. 231 (1985)*

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§ 527.78 Law Reviews

Bensinger, *From Public Charity to Social Justice: The Role of the Court in California's General Relief Program, 21 Loy. L.A.L. Rev. 497 (1988)*

Blum and Lobaco, *Legislative Cost-Cutting Puts Medi-Cal Out For Bid*, 4(5) Cal. Law. 30 (1984)

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Comment, *General Assistance in California, 12 U.S.F. L. Rev. 31 (1984)*

Comment, *Scaling the Welfare Bureaucracy: Expanding Concepts of Governmental Employee Liability, 21 UCLA L. Rev. 624 (1973)*

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Note, *The Rejected Applicant for General Assistance and His Right to a Review, 25 Hastings L.J. 678 (1974)*

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Silver, *A Practical Guide to Your First Welfare Case*, 16(6) Prac. Law. 77 (1970)

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§ 527.79 Text References

Witkin, California Procedure, vol. 8, *Extraordinary Writs*, §§ 72-133, 186-188, 225, 257 et seq. (4th ed. 1997)

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[Reserved]

§§ 527.80[Reserved]

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PART IV. FORMS

46-527 California Forms of Pleading and Practice--Annotated § 527.90

§ 527.90 Petition for Writ of Mandate to Review State Hearing Decision

[1] FORM Petition for Writ of Mandate to Review State Hearing Decision

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR WRIT OF MANDATE
Director, State Department of	)	
_____ [Social *or* Health] Services,	)	
Respondent.	)	
	)	

Petitioner respectfully represents:

1. Petitioner _____[*name*] ("Petitioner") is _____ [an applicant for *or* a recipient of] _____ [*specify public social service, e.g.,* Aid to Families With Dependent Children] under Welfare and Institutions Code Section _____, and is, and at all times mentioned herein was, a resident of _____ County, California.

2. Respondent _____[*name*] ("Respondent") is the Director of the State Department of _____ [Social *or* Health] Services.

3. On or about _____[*date*], _____[*name of county department that administers public social service*] notified Petitioner that _____ [*specify action or intended action of county department, e.g.,* Petitioner's monthly assistance would be reduced from $_____ to

$_____ for the following reason(s): _____ (*specify*)].

4. Petitioner requested a state hearing with the State Department of _____ [Social *or* Health] Services pursuant to *Welfare and Institutions Code Section 10950*. An administrative law judge was appointed, and a hearing was held on _____[*date*].

5. On or about _____[*date*], Petitioner received notice of a final decision issued by Respondent affirming the action of _____[*name of county department*].

[6. A copy of the record of the proceedings in this matter is attached hereto as Exhibit A and made a part hereof.]

7. Respondent's decision is invalid in that _____ [*specify questions of law, e.g.,* it does not comply with the requirements of Welfare and Institutions Code Section _____, which provides _____ (*specify*), and therefore constitutes an abuse of discretion].

8. Pursuant to *Welfare and Institutions Code Section 10962*, Petitioner's exclusive remedy is review by mandate under *Code of Civil Procedure Section 1094.5*, and Petitioner has no other plain, speedy, and adequate remedy in the ordinary course of law.

WHEREFORE, Petitioner prays judgment as follows:

1. For a review of the entire proceeding in this matter on the questions of law involved;

2. For an alternative writ of mandate directing Respondent to set aside his/her order of _____[*date*], _____ [*specify effect of order, e.g.,* reducing Petitioner's monthly assistance grant] [and _____ (*specify effect of any other order, e.g.,* to reconsider the amount of Petitioner's grant in light of the court's opinion and judgment)], or to show cause why he/she has not done so and why a peremptory writ of mandate to the same effect should not be issued;

3. For a peremptory writ of mandate _____[*specify terms of writ as in Paragraph 2, omitting words relating to order to show cause*];

4. For interest on any unpaid benefits which the court may find were due Petitioner, accruing from the dates these amounts were due;

5. For reasonable attorney's fees and costs pursuant to *Welfare and Institutions Code Section 10962*; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____[*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein

alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is for use by an applicant for or recipient of public social services to obtain judicial review of a final state hearing decision in a mandate proceeding in the superior court [*see Welf. & Inst. Code § 10962*]. Local practice regarding mandate proceedings varies. Therefore counsel should check with the superior court clerk regarding local practice in the county in which the writ is sought.

The petition must be accompanied by proof of service of a copy of the petition on the respondent; however, the court in which the application is filed, in its discretion and for good cause, may grant the application ex parte, without notice or service of the application [*Code Civ. Proc. § 1107*; for discussion of method of serving petition, *see* Ch. 358, *Mandate and Prohibition*].

[3] Allegations

The form alleges:

- The petitioner's capacity as either the applicant, recipient, or affected county (Paragraph 1) [*Welf. & Inst. Code § 10962*].

- The Director of the State Department of Social Services or the Director of the State Department of Health Services as the sole respondent in the proceeding (Paragraph 2) [*Welf. & Inst. Code § 10962*].

- The action or intended action that caused the petitioner to request a state hearing (Paragraph 3).

- That a state hearing on that matter was requested and held (Paragraph 4), since judicial review is available only after a final administrative decision has been rendered [*see Welf. & Inst. Code § 10962*].

- Since the petition must be filed within one year after receiving notice of the final decision [*see Welf. & Inst. Code § 10962*], the petition should also specifies the date on which the petitioner received notice of the respondent's final decision (Paragraph 5). If a rehearing was requested [*see Welf. & Inst. Code § 10960*], allegations regarding the request and the disposition of the request should be included.

- The petition should set forth the questions of law on which review is sought (Paragraph 7) [*see Welf. & Inst. Code § 10962*; *see also* discussion under [10], *below*].

- That a copy of the record is attached, if that is true (Paragraph 6).

- That the appropriate remedy is being sought in that there is no plain, speedy, and adequate remedy in the ordinary course of law, and a petition for a writ of mandate under *Code Civ. Proc. § 1094.5* is the exclusive remedy for review of a state hearing decision (Paragraph 8) [*Code Civ. Proc. § 1086*; *Welf. & Inst. Code § 10962*].

[4] Verification

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*].

[5] Filing of Petition

No filing fee is required for the filing of a petition for review of the director's decision [*Welf. & Inst. Code § 10962*]. Any such petition to the superior court is entitled to a preference in setting a date for hearing [*Welf. & Inst. Code § 10962*]. No bond is required in the case of any petition for review, nor in any appeal there from [*Welf. & Inst. Code § 10962*].

[6] Attorney's Fees and Costs

If the applicant or recipient obtains a decision in his or her favor, he or she is entitled to reasonable attorney's fees and costs [*Welf. & Inst. Code § 10962*].

[7] Interest

A recipient of public assistance who is adjudged entitled to a retroactive payment of benefits is also entitled to an award of prejudgment interest [*Tripp v. Swoap (1976) 17 Cal. 3d 671, 685, 131 Cal. Rptr. 789, 552 P.2d 749* (overruled on other grounds in *Frink v. Prod (1982) 31 Cal. 3d 166, 180, 181 Cal. Rptr. 893, 643 P.2d 476*); *see* discussion in *§ 527.53*].

[8] Filing of Record

The record may be filed with the petition or with the respondent's points and authorities, or may be ordered to be filed by the court. Except when otherwise prescribed by statute, the cost of preparing the record must be borne by the petitioner. When the petitioner has obtained a waiver of fees pursuant to *Gov. Code §§ 68630-68641* and *Cal. Rules of Ct., Rule 3.50 et seq.*, and when the transcript is necessary to a proper review of the administrative proceedings, the cost of preparing the transcript must be borne by the respondent. For discussion of waiving court fees because of a person's financial condition, see *Ch. 174, Costs and Attorney's Fees, § 174.110* et seq.

When the party seeking the writ has proceeded pursuant to *Code Civ. Proc. § 1088.5* (in trial court no alternative writ sought, and petition not accompanied by proof of service), the administrative record must be filed as expeditiously as possible, and may be filed with the petition, or by the respondent after payment of the costs by the petitioner when required, or as otherwise directed by the court.

If the expense of preparing all or any part of the record has been borne by the prevailing party, that expense is taxable as costs [*Code Civ. Proc. § 1094.5(a)*; *see also* discussion under [5], *above*].

[9] Memorandum

A supporting memorandum is not required by statute, but may be required by local court rule or customarily filed as a matter of local practice. However, since the respondent is specifically authorized to file points and authorities in opposition to the granting of the writ [*see Code Civ. Proc. § 1107*; *see also Code Civ. Proc. § 1094.5(a)* (record may be filed with respondent's points and authorities)], it is recommended that a memorandum of points and authorities be filed with the petition.

For memoranda of points and authorities relating to review of a final administrative adjudicative order or decision pursuant to *Code Civ. Proc. § 1094.5*, see California Points and Authorities, ch. 195, *Public Administrative Law* (Matthew Bender).

[10] Scope of Review

When a writ of mandate to review an administrative decision is issued, the inquiry extends to the questions of whether the respondent has proceeded without, or in excess of, jurisdiction, whether there was a fair trial, and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence [*Code Civ. Proc. § 1094.5(b)*].

For a discussion of the appropriate standard of review of a decision denying assistance to an applicant or terminating assistance to a recipient, *see § 527.51*.

For further discussion of the powers of the court in a proceeding for a writ of mandate under *Code Civ. Proc. § 1094.5*, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

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Volume 46: Settlement and Release thru Subpoena Chs. 520-535
Chapter 527 SOCIAL SERVICES
PART IV. FORMS

46-527 California Forms of Pleading and Practice--Annotated § 527.91

§ 527.91 Alternative Writ of Mandate

[1] FORM Alternative Writ of Mandate

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	ALTERNATIVE WRIT OF MANDATE
Director, State Department of	)	
_____ [Social *or* Health] Services,	)	
Respondent.	)	
	)	

_____

To _____[*name of respondent*]:

Good cause appearing, you are commanded, immediately after receipt of this writ, to set aside your decision made _____[*date*], in the matter entitled _____[*title of fair hearing proceeding*]; or, in the alternative, to appear on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] the above-entitled court, located at _____[*name of building and street address*], in _____[*city*], California, and then and there to show cause why you have not done so and why a peremptory writ of mandate to the same effect should not be issued.
Dated: _____.

Clerk of the Superior Court
By _____ [*signature*]

Deputy
[*seal*]

ORDER

Let the foregoing writ issue.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is for use in obtaining an alternative writ of mandate from a superior court. Local practice and superior court rules should be consulted on the use of the attached order, since some courts require it, and others require the writ and the order to be prepared separately. See also *§ 527.90*.

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Volume 46: Settlement and Release thru Subpoena Chs. 520-535
Chapter 527 SOCIAL SERVICES
PART IV. FORMS

46-527 California Forms of Pleading and Practice--Annotated § 527.92

§ 527.92 Class Action Complaint for Declaratory Relief to Declare Regulation Invalid and Petition for Writ of Mandate to Compel Benefit Payments

[1] FORM Class Action Complaint for Declaratory Relief to Declare Regulation Invalid and Petition for Writ of Mandate to Compel Benefit Payments

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*names*],	)	
on behalf of themselves and all others similarly situated,	)	NO. _____
Plaintiffs,	)	CLASS ACTION COMPLAINT FOR DECLARATORY RELIEF AND PETITION FOR WRIT OF MANDATE
vs.	)	
_____ [*name(s) and title(s)*],	)	
Defendant(s).	)	
	)	

_____

Plaintiffs allege:

FIRST CAUSE OF ACTION
(Declaratory Relief)

1. Plaintiffs _____[*names*] ("Plaintiffs") are _____ [applicants for *or* recipients of *or both*] _____[*name of assistance program*] under Welfare and Institutions Code Sections _____. They reside in _____ County, California.

2. Defendant _____[*name*] ("Defendant") is, and at all times mentioned herein was,

_____ [*specify, e.g.,* the Director of the State Department of Social Services of the State of California], who is authorized under the provisions of Welfare and Institution Code Sections _____ to _____ [*specify, e.g.,* promulgate regulations for the administration of _____ (*name of assistance program*)]. _____[*Allege capacity of other defendants, if any*].

3. Plaintiffs complain on behalf of themselves and all other persons who are _____ [*specify, e.g.,* recipients of assistance under _____ (*name of assistance program*)]. Such members of the class are readily ascertainable from the books and records of _____[*name of department(s) administering assistance program*], but are so numerous as to make joinder impracticable. There is a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented, and the representative parties will fairly and adequately protect the interests of the class.

4. On _____[*date*], Defendant _____[*name*] promulgated Regulation _____, [*specify*] , a copy of which is attached hereto as Exhibit A and made a part hereof. The regulation, since its promulgation, has been and now is in full force and effect and is enforced by Defendant(s).

5._____[*Allege facts, in consecutively numbered paragraphs, explaining the application of the regulation by defendant(s) to plaintiffs' applications for assistance or to plaintiffs' grants and the effect of the regulation*].

6._____ [*Cite and describe state statute, federal statute, federal regulation, or constitutional provision with which regulation must comply, e.g.,* Pursuant to Title 42 of the United States Code Section _____, in determining a recipient's need, the state agency must take into consideration _____ (*specify statutory requirements*)].

7. An actual controversy has arisen and now exists between Plaintiffs and denfendant(s) as to their respective rights and duties. Plaintiffs contend that Regulation _____[*specify*] is invalid and unenforceable for failure to comply with _____[*cite state statute, federal statute, federal regulation, or constitutional provision*] in that _____[*specify noncompliance*]. Defendant(s) dispute(s) Plaintiffs' contentions and maintain(s) that regulation _____[*specify*] and its application to Plaintiffs are valid.

8. Plaintiffs desire a judicial determination of their rights and a declaration as to the validity of regulation _____[*specify*]. A judicial declaration is necessary and appropriate at this time and under the circumstances so that Plaintiffs may ascertain their rights. The enforcement of regulation _____ is causing a burden to Plaintiffs because _____ [*specify, e.g.,* its enforcement results in the reduction of Plaintiffs' monthly assistance grants].

SECOND CAUSE OF ACTION
(Peremptory Writ of Mandate)

9. Plaintiffs refer to Paragraphs 1-8, inclusive, of their First Cause of Action and incorporate them herein by reference.

10. Pursuant to _____[*cite state statute, federal statute, federal regulation, or constitutional provision*], Defendant(s) _____ [has *or* have] a clear and present duty to _____[*specify requirements of state statute, federal statute, federal regulation, or constitutional provision*].

11. Plaintiffs have a clear, present, and substantial right to the performance of this duty because _____ [*describe right, e.g.,* Plaintiffs' monthly grants should be calculated pursuant to the requirements specified above].

12. Plaintiffs have a beneficial interest in the issuance of a writ of mandate in that _____ [*describe interest, e.g.,* the failure of Defendant(s) to comply with _____ (*cite state statute, federal statute, federal regulation, or constitutional provision*) has resulted in a reduction of Plaintiffs' monthly grants].

13. Plaintiffs have no plain, speedy, and adequate remedy in the ordinary course of law in that _____ [*specify, e.g.,* the administrative hearing procedure provided by the Welfare and Institutions Code does not afford class relief].

14. The failure of Defendant(s) to perform the duty described herein has damaged Plaintiffs, in an amount to be determined at trial, because _____ [*specify, e.g.,* Plaintiffs have not received monthly grants in the amount to which they are entitled].

WHEREFORE, Plaintiffs pray for judgment as follows:

1. For a declaration that regulation _____[*specify*] is invalid and unenforceable for failure to comply with _____[*cite state statute, federal regulation, or constitutional provision*] in that _____[*specify*];

2. For issuance of a peremptory writ of mandate commanding Defendants to _____ [*specify duty, e.g.,* calculate Plaintiffs' eligibility for assistance and benefit levels in accordance with Title 42 of the United States Code Section _____, which requires that _____ (*describe requirements*)], and pay to Plaintiffs the retroactive benefits wrongfully withheld through the enforcement of regulation _____[*specify*], together with interest thereon;

3. For reasonable attorney's fees and costs incurred herein; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiffs _____ [*names*]

[*Verification. See § 527.90.*]

[2] Use of Form

The form in [1], *above,* is for use in a class action by welfare applicants or recipients to have a state or county welfare regulation declared invalid and to obtain a writ of mandate to compel the payment of benefits which have been and are being withheld pursuant to the invalid regulation. Local practice regarding mandate proceedings varies. Counsel should therefore check with the superior court clerk regarding local practice in the county in which the writ is sought.

The petition must be accompanied by proof of service [*Code Civ. Proc. § 1107*].

When only a peremptory writ is sought pursuant to *Code Civ. Proc. § 1088.5*, however, the action may be filed and served in the same manner as an ordinary action [*Code Civ. Proc. § 1107*]. In a trial court, proof of service need not accompany such an application at the time of filing, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

[3] Caption

Local court rules should be consulted regarding requirements for captions for class actions. For example, all complaints for or against a class party filed in San Francisco Superior Courts are required to include in the caption the designation CLASS ACTION [*see* San Francisco Uniform Local Ct. Rules, Rule 402]. Even if not specifically required, counsel may want to include the words "Class Action" as part of the description of the character of the action or proceeding that must appear below the case number in the caption of any complaint or petition [*see Cal. Rules of Ct., Rule 2.111(6)*].

[4] Allegations

[a] Class Action

The complaint should allege an ascertainable class and a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented (Paragraph 3) [*see Code Civ. Proc. § 382*]. For further discussion, see Ch. 120, *Class Actions* .

[b] Complaint for Declaratory Relief

After alleging the capacity of the plaintiffs and the defendants (Paragraphs 1, 2), the complaint should allege:

- Facts showing that an actual controversy exists (Paragraphs 4-7), since an action for declaratory relief may be brought only in cases of actual controversy [*Code Civ. Proc. § 1060*].

- That plaintiffs desire a declaration of their rights and should state why a judicial decree is necessary and appropriate at this time (Paragraph 8) [*see Code Civ. Proc. § 1060*].

For further discussion, see Ch. 182, *Declaratory Relief* .

[c] Petition for Writ of Mandate

The petition should allege:

- The duty of the defendants that the plaintiffs seek to have enforced (Paragraph 10).

- The plaintiffs' right to have the duty performed (Paragraph 11).

- The plaintiffs' beneficial interest in the issuance of the writ (Paragraph 12) [*see Code Civ. Proc. §§ 1085, 1086*; *but see Green v. Obledo (1981) 29 Cal. 3d 126, 145, 172 Cal. Rptr. 206, 624 P.2d 256* (public right/public duty exception to beneficial interest requirement)].

- Facts showing that the plaintiffs have no plain, speedy, and adequate remedy in the ordinary course of law (Paragraph 13) [*see Code Civ. Proc. § 1086*].

- The damage sustained by the plaintiffs by the defendants' failure to perform the duty described (Paragraph 14) [*see Code Civ. Proc. § 1095*].

For further discussion, see Ch. 358, *Mandate and Prohibition* .

[5] Verification

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*].

[6] Jurisdiction

Although a writ of mandate may be issued by a superior or an appellate court [*see Code Civ. Proc. § 1085*], an original action for declaratory relief must be brought in the superior court as an unlimited civil case [*Code Civ. Proc. §§ 86(a)(7), 1060*].

[7] Statute of Limitations for Ordinary Writ of Mandate

The statute of limitations for an action for a writ of mandate is determined not by the remedy prayed for but by the nature of the underlying right or obligation [*Green v. Obledo (1981) 29 Cal. 3d 126, 141 n.10, 172 Cal. Rptr. 206, 624 P.2d 256]* . The obligation of a governmental entity to pay welfare benefits pursuant to law is a debt due to the recipient as of the date he or she first became entitled to the benefits [*Green v. Obledo (1981) 29 Cal. 3d 126, 141, 172 Cal. Rptr. 206, 624 P.2d 256]* . Therefore, since a class action for mandate to recover benefits wrongfully withheld seeks to enforce a liability created by statute, it is subject to a three-year limitations period [*Green v. Obledo (1981) 29 Cal. 3d 126, 141 n.10, 172 Cal. Rptr. 206, 624 P.2d 256* ; *see Code Civ. Proc. § 338(a)*].

[8] Amount of Recovery

A court issuing a writ of mandate has the power to order the retroactive payment of benefits with interest [*Tripp v. Swoap (1976) 17 Cal. 3d 671, 677, 685, 131 Cal. Rptr. 789, 552 P.2d 749]* .

Each deficient payment constitutes a separate violation triggering the running of a new period of limitations, so that only those payments which accrued within the limitations period preceding the filing of the complaint may be recovered [*Green v. Obledo (1981) 29 Cal. 3d 126, 141, 172 Cal. Rptr. 206, 624 P.2d 256]* . However, if it is shown that a disproportionate clerical and financial burden would result from an order requiring retroactive payments to a class for the entire period, it is in the discretion of the trial court to fix a more realistic starting date for the payment of retroactive benefits to class members [*Green v. Obledo (1981) 29 Cal. 3d 126, 142, 172 Cal. Rptr. 206, 624 P.2d 256]* .

[9] Award of Attorney's Fees

Although attorney's fees are specifically provided for by statute in a proceeding for administrative mandamus [*Welf. & Inst. Code § 10962*; *see § 527.52*], attorney's fees are not expressly provided for by statute in an ordinary mandamus proceeding [*see Code Civ. Proc. § 1021* (attorney's fees as matter of agreement)]. However, fees may be available to successful litigants in ordinary mandamus and declaratory relief proceedings under other statutory provisions [*Woods v. Superior Court (1981) 28 Cal. 3d 668, 681, 170 Cal. Rptr. 484, 620 P.2d 1032* ; *see Code Civ. Proc. § 1021.5* (fees recoverable when important public interest right is vindicated); *Gov. Code § 800* (fees recoverable against public entity where its action is arbitrary or capricious)].

For further discussion of the right to recovery of attorney's fees, see Ch. 120, *Class Actions* , and Ch. 174, *Costs and Attorney's Fees* , § 174.40 et seq.

[10] Points and Authorities

For a discussion of the submission of a memorandum of points and authorities with a petition for a writ of mandate, see *§ 527.90[9]*.

For memoranda of points and authorities relating to petitions for writs of mandate pursuant to *Code Civ. Proc. §§ 1085, 1086*, see California Points and Authorites, ch. 150, *Mandate and Prohibition* (Matthew Bender).

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Chapter 528 SPECIFIC PERFORMANCE

46-528 California Forms of Pleading and Practice--Annotated 528.syn

§ 528.syn Synopsis to Chapter 528: SPECIFIC PERFORMANCE

§ 528.01 Scope of Chapter

§ 528.02 Cross References

§§ 528.03-528.09 [Reserved]

§ 528.10 Governing Statutes

§ 528.11 Specific Performance Defined

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[2] Quasi-Specific Performance

§ 528.12 Award of Damages Incidental to Specific Performance Decree

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§ 528.13A Effect of Contractual Stipulation for Equitable Relief

§ 528.14 Security for Performance

[1] Scope of Mutuality

[2] Enforcement of Contract Signed by One Party

§ 528.15 Adequacy of Consideration

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§ 528.16 Just and Reasonable Contract

[1] In General

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§ 528.17 Mistake, Misapprehension, or Surprise

§ 528.18 Remedy at Law Inadequate

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[2] Personal Property

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§ 528.19 Fraud and Misrepresentation

§ 528.20 Contract Terms Required to Be Certain

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[2] Term Subject to Future Agreement

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§ 528.21 Performance of Conditions Precedent

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[2] When Performance or Tender of Performance Not Required

[a] Repudiation of Contract and Excuses for Nonperformance

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§ 528.22 Seller Required to Have Good Title

§§ 528.23through 528.39 [Reserved]

§ 528.40 In General

§ 528.41 Inequitability, Impossibility, and Illegality of Performance

§ 528.42 Penalties and Forfeitures

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[2] Determination of Penalty

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§ 528.43 Procuring Act or Consent of Spouse or Third Party

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§ 528.44 Series of Continuous Acts

§ 528.45 Contracts for Personal Services

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§ 528.46 Agreement to Make Disposition of Property by Will

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§ 528.49 Contract for Sale of Corporate Stock

§ 528.50 Agreement to Arbitrate Controversy

§ 528.51 Collective Bargaining Agreements

§ 528.52 Satisfaction of Accord

§ 528.53 Escrow Agreement

§ 528.54 Contract to Convey Patent Rights

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§ 528.72 Statute of Limitations

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[a] When Injunction Proper

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[d] Terms of Contract

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[8] Option Contracts

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[13] Procuring Act of Third Party

[14] Quasi-Specific Performance

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[a] Joint Wills

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§ 528.93 Law Reviews

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§ 528.130 Complaint for Specific Performance of Contract [Civ. Code § 3384]--General Form

[1] FORM

[2] Use of Form

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[4] Pleading Certainty of Contract

[5] Pleading Just and Reasonable Contract and Adequacy of Consideration

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[8] Excuse For Nonperformance

[9] Pleading Inadequate Remedy at Law

[10] Avoiding Statute of Frauds

[11] Action to Enforce Installment Agreements for Sale of Real Property

[12] Verification

[13] Jurisdiction

[14] Decisions

[a] Adequate Remedy at Law

[b] Principles Governing Relief

[c] Relief Granted by Court

[i] In General

[ii] Attorney's Fees

[iii] Compensation for Delay

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[15] Text References

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§ 528.131 Complaint for Quasi-Specific Performance of Contract to Make Will--Agreement to Devise Property

[1] FORM

[2] Use of Form

[3] Probate Court Jurisdiction

[4] Essential Allegations

[5] Parties

[6] Claim Against Estate

[7] Agreements Made In 1985-2000

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[10] State Statutes

[11] Decisions

[a] Agreements Made Before 1985

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§ 528.132 Complaint for Quasi-Specific Performance of Contract to Make Will--Agreement to Devise Property--Decedent Revoked Will Made in Compliance With Agreement

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[2] Use of Form

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§ 528.133 Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527(a)], and Permanent Injunction [Civ. Code §§ 3422, 3423(e); Code Civ. Proc. § 526(b)(5)]--Enjoining Breach of Personal Services Contract [Civ. Code § 3423(e); Code Civ. Proc. § 526(b)(5)]

[1] FORM

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[9] Decisions

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§ 528.134 Affirmative Defense--Contract to Procure Act of Third Person [Civ. Code § 3390(4)]

[1] FORM

[2] Use of Form

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§ 528.135 Affirmative Defense--Contract Requires Series of Acts

[1] FORM

[2] Use of Form

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[4] Text References

§ 528.136 Affirmative Defense--Contract for Personal Services [Civ. Code § 3390(1), (2)]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Decisions

[5] Text References

§ 528.137 Affirmative Defense--Seller's Title in Doubt [Civ. Code § 3394]

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

[5] Text References

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Chapter 528 SPECIFIC PERFORMANCE
PART I. SCOPE

46-528 California Forms of Pleading and Practice--Annotated § 528.01

§ 528.01 Scope of Chapter

This chapter discusses the basic elements of a cause of action for specific performance and situations in which specific performance will and will not be granted. It contains a general form of complaint for specific performance [*see § 528.130*], including forms of complaint for quasi-specific performance of a contract to make a will [*see §§ 528.131* and *528.132*]. It also contains a form of complaint for a temporary restraining order, preliminary injunction, and permanent injunction enjoining the breach of a personal services contract [*see § 528.133*]. Finally, the chapter includes forms of affirmative defenses for use by a defendant in an action for specific performance [*see §§ 528.134 -528.137*].

For a discussion of the basic elements of contract law, see Ch. 140, *Contracts* . For a discussion and forms for use in obtaining specific performance of a contract for the sale of goods, see Ch. 501, *Sales: Sales Under the Commercial Code* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewContracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance

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46-528 California Forms of Pleading and Practice--Annotated § 528.02

§ 528.02 Cross References

For a complaint for specific performance to compel satisfaction of an accord, see Ch. 6, *Accord and Satisfaction* .

For a complaint for specific performance of a contract to sell shares representing control of a corporation, see *Ch. 163, Corporations: Transfers of Shares, § 163.33*.

For a complaint by a corporation seeking specific performance of an option agreement to resell shares being held by a key employee whose employment has been terminated, and to obtain a preliminary injunction restraining the former employee from disposing of the shares in violation of the agreement, see *Ch. 163, Corporations: Transfers of Shares, § 163.34*.

For complaints for specific performance of options in leases, see Ch. 332, *Landlord and Tenant: The Tenancy* .

For complaints to enjoin breach of a contract for artistic services executed during an artist's minority and for injunctive relief by a motion picture corporation against an actor and a competing motion picture corporation to enjoin breach of contract when contract for artistic services was executed during the actor's minority and approved by superior court, see Ch. 365, *Minors: Contract Actions* .

For a complaint for use by a partner against a former partner when the former partner breached an agreement not to compete, see ch. 406, *Partnerships: Dissolution*, § 406.06.

For forms for ordering conveyance of real property to complete sale on a contract entered into by a since-deceased person, see Ch. 456, *Probate: Management of Assets* .

For discussion of the operation of the statute of frauds in an action for specific performance, see Ch. 530, *Statute of Frauds* .

For a complaint for specific performance of provisions of a deed of trust, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

For discussion and forms relating to the imposition of constructive trusts, see Ch. 561, *Trusts: Constructive Trusts* .

For forms to obtain injunctive relief to enjoin unfair interference with business relations by a former employee, to restrain unfair interference with business relations, to restrain selling below cost to eliminate competition, and to restrain a retailer from selling a commodity below its fair trade price, see Ch. 565, *Unfair Competition* .

For forms to compel specific performance of contracts for the sale of real property, see Ch. 569, *Vendor and Purchaser* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersTransfers of SharesCivil ProcedureRemediesInjunctionsGeneral OverviewContracts LawRemediesSpecific PerformanceEstate, Gift & Trust LawTrustsConstructive TrustsReal Property LawDeedsRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance

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46-528 California Forms of Pleading and Practice--Annotated §§ 528.03-528.09

[Reserved]

§§ 528.03[Reserved]

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Chapter 528 SPECIFIC PERFORMANCE
PART II. LEGAL BACKGROUND
A. Overview

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§ 528.10 Governing Statutes

The specific performance of obligations is governed by *Civ. Code §§ 3384-3395*. Preventive relief by injunction, including injunctions to prevent the breach of an obligation, are governed by *Civ. Code §§ 3420-3423* and *Code Civ. Proc. §§ 525 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesEquitable ReliefInjunctive ReliefContracts LawRemediesSpecific PerformanceReal Property LawDeedsRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance

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§ 528.11 Specific Performance Defined

[1] Equitable Remedy

Specific performance is an equitable action [*Schaefer v. United Bank & Trust Co. (1930) 104 Cal. App. 635, 641, 286 P. 723]* to procure the performance of a contract by the defendant [*Patterson v. Reddish (1922) 56 Cal. App. 197, 202, 204 P. 565]* . The specific performance of a contract may be compelled except when provided otherwise in *Civ. Code §§ 3384-3395* [*Civ. Code § 3384*].

An action for specific performance of a contract is usually by the buyer against the seller in situations involving a sale, although the remedy is technically available to the seller as well [*see Civ. Code § 3387*; *Laske v. Lampasona (1948) 89 Cal. App. 2d 284, 287-288, 200 P.2d 871* ; *see also Goldsworthy v. Dobbins (1952) 110 Cal. App. 2d 802, 808, 243 P.2d 883* (antideficiency statute [*Code Civ. Proc. § 580b*] does not prohibit remedy of specific performance to seller of real property)]. However, when the property involved has already been transferred to a buyer who has not paid the purchase price, the results of an action for specific performance and an action for damages are essentially the same--a judgment for the purchase price [*see* Powell on Real Property, Ch. 84, *Inter Vivos Transfer of Land Otherwise Than by Deed*, § 932 (Matthew Bender); California Real Property Sales Transactions, § 12.48 (Cal. C.E.B. 1981)].

[2] Quasi-Specific Performance

An action for quasi-specific performance is an action for the specific performance of a contract between a deceased person and the plaintiff. It is not truly for specific performance since a deceased person cannot be compelled to execute a contract. However, if the court determines that the plaintiff is entitled to receive what was promised in the contract, the court may declare a constructive trust on the property in the hands of those who have succeeded to the estate. This is the equivalent of specific performance since it accomplishes the result of enforcement of the contract [*Estate of Brenzikofer v. Schwartz (1996) 49 Cal. App. 4th 1461, 1467, 57 Cal. Rptr.2d 401* ; *Ludwicki v. Guerin (1961) 57 Cal. 2d 127, 130, 17 Cal. Rptr. 823, 367 P.2d 415* ; *Henderson v. Fisher (1965) 236 Cal. App. 2d 468, 472, 46 Cal. Rptr. 173]* . Equitable relief in the form of quasi-specific performance is not available, however, if the plaintiff has an adequate legal remedy [*see, e.g., Wilkison v. Wiederkehr (2002) 101 Cal. App. 4th 822, 832-833, 124 Cal. Rptr. 2d 631* (plaintiff could not maintain action for quasi-specific performance--seeking to impose constructive trust on proceeds of

home sale--when he had claim for damages for breach of written agreement to bequeath property)].

Although the relief in a quasi-specific performance action differs from that in a traditional specific performance action, the requisites for relief are identical [*Henderson v. Fisher (1965) 236 Cal. App. 2d 468, 473, 46 Cal. Rptr. 173* ; *see § 528.14* et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesEquitable ReliefGeneral OverviewContracts LawRemediesSpecific PerformanceEstate, Gift & Trust LawTrustsConstructive TrustsReal Property LawPurchase & SaleRemediesSpecific PerformanceReal Property LawTrustsConstructive Trusts

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46-528 California Forms of Pleading and Practice--Annotated § 528.12

§ 528.12 Award of Damages Incidental to Specific Performance Decree

[1] In General

When a person has a cause of action for specific performance, damages incidental to the specific performance decree, such as damages for delay in performance, may be awarded [*see Ellis v. Mihelis (1963) 60 Cal. 2d 206, 219, 32 Cal. Rptr. 415, 384 P.2d 7]* . For example, a party to a contract for the purchase or exchange of land who is entitled to a decree of specific performance is also ordinarily entitled to a judgment for the rents and profits from the time the party was entitled to a conveyance [*Ellis v. Mihelis (1963) 60 Cal. 2d 206, 219, 32 Cal. Rptr. 415, 384 P.2d 7]* . The amount awarded is, in reality, a form of compensation due the buyer for loss incurred because of the delay in receiving title [*Greenstone v. Claretian Theological Seminary (1959) 173 Cal. App. 2d 21, 29, 343 P.2d 161 , disapproved on other grounds, Ellis v. Mihelis (1963) 60 Cal. 2d 206, 32 Cal. Rptr. 415, 384 P.2d 7]* .

A court cannot award incidental damages, however, unless a cause of action for specific performance has been established [*Paratore v. Perry (1966) 239 Cal. App. 2d 384, 388, 48 Cal. Rptr. 682* ; *Rose v. Lawton (1963) 215 Cal. App. 2d 18, 21, 29 Cal. Rptr. 844]* .

Confusion has existed in the area of incidental damages because of the informal use of the term "damages" in connection with such an award. Compensation, however, neither constitutes damages as contemplated in an action for breach of contract, nor implies legal damages. The award of incidental damages is based on the theory that a court of equity, once it obtains jurisdiction of an action for specific performance, should adjust the rights of the parties and equalize any losses occasioned by the delay by offsetting them with money payments [*Greenstone v. Claretian Theological Seminary (1959) 173 Cal. App. 2d 21, 29, 343 P.2d 161 , disapproved on other grounds, Ellis v. Mihelis (1963) 60 Cal. 2d 206, 32 Cal. Rptr. 415, 384 P.2d 7]* .

[2] Pleading

No specific pleading appears necessary to implement enforcement of the contract and to allow the award of incidental damages in addition to the prayer for specific performance and the general prayer "for such other and further relief as the court may deem just" [*Greenstone v. Claretian Theological Seminary (1959) 173 Cal. App. 2d 21, 32, 343 P.2d*

161 , disapproved on other grounds, Ellis v. Mihelis (1963) 60 Cal. 2d 206] .

[3] Calculation of Damages

The guiding principle in calculating damages incident to the decree of specific performance is relation of the performance back to the date set in the contract. Thus, since timely performance of a contract for the sale of real property would result in the buyer's receiving the rents and profits of the land but losing the use of the purchase money, a buyer who seeks to recover rents and profits must permit an offset for his or her use of the purchase funds during the period that performance was delayed [*Ellis v. Mihelis (1963) 60 Cal. 2d 206, 220, 32 Cal. Rptr. 415, 384 P.2d 7* (trial court erred in not permitting offset of interest against profits); *Addiego v. Hill (1971) 17 Cal. App. 3d 453, 461, 95 Cal. Rptr. 151]* . Interest is offset only against the accumulating profits that the purchaser acquires with his or her purchase. Consequently, when the contract is for the sale of corporate stock, any adjustment to the purchase price to offset interest on sums retained by the purchasers of the stock during the pendency of an appeal should not exceed the increase in the proportionate net worth of the corporation attributable to the stock in question by reason of the business transacted by the corporation during that period [*Addiego v. Hill (1971) 17 Cal. App. 3d 453, 462, 95 Cal. Rptr. 151]* . An offset of interest against profits is not permitted when the purchaser, with notice to the seller, has set aside money toward the purchase price in such a manner as to realize no use or benefit from it [*Ellis v. Mihelis (1963) 60 Cal. 2d 206, 221, 32 Cal. Rptr. 415, 384 P.2d 7]* .

When a seller is awarded specific performance, the seller is only entitled to the purchase price, plus interest. Damages for operating losses and loss of income while obtaining specific performance are not recoverable [*BD Inns v. Pooley (1990) 218 Cal. App. 3d 289, 295-296, 266 Cal. Rptr. 815]* .

For further discussion of the computation of damages, see *Ch. 569, Vendor and Purchaser, § 569.10* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDamagesSpecial DamagesContracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesDamagesIncidental DamagesReal Property LawPurchase & SaleRemediesSpecific Performance

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46-528 California Forms of Pleading and Practice--Annotated § 528.13

§ 528.13 Injunctive Relief

[1] In General

Specific performance is generally granted to compel the performance of an affirmative obligation in a contract. When the obligation is negative, an agreement not to do something, an injunction may be granted [*see Long Beach Drug Co. v. United Drug Co. (1939) 13 Cal. 2d 158, 170-171, 89 P.2d 386* ; *Smith v. Mendonsa (1952) 108 Cal. App. 2d 540, 542-544, 238 P.2d 1039]* . An injunction can also be granted to prevent the breach of an affirmative obligation. In the latter situation, injunctive relief is very similar to granting specific performance of the contract [*see* Witkin, California Procedure, Vol. 6, *Provisional Remedies*, §§ 308-311 (4th ed. 1997)].

An injunction, however, cannot be granted except in certain limited situations to prevent the breach of a contract which is not specifically enforceable [*Civ. Code § 3423(5)*; *Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(b)(5)*; *Steinmeyer v. Warner Cons. Corp. (1974) 42 Cal. App. 3d 515, 519, 116 Cal. Rptr. 57* ; see discussion in *§ 528.45[1]*; but see discussion in *§ 528.13[1]*].

Even when a contract contains both affirmative and negative stipulations, equity will not interfere to prevent a breach of the negative covenant when the affirmative covenant is of such a nature that it cannot be specifically enforced by a judicial decree. Although this doctrine is contrary to the rule of the Restatement of Contracts, § 380, it is the settled law of California because of the express statutory provisions of *Civ. Code § 3423* and *Code Civ. Proc. § 526* [*Long Beach Drug Co. v. United Drug Co. (1939) 13 Cal. 2d 158, 168-169, 89 P.2d 386* ; *Anderson v. Neal Institutes Co. (1918) 37 Cal. App. 174, 178-179, 173 P. 779]* .

[2] Nonprofit Cooperative's Contract With Member

An exception to the rule that an injunction cannot be granted to prevent breach of a contract that is not specifically enforceable allows the granting of an injunction to prevent the breach of a contract entered into between any nonprofit cooperative corporation or association and one of its members or stockholders with respect to any provision regarding the sale or delivery to the corporation or association of the products produced or acquired by the member or stockholder [*Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(b)(5)*].

[3] Part Performance

If the plaintiff has altered his or her position so that the denial of specific performance would operate as a fraud on the plaintiff, equity will regard plaintiff's past performance as a substantial performance and indirectly decree specific performance by defendant by enjoining him or her from breaching the contract [Poultry Producers etc. v. *Barlow (1922) 189 Cal. 278, 294, 208 P. 93]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 528.13A Effect of Contractual Stipulation for Equitable Relief

As a general matter, if the parties have stipulated in the contract as to the nature or amount of a remedy, it is proper for the trial court to honor the parties' agreement unless the court finds that to do so would be contrary to a rule of law or public policy. In determining the lawfulness of a stipulation that contemplates an equitable remedy, the court should take into account the special nature of equitable remedies. Given their extraordinary nature, equitable remedies are usually unavailable when the remedy at law is adequate, as when damages are quantifiable. A court must reject a stipulation contemplating an equitable remedy that is contrary to law or public policy, as in a case in which the evidence shows that an aggrieved party actually has an adequate remedy at law; otherwise, the court should honor the parties' agreement and enforce the stipulation [*DVD Copy Control Assn. v. Kaleidescape, Inc. (2009) 176 Cal. App. 4th 697, 725726, 97 Cal. Rptr. 3d 856]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewContracts LawRemediesEquitable ReliefInjunctive ReliefContracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance

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§ 528.14 Security for Performance

[1] Scope of Mutuality

Under former California law, neither party to an obligation could be compelled specifically to perform it unless the other party thereto had performed, or could be compelled specifically to perform, everything to which the former was entitled under the same obligation, either completely or nearly so [*see* former *Civ. Code § 3386* as enacted in 1872]. Over the years, this doctrine of mutuality of remedy was so qualified as to be of little, if any, value. Many authorities noted that the only important consideration in deciding to grant specific performance was whether or not the court of equity in which the case was brought was able to assure that the defendant would receive the agreed performance from the plaintiff [*Ellis v. Mihelis (1963) 60 Cal. 2d 206, 215, 32 Cal. Rptr. 415, 384 P.2d 7]* . Consequently, *Civ. Code § 3386* was amended in 1969 to provide that a court may compel specific performance, even though the agreed counterperformance is not, or would not have been, specifically enforceable, if (1) specific performance would otherwise be an appropriate remedy; and (2) the agreed counterperformance has been substantially performed or its concurrent or future performance is assured or, if the court considers it necessary, can be secured to the court's satisfaction [*see* *Bleecher v. Conte (1981) 29 Cal. 3d 345, 352-353, 173 Cal. Rptr. 278, 626 P.2d 1051* (seller's waiver of right to specific performance in liquidated damages clause did not preclude buyers from compelling specific performance of land-sale agreement); Rest Contracts, §§ 372, 373].

[2] Enforcement of Contract Signed by One Party

A party who has signed a written contract may be compelled specifically to perform it although the other party has not signed the contract, if the latter has performed it, or offers to perform it, on his or her part, and the case is otherwise proper for enforcing specific performance [*Civ. Code § 3388*].

The requirement of security for performance is satisfied when the non-signing plaintiff brings suit since by suing the plaintiff binds himself or herself to abide by the court's decree and empowers the court to decree specific performance against him or her. The commencement of the action is his or her offer to perform [*Harper v. Goldschmidt (1909) 156 Cal. 245, 251, 104 P. 451* ; *Riverside Fence Co. v. Novak (1969) 273 Cal. App. 2d 656, 664, 78 Cal. Rptr. 536* (option contract to sell real property)]. Although these cases were decided prior to the 1969 amendment of *Civ. Code § 3388*

which deleted the mutuality of remedy requirement and substituted a security for performance requirement, the cases should still be applicable since, by bringing suit, the plaintiff's performance can be ensured.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawConsiderationMutual ObligationContracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance

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46-528 California Forms of Pleading and Practice--Annotated § 528.15

§ 528.15 Adequacy of Consideration

[1] In General

Specific performance cannot be enforced against a party to a contract unless the party has received adequate consideration for the contract [*Civ. Code § 3391(1)*; [*Drullinger v. Erskine (1945) 71 Cal. App. 2d 492, 495, 163 P.2d 48* (option contract to purchase real property)]. Inadequacy of consideration is in itself sufficient to deny the granting of specific performance [*Cornblith v. Valentine (1930) 211 Cal. 243, 246, 294 P. 1065* (consideration as inadequate for agreement to exchange real property when plaintiff's equity had value of $4,100 and defendant's equity had value of *$6,200); Paratore v. Perry (1966) 239 Cal. App. 2d 384, 387-388, 48 Cal. Rptr. 682* (consideration inadequate when property worth $50,000 sold for $36,000)].

Adequate consideration, as used in *Civ. Code § 3391*, does not necessarily mean the highest price obtainable, but a price that is fair and reasonable under all the circumstances [*Chalmers v. Raras (1962) 200 Cal. App. 2d 682, 689, 19 Cal. Rptr. 531* ; *Cushing v. Levi (1931) 117 Cal. App. 94, 100-101, 3 P.2d 958]* . Moreover, adequacy of consideration does not mean equality of price or a consideration measuring the value of the property to the fullest extent [*Schader v. White (1916) 173 Cal. 441, 446, 160 P. 557* (consideration adequate when total value of property involved was $20,000 and disparity in value of respective properties was $1,000)]. In determining adequacy of consideration, the relationship of the parties and their love, affection, and regard for each other, as well as the object to be attained by the contract, must be considered, insofar as these factors amount to consideration [*Johnson v. Servaes (1962) 210 Cal. App. 2d 392, 402, 26 Cal. Rptr. 733* ; see *Berkeley Lawn Bowling Club v. City of Berkeley (1974) 42 Cal. App. 3d 280, 290, 116 Cal. Rptr. 762]* .

The adequacy of the consideration in an action for specific performance is a question of fact for the trial court and should be left to the trial court's discretion if it is substantially supported by the evidence [*Henderson v. Fisher (1965) 236 Cal. App. 2d 468, 475, 46 Cal. Rptr. 173* ; *Ferguson v. Fajardo (1962) 211 Cal. App. 2d 119, 123, 27 Cal. Rptr. 72]* .

[2] Waiver of Claim of Inadequacy of Consideration

The acceptance of the agreed consideration is a waiver of any claim of inadequacy and hence a waiver of any cause of action for specific performance [*Peters v. Binnard (1933) 219 Cal. 141, 150, 25 P.2d 834* (inadequate consideration claim waived when parties who wanted to purchase notes enjoyed benefits of another person's efforts in obtaining notes at agreed price but refused to pay that party for money he advanced); *Westwood Temple v. Emanuel Center (1950) 98 Cal. App. 2d 755, 759, 221 P.2d 146* (dismissal of action brought for declaration of rights of parties valid consideration and acceptance of dismissal waiver of claim of inadequacy of consideration)]. However, the mere giving of a check does not ordinarily constitute payment nor does the mere acceptance thereof raise a presumption that such acceptance constitutes payment. A check is not payment until cashed; a party attempting to prove payment by mere delivery or acceptance must in addition prove that it was agreed that such delivery and acceptance was to be accepted as payment [*Mendiondo v. Greitman (1949) 93 Cal. App. 2d 765, 767, 209 P.2d 817]* . The parties, however, can make an agreement that acceptance of a check constitutes payment, which obviates the rule stated above [*Beazell v. Kane (1954) 127 Cal. App. 2d 593, 596, 274 P.2d 224]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawConsiderationAdequate ConsiderationContracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleContracts of SaleEnforceabilityFailure of ConsiderationReal Property LawPurchase & SaleRemediesSpecific Performance

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46-528 California Forms of Pleading and Practice--Annotated § 528.16

§ 528.16 Just and Reasonable Contract

[1] In General

Specific performance cannot be enforced against a party to a contract if the contract is not just and reasonable as to that party [*Civ. Code § 3391(2)*; *Berkeley Lawn Bowling Club v. City of Berkeley (1974) 42 Cal. App. 3d 280, 290, 116 Cal. Rptr. 762]* . Consequently, equity will not enforce a contract which on its face is so manifestly harsh and oppressive as to shock the conscience. Specific performance will be refused when a contract is unfair, one-sided, unconscionable, or affected by any other inequitable feature, and when specific enforcement would be oppressive on the defendant, would prevent the enjoyment of his or her own rights, or would work injustice in any other manner [*Jacklich v. Baer (1943) 57 Cal. App. 2d 684, 693, 135 P.2d 179* (contract unfair and unreasonable since defendant was required to pay plaintiffs 15 percent of net proceeds from defendant's boxing contests until $13,500 was paid and 10 percent thereafter for five years, plaintiffs received almost $33,500, and plaintiffs could extend contract for five more years for $5)].

A challenge on the basis that the contract is not just and reasonable as to the defendant must be considered in view of the entire circumstances, including the object to be obtained by the contract and the relationship of the parties [*Berkeley Lawn Bowling Club v. Berkeley (1974) 42 Cal. App. 3d 280, 290, 116 Cal. Rptr. 762]* .

Fairness and reasonableness is determined from the circumstances that existed at the time the contract was made. Thus, a mere change of circumstances that makes performance more difficult or more expensive is not a bar to specific performance of the contract [*Ellison v. Ventura Port Dist. (1978) 80 Cal. App. 3d 574, 582, 145 Cal. Rptr. 665]* . A prenuptial agreement under which the surviving spouse was to receive a life estate in decedent's residence was enforced despite the fact the decedent died unexpectedly a few months after the couple was married. The prenuptial agreement was fair and reasonable at the time it was made because at that time, the couple surely anticipated more time together than the few months they enjoyed [*Hall v. Hall (1990) 222 Cal. App. 3d 578, 588, 271 Cal. Rptr. 773]* .

[2] Unconscionable Contract

California has recently enacted an unconscionable contract provision that is almost identical to that of the Uniform

Commercial Code [*see Civ. Code § 1670.5*; U.C.C. § 2-302]. However, since the Legislature put Section 1670.5 in the Civil Code, it apparently applies to all contracts, not just to contracts for the sale of goods.

Under this provision, if a court finds, as a matter of law, that a contract or any clause of the contract was unconscionable at the time it was made, it may refuse to enforce the contract, may enforce the remainder of the contract without the unconscionable clause, may so limit the application of any unconscionable clause as to avoid any unconscionable result [*Civ. Code § 1670.5(a)*]. The basic test is whether or not, in the light of the general background and the needs of the particular case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract [Assembly Legislative Committee Comment to *Civ. Code § 1670.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesUnconscionabilityGeneral OverviewContracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleContracts of SaleEnforceabilityGeneral OverviewReal Property LawPurchase & SaleRemediesSpecific Performance

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§ 528.17 Mistake, Misapprehension, or Surprise

A contract will not be specifically enforced if the defendant's assent was given under the influence of mistake, misapprehension, or surprise, except that when the contract provides for compensation in case of mistake, in which case a mistake within the scope of the provision may be compensated for, and the contract specifically enforced in other respects, if such enforcement is proper [*Civ. Code § 3391(4)*; *Cornblith v. Valentine (1930) 211 Cal. 243, 247, 294 P. 1065* ; *Cavalieri v. Hess (1928) 205 Cal. 703, 706, 272 P. 295* (specific performance not granted when there is mutual mistake as to legal description of lands to be sold); *Loeb v. Wilson (1967) 253 Cal. App. 2d 383, 389, 61 Cal. Rptr. 377* (specific performance denied when seller's assent to contract was vitiated by her mistake of fact with respect to nature of her interest in property); for further discussion of mistake in contractual situations, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleContracts of SaleEnforceabilityMistakeReal Property LawPurchase & SaleRemediesSpecific Performance

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46-528 California Forms of Pleading and Practice--Annotated § 528.18

§ 528.18 Remedy at Law Inadequate

[1] In General

Specific performance will be decreed only when no other adequate relief is available to the plaintiff. Equity will not assume jurisdiction when the plaintiff may be adequately compensated in money [*Morrison v. Land (1915) 169 Cal. 580, 586, 147 P. 259* ; *see* *Palo Alto-Menlo Park Yellow Cab Co. v. Santa Clara County Transit Dist. (1976) 65 Cal. App. 3d 121, 133, 135 Cal. Rptr. 192* ; see also *Wilkison v. Wiederkehr (2002) 101 Cal. App. 4th 822, 832-833, 124 Cal. Rptr. 2d 631* (plaintiff could not maintain action for quasi-specific performance when he had adequate legal remedy in form of claim for damages)]. The question, in determining the adequacy of plaintiff's remedy at law, is not whether he or she has some remedy at law apart from the contract, but whether the remedy at law on the contract itself is sufficient [*Henderson v. Fisher (1965) 236 Cal. App. 2d 468, 474, 46 Cal. Rptr. 173* ; *see* discussion in *§ 528.45[2][b]*].

[2] Personal Property

The general rule is that equity will not decree the specific performance of contracts relating to personal property when the articles concerned do not have a quality which gives them special value to the contracting party and when the recovery of damages will enable the plaintiff to purchase others in the market of like kind and quality. Thus a presumption prevails in the case of contracts for the transfer of personalty that money damages will provide adequate compensation for a breach. However, this presumption is rebuttable, and when the articles are of such a rare or sentimental value that they cannot be duplicated, specific performance may be granted [*Wehen v. Lundgaard (1940) 41 Cal. App. 2d 610, 613, 107 P.2d 491* ; *see* *Gilfallan v. Gilfallan (1914) 168 Cal. 23, 25, 141 P. 623* (allegations in complaint for specific performance of contract to sell plaintiff oil company stock as sufficient against demurrer when stock had no fixed, ascertainable market value and would have no such value until oil was discovered); *Com. Code § 2716(1)* (specific performance permitted when goods are unique and in other proper circumstances); for discussion of *Com. Code § 2716(1), see* Ch. 501, *Sales: Sales Under the Commercial Code*].

If part of the subject matter of the contract consists of land and the other part consists of personal property, specific performance of the entire contract may be decreed even though compensation in money would be an adequate remedy

for the promisor's failure to perform that part of the contract calling for the transfer of ordinary chattels [*Henderson v. Fisher (1965) 236 Cal. App. 2d 468, 473, 46 Cal. Rptr. 173]* .

[3] Real Property

There is a presumption that the breach of an agreement to transfer real property cannot be adequately relieved by monetary damages. In the case of a single-family dwelling that the buyer intends to occupy, the presumption is conclusive. In all other cases, the presumption affects the burden of proof [*Civ. Code § 3387*]. By establishing a rebuttable presumption with respect to property other than a single-family dwelling, the Legislature left open the possibility that damages can be an adequate remedy for breach of a real estate contract. The rebuttable presumption shifts the burden of proof to the breaching party to prove the adequacy of damages. Thus, the Legislature intended that a damages remedy for a nonbreaching party to a commercial real estate contract is the exception rather than the rule [*Real Estate Analytics, LLC v. Vallas (2008) 160 Cal. App. 4th 463, 474, 72 Cal. Rptr. 3d 835* (seller, who was breaching party, did not overcome presumption against adequacy of damages merely by showing that buyer's purpose in acquiring property was to earn profits from developing or reselling it)].

Civ. Code § 3307, which specifies the detriment caused by breach of a real property contract and allows a seller to recover consequential damages and interest, does not eliminate the seller's ability to seek specific performance. The seller has a choice of remedies, and may pursue damages or specific performance [*BD Inns v. Pooley (1990) 218 Cal. App. 3d 289, 295-296, 266 Cal. Rptr. 815]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityAdequate Remedy at LawContracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance

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46-528 California Forms of Pleading and Practice--Annotated § 528.19

§ 528.19 Fraud and Misrepresentation

A contract cannot be specifically enforced against a party if that party's assent was obtained by the misrepresentation, concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract or by any promise of that party that has not been substantially fulfilled [*Civ. Code § 3391(3)*; *Cornblith v. Valentine (1930) 211 Cal. 243, 247, 294 P. 1065* (specific performance of agreement to exchange equities in properties denied when defendants had been induced to enter agreement because of false and fraudulent representations knowingly made by plaintiff that plaintiff's equity was equal in value to defendants', that plaintiff would convey to defendants all furniture in one house, and that designated mortgage was only encumbrance against plaintiff's property); *Boas v. Bank of America (1942) 51 Cal. App. 2d 592, 597, 125 P.2d 620* (specific performance refused if plaintiff's conduct in obtaining contract or acting under it has been unconscientious, inequitable, or characterized by bad faith); for further discussion of fraud in contractual situations and for related forms, *see* Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*].

The misrepresentation does not need to cause damage. When an intentional misrepresentation is made for the purpose of deceiving the defendant and is relied on by the defendant, who was deceived by the misrepresentation and who would not have entered into the contract but for the fact of the deceit, the fraud is a defense to an action for specific performance. A misrepresentation is considered material by an equitable court although not accompanied by damage [*Kelly v. Central Pac. R.R. Co. (1888) 74 Cal. 557, 561, 16 P. 386* (specific performance of contract in which railroad agreed to convey land to plaintiff denied since agent conveyed land because plaintiff had claimed that he had settled on land when in fact he had not done so and when land was being settled by another party, which plaintiff knew); Restatement of Contracts § 367 comment a]. Even if the defendant had the means and opportunity to detect the fraud by the exercise of ordinary prudence, a court of equity will not enforce a contract obtained by fraud [*Brandt v. Krogh (1910) 14 Cal. App. 39, 51, 111 P. 275* (executory contract)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesSpecific PerformanceReal

Property LawPurchase & SaleContracts of SaleEnforceabilityFraud & MisrepresentationReal Property LawPurchase & SaleRemediesSpecific Performance

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46-528 California Forms of Pleading and Practice--Annotated § 528.20

§ 528.20 Contract Terms Required to Be Certain

[1] In General

A contract cannot be specifically enforced if the terms of the contract are not sufficiently certain to make the precise act which is to be done clearly ascertainable [*Civ. Code § 3390(5)*; *Crail v. Blakely (1973) 8 Cal. 3d 744, 753-754, 8 Cal. 3d 744, 754, 106 Cal. Rptr. 187, 505 P.2d 1027* ; *Carlson v. Richardson (1968) 267 Cal. App. 2d 204, 206-207, 72 Cal. Rptr. 769* (agreement to convey realty incomplete if it lacks definite description of land to be conveyed)]. Many courts have stated that the material terms of a contract must be significantly more certain when a plaintiff demands the remedy of specific performance than when he or she seeks the traditional legal remedy of damages [*Larwin-Southern Cal., Inc. v. JGB Inv. Co. (1980) 101 Cal. App. 3d 626, 636, 162 Cal. Rptr. 52* ; *see Long Beach Drug Co. v. United Drug Co. (1939) 13 Cal. 2d 158, 164, 89 P.2d 386]* .

In determining whether the material terms of the contract are sufficiently certain for the contract to be specifically enforced, the modern trend of the law is to favor the enforcement of contracts, to lean against their unenforceability because of uncertainty, and to carry out the intentions of the parties if this can feasibly be done. Neither law nor equity requires that every term and condition of an agreement be set forth in contract. The usual and reasonable terms found in similar contracts can be looked to, unexpressed provisions of the contract may be inferred from the writing, external facts may be relied on, and custom and usage or other extrinsic evidence may be resorted to in an effort to supply a deficiency if it does not alter or vary the terms of the agreement [*Larwin-Southern Cal., Inc. v. JGB Inv. Co. (1980) 101 Cal. App. 3d 626, 641, 162 Cal. Rptr. 52* ; *Okun v. Morton (1988) 203 Cal. App. 3d 805, 819, 250 Cal. Rptr. 220* ; *see King v. Stanley (1948) 32 Cal. 2d 584, 588-589, 197 P.2d 321* , *disapproved on other grounds, Patel v. Liebermensch (2008) 45 Cal. 4th 344, 351 n.4, 86 Cal. Rptr. 3d 366, 197 P.3d 177* (in contract for sale of property, only four terms are essential: who is seller, what property is being sold, who is buyer, and what is price)]. For example, a court has held that a contract was not fatally uncertain although the contract did not articulate the precise definition of qualified subcontractors or the exact number of bids to be taken, thus making the pricing mechanism uncertain. The court stated that the custom, usage, and trade within the real estate development industry and other relevant extrinsic evidence could be looked at to determine the requisite factors [*Larwin-Southern Cal., Inc. v. JGB Inv. Co. (1980) 101 Cal. App. 3d 626, 644, 162 Cal. Rptr. 52]* .

Moreover, the fact that a contract does not indicate the time for performance does not necessarily render the contract so uncertain that it cannot be specifically enforced. When a person promises to will property to another individual in exchange for services of a peculiar nature involving the assumption of or continuation of a close family relationship, but dies without executing the will, although in such situations the contract generally does not specify a certain time for the promisor's performance, the courts will nonetheless decree quasi-specific performance by impressing a constructive trust on the particular property in favor of the promisee if the contract is otherwise specifically enforceable [*Henderson v. Fisher (1965) 236 Cal. App. 2d 468, 477, 46 Cal. Rptr. 173]* . Specific performance should be refused only when extrinsic evidence fails to remove any ambiguity or uncertainty [*Okun v. Morton (1988) 203 Cal. App. 3d 805, 819, 250 Cal. Rptr. 220* ; *Crescenta Valley Moose Lodge v. Bunt (1970) 8 Cal. App. 3d 682, 689, 87 Cal. Rptr. 428]* .

Only when the uncertainty or incompleteness of a contract prevents the court from knowing what to enforce does the defense of uncertainty have rationality [*Henderson v. Fisher (1965) 236 Cal. App. 2d 468, 477, 46 Cal. Rptr. 173]* .

Moreover, the fact that part of a contract is not sufficiently certain for specific performance does not require a court to in validate the entire agreement. The court can order specific performance of the certain or definite part of the contract [*Lawrence v. Shutt (1969) 269 Cal. App. 2d 749, 763, 75 Cal. Rptr. 533]* .

However, a party to a contract cannot erase uncertainty from the contract by waiving the uncertain clause or term and thereby restore its contractual validity [*White Point Co. v. Herrington (1968) 268 Cal. App. 2d 458, 469, 73 Cal. Rptr. 885]* , although a contracting party may waive provisions placed in a contract solely for the party's benefit [*Doryon v. Salant (1977) 75 Cal. App. 3d 706, 712, 142 Cal. Rptr. 378* (plaintiffs waived any condition precedent to performance and defendants were contractually assured of obtaining full purchase price in cash when plaintiffs obtained $51,000 loan although their offer was subject to obtaining $52,000 loan)].

[2] Term Subject to Future Agreement

When an important item is reserved for the future agreement of both parties, however, the promise generally cannot give rise to a legal obligation until the parties reach the agreement. Since either party, by the very terms of the promise, may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise [*White Point Co. v. Herrington (1968) 268 Cal. App. 2d 458, 468, 73 Cal. Rptr. 885* ; *Magna Dev. Co. v. Reed (1964) 228 Cal. App. 2d 230, 238, 39 Cal. Rptr. 284]* . However, when the contract provides for an objective method of ascertaining the term left to future agreement, such as the price, the contract will not be construed as too indefinite to enforce [*Larwin-Southern Cal., Inc. v. JGB Inv. Co. (1980) 101 Cal. App. 3d 626, 643, 162 Cal. Rptr. 52]* . Conduct of the parties in performing under the agreement before the controversy arose may provide an objective indication of what the parties intended as performance of the terms left for future agreement [*see* *Okun v. Morton (1988) 203 Cal. App. 3d 805, 819-820, 250 Cal. Rptr. 220* (investment agreement providing that plaintiff could participate in future restaurants "in a manner mutually agreeable in the same ratio which we currently hold stock")].

[3] Use of Extrinsic Evidence in Ambiguous Situations

Specific performance should be refused only when extrinsic evidence fails to remove any ambiguity or uncertainty [*Okun v. Morton (1988) 203 Cal. App. 3d 805, 819, 250 Cal. Rptr. 220* ; *Crescenta Valley Moose Lodge v. Bunt (1970) 8 Cal. App. 3d 682, 689, 87 Cal. Rptr. 428]* . Conduct of the parties in performing under the agreement before the controversy arose is one type of extrinsic evidence that may be considered [*Okun v. Morton (1988) 203 Cal. App. 3d 805, 819-820, 250 Cal. Rptr. 220]* .

Parol evidence and extrinsic evidence concerning custom and usage are properly admissible to clarify otherwise ambiguous terms [*Larwin-Southern Cal., Inc. v. JGB Inv. Co. (1980) 101 Cal. App. 3d 626, 645, 162 Cal. Rptr. 52]* .

The evidence is admissible to identify the subject matter of the contract from the written description, explain the meaning of ambiguous, abstruse, or technical expressions, and assist in interpreting the expressed intentions of the parties in the light of circumstances existing at the time of execution [*United Truckmen, Inc. v. Lorentz (1952) 114 Cal. App. 2d 26, 34, 249 P.2d 352]* . Even when the contract is uncertain as to the precise act to be done, extrinsic evidence is admissible to determine what the parties intended. Only when the extrinsic evidence fails to remove the ambiguity is specific performance refused [*Larwin-Southern Cal., Inc. v. JGB Inv. Co. (1980) 101 Cal. App. 3d 626, 645, 162 Cal. Rptr. 52* ; *Crescenta Valley Moose Lodge v. Bunt (1970) 8 Cal. App. 3d 682, 689, 87 Cal. Rptr. 428* (extrinsic evidence admissible even when uncertainty extends to precise act to be done); *White Point Co. v. Herrington (1968) 268 Cal. App. 2d 458, 468, 73 Cal. Rptr. 885* (ambiguous contract not specifically enforceable when parol evidence fails to remove ambiguity)].

However, although custom is admissible for the purpose of interpreting the contract or agreement of the parties, or for furnishing details not expressly covered thereby, it is not admissible to establish a contract [*White Point Co. v. Herrington (1968) 268 Cal. App. 2d 458, 468, 73 Cal. Rptr. 885]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationDefinite TermsContracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleContracts of SaleEnforceabilityGeneral OverviewReal Property LawPurchase & SaleRemediesSpecific Performance

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46-528 California Forms of Pleading and Practice--Annotated § 528.21

§ 528.21 Performance of Conditions Precedent

[1] In General

A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed [*Civ. Code § 1436*; for further discussion, *see* Ch. 140, *Contracts*]. Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on that party's part to the obligation of the other party, except when the party's failure to perform is only partial and either entirely immaterial or capable of being fully compensated, in which case specific performance may be compelled on full compensation being made for the default [*Civ. Code § 3392*; *Crail v. Blakely (1973) 8 Cal. 3d 744, 754, 106 Cal. Rptr. 187, 505 P.2d 1027* ; *Lifton v. Harshman (1947) 80 Cal. App. 2d 422, 433-434, 182 P.2d 222* , *disapproved on other grounds*, *Pao Ch'en Lee v. Gregoriou (1958) 50 Cal. 2d 502, 326 P.2d 135* ; for discussion of pleading requirements, *see* Comments to § 528.130].

Often one party's approval of the documents, or in real estate transactions, of preliminary title reports and inspections, will be a condition precedent to that party's performance [*see, e.g.*, *Realmuto v. Gagnard (2003) 110 Cal. App. 4th 193, 205, 1 Cal. Rptr. 3d 569* (seller's failure to deliver transfer disclosure statement--a nonwaivable condition precedent to buyer's duty to perform in sale covered by *Civ. Code § 1102 et seq.*--precluded action against buyer for specific performance and breach of contract)]. If the party whose approval is required expressly and unequivocally disapproves, the contract is terminated and cannot be revived by later "waiver" of the condition [*Beverly Way Associates v. Barham (1990) 226 Cal. App. 3d 49, 51, 56, 276 Cal. Rptr. 240]* .

[2] When Performance or Tender of Performance Not Required

[a] Repudiation of Contract and Excuses for Nonperformance

When a party unequivocally repudiates a contract and indicates that he or she is not bound thereby, a tender of performance is unnecessary since the law does not require the performance of an idle act. A formal tender of performance is excused by the refusal in advance of the party to accept the performance owing [*Beverage v. Canton Placer Mining Co. (1955) 43 Cal. 2d 769, 777, 278 P.2d 694* ; *Greenstone v. Claretian Theological Seminary (1959)*

173 Cal. App. 2d 21, 33, 343 P.2d 161 , disapproved on other grounds, Ellis v. Mihelis (1963) 60 Cal. 2d 206, 32 Cal. Rptr. 415, 384 P.2d 7 ; *see Kossler v. Palm Springs Developments, Ltd. (1980) 101 Cal. App. 3d 88, 102, 161 Cal. Rptr. 423]* . In these circumstances, commencement of an action for specific performance in itself constitutes sufficient demand for performance [*Heinlen v. Martin (1879) 53 Cal. 321, 345-346* ; *Greenstone v. Claretian Theological Seminary (1959) 173 Cal. App. 2d 21, 33, 343 P.2d 161 , disapproved on other grounds, Ellis v. Mihelis (1963) 60 Cal. 2d 206, 32 Cal. Rptr. 415, 384 P.2d 7]* .

Additionally, under the terms of *Civ. Code § 1511* (excuses for nonperformance of contract), plaintiff's performance or tender is excused if it was prevented by defendant's conduct [*see Towne Dev. Co. v. Lee (1965) 63 Cal. 2d 147, 152, 45 Cal. Rptr. 316, 403 P.2d 724* (plaintiff excused from performing when it attempted to tender money but could not do so because escrow company had gone out of business and defendant suggested that parties go to different escrow company but agreed to wait until rezoning report was received before opening another escrow)].

Thus an incomplete performance is not a defense to an action for specific performance when there has been substantial performance and full performance was prevented by the other party [*Ambrose v. Alioto (1944) 65 Cal. App. 2d 362, 369, 150 P.2d 502* (plaintiff substantially performed and defendant prevented full performance when master of boat had operated it as required but defendant discharged him, preventing him from making enough profits with boat to pay off debts)].

[b] Rule Not Applicable to Unilateral Contracts

The rule that repudiation of an executory contract by one party relieves the corresponding obligor from the necessity of tendering performance as a prerequisite of maintaining a suit to enforce specific performance does not apply to unilateral contracts. Until the plaintiff accepts the offer, there is no contract obligating him or her in any way. Plaintiff can signify acceptance only in accordance with the terms of the contract and subject to all, not part, of the conditions imposed by the contract [*Marsh v. Lott (1908) 8 Cal. App. 384, 393-394, 97 P. 163]* .

[3] Time of Performance

The general rule in equity is that time is not of the essence unless it is made so by express terms or is necessarily so from the nature of the contract [*Katemis v. Westerlind (1956) 142 Cal. App. 2d 799, 804, 299 P.2d 383* ; *see Civ. Code § 1492*]. Valuable contractual rights should not be surrendered or forfeitures suffered by a slight delay in performance unless such an intention clearly appears from the contract, when specific enforcement will work an injustice after a delayed tender, or when delay is inexcusable [*Katemis v. Westerlind (1953) 120 Cal. App. 2d 537, 541-542, 543, 261 P.2d 553* (plaintiffs as entitled to bring action for specific performance although their check for remainder of purchase price for real property arrived late when it arrived Monday after Saturday it was due and escrow office was closed on due date); *see Becker v. Becker (1950) 36 Cal. 2d 324, 327, 223 P.2d 479]* . When the contract shows time was not deemed to be of the essence, equity may decree specific performance although the act was done after the date fixed in the contract [*Katemis v. Westerlind (1956) 142 Cal. App. 2d 799, 807, 299 P.2d 383* (time as not of essence when contact provides for performance within reasonable time)].

When time is expressly made of the essence, a delay which is not considered excusable in an action for damages at law will also prevent an action for specific performance in equity, except that equity gives relief if the result would otherwise be a severe forfeiture. Relief from forfeiture is justified when defendant would receive all the advantages of plaintiff's performance, without suffering any damage because of the delay, whereas plaintiff would lose all consideration for the work done and costs paid by him or her [*Selby v. Battley (1957) 149 Cal. App. 2d 659, 663-664, 309 P.2d 120]* .

Even when time is of the essence of a contract, the provision with respect to time may be waived by the parties' conduct [*Pease v. Brown (1960) 186 Cal. App. 2d 425, 428, 8 Cal. Rptr. 917* (sellers as acquiescing in buyers' delay in

depositing purchase price)].

When a specified time for performance has been waived by a party, that party must, in order to put the other in default, not only give notice that strict compliance will thereafter be required but must allow the other party a reasonable time within which to perform [*Kossler v. Palm Springs Developments, Ltd. (1980) 101 Cal. App. 3d 88, 98, 161 Cal. Rptr. 423]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsConditions PrecedentContracts LawContract Conditions & ProvisionsExpress ConditionsTime LimitationsContracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleContracts of SaleEnforceabilityGeneral OverviewReal Property LawPurchase & SaleRemediesSpecific Performance

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46-528 California Forms of Pleading and Practice--Annotated § 528.22

§ 528.22 Seller Required to Have Good Title

An agreement for the sale of property cannot be specifically enforced in favor of a seller who cannot give to the buyer a title free from reasonable doubt [*Civ. Code § 3394*; *King v. Stanley (1948) 32 Cal. 2d 584, 589-590, 197 P.2d 321* (vendor as having duty of furnishing good and marketable title); *see § 528.137*]. Although the statute does not specify a particular kind of property, most of the cases involve real property [*see, e.g., King v. Stanley (1948) 32 Cal. 2d 584, 589-590, 197 P.2d 321* , *disapproved on other grounds, Patel v. Liebermensch (2008) 45 Cal. 4th 344, 351 n.4, 86 Cal. Rptr. 3d 366, 197 P.3d 177* ; *Lansburgh v. Market Street Ry. Co. (1950) 98 Cal. App. 2d 426, 427, 220 P.2d 423]* . The term "reasonable doubt," in the context of real property contracts, refers to dubious defects, encumbrances, outstanding claims, or color of title in others, which if upheld would prove the title defective at the time of performance [*Lansburgh v. Market Street Ry. Co. (1950) 98 Cal. App. 2d 426, 430, 220 P.2d 423* (presence of provisional map in public works department office and authorization for bonded debt for street extension project as not sufficient to create reasonable doubt of seller's title)]. The time when the condition of the title must be free from reasonable doubt is the time fixed for performance by the contract [*Lansburgh v. Market Street Ry. Co. (1950) 98 Cal. App. 2d 426, 430, 220 P.2d 423]* . Thus, the vendor does not need to have title at the time of the contract if, when the time for performance arrives, the vendor will be able to furnish the title he or she contracted to convey [*Wheat v. Thomas (1930) 209 Cal. 306, 316, 287 P. 102* ; *see Leiter v. Eltinge (1966) 246 Cal. App. 2d 306, 317, 54 Cal. Rptr. 703]* .

When the vendor has no title or interest in the land to be conveyed under a contract for the sale of real property, a decree of specific performance will not be awarded since a court will not attempt to require what is impossible to do [*Farnum v. Clarke (1906) 148 Cal. 610, 618, 84 P. 166* ; *Weisberg v. Ashcraft (1961) 194 Cal. App. 2d 225, 232, 14 Cal. Rptr. 817* ; *see* discussion in *§ 528.41* et seq.]. If, however, the vendor is the equitable owner and has the right to call for the legal title, specific performance will be decreed. Moreover, if the vendor has any interest in the property that he or she has contracted to convey, although the interest is not as complete as the one agreed to be conveyed, the vendee, at his or her option, may enforce the contract with respect to whatever interest the vendor possesses and may also receive compensation for the deficiency in performance [*Miller v. Dyer (1942) 20 Cal. 2d 526, 528-529, 127 P.2d 901* ; *Weisberg v. Ashcraft (1961) 194 Cal. App. 2d 225, 232, 14 Cal. Rptr. 817]* .

If the property is owned by a trust and the contract of sale was made by the beneficiary who had complete control over

the disposition of the trust property, the buyer can obtain specific performance against the trust even after the beneficiary has died [*Walgren v. Dolan (1990) 226 Cal. App. 3d 572, 578-580, 276 Cal. Rptr. 554]* .

Legal Topics:

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

§§ 528.23[Reserved]

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§ 528.40 In General

Specific performance of a contract may be granted unless otherwise specified [*Civ. Code § 3384*] when the requirements discussed in *§ 528.14* et seq. are met. The Legislature, however, has specified that the following obligations cannot be specifically enforced [*Civ. Code § 3390*; *see* discussion in *§ 528.20*]: (1) an obligation to render personal service; (2) an obligation to employ another in personal service; (3) an agreement to perform an act which the party has no power lawfully to perform when required to do so; (4) an agreement to procure the act or consent of the wife of the contracting party, or of any other third person; and (5) an agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable. Courts have delineated other situations in which specific performance will not be granted. Particular contracts and circumstances under which specific performance will or will not be granted are discussed below.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesIllegal BargainsContracts LawFormationDefinite TermsContracts LawRemediesSpecific PerformanceContracts LawTypes of ContractsPersonal Service AgreementsReal Property LawPurchase & SaleRemediesSpecific Performance

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46-528 California Forms of Pleading and Practice--Annotated § 528.41

§ 528.41 Inequitability, Impossibility, and Illegality of Performance

Specific performance will not be granted when a contract's enforcement would be inequitable. Thus, a contract to convey land cannot be enforced against an intervening purchaser who had no actual or constructive notice of plaintiff's claim to the property and who purchased it for valuable consideration [*Crittenden v. Hansen (1943) 59 Cal. App. 2d 56, 59, 138 P.2d 37]* . Similarly, circumstances under which enforcement of the contract would impose a great burden on the defendant, with a slight or no corresponding benefit to the plaintiff, or under which enforcement would be detrimental to the public interest, warrant the denial of specific performance [*Herzog v. Atchison, Topeka & Santa Fe R.R. Co. (1908) 153 Cal. 496, 500, 95 P. 898* (specific performance as denied when enforcement would be oppressive or inequitable); *Stanley v. Robert S. Odell & Co. (1950) 97 Cal. App. 2d 521, 531, 218 P.2d 162* (contract whose object is performance of acts against sound public policy as not specifically enforceable)].

The difficulty or impossibility of enforcing a contract is also a ground for denying specific performance [*Anderson v. Neal Institutes Co. (1918) 37 Cal. App. 174, 176, 173 P. 779* ; *see Crittenden v. Hansen (1943) 59 Cal. App. 2d 56, 59, 138 P.2d 37* ; for discussion of impossibility, see Ch. 140, *Contracts*]. Even though the objects sought to be accomplished by the agreement are lawful and proper, if there are no means available for its accomplishment, the agreement cannot be specifically enforced [*Dulin v. Pacific Wood & Coal Co. (1894) 103 Cal. 357, 364, 37 P. 207]* .

Impossibility is determined at the time the matter is tried. If the defendant did not have the power to perform when the contract was breached and the action was commenced, but its performance is possible at the time of trial or entry of judgment, the court may award specific performance [*Stevens Group Fund IV v. Sobrato Development Co. (1991) 1 Cal. App. 4th 886, 894-897, 2 Cal. Rptr. 2d 460* (sale of real property; loan that could not be prepaid matured before trial; thus, impossibility of conveying "free and clear" title was removed]. The court is not required to award specific performance because the impossibility has been removed, but must reevaluate all the equitable considerations [*Stevens Group Fund IV v. Sobrato Development Co. (1991) 1 Cal. App. 4th 886, 897, 2 Cal. Rptr. 2d 460]* .

For example, a court stated that specific performance of a contract was not proper when its enforcement would have required the court to order the defendant to prepare medical remedies used in the treatment of patients at any institutes that might be established by plaintiff for the treatment of alcoholics and drug addicts [*Anderson v. Neal Inst. Co.*

(1918) 37 Cal. App. 174, 176, 173 P. 779] . Similarly, a court refused to enforce an agreement among stockholders to elect a certain person president for two years and to pay him a specified salary since there was no means of forcing the stockholders to vote for a particular person [*Dulin v. Pacific Wood & Coal Co. (1894) 103 Cal. 357, 364, 37 P. 207]* .

An agreement to perform an act which the party does not have the power lawfully to perform when required to do so cannot be specifically enforced [*Civ. Code § 3390(3)*]. A court will not lend its aid to give effect to a contract that is illegal, whether it violates the common law or a statute, either expressly or by implication [*Kreamer v. Earl (1891) 91 Cal. 112, 117, 27 P. 735]* . Thus, the assurance of a county superintendent that retroactive unpaid leaves of absence could be granted for a period during which employees were on strike was not specifically enforceable since the superintendent did not have the authority to make the promise under the pertinent regulations [Social Workers Union Local 535 v. *Los Angeles County (1969) 270 Cal. App. 2d 65, 76-77, 75 Cal. Rptr. 566]* .

Furthermore, a vendor who has no title or interest in the land that he or she contracts to convey will not be required specifically to perform. Equity will not compel the vendor to obtain title [*Miller v. Dyer (1942) 20 Cal. 2d 526, 528-529, 127 P.2d 901* ; *Weisberg v. Ashcraft (1961) 194 Cal. App. 2d 225, 232, 14 Cal. Rptr. 817* ; *see* discussion in *§ 528.22*]. A destruction of a material part of the subject property without the fault of either party before title or possession has passed excuses the vendor's performance and entitles the purchaser to the return of any consideration paid. Therefore, the purchaser is not entitled to specific performance with an abatement for the damage [*Dixon v. Salvation Army (1983) 142 Cal. App. 3d 463, 467, 191 Cal. Rptr. 111]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesIllegal BargainsContracts LawDefensesPublic Policy ViolationsContracts LawPerformanceImpossibility of PerformanceGeneral OverviewContracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingImpossibility of PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance

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46-528 California Forms of Pleading and Practice--Annotated § 528.42

§ 528.42 Penalties and Forfeitures

[1] Denied Specific Enforcement

Specific performance cannot be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in the case of a nuisance or otherwise as provided by law, such as in a case of unfair competition [*Civ. Code § 3369*; *see Bus. & Prof. Code § 17202*(unfair competition)].

[2] Determination of Penalty

In determining whether a contractual clause is an agreement for a penalty, two things must be considered: (1) whether or not the parties to the contract intended that the sum fixed as damages for the breach of the agreement by either party should be a penalty; and (2) whether or not the agreement is, in the nature of things, a penalty regardless of the language of the agreement declaring it to be liquidated damages. If a provision is actually a penalty, no expression in the agreement that it should be regarded otherwise is controlling, since the parties cannot by their agreement change something which is by nature a penalty into liquidated damages. Liquidated damages not reasonably related to actual damages are unenforceable and void as penalties, except when a sum is agreed to be paid for doing or failing to do an act with respect to which damages are uncertain and cannot be readily ascertained [*Pogue v. Kaweah Power & Water Co. (1903) 138 Cal. 664, 667-668, 72 P. 144* ; *Sybron Corp. v. Clark Hosp. Supply Corp. (1978) 76 Cal. App. 3d 896, 900, 143 Cal. Rptr. 306* ; *Wright v. Rodgers (1926) 198 Cal. 137, 141, 243 P. 866* ; *Sybron Corp. v. Clark Hosp. Supply Corp. (1978) 76 Cal. App. 3d 896, 900, 143 Cal. Rptr. 306* ($28,000 penalty for delay in payment of $30,000 as bearing no rational relationship to amount of actual damages suffered and as unenforceable)].

A penalty does not need to take the form of a stipulated fixed sum. Any provision by which money or property would be forfeited without regard to the actual damage suffered would be an unenforceable penalty. For example, an amount equal to the net benefits conferred by part performance bears no rational relationship to the purpose of the penalty. It not only fails to take into consideration the degree of culpability, but its severity increases as the seriousness of the breach decreases. Under such a penalty, a party who breached his or her contract before he or she paid the other party any amount would suffer no penalty, whereas one who had almost completely performed his or her contract would suffer the maximum penalty [*Freedman v. St. Matthias Parish (1951) 37 Cal. 2d 16, 22, 230 P.2d 629* ; *but see Smith v. Allen*

(1968) 68 Cal. 2d 93, 95, 65 Cal. Rptr. 153 P.2d 65 (above-stated rule as not applicable to executed contracts to convey real property since such contracts are governed by foreclosure statutes)].

[3] Enforcement of Contract Imposing Penalty

In a situation in which a penalty is imposed or the damages for the breach of a contract are liquidated and the party in default is willing to pay the penalty or damages, the contract itself may still be enforced if it is otherwise specifically enforceable [*Civ. Code § 3389*; *Glock v. Howard & Wilson Colony Co. (1898) 123 Cal. 1, 9* ; *Johnston v. Blanchard (1911) 16 Cal. App. 321, 325-326, 116 P. 973* (whether or not sum specified in contract is liquidated damages or penalty as immaterial under Civ. Code § 3389since in either case plaintiff may waive action at law and seek specific performance)]. This rule does not require the court to decree specific performance of any contract containing a liquidated damages provision merely because it contains such a provision. Even though a contract is specifically enforceable, the party may elect to accept the liquidated damages amount instead of seeking enforcement of the contract [*Morrison v. Land (1915) 169 Cal. 580, 589, 147 P. 259* ; for discussion of liquidated damages, see Ch. 177, *Damages*].

[4] Relief From Forfeiture

[a] Compensation of Other Party

Equity will not enforce a forfeiture but, to the contrary, will grant relief from it. Whenever, by the terms of an obligation, a party to the agreement incurs a forfeiture, or a loss in the nature of a forfeiture, because of his or her failure to comply with its provisions, he or she may be relieved therefrom, on making full compensation to the other party, except in the case of a grossly negligent, willful, or fraudulent breach of duty [*Civ. Code § 3275*; *Ebbert v. Mercantile Trust Co. (1931) 213 Cal. 496, 499, 2 P.2d 776]* . For example, a court may relieve a tenant from forfeiture of a lease and restore the tenant to his or her former estate, in the case of hardship, when an application for such relief is made and on the condition that the rent due is paid or the conditions or covenants of the lease are fully performed, as far as is practicable [*Code Civ. Proc. § 1179*]. The equitable powers of the court exist to insure that the ultimate obligation imposed on the defaulting party is not unreasonable in proportion to the original obligation and the seriousness of the default [*Sybron Corp. v. Clark Hosp. Supply Corp. (1978) 76 Cal. App. 3d 896, 903, 143 Cal. Rptr. 306]* .

[b] Partial Performance When Time Is of the Essence

Whenever the conditions of *Civ. Code § 3275* are satisfied, the courts have granted relief to a defaulting party even though time was made of the essence of the contract involved [*Barkis v. Scott (1949) 34 Cal. 2d 116, 118, 208 P.2d 367* (defendant's failure to meet obligation by issuing checks with insufficient funds as not grossly negligent and willful but simple negligence in management of checking account); *Valley View Home of Beaumont, Inc. v. Department of Health Services (1983) 146 Cal. App. 3d 161, 168, 194 Cal. Rptr. 56]* . Forfeiture is not favored, and if possible, a contract and any conditions in the contract are to be construed to avoid forfeiture. When an express condition cannot be avoided by construction, and there is an express condition making time of the essence, even a party who has violated that express condition may have its compliance excused and be granted equitable relief against its enforcement if the facts and equities are balanced in favor of granting relief from forfeiture [*Valley View Home of Beaumont, Inc. v. Department of Health Services (1983) 146 Cal. App. 3d 161, 168, 194 Cal. Rptr. 56]* .

If the defaulting party has partially performed, the degree of default, even when serious and prolonged, must be weighed against the degree of part performance. When part performance is substantial, it will outweigh the degree of default, particularly when the court is able to determine and award damages to the innocent party for any detriment he or she has suffered by the default [*Scarbery v. Bill Patch Land & Water Co. (1960) 184 Cal. App. 2d 87, 104, 7 Cal. Rptr. 408* (although time was of essence, when more than three fourths of obligation had been paid and $60,000 had been spent in capital improvements, part performance as outweighing default)]. Under an installment land sale contract, if there has been substantial part performance or if the vendee has made substantial improvements in reliance on his or her contract,

permitting the vendor to terminate the vendee's rights under the contract and keep the installments that have been paid results in the harshest kind of forfeiture. Accordingly, relief will be granted whether or not time was made of the essence [*Barkis v. Scott (1949) 34 Cal. 2d 116, 122, 208 P.2d 367]* .

[c] No Reasonable Relation to Damage

Civ. Code § 3275 is not the exclusive source of a right to relief from forfeiture [*MacFadden v. Walker (1971) 5 Cal. 3d 809, 813, 97 Cal. Rptr. 537, 488 P.2d 1353]* . Even when a breach is willful so that a party does not qualify for relief under *Civ. Code § 3275*, a court may grant specific performance under certain circumstances. The courts have interpreted the prohibition of punitive damages for breach of contract [*Civ. Code § 3294(a)*], the strict limitations on the right to provide for liquidated damages [*Civ. Code §§ 1670, 1671*], and the provision that specific or preventive relief cannot be granted to enforce a penalty or forfeiture, as establishing a policy that precludes any forfeiture that does not have a reasonable relation to the damage caused by the breach [*MacFadden v. Walker (1971) 5 Cal. 3d 809, 813-814, 97 Cal. Rptr. 537, 488 P.2d 1353]* . Note that *MacFadden* is no longer the preferred method of giving buyer's relief for breaches of installment land sale contracts [*see Petersen v. Hartell (1985) 40 Cal. 3d 102, 116-117, 219 Cal. Rptr. 170, 707 P.2d 232* (establishing right of redemption)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsForfeiture ClausesContracts LawPerformancePartial PerformanceGeneral OverviewContracts LawPerformanceSubstantial PerformanceContracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance

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§ 528.43 Procuring Act or Consent of Spouse or Third Party

[1] In General

An agreement to procure the act or consent of the spouse of the contracting party, or of any other third person, is not specifically enforceable [*Civ. Code § 3390(4)*; *see Casady v. Modern Metal Spinning & Mfg. Co. (1961) 188 Cal. App. 2d 728, 731, 10 Cal. Rptr. 790* ; *see § 528.134*]. Note that the precise language of *Civ. Code § 3390(4)*, which dates from 1872 and has not been amended since 1961, refers to an agreement to procure the act or consent of the "wife" of the contracting party. However, *Civ. Code § 3390(4)* in fact applies with equal force to either spouse, since the husband clearly falls within the category of "any other third person" even though not otherwise specifically mentioned in the statute.

Civ. Code § 3390(4) does not bar specific performance of a contract to convey real property although the contract was entered into by a tenant in common without the consent of the other tenant in common. If a vendor has any interest in the property he or she has contracted to convey, the vendee may at his or her option enforce the contract with respect to whatever interest the vendor possesses and may also receive compensation for the deficiency in performance, a contract entered into by only one tenant in common may be enforced as to that party's interest in the property [*Milkes v. Smith (1949) 91 Cal. App. 2d 79, 81-82, 204 P.2d 419]* . Nevertheless, if a co-owner of real property contracts to convey the property and signs the name of the other owner to the contract without the authority of the co-owner, who subsequently refuses to perform, the court will not order specific performance of the contract by the signing co-owner of his or her part of the property. Compelling performance in such a situation would force the defendant to perform a contract which he never made or intended to make [*Olson v. Lovell (1891) 91 Cal. 506, 508, 27 P. 765* ; *Jackson v. Torrence (1890) 83 Cal. 521, 538, 23 P. 695* (husband and wife)].

The necessity of securing the approval of a governmental agency to the complete performance of an agreement does not bar the granting of the specific performance of the agreement [*Bleecher v. Conte (1981) 29 Cal. 3d 345, 354, 173 Cal. Rptr. 278, 626 P.2d 1051* ; *Kaneko v. Okuda (1961) 195 Cal. App. 2d 217, 232, 15 Cal. Rptr. 792* (consent of Commissioner of Corporations required)]. In such a case, the primary contract is the promise to convey property. The governmental approval is a condition precedent to the duty to perform, to close escrow [*Bleecher v. Conte (1981) 29*

Cal. 3d 345, 354, 173 Cal. Rptr. 278, 626 P.2d 1051] . However, the condition of approval and the implied covenant of good faith and fair dealing create a duty on the part of the party whose performance is conditioned on the approval, whether it be the approval of a governmental agency or of the board or shareholders of a corporate party to the contract, to seek that approval in good faith and in a timely manner [*see, e.g.,* *Jacobs v. Tenneco West, Inc. (1986) 186 Cal. App. 3d 1413, 1417-1418, 231 Cal. Rptr. 351* ; *Moreland Development Co. v. Gladstone Holmes, Inc. (1982) 135 Cal. App. 3d 973, 977-978, 186 Cal. Rptr. 6* ; *Jacobs v. Freeman (1980) 104 Cal. App. 3d 177, 190, 163 Cal. Rptr. 680* ; *see generally* discussion in *§ 528.21*]. If approval would have been given if sought, failure to seek approval excuses the condition of approval and specific performance may be granted [*Jacobs v. Tenneco West, Inc. (1986) 186 Cal. App. 3d 1413, 1417-1418, 231 Cal. Rptr. 351]* . If approval would not have been given if sought, failure to seek approval is excused, and the party whose performance was conditioned on approval is not required to perform. This excuse for nonperformance is an affirmative defense, burden of proof of which is on party claiming it [*Jacobs v. Tenneco West, Inc. (1986) 186 Cal. App. 3d 1413, 1418-1419, 231 Cal. Rptr. 351]* .

[2] Consent of Partner

Under the Uniform Partnership Act (applicable until January 1, 1999, to partnerships formed before January 1, 1997), the case of a contract for the sale of partnership property that was executed by fewer than all partners, whether or not the contract may be specifically enforced depends on whether the performance of the contract would make it impossible to carry on the ordinary partnership business [*Corp. Code § 15009(3)(c)*]. If the partnership is in the business of operating a motel, the contract is one for the sale of that motel, and specific performance would result in the sale of all the partnership assets, the contract cannot be specifically enforced [*Patel v. Patel (1989) 212 Cal. App. 3d 6, 9-11, 260 Cal. Rptr. 255* (buyers' right to partial specific performance with reduction in price was not considered because it was raised for first time on appeal)]. If a partnership is a "trading" partnership, that is, one in the business of buying and selling property, and the contract executed by fewer than all the partners is one for the sale of only part of the stock held for sale, the buyer can have specific performance [*see* *Owens v. Palos Verdes Monaco (1983) 142 Cal. App. 3d 855, 865-866, 191 Cal. Rptr. 381]* .

The issue is further complicated if record title to the property that is the subject of the contract is only in the names of the partners who executed the contract for its sale. *Corp. Code § 15010* provides that the partners in whose names a property stands may convey it, but that the partnership may recover the property unless the partners' act binds the partnership under the provisions of *Corp. Code § 15009(1)* (every act of partner to carry on business of partnership binds partnership), or unless the property was conveyed to a bona fide purchaser for value without knowledge that the partners, in executing the contract, exceeded their authority. Faced with a conflict between *Corp. Code § 15009(3)* and *Corp. Code § 15010*, at least one court of appeal has held that when the purpose of the partnership is to operate the asset contracted to be sold, the interest protected by *Corp. Code § 15009(3)* should prevail and denied specific performance [*Patel v. Patel (1989) 212 Cal. App. 3d 6, 10-11, 260 Cal. Rptr. 255]* .

Under the Uniform Partnership Act of 1994 (applicable to partnerships formed on or after January 1, 1997), partnership property held in the name of the partnership may be transferred by an instrument of transfer executed by a partner in the partnership [*Corp. Code § 16302(a)(1)*; *see Corp. Code § 16303* (statement of partnership authority)]. Partnership property held in the name of one or more partners or one or more persons other than the partnership may be transferred by an instrument of transfer executed by the persons in whose name the property is held [*see Corp. Code § 16302(a)(2), (3)* (statement of partnership authority)]. For a discussion of rights relative to partnership property, see Ch. 402, *Partnerships: Actions Between General Partners or Partnership and Third Parties* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleContracts of SaleEnforceabilityGeneral OverviewReal Property LawPurchase &

SaleRemediesSpecific Performance

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§ 528.44 Series of Continuous Acts

Generally, a court should not decree specific performance unless the subject matter of the decree is capable of being embraced in one order that is immediately enforceable [*Long Beach Drug Co. v. United Drug Co. (1939) 13 Cal. 2d 158, 171, 88 P.2d 698, 89 P.2d 386* (exclusive sales contract was not specifically enforceable because it would entail unfeasible supervision by court)]. However, in some cases, a contract has been specifically enforced by requiring a succession of acts by a party or performance extending for some time. Examples include the following:

- Plugging abandoned oil wells, with creation and monitoring of a schedule for doing so [*Union Oil Co. v. Greka Energy Corp. (2008) 165 Cal. App. 4th 129, 136-137, 80 Cal. Rptr. 3d 738*].

- Periodically dredging a shipping channel [*Ellison v. Ventura Port Dist. (1978) 80 Cal. App. 3d 574, 580-581, 145 Cal. Rptr. 665*].

- Installing water pipes in a tract subdivision [*Bakersfield Country Club v. Pacific Water Co. (1961) 192 Cal. App. 2d 528, 539, 13 Cal. Rptr. 573*].

- Permitting occupancy of premises for the duration of the occupants' lives, when no other specific acts or services were required [*Magee v. Magee (1917) 174 Cal. 276, 281, 162 P. 1023*].

However, other cases have followed a rule, which has been called archaic and has been "soundly criticized" [*Okun v. Morton (1988) 203 Cal. App. 3d 805, 820-821, 250 Cal. Rptr. 220*], prohibiting specific enforcement when enforcement would entail protracted supervision or direction by the court and the exercise of special knowledge, skill, and judgment by the party performing the acts. Application of the rule generally has been limited to construction contracts and distribution or sales-agency agreements. Examples of contractual obligations held not to be specifically enforceable under this rule include the following:

- Sale of automobiles by a dealership [*Thayer Plymouth Center, Inc. v. Chrysler Motors Corp. (1967) 255 Cal. App. 2d 300, 303-305, 63 Cal. Rptr. 148*].

- Operation of a rock quarry [*Whipple Rd. Quarry Co. v. L.C. Smith Co. (1952) 114 Cal. App. 2d 214, 216, 249 P.2d 854*].

- Sale of real property and construction of a staircase [*Moklofsky v. Moklofsky (1947) 79 Cal. App. 2d 259, 262-263, 179 P.2d 628* ; *but see Gale v. Seymour (1949) 91 Cal. App. 2d 727, 728, 205 P.2d 752* (decree required paving of parking lot; *Moklofsky* distinguished)].

- Sale of mining claims [*Lind v. Baker (1941) 48 Cal. App. 2d 234, 247, 119 P.2d 806*].

- Drilling for oil [*Sheehan v. Vedder (1930) 108 Cal. App. 419, 427-428, 292 P. 175* ; *but see Pub. Res. Code § 3301* (specific performance of agreement for cooperative development of oil and gas)].

- Sale of all eggs produced [*Poultry Producers of S. Cal., Inc. v. Barlow (1922) 189 Cal. 278, 289-291, 208 P. 93* ; *but see Poultry Producers of Cent. Cal., Inc. v. Murphy (1923) 64 Cal. App. 450, 454, 221 P. 962* (decree required signing of agreement under which defendant would sell and deliver all eggs produced; *Barlow* was distinguished because agreement was signed by all parties in *Barlow* but defendant had refused to sign in this case)].

- Construction and operation of a railroad [*Pacific Elec. Ry. Co. v. Campbell-Johnston (1908) 153 Cal. 106, 113, 94 P. 623*];

- Preparation of land for development of a citrus grove [*Moore v. Tuohy (1904) 142 Cal. 342, 347-348, 75 P. 896*].

- Opening and development of mining property [*Stanton v. Singleton (1899) 126 Cal. 657, 665-667, 59 P. 146*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityGeneral OverviewContracts LawRemediesEquitable ReliefGeneral OverviewContracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance

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46-528 California Forms of Pleading and Practice--Annotated § 528.45

§ 528.45 Contracts for Personal Services

[1] Generally Denied Enforcement

The general rule is that contracts to render personal service and to employ another in personal service will not be specifically enforced [*Civ. Code § 3390(1),(2)*; *Lyon v. Goss (1942) 19 Cal. 2d 659, 670, 123 P.2d 11* (contract to perform unique personal sales services); *Barndt v. County of Los Angeles (1989) 211 Cal. App. 3d 397, 404-405, 259 Cal. Rptr. 372* (contract for appointment to position of physician specialist in cardiology; see *Herman v. County of Los Angeles (2002) 98 Cal. App. 4th 484, 488-489, 119 Cal. Rptr. 2d 691* (finding statute inapplicable to contract providing for transfer of county police officers to sheriff's department)], either directly by means of a decree directing the defendant to perform it, or indirectly by an injunction restraining him or her from violating it [*Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(b)(5)* (no injunction to prevent breach of personal services contracts; exceptions)]. This rule is followed especially when the relation between the parties to the contract is one of mutual confidence, and the contract stipulates for acts that require special knowledge, skill, or ability, or the exercise of judgment, discretion, integrity, and like personal qualities [Poultry Producers etc. v. *Barlow (1922) 189 Cal. 278, 288, 208 P. 93* ; *Coykendall v. Jackson (1936) 17 Cal. App. 2d 729, 731, 62 P.2d 746* (contract for entire output in which other party agreed to devote entire time to selling and distributing output); *Barndt v. County of Los Angeles (1989) 211 Cal. App. 3d 397, 404-405, 259 Cal. Rptr. 372* (contract for appointment to position of physician specialist in cardiology); *but see Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(b)(5)* (exceptions, discussed § 528.45[2][c])].

Some courts have based the rule against specifically enforcing personal service contracts on the fact that it would be an invasion of one's statutory liberty to compel a person to work for or remain in the personal service of another, since it would place that person in a condition of involuntary servitude [*see Barndt v. County of Los Angeles (1989) 211 Cal. App. 3d 397, 404, 259 Cal. Rptr. 372]* . Another reason for the rule, according to some authorities, is that, in view of the peculiar personal relation that results from a contract of service, it would be inexpedient, from the standpoint of public policy, to attempt to enforce such a contract specifically. When one of the parties is to act as the confidential agent of the other, it is necessary that there should be entire harmony and a spirit of cooperation between the contracting parties [*Barndt v. County of Los Angeles (1989) 211 Cal. App. 3d 397, 404, 259 Cal. Rptr. 372]* . A third reason is that it is inconvenient, or impossible, for a court of justice to conduct and supervise the operations requisite for and incident to

the execution of a decree for the specific performance of a contract involving the rendering of personal services [Poultry Producers etc. v. *Barlow (1922) 189 Cal. 278, 288-289, 208 P. 93* ; *Barndt v. County of Los Angeles (1989) 211 Cal. App. 3d 397, 404, 259 Cal. Rptr. 372]* .

When a contract to render personal services, other than a contract of apprenticeship as provided in *Lab. Code §§ 3070-3097*, is specifically enforced, it may not be enforced against the employee beyond seven years from the commencement of service under the contract [*Lab. Code § 2855*]. Moreover, a valid contract to perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value and the loss of which cannot be reasonably or adequately compensated in damages in an action at law, cannot be enforced against the person contracting to render the service for a term exceeding seven years from the commencement of service under it [*Lab. Code § 2855*; *see De Haviland v. Warner Bros. Pictures (1944) 67 Cal. App. 2d 225, 230-232, 153 P.2d 983* (seven years as calendar years and not years of actual service)]. This seven-year limitation cannot be waived by the employee [*De Haviland v. Warner Bros. Pictures (1944) 67 Cal. App. 2d 225, 237, 153 P.2d 983]* .

An employee cannot invoke the seven-year protection of *Lab. Code § 2855(a)* with respect to a contract to render personal service in the production of phonorecords [*see 17 U.S.C. § 101*] unless he or she has first given written notice to the employer in accordance with *Code Civ. Proc. § 1020*, specifying that the employee from and after a future date will no longer render service under the contract by reason of *Lab. Code § 2855(a)* [*Lab. Code § 2855(b)*].

[2] Exceptions

[a] Substantially Performed

A court may, however, order specific performance of an obligation to perform personal services when the services have been fully or substantially performed [*Stone v. Burke (1952) 110 Cal. App. 2d 748, 756, 244 P.2d 51]* .

[b] Inadequate Remedy at Law

In specific performance actions involving contracts for personal services, the services usually were bargained for and rendered as the consideration for the promise sued upon. When enforcement of the promise is sought, specific performance may be denied because the services rendered are adequately compensable in money. However, when a plaintiff shows the inadequacy of the legal remedy in that a money payment would not adequately compensate for the services, relief has been granted. In particular, an agreement in consideration of personal services is subject to specific performance if the services are of such a peculiar, extraordinary, or exceptional character that it is impossible to estimate their value by any pecuniary standard or to adequately compensate for them in money [*Porporato v. Devincenzi (1968) 261 Cal. App. 2d 670, 676-677, 68 Cal. Rptr. 210]* .

In most of the cases granting quasi-specific performance of a contract to devise property, the services rendered as consideration for the agreement are menial or otherwise commonplace, but they are peculiar because, typically, by reason of a family or other close relationship between the contracting parties, only the promisee can perform them [*Porporato v. Devincenzi (1968) 261 Cal. App. 2d 670, 677, 68 Cal. Rptr. 210* (allegations that promisor wanted promisee daughter-in-law to live in San Francisco so promisor could be near his grandson after promisor's son died as alleging rendition of peculiar, extraordinary, or exceptional services); *De Hermosillo v. Morales (1956) 146 Cal. App. 2d 819, 829, 304 P.2d 854]* .

However, services in a menial or other wage-compensable sense are not a sine qua non of the consideration which will support a contract to bequeath or devise property. Quasi-specific performance of a contract has been granted when the promisee-plaintiff had agreed to and did live near the promisor and furnish her with companionship without performing services as such; and when the promisor, although in his last illness, desired none of the usual services of a nurse or housekeeper and received from the promisee only comfort, care, and consolation [*Porporato v. Devincenzi (1968) 261*

Cal. App. 2d 670, 675-677, 68 Cal. Rptr. 210 ; *see also § 528.46*].

[c] Injunctive Relief When Services Have Special Value

A contract to render personal services generally cannot be specifically enforced [*Civ. Code § 3390(1),(2)*], nor can the breach of such a contract usually be enjoined except in cases falling within the exception provided for by *Civ. Code § 3423* and *Code Civ. Proc. § 526* [*Long Beach Drug Co. v. United Drug Co. (1939) 13 Cal. 2d 158, 168, 89 P.2d 386* (plaintiff as not entitled to prohibitory injunction for breach of contract under which plaintiff was defendant's exclusive agent for sale of drug products)]. Those exceptions provide that an injunction may be granted to prevent breach of a personal service contract if the promised services are of such a special, unique, unusual, extraordinary, or intellectual character, that they have peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law, and the contract calls for compensation within the financial parameters set forth in the statute [*Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(b)(5)*]. The issue of enjoining personal service contracts frequently arises in situations involving athletes and star performers [*see MCA Records, Inc. v. Newton-John (1979) 90 Cal. App. 3d 18, 22, 153 Cal. Rptr. 153* ; *Foxx v. Williams (1966) 244 Cal. App. 2d 223, 235, 52 Cal. Rptr. 896]* . An injunction which forbids an artist to accept new employment may be a harsh and powerful remedy. The monetary limitations in *Civ. Code § 3423(e)* and *Code Civ. Proc. § 526(b)(5)* are intended to serve as a counterweigh in balancing the equities. Conversely, the rationale underlying the enforcement of negative covenants in contracts involving the unique personal services of star performers and athletes is that the employer has contracted for the exclusive right to display the "star" for a given period. That no other entrepreneur may display that star during the period contracted for is part of the right for which the employer has bargained and has compensated the star [*Lemat Corp. v. Barry (1969) 275 Cal. App. 2d 671, 678, 80 Cal. Rptr. 240]* . However, fairness precludes enforcement of a contract clause similar to those employed by the record companies in response to *Foxx* and *MCA*, which gives the company the right, at any time during the contract, to agree to pay the artist the statutory minimum compensation. The practice was a way for a company to hedge its bets on the success of its artists; the company would only exercise its option if the artist was making a substantial sum of money for the company. A performer will not be enjoined from rendering personal services to another unless the performer is guaranteed the requisite minimum annual compensation under that contract, and a clause giving the employer the option to pay that amount does not satisfy the minimum compensation requirement for injunctive relief [*Motown Record Corp. v. Brockert (1984) 160 Cal. App. 3d 123, 135-140, 207 Cal. Rptr. 574]* .

An employer that is prohibited by *Civ. Code § 3423(e)* from enjoining a performer from performing for another company cannot enjoin the other company from hiring the employee/performer [*Beverly Glen Music, Inc. v. Warner Communications, Inc. (1986) 178 Cal. App. 3d 1142, 1145, 224 Cal. Rptr. 260]* .

[3] Compensation Criteria

[a] Contract Formed Before 1994

If the personal services contract was entered into or or before December 31, 1993, and provides for minimum compensation at the rate of $6,000 per annum, its breach may be enjoined [*Civ. Code § 3423(e)(1)*; *Code Civ. Proc. § 526(b)(5)(A)*].

[b] Contracts Formed in or After 1994

If the personal service contract was entered into on or after January 1, 1994, one of two alternative compensation thresholds must be met in order for breach of the personal services contract to be enjoined [*Civ. Code § 3423(e)(2)(A),(B)*; *Code Civ. Proc. § 526(b)(5)(B)(i),(ii)*].

The contract must provide for minimum compensation at the rate of $9,000 per annum for the first year of the contract, $12,000 per annum for the second year of the contract, and $15,000 per annum for the third to seventh years, inclusive, of the contract [*Civ. Code § 3423(e)(2)(A)(i)*; *Code Civ. Proc. § 526(b)(5)(B)(i)(I)*].

In addition, after the third year of the contract, there must actually have been paid for the services through and including the contract year during which the injunctive relief is sought, over and above the minimum $15,000 specified in subclauses (i) and (I), the $15,000 per annum during the fourth and fifth years of the contract, the $30,000 per annum during the sixth and seventh years of the contract. As a condition to petitioning for an injunction, amounts payable under this clause may be paid at any time prior to seeking injunctive relief [*Civ. Code § 3423(e)(2)(A)(ii)*; *Code Civ. Proc. § 526(b)(5)(B)(i)(II)*]. For a chart showing how quickly these sums accumulate, and for discussion of other statutory parameters to these minimum compensation criteria, see Comments to § 528.133.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityAdequate Remedy at LawContracts LawPerformanceSubstantial PerformanceContracts LawRemediesEquitable ReliefInjunctive ReliefContracts LawRemediesSpecific PerformanceContracts LawTypes of ContractsPersonal Service Agreements

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46-528 California Forms of Pleading and Practice--Annotated § 528.46

§ 528.46 Agreement to Make Disposition of Property by Will

A contract to make a will or devise or other instrument, or not to revoke a will or devise or other instrument, or to die intestate, if made after 2000, can be established only by one of the following [*Prob. Code § 21700(a)*]:

- Provisions of a will or other instrument stating the material provisions of the contract.

- An expressed reference in a will or other instrument to a contract and extrinsic evidence proving the terms of the contract.

- A writing signed by the decedent evidencing the contract.

- Clear and convincing evidence of an agreement between the decedent and the claimant or a promise by the decedent to the claimant that is enforceable in equity.

- Clear and convincing evidence of an agreement between the decedent and another person for the benefit of the claimant or a promise by the decedent to another person for the benefit of the claimant that is enforceable in equity.

A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if made in 1985-2000 [*see Prob. Code § 21700(c)*] can be established only by one of the following [former *Prob. Code § 150(a)* (repealed eff. Jan. 1. 2001)]:

- Provisions of a will stating material provisions of the contract;

- An express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or

- A writing signed by the decedent evidencing the contract.

Although former *Prob. Code § 150(a)*, cited above, expressly provided that a contract to make a will or devise could be established "only" by the three methods listed above, courts have repeatedly held that the language of that section, notwithstanding use of the word "only," did not preclude application of equitable estoppel in appropriate cases [*Estate of Housley v. Haywood (1997) 56 Cal. App. 4th 342, 353-354, 65 Cal. Rptr. 2d 628* ; *Estate of Brenzikofer v. Schwartz (1996) 49 Cal. App. 4th 1461, 57 Cal. Rptr. 2d 401* ; *Juran v. Epstein (1994) 23 Cal. App. 4th 882, 897, 28 Cal. Rptr. 2d 588]* . In *Juran v. Epstein*, the leading case on this issue under former *Prob. Code § 150(a)*, the court held that an oral promise not to revoke a will could be enforced under the doctrine of equitable estoppel [*Juran v. Epstein (1994) 23 Cal. App. 4th 882, 897, 28 Cal. Rptr. 2d 588]* . The court found that while generally former *Prob. Code § 150(a)* provided the sole means under which a party could establish an agreement not to revoke a will, in enacting that section the Legislature did not express an intent to abolish the use of the equitable estoppel doctrine in appropriate circumstances [*Juran v. Epstein (1994) 23 Cal. App. 4th 882, 897, 28 Cal. Rptr. 2d 588]* . Subsequently, in *Estate of Housley v. Haywood*, it was held that equitable estoppel principles were available under former *Prob. Code § 150* (or its predecessor, former *Civ. Code § 1624(6)*) to enforce a testator's alleged oral agreement to leave all of his property to his son if the son cared for him during the testator's lifetime [*Estate of Housley v. Haywood (1997) 56 Cal. App. 4th 342, 358, 65 Cal. Rptr. 2d 628* (date of alleged agreement as before or after 1984 was not ascertainable)]. The court, following *Juran v. Epstein* [*Juran v. Epstein (1994) 23 Cal. App. 4th 882, 897, 28 Cal. Rptr. 2d 588]* , stated that nothing in the express language of former *Prob. Code § 150* distinguished between cases in which the promisor was alive and cases in which the promisor was dead [*Estate of Housley v. Haywood (1997) 56 Cal. App. 4th 342, 354-355, 65 Cal. Rptr. 2d 628]* . For further discussion, see *§ 528.131*.

A party may be estopped from asserting the statute of limitations as a defense to an untimely action to enforce an oral promise to make a will. In a case in which the one-year statute of limitations set forth in *Code Civ. Proc. § 366.2* applied because the promisor had made an inter vivos transfer of property covered by the contract, the court followed the reasoning of *Juran v. Epstein*, discussed *above* [*Battuello v. Battuello (1998) 64 Cal. App. 4th 842, 847-848, 75 Cal. Rptr. 2d 548* ; *see Juran v. Epstein (1994) 23 Cal. App. 4th 882, 897, 28 Cal. Rptr. 2d 588]* . It held that while *Code Civ. Proc. § 366.2(b)* (at the time designated as *Code Civ. Proc. § 366.2(a)(2)*), clearly shows that the Legislature intended that the one-year statute of limitations could not be "tolled" or "extended," the statute says nothing about equitable estoppel. The court concluded that in the absence of any such language or legislative history suggesting that was what the Legislature intended, the doctrine of equitable estoppel still applies [*Battuello v. Battuello (1998) 64 Cal. App. 4th 842, 847-848, 75 Cal. Rptr. 2d 548* (appellant alleged sufficient facts to come within doctrine of equitable estoppel to application of statute of limitations)].

A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if made on or before December 31, 1984, can be established under the law applicable to the contract on December 31, 1984 [*Prob. Code § 21700(c)*]. The statute applicable to such contracts is former *Civ. Code § 1624(6)*. Under the applicable laws a contract to make a particular disposition of an individual's property may be breached by not making a will disposing of the property as provided for in the agreement, or by revoking a will providing for the specified disposition, contrary to anagreement not to revoke [*Goldstein v. Hoffman (1963) 213 Cal. App. 2d 803, 812, 29 Cal. Rptr. 334]* . One of the remedies available to the promisee if the contract is breached is an action for equitable relief in the form of quasi-specific performance [§ 528.92[14]], in which equity gives relief equivalent to specific performance by impressing a constructive trust on the property which the decedent promised to leave to the promisee [*Goldstein v. Hoffman (1963) 213 Cal. App. 2d 803, 812, 29 Cal. Rptr. 334* ; *see Brown v. Superior Court (1949) 34 Cal. 2d 559, 563-564, 212 P.2d 878]* .

The execution of a joint will or mutual wills does not create a presumptions of a contract not to revoke the will or wills [*Prob. Code § 21700(b)*]. In fact, joint and mutual wills are now disfavored [*see* California Wills and Trusts, Ch. 60, *Joint and Mutual Wills* (Matthew Bender)]. Nevertheless, the following discussion of the older law is retained for use with older agreements. When two persons had made a joint will pursuant to an oral agreement to leave their entire property to the survivor and on the death of the survivor to named beneficiaries, and one person performed the agreement by failing to revoke the will prior to his death, and the other party, having received the benefit of the

agreement, then executed a new will in disregard of the agreed-on disposition, equity has granted quasi-specific performance of the oral agreement and imposed a constructive trust on the property in favor of the original beneficiaries. This remedy presumes that a constructive fraud has been practiced on the first decedent by the second decedent to the detriment of the original beneficiaries, and it hypothesizes that the newly designated beneficiaries of the surviving testator will be unjustly enriched if the oral agreement between the decedents is not enforced. Under such circumstances, the newly designated beneficiaries become derivatively estopped to plead the statutory requirement of a written agreement to make a will [*Stahmer v. Schley (1979) 96 Cal. App. 3d 200, 203, 157 Cal. Rptr. 756* ; *see Notten v. Mensing (1935) 3 Cal. 2d 469, 474, 45 P.2d 198]* .

Before 1985 there did not need to be an express agreement not to revoke mutual wills in order to enforce a contractual obligation to leave property to designated persons at death. Every contract contains an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement. When the parties contract to make a particular disposition of property by will, the agreement necessarily includes a promise not to breach the contract by revoking the will and failing to dispose of the property as agreed. Although a will may be revoked under *Prob. Code § 23* and the parties contract with knowledge of this fact, the obligation to make the agreed disposition may still be enforced [*Brown v. Superior Court (1949) 34 Cal. 2d 559, 564-565, 212 P.2d 878* ; *Goldstein v. Hoffman (1963) 213 Cal. App. 2d 803, 812, 29 Cal. Rptr. 334]* .

The right to enforce a contract to make a particular disposition of property on death is not restricted to the promisee. When two parties agree to make mutual wills, each promising to dispose of his or her property to the other, or if the other is dead, to certain third persons, and one of the parties performs by leaving his or her property to the other, the intended devisees and legatees are entitled to enforce their rights as beneficiaries under the agreement. The contracting party who survived is estopped from making any other or different disposition of the property, and his or her obligation under the agreement becomes irrevocable and enforceable against him or her when he or she has availed himself or herself of the provisions of decedent's will in his or her favor and accepts substantial benefits thereunder [*Brown v. Superior Court (1949) 34 Cal. 2d 559, 564, 212 P.2d 878]* .

For further discussion of quasi-specific performance, see the Comments to §§ 528.131 and 528.132.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesEquitable ReliefGeneral OverviewContracts LawRemediesSpecific PerformanceEstate, Gift & Trust LawTrustsConstructive TrustsEstate, Gift & Trust LawWillsContracts to Make WillsEstate, Gift & Trust LawWillsJoint & Mutual Wills

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46-528 California Forms of Pleading and Practice--Annotated § 528.47

§ 528.47 Cooperative Marketing Association Contract

Contracts for the sale of products by a member or stockholder of a nonprofit cooperative corporation or association to the corporation or association may be specifically enforced [*Corp. Code § 13356* (nonprofit fishmarketing association); *Food & Agric. Code §§ 54263, 54265* (nonprofit cooperative association); *Colma Vegetable Ass'n v. Bonetti (1928) 91 Cal. App. 103, 114, 267 P. 172]* . Additionally, an injunction may be granted to prevent a breach of the contract [*Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(b)(5)*; *Food & Agric. Code § 54265*;§ 528.13[1]].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCooperativesMembers & Other ConstituentsBusiness & Corporate LawNonprofit Corporations & OrganizationsManagement Duties & LiabilitiesContracts LawRemediesEquitable ReliefInjunctive ReliefContracts LawRemediesSpecific PerformanceContracts LawSales of GoodsDamages & RemediesBuyer's Damages & RemediesReplevin & Specific PerformanceContracts LawSales of GoodsDamages & RemediesSeller's Damages & RemediesGeneral Overview

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46-528 California Forms of Pleading and Practice--Annotated § 528.48

§ 528.48 Contract for Sale of Unique Goods

Specific performance of a contract may be decreed when the subject of the contract is goods that are unique or in other proper circumstances [*Com. Code § 2716(1)*]. The decree for specific performance may include such terms and conditions concerning payment of the price, damages, or other relief as the court deems just [*Com. Code § 2716(2)*]. For further discussion and forms relating to the sale of unique goods, see Ch. 501, *Sales: Sales Under the Commercial Code*
.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)RemediesBuyer's RemediesReplevin & Specific PerformanceCommercial Law (UCC)Sales (Article 2)RemediesSeller's RemediesGeneral OverviewContracts LawRemediesSpecific Performance

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46-528 California Forms of Pleading and Practice--Annotated § 528.49

§ 528.49 Contract for Sale of Corporate Stock

Specific performance of a contract for the sale of corporate stock ordinarily will not be granted because damages are an adequate remedy, especially when the stocks are publicly held [*Treasurer v. Commercial Coal Mining Co. (1863) 23 Cal. 390* ; *see* *Fleishman v. Woods (1901) 135 Cal. 256, 260-261, 67 P. 276* (contract to transfer water stock was specifically enforceable since enforcement was essential to adequate relief for respondent)]. However, a court will decree specific performance of such a contract when the stock has a peculiar value and cannot be compensated for by damages [*Korabek v. Weaver Aircraft Corp. (1944) 65 Cal. App. 2d 32* (specific performance of contract to transfer corporate stock granted since stock was of undeterminable value and many conditions were attached before stock was marketed); *see* *Kaneko v. Okuda (1961) 195 Cal. App. 2d 217, 233-234, 15 Cal. Rptr. 792* (specific performance of stock option as proper since reasonable value was tendered, shares had peculiar value, could not be acquired on open market, and were acquired as part of business program, and damages were inadequate remedy)].

For example, a court will order the specific enforcement of a contract to sell shares of stock in a closely held corporation which are not traded in the market and which have no established market value [*Capaldi v. Levy (1969) 1 Cal. App. 3d 274, 281, 81 Cal. Rptr. 629]* . For further discussion and forms relating to the specific performance of contracts for the sale of corporate stock and option agreements for the purchase of corporate stock, see Ch. 163, *Corporations: Transfer of Shares* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersTransfers of SharesContracts LawRemediesSpecific Performance

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46-528 California Forms of Pleading and Practice--Annotated § 528.50

§ 528.50 Agreement to Arbitrate Controversy

A party to an agreement to arbitrate a controversy may seek specific performance of the arbitration agreement if the controversy arises but the other party refuses to arbitrate [*Code Civ. Proc. § 1281*]. The petition to compel arbitration must allege a written agreement to arbitrate a controversy and refusal by respondent to arbitrate [*Code Civ. Proc. § 1281.2*]. For further discussion and forms relating to the enforcement of arbitration agreements in general, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration ClausesContracts LawRemediesSpecific Performance

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46-528 California Forms of Pleading and Practice--Annotated § 528.51

§ 528.51 Collective Bargaining Agreements

Any collective bargaining agreement between an employer and a labor organization is enforceable in equity, and a breach of such an agreement by any party is subject to the same remedies, including injunctive relief, as are available on other contracts [*Lab. Code § 1126*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesEquitable ReliefInjunctive ReliefContracts LawRemediesSpecific PerformanceLabor & Employment LawCollective Bargaining & Labor RelationsEnforcement

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46-528 California Forms of Pleading and Practice--Annotated § 528.52

§ 528.52 Satisfaction of Accord

The proper procedure to enforce an accord is to bring an action for specific performance of the accord [*Moving Picture etc. Union v. Glasgow Theaters, Inc. (1970) 6 Cal. App. 3d 395, 404 n.1, 86 Cal. Rptr. 33* ; *see Civ. Code § 1522* (parties to accord as bound to execute it)]. For a form of complaint for specific performance to compel satisfaction of an accord, see Ch. 6, *Accord and Satisfaction* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAccord & SatisfactionContracts LawRemediesSpecific Performance

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46-528 California Forms of Pleading and Practice--Annotated § 528.53

§ 528.53 Escrow Agreement

If an escrow holder refuses to deliver the instruments after performance of the conditions, the grantee may bring an action for specific delivery of personal property since any person having the possession or control of a particular article of personal property, of which he or she is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession [*see Civ. Code § 3380*]. For further discussion and forms relating to the specific performance of escrow agreements, see Ch. 253, *Escrows* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleRemediesSpecific Performance

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46-528 California Forms of Pleading and Practice--Annotated § 528.54

§ 528.54 Contract to Convey Patent Rights

Specific performance is a proper action to enforce a contract to convey patent rights [*Hercules Glue Co. v. Littooy (1938) 25 Cal. App. 2d 182, 186, 76 P.2d 700* (employee as properly compelled to specifically perform promise to assign to employer patent rights for insecticide spreader invented by employee when contract stated that all patents to employee's inventions during employment would be property of employer and employee invented spreader during his employment); *Coleman v. Dawson (1930) 110 Cal. App. 201, 211, 294 P. 13]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesSpecific PerformancePatent LawOwnershipConveyancesAssignmentsPatent LawOwnershipEmployee Inventions & Shop RightsPatent LawRemediesEquitable ReliefGeneral Overview

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46-528 California Forms of Pleading and Practice--Annotated § 528.55

§ 528.55 Deed of Trust

An action may be brought for specific performance of the provisions of a deed of trust, authorizing the beneficiary to take possession of the property after default and to collect the rents, issues, and profits, applying them toward payment of the indebtedness [*Santacroce Bros. v. Edgewater-Santa Clara, Inc. (1966) 242 Cal. App. 2d 584, 585-587, 51 Cal. Rptr. 613* (appointment of receiver to enter on, and take possession of, property for purpose of collecting rents is proper); *see Title Guar. & Trust Co. v. Monson (1938) 11 Cal. 2d 621, 624-625, 81 P.2d 944* (enforcement of provisions of deed of trust as governed by terms of trust deed and hence not by general rules regarding specific performance)]. Moreover, every express executory agreement in writing whereby the contracting party sufficiently indicates an intention to make particular property a security for a debt or other obligation creates an equitable lien on the property so indicated, which is enforceable against the property in the hands of the original contractor or his or her purchasers with notice or encumbrancers with notice. Thus a promise to give a mortgage or a trust deed on particular property as security for a debt will be specifically enforced by granting an equitable mortgage [*Coast Bank v. Minderhout (1964) 61 Cal. 2d 311, 313-314, 38 Cal. Rptr. 505, 392 P.2d 265 , disapproved on other grounds, Wellenkamp v. Bank of America (1978) 21 Cal. 3d 943, 953, 148 Cal. Rptr. 379, 582 P.2d 970* . For further discussion and forms relating to specific performance of provisions of deeds of trust, see Ch. 555, *Trust Deeds and Real Property Mortgages*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesSpecific PerformanceReal Property LawDeedsRemediesSpecific PerformanceReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsEquitable MortgagesReal Property LawFinancingMortgages & Other Security InstrumentsTransfersGeneral Overview

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46-528 California Forms of Pleading and Practice--Annotated §§ 528.56through 528.69

[Reserved]

§§ 528.56[Reserved]

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46-528 California Forms of Pleading and Practice--Annotated § 528.70

§ 528.70 Jurisdiction

The superior court has jurisdiction of an action for specific performance [*see Cal. Const. art. VI, § 10*].

The governing statutes do not expressly specify whether or not an action for specific performance can be a limited civil case [*see Code Civ. Proc. §§ 85, 86, 88*]. Specific performance is an equitable remedy [*see § 528.11[1]*], and since it is not included in the list of cases in equity that are limited civil cases [*see Code Civ. Proc. § 86(b)*], an action for specific performance will be an unlimited civil case unless it comes within one of the categories of cases in equity that are specifically designated as limited civil cases. These categories are the following [*Code Civ. Proc. § 86(b)*]:

- Cases to try title to personal property when the amount involved is not more than $25,000.
- Cases when equity is pleaded as a defensive matter in any case that is otherwise a limited civil case.
- Cases to vacate a judgment or order of the court obtained in a limited civil case through extrinsic fraud, mistake, inadvertence, or excusable neglect.

Additionally, the small claims division has jurisdiction to grant equitable relief in the form of specific performance, in lieu of or in addition to money damages, in any action brought for the recovery of money within the jurisdiction of that division [*Code Civ. Proc. § 116.220(a)(1)-(4)* (small claims division has jurisdiction of claims up to $5,000, with some exceptions)].

Because of the distribution of jurisdiction for equitable actions, a plaintiff should be very careful to meet all pleading requirements. Failure to do so might mean that the court in which the action was brought lacks jurisdiction of the action [*see Reardon v. Melbourne (1942) 53 Cal. App. 2d 257, 259-260, 127 P.2d 618* (court did not acquire jurisdiction over action when plaintiff added allegations of nonexistent specific performance cause of action to complaint to recover real estate broker's performance)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureEquityGeneral OverviewGovernmentsCourtsSmall Claims Courts

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§ 528.71 Venue

The proper county for trial of an action for specific performance of a contract to sell personal property is the county in which defendant's obligation is to be performed, in which the contract in fact was entered into, or in which the defendant resides at the commencement of the action [*Code Civ. Proc. § 395(a)*].

When the action is for specific performance of a contract to sell real property, the proper county for trial is the county in which the real property, or some part of it, is located [*Code Civ. Proc. § 392(a)(1)*; *Grocers' Fruit Growing Union v. Kern County Land Co. (1907) 150 Cal. 466, 473, 89 P. 120* (action for specific performance of contract for conveyance of land as governed by *Code Civ. Proc. § 392(a)(1)* since it seeks determination of right or interest in real property)]. However, an action in which the relief sought is personal, and title to, or possession of, real property is only incidentally involved, is transitory and not local. Thus, actions by a vendor for the purchase price of land or for specific performance of a vendee's contract to purchase land are governed by *Code Civ. Proc. § 395*, not *Code Civ. Proc. § 392(a)(1)* [*Marcacci v. Continental Baking Co. (1962) 202 Cal. App. 2d 224, 226-227, 20 Cal. Rptr. 567]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewContracts LawRemediesSpecific PerformanceContracts LawSales of GoodsDamages & RemediesBuyer's Damages & RemediesReplevin & Specific PerformanceContracts LawSales of GoodsDamages & RemediesSeller's Damages & RemediesGeneral OverviewReal Property LawPurchase & SaleRemediesSpecific Performance

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46-528 California Forms of Pleading and Practice--Annotated § 528.72

§ 528.72 Statute of Limitations

The period of limitation for an action for specific performance is four years for a written contract [*Code Civ. Proc. § 337(1)*; *see Estate of Brenzikofer v. Schwartz (1996) 49 Cal. App. 4th 1461, 1468-1469, 57 Cal. Rptr. 2d 401* ; *Ludwicki v. Guerin (1961) 57 Cal. 2d 127, 133, 17 Cal. Rptr. 823, 367 P.2d 415* (period of limitation for quasi-specific performance of written contract to make will as four years)] and two years for an oral contract [*Code Civ. Proc. § 339(1)*]. The period of limitation for an action for specific performance of an installment contract accrues when the last installment is due and not until that time [*Tahoe Pines Co. v. Newman (1922) 59 Cal. App. 186, 190, 210 P. 445]* .

A contract for the sale of land cannot be taken out of the statute of limitations governing contract actions by converting the action into one for the recovery of real property through the application of the doctrine of equitable conversion. Thus the five-year period of limitation provided by *Code Civ. Proc. § 318* for the recovery of real property can not be made applicable by the theory that under a contract for sale, the purchaser is deemed to be the equitable owner of the property and the seller is considered the owner of the purchase price [*Reiner v. Hermann (1947) 79 Cal. App. 2d 543, 546, 180 P.2d 385* (promise to convey real property if promisee married promisor)].

An action for quasi-specific performance of a written agreement is barred if not brought within the four-year period specified by *Code Civ. Proc. § 337(1)* or *343* (period of limitation for actions not otherwise provided for) [*Ludwicki v. Guerin (1961) 57 Cal. 2d 127, 133, 17 Cal. Rptr. 823, 367 P.2d 415]* . When the action is based on an oral contract to will property, the action is not governed by the two-year period of limitation set forth in *Code Civ. Proc. § 339*, but instead may be brought within four years when the property involved is impressed with the qualities of a resulting trust in the hands of the defendants [*Potter v. Bland (1955) 136 Cal. App. 2d 125, 134, 288 P.2d 569]* . Since a contract to make a will is breached only if it has not been complied with at the time of the promisor's death, the cause of action for the breach does not accrue or the period of limitation commence until the promisor dies [*Estate of Brenzikofer v. Schwartz (1996) 49 Cal. App. 4th 1461, 1468-1469, 57 Cal. Rptr. 2d 401* ; *Ludwicki v. Guerin (1961) 57 Cal. 2d 127, 130-131, 17 Cal. Rptr. 823, 367 P.2d 415]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesStatutes of LimitationsContracts LawRemediesSpecific PerformanceContracts LawTypes of ContractsOral AgreementsEstate, Gift & Trust LawWillsContracts to Make WillsGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawPurchase & SaleRemediesSpecific Performance

California Forms of Pleading and Practice--Annotated

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Volume 46: Settlement and Release thru Subpoena Chs. 520-535
Chapter 528 SPECIFIC PERFORMANCE
PART II. LEGAL BACKGROUND
D. Procedure

46-528 California Forms of Pleading and Practice--Annotated § 528.73

§ 528.73 Inconsistent Theories of Recovery

A complaint may allege inconsistent theories of a cause of action in the alternative. Thus a plaintiff may seek specific performance of an agreement or, in the alternative, damages for the breach of that agreement. The court may award damages if the plaintiff is not entitled to specific performance [*Foreman & Clark Corp. v. Fallon (1971) 3 Cal. 3d 875, 883, 92 Cal. Rptr. 162, 479 P.2d 362* ; *Brandolino v. Lindsay (1969) 269 Cal. App. 2d 319, 324, 75 Cal. Rptr. 56* ; *see Lynn v. Knob Hill Improvement Co. (1917) 177 Cal. 56, 61, 169 P. 1009* (complaint alleging causes of action for specific performance and for recovery of purchase money as defective since plaintiff did not separate two inconsistent causes of action)].

However, the remedies of damages for breach of contract and specific performance are inconsistent so that a plaintiff cannot receive both. Thus, when one is chosen, the other is considered to be abandoned if a change of remedy would injure the other party [*Buckmaster v. Bertram (1921) 186 Cal. 673, 678, 200 P. 610]* . Counsel's oral acknowledgment, at a hearing on a motion for summary judgment, that plaintiff is no longer seeking specific performance of the contract, but only damages, has been held sufficient withdrawal of that claim to support the court's order dismissing the cause of action for specific performance [*Tri-Continent Internat. Corp. v. Paris Savings & Loan Assn. (1993) 12 Cal. App. 4th 1354, 1358-1359, 16 Cal. Rptr. 2d 508]* .

On the other hand, if a plaintiff is mistaken and seeks a remedy to which he or she was never entitled, this does not prevent the plaintiff from subsequently availing himself or herself of a remedy that he or she is entitled to under the facts of the case if the defendant is placed in no worse position because of the unsuccessful prosecution of the first action [*McGibbon v. Schmidt (1916) 172 Cal. 70, 75, 155 P. 460* (when nonsuit entered in action for recovery of purchase money, plaintiff is permitted to bring subsequent action for specific performance)]. If a plaintiff recovers under one theory, however, he or she cannot recover under the other. A party cannot receive money damages, and at the same time enforce the contract [*see Boshes v. Miller (1953) 119 Cal. App. 2d 332, 337, 259 P.2d 447]* .

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesElection of RemediesContracts LawRemediesSpecific Performance

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46-528 California Forms of Pleading and Practice--Annotated § 528.74

§ 528.74 Right to Jury Trial

There is no right to a jury trial in an equitable action for specific performance. In specific performance actions involving both legal and equitable issues, however, there is a right to jury trial on the legal issues [*Gregory v. Hamilton (1978) 77 Cal. App. 3d 213, 219-220, 142 Cal. Rptr.563]* . Therefore, on amendment of the pleadings in an action for specific performance to include a legal cause of action for damages, the plaintiff is entitled to a jury trial on the issue of damages [*Farnsworth v. Hunter (1938) 11 Cal. 2d 27, 31-32, 77 P.2d 840]* . Additionally, when the complaint pleads a purely equitable cause of action such as one for specific performance and the defendant cross complains for legal relief such as damages, the parties are entitled to a jury trial on the legal issue [*Connell v. Bowes (1942) 19 Cal. 2d 870, 871-872, 123 P.2d 456]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsActions in EquityCivil ProcedureTrialsJury TrialsRight to Jury TrialContracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance

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46-528 California Forms of Pleading and Practice--Annotated §§ 528.77through 528.89

[Reserved]

§§ 528.77[Reserved]

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46-528 California Forms of Pleading and Practice--Annotated § 528.90

§ 528.90 California Points and Authorities

For memoranda of points and authorities relating to actions for specific performance of escrow agreements, see California Points and Authorities, Ch. 101, *Escrows*

For memoranda of points and authorities for use in opposing an injunction to prevent the breach of a contract that could not be specifically enforced, see California Points and Authorities, Ch. 116, *Injunctions*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesEquitable ReliefInjunctive ReliefContracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleRemediesSpecific Performance

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Chapter 528 SPECIFIC PERFORMANCE
PART III. RESEARCH GUIDE

46-528 California Forms of Pleading and Practice--Annotated § 528.91

§ 528.91 State Statutes

[1] Generally

Required form for contracts involving conveyance of real property that provide for binding arbitration of disputes between principals. *Code Civ. Proc. § 1298 et seq.*

Specific performance may be compelled. *Civ. Code § 3384*

Security for performance. *Civ. Code § 3386*

Pecuniary compensation presumed inadequate to relieve breach of contract for transfer of real property. *Civ. Code § 3387*

Enforceability of unsigned contract. *Civ. Code § 3388*

Contracts providing for penalty or liquidated damages enforceable. *Civ. Code § 3389*

Contracts not subject to specific performance. *Civ. Code § 3390*

Specific performance not available for want of equity, fraud, or mistake. *Civ. Code § 3391*

Performance of conditions precedent required. *Civ. Code § 3392*

Requirement that seller have good title. *Civ. Code § 3394*

Persons bound to perform obligation with respect to real property. *Civ. Code § 3395*

[2] Particular Contracts That Are Specifically Enforceable

Right of party to real property sales contract to specific performance. *Civ. Code § 1680*

Specific performance of endorsement of transferred bill of lading. *Com. Code § 7506*

Collective bargaining agreement is enforceable at law or in equity; breach of agreement is subject to same remedies, including injunctive relief, available to other contracts. *Lab. Code § 1126*

Specific performance of agreement for cooperative development of oil and gas. *Pub. Res. Code § 3301*

[3] Possession of Property

Method of obtaining possession of real property. *Civ. Code § 3375*

Method of obtaining possession of personal property. *Civ. Code § 3379*

Compelling delivery of personal property to owner. *Civ. Code § 3380*

Agreement made by testator for sale of property disposed of by prior will does not revoke testamentary disposal but sale agreement subject to specific performance. *Prob. Code § 77*

[4] Probate

Decree ordering personal representative to convey property to person entitled to it. *Prob. Code § 850 et seq.*

[5] Reformation

Specific performance of reformed contract. *Civ. Code § 3402*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesReplevinsContracts LawRemediesReformationContracts LawRemediesSpecific PerformanceEstate, Gift & Trust LawProbatePersonal RepresentativesClaims By & AgainstReal Property LawPurchase & SaleRemediesSpecific Performance

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46-528 California Forms of Pleading and Practice--Annotated § 528.92

§ 528.92 Decisions

[1] Adequate Consideration

Allegation that property is reasonably worth certain sum is averment of fact; when sum appears to be no greater than price agreed on for sale, plaintiff is fully complying with obligation to show by averment of appropriate facts that consideration for contract sought to be specifically enforced is adequate. *W.G. Reese Co. v. House (1912) 162 Cal. 740, 745, 124 P. 442*

Allegation of making of contract, setting it forth in haec verba and allegation that consideration named therein was, at time of contract's making, fair and reasonable value of property as sufficient allegation that contract was just and reasonable and consideration was adequate. *Friedrich v. Roland (1950) 95 Cal. App. 2d 543, 547-48, 213 P.2d 423*

Allegation that property is reasonably worth certain sum was averment of fact and when such sum appears to be no greater than price agreed on for sale, plaintiff was fully complying with obligation to aver appropriate facts showing consideration was adequate. *Friedrich v. Roland (1950) 95 Cal. App. 2d 543, 547-548, 213 P.2d 423*

Averment that consideration named in agreement is fair and reasonable value of property was sufficient allegation of adequacy of consideration. *Boro v. Ruzich (1943) 58 Cal. App. 2d 535, 540, 137 P.2d 51*

When complaint sets out contract in haec verba and further states that purchase price of property stipulated in contract was fair and reasonable value of property at time contract was made, allegation that purchase price was fair and reasonable taken in connection with terms of contract is sufficient allegation that contract is fair and equitable. *Minaker v. Sunset Bldg. & Real Estate Co. (1914) 25 Cal. App. 771, 773, 145 P. 542*

[2] Adequate Remedy at Law

Injunction is not granted when monetary damages afford adequate relief and are not extremely difficult to ascertain. *Thayer Plymouth Center, Inc. v. Chrysler Motors Corp. (1967) 255 Cal. App. 2d 300, 306, 63 Cal. Rptr. 148*

Contract for sale and delivery of garbage by defendants to plaintiff for feeding plaintiff's hogs was not specifically enforceable since plaintiff had adequate remedy at law in damages because substitute garbage was available at higher price. *LeMoyne Ranch v. Agajanian (1932) 121 Cal. App. 423, 425, 8 P.2d 1055*

[3] Conditions Precedent

Delivery of transfer disclosure statement is nonwaivable condition precedent to buyer's duty of performance in sale covered by *Civ. Code § 1102 et seq.*, and buyer of covered real estate has no duty to perform unless seller complies with disclosure requirements and buyer chooses not to exercise right of rescission; therefore, seller's failure to deliver required disclosure statement precluded action against buyer for specific performance and breach of contract. *Realmuto v. Gagnard (2003) 110 Cal. App. 4th 193, 205, 1 Cal. Rptr. 3d 569*

If approval would have been given if sought, failure to seek approval excused condition of approval and provided basis for specific performance. *Jacobs v. Tenneco West, Inc. (1986) 186 Cal. App. 3d 1413, 1417-1418, 231 Cal. Rptr. 351*

If approval would not have been given if sought, failure to seek approval was excused, and party whose performance was conditioned on approval was not required to perform; this excuse for nonperformance was affirmative defense, burden of proof of which was on party claiming it. *Jacobs v. Tenneco West, Inc. (1986) 186 Cal. App. 3d 1413, 1418-1419, 231 Cal. Rptr. 351*

When buyer expects to produce funds for purchase through loan, buyer is required to establish that prospective lender has ability to supply funds and is legally bound by contract to do so. *C. Robert Nattress & Associates v. CIDCO (1986) 184 Cal. App. 3d 55, 65, 229 Cal. Rptr. 33*

To establish ability to pay for property, buyer is not required to prove lender legally bound to lend; sufficient to find that buyer commanded adequate resources. *Henry v. Sharma (1984) 154 Cal. App. 3d 665, 670-672, 201 Cal. Rptr. 478*

Condition of approval and implied covenant of good faith and fair dealing creates duty on part of party whose performance is conditioned on approval to submit contract to party's board of directors for approval, and duty on part of board to confer and decide whether to approve contract. *Moreland Development Co. v. Gladstone Holmes, Inc. (1982) 135 Cal. App. 3d 973, 977-978, 186 Cal. Rptr. 6* ; *Jacobs v. Freeman (1980) 104 Cal. App. 3d 177, 190, 163 Cal. Rptr. 680*

Agreement that is subject to approval of board of directors of one party is not illusory; approval is condition precedent to party's duty to perform, not to formation of contract. *Jacobs v. Freeman (1980) 104 Cal. App. 3d 177, 187, 189-190, 163 Cal. Rptr. 680*

Deposit of $450 in escrow by buyers accompanied by demand that $700 which was amount of rent received by seller for lease of land be credited to buyers was insufficient performance on buyers' part to warrant specific performance when agreement required deposit of $1150 into escrow, since buyers' right of possession to land and claim to rents were contingent on payment of specified sum. *Evarts v. Johnston (1949) 34 Cal. 2d 6, 9, 206 P.2d 633*

Trial court's conclusion that plaintiff purchaser was not entitled to specific performance was erroneous when plaintiff's failure to pay installment under contract was not unlawful, grossly negligent, or intentional. *Williams Plumbing Co. v. Sinsley (1975) 53 Cal. App. 3d 1027, 1034, 126 Cal. Rptr. 345*

Finding that buyer seeking specific performance of contract has ability to purchase is supported by proof that buyer

commanded resources on which he or she could obtain requisite credit. *D-K Inv. Corp. v. Sutter (1971) 19 Cal. App. 3d 537, 546, 96 Cal. Rptr. 830*

[4] Employment Contracts

Lab. Code § 2855, prohibiting enforcement of employment contracts extending over more than seven years, is applicable to term of employment of minors under contracts specified in former *Civ. Code § 36* (*now Fam. Code § 6750 et seq.*) (contracts for necessities, artistic or creative services, or professional sports services). *Warner Bros. Pictures, Inc. v. Brodel (1948) 31 Cal. 2d 766, 775, 192 P.2d 949*

[5] Forfeiture

Doctrine of relief from forfeiture under *Civ. Code § 3275* was unavailable to allow optionee to recover price increment under new and more costly contract it was forced to negotiate because of its own failure to exercise option within time called for. *Bekins Moving & Storage Co. v. Prudential Ins. Co. (1985) 176 Cal. App. 3d 245, 253-254, 221 Cal. Rptr. 738*

Plaintiff was entitled to specific performance of contract to convey real property on ground of relief from forfeiture when his performance was delayed although time was declared to be of the essence, since otherwise defendants would receive advantages of plaintiff's performance without suffering damage because of delay whereas plaintiff would lose all consideration for work done and costs paid by him. *Selby v. Battley (1957) 149 Cal. App. 2d 659, 664, 309 P.2d 120*

[6] Injunctive Relief

[a] When Injunction Proper

Issuance of permanent injunction preventing health insurer from interfering in internal management of health maintenance organization that was originally set up and funded by insurer was proper, despite conflict between original article of incorporation and amended bylaws eliminating corporate members; article was unlawful as applied. *Health Maintenance Network v. Blue Cross of So. California (1988) 202 Cal. App. 3d 1043, 249 Cal. Rptr. 220*

Injunction was proper to restrain owner from utilizing policy preventing more than four persons from occupying three-bedroom apartment in publicly assisted complex; *Civ. Code § 3423* was not applicable since regulatory agreement provided that city could compel owner's performance by mandamus or other legal or equitable proceeding. *Zakaria v. Lincoln Property Co. (1986) 185 Cal. App. 3d 500, 510, 229 Cal. Rptr. 669*

Injunctive relief aws proper to enjoin defendants from permitting trees on their property to exceed certain height and to overhang plaintiff's property in violation of contract aimed at protecting plaintiff's property from shading when purpose of contract was to prevent very damage that ensued from breach, damage would recur each year, and damage would increase as trees grew. *Smith v. Mendonsa (1952) 108 Cal. App. 2d 540, 544, 238 P.2d 1039*

Injunction was proper remedy to prevent revocation of agency coupled with interest, whether or not contract could be specifically enforced. *Lane Mortgage Co. v. Crenshaw (1928) 93 Cal. App. 411, 431, 269 P. 672*

Defendant who was salesman for plaintiffs and who quit their employ, went into same business, and used plaintiffs' lists to solicit customers for himself was properly enjoined from further use of customer lists. *Gordon v. Wasserman*

(1957) 153 Cal. App. 2d 328, 328-329, 314 P.2d 759

Enjoining continuing trespass of defendants who were occupying and using gas station in manner prohibited by contract under which defendants were to sell plaintiff's products exclusively on property leased from plaintiff was proper. *General Petroleum Corp. of Cal. v. Loughead (1933) 218 Cal. 554, 555, 24 P.2d 457*

Injunction to restrain defendants from selling products and displaying advertising other than plaintiff's under lease which stated that plaintiff should have exclusive right to use all space for advertising purposes and to keep or store gasoline and plaintiff gave defendants right to use leased premises for sole purpose of reselling plaintiff's products together with one other brand was proper. *Associated Oil Co. v. Myers (1933) 217 Cal. 297, 302-303, 18 P.2d 668*

Agreement to transfer stock of peculiar value was specifically enforceable so that breach may also be enjoined. *Steinmeyer v. Warner Cons. Corp. (1974) 42 Cal. App. 3d 515, 519, 116 Cal. Rptr. 57*

[b] When Injunction Not Proper

Preliminary injunction to prevent termination of exclusive distributorship contract was properly denied when effect of injunction would require manufacturer to entrust marketing of its products in wide area to distributor with whom relationship of confidence and cooperation had been rendered impossible due to pendency of lawsuit. *Thayer Plymouth Center, Inc. v. Chrysler Motors Corp. (1967) 255 Cal. App. 2d 300, 304, 63 Cal. Rptr. 148*

Permanent injunction prohibiting manufacturer from breaching contract with distributor was not proper when effect of injunction would be to specifically enforce dealership agreement requiring manufacturer to sell its products to dealer over indefinite term inasmuch as decree would impose on court impossible task of supervising continuous performance by parties. *Thayer Plymouth Center, Inc. v. Chrysler Motors Corp. (1967) 255 Cal. App. 2d 300, 304, 63 Cal. Rptr. 148*

[c] Personal Service Contracts

Rationale underlying enforcement of negative covenants in contracts involving unique personal services of star performers and athletes is that employer has contracted for exclusive right to display "star" for given period. *Lemat Corp. v. Barry (1969) 275 Cal. App. 2d 671, 678, 80 Cal. Rptr. 240*

[d] Terms of Contract

All terms and conditions of proposed agreement were not required to be set forth in contract in order for injunction to be granted since usual and reasonable conditions of agreement are, in contemplation of parties, part of contract. *Nadell & Co. v. Grasso (1959) 175 Cal. App. 2d 420, 425, 346 P.2d 505*

[7] Just and Reasonable Contract

Contract for sale of realty as not just and reasonable was to defendant vendors within meaning of *Civ. Code § 3390* when contract provided nothing but plaintiff's good faith and business judgment to insure that they would receive anything for conveying their land. *Handy v. Gordon (1967) 65 Cal. 2d 578, 582, 55 Cal. Rptr. 769, 422 P.2d 329*

Allegation that contract is just and reasonable without allegations as to actual value of land and other circumstances showing that it was just and reasonable or that consideration was adequate is insufficient. *Salisbury v. Yawger (1921)*

184 Cal. 783, 795, 195 P. 682

Purchase of stock at value placed on it by both parties to be paid for by canceling seller's present debts and by advancing part of price to meet expected obligations of seller which she otherwise could not pay was fair and reasonable. *Gilfallan v. Gilfallan (1914) 168 Cal. 23, 27, 141 P. 623*

Requirement that specific performance can be granted only if contract is for adequate consideration and is just and reasonable is sufficiently satisfied for purpose of stating cause of action when complaint alleges contract price, that it is reasonable market value, and that contract, as to defendant, is just and reasonable. *Burrow v. Timmsen (1963) 223 Cal. App. 2d 283, 290, 35 Cal. Rptr. 668*

Mere allegation that agreement is just and reasonable as not precluding examination of agreement's terms as pleaded and allegation is permitted to be overcome if agreement itself, as matter of law, is unjust or unreasonable. *Burrow v. Timmsen (1963) 223 Cal. App. 2d 283, 290, 35 Cal. Rptr. 668*

Agreement pursuant to which plaintiff company had option to repurchase inventory of equipment at cost less 10 percent annual depreciation was unjust and unreasonable. *Beatty Safway Scaffold v. Skrable (1960) 180 Cal. App. 2d 650, 655-656, 4 Cal. Rptr. 543*

[8] Option Contracts

Doctrine of substantial performance was not applicable to extend term of option so as to allow exercise after expiration of stated term. *Bekins Moving & Storage Co. v. Prudential Ins. Co. (1985) 176 Cal. App. 3d 245, 251-253, 221 Cal. Rptr. 738*

When optionee had to pay rent for two years while obtaining judgment for specific performance from optionor-landlord, optionee was entitled to recover rent from date he should have had possession. *Erich v. Granoff (1980) 109 Cal. App. 3d 920, 930-931, 167 Cal. Rptr. 538*

Exercise of option within time specified by contract was sufficient to bind optionee so that specific performance could be granted. *Smith v. Bangham (1909) 156 Cal. 359, 363, 104 P. 689*

Option contract was fair when optionor received $10 for privilege of selling stock within two years with automatic extensions for successive periods of same duration, optionor was not overreached and thereby induced to sell, and he consciously and knowingly agreed to sell shares. *Glascock v. Sukumlyn (1955) 131 Cal. App. 2d 587, 591, 281 P.2d 90*

[9] Partnership Agreements

One remedy for wrongful repudiation of partnership or joint venture agreement under which partner or joint venturer converted assets of partnership or joint venture to own use and benefit was action for specific performance of partnership or joint venture agreement including remedy of judicial dissolution and accounting, and, if necessary, imposition of trust on partnership or joint venture property. *Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 564-565, 140 Cal. Rptr. 330*

[10] Part Performance Avoiding Statute of Frauds

Mere rendition of services is usually not such part performance of verbal agreement as to relieve contract from operation of statute of frauds, but when services are of such peculiar character that it is impossible to estimate value by pecuniary standard and plaintiff, after performing services, could not be restored to situation he or she was in prior to rendering services, part performance as sufficient to remove oral contract from operation of statute of frauds. *Walker v. Calloway (1950) 99 Cal. App. 2d 675, 678, 222 P.2d 455*

Contracts that violate statute of frauds are specifically enforceable when there has been part performance by party seeking relief. *Johnson v. Servaes (1962) 210 Cal. App. 2d 392, 398, 26 Cal. Rptr. 733* (action for specific performance of oral agreement to cancel note and release deed of trust)

[11] Penalties

Agreement to waive payment in default of making improvements under contract was not penalty or invalid provision for liquidated damages when specified payment was stipulation as to enhancement in value which would accrue to property if contemplated improvements were made within specified time. *Stevens v. Los Angeles Dock & Terminal Co. (1912) 20 Cal. App. 743, 748, 130 P. 197*

[12] Personal Service Contracts

Lease requiring that lessees keep gas station open 24 hours a day and conduct all business under lease in efficient manner did not require performance of personal services so that specific performance of lease is proper. *Pike v. Hayden (1950) 97 Cal. App. 2d 606, 613, 218 P.2d 578*

Rights of employees under *Lab. Code § 2855*, which states that contract to render personal service may not be enforced against employee beyond seven years from commencement of service, as created in public interest and was not waivable by employee. *De Haviland v. Warner Bros. Pictures (1944) 67 Cal. App. 2d 225, 234-235, 236, 153 P.2d 983*

Extensions of plaintiff actress's contract due to her suspensions for refusing roles and for illness was not binding plaintiff on beyond seven calendar years specified in *Lab. Code § 2855* as maximum period personal services contract can be specifically enforced. *De Haviland v. Warner Bros. Pictures (1944) 67 Cal. App. 2d 225, 234, 153 P.2d 983*

Contract of joint enterprise under which defendant was to furnish necessary money and plaintiff was to contribute his services in purchase of properties and in their upkeep, maintenance, and repair as specifically enforceable although plaintiff was required to contribute services since contract was not one of employment. *Harms v. Reed (1946) 73 Cal. App. 2d 853, 861-862, 167 P.2d 747*

[13] Procuring Act of Third Party

Agreement for sale of real property containing clause under which deferred portion of purchase price had to be secured by mortgage executed by buyers and wives, but wives did not execute contract, was specifically enforceable although clause itself would have been unenforceable since mortgage would have been due three years after delivery of deed, that time had elapsed, and court decree did not require giving of mortgage. *Wheat v. Thomas (1930) 209 Cal. 306, 316, 287 P. 102*

When father made agreement with daughter that, if daughter conveyed property to mother, mother and father would convey part of property to daughter's husband on daughter's death, compelling mother to carry out agreement was not proper, but since she accepted property, she had to comply with terms on which benefits were bestowed and had to

convey part of the property to daughter's husband or convey all of property to daughter's estate. *Simons v. Bedell (1898) 122 Cal. 341, 348, 55 P. 3*

Agreement to convey real property later found to be community property was not specifically enforceable when agreement was made by husband and wife did not sign it. *Waldeck v. Hedden (1928) 89 Cal. App. 485, 488, 265 P. 340*

[14] Quasi-Specific Performance

[a] In General

Probate decree distributing property free of any restrictions was not conclusive of rights of promisee or intended beneficiary of contract to make particular disposition of property by will. *Brown v. Superior Court (1949) 34 Cal. 2d 559, 565, 212 P.2d 878*

Plaintiff could not maintain action for quasi-specific performance--seeking to impose constructive trust on proceeds of home sale--when he had adequate legal remedy in the form of a claim for damages for breach of written agreement to bequeath property. *Wilkison v. Wiederkehr (2002) 101 Cal. App. 4th 822, 832-833, 124 Cal. Rptr. 2d 631*

Allegation in original complaint that plaintiff had filed claim that was disallowed against estate for money for services did not preclude plaintiff from alleging in amended complaint that services were of exceptional character and could not be estimated in money. *De Hermosillo v. Morales (1956) 146 Cal. App. 2d 819, 830-831, 304 P.2d 854*

[a] Joint Wills

Evidence showing that couple had consistently pooled their assets during 38-year marriage and wife had made substantial contributions to accumulation established that reciprocal will agreement was supported by adequate consideration. *Estate of Cates (1971) 16 Cal. App. 3d 1, 14, 93 Cal. Rptr. 696*

[15] Relief Granted by Court

When specific performance is ordered, decree is required to order performance as nearly as possible in accordance with terms of contract. *Ellis v. Mihelis (1963) 60 Cal. 2d 206, 220, 32 Cal. Rptr. 415, 384 P.2d 7* ; *Ellison v. Ventura Port Dist. (1978) 80 Cal. App. 3d 574, 583, 145 Cal. Rptr. 665*

Court of equity is not required to either enforce contract completely or not at all, so that when substantial justice may result by adjusting equities between parties, court is permitted to grant relief; if plaintiff does not complain that relief granted is less than agreement called for, defendant as not permitted to complain that obligation required is not what it could have been. *Ellison v. Ventura Port Dist. (1978) 80 Cal. App. 3d 574, 583, 145 Cal. Rptr. 665*

[16] Sale of Corporate Stock

Specific performance of contract to sell corporate stock was proper when complaint alleged that corporation had only forty acres of oil land, no oil had been discovered thereon and its value was speculative and uncertain, stock had no actual or market value and its value could be ascertained only on discovery of oil, stock was owned by only a few people, its value was fluctuating and dependent on oil market conditions, and plaintiff could not obtain same amount of stock elsewhere. *Gilfallan v. Gilfallan (1914) 168 Cal. 23, 26, 141 P. 623*

Specific performance decree was not inequitable because it requires purchaser to pay reasonable value of corporate stock without concomitantly directing sellers to perform conditions precedent when record established sellers had performed each and every condition of contract and had been excused from performing any acts after certain date because of purchaser's breach. *Capaldi v. Levy (1961) 1 Cal. App. 3d 274, 283, 81 Cal. Rptr. 629*

Contract for sale of shares of bowling alley corporation was specifically enforceable since shares had peculiar value to plaintiff in that they could not have been purchased on open market, could be acquired only from individual defendants, were acquired by plaintiff as part of his business program, and therefore defendants' failure to deliver could not have been compensated by money. *Kaneko v. Okuda (1961) 195 Cal. App. 2d 217, 233-234, 15 Cal. Rptr. 792*

[17] Separation Agreements

Separation agreements other than those relating to alimony and support are enforceable by specific performance unless provisions violate public policy or specific performance is unwarranted by facts and circumstances, such as when assent of third person not party to agreement is required. *Casady v. Modern Metal Spinning & Mfg. Co. (1961) 188 Cal. App. 2d 728, 731, 10 Cal. Rptr. 790*

[18] Time of Essence

Trial court's conclusion that buyer was entitled to specific performance of time-of-essence contract for sale of real property was erroneous when buyers had not deposited balance of purchase price or provided notice of loan approval within escrow period required in contract. *Fogarty v. Saathoff (1982) 128 Cal. App. 3d 780, 786-787, 180 Cal. Rptr. 484*

Vendee otherwise entitled to specific performance of installment land sale contract in which time declared to be of essence does not forfeit right to that remedy because of willful failure to make installment payments when due after there has been substantial part performance of contract. *MacFadden v. Walker (1971) 5 Cal. 3d 809, 811, 97 Cal. Rptr. 537, 488 P.2d 1353*

When contract required plaintiff to deposit balance due within 90 days of date of writing, failure to do so precluded action for specific performance although defendant's title to property was clouded since plaintiff was not induced by defendant's word or act not to deposit balance within time specified. *Pitt v. Mallalieu (1948) 85 Cal. App. 2d 77, 81-82, 192 P.2d 24*

[19] Unavailability of Specific Performance

When redevelopment agency had no power to levy assessment or development fee on subsequent developer in order to refund option deposit of developer who engaged in unsuccessful negotiations with agency, specific performance of provision requiring assessment and refund was properly denied. *Price Dev. Co. v. Redevelopment Agency (9th Cir. 1988) 852 F.2d 1123, 1126-1127* (applying California law in diversity action)

[20] Uncertain Contract

Oral agreement by spouses to leave their property to surviving spouse on condition that survivor leave combined estate to their children is sufficiently certain to sustain equitable relief. *Crail v. Blakely (1973) 8 Cal. 3d 744, 753-754, 106 Cal. Rptr. 187, 505 P.2d 1027*

Contract for sale of unbuilt home on lot in unapproved subdivision was sufficiently definite for enforcement because terms of agreement were ascertainable from properly admitted extrinsic evidence of developer's tract map, site plans, standard home-feature sheets, floor plans, and elevation plans. *Blackburn v. Charnley (2004) 117 Cal. App. 4th 758, 766-767, 11 Cal. Rptr. 3d 885*

Contract is not uncertain when it defines with sufficient legal certainty types of improvements contemplated by parties, includes objective method to determine improvement costs, and provides for use of objective third parties (qualified subcontractors) to determine costs. *Larwin-Southern Cal., Inc. v. JGB Inv. Co. (1980) 101 Cal. App. 3d 626, 643-644, 162 Cal. Rptr. 52*

Terms of escrow and written agreement for sale of corporate stock are specifically enforceable when contract provided that exact nature and extent of security for promissory note was to be determined and record disclosed that specific parcel of real property had been proposed as security at about time agreement was executed and land had been inspected and approved by sellers. *Capaldi v. Levy (1969) 81 Cal. Rptr. 629*

Use of word "contiguous" in contract renders contract uncertain since word, as used in contract, placed sellers of property in position where they could be deprived of all their choice land without adequate protection that they would be compensated by buyer for remainder. *Lawrence v. Shutt (1969) 269 Cal. App. 2d 749, 761, 75 Cal. Rptr. 533*

[21] Waiver

Seller's waiver of right to specific performance in liquidated damages clause did not prevent buyers from compelling specific performance of land sale agreement as long as buyers discharged their contractual duties. *Bleecher v. Conte (1981) 29 Cal. 3d 345, 354, 173 Cal. Rptr. 278, 626 P.2d 1051*

Contracting party may waive conditions placed in contract solely for that party's benefit. *Sabo v. Fasano (1984) 154 Cal. App. 3d 502, 505, 508-509, 201 Cal. Rptr. 270*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityAdequate Remedy at LawContracts LawConsiderationAdequate ConsiderationContracts LawContract Conditions & ProvisionsConditions PrecedentContracts LawContract Conditions & ProvisionsForfeiture ClausesContracts LawRemediesEquitable ReliefInjunctive ReliefContracts LawStatutes of FraudsExceptionsPartial PerformanceContracts LawTypes of ContractsOption ContractsContracts LawTypes of ContractsPartnership AgreementsContracts LawTypes of ContractsPersonal Service AgreementsFamily LawMarital Duties & RightsProperty RightsPostnuptial & Separation AgreementsEnforcement

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46-528 California Forms of Pleading and Practice--Annotated § 528.93

§ 528.93 Law Reviews

Schwartz, *The Case for Specific Performance, 89 Yale L.J. 271 (1979).*

Note, *Statutory Minimum Compensation and the Granting of Injunctive Relief to Enforce Personal Service Contracts in the Entertainment Industry: The Need for Legislative Reform, 52 So Cal. L. Rev. 489 (1979).*

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Comment, *Mutuality of Remedy--The Demise of An Ancient Proverb in California, 1 Pacific L.J. 654 (1970).*

Comment, *Specific Performance of Shopping Center Leases in California, 21 Hastings L.J. 532 (1970).*

Note, *Arbitration and Award: Judicial Confirmation of an Award of Specific Performance of a Personal Service Contract, 48 Cal. L. Rev. 140 (1960).*

Note, *Arbitration: Grounds for Vacating Award: Specific Performance of Personal Services Contract, 7 UCLA L. Rev. 507 (1960).*

Note, *Equity: Specific Performance: Inadequacy of Consideration as Defense, 42 Cal. L. Rev. 345 (1954).*

Note, *Equity, Specific Performance, Enforceable Contracts, Uncertainty of Terms, 24 So Cal. L. Rev. 91 (1950).*

Note, *Certainty of Terms Required for Specific Performance, 36 Cal. L. Rev. 120 (1948).*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawConsiderationAdequate ConsiderationContracts LawConsiderationMutual ObligationContracts

LawFormationDefinite TermsContracts LawRemediesSpecific PerformanceContracts LawTypes of ContractsPersonal Service Agreements

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§ 528.94 Text References

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, §§ 484 et seq. (4th ed. 1996)

Witkin, California Procedure, vol. 3, *Actions*, §§ 720, 741; vol. 5, *Pleading*, §§ 740-761, 796, 915, 916, 919, 999-1003, 1015-1026, 1048-1052 (4th ed.)

Witkin, Summary of California Law, vol. 4, *Sales* § 209; vol. 11, *Husband and Wife*, § 359; *Equity*, §§ 24-70; vol. 14, *Wills and Probate*, § 109 (10th ed.2005)

Rest Contracts, §§ 358-380, 382

Corbin on Contracts, Vol. 5A, *Specific Performance*, §§ 1136-1213

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewContracts LawGeneral OverviewFamily LawMarital Duties & RightsGeneral Overview

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46-528 California Forms of Pleading and Practice--Annotated §§ 528.95through 528.109

[Reserved]

§§ 528.95[Reserved]

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Chapter 528 SPECIFIC PERFORMANCE
PART IV. PROCEDURAL CHECKLIST

46-528 California Forms of Pleading and Practice--Annotated § 528.110

§ 528.110 Plaintiff's Checklist

A. Determine the potential defendants in an action for specific performance, including the following:

1. All persons having a claim in the subject matter of the contract.

Whenever an obligation regarding real property is specifically enforceable against a particular person, it may be enforced against any other person claiming under that party by a title created subsequently to the obligation, except a purchaser or encumbrancer in good faith and for value and except that any person may exonerate himself or herself by conveying all his or her estate to the person entitled to enforce the obligation [*Civ. Code § 3395*; *see Caras v. Parker (1955) 131 Cal. App. 2d 141, 142, 280 P.2d 226* (specific performance against vendor's grantee as authorized by *Civ. Code § 3395* when grantee has actual or constructive notice of prior rights of buyer)].

2. All beneficiaries or heirs at law of deceased person who breached contract [*see §§ 528.131* and *528.132*].

3. Beneficiaries under joint and mutual wills when surviving party made new will leaving the property to others [*see § 528.132*].

4. Administrator or executor of deceased person who breached contract [*see* comments to § 528.132].

5. Assignee of contract from breaching party.

6. Assignor of contract to breaching party.

7. Seller, buyer, or manufacturer of unique chattel.

8. Seller or buyer of real property.

9. Escrow officer.

10. Corporate owner of real property.

11. Any combination of the foregoing.

B. Ascertain the following facts relating to the potential cause of action:

1. Oral or written nature of contract.

2. Plaintiff's interest in obligation, e.g., party to interest, third party beneficiary, assignee, or other interest.

3. Date and place instrument was executed.

4. Subject matter of instrument.

The attorney should note that an action for specific performance cannot usually be brought to enforce (1) an obligation to render personal service, (2) an obligation to employ another in personal service, (3) an agreement to perform an act which the party has no power lawfully to perform when required to do so, (4) an agreement to procure the act or consent of the wife of the contracting party, or of any other third person, or (5) an agreement the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable [*Civ. Code § 3390*]. For further discussion of these agreements, see *§ 528.40* et seq.

5. Terms of instrument.

The terms of a contract must be express and definite in order to grant specific performance. If there is any doubt as to the terms, specific performance will be denied [*see Civ. Code § 3390(5)*].

6. Any consideration received by plaintiff from defendant pursuant to the contract.

7. Any consideration given by plaintiff to defendant pursuant to the contract.

Specific performance cannot be enforced against a party to the contract if he or she has not received an adequate consideration [*Civ. Code § 3391(1)*]. For further discussion, see *§ 528.15*.

8. Intention of contracting parties.

A written contract may be revised to express the intentions of the parties when through fraud or mutual mistake of the parties or mistake of one party, which the other at the time knew or suspected, the contract does not truly express the parties' intentions [*Civ. Code § 3399*]. As revised, the contract may be specifically enforced [*Civ. Code § 3402*]. For discussion of reformation, see Ch. 488, *Reformation of Instruments* .

9. Plaintiff's conduct in securing other party's assent to contract.

Specific performance cannot be enforced against a party to a contract when the party's assent was obtained by the misrepresentation, concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled [*Civ. Code § 3391(3)*], or when the party's assent was given under the influence of mistake, misapprehension, or surprise. When the contract provides for compensation in case of mistake, however, a mistake within the scope of the provision may be compensated for, and the contract specifically enforced in other respects, if specific performance is proper [*Civ. Code § 3391(4)*]. For further discussion, see *§ 528.17* and *§ 528.19*.

10. Plaintiff's criticisms, if any, of the conduct of the contracting party who refuses to perform.

11. Plaintiff's notification, if any, to defendant of his failure to perform.

12. Nature and extent of plaintiff's performance and excuses for nonperformance, if any, pursuant to the contract.

Specific peformance cannot be enforced in favor of a party who has not fully and fairly performed all conditions precedent on his or her part to the obligation of the other party, except when the failure to perform is only partial, and either entirely immaterial or capable of being fully compensated, in which case specific performance may be compelled on full compensation being made for the default [*Civ. Code § 3392*]. For further discussion, see *§ 528.21*.

13. Nature and extent of defendant's performance, if any, pursuant to the contract.

14. Unilateral rescission, if any, of contract by plaintiff.

. If the contract has been effectively rescinded, it cannot be specifically enforced.

a. If plaintiff attempted to rescind, did he or she notify the defendant of the rescission?

b. If plaintiff attempted to unilaterally rescind, did he or she restore, or offer to restore, the consideration received from the defendant?

c. Did defendant return, or offer to return, consideration received from plaintiff after notification of plaintiff's unilateral rescission?

To effectively rescind a contract, a party must promptly, on discovery of the facts entitling him or her to rescind, restore to the other party everything of value which he or she received from that party under the contract, or offer to restore such items on the condition that the other party do likewise, unless the latter is unable or positively refuses to do so [*Civ. Code § 1691(b)*].

For further discussion of rescission, see Ch. 490, *Rescission and Restitution* .

15. Unilateral rescission, if any, of contract by defendant.

On what ground was rescission attempted and what did each of the parties do with respect to the rescission?

16. Nature of defendant's breach or anticipatory repudiation of the contract.

17. Damages, if any, incurred by plaintiff as result of defendant's breach.

C. Obtain relevant documents, including the following:

1. Contract sought to be enforced, if written.

2. Papers related to contract, if any.

3. Amendments to, or modifications of, contract or related papers.

4. Any written communications between the parties relating to the contract or subject matter of the contract.

5. Outstanding leases of real property, if relevant.

6. If a party is incorporated, a copy of its articles of incorporation and bylaws, and any corporate documents relating to the contract or its subject matter.

D. Make the following determinations:

1. Whether a valid and binding contract exists.

2. Whether the contract is subject to specific performance.

Contracts which are specifically enforceable include the following:

a. Contract for sale of real property.

b. Cooperative marketing association contracts.

c. Contract for sale of unique goods.

d. Contract for sale of corporate stock.

e. Agreement to arbitrate controversy.

f. Collective bargaining agreements.

g. Satisfaction of accord.

h. Escrow agreement.

i. Contracts to convey patent rights.

j. Deeds of trust.

k. Agreement not to revoke will.

l. Agreement to make specific provisions in will.

For further discussion of these contracts, see *§ 528.40* et seq.

3. Whether or not the contract terms are sufficiently definite to be specifically enforced [*see Civ. Code § 3390(5)*].

4. Whether or not the contract is fair and reasonable as to the defendant [*Civ. Code § 3391(2)*].

5. Whether or not the defendant received adequate consideration for the contract [*Civ. Code § 3391(1)*].

6. If the remedy at law is sufficient.

It is presumed that the breach of an agreement to transfer real property is not adequately compensable by money [*Civ. Code § 3387*]. Breach of a contract for personal property can be adequately compensated at law unless the property is unique [*Wehen v. Lundgaard (1940) 41 Cal. App. 2d 610, 613, 107 P.2d 491]* .

7. If plaintiff has adequately performed all his or her conditions precedent to the contract and, if not, if his, or her failure was caused by the defendant or excused for some other reason [*see Civ. Code § 1511*].

8. If the contract is oral, whether or not any factors negative the defense of the statute of frauds.

For discussion of the statute of frauds, see Ch. 530, *Statute of Frauds* .

E. Consider possible counts and causes of action, such as the following:

1. Specific performance of contract with or without damages [*see §§ 528.130 -528.132*].

2. Specific performance of contract and injunction [*see § 528.133*].

3. Injunction of breach of contract [*see § 528.133*].

4. Damages for breach of contract [*see* Ch. 140, *Contracts*].

5. Reformation of contract and specific performance, or damages for breach of contract as reformed [*see* Ch. 488, *Reformation of Instruments*].

6. Restitution based on rescission of contract [*see* Ch. 490, *Rescission and Restitution*].

7. Cancellation of contract [*see* Ch. 107, *Cancellation of Instruments*].

8. Declaration of rights of parties under the contract or of the validity of the contract [*see* Ch. 182, *Declaratory Relief*].

9. Action for damages for fraud [*see* Ch. 269, *Fraud and Deceit*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawConsiderationGeneral OverviewContracts LawDefensesGeneral OverviewContracts LawRemediesGeneral OverviewContracts LawRemediesEquitable ReliefInjunctive ReliefContracts LawRemediesSpecific PerformanceContracts LawStatutes of FraudsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewReal Property LawPurchase & SaleRemediesSpecific Performance

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PART IV. PROCEDURAL CHECKLIST

46-528 California Forms of Pleading and Practice--Annotated § 528.111

§ 528.111 Defendant's Checklist of Defenses

NOTE:
The following list sets forth some defenses that counsel for defendant may want to consider.

Affirmative defenses can be raised by answer or by demurrer when they appear on the face of the complaint or from matters of which the court must or may take judicial notice.

Possible affirmative defenses to an action for specific performance include the following:

1. Assent obtained by misrepresentation, concealment, circumvention, or unfair practices.

Specific performance cannot be enforced against a party to a contract if the party's assent was obtained by the misrepresentation, concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled [*Civ. Code § 3391(3)*].

For discussion of this statutory provision, see *§ 528.19*.

2. Assent given under mistake, misapprehension, or surprise.

Specific performance cannot be enforced against a party to a contract if the party's assent was given under the influence of mistake, misapprehension, or surprise, except that when the contract provides for compensation in case of mistake, a mistake within the scope of that provision may be compensated for, and the contract specifically enforced in other respects, if such enforcement is proper [*Civ. Code § 3391(4)*].

For discussion and forms for use when assent was given by mistake, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

3. Contract for personal services.

Neither an obligation to render personal service [*Civ. Code § 3390(1)*] nor an obligation to employ another in personal service [*Civ. Code § 3390(2)*] can be specifically enforced.

For further discussion, see *§ 528.136*.

For a discussion of when an injunction can be obtained for the breach of a contract for personal services that meets certain requirements, see *§ 528.92[6]*.

4. Contract for unlawful act.

An agreement to perform an act which the party does not have the power lawfully to perform when required to do so cannot be specifically enforced [*Civ. Code § 3390(3)*].

For a form of defense based on illegality, see Ch. 140, *Contracts* .

5. Impossibility.

Impossibility is a ground for denying specific performance [*Anderson v. Neal Institutes Co. (1918) 37 Cal. App 174, 176, 173 P. 779]* . If there are no means available for the accomplishment of the objects of the contract, the agreement cannot be specifically enforced [*Dulin v. Pacific Wood & Coal Co. (1894) 103 Cal. 357, 364, 37 P. 207]* .

For a form of defense based on impossibility, see Ch. 140, *Contracts* .

6. Contract to procure act of third person.

An agreement to procure the act or consent of the wife of the contracting party, or of any third person, cannot be enforced [*Civ. Code § 3390(4)*].

For a form of defense based on procuring the act of a third person, see *§ 528.134*.

7. Seller's title in doubt.

An agreement for the sale of property cannot be specifically enforced in favor of a seller who cannot give the buyer a title free from reasonable doubt [*Civ. Code § 3394*]. This defense is generally used in situations involving the sale of real property. For discussion of contracts for the purchase and sale of real property, see Ch. 569, *Vendor and Purchaser* . For a form of defense based on doubtful title, see *§ 528.137*.

8. Contract requires series of acts.

A contract that requires a succession of continuous acts necessitating protracted supervision and direction by the court with the exercise of special knowledge, skill, and judgment by the parties performing the acts will not be specifically enforced [*Ellison v. Ventura Port Dist. (1978) 80 Cal. App. 3d 574, 580, 145 Cal. Rptr. 665]* .

For further discussion, see *§ 528.44*. For a form based on this defense, see *§ 528.135*.

9. Statute of limitations.

The period of limitations for an action for specific performance is four years for a written contract [*Code Civ. Proc. § 337(1)*] and two years for an oral contract [*Code Civ. Proc. § 339(1)*]. Counsel should ascertain when the contract was executed to determine whether or not the period of limitations had run prior to the time the complaint was filed. If it has run, counsel should raise the defense by demurrer if the defect appears on the face of the complaint [*Code Civ. Proc. § 430.10(e)*]. If the defect does not appear on the face of the complaint, counsel may raise the defense by a motion for summary judgment [*Code Civ. Proc. § 437c*] or by answer [*Code Civ. Proc. § 430.30(b)*].

For further discussion of the period of limitations in the context of specific performance, see *§ 528.72*. For further discussion of the limitation of actions in general and a form of defense based on the statute of limitations, see Ch. 345, *Limitation of Actions* .

10. Laches.

The defense of laches may be raised when the plaintiff has delayed prosecuting the action, although the statute of limitations has not yet run. However, the defendant or some other person must be prejudiced by the delay, or the lapse of time must be such that prejudice may reasonably be supposed to have occurred if the defense is to be allowed [*McGibbon v. Schmidt (1916) 172 Cal. 70, 74, 155 P. 460* ; *Marsh v. Lott (1909) 156 Cal. 643, 647, 105 P. 968* ; *see Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 120, 81 Cal. Rptr. 592, 460 P.2d 464]* .

For discussion and a demurrer based on laches, see Ch. 345, *Limitation of Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesGeneral OverviewContracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawDefensesStatutes of LimitationsContracts LawPerformanceImpossibility of PerformanceGeneral OverviewContracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleRemediesSpecific Performance

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PART V. FORMS

46-528 California Forms of Pleading and Practice--Annotated § 528.130

§ 528.130 Complaint for Specific Performance of Contract [Civ. Code § 3384]--General Form

[1] FORM Complaint for Specific Performance of Contract [Civ. Code § 3384]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR
vs.	)	SPECIFIC
_____ [*name*],	)	PERFORMANCE
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. _____ [Defendant _____ (*name*) is, and at all times herein mentioned was, a resident of _____ County, California *or allege other basis of venue as appropriate*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

[*EITHER*]

3. _____ [On or about _____ (*date*), at _____ (*city*), _____ County, California, plaintiff and defendant entered into a written agreement, a copy of which is attached as Exhibit A and incorporated by reference *or plead contract according to its legal effect or set forth written contract in its exact words*].

[*OR*]

3. On or about _____ [*date*], at _____ [*city*], _____County, California, plaintiff and defendant entered into an oral agreement whereby plaintiff agreed to _____ [*specify*] and defendant agreed to _____ [*specify*].

[*EITHER*]

4. The consideration set forth in the agreement was the fair and reasonable value of the _____ [*specify, e.g.,* painting] at the time the agreement was entered into and the contract is, as to defendant, just and reasonable.

[*OR*]

4. At the time the agreement was entered into, the property referred to therein was reasonably worth $_____ so that the agreement was fair, just, and reasonable as to the defendant and the consideration accruing to defendant is adequate.

[*EITHER*]

5. Plaintiff has performed all conditions, covenants, and promises required by him/her on his/her part to be performed in accordance with the terms and conditions of the contract.

[*OR*]

5. Plaintiff has performed all conditions, covenants, and promises required by him/her on his/her part to be performed in accordance with the terms and conditions of the contract, except _____ [*specify condition(s) not performed*] because _____ [*specify facts showing excuse for nonperformance*]. Plaintiff is now ready, willing, and able to perform _____ [this *or* these] condition(s) required by him/her on his/her part to be performed in accordance with the terms and conditions of the contract and has offered, and continues to offer, to perform them.

[*OR*]

5. Plaintiff has offered, and continues to offer, to _____ [*specify conditions of agreement that plaintiff has offered to perform*] [and has tendered to defendant the sum of $_____ as provided for in the agreement]. Plaintiff was at all times, and still is, ready, willing, and able to perform all conditions required by him/her on his/her part to be performed in accordance with the terms and conditions of the contract.

[6. *If a condition precedent imposed by the contract is an event which must happen before defendant's duty of performance accrues, allege that such event has occurred, e.g.,* On or about _____ (*date*), plaintiff removed the items from storage and took them to his/her house as required by the contract so that the items would be readily available for defendant to pick them up.]

7. Defendant has failed and refused, and continues to fail and refuse, to perform the conditions of the contract on his/her part in that he/she _____[*state facts showing defendant's breach of contract, e.g.,* refuses to execute a conveyance of the property as provided in the agreement].

[8. *If complaint is to enforce contract other than one involving real property, add:* For the reasons heretofore stated, plaintiff has no adequate legal remedy in that _____ (*specify facts showing that legal remedy is inadequate, e.g.,* damages, if awarded, cannot be properly ascertained since there is no fixed market value and damages will be inadequate to compensate plaintiff for the detriment suffered by him/her).]

[9. *If contract was oral and within statute of frauds, allege:* Defendant is estopped from relying on the statute of frauds because _____(*specify facts which avoid the statute of frauds*).]

[*If action is to enforce terms of agreement executed after January 1, 1986, for change of ownership of real property or mobilehome subject to local property taxation, add EITHER*]

10. The agreement on which this action is based was recorded in the office of the County Recorder of _____ County on _____ [*date*].

[*OR*]

10. The change-in-ownership statement required by *Revenue and Taxation Code Section 480* for this transaction was filed with the County _____ [Recorder *or* Assessor] of _____ County on _____[*date*].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. That defendant be ordered to _____ [*specify, e.g.,* execute and deliver to plaintiff a sufficient conveyance of the property described herein];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged

on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This complaint for specific performance is for use in an action in which plaintiff seeks to compel the defendant to perform a contract executed by both parties.

[3] Essential Allegations

The complaint alleges:

- The making of a written or oral contract that is sufficiently definite and certain in its terms to be enforced (Paragraph 3) [*see Code Civ. Proc. § 430.10(g)* (defendant as permitted to object by demurrer or answer on ground that one cannot ascertain from pleading whether contract is written or oral)].

- That the consideration was adequate and the contract just and reasonable as to defendant (Paragraph 4).

- That plaintiff has performed his or her side of the agreement (Paragraph 5).

- That any event that must happen before defendant's duty of performance accrues has occurred (Paragraph 6).

- That defendant has failed to perform his or her part of the contract (Paragraph 7).

- That plaintiff has no adequate remedy at law (Paragraph 8).

- That the defendant is estopped from relying on the statute of frauds if the contract was oral (Paragraph 9) [for discussion and allegations showing avoidance of the statute of frauds, *see* Ch. 530, *Statute of Frauds*].

These pleading requirements are discussed further in the remainder of this comment.

Since it is presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation [*Civ. Code § 3387*], Paragraph 8 is not necessary when this complaint is used to compel the specific performance of a contract to convey real property.

[4] Pleading Certainty of Contract

A contract cannot be specifically enforced if its terms are not certain [*see Hennefer v. Butcher (1986) 182 Cal. App. 3d 492, 500-502, 227 Cal. Rptr. 318* ; *Hastings v. Matlock (1985) 171 Cal. App. 3d 826, 838, 217 Cal. Rptr. 856]* . Thus, the party pleading an ambiguous contract must set forth the meaning of the writing and the meaning attributed to the agreement must be one to which it is reasonably susceptible. When a pleaded agreement, because of the uncertainty of the language in which it is expressed, is susceptible to more than one construction as to its nature or as to the purpose

intended by the parties to be attained by it, the construction of the party pleading it should be accepted, if the construction is reasonable when the pleading is attacked by a general demurrer [*Connell v. Zaid (1969) 268 Cal. App. 2d 788, 794-795, 74 Cal. Rptr. 371* ; *see Durkee v. Cota (1887) 74 Cal. 313, 315, 16 P. 5]* .

[5] Pleading Just and Reasonable Contract and Adequacy of Consideration

A complaint does not state a cause of action for specific performance if it does not allege that the defendant has received adequate consideration and that the contract was just and reasonable as to the defendant [*Young v. Matthew Turner Co. (1914) 168 Cal. 671, 675, 143 P. 1029* ; *Rose v. Lawton (1963) 215 Cal. App. 2d 18, 19, 29 Cal. Rptr. 844* (plaintiffs as not entitled to judgment for specific performance even though taken by default when complaint did not allege adequate consideration and that contract was just and reasonable as to defendant)].

To allege merely that the contract was just and reasonable and that the consideration was fair and adequate is not sufficient; the complaint should also allege facts supporting the conclusion that the contract is fair and the consideration adequate [*Lifton v. Harshman (1947) 80 Cal. App. 2d 422, 434-435, 182 P.2d 222 , disapproved on other grounds, Pao Ch'en Lee v. Gregoriou (1958) 50 Cal. 2d 502, 326 P.2d 135* ; *W.G. Reese Co. v. House (1912) 162 Cal. 740, 745, 124 P. 442* (allegation that $2,400, mentioned in option, is, and at all times since agreement's execution was, fair and reasonable value of property as sufficient allegation of consideration's adequacy); *Conway v. Moore (1945) 70 Cal. App. 2d 166, 173, 160 P.2d 865* (allegation that agreement between tenant and plaintiff buyers of property was that tenant was to occupy house for 19 months rent-free in consideration of $190 payment by her and attachment to complaint of contract between plaintiffs and property owners showing purchase price of $510 as sufficient to show that contracts were fair and reasonable and that consideration was adequate even though property was assessed at $1,500 and appraised at $2,500)]. An allegation of the ultimate fact that the consideration named in the contract was the fair and reasonable value of the property at the time of the agreement is a sufficient allegation of the adequacy of the consideration and of the fairness and reasonableness of the contract [*Beverage v. Canton Placer Mining Co. (1955) 43 Cal. 2d 769, 778, 278 P.2d 694* ; *Friedrich v. Roland (1950) 95 Cal. App. 2d 543, 547-548, 213 P.2d 423* (allegation of making of contract, setting it forth in haec verba, and allegation that consideration named in contract was, at time of agreement's making, fair and reasonable value of property as sufficient allegation that contract was just and reasonable and consideration was adequate)].

[6] Exceptions to Pleading Requirement

Fairness and adequacy of consideration do not need to be alleged when an agreed consideration has been accepted, since the acceptance itself constitutes a waiver of any claim of inadequacy [*Beab, Inc. v. First W. Bank & Trust Co. (1962) 204 Cal. App. 2d 680, 685, 22 Cal. Rptr. 583* ; *Conway v. Moore (1945) 70 Cal. App. 2d 166, 174, 160 P.2d 865]* .

When the facts are sufficiently pleaded, there is no necessity of expressly alleging that the contract was supported by adequate consideration and is, as to the defendant, fair and just [*Johnson v. Servaes (1962) 210 Cal. App. 2d 392, 399, 26 Cal. Rptr. 733* ; *Conway v. Moore (1945) 70 Cal. App. 2d 166, 173, 160 P.2d 865]* .

[7] Pleading Plaintiff's Performance

In order to state a cause of action for specific performance, plaintiff must allege his or her performance, offer of performance, or sufficient excuse for nonperformance of the contract terms and conditions to be performed on his or her part [*Cockrill v. Boas (1931) 213 Cal. 490, 492, 2 P.2d 774* ; *Reyburn v. Young (1936) 11 Cal. App. 2d 478, 479, 54 P.2d 86]* . A general allegation that plaintiff has duly performed all conditions on his or her part is usually sufficient [*Code Civ. Proc. § 457*; *Lynn v. Knob Hill Improvement Co. (1917) 177 Cal. 56, 60, 169 P. 1009* ; *Gilfallan v. Gilfallan (1914) 168 Cal. 23, 32, 141 P. 623]* . However, a general allegation of performance is insufficient to allege the performance of an expressed condition necessary to the enforcement of an option [*Estes v. Hardesty (1944) 66 Cal. App. 2d 747, 749, 152 P.2d 772]* . Moreover, when time is made of the essence of an agreement to pay money, an

allegation that the promisor was at all times ready, willing, and able to make the payment is not the equivalent of an allegation of payment and thus is insufficient to allege performance of conditions precedent [*Pitt v. Mallalieu (1948) 85 Cal. App. 2d 77, 84, 192 P.2d 24]* .

[8] Excuse For Nonperformance

Although performance may be alleged generally, excuse for nonperformance must be pleaded specifically [*Nelson v. Specialty Records, Inc. (1970) 11 Cal. App. 3d 126, 141, 89 Cal. Rptr. 540* (plaintiff intending to raise estoppel against defendant must plead facts on which estoppel was predicated); *see Hobbs v. Davis (1914) 168 Cal. 556, 561, 143 P. 733* (complaint did not state cause of action when facts alleged as excuse for nonperformance are intended to show that defendants prevented plaintiff from performing but fail to show that plaintiff was unable to pay small amount of money due or that defendants prevented plaintiff from paying)]. Moreover, although an unqualified repudiation by the promisor may excuse tender or performance of conditions precedent before suit, a party is not excused, when seeking specific performance, from pleading and proving at trial that he or she is ready, able, and willing to perform the contractual conditions [*Dotson v. International Alliance etc. Employes (1949) 34 Cal. 2d 362, 372, 210 P.2d 5* ; *Buckmaster v. Bertram (1921) 186 Cal. 673, 678, 200 P. 610* (positive repudiation of sales contract by vendor excuses vendee from formal tender of price as condition precedent to specific performance action but does not obviate necessity of stating in complaint that he is ready, able, and willing to pay amount due); *Ray Thomas, Inc., v. Cowan (1929) 99 Cal. App. 140, 146, 277 P. 1086* (when vendor has repudiated agreement to sell, vendee's allegation that vendee is ready, willing, and able to perform vendee's part of contract is sufficient pleading of performance)].

If a condition precedent imposed by the contract is an event which must happen before the defendant's duty of performance accrues, a specific allegation of the happening of the condition must be pleaded. For example, when the defendant's obligation or promise to pay money is conditional on his or her ability to pay or on the existence of a fund from which payment is to be made, the plaintiff must allege that the condition has been satisfied [*Byrne v. Harvey (1962) 211 Cal. App. 2d 92, 112-113, 27 Cal. Rptr. 110* (quoting Witkin, California Procedure, vol. 2, *Pleading*, § 261 (2d ed. 1970))]. Similarly, when it is essential to the cause of action that the plaintiff should have actually requested that the defendant perform the contract, that request must be stated in the complaint [*California Canneries Co. v. Great W. Lbr. Co. (1919) 44 Cal. App. 69, 71, 185 P. 1008* ; *see Colm v. Francis (1916) 30 Cal. App. 742, 748-749, 159 P. 237* (complaint not subject to demurrer on ground that condition precedent to defendant's performance was not alleged since no condition precedent to that performance existed)].

[9] Pleading Inadequate Remedy at Law

A plaintiff seeking specific performance of a contract must allege facts showing the inadequacy of the legal remedy of damages. An allegation merely that the legal remedy is inadequate or that the breach cannot be adequately compensated by damages is insufficient because it is a conclusion of law; the plaintiff must also allege facts showing the inadequacy of the remedy at law [*Wait v. Kern River Mining Etc. Co. (1909) 157 Cal. 16, 24, 106 P. 98* ; *Korabek v. Weaver Aircraft Corp. (1944) 65 Cal. App. 2d 32, 40, 149 P.2d 876* ; *see Gilfallan v. Gilfallan (1914) 168 Cal. 23, 25, 141 P. 623]* .

Since it is presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation, an allegation of the inadequacy of the legal remedy is not required in an action for specific performance of a contract to transfer real property [*Civ. Code § 3387*].

[10] Avoiding Statute of Frauds

When the contract is oral and within the statute of frauds, the complaint also must allege that the defendant is estopped from relying on the statute of frauds [*Porporato v. Devincenzi (1968) 261 Cal. App. 2d 670, 675, 68 Cal. Rptr. 210]* . For discussion of and forms for use in avoiding the statute of frauds, see Ch. 530, *Statute of Frauds* .

[11] Action to Enforce Installment Agreements for Sale of Real Property

Code Civ. Proc. § 1062.10 provides that no person or legal entity may maintain an action in any court in California to enforce the terms of a real property agreement as defined in *Civ. Code § 2985(a)* or a conditional sales contract on a mobilehome subject to local property taxation and subject to *Health & Safety Code § 18000 et seq.* providing for a change in ownership of the real property or mobilehome subject to local property taxation until the agreement is duly recorded by the county recorder or the change in ownership statement required by *Rev. & Tax. Code § 480* has been filed. This requirement is only applicable when the agreement that allegedly transferred ownership was entered into after January 1, 1986 (alternative Paragraphs 10) [*Code Civ. Proc. § 1062.10*; *see Gov. Code § 27288* (contract must be acknowledged before recording)].

[12] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[13] Jurisdiction

The superior court has jurisdiction of an action for specific performance [*see Cal. Const. art. VI, § 10*].

The governing statutes do not expressly specify whether or not an action for specific performance can be a limited civil case [*see Code Civ. Proc. §§ 85, 86, 88*]. Specific performance is an equitable remedy [*see § 528.11[1]*], and since is not included in the list of cases in equity that are limited civil cases [*see Code Civ. Proc. § 86(b)*], an action for specific performance will be an unlimited civil case unless it comes within one of the categories of cases in equity that are specifically designated as limited civil cases. These categories are the following [*Code Civ. Proc. § 86(b)*]:

- Cases to try title to personal property when the amount involved is not more than $25,000.
- Cases when equity is pleaded as a defensive matter in any case that is otherwise a limited civil case.
- Cases to vacate a judgment or order of the court obtained in a limited civil case through extrinsic fraud, mistake, inadvertence, or excusable neglect.

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[14] Decisions

[a] Adequate Remedy at Law

Specific performance was proper remedy in action to enforce contract to include plaintiff in screen credits of film when legal remedies available for damages from future exhibitions of film were too difficult to assess and overly speculative, and when exhibitions would constitute continuing breach of contract creating danger of numerous lawsuits. *Tamarind Lithography Workshop, Inc. v. Sanders (1983) 143 Cal. App. 3d 571, 575, 193 Cal. Rptr. 409*

[b] Principles Governing Relief

Availability of remedy of specific performance is premised on showing by plaintiff of inadequacy of legal remedy, underlying contract that is reasonable and supported by adequate consideration, existence of mutuality of remedies, sufficiently definite contractual terms, and substantial similarity of requested performance to that promised in contract. *Tamarind Lithography Workshop, Inc. v. Sanders (1983) 143 Cal. App. 3d 571, 575, 193 Cal. Rptr. 409*

[c] Relief Granted by Court

[i] In General

In action by former shareholder for specific performance of buy-sell agreement by which corporation conveyed shareholder all its rights to engage in stainless steel flatware import and sale business, plaintiff was entitled to accounting of profits made by defendant on business ordered conveyed to plaintiff, plus interest on those profits, during period injunction was stayed pending appeal. *Palmco Corp. v. Superior Court (1993) 16 Cal. App. 4th 221, 224-226, 19 Cal. Rptr. 2d 682* ; *see Code Civ. Proc. § 916* (stay during pendency of appeal)

Specific performance of plaintiff's right under investment agreement to participate in future ventures held proper when agreement was clear that defendant handled day-to-day management and plaintiff's participation was only financial. *Okun v. Morton (1988) 203 Cal. App. 3d 805, 820-821, 250 Cal. Rptr. 220*

Appellate court may correct judgment containing obvious clerical error by modifying judgment; in specific performance action, when findings of fact set forth in statement of decision clearly show amount of purchase price payable and amount of and reasons for several offsets, mathematical error in judgment is clerical error. *Hennefer v. Butcher (1986) 182 Cal. App. 3d 492, 506-508, 227 Cal. Rptr. 318*

[ii] Attorney's Fees

Attorney's fees properly awarded to party granted specific performance of oral settlement agreement rescinding contract which included attorney's fee provision that did not limit attorney's fees to particular forms of action involving contract. *Hastings v. Matlock (1985) 171 Cal. App. 3d 826, 840-842, 217 Cal. Rptr. 856*

Award of attorney's fees reversed when person against whom specific performance decreed not party to any contract providing for attorney's fees. *Glynn v. Marquette (1984) 152 Cal. App. 3d 277, 280-282, 199 Cal. Rptr. 306*

[iii] Compensation for Delay

Purchaser entitled to compensation for carrying costs during period of delay and for costs of having to reobtain governmental approvals which expired during delay wrongfully caused by vendor; vendor who does not raise issue in trial court not entitled to offset for lost interest on purchase price; question of entitlement to offset is not pure question of law but as requiring equitable accounting that involves factual and legal issues. *Hennefer v. Butcher (1986) 182 Cal. App. 3d 492, 499, 505-506, 227 Cal. Rptr. 318*

Party awarded specific performance is also entitled to compensation for increased costs resulting from breaching party's delay; such compensation not limited by foreseeability but required to be reasonable and based on equitable principles. *Bravo v. Buelow (1985) 168 Cal. App. 3d 208, 213-215, 214 Cal. Rptr. 65*

[iv] When Specific Performance Is Denied

Defaulting purchaser who was denied specific performance of contract for sale of real property held entitled to restitution of reasonable value of services rendered by it which benefitted land owner, but not to enhanced value of property attributable to those services because that would amount to windfall. *Lesny Development Co. v. Kendall (1985) 164 Cal. App. 3d 1010, 1022-1025, 210 Cal. Rptr. 890*

[d] Right to Jury Trial

No right to jury trial in action for specific performance of oral settlement agreement rescinding contract. *Hastings v. Matlock (1985) 171 Cal. App. 3d 826, 835-836, 217 Cal. Rptr. 856*

[e] Uncertain Contract

Law favors carrying out parties' intentions through enforcement of contracts and disfavors holding them unenforceable for uncertainty; parole evidence is admissible to resolve ambiguity; required terms in contract of sale of real property are parties, price, terms of sale, and identity of property. *Hennefer v. Butcher (1986) 182 Cal. App. 3d 492, 500-502, 227 Cal. Rptr. 318*

Agreement certain enough to be specifically enforced when reasonable time to pay is implied by law; hardship to seller not established just because value of house had risen at time of specific performance decree against seller. *Hastings v. Matlock (1985) 171 Cal. App. 3d 826, 838-840, 217 Cal. Rptr. 856*

[15] Text References

Witkin, California Procedure, vol. 5, *Pleading*, §§ 740-761 (4th ed. 1997)

[16] Cross References

For alternative fictitious name allegations and allegations of capacity and residence, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms for prayers and verifications, see Ch. 420, *Prayers* and Ch. 572, *Verification* , respectively

For alternative allegations of venue, see Ch. 571, *Venue*

For specific forms for use in compelling the specific performance of contracts involving real property, see Ch. 569, *Vendor and Purchaser*

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Volume 46: Settlement and Release thru Subpoena Chs. 520-535
Chapter 528 SPECIFIC PERFORMANCE
PART V. FORMS

46-528 California Forms of Pleading and Practice--Annotated § 528.131

§ 528.131 Complaint for Quasi-Specific Performance of Contract to Make Will--Agreement to Devise Property

[1] FORM Complaint for Quasi-Specific Performance of Contract to Make Will--Agreement to Devise Property

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR QUASI-SPECIFIC PERFORM-
_____ [*name(s)*],	)	ANCE OF CONTRACT TO MAKE WILL
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. _____ [Defendant _____ (*name*) is, and at all times herein mentioned was, a resident of _____ County, California *or allege other basis of venue as appropriate*]. He/She is _____ [an heir *or* a devisee and legatee under the will] of _____ [*name*], hereinafter referred to as the decedent. _____ [*Repeat allegation of residence of each defendant who is a beneficiary under the will or an heir of the decedent*].

[2. Defendant _____ (*name*) is the duly appointed, qualified, and acting _____ (administrator of the estate (with will annexed) *or* executor of the will) of the decedent.]

3. On or about _____ [*date*], plaintiff and decedent entered into _____ [a written

or, if action is based on an enforceable oral agreement (see § 528.131[8]): an oral] contract by the terms of which plaintiff promised to _____ [*specify services or acts that plaintiff agreed to perform*] and decedent promised to _____ [*specify testamentary provisions decedent agreed to make in favor of plaintiff*].

[*If written contract exists, add:*]

A copy of the agreement, signed by the decedent, is attached as Exhibit A and incorporated by reference.

[*OR, if contract is evidenced by other writing signed by the decedent, add:*]

The contract between plaintiff and decedent was evidenced by a writing signed by the decedent, in the form of _____ [*describe writing, e.g.,* a letter written by decedent], a copy of which is attached as Exhibit A and incorporated by reference.

[*OR, if contract is expressly referred to in decedent's will and there is extrinsic evidence proving the terms of the contract, add:*]

The contract between plaintiff and decedent is expressly referred to in Section _____ of decedent's will, a copy of which is attached as Exhibit A and incorporated by reference.]

[*CONTINUE*]

4. The contract was just and reasonable as to the decedent and the consideration accruing to decedent was adequate in that _____ [*specify facts showing adequacy of consideration*].

5. In reliance on the above-mentioned agreement, plaintiff _____ [*specify acts plaintiff performed or services plaintiff rendered in compliance with agreement*]. Plaintiff has thus performed all conditions, covenants, and promises required to be performed by him/her on his/her part in accordance with the terms and conditions of the contract.

6. On _____ [*date*], decedent died _____ [intestate *or* testate], possessing on that date the following real and personal property: _____ [*specify real and personal property owned by decedent at time of death*].

[*EITHER, if decedent died testate*]

7. By the terms of his/her will, a copy of which is attached as Exhibit B and incorporated by reference, decedent, in violation of his/her agreement with plaintiffs, devised his/her estate in the following manner: _____ [*specify property decedent left and to whom it was left*].

[*OR, if decedent died intestate*]

7. By operation of law, decedent's property _____ [has passed *or* will pass] to _____ [*specify names of decedent's heirs at law*].

[*CONTINUE*]

8. Plaintiff has no adequate remedy at law in that _____ [*specify reasons that legal remedy will not compensate plaintiff*].

[*If plaintiff is seeking equitable enforcement of oral agreement (see § 528.131[8]), add:*]

9. _____ [*For agreements made prior to 2001:* Defendant is estopped from relying on the statute of frauds *or, for agreements made in 2001 or later:* The agreement between plaintiff and the decedent is enforceable in equity] because plaintiff relied, to plaintiff's detriment, on decedent's promise by _____ [*specify reasons, e.g.,* caring for decedent from the date of the agreement between plaintiff and decedent until decedent's death], and plaintiff would suffer an unconscionable injury if the agreement between plaintiff and decedent was not enforced according to its terms.

WHEREFORE, plaintiff prays judgment against defendant [s, and each of them,] as follows:

1. For a declaration and judgment of the court imposing a constructive trust on the following property of the estate of the decedent: _____ [*specify*].

2. For a declaration and judgment of the court that plaintiff is the beneficiary of the constructive trust and that defendant(s) hold(s) the estate as constructive trustee(s) for the use and benefit of plaintiff;

3. For an order that defendant(s), as trustee(s), convey the property to plaintiff within _____ days from the entry of judgment;

[4. That plaintiff have and recover all income from the (real) property from the date of death of the decedent to the date of conveyance to plaintiff;]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 528.130.*]

CAUTION:

If the complaint is based on an alleged oral promise by a decedent to make a will, or not to revoke a will, or to die intestate, the circumstances under which it is enforceable are limited and the governing law may vary depending on the time at which the alleged oral promise was made. For discussion, see *§ 528.131[8]*.

[2] Use of Form

This complaint for quasi-specific performance of a contract to make a will is for use when plaintiff and a decedent entered into a contract by which decedent was to devise property to plaintiff in return for acts or services of the plaintiff. The action should be brought in a court of equity, not in a probate court [*Ludwicki v. Guerin (1961) 57 Cal. 2d 127, 130, 17 Cal. Rptr. 823, 367 P.2d 415* ; *Estate of Mullins (1988) 206 Cal. App. 3d 924, 928-932, 255 Cal. Rptr. 430]* . If the agreement was made in 1985-2000, it will be subject to the statute of frauds requirements imposed by former *Prob. Code § 150(a)*; *see § 528.13[7]*].

[3] Probate Court Jurisdiction

The probate court in which the administration of the estate is pending does not have jurisdiction to grant quasi-specific performance of an oral agreement to make a will, even if phrased as a petition for instructions pursuant to *Prob. Code § 17200*, when some of the property that is the subject of the promise is held by a trust [*Estate of Mullins (1988) 206 Cal. App. 3d 924, 931-932, 255 Cal. Rptr. 430* ; *cf. Stewart v. Towse (1988) 203 Cal. App. 3d 425, 430, 249 Cal. Rptr. 622* (when petitioner was both trustee and beneficiary of trust, all interested parties were before probate court, which had jurisdiction under *Prob. Code §§ 17000, 17001*, and could give instructions amounting to enforcement of oral promise regarding disposition of estate)]. *Prob. Code §§ 82(b)(1)* and *15003(a)* make it clear that the probate court has no equitable jurisdiction under the 1986 enactments to impose constructive trusts. The probate court's jurisdiction under *Prob. Code § 17200* is limited to matters concerning the internal affairs of the trust, while an action to impose a constructive trust to carry out an oral promise does not affect the internal affairs of the trust but is a contractual claim adverse to the beneficiaries of the trust [*Estate of Mullins (1988) 206 Cal. App. 3d 924, 931, 255 Cal. Rptr. 430]* . The action to impose the constructive trust must be brought as a civil action, separate from probate proceedings, in superior court [*Estate of Mullins (1988) 206 Cal. App. 3d 924, 928, 931, 255 Cal. Rptr. 430]* .

The superior court has jurisdiction of an action for specific performance [*see Cal. Const. art. VI, § 10*].

The governing statutes do not expressly specify whether or not an action for specific performance can be a limited civil case [*see Code Civ. Proc. §§ 85, 86, 88*]. Specific performance is an equitable remedy [*see § 528.11[1]*], and since is not included in the list of cases in equity that are limited civil cases [*see Code Civ. Proc. § 86(b)*], an action for specific performance will be an unlimited civil case unless it comes within one of the categories of cases in equity that are specifically designated as limited civil cases. These categories are the following [*Code Civ. Proc. § 86(b)*]:

- Cases to try title to personal property when the amount involved is not more than $25,000.
- Cases when equity is pleaded as a defensive matter in any case that is otherwise a limited civil case.
- Cases to vacate a judgment or order of the court obtained in a limited civil case through extrinsic fraud, mistake, inadvertence, or excusable neglect.

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[4] Essential Allegations

The elements that must be pleaded in an action for quasi-specific performance of an agreement to make a will are the same as those necessary for specific performance of any contract [*see Porporato v. Devincenzi(1968) 261 Cal. App. 2d 670, 675, 68 Cal. Rptr. 210]* . Thus, the plaintiff must allege the following:

- A contract sufficiently definite and certain in its terms to be enforced (Paragraph 3).

- That the contract was just and reasonable and was supported by adequate consideration (Paragraph 4).

- That the plaintiff has performed his or her side of the bargain (Paragraph 5).

- That the decedent promisor failed to perform his or her part (Paragraphs 6 and 7).

The plaintiff must also allege that his or her remedy at law is inadequate (Paragraph 8) and, if the contract was oral and would otherwise be banned by the statute of frauds, that the defendant is estopped from reliance on the statute of frauds because failure to enforce the agreement would result in either unconscionable injury to the plaintiff or unjust enrichment of the defendant (Paragraph 9).

Since the relief given is in the form of imposing a constructive trust on the property in the hands of the defendants, the plaintiff also must meet the requirements of alleging a constructive trust [*see Ludwicki v. Guerin (1961) 57 Cal. 2d 127, 130, 17 Cal. Rptr. 823, 367 P.2d 415]* . Consequently, the plaintiff must plead facts constituting the cause of action, such as breach of the promise to devise property (Paragraph 7) and specifically identifiable property (Paragraphs 3 and 6) [*see Ehret v. Ichioka (1967) 247 Cal. App. 2d 637, 642, 55 Cal. Rptr. 869]* .

[5] Parties

In an action for quasi-specific performance, since the action is against the distributee personally and not against the estate, the heirs, devisees, and legatees, neither the executor nor the administrator are necessary parties to the action [*Estate of Hoffman (1968) 265 Cal. App. 2d 135, 142, 71 Cal. Rptr. 230* ; *see Ludwicki v. Guerin (1961) 57 Cal. 2d 127, 130, 17 Cal. Rptr. 823, 367 P.2d 415]* . All beneficiaries under a will are interested in the issues and subject of the action and can properly be joined, but they are not indispensable parties. A plaintiff may litigate his or her claim against the appearing beneficiaries alone and obtain a decree which binds them alone. Any absent beneficiaries, not being before the court, will not be bound by the judgment, whether favorable or unfavorable, and their property interests will not be affected [*Bank of California v. Superior Court (1940) 16 Cal. 2d 516, 519, 524-525, 106 P.2d 879* (trial as proper even though summons served only on executor and residuary legatee)].

The executor may properly be made a party defendant for the purpose of restraining him or her from distributing the property without regard for plaintiff's interests [*Ludwicki v. Guerin (1961) 57 Cal. 2d 127, 132, 17 Cal. Rptr. 823, 367 P.2d 415]* .

[6] Claim Against Estate

The complaint for quasi-specific performance of an agreement to make a will does not need to show that, before its filing, the plaintiff presented a demand or claim for the property to the executor. Since the relief sought is equitable and plaintiff is not asserting a claim against the estate, the presentation of a claim is not a condition precedent to the maintenance of the action [*Walker v. Calloway (1950) 99 Cal. App. 2d 675, 683, 222 P.2d 455]* .

[7] Agreements Made In 1985-2000

Agreements to make a will or devise, or not to revoke a will or devise, or to die intestate, if made in the years 1985-2000, are governed by former *Prob. Code § 150* (repealed Jan. 1, 2001) [*Prob. Code § 21700(c)* (validity of pre-2001 agreements determined under law in effect at time agreement was made)]. Under former *Prob. Code § 150*, a contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if made after December 31, 1984,

can be established only by one of the following:

- Provisions of a will stating material provisions of the contract;

- An express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or

- A writing signed by the decedent evidencing the contract.

The language of former *Prob. Code § 150*, standing alone, would appear to preclude any enforcement of oral agreements not referred to in a will or in a writing. The courts, however, have held that while former *Prob. Code § 150* generally provides the sole means under which a party can establish an agreement not to revoke a will, the Legislature, by enacting that section, did not express an intent to abolish the use of the equitable estoppel doctrine in appropriate circumstances [*Juran v. Epstein (1994) 23 Cal. App. 4th 882, 897, 28 Cal. Rptr. 2d 588]* . Thus, equitable estoppel principles were available under former *Prob. Code § 150* (or its predecessor, former *Civ. Code § 1624(6)*) to enforce a testator's alleged oral agreement to leave all of his property to his son if the son cared for him during the testator's lifetime [*Estate of Housley v. Haywood (1997) 56 Cal. App. 4th 342, 358, 65 Cal. Rptr. 2d 628* (whether agreement was before or after Dec. 31, 1984, was not ascertainable)]. Equitable estoppel generally may apply to avoid the statutes of fraud and to make an oral agreement enforceable if (1) the promisee detrimentally relied on the agreement and would suffer an unconscionable injury if the oral agreement were not enforced, or (2) the promisor would receive unjust enrichment if allowed to retain the benefit of the promisee's performance without abiding by the promisor's obligations under the oral agreement [*Estate of Housley v. Haywood (1997) 56 Cal. App. 4th 342, 359, 65 Cal. Rptr. 2d 628]* . The language of optional Paragraph 9 of this form alleges detrimental reliance. It may be expected, however, that the availability of equitable estoppel will depend on the facts of each case.

A party also may be estopped from asserting the statute of limitations as a defense to an untimely action to enforce an oral promise to make awill. In a case in which the one-year statute of limitations set forth in *Code Civ. Proc. § 366.2* applied because the promisor had made an inter vivos transfer of property covered by the contract, the court followed the reasoning discussed above [*Battuello v. Battuello (1998) 64 Cal. App. 4th 842, 847-848, 75 Cal. Rptr. 2d 548* ; *see Juran v. Epstein (1994) 23 Cal. App. 4th 882, 897, 28 Cal. Rptr. 2d 588]* . It held that while *Code Civ. Proc. § 366.2(b)* (at the time designated as *Code Civ. Proc. § 366.2(a)(2)*), clearly shows that the Legislature intended that the one-year statute of limitations could not be "tolled" or "extended," the statute says nothing about equitable estoppel. The court concluded that in the absence of any such language or legislative history suggesting that was what the Legislature intended, the doctrine of equitable estoppel still applies [*Battuello v. Battuello (1998) 64 Cal. App. 4th 842, 847-848, 75 Cal. Rptr. 2d 548* (appellant alleged sufficient facts to come within doctrine of equitable estoppel to application of statute of limitations)].

[8] Agreements Made After 2000

Former *Prob. Code § 150* was repealed in 2000 and replaced by *Prob. Code § 21700*, effective Jan. 1, 2001. Under *Prob. Code § 21700*, a contract to make a will or devise or other instrument, or not to revoke a will or devise or other instrument, or to die intestate, if made after 2000, can be established only by one of the following [*Prob. Code § 21700(a)*]:

- Provisions of a will or other instrument stating the material provisions of the contract.

- An expressed reference in a will or other instrument to a contract and extrinsic evidence proving the terms of the contract.

- A writing signed by the decedent evidencing the contract.

- Clear and convincing evidence of an agreement between the decedent and the claimant or a promise by the decedent to the claimant that is enforceable in equity.

- Clear and convincing evidence of an agreement between the decedent and another person for the benefit of the claimant or a promise by the decedent to another person for the benefit of the claimant that is enforceable in equity.

The first three methods are carried over from the predecessor section, former *Prob. Code § 150*. The last two methods are new. Legislative analysis indicates that these additions were intended at least in part to codify the equitable basis for establishing such a contract that previously had been recognized by case law [*see* Bill Analysis, Senate Judiciary Committee, AB 1491, 1999-2000 Regulsar Session, pp. 12-13 (March 28, 2000); Bill Analysis, Assembly Committee on Judiciary, AB 1491, 1999-2000 Regulsar Session, p. 4 (Jan. 11, 2000)]. However, evidence of the agreement must be "clear and convincing."

The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills [*Prob. Code § 21700(b)*].

[9] Lis Pendens

If the property sought to be reached is real property, or has been invested in real property, counsel should file a lis pendens to preclude the possibility of a third party purchaser or encumbrancer acquiring an interest from defendant which would be superior to plaintiff's [*see Coppinger v. Superior Court (1982) 134 Cal. App. 3d 883, 891, 185 Cal. Rptr. 24* (action for constructive trust on real property as supporting filing of lis pendens)].

[10] State Statutes

Agreement that by its terms is not to be performed during promisor's lifetime required to be in writing. *Civ. Code § 1624(e)*

Party who gains thing by wrongful act is involuntary trustee of thing gained. *Civ. Code § 2224*

Promise to devise or bequeath property may be required to be in writing. *Prob. Code § 21700(a)*

[11] Decisions

[a] Agreements Made Before 1985

Party estopped from relying on statute of frauds (Code Civ. Proc. § 1624(6); now Code Civ. Proc. § 1624(e)) to invalidate oral agreement to dispose of property by will when unconscionable injury would result from denying enforcement after one party was induced to seriously change position in reliance on contract or when unjust enrichment would result if party receiving benefits of other's performance is allowed to invoke statute. *Redke v. Silvertrust (1971) 6 Cal. 3d 94, 101, 98 Cal. Rptr. 293, 490 P.2d 805*

When daughters sued step mother's estate and beneficiaries of step-mother's estate to impose constructive trust on property stepmother inherited from their father and had promised to leave to them, daughters were not engaged in contest within meaning of no contest clause in their father's will and could not be required to return to his estate distributions therefrom. *Estate of Watson (1986) 177 Cal. App. 3d 569, 574-575, 223 Cal. Rptr. 14*

Although promisee may have constructive trust imposed during promisor's lifetime if specific property is subject of promise to make will and promisor has no right to consume that property for maintenance and support or otherwise dispose of it during his or her lifetime, general promise was operative only was to property owned at date of death. *Westbrook v. Superior Court (1986) 176 Cal. App. 3d 703, 711-715, 222 Cal. Rptr. 317*

Promise was unenforceable when writing expressed only appreciation and intention to devise property to plaintiff, not actual promise to do so, and insufficient facts existed to estop application of statute of frauds; writing relating to claimed life estate created only agency and right to occupy rent-free during lifetime of principal. *Lombardo v. Santa Monica Young Men's Christian Assn. (1985) 169 Cal. App. 3d 529, 537-542, 215 Cal. Rptr. 224*

Even though case law contains two conflicting lines of authority on issue of inadequacy of legal remedy as condition precedent to equitable relief for breach of contract to make will, remedy at law is inadequate when action at law would merely mark time pending development of probate administration. *Thompson v. Beskeen (1963) 223 Cal. App. 2d 292, 296, 35 Cal. Rptr. 676*

[b] Agreements Made in 1985-2000

Doctrine of equitable estoppel precluded application of one-year statute of limitations set forth in *Code Civ. Proc. § 366.2* to untimely action to enforce father's oral promise to make will leaving vineyard to son; while statute could not be "tolled" or "extended," it did not mention equitable estoppel and in absence of statutory language or legislative history to contrary, doctrine of equitable estoppel still applied. *Battuello v. Battuello (1998) 64 Cal. App. 4th 842, 847-848, 75 Cal. Rptr. 2d 548*

Testator's alleged oral agreement to leave all of property to son if son cared for him during testator's lifetime was enforceable under equitable estoppel principles; following holding in *Juran* that use of equitable estoppel doctrine not abolished [*see Juran v. Epstein (1994) 23 Cal. App. 4th 882, 897, 28 Cal. Rptr. 2d 588]* , court found that nothing in former *Prob. Code § 150* distinguished between cases in which promisor was alive and cases in which promisor was dead. *Estate of Housley v. Haywood (1997) 56 Cal. App. 4th 342, 354-355, 65 Cal. Rptr. 2d 628*

Oral agreement between husband and wife not to revoke will was enforceable by stepdaughter under doctrine of equitable estoppel after wife (plaintiff's mother) died and stepfather (defendant) revoked original will; while former *Prob. Code § 150(a)* generally provided sole means under which party could establish agreement not to revoke will, Legislature did not intend to abolish use of equitable estoppel doctrine in appropriate circumstances. *Juran v. Epstein (1994) 23 Cal. App. 4th 882, 897, 28 Cal. Rptr. 2d 588*

Prenuptual agreement to leave life estate in residence was not promise to devise or bequeath property so as to be governed by former *Prob. Code § 150* when spouses contemplated that conveyance of life estate would be accomplished by modifying trust instrument; specific performance proper. *Hall v. Hall (1990) 222 Cal. App. 3d 578, 583, 587-588, 271 Cal. Rptr. 773*

[12] Text References

Witkin, California Procedure, vol. 5, *Pleading*, § 744 (4th ed. 1997)

Witkin, Summary of California Law, vol. 13, *Equity*, §§ 31, 33; vol. 14, *Wills and Probate*, § 109 (10th ed. 2005)

[13] Cross References

For a discussion of and forms for use in actions to impose constructive trusts, see Ch. 561, *Trusts: Constructive Trusts , Explain, Pubkuc, Charitable, and Totten Trusts*.

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Volume 46: Settlement and Release thru Subpoena Chs. 520-535
Chapter 528 SPECIFIC PERFORMANCE
PART V. FORMS

46-528 California Forms of Pleading and Practice--Annotated § 528.132

§ 528.132 Complaint for Quasi-Specific Performance of Contract to Make Will--Agreement to Devise Property--Decedent Revoked Will Made in Compliance With Agreement

[1] FORM Complaint for Quasi-Specific Performance of Contract to Make Will--Agreement to Devise Property--Decedent Revoked Will Made in Compliance With Agreement
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR QUASI-SPECIFIC PERFORM-
_____ [*name(s)*],	)	ANCE OF CONTRACT TO MAKE WILL
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. Plaintiff is named as beneficiary in the will dated _____ [*date*], of _____ [*name of decedent*], hereinafter referred to as the decedent.

2. _____ [Defendant _____ (*name*) is, and at all times herein mentioned was, a resident of _____ (*city*), _____ County, California *or allege other basis of venue as appropriate*]. He/She is _____ [an heir *or* a devisee and legatee under the subsequent purported will dated _____,] of the decedent [*Repeat allegation of residence of each defendant who is a beneficiary under the subsequent, purported will of the decedent*].

[3. Defendant _____ (*name*) is the duly appointed, qualified, and acting _____ (administrator of the estate (with the subsequent purported will annexed) *or* executor of the subsequent purported will) of the decedent in a pending proceeding in the Superior Court for the State of California for the County of _____, entitled _____, No. _____.]

4. On or about _____ [*date*], plaintiff and decedent entered into _____ [a written *or, if action is based on an enforceable oral agreement (see discussions under [3], below; see also § 528.131[7], [8]):* an oral] contract[, signed by decedent, a copy of which is attached as Exhibit A and incorporated by reference], by the terms of which plaintiff promised to _____ [*specify services or acts that plaintiff agreed to perform*] and decedent promised to _____ [*specify testamentary provisions decedent agreed to make in favor of plaintiff; e.g.,* devise decedent's entire estate to plaintiff]. Thereafter decedent did in fact execute such a will, a copy of which is attached as Exhibit Band incorporated by reference, containing provisions made in accordance with decedent's promise to plaintiff as specified in this paragraph.

5. [*Allegation that contract was just, reasonable and supported by adequate consideration. See § 528.131, Paragraph 4.*]

6. [*Allegation that plaintiff has performed his or her obligations under the contract. See § 528.131, Paragraph 5.*]

7. Subsequently, the decedent executed a new will, dated _____ [*date*], purporting to revoke the will executed in accordance with his/her agreement with plaintiff, and purporting to devise and bequeath to defendant _____ [*name*] the property that was promised to plaintiff, in contravention of the provisions of the agreement and the rights of plaintiff. A copy of the subsequent, purported will is attached as Exhibit "C" and incorporated by reference.

8. [*Remedy at law inadequate. See § 528.131, Paragraph 8.*]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For a declaration and judgment of the court imposing a constructive trust on the following property of the estate of the decedent: _____ [*specify*];

2. For a declaration and judgment of the court that plaintiff is the beneficiary of the constructive trust and that defendant(s) hold(s) the estate as constructive trustee(s) for the use and benefit of plaintiff;

3. For an order distributing to plaintiff the estate of the decedent as provided in the _____ [written *or* oral] agreement between plaintiff and the decedent, as hereinabove alleged, and in the will dated _____ [*date*];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 528.130.*]

[2] Use of Form

This complaint is for use by a plaintiff against beneficiaries of a decedent's will executed in violation of an agreement between plaintiff and decedent whereby decedent agreed to devise certain property to plaintiff in return for acts or services of the plaintiff, and decedent executed a will devising the property to plaintiff, but subsequently executed a second will revoking the previous will and devising the property to beneficiaries other than plaintiff. The complaint seeks to impose a constructive trust for plaintiff's benefit on the property [*see Civ. Code § 2224*]. The complaint is adapted from the facts in *Thompson v. Beskeen (1963) 223 Cal. App. 2d 292, 35 Cal. Rptr. 676* .

[3] Essential Allegations

This complaint alleges the following:

- That plaintiff was the beneficiary under the decedent's first will (Paragraph 1).
- That defendant or defendants is or are the beneficiary or beneficiaries under decedent's subsequent will (Paragraph 2).
- That plaintiff and decedent entered into a contract under which decedent would make a will favorable to plaintiff and the contract's relevant terms, and did not in fact make such a will (Paragraph 4).
- That the contract was just, reasonable, and supported by adequate consideration (Paragraph 5).
- That plaintiff performed all of his or her obligations under the contract (Paragraph 6).
- That decedent subsequently executed a second will, revoking the first and devising his or her estate to a beneficiary or beneficiaries other than plaintiff (Paragraph 7).
- That plaintiff has no adequate remedy at law (Paragraph 8).

This complaint assumes that the first will executed by the decedent incorporated provisions contemplated by the agreement between the parties. Even if the agreement is oral, its existence may be established, in accordance with former *Prob. Code § 150* (for agreements made during 1985-2000) or *Prob. Code § 21700* (for agreements executed after 2000), by provisions of a will or other instrument stating the material provisions of the contract [*see* former *Prob. Code § 150*; *Prob. Code § 21700(a)*; *see also Prob. Code § 21700(c)* (applicable law)]. For discussion regarding the general validity and proof of oral agreements to make or revoke a will, or to die intestate, see *§ 528.131[4], [7],* and *[8]*. The *form in § 528.131[1]* also contains provisions that may be used when the existence of the agreement is to be established in some other manner.

[4] Jurisdiction

The superior court has jurisdiction of an action for specific performance [*see Cal. Const. art. VI, § 10*].

The governing statutes do not expressly specify whether or not an action for specific performance can be a limited civil case [*see Code Civ. Proc. §§ 85, 86, 88*]. Specific performance is an equitable remedy [*see § 528.11[1]*], and since is not included in the list of cases in equity that are limited civil cases [*see Code Civ. Proc. § 86(b)*], an action for specific

performance will be an unlimited civil case unless it comes within one of the categories of cases in equity that are specifically designated as limited civil cases. These categories are the following [*Code Civ. Proc. § 86(b)*]:

- Cases to try title to personal property when the amount involved is not more than $25,000.

- Cases when equity is pleaded as a defensive matter in any case that is otherwise a limited civil case.

- Cases to vacate a judgment or order of the court obtained in a limited civil case through extrinsic fraud, mistake, inadvertence, or excusable neglect.

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[5] Cross References

For a related form, *see § 528.131*.

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Volume 46: Settlement and Release thru Subpoena Chs. 520-535
Chapter 528 SPECIFIC PERFORMANCE
PART V. FORMS

46-528 California Forms of Pleading and Practice--Annotated § 528.133

§ 528.133 Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527(a)], and Permanent Injunction [Civ. Code §§ 3422, 3423(e); Code Civ. Proc. § 526(b)(5)]--Enjoining Breach of Personal Services Contract [Civ. Code § 3423(e); Code Civ. Proc. § 526(b)(5)]

[1] FORM Complaint for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. § 527(a)], and Permanent Injunction [Civ. Code §§ 3422, 3423(e); Code Civ. Proc. § 526(b)(5)]--Enjoining Breach of Personal Services Contract [Civ. Code § 3423(e); Code Civ. Proc. § 526(b)(5)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR TEMPORARY RESTRAINING
Defendant.	)	ORDER, PRELIMINARY INJUNCTION, AND
	)	PERMANENT INJUNCTION
	)	

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, _____ [*identify plaintiff and allege capacity in which plaintiff is suing defendants, if that capacity is other than as individual*].

2. _____ [Defendant _____ (*name*) is, and at all times herein mentioned was, a resident of _____ County, California *or allege other basis of venue as appropriate*].

3. _____ [On or about _____ (*date*), plaintiff and defendant entered into a written contract, a copy of which is attached as Exhibit A and made a part hereof *or plead contract according to its legal effect or set it forth in its exact words*]. Under the contract, defendant agreed to render personal services to plaintiff for the period from _____ [*date*] to _____ [*date*]. The promised services are _____ [special *or* unique *or* unusual *or* extraordinary *or* intellectual] in character which gives them peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law.

4. The consideration plaintiff agreed to pay defendant for the personal services defendant agreed to render was $ _____, over the _____-year term of the contract, which exceeds the minimum rate of compensation required by *Code of Civil Procedure Section 526* and *Civil Code Section 3423*. [At the time of the filing of this complaint, payments actually made by plaintiff to defendant during the term of the contract aggregated $ _____, which exceeds the minimum rate of compensation required by *Code of Civil Procedure Section 526* and *Civil Code Section 3423*.]

[5. Defendant began performance of the contract on _____ and performed the requisite services until _____.]

6. Plaintiff has performed all conditions, covenants, and promises required to be performed on his/her part in accordance with the terms and conditions of the contract up to this time and is ready, willing, and able to perform all conditions required to be performed on his/her part in the future.

[*EITHER*]

7. On or about _____ [*date*], defendant entered into a contract with _____ [*name*] to render the following services to _____ [*name of third party*]: _____ [*specify services to be rendered to third party by defendant, which are substantially similar to the ones to be rendered to plaintiff under the contract with plaintiff*]. Defendant will not be able to perform the above-mentioned services for plaintiff if he/she complies with this new contract since _____ [*specify, e.g.,* the services are to be performed at the same time as those under plaintiff's contract and defendant cannot perform both services at one time].

[*OR*]

7. On or about _____ [*date*], defendant notified plaintiff that he/she would not [continue to] perform the personal services for plaintiff as provided in the contract because _____ [*specify reasons*]. [Pursuant to this notification, defendant stopped rendering the services on _____ (*date*).] Plaintiff is informed and believes and thereon alleges that defendant has contracted with a third party to perform services for that party that are substantially similar to the ones defendant contracted to perform for plaintiff.

[*OR*]

7. On or about _____ [*date*], defendant stopped performing the personal services he/she was obligated to render under the contract with plaintiff. Plaintiff has asked defendant to continue performing the services but defendant refused, and continues to refuse, to do so. Plaintiff is informed and believes and thereon alleges that defendant has contracted with a third party to perform services for that party that are substantially similar to the ones defendant contracted to perform for plaintiff.

[*ADD, if contract for producing phonorecord and seven-year period under Lab. Code § 2855 has passed*]

8. Defendant did not give written notice, in accordance with *Section 2855(b) of the Labor Code* and *Section 1020 of the Code of Civil Procedure*, to plaintiff specifying that he/she from and after a future specified date would no longer render service under the contract, which is a contract to render personal service in the production of phonorecords in which sounds are first fixed as defined in *Section 101 of Title 17 of the United States Code*.

9. [Plaintiff has spent considerable time and money in training defendant in that _____ (*specify supporting facts*).] [Plaintiff's financial stability is dependent on defendant's performing his/her services for plaintiff in that _____ (*specify reasons*)]. Plaintiff will suffer great and irreparable injury unless defendant is enjoined and restrained by order of this court from performing his/her services for anyone else in that _____ [*specify supporting facts*].

10. Plaintiff has no adequate remedy at law for the injuries _____ [currently being suffered *or* which are threatened] in that _____ [*specify facts in addition to those previously alleged which tend to show the inadequacy of any legal remedy, especially monetary damages, which plaintiff might pursue, e.g.,* it will be impossible for plaintiff to determine the precise amount of damage which he/she/it will suffer if defendant's conduct is not restrained].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an order requiring defendant to show cause, if any he/she has, why he/she should not be enjoined as hereinafter set forth, during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant from performing the following services for any other person, corporation, or association during the period of the contract with plaintiff: _____ [*specify services defendant is not to perform*].

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification. See § 528.130.*]

CERTIFICATION RE NOTICE

I hereby certify that _____ [*either* on _____ (*date*), I informed defendant of what time and where the foregoing application for a temporary restraining order would be made *or* in good faith I attempted to inform defendant of what time and where the foregoing application for a temporary restraining order would be made, by _____ (*specify efforts*), but I was unable to do so *or* notice to defendant of the foregoing application for a temporary restraining order should not be required for the reason that _____ (*specify*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[Attorney for] Plaintiff

[2] Use of Form

This complaint is for use in obtaining a temporary restraining order, preliminary injunction, and permanent injunction to prevent the breach of a contract for personal services [*Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(b)(5)*; *see* discussion in *§ 528.45[2][c]* and *§ 528.45[3]*].

[3] Essential Allegations

This complaint alleges:

- Plaintiff's capacity (Paragraph 1).
- Defendant's capacity (Paragraph 2).
- A contract between plaintiff and defendant, pursuant to which defendant was to perform special, unique, unusual, extraordinary, or intellectual services for plaintiff (Paragraph 3).
- The compensation plaintiff agreed to pay defendant, and that the compensation, and payments already made, exceeded the minimum prescribed by statute (Paragraph 4) [*see Civ. Code § 3423(e)(2)*; *Code Civ. Proc. § 526(b)(5)(B)* and discussion in [4], *below*].
- If defendant has partially performed, his or her partial performance of the contract (Paragraph 5).
- That plaintiff has performed on his or her part all conditions precedent to the contract and is willing to continue performance of the contract (Paragraph 6).
- That defendant has contracted with a third party to render services substantially similar to those promised to plaintiff or that defendant has refused to perform the requisite services or that defendant has notified plaintiff that he or she will not continue to perform those services for plaintiff (Paragraph 7).
- If the contract is for personal service in the production of phonorecords and the seven-year period under Lab. Code § 2855 has passed, that defendant failed to give written notice as required by *Lab. Code § 2855(b)* and *Code Civ. Proc. § 1020* that he or she would no longer render service after a certain date (Paragraph 8).
- If plaintiff has spent considerable time and money training defendant, that he or she has done so, and that plaintiff's financial stability is dependent on defendant's performance, and that plaintiff will suffer great and irreparable injury if defendant is not enjoined from performing his or her services for another party (Paragraph 9).
- That plaintiff has no adequate remedy at law (Paragraph 10).

[4] Calculating Required Compensation

In addition to the other statutory criteria, injunctive relief for breach of a personal services contract is available only if the minimum compensation requirements specified in *Civ. Code § 3423(e)(2)* and *Code Civ. Proc. § 526(b)(5)(B)* have been met. The statutory minimum compensation requirements (applicable to contracts entered into on or after January 1, 1994) are listed in the following chart:

(1) Year of contract in which injunction is sought	(2) Minimum rate of compensation	(3) Aggregate minimum compensation required to be specified in contract through and including year in which injunction is sought	(4) Additional compensation that must actually be paid through and including contract year during which injunction is sought	(5) Total minimum compensation required for injunctive relief
1st	9,000	$ 9,000	_____	$ 9,000
2nd	12,000	21,000	_____	21,000
3rd	15,000	36,000	_____	36,000
4th	15,000	51,000	15,000	66,000
5th	15,000	66,000	15,000	81,000
6th	15,000	81,000	30,000	111,000
7th	15,000	96,000	30,000	126,000

A personal services contract that does not meet the foregoing criteria still can be specifically enforced if it meets the alternative criteria of *Civ. Code § 3423(e)(2)(B)* and *Code Civ. Proc. § 526(b)(5)(B)(ii)*, which provide that injunctive relief may be granted if the aggregate compensation actually received for the services provided under a contract that does not meet the criteria of *Civ. Code § 3423(e)(2)(A)* and *Code Civ. Proc. § 526(b)(5)(B)(i)*, is at least 10 times the applicable aggregate minimum amount specified in clauses *Civ. Code § 3423(e)(2)(A)(i)* and *(ii)* and *Code Civ. Proc. § 526(b)(5)(B)(i)(I)* and *(II)* through and including the contract year during which the injunctive relief is sought. As a condition to petitioning for an injunction, amounts payable under these alternative minimums may be paid at any time prior to seeking injunctive relief [*Civ. Code § 3423(e)(2)(B)*; *Code Civ. Proc. § 526(b)(5)(B)(ii)*].

Compensation paid in any contract year in excess of the minimums specified in *Civ. Code § 3423(e)(2)(A)* and *(B)* and *Code Civ. Proc. § 526(b)(5)(B)(i)* and *(ii)* apply to reduce the compensation otherwise required to be paid under those provisions an any subsequent contract years [*Civ. Code § 3423(e)(3)*; *Code Civ. Proc. § 526(b)(5)(C)*].

[5] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*]) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[6] Certification re Notice

When a temporary restraining order is sought without notice to the opposite party, the applicant or the applicant's attorney must certify to the court under oath that either (1) within a reasonable time prior to the application he, she, or it informed the opposing party or the opposing party's attorney, if any, at what time and where the application would be made, (2) he or she in good faith attempted to so inform the opposing party and his or her attorney but was unable to do so, and specify the efforts made to contact them, or (3) for reasons specified he or she should not be required to so inform the opposing party or his or her attorney [*Code Civ. Proc. § 527(a)*; *see Cal. Rules of Ct., Rules 3.1150* (procedure for obtaining TRO), 3.1203(a) (requiring notice of ex parte applications absent exceptional circumstances)]. For detailed discussion and additional forms for obtaining injunctive relief, see Ch. 303, *Injunctions* .

[7] Los Angeles County Practice

All applications in the Superior Court of Los Angeles County for the issuance of temporary restraining orders and preliminary injunctions are assigned to Writs and Receivers Department [*see* Los Angeles Super. Ct. Rules, Rule 2.5(i)].

The procedure that counsel must follow to obtain provisional injunctive relief in Los Angeles County Superior Court is specified in great detail by Los Angeles Co. Super. Ct. Rules, Rule 9.32. Counsel seeking such relief in Los Angeles County should pay close attention to those sections.

[8] State Statutes

Obligation to render personal service or to employ another in personal service generally is not specifically enforceable. *Civ. Code § 3390(1),(2)*

Grounds for issuance of injunction. *Civ. Code § 3422*; *Code Civ. Proc. § 526*

Breach of personal service contract can be enjoined under specified circumstances. *Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(b)(5)*

Definition of injunction. *Code Civ. Proc. § 525*

Personal service contract cannot be specifically enforced beyond seven years from commencement of service. *Lab. Code § 2855(a)*

Enforceability of contract to render personal service in production of phonorecords; action for damages for breach of contract. *Lab. Code § 2855(b)*

[9] Decisions

Strictures against judicial compulsion of personal service contract is inapplicable in action against hospital for arbitrary refusal to provide medical services when hospital would not be required to provide services of any specific physician,

and therefore injunctive relief is available. *Leach v. Drummond Medical Group, Inc. (1983) 144 Cal. App. 3d 362, 369, 192 Cal. Rptr. 650*

[10] Text References

Witkin, California Procedure, vol. 6, *Provisional Remedies*, § 274 (4th ed. 1997)

Witkin, Summary of California Law, vol. 13, *Equity*, § 25 (10th ed. 2005)

[11] Cross References

For discussion of and forms for use in obtaining injunctive relief in general, see Ch. 303, *Injunctions*

For a complaint for damages for breach of an employment contract by refusal to perform services, see Ch. 249, *Employment Law: Termination and Discipline*

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Chapter 528 SPECIFIC PERFORMANCE
PART V. FORMS

46-528 California Forms of Pleading and Practice--Annotated § 528.134

§ 528.134 Affirmative Defense--Contract to Procure Act of Third Person [Civ. Code § 3390(4)]

[1] FORM Affirmative Defense--Contract to Procure Act of Third Person [Civ. Code § 3390(4)]

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

The contract between plaintiff and defendant is not subject to specific performance because it is an agreement to procure the act or consent of _____ [*specify name of wife of one of the contracting parties or of a third party*].

[2] Use of Form

The foregoing form of affirmative defense is for use by defendant in an answer to a complaint for specific performance of a contract when the contract calls for procuring the act or consent of the wife of a contracting party, or of any third person [*Civ. Code § 3390(4)*].

Although *Civ. Code § 3390(4)*specifically mentions the wife of the contracting party and does not make any provision for the husband of the contracting party, it appears that an action involving an agreement to procure the act or consent of a husband could also be defended on the ground that the husband was a third party.

[3] State Statutes

Agreement to procure act or consent of wife of contracting party or third person as not specifically enforceable. *Civ. Code § 3390(4)*

[4] Text References

Witkin, Summary of California Law, vol. 13, *Equity*, § 47 (10th ed. 2005)

58 Cal. Jur. 3d Specific Performance § 41

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46-528 California Forms of Pleading and Practice--Annotated § 528.135

§ 528.135 Affirmative Defense--Contract Requires Series of Acts

[1] FORM Affirmative Defense--Contract Requires Series of Acts

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

The agreement entered into between plaintiff and defendant is not subject to specific performance because the contract requires a continuing series of acts that cannot be consummated in one transaction so that performance of the contract would require protracted supervision and direction by the court and the exercise of special knowledge, skill, and judgment by the parties.

[2] Use of Form

The foregoing form of affirmative defense is for use by a defendant in an answer to a complaint for specific performance when the contract requires a continuing series of acts that would call for protracted supervision and direction by the court.

Although California follows the rule against the specific performance of contracts that stipulate a succession of continuous acts which require protracted supervision and direction by the court [*see Ellison v. Ventura Port Dist. (1978) 80 Cal. App. 3d 574, 580, 145 Cal. Rptr. 665]* , defense counsel should note that a number of cases that seem to involve a series of continuing acts have been specifically enforced [*see Bakersfield Country Club v. Pacific Water Co. (1961) 192 Cal. App. 2d 528, 539, 13 Cal. Rptr. 573* (installation of water pipes); *Gale v. Seymour (1949) 91 Cal. App. 2d 727, 728, 205 P.2d 752* (paving parking lot); for further cases, see *§ 528.44*]. One court distinguished the situation before it, the periodic dredging of a channel, on the basis that the act was not as complex as those involved in the contracts for which specific performance had been denied and no cooperation between the parties was required [*Ellison v. Ventura Port Dist. (1979) 80 Cal. App. 3d 574, 581, 145 Cal. Rptr. 665]* .

[3] Decisions

*Civ. Code § 3390(4)*as not applicable to bar specific performance because of seller's failure to obtain trust deed

beneficiary's consent to prepayment, which terms of note specified it did not have to give and which buyer knew at time of contracting, because loan matured before trial and court was required to consider equities of awarding specific performance as of time of entry of judgment. *Stevens Group Fund IV v. Sobrato Development Co. (1991) 1 Cal. App. 4th 886, 897, 2 Cal. Rptr. 2d 460*

[4] Text References

Witkin, Summary of California Law, vol. 13, *Equity*, § 45 (10th ed. 2005)

58 Cal. Jur. 3d Specific Performance § 37

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46-528 California Forms of Pleading and Practice--Annotated § 528.136

§ 528.136 Affirmative Defense--Contract for Personal Services [Civ. Code § 3390(1), (2)]

[1] FORM Affirmative Defense--Contract for Personal Services [Civ. Code § 3390(1), (2)]

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

The contract that plaintiff and defendant entered into was a contract to _____ [render *or* employ another in] personal services in that _____ [plaintiff *or* defendant] promised to _____ [perform the following services for _____ (defendant *or* plaintiff): _____ (*specify personal services to be performed*) *or* employ _____(defendant *or* plaintiff) in personal service to perform the following services: (*specify personal services to be performed*)]. Therefore, pursuant to _____ [Section 3390(1) *or* Section 3390(2)] of the Civil Code, the obligation cannot be specifically enforced.

[2] Use of Form

The foregoing form of affirmative defense is for use by a defendant in an answer to a complaint for specific performance when the contract which plaintiff seeks to specifically enforce is one to render or employ another in personal service [*see Civ. Code § 3390(1), (2)*].

For a discussion of when personal service contracts can be specifically enforced, see *§ 528.45[1]*. For a discussion of when injunctive relief may be granted in situations involving personal service contracts, see *§ 528.45[2][c]*.

[3] State Statutes

Obligation to render or employ another in personal service as not specifically enforceable. *Civ. Code § 3390(1),(2)*

[4] Decisions

Settlement agreement providing that plaintiff be appointed to permanent position of physician specialist in cardiology section of hospital as personal services contract, specific performance of which is prohibited by *Civ. Code § 3390(1),(2). Barndt v. County of Los Angeles (1989) 211 Cal. App. 3d 397, 403-406, 259 Cal. Rptr. 372*

[5] Text References

Witkin, Summary of California Law, vol. 13, *Equity*, §§ 48-51 (10th ed. 2005)

58 Cal. Jur. 3d Specific Performance §§ 45, 46

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46-528 California Forms of Pleading and Practice--Annotated § 528.137

§ 528.137 Affirmative Defense--Seller's Title in Doubt [Civ. Code § 3394]

[1] FORM Affirmative Defense--Seller's Title in Doubt [Civ. Code § 3394]

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

The contract between plaintiff and defendant cannot be specifically enforced in favor of plaintiff seller since the plaintiff cannot give defendant buyer a title to _____ [*specify property involved in contract*] that is free from reasonable doubt in that _____ [*specify reasons, e.g.,* seller conveyed title to the property to a third party bona fide purchaser who had no notice of the contract between seller and buyer].

[2] Use of Form

The foregoing form of affirmative defense is for use by a defendant buyer in an action for specific performance when the plaintiff seller is seeking to enforce a contract of sale but the seller cannot give defendant title free from reasonable doubt [*see Civ. Code § 3394*]. The defense will most likely be used in situations involving contracts for the sale and purchase of real property. See the discussion in *§ 528.22*.

[3] Cross References

For discussion and forms for use in actions for specific performance of contracts for the sale of real property, see Ch. 569, *Vendor and Purchaser*

[4] State Statutes

Agreement for sale of property as not specifically enforceable in favor of seller who cannot give buyer title free from reasonable doubt. *Civ. Code § 3394*

[5] Text References

Witkin, Summary of California Law, vol. 13, *Equity*, §§ 56-57 (10th ed. 2005) 2

58 Cal. Jur. 3d Specific Performance § 24

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Chapter 529 STATEMENT OF DECISION

46-529 California Forms of Pleading and Practice--Annotated 529.syn

§ 529.syn Synopsis to Chapter 529: STATEMENT OF DECISION

§ 529.01 Scope of Chapter

§ 529.02 Cross References

§§ 529.03-529.09 [Reserved]

§ 529.10 Governing Law

§ 529.11 Statement of Decision in Trial Courts

§ 529.12 Request for Statement of Decision

[1] Time for Making Request

[2] Contents of Request

[3] Effect of Failure to Make Request

§ 529.13 Length of Trial Affects Form and Procedure of Statement

[1] In General

[2] Determining Length of Trial

§ 529.14 Proposals Following Request for Statement of Decision

§ 529.15 Procedure for Preparation of Proposed Statement of Decision

§ 529.16 Objections to Proposed Statement of Decision

§ 529.17 Hearing in Unlimited Civil Case on Proposals or Objections

§ 529.18 Judgment When Statement Is Waived or Not Requested

[1] Proposed Judgment

[2] Objections

[3] Filing Judgment

529.19 Extension of Time

529.20 Bifurcated Trial

§ 529.21 Contents of Statement of Decision

[1] Explanation of Factual and Legal Bases for Decision

[2] Case Law Under Prior Statute

[a] Ultimate Facts and Conclusions of Law

[b] Intermediate Evidentiary Decisions

§ 529.22 Effect of Ambiguous or Insufficient Statement of Decision

§ 529.23 Effect of Trial Court's Failure to Issue Statement of Decision

§ 529.24 Amendment of Statement of Decision by Trial Court

[1] Motion for New Trial

[2] Motion to Vacate Judgment

§ 529.25 Amendment of Statement's Factual Determinations by Appellate Court

§§ 529.26-529.49 [Reserved]

§ 529.50 Related Texts From LEXIS Publishing

§ 529.51 State Statutes

[1] Ambiguity or Omission in Statement of Decision

[2] Effect of Statement of Decision After Trial

[3] Proceedings Requiring Statement of Decision or Fact Determinations

[4] Statement of Decision in Trial Courts

§ 529.52 California Rules of Court

[1] Extension of and Noncompliance With Time Requirements

[2] Determinations of Fact in Appellate Court

[3] Judgment When No Statement of Decision Requested

[4] Preparation of Statement of Decision

[5] Statement of Decision Following Bifurcated Trial

[6] Trial Completed Within One Day

§ 529.53 Decisions

[1] Amendment of Statement of Decision

[2] Construction of Statement of Decision

[3] Death of Trial Judge Before Statement of Decision Filed

[a] In General

[b] Failure to Make Statement of Decision

[c] Objection to Statement of Decision

[4] Request for Statement of Decision

[5] Special Proceedings Not Requiring Statement of Decision

[6] Sufficiency and Content of Statement of Decision

§ 529.54 Decisions Under Prior Law

[1] Amendment of Findings

[2] Construction of Findings

[a] In General

[b] Antecedent Expressions of Trial Court

[c] Findings Prepared by Counsel

[d] Proposed Findings and Conclusions

[3] Construction When No Findings Required

[4] Entry of Judgment Without Required Findings

[5] Failure to Make Findings

[a] In General

[b] Prejudicial Error Required

[c] Reversal

[6] Preparation

[7] Purpose of Requiring Findings

[8] Requirements and Sufficiency of Findings

[a] Findings Required to State Ultimate Facts

[i] In General

[ii] Conclusions of Law Distinguished

[iii] Evidentiary or Probative Facts

[b] Inconsistent Findings

[c] Inferred Findings

[d] Preparation of Findings

[i] Consolidated Actions

[ii] Format

[e] Specific Probative Findings

[f] Sufficiency of Findings

[i] In General

[ii] Definiteness and Certainty Required

[9] Special Findings

[a] Failure to Make Requested Finding

[b] Failure to Request Special Findings

[i] In General

[ii] Invoking Sanction

[c] Omission in Findings

[d] Preparation of Special Finding

[e] Purpose of Special Findings

[f] When Specific Findings Not Required

[10] Specific Proceedings Requiring Findings

[a] In General

[b] Special Proceedings

§§ 529.55-529.59 [Reserved]

§ 529.60 Request for Statement of Decision [Code Civ. Proc. § 632]

[1] FORM

[2] Use of Form

[3] Cross References

§ 529.61 Proposal as to Content of Statement of Decision [Code Civ. Proc. § 632]

[1] FORM

[2] Use of Form

[3] Distinction Between Factual and Legal Bases for Decision

[4] Timing of Proposals

§ 529.62 Proposed Statement of Decision [Cal. Rules of Ct., Rule 3.1590(f)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 529.63 Notice of Motion for Order That Statement of Decision Be Deemed Waived [Cal. Rules of Ct., Rule 3.1590(f)]

[1] FORM

[2] Use of Form

[3] Supporting Memorandum

[4] Cross References

§ 529.64 Declaration Under Penalty of Perjury in Support of Motion for Order That Statement of Decision Be Deemed Waived [Cal. Rules of Ct., Rule 3.1590(f)]

[1] FORM

[2] Use of Form

§ 529.65 Order Granting Motion That Statement of Decision Be Deemed Waived [Cal. Rules of Ct., Rule 3.1590(f)]

[1] FORM

[2] Use of Form

§ 529.66 Objections to Proposed Statement of Decision [Cal. Rules of Ct., Rule 3.1590(g)]

[1] FORM

[2] Use of Form

[3] Omission or Ambiguity in Statement of Decision

§ 529.67 Ex Parte Application for Order, Supporting Declaration, and Order for Hearing on Proposals as to Content of Statement of Decision, on Objections to Proposed Statement of Decision, or on Objections to Proposed Judgment When Statement of Decision Not Requested [Cal. Rules of Ct., Rule 3.1590(k)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 529.68 Notice of Motion for Order Excusing Noncompliance With Time Limit Prescribed for Doing Act Required by Cal. Rules of Ct., Rule 3.1590 [Cal. Rules of Ct., Rule 3.1590(m)]

[1] FORM

[2] Use of Form

[3] Supporting Memorandum

[4] Cross References

§ 529.69 Declaration Under Penalty of Perjury in Support of Motion for Order Excusing Noncompliance With Time Limit Prescribed for Doing Act Required by Cal. Rules of Ct., Rule 3.1590 [Cal. Rules of Ct., Rule 3.1590(m)]

[1] FORM

[2] Use of Form

§ 529.70 Order Granting Motion to Excuse Noncompliance With Time Limit Prescribed for Doing Act Required by

Cal. Rules of Ct., Rule 3.1590 [Cal. Rules of Ct., Rule 3.1590(m)]

[1] FORM

[2] Use of Form

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Chapter 529 STATEMENT OF DECISION
PART I. SCOPE

46-529 California Forms of Pleading and Practice--Annotated § 529.01

§ 529.01 Scope of Chapter

This chapter discusses procedures for obtaining a statement of decision that is issued by the court after a nonjury trial. It includes forms for:

- Requesting a statement of decision [*see § 529.60*].
- Proposals as to the content of the statement of decision [*see § 529.61*].
- A proposed statement of decision [*see § 529.62*].
- A notice of motion, declaration, and order that the statement of decision be deemed waived [*see §§ 529.63 -529.65*].
- Objections to the proposed statement of decision [*see § 529.66*].
- An ex parte application for an order for a hearing on proposals or objections to the statement of decision [*see § 529.67*].
- A notice of motion, declaration, and order excusing noncompliance with required time limits for procedures relating to the statement of decision [*see §§ 529.68 -529.70*].

This chapter includes in the Introduction and Research Guide some case law decided prior to the 1981 amendment of *Code Civ. Proc. § 632*, which replaced findings of fact and conclusions of law with the statement of decision. This prior case law has been included for guidance in areas not expressly covered by the new statute and rules governing statements of decision. For discussion of the effect of case law under the former findings of fact and conclusion of law procedure, see *§ 529.10*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral Overview

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§ 529.02 Cross References

For discussion and forms relating to a request that an appellate court make fact determinations in addition to those made in trial court, or take additional evidence, see Ch. 50, *Appeal: Briefs* .

Other chapters that may be of interest include:

- For judgment forms, see *Ch. 318, Judgments, § 318.40* et seq.
- For forms for motion for new trial and motion to vacate judgment, see Ch. 371, *Motions After Trial* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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46-529 California Forms of Pleading and Practice--Annotated §§ 529.03-529.09

[Reserved]

§§ 529.03[Reserved]

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46-529 California Forms of Pleading and Practice--Annotated § 529.10

§ 529.10 Governing Law

Code Civ. Proc. § 632 governs the procedure for requesting a statement of decision and the content and form of a statement of decision. Procedures for making proposals or objections to the statement of decision, preparing a proposed statement of decision, and waiving a statement of decision are governed by *Cal. Rules of Ct., Rule 3.1590*.

Cases on findings and conclusions decided under former *Code Civ. Proc. § 632* may be applied by analogy to determine issues raised under present *Code Civ. Proc. § 632* [*see McCurter v. Older (1985) 173 Cal. App. 3d 582, 591-592, 219 Cal. Rptr. 104 , disapproved on other grounds, In re Marriage of Arceneaux (1990) 51 Cal. 3d 1130, 1137, 275 Cal. Rptr. 797, 800 P.2d 1227]* . Older cases, of course, are not relevant if a provision of the statute material to the decision has changed [*see In re Marriage of Arceneaux (1990) 51 Cal. 3d 1130, 1137, 275 Cal. Rptr. 797, 800 P.2d 1227]* .

For discussion of case law prior to the 1982 amendment of *Code Civ. Proc. § 632, see § 529.21[2][a]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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46-529 California Forms of Pleading and Practice--Annotated § 529.11

§ 529.11 Statement of Decision in Trial Courts

Findings of fact and conclusions of law are no longer required on the trial of a question of fact by the court, but, on the request of any party appearing at trial, a statement of decision is required to be issued [*Code Civ. Proc. § 632*].

Because a statement of decision is only required on trial of a question of fact, a statement of decision is unnecessary when the only issue tendered to the trial court is one of law. If there is no factual dispute, there is nothing to inform the appellate court about except the law and, on questions of law, the reviewing court must decipher the law for itself [*Enterprise Ins. Co. v. Mulleague (1987) 196 Cal. App. 3d 528, 539-540, 241 Cal. Rptr. 846* ; *see Earp v. Earp (1991) 231 Cal. App. 3d 1008, 1012, 283 Cal. Rptr. 43* (interpretation of lease)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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46-529 California Forms of Pleading and Practice--Annotated § 529.12

§ 529.12 Request for Statement of Decision

[1] Time for Making Request

Any party appearing at trial may request a statement of decision [*see Code Civ. Proc. § 632*]. If the trial is concluded within one calendar day or in less than eight hours spread out over more than one day, the request must be made before the matter is submitted for decision [*see In re Marriage of Gray (2002) 103 Cal. App. 4th 974, 127 Cal. Rptr. 2d 271* (request in court trial concluding in less than eight hours filed after tentative decision filed was untimely)]. If the trial is longer than that, the request must be made within 10 days after the court announces a tentative decision [*Code Civ. Proc. § 632*; *see Earp v. Earp(1991) 231 Cal. App. 3d 1008, 1012, 283 Cal. Rptr. 43* (no error in denial of statement of decision as to issue tried separately and before trial of other issues when trial lasted less than a day and party did not request statement of decision before submission of issue; request at subsequent trial of remaining issues was untimely as to the issue tried separately); *Posey v. Leavitt (1991) 229 Cal. App. 3d 1236, 1243 n.3, 280 Cal. Rptr. 568* (request for a statement of decision six days after the trial court's denial of opposing party's motion to reconsider is timely)].

In deciding how long trial lasts in application of *Code Civ. Proc. § 632, Code Civ. Proc. § 581(a)(6)* applies to determine when trial commences [*Bevli v. Brisco (1985) 165 Cal. App. 3d 812, 820, 212 Cal. Rptr. 36* ; for further discussion, *see § 529.13[2]*]. Judicial time off the bench does not count in determining how long a trial lasts [*Gorman v. Tassajara Development Corporation (2009) 178 Cal. App. 4th 44, 61-63, 100 Cal. Rptr. 3d 152]* .

The 10-day period for making the request commences at the time the clerk mails the copy of the minute order or decision [*Hutchins v. Glanda (1990) 216 Cal. App. 3d 1529, 1531, 265 Cal. Rptr. 596* ; *see also Staten v. Heale (1997) 57 Cal. App. 4th 1084, 1088, 68 Cal. Rptr. 2d 35* (when service of tentative decision is by mail, 10-day period, as extended by *Code Civ. Proc. § 1013(a)*, normally commences on date it is deposited in mail, pursuant to *Code Civ. Proc. § 1013a(4)*)]. In determining whether a request is "made" within the statutory 10-day period, the court refers to the date the request is received and filed, as distinguished from the date it is mailed [*Staten v. Heale (1997) 57 Cal. App. 4th 1084, 1090-1091, 68 Cal. Rptr. 2d 35]* . For discussion relating to determining the length of trial, see *§ 529.13[2]*.

If counsel makes a timely request for the statement, the court's failure to prepare the statement is reversible error [Social

Service Union, Local 535 v. *County of Monterey (1989) 208 Cal. App. 3d 676, 681, 256 Cal. Rptr. 325* ; *In re Marriage of Ananeh-Firempong (1990) 219 Cal. App. 3d 272, 282, 268 Cal. Rptr. 83* ; for further discussion, *see § 529.23*].

[2] Contents of Request

The request for a statement of decision must specify the controverted issues for which a statement of decision is requested [*Code Civ. Proc. § 632*; for form of request, *see § 529.60*]. The trial judge is not required to sift through a host of improper specifications in search of a few arguably proper ones. While a party cannot be prevented from using the request as a way of arguing with the court rather than clarifying the grounds of its decision, a party who makes that choice is not entitled to rely on the resulting document to insulate the judgment from the presumption of correctness [*Yield Dynamics, Inc. v. TEA Systems Corp. (2007) 154 Cal. App. 4th 547, 558-559, 66 Cal. Rptr. 3d 1* (only three of 32 questions approximated nonargumentative specifications of factual issues, and it was doubtful that three even raised principal controverted issues)].

When there has been a request for a statement of decision, the statement of decision may be limited to only those issues specified in the request if less than all material issues are specified [*Harvard Investment Co. v. Gap Stores, Inc. (1984) 156 Cal. App. 3d 704, 709 n.3, 202 Cal. Rptr. 891]* .

A party waives any objection on appeal based on the trial court's failure to file a written statement of decision when trial lasts less than one day and that party fails to make an oral request, and when language in that party's points and authorities that were alleged to be a written request was not specific, but merely asked court to find in her favor [*Martinez v. County of Tulare (1987) 190 Cal. App. 3d 1430, 1434-1435, 235 Cal. Rptr. 851]* .

[3] Effect of Failure to Make Request

If no statement of decision has been requested, the reviewing court is required to presume that every fact essential to the judgment was proved and found by the trial court. Review in these circumstances is limited to a determination as to whether there is any evidence, contradicted or uncontradicted, to support the judgment [*Agri-Systems, Inc. v. Foster Poultry Farms (2008) 168 Cal. App. 4th 1128, 1134-1135, 85 Cal. Rptr. 3d 917*]

Although a failure to request a statement of decision may be fatal to an appeal if the record contains no explanation of the final judgment, absence of the statement is not fatal to appeal if the judgment sets forth reasons for the award [*In re Marriage of Seaman & Menjou (1991) 1 Cal. App. 4th 1489, 1494 n.2, 2 Cal. Rptr. 2d 690]* .

For discussion of preparation of a proposed judgment when a statement of decision is not requested or is waived, see *§ 529.18*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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46-529 California Forms of Pleading and Practice--Annotated § 529.13

§ 529.13 Length of Trial Affects Form and Procedure of Statement

[1] In General

In addition to affecting the time within which a request for a statement of decision must be made [*see § 529.12[1]*], the length of trial also determines the form (that is, oral or written) in which the statement of decision may be made and the procedure relating to determining the statement's content.

If a trial is concluded within one calendar day or in less than eight hours over more than one day, the statement of decision may be made orally on the record in the presence of the parties [*Code Civ. Proc. § 632*]. When a trial is completed within one day or in less than eight hours over more than one day, a request for statement of decision must be made before the matter is submitted for decision and the statement of decision may be made orally on the record in the presence of the parties [*Cal. Rules of Ct., Rule 3.1590(n)*].

If the trial is concluded after a longer period of time, the statement must be in writing unless the parties appearing at trial agree otherwise [*Code Civ. Proc. § 632*].

For discussion relating to preparation of a proposed written statement of decision and motion for order that statement of decision be deemed waived, see *§ 529.15*.

[2] Determining Length of Trial

Whether a trial lasts more than one day depends on when it commences and when it concludes. A nonjury trial is deemed to commence at the beginning of the opening statement of any party or party's counsel or, if there is no opening statement, at the time the oath or affirmation is administered to the first witness or the first evidence is introduced [*Code Civ. Proc. § 581(a)(6)*].

The introduction of evidence signaling the commencement of the trial in a petition for writ of administrative mandamus has been held to be the time the judge begins reading the administrative record, thereby considering the evidence, even though the parties did not formally stipulate to the introduction of the record into the superior court proceedings until the following day. Conversely, the reading of briefs prior to the appearance of counsel does not constitute the

commencement of the trial [*Bevli v. Brisco (1985) 165 Cal. App. 3d 812, 820-821, 821 n.3, 212 Cal. Rptr. 36* ; *but see Milligan v. Hearing Aid Dispensers Examining Com. (1983) 142 Cal. App. 3d 1002, 1004 n.3, 191 Cal. Rptr. 490]* .

The trial court's preliminary review of evidence may not be included in the calculation of the length of the trial unless its time spent in doing so is documented in the court record [*Kearl v. Board of Medical Quality Assurance (1986) 189 Cal. App. 3d 1040, 1051, 236 Cal. Rptr. 526]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral Overview

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§ 529.14 Proposals Following Request for Statement of Decision

After a party has requested a statement of decision, any party may make proposals as to its content [*Code Civ. Proc. § 632*]. Any such proposals must be made within 10 days after the date of the request [*Cal. Rules of Ct., Rule 3.1590(e)*]. The procedure for preparing a proposed statement is discussed in *§ 529.15*. For a form of proposal, see *§ 529.61*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 529.15 Procedure for Preparation of Proposed Statement of Decision

If a party requests a statement of decision, the court must, within 30 days of announcement or service of the tentative decision, prepare and serve a proposed statement of decision and a proposed judgment on all parties that appeared at the trial, unless the court has ordered a party to prepare the statement. A party that has been ordered to prepare the statement must, within 30 days after the announcement or service of the tentative decision, serve and submit to the court a proposed statement of decision and a proposed judgment [*Cal. Rules of Ct., Rule 3.1590(f)*].

If the proposed statement of decision and judgment are not served and submitted within the time prescribed in *Cal. Rules of Ct., Rule 3.1590(f)*, any other party that appeared at the trial may within 10 days thereafter: (1) prepare, serve, and submit to the court a proposed statement of decision and judgment or (2) serve on all other parties and file a notice of motion for an order that a statement of decision be deemed waived [*Cal. Rules of Ct., Rule 3.1590(f)*; for form of notice of motion, see *§ 529.63*].

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46-529 California Forms of Pleading and Practice--Annotated § 529.16

§ 529.16 Objections to Proposed Statement of Decision

Any party may, within 15 days after service of the proposed statement of decision and proposed judgment, serve and file objections thereto [*Cal. Rules of Ct., Rule 3.1590(g)*]. For a form for objections to proposed statement of decision, see *§ 529.66*.

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§ 529.17 Hearing in Unlimited Civil Case on Proposals or Objections

The court may order a hearing on any proposals for or objections to the proposed statement of decision or the proposed judgment [*Cal. Rules of Ct., Rule 3.1590(k)*]. For a form for an ex parte application for order for hearing on proposals or objections, see *§ 529.67*.

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46-529 California Forms of Pleading and Practice--Annotated § 529.18

§ 529.18 Judgment When Statement Is Waived or Not Requested

[1] Proposed Judgment

If no party requests or is ordered to prepare a statement of decision and a written judgment is required, the court must prepare and serve a proposed judgment on all parties that appeared at the trial within 20 days after the announcement or service of the tentative decision or the court may order a party to prepare, serve, and submit the proposed judgment to the court within 10 days after the date of the order [*Cal. Rules of Ct., Rule 3.1590(h)*].

[2] Objections

Any party may, within 10 days after service of the proposed judgment, serve and file objections thereto [*Cal. Rules of Ct., Rule 3.1590(j)*].

[3] Filing Judgment

If a written judgment is required, the court must sign and file the judgment within 50 days after the announcement or service of the tentative decision, whichever is later, or, if a hearing was held under *Cal. Rules of Ct., Rule 3.1590(k)*, within 10 days after the hearing. The judgment constitutes the decision on which judgment is to be entered under *Code of Civil Procedure § 664* [*Cal. Rules of Ct., Rule 3.1590(l)*].

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529.19 Extension of Time

The court may extend, by written order, any of the times prescribed by *Cal. Rules of Ct., Rule 3.1590*. The court may also make a written order excusing noncompliance with any of the time periods prescribed by *Cal. Rules of Ct., Rule 3.1590*. The order excusing noncompliance with time limits must be made prior to entry of judgment, for good cause shown and on such terms as may be just [*Cal. Rules of Ct., Rule 3.1590(m)*]. In addition, in a limited civil case the court may extend the time within which any act prescribed in the California Rules of Court is required to be done [*Cal. Rules of Ct., Rule 1.10(c)*]. For forms for notice of motion, declaration, and order to excuse noncompliance with those time periods, see *§§ 529.68 -529.70*.

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529.20 Bifurcated Trial

When a factual issue is tried separately and before other issues, the judge conducting the separate trial must announce his or her tentative decision on the separate issue and must issue a statement of decision regarding the separate issue if requested to do so by a party. However, the court must not prepare any proposed judgment until the other issues are tried, except when an interlocutory judgment or separate judgment may otherwise be properly entered at that time [*Cal. Rules of Ct., Rule 3.1591(a)*].

If the other issues are tried by a different judge or judges, each judge must perform all acts required by *Cal. Rules of Ct., Rule 3.1590* as to the issues tried by that judge. The judge trying the final issue prepares the proposed judgment [*Cal. Rules of Ct., Rule 3.1591(b)*]. A judge may proceed with the trial of subsequent issues before the issuance of a statement of decision on previously tried issues [*Cal. Rules of Ct., Rule 3.1591(c)*].

A motion for a new trial following a bifurcated trial must be made after all the issues are tried and, if the issues were tried by different judges, each judge must hear and determine the motion as to the issues tried by that judge [*Cal. Rules of Ct., Rule 3.1591(c)*].

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§ 529.21 Contents of Statement of Decision

[1] Explanation of Factual and Legal Bases for Decision

Code Civ. Proc. § 632 requires that the statement of decision explain the factual and legal basis for the court's decision as to each of the principal controverted issues at trial [*see Code Civ. Proc. § 632*].

There is an essential correspondence between the "factual and legal basis" of a decision and the "findings of fact and conclusions of law" given by the trial court under former law. One court has stated that case law on findings and conclusions under former law may be applied by analogy to determine issues arising under the current statute [*see McCurter v. Older (1985) 173 Cal. App. 3d 582, 592, 219 Cal. Rptr. 104]* . Thus, the distinction between ultimate facts, which must be stated, and evidentiary facts, which need not be stated, is still pertinent [*see Ingredient Communication Council, Inc. v. Lungren (1992) 2 Cal. App. 4th 1480, 1497, 4 Cal. Rptr. 2d 216* ; *McCurter v. Older (1985) 173 Cal. App. 3d 582* ; *Republic Indemnity Co. v. Empire Building Corp. (1985) 167 Cal. App. 3d 1163, 1167, 213 Cal. Rptr. 787* ; *Wolfe v. Lipsy (1985) 163 Cal. App. 3d 633, 643, 209 Cal. Rptr. 801* ; *In re Cheryl E. (1984) 161 Cal. App. 3d 587, 599, 207 Cal. Rptr. 728* ; *see also § 529.21[2][a], [b]*].

Consistent with this view, reviewing courts have held that a trial court, in its statement of decision, need not address all of the legal and factual issues raised by the parties. It need only state the grounds on which the judgment rests without necessarily specifying the particular evidence considered by the trial court in reaching its decision [*Peak-Las Positas Partners v. Bollag (2009) 172 Cal. App. 4th 101, 112, 90 Cal. Rptr. 3d 775* ; *Muzquiz v. City of Emeryville (2000) 79 Cal. App. 4th 1106, 1124-1125, 94 Cal. Rptr. 2d 579* ; *Haight v. Handweiler (1988) 199 Cal. App. 3d 85, 89-90, 244 Cal. Rptr. 488*]. The trial court need only set out ultimate findings rather than evidentiary ones [*In re Marriage of Balcof (2006) 141 Cal. App. 4th 1509, 1530-1531, 47 Cal. Rptr. 3d 183]* ; findings of ultimate facts necessarily include findings on all intermediate evidentiary facts necessary to sustain them [*Muzquiz v. City of Emeryville (2000) 79 Cal. App. 4th 1106, 1125, 94 Cal. Rptr. 2d 579* ; *In re Cheryl E. (1984) 161 Cal. App. 3d 587, 599, 207 Cal. Rptr. 728]* .

The statement is required to be in writing unless either of the following applies [*Code Civ. Proc. § 632*]:

- The parties stipulate otherwise; or

- The trial lasts less than one calendar day or less than eight hours over a period of more than one day.

In these situations, the statement may be made orally on the record in the parties' presence [*Code Civ. Proc. § 632*].

Appellate courts frown on the use of any shorthand method designed to avoid the mandate of *Code Civ. Proc. § 632* requiring a statement of decision that fairly discloses the court's determination of all material, factual issues involved in the action. For example, a trial court was in error when, after counsel requested a written statement of decision, the court concluded that the oral proceedings and the reporter's transcript would suffice [*Whittington v. McKinney (1991) 234 Cal. App. 3d 123, 126 285 Cal. Rptr. 586* (reviewing court held, however, that counsel had waived right to written statement of decision in earlier proceedings)].

In other cases, it has been stated that a trial court must make findings on "material subsidiary issues of fact" if a party makes such a request or informs the court of its failure to do so [*Midwest Television, Inc. v. Scott, Lancaster, Mills & Atha, Inc. (1988) 205 Cal. App. 3d 442, 457, 252 Cal. Rptr. 573* ; *see Code Civ. Proc. § 634*, discussed in *§ 529.22*]. A material issue of fact is one that is relevant and essential to the judgment and closely and directly related to the trial court's determination of the ultimate issue in the case [*Midwest Television, Inc. v. Scott, Lancaster, Mills & Atha, Inc. (1988) 205 Cal. App. 3d 442, 457, 252 Cal. Rptr. 573* ; *see McCurter v. Older (1985) 173 Cal. App. 3d 582, 591-594, 219 Cal. Rptr. 104* (reversing for failure of court to find on "material" issue)]. These cases suggest that the focus should now be on whether or not a fact is material more than on whether it would previously have been labelled as evidentiary or ultimate [*see Code Civ. Proc. § 632*].

For discussion of case law prior to the 1982 amendment of *Code Civ. Proc. § 632*, see *§ 529.21[2][a]*.

For a trial court's refusal to explain the factual and legal basis for a decision to constitute error, the request for a statement of decision must be timely [*In re Marriage of Katz (1991) 234 Cal. App. 3d 1711, 1718, 286 Cal. Rptr. 495* ; *see § 529.12[1]*].

[2] Case Law Under Prior Statute

[a] Ultimate Facts and Conclusions of Law

Pursuant to case law decided prior to the amendment of *Code Civ. Proc. § 632* effective in 1982, findings of fact were required to state ultimate facts only [*see Bulmash v. Davis (1979) 24 Cal. 3d 691, 700-701, 157 Cal. Rptr. 66, 597 P.2d 469* ; *Seeley v. Combs (1966) 65 Cal. 2d 127, 132, 52 Cal. Rptr. 578, 416 P.2d 810]* . Subsequent cases continue to refer to this rule [*see McCurter v. Older (1985) 173 Cal. App. 3d 582, 592, 219 Cal. Rptr. 104* ; *Republic Indemnity Co. v. Empire Building Corp. (1985) 167 Cal. App. 3d 1163, 1167, 213 Cal. Rptr. 787* ; *Wolfe v. Lipsy (1985) 163 Cal. App. 3d 633, 643, 209 Cal. Rptr. 801* ; *In re Cheryl E. (1984) 161 Cal. App. 3d 587, 599, 207 Cal. Rptr. 728* ; *People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 524, 206 Cal. Rptr. 164* ; *see also* [1], *above*].

Under that rule, although the ultimate facts found might have involved conclusions of fact, they did not include conclusions of law [*see Hayward Lbr. & Inv. Co. v. Construction Prod. Corp. (1952) 110 Cal. App. 2d 1, 3, 241 P.2d 1054]* . The test in determining whether the findings stated ultimate facts rather than conclusions of law was the same as that applied in determining the sufficiency of the pleadings [*see D'Andrea v. Pringle (1966) 243 Cal. App. 2d 689, 695, 52 Cal. Rptr. 606]* .

Although the distinction between an ultimate fact and a conclusion of law is not an easy one to draw [*Hayward Lbr. & Inv. Co. v. Construction Prod. Corp. (1952) 110 Cal. App. 2d 1, 3, 241 P.2d 1054]* , generally, if, from the facts in evidence, the result can be reached by that process of natural reasoning adopted in the investigation of truth, it is an

ultimate fact. If, on the other hand, resort must be had to the artificial processes of the law in order to reach a final determination, the result is a conclusion of law [*Levins v. Rovegno (1886) 71 Cal. 273, 278, 12 P. 161* ; *Ball v. American Trial Lawyers Assn. (1971) 14 Cal. App. 3d 289, 306, 92 Cal. Rptr. 228]* .

For example, a finding that a particular item of property was held in constructive trust [*see Efron v. Kalmanovitz (1967) 249 Cal. App. 2d 187, 195, 57 Cal. Rptr. 248]* , or a finding of unfairness or fraud when it is imposed by law without regard to the actual intention of the defendant [*see Ball v. American Trial Lawyers Assn. (1971) 14 Cal. App. 3d 289, 306, 92 Cal. Rptr. 228]* is not a finding; it is a conclusion of law since it is reached by the artificial processes of law based on other subsidiary findings of fact.

For the same reason, findings in terms of statutory language may also be considered conclusions of law. Thus, a finding in an equity action to set aside a default judgment under *Code Civ. Proc. § 473* that the entry of the default judgment was due to an extrinsic mistake of fact is a conclusion of law [*see Lieberman v. Aetna Ins. Co. (1967) 249 Cal. App. 2d 515, 530, 57 Cal. Rptr. 453]* . However, it was generally held sufficient to make findings in statutory language in cases in which the rights and liabilities of the parties were defined by statute [*see California Shipbuilding Corp. v. Industrial Acci. Com. (1947) 31 Cal. 2d 270, 271, 188 P.2d 27* (in workers' compensation case involving award of increased compensation under *Lab. Code § 4553*, finding of ultimate fact of serious and willful misconduct in language of statute as not fatally insufficient in form because of generality of language); *Kahn v. Gordon (1967) 249 Cal. App. 2d 722, 726, 57 Cal. Rptr. 725* (sufficiency of findings in language of *Civ. Code § 2334* holding principal liable for misrepresentations made by ostensible agent)].

[b] Intermediate Evidentiary Decisions

Because ultimate facts are reached by a process of natural reasoning, they are deduced from certain primary facts that are evidentiary in character [*Hayward Lbr. & Inv. Co. v. Construction Prod. Corp. (1952) 110 Cal. App. 2d 1, 3, 241 P.2d 1054]* . Any probative or evidentiary facts that have been relied on by the trial court to support the ultimate facts were not required to be stated nor were they a proper part of the findings [*Seeley v. Combs (1966) 65 Cal. 2d 127, 132, 52 Cal. Rptr. 578, 416 P.2d 810* ; *Beaupre v. Nave (1971) 13 Cal. App. 3d 402, 407, 91 Cal. Rptr. 473]* . Thus, the trial court was not required to show the intermediate, specific determinations that it made on every conflict of evidence in deducing the ultimate facts found [*see Moreno v. Jessup Buena Vista Dairy (1975) 50 Cal. App. 3d 438, 447, 123 Cal. Rptr. 393]* . In other words, a court issuing a statement of decision is required only to state ultimate rather than evidentiary facts [*McCurter v. Older (1985) 173 Cal. App. 3d 582, 593, 219 Cal. Rptr. 104]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 529.22 Effect of Ambiguous or Insufficient Statement of Decision

If a statement of decision is ambiguous or does not resolve a controverted issue and the record shows that the ambiguity or omission was brought to the court's attention prior to entry of judgment or at the time of a motion for new trial or motion to vacate judgment, it may not be inferred on appeal or on the motion after trial that the trial court decided in favor of the prevailing party as to those facts or that issue [*Code Civ. Proc. § 634*; *see In re Marriage of Weinstein (1991) 4 Cal. App. 4th 555, 571 , 5 Cal. Rptr. 2d 558*].

The clear implication of this provision is that, if a party does not bring the deficiencies to the trial court's attention, the party waives the right to claim on appeal that the statement was deficient in these regards, and, thus, the appellate court will imply findings to support the judgment. Furthermore, *Code Civ. Proc. § 634* refers to a party's need to point out deficiencies in the trial court's statement of decision as a condition of avoiding such implied findings; merely having requested a statement initially as provided in *Code Civ. Proc. § 632* is not adequate [*In re Marriage of Arceneaux (1990) 51 Cal. 3d 1130, 1133-1134, 275 Cal. Rptr. 797, 800 P.2d 1227* (disapproving *McCurter v. Older (1985) 173 Cal. App. 3d 582, 594, 219 Cal. Rptr. 104* , and *Employers Casualty Co. v. Northwestern Nat. Ins. Group (1980) 109 Cal. App. 3d 462, 474, 167 Cal. Rptr. 296* , to extent they suggest that a party who fails to bring omission or ambiguity to trial court's attention may nevertheless avoid presumption in favor of judgment)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 529.23 Effect of Trial Court's Failure to Issue Statement of Decision

The issuance of a statement of decision after a timely request pursuant to *Code Civ. Proc. § 632* and *Cal. Rules of Ct., Rule 3.1590*, is mandatory, and a trial court's total or material failure to comply with the statute's requirements constitutes reversible error per se [*Miramar Hotel Corp. v. Frank B. Hall & Co. (1985) 163 Cal. App. 3d 1126, 1129* , *210 Cal. Rptr. 114* ; *Bevli v. Brisco (1985) 165 Cal. App. 3d 812, 822, 212 Cal. Rptr. 36* ; *see In re Marriage of Reilley (1987) 196 Cal. App. 3d 1119, 1126, 242 Cal. Rptr. 302]* . For example, if a final judgment is entered after the issuance of a mere minute order, despite the appellant's timely request for a statement of decision, the court of appeal will reverse the judgment and remand for the issuance of a statement of decision [*Miramar Hotel Corp. v. Frank B. Hall & Co. (1985) 163 Cal. App. 3d 1126, 1129* , *210 Cal. Rptr. 114*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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46-529 California Forms of Pleading and Practice--Annotated § 529.24

§ 529.24 Amendment of Statement of Decision by Trial Court

[1] Motion for New Trial

In an action tried without a jury, on a motion for new trial made pursuant to *Code Civ. Proc. § 657*, the court may, on such terms as may be just, change or add to the statement of decision, modify or vacate the judgment in whole or in part, and grant a new trial on all or part of the issues. Alternatively, in lieu of granting a new trial, the court may vacate and set aside the statement of decision and judgment and reopen the case for further proceedings and the introduction of additional evidence. In so doing, the effect would be the same as if the case had been reopened after submission to the court but before the filing of a decision or the rendering of a judgment [*Code Civ. Proc. § 662*]. For further discussion and procedures, see Ch. 371, *Motions After Trial*, §§ 357.60 *et seq. and 357.90* et seq.

[2] Motion to Vacate Judgment

On a motion to vacate a judgment, when the judgment is set aside and vacated and a different judgment entered on the ground that there is an incorrect or erroneous legal basis for the original decision not consistent with or not supported by the facts, the statement of decision must be amended and corrected [*Code Civ. Proc. § 663*]. For further discussion and procedures, see *Ch. 371, Motions After Trial, § 357.90* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 529.25 Amendment of Statement's Factual Determinations by Appellate Court

In all cases in which trial by jury is not a matter of right or in which trial by jury has been waived, the reviewing court may make factual determinations contrary to or in addition to those made by the trial court. The factual determinations may be based on the evidence adduced before the trial court either with or without the taking of evidence by the reviewing court. The reviewing court may take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal and may direct any judgment, and make or give any order as the case may require [*Code Civ. Proc. § 909*].

Code Civ. Proc. § 909 must be liberally construed to the end, among others, that, when feasible, cases may be finally disposed of by a single appeal and without further proceedings in the trial court, except when in the interests of justice a new trial is required on some or all issues [*Code Civ. Proc. § 909*].

For further discussion and forms relating to requests that an appellate court make additional fact determinations or take additional evidence under *Code Civ. Proc. § 909*, see Ch. 50, *Appeal: Briefs* .

Legal Topics:

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

§§ 529.26[Reserved]

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§ 529.50 Related Texts From LEXIS Publishing

For forms of memoranda of points and authorities for use in proceedings regarding statements of decision, see California Points and Authorities, Ch. 215, *Statement of Decision* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 529.51 State Statutes

[1] Ambiguity or Omission in Statement of Decision

Effect of ambiguity or omission prior to entry of judgment or on motion for new trial or motion to vacate judgment. *Code Civ. Proc. § 634*

[2] Effect of Statement of Decision After Trial

Motion for new trial. *Code Civ. Proc. § 662*

Motion to vacate judgment. *Code Civ. Proc. § 663*

Additional fact determinations or additional evidence taken by appellate court on appeal from judgment in nonjury trial. *Code Civ. Proc. § 909*

[3] Proceedings Requiring Statement of Decision or Fact Determinations

Action defined. *Code Civ. Proc. § 22*

Special proceedings defined. *Code Civ. Proc. § 23*

Required finding in hearing to issue right to attach order. *Code Civ. Proc. § 484.090*

Required findings in hearing to issue writ of attachment. *Code Civ. Proc. §§ 484.370, 485.220* (ex parte)

Required findings in hearing to issue additional writ of attachment. *Code Civ. Proc. §§ 484.520, 485.540*

Required findings in hearing to issue temporary protective order. *Code Civ. Proc. § 486.020*

Required findings in hearing to issue writ of attachment against nonresident, foreign corporation, or partnership. *Code Civ. Proc. §§ 492.030, 492.090*

Required findings in hearing to issue writ of possession of personal property. *Code Civ. Proc. § 512.060*

Statement of decision in proceeding conducted by referee. *Code Civ. Proc. §§ 638, 643-645*

Trial court in proceedings for third parties claiming rights in property held under writ of attachment as not required to make findings. *Code Civ. Proc. § 720.400*

Statement of decision in arbitration proceedings. *Code Civ. Proc. § 1291*

Required findings in case where issue is custody of child. *Fam. Code § 3041*

Application to probate proceedings of rules of practice in civil proceedings. *Prob. Code § 1000*

[4] Statement of Decision in Trial Courts

Request for statement of decision. *Code Civ. Proc. § 632*

Requirements as to function and form of statement of decision. *Code Civ. Proc. § 632*

Statement of decision as part of judgment roll. *Code Civ. Proc. § 670*

Legal Topics:

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§ 529.52 California Rules of Court

[1] Extension of and Noncompliance With Time Requirements

Written order in superior court extending time limits or excusing noncompliance with time limits prescribed by *Cal. Rules of Ct., Rule 3.1590*. *Cal. Rules of Ct., Rule 3.1590(m)*

Court may extend time for doing any act required by rules of court. *Cal. Rules of Ct., Rule 1.10(c)*

[2] Determinations of Fact in Appellate Court

Procedure for requesting that appellate court make fact determinations or take additional evidence on appeal. *Cal. Rules of Ct., Rule 8.252*

[3] Judgment When No Statement of Decision Requested

Time limit for preparing proposed judgment. *Cal. Rules of Ct., Rule 3.1590(h)*

Who prepares proposed judgment. *Cal. Rules of Ct., Rule 3.1590(h)*

Objections to proposed judgment. *Cal. Rules of Ct., Rule 3.1590(j)*

Court-ordered hearing on objections to proposed judgment. *Cal. Rules of Ct., Rule 3.1590(k)*

Filing of judgment by court. *Cal. Rules of Ct., Rule 3.1590(l)*

[4] Preparation of Statement of Decision

Tentative decision of court may order who will prepare proposed statement of decision or direct that tentative decision is to be statement of decision unless timely objection is made by any party. *Cal. Rules of Ct., Rule 3.1590(c)*

Response as to content of statement of decision. *Cal. Rules of Ct., Rule 3.1590(d)*

Procedure for preparation and service of proposed statement of decision and proposed judgment. *Cal. Rules of Ct., Rule 3.1590(f)*

Objections to proposed statement of decision. *Cal. Rules of Ct., Rule 3.1590(g)*

Court-ordered hearing on proposals or objections. *Cal. Rules of Ct., Rule 3.1590(k)*

[5] Statement of Decision Following Bifurcated Trial

Separate statement of decision, but not separate proposed judgment, as required for each factual issue tried separately. *Cal. Rules of Ct., Rule 3.1591*

[6] Trial Completed Within One Day

Procedures concerning announcement of tentative decision statement of decision and judgment when trial completed within one day. *Cal. Rules of Ct., Rule 3.1590(n)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureAppealsRecords on AppealGovernmentsCourtsRule Application & Interpretation

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§ 529.53 Decisions

[1] Amendment of Statement of Decision

Trial court properly amended statement of decision to provide prejudgment interest, when trial court could not abrogate parties' statutory rights to object to court's statement of decision by alternative procedure without making this absolutely clear when it sought parties' approval of its proposed alternative procedure, and trial court did not clearly state parties would be precluded from submitting objections to court's statement of decision, but court stated parties would have three days to "look over" statement of decision and proposed judgment "as to form" so that plaintiff may have reasonably concluded alternative procedure to which it had agreed did not preclude it from objecting to absence of prejudgment interest in decision; and when statement of decision issued by court could not automatically constitute final decision for purposes of entry of judgment, so that trial court had inherent power to amend statement of decision to award prejudgment interest. *Bay World Trading, Inc. v. Nebraska Beef, Inc. (2002) 101 Cal. App. 4th 135, 138-141, 123 Cal. Rptr. 2d 632*

Reviewing court may not disregard trial court's written statement of decision and base its determination of error on trial court's own oral explanation of decision when trial court did not modify statement of decision in accordance with oral pronouncement. *Rainier Credit Co. v. Western Alliance Corp. (1985) 171 Cal. App. 3d 255, 262, 217 Cal. Rptr. 291*

[2] Construction of Statement of Decision

Fact that trial court failed to mention issue in its oral statement does not preclude it from including that issue in its written statement of decision. *Wurzl v. Holloway (1996) 46 Cal. App. 4th 1740, 1756, 54 Cal. Rptr. 2d 512*

Under doctrine of invited error, party is not permitted to challenge particular determination of issue that he or she proposed; however, this doctrine does not apply to preclude challenge to language that party proposed only because he or she believed that it accurately represented court's reasoning on an issue found in other party's favor. *Estate of Davis (1990) 219 Cal. App. 3d 663, 670 n.13, 268 Cal. Rptr. 384*

Trial court's oral announcement of tentative decision is not binding and does not preclude inclusion in statement of decision of bases for decision that was not mentioned in oral announcement. *Neptune Society Corp. v. Longanecker (1987) 194 Cal. App. 3d 1233, 1245, 240 Cal. Rptr. 117*

[3] Death of Trial Judge Before Statement of Decision Filed

[a] In General

Presiding judge of superior court properly signed and entered judgment in conformity with "Intended Decision" of trial judge who died before hearing on objections to intended decision [*see Code Civ. Proc. § 635*] when there was no indication that deceased judge had contemplated any modification of decision and when proposed statement of decision provided complete and adequate basis for appellate review. *Leiserson v. City of San Diego (1986) 184 Cal. App. 3d 41, 48 n.8, 229 Cal. Rptr. 22*

[b] Failure to Make Statement of Decision

Statement of decision is not required when the trial court is not adjudicating questions of fact, but is sitting as a reviewing court scrutinizing an administrative decision. *Southern Cal. Gas Co. v. City of Vernon (1995) 41 Cal. App. 4th 209, 221, 48 Cal. Rptr. 2d 661*

Failure of trial court to render statement of decision after timely request has been made is reversible error. *In re Marriage of Reilley (1987) 196 Cal. App. 3d 1119, 1126, 242 Cal. Rptr. 302*

Improper failure of trial court to support its decision by written statement of decision requested pursuant to *Code Civ. Proc. § 632* requires reversal of judgment. *Bevli v. Brisco (1985) 165 Cal. App. 3d 812, 822, 212 Cal. Rptr. 36*

[c] Objection to Statement of Decision

Court erred in signing judgment and statement of decision without granting party opportunity to object, but error was cured when court vacated prematurely signed judgment, considered party's objections, and issued minute order accordingly. *National Secretarial Service, Inc. v. Froehlich (1989) 210 Cal. App. 3d 510, 523, 258 Cal. Rptr. 506*

[4] Request for Statement of Decision

For purposes of determining whether trial was concluded within one calendar day or in less than eight hours over more than one day, judicial time off the bench is not included. *Gorman v. Tassajara Development Corporation (2009) 178 Cal. App. 4th 44, 61-63, 100 Cal. Rptr. 3d 152*

Plaintiff's request for statement of decision was not proper under *Code Civ. Proc. § 632*, and trial court's statement supported presumption of correctness of judgment, when only three of plaintiff's 32 questions approximated nonargumentative specifications of factual issues, and it was doubtful even three raised principal controverted issues and when statement of decision, while going well beyond recital of ultimate facts found by court, clearly and adequately disclosed that it had decided plaintiff's claim. *Yield Dynamics, Inc. v. TEA Systems Corp. (2007) 154 Cal. App. 4th 547, 558-559, 66 Cal. Rptr. 3d 1*

Trial court properly denied request for statement of decision as untimely in marital dissolution court trial conducted over more than one day, when request was filed after final paper and court's tentative decision were filed, when party requesting statement of decision failed to show trial court erred in making express finding that trial lasted less than eight

hours, and no legal authority required courtroom clerk to keep track of time of trial in minutes. *In re Marriage of Gray (2002) 103 Cal. App. 4th 974, 977-980, 127 Cal. Rptr. 2d 271*

Although failure to request statement of decision may be fatal to appeal if record contains no explanation of final judgment, absence of statement is not fatal to appeal when judgment sets forth reasons for award. *In re Marriage of Seaman & Menjou (1991) 1 Cal. App. 4th 1489, 1494 n.2, 2 Cal. Rptr. 2d 690*

When there is no request for statement of decision, reviewing court is required to presume that every fact essential to judgment was proved and found by court and review is limited to determination whether there is any evidence, contradicted or uncontradicted, to support judgment. *Gibbs v. American Savings & Loan Assn. (1990) 217 Cal. App. 3d 1372, 1375, 266 Cal. Rptr. 517*

Denial of request for statement of decision in personal injury action in which liability was admitted and only issue concerned damages requires reversal of judgment; failure to distinguish between general and special damages in award of lump sum prevents effective review of judgment. *Gordon v. Wolfe (1986) 179 Cal. App. 3d 162, 167-168, 224 Cal. Rptr. 481*

[5] Special Proceedings Not Requiring Statement of Decision

Requirement of statement of decision on request under *Code Civ. Proc. § 632* as not applicable to mandamus action testing validity of administrative decision, since trial court is limited to review of substantiality of evidence received by administrative body, which is not factfinding process; advisability of findings regardless of applicable scope of review as satisfied by court's peremptory writ of mandate setting forth basis of its decision. *City of Carmel-By-The-Sea v. Board of Supervisors (1986) 183 Cal. App. 3d 229, 237, 227 Cal. Rptr. 899*

Hearing of application for preliminary injunction, even on declarations, is not a trial for purposes of requiring statement of decision under *Code Civ. Proc. § 632*. *People v. Landlords Professional Services, Inc. (1986) 178 Cal. App. 3d 68, 72, 223 Cal. Rptr. 483*

[6] Sufficiency and Content of Statement of Decision

In employment discrimination action on basis of age, trial court's statement of decision did not adopt erroneous burden of proof or fail to resolve material issues of fact, when court addressed ample evidence of employee's poor job performance in context of discussion of central issue of whether employer had discriminated on basis of age, and when statement of decision clearly addressed ultimate issue, which was whether employee had borne burden of proving employer's stated reasons for eliminating her position were pretextual and actually motivated by age discrimination; trial court adequately set out its express determination that employee failed to prove pretext, together with the ultimate facts supporting that determination and the legal basis for its decision. *Muzquiz v. City of Emeryville (2000) 79 Cal. App. 4th 1106, 1125-1126, 94 Cal. Rptr. 2d 579*

Trial court is not required to make express finding of fact on every factual matter controverted at trial, as long as its statement of decision sufficiently disposes of all basic issues in the case. *Bauer v. Bauer (1996) 46 Cal. App. 4th 1106, 1118, 54 Cal. Rptr. 2d 377*

Trial court is not required to make in its statement of decision detailed findings of evidentiary facts as to each piece of evidence relied on. *People v. Dollar Rent-a-Car Systems, Inc. (1989) 211 Cal. App. 3d 119, 127-128, 259 Cal. Rptr. 191*

Under *Code Civ. Proc. § 632*, trial court in issuing statement of decision is not required to address each question listed

in party's request; statement that provides explanation of factual and legal basis for court's decisions regarding principal controverted issues listed in request is sufficient. *Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co., Inc. (1988) 200 Cal. App. 3d 1518, 1525, 246 Cal. Rptr. 823*

Failure of trial court to make finding on particular matter is harmless error if judgment is otherwise supported; however, failure to make finding on particular matter is error when there is sufficient evidence to sustain that finding in favor of complaining party and that finding would countervail or destroy other findings. *Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co., Inc. (1988) 200 Cal. App. 3d 1518, 1525, 246 Cal. Rptr. 823*

Statement of decision need do no more than give reasons that state grounds on which judgment rests; statement of ultimate findings are all that is required. *Haight v. Handweiler (1988) 199 Cal. App. 3d 85, 90, 244 Cal. Rptr. 488*

Fact that statement of decision did not state that trial court considered deposition testimony or other extrinsic evidence did not imply that trial court failed to do so because nothing in *Code Civ. Proc. § 632* requires that statement of decision specify particular evidence considered by trial court in reaching its final determination. *Aviointeriors SpA v. World Airways, Inc. (1986) 181 Cal. App. 3d 908, 913, 914, 226 Cal. Rptr. 527*

Fact determination is required to be on inference drawn from evidence rather than on mere speculation regarding probabilities without evidence. *California Shoppers, Inc. v. Royal Globe Insurance Co. (1985) 175 Cal. App. 3d 1, 45, 221 Cal. Rptr. 171*

Trial court rendering statement of decision under *Code Civ. Proc. § 632* is required only to state ultimate rather than evidentiary facts. *McCurter v. Older (1985) 173 Cal. App. 3d 582, 593, 219 Cal. Rptr. 104* ; *Republic Indemnity Co v. Empire Builders Corp. (1985) 167 Cal. App. 3d 1163, 1167, 213 Cal. Rptr. 787*

Court is not required to provide specific answers to questions by requesting party so long as findings in statement fairly disclose court's determination of all material issues. *People v. Casa Blanca Convalescent Homes, Inc. (1984) 159 Cal. App. 3d 509, 525, 206 Cal. Rptr. 164*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewEvidenceProcedural ConsiderationsRulings on EvidenceGovernmentsCourtsJudges

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§ 529.54 Decisions Under Prior Law

CAUTION:

In 1981, *Code Civ. Proc. §§ 632, 634, 662,* and *909* and Cal. Rules of Ct., Rule 232, were amended to replace findings of fact and conclusions of law with statements of decision. Many of the following cases were decided under prior statutes and rules, and these refer to procedures relating to findings of fact. Cases decided under prior law are mentioned, not as binding authority, but as persuasive authority only, which may be useful in providing guidance in areas not expressly covered under the amended statutes and rules [*see McCurter v. Older (1985) 173 Cal. App. 3d 582, 591-592, 219 Cal. Rptr. 104* , *disapproved on other grounds, In re Marriage of Arceneaux (1990) 51 Cal. 3d 1130, 1137, 275 Cal. Rptr. 797, 800 P.2d 1227]* . Older cases are, of course, not relevant if a provision of the statute material to the decision has changed [*see In re Marriage of Arceneaux (1990) 51 Cal. 3d 1130, 1137, 275 Cal. Rptr. 797, 800 P.2d 1227]* .

[1] Amendment of Findings

Trial court as afforded final opportunity to adjust form and contents of findings through ruling on motion for new trial. *Vogelsang v. Wolpert (1964) 227 Cal. App. 2d 102, 129, 38 Cal. Rptr. 440* (decided under prior law)

Appellate court as having power to amend findings where findings conflicting as result of inadvertence due to clerical error. *Johndrow v. Thomas (1947) 31 Cal. 2d 202, 207, 187 P.2d 681* (decided under prior law)

Only mode by which findings may be disturbed by trial court after they have been filed and judgment entered, except in cases of clerical error or misprision, as by granting of new trial, since entered judgment terminates power of trial court to change findings. *Hole v. Takekawa (1913) 165 Cal. 372, 375-376, 132 P. 445* (decided under prior law)

Purpose of former *Code Civ. Proc. § 662*, permitting court to change or add findings in ruling on motion for new trial, as to give to court on denying motion for new trial broad power to change its findings and to modify its judgment, thereby avoiding necessity of new trial. *Spier v. Lang (1935) 4 Cal. 2d 711, 714, 53 P.2d 138* (decided under prior law)

Findings of fact as not permitted to be amended to correct judicial error after judgment becomes final. *People v. A.T.L., Inc. (1957) 150 Cal. App. 2d 152, 153, 309 P.2d 552* (decided under prior law)

Findings of fact as permitted to be amended to correct mere clerical errors after judgment becomes final. *Williams v. Koenig (1934) 219 Cal. 656, 658-659, 28 P.2d 351* (decided under prior law)

[2] Construction of Findings

[a] In General

Findings of fact as required to be liberally construed to support judgment. *Johndrow v. Thomas (1947) 31 Cal. 2d 202, 207, 187 P.2d 681* (decided under prior law)

Substantial conflicts in findings as required to be resolved in favor of prevailing party and all legitimate and reasonable inferences indulged in to uphold findings if possible. *Richter v. Walker (1951) 36 Cal. 2d 634, 640, 226 P.2d 593* (decided under prior law)

Where findings of fact support conclusions necessary to judgment, absence or omission of proper specific conclusion as not availing to defeat judgment. *Roberts v. Graves (1969) 269 Cal. App. 2d 410, 419, 75 Cal. Rptr. 130* (decided under prior law)

Where findings are inconsistent, judgment as not permitted to be set aside unless conflict is clear and material and findings are incapable of being harmoniously construed. *Richter v. Walker (1951) 36 Cal. 2d 634, 639, 226 P.2d 593* (decided under prior law)

Inconsistent finding that supports judgment as disregarded as surplusage when correct finding also supports judgment. *Zinn v. Fred R. Bright Co. (1969) 271 Cal. App. 2d 597, 604, 76 Cal. Rptr. 663* (decided under prior law)

When difference exists in sum of damages between findings and judgment, findings as controlling. *Jen-Mar Constr. Co. v. Brown (1967) 247 Cal. App. 2d 564, 570, 55 Cal. Rptr. 832* (decided under prior law)

In absence of indications to contrary, general finding as including finding of all special facts necessary to sustain it. *Albonico v. Madera Irrigation Dist. (1960) 53 Cal. 2d 735, 741, 3 Cal. Rptr. 343, 350 P.2d 95* (decided under prior law)

Mixed findings of fact and conclusions of law in interpretation of instrument as not relieving appellate court from exercising its independent judgment in construing terms of instrument. *Estate of Page (1967) 254 Cal. App. 2d 702, 709, 62 Cal. Rptr. 740* (decided under prior law)

[b] Antecedent Expressions of Trial Court

Memorandum opinion or other antecedent expression of the court is usable to explain its formal written findings. Chapple v. Big Bear Super Market No. 3 *(1980) 108 Cal. App. 3d 867, 874, 167 Cal. Rptr. 103* (decided under prior law)

Court's memorandum of intended decision does not impeach findings of fact containing conclusions on all questions of fact submitted for decision. *Bulmash v. Davis (1979) 24 Cal. 3d 691, 701, 157 Cal. Rptr. 66, 597 P.2d 469* (decided under prior law)

No antecedent expression of judge, whether casual or cast in form of opinion, can in any way restrict judge's absolute power to declare his or her final conclusion by filing findings of fact and conclusions of law. *Strudthoff v. Yates (1946) 28 Cal. 2d 602, 616, 170 P.2d 873* (decided under prior law)

Opinion of trial court cannot be substituted for nor used to modify findings or judgment since findings of fact embody conclusions of trial court on all questions of fact submitted to it for decision. *Strudthoff v. Yates (1946) 28 Cal. 2d 602, 615-616, 170 P.2d 873* (decided under prior law)

Findings and conclusions are final deliberate expression of court, and expressions of judge during trial cannot be considered for purpose of contradicting deliberate findings and conclusions that he or she subsequently makes and files. *Martin School of Aviation v. Bank of America (1957) 48 Cal. 2d 689, 695, 312 P.2d 251* (decided under prior law)

Oral or written opinion by trial judge is not itself decision of court of judgment and cannot be used to challenge judgment or express findings. *Dairyman's Cooperative Creamery Assn. v. Leipold (1973) 34 Cal. App. 3d 184, 188, 109 Cal. Rptr. 753* (citing Witkin, California Procedure (2d ed.), Vol. 4, *Judgment*, § 5) (decided under prior law)

Memorandum decision cannot be relied on to fill interstices in findings and conclusions left void by failure to find pursuant to special request for findings. *Morris v. Thogmartin (1973) 29 Cal. App. 3d 922, 930, 105 Cal. Rptr. 919* (decided under prior law)

Memorandum of decision is superseded by judgment under former Cal. Rules of Ct., Rule 232(a) [*now see Cal. Rules of Ct., Rule 3.1590(a)*], and is not in itself appealable. *Burgess v. Board of Education (1974) 41 Cal. App. 3d 571, 582, 116 Cal. Rptr. 183* (decided under prior law)

Memorandum opinion can be resorted to, to ascertain grounds of its decision, to learn process by which court reached its decision, to ascertain court's theory of decision, or to ascertain basis for conclusion of law when conclusion gives no explanation for ruling. *Estate of Russell (1971) 17 Cal. App. 3d 758, 763, 95 Cal. Rptr. 88* (decided under prior law)

[c] Findings Prepared by Counsel

Where findings are prepared by counsel designated by court, and counsel was at liberty to use own judgment as to text of findings, no claim of insufficiency of findings can be entertained on appeal from judgment. *Snow Mountain Water & Power Co. v. Kraner (1923) 191 Cal. 312, 325, 216 P. 589* ; *Johnson v. Rich (1957) 150 Cal. App. 2d 740, 747, 310 P.2d 980* (decided under prior law)

[d] Proposed Findings and Conclusions

Proposed findings and conclusions prepared by respective parties prior to signing of findings and used in settlement thereof are of no legal significance, have no value as evidence, and cannot be used in determination of appeal. *Howard v. Howard (1953) 119 Cal. App. 2d 122, 124, 259 P.2d 41* (decided under prior law)

[3] Construction When No Findings Required

In absence of findings of fact and conclusions of law, every intendment is in favor of judgment or order appealed from and every fact or inference essential to support or order and warranted by evidence found by court is presumed. *Reid v. Valley Restaurants, Inc. (1957) 48 Cal. 2d 606, 609, 311 P.2d 473* ; *Estate of Rule (1944) 25 Cal. 2d 1, 10, 152 P.2d 1003* (decided under prior law); *Schubert v. Reynolds (2002) 95 Cal. App. 4th 100, 104, 115 Cal. Rptr. 2d 285*

Appellate court is required to assume that trial court found all necessary facts to support judgment where no findings and conclusions are requested. *Dairyman's Cooperative Creamery Assn. v. Leipold (1973) 34 Cal. App. 3d 184, 188-189, 109 Cal. Rptr. 753* (decided under prior law)

[4] Entry of Judgment Without Required Findings

Entry of judgment without findings when findings are required and not waived is material error in procedure. *Petroleum Midway Co. v. Zahn (1944) 62 Cal. App. 2d 645, 652, 145 P.2d 371* (decided under prior law)

Judgment entered without findings when findings are required is nullity and is superseded by subsequent judgment based on findings. *Ohio Cas. Ins. Co. v. Northwestern Mut. Ins. Co. (1971) 17 Cal. App. 3d 204, 207, 94 Cal. Rptr. 586* (decided under prior law)

Dismissal of appeal from judgment rendered void by entry of valid judgment containing required findings and conclusions. *Supple v. Luckenbach (1938) 12 Cal. 2d 319, 323, 84 P.2d 52* (decided under prior law)

Appeal is dismissed when no findings and conclusions made as required. *Larson v. Thoresen (1951) 36 Cal. 2d 666, 670, 226 P.2d 571* (decided under prior law)

Failure to make findings of fact when required in mandate proceeding does not affect validity of judgment so much as right to appeal therefrom. *International Asso. of Fire Fighters v. Palo Alto (1963) 60 Cal. 2d 295, 300, 32 Cal. Rptr. 842, 384 P.2d 170* (decided under prior law)

Proper procedure when judgment entered without required findings and conclusions is reversal of judgment with directions to enter findings and conclusions rather than dismissal of appeal, since dismissal affirms judgment or order appealed from. *Doty v. Doty (1975) 52 Cal. App. 3d 672, 678, 125 Cal. Rptr. 153* (decided under prior law)

[5] Failure to Make Findings

[a] In General

Denial of defendant's request for findings under former *Code Civ. Proc. § 632* is reversible error when requested findings were both material and essential to determine whether defendant was entitled to allocation of costs under *Code Civ. Proc. § 998(c)*. *Harvard Investment Co. v. Gap Stores, Inc. (1984) 156 Cal. App. 3d 704, 708-713, 202 Cal. Rptr. 891* (decided under prior law)

1968 amendment to *Code Civ. Proc. § 632*, changing its provisions to require findings and conclusions only on request, did not change prior case law as to effect of failure to make findings when findings are required. *Williams v. Williams (1971) 14 Cal. App. 3d 560, 566 n. 1, 92 Cal. Rptr. 385* (decided under prior law)

Trial court's depriving litigant of right to findings and conclusions by filing judgment or order unsupported by findings was improper. *Doty v. Doty (1975) 52 Cal. App. 3d 672, 678, 125 Cal. Rptr. 153* (decided under prior law)

When findings are essential, final judgment may not be rendered until findings signed and filed. *Supple v. Luckenbach (1938) 12 Cal. 2d 319, 320-321, 84 P.2d 52* (decided under prior law)

Judgment entered without findings when findings required is nullity. *McBride v. Alpha Realty Corp. (1975) 49 Cal. App. 3d 925, 928, 123 Cal. Rptr. 270* (quoting *Ohio Cas. Ins. Co. v. Northwestern Mut. Ins. Co. (1971) 17 Cal. App. 3d 204, 207, 94 Cal. Rptr. 586*) (decided under prior law)

Judgment rendered without findings on all material issues must be reversed. *Weisz Trucking Co. v. Emil R. Wohl Constr. (1970) 13 Cal. App. 3d 256, 263, 91 Cal. Rptr. 489* ; *Anderson v. Southern Pac. Co. (1968) 264 Cal. App. 2d 230, 235, 70 Cal. Rptr. 389* (decided under prior law)

When material issue raised by pleadings and evidence and party desiring findings on issue submitted proposed findings, failure of court to make findings is reversible error. *Williams v. Williams (1971) 14 Cal. App. 3d 560, 566, 92 Cal. Rptr. 385* (decided under prior law)

Failure to find on issue is not ground for reversal when record discloses no evidence on which finding favorable to complaining party could properly be made. *Kalashian v. Fresno County (1973) 35 Cal. App. 3d 43, 52, 110 Cal. Rptr. 429* (decided under prior law)

[b] Prejudicial Error Required

Appellant could not complain of failure to make finding which necessarily would have been adverse to him. *Santoro v. Carbone (1972) 22 Cal. App. 3d 721, 730 99 Cal. Rptr. 488* (decided under prior law)

Failure to find on issue is not ground for reversal when no substantial right of appellant is prejudiced thereby. *Kerr Land & Timber Co. v. Emmerson (1965) 233 Cal. App. 2d 200, 223, 43 Cal. Rptr. 333* (quoting from *Eastman v. Piper (1924) 68 Cal. App. 554, 559, 229 P. 1002*) (decided under prior law)

[c] Reversal

When judgment must be reversed for failure to make required findings and record does not indicate any purpose to be served in ordering new trial, proper procedure is to remand case with directions to trial court to make adequate findings based on evidence before it, to draw proper conclusions, and to enter judgment accordingly. *Weisz Trucking Co. v. Emil R. Wohl Constr. (1970) 13 Cal. App. 3d 256, 264, 91 Cal. Rptr. 489* (decided under prior law)

Appellate court has jurisdiction to reverse judgment when findings not made when required since appeal may be taken from judgment or order notwithstanding fact that it is void. *Petroleum Midway Co. v. Zahn (1944) 62 Cal. App. 2d 645, 652, 145 P.2d 371* (decided under prior law)

[6] Preparation

Judge may prepare own findings. *Estate of McCormack (1969) 2 Cal. App. 3d 492, 501, 82 Cal. Rptr. 651* (decided under prior law)

Time for service and filing of findings and conclusions, as subject to time extension provisions of *Code Civ. Proc. § 1013(a)*. *McBride v. Alpha Realty Corp. (1975) 49 Cal. App. 3d 925, 929, 123 Cal. Rptr. 270* (decided under prior law)

Failure of trial court to read findings prepared by prevailing party on controverted facts was improper and constituted irregularity under *Code Civ. Proc. § 657(1)* related to motions for new trial. *Chung Sing v. Southern Pac. Co. (1920) 182 Cal. 609, 609-610* (decided under prior law)

[7] Purpose of Requiring Findings

Purpose of findings is to answer questions raised by pleadings and to make case more susceptible to review by disclosing exact grounds on which judgment rests. *Estate of Pack (1965) 233 Cal. App. 2d 74, 78, 43 Cal. Rptr. 361* (decided under prior law)

Duty of trial court to make findings on all material issues in order that parties and appellate court may determine factual basis for court's decision. *Green v. City of Los Angeles (1974) 40 Cal. App. 3d 819, 835, 115 Cal. Rptr. 685* (decided under prior law)

Function of trial court as normal and primary finder of facts is uniformly recognized. *Hicks v. Barnes (1952) 109 Cal. App. 2d 859, 863, 241 P.2d 648* (decided under prior law)

[8] Requirements and Sufficiency of Findings

[a] Findings Required to State Ultimate Facts

[i] In General

Trial court must find ultimate facts; that is, court as required to find those facts to which legal consequences attach. *London v. Guberman (1963) 214 Cal. App. 2d 215, 219, 29 Cal. Rptr. 279* (decided under prior law)

Ultimate facts as logical conclusions deduced from certain primary facts evidentiary in character. *Hayward Lbr. & Inv. Co. v. Construction Products Corp. (1952) 110 Cal. App. 2d 1, 3, 241 P.2d 1054* (decided under prior law)

Findings of fact as not excluding conclusions of fact, only conclusions of law. *Hayward Lbr. & Inv. Co. v. Construction Prod. Corp. (1952) 110 Cal. App. 2d 1, 3, 241 P.2d 1054* (decided under prior law)

Finding of ultimate fact of serious and willful misconduct in language of statute as not fatally insufficient in form merely because of generality of language. *California Shipbuilding Corp. v. Industrial Acci. Com. (1947) 31 Cal. 2d 270, 271, 188 P.2d 27* (involving award of increased compensation in workers' compensation case) (decided under prior law)

Plaintiff as having no prescriptive or other right to receive water from canal at any other level than bottom of canal as ultimate fact. *Weidenmueller v. Stearns Ranchos Co. (1900) 128 Cal. 623, 625-626, 61 P. 374* (decided under prior law)

Plaintiff as having not rescinded sales as ultimate fact. *Hollenbach v. Schnabel (1894) 101 Cal. 312, 317, 35 P. 872* (decided under prior law)

Finding of amount of damage and injury as ultimate fact to be deduced from evidence of wherein such damage consisted. *Klein v. Milne (1926) 198 Cal. 71, 75, 243 P. 420* (decided under prior law)

Defendant as having no right, title, interest, claim, or lien of, in, to, or against any of land or premises as ultimate fact. *Dam v. Zink (1896) 112 Cal. 91, 93, 44 P. 331* (decided under prior law)

Finding of indebtedness as not conclusion of law but as statement of ultimate fact. *Nisbet v. Rhinehart (1935) 2 Cal. 2d 477, 482, 42 P.2d 71* (decided under prior law)

Finding that property owned by married person is separate property as finding of ultimate fact. *In re Marriage of Knickerbocker (1974) 43 Cal. App. 3d 1039, 1042, 118 Cal. Rptr. 232* (decided under prior law)

[ii] Conclusions of Law Distinguished

If, from facts in evidence, result can be reached by that process of natural reasoning adopted in investigation of truth, result as ultimate fact and not conclusion of law. *Levins v. Rovegno (1886) 71 Cal. 273, 278, 12 P. 161* ; *Ball v. American Trial Lawyers Assn. (1971) 14 Cal. App. 3d 289, 306, 92 Cal. Rptr. 228* (decided under prior law)

If, from facts in evidence, resort must be had to artificial processes of law in order to reach final determination, result as conclusion of law. *Levins v. Rovegno (1886) 71 Cal. 273, 278, 12 P. 161* ; *Ball v. American Trial Lawyers Assn. (1971) 14 Cal. App. 3d 289, 306, 92 Cal. Rptr. 228* (decided under prior law)

When findings made as to fact that damage was or was not suffered, or that it was suffered to certain extent, are unaccompanied by facts to support them, such findings as conclusions of law, *D'Andrea v. Pringle (1966) 243 Cal. App. 2d 689, 696, 52 Cal. Rptr. 606* (decided under prior law)

Finding that property was held in constructive trust as not finding but conclusion of law. *Efron v. Kalmanovitz (1967) 249 Cal. App. 2d 187, 195, 57 Cal. Rptr. 248* (decided under prior law)

Finding in equity action to set aside default judgment that entry of default judgment was due to extrinsic mistake of fact as conclusion of law. *Lieberman v. Aetna Ins. Co. (1967) 249 Cal. App. 2d 515, 530, 57 Cal. Rptr. 453* (decided under prior law)

Word or phrase standing for fact in one connection as designating conclusion of law in different connection. *Hill v. Finigan (1888) 77 Cal. 267, 273, 19 P. 494* (decided under prior law)

While pleading of ownership may be that of ultimate fact, when it appears that allegation of ownership is based on evidentiary facts, ownership as then mere conclusion of law. *Palpar, Inc. v. Thayer (1947) 82 Cal. App. 2d 578, 583, 186 P.2d 748* ; *Morel v. Morel (1928) 203 Cal. 417, 419, 264 P. 760* (decided under prior law)

When no conflict in evidence exists, finding by trial court on issue in question as amounting to conclusion of law. *County of San Diego Trust & Sav. Bank v. San Diego (1940) 16 Cal. 2d 142, 153, 105 P.2d 94* (decided under prior law)

Unless facts on which finding of good faith or bad faith is based are stated, such finding as conclusion of law. *D'Andrea v. Pringle (1966) 243 Cal. App. 2d 689, 697, 52 Cal. Rptr. 606* (decided under prior law)

Finding of unfairness or fraud imposed by law without regard to actual intention of defendant as one reached by artificial processes of law based on other subsidiary findings of fact. *Ball v. American Trial Lawyers Assn. (1971) 14 Cal. App. 3d 289, 306, 92 Cal. Rptr. 228* (decided under prior law)

Reference to rule of evidence as not proper part of conclusion of law. *Estate of Grimble (1974) 42 Cal. App. 3d 741, 749, 117 Cal. Rptr. 125* (decided under prior law)

[iii] Evidentiary or Probative Facts

In marital dissolution proceeding, in response to petition's request for statement of decision with 37 questions, trial court was not required to discuss each question listed in request; court properly explained factual and legal basis of its decision regarding principal controverted issues at trial as are listed in request. *In re Marriage of Balcof (2006) 141 Cal. App. 4th 1509, 1530-1531, 47 Cal. Rptr. 3d 183*

Findings, including any special findings requested, as required to state ultimate facts, and as not permitted to state evidentiary facts relied on by court to reach ultimate facts. *Seeley v. Combs (1966) 65 Cal. 2d 127, 132, 52 Cal. Rptr. 578, 416 P.2d 810* ; *Hayward Lbr. & Inv. Co. v. Construction Prod. Corp. (1952) 110 Cal. App. 2d 1, 3, 241 P.2d 1054* (decided under prior law)

Findings as required to adequately state ultimate facts, and probative or evidentiary facts supportive thereof as neither required nor proper. *Beaupre v. Nave (1970) 13 Cal. App. 3d 402, 407, 91 Cal. Rptr. 473* (decided under prior law)

Where finding of ultimate fact made, trial court as not required to give its reason for finding since evidence given at trial furnished reason therefor. *Hayward Lbr. & Inv. Co. v. Construction Prod. Corp. (1952) 110 Cal. App. 2d 1, 3, 241 P.2d 1054* (decided under prior law)

Test for determination of whether findings state ultimate facts rather than evidentiary facts or conclusions of law as same test as that applied in determining sufficiency of pleadings. *D'Andrea v. Pringle (1966) 243 Cal. App. 2d 689, 695, 52 Cal. Rptr. 606* (decided under prior law)

Former *Code Civ. Proc. §§ 632, 634* as only requiring that findings disclose court's determination of all issues of fact in case; issues as required to relate to ultimate facts and not specific determination on every conflict of evidence, much less to diagram all intermediate decisions of law. *Moreno v. Jessup Buena Vista Dairy (1975) 50 Cal. App. 3d 438, 447, 123 Cal. Rptr. 393* (decided under prior law)

Fact of agency as evidentiary and as not required to be found. *Kerr Land & Timber Co. v. Emmerson (1965) 233 Cal. App. 2d 200, 223, 43 Cal. Rptr. 333* (decided under prior law)

[b] Inconsistent Findings

Inconsistent findings when one part would support the judgment and another would necessarily upset it as requiring reversal of judgment. Chapple v. Big Bear Super Market No. 3 *(1980) 108 Cal. App. 3d 867, 875, 167 Cal. Rptr. 103* (decided under prior law)

Inconsistent or unsupported findings as not compelling reversal of judgment when at least one clear finding is sustained by evidence. *Conley v. Lieber (1979) 97 Cal. App. 3d 646, 658, 158 Cal. Rptr. 770* (decided under prior law)

[c] Inferred Findings

Where proper findings have been made on various issues of case, trial court as not required to negate issues contradictory thereto, since finding on particular issue is implied negation of all contradictory propositions. *Beaupre v. Nave (1970) 13 Cal. App. 3d 402, 408, 91 Cal. Rptr. 473* (decided under prior law)

Unless there is request for special findings or defect in findings is brought to attention of trial court, judgment as not permitted to be set aside because of failure to make express finding on issue, if finding thereon results by necessary implication from express findings which are made. *In re Marriage of Warren (1972) 28 Cal. App. 3d 777, 785, 104 Cal. Rptr. 860* ; *Auer v. Frank (1964) 227 Cal. App. 2d 396, 407, 38 Cal. Rptr. 684* (decided under prior law)

Judgment as not to be set aside because of failure to make express finding on issue if finding thereon, consistent with judgment, results by necessary implication from express findings. *Culbertson v. Cizek (1964) 225 Cal. App. 2d 451, 465, 37 Cal. Rptr. 548* (decided under prior law)

In absence of special request for special findings, finding that contract was fully performed as impliedly finding that alleged breaches did not occur. *Robinson v. Diller (1969) 274 Cal. App. 2d 813, 815, 79 Cal. Rptr. 508* (decided under prior law)

If findings support judgment, judgment as affirmed, regardless of whether or not conclusions are consistent or properly stated, or even if conclusions are omitted entirely. *Estate of Grimble (1974) 42 Cal. App. 3d 741, 750, 117 Cal. Rptr. 125* (decided under prior law)

[d] Preparation of Findings

[i] Consolidated Actions

Consolidated actions as permitted to be determined by single set of findings since allegations of complaints may be taken together and treated as one pleading. *Didier v. American Cas. Co. (1968) 261 Cal. App. 2d 742, 752, 68 Cal. Rptr. 217* (decided under prior law)

[ii] Format

Findings and conclusions ordinarily under prevailing custom and practice as set forth in separate instrument, but neither statute nor rule as requiring that this be done. *Baron v. Baron (1970) 9 Cal. App. 3d 933, 937, 88 Cal. Rptr. 404* (decided under prior law)

Findings and conclusions as permitted to be contained in judgment itself, although not usual practice. *Supple v. Luckenbach (1938) 12 Cal. 2d 319, 322, 84 P.2d 52* ; *Estate of Pesula (1957) 150 Cal. App. 2d 462, 466, 310 P.2d 39* (decided under prior law)

[e] Specific Probative Findings

Where conclusions, whether characterized as ultimate fact or conclusion of law, are drawn from specific probative findings, such conclusions as unable to stand if not supported by or inconsistent with such specific findings. *Green v. Smith (1968) 261 Cal. App. 2d 392, 397-398, 67 Cal. Rptr. 796* (decided under prior law)

Specific findings as controlling if in conflict with general findings as to pleadings. *Staub v. Muller (1936) 7 Cal. 2d 221, 226, 60 P.2d 283* (decided under prior law)

Finding of probative facts as not controlling, limiting, or modifying finding of ultimate facts and as not tending to establish that ultimate facts were found against evidence unless ultimate facts are necessarily based on probative findings and are completely overcome. *Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 655, 3 Cal. Rptr. 421* (decided under prior law)

Where probative facts are found from which appellate court can declare that ultimate facts necessarily result, finding as sufficient. *McCray v. Burr (1899) 125 Cal. 636, 638, 58 P. 203* (decided under prior law)

As long as specific findings made support judgment, defective or omitted finding as unable to be prejudicial. *Rubin v. Toberman (1964) 226 Cal. App. 2d 319, 329, 38 Cal. Rptr. 32* (decided under prior law)

[f] Sufficiency of Findings

[i] In General

Findings as required to provide sufficient guidance to enable reviewing court to determine how trial court resolved material issues in case. *Whitney Inv. Co. v. Westview Dev. Co. (1969) 273 Cal. App. 2d 594, 604, 78 Cal. Rptr. 302* (decided under prior law)

Finding as sufficient if it is responsive to averments and denials of pleadings with respect to issue. *Dam v. Zink (1896) 112 Cal. 91, 93, 44 P. 331* (decided under prior law)

If findings sufficient to support judgment, findings as not vitiated by unintelligibility of other findings. *Richter v. Walker (1951) 36 Cal. 2d 634, 639* (decided under prior law)

Even though minor inconsistencies, legal conclusions, and evidentiary matters may appear in findings, findings as to be liberally construed and resolved in favor of upholding rather than defeating judgment. *Woodbine v. Van Horn (1946) 29 Cal. 2d 95, 109, 173 P.2d 17* (decided under prior law)

Negative pregnants followed by recitals coupled with conjunctive as not always rendering findings insufficient. *Johndrow v. Thomas (1947) 31 Cal. 2d 202, 208-209, 187 P.2d 681* (decided under prior law)

When proceedings governed by statute, statute as generally controlling how specific findings must be. *Albonico v. Madera Irrigation Dist. (1960) 53 Cal. 2d 735, 741, 3 Cal. Rptr. 343, 350 P.2d 95* (decided under prior law)

Findings that referred only to truth and falsity of allegations contained in complaint and cross complaint are not in compliance with *Cal. Rules of Ct., Rule 3.1590* and constitute reversible error since losing party is unable to prepare record on appeal. *Martin v. Baker (1974) 43 Cal. App. 3d 1049, 1053-1054, 118 Cal. Rptr. 238* (decided under prior law)

Finding that allegations contained in pleading not in accord with or contrary to findings already found as ambiguous finding of fact since it cannot be determined which allegations in answer trial court believed to be contrary to or inconsistent with previous findings of fact. *Rubin v. Toberman (1964) 226 Cal. App. 2d 319, 328, 38 Cal. Rptr. 32* (decided under prior law)

Rule of negative pregnant, rendering findings insufficient, as not applicable if rule of liberal construction of findings to support judgment is applicable. *Johndrow v. Thomas (1947) 31 Cal. 2d 202, 208, 187 P.2d 681* (decided under prior law)

Finding of negligence couched in general terms as insufficient in response to complaint which alleges specific act of negligence if defendants make appropriate request for findings on such act. *Goss v. Fanoe (1952) 114 Cal. App. 2d 819, 824, 251 P.2d 337* (decided under prior law)

[ii] Definiteness and Certainty Required

Findings of fact as required to be definite and certain so that defeated party may show how or in what manner findings made are unsupported by evidence. *Ball v. American Trial Lawyers Assn. (1971) 14 Cal. App. 3d 289, 307, 92 Cal. Rptr. 228* (decided under prior law)

Findings as required to be sufficiently definite and certain so that reviewing court can arrive at just determination of merits of appeal. *Bank of Cal. v. Connolly (1973) 36 Cal. App. 3d 350, 369, 111 Cal. Rptr. 468* (decided under prior law)

Where finding is fatally uncertain, such finding as equivalent to failure to find. *Rubin v. Toberman (1964) 226 Cal. App. 2d 328-329, 226 Cal. App. 2d 319, 329, 38 Cal. Rptr. 32* (decided under prior law)

Any uncertainty in findings as to be construed to support judgment rather than defeat it. *Richter v. Walker (1951) 36 Cal. 2d 634, 639, 226 P.2d 593* ; *Sutter v. Madrin (1969) 269 Cal. App. 2d 161, 170, 74 Cal. Rptr. 627* (decided under prior law)

Uncertainties not brought to attention of trial court that exist in findings as to be resolved, if reasonably possible, to support judgment. *Ensele v. Jolley(1922) 188 Cal. 297, 302, 204 P. 1085* ; *Neel v. San Antonio Community Hosp. (1959) 176 Cal. App. 2d 233, 237, 1 Cal. Rptr. 313* (decided under prior law)

[9] Special Findings

[a] Failure to Make Requested Finding

Failure of trial court to make finding on issue for which special finding was requested as reversible error if substantial evidence introduced to support finding. *Hemmerling v. Tomlev, Inc. (1967) 67 Cal. 2d 572, 576, 63 Cal. Rptr. 1, 432 P.2d 697* (decided under prior law)

When court required to make finding on value of property condemned and on each estate therein, failure to make finding on value of each estate following request for special finding as reversible error. *Hemmerling v. Tomlev, Inc. (1967) 67 Cal. 2d 572, 576, 63 Cal. Rptr. 1, 432 P.2d 697* (decided under prior law)

Refusal of trial judge to make special findings as requested on issues of foreseeability of harm, nature and extent of duty, and acts constituting breach of duty as reversible error. *Morris v. Thogmartin (1973) 29 Cal. App. 3d 922, 927-929, 105 Cal. Rptr. 919* (decided under prior law)

Duty of complying with requirement for special findings as resting on trial court, not losing party. *Morris v. Thogmartin (1973) 29 Cal. App. 3d 922, 930, 105 Cal. Rptr. 919* (decided under prior law)

Finding of negligence in general terms as insufficient in face of request for specific factual findings under former *Code Civ. Proc. § 634*, on which finding of negligence was predicated. *Shell Oil Co. v. Allied Constr. & Eng'r Co. (1971) 22 Cal. App. 3d 1, 5-6, 98 Cal. Rptr. 922* (decided under prior law)

Failure to make special finding, on plaintiffs' request, on issue of whether contractor acted reasonably in rejecting sureties on bond pursuant to satisfaction clause contained in his contract with plaintiffs as reversible error. *Weisz Trucking Co. v. Emil R. Wohl Constr. (1970) 13 Cal. App. 3d 256, 263, 91 Cal. Rptr. 489* (decided under prior law)

Finding that city had no notice of defective condition in sidewalk as insufficient when plaintiff requested special findings under *Code Civ. Proc. § 634* on whether there had been previous fall at the location. *Garber v. Los Angeles (1964) 226 Cal. App. 2d 349, 356, 38 Cal. Rptr. 157* (decided under prior law)

Finding on issue of total cost on construction contract without making further findings on reasonable value of extras and changes under contract as reversible error when such further findings were requested. *Culbertson v. Cizek (1964) 225 Cal. App. 2d 451, 465-466, 37 Cal. Rptr. 548* (decided under prior law)

In action to recover money from defendant who maintained fiduciary relationship with plaintiff, trial court's refusal to make special findings, as requested, on issues of subnormal intelligence of plaintiff and confidential relationship as reversible error. *Ortiz v. Avila (1963) 222 Cal. App. 2d 786, 790-792, 35 Cal. Rptr. 522* (decided under prior law)

When evidence offered and trial briefs argued existence of oral contract and trial court found only that there was no written contract, ambiguity as created under former *Code Civ. Proc. § 634* and appellate court as unable to determine issue found by trial court in favor of prevailing party. *Distribu-Dor, Inc. v. Karadanis (1970) 11 Cal. App. 3d 463, 467, 90 Cal. Rptr. 231* (decided under prior law)

[b] Failure to Request Special Findings

[i] In General

While failure to object to findings is not waiver of failure to find on material issue, rule that findings must be construed liberally in support of judgment as particularly applicable in absence of request for specific findings. *Pilch v. Milikin (1962) 200 Cal. App. 2d 212, 225, 19 Cal. Rptr. 334* ; *McKinley v. Buchanan (1959) 176 Cal. App. 2d 608, 612, 1 Cal. Rptr. 573* (decided under prior law)

When losing party has had opportunity to obtain specific findings but has failed to avail himself or herself of such right in trial court, his or her assertion of insufficiency of findings for uncertainty as unfair to court and prevailing party and as militating against expeditious disposition of lawsuits. *Nemeth v. Pankost (1964) 224 Cal. App. 2d 351, 355, 36 Cal. Rptr. 600* (decided under prior law)

Failure to request specific findings or otherwise bring to attention of court objection based on specificity as requiring appellate court to assume that finding of ultimate fact includes finding of all probative facts necessary to sustain it. *Yakov v. Board of Medical Examiners (1968) 68 Cal. 2d 67, 71 n. 2, 64 Cal. Rptr. 785, 435 P.2d 553* (decided under prior law)

[ii] Invoking Sanction

Prohibition of *Code Civ. Proc. § 634* against inferred findings as applying only if party attacking judgment requested specific finding or otherwise brought defect to attention of trial court. *In re Marriage of Warren (1972) 28 Cal. App. 3d 777, 785, 104 Cal. Rptr. 860* (decided under prior law)

When from all papers filed in connection with new trial motion and transcript of argument on that motion appellants never suggested to court that findings were ambiguous or incomplete, but only that findings were in error, appellate court as not bound by provisions of former *Code Civ. Proc. § 634* since appellants never brought alleged deficiency to attention of trial court. *Tyler v. Norton (1973) 34 Cal. App. 3d 717, 725-726, 110 Cal. Rptr. 307* (decided under prior law)

[c] Omission in Findings

Request that trial court comment on certain issue as not calling court's attention to omission in findings for purposes of former *Code Civ. Proc. § 634*. *Ripani v. Liberty Loan Corp. (1979) 95 Cal. App. 3d 603, 614, 157 Cal. Rptr. 272* (decided under prior law)

[d] Preparation of Special Finding

Established practice as presupposing that counsel desiring special findings will draft and propose them in usual form. *Moreno v. Jessup Buena Vista Dairy (1975) 50 Cal. App. 3d 438, 447, 123 Cal. Rptr. 393* (decided under prior law)

[e] Purpose of Special Findings

Purpose of 1959 amendment to former *Code Civ. Proc. § 634* as to overcome effects of doctrine of implied findings by authorizing filing of request for specific findings. *Morris v. Thogmartin (1973) 29 Cal. App. 3d 922, 927, 105 Cal. Rptr. 919* (decided under prior law)

Purpose of 1959 amendment to former *Code Civ. Proc. § 634* as to discourage mere finding of so-called ultimate facts when such method left counsel and appellate court unable to determine trial court's resolution of conflicting facts needed for factual determination of case. *Ball v. American Trial Lawyers Assn. (1971) 14 Cal. App. 3d 289, 307, 92 Cal. Rptr. 228* (decided under prior law)

When findings on material issue are requested but not made, reviewing court as not permitted to infer that trial court found in favor of prevailing party on issue. *Common Wealth Ins. Systems, Inc. v. Kersten (1974) 40 Cal. App. 3d 1014, 1032, 115 Cal. Rptr. 653* ; *Kerr Land & Timber Co. v. Emmerson (1965) 233 Cal. App. 2d 200, 222, 43 Cal. Rptr. 333* (decided under prior law)

Former *Code Civ. Proc. § 634* as providing that findings in support of judgment can be inferred by appellate court unless they were requested, omitted, and the omission was brought to attention of trial court either prior to entry of judgment or afterward. *In re Marriage of Warren (1972) 28 Cal. App. 3d 777, 785, 104 Cal. Rptr. 860* (decided under prior law)

Former *Code Civ. Proc. § 634*, relating to requests for special findings, as amended in 1959, as not changing basic rule that appellate court must accept as true all evidence tending to establish correctness of findings made, taking into account all inferences which might reasonably have been thought by trial court to lead to same conclusion. *Mashon v. Haddock (1961) 190 Cal. App. 2d 151, 167, 11 Cal. Rptr. 865* (decided under prior law)

[f] When Specific Findings Not Required

Former *Code Civ. Proc. § 634* as not requiring finding be made as to every minute matter on which evidence is received at trial, nor supplemental or explanatory findings on evidentiary matter. *Kanner v. Globe Bottling Co. (1969) 273 Cal. App. 2d 559, 567-568, 78 Cal. Rptr. 25* (decided under prior law)

Former *Code Civ. Proc. § 634* as not requiring that findings be made as to every minute matter on which evidence is received at trial. *Coleman Engineering Co. v. North American Aviation, Inc. (1966) 65 Cal. 2d 396, 410, 55 Cal. Rptr. 1, 420 P.2d 713* (decided under prior law)

Court as not required to make requested special findings when case submitted on agreed statement of facts. *James v. P.C.S. Ginning Co. (1969) 276 Cal. App. 2d 19, 24, 80 Cal. Rptr. 457* (decided under prior law)

Unless request made, specific finding as not required on issue when it follows by necessary implication from general finding. *Beaupre v. Nave (1970) 13 Cal. App. 3d 402, 408, 91 Cal. Rptr. 473* (decided under prior law)

If from findings made it can be determined that requested special findings not made would have been adverse to complainant, then complainant as unable to complain of failure of court to make such findings. *Roberts v. Graves (1969) 269 Cal. App. 2d 410, 419, 75 Cal. Rptr. 130* (decided under prior law)

[10] Specific Proceedings Requiring Findings

[a] In General

When issues of fact are joined in contested probate matters, findings as required when required under former *Code Civ. Proc. § 632*. *Estate of McAfee (1960) 182 Cal. App. 2d 553, 556, 6 Cal. Rptr. 79* (decided under prior law)

Trial court as required to make findings of fact in dissolution actions in order to determine character of property and value of each asset for purposes of division of community and quasi-community property. *In re Marriage of Knickerbocker (1974) 43 Cal. App. 3d 1039, 1042, 118 Cal. Rptr. 232* (decided under prior law)

Former *Prob. Code § 1230* (*now see Prob. Code § 1000*) by reference made former *Code Civ. Proc. § 632* applicable to trial and determination of issues of fact in probate proceedings. *Estate of Pendell (1932) 216 Cal. 384, 385-386, 14 P.2d 506* ; *Guardianship of Pankey (1974) 38 Cal. App. 3d 919, 928, 113 Cal. Rptr. 858* (decided under prior law)

Order denying petition for accounting, for revocation of letters of administration, and for appointment of disinterested administrator in probate proceedings as requiring findings if required under former *Code Civ. Proc. § 632*. *Estate of Dow (1949) 91 Cal. App. 2d 420, 423, 205 P.2d 698* (decided under prior law)

Findings as required in prohibition proceedings. *Mellinger v. Municipal Court (1968) 265 Cal. App. 2d 843, 847, 71 Cal. Rptr. 535* (decided under prior law)

Provisions of former *Code Civ. Proc. § 632* and former Cal. Rules of Ct., Rule 232, applied to special proceeding of administrative mandamus in cases in which trial court has determined question of fact. *International Asso. of Fire Fighters v. Palo Alto (1963) 60 Cal. 2d 295, 300, 32 Cal. Rptr. 842, 384 P.2d 170* ; *Hadley v. Superior Court (1972) 29 Cal. App. 3d 389, 394, 105 Cal. Rptr. 500* (decided under prior law)

Findings of fact and conclusions of law in arbitration proceedings as not required unless requested. *Stermer v. Modiano Constr. Co. (1975) 44 Cal. App. 3d 264, 271, 118 Cal. Rptr. 309* (decided under prior law)

Findings as required in equity case, whether tried with aid of jury or not. *Holland v. Kelly (1917) 177 Cal. 43, 45, 169 P. 1000* (decided under prior law)

Obligation to make findings under former *Code Civ. Proc. § 631.8* (motion for judgment on completion of presentation of plaintiff's evidence), when required under former *Code Civ. Proc. § 632*, as same as that applying generally in cases tried by court. *East-West Capital Corp. v. Khourie (1970) 10 Cal. App. 3d 553, 556, 89 Cal. Rptr. 369* (decided under prior law)

[b] Special Proceedings

Provisions of former *Code Civ. Proc. § 632* and former Cal. Rules of Ct., Rule 232, as not applying to special proceedings. *Carpenter v. Pacific Mut. Life Ins. Co. (1937) 10 Cal. 2d 307, 328, 74 P.2d 761* ; *In re Helen J. (1973) 31 Cal. App. 3d 238, 243-244, 107 Cal. Rptr. 106* (decided under prior law)

Findings in special proceedings as not required if statute dealing with such proceeding is silent on requirement. *Carpenter v. Pacific Mut. Life Ins. Co. (1937) 10 Cal. 2d 307, 328, 74 P.2d 761* (decided under prior law)

Any proceeding in court which was not under common law and equity practice (either action at law or suit in chancery) as special proceeding. *In re Helen J. (1973) 31 Cal. App. 3d 238, 244, 107 Cal. Rptr. 106* (decided under prior law)

Proceedings in aid of execution under former *Code Civ. Proc. §§ 715, 717*, as special proceedings not requiring findings under former *Code Civ. Proc. § 632*. *Lyons v. Marcher (1897) 119 Cal. 382, 382-383, 51 P. 559* (decided

under prior law)

Proceedings to declare minor child free of custody and control of natural parents as not action but special proceeding which did not require findings. *In re Helen J. (1973) 31 Cal. App. 3d 238, 243-244, 107 Cal. Rptr. 106* (decided under prior law)

Proceedings under *Ins. Code §§ 1010-1061* relative to rehabilitation and liquidation of insurance companies as special proceedings and not within provisions of former *Code Civ. Proc. § 632*. *Carpenter v. Pacific Mut. Life Ins. Co. (1937) 10 Cal. 2d 307, 327, 74 P.2d 761* (decided under prior law)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureJudgmentsGeneral OverviewCivil ProcedureAppealsDismissals of AppealsInvoluntary DismissalsCivil ProcedureAppealsRecords on AppealCivil ProcedureAppealsStandards of ReviewGeneral OverviewEvidenceProcedural ConsiderationsRulings on Evidence

California Forms of Pleading and Practice--Annotated

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Volume 46: Settlement and Release thru Subpoena Chs. 520-535
Chapter 529 STATEMENT OF DECISION
PART III. RESEARCH GUIDE

46-529 California Forms of Pleading and Practice--Annotated §§ 529.55-529.59

[Reserved]

§§ 529.55[Reserved]

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Volume 46: Settlement and Release thru Subpoena Chs. 520-535
Chapter 529 STATEMENT OF DECISION
PART IV. FORMS

46-529 California Forms of Pleading and Practice--Annotated § 529.60

§ 529.60 Request for Statement of Decision [Code Civ. Proc. § 632]

[1] FORM Request for Statement of Decision [Code Civ. Proc. § 632]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	REQUEST FOR
_____ [*name*],	)	STATEMENT OF
Defendant.	)	DECISION
	)	
	)	

_____ [*Specify party, e.g.,* Plaintiff], who appeared at the trial of the above-entitled action, hereby requests that the court issue a statement of decision explaining the factual and legal bases for its decision regarding the following controverted issues:

1. _____ [*Specify controverted issue, e.g.,* Whether or not defendant breached a duty of care owed to plaintiff].

[*Set forth additional controverted issues. State and enumerate each issue separately.*]

Dated: _____.

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This form of request for statement of decision is for use by any party appearing at trial. The request must specify the controverted issues that the requesting party wishes to be included in the statement of decision and must be made within 10 days after the court announces a tentative decision or, if the trial lasts less than one calendar day, or less than eight hours over a period of more than one day, before submission of the matter for decision [*Code Civ. Proc. § 632*].

The 10-day period commences at the time the clerk mails the copy of the minute order or decision, and the request is timely "made" when it is received and filed during this period [*see Staten v. Heale (1997) 57 Cal. App. 4th 1084, 1088-1091, 68 Cal. Rptr. 2d 35]* . It appears that the statement of decision may be limited to only those issues specified in the request, when less than all material issues are specified [*see Harvard Investment Co. v. Gap Stores, Inc. (1984) 156 Cal. App. 3d 704, 709 n.3, 202 Cal. Rptr. 891]* .

Procedure relating to the statement of decision is governed by *Cal. Rules of Ct., Rule 3.1590*. For discussion, see *§ 529.15*.

[3] Cross References

For a form of proposal as to the content of a statement of decision, see *§ 529.61*

For a form of proposed statement of decision, see *§ 529.61*

For a form of application for a hearing on the content of a statement of decision, see *§ 529.66*

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46-529 California Forms of Pleading and Practice--Annotated § 529.61

§ 529.61 Proposal as to Content of Statement of Decision [Code Civ. Proc. § 632]

[1] FORM Proposal as to Content of Statement of Decision [Code Civ. Proc. § 632]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	PROPOSAL AS TO CONTENT OF STATEMENT
Defendant.	)	OF DECISION
	)	
	)	

_____ [*Specify party, e.g.,* Plaintiff] in the above-entitled action hereby makes the following proposals as to the content of the statement of decision:

1. That the factual and legal bases for the court's decision regarding the controverted issue of _____ [*specify controverted issue to be included in statement of decision*] be explained as follows:

a. The court based its decision on the following facts: _____ [*set forth factual determinations explaining court's decision*].

b. The legal basis for the court's decision is _____ [*set forth legal determinations explaining court's*

decision].

[*Set forth any additional issues to be included. State and enumerate each issue separately.*]

Dated: _____.

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This form is a proposal for the content of a statement of decision for use by any party [*Code Civ. Proc. § 632*]. If a party requests a statement of decision, any other party may make proposals as to the content of the statement of decision within 10 days after the date of request for a statement of decision [*Cal. Rules of Ct., Rule 3.1590(e)*].

Code Civ. Proc. § 632 does not expressly define "proposals as to the content of the statement of decision." Therefore, it is unclear whether "content" refers to the issues to be included, to the explanation of the court's decision, or both. Because any party may specify which controverted issues should be included when that party requests a statement of decision, it would seem that once a request is made, any other party would also be allowed to propose what issues will be included in the statement of decision [*see Code Civ. Proc. § 632, 634*]. Thus, counsel may wish to propose both the issues to be included and a statement of the factual and legal bases for the court's decision.

Cal. Rules of Ct., Rule 3.1590, refers separately to proposals as to the content of the statement of decision and the proposed statement of decision, although it does not indicate whether there is a distinction in form between the two. If it is determined that there is no distinction in form, counsel may wish to attach a proposed statement of decision, such as the one *set out in § 529.62,* to the caption and introduction of this form, as an alternative to setting out the proposed contents as done here. Counsel should consult local practice to ascertain what form of proposals and proposed statement of decision will be accepted by the court.

[3] Distinction Between Factual and Legal Bases for Decision

Code Civ. Proc. § 632 requires that the statement of decision contain the factual and legal bases for the court's decision. Formerly, findings of fact and conclusions of law were presented separately, suggesting that perhaps the factual basis and the legal basis for a court's decision should each be presented separately within the statement of decision, as in the foregoing form. In addition, *Code Civ. Proc. § 909* provides that in a nonjury trial a reviewing court may make factual determinations contrary to the factual determinations made by the trial court. In these cases, at least, the factual basis for a decision would apparently be treated separately from the legal basis for a decision.

Nevertheless, prior to the elimination of findings of fact and conclusions of law, courts held that the distinction between conclusions of fact and conclusions of law are difficult to make [*Hayward Lbr. & Inv. Co. v. Construction Prod. Corp. (1952) 110 Cal. App. 2d 1, 3, 241 P.2d 1054]* . In addition, appellate courts treated factual determinations by trial courts as findings of fact, whether a trial court presented them as findings of fact or conclusions of law [*Rees v. Department of Motor Vehicles (1970) 8 Cal. App. 3d 746, 749, 87 Cal. Rptr. 456* ; *San Francisco Boys' Club, Inc. v. County of Mendocino (1967) 254 Cal. App. 2d 548, 562-563, 62 Cal. Rptr. 294]* . Courts also held that conclusions of law, although mentioned in former *Code Civ. Proc. § 632,* were a relatively useless appendage to findings of fact, since the important conclusion of law is the judgment [*Mayes v. Sturdy N. Sales, Inc. (1979) 91 Cal. App. 3d 69, 82, 154 Cal. Rptr. 43* ; *Estate of Grimble (1974) 42 Cal. App. 3d 741, 750, 117 Cal. Rptr. 125*].

These opinions suggest that courts have considered the distinction between findings of fact and conclusions of law as meaningless or unclear, which may have been one factor resulting in the elimination of findings of fact and conclusions of law in favor of the statement of decision as a single unit. Therefore, in a statement of decision, stating a legal basis for the court's decision separately from the factual basis for the decision may be unnecessary. Counsel may wish to modify this form, to state the factual and legal bases for a decision together. It is as yet unclear, however, whether the preferred form of statement of decision will be one in which the factual and legal determinations are set forth together or one in which they are set forth separately.

[4] Timing of Proposals

The time within which to submit proposals as to content of statement of decision is governed by *Cal. Rules of Ct., Rule 3.1590(e)*. For discussion, see *§§ 529.14* and *529.15*. When a trial is completed within one day or in less than eight hours over more than one day, a request for statement of decision must be made before the matter is submitted for decision and the statement of decision may be made orally on the record in the presence of the parties [*Cal. Rules of Ct., Rule 3.1590(n)*].

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46-529 California Forms of Pleading and Practice--Annotated § 529.62

§ 529.62 Proposed Statement of Decision [Cal. Rules of Ct., Rule 3.1590(f)]

[1] FORM Proposed Statement of Decision [Cal. Rules of Ct., Rule 3.1590(f)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	PROPOSED STATEMENT OF DECISION
Defendant.	)	
	)	
	)	

The above-entitled cause came on regularly for trial on _____ [*date*], in Department _____ of the above-entitled court, the Honorable _____, Judge, presiding without a jury [, a jury having been expressly waived], and was tried on that date [and on _____ (*state additional dates of trial*)]. _____ [*Name*] appeared as counsel for plaintiff and _____ [*name*] appeared as counsel for defendant. _____ [*Specify other appearances, if any*].

Oral and documentary evidence was introduced on behalf of the respective parties and the cause was argued and submitted for decision. The court, having considered the evidence and heard the arguments of counsel and being fully advised, issues the following statement of decision:

1. With regard to the issue of _____ [*specify issue*] the court's decision is _____ [*set forth decision*].

a. The court based its decision on the following facts: _____ [*set forth factual determinations explaining court's decision*].

b. The legal basis for the court's decision is _____ [*set forth legal determinations explaining court's decision*].

[*Set forth additional issues to be included, along with the decision, and factual and legal basis for the decision as to each issue. State and enumerate each issue separately.*]

Judgment is hereby ordered to be entered as follows: _____ [*specify*].
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form is a proposed statement of decision for use by any party [*Cal. Rules of Ct., Rule 3.1590(f)*].

The party that has been ordered to prepare the statement must, within 30 days after the announcement or service of the tentative decision, serve and submit to the court a proposed statement of decision and a proposed judgment [*Cal. Rules of Ct., Rule 3.1590(f)*]. If the proposed statement of decision and judgment are not served and submitted within that time, any other party that appeared at the trial may within 10 days thereafter: (1) prepare, serve, and submit to the court a proposed statement of decision and judgment, or (2) serve on all other parties and file a notice of motion for an order that a statement of decision be deemed waived [*Cal. Rules of Ct., Rule 3.1590(f)*; for a form for a notice of motion, see *§ 529.63*]. For further discussion, see *§ 529.15[1]*.

[3] Cross References

For forms of judgment, see *Ch. 318, Judgments, § 318.40* et seq.

For a form of request for a statement of decision, see *§ 529.60*

For a form of proposal as to the content of a statement of decision, see *§ 529.61*

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46-529 California Forms of Pleading and Practice--Annotated § 529.63

§ 529.63 Notice of Motion for Order That Statement of Decision Be Deemed Waived [Cal. Rules of Ct., Rule 3.1590(f)]

[1] FORM Notice of Motion for Order That Statement of Decision Be Deemed Waived [Cal. Rules of Ct., Rule 3.1590(f)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Defendant.	)	DER THAT STATEMENT OF DECISION BE
	)	DEEMED WAIVED
	)	

_____

To _____ [*specify party, e.g.*, plaintiff] _____ [*name*] and to his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____[*time*], or as soon thereafter as the matter can be heard in the courtroom of [_____(Department *or* Division) _____ of] the above entitled court, located at _____[*street address and city*], California, _____[*specify party, e.g.*, defendant] will, and hereby does move the court for an order that the statement of decision, requested by _____[*specify party, e.g.*, plaintiff] be deemed waived as provided

by *Rule 3.1590(f) of the California Rules of Court*. The motion will be made on the ground that _____[*specify party, e.g.*, plaintiff] who was ordered by the court to prepare a proposed statement of decision, has failed to serve or submit to the court a proposed statement of decision within 30 days after announcement or service of the tentative decision, [and within the additional time of _____(*state number of days*) granted by the court].

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This form is a notice of motion for use by any party to the action when the party ordered to prepare the proposed statement of decision has failed to do so within the time limits prescribed by *Cal. Rules of Ct., Rule 3.1590(f)*, or within any additional time limit granted by the court [*see Cal. Rules of Ct., Rule 1.10(c)*]. The notice of motion must be served on all other parties to the action [*Cal. Rules of Ct., Rule 3.1590(f)*].

In lieu of serving and submitting to the court the notice of motion when the designated party has not served and submitted a proposed statement of decision, any other party that appeared at trial may prepare, serve, and submit a proposed statement of decision [*Cal. Rules of Ct., Rule 3.1590(f)*].

[3] Supporting Memorandum

A supporting memorandum must accompany notices of motion in law and motion proceedings [*Cal. Rules of Ct., Rule 3.1113(a)*]. Although the proceeding in which this form would be used does not fall within the definition of law and motion proceedings in *Cal. Rules of Ct., Rule 3.1103(a)*, it is nevertheless recommended that this form be accompanied with a supporting memorandum. For general discussion and forms relating to memoranda, see Ch. 417, *Points and Authorities* .

[4] Cross References

For form of declaration supporting this motion, and an order granting it, see *§§ 529.64* and 529.75

For general discussion and forms relating to motions and orders, see Ch. 372, *Motions and Orders*

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46-529 California Forms of Pleading and Practice--Annotated § 529.64

§ 529.64 Declaration Under Penalty of Perjury in Support of Motion for Order That Statement of Decision Be Deemed Waived [Cal. Rules of Ct., Rule 3.1590(f)]

[1] FORM Declaration Under Penalty of Perjury in Support of Motion for Order That Statement of Decision Be Deemed Waived [Cal. Rules of Ct., Rule 3.1590(f)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*]	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DECLARATION OF _____ [*name*]
Defendant.	)	IN SUPPORT OF MOTION FOR ORDER THAT
	)	STATEMENT OF DECISION BE DEEMED
	)	WAIVED

_____

I, _____ [*name*], declare:

1. I am an attorney at law duly admitted to practice before all the courts of the State of California, and the attorney or record herein for _____ [*specify moving party, e.g.,* defendant].

[*EITHER, if in an unlimited civil case in superior court*]

2. I did not receive [nor did any member of the law firm with which I am associated receive] a proposed statement of decision prepared by [counsel for] _____ [*specify party, e.g.*, plaintiff] in this action within 15 days after _____ [expiration of the time for filing proposals as to the content of the statement of decision on _____ [*date*], *or* notification by the court that (counsel for) the _____ (*specify party, e.g.*, plaintiff) was to prepare and submit the proposed statement of decision].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form is a declaration for use by any party to support a motion for an order that the statement of decision be deemed waived on the grounds stated in *Cal. Rules of Ct., Rule 3.1590(f). Code Civ. Proc. § 2015.5* authorizes a declaration under penalty of perjury, as in the above form, in lieu of an affidavit. For forms of affidavits, see Ch. 15, *Affidavits, Certificates, and Declarations* .

For the related form of notice of motion, and discussion of the motion, *see § 529.63*.

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46-529 California Forms of Pleading and Practice--Annotated § 529.65

§ 529.65 Order Granting Motion That Statement of Decision Be Deemed Waived [Cal. Rules of Ct., Rule 3.1590(f)]

[1] FORM Order Granting Motion That Statement of Decision Be Deemed Waived [Cal. Rules of Ct., Rule 3.1590(f)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER GRANTING MOTION THAT STATE-
Defendant.	)	MENT OF DECISION BE DEEMED WAIVED
	)	
	)	

The motion of _____ [*specify moving party, e.g.,* defendant] for an order that the statement of decision be deemed waived came on regularly for hearing by the court on _____ [*date*]. _____ [*Name*] appeared as counsel for plaintiff and _____ [*name*] appeared as counsel for defendant. _____ [*Specify other appearances, if any*].

Proof having been made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be and hereby is granted and that the statement of decision is deemed waived.

Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use when the court has granted a motion that the statement of decision be deemed waived on the ground that the party ordered by the court to prepare, serve, and submit a proposed statement of decision has failed to do so within the time specified in *Cal. Rules of Ct., Rule 3.1590(f)* [*see Cal. Rules of Ct., Rule 3.1590(f)*]. For the related form of notice of motion, and discussion of the motion, see *§ 529.63*.

See also References to § 529.60.

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46-529 California Forms of Pleading and Practice--Annotated § 529.66

§ 529.66 Objections to Proposed Statement of Decision [Cal. Rules of Ct., Rule 3.1590(g)]

[1] FORM Objections to Proposed Statement of Decision [Cal. Rules of Ct., Rule 3.1590(g)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	OBJECTIONS TO PROPOSED STATEMENT OF
Defendant.	)	DECISION
	)	
	)	

_____ [*Specify party, e.g.,* Plaintiff], pursuant to *Rule 3.1590(g) of the California Rules of Court*, objects to the proposed statement of decision submitted to the court by _____ *specify party, e.g.,* defendant] as follows:

1. Objection is hereby made to _____ [*specify, e.g.,* the proposed statement of factual basis for the court's decision as to Issue No. 1, which was the issue _____ (*specify*), *or* the proposed decision and the proposed factual and legal bases for the decision as to Issue No. 2] of the proposed statement of decision, on the grounds that _____ [*state reasons for objection, e.g.,* it does not correctly reflect the evidence on the issue presented at trial].

[In connection with this objection, _____ (*specify party, e.g.,* plaintiff) requests that the court refer to Paragraph _____ (*number*) of the proposal as to content of the statement of decision previously submitted by _____ (*specify party, e.g.,* plaintiff), and attached hereto as Exhibit A, and requests that the court incorporate the proposed content of Paragraph _____ (*number*) of Exhibit A into the final statement of decision.]

[*Set forth additional objections to the proposed statement of decision, and, if appropriate, references to the corresponding paragraphs in any proposals as to content of the statement of decision previously filed. State and enumerate each objection separately.*]

Dated: _____.

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This form of objections to the proposed statement of decision is for use to make objections to the proposed statement of decision.

Objections to the proposed statement of decision or to the proposed judgment may be served and filed by any party within 15 days after the proposed statement of decision and judgment have been served [*Cal. Rules of Ct., Rule 3.1590(g)*].

[3] Omission or Ambiguity in Statement of Decision

If there is an omission or ambiguity in the statement of decision issued by the court, and if the record shows that the omission or ambiguity was brought to the court's attention either prior to the entry of judgment or in conjunction with a motion for new trial or motion to vacate judgment, it may not be inferred on appeal or on a motion for new trial or motion to vacate judgment that the trial court decided in favor of the prevailing party as to that issue or those facts [*Code Civ. Proc. § 634*].

For forms for use in seeking amendment of the statement of decision in a motion for new trial or motion to vacate judgment, see Ch. 371, *Motions After Trial*, §§ 357.60 *et seq. and 357.90* et seq.

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46-529 California Forms of Pleading and Practice--Annotated § 529.67

§ 529.67 Ex Parte Application for Order, Supporting Declaration, and Order for Hearing on Proposals as to Content of Statement of Decision, on Objections to Proposed Statement of Decision, or on Objections to Proposed Judgment When Statement of Decision Not Requested [Cal. Rules of Ct., Rule 3.1590(k)]

[1] FORM Ex Parte Application for Order, Supporting Declaration, and Order for Hearing on Proposals as to Content of Statement of Decision, on Objections to Proposed Statement of Decision, or on Objections to Proposed Judgment When Statement of Decision Not Requested [Cal. Rules of Ct., Rule 3.1590(k)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	EX PARTE APPLICATION, SUPPORTING DE-
Defendant.	)	CLARATION, AND ORDER FOR HEARING ON
	)	_____ [PROPOSALS AS TO CON-
	)	TENT OF THE STATEMENT OF DECISION *or* OBJECTIONS TO PROPOSED STATEMENT OF DECISION *or* OBJECTIONS TO PROPOSED JUDGMENT] [*Cal. Rules of Ct., Rule 3.1590(k)*]

_____

APPLICATION

I, _____ [*name of attorney*], hereby apply on behalf of _____ [*specify party, e.g.,* defendant] for an order for a hearing on _____ [the proposal as to the content of the statement of

decision submitted by _____ (*specify party, e.g.,* defendant) *or* the objections to the proposed statement of decision filed by _____ (*specify party, e.g.,* defendant) *or* the objections to the proposed judgment filed by _____ (*specify party, e.g.,* defendant)].
Dated: _____.

Respectfully submitted,
_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

DECLARATION

I, _____ [*name*], declare:

I am an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ [*specify moving party, e.g.,* defendant].

[*EITHER, if hearing requested on proposals*]

Proposals as to content of the statement of decision _____ [are hereby (served and) submitted concurrently with the submission of this application *or* were (served and submitted by _____ (*specify party, e.g.,* defendant) and are attached hereto as Exhibit A].

[*OR, if hearing requested on objections*]

Objections to the _____ [proposed statement of decision *or* proposed judgment] _____ [are hereby served and filed concurrently with the submission of this application *or* were served and filed by _____ (*specify party, e.g.,* defendant) and are attached hereto as Exhibit A].

A hearing on the _____ [proposal as to content of the statement of decision *or* objections to the proposed statement of decision *or* objections to the proposed judgment] should be ordered because _____ [*set forth reason hearing is requested, e.g.,* the complex nature of the issues discussed in the proposal as to content of the statement of decision makes it necessary for the court to hear explanation as to how those issues should be resolved].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

MEMORANDUM

[*Set forth memorandum in support of application.*]

ORDER FOR HEARING
[*Cal. Rules of Ct., Rule 3.1590(k)*]

Proof having been made to the satisfaction of the court that the application by _____ [*specify party, e.g.*, defendant] for an order for a hearing ought to be granted,

IT IS HEREBY ORDERED that a hearing on _____ [proposals as to content of the statement of decision *or* objections to the proposed statement of decision *or* objections to the proposed judgment] be held on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in the courtroom of [_____ (Department *or* Division) _____ of] the above-entitled court.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of ex parte application for an order for a hearing is for use by any party when counsel for any party seeks a hearing on proposals as to content of the statement of decision or objections to the proposed statement of decision that have been submitted or filed by that party or by any other party. It may also be used to seek a hearing on objections to the proposed judgment when a statement of decision is not requested or has been waived [*Cal. Rules of Ct., Rule 3.1590(k)*; *see Cal. Rules of Ct., Rule 3.1590(h), (i)*]. The application should be presented to the judge for signature on the portion of the form that constitutes the order granting the hearing.

Neither *Code Civ. Proc. § 632* nor *Cal. Rules of Ct., Rule 3.1590(d)* expressly requires that a proposal as to content of the statement of decision be served and filed or served and submitted. Therefore, if a hearing on the proposal is requested by ex parte application, it is not required that the proposal be served on the other parties, although it is better practice to do so.

Objections to either the proposed statement of decision or the proposed judgment must be served and filed [*Cal. Rules of Ct., Rule 3.1590(g), (j)*]. There are no requirements for serving or filing the proposal as to the content of the statement, but they would be submitted to the court. Therefore, if counsel is filing any objections concurrently with submitting the ex parte application, he or she should remember to serve the objections also.

Counsel should consult local court rules and procedure for requirements for ex parte applications.

[3] Cross References

For a form of proposal as to the content of a statement of decision and related discussion, see *§ 529.62*

For a form of proposed statement of decision and related discussion, see *§ 529.63*

For a form of objections to a proposed statement of decision and related discussion, see *§ 529.66*

For general discussion and forms relating to motions, ex parte applications, and orders, see Ch. 372, *Motions and Orders*

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46-529 California Forms of Pleading and Practice--Annotated § 529.68

§ 529.68 Notice of Motion for Order Excusing Noncompliance With Time Limit Prescribed for Doing Act Required by Cal. Rules of Ct., Rule 3.1590 [Cal. Rules of Ct., Rule 3.1590(m)]

[1] FORM Notice of Motion for Order Excusing Noncompliance With Time Limit Prescribed for Doing Act Required by Cal. Rules of Ct., Rule 3.1590 [Cal. Rules of Ct., Rule 3.1590(m)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Defendant.	)	DER EXCUSING NONCOMPLIANCE WITH TIME
	)	LIMIT PRESCRIBED BY *CALIFORNIA RULES OF*
	)	*COURT, RULE 3.1590*

_____

To _____ [*specify party, e.g.*, defendant] _____ [*name*] and to his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter can be heard, in the courtroom of [_____ (Department *or* Division) _____ of] the above-entitled court, located at _____ [*street address and city*], California, _____ [*specify party, e.g.*, plaintiff] will, and hereby does, move the court for an order excusing him/her/it from compliance with the time limit prescribed in Rule 3.1590 _____ [*specify subdivision, e.g.*, (c)] of the California Rules of Court for _____ [*state act, e.g.*, serving and submitting a proposed statement of decision and proposed judgment]. The motion will be made on the ground(s) that _____

[*set forth ground(s) showing good cause for excusing noncompliance with a time limit prescribed by Cal. Rules of Ct., Rule 3.1590, e.g.,* a fire in the office building of the attorney for _____ (*moving party, e.g.,* plaintiff) destroyed the attorney's records in the above-entitled action on _____ [*date*], two days before the expiration of the time period within which the attorney was required to serve and submit a proposed statement of decision and proposed judgment].

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This form of notice of motion is for use by any party who has failed to comply with one of the time limits prescribed by *Cal. Rules of Ct., Rule 3.1590* [for discussion of those time periods, *see § 529.15[1]*]. At any time prior to the entry of judgment, the court may, for good cause shown and on such terms as may be just, excuse a noncompliance with the time limits prescribed for doing any act required by *Cal. Rules of Ct., Rule 3.1590* [*Cal. Rules of Ct., Rule 3.1590(m)*].

Depending on the circumstances, it may be necessary to shorten the 16 court-day minimum notice period required by *Code Civ. Proc. § 1005*. In such a case counsel should submit an ex parte application for an order shortening time for notice of motion [*see Code Civ. Proc. § 1005(b)*; *see also Cal. Rules of Ct., Rule 3.1300(b)* (requiring supporting declaration showing good cause for shortening time)]. The ex parte application, a supporting declaration, proposed order, and a memorandum in support of the application must be submitted to the judge along with the form. For discussion and forms of ex parte application, supporting declaration, proposed order, and order shortening time for service of notice of motion, see Ch. 524, *Shortening and Extension of Time* .

Counsel may also move for a written order extending any of the time limits prescribed by *Cal. Rules of Ct., Rule 3.1590* [*Cal. Rules of Ct., Rule 3.1590(m)*]; *see also Cal. Rules of Ct., Rule 1.10(c)* (extensions of time generally)].

[3] Supporting Memorandum

A supporting memorandum must accompany notices of motion in law and motion proceedings [*Cal. Rules of Ct., Rule 3.1113(a)*]. Although the proceeding in which this form would be used does not fall within the definition of law and motion proceedings in *Cal. Rules of Ct., Rule 3.1103(a),* it is nevertheless recommended that this form be accompanied with supporting memoranda. For general discussion and forms relating to memoranda, see Ch. 417, *Points and Authorities* .

[4] Cross References

For form of declaration supporting this motion, and an order granting it, see *§§ 529.69* and *529.70*

For discussion and forms relating to a motion for an order shortening or extending time generally, see Ch. 524, *Shortening and Extension of Time* .

For memoranda relating to shortening or extending time generally, see California Points and Authorities, Ch. 212,

Shortening and Extension of Time

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46-529 California Forms of Pleading and Practice--Annotated § 529.69

§ 529.69 Declaration Under Penalty of Perjury in Support of Motion for Order Excusing Noncompliance With Time Limit Prescribed for Doing Act Required by Cal. Rules of Ct., Rule 3.1590 [Cal. Rules of Ct., Rule 3.1590(m)]

[1] FORM Declaration Under Penalty of Perjury in Support of Motion for Order Excusing Noncompliance With Time Limit Prescribed for Doing Act Required by Cal. Rules of Ct., Rule 3.1590 [Cal. Rules of Ct., Rule 3.1590(m)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DECLARATION OF _____ [*name*]
Defendant.	)	IN SUPPORT OF MOTION FOR ORDER EXCUS-
	)	ING NONCOMPLIANCE WITH TIME LIMIT PRE-
	)	SCRIBED BY *CALIFORNIA RULES OF COURT, RULE 3.1590*

_____

I, _____ [*name*], declare:

1. I am an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ [*specify party, e.g.,* defendant].

2. _____ [*State facts showing good cause for excuse from noncompliance, e.g.,* On _____ [*date*], a fire occurred in my office. All of the records I was keeping regarding this action were in my office at the time and were destroyed by the fire. Due to the destruction of the records in this case, I was delayed

in preparing a proposed statement of decision and proposed judgment and, as a result, I was unable to serve and submit a proposed statement of decision and proposed judgment until _____ [*date*], three days after expiration of the time period prescribed by *Rule 3.1590(f) of the California Rules of Court*.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form of declaration is for use by counsel for any party to support a motion for an order excusing noncompliance with a time limit prescribed by *Cal. Rules of Ct., Rule 3.1590* [for the related form of notice of motion, and discussion of the motion, *see § 529.68*]. The declaration must set forth facts showing good cause for excuse of the noncompliance [*see Cal. Rules of Ct., Rule 3.1590(m)*]. For a general discussion of what constitutes good cause for the purposes of extending time, see the Introduction to Ch. 524, *Shortening and Extension of Time*.

Code Civ. Proc. § 2015.5 authorizes a declaration under penalty of perjury, as in the above form, in lieu of an affidavit. For forms of affidavits, see Ch. 15, *Affidavits, Certificates, and Declarations* .

See also Comments and References to § 529.68.

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46-529 California Forms of Pleading and Practice--Annotated § 529.70

§ 529.70 Order Granting Motion to Excuse Noncompliance With Time Limit Prescribed for Doing Act Required by Cal. Rules of Ct., Rule 3.1590 [Cal. Rules of Ct., Rule 3.1590(m)]

[1] FORM Order Granting Motion to Excuse Noncompliance With Time Limit Prescribed for Doing Act Required by Cal. Rules of Ct., Rule 3.1590 [Cal. Rules of Ct., Rule 3.1590(m)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER GRANTING MOTION TO EXCUSE
Defendant.	)	NONCOMPLIANCE WITH TIME LIMIT PRE-
	)	SCRIBED BY *CALIFORNIA RULES OF COURT,*
	)	*RULE 3.1590*

_____

The motion of _____ [*specify moving party, e.g.,* defendant] for an order excusing noncompliance with the time limit prescribed by Rule 3.1590 _____ [*specify subdivision, e.g.,* (c)] of the California Rules of Court for _____ [*state act, e.g.,* serving and submitting a proposed statement of decision and proposed judgment] came on regularly for hearing by the court on _____ [*date*]. _____ [*Name*] appeared as counsel for plaintiff; _____ [*name*] appeared as counsel for defendant. _____ [*Specify other appearances, if any*].

Proof having been made to the satisfaction of the court that the motion ought to be granted, and good cause appearing therefor,

IT IS ORDERED that the motion be and hereby is granted and that _____ [*specify party, e.g.,* defendant] is hereby excused from noncompliance with the time limit prescribed by Rule 3.1590 _____ [*specify subdivision, e.g.,* (e)] of the California Rules of Court, that _____ [*specify effect of excuse from noncompliance, e.g.,* a statement of decision is not waived, and that _____ (*specify party, e.g.,* defendant) may serve and submit a proposed statement of decision and proposed judgment on or before _____ (*date*)].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use in granting a motion to excuse a noncompliance with a time limit prescribed by *Cal. Rules of Ct., Rule 3.1590* [for related form of notice of motion, and discussion of motion, *see § 529.68*]. *Cal. Rules of Ct., Rule 3.1590(m)*, provides that the order excusing noncompliance must be made on such terms as may be just.

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46-530 California Forms of Pleading and Practice--Annotated 530.syn

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§ 530.01 Scope of Chapter

§ 530.02 Cross References

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§ 530.11 Purpose of Statute of Frauds

§ 530.12 Contracts Required to Be in Writing

[1] Agreements Not to Be Performed Within One Year

[a] General Requirement

[i] Statement of Rule

[ii] Real Property Leases Are Governed by Two Provisions

[iii] Possibility of Performance Within One Year

[b] Computation of One-Year Period

[c] Exception for Qualified Financial Contracts

[i] Terms of Exception

[ii] "Qualified Financial Contracts" Defined

[iii] Evidence Sufficient To Establish Qualified Financial Contract Was Made

[2] Promise to Answer for Another's Debt

[a] General Requirement and Exceptions

[b] Guaranty on Face of Commercial Paper

[c] Personal Representative's Promise to Pay Estate Debt

[d] Nonprofit Association Member's Promise to Pay Association Debt

[e] Representation Regarding Another's Credit

[3] Prenuptial Agreements

[4] Agreement to Transfer Real Property Interest

[5] Transfer of Real Property Interest

[6] Mortgages and Deeds of Trust

[7] Employment of Real Estate Broker

[8] Promise to Be Performed After Death

[9] Promise to Make Will

[a] Promise Made After 2000

[b] Promise Made in 1985-2000

[c] Promise Made Before 1985

[10] Commercial Loan Commitment in Excess of $100,000

[11] Sale of Personal Property in Excess of $5,000

[12] Sale of Goods in Excess of $500

[a] In General

[b] Written Confirmation of Contract; Notice of Objection

[c] Estoppel

[d] Effect of Admission of Contract's Existence in Pleading, Testimony, or Otherwise

[e] "Sale or Return" Transactions

[f] Sale of Securities

[g] Security Agreements

[h] Goods Being Specially Manufactured for Buyer

[i] Goods Which Have Been Accepted or Paid for

[13] Agreement Waiving or Tolling of Statute of Limitations

§ 530.13 Agent's Authority: The Equal Dignity Rule

[1] Scope of Rule

[2] Estoppel and Ratification

§ 530.14 Memorandum

[1] Sufficiency of Memorandum

[2] Memorandum May Be Contained in More Than One Document

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§ 530.15 Modification of Written Contract

[1] Permitted Methods of Modifying Written Contract

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§ 530.16 Effect of Statute of Frauds

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[1] Elements of Doctrine

[2] Partially Performed Agreement Not to Be Performed Within One Year

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[1] Application of Doctrine

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§ 530.22 Severability of Unenforceable Promises

§ 530.23 Pleading Contract and Statute of Frauds

§ 530.24 Establishing Statute of Frauds as Defense

[1] Demurrer, Motion, or Objection Is Required

[2] Who May Assert Defense

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§ 530.31 State Statutes

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[3] Marriage and Dissolution

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[7] Real Property Transactions

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[d] Settlement Agreements

[3] Contracts Required to Be in Writing

[a] Agreements Not to Be Performed Within One Year

[b] Real Property Transactions

[c] Sales of Goods and Personal Property

[4] Estoppel to Assert Statute of Frauds

[a] In General

[b] Estoppel Found

[c] Estoppel Not Found

[d] Motion for Summary Judgment

[5] Fully Performed Contract

[6] Memorandum of Agreement

[a] Sufficiency of Memorandum

[b] Signature

[7] Modification of Written Agreement

[8] Part Performance

[9] Who May Assert Defense

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§§ 530.35-530.39 [Reserved]

§ 530.40 Methods by Which Statute of Frauds May Be Raised

[1] On Demurrer

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[3] At Trial

§§ 530.41-530.49 [Reserved]

§ 530.50 General Form of Affirmative Defense That Contract Is Unenforceable Under Statute of Frauds

[1] FORM

[2] Use of Form

[3] Affirmative Defense Required When Oral Contract Is Admitted

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§ 530.51 Affirmative Defense That Oral Contract for Sale of Goods Valued at Over $500 Is Unenforceable Under Statute of Frauds [Com. Code § 2201]

[1] FORM

[2] Use of Form

[3] Allegations of Optional Paragraphs

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§ 530.60 Allegation of Part Performance Rendering Statute of Frauds Inapplicable to Oral Contract to Convey Real Property

[1] FORM

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[4] Requirement of Actual Possession

§ 530.61 Allegation of Qualified Financial Contract Not Subject to Statute of Frauds [Civ. Code § 1624(b); Com. Code §§ 1206(3), 2201(4)]

[1] FORM

[2] Use of Form

[3] Allegations

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46-530 California Forms of Pleading and Practice--Annotated § 530.01

§ 530.01 Scope of Chapter

This chapter discusses and contains forms relating to the statute of frauds. The chapter contains the following forms:

- Forms for affirmative defenses asserting the statute of frauds both in general and in cases relating to contracts for the sale of goods [*see §§ 530.50, 530.51*].

- A form for an allegation of part performance of a contract for the sale of real property [§ 530.60].

- A form for an allegation that the contract is exempt from the statute of frauds as a qualified financial contract [§ 530.61].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsExceptionsGeneral OverviewContracts LawPerformancePartial PerformanceOral AgreementsContracts LawStatutes of FraudsGeneral OverviewContracts LawStatutes of FraudsExceptionsGeneral OverviewContracts LawStatutes of FraudsExceptionsPartial PerformanceReal Property LawPurchase & SaleContracts of SaleEnforceabilityStatutes of Frauds

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§ 530.02 Cross References

- For a discussion and forms relating to the effect of the statute of frauds on auctions, see Ch. 77, *Auctions and Auctioneers* .

- The statute of frauds requirement concerning a contract to pay an agent, broker, or other person a commission in relation to a real estate transaction is not discussed in this chapter, but is covered in Ch. 103, *Brokers* .

- For a discussion and forms relating to quantum meruit, see Ch. 121, *Common Counts* .

- For a form for an affirmative defense asserting the statute of frauds, see Ch. 140, *Contracts* .

- For discussion of the parol evidence rule and interpretation of contracts generally, see Ch. 140, *Contracts* .

- For a discussion and forms relating to property settlement agreements, see Ch. 221, *Dissolution of Marriage: Procedure* , and Ch. 222, *Dissolution of Marriage: Property Division and Valuation* .

- For a discussion of the effect of the statute of frauds on actions for fraud and deceit, see Ch. 269, *Fraud and Deceit* .

- For a discussion of marriage settlement agreements, see Ch. 359, *Marriage* .

- For discussion of the requirements for a writing in regard to personal property leases first effective between the parties on or after January 1, 1990, see Ch. 413, *Personal Property Leases* .

- For a discussion of the requirement that an agent have written authority to enter into a contract required to be in writing, see Ch. 427, *Principal and Agent* .

- For discussion and forms relating to the statute of frauds applicable to sales of goods governed by the Commercial Code, see Ch. 501, *Sales: Sales Under the Commercial Code* .

- For a discussion of and forms for complaints in actions for quasi-specific performance generally, see Ch. 528, *Specific Performance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActStatutes of FraudsCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral OverviewContracts LawContract InterpretationParol EvidenceGeneral OverviewContracts LawRemediesSpecific PerformanceContracts LawSales of GoodsAuction SalesContracts LawStatutes of FraudsGeneral OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesStatutes of FraudsEvidenceDocumentary EvidenceParol EvidenceFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionProperty Settlements

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[Reserved]

§§ 530.03[Reserved]

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46-530 California Forms of Pleading and Practice--Annotated § 530.10

§ 530.10 Governing Statutes

The basic statute of frauds, requiring certain types of contracts to be in writing, is *Civ. Code § 1624*. In addition, numerous other statutes require that other types of contracts be in writing. Some of these statutory requirements overlap. For a list of these statutes, see *§ 530.31*.

Personal property leases first effective between the parties on or after January 1, 1990, are governed by Division 10 of the Commercial Code (*Com. Code § 10101 et seq.*), which is discussed in Ch. 413, *Personal Property Leases* , not by *Civ. Code § 1624*[*Civ. Code § 1624(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral OverviewContracts LawStatutes of FraudsGeneral OverviewContracts LawTypes of ContractsLease AgreementsPersonalty LeasesStatutes of FraudsReal Property LawPurchase & SaleContracts of SaleEnforceabilityStatutes of Frauds

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46-530 California Forms of Pleading and Practice--Annotated § 530.11

§ 530.11 Purpose of Statute of Frauds

Some contracts are declared to be invalid unless the contract, or some note or memorandum of it, is in writing and subscribed by the party to be charged or by his or her agent. The requirement of a writing is imposed by a number of statutory provisions dealing with various kinds of contracts [*see, e.g., Civ. Code § 1624*; *Fam. Code § 1611*]. The primary kinds of contracts that are required to be in writing are discussed in *§ 530.12*.

The purpose of the statute of frauds is to prevent fraud and perjury with respect to certain agreements by requiring more reliable evidence of those agreements in the form of a writing signed by the party to be charged in order to enforce those agreements [*Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 764, 206 Cal. Rptr. 354, 686 P.2d 1158* (*overruled on other grounds in Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal. 4th 85, 88, 44 Cal. Rptr. 2d 420, 900 P.2d 669*); *Riley v. Bear Creek Planning Committee (1976) 17 Cal. 3d 500, 509, 131 Cal. Rptr. 381, 551 P.2d 1213]* . The purpose of the statute of frauds has been described as evidentiary in nature, to prevent the enforcement of promises or contracts that were never in fact made, but not to justify repudiation of promises that were in fact made [*Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 764, 206 Cal. Rptr. 354, 686 P.2d 1158* , (*overruled on other grounds in Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal. 4th 85, 88, 44 Cal. Rptr. 2d 420, 900 P.2d 669*); *Lockwood v. Smigel (1971) 18 Cal. App. 3d 800, 803, 96 Cal. Rptr. 289]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawStatutes of FraudsGeneral Overview

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46-530 California Forms of Pleading and Practice--Annotated § 530.12

§ 530.12 Contracts Required to Be in Writing

[1] Agreements Not to Be Performed Within One Year

[a] General Requirement

[i] Statement of Rule

An agreement that by its terms is not to be performed within one year from the making of the agreement is invalid unless it, or some note or memorandum of it, is in writing and subscribed by the party to be charged or his or her agent [*Civ. Code § 1624(a)(1)*].

If a contract is silent as to its duration, but is implied by law to be for a reasonble time, the contract falls within the statute of frauds if the trier of fact determines that the reasonable time amounts to a period in excess of one year [*San Francisco Brewing Corp. v. Bowman (1959) 52 Cal. 2d 607, 615-619, 343 P.2d 1* (exclusive distributorship)].

A contingency that may extend a contract for more than one year, such as an option to renew for the succeeding year that is exercisable prior to the end of the current year, does not bring a contract within the statute of frauds [*Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 759, 161 P.2d 217* (employment contract)].

[ii] Real Property Leases Are Governed by Two Provisions

Leases of real property for a period of longer than one year are required to be in writing by other statutory provisions, in addition to *Civ. Code § 1624(a)(1)* [*see Civ. Code §§ 1091, 1624(a)(3)*; *Code Civ. Proc. § 1971*, discussed in [4], *below*]. There is no distinction in the manner in which these overlapping requirements are applied to leases, however [*see Fisher v. Parsons (1963) 213 Cal. App. 2d 829, 837, 29 Cal. Rptr. 210* (no distinction between *Civ. Code § 1624(a)(1)* and *(3)*); *but see Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners (1997) 52 Cal. App. 4th 867, 875-877, 60 Cal. Rptr. 2d 830* (finding distinction and holding that agreement to lease real property for term exceeding one year is within *Civ. Code § 1624* regardless whether agreement provides that it may be canceled or terminated within one year of date of its making and prior to commencement of the lease term)].

[iii] Possibility of Performance Within One Year

Civ. Code § 1624(a)(1) applies only to those contracts which, by their terms, cannot possibly be performed within one year [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 674-675, 254 Cal. Rptr. 211, 765 P.2d 373* (employment as long as employee's performance was satisfactory); *White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 343, 66 Cal. Rptr. 697, 438 P.2d 345* (not applicable to contract for permanent employment for indefinite period); *Hollywood Motion Picture Equip. Co. v. Furer (1940) 16 Cal. 2d 184, 187, 105 P.2d 299* (not applicable to agreement not to make castings from plaintiff's patterns exclusively for plaintiff, with no reference to time)]. For a contract to be within *Civ. Code § 1624(a)(1)*, there must not be the slightest possibility that it can be fully performed within one year [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 674-675, 254 Cal. Rptr. 211, 765 P.2d 373* ; *White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 343 n.2, 66 Cal. Rptr. 697, 438 P.2d 345* ; *Fisher v. Parsons (1963) 213 Cal. App. 2d 829, 837, 29 Cal. Rptr. 210]* .

ILLUSTRATION:

Contingency Could Occur Within One Year. A requirements contract for office space provided that the lease would be effective so long as the lessee was in business and required space and so long as appropriate space was available. Did the lease come within *Civ. Code § 1624(a)(1)*? No, contingencies could terminate the contract in less than one year [*Fisher v. Parsons (1963) 213 Cal. App. 2d 829, 837, 29 Cal. Rptr. 210]* .

Application of this rule provides that if a condition terminating a contract may occur within one year of its making, the contract is performable within a year and does not fall within the scope of the statute of frauds. This is true even though performance of the contract may extend for longer than one year if the condition does not occur [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 673, 254 Cal. Rptr. 211, 765 P.2d 373* ; *Abeyta v. Superior Court (1993) 17 Cal. App. 4th 1037, 1045-1046, 21 Cal. Rptr. 2d 680]* . Thus, an employment contract for an indefinite period is not brought within the statute of frauds merely because the compensation is measured by annual gross sales or the value of the services to the employer over a period of more than one year [*White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 343-344, 66 Cal. Rptr. 697, 438 P.2d 345* ; *see also Gray v. Superior Court (1986) 181 Cal. App. 3d 813, 821, 226 Cal. Rptr. 570* (following *White Lighting Co.* but noting contrary authority)]. Similarly, an oral contract of employment that is terminable only for good cause is not within statute of frauds because it good cause may exist within one year of formation of the contract [*Jenkins v. Family Health Program (1989) 214 Cal. App. 3d 440, 445-446, 262 Cal. Rptr. 798* ; *Steward v. Mercy Hospital (1987) 188 Cal. App. 3d 1290, 1296, 233 Cal. Rptr. 881* ; *accord Robards v. Gaylord Bros., Inc. (9th Cir. 1988) 854 F.2d 1152, 1155]* .

[b] Computation of One-Year Period

In computing the one-year period referred to in *Civ. Code § 1624(a)(1)*, the day on which the agreement is made is excluded; the period begins on the following day and ends at the close of the anniversary of the day on which the agreement was made [*Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 759, 161 P.2d 217]* .

ILLUSTRATION:

One-Year Contract Commencing After Contract Is Made. A contract is limited to a one-year period, but that period is to begin in the future and not on the day following the making of the contract. Does the statute of frauds require that contract to be in writing? Yes [*Kraft v. Rooke (1930) 103 Cal. App. 552, 555, 284 P. 935* ; *see also American Trust Co. v. Kindsfater (1960) 187 Cal. App. 2d 735, 737-739, 9 Cal. Rptr. 840]* .

[c] Exception for Qualified Financial Contracts

[i] Terms of Exception

Notwithstanding the general requirement regarding agreements not to be performed within one year [*Civ. Code § 1624(a)(1)*; *see* discussion in [a], *above*], a "qualified financial contract" [*see Civ. Code § 1624(b)(2)*; *see also* discussion in [ii], *below*] that is valid in other respects and is otherwise enforceable is not invalid for lack of a note, memorandum, or other writing and is enforceable by way of action or defense, if either of the following conditions are satisfied [*Civ. Code § 1624(b)(1)*]:

- There is sufficient evidence to indicate that a contract has been made [*Civ. Code § 1624(b)(3)*; *see* discussion in [iii], *below*].

- The parties have agreed by means of a prior or subsequent written contract to be bound by the terms of the qualified financial contract from the time they reached agreement (by telephone, by exchange of electronic messages, or otherwise) on those terms.

"Qualified financial contracts" that meet the requirements of *Civ. Code § 1624(b)* also are excepted from the statute of frauds contained in *Com. Code §§ 1206* and *2201* [*Com. Code §§ 1206(3), 2201(4)*]. For an allegation of a qualified financial contract meeting these criteria, see *§ 530.61*.

[ii] "Qualified Financial Contracts" Defined

A "qualified financial contract" means an agreement as to which each party is other than a natural person and that is for any of the following [*Civ. Code § 1624(b)(2)*]:

- The purchase and sale of foreign exchange, foreign currency, bullion, coin, or precious metals on a forward, spot, next-day value or other basis.

- The purchase (other than the purchase of a commodity for future delivery on, or subject to the rules of, a contract market or board of trade), sale, or transfer of any commodity or any similar good, article, service, right, or interest that is presently or in the future becomes the subject of a dealing in the forward contract trade, or any product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into.

- The purchase and sale of currency, or interbank deposits denominated in United States dollars.

- A currency option, currency swap, or cross-currency rate swap.

- A commodity swap or a commodity option (other than an option contract traded on, or subject to the rules of, a contract market or board of trade).

- A rate swap, basis swap, forward rate transaction, or an interest rate option.

- A security-index swap or option, or a security or securities price swap or option.

- Any other similar transaction relating to a price or index (including any transaction or agreement involving any combination of the above, any cap, floor, collar, or similar transaction with respect to a rate, commodity price, commodity index, security or securities price, security index, other price index, or loan price).

- An option with respect to any of the above.

[iii] Evidence Sufficient To Establish Qualified Financial Contract Was Made

Evidence of an electronic communication (including the recording of a telephone call or the tangible written text produced by computer retrieval), admissible in evidence under the laws of California, sufficient to indicate that in the communication a contract was made between the parties, is sufficient evidence that a contract has been made [*Civ. Code § 1624(b)(3)(A)*].

If a confirmation in writing sufficient to indicate that a contract has been made between the parties and sufficient against the sender is received by the party against whom enforcement is sought no later than the fifth business day after the contract is made (or any other period of time that the parties agree in writing) and the sender does not receive, on or before the third business day after receipt (or the other period of time that the parties agree in writing), written objection to a material term of the confirmation, there is sufficient evidence that a contract has been made [*Civ. Code § 1624(b)(3)(B)*; *see Civ. Code § 1624(b)(4)* (communication of confirmation or objection by electronic signals)].

Furthermore, there is sufficient evidence that a contract has been made if the party against whom enforcement is sought admits in its pleading, testimony, or otherwise in court that a contract was made [*Civ. Code § 1624(b)(3)(C)*]. Finally, a note, memorandum, or other writing sufficient to indicate that a contract has been made, signed by the party against whom enforcement is sought or by its authorized agent or broker, constitutes sufficient evidence that a contract has been made [*Civ. Code § 1624(b)(3)(D)*].

[2] Promise to Answer for Another's Debt

[a] General Requirement and Exceptions

A special promise to answer for the debt, default, or miscarriage of another is invalid unless it, or some note or memorandum of it, is in writing and subscribed by the party to be charged or by his or her agent [*Civ. Code §§ 1624(a)(2), 2793*]. Exceptions to this rule exist when the promise to answer for the obligation of another is deemed an original obligation of the promisor, and thus need not be in writing, in any of the following cases [*Civ. Code §§ 1624(a)(2), 2793, 2794*]:

- When the promise is made by one who has received property of another on an undertaking to apply it pursuant to that promise, or by one who has received a discharge from an obligation in whole or in part, in consideration of that promise.

- When the creditor parts with value, or enters into an obligation, in consideration of the obligation in respect to which the promise is made, in terms or under circumstances which render the party making the promise the principal debtor and the person in whose behalf it is made, his or her surety.

- When a promise to answer for an antecedent obligation of another is made in a consideration for the promisee's canceling the antecedent obligation and accepting the new promise as a substitute, or in consideration for the promisee releasing the property of another from a levy or his or her person from imprisonment under an execution on a judgment obtained on the antecedent obligation.

- When the promise is given for a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation or from another person.

- When a factor undertakes, for a commission, to sell merchandise and act as surety in connection with the sale.

- When the holder of an instrument for the payment of money, on which a third person is or may become liable to him or her, transfers it in payment of a precedent debt of the holder or for a new

consideration and, in connection with the transfer, enters into a promise respecting that instrument.

ILLUSTRATION:

Examples of Promises Benefitting Promisor. Assumption of a chattel mortgage may render the promisor the principal debtor [*Parrish v. Greco (1953) 118 Cal. App. 2d 556, 561, 258 P.2d 566* ; *see Civ. Code § 2794(2)*]. A sale made on the promisor's promise to pay with delivery to a third party may render the promisor the principal debtor [*Merz v. Poole (1927) 82 Cal. App. 12, 14-15, 254 P. 914]* . A promise to indemnify the sheriff for any damage to property attached in a suit brought by the promisor and delivered to the promisor by the sheriff rendered the promisor the principal debtor and the promise outside the statute of frauds [*Burr v. Cross (1906) 3 Cal. App. 414, 415-416, 86 P. 824]* .

In determining whether or not a promise is given for consideration beneficial to the promisor, so as to take the promise to answer for another's debt out of the statute of frauds pursuant to *Civ. Code § 2794(4)*, if the leading and main object of the promisor is not to become surety or guarantor of another but to serve the promisor's own purposes or interests, the promise is not within the statute, even though its effect may be to pay the debt or discharge the obligation of another [*Schumm v. Berg (1951) 37 Cal. 2d 174, 187, 231 P.2d 39* (promise to support child on consideration of mother's forbearance from paternity suit was not within statute)]. Under this test, for example, the promise of the majority shareholder of a corporation to pay the corporation's debt to a supplier in consideration for the supplier's continuing deliveries to the corporation may be an original obligation of the shareholder under *Civ. Code § 2794(4)* [*Michael Distrib. Co. v. Tobin (1964) 225 Cal. App. 2d 655, 664-666, 37 Cal. Rptr. 518]* . The consideration usually is, but does not need to be, pecuniary [*Farr & Stone Ins. Brokers, Inc. v. Lopez (1976) 61 Cal. App. 3d 618, 622, 132 Cal. Rptr. 641* (benefits to children's welfare and economic venture and to own business reputation were sufficient)]. An incidental or secondary benefit is insufficient, however [*Seneca Communications, Inc. v. International Bank of California (1980) 103 Cal. App. 3d 541, 550-551, 163 Cal. Rptr. 176* (applying *Code Civ. Proc. § 1974*; bank's desire to keep customer was insufficient benefit in relation to representation regarding customer's account)].

If the promise to pay another person's debt is made to the debtor rather than to the debtor's creditor, there is no contract to answer for the debt of another within the statute of frauds [*King v. Smith (1948) 33 Cal. 2d 71, 74, 199 P.2d 308]* .

[b] Guaranty on Face of Commercial Paper

The obligation of a guarantor of a negotiable instrument or the obligation of an accommodation party (one who signs as maker, drawer, acceptor, or indorser for the benefit of another) may be enforced notwithstanding any statute of frauds and whether or not the accommodation party receives consideration for the accommodation [*Com. Code § 3419(b)*; *see Com. Code § 3419(d)* (when collection rather than payment is guaranteed)].

[c] Personal Representative's Promise to Pay Estate Debt

No personal representative is chargeable on a special promise to answer in damages for a liability of the decedent or to pay a debt of the decedent out of the personal representative's own estate unless the agreement for that purpose, or some memorandum or note of that agreement, is in writing and is signed by either the personal representative or by some other person specifically authorized by the personal representative in writing to sign the agreement or the memorandum or note [*Prob. Code § 9604*; *see also* Ch. 456, *Probate: Management of Estate Assets*].

[d] Nonprofit Association Member's Promise to Pay Association Debt

A member, director, or agent of a nonprofit association is not liable for a debt, obligation, or liability of the association solely by reason of being a member, director, officer, or agent [*Corp. Code § 18605*; *see Corp. Code § 21200* (nonliability of members of unincorporated association that is organized as medical society)].

A member of a nonprofit association is not liable for a contractual obligation of the association unless one of the

following conditions is satisfied [*Corp. Code § 18610*]:

- The member expressly assumes personal responsibility for the obligation in a signed writing that specifically identifies the obligation assumed.

- The member expressly authorizes or ratifies the specific contract, as evidenced by a writing, except when the member authorizes or ratifies a contract solely in the member's capacity as a director, officer, or agent of the association.

- With notice of the contract, the member receives a benefit under the contract; in this case, liability is limited to the value of the benefit received.

- The member executes the contract without disclosing that the member is acting on behalf of the association.

- The member executes the contract without authority to execute the contract.

In any event, a member or person in control of a nonprofit association may be subject to liability for a debt, obligation, or liability of the association under common law principles governing alter ego liability of shareholders of a corporation, taking into account the differences between a nonprofit association and a corporation [*Corp. Code § 18630*].

[e] Representation Regarding Another's Credit

No evidence is admissible to charge a person on a representation as to the credit of a third person unless the representation, or some memorandum of it, is in writing, either subscribed by or in the handwriting of the party to be charged [*Code Civ. Proc. § 1974*]. *Code Civ. Proc. § 1974* bars any cause of action in which proof of the oral representation is essential, including actions for negligent and fraudulent misrepresentation of a third party's credit [*Seneca Communications, Inc. v. International Bank of California (1980) 103 Cal. App. 3d 541, 547-548, 163 Cal. Rptr. 176* (bank not liable to creditor for false oral representation concerning existence and amount of debtor's account)].

Code Civ. Proc. § 1974 is a statute of frauds provision and is to be applied consistently with *Civ. Code § 1624(a)(2)* [*Code Civ. Proc. § 1974*; *see* discussion of *Civ. Code § 1624(a)(2)* at [2][a], *above*]. The requirement that *Code Civ. Proc. § 1974* be applied consistently with *Civ. Code § 1624(a)(2)* is intended to make construction of *Civ. Code § 1624* applicable to cases under *Code Civ. Proc. § 1974*. Thus, *Code Civ. Proc. § 1974*, like *Civ. Code § 1624(a)(2)*, is inapplicable in cases in which the representation is made under circumstances involving an estoppel to assert the statute of frauds, a fraud by a fiduciary on his or her principal, or a benefit received by defendant himself or herself [*see Seneca Communications, Inc. v. International Bank of California (1980) 103 Cal. App. 3d 541, 548-549, 163 Cal. Rptr. 176]* .

For a form for a complaint for damages for misrepresentation of the creditworthiness of another, see Ch. 95, *Banks, Deposits, and Checks* .

[3] Prenuptial Agreements

Premarital agreements executed on or after January 1, 1986 are governed by the Uniform Premarital Agreement Act (*Fam. Code § 1500 et seq.*) [*Fam. Code § 1601*]. Agreements executed prior to that date are governed by the prior law [*Fam. Code § 1503*; *see* former *Civ. Code §§ 1624(3), 5134*]. Premarital agreements are discussed in Ch. 359, *Marriage* .

The Uniform Premarital Agreement Act requires a premarital agreement to be in writing and signed by both parties in order for it to be enforceable, although no additional consideration is required [*Fam. Code § 1611*; *see Hall v. Hall (1990) 222 Cal. App. 3d 578, 585, 271 Cal. Rptr. 773* (oral agreements are not enforceable outside Act despite single "throw away" legislative committee comment to contrary)]. Agreements within the Act are specifically limited to agreements between prospective spouses [*Fam. Code § 1610(a)*]. Thus, the Act does not govern agreements relating to the disposition of property between parties who live together without marrying [*see Marvin v. Marvin (1976) 18 Cal. 3d 660, 673-675, 134 Cal. Rptr. 815, 557 P.2d 106]* . Agreements by persons not contemplating marriage are discussed in Ch. 387, *Nonmarital Cohabitation* , and in Kirkland, Lurvey & Richmond, California Family Law Practice amd Procedure, 2nd ed., Chs. 2, 200 (Matthew Bender)

The Uniform Premarital Agreement Act (*Fam. Code § 1500 et seq.*) does not specifically make reference to any of the traditional exceptions to the statute of frauds. However, it does not preclude them either. A court of appeal has held that traditional exceptions do apply to *Fam. Code § 1611* [*see Hall v. Hall (1990) 222 Cal. App. 3d 578, 587, 271 Cal. Rptr. 773* (oral premarital agreement made in spring of 1986 enforceable under partial performance exception, discussed in *§ 530.18[3]*)].

[4] Agreement to Transfer Real Property Interest

An agreement to sell real property or an interest therein, or to lease it for a period exceeding one year, is invalid unless the agreement, or some note or memorandum of it, is in writing and subscribed by the party to be charged or his or her agent. In addition, such an agreement, if made by an agent of the party sought to be charged, is invalid unless the authority of the agent is in writing and subscribed by the party to be charged [*Civ. Code § 1624(a)(3)*; *see, e.g., Elias Real Estate, LLC v. Tseng (2007) 156 Cal. App. 4th 425, 430-434, 67 Cal. Rptr. 3d 360* (three brothers, who with a fourth brother owned parcel of real property as tenants in common, were not bound by fourth brother's acceptance of offer to buy, because that brother's authority, if any, to act as agent for others was not evidenced by any writing that others had signed)].

Agreements to convey an interest in real property, within the meaning of *Civ. Code § 1624(a)(3)*, include, for example, the following:

- A conveyance or an agreement to convey water rights [*Stepp v. Williams (1921) 52 Cal. App. 237, 253, 198 P. 661]* ;

- An option to purchase real property [*Pacific S.W. Dev. Corp. v. Western Pac. R.R. Co. (1956) 47 Cal. 2d 62, 68, 301 P.2d 825* (*Civ. Code § 1624(a)(4)*); *Ganiats Constr., Inc. v. Hesse (1960) 180 Cal. App. 2d 377, 383-384, 4 Cal. Rptr. 706]* ; and

- Agreements restricting the right to alienate real property [*Estate of Baglione (1966) 65 Cal. 2d 192, 197, 53 Cal. Rptr. 139, 417 P.2d 683* ; *Pellerito v. Dragna (1940) 41 Cal. App. 2d 85, 89, 105 P.2d 1011]* .

A borrower-buyer's oral promise to grant a lien on real property in return for the loan of money with which to purchase that property is severable from its promises to repay principal and to pay interest and fees on the loan. A borrower to whom a loan is made in that situation will be required to grant the lien on the basis of estoppel and part performance [*Landes Constr. Co., Inc. v. Royal Bank of Canada (9th Cir. 1987) 833 F.2d 1365, 1370 n.1* (applying California law and decided before enactment of *Civ. Code § 1624(a)(7)*, discussed at [10], *below*)].

Similarly, an agreement to share the profits from a transaction involving real estate is not required to be in writing. Thus, although an agreement assigning a fractional interest in the minerals produced under an oil and gas lease is a transfer of an interest in real property that must be in writing, an agreement giving an interest in the net profits realized

under an oil and gas lease is not required to be in writing [*Dutton v. Interstate Inv. Corp. (1941) 19 Cal. 2d 65, 69-70, 119 P.2d 138]* .

A partnership or joint venture agreement may be oral even though one party's contribution to the partnership or joint venture consists of real property [*James v. Herbert (1957) 149 Cal. App. 2d 741, 748, 309 P.2d 91]* .

[5] Transfer of Real Property Interest

An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the estate or by an agent authorized by writing [*Civ. Code § 1091*; *but see Estate of Stephens v. Williams (2002) 28 Cal. 4th 665, 677-678, 678, 122 Cal. Rptr. 2d 358, 49 P.3d 1093* (conveyance signed by amanuensis ["one who copies or writes from the dictation of another"] performing a mere mechanical function in signing rather than exercising judgment or discretion deemed valid as a deed under *Civ. Code § 1091*)]. No estate or interest in real property, other than leases for a term not exceeding one year, or any power over or concerning it or in any manner relating to it, can be created, granted, assigned, surrendered, or declared, except by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the estate or interest, or by the party's lawful agent authorized by writing [*Code Civ. Proc. § 1971*; *see also Prob. Code § 15206* (validity of trust in relation to real property)]. However, *Code Civ. Proc. § 1971* is not to be construed to abridge the power of any court to compel the specific performance of an agreement, in case of part performance [*Code Civ. Proc. § 1972(a)*; *see § 530.18[4]*]. Moreover, *Code Civ. Proc. § 1971* does not affect the creation of a trust under the Trust Law (*Prob. Code § 15000 et seq.*) or prevent any trust from arising or being extinguished by implication or operation of law [*Code Civ. Proc. § 1972(b)*; *see Prob. Code § 82* (definition of trust within meaning of Trust Law)].

For a discussion of what constitutes an interest in real property, see [4], *above*.

[6] Mortgages and Deeds of Trust

A mortgage may only be created, renewed, or extended by writing, executed with the formalities required in the case of a grant of real property [*Civ. Code § 2922*]. Likewise, a power of attorney to execute a mortgage must be in writing, subscribed, acknowledged, or proved, certified, and recorded in the same manner as powers of attorney for grants of real property [*Civ. Code § 2933*].

An agreement by a purchaser of real property to pay an indebtedness secured by a mortgage or deed of trust on the property purchased, unless assumption of the indebtedness by the purchaser is specifically provided for in the conveyance of the property, is invalid unless the agreement, or some note or memorandum of it, is in writing and subscribed by the party to be charged or by his or her agent [*Civ. Code § 1624(a)(6)*].

A borrower-buyer's oral promise to grant a lien on real property in return for the loan of money with which to purchase that property is severable from its promises to repay principal and to pay interest and fees on the loan. A borrower to whom a loan is made in that situation will be required to grant the lien on the basis of estoppel and part performance [*Landes Constr. Co., Inc. v. Royal Bank of Canada (9th Cir. 1987) 833 F.2d 1365, 1370 n.1* (applying California law and decided before enactment of *Civ. Code § 1624(a)(7)*, discussed at [10], *below*)].

An unsigned agreement by which a lender agreed to forbear from exercising the right of foreclosure under a deed of trust securing an interest in real property came within the statute of frauds. Although the forbearance agreement did not create, renew, or extend the note and deed of trust, it did modify them, and an agreement to modify a contract that is subject to the statute of frauds is also subject to the statute of frauds [Secrest v. Security National Mortgage Loan Trust 2002-2 *(2008) 167 Cal. App. 4th 544, 553, 84 Cal. Rptr. 3d 275*]. The fact that the borrowers made a down payment pursuant to the agreement did not estop the lender from asserting the statute of frauds [Secrest v. Security National

Mortgage Loan Trust 2002-2 *(2008) 167 Cal. App. 4th 544, 555, 84 Cal. Rptr. 3d 275*]. The court of appeal therefore affirmed the trial court judgment declaring valid the lender's notice of default and election to sell under the deed of trust.

[7] Employment of Real Estate Broker

An agreement authorizing or employing an agent, broker, or any other person for compensation or a commission to purchase or sell real estate, to lease real estate for a period exceeding one year, or to procure, introduce, or find a purchaser or seller of real estate or a lessee or lessor of real estate when the lease is for a period exceeding one year is invalid unless the agreement, or some note or memorandum of it, is in writing and subscribed by the party to be charged or by his or her agent [*Civ. Code § 1624(a)(4)*]. A contract to pay an unlicensed person a finder's fee for merely introducing a buyer and seller is also required by *Civ. Code § 1624(a)(4)* to be in writing [*Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 25-27, 216 Cal. Rptr. 130, 702 P.2d 212]* . For further discussion of *Civ. Code § 1624(a)(4)* and grounds for avoiding its effect, see Ch. 103, *Brokers* .

[8] Promise to Be Performed After Death

An agreement that, by its terms, is not to be performed during the lifetime of the promisor is invalid unless it, or some note or memorandum of it, is in writing and subscribed by the party to be charged or by his or her agent [*Civ. Code § 1624(a)(5)*]. If it is possible that a contract may be performed during the lifetime of the promisor, it is not barred by *Civ. Code § 1624(a)(5)* [*Roy v. Salisbury (1942) 21 Cal. 2d 176, 182, 130 P.2d 706]* . For example, a contract to care for a dog if the owner was unable to do so or if the owner died was not required to be in writing because that contract could have been performed in decedent's lifetime if the dog had died first [*see Roy v. Salisbury (1942) 21 Cal. 2d 176, 182, 130 P.2d 706]* .

[9] Promise to Make Will

[a] Promise Made After 2000

A contract to make a will or devise or other instrument, or not to revoke a will or devise or other instrument, or to die intestate, if made after 2000, can be established only by one of the following [*Prob. Code § 21700(a)*]:

- Provisions of a will or other instrument stating the material provisions of the contract.
- An expressed reference in a will or other instrument to a contract and extrinsic evidence proving the terms of the contract.
- A writing signed by the decedent evidencing the contract.
- Clear and convincing evidence of an agreement between the decedent and the claimant or a promise by the decedent to the claimant that is enforceable in equity.
- Clear and convincing evidence of an agreement between the decedent and another person for the benefit of the claimant or a promise by the decedent to another person for the benefit of the claimant that is enforceable in equity.

For discussion of equitable enforcement of contracts to make wills, see [b] and [c], *below*, and Ch. 528, *Specific Performance.*

The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills [*Prob. Code § 21700(b)*].

[b] Promise Made in 1985-2000

Under former *Prob. Code § 150* (repealed eff. Jan. 1, 2001), a contract to make a will or devise, not to revoke a will or devise, or to die intestate, if made in 1985-2000 [*see Prob. Code § 21700(c)*] can be established "only" by one of the following [former *Prob. Code § 150(a)* (repealed eff. Jan. 1, 2001)]:

- Provisions of a will stating material provisions of the contract.
- An express reference in a will to a contract and extrinsic evidence proving the terms of the contract.
- A writing signed by the decedent evidencing the contract.

The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills [former *Prob. Code § 150(b)*].

Notwithstanding the statement in former *Prob. Code § 150* that a provision to make a will can "only" be established by one of the three methods listed above, the courts have held that an oral promise not to revoke a will may be enforced under the doctrine of equitable estoppel [*Juran v. Epstein (1994) 23 Cal. App. 4th 882, 897, 28 Cal. Rptr. 2d 588]* . The court in *Juran v. Epstein* found that while generally former *Prob. Code § 150(a)* provided the sole means under which a party could establish an agreement not to revoke a will, in enacting that section the Legislature did not express an intent to abolish the use of the equitable estoppel doctrine in appropriate circumstances [*Juran v. Epstein (1994) 23 Cal. App. 4th 882, 897, 28 Cal. Rptr. 2d 588]* . Equitable estoppel principles subsequently were held to be available under former *Prob. Code § 150* (or its predecessor, former *Civ. Code § 1624(6)*) to enforce a testator's alleged oral agreement to leave all of his property to his son if the son cared for him during the testator's lifetime [*Estate of Housley v. Haywood (1997) 56 Cal. App. 4th 342, 358, 65 Cal. Rptr. 2d 628* (whether date of alleged agreement was before or after 1985 was not ascertainable)]. The court, following *Juran v. Epstein*, stated that nothing in the express language of former *Prob. Code § 150* distinguished between cases in which the promisor was alive and cases in which the promisor was dead [*Estate of Housley v. Haywood (1997) 56 Cal. App. 4th 342, 354-355, 65 Cal. Rptr. 2d 628]* . For discussion of the doctrine of equitable estoppel to assert the statute of frauds generally, see *§ 530.19*. For application of the doctrine in an action for quasi-specific performance of a promise to make a will, see *§ 530.20* [*see also* Ch. 528, *Specific Performance* , Form 2 and Comment]. The related issue of part performance of an agreement to make a will is discussed in *§ 530.18[5]*.

A party also may be estopped from asserting the statute of limitations as a defense to an untimely action to enforce an oral promise to make a will. In a case in which the one-year statute of limitations set forth in *Code Civ. Proc. § 366.2* applied because the promisor had made an inter vivos transfer of property covered by the contract, the court followed the reasoning of *Juran v. Epstein* discussed above [*Battuello v. Battuello (1998) 64 Cal. App. 4th 842, 847-848, 75 Cal. Rptr. 2d 548* ; *see Juran v. Epstein (1994) 23 Cal. App. 4th 882, 897, 28 Cal. Rptr. 2d 588]* . It held that while *Code Civ. Proc. § 366.2(a)(2)* clearly shows that the Legislature intended that the one-year statute of limitations could not be "tolled" or "extended," the statute says nothing about equitable estoppel. The court concluded that in the absence of any such language or legislative history to the contrary, the doctrine of equitable estoppel still applies [*Battuello v. Battuello (1998) 64 Cal. App. 4th 842, 847-848, 75 Cal. Rptr. 2d 548* (appellant alleged sufficient facts to come within doctrine of equitable estoppel to application of statute of limitations)].

A promise to leave another an interest in property is not necessarily a promise to devise or bequeath property so as to be governed by former *Prob. Code § 150*. In a case involving a promise made in contemplation of marriage to leave the prospective spouse a life estate, the agreement was held to be governed by *Fam. Code § 1611* of the Uniform Premarital Agreement Act (discussed in [3], *above*). When the agreement was made, the property was held by a trust and it was contemplated that the conveyance of the life estate would be accomplished by modifying the trust instrument. Also, the promise was made prior to marriage, and the return consideration was the prospective spouse's promise to stop working

[*Hall v. Hall (1990) 222 Cal. App. 3d 578, 583, 271 Cal. Rptr. 773]* .

[c] Promise Made Before 1985

An agreement to devise or bequeath property or to make any provision for any person by will, if executed on or before December 31, 1984, is governed by former *Civ. Code § 1624(6)*. Under this former statute, such an agreement is invalid unless it, or some note or memorandum of it, is in writing and subscribed by the party to be charged or by his or her agent [former *Civ. Code § 1624(6)*; *see* *Estate of Baglione (1966) 65 Cal. 2d 192, 197, 53 Cal. Rptr. 139, 417 P.2d 683* (reciprocal agreement between spouses that property would go to other spouse on death); *Palmer v. Phillips (1954) 123 Cal. App. 2d 291, 293-295, 266 P.2d 850* (promise to make will providing for person who acts as companion and manages affairs)]. However, case law permitted enforcement of oral agreements in equity under the doctrine of equitable estoppel in appropriate circumstances. For discussion, see Ch. 528, *Specific Performance* , Form 2, Comments; see also [b], *above*.

[10] Commercial Loan Commitment in Excess of $100,000

A contract, promise, undertaking, or commitment to loan money or to grant or extend credit, in an amount greater than $100,000, not primarily for personal, family, or household purposes, made by a person engaged in the business of lending or arranging for the lending of money or extending credit is invalid unless it, or some note or memorandum of it, is in writing and subscribed by the party to be charged or by that party's agent [*Civ. Code § 1624(a)(7)*]. For purposes of *Civ. Code § 1624(a)(7)*, a contract, promise, undertaking, or commitment to loan money secured solely by residential property consisting of one to four dwelling units shall be deemed to be for personal, family, or household use [*Civ. Code § 1624(a)(7)*].

It was the intent of the Legislature in enacting *Civ. Code § 1624(a)(7)* that judicially and legislatively recognized defenses and exceptions to *Civ. Code § 1624(a)(1)-(6)* also apply to *Civ. Code § 1624(a)(7)* [Stats. 1988, ch. 1096, § 3].

[11] Sale of Personal Property in Excess of $5,000

A contract for the sale of personal property is not enforceable by way of action or defense beyond $5,000 in amount or value of remedy unless there is some writing that does all of the following [*Com. Code § 1206(1)*]:

- Indicates that a contract for sale has been made between the parties at a defined or stated price.
- Reasonably identifies the subject matter.
- Is signed by the party against whom enforcement is sought or by his or her authorized agent.

Com. Code § 1206(1) does not apply to any of following [*Com. Code § 1206(2), (3)*]:

- Contracts for the sale of goods [*Com. Code § 2201*; *see* discussion in [12], *below*].
- Contracts for the sale of securities [*Com. Code § 8113*; *see* discussion in [12][f], *below*].
- Security agreements [*Com. Code §§ 9201, 9203*; *see* discussion in [12][g], *below*].
- Qualified financial contracts [*Civ. Code § 1624(b)*; *see* discussion in [1][c], *above*].

[12] Sale of Goods in Excess of $500

[a] In General

Except as otherwise provided in *Com. Code § 2201*, a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his or her authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed on, but the contract is not enforceable under this provision beyond the quantity of goods shown in the writing [*Com. Code § 2201(1)*].

Under *Com. Code § 2201(1)*, there are only three definite and invariable requirements for the memorandum [*Lockwood v. Smigel (1971) 18 Cal. App. 3d 800, 803, 96 Cal. Rptr. 289]* :

- It must evidence a contract for the sale of goods.

- It must be "signed" (any authentication identifying the party to be charged) [*see Donovan v. RRL Corp. (2001) 26 Cal. 4th 261, 276-278, 109 Cal. Rptr. 2d 807, 27 P.3d 702* (car dealership's name in printed newspaper advertisement was "signature" within meaning of *Com. Code § 1201(38)* sufficient to satisfy statute of frauds; when advertisement reasonably justifies recipient's understanding that communication was intended as offer, offeror's intent to authenticate his or her name as signature can be established from face of advertisement)].

- It must specify a quantity.

A memorandum evidencing a requirements contract is sufficient if it indicates that there has been a real transaction for the sale of output or for the purchase of requirements [*Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 762-764, 206 Cal. Rptr. 354, 686 P.2d 1158* (*overruled on other grounds in Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal. 4th 85, 88, 44 Cal. Rptr. 2d 420, 900 P.2d 669*)].

[b] Written Confirmation of Contract; Notice of Objection

Between merchants, if a writing confirming the contract and sufficient against the sender is received within a reasonable time and the party receiving it has reason to know its contents, it satisfies the requirements of *Com. Code § 2201(1)* against the receiving party unless written notice of objection to its contents is given within 10 days after it is received [*Com. Code § 2201(2)*]. A reasonable time for taking any action is determined by the nature, purpose, and circumstances of that action [*Com. Code § 1204(2)*].

ILLUSTRATION:

Letter of Credit as Confirmation. A buyer instructed its bank to issue an irrevocable letter of credit in favor of a seller. The letter of credit contained all the essential terms of the transaction and was signed by the buyer's bank, not by the buyer. Is the letter of credit a sufficient memorandum of confirmation under *Com. Code § 2201(2)* to allow the buyer to recover damages for the seller's breach of the contract? Yes. The letter of credit it was "sufficient against the sender" because the buyer's instruction to its bank to issue the letter of credit amounted to its adoption of the bank's signature as its own within the meaning of *Com. Code § 1201(39)* [*now see Com. Code § 1201(38)*]. In that limited sense, the bank was the buyer's agent, and most important, the buyer was bound by the letter of credit [*Procyon Corp. v. Components Direct, Inc. (1988) 203 Cal. App. 3d 409, 412-413, 249 Cal. Rptr. 813]* .

[c] Estoppel

A California court of appeal has held that under *Com. Code § 1103*], equitable principles survived enactment of the Uniform Commercial Code in California. Thus, the doctrine of equitable estoppel is available to bar assertion of the statute of frauds to prevent enforcement of a contract for the sale of goods under the Commercial Code [*Allied Grape*

Growers v. Bronco Wine Co. (1988) 203 Cal. App. 3d 432, 442-443, 249 Cal. Rptr. 872 (commenting that *Com. Code § 2201(3)(c)*, discussed in *§ 530.12[12][i]*, amounts to a codification of one aspect of equitable estoppel), disagreeing with Ninth Circuit's contrary conclusion in *C. R. Fedrick, Inc. v. Borg-Warner Corp. (9th Cir. 1977) 552 F.2d 852, 856-858*]. The majority of other jurisdictions apply the doctrine of estoppel to overcome the Commercial Code statute of frauds. As in other contexts, the doctrine of estoppel is proven if one party will suffer an unconscionable injury if the statute of frauds is asserted to prevent enforcement of an oral contract. Unconscionable injury results from denying enforcement of an oral contract after one party is induced by another to seriously change its position in reliance on the oral agreement. It also occurs in cases of unjust enrichment [*Allied Grape Growers v. Bronco Wine Co. (1988) 203 Cal. App. 3d 432, 444, 249 Cal. Rptr. 872]* .

ILLUSTRATION:

Estoppel in Contract for Sale of Goods. In a situation involving an oral agreement for the purchase and sale of 850 tons of grapes, plaintiff had negotiated its way out of another contract for those grapes in order to enter the oral contract with the defendant. Then, defendant refused to schedule delivery of the grapes, at a time when there was a glut of grapes on the market and heavy rains were causing the grapes to rot in the field. Was plaintiff's change in position in reliance on the contract and resulting injury sufficient to bar the application of the statute of frauds on the basis of estoppel? Yes [*Allied Grape Growers v. Bronco Wine Co. (1988) 203 Cal. App. 3d 432, 444-445, 249 Cal. Rptr. 872]* .

General principles for estoppel to assert the statue of frauds are discussed in *§ 530.19, below*.

[d] Effect of Admission of Contract's Existence in Pleading, Testimony, or Otherwise

A contract that does not satisfy the requirements of *Com. Code § 2201(1)*, but that is valid in other respects, is enforceable if the party against whom enforcement is sought admits in his or her pleading, testimony, or otherwise in court that a contract for sale was made. If an admission is made, the contract is enforceable to the extent of the quantity of goods admitted [*Com. Code § 2201(3)(b)*]. A question exists whether enactment of *Com. Code § 2201(3)(b)* would change the earlier result in *Isaac v. A & B Loan Co. (1988) 201 Cal. App. 3d 307, 247 Cal. Rptr. 104* , in which it was held that the fact that a defendant made a declaration in another action and referred to "an agreement" with plaintiff in that declaration did not bar the defendant from asserting the defense of the statute of frauds in the action on the contract [*Isaac v. A & B Loan Co. (1988) 201 Cal. App. 3d 307, 311-312, 247 Cal. Rptr. 104]* .

[e] "Sale or Return" Transactions

Unless otherwise agreed, if goods that are delivered primarily for resale may be returned by the buyer even though they conform to the contract, the transaction is termed a "sale or return" [*Com. Code § 2326(1)(b)*]. This provision applies to contracts for the sale of goods to merchants who would buy only if the seller agreed to take back the goods in lieu of payment if the goods are not resold [UCC Comment to *Com. Code § 2326*]. Any "or return" term of a contract for sale is treated as a separate contract for sale within the statute of frauds provision of *Com. Code § 2201* [*Com. Code § 2326(3)*].

[f] Sale of Securities

A contract or modification of a contract for the sale or purchase of a security is enforceable whether or not there is a writing signed or record authenticated by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one year of its making [*Com. Code § 8113*]. For a discussion of the sale of securities, see Ch. 163, *Corporations: Transfers of Shares* .

[g] Security Agreements

A security interest that is subject to Division 9 of the Commercial Code (which concerns personal property and fixtures

as collateral) may be enforceable even if not created by a specific writing that was signed by the debtor [*see generally Com. Code § 9201 et seq.*]. The general rule is that a security interest is enforceable against the debtor and third parties with respect to the collateral when (1) value has been given, (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party, and (3) any of four alternative conditions has been satisfied [*Com. Code § 9203(b)*]. Only one of those conditions requires a signed specific security agreement [*see Com. Code § 9203(b)(3)(A)*]; the others require an agreement but not necessarily a signed or specific security agreement [*see Com. Code § 9203(b)(3)(B)-(D)*]. Moreover, the generally applicable provisions of Division 9 are subordinate to numerous other provisions of law, both apart from the Commercial Code [*see* Com. Code § 9201(b), (c)] and within it [*see Com. Code § 9203(c)*], that could apply in a particular transaction and might or might not require a signed writing. For further discussion of security interests and security agreements under Division 9, see *Ch. 503, Sales: Secured Transactions, § 503.20* et seq.

[h] Goods Being Specially Manufactured for Buyer

A contract that does not satisfy the requirements of *Com. Code § 2201(1)*, but that is valid in other respects, is enforceable if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, and the seller has made either a substantial beginning of their manufacture or commitments for their procurement before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer [*Com. Code § 2201(3)(a)*].

An oral contract for the sale of goods that is enforceable because some of the goods are manufactured specially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business may also be enforced as to other goods included in the oral contract, even though the other goods are normally saleable to others in the seller's course of business [*Distribu-Dor, Inc. v. Karadanis (1970) 11 Cal. App. 3d 463, 468, 90 Cal. Rptr. 231]* .

[i] Goods Which Have Been Accepted or Paid for

A contract that does not satisfy the requirements of *Com. Code § 2201(1)*, but that is valid in other respects, is enforceable with respect to goods for which payment has been made and accepted or which have been received and accepted [*Com. Code § 2201(3)(c)*; *see Com. Code § 2606*]. Receipt and acceptance of goods by a third party, to whom the goods were delivered at the buyer's request, excepts the contract from the statute of frauds pursuant to *Com. Code § 2201(3)(c)* [*Dairyman's Cooperative Creamery Assn. v. Leipold (1973) 34 Cal. App. 3d 184, 188, 109 Cal. Rptr. 753]* .

Part payment makes a contract enforceable only as to the portion of the goods for which payment has been made, when the goods are apportionable. The purpose of the rule is to avoid disputes over the quantity of goods claimed to be covered by the contract. If, however, a buyer claims that the contract is only for the sale of one indivisible unit, such as a single automobile, part payment will allow an oral contract to be enforced, because the part payment provides evidence of the contract and of the party to be charged and there can be no dispute over quantity when only one indivisible unit is claimed under the contract [*Lockwood v. Smigel (1971) 18 Cal. App. 3d 800, 803-804, 96 Cal. Rptr. 289]* .

[13] Agreement Waiving or Tolling of Statute of Limitations

An acknowledgment or promise is not sufficient evidence of a new or continuing contract to take a case out of the operation of the statute of limitations unless the acknowledgment or promise is contained in a writing signed by the party to be charged. However, any payment on account of principal or interest due on a promissory note made by the party to be charged is sufficient acknowledgment or promise of a continuing contract to stop, from the time such payment is made, the running of the time within which an action may be commenced on the principal sum or on any installment of principal or interest due on the note, and to start the running of a new period of time. Such a payment by

itself will not revive a cause of action once barred [*Code Civ. Proc. § 360*].

For discussion and forms for allegations relating to revival of an obligation barred by the statute of limitations, see Ch. 385, *Negotiable Instruments* , and Ch. 345, *Limitation of Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral OverviewContracts LawStatutes of FraudsGeneral OverviewContracts LawStatutes of FraudsRequirementsPerformanceContracts LawTypes of ContractsGuaranty ContractsEstate, Gift & Trust LawWillsContracts to Make WillsFamily LawMarital Duties & RightsProperty RightsPremarital AgreementsDefensesGeneral OverviewGovernmentsLegislationStatutes of LimitationsWaiversLabor & Employment LawEmployment RelationshipsEmployment ContractsStatutes of FraudsReal Property LawFinancingMortgages & Other Security InstrumentsFormalitiesReal Property LawPurchase & SaleContracts of SaleEnforceabilityStatutes of Frauds

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§ 530.13 Agent's Authority: The Equal Dignity Rule

[1] Scope of Rule

Authority for an agent to enter into a contract required by law to be in writing can only be given in writing [*Civ. Code § 2309*]. This is sometimes called the "equal dignity rule." Exceptions to the equal dignity rule include the following:

- Authority of an executive officer of a corporation need not be in writing [*Jeppi v. Brockman Holding Co. (1949) 34 Cal. 2d 11, 17-18, 206 P.2d 847* ; *Monteleone v. Southern California Vending Corp. (1968) 264 Cal. App. 2d 798, 806, 70 Cal. Rptr. 703]* .

- Written authorization is not necessary when the agent merely performs the ministerial act of signing his or her principal's name to a contract whose terms have already been agreed on, an act not involving the exercise of discretion [*Ellis v. Mihelis (1963) 60 Cal. 2d 206, 214, 32 Cal. Rptr. 415, 384 P.2d 7* ; *Dufresne v. Elite Insurance Co. (1972) 26 Cal. App. 3d 916, 923, 103 Cal. Rptr. 347]* .

- An agent need not have written authorization to exercise a right that is only required to be in writing by agreement of the parties, rather than by law [*Ripani v. Liberty Loan Corp. (1979) 95 Cal. App. 3d 603, 610, 157 Cal. Rptr. 272* (oral authority sufficient to exercise option required by lease to be in writing)].

There is no spousal exception to the requirement that authorization to enter a contract within the statute of frauds must be written. Thus, a spouse who gives oral consent to his or her spouse to enter a contract within the statute of frauds is not bound by the contract [*O'Banion v. Paradiso (1964) 61 Cal. 2d 559, 563, 39 Cal. Rptr. 370, 393 P.2d 682]* , but may ratify it [*see* *Cano v. Tyrrell (1967) 256 Cal. App. 2d 824, 830, 64 Cal. Rptr. 522* (husband's oral agency ratified by wife)].

The "amanuensis" rule has been invoked successfully as an exception to *Civ. Code § 2309*. In a case in which a father orally instructed his daughter to sign his name to a grant deed conveying property to himself and to his daughter as joint tenants, the California Supreme Court held that because the daughter acted as a mere "amanuensis" ("one who copies or

writes from the dictation of another"), performing a mere mechanical function in signing the deed rather than exercising her judgment or discretion, the conveyance was deemed valid even though the signing took place outside the father's presence and the daughter was the sole beneficiary of the transfer [*Estate of Stephens v. Williams (2002) 28 Cal. 4th 665, 674-676, 678, 122 Cal. Rptr. 2d 358, 49 P.3d 1093* (holding that although signing of grantor's name by interested amanuensis must be presumed invalid, daughter met burden of showing that signing of grantor's name was mechanical act in that grantor intended to sign using that instrumentality)].

The equal dignities rule does not bar enforcement of the agency agreement itself. Thus, an agent who had only oral authority may recover indemnification from its principal after a third party recovers damages from the agent for breach of a contract within the statute of frauds [*Sunset-Sternau Food Co. v. Bonzi (1964) 60 Cal. 2d 834, 839-843, 36 Cal. Rptr. 741, 389 P.2d 133]* .

[2] Estoppel and Ratification

A principal will not be estopped to rely on the equal dignities rule unless he or she causes the third party to believe that the agent either has or does not need written authority, or the principal orally authorized the agent and, with complete knowledge of the circumstances, receives the benefits resulting from the oral authorization. This rule applies even when the principal would be estopped to rely on the statute of frauds provision that applies to the agreement with the third party [*McGirr v. Gulf Oil Corp. (1974) 41 Cal. App. 3d 246, 257-258, 115 Cal. Rptr. 902* ; *see Kerner v. Hughes Tool Co. (1976) 56 Cal. App. 3d 924, 934, 128 Cal. Rptr. 839]* .

A contract entered into by an agent with only oral authority when written authority was required by *Civ. Code § 2309*, may be ratified by his or her principal by a subsequent writing [*Cano v. Tyrrell (1967) 256 Cal. App. 2d 824, 830-831, 64 Cal. Rptr. 522* ; *see Civ. Code §§ 2307, 2310*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActApparent AuthorityRelianceBusiness & Corporate LawAgency RelationshipsAuthority to ActStatutes of FraudsBusiness & Corporate LawAgency RelationshipsRatificationGeneral OverviewContracts LawStatutes of FraudsGeneral Overview

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§ 530.14 Memorandum

[1] Sufficiency of Memorandum

A written memorandum sufficient to satisfy the statute of frauds is merely evidence of an oral contract and usually does not contain all its terms [*Crowley v. Modern Faucet Mfg. Co. (1955) 44 Cal. 2d 321, 323, 282 P.2d 33* ; *Lamle v. Mattel, Inc. (Fed. Cir. 2005) 394 F.3d 1355, 1361-1362* (finding genuine issue of material fact as to materiality of terms that were omitted from writing but agreed upon at meeting); *Kerner v. Hughes Tool Co. (1976) 56 Cal. App. 3d 924, 934, 128 Cal. Rptr. 839]* . To be sufficient, the memorandum must contain all essential elements of a specific, consummated agreement. What is essential depends on the agreement; and failure to express that which is clearly implied does not render the memorandum deficient [*Sterling v. Taylor (2007) 40 Cal. 4th 757, 773, 55 Cal. Rptr. 3d 116, 152 P.3d 420* (extrinsic evidence properly considered to locate properties identified only by street address); *Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 762-763, 206 Cal. Rptr. 354, 686 P.2d 1158 , overruled on other grounds in Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal. 4th 85, 88, 44 Cal. Rptr. 2d 420, 900 P.2d 669]* . The writing must state all of the following with reasonable certainty [*Ontario Downs, Inc. v. Lauppe (1961) 192 Cal. App. 2d 697, 702, 13 Cal. Rptr. 782* ; *Rivers v. Beadle (1960) 183 Cal. App. 2d 691, 696, 7 Cal. Rptr. 170]* :

- Each party to the contract.

- The land, goods, or other subject matter to which the contract relates [*see, e.g., Alameda Belt Line v. City of Alameda (2003) 113 Cal. App. 4th 15, 18, 5 Cal. Rptr. 3d 879* (trial court improperly held on summary judgment that option to repurchase real property in written contract was not sufficiently certain to be enforceable; parol evidence coming into existence after execution may be considered in order to satisfy statute of frauds and to render agreement sufficiently certain to be enforceable)].

- The terms and conditions of the promises constituting the contract.

- By whom and to whom the promises are made.

Because the memorandum itself must include the essential contractual terms, it is clear that extrinsic evidence cannot supply those required terms [*see, e.g., Friedman v. Bergin (1943) 22 Cal. 2d 535, 537-539, 140 P.2d 1]* . However, extrinsic evidence can be used to explain essential terms that were understood by the parties but otherwise would be unintelligible to others. If a memorandum includes the essential terms of the parties' agreement, but the meaning of those terms is unclear, the memorandum is sufficient under the statute of frauds if extrinsic evidence clarifies the terms with reasonable certainty and the evidence as a whole demonstrates that the parties intended to be bound. Conflicts in the extrinsic evidence are for the trier of fact to resolve, but whether the evidence meets the standard of reasonable certainty is a question of law for the court [*Sterling v. Taylor (2007) 40 Cal. 4th 757, 767, 771, 55 Cal. Rptr. 3d 116, 152 P.3d 420]*

The time of performance of an act required for the sale of property subject to the statute of frauds may be implied under *Civ. Code § 1657*. For example, in one case the statute of frauds did not prevent an agreement to transfer church property from being specifically enforced, even though the agreement contained no time of performance. The court implied a reasonable time for performance, and the agreement was enforceable with the implied term [*House of Prayer v. Evangelical Assn. for India (2003) 113 Cal. App. 4th 48, 52-54, 7 Cal. Rptr. 3d 24]* .

For a discussion of the contents required in a memorandum of a contract for the sale of goods, see *§ 530.12[12]*. For discussion of the parol evidence rule and interpretation of contracts generally, see Ch. 140, *Contracts* .

[2] Memorandum May Be Contained in More Than One Document

The statute of frauds may be satisfied by more than one writing when the writings, viewed together in light of the conditions and circumstances of the parties at the time they were written, show unmistakably that they relate to the same matter, even though there is no express reference between the writings. Parol evidence is admissible to establish the connection between the writings [*Rader Co. v. Stone (1986) 178 Cal. App. 3d 10, 24, 223 Cal. Rptr. 806* (two brochures and registration statement); *Addiego v. Hill (1968) 268 Cal. App. 2d 280, 286, 73 Cal. Rptr. 901]* . Multiple papers may be considered together as a memorandum of the contract even though the party to be charged has signed only one of the papers [*Seck v. Foulks (1972) 25 Cal. App. 3d 556, 568, 102 Cal. Rptr. 170* ; *Karl v. Je Bien (1965) 231 Cal. App. 2d 769, 772, 42 Cal. Rptr. 461]* .

[3] Signature

The necessary signature need not appear at the end of the memorandum [*Cal. Canneries Co. v. Scatena (1897) 117 Cal. 447, 449-450, 49 P. 462]* . Additionally, the signature need not be manually affixed, but may be printed, stamped, or typewritten. An e-mail signed with a party's name was held to have satisfied the statute of frauds, assuming that a binding oral agreement existed and that the e-mail included all the material terms of that agreement [*Lamle v. Mattel, Inc. (Fed. Cir. 2005) 394 F.3d 1355, 1362-1363* (applying California common law); *Civ. Code § 1633.7* (signature may not be denied legal effect solely because it is in electronic form)]. In any case, however, it must appear from the face of the document that the party to be charged placed or adopted the name on the document with the intention of authenticating the writing [*Marks v. Walter G. McCarty Corp. (1949) 33 Cal. 2d 814, 820-821, 205 P.2d 1025* (letterhead held not to have been adopted as signature); *Skirball v. RKO Radio Pictures, Inc. (1955) 134 Cal. App. 2d 843, 863, 286 P.2d 954* (typewritten name at end of document adopted by initialing memorandum)]. The essential element is an intent to appropriate the name as a signature; it need not be a full handwritten signature to qualify. Thus, even initials may qualify [*Poag v. Winston (1987) 195 Cal. App. 3d 1161, 1179, 241 Cal. Rptr. 330]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract InterpretationParol EvidenceGeneral OverviewContracts LawStatutes of FraudsRequirementsGeneral OverviewContracts LawStatutes of FraudsRequirementsSignaturesContracts LawStatutes

of FraudsRequirementsWritingsEvidenceDocumentary EvidenceParol EvidenceReal Property LawPurchase & SaleContracts of SaleEnforceabilityStatutes of Frauds

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§ 530.15 Modification of Written Contract

[1] Permitted Methods of Modifying Written Contract

Contracts in writing may be modified as follows [*Civ. Code § 1698(a)-(c)*]:

- By a contract in writing.
- By an oral agreement to the extent that the oral agreement is executed by the parties.
- Unless the contract expressly provides otherwise, by an oral agreement supported by new consideration [*see Marani v. Jackson (1986) 183 Cal. App. 3d 695, 704-705, 228 Cal. Rptr. 518* (contract provision prohibiting modification except in writing precluded modification by executed oral agreement)].

An obligation that a party is required to perform under the written contract is not consideration that will support an oral modification [*Marani v. Jackson (1986) 183 Cal. App. 3d 695, 704-706, 228 Cal. Rptr. 518* ; *see also Malmstrom v. Kaiser Aluminum & Chemical Corp. (1986) 187 Cal. App. 3d 299, 314, 231 Cal. Rptr. 820* (no consideration found)]. If the modification is by an oral agreement supported by new consideration, the statute of frauds must be satisfied if the contract, as modified, is within its provisions [*Civ. Code § 1698(c)*].

Nothing in Civ. Code § 1698precludes the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts [*Civ. Code § 1698(d)*].

Personal property leases first effective between the parties on or after January 1, 1990, may be modified in accordance with *Com. Code § 10201 et seq.*, which is discussed in Ch. 413, *Personal Property Leases* .

[2] Burden of Proof of Oral Modification of Written Contract

The burden of proof for oral modification of a written contract is a preponderance of the evidence. It is error to require

oral modification to be proven by clear and convincing evidence [*Liodas v. Sahadi (1977) 19 Cal. 3d 278, 289 n.6, 137 Cal. Rptr. 635, 562 P.2d 316* ; *Barrett v. Bank of America (1986) 183 Cal. App. 3d 1362, 1370-1371, 229 Cal. Rptr. 16* (disapproving *Coldwell Banker & Co. v. Pepper Tree Office Center Associates (1980) 106 Cal. App. 3d 272, 165 Cal. Rptr. 51* , to extent that it requires clear and convincing burden of proof)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewContracts LawContract ModificationsOral ModificationsContracts LawStatutes of FraudsRequirementsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofPreponderance of Evidence

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§ 530.16 Effect of Statute of Frauds

An oral agreement within the statute of frauds is voidable at the election of either party, and each party assumes the risk of the other party withdrawing [*Goldstein v. McNeil (1954) 122 Cal. App. 2d 608, 611, 265 P.2d 113]* . An oral agreement within the statute of frauds is not invalid in the sense that it is void, however, because the statute of frauds relates only to the remedy and not to the validity of the oral contract [*O'Brien v. O'Brien (1925) 197 Cal. 577, 586, 241 P. 861]* . Whatever the form of action may be, if proof of a promise or contract within the statute is essential to maintain it, there can be no recovery unless the statute is satisfied [*Beard v. Melvin (1943) 60 Cal. App. 2d 421, 426, 140 P.2d 720]* . However, because the contract is only voidable, and not void, it may be taken out of the operation of statute by certain circumstances, such as part or full performance of the contract, estoppel to assert the statute of frauds, or waiver of the statute by failure to assert it in court [*see* discussions at *§§ 530.17-530.19* and 530.24].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesEquitable EstoppelStatutes of FraudsContracts LawPerformancePartial PerformanceOral AgreementsContracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawStatutes of FraudsGeneral Overview

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§ 530.17 Fully Performed Agreements

A fully executed oral contract is not voidable for failure to satisfy the statute of frauds, and cannot be assailed by either party or by third persons on the ground that it is not in writing [*Realty Corp. of America, Inc. v. Burton (1958) 162 Cal. App. 2d 44, 57, 327 P.2d 948* ; *Freitas v. Freitas (1916) 31 Cal. App. 16, 19, 159 P. 611]* . This principle has been applied in cases in which only one party has fully performed, on the ground that it would be inequitable to allow the other party to set up the statute of frauds [*Prince v. Varona (1956) 144 Cal. App. 2d 673, 676, 301 P.2d 512]* . It has also been held, without reference to equitable considerations, that the statute of frauds does not apply when a contract has been fully performed by one party and nothing remains to be done except the payment of money by the other party [*see* *Blaustein v. Burton (1970) 9 Cal. App. 3d 161, 185, 88 Cal. Rptr. 319* (producer revealed idea for motion picture to defendants); *Nesson v. Moes (1963) 215 Cal. App. 2d 655, 657-659, 30 Cal. Rptr. 428* (four-year employment contract)]. Similarly, the statute of frauds does not apply to a unilateral contract, that is, when a promise is given for an act rather than for another promise [*Blaustein v. Burton (1970) 9 Cal. App. 3d 161, 184-185, 88 Cal. Rptr. 319]* .

A valid deed--one that is executed by the grantor and delivered to the grantee--is an executed contract [*Civ. Code §§ 1040, 1054*], and the statute of frauds provides no basis for invalidating an alleged oral contract to make the conveyance [*Lee v. Lee (2009) 175 Cal. App. 4th 1553, 1557, 97 Cal. Rptr. 3d 516]* .

An oral prenuptial contract that has been fully performed by both parties may not be avoided even though it does not satisfy the statute of frauds [*Estate of Dokoozlian (1963) 219 Cal. App. 2d 531, 535, 33 Cal. Rptr. 151* ; *McComsey v. Leaf (1939) 36 Cal. App. 2d 132, 141-142, 97 P.2d 242]* . An oral prenuptial agreement that property shall be community property is taken out of the statute of frauds if confirmed by acts and conduct of the parties after marriage [*Handley v. Handley (1952) 113 Cal. App. 2d 280, 283, 248 P.2d 59* ; *see* *Estate of Piatt (1947) 81 Cal. App. 2d 348, 351, 183 P.2d 919]* .

Although a transfer of property after marriage pursuant to an oral prenuptial agreement may execute the agreement completely, and thus preclude the parties to the agreement from asserting its invalidity under the statute of frauds, such a transfer is voluntary, and may be set aside by creditors if the other elements of a transfer in fraud of creditors are present, because the unexecuted oral agreement to transfer the property cannot be specifically enforced [*Sudbrock v. Kroener (1934) 136 Cal. App. 624, 631-632, 29 P.2d 435]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceDischarges & TerminationsContracts LawStatutes of FraudsExceptionsGeneral OverviewContracts LawTypes of ContractsExecuted ContractsContracts LawTypes of ContractsOral Agreements

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Volume 46: Settlement and Release thru Subpoena Chs. 520-535
Chapter 530 STATUTE OF FRAUDS
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46-530 California Forms of Pleading and Practice--Annotated § 530.18

§ 530.18 Part Performance

[1] Elements of Doctrine

Before a party can be estopped to assert the statute of frauds due to the other's part performance, it must appear that a sufficient change of position has occurred so that the application of the statutory bar would result in an unjust and unconscionable loss, amounting in effect to a fraud. Payment of money is not sufficient part performance to take an oral agreement out of the statute of frauds because a party paying money under an invalid contract has an adequate remedy at law [*Anderson v. Stansbury (1952) 38 Cal. 2d 707, 715-716, 242 P.2d 305* ; *but see Com. Code § 2201(3)(c)* (Commercial Code exception for goods being accepted and/or paid for, discussed at *§ 530.12[12][i]*].

If a party pays money or renders services under a contract that is unenforceable under the statute of frauds, and the other party does not perform voluntarily, the performing party may recover the money paid or the value of the services rendered in an action for assumpsit [*see Fuller v. Reed (1869) 38 Cal. 99, 110* ; *see* discussion and forms in Ch. 121, *Common Counts*] or by common count in quantum meruit [*White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 346, 66 Cal. Rptr. 697, 438 P.2d 345* ; for discussion and forms relating to quantum meruit, *see* Ch. 121, *Common Counts*]. In such an action, the oral agreement, though unenforceable under the statute of frauds, is admissible as evidence of the reasonable value of the services [*Offeman v. Robertson-Cole Studios, Inc. (1926) 80 Cal. App. 1, 13-14, 251 P. 830* (quantum meruit)].

The acts relied on to establish part performance must refer unequivocally to the oral contract [*Baker v. Bouchard (1932) 122 Cal. App. 708, 711, 10 P.2d 468]* . For discussion of Com. Code *§ 2201(3)(a), the Commercial Code* exception for goods being specially manufactured for buyer, see *§ 530.12[12][h]*.

[2] Partially Performed Agreement Not to Be Performed Within One Year

When the parties to an oral contract that is not to be performed within one year have partly performed it, neither can avoid its obligations as to past transactions on the basis of the statute of frauds, and the contract is enforceable to the extent it has been performed [*Roberts v. Wachter (1951) 104 Cal. App. 2d 271, 281, 231 P.2d 534* ; *see Macmorris Sales Corp. v. Kozak (1968) 263 Cal. App. 2d 430, 442, 69 Cal. Rptr. 719* ; *but see Gressley v. Williams (1961) 193 Cal. App. 2d 636, 640-641, 14 Cal. Rptr. 496* (mere rendition of services usually not sufficient part performance to

avoid statute of frauds; action apparently seeking only to recover compensation under contract for amount due based on services performed)].

Part performance by the parties does not take the unexecuted portion of the contract out of the statute of frauds, and it remains unenforceable [*Long v. Long (1912) 162 Cal. 427, 431, 122 P. 1077* ; *Kraft v. Rooke (1930) 103 Cal. App. 552, 555-557, 284 P. 935]* .

[3] Partially Performed Prenuptial Agreements

Premarital agreements executed on or after January 1, 1986, are governed by *Fam. Code § 1611* in the Uniform Premarital Agreement Act (*Fam. Code § 1600 et seq.*) [*Fam. Code § 1601*]. As under the prior law [*see* former *Civ. Code §§ 1624(3), 5134*], the traditional exceptions to the statute of frauds, including the doctrine of partial performance, still apply [*Hall v. Hall (1990) 222 Cal. App. 3d 578, 585-587, 271 Cal. Rptr. 773]* . As under the prior law, the marriage itself and payment of money from one spouse to, or on behalf of, the other spouse is not sufficient to take the agreement out of the statute of frauds on the basis of the partial performance exception [*Hall v. Hall (1990) 222 Cal. App. 3d 578, 586-587, 271 Cal. Rptr. 773* ; *see Betty v. Knapp (1935) 5 Cal. App. 2d 512, 517, 43 P.2d 325* (marriage alone insufficient); *Stevenson v. Pantaleone (1933) 131 Cal. App. 401, 404-408, 21 P.2d 703* (marriage and designation of spouse as beneficiary under insurance policy as insufficient)]. The spouse seeking to enforce the oral agreement must have irretrievably changed his or her position in reliance on the oral agreement [*Hall v. Hall (1990) 222 Cal. App. 3d 578, 586-587, 271 Cal. Rptr. 773]* . In *Hall,* an irretrievable change of position was established by the spouse's giving up a job and applying for Social Security at age 62 so both spouses could spend most of their time together [*Hall v. Hall (1990) 222 Cal. App. 3d 578, 586-587, 271 Cal. Rptr. 773]* .

The acts relied on to establish partial performance sufficient to take the oral agreement out of the statute of frauds must be unequivocably referable to the contract. Acts that, although done in performance of the contract, admit to an explanation other than the contract (such as performance of husbandly or wifely duties) are not generally acts of part performance that will take the agreement out of the statute of frauds [*Hall v. Hall (1990) 222 Cal. App. 3d 578, 586, 271 Cal. Rptr. 773* ; *Trout v. Ogilvie (1919) 41 Cal. App. 167, 171, 182 P. 333* (marriage and payment of spouse's debts held insufficient)].

[4] Partially Performed Real Property Transactions

Equity will enforce an oral contract for the sale of real property that has been taken out of the statute of frauds by part performance. Mere payment of money is not enough, but taking possession in reliance on the oral agreement, if the possession is actual, visible, notorious, and exclusive so that it furnishes evidence of the agreement between the parties that is as good as a writing, is sufficient to take the agreement out of the statute [*Francis v. Colendich (1961) 193 Cal. App. 2d 128, 130-131, 14 Cal. Rptr. 56* (payment, survey, and fencing in of parcel sufficient); *Davis v. Judson (1910) 159 Cal. 121, 131-132, 113 P. 147* (payment, visiting vacant lots insufficient)]. Taking possession and making valuable improvements may be sufficient to take the contract out of the statute of frauds, but trivial expenditures are insufficient [*Harrison v. Hanson (1958) 165 Cal. App. 2d 370, 376-377, 331 P.2d 1084* (employment of consultants to make development plans as technical possession at most, and expenditures were trivial)]. To constitute part performance, the possession must be taken with the vendor's knowledge and consent [*Wolfsen v. Hathaway (1948) 32 Cal. 2d 632, 642, 198 P.2d 1 , overruled on other grounds, Flores v. Arroyo (1961) 56 Cal. 2d 492, 497, 15 Cal. Rptr. 87, 364 P.2d 263* ; *Stark v. Byington (1937) 21 Cal. App. 2d 642, 648, 69 P.2d 995]* . Continuing in possession under a purported oral agreement after having made rental payments on the same property may constitute part performance when coupled with other acts. Thus, for example, part performance was sufficient when purchasers made a substantial down payment, increased their monthly payments to equal sellers' mortgage payments, reimbursed sellers for property taxes, and made numerous improvements to the property [*Sutton v. Warner (1993) 12 Cal. App. 4th 415, 422-424, 15 Cal. Rptr. 2d 632]* .

For an allegation of part performance of an oral contract for the sale of real property, see *§ 530.60*.

[5] Partially Performed Promise to Make Will

Execution of a will in accordance with an oral agreement does not constitute part performance of the agreement, and does not take it out of the statute of frauds when the will does not expressly refer to the agreement [*Shive v. Barrow (1948) 88 Cal. App. 2d 838, 848, 199 P.2d 693* ; *Zaring v. Brown (1940) 41 Cal. App. 2d 227, 232-233, 106 P.2d 224* ; *see also* discussion at *§ 520.12[9][a]*].

The mere rendition of services does not constitute part performance of an agreement to leave property by will in return for the services sufficient to take the agreement out of the statute of frauds [*Riganti v. McElhinney (1967) 248 Cal. App. 2d 116, 121, 56 Cal. Rptr. 195]* . However, it may be possible to avoid the statute of frauds by an action for quasi-specific performance to impose a constructive trust on the property, or in an action to recover the reasonable value of the services. For a discussion of these theories, see *§ 530.20[1], below*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformancePartial PerformanceOral AgreementsContracts LawStatutes of FraudsExceptionsPartial PerformanceContracts LawStatutes of FraudsRequirementsPerformanceEstate, Gift & Trust LawWillsContracts to Make WillsFamily LawMarital Duties & RightsProperty RightsPremarital AgreementsDefensesGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityStatutes of Frauds

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§ 530.19 Estoppel to Assert Statute of Frauds

[1] Application of Doctrine

Estoppel to assert the statute of frauds is applied to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances. Such fraud is inherent in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other to seriously change his or her position in reliance on the contract or in the unjust enrichment that would result if a party who has received the benefits of the other's performance were allowed to rely on the statute [*Monarco v. Lo Greco (1950) 35 Cal. 2d 621, 623-624, 220 P.2d 737* ; *see Byrne v. Laura (1997) 52 Cal. App. 4th 1054, 1068-1069, 60 Cal. Rptr. 2d 908* (citing *Monarco* and finding reliance on representations to be classic case for applying equitable estoppel doctrine); *McGirr v. Gulf Oil Corp. (1974) 41 Cal. App. 3d 246, 253, 115 Cal. Rptr. 902]* . Both unconscionable injury and unjust enrichment may be present in some cases [*Monarco v. Lo Greco (1950) 35 Cal. 2d 621, 624, 220 P.2d 737* (son, in reliance on contract that property would be left to him, devoted years to work on family property, giving up opportunity for education and to acquire own property, and value of property enhanced by his work)].

Estoppel is an equitable remedy and will only be applied to avoid injustice. In addition, when estoppel is claimed by a person having a fiduciary relationship with the party against whom the claim is asserted, the underlying agreement must be fair and reasonable [*Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 30-33, 216 Cal. Rptr. 130, 702 P.2d 212* (finder's fee claimed from corporation by corporate director)].

Estoppel to assert the statute of frauds does not require that there have been any representations with respect to the requirements of the statute indicating that a writing is not necessary or will be executed or that the statute will not be relied on as a defense, because a party's change in position may be made in reliance on the promise that the contract will be performed and because acceptance of the benefits of the contract results in unjust enrichment regardless of whether the representation related to the statute of frauds or to performance of the contract [*see Monarco v. Lo Greco (1950) 35 Cal. 2d 621, 625-626, 220 P.2d 737* ; *see also Civ. Code § 1623*, discussed at *§ 530.21*]. However, a defendant is not estopped to rely on the statute of frauds and the oral agreement will not be enforced merely because nonenforcement of the agreement would permit the defendant to assert the statute and thus avoid the parol obligation [*Estate of Baglione (1966) 65 Cal. 2d 192, 198, 53 Cal. Rptr. 139, 417 P.2d 683]* .

[2] Nature of Acts Constituting Change of Position

Estoppel to assert the statute of frauds may be based on a change in position resulting from an act that does not constitute part performance of the oral contract, such as giving up a job that was terminable only for good cause after trial in order to accept employment under an oral contract that is unenforceable under *Civ. Code § 1624(a)(1)*because it could not be performed within one year [*see Seymour v. Oelrichs (1909) 156 Cal. 782, 794, 106 P. 88 , overruled in part by Sterling v. Taylor (2007) 40 Cal. 4th 757, 770-771* , (unconscionable injury established by that change in position), *disapproved on other grounds, Sterling v. Taylor (2007) 40 Cal. 4th 757, 770*]. When acts in part performance of a contract are relied on as a basis for estoppel to assert the statute of frauds, unjust enrichment or unconscionable injury due to a change in position, similar to the requirements of the doctrine of part performance, must be shown [*see Anderson v. Stansbury (1952) 38 Cal. 2d 707, 715-716, 242 P.2d 305* (part payment of price not sufficient change or injury for estoppel); *Oren Realty & Development Co. v. Superior Court (1979) 91 Cal. App. 3d 229, 234-236, 154 Cal. Rptr. 97* (part payment of price and loss of opportunity to purchase other land were not sufficient to establish unconscionable injury); *see § 530.18, above*].

Unlike the doctrine of part performance, the doctrine of estoppel does not require that the change of position relied on refer unequivocally to the oral agreement [*see Carlson v. Richardson (1968) 267 Cal. App. 2d 204, 208-209, 72 Cal. Rptr. 769]* .

[3] Doctrine of Judicial Admissions

A species of estoppel to assert the statute of frauds is referred to as the doctrine of judicial admissions. That doctrine imposes the rule that a defendant who is sued on an oral contract within the statute of frauds and who admits the contract in the answer but does not raise the statute of frauds as a defense is held to have waived the protection of the statute of frauds [*Burt v. Wilson (1865) 28 Cal. 631, 638* ; *Isaac v. A & B Loan Co. (1988) 201 Cal. App. 3d 307, 311, 247 Cal. Rptr. 104* ; *see also § 530.24[1]*]. Nevertheless, testimony that admits the existence of an oral contract does not waive the statute of frauds. Thus, the fact that a defendant made a declaration in another action and referred to "an agreement" with plaintiff in that declaration does not bar the defendant from asserting the defense of the statute of frauds in the action on the contract [*Isaac v. A & B Loan Co. (1988) 201 Cal. App. 3d 307, 311-312, 247 Cal. Rptr. 104]* . Note that under *Com. Code § 2201(3)(b)*, if the contract is one for the sale of goods for a price of $500 or more, it is not enforceable beyond the quantity of goods admitted [*see* discussion at *§ 530.12[12][d]*].

[4] Pleading Estoppel

The party pleading estoppel must allege the facts giving rise to estoppel. A conclusory pleading that the other party is estopped from asserting the defense that the contract is invalid under the statute of frauds is inadequate [*Gressley v. Williams (1961) 193 Cal. App. 2d 636, 640-641, 14 Cal. Rptr. 496* ; *see Carlson v. Richardson (1968) 267 Cal. App. 2d 204, 208, 72 Cal. Rptr. 769* (estoppel sufficiently alleged)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsHeightened Pleading RequirementsGeneral OverviewContracts LawDefensesEquitable EstoppelStatutes of FraudsContracts LawStatutes of FraudsExceptionsGeneral OverviewEvidenceJudicial AdmissionsEffects

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§ 530.20 Quasi-Specific Performance

[1] Agreement to Make Will in Return for Services

In an action for quasi-specific performance to impose a constructive trust on property that was to be left to plaintiff by will pursuant to an oral agreement to make a will, the defendant will be estopped to assert the statute of frauds if plaintiff will suffer unconscionable injury or defendant will be unjustly enriched [*Porporato v. Devincenzi (1968) 261 Cal. App. 2d 670, 675, 68 Cal. Rptr. 210]* . A testator's alleged oral agreement to leave all of his property to his son if the son cared for him during the testator's lifetime was held to be enforceable under equitable estoppel principles, notwithstanding former *Prob. Code § 150* (or its predecessor, former *Civ. Code § 1624(6)*) [*Estate of Housley v. Haywood (1997) 56 Cal. App. 4th 342, 358, 65 Cal. Rptr. 2d 628* ; *see §§ 520.13[9]* and *530.18[5]*]. The rendition of services that are compensable in money cannot be the basis for estoppel because there is an adequate legal remedy in the form of quantum meruit [*Palmer v. Phillips (1954) 123 Cal. App. 2d 291, 295-296, 266 P.2d 850* (no estoppel if plaintiffs performed services of both impersonal and intimate nature); *see Kennedy v. Bank of America (1965) 237 Cal. App. 2d 637, 647-648, 47 Cal. Rptr. 154* (no estoppel if plaintiff performed services of domestic servant and gasoline station assistant)]. However, when the services rendered are of such peculiar, extraordinary, or exceptional character that it is impossible to estimate their value in money, an estoppel arises [*Ward v. Wrixon (1959) 168 Cal. App. 2d 642, 655, 336 P.2d 640* (unjust enrichment and unconscionable injury found when plaintiff gave up home to live with decedent, performed heavy construction work, and was companion, all without compensation); *see Porporato v. Devincenzi (1968) 261 Cal. App. 2d 670, 678-679, 68 Cal. Rptr. 210* (unconscionable injury when plaintiff performed no services but only agreed to live near decedent who wanted to be near his grandchild, plaintiff's son)]. For discussion of and forms of complaint in actions for quasi-specific performance, see Ch. 528, *Specific Performance* .

If the plaintiff cannot meet the requirements of a suit for quasi-specific performance, plaintiff may recover the reasonable value of the services rendered in an action in quantum meruit. To maintain such an action, however, plaintiff must first file a claim for the value of his or her services against the estate of the deceased promisor [*Palmer v. Phillips (1954) 123 Cal. App. 2d 291, 299, 266 P.2d 850* ; for discussion and forms relating to quantum meruit, *see* Ch. 121, *Common Counts*].

[2] Mutual Wills

The mere fact that wills are reciprocal or contain similar or identical provisions, or that they were executed at the same time and before the same witnesses, is not of itself sufficient evidence of an oral agreement to make a particular disposition of property by will [*see* Former *Prob. Code § 150(b)* (repealed eff. Jan. 1, 2001) (discussed at *§ 530.12[9][a]*)]. If such an agreement is proved by full, clear, and convincing evidence, however, it will be enforced. When mutual wills have been made pursuant to such an agreement and one party has died before either will has been revoked, if the second party accepts the benefits of the will of the first party, but subsequently revokes his or her will and executes a new will in violation of the agreement, the intended beneficiaries of the mutual will may bring an action for quasi-specific performance to impress a constructive trust on the persons claiming under the new will. In such an action, the persons claiming under the new will are estopped from asserting the statute of frauds, because a constructive fraud has been worked on the first decedent and the beneficiaries of the mutual will [*Juran v. Epstein (1994) 23 Cal. App. 4th 882, 897, 28 Cal. Rptr. 2d 588* ; *Crail v. Blakely (1973) 8 Cal. 3d 744, 747, 751-752, 106 Cal. Rptr. 187, 505 P.2d 1027* ; *Notten v. Mensing (1935) 3 Cal. 2d 469, 473-477, 45 P.2d 198]* .

For discussion of and forms for complaints in actions for quasi-specific performance, see Ch. 528, *Specific Performance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesEquitable EstoppelStatutes of FraudsContracts LawRemediesSpecific PerformanceEstate, Gift & Trust LawTrustsConstructive TrustsEstate, Gift & Trust LawWillsContracts to Make WillsEstate, Gift & Trust LawWillsJoint & Mutual Wills

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§ 530.21 Fraud Preventing Writing

When a contract that is required by law to be in writing is prevented from being put into writing by the fraud of one party to the contract, any other party who was led by that fraud to believe that the contract was in writing, and who acted on that belief to his or her prejudice, may enforce the contract against the party perpetrating the fraud [*Civ. Code § 1623*].

Similarly, a representation that one intends to sign an agreement in near future is basis for estoppel, preventing the party who made the representation from asserting the statute of frauds [*Wilk v. Vencill (1947) 30 Cal. 2d 104, 107-108, 180 P.2d 351* ; *see also § 530.19*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 530.22 Severability of Unenforceable Promises

When a promisor makes two or more oral promises that can easily be distinguished and separated by the court by reference to the agreement, only the promise which falls clearly within the statute of frauds is unenforceable [*White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 345, 66 Cal. Rptr. 697, 438 P.2d 345* (oral promise to repurchase stock for $15,000, pay moving expenses, severance pay, and share of gross receipts in return for plaintiff's resignation enforceable except for purchase of stock)]. Similarly, when an oral contract contains two promises which are in the alternative, rather than being merely divisible, and only one is within the statute of frauds, recovery may be had on the promise that is not within the statute, even though performance of that promise may also constitute performance of the promise that is within the statute [*Roy v. Salisbury (1942) 21 Cal. 2d 176, 183, 130 P.2d 706* (contract to take care of decedent's dog if owner unable to do so or if owner should die enforceable when performance began under first alternative)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 530.23 Pleading Contract and Statute of Frauds

A complaint for breach of a contract within the statute of frauds is not fatally defective for failure to allege a writing because the law will presume the contract to be valid and therefore evidenced by a writing. A defendant relying on the statute of frauds as a defense to such an action must plead the statute [*Alaska Salmon Co. v. Standard Box Co. (1910) 158 Cal. 567, 569, 112 P. 454* ; *McLaughlin v. McLaughlin (1958) 159 Cal. App. 2d 287, 292, 323 P.2d 820* ; for forms of affirmative defense raising the statute of frauds, *see* Forms 1, 2]. A general denial of entering into the contract is also sufficient to raise the defense of the statute of frauds [*San Francisco Brewing Corp. v. Bowman (1959) 52 Cal. 2d 607, 618, 343 P.2d 1* ; *Walsh v. Standart (1917) 174 Cal. 807, 810, 164 P. 795* ; for forms of general and specific denial of allegations, *see* Ch. 26, *Answers*]. Failure to deny the contract or to plead the statute of frauds, however, waives the defense of the statute [*Healy v. Obear (1916) 29 Cal. App. 696, 698, 157 P. 569 , reh'g denied, 157 P. 570]* .

In an action founded on a contract, the defendant or cross defendant may object by demurrer or answer that it cannot be ascertained from the pleading whether the contract is written, oral, or implied by conduct [*Code Civ. Proc. § 430.10(g)*]. A party failing to object to a complaint or cross complaint either by demurrer or answer is deemed to have waived the objection [*Code Civ. Proc. § 430.80*]. For a discussion and forms relating to demurrers on this ground, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProceduresPleading & PracticePleadingsComplaintsRequirementsContracts LawStatutes of FraudsGeneral Overview

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46-530 California Forms of Pleading and Practice--Annotated § 530.24

§ 530.24 Establishing Statute of Frauds as Defense

[1] Demurrer, Motion, or Objection Is Required

Even though the defense of the statute of frauds has been placed in issue by the answer, the right to rely on it is waived by failure to demur to the complaint, to object to the introduction of testimony to prove the oral agreement at trial, or to move to strike the testimony [*Pao Ch'en Lee v. Gregoriou (1958) 50 Cal. 2d 502, 506, 326 P.2d 135* ; *Coleman v. Satterfield (1950) 100 Cal. App. 2d 81, 83-84, 223 P.2d 61* ; *but see Tahoe Nat. Bank v. Phillips (1971) 4 Cal. 3d 11, 23-24, 92 Cal. Rptr. 704, 480 P.2d 320* (modifying approach taken in *Pao Ch'en Lee*; defendant who did not object at trial may not object on appeal to trial court's receipt of extrinsic evidence, but may argue on appeal that the extrinsic evidence conflicts with any interpretation to which instrument is reasonably susceptible); for forms of denial and affirmative defense placing the statute of frauds in issue, *see* Forms 1, 2]. An objection or motion to strike on grounds that evidence violated the statute of frauds may be made at any time during the trial [*McGirr v. Gulf Oil Corp. (1974) 41 Cal. App. 3d 246, 252, 115 Cal. Rptr. 902* (after "substantial" testimony); *see Bank of America v. Hutchinson (1963) 212 Cal. App. 2d 142, 149-150, 27 Cal. Rptr. 787* (motion, two weeks after trial, to strike all testimony relating to defendant's representations regarding credit of third party properly denied as untimely and indefinite)].

A defendant may also assert the statute of frauds in a motion for nonsuit at the close of plaintiff's case [*Carrier & Braddock v. S.W. Straus & Co. (1931) 213 Cal. 508, 513, 2 P.2d 811]* . In some instances, motion for nonsuit may be the first time that the issue of the statute of frauds may be properly raised [*see Ira Garson Realty Co. v. Brown (1960) 180 Cal. App. 2d 615, 621, 4 Cal. Rptr. 734* (plaintiff presented case on theory of oral contract supported by written memorandum until time of motion)].

If evidence of an oral agreement is introduced to prove an oral contract not subject to the statute, or if there is evidence of estoppel to rely on the statute, so that evidence of the contract could not be excluded, a request for a jury instruction on the issue of the statute of frauds is sufficient to preserve the statute as a defense, even though there was no objection to evidence of the oral agreement, motion to strike, or motion for nonsuit [*San Francisco Brewing Corp. v. Bowman (1959) 52 Cal. 2d 607, 618-619, 343 P.2d 1]* .

[2] Who May Assert Defense

The statute of frauds may be asserted as a defense by third persons who are in privity with a party to the contract, but not by third persons who are neither parties nor in privity with a party to an unwritten contract [*O'Banion v. Paradiso (1964) 61 Cal. 2d 559, 562-563, 39 Cal. Rptr. 370, 393 P.2d 682* (successor in title to real property may assert statute); *Demeter v. Annenson (1947) 80 Cal. App. 2d 48, 57, 180 P.2d 998* (taxicab operators unable to raise statute in regard to contract between competitors and railway for exclusive right to solicit passengers at railway station)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsWaiver & PreservationCivil ProcedureAppealsReviewabilityPreservation for ReviewContracts LawStatutes of FraudsGeneral OverviewEvidenceProcedural ConsiderationsObjections & Offers of ProofObjections

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[Reserved]

§§ 530.25[Reserved]

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§ 530.30 Other Matthew Bender Publications

For discussion and forms relating to contracts between spouses, persons in cohabitation, and contracts in contemplation of marriage, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, 2nd ed., Chs. 2, 200, 201, 210 (Matthew Bender)

For memoranda of points and authorities supporting and opposing a demurrer to an action for a commission on the sale of real property, see California Points and Authorities, Ch. 34, *Brokers and Salespersons* (Matthew Bender)

For memoranda of points and authorities supporting and opposing a demurrer to an action on a common count, such as quantum meruit, based on a special count which is barred by the statute of frauds, see California Points and Authorities, Ch. 43, *Common Counts and Bills of Particulars* (Matthew Bender)

For a memorandum of points and authorities supporting a demurrer to a complaint for failure to show whether a contract is written, oral, or implied by law, see California Points and Authorities, Ch. 50, *Contracts* (Matthew Bender)

For memoranda of points and authorities supporting and opposing a demurrer to a complaint for breach of an oral contract for the sale of goods, see California Points and Authorities, Ch. 206, *Sales* (Matthew Bender)

For memoranda of points and authorities supporting and opposing a demurrer to a complaint for quasi-specific performance of an oral agreement to leave property by will, see California Points and Authorities, Ch. 214, *Specific Performance* (Matthew Bender)

For discussions of the application and avoidance of the statute of frauds in relation to real estate transactions, see California Real Estate Law and Practice, Chs. 70, 71, 73, 80, 91, 111, 115, 151-153, 172, 201, 343 (Matthew Bender)

For a discussion of the application and avoidance of the statute of frauds in relation to contracts for the employment of a real estate broker or property manager, see California Real Estate Law and Practice, Chs. 61, 382 (Matthew Bender)

For discussion of contracts to make wills, see California Wills & Trusts, Ch. 61, *Contracts and Other Instruments Affecting Wills* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral OverviewContracts LawStatutes of FraudsGeneral OverviewEstate, Gift & Trust LawTrustsConstructive TrustsEstate, Gift & Trust LawWillsContracts to Make WillsReal Property LawPurchase & SaleContracts of SaleEnforceabilityStatutes of Frauds

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§ 530.31 State Statutes

[1] Agency

Agent's authorization to enter into contract required by law to be in writing must be in writing. *Civ. Code § 2309*

[2] Fraud Preventing Writing

Oral contract is enforceable when writing of contract was prevented by fraud. *Civ. Code § 1623*

[3] Marriage and Dissolution

Premarital agreement made in contemplation of marriage. *Fam. Code § 1500 et seq.*

Spouses' agreement to immediate separation, support during separation, and support on dissolution must be in writing. *Fam. Code § 3580*

[4] Miscellaneous Agreements

Joint interests in property to be expressed in writing. *Civ. Code § 683*

Agreement by its terms not to be performed within one year. *Civ. Code § 1624(a)(1)*

Agreement by its terms not to be performed in promisor's lifetime. *Civ. Code § 1624(a)(5)*

Pre-1985 agreement to make will. Former *Civ. Code § 1624(a)(6)* (repealed eff. Jan 1, 2001)

Commercial loan in excess of $100,000. *Civ. Code § 1624(a)(7)*

Qualified financial contracts. *Civ. Code § 1624(b)*

Revival of contract obligation barred by statute of limitations must be in writing. *Code Civ. Proc. § 360*

Waiver of statute of limitations. *Code Civ. Proc. § 360.5*

Arbitration agreements in writing are enforceable. *Code Civ. Proc. § 1281*

Life care contracts must be in writing. *Health & Safety Code § 1787*; *see also Health & Safety Code § 1780.4(a)* (deposit subscription agreements must be in writing)

Contract made in 1985-2000 to make will or devise, or not to revoke will or devise, or to die intestate. Former *Prob. Code § 150(a)* (repealed eff. Jan 1, 2001)

Contract made after 2000 to make will or devise or other instrument, or not to revoke will or devise or other instrument, or to die intestate. *Prob. Code § 21700(a)*

[5] Modification of Written Contracts

Methods by which written contract may be modified. *Civ. Code § 1698*

[6] Personal Property Transactions

Transfer of interest in ship must be in writing. *Civ. Code § 1135*

Motor vehicle conditional sales contract must be in writing. *Civ. Code § 2981.9*

Personal property sales contract over $5,000 must be in writing. *Com. Code § 1206*

Contract for sale of goods over $500 must be in writing. *Com. Code § 2201*

"Sale or return" transaction defined. *Com. Code § 2326(1)*

"Return" term of contract for sales of goods must be in writing. *Com. Code § 2326(3)*

Securities sale contract is not required to be in writing. *Com. Code § 8113*

Effectiveness of security agreements. *Com. Code § 9201 et seq.*

Personal property leases. *Com. Code § 10201 et seq.*

[7] Real Property Transactions

Estate or interest in real property created by writing or by operation of law. *Code Civ. Proc. §§ 1971, 1972*

Trust in relation to real property created by writing or by operation of law. *Prob. Code § 15206*

Lease of real property for over one year must be in writing. *Civ. Code §§ 1091, 1624(a)(3)*; *Code Civ. Proc. §§ 1971, 1972*

Real property transfers required to be in writing. *Civ. Code § 1091*; *Code Civ. Proc. §§ 1971, 1972*

Real estate sales contracts must be in writing. *Civ. Code § 1624(a)(3)*

Agreement to pay agent, broker, or other person commission for services in sale, purchase, or lease of real estate must be in writing. *Civ. Code § 1624(a)(4)*

Agreement by purchaser to assume indebtedness secured by mortgage or deed of trust on real property unless assumption provided for in conveyance. *Civ. Code § 1624(a)(6)*

Mortgages must be created by writing. *Civ. Code § 2922*

Power of attorney to execute mortgage must be in writing. *Civ. Code § 2933*

[8] Satisfaction and Release of Obligation

Creditor's written agreement to accept part performance of obligation without new consideration extinguishes obligation. *Civ. Code § 1524*

Release of obligation without new consideration must be in writing. *Civ. Code § 1541*

[9] Suretyship and Guaranty

Special promise to answer for debt, default, or miscarriage of another. *Civ. Code §§ 1624(a)(2), 2793, 2794*

Representation of third person's credit must be in writing. *Code Civ. Proc. § 1974*

Meaning of words of guaranty on commercial paper; exception to statute of frauds for guaranty written on commercial paper. *Com. Code § 3416*

Nonprofit association member's assumption of association debt must be in writing. *Corp. Code § 18610(a)*

Executor's or administrator's promise to pay decedent's debt from executor's or administrator's estate must be in writing. *Prob. Code § 9604*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActStatutes of FraudsCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral OverviewContracts LawContract ModificationsOral ModificationsContracts LawSales of GoodsForm, Formation & ReadjustmentStatutes of FraudsGeneral OverviewContracts LawStatutes of FraudsGeneral OverviewContracts LawStatutes of FraudsExceptionsGeneral OverviewContracts LawStatutes of FraudsRequirementsPerformanceContracts LawTypes of ContractsGuaranty ContractsEstate, Gift & Trust LawWillsContracts to Make WillsFamily LawMarital Duties & RightsProperty RightsPremarital AgreementsDefensesGeneral Overview

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§ 530.32 Decisions

[1] Conflict of Laws

In federal diversity action on oral contract between California resident and New York resident, when substantive law statute of frauds of New York and of California would produce different results, each state had interest in having its law applied, and New York's interest would be most impaired by application of California law, New York law applied to bar action. *Rosenthal v. Fonda (9th Cir. 1988) 862 F.2d 1398, 1401* (applying California's conflict analysis)

[2] Contracts Outside Statute of Frauds

[a] Contract May Be Performed Within One Year

Oral agreement for permanent employment is not within statute of frauds if it is capable of being performed in one year. *Eisenberg v. Insurance Co. of North America (9th Cir. 1987) 815 F.2d 1285, 1290-1291* (criticizing *Newfield v. Insurance Co. of the West (1984) 156 Cal. App. 3d 440, 447, 203 Cal. Rptr. 9* , which was later disapproved by *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 675 n.19, 254 Cal. Rptr. 211, 765 P.2d 373*)

Provision giving one party option to end contract if other party did not meet condition, to be determined at end of one year, took contract out of operation of statute of frauds. *Plumlee v. Poag (1984) 150 Cal. App. 3d 541, 549-550, 198 Cal. Rptr. 66*

Oral agreement to support person for balance of his or her life is not subject to statute of frauds because possibility exists of performance within one year. *Leonard v. Rose (1967) 65 Cal. 2d 589, 592, 55 Cal. Rptr. 916, 422 P.2d 604* ; *see Civ. Code § 1624(a)(1)*

[b] Promise to Pay Another's Debt Benefits Promisor

Chairman of board's promise to pay corporate debt is exception to statute of frauds under *Civ. Code § 2794(4)* because

creditor promised to forbear canceling company's insurance, primarily serving chairman's object of welfare of his children, who had interest in company, and his own business reputation, as he had undertaken to save failing company. *Farr & Stone Ins. Brokers, Inc. v. Lopez (1976) 61 Cal. App. 3d 618, 621-622, 132 Cal. Rptr. 641*

[c] Real Property Transactions

Contract to install off-site improvements is not contract for the sale of land or interest in land, and is not within statute of frauds. *Pollyanna Homes, Inc. v. Berney (1961) 56 Cal. 2d 676, 679, 16 Cal. Rptr. 345, 365 P.2d 401*

Written forebearance agreement was not enforceable against holder of note secured by deed of trust, because agreement was not signed by holder or any predecessor in interest as secured creditor. Secrest v. Security Nat'l Mortgage Loan Trust 2002-2 *(2008) 167 Cal. App. 4th 544, 552-553, 84 Cal. Rptr. 3d 275*

Option contained in written lease allowing renewal of lease for period in excess of one year is exercisable orally because original lease provides writing satisfying statute of frauds. *Ripani v. Liberty Loan Corp. (1979) 95 Cal. App. 3d 603, 609-610, 157 Cal. Rptr. 272*

Joint venture agreement calling for transfer of realty to venture is not within statute of frauds of *Civ. Code § 1091* or *Code Civ. Proc. § 1971* (former *Code Civ. Proc. § 1973*). *Epstein v. Stahl (1959) 176 Cal. App. 2d 53, 63-64, 1 Cal. Rptr. 143*

[d] Settlement Agreements

Statute of frauds inapplicable to oral settlement agreement stipulated to by parties to litigation before court following judicially mandated and supervised settlement conference. *Kohn v. Jaymar-Ruby, Inc. (1994) 23 Cal. App. 4th 1530, 1534, 28 Cal. Rptr. 2d 780*

Statute of frauds is inapplicable to oral out-of-court settlement agreement involving transfer of real property. *Hastings v. Matlock (1985) 171 Cal. App. 3d 826, 837, 217 Cal. Rptr. 856*

Lawsuit settlement agreement is not sale of chose in action and not barred by statute of frauds of *Com. Code § 1206*. *Greyhound Lines, Inc. v. Superior Court (1979) 98 Cal. App. 3d 604, 608-609, 159 Cal. Rptr. 657*

[3] Contracts Required to Be in Writing

[a] Agreements Not to Be Performed Within One Year

Agreement calling for employment not to be performed within one year is required to be in writing under statute of frauds. *Robinson v. Hewlett-Packard Corp. (1986) 183 Cal. App. 3d 1108, 1120 n.10, 228 Cal. Rptr. 591*

[b] Real Property Transactions

When father orally instructed daughter to sign his name to grant deed conveying property to himself and daughter as joint tenants, conveyance was deemed valid as a deed executed by the grantor under *Civ. Code § 1091* because daughter acted as mere "amanuensis," performing mere mechanical function in signing deed rather than exercising her judgment or discretion. *Estate of Stephens v. Williams (2002) 28 Cal. 4th 665, 678, 122 Cal. Rptr. 2d 358, 49 P.3d 1093*

Oral lien on real property is precluded by statute of frauds of *Code Civ. Proc. § 1971*. *Remainders, Inc. v. Bartlett*

(1963) 215 Cal. App. 2d 295, 298-299, 30 Cal. Rptr. 191

Agreement restricting the use of land is within statute of frauds. *Triangle Ranch, Inc. v. Union Oil Co. (1955) 135 Cal. App. 2d 428, 438-439, 287 P.2d 537* ; *see Civ. Code § 1091*; *Code Civ. Proc. §§ 1971, 1973*

[c] Sales of Goods and Personal Property

Contract between brokerage firm and customer, as purchaser, for sale and purchase of shares owned by brokerage firm was contract between vendor and purchaser, not regular agency agreement, and thus not within exception of former *Com. Code § 8319(2). Leason v. Rosart (9th Cir. 1987) 811 F.2d 1322, 1325* (except one order confirmed under *Com. Code § 8319(1)(c)*)

Confirmation under former *Com. Code § 8319(1)(c)* was effective even though mailed with wrong zip code and buyer denied receipt when there was no evidence that it was sent but not returned by postal service to sender. *Leason v. Rosart (9th Cir. 1987) 811 F.2d 1322, 1325*

[4] Estoppel to Assert Statute of Frauds

[a] In General

Doctrine of estoppel requires that unconscionable injury will result from failure to enforce oral agreement; unconscionable injury results from denying enforcement of oral contract after one party is induced by another to seriously change its position in reliance on the oral agreement or in cases of unjust enrichment. *Allied Grape Growers v. Bronco Wine Co. (1988) 203 Cal. App. 3d 432, 444, 249 Cal. Rptr. 872*

Doctrine of estoppel requires that unconscionable injury or unjust enrichment would result from failure to enforce oral agreement; when plaintiff will lose only opportunity and can obtain return of monies paid, estoppel is not to be invoked. *Isaac v. A & B Loan Co. (1988) 201 Cal. App. 3d 307, 313, 247 Cal. Rptr. 104*

[b] Estoppel Found

Serious change of position estopped party from relying on statute of frauds when wife, in reliance on oral contract with husband to make reciprocal will benefitting daughter after death of both testators, later failed to change will to make daughter sole beneficiary at time wife became concerned with daughter's welfare. *Redke v. Silvertrust (1971) 6 Cal. 3d 94, 101, 98 Cal. Rptr. 293, 490 P.2d 805*

Unconscionable injury and unjust enrichment were established when husband refrained from making inter vivos gifts or testamentary disposition for daughter and gave all property before and at his death to wife in reliance on agreement that her will would provide for his daughter equally with her own children. *Day v. Greene (1963) 59 Cal. 2d 404, 408-410, 29 Cal. Rptr. 785, 380 P.2d 385*

Under *Com. Code § 1103*, equitable principles survived enactment of Uniform Commercial Code in California; thus estoppel was applicable to bar assertion of statute of frauds against oral contract for sale of goods under *Commercial Code. Allied Grape Growers v. Bronco Wine Co. (1988) 203 Cal. App. 3d 432, 442-443, 249 Cal. Rptr. 872* ; *contra, C.R. Fedrick, Inc. v. Borg-Warner Corp. (9th Cir. 1977) 552 F.2d 852, 856-858* (California not likely to allow estoppel to bar Commercial Code statute of frauds)

Beneficiaries of will made in breach of oral contract to make mutual wills after testator accepted benefits under mutual

will were estopped to assert statute of frauds against intended beneficiaries of mutual will. *Stahmer v. Schley (1979) 96 Cal. App. 3d 200, 203, 157 Cal. Rptr. 756*

Unconscionable injury shown that could estop oil company from relying on statute of frauds when plaintiff gave up lease on profitable service station and entered lease, paid deposit, and bought inventory for unprofitable station in reliance on oral promise to also lease a second, profitable station. *McGirr v. Gulf Oil Corp. (1974) 41 Cal. App. 3d 246, 253-254, 115 Cal. Rptr. 902* (but no estoppel due to *Civ. Code § 2309* "equal dignities rule")

Quasi-specific performance is available when party to reciprocal wills made pursuant to oral agreement accepts benefit of other party's will and then revokes own will; those acts constituted constructive fraud on first decedent and beneficiaries of oral agreement so as to estop reliance on statute of frauds. *Mintz v. Rowitz (1970) 13 Cal. App. 3d 216, 223-224, 91 Cal. Rptr. 435*

Unconscionable injury to seller estopped buyer from relying on statute of frauds when seller, in reliance on contract, sought no other buyers for perishable crop until buyer's repudiation, at which time crop had deteriorated in value. *Mosekian v. Davis Canning Co. (1964) 229 Cal. App. 2d 118, 123-124, 40 Cal. Rptr. 157*

Unconscionable injury to seller estopped buyer from relying on statute of frauds when seller, in reliance on contract, transported automobiles to California from Louisiana, and was caught in market slump after buyer's breach of contract made during very high market. *Goldstein v. McNeil (1954) 122 Cal. App. 2d 608, 611-612, 265 P.2d 113*

[c] Estoppel Not Found

Real estate broker was not able to assert equitable estoppel against statute of frauds defense to enforcement of oral commission agreement unless there was showing of actual fraud, because it was not reasonable to rely on oral listing contract. *Phillippe v. Shapell Industries (1987) 43 Cal. 3d 1247, 1259-1270, 241 Cal. Rptr. 22, 743 P.2d 1279*

Unconscionable injury was not established by giving up terminable-at-will employment to go to work under oral contract not performable in one year. *Ruinello v. Murray (1951) 36 Cal. 2d 687, 698-690, 227 P.2d 251*

Testimony that admits existence of oral contract does not waive statute of frauds; fact that defendant made declaration in another action and referred to "an agreement" with plaintiff in that declaration did not bar defendant from asserting defense of statute of frauds in action on contract. *Isaac v. A & B Loan Co. (1988) 201 Cal. App. 3d 307, 311-312, 247 Cal. Rptr. 104* ; *but see Com. Code § 2201(3)(b)* (contrary result if contract is for sale of goods)

Alleged oral employment contract for period of three years was within purview of statute of frauds; plaintiff's move from Texas to California for employment when unemployed and unable to maintain stable employment in Texas together with sale of home in Texas and purchase of comparable home in California did not constitute unconscionable injury; therefore defendant was not estopped to assert statute of frauds. *Munoz v. Kaiser Steel Corp. (1984) 156 Cal. App. 3d 965, 971, 972-974, 203 Cal. Rptr. 345*

Buyer's loss of bargain was insufficient to estop seller from relying on statute of frauds. *Carlson v. Richardson (1968) 267 Cal. App. 2d 204, 208, 72 Cal. Rptr. 769*

Unjust enrichment of breaching seller of real property was not established by increase in property's value resulting from market conditions rather than from act of forbearance of buyer. *Carlson v. Richardson (1968) 267 Cal. App. 2d 204, 208, 72 Cal. Rptr. 769*

[d] Motion for Summary Judgment

Fact question regarding whether decedent's estate was equitably estopped from using statute of frauds to bar cohabitant's claim under oral property agreement precluded summary judgment for estate as to cohabitant's claim for breach of property agreement. *Byrne v. Laura (1997) 52 Cal. App. 4th 1054, 1068-1069, 60 Cal. Rptr. 2d 908*

[5] Fully Performed Contract

Full performance of contract taking it out of statute of frauds was established when parties exchanged residences, assuming balances due on property acquired, one party paid balance due and received deed directly from former owner pursuant to oral exchange agreement while other party defaulted on assumed deed of trust. *McGlasson v. Blythe (1956) 143 Cal. App. 2d 152, 155-156, 299 P.2d 325*

Full performance of agreement terminating trust over real property and selling it to trustee and estoppel to assert statute of frauds were established when trustee gave agreed consideration, took possession, paid taxes, and made repairs and improvements. *Robison v. Hanley (1955) 136 Cal. App. 2d 820, 824-825, 289 P.2d 560*

[6] Memorandum of Agreement

[a] Sufficiency of Memorandum

If memorandum includes essential terms of agreement but meaning of those terms is unclear, memorandum is sufficient under statute of frauds if (1) extrinsic evidence clarifies terms with reasonable certainty, and (2) evidence as a whole demonstrates that parties intended to be bound. *Sterling v. Taylor (2007) 40 Cal. 4th 757, 771, 55 Cal. Rptr. 3d 116, 152 P.3d 420* Memorandum is required to contain essential elements of specific, consummated agreement; what is essential depends on agreement and failure to express that which is clearly implied does not render memorandum deficient. *Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 762-763, 206 Cal. Rptr. 354, 686 P.2d 1158*

Writing evidencing "requirements" or output contract is sufficient when it indicates that there has been real transaction for sale of output or for purchase of requirements. *Seaman's Direct Buying Service, Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 762-764, 206 Cal. Rptr. 354, 686 P.2d 1158*

Time of performance of act required for sale of property subject to statute of frauds is not essential element of agreement and may be implied pursuant to *Civ. Code § 1657*. *House of Prayer v. Evangelical Assn. for India (2003) 113 Cal. App. 4th 48, 53-54, 7 Cal. Rptr. 3d 24*

Application to Commissioner of Corporations for approval of stock transfer was memorandum of contract to sell stock. *Kaneko v. Okuda (1961) 195 Cal. App. 2d 217, 230-231, 15 Cal. Rptr. 792*

[b] Signature

E-mail signed with party's name satisfied statute of frauds, assuming binding oral agreement existed and e-mail included all material terms of that agreement. *Lamle v. Mattel, Inc. (Fed. Cir. 2005) 394 F.3d 1355, 1362-1363* (applying California common law); *see Civ. Code § 1633.7* (signature may not be denied legal effect solely because it is in electronic form)

"Mother" was insufficient signature when not intended to be legally binding signature. *Berdan v. Berdan (1940) 39 Cal. App. 2d 478, 483, 103 P.2d 622*

[7] Modification of Written Agreement

When one party, through oral representations and conduct or custom, has behaved after execution of contract in manner antithetical to one or more terms of express written contract and induced other party to rely on those representations and conduct or custom, equity upholds apparent modification. *Wagner v. Glendale Adventist Medical Center (1989) 216 Cal. App. 3d 1379, 1388, 265 Cal. Rptr. 412* (dicta, as conduct was not sufficient)

Oral modification of term of written agreement requires new consideration; employee's move, after elimination of position, to locale of another facility of employer did not amount to consideration because detriment was incidental to preparation to accept out-of-state offer of employment. *Malmstrom v. Kaiser Aluminum & Chemical Corp. (1986) 187 Cal. App. 3d 299, 314, 231 Cal. Rptr. 820*

Reliance on oral statements alleged to modify or supersede written agreement is not justifiable; thus, doctrine of estoppel is unavailable to provide basis for oral modification unless unconscionable injury or unjust enrichment would result from failure to enforce oral modification. *Malmstrom v. Kaiser Aluminum & Chemical Corp. (1986) 187 Cal. App. 3d 299, 319-320, 231 Cal. Rptr. 820*

Obligation that party was required to perform under written contract was not consideration that would support oral modification. *Marani v. Jackson (1986) 183 Cal. App. 3d 695, 704-706, 228 Cal. Rptr. 518*

[8] Part Performance

Part performance by parties to contract not to be performed within one year bars both parties from asserting statute of frauds. *Dean v. Davis (1946) 73 Cal. App. 2d 166, 168, 166 P.2d 15*

[9] Who May Assert Defense

Defendant whose fraudulent acts and misrepresentations have caused another to fail to perform in conformity with promises under oral contract is not permitted to assert statute of frauds as defense to action for tortious interference with contractual relations. *Friedman v. Jackson (1968) 266 Cal. App. 2d 517, 518, 72 Cal. Rptr. 129*

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsGeneral OverviewContracts LawContract ModificationsOral ModificationsContracts LawDefensesEquitable EstoppelStatutes of FraudsContracts LawSales of GoodsForm, Formation & ReadjustmentStatutes of FraudsGeneral OverviewContracts LawStatutes of FraudsExceptionsGeneral OverviewContracts LawStatutes of FraudsExceptionsPartial PerformanceContracts LawStatutes of FraudsRequirementsPerformanceContracts LawStatutes of FraudsRequirementsSignaturesContracts LawStatutes of FraudsRequirementsWritingsReal Property LawPurchase & SaleContracts of SaleEnforceabilityStatutes of Frauds

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§ 530.33 Law Reviews

Daniel, *Electronic Contracting Under the 2003 Revisions to Article 2 of the Uniform Commercial Code: Clarification of Chaos?* 20 Santa Clara Computer & High Tech. L.J. 319 (2004)

Comment, *Here's Why Hollywood Should Kiss the Handshake Deal Goodbye*, *23 Loy. L.A. Ent. L. Rev. 503 (2003)*

Phillips, *Accepting the Inevitable; California Statute Finally Embraces Oral Testamentary Contracts*, *4 J. Legal Advoc. & Prac. 1 (2002)*

Comment, *California Oral Will Contracts: The Decline of Testator Intent in the Shadow of Equitable Estoppel*, *39 Santa Clara L. Rev. 1187 (1999)*

Comment, *The Indelibility of Invisible Ink: A Critical Survey of the Enforcement of Oral Contracts Without the Statute of Frauds Under the U.C.C.*, 19 Whittier L. Rev. 423 (1997)

Comment, *Intentional Interference with Prospective Economic Advantage: A Tort That Eviscerates the Real Estate Brokers' Statute of Frauds*, *36 Santa Clara L. Rev. 1219 (1996)*

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Note, *Oral Employment Contracts and Equitable Estoppel: The Real Estate Broker as Victim, 26 Hastings L.J. 1503 (1975)*

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Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentStatutes of FraudsExceptionsStatutory ExceptionsContracts LawDefensesEquitable EstoppelStatutes of FraudsContracts LawStatutes of FraudsGeneral OverviewContracts LawStatutes of FraudsExceptionsGeneral OverviewContracts LawTypes of ContractsOral AgreementsLabor & Employment LawEmployment RelationshipsEmployment ContractsStatutes of Frauds

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§ 530.34 Text References

Witkin, California Procedure, Vol. 5, *Pleading*, § 999 (4th ed. 1997)

Witkin, Summary of California Law, Vol. 1, *Contracts*, §§ 277, 297-300, 318-320; Vol. 11, *Equity*, §§ 25-26, 57 (9th ed.)

Legal Topics:

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[Reserved]

§§ 530.35[Reserved]

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§ 530.40 Methods by Which Statute of Frauds May Be Raised

[1] On Demurrer

☐ Special demurrer:

☐ Used to force the party pleading the contract to indicate whether the contract is written, oral, or implied in law [*Code Civ. Proc. § 430.10(g)*; *see* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*].

☐ General demurrer:

☐ Available when it appears from face of the complaint that the contract is oral and within the statute [*see Code Civ. Proc. §§ 430.10(e), 430.30(a)*; see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*].

[2] In Answer

☐ General denial of unverified complaint [*Code Civ. Proc. § 431.30(d)*] or complaint involving $1,000 or less [*Code Civ. Proc. § 431.40*; *see Howard v. Adams (1940) 16 Cal. 2d 253, 257, 105 P.2d 971* ; Ch. 26, *Answers*].

☐ Specific denial of contract (i.e., generally denying execution of alleged contract) [*Walsh v. Standart (1917) 174 Cal. 807, 810, 164 P. 795* ; for a form, *see § 530.50*].

☐ Affirmative defense specifically pleading applicable code section requiring alleged contract to be written [*Jamison v. Hyde (1903) 141 Cal. 109, 112, 74 P. 695* ; for forms, *see §§ 530.51*, 530.52].

NOTE:

Even though the defense of the statute of frauds has been raised in the pleadings, the right to rely on the statute may be waived by failure to demur to the pleading that alleges the oral contract or by failure to preserve the defense of the statute at trial [*Pao Ch'en Lee v. Gregoriou (1958) 50 Cal. 2d 502, 505-506, 326 P.2d 135* ; *see* *§ 530.24[1]*].

[3] At Trial

☐ Motion to exclude or strike evidence of the oral contract [*see* *Pao Ch'en Lee v. Gregoriou (1958) 50 Cal. 2d 502, 505-506, 326 P.2d 135* , discussed at *§ 530.24[1]*].

☐ Motion for nonsuit [*Carrier & Braddock v. S.W. Straus Co. (1931) 213 Cal. 508, 513, 2 P.2d 811* (proper when plaintiff not prejudiced by delay; otherwise entitled to reopen); *Ira Garson Realty Co. v. Brown (1960) 180 Cal. App. 2d 615, 621, 4 Cal. Rptr. 734* (proper when first opportunity to object, as when case proceeded on theory of oral contract supported by memorandum); *see § 530.24[1*]; *see also* Ch. 389, *Nonsuit and Motions for Judgment*].

☐ Request for jury instructions: available when evidence of oral agreement is admissible to prove oral argreement not within statute of frauds, e.g., when there is a claim that there is a sufficient memorandum of the agreement, or when there is evidence of estoppel to assert the statute of frauds [*San Francisco Brewing Corp. v. Bowman (1959) 52 Cal. 2d 607, 618, 343 P.2d 1* ; *see § 530.24[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsAnswersCivil ProceduresPretrial JudgmentsNonsuitsGeneral OverviewCivil ProceduresTrialsJury TrialsJury InstructionsRequests for InstructionsContracts LawStatutes of FraudsGeneral OverviewEvidenceProcedural ConsiderationsObjections & Offers of ProofObjections

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[Reserved]

§§ 530.41[Reserved]

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46-530 California Forms of Pleading and Practice--Annotated § 530.50

§ 530.50 General Form of Affirmative Defense That Contract Is Unenforceable Under Statute of Frauds

[1] FORM General Form of Affirmative Defense That Contract Is Unenforceable Under Statute of Frauds

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the contract alleged in the complaint is invalid under the provisions of _____ [*allege particular statute applicable, e.g., Civil Code Section 1624(a)(5)*] because it _____ [*specify reason contract is within statute of frauds, e.g.,* is an agreement to provide for _____(*name*) by will] which is not in writing, nor is there any note or memorandum of it, subscribed by _____ [defendant *or specify person through whom defendant claims right to property*] or his/her agent.

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer to an action based on an oral agreement that is unenforceable under the provisions of the statute of frauds. Failure to deny the making of the contract or to plead the statute of frauds as a bar constitutes waiver of the defense [*Healy v. Obear (1916) 29 Cal. App. 696, 698, 157 P. 569 , reh'g denied, 157 P. 570]* . However, merely pleading the affirmative defense of the statute of frauds is not sufficient. To preserve the defense, counsel also must demur to the pleading that alleges the oral contract or raise the defense of the statute at trial, or otherwise by motion [*see Pao Ch'en Lee v. Gregoriou (1958) 50 Cal. 2d 502, 505-506, 326 P.2d 135* ; §§ 530.24[1], 530.40[1] and [3]].

[3] Affirmative Defense Required When Oral Contract Is Admitted

The assertion, as a separate defense, that a contract is invalid under the statute of frauds pursuant to a specified code section raises the issue of the statute of frauds. The issue may be raised in this manner even though the answer otherwise admits making the oral contract. However, a defendant who admits the oral contract in his or her answer must assert the statute of frauds as an affirmative defense; if the defense not raised, under the doctrine of judicial admissions, the defendant will be held to have waived protection of statute of frauds [*Jamison v. Hyde (1903) 141 Cal. 109, 112, 74 P. 695* ; *Burt v. Wilson (1865) 28 Cal. 631, 639* ; *Isaac v. A & B Loan Co. (1988) 201 Cal. App. 3d 307, 311, 247*

Cal. Rptr. 104 ; *cf. Com. Code 2201(3)(b)* (operative January 1, 1990; applicable to contract for sale of goods for price of $500 or more, and discussed in *§ 530.12[12][d]*); *see also § 530.19[3]*].

[4] Cross References

For an alternative form pleading statute of frauds as an affirmative defense, see Ch. 140, *Contracts*

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46-530 California Forms of Pleading and Practice--Annotated § 530.51

§ 530.51 Affirmative Defense That Oral Contract for Sale of Goods Valued at Over $500 Is Unenforceable Under Statute of Frauds [Com. Code § 2201]

[1] FORM Affirmative Defense That Oral Contract for Sale of Goods Valued at Over $500 Is Unenforceable Under Statute of Frauds [Com. Code § 2201]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. The contract set forth in plaintiff's complaint, on which plaintiff bases his/her cause of action, is an oral contract for the sale of goods valued at $500 or more, enforcement of which is barred by *Section 2201 of the Commercial Code*.

2. No written note or memorandum of the [alleged] contract signed by defendant or any authorized agent of defendant exists [(*add if parties are merchants:* nor did defendant receive any written confirmation of the (alleged) contract from plaintiff).]

[3. _____ (Defendant *or* Plaintiff) has neither accepted nor received any part of these goods, nor given anything in part payment of the (alleged) contract. (*If plaintiff is seller, add:* These goods were not specially manufactured for defendant).]

[4. The contract set forth in plaintiff's complaint is not a "qualified financial contract" excepted from the rule of *Commercial Code § 2201*.]

[2] Use of Form

The form of affirmative defense in [1], *above*, is for use in an answer to an action based on an oral contract for the sale of goods valued at $500 or more. The form alleges facts bringing the contract within the statute of frauds pertaining to contracts for the sale of goods [*see Com. Code § 2201*, discussed at *§ 530.12[12]*].

Com. Code § 2201(1) provides that oral contracts for the sale of goods valued at $500 or more are unenforceable by

way of action or defense, except as otherwise provided in *Com. Code § 2201* [*see Com. Code § 2201*]. Paragraphs 2 through 4 of the form provide allegations negating the existence of some of the exceptions to the rule of *Com. Code § 2201(1)*. These paragraphs are included for optional use because it is not clear which party must plead and prove these exceptions to the statute of frauds--the party relying on the statute or the party seeking to come within the exception to the statute. The general rule is that a party relying on a statutory right which includes an exception in its enacting clause must negate that exception, although the party need not negate an exception made in a proviso or a subsequent section [*see People v. Gordon (1951) 105 Cal. App. 2d 711, 724, 234 P.2d 287]* . The effect of this rule on pleading and proof under *Com. Code § 2201* is not clear.

Omitted from this form is any allegation negating the existence of the exception of *Com. Code § 2201(3)(b)*, discussed at *§ 530.12[12][d]*, which allows enforcement of a contract for goods to the extent the party against whom the contract is sought to be enforced admits in his or her pleading, testimony, or otherwise in court that contract for sale was made [*Com. Code § 2201(3)(b)*].

[3] Allegations of Optional Paragraphs

The bracketed allegations in Paragraph 2 of the form negate the existence of the exception of *Com. Code § 2201(2)*, discussed at *§ 530.12[12][b]*, which allows enforcement of a contract between merchants if a confirmation was sent to the party against whom the contract is sought to be enforced and that party did not object to the confirmation [*Com. Code § 2201(2)*].

Paragraph 3 of the form provides an allegation negating the existence of the exceptions of *Com. Code § 2201(3)(a)* and *(c)*, discussed at *§ 530.12[12][h]* and *[i]*, which allow enforcement of a contract:

- For goods which are being manufactured specifically for defendant/buyer and are not suitable for sale to others in the ordinary course of the seller's business [*Com. Code § 2201(3)(a)*].

- To the extent of goods received and accepted or accepted and paid for [*Com. Code § 2201(3)(c)*].

Paragraph 4 of the form provides an allegation negating the existence of the exception to the rule of *Com. Code § 2201(1)* for "qualified financial contracts" [*Com. Code § 2201(4)*; *see Civ. Code § 1624(b)(2)*(definition); *see also § 530.12[1][c]*].

[4] Cross References

For discussion and forms relating generally to contracts for the sale of goods, see Ch. 501, *Sales: Sales Under the Commercial Code* .

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[Reserved]

§§ 530.52[Reserved]

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46-530 California Forms of Pleading and Practice--Annotated § 530.60

§ 530.60 Allegation of Part Performance Rendering Statute of Frauds Inapplicable to Oral Contract to Convey Real Property

[1] FORM Allegation of Part Performance Rendering Statute of Frauds Inapplicable to Oral Contract to Convey Real Property

1. On _____ [*date*] plaintiff and defendant entered into an oral contract by which it was agreed that _____ [plaintiff *or* defendant] would convey to _____ [defendant *or* plaintiff] certain real property described as _____ [*describe real property*], and _____ [defendant *or* plaintiff] would pay _____[plaintiff *or* defendant] $_____, to be paid _____ [*describe terms of payment, e.g.,* by check, $_____ at the time of the agreement, and $_____ on _____ (*date*)].

[*EITHER*]

2. Pursuant to the contract _____ [plaintiff *or* defendant] delivered and _____ [defendant *or* plaintiff] took possession of said real property, and at all times thereafter, _____ [defendant *or* plaintiff] has maintained actual possession of said premises by _____ [*allege facts constituting actual possession, e.g.,* residing thereon with his/her family and all their household possessions].

[*AND/OR*]

2. _____ [Defendant *or* Plaintiff], in reliance on the oral contract, has made substantial and permanent improvements on and to the real property in that he/she has _____ [*indicate nature and cost of improvements, e.g.,* graded and paved a driveway and constructed a garage at a cost of $_____].

[*EITHER*]

3. _____ [Defendant *or* Plaintiff] paid the purchase price of the property in full to _____ [plaintiff *or* defendant] _____ [*specify amounts and dates of payments, e.g.,* by checks dated _____ (*date*), and _____ (*date*), for $_____ and $_____, respectively], and _____ [plaintiff *or* defendant] accepted and retained the payment(s).

[*OR*]

3. _____ [Defendant *or* Plaintiff] has paid to _____ [plaintiff *or* defendant] and _____ [plaintiff *or* defendant] has accepted the following sums to be applied to the total price of said real property: _____ [*list amounts paid and dates of payment*]. _____[Defendant *or* Plaintiff] tendered the balance due of $_____to _____ [plaintiff *or* defendant], but _____ [plaintiff *or* defendant] refused then, and continues to refuse, to execute a deed conveying said real property to _____ [defendant *or* plaintiff].

[2] Use of Form

The form of allegation in [1], *above*, may be used in any action in which a party seeks to rely on an oral contract for the sale of real property which has been partly performed [*see Civ. Code § 1624(a)(3)*(agreement for the § 530.18[4] (sufficiency of part performance)]. Thus, for example, the allegations may be inserted in a complaint for specific performance of such a contract or for damages for breach of such a contract. When appropriate, the allegations may also be included in a defendant's answer to an action in which the defendant bases his or her rights on an oral contract for the sale of real property, such as a quiet title action or an action to enjoin interference with property rights.

For an example of a complaint for specific performance of a contract to convey real property, see Ch. 528, *Specific Performance* .

[3] Allegations

This form alleges:

- The making of the oral contract (Paragraph 1),

- That the party who bought the property went into actual possession of it pursuant to the contract, or made valuable improvements on the land in reliance on the contract, or both (Pararaph 2), and

- That the vendee made full or part payment of the purchase price (Paragraph 3).

[4] Requirement of Actual Possession

Mere payment of the purchase price is not sufficient to establish part performance which would take the contract out of the statute of frauds. It must be shown that the vendee was given, and took, actual possession of the property pursuant to the terms of the contract and continued to hold possession or made valuable improvements on the land in reliance on the contract [*Davis v. Judson (1910) 159 Cal. 121, 131, 113 P. 147* ; *McGinn v. Willey (1914) 24 Cal. App. 303, 308, 141 P. 49* (possession, improvements, and part payment of purchase price)]. For example, part performance was sufficient when the vendee did the following [*Engasser v. Jones (1948) 88 Cal. App. 2d 171, 175-176, 198 P.2d 546]* :

- Taking possession under the oral sales contract;
- Expending money in moving onto the property;
- Furnished the house;
- Arranged to buy water rights; and
- Maintained exclusive control of the property with the vendor's consent and knowledge.

To constitute part performance, the vendee must be in physical possession of the property. The possession must be so visible, notorious, and exclusive as to clearly manifest that the vendee is claiming a distinctive ownership which is inconsistent with the right of ownership in any other person [*Davis v. Judson (1910) 159 Cal. 121, 132, 113 P. 147* (visiting lots every year or two insufficient); *Francis v. Colendich (1961) 193 Cal. App. 2d 128, 131, 14 Cal. Rptr. 56* (surveying, fencing, and occupying parcel adjacent to previously owned property sufficient)]. Visiting lots every year or two is not sufficient possession [*Davis v. Judson (1910) 159 Cal. 121, 132, 113 P. 147]* , nor is possession by one who is already in possession as lessee. In the later case, possession would not taken pursuant to the terms of the sale contract [*Hawke v. Ellwanger (1930) 108 Cal. App. 105, 107, 291 P. 279]* .

Slight and temporary improvements or trivial outlays, such as placing few loads of gravel on lot and planting some trees, or spending $500 for development plans, are insufficient to constitute valuable improvements taking the contract out of the statute of frauds [*Wood v. Anderson (1926) 199 Cal. 440, 445, 249 P. 862* ; *Harrison v. Hanson (1958) 165 Cal. App. 2d 370, 377, 331 P.2d 1084]* .

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46-530 California Forms of Pleading and Practice--Annotated § 530.61

§ 530.61 Allegation of Qualified Financial Contract Not Subject to Statute of Frauds [Civ. Code § 1624(b); Com. Code §§ 1206(3), 2201(4)]

[1] FORM Allegation of Qualified Financial Contract Not Subject to Statute of Frauds [Civ. Code § 1624(b); Com. Code §§ 1206(3), 2201(4)]

1. On _____ [*date*] plaintiff and defendant entered into an oral contract for _____ [*specify type of qualified financial contract listed in Civ. Code § 1624(b)(2), e.g.,* the purchase and sale of foreign exchange], which was otherwise valid and enforceable.

[*EITHER*]

2. There is sufficient evidence that a contract has been made: [*specify type of evidence listed in Civ. Code § 1624(b)(3), e.g.,* plaintiff has a recording of the telephone call, admissible in evidence under California law, which indicates that the parties made a contract].

[*OR*]

2. Pursuant to a [prior *or* subsequent] written contract dated _____, plaintiff and defendant agreed to be bound by the terms of the qualified financial contract from the time they reached agreement _____ [by telephone *or otherwise*] on those terms. A copy of that contract is attached hereto marked "Exhibit A" and made a part hereof by this reference.

[2] Use of Form

The allegation in [1], *above*, may be used when a party seeks to rely on an oral contract that falls within the exception to the statute of frauds [*see Civ. Code § 1624(a)(1)*] for certain qualified financial contracts [*Civ. Code § 1624(b)*; *see § 530.12[1][c]*]. For example, the allegations may be inserted in a complaint for specific performance of such a contract or for damages for breach of such a contract.

[3] Allegations

This form alleges:

- That the agreement or contract is a qualified financial contract which is valid in other respects and is otherwise enforceable (Paragraph 1) [*see Civ. Code § 1624(b)(2)* ("qualified financial contract" defined)].

- Either there is sufficient evidence to indicate that a contract has been made, [*see Civ. Code § 1624(b)(3)* (what constitutes sufficient evidence that contract was made)] or the parties have agreed by means of a prior or subsequent written contract to be bound by the terms of the qualified financial contract from the time they reached agreement on those terms (Paragraph 2) [*see Civ. Code § 1624(b)(4)* ("writing" includes tangible written text produced by electronic signals)].

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46-531 California Forms of Pleading and Practice--Annotated 531.syn

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[1] FORM

[2] Use of Form

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§ 531.152 Allegations of Compliance With Conditions Precedent Under Statute or Ordinance [Code Civ. Proc. § 459]

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[2] Use of Form

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[4] State Statutes

[5] Decisions

§ 531.153 Allegation of Violation of Statute or Ordinance

[1] FORM

[2] Use of Form

[3] Decisions

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[1] FORM

[2] Use of Form

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§ 531.155 Notice of Request [Evid. Code § 453(a)] That Court Take Judicial Notice of Statute or Ordinance of Sister State, Foreign Statute, or Ordinance of Public Entity

[1] FORM

[2] Use of Form

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§ 531.01 Scope of Chapter

This chapter discusses and contains forms relating to statutes and ordinances generally, including the manner of pleading statutes and ordinances. It includes forms to allege the existence of county ordinances and municipal corporation ordinances in California [*see §§ 531.150, 531.151*], to allege compliance with conditions precedent to an action under a statute or ordinance [*see § 531.152*], to allege violation of a statute or ordinance [*see § 531.153*], and to allege the existence of foreign or sister state statutes and ordinances [*see § 531.154*]. It also includes forms of notice of a request for the court to take judicial notice of a statute or ordinance [*see § 531.155*] and of a declaration of a city clerk that a copy of an ordinance is correct [*see § 531.156*].

This chapter also contains a brief discussion of declaratory and injunctive relief against enforcement of unconstitutional or otherwise invalid statutes or ordinances. For forms and further discussion relating to declaratory relief to determine the validity of statutes and ordinances, see Ch.183, *Declaratory Relief* . For forms and further discussion relating to a taxpayer's suit to restrain the expenditure of public money to enforce an unconstitutional statute or ordinance, see Ch. 466, *Public Entities and Officers: Taxpayer's Actions* . For forms and further discussion relating to injunctive relief generally, see Ch. 303, *Injunctions* . For forms and further discussion relating to judicial notice generally, see Ch. 321, *Judicial Notice* . For discussion of California constitutional law, see Ch. 126A, *Constitutional Law* .

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§ 531.02 Cross References

For forms of complaint for declaratory and injunctive relief against enforcement of invalid statutes and ordinances, see Ch. 182, *Declaratory Relief* , and for forms relating to injunctive relief generally, see Ch. 303, *Injunctions* .

For discussion of constitutionality of statutes and ordinances generally, see Ch. 126A, *Constitutional Law* .

For a discussion of and forms for use in proceedings involving the initiative or referendum process for constitutional amendments, statutes, or ordinances, see Ch. 302, *Initiative, Referendum, and Recall* .

For a discussion of judicial notice proceedings relating to demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

For a discussion of and forms in a taxpayer's suit to enjoin implementation of an unconstitutional statute or ordinance, see Ch. 466, *Public Entities and Officers: Taxpayer's Actions* , and for related discussions and forms, see Ch. 303, *Injunc tions* , and Ch. 471, *Investigations by Public Agencies* .

For a discussion of and forms to use in requesting a court to take judicial notice, see Ch. 321, *Judicial Notice* .

For a discussion of and forms for use in proceedings involving zoning ordinances generally, including a complaint for declaratory and injunctive relief challenging the constitutionality of a zoning ordinance, see Ch. 579, *Zoning and Planning* .

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46-531 California Forms of Pleading and Practice--Annotated §§ 531.03-531.09

[Reserved]

§§ 531.03[Reserved]

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46-531 California Forms of Pleading and Practice--Annotated § 531.10

§ 531.10 Governing Statutes

Laws, including statutes, are defined in *Code Civ. Proc. §§ 1895-1899*. Ordinances are authorized under *Cal. Const., art. XI, §§ 5* and *7*, and *Gov. Code § 37100*. Pleading of ordinances and private statutes and of conditions precedent under statutes and ordinances is governed by *Code Civ. Proc. § 459*.

Judicial notice is governed by *Evid. Code § 450 et seq.*, and proof of official writings is governed by *Evid. Code §§ 1530* and *1531*.

Interpretation of statutes generally is governed by *Code Civ. Proc. §§ 1858, 1859*, and *1866*. Additionally, particular codes and acts may have definitions and rules of construction applicable to the interpretation of provisions included within that code or act [*see, e.g., Civ. Code § 2 et seq.* (Civil Code); *Bus. & Prof. Code § 23000 et seq.* (Alcoholic Beverage Control Act)].

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46-531 California Forms of Pleading and Practice--Annotated § 531.11

§ 531.11 Statutes Defined

The written law of California is contained in its constitution and statutes, and in the constitution and statutes of the United States. "Statutes" are written laws other than the state and federal constitutions [*Code Civ. Proc. § 1897*]. Except for private statutes, which concern only certain designated individuals and affect only their private rights, all statutes are public [*Code Civ. Proc. § 1898*]. The only way in which the Legislature may make law is by statute [*Cal. Const., art. IV, § 8*].

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§ 531.12 Ordinances Defined

Cities and counties generally may make and enforce within their limits all local, police, sanitary, and other ordinances not in conflict with general laws [*Cal. Const., art. XI, §§ 4(h), 7*]. Ordinances must not conflict with the constitutions or statutes of California or the United States [*Gov. Code § 37100*]. However, charter cities may make and enforce ordinances in respect to municipal affairs subject only to the restrictions in their respective charters. With respect to municipal affairs, city charters supersede all inconsistent laws [*Cal. Const., art. XI, § 5(a)*; for further discussion of the scope of the power to make ordinances, *§ 531.91[3]*].

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46-531 California Forms of Pleading and Practice--Annotated § 531.13

§ 531.13 Judicial Notice of Statutes and Ordinances

Judicial notice may be mandatory or permissive. California courts must take judicial notice of the decisional, constitutional, and public statutory law of California and the United States, and of the provisions of any city or county charter described in *Cal. Const., art. XI, § 3, 4,* or *5* [*Evid. Code § 451(a)*]. In addition, to the extent that they are not encompassed in the mandatory notice provisions of *Evid. Code § 451*, California courts may, and on proper request, must, take judicial notice of the following matters [*Evid. Code §§ 452, 453*]:

(1) The constitutional and statutory law of any state of the United States and the resolutions and private acts of the United States Congress or the California Legislature [*Evid. Code § 452(a)*]; and

(2) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States [*Evid. Code § 452(b)*; *see Grant v. Hipsher (1967) 257 Cal. App. 2d 375, 380 n.2, 64 Cal. Rptr. 892* (city and county ordinances may be judicially noticed as regulations and legislative enactments issued by or under authority of public entity)].

For a form of request that the court take judicial notice of a statute or ordinance of a sister state, a foreign statute, or an ordinance of a public entity, see *§ 531.155*. For discussion of other matters subject to judicial notice and of the procedure for taking judicial notice, see Ch. 321, *Judicial Notice* .

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[Reserved]

§§ 531.14[Reserved]

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46-531 California Forms of Pleading and Practice--Annotated § 531.30

§ 531.30 Necessity and Manner of Pleading Public Statutes and Ordinances

Matters subject to mandatory judicial notice need not be pleaded [*see Loranger v. Nadeau (1932) 215 Cal. 362, 364-366, 10 P.2d 63* (decided under former *Code Civ. Proc. § 1875*, which listed matters subject to judicial notice but did not have a mandatory/permissive scheme comparable to *Evid. Code §§ 451-453*, overruled on other grounds, *Reich v. Purcell (1967) 67 Cal. 2d 551, 555, 63 Cal. Rptr. 31, 432 P.2d 727*)]. Thus, California and federal public statutes need not be pleaded [*see Evid. Code § 451(a)*]. However, because city and county ordinances are subject only to permissive judicial notice [*see Evid. Code § 452(b)*], they should be pleaded. It is sufficient to plead an ordinance by its title and date of passage [*Code Civ. Proc. § 459*]. As an alternative to the simplified method of pleading an ordinance provided for in *Code Civ. Proc. § 459*, an ordinance may be pleaded by setting forth the substance of the provision relied on [*Clements v. T.R. Bechtel Co. (1954) 43 Cal. 2d 227, 241, 273 P.2d 5* ; *see § 531.151*]. Mere reference to an ordinance by number, however, is insufficient [*Agnew v. Los Angeles (1950) 99 Cal. App. 2d 105, 106, 221 P.2d 340]* . If the pleading gives notice that judicial notice of the ordinance will be requested and furnishes the court with sufficient information to enable it to take judicial notice of the ordinance, judicial notice will become mandatory [*see Evid. Code § 453*; *see also § 531.13*; for forms, *see §§ 531.150, 531.151, 531.153, 531.154*].

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§ 531.31 Necessity and Manner of Pleading Private Statute

Because private statutes are subject only to permissive judicial notice [*see Evid. Code § 452(a)*], they should be pleaded [*see* Necessity and Manner of Pleading Public Statutes and Ordinances, *above*]. In pleading a private statute, an ordinance of a county or municipal corporation, or a right derived therefrom, it is sufficient to refer to the statute or ordinance by its title and the day of its passage [*Code Civ. Proc. § 459*; *see Code Civ. Proc. § 1898* (definition of "private statute"); discussion § 531.11; see also *§ 531.150*].

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46-531 California Forms of Pleading and Practice--Annotated § 531.32

§ 531.32 Pleading Right to Recover Based on Statutory Liability

When a party seeks to recover on a purely statutory liability, the complaint must allege facts demonstrating his or her right to recover under the statute. The complaint must plead every fact which is essential to the cause of action under the statute. If the statute contains a limitation in the clause creating and defining the liability, the limitation must be negated in the complaint [*Green v. Grimes-Stassforth S. Co. (1940) 39 Cal. App. 2d 52, 55, 102 P.2d 452* ; *see Bach v. McNelis (1989) 207 Cal. App. 3d 852, 865, 255 Cal. Rptr. 232*]. If the statutory liability is limited by a proviso, however, or by a later section in the same act, the exception does not have to be negated in the complaint [*see People v. Gordon (1951) 105 Cal. App. 2d 711, 724, 234 P.2d 287*]. For a form of allegation pleading a violation of statute giving rise to liability, see *§ 531.153*.

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§ 531.33 Pleading Conditions Precedent Under Statute or Ordinance

In pleading the performance of conditions precedent under a statute, an ordinance of a county or municipal corporation, or a right derived therefrom, it is not necessary to state the facts showing performance, but it may be stated generally that the party duly performed all the conditions required by the statute or ordinance on his or her part [*Code Civ. Proc. § 459*; *Blumer v. Kirkman Corporation (1952) 38 Cal. 2d 480, 485, 241 P.2d 17*]. Under *Code Civ. Proc. § 459*, an allegation that acts were done "pursuant to," "according to," "in conformance to," or "in compliance with" a specified statute is sufficient to allege the performance of conditions precedent imposed by the statute [*Motor City Sales v. Superior Court (1973) 31 Cal. App. 3d 342, 347, 107 Cal. Rptr. 280*]. For a form of allegation pleading performance of conditions precedent, see *§ 531.152*.

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§ 531.34 Statute or Ordinance Creating Duty in Negligence Action

It is not necessary to plead or to refer to a statute or ordinance relied on as creating a duty when the action is predicated on the defendant's negligence and is not an action to enforce a liability or penalty imposed by statute [*McNeill v. A. Teichert & Son, Inc. (1955) 137 Cal. App. 2d 5, 8-9, 289 P.2d 595* ; *Jackson v. Hardy (1945) 70 Cal. App. 2d 6, 12, 160 P.2d 161*]. A motion to strike an allegation of a statute or ordinance is properly granted when the cause of action is not for violation of the statute [*see* *Szopieray v. West Berkeley etc. Co. (1924) 194 Cal. 106, 113, 227 P. 720* (ordinance)].

Even though it has not been pleaded, an ordinance is admissible as evidence of negligence [*Szopieray v. West Berkeley etc. Co. (1924) 194 Cal. 106, 113, 227 P. 720* ; *McNeill v. A. Teichert & Son, Inc. (1955) 137 Cal. App. 2d 5, 8-9, 289 P.2d 595*].

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§ 531.35 Effect of Repeal on Cause of Action

[1] When Right Accrues Solely From Statute

When a cause of action rests on a statute, the repeal of the statute destroys the right unless the right has been reduced to final judgment or unless the repealing statute contains a saving clause protecting the right in a pending litigation [*Governing Board v. Mann (1977) 18 Cal. 3d 819, 829, 135 Cal. Rptr. 526, 558 P.2d 1*]; *Cross v. Bonded Adjustment Bureau (1996) 48 Cal. App. 4th 266, 275-276, 55 Cal. Rptr. 2d 801* .

For discussion of retroactivity and vested rights, see *§ 531.71*.

[2] When Right Accrues From Statute Codifying Common Law

The rule that a repeal of the statute destroys the right only applies when the right in question is a statutory right and does not apply to an existing right of action which has accrued to a person under the rules of the common law, or by virtue of a statute codifying the common law. In such a case, it is generally stated that the cause of action is a vested property right which may not be impaired by legislation. In other words, the repeal of such a statute or of such a right should not be construed to affect existing causes of action [*Callet v. Alioto (1930) 210 Cal. 65, 67-68, 290 P. 438* ; *Cross v. Bonded Adjustment Bureau (1996) 48 Cal. App. 4th 266, 275-276, 55 Cal. Rptr. 2d 801*]. In short, the repeal of a statute affects a cause of action based solely on the statute; it does not affect a claim that exists at common law [*Cross v. Bonded Adjustment Bureau (1996) 48 Cal. App. 4th 266, 275-276, 55 Cal. Rptr. 2d 801*].

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[Reserved]

§§ 531.36[Reserved]

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§ 531.50 Interpretation Is Question of Law

The interpretation and applicability of a statute is a question of law [*Suman v. BMW of North America, Inc. (1994) 23 Cal. App. 4th 1, 9, 28 Cal. Rptr. 2d 133* ; *Bravo Vending v. City of Rancho Mirage (1993) 16 Cal. App. 4th 383, 391, 20 Cal. Rptr. 2d 164* ; *Cabrera v. Plager (1987) 195 Cal. App. 3d 606, 611, 241 Cal. Rptr. 731*]. An appellate court is not limited by the interpretation of a statute made by the trial court, or limited to the evidence presented on the question of statutory interpretation in the trial court [*Bravo Vending v. City of Rancho Mirage (1993) 16 Cal. App. 4th 383, 391-392, 20 Cal. Rptr. 2d 164* ; *see Cal-Air Conditioning, Inc. v. Auburn Union School Dist. (1993) 21 Cal. App. 4th 655, 667, 26 Cal. Rptr. 2d 703* (interpretation and application of statutory scheme to undisputed set of facts is subject to de novo review on appeal)]. The rules of statutory construction apply equally in construing statutes enacted through the initiative process [*Day v. City of Fontana (2001) 25 Cal. 4th 268, 272, 105 Cal. Rptr. 2d 457, 19 P.3d 1196*].

The interpretation of a statute is an exercise of the judicial power the California Constitution assigns to the courts. The Legislature has no authority to interpret a statute because that is a judicial task. If the courts have not yet finally and conclusively interpreted a statute and are in the process of doing so, a declaration of a later Legislature as to what an earlier Legislature intended is entitled to consideration. But even then, a legislative declaration of an existing statute's meaning is but a factor for a court to consider and is neither binding nor conclusive in construing the statute. Moreover, once the California Supreme Court has finally and definitively interpreted a statute, the Legislature has the power (subject to constitutional restraints) to overrule the decision by amending the statute, but it has no power to decide that the amendment merely declares existing law [*McClung v. Employment Dev. Dep't (2004) 34 Cal. 4th 467, 475-476, 20 Cal. Rptr. 3d 428, 99 P.3d 1015* (Legislature lacked power to state that amendment of *Gov. Code § 12940(j)* was "declaratory of existing law," because amendment changed law by overruling definitive and final judicial interpretation of that statute); *see Carter v. California Dept. of Veterans Affairs (2006) 38 Cal. 4th 914, 44 Cal. Rptr. 3d 223, 135 P.3d 637* (because Supreme Court had not yet definitively interpreted *Gov. Code § 12940(j)(1)* with respect to employer liability for sexual harassment of employees by nonemployees, Court gave due consideration to legislative statement that 2003 amendment of statute was declaratory of existing law)].

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§ 531.51 Legislative Intent to Prevail

The fundamental task of statutory construction is to ascertain legislative intent so as to effectuate the purpose of the law [*Code Civ. Proc. § 1859*; *People v. Cruz (1996) 13 Cal. 4th 764, 774-775, 55 Cal. Rptr. 2d 117, 919 P.2d 731* ; *Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal. 3d 245, 268, 284 Cal. Rptr. 718, 814 P. 2d 704* ; *Altaville Drug Store, Inc. v. Employment Development Department (1988) 44 Cal. 3d 231, 238, 242 Cal. Rptr. 732, 746 P.2d 871* ; *Pollack v. Department of Motor Vehicles(1985) 38 Cal. 3d 367, 372, 211 Cal. Rptr. 748, 696 P.2d 141* ; *Marina Green Homeowners Assn. v. State Farm Fire & Casualty Co. (1994) 25 Cal. App. 4th 200, 204, 30 Cal. Rptr. 2d 364*]. Thus, determining legislative intent is said to be the fundamental, or cardinal, rule of statutory construction [*Tyrone v. Kelley (1973) 9 Cal. 3d 1, 10-11, 106 Cal. Rptr. 761, 507 P.2d 65* ; *Los Angeles Taxpayers Alliance v. Fair Political Practices Com. (1993) 14 Cal. App. 4th 1214, 1219, 18 Cal. Rptr. 2d 472*], and the many rules of statutory construction established in the decisional law are all basically guides for courts to use in determining that intent [*Kinder v. Pacific Public Carriers Co-op, Inc. (1980) 105 Cal. App. 3d 657, 664, 164 Cal. Rptr. 567*].

Whenever possible a construction must be adopted which will give effect to all provisions of a statute [*Parris v. Zolin (1996) 12 Cal. 4th 839, 845, 50 Cal. Rptr. 2d 109*]. Accordingly, a statute must be construed in light of its legislative purpose and design, and in enforcing its command, both the policy expressed in its terms and the object implicit in its history should be recognized [*In re Schaefer (1981) 116 Cal. App. 3d 588, 597, 172 Cal. Rptr. 335*].

The object that a statute seeks to achieve and the evil that it seeks to prevent are of prime consideration in its interpretation [*Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 860-861 n.12, 171 Cal. Rptr. 619, 623 P.2d 180* ; *Dubins v. Regents of University of California (1994) 25 Cal. App. 4th 77, 83, 30 Cal. Rptr. 2d 336* ; *Judson Steel Corp. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 658, 669, 150 Cal. Rptr. 250, 586 P.2d 564*].

When the Legislature enacts a remedial statute, courts must construe it liberally to promote its purposes and protect persons within its purview. When the meaning of such a statute is in doubt, courts must construe it to suppress the mischief at which it is addressed, to advance or extend the remedy provided, and to bring within the scope of the law every case that comes clearly within its spirit and policy [*Tetra Pak, Inc. v. State Bd. of Equalization (1991) 234 Cal. App. 3d 1751, 1756, 286 Cal. Rptr. 529*].

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§ 531.52 Three-Step Analysis for Statutory Interpretation

Statutory interpretation involves a three-step analysis [*Herman v. Los Angeles County Metropolitan Transportation Authority (1999) 71 Cal. App. 4th 819, 823, 84 Cal. Rptr. 2d 144*]:

- First, a court should examine the actual language of the statute [*see* discussion in *§ 531.53*, together with following discussion of rules for interpreting words of statute].

- If the meaning of the words is not clear, the court must take the second step and refer to extrinsic sources, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part [*Mejia v. Reed (2003) 3 Cal. Rptr. 3d 390, 74 P.3d 166* (if neither statutory language nor legislative history is dispositive, court should consider relevant policy considerations as they bear on question of legislative intent); *Hoechst Celanese Corp. v. Franchise Tax Bd. (2001) 25 Cal. 4th 508, 519, 106 Cal. Rptr. 2d 548, 22 P.3d 324 , cert. denied, 122 S. Ct. 614 (2001)* ; *Day v. City of Fontana (2001) 25 Cal. 4th 268, 272, 105 Cal. Rptr. 2d 457, 19 P.3d 1196* ; *see* discussion in *§ 531.55*]. If the statute is part of a uniform act adopted by the Legislature, the history surrounding the creation and adoption of the uniform act is also relevant [*Hoechst Celanese Corp. v. Franchise Tax Bd. (2001) 25 Cal. 4th 508, 519, 106 Cal. Rptr. 2d 548, 22 P.3d 324 , cert. denied, 122 S. Ct. 614 (2001)]* .

- When the first two steps have failed to reveal clear meaning, the final step is to apply reason, practicality, and common sense to the language at hand.

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§ 531.53 Words of Statute as First Consideration

In order to determine legislative intent, courts begin by examining the current language of the statute [*Lamie v. United States Trustee (2004) 540 U.S. 526, 124 S. Ct. 1023, 157 L. Ed. 2d 1024, 1033* (starting point in discerning legislative intent is existing statutory text, not predecessor statutes); *People v. Cruz (1996) 13 Cal. 4th 764, 775, 55 Cal. Rptr. 2d 117, 919 P.2d 731*], because those words are generally the best indicator of legislative intent [*Rhiner v. Workers' Comp. Appeals Bd. (1993) 4 Cal. 4th 1213, 1217, 18 Cal. Rptr. 2d 129, 848 P.2d 244* ; *Hoyme v. Board of Education (1980) 107 Cal. App. 3d 449, 452, 165 Cal. Rptr. 737]* . If the Legislature has declared its intent, the court must accept that declaration [*Tyrone v. Kelley (1973) 9 Cal. 3d 1, 10-11, 106 Cal. Rptr. 761, 507 P.2d 65]* .

Awkward or ungrammatical language does not make a statute ambiguous, if the intended meaning is nevertheless clear. For example, the disjunctive nature of a list set forth in a statute may be made clear by the context in which the list appears, despite the inadvertent omission of the word "or." In contrast, the meaning might be altered or obscured if a "not" were missing or if an "or" were inadvertently substituted for an "and" [*Lamie v. United States Trustee (2004) 540 U.S. 526, 124 S. Ct. 1023, 157 L. Ed. 2d 1024, 1034]* .

Ambiguity may be established through the existence of conflicting opinions of courts that have interpreted either the relevant words or the same words in similar statutes [*Hoechst Celanese Corp. v. Franchise Tax Bd. (2001) 25 Cal. 4th 508, 522, 106 Cal. Rptr. 2d 548, 22 P.3d 324 , cert. denied, 122 S. Ct. 614 (2001)* (conflicting opinions of other states' courts interpreting uniform law demonstrate that reasonable minds may disagree over meaning of statutory words)].

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§ 531.54 Interpretation of Unambiguous Statutes

When statutory language is clear and unambiguous, there is no need for construction and a court should not indulge in it [*People v. Jones (1993) 5 Cal. 4th 1142, 1146, 22 Cal. Rptr. 2d 753, 857 P. 2d 1163* ; *DaFonte v. Up-Right, Inc. (1992) 2 Cal. 4th 593, 601, 7 Cal. Rptr. 2d 238, 828 P. 2d 140* ; *In re Lance W. (1985) 37 Cal. 3d 873, 886, 210 Cal. Rptr. 631, 694 P.2d 744*]. A statutory phrase is clear and unambiguous if the meaning assigned to it is not in conflict with other language in the same act [*Dubins v. Regents of University of California (1994) 25 Cal. App. 4th 77, 83, 30 Cal. Rptr. 2d 336*].

The unambiguous language must be given its plain meaning, and rules of statutory construction are applied only if there is ambiguity or conflict in the statute's provisions or if a literal interpretation would lead to absurd consequences [*Droeger v. Friedman, Sloan, & Ross (1991) 54 Cal. 3d 26, 38, 283 Cal. Rptr. 584, 812 P.2d 931* ; *Marina Green Homeowners Assn. v. State Farm Fire & Casualty Co. (1994) 25 Cal. App. 4th 200, 204, 30 Cal. Rptr. 2d 364* ; *Castaneda v. Holcomb (1981) 114 Cal. App. 3d 939, 942, 170 Cal. Rptr. 875* ; *see Edgington v. County of San Diego (1981) 118 Cal. App. 3d 39, 46, 173 Cal. Rptr. 225*].

Nevertheless, a claim of ambiguity cannot always be decided from the face of the statute. It may be latent, in which case it requires a provisional examination of extrinsic matters to determine whether the claim is tenable [*City of Sacramento v. Public Employees' Retirement System (1994) 22 Cal. App. 4th 786, 795, 27 Cal. Rptr. 2d 545*].

When ambiguity does exist, consideration should be given to the consequences that flow from a particular interpretation [*People v. Cruz (1996) 13 Cal. 4th 764, 782, 55 Cal. Rptr. 2d 117, 919 P.2d 731]* . For further discussion, see *§ 531.55*.

The literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in light of the statute's legislative history, appear from its provisions considered as a whole [*People v. Belleci (1979) 24 Cal. 3d 879, 884, 157 Cal. Rptr. 503, 598 P.2d 473* (following plain meaning); *Looney v. Superior Court (1993) 16 Cal. App. 4th 521, 532, 20 Cal. Rptr. 2d 182*]. One case, for example, involved a conflict between a Vehicle Code provision that, under certain circumstances, authorized immediate suspension of the driver's license of a

person with blood-alcohol content of 0.04 percent or more, and another Vehicle Code provision that required blood-alcohol content of at least 0.08 percent to sustain the suspension at an administrative hearing [*see Veh. Code §§ 13353.2(a)(3), 13557(b)(2)(C)*]. Because the two provisions could not be harmonized, the court of appeal concluded, in light of the manifest purpose of the statutes to protect the public, that a blood-alcohol content of 0.04 percent was sufficient both to warrant the initial suspension and to sustain the suspension at an administrative hearing [*Rehman v. Department of Motor Vehicles (2009) 178 Cal. App. 4th 581, 584, 587-588, 100 Cal. Rptr. 3d 510* ("[T]his is one of the rare instances in which we must disregard the literal terms of a statute because they conflict with another statute and would compel an absurd result that the Legislature obviously did not intend.")].

A literal reading of a statute may also be disregarded when one of its provisions is rendered meaningless by the literal reading [*Clavell v. North Coast Business Park (1991) 232 Cal. App. 3d 328, 331-332, 283 Cal. Rptr. 419* ; *see also* Every Word to Have Meaning, *below*].

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§ 531.55 Interpretation of Ambiguous Statutes Generally

When a statute is ambiguous, courts typically consider evidence of the Legislature's intent beyond the words of the statute. The court may examine a variety of extrinsic aids, including the statutory scheme of which the provision is a part, the history and background of the statute, the apparent purpose, and any considerations of constitutionality, in an attempt to ascertain the most reasonable interpretation of the measure [*Hughes v. Board of Architectural Examiners (1998) 17 Cal. 4th 763, 776, 72 Cal. Rptr. 2d 624, 952 P.2d 641*]. If the statute is part of a uniform act adopted by the Legislature, the history surrounding the creation and adoption of the uniform act is also relevant [*Hoechst Celanese Corp. v. Franchise Tax Bd. (2001) 25 Cal. 4th 508, 519, 106 Cal. Rptr. 2d 548, 22 P.3d 324 , cert. denied, 122 S. Ct. 614 (2001)*]. The court will select a construction that comports most closely with the apparent intent of the lawmakers, with a view to promoting rather than defeating the general purpose of the statute, and to avoiding an interpretation that would lead to absurd consequences [*Day v. City of Fontana (2001) 25 Cal. 4th 268, 272, 105 Cal. Rptr. 2d 457, 19 P.3d 1196* ; *see, e.g., Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson (2005) 545 U.S. 409, 125 S. Ct. 2444, 162 L. Ed. 2d 390, 400-402* (faced with ambiguous federal statute of limitations, Court selected plausible construction that starts time limit running when cause of action accrues, rather than alternative construction under which time limit could expire before accrual of cause of action)].

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§ 531.56 Ordinary Meaning of Words

Words in a statute should, unless otherwise clearly indicated, be given their usual, ordinary, commonsense meaning [*Crawford v. Metropolitan Gov't (2009) -- U.S. --, 129 S. Ct. 846, 172 L. Ed. 2d 650, 656* ; *Walnut Creek Manor v. Fair Employment & Housing Com. (1991) 54 Cal. 3d 245, 268, 284 Cal. Rptr. 718, 814 P. 2d 704* ; *People v. Belleci (1979) 24 Cal. 3d 879, 884, 157 Cal. Rptr. 503, 598 P.2d 473* ; *Hoschler v. Sacramento City Unified Sch. Dist. (2007) 149 Cal. App. 4th 258, 263-264, 266, 57 Cal. Rptr. 3d 115* (when statute requires that notice be given, but does not specify manner of giving notice, personal service is required); *George M. v. Superior Court (1988) 201 Cal. App. 3d 755, 759, 247 Cal. Rptr. 330*]. That meaning is to be ascertained and the words interpreted in the sense in which they would have been understood at the time of the statutory enactment [*People v. Cruz (1996) 13 Cal. 4th 764, 782, 55 Cal. Rptr. 2d 117, 919 P.2d 731* ; *see, e.g., Carcieri v. Salazar (2009) -- U.S. --, 129 S. Ct. 1058, 172 L. Ed. 2d 791, 800-802* (in *25 U.S.C. § 479*, which authorizes Secretary of Interior to acquire property for use of Indian tribes "now under Federal jurisdiction," word "now" refers to time of time of statute's enactment, rather than time of acquisition of property)]. In determining the common meaning of statutory words, the court may refer to a standard dictionary [*see, e.g., Crawford v. Metropolitan Gov't (2009) -- U.S. --, 129 S. Ct. 846, 172 L. Ed. 2d 650, 656* (relying on dictionary definition of "opposed," which appears in *42 U.S.C. § 2000e-3(a)* and is left undefined by statute); *Estate of Griswold (2001) 25 Cal. 4th 904, 911, 108 Cal. Rptr. 2d 165, 24 P.3d 1191*]. However, when a statute prescribes the meaning to be given to particular terms used by it, that meaning is generally binding on the courts [*Great Lakes Properties, Inc. v. City of El Segundo (1977) 19 Cal. 3d 152, 156, 137 Cal. Rptr. 154, 561 P.2d 244*].

In according words their usual, ordinary, and commonsense meaning, the purpose for which the statute was adopted should be kept in mind [*Hamilton v. State Bd. of Education (1981) 117 Cal. App. 3d 132, 141, 172 Cal. Rptr. 748*]. When a word of common usage has more than one meaning, the one which will best attain the purposes of the statute should be adopted, even though the ordinary meaning of the word is thereby enlarged or restricted [*Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 860-861 n.12, 171 Cal. Rptr. 619, 623 P.2d 180*]. For example, if a statute uses a general word in conjunction with other words describing specific acts that would ordinarily be within the ambit of the general word, the court may infer that the general word refers to conduct other than those specific acts [*see Estate of Griswold (2001) 25 Cal. 4th 904, 911, 108 Cal. Rptr. 2d 165, 24 P.3d 1191* ("acknowledged the child," in *Prob. Code § 6452*, refers to conduct other than contributing to support or care of child, since statute specifically requires such

contribution *plus* acknowledgement before natural parent may inherit from child who was born out of wedlock)].

A potential ambiguity created by the organizational structure of a statute can be clarified by the clear meaning of the words of the statute. For example, in a statutory subparagraph that is divided into clauses, a limiting provision that appears only in one clause may nevertheless be construed to apply to another clause if it purports to apply to "this subparagraph" [*Koons Buick Pontiac GMC, Inc. v. Nigh (2004) 543 U.S. 50, 125 S. Ct. 460, 467-468, 160 L. Ed. 2d 389* (construing *15 U.S.C. § 1640(a)(2)(A)(i), (ii)* in light of ordinary meaning of "section," "subsection," "paragraph," "subparagraph," and "clause" as used in congressional legislative drafting manuals)].

A party contending that a provision of an act should not be applied according to the natural or customary purport of its language must show either that some other section of the act expands or restricts its meaning, that the provision itself is repugnant to the general purview of the act, or that the act, construed with other acts on the same subject matter or with the legislative history of the subject matter, imports a different meaning [*Great Lakes Properties, Inc. v. City of El Segundo (1977) 19 Cal. 3d 152, 155-156, 137 Cal. Rptr. 154, 561 P.2d 244*].

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§ 531.57 Judicial Alteration of Statute Impermissible

In construing a statute, the court's function is simply to ascertain and declare what is in terms or in substance contained in the statute, not to insert what has been omitted, or to omit what has been inserted [*Code Civ. Proc. § 1858*]. The courts may not alter the words of a statute or insert qualifying provisions to accomplish a purpose or assumed intention that does not appear either on the statute's face, or from its language, or from its legislative history [*In re Hoddinott (1996) 12 Cal. 4th 992, 1002, 50 Cal. Rptr. 2d 706* ; *People v. Gaines (1980) 112 Cal. App. 3d 508, 517* ; *City of Sacramento v. Public Employees' Retirement System (1994) 22 Cal. App. 4th 786, 793, 27 Cal. Rptr. 2d 545* (meaning of statute is to be sought in language used by Legislature and words may not be inserted in statute under guise of interpretation); *Cemetery Board v. Telophase Society of America (1978) 87 Cal. App. 3d 847, 858, 151 Cal. Rptr. 248* ; *see also People v. Tilbury (1991) 54 Cal. 3d 56, 70, 284 Cal. Rptr. 288, 813 P.2d 1318* (when Legislature enacts statute in area fraught with medical and scientific uncertainty, courts must be careful not to rewrite statute); *Planned Parenthood Affiliates v. Swoap (1985) 173 Cal. App. 3d 1187, 1194-1195, 219 Cal. Rptr. 664* (court may not impeach legislation by extrinsic evidence that legislation does not genuinely reflect Legislature's will)].

If the Legislature's intent is clearly ascertainable, however, words inadvertently omitted from a statute may be supplied in the process of construction in order to effectuate the legislative intent [*People v. Hernandez (1980) 111 Cal. App. 3d 888, 900, 168 Cal. Rptr. 898* (obvious error in reference to subdivisions of another statute corrected by court)].

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§ 531.58 Title or Chapter Heading Not Controlling

A title or chapter heading merely states the general subject of a legislative act. Therefore, provisions found within the body of an act are not restricted in operation by the statement in the heading [*People v. Garfield (1985) 40 Cal. 3d 192, 200, 219 Cal. Rptr. 196, 707 P.2d 258* ; *People v. Tawney (1959) 168 Cal. App. 2d 599, 613, 336 P.2d 659]* . Although a title or chapter heading by itself is not sufficient evidence in support of a restrictive reading of provisions found within the body of an act, the heading is nevertheless a useful guide in determining the intended scope of legislation [*see People v. Garfield (1985) 40 Cal. 3d 192, 199-200, 219 Cal. Rptr. 196, 707 P.2d 258* ; *see also § 531.63[1]*]. Therefore, it appears that titles, chapters, and section headings may be persuasive when coupled with other evidence in support of a particular statutory construction [*see People v. Silverbrand (1990) 220 Cal. App. 3d 1621, 1626, 270 Cal. Rptr. 261* (statutory reference to "criminal proceeding" includes prearrest warrant hearing because statute governing warrant hearing appears under heading of criminal "proceedings," criminal magistrate presides over hearing, and hearing comes within ordinary meaning of word "proceeding")].

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§ 531.59 Every Word to Have Meaning

In attempting to ascertain legislative intent, effect should be given, whenever possible, to the statute as a whole and to its every word and clause; an interpretation that renders particular terms of a statute surplusage is ordinarily rejected [*City of San Jose v. Superior Court (1993) 5 Cal. 4th 47, 55, 19 Cal. Rptr. 2d 73, 850 P.2d 621* ; *Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal. 3d 1379, 1387, 241 Cal. Rptr. 67, 743 P.2d 1323* ; *Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal. 3d 458, 478, 156 Cal. Rptr. 14, 595 P.2d 592* ; *see also Code Civ. Proc. § 1858*; *Adams v. Murakami (1991) 54 Cal. 3d 105, 123, 284 Cal. Rptr. 318, 813 P. 2d 1348* (court is not to presume that Legislature engages in idle acts)]. For example, the statute of limitations applicable to claims of domestic violence provides a three-year limitations period measured from the date of the "last act" of domestic violence by the defendant against the plaintiff [*Code Civ. Proc. § 340.15(a)(1)*]. A court of appeal has held that the words "last act" would be rendered superfluous unless the statute is interpreted as adopting the continuing tort theory, allowing domestic violence victims to recover damages for all acts of domestic violence occurring during the marriage, provided the victim proves a continuing course of abusive conduct and files suit within three years of the "last act" of domestic violence [*Pugliese v. Superior Court (2007) 146 Cal. App. 4th 1444, 1451, 53 Cal. Rptr. 3d 681]* .

In general, a word that has a particular meaning in one part of a law should be given the same meaning in other parts of the same law. However, this axiom of statutory construction does not control when the word is qualified by different modifiers. For example, *Public Resources Code Section 5540* restricts the ability of a regional-park or open-space district to convey land that has been "actually dedicated" for park or open space purposes, and that statute specifies that dedication may be accomplished by a resolution of the district's board of directors [*Pub. Res. Code § 5540*]. *Public Resources Code Section 5565*, however, simply states that land is "dedicated" when acquired by a regional park or open space district [*Pub. Res. Code § 5565*]. Construing these provisions together, the California Supreme Court held that "actually dedicated" and "dedicated" do not mean the same thing. Treating the two usages of "dedicated" as meaning the same thing would render the qualifying word "actually" surplusage, thus violating the rule of statutory construction that courts should, if possible, accord meaning to every word and phrase in a statute so as to better effectuate the Legislature's intent [*Ste. Marie v. Riverside County Reg'l Park & Open-Space Dist. (2009) 46 Cal. 4th 282, 289-290, 93 Cal. Rptr. 3d 369, 206 P.3d 739* (also, if under *Pub. Res. Code § 5565* land is deemed dedicated at moment of acquisition, *Pub. Res. Code §5540*'s provision for dedication by resolution of district board would be unnecessary and

superfluous)].

Although every word in a statute must be given effect, it is important to distinguish between a prefatory statement of purpose and its operative language; the former usually does not limit or expand the scope of the operative language, although it may help to clarify the meaning of the operative language [*District of Columbia v. Heller (2008) -- U.S. --, 128 S. Ct. 2783, 171 L. Ed. 2d 637, 649* & nn.3, 4 (interpreting *U.S. Const., amend. II*)]. In any event, rules directing courts to avoid interpreting legislative enactments as surplusage are mere guides and will not be used to defeat legislative intent [*Lamie v. United States Trustee (2004) 540 U.S. 526, 124 S. Ct. 1023, 157 L. Ed. 2d 1024, 1035* (preference for avoiding surplusage constructions is not absolute); *People v. Cruz (1996) 13 Cal. 4th 764, 782, 55 Cal. Rptr. 2d 117, 919 P.2d 731*].

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§ 531.60 Words Qualified by Context

The meaning of the words of a statute can only be determined with reference to the context in which the words are used; that is, with reference to such purpose as may be discerned from examining the entire enactment of which the words are part [*Dubins v. Regents of University of California (1994) 25 Cal. App. 4th 77, 83, 30 Cal. Rptr. 2d 336*]. For example, if a statute uses a general word in conjunction with other words describing specific acts that would ordinarily be within the ambit of the general word, the court may infer that the general word refers to conduct other than those specific acts [*see* *Estate of Griswold (2001) 25 Cal. 4th 904, 911, 108 Cal. Rptr. 2d 165, 24 P.3d 1191* ("acknowledged the child," in *Prob. Code § 6452*, refers to conduct other than contributing to support or care of child, since statute specifically requires such contribution *plus* acknowledgement before natural parent may inherit from child who was born out of wedlock)].

The doctrine of *ejusdem generis* provides that when a general term or category follows or precedes an enumeration of particular classes of persons or things, the general term or category will be construed as applicable only to persons or things that are similar to those that are specifically enumerated [*International Fed'n of Prof'l & Technical Eng'rs, Local 21 v. Superior Court (2007) 42 Cal. 4th 319, 342, 64 Cal. Rptr. 3d 693, 165 P.3d 488]* . The rationale for the rule is that if the general words were intended to be used in their unrestricted sense, the particular things would not have been mentioned as they would in that case be surplusage [*Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters (1979) 25 Cal. 3d 317, 331 n.10, 158 Cal. Rptr. 370, 599 P.2d 676*]. *Ejusdem generis* is inapplicable, however, when there is no general or collective term that precedes or follows a list of items. Thus, in a simple disjunctive phrase that combines specific and general items, *ejusdem generis* provides no basis for assuming that the specificity of some listed items is intended to limit the generality of the other listed items [*see* *Ali v. Federal Bureau of Prisons (2008) 552 U.S. 214, 128 S. Ct. 831, 169 L. Ed. 2d 680, 689-691* (construing *28 U.S.C.S. § 2680(c)*)].

Similarly, the rule *noscitur a socis* provides that the meaning of a word may be enlarged or restrained by reference to the object of the whole clause in which it is used [*People v. Stout (1971) 18 Cal. App. 3d 172, 177, 95 Cal. Rptr. 593* ; *but see* *Ali v. Federal Bureau of Prisons (2008)552U.S.214, 128 S. Ct. 831, 169 L. Ed. 2d 680, 691* (*noscitur a sociis* not applicable to limit ordinary expansive meaning of "any other law enforcement officer" in *28 U.S.C.S. § 2680(c)*: "although customs and excise are mentioned twice in § 2680(c), nothing in the overall statutory context suggests that

customs and excise officers were the exclusive focus of the provision")].

Additionally, words grouped in a list should be given related meaning [*Droeger v. Friedman, Sloan, & Ross (1991) 54 Cal. 3d 26, 38, 283 Cal. Rptr. 584, 812 P.2d 931* (rejecting argument that, in statute regarding married person's power to lease for more than one year, sell, convey, or encumber community property, encumbrances should be treated differently than leases, sales, and conveyances)], and modifying phrases must be applied to the words immediately preceding them and are not to be construed as extending to more remote phrases [*City of Victorville v. County of San Bernardino (1991) 233 Cal. App. 3d 1312, 1322, 285 Cal. Rptr. 206* ; *but see Hoechst Celanese Corp. v. Franchise Tax Bd. (2001) 25 Cal. 4th 508, 521, 106 Cal. Rptr. 2d 548, 22 P.3d 324 , cert. denied, 122 S. Ct. 614 (2001)* (application of "last antecedent" doctrine--under which qualifying words are to be applied to immediately preceding words but not to more remote ones--supported finding that language of *Rev. & Tax. Code § 25120(a)* was ambiguous)]. However, the latter principle--the "last antecedent" rule--may be inapplicable, depending on the context. For example, when several words are followed by a clause that applies as much to the first and other words as to the last, or when the sense of the entire act requires that a qualifying word or phrase apply to several preceding words, the last antecedent rule does not apply [*Renee J. v. Superior Court (2001) 26 Cal. 4th 735, 743, 110 Cal. Rptr. 2d 828, 28 P.3d 876 , superseded by statute as stated in In re Angelique C., 113 Cal. App. 4th 509* ("[p]rinciples of statutory construction are not rules of independent force, but merely tools to assist courts in discerning legislative intent")].

When a sentence in a statute contains a transitive verb that has an object, an adverb that modifies the verb is commonly understood to apply to the entire action conveyed by the complete predicate, including the object of the verb. Thus, under a statute that penalizes a person who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" [*see 18 U.S.C. § 1028A(a)(1)*], punishment may be imposed only if the government proves not only that the defendant knew that he or she was transferring, possessing, or using something, but also that the defendant knew the something was another person's means of identification [*Flores-Figueroa v. United States (2009) -- U.S. --, 129 S. Ct. 1886, 1890-1894, 173 L. Ed. 2d 853, 857-862]* .

Some words are particularly subject to varying interpretations and depend on context for their meaning in a given statutory provision. In one case, for example, a federal statutory provision barred judicial review of decisions of the Attorney General "the authority for which is specified under this subchapter to be in the discretion of the Attorney General" [*see 8 U.S.C. § 1252(a)(2)(B)(ii)*]. The parties in the case disagreed over whether the statutory word "under" referred only to the Attorney General's discretionary authority specified "in" the statute, or whether it encompassed matters made discretionary under regulations adopted "pursuant to" the statute. Looking to the context surrounding the word "under," the United States Supreme Court concluded that the word referred only to matters specified in the statute. In so holding, the Court remarked that "[t]he word 'under' is chameleon; it 'has many dictionary definitions and must draw its meaning from its context'" [*Kucana v. Holder (2010) -- U.S. --, 130 S. Ct. 827, 175 L. Ed. 2d 694, 2010 U.S. LEXIS 764, at *22* (quoting *Ardestani v. INS (1991) 502 U.S. 129, 135, 112 S. Ct. 515, 116 L. Ed. 2d 496*)].

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§ 531.61 Legislative Specification of One Thing Excludes Any Other

Under the rule of *expressio unius est exclusio alterius,* when exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed [*In re Lance W. (1985) 37 Cal. 3d 873, 888, 210 Cal. Rptr. 631, 694 P.2d 744* ; *Wildlife Alive v. Chickering (1976) 18 Cal. 3d 190, 195, 132 Cal. Rptr. 377, 553 P.2d 537* ; *Bearden v. U.S. Borax, Inc. (2006) 179 L.R.R.M. (BNA) 2993, 138 Cal. App. 4th 429, 436-437, 41 Cal. Rptr. 3d 482* (Industrial Wage Commission lacked authority to adopt regulation creating new exemption to employers' duty to provide meal periods in addition to exemptions provided by statute)]. However, this rule gives way when it would operate contrary to the legislative intent to which it is subordinate or when its application would nullify the essence of the statute [*County of Alameda v. State Bd. of Equalization (1982) 131 Cal. App. 3d 374, 381, 182 Cal. Rptr. 450*].

A similar rule of construction is *inclusio unius est exclusio alterius,* inclusion of the one is the exclusion of another [*see, e.g.,* *Murillo v. Fleetwood Enterprises, Inc. (1998) 17 Cal. 4th 985, 991, 73 Cal. Rptr. 2d 682, 953 P.2d 858* (court rejected buyer's contention regarding *Civ. Code § 1794(d)*)]. This rule of statutory construction is a rule of reasonable inference and may not control over the plain meaning of the statutory language [*Murillo v. Fleetwood Enterprises, Inc. (1998) 17 Cal. 4th 985, 991, 73 Cal. Rptr. 2d 682, 953 P.2d 858*].

These rules of construction are inapplicable in construing two statutory provisions that govern discrete subject areas. For example, if a list of exemptions from a provision invalidating fraudulent transfers omits transfers made under marital settlement agreements, while a list of exceptions from a provision validating marital settlement agreements omits fraudulent transfers, the Legislature's failure to address the rare instance in which these provisions overlap does not suggest any legislative intent as to which should prevail [*Mejia v. Reed (2003) 31 Cal. 4th 657, 666-667, 3 Cal. Rptr. 3d 390, 74 P.3d 166* ; *see Civ. Code § 3439 et seq.* ; *Fam. Code § 916*].

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§ 531.62 Omission of Provision Included in Related Statute

When a statute contains a particular provision, the omission of that provision from a similar statute on the same or a related subject reveals a different intent [*Murphy v. Kenneth Cole Prods., Inc. (2007) 40 Cal. 4th 1094, 1109* (that Legislature chose to eliminate "penalty" language in *Lab. Code § 226.7(c)*, while retaining it in other statutes enacted in same measure, indicates that "additional hour of pay," required by *Lab. Code § 226.7(b)* when employer fails to provide required meal period or rest period, constitutes wage rather than penalty); *Committee of Seven Thousand v. Superior Court (1988) 45 Cal. 3d 491, 507, 247 Cal. Rptr. 362, 754 P. 2d 708* ; *City of Dublin v. County of Alameda (1993) 14 Cal. App. 4th 264, 280, 17 Cal. Rptr. 2d 845* ; *see Suman v. BMW of North America, Inc. (1994) 23 Cal. App. 4th 1, 10-11, 28 Cal. Rptr. 2d 133* (when Legislature has carefully employed term in one place and excluded in another, it should not be implied where it is excluded); *but see Webster v. State Bd. of Control (1987) 197 Cal. App. 3d 29, 35-36, 242 Cal. Rptr. 685* (rule held inapplicable in light of other canons of statutory construction)]. Similarly, when one part of a statute contains a term or provision, the omission of that term or provision from another part of the same statute indicates that the Legislature intended to convey a different meaning [*Cornette v. Department of Transp. (2001) 26 Cal. 4th 63, 73, 109 Cal. Rptr. 2d 1, 26 P.3d 332*].

The implications raised by disparate provisions in related statutes are not as strong if the two statutes were not considered or enacted together. In one case, for example, the United States Supreme Court held that the Age Discrimination in Employment Act prohibits retaliation against a federal employee who files an age-discrimination complaint. The Court interpreted the Act's prohibition of "discrimination based on age" in federal employment [*see 29 U.S.C. § 633a(a)*] as encompassing retaliation, even though the Act's federal-sector provision does not expressly mention retaliation. In so holding, the Court rejected an argument that the express prohibition of retaliation in the Act's private-sector provision [*see 29 U.S.C. § 623(d)*] implies that Congress did not intend to prohibit retaliation in the federal sector. Noting that the federal-sector provision was enacted seven years after the private-sector provision, was not modeled after the private-sector provision, and is couched in very different terms [*Gomez-Perez v. Potter (2008) 553 U.S. 474, 128 S. Ct. 1931, 1940, 170 L. Ed. 2d 887, 899*].

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§ 531.63 Interpretation in Context of Related Statutes

[1] In General

A statute should be construed in the context of the entire statutory system of which it is a part in order to achieve harmony among the parts [*Nickelsberg v. Workers' Comp. Appeals Bd. (1991) 54 Cal. 3d 288, 298, 285 Cal. Rptr. 86, 814 P. 2d 1328* (construing related statutes to avoid implied repeal of conflicting provisions); *Droeger v. Friedman, Sloan, & Ross (1991) 54 Cal. 3d 26, 43, 283 Cal. Rptr. 584, 812 P.2d 931* (dicta); *Ohio Farmers Ins. Co. v. Quin (1988) 198 Cal. App. 3d 1338, 1348, 244 Cal. Rptr. 359* ; *see also CBOCS W., Inc. v. Humphries (2008) 553 U.S. 442, 128 S. Ct. 1951, 1956, 170 L. Ed. 2d 864, 870-871* (United States Supreme Court construes *42 U.S.C. § 1981*, which prohibits racial discrimination in contracts, and *42 U.S.C. § 1982*, which prohibits racial discrimination in property ownership, alike because of statutes' common language, origin, and purposes); *Sonoma County Bd. of Education v. Public Employment Relations Bd. (1980) 102 Cal. App. 3d 689, 163 Cal. Rptr. 464* (statutes *in pari materia* (on same subject) may be construed together)].

To construe a specific provision with reference to the entire statutory system of which it is part, and to respect the policy sought to be implemented, the titles of acts, headnotes, and chapter and section headings may properly be considered in determining legislative intent [*Bowland v. Municipal Court (1976) 18 Cal. 3d 479, 489, 134 Cal. Rptr. 630, 556 P.2d 1081* ; *American Federation of Teachers v. Board of Education (1980) 107 Cal. App. 3d 829, 836, 166 Cal. Rptr. 89*]. Some codes, however, may provide that headings of divisions, chapters, articles, and sections are not to be considered to affect the scope, meaning, or intent of the provisions in the code [*see, e.g., Evid. Code § 5*; *Prob. Code § 4*; *see also* Title or Chapter Heading Not Controlling, *above*].

It should be noted that various codes and acts may provide definitions and rules of construction that govern or affect the interpretation of statutory provisions within that code or act [*see, e.g., Civ. Code § 2 et seq.* (governing Civil Code); *Bus. & Prof. Code § 23000 et seq.* (*Alcoholic Beverage Control Act); River Trails Ranch Co. v. Superior Court (1980) 111 Cal. App. 3d 562, 565-566, 168 Cal. Rptr. 747* (construing Civil Code provisions); *see also Nickelsberg v. Workers' Comp. Appeals Bd. (1991) 54 Cal. 3d 288, 298, 285 Cal. Rptr. 86, 814 P. 2d 1328* (rule of liberal construction set forth in *Lab. Code § 3202* should not be used to create inconsistency among statutes to be interpreted in context of

overall statutory system)].

Even if two potentially conflicting statutes are contained in different legislative acts, the courts will strive to effectuate the purpose of each by harmonizing them, if possible, in a way that allows both to be given effect [*Chavez v. City of Los Angeles (2010) 47 Cal. 4th 970, 986, -- Cal. Rptr. 3d --, 224 P.3d 41]* . In one case, for example, the California Supreme Court dealt with a potential conflict between *Code Civ. Proc. § 1033(a)* and *Gov. Code § 12965(b)*. Section 1033(a) authorizes a trial court to deny costs to a prevailing plaintiff in an unlimited civil case if the judgment could have been recovered in a limited civil case. Section 12965(b), which is part of the California Fair Employment and Housing Act (FEHA), gives the trial court discretion to award attorney's fees and costs to a prevailing plaintiff in a FEHA action. Giving effect to both provisions, the Court held that section 1033(a) gives a trial court discretion to deny attorney's fees to a plaintiff who prevails on a FEHA claim but recovers an amount that could have been recovered in a limited civil case. In exercising that discretion, however, the trial court must give due consideration to the policies and objectives of the FEHA in general and of its fee-shifting provision in particular [*Chavez v. City of Los Angeles (2010) 47 Cal. 4th 970, 986989, -- Cal. Rptr. 3d --, 224 P.3d 41]* .

[2] Specific Statute to Prevail Over General

A specific provision relating to a particular subject will govern a general provision, even though the general provision standing alone would be broad enough to include the subject to which the specific provision relates [*Civ. Code § 3534*; *Code Civ. Proc. § 1859*; *San Francisco Taxpayers Assn. v. Board of Supervisors (1992) 2 Cal. 4th 571, 577-578, 7 Cal. Rptr. 2d 245, 828 P. 2d 147* ; *Cavalier Acres, Inc. v. San Simeon Acres Community Services Dist. (1984) 151 Cal. App. 3d 798, 802, 199 Cal. Rptr. 4* ; *see, e.g., People v. DeLaCruz (1993) 20 Cal. App. 4th 955, 962, 25 Cal. Rptr. 2d 202* (construing term "notwithstanding other provisions of law")]. The specific provision governs whether it was passed before or after the general statute [*Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co. (1988) 200 Cal. App. 3d 1518, 1539, 246 Cal. Rptr. 823* ; *People v. Garcia (1981) 115 Cal. App. 3d 85, 109, 171 Cal. Rptr. 169* (passed after); *Consumers Union of U.S., Inc. v. California Milk Producers Advisory Bd. (1978) 82 Cal. App. 3d 433, 446, 147 Cal. Rptr. 265* (passed before)].

Statutes relating to the same subject matter should be harmonized if possible, and the Legislature is not presumed to overthrow long established principles of law unless it clearly makes its intent appear by express declaration or necessary implication. Thus, the rule that a later specific statute governs an earlier general statute on the same subject matter applies only if the statutes are irreconcilable and the necessary implication of intent to overthrow the established principle of law exists [*Palmer v. Agee (1978) 87 Cal. App. 3d 377, 383, 150 Cal. Rptr. 841*]. There is a strong presumption against the implied repeal of an earlier statute, and the presumption may be overcome only if the two acts are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation [*Merrill v. Navegar, Inc. (2001) 26 Cal. 4th 465, 487, 110 Cal. Rptr. 2d 370, 28 P.3d 116* ; *Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist. (1989) 49 Cal. 3d 408, 419-420, 261 Cal. Rptr. 384, 777 P.2d 157* ; *Sanford v. Garamendi (1991) 233 Cal. App. 3d 1109, 1122, 284 Cal. Rptr. 897*]. When a general statute standing alone would include the same matter as a special act, and therefore conflict with it, the special act will be considered as an exception to the general statute, whether it was passed before or after that general enactment [*People v. DeLaCruz (1993) 20 Cal. App. 4th 955, 962, 25 Cal. Rptr. 2d 202*].

The principle that a specific provision takes precedence over a general provision is inapplicable if neither provision under consideration is significantly more specific than the other. For example, a provision governing the validity of marital settlement agreements [*see Fam. Code § 916*] might seem more specific than a provision that generally invalidates fraudulent transfers [*see Civ. Code § 3439 et seq.* (Uniform Fraudulent Transfers Act)], because the latter applies to all transactions, not just those made as part of marital settlements. On the other hand, the fraudulent-transfer provision might seem more specific, given that it deals only with fraudulent transfers, while the marital-settlement provision regulates all transfers made in marital settlement agreements. In such a case, an apparent conflict between the provisions cannot be resolved by application of the principle that a specific provision takes precedence over a general

provision [*Mejia v. Reed (2003) 31 Cal. 4th 657, 666, 3 Cal. Rptr. 3d 390, 74 P.3d 166*].

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§ 531.64 Presumption of Constitutionality

A presumption exists that, in enacting a statute, the Legislature did not intend to violate the Constitution, but instead intended to enact a valid statute within the scope of its constitutional powers. Therefore, a statute must be interpreted in a manner consistent with the statute's language and purpose that eliminates doubts regarding the statute's constitutionality [*Hughes v. Board of Architectural Examiners (1998) 17 Cal. 4th 763, 788, 72 Cal. Rptr. 2d 624, 952 P.2d 641* ; *see* *Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal. 3d 1379, 1387, 241 Cal. Rptr. 67, 743 P.2d 1323* ; *Rowe v. Superior Court (1993) 15 Cal. App. 4th 1711, 1722, 19 Cal. Rptr. 2d 625*]. A court may not engage in wholesale rewriting of statute, however, to preserve its constitutionality [*Bayscene Resident Negotiators v. Bayscene Mobilehome Park (1993) 15 Cal. App. 4th 119, 134, 18 Cal. Rptr. 2d 626* ; *see also* Judicial Alteration of Statute Impermissible, *above*].

If a statute is reasonably susceptible of two or more interpretations, of which at least one raises constitutional questions, it should be construed in a manner that avoids any doubt about its validity [*Association for Retarded Citizens v. Department of Developmental Services (1985) 38 Cal. 3d 384, 394, 211 Cal. Rptr. 758, 696 P.2d 150*].

So long as a statute does not threaten to infringe on the exercise of constitutional rights, ambiguities in the statute, even if numerous, do not justify the invalidation of a statute on its face [*People v. Scott (1993) 26 Cal. Rptr. 2d 179*].

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§ 531.65 Legislative History

[1] In General

Courts consider legislative history as an extrinsic aid to help elucidate legislative intent [*City of San Jose v. Superior Court (1993) 5 Cal. 4th 47, 54, 19 Cal. Rptr. 2d 73, 850 P.2d 621* ; *see, e.g.,* *Jevne v. Superior Court (2005) 35 Cal. 4th 935, 948, 28 Cal. Rptr. 3d 685, 111 P.3d 954* (considering report by Assembly Committee on Judiciary and Senate floor analysis in determining legislative intent); *see also* *District of Columbia v. Heller (2008) -- U.S. --, 128 S. Ct. 2783, 171 L. Ed. 2d 637, 665* ("legislative history" refers to pre-enactment statements of those who drafted or voted for law; it is persuasive not because it reflects general understanding of legislation, but because legislators who read or heard those statements presumably voted with that understanding)]. However, in construing the terms of a statute, courts resort to its legislative history only if its terms are ambiguous. An ambiguity arises only if there is more than one construction in issue that is semantically permissible, that is, more than one usage that makes sense of the statutory language given the context and applicable rules of usage [*City of Sacramento v. Public Employees' Retirement System (1994) 22 Cal. App. 4th 786, 795, 27 Cal. Rptr. 2d 545*]. Statements in a report of a legislative committee concerning the object and purposes of a proposed amendment should be followed [*Hassan v. Mercy Am. River Hosp. (2003) 31 Cal. 4th 709, 717, 3 Cal. Rptr. 3d 623, 74 P.3d 726* ; *People v. Swinney (1975) 46 Cal. App. 3d 332, 342, 120 Cal. Rptr. 148* , overruled on other grounds, *People v. Zamora (1976) 18 Cal. 3d 538, 565, 134 Cal. Rptr. 784, 557 P.2d 75* ; *People v. Cherry (1989) 209 Cal. App. 3d 1131, 1135-1136, 257 Cal. Rptr. 684*]. It is reasonable to presume that the Legislature acted with the intent and meaning expressed in the Legislative Counsel's digest [*San Francisco Police Officers' Assn. v. Superior Court (1988) 202 Cal. App. 3d 183, 189, 248 Cal. Rptr. 297*]. A legislative analyst's report is also admissible as "cognizable legislative history" [*Aguimatang v. California State Lottery (1991) 234 Cal. App. 3d 769, 788-789, 286 Cal. Rptr. 57*]. However, while the Digest may be helpful in interpreting an ambiguous statute, it is not the law. At most, the legislative counsel's interpretation of a statute is to be accorded great weight, but even that principle has no application when the comments directly conflict with the statutes; in that case the comments are to be disregarded [*In re Barry W. (1993) 21 Cal. App. 4th 358, 367, 26 Cal. Rptr. 2d 161*].

Material in the legislative record that does not state the intent of the legislature has no persuasive value in interpreting an ambiguous statute. For example, a letter asserting a private party's interpretation of proposed legislation has no value

in interpreting the legislation if the legislative history shows no support for that interpretation from within the Legislature itself [*Hassan v. Mercy Am. River Hosp. (2003) 31 Cal. 4th 709, 722-723, 3 Cal. Rptr. 3d 623, 74 P.3d 726*].

[2] Statements of Individual Legislators

Statements of individual legislators showing their motives or understandings are not admissible in construing a statute, even though the legislator whose motives are profferred authored the bill in controversy, because there is no guarantee that the other supporters of the proposal shared the author's view of its compass [*Williams v. Garcetti (1993) 5 Cal. 4th 561, 569, 20 Cal. Rptr. 2d 341, 853 P.2d 507*]. However, an individual legislator's letter may be considered if the circumstances indicate that the letter reflects the Legislature's collective intent [*City of Long Beach v. Department of Indus. Relations (2004) 34 Cal. 4th 942, 952-953, 22 Cal. Rptr. 3d 518, 102 P.3d 904* (prior to bill's enactment, legislator's letter was presented to full Senate, which carried legislator's motion to print it in Senate Daily Journal)]. For example, a legislator's statement may be considered when it is a reiteration of legislative discussion and events leading up to adoption of proposed amendments rather than a mere expression of personal opinion, or when the statement gives some indication of arguments made to the Legislature and was printed on motion of the Legislature as a "letter of legislative intent" [*Bronco Wine Co. v. Jolly (2004) 33 Cal. 4th 943, 977 n.46, 17 Cal. Rptr. 3d 180, 95 P.3d 422* (legislative intent was evidenced by statements of author of bill, particularly because statements reiterated what was contained in committee reports and did not amount to mere expressions of personal opinion); *see Sierra Club v. California Coastal Comm'n (2005) 35 Cal. 4th 839, 853 n.8, 28 Cal. Rptr. 3d 316, 111 P.3d 294* (considering letter from author of legislation, because letter purported to reiterate statements made to Legislature during consideration of bill and letter was printed with Senate's consent pursuant to motion of author of legislation); *California Teachers Assn. v. San Diego Community College Dist. (1981) 28 Cal. 3d 692, 699-701, 170 Cal. Rptr. 817, 621 P.2d 856* ; *Haworth v. Lira (1991) 232 Cal. App. 3d 1362, 1368-1369, 284 Cal. Rptr. 62* (letter from legislator's staff member expressing staff member's opinion of legislative intent not admissible because it did not allude to arguments presented in securing passage of legislation or reiterate discussion and events taking place in Legislature)]. In addition, courts may take judicial notice of various letters and legislative staff analyses related to the particular legislation; however, in determining legislative intent, courts will not rely on evidence of the individual views of proponents of the legislation [*People v. Cruz (1996) 13 Cal. 4th 764, 780, fn. 9, 55 Cal. Rptr. 2d 117, 919 P.2d 731*].

[3] Rejection of Specific Provision

When the Legislature rejects a specific provision contained in an act as originally introduced, or rejects an amendment to a bill, the rejection is most persuasive to the conclusion that the act should not be construed to include the omitted provision [*Murphy v. Kenneth Cole Prods., Inc. (2007) 40 Cal. 4th 1094, 1107, 56 Cal. Rptr. 3d 880, 155 P.3d 284* ("The rejection of a specific provision contained in an act as originally introduced is 'most persuasive' that the act should not be interpreted to include what was left out.") (quoting *Wilson v. City of Laguna Beach (1992) 6 Cal. App. 4th 543, 555, 7 Cal. Rptr. 2d 848*); *California Coastal Com. v. Quanta Investment Corp. (1980) 113 Cal. App. 3d 579, 601-602, 170 Cal. Rptr. 263* ; *Madrid v. Justice Court (1975) 52 Cal. App. 3d 819, 825, 125 Cal. Rptr. 348*].

If, when it enacted a given statutory provision, the Legislature was advised concerning a potential effect of the provision and chose not to address the subject with specific legislation, the absence of legislative action does not serve as a basis for drawing any conclusions as to what the Legislature intended regarding that subject [*Mejia v. Reed (2003) 31 Cal. 4th 657, 667-668, 3 Cal. Rptr. 3d 390, 74 P.3d 166*].

[4] Reports of Drafting Commissions

Reports of commissions which have proposed statutes that are subsequently adopted are entitled to substantial weight in construing the statutes, particularly when the statute proposed by the commission is adopted by the Legislature without any change and the commission's comment is brief [*People v. Garfield (1985) 40 Cal. 3d 192, 199, 219 Cal. Rptr.*

196, 707 P.2d 258 (Law Revision Commission) ; *Owens v. Superior Court (1980) 28 Cal. 3d 238, 246, 168 Cal. Rptr. 466, 617 P.2d 1098 (Judicial Council)* ; *Brian W. v. Superior Court (1978) 20 Cal. 3d 618, 623, 143 Cal. Rptr. 717, 574 P.2d 788* (special study commission created by governor)]. In that type of situation, there is ordinarily strong reason to believe that the legislators' votes were based in large measure on the explanation of the commission in proposing the bill, lending weight to the commission report [*Brigante v. Huang (1993) 20 Cal. App. 4th 1569, 1581, 25 Cal. Rptr. 2d 354* (Report of Discovery Commission)]. On the other hand, if the commission's comment on a given statutory provision is just one item in a lengthy report, the inference is less strong that the Legislature approved that comment [*Conservatorship of Wendland (2001) 26 Cal. 4th 519, 542, 110 Cal. Rptr. 2d 412, 28 P.3d 151* ("one may legitimately question whether the Legislature can fairly be assumed to have read and endorsed every statement in the commission's 280-page report on the Health Care Decisions Law," 1999 Stats., ch. 658)].

[5] Election Brochure Arguments

Election brochure arguments may be used as an aid in construing legislative measures and constitutional amendments adopted pursuant to a vote of the people [*Day v. City of Fontana (2001) 25 Cal. 4th 268, 274-282, 105 Cal. Rptr. 2d 457, 19 P.3d 1196* (reviewing ballot pamphlet materials, including ballot arguments, to support court's construction of statute enacted through initiative process); *Legislature v. Eu (1991) 54 Cal. 3d 492, 504-505, 286 Cal. Rptr. 283, 816 P.2d 1309* (in reviewing constitutionality of proposition, Supreme Court considered arguments in official ballot pamphlet both for and against proposition); *White v. Davis (1975) 13 Cal. 3d 757, 775 n.11, 120 Cal. Rptr. 94, 533 P.2d 222*].

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§ 531.66 Subsequent Enactments

[1] Reenactment or Modification After Judicial Construction

When determining the Legislature's intent in amending a statute that has been the subject of judicial construction, courts must proceed in light of the decisional background against which the Legislature acted [*People v. Mobil Oil Corp. (1983) 143 Cal. App. 3d 261, 270, 192 Cal. Rptr. 155*]. A statutory amendment may explicitly state the Legislature's intent to overrule a specific judicial decision construing the statute [*see, e.g., Civ. Code § 1714(b)*]. But even in the absence of the specific rejection of a judicial decision, the circumstances may indicate that the amendment was intended to reject the judicial construction of the statute [*see Goodman v. Lozano (2010) 47 Cal. 4th 1327, 1336, 104 Cal. Rptr. 3d 219, 223 P.3d 77* (repeal and reenactment of statute with new language showed that Legislature was aware of, and intended to reject, judicial decisions construing statute)].

When a statute has been construed by the courts and is reenacted in the same or substantially the same terms, the Legislature is presumed to be familiar with that construction and to have adopted it as part of the law [*People v. Atkins (2001) 25 Cal. 4th 76, 90-91, 104 Cal. Rptr. 2d 738, 18 P.3d 660* ; *Wilkoff v. Superior Court (1985) 38 Cal. 3d 345, 353, 211 Cal. Rptr. 742, 696 P.2d 134* ; *In re Marriage of Skelley (1976) 134 Cal. Rptr. 197, 556 P.2d 297* ; *see also People v. Williams (1991) 232 Cal. App. 3d 1643, 1647, 284 Cal. Rptr. 241* (failure to change statute in a particular respect when subject is before Legislature, and changes are made in other respects, indicates intention to leave law unchanged in that respect)]. However, this presumption is merely one factor in the total effort to give fair meaning to statutory language [*I. J. Weinrot & Son, Inc. v. Jackson (1985) 40 Cal. 3d 327, 336, 220 Cal. Rptr. 103, 708 P.2d 682*]. For example, a legislative enactment subsequent to a judicial interpretation does not incorporate the judicial decision into the meaning of the statute when it is clear that the legislative enactment had nothing to do with the topic of the judicial decision [*I. J. Weinrot & Son, Inc. v. Jackson (1985) 40 Cal. 3d 327, 336, 220 Cal. Rptr. 103, 708 P.2d 682*].

When the Legislature modifies a statute without addressing a provision that had been interpreted by case law, the modification does not necessarily indicate acquiescence with the prior law. Something more than mere silence is required before acquiescence is elevated into a species of implied legislation [*Moradi-Shalal v. Fireman's Fund Ins.*

Companies (1988) 46 Cal. 3d 287, 300-301, 250 Cal. Rptr. 116, 758 P.2d 58 (overruling previous Supreme Court interpretation of standing under *Ins. Code § 790.03(h)*)]. Legislative silence after a court has construed a statute gives rise, at most, to an arguable inference of acquiescence or passive approval. Thus, when a statute that is part of an act has been construed by the courts, and the Legislature subsequently adds other statutes to that act, but takes no action on the previously construed statute, the Legislature is not presumed to have been aware of and to have acquiesced in the judicial construction. Again, the Legislature's silence does not amount to implied legislation, because the Legislature's failure to act may indicate many things other than approval of a judicial construction of a statute [*Cianci v. Superior Court (1985) 40 Cal. 3d 903, 923, 924, 221 Cal. Rptr. 575, 710 P.2d 375*]. Thus, if the court determines that its original interpretation was erroneous, it may overrule that interpretation even though the Legislature has amended other aspects of the law while leaving the construed language unchanged [*Cianci v. Superior Court (1985) 40 Cal. 3d 903, 923 n.7, 924, 221 Cal. Rptr. 575, 710 P.2d 375* (also holding that correction is not precluded by stare decisis)].

The Legislature's failure to abrogate a decision is not a cause for finding a presumption of legislative approval of the decision when the decision is a single decision on a question of first impression, and not a consistent and long-standing judicial interpretation of the statutory language [*Snyder v. Michael's Stores, Inc. (1997) 16 Cal. 4th 991, 1002, 68 Cal. Rptr. 2d 476, 945 P.2d 781*].

Because the Legislature is far more likely to revise the "bottom line" results of decisions rather than to rewrite broad judicial language as an abstract exercise, the presumption of legislative acquiescence in prior judicial decisions extends only to the decisions' holdings, not to broad language unrelated to the specific factual situations presented by the cases [*Harris v. Capital Growth Investors XIV (1991) 52 Cal. 3d 1142, 1156-1157*].

[2] Use of Previously Construed Language

When legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in identical language, unless a contrary intent appears, it will ordinarily be presumed that the Legislature intended the language used in the later enactment to be accorded the same meaning [*People v. Wells (1996) 12 Cal. 4th 979, 986, 50 Cal. Rptr. 2d 699* ; *In re D. (1980) 28 Cal. 3d 210, 216, 168 Cal. Rptr. 455, 617 P.2d 1087* ; *Kaplan's Fruit & Produce Co. v. Superior Court (1979) 26 Cal. 3d 60, 73, 160 Cal. Rptr. 745, 603 P.2d 1341* ; *see also Orange County Employees Assn., Inc. v. County of Orange (1993) 14 Cal. App. 4th 575, 581-582, 17 Cal. Rptr. 2d 695* (Legislature presumably aware of Attorney General's opinions when using language identical to that previously interpreted in such opinions)]. Similarly, the court may look to prior construction of a general word [*see Droeger v. Friedman, Sloan, & Ross (1991) 54 Cal. 3d 26, 38, 283 Cal. Rptr. 584, 812 P.2d 931* ("[f]rom the earliest days of statehood we have interpreted 'any' to be broad, general and all embracing")].

[3] Incorporation of Statute That Is Subsequently Amended

When a statute adopts by specific reference the provisions of another statute, regulation, or ordinance, those provisions are incorporated in the form in which they exist at the time of the reference, not as subsequently amended [*Palermo v. Stockton Theatres, Inc. (1948) 32 Cal. 2d 53, 58-59, 195 P.2d 1*]. However, if the reference is general instead of specific, such as a reference to a system or body of laws or to a general law relating to a particular subject, the referring statute takes the law or laws referred to not only in their contemporary form, but also as they may be changed from time to time or even as they may be repealed [*People v. Cooper (2002) 27 Cal. 4th 38, 44, 115 Cal. Rptr. 2d 219, 37 P.3d 403*].

[4] Material Change in Language

An intent to change the law or the meaning of a statute will be inferred or presumed from a material change in statutory language, as when the Legislature makes such an amendment subsequent to judicial decisions interpreting the statute in its former wording [*People v. Hickey (1980) 109 Cal. App. 3d 426, 439, 167 Cal. Rptr. 256* ; *Van Nuis v. Los*

Angeles Soap Co. (1973) 36 Cal. App. 3d 222, 228, 111 Cal. Rptr. 398 ; *see Dubins v. Regents of University of California (1994) 25 Cal. App. 4th 77, 85, 30 Cal. Rptr. 2d 336* (any material change in language of original act is presumed to indicate change in legal rights)]. However, a mere change in wording, incident to a revision of the Constitution or a statute, does not result in a change of meaning unless the intent to make such a change clearly appears [*Mosk v. Superior Court of Los Angeles County (1979) 25 Cal. 3d 474, 493, 159 Cal. Rptr. 494, 601 P.2d 1030* ; *DeCastro West Chodorow & Burns, Inc. v. Superior Court (1996) 47 Cal. App. 4th 410, 418, 54 Cal. Rptr. 2d 792*]. Similarly, it is highly unlikely that the Legislature intended to codify a previous judicial decision if the amendment merely makes minor changes in wording unrelated to the substance of that decision [*Lambert v. Commonwealth Land Title Ins. Co. (1991) 53 Cal. 3d 1072, 1080, 282 Cal. Rptr. 445, 811 P.2d 737*].

[5] Statute Patterned on Federal Statute

It is presumed that the Legislature has the interpretation of a federal statute by the federal courts in mind when it enacts a state statute patterned on the federal statute. In addition, when the federal interpretation is rendered after the state statute was enacted, it may be persuasive and is entitled to great weight even though it is not binding [*Kahn v. Kahn (1977) 68 Cal. App. 3d 372, 387, 137 Cal. Rptr. 332* ; *see Kaplan's Fruit & Produce Co. v. Superior Court (1979) 26 Cal. 3d 60, 65, 73-74, 160 Cal. Rptr. 745, 603 P.2d 1341*]. The federal interpretation, however, is relevant only to the extent that the federal provisions may be fairly said to parallel the state statute [*Wildlife Alive v. Chickering (1976) 18 Cal. 3d 190, 202, 132 Cal. Rptr. 377, 553 P.2d 537*].

[6] Use of Legislative History From Other States

A court may also consider the legislative history of enactments in other states. For example, the California Supreme Court has considered legislative history regarding other states' fair employment practices acts in construing the meaning of similar language in the California Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*) [*see Robinson v. Fair Employment & Housing Com. (1992) 2 Cal. 4th 226, 236-239, 5 Cal. Rptr. 2d 782, 825 P. 2d 767*].

[7] Expression of Intent of Earlier Act

When the Legislature declares a statutory amendment is intended to "clarify" the meaning of a preexisting version of the statute, any such declaration is not binding on courts or determinative of the meaning of the earlier version; courts still must ascertain the scope and meaning of the earlier version from all the pertinent circumstances and considerations [*People v. Cruz (1996) 13 Cal. 4th 764, 781, 55 Cal. Rptr. 2d 117, 919 P.2d 731*]. However, the declared legislative intent may be considered together with other factors, including subsequent amendments or other related enactments, in arriving at the true legislative intent of the earlier version of the statute. Thus, subsequent amendments or other related enactments or attempted enactments may be considered to clarify the intent of the earlier statute [*Eu v. Chacon (1976) 16 Cal. 3d 465, 470, 128 Cal. Rptr. 1, 546 P.2d 289* (considering vetoed bill that would have created exception to statute being interpreted by court); *Estate of Lacy (1975) 54 Cal. App. 3d 172, 189, 126 Cal. Rptr. 432* (later statutes enacted to clarify and restate requirements of statute being interpreted); *Friends of Lake Arrowhead v. Board of Supervisors (1974) 38 Cal. App. 3d 497, 506, 113 Cal. Rptr. 539* (later statute creating exception to statute being interpreted, and amendment of statute being interpreted)].

The Legislature's subsequent expression of intent made in an act that simply states the Legislature's intent as to a prior statute and states that this was the intent when the statute was originally enacted is not binding on the court, but may properly be used in determining the effect of the prior statute [*In re Retirement Cases (2003) 110 Cal. App. 4th 426, 480-481, 1 Cal. Rptr. 3d 790*]. If the prior statute has already been construed in a different fashion by the California Supreme Court, however, an appellate court is bound by stare decisis to follow the Supreme Court's interpretation, despite the Legislature's subsequent expression of its intent [*People v. Savala (1981) 116 Cal. App. 3d 41, 59, 171 Cal. Rptr. 882* ; *see McClung v. Employment Dev. Dep't (2004) 34 Cal. 4th 467, 475-476, 20 Cal. Rptr. 3d 428, 99 P.3d 1015* (once California Supreme Court has finally and definitively interpreted statute, Legislature has power,

subject to constitutional restraints, to overrule that decision by amending statute, but it has no power to decide that amendment merely declares existing law)].

[8] Failure to Pass Bill

The failure of the Legislature to pass a bill, such as a bill that would have amended a statute so as to expressly set forth the interpretation of the statute adopted by the court, is little evidence of legislative intent because the bill may have failed passage for reasons other than its merits, including the possibility that the Legislature believed that the interpretation was already manifest [*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1979) 88 Cal. App. 3d 43, 62-63, 152 Cal. Rptr. 153* ; *Burgess v. Board of Education (1974) 41 Cal. App. 3d 571, 580-581, 116 Cal. Rptr. 183*]. Moreover, a later Legislature's failure to adopt a proposed amendment to an existing law is of little weight in determining the relevant intent of the earlier Legislature that enacted that law [*Lolley v. Campbell (2002) 28 Cal. 4th 367, 378-379, 121 Cal. Rptr. 2d 571, 48 P.3d 1128* ("[N]o clear inference may be drawn from the failed amendment about the Legislature's understanding of [*Lab. Code § 98.2(c)*] at the time that it was enacted. ... [T]he statute presently in effect [is binding], not ... a legislative statement of intent that failed to become law")].

However, when the courts put the Legislature on notice of the potential scope of a statute and the Legislature fails to amend the statute to restrict the statute's scope, the Legislature's failure to act is of some, but not controlling, significance [*Coulter v. Superior Court (1978) 21 Cal. 3d 144, 151, 145 Cal. Rptr. 534, 577 P.2d 669* (failure of Legislature to exclude social hosts from liability for serving alcoholic beverages under *Bus. & Prof. Code § 25602* after Supreme Court decision gave notice of possibility of such liability; liability later barred by amendment of *Bus. & Prof. Code § 25602* and *Civ. Code § 1714* after decision in *Coulter*)].

For a discussion of the effect of the Legislature's failure to enact a provision contained in the original bill, or in an amendment to a bill which is passed, see the discussion under Legislative History, *above.*

[9] Nonrepealable Enactment Not Permitted

A legislative body may modify or abolish acts passed by itself or its predecessors. Therefore, a legislative body cannot restrict the powers of its successors by enacting legislation that is purported to be nonrepealable. A legislature may not bind a future legislature to a particular mode of repeal. It may not declare in advance intent of future legislatures, nor may it declare in advance the effect of subsequent legislation on existing statutes [*County Mobilehome Positive Action Committee, Inc. v. County of San Diego (1998) 62 Cal. App. 4th 727, 734, 73 Cal. Rptr. 2d 409*].

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§ 531.67 Administrative Agency Interpretation

[1] Persuasiveness

The contemporaneous construction of a statute by an administrative agency charged with its enforcement generally is given great weight by courts [*Water Quality Assn. v. Santa Barbara County (1996) 44 Cal. App. 4th 732, 744, 52 Cal. Rptr. 2d 184*], and the agency interpretation of the statute will be followed if not clearly erroneous [*Judson Steel Corp. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 658, 668-669, 150 Cal. Rptr. 250, 586 P.2d 564* (Workers' Compensation Appeal Board interpretation of Labor Code provision); *Zenker-Felt Imports v. Malloy (1981) 115 Cal. App. 3d 713, 720, 171 Cal. Rptr. 482* (interpretation of Code of Civil Procedure provision by Judicial Council in California Rules of Court); *see also Federal Express Corp. v. Holowecki (2008) 552 U.S. 389, 128 S. Ct. 1147, 170 L. Ed. 2d 10, 18* (when federal agency with statutory authority to issue regulations invokes that authority to issue regulations interpreting ambiguous statutory terms, courts defer to agency's reasonable interpretations; *citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc. (1984) 467 U.S. 837, 843-845, 104 S. Ct. 2778, 81 L. Ed. 2d 694*); *Davey Tree Surgery Co. v. Occupational Safety & Health Appeals Bd. (1985) 167 Cal. App. 3d 1232, 1243, 213 Cal. Rptr. 806* (defense to safety violations developed by Occupational Safety & Health Appeals Board in board decisions)]. Moreover, the contemporaneous administrative construction of a statute is considered as highly relevant and material evidence of the likely general understanding of the times and of the opinions of the persons who probably were active in drafting the statute [*Whitcomb Hotel, Inc. v. Cal. Emp. Com. (1944) 24 Cal. 2d 753, 756, 757, 151 P.2d 233* ; *Webster v. State Bd. of Control (1987) 197 Cal. App. 3d 29, 36, 242 Cal. Rptr. 685* ; *see also Department of Water & Power v. Energy Resources Conservation & Development Com. (1991) 2 Cal. App. 4th 206, 220, 3 Cal. Rptr. 2d 289* (administrative agency ruling 16 years after statute was enacted is not contemporaneous and is not entitled to great weight)].

Consistent administrative construction of a statute over many years, particularly when it originated with those charged with putting the statutory machinery into effect, is entitled to great weight [*Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal. 3d 458, 491, 156 Cal. Rptr. 14, 595 P.2d 592* ; *Castaneda v. Holcomb (1981) 114 Cal. App. 3d 939, 945-946, 170 Cal. Rptr. 875*]. Nonetheless, an administrative agency and its employees may not enlarge the scope of a legislative enactment [*California Department of Transportation v. Superior Court (1996) 47 Cal. App. 4th 852,*

858].

The general rule of deference to an agency interpretation does not apply if the interpretation was not adopted in accordance with applicable legal requirements. For example, the California Supreme Court has held that the interpretive policies contained in the enforcement manual of the California Division of Labor Standards Enforcement (DLSE) are void as regulations, because they were not promulgated in accordance with the Administrative Procedure Act [*Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal. 4th 557, 572, 59 Cal. Rptr. 2d 186, 927 P.2d 296* ; *see Gov. Code § 11340 et seq.* (Administrative Procedure Act)]. As a result, courts do not give weight to statutory interpretations that may be implied from the DLSE's enforcement manual [*see, e.g.,* *Church v. Jamison (2006) 143 Cal. App. 4th 1568, 1577-1583, 50 Cal. Rptr. 3d 166* (rejecting DLSE's "reverse" application of statute of limitations to limit years for which terminated employee may seek compensation for unused vested vacation under *Lab. Code § 227.3*)].

Whether or not it is owed deference, an administrative interpretation of a given statute is not *binding* on the courts. Ultimately, it is for the judiciary to ascertain the correct interpretation of statutes [*Murphy v. Kenneth Cole Prods., Inc. (2007) 40 Cal. 4th 1094, 1106, 56 Cal. Rptr. 3d 880, 155 P.3d 284]* .

[2] Internal Agency Memoranda

The rule of judicial deference to the administrative interpretation of a statute by the agency charged with its enforcement does not apply to internal agency memoranda, as opposed to administrative regulations, especially when the memorandum is composed after the agency becomes amicus curiae to the case in which the memorandum is brought to the court's attention [*Jones v. Tracy School Dist. (1980) 27 Cal. 3d 99, 107, 165 Cal. Rptr. 100, 611 P.2d 441* ; *Campbell v. Arco Marine, Inc. (1996) 42 Cal. App. 4th 1850, 1860, 50 Cal. Rptr. 2d 626* (Department of Fair Employment and Housing non-contemporaneous interpretation of Fair Employment and Housing Act)]. However, even though not entitled to deference, the agency's interpretation of a statute is entitled to a "measure of respect" if it has been applied consistently by the agency and reflects a body of experience and informed judgment to which courts and litigants may properly resort for guidance [*Federal Express Corp. v. Holowecki (2008) 552 U.S. 389, 128 S. Ct. 1147, 1156-1158, 170 L. Ed. 2d 10, 21-23* (adopting Equal Employment Opportunity Commission's interpretation of "charge" that starts waiting period before employee may file suit under Age Discrimination in Employment Act, *29 U.S.C. § 626(d)*, as embodied in EEOC's compliance manual and internal directives, which had been binding on EEOC staff for at least five years)].

[3] Reenactment of Statute After Agency Interpretation

Reenactment of a statutory provision without a change in light of a prior administrative interpretation is persuasive of a legislative intent to adopt the administrative interpretation [*Division of Industrial Safety v. Municipal Court (1976) 61 Cal. App. 3d 696, 700-701, 132 Cal. Rptr. 573*]. Nonetheless, the ultimate interpretation of a statute is an exercise of judicial power, and courts are responsible for declaring a statute's true meaning even if that requires rejection of an earlier erroneous administrative interpretation [*Wheeler v. Board of Administration (1979) 25 Cal. 3d 600, 605, 159 Cal. Rptr. 336, 601 P.2d 568* ; *Estate of Elsman (1977) 74 Cal. App. 3d 721, 734, 141 Cal. Rptr. 657* (administrative interpretation rejected even though statute subsequently reenacted without change)].

[4] Federal Agency Interpretation of Similar Federal Regulation

A federal agency interpretation of a federal regulation may be persuasive authority for interpreting a state regulation. However, federal authority is lessened to the extent the federal regulation differs from the state regulation [*Aguilar v. Association for Retarded Citizens (1991) 234 Cal. App. 3d 21, 31, 285 Cal. Rptr. 515*].

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§ 531.68 Attorney General Interpretation

The California Attorney General's opinion regarding the meaning of a constitutional provision or statute is not binding on a court [*City of Long Beach v. Department of Indus. Relations (2004) 34 Cal. 4th 942, 952, 22 Cal. Rptr. 3d 518, 102 P.3d 904*]. It is, however, entitled to great weight and respect, however [*Fischer v. Los Angeles Unified School Dist. (1999) 70 Cal. App. 4th 87, 101, 82 Cal. Rptr. 2d 452* ; *Tafoya v. Hastings College (1987) 191 Cal. App. 3d 437, 445 n.7, 236 Cal. Rptr. 395]* . This is true even though the opinion is unpublished [*California Assn. of Psychology Providers v. Rank (1990) 51 Cal. 3d 1, 270 Cal. Rptr. 796, 793 P.2d 2*].

In addition, the Legislature is presumed to act with knowledge of opinions of the attorney general that affect the subject matter of proposed legislation [*Burden v. Snowden (1992) 2 Cal. 4th 556, 564, 7 Cal. Rptr. 2d 531, 828 P. 2d 672]* .

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§ 531.69 Criminal Statutes

In construing a criminal statute, a defendant must be given the benefit of every reasonable doubt as to whether the statute was applicable to him or her [*People v. Baker (1968) 69 Cal. 2d 44, 46, 69 Cal. Rptr. 595, 442 P.2d 675*]. Generally, criminal statutes are to be construed according to the fair import of their terms, with a view to effect its objects and promote justice [*Penal Code § 4*; *Bowland v. Municipal Court (1976) 18 Cal. 3d 479, 487, 134 Cal. Rptr. 630, 556 P.2d 1081*]. If two interpretations of a criminal statute are possible, the construction that favors the defendant is preferred unless such a construction is contrary to the public interest, sound sense, and wise policy [*People v. Garfield (1985) 40 Cal. 3d 192, 200, 219 Cal. Rptr. 196, 707 P.2d 258* ; *People v. Squier (1993) 15 Cal. App. 4th 235, 241, 18 Cal. Rptr. 2d 536* ; *In re Kemper (1980) 112 Cal. App. 3d 434, 438, 169 Cal. Rptr. 513*].

The penalty clause of a penal statute should be given the narrowest construction which is reasonable in light of its legislative purpose. This principle applies even when the underlying action is civil in nature [*Tos v. Mayfair Packing Co. (1984) 160 Cal. App. 3d 67, 79, 206 Cal. Rptr. 459* ; *People v. Mobil Oil Corp. (1983) 143 Cal. App. 3d 261, 276, 192 Cal. Rptr. 155*]. The rule of strict construction of penal statutes is not, however, an inexorable command to override common sense and evident statutory purpose [*People ex rel. Lungren v. Superior Court (1996) 14 Cal. 4th 294, 312, 58 Cal. Rptr. 2d 855, 926 P.2d 1042* ; *People v. Anderson (1987) 43 Cal. 3d 1104, 1145-1146, 240 Cal. Rptr. 585, 742 P.2d 1306*].

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§ 531.70 Civil Statutes Imposing Monetary Penalty

The rule of strict construction of penal statutes, *discussed under § 531.69 above*, has generally been applied in this state to criminal statutes, rather than statutes which prescribe only civil monetary penalties [*People ex rel. Lungren v. Superior Court (1996) 14 Cal. 4th 294, 312, 58 Cal. Rptr. 2d 855, 926 P.2d 1042* ; *People v. Forbis (1996) 42 Cal. App. 4th 599, 603-604, 49 Cal. Rptr. 2d 836*]. The rule is not an absolute one, however, and there may be circumstances in which civil statutes should be strictly construed [*see* *People ex rel. Lungren v. Superior Court (1996) 14 Cal. 4th 294, 312, 58 Cal. Rptr. 2d 855, 926 P.2d 1042* (concluding that circumstances for strict construction did not exist)].

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§ 531.71 Retroactivity

[1] When A Statute Has Retroactive Effect

A statute has retrospective effect when it substantially changes the legal consequences of past events [*Western Security Bank v. Superior Court (1997) 15 Cal. 4th 232, 243, 62 Cal. Rptr. 2d 243, 933 P.2d 507* ; *Kizer v. Hanna (1989) 48 Cal. 3d 1, 7, 255 Cal. Rptr. 412, 767 P.2d 679*].

In contrast, a statute affecting the consequences of past events is not considered to have retroactive effect if it does not impair rights that arose when the events occurred [*Myers v. Philip Morris Cos. (2002) 28 Cal. 4th 828, 847, 123 Cal. Rptr. 2d 40, 50 P.3d 751*]. The California Supreme Court applied this principle in a case involving a statute that granted immunity for certain conduct but was repealed by a subsequent statute. Noting the absence of a clear indication of legislative intent to have the repealing statute act retroactively, the Court held that the repeal of the immunity statute did not remove any immunity for conduct occurring while the immunity statute was in effect [*Myers v. Philip Morris Cos. (2002) 28 Cal. 4th 828, 840-847, 123 Cal. Rptr. 2d 40, 50 P.3d 751* ; *see Civ. Code § 1714.45* (formerly granting tobacco companies complete immunity in certain product liability suits as of January 1, 1988; amended to remove that immunity as of January 1, 1998)]. However, the Court also held that the repealing statute *did* remove protection that had been available under the immunity statute for conduct occurring *before* the immunity statute's effective date. In effect, the repealing statute restored the law to what it had been prior to the effective date of the (later-repealed) immunity statute. Thus, the removal of protection for conduct predating the immunity statute was not an impermissible retroactive effect of the repealing statute, because a retroactive effect is one that impairs rights a party possessed when he or she acted [*Myers v. Philip Morris Cos. (2002) 28 Cal. 4th 828, 847, 123 Cal. Rptr. 2d 40, 50 P.3d 751*].

In another case, the California Supreme Court approved the application of Proposition 64 to cases pending on the measure's effective date, because that did not constitute an impermissible "retroactive" application. Proposition 64, which took effect with its passage on November 2, 2004, added a standing requirement to California's unfair competition and false advertising laws [*Bus. & Prof. Code §§ 17200 et seq., 17500 et seq.*]. Specifically, a private plaintiff can no longer bring a class or representative action under those laws unless he or she suffered injury in fact and lost money or property as a result of the alleged unfair competition or false advertising [*Bus. & Prof. Code §§ 17203,*

17204, 17535, as amended by Proposition 64]. The Supreme Court held that applying Proposition 64's standing provisions to cases pending on the measure's effective date did not constitute a "retroactive" application, because the measure did not change the legal consequences of past conduct by imposing any new or different liabilities based on such conduct. The measure left entirely unchanged the substantive rules governing business and competitive conduct. Nothing that was lawful before Proposition 64 became unlawful, and nothing that was unlawful before the proposition was made lawful. Moreover, the measure did not eliminate any right to recover. Although applying Proposition 64's standing rules to pending cases could be seen as impairing the settled rights and expectations of uninjured plaintiffs to continue prosecution of their actions, that consequence was relatively insignificant and did not make such application of the measure "retroactive" [*Californians for Disability Rights v. Mervyn's, LLC (2006) 39 Cal. 4th 223, 230-233, 46 Cal. Rptr. 3d 57, 138 P.3d 207]* .

Often, the critical question for determining retroactivity is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date. For example, the California Supreme Court has held that *Penal Code § 3003.5(b),* which places restrictions on where paroled sex offenders subject to lifetime registration may reside, applies to persons who were convicted of registrable offenses before the effective date of the statute but were paroled--and sought housing--after that date. The Court explained that for purposes of retroactivity analysis, the pivotal "last act or event" that must occur before the mandatory residency restrictions come into play is the registered sex offender's securing of a residence upon his or her release from custody on parole. If that last act or event occurs after the effective date of *Penal Code § 3003.5(b),* then a conclusion that it was a violation of the registrant's parole does not constitute a retroactive application of the statute [*In re E.J. (2010) 47 Cal. 4th 1258, 12731274, 104 Cal. Rptr. 3d 165, 223 P.3d 31]* .

[2] Two-Step Approach for Initiatives

Courts addressing retroactive application of initiatives generally follow a two-step analysis. First, the court must determine whether the initiative has been retroactively applied. If so, the court must then decide if the people intended that the statute be so applied. On a finding of intent, the initiative may be enacted unless it is prohibited by state or federal constitutional provisions [*Yoshioka v. Superior Court (1997) 58 Cal. App. 4th 972, 979, 68 Cal. Rptr. 2d 553* ; *Gutierrez v. De Lara (1987) 188 Cal. App. 3d 1575, 1578, 234 Cal. Rptr. 158*].

[3] Legislature's Expressed View Considered by Courts

Some codes specifically provide that their provisions do not apply retroactively unless expressly declared retroactive [*see, e.g., Civ. Code § 3*; *Code Civ. Proc. § 3*; *Penal Code § 3*; *see also Droeger v. Friedman, Sloan, & Ross (1991) 54 Cal. 3d 26, 42-43, 283 Cal. Rptr. 584, 812 P.2d 931*]. The Legislature's expressed views on the prior import of its statutes are entitled to due consideration by courts [*Carter v. California Dept. of Veterans Affairs (2006) 38 Cal. 4th 914, 44 Cal. Rptr. 3d 223, 229, 135 P.3d 637* (because Supreme Court had not yet definitively interpreted *Gov. Code § 12940(j)(1)* with respect to employer liability for sexual harassment of employees by nonemployees, Court gave due consideration to legislative statement that 2003 amendment of statute was declaratory of existing law)]. Ultimately, however, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts [*Western Security Bank v. Superior Court (1997) 15 Cal. 4th 232, 244, 62 Cal. Rptr. 2d 243, 933 P.2d 507* ; *California Emp. etc. Com. v. Payne (1947) 31 Cal. 2d 210, 213, 187 P.2d 702*]. Moreover, once the California Supreme Court has finally and definitively interpreted a statute, the Legislature has the power (subject to constitutional restraints) to overrule the decision by amending the statute, but it has no power to decide that the amendment merely declares existing law [*McClung v. Employment Dev. Dep't (2004) 34 Cal. 4th 467, 475-476, 20 Cal. Rptr. 3d 428, 99 P.3d 1015*].

[4] Postponement of Statute's Operative Date Not Determinative of Retroactive Effect

The effective date of a statute is the date on which it becomes law; the operative date is the date on which the directives

of the statute may actually be implemented [*Preston v. State Bd. of Equalization (2001) 25 Cal. 4th 197, 223, 105 Cal. Rptr. 2d 407, 19 P.3d 1148*]. Although the effective and operative dates often are the same, the Legislature may expressly postpone the operative date. However, a postponed operative date does not necessarily imply an intention to give the statute prospective effect only. The Legislature may postpone the operative effect for reasons unrelated to an intent to avoid retroactive effect. For example, the Legislature may delay the operation of a statute to allow persons affected by the statute [*Preston v. State Bd. of Equalization (2001) 25 Cal. 4th 197, 223-224, 105 Cal. Rptr. 2d 407, 19 P.3d 1148*]:

- To become aware of it and to comply with its terms;
- To give governmental authorities sufficient time to prepare a mechanism to administer or implement the new law;
- To provide time for cleanup amendments and the passage of related legislation; or
- To simplify bookkeeping or setting retirement dates.

[5] Presumption of Prospective Application

Statutes are not given retroactive effect unless that is clearly the intent of the Legislature [*Balen v. Peralta Junior College Dist. (1974) 11 Cal. 3d 821, 828, 114 Cal. Rptr. 589, 523 P.2d 629* ; *Estate of Hilton (1996) 44 Cal. App. 4th 890, 906-907, 52 Cal. Rptr. 2d 491*]. Such intent may be inferred from the express provisions of the statute as well as from extrinsic sources, including the legislative history [*Preston v. State Bd. of Equalization (2001) 25 Cal. 4th 197, 221-222, 105 Cal. Rptr. 2d 407, 19 P.3d 1148*].

If a statute and its legislative history are silent as to retroactive applicability, the Legislature is presumed to have intended the statute to have prospective application only [*Nelson v. A.H. Robins Co. (1983) 149 Cal. App. 3d 862, 870, 197 Cal. Rptr. 179* (alternative ground that *Code Civ. Proc. § 3* provides that no part of the Code of Civil Procedure is retroactive unless explicitly so declared)]. This long-established presumption applies particularly to laws creating new obligations, imposing new duties, or exacting new penalties because of past transactions. The rationale behind the presumption is that retroactive laws are characterized by want of notice and lack of knowledge of past conditions, and they disturb feelings of security in past transactions. Also, the purpose of a legislative alteration would not often be significantly advanced by application of the legislation to transactions that preceded it [*In re Marriage of Reuling (1994) 23 Cal. App. 4th 1428, 1439, 28 Cal. Rptr. 2d 726*].

The presumption is subordinate to the fundamental rule of construction that a statute must be interpreted to effectuate the Legislature's intent. Thus, the presumption is to be applied only after it is determined impossible to ascertain legislative intent [*In re Marriage of Bouquet (1976) 16 Cal. 3d 583, 587, 128 Cal. Rptr. 427, 546 P.2d 1371* (statute changing nature of property from community to separate intended to apply retroactively); *Mannheim v. Superior Court (1970) 3 Cal. 3d 678, 686-687, 91 Cal. Rptr. 585, 478 P.2d 17* (statute adding persons as distributees for purposes of intestate succession intended to apply retroactively); *see also Hudson Properties Co. v. Governing Board (1985) 168 Cal. App. 3d 63, 70, 213 Cal. Rptr. 909* (rule of construction giving prospective application of statute should not be followed blindly)]. In other words, the absence of an express declaration of retroactivity does not prohibit a finding that the Legislature intended a statute to apply retroactively. However, it is a significant indication that the Legislature intended the statute to apply prospectively only [*In re Cindy B. (1987) 192 Cal. App. 3d 771, 780-781, 237 Cal. Rptr. 677*].

[6] Clarification Is Not Considered Retroactive Enactment

A statute that merely clarifies, rather than changes, existing law does not operate retrospectively even if applied to

transactions predating its enactment [*Western Security Bank v. Superior Court (1997) 15 Cal. 4th 232, 243, 62 Cal. Rptr. 2d 243, 933 P.2d 507* ; *Bowen v. Board of Retirement (1986) 42 Cal. 3d 572, 575 n.1, 229 Cal. Rptr. 814, 724 P.2d 500* ; *Negrette v. California State Lottery Com. (1994) 21 Cal. App. 4th 1739, 1744, 26 Cal. Rptr. 2d 809* ; *Arcadia Redevelopment Agency v. Ikemoto (1993) 16 Cal. App. 4th 444, 457, 20 Cal. Rptr. 2d 112*].

When a statute provides that it clarifies or declares existing law, the provision indicates a legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of statutory construction, the court must give effect to this intention unless there is some constitutional objection [*Western Security Bank v. Superior Court (1997) 15 Cal. 4th 232, 244, 62 Cal. Rptr. 2d 243, 933 P.2d 507*].

A court may consider the surrounding circumstances to determine whether material changes in statutory language by the Legislature were an effort only to clarify a statute's true meaning [*see, e.g.,* *Colmenares v. Braemar Country Club, Inc. (2003) 29 Cal. 4th 1019, 1028-1031* (based on legislative history and contemporaneous amendment of other statutes, enactment of *Gov. Code § 12926.1* effective January 1, 2001, clarified existing law that impairment need not *substantially* limit major life activity to constitute physical disability under Fair Employment and Housing Act, *Gov. Code § 12926(k)*)]. If the true meaning of the statute remains the same, the legislative act has no retrospective effect [*Western Security Bank v. Superior Court (1997) 15 Cal. 4th 232, 243, 62 Cal. Rptr. 2d 243, 933 P.2d 507*].

If the court does not accept the Legislature's assurance that an unmistakable change in the law is merely a "clarification," a declaration of intent may still effectively reflect the Legislature's purpose to achieve a retrospective change [*Western Security Bank v. Superior Court (1997) 15 Cal. 4th 232, 243, 62 Cal. Rptr. 2d 243, 933 P.2d 507* ; *California Emp. etc. Com. v. Payne (1947) 31 Cal. 2d 210, 214, 187 P.2d 702*]. However, an erroneous statement that an amendment merely declares existing law is not sufficient to overcome the strong presumption against retroactively applying an amendment that was enacted in response to a judicial interpretation of the statute [*McClung v. Employment Dev. Dep't (2004) 34 Cal. 4th 467, 475-476, 20 Cal. Rptr. 3d 428, 99 P.3d 1015* (once California Supreme Court has finally and definitively interpreted statute, Legislature has no power to decide that subsequent amendment merely declares existing law)].

[7] Due Process Challenge

[a] Change Impairing Vested Rights

The retroactive application of a civil statute may be unconstitutional if it deprives a person of a vested right without due process or if it impairs the obligation of a contract [*In re Marriage of Heikes (1995) 10 Cal. 4th 1211, 1218-1225, 44 Cal. Rptr. 2d 155, 899 P.2d 1349* ; *In re Marriage of Bouquet (1976) 16 Cal. 3d 583, 591-594, 128 Cal. Rptr. 427, 546 P.2d 1371* (retroactive application of statute changing community to separate property held not to constitute unconstitutional taking of property without due process); *Mannheim v. Superior Court (1970) 3 Cal. 3d 678, 688, 91 Cal. Rptr. 585, 478 P.2d 17* (retroactive application of amendment of intestate succession statute lessening occasions for escheat held not to constitute unconstitutional gift of public funds); *Estate of Hilton (1996) 44 Cal. App. 4th 890, 906-907, 52 Cal. Rptr. 2d 491* (modification of statutory compensation rates could not be used to force repayment of prior interim fee award in absence of clear evidence of retroactive operation of amendment)].

However, retroactive application is not unconstitutional per se, even when it impairs vested rights. The constitutional question in such a case is not whether a vested right is impaired by the change in the law, but whether the change reasonably could be believed to be sufficiently necessary to the public welfare to justify the impairment [*In re Marriage of Bouquet (1976) 16 Cal. 3d 583, 592, 592 n.8, 128 Cal. Rptr. 427, 546 P.2d 1371*]. For example, statutes enacted to cure an injustice in the law and promote the interest of the state in the equitable division of community property have been applied retroactively against the contention that to do so would violate due process [*see* *In re Marriage of Taylor (1987) 189 Cal. App. 3d 435, 443, 234 Cal. Rptr. 486*]. Similarly, although the Legislature generally cannot provide retroactive relief for taxes that have become fixed and vested, a retroactive tax exemption may

be upheld if it is based on the Legislature's reasonable determination that the exemption serves a public purpose [*Preston v. State Bd. of Equalization (2001) 25 Cal. 4th 197, 224-225, 105 Cal. Rptr. 2d 407, 19 P.3d 1148* (upholding retroactivity of sales-tax exemption under *Rev. & Tax. Code §§ 6011(c)(10), 6012(c)(10),* to further public purpose of providing certainty to business taxpayers and improving business climate in California)]. For a discussion of retroactive criminal laws as unconstitutional ex post facto laws, see California Criminal Defense Practice, ch. 140 (Matthew Bender).

[b] Alternative Analysis of Weighing Factors

An alternative analysis in determining if a retroactive initiative violates due process requires a weighing of a variety of factors [*In re Marriage of Bouquet (1976) 16 Cal.3d 583, 592, 128 Cal. Rptr. 427, 546 P.2d 1371* ; *Yoshioka v. Superior Court (1997) 58 Cal. App. 4th 972, 983, 68 Cal. Rptr. 2d 553*].

The following factors are considered by the court [*In re Marriage of Bouquet (1976) 16 Cal. 3d 583, 592, n.2, 128 Cal. Rptr. 427, 546 P.2d 1371* ; *Yoshioka v. Superior Court (1997) 58 Cal. App. 4th 972, 983, 68 Cal. Rptr. 2d 553*]:

- The significance of the state interest served by the law.
- The importance of the retroactive application of the law to the effectuation of that interest.
- The extent of reliance upon the former law.
- The legitimacy of that reliance.
- The extent of actions taken on the basis of that reliance.
- The extent to which the retroactive application of the new law would disrupt those actions.

[c] Change in Procedural Law

The application to pending litigation of a statute changing procedure or providing a new remedy for the enforcement of existing rights does not violate the principle that statutes are presumed to act prospectively only, and such laws have historically been held to apply to pending or existing matters [*Anton v. San Antonio Community Hosp. (1977) 19 Cal. 3d 802, 826, 140 Cal. Rptr. 442, 567 P. 2d 1162* ; *Angeli v. Lischetti (1962) 58 Cal. 2d 474, 478, 24 Cal. Rptr. 845, 374 P.2d 813* (change in manner of enforcing valid judgment); *Governing Board v. Commission on Professional Competence (1977) 72 Cal. App. 3d 447, 461, 140 Cal. Rptr. 206* (amendment of statute to empower agency to stay disciplinary orders subject to probationary terms applied to uphold agency action when amendment occurred pending appeal from superior court judgment upholding agency's order)]. Such an application of a change in procedural law is actually prospective in nature because it relates to procedure to be followed in the future, and the statute is not made retroactive merely because it draws on facts existing prior to its enactment [*Strauch v. Superior Court (1980) 107 Cal. App. 3d 45, 48-49, 165 Cal. Rptr. 552* (late filing of certificate of merit in medical malpractice action allowed by trial court saved by subsequent amendment extending time for filing and easing effect of failure to file)]. Furthermore, reasons of fairness dictate prospective application of procedural changes, in the absence of clear legislative intent to the contrary [*Estate of Hilton (1996) 44 Cal. App. 4th 890, 906-907, 52 Cal. Rptr. 2d 491* (statutes not to be given retrospective application absent clear legislative intent to do so)].

When a new time limit has been imposed or an existing time limit has been shortened, courts have not resorted to expressions of legislative intent to determine when the new time limit began running. Rather they have relied on a presumption that drafters did not intend to terminate existing rights but instead intended to give parties a reasonable time in which to preserve their rights [*Save Our Forest & Ranchlands v. County of San Diego (1996) 50 Cal. App. 4th*

1757, 1767-1768, 58 Cal. Rptr. 2d 708]. If the statute operates immediately to cut off an existing remedy, or within so short a time that a party has no reasonable opportunity to exercise his or her remedy, then the retroactive application of the statute is unconstitutional regarding that party [*Rosefield Packing Co. v. Superior Court (1935) 4 Cal. 2d 120, 122-123, 47 P.2d 716* ; *Santangelo v. Allstate Ins. Co. (1998) 65 Cal. App. 4th 804, 815, 76 Cal. Rptr. 2d 735* (when change in statute of limitations became operative, two months for claimant in uninsured motorist arbitration to complete arbitration was reasonable under circumstances)].

A statute is procedural when it neither creates a new cause of action nor deprives defendant of any defense on the merits [*Strauch v. Superior Court (1980) 107 Cal. App. 3d 45, 49, 165 Cal. Rptr. 552*]. The classification of a law as substantive or procedural depends on its effect rather than its form, and a statute which might ordinarily be classified as procedural may so change the legal effect of past events that its application to pending matters may be retroactive [*Perry v. Heavenly Valley (1985) 163 Cal. App. 3d 495, 504, 209 Cal. Rptr. 771* (presumption against retroactivity applied to amendment which abolished basis for action in negligence by making worker's compensation exclusive remedy); *Coast Bank v. Holmes (1971) 19 Cal. App. 3d 581, 594-595, 97 Cal. Rptr. 30* (statute altering effect of attorney's fees clauses in contracts deemed both procedural and substantive; legislative intent for retroactive application found); *City of Sausalito v. County of Marin (1970) 12 Cal. App. 3d 550, 557, 90 Cal. Rptr. 843* (statute on procedure for local zoning proceedings deemed substantive as it established standard of validation of such proceeding by reviewing court and did not reach court's procedure; legislative intent to apply to pending litigation found)].

[8] Equal Protection Challenge

Equal protection requires that persons similarly situated receive like treatment [*Georgie Boy Manufacturing, Inc. v. Superior Court (1981) 115 Cal. App. 3d 217, 224, 171 Cal. Rptr. 382*].

When a statute or initiative classifies individuals in a manner which involves economic rights, the rational basis test applies. The test is met if the court finds both of the following [*Yoshioka v. Superior Court (1997) 58 Cal. App. 4th 972, 986, 68 Cal. Rptr. 2d 553*]:

- The statute has a legitimate purpose.
- The lawmakers reasonably believed the classification would promote that purpose.

The court must conduct a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals even if the court is invoking only the rational relations test [*Fein v. Permanente Medical Group (1985) 38 Cal. 3d 137, 163, 211 Cal. Rptr. 368, 695 P.2d 665]* .

However, equal protection violations are generally not found under the rational relationship test unless the classification rests on grounds wholly irrelevant to the achievement of the state's objective [*Yoshioka v. Superior Court (1997) 58 Cal. App. 4th 972, 986, 68 Cal. Rptr. 2d 553]* . The question therefore is not whether in fact an act will promote the legislative objectives but whether the Legislature could rationally have decided that it might do so [*American Bank & Trust Co. v. Community Hospital (1984) 36 Cal. 3d 359, 374, 204 Cal. Rptr. 671, 683 P.2d 670, 41 A.L.R. 4th 233* , quoting *Minnesota v. Clover Leaf Creamery Co. (1981) 449 U.S. 456, 466, 101 S.Ct. 715, 725, 66 L. Ed. 2d 659*]. The burden to prove this rests on the challenger [*Yoshioka v. Superior Court (1997) 58 Cal. App. 4th 972, 987, 68 Cal. Rptr. 2d 553*].

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[Reserved]

§§ 531.72[Reserved]

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46-531 California Forms of Pleading and Practice--Annotated § 531.90

§ 531.90 Preemption

[1] State Law by Federal

The authority of Congress to preempt state law derives from the *Supremacy Clause* in the U.S. Constitution. It provides that the federal constitution and federal statutes and treaties are the supreme law of the land and bind state judges, despite state constitutional and statutory law to the contrary [*see U.S. Const., art. VI, cl. 2*]. In exercising its legislative powers, Congress may expressly preempt state law [*California Service Station etc. Assn. v. Union Oil Co. (1991) 232 Cal. App. 3d 44, 51, 283 Cal. Rptr. 279]* . Moreover, absent express preemption, there are three bases for finding implied preemption [*Bronco Wine Co. v. Jolly (2004) 33 Cal. 4th 943, 955-956, 17 Cal. Rptr. 3d 180, 95 P.3d 422]* . Whether the preemption is express [*see Southern Cal. Gas Co. v. Occupational Safety & Health Appeals Bd. (1997) 58 Cal. App. 4th 200, 205, 67 Cal. Rptr. 2d 892]* or implied [*see Jevne v. Superior Court (2005) 35 Cal. 4th 935, 960-961, 28 Cal. Rptr. 3d 685, 111 P.3d 954]* , the scope of the preemption must also be determined.

For detailed discussion of federal-law preemption of state law, see *Ch. 126A, Constitutional Law, § 126A.23*.

[2] Local Ordinance by State Statute

City and county ordinances must not conflict with general laws [*Cal. Const., art. XI, § 7*; *Gov. Code § 37100*], but they will be presumed valid until a conflict is shown [*Water Quality Assn. v. Santa Barbara County (1996) 44 Cal. App. 4th 732, 740-741, 52 Cal. Rptr. 2d 184]* . However, once a conflict with state law is found to exist, the ordinance is void [*Building Industry Association of Northern California v. City of Livermore (1996) 45 Cal. App. 4th 719, 724, 52 Cal. Rptr. 2d 902]* .

EXCEPTION:

Under *Cal. Const., art. XI, §§ 5* and *7*, it is clear that ordinances enacted by a charter city are not subject to and controlled by conflicting state legislative action if the subject matter is a "municipal affair," as those words are used in *Cal. Const., art. XI, § 5* [*Whisman v. San Francisco Unified Sch. Dist. (1978) 86 Cal. App. 3d 782, 789, 150 Cal. Rptr. 548* (school system not municipal affair)].

For detailed discussion of state-law preemption of local law, see *Ch. 126A, Constitutional Law, § 126A.24*.

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§ 531.91 Equal Protection

Equal protection of the law with respect to state legislation is guaranteed by *U.S. Const., amend. XIV, § 1,*, and *Cal. Const., art. I, § 7(a)*. The first prerequisite to a meritorious equal protection claim is a showing that the state has adopted a classification which affects two or more similarly situated groups in an unequal manner [*People v. Travis (2006) 139 Cal. App. 4th 1271, 1291, 44 Cal. Rptr. 3d 177]* . There are two tests for determining the validity of a classification under the *equal protection clause*. The conventional standard presumes the legislation to be constitutional and merely requires that distinctions drawn by a challenged statute bear some rational relationship to a conceivable, legitimate state purpose. A more stringent "strict scrutiny" test is applied in cases involving "suspect classifications" or touching on "fundamental interests." In those cases, the state bears the burden of establishing not only that it has a compelling interest that justifies the law but that the distinctions drawn by the law are necessary to further its purpose [*Kasler v. Lockyer, 23 Cal. 4th 472, 480, 97 Cal. Rptr. 2d 334, 2 P.3d 581 (2000)* (quoting *Warden v. State Bar (1999) 21 Cal. 4th 628, 640-641, 88 Cal. Rptr. 2d 283, 982 P.2d 154*)].

For further discussion of equal protection, see *Ch. 126A, Constitutional Law, § 126A.60* et seq.

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§ 531.92 Privileges and Immunities

The privileges and immunities clause of the California Constitution, which requires privileges and immunities to be granted to all citizens on like terms [*see Cal. Const., art I, § 7(b)*], statutory classifications are valid unless the classification is unreasonable or arbitrary [*City and County of San Francisco v. Flying Dutchman Park, Inc. (2004) 122 Cal. App. 4th 74, 87, 18 Cal. Rptr. 3d 532* ; *People v. Housman (1984) 163 Cal. App. 3d Supp. 43, 53, 210 Cal. Rptr. 186]* . Thus, this provision is "substantially the equivalent" of the *equal protection clause of the Fourteenth Amendment to the federal constitution* [*Dep't of Mental Hygiene v. Kirchner (1965) 62 Cal.2d 586, 588, 43 Cal.Rptr. 329, 400 P.2d 321]* .

For additional discussion of privileges and immunities under *Cal. Const., art. I, § 7(b)*, see *Ch. 126A, Constitutional Law, § 126A.64*.

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§ 531.93 Due Process

Under the California constitution, a person may not be deprived of life, liberty, or property without due process of law [*Cal. Const., art. I, § 7(a)*]. Similarly, the federal constitution provides that "no State shall ... deprive any person of life, liberty, or property, without due process of law" [*U.S. Const., amend. XIV, § 1*]. The touchstone of due process is protection of the individual against arbitrary action of government [*County of Sacramento v. Lewis (1998) 523 U.S. 833, 845-846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043* , quoting *Wolff v. McDonnell (1974) 418 U.S. 539, 558, 94 S. Ct. 2963, 41 L. Ed. 2d 935]* , whether the fault lies in a denial of fundamental procedural fairness, i.e., procedural due process, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, i.e., substantive due process [*County of Sacramento v. Lewis (1998) 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043]* .

For discussion of due process under *Cal. Const., art. I, § 7(a)*, see *Ch. 126A, Constitutional Law, §§ 126A.40, 126.50* et seq.

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[Reserved]

§§ 531.94[Reserved]

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§ 531.110 Declaratory Relief

The interpretation of ordinances and statutes are proper matters for declaratory relief [*Walker v. County of Los Angeles (1961) 55 Cal. 2d 626, 637, 12 Cal. Rptr. 671, 361 P.2d 247* ; *Redwood Coast Watersheds Alliance v. State Bd. of Forestry & Fire Protection (1999) 70 Cal. App. 4th 962, 970, 83 Cal. Rptr. 2d 24*].

Declaratory relief is also available to adjudicate the constitutionality of statutes and ordinances on their face or as applied to a particular party or situation [*State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 251-252, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *Excelsior College v. Board of Registered Nursing (2006) 136 Cal. App. 4th 1218, 1228 n.2, 39 Cal. Rptr. 3d 618]* .

For discussion relating to actions for declaratory relief to determine the constitutional validity of statutes, ordinances, and administrative regulations, see Ch. 126A, *Constitutional Law* .

For a further discussion and forms relating to actions for declaratory relief, including forms of complaints for declaratory relief to interpret statutes, ordinances, and administrative regulations, or to determine the validity of ordinances and administrative regulations under the statutes, see Ch. 182, *Declaratory Relief* .

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§ 531.111 Injunction

[1] To Restrain Enforcement or Implementation in General

As a general rule, an injunction may not be granted to prevent the execution of a public statute by officers of the law for the public benefit [*Civ. Code § 3423(d)*; *Code Civ. Proc. § 526(b)(4)*]. For example, injunctive relief is not available to a plaintiff who makes no claim of unconstitutionality or of irreparable injury to a property right but who is merely seeking to have a penal statute construed in a manner that will allow him or her to engage in an activity undertaken merely for pleasure [*Manchel v. County of Los Angeles County (1966) 245 Cal. App. 2d 501, 506, 54 Cal. Rptr. 53*].

Injunctive relief may be granted:

- When a statute or ordinance is being applied to conduct not within its terms [*Crittenden v. Superior Court (1964) 61 Cal. 2d 565, 569, 39 Cal. Rptr. 380, 393 P.2d 692* ; *Novar Corp. v. Bureau of Collection & Investigative Services (1984) 160 Cal. App. 3d 1, 6, 206 Cal. Rptr. 287]* ; or

- In a taxpayer action to enjoin the illegal expenditure of public funds [*Code Civ. Proc. § 526a*].

For discussion relating to actions for injunctive relief to determine the constitutional validity of statutes, ordinances, and administrative regulations, see Ch. 126A, *Constitutional Law* .

For discussion and forms relating to obtaining injunctive relief against illegal acts of public officials, see Ch. 303, *Injunctions* , and see Ch. 471, *Investigations by Public Agencies* .

For discussion and forms relating to taxpayer's suits, see Ch. 466, *Public Entities and Officers: Taxpayer's Actions* .

[2] Penal Statutes

Once criminal prosecution has commenced, injunctive relief against a criminal statute or ordinance is not available because there is an adequate remedy at law [*Miller v. State of California (1970) 6 Cal. App. 3d 202, 204-205, 85 Cal.*

Rptr. 801 ; *Holden v. Arnebergh (1968) 265 Cal. App. 2d 87, 92, 71 Cal. Rptr. 401 , appeal dismissed, 394 U.S. 102, 89 S. Ct. 926, 22 L. Ed. 2d 112 (1969)*].

A preliminary injunction against enforcement of a penal statute or ordinance regulating moral conduct is to be granted only under extraordinary circumstances [*Theresa Enterprises, Inc. v. Davis (1978) 81 Cal. App. 3d 940, 946-947*]. The applicant for preliminary injunctive relief must show that he or she will suffer irreparable injury from enforcement of an unconstitutional law pending trial [*EWAP, Inc. v. City of Los Angeles (1979) 97 Cal. App. 3d 179, 188, 158 Cal. Rptr. 579* ; *7978 Corporation v. Pitchess (1974) 41 Cal. App. 3d 42, 46, 115 Cal. Rptr. 746*].

[3] Taxpayer's Suit

Taxpayers may bring suit to restrain the illegal expenditure of public funds, which includes the expenditure of a public official's time in performing illegal and unauthorized acts. In a taxpayer's suit, public officials may be enjoined from implementing an unconstitutional statute or ordinance [*Code Civ. Proc. § 526a*; *Blair v. Pitchess (1971) 5 Cal. 3d 258, 267-269, 96 Cal. Rptr. 42, 486 P.2d 1242* ; *see Ketchens v. Reiner (1987) 194 Cal. App. 3d 470, 474, 239 Cal. Rptr. 549*]. Declaratory relief is also available in a taxpayer's action [*Van Atta v. Scott (1980) 27 Cal. 3d 424, 449-450, 166 Cal. Rptr. 149, 613 P.2d 210*]. For discussion and forms relating to taxpayer's suits, see Ch. 466, *Public Entities and Officers: Taxpayer's Actions* . Also see Ch. 303, *Injunctions* and Ch. 471, *Investigations by Public Agencies* .

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[Reserved]

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§ 531.130 California Points and Authorities

For forms of points and authorities supporting and opposing applications for temporary restraining orders and preliminary injunctions against enforcement of a statute or ordinance, and for a form of points and authorities opposing an application for a preliminary injunction to prevent a municipal corporation from taking legislative action, see California Points and Authorities, Ch. 116, *Injunctions* (Matthew Bender)

For forms of points and authorities supporting a demurrer on the basis of information which is the subject of judicial notice, and including a request that judicial notice be taken of that information, see California Points and Authorities, Ch. 71, *Demurrers and Motions for Judgment on the Pleadings* (Matthew Bender)

For forms of points and authorities concerning statutory interpretation, see California Points and Authorities, Ch. 217, *Statutory Interpretation* (Matthew Bender)

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§ 531.131 Federal Constitution

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§ 531.132 State Constitution

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Manner of enacting statutes. *Cal. Const., art. IV, § 8(a), (b)*

Effective date of statutes. *Cal. Const., art. IV, § 8(c), (d)*

Manner of amending statute. *Cal. Const., art. IV, § 9*

Statute to embrace only one subject, expressed in its title. *Cal. Const., art. IV, § 9*

All laws of general nature as having uniform operation. *Cal. Const., art. IV, § 16(a)*

Local or special statute as invalid if general statute can be made applicable. *Cal. Const., art. IV, § 16(b)*

Charter city ordinances relating to municipal affairs as superseding state law. *Cal. Const., art. XI, § 5(a)*

City and county ordinances not conflicting with general state or federal law as authorized. *Cal. Const., art. XI, § 7*

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§ 531.133 State Statutes

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Statutes defined. *Code Civ. Proc. §§ 1897, 1898*; *Evid. Code § 230*

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Effective date of general law city ordinances. *Elec. Code §§ 9235, 9236*; *Gov. Code § 36937*

Effective date of statutes. *Gov. Code § 9600*

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Effect of amendment. *Gov. Code § 9605*

Repealed statute as not revived by repeal of repealing statute. *Gov. Code § 9607*

Ordinances not conflicting with general state or federal law as authorized. *Gov. Code § 37100*

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Injunction to prevent execution of public statute by officers of law for public benefit as forbidden. *Civ. Code § 3423(d)*; *Code Civ. Proc. 526(b)(4)*

Injunction to prevent legislative act by municipal corporation as forbidden. *Civ. Code § 3423(g)*; *Code Civ. Proc. § 526(b)(7)*

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§ 531.134 Decisions

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[2] Constitution

Constitutional provisions as construed in accordance with natural and ordinary meaning of its words; literal language to be disregarded to avoid absurd results and to fulfill apparent intent of framers; language to receive liberal, practical common sense construction that will meet changed conditions and growing needs of people. *Los Angeles County Transportation Com. v. Richmond (1982) 31 Cal. 3d 197, 202-203, 182 Cal. Rptr. 324, 643 P.2d 941*

Constitutional amendments as interpreted by rules of statutory construction. *State Bd. of Equalization v. Board of Supervisors (1980) 105 Cal. App. 3d 813, 823, 164 Cal. Rptr. 739*

[3] Constitutional Construction Preferred

If terms of statute are by fair and reasonable interpretation capable of meaning consistent with requirements of Constitution, statute as given that meaning, rather than another meaning in conflict with *Constitution. Association for Retarded Citizens v. Department of Developmental Services (1985) 38 Cal. 3d 384, 394, 211 Cal. Rptr. 758, 696 P.2d 150* ; *Metromedia, Inc. v. City of San Diego (1982) 32 Cal. 3d 180, 186, 185 Cal. Rptr. 260, 649 P.2d 902* ; *McLaughlin v. Superior Court (1983) 140 Cal. App. 3d 473, 483, 189 Cal. Rptr. 479*

Court as permitted to rewrite ambiguous language when literal meaning would cause statute to be facially unconstitutional and statute can be reasonably construed to avoid constitutional difficulty. *Lillebo v. Davis (1990) 222*

Cal. App. 3d 1421, 1439-1440, 272 Cal. Rptr. 638 (substituting "in" for "and")

[4] Injunctive Relief

When injunctive relief against legislative enactment is sought, relevant provision for purposes of appeal as being measure that is in effect at time appeal is decided; thus, in action challenging validity of ordinance, which was amended in good faith during pendency of appeal, action as remanded to trial court for reconsideration in light of new ordinance. *Building Industry Ass'n v. City of Oxnard (1985) 40 Cal. 3d 1, 3-4, 218 Cal. Rptr. 672, 706 P.2d 285*

[5] Ordinances

Rules for construction of statutes as applicable to resolutions of planning commission that were treated as ordinances under city charter. *Russ Bldg. Partnership v. City and County of San Francisco (1988) 44 Cal. 3d 839, 847 n.8, 244 Cal. Rptr. 682, 750 P.2d 324*

Rules of statutory construction as applicable to construction of city ordinance. *City of Berkeley v. Cukierman (1993) 14 Cal. App. 4th 1331, 1338-1341, 18 Cal. Rptr. 2d 478*

Ordinances as construed by same rules that courts apply to statutes. *Anderson v. San Francisco Rent Stabilization & Arbitration Bd. (1987) 192 Cal. App. 3d 1336, 1343, 237 Cal. Rptr. 894*

Declaration of emergency and enactment of emergency ordinance by municipality as prima facie evidence of sufficient inquiry of existence of emergency. *Northgate Partnership v. City of Sacramento (1984) 155 Cal. App. 3d 65, 69, 202 Cal. Rptr. 15*

Motives of city's legislative body in passing ordinance as not considered in determining ordinance's validity absent fraud when improper motives are neither shown on face of ordinance nor inferable from its operation and effect under circumstances of which judicial notice may be taken. *National Independent Business Alliance v. City of Beverly Hills (1982) 128 Cal. App. 3d 13, 22, 180 Cal. Rptr. 59*

[6] Resolutions

Construction of city planning commission resolution as governed by same rules as construction of statutes and ordinances when particular resolution has same force and effect as ordinance. *Terminal Plaza Corp. v. City and County of San Francisco (1986) 186 Cal. App. 3d 814, 825 n.7, 230 Cal. Rptr. 875*

[7] Retroactivity

Critical question for determining retroactivity usually is whether last act or event necessary to trigger application of statute occurred before or after statute's effective date. *In re E.J. (2010) 47 Cal. 4th 1258, 12731274, 104 Cal. Rptr. 3d 165, 223 P.3d 31*

Although Legislature generally cannot provide retroactive relief for taxes that have become fixed and vested, retroactive tax exemption may be upheld if it is based on Legislature's reasonable determination that exemption serves

public purpose. *Preston v. State Bd. of Equalization (2001) 25 Cal. 4th 197, 224-225, 105 Cal. Rptr. 2d 407, 19 P.3d 1148*

Context of legislation, its objective, evils to be remedied, history of times and legislation on same subject, public policy, and contemporaneous construction as factors considered in determining Legislature's intent as to whether statute is to be given retroactive effect. *Fox v. Alexis (1985) 38 Cal. 3d 621, 629, 214 Cal. Rptr. 132, 699 P.2d 309*

If retroactivity were imposed and it would have only limited effect on a defined group of people for a relatively short period of time, then members of the group lack standing to raise retroactivity question. *Quackenbush v. Superior Court (1997) 60 Cal. App. 4th 454, 464-465, 70 Cal. Rptr. 2d 271*

Absence of express language providing for retroactivity as strongly implying statutory amendment was intended to be prospective only when Legislature specifically conferred retroactive application on other amendments passed in same measure. *Wienholz v. Kaiser Foundation Hospitals (1989) 217 Cal. App. 3d 1501, 1505-1506, 267 Cal. Rptr. 1*

Statute as properly applied retroactively when statutory language and circumstances of enactment demonstrate that purpose of statute was merely to clarify existing law. *Bradley v. State Farm Mut. Auto. Ins. Co. (1989) 212 Cal. App. 3d 404, 409, 260 Cal. Rptr. 470*

Statute that, by its terms, applies to matters "not final" as interpreted to govern all matters not yet free from further direct attack, including judgment on appeal. *Bradley v. State Farm Mut. Auto. Ins. Co. (1989) 212 Cal. App. 3d 404, 408, 260 Cal. Rptr. 470*

Test of whether application of statute is retroactive as whether statute operates to alter materially legal significance of prior event. *California Trout, Inc. v. State Water Resources Control Bd. (1989) 207 Cal. App. 3d 585, 609, 255 Cal. Rptr. 184*

Doctrine disfavoring retroactivity as intended to avoid unfairness that attends changing law after action has been taken in justifiable reliance on former law; doctrine as qualified with exceptions for circumstances that ordinarily do not give rise to substantial claim of unfairness. *Mahon v. Safeco Title Ins. Co. (1988) 199 Cal. App. 3d 616, 620-621, 245 Cal. Rptr. 103*

Law as properly given retrospective application when Legislature clearly evinces that intent and when no vested or constitutional rights are infringed. *Leavenworth Properties v. City and County of San Francisco (1987) 189 Cal. App. 3d 986, 994, 234 Cal. Rptr. 598*

Civ. Code § 4800.3 as constitutional when retroactively applied because retroactive application cures "rank injustice" of former law. *In re Marriage of Slivka (1986) 183 Cal. App. 3d 159, 164-168, 228 Cal. Rptr. 76*

Statute raising rate of interest on judgments that by its terms purported to become effective prior to its enactment date as construed to have only prospective effect in light of legislative history indicating effective date was inadvertent error and to avoid unconstitutionality of retroactive effect. *American National Bank v. Peacock (1985) 165 Cal. App. 3d*

1206, 1210-1212, 212 Cal. Rptr. 97

Enactment's operative date as able to differ from effective date, and effective date will not be given retroactive application unless there is clearly apparent intention for so doing. *City of Sacramento v. State of California (1984) 156 Cal. App. 3d 182, 193-194, 203 Cal. Rptr. 258*

[8] Severability

When portion of administrative rule conflicts with statute, invalid portion as severable from whole if (1) language of invalid portion is mechanically severable from remainder of rule and (2) remaining provisions stand on their own, unaided by invalid provisions nor rendered vague by their absence nor inextricably connected to them by policy considerations. *California Beer & Wine Wholesalers Assn. v. Department of Alcoholic Beverage Control (1988) 201 Cal. App. 3d 100, 110, 247 Cal. Rptr. 60*

Severability clause in statute as not to be used to delegate task of rewriting statute to courts. *People's Advocate, Inc. v. Superior Court (1986) 181 Cal. App. 3d 316, 330-331 n.15, 226 Cal. Rptr. 640*

Severable, invalid parts of ordinance as not invalidating parts of ordinance that are valid in themselves; test of severability as whether or not invalid part can be severed without destroying legislative scheme or utility of remaining provisions. *Galligan v. City of San Bruno (1982) 132 Cal. App. 3d 869, 874, 183 Cal. Rptr. 466*

When part of statute is declared unconstitutional, remainder as standing if complete in itself and if it would have been adopted had legislative body foreseen partial invalidation of statute. *Park & Shop Markets, Inc. v. City of Berkeley (1981) 116 Cal. App. 3d 78, 89, 172 Cal. Rptr. 515*

[9] Special Legislation

Legislation as special when it confers particular privileges or imposes burdensome conditions, in the exercise of a common right, on class of persons arbitrarily selected from general body of persons standing in same relation to subject of legislation; law as general when it applies equally to all persons embraced in class founded on some natural, intrinsic, or constitutional distinction. *White v. Church (1986) 185 Cal. App. 3d 627, 632, 231 Cal. Rptr. 565*

[10] Statutory Construction

[a] Ascertaining Legislative Intent

To determine what a statute means, courts first consult the words themselves, giving them their usual and ordinary meaning. *Smith v. Fair Employment & Housing Commission (1996) 12 Cal. 4th 1143, 1155, 51 Cal. Rptr. 2d 700, 913 P.2d 909*

Fundamental rule of statutory construction as being that court should ascertain intent of Legislature so as to effectuate purposes of law; in determining intent, court as required to first look to words of statute. *State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal. 3d 1147, 1182, 252 Cal. Rptr. 221, 762 P.2d 385* ; *T.M. Cobb Co. v. Superior Court (1984) 36 Cal. 3d 273, 277, 204 Cal. Rptr. 143, 682 P.2d 338* ; *Price v. Tennant Community Services*

Dist. (1987) 194 Cal. App. 3d 491, 499, 239 Cal. Rptr. 572

Legislative intent as usually determinable from statutory language; statutes as required to be given reasonable construction that conforms to apparent purpose and intention of law makers, and various parts of enactment as required to be harmonized by considering particular clause in context of whole statute. *Nunn v. State of California (1984) 35 Cal. 3d 616, 624-625, 200 Cal. Rptr. 440, 677 P.2d 846*

Court's overriding purpose in construing statute is to ascertain legislative intent and give reasonable construction conforming to that intent; in interpreting legislative intent, court first looks to usual and ordinary meaning of words of statute. *Home Depot U.S.A. v. Contractors' State License Board (1996) 41 Cal. App. 4th 1592, 1600-1601, 49 Cal. Rptr. 2d 302*

Utility of legislative history as confined to construction of statutory text. *City of Sacramento v. Public Employees' Retirement System (1994) 22 Cal. App. 4th 786, 794-795, 27 Cal. Rptr. 2d 545*

Legislative purpose as effectuated even when it is inconsistent with strict letter of statute. *Bliler v. Covenant Control Com. (1988) 205 Cal. App. 3d 18, 26, 252 Cal. Rptr. 50*

When statutory language is susceptible of more than one meaning, duty of courts as being to accept that meaning intended by framers of legislation, so far as its intention can be ascertained; to discern intent, court as required to examine legislative history and statutory context of act under scrutiny. *Los Angeles County Safety Police Assn. v. County of Los Angeles (1987) 192 Cal. App. 3d 1378, 1388, 237 Cal. Rptr. 920*

[b] Avoiding Constitutional Questions

Courts will not reach constitutional questions unless absolutely required to do so, if other grounds are available and dispositive of issues in the case. *California State Electronics Association v. Zeos International, Ltd. (1996) 41 Cal. App. 4th 1270, 1274, 49 Cal. Rptr. 2d 127*

[c] Common-Law Language Used in Statute

When new right not existing at common law is created by statute, that statutory remedy is exclusive; for rights that already existed at common law before creation of statutory right, statutory remedy is usually regarded as merely cumulative, permitting plaintiff to pursue common law remedy as well. *Cabesuela v. Browning-Ferris Industries of California, Inc. (1998) 68 Cal. App. 4th 101, 80 Cal. Rptr. 2d 60*

Intent of Legislature in enacting statute that uses common-law language as presumed to continue common-law rules in statutory form. *People v. Martin (1985) 168 Cal. App. 3d 1111, 1116, 214 Cal. Rptr. 873*

[d] Conflicting Statutes; Specific Statute Prevails Over General Statute

In examining statutes that appear to conflict, court as required, if reasonably possible, to reconcile them, even when court interprets provisions in different codes. *Walters v. Weed (1988) 45 Cal. 3d 1, 9, 246 Cal. Rptr. 5, 752 P.2d 443*

When special and general laws conflict, former as prevailing; special law as treated as exception to general law, regardless of which was first enacted; thus, *Com. Code § 2719(3)* rather than *Civ. Code § 1668* as applying to test unconscionability of contract limiting consequential damages in commercial transactions. *Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co. (1988) 200 Cal. App. 3d 1518, 1539, 246 Cal. Rptr. 823*

Special statute dealing with particular subject as constituting exception so as to control and take precedence over conflicting general statute on same subject, even though, standing alone, general provision would be broad enough to include subject to which more particular one relates. *Jones v. Pierce (1988) 199 Cal. App. 3d 736, 742, 245 Cal. Rptr. 149*

[e] Construction to Meet Evolving Mores of Society

Courts as enlarging terms and provisions of statutes to meet evolving mores of society, unless there is clear indication that to do so will interfere with legislative intent underlying enactment of statute; while powers granted by statute do not change, such powers as applying in different periods to all things to which they are in their nature applicable. *Barrett v. Superior Court (1990) 222 Cal. App. 3d 1176, 1192, 272 Cal. Rptr. 304*

[f] Effect of Administrative Agency Interpretation

In absence of formal adoption of regulations to which courts would owe deference, agency's internal memoranda interpreting statute that agency is empowered to enforce is entitled to "measure of respect" if that interpretation has been applied consistently by agency and reflects body of experience and informed judgment to which courts and litigants may properly resort for guidance. *Federal Express Corp. v. Holowecki (2008) 552 U.S. 389, 128 S. Ct. 1147, 170 L. Ed. 2d 10, 21-23*

Agency's interpretation of statutes it is charged with enforcing and interpreting as entitled to great weight and to be followed unless clearly erroneous. *County of Alameda v. State Bd. of Control (1993) 14 Cal. App. 4th 1096, 1106, 18 Cal. Rptr. 2d 487*

Although statutory construction is matter for courts rather than administrative agencies, agency's construction of its own regulations as entitled to great weight unless clearly erroneous or unauthorized. *Sangster v. California Horse Racing Bd. (1988) 202 Cal. App. 3d 1033, 1038, 249 Cal. Rptr. 235*

No judicial deference to administrative construction of statute required when meaning of statutory language and its legislative history is accessible and intelligible to judges, without need for administrative expertise. *California Beer & Wine Wholesalers Assn. v. Department of Alcoholic Beverage Control (1988) 201 Cal. App. 3d 100, 107, 247 Cal. Rptr. 60*

Longstanding administrative construction of statute as entitled to judicial consideration in interpreting statute because it is reasonable to assume Legislature would have taken corrective action had it disagreed with administrative interpretation. *Jones v. Pierce (1988) 199 Cal. App. 3d 736, 745-746, 245 Cal. Rptr. 149*

Although general presumption exists that amendment to statute is made with intent to change law, presumption as rebutted when practice of relevant administrative body indicates that amendment was merely clarification. *Anne B. v.*

State Bd. of Control (1984) 165 Cal. App. 3d 279, 285, 209 Cal. Rptr. 83

[g] Effect of Attorney General's Opinions

Legislature as presumed to act with knowledge of opinions of attorney general that affect subject matter of proposed legislation. *Burden v. Snowden (1992) 2 Cal. 4th 556, 564, 7 Cal. Rptr. 2d 531, 828 P. 2d 672*

California Attorney General opinion, even if unpublished, as entitled to great weight when construing statute. *California Ass'n of Psychology Providers v. Rank (1990) 51 Cal. 3d 1, 270 Cal. Rptr. 796, 793 P.2d 2*

Opinions of Attorney General as not controlling as to meaning of constitutional provision or statute but as entitled to great weight and respect. *Tafoya v. Hastings College (1987) 191 Cal. App. 3d 437, 445 n.7, 236 Cal. Rptr. 395*

[h] Effect of Federal Acts on State Legislation

Federal act as not automatically giving meaning to state legislation unless it is part of a mandatory regulatory scheme; when federal funding program is optional, state Legislature as able to enact legislation that does not fully comply with federal program. *Coastal Care Centers, Inc. v. Meeks (1986) 184 Cal. App. 3d 85, 93, 228 Cal. Rptr. 883*

[i] Effect of Federal Acts on State Liability

If rule requiring clear statement of Congressional intent to impose monetary liability on states is overcome or inapplicable so that liability is imposed, Supremacy Clause as making federal statute law in every state, fully enforceable in state court. *Hilton v. S.C. Pub. R. Com. (1991) 502 U.S. 197, 112 S. Ct. 560, 116 L. Ed. 2d 560, 567, 572* (rule did not prevail over application of stare decisis doctrine in FELA action; but Court stated rule should be applied in cases of statutory construction, as already applied in *Eleventh Amendment* cases)

[j] Effect of Sister-State Interpretation

Ambiguity of statutory language may be established through conflicting opinions of other states' courts interpreting uniform law; such conflict demonstrates that reasonable minds may disagree over meaning of those statutory words. *Hoechst Celanese Corp. v. Franchise Tax Bd. (2001) 25 Cal. 4th 508, 522, 106 Cal. Rptr. 2d 548, 22 P.3d 324 , cert. denied, 122 S. Ct. 614 (2001)*

Judicial interpretation of sister-state courts of parallel legislation on same subject as relevant in construing California legislation, if no relevant California judicial authority exists. *Webster v. State Bd. of Control (1987) 197 Cal. App. 3d 29, 37 n.3, 242 Cal. Rptr. 685*

[k] Exceptions to Statute

When statute specifies exceptions to general rule, other exceptions as not to be implied or presumed. *In re Lance W. (1985) 37 Cal. 3d 873, 888, 210 Cal. Rptr. 631, 694 P.2d 744*

As general rule of statutory construction, if statute announces general rule and makes no exception to it, courts as

unable to make exception. *Burnsed v. State Bd. of Control (1987) 189 Cal. App. 3d 213, 217, 234 Cal. Rptr. 316*

[l] Exclusive Versus Cumulative Statutory Remedy

Under "new right-exclusive remedy" rule of statutory construction, statutory remedy as exclusive when statute creates right that did not exist at common law and provides comprehensive and detailed remedial scheme for its enforcement; under "preexisting right-cumulative remedies" rule of construction, new statutory remedy as cumulative when it is provided for preexisting common law right. *Rojo v. Kliger (1990) 52 Cal. 3d 65, 79, 276 Cal. Rptr. 130, 801 P. 2d 373*

[m] Implied Amendment or Repeal

Presumption against implied repeals as requiring that in order for later law to repeal or supersede earlier law, later law must constitute revision of entire subject so that court may say that it was intended to be substitute for earlier. *Board of Supervisors v. Lonergan (1980) 27 Cal. 3d 855, 868, 167 Cal. Rptr. 820, 616 P.2d 802*

Presumption against implied repeal as strong; courts as especially reluctant to find implied repeal of statutes that serve important public purpose. *Henning v. Division of Occupational Saf. & Health (1990) 219 Cal. App. 3d 747, 761-762, 268 Cal. Rptr. 476*

Amendment or repeal by implication as disfavored and as to be recognized only when irreconcilable conflict exists between statutes; in absence of clear expression by declaration or necessary implication, implied repeal of tax deduction as not presumed. *California State Auto. Assn. v. Franchise Tax Bd. (1987) 191 Cal. App. 3d 1253, 1261, 237 Cal. Rptr. 44*

Legislative enactments as not presumed to overthrow long established principles of law unless intention to do so clearly appears either by express declaration or by necessary implication. *Hochheiser v. Superior Court (1984) 161 Cal. App. 3d 777, 788, 208 Cal. Rptr. 273*

[n] Initiative Measures

Courts as required to determine voters' intent when interpreting constitutional provision enacted by initiative; when existing statutory language is incorporated into initiative, court as not permitted to resolve ambiguity by turning to statute's legislative history because history demonstrates Legislature's intent, not voters' intent. *Delaney v. Superior Court (1990) 50 Cal. 3d 785, 798, 800-801, 268 Cal. Rptr. 753, 789 P.2d 934*

Ballot summaries and arguments as accepted sources for ascertaining voters' intent and understanding of initiative measures. *In re Lance W. (1985) 37 Cal. 3d 873, 888 n.8, 210 Cal. Rptr. 631, 694 P.2d 744*

Words of initiative as interpreted in common, popular way and, absent some strong reason to contrary, not in technical sense inconsistent with words' popular meaning. *AIU Ins. Co. v. Gillespie (1990) 222 Cal. App. 3d 1155, 1159, 272 Cal. Rptr. 334*

Rules of construction applicable to statutes enacted by legislature as applicable to statutes passed by voters. *San Francisco Fire Fighters v. Civil Service Com. (1987) 191 Cal. App. 3d 919, 922, 236 Cal. Rptr. 713*

Purpose of voters' initiative as to be determined with reference to language used, ballot summary, argument and analysis presented to voters, and contemporaneous construction by *Legislature. People v. Horn (1984) 158 Cal. App. 3d 1014, 1028, 205 Cal. Rptr. 119*

[o] Judicial Alteration

Generally, it is not for courts to determine whether or not policy of statute is economically sound or beneficial; such determination is matter solely for legislature. *ABC Internat. Traders, Inc. v. Matsushita Electric Corp. (1997) 14 Cal. 4th 1247, 61 Cal. Rptr. 2d 112, 931 P.2d 290*

Court as not permitted to insert into statute qualifying provisions not intended by Legislature and as not permitted to rewrite statute to conform to assumed but unapparent legislative intent. *Burnsed v. State Bd. of Control (1987) 189 Cal. App. 3d 213, 217, 234 Cal. Rptr. 316*

In construing statute, court as not authorized to insert qualifying provisions not included or rewrite statute to conform to assumed intention not appearing from statutory language. *McLaughlin v. Superior Court (1983) 140 Cal. App. 3d 473, 482, 189 Cal. Rptr. 479*

[p] Legislative History as Evidence

[i] Amendments in Course of Enactment

That Legislature amended original bill to eliminate "penalty" language in *Lab. Code § 226.7(c)*, while retaining it in other statutes enacted in same measure, indicates that "additional hour of pay," required by *Lab. Code § 226.7(b)* when employer fails to provide required meal period or rest period, constitutes wage rather than penalty. *Murphy v. Kenneth Cole Prods., Inc. (2007) 40 Cal. 4th 1094, 1107*

Rejection of specific provision that was part of act when originally introduced as indicating that law as enacted should not be construed to contain that provision. *Ventura v. City of San Jose (1984) 151 Cal. App. 3d 1076, 1080, 199 Cal. Rptr. 216*

[ii] Historical Circumstances

Both legislative history of statute and wider historical circumstances of its enactment as properly considered in ascertaining legislative intent. *Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal. 3d 1379, 1387, 241 Cal. Rptr. 67, 743 P.2d 1323*

[iii] Individual Legislator's Statements and Motives

Despite judicial reticence to rely on statements made by individual legislators as expressions of entire Legislature's intent, committee hearing transcript incorporating bill author's testimony as commanding respect when (1) court has in

the past accepted that legislator's statement as aid to ascertaining statute's underlying purpose when statement gave some indication of arguments made to Legislature and was subsequently printed by Legislature, and (2) transcript reveals discussion and events at hearing showing that other legislators and witnesses share author's views. *Walters v. Weed (1988) 45 Cal. 3d 1, 10, 246 Cal. Rptr. 5, 752 P.2d 443*

Declarations of city officials and members of planning commission and board of permit appeals as disregarded to extent they purport to offer declarants' opinions, understandings, and interpretation of resolution at issue; declarations as considered, however, to extent they contained narratives of discussions and events leading to adoption of resolution. *Terminal Plaza Corp. v. City and County of San Francisco (1986) 186 Cal. App. 3d 814, 827-828, 230 Cal. Rptr. 875*

Motives or understandings of individual legislators in voting for bill as not considered by courts in interpreting statute; fact that motives of individual legislator are offered creates no exception to rule because no guarantee can issue that other legislators who supported bill shared individual author's view of its compass. *Flood v. Wyeth Laboratories, Inc. (1986) 183 Cal. App. 3d 1272, 1279, 228 Cal. Rptr. 700*

[iv] Law Revision Commission Comments

Law Revision Commission's comments as declarative of intent not only of drafters of codes, but also of legislators who subsequently enact them. *Hochheiser v. Superior Court (1984) 161 Cal. App. 3d 777, 789 n.6, 208 Cal. Rptr. 273*

Report of Law Revision Commission proposing statute that is subsequently adopted without change as entitled to substantial weight in determining legislative purpose and intent. *Hong v. Somerset Associates (1984) 161 Cal. App. 3d 111, 115 n.6, 207 Cal. Rptr. 597* ; *Guthman v. Moss (1984) 150 Cal. App. 3d 501, 510, 198 Cal. Rptr. 54*

[v] Legislative Committee Reports

Legislative committee reports, while legitimate and valuable aids in determining legislative intent, as certainly not conclusive, and omissions in reports as inherently less reliable indicia of intent than positive statements. *Committee of Seven Thousand v. Superior Court (1988) 45 Cal. 3d 491, 508, 247 Cal. Rptr. 362, 754 P.2d 708*

Statements of legislative committees pertaining to purpose of legislation as presumed to express legislative intent of statutes as enacted. *Altaville Drug Store, Inc. v. Employment Development Department (1988) 44 Cal. 3d 231, 238, 242 Cal. Rptr. 732, 746 P.2d 871*

Legislative history of bill, including committee staff analysis and enrolled bill report, as evidence of legislative intent. *Ventura v. City of San Jose (1984) 151 Cal. App. 3d 1076, 1080-1081, 199 Cal. Rptr. 216*

[vi] Legislative Counsel Opinion

Opinion of California Legislative Counsel as entitled to great weight when Legislature left proposed statutory language intact after receiving Legislative Counsel's opinion. *California Ass'n of Psychology Providers v. Rank (1990) 51 Cal. 3d 1, 17-18, 270 Cal. Rptr. 796, 793 P.2d 2*

Summary of bill by legislative counsel forwarded to Governor as properly used to determine legislative intent. *People v. Rodriguez (1984) 160 Cal. App. 3d 207, 214, 206 Cal. Rptr. 563*

[q] No Construction of Clear Statute

Determination by highest state court that statute is clear and unambiguous as requiring statute's provisions to be applied according to its terms without further judicial construction. *People v. Ross (1985) 165 Cal. App. 3d 368, 371-372, 211 Cal. Rptr. 595*

Starting point for interpretation of statute as language of statute itself and no need for construction when language clear and unambiguous. *Guelfi v. Marin County Employees' Retirement Assn. (1983) 145 Cal. App. 3d 297, 302, 193 Cal. Rptr. 343*

Clear words of statute as not to be changed by court to accomplish purpose not appearing from face of statute or from its legislative history. *People v. Mobil Oil Corp. (1983) 143 Cal. App. 3d 261, 270, 192 Cal. Rptr. 155*

[r] Particular Words

"Under" depends on context for its meaning in any particular statutory provision; in federal statute barring judicial review of Attorney General's decisions that are discretionary "under" particular law [*8 U.S.C. § 1252(a)(2)(B)(ii)*], context indicates that "under" refers only to discretionary authority specified "in" that statute, rather than matters made discretionary under regulations adopted "pursuant to" that statute. *Kucana v. Holder (2010) -- U.S. --, 130 S. Ct. 827, 175 L. Ed. 2d 694, 2010 U.S. LEXIS 764, at *22*

In *25 U.S.C. § 479*, which authorizes Secretary of Interior to acquire property for use of Indian tribes "now under Federal jurisdiction," word "now" refers to time of time of statute's enactment, rather than time of acquisition of property. *Carcieri v. Salazar (2009) -- U.S. --, 129 S. Ct. 1058, 172 L. Ed. 2d 791, 800-802*

In construing plain meaning of statute, ordinary usage of "and" is to condition one of two conjoined requirements by other, thereby causally linking them; use of conjunction "and" in one statute indicates contrasting meaning to another statute's disjunctive "or," in former public entity must act after both events occur, and in latter either event allows action. *Kobzoff v. Los Angeles County Harbor/UCLA Medical Center (1998) 19 Cal. 4th 851, 861, 80 Cal. Rptr. 2d 803, 968 P.2d 514*

Term "notwithstanding other provisions of law" as indicating express legislative intent to have specific statute control despite existence of other law that might otherwise govern. *People v. DeLaCruz (1993) 20 Cal. App. 4th 955, 962, 25 Cal. Rptr. 2d 202*

Although usually "effective" date is same as "operative" date, Legislature as having power to fix future date on which act will become operative; legislation as possibly having practical legal consequences once effective, even in advance of operative date. *Sutco Construction Co. v. Modesto High School Dist. (1989) 208 Cal. App. 3d 1220, 1230, 256 Cal. Rptr. 671*

"Consist" as meaning to be composed of or made up of, but as not synonymous with "including," which always implies there may be others that are not mentioned. *Doyle v. Board of Supervisors (1988) 197 Cal. App. 3d 1358, 1364, 243*

Cal. Rptr. 572

Proviso or clause beginning with word "unless" as meaning an exception or condition subsequent rather than a condition precedent. *Baggett v. Housing Authority (1987) 195 Cal. App. 3d 383, 389, 240 Cal. Rptr. 640* (involving interpretation of federal regulation)

"Any" as used in statutes as interpreted to be broad, general, and all embracing; as used in such statutory expressions as "any other source," word "any" as meaning "every," thus, "every other source." *Burnsed v. State Bd. of Control (1987) 189 Cal. App. 3d 213, 217, 234 Cal. Rptr. 316*

"Or" as ordinarily used as disjunctive that marks alternative generally corresponding to "either." *Citizen Advocates, Inc. v. Board of Supervisors (1983) 146 Cal. App. 3d 171, 176, 194 Cal. Rptr. 61*

[s] Punctuation and Sentence Structure

When sentence in statute contains transitive verb that has object, adverb that modifies verb is commonly understood to apply to entire action conveyed by complete predicate, including verb's object; thus *18 U.S.C. § 1028A(a)(1)*, which penalizes person who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person," punishment may be imposed only if government proves not only that defendant knew he or she was transferring, possessing, or using something, but also that defendant knew that something was another person's means of identification. *Flores-Figueroa v. United States (2009) -- U.S. --, 129 S. Ct. 1886, 1889-1894, 173 L. Ed. 2d 853*

Although not controlling, punctuation as required to be considered in interpreting statute; fact that qualifying phrase is separated from antecedents by comma as evidence that qualifying phrase is supposed to apply to all antecedents, instead of only to immediately preceding one. *Victoria Groves Five v. Chaffey Joint Union High Sch. Dist. (1990) 225 Cal. App. 3d 1548, 1553, 276 Cal. Rptr. 14*

"Last antecedent rule" of statutory construction as requiring qualifying words, phrases, and clauses to be applied to words or phrases immediately preceding them and not to words or phrases more remote. *Mayo v. Department of Motor Vehicles (1987) 193 Cal. App. 3d 406, 409, 238 Cal. Rptr. 465*

Erroneous punctuation of statute or other enactment as disregarded in construing its meaning. *Indian Springs, Ltd. v. Palm Desert Rent Review Bd. (1987) 193 Cal. App. 3d 127, 134, 238 Cal. Rptr. 112*

[t] Reasonable Construction Preferred

Statutes as given reasonable and commonsense interpretation consistent with apparent legislative purpose and intent, and which, when applied, will result in wise policy rather than mischief or absurdity. *Dyna-Med, Inc. v. Fair Employment & Housing Com. (1987) 43 Cal. 3d 1379, 1392, 241 Cal. Rptr. 67, 743 P.2d 1323*

Statutes must be construed in a way that renders them reasonable, fair, and harmonious with their manifest legislative purpose; literal meaning of words must give way to avoid harsh results and mischievous or absurd consequences not intended by *Legislature. Hall v. Regents of the University of California (1996) 43 Cal. App. 4th 1580, 1586, 51 Cal. Rptr. 2d 387*

Golden rule of statutory construction as being that unreasonableness of result produced by one among alternative possible interpretations of statute is reason for rejecting that interpretation in favor of another that would produce reasonable result. *Jones v. Pierce (1988) 199 Cal. App. 3d 736, 743 n.7, 245 Cal. Rptr. 149*

Statute that is reasonably susceptible to two interpretations construed as the more reasonable and just of the two. *Palmer v. Workers' Comp. Appeals Bd. (1987) 192 Cal. App. 3d 1241, 1249, 237 Cal. Rptr. 800*

[u] Shall and May

Justice is not the slave of grammar, and "shall" has sometimes been judicially construed as directory or permissive; "shall," used in statute, does not always import that its provisions are mandatory, although in most cases it does; the test is this: "If to construe it as directory would render it ineffective and meaningless it should not receive that construction." *Cole v. Antelope Valley Union High School Dist. (1996) 47 Cal. App. 4th 1505, 1512, 55 Cal. Rptr. 2d 443*

When "shall" and "may" appear in close proximity in particular context, inference as proper that Legislature intended mandatory and discretionary meanings, respectively. *Mughrabi v. Suzuki (1988) 197 Cal. App. 3d 1212, 1215, 243 Cal. Rptr. 438* ; *People v. Mobil Oil Corp. (1983) 143 Cal. App. 3d 261, 270, 192 Cal. Rptr. 155*

When used in statute, "shall" as importing that its provisions are mandatory if that meaning is in accord with legislative intent. *Doyle v. Board of Supervisors (1988) 197 Cal. App. 3d 1358, 1364, 243 Cal. Rptr. 572*

Whether use of "shall" means statutory provision is mandatory or directory as distinction used to determine whether action taken in violation of provision is valid; failure to comply with mandatory, rather than merely directory, provision as rendering action void; characterization of provision as mandatory or directory as depending on provision's importance in legislative scheme. *Myers v. Patterson (1987) 196 Cal. App. 3d 130, 135, 241 Cal. Rptr. 751*

Word "shall," as used in a statute, as not always importing that its provisions are mandatory. *Johnson v. Mead (1987) 191 Cal. App. 3d 156, 159, 236 Cal. Rptr. 277*

In absence of necessity to effectuate legislative intent by using another meaning, word "may" in statute interpreted as permissive, or conferring discretion. *Rhyne v. Municipal Court (1980) 113 Cal. App. 3d 807, 817, 170 Cal. Rptr. 312*

[v] Statutes Construed in Context of Whole

If statute uses general word in conjunction with other words describing specific acts that would ordinarily be within ambit of general word, then court may infer that general word refers to conduct other than those specific acts; thus, "acknowledged the child" in *Prob. Code § 6452* refers to conduct other than contributing to support or care of child, since statute specifically requires such contribution *plus* acknowledgement before natural parent may inherit from child who was born out of wedlock. *Estate of Griswold (2001) 25 Cal. 4th 904, 911, 108 Cal. Rptr. 2d 165, 24 P.3d 1191*

Statute to be construed with reference to whole system of law of which it is part so that all may be harmonized and have effect. *Moore v. Panish (1982) 32 Cal. 3d 535, 541, 186 Cal. Rptr. 475, 652 P.2d 32* ; *O'Brien v. Dudenhoeffer*

(1993) 16 Cal. App. 4th 327, 332, 19 Cal. Rptr. 2d 826

Statute as required always to be construed in context, keeping in mind nature and purpose of statutory act. *CEJA v. J. R. Wood, Inc. (1987) 196 Cal. App. 3d 1372, 1375, 242 Cal. Rptr. 531*

Two code sections on same subject as required to be read together. *Johnson v. Mead (1987) 191 Cal. App. 3d 156, 159, 236 Cal. Rptr. 277*

[w] Strict Construction

Statutes imposing new and unusual liability in nature of penalty as strictly construed in favor of persons sought to be subjected to operation; penal statute as requiring narrowest construction that is reasonably susceptible in light of its legislative purpose. *Tos v. Mayfair Packing Co. (1984) 160 Cal. App. 3d 67, 78-79, 206 Cal. Rptr. 459*

[x] Subsequent Enactments

When statute adopts by specific reference provisions of another statute, those provisions are incorporated in form in which they exist at time of reference, not as subsequently amended; however, if reference is general instead of specific (such as reference to system or body of laws or to general law relating to particular subject), referring statute takes law or laws referred to not only in their contemporary form, but also as they may be changed from time to time or may even be repealed. *People v. Cooper (2002) 27 Cal. 4th 38, 44, 115 Cal. Rptr. 2d 219, 37 P.3d 403*

Legislature as presumed to have been aware of and to have acquiesced in previous judicial construction when it amends statute without altering portions of provision that were judicially construed. *In re Malinda S. (1990) 51 Cal. 3d 368, 380, 272 Cal. Rptr. 787, 795 P.2d 1244*

Reenactment of statute that has been judicially construed as establishing presumption that Legislature adopted construction placed on statute by courts. *Wilkoff v. Superior Court (1985) 38 Cal. 3d 345, 353, 211 Cal. Rptr. 742, 696 P.2d 134*

Legislature's failure to change law in particular respect when subject is generally before it and changes in other respects are made as indicative of intent to leave law as it stands in aspects not amended. *Shaw v. McMahon (1987) 197 Cal. App. 3d 417, 424-427, 243 Cal. Rptr. 26*

Court as considering state of law existing prior to enactment of provision in determining intent of statutory enactment. *People v. Horn (1984) 158 Cal. App. 3d 1014, 1031, 205 Cal. Rptr. 119*

[y] Surplusage Avoided

Word "dedicated" does not have same meaning in *Pub. Res. Code § 5540*, which restricts regional-park or open-space district's ability to convey land that has been "actually dedicated" for park or open-space purposes, and in *Pub. Res. Code § 5565*, which states that land is "dedicated" when acquired by regional-park or open-space district; treating two usages of "dedicated" as meaning same thing would render qualifying word "actually" surplusage, thus violating rule of

statutory construction that courts should, if possible, accord meaning to every word and phrase in statute so as to better effectuate Legislature's intent. *Ste. Marie v. Riverside County Reg'l Park & Open-Space Dist. (2009) 46 Cal. 4th 282, 289-290, 93 Cal. Rptr. 3d 369, 206 P.3d 739*

In statutory construction, courts as required, if possible, to place significance on every word, phrase, sentence and part of an act to achieve underlying legislative purpose for particular statute or legislative scheme; interpretation making some words surplusage as to be avoided. *CEJA v. J. R. Wood, Inc. (1987) 196 Cal. App. 3d 1372, 1375, 242 Cal. Rptr. 531*

Statute as not to be given construction that results in rendering one of its provisions nugatory. *St. Cyr v. Workers' Comp. Appeals Bd. (1987) 196 Cal. App. 3d 468, 473, 243 Cal. Rptr. 1*

[z] Typographical Error

Trial court's substitution of "of" for "or," on theory that ambiguity in statute resulted from typographical error, as erroneous when predecessor statutes also contained "or"; court as required to presume that Legislature meant word it used. *Malibu Committee for Incorporation v. Board of Supervisors (1990) 222 Cal. App. 3d 397, 404, 271 Cal. Rptr. 505*

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§ 531.135 Law Reviews

Comment, *A Functional Approach to Borrowing Limitations Periods for Federal Statutes, 77 Calif. L. Rev. 133 (1989)*

Popkin, *The Collaborative Model of Statutory Interpretation, 61 S. Cal. L. Rev. 543 (1988)*

Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process, 35 Stan. L. Rev. 213 (1983)*

Plater, *Statutory Violations and Equitable Discretion, 70 Calif. L. Rev. 524 (1982)*

Comment, *The Use of Extrinsic Aids in Determining Legislative Intent in California: The Need for Standardized Criteria, 12 Pac. L.J. 189 (1981)*

Steck, *California Legislation: Sources Unlimited, 6 Pac. L.J. 536 (1975)*

Nunez, *The Nature of Legislative Intent and the Use of Legislative Documents as Extrinsic Aids to Statutory Interpretation: A Reexamination, 9 Cal. W. L. Rev. 128 (1972)*

Note, *Pre-emption as a Preferential Ground: A New Canon of Construction, 12 Stan. L. Rev. 208 (1959)*

Note, *Statutes: Construction: The Legislative Silence Doctrine, 43 Cal. L. Rev. 907 (1955)*

Note, *Statutes: The Use of Code Headings As Constructional Aids, 33 Cal. L. Rev. 155 (1945)*

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[Reserved]

§§ 531.136[Reserved]

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46-531 California Forms of Pleading and Practice--Annotated § 531.150

§ 531.150 Allegations of Passage and Title [Code Civ. Proc. § 459] and Existence of Ordinance--Attaching Copy and Setting Forth Substance

[1] FORM Allegations of Passage and Title [Code Civ. Proc. § 459] and Existence of Ordinance--Attaching Copy and Setting Forth Substance

1. On _____ [*date of passage*], the _____ [*legislative body, e.g.,* Board of Supervisors] of the _____ [*specific public entity, e.g.,* County of Paradise] duly made and passed an ordinance entitled "_____" [*formal title of ordinance*] [*if desired for further clarity, add:* and more commonly known as _____ (*popular name, and municipal, or other, code number*)]. The ordinance was in full force and effect _____ [at all times mentioned herein *or* on _____ (*date of occurrence or transaction at issue in the case)*]. [A correct (certified) copy of said ordinance is attached as Exhibit A and made a part hereof.]

[2. The ordinance provides, in part, _____ (*allege the substance of material parts of the ordinance, verbatim or by allegations summarizing its terms and showing their legal effect, as an aid to appreciation of the significance of subsequent allegations in the pleading or paper*).]

3. _____ [*Specify pleading party, e.g.,* Plaintiff] requests that judicial notice be taken of the ordinance.

[2] Use of Form

The foregoing allegation is for use in a pleading to allege the existence of an ordinance.

Matters that are judicially known do not need to be pleaded [*Loranger v. Nadeau (1932) 215 Cal. 362, 364-366, 10 P.2d 63* , overruled on other grounds, *Reich v. Purcell (1967) 67 Cal. 2d 551, 555, 63 Cal. Rptr. 31, 432 P.2d 727*]. Ordinances, however, are not subject to mandatory judicial notice but to permissive judicial notice which becomes mandatory only if a party requests notice to be taken, gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request, and furnishes the court with sufficient information to enable it to take judicial notice of the matter [*see Evid. Code §§ 452(b), 453*]. Paragraph 3 of the foregoing allegation may be included in a pleading to provide notice of a request for judicial notice of the ordinance.

For further discussion and forms to use in requesting judicial notice generally, see Ch. 321, *Judicial Notice* .

[3] Allegation of Ordinance

An ordinance or private statute may be alleged by reference to its title and day of passage [*Code Civ. Proc. § 459*]. Citation of a number or popular name, attachment of a copy, and allegation of relevant terms of the ordinance or private statute are not necessary but may be provided in order to clarify the pleading.

[4] State Statutes

Pleading ordinance or private statute by title and day of passage as sufficient. *Code Civ. Proc. § 459*

Judicial notice of regulations and ordinances of public entities. *Evid. Code § 452(b)*

Judicial notice as mandatory on noticed request and furnishing of information *Evid. Code § 453*

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46-531 California Forms of Pleading and Practice--Annotated § 531.151

§ 531.151 Allegation of Substance of Ordinance

[1] FORM Allegation of Substance of Ordinance

1. At all times herein mentioned, there existed in full force and effect in the _____ [*specify county or municipal corporation, e.g.,* County of Paradise] a certain _____ [municipal *or* county] ordinance providing as follows: _____ [*set forth the substance of the ordinance relied on, verbatim or by allegations summarizing its terms and showing their legal effect*]. [A correct (certified) copy of the ordinance is attached as Exhibit A and made a part hereof.]

2. _____ [*Specify pleading party, e.g.,* Plaintiff] requests that judicial notice be taken of the ordinance.

[2] Use of Form

The foregoing allegation is for use in pleading an ordinance. As an alternative to pleading an ordinance by title and day of passage, as authorized by *Code Civ. Proc. § 459* [*see § 531.150*], an ordinance may be pleaded by setting forth the substance of the provision relied on or by incorporating a copy of the ordinance by reference [*Clements v. T.R. Bechtel Co. (1954) 43 Cal. 2d 227, 241, 273 P.2d 5*].

Paragraph 2 of the form may be included in a pleading to provide notice of a request for judicial notice of the ordinance [*see Evid. Code § 453(a)*; for discussion, *see § 531.150*].

[3] Decisions

Pleading adoption and effect or language of ordinance as alternative to pleading title and day of passage. *Simpson v. City of Los Angeles (1953) 40 Cal. 2d 271, 277, 253 P.2d 464 , appeal dismissed, 346 U.S. 802, 74 S. Ct. 37, 98 L. Ed. 333* ; *Taliaferro v. Wampler (1954) 127 Cal. App. 2d 306, 308, 273 P.2d 829*

[4] Cross Reference

See also Comments and References to § 531.150

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46-531 California Forms of Pleading and Practice--Annotated § 531.152

§ 531.152 Allegations of Compliance With Conditions Precedent Under Statute or Ordinance [Code Civ. Proc. § 459]

[1] FORM Allegations of Compliance With Conditions Precedent Under Statute or Ordinance [Code Civ. Proc. § 459]

[*EITHER*]

Plaintiff duly performed all the conditions precedent to _____ [the bringing of this action *or specify right derived from statute*] required by _____ [*cite or identify statute or ordinance*].

[*OR*]

Plaintiff _____ [*specify condition precedent generally, e.g.,* gave notice to defendant] in the manner and within the time provided by _____ [*specify, e.g.,* law *or cite or identify statute or ordinance*].

[*OR*]

The _____ [*specify act requiring conditions precedent, e.g.,* sale] in all respects complied with the provisions of law contained in _____ [*cite statutes, e.g.,* Division 5, Chapter 7 of the Food and Agricultural Code].

[2] Use of Form

The foregoing allegations are alternatives for use in alleging performance of conditions precedent under a statute, an ordinance of a county or municipal corporation, or of a right derived therefrom. If statutory conditions are not pleaded, the complaint will be subject to a general demurrer even if the existence of the conditions does not appear on the face of the complaint, because the court takes judicial notice of their existence [*see Code Civ. Proc. § 430.30(a)*; *Evid. Code §§*

451(a), 452(b)].

When plaintiff is relying on an ordinance as part of his or her cause of action, this form may be combined with § 531.150 or 2, pleading the ordinance and requesting that judicial notice be taken of it.

[3] Contents of Allegation

The allegations allege as a conclusion the performance of a condition precedent under a statute or an ordinance of a county or municipal corporation. In making the allegation, it is not necessary to state the facts showing performance, but it may be stated generally that the party duly performed all the conditions on his or her part required by the statute or ordinance. If the allegation is controverted, the party pleading performance must establish facts showing such performance at trial [*Code Civ. Proc. § 459*].

[4] State Statutes

Pleading compliance with conditions precedent under statute or ordinance. *Code Civ. Proc. § 459*

[5] Decisions

Illustrative allegations held sufficient under *Code Civ. Proc. § 459*. *Blumer v. Kirkman Corporation (1952) 38 Cal. 2d 480, 485, 241 P.2d 17* ; *Motor City Sales v. Superior Court (1973) 31 Cal. App. 3d 342, 347-348, 107 Cal. Rptr. 280* ; *Rembold v. San Francisco (1952) 113 Cal. App. 2d 795, 798, 249 P.2d 58* ; *Bank of America v. McLaughlin etc. Co. (1940) 40 Cal. App. 2d 620, 635, 105 P.2d 607 , cert. denied, 313 U.S. 571, 61 S. Ct. 958, 85 L. Ed. 1529 (1941)* ; *Ley v. Babcock (1931) 118 Cal. App. 525, 527, 5 P.2d 620*

Allegation of compliance with statutory conditions precedent as necessary to state cause of action. *First Tr. & Sav. Bank v. City of Pasadena (1942) 21 Cal. 2d 220, 221-223, 130 P.2d 702* ; *People v. Ballerino (1893) 99 Cal. 598, 600, 34 P. 330* ; *Sierra Inv. Corp. v. County of Sacramento (1967) 252 Cal. App. 2d 339, 346, 60 Cal. Rptr. 519* ; *Chas. L. Harney, Inc. v. State of California (1963) 217 Cal. App. 2d 77, 101-102, 31 Cal. Rptr. 524* (questioned as to substance of condition precedent in *Savage v. State of California (1970) 4 Cal. App. 3d 793, 796, 84 Cal. Rptr. 650*)

Allegation held insufficient. *J.T. Jenkins Co. v. Kennedy (1975) 45 Cal. App. 3d 474, 481-482, 119 Cal. Rptr. 578*

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46-531 California Forms of Pleading and Practice--Annotated § 531.153

§ 531.153 Allegation of Violation of Statute or Ordinance

[1] FORM Allegation of Violation of Statute or Ordinance

1. On or about _____ [*date*], at _____ [*address or location*] _____ [*allege acts or omissions in violation of statute, e.g.*, defendant, a retail automobile dealer, sold to plaintiff a motor vehicle, taking plaintiff's old car in trade and accepting an assignment of the insurance policy pertaining to plaintiff's old car. Defendant has collected $ _____ on the insurance policy, but has failed and refused to credit that amount toward plaintiff's monthly payments or to refund the amount to plaintiff] in violation of _____ [*cite or identify statute or ordinance, e.g., Section 18450 of the Business and Professions Code*], then and there in full force and effect [which provides that: _____ (*set forth relevant portions of ordinance, when ordinance is involved*)].

[2. Plaintiff requests that judicial notice be taken of _____ (*cite or identify ordinance relied on, if any, in Paragraph 1*). (A true and correct copy of that ordinance, certified as such by _____ (*certifying official*), is attached as Exhibit A and made a part hereof.)]

[2] Use of Form

The foregoing allegation is for use in alleging violation of a statutory duty or a duty imposed by ordinance in an action to enforce a liability or penalty imposed by the statute or ordinance. It is not necessary to plead or refer to a statute relied on as creating a duty when the action is one predicated on defendant's negligence and is not one to enforce a liability or penalty imposed by statute or ordinance. When the case is predicated on negligence, the statute or ordinance is merely evidentiary, and may be introduced at trial without being pleaded [*McNeill v. A. Teichert & Son, Inc. (1955) 137 Cal. App. 2d 5, 8-9, 289 P.2d 595* (ordinance); *Jackson v. Hardy (1945) 70 Cal. App. 2d 6, 12, 160 P.2d 161* (statute)]. Although violations of statutes are frequently alleged without objection in connection with general allegations of negligence, this practice is improper, and the statutory references may be striken as surplusage [*see Szopieray v. West Berkeley etc. Co. (1924) 194 Cal. 106, 113, 227 P. 720]* .

The optional second paragraph is for use if Paragraph 1 relies on an ordinance, and is designed as a request and notice of a request for judicial notice of the ordinance [*see Evid. Code §§ 452(b), 453*; *see § 531.150*]. If the duty relied on in

Paragraph 1 arises out of a California or federal public statute, the second paragraph is unnecessary because judicial notice of such statutes is always mandatory [*see Evid. Code § 451(a)*; for a discussion of public versus private statutes, *see § 531.11*].

For forms of allegation of violation of statutes and ordinances relating to any particular subject, see the chapter relating to that subject in this set.

[3] Decisions

Statute or ordinance as evidentiary matter that need not be pleaded in action for negligence rather than for enforcement of penalty or liability imposed by statute or ordinance. *Szopieray v. West Berkeley etc. Co. (1924) 194 Cal. 106, 113, 227 P. 720* ; *Opitz v. Schenck (1918) 178 Cal. 636, 638-639, 174 P. 40* ; *Karl v. C.A. Reed Lumber Co. (1969) 275 Cal. App. 2d 358, 361-362, 79 Cal. Rptr. 852*

Pleading of every fact essential to existence of statutory cause of action as required. *Susman v. City of Los Angeles (1969) 269 Cal. App. 2d 803, 809, 75 Cal. Rptr. 240*

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46-531 California Forms of Pleading and Practice--Annotated § 531.154

§ 531.154 Allegation of Foreign or Sister State Statute or Ordinance

[1] FORM Allegation of Foreign or Sister State Statute or Ordinance

1. At all times herein mentioned, there was in full force and effect in _____ [*specify place of transaction or occurrence at issue*] a certain _____ [statute *or* ordinance] entitled and known as _____ [*specify title*], which provided _____ [*set forth pertinent provisions of foreign or sister state statute or ordinance*]. [A true and correct copy of the _____ (statute *or* ordinance), certified as such by (*certifying official*), is attached as Exhibit A and made a part hereof.]

2. _____ [*Specify pleading party, e.g.,* Plaintiff] requests that judicial notice be taken of the _____ [statute *or* ordinance].

3. _____ [*Allege facts showing applicability of foreign or sister state statute or ordinance to the facts and issues of the case*].

[2] Use of Form

The foregoing allegation is for use in alleging foreign or sister state statutes or ordinances of public entities in foreign nations or sister states.

Statutes and ordinances of foreign countries and sister states are subject to permissive judicial notice which may be made mandatory by request, and Paragraph 2 of this form is designed to request and give notice of a request for judicial notice [*Evid. Code §§ 452(a), (b), (f), 453*; for discussion, *see § 531.150*].

[3] Allegation of Statute or Ordinance

The allegation sets out information sufficient to identify the foreign or sister state statute or ordinance which is relevant to the case.

[4] State Statutes

Judicial notice of sister state statutes. *Evid. Code § 452(a)*

Judicial notice of ordinances of public entities in sister states. *Evid. Code § 452(b)*

Judicial notice of foreign statutes and ordinances of public entities in foreign nations. *Evid. Code § 452(f)*

Judicial notice as mandatory on noticed request and furnishing of information. *Evid. Code § 453*

Information court may consider in determining whether to take judicial notice. *Evid. Code § 454*

Parties as having opportunity to present information regarding matter to be judicially noticed. *Evid. Code § 455*

Appointment of person learned in the subject matter to be judicially noticed. *Evid. Code § 460*

Proof of official writings. *Evid. Code §§ 1530, 1531*

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46-531 California Forms of Pleading and Practice--Annotated § 531.155

§ 531.155 Notice of Request [Evid. Code § 453(a)] That Court Take Judicial Notice of Statute or Ordinance of Sister State, Foreign Statute, or Ordinance of Public Entity

[1] FORM Notice of Request [Evid. Code § 453(a)] That Court Take Judicial Notice of Statute or Ordinance of Sister State, Foreign Statute, or Ordinance of Public Entity

PLEASE TAKE NOTICE that _____ [*specify party, e.g.,* plaintiff], _____ [*name*], _____ [*specify when judicial notice will be requested to be taken, e.g.,* at the hearing on the motion for summary judgment], will request the court to take judicial notice of _____ [*specify matter to be noticed, e.g.,* _____ County ordinance _____ (*number*), duly enacted and passed by the _____ County Board of Supervisors on _____ [*date*], and entitled _____].

[*EITHER, in the case of sister state statute*]

The request will be made on the ground that the statute is subject to judicial notice under *Evid. Code §§ 452(a)* and *453*.

[*OR, in case of foreign statute or ordinance*]

The request will be made on the ground that the _____ [statute *or* ordinance] is subject to judicial notice under *Evid. Code §§ 452(f)* and *453*.

[*OR, in case of ordinance of public entity in California or sister state*]

The request will be made on the ground that the ordinance is subject to judicial notice under *Evid. Code §§ 452(b)* and *453*.

[2] Use of Form

The foregoing notice of request is for use in giving notice of a request that the court take judicial notice of an ordinance of a public entity of California, a sister state, or a foreign nation. The notice may also be used to give notice of a request to take notice of a sister state or foreign statute. The form may be adapted for use in giving notice of a request that the court take judicial notice of other matters listed in *Evid. Code § 452* [*see Evid. Code § 453*; for discussion of matters listed in *Evid. Code § 452, see § 531.13*].

This form of notice should be used when notice of a request that judicial notice be taken was not given through the pleadings. Even if notice has been given through the pleadings, this form may be used in connection with a pretrial proceeding, such as a motion for summary judgment, to make it clear that a request for judicial notice to be taken will be made at the hearing on the pretrial proceeding.

This form does not provide a complete form of notice, but is intended for incorporation in a notice of motion or points and authorities relating to the pretrial proceeding at which notice will be requested. If the issue of judicial notice should arise when no other papers are called for, the foregoing form may be adapted for use by the addition of a caption, introduction, and signature block.

[3] Cross References

See also *§ 531.150, 531.154, 531.156*

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46-531 California Forms of Pleading and Practice--Annotated § 531.156

§ 531.156 Declaration of City Clerk That Ordinance Was in Effect on a Given Date

[1] FORM Declaration of City Clerk That Ordinance Was in Effect on a Given Date

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DECLARATION OF CITY CLERK AS TO EXIST-
Defendant.	)	ENCE OF ORDINANCE
	)	
	)	

_____

I, _____ [*name*], the undersigned, declare that I am the City Clerk in and for the City of _____, _____ County, California; I have searched the records maintained in my office and find that Ordinance No. _____, entitled _____, was enacted by the City Council, City of _____, on _____ [*date*], and that the ordinance was in effect from that date and was still in effect on _____ [*relevant date*].

Declarant further states that [Section _____ of] the ordinance reads as follows:
_____ [*set out ordinance*].

[A certified copy (of Section _____) of the ordinance is attached as Exhibit A and made a part of this declaration.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]
City Clerk

[2] Use of Form

The foregoing declaration may be used to furnish a court with sufficient information to enable it to take judicial notice of a city ordinance [*see Evid. Code §§ 452(b), 453-455*]. It may be adapted for use in furnishing the court with information regarding a county ordinance.

Use of this form is not necessary if a copy of the ordinance is available that purports to be published by the authority of the public entity in which the ordinance is kept, because such a copy is also prima facie evidence of the existence and content of the ordinance [*Evid. Code § 1530(a)(1)*].

[3] Contents of Declaration

Although *Evid. Code § 453* does not define what constitutes sufficient information to enable a court to take judicial notice of a matter, a copy of a writing in the custody of a public entity attested or certified [or declared (*Code Civ. Proc. § 2015.5*)] as a correct copy by a public employee, or by his or her deputy, having legal custody of the writing is prima facie evidence of the existence and content of the writing [*Evid. Code § 1530(a)(2)*]. Because the declaration would be prima facie evidence of an ordinance, it would of necessity be sufficient information to enable the court to take judicial notice of it.

The declaration states that the copy is a correct copy of the original, or of a specified part of the original, as is required in an attestation or certificate (or declaration under *Code Civ. Proc. § 2015.5*) of a copy of a writing for the purpose of evidence [*Evid. Code § 1531*]. The declaration also states the day of passage of the ordinance, and that the ordinance was still in effect on the date of the transaction or occurrence at issue in the case in order to show its existence at the pertinent time.

[4] State Statutes

Sufficient evidence as required to be presented to make judicial notice of ordinance mandatory. *Evid. Code §§ 452(b), 453*

Copy attested or certified as correct copy as prima facie evidence. *Evid. Code § 1530(a)(2)*

Contents of attestation or certificate of correctness of copy. *Evid. Code § 1531*

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§ 533.syn Synopsis to Chapter 533: STIPULATIONS

§ 533.01 Scope of Chapter

§ 533.02 Cross References

§§ 533.03-533.09 [Reserved]

§ 533.10 Governing Law

[1] Attorney's Authority

[2] Local Rule Limitations

§ 533.11 Stipulation Defined

§ 533.12 Authority of Attorney to Bind Client

[1] Implied Authority

[2] Express Authority

§ 533.13 Particular Matters to Which Parties May Effectively Stipulate

[1] Extending Service of Process Requirements

[2] Extending or Waiving Pleading Requirements

[3] Preserving Confidentiality of Documents

[4] Dismissing Claims

[5] Narrowing Issues or Defenses

[6] Admitting Facts or Waiving Evidentiary Requirements

[a] Admitting Facts

[b] Admission of Otherwise Inadmissible Evidence

[c] Evidence Introduced in Other Proceedings

[d] Admission of Depositions

[e] Expert Witnesses

[f] Judicial Notice

[7] Modifying Trial Procedures

[8] Settlement and Stipulated Judgment

[a] Stipulating to Entry of Judgment

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[9] Matters Affecting Appellate Procedure or Review

§ 533.14 Particular Matters to Which Parties May Not Effectively Stipulate

[1] Matters That Are Illegal or Contrary to Public Policy

[2] Matters That Constitute Questions of Law

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PART I. SCOPE

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§ 533.01 Scope of Chapter

This chapter discusses the requirements, scope and effect of stipulations, as well as the method for seeking relief from a stipulation's terms. The chapter contains the following forms:

- General form for a stipulation [*see § 533.40*].
- Stipulation of facts [*see § 533.41*].
- Notice of motion and supporting declaration to set aside a stipulation [*see § 533.42*] and order granting the motion [*see § 533.43*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral Overview

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§ 533.02 Cross References

For discussion of the general authority of an attorney to control litigation, see *Ch. 72, Attorney Practice and Ethics, § 72.190* et seq.

Many other chapters have discussion and forms relating to stipulations on specific subject matter as follows:

- For forms for use in obtaining continuances or dropping cases from the trial calendar, see Ch. 136, *Continuances* .

- For discussion and forms for use to obtain the entry of a judgment by stipulation, see *Ch. 318, Judgments, § 318.40* et seq.

- For procedure and forms for use to stipulate to the amendment of pleadings and the filing of supplemental pleadings, see Ch. 21, *Amended and Supplemental Pleadings* .

- For forms for use to stipulate to the use of answers on file and to extend time to plead, see Ch. 26, *Answers* .

- For procedures and a form for use to stipulate to a general reference, see Ch. 38, *Reference* .

- For forms for use to stipulate to the substitution of a security deposit in lieu of an undertaking, to the abandonment of an appeal, and to the consolidation of appeals, see *Ch. 43, Appeal: Stay of Proceedings, § 43.71, Ch. 48, Appeal: Abandonment, Dismissal, and Stipulated Reversal, § 48.51 -48.52,* and *Ch. 42, Appeal: Notice of Appeal, § 42.100,* respectively.

- For a form for use to stipulate to judicial arbitration, see Ch. 36, *Judicial Arbitration* .

- For procedures and forms for use to stipulate to the consolidation of actions or of issues for trial, see Ch. 125, *Consolidation, Severance, and Coordination of Actions*

- For procedures and forms for use in stipulations relating to discovery, see Ch. 190- 200: *Discovery* .

- For a form for use to stipulate to the discharge of an interpleading party, see Ch. 314, *Interpleader* .

- For procedures and forms for use to stipulate to the appointment of temporary judges, and for disqualification or transfer to a different judge, see Ch. 317, *Judges* .

- For a form for use to stipulate to the calling of alternate jurors when a lengthy trial is anticipated, see *Ch. 322, Juries and Jury Selection, § 322.101*.

- For procedures and a form for use to stipulate to an extension of time to file affidavits supporting and opposing a motion for new trial, see *Ch. 371, Motions After Trial, § 371.60* et seq.

- For forms for use to stipulate to continuances of pretrial conferences, to corrections of pretrial orders, and to settlement conferences with binding determinations, see Ch. 425, *Pretrial Proceedings* ,.

- For forms for use to stipulate to the extension of time, see Ch. 524, *Shortening and Extension of Time* .

- For a form for use to submit a controversy on an agreed statement of facts, see Ch. 534, *Submitted Controversy (Agreed Case)*.

- For forms for use to stipulate to the extension of time to bring an action to trial, to the removal of a case from the calendar, and to the use of photocopies as evidence at trial, see Ch. 551, *Trial* .

- For a form for use to stipulate to the change of the place of trial, see Ch. 571, *Venue* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedurePretrial MattersContinuances

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[Reserved]

§§ 533.03[Reserved]

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§ 533.10 Governing Law

[1] Attorney's Authority

An attorney's authority to enter into a stipulation is governed by *Code Civ. Proc. § 283*.

[2] Local Rule Limitations

All trial courts are required to implement the Trial Court Delay Reduction Act, *Gov. Code § 68600 et seq.* through local rules [*Gov. Code §§ 68605.5, 68620*]. These local rules may restrict the availability of stipulations [Los Angeles Co. Super. Ct. Rules, Rule 7.10(a) (as general rule, no time standard may be modified, extended, or avoided by stipulation unless written order approving stipulation is first obtained from judge hearing case)].

Local trial delay reduction rules must, however, allow the parties to agree, by stipulation filed with the court within 30 days of service of the responsive pleadings, to a continuance not to exceed 30 days [*Gov. Code § 68616(d)*].

For further discussion, see Ch. 552, *Trial Court Delay Reduction* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityGeneral OverviewCivil ProcedureCounselGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedurePretrial MattersContinuances

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§ 533.11 Stipulation Defined

A stipulation is an agreement entered into between counsel, relating to business before the court [*see Spindell v. State Bar (1975) 13 Cal. 3d 253, 260-261, 118 Cal. Rptr. 480, 530 P.2d 168]* . Unless contrary to law, court rule or policy, it is also binding on the court [*T & O Mobile Homes, Inc. v. United California Bank (1985) 40 Cal. 3d 441, 451 n.11, 220 Cal. Rptr. 627, 709 P.2d 430]* .

It may be made at any step of the action or proceeding [*Code Civ. Proc. § 283*]. For discussion of matters to which the parties may stipulate, see *§ 533.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral Overview

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46-533 California Forms of Pleading and Practice--Annotated § 533.12

§ 533.12 Authority of Attorney to Bind Client

[1] Implied Authority

An attorney has the authority to bind his or her client in any of the steps of an action or proceeding [*see Code Civ. Proc. § 283(1)*]. An attorney may enter into stipulations without a client's prior, express authority with respect to tactical decisions or necessary or incidental matters regarding the management of the suit [*Blanton v. Womancare, Inc. (1985) 38 Cal.3d 396, 404, 212 Cal. Rptr. 151, 696 P.2d 645* ; *see also Hayman v. Block (1986) 176 Cal. App. 3d 629, 634 n.5, 222 Cal. Rptr. 293* (attorney has control over presentation of evidence and can enter into stipulations without client's concurrence)]. An attorney also has the authority to stipulate to a temporary judge to hear the action without first obtaining express authority from the client [*In re Horton (1991) 54 Cal. 3d 82, 92-93, 284 Cal. Rptr. 305, 813 P.2d 1335]* . In these instances, the authority of the client is implied and the client is bound by the stipulation.

[2] Express Authority

An attorney must obtain his or her client's consent before entering into a stipulation which impairs a substantial portion of the case or involves a waiver or compromise of a fundamental right [*Levy v. Superior Court (1995) 10 Cal. 4th 578, 584, 41 Cal. Rptr. 2d 878, 896 P.2d 171* (agreement to settle signed by attorneys is not enforceable under *Code Civ. Proc. § 664.6*); *Blanton v. Womancare, Inc. (1985) 38 Cal. 3d 396, 407, 212 Cal. Rptr. 151, 696 P.2d 645* (attorney cannot stipulate to binding arbitration without client's authority); *see also Linsk v. Linsk (1969) 70 Cal. 2d 272, 276-278, 74 Cal. Rptr. 544, 449 P.2d 760]* . However, a client may ratify an unauthorized stipulation entered into by his or her attorney [*Redsted v. Weiss (1945) 71 Cal. App. 2d 660, 664-665, 163 P.2d 105]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityExpress AuthorityBusiness & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityImplied AuthorityGeneral OverviewCivil ProcedureCounselGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral Overview

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§ 533.13 Particular Matters to Which Parties May Effectively Stipulate

[1] Extending Service of Process Requirements

The parties may stipulate to extend the time required to effectuate service of process [*Big Bear Mun. Water Dist. v. Superior Court (1969) 269 Cal. App. 2d 919, 923, 75 Cal. Rptr. 580]* . However, local rules may limit the length of an extension (*see § 533.10 [2]*). For further discussion on impact of an extension on dismissal of the action, see *Ch. 212, Dismissal, § 212.60* et seq.

[2] Extending or Waiving Pleading Requirements

Subject to local rule limitations, discussed in *§ 533.10 [2]*, stipulations may extend the time to move, answer, or otherwise plead to the complaint [*see, e.g., Farrar, Herrick & Associates v. Safecare Co. (1981) 115 Cal. App. 3d 123, 127, 131, 171 Cal. Rptr. 191* ; *Consolidated Dock & Storage Co. v. Superior Court (1971) 18 Cal. App. 3d 949, 951, 952, 96 Cal. Rptr. 254]* .

A stipulation granting an open extension of time to respond to a complaint will not preclude dismissal of an action for delay in prosecution [*see Marra v. Mission Foods Corp. (1993) 19 Cal. App. 4th 724, 728, 23 Cal. Rptr. 2d 741* ; *Martin v. K & K Properties, Inc. (1987) 188 Cal. App. 3d 1559, 1566, 234 Cal. Rptr. 161]* .

A stipulation to take a motion off calendar may have unintended consequences as, for example, where a demurrer was taken off calendar in exchange for plaintiff's agreement to file an amended complaint. The court dismissed the action with prejudice on the basis that the stipulation deemed the demurrer sustained without leave to amend [*see Harding v. Collazo (1986) 177 Cal. App. 3d 1044, 1053, 223 Cal. Rptr. 329]* .

[3] Preserving Confidentiality of Documents

Parties commonly enter into stipulations to preserve and protect the confidentiality of certain documents during litigation. The parties may stipulate to a protective order in anticipation of or in response to written discovery requests and then seek the court's approval [*Code Civ. Proc. § 2017(c)* (*Code Civ. Proc. § 2017.020* operative July 1, 2005), *Code Civ. Proc. § 2019* (*Code Civ. Proc. § 2019.030* operative July 1, 2005), *Code Civ. Proc. § 2021* (*Code Civ. Proc.*

§ 2016.030 operative July 1, 2005)]. A stipulated protective order may include adescription of documents which are to remain sealed, which are to be redacted to conceal confidential information, and a procedural mechanism for the parties to challenge confidential designations of documents [*see e.g., Flagship Federal Sav. Bank v. Wall (S.D. Cal. 1990) 748 F.Supp. 742, 749]* .

[4] Dismissing Claims

Stipulations may provide for the dismissal or abatement of an action [*see, e.g., Reid v. Valley Restaurants, Inc. (1957) 48 Cal. 2d 606, 609-610, 311 P.2d 473* ; *Cal-Vada Aircraft, Inc. v. Superior Court (1986) 179 Cal. App. 3d 435, 448, 224 Cal. Rptr. 809]* .

[5] Narrowing Issues or Defenses

The parties may stipulate to limit the issues or defenses to be adjudicated [*Title Ins. Co. v. State Bd. of Equalization (1992) 4 Cal. 4th 715, 733, 14 Cal. Rptr. 2d 822, 842 P.2d 121* ; *see also County of Sacramento v. Workers' Comp. Appeals Bd. (2000) 77 Cal. App. 4th 1114, 1117, 1119, 92 Cal. Rptr. 2d 290* (stipulation clarifying issues in controversy); *Golden State Homebuilding Associates v. City of Modesto (1994) 26 Cal. App. 4th 601, 614, 31 Cal. Rptr. 2d 572* (limiting scope of court's ruling to real property lots at issue)]. A stipulation may also admit liability or damages [*Gonzales v. Pacific Greyhound Lines (1950) 34 Cal. 2d 749, 754, 214 P.2d 809]* .

[6] Admitting Facts or Waiving Evidentiary Requirements

[a] Admitting Facts

Stipulations are frequently made concerning evidentiary matters. Proof of facts may be dispensed with by stipulations in civil or criminal actions [*People v. Adams (1993) 6 Cal. 4th 570, 580-582, 24 Cal. Rptr. 2d 831* P.2d 831; *Greatorex v. Board of Administration (1979) 91 Cal. App. 3d 54, 58, 154 Cal. Rptr. 37]* . Once a party has stipulated to a fact, he or she is bound by the stipulation even if other provisions of the stipulation are later set aside [*Rossman v. State Bar (1985) 39 Cal. 3d 539, 542, 216 Cal. Rptr. 919, 703 P.2d 390]* . For discussion of relief from a stipulation based on mistake of fact or law, *see § 533.17[1][b], below*.

[b] Admission of Otherwise Inadmissible Evidence

The parties may stipulate to the admission of evidence even if the evidence is otherwise inadmissible [*County of Alameda v. Risby (1994) 28 Cal. App. 4th 1425, 1430, 34 Cal. Rptr. 2d 333* (paternity blood test results admissible pursuant to stipulation); *Civil Service Assn. v. Civil Service Com. (1983) 139 Cal. App. 3d 449, 459, 188 Cal. Rptr. 806* (polygraph test results admissible pursuant to stipulation; overruled on other grounds)].

[c] Evidence Introduced in Other Proceedings

Parties may also stipulate to admit evidence introduced in other actions or proceedings [*Werner v. State Bar (1944) 24 Cal. 2d 611, 614, 150 P.2d 892* ; *see also In re Kerry O. (1989) 210 Cal. App. 3d 326, 332, 258 Cal. Rptr. 448* (stipulation to use child's prior testimony in dependency proceeding)].

[d] Admission of Depositions

Depositions may be admitted in evidence by stipulation [*see, e.g.,* Los Angeles County Employees' Assn. v. Sanitation Dist. No. 2 *(1979) 89 Cal. App. 3d 294, 300, 152 Cal.Rptr. 415]* .

[e] Expert Witnesses

The parties may also stipulate to the qualifications and findings of an expert witness [*McGuire v. Baird (1937) 9 Cal. 2d 353, 356, 70 P.2d 915* ; *People v. McCoy (1953) 115 Cal. App. 2d 565, 568, 252 P.2d 371]* .

[f] Judicial Notice

The parties may stipulate that the trial court take judicial notice of particular matters [*Laguna Beach Taxpayers' Asso. v. City Council of Laguna Beach (1960) 187 Cal. App. 2d 412, 416, 9 Cal. Rptr. 775]* .

[7] Modifying Trial Procedures

Stipulations are frequently made pertaining to procedural steps during trial. For example, stipulations may:

- Extend the time for trial or for a hearing on a motion [*Code Civ. Proc. § 1054*; *see also, Miles v. Speidel (1989) 211 Cal. App. 3d 879, 884, 259 Cal. Rptr. 582* (extension of five-year period to bring action to trial); *but see § 355.10 [2*], discussing the impact of rules under the Trial Court Delay Reduction Act, *Gov. Code § 68600 et seq.*].

- Provide that the action be tried by a temporary judge or special master [*see, e.g., In re Horton (1991) 54 Cal. 3d 82, 97-98, 284 Cal. Rptr. 305, 813 P.2d 1335]* .

- Provide for the consolidation of actions with court approval under *Code Civ. Proc. § 1048(a)* [*see, e.g., Ranchers Bank v. Pressman (1971) 19 Cal. App. 3d 612, 616, 97 Cal. Rptr. 78]* .

- Designate the content of jury instructions [*see, e.g., Cracknell v. Fisher Governor Co. (1967) 247 Cal. App. 2d 857, 862, 56 Cal. Rptr. 64]* .

- Waive findings by the court [*see, e.g., Worcester v. Worcester (1966) 246 Cal. App. 2d 56, 62, 54 Cal. Rptr. 436]* .

- Provide that the case be taken under submission without further hearing [*see, e.g., Jacoby v. Feldman (1978) 81 Cal. App. 3d 432, 445, 446, 146 Cal. Rptr. 334]* .

- Waive the requirement that the court provide a statement of reasons for granting a new trial when it has expressly adopted previously filed reasons [*see, e.g., Herman v. Shandor (1970) 8 Cal. App. 3d 476, 481, 87 Cal. Rptr. 443]* .

- Provide that the court determine liability issues before deciding whether to certify the case as a class action [*Woosley v. State of California (1992) 3 Cal. 4th 758, 794, 13 Cal. Rptr. 2d 30, 838 P.2d 758* , *cert. denied, 124 L. Ed. 2d 639 (1993)]* .

[8] Settlement and Stipulated Judgment

[a] Stipulating to Entry of Judgment

The parties to an action or proceeding may stipulate to the entry of judgment [*see, e.g., California State Auto. Ass'n Inter-Ins. Bureau v. Superior Court (1990) 50 Cal. 3d 658, 664, 268 Cal. Rptr. 284, 788 P.2d 1156* ; *Xebec Development Partners, Ltd. v. National Union Fire Ins. Co. (1993) 12 Cal. App. 4th 501, 574, 15 Cal. Rptr. 2d 726]* . The court may enter judgment on motion of a party pursuant to the terms of a settlement agreement that has either been stipulated to orally in court or by written agreement [*Code Civ. Proc. § 664.6*; *Corkland v. Boscoe (1984) 156 Cal. App. 3d 989, 994, 203 Cal. Rptr. 356]* . If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement [*Code Civ. Proc. § 664.6*].

A Section 664.6 stipulation requires the direct participation of the parties; a stipulation signed only by the attorneys is not enforceable under Section 664.6 [*Levy v. Superior Court (1995) 10 Cal. 4th 578, 585-586, 41 Cal. Rptr. 2d 878, 896 P.2d 171]* . For further discussion of Section 664.6, see Ch. 520, *Settlement and Release* .

For forms of stipulation and notice of motion for entry of judgment pursuant to stipulation, see *Ch. 318, Judgments, § 318.40* et seq., for disscussion regarding stipulating to the reversal of a judgment as part of a settlement, see Ch. 48, *Appeal: Abandonment, Dismissal, and Stipulated Reversal* .

[b] Res Judicata and Collateral Estoppel

A stipulated judgment is a decision on the merits [*Greatorex v. Board of Administration (1979) 91 Cal. App. 3d 54, 58, 154 Cal. Rptr. 37]* , and the doctrines of res judicata and collateral estoppel apply to those claims and issues embraced within the consent judgment [*Greatorex v. Board of Administration (1979) 91 Cal. App. 3d 54, 58, 154 Cal. Rptr. 37* ; *Ellena v. State of California (1977) 69 Cal. App. 3d 245, 260, 138 Cal. Rptr. 110]* . A stipulated judgment normally determines all matters placed in issue by the pleadings but the parties can agree to restrict the scope of the judgment by expressly withdrawing an issue from it [*see In re Marriage of Buckley (1982) 133 Cal. App. 3d 927, 935, 184 Cal. Rptr. 290* ; *Ellena v. State of California (1977) 69 Cal.App. 3d 245, 260, 138 Cal. Rptr. 110]* . For further discussion, see Ch. 491, *Res Judicata* .

For forms of stipulation and notice of motion for entry of judgment pursuant to stipulation, see *Ch. 318, Judgments, § 318.40* et seq.

[9] Matters Affecting Appellate Procedure or Review

The parties may stipulate to appellate procedures, including:

- Voluntary abandonment and waiver of the right to appeal [*Cal. Rules of Ct., Rule 8.244(b)*; *In re Cody W. (1994) 31 Cal. App. 4th 221, 231, 36 Cal. Rptr. 2d 848]* .

- Limitations of issues on appeal [*see, e.g., People v. Harris (1971) 18 Cal. App. 3d 1, 7, 95 Cal. Rptr. 468* ; *Phillips v. Patterson (1939) 34 Cal. App. 2d 481, 483, 93 P.2d 807]* .

- The issuance of a writ of supersedeas [*see, e.g., Willingham v. Pecora (1940) 40 Cal. App. 2d 123, 124, 104 P.2d 405]* .

- The preparation of a partial transcript [*Cal. Rules of Court, Rule 8.130(b)*].

Although parties may stipulate to have a judgment reversed or vacated, the appellate court is statutorily directed not to reverse or vacate the judgment unless the public interest outweighs the parties' reasons for the request [*see Code Civ. Proc. § 128(a)(8)*]. For further discussion, including the test used by the court, see *Ch. 48, Appeal: Abandonment, Dismissal, and Stipulated Reversal, § 48.12*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedurePleading & PracticeService of ProcessTime LimitationsExtensionsCivil ProcedureCounselGeneral OverviewCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureDismissalsVoluntary DismissalsStipulationsCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureTrialsGeneral OverviewCivil

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46-533 California Forms of Pleading and Practice--Annotated § 533.14

§ 533.14 Particular Matters to Which Parties May Not Effectively Stipulate

[1] Matters That Are Illegal or Contrary to Public Policy

A stipulation is not binding on the court if it is illegal or contrary to public policy [*see California State Auto. Ass'n Inter-Ins. Bureau v. Superior Court(1990) 50 Cal. 3d 658, 664, 268 Cal. Rptr. 284, 788 P.2d 1156]* . The benefits of statutes designed to protect the public interest and welfare cannot be limited or abridged by stipulation [*Wilson v. Wilson (1873) 45 Cal. 399, 405]* .

[2] Matters That Constitute Questions of Law

A stipulation will not bind the court on questions of law, including legal conclusions to be drawn from admitted or stipulated facts, or interpretations of the federal and California Constitutions, statutes, and ordinances [*Fields v. Blue Shield of California (1985) 163 Cal. App. 3d 570, 579, 580 n.5, 209 Cal. Rptr. 781* ; *County of Inyo v. City of Los Angeles (1984) 160 Cal. App. 3d 1178, 1183, 207 Cal. Rptr. 425]* .

[3] Matters Affecting Subject Matter Jurisdiction of Court

Jurisdiction over the subject matter of an action or proceeding generally cannot be conferred on the court, enlarged, or waived by stipulation of the parties [*Harrington v. Superior Court (1924) 194 Cal. 185, 188, 228 P. 15* ; *Norman I. Krug Real Estate Investments, Inc. v. Praszker (1990) 220 Cal. App. 3d 35, 47, 269 Cal. Rptr. 228]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsValidityContracts LawDefensesIllegal BargainsContracts LawDefensesPublic Policy Violations

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46-533 California Forms of Pleading and Practice--Annotated § 533.15

§ 533.15 Requirements for Stipulations

[1] Written Record

Code Civ. Proc. § 283(1), provides that a stipulation is effective at any of stage of an action or proceeding when filed with the clerk, or entered on the minutes of the court [*see Lipscomb v. Krause (1978) 87 Cal. App. 3d 970, 974, 151 Cal. Rptr. 465]* . The purpose of Section 283 is to ensure that there is a record of any stipulation that will preclude any question concerning its character or effect. The extent of the agreement must be ascertainable from the record--either from the minutes, if oral, or from a writing filed with the clerk [*Cathcart v. Gregory (1941) 45 Cal. App. 2d 179, 187, 113 P.2d 894]* . The terms of an oral stipulation entered in the minutes must be definite and certain to be valid and effective [*Harris v. Spinali Auto Sales, Inc. (1966) 240 Cal. App. 2d 447, 452, 49 Cal. Rptr. 610]* .

An unexecuted agreement that is neither embodied in a writing filed with the clerk nor entered on the minutes of the court is not binding and can be revoked at any time before it becomes executed [*McDowell v. Orsini (1976) 54 Cal. App. 3d 951, 960, 127 Cal. Rptr. 285]* .

[2] Exceptions to Requirement of Writing

Stipulations that are neither filed with the court nor entered on the minutes of the court will be recognized if they have been executed and cannot be nullified without doing an injustice to one party [*see Baker v. Ramirez (1987) 190 Cal. App. 3d 1123, 1135, 235 Cal. Rptr. 857* (stipulation set aside due to finding of injustice)].

An oral stipulation may be enforced based on the parties' conduct through either estoppel or ratification, despite the provisions of *Code Civ. Proc. § 283* [*Harding v. Collazo (1986) 177 Cal. App. 3d 1044, 1052, 223 Cal. Rptr. 329]* . For example, if, under the terms of a verbal stipulation, one party has received the advantage sought, or the other party has given up some right or lost some advantage, sothat it would be inequitable to insist that the stipulation is invalid, then the first party may not repudiate the stipulation on the ground that it was not entered in the court's minutes. If the party admits making the stipulation, it will be as binding as if entered in the minutes [*Harding v. Collazo (1986) 177 Cal. App. 3d 1044, 1052, 223 Cal. Rptr. 329* (party bound by stipulation to take hearing on demurrer off calendar and to file amended complaint by a certain date)]. If, however, the stipulation is disputed and there is no showing of estoppel or ratification, the stipulation will not be enforced [*Estate of Cattalini (1979) 97 Cal. App. 3d 366, 370-371, 158 Cal.*

Rptr. 640 (stipulation regarding division of broker's commission on sale of property in decedent's estate unenforceable)].

Thus, a stipulation entered into and fully executed by the parties in open court and duly reported in the trial proceedings, but not entered in the minutes, is binding on the parties [*Webster v. Webster (1932) 216 Cal. 485, 489-490, 491, 14 P.2d 522* ; *Cathcart v. Gregory (1941) 45 Cal. App. 2d 179, 187-188, 113 P.2d 894]* .

Similarly, the parties may not repudiate a written stipulation on the ground that it has not been filed with the clerk if they have acted on it to such an extent that it would be inequitable not to recognize its binding effect [*Smith v. Whittier (1892) 95 Cal. 279, 288-289, 30 P. 529* ; *Harding v. Collazo (1986) 177 Cal. App. 3d 1044, 1052, 223 Cal. Rptr. 329]* .

[3] Signature or Assent by Attorney of Record

When there is an attorney of record, no stipulation as to the conduct or disposal of an action can be entertained by the court unless signed or assented to by the attorney [*Wells Fargo & Co. v. San Francisco (1944) 25 Cal. 2d 37, 42-43 152 P.2d 625* ; *Toy v. Haskell (1900) 128 Cal. 558, 560, 61 P. 89]* . A definite and complete agreement usually does not require the signature of the parties to be effective [*see Johnston, Baker & Palmer v. Record Machine & Tool Co. (1960) 183 Cal. App. 2d 200, 206, 6 Cal. Rptr. 847]* . For further discussion of the scope of attorneys' authority to bind clients, see *§ 533.12*.

[4] Timely Filing of Written Stipulation

There is no time limit for filing a stipulation under *Code Civ. Proc. § 283*. The stipulation should be effective when filed if no injury is shown resulting from a delay in filing [*Clemens v. Gregg (1917) 34 Cal. App. 245, 253, 167 P. 294]* .

When filed, the stipulation becomes binding on the parties as of the date of its execution [*Smith v. Whittier (1892) 95 Cal. 279, 290, 30 P. 529]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsValidity

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46-533 California Forms of Pleading and Practice--Annotated § 533.16

§ 533.16 Construction and Effect

Stipulations are generally considered to be contracts [*Palmer v. City of Long Beach (1948) 33 Cal. 2d 134, 142, 199 P.2d 952* ; *Rappenecker v. Sea-Land Service, Inc. (1979) 93 Cal. App. 3d 256, 263, 155 Cal. Rptr. 516]* . In construing stipulations, courts apply the rules for construction of contracts [*J.C. Penney Co. v. Superior Court (1959) 52 Cal. 2d 666, 669, 343 P.2d 919* ; *Sy First Family Ltd. Partnership v. Cheung (1999) 70 Cal. App. 4th 1334, 1341, 83 Cal. Rptr. 2d 340* ; *Floystrup v. City of Berkeley Rent Stabilization Bd. (1990) 219 Cal. App. 3d 1309, 1318, 268 Cal. Rptr. 898]* .

The parties must set forth the terms of a stipulation clearly and properly if they intend to be bound by it, and a party cannot later complain if it is determined that his or her own carelessness resulted in the wrong choice of words [*Cohn v. Bugas (1974) 42 Cal. App. 3d 381, 392, 116 Cal. Rptr. 810]* . Thus, a court will interpret a stipulation using an objective standard to give effect to the mutual intent of the parties; it will not be construed so as to give it the effect of an admission of an act obviously intended to be controverted or a waiver of a right not plainly intended to be relinquished [*Searle v. Allstate Life Ins. Co. (1985) 38 Cal. 3d 425, 438-439, 212 Cal. Rptr. 466, 696 P.2d 1308]* .

It is immaterial that one of the parties had an undisclosed intention or belief as to what the stipulation meant [*Consolidated Dock & Storage Co. v. Superior Court (1971) 18 Cal. App. 3d 949, 952, 96 Cal. Rptr. 254]* . A court's paramount consideration in construing a stipulation is the parties' objective intent when they entered into it. Labels are not controlling. Where practicable, the meaning of an agreement must be derived from a reading of the whole contract. If an inconsistency exists in the language of a contract, courts must give effect to the parties' main purpose [*Sy First Family Ltd. Partnership v. Cheung (1999) 70 Cal. App. 4th 1334, 1341-1342, 83 Cal. Rptr. 2d 340]* . The court may not add to the provisions of a stipulation, insert terms, or make a new stipulation for the parties [*California State Auto. Ass'n Inter-Ins. Bureau v. Superior Court (1990) 50 Cal. 3d 658, 664, 268 Cal. Rptr. 284, 788 P.2d 1156]* .

A stipulation is conclusive with respect to the matters covered by it, unless the court, for good cause shown, later permits its abandonment or withdrawal [*Spindell v. State Bar (1975) 13 Cal. 3d 253, 260-261, 118 Cal. Rptr. 480, 530 P.2d 168]* . However, when stipulations are entered into for specific restricted purposes, they should be used only for those purposes, and are not binding outside the scope of those purposes [*Winn v. Board of Pension Comm'rs (1983) 149 Cal. App. 3d 532, 540, 197 Cal. Rptr. 111]* .

Lack of or failure of consideration is generally not an issue in construing stipulations. One court has held that when the parties act on a stipulation that has been presented to the court, it is deemed supported by consideration [*see Barendregt v. Downing (1959) 175 Cal. App. 2d 733, 736, 346 P.2d 870]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewContracts LawContract InterpretationGeneral Overview

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46-533 California Forms of Pleading and Practice--Annotated § 533.17

§ 533.17 Relief From Stipulations

[1] Grounds

[a] Grounds Summarized

A party must show good cause in order to be released from a stipulation [*Huston v. Workers' Comp. Appeals Bd. (1979) 95 Cal. App. 3d 856, 865, 157 Cal. Rptr. 355]* . A court may exercise its sound discretion and set aside the stipulation in the following situations [*see* *Baker v. Ramirez (1987) 190 Cal. App. 3d 1123, 1135, 235 Cal. Rptr. 857* (party relieved from stipulation that had not been filed or executed); *Roth v. Morton's Chefs Services, Inc. (1985) 173 Cal. App. 3d 380, 385-387, 218 Cal. Rptr. 684* (party relieved from stipulation on *Code Civ. Proc. § 473* motion); *In re the Marriage of Kerry (1984) 158 Cal. App. 3d 456, 465, 204 Cal. Rptr. 660* (party relieved from stipulation on *Code Civ. Proc. § 473* motion)]:

- When a stipulation has been entered into through inadvertence, excusable neglect, fraud, mistake of fact, or mistake of law;

- When facts stipulated have changed or there has been a change in the underlying conditions that could not have been anticipated; or

- When special circumstances exist rendering it unjust to enforce the stipulation.

The court has inherent power, independent of *Code Civ. Proc. § 473* to set aside a stipulation in these situations [*see* *In re Marriage of Jacobs (1982) 128 Cal. App. 3d 273, 283 n.3, 180 Cal. Rptr. 234* (dicta; collecting cases discussing motion for relief that did not mention Section 473)].

A poor outcome is not a principled reason to set aside a stipulation by counsel [*Mileikowsky v. Tenet Healthsystem (2005) 128 Cal. App. 4th 262, 279, 26 Cal. Rptr. 3d 831* (discovery stipulation may waive a party's right to insist on a formal order compelling responses as a precursor to an issuance of evidentiary, issue, or terminating sanctions)].

Under some circumstances, a stipulation entered into without the consent of the client may be set aside [*see § 533.12*].

[b] Mistake of Fact or Law

The trial court may, in its discretion, disregard a stipulation that has been entered into through inadvertence or mistake of fact [*County of Sacramento v. Workers' Comp. Appeals Bd. (2000) 77 Cal. App. 4th 1114, 1121, 92 Cal. Rptr. 2d 290]* . The court may relieve a party from a stipulation that incorrectly sets forth material facts that are contradicted by undisputed evidence [*Sinnock v. Young (1943) 61 Cal. App. 2d 130, 131, 142 P.2d 85]* . A mistake of fact must be of a material character, that will change the legal rights of the parties, as well as one that could not have been avoided by the exercise of ordinary care [*Harris v. Spinali Auto Sales, Inc. (1966) 240 Cal. App. 2d 447, 454, 49 Cal. Rptr. 610]* . When there is no mistake but merely a lack of full knowledge of the facts, which is due to the failure of a party to exercise due diligence to ascertain them, there is no proper ground for relief from the stipulation [*Robinson v. Workers' Comp. Appeals Bd. (1987) 194 Cal. App. 3d 784, 791, 239 Cal. Rptr. 841* ; *Huston v. Workers' Comp. Appeals Bd. (1979) 95 Cal. App. 3d 856, 866, 157 Cal. Rptr. 355* ; *see also County of Sacramento v. Workers' Comp. Appeals Bd. (2000) 77 Cal. App. 4th 1114, 1121, 92 Cal. Rptr. 2d 290* (poor outcome is not principled reason to set aside stipulation by counsel)].

Some courts have stated that a stronger showing should be made to justify relief from the effect of a mistake in law than in the case of a mistake involving a matter of fact [*see, e.g., L. A. City Sch. Dist. v. Landier Inv. Co. (1960) 177 Cal. App. 2d 744, 751, 2 Cal. Rptr. 662]* . Under that view, to set aside a stipulation on the ground of a mistake of law, it must be established that the mistake was mutual or arose from a misapprehension of the law by one party, of which the other was aware but did not rectify [*see Civ. Code § 1578*; *L. A. City Sch. Dist. v. Landier Inv. Co. (1960) 177 Cal. App. 2d 744, 751, 2 Cal. Rptr. 662* ; *see also Civ. Code § 1577* (mistake of fact)].

[2] Procedure

[a] Noticed Motion

A party may be relieved from a stipulation only on a noticed motion to set it aside, made in the trial court and supported by an affidavit or declaration under penalty of perjury stating the grounds for relief [*Harris v. Spinali Auto Sales, Inc. (1966) 240 Cal. App. 2d 447, 453, 49 Cal. Rptr. 610* ; *L. A. City Sch. Dist. v. Landier Inv. Co. (1960) 177 Cal. App. 2d 744, 750, 2 Cal. Rptr. 662* ; *see Code Civ. Proc. § 2015.5* (declaration under penalty of perjury)]. The motion should be made to the court in which the stipulation was made, and notice should be given to the other parties to the stipulation [*Harris v. Spinali Auto Sales, Inc. (1966) 240 Cal. App. 2d 447, 453, 49 Cal. Rptr. 610* ; *L. A. City Sch. Dist. v. Landier Inv. Co. (1960) 177 Cal. App. 2d 744, 750, 2 Cal. Rptr. 662]* .

For forms of motion and order to set aside a stipulation, see *§§ 533.42 -533.43*.

[b] Standing

An individual who is not a party to a stipulation nor the person for whose benefit it was entered into may not seek to set the stipulation aside [*People v. Mendez (1991) 234 Cal. App. 3d 1773, 1783, 286 Cal. Rptr. 216]* .

[c] Timeliness of Motion

An application to the trial court for relief from a stipulation must be timely made [*see Smith v. State Bar (1985) 38 Cal. 3d 525, 534-535, 213 Cal. Rptr. 236, 698 P.2d 139]* . What is timely depends on the circumstances.

If the motion to set aside a stipulated judgment or order is made under *Code Civ. Proc. § 473(b)* based on mistake, inadvertence, surprise, or excusable neglect, the motion must be brought within a reasonable time, in no case exceeding six months of the judgment or order [*County of Alameda v. Risby (1994) 28 Cal. App. 4th 1425, 1430-1431, 34 Cal. Rptr. 2d 333]* .

Motions that in effect seek to cancel a void stipulation or to rescind or reform an originally valid agreement on the ground of mistake ordinarily are controlled by the three-year statute of limitations contained in *Code Civ. Proc. § 338(d)* for actions for relief on the ground of fraud or mistake. From the standpoint of laches, whether a party has delayed unreasonably resulting in prejudice to another party is a question of fact and depends on the circumstances of the particular case [*L. A. City Sch. Dist. v. Landier Inv. Co. (1960) 177 Cal. App. 2d 744, 750-751, 2 Cal. Rptr. 662]* .

For further discussion of time requirements for Section 473 motions and relief from void judgments, see Ch. 489, *Relief From Judgments and Orders* .

Other provisions may govern timeliness of motions for relief from stipulations. For example, in *Smith v. State Bar (1985) 38 Cal. 3d 525, 213 Cal. Rptr. 236, 698 P.2d 139* , a state bar disciplinary proceeding, the motion for relief was untimely under a former State Bar Rule of Procedure.

If the motion is addressed to the court's inherent power, independent of *Code Civ. Proc. § 473*, to set aside a stipulation, the motion should be made as soon as the grounds become known [*see In re Marriage of Jacobs (1982) 128 Cal. App. 3d 273, 283 n.3, 180 Cal. Rptr. 234* (dicta)].

[d] Appeal

An order granting or denying relief from a stipulation is not directly appealable; an appeal lies from the judgment in the action [*see Code Civ. Proc. §§ 904.1, 904.2*].

The trial court has discretion whether or not to grant relief from a stipulation, and its discretion will not be disturbed on appeal absent a showing of abuse [*Ward v. Clay (1890) 82 Cal. 502* ; *Baker v. Ramirez (1987) 190 Cal. App. 3d 1123, 1135, 235 Cal. Rptr. 857]* . The existence of a stipulation is also a question of fact within the trial court's discretion [*In re Marriage of Lieberman (1981) 114 Cal. App. 3d 583, 586, 170 Cal. Rptr. 757]* .

Relief from a stipulation may not be granted when requested for the first time on appeal [*Leonard v. City of Los Angeles (1973) 31 Cal. App. 3d 473, 478, 107 Cal. Rptr. 378]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsRescissionCivil ProcedureAppealsReviewabilityGeneral Overview

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[Reserved]

§§ 533.18[Reserved]

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§ 533.30 State Constitution

Stipulation as to trial by temporary judge. *Cal. Const., art. VI, § 21*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewConstitutional LawState Constitutional OperationGovernmentsCourtsSpecial Judges

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46-533 California Forms of Pleading and Practice--Annotated § 533.31

§ 533.31 State Statutes

[1] Authority to Bind Clients

Attorney/s authority to bind client by stipulation. *Code Civ. Proc. § 283*

[2] Stipulations Regarding Specific Matters

[a] Discovery

Taking of deposition. *Code Civ. Proc. § 2025(t)* [*Code Civ. Proc. § 2025.610* operative July 1, 2005].

Physical, mental, or blood examination. *Code Civ. Proc. § 2032(d), (e)* [*Code Civ. Proc. §§ 2032.320(b), (c), 2016.030* operative July 1, 2005].

Protective orders regarding interrogatories and demands for inspection of documents. *Code Civ. Proc. §§ 2030(e), 2031(f)* [*Code Civ. Proc. §§ 2030.090, 2031.060* operative July 1, 2005].

Additional discovery in limited civil cases. *Code Civ. Proc. § 95(b)*

Modification of deposition and other discovery procedures. *Code Civ. Proc. § 2021* [*Code Civ. Proc. § 2016.030* operative July 1, 2005].

[b] Extensions or Postponements

Stipulations relating to extensions or postponements. *Code Civ. Proc. §§ 583.230, 583.330, 595, 595.2, 1054*

[c] Settlement

Stipulation as to settlement. *Code Civ. Proc. § 664.6*

Alternative procedures for awarding costs. *Code Civ. Proc. § 1032(c)*

[d] Venue

Venue when county or city is party to proceeding. *Code Civ. Proc. § 394*

Change of venue. *Code Civ. Proc. § 398*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureDiscoveryMethodsStipulationsCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedurePretrial MattersContinuances

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§ 533.32 California Rules of Court

Stipulations relating to appeal. *Cal. Rules of Ct., Rules 8.130(g), 8.122(b), 8.244(b), 8.248(b), 8.320(f)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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46-533 California Forms of Pleading and Practice--Annotated § 533.33

§ 533.33 Local Rules of Court

Limitations on stipulations extending time. Los Angeles Co. Super. Ct. Rules, Rule 7.10

Informing jury of stipulated facts. Los Angeles Co. Super. Ct. Rules, Rule 8.44

Written stipulation to judgment is to be separate document from judgment. Sacramento Co. Super. Ct. Rules, Rule 9.17

Legal Topics:

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

[1] Authority of Attorney to Bind Client

Attorney's authority to stipulate does not include power to compromise claim or confess judgment. *Preston v. Hill (1875) 50 Cal. 43, 50-57*

Code Civ. Proc. § 664.6, providing that parties may stipulate to settlement and entry of judgment, empowers trial court to determine whether or not litigant's attorney had authority to settle case on client's behalf. *Haldeman v. Boise Cascade (1985) 176 Cal. App. 3d 230, 233-234, 221 Cal. Rptr. 412*

Agreement to dismiss cause of action by attorney without client's authority is beyond attorney's authority. *Bowden v. Green (1982) 128 Cal. App. 3d 65, 73, 180 Cal. Rptr. 90* (dismissal of cross complaint by attorney pursuant to purported stipulation)

Stipulation in joint pretrial statement withdrawing certain objections to executor's account was not unauthorized abandonment of substantial rights by trial attorney. *Estate of Cooper (1970) 11 Cal. App. 3d 1114, 1124, 90 Cal. Rptr. 283*

[2] Construction and Effect

A stipulation stating that defendant could file a motion for sanctions if it did not receive plaintiff's supplemental discovery responses by a certain date had the same effect as a court order stating such, despite the fact that it was neither signed by the discovery referee or court or filed with the court. *Mileikowsky v. Tenet Healthsystem (2005) 128 Cal App 4th 262, 279-280, 26 Cal. Rptr. 3d 831*

Stipulations are not deemed amended to conform to proof because point of stipulation is to obviate need for proof. *County of Sacramento v. Workers' Comp. Appeals Bd. (2000) 77 Cal. App. 4th 1114, 1120, 92 Cal. Rptr. 2d 290*

Stipulation is agreement and subject to ordinary rules employed to interpret contracts; court's paramount consideration in construing stipulation is parties' objective intent when they entered into it; labels are not controlling; when practicable, meaning of agreement must be derived from reading of whole contract; when inconsistency exists in language of contract, courts must give effect to parties' main purpose. *Sy First Family Ltd. Partnership v. Cheung (1999) 70 Cal. App. 4th 1334, 1341-1342, 83 Cal. Rptr. 2d 340*

Stipulation is agreement between attorneys for adverse parties relating to matter involved in judicial proceeding, relating to evidence or facts, and resulting in judicial admission removing issues from case. *In re Marriage of Hahn (1990) 224 Cal. App. 3d 1236, 1239, 273 Cal. Rptr. 516*

In construing stipulations, court applies rules for construction of contracts. *Harris v. Spinali Auto Sales, Inc. (1966) 240 Cal. App. 2d 447, 453, 49 Cal. Rptr. 610* ; *L. A. City Sch. Dist. v. Landier Inv. Co. (1960) 177 Cal. App. 2d 744, 752, 2 Cal. Rptr. 662*

Stipulation entered into by parties in litigation is construed according to ordinary rules for interpretation of contracts, with paramount consideration being parties' objective intention at time of contracting. *Porreco v. Red Top RV Center (1989) 216 Cal. App. 3d 113, 119, 264 Cal. Rptr. 609*

Stipulation to postpone trial indefinitely subject to being reset on motion to advance by any party is subject to rules of contract construction. *Imperial Ins. Co. v. California Casualty Indem. Exchange (1984) 158 Cal. App. 3d 540, 546, 204 Cal. Rptr. 819*

Stipulation by Workers' Comp. Appeals Board as to applicant's disability which was made after public pension board's determination to deny disability pension and labeled as for workers' compensation purposes only is not binding on pension board in determining whether to award disability pension. *Winn v. Board of Pension Commissioners (1983) 149 Cal. App. 3d 532, 540, 197 Cal. Rptr. 111*

Stipulation extending time indefinitely to plead under *Code Civ. Proc. § 583.310* is subject to general rules for construction of contracts. *Farrar, Herrick & Associates v. Safecare Co. (1981) 115 Cal. App. 3d 123, 130, 171 Cal. Rptr. 191*

Stipulation is conclusive on parties; having stipulated, party is estopped from taking contrary position in same or related litigation. *Palmer v. City of Oakland (1978) 86 Cal. App. 3d 39, 44, 150 Cal. Rptr. 41*

Stipulation that plaintiff's prior arrest was made with probable cause entered in criminal proceeding is binding so as to bar plaintiff's subsequent action for false imprisonment. *Leonard v. City of Los Angeles (1973) 31 Cal. App. 3d 473, 476-479, 107 Cal. Rptr. 378*

Stipulation is not one of usual pleadings, but proceeding in cause under court/s supervision, by means of its coercive power over parties and their attorneys; actions of unqualified temporary judge who suggested stipulation and who initiated waiver of statutory provisions as nullities. *Lovret v. Seyfarth (1972) 22 Cal. App. 3d 841, 856-857, 101 Cal. Rptr. 143*

Court as interpreting stipulations so as to protect parties from their erroneous legal assumptions. *Burrows v. State of California (1968) 260 Cal. App. 2d 29, 33, 34, 66 Cal. Rptr. 868*

Court as interpreting stipulations so as to carry out parties' intent and to ascertain that intent if language used in stipulation is ambiguous. *Southern Cal. Gas Co. v. Joseph W. Wolfskill Co. (1963) 212 Cal. App. 2d 882, 888, 28 Cal. Rptr. 345*

[3] Writing Requirement

Code Civ. Proc. § 283 as applicable to making of oral stipulation not reduced to writing and filed with clerk or entered in minutes. *May v. May (1969) 275 Cal. App. 2d 264, 277-278, 79 Cal. Rptr. 622*

[4] Relief From Stipulation

In ordinary civil case, trial court has discretion to disregard stipulation entered into by reason of inadvertence or mistake of fact; same good cause rule should apply to this workers' compensation proceeding; lack of diligence is not good cause; applicant's attorney entered into stipulation in open court that in hindsight appeared to have impaired applicant's case, but poor outcome is not principled reason to set aside stipulation by counsel; record devoid of any reasons why client should not be held to stipulation. *County of Sacramento v. Workers' Comp. Appeals Bd. (2000) 77 Cal. App. 4th 1114, 1121, 92 Cal. Rptr. 2d 290*

Trial court has discretion to allow party to withdraw stipulation for good cause; trial court allowed city to withdraw its stipulation that plaintiff had not earlier stipulated to having commissioner hear matter and found that plaintiff had so stipulated. *Flahive v. City of Dana Point (1999) 72 Cal. App. 4th 241, 247, 85 Cal. Rptr. 2d 51*

In usual case, party is not permitted unilaterally to avoid valid stipulation; fact that stipulations serve convenience of parties, often simplify and expedite proceeding, and are supported by policy favoring compromise to reduce volume of litigation as reason for supporting stipulations against ensuing attack in most instances. *In re Marriage of Hahn (1990) 224 Cal. App. 3d 1236, 1239, 273 Cal. Rptr. 516*

Summary adjudication that indisputably changed material circumstances relative to rights and duties of parties provided court with discretion to refuse to compel performance of stipulation. *Abadjian v. Superior Court (1985) 168 Cal. App. 3d 363, 370-371, 214 Cal. Rptr. 234*

Dismissal of cause of action based on stipulation to dismiss that was not authorized by client is subject to being vacated at any time. *Bowden v. Green (1982) 128 Cal. App. 3d 65, 73, 180 Cal. Rptr. 90*

Lack of supporting evidence does not necessarily invalidate stipulation. *Aten v. Workers' Comp. Appeals Bd. (1977) 75 Cal. App. 3d 113, 119, 142 Cal. Rptr. 42*

Stipulation that trial court could determine issues involved on record before jury in principal action as no longer binding if made under false assumption that trial judge who presided at jury trial would decide action. *Kerr Chemicals, Inc. v. Crown Cork & Seal Co. (1971) 21 Cal. App. 3d 1010, 1017, 99 Cal. Rptr. 162*

Appeal from judgment by stipulation as frivolous under *Code Civ. Proc. § 907*, entitling reviewing court to add damages to costs on appeal. *Lawler v. Bannerman (1970) 8 Cal. App. 3d 893, 894, 87 Cal. Rptr. 756*

Relief from stipulation as available for mistake of fact or other special circumstances rendering it unjust to enforce it. *McDonagh v. Gourneau (1969) 2 Cal. App. 3d 1033, 1038, 83 Cal. Rptr. 63*

Setting aside of stipulation appropriate when entered into in reliance on false testimony. *Brown v. Superior Court (1935) 10 Cal. App. 2d 365, 366, 367-368, 52 P.2d 256*

Legal Topics:

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

Business & Corporate LawAgency RelationshipsAuthority to ActActual AuthorityGeneral OverviewCivil ProcedureCounselGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsRescissionContracts LawContract InterpretationGeneral Overview

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§ 533.35 Text References

Witkin, California Procedure, Vol. 1, *Attorneys*, § 289 et seq. (4th ed. 1996)

Legal Topics:

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

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[Reserved]

§§ 533.36[Reserved]

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PART IV. FORMS

46-533 California Forms of Pleading and Practice--Annotated § 533.40

§ 533.40 Stipulation [Code Civ. Proc. § 283]--General Form

[1] FORM Stipulation [Code Civ. Proc. § 283]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	STIPULATION
Defendant.	)	
	)	
	)	

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective counsel, that _____ [*specify, in numbered paragraphs if convenient, the step or steps of the action or proceeding to which the parties agree to be bound, e.g.,* Joseph Stevenson, M.D., is an expert witness who is qualified to testify as to whether the defendant's treatment of plaintiff's broken arm was consistent with what other physicians in the locality in question in the exercise of reasonable care might do under similar circumstances].
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant

[*Add appropriate signature(s), if client's express authorization appears necessary*]

Dated: _____.

_____ [*signature*]

Plaintiff

Dated: _____.

_____ [*signature*]

Defendant

[2] Use of Form

The form of stipulation in [1], *above*, is for use by any party in entering into an agreement with any other party concerning any steps of an action or proceeding [*Code Civ. Proc. § 283*].

[3] Execution and Filing

A written stipulation must be signed by the attorney of record, if any, and usually does not require the client's signature [for discussion, *see § 533.15 [3]*]. The stipulation should be filed in the action or proceeding to which it relates [for discussion, *see § 533.15[4]*].

[4] Cross References

For a discussion of an attorney's general authority to appear and to control the litigation, see *Ch. 72, Attorney Practice and Ethics, § 72.190* et seq.

For a form of introduction to a stipulation, see Ch. 108, *Captions and Introductions*

Witkin, California Procedure (4th ed. 1997), Vol. 1, *Attorneys*, §§ 289-310

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Chapter 533 STIPULATIONS
PART IV. FORMS

46-533 California Forms of Pleading and Practice--Annotated § 533.41

§ 533.41 Stipulation of Facts [Code Civ. Proc. § 283]--Objections to Admissibility Not Waived

[1] FORM Stipulation of Facts [Code Civ. Proc. § 283]--Objections to Admissibility Not Waived

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	STIPULATION OF FACTS
Defendant.	)	
	)	
	)	

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective counsel, that, for the purpose of trial in this action, the facts listed below are undisputed and may be treated by the court as facts proved in open court.

The parties may, during the trial of this matter, call witnesses and offer evidence for the purpose of proving any additional facts as the parties may see fit.

[In making the stipulation, the parties do not waive any legal objection to the relevancy, the materiality, or the admissibility in evidence of any of the facts set forth in this stipulation, and each party reserves the right to offer any legal objection to those facts, or any part of those facts, either by filing written objections or by stating such objections orally in open court, at any time during the trial before the objecting party concludes his/her offer of evidence and rests his/her case. An objection so made shall be considered timely.]

The undisputed facts are as follows:

1. _____ [*List undisputed facts here and under following numbers*].
Dated: _____.

_____[*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

Dated: _____.

_____[*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant

[2] Use of Form

The form in [1], *above*, is for use to stipulate that certain facts are undisputed and may be treated as proved in court [*Code Civ. Proc. § 283*].

Counsel may reserve any legal objections to the relevancy, materiality, or admissibility in evidence of any of the facts set forth in the stipulation by including the optional third paragraph.

[3] Execution and Filing

A written stipulation must be signed by the attorney of record, if any, and usually does not require the client's signature [for discussion, *see § 533.15 [3]*]. The stipulation should be filed in the action or proceeding to which it relates [for discussion, *see § 533.15[4]*].

[4] Cross References

For discussion of specific matters to which parties may effectively stipulate, see *§ 533.13*

For general form of stipulation, see *§ 533.40*

Witkin, California Procedure (4th ed. 1997), Vol. 1, *Attorneys*, §§ 289-310

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46-533 California Forms of Pleading and Practice--Annotated § 533.42

§ 533.42 Notice of Motion to Set Aside Stipulation and Supporting Declaration

[1] FORM Notice of Motion to Set Aside Stipulation and Supporting Declaration

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION TO SET ASIDE STIPULA-
vs.	)	TION, SUPPORTING DECLARATION OF
_____ [*name*],	)	_____ [*name*], AND MEMOR-
Defendant.	)	ANDUM OF POINTS AND AUTHORITIES
	)	Date: _____
	)	Time: _____
	)	Location _____
	)	[Judge: _____]
		Date Action Filed: _____
		[Trial Date: _____]

_____

To _____ [*specify party, e.g.,* plaintiff] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*address*], _____ [*city*], _____ [*specify party, e.g.,* defendant] will move for an order setting aside the stipulation _____ [*describe stipulation, e.g.,* regarding the testimony of _____ (*name*)], dated _____, on file in this action. The motion will be made on the ground that good cause exists to set aside the stipulation in that

_____ [*specify, e.g.,* the stipulation was entered into through inadvertence, surprise, excusable neglect, fraud, and mistake of fact and law *or* the facts stipulated to have changed *or* there has been a change in the underlying conditions to the stipulation that could not have been anticipated *or* special circumstances exist rendering it unjust to enforce the stipulation *or specify other ground*].

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum of points and authorities served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for_____ [*party's status, e.g., Defendant*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*specify party, e.g.,* defendant) *or other statement as appropriate*].

On or about _____ [*date*], I entered into a stipulation with _____ [*name*], attorney of record for the _____ [*specify party, e.g.,* plaintiff]. On behalf of our respective clients, we stipulated that _____ [*specify effect of stipulation, e.g.,* _____ (*name*) would, if called and sworn as a witness, testify that the milk in question in this breach of contract action was grade A milk].

The stipulation should be set aside because _____ [*specify, e.g.,* of a mistake of fact, in that the facts stipulated have changed, and special circumstances now render it unjust to enforce the stipulation in that _____ (*name of witness*) has told me that a doubt now exists in his mind as to whether or not the milk in question in this action was grade A milk, as set forth more fully in the declaration of _____ (*name of witness*), also submitted in support of this motion].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature*]

MEMORANDUM OF POINTS AND AUTHORITIES

[*Add memorandum of points and authorities supporting motion*]

[2] Use of Form

The form of notice of motion and supporting declaration in [1], *above*, may be used by any party seeking to set aside a stipulation previously agreed to between the parties. A memorandum of points and authorities is required to be served and filed with the notice of motion [*Cal. Rules of Ct., Rule 3.113(a)*].

[3] Grounds

The motion is made on the general ground that good cause exists to set aside the stipulation. For discussion of particular grounds for setting aside a stipulation, see *§ 533.17[1]*.

[4] Timing

An application to the trial court for relief from a stipulation must be timely made. For further discussion of timing requirements, see *§ 533.17 [2]*.

[5] Cross References

For a form of order granting the motion, see *§ 533.43*

For a discussion and forms relating to attacking judgments and orders, including stipulated judgments, in the trial court under the grounds contained in *Code Civ. Proc. § 473*, see Ch. 489, *Relief From Judgments and Orders*

For a procedural guide and a general form of notice of motion, see Ch. 372, *Motions and Orders*

Witkin, California Procedure (4th ed. 1997), Vol. 1, *Attorneys*, §§ 289-310

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46-533 California Forms of Pleading and Practice--Annotated § 533.43

§ 533.43 Order Setting Aside Stipulation

[1] FORM Order Setting Aside Stipulation

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [*specify moving party, e.g.,* defendant] _____ [*name*] for an order to set aside the stipulation dated _____ [*date*], on file in this action came on regularly for hearing by the court this date. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion should be granted,

IT IS ORDERED that the motion be, and hereby is, granted and the stipulation of _____[*date*], providing that _____ [*specify provisions*], be vacated.
Dated: _____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

The form of order in [1], *above*, is for use when the court grants a motion to set aside a stipulation previously agreed to between the parties.

[3] Cross References

For a related form of notice of motion, see *§ 533.42*

For a procedural checklist and a general form of order, see Ch. 372, *Motions and Orders*

Witkin, California Procedure (4th ed. 1997), Vol. 1, *Attorneys*, §§ 289-310

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46-534 California Forms of Pleading and Practice--Annotated 534.syn

§ 534.syn Synopsis to Chapter 534: SUBMITTED CONTROVERSY (AGREED CASE)

§ 534.01 Scope of Chapter

§ 534.02 Cross References

§§ 534.03-534.09 [Reserved]

§ 534.10 Governing Statutes

§ 534.11 Purpose of Submitting Controversy

§ 534.12 Distinction Between Procedures

§ 534.13 Submission of Agreed Case Without Commencement of Action

[1] Submission of Dispute That Could Have Been Subject of Civil Action

[2] Affidavit Required Stating Controversy Is Real and Brought in Good Faith

[3] Heard as Though Action Had Been Brought

[4] Judgment in Agreed Case

[5] Enforcement of Judgment

[6] Review

§ 534.14 Agreed Statement of Facts

[1] Stipulation to Facts After Action Has Been Commenced

[2] Stipulation Is Substitute for Evidence; No Jury Trial

§§ 534.15-534.29 [Reserved]

§ 534.30 State Statutes

§ 534.31 Decisions

[1] Submission of Agreed Case Without Commencement of Civil Action

[2] Agreed Statement of Facts

§ 534.32 Text References

§§ 534.33-534.39 [Reserved]

§ 534.40 Submission on Agreed Case [Code Civ. Proc. § 1138]--General Form

[1] FORM

[2] Use of Form

[3] Affidavit or Declaration Required

[4] Cross References

§ 534.41 Submission on Agreed Case [Code Civ. Proc. § 1138]--Alternate Form

[1] FORM

[2] Use of Form

§ 534.42 Declaration Accompanying Submission on Agreed Case [Code Civ. Proc. § 1138]

[1] FORM

[2] Use of Form

[3] Cross References

§ 534.43 Judgment on Agreed Case [Code Civ. Proc. § 1139]

[1] FORM

[2] Use of Form

[3] Cross References

§ 534.44 Stipulation [Code Civ. Proc. § 283] of Agreed Statement of Facts

[1] FORM

[2] Use of Form

[3] Cross References

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Chapter 534 SUBMITTED CONTROVERSY (AGREED CASE)
PART I. SCOPE

46-534 California Forms of Pleading and Practice--Annotated § 534.01

§ 534.01 Scope of Chapter

This chapter discusses and provides forms for submitting controversies to a court on stipulated facts. The chapter discusses submission to the court both of an "agreed case" [§ 534.13] and an agreed statement of facts [§ 534.14] and compares these procedures [§§ 534.10-534.12].

The chapter includes a Research Guide [§ 534.30 et seq.], and the following forms:

- Submissions of an agreed case [§§ 534.40, 534.41].
- Declaration to accompany the submission [§ 534.42].
- Judgment on an agreed case [§ 534.43].
- Stipulation of agreed statement of facts [§ 534.44].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral Overview

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Chapter 534 SUBMITTED CONTROVERSY (AGREED CASE)
PART I. SCOPE

46-534 California Forms of Pleading and Practice--Annotated § 534.02

§ 534.02 Cross References

For a discussion of and forms relating to judicial declarations of rights, as distinguished from a judgment based on the submission of an agreed case which may include such relief, see Ch. 182, *Declaratory Relief*

For a general discussion of agreements between parties to an action concerning matters including but not limited to the facts, see Ch. 533, *Stipulations*

For a form for use in entering judgment pursuant to a stipulation of facts, see Ch. 318, *Judgments* , § t. I

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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[Reserved]

§§ 534.03[Reserved]

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PART II. LEGAL BACKGROUND

46-534 California Forms of Pleading and Practice--Annotated § 534.10

§ 534.10 Governing Statutes

Submission to a court of a controversy on an "agreed case" without commencement of an action is governed by *Code Civ. Proc. §§ 1138-1140*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral Overview

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46-534 California Forms of Pleading and Practice--Annotated § 534.11

§ 534.11 Purpose of Submitting Controversy

The term "submitted controversy," as it is used in this chapter and by most California attorneys, includes both the agreed case and the agreed statement of facts submitted by stipulation. The purpose of submitting a controversy, in either manner, is to provide the court with a set of facts which both parties are willing to accept as a factual basis to which the applicable law is to be applied [*see, e.g., Faust v. San Diego (1931) 115 Cal. App. 277, 278, 1 P.2d 543]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral Overview

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PART II. LEGAL BACKGROUND

46-534 California Forms of Pleading and Practice--Annotated § 534.12

§ 534.12 Distinction Between Procedures

The agreed statement of facts is only a substitute for evidence of facts pleaded, and in this respect it differs from the agreed case which is submitted for decision without any pleadings [Towle v. Sweeney (1905) 2 Cal. App. 29-32, 83 P. 74 (disapproved on another point in Gaffigan v. Lawton (1934) 1 Cal. 2d 722, 729, 37 P.2d 79)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureTrialsBench Trials

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PART II. LEGAL BACKGROUND

46-534 California Forms of Pleading and Practice--Annotated § 534.13

§ 534.13 Submission of Agreed Case Without Commencement of Action

[1] Submission of Dispute That Could Have Been Subject of Civil Action

Parties to a "question in difference" may, without bringing an action, submit an agreed case to any court which would have had jurisdiction if an action had been brought to that court originally. The question in difference must be one which might be the subject of a civil action [*Code Civ. Proc. § 1138*]. The persons submitting an agreed case must be interested, authorized, and capable of litigating the question as if an action had been filed [*see Bailey v. Johnson (1898) 121 Cal. 562, 562-563, 54 P. 80]* .

By using this special summary proceeding, parties may avoid the expense and delay of an ordinary action [*Market Street Ry.Co. v. Hellman (1895) 109 Cal. 571, 578, 42 P. 225]* so long as the requirements of *Code Civ. Proc. § 1138* are satisfied [*see White v. Clarke (1896) 111 Cal. 425, 427-428, 44 P. 164* (submitted controversy did not show that question in difference could be subject of civil action; affidavit did not show controversy was real or proceedings were in good faith)].

For forms for submission of the agreed case, see *§§ 534.40, 534.41*.

[2] Affidavit Required Stating Controversy Is Real and Brought in Good Faith

An affidavit, or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*], must be submitted by each party, stating that the controversy is real and that the proceeding is brought in good faith to determine the rights of the parties [*Code Civ. Proc. § 1138*; *see White v. Clarke (1896) 111 Cal. 425, 427-428, 44 P. 164* (affidavit did not show controversy was real or proceedings were in good faith)].

The affidavit or declaration is mandatory, and an agreed statement on appeal that recites that the trial court heard the case on an agreed statement and on an affidavit that the controversy was real is inadequate [*see Mellois v. Chaine (1862) 20 Cal. 679, 680]* .

For a form of declaration, see *§ 534.42*.

[3] Heard as Though Action Had Been Brought

The court hears and determines the case and renders judgment as if an action had been brought [*Code Civ. Proc. § 1138*]. The judgment is to be determined solely from the submitted facts [*Cannon v. Handley (1887) 72 Cal. 133, 138, 13 P. 315]* .

[4] Judgment in Agreed Case

Judgment is entered as in other cases, but without costs for any proceeding prior to trial. The case, the submission, and a copy of the judgment constitute the judgment roll [*Code Civ. Proc. § 1139*]. For a form of judgment, see *§ 534.43*.

[5] Enforcement of Judgment

Judgment in an agreed case may be enforced as if it had been rendered in an action in the same court [*Code Civ. Proc. § 1140*].

[6] Review

A judgment in an agreed case is subject to appeal in the same manner as any civil judgment [*Code Civ. Proc. § 1140*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityCase or Controversy RequirementsGeneral OverviewCivil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureAppealsReviewabilityGeneral Overview

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46-534 California Forms of Pleading and Practice--Annotated § 534.14

§ 534.14 Agreed Statement of Facts

[1] Stipulation to Facts After Action Has Been Commenced

An agreed statement of facts is a submission to a court, after an action is commenced and jurisdiction obtained, of a controversy involving a set of facts. The submission is nonstatutory and is made by stipulation of the parties involved [*see, e.g.,* Faust v. San Diego (1931) 115 Cal. App. 277, 275-279, 1 P.2d 543] .

For a form of stipulation, see *§ 534.44.*

[2] Stipulation Is Substitute for Evidence; No Jury Trial

A written stipulation of an agreed statement of facts may be submitted to the court by the parties involved in an action after the action has commenced. The agreed statement of facts is only a substitute for evidence of facts pleaded, and in this respect it differs from the agreed case, which is submitted for decision without any pleadings [*Towle v. Sweeney (1905) 2 Cal. App. 29, 31-32, 83 P. 74]* .

There is no jury trial when an agreed statement of facts has been submitted, for the statement itself makes formal findings unnecessary [*see, e.g., Division Labor Law Enfmt. v. Brooks (1964) 226 Cal. App. 2d 631, 632, 38 Cal. Rptr 284]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureTrialsBench Trials

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[Reserved]

§§ 534.15[Reserved]

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46-534 California Forms of Pleading and Practice--Annotated § 534.30

§ 534.30 State Statutes

Submission of agreed case. *Code Civ. Proc. § 1138*

Judgment based on agreed case. *Code Civ. Proc. § 1139*

Enforcement of judgment in agreed case. *Code Civ. Proc. § 1140*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral Overview

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PART III. RESEARCH GUIDE

46-534 California Forms of Pleading and Practice--Annotated § 534.31

§ 534.31 Decisions

[1] Submission of Agreed Case Without Commencement of Civil Action

Certain questions of public interest as prompting court to adjudicate agreed case absent real controversy. *Collier v. Lindley (1928) 203 Cal. 641, 644-645, 266 P. 526*

Necessity of real controversy between parties in agreed case. *In re De Lucca (1905) 146 Cal. 110, 111-112, 79 P. 853*

Court, on submission of agreed case, as not restricted to submitted questions or conclusions of law. *San Francisco Lbr. Co. v. Bibb (1903) 139 Cal. 325, 326, 73 P. 864*

Basis of judgment in agreed case as limited to facts submitted. *Green v. Fresno County (1892) 95 Cal. 329, 333-334, 30 P. 544*

Judgment against plaintiff as proper where agreed set of facts does not establish defendant's liability. *Crandall v. Amador County (1862) 20 Cal. 72, 74*

Agreed case with inadequate statement of facts as subject to dismissal. *Division Labor Law Enfmt. v. Brooks (1964) 226 Cal. App. 2d 631, 633, 38 Cal. Rptr 284*

Submission of agreed case to appellate court as improper unless agreed set of facts otherwise supports petition for writ of mandate. *Northridge etc. Water Dist. v. McDonell (1958) 158 Cal. App. 2d 123, 125-126, 322 P.2d 25*

[2] Agreed Statement of Facts

Facts occurring after stipulation of agreed statement of facts made by parties at commencement of action as included. *Ellis v. Witmer (1906) 148 Cal. 528, 536, 83 P. 800*

Effect of agreed statement of facts. *Robinson v. El Centro Grain Co. (1933) 133 Cal. App. 567, 572, 24 P.2d 554*

No necessity of findings of fact by court when stipulation of agreed statement of facts made by parties. Faust v. San Diego (1931) 115 Cal. App. 277, 279279, 1 P.2d 543

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityCase or Controversy RequirementsGeneral OverviewCivil ProcedurePretrial JudgmentsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEffectsCivil ProcedureTrialsBench Trials

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46-534 California Forms of Pleading and Practice--Annotated § 534.32

§ 534.32 Text References

Witkin, California Procedure (3d ed), Vol. 3, *Actions*, § 78; Vol. 6, *Proceedings Without Trial*, § 72-73; Vol. 9, *Appeal*, §§ 557-559

California Civil Procedure Before Trial, Vol. 3, Ch. 59, *Submitted Case* (Cal. CEB 2000)

Legal Topics:

For related research and practice materials, see the following legal topics:
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46-534 California Forms of Pleading and Practice--Annotated §§ 534.33-534.39

[Reserved]

§§ 534.33[Reserved]

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46-534 California Forms of Pleading and Practice--Annotated § 534.40

§ 534.40 Submission on Agreed Case [Code Civ. Proc. § 1138]--General Form

[1] FORM Submission on Agreed Case [Code Civ. Proc. § 1138]--General Form
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

In the Matter of the Agreed Case Between _____ [*name*], Plaintiff, and _____ [*name*], Defendant.	))))))))))	NO. _____ AGREED CASE

_____ [*Name*] and _____ [*name*], parties to the following question in difference which might be the subject of a civil action, hereby agree on the following facts concerning that question to be submitted to the proper jurisdiction of this court for its determination and judgment pursuant to *Code of Civil Procedure section 1138*.

I. AGREED FACTS

1. _____ [*Here, and in successive paragraphs, set forth specifically the facts agreed on, e.g.,* In an

agreement dated _____ (*date*), attached hereto as Exhibit A and made a part of this submission, _____ (*name*) agreed to sell, and _____ (*name*) agreed to purchase, certain real property described in the agreement. _____ (*Name*), as purchaser, entered into possession of the property on, _____ [*date*], and from that date received all rents and profits from the property, pursuant to the agreement. The escrow on the transaction closed on _____ [*date*], _____ days after the entry into possession by _____ (*name*), the purchaser].

[2. _____ (*Name*), the seller, and _____ (*name*), the purchaser, are parties to this submission and are interested, authorized, and capable of litigating the following question in difference for the following reasons: _____ (*state facts showing standing, capacity, etc., of parties*).]

[3. The following question in difference, if brought before this court as a civil action, would be within the proper jurisdiction of this court for the following reasons: _____ (*state facts showing venue and jurisdiction of the court*).]

II. QUESTION SUBMITTED FOR DETERMINATION

The question in difference submitted for the determination of the court is _____ [*specify, e.g.,* whether or not the seller is entitled, pursuant to the terms of the agreement, to interest on the unpaid balance of the purchase price from the date of the purchaser's entry into possession or only from the date of the closing of escrow].

Dated: _____.

_____ [*signature*]

_____ [*typed name*]

Plaintiff

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

_____ [*signature*]

_____ [*typed name*]

Defendant

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Use of Form

The form in [1], *above*, is for use by parties who agree as to the facts of an actual controversy to submit the case to the court for determination. The form is used when no action has yet been commenced on the controversy, but when the controversy could be the subject of a civil action within the jurisdiction of the court to which it is to be submitted [*see Code Civ. Proc. § 1138*; *see also* Ziegelmaier v. Rasmussen (1958) 159 Cal. App. 2d Supp. 881, 881-884, *159 Cal. App. 2d Supp. 881, 324 P.2d 116* (submission to court, pursuant to *Code Civ. Proc. § 1138*, to determine whether sellers entitled to interest on unpaid purchase price from date purchasers entered into possession or from date escrow closed)].

Once submitted, the court must render judgment as if it were an action, and as such may award any proper remedy exceptpretrial costs [*see Code Civ. Proc. §§ 1138, 1139*].The judgment may be enforced or appealed as in an ordinary civil action [*Code Civ. Proc. § 1140*].

[3] Affidavit or Declaration Required

This form must be accompanied with a supporting affidavit, or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*], from each party [*Code Civ. Proc. § 1138*]. For a form of declaration, see *§ 534.42*.

[4] Cross References

For further discussion of agreed case, see *§ 534.13*

For an alternative form of submission, see *§ 534.41*

For a form of stipulation to agreed facts to be used if the action has already been commenced, see *§ 534.44*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For forms of stipulations generally, see Ch. 533, *Stipulations*

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PART IV. FORMS

46-534 California Forms of Pleading and Practice--Annotated § 534.41

§ 534.41 Submission on Agreed Case [Code Civ. Proc. § 1138]--Alternate Form

[1] FORM Submission on Agreed Case [Code Civ. Proc. § 1138]--Alternate Form
[*Caption. See Form 1.*]

_____ [*Name*] and _____ [*name*], parties to a controversy involving a question in difference which might be the subject of a civil action, hereby agree that the following is a true statement of the facts concerning that controversy, and hereby submit the same to the above-entitled court for its determination and judgment without action, as provided by *Section 1138 of the Code of Civil Procedure.*

I. AGREED FACTS

1. _____ [*Here, and in successive paragraphs, set forth specifically the facts agreed on, including facts showing capacity and standing of parties and venue and jurisdiction of the court, see, e.g.,* Form 1, Paragraphs under I].

II. CLAIMS AND DEFENSES TO BE DETERMINED BY THE COURT

_____ [*Specify claims and defenses constituting the question in difference between the parties, e.g.,* _____ (*Name*), the seller, claims the sum of $_____ as interest on the unpaid balance of the purchase price from the date of purchaser's entry into possession. _____ (*Name*), the purchaser, asserts in defense that no date for the commencement of interest is evidenced in the agreement and thus there is no intent shown for the payment of interest prior to the date of the execution of the promissory note for the unpaid balance of the purchase price].

Dated: _____.

_____ [*signature*]

_____ [*typed name*]

Plaintiff

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

_____ [*signature*]

_____ [*typed name*]

Defendant

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Use of Form

The form in [1], *above*, may be used as an alternative to the *form in § 534.40* to set forth a submission on an agreed case submitted [*see Code Civ. Proc. § 1138*]. This form must be supported by affidavit or declaration submitted [*see Code Civ. Proc. § 1138*; for a form of declaration, *see § 534.42*].

For further discussion, see *§ 534.40[2]* et seq.

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46-534 California Forms of Pleading and Practice--Annotated § 534.42

§ 534.42 Declaration Accompanying Submission on Agreed Case [Code Civ. Proc. § 1138]

[1] FORM Declaration Accompanying Submission on Agreed Case [Code Civ. Proc. § 1138]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

In the Matter of the Agreed Case Between _____ [*name*], Plaintiff, and _____ [*name*], Defendant.	))))))))))	NO. _____ DECLARATION OF _____ [*name*] INSUPPORT OF AGREED CASE

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all courts of the State of California and the attorney of record herein for _____ (*party*) or other as appropriate].

2. The controversy in the above-entitled case is real and the proceedings are instituted in good faith to determine the rights of the parties in that _____ [*specify facts showing that controversy is real and proceeding is instituted in good faith*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

The form of declaration in [1], *above*, is for use to satisfy the requirement of *Code Civ. Proc. § 1138* that a submission on an agreed case be accompanied by an affidavit verifying that the controversy is real and the proceeding has been instituted in good faith. A declaration under penalty of perjury may be submitted in lieu of an affidavit [*see Code Civ. Proc. § 2015.5*].

The declaration must state that the controversy, that is, the proceeding, is in good faith; it is not adequate to state that a party's *contention* is in good faith [*see White v. Clarke (1896) 111 Cal. 425, 427-428, 44 P. 164]* .

Each party must submit an affidavit or declaration to this effect [*see Code Civ. Proc. § 1138*].

For discussion, see *§ 534.13[2]*.

[3] Cross References

For alternate forms of declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

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46-534 California Forms of Pleading and Practice--Annotated § 534.43

§ 534.43 Judgment on Agreed Case [Code Civ. Proc. § 1139]

[1] FORM Judgment on Agreed Case [Code Civ. Proc. § 1139]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

In the Matter of the Agreed Case Between _____ [*name*], Plaintiff, and _____ [*name*], Defendant.	))))))))))	NO. _____ JUDGMENT ON AGREED CASE

The above-named parties have submitted a controversy on an agreed case, duly verified by _____ [affidavit *or* declaration] as required by *Section 1138 of the Code of Civil Procedure*. The court, after examining the agreed case, after hearing _____ [*name*], attorney for plaintiff and _____ [*name*], attorney for defendant, and after due deliberation, finds on the facts submitted and determines as a matter of law that _____ [plaintiff *or* defendant] _____ [*name*] is entitled to judgment.

[*EITHER*]

IT IS HEREBY ADJUDGED AND ORDERED that plaintiff _____ [*name*] have judgment against defendant _____ [*name*] in the sum of $_____.

[*OR*]

IT IS HEREBY ADJUDGED AND ORDERED that plaintiff take nothing.

Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

Counsel may submit the form of judgment in [1], *above*, for use by the court in entering a judgment pursuant to asubmission of an agreed case [*see Code Civ. Proc. § 1139*]. For discussion, see *§ 534.13[3]* et seq.

[3] Cross References

For a discussion and forms of judgments, generally, see *Ch. 318, Judgments, § 318.40* et seq.

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46-534 California Forms of Pleading and Practice--Annotated § 534.44

§ 534.44 Stipulation [Code Civ. Proc. § 283] of Agreed Statement of Facts

[1] FORM Stipulation [Code Civ. Proc. § 283] of Agreed Statement of Facts
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*], Plaintiff, vs.	)	
_____ [*name*],	)	NO. _____
[and DOES I through _____,]	)	STIPULATION OF AGREED FACTS
Defendant(s).	)	
	)	

IT IS HEREBY STIPULATED AND AGREED by and between the parties to this action, acting through their respective attorneys of record that:

1. The above-entitled cause may be tried in this court without a jury, and this court may render judgment on the pleadings filed herein and on the following facts which are hereby agreed to, and which the court may consider as evidence in the case.

[*SET FORTH specifically the facts agreed on in as many paragraphs as necessary, e.g.:*]

2. In an agreement dated _____ [*date*] attached hereto as Exhibit A and made a part hereof, _____ [*name*] agreed to sell, and _____ [*name*] agreed to purchase, certain real property described therein.

3. _____ [*Name*] as purchaser, entered into possession of the property on _____ [*date*], and from that date received all rents and profits therefrom, pursuant to the agreement.

4. The escrow on the transaction closed on _____ [*date*], _____ days after the _____ [*name*], the purchaser entered into possession.

[*CONTINUE setting out relevant facts*]

Dated: _____.

_____ [*signature*]

_____ [*typed name*]

Plaintiff

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

_____ [*signature*]

_____ [*typed name*]

Defendant

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Use of Form

The form of agreed facts in [1], *above*, is for use after an action has been commenced by parties who agree as to all or part of the facts, to stipulate to those facts as a substitute for evidentiary proof of the pleadings. For discussion, see *§ 534.14*.

[3] Cross References

For forms of agreed case to be used when an action has not yet been commenced, see *§§ 534.40 -534.42*

For forms of stipulations generally, see Ch. 533, *Stipulations*

For a form for use in entering judgment pursuant to a stipulation of facts, see *Ch. 318, Judgments, § 318.40* et seq.

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Chapter 535 SUBPOENA

46-535 California Forms of Pleading and Practice--Annotated 535.syn

§ 535.syn Synopsis to Chapter 535: SUBPOENA

§ 535.01 Scope of Chapter

§ 535.02 Cross References

§§ 535.03-535.09 [Reserved]

§ 535.10 Governing Law

§ 535.11 Use of Subpoenas and Subpoenas Duces Tecum

[1] Purposes

[2] Special Provisions

§ 535.12 Obtaining Subpoena

[1] To Require Attendance Before Court or at Trial

[2] To Require Attendance Before Commissioner Appointed by Non-California Court

[3] To Require Attendance out of Court in Cases Not Provided for by Code Civ. Proc. § 1986(a)

[4] To Require Attendance Before Officer on Taking Deposition

§ 535.13 Issuance

[1] By Clerk or Judge

[2] By Attorney

§ 535.14 Limitation to California Residents

[1] In General

[2] Definition of Residence

[3] Exception for Custodian of Records if Attendance Not Required

[4] Exception for Member of California Highway Patrol

§ 535.15 Agreement to Appear at Another Time

[1] Availability

[2] Failure to Appear

§ 535.16 Affidavit Supporting Subpoena Duces Tecum

[1] Requirements

[2] Contents

[3] Filing

§ 535.17 Service

[1] In General

[2] Time of Service

[3] Subpoena Duces Tecum

[4] On Concealed Witness

[5] On Peace Officers, Firefighters, and Other Public Employees

[6] On Nonresident Members of the California Highway Patrol

[7] Fees for Service

§ 535.18 Witness Fees

[1] In General

[2] Fees for Experts

[a] Availability

[b] Tender of Fees

[c] Motion to Set Compensation

[d] Notice of Continuation or Cancellation

§ 535.19 Fees for Public Employees

[1] City and County Employees, Peace Officers, Firefighters, and Specified Others

[a] In General

[b] Salary and Expenses

[c] Reimbursement of Entity

[d] Overpayment or Underpayment

[2] Deposit for Nonresident Highway Patrol Officer

[3] Deposit for Appearance at Subsequent Proceedings

[4] Relief From Deposit or Payment Requirement

§ 535.20 Production of Business Records by Subpoena Duces Tecum

[1] When Personal Attendance Not Required

[a] In General

[b] Transmittal of Records

[c] Records Made Available to Attorney

[d] Admissibility of Copies

[2] Personal Attendance of Custodian or Witness

[a] In General

[b] Witness Fees and Mileage

[3] Reasonable Costs for Production of Business Records

[a] Set by Statute

[b] Demand for Payment and Itemized Statement of Costs

[c] Petition to Reduce Excessive Costs

[d] When Witness Entitled to Reimbursement

§ 535.21 Subpoena Duces Tecum Requiring Production of Personal Records of Consumer or Employment Records of Employee

[1] In General

[2] Definitions

[a] Personal Records and Witnesses

[b] Consumer

[c] Employment Records

[d] Employee

[e] Subpoenaing Party

[3] Time Allowed for Production

[4] Service of Subpoena Duces Tecum, Affidavit, and Notice on Consumer or Employee

[a] Requirements

[b] Contents of Notice

[5] Proof of Service or Written Authorization Served on Witness

[6] Motion to Shorten Time or to Waive Notice Requirements by Subpoenaing Party

[7] Motion to Quash by Party Consumer or Employee

[8] Objection by Nonparty Consumer or Employee

[9] Medical Records

§ 535.21A Subpoena Requiring Production of Electronically Stored Information

[1] Party May Require Production

[2] "Electronic" and "Electronically Stored Information" Defined

[3] Requesting Production

[4] Opposing Production

[5] Limiting Discovery

[6] Sanctions

§ 535.21B Subpoenas in California for Out-of-State Proceedings

[1] Governing Law

[2] Definitions

[3] Procedure for Obtaining Subpoena

[4] Subpoena Form and Contents

[5] Party Not Required to Retain Local Attorney

[6] Service of Subpoena

§ 535.22 Private Records of Public Employees

§ 535.22A Nonparty Objection to Subpoena

§ 535.23 Quashing, Modifying or Enforcing Compliance With Subpoena

[1] Motion Procedure

[2] By Public Employees

[3] Grounds for Motion

[4] Costs of Motion

§ 535.24 Notice in Lieu of Subpoena

[1] Persons Subject to Notice

[2] Definition of "Benefitted Persons"

[3] Time of Service

[4] Witness Fees on Notice

[5] Requests for Books, Documents, or Other Things

[6] Objection to Notice Requesting Production

§ 535.25 Examination of Prisoners

§ 535.26 Disobedience of Subpoena

[1] Contempt

[a] In General

[b] Service of Subpoena on Witness Necessary for Jurisdiction

[c] Direct Contempt

[d] Subpoena Requiring Attendance Out of Court

[e] Public Safety Employees

[f] Sexual Assault Victims

[g] Victims of Domestic Violence

[2] Penalty

[3] Warrant and Arrest

[4] Other Sanctions

§§ 535.27-535.39 [Reserved]

§ 535.40 Related Matthew Bender Publications

§ 535.41 State Constitution

§ 535.42 State Statutes

[1] Deposition of Prisoners

[2] Disobedience of Subpoena

[3] Issuance

[4] Miscellaneous Records Subject to Subpoena

[5] Motion to Quash

[6] Notice to Attend in Lieu of Subpoena

[7] Persons in Court, But Not Subpoenaed

[8] Purpose and Use of Subpoenas

[9] Service

[10] Subpoena Duces Tecum

[11] Subpoena Duces Tecum Requiring Production of Employment Records of Employee

[12] Subpoena Duces Tecum Requiring Production of Personal Records of Consumer

[13] Subpoena Duces Tecum Requiring Production of Private Records of Public Employees

[13A] Subpoena Requiring Production of Electronically Stored Information

[14] Subpoenas in Particular Proceedings

[a] In General

[b] Criminal

[c] Involving State Agencies

[15] Witness Fees

§ 535.43 Decisions

[1] Administrative Proceedings

[2] Disobedience of Subpoena

[3] Motion to Quash

[4] Production of Business Records

[5] Production of Personal Records of Consumer

[6] Sufficiency of Affidavit Accompanying Subpoena Duces Tecum

[7] Witness Fees

§ 535.44 Attorney General Opinions

§ 535.45 Law Reviews

§ 535.46 Text References

§§ 535.47-535.49 [Reserved]

§ 535.50 Party Seeking Subpoena

[1] Make Preliminary Determinations

[2] Decide the Type and Content of the Subpoena Best Fitting Your Needs

[3] Calendar Relevant Dates

[4] Fees for Resident Peace Officer, Other Public Employee, or Nonresident California Highway Patrol Member

[5] Prepare and Issue Subpoena

[6] Service

[7] Obtain Penalties for Noncompliance

§ 535.51 Party Seeking Subpoena Duces Tecum

[1] Make Preliminary Determinations

[2] Deposit Fees for Nonresident California Highway Patrol Member

[3] Prepare and Issue Subpoena Duces Tecum, and Supporting Papers

[4] Service

[5] File Documents

[6] Obtain Penalties for Noncompliance With Subpoena Duces Tecum

§ 535.52 Person Receiving Subpoena or Subpoena Duces Tecum

[1] For Custodian of Business Records to Comply if Attendance Is Not Required

[2] To Comply Generally

[3] To Object if a Nonparty Consumer or Employee

[4] To Quash or Modify Subpoena or Subpoena Duces Tecum

§ 535.53 Party Seeking to Compel Appearance by Notice in Lieu of Subpoena

[1] Make Preliminary Determinations

[2] To Compel Attendance Without Production

[3] To Compel Attendance With Books, Documents, or Other Things

§ 535.54 Party Receiving Notice to Appear in Lieu of Subpoena

[1] To Comply With Notice

[2] To Object to Notice to Produce

§§ 535.55-535.59 [Reserved]

§ 535.60 Civil Subpoena with Proof of Service [Code Civ. Proc. § 1985; Cal. Judicial Council Form SUBP-001]

[1] FORM

[2] Use of Form

[3] Procedure for Obtaining Subpoenas

[4] Issuance

[5] Filling in Form

[a] Heading

[b] Attendance Requirement (Paragraph 1)

[c] Agreement to Appear at Another Time (Paragraph 2)

[d] Witness Fees (Paragraph 3)

[6] Disobedience of Subpoena

[7] Proof of Service

[8] Cross References

§ 535.61 Civil Subpoena Duces Tecum with Supporting Declaration and Proof of Service [Code Civ. Proc. § 1985; Cal. Judicial Council Form SUBP-002]

[1] FORM

[2] Use of Form

[3] Procedure for Obtaining Subpoena Duces Tecum

[4] Issuance

[5] Filling in Form

[a] Heading

[b] Requirement of Attendance and Production of Records

[c] Agreement to Appear at Another Time

[d] Witness Fees

[6] Supporting Declaration

[7] Disobediance of Subpoena

[8] Proof of Service

[9] Cross References

§ 535.62 Declaration Under Penalty of Perjury Supporting Subpoena Duces Tecum--Materiality and Good Cause for Production of Hospital Records in Personal Injury Action

[1] FORM

[2] Use of Form

[3] Deposition Subpoenas

[4] Cross References

§ 535.63 Statements in Declaration or Affidavit [Code Civ. Proc. § 2003] for Subpoena Duces Tecum--Materiality and Good Cause for Production of X Rays in Personal Injury Action

[1] FORM

[2] Use of Form

§ 535.64 Statements in Declaration or Affidavit for Subpoena Duces Tecum--Materiality and Good Cause for Production of Medical Records in Malpractice Action

[1] FORM

[2] Use of Form

§ 535.65 Statements in Declaration or Affidavit for Subpoena Duces Tecum--Materiality and Good Cause for Production of Earning Records of Company--Loss of Earnings

[1] FORM

[2] Use of Form

§ 535.66 Statements in Declaration or Affidavit for Subpoena Duces Tecum--Materiality and Good Cause for Production of Truck and Shipping Records

[1] FORM

[2] Use of Form

[3] Cross References

§ 535.67 Declaration Under Penalty of Perjury of Custodian of Business Records to Accompany Copies of Records Mailed or Delivered to Court in Compliance With Subpoena Duces Tecum [Evid. Code § 1561]

[1] FORM

[2] Use of Form

[3] Time of Compliance

[4] Declaration of Custodian or Witness

[5] Transmittal

[6] Cross References

§ 535.68 Declaration Under Penalty of Perjury of Attorney of Subpoenaing Party to Accompany Copies of Records Made in Compliance With Subpoena Duces Tecum [Evid. Code § 1561]

[1] FORM

[2] Use of Form

[3] Cross References

§ 535.69 Notice to Consumer or Employee and Objection [Code Civ. Proc. §§ 1985.3, 1985.6; Cal. Judicial Council Form SUBP-025]

[1] FORM

[2] Use of Form

[a] Adopted by Judicial Council for Mandatory Use

[b] Notice to Consumer or Employee That Personal Records Are Being Subpoenaed

[c] Objection by Non-party Consumer or Employee

[3] Contents of Notice

[4] Procedure for Notice to Consumer or Employee

[a] Accompanying Papers

[b] Method of Service in General

[c] Method of Service When Consumer or Employee Is Minor

[5] Time of Service on Consumer or Employee

[6] Order Shortening Time or Waiving Requirements of Code Civ. Proc. § 1985.3(b)

[7] Proof of Service or Written Authorization Served on Witness

§ 535.70 Consumer's Authorization for Release of Personal Records [Code Civ. Proc. § 1985.3(c)(2)]

[1] FORM

[2] Use of Form

§ 535.71 Consumer's Authorization for Release of Telephone Records [Code Civ. Proc. § 1985.3(f); Pub. Util. Code § 2891]

[1] FORM

[2] Use of Form

§ 535.72 [Reserved]

§ 535.73 Employee's Authorization for Release of Employment Records [Code Civ. Proc. § 1985.6(c)(2)]

[1] FORM

[2] Use of Form

§ 535.74 Notice of Motion for Order Quashing, Modifying, or Directing Compliance With Subpoena or Subpoena Duces Tecum and for Expenses of Motion [Code Civ. Proc. §§ 1987.1, 1987.2]

[1] FORM

[2] Use of Form

[a] Generally

[b] By a Party Consumer or Employee Whose Records Are Sought

[c] By a Nonparty Consumer or Employee Whose Records Are Sought

[d] By Person Whose Personally Identifying Information Is Sought in Connection With Underlying Action Involving Free Speech Rights

[e] By Person Immune From Service of Process

[3] Awarding Expenses

[4] Accompanying Papers

[5] Cross References

§ 535.75 [Reserved]

§ 535.76 Declaration Under Penalty of Perjury in Support of Motion for Order Quashing, Modifying, or Enforcing Subpoena or Subpoena Duces Tecum and for Expenses of Motion

[1] FORM

[2] Use of Form

[3] Showing Required for Subpoena Duces Tecum

[4] Cross References

§ 535.77 Order Quashing, Modifying, or Directing Conditional Compliance With Subpoena, or Protecting a Party, Witness, Consumer, or Employee From Unreasonable or Oppressive Demands, and Awarding Expenses of Motion

[1] FORM

[2] Use of Form

[3] Awarding Expenses

[4] Cross References

§ 535.78 Notice to Attorney in Lieu of Subpoena to Compel Attendance of Party or Party-Related Person Before Court [Code Civ. Proc. § 1987(b)]

[1] FORM

[2] Use of Form

[3] Persons Subject to Notice

[4] Effect of Notice

[5] Service

[6] Cross References

§ 535.79 Notice to Attorney in Lieu of Subpoena Duces Tecum to Compel Attendance of Party or Party-Related Person Before Court and Bringing of Books, Documents, or Other Things [Code Civ. Proc. § 1987(c)]

[1] FORM

[2] Use of Form

[3] Time of Service

[4] Contents of Notice

§ 535.80 Objections to Request That Party or Party-Related Person Produce Books, Documents, or Other Things Before Court on Notice to Attorney

[1] FORM

[2] Use of Form

[3] Time for Objecting

[4] Requesting Party's Response

[5] Cross References

§ 535.81 Notice of Motion for Order That Party or Party-Related Person Produce Books, Documents, or Other Things Before Court and for Reasonable Expenses of Motion

[1] FORM

[2] Use of Form

[3] Accompanying Papers

[4] Award of Expenses of Motion

[5] Cross References

§ 535.82 Declaration Under Penalty of Perjury in Support of Motion for Order that Party or Party-Related Person Produce Books, Documents, or Other Things Before Court and for Reasonable Expenses of Motion

[1] FORM

[2] Use of Form

[3] Showing Required

[4] Cross References

§ 535.83 Order That Party or Party-Related Person Produce Books, Documents, or Other Things Before Court and for Expenses of Motion

[1] FORM

[2] Use of Form

[3] Cross References

§ 535.84 Subpoena and Subpoena Duces Tecum--Order to Attend Court or Provide Documents [Penal Code § 1326; Welf. & Inst. Code §§ 341, 664; Cal. Judicial Form CR-125/JV-525]

[1] FORM

[2] Use of Form

[3] Issuance

[a] Criminal Proceedings

[b] Juvenile Proceedings

[4] Cross References

§ 535.85 Subpoena for Production of Business Records in Action Pending Outside California [Code Civ. Proc. § 2029.100 et seq.; Cal. Judicial Council Form SUBP-035]

[1] FORM

[2] Use of Form

[3] Procedure for Obtaining Subpoena

[4] Notice to Consumer or Employee and Objection

[5] Proof of Service

[6] Cross References

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Chapter 535 SUBPOENA
PART I. SCOPE

46-535 California Forms of Pleading and Practice--Annotated § 535.01

§ 535.01 Scope of Chapter

This chapter discusses and sets forth procedures for obtaining and serving subpoenas and subpoenas duces tecum. In addition to forms for subpoenas [*see §§ 535.60, 535.61, 535.84*, 535.85], the chapter includes the following forms:

- Declarations and statements for use in declarations in support of subpoenas duces tecum [*see §§ 535.62 -535.66*].

- Declaration of a custodian of business records for use when a subpoena duces tecum does not require personal appearance [*see § 535.67*].

- Declaration by the attorney of the subpoenaing party when the business records were made available to the attorney for inspection and copying pursuant to a subpoena duces tecum [*see § 535.68*].

- Notice to a consumer or employee that his or her personal records are being sought [*see § 535.69*] and authorization by a consumer or employee for the release of those records [*see §§ 535.70, 535.73*].

- Notice to an employee that his or her employment records are being sought [*see § 535.72*] and authorization by an employee for the release of those records [*see § 535.73*].

- Authorization by a consumer for the release of telephone records [*see § 535.71*].

- Moving papers for bringing a motion for an order to quash a subpoena [*see §§ 535.74 -535.77*].

- Notices to be used in lieu of subpoenas [*see §§ 535.78, 535.79*].

- Objections to a notice to produce [*see §§ 535.69, 535.80*].

- Moving papers for bringing a motion for an order to produce [*see §§ 535.81 -535.84*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedurePretrial MattersSubpoenas

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§ 535.02 Cross References

For discussion, procedures, and forms relating to subpoenaing a witness to attend a deposition, see Ch. 193, *Discovery: Depositions* .

For discussion and a procedural checklist relating to subpoenaing witnesses to attend administrative hearings, see Ch. 473F, *Agency Adjudication Hearings* .

For discussion and forms relating to contempt proceedings, see Ch. 135, *Contempt* .

For discussion, procedural guides, and forms relating to subpoenas in discovery proceedings, see Ch. 193, *Discovery: Depositions* .

For discussion and forms relating to quashing service of summons on witnesses subpoenaed from out of state to testify in a criminal proceeding in California, see Ch. 323, Jurisdiction: *Personal Jurisdiction, Inconvenient Forum, and Appearances*.

For a form for use in worker's compensation proceedings, see Ch. 577, *Workers' Compensation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsScopeSubpoenasCivil ProceduresPleading & PracticeService of ProcessSummonsGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProceduresPretrial MattersSubpoenasCivil ProceduresSanctionsContemptGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsGeneral Overview

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[Reserved]

§§ 535.03[Reserved]

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§ 535.10 Governing Law

Most of the general provisions relating to subpoenas are set out in *Code Civ. Proc. §§ 1985-1997*. The issuance of subpoenas is governed by *Code Civ. Proc. §§ 1985-1986*, service by *Code Civ. Proc. §§ 1987-1988*, motions to quash, modify, or comply by *Code Civ. Proc. § 1987.1*, and penalties for disobedience of a subpoena by *Code Civ. Proc. §§ 1991-1994*. Temporary removal of prisoners and their production in court is governed by *Code Civ. Proc. §§ 1995-1997*, and subpoenas in criminal proceedings by *Penal Code §§ 1326-1332*. The service of subpoenas on certain peace officers is governed by *Gov. Code §§ 68097.1-68097.10*. The use of subpoenas duces tecum for the production of business records is governed by *Evid. Code §§ 1560-1566*.

In the case of subpoenas used in the context of obtaining discovery, the provisions governing subpoenas generally are modified by the more specific provisions of the Civil Discovery Act (*Code Civ. Proc. § 2016.010 et seq.*) [*see Code Civ. Proc. §§ 2020.010*]. Subpoenas issued in an action pending outside California are governed by the Interstate and International Depositions and Discovery Act [*Code Civ. Proc. § 2029.100 et seq.*; *see Code Civ. Proc. § 2029.500* (other applicable law)]. For further discussion and forms relating to provisions specifically applicable to deposition subpoenas, see Ch. 193, *Discovery: Depositions* .

There are also a number of additional provisions governing issuance of subpoenas in specialized contexts and proceedings [*see, e.g., Welf. & Inst. Code §§ 341, 664* (juvenile dependency and wardship proceedings); *Mil. & Vet. Code § 460 et seq.* (military court proceedings); *Prob. Code § 451* (issuance by probate referees); *Educ. Code § 48918* (school expulsion proceedings); *Veh. Code § 14104.5* (informal hearings before the Department of Motor Vehicles)]. However, this is only a partial listing and relevant code indexes should be consulted to determine if any additional provisions governing issuance of subpoenas are applicable in a specific context.

Legal Topics:

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

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§ 535.11 Use of Subpoenas and Subpoenas Duces Tecum

[1] Purposes

A subpoena is a writ or order directed to a person requiring his or her attendance at a particular time and place to testify as a witness. It is the process by which the attendance of a witness is required [*Code Civ. Proc. § 1985(a)*].

A subpoena duces tecum requires the witness also to bring with him or her any books, documents, or other things under the witness's control which he or she is bound by law to produce in evidence [*Code Civ. Proc. § 1985(a)*].

[2] Special Provisions

Special provisions concerning service and payment of fees apply when the witness being subpoenaed is a peace officer, fire fighter, or technical analyst in a related area [*see Gov. Code §§ 68097.1-68097.10*]. For discussion of service of subpoena and payment of fees relating to these individuals, see *§§ 535.17[5]* and *535.19[1][a]*, respectively.

Special provisions may also apply if a party has subpoenaed the records of certain businesses [*Code Civ. Proc. §§ 1987.3*; *Evid. Code §§ 1560-1566*]. These provisions are discussed in *§ 535.20*.

Special requirements also apply when the personal records of consumers, as defined in *Code Civ. Proc. § 1985.3*, the employment records of employees, or the private records of public employees are sought by subpoena duces tecum [*see Code Civ. Proc. §§ 1985.3* (consumers), 1985.4 (public employees), 1985.6 (private employers)]. These requirements are discussed in *§§ 535.21* and 525.22, respectively.

Parties and certain party-related persons may be compelled to attend and produce certain things by notice to their attorneys, instead of by a subpoena or subpoena duces tecum [*see Code Civ. Proc. § 1987(b), (c)*]. This method of compelling attendance is discussed in *§ 535.24*.

Legal Topics:

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

Civil ProcedurePretrial MattersSubpoenas

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§ 535.12 Obtaining Subpoena

[1] To Require Attendance Before Court or at Trial

A subpoena to require attendance before a court, or at the trial of an issue therein, is obtainable from the clerk of the court in which the action or proceeding is pending [*Code Civ. Proc. § 1986(a)*]. It is unclear what significance this provision would have when the subpoena is going to be issued by an attorney pursuant to *Code Civ. Proc. § 1985(c)* [*see discussion under § 535.13[2]*]. Since the attorney of record may sign and issue a subpoena which requires attendance pursuant to *Code Civ. Proc. § 1986(a)*, it would appear that the mandatory Judicial Council subpoena forms [*see §§ 535.60, 535.61*] could be obtained from any court, as long as the attorney fills in the name of the court in which the action or proceeding is pending.

Although *Code Civ. Proc. § 1986(a)* refers only to subpoenas, and not to subpoenas duces tecum, it appears that both are obtained in the same manner.

[2] To Require Attendance Before Commissioner Appointed by Non-California Court

A subpoena to require attendance before a commissioner appointed to take testimony by a court of a foreign county, or of the United States, or of any other state in the United States, or before any other officers empowered by the laws of the United States to take testimony may be obtained from the clerk of the superior court of the county in which the witness is to be examined [*Code Civ. Proc. § 1986(b)*].

[3] To Require Attendance out of Court in Cases Not Provided for by Code Civ. Proc. § 1986(a)

A subpoena to require attendance out of court, in cases not provided for in *Code Civ. Proc. § 1986(a)* (*see* discussions in [1], *above* and [4], *below*), before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under California laws, is obtainable from the judge, justice, or other officer before whom the attendance is required [*Code Civ. Proc. § 1986(c)*].

[4] To Require Attendance Before Officer on Taking Deposition

Code Civ. Proc. § 1986(a) provides that a subpoena to require attendance on the taking of a deposition in an action or proceeding is obtainable from the clerk of the court in which the action or proceeding is pending.

The last paragraph of *Code Civ. Proc. § 1986* provides that if the subpoena will require attendance before a commissioner or other officer on the taking of a deposition, it must be obtained "as of course" from the clerk of the superior court of the county where the attendance is required on application of the party requiring it. This provision appears to conflict with *Code Civ. Proc. § 1986(a)*, which provides that the court from which the subpoena is obtained is the court in which the action or proceeding is pending.

Legal Topics:

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

[1] By Clerk or Judge

The clerk, or a judge, issues a subpoena or subpoena duces tecum signed and sealed, but otherwise blank, to the party requesting it, who must fill it in before service [*Code Civ. Proc. § 1985(c)*].

[2] By Attorney

The attorney of record in an action or proceeding may sign and issue a subpoena to require attendance before the court in which the action or proceeding is pending, or at the trial of an issue therein, or on the taking of a deposition in an action or proceeding pending therein. The subpoena in such a case need not be sealed [*Code Civ. Proc. § 1985(c)*]. The attorney of record may also sign and issue a subpoena duces tecum to require production of the matters or things described in the subpoena [*Code Civ. Proc. § 1985(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 535.14 Limitation to California Residents

[1] In General

Generally, a person is not obliged to attend as a witness before any court, judge, justice, or other officer, unless the witness is a resident within California at the time of service of the subpoena [*Code Civ. Proc. § 1989*].

PRACTICE TIP:
Seek Voluntary Appearance. It may be worth a telephone call or a letter to the out-of-state witness. Communication may yield an agreement to appear voluntarily. *By Corinne Burt.*

[2] Definition of Residence

Residence, for the purpose of a subpoena, means residence in fact and not domicile. Pursuant to *Code Civ. Proc. § 1989*, the term "residence" envisages nothing more than an abode, possibly combined with a professional base of operations, which gives the resident a sojourning connection with the area of a type and duration related to the status of witness and which does not make it a hardship for him or her to attend the legal proceedings at which he or she is commanded to appear [*In re Morelli (1970) 11 Cal. App. 3d 819, 831, 91 Cal. Rptr. 72]* .

[3] Exception for Custodian of Records if Attendance Not Required

The limitations of *Code Civ. Proc. § 1989* do not apply when a subpoena duces tecum is served on a custodian of records or other qualified witness as provided by *Evid. Code §§ 1560-1566* and his or her personal attendance is not required by the terms of the subpoena [*Code Civ. Proc. § 1987.3*; *see* discussion in *§ 535.20[1]*].

[4] Exception for Member of California Highway Patrol

A member of the California Highway Patrol may be required by a subpoena requiring attendance to appear as a witness before any court located in California, in any civil action or proceeding, in connection with a matter regarding an event or transaction which he or she has perceived or investigated in the course of his or her duties, even if he or she is not subject to a subpoena pursuant to *Code Civ. Proc. § 1989* [*Gov. Code § 68097.3*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedurePretrial MattersSubpoenas

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§ 535.15 Agreement to Appear at Another Time

[1] Availability

A subpoenaed person, in lieu of appearance at the time specified in the subpoena, may agree with the party at whose request the subpoena isissued to appear at another time or on such notice as may be agreed on [*Code Civ. Proc. § 1985.1*; *Gov. Code § 68097.9* (peace officers and related persons)].

PRACTICE TIP:

Coordinate With Witnesses to Save Time and Gain Cooperation. To save time and scheduling headaches, contact witnesses before serving the subpoena to let them know they will be subpoenaed and that you want to accommodate their schedule. This will not only save time, but it may yield a more cooperative witness. In the event that there is an agreement to appear at another time, make sure it is memorialized in writing. *By Corinne Burt.*

[2] Failure to Appear

Failure to appear pursuant to an agreement may be punishable as contempt by the court issuing the subpoena [*Code Civ. Proc. § 1985.1*; *see* discussion in *§ 535.26[1]*, and in Ch. 135, *Contempt*]. Facts establishing or disproving such an agreement and the failure to appear may be proved by an affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) of any person having personal knowledge of the facts [*Code Civ. Proc. § 1985.1*].

If a witness disobeys a subpoena served in a civil action pursuant to *Evid. Code § 1560(e)*, the disobedience may be punished as a contempt as provided in *Code Civ. Proc. § 2020.240* [*Evid. Code § 1560(e)*]. *Code Civ. Proc. § 2020.240* provides that disobedience of deposition subpoena may be punished for contempt under *Code Civ. Proc. 2023.010 et seq.* without the necessity of a prior order of court directing compliance [*see Code Civ. Proc. § 2023.030(e)* (court may impose a sanction for misuse of the civil discovery process by issuing an order treating the misuse as a contempt of court); for discussion of the use of contempt orders to punish disobedience of subpoenas generally, *see § 535.26[1]*]. The witness or person who fails to appear pursuant to a subpoena or a court order is also subject to the forfeiture and payment of damages set forth in *Code Civ. Proc. § 1992* [*Code Civ. Proc. § 2020.240*]. As an alternative to a contempt sanction, the court may issue a warrant for the arrest of witness or person who fails to appear [*Code Civ. Proc. §*

1993(a)(1); *see Code Civ. Proc. §§ 1993(a)(2), (b), 1993.1-1993.2* (procedures); § 535.26[2]].

Legal Topics:

For related research and practice materials, see the following legal topics:
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46-535 California Forms of Pleading and Practice--Annotated § 535.16

§ 535.16 Affidavit Supporting Subpoena Duces Tecum

[1] Requirements

A copy of an affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) on which a subpoena duces tecum is based must be served with the subpoena duces tecum [*Code Civ. Proc. §§ 1985(b), 1987.5*; *see §§ 535.61, 535.62* et seq.].

[2] Contents

The affidavit or declaration must show good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control [*Code Civ. Proc. § 1985(b)*; *see Lee v. Superior Court (2009) 177 Cal. App. 4th 1108, 1126-1130, 99 Cal. Rptr. 3d 712* (subpoenas duces tecum were ineffective because each failed to include declaration containing "a sufficient statement of materiality" as required *Code Civ. Proc. § 1985(b)*; *see also §§ 535.61 -535.66*]. The affidavit must show that the requested material contains competent and admissible evidence that is material to some disputed issue of fact at the trial [*People v. Schmitt (1957) 155 Cal. App. 2d 87, 106, 317 P.2d 673]* . The affidavit cannot consist of reliance "merely upon the legal conclusion, stated in general terms, that the desired documentary evidence is relevant and material" [*McClatchy Newspapers v. Superior Court (1945) 26 Cal. 2d 386, 396, 159 P.2d 944* ; *Lee v. Superior Court (2009) 177 Cal. App. 4th 1108, 1112, 99 Cal. Rptr. 3d 712* (declarations that lacked any factual bases for legal conclusion that documents were material to proceedings failed to comply with *Code Civ. Proc. § 1985(b)*, collecting cases, quoting *McClatchy*); *Johnson v. Superior Court (1968) 258 Cal. App. 2d 829, 837, 66 Cal. Rptr. 134* ("the trial court must be afforded the factual data by the required affidavit to enable it to make an informed ruling on the issues of materiality and good cause.")]. Rather, the documents or other things should be described with such certainty that the person producing the records is reasonably apprised of what is required [*Pacific Auto. Ins. Co. v. Superior Court (1969) 273 Cal. App. 2d 61, 68-69, 77 Cal. Rptr. 836* ; *see also Flora Crane Serv., Inc. v. Superior Court (1965) 234 Cal. App. 2d 767, 785-786, 45 Cal. Rptr. 79]* .

[3] Filing

The party causing the subpoena to be served must retain the original affidavit or declaration until final judgment in the

action, and must file this affidavit or declaration with the court only on reasonable request by any party or witness affected thereby [*Code Civ. Proc. § 1987.5*].

Legal Topics:

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

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§ 535.17 Service

[1] In General

The service of a subpoena generally is made (except on peace officers, firefighters, and specified technical analysts, discussed in *§ 535.17[5]*) by delivering a copy or ticket containing its substance to the witness personally [*Code Civ. Proc. § 1987(a)*]. However, when service is to be made on a minor, service must be made on the minor's parent, guardian, conservator, or similar fiduciary, or if one of them cannot be located with reasonable diligence, then service must be made on any person having the care or control of the minor or with whom the minor resides or by whom the minor is employed, and on the minor if the minor is 12 years of age or older. However, if the minor is alleged to come within the description of *Welf. & Inst. Code §§ 300*, *601*, or *602* and the minor is not in the custody of a parent or guardian, regardless of the age of the minor, service also must be made on the designated agent for service of process at the county child welfare department or the probation department under whose jurisdiction the minor has been placed [*Code Civ. Proc. § 1987(a)*; *Penal Code § 1328(b)*; *see Welf. & Inst. Code §§ 300* (persons subject to jurisdiction of juvenile court), 601 (persons subject to jurisdiction of juvenile court as ward for refusal to obey parents, violation of curfew, or truancy), 602 (persons subject to jurisdiction of juvenile court and adjudicated as ward for violation of law or ordinance defining crime)].

Service may be made by any person [*Code Civ. Proc. § 1987(a)*].

[2] Time of Service

Service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance [*Code Civ. Proc. § 1987(a)*].

PRACTICE TIP:

Allow Witness as Much Time as possible. Give as much notice as possible to avoid the assertion that the notice given was not reasonable. *By Corinne Burt.*

When serving a written notice instead of a subpoena [*see § 535.24[1]* for discussion of when written notice may substitute for subpoena], the notice must be served at least 10 days before the time required for attendance unless the

court prescribes a shorter time [*Code Civ. Proc. § 1987(b)*]. The notice may include a request that the party or person bring books, documents or other things if the notice is served at least 20 days before the time required for attendance, or within such shorter time as the court may order [*Code Civ. Proc. § 1987(c)*].

[3] Subpoena Duces Tecum

A copy of the affidavit on which the subpoena duces tecum is based [*see* discussion at *§ 535.16*] must be served simultaneously with the subpoena duces tecum. If it is not, the service of the subpoena duces tecum is invalid [*Code Civ. Proc. § 1987.5*]. A subpoena duces tecum requiring appearance and the production of matters and things at the taking of a deposition is not valid unless a copy of the affidavit on which the subpoena is based and the designation of the materials to be produced, as set forth in the subpoena, is attached to the notice of taking the deposition served on each party or its attorney as provided in *Code Civ. Proc. § 2002 et seq.* [*Code Civ. Proc. § 1987.5*; *see also* Ch. 193, *Discovery: Depositions*].

Although the general provisions of the Code of Civil Procedure dealing with the issuance of subpoenas, *Code Civ. Proc. § 1985 et seq.*, apply to deposition subpoenas as well as to trial subpoenas, they do so only to the extent that those provisions are not modified by provisions in the *nonparty* discovery chapter of the Civil Discovery Act, *Code Civ. Proc. § 2020.010 et seq.* [*Code Civ. Proc. § 2020.030* (general subpoena provisions that include *Code Civ. Proc. §§ 1985* and *1987.5* apply to a deposition subpoena "[e]xcept as modified in this chapter"); *see § 535.10*]. *Code Civ. Proc. § 1987.5* provides that in the case of a subpoena duces tecum requiring appearance and the production of matters and things at the taking of a deposition, the subpoena is not valid unless a copy of the affidavit on which the subpoena was based and the designation of the materials to be produced, as set forth in the subpoena, is attached to the notice of taking the deposition served on each party or its attorney. *Code Civ. Proc. § 2020.510(b)*, however, provides that a deposition subpoena commanding the attendance and the testimony of the deponent, as well as the production of business records, documents, or tangible things need not be accompanied by an affidavit or declaration showing good cause for the production of the documents and things designated. Faced with these two contradictory and irreconcilable provisions, one court of appeal held, as a matter of first impression, that *Code Civ. Proc. § 2020.510(b)* controls [*Terry v. SLICO (2009) 175 Cal. App. 4th 352, 355, 95 Cal. Rptr. 3d 900]* . The court reasoned that treating *Code Civ. Proc. §§ 1985* and *1987.5* as the controlling provisions would be at odds with *Code Civ. Proc. § 2020.030* and with the "fundamental understanding that has prevailed since the adoption of the Civil Discovery Act," that to the extent that its provisions concerning nonparty discovery overlap or conflict with other provisions of more general application, the provisions of the Civil Discovery Act prevail [*Terry v. SLICO (2009) 175 Cal. App. 4th 352, 359, 95 Cal. Rptr. 3d 900]* . Because service of the deposition subpoena on a nonparty witness was effective despite the absence of a supporting affidavit or declaration, the trial court did not err in imposing reasonable monetary sanctions for the witness' failure to comply with the subpoena [*Terry v. SLICO (2009) 175 Cal. App. 4th 352, 359, 95 Cal. Rptr. 3d 900]* .

Code Civ. Proc. § 1987.5 does not apply to deposition subpoenas commanding only the production of business records for copying under *Code Civ. Proc. § 2020.420*.

For a discussion of the special requirements for a subpoena duces tecum for production of a consumer's personal records or an employee's employment records, see *§ 535.21*.

[4] On Concealed Witness

If a witness is concealed in a building or vessel to prevent the service of a subpoena on him or her, any court, judge, or officer issuing the subpoena may, on proof by affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) of the concealment and of the materiality of the witness, order that the sheriff of the county serve the subpoena. The sheriff may then break into the building or vessel where the witness is concealed for the purpose of serving the subpoena [*Code Civ. Proc. § 1988*].

[5] On Peace Officers, Firefighters, and Other Public Employees

If a witness is a peace officer of Department of the California Highway Patrol, member of the California State Police, employee of the Department of Justice who is a peace officer or analyst in a technical field, sheriff, deputy sheriff, marshal, deputy marshal, district attorney inspector, probation officer, building inspector, fire fighter, or city police officer, and he or she is required as a witness before a court or other tribunal in a civil action or proceeding in connection with an event or transaction that he or she has perceived or investigated in the course of his or her duties, the subpoena may be served by delivering a copy either to him or her personally or by delivering two copies to that person's immediate superior at the public entity by which he or she is employed [*Gov. Code § 68097.1(a)* (service may also be made on superior's designated agent)]. If a witness is any other state employee or any employee of the trial courts required to testify regarding a matter, event, or transaction about which he or she has expertise gained in the course of his or her duties, the subpoena may be served by delivering a copy either to him or her personally or by delivering two copies to his or her immediate superior [*Gov. Code § 68097.1(b)* (service may also be made on superior's designated agent)]. For a provision relating to service of subpoenas on peace officers in criminal proceedings, see *Penal Code § 1328*.

The attendance of this type of witness may be required pursuant to *Gov. Code § 68097.1* only in accordance with *Code Civ. Proc. § 1989* [*Gov. Code § 68097.1(c)*; *see § 535.14[1]*].

[6] On Nonresident Members of the California Highway Patrol

A member of the California Highway Patrol who is not subject to subpoena pursuant to the limitations of *Code Civ. Proc. § 1989* (limitation to residents of California) may nevertheless be served by delivering a copy, during usual office hours, at least five days before the date of the member's required attendance, to the person in charge of the office of the California Highway Patrol where the member filed his or her report of the event or transaction [*Gov. Code § 68097.3*].

[7] Fees for Service

The fee for serving a subpoena by a public officer, registered process server, or other means is an allowable cost under *Code Civ. Proc. § 1032(a)(4), (b)* (defining "prevailing party," directing court to determine prevailing party in cases not coming within definition, and providing that prevailing party is entitled to recover costs) [*Code Civ. Proc. § 1032(a)(4), (b)*]. If service is by a public officer, the recoverable cost is the fee authorized by law at the time of service [*Code Civ. Proc. § 1033.5(a)(4)(A)*]. Fees for service by sheriffs, constables, and marshals are governed by statute. For sheriffs, the fee for service of process is governed by *Gov. Code § 26721*, and certain charges for actual expenses are set out by *Gov. Code § 26748*. Marshals are required to charge and collect for their services the fees, expenses, and mileage allowed by law to sheriffs [*Gov. Code § 71266*]. If service is by a process server registered pursuant to *Bus. & Prof. Code § 22350 et seq.*, the recoverable cost is the amount actually incurred in effecting service, including, but not limited to, a stakeout or other means employed in locating the person to be served, unless those charges are successfully challenged by a party to the action [*Code Civ. Proc. § 1033.5(a)(4)(B)*]. If service is made by a person other than a public officer or registered process server, the recoverable cost is the sum actually incurred or the amount allowed to a public officer in California for that service, whichever is less, except that the court may allow the sum actually incurred in effecting service on application pursuant to *Code Civ. Proc. § 1033.5(c)(4)* (granting court discretion to allow or deny) [*Code Civ. Proc. § 1033.5(a)(4)(D)*].

Legal Topics:

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

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46-535 California Forms of Pleading and Practice--Annotated § 535.18

§ 535.18 Witness Fees

[1] In General

A witness subpoenaed in any civil or administrative action or proceeding must be given written notice on the subpoena that he or she may be entitled to receive attendance fees and payment for mileage [*Code Civ. Proc. § 2065*]. If the witness demands it, payment for travel (mileage) and attendance fees for one day must be given or offered to him or her at the time of service of the subpoena [*Code Civ. Proc. § 1987(a)*]. A witness who demands such payment is not compelled to attend under the terms of the subpoena until the fees are paid [*Gov. Code § 68097*]. The amount of witness fees for each day's actual attendance and for mileage actually traveled, both ways, is provided for by *Gov. Code § 68093*.

PRACTICE TIP:
Have Fees Ready. Don't forget to have a check ready. Overlooking this detail could have dire consequences. *By Corinne Burt.*

[2] Fees for Experts

[a] Availability

A party subpoenaing an expert witness to testify before any court, tribunal, or arbiter in any civil action or proceeding must pay the reasonable and customary hourly or daily fee for the actual time consumed in the examination of that witness by any party attending the action or proceeding [*Gov. Code § 68092.5(a)*]. However, the hourly or daily fee must not exceed the fee charged the party who retained the expert except when the expert donated his or her services to a charitable or other nonprofit organization [*Gov. Code § 68092.5(a)*]. A daily fee may only be charged for a full day of attendance at a deposition, or when the expert was required by the deposing party to be available for a full day and the expert necessarily had to forego all business he or she would have otherwise conducted that day but for the request that he or she be available all day for the scheduled deposition [*Gov. Code § 68092.5(a)*].

For the purpose of this provision, "expert witness" means a witness other than one who is a party or employee of a party, and who is one of the following [*Gov. Code § 68092.5(a)*]:

- An expert described in *Code Civ. Proc. § 2034.210(b)* (an expert retained by a party in connection with litigation);

- A treating physician and surgeon or other treating health care practitioner who is to be asked during the deposition to express opinion testimony, including opinion or factual testimony regarding the past or present diagnosis or prognosis made by the practitioner or the reasons for a particular treatment decision made by the practititioner, but not including testimony requiring only the reading of words and symbols contained in the relevant medical record; or

- An architect, professional engineer, or licensed land surveyor who was involved with the original project design or survey for which he or she is asked to express an opinion within his or her expertise and relevant to the action or proceeding.

An express contract, relating to compensation, entered into between a person and the party requesting or requiring the person to testify prevails over the provisions of *Gov. Code § 68092.5* [*Gov. Code § 68092.5(e)*].

There is currently no prohibition against allowing costs for expert witness fees under *Gov. Code § 68092.5*. Prior to its 1988 amendment, expert witness fees paid pursuant to *Gov. Code § 68092.5* were not allowable costs [*see* former *Gov. Code § 68092.5(a)*; *see also Posey v. State of California (1986) 180 Cal. App. 3d 836, 852, 225 Cal. Rptr. 830* (decided under prior law)].

The deposition of an expert witness is governed by *Code Civ. Proc. § 2034.010 et seq.* [*Gov. Code § 68092.5(f)*]. The compensation of experts for depositions is set forth in *Code Civ. Proc. §§ 2034.420-2034.450*. For additional discussion and forms relating to *Code Civ. Proc. §§ 2034.430-2034.470*, see Ch. 198, *Discovery: Exchange of Expert Witness Information* . Special provisions relating to compensation of experts appointed by the court are set forth in *Evid. Code §§ 730, 731*. For discussion of *Evid. Code §§ 730, 731*, see Ch. 551, *Trial* .

[b] Tender of Fees

The party requiring the attendance must either accompany the service of the subpoena with a tender of the expert's fees based on the anticipated length of time the expert is required to remain at the place specified in the subpoena, or must tender the fee at the required time of appearance. The expert's fee must be delivered to the attorney for the party designating the expert. If the appearance of the expert takes longer than anticipated, the party serving the subpoena must pay the balance of the expert's fee within five days of receipt of an itemized statement from the expert. The party designating the expert is responsible for any fee charged by the expert for preparing for the testimony and for traveling to the place of the civil action or proceeding, as well as for any travel expenses of the expert, unless otherwise determined by the court [*Gov. Code § 68092.5(a)*].

The service of a proper subpoena accompanied by the tender of the expert witness fee is effective to require the party employing or retaining the expert to produce the expert for testimony. If the party serving the notice or subpoena fails to tender the expert's fee, the expert is not required to appear at that time unless the parties stipulate otherwise [*Gov. Code § 68092.5(b)*].

[c] Motion to Set Compensation

If the subpoenaing party deems that the hourly or daily fee of the expert for providing testimony is unreasonable, that party may move for an order setting the compensation of the expert. The motion must be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. Notice of the motion must also be given to the expert [*Gov. Code § 68092.5(c)*].

In any such attempt at an informal resolution, either the party or the expert must provide the other with the following information [*Gov. Code § 68092.5(c)*]:

- Proof of the ordinary and customary fee actually charged and received by that expert for similar services provided outside the subject litigation;

- The total number of times the presently demanded fee has ever been charged and received by that expert; and

- The frequency and regularity with which the presently demanded fee has been charged and received by that expert within the two-year period preceding the hearing on the motion.

In addition to any other facts or evidence, the expert or the party designating the expert must provide, and the court's determination of the reasonableness of the fee must be based on, the proof described in the foregoing list. The court may also consider the ordinary and customary fees charged by similar experts for similar services within the relevant community, and any other facts the court deems necessary or appropriate to make its determination. On determining that the fee demanded by the expert is unreasonable, and based on the evidence and factors considered, the court must set the expert's fee [*Gov. Code § 68092.5(c)*].

For a form of motion to set the compensation of an expert deponent pursuant to *Code Civ. Proc. § 2034.470*, which may be adapted for use under *Gov. Code § 68092.5(c)*, see Ch. 198, *Discovery: Exchange of Expert Witness Information* .

[d] Notice of Continuation or Cancellation

If the proceeding at which the expert witness has been notified his or her attendance is required is continued or canceled in advance of the time for which it is scheduled, the witness must be so notified by the party requiring his or her attendance by the quickest and most reliable means of giving notice under the circumstances, or the expert witness is entitled to receive the compensation specified in *Gov. Code § 68092.5(a)*, notwithstanding his or her failure to give any testimony [*Gov. Code § 68092.5(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSubpoenasEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyLay WitnessesGeneral Overview

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46-535 California Forms of Pleading and Practice--Annotated § 535.19

§ 535.19 Fees for Public Employees

[1] City and County Employees, Peace Officers, Firefighters, and Specified Others

[a] In General

Special rules apply when any employee of a local agency or any peace officer, as defined in *Penal Code § 830 et seq.*, any firefighter, or any state employee is subpoenaed [*see Gov. Code §§ 68096.1* (local agency employees, including employees of a city, county, city and county, special district, redevelopment agency, or any other political subdivision of the state), 68097.2 (peace officer, firefighter, specified county employee, state employee, or trial court employee)].

A party subpoenaing any of these individuals must tender the amount of $150, together with the subpoena, to the person accepting the subpoena for each day that the employee or officer is required to remain in attendance pursuant to the subpoena [*Gov. Code §§ 68096.1(b), 68097.2(b)*].

For purposes of *Gov. Code § 68097 et seq.*, the term "firefighter" has the definition provided in *Gov. Code § 50925*, and a volunteer firefighter is deemed to be employed by the public entity for which he or she volunteers as a firefighter [*Gov. Code § 68097*; *see Gov. Code § 68097.2(f)* (when payment to volunteer firefighter is required)].

[b] Salary and Expenses

Any local agency employee, peace officer, firefighter, or state employee who is obliged by subpoena to attend as a witness must receive the salary or other compensation to which he or she is normally entitled from the public entity by which he or she is employed during the time that the officer or employee travels to and from the place where the court or other tribunal is located and while required to remain at such place pursuant to that subpoena. That officer or employee must also receive from the employing public entity the actual, necessary, and reasonable traveling expenses incurred in complying with the subpoena [*Gov. Code §§ 68096.1(a), 68097.2(a)*].

[c] Reimbursement of Entity

The party at whose request the subpoena is issued must reimburse the public entity for the full cost the public entity

incurred in paying the employee or officer his or her salary or other compensation and traveling expenses, for each day that the employee or officer is required to remain in attendance pursuant to the subpoena [*Gov. Code §§ 68096.1(b), 68097.2(b)*]. However, it is not necessary to reimburse a public entity which is itself a defendant through the actions of its officers or employees. In that case the usual statutory provisions with respect to witnesses are applicable [*Patterson v. Sharp (1967) 253 Cal. App. 2d 838, 840-841, 61 Cal. Rptr. 517* ; *see Gov. Code §§ 68093, 68097*; *see also Gov. Code § 68096.1(a)* (specifically limiting its provisions to actions to which employing city, county, or city and county is not party)].

[d] Overpayment or Underpayment

If the actual expenses should later prove to be less than the amount tendered, the excess of the amount tendered will be refunded [*Gov. Code §§ 68096.1(c), 68097.2(c)*]. If the actual expenses should later prove to be more than the amount deposited, the difference must be paid to the public entity by the party at whose request the subpoena is issued [*Gov. Code §§ 68096.1(d), 68097.2(d)*].

[2] Deposit for Nonresident Highway Patrol Officer

When a member of the California Highway Patrol is subpoenaed under *Gov. Code § 68097.3* (when not subject to subpoena pursuant to *Code Civ. Proc. § 1989*; *see* discussion at *535.14[4]*), a deposit in an amount equal to the estimated amount of his or her salary and expenses for the time and travel required by the subpoena must be made with the clerk of the court prior to the issuance of that subpoena [*Gov. Code § 68097.4*].

[3] Deposit for Appearance at Subsequent Proceedings

If a court continues a proceeding on its own motion, no additional witness fee are required prior to the issuance of the subpoena or to the making of an order directing an employee or officer to appear on the date to which the proceeding is continued [*Gov. Code §§ 68096.1(e), 68097.2(e)*].

No peace officer of the Department of the California Highway Patrol, peace officer member of the State Fire Marshal's Office, employee of the Department of Justice who is a peace officer or an analyst in a technical field, sheriff, deputy sheriff, marshal, deputy marshal, firefighter, or city police officer may be ordered by the court to return for subsequent proceedings beyond the date stated in the subpoena referred to in *Gov. Code §§ 68097.1-68097.4* or the day on which that witness appeared pursuant to the provisions of *Gov. Code § 68097.9* (agreement by witness to appear at time other than specified in subpoena), unless the party at whose request the subpoena was issued, or the party at whose request the witness is ordered to return, first tenders to the public entity that employs the witness the same sum required to be tendered for the issuance of the subpoena in the first instance [*Gov. Code § 68097.5* (language was not amended to reflect amendment to *Gov. Code § 68097.2(b)* eliminating deposit prior to issuance of subpoena); *see* discussion at *§ 535.19[1][a]*].

[4] Relief From Deposit or Payment Requirement

The court, on good cause shown, including the fact that the party is proceeding in forma pauperis, may relieve a party of the duty to make any deposit or payment required by *Gov. Code §§ 68096.1, 68097.1-68097.5* [*Gov. Code § 68097.55*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSubpoenasEvidenceTestimonyExpertsGeneral OverviewEvidenceTestimonyLay WitnessesGeneral Overview

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46-535 California Forms of Pleading and Practice--Annotated § 535.20

§ 535.20 Production of Business Records by Subpoena Duces Tecum

[1] When Personal Attendance Not Required

[a] In General

When a subpoena duces tecum requiring the production of all or any part of a business' records is served on the custodian of records or other qualified witness of the business, in a civil action in which the business is neither a party nor the place where any cause of action is alleged to have arisen, the custodian or other qualified witness may comply with the subpoena duces tecum by mailing or otherwise delivering to the clerk of the court (or the judge, if there is no clerk), within 15 days after receipt of the subpoena, or within the time agreed on by the party who served the subpoena and the custodian or other qualified witness, a true, legible, and durable copy of all of the records described in the subpoena duces tecum, together with an affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) pursuant to *Evid. Code § 1561*. This procedure does not apply if attendance is required pursuant to *Evid. Code § 1564* [*Evid. Code § 1560(b)*].

[b] Transmittal of Records

The copy of the records is to be enclosed separately from the affidavit in a sealed inner envelope or wrapper, with the title and number of the action, name of the witness, and date of the subpoena clearly inscribed on it. The sealed envelope or wrapper must then be enclosed in an outer envelope or wrapper, sealed, and directed as follows [*Evid. Code § 1560(c)*]:

- If the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk;

- If the subpoena directs attendance at a deposition, to the officer before whom the deposition is to be taken, at the place designated in the subpoena for the taking of the deposition, or at the officer's place of business;

- In other cases, to the officer, body, or tribunal conducting the hearing, at a like address.

Unless the parties otherwise agree, or unless the sealed envelope or wrapper is returned to a witness who is to appear personally, the copy of the records must remain sealed and will be opened only at the time of trial, deposition, or other hearing, on the direction of the judge, officer, body, or tribunal conducting the proceeding, in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records that are original documents and that are not introduced in evidence or required as part of the record will be returned to the person or entity from whom received. Records that are copies may be destroyed [*Evid. Code § 1560(d)*].

[c] Records Made Available to Attorney

As an alternative to the procedures described in *Evid. Code § 1560(b), (c),* and *(d),* a subpoenaing party in a civil action seeking discovery of records may direct the witness to make the records available for inspection or copying by the party's attorney or the attorney's representative at the business address of the witness under reasonable conditions during normal business hours. When provided with at least five business days advance notice by the attorney or his or her representative, or by the deposition officer (*see Code Civ. Proc. § 2020.420*), the witness must designate a time period of not less than six continuous hours on a day certain for copying of the subpoenaed records by the attorney, the attorney's representative, or deposition officer [*Evid. Code § 1560(e)*].

It is the responsibility of the attorney's representative to deliver any copy of the records as directed in the subpoena [*Evid. Code § 1560(e)*].

Evid. Code § 1560(e) does not apply to criminal cases [*Penal Code § 1326(b)*].

[d] Admissibility of Copies

If the original records would be admissible in evidence if the custodian or other qualified witness had been present and testified to the matters stated in the affidavit, and if the requirements of *Evid. Code § 1271* (record as evidence) have been met, the copy of the records is admissible in evidence [*Evid. Code § 1562*].

[2] Personal Attendance of Custodian or Witness

[a] In General

A party who desires the personal attendance of the custodian or other qualified witness may obtain it through a subpoena duces tecum containing the clause set out in *Evid. Code § 1564* [*see Evid. Code § 1564*; § 535.6[1]].

PRACTICE TIP:

Consider Deposing Custodian of Records. Always consider deposing the custodian of records. This is a good way to ensure that you have received all documents responsive to the subpoena. In the course of questioning the custodian, you may also learn whether further investigation is necessary. *By Corinne Burt.*

[b] Witness Fees and Mileage

When the personal attendance of the custodian of a record or other qualified witness is required pursuant to *Evid. Code § 1564* in a civil proceeding, he or she is entitled to the same witness fees and mileage permitted in a case when the subpoena requires the witness to attend and testify before a court in which the action or proceeding is pending and to any additional costs incurred as provided by *Evid. Code § 1563(b)* [*Evid. Code § 1563(c)*; *see Gov. Code § 68093* (witness fees and mileage); *see also* discussion at *§ 535.18[1]*].

[3] Reasonable Costs for Production of Business Records

[a] Set by Statute

When the records are delivered to the attorney, the attorney's representative, or a deposition officer for inspection and photocopying at the witness' place of business, the only fee for complying with the subpoena must not exceed $15, plus the actual cost, if any, charged to the witness by a third person for retrieval and return of records held offsite by the third person. If the records are retrieved from microfilm, the reasonable cost defined in *Evid. Code § 1563(b)(1)* also applies [*Evid. Code § 1563(b)(6)*]. The party serving a subpoena duces tecum may be charged all reasonable costs incurred by any witness who is not a party in the production of all or any part of business records pursuant to the subpoena duces tecum [*Evid. Code § 1563(b)*].

"Reasonable cost," as used in *Evid. Code § 1563*, includes, but is not limited to, 10 cents per page for standard reproduction of standard documents, 20 cents per page for copying documents from microfilm, actual costs for reproduction of documents requiring special processing, reasonable clerical costs in locating and making the records available to be billed at the maximum rate of $24 per hour per person, actual postage charges, and the actual cost charged to the witness by a third person for the retrieval and return of records held by that third person [*Evid. Code § 1563(b)(1)*].

[b] Demand for Payment and Itemized Statement of Costs

The party requesting production of business records is not required to pay reasonable production costs or any estimate of them prior to the time the records are available for delivery pursuant to the subpoena. However, the witness may demand payment of costs pursuant to *Evid. Code § 1563* simultaneous with actual delivery of the subpoenaed records, and, until such time as payment is made, is under no obligation to deliver the records [*Evid. Code § 1563(b)(2)*].

The witness must submit an itemized statement for all reasonable costs to the requesting party or the requesting party's depostion officer, setting forth the reproduction and clerical costs incurred by the witness.If the costs exceed those authorized by statute [*see* [a], *above*], or if the witness refuses to produce the required itemized statement of costs, the witness, on demand of the requesting party or that party's deposition officer, must furnish a statement setting forth the actions taken by the witness in justification of the costs [*Evid. Code § 1563(b)(3)*].

[c] Petition to Reduce Excessive Costs

The requesting party may petition the court in which the action is pending to recover from the witness all or a part of the costs paid to the witness, or to reduce all or a part of the costs charged by the witness pursuant to *Evid. Code § 1563(b)*, on the ground that the costs were excessive. On the filing of the petition, the court must issue an order to show cause, and from the time the order is served on the witness the court has jurisdiction over the witness. The court may hear testimony on the order to show cause, and if it finds that the costs demanded and collected, or charged but not collected, exceed the amount authorized by *Evid. Code § 1563(b)*, it must order the witness to remit to the requesting party, or reduce its charge to the requesting party by an amount equal to, the amount of the excess. If the court finds the costs excessive and charged in bad faith by the witness, the court must order the witness to remit the full amount of the costs demanded and collected or excuse the requesting party from any payment of costs charged but not collected, and the court must also order the witness to pay the requesting party the amount of the reasonable expenses incurred in obtaining the order, including attorney's fees. If the court finds the costs were not excessive, it must order the requesting party to pay the witness the amount of the reasonable expenses incurred in defending the petition, including attorney's fees [*Evid. Code § 1563(b)(4)*].

[d] When Witness Entitled to Reimbursement

If a subpoena is served to compel the production of business records and is subsequently withdrawn, or is quashed, modified, or limited on a motion made other than by the witness, the witness is entitled to reimbursement pursuant to

Evid. Code § 1563(b)(1) for all costs incurred in compliance with the subpoena to the time that the requesting party has notified the witness that the subpoena has been withdrawn, quashed, modified, or limited. In the event the subpoena is withdrawn or quashed, if those costs are not paid within 30 days after demand therefor, the witness may file a motion in the court in which the action is pending for an order requiring payment, and the court must award the payment of expenses and attorney's fees in the manner set forth in *Evid. Code § 1563(b)(4)* [*Evid. Code § 1563(b)(5)*].

Legal Topics:

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

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46-535 California Forms of Pleading and Practice--Annotated § 535.21

§ 535.21 Subpoena Duces Tecum Requiring Production of Personal Records of Consumer or Employment Records of Employee

[1] In General

Code Civ. Proc. § 1985.3 establishes procedures for obtaining personal records of consumers by use of a subpoena duces tecum. Similarly, *Code Civ. Proc. § 1985.6* provides requirements for seeking employment records of employees through a subpoena duces tecum. Failure to comply with the provisions of *Code Civ. Proc. §§ 1985.3* and *1985.6*, discussed below, is a sufficient basis for a witness to refuse to produce, by a subpoena duces tecum, personal records of a consumer [*Code Civ. Proc. § 1985.3(k)*], or employment records of an employee [*Code Civ. Proc. § 1985.6(j)*].

Code Civ. Proc. §§ 1985.3 and *1985.6* do not apply to any subpoena duces tecum that does not request the records of any particular consumer or employee and that requires a custodian of records to delete all information that would in any way identify the consumer or employee [*Code Civ. Proc. §§ 1985.3(i), 1985.6(h)*], or to proceedings under *Lab. Code §§ 50-175, 3200-6002, 6100-6149,* or *6200-6208* [*Code Civ. Proc. §§ 1985.3(j), 1985.6(i)*]. In addition, if the subpoenaing party is the consumer or the employee, and the consumer or employee is the only subject of the subpoenaed records, notice to the consumer or to the employee and the delivery of the other documents specified in *Code Civ. Proc. § 1985.3(b)*, or in *Code Civ. Proc. § 1985.6(b)* is not required [*Code Civ. Proc. § 1985.3*(*l*) (consumer); *Code Civ. Proc. § 1985.6(k)* (employee); *see § 535.21[4][a]*].

PRACTICE TIP:

Give Notice to Consumer. Don't forget notice to the consumer when subpoenaing personal records. *By Corinne Burt.*

[2] Definitions

[a] Personal Records and Witnesses

The phrase "personal records" as used in *Code Civ. Proc. § 1985.3* means the original or any copy of books, documents, other writings, or electronic data pertaining to a consumer that are maintained by any "witness" [*Code Civ. Proc. § 1985.3(a)(1)*]. "Witness," in turn, is defined as a physician, dentist, ophthalmologist, optometrist, chiropractor, physical

therapist, acupuncturist, podiatrist, veterinarian, veterinary hospital, veterinary clinic, pharmacist, pharmacy, hospital, medical center, clinic, radiology or MRI center, clinical or diagnostic laboratory, state or national bank, state or federal association as defined under *Fin. Code § 5102*, state or federal credit union, trust company, anyone authorized by the state to make or arrange loans that are secured by real property, security brokerage firm, insurance company, underwritten title company, title insurance company, escrow agent (either licensed under *Fin. Code § 17000 et seq.* or exempt from licensing), attorney, accountant, institution of the Farm Credit System as specified in *12 U.S.C. § 2002*, telephone corporation that is a public utility as defined in *Pub. Util. Code § 216*, a psychotherapist as defined in *Evid. Code § 1010*, or a private or public preschool, elementary school, secondary school, or post secondary school as described in *Educ. Code § 76244* [*Code Civ. Proc. § 1985.3(a)(1)*].

[b] Consumer

The term "consumer" as used in *Code Civ. Proc. § 1985.3* means any individual, partnership of five or fewer persons, association, or trust that has transacted business with or has used the services of the witness or for whom the witness has acted as agent or fiduciary [*Code Civ. Proc. § 1985.3(a)(2)*].

[c] Employment Records

Under *Code Civ. Proc. § 1985.6*, "employment records" means the original or any copy of books, documents, other writings, or electronic data pertaining to the employment of any employee maintained by the current or former employer of the employee, or by an labor organization that has represented or currently represents the employee [*Code Civ. Proc. § 1985.6(a)(3)*; *see Code Civ. Proc. § 1985.6(a)(4)* ("labor organization" defined)].

[d] Employee

Under *Code Civ. Proc. § 1985.6*, "employee" means any individual who is or has been employed by a witness subject to a subpoena duces tecum [*Code Civ. Proc. § 1985.6(a)(2)*]. "Employee" also means any individual who is or has been represented by a labor organization that is a witness subject to a subpoena duces tecum [*Code Civ. Proc. § 1985.6(a)(2)*; *see Code Civ. Proc. § 1985.6(a)(4)* ("labor organization" defined)].

[e] Subpoenaing Party

The phrase "subpoenaing party" as used in *Code Civ. Proc. §§ 1985.3* and *1985.6* means the person or persons causing a subpoena duces tecum to be issued or served in connection with any civil action or proceeding. (Under *Code Civ. Proc. § 1985.3*, the civil action or proceeding must be commenced pursuant to the Code of Civil Procedure.) The term does not include any state or local agencies described in *Gov. Code § 7465* or any entity provided for under Article VI of the California Constitution in any proceeding maintained before an adjudicative body of that entity pursuant to *Bus. & Prof. Code §§ 6000-6228* (State Bar Act) [*Code Civ. Proc. §§ 1985.3(a)(3), 1985.6(a)(5)*].

[3] Time Allowed for Production

The subpoena duces tecum must be served in sufficient time to allow the witness a reasonable time, as provided in *Code Civ. Proc. §§ 2020.410-2020.440*, to locate and produce the records themselves or copies of them [*Code Civ. Proc. §§ 1985.3(d)* (personal records of consumer), 1985.6(d) (employment records)]. Under *Code Civ. Proc. § 2020.410*, a party issuing a depostion subpoena duces tecum for the production of records for copying must specify a date for compliance that is no earlier than 20 days after issuance of the subpoena, or 15 days after its service, whichever is later.

PRACTICE TIP:

Act Promptly to Object. If the consumer has objections to the subpoena or plans to file a motion to quash, counsel should notify the person or entity in control of the documents, as well as opposing counsel, *immediately*. Also, the objections and/or motion to quash should be filed with the court

immediately if opposing counsel will not agree to limit the scope of the subpoena. *By Corinne Burt.*

[4] Service of Subpoena Duces Tecum, Affidavit, and Notice on Consumer or Employee

[a] Requirements

Prior to the date called for in the subpoena duces tecum for the production of personal or employment records, the subpoenaing party must serve, or cause to be served, copies of the following on the consumer or employee whose records are being sought [*Code Civ. Proc. §§ 1985.3(b)* (personal records of consumer), 1985.6(b) (employment records); *see* [b], *below; § 535.69*]:

- The subpoena duces tecum.

- The affidavit (or declaration under penalty of perjury [*Code Civ. Proc. § 2015.5*]) supporting the issuance of the subpoena, if any.

- The notice described in *Code Civ. Proc. § 1985.3(e)* (personal records of consumer) or 1985.6(e) (employment records).

- Proof of service as indicated in *Code Civ. Proc. § 1985.3(c)* (personal records of consumer) or *Code Civ. Proc. § 1985.6(c)* (employment records).

However, if the subpoenaing party is the consumer or the employee, and the consumer or employee is the only subject of the subpoenaed records, notice to the consumer or to the employee and the delivery of the other documents specified in *Code Civ. Proc. § 1985.3(b)*, or in *Code Civ. Proc. § 1985.6(b)* is not required [*Code Civ. Proc. § 1985.3*(*l*) (consumer); *Code Civ. Proc. § 1985.6(k)* (employee)].

The service must satisfy the following requirements [*Code Civ. Proc. §§ 1985.3(b)* (personal records of consumer), 1985.6(b) (employment records)]:

- It must be made to the consumer or employee personally, or at his or her last known address, or in accordance with *Code Civ. Proc. §§ 1010-1020*, or, if the consumer or employee is a party, to his or her attorney of record. If the consumer or employee is a minor, service is to be made on the minor's parent, guardian, conservator, or similar fiduciary, or if one of them cannot be located with reasonable diligence, then service is to be made on any person having the care or control of the minor, or with whom the minor resides, or, in the case of a consumer, by whom the minor is employed, and on the minor if the minor is at least 12 years of age.

- Service must be completed not less than 10 days prior to the date for production specified in the subpoena duces tecum, plus the additional time provided for by *Code Civ. Proc. § 1013* if service is by mail.

- Service must be completed at least five days prior to service on the custodian of records, plus the additional time provided by *Code Civ. Proc. § 1013* if service is by mail.

If service is by mail, the time for service is extended by five calendar days if the place of address and the place of mailing is within the state of California, 10 calendar days if either the place of mailing or the place of address is outside California but within the United States, and 20 calendar days if either the place of mailing or the place of address is outside the United States [*Code Civ. Proc. § 1013(a)*; *see also Code Civ. Proc. § 2019.010 et seq.* (incorporating by reference provisions of *Code Civ. Proc. § 1013(c), (e)* (extension when service is by Express Mail or fax); for

discussion of *Code Civ. Proc. §§ 1010-1020, see generally* Ch. 518, *Service of Summons and Papers*].

A subpoena duces tecum for personal records maintained by a telephone corporation that is a public utility, as defined in *Pub. Util. Code § 216*, is not valid or effective unless it includes a consent to release, signed by the consumer whose records are requested, as required by *Pub. Util. Code § 2891* [*Code Civ. Proc. § 1985.3(f)*; *see § 535.71*].

[b] Contents of Notice

The notice accompanying every copy of the subpoena duces tecum and affidavit, if any, served on a consumer, employee, or his or her attorney must be in a typeface designed to call attention to the notice and must indicate the following [*Code Civ. Proc. §§ 1985.3(e)* (personal records of consumer), 1985.6(e) (employment records); *see § 535.69*]:

- Records about the consumer or employee are being sought from the witness named on the subpoena;

- If the consumer or employee objects to the witness furnishing the records to the party seeking them, he or she must file papers with the court, or serve a written objection as provided in *Code Civ. Proc. § 1985.3(g)* (consumer) or 1985.6(f) (employee), prior to the date specified for production on the subpoena; and

- If the party who is seeking the records will not agree in writing to cancel or limit the subpoena, an attorney should be consulted about the consumer's or employee's interest in protecting his or her right of privacy.

Under *Code Civ. Proc. § 1985.6* (employment records), the notice must also indicate that the employment records may be protected by a right of privacy [*Code Civ. Proc. § 1985.6(e)*].

If a notice of taking of deposition is also served, that other notice may be set forth in a single document with the notice required by *Code Civ. Proc. §§ 1985.3(e)* and *1985.6(e)* [*Code Civ. Proc. §§ 1985.3(e)* (personal records of consumer), 1985.6(e) (employment records)]. For forms of notice of taking deposition that may be combined with the notice to a consumer, see Ch. 193, *Discovery: Depositions* .

[5] Proof of Service or Written Authorization Served on Witness

Prior to the production of personal records of a consumer or employment records of an employee, the subpoenaing party must perform either of the following [*Code Civ. Proc. §§ 1985.3(c)* (personal records of consumer), 1985.6(c) (employment records)]:

- Serve or cause to be served on the witness a proof of personal service or of service by mail attesting to compliance with *Code Civ. Proc. § 1985.3(b)* regarding notice [*see Code Civ. Proc. §§ 1985.3*(*l*), 1985.6(k) (when notice to consumer or employee is not required); [4][a], *above*]; or

- Furnish the witness with a written authorization to release the records signed by the consumer, employee, or his or her attorney of record.

The witness may presume that any attorney purporting to sign the authorization on behalf of the consumer or employee acted with the consent of the consumer or employee, and that any objection to release of records is waived [*Code Civ. Proc. §§ 1985.3(c)* (personal records of consumer), 1985.6(c) (employment records); *see § 535.70*].

[6] Motion to Shorten Time or to Waive Notice Requirements by Subpoenaing Party

On good cause shown and provided that the rights of witnesses and consumers or employees are preserved, a subpoenaing party is entitled to obtain an order shortening the time for service of a subpoena duces tecum or waiving the requirements of constructive notice and service of a certificate when due diligence by the subpoenaing party has been shown [*see Code Civ. Proc. §§ 1985.3(h)* (personal records of consumer), 1985.6(g) (employment records)].

[7] Motion to Quash by Party Consumer or Employee

Any consumer or employee who is a party to the action and whose personal records are sought by a subpoena duces tecum, may, prior to the date for production, bring a motion to quash or modify the subpoena duces tecum pursuant to *Code Civ. Proc. § 1987.1*. Notice of the bringing of the motion must be given to the witness and deposition officer at least five days prior to production. No witness or deposition officer can be required to produce the records after receipt of notice that such a motion has been brought, except on order of the court in which the action is pending or by agreement of the parties, witnesses, and consumers or employees affected [*Code Civ. Proc. §§ 1985.3(g)* (personal records of consumer), 1985.6(f) (employment records); *see § 535.74*]. The phrase "prior to the date for production" is designed to guide the witness with the records regarding when he or she may safely honor or not honor the subpoena when the consumer or employee objects. It does not limit the court's jurisdiction to motions brought by that time [*see Slagle v. Superior Court (1989) 211 Cal. App. 3d 1309, 1312, 260 Cal. Rptr. 122* (consumer)]. Motions to quash or modify subpoenas are discussed more fully in § 535.23.

[8] Objection by Nonparty Consumer or Employee

Any nonparty consumer or other nonparty, or any employee who is not a party to the action, whose personal records or employment records are being sought by a subpoena duces tecum, may, before the date set for production, serve on the subpoenaing party, the witness, and the deposition officer, a written objection that cites the grounds on which the production of the subpoenaed records should be denied. No witness or deposition officer is required to produce personal records of a nonparty consumer or other nonparty or employment records of a nonparty employee after receipt of notice that the motion has been brought by the consumer or employee, or after receipt of a written objection from a nonparty consumer or nonparty employee, except upon order of the court in which the action is pending or by agreement of the parties, witnesses, and consumers or employees affected. The party requesting the requests then may bring a motion under *Code Civ. Proc. § 1987.1(a)* to enforce the subpoena within 20 days of service of the written objection. The motion must be accompanied by a declaration showing a reasonable and good faith attempt to resolve the matter informally between the requesting party and the consumer or the consumer's attorney [*Code Civ. Proc. §§ 1985.3(g)* (consumer), 1986.6(f) (employee)].

[9] Medical Records

The Confidentiality of Medical Information Act (*Civ. Code §§ 56-56.37*) [*see Ch. 429, Privacy, § 429.60* et seq.] prohibits unauthorized disclosure by a health care provider, health service plan, or contractor, of medical information regarding a patient of the health care provider, or an enrollee or subscriber of the plan [*see Civ. Code § 56.10(a)*]. An exception to this prohibition exists under *Civ. Code § 56.10(b)(3)* when disclosure is compelled by a party to a proceeding before a court or administrative agency pursuant to a subpoena duces tecum. For the exception to be valid as against a patient's privilege against disclosure of medical information, the subpoenaing party must have complied with the requirements of *Code Civ. Proc. § 1985.3*, including the requirement that the consumer be given notice of his or her right to object and to seek the services of an attorney in order to protect his or her rights of privacy [*see Code Civ. Proc. § 1985.3(e)*; *Colleen M. v. Fertility and Surgical Assocs. of Thousand Oaks (2005) 132 Cal. App. 4th 1466, 1479, 34 Cal. Rptr. 3d 439* (citing *Inabnit); Inabnit v. Berkson (1988) 199 Cal. App. 3d 1230, 1236-1239, 245 Cal. Rptr. 525]* . Failure by the patient to take any action to prevent unwanted disclosure after receiving the requisite notice constitutes a waiver of the privilege, and leaves the health care provider in the position of being compelled to disclose the medical records under *Civ. Code § 56.10(b)(3)* [*see Colleen M. v. Fertility and Surgical Assocs. of Thousand Oaks (2005) 132*

Cal. App. 4th 1466, 1479, 34 Cal. Rptr. 3d 439 (in accordance with Code Civ. Proc. § 56.10(b)(3), subpoena required health care provider to disclose patient's medical records to ex-fiance's attorney because ex-fiance's attorney complied with *Code Civ. Proc. § 1985.3(e)*, and patient did not file objection; this undisputed evidence was sufficient to establish complete defense to cause of action under Code Civ. Proc. § 56.10(b)(3)); *Inabnit v. Berkson (1988) 199 Cal. App. 3d 1230, 1236-1239, 245 Cal. Rptr. 525]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSubpoenasCivil Rights LawPrivacy RightsGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationPersonnel Files

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§ 535.21A Subpoena Requiring Production of Electronically Stored Information

[1] Party May Require Production

A subpoena in a civil proceeding may require that electronically stored information (ESI) [*see Code Civ. Proc. § 2016.020* (definition); § 535.21A[2]] be produced for inspection, copying, testing, or sampling [*see Code Civ. Proc. § 1985.8(a)(1)*]. The party serving the subpoena requiring production may specify the form or forms in which each type of ESI is to be produced [*Code Civ. Proc. § 1985.8(b)*].

Code Civ. Proc. § 1985.8 establishes procedures for a party to obtain discovery of ESI [*see Code Civ. Proc. § 1985.8(c)*; § 535.21A[3]; *see also Code Civ. Proc. § 1985.8(d)* (opposition to discovery); § 535.21A[4]].

For a more detailed discussion of the California Electronic Discovery Act [Stats. 2009, ch. 5] and the process of "e-discovery," see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*. For in-depth coverage of e-discovery and a step-by-step guide to subpoenaing ESI from nonparties, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 6, *Demanding Production of Electronically Stored Evidence in California Court*.

[2] "Electronic" and "Electronically Stored Information" Defined

"Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities [*Code Civ. Proc. § 2016.020(d)*]. "Electronically stored information" is information that is stored in an electronic medium [*Code Civ. Proc. § 2016.020(e)*].

[3] Requesting Production

Unless otherwise agreed or ordered by the court, if a subpoena requiring production of ESI does not specify a form or forms for production, the person subpoenaed must produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable [*Code Civ. Proc. § 1985.8(c)(1)*]. However, the same ESI need not be produced in more than one form [*Code Civ. Proc. § 1985.8(c)(2)*].

If the person subpoenaed establishes that the ESI is from a source that is not reasonably accessible because of undue burden or expense, the court may still order discovery if the subpoenaing party shows good cause, subject to specified limitations [*Code Civ. Proc. § 1985.8(e)*; *see Code Civ. Proc. § 1985.8(h)* (limitations); § 535.21A[5]].

If the court finds good cause for the production from a source that is not reasonably accessible, the court may set conditions for the discovery, including allocation of the expense [*Code Civ. Proc. § 1985.8(f)*]. If necessary, the subpoenaed person, at the reasonable expense of the subpoenaing party, must translate, through detection devices, any data compilations included in the subpoena into a reasonably usable form [*Code Civ. Proc. § 1985.8(g)*].

The party serving the subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena [*Code Civ. Proc. § 1985.8(j)*]. Additionally, a court order requiring compliance with a subpoena for ESI must protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance [*Code Civ. Proc. § 1985.8(k)*].

[4] Opposing Production

The subpoenaed person opposing the production, inspection, copying, testing, or sampling of electronically stored information on the basis that information is from a source that is not reasonably accessible because of undue burden or expense bears the burden of demonstrating inaccessibility based on undue burden or expense [*Code Civ. Proc. § 1985.8(d)*].

For a more detailed discussion and a step-by-step guide to opposing the production of ESI, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 6, *Demanding Production of Electronically Stored Evidence in California Court*.

[5] Limiting Discovery

The court must limit the frequency or extent of ESI discovery, even from a source that is reasonably accessible, if the court determines that any of the following conditions exists [*Code Civ. Proc. § 1985.8(h)*]:

- It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive.

- The discovery sought is unreasonably cumulative or duplicative.

- The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought.

- The likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.

A claim of privilege or work product protection may also limit discovery of ESI [*Code Civ. Proc. § 1985.8(i)*; see *Code Civ. Proc. § 2031.285* (governing claim of privilege or protection)]. For detailed discussion of privilege and work product protection in the ESI context, see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*.

[6] Sanctions

Absent exceptional circumstances, the court may not impose sanctions on a subpoenaed person or that person's attorney

for failure to provide ESI that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system. However, this provision does not alter any obligation to preserve otherwise discoverable information [*Code Civ. Proc. § 1985.8(l)(1)*; *see Code Civ. Proc. § 1985.8(l)(2)*].

For a step-by-step guide, as well as forms for use to seek or oppose sanctions for noncompliance, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 13, *Seeking or Opposing Sanctions for Noncompliance*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSubpoenasCivil ProcedureDiscoveryCivil ProcedureDiscoveryElectronic Discovery

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§ 535.21B Subpoenas in California for Out-of-State Proceedings

[1] Governing Law

Effective January 1, 2010 [Stats. 2008 ch. 231, § 3; *Code Civ. Proc. § 2029.900*], the Interstate and International Depositions and Discovery Act [*Code Civ. Proc. § 2029.100 et seq.*] governs deposition subpoenas, subpoenas for inspections and copying of books, documents, records, ESI, or tangible things, and for inspection of premises in California for out-of-state actions. The Act applies to requests for discovery in cases pending on or after its effective date [*Code Civ. Proc. § 2029.800*]. The Act is California's version of the Uniform Interstate Depositions and Discovery Act [*see Code Civ. Proc. § 2029.700*].

The Civil Discovery Act [*Code Civ. Proc. § 2016.010 et seq*], as well as Code Civ. Proc. Title 3 [*Code Civ. Proc. § 1985 et seq.* (means of production)] and any other California law or court rule governing a deposition, the production of documents or other tangible items, or an inspection of premises, including any law or court rule governing payment of court costs or sanctions, apply to discovery under the Interstate and International Depositions and Discovery Act [*Code Civ. Proc. § 2029.500*].

[2] Definitions

For purposes of the Interstate and International Depositions and Discovery Act, "foreign jurisdiction" means either a state other than California or a foreign nation [*Code Civ. Proc. § 2029.200(a)*]. A "foreign subpoena" is a subpoena issued under authority of a court of record of a foreign jurisdiction [*Code Civ. Proc. § 2029.200(b)*].

"Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity [*Code Civ. Proc. § 2029.200(c)*].

"State" means a state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States [*Code Civ. Proc. § 2029.200(d)*].

"Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to do any of the following [*Code Civ. Proc. § 2029.200(e)*]:

- Attend and give testimony at a deposition.
- Produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person.
- Permit inspection of premises under the control of the person.

[3] Procedure for Obtaining Subpoena

To request issuance of a subpoena, a party must submit the original or a true and correct copy of a foreign subpoena to the clerk of the superior court in the California county in which discovery is sought to be conducted [*Code Civ. Proc. § 2029.300(a)*]. A request for the issuance of a subpoena in these circumstances does not constitute making an appearance in the California courts [*Code Civ. Proc. § 2029.300(a)*].

In addition to submitting a foreign subpoena, as described above, a party seeking discovery must do both of the following [*Code Civ. Proc. § 2029.300(b)*]:

- Submit an application requesting that the superior court issue a subpoena with the same terms as the foreign subpoena. The application must be on the official Judicial Council form [see Judicial Council Form SUBP-030, reproduced and discussed in *Ch. 193, Discovery: Depositions, § 193.180*].
- Pay the specified fee [*see Gov. Code § 70626*].

When these requirements are satisfied, the court clerk must promptly issue a subpoena for service on the person to which the foreign subpoena is directed [*Code Civ. Proc. § 2029.300(c)*].

[4] Subpoena Form and Contents

A subpoena issued under *Code Civ. Proc. § 2029.300* must [*Code Civ. Proc. § 2029.300(d)*]:

- Incorporate the terms used in the foreign subpoena.
- Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.
- Bear the caption and case number of the out-of-state case to which it relates.
- State the name of the court that issues it.
- Be on the official Judicial Council form [*see Code Civ. Proc. § 2029.390*; *see, e.g., § 535.85[1]* (subpoena for production of business records in action pending outside California)].

[5] Party Not Required to Retain Local Attorney

A party is not required to retain a local attorney to depose a witness in these circumstances. The Act permits an active member of the California State Bar who is retained by a party to an out-of-state court proceeding to issue a deposition subpoena [*Code Civ. Proc. § 2029.350(a)*]. A subpoena that issues under *Code Civ. Proc. § 2029.350(a)* must [*Code*

Civ. Proc. § 2029.350(b)]:

- Incorporate the terms used in the foreign subpoena.

- Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

- Bear the caption and case number of the out-of-state case to which it relates.

- State the name of the superior court of the county in which the discovery is to be conducted.

- Be the official Judicial Council form [*see Code Civ. Proc. § 2029.390*; § 535.85[1] (Judicial Council Form SUBP-035)].

[6] Service of Subpoena

A discovery subpoena issued under the Act must be personally served in compliance with California law, including, without limitation, *Code Civ. Proc. § 1985* [*Code Civ. Proc. § 2029.400*]. For discussion of service, see *§ 535.17*.

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§ 535.22 Private Records of Public Employees

The procedures set out in *Code Civ. Proc. § 1985.3* [discussed in *§ 535.21*] are applicable to a subpoena duces tecum for records containing "personal information," as defined in Code Civ. Proc. § 1798.3, that are otherwise exempt from public disclosure under *Gov. Code § 6254* that are maintained by a state or local agency as defined in *Gov. Code § 6252* [*Code Civ. Proc. § 1985.4*]. For the purposes of applying the procedures of *Code Civ. Proc. § 1985.3* pursuant to *Code Civ. Proc. § 1985.4*, the term "witness" means a state or local agency as defined in *Gov. Code § 6252*, and the term "consumer" means any employee of any state or local agency as defined in *Gov. Code § 6252*, or any other natural person [*Code Civ. Proc. § 1985.4*]. *Gov. Code § 6254(c)* exempts personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of privacy, from the public disclosure requirement of the Public Records Act (*Gov. Code §§ 6250-6267*). For a more detailed discussion of the disclosure requirement of the Public Records Act and its exemptions, see Ch. 470C, *Public Records Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 535.22A Nonparty Objection to Subpoena

Nonparties who want to challenge a deposition subpoena calling for either records only or records and testimony may, but are not required to, file a motion to quash the subpoena. They may simply wait, putting the onue on the proponent to move to compel, and object to the subpoena in opposition to the proponent's motion [*Monarch Healthcare v. Superior Court (2000) 78 Cal. App. 4th 1282, 1284, 93 Cal. Rptr. 2d 619* (as matter of first impression, petitioner nonparty's timely objection to records-only discovery request for privileged information was sufficient; nonparty was not required to file a motion to quash); *see § 535.23*; *cf. Code Civ. Proc. § 1987.1(a)* (motions to quash) with *Code Civ. Proc. § 2025.460(a)* (objections to disclosure)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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46-535 California Forms of Pleading and Practice--Annotated § 535.23

§ 535.23 Quashing, Modifying or Enforcing Compliance With Subpoena

[1] Motion Procedure

The court may issue an order quashing a subpoena entirely, modifying it, or directing compliance with it on specified terms or conditions. This may be done on a motion reasonably made by the party, the witness, any party-consumer described in *Code Civ. Proc. § 1985.3*, any party-employee described in *Code of Civ. Proc. § 1985.6* [*see* discussion in *§ 535.21[7]*], a person whose personally identifying information [*see Civ. Code § 1798.79*.8 (definition)] is sought in connection with an underlying action involving that person's exercise of free speech rights, or on the court's own motion after giving counsel an opportunity to be heard [*Code Civ. Proc. § 1987.1(a)*]. In the case of a consumer or employee, this also may be done by on the filing of a motion by the requesting party after written objections are served by a nonparty consumer or employee pursuant to *Code Civ. Proc. §§ 1985.3(g), 1985.6(f)* [*Code Civ. Proc. §§ 1985.3(e), (g), 1985.6(f)*]. The court may also make any other order to protect the parties, the witness, the consumer, the employee, or the person whose personally identifying information [*see Civ. Code § 1798.79*.8 (definition)] is sought in connection with an underlying action involving that person's exercise of free speech rights, from unreasonable or oppressive demands, including unreasonable violations of the right of privacy of the person [*Code Civ. Proc. § 1987.1(a)*; *see Code Civ. Proc. §§ 1985.3(g)* (consumer), 1985.6(f) (employee); for forms, *see §§ 535.74 -535.77*]. Pursuant to a motion to quash, the court examines the issues raised and determines the relevancy of the evidence sought to be elicited and whether the requested order for production would constitute an unlawful invasion of privacy [*Southern Pac. Co. v. Superior Court (1940) 15 Cal. 2d 206, 209, 100 P.2d 302]* .

PRACTICE TIP:

Meet and Confer. Meet and confer with opposing counsel before bringing a motion. It may result in narrowing or eliminating the discovery dispute. *By Corinne Burt.*

[2] By Public Employees

Code Civ. Proc. § 1987.1 does not mention a motion to quash by a public employee whose private records are sought by subpoena duces tecum [*see Code Civ. Proc. § 1987.1(a)*; *see* discussion at *§ 535.22*]. However, *Code Civ. Proc. § 1985.3(g)*, which provides that a consumer that is a party to the action may bring a motion to quash under *Code Civ. Proc. § 1987.1*, is made applicable to certain public records by *Code Civ. Proc. § 1985.4*. *Code Civ. Proc. § 1985.4*

defines the term "consumer" for its own purposes as an employee of a state or public agency, as defined in *Gov. Code § 6252*, or any other natural person [*Code Civ. Proc. § 1985.4*]. Thus, it appears that *Code Civ. Proc. §§ 1985.3(g)* and *1985.4*, taken together, entitle a state or local agency employee who is a party to the action to bring a motion to quash pursuant to *Code Civ. Proc. § 1987.1(a)* when the records in question are covered by *Code Civ. Proc. § 1985.4*. Furthermore, *Code Civ. Proc. § 1985.3(g)* provides that a nonparty consumer whose personal records are sought may serve a written objection that states the specific grounds on which production should be prohibited. Therefore, a nonparty public employee would be similarly entitled to file a written objection to prevent production, in lieu of bringing a motion to quash, under *Code Civ. Proc. § 1985.3(g)* [*see* discussion at *§ 535.21[8]*]. For a more detailed discussion of *Code Civ. Proc. § 1985.4*, see *§ 535.22*.

[3] Grounds for Motion

A motion to quash or modify a subpoena may be made on the grounds that the subpoena fails to comply with the form, content, or service requirements of the applicable statutory provisions [Code Civ. Proc. §§ 53.30, *1985, 1985.3, 2020.210 et seq.*; *see Mosk v. Superior Court of Los Angeles County (1979) 25 Cal. 3d 474, 479, 159 Cal. Rptr. 494* (subpoena quashed on grounds that public investigation pursuant to Cal. Rules of Ct., Rule 902.5, was unconstitutional in light of California Constitution)]. It may also be made on the grounds that the matters sought to be discovered are privileged, protected, or otherwise beyond the scope of discovery [*Code Civ. Proc. § 2017.010*; *see also Rudnick v. Superior Court (1974) 11 Cal. 3d 924, 929, 114 Cal. Rptr. 603* ("[t]here can be no discovery of matter which is privileged")]. The motion may also be made on the grounds that the discovery sought is an unreasonable or oppressive demand or unreasonable violation of the deponent's right to privacy [*Code Civ. Proc. § 1987.1(a)*] or that it is unreasonably cumulative, duplicative, or obtainable from another source that is more convenient, less burdensome, or less expensive [*Code Civ. Proc. § 2019.030(a)*].

[4] Costs of Motion

If the court finds that the motion to quash or modify was made or opposed in bad faith or without substantial justification, or that one or more of the requirements of the subpoena was oppressive, the court, in its discretion, may award the amount of the reasonable expenses incurred in making or opposing the motion, including reasonable attorney's fees [*Code Civ. Proc. § 1987.2(a)*].

If a motion is filed under *Code Civ. Proc. § 1987.1* for an order to quash or modify a subpoena from the state of California for personally identifying information [*see Civ. Code § 1798.79*.8(b) (definition)], for use in an action pending in another state, territory, or district of the United States, or in a foreign nation, and that subpoena has been served on any Internet service provider, or on the provider of any other interactive computer service [*see 47 U.S.C. § 230(f)(2)* (definition)], the court *must* award the amount of the reasonable expenses incurred in making the motion, including reasonable attorney's fees, if the moving party prevails, and if the underlying action arises from the moving party's exercise of free speech rights on the Internet, and the respondent has failed to make a prima facie showing of a cause of action [*Code Civ. Proc. § 1987.2(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeContent & FormCivil ProceduresDiscoveryProtective OrdersCivil ProceduresPretrial MattersSubpoenasLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationPublic Employees

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§ 535.24 Notice in Lieu of Subpoena

[1] Persons Subject to Notice

The service of a subpoena is not required for certain parties if written notice requesting the witness to attend before a court or at a trial of an issue therein is served on the attorney of the party or person. The following persons may be compelled to attend with written notice [*Code Civ. Proc. § 1987(b)*]:

- A party to the record of any civil action or proceeding;
- A person for whose immediate benefit the action or proceeding is prosecuted or defended; and
- Anyone who is an officer, director, or managing agent of any such party or person.

For a discussion of the use of a notice pursuant to *Code Civ. Proc. § 2025.280(a)* in lieu of a subpoena re deposition, see Ch. 193, *Discovery: Depositions* . For a discussion of the time of service of the notice, see *§ 535.17[2]*.

[2] Definition of "Benefitted Persons"

A benefitted person is one who would have an immediate right to an amount recovered, or some of it, as soon as it is recovered by a nominal plaintiff [*Southern Cal. Edison Co. v. Superior Court (1972) 7 Cal. 3d 832, 837-838, 103 Cal. Rptr. 709, 500 P.2d 621* ; *Waters v. Superior Court (1962) 58 Cal. 2d 885, 897, 27 Cal. Rptr. 153, 377 P.2d 265]* . A person with immediate and direct liability is a person for whose immediate benefit an action is defended [*Waters v. Superior Court (1962) 58 Cal. 2d 885, 897, 27 Cal. Rptr. 153, 377 P.2d 265]* .

[3] Time of Service

The written notice must be served on the attorney of the party or person at least 10 days before the time required for attendance, unless the court prescribes a shorter time [*Code Civ. Proc. § 1987*].

[4] Witness Fees on Notice

If entitled to such compensation, the witness, on demand, must be paid witness fees and mileage before being required to testify [*Code Civ. Proc. § 1987*; *see § 535.18*].

[5] Requests for Books, Documents, or Other Things

If the notice is served at least 20 days before the time required for attendance, or within such shorter time as is ordered by the court, it may include a request that the party or person bring with him or her books, documents, or other things. The notice must then state the exact things or materials desired and that the party or person has them in his or her possession or under his or control [*Code Civ. Proc. § 1987(c)*]. This procedure is alternative to the procedure provided by *Code Civ. Proc. §§ 1985* and *1987.5* (subpoena duces tecum and accompanying affidavit), in the cases provided for in *Code Civ. Proc. § 1987(c)*. No subpoena duces tecum is required in these cases [*Code Civ. Proc. § 1987(c)*].

[6] Objection to Notice Requesting Production

Within five days after service of the notice, or within such other period as the court may allow, the party or person to whom the request to bring books, documents, or other things is made may serve and file written objections to all of any part of the request with a statement of grounds [*Code Civ. Proc. § 1987(c)*; *see § 535.80*; *see also § 535.75* (form for Written Objection to Subpoena Duces Tecum by Nonparty Consumer or Employee)]. The five-day period for objection is extended if the notice was served by mail [*see Code Civ. Proc. § 1013(a)*; *see also Code Civ. Proc. § 1013(c), (e)* (extension when service is by Express Mail or fax); *Shell Oil Co. v. Superior Court (1975) 50 Cal. App. 3d 489, 491, 123 Cal. Rptr. 307* (interpreting *Code Civ. Proc. § 1013(a)* before 1980 amendment)].

PRACTICE TIP:

Act Promptly. This does not leave much time to object. Make sure that you review the notice immediately on receipt and make objections immediately. *By Corinne Burt.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedurePretrial MattersSubpoenas

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§ 535.25 Examination of Prisoners

A court in which the action or special proceeding is pending (with the exception of small claims court) or certain judges (as provided for in *Code Civ. Proc. § 1995(2)*) may order the production of prisoners before the court or the prisoner's examination in jail for the purpose of deposing him or her [*Code Civ. Proc. § 1995*]. The production of the prisoner may only be required if the witness is imprisoned in a jail in the county in which the action or proceeding is pending. In all other cases, the examination of the prisoner, when allowed, must be taken on deposition [*Code Civ. Proc. § 1997*].

Such an order may be made only on the motion of a party, on affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality [*Code Civ. Proc. § 1996*]. See the discussion of examination of prisoners in Ch. 193, *Discovery: Depositions*.

For depositions of prisoners in state prison, see *Penal Code § 2623* and the discussion in Ch. 193, *Discovery: Depositions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPartiesPrisonersGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedurePretrial MattersSubpoenas

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46-535 California Forms of Pleading and Practice--Annotated § 535.26

§ 535.26 Disobedience of Subpoena

[1] Contempt

[a] In General

Disobedience to a subpoena or refusal to be sworn, to answer as a witness, or to subscribe an affidavit when required may be punished as a contempt by the court that issued the subpoena [*Code Civ. Proc. § 1991*]. For a discussion and forms relating to contempt, see Ch. 135, *Contempt* .

Failure to appear at another time or place or on such notice as may be agreed on pursuant to an agreement with the party at whose request a subpoena is issued may also be punishable as contempt [*Code Civ. Proc. § 1985.1*]. Facts establishing or disproving such an agreement and the failure to appear may be proved by affidavit (or declaration [*Code Civ. Proc. § 2015.5*]) of any person having personal knowledge of the facts [*Code Civ. Proc. § 1985.1*].

Advising a witness to conceal himself or herself for the purpose of avoiding service of a subpoena is a violation of *Penal Code § 136.1* (preventing or dissuading person from testifying as misdemeanor), and therefore is unlawful within the meaning of *Code Civ. Proc. § 1209(a)(8)* (unlawful interference with process or proceedings of court as contempt) [*In re Holmes (1983) 145 Cal. App. 3d 934, 942-943, 193 Cal. Rptr. 790]* .

[b] Service of Subpoena on Witness Necessary for Jurisdiction

For contempt proceedings to be proper when a witness has not obeyed a subpoena, the subpoena must have been served directly on the witness. Substituted service of a subpoena on an attorney does not confer personal jurisdiction over the witness. Therefore, the witness may not be held in criminal contempt for not obeying the subpoena if the service of the subpoena was made without the witness's knowledge and out of the witness's presence [*In re Abrams (1980) 108 Cal. App. 3d 685, 687, 694-695, 166 Cal. Rptr. 749]* .

[c] Direct Contempt

A contempt committed in the immediate view and presence of the court or the judge at chambers, known as a direct

contempt, is treated summarily [*Code Civ. Proc. § 1211*; *Arthur v. Superior Court (1965) 62 Cal. 2d 404, 407, 42 Cal. Rptr. 441, 398 P.2d 777]* . No hearing is required in a direct contempt proceeding [*DeGeorge v. Superior Court (1974) 40 Cal. App. 3d 305, 315, 114 Cal. Rptr. 860]* .

[d] Subpoena Requiring Attendance Out of Court

When the subpoena requires attendance of the witness before an officer or commissioner out of court, special rules apply. The witness may not be punished for any refusal to be sworn, to answer a question, or to subscribe an affidavit, unless after a hearing on notice, the court orders the witness to be sworn, to answer, or to subscribe. The witness may then be punished for disobedience of the court's order [*see Code Civ. Proc. § 1991*]. *Code Civ. Proc. § 1991* includes provisions for reporting such disobedience and for issuing the order [*see Code Civ. Proc. § 1991*].

Different provisions apply, however, if the subpoena requires attendance at a deposition [*see Code Civ. Proc. §§ 1991.1, 1991.2, 2020.240, 2025.480*]. For discussion, procedures, and forms relating to acts and omissions at depositions, see Ch. 193, *Discovery: Depositions* .

[e] Public Safety Employees

Notwithstanding *Code Civ. Proc. § 1211* or any other law, if an order of contempt is made affecting a public safety employee acting within the scope of employment because of the employee's failure to comply with a subpoena or subpoena duces tecum, the execution of any sentence must be stayed pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of the court's order on which contempt is based [*Code Civ. Proc. §§ 128(c), 1209(d)*].

"Public safety employee" includes any peace officer, firefighter, paramedic, or any other employee of a public law enforcement agency whose duty is either to maintain official records or to analyze or present evidence for investigative or prosecutorial purposes [*Code Civ. Proc. § 128(c), 1209(d)*].

[f] Sexual Assault Victims

Notwithstanding *Code Civ. Proc. § 1211* or any other law, if an order of contempt is made affecting the victim of sexual assault, when the contempt consists of refusing to testify concerning that sexual assault, the execution of any sentence is stayed pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of the court's order, a violation of which is the basis for the contempt. "Sexual assault" means any act made punishable by *Penal Code § 261, 262, 264.1, 285, 286, 288, 288a,* or *289* [*Code Civ. Proc. § 128(d)*].

[g] Victims of Domestic Violence

Notwithstanding *Code Civ. Proc. § 1211* or any other law, if an order of contempt is made affecting the victim of domestic violence, when the contempt consists of refusing to testify concerning that domestic violence, the execution of any sentence is stayed pending the filing within three judicial days of a petition for extraordinary relief testing the lawfulness of the court's order, a violation of which is the basis for the contempt [*Code Civ. Proc. § 128(e)*]. In a finding of contempt for a victim of sexual assault or domestic violence who refuses to testify about that sexual assault or domestic violence crime, the court may not incarcerate the victim [*Code Civ. Proc. § 1219(b)*]. As used in *Code Civ. Proc. §§ 128(e), 1219*, "domestic violence" means "domestic violence" as defined in *Fam. Code § 6211* [*see* Ch. 293, *Harassment and Domestic Violence*]. For purposes of *Code Civ. Proc. § 1219*, "sexual assault" means any act punishable by *Penal Code §§ 261, 262, 264.1, 285, 286, 288, 288a,* or *289* [*Code Civ. Proc. § 1219(c)*].

[2] Penalty

A witness who fails to obey a subpoena (or a court order) forfeits to the aggrieved party the sum of $500 and all

damages that he or she may havesustained by the failure of the witness to attend. This forfeiture and damages may be recovered in a civil action [*Code Civ. Proc. § 1992*; *see* discussion in Ch. 193, *Discovery: Depositions*]. In addition, the court may order that misuse of discovery process be treated as contempt of court [*Code Civ. Proc. § 2020.240*] or, in the alternative, issue a warrant for the arrest of witness or person who fails to appear [*Code Civ. Proc. § 1993(a)(1)*; *see Code Civ. Proc. §§ 1993(a)(2), (b), 1993.1-1993.2* (procedures); *see also § 535.26[3]*].

[3] Warrant and Arrest

As an alternative to a contempt sanction [*see Code Civ. Proc. § 2020.240*], the court may issue a warrant for the arrest of a witness who failed to appear pursuant to a subpoena or a person who failed to appear pursuant to a court order. The court, on proof of the service of the subpoena or order, may issue a warrant to the sheriff of the county in which the witness or person may be located and will arrest the witness or person and bring him or her before the court [*Code Civ. Proc. § 1993(a)(1)*; *see Code Civ. Proc. §§ 1993(a)(2), (b), 1993.1-1993.2* (procedures); *Gov. Code § 26744.5* (fees)].

A warrant of commitment issued pursuant to *Code Civ. Proc. § 1985 et seq.* must specify, particularly, the cause of the commitment. If the cause is for refusing to answer a question, that question also must be stated in the warrant; *see Allison v. County of Ventura (1977) 68 Cal. App. 3d 689, 702, 137 Cal. Rptr. 542* (body attachment issued to compel witness's attendance must specify reason for attachment, decided under prior law)].

[4] Other Sanctions

In addition, a judicial officer has the power to impose reasonable money sanctions, not to exceed $1,500, payable to the court, for violation by any person of a lawful court order without good cause or substantial justification. The term "person" includes a witness, a party, a party's attorney, or both [*Code Civ. Proc. § 177.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSubpoenasCivil ProcedureSanctionsGeneral OverviewCivil ProcedureSanctionsContemptGeneral OverviewCivil ProcedureSanctionsContemptCivil ContemptCivil ProcedureSanctionsContemptCriminal Contempt

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[Reserved]

§§ 535.27[Reserved]

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46-535 California Forms of Pleading and Practice--Annotated § 535.40

§ 535.40 Related Matthew Bender Publications

For memoranda of points and authorities relating to motions to compel attendance and production at depositions, see California Points and Authorities, Ch. 80, *Discovery*

For a discussion of the use of deposition subpoenas, see DeMeo, California Deposition and Discovery Practice, Ch. 53, *Deposition of Non-Party*

For in-depth coverage of e-discovery and a step-by-step guide to subpoenaing electronically stored information (ESI) from nonparties, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 6, *Demanding Production of Electronically Stored Evidence in California Court*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMotions to CompelCivil ProcedurePretrial MattersSubpoenas

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§ 535.41 State Constitution

Subpoena in proceedings by Public Utilities Commissions. *Cal. Const., art. XII, § 6*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSubpoenasEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral Overview

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46-535 California Forms of Pleading and Practice--Annotated § 535.42

§ 535.42 State Statutes

[1] Deposition of Prisoners

Examination in jail on deposition, or for production before court or officer. *Code Civ. Proc. § 1995*

Motion on affidavit for production before court or officer. *Code Civ. Proc. § 1996*

Examination of prisoner who is in jail in county where action or proceeding is pending. *Code Civ. Proc. § 1997*

[2] Disobedience of Subpoena

Money sanctions for violation of lawful court order without good cause or substantial justification. *Code Civ. Proc. § 177.5*

Contempt. *Code Civ. Proc. §§ 1209(a)(9), 1211, 1991-1991.2, 2023.030(e)*; *Penal Code § 1331*

Failure to appear after agreement to appear at another time punishable is contempt; proof of such agreement by affidavit. *Code Civ. Proc. § 1985.1*; *Penal Code § 1331.5*

Monetary penalty for disobedience of subpoena. *Code Civ. Proc. § 1992*

Warrant and arrest for disobedience of subpoena. *Code Civ. Proc. §§ 1993, 1993.1-1993.2, 1994*

Disobedience of deposition subpoena. *Code Civ. Proc. § 2020.240*

[3] Issuance

Authority of attorney of record to sign and issue. *Code Civ. Proc. § 1985*; *Penal Code § 1326(a)(4)*

Issuance in blank. *Code Civ. Proc. § 1985(c)*; *Penal Code § 1326(a)(3)*

Issuance as of course on application of party. *Code Civ. Proc. § 1986*

[4] Miscellaneous Records Subject to Subpoena

Disclosure of records of video recording sales or rental services without subject's written consent is permissible when made pursuant to subpoena. *Civ. Code § 1799.3(b)(1)*

[5] Motion to Quash

Motion to quash or modify subpoena duces tecum for production of personal records of consumer. *Code Civ. Proc. § 1985.3(g)*

Motion to quash, modify, or enforce compliance with subpoena. *Code Civ. Proc. § 1987.1*

Award of expenses, including reasonable attorney's fees. *Code Civ. Proc. § 1987.2*

[6] Notice to Attend in Lieu of Subpoena

Notice to attend in lieu of subpoena. *Code Civ. Proc. § 1987(b)*

Notice to attend and produce books, etc., in lieu of subpoena; objections to notice. *Code Civ. Proc. § 1987(c)*

[7] Persons in Court, But Not Subpoenaed

Persons present in court are required to testify in same manner as if subpoenaed. *Code Civ. Proc. § 1990*

[8] Purpose and Use of Subpoenas

Subpoena is writ or order directed to person and requiring attendance at particular time and place to testify as witness. *Code Civ. Proc. § 1985(a)*

To require attendance before court, at trial, or on taking deposition. *Code Civ. Proc. § 1986(a)*

To require attendance before commissioner. *Code Civ. Proc. § 1986(b)*

To require attendance out of court. *Code Civ. Proc. § 1986(c)*

To require production of business records. *Evid. Code § 1560 et seq.*

[9] Service

Recovery of cost of service. *Code Civ. Proc. § 1033.5(a)(4)*

Manner of service. *Code Civ. Proc. § 1987(a)*; *Penal Code § 1328*

Service and filing of affidavit supporting subpoena duces tecum. *Code Civ. Proc. § 1987.5*

Service by sheriff on concealed witness. *Code Civ. Proc. § 1988*

Sheriff's fee for serving subpoena on witness. *Gov. Code § 26743*

Service of subpoena on peace officers. *Gov. Code §§ 68097.1(a), 68097.3*; *Penal Code § 1328*

Service of subpoena on firefighters. *Gov. Code §§ 68097.1-68097.10*

Service on district attorney inspectors, probation officers, and building inspectors. *Gov. Code §§ 68097, 68097.1(a)*

Service on state employees who are neither peace officers nor firefighters and on trial court employees. *Gov. Code § 68097.1(b)*

Service on director and Department of Motor Vehicles for production of department records. *Veh. Code § 24.5*

[10] Subpoena Duces Tecum

Subpoena duces tecum of business records. *Evid. Code §§ 1560-1566*

To require witness to bring books, documents, or other things under his or her control that he or she is bound by law to produce in evidence. *Code Civ. Proc. § 1985(a)*

County recorder's certified copy of microfilmed record is in compliance with subpoena duces tecum. *Code Civ. Proc. § 1985(a)*

Requirement and contents of supporting affadavit. *Code Civ. Proc. § 1985(b)*

When personal attendance of custodian of records is not required. *Code Civ. Proc. § 1987.3*; *Evid. Code §§ 1560(b), 1564*

Service of copy of affidavit; motions for relief for production of subpoena in violation of *Code Civ. Proc. § 1987.5*.

[11] Subpoena Duces Tecum Requiring Production of Employment Records of Employee

Service of copy of subpoena duces tecum, affidavit, and notice on employee. *Code Civ. Proc. § 1985.6(b), (e), (k)*

Service, on witness, of proof of service or written authorization to release records. *Code Civ. Proc. § 1985.6(c)*

Objections by employee to furnishing of records by witness. *Code Civ. Proc. § 1985.6(e)*

Motion by employee to quash or modify subpoena duces tecum. *Code Civ. Proc. § 1985.6(f)*

Order shortening time for service or waiving requirements for production of employment records of employee. *Code Civ. Proc. § 1985.6(g)*

[12] Subpoena Duces Tecum Requiring Production of Personal Records of Consumer

Health care provider may be required to disclose medical records pursuant to subpoena duces tecum when patient is notified and does not object. *Civ. Code § 56.10(b)(3)*

Service of copy of subpoena duces tecum, affidavit, and notice on consumer. *Code Civ. Proc. § 1985.3(b), (e), (l)*

Service, on witness, of proof of service or written authorization to release records. *Code Civ. Proc. § 1985.3(c)*

Objections by consumer to furnishing of records by witness. *Code Civ. Proc. § 1985.3(e)*

Consumer's consent to release personal records by telephone corporation. *Code Civ. Proc. § 1985.3(f)*

Motion by consumer to quash or modify subpoena duces tecum. *Code Civ. Proc. § 1985.3(g)*

Order shortening time for service or waiving requirements for production of personal records of consumer. *Code Civ. Proc. § 1985.3(h)*

[13] Subpoena Duces Tecum Requiring Production of Private Records of Public Employees

Special procedures set out in *Code Civ. Proc. § 1985.3* are applicable to specified records of public employees and other natural persons maintained by public agencies. *Code Civ. Proc. § 1985.4*

[13A] Subpoena Requiring Production of Electronically Stored Information

Subpoena of electronically stored information and access to information by party serving subpoena. *Code Civ. Proc. § 1985.8*

[14] Subpoenas in Particular Proceedings

[a] In General

Subpoena to compel attendance of nonparty at deposition. *Code Civ. Proc. § 2025.280(b)*

Actions relating to election contests. *Elec. Code § 16502*

Administrative proceedings. *Gov. Code §§ 11450.05-11450.50*

Proceedings by county board of supervisors. *Gov. Code § 25170 et seq.*

Coroner's inquests. *Gov. Code §§ 27498, 27499.1 et seq.*

Military courts. *Mil. & Vet. Code § 460 et seq.*

Proceedings by county board of equalization. *Rev. & Tax. Code §§ 1609.4, 1609.5*

Discovery subpoenas issued in actions pending outside California. *Code Civ. Proc. § 2029.100 et seq.*

[b] Criminal

Issuance for felony preliminary hearing. *Penal Code § 859(b)*

Issuance by magistrate, district attorney, or attorney of record of defendant. *Penal Code § 1326(a)*

Contents and prescribed form. *Penal Code § 1327*

Telegraphic copy. *Penal Code § 1328a et seq.*

Distance limitation for out-of-county witness. *Penal Code § 1330*

Agreement to appear at a time other than specified in subpoena. *Penal Code § 1331.5*

Conditional examination of witness. *Penal Code § 1342*

Habeas corpus proceedings. *Penal Code §§ 1484, 1489, 1503*

[c] Involving State Agencies

Proceedings by State Bar. *Bus. & Prof. Code §§ 6049, 6050 et seq.*

Proceedings by State Athletic Commission. *Bus. & Prof. Code § 18845 et seq.*

Proceedings by State Board of Education. *Educ. Code § 33034*

Actions brought against Lottery Commission. *Gov. Code § 8880.72*

State Legislature proceedings. *Gov. Code § 9401 et seq.*

State Department proceedings. *Gov. Code § 11181*

Investigations by Attorney General. *Gov. Code §§ 12550, 12560*

Proceedings by State Board of Control. *Gov. Code §§ 13910, 13911*

State civil service proceedings. *Gov. Code §§ 18671, 18672, 18678*

Proceedings by Commission on Judicial Qualifications. *Gov. Code § 68750 et seq.*

Proceedings by Insurance Commissioner. *Ins. Code §§ 1042, 12924*

Proceedings by Department of Natural Resources. *Pub. Res. Code § 3357*

Proceedings by probate referee. *Prob. Code §§ 450-453*

Proceedings by assessor. *Rev. & Tax. Code § 454*

Proceedings by controller regarding gift taxes. *Rev. & Tax. Code § 16532 et seq.*

Proceedings by State Water Rights Board. *Water Code § 1080*

[15] Witness Fees

Witness fees and mileage are same for deposition as for appearance in court. *Code Civ. Proc. § 1986.5*

Written notice of entitlement to fees. *Code Civ. Proc. § 2065*

Witness fees for complying with subpoena duces tecum of nonparty business records. *Evid. Code § 1563*

Superior courts. *Gov. Code § 68093*

Grand juries. *Gov. Code § 68094*

Coroner's jury. *Gov. Code § 68095*

Special fees for local agency employees. *Gov. Code § 68096.1*

Payable to witness in civil cases in advance. *Gov. Code § 68097*

Special fees for certain peace officers, members of California Highway Patrol, sheriffs, deputy sheriffs, marshals, deputy marshals, district attorney inspectors, probation officers, building inspectors, fire fighters, other state employees, trial court employees and city police officers. *Gov. Code § 68097 et seq.*

Criminal proceedings. *Penal Code §§ 1329, 1329.1*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureParties Prisoners General OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedurePretrial MattersSubpoenasCivil ProcedureSanctionsContemptGeneral OverviewCivil Rights LawPrivacy RightsGeneral OverviewCriminal Law & ProcedureDiscovery & InspectionSubpoenasGeneral OverviewEvidenceTestimonyGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationPublic Employees

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46-535 California Forms of Pleading and Practice--Annotated § 535.43

§ 535.43 Decisions

[1] Administrative Proceedings

Before confidential third party personal records may be disclosed in administrative proceedings, subpoenaing party is required to take reasonable steps to notify third party of pendency and nature of proceedings and to afford third party fair opportunity to object to disclosure by seeking protective order or by instituting other legal proceedings to limit discovery; legislature's failure to incorporate explicit notice provisions do not diminish constitutional privacy rights. *Sehlmeyer v. Department of General Services (1993) 17 Cal. App. 4th 1072, 1079-1081, 21 Cal. Rptr. 2d 840*

[2] Disobedience of Subpoena

Act of knowingly assisting another person to evade service of process is unlawful act in violation of *Penal Code § 136.1* (preventing or dissuading person from testifying is misdemeanor) and is within acts or omissions constituting contempt under *Code Civ. Proc. § 1209(a)(8)*. *In re Holmes (1983) 145 Cal. App. 3d 934, 936, 942, 193 Cal. Rptr. 790* (attorney who assisted husband in avoiding service of subpoena compelling him to testify as expert witness in civil case)

Punishment of contempt of court is not applicable to person not duly served with subpoena. *Chapman v. Superior Court (1968) 261 Cal. App. 2d 194, 197, 67 Cal. Rptr. 842*

Courts and judicial tribunals possess power to compel attendance of necessary witnesses. *Walker Mining Co. v. Industrial Acci. Com. (1939) 35 Cal. App. 2d 257, 262-263, 95 P.2d 188*

[3] Motion to Quash

Motion to quash subpoena duces tecum on ground of improper service is denied if service was only on California partner of national corporation, not on designated out-of-state custodian of records. *Boal v. Price Waterhouse & Co.*

(1985) 165 Cal. App. 3d 806, 810-811, 212 Cal. Rptr. 42

Order quashing subpoena duces tecum does not prevent party from securing subpoena for attendance of persons without books or documents described in subpoena duces tecum. *Walker v. Signal Companies, Inc. (1978) 84 Cal. App. 3d 982, 1002, 149 Cal. Rptr. 119*

Party does not have right to quash subpoena through motion based on invasion of third party's right to privacy. *County of Kern v. Superior Court (1978) 82 Cal. App. 3d 396, 399, 401, 147 Cal. Rptr. 248*

Motion to quash is procedurally appropriate method of testing validity of subpoena duces tecum. *People ex rel. Dept. of Public Works v. Younger (1970) 5 Cal. App. 3d 575, 579, 86 Cal. Rptr. 237*

[4] Production of Business Records

Compliance with subpoena duces tecum for production of business records under *Evid. Code § 1563(b)(1)* does not allow recovery of computer costs. *In re Marriage of Stephens (1984) 156 Cal. App. 3d 909, 913, 203 Cal. Rptr. 331*

[5] Production of Personal Records of Consumer

In accordance with Code Civ. Proc. § 56.10(b)(3), subpoena required health care provider to disclose patient's medical records to ex-fiance's attorney because ex-fiance's attorney complied with *Code Civ. Proc. § 1985.3(e)*, and patient did not file objection; this undisputed evidence was sufficient to establish complete defense to cause of action under Code Civ. Proc. § 56.10(b)(3). *Colleen M. v. Fertility and Surgical Assocs. of Thousand Oaks (2005) 132 Cal. App. 4th 1466, 1479, 34 Cal. Rptr. 3d 439*

Psychiatrist served with subpoena duces tecum requiring production of patients' records is required to produce those records if patients were notified that their records were sought and were informed of their right to object, but failed to take action to prevent disclosure. *Inabnit v. Berkson (1988) 199 Cal. App. 3d 1230, 1236-1239, 245 Cal. Rptr. 525*

[6] Sufficiency of Affidavit Accompanying Subpoena Duces Tecum

Declarations that lacked any factual bases for legal conclusion that documents were material to proceedings failed to comply with *Code Civ. Proc. § 1985(b)*. *Lee v. Superior Court (2009) 177 Cal. App. 4th 1108, 1112, 99 Cal. Rptr. 3d 712* (collecting cases)

Service of deposition subpoena on nonparty witness was effective despite absence of supporting affidavit or declaration; *Code Civ. Proc. § 2020.510(b)*, providing that "[a] deposition subpoena need not be accompanied by an affidavit or declaration showing good cause for the production of the documents and things designated," controlled, prevailing over *Code Civ. Proc. § 1987.5*, which provides that service of subpoena duces tecum issued before trial without copy of affidavit is invalid. *Terry v. SLICO (2009) 175 Cal. App. 4th 352, 359, 95 Cal. Rptr. 3d 900*

Subpoenas issued for investigation permitted by statute does not require affidavit showing good cause. *Fielder v. Berkeley Properties Co. (1972) 23 Cal. App. 3d 30, 40, 99 Cal. Rptr. 791* (investigation pursuant to *Gov. Code §§ 11180, 11181(a), (e)* for Agricultural Code violations)

Affidavit for issuance of subpoena duces tecum based only on information and belief is insufficient. *Grannis v. Board of Medical Examiners (1971) 19 Cal. App. 3d 551, 564, 96 Cal. Rptr. 863*

Party is required to show good cause supporting affidavit for subpoena duces tecum for production of matters and things described in subpoena. *Kenney v. Superior Court (1967) 255 Cal. App. 2d 106, 109, 63 Cal. Rptr. 84*

[7] Witness Fees

Rule that fees of experts employed by one party are not allowable is codified in *Gov. Code § 68092.5*. *Posey v. State of California (1986) 180 Cal. App. 3d 836, 852, 225 Cal. Rptr. 830*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsScopeSubpoenasCivil ProcedurePretrial MattersSubpoenasCivil ProcedureSanctionsContemptGeneral OverviewCivil Rights LawPrivacy RightsGeneral Overview

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46-535 California Forms of Pleading and Practice--Annotated § 535.44

§ 535.44 Attorney General Opinions

Deputy in charge of civil divisions of sheriff's offices may execute certificate of service with respect to summons or subpoena actually served by another deputy. *67 Ops. Cal. Att'y Gen. 72 (1984)*

Party subpoenaing California Highway Patrol member is required to pay monies specified in *Gov. Code § 68097.2* unless that department is a party to the litigation and subject matter arises out of its activities. *58 Ops. Cal. Att'y Gen. 543 (1975)*

Legal Topics:

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

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PART III. RESEARCH GUIDE

46-535 California Forms of Pleading and Practice--Annotated § 535.45

§ 535.45 Law Reviews

Review of Selected 1982 California Legislation, *Civil Procedure; Subpoenas and Subpoenas Duces Tecum, 14 Pac. L.J. 484 (1983)*

Note, *Compelling Expert Testimony: A Proposed Statutory Reform, 30 Hastings L.J. 209 (1978)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSubpoenasEvidenceTestimonyExpertsGeneral Overview

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§ 535.46 Text References

Witkin, California Evidence, vol. 2, ch. IX, *Witnesses*, §§ 1036-1045; Ch. X, *Discovery and Production of Evidence*, §§ 1568-1579, 1612-1614, 1633 (3d ed. 1986)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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[Reserved]

§§ 535.47[Reserved]

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PART IV. PROCEDURAL CHECKLISTS

46-535 California Forms of Pleading and Practice--Annotated § 535.50

§ 535.50 Party Seeking Subpoena

[1] Make Preliminary Determinations

☐ What facts need to be proved to prevail?

☐ Who has the burden of proof?

☐ What information is necessary to prove those facts?

PRACTICE TIP:
Plan Requests to Save Costs and Avoid Objections. It is useful to spend the time before serving the subpoena to decide exactly what information is necessary, and then what specific questions or documents will yield this information. This will save expensive deposition time and may result in fewer objections to document requests. ***By Corinne Burt.***

☐ Which will be more effective proof, witness testimony, or documents, or both?

☐ Who can provide that information, either by testimony, or the production of documents?

[2] Decide the Type and Content of the Subpoena Best Fitting Your Needs

☐ Does witness reside in California [*see Code Civ. Proc. § 1989*; § 535.14]?

☐ Status of witness:

☐ California Highway Patrol member [*see* Code Civ. Proc. § 1989 Gov. Code §

68097.3; § 535.14[4]].

☐ Party or party-related person [*see Code Civ. Proc. § 1987(b)(c)*; § 535.54].

☐ Purpose of subpoena:

☐ To require attendance in court or for trial of issue in court [*see Code Civ. Proc. § 1986(a)*; § 535.12[1]].

☐ To require attendance out of court (except at deposition) [*see Code Civ. Proc. § 1986(c)*; § 535.12[3]].

☐ To require attendance on taking of deposition [*see § 535.12[4]*; *see also* Ch. 193, *Discovery: Depositions* , Procedural Checklist].

☐ Date, time, and place for appearance.

☐ When service will be made, which must be reasonable time to allow witness to prepare and travel [*see Code Civ. Proc. § 1987(a)*; § 535.17[2]].

☐ Documents to be produced, if any [for a checklist for a subpoena duces tecum if documents are to be requested, *see § 535.51*].

☐ Whether attorney of record in an action or proceeding may sign and issue subpoena without seal or must obtain signed and sealed subpoena from clerk or judge to be filled in by attorney. Attorney may sign and issue [*see Code Civ. Proc. § 1985(c)*; for discussion, *see § 535.13*]:

☐ If subpoena is to require attendance before court in which action is pending; or

☐ If subpoena is to require attendance at deposition in action or proceeding.

☐ If person to be subpoenaed is public employee for whom fees must be paid [*see § 535.19[1] -[3]*], whether good cause may exist for relief from the duty to make any deposit or payment of fees or portion thereof [*see Gov. Code § 68097.55*; for discussion, *see § 535.19[4]*].

[3] Calendar Relevant Dates

PRACTICE TIP:

Calendaring the Relevant Dates Is Critical. Depending on the type of subpoena, the time within which to make an objection or motion to quash may be quite short. Always use calendaring to keep track both of the date after which objections are waived by lapse of time, and also of the date after which penalties for noncompliance may be enforced [*see §§ 535.21[7], [8], 535.23, 535.26*]. *By Corinne Burt.*

[4] Fees for Resident Peace Officer, Other Public Employee, or Nonresident California Highway Patrol

Member

☐ Be prepared to tender witness fees if witness is local agency employee, peace officer, firefighter, state employee, or trial court employee [*see Gov. Code §§ 68096.1(a), (b), 68097.1, 68097.2(a), (b)*; § 535.19[1]].

☐ If witness is a nonresident member of the California Highway Patrol, deposit fees [*see Gov. Code §§ 68097.3, 68097.4*; § 535.19[2]].

[5] Prepare and Issue Subpoena

☐ As attorney of record, fill in, sign, and issue subpoena [for the form, *see §§ 535.60, 535.61*] if subpoena is to [*see Code Civ. Proc. § 1985(c)*; § 535.13[2]]:

☐ Require attendance before the court in which the action or proceeding is pending.

☐ Require attendance at deposition in the action or proceeding.

☐ In any other situation, obtain signed and sealed subpoena from clerk or judge and fill it in [*see Code Civ. Proc. § 1985(c)*; § 535.13[1]].

[6] Service

☐ Deliver original and one copy to server, who may be any person [*Code Civ. Proc. § 1987(a)*].

NOTE:
The fee for a sheriff to subpoena witnesses is provided for in *Gov. Code § 26743*.

☐ Except for public employees, serve by delivering a copy of the subpoena, or ticket containing its substance, to witness personally or, if a minor, deliver to parent, guardian, conservator, or similar fiduciary, and, in specified cases, to the designated agent for service of process at the county child welfare department or the probation department under whose jurisdiction the minor has been placed [*see Code Civ. Proc. § 1987(a)*; § 535.17].

☐ For peace officers, firefighters, and other public employees or employees of the trial courts [*see § 535.17[5]*], serve as follows [*Gov. Code § 68097.1(a), (b)*]:

☐ Deliver one copy to the witness personally; or

☐ Deliver two copies to the employee's immediate superior (or agent designated by that superior to receive that service) at the place of employment.

☐ For peace officers of the Department of the California Highway Patrol (CHP):

☐ Deliver a copy to the peace officer personally [*see Gov. Code § 68097.1(a)*]; or

☐ Deliver two copies to the employee's immediate superior (or agent designated by that superior to receive that service) [*see Gov. Code § 68097.1(a)*]; or

☐ If witness is nonresident member of CHP, deliver a copy during office hours to the person in charge of the office of the CHP at least five days prior to the date scheduled for attendance [*see Gov. Code § 68097.3*].

☐ Pay witness fees.

☐ If demanded, pay required fees to witness on delivery of subpoena [*see Code Civ. Proc. § 1987(a)*; *Gov. Code § 68097*; *Gov. Code § 68093*; § 535.18].

☐ For city or county employees, peace officers, firefighters, and state employees [*see* [2], *above*].

☐ For expert witnesses [*see Gov. Code § 68092.5(a)*]. If expert's fee is unreasonable, move for an order setting the compensation of the expert [*Gov. Code § 68092.5(c)*; § 535.18[2]].

☐ Prepare proof of service [for an illustration of the form, *see §§ 535.60*, *535.61*].

☐ File subpoena and proof with court (recommended but not required) [*see Code Civ. Proc. § 1985 et seq.*].

[7] Obtain Penalties for Noncompliance

☐ Contempt proceedings [*see Code Civ. Proc. § 1991*, § 535.26[1], *see also* Ch. 135, *Contempt*].

☐ Request court to issue warrant to have witness arrested and brought before court [*see Code Civ. Proc. § 1993*, *1993.1-1993.2*; § 535.26[3]].

☐ Other sanctions or penalties [*see § 535.26[2], [4]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSubpoenasCivil ProcedureSanctionsContemptGeneral Overview

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46-535 California Forms of Pleading and Practice--Annotated § 535.51

§ 535.51 Party Seeking Subpoena Duces Tecum

[1] Make Preliminary Determinations

☐ For checklist of initial determinations, see *§ 535.50[1]*.

☐ Facts showing good cause for requiring production of things to be produced under the subpoena, including [*see § 535.16*]:

☐ Materiality of the things to be produced to the issues involved in the case;

☐ Possession or control of things by witness who is to be subpoenaed.

☐ Whether subpoena is for production of business records of a business that is neither a party nor the place where the cause of action arose:

☐ If so, whether to require attendance of custodian of records and production of original records [*see § 535.20*].

☐ Whether subpoena is for production of consumer records [*see § 535.21*].

☐ Whether subpoena is for production of employment records [*see §§ 535.21, 535.22*].

☐ If records sought are personal records maintained by a public utility telephone corporation [*see Pub. Util. Code § 216*], obtain consent to release signed by the consumer [*see Code Civ. Proc. §*

1985.3(f); for a form, *see § 535.71*].

[2] Deposit Fees for Nonresident California Highway Patrol Member

☐ For checklist, see *§ 535.50[2]*.

[3] Prepare and Issue Subpoena Duces Tecum, and Supporting Papers

☐ For checklist for preparing and issuing the subpoena, see *§ 535.50[3]*.

☐ Prepare supporting affidavit or declaration supporting subpoena duces tecum [*see Code Civ. Proc. §§ 1985(b), 2015.5*; for forms, *see §§ 535.61 -535.68*].

☐ In case of subpoena duces tecum for personal records of consumer or employment records:

☐ Set a date for compliance that is no earlier than 20 days after issuance of the subpoena, or 15 days after its service, whichever is later [*Code Civ. Proc. §§ 1985.3(d), 1985.6(d), 2020.410(c)*; *see § 535.21[3]*].

☐ Prepare notice to affected consumer or employee [*see Code Civ. Proc. §§ 1985.3(e), 1985.6(e)* [for a form, *see § 535.69*]].

[4] Service

☐ For checklist for serving a subpoena, see *§ 535.50[3]*. Accompany subpoena with:

☐ Supporting affidavit or declaration of good cause.

☐ If records sought are personal records maintained by a public utility telephone corporation, consent to release signed by the consumer [*see Code Civ. Proc. § 1985.3(f)*].

☐ If records sought are consumer or employment records:

☐ Serve notice, proof of service, subpoena duces tecum, and supporting affidavit or declaration, if any, on consumer or employee [*Code Civ. Proc. §§ 1985.3(b)(1), 1985.6(b)(1)*; *see Code Civ. Proc. §§ 1985.3*(*l*), 1985.6(k) (when notice to consumer or employee and delivery of documents specified in *Code Civ. Proc. §§ 1985.3(b)* or *1985.6(b)* is not required); *see generally § 535.21*].

☐ Demonstrate compliance with notice requirements, by either:

☐ Serving subpoenaed witness with proof of personal service or of service by mail [*see Code Civ. Proc. §§ 1985.3(b), (c)(1), 1985.6(b), 1985.6(c)(1)*]; or

☐ Providing witness written authorization to release the records signed by consumer or employee, or by his or her attorney of record [*Code Civ. Proc. §§ 1985.3(c)(2), 1985.6(c)(2)*; for a form, *see § 535.70*].

☐ Payment of witness fees and reasonable costs [*see § 535.50[6][c]*.

☐ If business records have been requested from a nonparty witness [*see Evid. Code §§ 1563(b)*; § 535.20[3]].

☐ Time of service:

☐ Allow reasonable time [*see Code Civ. Proc. § 1987(a)*; § 535.59[6][d]].

☐ Service must allow reasonable time to locate and produce the records themselves or copies of them. [*Code Civ. Proc. § 1985.3(d), (h)* (consumer) or 1985.6(d), (g) (employee)].

NOTE:
Party subpoenaing a consumer's personal records or employee's employement records may be entitled to an order shortening time for service or a waiver of the requirements for providing notice to the consumer or employee [*Code Civ. Proc. §§ 1985.3(h), 1985.6(g)*].

☐ Proof of service. The person making service prepares proof of service on reverse side of original subpoena [*see §§ 535.60, 535.61*].

NOTE:
Appearance at Deposition. For requirements relating to service of a subpoena duces tecum regarding a deposition, see Ch. 193, *Discovery: Depositions* .

[5] File Documents

☐ Retain original affidavit until final judgment, and file with court only on reasonable request [*Code Civ. Proc. § 1987.5*]. If original affidavit is filed on request, file with the original subpoena duces tecum and proof of service.

☐ If business records from a nonparty were made available at the place of business rather than sent, deliver copy of records as directed in the subpoena, with affidavit stating that the copy is a true copy of all the records delivered [*see Evid. Code §§ 1560(e), 1561(c)*; § 535.68].

[6] Obtain Penalties for Noncompliance With Subpoena Duces Tecum

☐ For checklist for obtaining penalties against a person for failure to comply with a subpoena, see *§ 535.50[5]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersSubpoenasCivil ProcedureSanctionsGeneral Overview

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46-535 California Forms of Pleading and Practice--Annotated § 535.52

§ 535.52 Person Receiving Subpoena or Subpoena Duces Tecum

[1] For Custodian of Business Records to Comply if Attendance Is Not Required

☐ Enclose and seal records [*Evid. Code § 1560(c)*] and direct to:

☐ Court clerk or judge, if subpoena directed to attendance in court.

☐ Deposition officer, if the subpoena directs attendance at a deposition.

☐ To the officer, body, or tribunal conducting the hearing in other, applicable cases.

☐ Deliver copy of records, within 15 days after receipt of the subpoena, or within the time agreed, to the clerk of the court or to the judge [*Evid. Code § 1560(b)* (civil cases; *see § 535.84[3][a]* (criminal cases)].

☐ Send affidavit or declaration as appopriate regarding compliance and the genuineness of the records [*Evid. Code § 1561(a), (b)*; *Code Civ. Proc. § 2015.5*; § 535.67].

☐ Make records available for inspection or copying [*see Evid. Code § 1560(b)-(e)*].

[2] To Comply Generally

☐ Either attend and produce documents if required [*Code Civ. Proc. § 1985*]; or

☐ Agree with subpoenaing party to reschedule [*see Code Civ. Proc. § 1985.1*].

[3] To Object if a Nonparty Consumer or Employee

☐ For consumers, serve written objection pursuant to *Code Civ. Proc. § 1985.3(g)* in lieu of a motion to quash [*see § 535.75*].

☐ For employees, serve written objection pursuant to *Code Civ. Proc. § 1985.6(f)* in lieu of a motion to quash [*see § 535.75*].

[4] To Quash or Modify Subpoena or Subpoena Duces Tecum

☐ Determine whether to seek to quash or modify subpoena duce tecum [*see § 535.23*].

☐ Prepare moving papers:

☐ Notice of motion to quash or modify [for a form, *see § 535.74*].

☐ Supporting declaration [for a form, *see § 535.76*].

☐ Memorandum of points and authorities [for forms, *see* California Points and Authorities, Ch. 218, *Subpoena* (Matthew Bender)].

☐ Follow general procedures for noticed motions as set out in Ch. 372, *Motions and Orders* .

☐ Give notice of motion to witness and deposition officer at least five days prior to production [*Code Civ. Proc. §§ 1985.3(g), 1985.6(f)(1)*].

☐ If motion is granted, prepare, file, and serve order [*see Code Civ. Proc. §§ 1019.5, 1987.1, 1987.2*; for a form, *see § 535.77*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryProtective OrdersCivil ProceduresPretrial MattersSubpoenasCivil Rights LawPrivacy RightsGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationGeneral OverviewLabor & Employment LawEmployee PrivacyDisclosure of Employee InformationPublic Employees

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46-535 California Forms of Pleading and Practice--Annotated § 535.53

§ 535.53 Party Seeking to Compel Appearance by Notice in Lieu of Subpoena

[1] Make Preliminary Determinations

☐ Whether witness is one who may be compelled to attend by notice to their attorney in lieu of subpoena [*see Code Civ. Proc. § 1987(b)*; § 535.24]:

☐ A party to any civil action or proceeding.

☐ A person for whose immediate benefit the action or proceeding is prosecuted or defended.

☐ An officer, director, or managing agent of any such party or person.

☐ Date, time, and place for appearance.

[2] To Compel Attendance Without Production

☐ Prepare notice [for a form, *see § 535.78*] in the following number of copies:

☐ Original for filing.

☐ Copy for attorney to whom notice is given.

☐ Office copy.

☐ Other copies as desired.

☐ Prepare proof of service by mail [*see* Ch. 518, *Service of Summons and Papers*].

☐ Serve notice and execute proof of service:

☐ At least 10 days before the time required for attendance (unless the court prescribes a shorter time),

☐ Serve copy of the notice on the attorney for the witness [*see Code Civ. Proc. § 1987(b)*; for procedural checklist relating to service of papers, *see* Ch. 518, *Service of Summons and Papers* ; for forms for use in shortening time, *see* Ch. 524, *Shortening and Extension of Time*].

☐ Execute proof of service [*Code Civ. Proc. § 1013a*].

☐ Present the original notice to the court clerk for filing.

[3] To Compel Attendance With Books, Documents, or Other Things

☐ Prepare notice [§ 535.79] in the same number of copies as for notice in [2], *above*.

☐ Prepare proof of service in same manner as [2], *above*.

☐ Serve notice and execute proof of service:

☐ At least 20 days before the time required for attendance (or within such shorter time as the court may order),

☐ Serve copy of the notice on the attorney for the witness [*Code Civ. Proc. § 1987(c)*; *see* Ch. 518, *Service of Summons and Papers*],

☐ Execute proof of service [*Code Civ. Proc. § 1013a*].

☐ Present the original notice to the court clerk for filing.

☐ If objections are filed by the witness [*see § 535.54[2]*] and do the following:

☐ Prepare moving papers [*Code Civ. Proc. § 1987(c)*]:

☐ Notice of motion [for a form, *see § 535.81*].

☐ Supporting declaration [for a form, *see § 535.82*].

☐ Supporting memorandum [for discussion and general forms, *see* Ch. 417, *Points and Authorities*].

☐ Draft copies, serve and file papers in the same manner as for any noticed motion [*see* Ch. 372, *Motions and Orders*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & Inspection

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PART IV. PROCEDURAL CHECKLISTS

46-535 California Forms of Pleading and Practice--Annotated § 535.54

§ 535.54 Party Receiving Notice to Appear in Lieu of Subpoena

[1] To Comply With Notice

☐ Attend as required.

[2] To Object to Notice to Produce

☐ Prepare objections [for a form, *see § 535.80*].

☐ Sign objections.

☐ Prepare proof of service by mail [*see* Ch. 518, *Service of Summons and Papers*].

☐ Serve written objections and execute proof of service [*see Code Civ. Proc. §§ 1013a, 1987(c)*; § 535.24[6]].

☐ Present the original objections to the court clerk for filing.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureDiscoveryMethodsRequests for Production & InspectionCivil ProcedureDiscoveryProtective Orders

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[Reserved]

§§ 535.55[Reserved]

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PART V. FORMS

46-535 California Forms of Pleading and Practice--Annotated § 535.60

§ 535.60 Civil Subpoena with Proof of Service [Code Civ. Proc. § 1985; Cal. Judicial Council Form SUBP-001]

[1] FORM Civil Subpoena with Proof of Service [Code Civ. Proc. § 1985; Cal. Judicial Council Form SUBP-001]

Click here to view image.

[2] Use of Form

The civil subpoena set out in [1], *above*, is a reproduction of Cal. Judicial Council Form SUBP-001, adopted by the Judicial Council for mandatory use [*see* Cal. Rules of Ct., Appendix, Div. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form is for use in requiring the personal attendance of a witness at a trial or hearing [*see Code Civ. Proc. § 1985(a)*]. For a form for a subpoena duces tecum, requiring the witness to produce records in addition to or in lieu of a personal appearance, see *§ 536.61*.

[3] Procedure for Obtaining Subpoenas

The subpoena may be obtained from the clerk of the court [*Code Civ. Proc. § 1986(a)*]. If the subpoena requires attendance before a commissioner appointed by a non-California court, it may be obtained from the clerk of the superior court of the county in which the witness is to be examined [*Code Civ. Proc. § 1986(b)*].

[4] Issuance

The subpoena or subpoena duces tecum is issued, signed and sealed by the clerk or a judge to the party requesting it [*Code Civ. Proc. § 1985(c)*].

The attorney of record may also sign and issue a subpoena to require attendance before the court [*Code Civ. Proc. § 1985(c)*].

[5] Filling in Form

[a] Heading

The heading should be filled in with the name, bar membership number, address, and telephone number of the attorney for the subpoenaing party, the name of the subpoenaing party, the name and address of the court (including its branch name, if any), the names of the plaintiff and defendant, and the case number. The name of the witness should be filled in under "THE PEOPLE OF THE STATE OF CALIFORNIA, TO (*name*)."

[b] Attendance Requirement (Paragraph 1)

Paragraph 1 directs the witness to appear at a particular time and place in order to testify unless the witness agrees otherwise with the person named in item 3 [*see Code Civ. Proc. §§ 1985(a), 1985.1*].

[c] Agreement to Appear at Another Time (Paragraph 2)

Paragraph 2 is included to comply with the notice required by *Code Civ. Proc. § 1985.2*. Paragraph 1 provides that the person must appear as a witness unless the person subpoenaed makes a special agreement with the person named in Paragraph 2. Hence, Paragraphs 1 and 2 also serve to notify the witness that in lieu of appearance at the time and place specified, the witness may agree with the party at whose request the subpoena was issued to appear at another time or on such notice as may be agreed on [*see Code Civ. Proc. § 1985.1*].

[d] Witness Fees (Paragraph 3)

Paragraph 4 is designed to satisfy the requirement that any witness subpoenaed in a civil or administrative action must be given written notice that he or she may be entitled to receive witness and mileage fees [*see Code Civ. Proc. § 2065*]. See the discussion of witness fees generally at § 535.18 and fees for public employees at § 535.19.

[6] Disobedience of Subpoena

This form states that disobedience of a subpoena may be punished as contempt [*see Code Civ. Proc. § 1991*] and that the person disobeying the subpoena will also be liable for a $500 penalty and all damages resulting from his or her failure to obey [*see Code Civ. Proc. § 1992*].

[7] Proof of Service

The reverse side of the subpoena form contains a proof of service to be filled in by the server after service is made.

[8] Cross References

For a discussion and forms for subpoenas for compel attendance at depositions, see Ch. 193, *Discovery: Depositions*

For discussion and forms pertaining to subpoenas and subpoenas duces tecum in discovery proceedings, see DeMeo, California Deposition and Discovery Practice, Ch. 53, *Deposition of Nonparty* (Matthew Bender)

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46-535 California Forms of Pleading and Practice--Annotated § 535.61

§ 535.61 Civil Subpoena Duces Tecum with Supporting Declaration and Proof of Service [Code Civ. Proc. § 1985; Cal. Judicial Council Form SUBP-002]

[1] FORM Civil Subpoena Duces Tecum with Supporting Declaration and Proof of Service [Code Civ. Proc. § 1985; Cal. Judicial Council Form SUBP-002]

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[2] Use of Form

The civil subpoena duces tecum and supporting declaration set out in [1], *above*, is a reproduction of Cal. Judicial Council Form SUBP-002, adopted by the Judicial Council for mandatory use [*see* Cal. Rules of Ct., Appendix, Div. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form is for use in requiring a witness to appear in person and produce specified records, books, documents, or other things, or, alternatively, to produce the specified records only [*see Code Civ. Proc. § 1985(a)*; *Evid. Code § 1560 et seq.*]. For a form for a subpoena for use in requiring personal attendance only, see *§ 536.60*.

[3] Procedure for Obtaining Subpoena Duces Tecum

If the subpoena duces tecum requires attendance or production of records before a court [*Code Civ. Proc. § 1986(a)*]. If it requires attendance or production of records before a commissioner appointed by a non-California court, it may be obtained from the clerk of the superior court of the county in which the witness is to be examined [*Code Civ. Proc. § 1986(b)*].

[4] Issuance

The subpoena duces tecum is issued, signed and sealed by the clerk or a judge to the party requesting it [*Code Civ. Proc. § 1985(c)*]. The attorney of record may also sign and issue a subpoena duces tecum to require production of the

matters or things described in the subpoena [*Code Civ. Proc. § 1985(c)*].

[5] Filling in Form

[a] Heading

The heading should be filled in with the name, bar membership number, address, and telephone number of the attorney for the subpoenaing party, the name of the subpoenaing party, the name and address of the court (including its branch name, if any), the names of the plaintiff and defendant, and the case number. The appropriate information should be filled in under "THE PEOPLE OF THE STATE OF CALIFORNIA, TO (*name, address, and telephone number of deponent, if known*)."

[b] Requirement of Attendance and Production of Records

Paragraph 1 directs the witness to appear at a particular time and place unless the appearance is excused under Paragraph 3(b), discussed *below*, or the witness makes an agreement otherwise with the person named in Paragraph 4, discussed in [c], *below* [*see Code Civ. Proc. §§ 1985(a), 1985.1*].

Paragraph 2 provides notice to the witness that, if he or she is the custodian of consumer or employee records sought under *Code Civ. Proc. § 1985.3* or *1985.6*, and he or she has been served with a motion to quash the subpoena or an objection, then he or she is not to produce the records unless and until further directed by a court order or agreement of the parties [*see Code Civ. Proc. §§ 1985.3(g), 1985.6(f)(3)* and discussion in *§ 535.21[7], [8]*; for forms for an objection and a motion to quash, see *respectively §§ 535.69* and *535.74*].

Paragraphs 3(a) and 3(b) are mutually exclusive, and only one is to be checked by the subpoenaing party. Paragraph 3(a) is checked when personal appearance by the witness or custodian is required.

Paragraph 3(b) is checked when, alternatively, the subpoenaing party does not require personal appearance but only that the custodian mail or deliver copies of all the records described in the subpoena in compliance with *Evid. Code § 1560 et seq.* [*see § 535.20[1]*]. Paragraph 3(b) provides the witness or custodian with instructions for delivering the required copies. Note that if the subpoenaing party in a civil action has chosen the alternative procedure set out in Paragraph 3(b), a witness or custodian may comply with a subpoena duces tecum by making the records available to the subpoenaing party's attorney or that attorney's representative or deposition officer at the business address of the witness under reasonable conditions during normal business hours [*see Evid. Code § 1560(e)* and discussion in *§§ 535.20[1][c], 535.67[2], [3]*].

[c] Agreement to Appear at Another Time

Paragraph 4 is included to comply with the notice required by *Code Civ. Proc. § 1985.2*. Paragraph 1 provides that the witness or custodian must appear or produce records as directed, unless he or she makes a special agreement to do otherwise with the person named in Paragraph 4. Paragraphs 1 and 4 also serve to notify the witness that, in lieu of appearance or production at the time and place specified, the witness or custodian may agree with the party at whose request the subpoena was issued to appear at another time or on such notice as may be agreed on [*see Code Civ. Proc. § 1985.1*].

[d] Witness Fees

Paragraph 5 is designed to satisfy the requirement that any witness subpoenaed in a civil or administrative action must be given written notice that he or she may be entitled to receive witness and mileage fees [*see Code Civ. Proc. § 2065* and discussion in *§ 535.18* (witness fees generally), § 535.19 (fees for public employees)].

[6] Supporting Declaration

A subpoena duces tecum must be accompanied by a copy of an affidavit or declaration that shows good cause for the production of the matters and things described in the subpoena duces tecum and that sets forth their materiality to the issues involved in the case [*Code Civ. Proc. § 1985(b)*]. Page two of the form allows to the subpoenaing party to check one of two options: (1) that the subpoena is supported by an attached declaration [*see, e.g., §§ 535.62 -535.67*], or (2) that it is supporting by the form of declaration provided on that page (with accompanying attachments, if any).

In order to make a proper showing of good cause, the affidavit or declaration must specify the exact matters or things desired to be produced, setting forth in full detail their materiality to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control [*Code Civ. Proc. § 1985(b)*; *see Lee v. Superior Court (2009) 177 Cal. App. 4th 1108, 1126-1130, 99 Cal. Rptr. 3d 712* (subpoenas duces tecum were ineffective because each failed to include declaration containing "a sufficient statement of materiality" as required by *Code Civ. Proc. § 1985(b)*)]. The affidavit must show that the requested material contains competent and admissible evidence that is material to some disputed issue of fact at the trial [*People v. Schmitt (1957) 155 Cal. App. 2d 87, 106, 317 P.2d 673]* .

The affidavit cannot consist of reliance "merely upon the legal conclusion, stated in general terms, that the desired documentary evidence is relevant and material" [*McClatchy Newspapers v. Superior Court (1945) 26 Cal. 2d 386, 396, 159 P.2d 944* ; *Lee v. Superior Court (2009) 177 Cal. App. 4th 1108, 1112, 99 Cal. Rptr. 3d 712* (declarations that lacked any factual bases for legal conclusion that documents were material to proceedings failed to comply with *Code Civ. Proc. § 1985(b)*, collecting cases, quoting *McClatchy*); *Johnson v. Superior Court (1968) 258 Cal. App. 2d 829, 837, 66 Cal. Rptr. 134* ("the trial court must be afforded the factual data by the required affidavit to enable it to make an informed ruling on the issues of materiality and good cause")]. Rather, the documents or other things should be described with such certainty that the person producing the records is reasonably apprised of what is required [*Pacific Auto. Ins. Co. v. Superior Court (1969) 273 Cal. App. 2d 61, 68-69, 77 Cal. Rptr. 836* ; *see also Flora Crane Serv., Inc. v. Superior Court (1965) 234 Cal. App. 2d 767, 785-786, 45 Cal. Rptr. 79]* .

For further discussion of the supporting declaration, including retention requirements, see *§ 535.16*.

[7] Disobediance of Subpoena

The form, at the bottom of the first page, states that disobedience of a subpoena may be punished as contempt [*see Code Civ. Proc. § 1991*] and that the person disobeying the subpoena will also be liable for a $500 penalty and all damages resulting from his or her failure to obey [*see Code Civ. Proc. § 1992*].

[8] Proof of Service

Page three of the form contains a proof of service to be filled in by the server after service is made.

[9] Cross References

For a discussion and forms for deposition subpoenas duces tecum, see Ch. 193, *Discovery: Depositions*

For detailed discussion of subpoenas requiring the production of electronically stored evidence, see Ch. 195A, *Discovery: Discovery of Electronically Stored Evidence (E-Discovery)*.

For discussion and forms pertaining to subpoenas duces tecum in discovery proceedings, see also DeMeo, California Deposition and Discovery Practice, Ch. 53, *Deposition of Nonparty* (Matthew Bender)

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PART V. FORMS

46-535 California Forms of Pleading and Practice--Annotated § 535.62

§ 535.62 Declaration Under Penalty of Perjury Supporting Subpoena Duces Tecum--Materiality and Good Cause for Production of Hospital Records in Personal Injury Action

[1] FORM Declaration Under Penalty of Perjury Supporting Subpoena Duces Tecum--Materiality and Good Cause for Production of Hospital Records in Personal Injury Action

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF ISSUANCE OF SUBPOENA
_____ [*name*],	)	DUCES TECUM
Defendant.	)	Date: _____
	)	Time: _____
	)	Dept: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*specify party*) *or other statement as appropriate*].

2. This cause was duly set for trial on _____ [*date*], at _____ [*time*], in Department _____ of the above-entitled court.

3. _____ [*Name of witness*] has in his/her possession or under his/her control the following things:

_____ [*specify exact matters or things to be produced*].

4. The described items are material to the issues and good cause exists for the production of the described items, in that:

The above-entitled action is one for personal injuries arising out of an automobile accident; the plaintiff named above received medical care and attention for said injuries at _____ Hospital, located at _____ [*address*]; these medical records, diagnoses, histories, X rays, and other data are material and relevant and necessary for a proper prosecution of the above case. Good cause exists for their production in that _____ [*specify reasons, e.g.*, they are unavailable elsewhere].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

The form of declaration in [1], *above*, signed under penalty of perjury [*see Code Civ. Proc. § 2015.5*], is for use in support of a subpoena duces tecum requiring a hospital to produce in court documents relating to the medical care and attention received by a plaintiff subsequent to injuries suffered by him or her. It should be attached to the mandatory form of subpoena duces tecum [*see § 535.61[1]* and *[6]*].

Such a declaration is required by *Code Civ. Proc. § 1985(b)* for issuance of a subpoena duces tecum.

For discussion of compliance by hospital records custodians with subpoenas duces tecum, see *§§ 535.20, 535.67*.

[3] Deposition Subpoenas

The process by which a nonparty is required to provide discovery through deposition is a deposition subpoena [*Code Civ. Proc. §§ 2020.010-2020.020, 2025.280(b)*]. The Judicial Council has adopted three forms of deposition subpoenas. One is for use to require the attendance, testimony, and production of documents or tangible things of a nonparty deponent. The other is for use to require the production of business records by a nonparty. When either form is appropriate, its use is mandatory [*see Cal. Rules of Ct., Rule 1.30-1.35*]. A deposition subpoena need not be accompanied by an affidavit or declaration showing good cause for the production of documents or things designated [*Code Civ. Proc. § 2020.410(e)*]. For discussion of deposition subpoenas, and reproductions of the Judicial Council forms of deposition subpoena, see Ch. 193, *Discovery: Depositions* .

[4] Cross References

For discussion of compliance by hospital records custodians with subpoenas duces tecum, see *§§ 535.20, 535.67*

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46-535 California Forms of Pleading and Practice--Annotated § 535.63

§ 535.63 Statements in Declaration or Affidavit [Code Civ. Proc. § 2003] for Subpoena Duces Tecum--Materiality and Good Cause for Production of X Rays in Personal Injury Action

[1] FORM Statements in Declaration or Affidavit [Code Civ. Proc. § 2003] for Subpoena Duces Tecum--Materiality and Good Cause for Production of X Rays in Personal Injury Action

[*If appropriate, the following may be substituted for Paragraph 4 in § 535.62[1].*]

4. The described items are material to the issues and good cause exists for the production of the described items in that:

Plaintiff has alleged injuries to his/her _____ [*specify, e.g.,* chest] arising out of _____ [*specify, e.g.,* an automobile collision]. The diagnosis of the extent of plaintiff's injuries was based in part on the X rays described above and the extent of plaintiff's injuries is at issue in this action. It is necessary for the fair and proper presentation of plaintiff's case that he/she have access to all of the X rays taken of the _____ [*specify, e.g.,* chest] of plaintiff, _____ [*name*], at _____ Hospital, _____ [*address*], to prove the extent of plaintiff's injuries. Good cause exists for their production in that _____ [*specify reasons, e.g.,* they are unavailable elsewhere].

[2] Use of Form

The form of statements in [1], *above*, is for use in an affidavit or declaration under penalty of perjury in support of a subpoena duces tecum [for the form of declaration, *see § 535.62*] requiring a hospital to produce in court X rays taken of the plaintiff subsequent to injuries suffered by plaintiff. It may also be incorporated into a printed court form of declaration in support of a subpoena duces tecum [*see § 535.61[6]*].

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46-535 California Forms of Pleading and Practice--Annotated § 535.64

§ 535.64 Statements in Declaration or Affidavit for Subpoena Duces Tecum--Materiality and Good Cause for Production of Medical Records in Malpractice Action

[1] FORM Statements in Declaration or Affidavit for Subpoena Duces Tecum--Materiality and Good Cause for Production of Medical Records in Malpractice Action

[*If appropriate, the following may be substituted for Paragraph 4 in § 535.62[1].*]

4. The described items are material to the issues and good cause exists for the production of the described items in that:

[*EITHER*]

This is an action for medical malpractice. The above documents are material to the issues involved in this case, and are admissible in evidence therein, in that they show the medical treatment given to plaintiff as a result of defendant's alleged negligence. There is good cause for their production in that it is necessary for the fair and proper presentation of plaintiff's case that he/she have access to all of the above documents as _____ [*specify facts showing good cause, e.g.,* they are not available elsewhere].

[*OR*]

It is necessary for a subpoena duces tecum to issue requiring the custodian of records of Dr. _____ to appear and produce these records. They are material to the issues of damages and liability, and good cause exists for their production in that _____ [*specify reason(s), e.g.,* because they are not otherwise available to plaintiff].

[2] Use of Form

The form in [1], *above*, is for use in an affidavit or declaration under penalty of perjury in support of a subpoena duces

tecum [for the form of declaration, *see § 535.62*] requiring a hospital to produce in court documents relating to the medical care and attention received by a plaintiff in a medical malpractice action. It may also be incorporated into a printed court form of declaration in support of a subpoena duces tecum [*see § 535.61[6]*].

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46-535 California Forms of Pleading and Practice--Annotated § 535.65

§ 535.65 Statements in Declaration or Affidavit for Subpoena Duces Tecum--Materiality and Good Cause for Production of Earning Records of Company--Loss of Earnings

[1] FORM Statements in Declaration or Affidavit for Subpoena Duces Tecum--Materiality and Good Cause for Production of Earning Records of Company--Loss of Earnings

[*If appropriate, the following may be substituted for Paragraph 4 in § 535.62.*]

4. The described items are material to the issues and good cause exists for the production of the described items in that:

_____ [*name*], _____ [*address*], has been the accountant and auditor of the _____ Company, _____ [*address*], for _____ years and has certain records, books, and documents under his/her control or has a right to obtain control of all of the records of salaries and other data concerned with the financial affairs of the _____ Company for the last _____ years prior to _____ [*date*]; this action is one for personal injuries involving a loss of earnings on the part of plaintiff; one of the issues is the amount of loss of earnings of plaintiff; these records, books, and other data concern and relate to the loss of earnings of plaintiff.

The production of the above-described records is necessary to prove the regular earnings of plaintiff and the period of time plaintiff was absent from his employment, and there is good cause for their production in that _____ [*specify reasons, e.g.,* they are not otherwise available].

[2] Use of Form

The form of statements in [1], *above*, is for use in an affidavit or declaration under penalty of perjury in support of a subpoena duces tecum [*see § 535.62*] requiring a company to produce in court records relating to the earnings of the company and the loss of earnings incurred by the plaintiff during the period of his/her absence from employment. It may also be incorporated into a printed court form of declaration in support of a subpoena duces tecum [*see § 535.61[6]*].

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46-535 California Forms of Pleading and Practice--Annotated § 535.66

§ 535.66 Statements in Declaration or Affidavit for Subpoena Duces Tecum--Materiality and Good Cause for Production of Truck and Shipping Records

[1] FORM Statements in Declaration or Affidavit for Subpoena Duces Tecum--Materiality and Good Cause for Production of Truck and Shipping Records

[*If appropriate, the following may be substituted for Paragraph 3 in § 535.62[1].*]

3. The above-entitled action is for damages to _____ [*specify goods, e.g.,* furniture and glassware] in the possession of defendant _____ [*name*] for shipment on _____ [*date of pickup*], from _____ [*place of origin*] to _____ [*destination*] which were damaged in a collision on _____ [*date*], at _____ [*location of collision*], which is alleged in the complaint to have been caused by defendant's negligence.

_____ [*Name of witness*] is _____ [*specify capacity, e.g.,* the Secretary of defendant _____ (*name*), a corporation]. The witness has in his/her possession or under his/her control the following documents, records, books, and facts relating to the shipment and collision which he/she can produce and be examined about: _____ [*specify, e.g.,* records, correspondence, notes, memoranda, bills of lading, inspection reports, copies of reports to police and government agencies, pictures, witnesses' statements, investigation reports, names and addresses of all drivers, reports made by such drivers on the condition of the load, records identifying the trucks, tractors, trailers, and other equipment used for the shipment, records of the purchase of the tires on the equipment and of the disposition of the tires, names and addresses of all persons and crews involved in the salvage and pickup of the equipment and the _____ (*specify goods, e.g.,* furniture and glassware) after the collision, records of the disposition of the equipment and _____ (*specify goods, e.g.,* furniture and glassware) after the collision including records of its repair, and the tachograph cards from all such equipment while being used in connection with the shipment].

[*If appropriate, the following may be substituted for Paragraph 4 in § 535.62[1].*]

4. The described items are material to the issues and good cause exists for the production of the described items in that:

They are material to the issue of defendant's negligence, in that _____ [*specify reasons, e.g.,* they indicate defendant's control of and responsibility for plaintiff's _____ (*specify goods, e.g.,* furniture and glassware)]. Good cause exists for the production of the foregoing records and the information that they contain in that _____ [*specify reasons, e.g.,* they are not otherwise available to plaintiff and it is necessary that they be produced by this witness so that plaintiff can complete his/her proof of defendant's negligence].

[2] Use of Form

The form of statements in [1], *above*, is for use in an affidavit or declaration under penalty of perjury in support of a subpoena duces tecum requiring a shipper to produce in court documents relating to the shipping of plaintiff's goods. It may also be incorporated into a printed court form of declaration in support of a subpoena duces tecum [*see § 535.61[6]*].

[3] Cross References

For a form for a declaration supporting a subpoena duces tecum, see *§ 535.62*

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46-535 California Forms of Pleading and Practice--Annotated § 535.67

§ 535.67 Declaration Under Penalty of Perjury of Custodian of Business Records to Accompany Copies of Records Mailed or Delivered to Court in Compliance With Subpoena Duces Tecum [Evid. Code § 1561]

[1] FORM Declaration Under Penalty of Perjury of Custodian of Business Records to Accompany Copies of Records Mailed or Delivered to Court in Compliance With Subpoena Duces Tecum [Evid. Code § 1561]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DECLARATION OF _____ [*name*]
Defendant.	)	RE RECORDS
	)	
	)	

_____

I, _____ [*name*], declare:

I am _____ [*identify declarant, e.g.,* the duly authorized custodian *or if an otherwise qualified witness, state qualification*] of the records of _____ [*name of business*], and have authority to certify such records.

2. On _____ [*date*], I was served with a subpoena duces tecum and supporting _____ [affidavit *or* declaration] issued out of the _____ [*specify court, e.g.,* Superior Court of the State of California for the (City and) County of _____] in an action entitled _____ vs. _____, No. _____, calling for _____ [*specify material sought, e.g.,* all medical and hospital records relating to the care and treatment of _____ (*name of patient*) during the period _____ [*date*], to _____ [*date*].

[*EITHER*]

3. The accompanying copies are true copies of all the records described in the subpoena that are in my possession as custodian of records of _____ [*name of business*].

[*OR*]

3. All of the records described in the subpoena duces tecum were delivered to _____ [*name of subpoenaing party's attorney or that attorney's representative or deposition officer*] at _____ [*address*], my business address, under reasonable conditions during normal business hours.

[*CONTINUE*]

4. These records were prepared by the personnel of _____ [*name of business*], and by other persons acting under the control of those personnel, in the ordinary course of business, at or near the times of the acts, conditions, or events recorded therein.

[5. *If additional records requested are not being produced, add:* Of the records described in the subpoena duces tecum, _____ (*name of business*) does not have the following: _____.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature of custodian or other qualified witness*]

[2] Use of Form

The form of declaration in [1], *above*, is for use by a custodian of business records or other qualified witness whose personal attendance was not requested by the subpoenaing party pursuant to *Evid. Code § 1564*, in complying with a subpoena duces tecum that requires the production of all or any part of the records of a business in an action in which the business is neither a party nor the place where any cause of action is alleged to have happened [*see also Code Civ. Proc. § 1987.3*]. It should be attached to the mandatory form of subpoena duces tecum [*see § 535.61[1]* and *[6]*].

Alternative allegations regarding the form of the custodian's compliance are provided in Paragraph 3 [*see Evid. Code § 1561(a)(2)*]. The first alternative is for use when the custodian is providing copies of the documents requested. The second alternative is for use when the subpoenaing party in a civil action chose the procedure of *Evid. Code § 1560(e)*, and when the custodian delivered the records for copying by the subpoenaing party's attorney, that attorney's representative or deposition officer described in *Code Civ. Proc. § 2020.420*. The declaration is to accompany the records called for in the subpoena duces tecum [*see Evid. Code § 1561(a)*].

[3] Time of Compliance

The custodian or qualified witness may comply with the subpoena duces tecum by mailing or delivering, within 15 days after receipt of the subpoena, or within the time agreed on with the subpoenaing party, a true, legible, and durable copy of all records described in the subpoena together with this declaration or an affidavit to the court clerk or, if there is no

clerk, to the judge or to another person described in *Code Civ. Proc. § 2026.010* (person conducting deposition outside California) [*Evid. Code § 1560(b)*].

If the subpoenaing party in a civil action has chosen the alternative procedure authorized by *Evid. Code § 1560(e)*, there is no time of compliance specified, although the "reasonable conditions" requirement arguably implies the same 15-day requirement. When provided with at least five business days advance notice by the attorney, his or her representative, or deposition officer (*see Code Civ. Proc. § 2020.420*), the witness must designate a time period of not less than six continuous hours on a day certain for copying of the subpoenaed records by the attorney, the attorney's representative, or deposition officer [*Evid. Code § 1560(e)*]. Under that alternative, the attorney's representative has the responsibility of delivering any copy of the records as directed in the subpoena, as well as an accompanying affidavit [*Evid. Code §§ 1560(e), 1561(c)*; *see § 535.68*].

If a witness disobeys a subpoena served pursuant to *Evid. Code § 1560(e)*, the disobedience may be punished as a contempt as provided in *Code Civ. Proc. § 2020.240* [*Evid. Code § 1560(e)*]. *Code Civ. Proc. § 2020.240* provides that disobedience of deposition subpoena may be punished for contempt under *Code Civ. Proc. 2023.010 et seq.* without the necessity of a prior order of court directing compliance [*see Code Civ. Proc. § 2023.030(e)* (court may impose a sanction for misuse of the civil discovery process by issuing an order treating the misuse as a contempt of court); for discussion of the use of contempt orders to punish disobedience of subpoenas generally, *see § 535.26[1]*]. The witness or person who fails to appear pursuant to a subpoena or a court order is also subject to the forfeiture and payment of damages set forth in *Code Civ. Proc. § 1992* [*Code Civ. Proc. § 2020.240*]. In addition to a contempt sanction, the court may issue a warrant for the arrest of witness or person who fails to appear [*Code Civ. Proc. § 1993(a)(1)*; *see Code Civ. Proc. §§ 1993(a)(2), (b), 1993.1-1993.2* (procedures); *see generally § 535.26[2], [3]*].

[4] Declaration of Custodian or Witness

The accompanying affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of the custodian or other qualified witness must state the following [*Evid. Code § 1561(a)*]:

- The declarant is the duly authorized custodian of the records or other qualified witness and has authority to certify the records;

- The copies are true copies of all records described in the subpoena duces tecum, or, pursuant to *Evid. Code § 1560(e)*, the records were delivered to the attorney, the attorney's representative, or deposition officer for copying at the custodian's or witness's place of business, as the case may be; and

- The records were prepared by the personnel of the business in the ordinary course of business at or near the time of the act, condition, or event.

If the business does not have any of the records described, or has only a part of them, the custodian or other qualified witness must so state in the affidavit and deliver the affidavit and any available records in one of the manners provided in *Evid. Code § 1560* [*Evid. Code § 1561(b)*; for discussion, *see § 535.20*].

Counsel will note some variation between the format of this form and the explicit provisions of *Evid. Code § 1561(a)*; this was deliberate and reflects compliance with *Evid. Code § 1560(e)*. There is some inconsistency between *Evid. Code §§ 1560* and *1561* regarding the description of the person served. Some provisions refer to a custodian or other witness [*see Evid. Code §§ 1560(b), 1561(a)-(c)*]. *Evid. Code § 1560(e)* specifies that the records be made available at the witness's place of business and is the only provision not using the term "custodian." Although in most instances the custodian and witness are the same person, that is not necessarily always the case and the declaration is limited to "witness."

[5] Transmittal

The copy of the records and the declaration or affidavit are mailed or delivered in the manner described in the Procedural Guide, § 535.42[1] [*see Evid. Code § 1560(c)-(e)*].

[6] Cross References

For alternative forms of affidavits and declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

For a procedural guide and forms of affidavit or declaration by custodian certifying records for deposition, see Ch. 193, *Discovery: Depositions* .

For a discussion and form for use where personal attendance is not required by subpoena duces tecum re deposition for production of business records, see De Meo, California Deposition and Discovery Practice, Ch. 53, *Deposition of Nonparty* (Matthew Bender)

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46-535 California Forms of Pleading and Practice--Annotated § 535.68

§ 535.68 Declaration Under Penalty of Perjury of Attorney of Subpoenaing Party to Accompany Copies of Records Made in Compliance With Subpoena Duces Tecum [Evid. Code § 1561]

[1] FORM Declaration Under Penalty of Perjury of Attorney of Subpoenaing Party to Accompany Copies of Records Made in Compliance With Subpoena Duces Tecum [Evid. Code § 1561]

[*Caption. See § 535.67* .]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*name of subpoenaing party*) *or* the representative for _____ (*name of attorney representing subpoenaing party*)].

2. On _____ [*date*], pursuant to a subpoena duces tecum and supporting _____ [affidavit *or* declaration] issued out of the _____ [*specify court, e.g.,* Superior Court of the State of California for the (City and) County of _____] in an action entitled _____ vs. _____, No. _____, _____ [*name of witness*] made available to me _____ [*specify material made available by witness, e.g.,* all medical and hospital records relating to the care and treatment of _____ (*name of patient*) during the period _____ [*date*], to _____ [*date*].

3. The accompanying copies are true copies of all the records delivered to me for copying.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [Attorney *or* Representative of Attorney *or* Deposition Officer] for
_____ [*name of subpoenaing party*]

[2] Use of Form

The form of declaration in [1], *above*, is for use by the subpoenaing party's attorney, that attorney's representative, or deposition officer when business records have been made available by a witness pursuant to *Evid. Code § 1560(e)*. *Evid. Code § 1560(e)* provides an alternative to the procedures described in *Evid. Code § 1560(b)*, *(c)*, and *(d)*, and authorizes the subpoenaing party in a civil action to direct the witness to make the records available for inspection or copying by the party's attorney or the attorney's representative at the business address of the witness under reasonable conditions during normal business hours. When this procedure is used, the attorney's representative has the responsibility of delivering any copy of the records as directed in the subpoena [*Evid. Code § 1560(e)*]. The declaration is to accompany the copy of the records made by the attorney, his or her representative, or deposition officer [*Evid. Code § 1561(c)*].

[3] Cross References

For a form for a declaration for the custodian of business records pursuant to a subpoena duces tecum, see *§ 535.67*

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46-535 California Forms of Pleading and Practice--Annotated § 535.69

§ 535.69 Notice to Consumer or Employee and Objection [Code Civ. Proc. §§ 1985.3, 1985.6; Cal. Judicial Council Form SUBP-025]

[1] FORM Notice to Consumer or Employee and Objection [Code Civ. Proc. §§ 1985.3, 1985.6; Cal. Judicial Council Form SUBP-025]

Click here to view image.

[2] Use of Form

[a] Adopted by Judicial Council for Mandatory Use

The form in [1], *above*, is a reproduction of Judicial Council Form SUBP-025, adopted for mandatory use in providing the notice described in [b], *below* [*see* Cal. Rules of Ct., Appendix, Div. C]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[b] Notice to Consumer or Employee That Personal Records Are Being Subpoenaed

The primary use of the Judicial Council form in [1], *above*, is by a party who is serving a subpoena duces tecum on a witness to compel the production of records that contain personal information concerning a consumer or employee. In this situation the subpoenaing party must serve this form, together with a copy of the subpoena, in order to provide notice to the consumer or employee that his or her personal records are being sought for inspection [*Code Civ. Proc. §§ 1985.3(b), 1985.6(b)*; *see Code Civ. Proc. §§ 1985.3*(*l*), 1985.6(k) (when notice to consumer or employee and delivery of documents specified in *Code Civ. Proc. §§ 1985.3(b)* or *1985.6(b)* is not required); *see generally § 535.21[4][a]*].

If a notice of taking a deposition is also to be served on the consumer or employee, the deposition notice may be attached to this form and served as a single document [*Code Civ. Proc. §§ 1985.3(e), 1985.6(e)*; *see § 535.21[4][b]*]. For forms for a deposition notice, see Ch. 193, *Discovery: Depositions* .

This form may also be adapted for use to give notice to a state or local agency employee or any other natural person of a request for production of records containing "personal information," as defined in *Civ. Code § 1798.3(a)*, maintained by a state or local agency that pertain to that individual, when this notice is required by *Code Civ. Proc. § 1985.3*. The subpoena procedures set out in *Code Civ. Proc. § 1985.3* apply to subpoenas of records of state or local agency employees or other natural persons maintained by state or public agencies when these records are otherwise exempt from disclosure by the terms of *Gov. Code § 6254* (exemption from disclosure under Public Records Act [*Gov. Code § 6250 et seq.*] when disclosure invades privacy) [*see Code Civ. Proc. § 1985.4*].

[c] Objection by Non-party Consumer or Employee

A portion of the form set out in [1], *above* is an objection for use by a non-party recipient of the notice who wishes to object to the productionof the subpoenaed records. The objection must be served on the subpoenaing party [*Code Civ. Proc. §§ 1985.3(g), 1985.6(f)(2)*; *see § 535.21[8]*].

[3] Contents of Notice

The notice to the consumer or employee/s or to his or her representative indicate the following in a typeface designed to call attention to the notice [*Code Civ. Proc. §§ 1985.3(e), 1985.6(e)*]:

- Records about the consumer or employee are being sought from the witness named on the subpoena.

- If the consumer or employee objects to the witness furnishing the records to the party seeking the records, the consumer must file papers with the court prior to the date specified for production in the subpoena.

- If the party who is seeking the records will not agree in writing to cancel or limit the subpoena, an attorney should be consulted about the consumer's or employee's interest in protecting his or her right of privacy.

[4] Procedure for Notice to Consumer or Employee

[a] Accompanying Papers

Notice is given to the consumer or employee whose records are being sought, or to his or her representative, by delivering copies of the following [*Code Civ. Proc. § 1985.3(b), 1985.6(b)*; *see Code Civ. Proc. §§ 1985.3*(*l*), 1985.6(k) (when notice to consumer or employee and delivery of documents specified in *Code Civ. Proc. §§ 1985.3(b)* or *1985.6(b)* is not required); *see generally § 535.21[4][a]*]:

- The subpoena duces tecum.

- The affidavit supporting the issuance of the subpoena, if any.

- This form of notice that records of the consumer are being sought, together with the proof of service (included on the second page of this form) indicated in *Code Civ. Proc. § 1985.3(c)* (personal records of consumer) or *Code Civ. Proc. § 1985.6(c)* (employment records).

[b] Method of Service in General

If notice is given directly to the consumer or employee, it must be given personally, at the consumer's last known address, or in accordance with *Code Civ. Proc. § 1010 et seq.* If the consumer is a party, notice may be given to his or her attorney of record [*Code Civ. Proc. §§ 1985.3(b)(1), 1985.6(b)(1)*].

[c] Method of Service When Consumer or Employee Is Minor

If the consumer or employee is a minor, service must be made on the minor's parent, guardian, conservator, or similar fiduciary, or if one ofthem cannot be located with reasonable diligence, then service must be made on any person having the care or control of the minor or with whom the minor resides or by whom the minor is employed, and on the minor if the minor is at least 12 years of age [*Code Civ. Proc. §§ 1985.3(b)(1), 1985.6(b)(1)*].

When *Code Civ. Proc. §§ 1985.3* and *1985.6* were amended to include the notice provision for cases involving minors consumers, they were not similarly amended in their authorization or objection provisions. An authorization for release must be signed by the consumer or employee or by his or her attorney of record [*Code Civ. Proc. §§ 1985.3(c)(2), 1985.6(c)(2)*]. Objection papers must be filed with the court by the objecting consumer or employee [*Code Civ. Proc. §§ 1985.3(e), 1985.6(e)*]. Thus, because *Code Civ. Proc. §§ 1985.3, 1985.6* do not explicitly allow the minor's fiduciary to authorize or object to the release of records, it is not clear whether the parent's or fiduciary's signature is sufficient. However, a witness may rely on the signature of a consumer's or employee's attorney, and, by analogy, it could be argued that a witness may presume the signature of the parent or fiduciary is valid [*see Code Civ. Proc. §§ 1985.3(c)(2), 1985.6(c)(2)* (witness may presume that attorney's authorization is with consent of consumer or employee)].

[5] Time of Service on Consumer or Employee

The subpoenaing party must deliver this form of notice with copies of the subpoena duces tecum and supporting affidavit not less than 10 days prior to the date for production specified in the subpoena duces tecum, plus the additional time provided for by *Code Civ. Proc. § 1013* if service is by mail [*Code Civ. Proc. § 1985.3(b)(2)*].

[6] Order Shortening Time or Waiving Requirements of Code Civ. Proc. § 1985.3(b)

If good cause and due diligence by the subpoenaing party have been shown, and provided that the rights of witnesses and consumers or employees are preserved, a subpoenaing party is entitled to obtain an order shortening the time for service of a subpoena duces tecum or waiving the requirements of *Code Civ. Proc. §§ 1985.3(b), 1985.6(b)* [*Code Civ. Proc. §§ 1985.3(h), 1985.6(g)*].

[7] Proof of Service or Written Authorization Served on Witness

Prior to the production of personal records of a consumer or employee, the subpoenaing party must do either of the following [*Code Civ. Proc. §§ 1985.3(c), 1985.6(c)*]:

- Serve or cause to be served on the witness a proof of personal service or of service by mail attesting to compliance with *Code Civ. Proc. § 1985.3(b)* regarding service of a copy of the subpoena duces tecum,of the supporting affidavit or declaration, and of the notice on the consumer or employee [*see Code Civ. Proc. §§ 1985.3*(*l*), 1985.6(k) (when notice to consumer or employee and delivery of documents specified in *Code Civ. Proc. §§ 1985.3(b)* or *1985.6(b)* is not required); *see generally § 535.21[4][a]*]; or

- Furnish the witness with a written authorization to release the records signed by the consumer or employee or by his or her attorney of record [*see § 535.70* (written authorization)].

For discussion and forms relating to proof of service, see Ch. 518, *Service of Summons and Papers* .

If the consumer records sought are personal records maintained by a telephone corporation that is a public utility, as defined in *Pub. Util. Code § 216*, the consumer must consent to their release, as required by *Pub. Util. Code § 2891* [*Code Civ. Proc. § 1985.3(f)*; *see § 535.71* (consent to release)].

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46-535 California Forms of Pleading and Practice--Annotated § 535.70

§ 535.70 Consumer's Authorization for Release of Personal Records [Code Civ. Proc. § 1985.3(c)(2)]

[1] FORM Consumer's Authorization for Release of Personal Records [Code Civ. Proc. § 1985.3(c)(2)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	CONSUMER'S AUTHORIZATION FOR RE-
Defendant.	)	LEASE OF PERSONAL RECORDS
	)	
	)	

_____

To _____ [*name of witness*]:

The original or any copy of books, documents, or other writings pertaining to _____ [*name of consumer*] which you possess and maintain may be released to _____ [*name of subpoenaing party*], _____ [*specify party, e.g.,* plaintiff] in the above-entitled action.
Dated: _____.

_____ [*signature*]

[*ADD, if appropriate*]

Attorney of Record for _____ [*name of consumer*]

[2] Use of Form

The form of written authorization in [1], *above*, may be used by a subpoenaing party to obtain a consumer's consent to the release of his or her personal records by a witness. This form may be used by serving it on the consumer along with the copy of the subpoena duces tecum, supporting affidavit, and notice [*see § 535.69*] served pursuant to *Code Civ. Proc. § 1985.3(b)*. If the consumer, or his or her attorney of record, signs the form and returns it to the subpoenaing party, the subpoenaing party should furnish the witness with the form prior to production of the records. The witness may presume that any attorney purporting to sign the authorization on behalf of the consumer acted with the consumer's consent, and that any objection to release of records is waived [*see Code Civ. Proc. § 1985.3(c)(2)*].

If written authorization is not obtained from the consumer for the release of his or her personal records, the subpoenaing party must serve or caused to be served on the witness a proof of personal service or of service by mailattesting to compliance with *Code Civ. Proc. § 1985.3(b)* [*Code Civ. Proc. § 1985.3(c)(1)*; *see* Ch. 518, *Service of Summons and Papers*].

The form may also be adapted for use when seeking production of records containing "personal information" maintained by a state or local agency when the provisions of *Code Civ. Proc. § 1985.3* apply to those records [*see Code Civ. Proc. § 1985.4*]. For discussion of the applicability of *Code Civ. Proc. § 1985.4* to records maintained by state or local agencies, see the discussion at *§ 535.69*.

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46-535 California Forms of Pleading and Practice--Annotated § 535.71

§ 535.71 Consumer's Authorization for Release of Telephone Records [Code Civ. Proc. § 1985.3(f); Pub. Util. Code § 2891]

[1] FORM Consumer's Authorization for Release of Telephone Records [Code Civ. Proc. § 1985.3(f); Pub. Util. Code § 2891]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	CONSUMER'S CONSENT TO RELEASE OF
Defendant.	)	TELEPHONE RECORDS
	)	
	)	

_____

To _____ [*Name of telephone corporation*]:

The original or any copies of personal records pertaining to _____ [*name of consumer*], which you possess and maintain, may be released to _____ [*name of subpoenaing party*], _____ [*identify party, e.g.*, plaintiff] in the above-entitled action.

_____ [*date and place*]
_____ [*signature*]

[2] Use of Form

The form of written consent to release in [1], *above,* may be used by a subpoenaing party to obtain a consumer's consent to the release of his or her personal records maintained by a telephone corporation that is a public utility, as defined in

Pub. Util. Code § 216. A subpoena duces tecum for personal records maintained by such a telephone corporation is not valid or effective unless it includes a consent to release signed by the consumer whose records are requested, as required by *Pub. Util. Code § 2891* [*Code Civ. Proc. § 1985.3(f)*]. After it has been signed by the consumer, this form may be used by serving it on the witness along with a copy of the subpoena duces tecum and supporting affidavit [*see Code Civ. Proc. § 1985.3(b), (f)*; *see Code Civ. Proc. §§ 1985.3*(*l*), 1985.6(k) (when notice to consumer or employee and delivery of documents specified in *Code Civ. Proc. §§ 1985.3(b)* or *1985.6(b)* is not required); *see generally § 535.21*].

Pub. Util. Code § 2891 generally requires written consent by the consumer prior to releasing information regarding his or her personal calling patterns, credit or other personal financial information, services obtained, or demographic information.

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46-535 California Forms of Pleading and Practice--Annotated § 535.72

[Reserved]

§ 535.72[Reserved]

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46-535 California Forms of Pleading and Practice--Annotated § 535.73

§ 535.73 Employee's Authorization for Release of Employment Records [Code Civ. Proc. § 1985.6(c)(2)]

[1] FORM Employee's Authorization for Release of Employment Records [Code Civ. Proc. § 1985.6(c)(2)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	EMPLOYEE'S AUTHORIZATION FOR RELEASE
Defendant.	)	OF EMPLOYMENT RECORDS
	)	
	)	

_____

To _____ [*name of witness*]:

The original or any copy of books, documents, or other writings pertaining to _____ [*name of employee*] which you possess and maintain may be released to _____ [*name of subpoenaing party*], _____ [*specify party, e.g.,* plaintiff] in the above-entitled action.
Dated: _____.

_____ [*signature*]

[*ADD, if appropriate*]

Attorney of Record for _____ [*name of employee*]

[2] Use of Form

The written authorization in [1], *above*, may be used by a subpoenaing party to obtain an employee's consent to the release of his or her employment records by a witness [*see Code Civ. Proc. § 1985.6(c)(2)*]. The form is similar to a form of a consumer's authorization for release of personal records [*see § 535.70*]. For a discussion on the use of these forms, see *§ 535.70*, which discusses provisions of *Code Civ. Proc. § 1985.3* that are parallel to *Code Civ. Proc. § 1985.6*.

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46-535 California Forms of Pleading and Practice--Annotated § 535.74

§ 535.74 Notice of Motion for Order Quashing, Modifying, or Directing Compliance With Subpoena or Subpoena Duces Tecum and for Expenses of Motion [Code Civ. Proc. §§ 1987.1, 1987.2]

[1] FORM Notice of Motion for Order Quashing, Modifying, or Directing Compliance With Subpoena or Subpoena Duces Tecum and for Expenses of Motion [Code Civ. Proc. §§ 1987.1, 1987.2]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	MOTION AND NOTICE OF MOTION FOR ORDER _____ [QUASHING *or* MODIFYING *or* DIRECTING COMPLIANCE WITH] SUBPOENA [DUCES TECUM] [AND FOR EXPENSES OF THE MOTION]
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Dept: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*specify party, e.g.*, defendant] _____ [*name*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court located at _____ [*street address*], _____ [*city*], _____

[*name*], the _____ [witness *or* consumer *or* employee *or specify party, e.g.,* plaintiff] will, and hereby does, move for an order _____ [quashing *or* modifying *or* enforcing compliance with] the subpoena [duces tecum] issued and served on _____ [*name*], the witness, requiring his/her attendance at _____ [the trial of the above-entitled matter *or* the hearing of the above-entitled matter *or* a deposition] on _____ [*date*] [, and the production of certain records]. [*If reasonable expenses sought, add:* _____ (*name of moving person*) will also move for an order requiring _____ (*specify party who sought subpoena, e.g.,* defendant) _____ (*name*) to pay him/her the reasonable expenses of making the motion, including reasonable attorney's fees.]

[*ADD if reasonable expenses are requested under Code Civ. Proc. § 1987.2(a):*]

The motion for expenses is made on the ground that _____ [*specify, e.g.,* one or more of the elements of the subpoena is oppressive *or* the motion was made in bad faith or without substantial justification *or* the records sought are personal records pertaining to a _____ (consumer *or* employee *or* (*other person, as applicable*) and release of the records would constitute an unreasonable violation of that person's right of privacy].

[*ADD if reasonable expenses are requested under Code Civ. Proc. § 1987.2(b):*]

The motion for reasonable expenses, including reasonable attorney's fees, is made on the ground that the court is required to award the amount of reasonable expenses incurred in making a motion filed under *Code Civ. Proc. § 1987.1* for an order to _____ [quash *or* modify] a subpoena from the state of California for personally identifying information, as described in *Civil Code Section 1798.79*.8(b), for use in an action pending in another _____ [state *or* territory *or* district of the United States *or* in a foreign nation], and that subpoena has been served on an _____ [Internet service provider *or* on the provider of any other interactive computer service, as defined in *47 United States Code Section 230(f)(2)*], if the moving party prevails and the underlying action arises from the moving party's exercise of free speech rights on the Internet, and the respondent has failed to make a prima facie showing of a cause of action.

The motion will be based on this notice of motion, on the declaration of _____ [*name*] and the memorandum served and filed herewith, on the papers and records on file herein, and on such oral and documentary evidence as may be presented on the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

[a] Generally

The notice of motion for an order to quash, modify, or enforce a subpoena or subpoena duces tecum in [1], *above*, is for use by a party, the witness, any consumer described in *Code Civ. Proc. § 1985.3* whose personal records are being sought from a witness, or any employee described in *Code Civ. Proc. § 1985.6* whose employment records are being sought. This form also may be used by a person whose personally identifying information [*see Civ. Code § 1798.79*.8 (definition)] is sought in connection with an underlying action involving that person's exercise of free speech rights, from unreasonable or oppressive demands, including unreasonable violations of the right of privacy of the person. The motion may be made with regard to proceedings before a court, at trial, or at the taking of a deposition [*Code Civ. Proc. § 1987.1(a)*; *see also Code Civ. Proc. §§ 1985.3(g), 1985.6(f)*].

The court may make an order quashing, modifying, or directing compliance with the subpoena on those terms or conditions that it declares, including protective orders. In addition, the court may make any other order as may be appropriate to protect the parties, witnesses, consumer, employee, or person whose personally identifying information [*see Civ. Code § 1798.79*.8 (definition)] is sought in connection with an underlying action involving that person's exercise of free speech rights, from unreasonable or oppressive demands including unreasonable violations of that person's right of privacy [*Code Civ. Proc. § 1987.1(a)*]. This form can be adapted for use as a notice of motion for a protective order.

The court, in its discretion, may award the amount of the reasonable expenses incurred in making or opposing the motion, including reasonable attorney's fees, if it finds that the motion was made or opposed in bad faith or without substantial justification or that one of the requirements of the subpoena was oppressive [*Code Civ. Proc. § 1987.2*]. However, the court *must* award the amount of reasonable expenses incurred in making a motion filed under *Code Civ. Proc. § 1987.1* for an order to quash or modify a subpoena from the state of California for personally identifying information [*see Civ. Code § 1798.79*.8(b) (definition)], for use in an action pending in another state, territory, or district of the United States, or in a foreign nation, if that subpoena has been served on any Internet service provider, or on the provider of any other interactive computer service [*see 47 U.S.C. § 230(f)(2)* (definition)], if the moving party prevails, and if the underlying action arises from the moving party's exercise of free speech rights on the Internet, and the respondent has failed to make a prima facie showing of a cause of action [*Code Civ. Proc. § 1987.2(b)*].

[b] By a Party Consumer or Employee Whose Records Are Sought

A consumer who is a party to the action and whose personal records are being sought by a subpoena duces tecum, or an employee whose employment records are being similarly sought, may use this form to bring a motion under *Code Civ. Proc. § 1987.1* to quash or modify the subpoena duces tecum. A motion to quash is the procedurally appropriate method of testing the validity of a subpoena duces tecum, attacking an order made for discovery of documents without showing of good cause, or attacking a request for documents which is not particularized [*see People ex rel. Dept. of Public Works v. Younger (1970) 5 Cal. App. 3d 575, 579, 86 Cal. Rptr. 237* (prior to adoption of *Code Civ. Proc. § 1987.1*); *Pacific Auto. Ins. Co. v. Superior Court (1969) 273 Cal. App. 2d 61, 67-68, 77 Cal. Rptr. 836* ; *Flora Crane Serv., Inc. v. Superior Court (1965) 234 Cal. App. 2d 767, 787, 45 Cal. Rptr. 79]* .

The motion must be brought prior to the date for production. Notice of the bringing of the motion must be given to the witness and deposition officer at least five days prior to production. No witness or deposition officer is required to produce the records after receipt of a notice that such a motion has been brought, except on order of the court in which the action is pending or by agreement of the parties, witnesses, consumers, and employees affected [*Code Civ. Proc. §§ 1985.3(g), 1985.6(f)*]. The time limit specified in *Code Civ. Proc. § 1985.3(g)* is designed to guide witnesses concerning when to honor or not honor the subpoena safely, but it does not restrict the jurisdiction of the court [*see Slagle v. Superior Court (1989) 211 Cal. App. 3d 1309, 1312, 260 Cal. Rptr. 122]* .

[c] By a Nonparty Consumer or Employee Whose Records Are Sought

A consumer or nonparty employee whose personal or employment records are sought may serve a written objection to the production of the records on the requesting party and the witness [*Code Civ. Proc. § 1985.3(g)*; *Code Civ. Proc. § 1985.6(f)(1)-(3)*; *see § 535.76* for a form for a written objection]. The party requesting the records may then use the form above to bring a motion to enforce the subpoena [*Code Civ. Proc. § 1985.3(g)*; *Code Civ. Proc. § 1985.6(f)(4)*].

[d] By Person Whose Personally Identifying Information Is Sought in Connection With Underlying Action Involving Free Speech Rights

A person whose personally identifying information, as described in *Civ. Code § 1798.79*.8, is sought in connection with

an underlying action involving that person's exercise of free speech rights may used this form to bring a motion under *Code Civ. Proc. § 1987.1* to quash or modify the subpoena duces tecum [*Code Civ. Proc. § 1987.1(a), (b)*].

The "personally identifying information" referred to in *Code Civ. Proc. § 1987.1(a)* includes [*Civ. Code § 1798.79*.8]:

- First and last name or last name only.
- Home or other physical address, including, but not limited to, a street name or ZIP Code, other than an address obtained pursuant to the California Safe At Home program or a business mailing address for the victim service provider.
- Electronic mail address or other online contact information, such as an instant messaging user identifier or a screen name that reveals an individual's electronic mail address.
- Telephone number, other than a business telephone number for the victim service provider.
- Social security number.
- Date of birth, with the exception of the year of birth.
- Internet protocol address or host name that identifies an individual.
- Any other information, including, but not limited to, the first and last names of children and relatives, racial or ethnic background, or religious affiliation, that, in combination with any other nonpersonally identifying information, would serve to identify any individual.

[e] By Person Immune From Service of Process

A subpoena is the "process" by which the attendance of a witness is required [*Code Civ. Proc. § 1985(a)*]. Certain persons are immune from service of process under specified circumstances [*see, e.g., 22 U.S.C. § 254d* (diplomatic agents); *Cal. Const., art. IV, § 14* (California legislators); *Penal Code § 1555* (person brought into California on or after waiver of extradition based on criminal charge)]. It would thus appear that a person who is immune from service of process, if served with a subpoena, could move to have service of the subpoena quashed. With appropriate modifications, this form may be used to move for an order quashing service of the subpoena on the ground of immunity. For a form for a notice of motion to quash service of summons on this ground which may also be adapted for use to move to quash service of the subpoena and for further discussion, see Ch. 323, *Jurisdiction: Inconvenient Forum and Appearances* .

[3] Awarding Expenses

If the court finds that the motion to quash the subpoena was made or opposed in bad faith or without substantial justification, or that one or more of the requirements of the subpoena was oppressive, the court may in its discretion award the amount of the reasonable expenses incurred in making or opposing the motion, including reasonable attorney's fees [*Code Civ. Proc. § 1987.2(a)*].

However, the court *must* award the amount of reasonable expenses incurred in making a motion filed under *Code Civ. Proc. § 1987.1* for an order to quash or modify a subpoena from the state of California for personally identifying information [*see Civ. Code § 1798.79*.8(b) (definition)], for use in an action pending in another state, territory, or district of the United States, or in a foreign nation, if that subpoena has been served on any Internet service provider, or on the provider of any other interactive computer service [*see 47 U.S.C. § 230(f)(2)* (definition)], if the moving party

prevails, and if the underlying action arises from the moving party's exercise of free speech rights on the Internet, and the respondent has failed to make a prima facie showing of a cause of action [*Code Civ. Proc. § 1987.2(b)*].

If those expenses are requested, include the appropriate paragraph of the form and state the grounds on which the award is requested.

[4] Accompanying Papers

A supporting memorandum is required to be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), (c), 1010*; *see also* discussion and forms in Ch. 417, *Points and Authorities*].

[5] Cross References

For procedure and forms for use on noticed motions generally, see Ch. 372, *Motions and Orders*

For procedure and forms for use in proof of service, see Ch. 518, *Service of Summons and Papers*

For procedure and forms for use in shortening time for notice of motion, see Ch. 524, *Shortening and Extension of Time*

For memoranda for use in supporting a motion to quash or modify a subpoena, see California Points and Authorities , Ch. 218, *Subpoena* , Forms 1-7 (Matthew Bender)

For memoranda for use in supporting a motion to compel compliance with a subpoena, see California Points and Authorities , Ch. 218, *Subpoena* , Forms 8-11 (Matthew Bender)

For a memorandum for use in supporting a motion to award expenses incurred in making or opposing a motion to quash, modify, or compel compliance with a subpoena, see California Points and Authorities , Ch. 218, *Subpoena* , Form 12 (Matthew Bender)

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46-535 California Forms of Pleading and Practice--Annotated § 535.75

[Reserved]

§ 535.75[Reserved]

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46-535 California Forms of Pleading and Practice--Annotated § 535.76

§ 535.76 Declaration Under Penalty of Perjury in Support of Motion for Order Quashing, Modifying, or Enforcing Subpoena or Subpoena Duces Tecum and for Expenses of Motion

[1] FORM Declaration Under Penalty of Perjury in Support of Motion for Order Quashing, Modifying, or Enforcing Subpoena or Subpoena Duces Tecum and for Expenses of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF MOTION FOR ORDER
_____ [*name*],	)	_____ [QUASHING *or* MODIFY-
Defendant.	)	ING *or* ENFORCING] SUBPOENA [DUCES
	)	TECUM] [AND FOR EXPENSES OF THE MO-
	)	TION]
	)	Date: _____
	)	Time: _____
		Dept: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. On _____ [*date*], a subpoena [duces tecum], issued in the above-entitled cause, was served on _____ [*name*], as a witness on behalf of [*specify, e.g.,* defendant] at _____ [the trial of the above-entitled matter *or* the hearing of the above-entitled matter *or* a deposition], on _____ [*date*].

3. _____ [*State reasons why subpoena should be quashed, modified, enforced, e.g.,* Good cause does not exist for the production of the subpoenaed records because they are otherwise available to the plaintiff *or* The subpoenaed records may not be introduced because they are privileged pursuant to _____ (*specify appropriate authority*) *or, to enforce subpoena,* The subpoenaed records are not available from any other source].

[4. *If expenses are requested pursuant to Code Civ. Proc. § 1987.2, state reasons why reasonable expenses of making motion, including reasonable attorney's fees, should be awarded, e.g.,* The requirements of the subpoena were oppressive in that _____ (*specify*), and reasonable expenses of this motion, including attorney's fees, should therefore be awarded to plaintiff _____ (*name*).]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The declaration under penalty of perjury in [1], *above*, is for use in support of a motion to quash, modify, or enforce a subpoena or a subpoena duces tecum [*see Code Civ. Proc. § 1987.1*].

[3] Showing Required for Subpoena Duces Tecum

The motion to quash may point out the deficiencies of the affidavit or declaration supporting issuance of the subpoena duces tecum. The party at whose instance the subpoena was issued must show good cause for the production of the items and their materiality to the issues in the action [*see Code Civ. Proc. § 1985(b)*]. The declarant in support of issuance of the subpoena cannot rely merely on the legal conclusion, stated in general terms, that the desired documentary evidence is relevant and material [*People ex rel. Dept. of Public Works v. Younger (1970) 5 Cal. App. 3d 575, 580, 86 Cal. Rptr. 237]* .

[4] Cross References

For a form for notice of motion for an order quashing or modifying a subpoena or subpoena duces tecum, see *§ 535.74*

For forms for affidavits and declarations generally, see Ch. 15, *Affidavits, Certificates, and Declarations*

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46-535 California Forms of Pleading and Practice--Annotated § 535.77

§ 535.77 Order Quashing, Modifying, or Directing Conditional Compliance With Subpoena, or Protecting a Party, Witness, Consumer, or Employee From Unreasonable or Oppressive Demands, and Awarding Expenses of Motion

[1] FORM Order Quashing, Modifying, or Directing Conditional Compliance With Subpoena, or Protecting a Party, Witness, Consumer, or Employee From Unreasonable or Oppressive Demands, and Awarding Expenses of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER
Plaintiff,	)	Date: _____
vs.	)	Time: _____
_____ [*name*],	)	Location: _____
Defendant.	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

The motion of _____ [*name of moving party*] for an order _____ [*specify*] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion should be granted,

[*EITHER*]

IT IS HEREBY ORDERED that the subpoena [duces tecum] served on _____ [*name of witness*] on _____ [*date*], to compel the attendance of _____ [*name of witness*] at _____ [the trial of the above-entitled matter *or* the hearing of the above-entitled matter *or* a deposition] on _____ [*date*], [with certain things] be deemed, and is, quashed.

[*OR*]

IT IS HEREBY ORDERED that the subpoena [duces tecum] served on _____ [*name of witness*] on _____ [*date*], to compel the attendance of _____ [*name of witness*] at _____ [the trial of the above-entitled matter *or* the hearing of the above-entitled matter *or* a deposition] on _____ [*date*], [with certain things] be modified in the following respects: _____ [*specify*].

[*OR*]

IT IS HEREBY ORDERED that the subpoena [duces tecum] served on _____ [*name of witness*] on _____ [*date*], to compel the attendance of _____ [*name of witness*] at _____ [the trial of the above-entitled matter *or* the hearing of the above-entitled matter *or* a deposition] on _____ [*date*], [with certain things] be complied with on the following terms: _____ [*specify*].

[*AND/OR*]

IT IS HEREBY [FURTHER] ORDERED that, in order to protect the _____ [parties *or* witness *or* consumer *or* employee] from unreasonable or oppressive demands, _____ [*specify, e.g.*, only employment records from _____ [*date*], to _____ [*date*], need be produced].

[*CONTINUE*]

[*If costs and expenses ordered, add:* IT IS FURTHER ORDERED that _____ (*name of party*) pay to _____ (*name of party or witness*) the sum of $_____ as reasonable costs, expenses, and attorney's fees.]
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The order in [1], *above*, quashing, modifying, or directing conditional compliance with a subpoena or a subpoena duces tecum is for use when the court grants a motion for an order quashing or modifying the subpoena or directing compliance with it on those terms that the court may declare, including protective orders. In addition, the court may make any other order as may be appropriate to protect the parties, witnesses, consumer, employee, or person whose personally identifying information [*see Civ. Code § 1798.79*.8 (definition)] is sought in connection with an underlying

action involving that person's exercise of free speech rights, from unreasonable or oppressive demands, including unreasonable violations of that person's right of privacy [*see Code Civ. Proc. § 1987.1(a)*].] The form includes a provision for a protective order.

[3] Awarding Expenses

If the court finds that the motion to quash the subpoena was made or opposed in bad faith or without substantial justification, or that one or more of the requirements of the subpoena was oppressive, the court, in its discretion, may award the amount of the reasonable expenses incurred in making or opposing the motion, including reasonable attorney's fees [*Code Civ. Proc. § 1987.2(a)*].

However, the court *must* award the amount of reasonable expenses incurred in making a motion filed under *Code Civ. Proc. § 1987.1* for an order to quash or modify a subpoena from the state of California for personally identifying information [*see Civ. Code § 1798.79*.8(b) (definition), for use in an action pending in another state, territory, or district of the United States, or in a foreign nation, if that subpoena has been served on any Internet service provider, or on the provider of any other interactive computer service [*see 47 U.S.C. § 230(f)(2)* (definition)], if the moving party prevails, and if the underlying action arises from the moving party's exercise of free speech rights on the Internet, and the respondent has failed to make a prima facie showing of a cause of action [*Code Civ. Proc. § 1987.2(b)*].

If the above expenses are ordered, include the final paragraph of the form.

[4] Cross References

For a form for a notice of motion for an order quashing, modifying or enforcing a subpoena or subpoena duces tecum, see *§ 535.74*

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46-535 California Forms of Pleading and Practice--Annotated § 535.78

§ 535.78 Notice to Attorney in Lieu of Subpoena to Compel Attendance of Party or Party-Related Person Before Court [Code Civ. Proc. § 1987(b)]

[1] FORM Notice to Attorney in Lieu of Subpoena to Compel Attendance of Party or Party-Related Person Before Court [Code Civ. Proc. § 1987(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE TO COMPEL ATTENDANCE BEFORE
vs.	)	COURT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Trial Date: _____
_____		

To _____ [*name*], attorney for _____ [*name*], _____ [*specify party, e.g.,* defendant] herein:

NOTICE IS HEREBY GIVEN that _____ [*name*], _____ [*specify party, e.g.,* defendant] herein, is requested to attend before the above-entitled court, located at _____ [*street address of court and city*], on _____ [*date*], at _____ [*time*], at _____ [*department, division, or room number, if any*], to testify as a witness in this action.

This request is made pursuant to *Section 1987(b) of the Code of Civil Procedure*, which provides that the giving of this notice has the same effect as the service of a subpoena and that, in the event of noncompliance with this notice, the parties will have the rights, and the court may make such orders, including the imposition of sanctions, as in the case of

a subpoena for attendance before the court.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form of notice in [1], *above*, is for use in lieu of a subpoena to compel attendance before a court or at trial of an issue therein [*see Code Civ. Proc. § 1987(b)*; for discussion, *see § 535.24*].

[3] Persons Subject to Notice

This form of notice may be used to compel attendance of any of the following [*Code Civ. Proc. § 1987(b)*]:

- A party to the record of any civil action or proceeding;

- A person for whose immediate benefit an action or proceeding is prosecuted or defended [for discussion, *see § 535.24[2]*]; or

- An officer, director, or managing agent of any such party or person.

[4] Effect of Notice

Giving this form of notice has the same effect as service of a subpoena on the witness, and the parties have such rights, and the court may make such orders, including the imposition of sanctions, as in the case of a subpoena for attendance before the court [*Code Civ. Proc. § 1987(b)*].

[5] Service

This form of notice must be served by mail, at least 10 days before the time required for attendance, unless the court prescribes a shorter time, on the attorney for the party who is required to attend [*Code Civ. Proc. § 1987(b)*].

[6] Cross References

For discussion, procedure, and forms of notice pursuant to *Code Civ. Proc. § 2019.010* in lieu of subpoena to take deposition, see Ch. 193, *Discovery: Depositions*

Witkin, California Evidence, vol. 2, ch. IX, *Witnesses*, § 764A (3d ed. 1986)

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46-535 California Forms of Pleading and Practice--Annotated § 535.79

§ 535.79 Notice to Attorney in Lieu of Subpoena Duces Tecum to Compel Attendance of Party or Party-Related Person Before Court and Bringing of Books, Documents, or Other Things [Code Civ. Proc. § 1987(c)]

[1] FORM Notice to Attorney in Lieu of Subpoena Duces Tecum to Compel Attendance of Party or Party-Related Person Before Court and Bringing of Books, Documents, or Other Things [Code Civ. Proc. § 1987(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE TO COMPEL ATTENDANCE BEFORE
Defendant.	)	THE COURT AND BRINGING OF BOOKS, DOC-
	)	UMENTS, OR OTHER THINGS
	)	

_____

To _____ [*name*], attorney for _____ [*name*], _____ [*specify party or party-related person, e.g.,* defendant] herein:

NOTICE IS HEREBY GIVEN that _____ [*name*], _____ [*specify party or party-related person, e.g.,* defendant] herein, is requested to attend before the above-entitled court, located at _____ [*street address of court and city*], on _____ [*date*], at _____ [*time*], at _____ [*department, division, or room number, if any*], to testify as a witness in this action.

_____ [*Name*], _____ [*specify party, or party-related person, e.g.,* defendant] herein, has in his/her possession or under his/her control the following _____ [*specify type of material, e.g.,* books *or* documents *or other things*]: _____ [*state exact materials or things to be produced*]. _____ [*name*], _____ [*specify party or party-related person, e.g.,* defendant] herein,

is requested to bring with him the above-described _____ [books *or* documents *or other things*].

This request is made pursuant to Section 1987(b), (c) of the Code of Civil Procedure, which provides that the giving of this notice has the same effect as the service of a subpoena and that, in the event of noncompliance with this notice, the parties shall have such rights, and the court may make such orders, including the imposition of sanctions, as in the case of a subpoena for attendance before the court.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form of notice in [1], *above*, is for use in lieu of a subpoena duces tecum [*Code Civ. Proc. § 1987(c)*]. Persons subject to the notice, and the effect of the notice, are the same as for a notice under *Code Civ. Proc. § 1987(b)* [*Code Civ. Proc. § 1987(c)*; *see § 535.78[2]* et seq.].

[3] Time of Service

This form of notice is to be served at least 20 days before the time required for attendance, or within such shorter time as is ordered by the court [*Code Civ. Proc. § 1987(c)*].

[4] Contents of Notice

The notice must state the exact materials or things desired to be produced and that the named party or person has them under his or her possession or control [*Code Civ. Proc. § 1987(c)*]. *Code Civ. Proc. § 1987(c)* has no requirement that the notice contain a showing of materiality or that good cause exists for the production as in an affidavit or declaration supporting a subpoena duces tecum [*see § 535.61[6]*]. However, the party or party-related person to whom the notice is given may object to the request [*see § 535.80*] and thereafter, on noticed motion, the requesting party must make a showing of materiality and good cause to obtain a court order for the production [*Code Civ. Proc. § 1987(c)*; *see §§ 535.81, 535.82*]. In addition, this procedure applies to consumers and employees, under *Code Civ. Proc. §§ 1985.3(g)* and *1985.6(f)*, respectively.

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46-535 California Forms of Pleading and Practice--Annotated § 535.80

§ 535.80 Objections to Request That Party or Party-Related Person Produce Books, Documents, or Other Things Before Court on Notice to Attorney

[1] FORM Objections to Request That Party or Party-Related Person Produce Books, Documents, or Other Things Before Court on Notice to Attorney

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	OBJECTIONS TO REQUEST THAT PARTY PRO-
Defendant.	)	DUCE BOOKS, DOCUMENTS, OR OTHER
	)	THINGS BEFORE COURT
	)	

_____

To _____ [*specify party who gave notice, e.g.,* plaintiff] and _____ [*name*], his/her attorney:

NOTICE IS HEREBY GIVEN that _____ [*specify objecting party or party-related person, e.g.,* defendant] _____ [*name*] objects to the notice to compel production of _____ [books *or* documents *or other things*], served on _____ [*date*], on the following grounds: _____ [*specify grounds, e.g.,* the documents requested are not material to the issues in this action in that they relate solely to _____ (*describe*)].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for _____ [*name party or party-related person*]

[2] Use of Form

The form of objections in [1], *above*, is for use when the attorney for the party or party-related person described in *Code Civ. Proc. § 1987(b)* [*see § 535.79*] has been given notice for that party or person to appear before the court and to bring books, documents, or other things with him or her [*Code Civ. Proc. § 1987(c)*].

[3] Time for Objecting

This form of objections is to be served and filed within five days after service of the notice to produce, or within such other period as the court may allow [*Code Civ. Proc. § 1987(c)*].

[4] Requesting Party's Response

After the objections have been served and filed, the requesting party, on noticed motion, accompanied by a showing of good cause and materiality of the items requested to the issues of the case, may obtain a court order for the production of the items, unless the objecting party or party-related person establishes good cause for the nonproduction, or for production under limitations or conditions [*Code Civ. Proc. § 1987(c)*; *see §§ 535.81 -535.83*].

[5] Cross References

For forms of notice to attorney in lieu of subpoena or subpoena duces tecum, to compel attendance of a party or party-related person, see *§§ 535.78*, *535.79*, respectively

Witkin, California Evidence, vol. 2, ch. IX, *Witnesses*, § 764A (3d ed. 1986)

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46-535 California Forms of Pleading and Practice--Annotated § 535.81

§ 535.81 Notice of Motion for Order That Party or Party-Related Person Produce Books, Documents, or Other Things Before Court and for Reasonable Expenses of Motion

[1] FORM Notice of Motion for Order That Party or Party-Related Person Produce Books, Documents, or Other Things Before Court and for Reasonable Expenses of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION TO PRODUCE
Defendant.	)	_____ [BOOKS *or* DOCUMENTS
	)	*or specify other things*] BEFORE COURT [AND
	)	FOR REASONABLE EXPENSES OF MOTION]

_____

To _____ [*specify party, e.g.,* defendant] _____ [*name*] and _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter can be heard, in _____ [*department, division, or room number, if any*], of the above-entitled court, located at _____ [*street address*], _____ [*city*], California, _____ [*name*], _____ [*specify party, e.g.,* plaintiff] herein, will move for an order directing _____ [*name*], _____ [*specify party or party-related person, e.g.,* defendant] herein, to appear before this court on _____ [*date*], at _____ [*time*], _____ [*department, division, or room number, if any*], to testify as a witness in this action and to bring with him/her the following _____ [books *or* documents *or other things*]: _____ [*state exact materials or things desired*]. [*If reasonable expenses sought, add:* _____ (*specify party, e.g.,*

plaintiff) _____ (*name*) will also move for an order requiring (*specify party or party-related person, e.g.,* defendant) _____ (*name*) to pay to him/her the reasonable expenses of making this motion, including reasonable attorney's fees.]

The motion will be made on the grounds that _____ [*specify party or party-related person, e.g.,* defendant] _____ [*name*] has such _____ [books *or* documents *or other things*] in his/her possession or under his/her control, that a notice to produce said items was served on his/her attorney on _____ [*date*], and objections to that notice were served and filed by him/her on _____ [*date*], pursuant to *Section 1987(c) ofthe Code of Civil Procedure*, and that _____ [*specify moving party, e.g.,* plaintiff] _____ [*name*] has good cause to request the production of these items and that they are material to the issues in this action, all as is more particularly set forth in the declaration of _____ [*name*] attached hereto. [*If reasonable expenses of motion sought, add:* The motion for expenses is made on the ground that the objections were made _____ (in bad faith *or* without substantial justification).] The motion will be based on this notice of motion, the declaration of _____ [*name*] and the memorandum of points and authorities served and filed herewith, the papers and records on file herein, and such oral and documentary evidence as may be presented at the hearing of this motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form of notice of motion in [1], *above*, is for use by the requesting party after he or she has served the attorney for the person or party whose presence is requested with a notice to produce documents, etc., [§ 535.79] and that attorney has served and filed objections to the production [§ 535.81] under the provisions of *Code Civ. Proc. § 1987(c)*.

[3] Accompanying Papers

A supporting memorandum is required to be served and filed with this notice of motion [*Cal. Rules of Ct., Rules 3.1113(a)*; *see* discussion and forms in Ch. 417, *Points and Authorities*].

[4] Award of Expenses of Motion

In making an order pursuant to a motion under *Code Civ. Proc. § 1987(c)*, the court may in its discretion award the amount of reasonable expenses incurred in making or opposing the motion, including reasonable attorney's fees, if the court finds the motion was made or opposed in bad faith or without substantial justification or that one or more of the requirements of the subpoena was oppressive [*Code Civ. Proc. § 1987.2*]. Since the form in [1], *above*, would most likely be opposed on the same grounds as those stated in the objections, the request in the form for expenses and attorney's fees is based on the ground that the objections to the notice were made in bad faith or without substantial justification. A moving party seeking the expenses of the motion should include the appropriate optional language in the form.

[5] Cross References

For forms compelling attendance of a party or party-related witness by notice to attorney in lieu of subpoenas and related objections, see *§§ 535.78 -535.80*

For forms of affidavits and declarations generally, see Ch. 15, *Affidavits, Certificates, and Declarations*

For procedure and forms of notice to produce documents at a deposition, see Ch. 193, *Discovery: Depositions*

For procedure and forms for use in noticed motions generally, see Ch. 372, *Motions and Orders*

Witkin, California Evidence, vol. 2, ch. IX, *Witnesses*, § 764A (3d ed. 1986)

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46-535 California Forms of Pleading and Practice--Annotated § 535.82

§ 535.82 Declaration Under Penalty of Perjury in Support of Motion for Order that Party or Party-Related Person Produce Books, Documents, or Other Things Before Court and for Reasonable Expenses of Motion

[1] FORM Declaration Under Penalty of Perjury in Support of Motion for Order that Party or Party-Related Person Produce Books, Documents, or Other Things Before Court and for Reasonable Expenses of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DECLARATION OF _____ [*name*]
Defendant.	)	IN SUPPORT OF MOTION FOR ORDER TO PRO-
	)	DUCE _____ [BOOKS *or* DOCU-
	)	MENTS *or other things*] BEFORE COURT [AND
		FOR REASONABLE EXPENSES OF MOTION]

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*party*) *or other statement as appropriate*].

2. A notice to attend _____ [before the court *or* at trial] on _____ [*date*], with _____ [books *or* documents *or other things*] was served on _____ [*name*] on _____ [*date*]. A copy of that notice is attached to this declaration as Exhibit A and made a part hereof.

3. _____ [*Name of person on whom notice served*] is _____ [a party to this action *or*

a person for whose immediate benefit this action is _____ (prosecuted *or* defended) *or* a(n) _____ (officer *or* director *or* managing agent) of _____ (*specify name and status of a person who is a party or for whose immediate benefit the action is being prosecuted or defended*)].

4. _____ [*Specify party or party-related person, e.g.,* defendant] has in his/her possession or under his/her control the _____ [*specify the materials or things desired, e.g.,* books *or* documents *or other things*] to be produced.

5. Good cause exists for the production of the above-described materials or things by reason of the following facts: _____ [*state reasons, e.g.,* because they are not otherwise available to _____ (*specify party seeking their production*)].

6. The above-described materials or things are material to the issues involved in the case by reason of the following facts: _____ [*state reasons, e.g.,* they indicate defendant's control of and responsibility for plaintiff's _____ (*goods*)].

[7. *If desired, state reasons why reasonable expenses of making the motion, including reasonable attorney's fees, should be awarded, e.g.,* The party who opposed the motion did so in bad faith or without justification, and reasonable expenses of the motion, including attorney's fees, should therefore be awarded to plaintiff _____ (*name*).]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

The form of declaration under penalty of perjury in [1], *above,* is for use in support of a motion for an order for a party or party-related person to produce books, documents, or other things before the court [*Code Civ. Proc. § 1987(c)*].

[3] Showing Required

The party requesting the production of items must show the following [*Code Civ. Proc. § 1987(c)*]:

- The party or person requested to bring the items has them in his or her possession or under his or her control;
- Good cause exists for the production of the items; and
- Production of the items is material to the issues in the action.

The objecting party or person can defeat the requesting party by establishing good cause for nonproduction of the items or good cause for limitations or conditions on production [*Code Civ. Proc. § 1987(c)*].

[4] Cross References

For forms compelling attendance of a party or party-related witness by notice to attorney in lieu of subpoenas, related objections and notice of motion to compel attendance and produce documents and things, see *§§ 535.78 -535.81*

For forms of affidavits and declarations generally, see Ch. 15, *Affidavits, Certificates, and Declarations*

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46-535 California Forms of Pleading and Practice--Annotated § 535.83

§ 535.83 Order That Party or Party-Related Person Produce Books, Documents, or Other Things Before Court and for Expenses of Motion

[1] FORM Order That Party or Party-Related Person Produce Books, Documents, or Other Things Before Court and for Expenses of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER TO PRODUCE _____
Defendant.	)	[BOOKS *or* DOCUMENTS *or other things*] BE-
	)	FORE COURT [AND FOR EXPENSES OF MO-
	)	TION]

_____

The motion of _____ [*name of moving party*] for an order _____ [*specify, e.g.,* requiring _____ (*name*) to produce _____ (*specify items*)] at the trial of this action] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be _____ [granted *or* granted under _____ (limitations *or* conditions)],

[*EITHER*]

IT IS ORDERED that the motion be, and it hereby is, granted and that _____ [*name*],

_____ [*the party or party-related person whose presence is requested*], appear before this court on _____ [*date*], at _____ [*time*], at _____ [*department, division, or room number, if any*], to testify as a witness in this action and to bring with him/her the following _____ [*state exact materials or things*].

[*OR*]

IT IS ORDERED that the motion be, and hereby is, granted and that _____ [*name*], _____ [*the party or party-related person whose presence is requested*] appear before this court on _____ [*date*], at _____ [*time*], at _____ [*department, division, or room number, if any*], to testify as a witness in this action and to bring with him/her the following _____ [*state exact materials or things*]. _____ [*State limitationsor conditions on use of produced items, e.g.,* _____ (*Specify documents*) may only be inspected in camera].

[*CONTINUE*]

[*If expenses awarded, add:* IT IS FURTHER ORDERED that _____ (*name of party or party-related person*) pay to _____ (*name of moving party*) the sum of $_____ as reasonable expenses and attorney's fees.]
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, is for use when the court grants a party's motion for an order to produce to produce books, documents, or other things [*see Code Civ. Proc. § 1987(c)*].

[3] Cross References

For forms compelling attendance of a party or party-related witness by notice to attorney in lieu of subpoenas, related objections, notice of motion to compel attendance and supporting declaration, see *§§ 535.78 -535.82*

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46-535 California Forms of Pleading and Practice--Annotated § 535.84

§ 535.84 Subpoena and Subpoena Duces Tecum--Order to Attend Court or Provide Documents [Penal Code § 1326; Welf. & Inst. Code §§ 341, 664; Cal. Judicial Form CR-125/JV-525]

[1] FORM Subpoena and Subpoena Duces Tecum--Order to Attend Court or Provide Documents [Penal Code § 1326; Welf. & Inst. Code §§ 341, 664; Cal. Judicial Form CR-125/JV-525]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of the Judicial Council's subpoena form for use in criminal and juvenile proceedings [*see Cal. Rules of Ct., Rule 1.31*]. Use of this form is mandatory [*Gov. Code § 68511*; *Cal. Rules of Ct., Rule 1.31*]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The form may be used to require the attendance and testimony of a witness in criminal or juvenile proceedings before a court or magistrate [*see Penal Code §§ 1326-1332*; *Welf. & Inst. Code §§ 341, 664*]. It may also be used to require the witness to attend and to bring with him or her books, papers, or documents [*Penal Code § 1327*; *Welf. & Inst. Code §§ 341, 664*].

[3] Issuance

[a] Criminal Proceedings

The subpoena or subpoena duces tecum may be signed and issued by any of the officials described in *Penal Code § 1326*.

A subpoena issued in a criminal action that requires the custodian of records or other qualified witness of a business to produce books, papers, documents, or records must direct that those items be delivered by the custodian or qualified witness in the manner specified in *Evid. Code § 1560(b)*, within five days after the receipt of the subpoena or within the

time agreed on by the party who served the subpoena and the custodian or other qualified witness [*Penal Code § 1326(b)*; *see § 535.20[1][a]* (discussing *Evid. Code § 1560(b)*)]. The alternative procedure set forth in *Evid. Code § 1560(e)* does not apply to criminal cases [*Penal Code § 1326(b)*; *see § 535.20[1][c]*].

Further, in a criminal action, no party, or attorney or representative of a party, may issue a subpoena requesting the custodian of records or other qualified witness of a business to provide books, papers, documents, or records, or copies of these documents or records, relating to a person or entity other than the subpoenaed person or entity in any manner other than that specified in *Evid. Code § 1560(b)* [*Penal Code § 1326(c)*]. When a defendant has issued a subpoena to a person or entity that is not a party for the production of books, papers, documents, or records, or copies of those documents or records, the court may order an in camera hearing to determine whether the defense is entitled to receive the documents [*Penal Code § 1326(c)*]. The court may not order the documents disclosed to the prosecution, except as required by *Penal Code § 1054.3* [*Penal Code § 1326(c)*; *see Penal Code § 1054.3* (requiring defendant's disclosure to prosecutor of names and addresses of persons to be called as witnesses, relevant written or recorded statements, or reports, of those persons, including experts' reports or statements, and any real evidence defendant intends to offer in evidence)]. This law, however, does not prohibit obtainingbooks, papers, documents, or records with the consent of the person to whom those items relate [*Penal Code § 1326(d)*].

[b] Juvenile Proceedings

The subpoena or subpoena duces tecum must be issued by the court or the clerk of the court on the request of the probation officer, district attorney, the minor, or the minor's parent, guardian, or custodian.

The subpoena or subpoena duces tecum may be issued by the court or the clerk of the court on the court's own motion [*Welf. & Inst. Code §§ 341, 664*].

[4] Cross References

For additional general information on subpoenas and subpoenas duces tecum, see *§§ 535.60, 535.61*

For a discussion of the use of subpoenas in criminal proceedings, see California Criminal Defense Practice, Ch. 72, *Preparing for Trial* (Matthew Bender)

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46-535 California Forms of Pleading and Practice--Annotated § 535.85

§ 535.85 Subpoena for Production of Business Records in Action Pending Outside California [Code Civ. Proc. § 2029.100 et seq.; Cal. Judicial Council Form SUBP-035]

[1] FORM Subpoena and Subpoena Duces Tecum--Order to Attend Court or Provide Documents [Penal Code § 1326; Welf. & Inst. Code §§ 341, 664; Cal. Judicial Form CR-125/JV-525]

Click here to view image.

[2] Use of Form

This form is a subpoena for production of business records in an action pending outside California. It is a reproduction of Cal. Judicial Council Form SUBP-035, adopted by the Judicial Council for mandatory use [*see* Cal. Rules of Ct., Appendix, Div. A]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format is available at www.lexisone.com at no charge.

The form may be used to request production of business records under the Interstate and International Depositions and Discovery Act [*Code Civ. Proc. § 2029.010 et seq.*]. For a detailed discussion of the Act, see *§ 535.21B*.

Additional Judicial Council forms for use under the Interstate and International Depositions and Discovery Act, including the application, a subpoena for personal appearance only, and a subpoena for personal appearance and production of documents and things, are reproduced and discussed in detail in *Ch. 193, Discovery: Depositions, § 193.180 -193.182*. The Judicial Council subpoena form for the inspection of premises in an action pending outside California is reproduced and discussed in *Ch. 195, Discovery: Inspection of Tangible Evidence, § 195.70*.

[3] Procedure for Obtaining Subpoena

To request issuance of this subpoena, a party must submit the original or a true and correct copy of a foreign subpoena to the clerk of the superior court in the California county in which discovery is sought to be conducted [*Code Civ. Proc. § 2029.300(a)*]. A request for the issuance of a subpoena in these circumstances does not constitute making an appearance in the California courts [*Code Civ. Proc. § 2029.300(a)*].

In addition to submitting a foreign subpoena, as described above, a party seeking discovery must do both of the following [*Code Civ. Proc. § 2029.300(b)*]:

- Submit an application requesting that the superior court issue a subpoena with the same terms as the foreign subpoena. The application must be on the Judicial Council form [*see* Judicial Council Form SUBP-030, reproduced and discussed in *Ch. 193, Discovery: Depositions, § 193.180*]. No civil coversheet is required.

- Pay the specified fee [*see Gov. Code § 70626*].

When these requirements are satisfied, the court clerk must promptly issue a subpoena for service on the person to which the foreign subpoena is directed [*Code Civ. Proc. § 2029.300(c)*].

[4] Notice to Consumer or Employee and Objection

Paragraph five of this form states that if the person has been served with this subpoena as a custodian of consumer or employee records under *Code Civ. Proc. § 1985.6 and* a motion to quash has also been served on the custodian, then a court order, or agreement of the parties, witnesses, and consumer or employee affected must be obtained before the custodian is required to produce the consumer or employee records [*see Code Civ. Proc. §§ 1985.3, 1985.6*]. For further discussion of subpoena duces tecum requiring production of records that contain personal information concerning a consumer or an employee, see *§§ 535.21* and *535.69[2]*.

[5] Proof of Service

The form includes a proof of service to be filled in by the server after service is made. A discovery subpoena issued under the Act must be personally served in compliance with California law, including, without limitation, *Code Civ. Proc. § 1985* [*Code Civ. Proc. § 2029.400*]. For discussion of service, see *§ 535.17*.

[6] Cross References

For general information on subpoenas and subpoenas duces tecum, see *§§ 535.60, 535.61*.

For discussion and forms for subpoenas to compel attendance at a deposition in an action pending in California, see Ch. 193, *Discovery: Depositions* .

For discussion and forms for subpoenas to compel appearance at a deposition, or appearance and production of documents and things at a deposition in an action pending outside California, see Ch. 193, *Discovery: Depositions* .

For discussion and forms pertaining to subpoenas in discovery proceedings, see also DeMeo, California Deposition And Discovery Practice, Ch. 53, *Deposition of Nonparty* (Matthew Bender).

For in-depth coverage of e-discovery and a step-by-step guide to subpoenaing electronically stored information (ESI) from nonparties, see Matthew Bender(R) Practice Guide: California E-Discovery and Evidence, Ch. 6, *Demanding Production of Electronically Stored Evidence in California Court*.

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[1] FORM

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§ 536.100 Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Casualty Insurer as Subrogee of Its Insured for Damages [Civ. Code § 3333]--Against Tortfeasor to Recover Amount Paid to Insured for Property Loss or Damage Covered by Insurance Policy--General Form

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§ 536.101 Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Insurer as Subrogee of Its Insured for Damages [Civ. Code § 3333]--Against Tortfeasor to Recover Amount Paid to Insured as Replacement Cost of Destroyed Property [Civ. Code § 1714(a)]

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§ 536.102 Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Insurer as Subrogee of Its Insured for Damages [Civ. Code § 3333]--Against Insured's Former Employee to Recover Amount Paid to Insured for Loss Through Employee's Theft or Embezzlement [Civ. Code § 3336]

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§ 536.103 Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Insurer as Subrogee of Its Insured for Damages [Civ. Code § 3333]--Against Contractor and Subcontractors to Recover Amount of Payment Made by Subrogee for Repairs Made Necessary by Negligent Construction of a Building on Insured's Property [Civ. Code § 1714(a)]

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§ 536.104 Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Insurer as Subrogee of Its Insured for Damages [Civ. Code § 3300]--Against Insured's Subcontractors Under Indemnity Agreements [Civ. Code §§ 2772, 2778] to Recover Amount of Payments Made by Plaintiff on Behalf of Insured in Settlement of Action Brought Against It and Subcontractors for Injuries Caused by Negligence of Subcontractors [Civ. Code § 1714(a)]

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§ 536.105 Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Surety as Subrogee of General Contractor--Against Subcontractor and Its Surety to Recover Amount of Payments Made by Subrogee to Material Suppliers of Defaulting Subcontractor [Civ. Code §§ 2848, 3300, 3302]

[1] FORM

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§ 536.106 Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Remainderman as Subrogee of Public Taxing Body [Civ. Code § 2903]--Against Life Tenant to Compel Sale of Real Property, Apportion Proceeds, and Recover Amount Paid by Remainderman to Satisfy Tax Lien

[1] FORM

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§ 536.107 Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Insurer as Subrogee of Its Insured--Against Insured's Certified Public Accountants to Recover Amount of Payments Made to Insured for Losses Resulting From Employee's Defalcations on Grounds of Negligence [Civ. Code § 3333] and Breach of Contract [Civ. Code § 3300] in Conducting Annual Audits and Failing to Discover Defalcations [Civ. Code § 1714(a)]

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§ 536.108 Complaint [Code Civ. Proc. § 425.10] for Declaratory Relief [Code Civ. Proc. § 1060]--By Fidelity Insurer Against Insured and Bank Paying Forged Check Drawn on Insured's Account--To Declare Rights and Duties of Parties Relating to Reimbursement and Subrogation [Com. Code §§ 3419(1)(c), 4406]

[1] FORM

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§ 536.121 Affirmative Defense--Accident Caused by Subrogor's Negligence

[1] FORM

[2] Use of Form

[3] Cross References

§ 536.122 Affirmative Defense--Action Barred by Statute of Limitations

[1] FORM

[2] Use of Form

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§ 536.123 Affirmative Defense--Plaintiff's Claim Paid by Setoff [Code Civ. Proc. § 431.70]

[1] FORM

[2] Use of Form

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§ 536.01 Scope of Chapter

This chapter discusses subrogation and contains forms of capacity allegations [*see §§ 536.80 -536.83*], complaints [*see §§ 536.100 -536.108*], and affirmative defenses [*see §§ 536.120* -536.125]. The affirmative defenses are those most likely to be used in answers to complaints in subrogation.

For other chapters in this set discussing or containing forms relating to specific aspects of subrogation, see *§ 536.02*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesGeneral OverviewCivil ProcedureRemediesGeneral Overview

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§ 536.02 Cross References

For discussion and a form of complaint in subrogation for use by a vehicle owner against a negligent operator, see *Ch. 82, Automobiles: Causes of Action, § 82.16*.

For discussion and a form of complaint in subrogation by an insurer as the subrogee of its insured against an uninsured motorist to recover the amount paid under the uninsured motorist provision of its policy, see Ch. 88, *Automobiles: Automobile Insurance* , and Ch. 88A, *Automobiles: Uninsured Motorist Claims* .

For discussion and forms of allegations for use in a complaint in subrogation by a vessel owner against a negligent vessel operator, see Ch. 100, *Boats and Boating* .

For discussion of the right of the Real Estate Commissioner to be subrogated to the rights of the judgment creditor against a broker or salesperson to the extent of payments made from the Real Estate Fund for education, research, and recovery, see Ch. 103, *Brokers* .

For discussion and a form of complaint in subrogation for use by a contractor's surety against the property owner to the extent of funds paid to the contractor's creditors, see Ch. 104, *Building Contracts* .

For discussion and a form of cross complaint in surbrogation for use by a defendant corporate director sued by and liable to the corporation under *Corp. Code § 316* (illegal distribution to shareholders and illegal loan or guaranty) against the shareholders who received the illegal distribution or against the person who received the illegal loan or guaranty, see Ch. 164, *Corporations: Dividends and Reacquisitions of Shares* ,, and Ch. 167, *Corporations: Directors and Management* , *§ 167.50* et seq., respectively.

For discussion and forms regarding surety insurance generally, see Ch. 308, *Insurance* .

For a form of complaint by one insurance company against another for a declaration of the rights and duties of the parties, including the right to subrogation, under their respective policies of liability insurance, see Ch. 308, *Insurance* .

For discussion and a form of complaint in subrogation by an insurer as the subrogee of its insured for damages against the insured's tenant to recover the amount paid to the insured for fire damages caused by the tenant's negligence, see *Ch. 334, Landlord and Tenant: Claims for Damages, § 334.95*.

For discussion of the right of the person who redeems from a lien property in which he or she has an interest to be subrogated to all benefits of the lien, see Ch. 342, *Liens and Wage Preferences* .

For discussion of the right of a holder of a reversionary interest in property to succeed, under equitable principles of subrogation, to the lien held by a taxing authority where the holder paid taxes to protect his or her interest in the property after the life tenant failed to do so, see Ch. 344, *Life Estates and Remainders* .

For discussion of the persons entitled to indemnification under an indemnity agreement as including a subrogee and the subrogation of the insurance company which satisfies the loss or liability incurred by its insured to any right of indemnity for such loss or liability which the insured may have by virtue of the indemnity agreement or implied indemnity, see Ch. 300, *Indemnity and Contribution* .

For discussion of the right of a surety who has, pursuant to the provisions of its contractor's payment bond, paid claims of valid mechanic lien claimants to be subrogated to the rights of the claimants as against the principal on the bond, see Ch. 361, *Mechanics' Liens* .

For discussion of the nonsubrogation of the source of collateral benefits introduced on the issue of damages by the defendant in a personal injury action against a health care provider, see Ch. 415, *Physicians: Medical Malpractice* .

For discussion of the right of the State of California to be subrogated to the rights of the victim of a crime to whom cash payments are granted pursuant to the law governing aid to victims of crime, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesCauses of ActionGeneral OverviewCivil ProcedureRemediesGeneral OverviewContracts LawThird PartiesSubrogationContracts LawTypes of ContractsGuaranty ContractsInsurance LawClaims & ContractsSubrogationGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageUninsured MotoristsSubrogationReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral OverviewReal Property LawNonmortgage LiensGeneral OverviewTortsMalpractice & Professional LiabilityHealthcare ProvidersTortsPublic Entity LiabilityLiabilityState Tort Claims ActsRemedies

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[Reserved]

§§ 536.03[Reserved]

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§ 536.10 Governing Law

The right of subrogation is governed by equitable principles developed by the cases and by a number of statutes, most of which apply to particular relationships. For a listing of these statutes, see *§ 536.40*. See also *§ 536.16*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewGovernmentsLegislationStatutory Remedies & Rights

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§ 536.11 Subrogation Defined

"To subrogate" is to put in the place of another, to substitute. Subrogation is the substitution of another person (the subrogee) in place of the creditor or claimant (the subrogor) to whose rights the other person succeeds in relation to the debt or claim. The subrogee is equitably subrogated to the subrogor, and succeeds the subrogor's rights against the obligor [*Reliance Nat'l Indem. Co. v. General Star Indem. Co. (1999) 72 Cal. App. 4th 1063, 1077, 85 Cal. Rptr. 2d 627*].

An action in subrogation is an equitable remedy by which a third party is substituted in the place of a creditor when the third party, by reason of some obligation or to preserve an interest, has paid the creditor the debt of the principal debtor; its purpose is to enable the third party to recover from the debtor the amount of the payment made [*see* *Offer v. Superior Court (1924) 194 Cal. 114, 118, 228 P. 11* ; *Redington v. Cornwall (1891) 90 Cal. 49, 58, 27 P. 40* ; *Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 47, 162 Cal. Rptr. 238 , superseded by statute on other grounds as stated in* *Goodman v. Lozano (2010) 47 Cal. 4th 1327, 1336-1338, 104 Cal. Rptr. 3d 219, 223 P.3d 77*]. Equitable subrogation has also been defined as a legal device that permits a party who has been required to satisfy a loss created by a third party's wrong to step into the shoes of the loser and recover from the wrongdoer [*Transit Cas. Co. v. Spink Corp. (1979) 94 Cal. App. 3d 124, 132, 156 Cal. Rptr. 360* (disapproved on another point in *Commercial Union Assurance Cos. v. Safeway Stores, Inc. (1980) 26 Cal. 3d 912, 921, 164 Cal. Rptr. 709, 610 P.2d 1038*)].

For a discussion of the historical development of the doctrine, see *Offer v. Superior Court (1924) 194 Cal. 114, 120-121, 228 P. 11* .

Legal Topics:

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§ 536.12 Terminology

The third party substituted for the creditor is the "subrogee"; the creditor is the "subrogor"; and the debtor or tortfeasor is the "obligor."

Legal Topics:

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§ 536.13 Elements of Subrogation

[1] In General

Subrogation applies when one person, not a volunteer, pays a debt for which another is primarily answerable and that, in equity and good conscience, should have been discharged by the latter [*Stein v. Simpson (1951) 37 Cal. 2d 79, 83, 230 P.2d 816* ; *Phoenix Ins. Co. v. United States Fire Ins. Co. (1987) 189 Cal. App. 3d 1511, 1525-1526, 235 Cal. Rptr. 185* (finding indemnification rather than subrogation)]. The doctrine is liberally applied to promote justice [*St. Paul Fire & Marine Ins. Co. v. Murray Plumbing & Heating Corp. (1976) 65 Cal. App. 3d 66, 72, 135 Cal. Rptr. 120*].

The prerequisites for equitable subrogation generally are: (1) payment was made by the subrogee to protect his or her own interest; (2) the subrogee did not act as a volunteer; (3) the debt is one for which the subrogee was not primarily liable; (4) the entire debt has been paid; and (5) subrogation does not work any injustice to the rights of others [*Caito v. United Cal. Bank (1978) 20 Cal. 3d 694, 704, 144 Cal. Rptr. 751, 576 P.2d 466* ; *Grant v. De Otte (1954) 122 Cal. App. 2d 724, 728, 265 P.2d 952*].

[2] In Context of Insurance Claims

Subrogation issues commonly arise in connection with insurance claims. With respect to insurance, subrogation takes the form of an insurer's right to be put in the position of the insured to pursue recovery from third parties legally responsible to the insured for a loss that the insurer has both insured and paid [*Reliance Nat'l Indem. Co. v. General Star Indem. Co. (1999) 72 Cal. App. 4th 1063, 1077, 85 Cal. Rptr. 2d 627*]. In this context, the courts have identified the following elements as essential to an insurer's cause of action based on equitable subrogation [*Fireman's Fund Ins. Co. v. Maryland Cas. Co. (1994) 21 Cal. App. 4th 1586, 1596, 26 Cal. Rptr. 2d 762* , *Troost v. Estate of DeBoer (1984) 155 Cal. App. 3d 289, 294, 202 Cal. Rptr. 47*]:

- The insured has suffered a loss for which the party to be charged is liable, either because the latter is a wrongdoer whose act or omission caused the loss, or because he or she is legally responsible to the insured for the loss caused by the wrongdoer;

- The insurer has wholly or partially compensated the insured for the same loss for which the party to

be charged is liable;

- The insured has an existing, assignable cause of action against the party to be charged, and the insured could have asserted that that cause of action for his or her own benefit if he or she had not been compensated by the insurer for the loss;

- The insurer has suffered damages caused by the act or omission upon which the liability of the party to be charged depends;

- Justice requires that the loss should be entirely shifted from the insurer to the party to be charged; and

- The insurer's damages are in a stated sum, usually the amount it has paid to its insured, assuming the payment was not voluntary and was reasonable.

Legal Topics:

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§ 536.14 Kinds of Subrogation

[1] Legal and Conventional

Subrogation has been said to be of two kinds, "legal" and "conventional." Legal subrogation has its source in equity and arises by operation of law. Conventional subrogation arises by the act of the parties and rests in contract [*Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 638, 7 Cal. Rptr. 377, 354 P.2d 1073* ; *Knight v. Alefosio (1984) 158 Cal. App. 3d 716, 723, 205 Cal. Rptr. 42*].

What is treated as conventional subrogation in other states is to some extent covered by statutes in California. For example, *Civ. Code §§ 2849, 2903, 2904* provide the right of subrogation to a lien on property that is afforded in other states by conventional, that is, contractual, subrogation [*see* 83 C.J.S. Subrogation § 4]. A right to subrogation may not be created by contract, however, if there is an express statutory reservation against assignment of the type of claim involved [*see* *Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 639-640, 7 Cal. Rptr. 377, 354 P.2d 1073* (involving claim arising from tortious injury to person which was nonassignable under former *Civ. Code § 956* (repealed; *now see Code Civ. Proc. § 377.22*))]. Morever, when a contract, such as an insurance policy, reserves a right of subrogation with respect to claims paid under certain policy coverages (otherwise assignable), it does not have the right to subrogate as to other coverages that do not reserve the right [*Knight v. Alefosio (1984) 158 Cal. App. 3d 716, 724, 205 Cal. Rptr. 42*].

Legal subrogation arises, for example, when a person having a liability or a right or a fiduciary relationship in the premises pays a debt due by another under such circumstances that he or she is in equity entitled to the security or obligation held by the creditors whom he or she has paid. It does not arise from any contractual relationship between the parties, but takes place as a matter of equity with or without an agreement to that effect [*Knight v. Alefosio (1984) 158 Cal. App. 3d 716, 723, 205 Cal. Rptr. 42*]. The doctrine cannot be invoked, however, to override the contract of the parties and, hence, is not applicable when its enforcement would be inconsistent with the terms of the contract or if the contract expressly or by implication forbids its application [*Knight v. Alefosio (1984) 158 Cal. App. 3d 716, 724, 205 Cal. Rptr. 42* (quoting out-of-state case with approval)].

[2] Common-Law and Statutory

Subrogation is also classified as common law or statutory [*see* *Commercial Union Assurance Co. v. City of San Jose*

(1982) 127 Cal. App. 3d 730, 734, 736-737, 179 Cal. Rptr. 814 ; *Phoenix of Hartford Ins. Cos. v. Colony Kitchens (1976) 57 Cal. App. 3d 140, 144-145, 128 Cal. Rptr. 893* ; *see also County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 875-876* , n.7,]. Common law subrogation may be either nonstatutory or merely confirmed by statute, and arises from common law equitable principles. Statutory subrogation is subrogation that is expressly authorized by statute [*State Bar of Cal. v. Statile (2008) 168 Cal. App. 4th 650, 662-663, 86 Cal. Rptr. 3d 72*]. Examples of statutory subrogation include *Gov. Code § 21451*, giving the State Retirement System a cause of action against a person causing a member's injury or death to recover one-half the actuarial equivalent of the benefits for which the system is liable because of that injury or death; *Gov. Code § 31820*, giving a similar right to a County Employees' Retirement System; *Lab. Code § 3852*, subrogating the employer (or the employer's insurer [*see Lab. Code § 3850(b)*]) who has paid worker's compensation to the employee's cause of action against a tortfeasor responsible for the employee's injuries; and *Veh. Code § 17153*, subrogating the owner who is liable for tortious injuries caused by a person operating the owner's vehicle with the owner's consent to the rights of the injured person against the operator. Causes of action for tortious injury to person are not assignable [*see Code Civ. Proc. § 377.22*] and therefore would not be subject to subrogation without that express statutory authorization [*see Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 639-640, 7 Cal. Rptr. 377, 354 P.2d 1073*]. (Causes of action for tortious damage to property are, however, assignable under *Civ. Code § 954* and are subject to subrogation [*see Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 640, 7 Cal. Rptr. 377, 354 P.2d 1073* ; *Offer v. Superior Court (1924) 194 Cal. 114, 121, 228 P. 11* ; *Royal Indem. Co. v. Security Truck Lines (1963) 212 Cal. App. 2d 61, 64, 27 Cal. Rptr. 858*].)

Business and Professions Code § 6140.5(b) provides, with respect to the Client Security Fund (CSF) of the State Bar:

> Upon making a payment to a person who has applied to the fund for payment to relieve or mitigate pecuniary losses caused by the dishonest conduct of an active member of the State Bar, the State Bar is subrogated, to the extent of that payment, to the rights of the applicant against any person or persons who, or entity that, cause the pecuniary loss. The State Bar may bring an action to enforce those rights within three years from the date of payment to the applicant.

In one case, the attorney and his clients settled a lawsuit concerning the attorney's alleged misappropriation of client trust funds, while preserving the plaintiff's right to seek full reimbursement for their losses from the CSF. As part of the settlement, the attorney agreed not to object to any notice of intent to pay issued by the CSF. After the settlement but before the defendant had paid some of the payments structured in installments, the CSF paid amounts of money to some claimants involved in the matter. When the State Bar filed a subrogation action against the attorney, the issue arose over what subrogation rights the State Bar acquired against the attorney when the CSF paid the claims. The appellate court framed the issue in the following manner: "When an injured party releases a tortfeasor but reserves its right against a party with statutory subrogation rights, is that party later permitted to seek reimbursement from the tortfeasor if it pays money that the tortfeasor owed the injured party?" The court held that neither the statutory scheme nor the settlement agreement in this case limits the State Bar's subrogation rights against the attorney [*State Bar of Cal. v. Statile (2008) 168 Cal. App. 4th 650, 669, 86 Cal. Rptr. 3d 72*].

In addition, rules applicable to the two kinds of subrogation may differ in some respects. For example, if the right to subrogation is nonstatutory or is merely confirmed by statute, then the normal rules of equitable subrogation apply; that is, the subrogee succeeds to the rights of the subrogor and may not, for example, recover an amount greater than that which could have been recovered by the subrogor [*see Breesev. Price (1981) 29 Cal. 3d 923, 929, 176 Cal. Rptr. 791, 633 P.2d 987* (involving employer's right to recover from tortfeasor benefits paid to or on behalf of injured employee); *County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 876 n.7, 140 Cal. Rptr. 638, 568 P.2d 363* (same)]. In addition, the action by the subrogee is subject to the same statute of limitations that applies to the subrogor's action [*see Commercial Union Assurance Co. v. City of San Jose (1982) 127 Cal. App. 3d 730, 734, 179 Cal. Rptr. 814* ; *see also § 536.20*].

However, in the case of statutory subrogation, if the statute providing for subrogation expressly authorizes recovery

from an obligor (for example, a tortfeasor) in an amount necessary to compensate the subrogee for the full amount of payments made by it, and that amount is greater than that which could have been recovered in an action by the subrogor, the action to that extent is in the nature of an action for indemnity. For example, *Lab. Code § 3852* (relating to workers' compensation), to the extent it authorizesrecovery by an employer (or the employer's insurer) of an amount required to be paid to the Department of Industrial Relations pursuant to *Lab. Code § 4706.5* (death benefits when deceased employee leaves no dependents), subjects the tortfeasor to liability for an amount greater than that for which he or she would have been liable in an action by the deceased employee's estate [*see Associated Indem. Corp. v. Pacific Sw. Airlines (1982) 128 Cal. App. 3d 898, 907, 180 Cal. Rptr. 685*].

In addition, if an applicable statute expressly so provides, a purely statutory right to subrogation may be subject to a different statute of limitations providing a longer period in which the subrogated action may be brought. In this event the subrogee has a greater right than that of the subrogor [*see Commercial Union Assurance Co. v. City of San Jose (1982) 127 Cal. App. 3d 730, 736, 179 Cal. Rptr. 814* ; *Allstate Ins. Co. v. County of Alameda (1973) 33 Cal. App. 3d 418, 421, 109 Cal. Rptr. 53* ; *see also § 536.20*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 536.15 Subrogation and Assignment Distinguished

[1] In General

Although assignment was once regarded as one form of subrogation, and both subrogation and assignment entail the substitution of a third party for an existing party to prosecute a claim against another, they do have certain technical differences [*see Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 640, 7 Cal. Rptr. 377, 354 P.2d 1073*]. Except as otherwise provided by statute, subrogation presupposes an actual payment and satisfaction of the creditor's claim to which the subrogor is subrogated for the purpose of recovering the payment from the obligor. It operates only to secure recovery to the extent of the payment made. It presupposes that payment was not made officiously but by reason of some obligation or for the protection of some interest. Finally, at least so far as legal subrogation is concerned [*see § 536.14*], it is the act of the law, substituting one party for another, and depends not on contract but on principles of equity [*see Caito v. United Cal. Bank (1978) 20 Cal. 3d 694, 704, 144 Cal. Rptr. 751, 576 P.2d 466* ; *Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 638-640, 7 Cal. Rptr. 377, 354 P.2d 1073* ; *Offer v. Superior Court (1924) 194 Cal. 114, 118, 228 P. 11* ; *Iusi v. City Title Ins. Co. (1963) 213 Cal. App. 2d 582, 586-588, 28 Cal. Rptr. 893*].

Assignment, on the other hand, contemplates the continued existence of the claim unpaid at the time of the assignment; it is unconcerned with any officiousness of the assignee; and it is the act of the parties, depending generally on intention [*see Civ. Code § 953-955.1*; *Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 639-640, 7 Cal. Rptr. 377, 354 P.2d 1073* ; *see also* Ch. 60, *Assignments*].

[2] Limitations on Subrogation to Nonassignable Cause of Action

Nonassignable claims are not subject to subrogation absent statutory authorization [*Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 640, 7 Cal. Rptr. 377, 354 P.2d 1073* ; *Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg (1994) 30 Cal. App. 4th 1373, 1383, 1387, 36 Cal. Rptr. 2d 424* . Thus, because a tort cause of action for injury to the person normally is not assignable, a right of subrogation to a cause of action for tortious injury to the person is not recognized, except when the right of subrogation has been expressly granted by statute [*Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 639, 7 Cal. Rptr. 377, 354 P.2d 1073* (former *Civ. Code § 956* (*now see Code Civ. Proc. § 377.22*))]; *Peller v. Liberty Mut. Fire Ins. Co. (1963) 220 Cal. App. 2d 610, 612, 34 Cal. Rptr. 41*].

Similarly, California law prohibits assignment of most legal malpractice claims. Thus, a liability insurer that pays a claim against its insured that resulted from the negligence of the insured's attorneys has no subrogation rights with respect to the insured's legal malpractice claim against the attorneys [*Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg (1994) 30 Cal. App. 4th 1373, 1387, 36 Cal. Rptr. 2d 424*].

One exception to this prohibition against assignment involved an attorney who sued concurrent counsel for indemnification of malpractice damages. In that case, the attorney's insurer may be subrogated to the attorney's indemnity claim against concurrent counsel [*Musser v. Provencher (2002) 28 Cal. 4th 274, 285-287, 121 Cal. Rptr. 2d 373, 48 P.3d 408*].

[3] Agreement for Reimbursement as Avoiding Nonassignability

While a cause of action to recover damages for personal injuries is not assignable, provisions in a health insurance contract requiring an insured who obtains a settlement or judgment against a third party tortfeasor for personal injuries to reimburse the insurer for medical payments arising out of those injuries are valid and enforceable [*Samura v. Kaiser Found. Health Plan Inc. (1993) 17 Cal. App. 4th 1284, 1292, 1297, 22 Cal. Rptr. 2d 20* (involving health maintenance organization); *Lee v. State Farm Mut. Auto. Ins. Co. (1976) 57 Cal. App. 3d 458, 465-466, 129 Cal. Rptr. 271*]. Enforcement is justified based on the assumption that the recovery from the party at fault will create a fund from which medical costs may be paid without burdening the injured party [*Samura v. Kaiser Found. Health Plan Inc. (1993) 17 Cal. App. 4th 1284, 1296, 22 Cal. Rptr. 2d 20*]. Hence, a provision in an insurance policy or health plan requiring the insured to reimburse the insurer or provider for medical payments in the event the insured recovers damages from a third party tortfeasor bars bars an insured who has settled his or claim against the tortfeasor from recovering medical payments from the insurer [*West v. State Farm Mut. Auto. Ins. Co. (1973) 30 Cal. App. 3d 562, 565, 106 Cal. Rptr. 486*].

However, the doctrine of contract unconscionability may limit the enforceability of such a provision in some fact situations. If the tort victim does not recover enough from the third party to compensate for lost wages, future loss of earning capacity, or uninsured future medical expenses, the victim would also bear the burden of paying medical expenses from the tort recovery. In such a case, enforcement of the medical lien may create a heavy burden on the injured party by reducing recovery of actual economic losses, and the victim may be able to present a defense to enforcement on the ground of unconscionability. Unconscionability involves (1) an inequality of bargaining power resulting in no real negotiation and the absence of meaningful choice and (2) surprise, which occurs if the terms of the bargain are hidden in a printed form drafted by the party seeking to enforce the disputed terms [*Samura v. Kaiser Found. Health Plan, Inc. (1993) 17 Cal. App. 4th 1284, 1296-1297, 22 Cal. Rptr. 2d 20*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 536.16 Common Subrogation Actions

[1] By Sureties

The most common situation in which the right to subrogation arises is when a surety pays a principal debtor's obligation to a creditor and the surety is subrogated to any causes of action that either the creditor or the debtor has against third parties responsible for the loss, as well as to the creditor's rights to priorities or securities [*see Civ. Code §§ 2848, 2849*; *Regents of Univ. of Cal. v. Hartford Accident & Indem. Co. (1978) 21 Cal. 3d 624, 638 n. 6, 147 Cal. Rptr. 486, 581 P.2d 197* ; *Commercial Standard Ins. Co. v. Bank of Am. (1976) 57 Cal. App. 3d 241, 247, n. 1, 129 Cal. Rptr. 91*]. A surety or guarantor is defined as one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor [*Civ. Code § 2787*]. Surety is a class of insurance defined in *Ins. Code § 105* [*Ins. Code § 100(5)*].

A surety, on satisfying the obligation of the principal, is entitled to enforce every remedy that the creditor then has against the principal to the extent of reimbursing what the surety has expended, and also to require all his or her cosureties to contribute thereto, without regard to the order of time in which they became sureties [*Civ. Code § 2848*]. The question whether the obligation which is satisfied is in fact the obligation of the particular principal is to be decided in accordance with the rules of law and principles of equity [*Painter v. Berglund (1939) 31 Cal. App. 2d 63, 67, 87 P.2d 360*].

In addition, a surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a cosurety at the time of entering into the contract of suretyship, or acquired by him or her afterwards, whether the surety was aware of the security or not [*Civ. Code § 2849*].

Civ. Code §§ 2848 and *2849* are but reenactments of well-settled rules of equity on subrogation [*Title Guar. & Sur. Co. v. Duarte (1921) 54 Cal. App. 260, 265, 201 P. 790*]. *Civ. Code § 2848* is, however, merely declaratory of the common law and controlling only so far as it goes; it is neither comprehensive nor exclusive as to the rights of sureties to subrogation [*Estate of Elizalde (1920) 182 Cal. 427, 432, 188 P. 560* ; *Commercial Standard Ins. Co. v. Bank of Am. (1976) 57 Cal. App. 3d 241, 247, 129 Cal. Rptr. 91*]. Hence, the doctrine of subrogation applies, for example, to the creditor's rights against third persons when the surety's equities are superior to those of the third party wrongdoer [

Commercial Standard Ins. Co. v. Bank of Am. (1976) 57 Cal. App. 3d 241, 247, 129 Cal. Rptr. 91 ; *see § 536.42[9]*].

The right of subrogation provided for in *Civ. Code §§ 2848* and *2949* is to be distinguished from any right the surety may have for reimbursement from the debtor whose obligation was discharged by the payment [*see Civ. Code § 2847*]. A surety who pays the principal debt extinguishes the obligation and thus cannot sue the debtor as subrogee of the original debt [*Regents of Univ. of Cal. v. Hartford Accident & Indem. Co. (1978) 21 Cal. 3d 624, 637-638, 147 Cal. Rptr. 486, 581 P.2d 197*].

For further discussion of suretyship and forms of complaints for use by a surety to secure reimbursement from a principal and to compel contribution by cosureties, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[2] By Insurers

[a] Property Insurance

Although the principle on which the right of subrogation is founded applies to cases of suretyship, the doctrine of equitable subrogation is broad enough today to include every instance in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter [*Caito v. United Cal. Bank (1978) 20 Cal. 3d 694, 704, 144 Cal. Rptr. 751, 576 P.2d 466* ; *St. Paul Fire & Marine Ins. Co. v. Murray Plumbing & Heating Corp. (1976) 65 Cal. App. 3d 66, 72, 135 Cal. Rptr. 120*].

For example, another common situation, in part confirmed by statute, in which the right to subrogation arises is when an insurer pays a property loss sustained by its insured as a result of the wrongful act of a tortfeasor and the insurer is subrogated to the claim of the insured against the tortfeasor [*Ferraro v. Southern Cal. Gas Co. (1980) 162 Cal. Rptr. 238 , superseded by statute on other grounds as stated in Goodman v. Lozano (2010) 47 Cal. 4th 1327, 1336-1338, 104 Cal. Rptr. 3d 219, 223 P.3d 77* (involving fire insurer); *see Ins. Code §§ 1996* (marine insurance), 2071 (fire and other casualty insurance)]. The right of the insurer against the third party wrongdoer does not arise out of or depend on any contractual relation or of privity between them, but emanates from the nature of the insurance contract as a contract of indemnity [*Automobile Ins. Co. v. Union Oil Co. (1948) 85 Cal. App. 2d 302, 305* ; *St. Paul Fire & Marine Ins. Co. v. Murray Plumbing & Heating Corp. (1976) 65 Cal. App. 3d 66, 72, 135 Cal. Rptr. 120*]. The right arises independent of any provision in the insurance contract giving the insurer the right to recover damages from the person responsible for the loss [*Offer v. Superior Court (1924) 194 Cal. 114, 118, 228 P. 11*].

The insurer's subrogated right in such case generally is its right to be put in the position of its insured against third parties legally responsible to its insured for the loss which the insurer has both insured against and paid [*Commercial Union Assurance Co. v. City of San Jose (1982) 127 Cal. App. 3d 730, 733, 179 Cal. Rptr. 814* (subrogation of insurer to insured's claim against city for property damage from falling tree branches allegedly caused by city's negligence); *see Travelers Indem. Co. v. Ingebretsen (1974) 38 Cal. App. 3d 858, 864, 113 Cal. Rptr. 679* (insurer, after paying amount of loss on property insured, stands in place of its insured and is subrogated in like amount to insured's right of action against any other party responsible for that loss)]. Thus, the insurance carrier may recoup a loss inflicted on its policyholder by equitable subrogation to the policyholder's claim [*Transit Cas. Co. v. Spink Corp. (1979) 94 Cal. App. 3d 124, 132, 156 Cal. Rptr. 360 , disapproved on other grounds, Commercial Union Assurance Cos. v. Safeway Stores, Inc. (1980) 26 Cal. 3d 912, 921, 164 Cal. Rptr. 709, 610 P.2d 1038*].

The doctrine of equitable subrogation applies after the insured has already been made whole by the insurer, and the insurer is proceeding against the individual responsible for the loss. Although some decisions indicate that the doctrine requires no contractual provision, there appears to be no instance in which a court has permitted intervention under this theory while the insured is actually pursuing a lawsuit against a person claimed to be responsible. When the insured is a party plaintiff in an action against a tortfeasor, and no contractual right of subrogation is in evidence or admitted by the

parties, the right of equitable subrogation has been held not to apply [*Continental Ins. Co. v. American Prot. Indus. (1987) 197 Cal. App. 3d 322, 327, 242 Cal. Rptr. 784* (summary judgment against insurer and in favor of alleged tortfeasor); *Knight v. Alefosio (1984) 158 Cal. App. 3d 716, 725-726, 205 Cal. Rptr. 42*].

Some courts have held that language in an insurance policy that grants the insurance company "all rights of recovery to the extent of its payment" overrides the common law made-whole rule [*see, e.g., Barnes v. Independent Auto. Dealers Ass'n of Cal. Health & Welfare Benefit Plan (9th Cir. 1995) 64 F.3d 1389, 1393, 1396* ; *see also Progressive W. Ins. Co. v. Superior Court (2005) 135 Cal. App. 4th 263, 274, 37 Cal. Rptr. 3d 434*]. However, according to the growing trend of California authority, the contractual provision that intends to vitiate this rule must clearly and specifically give the insurer a priority out of proceeds from the tortfeasor regardless of whether the insured was first made whole [*see Progressive W. Ins. Co. v. Superior Court (2005) 135 Cal. App. 4th 263, 274-275, 37 Cal. Rptr. 3d 434* ; *Sapiano v. Williamsburg Nat'l Ins. Co. (1994) 28 Cal. App. 4th 533, 538-539, 33 Cal. Rptr. 2d 659*].

In the proper case, a property insurer may intervene in a lawsuit brought by the insured against tortfeasors, to bring a complaint in subrogation. A nonparty has a right to intervene in a pending action if the person seeking intervention claims an interest relating to the property or transaction that is the subject of the action and if that person is so situated that the disposition of the action may as a practical matter impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by existing parties [*Code Civ. Proc. § 387(b)*; *Hodge v. Kirkpatrick Dev., Inc. (2005) 130 Cal. App. 4th 540, 547, 30 Cal. Rptr. 3d 303* ; *see* Ch. 395, *Parties*]. In one case, for example, an insurer had a statutory right to intervene in a construction defect lawsuit brought bythe insureds against third-party tortfeasors, after the insurer obtained partial subrogation rights (by operation of law and pursuant to policy provisions) against the third parties by paying a portion of the insureds' claims for property damage to their house [*Hodge v. Kirkpatrick Dev., Inc. (2005) 130 Cal. App. 4th 540, 550, 30 Cal. Rptr. 3d 303*].

If the insurance company does not interplead itself into the underlying action, the insurance company's rights to recover any payments received by its insured are limited. Under the made-whole rule, if an insurer does not participate in the insured's action against a tortfeasor, despite knowledge of that action, the insurer cannot recover any funds obtained through settlement of the action unless the full amount received exceeds the insured's actual loss. Furthermore, the insured need not account to the nonparticipating insurer for more than the surplus remaining in the insured's hands, after satisfying the loss in full and reasonable expenses incurred in the recovery. Therefore, if an insurer elects not to participate in the insured's action against a tortfeasor, the insurer is entitled to subrogation only after the insured has recouped the loss and some or all of the litigation expenses incurred in the action against the tortfeasor [*Progressive W. Ins. Co. v. Superior Court (2005) 135 Cal. App. 4th 263, 273, 37 Cal. Rptr. 3d 434*].

[b] Liability Insurance

Subrogation issues may arise among insurers covering the same risk. For example, if an insurer of one party indemnifies its insured under a liability policy, it may later bring an equitable subrogation action against an insurer of a co-defendant in the action to recover the second insurer's portion of the sums paid.

In one case, a contractor entered into an indemnity contract for the benefit of its subcontractor on a construction project. The contractor was named as an "additional insured" under the subcontractor's primary commercial general liability policy, which provided aggregate coverage of $2 million. The subcon-tractor was also the sole named insured on a commercial umbrella policy, which provided a general aggregate and "per occurrence" limit of $9 million. The umbrella policy also contained an "other insurance" clause specifying that it was an excess policy to other applicable insurance. The contractor was insured under a primary commercial general liability policy by a different insurer. After a worker was killed while on the job, the worker's family brought a wrongful death action against the contractor, the subcontractor, and others. The subcontractor's primary insurer assumed defense of the action on behalf of both those defendants. Following a verdict for the plaintiff apportioning fault (70%/20% against the subcontractor and contractor, respectively), the parties stipulated to a reduction in the damages award to $4.9 million. The subcontractor's primary

insurer paid $1 million in a 70/20 split. The subcontractor's excess insurer paid $3.9, also split 70/20. The contractor then filed a complaint against the subcontractor and both its insurers, seeking complete indemnity for the full amount of damages awarded, pursuant to the indemnity agreement with the subcontractor; and declaratory relief against the subcontractor's excess insurer regarding indemnity. The subcontractor's excess insurer then filed a cross-complaint for equitable subrogation and equitable indemnity against the contractor's primary insurer, alleging that any obligation it owed under its policy is subject to the terms and conditions of its policy, and that it was entitled under equitable principles of subrogation to reimbursement from the contractor's primary insurer of its settlement payment on behalf of the contractor; and also alleging equitable indemnification rights. With regard to the equitable subrogation claim, the appellate court noted that the contractor was covered by its primary insurer for the damages arising from the accident. Thus, the subcontractor's excess policy was excess to the contractor's primary coverage. Accordingly, having paid a portion of the settlement funds on behalf of the contractor's primary insurer, it was entitled to seek reimbursement from that insurer by way of its cross-complaint for equitable subrogation. The court also found that favoring the subcontractor's excess insurer does not entirely negate the indemnity clause of the subcontract because the contractor was insured by the subcontractor's primary as well as excess insurer. The court therefore held that the contractor's primary insurer is not entitled to indemnification by the subcontractor's excess insurer on the basis of the indemnification clause in the construction contract. Accordingly, the trial court properly awarded summary judgment in favor of the subcontractor's excess insurer on its claim for equitable subrogation against the contractor's primary insurer [*JPI Westcoast Constr., L.P. v. RJS & Assoc., Inc. (2007) 156 Cal. App. 4th 1448, 1463-1466, 68 Cal. Rptr. 3d 91*].

In another case, the insured landlord owned a shopping center. The insured and one of its tenants were successor parties to two effectively identical leases originally executed by the organizers of the insured's company and a corporation related to the tenant company. The leases each contained provisions requiring the tenant to maintain liability insurance, and requiring the tenant to indemnify the owner regarding damage occurring on the premises arising out of the tenant's failure to perform lease requirements. They also contained a release and waiver of subrogation, providing [*see Fireman's Fund Ins. Co. v. Sizzler USA Real Property, Inc. (2008) 169 Cal. App. 4th 415, 417, 86 Cal. Rptr. 3d 715*]:

> The parties release each other and their respective authorized representatives from any claims for damage to any person or property of either Landlord or Tenant ... about the Premises that are caused by or result from risks insured against under any insurance policies carried by the parties... .
>
> The parties further agree that neither party shall be liable to the other for any damage caused by fire or any of the risks insured against under any insurance policy and each party shall cause each insurance policy obtained by it to provide that the insurance company waives all right of recovery by way of subrogation against either party in connection with any covered damage.

In the underlying suit, the injured patron, who was accosted in the tenant club by assailants who later attacked him in the parking lot, brought suit against the landlord. The landlord sought indemnification and defense from the company that owned the tenant club, which directed the landlord to its insurance. That insurance, however, provided only $750,000 coverage, after a self-insured retention of $250,000, and did not name the landlord as an additional insured on that policy. The landlord turned the case over to its own liability insurer. That insurer tendered the defense to the insurer for the tenant's owner, which stated that it would defend the landlord under a reservation of rights, after its defense and settlement costs exceeded $250,000. The landlord's insurer proceeded to defend the landlord, and settled the underlying suit, expending $300,000 in settlement and $84,000 for defense costs. It then commenced the instant suit against the owner of the tenant club, to recover what it had paid, and attorney's fees under a lease provision. The appellate court upheld judgment for the defendant because the subrogation waiver provision was part of a mutual release of claims and damages that were covered by insurance [*Fireman's Fund Ins. Co. v. Sizzler USA Real Property, Inc. (2008) 169 Cal. App. 4th 415, 422, 86 Cal. Rptr. 3d 715*]. The court rejected the insurer's arguments that the defendant's failure to obtain the full amount of required insurance precludes enforcement of the waiver, and that enforcement of the waiver would defeat the parties' intent that defendant be responsible of the club's prior nuisance designation by the city and its consequences [*Fireman's Fund Ins. Co. v. Sizzler USA Real Property, Inc. (2008) 169 Cal. App. 4th 415, 420-422, 86*

Cal. Rptr. 3d 715].

[c] Med-Pay Coverage

"Med-pay" is first-party, no-fault medical payment insurance coverage in an automobile policy in case of an accident [*see* 21st *Century Ins. Co. v. Superior Court (2009) 47 Cal. 4th 511, 515, 98 Cal. Rptr. 3d 516, 213 P.3d 972* ; *see* also *Ch. 88, Automobiles: Automobile Insurance, § 88.20*]. Med-pay insurers must seek recovery for personal injury claims through contractual reimbursement rights against their insureds, because they are not allowed to assert subrogation claims directly against third-party tortfeasors. This rule is based on the premise that personal injury claims are not assignable, and therefore a med-pay insurer generally has no right to sue the tortfeasor directly and has no standing to intervene. If insureds must reimburse their insurers once they recover from the tortfeasors, they are prevented from receiving double recovery and the financial responsibility for their loss is placed on the tortfeasor. Med-pay insurance contracts typically contain provisions that grant the insurer a right of reimbursement for certain payments that the third party who caused the insured's losses makes to the insured. These provisions are often interchangeably referred to as reimbursement or subrogation provisions, depending on the context [21st *Century Ins. Co. v. Superior Court (2009) 47 Cal. 4th 511, 518, 98 Cal. Rptr. 3d 516, 213 P.3d 972]* .

In California there is a technical difference between subrogation and reimbursement. While subrogation refers to the right of the insurance company to step into the shoes of the insured and assert the insured's rights against the third party, reimbursement refers to the right to receive payment back of what has been expended by the insurance company. In California, both the subrogation rights and reimbursement rights of the insurance company fall within the rubric of subrogation [21st *Century Ins. Co. v. Superior Court (2009) 47 Cal. 4th 511, 518 n.3, 98 Cal. Rptr. 3d 516, 213 P.3d 972]* .

[3] By Stranger Paying Mortgage at Debtor's Request

The doctrine of subrogation has been extended, by analogy, to one who, having no previous interest and being under no obligation, pays off a mortgage, or advances money for its payment, at the instance of a debtor party and for his or her benefit; such a person is in no true sense a mere stranger and volunteer and, hence, may be subrogated to the right of the mortgagee against the mortgator [*Grand v. De Otte (1954) 122 Cal. App. 2d 724, 729, 265 P.2d 952*].

[4] By Persons Authorized by Statute

Certain insurers are authorized by statute to subrogate to nonassignable claimsthat otherwise would not be subject to subrogation. These include liability insurers that have paid an uninsured motorist claim under the terms of their policies and workers' compensation insurance carriers (or self-insured employers) who have paid or become obligated to pay claims on behalf on injured employees [*see Ins. Code §§ 11580.2(g)* (uninsured motorist insurers), 11580.26 (same); and *Ins. Code § 11662* and *Lab. Code §§ 3850-3864* (workers' compensation insurers)]. For further discussion of subrogation in the context of uninsured motorist insurers, see Ch. 88, *Automobiles: Automobile Insurance* , and Ch. 88A, *Automobiles: Uninsured Motorist Claims* .

Another common form of statutory subrogation is that of a public retirement system to recover a portion of payments made on account of injury to an employee-member by a third party tortfeasor [*see, e.g., Gov. Code §§ 21450-21456* (subrogation of Board of Administration of Public Employees' Retirement System to recover from tortfeasor portion of benefits payable for injury to or death of covered employee-member); *31820-31823* (similar provisions applicable to county employees' retirement associations)].

The State Bar has a statutory subrogation right under *Bus. & Prof. Code § 6140.5(b)* (Client Security Fund), after paying a person for pecuniary losses caused by the dishonest conduct of an active member of the State Bar, to bring an action against that attorney [*State Bar of Cal. v. Statile (2008) 168 Cal. App. 4th 650, 669, 86 Cal. Rptr. 3d 72* ; *see §*

536.14[2]].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewContracts LawThird PartiesSubrogationContracts LawTypes of ContractsGuaranty ContractsGovernmentsLegislationStatutory Remedies & RightsInsurance LawClaims & ContractsSubrogationGeneral OverviewInsurance LawMotor Vehicle InsuranceCoverageUninsured MotoristsSubrogation

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§ 536.17 Doctrine of Superior Equities

[1] As Limitation on Right to Subrogation

In some cases, a wrongdoer (primary obligor) is enabled to complete the wrong only by the act of some third person, for example, by a bank (third person) which pays the wrongdoer, a dishonest employee (primary obligor), the proceeds of a forged check drawn on the account of the employer (subrogor) who is insured and the surety or insurer (subrogee) is required to cover the loss by reason of its policy. Under the normal rules of subrogation, the surety or insurer would be subrogated to the right of the employer against the employee, but the employee has frequently absconded or is insolvent. The question arises whether the surety or insurer can be subrogated to any right the employer may have against the third party, e.g., the payee bank [*see Fireman's Fund Ins. Co. v. Security Pac. Nat'l Bank (1978) 85 Cal. App. 3d 797, 805-832, 149 Cal. Rptr. 883* ; *Hartford Accident & Indem. Co. v. Bank of Am. (1963) 220 Cal. App. 2d 545, 550, 34 Cal. Rptr. 23*].

Since subrogation is a creation of equity, it is subject to the limitation that it will not be allowed when it will be inequitable to third persons [*Federal Ins. Co. v. Allen (1970) 13 Cal. App. 3d 648, 650, 92 Cal. Rptr. 125*]. Or, as otherwise stated, subrogation will never be enforced when the equities are equal or the rights not clear [*Meyers v. Bank of Am. Nat'l Trust & Sav. Ass'n (1938) 11 Cal. 2d 92, 101, 77 P.2d 1084* ; *Fireman's Fund Ins. Co. v. Morse Signal Devices (1984) 151 Cal. App. 3d 681, 686, 198 Cal. Rptr. 756*]. Consequently, whether the surety or insurer can recover depends on whether the equity in favor of the surety or insurer is superior to the equity in favor of the third party. Put another way, the surety's or insurer's normal right of recovery through subrogation against a third person when a wrongdoer causes loss both to the surety or insurer by reason of its bond or insurance policy and to the third person is limited to situations in which the equity of the surety or insurer is superior to that of the third person [*Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc. (1978) 83 Cal. App. 3d 593, 602, 148 Cal. Rptr. 57*].

In any such action, the burden is on the surety to establish its superior equity, and for the purpose of weighing the equities, the negligence or other fault of the insured is imputed to the surety or insurer seeking subrogation [*Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc. (1978) 83 Cal. App. 3d 593, 602, 148 Cal. Rptr. 57* ; *see § 536.107*].

[2] Examples of Application of Doctrine

Following the rule of superior equities, a cross complaint by a surety for subrogation in an action by a property owner against a building contractor and its surety arising out of the contractor's default on an agreement to construct a duplex in which the surety cross complained against a bank that had made a construction loan to the owner and had agreed to disburse the funds to the contractor on the basis of work completed was held sufficient where it was alleged that the loss was caused by the bank's negligence in disbursing an excessive amount of the loan proceeds to the contractor [*Commercial Standard Ins. Co. v. Bank of Am. (1976) 57 Cal. App. 3d 241, 246-247, 129 Cal. Rptr. 91*].

On the other hand, California decisions have denied the right of subrogation to sureties on employee bonds where the surety has sought to recover from drawee banks the proceeds of payments on checks forged by the bonded employee [*see Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc. (1978) 83 Cal. App. 3d 593, 602, 148 Cal. Rptr. 57* ; *see also Meyers v. Bank of Am. Nat'l Trust & Sav. Ass'n (1938) 11 Cal. 2d 92, 102-103, 77 P.2d 1084* ; *American Alliance Ins. Co. v. Capital Nat'l Bank of Sacramento (1946) 75 Cal. App. 2d 787, 793, 171 P.2d 449*].

The rule has also been applied to deny recovery in other situations, for example: (1) to deny recovery by a surety on a fidelity bond seeking subrogated recovery against a purchaser of property stolen by the bonded employee from his employer; (2) to deny recovery to the fire insurer of a subcontractor which asserted a claim based on subrogation to its insured's right of action against the prime contractor for failure to procure its own fire insurance; (3) to deny recovery to the insurer of a title company which sought recovery in subrogation from the employers of an employee who had procured illegal releases of liens on property by the use of forged instruments; and (4) to deny recovery to the surety of an employer who sued the purchaser of cotton stolen by the employee from the employer insured by the surety [*see Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc. (1978) 83 Cal. App. 3d 593, 602-603, 148 Cal. Rptr. 57*]. In a case thatinvolved the theft of some $3 million dollars worth of United States treasury bills, the rule was applied to deny the surety, which had paid the employer its loss, the right to subrogation against the brokerage firm (which had purchased some $500,000 of the bills and resold them) because the negligence of the employer--which was imputed to the surety--permitted, if it did not invite, the theft of the bills [*Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc. (1978) 83 Cal. App. 3d 593, 604-605, 148 Cal. Rptr. 57*].

In another case, the doctrine was applied to deny an insurance company which had paid fire and burglar losses to its insureds to recover the amounts paid from defendant fire and burglar alarm companies [*Fireman's Fund Ins. Co. v. Morse Signal Devices (1984) 151 Cal. App. 3d 681, 687-688, 198 Cal. Rptr. 756*]. Each of the defendants had contracted with plaintiff's insureds to maintain burglar or fire alarm systems; the systems failed to function, either because of mechanical failure or because of the failure of defendants' personnel to notify police or fire departments on receiving signals from otherwise properly functioning systems. The court denied subrogation on the grounds that (1) plaintiff paid what it contracted to pay under its insurance policies; (2) while the defendants may have been negligent in the performance of their contractual duties to plaintiff's insureds, their breach of duty did not create the harm; (3) the primary cause of each insured's loss was the creator of the fire or the burglar and that defendants' negligence was secondary to creation of the perils; (4) the insureds were in the best position to place a value on the contents of their premises (and hence to secure insurance in a proper amount); and (5) the insurance company, which charges its premiums based on the extent of insurance coverage, was in the best position to spread the risks assumed. That is, the court held that the insurer did not have a superior equity permitting it to recover from defendants [*Fireman's Fund Ins. Co. v. Morse Signal Devices (1984) 151 Cal. App. 3d 681, 687-688, 198 Cal. Rptr. 756*].

The court of appeal has held that the nature of the underlying cause of action is a relevant factor in balancing the respective equities of the parties [*State Farm Gen. Ins. Co. v. Wells Fargo Bank, N.A. (2006) 143 Cal. App. 4th 1098, 1109 n.8, 49 Cal. Rptr. 3d 785]* . In that case, the tenant of an apartment building caused a fire by careless disposal of hot ashes into a plastic trash can, which was the only waste container provided to him. A bank was the executor of the estate that owned the apartment complex, the executor contracted with a property management company, and the management company contracted with a waste management company to service the complex. The insurer that paid out

$2 million in claims arising from damage to adjacent condominiums sought subrogation from the estate, the executor, the property management company, and the waste management company. The trial court granted the defendants' motion for summary judgment. The court of appeal reversed, holding that the defendants were not entitled to judgment as a matter of law, based on the doctrine of superior equities. The court noted that the gravamen of the insurer's subrogation claim was that the defendants negligently permitted a fire to occur and to spread to its insureds' property; and that it would be inequitable to bar the insurer from pursuing its claim solely because the defendants did not place the ignition source in the trash can. The court held that the contest was between an innocent insurance company (which admittedly received premiums for the very loss that occurred) and alleged tortfeasors (who did not physically start the fire, but whose negligence allegedly permitted the fire to be started and to spread by failing to provide for the safe disposal of fireplace ashes) [*State Farm Gen. Ins. Co. v. Wells Fargo Bank, N.A. (2006) 143 Cal. App. 4th 1098, 1117-1119, 49 Cal. Rptr. 3d 785* (remanding case for determination of merits of negligence claim)].

Although the court of appeal questioned the continued vitality of the superior-equities rule, it held that the law in California is that the doctrine of superior equities applies in all cases of subrogation, and therefore the trial court properly applied the doctrine and required the subrogating insurer to establish its superior equity in seeking recovery against the defendants. However, in comparing the relative positions of the parties, a court is required to determine who ultimately ought to bear the loss; and there is no facile formula for determining superiority of equities. If third parties are involved to various degrees of responsibility, courts balance the equities by looking for the party who, in good conscience, ultimately ought to bear the loss. If a third party dealing with a direct wrongdoer is in a better position to avoid the loss, the insurer is said to have superior equities [*State Farm Gen. Ins. Co. v. Wells Fargo Bank, N.A. (2006) 143 Cal. App. 4th 1098, 1110-1114, 49 Cal. Rptr. 3d 785]* . In this case, there was no contractual relationship between the insureds and the defendants. Instead, the insurer's subrogation claim was premised on a tort claim--that the defendants' negligence permitted a fire to occur and spread. The court of appeal held that if the third party is an indirect cause of the loss, because it contributed to or permitted the loss, the court must differentiate between primary and secondary causes of loss to determine whether the third party was in a better position to avoid the loss. The mere fact that the defendants did not start the fire does not automatically mean that they have a superior equitable position over the insurer. A significant factor in weighing the equities is whether a defendant's negligent acts were related to or contributed to the primary cause of loss. The court of appeal concluded that the issue in this case was whether the defendants were in a better position to avoid the loss than the insurer or its insureds. Although arguably an insurer should in fairness bear the loss if the third party's liability is solely contractual, such a result is unfair if the loss has been caused by the third party's tortious conduct [*State Farm Gen. Ins. Co. v. Wells Fargo Bank, N.A. (2006) 143 Cal. App. 4th 1098, 1117-1118, 49 Cal. Rptr. 3d 785* (remanding case for determination of merits of negligence claim)].

[3] Circumstances Establishing Superior Equity

The language of the California cases has not been entirely consistent in defining the circumstances in which a surety has a superior equity which permits recovery [*Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc. (1978) 83 Cal. App. 3d 593, 603, 148 Cal. Rptr. 57*]. To illustrate, the court in *Continental* discussed the following three cases: *Meyers v. Bank of Am. Nat'l Trust & Sav. Ass'n (1938) 11 Cal. 2d 92, 98-102, 77 P.2d 1084* ; *Commercial Standard Ins. Co. v. Bank of Am. (1976) 129 Cal. Rptr. 91* ; and *Hartford Accident & Indem. Co. v. Bank of Am. (1963) 220 Cal. App. 2d 545, 34 Cal. Rptr. 23* . In the first of these cases (*Meyers*), the California Supreme Court held that the surety's equity does not become superior to that of the person (a bank that paid checks forged by an employee of the surety's insured) against whom subrogation is asserted merely because that person is guilty of ordinary negligence, but that the person against whom subrogation is sought must have participated in the wrongful act of the primary wrongdoer, be guilty of "culpable negligence," or have notice of the wrongdoing prior to payment. In the second case (*Commercial Standard*), an allegation that a bank had been negligent in disbursing loan proceeds contrary to its obligation to inspect was held by the court of appeal to be sufficient to withstand a general demurrer where the bank was sued by a surety as subrogee of a property owner's rights against a defaulting contractor whose obligation was insured by the surety. In the third case (*Hartford*), the court of appeal, dealing with a nonsuit, held that the superior equities rule did not, as a matter of law, bar subrogated recovery by a surety which had issued a fidelity bond covering

an employee who forged his employer's check where the bank paying the check negligently departed from banking custom and its own rules in not confirming the check's validity.

The apparent discrepancy in the language of the cases is nevertheless explainable and the rule may be stated as follows: fault of the third person which creates the superior equity in the surety suing in subrogation must be related to the "primary cause" of the loss. It is only when the person dealing with the wrongdoer is in a better position than the insured or the surety to avoid the loss that the surety has the superior equity permitting it to recover as subrogee [*Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc. (1978) 83 Cal. App. 3d 593, 603-604, 148 Cal. Rptr. 57*].

Thus, in the case of the check forged by a bonded employee (*Meyers*), the primary cause of the loss was the conduct of the dishonest employee. The action of the bank in paying the check was secondary. Absent some negligent conduct of a character which promotes or encourages the employee's fraud, the bank was not in a better position to avoid the loss than was the insured's employer. In the case of the bank negligently disbursing proceeds of a construction loan (*Commercial Standard*), the action of the bank was related to the primary cause of the loss because the bank undertook a contractual duty to inspect before disbursement, placing itself in a superior position to avoid loss from a false claim to a sum disbursed. In the case of a bank grossly departing from its own and generally accepted practices (*Hartford*), the trier of fact could find that the departure was the primary cause and that the bank failed to avoid the loss where it was in the best position to do so [*Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc. (1978) 83 Cal. App. 3d 593, 604, 148 Cal. Rptr. 57*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityContracts LawThird PartiesSubrogationContracts LawTypes of ContractsGuaranty ContractsInsurance LawClaims & ContractsSubrogationGeneral Overview

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§ 536.18 Subrogation Actions Against Public Entities

[1] Claims Requirement

Compliance with the claims statutes (*Gov. Code §§ 900-935.6*) is normally mandatory before suit may be filed against a public entity, and except in the case of a defective but substantial compliance with the filing requirement, failure to file a claim is fatal to the cause of action [*Pacific Tel. & Tel. Co. v. County of Riverside (1980) 106 Cal. App. 3d 183, 188, 165 Cal. Rptr. 29*].

Moreover, in a tort action against an insured, a subrogee-insurer's right of action is not independent and separate, but is equal to and limited by the insured's right of action, because the subrogee simply stands in the stead of the original claimant. Therefore, if the insured has filed a cross complaint against a public entity, having already satisfied the requirements of the claims statutes, and a subrogee-insurer that paid the injured party was substituted as intervenor in the insured's cause of action, the subrogee assumes the rights of insured and need not file a separate claim against the public entity [*Smith v. Parks Manor (1987) 197 Cal. App. 3d 872, 881, 243 Cal. Rptr. 256*]. Likewise, in the case of an injured employee suing an alleged third-party tortfeasor, the employee's compliance with the written claim requirements of the Tort Claims Act [*see Gov. Code §§ 911.2, 945.4*] satisfies the employer's compensation carrier's claim filing requirement for the purpose of intervening in the employee's action because the public entity is made aware of the employee's claim by its filing and the carrier's claim is entirely included within the employee's claim [*San Diego Unified Port Dist. v. Superior Court (1988) 197 Cal. App. 3d 843, 846-852, 243 Cal. Rptr. 163*].

For a discussion of the procedure for filing a claim, a procedural checklist, and forms for use in filing or amending a claim, applying for leave to present a late claim, and seeking judicial relief from a failure to have filed a claim, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

In addition, any suit brought against a public entity on a cause of action for which a claim is required to be presented must be commenced within the time limits specified in *Gov. Code § 945.6*. For a discussion of the procedure, a procedural checklist, and forms of pleadings, including allegations of the presentation and rejection of the claim, for use in such actions, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

These rules apply to subrogation actions against public entities founded on a tort liability [*see Commercial Union Assurance Co. v. City of San Jose (1982) 127 Cal. App. 3d 730, 733-735, 179 Cal. Rptr. 814* ; *Pacific Tel. & Tel. Co. v. County of Riverside (1980) 106 Cal. App. 3d 183, 193-194, 165 Cal. Rptr. 29*]. In this connection, it should be noted that the filing of a claim with a public entity by an employer to recover workers' compensation benefits paid on account of the death of its employee [*see Lab. Code § 3852*] does not relieve the widow of the deceased employee from the necessity of filing a claim on her own behalf when she seeks damages from the public entity for wrongful death [*Pacific Tel. & Tel. Co. v. County of Riverside (1980) 106 Cal. App. 3d 183, 188-192, 165 Cal. Rptr. 29* ; *cf. Smith v. Parks Manor (1987) 197 Cal. App. 3d 872, 880-881, 243 Cal. Rptr. 256* (rights of subrogee of cross complainant not controlled by *Pacific Tel. & Tel. Co.* because not based on separate and distinct injury)].

[2] Time in Which Claim Must Be Filed

A claim relating to a cause of action for death or injury to person must be presented not later than six months after the accrual of the cause of action [*Gov. Code § 911.2*]. For the purpose of computing the six-month time limit, the date of accrual is the date on which the cause of action would be deemed to have accrued within the meaning of the statute of limitations that would be applicable in the absence of the claim-filing requirement [*Gov. Code § 901*]. The statute of limitations normally applicable to the underlying action may be altered, however, by another statute specifying a different period of limitations for a particular subrogation action. For example, although the limitations period normally applicable to an action for personal injury or wrongful death is two years (one year, prior to January 1, 2003) [*Code Civ. Proc. § 335.1*; *see* former *Code Civ. Proc. § 340(3)*; Ch. 345, *Limitation of Actions*, § 345.14], *Ins. Code § 11580.2(g)* provides that the insurer paying a claim under an uninsured motorist endorsement or coverage is entitled to be subrogated to the rights of the insured to whom the claim was paid against any person legally liable for such injury or death to the extent that payment was made and that such action may be brought within three years from the date that payment was made. Under this statute, the subrogee's cause of action does not accrue until insurance benefits are paid. Hence, the claim of an insurer, as subrogee, against a county was held to have been timely filed under *Gov. Code § 911.2* because it was presented within 100 days after the insurer had paid the insured under the uninsured motorist coverage, even though the injury giving rise to the claim occurred more than 100 days prior to the date the claim was filed and the insured had filed no claim [*Allstate Ins. Co. v. County of Alameda (1973) 33 Cal. App. 3d 418, 420-423* ; *see People ex rel. Dep't of Transp. v. Superior Court (1980) 26 Cal. 3d 744, 754-755, 163 Cal. Rptr. 585, 608 P.2d 673*].

[3] Equitable Indemnity Actions Distinguished

Actions against public entities based on equitable subrogation are to be distinguished from actions against public entities by tortfeasors seeking equitable indemnity. An action by a tortfeasor for equitable indemnity against a public entity (or any other joint tortfeasor) to recover all or a portion of the amount of any judgment rendered against the tortfeasor in an action by the injured party is separate and distinct from the injured party's action against the tortfeasor. Normally, the time for filing a claim against a public entity does not commence to run until the time the action accrues for statute of limitations purposes [*Gov. Code § 901*]. But an action for equitable or partial equitable indemnity against a public entity accrues on the date on which a defendant is served with the complaint giving rise to the defendant's claim for equitable or partial equitable indemnity against the public entity [*Gov. Code § 901* (in effect repudiating in part the holding of *People ex rel. Dep't of Transp. v. Superior Court (1980) 26 Cal. 3d 744, 747-748, 750-760, 762-763, 163 Cal. Rptr. 585, 608 P.2d 673*); *Smith v. Parks Manor (1987) 197 Cal. App. 3d 872, 880-881, 243 Cal. Rptr. 256*]. For further discussion of equitable indemnity and forms for use in enforcing the right, see Ch. 300, *Indemnity and Contribution* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewInsurance LawClaims & ContractsSubrogationGeneral

OverviewTortsPublic Entity LiabilityLiabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityClaim PresentationTime LimitationsTortsPublic Entity LiabilityLiabilityState Tort Claims ActsRemedies

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§ 536.19 Partial Subrogation

[1] Terminology

There may be situations in which the third party (subrogee) pays the creditor (subrogor) only a portion of the principal debtor's or tortfeasor's (obligor's) obligation. In such event the third party is a partial subrogee and the creditor is a partial subrogor [*see Bank of Orient v. Superior Court (1977) 67 Cal. App. 3d 588, 594, 136 Cal. Rptr. 741*].

[2] Enforcement of Partial Claims

Both the partial subrogee and the partial subrogor have a claim against the obligor and each may sue the obligor [*see Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 43, 162 Cal. Rptr. 238 , superseded by statute on other grounds as stated in Goodman v. Lozano (2010) 47 Cal. 4th 1327, 1336-1338, 104 Cal. Rptr. 3d 219, 223 P.3d 77*]. That is, each has a *right* of action against the obligor [*see Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 41, 47, 162 Cal. Rptr. 238 , superseded by statute on other grounds as stated in Goodman v. Lozano (2010) 47 Cal. 4th 1327, 1336-1338, 104 Cal. Rptr. 3d 219, 223 P.3d 77* ; *Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 953, 151 Cal. Rptr. 695*].

[3] Splitting Cause of Action

[a] Rule Against

Although both the partial subrogee and the partial subrogor have a right of action against the obligor, there is only one cause of action. Hence, they may not (except to the extent that the rule has been modified by a specific statute), over the objection of the obligor, each sue the obligor in a separate action and recover judgment, thereby subjecting the obligor to two actions instead of one; this would constitute an impermissible splitting of the cause of action, which is condemned as subjecting a defendant to vexatious litigation and as a waste of judicial resources [*Wulfjen v. Dolton (1944) 24 Cal. 2d 891, 894-895, 151 P.2d 846*]. This rule applies to subrogated insurers, since the insured and the subrogated insurer are "privies" and the same parties under *Code Civ. Proc. § 1910*, relating to parties concluded by a judgment [*Travelers Indem. Co. v. Ingebretsen (1974) 38 Cal. App. 3d 858, 867-868, 113 Cal. Rptr. 679*].

[b] Raising or Waiving Objection

The splitting of a cause of action is not a jurisdictional defect but rather an affirmative defense that must be pleaded by the defendant or is waived [*Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 43-44, 162 Cal. Rptr. 238 , superseded by statute on other grounds as stated in Goodman v. Lozano (2010) 47 Cal. 4th 1327, 1336-1338, 104 Cal. Rptr. 3d 219, 223 P.3d 77*]. The same is true of the alternative objection that the partial subrogee or partial subrogor has failed to join the other as a party in his or her action against the obligor; the failure is not a jurisdictional defect in the fundamental sense, since it does not deprive the trial court of subject matter jurisdiction [*Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 44-45, 162 Cal. Rptr. 238 , superseded by statute on other grounds as stated in Goodman v. Lozano (2010) 47 Cal. 4th 1327, 1336-1338, 104 Cal. Rptr. 3d 219, 223 P.3d 77*]. The omitted party is not an indispensable party but only what would have been classified as a conditionally necessary party under *Code Civ. Proc. § 389* prior to its 1971 amendment [*Peerless Ins. Co. v. Superior Court (1970) 6 Cal. App. 3d 358, 362, 85 Cal. Rptr. 679*]. Hence, the objection of nonjoinder is waived if not timely and properly made (usually by demurrer or answer) [*Peerless Ins. Co. v. Superior Court (1970) 6 Cal. App. 3d 358, 361, 85 Cal. Rptr. 679*]. A fortiori, the objection may not be raised for the first time on appeal from the judgment [*Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 44-45, 162 Cal. Rptr. 238 , superseded by statute on other grounds as stated in Goodman v. Lozano (2010) 47 Cal. 4th 1327, 1336-1338, 104 Cal. Rptr. 3d 219, 223 P.3d 77*].

[c] How to Raise Objection That Action Has Been Split

The defense that the action has been split may be raised by demurrer if the objection appears from the face of the complaint or from matter of which the court must or may take judicial notice, or by answer if the objection does not appear from the face of the complaint [*see Code Civ. Proc. §§ 430.10, 430.30, 431.30(b)(2)*]. The ground of objection is that (1) there is a defect (i.e., nonjoinder) of parties plaintiff [*Code Civ. Proc. § 430.10(d)*], or (2) there is another action pending between the same parties on the same cause of action [*Code Civ. Proc. § 430.10(c)*], or (3) the complaint does not state facts sufficient to constitute a cause of action [*Code Civ. Proc. § 430.10(e)*] since the action is barred by the doctrine of res judicata.

Thus, if the partial subrogee and the partial subrogor each sues the obligor in a separate action, the obligor may plead in either action, or in both actions, that there is a defect of parties plaintiff or move to compel joinder of the omitted party [*see Code Civ. Proc. §§ 389, 430.10(d)*]. Alternatively, the obligor, in the second action, may plead the pendency of the first action in abatement, based on another action pending. If judgment has previously been rendered on the merits in the first action, the obligor in the second action may plead the judgment in the first action in bar, based on res judicata [*Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 41, 162 Cal. Rptr. 238 , superseded by statute on other grounds as stated in Goodman v. Lozano (2010) 47 Cal. 4th 1327, 1336-1338, 104 Cal. Rptr. 3d 219, 223 P.3d 77* ; *Phillips v. Western Pac. R.R. Co. (1971) 22 Cal. App. 3d 441, 444, 99 Cal. Rptr. 451*].

For further discussion and forms of affirmative defenses and demurrers on the above grounds, see Ch. 3, *Abatement of Actions* ; Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* ; and Ch. 491, *Res Judicata* . For discussion and forms for use in moving to secure a separate trial of the affirmative defense, see *Ch. 3, Abatement of Actions, § 3.110* et seq.. For discussion, procedural guides, and forms for use in moving to compel joinder of an omitted party or to intervene in an action, see Ch. 395, *Parties* .

[d] How to Avoid Defense That Action Has Been Split

To avoid the defense that the cause of action has been split (as well as the issue of nonjoinder of a party), both the partial subrogee and partial subrogor should, each to enforce his or her own claim, join together as plaintiffs in a lawsuit against the debtor or tortfeasor. If either the partial subrogee or partial subrogor is unwilling to be joined as a plaintiff in an action by the other, the other may sue the obligor and name the unwilling plaintiff as a defendant in that action, as authorized by *Code Civ. Proc. § 382* [*see Offer v. Superior Court (1924) 194 Cal. 114, 118-119, 228 P. 11* ; *Phillips*

v. Western Pac. R.R. Co. (1971) 22 Cal. App. 3d 441, 443, 99 Cal. Rptr. 451]. If this is done, a cross complaint by the unwilling plaintiff as defendant on his or her partial claim against the codefendant (the principal debtor or tortfeasor), does not constitute, but rather prevents, an impermissible splitting of a cause of action [*Phillips v. Western Pac. R.R. Co. (1971) 22 Cal. App. 3d 441, 445, 99 Cal. Rptr. 451* ; *see Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 42-43, 162 Cal. Rptr. 238 , superseded by statute on other grounds as stated in Goodman v. Lozano (2010) 47 Cal. 4th 1327, 1336-1338, 104 Cal. Rptr. 3d 219, 223 P.3d 77* (explaining court's holding in *Phillips*)].

[e] Prohibition Against Double Liability of Obligor

An adjunct of subrogation is the rule prohibiting double liability or double recovery of damages, a rule of special importance in the prosecutionof subrogation claims because the proration of damages among those who have shared the costs of personal injuries, for example, increases the possibility of duplicate claims for the same loss. Only one totality of recovery of damages for personal injuries is allowed, and only one totality of liability can be imposed on the tortfeasor. Duplicate recovery of damages is barred, and neither double recovery of the same item of loss nor double liability for the same item of injury is permitted [*Board of Admin. v. Glover (1983) 34 Cal. 3d 906, 915, 196 Cal. Rptr. 330, 671 P.2d 834* ; *Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 952, 151 Cal. Rptr. 695*].

The nature of subrogation and its prohibition against double recovery make clear that subrogation involves succession to the rights of others. Rights under subrogation are derivative rights, and succession to another's rights, like water, cannot rise higher than its source [*Board of Admin. v. Glover (1983) 34 Cal. 3d 906, 915, 196 Cal. Rptr. 330, 671 P.2d 834* ; *Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 952, 151 Cal. Rptr. 695*]. Thus, regardless of substitution of parties and subrogation of claimants who have borne portions of the costs of, for example, personal injuries, all claims of third parties for damages for personal injuries to an injured person--including the employer which reimburses for lost earnings, the medical service group which provides medical care, the compensation insurance carrier which reimburses for loss of future earnings, the medical insurer which underwrites future medical care, and the pension fund or retirement association which pays benefits for loss of ability to work--derive from the injured person's claims against the tortfeasor for damages for personal injuries. In their own right these claimants possess no claims of their own against the tortfeasor, for the tortfeasor has committed no wrong against them. It is only because they have carried part of the costs of the injured person's losses that they acquire claims against the tortfeasor as subrogees to the injured person's claims for damages for personal injuries [*Board of Admin. v. Glover (1983) 34 Cal. 3d 906, 915, 196 Cal. Rptr. 330, 671 P.2d 834* ; *Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 952, 151 Cal. Rptr. 695*].

Thus, the obligor cannot be compelled to pay the entire amount of the partial subrogee's claim plus the full amount of the subrogor's claim without credit for the amount of the claim paid to the partial subrogee. Payment made to the partial subrogor by the partial subrogee is not payment from a "collateral source," within the meaning of that term, and to allow the partial subrogor to collect from the obligor the full amount of the claim without an offset for the amount the obligor must pay the partial subrogee would subject the obligor to double liability on the same claim [*Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 46, 162 Cal. Rptr. 238 , superseded by statute on other grounds as stated in Goodman v. Lozano (2010) 47 Cal. 4th 1327, 1336-1338, 104 Cal. Rptr. 3d 219, 223 P.3d 77* ; *Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 951, 151 Cal. Rptr. 695* ; *see Board of Admin. v. Glover (1983) 196 Cal. Rptr. 330, 671 P.2d 834* . For example, if the total amount of an insured's loss from a fire is $100,000, the liability of the torfeasor who caused the fire is $100,000. If the insurer pays the insured the policy limit of $50,000, the tortfeasor is still liable for the full amount of $100,000. $50,000 of this amount would go to reimburse the partial subrogee and the balance would go to the partial subrogor. That is, the tortfeasor would not be liable for the amount of $150,000 ($50,000 to the partial subrogee and $100,000 to the partial subrogor).

This is also true where the obligor has paid the partial subrogor the full amount of its liability. Thus, in the example above, if the tortfeasor-obligor had paid the partial subrogor the full amount of $100,000, the partial subrogee could not

recover its payment of $50,000 from the obligor. The partial subrogee may not, at least where the obligor had no notice of the subrogee's claim, recover the amount of its claim from the obligor, since this would constitute double recovery [*see Board of Admin. v. Glover (1983) 34 Cal. 3d 906, 916, 196 Cal. Rptr. 330, 671 P.2d 834*].

Moreover, a workers' compensation carrier (a partial subrogee) which has paid benefits to an injured employee may assign its lien on any recovery that might be obtained by the injured employee in an action against a third party tortfeasor to the third party tortfeasor and his or her liability carrier, who may then set off the face amount of the lien against any recovery by the injured employee, even though the lien was assigned for less than its face value [*Quinn v. Warnes (1983) 144 Cal. App. 3d 309, 317, 192 Cal. Rptr. 660*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewCivil ProcedureParties JoinderCompulsory JoinderCivil ProcedureParties JoinderNecessary PartiesCivil ProcedureRemediesGeneral OverviewGovernmentsLegislationStatutory Remedies & Rights

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§ 536.20 Statutes of Limitations

A few statutes relating to subrogation by particular parties expressly provide a longer period of limitations on the subrogated action than that normally applicable to the subrogor's cause of action. For example, *Gov. Code § 21455*, relating to a subrogation action by the Board of Administration on behalf of California's Public Employees' Retirement System against a tortfeasor for injury to or death of a member-employee to recover the authorized portion of benefits paid, requires that the subrogated action be commenced within three years after the liability of the system to pay benefits is fixed. (For the respective obligations of the system, an injured member-employee, and an alleged third party tortfeasor within the context of a personal injury settlement between the tortfeasor and the member-employee and a reimbursement claim by the system against the tortfeasor for disability retirement benefits paid to the member-employee, see *Board of Admin. v. Glover (1983) 34 Cal. 3d 906, 909-919, 196 Cal. Rptr. 330, 671 P.2d 834* .) A similar provision applies to subrogation actions by county retirement associations to recover the authorized portion of benefits paid for injury to or death of an employee [*Gov. Code § 31823*]. Another example is *Ins. Code § 11580.2(g)*, relating to a subrogation action by an insurerto recover the amount it paid in settlement of a claim under the uninsured motorist endorsement in a motor vehicle policy, which requires that the subrogated action be brought within three years from the date payment was made [*see Liberty Mut. Ins. Co. v. Fales (1973) 8 Cal. 3d 712, 716, 106 Cal. Rptr. 21, 505 P.2d 213* ; *Commercial Union Assurance Co. v. City of San Jose (1982) 127 Cal. App. 3d 730, 735-736, 179 Cal. Rptr. 814*]. The purpose of these extended periods of limitation is to protect the subrogation rights of the subrogee when the statute of limitations on the subrogor's cause of action might expire before the subrogee's cause of action arises; but in any such action the subrogee may not rely on the statute of limitations applicable to the subrogor's action to cut off the obligor's right to seek affirmative relief by a cross claim [*Liberty Mut. Ins. Co. v. Fales (1973) 8 Cal. 3d 712, 716-717, 106 Cal. Rptr. 21* (construction of *Ins. Code § 11580.2(g)*)].

Except as otherwise expressly provided by statute, a subrogation action is subject to the same statute of limitations that applies to the subrogor's action against the obligor and commences to run at the same time [*see, e.g., Employers Ins. of Wausau v. Granite State Ins. Co. (9th Cir. 2003) 330 F.3d 1214, 1218* (insurer entitled to same limitations period as insured bringing suit on own behalf; applying four-year limitations period); *Commercial Union Assurance Co. v. City of San Jose (1982) 127 Cal. App. 3d 730, 734, 179 Cal. Rptr. 814* ; *Iusi v. City Title Ins. Co. (1963) 213 Cal. App. 2d 582, 588, 28 Cal. Rptr. 893* ; *Automobile Ins. Co. v. Union Oil Co. (1948) 85 Cal. App. 2d 302, 304-305, 193 P.2d 48*]. For example, if the subrogor's action arises out of injury to real property or to goods or chattels, the action is, unless

otherwise expressly provided by statute, governed by *Code Civ. Proc. § 338(b)* or *(c)* and, under this statute, must be commenced against the tortfeasor within three years [*Automobile Ins. Co. v. Union Oil Co. (1948) 85 Cal. App. 2d 302, 306-307, 193 P.2d 48*]. By the same token, if the subrogor's action arises from a personal injury as the result of a wrongful act, the action is, unless otherwise expressly provided by statute, governed by *Code Civ. Proc. § 335.1* and, under that statute, must be commenced against the tortfeasor within two years (one year, prior to January 1, 2003) [*see Code Civ. Proc. § 335.1*; *County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 869, 871-886, 140 Cal. Rptr. 638, 568 P.2d 363* ; *Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 947-955, 151 Cal. Rptr. 695* ; *see also* former *Code Civ. Proc. § 340(3)*; Ch. 345, *Limitation of Actions*, § 345.14].

Thus, in a subrogation action under *Lab. Code § 3852* by an employer against a tortfeasor to recover a sum equivalent to the benefits that the employer was required to provide the employee under the Workers' Compensation Law, the Supreme Court pointed out that since 1953 California courts have consistently held that former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 335.1*), the statute of limitations that governs actions for injury caused by the wrongful act or neglect of another, governs an employer's action against a third party, just as it would govern an employee's suit against the third party, and that, under these decisions, an employer has one year from the date of the employee's injury in which to bring an action against the third party [*County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 868-869, 140 Cal. Rptr. 638, 568 P.2d 363* ; *see Board of Admin. v. Glover (1983) 34 Cal. 3d 906, 911-912, 196 Cal. Rptr. 330, 671 P.2d 834* ; *Jordan v. Superior Court (1981) 116 Cal. App. 3d 202, 206, 172 Cal. Rptr. 30*].

For the statute of limitations applicable to an action by an employer for indemnity against a third party tortfeasor to recover money paid for personal injuries to its employee under the Federal Employers' Liability Act (*45 U.S.C. §§ 51-60*), which, unlike California's Workers' Compensation Act, has no provisions subrogating the employer to the employee's rights against a third party, see *Southern Pac. Transp. Co. v. Ohbayashi Am. Corp. (1983) 147 Cal. App. 3d 233, 236-238, 195 Cal. Rptr. 63* . For discussion of the Federal Employers' Liability Act, see Ch. 522, *Ships and Shipping* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLegislationStatutory Remedies & RightsInsurance LawMotor Vehicle InsuranceCoverageUninsured MotoristsSubrogationPensions & Benefits LawGovernmental EmployeesGeneral Overview

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§ 536.21 Defenses Generally

Except as noted under § 536.20, a subrogee is subject to any defenses the obligor has against the subrogor [*Breese v. Price (1981) 29 Cal. 3d 923, 930-931, 176 Cal. Rptr. 791, 633 P.2d 987* ; *Commercial Union Assurance Co. v. City of San Jose (1982) 127 Cal. App. 3d 730, 733, 179 Cal. Rptr. 814* ; *Iusi v. City Title Ins. Co. (1963) 213 Cal. App. 2d 582, 588, 28 Cal. Rptr. 893*]. In addition, the obligor may raise any defenses he or she has against the subrogee--for example, that the subrogee's payment was voluntary [*see § 536.120*], that the subrogee's action is barred by the statute of limitations [*see § 536.122*], or that the obligor has a money claim against the plaintiff that may be set off against the plaintiff's claim against the obligor [*see § 536.123*]. An insured sued by its own insurer in a subrogation action may raise the affirmative defense that an insurer is barred from suing a third party that it has also insured under a separate policy [*National Union Fire Ins. v. Engineering-Sci. (9th Cir. 1989) 884 F.2d 1208, 1210* ; *see* § 536.124].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 536.22 Effect of Release on Subrogation Rights

The general rule is that execution of a valid release extinguishes any subrogation rights against the released party. For example, in the insurance context, when an insured has released a third party, neither the insured nor the subrogated insurer thereafter has any right to recover from the third party [*Fireman's Fund Ins. Co. v. Maryland Cas. Co. (1994) 21 Cal. App. 4th 1586, 1597, 26 Cal. Rptr. 2d 762*]. This rule derives from the principle that since the subrogated insurer stands in the shoes of its insured, it has no greater rights against the third party than the insuredhad [*Fireman's Fund Ins. Co. v. Maryland Cas. Co. (1994) 21 Cal. App. 4th 1586, 1597, 26 Cal. Rptr. 2d 762* ; *Continental Mfg. Corp. v. Underwriters at Lloyds London (1960) 185 Cal. App. 2d 545, 556, 8 Cal. Rptr. 276*].

It appears that there is a significant exception to this rule, however. When a tortfeasor obtains a release from the insured with knowledge that the insured already has been indemnified by the insurer, the courts have stated that the release does not bar the insurer's subrogation right [*Conservatorship of Edwards (1988) 198 Cal. App. 3d 1176, 1184, 244 Cal. Rptr. 330* ; *see also Board of Admin. v. Glover (1983) 34 Cal. 3d 906, 916, 196 Cal. Rptr. 330, 671 P.2d 834* ; *Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 952, 957, 151 Cal. Rptr. 695*]. However, while courts readily recognize the existence of this exception, it has been applied infrequently, if at all, in the reported cases [*see California Insurance Law & Practice, Ch. 35, § 35.11[5][b]* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureRemediesGeneral OverviewGovernmentsLegislationStatutory Remedies & RightsInsurance LawClaims & ContractsSubrogationGeneral OverviewTortsProcedureSettlementsReleasesGeneral Overview

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 536 SUBROGATION
PART II LEGAL BACKGROUND

47-536 California Forms of Pleading and Practice--Annotated § 536.23

§ 536.23 Doctrine of Comparative Negligence

The doctrine of comparative negligence applies to the action of a subrogee against the obligor [*Breese v. Price (1981) 29 Cal. 3d 923, 930, 176 Cal. Rptr. 791, 633 P.2d 987* ; *see § 536.121*]. For example, if a fire caused $100,000 worth of damage to insured property, the insurer, on paying the insured $100,000, would be subrogated to the rights of the insured against the person whose negligence caused the fire [*see Ins. Code § 2071*]. If, in that action, the trier of fact concluded that the defendant was only 60 percent at fault and the insured was 40 percent at fault, the $100,000 recovery would be reduced 40 percent--that is, the insurer would recover judgment for only $60,000 on its subrogated claim.

As another example, if an employee were injured by a third-party tortfeasor and the employer's compensation insurer paid benefits as a result of the injury, either the employee or the employer (or the employer's insurer) could sue the third-party tortfeasor, or they could join in an action against the tortfeasor, or one could intervene in the other's action against the tortfeasor, or, if the employee alone sued, the employer's insurer could secure a lien on any judgment recovered [*see Lab. Code §§ 3852-3856*; *County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 872-873, 140 Cal. Rptr. 638, 568 P.2d 363*]. Suppose that, in an action by the employee and the employer's insurer, the jury awards the injured plaintiff-employee total damages in the sum of $550,000 and it finds the tortfeasor was 22 percent negligent, the employee 78 percent negligent, and the employer zero percent negligent. Suppose further that the employer's insurer paid benefits in the sum of $52,423. In this case, the total damages awarded would be reduced by the amount of $429,000 (78 percent attributable to the employee), leaving a difference of $121,000 as the total amount to be paid by defendant tortfeasor. Of this amount, the employer's insurer would recover $52,423, which, subtracted from $121,000, leaves $68,577, which would be the employee's net recovery [*see Jarvis v. Southern Pac. Transp. Co. (1983) 142 Cal. App. 3d 246, 259, 191 Cal. Rptr. 29*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesGeneral OverviewGovernmentsLegislationStatutory Remedies & RightsInsurance LawClaims & ContractsSubrogationGeneral OverviewTortsNegligenceDefensesComparative NegligenceGeneral Overview

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[Reserved]

§§ 536.24[Reserved]

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47-536 California Forms of Pleading and Practice--Annotated § 536.40

§ 536.40 Related Matthew Bender Publications

For a memorandum of points and authorities supporting the contention that an omitted partial assignee or subrogee should be joined as a party to the action, see California Points and Authorities, Ch. 168, *Parties*

For additional discussion of subrogation in the insurance context, see *California Insurance Law & Practice, § 35.11*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderCompulsory JoinderCivil ProcedurePartiesJoinderNecessary PartiesInsurance LawClaims & ContractsSubrogationGeneral Overview

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47-536 California Forms of Pleading and Practice--Annotated § 536.41

§ 536.41 State and Federal Statutes

[1] Banks

Formation of national banking associations. *12 U.S.C.S. §§ 21-40*

Person is not liable on instrument unless his or her signature appears thereon. *Com. Code § 3401(a)*

Unauthorized signature on instrument is inoperative and exceptions. *Com. Code § 3404*

Payment of instrument on forged endorsement is conversion. *Com. Code § 3419(1)(c)*

When bank may charge customer's account. *Com. Code § 4401*

When customer is precluded from asserting against bank that his or her signature on item was unauthorized or that item was altered. *Com. Code § 4406*

Subrogation of payor bank on improper payment of item over stop payment order. *Com. Code § 4407*

Formation of banking corporation. *Fin. Code §§ 350-407*

[2] California Insurance Guarantee Association

Subrogation of California Insurance Guarantee Association with respect to payment or discharge of covered claims. *Ins. Code § 1063.2*

[3] Classes of Insurance

Classes of insurance. *Ins. Code §§ 100-123*

Fire insurance. *Ins. Code §§ 100(2), 102*

Surety insurance. *Ins. Code §§ 100(5), 105*

Liability insurance. *Ins. Code §§ 100(8), 108, 108.1, 122*

Miscellaneous insurance. *Ins. Code §§ 100(20), 120*

[4] County Retirement Association

Subrogation of county retirement association to recover from tortfeasors portion of benefits payable for injury or death of covered member. *Gov. Code §§ 31820-31823*

[5] Damages

Interest on damages. *Civ. Code §§ 3287, 3288*

Measure of damages for breach of contract. *Civ. Code §§ 3300, 3302*

Measure of damages for liability not arising from contract. *Civ. Code § 3333*

Prohibition against stating amount of damages in superior court action for personal injuries or wrongful death. *Code Civ. Proc. § 425.10(b)*

[6] Defenses

Answer must contain statement of any new matter constituting defense. *Code Civ. Proc. § 431.30(b)(2)*

Defenses must be separately stated and refer to causes of action that they are intended to answer. *Code Civ. Proc. § 431.30(g)*

[7] Definitions

"Insurance" defined. *Ins. Code § 22*

"Insurer" and "insured" defined. *Ins. Code § 23*

[8] Director of Corporation

Subrogation of director of corporation liable to corporation under *Corp. Code § 316*, relating to illegal distributions to shareholders, loans, or guaranties, to rights of corporation against shareholders who received distribution or person who received illegal loan or guaranty. *Corp. Code § 316(f)*

[9] Indemnity

Indemnity. *Civ. Code §§ 2772-2784.5*

[10] Insurers

Subrogation of marine insurer to insured's right of contribution. *Ins. Code § 1996*

Subrogation of fire insurer to insured's right of recovery against person who caused loss. *Ins. Code § 2071*

Subrogation of insurer to right of insured against uninsured motorist to extent of insurer's payment of claim under uninsured motorist coverage; action is required to be commenced within three years from date payment is made. *Ins. Code §§ 11580.2(g)*; *see also Ins. Code § 11580.26*

[11] Person Liable to Secured Party

Secondary obligor acquires rights of, and becomes obligated to perform duties of, secured party after secondary obligor becomes subrogated to rights of secured party with respect to collateral. *Com. Code § 9618(a)(3)*

[12] Public Employees' Retirement System

Subrogation of Board of Administration of state's Public Employees' Retirement System to recover from tortfeasor portion of benefits payable for injury or death of covered member. *Gov. Code §§ 21450-21456*

[13] Real Estate Commissioner

Subrogation of Real Estate Commissioner to rights of judgment creditor for payments made from Real Estate Fund for education, research, and recovery. *Bus. & Prof. Code § 10479*

[14] Redeemer of Property

Duty of owner of life estate to pay taxes and other annual charges. *Civ. Code § 840*

Person who redeems property in which he or she has interest from lien is subrogated to all benefits of lien as against all owners of other interests in property, except insofar as he or she was bound to make such redemption for their benefit. *Civ. Code § 2903*

Junior lienor has right to redeem property in same manner that owner might from superior lien and to be subrogated to benefits of superior lien when necessary for protection of his or her interests, on satisfying claim so secured. *Civ. Code § 2904*

Manner of redeeming from lien. *Civ. Code § 2905*

[15] Remedies

Right to recover money by judicial proceeding arising out of violation of right of property or an obligation is assignable by owner. *Civ. Code §§ 953, 954*

[16] Source of Collateral Benefits

Source of collateral benefits which have been introduced by defendant on issue of damages in personal injury action against health care provider pursuant to *Civ. Code § 3333.1(a)* is not subrogated to rights of plaintiff against defendant. *Civ. Code § 3333.1(b)*

[17] Standard Forms

Standard form fire insurance policy. *Ins. Code § 2071*

[18] State Bar

State Bar subrogated to rights of person compensated from Client Security Fund for dishonest conduct of State Bar member. *Bus. & Prof. Code § 6140.5(b)*

[19] State Compensation Insurance Fund

Subrogation of State Compensation Insurance Fund to rights of state agencies. *Ins. Code § 11871*

[20] State of California

Subrogation of State of California to rights of victims of crime to whom cash payments are granted under law governing aid to victims (*Gov. Code §§ 13970-13974*), to extent of payments granted. *Gov. Code § 13966.01*

[21] State Teachers' Retirement System

Subrogation of State Teachers' Retirement System to recover from tortfeasor for amounts paid as disability or family allowance for injury or death of covered member. *Educ. Code §§ 24500-24505*

[22] Statutes of Limitations

Pleading bar of statute of limitations. *Code Civ. Proc. § 458*

Court permitted on motion of party or its own motion to order separate trial of defense that action is barred by statute of limitations. *Code Civ. Proc. § 597*

[23] Surety

Suretyship. *Civ. Code §§ 2787-2855*

Construction of surety contracts. *Civ. Code § 2837*

Surety entitled to require creditor, subject to *Code Civ. Proc. § 996.440* (motions to enforce liability on bond given in action or proceeding), to proceed against principal or to pursue any other remedy in creditor's power that surety cannot pursue and that would lighten surety's burden. *Civ. Code § 2845*

Liability of principal to reimburse surety that satisfies principal obligation. *Civ. Code § 2847*

Subrogation of surety to creditor's right against principal to extent of payment made on principal's obligation and surety's right to contribution from co-sureties. *Civ. Code §§ 2848*

Surety's right to benefit of security for principal's performance held by creditor or by co-surety. *Civ. Code § 2849*

[24] Vehicle Owner

Subrogation of owner of vehicle, owner's bailee, or decedent's personal representative to rights of person injured or whose property has been injured against negligent operator to extent of judgment recovered against owner, bailee, or personal representative. *Veh. Code § 17153*

Both bailee of vehicle and operator as deemed operators within meaning of *Veh. Code § 17153* when bailee permitted operator to operate owner's motor vehicle. *Veh. Code § 17154*

[25] Vessel Owner

Subrogation of vessel owner to rights of person injured or whose property has been injured against vessel operator to extent of judgment and costs recovered against owner. *Harb. & Nav. Code § 661(d)*

[26] Waiver or Release

Extinction of obligations by release. *Civ. Code § 1541*

Scope of release and effect on unknown claims. Code Cov. Proc. § 1542

[27] Workers' Compensation Insurer

Subrogation of workers' compensation insurer to rights of employer to recover losses paid. *Ins. Code § 11662*

Subrogation of employer or employer's insurer against tortfeasor for payments made under Workers' Compensation Law. *Lab. Code §§ 3850-3864*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawGeneral OverviewCivil ProcedureRemediesGeneral OverviewCivil ProcedureRemediesDamagesGeneral OverviewContracts LawThird PartiesSubrogationContracts LawTypes of ContractsGuaranty ContractsGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutory Remedies & RightsInsurance LawGeneral OverviewInsurance LawClaims & ContractsSubrogationGeneral OverviewWorkers' Compensation & SSDIThird Party ActionsSubrogation

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47-536 California Forms of Pleading and Practice--Annotated § 536.42

§ 536.42 Decisions

[1] Application of Equitable Principles

Equitable subrogation enables one who pays, otherwise than as volunteer, an obligation for which another is primarily liable, to be given by equity the protection of any lien or other security for payment of debt to creditor, and to enforce security against principal debtor or collect obligation from debtor. *In re Deuel (9th Cir. 2010) 594 F.3d 1073, 1079*

In application of maxim of jurisprudence that he or she who seeks equity must do equity, court does not create substantive rights under guise of doing equity; that is, court does not confer rights if one who invokes maxim has none. *Stein v. Simpson (1951) 37 Cal. 2d 79, 82-83, 230 P.2d 816* (denying subrogation to junior lienholder who without obligation to do so paid senior lienholder pursuant to fraudulent scheme to deprive owners of their property)

Right to subrogation is governed by equitable principles. *Meyers v. Bank of Am. Nat'l Trust & Sav. Ass'n (1938) 11 Cal. 2d 92, 96-97, 77 P.2d 1084* ; *Liberty Mut. Fire Ins. Co. v. Auto Spring Supply Co. (1976) 59 Cal. App. 3d 860, 865, 131 Cal. Rptr. 211*

While *Civ. Code § 2848* provides that surety, on satisfying obligation of his or her principal, is entitled to be subrogated to that extent to all remedies which creditor has against principal, question whether obligation which is satisfied is in fact obligation of the particular principal is to be decided in accordance with rules of law and principles of equity. *Painter v. Berglund (1939) 31 Cal. App. 2d 63, 67, 87 P.2d 360*

[2] Assignment, Subrogation, and Reimbursement Compared

Assignment and subrogation distinguished. *Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 638-640, 7 Cal. Rptr. 377, 354 P.2d 1073*

Cause of action for personal injuries is nonassignable and, in absence of statutory authority, is not subject to subrogation. *Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 639, 7 Cal. Rptr. 377, 354 P.2d 1073* ; *Lee v. State*

Farm Mut. Auto. Ins. Co. (1976) 57 Cal. App. 3d 458, 465, 129 Cal. Rptr. 271 ; *Peller v. Liberty Mut. Fire Ins. Co. (1963) 220 Cal. App. 2d 610, 612, 34 Cal. Rptr. 41*

Rights accruing to party entitled to be subrogated to claim of another do not differ from those that would be conferred by assignment of same claim. *Meyers v. Bank of Am. Nat'l Trust & Sav. Ass'n (1938) 11 Cal. 2d 92, 94-95, 77 P.2d 1084* ; *Snider v. Basinger (1976) 61 Cal. App. 3d 819, 824, 132 Cal. Rptr. 637*

Formal written assignment adds nothing to enforceability by assignee of cause of action. *Meyers v. Bank of Am. Nat'l Trust & Sav. Ass'n (1938) 11 Cal. 2d 92, 94, 77 P.2d 1084* ; *Federal Ins. Co. v. Allen (1970) 13 Cal. App. 3d 648, 650, 92 Cal. Rptr. 125*

California law prohibits assignment of legal malpractice claims, and nonassignable claims generally are not subject to subrogation absent statutory authorization; thus liability insurer that pays claim against its insured that resulted from negligence of insured's attorneys has no subrogation rights with respect to insured's legal malpractice claim against attorneys. *Fireman's Fund Ins. Co. v. McDonald, Hecht & Solberg (1994) 30 Cal. App. 4th 1373, 1387, 36 Cal. Rptr. 2d 424*

Subrogation right assignable. *Bush v. Superior Court (1992) 10 Cal. App. 4th 1374, 1381, 13 Cal. Rptr. 2d 382*

Subrogation operates as equitable assignment. *Allianz Ins. Co. v. Municipal Court (1981) 126 Cal. App. 3d 1043, 1046, 179 Cal. Rptr. 334*

Although recorded assignment of note and deed of trust vests in assignee all rights and interests of beneficiary, including authority to exercise any power of sale given beneficiary, equitable subrogee of senior lienholder's right does not have identical rights; for example, equitable subrogee is not able to compel written assignment or to foreclose by nonjudicial process as can assignee of such rights by written instrument. *Strike v. Trans-W. Disc. Corp. (1979) 92 Cal. App. 3d 735, 744, 155 Cal. Rptr. 132*

Party entitled to equitable lien by subrogation acquires all rights that would otherwise be acquired by written assignment; insofar as assignment would entitle party to priority senior to that of junior encumbrancers, party is likewise entitled to same priorty as subrogee. *Snider v. Basinger (1976) 61 Cal. App. 3d 819, 825, 132 Cal. Rptr. 637*

While cause of action to recover damages for personal injuries is not assignable, provisions in insurance contract requiring reimbursement of medical payments under label of subrogation, but providing only access to proceeds of settlement or judgment resulting from exercise of rights of recovery by injured person, were valid and enforceable. *Lee v. State Farm Mut. Auto. Ins. Co. (1976) 57 Cal. App. 3d 458, 465-466, 129 Cal. Rptr. 271*

Although assignment of cause of action to recover damages for personal injuries is prohibited by *Code Civ. Proc. § 377.20 et seq.* (relating to survivability of actions), as well as at common law, agreement to reimburse insurer in event of recovery of such damages by insured from third party tortfeasor by either judgment or settlement is valid. *West v. State Farm Mut. Auto. Ins. Co. (1973) 30 Cal. App. 3d 562, 565, 106 Cal. Rptr. 486*

[3] Compliance with Claims Statutes in Actions Against Public Entities

Absent special considerations, insurer's right to recover on insured's cause of action against alleged tortfeasor (city) for damages to insured's property is barred when statutory period under *Gov. Code § 945.6(a)* ran on insured's claim. *Commercial Union Assurance Co. v. City of San Jose (1982) 127 Cal. App. 3d 730, 735, 179 Cal. Rptr. 814*

Compliance with claims statutes is mandatory to suit against public entity and failure to file claim is fatal to cause of

action. *Pacific Tel. & Tel. Co. v. County of Riverside (1980) 106 Cal. App. 3d 183, 188, 165 Cal. Rptr. 29*

Demurrer to widow's complaint in intervention for wrongful death filed in action against county by employer, which had properly filed claim prior to suit, to recover benefits paid to survivors under workers' compensation law, was properly sustained because widow had failed to comply with claims statutes; claims filing requirement does not abrogate right of joinder granted by *Lab. Code § 3853*, but merely conditions availability of joinder when third party tortfeasor is governmental entity. *Pacific Tel. & Tel. Co. v. County of Riverside (1980) 106 Cal. App. 3d 183, 192-193, 165 Cal. Rptr. 29*

Insurer's claim as subrogee under uninsured motorist coverage (see Gov. Code § 11580.2(g)) against county was timely filed under *Gov. Code § 911.2*, requiring claim for injury to person to be filed within 100 days after accrual of cause of action, when, though injury giving rise to claim occurred more than 100 days prior to filing date and insured had filed no claim, claim was presented within 100 days after insurer had made payment to insured. *Allstate Ins. Co. v. County of Alameda (1973) 33 Cal. App. 3d 418, 420-423, 109 Cal. Rptr. 53* (decided prior to January 1, 1988, amendment extending claim period to six months)

[4] Constitutionality

Legislative classification allowing statutory pension or retirement system to pursue subrogation against third party tortfeasor for disabling injuries to employee-member does not violate *equal protection clauses* of state and federal *Constitutions. Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 946, 151 Cal. Rptr. 695*

Subrogation action by employees' retirement association pursuant to *Gov. Code § 31820* against third party tortfeasor who had caused disabling injuries to employee did not violate constitutional prohibition against impairment of contract [U.S. *Const. art. I, § 10*; *Cal. Const. art. I, § 9*], even though employee had settled her claim against third party and executed general release, where association had not given written consent to general release, as required by *Lab. Code § 3859*, which provision was implicitly incorporated into defendant's general release. *Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 946, 151 Cal. Rptr. 695*

[5] County Retirement Associations

Gov. Code §§ 31820-31822 incorporates employer subrogation provisions of workers compensation law (*Lab. Code §§ 3850-3864*) into statutory scheme for county employees' retirement. *Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 942, 151 Cal. Rptr. 695*

[6] Cross Complaints

In action by insured against insurer on fidelity bond to recover indemnity for loss caused by dishonest employee, insurer's cross complaint for declaratory relief against third party (accounting firm), whose negligence was alleged to have permitted or increased amount of insured's loss, for judgment that third party is liable to insurer if insurer is liable to insured, was proper. *Liberty Mut. Ins. Co. v. Harris, Kerr, Forster & Co. (1970) 10 Cal. App. 3d 1100, 1102-1104, 89 Cal. Rptr. 437*

[7] Defenses

Defendant third party tortfeasor in action by subrogee is entitled to contest both liability and causation of injuries to same extent as if injured subrogor had brought action, and right to contest liability includes right to raise issue of

comparative negligence. *Breese v. Price (1981) 29 Cal. 3d 923, 930, 176 Cal. Rptr. 791, 633 P.2d 987* ; *Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 943, 945, 151 Cal. Rptr. 695*

Under settled principles, insurer, in its role as subrogee, has no greater rights than those possessed by its insured, and its claims are subject to same defenses. *Liberty Mut. Ins. Co. v. Fales (1973) 8 Cal. 3d 712, 717, 106 Cal. Rptr. 21 505 P.2d 213*

Equitable doctrine of subrogation passes to insurer only those rights that assured had; if rights of assured have been limited by lawful contract, rights of insurer are likewise limited. *Rokeby-Johnson v. Aquatronics Int'l, Inc. (1984) 159 Cal. App. 3d 1076, 1086, 206 Cal. Rptr. 232*

Surety subrogated to rights of principal against third person takes rights subject to all defenses that third person had against principal. *Rokeby-Johnson v. Aquatronics Int'l, Inc. (1984) 159 Cal. App. 3d 1076, 1083, 206 Cal. Rptr. 232*

Illustrations of apportionment of damages based on comparative negligence in workers' compensation carrier's subrogated action. *Jarvis v. Southern Pac. Transp. Co. (1983) 142 Cal. App. 3d 246, 258-259, 191 Cal. Rptr. 29*

Defendant third party tortfeasor in subrogated action by insurer is usually permitted to assert all defenses available against insured including statute of limitations. *Commercial Union Assurance Co. v. City of San Jose (1982) 127 Cal. App. 3d 730, 733, 179 Cal. Rptr. 814*

Insurer-subrogee of claim of its insured is subject to same defenses applicable to action by insured on that claim. *Phoenix of Hartford Ins. Cos. v. Colony Kitchens (1976) 57 Cal. App. 3d 140, 144, 128 Cal. Rptr. 893*

Tenant who burns waste in incinerator constructed and maintained in violation of provisions of *Pub. Res. Code § 4446* is negligent as matter of law when unattended fire escapes from incernator and burns landlord's buildings; landlord's insurer, which paid loss, is barred from recovery in subrogation against tenant on ground of landlord's contributory negligence consisting of landlord's having maintained incinerator in violation of law. *Travelers Indem. Co. v. Titus (1968) 265 Cal. App. 2d 515, 517-518, 71 Cal. Rptr. 490*

Subrogee has no greater rights than subrogor and is subject to same defenses. *Iusi v. City Title Ins. Co. (1963) 213 Cal. App. 2d 582, 588, 28 Cal. Rptr. 893*

Any defenses that wrongdoer has against insured are good against insurer in action by insurer as subrogee of insured's claim against wrongdoer. Royal *Indem. Co. v. Security Truck Lines (1963) 212 Cal. App. 2d 61, 66, 27 Cal. Rptr. 858*

Wrongdoer in action against it by insurer as subrogee of its insured is entitled to file counterclaim against insurer on unrelated claim it has against insured. *Royal Indem. Co. v. Security Truck Lines (1963) 212 Cal. App. 2d 61, 66, 27 Cal. Rptr. 858* (former *Code Civ. Proc. §§ 437, 438* (*now see Code Civ. Proc. §§ 428.80, 431.30(c), 431.70*))

[8] Definitions

Subrogation is substitution of one party in place of another with reference to lawful claim, demand, or right; right of subrogation is derivative, acquired by satisfaction of loss or claim that third party has against another. *Hamada v. Far E. Nat'l Bank (9th Cir. 2002) 291 F.3d 645, 649*

Definition, origin, development, and scope of subrogation. *Redington v. Cornwell (1891) 90 Cal. 49, 58, 27 P. 40* ; *Offer v. Superior Court (1924) 194 Cal. 114, 119, 228 P. 11*

Subrogation, a legal fiction, is broadly defined as substitution of one person in place of another with reference to lawful claim or right. *State Bar of Cal. v. Statile (2008) 168 Cal. App. 4th 650, 662, 86 Cal. Rptr. 3d 72*

Subrogation is substitution of another person in place of creditor or claimant to whose rights he or she succeeds in relation to debt or claim. *Morgan Creek Residential v. Kemp (2007) 153 Cal. App. 4th 675, 690, 63 Cal. Rptr. 3d 232* ; *State Farm Gen. Ins. Co. v. Wells Fargo Bank, N.A. (2006) 143 Cal. App. 4th 1098, 1105, 49 Cal. Rptr. 3d 785* ; *Gulf Ins. Co. v. TIG Ins. Co. (2001) 86 Cal. App. 4th 422, 430-431, 103 Cal. Rptr. 2d 305*

Subrogation defined. *Bush v. Superior Court (1992) 10 Cal. App. 4th 1374, 1381, 13 Cal. Rptr. 2d 382*

[9] Doctrine of Superior Equities

Subrogation not available when party seeking subrogation was primarily liable on letter of credit; subrogation depends on superiority of equities of party asserting it over equities of one against whom it is sought; defendants, as mere guarantors, bargained for limited exposure. *Morgan Creek Residential v. Kemp (2007) 153 Cal. App. 4th 675, 690-691, 63 Cal. Rptr. 3d 232*

Doctrine of superior equities prevents insurer from recovering against party whose equities are equal or superior to those of insurer; although insurer might have subrogation interest in insured's claim against party that caused loss, it cannot enforce its subrogation rights unless it has equities superior to those of wrongdoer; in California, doctrine of superior equities is critical in determining whether right of subrogation exists. *State Farm Gen. Ins. Co. v. Wells Fargo Bank, N.A. (2006) 143 Cal. App. 4th 1098, 1107-1108, 49 Cal. Rptr. 3d 785*

In subrogation litigation, California follows doctrine of superior equities, which, in action by insurer against third person, requires court to consider negligence of insured and that of third person; burden is on surety to establish its superior equity. *Rokeby-Johnson v. Aquatronics Int'l, Inc. (1984) 159 Cal. App. 3d 1076, 1084, 206 Cal. Rptr. 232*

Insurer which under its policies paid losses resulting from fires and burglaries was unable to recover payments from fire and burglar alarm companies whose alarms failed; surety has superior equity permitting it to recover as subrogee only when person dealing with wrongdoer is in better position to avoid loss than is insured or surety. *Fireman's Fund Ins. Co. v. Morse Signal Devices (1984) 151 Cal. App. 3d 681, 687, 198 Cal. Rptr. 756*

California cases have approved application of doctrine of subrogation to creditor's rights against third persons when surety's equities are superior to those of third party wrongdoer; such surety, on its payment to employer, is subrogated to employer's rights. *Fireman's Fund Ins. Co. v. Security Pac. Nat'l Bank (1978) 85 Cal. App. 3d 797, 805 n. 6, 149 Cal. Rptr. 883*

Doctrine of superior equities explained. *Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc. (1978) 83 Cal. App. 3d 593, 602-604, 148 Cal. Rptr. 57*

California cases have approved application of doctrine of subrogation to creditor's rights against third persons when surety's equities are superior to those of third party wrongdoer. *Commercial Standard Ins. Co. v. Bank of Am. (1976) 57 Cal. App. 3d 241, 247, 129 Cal. Rptr. 91*

Insureds who had recovered judgments against county for earth slippage damage to their homes triggered by county's construction work were unable to defeat subrogation claims of their insurers, which had made payments to them in connection with their losses, on theory that insurers could not have recovered against county on basis of their subrogation rights on ground, among others, that county was innocent party and insurers must prove they have greater "equities" than county; argument is without merit since equities of county, whose actions (whether negligent or not)

caused the damages, were inferior to those of plaintiff insurers. *Travelers Indem. Co. v. Ingebretsen (1974) 38 Cal. App. 3d 858, 863-864, 113 Cal. Rptr. 679*

Subrogation is creation of equity and subject to limitation that it will not be allowed when it will be inequitable to third persons. *Federal Ins. Co. v. Allen (1970) 13 Cal. App. 3d 648, 650, 92 Cal. Rptr. 125*

Surety subrogee is able to recover only if it shows an equity superior to that of defendants. *Federal Ins. Co. v. Allen (1970) 13 Cal. App. 3d 648, 650, 92 Cal. Rptr. 125*

In surety's action arising from its payment of theft claim on employee fidelity bond to recover value of stolen goods from defendants who had purchased them from employee, plaintiff failed to establish superior, or even equal, equity to entitle it to recover when it was shown that defendants had no notice of theft and there were no facts to put them on inquiry, whereas plaintiff had, in effect, vouched for employee's integrity and accepted premium for its agreement to indemnify against employee's defalcations. *Federal Ins. Co. v. Allen (1970) 13 Cal. App. 3d 648, 650, 92 Cal. Rptr. 125*

[10] Double Liability of Obligor Prohibited

Double recovery from or liability of obligor by reason of subrogation prohibited when obligor is unaware of subrogee's claim. *Board of Admin. v. Glover (1983) 34 Cal. 3d 906, 915-916, 918-919, 196 Cal. Rptr. 330, 671 P.2d 834* ; *Ventura CountyEmployees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 951-952, 151 Cal. Rptr. 695*

[11] Elements of Subrogation

Equitable assignment or right of subrogation is creature of equity, and is applicable to all cases in which one party involuntarily pays debt for which another is primarily liable and that in equity and good conscience should have been paid by party primarily liable. *Fidelity Nat'l Title Ins. Co. v. Miller (1989) 215 Cal. App. 3d 1163, 1174, 264 Cal. Rptr. 17*

[12] Estoppel

Lender is estopped to recover a deficiency judgment against guarantor when it elects remedy (nonjudicial foreclosure) that cuts off guarantor's subrogation rights against debtor. *Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 46, 71 Cal. Rptr. 64*

Lender that elects nonjudicial foreclosure and thereby cuts off loan guarantor's subrogation rights against debtor is estopped to recover deficiency judgment against guarantor when waiver language in guaranty agreement did not adequately inform guarantor that destruction of guarantor's subrogation rights gives guarantor an estoppel defense against recovery of a deficiency judgment. *Cathay Bank v. Lee (1993) 14 Cal. App. 4th 1533, 1542, 18 Cal. Rptr. 2d 420 , superseded by statute as stated in WRI Opportunity Loans II, LLC v. Cooper (2007) 154 Cal. App. 4th 525, 65 Cal. Rptr. 3d 205*

[13] Indemnity and Subrogation Distinguished

When claim must be filed by tortfeasor to secure equitable indemnity against public entity alleged to be joint tortfeasor. *People ex rel. Dep't of Transp. v. Superior Court (1980) 26 Cal. 3d 744, 747-748, 750-751, 163 Cal. Rptr. 585, 608 P.2d 673* (repudiated in part by 1981 amendment of *Gov. Code § 901*)

Right of subrogation and right of indemnity distinguished. *Associated Indem. Corp. v. Pacific Sw. Airlines (1982) 128 Cal. App. 3d 898, 906, 180 Cal. Rptr. 685*

Lab. Code § 3852 (recovery of benefits paid as workers' compensation from third party tortfeasor in action by employer or by employee for damages for injury) provides action for indemnity when action is to recover from defendant "damages" employer is required to pay to State pursuant to *Lab. Code § 4706.5* when employee dies leaving no dependents. *Associated Indem. Corp. v. Pacific Sw. Airlines (1982) 128 Cal. App. 3d 898, 907, 180 Cal. Rptr. 685*

[14] Insurers

Subrogation lien is not express lien based on agreement, but instead is equitable lien impressed on moneys on ground that they ought to go to insurer. *See Sereboff v. Mid Atl. Med. Servs., Inc. (2006) 547 U.S. 356, 126 S. Ct. 1869, 1877, 164 L. Ed. 2d 612* (ERISA action determining when fiduciary may sue beneficiary for reimbursement of medical expenses paid by ERISA plan; not involving subrogation)

Made-whole rule does not bar automobile insurer from seeking reimbursement for med-pay proceeds that it paid to insured, subject to deduction under common-fund theory for its share of attorney's fees that insured expended to obtain payment from tortfeasor. 21st *Century Ins. Co. v. Superior Court (2009) 47 Cal. 4th 511, 518, 98 Cal. Rptr. 3d 516, 213 P.3d 972* ; see also 21st *Century Ins. Co. v. Superior Court (2009) 47 Cal. 4th 511, 515, 533-535, 98 Cal. Rptr. 3d 516, 213 P.3d 972* (conc. opn. of Werdegar, J.)

If attorney properly sues concurrent counsel for indemnification of malpractice damages, attorney's insurer may be subrogated to attorney's indemnity claim against concurrent counsel. *Musser v. Provencher (2002) 28 Cal. 4th 274, 285-287, 121 Cal. Rptr. 2d 373, 48 P.3d 408*

Under settled principles, insurer in its role as subrogee has no greater rights than those possessed by its insured. *Liberty Mut. Ins. Co. v. Fales (1973) 8 Cal. 3d 712, 717, 106 Cal. Rptr. 21, 505 P.2d 213* ; *State Farm Gen. Ins. Co. v. Wells Fargo Bank, N.A. (2006) 143 Cal. App. 4th 1098, 1106, 49 Cal. Rptr. 3d 785*

Good-faith settlement order does not bar nonsettling tortfeasor from asserting indemnification claim against settling defendants based on express contract; because insurer stands in shoes of its insured, insurer can pursue cause of action against settling tortfeasor for breach of express contractual indemnification clause. *Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co. (2010) 182 Cal. App. 4th 23, 32-33, 105 Cal. Rptr. 3d 606*

In case involving contractor and subcontractors, in which injured party was employed by one subcontractor and injured by other subcontractor, insurer had right of equitable subrogation against second subcontractor as settling tortfeasor; only first subcontractor indemnified contractor although both were obligated to do so; elements of subrogation are met by following: (1) insured general contractor suffered loss for which defendant is liable; (2) loss was one for which insurer was not primarily liable; (3) insurer compensated insured for loss; (4) insured has cause of action against defendant; (5) insurer suffered damages arising from defendant's act or omission; and (5) insurer's equitable position is superior to defendant's. *Interstate Fire & Cas. Ins. Co. v. Cleveland Wrecking Co. (2010) 182 Cal. App. 4th 23, 34-49, 105 Cal. Rptr. 3d 606*

Claim by insurer or claim by right of subrogation is not "covered claim" under California Insurance Guarantee Association (CIGA); under *Ins. Code § 1063.1(c),* CIGA is required to pay only "covered claims," excluding claims for subrogation and claims covered by any other insurance; CIGA has no duty to reimburse solvent workers' compensation carrier for benefits paid to injured employee. *Baur v. Workers' Compensation Appeals Board (2009) 176 Cal. App. 4th 1260, 1266, 98 Cal. Rptr. 3d 493*

In insurance context, equitable subrogation doctrine permits paying insurer to be placed in shoes of insured and to pursue recovery from third parties responsible to insured for loss for which insurer was liable and paid; because subrogation rights are purely derivative, insurer cannot acquire anything by subrogation to which insured has no right and can claim no right that insured does not have. *Great American Ins. Cos. v. Gordon Trucking, Inc. (2008) 165 Cal. App. 4th 445, 451, 81 Cal. Rptr. 3d 65*

Because insurer is subject to same defenses as insured, statute of limitations on insurer's cause of action runs from date of accrual of its insured's cause of action. *Great American Ins. Cos. v. Gordon Trucking, Inc. (2008) 165 Cal. App. 4th 445, 451, 81 Cal. Rptr. 3d 65*

When insured has released third party, subrogated insurer's claims are also released. *Great American Ins. Cos. v. Gordon Trucking, Inc. (2008) 165 Cal. App. 4th 445, 452, 81 Cal. Rptr. 3d 65*

In insurance context, equitable subrogation generally involves the substitution of insurer in position of its insured to seek reimbursement from responsible third parties for loss paid to insured by insurer. *Crowley Maritime Corp. v. Boston Old Colony Ins. Co. (2008) 158 Cal. App. 4th 1061, 70 Cal. Rptr. 3d 605, 2008 Cal. App. LEXIS 36* , p.7 (involving equitable contribution, not subrogation)

Insurer does not have standing to recover insured's unpaid deductible in subrogation suit; under general law of subrogation, insurer has right to sue only for its subrogated loss, i.e., what it paid its insured. *Pacific Gas & Elec. Co. v. Superior Court (2006) 144 Cal. App. 4th 19, 23-24, 50 Cal. Rptr. 3d 199*

Ins. Code § 790.03(h) enumerates unfair claims settlement practices; *10 Cal. Code Reg. § 2695.7* is part of larger regulatory scheme designed to curtail unfair business practices in insurance business, and concerns settlement of claims, not pursuit of claims in litigation; regulation does not confer standing on insurer to seek its nonparty insured's deductible in lawsuit. *Pacific Gas & Elec. Co. v. Superior Court (2006) 144 Cal. App. 4th 19, 24-26, 50 Cal. Rptr. 3d 199*

Excess insurer cannot maintain subrogation action against primary insurer, based on unreasonable refusal to settle underlying tort claim, if tort claim did not go to trial, and no excess judgment was entered against insured. *RLI Ins. Co. v. CNA Cas. of Cal. (2006) 141 Cal. App. 4th 75, 82-83, 45 Cal. Rptr. 3d 667* ; *see also* *Hamilton v. Maryland Cas. Co. (2002) 27 Cal. 4th 718, 117 Cal. Rptr. 2d 318, 41 P.3d 128* (judgment in excess of policy must be entered before there can be claim for breach of primary insurer's duty to settle); *but see* *Fortman v. Safeco Ins. Co. (1990) 221 Cal. App. 3d 1394, 271 Cal. Rptr. 117*

In personal injury actions, insurer may not assert its subrogation claim directly against third-party tortfeasor on its own behalf and may not seek to use policyholder's personal injury attorney as collection agent by suing attorney to pay it any judgment or settlement proceeds from third party recovered by that attorney; to preserve its right of subrogation, insurer must either interplead itself into any action brought by insured against third-party tortfeasor or wait to seek reimbursement under language of its policy from its insured to extent that insured recovers money from third party. *Progressive W. Ins. Co. v. Superior Court (2005) 135 Cal. App. 4th 263, 272-273, 37 Cal. Rptr. 3d 434*

If insurer pays out claim on first-party insurance policy to its insured, insurer is subrogated to rights of its insured against any tortfeasor that is liable to insured for insured's damages; subrogation provisions of most insurance contracts typically are general and add nothing to rights of subrogation that arise as matter of law. *Progressive W. Ins. Co. v. Superior Court (2005) 135 Cal. App. 4th 263, 272, 37 Cal. Rptr. 3d 434*

Because insurer obtained assignment of insured's claims against nonsettling defendants in underlying defective-construction suit, insurer had option to pursue insured's claims by way of assignment rights, and insurer was

not under obligation to pursue equitable subrogation rights; subrogation is right, not obligation. *Casa Eva I Homeowners Ass'n v. Ani Constr. & Tile, Inc. (2005) 134 Cal. App. 4th 771, 782, 36 Cal. Rptr. 3d 401*

Pilot who rented and then damaged airplane was not insured on policy issued to airplane-rental company, could not bring bad faith action, and was properly defendant in subrogation action brought by insurer. *McKinley v. XL Specialty Ins. Co. (2005) 131 Cal. App. 4th 1572, 1575, 1578, 33 Cal. Rptr. 3d 98*

Insurer entitled to subrogation is in same position as assignee of insured's claim and succeeds only to rights of insured; in insurance context, right to equitable contribution arises if several insurers are obligated to indemnify or defend same loss or claim, and one insurer has paid more than its share of loss or has defended action without any participation by others. *Hartford Cas. Ins. Co. v. Mt. Hawley Ins. Co. (2004) 123 Cal. App. 4th 278, 287, 20 Cal. Rptr. 3d 128*

Intervening insurer is not subject to same limitation on damages that was imposed on its insured due to jurisdictional flaw in insured's complaint; if insured sued tortfeasor but erroneously capped damages at $25,000, after being paid $130,000 in benefits by his own insurer, his insurer was nevertheless allowed to recover from tortfeasor's insurer full amount of its subrogation judgment of $130,000 plus interest and costs. *Low v. Golden Eagle Ins. Co. (2002) 101 Cal. App. 4th 1354, 1363-1364, 125 Cal. Rptr. 2d 155*

Insurer has no right of equitable subrogation against its own insured with respect to loss or liability for which insured is covered under policy because, as between insurer and insured, insurer assumes responsibility; if policy does not cover insured for particular loss or liability, however, it would neither undermine insured's coverage nor be inequitable to impose loss or liability on insured if insured caused or was otherwise responsible for loss or liability. *Truck Ins. Exch. v. County of Los Angeles (2002) 95 Cal. App. 4th 13, 21-26, 115 Cal. Rptr. 2d 179* (county, additional insured under hospital liability policy, required to reimburse insurer for defense of malpractice action against hospital because injuries were caused by county's referral of high-risk patient to hospital)

Subrogation takes form of insurer's right to be put in position of insured to pursue recovery from third parties legally responsible to insured for loss that insurer has both insured and paid. *State Farm Gen. Ins. Co. v. Wells Fargo Bank, N.A. (2006) 143 Cal. App. 4th 1098, 1106, 49 Cal. Rptr. 3d 785* ; *Gulf Ins. Co. v. TIG Ins. Co. (2001) 86 Cal. App. 4th 422, 431, 103 Cal. Rptr. 2d 305*

Elements of insurer's cause of action for equitable subrogation are: (1) insured has suffered a loss for which party to be charged is liable; (2) insurer has compensated for loss; (3) insured has existing, assignable causes of action against party to be charged, which insured could have pursued had insurer not compensated for theloss; (4) insurer has suffered damages caused by act or omission that triggers liability of party to be charged; (5) justice dictates that loss be shifted entirely from insurer to party to be charged; and (6) insurer's damages are in stated sum, which is usually amount paid to insured, assuming payment was not voluntary and was reasonable. *Truck Ins. Exch. v. County of Los Angeles (2002) 95 Cal. App. 4th 13, 115 Cal. Rptr. 2d 179* ; *United Servs. Auto. Ass'n v. Alaska Ins. Co. (2001) 114 Cal. Rptr. 2d 449* ; *Gulf Ins. Co. v. TIG Ins. Co. (2001) 86 Cal. App. 4th 422, 432, 103 Cal. Rptr. 2d 305*

Insurer that acted as surety on performance bond was not equitably subrogated to principal's rights as insured with respect to principal's commercial general liability (CGL) insurer, because insured did not suffer an injury for which surety paid, such that CGL insurer should be held liable; insurer acting as surety was not equitably subrogated to insured's rights with respect to bad faith claim against CGL insurer because CGL insurer's alleged wrongful conduct did not result in any injury to the insured. *Gulf Ins. Co. v. TIG Ins. Co. (2001) 86 Cal. App. 4th 422, 432, 103 Cal. Rptr. 2d 305*

Lessor's fire insurance provider, which paid fire-damage claim benefits to lessor, was entitled to sue lessees under subrogation theory for negligence and breach of contract, asserting that lessees negligently caused fire; under rental agreement, parties had no reasonable expectation that lessees were exculpated from liability for negligently caused fire

damages or that lessor's policy was for their mutual benefit. *Fire Ins. Exch. v. Hammond (2000) 83 Cal. App. 4th 313, 321, 99 Cal. Rptr. 2d 596* (summary judgment for defendants reversed)

Because equitable subrogation doctrine shifts entire cost burden between insurers, insurer seeking subrogation must show that other insurer was primarily liable for loss and that its own equitable position is inferior to that of second insurer. *Maryland Cas. Co. v. Nationwide Mut. Ins. Co. (2000) 81 Cal. App. 4th 1082, 1088, 97 Cal. Rptr. 2d 374* (applying equitable contribution, rather than equitable subrogation)

Insurer's settlement of lawsuit involving claims for which it had potential liability, without judicial determination of coverage, was not binding concession by insurer that all settlement proceeds were attributable to all damages covered under its policy, and did not preclude insurer from contending settlement proceeds encompassed elements of loss other insurer's policy covered; "other insurance" clause of no application in assigning priorities to policies under facts of case; settling insurer's right to subrogation or indemnity was disputable, precluding summary judgment. *Pines of La Jolla Homeowners Ass'n v. Industrial Indem. (1992) 5 Cal. App. 4th 714, 726-727, 7 Cal. Rptr. 2d 53*

In equitable subrogation action arising from underlying personal injury action in which primary insurer of one defendant initially refused to settle within primary limits, resulting in ultimate settlement contributed to by excess insurer, and in which jury subsequently found that insured-defendant was totally faultless, injured party is entitled to sue primary insurer after assignment by excess insurer; absence of judgment against insured in excess of primary policy limits does not preclude equitable subrogation action. *Fortman v. Safeco Ins. Co. (1990) 221 Cal. App. 3d 1394, 1399-1402, 271 Cal. Rptr. 117* ; *see also* *Hamilton v. Maryland Cas. Co. (2002) 27 Cal. 4th 718, 117 Cal. Rptr. 2d 318, 41 P.3d 128* (judgment in excess of policy must be entered before there can be claim for breach of primary insurer's duty to settle); *but see* *RLI Ins. Co. v. CNA Cas. of Cal. (2006) 141 Cal. App. 4th 75, 79, 85, 45 Cal. Rptr. 3d 667* (declining to follow *Fortman*)

In action by insured against insurer to recover property damage claim that insurer partially denied, damages for which insured had already recovered in action against tortfeasor, insurer has waived right to subrogation, and therefore defense of insured's violation of subrogation clause in contract, by failing to plead breach of subrogation clause at trial. *Kardly v. State Farm Mut. Auto. Ins. Co. (1989) 207 Cal. App. 3d 479, 488, 255 Cal. Rptr. 40* (recovery limited to amounts not already paid by insurer)

Both subrogee (insurer) and subrogor (insured) have right of action against third-party tortfeasor; subrogated insurer is not limited to intervening in action between insured and third-party tortfeasor but is permitted to bring separate independent action to recover directly from third-party tortfeasor. *Basin Constr. Corp. v. Department of Water & Power (1988) 199 Cal. App. 3d 819, 825, 245 Cal. Rptr. 178*

California Insurance Guarantee Association is entitled under *Ins. Code § 1063.2(c)(1)* to credit in full amount of claimant's uninsured motorist coverage when claimant has "covered claim" against it; credit also inures to benefit of insureds of insolvent carrier. *California Ins. Guarantee Ass'n v. Liemsakul (1987) 193 Cal. App. 3d 433, 442, 238 Cal. Rptr. 346*

Premises liability insurer that is obligated to defend personal injury action against its insured, a physician, and settles action is subrogated to insured's claim, if any, against its medical malpractice carrier that had denied coverage and refused to contribute to settlement. *State Farm Fire & Cas. Co. v. Cooperative of Am. Physicians, Inc. (1984) 163 Cal. App. 3d 199, 202-206, 209 Cal. Rptr. 251*

Insurer subrogated to rights of property owner by virtue of insurance policy has standing to maintain action in inverse condemnation against city seeking recovery of claims paid to property owner. *McMahan's of Santa Monica v. City of Santa Monica (1983) 146 Cal. App. 3d 683, 690-691, 194 Cal. Rptr. 582*

Insurer-subrogee's right to seek recovery in inverse condemnation either in insured's name or in its own name. *McMahan's of Santa Monica v. City of Santa Monica (1983) 146 Cal. App. 3d 683, 690-691, 194 Cal. Rptr. 582*

Insurer who pays claim by insured whom it is required by contract to indemnify is not subrogated to insured's rights against third parties also contractually liable to indemnify insured unless loss involved is causally related to breach of duty by that third party. *California Food Serv. Corp. v. Great Am. Ins. Co. (1982) 130 Cal. App. 3d 892, 898, 182 Cal. Rptr. 67* (nevertheless holding that equitable contribution doctrine applies when two insurers each insure against same loss)

Excess insurer, on paying insured's liability to injured claimant, is equitably subrogated to rights of insured against primary insurer, including insured's right of action against primary insurer for bad faith failure to settle. *Northwestern Mut. Ins. Co. v. Farmers' Ins. Group (1978) 76 Cal. App. 3d 1031, 1040, 143 Cal. Rptr. 415*

In action seeking declaration of rights and liabilities of three insurers whose policies provided concurrent coverage for accident, each policy containing excess insurance clause providing that policy was excess insurance to other insurance available to insured, trial court properly found under established principles of subrogation that plaintiff insurer's comprehensive general liability policy was excess insurance when defendant insurers' policies covered tortfeasor employee and plaintiff insurer's policy did not. *Argonaut Ins. Co. v. Colonial Ins. Co. (1977) 70 Cal. App. 3d 608, 614-615, 138 Cal. Rptr. 855*

Subrogation as applied to an insurer as right to be put in position of its insured against third parties legally responsible to insured for loss which insurer has both insured and paid. *Liberty Mut. Fire Ins. Co. v. Auto Spring Supply Co. (1976) 59 Cal. App. 3d 860, 864, 131 Cal. Rptr. 211*

Surety for compensation on employee fidelity bond is subrogated to employer's rights on payment of claim under bond. *Federal Ins. Co. v. Allen (1970) 13 Cal. App. 3d 648, 650, 92 Cal. Rptr. 125*

Equitable subrogation is not permitted to insurers whoses losses are not causally related to breach of duty for which party to be charged may be liable to insured for loss compensated by insurers; hence, liability insurer of permissive driver of car involved in accident is not entitled to reimbursement from car owner's insurance agent for his negligent failure to have had owner's liability policy renewed; plaintiff's loss results from its insured's having negligently caused accident and not from agent's failure to have procured renewal of owner's insurance. *Mid-Century Ins. Co. v. Hutsel (1970) 10 Cal. App. 3d 1065, 1070, 89 Cal. Rptr. 421*

Purpose of provision waiving subrogation against lessee in fire insurance policy issued to lessor. *Sacramento-Yolo Port Dist. v. Cargill of Cal., Inc. (1970) 4 Cal. App. 3d 1004, 1012, 84 Cal. Rptr. 822*

Under California law, employer who is held derivatively liable for negligent acts of employee has right to recover from that employee for loss caused by negligence, and insurance carrier compelled to pay loss is permitted, having equitable right of subrogation, to recover amount which it has paid by suit against negligent employee. *Transport Indem. Co. v. American Fid. & Cas. Co. (1970) 4 Cal. App. 3d 950, 956, 84 Cal. Rptr. 856*

Employer is permitted to recover from employee for loss to employer caused by employee's negligence which employer neither authorized nor participated in, and employer's insurer is subrogated to employer's right to such recovery. *Pacific Indem. Co. v. Truck Ins. Exch. (1969) 269 Cal. App. 2d 420, 426, 74 Cal. Rptr. 793*

Subrogation agreement assigning insured's cause of action for personal injuries to her insurer to extent of payment made to her by insurer under uninsured motorist coverage does not constitute determination of extent of insured's damages as between her and tortfeasor. *Johnson v. Oliver (1968) 266 Cal. App. 2d 178, 180-182, 72 Cal. Rptr. 137*

Although insurer who issues fidelity bond is not surety for employer and principal, if any, is unnamed and prospective criminal employee, courts by analogy have held principles of subrogation to be applicable to fidelity bond situation; insurer in such case is permitted to have subrogation against third party, including third party bank, provided its equities are superior to those of third party. *Hartford Accident & Indem. Co. v. Bank of Am. (1963) 220 Cal. App. 2d 545, 550, 34 Cal. Rptr. 23*

On insurer's payment of insured's loss resulting from employee's forgery of checks, insurer is immediately vested with all rights of employer against drawee bank, subject to priority of equities as between insurer and bank. *Hartford Accident & Indem. Co. v. Bank of Am. (1963) 220 Cal. App. 2d 545, 550, 34 Cal. Rptr. 23*

Insurer who has indemnified insured for property loss is subrogated to insured's right against person wrongfully causing loss; rule applies whether insured's cause of action is in contract or tort. *Royal Indem. Co. v. Security Truck Lines (1963) 212 Cal. App. 2d 61, 65, 27 Cal. Rptr. 858*

[15] Intervention

In action brought by subrogor insured against tortfeasor, complaint in intervention filed by insurer with property subrogation claim is subject to running of five-year dismissal rule (*Code Civ. Proc. §§ 583.310, 583.360*) from time when original complaint was filed, if complaint to recover subrogated property loss states essentially same causes of action as original complaint. *Bright v. American Termite Control Co. (1990) 220 Cal. App. 3d 1464, 1468-1469, 269 Cal. Rptr. 793*

Injured employee is able to intervene under *Lab. Code § 3853* in action brought by his or her employer's insurer against public transit district to recover workers' compensation paid, even though employee's complaint was not filed within limitation period of California Tort Claims Act when employee had timely filed claim against defendant public entity. *Home Ins. Co. v. Southern Cal. Rapid Transit Dist. (1987) 196 Cal. App. 3d 522, 525-527, 241 Cal. Rptr. 858*

Demurrer to widow's complaint in intervention for wrongful death filed in action against county by employer, which had properly filed claim prior to suit, to recover benefits paid to survivors under workers' compensation law, was properly sustained wherewidow had failed to comply with claims statutes; claims filing requirement does not abrogate right of joinder granted by *Lab. Code § 3853*, but merely conditions availability of joinder when third party tortfeasor is governmental entity. *Pacific Tel. & Tel. Co. v. County of Riverside (1980) 106 Cal. App. 3d 183, 192-193, 165 Cal. Rptr. 29*

Motion of health insurer to intervene in personal injury action by one of its subscribers against doctors, hospital, and others, even though insurer's contract provided for lien and reimbursement with respect to benefits provided for tort-caused injuries and subscriber had separately agreed to make good faith effort to recover costs of benefits in pending action was properly denied, since cause of action in tort is not "property" and insurer's contract is not "transaction" which is subject of litigation within meaning of *Code Civ. Proc. § 387(b)*, relating to mandatory intervention. *California Physicians' Serv. v. Superior Court (1980) 102 Cal. App. 3d 91, 96-97, 162 Cal. Rptr. 266*

[16] Issues

Matters required to be determined by court in action by county employees' retirement association, as subrogee, against third party tortfeasor, to recover portion of disability benefits payable under *Lab. Code §§ 3854, 3855* and *Gov. Code § 31820* to employee-member of association as result of automobile accident (nonservice connected disability). *Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 944, 151 Cal. Rptr. 695*

[17] Judgments

Surety which has satisfied judgment against principal is entitled under doctrine of equitable subrogation to enforce execution against codefendant tortfeasor. *Painter v. Berglund (1939) 31 Cal. App. 2d 63, 66, 87 P.2d 360* (former *Code Civ. Proc. § 709* (*now see Code Civ. Proc. §§ 882, 883*))

[18] Jurisdiction

Subrogee (workers' compensation insurer) was assignee within meaning of former *Code Civ. Proc. § 117.5* (*now see Code Civ. Proc. § 116.420*), relating to small claims courts, and was, under that section, barred from prosecuting action in small claims court. *Allianz Ins. Co. v. Municipal Court (1981) 126 Cal. App. 3d 1043, 1044-1046, 179 Cal. Rptr. 334*

[19] Lessor-Lessee

Right of lessor to be subrogated to right of lessee under former *Pub. Res. Code § 4702* (*now see Pub. Res. Code § 4852*) to receive damages for injuries to leased premises caused by flood-borne logs to extent lessor has made expenditures in repairing damage done. *Bess v. Wise (1969) 275 Cal. App. 2d 158, 163, 79 Cal. Rptr. 611*

[20] Lienholders

Contingent remainderman's interest in real property sufficent to entitle him or her to pay delinquent taxes without being considered mere volunteer and, under equitable principles of subrogation, to succeed to lien held by public taxing bodies. *Riley v. Turpin (1956) 47 Cal. 2d 152, 156, 301 P.2d 834*

Rule that holder of junior lien on property who, to protect his or her interest, pays debt secured by senior lien thereby becomes subrogated to rights of senior lienholder as against owner of property, even though he or she takes no assignment of senior lien (see *Civ. Code § 2904*), is subject to rule that person invoking doctrine of subrogation must, in making payment, have had some interest to protect and must not have been a volunteer, that is, an officious intermeddler. *Stein v. Simpson (1951) 37 Cal. 2d 79, 84, 230 P.2d 816*

Person who discharges lien on another's property mistakenly believed to be his or her own is subrogated to rights of lienholder. *Stein v. Simpson (1951) 37 Cal. 2d 79, 84, 230 P.2d 816*

[21] Nature of Subrogation

Nature of subrogration and its prohibition against double recovery make it abundantly clear that subrogation involves succession to rights of others; rights under subrogation are derivative rights, succession to another's rights, like water, is not able to rise higher than its source. *Board of Admin. v. Glover (1983) 34 Cal. 3d 906, 915, 196 Cal. Rptr. 330, 671 P.2d 834* ; *State Bar of Cal. v. Statile (2008) 168 Cal. App. 4th 650, 663, 86 Cal. Rptr. 3d 72* ; *Ventura County Employees' Ret. Ass'n v. Pope (1978) 87 Cal. App. 3d 938, 952, 151 Cal. Rptr. 695*

Equitable subrogation permits party who has been required to satisfy a loss created by third party's wrongful act to "step into the shoes" of loser and pursue recovery from responsible wrongdoer. *Great American Ins. Cos. v. Gordon Trucking, Inc. (2008) 165 Cal. App. 4th 445, 81 Cal. Rptr. 3d 65* , p.8

Subrogee's rights are able to rise no higher than those of subrogor. *Transit Cas. Co. v. Spink Corp. (1979) 94 Cal. App. 3d 124, 132, 156 Cal. Rptr. 360 , disapproved on other grounds,* *Commercial Union Assurance Cos. v. Safeway*

Stores, Inc. (1980) 26 Cal. 3d 912, 921, 164 Cal. Rptr. 709, 610 P.2d 1038

[22] Parties

Nonjoinder of partial subrogor or partial subrogee in action by one of them against obligor is not jurisdictional defect in fundamental sense and does not deprive court of subject matter jurisdiction. *Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 44-45, 162 Cal. Rptr. 238 , superseded by statute on other grounds as stated in Goodman v. Lozano (2010) 47 Cal. 4th 1327, 1336-1338, 104 Cal. Rptr. 3d 219, 223 P.3d 77*

[23] Prerequisites to Equitable Subrogation

One who claims to be equitably subrogated to rights of secured creditor must satisfy following prerequisites: (1) payment must have been made by subrogee to protect its own interest; (2) subrogee must not have acted as volunteer; (3) debt paid must be one for which subrogee was not primarily liable; (4) entire debt must have been paid; (5) subrogation must not work any injustice to rights of others. *Morgan Creek Residential v. Kemp (2007) 153 Cal. App. 4th 675, 690, 63 Cal. Rptr. 3d 232*

Actual loss to subrogor is not a prerequisite to equitable subrogation; all that is required is that subrogor would have suffered loss had not subrogee discharged liability or paid loss. *Northwestern Mut. Ins. Co. v. Farmers' Ins. Group (1978) 76 Cal. App. 3d 1031, 1044, 143 Cal. Rptr. 415*

[24] Principle on Which Subrogation Is Founded

Principle on which subrogation is founded applies if one person, not a volunteer, pays debt for which another is primarily answerable and which, in equity and good conscience, should have been discharged by latter. *Stein v. Simpson (1951) 37 Cal. 2d 79, 83, 230 P.2d 816* ; *Offer v. Superior Court (1924) 194 Cal. 114, 118, 228 P. 11* ; *Meyer Koulish Co. v. Cannon (1963) 213 Cal. App. 2d 419, 424, 28 Cal. Rptr. 757* (repudiated on another point in *Patent Scaffolding Co. v. William Simpson Constr. Co. (1967) 256 Cal. App. 2d 506, 514-515, 64 Cal. Rptr. 187*)

[25] Public Employees' Retirement System

Gov. Code § 21451 grants Public Employees' Retirement System right to recover against negligent third party who caused member's injury, which subsequently required member's disability retirement and imposed burden of retirement benefits on *System. Aetna Cas. & Sur. Co. v. Board of Admin. (1979) 89 Cal. App. 3d 766, 769, 153 Cal. Rptr. 62*

Although subrogation rights of Employees' Retirement System are equal to those of employer, System is not bound by releases to which it has not consented. *Aetna Cas. & Sur. Co. v. Board of Admin. (1979) 89 Cal. App. 3d 766, 770, 153 Cal. Rptr. 62*

Gov. Code §§ 21453, relating to public employees' retirement system, incorporates subrogation provisions of workers compensation law, including *Lab. Code §§ 3852, 3859*, and *3860*, relating to actions against third-party tortfeasors, release, and settlement respectively. *Aetna Cas. & Sur. Co. v. Board of Admin. (1979) 89 Cal. App. 3d 766, 770, 153 Cal. Rptr. 62*

Gov. Code § 21453 gives Public Employees' Retirement System same right to proceed against third party who settled without its consent as employer who has paid compensation is accorded under *Lab. Code § 3859* (settlement or release by employee with third party without employer's consent is subject to employer's right to proceed to recover

compensation paid). *Board of Admin. v. Kuppens (1975) 49 Cal. App. 3d 758, 761-764, 122 Cal. Rptr. 856*

Gov. Code § 21451, providing for reimbursement of Public Employees' Retirement System for benefits paid by reason of member's injury or death resulting from third party's act, is inapplicable when member's injury or death is proximate consequence of act of member's employer; hence, system is unable to recover benefits provided in *Gov. Code § 21451* from third party whose act may also be proximate cause of member's injury or death. *McQuillan v. Southern Pac. Co. (1974) 40 Cal. App. 3d 802, 805-806, 115 Cal. Rptr. 418*

[26] Small Claims Courts

Workers' compensation insurer is subrogee of rights of workers' employer against third parties as "assignee" of employer's claims against third parties within meaning of *Code Civ. Proc. § 117.5* and hence barred from filing or prosecuting claims in small claims court. *Allianz Ins. Co. v. Municipal Court (1981) 126 Cal. App. 3d 1043, 1046, 179 Cal. Rptr. 334*

[27] Splitting Cause of Action

Basis of rule against splitting cause of action. *Wulfjen v. Dolton (1944) 24 Cal. 2d 891, 894-895, 151 P.2d 846* ; *Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 41, 162 Cal. Rptr. 238 , superseded by statute on other grounds as stated in Goodman v. Lozano (2010) 47 Cal. 4th 1327, 1336-1338, 104 Cal. Rptr. 3d 219, 223 P.3d 77, 2010 Cal. LEXIS 868* ; *Phillips v. Western Pac. R.R. Co. (1971) 22 Cal. App. 3d 441, 444, 99 Cal. Rptr. 451*

Insured splits cause of action by filing complaint against tortfeasor after insured has been partially reimbursed for loss by insurance benefits and subrogated insurer to amount of such payment. *Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 41-42, 162 Cal. Rptr. 238 , superseded by statute on other grounds as stated in Goodman v. Lozano (2010) 47 Cal. 4th 1327, 1336-1338, 104 Cal. Rptr. 3d 219, 223 P.3d 77*

Defense that plaintiff has split cause of action is affirmative defense which is waived if not pleaded by defendant in abatement or in bar. *Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 43, 162 Cal. Rptr. 238 , superseded by statute on other grounds as stated in Goodman v. Lozano (2010) 47 Cal. 4th 1327, 1336-1338, 104 Cal. Rptr. 3d 219, 223 P.3d 77* ; *see Phillips v. Western Pac. R.R. Co. (1971) 22 Cal. App. 3d 441, 444, 99 Cal. Rptr. 451*

[28] Statute of Limitations

Action by employer against third party tortfeasor to recover workers' compensation benefits paid to injured employee is governed by former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. § 335.1* (two-year statute of limitations)), providing one year period of limitation on actions for injury caused by wrongful act or neglect of another. *County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 868, 140 Cal. Rptr. 638, 568 P.2d 363*

Statute of limitations applicable to action for indemnity for payments made to injured employee under Federal Employers' Liability Act (*45 U.S.C. §§ 51-60*). *Southern Pac. Transp. Co. v. Ohbayashi Am. Corp. (1983) 147 Cal. App. 3d 233, 236-238, 195 Cal. Rptr. 63 .*

Subrogation by insurer to rights of its insured against third party tortfeasor is enforceable in equity only when action is brought within time in which action could have been brought to enforce original obligation to which right of subrogation is sought; same rule is applicable to common law subrogation, as distinguished from indemnity or contribution, and to employer's statutory right to subrogation against tortfeasor for workers' compensation benefits paid

to employee for injuries caused by tortfeasor's negligence. *Commercial Union Assurance Co. v. City of San Jose (1982) 127 Cal. App. 3d 730, 734, 179 Cal. Rptr. 814*

Absent special considerations, insurer's right to recover on insured's cause of action against alleged tortfeasor (city) for damages to insured's property is barred when statutory period of *Gov. Code § 945.6(a)* (time for suit against public entity after denial of claim) ran on insured's claim. *Commercial Union Assurance Co. v. City of San Jose (1982) 127 Cal. App. 3d 730, 735, 179 Cal. Rptr. 814*

Insurer's action under *Ins. Code § 11580.2(g)* (subrogation to insured's rights when insurer pays uninsured motorist claim) must be brought within three years after date of payment. *Commercial Union Assurance Co. v. City of San Jose (1982) 127 Cal. App. 3d 730, 735-736, n. 2, 179 Cal. Rptr. 814*

Disability of minor which tolls statute of limitations (*Code Civ. Proc. § 352(a)*) is personal and not subject to transfer by assignment or subrogation. *Amie v. Superior Court (1979) 99 Cal. App. 3d 421, 426, 160 Cal. Rptr. 271*

Action by insurer pursuant to *Ins. Code § 11580.2(g)* to recover amounts paid under uninsured motorist endorsement in policy is barred if not brought within three years from date payment was made. *Phoenix of Hartford Ins. Cos. v. Colony Kitchens (1976) 57 Cal. App. 3d 140, 144-145, 128 Cal. Rptr. 893*

Statute of limitations is tolled by filing of declaratory relief action against third person before surety has made payment under its bond for loss caused by dishonesty of insured's employee. *Liberty Mut. Ins. Co. v. Harris, Kerr, Forster & Co. (1970) 10 Cal. App. 3d 1100, 1104, 89 Cal. Rptr. 437*

Statute of limitations applicable to obligation on which subrogated action is brought applies to subrogated action. *Iusi v. City Title Ins. Co. (1963) 213 Cal. App. 2d 582, 588, 28 Cal. Rptr. 893* ; *Automobile Ins. Co. v. Union Oil Co. (1948) 85 Cal. App. 2d 302, 304-305, 193 P.2d 48*

[29] Sureties

Civ. Code § 2848, relating to sureties, does not comprehensively and exclusively measure surety's rights to subrogation; section is merely declaratory of common law on subject and controlling only so far as it goes. *Estate of Elizalde (1920) 182 Cal. 427, 432, 188 P. 560* ; *Commercial Standard Ins. Co. v. Bank of Am. (1976) 57 Cal. App. 3d 241, 247, 129 Cal. Rptr. 91*

Surety making payment as subrogated to all rights and remedies that were available to creditor to obtain payment from any person or property of any person who, as to surety, is primarily liable for debt; both gratuitous and paid sureties have all rights, remedies, and priorities of party to whom they have paid debt of principal. *Rokeby-Johnson v. Aquatronics Int'l, Inc. (1984) 159 Cal. App. 3d 1076, 1083, 206 Cal. Rptr. 232*

Construction of surety bond is question of law. *Continental Cas. Co. v. Hartford Accident & Indem. Co. (1966) 243 Cal. App. 2d 565, 570, 52 Cal. Rptr. 533* ; *see also Civ. Code §§ 1639, 2837*

Bond given for faithful performance of contract to which it refers is binding surety for labor performed and materials furnished thereunder as completely as though surety were party to contract. *Continental Cas. Co. v. Hartford Accident & Indem. Co. (1966) 243 Cal. App. 2d 565, 568, 52 Cal. Rptr. 533*

As general rule, if subcontractor's bond is put up in order to indemnify prime contractor for any claim for which latter may be held liable and for payment of which subcontractor is primarily liable, subcontractor's surety is required to indemnify principal contractor, or latter's surety, for any liability imposed for labor and materials furnished to

subcontractor. *Continental Cas. Co. v. Hartford Accident & Indem. Co. (1966) 243 Cal. App. 2d 565, 568, 52 Cal. Rptr. 533*

Failure on part of subcontractor to pay for materials and supplies furnished pursuant to subcontract is breach of subcontract, and bond that undertakes to guarantee faithful performance of subcontract to furnish all necessary labor and materials for specified portion of structure implies promise to pay for such labor and materials furnished. *Continental Cas. Co. v. Hartford Accident & Indem. Co. (1966) 243 Cal. App. 2d 565, 569, 52 Cal. Rptr. 533*

Cosureties and successive sureties distinguished. *Continental Cas. Co. v. Hartford Accident & Indem. Co. (1966) 243 Cal. App. 2d 565, 570, 52 Cal. Rptr. 533*

First of two successive sureties forced to pay debt is subrogated to creditor's rights on bond and permitted to enforce it against second surety. *Continental Cas. Co. v. Hartford Accident & Indem. Co. (1966) 243 Cal. App. 2d 565, 570-571, 52 Cal. Rptr. 533*

[30] Volunteers

Doctrine of subrogation is inapplicable to one who, in paying another's debt, acts as volunteer or officious intermeddler. *Stein v. Simpson (1951) 37 Cal. 2d 79, 84, 230 P.2d 816*

Person who discharges another's obligation or lien on another's property or who is induced to make payment by fraud or duress is not officious intermeddler. *Stein v. Simpson (1951) 37 Cal. 2d 79, 85, 230 P.2d 816*

Premises liability insurer that, with medical malpractice insurer, was, by allegations of complaint, obligated to defend its insured and, in doing so, settled claim against insured was not volunteer with respect to medical malpractice insurer against which it seeks subrogation of amount paid in settlement. *State Farm Fire & Cas. Co. v. Cooperative of Am. Physicians, Inc. (1984) 163 Cal. App. 3d 199, 203, 209 Cal. Rptr. 251*

One who advances money to pay off encumbrance on real property at instance of either owner of property or holder of encumbrance, either on express understanding or under circuimstances from which understanding will be implied, that advance made is to be secured by first lien on property is not mere volunteer; in event new security is for any reason not first lien on property, holder of security, if not chargeable with culpable and inexcusable neglect, is subrogated to rights of prior encumbrancer under security held by him or her, unless superior or equal equities of others would be prejudiced by it. *Katsivalis v. Serrano Reconveyance Co. (1977) 70 Cal. App. 3d 200, 210, 138 Cal. Rptr. 620*

Person voluntarily paying debt of third person with no promise of repayment by person whose debt is paid is not entitled to reimbursement under doctrine of equitable subrogation. *McMillan v. O'Brien (1934) 219 Cal. 775, 779, 29 P.2d 183*

Subrogation is not applied in favor of one who has officiously and as mere volunteer paid debt of another for which neither payor nor payor's property was answerable and which payor was under no obligation to pay. *Grant v. De Otte (1954) 122 Cal. App. 2d 724, 728, 265 P.2d 952*

[31] Waiver or Release of Subrogation Rights

Under standard American Institute of Architects (AIA) construction contract (1) requiring owner to maintain property insurance covering interest of owner and contractor; and (2) containing a mutual waiver of owner's and contractor's rights against another for damages covered by that property insurance, owner's insurer could not recover as subrogee for rain damage to interior of facility cause by contractor's alleged negligence; owner's waiver of all claims to extent

covered by insurance barred owner's property insurer from recovering as subrogee, even though damage was outside scope of contractor's work. *Lloyd's Underwriters v. Craig & Rush, Inc. (1994) 26 Cal. App. 4th 1194, 1199-1201, 32 Cal. Rptr. 2d 144*

When insured has released third party, neither insured not subrogated insurer has any right to recover from third party. *Fireman's Fund Ins. Co. v. Fireman's Fund Ins. Co. (1994) 21 Cal. App. 4th 1586, 1596-1597, 26 Cal. Rptr. 2d 762* (subrogation claim by excess insurer against primary insurer); *Continental Mfg. Co. v. Underwriters at Lloyd's London (1960) 185 Cal. App. 2d 545, 556, 8 Cal. Rptr. 276*

Guaranty agreement informing guarantor that he might lose subrogation rights, but failing to inform guarantor that loss of subrogation rights gives guarantor immunity from a deficiency judgment in form of estoppel defense, and that guarantor was waiving that defense under terms of guaranty agreement, failed to contain a sufficiently "explicit" or "specific" waiver of estoppel defense. *Cathay Bank v. Lee (1993) 14 Cal. App. 4th 1533, 1539-1540, 18 Cal. Rptr. 2d 420 , superseded by statute as stated in WRI Opportunity Loans II, LLC v. Cooper (2007) 154 Cal. App. 4th 525, 65 Cal. Rptr. 3d 205*

When tortfeasor obtains release from insured with knowledge that insured has already been indemnified by insurer, release of insured does not bar insurer's subrogation rights. *Conservatorship of Edwards (1988) 198 Cal. App. 3d 1176, 1184, 244 Cal. Rptr. 330* ; *see Steigerwald v. Godwin (1956) 144 Cal. App. 2d 591, 595, 301 P.2d 386* ; *Mitchell v. Holmes (1935) 9 Cal. App. 2d 461, 463-464, 50 P.2d 473*

[32] When Subrogation May Be Sought

Although principle on which right of subrogation is founded applies to cases of suretyship, doctrine of equitable subrogation is broad enough to include every instance in which one person, not acting as mere volunteer or intruder, pays debt for which another is primarily liable, and which in equity and good conscience should have been discharged by latter. *Caito v. United Cal. Bank (1978) 20 Cal. 3d 694, 704, 144 Cal. Rptr. 751, 576 P.2d 466* ; *Stein v. Simpson (1951) 37 Cal. 2d 79, 83, 230 P.2d 816*

Equitable subrogation is applicable to holder of three senior encumbrances when holder of fourth encumbrance would not be prejudiced by application of doctrine but be left in same position as before. *Smith v. State Savings & Loan Ass'n (1985) 175 Cal. App. 3d 1092, 1098, 223 Cal. Rptr. 298*

Fact of recording of junior encumbrance is not by itself a bar to equitable subrogation, even though equitable subrogation is denied to new lender who has actual knowledge of junior encumbrance. *Smith v. State Savings & Loan Ass'n (1985) 175 Cal. App. 3d 1092, 1098, 223 Cal. Rptr. 298*

Equitable subrogation was improperly denied on ground that senior encumbrance holder had no interest in property to protect and was "mere volunteer," because holder had advanced money at request of debtor to pay off encumbrance with understanding that advance would be secured by first trust deed, thus was not "mere volunteer." *Smith v. State Savings & Loan Ass'n (1985) 175 Cal. App. 3d 1092, 1098-1099, 223 Cal. Rptr. 298*

Subrogation, although equitable right, is enforceable in court of law, and separate suit in equity is not required. *A.F.C., Inc. v. Brockett (1967) 257 Cal. App. 2d 40, 42, 64 Cal. Rptr. 771*

Right to subrogation is capable of being established in third party claim proceedings as well as in direct two party actions at law. *A.F.C., Inc. v. Brockett (1967) 257 Cal. App. 2d 40, 42, 64 Cal. Rptr. 771*

[33] Workers' Compensation

Lab. Code §§ 3850 and *3852* (relating to workers' compensation) are merely codification of judicially created principles of equitable subrogation. *Breese v. Price (1981) 29 Cal. 3d 923, 929, 176 Cal. Rptr. 791, 633 P.2d 987* ; *County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 876 n. 7, 140 Cal. Rptr. 638, 568 P.2d 363* ; *Allianz Ins. Co. v. Municipal Court (1981) 126 Cal. App. 3d 1043, 1045, 179 Cal. Rptr. 334*

Substantively, as well as procedurally, employer and employee actions against third party tortfeasor under *Lab. Code § 3852*, relating to workers' compensation, are interchangeable; regardless of who brings action, it is essentially same lawsuit. *Breese v. Price (1981) 29 Cal. 3d 923, 928, 176 Cal. Rptr. 791, 633 P.2d 987* ; *County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 874, 140 Cal. Rptr. 638, 568 P.2d 363* ; *Buell v. CBS, Inc. (1982) 136 Cal. App. 3d 823, 826, 186 Cal. Rptr. 455*

Lab. Code § 3854 (if action is prosecuted by employer alone, evidence of any amount which employer has paid or become obligated to pay due to injury or death of employee is admissible; such expenditures or liability to be deemed as proximately resulting from the injury or death in addition to any other items of damage), means only that (1) intervening act of employer's payment to employee of compensation shall not be construed as breaking chain of causation which is essential to plaintiff's recovery under traditional negligence principles, and (2) employer is entitled to full reimbursement if defendant's tort liability, in an amount equal to or in excess of employer's expenditures, is otherwise established. *Breese v. Price (1981) 29 Cal. 3d 923, 929, 176 Cal. Rptr. 791, 633 P.2d 987 , disapproving State Comp. Ins. Fund v. Williams (1974) 38 Cal. App. 3d 218, 112 Cal. Rptr. 226 , and Board of Admin. v. Ames (1963) 215 Cal. App. 2d 215, 29 Cal. Rptr. 917*

In negligence action against workers compensation insurer, workers' compensation law does not impose duty on carrier to pursue subrogation rights. *New Plumbing Contractors, Inc. v. Nationwide Mut. Ins. Co. (1992) 7 Cal. App. 4th 1088, 1094, 9 Cal. Rptr. 2d 469*

When employee is injured by third party's tortious act, employer is indirectly injured to extent employer must pay out workers' compensation benefits; by statute employer is entitled to recoup its damages from third party through subrogation, and by definition workers' compensation insurance carrier that has paid benefits has all rights of employer (*see Lab. Code § 3850*); carrier is able to recover its damages by (1) suing third party in its own name (*see Lab. Code § 3852*), (2) intervening in action filed by employee (*see Lab. Code § 3853*), or (3) filing lien claim in suit by employee (*see Lab. Code § 3856(b)*); should employee and carrier file independent suits, suits must be consolidated under *Lab. Code § 3853*. *San Diego Unified Port Dist. v. Superior Court (1988) 197 Cal. App. 3d 843, 846, 243 Cal. Rptr. 163*

Lab. Code § 3852, mandating that respective rights of employee's heirs seeking wrongful death damages and of employer seeking recoupment of payment made pursuant to workers' compensation laws against third-party tortfeasor be determined by court, also mandates that court determine apportionment of damage award. *Eli v. Travelers Indem. Co. (1987) 190 Cal. App. 3d 901, 905, 235 Cal. Rptr. 704*

Lab. Code § 3852, authorizing actions against third party tortfeasors who injure employees, is more than a subrogation statute and includes actions under equitable doctrine of indemnity. *Associated Indem. Corp. v. Pacific Sw. Airlines (1982) 128 Cal. App. 3d 898, 905-906, 180 Cal. Rptr. 685*

Third party tortfeasor is liable, under doctrine of comparative negligence, to injured employee's employer only to extent of tortfeasor's proportional share of responsibility, regardless of amount employer has paid in compensation benefits. *Finney v. Manpower, Inc. (1981) 123 Cal. App. 3d 1066, 1071, 177 Cal. Rptr. 74*

Under *Lab. Code § 3853*, relating to workers' compensation, when action is brought against third party tortfeasor by either employer or employee, the other is permitted at any time before trial on facts to join as party plaintiff, even though statute of limitations may have run on other's claim since complaint was filed. *Jordan v. Superior Court*

(1981) 116 Cal. App. 3d 202, 206-210, 172 Cal. Rptr. 30

Legal Topics:

For related research and practice materials, see the following legal topics:
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Borowitz, *Waiving Subrogation Rights and Conjuring Up Demons in Response to Deprizio, 45 Bus. Law. 2151 (1990)*

Fleming, *The Collateral Source Rule and Contract Damages, 71 Cal. L. Rev. 56, 70 (1983)*

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Note, *Suretyship: Subrogation: Subrogation of Surety on Appeal Bond Against Surety on Release of Attachment Bond, 22 Cal. L. Rev. 118 (1933)*

Note, *Suretyship: Subrogation to Rights of Creditor Against Third Person, 21 Cal. L. Rev. 176 (1933)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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Witkin, California Procedure, Vols. 4, 5, *Pleading*, §§ 107, 113-114, 863; Vol. 9, *Appeal*, § 272 (4th ed. 1997)

Witkin, Summary of California Law, Vol. 4, *Security Transactions in Real Property*, § 111; Vol. 13, *Equity*, §§ 183-189 (10th ed. 2005)

83 C.J.S., *Subrogation*, §§ 1-72

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[Reserved]

§§ 536.45[Reserved]

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47-IV California Forms of Pleading and Practice--Annotated Scope

Scope

Practice Tip: A complaint in subrogation must both allege and prove (1) the elements establishing the plaintiff subrogee's right to subrogation and (2) the subrogor's cause of action against the obligor [*see Breese v. Price (1981) 29 Cal. 3d 923, 926-927, 930-931, 176 Cal. Rptr. 791, 633 P.2d 987* ; *Knight v. Alefosio (1984) 158 Cal. App. 3d 716, 725, 205 Cal. Rptr. 42* ; *see also Code Civ. Proc. § 590* (manners in which issues of fact are raised); *Evid. Code §§ 500, 521* (burden of proof)]. These allegations need not be separately grouped but should be integrated so that the complaint sets forth the facts in a logical fashion [*see, e.g., § 536.100*].

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47-536 California Forms of Pleading and Practice--Annotated § 536.60

§ 536.60 Plaintiff's Right to Be Subrogated to Subrogor's Cause of Action Against Defendant Obligor

A complaint in subrogation must plead the facts showing the plaintiff's right to subrogation. While the facts giving rise to the right may vary, depending on the particular obligation discharged by the plaintiff, a complaint in subrogation generally should show the following:

1. Payment of an obligation by the plaintiff subrogee [*see Iusi v. City Title Ins. Co. (1963) 213 Cal. App. 2d 582, 587-588, 28 Cal. Rptr. 893]* ; or, if the subrogee is a state or county retirement system or a workers' compensation carrier, the payment of a liability, or an obligation to pay a liability, or both past payment and an obligation for future payments of a liability, because of injury to or death of a member or employee [*see Gov. Code §§ 21451, 31820*; *Lab. Code § 3852*].

2. Plaintiff, in paying the obligation, was not acting as a mere volunteer [*see Caito v. United Cal. Bank (1978) 20 Cal. 3d 694, 704, 144 Cal. Rptr. 751, 576 P.2d 466* ; *Stein v. Simpson (1951) 37 Cal. 2d 79, 84, 230 P.2d 816* ; *McMillan v. O'Brien (1934) 219 Cal. 775, 779-782, 29 P.2d 183]* .

3. The debt paid was one for which the subrogee was not primarily liable [*see Caito v. United Cal. Bank (1978) 20 Cal. 3d 694, 704, 144 Cal. Rptr. 751, 576 P.2d 466]* .

4. An underlying cause of action or statutory basis for subrogation by alleging either:

a. The subrogor had an assignable cause of action to which the subrogee was subrogated [*see, e.g., Offer v. Superior Court (1924) 194 Cal. 114, 121, 228 P. 11* ; *Royal Indem. Co. v. Security Truck Lines (1963) 212 Cal. App. 2d 61, 64-65, 27 Cal. Rptr. 858]* , or

b. The facts showing that plaintiff comes within the operation of a statute that provides for subrogation to an otherwise nonassignable cause of action for personal injury [*see Gov. Code §§ 21451, 31820* (for benefits paid by state and county retirement associations); *Lab. Code § 3852* (for benefits paid by workers' compensation carriers); *Ins. Code § 11580.2(g)* (for claims paid by an insurer under the uninsured motorist

coverage)].

5. Subrogation will not work any injustice to the rights of others [*see* *Caito v. United Cal. Bank (1978) 20 Cal. 3d 694, 704, 144 Cal. Rptr. 751, 576 P.2d 466* ; *Federal Ins. Co. v. Allen (1970) 13 Cal. App. 3d 648, 650, 92 Cal. Rptr. 125*].

6. When the action is against a person other than the actual wrongdoer who was the primary cause of the loss, plaintiff's equities are superior to those of the defendant [*see* *Fireman's Fund Ins. Co. v. Morse Signal Devices (1984) 151 Cal. App. 3d 681, 687, 198 Cal. Rptr. 756* ; *Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc. (1978) 83 Cal. App. 3d 593, 602, 148 Cal. Rptr. 57*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesGeneral OverviewGovernmentsLegislationStatutory Remedies & Rights

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PART IV PROCEDURAL CHECKLIST

47-536 California Forms of Pleading and Practice--Annotated § 536.61

§ 536.61 Subrogor's Cause of Action Against Defendant Obligor

A complaint in subrogation must also allege the subrogor's cause of action against the obligor, since it is this cause of action to which the plaintiff is subrogated. The cause of action will, of course, vary, depending on the nature of the obligation discharged by the; plaintiff subrogee. The most common forms of subrogated actions appear to be actions arising from tort and actions arising from contract The elements of these causes of action are set forth below.

1. Subrogated Action in Tort. The complaint in a subrogated tort action (for example, negligence) should plead facts showing the following [*see Civ. Code §§ 3281, 3282, 3333*; *Breese v. Price (1981) 29 Cal. 3d 923, 926-927, 176 Cal. Rptr. 791, 633 P.2d 987*]:

a. A duty on the part of the defendant (obligor) to the subrogor.

b. A breach of that duty.

c. Detriment or loss to the subrogor (or a detriment or loss that would have been sustained had it not been paid by plaintiff subrogee).

d. The detriment or loss was proximately caused by the defendant's breach.

e. The measure of damages (amount of money) required to compensate for the detriment sustained. (However, if the action is for personal injuries or wrongful death, the amount of the subrogor's claim must not be stated [*see Code Civ. Proc. § 425.10(b)*].)

2. Subrogated Action in Contract. The complaint in a subrogated action for breach of contract should allege facts showing the following [*see Civ. Code §§ 3281, 3282, 3300, 3302*]:

a. A duty on the part of the defendant to plaintiff's subrogor (the execution of the contract).

b. A breach of the contract by defendant (nonperformance of a contract provision).

c. The breach proximately caused detriment or loss to plaintiff's subrogor (or a detriment or loss would have been sustained had plaintiff not discharged the obligation or paid the loss).

d. The measure of the detriment in terms of money (damages), that is, the amount paid by plaintiff plus interest [*Civ. Code § 3287* (recovery of interest authorized)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesGeneral OverviewContracts LawThird PartiesSubrogationGovernmentsLegislationStatutory Remedies & RightsTortsProcedureCommencement & ProsecutionGeneral Overview

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47-536 California Forms of Pleading and Practice--Annotated §§ 536.62-536.79

[Reserved]

§§ 536.62[Reserved]

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PART V FORMS
A. Capacity Allegations

47-536 California Forms of Pleading and Practice--Annotated § 536.80

§ 536.80 Allegation--Capacity of Plaintiff Insurer Suing as Subrogee of Insured and Authority to Transact Insurance Business--Multiple Line Insurer Including Particular Class Involved in Action

[1] FORM Allegation--Capacity of Plaintiff Insurer Suing as Subrogee of Insured and Authority to Transact Insurance Business--Multiple Line Insurer Including Particular Class Involved in Action
Plaintiff is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of _____ and authorized to transact, and transacting, a multiple line, including_____ [surety *or* fire *or* liability *or specify other as appropriate to the action*], insurance business in California.

[2] Use of Form

This allegation is for use in a complaint on a subrogated claim to allege the capacity of the plaintiff insurer-subrogee as a corporation and its authority to transact a multiple line or, as it is frequently called, a general, insurance business, including the class of insurance involved in the particular case. Many subrogees are insurance companies subrogated to claims of their insureds. Insurers are prohibited from transacting any class of insurance which is not authorized by their charters [*Ins. Code §§ 16, 680*]. The complaint should, therefore, allege the particular class or combination of classes of insurance that the plaintiff is authorized to transact.

[3] Classes of Insurance

No person shall transact any class of insurance business in this state without first being admitted for such class [*Ins. Code § 700(a)*]. There are 22 separate classes of insurance in California [*Ins. Code § 100*] and a large number of possible combinations. Each class is separately defined in *Ins. Code §§ 100 et seq.*

[4] Cross References

For capacity allegations generally, see Ch. 20, *Allegations Commonly Used*

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47-536 California Forms of Pleading and Practice--Annotated § 536.81

§ 536.81 Allegation--Capacity of Plaintiff Insurer Suing as Subrogee of Insured and Authority to Transact Insurance Business--Insurer of Particular Class Involved in Action

[1] FORM Allegation--Capacity of Plaintiff Insurer Suing as Subrogee of Insured and Authority to Transact Insurance Business--Insurer of Particular Class Involved in Action
Plaintiff is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of _____ and authorized to transact, and transacting, a_____ [*specify, e.g.,* liability and automobile] insurance business in California.

[2] Use of Form

This allegation is for use when the plaintiff insurer-subrogee is authorized to transact one or more classes of insurance business, but not a general insurance business.

[3] Cross References

See also *§ 536.80*

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47-536 California Forms of Pleading and Practice--Annotated § 536.82

§ 536.82 Allegation--Capacity of Defendant Insurer in Subrogation Action, Authority to Transact Insurance Business, and Location of Principal Place of Business--Multiple Line Insurer Including Particular Class Involved in Action

[1] FORM Allegation--Capacity of Defendant Insurer in Subrogation Action, Authority to Transact Insurance Business, and Location of Principal Place of Business--Multiple Line Insurer Including Particular Class Involved in Action

Defendant is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of _____ and authorized to transact, and transacting, a multiple line, including_____ [surety *or* fire *or* liability *or specify other as appropriate to the action*], insurance business in California, with its principal place of business in this state situated in _____ County.

[2] Use of Form

This allegation is for use in a complaint on a subrogated claim against an insurer obligor. Like the allegation in *see § 536.80*, this allegation alleges the insurer's capacity as a corporation and authority to transact a multiple line insurance business, but includes in addition the statement of the insurer's principal place of business in California. For discussion of the county of a corporation's principal place of business, as well as other counties in which corporations may be sued, see *Code Civ. Proc. § 395.5* and Ch. 571, *Venue* .

[3] Cross References

See also *§ 536.80*

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47-536 California Forms of Pleading and Practice--Annotated § 536.83

§ 536.83 Allegation--Capacity of Defendant Insurer in Subrogation Action, Authority to Transact Insurance Business, and Location of Principal Place of Business--Insurer of Particular Class Involved in Action

[1] FORM Allegation--Capacity of Defendant Insurer in Subrogation Action, Authority to Transact Insurance Business, and Location of Principal Place of Business--Insurer of Particular Class Involved in Action
Defendant is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of _____ and authorized to transact, and transacting, a_____ [*specify, e.g.,* liability and automobile] insurance business in California, with its principal place of business in this state situated in _____ County.

[2] Use of Form

This allegation is for use in a complaint on a subrogated claim against an insurer obligor. This allegation alleges the insurer's capacity as a corporation and authority to transact the particular class or classes of insurance business, but includes in addition the statement of the insurer's principal place of business in California. For discussion of the county of a corporation's principal place of business, as well as other counties in which corporations may be sued, see *Code Civ. Proc. § 395.5* and.

[3] Cross References

See also *§ 536.80*

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47-536 California Forms of Pleading and Practice--Annotated §§ 536.84-536.99

[Reserved]

§§ 536.84[Reserved]

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B. Complaints

47-536 California Forms of Pleading and Practice--Annotated § 536.100

§ 536.100 Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Casualty Insurer as Subrogee of Its Insured for Damages [Civ. Code § 3333]--Against Tortfeasor to Recover Amount Paid to Insured for Property Loss or Damage Covered by Insurance Policy--General Form

[1] FORM Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Casualty Insurer as Subrogee of Its Insured for Damages [Civ. Code § 3333]--Against Tortfeasor to Recover Amount Paid to Insured for Property Loss or Damage Covered by Insurance Policy--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
a_____ [*e.g.*, California]	)	
Corporation,	)	
Plaintiff,	)	
	)	NO. _____
vs.	)	COMPLAINT IN SUBROGATION FOR DAMAGES
	)	
_____ [*name*],	)	[LIMITED CIVIL CASE]
[_____ (*specify capacity, if a legal entity*),]	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
[and DOES 1 through _____,]	)	
Defendant(s).	)	
	)	
	)	

Plaintiff alleges:
1. Plaintiff is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of

_____ and authorized to transact, and transacting, business in this state as a_____ [*specify particular casualty insured against, e.g.,* fire] insurer.
2. _____ [*Name of plaintiff's insured*] [is, and] at all times herein mentioned was[,] _____ [*specify, e.g.,* the owner and operator of a restaurant, hereinafter "the restaurant," located at _____ (*street address*), _____ (*city and/or county*), _____ (*state*)].
3. At all times herein mentioned,_____ [*specify, e.g.,* the restaurant and its contents were] insured against loss or damage by_____ [*specify casualty covered, e.g.,* fire] under a policy of insurance, hereinafter "the policy," issued by plaintiff to_____ [*name of plaintiff's insured*] as the named insured. [A copy of the policy is attached hereto as Exhibit A and made a part hereof.]
4. Defendant_____ [*name*] [is, and] at all times herein mentioned was[,] _____ [*specify, e.g.,* the owner and operator of a service station, hereinafter "the service station," located at _____ (*street address*), _____ (*city and/or county*), _____ (*state*)].
[5. Defendants Doe 1 through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.)]

[6. (Plaintiff is informed and believes and thereon alleges that) (A)t all times mentioned in this complaint, each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of that agency and employment.]
7. On or about_____ [*date*], defendant[s, and each of them,] so negligently_____ [*specify, e.g.,* controlled, owned, operated, maintained, serviced, and repaired the service station premises as to allow gasoline to escape from the gas pumps and to cascade to the restaurant premises where it caught fire and exploded].
8. As a proximate result of the negligence of defendant[s, and each of them,] in_____ [*specify, e.g.,* allowing the gasoline to escape from the gas pumps, to catch fire, and explode], as hereinabove alleged,_____ [*specify damage to plaintiff's insured, e.g.,* the restaurant and all of its contents were totally destroyed].
9. As a further proximate result of the negligence of defendant[s, and of each of them,] and the_____ [*specify damage to plaintiff's insured, e.g.,* destruction of the restaurant and its contents], as hereinabove alleged,_____ [*name of plaintiff's insured*] _____ [*specify damages, e.g.,* was damaged in the sum of $_____ *or* sustained damages in the following amounts: _____ (*specify, e.g.,* $_____), the value of the restaurant building immediately before the fire; $_____, the value of personal property including appliances, furniture, carpets, draperies, curtains, and other furnishings, and uniforms, table linen, towels, dishes, glassware, silverware, supplies, foodstuffs, and other items; and $_____, the cost of removing the burned debris from the premises].
10. On or about_____ [*date*], plaintiff, in accordance with the terms of the policy paid_____ [*name of plaintiff's insured*] the sum of $_____ in full satisfaction of his/her claim for_____ [*specify, e.g.,* loss of property by fire] [and took from _____ (*name of plaintiff's insured*) an assignment of his/her right of recovery against any party responsible for the loss to the extent that payment therefor was made by plaintiff]. [A copy of the assignment is attached hereto as Exhibit B and made a part hereof.]
11. On or about_____ [*date*], plaintiff notified defendant_____ [*name*] of the payment and of plaintiff's right to subrogation [and the assignment],and demanded payment in the sum of $_____ [*amount paid*], but defendant_____ [*name*] failed and refused and continues to fail and refuse to pay plaintiff the whole or any part thereof.

WHEREFORE, plaintiff prays judgment as follows:
1. For the sum of $_____ paid by plaintiff to_____ [*name of plaintiff's insured*] and for interest thereon at the legal rate from and after_____ [*date of payment*];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

This form of complaint is for use by a casualty insurer as the subrogee of its insured (subrogor) to recover from the defendant obligor (tortfeasor) the amount that plaintiff paid to its insured under an insurance policy covering property damage or loss, which damage or loss was tortiously caused by the defendant obligor. For alternative forms of allegations of the capacity of an insurer, see *§§ 536.80* and *536.81*.

[3] Allegations

This complaint alleges the following:

- The plaintiff's legal capacity and its authority to engage in the insurance business as a particular class of insurer (Paragraph 1);

- The identity of the subrogor (Paragraph 2);

- The existence of insurance covering the loss (Paragraph 3);

- The identity of the defendant obligor (Paragraph 4);

- The venue of the action (Paragraphs 2, 7) [*see Code Civ. Proc. §§ 392(1)(a), 395(a), 395.2, 395.5*; *see also* Ch. 571, *Venue*];

- The defendants sued by fictitious names (Paragraph 5) [*see Code Civ. Proc. § 474*; *see also* Ch. 20, *Allegations Commonly Used*];

- Any agency relationship of defendants (Paragraph 6) [*see generally* Ch. 427, *Principal and Agent*];

- The defendant's duty to the subrogor, that is, the relationship between the parties giving rise to defendant's duty to exercise due care (Paragraphs 2, 4) [*see Civ. Code § 1714(a)*];

- The defendant's breach of that duty (Paragraph 7) [*see Civ. Code § 3333*];

- Proximate causation and detriment (Paragraphs 8, 9) [*see Civ. Code §§ 3282, 3333*];

- Damages (the measure of the subrogor's loss in terms of money) (Paragraph 9) [*see Civ. Code §§ 3281, 3333*];

- The plaintiff's payment of the subrogor's claim against defendant obligor (Paragraph 10); and

- The plaintiff's notice to and demand for payment from defendant obligor (Paragraph 11).

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the claim is for $25,000 or less and the right to which the subrogee is subrogated is a legal, as opposed to an equitable, right, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 72055*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[6] Cross References

For alternative forms of capacity, residence, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For alternative forms of verification, see Ch. 572, *Verification*

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47-536 California Forms of Pleading and Practice--Annotated § 536.101

§ 536.101 Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Insurer as Subrogee of Its Insured for Damages [Civ. Code § 3333]--Against Tortfeasor to Recover Amount Paid to Insured as Replacement Cost of Destroyed Property [Civ. Code § 1714(a)]

[1] FORM Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Insurer as Subrogee of Its Insured for Damages [Civ. Code § 3333]--Against Tortfeasor to Recover Amount Paid to Insured as Replacement Cost of Destroyed Property [Civ. Code § 1714(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
a_____ [*e.g.*, California]	)	
Corporation,	)	
Plaintiff,	)	
	)	NO. _____
vs.	)	COMPLAINT IN SUBROGATION FOR DAMAGES
	)	
_____ [*name*],	)	[LIMITED CIVIL CASE]
[_____ (*specify capacity, if a legal entity*),]	)	[Amount demanded _____ (exceeds *or* does not exceed) $10,000]
[and DOES 1 through _____,]	)	
Defendant(s).	)	
	)	
	)	

_____

Plaintiff alleges:
1. Plaintiff is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of

_____ and authorized to transact, and transacting, business in this state as a_____ [*specify, e.g.,* liability] insurer.
2. _____ [*Name of plaintiff's insured*], hereinafter "the insured," is, and at all times herein mentioned was,_____ [*specify, e.g.,* the owner and operator of a service station, hereinafter "the service station property,"] located at_____ [*street or highway address and city or county*], California.
3. At all times herein mentioned, the insured was insured by plaintiff under an insurance policy by the terms of which plaintiff was obligated to indemnify the insured against loss or damage to the_____ [*specify, e.g.,* service station property], including a certain_____ [*specify, e.g.,* pole sign] standing thereon and owned by the insured. [A copy of the policy is attached hereto as Exhibit A and made a part hereof.]
[4. Defendants Doe 1 through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacitiesherein. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants.)]
5. Defendant,_____ [*name*], is, and at all times herein mentioned was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a resident of *or* a corporation organized and existing under the laws of the State of _____ with its principal place of business in] _____ County, California.
[6. (Plaintiff is informed and believes and thereon alleges that) (A)t all times mentioned in this complaint, defendant, _____ (*name*), was the agent of the defendant _____ (*name*), and (in doing the things hereinafter alleged) was acting within the course and scope of that agency and with the permission and consent of his/her/its codefendant.]
7. _____ [*Allege damage to or destruction of property, e.g.,* On or about_____ [*date*], _____ (defendant *or name of defendant's employee*) was operating a certain truck on _____ (*name of highway or street*) at or near the location of the _____ (*specify, e.g.,* service station property). At that time and place, _____ (defendant *or name of defendant's employee*) so negligently operated, maintained, and controlled the truck that as a proximate result it was caused to, and did, leave the highway and collide violently with the _____ (*specify, e.g.,* pole sign) standing on _____ (*specify, e.g.,* the service station property)].
8. As a proximate result of the negligence of_____ [defendant *or name of defendant's employee*] and the collision hereinabove alleged, the_____ [*specify, e.g.,* pole sign] was_____ [*specify, e.g.,* damaged beyond repair].
9. The cost of replacing the_____ [*specify, e.g.,* pole sign] was $_____. On or about_____ [*date*], plaintiff under the terms of its policy paid the insured the sum of $_____, and plaintiff is therefore subrogated to all rights of the insured against defendant for the damage.
10. On or about_____ [*date*], plaintiff notified defendant_____ [*name*] of the payment and of plaintiff's right to subrogation, and demanded payment in the sum of $_____ [*amount paid*], but defendant_____ [*name*] failed and refused and continues to fail and refuse to pay plaintiff the whole or any part thereof].

[2] Use of Form

This form of complaint is for use by an insurer as the subrogee of its insured (subrogor) to recover from the obligor (tortfeasor) the amount plaintiff paid to its insured under a policy providing indemnity insurance for a loss tortiously caused by the defendant and which was covered by the policy [*see Royal Indem. Co. v. Security Truck Lines (1963) 212 Cal. App. 2d 61, 65, 27 Cal. Rptr. 858*].

[3] Allegations

This complaint alleges the following:

- The plaintiff's legal capacity and its authority to engage in the insurance business as a particular class of insurer (Paragraph 1);

- The identity of the subrogor (Paragraph 2);

- The existence of an insurance policy providing indemnity for damaged or destroyed personal property (Paragraph 3);

- The defendants, if any, sued by fictitious names (Paragraph 4) [*see Code Civ. Proc. § 474*; *see also* Ch. 20, *Allegations Commonly Used*];

- The residence or capacity of the defendant if other than a natural person acting in an individual capacity and the identity of its employee who committed the tort if liability is founded on respondeat superior (Paragraphs 5, 6);

- The tortious act (Paragraph 7);

- Damage (Paragraph 8);

- The cost of repairing the damage and plaintiff's payment of the subrogor's claim against defendant obligor (Paragraph 9); and

- The plaintiff's demand for payment from the obligor and the obligor's failure to pay (Paragraph 10).

Paragraphs 2, 7, and 8, and alternatively Paragraph 5, lay venue [*see Code Civ. Proc. §§ 392, 395(a), 395.2, 395.5*; *see also* Ch. 571, *Venue*].

[4] Cross References

See also *§ 536.100*

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47-536 California Forms of Pleading and Practice--Annotated § 536.102

§ 536.102 Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Insurer as Subrogee of Its Insured for Damages [Civ. Code § 3333]--Against Insured's Former Employee to Recover Amount Paid to Insured for Loss Through Employee's Theft or Embezzlement [Civ. Code § 3336]

[1] FORM Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Insurer as Subrogee of Its Insured for Damages [Civ. Code § 3333]--Against Insured's Former Employee to Recover Amount Paid to Insured for Loss Through Employee's Theft or Embezzlement [Civ. Code § 3336]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
a_____ [*specify, e.g.,* Califor-	)	
nia]	)	
Corporation,	)	NO. _____
Plaintiff,	)	COMPLAINT IN SUBROGATION FOR DAM-
	)	AGES
vs.	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
_____ [*name*],	)	(exceeds *or* does not exceed) $10,000]
Defendant.	)	
	)	

_____

Plaintiff alleges:
1. Plaintiff is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of _____ and authorized to transact, and transacting, business in this state as an admitted surety insurer.
2. Defendant,_____ [*name*], is, and at all times herein mentioned was, a resident of _____ County, California.

3. _____ [*Name of plaintiff's insured*], hereinafter "the insured," is, and at all times herein mentioned was,_____ [*specify capacity if other than a natural person, e.g.,* a corporation organized and existing under the laws of California and] engaged in business as a_____ [*specify, e.g.,* manufacturer of television sets], with its principal place of business in this state located in _____ County, California.

4. At all times herein mentioned, plaintiff was surety on a fidelity bond issued to the insured by the terms of which plaintiff agreed to indemnify the insured against any loss which the insured might sustain through any fraudulent or dishonest act by any one or more employees of the insured, of money or other property, real or personal, belonging to the insured, or in which the insured might have a pecuniary interest, or for which the insured might be legally liable, or which might be held by the insured in any capacity. [A copy of the bond is attached hereto as Exhibit A and made a part hereof].
5. During the period beginning on or about _____ and continuing until on or about _____, defendant was employed as a_____ [*specify, e.g.,* bookkeeper] by the insured.
6. During the period of employment, defendant stole, embezzled, misappropriated, wrongfully abstracted and willfuly misapplied, and converted to his/her own use_____ [money *or specify other property as appropriate*] belonging to the insured_____ [in the sum *or* having a reasonable value] of $_____.
7. On or about _____, the insured executed and submitted to plaintiff its sworn proof of loss in the above stated sum of $_____ by reason of the acts of defendant as hereinabove alleged and made demand on plaintiff for indemnification in that sum. On or about _____, plaintiff paid to the insured the sum of $_____ under its bond to indemnify for such loss and thereupon became subrogated to all rights, and entitled to enforce all remedies, of the insured against defendant.
8. Plaintiff has made demand on defendant for payment of the sum of $_____, but defendant has failed and refused to pay either all or any part of it.

[2] Use of Form

This form of complaint is for use by an insurer as the subrogee of its insured (subrogor) to recover from the obligor (the insured's former employee) the amount plaintiff paid its insured under a fidelity bond for a loss resulting from the employee's theft or embezzlement of the insured's property or money. For a form of complaint by an insurer against a third party whose acts facilitated the defalcations of a dishonest employee, see *§ 536.107*.

[3] Allegations

This complaint alleges the following:

- The plaintiff's legal capacity and its authority to engage in the insurance business as a particular class of insurer (Paragraph 1);

- The residence of the defendant (Paragraph 2) [*see Code Civ. Proc. § 395(a)*; *see also* Ch. 571, *Venue*];

- The identity of the subrogor (Paragraph 3);

- The existence of an insurance policy providing indemnity for the fraudulent or dishonest act of any employee (Paragraph 4);

- The employment period of the employee (Paragraph 5);

- The tortious act of the employee (Paragraph 6);

- The filing by the insured of a proof of loss and payment by plaintiff (Paragraph 7); and
- The plaintiff's demand of defendant for payment and defendant's failure to pay (Paragraph 8).

[4] Cross References

See also *§ 536.100*

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 536 SUBROGATION
PART V FORMS
B. Complaints

47-536 California Forms of Pleading and Practice--Annotated § 536.103

§ 536.103 Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Insurer as Subrogee of Its Insured for Damages [Civ. Code § 3333]--Against Contractor and Subcontractors to Recover Amount of Payment Made by Subrogee for Repairs Made Necessary by Negligent Construction of a Building on Insured's Property [Civ. Code § 1714(a)]

[1] FORM Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Insurer as Subrogee of Its Insured for Damages [Civ. Code § 3333]--Against Contractor and Subcontractors to Recover Amount of Payment Made by Subrogee for Repairs Made Necessary by Negligent Construction of a Building on Insured's Property [Civ. Code § 1714(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
a_____ [*e.g.*, California]	)	
Corporation,	)	
Plaintiff,	)	
	)	
vs.	)	NO. _____
	)	COMPLAINT IN SUBROGATION FOR DAM-
_____ [*name of contractor*],	)	AGES
[_____ (	)	[LIMITED CIVIL CASE]
if a legal entity),] [and]	)	[Amount demanded _____
_____ [*names and capac-*	)	(exceeds *or* does not exceed) $10,000]
ities of subcontractors]	)	
[, and DOES 1 through _____,]	)	
Defendant(s).	)	
	)	
	)	
_____		

Plaintiff alleges:
1. Plaintiff is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of _____ and authorized to transact, and transacting, business in this state as, among other classes, a miscellaneous insurer.
2. _____ [*Name of plaintiff's insured*], hereinafter "the insured," is, and at all times herein mentioned was, the owner of certain real property, hereinafter "the property," known as_____ [*street address*], _____ [*city or county*], California, and more particulary described as follows:_____ [*legal description*].

3. At all times herein mentioned, the insured was insured by plaintiff under a policy of property insurance, hereinafter "the policy," by the terms of which plaintiff insured the insured against, among other risks, any loss or damage resulting from any improper construction of a building on the property. [A copy of the policy is attached hereto as Exhibit A and made a part hereof.]
4. Defendant_____ [*name*], hereafter "defendant contractor," is, and at all times herein mentioned was, _____ [*specify capacity, e.g.,* a corporation organized and existing under the laws of the State of _____, with its principal place of business in _____ County, and engaged in business as a general contractor.
5. Defendants_____ [*names*], hereinafter "defendant subcontractors," are, and at all times herein mentioned were, [*specify capacity, e.g.,* associated together under the assumed name of _____, with their principal place of business in this state located _____ in _____ County], and engaged in business as a specialty contractor performing_____ [*e.g.,* cement and concrete work].

[6. *Fictitious name allegation, if appropriate. See § 536.100[1], Paragraph 5.*]
7. On or about_____ [*date*], the insured entered into a written contract with defendant contractor by the terms of which defendant contractor agreed to construct a_____ [*e.g.,* residence], hereinafter "the building," on the property. [A copy of the contract is attached hereto as Exhibit B and made a part hereof.]
8. On or about_____ [*date*], defendant contractor employed defendant subcontractors [, and defendants Does 1 to _____, inclusive,] to perform the_____ [*e.g.,* cement and concrete work for the foundation and caissons] for the building.
9. Defendants, and each of them, so negligently performed the work under the contract that_____ [*describe injury, e.g.,* immediately on its completion, the building was caused to and did settle] and was thereby damaged.
10. As a proximate result of the negligence of defendants and each of them and the damage to the building as herein alleged, the insured was required to, and did, have repairs made to the building to put it in proper condition; the cost of the repairs was the sum of $_____, which is the reasonable value thereof and which was paid by the insured.
11. On or about_____ [*date*], plaintiff, pursuant to the terms of its policy, reimbursed its insured in the sum of $_____ in full payment of the costs of the repairs and thereby became subrogated to all of the insured's rights, and is entitled to enforce all of the insured's remedies, against defendants.
12. On or about_____ [*date*], plaintiff notified defendants, and each of them, of the payment made and of plaintiff's right to subrogation, and demanded reimbursement in the sum of $_____ [*amount paid*], but defendants, and each of them, failed and refused and continue to fail and refuse to reimburse plaintiff the whole or any part thereof.

[2] Use of Form

This form of complaint is for use by an insurer as the subrogee of its insured (subrogor, property owner) to recover from the obligors (contractor and subcontractors) the amount the insurer paid its insured under an insurance policy in reimbursement of the amount paid by its insured to repair the damage caused by the negligence of the defendants in

constructing the building [*see Firemen's Ins. Co. v. Indermill (1960) 182 Cal. App. 2d 339, 341-342, 6 Cal. Rptr. 469]* .

[3] Allegations

This complaint alleges the following:

- The plaintiff's legal capacity and its authority to engage in the insurance business as a miscellaneous insurer (Paragraph 1);

- The identity of plaintiff's subrogor, a property owner, and if venue is based on the county in which the contract was to be performed [*see Code Civ. Proc. § 395(a)*; *see also* Ch. 571, *Venue*], the county in which the property is situated (Paragraph 2);

- The fact that the subrogor was insured by plaintiff against the loss alleged in the complaint (Paragraph 3);

- The legal capacity of the defendant contractor (obligor) and, if venue is based on the contractor's residence or place of business [*see Code Civ. Proc. § 395(a), 395.2, 395.5*; *see also* Ch. 571, *Venue*], the county of its principal place of business (Paragraph 4);

- The legal capacity of the defendant subcontractors (obligors) and, if venue is based on their residence or place of business [*see Code Civ. Proc. § 395(a), 395.2, 395.5*; *see also* Ch. 571, *Venue*], the county of their residence or principal place of business (Paragraph 5);

- The defendants, if any, sued by fictitious names (Paragraph 6) [*see Code Civ. Proc. § 474*; *see also* Ch. 20, *Allegations Commonly Used*];

- The duty of defendants to use reasonable care in constructing the building, that is, the execution of the contract with defendant contractor and its employment of the subcontractors (Paragraphs 7, 8);

- Breach of duty (Paragraph 9);

- Proximate causation, detriment, and damages (Paragraph 10);

- Payment by the insured of the cost of the repairs (Paragraph 10);

- The plaintiff's reimbursement of the amount paid as required by the terms of its insurance policy (Paragraph 11); and

- The plaintiff's demand for payment and defendants' failure to pay (Paragraph 12).

[4] Cross References

See also *§ 536.100*

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47-536 California Forms of Pleading and Practice--Annotated § 536.104

§ 536.104 Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Insurer as Subrogee of Its Insured for Damages [Civ. Code § 3300]--Against Insured's Subcontractors Under Indemnity Agreements [Civ. Code §§ 2772, 2778] to Recover Amount of Payments Made by Plaintiff on Behalf of Insured in Settlement of Action Brought Against It and Subcontractors for Injuries Caused by Negligence of Subcontractors [Civ. Code § 1714(a)]

[1] FORM Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Insurer as Subrogee of Its Insured for Damages [Civ. Code § 3300]--Against Insured's Subcontractors Under Indemnity Agreements [Civ. Code §§ 2772, 2778] to Recover Amount of Payments Made by Plaintiff on Behalf of Insured in Settlement of Action Brought Against It and Subcontractors for Injuries Caused by Negligence of Subcontractors [Civ. Code § 1714(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
a_____ [*e.g.*, California]	)	
Corporation,	)	
Plaintiff,	)	NO. _____
	)	COMPLAINT IN SUBROGATION FOR DAM-
vs.	)	AGES
	)	[LIMITED CIVIL CASE]
_____ [	)	[Amount demanded _____
of subcontractors],	)	(exceeds *or* does not exceed) $10,000]
Defendants.	)	
	)	
	)	

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of _____ and authorized to transact, and transacting, business in this state as a liability insurer.
2. _____ [*Name*], hereinafter "the insured," is, and at all times herein mentioned was, a_____ [*specify capacity, e.g.,* a corporation organized and existing under the laws of State of California and] engaged in business as a general contractor.

3. At all times herein mentioned, the insured was insured by plaintiff under a policy of liability insurance by the terms of which plaintiff was obligated to assume and discharge any liability which the insured might incur for any injuries to any person in the course and scope of its business as a general building con tractor. [A copy of the policy is attached hereto as Exhibit A and made a part hereof.]
4. Defendant_____ [*name*] is, and at all times herein mentioned was,_____ [*specify capacity, e.g.,* a corporation organized and existing under the laws of the State of California and] engaged in business as a specialty contractor concerned with _____ [*e.g.,* furring, lathing, and plastering] [, with its principal place of business in this state _____] [situated in _____ County].
5. Defendant,_____ [*name*], is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of _____ with its principal place of business in _____ County, and engaged in business as a specialty contractor concerned with_____ [*e.g.,* installation of floor covering].
6. On or about_____ [*date*], the insured was awarded a contract for the construction of a building, hereinafter "the building," on the premises known as_____ [*street address, or other common description as appropriate, city, county, and state*], hereinafter "the construction site." [A copy of the contract is attached hereto as Exhibit B and made a part hereof.]
7. On or about_____ [*date*], defendant_____ [*name of, e.g., furring, lathing, and plastering contractor*] entered into a written contract with plaintiff's insured by the terms of which it promised and agreed, for a consideration, to furnish all necessary labor, materials, tools, and equipment required for_____ [*e.g., metal furring, lathing, and plastering*] in the construction of the building. [A copy of the contract is attached hereto as Exhibit C and made a part hereof.]
8. As part of its terms, the contract contains the following indemnity and hold harmless agreement by defendant_____ [*name of, e.g., furring, lathing, and plastering contractor*]: _____ [*quote provisions*].
9. On or about_____ [*date*], defendant_____ [*name of, e.g., terrazzo contractor*] entered into a written contract with plaintiff's insured by the terms of which it promised and agreed, for a consideration, to furnish all necessary labor, materials, tools, and equipment required to_____ [*e.g.,* install terrazzo work] in the construction of the building. [A copy of the contract is attached hereto as Exhibit D and made a part hereof.]
10. As part of its terms, the contract contains the following indemnity and save harmless agreement by defendant_____ [*name of, e.g., terrazzo contractor*]:_____ [*quote provisions*].
11. On or about_____ [*date*], plaintiff's insured, and defendants, and each of them, were engaged in the construction of the building at the construction site. At this time and place, while one_____ [*name*], hereinafter "the injured party," was lawfully present at the construction site, defendants, and each of them, so negligently_____ [*specify acts, e.g.,* operated, maintained, and controlled a certain hoist] that as a proximate result thereof_____ [*specify accident, e.g.,* a board was caused to fall from the hoist and strike] the injured party causing serious personal injuries to his/her_____ [*specify, e.g.,* head and body].
12. By reason of the negligence of defendants and the injuries thereby caused, the injured person instituted an action for damages for personalinjuries against plaintiff's insured and against defendants, and each of them, in the Superior Court of California, [City and] County of _____, entitled_____ [*name*], Plaintiff, vs._____ [*names*], Defendants, No. _____, hereinafter "the action."
13. On or about_____ [*date*], after being served with summons, plaintiff's insured [in writing] tendered defense of the action as to it to defendants, and each of them, in accordance with their respective indemnity and hold

harmless agreements, but defendants, and each of them, refused the tender, as a result of which plaintiff's insured was required to undertake its own defense to the action.

14. Concurrently therewith, plaintiff's insured demanded [in writing] of defendants, and each of them, that, in accordance with their respective indemnity and hold harmless agreements, they do all acts necessary to indemnify plaintiff's insured and hold it harmless from all liability, costs, losses, and claims resulting from the action, but defendants, and each of them, failed and refused to do so.
15. Thereafter defendants, and each of them, entered into negotiations with the injured party, who demanded the sum of $_____ [*specify amount, e.g.,* $30,000] as the minimum amount he/she would accept in full settlement of the action, and, on or about_____ [*date*], severally entered into agreements with the injured party providing for the payment to him/her of the sum of $_____ [*specify amount, e.g.,* $10,000] from each of them in exchange for the execution by the injured party of covenants not to levy execution against them.
16. As a proximate result of the failure and refusal of defendants, and each of them, to so honor their respective indemnity and hold harmless agreements and the making by them of the settlement agreements in partial satisfaction only of the minimum demand of the injured party, plaintiff, as insurer of plaintiff's insured, was required to, and on or about _____, did pay the balance of $_____ [*specify amount, e.g.,* $10,000] of the injured party's minimum demand in full settlement of his/her claim in order to avoid the expense of further defense of the action and the risk of a judgment in a larger sum being assessed against plaintiff's insured. As a further proximate result thereof, plaintiff, as such insurer, was required to, and on or about _____, did, pay to_____ [*name*], the attorney for plaintiff's insured, the sum of $_____ for his/her services in the defense of the action and in effecting the full settlement thereof. The sum so paid was the reasonable value of the services rendered by the attorney in the action.

17. By reason of the foregoing, plaintiff has become subrogated to the rights of plaintiff's insured against defendants, and each of them, to the extent of the sums so paid by it. [Prior to the commencement of this action, plaintiff's insured assigned to plaintiff all of its rights against defendants, and each of them.]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:
1. For the sum of $_____ [*specify amount, e.g.,* $10,000] together with interest thereon at the legal rate from and after_____ [*date of payment*].
2. For attorney fees in the sum of $_____ incurred and paid in defense of the action from and after_____ [*date of payment*].

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

This form of complaint is for use by an insurer as the subrogee of its insured (subrogor, a general contractor) to recover from the obligors (two subcontractors) the amount the insurer paid in settlement of a portion of a cause of action which had been brought against its insured and the obligors on a liability of the obligors arising out of their negligence. The action is founded on a written agreement by the obligors to indemnify and hold harmless plaintiff's insured from any liability, claims, demands, or costs arising out of their negligence in the construction of a building.

[3] Allegations

This complaint alleges the following:

- The plaintiff's legal capacity and its authority to engage in the insurance business as a liability insurer (Paragraph 1);

- The identity of plaintiff's subrogor, a general contractor (Paragraph 2);

- The existence of insurance issued by plaintiff covering its insured (Paragraph 3);

- The legal capacities of the defendants (Paragraphs 4, 5);

- The execution of the general contract (Paragraph 6);

- The execution of the subcontracts and of the indemnity and hold harmless agreements (establishing defendants' duty to plaintiff's insured) (Paragraphs 7-10);

- The injury to the third party, including the allegations of defendants' duty to that party (third party was lawfully on premises [*see Civ. Code § 1714*]) and their breach of that duty (negligence), as well as proximate causation and injury [*see Civ. Code § 3333*] (Paragraph 11);

- The filing of a lawsuit by the injured party against plaintiff and defendants (Paragraph 12);

- The defendants' breach of their indemnity and hold harmless agreements (Paragraphs 13-15);

- The plaintiff's payment on behalf of its insured as a proximate result of defendants' breach of their indemnity and hold harmless agreements (Paragraph 16); and

- The plaintiff's subrogation to the rights of its insured under the indemnity and hold harmless agreements (Paragraph 17).

[4] Cross References

See also *§ 536.100*

For related forms and alternative forms of complaints on actions arising out of indemnity agreements, see Ch. 300, *Indemnity and Contribution*

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47-536 California Forms of Pleading and Practice--Annotated § 536.105

§ 536.105 Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Surety as Subrogee of General Contractor--Against Subcontractor and Its Surety to Recover Amount of Payments Made by Subrogee to Material Suppliers of Defaulting Subcontractor [Civ. Code §§ 2848, 3300, 3302]

[1] FORM Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Surety as Subrogee of General Contractor--Against Subcontractor and Its Surety to Recover Amount of Payments Made by Subrogee to Material Suppliers of Defaulting Subcontractor [Civ. Code §§ 2848, 3300, 3302]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
a_____ [*e.g.*, California]	)	
Corporation,	)	
Plaintiff,	)	
	)	
vs.	)	NO. _____
	)	COMPLAINT IN SUBROGATION FOR MONEY
_____ [*name of subcontractor*],	)	[LIMITED CIVIL CASE]
[_____ (	)	[Amount demanded _____
legal entity, e.g., a California Corporation),]	)	(exceeds *or* does not exceed) $10,000]
and_____	)	
[*name of surety*], a_____	)	
[*e.g.*, California] Corporation,	)	
Defendants.	)	
	)	

Plaintiff alleges:

1. [*Capacity of plaintiff as admitted surety insurer. See § 536.102[1], Paragraph 1.*]

2. [*Identity of plaintiff's insured. See § 536.104[1], Paragraph 2.*]
3. Defendant_____ [*name*], hereinafter "defendant subcontractor," is, and at all times herein mentioned was, _____ [*specify capacity, e.g.,* a corporation organized and existing under the laws of the State of _____, and engaged in business in this state as a_____ [*specify specialty, e.g.,* plumbing] contractor, with its principal place of business in _____ County].
4. Defendant_____ [*name*], hereinafter "defendant surety," is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of _____, and authorized to transact, and transacting, a surety insurance business in California, with its principal place of business in _____ County].
5. On or about_____ [*date*], plaintiff's insured entered into a written contract, hereinafter "the contract," with_____ [*name of owner*] for the construction of_____ [*specify, e.g.,* houses], hereinafter"the construction project," in_____ [*city*], _____ County, California. [A copy of the contract is attached hereto as Exhibit A and made a part hereof.]
6. Pursuant to the provisions of the contract, plaintiff, as surety, executed and delivered to_____ [*name of owner*], as obligee, a performance bond conditioned on the faithful performance by plaintiff's insured of all work agreed to be performed under the contract and for the payment of all labor and materials furnished to the construction project, including all labor and materials furnished by the subcontractors and suppliers of plaintiff's insured. [A copy of the bond is attached hereto as Exhibit B and made a part hereof.]
7. On or about_____ [*date*], defendant subcontractor entered into a written subcontract, hereinafter "the subcontract," with plaintiff's insured by the terms of which defendant agreed to perform certain_____ [*e.g.,* plumbing] work in connection with the construction project and to provide all labor, materials, and supplies necessary to complete the work under the subcontract. [A copy of the subcontract is attached hereto as exhibit C and made a part hereof.]

8. On or about the date the subcontract was executed, defendant insurer, as surety, executed and delivered to plaintiff's insured, as obligee, a bond, incorporating the subcontract, and conditioned on the faithful performance by defendant subcontractor, as principal, of all terms and conditions of the subcontract and the payment in full of all persons supplying labor and materials in connection with the performance of the subcontract. [A copy of the bond is attached hereto as Exhibit D and made a part hereof.]

9. Defendant subcontractor failed to perform the subcontract in that it did not pay and discharge debts incurred by it for materials furnished to it by certain material suppliers and incorporated into the construction project[; defendant subcontractor further failed to perform its subcontract in that it allowed mechanics' liens to be filed against the construction project for the unpaid debts].
10. The indebtednesses incurred by defendant subcontractor to the suppliers of materials to the construction project which defendant subcontractor failed to pay and which plaintiff was obligated to and did pay consist of the following:_____ [*set forth list, identifying each supplier, the materials supplied, and the amount of the supplier's charges*].
11. As a proximate result of defendant subcontractor's failure to pay for materials and supplies, plaintiff[, in order to avoid foreclosure of the mechanics' liens on the construction project,] was obligated under the terms of its bond to, and on or about _____ did, pay and discharge the indebtedness to each of the suppliers in the amounts hereinabove alleged in the total sum of $_____.
12. By reason of the payment of the claims in the total sum of $_____, as herein alleged, plaintiff became subrogated to all of the rights, and is entitled to enforce all of the remedies, of its insured against defendants, and each of them, to the extent of the payment made.

13. Plaintiff has demanded reimbursement from defendants of the amounts paid as herein alleged, but defendants have

failed and refused, and continue to fail and refuse to reimburse plaintiff the amounts paid or any portion thereof.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:
1. For the total sum of $_____ which plaintiff paid to defendant subcontractor's suppliers, with interest thereon as provided by law from the date of payment;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

This form of complaint is for use by the surety (subrogee) of a general contractor (subrogor) against a subcontractor and its surety (obligors) to recover the amounts plaintiff was required to pay under its bond to the subcontractor's suppliers on the failure of the subcontractor (or its surety) to pay them as it was required to do by the terms of the subcontract which was incorporated by reference in the performance bond executed by defendant surety [*see Continental Cas. Co. v. Hartford Accident & Indem. Co. (1966) 243 Cal. App. 2d 565, 570-571, 52 Cal. Rptr. 533]* .

[3] Allegations

This complaint alleges the following:

- The plaintiff's legal capacity and its authority to engage in a surety insurance business (Paragraph 1);

- The legal capacity (identity) of plaintiff's subrogor, a general contractor (Paragraph 2);

- The legal capacity and business of the defendant subcontractor (obligor) and its principal place of business [*see Code Civ. Proc. §§ 395(a), 395.2, 395.5*; *see also* Ch. 571, *Venue*] (Paragraph 3);

- The legal capacity of defendant surety (obligor), its authority to engage in a surety insurance business, and its principal place of business (Paragraph 4) [*see Code Civ. Proc. § 395.5*; *see also* Ch. 571, *Venue*];

- The execution by plaintiff's subrogor of the construction contract (Paragraph 5);

- The execution of the bond by plaintiff on behalf of its principal obligating it, among other things, to pay for materials and supplies furnished to the construction project on the failure of any of the contractor's subcontractors to do so (Paragraph 6);

- The execution of the subcontract by defendant subcontractor imposing on it the duty, among others, to pay for materials and supplies furnished to it for incorporation in the construction project (Paragraph 7);

- The execution of the bond by defendant surety imposing on defendant surety the duty, among others, to perform the subcontract on the subcontractor's failure to do so (Paragraph 8);

- The breach of the subcontract by defendant subcontractor (Paragraph 9);

- The names of the suppliers who were not paid by defendant subcontractor and the amounts owing to each (Paragraph 10);

- Payment of the suppliers by plaintiff (Paragraph 11);

- The plaintiff's right to be subrogated to the claim of its subrogor under the subcontract and defendant surety's bond against defendants (Paragraph 12); and

- The plaintiff's demand for payment and the failure of defendants to pay (Paragraph 13).

[4] Cross References

See also *§ 536.100*

For additional forms of complaints by contractors and their sureties relating to construction contracts, see Ch. 104, *Building Contracts*

For forms of complaints for damages for breach of contract and various allegations for use in such complaints, see Ch. 140, *Contracts*

For additional forms of complaints by and against sureties relating to bonds, see Ch. 538, *Suretyship, Bonds, and Undertakings*

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47-536 California Forms of Pleading and Practice--Annotated § 536.106

§ 536.106 Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Remainderman as Subrogee of Public Taxing Body [Civ. Code § 2903]--Against Life Tenant to Compel Sale of Real Property, Apportion Proceeds, and Recover Amount Paid by Remainderman to Satisfy Tax Lien

[1] FORM Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Remainderman as Subrogee of Public Taxing Body [Civ. Code § 2903]--Against Life Tenant to Compel Sale of Real Property, Apportion Proceeds, and Recover Amount Paid by Remainderman to Satisfy Tax Lien

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	COMPLAINT IN SUBROGATION TO ENFORCE
Defendants.	)	LIEN ON REAL PROPERTY
	)	
	)	

Plaintiff alleges:
1. Plaintiff is, and at all times herein mentioned was, the owner of the remainder interest after the life estate in real property, hereinafter "the property," known as_____ [*street address*], _____ [*city and/or county*], California, and more particularly described as follows:_____ [*legal description*].

2. Defendant is, and at all times herein mentioned was, the owner of an estate for life in the property.
3. At all times herein mentioned, defendant, as such the life tenant, had the duty to pay all taxes assessed on the property, but failed to pay the following taxes:_____ [*specify taxing agency, year, and amount*].
4. On or about_____ [*date*], as a proximate result of defendant's failure to have paid the taxes as

hereinabove alleged, the property was sold to the State of California for delinquent taxes.
5. On or about_____ [*date*], and before expiration of the period for redeeming the property from the tax sale, plaintiff made demand in writing on defendant to pay the taxes and penalties on the property, but defendant failed to do so.
6. On or about_____ [*date*], plaintiff, to prevent a final forfeiture of the property, including plaintiff's remainder interest in it, and to redeem the property from the tax sale, paid the taxes and penalties as follows:_____ [*specify date and amount paid, separately stating amount paid for taxes and amount paid for penalties and total amount of payment, and agency to which paid*].
7. By reason of the payment of the taxes and penalties as hereinabove alleged, plaintiff thereby became subrogated to the rights and remedies of_____ [*name of tax agency*] against defendant to the extent of the payment.

WHEREFORE, plaintiff prays judgment as follows:
1. For sale of the property, apportioning the proceeds between the parties according to the value of their respective estates, and recovery of the sum of $_____ out of defendant's share of the proceeds to reimburse plaintiff for the taxes and penalties paid;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

[2] Use of Form

This form of complaint is for use by the remainderman, after payment of delinquent taxes and penalties to redeem the property from the lien, as subrogee of the taxing authority, against the life tenant who was obligated but failed to pay the taxes and penalties [*see Riley v. Turpin (1956) 47 Cal. 2d 152, 154-157, 301 P.2d 834*].

[3] Allegations

This complaint alleges the following:

- The identity of the real property involved and its location, thereby laying venue in the county in which the real property is situated [*see Code Civ. Proc. § 392*; *see also* Ch. 571, *Venue*] (Paragraph 1);

- The respective interests of the parties in the property (Paragraphs 1, 2);

- The defendant's duty to pay the taxes [*see Civ. Code § 840*] and defendant's breach of that duty by failing to do so (Paragraph 3);

- The sale of the property to the state for delinquent taxes as a proximate result of defendant's failure to have paid the taxes (Paragraph 4);

- The plaintiff's demand that defendant pay the taxes and penalties and defendant's failure to do so (Paragraph 5);

- The plaintiff's payment of the taxes and penalties to redeem the property and prevent a forfeiture [*see Civ. Code § 2903*] (Paragraph 6); and

- The plaintiff's subrogation to the rights of the taxing authority against the life tenant [*see Civ. Code § 2903*] (Paragraph 7).

[4] Subrogation of Person Redeeming Property from Lien

Every person, having an interest in property subject to a lien has the right to redeem it from the lien, at any time after the claim is due and before his or her right of redemption is foreclosed, and, by such redemption, becomes subrogated to all the benefits of the lien as against all owners of other interests in the property, except insofar as he or she was bound to make the redemption for their benefit [*Civ. Code § 2903*; *see Jones v. Gore (1956) 141 Cal. App. 2d 667, 674, 297 P.2d 474*].

Moreover, one who has a lien inferior to another on the same property has a right (1) to redeem the property in the same manner as its owner might from the superior lien and (2) to be subrogated to all the benefits of the superior lien, when necessary for the protection of his or her interests, on satisfying the claim secured by it [*Civ. Code § 2904*].

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Chapter 536 SUBROGATION
PART V FORMS
B. Complaints

47-536 California Forms of Pleading and Practice--Annotated § 536.107

§ 536.107 Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Insurer as Subrogee of Its Insured--Against Insured's Certified Public Accountants to Recover Amount of Payments Made to Insured for Losses Resulting From Employee's Defalcations on Grounds of Negligence [Civ. Code § 3333] and Breach of Contract [Civ. Code § 3300] in Conducting Annual Audits and Failing to Discover Defalcations [Civ. Code § 1714(a)]

[1] FORM Complaint [Code Civ. Proc. § 425.10] in Subrogation--By Insurer as Subrogee of Its Insured--Against Insured's Certified Public Accountants to Recover Amount of Payments Made to Insured for Losses Resulting From Employee's Defalcations on Grounds of Negligence [Civ. Code § 3333] and Breach of Contract [Civ. Code § 3300] in Conducting Annual Audits and Failing to Discover Defalcations [Civ. Code § 1714(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
a_____ [*e.g.*, California]	)	
Corporation,	)	
Plaintiff,	)	NO. _____
	)	COMPLAINT IN SUBROGATION FOR DAM-
vs.	)	AGES
	)	[LIMITED CIVIL CASE]
_____ [*names*],	)	[Amount demanded _____
Defendants.	)	(exceeds *or* does not exceed) $10,000]
	)	
	)	

_____

Plaintiff alleges:

[2] Use of Form

This form of complaint is for use by an insurer as the subrogee of its insured (subrogor) to recover the amount the subrogee was required to pay to its insured under its bond or bonds because of the defalcations of the insured's employee. The action is not against the defaulting employee (obligor) but rather against the insured's accountants whose negligence in performing audits permitted the defalcations to occur. For a form of complaint for use by a subrogee against a defaulting employee, see *§ 536.102*. For a discussion of the doctrine of superior equities, which is applied to determine whether or not a subrogee may recover against a party other than the actual wrongdoer who caused the loss (primary obligor), see *§ 536.42[9]*.

If the loss was in excess of the penalty amount of the bond or bonds and the insured assigned to plaintiff its right to recover the excess amount from the accountants, optional Paragraph 12 should be used [*see Civ. Code §§ 953, 954*]. In the absence of an assignment, both the insurer and insured should join as plaintiffs in the same action, the insurer to recover the amount it paid and the insured to recover the unpaid amount of its loss, to avoid the defense of res judicata based on a splitting of a cause of action [*see Ferraro v. Southern Cal. Gas Co. (1980) 102 Cal. App. 3d 33, 41, 162 Cal. Rptr. 238 , superseded by statute on other grounds as stated in Goodman v. Lozano (2010) 47 Cal. 4th 1327, 1336-1338, 104 Cal. Rptr. 3d 219, 223 P.3d 77* ; *Phillips v. Western Pac. R.R. Co. (1971), 22 Cal. App. 3d 441, 444, 99 Cal. Rptr. 451*].

[3] Allegations

This complaint sets forth in separate counts alternative theories of liability and alleges the following:

- The plaintiff's legal capacity and its authority to engage in a surety insurance business (Paragraph 1);

- The capacity of defendants and their business as certified public accountants, and the place of their principal place of business in California (Paragraph 2) [*see Code Civ. Proc. § 395.2*; *see also* Ch. 571, *Venue*];

- The legal capacity (identity) of plaintiff's subrogor and the insurance coverage (Paragraph 3);

- The terms of the bonds (Paragraph 4);

- The facts surrounding the discovery of the defalcations, prompt notice to the insurer, and the insured's justifiable reliance on the defendants' audits to discover any dishonesty of its employee (Paragraphs 5-8) (to negate any implication that the loss was caused by the insured's negligence which is imputed to the insurer) [*see Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc. (1978) 83 Cal. App. 3d 593, 602, 148 Cal. Rptr. 57*];

- The defendants' duty (established by contract) to audit the insured's books during the periods in question (Paragraph 7);

- The defendants' breach of duty (negligence) and failure to discover the defalcations (Paragraph 9) [*see Liberty Mut. Ins. Co. v. Harris, Kerr, Forster & Co. (1970) 10 Cal. App. 3d 1100, 1102, 89 Cal. Rptr. 437*];

- The loss to the insured as a proximate result of defendants' breach of duty (Paragraph 10);

- The plaintiff's payment to its insured in the penalty amount(s) of the bond(s) (Paragraph 11);

- The insured's assigment to plaintiff of its right to recover from defendants the excess of the amount

embezzled over the amount covered by the bond(s) (Paragraph 12);

- The plaintiff's demand for reimbursement and defendants' failure to pay (Paragraph 13);

- The incorporation of pertinent paragraphs into the second cause of action (Paragraph 14);

- The breach of contract by the defendants (Paragraph 15); and (14) proximate causation and damage to the insured (Paragraph 16).

[4] Cross References

See also *§ 536.100*

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47-536 California Forms of Pleading and Practice--Annotated § 536.108

§ 536.108 Complaint [Code Civ. Proc. § 425.10] for Declaratory Relief [Code Civ. Proc. § 1060]--By Fidelity Insurer Against Insured and Bank Paying Forged Check Drawn on Insured's Account--To Declare Rights and Duties of Parties Relating to Reimbursement and Subrogation [Com. Code §§ 3419(1)(c), 4406]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Declaratory Relief [Code Civ. Proc. § 1060]--By Fidelity Insurer Against Insured and Bank Paying Forged Check Drawn on Insured's Account--To Declare Rights and Duties of Parties Relating to Reimbursement and Subrogation [Com. Code §§ 3419(1)(c), 4406]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
a_____ [*e.g.*, California]	)	
Corporation,	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
_____ [	)	NO. _____
principal],	)	COMPLAINT FOR DECLARATORY RELIEF
[_____ (	)	
legal entity, e.g., a California	)	
Corporation,) and_____	)	
[*name of bank*], [_____	)	
(*specify capacity, e.g.*, a Nation-	)	
al Banking Association,)]	)	
Defendants.	)	
	)	
	)	
_____		

Plaintiff alleges:

1. [*Capacity of plaintiff as admitted surety insurer. See § 536.102[1], Paragraph 1.*]
2. Defendant_____ [*name of principal*], hereinafter "the insured," is, and at all times herein mentioned was, _____ [*specify capacity, e.g.,* a corporation organized and existing under the laws of the State of _____, with its principal place of business in _____ County.
3. The insured is, and at all times herein mentioned was insured by plaintiff under a fidelity bond, hereinafter "the bond," insuring against loss through the dishonest act of any of the insured's employees to a liability limit of $_____ [*specify amount, e.g.,* $15,000]. A copy of the bond is attached hereto as Exhibit A and made a part hereof.
4. Defendant_____ [*name of bank*], hereinafter "the bank," is, and at all times herein mentioned was, _____ [a national banking association organized and existing under the laws of the United States of Americaand authorized to transact, and transacting, a banking business in California *or* a corporation duly organized and existing under the laws of California and authorized to do business as a bank by the Superintendent of the State Banking Department of California], with its principal place of business [in this State] situated in _____ County].
5. At all times herein mentioned, the insured maintained a checking account with defendant_____ [*name of bank*].
6. On or about_____ [*date*], the insured presented plaintiff with a written claim under the bond for loss in the sum of $_____ [*specify amount, e.g.,* $15,000], asserting that a certain employee of the insured had forged a check, hereinafter "the check," on the insured's account in the amount of $_____ [*specify amount, e.g.,* $35,000], that the bank had paid the forged check and charged the full amount to the insured's account, that the bank subsequently credited the insured's account in the amount of $_____ [*specify amount, e.g.,* $20,000], leaving a loss in the amount of $_____ [*specify amount, e.g.,* $15,000], that the amount of $_____ [*specify amount, e.g.,* $15,000] was a loss occasioned though a dishonest act of an employee, and that the insured looked to plaintiff for payment of the loss under the terms of the bond. A copy of the claim is attached hereto as Exhibit B and made a part hereof.

7. Plaintiff is informed and believes and thereon alleges that the check was drawn by an unauthorized person and that the signature of the purported drawer thereon was forged.
8. Plaintiff is further informed and believes and thereon alleges that the bank failed to obtain any identification from the person presenting the check for payment, that it did not examine the purported signature of the payor on the check, that it did not compare the signature with copies of the signatures of those persons authorized to sign checks on the insured's behalf on file with the bank, and that it did not phone or attempt to phone the insured to verify the check, all in direct violation of the customs and practices of the banking industry in the _____ [*e.g.,* County of _____] and in violation of its express instructions to its own employees in force at that time, that the bank was thereby negligent, and that as a proximate result of its negligence it failed to discover the forgery and honored the check, to the insured's damage in the entire amount of the check charged against the insured's account.
8. On or about_____ [*date*], plaintiff demanded of the insured in writing that the insured proceed against the bank to recover the claimed loss in the amount of $_____ [*specify amount, e.g.,* $15,000], but the insured failed and refused and continues to fail and refuse to do so. A copy of the demand is attached hereto as Exhibit C and made a part hereof.
9. Plaintiff is informed and believes and thereon alleges that the bank has refused and continues to refuse to credit the insured's account for the full amount of the check and that the difference between the amount of the check and the amount credited is $_____ [*specify amount, e.g.,* $15,000].

10. By reason of the existence of the bond, the claim of loss made by the insured thereunder, the failure and refusal of the insured to proceed against the bank to recover the loss, and the refusal of the bank to credit the insured's account in the amount of the claimed loss, an actual controversy exists relating to the rights and duties of the respective parties.

11. More specifically, the controversy consists of the following opposing contentions:
a. Plaintiff contends that the bank, by reason of its negligence in having honored a forged check as alleged above, is liable to the insured for the full amount of the check, to wit, $_____ [*specify amount, e.g.,* $35,000], and not just for the amount of the check minus the liability limit of the bond, that the insured has a duty to proceed against the bank to recover the loss, as demanded by plaintiff, and that plaintiff has no present duty under its bond to pay the claimed loss.

b. The insured contends that it has no duty to proceed against the bank and that it is entitled to the penal limit of plaintiff's bond.
c. The bank contends that it has no duty to credit the insured's account with the full amount of the check, that $_____ [*specify amount, e.g.,* $15,000] of the loss was covered by the bond, and that it is the duty of plaintiff to pay the insured this sum under the terms of the bond.
d. Plaintiff contends that if it is obligated to pay the amount of $_____ [*specify amount, e.g.,* $15,000] to the insured it is thereby subrogated to all rights of the insured against the bank and entitled to recover such amount from the bank.

e. The bank contends that the insured has no rights against the bank to which plaintiff may be subrogated and that plaintiff is not entitled to recover the claimed loss from it.

WHEREFORE, plaintiff prays judgment:
1. Declaring the rights and duties of the parties herein, and specifically declaring that the bank is liable to the insured for the full amount of the forged check, that if plaintiff is required to pay the insured the amount of $_____ [*specify amount, e.g.,* $15,000] under the bond, the plaintiff may recover this amount from the bank under the doctrine of subrogation.

2. For costs of suit herein incurred.

3. For such other and further relief as the court deems proper.

[2] Use of Form

This form of complaint is for use by a fidelity--that is, a surety (see *Ins. Code § 105*)--insurer against its insured and a drawee bank to secure adeclaration of the respective rights and duties of the parties with respect to a loss arising out of a forged check, including any right plaintiff may have in the event it is required to pay its insured the bond to be subrogated to the insured's right against the bank [*see Hartford Accident & Indem. Co. v. Bank of Am. (1963) 220 Cal. App. 2d 545, 550, 34 Cal. Rptr. 23*]. For a discussion of the doctrine of superior equities, see *§ 536.42[9]*.

[3] Allegations

This complaint alleges the following:

- The plaintiff's legal capacity and its authority to engage in business as a surety insurer (Paragraph 1) [*see Ins. Code § 105*];

- The name and capacity of plaintiff's princi- pal and its status in the action as a defendant (Paragraph 2);

- The insurance contract (bond) between plaintiff and its principal (Paragraph 3);

- The capacity of defendant bank and its authority to transact a banking business in California (Paragraph 4);

- The venue of the action (Paragraph 2 or 4) [*see Code Civ. Proc. § 395.5*; *see also* Ch. 571, *Venue*];

- The contractual relationship between the principal and the bank (Paragraph 5);

- The making of a claim by the principal against plaintiff for a loss covered by the bond based on defendant bank's cashing a check drawn on the principal's account that was forged by a dishonest employee of the principal and the bank's crediting the principal's account only with the amount of the check in excess of the amount of plaintiff's bond (Paragraphs 6, 7);

- The plaintiff's demand on the principal that the principal take steps to recover the full amount of the check from the bank, and the principal's refusal to do so (Paragraph 8) [*see Civ. Code § 2845*; *Com. Code §§ 3419(1)(c), 4406*];

- The bank's refusal to credit the principal's account with the full amount of the check (Paragraph 9);

- The existence of an actual controversy among the parties as to their respective duties and liabilities (Paragraph 10) [*Code Civ. Proc. § 1060*]; and

- The contentions of the parties with respect to their duties and liabilities, showing that a justiciable controversy exists (Paragraph 11) [*see Alturas v. Gloster (1940) 16 Cal. 2d 46, 48, 104 P.2d 810* (complaint insufficient)].

[4] Cross References

See also *§§ 536.100* and *536.102*

For forms of complaint by a drawer against its bank and by a payee bank against others, see Ch. 95, *Banks, Deposits, and Checks*

For additional forms of complaint for declaratory relief and a more detailed discussion of the requirements of such complaints, see Ch. 182, *Declaratory Relief*

For a form of complaint and related forms of allegations for use in an action by an insured against a fidelity insurer for breach of contract, see Ch. 308, *Insurance*

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[Reserved]

§§ 536.109[Reserved]

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47-536 California Forms of Pleading and Practice--Annotated § 536.120

§ 536.120 Affirmative Defense--Plaintiff Was Volunteer in Satisfying Claim

[1] FORM Affirmative Defense--Plaintiff Was Volunteer in Satisfying Claim
AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that plaintiff, in satisfying the claim sued on, acted officiously and as a mere volunteer for his/her own purposes, without any _____ [obligation to _____ (*name of creditor*) *or* interest in the property] and thereby acquired no rights against defendant.

[2] Use of Form

This form of allegation is for inclusion in an answer to a complaint in subrogation to raise the defense that the subrogee's payment was made voluntarily and without any obligation by plaintiff to make it.

[3] Cross References

For a discussion of the format requirements and complete forms of answers, see Ch. 26, *Answers*

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47-536 California Forms of Pleading and Practice--Annotated § 536.121

§ 536.121 Affirmative Defense--Accident Caused by Subrogor's Negligence

[1] FORM Affirmative Defense--Accident Caused by Subrogor's Negligence
AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that _____ [*specify, e.g.,* at the alleged time and place in question, plaintiff's subrogor, _____ (*name*), so negligently drove, operated, maintained, and controlled his/her vehicle as to proximately cause and contribute to the collision complained of and to whatever injury or damage, if any, plaintiff's subrogor claims to have sustained therefrom].

[2] Use of Form

This form of affirmative defense is for use in an answer by the alleged obligor in an action by a subrogee (insurer, workers' compensation carrier, or state or county retirement system) who paid its insured's, employee's, or member's claim for injuries sustained as a proximate result of defendant's alleged negligence. It raises the defense that the subrogor (plaintiff's insured, the injured employee, or the retirement system member) was contributorily negligent in the accident that caused the loss. The defense of comparative negligence may, however, be raised in any action based on negligence [*see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226*]; hence, the defense may be raised in a subrogated action based on negligence for loss or damage to property as well.

[3] Cross References

See also *§ 536.120*

For an alternative form and further discussion of the doctrine of comparative negligence, see Ch. 380, *Negligence*

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47-536 California Forms of Pleading and Practice--Annotated § 536.122

§ 536.122 Affirmative Defense--Action Barred by Statute of Limitations

[1] FORM Affirmative Defense--Action Barred by Statute of Limitations
AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the action sued on in the complaint herein is barred by the provisions of Section_____ [*specify, e.g.,* 335.1] of the_____ [*specify, e.g.,* Code of Civil Procedure].

[2] Use of Form

This form of affirmative defense is for use in an answer by the obligor to a complaint by a subrogee when the subrogor's action (or the subrogee's action in the case of a subrogated claim by the state or a county retirement system [*see Gov. Code §§ 21455, 31823*] or by an insurer seeking recovery of the amount it paid to its insured under the uninsured motorist provisions of its policy [*see Ins. Code § 11580.2(g)*]) is barred by the statute of limitations [*see §§ 536.20, 536.21*].

[3] Cross References

See also *§ 536.120*

For further discussion and alternative forms of affirmative defenses, and forms of demurrers to the complaint, based on the statute of limitations, see Ch. 345, *Limitation of Actions*

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47-536 California Forms of Pleading and Practice--Annotated § 536.123

§ 536.123 Affirmative Defense--Plaintiff's Claim Paid by Setoff [Code Civ. Proc. § 431.70]

[1] FORM Affirmative Defense--Plaintiff's Claim Paid by Setoff [Code Civ. Proc. § 431.70]
AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the claim sued on in the complaint has been paid _____ [in full *or* in the amount of $_____] by virtue of the following cross claim that coexisted with the claim of_____ [plaintiff *or name of plaintiff's subrogor*] at a point in time when neither claim was barred by the statute of limitations:_____ [*specify*].

[2] Use of Form

This form of affirmative defense is for use in an answer by the obligor to a complaint by a subrogee to raise the defense th

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47-537 California Forms of Pleading and Practice--Annotated 537.syn

AUTHOR: Hon. Patti S. Kitching Barbara A. Reeves Charles Pereyra-Suarez Contributing Editors Justice Kitching, an Associate Justice of the California Court of Appeal, Second Appellate District, Division Three, was formerly a Judge of the Los Angeles Superior Court, where her assignments included the law and motion department. Barbara A. Reeves is a partner with Morrison & Foerster, Los Angeles, California. Her areas of litigation expertise include intellectual property, securities, fraud, contract, international trade, antitrust, environmental coverage, and white-collar criminal defense. Charles Pereyra-Suarez is a partner in McKenna & Cuneo and heads the Litigation Department in the Los Angeles office. He also has served as a judge pro tem of the Los Angeles County Municipal and Superior Courts since 1986. This chapter was adapted from California Practice Handbook: Pretrial Disposition (Matthew Bender), Litigation Section, Los Angeles County Bar Association, Handbook Editor; Hon. Patti S. Kitching, Barbara A. Reeves, Charles Pereyra-Suarez, Contributing Editors.

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§§ 537.03-537.09 [Reserved]

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§ 537.12 Purpose and Nature of Summary Proceedings

§ 537.13 Summary Proceedings Compared to Other Proceedings

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§ 537.16 No Comment When Summary Judgment Granted on Basis That Defendant Was Without Fault

§ 537.17 Summary Adjudication

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[2] Cause of Action

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[5] No Comment on Summary Adjudication

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[4] Collecting Evidence for Motion

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[1] Notice of Motion

[2] Declarations and Other Supporting Evidence

[3] Statement of Material Facts

[4] Supporting Memorandum

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[1] Supporting Affidavits or Declarations

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[b] Showing Declarant's Competency

[c] Stating Evidentiary Facts

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§ 537.25 Opposing Motion for Summary Judgment

[1] Opposing Memorandum

[2] Opposing Statement of Material Facts

[3] Opposing Evidence

[a] Requirement

[b] Sufficiency

[c] Preparation

[d] Defamation and Invasion of Privacy Actions

[4] Procedural and Evidentiary Objections

[a] Nature and Purpose of Objections

[b] Time for Filing Objections

[c] Required Format for Written Objections

[d] Proposed Order and Court's Ruling on Objections

[5] Proposed Order

[6] Motion for Sanctions for Bad-Faith Affidavits

[7] Motion to Continue

[8] Cross Motion for Affirmative Relief

[9] Limitation Concerning Voluntary Dismissal

§ 537.26 Serving and Filing the Opposing Papers

§ 537.27 Reply to Opposition to Motion for Summary Judgment

[1] Reply Memorandum of Points and Authorities

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§ 537.29 Procedure on Motion for Summary Adjudication

§ 537.30 Obtaining Deposition of Expert Witness

§ 537.31 Hearing Requirement

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§ 537.33 Standard for Granting Summary Judgment

[1] No Triable Issue and Moving Party Entitled to Judgment

[2] Evaluation of Evidence to Determine if Triable Issues Exist

[a] All Evidence in Papers Generally Considered

[b] Moving Party's Initial Burden of Persuasion and/or Production

[i] Plaintiff or Cross Complainant

[ii] Defendant or Cross Defendant

[c] Shift of Burden to Opposing Party

[d] Showing Required to Shift Burden of Production

[i] Move Toward Federal Standard

[ii] Showing Required on Defendant's Motion

[A] When Element of Plaintiff's Cause of Action Lacking

[B] For Affirmative Defense

[e] Effect of Heightened Burden of Proof

[f] Construction of Affidavits and Declarations

[g] Weight of Admissions

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[3] Power of Court to Grant Motion on Issue Party Did Not Raise

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[2] Contradicted Inferences of Fact

[3] Motion Based on Issues Asserted in Prior Unsuccessful Motion for Summary Adjudication

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[5] Denial With Opportunity to Amend Complaint

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[2] Standard of Review

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[g] Testimony From Other Cases

[h] Written Documents

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[18] Purpose of Summary Judgment

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[2] Motion Procedure

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[2] Opposition Procedure

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[1] FORM

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[4] Caption

[5] Supporting Papers

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[1] FORM

[2] Use of Form

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[4] Summary Adjudication

[5] Proposed Order

[6] Cross References

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

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[5] Sanctions

[6] Cross References

[7] Text References

§ 537.74 Statement of Undisputed Material Facts Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c(b)(1); Cal. Rules of Ct., Rule 3.1350(c), (d), (h), (i)]

[1] FORM

[2] Use of Form

[3] Format of Papers

[4] Providing Electronic Version

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

[3] Other Opposing Papers

[4] Cross Motion for Affirmative Relief

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[6] Service and Filing

[7] Cross References

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[1] FORM

[2] Use of Form

[3] Format of Papers

[4] Objections to Evidence in Support of the Motion

[a] Manner of Objecting

[b] As Inadmissible

[c] As Declaration by Sole Witness or Affirming Declarant's State of Mind

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[5] Providing Electronic Version

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[1] FORM

[2] Use of Form

§ 537.79 Evidence Opposing Motion for Summary Judgment or Adjudication--Cover [Cal. Rules of Ct., Rule 3.1350(e)(3), (g)]

[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

§ 537.81 Order Granting Motion for Summary Judgment [Code Civ. Proc. § 437c]

[1] FORM

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[3] Specification of Reasons

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[5] Cross References

§ 537.82 Order Granting Motion for Summary Judgment and Judgment [Code Civ. Proc. § 437c]

[1] FORM

[2] Use of Form

[3] Entry of Judgment and Notice of Entry

[4] Review After Entry of Judgment

[5] Cross References

§ 537.83 Summary Judgment [Code Civ. Proc. § 437c]

[1] FORM

[2] Use of Form

§ 537.84 Order Granting Motion for Summary Adjudication of Cause of Action, Defense, Claim for Punitive Damages, or Issue of Duty [Code Civ. Proc. § 437c]

[1] FORM

[2] Use of Form

[3] Specification of Reasons

[4] Cross References

§ 537.85 Order Denying Motion for Summary Judgment and/or Summary Adjudication of Cause of Action,

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[1] FORM

[2] Use of Form

[3] Statement of Grounds for Denial

[4] Notice of Order

[5] Review

[6] Text References

§ 537.86 Written Objections to Evidence in Support of or in Opposition to Motion for Summary Judgment or Summary Adjudication [Cal. Rules of Ct., Rule 3.1354(b)]

[1] FORM

[2] Use of Form

[3] Time for Filing and Service

§ 537.87 Order on Written Objections to Evidence in Support of or in Opposition to Motion for Summary Judgment or Summary Adjudication [Cal. Rules of Ct., Rule 3.1354(c)]

[1] FORM

[2] Use of Form

Hon. Patti S. Kitching
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FOOTNOTES:
(n97)Footnote *.
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Chapter 537 SUMMARY JUDGMENT
PART I. SCOPE

47-537 California Forms of Pleading and Practice--Annotated § 537.01

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§ 537.01 Scope of Chapter

This chapter discusses summary judgment proceedings in state trial courts in the following sections:

- An overview of summary judgment proceedings. [*see § 537.10* et seq.]
- The procedural requirements for summary proceedings. [*see § 537.20* et seq.]
- Issues relating to the ruling on a summary motion. [*see § 537.31* et seq.]
- Post-ruling matters. [*see § 537.39* et seq.]

The chapter includes the following forms:

- Notices of motion for summary judgment and summary adjudication [*see §§ 537.70, 537.71*].
- Covers for supporting [*see § 537.72*] and opposing [*see § 537.79*] evidence.
- Supporting [*see § 537.73*] and opposing [*see § 537.76*] declarations.

- Supporting [*see §§ 537.74, 537.75*] and opposing [*see §§ 537.77, 537.78*] statements of facts claimed to be undisputed or disputed.

- Orders granting [*see §§ 537.81, 537.84*] or denying [*see § 537.85*] a motion for summary judgment or for summary adjudication.

- Judgment combined with an order granting a motion for summary judgment [*see § 537.82*], and a separate form of judgment [*see § 537.83*].

- Notice of motion and supporting declaration to seek sanctions against another party who has filed a summary judgment affidavit or declaration in bad faith or solely for purposes of delay [*see § 537.80*].

- Form of written objections to evidence in support of or in opposition to a motion for summary judgment, along with the required proposed order for ruling on the objections [see *§§ 537.86, 537.87*].

This chapter includes a Research Guide [*see § 537.50* et seq.]

This chapter also includes Procedural Checklists for moving [*see § 537.60*] and opposing [*see § 537.61*] parties and for a hearing on motion [*see § 537.62*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentNoticesCivil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentSupporting MaterialsGeneral Overview

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PART I. SCOPE

47-537 California Forms of Pleading and Practice--Annotated § 537.02

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§ 537.02 Cross References

For forms and discussion relating to motions for summary judgment in particularactions or proceedings, see specific chapters on substantive topics and the General Index in this set

For further discussion and forms concerning affidavits and declarations, see Ch. 15, *Affidavits, Certificates, and Declarations* .

For discussion and forms relating to the recovery of costs and fees in general, see Ch. 174, *Costs and Attorney's Fees* .

For discussion and forms relating to sanctions, see Ch. 174, *Costs and Attorney's Fees* .

For discussion and forms for use in obtaining, amending, enforcing, or attacking judgments in general, see Ch. 318, *Judgments* .

For further discussion and forms concerning review by extraordinary writ of mandate, see Ch. 358, *Mandate and Prohibition* .

For discussion and forms for use in supporting summary judgment based on the affirmative defense of res judicata or collateral estoppel, see Ch. 491, *Res Judicata* .

For further discussion and forms concerning service of papers and proof of service, see Ch. 518, *Service of Summons and Papers* .

For discussion and forms for use in shortening or extending the time requirements in summary judgment proceedings, see Ch. 524, *Shortening and Extension of Time* .

For discussion and forms relating to stipulations, for use as admissions when the parties do not dispute the facts and seek summary judgment to resolve issues of law, see Ch. 533, *Stipulations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessSummonsGeneral OverviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsRes JudicataCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamus

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47-537 California Forms of Pleading and Practice--Annotated §§ 537.03-537.09

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[Reserved]

§§ 537.03[Reserved]

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PART II. LEGAL BACKGROUND

47-537 California Forms of Pleading and Practice--Annotated § 537.10

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§ 537.10 Governing Law

Summary judgment in state trial courts is governed generally by *Code Civ. Proc. § 437c* and *Cal. Rules of Ct., Rule 3.1350*. In addition, objections to evidence in the papers in a summary judgment proceeding are governed by *Cal. Rules of Ct., Rules 3.1352* and *3.1354*. Local court rules may also affect summary judgment proceedings [*see, e.g.,* San Francisco Uniform Local Ct. Rules, Rule § 8.11] although any local rule or policy in conflict with the statute, rule of law, or Judicial Counsel rule is invalid [*Lokeijak v. City of Irvine (1998) 65 Cal. App. 4th 341, 344, 76 Cal. Rptr. 2d 429*], and all local rules relating to motions and the form and format of papers are preempted by the Judicial Council unless otherwise permitted or required by statute or Judicial Council Rule [*Cal. Rules of Ct., Rule 3.20*].

Statutes applicable to specific cases include the following:

- *Code Civ. Proc. § 1170.7,* providing for expedited summary judgment procedure in unlawful detainer or forcible entry proceedings [*see Code Civ. Proc. § 437c(q), (r)*].

- *Civ. Code § 1781(c),* providing for a hearing similar to and in lieu of summary judgment procedure in consumer class actions brought under that section.

- *Code Civ. Proc. § 1029.6(e), (f),* under which a motion to require the plaintiff in a medical

malpractice action to file an undertaking and motions for summary judgment are mutually exclusive.

- *Code Civ. Proc. § 1038*, allowing recovery of defense costs when granting summary judgment in certain actions.

For further discussion of these sections, see *§ 537.18[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationCivil ProcedureSummary JudgmentEvidenceCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsUnlawful DetainerTortsMalpractice & Professional LiabilityHealthcare Providers

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47-537 California Forms of Pleading and Practice--Annotated § 537.11

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§ 537.11 Types of Summary Proceedings

[1] Summary Judgment

Summary judgment is a procedure by which a plaintiff or defendant in an action or proceeding may obtain a judgment without a trial [*see Code Civ. Proc. § 437c*]. A summary judgment is a final judgment disposing of an entire action or proceeding as to the parties to the motion, granted on the ground that the action has no merit or there is no defense [*see Code Civ. Proc. § 437c(a)*].

For further discussion, see *§ 537.14*.

[2] Summary Adjudication

A motion for summary adjudication seeks an order disposing of one or more ofthe following without trial, when they comprise less than the entire action [*Code Civ. Proc. § 437c(f)(1)*]:

- One or more causes of action within an action.
- An affirmative defense to a cause of action.

- A claim for punitive damages under *Civ. Code § 3294*.
- The issue of whether one or more defendants owed, or did not owe, a duty to one or more plaintiffs.

For further discussion, see *§ 537.17[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentPartial Summary Judgments

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47-537 California Forms of Pleading and Practice--Annotated § 537.12

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§ 537.12 Purpose and Nature of Summary Proceedings

Summary judgment is intended to expedite litigation by preventing unnecessary trials and protect and promote the administration of justice [*Campanano v. California Medical Center (1995) 38 Cal. App. 4th 1322, 1326-1327, 45 Cal. Rptr. 2d 606* ; *Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd. (1983) 147 Cal. App. 3d 309, 313, 195 Cal. Rptr. 90*].

Two basic aims underlie summary proceedings:

- To penetrate adept pleadings and discover, through the media of affidavits (or declarations under *Code Civ. Proc. § 2015.5*) whether the parties actually possess evidence requiring the weighing procedures of a trial [*Chern v. Bank of America (1976) 15 Cal. 3d 866, 873, 127 Cal. Rptr. 110, 544 P.2d 1310* ; *Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal. 3d 842, 851, 94 Cal. Rptr. 785, 484 P.2d 953* ; *see Frank and Freedus v. Allstate Ins. Co. (1996) 45 Cal. App. 4th 461, 468, 52 Cal. Rptr. 2d 678*].

- To summarily determine whether the moving party is entitled to judgment as a matter of law, if no triable issues of material fact are found to exist [*see Miller v. Bechtel Corp. (1983) 33 Cal. 3d 868, 874, 191 Cal. Rptr. 619, 663 P.2d 177* ; *Stationers Corp. v. Dun & Bradstreet, Inc. (1965) 62 Cal. 2d*

412, 417, 42 Cal. Rptr. 449, 398 P.2d 785].

The purpose of summary judgment is to separate those cases in which there are material issues of fact meriting a trial from those in which there are no such issues [*Sangster v. Paetkau (1998) 68 Cal. App. 4th 151, 162, 80 Cal. Rptr. 2d 66*].

In ruling on a summary judgment motion the court merely determines if triable issues of material fact exist. The court does not decide the merits of the issues [*Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1107, 252 Cal. Rptr. 122, 762 P.2d 46*] (in light of 1992 and 1993 amendments of *Code Civ. Proc. § 437c*, *Molko* held to be no longer vital on the issue of the showing required by a moving defendant in *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 853, 107 Cal. Rptr. 2d 841, 24 P.3d 493*); *accord Hayward Area Planning Assn. v. Alameda County Transportation Auth. (1999) 72 Cal. App. 4th 95, 110, 84 Cal. Rptr. 2d 744* .

Notwithstanding the economic benefits of summary judgment, courts generally view it with caution as a drastic procedure that should not beallowed to supplant the open-trial method of determining facts unless clearly appropriate [*see, e.g., Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1107, 252 Cal. Rptr. 122, 762 P.2d 46* ; *Security Pacific Nat'l Bank v. Bradley (1992) 4 Cal. App. 4th 89, 5 Cal. Rptr. 2d 220* ; *cf. Alszeh v. Home Box Office (1998) 67 Cal. App. 4th 1456, 1460, 80 Cal. Rptr. 2d 16* (summary judgment favored remedy in defamation and invasion of privacy cases)]. Moreover, because it is a drastic remedy it is important that all procedural requirements be satisfied before a trial court grants the remedy. Thus, local rules may not provide a shortcut for these requirements [*Sierra Craft, Inc. v. Magnum Enterprises, Inc. (1998) 64 Cal. App. 4th 1252, 1256, 75 Cal. Rptr. 2d 681* (local rule not consistent with *Code Civ. Proc. § 437c* invalid and judgment resulting from invocation of its procedures reversed)]. Parties must comply with the summary judgment procedures mandated by statute and court rules, and it is improper for parties to enter into a stipulated judgment that the trial court would have granted summary judgment in a matter for purposes of expediting an appeal; it is not the place of the parties, even if assigned to the complex litigation court, to rewrite the Code of Civil Procedure for their own convenience and economic interests [*Magana Cathcart McCarthy v. CB Richard Ellis, Inc. (2009) 174 Cal. App. 4th 106, 118, 94 Cal. Rptr. 3d 109]* .

CAUTION:

Highly technical procedure. *Code Civ. Proc. § 437c* is a complicated statute, and there is little flexibility in its procedural imperatives. Courts have held that a trial court has discretion to forgive such procedural imperfections such as an opposing party's failure to dispute a fact set forth in the separate statement where the other evidence as a whole warrants it. This is based, in large part, on the discretionary language of *Code Civ. Proc. § 437c(b)*. However, a court may not overlook defects in a party's moving or opposing papers when the evidence and other material submitted do not "alleviate the problems created by the parties' omissions and concessions" [*Zimmerman, Rosenfeld, Gersh & Leeds v. Larson (2005) 131 Cal. App. 4th 1466, 1475, 33 Cal. Rptr. 3d 111*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentStandardsNeed for Trial

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PART II. LEGAL BACKGROUND

47-537 California Forms of Pleading and Practice--Annotated § 537.13

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§ 537.13 Summary Proceedings Compared to Other Proceedings

[1] Demurrer or Motion for Judgment on the Pleadings

A motion for judgment on the pleadings has the purpose and effect of a general demurrer. It may be used after the time to demur has expired to challenge an adversary's pleading on the ground that the pleading fails to state facts sufficient to constitute a cause of action or defense [*compare Code Civ. Proc. § 430.30(a)* (demurrer available when ground for objection to complaint, cross complaint, or answer appears on face thereof) *with Code Civ. Proc. § 438* (motion for judgment on the pleadings)].

While a party moving for summary judgment is required to present extrinsic evidence, such as affidavits, declarations, admissions, and the like [*see* discussion in *§ 537.24[1][a]* et seq., *below*], a party seeking judgment on the pleadings is confined to presenting defects fully disclosed on the face of the pleadings under attack or matters for which the court may take judicial notice [*see Code Civ. Proc. § 438(d)*].

PRACTICE TIP:

Test of the Pleadings. Unlike a motion for judgment on the pleadings, a summary judgment motion presupposes that the pleadings are adequate to put in issue a cause of action or a defense to a cause of action. Nevertheless, a pleading may be defective in failing to allege an element of a cause of action or in failing intelligibly to identify a defense to it. In such a case, the moving party need not address a missing

element or, obviously, respond to assertions that are unintelligible or make out no recognizable legal claim. The summary judgment proceeding is thereby necessarily transmuted into a test of the pleadings and the summary judgment motion into a motion for judgment on the pleadings. A defendant's motion for summary judgment then necessarily includes a test of the complaint's sufficiency and, as such, is in legal effect a motion for judgment on the pleadings. Similarly, a plaintiff's motion for summary judgment necessarily includes a test of the sufficiency of the answer [*FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 382, 282 Cal. Rptr. 508* ; *see also American Airlines, Inc. v. County of San Mateo (1996) 12 Cal. 4th 1110, 1117-1118, 51 Cal. Rptr. 2d 251, 912 P.2d 1198* (defendants' summary judgment motion used to test whether complaint stated cause of action treated as motion for judgment on the pleadings because time for demurrer had passed); *Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal. App. 4th 1509, 1532, 80 Cal. Rptr. 2d 94* (motion for summary judgment that argues pleadings do not support claim evaluated as motion for judgment on the pleadings, and tests whether complaint sufficient to state cause of action); *Columbia Casualty Co. v. Northwestern Nat. Ins. Co. (1991) 231 Cal. App. 3d 457, 463, 468-470, 282 Cal. Rptr. 389* (distinguishing motions for summary judgment and motions for judgment on pleadings)].

PRACTICE TIP: Test Sufficiency of Pleadings Before Determining Triable Issues. To avoid unnecessary confusion or delay, the parties and the court, on a motion for summary judgment, should first consider the sufficiency of the pleadings. If the pleadings are not defective, the court may then determine from the evidence supporting and opposing the motion whether the triable issues apparently raised by them are real or merely the product of adept pleadings. If, however, the pleadings are defective, the court has discretion to grant the opposing party leave to amend. In the latter situation, on a subsequent motion the court may rule in favor of the moving party if it determines that (a) the opposing party simply cannot state a cause of action on the theory relied on (in effect a judgment on the pleadings without leave to amend), or (b) there are no triable issues of material fact that would permit recovery on that theory [*Hejmadi v. AMFAC, Inc. (1988) 202 Cal. App. 3d 525, 536, 249 Cal. Rptr. 5* ; *see also Taylor v. Lockheed Martin Corp. (2000) 78 Cal. App. 4th 472, 479, 92 Cal. Rptr. 2d 873* (when motion for summary judgment is treated as motion for judgment on pleadings, trial court may give plaintiff opportunity to amend complaint even when no motion to amend has been filed)].

When a motion for summary judgment is in effect a motion for judgment on the pleadings, it is better practice to grant the motion with leave toamend and, after the issues have been properly plead, to renew the motion for summary judgment [*Wood v. Riverside General Hospital (1994) 25 Cal. App. 4th 1113, 1120, 31 Cal. Rptr. 2d 8* (dicta; affirming summary judgment without returning the case to the trial court to follow the two-step procedure because result would be the same)].

A motion for summary judgment or summary adjudication may revisit issues that were the subject of an earlier demurrer which was overruled. The *Code Civ. Proc. § 1008* restrictions on motions for reconsideration do not apply [*Community Memorial Hospital v. County of Ventura (1996) 50 Cal. App. 4th 199, 205, 56 Cal. Rptr. 2d 732*].

For discussion relating to motions for judgment on the pleadings, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[2] Trial of Special Issues

The court may, on its own motion or on a party's motion, proceed to the trial of a defense before the trial of any other issue in the case when the answer to a complaint or cross complaint pleads any of the following defenses [*see Code Civ. Proc. § 597*]:

- The action is barred by the statute of limitations [*see also Code Civ. Proc. § 597.5* (separate trial of

limitations defense in medical malpractice action)].

- The action is barred by a prior judgment.
- Another action is pending on the same cause.
- Another defense exists not involving the merits of the action but constituting a bar or ground of abatement to its prosecution.

For discussion and forms relating to separate trial of defenses, see *Ch. 3, Abatement, § 3.110* et seq.

[3] Motion to Strike

Any party may serve and file a notice of motion to strike the whole or any part of the following pleadings [*Code Civ. Proc. § 435(a)(2), (b)(1)*]:

- Demurrers.
- Answers.
- Complaints.
- Cross complaints.

A motion to strike must be made within the time allowed to respond to the challenged pleading [*Code Civ. Proc. § 435(b)(1)*].

Contrasted with a motion for summary judgment, the function of a motion to strike is to raise objections to pleadings on grounds that appear on the face of the pleading or from matters of which the court is required to take judicial notice [*see Code Civ. Proc. § 437(a)*].

For discussion and forms relating to motions to strike, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[4] Motion to Enforce Settlement

If the parties stipulate to a settlement, either in writing signed by the parties outside the presence of the court or orally on the record before the court, the court may entertain a motion to enter judgment pursuant to the terms of the settlement [*Code Civ. Proc. § 664.6*]. The motion may be made only in the action that the agreement is purported to settle [*Viejo Bancorp, Inc. v. Wood (1989) 217 Cal. App. 3d 200, 206-208, 265 Cal. Rptr. 620* .] *Code Civ. Proc. § 664.6* makes it unnecessary to file a motion for summary judgment to enforce an oral settlement agreement. For further discussion of motions to enforce settlement, see *Ch. 318, Judgments, § 318.40* et seq.

An oral, out-of-court settlement may be enforced by a motion for summary judgment. The motion may be granted only if there is no dispute of material fact [*see Code Civ. Proc. § 437c(c)*; *Kilpatrick v. Beebe (1990) 219 Cal. App. 3d 1527, 1529-30, 269 Cal. Rptr. 52*].

Legal Topics:

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

Civil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSettlementsSettlement AgreementsEnforcementGeneral OverviewCivil ProcedurePretrial MattersSeparate Trials

California Forms of Pleading and Practice--Annotated

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 537 SUMMARY JUDGMENT
PART II. LEGAL BACKGROUND

47-537 California Forms of Pleading and Practice--Annotated § 537.14

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§ 537.14 Summary Judgment Is Available When Action Has No Merit or No Defense

Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense thereto [*Code Civ. Proc. § 437c(a)*]. Such a contention is well taken when all the papers submitted in connection with the motion show that there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law [*Code Civ. Proc. § 437c(c)*; *see* discussion in *§ 537.33[1]*].

A cause of action has no merit if either of the following is true [*Code Civ. Proc. § 437c(o)*]:

- One or more of the elements of the cause of action cannot be separately established, even if the element is separately pleaded.

- If a defendant establishes an affirmative defense to the cause of action.

Parties who agree as to the facts and seek merely to resolve disputed issues of law may also move for summary judgment [*see T.M. Cobb Co. v. County of Los Angeles (1976) 16 Cal. 3d 606, 612, 128 Cal. Rptr. 655, 547 P.2d 431* ; *Dixon v. Salvation Army (1983) 142 Cal. App. 3d 463, 464, 191 Cal. Rptr. 111*]. Nevertheless, the mere fact that both sides move for summary judgment does not establish that there is no triable issue of material fact; the trial court may make an independent determination on this point before proceeding to decide any questions of law [*Coast*

Elevator Co. v. State Bd. of Equalization (1975) 44 Cal. App. 3d 576, 583-584, 118 Cal. Rptr. 818 (disapproved on another ground in *Culligan Water Conditioning v. State Bd. of Equalization (1976) 17 Cal. 3d 86, 93 n.4, 130 Cal. Rptr. 321, 550 P.2d 593*)].

Summary judgment is available only on motion. Thus, it cannot be granted in favor of a nonmoving party who successfully opposes a motion for summary judgment [*Dvorin v. Appellate Dep't of Superior Court (1975) 15 Cal. 3d 648, 650-651, 125 Cal. Rptr. 771, 542 P.2d 1363* ; *see also Certain Underwriters at Lloyd's of London v. Superior Court (1997) 56 Cal. App. 4th 952, 958, 65 Cal. Rptr. 2d 821* (as amended, *Code Civ. Proc. § 437c(a)* expressly precludes California trial judges from entering a summary judgment sua sponte); *but see Conley v. Matthes (1997) 56 Cal. App. 4th 1453, 1459 n.7, 66 Cal. Rptr. 2d 518* (power of reviewing court under *Code Civ. Proc. § 43* to direct trial court to enter summary judgment, when it appears from the record as a matter of law that there is only one proper judgment on undisputed facts)]. Similarly, a trial court cannot grant summary judgment in favor of a party that sought only summary adjudication of certain claims and that had conceded that another claim should go to trial [*Denney v. Universal City Studios, Inc. (1992) 10 Cal. App. 4th 1226, 1232, 13 Cal. Rptr. 2d 170*].

Summary judgment may not be available if there was an earlier motion for summary adjudication [*see Code Civ. Proc. § 437c(f)(2)*; *see § 537.34[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentBurdens of Production & ProofAbsence of Essential Element of ClaimCivil ProcedureSummary JudgmentBurdens of Production & ProofImplausible ClaimsCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentStandardsGeneral Overview

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Chapter 537 SUMMARY JUDGMENT
PART II. LEGAL BACKGROUND

47-537 California Forms of Pleading and Practice--Annotated § 537.15

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§ 537.15 No Summary Judgment as to Liability When Damages Must Be Determined

Code Civ. Proc. § 437c does not provide for partial summary judgment as to liability when issues as to the calculation of damages remain. A decision on the issue of liability against a party on whom liability is sought to be imposed does not result in a judgment until the issue of damages is resolved [*see Department of Industrial Relations v. UI Video Stores, Inc. (1997) 55 Cal. App. 4th 1084, 1097, 64 Cal. Rptr. 2d 457*]. In *Department of Industrial Relations* the court of appeal, after finding that the defendant was liable to the plaintiff, denied the plaintiff's request to order the trial court to enter summary judgment in the plaintiff's favor. The trial court had apparently ordered the plaintiff to move for summary judgment on the issue of defendant's liability, with damages to be determined in a later accounting proceeding. The correct trial court procedure would have been a motion to bifurcate the issue of liability under *Code Civ. Proc, § 598*, which the parties could have tried on the undisputed facts [*Department of Industrial Relations v. UI Video Stores, Inc. (1997) 55 Cal. App. 4th 1084, 1097, 64 Cal. Rptr. 2d 457*]. Thus, summary judgment should not be granted unless there is no triable issue of material fact as to both the issues of liability and damages [*see, e.g., Kurinij v. Hanna & Morton (1997) 55 Cal. App. 4th 853, 870-871, 64 Cal. Rptr. 2d 324* (when summary judgment in legal malpractice action was granted in defendant's favor, additional summary judgment granted in defendant's favor on its cross complaint for unpaid attorney fees was also proper because issue of malpractice had been disposed of on other summary judgment motion and plaintiff was bound by judicial admissions that were binding without further evidence as to the reasonableness of the fees and plaintiff's obligation to pay them)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentPartial Summary JudgmentsCivil ProcedureSummary JudgmentStandardsGeneral Overview

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47-537 California Forms of Pleading and Practice--Annotated § 537.16

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§ 537.16 No Comment When Summary Judgment Granted on Basis That Defendant Was Without Fault

In actions that arise out of an injury to the person or to property, when a motion for summary judgment has been granted on the basis that the defendant was without fault, no other defendant during trial, over plaintiff's objection, may attempt to attribute fault to or comment on the absence or involvement of the defendant who was granted the motion [*Code Civ. Proc. § 437c(l)*]. Violation of *Code Civ. Proc. § 437c(l)*, however, is not reversible error per se [*Knowles v. Tehachapi Valley Hospital Dist. (1996) 49 Cal. App. 4th 1083, 1094-1094, 57 Cal. Rptr. 2d 192* (*Cal. Const., art. VI, § 13*, prohibits reversible error per se in civil cases; miscarriage of justice is required to reverse civil judgment)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentAppellate ReviewStandards of ReviewCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral OverviewCivil ProcedureAppealsStandards of ReviewReversible Errors

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47-537 California Forms of Pleading and Practice--Annotated § 537.17

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§ 537.17 Summary Adjudication

[1] Available to Dispose of Cause of Action, Affirmative Defense, Claim for Punitive Damages, or Issue of Duty

Summary adjudication is available only on a motion for such relief, either by itself or as an alternative to summary judgment [*Code Civ. Proc. § 437c(f)(2)*; *see Travelers Indemnity Co. v. Maryland Casualty Co. (1996) 41 Cal. App. 4th 1538, 1542, 49 Cal. Rptr. 2d 271*].

PRACTICE TIP:

Alternative Notice For Summary Adjudication. If counsel only gives notice of a summary judgment, the court cannot grant a summary adjudication [*see Jimenez v. Protective Life Ins. Co. (1992) 8 Cal. App. 4th 528, 534-535, 10 Cal. Rptr. 2d 326*]. Consequently, it is usually a good idea to give alternative notice for summary judgment or summary adjudication.

Any party may move for summary adjudication when he or she contends one of the following [*Code Civ. Proc. § 437c(f)(1)*]:

- That one or more causes of action within an action has no merit.

- That there is no defense to one or more causes of action within an action.
- That there is no merit to an affirmative defense as to any cause of action.
- That there is no merit to a claim for punitive damages under *Civ. Code § 3294*.
- That one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs.

A cause of action has no merit if either of the following is true [*Code Civ. Proc. § 437c(o)*]:

- One or more of the elements of the cause of action cannot be separately established, even if the element is separately pleaded.
- A defendant establishes an affirmative defense to the cause of action.

Summary adjudication can be used only to adjudicate facts or issues that completely dispose of a cause of action, affirmative defense, claim for damages, or issue of duty [*see Code Civ. Proc. 437c(f)(1)*; *Rooz v. Kimmel (1997) 55 Cal. App. 4th 573, 593-594, 64 Cal. Rptr. 2d 177* (judge had no authority to find no triable issues of fact remained with respect to delineated issues of fact without drawing legal conclusion from those facts that conclusively disposed of a cause of action or an issue of duty); *Exxon Corp. v. Superior Court (1997) 51 Cal. App. 4th 1672, 1688 n.11, 60 Cal. Rptr. 2d 195* (when plaintiffs pleaded their case by combining causes of action, defendant nonetheless entitled to move for summary adjudication to dispose of allegations that would have formed a single cause of action if properly pleaded)]. As a result of a 1990 amendment to the statute, "facts" of any kind, whether undisputed, underlying, supporting, or subsidiary, are not subject to summary adjudication [*Raghavan v. The Boeing Co. (2005) 133 Cal. App. 4th 1120, 1136, 35 Cal. Rptr. 3d 397*]. The aim of the procedure is to discover whether the parties possess evidence requiring the weighing procedures of a trial [*Federal Deposit Ins. Corp. v. Superior Court (1997) 54 Cal. App. 4th 337, 344, 62 Cal. Rptr. 2d 713*]. If a motion for summary adjudication is granted, any cause of action, defense, claim, or issue of duty as to which the motion was granted is deemed to be established at the trial of the action. The action proceeds to trial only with regard to any remaining cause of action, defense, claim, or issue of duty [*Code Civ. Proc. § 437c(n)(1)*]. At trial, the grant of summary adjudication will not operate to bar any cause of action, affirmative defense, claim for damages, or issue of duty as to which summary adjudication was not sought or was denied [*Code Civ. Proc. § 437c(n)(2)*].

A motion for summary adjudication is not a reconsideration of a motion overruling a demurrer. The requirements of *Code Civ. Proc. § 1008*, dealing with reconsideration motions, do not apply to such a motion. Accordingly, a motion for summary adjudication may revisit issues of law raised on a demurrer [*Community Memorial Hospital v. County of Ventura (1996) 50 Cal. App. 4th 199, 205, 56 Cal. Rptr. 2d 732* (refusing to follow *Gilberd v. AC Transit (1995) 32 Cal. App. 4th 1494, 1502, 38 Cal. Rptr. 2d 626* , to the extent it may be read to the contrary)].

Summary judgment, not summary adjudication, is the appropriate remedy when a defendant establishes an affirmative defense to all the claims against that defendant [*24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal. App. 4th 1199, 1216 n.12, 78 Cal. Rptr. 2d 533*].

[2] Cause of Action

A party may move for summary adjudication challenging a separate and distinct wrongful act, even if that act is combined with other wrongful acts alleged in the same cause of action [*Lilienthal & Fowler v. Superior Court (1993) 12 Cal. App. 4th 1848, 1854-1855, 16 Cal. Rptr. 2d 458* ; *Exxon Corp. v. Superior Court (1997) 51 Cal. App. 4th 1672, 1688 n.11, 60 Cal. Rptr. 2d 195*]. Although *Code Civ. Proc. § 437c(f)* does not specifically define "cause of action," allegations relating to two separate matters involving acts performed at different times, with different and

distinct obligations, involve two separate and distinct causes of action, regardless of how pled in the complaint [*Lilienthal & Fowler v. Superior Court (1993) 12 Cal. App. 4th 1848, 1854, 16 Cal. Rptr. 2d 458* (claim of professional negligence in two transactions pled in same cause of action); *see also Catalano v. Superior Court (2000) 82 Cal. App. 4th 91, 96, 97 Cal. Rptr. 2d 842* (liability based on separate theory as constituting cause of action)].

A party cannot select issues (other than duty and punitive damages) implicated in one or more causes of action, amend its pleading to add a cause of action for declaratory relief as to those issues, and then obtain a summary adjudication of the declaratory relief cause of action [*Nazir v. United Airlines, Inc. (2009) 178 Cal. App. 4th 243, 251, 100 Cal. Rptr. 3d 296* (defendant's motion improperly sought adjudication of 44 "issues," none of which, taken individually, would dispose of an entire cause of action)]. This would subvert *Code Civ. Proc. § 437c(f)(1)*, which restricts the summary adjudication remedy to motions that would adjudicate an entire cause of action or affirmative defense, or the issues of duty or punitive damages [*Hood v. Superior Court (1995) 33 Cal. App. 4th 319, 321, 323, 39 Cal. Rptr. 2d 296*]. When the adjudication of a declaratory relief action does not adjudicate the entirety of any cause of action, it is prohibited by the statute. Failure to deny the motion is an abuse of discretion [*Hood v. Superior Court (1995) 33 Cal. App. 4th 319, 324, 39 Cal. Rptr. 2d 296* (declaratory relief cause of action unnecessary and superfluous as issues invoked in that cause of action already fully engaged by other causes of action)]. However, summary adjudication of a properly pled cause of action for declaratory relief is not precluded merely because the issues subject to declaratory relief are present in other causes of action [*Southern Cal. Edison Co. v. Superior Court (1995) 37 Cal. App. 4th 839, 845-846, 44 Cal. Rptr. 2d 227*]. In *Southern Cal. Edison Co.*, the court distinguished *Hood v. Superior Court* as a case in which the court had recognized that what the party had done was to pluck certain issues out of an existing complaint and cross complaint and put them in a purported declaratory relief cause of action solely for the purpose of moving for summary adjudication on that cause of action and thus making an end run around the restrictions of *Code Civ. Proc. § 437c(f)*. The lesson of *Hood* is that parties will not be permitted to misuse a declaratory relief cause of action in an attempt to subvert the requirement that a summary adjudication must completely dispose of a cause of action [*Southern Cal. Edison Co. v. Superior Court (1995) 37 Cal. App. 4th 839, 846, 44 Cal. Rptr. 2d 227*].

[3] Issue of Duty

An "issue of duty" for purposes of *Code Civ. Proc. § 437c(f)* is not statutorily defined. It has been held, however, that the phrase "an issue of duty" in *Code Civ. Proc. § 437c(f)* is not limited to negligence causes of action. If, under the facts and circumstances of a given case, a court finds it appropriate to determine the existence or nonexistence of a duty in the nature of a contractual obligation, it may properly do so by ruling on that issue presented by a motion for summary adjudication [*Linden Partners v. Wilshire Linden Associates (1998) 62 Cal. App. 4th 508, 518-519, 73 Cal. Rptr. 2d 708*].

There are conflicting opinions on whether summary adjudication is available under *Code Civ. Proc. § 437c(f)* when a ruling on an issue of duty would not dispose of an entire cause of action or affirmative defense, or terminate some portion of an action. There is authority that has held that to be consonant with the legislative purpose of *Code Civ. Proc. § 437c(f)*, a ruling on a summary adjudication which determines an issue of duty must dispose of an entire cause of action or affirmative defense, or terminate some portion of an action [*Regan Roofing Co. v. Superior Court (1994) 24 Cal. App. 4th 425, 436, 29 Cal. Rptr. 2d 413 (Fourth Dist., Div. One)*]. This authority, however, has been rejected by another court [*see Linden Partners v. Wilshire Linden Associates (1998) 62 Cal. App. 4th 508, 517-518, 73 Cal. Rptr. 2d 708* (Second Dist., Div. Seven; rejecting *Regan* as controlling precedent)]. In *Linden*, the court noted that the substantive areas which may be challenged under *Code Civ. Proc. § 437c(f)* are stated in the disjunctive, that is, "a cause of action, an affirmative defense, a claim for damages or an issue of duty." The *Linden* court believed that the plain meaning of this language is that a motion for summary adjudication may be granted or denied as to any of these substantive areas, standing alone, and without reference to the dispositive effect of such ruling on any of the companion substantive issues. A ruling that completely disposes of an issue of duty as required by the last sentence of the section, but which has no dispositive impact on other issues would appear to conform with legislative intent and the straight-forward, unambiguous language of the *Code Civ. Proc. § 437c(f)*. Thus, on a motion for summary adjudication,

the court may rule whether a defendant owes or does not owe a duty to plaintiff without regard for the dispositive effect of such ruling on other issues in the litigation, except that the ruling must completely dispose of the issue of duty [*Linden Partners v. Wilshire Linden Associates (1998) 62 Cal. App. 4th 508, 519-522, 73 Cal. Rptr. 2d 708*].

[4] Punitive Damages

A claim for punitive damages is one of the substantive areas which is properly the subject of a motion for summary adjudication. *Code Civ. Proc. § 437c(f)*, however, does not allow piecemeal disposition of some of the asserted facts within a claim for punitive damages, but may only be granted when the entire claim for punitive damages is eliminated. Accordingly, when a claim for punitive damages is based on an interrelated set of facts and circumstances, if any one or more of the facts would support a claim for punitive damages, then summary judgment is not available to eliminate from trial other facts relating to the claim for punitive damages [*Catalano v. Superior Court (2000) 82 Cal. App. 4th 91, 92, 95, 97-98, 97 Cal. Rptr. 2d 842*]. The *Catalano* court, however, did not decide if summary adjudication must eliminate all claims for punitive damages in one action when there are separate and distinct claims for punitive damages, having nothing to do with one another, although contained within one complaint [*Catalano v. Superior Court (2000) 82 Cal. App. 4th 91, 98 n.5, 97 Cal. Rptr. 2d 842*].

[5] No Comment on Summary Adjudication

At trial, neither a party, nor a witness, nor the court may comment on the grant or denial of a motion for summary adjudication to the jury [*Code Civ. Proc. § 437c(m)(3)*]. It is also error for a court, after summary adjudication of certain causes of action, to instruct the jury considering the remaining cause of action that certain facts were established despite the fact that the court did not use the term "summary adjudication" [*Raghavan v. The Boeing Co. (2005) 133 Cal. App. 4th 1120, 1136, 35 Cal. Rptr. 3d 397*]. For discussion of the *Code Civ. Proc. § 437c(l)* prohibition of comment on a defendant whose summary judgment motion was granted in a personal injury or property damage action, see *§ 537.16*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentPartial Summary JudgmentsCivil ProcedureJudgmentsPreclusion & Effect of JudgmentsGeneral OverviewCivil ProcedureRemediesDamagesPunitive Damages

California Forms of Pleading and Practice--Annotated

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 537 SUMMARY JUDGMENT
PART II. LEGAL BACKGROUND

47-537 California Forms of Pleading and Practice--Annotated § 537.18

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§ 537.18 Particular Actions in Which Summary Proceedings Are Limited or Unavailable

[1] Action for Unlawful Detainer, Forcible Entry, or Forcible Detainer

Although summary judgment generally is available in actions for unlawful detainer and forcible entry or detainer on the same basis as a motion under *Code Civ. Proc. § 437c* [*see Code Civ. Proc. § 1170.7*] the following special rules apply:

- *Code Civ. Proc. § 437c(a)* and *(b)* are expressly inapplicable [*Code Civ. Proc. § 437c(r)*].

- Notice of a motion for summary judgment must be given in compliance with *Code Civ. Proc. §§ 1013* and *1170.7* [*Cal. Rules of Ct., Rule 3.1351(a)*].

- Opposition to the motion and any reply to that opposition may be made orally at the time of the hearing. Alternatively, if a party seeks to have a written opposition considered in advance of the hearing, the written opposition must be filed and served on or before the court day before the hearing and must be by personal delivery, facsimile transmission, express mail, or other means consistent with *Code Civ. Proc. §§ 1010*, *1011*, *1012* and *1013*, and reasonably calculated to ensure delivery to the other party or parties no later than the close of business on the court day before the hearing. The court, in its discretion, may consider written opposition filed later [*Cal. Rules of Ct., Rule 3.1351(b)*, *(c)*].

- No provision in *Code Civ. Proc. § 437c* may be construed to extend the period for trial otherwise provided for the proceedings under *Code Civ. Proc. § 1170.5* [*Code Civ. Proc. § 437c(q)*].

- A motion for summary judgment may be made at any time after the answer is filed on giving five days' notice [*Code Civ. Proc. § 1170.7*; *compare CodeCiv. Proc. § 437c(a)* (requiring at least 75 days' notice)].

PRACTICE TIP:

Good Cause for Shortening Time. While *Code Civ. Proc. § 437c(q)* excludes application of the time requirements for service and filing of any opposition or reply under *Code Civ. Proc. § 437c(b)*, Code Civ. Proc. § 1170.7 provides no time requirements in their place. In the absence of any other provision, the time for service and filing would normally be nine court days for opposition papers and five court days for a reply [*Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(a)*; *see Code Civ. Proc. § 1177* (unless otherwise provided, general rules of civil practice apply in unlawful detainer and forcible entry actions)]. But in this instance compliance with the normal rules is impractical, if not impossible, in light of the five-day notice of motion period permitted by *Code Civ. Proc. § 1170.7*. Parties seeking to submit an opposition or reply in such cases, including those seeking to submit written objections to evidence under *Cal. Rules of Ct., Rules 3.1352* and *3.1354*, should therefore cite the five-day notice period of *Code Civ. Proc. § 1170.7* as good cause for an order permitting the service and filing of the opposition or reply within less time than that normally required.

For discussion of unlawful detainer proceedings, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

[2] Consumer Class Action

A motion under *Code Civ. Proc. § 437c* will not be granted in any class action under *Civ. Code § 1781(a)* of the Consumers Legal Remedies Act (*Civ. Code § 1750 et seq.*). Nonetheless, any party in such an action may move for a hearing to determine whether the action is without merit or there is no defense to the action. The moving party must give at least 10 days' notice to the other parties to the action and submits supporting affidavits or declarations by any persons having knowledge of the facts [*Civ. Code § 1781(c)*; *see, e.g., Kagan v. Gibraltar Sav. & Loan Assn. (1984) 35 Cal. 3d 582, 589 n.2, 200 Cal. Rptr. 38, 676 P.2d 1060* (motion under *Code Civ. Proc. 437c* treated as motion under *Civ. Code § 1781(c)(3)*)]. For discussion of these actions, see Ch. 504, *Sales: Consumers Legal Remedies Act* .

[3] Medical Malpractice Action in Which Defendant Seeks Security for Defense Costs

Any defendant in an action for medical malpractice who moves for an order requiring the plaintiff to post security for defense costs as provided by *Code Civ. Proc. § 1029.6(a)* cannot afterwards move for summary judgment. Similarly, any defendant moving for summary judgment is precluded from subsequently moving for security under *Code Civ. Proc. § 1029.6(a)* [*Code Civ. Proc. § 1029.6(e), (f)*]. For discussion of *Section 1029.6*, see Ch. 295, *Hospitals* .

[4] Action to Terminate Parental Custody

Summary judgment procedure is inappropriate in a proceeding to terminate a parent's rights of custody and control over his or her child [*Fam. Code § 7800 et seq.*], because these proceedings must be set for trial prior to the time that a motion for summary judgment may be brought [*see Fam. Code § 7870*; *In re Mark K. (1984) 159 Cal. App. 3d 94, 101-104, 205 Cal. Rptr. 393* (applying former *Civ. Code § 232 et seq.*)].

[5] Election Contest

Summary judgment is unavailable in election contests due to incompatibility with time requirements imposed under

Elec. Code § 20020 et seq. [*Anderson v. County of Santa Barbara (1976) 56 Cal. App. 3d 780, 786-787, 128 Cal. Rptr. 707*].

Pre-election review of a proposed ballot initiative, however, was appropriately carried out and trial court properly granted summary judgment to city and baseball team on their requests for declaratory relief that the proposed initiative was invalid [*City of San Diego v. Dunkl (2001) 86 Cal. App. 4th 384, 389, 103 Cal. Rptr. 2d 269*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationCivil ProcedureSummary JudgmentGeneral OverviewFamily LawParental Duties & RightsTermination of RightsGeneral OverviewGovernmentsLocal GovernmentsElectionsGovernmentsState & Territorial GovernmentsElectionsReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerTortsMalpractice & Professional LiabilityHealthcare Providers

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47-537 California Forms of Pleading and Practice--Annotated § 537.19

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§ 537.19 Strategic Planning for Bringing Motion

[1] Pre-discovery Planning

Preparation for a motion for summary judgment should be a major part of the initial evaluation of the case. It can begin before the first responsive pleadings are filed.

Some issues, however, may be best resolved early by demurrer, motion to strike, motion for separate trial of special defenses, motion for judgment on the pleadings, or other grounds for abatement [*see* discussion in *§ 537.13[1]* et seq.]. Other issues, even if they are evident on the face of the complaint might better be resolved after limited discovery.

ILLUSTRATION:

Summary Judgment vs. Demurrer. Defendant identifies an issue that appears on the face of the pleadings but that is not waived if raised later. Strategic considerations regarding demurring include:

- Demurrer sustained without leave to amend: case resolved favorably.
- Demurrer sustained with leave to amend:

- Advantage: limits issues, thus limiting discovery and other costs.

- Disadvantage: strengthens plaintiff's complaint, provides plaintiffwith a preview of expected motion for summary judgment.

Strategic considerations in merely answering the defective pleading, conducting discovery, possibly focused primarily on this issue, include:

- Summary judgment granted:

  - Advantages: final judgment, more time to understand case fully, focuses opponent's attention on his or her case's weaknesses, which may lead to settlement.

  - Disadvantage: costs of discovery incurred.

- Summary judgment denied:

  - Disadvantages: opponent given preview of movant's evidence and legal theories, parties or witnesses will be barred by statements in affidavits or declarations and may be impeached by these statements at trial, expensive, parties assume same risk as going to trial.

A discovery plan is a key part of case strategy and management. Any discovery plan should be developed with an eye toward using discovery in a summary judgment motion as well as in trial preparation. For further discussion of discovery plans, see DeMeo, California Deposition and Discovery Practice, Ch. 2 (Matthew Bender).

[2] Effect of "Fast Track" and Other Local Rules

All courts are required to have "fast-track" procedures to implement the Trial Court Delay Reduction Act [*see Gov. Code §§ 68605.5, 68620*]. These procedures may affect the prospective movant's timing and strategy. For example, some courts may require discussion early in the litigation of issues as to which early resolution may be possible [*see* Los Angeles Co. Super. Ct. Rules, Rule 7.6(c), (d) (court to consider at first status conference nature and extent of law and motion proceedings anticipated and whether some or all issues can be arbitrated or should be referred to another form of Alternative Dispute Resolution)].

Some counties have other programs designed to foster early resolution of cases that provide opportunities for testing summary judgment issues [*see, e.g.,* San Francisco Uniform Local Ct. Rules, Rule 4.2 (Voluntary Civil Mediation)]; such programs provide an added incentive for parties to prepare to argue summary judgment issues early in the litigation.

Although the court may for good cause modify the periods within which papers supporting and opposing a motion for summary judgment may be filed, local court rules may not restrict the availability of summary judgment [*see Wells Fargo Bank v. Superior Court (1988) 206 Cal. App. 3d 918, 923, 254 Cal. Rptr. 68*]. Local rules and practices may not be applied so as to prevent the filing and hearing of a summary judgment motion filed within the time limits of *Code Civ. Proc. § 437c* [*Sentry Ins. Co. v. Superior Court (1989) 207 Cal. App. 3d 526, 529, 255 Cal. Rptr. 13*]. Mandamus proceedings may be used to challenge local rules in conflict with *Code Civ. Proc. § 437c* [*see Wells Fargo Bank v. Superior Court (1988) 206 Cal. App. 3d 918, 923, 254 Cal. Rptr. 68*].

In complex litigation, a case management order cannot preclude a party from filing a motion under *Code Civ. Proc. §*

437c, for example, by setting up a procedure for resolving choice of law issues involved in dispositive motions before the motions themselves may be filed [*First State Ins. Co. v. Superior Court (2000) 79 Cal. App. 4th 324, 330-331, 336, 94 Cal. Rptr. 2d 104*]. The *First State* court also held, however, that once a *Code Civ. Proc. § 437c* motion has been filed, the trial court has inherent power to defer hearing *Code Civ. Proc. § 437c* motions in order to first decide the myriad choice of law issues potentially involved in the case. The court specifically said that it was not stating that the trial court may establish a procedure for deferred hearing of *Code Civ. Proc. § 437c* motions in every complex case. Each case must be examined individually to determine the propriety of the case management order issued in that case [*First State Ins. Co. v. Superior Court (2000) 79 Cal. App. 4th 324, 331-336, 94 Cal. Rptr. 2d 104]* .

ILLUSTRATION:

Conflicting Local Court Rule. A local court rule requires that "extensive" or "complicated" motions for summary judgment be filed six months before trial. This increases the time period by which a motion must be heard before trial, well exceeding the 58-day period provided in *Code Civ. Proc. § 437c*. Is the local rule enforceable? No. The rule conflicts with *Code Civ. Proc. § 437c* and is unenforceable and void [*Wells Fargo Bank v. Superior Court (1988) 206 Cal. App. 3d 918, 923, 254 Cal. Rptr. 68*].

[3] Use of Discovery

Discovery should be conducted keeping in mind, among other things, how the discovery can be used in a summary judgment motion [*see also* discussion in *§ 537.24[2]*, and *537.24[3]*].

ILLUSTRATION:

Refuting the Complaint's Allegations. In an action in which the complaint alleges that certain statements were made and heard, defendant propounds interrogatories requesting identification of all persons, including third parties, who heard the statements. Plaintiff identifies two nonparties. Defendant informally interviews the nonparties to determine whether their depositions are necessary, and obtains favorable testimony that the allegation does not accuratelyreflect what the nonparties heard. The nonparties are not deposed. Defendant incorporates the testimony into declarations supporting a motion for summary judgment. Proof of plaintiff's allegation is undermined. Moreover, plaintiff is precluded from producing contradicting declarations of persons who were not previously identified in the interrogatory response.

PRACTICE TIP: Requests for Admission. Requests for admission are an effective way of generating evidence sufficient to support a motion for summary judgment. This is especially true if counsel has reason to expect that the opposing party (e.g., a plaintiff acting in propria persona) will not respond to the requests and that they are consequently likely to be deemed admitted. Requests should be formulated so that, if admitted, they establish a complete cause of action or defense. For example, in an action in which plaintiff sues on a promissory note, plaintiff may serve requests for admissions asking the defendant to admit defendant signed the promissory note, that no payments have been made on the note, etc. [*see, e.g., Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 576, 37 Cal. Rptr. 2d 653* (defendant relied on plaintiff's factually insufficient interrogatory answers and admissions as evidentiary basis for its separate statement supporting summary judgment motion, shifting burden to plaintiff to prove existence of triable issue of material fact)].

Counsel for the moving party should be cautious, however, about not tipping the party's hand as to the fact that a summary judgment motion is planned or as to the basis for the motion. In addition to simply denying the admission, the nonmoving party may take the opportunity to make declarations showing how the requested admission is untrue.

[4] Collecting Evidence for Motion

[a] Advance Preparation

Supporting declarations should be drafted well in advance of the service deadline for a motion for summary judgment to accommodate witnesses who may become unavailable. Also, certified copies of documents and any matters to be judicially noticed should be collected with time to spare for unforeseen difficulties in obtaining the material.

Since document assembly for a summary judgment or summary adjudication motion can be extremely time-consuming, as much of the process should be completed in advance as possible. Early preparation also makes drafting of the separate statement of undisputed (or disputed) material facts proceed smoothly. For discussion of the separate statement, see *§ 537.21[3]*.

[b] Stipulation to Facts

Depending on the complexity of the case, it may be clear that summary judgment motions by both sides are required. In that case, the parties may wish to stipulate to certain foundational facts, such as the citizenship of a party or the authenticity of documentary evidence.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsMotions to StrikeGeneral OverviewCivil ProceduresSummary JudgmentGeneral OverviewCivil ProceduresSummary JudgmentEvidenceCivil ProceduresSummary JudgmentSupporting MaterialsDiscovery MaterialsCivil ProceduresSummary JudgmentTime LimitationsCivil ProceduresPretrial MattersSeparate Trials

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§ 537.20 Timing Requirements for Making Motion for Summary Judgment

[1] Motion Permitted If 60 Days Have Lapsed Since Opposing Party's General Appearance

A motion for summary judgment may be made [*Code Civ. Proc. § 437c(a)*; *see Code Civ. Proc. § 1005.5*]:

- At any time after 60 days have elapsed since the general appearance [*see Code Civ. Proc. § 1014* (discussed *below*)] in the action or proceeding of each party against whom the motion is directed.

- At an earlier time after such general appearance as the court, with or without notice and on good cause shown, may direct.

A court cannot shorten the 75-day notice period required for a motion for summary judgment [*see Code Civ. Proc. § 437c(a)*], but the statute does gives trial courts authority to shorten the 60-day period after the opposing party's general appearance to file the motion [*McMahon v. Superior Court (2003) 106 Cal. App. 4th 112, 115-118, 130 Cal. Rptr. 2d 407* ; *Urshan v. Musicians' Credit Union (2004) 120 Cal. App. 4th 758, 765, 15 Cal. Rptr. 3d 839* (court's setting of motion for summary judgment 10 days before trial violated notice requirement; two days to prepare motion denied due process)].

A party has generally appeared if he or she has filed a complaint [*Brown v. Swickard (1985) 163 Cal. App. 3d 820, 826-827* & n.10] or done any of the following [*Code Civ. Proc. § 1014*]:

- Answered.
- Demurred.
- Filed a notice of motion to strike.
- Filed a notice of motion to transfer under *Code Civ. Proc. § 396b*.
- Moved for jurisdictional reclassification under *Code Civ. Proc. § 403.040*.
- Given the plaintiff written notice of appearance.

The acts listed above constituting a general appearance under *Code Civ. Proc. § 1014* are not exclusive [*Creed v. Schultz (1983) 148 Cal. App. 3d 733, 739, 196 Cal. Rptr. 252*]. Any act of a defendant is equivalent to a general appearance when, by that act, the defendant intentionally submits him or herself to thejurisdiction of the court for the purpose of obtaining any ruling or order of the court going to the merits of the case, and the act may reasonably be construed to imply that the court has acquired jurisdiction of the person of the defendant [*Davenport v. Superior Court (1920) 183 Cal. 506, 511, 191 P. 911*].

A motion is deemed "made" on the service and filing of the notice of motion [*Code Civ. Proc. § 1005.5*]. Thus, a party seeking summary judgment generally must wait until 60 days after the opponent's general appearance to file or serve the notice of motion. One court, however, upheld a plaintiff's filing of a motion for summary adjudication of the issues less than 60 days after the defendant's general appearance when the hearing on the motion occurred after the 60-day period. The court stated that *Code Civ. Proc. § 1005.5* was not intended to deprive a party of a right to a hearing on a motion under *Code Civ. Proc. § 437c* if either the filing or hearing at which the motion is made occurs after the 60-day period [*see Sadlier v. Superior Court (1986) 184 Cal. App. 3d 1050, 1053-1054, 229 Cal. Rptr. 374* ; *see also Code Civ. Proc. § 1005.5* (providing that its provisions "shall not deprive a party of a hearing of the motion to which he is otherwise entitled") and discussion in *§ 537.29, below*]. If the moving party is the defendant, the 60-day waiting period is computed from the time the action was filed [*see St. Mary Medical Center v. Superior Court (1997) 50 Cal. App. 4th 1531, 1537, 58 Cal. Rptr. 2d 182*].

PRACTICE TIP:

Early Motion Continued for Discovery. If the motion is made within a short time after commencement of the action, the trial court, on request, may grant a continuance to the opposing party giving a reasonable time in which to conduct discovery before deciding the motion [*see Code Civ. Proc. § 437c(h)*].

For discussion of an exception to the 60-day rule applicable in actions for unlawful detainer and forcible detainer or entry, see *§ 537.18[1]*.

[2] Cutoff for Hearing 30 Days Before Trial

A motion for summary judgment must be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise [*Code Civ. Proc. § 437c(a)*].

The 30-day limit is necessary to permit the completion of discovery and to provide the trial court with sufficient time to consider the motion and any supplemental papers that may be filed. It is calculated based on the trial date in existence

when the motion is noticed [*Green v. Bristol Myers Co. (1988) 206 Cal. App. 3d 604, 609, 609 n.4, 253 Cal. Rptr. 745* ; *see also Sentry Ins. Co. v. Superior Court (1989) 207 Cal. App. 3d 526, 529, 255 Cal. Rptr. 13*].

A court cannot shorten the 75-day notice period required for a motion for summary judgment [*see Code Civ. Proc. § 437c(a)*], but the statute does gives trial courts authority to shorten the 30-day period before the trial date for hearing on the motion [*Robinson v. Woods (2009) 168 Cal. App. 4th 1258, 1268, 86 Cal. Rptr. 3d 241* ; *McMahon v. Superior Court (2003) 106 Cal. App. 4th 112, 115-118, 130 Cal. Rptr. 2d 407*].

PRACTICE TIP:

Scheduling Hearing. When selecting a date for the hearing, try to avoid a Friday hearing date. Friday tends to be the day on which most motions are heard, because cases normally are assigned a Monday trial date, and the last possible day for the hearing in such cases is the Friday four weeks earlier. Similarly, it can be risky to schedule the hearing for the last possible day; if it turns out that anything is wrong with the motion, there is no time for a continuance to rectify the problem.

[3] Motion Does Not Extend Time for Filing Responsive Pleading

The filing of a motion for summary judgment does not extend the time within which a party must otherwise file a responsive pleading [*Code Civ. Proc. § 437c(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsExtensionsCivil ProcedureSummary JudgmentHearingsGeneral OverviewCivil ProcedureSummary JudgmentTime Limitations

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47-537 California Forms of Pleading and Practice--Annotated § 537.21

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§ 537.21 Preparing Notice of Motion for Summary Judgment and Accompanying Papers

[1] Notice of Motion

A party seeking summary judgment must request the order by written notice of motion [*see Code Civ. Proc. § 437c(a)*]. The notice of motion must be accompanied by the following [*Code Civ. Proc. § 437c(b)(1)*]:

- Supporting declarations or other evidence [*see* [2], *below*].
- A separate statement of material facts [*see* [3], *below*].
- A supporting memorandum [*see* [4], *below*].
- Any additional papers as required by local court rule [*see* [5], *below*].

For forms of notice of motion for summary judgment and summary adjudication, see *§§ 537.70* and *537.71*.

[2] Declarations and Other Supporting Evidence

A motion for summary judgment is a "speaking motion" in that it goes outside the pleadings and must be supported by

extrinsic evidence. Evidence may be presented in the following form [*Code Civ. Proc. § 437c(b)(1), (2)*]:

- Affidavits or declarations [*see* discussion in *§ 537.24[1][a]* et seq.].
- Admissions [*see* discussion in *§ 537.24[2]*].
- Answers to interrogatories and deposition testimony [*see 537.24[3]*].
- Matters of which the trial court must or may take judicial notice [*see 537.24[4][a]* et seq.].

Neither the moving party nor the opposing party can rely on allegations in their own pleadings in lieu of or in support of these authorized forms of evidence, although each may use, as admissions, allegations pleaded by the other [*Parker v. Twentieth Century-Fox Film Corp. (1970) 3 Cal. 3d 176, 181, 89 Cal. Rptr. 737, 474 P.2d 689* ; *see Billmeyer v. Plaza Bank of Commerce (1995) 42 Cal. App. 4th 1086, 1099*]. This rule applies to verified as well as unverified pleadings [*Vesely v. Sager (1971) 5 Cal. 3d 153, 169, 95 Cal. Rptr. 623, 486 P.2d 151* , disapproved on other grounds in *Strangv. Cabrol (1984) 37 Cal. 3d 720, 724, 209 Cal. Rptr. 347, 691 P.2d 1013* ; *Cornelius v. Los Angeles County Etc. Authority (1996) 49 Cal. App. 4th 1761, 1768, 57 Cal. Rptr. 2d 618*].

A motion for summary judgment must be directed to the issues raised by the pleadings [*Laabs v. City of Victorville (2008) 163 Cal. App. 4th 1242, 1253, 78 Cal. Rptr. 3d 372* ; *Tsemetzin v. Coast Federal Savings & Loan Assn. (1997) 57 Cal. App. 4th 1334, 1342, 67 Cal. Rptr. 2d 726*]. The complaint limits the issues to be addressed in defendant's motion for summary judgment [*Alvis v. County of Ventura (2009) 178 Cal. App. 4th 536, 548, 100 Cal. Rptr. 3d 494* ; *Laabs v. City of Victorville (2008) 163 Cal. App. 4th 1242, 1258, 78 Cal. Rptr. 3d 372]* . If plaintiff wishes to expand the issues to be considered, plaintiff must seek leave to amend the complaint [*Alvis v. County of Ventura (2009) 178 Cal. App. 4th 536, 548, 100 Cal. Rptr. 3d 494* ; *Laabs v. City of Victorville (2008) 163 Cal. App. 4th 1242, 1258, 78 Cal. Rptr. 3d 372]* .

The function of supporting and opposing evidence is to establish whether there is any triable issue of fact within the issues delimited by the pleadings. In a properly pleaded case, the pleadings allege the ultimate facts constituting the cause of action or defense, and the evidence in support or opposition to the motion for summary judgment tracks these pleadings by providing evidence of the alleged ultimate facts. Absent an appropriate objection, however, the evidence produced in a summary judgment proceeding may cure some defects in pleading ultimate facts; the pleadings may be read together with that evidence for the purpose of discerning what is in issue [*FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 381-382, 282 Cal. Rptr. 508* ; *see People ex rel. Dep't of Transportation v. Ad Way Signs, Inc. (1993) 14 Cal. App. 4th 187, 196, 17 Cal. Rptr. 2d 496*].

For further discussion regarding preparation and evaluation of the supporting and opposing evidence, see *§ 537.24[1][a] et seq., §§ 537.25[3]*, and *537.25[4]*.

[3] Statement of Material Facts

A motion for summary judgment puts in issue the existence of material facts. To assist the court in determining the motion, the supporting papers must include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed. Each of the material facts stated must be followed by a reference to the supporting evidence [*Code Civ. Proc. § 437c(b)(1)*].

PRACTICE TIP:

Which Facts Are "Material." Materiality goes to issues [*Monastra v. Konica Business Machines, U.S.A., Inc. (1996) 43 Cal. App. 4th 1628, 1635, 51 Cal. Rptr. 2d. 528* ; *Billmeyer v. Plaza Bank of Commerce (1995) 42 Cal. App. 4th 1086, 1099*]. Whether a fact is material will depend on the issues

involved as determined from the pleadings and applicable law [*see Billmeyer v. Plaza Bank of Commerce (1995) 42 Cal. App. 4th 1086, 1099* ; *see also Addy v. Bliss & Glennon (1996) 44 Cal. App. 4th 205, 215, 51 Cal. Rptr. 2d 642* (pleadings define issues to which summary judgment motion must be directed)]. Materiality is measured by the law applicable to the legal theories put in issue by the complaint [*Teselle v. McLoughlin (2009) 173 Cal. App. 4th 156, 161, 92 Cal. Rptr. 3d 696* ; *Anderson v. Heart Federal Sav. & Loan Assn. (1989) 208 Cal. App. 3d 202, 210, 256 Cal. Rptr. 180* ; *see also Kelly v. First Astri Corp. (1999) 72 Cal. App. 4th 462, 470, 84 Cal. Rptr. 2d 810* (fact to be material must relate to a claim or defense that is in issue and must also be necessary to judgment somehow); *cf.*; *accord Eisenberg v. Alameda Newspapers, Inc. (1999) 74 Cal. App. 4th 1359, 1375, 88 Cal. Rptr. 2d 802* , *Sangster v. Paetkau (1998) 68 Cal. App. 4th 151, 162, 80 Cal. Rptr. 2d 66* (both stating that for practical purposes, issue of material fact is one which in context and circumstances of case warrants time and cost of factfinding by trial)]. Local superior court rules formerly defined the term "material fact" as a fact that is "necessary for the proof of an essential element," to be distinguished from "a fact which, while explanatory, does not tend directly or by inference to prove an essential element." Counsel should use this definition as a guide in assessing which facts to include in a separate statement.

The references to supporting evidence must be specific and supported by citation to exhibit, title, page and line numbers [*Cal. Rules of Ct., Rule 3.1350(d), (f)*].

The statement must be prepared as a separate document [*Cal. Rules of Ct., Rule 3.1350(c), (e)*] with a two-column format, stating in numerical sequence the undisputed material facts in the first column followed by the evidence that establishes those undisputed facts in that same column [*Cal. Rules of Ct., Rule 3.1350(d), (f), (h)*]. The requirement for separately identified issues is required only for supporting and opposing separate statements in a motion for summary adjudication [*Cal. Rules of Ct., Rule 3.1350(h)*; *see also Cal. Rules of Ct., Rule 3.1350(b), Truong v. Glasser (2009) 181 Cal. App. 4th 102, 118, 103 Cal. Rptr. 3d 811* (because defendant's motion sought summary judgment, rather than summary adjudication of subissue, his statement, using format contained in *Cal. Rules of Ct., Rule 3.1350(h)* met requirements of Rule 3.1350 without necessity of separately listing subissues as to which summary adjudication was sought)]. The court's power to deny summary judgment on the basis of failure to comply with *Cal. Rules of Ct., Rule 3.1350* is discretionary, not mandatory [*Truong v. Glasser (2009) 181 Cal. App. 4th 102, 118, 103 Cal. Rptr. 3d 811]* .

Effective January 1, 2002, a party must provide an electronic version of its separate statement to any other party or the court within 3 days of a request to do so [*Cal. Rules of Ct., Rule 3.1350(i)*]. The electronic version may be provided in any form on which the parties agree; however, if the parties are unable to agree on the form, the responding party must provide the electronic version of the separate statement that it used to prepare the document filed with the court. Pursuant to this rule, a party is not required to create an electronic version or any new version of any document for the purpose of transmission to the requesting party [*Cal. Rules of Ct., Rule 3.1350(i)*].

The court has discretion to deny a motion for summary judgment if the moving party fails to supply a separate statement, or to grant the motion if the opposing party fails to supply its separate statement [*Code Civ. Proc. § 437c(b)(1), (3)*].The prevailing view, however, is that it is only in the truly exceptional case involving a single, simple issue with minimal evidentiary support that a court will consider the merits of a motion unaccompanied by a separate statement [*United Community Church v. Garcin (1991) 231 Cal. App. 3d 327, 335, 282 Cal. Rptr. 368*]. Usually failure to file a separate statement with the motion will result in a denial of the motionwithout prejudice, a continuance, or an order taking the motion off the calendar.

It has been held to be an abuse of discretion to grant the motion solely on the ground of failure to file a separate statement without affording an opportunity for a pro per party to submit a proper response [*see Security Pacific Nat'l Bank v. Bradley (1992) 4 Cal. App. 4th 89, 5 Cal. Rptr. 2d 220* . Similarly, one court holds it is an abuse of discretion for a court to grant summary judgment based on deficiency in opposing separate statement where the opposing party's separate statement plainly indicated which proposed material facts were disputed and included general references to

supporting evidence but did not set forth the nature of the dispute or specific citations to the evidence [*Parkview Villas Ass'n, Inc. v. State Farm Fire and Cas. Co. (2005) 133 Cal. App. 4th 1197, 1210-1216, 35 Cal. Rptr. 3d 411*]. The trial court has discretion to overlook procedural errors in the moving and opposition papers, but only if the evidence presented warrants it [*Zimmerman, Rosenfeld, Gersh & Leeds v. Larson (2005) 131 Cal. App. 4th 1466, 1478, 33 Cal. Rptr. 3d 111* (glaring omissions and concessions could not be overlooked)]. However, it was not an abuse of discretion for a court to grant summary judgment based on deficiencies in plaintiffs' amended opposing separate statement when the trial court identified deficiencies in the initial opposing separate statement, identified the precise manner in which the deficiencies could be rectified, and provided plaintiffs ample time to prepare new, compliant papers, yet plaintiffs' opposing separate statement was still not compliant with the applicable rules [*Collins v. Hertz Corp. (2006) 144 Cal. App. 4th 64, 74-75, 50 Cal. Rptr. 3d 149]* .

For forms of statement of undisputed material facts supporting motions for summary judgment or summary adjudication, see *§§ 537.74* and *537.75*.

ILLUSTRATION:

Late Separate Statement. A party serves a motion for summary judgment on October 9, 1984. The motion, originally set for hearing on November 16, 1984, is continued, first to January 14, 1985, and then to January 28, 1985. The motion is actually heard on the latter date. Movant's separate statement is served by mail on December 21, 1984, 38 days before the actual hearing date. Rejecting the opposing party's objection based on this procedural irregularity, the trial court hears and grants the motion. Did the trial court commit an abuse of discretion when it refused to deny the summary judgment motion due to the late separate statement? No. Inasmuch as movant's statement was served 38 days before January 28, 1985, when the motion was actually heard, it cannot be said that the opposing parties were prejudiced or that the trial court abused its discretion by refusing to deny the summary judgment motion on the ground the statement was filed late [*see Michael H. v. Gerald D. (1987) 191 Cal. App. 3d 995, 1004, 236 Cal. Rptr. 810 , aff'd, 491 U.S. 110, 109 S. Ct. 91, 105 L. Ed. 2d 91 (1987)*].

[4] Supporting Memorandum

A supporting memorandum must accompany a notice of motion for summary judgment [*see Cal. Rules of Ct., Rules 3.1113(a), 3.1350(c), (e)*]. As a general rule, the opening memorandum in support of a summary judgment motion may not exceed 20 pages in length, exclusive of exhibits, declarations, attachments, and a table of contents [*see Cal. Rules of Ct., Rule 3.1113(d)* (also permitting longer memorandum with court approval)]. The 20-page limit applies even when there are multiple plaintiffs opposing a summary judgment motion [*Collins v. Hertz Corp. (2006) 144 Cal. App. 4th 64, 71, 50 Cal. Rptr. 3d 149* (court held plaintiffs were not entitled to 60 pages of opposition papers despite the fact there were three opponents)]. It is not required that the memorandum cites to the evidence in the record. It is sufficient that the statement of undisputed facts cites to the record [*Basich v. Allstate Insurance Co. (2001) 87 Cal. App. 4th 1112, 1118, 105 Cal. Rptr. 2d 153*].

There is no requirement in the rules of court that a memorandum in support of a motion for summary judgment or summary adjudication be organized by cause of action [*Hope Int'l Univ. v. Superior Court (2004) 119 Cal. App. 4th 719, 723, 14 Cal. Rptr. 3d 643*].

PRACTICE TIP:

Circumvention of Page Limitation Impermissible. Do not attempt to avoid page limitations by using unusually small typewriter print or by inappropriately using single-spacing in the body of the memo. Papers filed with the court must be in type not smaller than 12 points. Lines on each page must be one and one-half spaced or double spaced, with exceptions for the description of real property, footnotes, and quotations [*see Cal. Rules of Ct., Rules 2.104, 2.108*].

The memorandum need not repeat citations to the record in support of the motion when the moving papers include the statement of undisputed material facts as required by *Code Civ. Proc § 437c(b)(1)* and *California Rules of Court, Rule 3.1350(c)* and *(d)* [*see Basich v. Allstate Ins. Co. (2001) 87 Cal. App. 4th 1112, 1118, 105 Cal. Rptr. 2d 153*].

For discussion of the format and content requirements for memoranda of points and authorities, see Ch. 417, *Points and Authorities* .

[5] Proposed Order

If counsel submits a proposed order in addition to the usual supporting papers, the proposed order must be lodged and served with the moving papers, but is not to be attached to them [*see Cal. Rules of Ct., Rule 3.1113(m)*]. In any case, the prevailing party will be required to submit a proposed order after the ruling on the motion [*see Cal. Rules of Ct., Rule 3.1312*]. Preparation of a proposed order ahead of time may facilitate timely compliance with this requirement.

PRACTICE TIP:

Forms of Proposed Order. The form of proposed order *set out in § 537.81* is for use when the court grants a motion for summary judgment and requires counsel to prepare and submit a proposed order. If the court permits the order and judgment to be combined in the same paper, the form *set out in § 537.82* may be used. Otherwise, if the order granting the motion terminates the action as between at least two parties, a separate proposed judgment, such as that set out in the *form in § 537.83*, maybe prepared and submitted to the judge for signature.

For forms of proposed orders, see *§ 537.81* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentNoticesCivil ProcedureSummary JudgmentSupporting MaterialsGeneral OverviewCivil ProcedureSummary JudgmentSupporting MaterialsAffidavitsCivil ProcedureSummary JudgmentSupporting MaterialsDiscovery MaterialsCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

California Forms of Pleading and Practice--Annotated

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 537 SUMMARY JUDGMENT
PART II. LEGAL BACKGROUND

47-537 California Forms of Pleading and Practice--Annotated § 537.22

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§ 537.22 Service Requirements

Effective January 1, 2003, notice of the motion and supporting papers must be served on all other parties to the action at least 75 days before the time appointed for hearing. [*Code Civ. Proc. § 437c(a)*]. This marks a significant change in the notice period required for summary judgment motions. Prior to this most recent amendment, the notice period was 28 days.

If the notice is served by mail, this 75-day notice period is increased by [*Code Civ. Proc. § 437c(a)*]:

- Five days if the place of address is within California.
- Ten days if it is outside the state but within the United States.
- Twenty days if it is outside the United States.

If the notice is served by facsimile transmission, Express Mail, or another method of overnight delivery, the 75-day notice period is increased by two court days [*Code Civ. Proc. § 437c(a)*]. When increasing the 75 days' notice required by two court days for overnight delivery, the two court days are added on at the end of the 75-day period [*Barefield v. Washington Mutual Bank (2006) 136 Cal. App. 4th 299, 303, 38 Cal. Rptr. 3d 858*].

For discussion of an exception to these requirements, applicable in actions for unlawful detainer or forcible detainer or entry, see *§ 537.18[1]*.

If the notice is served by electronic service, the period of notice or any right to respond within any period or on a date certain after the service is extended by two court days under *Code Civ. Proc. § 1010.6(a)(6)*. This extension applies absent a specific exception provided for by another statute or rule of court [*Code Civ. Proc. § 1010.6(a)(6)*]. Although *Code Civ. Proc. § 437c(b)(6)* excludes extensions under *Code Civ. Proc. §§ 1005* and *1013*, as of the enactment of section 1010.6, it does not exclude extensions under 1010.6. For discussion of section 1010.6, see Ch. 518, *Service of Summons and Papers* .

A court cannot shorten the 75-day notice period required for a motion for summary judgment [*see Code Civ. Proc. § 437c(a)*], but the statute does gives trial courts authority to shorten the 60-day period after the opposing party's general appearance to file the motion, and to shorten the 30-day period before the trial date for the hearing on the motion [*McMahon v. Superior Court (2003) 106 Cal. App. 4th 112, 115-118, 130 Cal. Rptr. 2d 407*]. A court also cannot shorten the 75-day notice period required for a motion for summary judgment under *Code Civ. Proc. § 437c(a)* by issuing a general order providing for an expedited summary judgment on 60 days' notice [*Boyle v. CertainTeed Corp. (2006) 137 Cal. App. 4th 645, 655-656, 40 Cal. Rptr. 3d 501* (general order providing for expedited summary judgment procedure applicable to asbestos cases)].

Proof of service of the notice of motion must be filed no later than five calendar days before the appointed hearing date [*Cal. Rules of Ct., Rule 3.1300(c)*]. For discussion of the manner of service and forms for proof of service, see Ch. 518, *Service of Summons and Papers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentNoticesCivil ProcedureSummary JudgmentSupporting MaterialsGeneral OverviewCivil ProcedureSummary JudgmentTime Limitations

California Forms of Pleading and Practice--Annotated

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47-537 California Forms of Pleading and Practice--Annotated § 537.23

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§ 537.23 Filing Requirements

The notice of motion and supporting papers must be filed 16 court days before the appointed hearing date [*see Code Civ. Proc. § 1005(b)*; *Cal. Rules of Ct., Rule 3.1300(a)*]. The latest a paper may be filed is at the close of business of the clerk's office on the day the paper is due [*Cal. Rules of Ct., Rule 3.1300(e)*].

Papers submitted for filing after the time set forth in *Cal. Rules of Ct., Rule 3.1300*, will be filed, but the court, in its discretion, may refuse to consider these papers in ruling on the motion [*Cal. Rules of Ct., Rule 3.1300(d)*]. If the court refuses to consider the papers, the minutes or order are required to so indicate [*Cal. Rules of Ct., Rule 3.1300(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentNoticesCivil ProcedureSummary JudgmentSupporting MaterialsGeneral OverviewCivil ProcedureSummary JudgmentTime Limitations

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47-537 California Forms of Pleading and Practice--Annotated § 537.24

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§ 537.24 Preparing the Supporting Evidence

[1] Supporting Affidavits or Declarations

[a] Sufficiency Requirements

The most common method for providing the requisite evidence in support of amotion for summary judgment is by a sworn statement, that is, by affidavit or declaration [*see Code Civ. Proc. §§ 437c(b)(1), 2009, 2015.5*; *Shultz Steel Co. v. Hartford Accident & Indemnity Co. (1986) 187 Cal. App. 3d 513, 518, 231 Cal. Rptr. 715* ; *see also* discussion in *§ 537.21[2]*]. A supporting or opposing affidavit or declaration must do all of the following [*Code Civ. Proc. § 437c(d)*]:

- Be based on the affiant's or declarant's personal knowledge, and show affirmatively that the affiant or declarant is competent to testify to the facts stated in the affidavit or declaration [*see* discussion in *§ 537.24[1][b]*].

- Set forth admissible evidence [*see* discussion in *§ 537.24[1][c]*]. In this respect, the rules governing the admission of evidence apply [*see, e.g., Evid. Code §§ 1100 et seq., 1200 et seq.*].

For discussion of sanctions for filing affidavits or declarations in bad faith, see *§ 537.38*. For a form of supporting declaration, see *§ 537.73*.

For a declaration to comply with the requirements of *Code Civ. Proc. § 2015.5* in support of or to oppose a summary judgment motion, thedeclaration must either state on its face that it was executed in California or state that it is declared under the laws of the state of California [*Kulshrestha v. First Union Commercial Corp. (2004) 33 Cal. 4th 601, 618, 15 Cal. Rptr. 3d 793, 93 P.3d 386* (declaration stricken; summary judgment for defendant affirmed)].

The moving party's papers are strictly construed, accepting as fact only those portions that are not contradicted by opposing papers, while the opposing party's papers are liberally construed, all facts therein being accepted as true [*Salazar v. Southern Cal. Gas Co. (1997) 54 Cal. App. 4th 1370, 1376, 63 Cal. Rptr. 2d 522* ; for discussion, *see § 537.33[2][a]*].

[b] Showing Declarant's Competency

An affidavit or declaration must affirmatively show that the affiant or declarant is competent to testify to the matters stated within it [*Code Civ. Proc. §§ 437c(d)*; *Regents of University of California v. Superior Court (1996) 41 Cal. App. 4th 1040, 1044, 48 Cal. Rptr. 2d 922*]. The affidavit or declaration need not contain a conclusory statement that the affiant or declarant can competently testify; all that is required is that the affiant or declarant allege facts showing his or her competence [*see Roy Brothers Drilling Co. v. Jones (1981) 123 Cal. App. 3d 175, 181-182, 176 Cal. Rptr. 449* ; *see also Gatton v. A.P. Green Services, Inc. (1998) 64 Cal. App. 4th 688, 696, 75 Cal. Rptr. 2d 523* (affiant must show that if sworn as witness he or she can testify competently to evidentiary facts contained in affidavit)].

Code Civ. Proc. § 437c expressly requires that a supporting or opposing affidavit and declaration be based on personal knowledge [*Code Civ. Proc. § 437c(d)*; *Regents of University of California v. Superior Court (1996) 41 Cal. App. 4th 1040, 48 Cal. Rptr. 2d 922* ; *see Maltby v. Shook (1955) 131 Cal. App. 2d 349, 352-354, 280 P.2d 541* (personal knowledge requirement applies even when affiant or declarant is a party's attorney)]. Personal knowledge is essentially an element of the affiant's or declarant's competency to testify [*see Evid. Code § 702*] and therefore must be affirmatively shown. Thus, a conclusory allegation of personal knowledge is by itself insufficient; the affiant or declarant must state facts showing how he or she came to know personally the facts stated [*see Snider v. Snider (1962) 200 Cal. App. 2d 741, 753, 19 Cal. Rptr. 709*].

For example, a declarant's statement made "to the best of my knowledge" is inadmissible for failure to meet the required showing of personal knowledge [*Bowden v. Robinson (1977) 67 Cal. App. 3d 705, 719-720, 136 Cal. Rptr. 871* ; *see also Lopez v. University Partners (1997) 54 Cal. App. 4th 1117, 1124, 63 Cal. Rptr. 2d 359* (declarations based on information and belief insufficient to satisfy burden of either moving or opposing party on motion for summary judgment or adjudication)]. Conversely, statements indicating a declarant's inability to recall facts exactly merely affects the weight of such evidence, and not its admissibility on the basis of personal knowledge [*Buehler v. Oregon-Washington Plywood Corp. (1976) 17 Cal. 3d 520, 528-529, 131 Cal. Rptr. 394, 551 P.2d 1226*].

If the affiant or declarant is stating expert opinion, the affidavit or declaration should establish competency by stating the affiant's or declarant's qualifications to give expert opinion testimony [*see Evid. Code §§ 720, 801, 802*; *Mann v. Cracchiolo (1985) 38 Cal. 3d 18, 37-39, 210 Cal. Rptr. 762, 694 P.2d 1134* ; *see also Tibor v. Superior Court (1997) 52 Cal. App. 4th 1359, 1364 n.1, 61 Cal. Rptr. 2d 326* (declaration contained no foundational facts showing that declarant had the training, experience or skill that would qualify declarant to render an opinion on the particular matters in controversy)]. An expert's opinion also must lay the foundation for an exception to the hearsay rule if hearsay evidence is used to form the basis of the expert's opinion [*Garibay v. Hemmatt (2008) 161 Cal. App. 4th 735, 743*].

[c] Stating Evidentiary Facts

A supporting or opposing affidavit or declaration must set forth admissible evidence [*Code Civ. Proc. § 437c(d)*; *Regents of University of California v. Superior Court (1996) 41 Cal. App. 4th 1040, 1044, 48 Cal. Rptr. 2d 922* ; *see*

Franklin v. Benevolent etc. Order of Elks (1979) 97 Cal. App. 3d 915, 930, 159 Cal. Rptr. 131 and discussion in *§ 537.24[1][a]*]. Nonetheless, the mere presence in a supporting declaration of inadmissible evidence concerning an immaterial fact is not a valid ground to deny a motion otherwise well taken [*Overland Plumbing, Inc. v. Transamerica Ins. Co. (1981) 119 Cal. App. 3d 476, 481, 174 Cal. Rptr. 1*].

The admissible evidence must be stated in the form of evidentiary facts, specifically, all necessary evidentiary facts including those establishing personal knowledge and competency (discussed in *§ 537.24[1][b]*). Affidavits and declarations may not simply state ultimate facts or conclusions [*Krantz v. BT Visual Images (2001) 89 Cal. App. 4th 164, 173-174, 107 Cal. Rptr. 2d 109* ; *Hayman v. Block (1986) 176 Cal. App. 3d 629, 638-639, 222 Cal. Rptr. 293* ; *Rodes v. Shannon (1961) 194 Cal. App. 2d 743, 748, 15 Cal. Rptr. 349*]. These are insufficient when not supported by evidentiary facts based on personal knowledge [*see Colby v. Schwartz (1978) 78 Cal. App. 3d 885, 889, 144 Cal. Rptr. 624*].

ILLUSTRATION:

Insufficient Conclusionary Statements. Plaintiffs bring an action for wrongful death and emotional distress based on the death at birth of their infant child. Defendant physician moves for summary judgment against both parents, on the theory that there is no cause of action for wrongful death because the baby was stillborn. In his declaration submitted in support of the motions, defendant claims that the child was "a stillborn fetus." Does this statement meet the requirement for evidentiary facts? No. Facts set forth to support a grant of summary judgment must be evidentiary in quality. Conclusionary affidavits are insufficient for this purpose. The doctor's conclusionary statement in this situation did not enlighten the court as to the child's vital signs, such as breathing, heartbeat, signs of cerebration, muscular activities, or lack thereof [*see Sesma v. Cueto (1982) 129 Cal. App. 3d 108, 113-114, 181 Cal. Rptr. 12*].

Hearsay evidence is not sufficient to raise an issue of fact when the party relying on it fails to lay a proper foundation for it [*Garibay v. Hemmatt (2008) 161 Cal. App. 4th 735, 743* (failure to lay foundation for business records exception to the hearsay rule rendered expert doctor's opinion inadmissible); *Rochlis v. Walt Disney Co. (1993) 19 Cal. App. 4th 201, 23 Cal. Rptr. 2d 793* (regarding admission, party failed to show declarant was authorized to speak on behalf of party against whom the statement was offered), *disapproved on other grounds, Turner v. Anheuser-Busch, Inc. (1994) 7 Cal. 4th 1238, 1251, 32 Cal. Rptr. 2d 223, 876 P.2d 1022*].

[d] Incorporating Documentary Evidence

Documentary evidence should be incorporated by reference into an affidavit or declaration. Such documents must satisfy applicable rules of evidence [*Dugar v. Happy Tiger Records, Inc. (1974) 41 Cal. App. 3d 811, 815, 116 Cal. Rptr. 412*], which would include authentication [*Evid. Code § 1400 et seq.*] and the Secondary Evidence Rule [*Evid. Code § 1520 et seq.*]. Any incorporation by reference of matter in the court's file must set forth with specificity the exact matter to which reference is being made and may not incorporate the entire file [*Code Civ. Proc. § 437c(b)(7)*].

PRACTICE TIP:

Use of Authenticated Copies. Parties should file authenticated copies of documentary evidence in lieu of originals. Secondary evidence is admissible; however, the Secondary Evidence Rule expressly provides that nothing in the Rule excuses compliance with authentication requirements [*Evid. Code § 1521(a), (c)*]. Be prepared to produce originals of the documents at the hearing on the motion if there is a genuine dispute concerning material terms of the writing or admission of secondary evidence would be unfair [*see Evid. Code § 1521(a)* (grounds for court to exclude secondary evidence)].

[e] Contradicting or Repudiating Prior Testimony or Statements

In reviewing motions for summary judgment or adjudication, courts treat affidavits or declarations repudiating previous

testimony as not constituting substantial evidence of the existence of a triable issue of fact [*Advanced Micro Devices, Inc. v. Great American Surplus Lines Ins. Co. (1988) 199 Cal. App. 3d 791, 800, 245 Cal. Rptr. 44* ; *Jacobs v. Fire Ins. Exchange (1995) 36 Cal. App. 4th 1258, 1270, 42 Cal. Rptr. 2d 906* (rejecting expert's declaration contradicting deposition testimony)]. Courts also will not accept as substantial evidence of a triable issue of fact a declaration that directly contradicts the declarant's prior statement, even when the prior statement was not under oath, when the contradiction is unexplained [*Alvis v. County of Ventura (2009) 178 Cal. App. 4th 536, 548-549, 100 Cal. Rptr. 3d 494]* .

[2] Admissions

Admissions may be used to support or oppose a motion for summary judgment [*Code Civ. Proc. § 437c(b)(1), (2)*; *see also* discussion in *§ 537.21[2]* and in *§ 537.19[3]*].

Admissions are derived primarily through the use of requests for admissions, in either of the following ways:

- Matters admitted in an answer to a request for admission [*Code Civ. Proc. § 2033(f)* (*Code Civ. Proc. § 2033.220* operative July 1, 2005)]; *see, e.g.,* *Bennett v. Hibernia Bank (1960) 186 Cal. App. 2d 748, 753, 9 Cal. Rptr. 896* (decided under prior law)].

- Matters deemed admitted on the motion of the party who served a request for admissions, when the party served with the request has failed to provide a timely response [*Code Civ. Proc. § 2033(k)* (*Code Civ. Proc. § 2033.280* operative July 1, 2005)] *see, e.g.,* *Swedberg v. Christiana Community Builders (1985) 175 Cal. App. 3d 138, 144, 220 Cal. Rptr. 544* (affirming summary judgment based on deemed admissions; decided under prior law)].

PRACTICE TIP:

Use of Deemed Admissions. Requests for admissions are a useful and relatively inexpensive means of obtaining the supporting evidence necessary to obtain summary judgment or summary adjudication. They are particularly effective when it is reasonable to expect that the opposing party may not respond, and the matters in the request may thereafter be deemed admitted. In this situation the requests for admission should be framed to elicit admissions that, if admitted, establish all the facts necessary for the cause of action or defense. For example, a personal injury plaintiff appearing in propria persona may well fail to provide timely response to requests for admissions served by the defendant, and defense counsel may thereafter obtain a summary judgment in defendant's favor so long as the matters deemed admitted are sufficient to establish a complete defense.

For discussion of discovery by requests for admissions under *Code Civ. Proc. § 2033* [*Code Civ. Proc. § 2033.010-2033.420* operative July 1, 2005], see Ch. 196, *Discovery: Requests for Admissions* .

Admissions may also derived from the following:

- Deposition testimony [*see* *Visueta v. General Motors Corp. (1991) 234Cal. App. 3d 1609, 1613, 286 Cal. Rptr. 402* and discussion in *§ 537.24[3]*].

- Answers to interrogatories [*see* *Mason v. Marriage & Family Center (1991) 228 Cal. App. 3d 537, 545, 279 Cal. Rptr. 51* , and discussion in *§ 537.24[3]*].

- Pleadings of the opposing party. In this situation the admissions may be either expressly pleaded [*see, e.g.,* *Aim Insurance Co. v. Culcasi (1991) 229 Cal. App. 3d 209, 213 n.1, 280 Cal. Rptr. 766* (allegations in cross complaint)], or they may result from an ineffective denial [*see, e.g.,* *Oliver v. Swiss*

Club Tell (1963) 222 Cal. App. 2d 528, 539, 35 Cal. Rptr. 324 (ineffective denial based on information and belief)].

- Factual stipulations entered into by the opposing party [*see Smith v. Walter E. Heller & Co. (1978) 82 Cal. App. 3d 259, 269, 147 Cal. Rptr. 1*].

For further discussion of the effect of admissions, see *§ 537.33[2][g]*.

[3] Depositions and Answers to Interrogatories

Depositions and answers to interrogatories may be used to support or oppose a motion for summary judgment [*Code Civ. Proc. § 437c(b)(1), (2)*; *see also* discussion in *§ 537.21[2]*, and in *§ 537.19[3]*], subject to admissibility objections that may be made and sustained [*see L&B Real Estate v. Superior Court (1998) 67 Cal. App. 4th 1342, 1346-1348, 79 Cal. Rptr. 2d 759* ; *Gatton v. A.P. Green Services, Inc. (1998) 64 Cal. App. 4th 688, 692, 75 Cal. Rptr. 2d 523*]. A party responding to interrogatories may not use those responses in support of its own motion or opposition to a motion for summary judgment [*Great American Ins. Companies v. Gordon Trucking, Inc. (2008) 165 Cal. App. 4th 445, 450, 81 Cal. Rptr. 3d 65*].

With regard to deposition testimony, it may in some instances be appropriate simply to recite small portions of relevant testimony within a declaration [*see* discussion in *§ 537.24[1]*]. Usually, however, the party relying on deposition testimony should copy the relevant pages of the deposition transcript and submit these as an exhibit. When deposition testimony is submitted as an exhibit, the following requirements apply [*Cal. Rules of Ct., Rule 3.1116*]:

- Other than the title page, the exhibit must contain only the relevant pages of the transcript. The original deposition transcript page number must be clearly visible at the bottom of each page.

- The relevant portions of any testimony in the deposition must be highlighted or marked in a manner that calls attention to that testimony.

Interrogatories and their answers should be similarly prepared as exhibits.

[4] Matters Subject to Judicial Notice

[a] Supporting or Opposing Motion for Summary Judgment

Matters of which judicial notice shall or may be taken may be used to support or oppose a motion for summary judgment [*see Code Civ. Proc. § 437c(b)(1), (2)* and discussion in *§ 537.21[2]*]. Among the more significant matters subject to judicial notice are the following:

- Statutes, case law, and court rules of the United States and California [*see Evid. Code §§ 451(a), (d), 452(a), (e)*].

- Court records [*see Evid. Code § 452(d)*].

- Facts and propositions:

  - Of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute [*Evid. Code § 451(f)*].

  - That are of such common knowledge within the territorial jurisdiction of the court

that they cannot reasonably the subject of dispute [*Evid. Code § 452(g)*].

- That are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonable indisputable accuracy [*see Evid. Code § 452(h)*].

Any request for judicial notice must be made in a separate document listing the specific items for which notice is requested and must comply with *Cal. Rules of Ct., Rule 3.1306(c)* [*Cal. Rules of Ct., Rule 3.1113(l)*]. A party requesting judicial notice of material under *Evid. Code § 452* or § 453 must provide the court and each party with a copy of the material.

If the material is part of a file in the court in which the motion is being heard, the party must specify in writing the part of the court file sought to be judicially noticed and make arrangements with the clerk to have that file in the courtroom at the time of the hearing [*Cal. Rules of Ct., Rule 3.1306(b)*]. Local rules may impose additional requirements. For example, in Los Angeles County Superior Court, the party requesting notice must file a request at least five days before the hearing. The request must be filed with the clerk of the department in which the matter is noticed and must include the case name and number. Moreover, the file must be delivered at least two court days before the hearing to give the judge an opportunity to review the file in preparation for the hearing [Los Angeles Co. Super. Ct. Rules, Rule 9.2; *see also* San Francisco Uniform Local Ct. Rules, Rule 8.9 (similar requirement)]. A copy of the relevant portions of the file should be included with the supporting or opposing papers for the following reasons:

- The court may consider the copy if the file cannot be located in time for the hearing [*see* Los Angeles Co. Super. Ct. Rules, Rule 9.2(b)].

- The requesting party may not incorporate the entire court file by reference and must set out with specificity the exact matter in the file that is soughtto be incorporated by reference [*Code Civ. Proc. § 437c(b)(7)*].

If the matter subject to permissive notice is contained in another court's file, the party requesting notice must obtain the file for the date of the hearing or, alternatively provide a certified copy of relevant portions of the file with his or her moving or opposing papers [*see* Los Angeles Co. Super. Ct. Rules, Rule 9.2(c) (also providing that this procedure applies when file is in another district of the same court); *see also § 537.24[4][c]*].

For discussion of judicial notice, see Ch. 321, *Judicial Notice* .

[b] Mandatory Judicial Notice

Matters subject to mandatory judicial notice under *Evid. Code § 451* need not be specifically requested, but should be drawn to the court's attention by appropriate reference, as, for example, in the separate statement of material facts and memorandum [*see § 537.21[3]* and *§ 537.21[4]*]. Any failure by the court to notice matters under *Evid. Code § 451* may be deemed harmless or invited error if the matter was not brought to the court's attention [*see* Assembly Committee on Judiciary comment to *Evid. Code § 451*; *Stafford v. Ware (1960) 187 Cal. App. 2d 227, 231-232, 9 Cal. Rptr. 706*].

[c] Permissive Judicial Notice

Any request for judicial notice of matters subject to permissive notice under *Evid. Code § 452*, as required by *Evid. Code § 453*, should be filed with the papers supporting or opposing the motion for summary judgment. This will satisfy the requirement that "sufficient notice" be given to the adverse parties to enable them to prepare to meet the request [*Evid. Code § 453(a)*; *see* Law Revision Commission comment to *Evid. Code § 453*]. For example, the request may take the form of a reference to the matter sought to be noticed in a declaration filed in support of a motion for summary

judgment [*see* *Stepan v. Garcia (1974) 43 Cal. App. 3d 497, 500, 117 Cal. Rptr. 919* (reference to contents of court records)].

A request for permissive judicial notice must be accompanied with information sufficient to enable the court to take the notice requested, i.e., a copy of the material to be noticed [*Evid. Code § 453(b)*; *Cal. Rules of Ct., Rule 3.1306(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentEvidenceCivil ProcedureSummary JudgmentSupporting MaterialsGeneral OverviewCivil ProcedureSummary JudgmentSupporting MaterialsAffidavitsCivil ProcedureSummary JudgmentSupporting MaterialsDiscovery MaterialsEvidenceJudicial NoticeGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 537 SUMMARY JUDGMENT
PART II. LEGAL BACKGROUND

47-537 California Forms of Pleading and Practice--Annotated § 537.25

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§ 537.25 Opposing Motion for Summary Judgment

[1] Opposing Memorandum

A memorandum is essential to effective opposition; it not only states the opposing points and authorities, but, in presenting opposing argument, serves to coordinate the other opposing papers. Any objections to notice, evidentiary objections, and objections to the sufficiency of supporting declarations should also be discussed fully in the opposing memorandum whenever possible. These objections are waived if not raised at the hearing, and evidentiary objections must be in writing unless arrangements have been made to have a reporter transcribe the hearing [*see* discussion in *§ 537.25[4]*].

As a general rule, the opposing memorandum in a proceeding for summary judgment may not exceed 20 pages in length, exclusive of exhibits, declarations, attachments, and a table of contents [*see Cal. Rules of Ct., Rule 3.1113(d)* (also permitting longer memorandum with court approval)]. For discussion of the required format and content requirements for memoranda, see Ch. 417, *Points and Authorities* .

[2] Opposing Statement of Material Facts

The opposing papers must include a separate statement of material facts that does both of the following [*Code Civ. Proc. § 437c(b)(3)*]:

- Responds to each of the material facts contended by the moving party to be undisputed (*see* discussion in *§ 537.21[3]*) and indicates whether the opposing party agrees or disagrees that those facts are undisputed.

- Sets forth plainly and concisely any other material facts that the opposing party contends are disputed.

If the opposing party admits any of the facts set out in the moving party's separate statement, the admission should be clearly stated [*Blackman v. Burrows (1987) 193 Cal. App. 3d 889, 895, 238 Cal. Rptr. 642*]. If the opposing party contends that any of those facts are disputed, this contention must be followed by a reference to the evidence establishing that the facts are disputed [*Code Civ. Proc. § 437c(b)(3)*; *see § 537.25[3]*].

Specific format requirements for preparing the opposing statement are provided in *Cal. Rules of Ct., Rule 3.1350(f)* [*see also § 537.21[3]*]:

- The opposing statement of facts must be prepared as separate document.

- The opposing statement must quote each of the facts in the moving party's statement in the same order in which they appear in the moving party's statement.

- The opposing statement must state whether or not he or she disputes each such fact. If the opposing party disputes a fact set out in the moving party's statement, he or she must cite to the page and paragraph of the exhibit where evidence establishing the dispute can be located.

- After responding to each of the moving party's facts, the opposing party may set out any additional facts claimed to be disputed, with appropriate evidentiary support and references thereto.

- The facts must be listed in a left-hand column, with a correspondingright-hand column that states whether that fact is undisputed or disputed, and, if disputed, sets out specific references to the paragraph and page of each identified exhibit where the supporting evidence can be found.

Effective January 1, 2007, written objections to the moving party's evidence must follow a specific format [see discussion in *§ 537.25[4]*; for forms, see *§§ 537.86* and *537.87*]. Objections to specific evidence may be referenced by the objection number in the right column of the separate statement, but the objections must not be restated or reargued in the separate statement [*Cal. Rules of Ct., Rule 3.1354(b)*].

A party must provide an electronic version of its separate statement to any other party or the court within 3 days of a request to do so [*Cal. Rules of Ct., Rule 3.1350(i)*]. The electronic version may be provided in any form on which the parties agree; however, if the parties are unable to agree on the form, the responding party must provide the electronic version of the separate statement that it used to prepare the document filed with the court. Pursuant to this rule, a party is not required to create an electronic version or any new version of any document for the purpose of transmission to the requesting party [*Cal. Rules of Ct., Rule 3.1350(i)*].

The court has discretion to grant the motion for summary judgment if the opposing party fails to comply with this requirement [*Code Civ. Proc. § 437c(b)(3)*]. Some cases have held, however, that unless the moving party has met its initial burden of proof, the court does not have discretion under *Code Civ. Proc. § 437c(b)(3)* to grant summary judgment based on the opposing party's failure to file a proper separate statement [*Teselle v. McLoughlin (2009) 173 Cal. App. 4th 156, 168-173, 92 Cal. Rptr. 3d 696* ; *Thatcher v. Lucky Stores, Inc. (2000) 79 Cal. App. 4th 1081, 1086, 94 Cal. Rptr. 2d 575* ; *see Kulesa v. Castleberry (1996) 47 Cal. App. 4th 103, 111-112* (discretion to grant motion

under section 437c(b) does not override court's *Code Civ. Proc. § 437c(c)* duty to review all papers filed in conjunction with motion); *see also Rubenstein v. Rubenstein (2000) 81 Cal. App. 4th 1131, 1151-1152, 97 Cal. Rptr. 2d 707* (moving defendant not entitled to summary judgment despite plaintiff's failure to file proper opposing separate statement and untimeliness of opposition papers because defendant did not meet burden in first instance of establishing right to relief defendant sought); *Pepperell v. Scottsdale Ins. Co. (1998) 62 Cal. App. 4th 1045, 1055 n.7, 73 Cal. Rptr. 2d 164* (although trial court has discretion under *Code Civ. Proc. § 437c(b)* to grant summary judgment when opposing party fails to comply with statutory requirement of separate statement, appellate court will not affirm granting of summary judgment solely on that basis)].

Other cases have upheld the granting of summary judgment based on the opposing party's failure to file a separate statement as required under *Code Civ. Proc. § 437c(b)(3)* without specifying any requirement that the moving party first satisfy its burden of proof [*see, e.g., Whitehead v. Habig (2008) 163 Cal. App. 4th 896, 900-903, 77 Cal. Rptr. 3d 679* (trial court granted motion for summary adjudication both on substantive grounds and on basis that opposing party failed to file separate statement but court of appeals upheld ruling based solely on failure to file separate statement); *Kaplan v. LaBarbera (1997) 58 Cal. App. 4th 175, 179, 67 Cal. Rptr. 2d 903* (failure to submit separate statement in opposition to motion alone is sufficient to uphold trial court's grant of motion; summary judgment for defendant upheld on that and other grounds); *Blackman v. Burrows (1987) 193 Cal. App. 3d 889, 893, 238 Cal. Rptr. 642* (trial court did not abuse its discretion in granting summary judgment motion based on opposing party's failure to submit separate statement); *see also Gilbertson v. Osman (1986) 185 Cal. App. 3d 308, 315-316* (trial courts may grant motion if opposing party fails to submit separate statement of material facts if failure significantly interferes with court's mission of seeking truth and justice; under facts of case, however, plaintiff's failure to submit separate statement of disputed facts did not justify order granting summary judgment; disapproved on other grounds in *Woods v. Young (1991) 53 Cal. 3d 315, 328 n.4, 279 Cal. Rptr. 613, 807 P.2d 455*)].

In any event, usually an opposing party's failure to file a responsive separate statement will result in a continuance of the motion to permit the filing of proper papers and an award of fees and costs as a condition of the continuance [*see United Community Church v. Garcin (1991) 231 Cal. App. 3d 327, 335, 282 Cal. Rptr. 368* ; Los Angeles Co. Super. Ct. Rules, Rule 9.21(f)].

A summary judgment motion cannot be defeated by attempting to generate a factual dispute as to an immaterial issue. The presence of a factual dispute will not defeat a summary judgment motion unless the fact in dispute is material [*Romero v. American President Lines, Ltd. (1995) 38 Cal. App. 4th 1199, 1203, 45 Cal. Rptr. 2d 421*] that is, it relates to a claim or defense in issue which could make a difference in the outcome [*Los Angeles Nat. Bank v. Bank of Canton (1991) 229 Cal. App. 3d 1267, 1274, 280 Cal. Rptr 831*].

If the opposing party's evidence would show some factual assertion, legal theory, defense or claim not yet pleaded, that party should seek leave to amend the pleadings before the hearing on the summary judgment motion [*Distefano v. Forester (2001) 85 Cal. App. 4th 1249, 1264-1265, 102 Cal. Rptr. 2d 813*]. The papers filed in response to the defendant's motion for summary judgment may not create an issue outside the pleadings and are not a substitute for an amendment to the pleadings [*Sutherland v. Barclays American/Mortgage Corp. (1997) 53 Cal. App. 4th 299, 317, 61 Cal. Rptr. 2d 614* ; *Nash v. Fifth Amendment (1991) 228 Cal. App. 3d 1106, 1116, 279 Cal. Rptr. 465* ; *see also Hobson v. Raychem Corp. (1999) 73 Cal. App. 4th 614, 629, 86 Cal. Rptr. 2d 497* (plaintiff cannot successfully resist summary judgment on theory which is not pleaded in complaint); *Allyson v. Department of Transportation (1997) 53 Cal. App. 4th 1304, 1318-1321, 62 Cal. Rptr. 2d 490* , and discussion in *§ 537.33[2][c]*].

For further discussion of what constitutes material facts, *see § 537.21[3]*. For a form of opposing statement of disputed and/or undisputed material facts, see *§ 537.77*.

ILLUSTRATION:

Failure to File Response. Plaintiff moves for summary judgment. Defendant, appearing in pro per, does

not file a separate responsive statement. Defendant mistakenly believes that a separate responsive statement he filed to a prior summary judgment motion by plaintiff also applied to the present motion. At the hearing, the trial court points out that *Code Civ. Proc. 437c(b)* requires a separate responsive statement and that none has been filed. It grants the motion based on defendant's failure to file a separate responsive statement. Defendant tells the court, "I don't understand the summary judgment," and the court responds, "Well, I don't give advice, sir. I just rule on cases as they are brought to me." The trial court enters judgment for plaintiff. Has the court abused its discretion in granting the plaintiff's motion? Yes. The court abused its discretion in failing to give defendant a further opportunity to file a separate responsive statement. Defendant's failure to file a separate responsive statement was not a refusal to comply with *Code Civ. Proc. § 437c*, but was rather based on a mistaken belief that the statement was unnecessary. Unless the trial court has reason to believe no responsive statement would be filed even if the respondent was afforded a reasonable opportunity to file one, the respondent should be afforded that opportunity rather than suffer a judgment not supported by a decision on the merits [*see Security Pacific Nat'l Bank v. Bradley (1992) 4 Cal. App. 4th 89, 94, 98-99, 5 Cal. Rptr. 2d 220*]

ILLUSTRATION: Failure to Include Stipulation in Separate Statement. As litigation progresses plaintiff and defendant enter into a stipulation whereby plaintiff waives punitive damages and all other causes of action except negligence and defendant stipulates to negligence, but expressly reserves the right to dispute the issues relating to causation and damages. Thereafter defendant moves for summary judgment without mentioning the stipulation or even that defendant has conceded negligence. The theory of defendant's motion is that the firefighter's rule is applicable and defeats an element of plaintiff's negligence cause of action. Plaintiff responds by contending that the firefighter's rule does not apply because at the time of plaintiff's injury plaintiff was neither a firefighter nor a policeman. In plaintiff's opposition, plaintiff sets forth the stipulation in full, but makes no argument with respect to it. The trial court grants summary judgment in favor of the defendant based on the defendant having proffered evidence establishing as a matter of law that the firefighter's rule bars plaintiff's claim and that plaintiff in opposition proffered no evidence that raised a substantial controversy as to the applicability of the firefighter's rule. Has the trial court erred in determining by summary judgment that the firefighter's rule barred plaintiff's action for negligence against defendant. Yes. Plaintiff's response in opposition to the motion called the court's attention to the stipulation on the first page and defendant made no objection to the exhibit. The only issues reserved for dispute under the stipulation were the issues relating to damage causation and damages. The applicability of the firefighter's rule, as an issue relevant to the element of duty, was not an issue that defendant expressly reserved to dispute. Moreover, plaintiff as the opposing party complied with plaintiff's obligations under *Code Civ. Proc. § 437c(b)*. Although *Code Civ. Proc. § 437c(b)* required plaintiff as the opposing party to "include a separate statement which responds to each of the material facts contended by the moving party to be undisputed ... ," because defendant as the moving party had not listed the stipulation as an undisputed fact, plaintiff had no obligation to respond with any mention of the stipulation. Plaintiff, however, did respond to defendant's statement of undisputed facts, and thus complied with the first obligation under *Code Civ. Proc. § 437c(b)*. In addition, although *Code Civ. Proc. § 437c(b)* required plaintiff to list in a separate statement any facts that plaintiff thought to be disputed, because the existence of the stipulation was not in dispute, plaintiff had no obligation to include the stipulation in plaintiff's separate statement and waived nothing by not including it in the statement. Furthermore, the stipulation did not contain facts that were relevant to the theory of defendant's motion for summary judgment. Under the stipulation defendant conceded the elements of duty and breach (or negligence) as a matter of law and only retained the right to raise material factual issues on the elements of causation and damage. Thus, nothing in *Code Civ. Proc. § 437c(b)* required plaintiff to set forth the stipulation in plaintiff's separate statement of material facts. Plaintiff was only required to place the stipulation in evidence in opposition to the motion which plaintiff did by attaching the stipulation [*Assad v. Southern Pacific Transportation Co. (1996) 42 Cal. App. 4th 1609, 1614-1616, 50 Cal. Rptr. 2d 443]* .

[3] Opposing Evidence

[a] Requirement

When appropriate, the opposition to a motion for summary judgment must include opposing evidence. This evidence may be presented in any of the following forms [*Code Civ. Proc. § 437c(b)(2)*]:

- Affidavits or declarations.
- Admissions.
- Answers to interrogatories and deposition testimony.
- Matters of which the trial court must or may take judicial notice.

It is impossible to raise a triable issue of material fact in opposing a motion for summary judgment unless evidentiary items are filed as part of the opposition [*Arciniega v. Bank of San Bernardino (1997) 52 Cal. App. 4th 213, 224, 60 Cal. Rptr. 2d 495* (criticized on another point in *Rice v. Crow (2000) 81 Cal. App. 4th 725, 726, 737-741, 97 Cal. Rptr. 2d 110*); *see also* *Tibor v. Superior Court (1997) 52 Cal. App. 4th 1359, 1364 n.1, 61 Cal. Rptr. 2d 326* (policy reasons requiring opposing expert declarations in medical malpractice cases appear equally applicable in cases involving alleged malpractice of criminal defense attorney)].

If no affidavits or declarations are filed in opposition to a motion for summaryjudgment, the court is entitled to accept as true the facts alleged in the movant's affidavits and declarations, provided they are within the personal knowledge of the affiant or declarant and are facts to which he or she could competently testify [*Lyons v. Security Pacific Nat. Bank (1995) 40 Cal. App. 4th 1001, 1014, 48 Cal. Rptr. 2d 174* ; *see Code Civ. Proc. § 2015.5* (use of declarations)].

[b] Sufficiency

Counter affidavits and declarations need not prove the opposition's case. They suffice if they disclose the existence of a triable issue [*McManis v. San Diego Postal Credit Union (1998) 61 Cal. App. 4th 547, 555, 71 Cal. Rptr. 2d 617*].

The sole declaration of a party opposing a summary judgment motion which raises a triable issue of fact is sufficient to deny the motion [*Estate of Housley (1997) 56 Cal. App. 4th 342, 359, 65 Cal. Rptr. 2d 628*]. *Code Civ. Proc. § 437c(e)* does not allow a trial court to weigh the credibility of a declaration submitted by the party opposing a summary judgment motion and then grant the motion, except where the declaration is facially so incredible as a matter of law that the moving party otherwise would be entitled to summary judgment [*Estate of Housley (1997) 56 Cal. App. 4th 342, 359-360, 65 Cal. Rptr. 2d 628*].

An opposing party may not avoid summary judgment based on mere speculation or conjecture [*Frank and Freedus v. Allstate Ins. Co. (1996) 45 Cal. App. 4th 461, 468-469, 52 Cal. Rptr. 2d 678* ; *see* *Padgett v. Phariss (1997) 54 Cal. App. 4th 1270, 1284, 63 Cal. Rptr. 2d 373* ; *see also* *Sangster v. Paetkau (1998) 68 Cal. App. 4th 151, 163, 80 Cal. Rptr. 2d 66* (responsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial and is insufficient to establish triable issue of material fact); *Andrews v. Foster Wheeler, LLC (2006) 138 Cal. App. 4th 96, 113, 41 Cal. Rptr. 3d 229* (speculative expert declarations lacking factual basis and consisting of merely general statements were not sufficient to create a triable issue of material fact)]. An issue of fact cannot be created by speculation, conjecture, imagination or guess-work nor can it be raised by cryptic, broadly phrased, and conclusory assertions, or by mere possibilities. Only a conflict of evidence can create an issue of fact [*accord* *Myricks v. Lynwood Unified School Dist. (1999) 74 Cal. App. 4th 231, 237, 87 Cal. Rptr. 2d 734* ; *Lyons v. Security Pacific Nat. Bank (1995) 40 Cal. App. 4th 1001, 1014, 48 Cal. Rptr. 2d 174* ; *see also* *American Golf Corp. v. Superior Court (2000) 79*

Cal. App. 4th 30, 39, 93 Cal. Rptr. 2d 683 (expert testimony that sports injury would not have occurred if recreation provider had done something differently is not sufficient to establish that provider increased inherent risks of sport, and does not create triable issue of fact on motion for summary judgment based on primary assumption of risk defense); *Benavidez v. San Jose Police Dept. (1999) 71 Cal. App. 4th 853, 865, 84 Cal. Rptr. 2d 157* (expert's declaration rejected to extent it drew legal conclusions); *Travelers Casualty & Surety Co. v. Superior Court (1998) 63 Cal. App. 4th 1440, 1462, 75 Cal. Rptr. 2d 54* (expert declarations cannot createtriable question of fact if expert's opinion is based on factors that are remote, speculative, or conjectural); *Garibay v. Hemmatt (2008) 161 Cal. App. 4th 735, 743* (expert's opinion inadmissible to establish material fact if opinion based on hearsay with no foundation made to establish an exception to the hearsay rule)]. Thus, the opposing party must produce admissible evidence that raises a triable issue of fact [*Frank and Freedus v. Allstate Ins. Co. (1996) 45 Cal. App. 4th 461, 468-469, 52 Cal. Rptr. 2d 678*]. For example, a mere assertion in the complaint of the party that opposes the motion that such evidence exists is not sufficient to raise a triable issue of material fact that merits a trial [*Frank and Freedus v. Allstate Ins. Co. (1996) 45 Cal. App. 4th 461, 475-476, 52 Cal. Rptr. 2d 678* ; *see Lyons v. Security Pacific Nat. Bank (1995) 40 Cal. App. 4th 1001, 1014, 48 Cal. Rptr. 2d 174*] (issue of fact notraised by allegations in complaint); *see also § 537.33[2][c]*, although the party opposing the motion may rely on allegations pleaded by the moving party to establish facts that are not contained in his or her declarations or affidavits [*Parker v. Twentieth Century-Fox Film Corp. (1970) 3 Cal. 3d 176, 181, 89 Cal. Rptr. 737, 474 P.2d 689* ; *24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal. App. 4th 1199, 1211, 78 Cal. Rptr. 2d 533*); *Troche v. Daley (1990) 266 Cal. Rptr. 34* (in summary judgment motions, law allows reliance on adversary's pleadings; judicial admission in pleading conclusively establishes truth of matter); *see also Uram v. Abex Corp. (1990) 217 Cal. App. 3d 1425, 1433, 266 Cal. Rptr. 695* (defendant moving for summary judgment may rely on allegations contained in plaintiff's complaint which constitutes judicial admission)].

When the plaintiff carries a clear and convincing burden of proof, the evidence and all inferences that can reasonably be drawn from it must meet that standard [*Rowe v. Superior Court (1993) 15 Cal. App. 4th 1711, 1724, 19 Cal. Rptr. 2d 625* ; *see also Reader's Digest Assn. v. Superior Court (1984) 37 Cal. 3d 244, 252, 690 P.2d 610*]

[c] Preparation

The requirements governing the preparation of supporting evidence also apply to the preparation of opposing evidence. For further discussion, see *§ 537.21[2]* and *§ 537.24[1][a]* et seq. For a form of a declaration in opposition to a motion for summary judgment, see *§ 537.76*. For discussion of when deposition of an opposing party's expert may be permitted, *see § 537.30, below*.

[d] Defamation and Invasion of Privacy Actions

Summary judgment is a favored remedy in defamation and invasion of privacy cases due to the chilling effect of protracted litigation on *First Amendment* rights. The courts impose more stringent burdens on one who opposes the motion and require a showing of high probability that the plaintiff will ultimately prevail in the case. Absent such a showing, the courts are inclined to grant the motion and do not permit the case to proceed beyond the summary judgment stage [*Alszeh v. Home Box Office (1998) 67 Cal. App. 4th 1456, 1460, 80 Cal. Rptr. 2d 16*].

[4] Procedural and Evidentiary Objections

[a] Nature and Purpose of Objections

When evidentiary objections are in a proper form, a trial court must rule on the objections; it is imperative that a trial court rule on evidentiary objections regardless of whether the motion is denied or granted, and failure to rule on the objections is reversible error [*Vineyard Springs Estates, LLC v. Superior Court (2004) 120 Cal. App. 4th 633, 642, 15 Cal. Rptr. 3d 587*].

Objections to defects in the moving papers are generally waived if the opposing party fails to make a proper objection in

the opposing papers or at the hearing. Specifically, the following rules regarding waiver of objections apply:

- Any objections to a moving party's failure to give proper notice of a motion for summary judgment as required by *Code Civ. Proc. § 437c(a)* (for discussion of service requirements, *see § 537.22*) are waived if the responding party appears at the hearing and argues the motion on the merits with no reference to the failure to provide adequate notice or with reference to the failure, but without requesting a continuance or contending that he or she was prejudiced by the inadequate notice or service [*Carlton v. Quint (2000) 77 Cal. App. 4th 690, 696-698, 91 Cal. Rptr. 2d 844* (failure to request continuance or claim prejudice); *Pichon v. Pacific Gas & Electric Co. (1989) 212 Cal. App. 3d 488, 499, 260 Cal. Rptr. 677* (failure to mention)].

- Any objection based on the failure to comply with the requirements of *Code Civ. Proc. § 437c(d)* regarding the forms and content of a supporting declaration (discussed in *§ 537.24*) must be made at the hearing or will be deemed waived [*Code Civ. Proc. § 437c(d)*].

- Evidentiary objections not made at the hearing will be deemed waived [*Code Civ. Proc. § 437c(b)(5)*]. This provision abrogates a former rule that there could be no waiver of the right to object to inadmissible evidence in summary judgment proceedings [*see, e.g.,* *Dugar v. Happy Tiger Records, Inc. (1974) 41 Cal. App. 3d 811, 817, 116 Cal. Rptr. 412*].

- A party opposing a summary judgment motion has the right to waive evidentiary objections. It is therefore error for a trial court to interpose and sustain its own hearsay objection [*Andrews v. Mobile Aire Estates (2005) 125 Cal. App. 4th 578, 587 n.6, 22 Cal. Rptr. 3d 832*].

Any party who desires to make an evidentiary objection must either submit written objections or arrange for a court reporter to be present at the hearing [*Cal. Rules of Ct., Rule 3.1352*; *see* *Mediterranean Construction Co. v. State Farm Fire & Casualty Co. (1998) 66 Cal. App. 4th 257, 263-264, 265, 77 Cal. Rptr. 2d 781*]. Whenever possible, it is preferable to provide written objections. This assists the court's review of the objections and preserves a clear record for appeal.

[b] Time for Filing Objections

Unless otherwise excused by the court on a showing of good cause, all written objections to evidence in support of a motion for summary judgment or summary adjudication must be served and filed at the same time as the objecting party's opposition papers [*Cal. Rules of Ct., Rule 3.1354(a)*].

[c] Required Format for Written Objections

Effective January 1, 2007, the California Rules of Court contain specific format requirements for written objections to evidence in support of or in opposition to summary judgment and summary adjudication motions. All written objections to evidence must be served and filed separately from the other papers in support of or in opposition to the motion. Each written objection must be numbered consecutively and must [*Cal. Rules of Ct., Rule 3.1354(b)*]:

- Identify the name of the document in which the specific material objected to is located;

- State the exhibit, title, page, and line number of the material objected to;

- Quote or set forth the objectionable statement or material; and

- State the grounds for each objection to that statement or material.

Additionally, written objections must follow one of two formats provided in Rule 3.1354(b). For a form of written objections to evidence in support of or in opposition to a motion for summary judgment or summary adjudication, see *§ 537.86*.

[d] Proposed Order and Court's Ruling on Objections

Effective January 1, 2007, a party submitting written objections to evidence must submit with the objections a proposed order. The order must include places for the court to indicate whether it has sustained or overruled each objection and must include a place for the judge's signature. Additionally, the order must follow one of two formats provided [*Cal. Rules of Ct., Rule 3.1354(c)*]. For a form of proposed order on evidentiary objections, see *§ 537.87*.

The court cannot consider evidence to which objections have been made and sustained [*Code Civ. Proc. § 437c(c)*]. Thus, the trial court is required to rule on objections made orally or in writing. If, however, the trial judge does not rule specifically on the objections, but nevertheless considers only legally admissible evidence in making his or her ruling on the summary judgment motion, an appellant has the burden of pointing out any evidentiary errors that prejudiced hisor her position. Failure to do so constitutes a waiver on appeal of any possible error in this respect [*Hayman v. Block (1986) 176 Cal. App. 3d 629, 640, 222 Cal. Rptr. 293* ; *cf. Knight v. City of Capitola (1992) 4 Cal. App. 4th 918, 924 n.2, 6 Cal. Rptr. 2d 874* (record reflected no rulings in trial court on any objections; because neither party appeared to have insisted on ruling, objections were waived and appellate court will consider all evidence set forth in papers); *see also Demps v. San Francisco Housing Authority (2007) 149 Cal. App. 4th 564, 578-579, 57 Cal. Rptr. 3d 204* (trial court presented with timely evidentiary objections in proper form must rule on the objections or they are deemed waived and the objected-to evidence will be included in the record; where counsel expressly requests ruling on objections and court fails to do so, objections may not be waived); *City of Long Beach v. Farmers & Merchants Bank (2000) 81 Cal. App. 4th 780, 783-785, 97 Cal. Rptr. 2d 140* (evidentiary objections deemed waived on appeal if trial judge failed to rule on them; however, issues preserved for review if it would be fruitless or idle act for attorney to object; to have made third oral request for ruling after filing written objections and having requested judge to rule on them on two separate hearing dates would have been fruitless or idle act); *PMC, Inc. v. Kadisha (2000) 78 Cal. App. 4th 1368, 1378, 93 Cal. Rptr. 2d 663* (parties waived objections by not securing rulings on them and appellate court treats all evidence as having been properly admitted); *Benavidez v. San Jose Police Dept. (1999) 71 Cal. App. 4th 853, 865, 84 Cal. Rptr. 2d 157* (record did not show trial court ever formally ruled on defendants' evidentiary objections to declaration; thus, all evidence submitted was available for trial court's consideration; nevertheless, presumed on appeal that judge did not rely on irrelevant or incompetent evidence)].

A party's mere reference to evidence in a statement of undisputed facts does not waive an objection, contemporaneously raised in the accompanying points and authorities, that the evidence is inadmissible [*Rio Linda Unified School Dist. v. Superior Court (1997) 52 Cal. App. 4th 732, 734, 740, 60 Cal. Rptr. 2d 710* (distinguishing *Hurley Construction Co. v. State Farm Fire & Casualty Co. (1992) 10 Cal. App. 4th 533, 12 Cal. Rptr. 2d 629* , in which one party had admitted all the facts in the other party's separate statement of undisputed facts)].

[5] Proposed Order

While local court rules often require a proposed order to be submitted by the moving party, there is no similar requirement of the nonmoving party. Counsel for the opposing party may, however, wish to prepare a proposed order to submit at the hearing on the motion, especially if the tentative ruling is in the opposing party's favor. Opposing counsel must prepare and submit a proposed order in any case if the opposing party ultimately prevails on the motion [*see Cal. Rules of Ct., Rule 3.1312*]. Preparation of a proposed order ahead of time may facilitate timely compliance with this requirement.

[6] Motion for Sanctions for Bad-Faith Affidavits

If counsel determines that any of the affidavits or declarations submitted in support of the motion were presented in bad faith or solely for the purpose of delay, he or she may wish to include with the opposition a motion to recover reasonable expenses incurred as a result [*see Code Civ. Proc. § 437c(j)*; *see also § 537.38*].

[7] Motion to Continue

Opposing counsel may wish to seek an order denying or continuing the motion on the basis of a declaration or affidavit that shows that facts essential to justify opposition may exist, but cannot be then presented for reasons stated [*Code Civ. Proc. § 437c(h)*]. For further discussion, see *§ 537.36*.

[8] Cross Motion for Affirmative Relief

A cross motion for summary judgment or summary adjudication of issues is necessary before the court may grant such affirmative relief in favor of the opposing party [*see Code Civ. Proc. § 437c(a), (f)*; *Dvorin v. Appellate Dep't of Superior Court (1975) 15 Cal. 3d 648, 650-651, 125 Cal. Rptr. 771, 542 P.2d 1363*]. If the moving party has filed its motion on the last day possible before the cutoff, it may be too late for the opposing party to move for affirmative relief.

PRACTICE TIP:

Hearing Cross Motions Simultaneously. In a case involving cross motions for summary judgment, counsel should seek to have the motions heard simultaneously on a mutually convenient date. If such motions are set for different dates, a court will likely order on its own that they be moved to the same date.

PRACTICE TIP: Opposing Papers as Cross Motion. If only one party, defendant, for example, has moved for summary judgment, and if desirable to expedite presenting issues for appellate review, the parties may elect to stipulate that the papers opposing defendant's motion be deemed plaintiff's cross motion for summary judgment, and that defendant's moving papers be deemed opposition to plaintiff's cross motion. If the court accepts this characterization, then a ruling in favor of either party would permit the other to file an appeal [*see, e.g., Jimenez v. Protective Life Ins. Co. (1992) 8 Cal. App. 4th 528, 534-535, 10 Cal. Rptr. 2d 326*].

[9] Limitation Concerning Voluntary Dismissal

A plaintiff who waits until a motion for summary judgment has been filed, and the time for opposition has passed, to attempt to dismiss his or her complaint, is subject to the trial court's continuing jurisdiction to hear and rule on the pendingmotion. A plaintiff may not frustrate the summary judgment statute by interposing a voluntary dismissal without prejudice in lieu of opposition to a defendant's motion [*Cravens v. State Bd. of Equalization (1997) 52 Cal. App. 4th 253, 255, 60 Cal. Rptr. 2d 436*]. Thus, a trial court has been held to have the power to grant an unopposed defense motion for summary judgment when the defendants'moving papers met their burden of negating the plaintiff's claims, entitling them to judgment as a matter of law if no issues of disputed fact were raised, and plaintiff, rather than filing opposition papers within the requisite time, filed a request for dismissal without prejudice one day before the scheduled hearing date. At the point that the plaintiff failed to file opposition papers within the requisite time, entry of summary judgment in favor of defendants' became a formality which plaintiff could not avoid by the stratagem of filing a last minute request for dismissal without prejudice [*Cravens v. State Bd. of Equalization (1997) 52 Cal. App. 4th 253, 255, 257, 60 Cal. Rptr. 2d 436* ; *see also Code Civ. Proc. § 437c(b)* (discretion of court to grant motion if opposition papers including separate statement of disputed fact is not filed)].

Legal Topics:

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

Civil ProcedureSummary JudgmentBurdens of Production & ProofNonmovantsCivil ProcedureSummary JudgmentEvidenceCivil ProcedureSummary JudgmentMotions for Summary JudgmentCross-MotionsCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentOppositionSupporting MaterialsEvidenceProcedural ConsiderationsObjections & Offers of ProofObjections

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47-537 California Forms of Pleading and Practice--Annotated § 537.26

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§ 537.26 Serving and Filing the Opposing Papers

Any opposition to the motion must be served and filed no less than 14 days before the noticed or continued hearing date, unless the court for good cause orders otherwise [*Code Civ. Proc. § 437c(b)(1)*]. Case law has been strict requiring good cause to be shown before late filed papers will be accepted [*Hobson v. Raychem Corp. (1999) 73 Cal. App. 4th 614, 625, 86 Cal. Rptr. 2d 497* (trial court has broad discretion to regulate submission of materials in connection with pending motions)]. As distinguished from the service of a notice of motion under *Code Civ. Proc. § 437c(a)* (*see § 537.22*), there is no provision extending the time period for service by mail [*see Code Civ. Proc. § 437c(b)*].

PRACTICE TIP:

Expedient Service. Effective January 1, 2003, *Code Civ. Proc. § 1005(c)* expressly applies to method of service for opposition and reply papers under the amended *Code Civ. Proc. § 437c(b)(6)*. *Code Civ. Proc. § 1005(c)* provides that all papers opposing a motion and all reply papers shall be served by personal delivery, facsimile transmission, express mail or other means reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers are filed.

Legal Topics:

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

Civil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentOppositionSupporting MaterialsCivil ProcedureSummary JudgmentTime Limitations

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47-537 California Forms of Pleading and Practice--Annotated § 537.27

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§ 537.27 Reply to Opposition to Motion for Summary Judgment

[1] Reply Memorandum of Points and Authorities

A reply or closing memorandum may not exceed 10 pages in length, excluding exhibits, declarations, attachments, and a table of contents when required [*Cal. Rules of Ct., Rule 3.1113(d)* (also providing procedure for obtaining permission to file longer memorandum)]. For discussion of the format and content requirements for memoranda, see Ch. 417, *Points and Authorities* .

In addition to any rebuttal argument, e.g., pointing out any inaccurate points or authorities raised in the opposing memorandum, the reply memorandum should also include any objections to the following:

- The timeliness of filing or service of the opposing papers.
- The form and content of the opposing papers, including objections based on the following defects:
  - A failure to file a responsive statement of facts, or any insufficiency in this responsive statement [for discussion of the requirements for the responsive statement and the effect of failure to file, *see § 537.25[2]*].

- Any insufficiency in the opposing declarations or other opposing evidentiary papers, including objections to the evidence produced by the opposing party based on the rules of evidence [for discussion of the requirements regarding evidentiary papers, *see § 537.24[1][a]* et seq.]. Effective January 1, 2007, a moving party's objections to the opposing party's evidence in opposition to the motion must follow the new format for objections provided in the Rules of Court and must be filed and served at the same time as the reply papers [*Cal. Rules of Ct., Rule 3.1354(a), (b)*]. The objections must also include a proposed order [*Cal. Rules of Ct., Rule 3.1354(c)*]. For further discussion regarding format requirements for objections and objections in general, see *§ 537.25[4]*. For forms of written objections to evidence and proposed order on objections, see *§§ 537.86* and *537.87*.

PRACTICE TIP:

Substantive vs. Procedural Objections. Because of the drastic nature of a summary judgment or summary adjudication, trial courts are generally reluctant to grant a motion simply because of a technical defect in the opposing party's papers, e.g., a deficiency in the opposing party's separate statement of facts. This is particularly true if there appear to be triable issues of fact. Counsel for the moving party should therefore avoid placing too much reliance on such objections, and focus instead on substantive objections, e.g., the inadmissibility of evidence produced in opposition to the motion.

If the party opposing summary judgment includes facts in its papers that the moving party had failed to address in its moving papers, the moving party may address the point in its reply papers and if appropriate, may adopt the opposing party's own evidence to demonstrate that no triable issue of material fact exists [*see 216 Sutter Bay Associates v. County of Sutter (1997) 58 Cal. App. 4th 860, 879-881, 68 Cal. Rptr. 2d 492*].

[2] Supplementary Evidence

The court has inherent power to request or consider supplemental or additional declarations submitted by the moving party in reply to the opposing declarations [*Weiss v. Chevron, U.S.A., Inc. (1988) 204 Cal. App. 3d 1094, 1098-1099, 251 Cal. Rptr. 727*]. Any supplemental evidentiary papers should include facts that establish the reasons that such papers are necessary, in view of the fact that supplementary evidentiary papers may be filed only in the discretion of the court [*see Johnson v. Banducci (1963) 212 Cal. App. 2d 254, 259-260, 27 Cal. Rptr. 764*].

PRACTICE TIP:

Supplementary Statement of Material Facts. When submitting supplemental evidentiary papers, it would also be advisable to prepare a supplementary statement of undisputed facts to accompany such evidence, in the same manner as the statement of material facts in support of the motion [*see § 537.21[3]*].

[3] Motion for Sanctions for Bad-Faith Affidavits

If counsel determines that any of the affidavits or declarations submitted in support of the opposition were presented in bad faith or solely for the purpose of delay, he or she may wish to include with the reply a motion to recover reasonable expenses incurred as a result [*see Code Civ. Proc. § 437c(j)*; *see also § 537.38[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentOppositionSupporting MaterialsCivil ProcedureSummary JudgmentSupporting MaterialsGeneral

OverviewCivil ProcedureSummary JudgmentSupporting MaterialsMemoranda of Law

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47-537 California Forms of Pleading and Practice--Annotated § 537.28

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§ 537.28 Serving and Filing the Reply Papers

Any reply to the opposition must be served and filed by the moving party no less than five days before the noticed or continued hearing date, unless the court for good cause orders otherwise [*Code Civ. Proc. § 437c(b)(4)*]. As distinguished from the service of a notice of motion under *Code Civ. Proc. § 437c(a)* [*see § 537.22*], there is no provision extending the time period for service by mail.

PRACTICE TIP:

Expedient Service. *Code Civ. Proc. § 1005(c)* expressly applies to method of service for opposition and reply papers under *Code Civ. Proc. § 437c(b)(6). Code Civ. Proc. § 1005(c)* provides that all papers opposing a motion and all reply papers shall be served by personal delivery, facsimile transmission, express mail or other means reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers are filed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentSupporting MaterialsGeneral OverviewCivil ProcedureSummary JudgmentTime Limitations

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§ 537.29 Procedure on Motion for Summary Adjudication

A motion for summary adjudication must proceed in all procedural respects as a motion for summary judgment [*Code Civ. Proc. § 437c(f)(2)*; *see Maria D.v. Westec Residential Security, Inc. (2000) 85 Cal. App. 4th 125, 133, 102 Cal. Rptr. 2d 326* ; *Toigo v. Town of Ross (1998) 70 Cal. App. 4th 309, 324, 82 Cal. Rptr. 2d 649*]. In other words, the procedural requirements governing summary judgment motions discussed above in this chapter apply equally to motions for summary adjudication [*see, e.g., Haskell v. Carli (1987) 195 Cal. App. 3d 124, 130, 240 Cal. Rptr. 439* (applying *Code Civ. Proc. § 437c(b)* and *(c)* in motion for summary adjudication)].

For a form of notice of motion for summary adjudication, see *§ 537.71*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentPartial Summary Judgments

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§ 537.30 Obtaining Deposition of Expert Witness

While it is true that motions for summary judgment are heard on affidavits or declarations, contradictions raised by discovery may require the trial court to disregard the declarations or affidavits. This applies equally to party and nonparty deponents. For that reason, even though there has been no exchange of experts pursuant to *Code Civ. Proc. § 2034* [*Code Civ. Proc. § 2034.010-2034.730* operative July 1, 2005] under the proper circumstances the parties should be allowed to depose an expert who supplies a declaration or affidavit in support of or in opposition to summary judgment or summary adjudication when there is a legitimate question regarding the foundation of the expert's opinion. Whether to grant discovery falls within the sound discretion of the trial court based on all the facts presented. There must be objective facts presented that create a significant question regarding the validity of the affidavit or declaration which, if successfully pursued, will impeach the foundational basis of the affidavit or declaration in question [*St. Mary Medical Center v. Superior Court (1997) 50 Cal. App. 4th 1531, 1540-1541* (cautioning that this process should not be used to turn summary proceedings into mini-trials)]. For discussion of continuances, *see § 537.36*.

An expert's opinion must be based on admissible evidence [*Garibay v. Hemmatt (2008) 161 Cal. App. 4th 735, 743* (expert's opinion inadmissible to establish material fact if opinion based on hearsay with no foundation made to establish an exception to the hearsay rule)]. For additional discussion of the requirements for an expert opinion as evidence in a summary judgment motion, see *§§ 537.24[1][b], 537.24[1][c], 537.25[3][b],*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryMethodsExpert Witness DiscoveryCivil ProcedureSummary JudgmentEvidenceCivil ProcedureSummary JudgmentOppositionMotions for Additional DiscoveryCivil ProcedureSummary JudgmentSupporting MaterialsDiscovery Materials

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47-537 California Forms of Pleading and Practice--Annotated § 537.31

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§ 537.31 Hearing Requirement

Code Civ. Proc. § 437c has been interpreted to require an oral hearing at which time counsel has the opportunity to persuade the court and respond to inquires. This means more than posting a ruling on a locked courtroom door or telephoning litigants with a decision. A "hearing" on summary judgment involves the contemporaneous presence (whether in person or electronically) of the parties and the judge. While judges retain considerable discretion regarding how the hearing is to be conducted, including imposing time limits and adopting tentative ruling procedures [*see Cal. Rules of Ct., Rule 3.1308*], they cannot do away with oral argument altogether [*Brannon v. Superior Court (2004) 114 Cal. App. 4th 1203,1208-1212, 8 Cal Rptr. 3d 491* ; *Mediterranean Construction Co. v. State Farm Fire & Casualty Co. (1998) 66 Cal. App. 4th 257, 259-260, 265, 77 Cal. Rptr. 2d 781* . Various court rules regarding hearings, such as *Cal Rules of Ct., Rules 3.1304, 3.1310*, also show an intent to allow for oral hearings. While litigants are not given the right to present testimony at such hearings, there are no restrictions against oral argument [*see Cal. Rules of Ct., Rule 3.1306*; *Mediterranean Construction Co. v. State Farm Fire & Casualty Co. (1998) 66 Cal. App. 4th 257, 263, 265, 77 Cal. Rptr. 2d 781*].

Despite the appearance of a fairness issue when the trial court fails to allow oral argument, the court of appeal may decline to reverse on that ground when it decides on the merits of the parties arguments that the trial court correctly entered judgment, as the reversal would serve no useful purpose [*Victor v. Hedges (1999) 77 Cal. App. 4th 229, 244-245, 245 n.18, 91 Cal. Rptr. 2d 466*]. It is questionable whether *Victor* is still good law on this point after

Brannon v. Superior Court (2004) 114 Cal. App. 4th 1203, 1208-1212, 8 Cal Rptr. 3d 491 . *Brannon* did not specifically address whether a court of appeal may decline to reverse based on the failure to allow oral argument, but the *Brannon* court did appear to hold that there is an absolute right to oral argument in summary judgment motions. Until the California Supreme Court rules on this issue, it can still be considered an open question.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentAppellate ReviewStandards of ReviewCivil ProcedureSummary JudgmentHearingsGeneral OverviewCivil ProcedureSummary JudgmentHearingsOral Arguments

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§ 537.32 Trial Court Cannot Delegate Responsibility to Rule on Motion Absent Consent

Parties on each side of a dispositive motion are entitled to have the issues fully considered and resolved by the trial court and, in the absence of a proper stipulation, the responsibility to decide cannot be delegated irrespective of the burdens imposed by the court's pending caseload [*Jovine v. FHP, Inc. (1998) 64 Cal. App. 4th 1506, 1509, 76 Cal. Rptr. 2d 322*]. The court does not have authority to order a nonconsensual reference under *Code Civ. Proc. § 639* for the purpose of hearing and determining summary judgment motions [*Jovine v. FHP, Inc. (1998) 64 Cal. App. 4th 1506, 1522-1525, 76 Cal. Rptr. 2d 322*]. For discussion of references, see Ch. 38, *Reference* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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PART II. LEGAL BACKGROUND

47-537 California Forms of Pleading and Practice--Annotated § 537.33

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§ 537.33 Standard for Granting Summary Judgment

[1] No Triable Issue and Moving Party Entitled to Judgment

A plaintiff may move for summary judgment if he or she contends that there is no defense to the action; a defendant may move for summary judgment if he or she contends that the plaintiff's action has no merit [*Code Civ. Proc. § 437c(a)*]. A cause of action has no merit if either of the following exists [*Code Civ. Proc. § 437c(o)*]:

- One or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded.
- A defendant establishes an affirmative defense to that cause of action.

A court shall grant a motion for summary judgment if all the papers submitted show both of the following [*Code Civ. Proc. § 437c(c)*]:

- There is no triable issue as to any material fact.
- The moving party is entitled to judgment as a matter of law.

Whether there is a triable issue of material fact does not turn on the trial court's discretion [*Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1490, 82 Cal. Rptr. 2d 359*]. Under *Code Civ. Proc. § 437c(c)*, a trial court is required to grant summary judgment if all the papers and affidavits submitted, together with all inferences reasonably deducible from the evidence and uncontradicted by other inferences or evidence, show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law [*Sangster v. Paetkau (1998) 68 Cal. App. 4th 151, 161, 80 Cal. Rptr. 2d 66* ; *see Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1490, 82 Cal. Rptr. 2d 359*]. There is a triable issue of material fact only if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion [*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 850, 107 Cal. Rptr. 2d 841, 24 P.3d 493*].

The trial court's function in ruling on the motion is merely to determine whether such issues of fact exist, not to decide the merits of the issues themselves [*Furla v. Jon Douglas Co. (1998) 65 Cal. App. 4th 1069, 1076-1077, 76 Cal. Rptr. 2d 911* ; *see City of Santa Cruz v. Pacific Gas & Electric Co. (2000) 82 Cal. App. 4th 1167, 1188, 99 Cal. Rptr. 2d 198* ; *see also Binder v. Aetna Life Ins. Co. (1999) 75 Cal. App. 4th 832, 839, 89 Cal. Rptr. 2d 540* (only when inferences are indisputable may court decide issues as matter of law)]. The court must consider the bare evidence and reasonable inferences deducible from the evidence and determine whether the evidence is sufficient to support a potential judgment in favor of the opposing party [*Binder v. Aetna Life Ins. Co. (1999) 75 Cal. App. 4th 832, 840*]. The court seeks to find contradictions in the evidence, or in inferences reasonably deducible from the evidence, that raise a triable issue of material fact [*Oliver v. County of Los Angeles (1998) 66 Cal. App. 4th 1397, 1403, 78 Cal. Rptr. 2d 641*].

Whether or not a disputed fact is "material" is determined by the law applicable to the legal theories put in issue by the complaint [*see Anderson v. Heart Federal Sav. & Loan Assn. (1989) 208 Cal. App. 3d 202, 210, 256 Cal. Rptr. 180* ; *see also Kelly v. First Astri Corp. (1999) 72 Cal. App. 4th 462, 470, 84 Cal. Rptr. 2d 810* (fact to be material must relate to a claim or defense that is in issue and must alsobe somehow necessary to judgment)]. For further discussion of what constitutes a material fact, *see §§ 537.21[3]* and *537.25[2]*.

If the trial court determines that no triable issue of fact exists but only one of law, it is the trial court's duty to determine the issue of law [*Monteleone v. Allstate Ins. Co. (1996) 51 Cal. App. 4th 509, 514* ; *accord Aloha Pacific, Inc. v. California Ins. Guarantee Assn. (2000) 79 Cal. App. 4th 297, 307, 93 Cal. Rptr. 2d 148* ; *Armato v. Baden (1999) 71 Cal. App. 4th 885, 893, 84 Cal. Rptr 2d 294*].

If a defendant's declarations in support of a motion for summary judgment demonstrate the absence of an essential element of plaintiff's case, and plaintiff's declarations submitted in reply do not show that a triable issue of fact exists with respect to that essential element, no amount of factual conflicts on other aspects of the case will affect the result, and the motion for summary judgment should be granted [*see Armato v. Baden (1999) 71 Cal. App. 4th 885, 893, 84 Cal. Rptr 2d 294*].

The trial courts and appellate courts use the same three-step analysis to determine if summary judgment is warranted [*see, e.g., Padgett v. Phariss (1997) 54 Cal. App. 4th 1270, 1278-1279, 63 Cal. Rptr. 2d 373* ; *Ojavan Investors, Inc. v. California Coastal Com. (1997) 54 Cal. App. 4th 373, 385, 62 Cal. Rptr. 2d 803* ; *Allyson v. Department of Transportation (1997) 53 Cal. App. 4th 1304, 1317, 62 Cal. Rptr. 2d 490* ; for a statement of this three-step analysis, see *§ 537.43[2][b]*].

For forms of order granting summary judgment, see *§§ 537.81 -537.83*.

[2] Evaluation of Evidence to Determine if Triable Issues Exist

[a] All Evidence in Papers Generally Considered

In determining whether a triable issue of material fact exists, the court is required to consider all the evidence set forth in the papers, except that to which objections have been made and sustained by the court [*Code Civ. Proc. § 437c(c)*; *Tchorbadjian v. Western Home Ins. Co. (1995) 39 Cal. App. 4th 1211, 1217, 46 Cal. Rptr. 2d 370* ; *see also § 537.25[4]*]. The court is also required to consider all inferences reasonably deducible from that evidence [*Code Civ. Proc. § 437c(c)*; *Assad v. Southern Pacific Transportation Co. (1996) 42 Cal. App. 4th 1609, 1612, 50 Cal. Rptr. 2d 443* ; *Tchorbadjian v. Western Home Ins. Co. (1995) 39 Cal. App. 4th 1211, 1217, 46 Cal. Rptr. 2d 370* ; *Sanchez v. Swinerton & Walberg (1996) 47 Cal. App. 4th 1461, 1465, 55 Cal. Rptr. 2d 415* (court must consider presumptions and draw inferences from facts adduced when an inference is the only reasonable one that may be drawn); *accord Murillo v. Rite Stuff Foods, Inc. (1998) 65 Cal. App. 4th 833, 841, 77 Cal. Rptr. 2d 12 but see § 537.34[4][a], below*]. The court must therefore consider what inferences favoring the opposing party a factfinder could reasonably draw from the evidence [*Binder v. Aetna Life Ins. Co. (1999) 75 Cal. App. 4th 832, 839, 89 Cal. Rptr. 2d 540*]. However, in the antitrust context an inference that implies conduct equally favoring either party's contentions, without more, is not enough to amount to a triable issue of fact [*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 852, 107 Cal. Rptr. 2d 841, 24 P.3d 493*].

On the other hand, the trial court may not weigh the evidence in the manner of a factfinder to determine whose version is more likely true. Nor may the trial court grant summary judgment based on the court's evaluation of credibility. Moreover, a trial court may not grant summary judgment for a defendant simply on its opinion that plaintiff's claims are "implausible," if a reasonable factfinder could find for plaintiff on the evidence presented [*Binder v. Aetna Life Ins. Co. (1999) 75 Cal. App. 4th 832, 840, 89 Cal. Rptr. 2d 540*]. The court has no power in a summary proceeding to weigh one inference against another or against other evidence [*Murillo v. Rite Stuff Foods, Inc. (1998) 65 Cal. App. 4th 833, 841, 77 Cal. Rptr. 2d 12* ; *Sanchez v. Swinerton & Walberg Co. (1996) 47 Cal. App. 4th 1461, 1465-1466, 55 Cal. Rptr. 2d 415*]. Moreover, an assertion based solely on conjecture or speculation is insufficient to avoid summary judgment [*Sanchez v. Swinerton & Walberg Co. (1996) 47 Cal. App. 4th 1461, 1466, 55 Cal. Rptr. 2d 415*].

The court strictly construes the moving party's evidence and liberally construes the opposing party's evidence [*Swat-Fame, Inc. v. Goldstein (2002) 101 Cal. App. 4th 613, 622, 124 Cal. Rptr. 2d 556* ; *City of Vista v. Robert Thomas Securities, Inc. (2000) 84 Cal. App. 4th 882, 886, 101 Cal. Rptr. 2d 237* ; *accord Binder v. Aetna Life Ins. Co. (1999) 75 Cal. App. 4th 832, 838, 89 Cal. Rptr. 2d 540* ; *see also* discussion in *§ 537.33[2][f]*].

The court accepts as undisputed facts only those portions of the moving party's evidence that are not contradicted by the opposing party's evidence, that is, the facts alleged in the opposing party's evidence and the reasonable inferences therefrom must be accepted as true [*Kelsey v. Waste Management of Alameda County (1999) 76 Cal. App. 4th 590, 594, 90 Cal. Rptr. 2d 510* ; *accord Depew v. Crocodile Enterprises, Inc. (1998) 63 Cal. App. 4th 480, 485, 73 Cal. Rptr. 2d 673* ; *see City of Santa Cruz v. Pacific Gas & Electric Co. (2000) 82 Cal. App. 4th 1167, 1176, 99 Cal. Rptr. 2d 198*]. Any doubts concerning the propriety of granting the motion must be resolved in favor of the party opposing the motion [*PMC, Inc. v. Saban Entertainment, Inc. (1996) 45 Cal. App. 4th 579, 590, 52 Cal. Rptr. 2d 877* ; *Tchorbadjian v. Western Home Ins. Co. (1995) 39 Cal. App. 4th 1211, 1217, 46 Cal. Rptr. 2d 370* ; *City of Santa Cruz v. Pacific Gas & Electric Co. (2000) 82 Cal. App. 4th 1167, 1176, 1188, 99 Cal. Rptr. 2d 198*].

When a motion for summary judgment is made in a case in which the plaintiff's claim carries a clear and convincing burden of proof, the evidence and all inferences that can reasonably be drawn therefrom must meet the higher standard [*Rowe v. Superior Court (1993) 15 Cal. App. 4th 1711, 1724, 19 Cal. Rptr. 2d625*]; *see also Reader's Digest Assn. v. Superior Court (1984) 37 Cal. 3d 244, 252, 208 Cal. Rptr. 137, 690 P.2d 610* .

CAUTION:

Waived Objections. Objections to the evidence cannot be made for the first time on appeal [*see* discussion in *§ 537.43[3][c]*]. Preferably objections to the evidence should be made in writing before the hearing [*see § 537.25[4]*, and *§ 537.27[1]*]. Any objections not already made in the opposing or reply papers must, however, be made at the hearing itself.

If the moving party is otherwise entitled to summary judgment, the court may generally not deny the motion on grounds of credibility or for want of cross-examination of witnesses who furnish affidavits or declarations in support of the motion [*Code Civ. Proc. § 437c(e)*; for discussion of exceptions to this rule, *see § 537.34[1]*].

[b] Moving Party's Initial Burden of Persuasion and/or Production

[i] Plaintiff or Cross Complainant

When the moving party is a plaintiff or cross complainant, he or she has the burden of proving each element of the cause of action entitling him or her to judgment on that cause of action [*Code Civ. Proc. § 437c(p)(1)*; *see San Diego Unified Port Dist. v. Gallagher (1998) 62 Cal. App. 4th 501, 503, 73 Cal. Rptr. 2d 30* (plaintiff must produce admissible evidence of each element of the cause of action entitling the party to judgment on that cause); *see also Federal Deposit Ins. Corp. v. Superior Court (1997) 54 Cal. App. 4th 337, 345, 62 Cal. Rptr. 2d 713* (on summary adjudication motion, plaintiff or cross complainant must show there is no material factual dispute with respect to one or more causes of action to prevail)]. In other words, that moving party must show, on the basis of his or her own affidavits and the admissions of the opposing party, every legal element necessary to sustain judgment in his or her favor [*Rowland v. Christian (1968) 69 Cal. 2d 108, 111, 70 Cal. Rptr. 97, 443 P.2d 561* (decided under prior law); *Harman v. Mono General Hospital (1982) 131 Cal. App. 3d 607, 613, 182 Cal. Rptr. 570* (decided under prior law; unopposed motion must still meet initial burden); *see Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 585, 37 Cal. Rptr. 2d 653* (*dicta* in discussion of legislative history in case involving defendant's burden of proof)].

The Supreme Court has characterized the moving party's burden on summary judgment as more properly one of persuasion rather than of proof, since he or she must persuade the court that there is no material fact for a reasonable trier of fact to find, and not prove any such fact to the satisfaction of the court itself as though it were sitting as the trier of fact [*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 850, 107 Cal. Rptr. 2d 841, 24 P.3d 493*]. The party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he or she carries this burden of production, the moving party causes a shift, and the opposing party is then subjected to a burden of production to make a prima facie showing of the existence of a triable issue of material fact [*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 850-851, 107 Cal. Rptr. 2d 841, 24 P.3d 493*].

ILLUSTRATION:

Burden Despite Lack of Opposition. The opposing party fails to file a counter affidavit. Does this relieve the moving party of the burden of establishing evidentiary facts of every element necessary to entitle him or her to judgment? No [*see Vesely v. Sager (1971) 5 Cal. 3d 153, 169, 95 Cal. Rptr. 623, 486 P.2d 151* , disapproved on other grounds in *Strang v. Cabrol (1984) 37 Cal. 3d 720, 724, 209 Cal. Rptr. 347, 691 P.2d 1013* ; *see also Rubenstein v. Rubenstein (2000) 81 Cal. App. 4th 1131, 1151-1152, 97 Cal. Rptr. 2d 707* (moving defendant not entitled to summary judgment despite plaintiff's failure to file proper opposing separate statement and untimeliness of opposition papers because defendant did not meet burden of establishing right to relief defendant sought; until defendant met burden, plaintiff had no burden to produce opposing evidence)]. When no affidavits or declarations are filed in opposition to a motion for summary judgment, however, the court is entitled to accept as true the facts alleged in the movant's affidavits and declarations, provided they are within the personal knowledge of the affiant or declarant and are facts to which he or she could competently testify [*Lyons v. Security Pacific Nat. Bank (1995) 40 Cal. App. 4th 1001, 1014, 48 Cal. Rptr. 2d 174* ; *see Code Civ. Proc. § 2015.5* (use of declarations)].

[ii] Defendant or Cross Defendant

When the moving party is a defendant or cross defendant, he or she has the burden of showing either of the following [

Code Civ. Proc. § 437c(p)(2)]:

- That one or more elements of the cause of action, even if not separately pleaded, cannot be established.

- There is a complete defense to that cause of action or a defense to it.

The defendant by establishing either of the above has met his or her burden of showing that a cause of action has no merit [*Green v. Ralee Engineering Co. (1998) 19 Cal. 4th 66, 72, 78 Cal. Rptr. 2d 16, 960 P.2d 1046*].

The defendant must show that under no possible hypothesis within the reasonable purview of the allegations contained in the complaint is there a material question of fact that requires examination by trial. The moving defendant bears the burden of proving the absence of any triable issue of material fact even though the plaintiff has the burden of proof as to that particular issue at trial. Thedefendant, however, need only demonstrate the absence of a triable issue of material fact as to those bases of liability the plaintiff has pleaded [*Sanchez v. Swinerton & Walberg Co. (1996) 47 Cal. App. 4th 1461, 1465, 55 Cal. Rptr. 2d 415* ; *see Jacobs v. Universal Development Corp. (1997) 53 Cal. App. 4th 692, 697-698* ; *62 Cal. Rptr. 2d 446* ; *see also Binder v. Aetna Life Ins. Co. (1999) 75 Cal. App. 4th 832, 839, 89 Cal. Rptr. 2d 540* (even though plaintiff bears burden of proof at trial, moving defendant bears initial burden of showing lack of any triable factual issue); *Government Employees Ins. Co. v. Superior Court (2000) 79 Cal. App. 4th 95, 98 n.4, 93 Cal. Rptr. 2d 820* (defendant moving for summary judgment need address only issues raised by complaint; plaintiff cannot bring up new, unpleaded issues in his or her opposition papers); *Tsemetzin v. Coast Federal Savings & Loan Assn. (1997) 57 Cal. App. 4th 1334, 1342, 67 Cal. Rptr. 2d 726* (moving defendant need not refute liability on some theoretical possibility not included in pleadings)].

If a plaintiff pleads several theories, the defendant has the burden of demonstrating there are no material facts requiring trial on any of them. The moving defendant whose declarations omit facts as to any theory permits that portion of the complaint to be unchallenged. Even if no opposition is presented, the moving party still has the burden of eliminating all triable issues of fact [*Wright v. Stang Manufacturing Co. (1997) 54 Cal. App. 4th 1218, 1228, 63 Cal. Rptr. 2d 422* ; *see also Juarez v. Boy Scouts of America, Inc. (2000) 81 Cal. App. 4th 377, 397, 97 Cal. Rptr. 2d 12* (defendant is not entitled to summary judgment unless defendant negates all theories of liability pleaded by plaintiff); *Campbell v. Derylo (1999) 75 Cal. App. 4th 823, 826, 89 Cal. Rptr. 2d 519* (moving party bears burden of proving that claims of adverse party are entirely without merit on any legal theory)]. A responding plaintiff has no evidentiary burden unless the moving defendant has first met its initial burden [*Binder v. Aetna Life Ins. Co. (1999) 75 Cal. App. 4th 832, 840, 89 Cal. Rptr. 2d 540* ; *see also Rubenstein v. Rubenstein (2000) 81 Cal. App. 4th 1131, 1151-1152, 97 Cal. Rptr. 2d 707* (until moving defendant met its initial burden, plaintiff had no burden to produce opposing evidence); *Thatcher v. Lucky Stores, Inc. (2000) 79 Cal. App. 4th 1081, 1085-1086, 94 Cal. Rptr. 2d 575* (moving party must meet its initial burden of proof before court grants summary judgment, even in absence of opposition)]. Only if the defendant makes the requisite showing does the court need to examine plaintiff's opposing papers to determine if they demonstrate the existence of a triable issue of material fact [*Salazar v. Southern Cal. Gas Co. (1997) 54 Cal. App. 4th 1370, 1376, 63 Cal. Rptr. 2d 522* ; *Binder v. Aetna Life Ins. Co. (1999) 75 Cal. App. 4th 832, 840, 89 Cal. Rptr. 2d 540*].

When a defendant moves for summary judgment based on the plaintiff's inability to establish one or more elements of the cause of action, the defendant does not need to conclusively negate an element of the plaintiff's cause of action. It is enough for the defendant to show that one or more elements of the cause of action cannot be established [*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 853-854, 107 Cal. Rptr. 2d 841, 24 P.3d 493* ; *Saelzler v. Advanced Group 400 (2001) 25 Cal. 4th 763, 767-769, 107 Cal. Rptr. 2d 617, 23 P.3d 1143*]. For discussion, see *§ 537.33[2][d]* et seq.

The burden on a defendant moving for summary judgment based on the assertion of an affirmative defense is heavier than the burden to show that one or more elements of plaintiff's action cannot be established [*Anderson v. Metalclad*

Insulation Corp. (1999) 72 Cal. App. 4th 284, 289-290, 85 Cal. Rptr. 2d 331]. Instead of merely submitting evidence to negate a single element of plaintiff's cause of action, or offering evidence, such as vague or insufficient discovery responses, that the plaintiff does not have evidence to create an issue of fact as to one or more elements of his or her case, the defendant has the initial burden to show that undisputed facts support each element of the affirmative defense [*Anderson v. Metalclad Insulation Corp. (1999) 72 Cal. App. 4th 284, 289-290, 85 Cal. Rptr. 2d 331* ; *see Bacon v. Southern Edison Co. (1997) 53 Cal. App. 4th 854, 858, 62 Cal. Rptr. 2d 16]* . If the defendant does not meet this burden, the motion must be denied. Only if the defendant meets this burden does the burden shift to plaintiff to show an issue of fact concerning at least one element of the defense [*Anderson v. Metalclad Insulation Corp. (1999) 72 Cal. App. 4th 284, 289-290, 85 Cal. Rptr. 2d 331* ; *see Huynh v. Ingersoll-Rand (1993) 16 Cal. App. 4th 825, 830, 20 Cal. Rptr. 2d 296*]. Moreover, if, in anticipation of an affirmative defense, the complaint alleges facts to refute it, the pleadings themselves create a material issue that defendant would have to refute to obtain summary judgment [*Bacon v. Southern Cal. Edison Co. (1997) 53 Cal. App. 4th 854, 858, 62 Cal. Rptr. 2d 16*].

[c] Shift of Burden to Opposing Party

Once the moving party presents evidence sufficient to sustain judgment in his or her favor, the burden then shifts to the opposing party to show that a triable issue of one or more material facts exists as to the cause of action or a defense to it [*Code Civ. Proc. § 437c(p)(1), (2)*; *see Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 850, 107 Cal. Rptr. 2d 841, 24 P.3d 493* (burden on opposing party best described as a burden of production of evidence to make a prima facie showing of the existence of a triable issue of material fact); *Green v. Ralee Engineering Co. (1998) 78 Cal. Rptr. 2d 16, 960 P.2d 1046* (once defendant meets its burden, burden shifts to plaintiff to show that a triable issue of one or more material facts exists as to cause of action or a defense to it); *Weseloh Family Ltd. Partnership v. K.L. Wessel Const. Co. (2004) 125 Cal. App. 4th 152, 162, 22 Cal. Rptr. 3d 660* (in professional negligence case, defendants met burden of showing they owed no duty of care to plaintiff; burden then shifted to plaintiff to show either that such a duty existed or that there wasa triable issue of material fact relevant to the determination of the duty issue); *Wagner v. City of South Pasadena (2000) 78 Cal. App. 4th 943, 947, 93 Cal. Rptr. 2d 91* (once defendant's burden is met, burden shifts to plaintiff to show triable issue of fact exists; plaintiff must set forth specific facts showing triable issue of material facts exist); *Shapiro v. Sutherland (1998) 64 Cal. App. 4th 1534, 1543, 76 Cal. Rptr. 2d 101* (when defendant meets its burden, burden of proof shifts to plaintiff to show by responsive separate statement and admissible evidence that triable issues of fact exists)].

The opposing party has no burden to present opposing evidence when the moving party fails to meet the initial burden [*see Weber v. John Crane, Inc. (2006) 143 Cal. App. 4th 1433, 1442, 50 Cal. Rptr. 3d 71* ; *Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 83-84, 81 Cal. Rptr. 2d 360* ; *Pepperell v. Scottsdale Ins. Co. (1998) 62 Cal. App. 4th 1045, 1054, 73 Cal. Rptr. 2d 164* ; *Quintilliani v. Mannerino (1998) 62 Cal. App. 4th 54, 59-60, 72 Cal. Rptr. 2d 359* ; *Bacon v. Southern Cal. Edison Co. (1997) 53 Cal. App. 4th 854, 858, 62 Cal. Rptr. 2d 16* ; *Rowland v. Christian (1968) 69 Cal. 2d 108, 111, 70 Cal. Rptr. 97, 443 P.2d 561* (decided under prior law)]. Although *Code Civ. Proc. § 437c* was substantively amended in 1992 and 1993, the initial burden of proof remains with moving party. Prior to adoption of the 1992 amendment, there was no obligation on the opposing party to show that a triable issue of material fact existed unless and until the moving party had met its burden, and nothing in language of 1992 adoption of *Code Civ. Proc. § 437c(n)(2)* (*now see Code Civ. Proc. § 437c(p)(2)*) abrogates this well established summary judgment requirement that initial burden rests with moving party [*Quintilliani v. Mannerino (1998) 62 Cal. App. 4th 54, 59-60, 72 Cal. Rptr. 2d 359* ; *see Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 70-71, 81 Cal. Rptr. 2d 360* (amendments did not change fundamental requirement that moving party prove its right to summary judgment; amended *section 437c*, like *Fed. R. Civ. P., Rule 56*, now places initial burden on moving party)]. Thus, for example, if a moving defendant's showing does not support judgment in the defendant's favor, the burden does not shift to the plaintiff and the motion must be denied without regard to the plaintiff's showing [*Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal. App. 4th 1509, 1534-1535, 80 Cal. Rptr. 2d 94* (in legal malpractice action, when defendants produced no expert testimony negating duty of care or breach of duty elements of plaintiff's cause of action, defendants' motion for summary judgment should have been denied even though plaintiff did not produce expert testimony)].

In meeting its burden of proof, the opposing party may not rely on the mere allegations or denials of his or her pleadings to show that a triable issue of fact exists but, instead, must set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense to it [*Code Civ. Proc. § 437c(p)(1), (2)*; *see Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 850, 107 Cal. Rptr. 2d 841, 24 P.3d 493* ; *Eisenberg v. Alameda Newspapers, Inc. (1999) 74 Cal. App. 4th 1359, 1375, 88 Cal. Rptr. 2d 802* ; *Regents of University of California v. Superior Court (1996) 41 Cal. App. 4th 1040, 1044, 48 Cal. Rptr. 2d 922* ; *see also Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 69, 81 Cal. Rptr. 2d 360* ; *Sangster v. Paetkau (1998) 68 Cal. App. 4th 151, 162, 80 Cal. Rptr. 2d 66* ; *Bacon v. Southern Cal. Edison Co. (1997) 53 Cal. App. 4th 854, 858, 62 Cal. Rptr. 2d 16*].

The opposing party is only required to show the existence of a triable issue of fact, not demonstrate its ability to prevail at trial [*Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal. App. 3d 593, 608, 176 Cal. Rptr. 824* ; *see Padgett v. Phariss (1997) 54 Cal. App. 4th 1270, 1279, 63 Cal. Rptr. 2d 373* ; *Carleton v. Tortosa (1993) 14 Cal. App. 4th 745, 752-753, 17 Cal. Rptr. 2d 734*]. On the other hand, he or she cannot rely on contradictions in his or her own opposing evidence to create a triable issue [*State Farm Mut. Auto. Ins. Co. v. Eastman (1984) 158 Cal. App. 3d 562, 573, 204 Cal. Rptr. 827* .]

The opposing party cannot defeat summary judgment by attempting to raise a factual dispute as to immaterial issues [*Ramero v. American President Lines, Ltd. (1995) 38 Cal. App. 4th 1199, 1202-1203, 45 Cal. Rptr. 2d 421*]. A summary judgment motion will not be defeated by the presence of a factual dispute unless the fact in dispute is material [*Romero v. American President Lines, Ltd. (1995) 38 Cal. App. 4th 1199, 1202-1203, 45 Cal. Rptr. 2d 421*], that is, it relates to a claim or defense in issue which could make a difference in the outcome [*Los Angeles Nat. Bank v. Bank of Canton (1991) 229 Cal. App. 3d 1267, 1274, 280 Cal. Rptr 831* ; *see also § 537.21[3]*, for what constitutes material facts]. Thus, papers filed in response to the defendant's motion for summary judgment may not create an issue outside the pleadings and are not a substitute for an amendment to the pleadings [*Laabs v. City of Victorville (2008) 163 Cal. App. 4th 1242, 1253, 78 Cal. Rptr. 3d 372* ; *Sutherland v. Barclays American/Mortgage Corp. (1997) 53 Cal. App. 4th 299, 317, 61 Cal. Rptr. 2d 614* ; Nash v. *Fifth Amendment (1991) 228 Cal. App. 3d 1106, 1116, 279 Cal. Rptr. 465* ; *see also Government Employees Ins. Co. v. Superior Court (2000) 79 Cal. App. 4th 95, 98 n.4, 93 Cal. Rptr. 2d 820* (plaintiff cannot bring up new, unpleaded issues in his or her opposition papers); *Hobson v. Raychem Corp. (1999) 73 Cal. App. 4th 614, 629, 86 Cal. Rptr. 2d 497* (plaintiff cannot successfully resist summary judgment on theory which is not pleaded in complaint); *Allyson v. Department of Transportation (1997) 53 Cal. App. 4th 1304, 1318-1321, 62 Cal. Rptr. 2d 490* (summary judgment granted in defendant's favor when none of plaintiff's extensive filings in opposition even remotely addressed the dispositive issue framed by the pleadings; plaintiff's filings all addressed nonissues)].

[d] Showing Required to Shift Burden of Production

[i] Move Toward Federal Standard

The addition of subdivision (n) to *Code Civ. Proc. § 437c*, effective January 1,1993, codified the burden of persuasion and production in summary proceedings [*see* Stats. 1992, ch. 1348]. Now relettered as *Code Civ. Proc. § 437c(p)*, it appears to abrogate inconsistent prior case law, for example, requiring a moving party plaintiff to negate any applicable affirmative defenses before the burden shifted to the defendant to raise a triable issue of material fact [*Oldcastle Precast, Inc. v. Lumbermens Mut. Cas. Co. (2009) 170 Cal. App. 4th 554, 564-565, 88 Cal. Rptr. 3d 363* ; *see Nymark v. Heart Fed. Savings & Loan Assn. (1991) 231 Cal. App. 3d 1089, 1095, 283 Cal. Rptr. 53*]. Counsel should exercise caution in citing cases decided under prior law, especially those that hold the moving party to a more stringent initial showing than that now required under *Code Civ. Proc. § 437c(p)*.

Code Civ. Proc. § 437c(p) moves California summary judgment law closer to the federal standard under *Fed. R. Civ. Proc., Rule 56*, as interpreted by the *United States Supreme Court in Celotex Corp. v. Catrett (1986) 477 U.S. 317,*

325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 [*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 847-848, 107 Cal. Rptr. 2d 841, 24 P.3d 493*].

Under the federal standard governing burden of proof on summary judgment motions, although a moving party always initially bears the burden of establishing there is an absence of genuine issue of material fact, when the nonmoving party bears the burden of proof on an issue at trial the moving party need not support its summary judgment motion with evidence negating an essential element of the nonmoving party's case to satisfy its burden. Rather, the moving party may simply point to the absence of evidence to support the nonmoving party's case. The nonmoving party must then set forth specific facts by affidavits, declarations, or admissible discovery material showing that there is a genuine issue for trial [*Hunter v. Pacific Mechanical Corp. (1995) 37 Cal. App. 4th 1282, 1286, 44 Cal. Rptr. 2d 335* (citing federal authority); *but cf. Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 855, 107 Cal. Rptr. 2d 841, 24 P.3d 493* (disapproving Hunter language to effect that moving defendant could satisfy burden simply by pointing out absence of evidence to support an element of plaintiff's action); *see also Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 71-72, 81 Cal. Rptr. 2d 360* (under federal law, moving party has been permitted to simply assert absence of evidence to support claim in order to shift burden to opposing party)].

Although the 1993 amendment was not a "wholesale adoption" of the federal system, as in the federal the parties' burden of persuasion and/or production on summary judgment is dependent on their burden of proofat trial [*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 851 n.15, 107 Cal. Rptr. 2d 841, 24 P.3d 493* ; *see also Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 71, 75, 81 Cal. Rptr. 2d 360* (1992 and 1993 amendments did not change fundamental requirement that moving party prove its right to summary judgment, but did adopt federal mechanism of burden shifting; unlike federal rule, however, California procedure requires moving party to support motion with evidence)].

For discussion of differences between the federal and state standards, see *§ 537.33[2][d][ii]*.

[ii] Showing Required on Defendant's Motion

[A] When Element of Plaintiff's Cause of Action Lacking

The burden-shifting characteristics of the federal procedure are to be applied to California summary judgment motions so that a moving defendant may rely on factually devoid discovery responses to shift the burden of production pursuant to *Code Civ. Proc. § 437c(p)(2)* [*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 853-854, 107 Cal. Rptr. 2d 841, 24 P.3d 493* ; *see also Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 590, 37 Cal. Rptr. 2d 653* ; *Andrews v. Foster Wheeler, LLC (2006) 138 Cal. App. 4th 96, 101, 41 Cal. Rptr. 3d 229*]. Once the burden shifts as a result of the factually devoid discovery responses, the plaintiff must set forth specific facts which prove the existence of a triable issue of material fact [*Hunter v. Pacific Mechanical Corp. (1995) 37 Cal. App. 4th 1282, 1287-1289, 44 Cal. Rptr. 2d 335* ; *Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 590, 37 Cal. Rptr. 2d 653*)]. Thus, the burden to show that there is a triable issue of material fact is placed on the party that bears the burden of proof for that fact at trial [*Hunter v. Pacific Mechanical Corp. (1995) 37 Cal. App. 4th 1282, 1287, 44 Cal. Rptr. 2d 335*].

Under this view, a moving defendant has two ways to shift the burden of proof under *Civ. Proc. § 437c(p)(2)* to the plaintiff to produce a triable issue of fact [*Brantley v. Pisaro (1996) 42 Cal. App. 4th 1591, 1597-1598, 50 Cal. Rptr. 2d 431*]:

- In accordance with the holding in *Union Bank*, a defendant may rely on a plaintiff's factually insufficient discovery responses to show that a plaintiff cannot establish an essential element of the plaintiff's cause of action.

- Alternatively, the defendant may use the tried and true technique of negating an essential element in

the plaintiff's cause of action.

The California Supreme Court has rejected the view that a moving defendant may shift the burden simply by suggesting the possibility that the plaintiff cannot prove his or her case [*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 107 Cal. Rptr. 2d 841, 24 P.3d 493* ,]. The Court has held that *Code Civ. Proc. § 437c(p)(2)* requires a defendant to show by evidence and not mere argument that one or more elements ofthe cause of action cannot be established. A defendant must make an affirmative showing. A defendant, although not required to conclusively negate an element in the plaintiff's case, must produce direct or circumstantial evidence that the plaintiff does not possess, and cannot reasonably expect to obtain, a prima facie case. When the defendant makes such a showing, the burden of production to make a prima facie case shifts to the plaintiff [*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 853-855, 107 Cal. Rptr. 2d 841, 24 P.3d 493*].

A defendant must do more than merely point out that there is an absence of evidence and must produce affirmative evidence to show that the plaintiff cannot establish a prima facie case [*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 854, 107 Cal. Rptr. 2d 841, 24 P.3d 493* ; *see Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 81, 81 Cal. Rptr. 2d 360*]. The defendant may achieve this by, for example, pointing to admissions by the plaintiff following extensive discovery to the effect that the plaintiff has discovered nothing [*Aguilar v. Atlantic Richfield Co. (2001)25 Cal. 4th 826, 854-855, 107 Cal. Rptr. 2d 841, 24 P.3d 493* ; *see Golden Eagle Refinery Co., Inc. v. Associated Intern. Ins. Co. (2001) 85 Cal. App. 4th 1300* (defense granted summary adjudication on cause of action for clean up costs of groundwater contamination where lack of evidence on damages shown by plaintiff's interrogatory responses admitting it was unable to attribute damages to any particular cause, event, or time)]. The defendant may also produce affirmative evidence that an element of a cause of action cannot be established by showing after extensive discovery that one of the plaintiff's elements is based on mere speculation *Saelzler v. Advanced Group 400 (2001) 25 Cal. 4th 763, 780-781* (plaintiff sued the owners of an apartment complex after she was criminally assaulted on the premises and claimed that defendant's failure to take proper security precautions was the proximate cause of her damages; motion for summary judgment granted because plaintiff was unable to provide evidence of causation since she had no evidence showing the identity of her assailants, whether they were trespassers or tenants, whether the security gate was broken, or whether defendant could reasonably have warned the public of unspecified dangers from unknown assailants; declaration of plaintiff's security expert based on same evidence was equally speculative since he equally unaware of assailants' identities and his opinion regarding causation was too tenuous to create a triable issue)].

Unlike the federal rule, California procedure requires the moving party to support the motion with evidence. *Code Civ. Proc. § 437c(c), (p)(2)* implies a need for concrete evidence from the moving party and expressly requires the moving party to supply more than bare assertions, whether alleged in a pleading or by way of argument, that the opposing party has no evidence to support a particular claim [*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 854, 107 Cal. Rptr. 2d 841, 24 P.3d 493* , approving *Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 37 Cal. Rptr. 2d 653*]. The court in *Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 81, 81 Cal. Rptr. 2d 360* attempted to reconcile cases that addressed the required showing prior to *Aguilar*. The *Scheiding* court pointed out that *Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 37 Cal. Rptr. 2d 653* declined to describe the extent to which the Legislature in its amendments may have adopted (or even understood) the test in *Celotex Corp v. Catrett (1986) 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265* . How, then, was the *Union Bank* opinion able to characterize the plaintiff's interrogatory answers which contained no facts supporting the existence of misrepresentations or a fraudulent conspiracy, as the affirmative evidence required by the statute to shift the burden of proof in connection with the summary judgment? The court concluded it could do so by inferring from the plaintiffs' discovery answers that there was no further evidence to oppose the motion. Because the Civil Discovery Act of 1986 [*Code Civ. Proc. § 2016 et seq.*; *see now* Civil Discovery Act (*Code Civ. Proc. § 2016.010 et seq.* operative July 1, 2005)] imposed on the *Union Bank* plaintiffs a duty to answer interrogatories as completely as possible, given the information available to them, the *Union Bank* court could presume that the plaintiffs had answered "fully and truthfully," and could infer that they had no other evidence to support their claims. The plaintiffs had not asked for a continuance to obtain further evidence.

Plaintiffs in that case responded to discovery in two ways: by making an admission damaging to their case and also by stating their "belief" that evidence supporting their claims would be later revealed. Later cases, including *Hunter v. Pacific Mechanical Corp. (1995) 37 Cal. App. 4th 1282, 44 Cal. Rptr. 2d 335 (First Dist., Div. Two)* , have concluded that the later category of "empty" discovery response can be enough by themselves to support summary judgment. *Hunter* upheld summary judgment granted in an asbestos case on the issue of causation because the plaintiff's deposition responses failed to tie the defendant to any jobsite where alleged asbestos exposure occurred. The inference drawn by the *Hunter* court was an extension of the one which supported the court's conclusion in the *Union Bank* case: since the plaintiff had a statutory duty to respond fully, plaintiff's "factually devoid" answers showed plaintiff had no facts [*Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 71-80, 81 Cal. Rptr. 2d 360* .]

Scheiding noted that both *Union Bank* and *Hunter* spoke of a defendant no longer needing to affirmatively negate an element of the plaintiff's case and both relied on the Civil Discovery Act of 1986 to infer an absence of evidence. Neither case, however, held that a moving party can simply argue or allege that the opposing party has no evidence and no California case has concluded that a party moving for summary judgment can simply argue there is an absence of facts to support the opposing party's case. The cases that have read the statutory amendments much less expansively than did the *Union Bank* and *Hunter* opinions generally look beyond themere absence of evidence and ask whether, given the particular circumstances of the case, "factually devoid" discovery responses should be held against the plaintiff. Noting that it may not be fair to say there is an opposing minority view contrary to the logic of *Union Bank* as extended by *Hunter*, the court stated that *Hagen v. Hickenbottom (1995) 41 Cal. App. 4th 168,186* , which is often cited for its criticism of the expansive boundary delineated by *Hunter* actually argues caution more than disagreement. The *Hagen* court noted in part that (1) a defendant must make an affirmative showing in support of plaintiff's motion which showing connotes something significantly more than simply pointing out to the court that there is an absence of evidence, and (2) before the burden of producing even a prima facie case should be shifted to the plaintiff in advance of trial, a defendant who cannot negate an element of the plaintiff's case should be required to produce direct or circumstantial evidence that the plaintiff not only does not have but cannot reasonably expect to obtain a prima facie case. The *Scheiding* court concluded that it agreed with *Hunter* that the circumstantial evidence which would be required by *Hagen* can consist of "factually devoid" discovery responses from which an absence of evidence can be inferred. The court also agreed with the view in *Hagen* that the burden should not shift without stringent review of the direct, circumstantial and inferential evidence. Reconciliation of the two views is not difficult once the inferential reasoning expressly permitted by *Code Civ. Proc. § 437c* is considered. However, the court did not decide whether the more cautious view is the better one for the trial court's ruling was incorrect even under the more circumspect approach. In *Scheiding*, the motion was supported by a declaration of counsel stating that plaintiff's responses to discovery did not mention the defendant. However, the defendant conducted no discovery. In plaintiff's deposition, plaintiff was not asked a single question concerning the defendant. The duty to answer completely only extended so far as the reasonable ambit of the questions asked. The plaintiff had no duty to volunteer information that was not requested. Although summary judgment is more obtainable under the amended statute, the initial burden of producing evidence expressly resides with the moving party and cannot be shifted without the "evidence and inferences" described in the statute. Defendant's motion, unlike the motions in *Union Bank* and *Hunter*, relied on argument rather than on evidence. This was insufficient to support a reasonable inference that plaintiffs could not produce further evidence to support an element crucial to their claims [*Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 67, 80-84, 81 Cal. Rptr. 2d 360* ; *see also* *Weber v. John Crane, Inc. (2006) 143 Cal. App. 4th 1433, 1442, 50 Cal. Rptr. 3d 71* (in asbestos exposure case, plaintiff's deposition testimony to the effect that he was unable to recall working with defendant's products did not permit an inference that plaintiff neither possessed, nor reasonably could obtain, evidence that plaintiff was exposed to defendant's products and therefore burden did not shift to plaintiff); *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone (2000) 79 Cal. App. 4th 114, 133-136, 93 Cal. Rptr. 2d 534* (following *Scheiding* plaintiff's nonresponsive answer to interrogatory did not constitute "factually devoid" discovery to shift burden to plaintiff on question of causation of plaintiff's damages, since discovery did not call for information on that subject, or for other information from which information on that subject could be deduced)].

In any event, the method for establishing a prima facie entitlement to summary judgment requires the moving party to

demonstrate a negative, that is, that there is no evidence to support an element of the opponent'scase [*Rio Linda Unified School Dist. v. Superior Court (1997) 52 Cal. App. 4th 732, 735, 735 n.1, 739-740, 60 Cal. Rptr. 2d 710* (citing *Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 590, 37 Cal. Rptr. 2d 653* , for how prima facie case may be proved, and declining to reach the issue of whether the strict standard of *Addy v. Bliss & Glennon (1996) 44 Cal. App. 4th 205, 214, 51 Cal. Rptr. 2d 642* , is correct)]. This is akin to the burden of an appellant in proving there is no substantial evidence in support of a judgment. It is incumbent on an appellant who claims evidentiary insufficiency to set forth the evidence supporting the judgment and indicate wherein it is insufficient. If a party contends some particular issue of fact has no support in the record, it must set forth all the material evidence on the point and not merely the evidence favorable to it [*Rio Linda Unified School Dist. v. Superior Court (1997) 52 Cal. App. 4th 732, 739-740, 60 Cal. Rptr. 2d 710*]. Thus, on a summary judgment motion in a personal injury action, the defendant was required to include portions of depositions in which parents recounted the purported identification by the real party of the cause of his injury. To have omitted these facts would have put defendant at risk of the accusation of an attempt to mislead the trial court as to the state of the discovery record. Moreover, a moving party's reference to inadmissible evidence in its statement of undisputed facts does not waive a contemporaneously raised objection to that evidence in the accompanying points and authorities [*Rio Linda Unified School Dist. v. Superior Court (1997) 52 Cal. App. 4th 732, 735, 740, 60 Cal. Rptr. 2d 710* (opposing party never asserted in trial court that moving party waived its objection to the evidence and appellate court found no factual basis for imposing doctrine of waiver under circumstances)].

Also, although a plaintiff who has pleaded several causes of action based on the same set of facts need only sustain its burden on one theory to prevail at trial, a defendant who seeks summary judgment must define all of the theories alleged in the complaint and challenge each factually. A defendant as the moving party has the burden to show it is entitled to judgment on all theories of liability asserted by the plaintiff [*see* *Lopez v. Superior Court (1996) 45 Cal. App. 4th 705, 713-714, 717, 52 Cal. Rptr. 2d 821*].

If the defendant claims that the plaintiff cannot establish the cause of action pled because the defendant's affirmative evidence discloses facts that negate the existence of an essential element of the plaintiff's claim by proving the contrary is true, the court should evaluate the defendant's evidence under the same strictstandards which were held to apply to a defendant's attempt to disprove an element of the plaintiff's cause of action before the 1992 and 1993 amendments to *Code Civ. Proc. § 437c*, in order to avoid unjustly depriving the plaintiff of a trial [*Tibor v. Superior Court (1997) 52 Cal. App. 4th 1359, 1368, 61 Cal. Rptr. 2d 326*].

[B] For Affirmative Defense

The burden on a defendant moving for summary judgment based on the assertion of an affirmative defense is heavier than the burden to show oneor more elements of plaintiff's action cannot be established. Instead of merely submitting evidence to negate a single element of plaintiff's cause of action, or offering evidence, such as vague or insufficient discovery responses, that the plaintiff does not have evidence to create an issue of fact as to one or more elements of his or her case, the defendant has the initial burden to show that undisputed facts support each element of the affirmative defense. The defendant must demonstrate that under no hypothesis is there a material factual issue requiring trial. If the defendant does not meet this burden, the motion must be denied. Only if the defendant meets this burden does the burden shift to plaintiff to show an issue of fact concerning at least one element of the defense [*Anderson v. Metalclad Insulation Corp. (1999) 72 Cal. App. 4th 284, 289-290, 85 Cal. Rptr. 2d 331*]. Even if the plaintiff admits during discovery that it has no evidence to dispute the applicability of an affirmative defense, the moving defendant has the initial burden to show that undisputed facts support each element of the affirmative defense [*Consumer Cause, Inc. v. SmileCare (2001) 91 Cal. App. 4th 454, 467-468, 110 Cal. Rptr. 2d 627* (order granting defendant's motion reversed since based on plaintiff's statement and defendant did not prove undisputed facts for each element)].

The submission of evidence which is equivocal, or from which conflicting inferences may be drawn is insufficient to meet the movant's burden [*Anderson v. Metalclad Insulation Corp. (1999) 72 Cal. App. 4th 284, 297, 85 Cal. Rptr. 2d 331*].

[e] Effect of Heightened Burden of Proof

When a motion for summary judgment is made in a case in which the plaintiff's claim carries a clear and convincing burden of proof, the evidence and all inferences that can reasonably be drawn therefrom must meet the higher standard [*Rowe v. Superior Court (1993) 15 Cal. App. 4th 1711, 1724, 19 Cal. Rptr. 2d 625* ; *see also Basich v. Allstate Insurance Co. (2001) 87 Cal. App. 4th 1112, 1121, 105 Cal. Rptr. 2d 153* ; *Reader's Digest Assn. v. Superior Court (1984) 37 Cal. 3d 244, 252, 208 Cal. Rptr. 137, 690 P.2d 610*].

[f] Construction of Affidavits and Declarations

In determining whether the parties have met their respective burdens of proof, courts construe the affidavits or declarations of the moving party strictly, resolving any doubts in the opposing party's favor [*Miller v. Bechtel Corp. (1983) 33 Cal. 3d 868, 874, 191 Cal. Rptr. 619, 663 P.2d 177* ; *Pender v. Radin (1994) 23 Cal. App. 4th 1807, 1813, 29 Cal. Rptr. 2d 36* ; *see Cortez v. Vogt (1997) 52 Cal. App. 4th 917, 925-926, 60 Cal. Rptr. 2d 841* ; *see also Salazar v. Southern Cal. Gas Co. (1997) 54 Cal. App. 4th 1370, 1376, 63 Cal. Rptr. 2d 522* (moving party's papers strictly construed, accepting as fact only those portions not contradicted by opposing papers)]. By contrast, they construe the affidavits or declarations of the opposing partyliberally, resolving any doubts in favor of the party opposing the motion [*Miller v. Bechtel Corp. (1983) 33 Cal. 3d 868, 874, 191 Cal. Rptr. 619, 663 P.2d 177* ; *Pender v. Radin (1994) 23 Cal. App. 4th 1807, 1813, 29 Cal. Rptr. 2d 36* ; *see Cortez v. Vogt (1997) 52 Cal. App. 4th 917, 925-926, 60 Cal. Rptr. 2d 841* ; *see also Brown v. FSR Brokerage, Inc. (1998) 62 Cal. App. 4th 766, 773, 72 Cal. Rptr. 2d 828* (papers in opposition construed more liberally; doubts resolved against granting motion); *Salazar v. Southern Cal. Gas Co. (1997) 54 Cal. App. 4th 1370, 1376, 63 Cal. Rptr. 2d 522* (opposing papers liberally construed, all facts therein being accepted as true); *but see § 537.33[2][g]*]. Nonetheless, despite the construction of affidavits in its favor, the opposing party has the burden of showing the existence of a triable issue of material fact [*Chern v. Bank of America (1976) 15 Cal. 3d 866, 873, 127 Cal. Rptr. 110, 544 P.2d 1310* ; *Murillo v. Rite Stuff Foods, Inc. (1998) 65 Cal. App. 4th 833, 841, 77 Cal. Rptr. 2d 12* ; *see § 537.33[2][c]*].

The sole declaration of a party opposing a summary judgment motion which raises a triable issue of fact is sufficient to deny the motion [*Estate of Housley (1997) 56 Cal. App. 4th 342, 359, 65 Cal. Rptr. 2d 628*]. *Code Civ. Proc. § 437c(e)* does not allow a trial court to weigh the credibility of a declaration submitted by the party opposing a summary judgment motion and then grant the motion, except where the declaration is facially so incredible as a matter of law that the moving party otherwise would be entitled to summary judgment [*Estate of Housley (1997) 56 Cal. App. 4th 342, 359-360, 65 Cal. Rptr. 2d 628*].

Courts have been highly critical and must be cautious when an expert offers legal conclusions as to ultimate facts in the guise of an expert opinion [*Benavidez v. San Jose Police Dept. (1999) 71 Cal. App. 4th 853, 865, 84 Cal. Rptr. 2d 157* (court rejected retired field training police office's declaration to extent it drew legal conclusions)]. Moreover, expert declarations cannot create a triable question of fact if the expert's opinion is based on factors that are remote, speculative, or conjectural [*Travelers Casualty & Surety Co. v. Superior Court (1998) 63 Cal. App. 4th 1440, 1462, 75 Cal. Rptr. 2d 54*], or it if lacks foundation or is stated without sufficient certainty [*see Sanchez v. Hillerich & Bradsby Co. (2002) 104Cal. App. 4th 703* (expert affidavit sufficient because it established matters relied upon in expressing the opinion, opinion rested on matters of type reasonably relied upon, and it established bases for opinion)].

If no affidavits or declarations are filed in opposition to a motion for summary judgment the court is entitled to accept as true the facts alleged in the movant's affidavits and declarations, provided they are within the personal knowledge of the affiant or declarant and are facts to which he or she could competently testify [*Lyons v. Security Pacific Nat. Bank (1995) 40 Cal. App. 4th 1001, 1014, 48 Cal. Rptr. 2d 174* ; *see Code Civ. Proc. § 2015.5* (use of declarations)].

[g] Weight of Admissions

[i] Admissions Obtained Through Discovery

Admissions against interest obtained through discovery are entitled to greater weight than evidentiary allegations in affidavits or declarations [*D'Amico v. Board of Medical Examiners (1974) 11 Cal. 3d 1, 21-22, 112 Cal. Rptr. 786, 520 P.2d 10*]. Thus, admissions made in the course of a party's deposition cannot be contradicted solely by that party's declaration in opposition to summary judgment [*Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 545, 30 Cal. Rptr. 2d 706* ; *see Benavidez v. San Jose Police Dept. (1999) 71 Cal. App. 4th 853, 860, 84 Cal. Rptr. 2d 157* (party cannot create issue of fact by declaration that contradicts his or her prior discovery responses); *Barton v. Elexsys Internat., Inc. (1998) 62 Cal. App. 4th 1182, 1191-1192, 73 Cal. Rptr. 2d 212* (to extent descriptions in plaintiff's declaration submitted in opposition to defendant's motion for summary judgment contradicted plaintiff's discovery responses, they must be disregarded)]. A party is bound by admissions made in the course of discovery, and on motion for summary judgment, no further evidence of the matters so admitted is required [*Hejmadi v. AMFAC, Inc. (1988) 202 Cal. App. 3d 525, 552-553, 249 Cal. Rptr. 5*].

All admissions elicited in the course of discovery are not created equal under the *D'Amico* rule; and deposition answers are simply evidence and do not constitute incontrovertible judicial admissions as do concessions in a pleading or answers to requests for admissions [*Scalf v. D.B. Log Homes, Inc. (2005) 128 Cal. App. 4th 1510, 1522, 27 Cal. Rptr. 3d 826*]. An opposing party's deposition testimony that he found "nothing wrong" and had no criticisms of moving party's product were not the equivalent of judicial admissions and did not carry the moving party's burden of demonstrating the absence of a factual dispute on express indemnity claim [*Scalf v. D.B. Log Homes, Inc. (2005) 128 Cal. App. 4th 1510, 1523, 27 Cal. Rptr. 3d 826*].

Notwithstanding the above, the extent to which discovery-related admissions are conclusive in a summary judgment proceeding, in the face of contradictory affidavits or declarations by the admitting party, is somewhat unclear. The court of appeal in *Leasman v. Beech Aircraft Corp. (1975) 48 Cal. App. 3d 376, 121 Cal. Rptr. 768 (First Dist., Div. One)* , relying on *D'Amico v. Board of Medical Examiners (1974) 11 Cal. 3d 1, 112 Cal. Rptr. 786, 520 P.2d 10* , stated that when a defendant can establish his or her defense with the plaintiff's admissions sufficient to pass the strict construction test imposed on the moving party (for discussion, *see § 537.33[2][f]*), the credibility of the admissions are valued so highly that controverting affidavits may be disregarded entirely as irrelevant, inadmissible, or evasive [*see Leasman v. Beech Aircraft Corp. (1975) 48 Cal. App. 3d 376, 382, 121 Cal. Rptr. 768]* . Several courts adopted this view [*see Niederer v. Ferreira (1987) 189 Cal. App. 3d 1485, 1503, 234 Cal. Rptr.779 (Second District, Div. One)* ; *Shapero v. Fliegel (1987) 191 Cal. App. 3d 842, 849, 236 Cal. Rptr. 696 (Second District, Division Two)* ; *see also Benavidez v. San Jose Police Dept. (1999) 71 Cal. App. 4th 853, 860, 84 Cal. Rptr. 2d 157 (Sixth Dist.)* ; *Wilkins v. National Broadcasting Co. (1999) 71 Cal. App. 4th 1066, 1082, 84 Cal. Rptr. 2d 329 (Second Dist., Div. Three)*].

The same district and division of the court that decided *Leasman*, however, subsequently stated that the broad language in *Leasman* should be accepted with caution [*Price v. Wells Fargo Bank (1989) 213 Cal. App. 3d 465, 482, 261 Cal. Rptr. 735*]. The *Price* court did not interpret *D'Amico* as saying that admissions should be shielded from careful examination in light of the entire record and stated that a summary judgment should not be based on tacit admissions or fragmentary and equivocal concessions that are contradicted by other evidence [*Price v. Wells Fargo Bank (1989) 213 Cal. App. 3d 465, 482, 261 Cal. Rptr. 735* (First Dist., Div. One; trial court's reliance on admissions upheld only because appellate court found nothing in record that was materially inconsistent with the admissions); *accord Kirby v. Albert D. Seeno Construction Co. (1992) 11 Cal. App. 4th 1059, 1066-1067* (First Dist., Div. One; *Price* approved of reliance on admissions made in course of discovery when they are uncontradicted or contradicted by self-serving declarations of party); *see also Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 77-78, 81 Cal. Rptr. 2d 360* (First Dist., Div. One; court discussed *D'Amico*, noting Supreme Court has consistently refused to allow triable issue of fact to be conjured by submission of affidavit contradicting declarant's prior deposition testimony; however, court, discussing *Price*, viewed record before it with caution); *Wright v. Stang Manufacturing Co. (1997) 54 Cal. App. 4th 1218, 1224 n.2, 1227 n.3, 63 Cal. Rptr. 2d 422* (plaintiffs mistaken response as "Undisputed" to one of defendants' separate statement of facts held not to be a judicial admission, or an admission, or concession on issues of

liability and causation when such response was not under oath or part of any pleading, and when the response was inconsistent with other responses and evidence submitted in opposition to summary judgment motion); *FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 396, 282 Cal. Rptr. 508* (stating that "admission is binding unless there is a credible explanation for inconsistent positions taken by a party")]. If an admission is susceptible ofdifferent meanings, trial court must use its discretion to determine admission's scope and effect [*Jackson v. County of Los Angeles (1997) 60 Cal. App. 4th 171, 192 n.15, 70 Cal. Rptr. 2d 96* (citing *Fredericks v. Kontos Industries, Inc. (1987) 189 Cal. App. 3d 272, 277, 234 Cal. Rptr. 395* ; involving requests for admissions)].

A defendant may provide affirmative evidence that the plaintiff lacks any factual support for the plaintiff's claims through an admission by the plaintiff that extensive discovery has yielded nothing [*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 854-855, 107 Cal. Rptr. 2d 841, 24 P.3d 493* ; *Tran v. Farmers Group, Inc. (2002) 104 Cal. App. 4th 1202, 1215, 128 Cal. Rptr. 2d 728]* .

The court may disregard admissions that are ambiguous, irrelevant, or incomplete [*see Jackson v. County of Los Angeles (1997) 60 Cal. App. 4th 171, 192 n.15, 70 Cal. Rptr. 2d 96*].

[ii] Judicial Admissions

Although, as indicated above, a line of cases has developed the rule that when a party has made an admission in discovery that justifies summary judgment in favor of the opponent, that party cannot attempt to defeat a summary judgment motion by submitting a declaration contradicting the admission, the related principle of judicial admission has not been accorded as broad an application [*Prilliman v. United Air Lines, Inc. (1997) 53 Cal. App. 4th 935, 961, 62 Cal. Rptr. 2d 142* (judicial admission not involved); *see Kirby v. Albert D. Seeno Construction Co. (1992) 11 Cal. App. 4th 1059, 1066-1067, 14 Cal. Rptr. 2d 604* (court refused to give conclusive effect to ambiguous statement in an unverified complaint when statement was explained in deposition testimony under oath; summary judgment should not be entered based on mistaken legal conclusions in complaint when facts submitted in opposition indicate existence of material factual issue); *see also 24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal. App. 4th 1199, 1211, 78 Cal. Rptr. 2d 533* (admission in complaint will not bind plaintiff on summary judgment if plaintiff offers countervailing evidence in opposition to motion)]. Nevertheless, in an appropriate case, a judicial admission may be deemed binding and dispositive without further evidence [*see, e.g., Kurinij v. Hanna & Morton (1997) 55 Cal. App.4th 853, 870-871, 64 Cal. Rptr. 2d 324* (judicial admissions in underlying case and related indemnity action were binding and dispositive without further evidence on motion for summary judgment concerning cross complaint). According to *Kurinij*, such admissions are proper on summary judgment and overcome evidence even when the opposing party seeks to contradict the prior admission. The trial court, however, has discretion to disregard the admissions [*Kurinij v. Hanna & Morton (1997) 55 Cal. App. 4th 853, 871, 64 Cal. Rptr. 2d 324* (no abuse of discretion when trial court chose not to disregard admissions)]. There is also authority, however, that has held that such admissions are conclusive and limit contradictory evidence [*see Barr v. ACandS, Inc. (1997) 57 Cal. App. 4th 1038, 1055-1056, 67 Cal. Rptr. 2d 494* (defendant moving for summary judgment may rely on allegations in plaintiff's complaint which are judicial admissions; as such, they are conclusive concessions of truth of a matter and remove it from issues; contradictory evidence is limited to that which collaterally attacks the prior judicial admission on the basis of mistake, inadvertence, or lack of authority)].

[3] Power of Court to Grant Motion on Issue Party Did Not Raise

A trial court has discretion to grant summary judgment on an issue that the moving party has not raised if the court notifies the opposing party of its intent to do so and provides an opportunity to respond to the new issue [*Gomez v. Acquistapace (1996) 50 Cal. App. 4th 740, 744, 57 Cal. Rptr. 2d 821* ; *see Bacon v. Southern Cal. Edison Co. (1997) 53 Cal. App. 4th 854, 860, 62 Cal. Rptr. 2d 16* ; *cf. Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 75, 81 Cal. Rptr. 2d 360* (Code Civ. Proc. § 473c, unlike *Fed. R. Civ. P., Rule 56,* does not permit court to enter summary judgment on its own); *Certain Underwriters at Lloyd's of London v. Superior Court (1997) 56 Cal. App. 4th 952, 958, 65 Cal. Rptr. 2d 821* (stating that, under *Code Civ. Proc. § 437c(a),* which provides that any "party" may

move for summary judgment, California state judges, unlike federal judges, do not have the power to enter summary judgment sua sponte, subject only to giving the losing party notice of a need to come forward with its evidence)].

Notice and providing the opposing party a meaningful opportunity to respond are essential. Thus, for example, when a moving party raised additional facts in a supplemental statement of undisputed material facts, not accompanied by additional legal argument, filed two days before the hearing and after the opposition had been filed, and the plaintiff did not respond to it before the hearing, the trial court erred in granting the motion, not because it relied on a new issue, but because it did so without notice and opportunity to respond [*Gomez v. Acquistapace (1996) 50 Cal. App. 4th 740, 744, 57 Cal. Rptr. 2d 821*]. Where a defendants' summary judgment motion was based solely on the statute of limitations, and they did not assert that plaintiffs had failed to state a cause of action due to the absence of allegations of physical injury to their buildings, and plaintiffs were given no opportunity to respond to defendants' motion on that unstated ground, it was reversible error for the trial court to grant the motion [*County of Santa Clara v. Atlantic Richfield (2006) 137 Cal. App. 4th 292, 326, 40 Cal. Rptr. 3d 313*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentBurdens of Production & ProofAbsence of Essential Element of ClaimCivil ProcedureSummary JudgmentBurdens of Production & ProofMovantsCivil ProcedureSummary JudgmentBurdens of Production & ProofNonmovantsCivil ProcedureSummary JudgmentStandardsLegal EntitlementCivil ProcedureSummary JudgmentStandardsMateriality

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 537 SUMMARY JUDGMENT
PART II. LEGAL BACKGROUND

47-537 California Forms of Pleading and Practice--Annotated § 537.34

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§ 537.34 Standards for Denying Summary Judgment

[1] Triable Issues Exist or Moving Party Is Not Entitled to Judgment

Denial is, by implication, required when a triable issue of material fact has been shown to exist, or when the moving party is nonetheless not entitled to judgmentas a matter of law [*Code Civ. Proc. § 437c(c)*; *see Bigbee v. Pacific Tel. & Tel. Co. (1983) 34 Cal. 3d 49, 56, 192 Cal. Rptr. 857, 665 P.2d 947*]. The latter situation arguably includes cases in which the moving party has not met its initial burden of proof [*see Vesely v. Sager (1971) 5 Cal. 3d 153, 169-170, 95 Cal. Rptr. 623, 486 P.2d 151* , disapproved on other grounds in *Strang v. Cabrol (1984) 37 Cal. 3d 720, 724, 209 Cal. Rptr. 347, 691 P.2d 1013* ; *see also § 537.33[2][c]*].

For a form of order denying motion for summary judgment or summary adjudication, see *§ 537.85*.

[2] Contradicted Inferences of Fact

A court is expressly prohibited from granting summary judgment on the basis of inferences reasonably deducible from the evidence if those inferences are contradicted by other inferences or evidence which raise a triable issue as to any material fact [*Code Civ. Proc. § 437c(c)*; *see also § 537.33[2][a]*].

The court may not grant defendant's motion based on any evidence from which such inferences are drawn, if so

contradicted. That means that, if the court concludes that plaintiff's evidence or inferences raise a triable issue of material fact, it must conclude its consideration and deny the defendants' motion. If there is a conflict in the inferences such that a triable issue exists, the summary judgment motion must be denied [*Kids' Universe v. In2Labs (2002) 95 Cal. App. 4th 870, 116 Cal. Rptr. 2d 158*]

Absent new facts, summary judgment is not to be granted based on issues raised in a previously denied motion for summary adjudication [*see Code Civ. Proc. § 437c(f)(2)*; *see also § 537.34[3]*].

[3] Motion Based on Issues Asserted in Prior Unsuccessful Motion for Summary Adjudication

A party may not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court, unless that party establishes to the satisfaction of the court the existence of newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion [*Code Civ. Proc. § 437c(f)(2)*; *see Bagley v. TRW, Inc. (1999) 73 Cal. App. 4th 1092, 1096-1098, 86 Cal. Rptr. 2d 909* (second motion prohibited)]. *Code Civ. Proc. § 437c(f)(2)* does not apply when the prior motion was for summary judgment, not summary adjudication [*see Nieto v. Blue Shield of California Life & Health Ins. (2010) 181 Cal. App. 4th 60, 72, 103 Cal. Rptr. 3d 906* (defendant's motion for summary judgment fell outside scope of *Code Civ. Proc. § 437c(f)(2)*, where prior motion was one for summary judgment rather than summary adjudication)].

For the purposes of this requirement, "change of law" does not include a later enacted statute without retroactive application [*Code Civ. Proc. § 437c(s)*], nor does it include published decisions not cited in connection with the earlier summary adjudication motion that are raised for the first time in connection with the later summary judgment motion [*Bagley v. TRW, Inc. (1999) 73 Cal. App. 4th 1092, 1097, 1097 n.4, 86 Cal. Rptr. 2d 909*] or a nonpublished Superior Court opinion [*Schachter v. Citigroup, Inc. (2005) 126 Cal. App. 4th 726, 738, 23 Cal. Rptr. 3d 920*]. The trial court is not required to outline the newly discovered facts or circumstances in its order when it allows a party to renew a motion for summary judgment/summary adjudication [*Pender v. Radin (1994) 23 Cal. App. 4th 1807, 1812, 29 Cal. Rptr. 2d 36* (applying former version of subsection (f)(2))].

As an exception, because of the nature of litigation over insurance coverage, an insurer may be able to move for summary adjudication on the duty to defend despite an earlier summary adjudication that an insurer had a duty to defend [*see Liberty Mutual Ins. Co. v. Superior Court (1997) 58 Cal. App. 4th 617, 620-623, 68 Cal. Rptr. 2d 219*].

[4] Discretionary Denial

[a] Material Fact Depends on Sole Witness

A court has discretion to deny a motion in the following situations [*Code Civ. Proc. § 437c(e)*; *see Meighan v. Shore (1995) 34 Cal. App. 4th 1025, 1046, 40 Cal. Rptr. 2d 744* (mental process); *Times-Mirror Co. v. Superior Court (1988) 198 Cal. App. 3d 1420, 1430, 244 Cal. Rptr. 556* (sole witness); *Allen v. McMillion (1978) 82 Cal. App. 3d 211, 215-216, 147 Cal. Rptr. 77* (state of mind)]:

- When the only proof of a material fact offered in support of the motion is an affidavit or declaration made by an individual who was the sole witness to the fact.

- When a material fact is an individual's state of mind, or lack thereof, and the fact is sought to be established solely by that individual's affirmation.

These situations are exceptions to the general rule that a court cannot deny the motion merely on grounds of credibility or for want of cross-examination of witnesses who furnish affidavits or declarations in support of the motion [*Code Civ. Proc. § 437c(e)*; *see* discussion in *§ 537.33[2][b][i]* et seq.].

PRACTICE TIP:

Who Is "Sole Witness." The phrase "sole witness" is not expressly defined by statute. It is arguable that it includes not only the sole witness of a fact, but also the sole witness of a fact who is available to testify under *Evid. Code § 240*.

[b] Failure to State Legal Ground for Motion

Code Civ. Proc. § 437c requires the party seeking summary judgment to state with specificity in its moving papers each of the grounds of law on which the moving party is relying in contending the action has no merit or there is no defense to it [*Juge v. County of Sacramento (1993) 12 Cal. App. 4th 59, 68, 15 Cal. Rptr. 2d 598*]. If the parties' separate statements of material facts include an undisputed material fact that is dispositive of the action, but the moving party has overlooked its legal significance, the trial court may deny the motion even if the court recognizes the legal significance of the fact and knows it would entitle the party to summary judgment if it had been explicitly raised in the moving papers [*Juge v. County of Sacramento (1993) 12 Cal. App. 4th 59, 68, 15 Cal. Rptr. 2d 598* (granting summary judgment when undisputed facts showed no causation)].

The court does, however, have power under these circumstances to grant the motion on a ground not explicitly tendered by the moving party. Before granting the motion, the court must provide the opposing party an opportunity to respond to the ground of law identified by the court and a chance to show the existence of a triable issue of material fact as to that ground of law [*Juge v. County of Sacramento (1993) 12 Cal. App. 4th 59, 70, 15 Cal. Rptr. 2d 598*].

[c] Absence of Statement of Undisputed Facts or Unavailablity of Facts

The court may deny a motion in the following additional circumstances:

- It is not supported by the required separate statement of undisputed facts [*Code Civ. Proc. § 437c(b)(1)*; *see* discussion in *§ 537.21[3]*].

- It is shown that facts justifying opposition may exist but cannot be then presented [*Code Civ. Proc. § 437c(h)*; *see* discussion in *§ 537.36*]. While a mere continuance is the more likely result in this case, denial may be necessary, for example, when the continued date is less than thirty days before the date set for trial [*Code Civ. Proc. § 437c(a)*].

Despite the court's discretion under *Code Civ. Proc. § 437c(b)(1)* to deny a motion based on an inadequate separate statement, the court must first consider all the submitted papers as required by *Code Civ. Proc. § 437c(c)* to determine whether there are triable issues of fact and whether the moving party is entitled to summary judgment as a matter of law. However, this requirement does not require the court to grope its way through a maze of arguments and reams of documents, searching for obscure traces of triable issues of material fact [*Kulesa v. Castleberry (1996) 47 Cal. App. 4th 103, 113, 116-117, 54 Cal. Rptr. 2d 669* (reversing trial court's denial of motion where the most cursory review of the papers showed the motion to be utterly without factual or legal merit)].

[5] Denial With Opportunity to Amend Complaint

If summary judgment is granted on the ground that the complaint is legally insufficient, but it appears from the materials submitted in opposition to the motion that the plaintiff could state a cause of action, the trial court should give the plaintiff an opportunity to amend the complaint before entry of judgment [*College Hospital, Inc. v. Superior Court (1994) 8 Cal. 4th 704, 719 n.5, 34 Cal. Rptr. 2d 898, 882 P.2d 894* ; *Bostrom v. County of San Bernardino (1995) 35 Cal. App. 4th 1654, 1663, 42 Cal. Rptr. 2d 669*].

However, absent a request to amend, there is no occasion for the court to inquire about possible issues not raised by the

pleadings [*Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 885, 164 Cal. Rptr. 510, 610 P.2d 407*].

[6] Denial of Motion to Allow Discovery

Under appropriate circumstances, *Code Civ. Proc. § 437c(h)* authorizes the court to deny a motion for summary judgment or make any other order it deems just. For example, in *People v. $4,503 United States Currency (1996) 49 Cal. App. 4th 1743, 57 Cal. Rptr. 2d 467* , a forfeiture proceeding, the defendant, who repeatedly failed to appear for scheduled depositions, moved for summary judgment. The trial court concluded that because defendant was a fugitive from justice it had been impossible for the People to conduct discovery and denied defendant's motion for summary judgment without prejudice to renew the motion after discovery took place. The trial court was held to have authority under *Code Civ. Proc. § 437c(h)* to fashion the order that it did [*People v. $4,503 United States Currency (1996) 49 Cal. App. 4th 1743, 1746-1749, 57 Cal. Rptr. 2d 467*].

For discussion of continuances, as opposed to denial of the motion, under *Code Civ. Proc. § 437c(h)*, see *§ 537.36*.

[7] Denial Based on Issues Raised Outside of Pleadings

A plaintiff's motion for summary judgment is limited to the causes of action pled in the complaint [*Distefano v. Forester (2001) 85 Cal. App. 4th 1249, 1264-1265, 102 Cal. Rptr. 2d 813*]. In *Distefano*, the plaintiff sought recovery for injuries suffered while "off-roading." Defendant contended that plaintiff's action was barred by the doctrine of primary assumption of the risk, in that collisions were an inherent risk in the sport of "off-roading." Plaintiff's complaint pled only that defendant was negligent; it did not allege recklessness. On appeal, plaintiff argued that the evidence supported a claim of recklessness, which would avoid the defense of primary assumption of the risk. The court of appeal held that the trial court was correct in deciding the case based on the pleadings, and held that the plaintiff should have sought leave to amend the complaint prior to the hearing on the summary judgment motion [*Distefano v. Forester (2001) 85 Cal. App. 4th 1249, 1264-1265, 102 Cal. Rptr. 2d 813*].

[8] Special Rule in Cases of Public Design Immunity

The normal rules requiring denial of summary judgment if any triable issue of fact appears are not fully applicable in the case of a claim of design immunity under *Gov. Code § 830.6* [*Wyckoff v. State of California (2001) 90 Cal. App. 4th 45, 50-51, 108 Cal. Rptr. 2d 198*]. In a claim of design immunity, the defendant public entity is not required to prove that the design was a reasonable one. Instead, the defendant must only show some substantial evidence that a reasonable public employee or legislative body could have approved the design. Therefore, on a motion for summary judgment, the existence of a possible conflict in the evidence regarding the reasonableness of the design will not defeat summary judgment, as long as there is substantial evidence of reasonableness, even if contradicted [*Wyckoff v. State of California (2001) 90 Cal. App. 4th 45, 50-51, 108 Cal. Rptr. 2d 198* (affirming order granting State's motion for summary judgment)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentBurdens of Production & ProofGeneral OverviewCivil ProcedureSummary JudgmentBurdens of Production & ProofMovantsCivil ProcedureSummary JudgmentBurdens of Production & ProofNonmovantsCivil ProcedureSummary JudgmentStandardsLegal EntitlementCivil ProcedureSummary JudgmentStandardsMateriality

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47-537 California Forms of Pleading and Practice--Annotated § 537.35

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§ 537.35 Standard for Granting or Denying Summary Adjudication

The court is not to grant a motion for summary adjudication unless it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty [*Code Civ. Proc. § 437c(f)(2)*]. Other than this, *Section 437c(f)* does not expressly provide a standard for granting a motion for summary adjudication, but provides merely that a motion for summary adjudication "shall proceed in all procedural respects as a motion for summary judgment" [*Code Civ. Proc. § 437c(f)*; *see § 537.29*]. It therefore appears the standard for determining a motion for summary judgment [*see § 537.33[1]* (no triable issue) and *§ 537.34[1]* (triable issues exist)] also applies in determining whether to grant a motion for summary adjudication with respect to a cause of action, affirmative defense, claim for punitive damages, or issue of duty owed [*see Code Civ. Proc. § 437c(f)*; *Lazar v. Hertz Corp. (1999) 69 Cal. App. 4th 1494, 1507* ; *Certain Underwriters at Lloyd's of London v. Superior Court (1997) 56 Cal. App. 4th 952, 956-960, 65 Cal. Rptr. 2d 821* ; *Exxon Corp. v. Superior Court (1997) 51 Cal. App. 4th 1672, 1679, 60 Cal. Rptr. 2d 195* ; *Ojavan Investors, Inc. v. California Coastal Com. (1997) 54 Cal. App. 4th 373, 385, 62 Cal. Rptr. 2d 803* ; and discussion in *§ 537.17[1]* et seq.; *see also Kendall-Jackson Winery, Ltd. v. Superior Court (1999) 76 Cal. App. 4th 970, 977-978, 90 Cal. Rptr. 2d 743* (standard applied to summary adjudication motion concerning affirmative defense); *Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners (1997) 52 Cal. App. 4th 867, 881, 60 Cal. Rptr. 2d 830* (same burden of proof as for summary judgment applied)].

For a form of order granting summary adjudication, see *§ 537.84*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentBurdens of Production & ProofGeneral OverviewCivil ProcedureSummary JudgmentPartial Summary JudgmentsCivil ProcedureSummary JudgmentStandardsGeneral Overview

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§ 537.36 Continuance When Opposing Facts Cannot Be Presented

If it appears from the affidavits or declarations submitted in opposition to the motion that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits or declarations to be obtained or discovery to be had, or may make such other order as may be just [*Code Civ. Proc. § 437c(h)*; *see People v. $4,503 United States Currency (1996) 49 Cal. App. 4th 1743, 1746-1749, 57 Cal. Rptr. 2d 467* (court had authority to deny motion without prejudice when moving defendant had repeatedly failed appear for depositions); *see also § 537.34[6]*]. An application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition is due [*Code Civ. Proc. § 437c(h)*].

The purpose of the Code Civ. Proc. § 473c(h) affidavit requirement is to inform the court of the outstanding discovery that is necessary to resist the summary judgment motion [*Bahl v. Bank of America (2001) 89 Cal. App. 4th 389, 396, 107 Cal. Rptr. 2d 270* ; *Scott v. CIBA Vision Corp. (1995) 38 Cal. App. 4th 307, 325-326, 44 Cal. Rptr. 2d 902*].

There is an added provision in *Code Civ. Proc. § 437c* providing that if, after granting a continuance to allow specified additional discovery, the court determines that the party seeking summary judgment has unreasonably failed to allow the discovery to be conducted, the court shall grant a continuance to permit the discovery to go forward or deny the motion for summary judgment or summary adjudication [*Code Civ. Proc. § 437c(i)*].

PRACTICE TIP:

Required Showing for Continuance. If a continuance is sought by the opposing party on the ground that facts justifying opposition may exist but cannot then be presented, this request must be supported by an affidavit or declaration stating the reasons why the opposing party cannot then present that evidence, as well as the estimated time required and the steps proposed to obtain the evidence [*see, e.g.,* *Davis v. Nadrich (2009) 174 Cal. App. 4th 1, 8, 94 Cal. Rptr. 3d 414* ; *Cooksey v. Alexakis (2004) 123 Cal. App. 4th 246, 254, 19 Cal. Rptr. 3d 810* ; *Wachs v. Curry (1993) 13 Cal. App. 4th 616, 622-624, 16 Cal. Rptr. 2d 496* ; *see also* *American Continental Ins. Co. v. C & Z Timber Co. (1987) 195 Cal. App. 3d 1271, 1280, 241 Cal. Rptr. 466*]. The affidavit or declaration is essential; it is not enough merely to raise the issue in the opposing memorandum [*Hill v. Physicians & Surgeons Exchange (1990) 225 Cal. App. 3d 1, 7-8, 274 Cal. Rptr. 702*].

An attorney's declaration in support of a request for a continuance that merely states that the attorney has not yet deposed the parties is not sufficient to support a continuance. The declaration needs to explain what efforts were made to take the necessary depositions and why they could not have been taken earlier [*see, e.g.,* *Cooksey v. Alexakis (2004) 123 Cal. App. 4th 246, 254, 19 Cal. Rptr. 3d 810* (continuance for stated purpose of taking depositions was not warranted when declaration did not explain what efforts had been made to take depositions or why they had not been taken sooner); *Desaigoudar v. Meyercord (2003) 108 Cal. App. 4th 173, 191, 133 Cal. Rptr. 2d 408* (showing of discovery diligence is required for continuance); *A & B Painting & Drywall, Inc. v. Superior Court (1994) 25 Cal. App. 4th 349, 356-357, 30 Cal. Rptr. 2d 418*]. Moreover, it is incumbent on the party opposing the summary judgment motion to show by affidavit or declaration that the proposed discovery could reasonably lead to facts essential to justify opposition to the motion [*Scott v. CIBA Vision Corp. (1995) 38 Cal. App. 4th 307, 326, 44 Cal. Rptr. 2d 902*]. Thus, if the party opposing the motion seeks a continuance, but fails to submit a supporting affidavit or declaration, the conditions of Code Civ. Proc. § 473c(h) have not been met and a continuance is not mandatory [*Scott v. CIBA Vision Corp. (1995) 38 Cal. App. 4th 307, 313-314, 326, 44 Cal. Rptr. 2d 902* ; *see also* *Thatcher v. Lucky Stores, Inc. (2000) 79 Cal. App. 4th 1081, 1083, 94 Cal. Rptr. 2d 575* (trial court was not required to continue summary judgment motion because request was not included in timely opposition to summary judgment motion and plaintiffs failed to establish that facts essential to justifying opposition might exist but could not be presented before hearing); *Waisbren v. Peppercorn Productions, Inc. (1995) 41 Cal. App. 4th 246, 263, 48 Cal. Rptr. 2d 437* (trial court did not abuse discretion in denying plaintiff's request for continuance when plaintiff in opposing motion did not explain how outstanding discovery was related to issues raised by motion and motion was based on issue solely within plaintiff's knowledge so that plaintiff did not need discovery from defendants to dispute or address that issue)].

One court has questioned whether the lack of diligence alone should make or break a continuance request under *Code Civ. Proc § 437c(h)*, while noting that the trial judge may deny the request for continuance of the motion when lack of diligence results in a party's having insufficient information to know if facts essential to justify opposition may exist, and the party is therefore unable to provide the requisite affidavit [*Bahl v. Bank of America (2001) 89 Cal. App. 4th 389, 396, 107 Cal. Rptr. 2d 270* (denial of plaintiff's request for continuance abused court's limited discretion where plaintiff provided affidavit informing court of outstanding discovery matters and why essential facts could not be presented at that time, transcripts of depositions essential to justify opposition had not yet been received from court reporter, defendant produced over 600 pages of documentation after plaintiff filed her opposition to motion, defendant did not suggest that it suffered any prejudice on account of plaintiff's due diligence deficit, and parties had provided no indication that there was special reason to protect trial date)].

It has been held that a continuance is not necessarily required simply because the opposing party claims that to file substantive opposition might violate his right against self incrimination; rather, the opposing party must show that his *fifth amendment* rights would in fact be violated and that he was unable to present any other substantive opposition to the motion [*Fisher v. Gibson (2001) 90 Cal. App. 4th 275, 283-284, 109 Cal. Rptr. 2d 145*].

It has been held improper for the trial court to consider as a factor in denying a continuance to a plaintiff opposing a

motion for summary judgment that granting the continuance would permit a disgruntled plaintiff to take a voluntary dismissal in the hope of drawing a more sympathetic judge upon refiling the complaint, since this concern would militate against summary judgment continuances under any circumstances. Moreover this concern has been deemed unfounded because were a plaintiff to dismiss his or her complaint after a *Code Civ. Proc. § 437c(h)* continuance had been granted, the court would retain jurisdiction to rule on the summary judgment motion [*Bahl v. Bank of America (2001) 89 Cal. App. 4th 389, 396, 107 Cal. Rptr. 2d 270]* .

At least one court has held that the inquiry does not end once the court determines that a continuance is not mandatory under *Code Civ. Proc. § 437c(h)*. The court must then determine whether the party requesting the continuance has nonetheless established good cause therefor. This determination is within the court's discretion [*Lerma v. County of Orange (2004) 120 Cal. App. 4th 709, 714, 15 Cal. Rptr. 3d 609* (court held continuance was clearly necessary when plaintiff's attorney was served with a summary judgment motion on the day he was admitted to the hospital for bladder cancer surgery and was unaware that he had been served with motion until he was released from the hospital, two business days before the response was due)].

Code Civ. Proc. § 437c(h) has no comparable provision for the moving party. The moving party, however, controls when the motion is brought and, except for expert witnesses, will have had a chance to depose the necessary witnesses prior to noticing the motion [*see St. Mary Medical Center v. Superior Court (1997) 50 Cal. App. 4th 1531, 1539-1540* (case decided in context of defendants noticing the deposition of plaintiff's expert and at same time taking their motion for summary judgment off calendar; *see also § 537.30*)].

For a form of order with optional language granting a continuance, see *§ 537.85*.

When the moving party raises new arguments in its reply papers, given these 12th-hour circumstances, the opposing party has been held entitled to move orally at the hearing for a postponement to give it sufficient time to respond [*Mediterranean Construction Co. v. State Farm Fire & Casualty Co. (1998) 66 Cal. App. 4th 257, 264, 77 Cal. Rptr. 2d 781* (new arguments in moving party's papers regarding various coverage exclusions)]. Similarly, the court in *Mediterranean* noted that an oral motion for a continuance can be made at the hearing to allow sufficient time to amend a pleading when it becomes apparent at that time that defects in the pleading can be remedied [*Mediterranean Construction Co. v. State Farm Fire & Casualty Co. (1998) 66 Cal. App. 4th 257, 264, 77 Cal. Rptr. 2d 781*].

When an adverse tentative ruling has been announced, hearing commenced, and a continuance has been granted under *Code Civ. Proc. § 437c(h)* for the express and exclusive purpose of permitting the plaintiff an opportunity to produce opposition evidence, the plaintiff cannot voluntarily dismiss the action without prejudice [*Mary Morgan, Inc. v. Melzark (1996) 49 Cal. App. 4th 765, 768-769, 57 Cal. Rptr. 2d 4*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentOppositionMotions for Additional DiscoveryCivil ProcedureSummary JudgmentTime Limitations

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 537 SUMMARY JUDGMENT
PART II. LEGAL BACKGROUND

47-537 California Forms of Pleading and Practice--Annotated § 537.37

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§ 537.37 Statement of Reasons for Ruling

[1] Denying Motion

If the court denies the motion on the ground that there is a triable issue as to one or more material facts, it must, by written or oral order, specify one or more material facts raised by the motion as to which it has determined that a triable controversy exists [*Code Civ. Proc. § 437c(g)*; *see Payless Drug Store v. Superior Court (1993) 20 Cal. App. 4th 277, 279, 24 Cal. Rptr. 2d 506* (judge orally referred to the opposition papers when asked what facts were in dispute; writ of mandate issued directing trial court to make appropriate order); *Exxon Corp. v. Superior Court (1997) 51 Cal. App. 4th 1672, 1679, 60 Cal. Rptr. 2d 195* (order held to suffice procedurally despite objection that it insufficiently specified what evidence was in conflict given failure to demand greater specificity in the trial court)]. The determination that a triable controversy exists must specifically refer to the evidence in the supporting or opposing papers which indicates the existence of such triable controversy [*Code Civ. Proc. § 437c(g)*].

ILLUSTRATION:

Specific Reference to Evidence. An order denying a summary judgment motion merely recites the existence of a factual issue and lists evidentiary documents submitted in support and in opposition to the motion. Is the order sufficient under *Code Civ. Proc. § 437c(g)*? No. The order must refer to specific items of supporting and opposing evidence that show the existence of a factual issue [*see Continental Ins. Co. v. Superior Court (1985) 165 Cal. App. 3d 1069, 1071-1072, 212 Cal. Rptr. 140*].

ILLUSTRATION: General Statement Insufficient. In its written order denying summary judgment, a court makes a general statement that the liability of the moving party is at issue. Is the order sufficient under *Code Civ. Proc. § 437c(g)*? No. The order fails to comply with *Code Civ. Proc. § 437c(g)* because it does not adequately specify the material facts as to which there is a triable issue and does not in any manner specify the evidence which indicates that such triable controversy exists as required by statute [*Beatrice Cos. v. Superior Court (1986) 182 Cal. App. 3d 525, 527-528, 227 Cal. Rptr. 316*].

[2] Granting Motion

If the court grants the motion on the ground that there is no triable issue of material fact, the court must [*Code Civ. Proc. § 437c(g)*]:

- Specify the reasons for its determination.

- Specifically refer in the order to the evidence proffered in support of and, if applicable, in opposition to, the motion that indicates that no triable issue exists.

The court must also state its reasons for any other determination. The court must record its determination by court reporter or written order [*Code Civ. Proc. § 437c(g)*]. A key objective for the statement of reasons under *Code Civ. Proc. § 437c(g)* is to allow for meaningful appellate review [*Wedeck v. Unocal Corp. (1997) 59 Cal. App. 4th 848, 864, 69 Cal. Rptr. 2d 501*]. Although a court's failure to provide a sufficient statement of reasons is not automatic grounds for reversal, since it is the validity of the ruling which is reviewable and not the reasons for it, the trial court's failure to provide a statement of reasons was not harmless error where the issues litigated through the summary judgment motion were complex, and the appellate court was precluded from undertaking a meaningful review of the issues, including a decision of the trial court on credibility issues [*Santa Barbara Pistachio Ranch v. Chowchilla Water Dist. (2001) 88 Cal. App. 4th 439, 448-449, 105 Cal. Rptr. 2d 856* (court granted summary judgment to defendant as to cause of action of one plaintiff, and denied it as to another plaintiff; there were facts supporting position of both plaintiffs and defendant, and, at original hearing on motion, court identified contradictions in declarations prepared for motion as compared to testimony given in deposition)]. However, the trial court's statement that it was relying on all the evidence has been treated as harmless error when the appellate court's independent review establishes the validity of the judgment [*see* *Goldrich v. Natural Y Surgical Specialties, Inc. (1994) 25 Cal. App. 4th 772, 782, 31 Cal. Rptr. 2d 162* ; *see also* *Carnes v. Superior Court (2005) 126 Cal. App. 4th 688, 692, 23 Cal. Rptr. 3d 915* (in granting defendant's motion for summary judgment, judge merely signed order prepared by defense counsel without stating his own reasons for ruling; although appellate court disapproved of judge's actions, judge technically complied with *Code Civ. Proc. § 437c(g)* in adopting counsel's order as his own and therefore no reversal was required); *Tahoe Vista Concerned Citizens v. Counter of Placer (2000) 81 Cal. App. 4th 577, 594 n.7, 96 Cal. Rptr. 2d 880* (because appellate court reviews grant of summary judgment de novo, plaintiff's arguments citing *Code Civ. Proc. § 437c(g)* to fault trial court's decision for failing to distinguish it was ruling on affirmative defense and not on merits of cause of action, and for failing to specify reasons for its ruling and refer to evidence showing no triable issue of fact exist, were of no moment)].

[3] Correcting Erroneous Ruling on Motion for Clarification

Until judgment is entered, the trial court has the power to change its decision as it may determine. On its own motion, or on motion of a party, it may correct an erroneous ruling [*Bernstein v. Consolidated American Ins. Co. (1995) 37 Cal. App. 4th 763, 774, 43 Cal. Rptr. 2d 817*]. Thus, for example, when a trial court in initially denying a motion for summary adjudication failed to articulate the basis for its ruling in accordance with *Code Civ. Proc. § 437c(g)* and the opposing party's proposed order did not rectify these deficiencies, it was held appropriate for the party who had brought the motion to object to the proposed order and move for clarification of the court's minute order. The trial court in

attempting to identify disputed factual issues requiring a trial as required by *Code Civ. Proc. § 437c(g)* was unable to do so. Consequently, it corrected its prior erroneous ruling denying the summary adjudication ruling by granting the motion for clarification and motion for summary adjudication and in so doing met the requirements of *Code Civ. Proc. § 437c*. The court in taking this action was not entertaining a motion for reconsideration under *Code Civ. Proc. § 1008*, but was correcting an erroneous ruling on its own motion [*Bernstein v. Consolidated American Ins. Co. (1995) 37 Cal. App. 4th 763, 773-774, 43 Cal. Rptr. 2d 817*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentAppellate ReviewStandards of ReviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral Overview

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§ 537.38 Sanctions for Bad Faith or Delay

[1] In Presentation of Affidavits

If, at any time, the court determines that any of the affidavits (or declarations under *Code Civ. Proc. § 2015.5*) are presented in bad faith or solely for purposes of delay, the court must order the party presenting such affidavits to pay the other party the amount of the reasonable expenses which the filing of the affidavits cau sed the other party to incur [*Code Civ. Proc. § 437c(j)*; *see* Winick Corp. v. County Sanitation Dist. No. 2 *(1986) 185 Cal. App. 3d 1170, 1176, 230 Cal. Rptr. 289*]. "Reasonable expenses" within the meaning of this subsection does not include attorney's fees; rather, it includes recovery of expenses such as expert fees and service fees [*Collins v. State Dept. of Transportation (2003) 114 Cal. App. 4th 859, 870, 8 Cal. Rptr. 3d 132*].

Sanctions may not be imposed pursuant to *Code Civ. Proc. § 437c(j)* except on notice contained in a party's papers, or on the court's own noticed motion, and after an opportunity to be heard [*Code Civ. Proc. § 437c(j)*]. A separate noticed motion for sanctions is not required so long as notice is contained in other papers [*Code Civ. Proc. § 437c(j)*].

For a form of motion for order imposing sanctions, see *§ 537.80*.

[2] In Making or Opposing Motion

Parties may also seek to recover reasonable expenses, including attorney's fees, on the more general ground that the motion for summary judgment or opposition to the motion was made in bad faith in that it was frivolous or solely intended to cause unnecessary delay [*Code Civ. Proc. § 128.5(a)*; *see Winick Corp. v. County Sanitation Dist. No. 2 (1986) 185 Cal. App. 3d 1170, 1176, 230 Cal. Rptr. 289*]. If so, notice must be given in the moving or responding papers [*Code Civ. Proc. § 128.5(c)*]. *Code Civ. Proc. § 128.5* applies only to actions filed prior to January 1, 1995. For actions filed thereafter, *Code Civ. Proc. § 128.7* imposes sanctions for improper motions, as defined by that section [*see Code Civ. Proc. § 128.7(i), (j)* (providing sanctions for frivolous tactics in actions commenced after January 1, 1995)].

For discussion of sanctions based on these sections, see Ch. 510, *Sanctions* .

[3] In Action for Indemnity or Contribution or Under California Tort Claims Act

In any civil action for indemnity or contribution, or in any civil proceeding under the California Tort Claims Act (*Gov. Code § 810 et seq.*), at the time that a defendant's motion for summary judgment is granted, and that defendant's motion made prior to the entry of judgment, the court, as fact finder, shall determine whether the complaint defended against was brought with reasonable cause and in good faith. If the court finds in favor of the moving defendant on this issue, it shall further determine and award all reasonable and necessary defense costs incurred [*Code Civ. Proc. § 1038(a), (c), (d)*].

An award of defense costs under *Code Civ. Proc. § 1038* can only be made on notice contained in a party's papers and following an opportunity to be heard [*Code Civ. Proc. § 1038(a)*]. Defense costs include [*Code Civ. Proc. § 1038(b)*]:

- Attorney's fees.
- Expert witness fees.
- Other fees for expert services or consultation.

A motion on this ground waives any right to seek damages for malicious prosecution [*Code Civ. Proc. § 1038(c)*].

[4] Review of Order Imposing Sanctions

Other than in a limited civil case, an appeal may be taken from a superior court's interlocutory judgment or order directing payment of monetary sanctions by a party or attorney if the amount exceeds $5000 [*Code Civ. Proc. §§ 904.1(a)(11), (12)*]. Sanction orders or judgments imposing lesser sanctions against a party or an attorney for a party may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed on petition for extraordinary writ [*see Code Civ. Proc. § 904.1(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentSupporting MaterialsAffidavitsCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesGeneral OverviewCivil ProcedureSanctionsBaseless FilingsBad Faith MotionsCivil ProcedureAppealsReviewabilityGeneral OverviewTortsPublic Entity LiabilityLiabilityState Tort Claims ActsRemedies

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47-537 California Forms of Pleading and Practice--Annotated § 537.39

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§ 537.39 Motion for Reconsideration

Prior to the entry of judgment, a party may move for reconsideration of the order or make a renewed motion for summary judgment or summary adjudication, so long as the motion is supported by new or different facts, circumstances, or law [*Code Civ. Proc. §§ 437c(f)(2), (s), 1008*; *see Schulze v. Schulze (1953) 121 Cal. App. 2d 75, 83, 262 P.2d 646* ; *cf. Liberty Mutual Ins. Co. v. Superior Court (1997) 58 Cal. App. 4th 617, 619-623, 68 Cal. Rptr. 2d 219* (second motion based on insurer's duty to defend was not motion for reconsideration)]. The court may properly deny a motion for reconsideration that is based on a witness's second declaration that contradicts the witness's previous deposition testimony [*Nunez v. R'Bibo (1989) 211 Cal. App. 3d 559, 564, 260 Cal. Rptr. 1]* .

The specific requirements of *Cal. Civ. Proc. § 437c(f)(2)*, rather than the general provisions of *Code Civ. Proc. § 1008*, govern a motion for summary judgment based on issues asserted in an earlier summary adjudication motion that was denied [*Le Francois v. Goel (2005) 35 Cal. 4th 1094, 1099, 29 Cal. Rptr. 3d 249* ; *Schachter v. Citigroup, Inc. (2005) 126 Cal. App. 4th 726, 739, 23 Cal. Rptr. 3d 920* ; *Bagley v. TRW, Inc. (1999) 73 Cal. App. 4th 1092, 1096 n.3, 86 Cal. Rptr. 2d 909]* . For discussion, see *§ 537.34[3]*. *CCP § 437c(f)(2)* does not, however, restrict the court's ability to reconsider its prior interim rulings on its own motion [*Le Francois v. Goel (2005) 35 Cal 4th 1094, 1105, 29 Cal Rptr. 3d 249]* .

In contrast to the independent review on appeal of the summary judgment motion itself [*see § 537.43, below*], appellate

courts review a trial court's decision to allow a party to file a renewed or subsequent motion for summary judgment for an abuse of discretion [*Nieto v. Blue Shield of California Life & Health Ins. (2010) 181 Cal. App. 4th 60, 72, 103 Cal. Rptr. 3d 906]* .

For further discussion and forms relating to *Code Civ. Proc. § 1008*, see Ch. 374, *Motions to Reconsider and Renewed Motions* . For the distinction concerning a motion for clarification, see *§ 537.37[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral Overview

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§ 537.40 Motion for New Trial

A party may also seek relief from summary judgment in the trial court by moving for a new trial in accordance with *Code Civ. Proc. § 659* [*see, e.g., Wall Street Network, Ltd. v. New York Times Co. (2008) 164 Cal. App. 4th 1171, 1192, 80 Cal. Rptr. 3d 6* (order denying motion for new trial affirmed); *Kohan v. Cohan (1988) 204 Cal. App. 3d 915* (order granting motion for new trial affirmed); *Jacobs v. Retail Clerks Union, Local 1222 (1975) 49 Cal. App. 3d 959* (summary judgment affirmed after denial of motion for new trial); *see also Doe v. United Airlines (2008) 160 Cal. App. 4th 1500, 1513, 73 Cal. Rptr. 3d 541* (motion for new trial denied; plaintiff failed to show newly discovered evidence material to her case); *Tortorella v. Castro (2006) 140 Cal. App. 4th 1, 10, 43 Cal. Rptr. 3d 853* (order granting new trial after grant of summary judgment upheld if it should have been granted based on any ground raised in motion); *Victor v. Hedges (1999) 77 Cal. App. 4th 229, 245, 91 Cal. Rptr. 2d 466* (noting authority for motion for new trial following grant of summary judgment, but finding reversal based on trial judge's ruling that motion would not lie after summary judgment would serve no purpose under circumstances); *Zavala v. Arce (1997) 58 Cal. App. 4th 915, 924, 68 Cal. Rptr. 2d 571* (appeal from order denying new trial treated as appeal from the summary judgment)]. Technically, since there was no trial, there can be no motion for a new trial, and the net result of granting the motion is simply denial of the motion for summary judgment. Nonetheless, in these circumstances, appellate courts have either construed the trial court's order as an appealable order granting new trial or treated the appeal as a petition for mandate [*Waschek v. Department of Motor Vehicles (1997) 59 Cal. App. 4th 640, 643 n.4, 69 Cal. Rptr. 2d 296*].

For discussion and forms relating to motions for new trial, see *Ch. 371, Motions After Trial, § 371.60*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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§ 537.41 Motion to Vacate Judgment

There may be circumstances that enable a party to move to vacate a summary judgment on the grounds of mistake, inadvertence, surprise, or excusable neglect under *Code Civ. Proc. § 473(b)* [*see, e.g., Uriate v. United States Pipe & Foundry Co. (1996) 51 Cal. App. 4th 780, 791, 59 Cal. Rptr. 2d 332* ; *cf. Garcia v. Hejmadi (1997) 58 Cal. App. 4th 674, 681-685, 68 Cal. Rptr. 2d 228* (type of mistake, inadvertence, surprise or excusable neglect that might have permitted order granting summary judgment to have been vacated was not present in record)]. However, the mandatory provision of *Code Civ. Proc. § 473(b)* that requires a court to vacate a default, default judgment, or dismissal resulting from attorney mistake, inadvertence, surprise, or neglect does not apply to summary judgments because a summary judgment is neither a "default," a "default judgment," nor a "dismissal" within the meaning of *Code Civ. Proc. § 473(b)* [*English v. IKON Business Solutions, Inc. (2001) 94 Cal. App. 4th 130, 143-149, 114 Cal. Rptr. 2d 93*]. For discussion and forms relating to motions for relief from a judgment based on mistake, inadvertence, surprise, or excusable neglect, see Ch. 489, *Relief From Judgment and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentExcusable Neglect & MistakesGeneral OverviewCivil ProcedureJudgmentsRelief From

JudgmentMotions to Vacate

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§ 537.42 Entry of Judgment

A judgment is entered in the court's judgment book or as provided in *Code Civ. Proc. § 668.5* [*Code Civ. Proc. § 668*]. The time for entry of judgment by the clerk is governed by *Code Civ. Proc. § 664*. While *Code Civ. Proc. § 664* does not expressly apply to a judgment rendered without a trial, it could be applied if a summary judgment proceeding were to be treated as analogous to a trial by the court. In that case, the clerk is required to enter judgment immediately after the court's decision or formal judgment is filed [*Code Civ. Proc. § 664*; *see also Code Civ. Proc. § 635*; *Cal. Rules of Ct., Rule 3.1590(f)*].

In any contested action or special proceeding, the party submitting an order or judgment for entry is required to serve notice of entry of judgment on all parties and file the original of the notice with proof of service. This requirement does not apply in proceedings for dissolution of marriage, annulment, or legal separation, small claims actions, or any action or proceeding in which the prevailing party is not represented by counsel [*Code Civ. Proc. § 664.5(a)*].

"Judgment," as used in *Code Civ. Proc. § 664.5*, is defined as including any judgment, decree, or signed order from which an appeal lies [*Code Civ. Proc. § 664.5(c)*]. "Contested" is not defined in *Code Civ. Proc. § 664.5* or in any related statute, but appears to be intended to exclude default cases and not cases that are terminated without trial pursuant to a pretrial proceeding such as summary judgment, which is opposed by the adverse party.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewGovernmentsCourtsClerks of Court

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§ 537.43 Review of Summary Proceeding on Appeal

[1] Availability of Appeal

[a] When Summary Judgment Is Granted

A summary judgment entered under *Code Civ. Proc. § 437c* is an appealable judgment as in other cases [*Code Civ. Proc. § 437c(m)*]. That is, it is appealable when it constitutes a final judgment [*see De Grandchamp v. Texaco, Inc. (1979) 100 Cal. App. 3d 424, 431, 160 Cal. Rptr. 899 Code Civ. Proc. §§ 904.1(a)(1), 904.2(a)*].

A summary judgment cannot be entered as a final judgment unless it terminates the action, except when "a separate judgment may properly be awarded in the action" [*Code Civ. Proc. § 437c(k)*]. A separate judgment may properly be awarded, and an appeal may lie from an otherwise interlocutory summary judgment, when, for example, the summary judgment disposes of all issues to be determined between at least two parties [*see Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 740-741, 29 Cal. Rptr. 2d 804, 872 P.2d 143* (dicta; holding that appeal may not be taken from a judgment that fails to complete the dispostion of all causes of action pending between parties even if the causes of action have been ordered to be tried separately or may be characterized as "separate and independent" from those remaining, and disapproving cases that had allowed appeal in that situation)].

In the interest of justice and to prevent unnecessary delay, a reviewing court may choose to treat an appeal from the

order granting summary judgment as anappeal from a final judgment when a judgment has been entered, although such an order is technically nonappealable [*Zavala v. Arce (1997) 58 Cal. App. 4th 915, 924 n.7, 68 Cal. Rptr. 2d 571 (Fourth Dist., Div. One)* ; *Allabach v. Santa Clara County Fair Assn. (1996) 46 Cal. App. 4th 1007, 1010-1011, 54 Cal. Rptr. 2d 330 (Sixth Dist.)* *Demyer v. Costa Mesa Mobile Home Estates (1995) 36 Cal. App. 4th 393, 399 n.14, 42 Cal. Rptr. 2d 260 (Fourth Dist., Div. Three)* ; *Knight v. City of Capitola (1992) 4 Cal. App. 4th 918, 923 n.1, 6 Cal. Rptr. 2d 874 (Sixth Dist.)* ; *Rivera v. Southern Pacific Transportation Co. (1990) 217 Cal. App. 3d 294, 297, 266 Cal. Rptr. 11 (First Dist., Div. One)*]. Moreover, in the interest of justice and judicial economy to obviate possible multiple trials, a reviewing court may exercise its discretion to treat a plaintiff's technically nonappealable notice of appeal from a minute order granting the defendant summary judgment as a petition for writ of mandate when entry of a final appealable judgment against the defendant is prevented because plaintiff's main action is still proceeding against a codefendant and the defendant in whose favor summary judgment was granted has a cross complaint pending against that codefendant [*Johnson v. Superior Court (2006) 143 Cal. App. 4th 297, 304, 49 Cal. Rptr. 3d 52* ; *Lopez v. Superior Court (1996) 45 Cal. App. 4th 705, 710 n.1, 52 Cal. Rptr. 2d 821 (Second Dist., Div. Seven)*].

ILLUSTRATION:

Nonappealable Order Deemed Appealable. The trial court issues an "Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment." May such an order be appealable? Yes. The order may be construed as a judgment. The better practice, however, is to title a judgment as such and to use language specifically stating that judgment "is" entered [*see* *Rogness v. English Moss Joint Ventures (1987) 194 Cal. App. 3d 190, 192 n.2, 239 Cal. Rptr. 387 (First Dist., Div. 4)* ; *see also* *San Francisco Unified School Dist. v. W.R. Grace & Co. (1995) 37 Cal. App. 4th 1318, 1322 n.1, 44 Cal. Rptr. 2d 305* (First Dist., Div. Four; order granting summary judgment not appealable order; however, ordergranting summary judgment purporting to constitute judgment construed as appealable judgment)].

PRACTICE TIP: Trend Toward Requiring Perfected Appeal. Courts have been increasingly reluctant to treat a nonappealable order as appealable or to amend a nonappealable order to make it an appealable judgment of dismissal [*see, e.g.,* *Jordan v. Malone (1992) 5 Cal. App. 4th 18, 22-23, 6 Cal. Rptr. 2d 454 (Fifth District panel dismissed purported appeal from tentative written decision)* ; *Modica v. Merin (1991) 234 Cal. App. 3d 1072, 1074, 285 Cal. Rptr. 673* (Third District panel dismissed appeal from order granting summary judgment after plaintiff failed to take opportunity to have judgment entered)]. In the case of an unperfected appeal from an order sustaining a demurrer, the Second District Court of Appeal, Division Seven agreed to "save" the appeal, but served notice that it would not "bail out" careless attorneys in the future [*Cohen v. Equitable Life Assurance Society (1987) 196 Cal. App. 3d 669, 671, 242 Cal. Rptr. 84* ; *see also* *Hill v. City of Long Beach (1995) 33 Cal. App. 4th 1684, 1695-1696, 40 Cal. Rptr. 2d 125 (Second Dist., Div. Five)*]. This is not a universal development, however, and counsel should be aware of practice in the relevant appellate district. For example, the Fourth District, Division Four, rejected *Modica* on the basis that sending the appellant back to the trial court to have a judgment entered and then to appeal from the judgment was a waste of time [*Francis v. Dun & Bradstreet Inc. (1992) 3 Cal. App. 4th 535, 539, 4 Cal. Rptr. 2d 361*].

The ultimate responsibility for perfecting an appeal rests with the appealing party [*Jordan v. Malone (1992) 5 Cal. App. 4th 18, 21, 6 Cal. Rptr. 2d 454*].

An opposing party that does not file any opposition to a motion for summary judgment may, under the right circumstances, be deemed to waive a right to appeal [*Schumacher v. Worcester (1997) 55 Cal. App. 4th 376, 379 n.4, 64 Cal. Rptr. 2d 1* (waiver not found under circumstances of case)].

[b] When Summary Adjudication Is Granted

The one final judgment rule applies in California. Parties will not be allowed to employ the artifice of trying to create an appealable order from an otherwise nonappealable grant of summary adjudication by dismissing the remaining causes of action without prejudice but with a waiver of applicable time bars [*Don Jose's Restaurant, Inc. v. Truck Ins. Exchange (1997) 53 Cal. App. 4th 115, 116* (summary adjudication disposed of two of eleven cause of action); *see Jackson v. Wells Fargo Bank (1997) 54 Cal. App. 4th 240, 244, 62 Cal. Rptr. 2d 679* (following *Don Jose's Restaurant, Inc.*); *see also Four Point Entertainment, Inc. v. New World Entertainment, Ltd. (1997) 60 Cal. App. 4th 79, 83, 70 Cal. Rptr. 2d 82* (following *Don Jose's Restaurant, Inc.* and *Jackson*)].

Under the proper factual circumstances, however, an order granting summary adjudication may be appealable. When a trial court's order granting summary adjudication as to one cause of action effectively disposes of the case, appeal is proper [*Belio v. Panorama Optics, Inc. (1995) 33 Cal. App. 4th 1096, 1101-1102, 39 Cal. Rptr. 2d 737* ; *see California Ass'n of Psychology Providers v. Rank (1990) 51 Cal. 3d 1, 9, 270 Cal. Rptr. 796, 793 P.2d 2*]. For discussion of review by mandate, see *§ 537.44[2]*. It is not the form of the decree but the substance and effect of the adjudication that determines whether a decree is interlocutory and nonappealable, or final and appealable [*Belio v. Panorama Optics, Inc. (1995) 33 Cal. App.4th 1096, 1101, 39 Cal. Rptr. 2d 737* ; *see Lyon v. Goss (1942) 19 Cal. 2d 659, 669-670, 123 P.2d 11*].

Thus, it was held to be appropriate to allow plaintiff to appeal an order granting summary adjudication for defendant on one cause of action, for involuntary dissolution of a corporation, when the other two causes of action, for an accounting and to preserve corporate assets, were ancillary to the first one [*Belio v. Panorama Optics, Inc. (1995) 33 Cal. App. 4th 1096, 1099, 1102, 39 Cal. Rptr. 2d 737*].

[c] When Summary Judgment or Summary Adjudication Is Denied

Orders denying a motion for summary judgment or denying a motion for summary adjudication are not appealable [*see Federal Deposit Inc. Corpt. v. Dintino (2008) 167 Cal. App. 4th 333, 343, 84 Cal. Rptr. 3d 38* ; *Gaillard v. Natomas Co. (1989) 208 Cal. App. 3d 1250, 1255 n.1, 256 Cal. Rptr. 702* (decided under former *Code Civ. Proc. § 437c(f)*, which permitted summary adjudication of "issues"); *Mesnick v. Caton (1986) 183 Cal. App. 3d 1248, 1255, 228 Cal. Rptr. 779* ; *Holmes v. California State Auto. Assn. (1982) 135 Cal. App. 3d 635, 640, 185 Cal. Rptr. 521*]. For discussion concerning review of these orders, see *§ 537.44[1]*.

[2] Standard of Review

[a] Limited Use of Abuse of Discretion Standard

The correct standard for reviewing a summary judgment is independent review [*Johnson v. City of Loma Linda (2000) 24 Cal. 4th 61, 65-68, 99 Cal. Rptr. 2d 316* ; *Angell v. Peterson Tractor, Inc. (1994) 21 Cal. App. 4th 981, 985-986, 26 Cal. Rptr. 2d 541* ; *Saldana v. Globe-Weis Systems Co. (1991) 233 Cal. App. 3d 1505, 1512-1514, 285 Cal. Rptr. 385* (noting that many cases continued to use abuse of discretion standard after Legislature amended Section 437c in 1973 to preclude the use of discretion in most situations, but that the appropriate standard was not a contested issue in those cases); *see also Lindstrom v. Hertz Corp. (2000) 81 Cal. App. 4th 644, 648, 96 Cal. Rptr. 2d 874* (de novo review; standard of review of grant of summary adjudication of issues is same as that applied to summary judgments); *Lazar v. Hertz Corp. (1999) 69 Cal. App. 4th 1494, 1507* (on appeal from judgment after order granting summary adjudication, appellate court independently reviews trial court record)].

Review of a summary judgment has been held to be de novo even when based on a trial court ruling that is normally sustained if supported by substantial evidence [*see Johnson v. Cityof Loma Linda (2000) 24 Cal. 4th 61, 67-68, 99 Cal. Rptr. 2d 316*]. For example, the Supreme Court has held that a court of appeal erred by reviewing a trial court ruling on laches by the abuse of discretion standard when the finding of laches was the basis for an order granting summary judgment [*Johnson v. City of Loma Linda (2000) 24 Cal. 4th 61, 67-68, 99 Cal. Rptr. 2d 316*].

There are very limited circumstances in which the trial court has discretion in ruling on a Section 437c motion. These include granting additional time for discovery under *Code Civ. Proc. § 437c(h)* and on the sole witness and mental state provisions of *Code Civ. Proc. § 437c(e)* [*Krieger v. Nick Alexander Imports, Inc. (1991) 234 Cal. App. 3d 205, 212 n.3, 285 Cal. Rptr. 717* ; *Saldana v. Globe-Weis Systems Co. (1991) 233 Cal. App. 3d 1505, 1512 n.3, 285 Cal. Rptr. 385* ; *see* *Scott v. CIBA Vision Corp. (1995) 38 Cal. App. 4th 307, 313-314, 326, 44 Cal. Rptr. 2d 902* (when continuance not mandatory because conditions of *Code Civ. Proc. § 437c(h)* not met, appellate court reviews trial court's denial of continuance under abuse of discretion standard); *see also* *Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1490, 82 Cal. Rptr. 2d 359* (only rulings under Section 437c(e) are discretionary); *Angell v. Peterson Tractor, Inc. (1994) 21 Cal. App. 4th 981, 985-986, 26 Cal. Rptr. 2d 541* (only rulings under Section 437c(e) discretionary); for discussion, see *§ 537.34[4][a]* et seq.]. Evidentiary rulings on summary judgment are also reviewed for abuse of discretion [*Jackson v. County of Los Angeles (1997) 60 Cal. App. 4th 171, 192 n.15, 70 Cal. Rptr. 2d 96* (citing *Aguimatang v. California State Lottery (1991) 234 Cal. App. 3d 769, 798, 286 Cal. Rptr. 57*); *but see* *Nazir v. United Airlines (2009) 178 Cal. App. 4th 243, 251, 100 Cal. Rptr. 3d 296* (recognizing split of authority as to the issue and holding that trial court's sustaining of all but one of defendant's 764 objections, without explanation, was abuse of discretion); *Gatton v. A.P. Green Services, Inc. (1998) 64 Cal. App. 4th 688, 692, 75 Cal. Rptr. 2d 523* (when trial court sustains objection to deposition transcript based on inadmissible hearsay in connection with summary judgment motion, appellate court independently reviews deposition's admissibility and legal effect of facts properly presented)]. Furthermore, in the limited and exceptional circumstances where a trial court is required to exercise its discretion in passing on a motion for summary judgment, and grants or denies such a motion on the basis of its equitable determination of a question as to which the exercise of judicial discretion is proper, the standard of review on appeal necessarily is whether the trial court's decision amounted to an abuse of discretion [*Dieden v. Schmidt (2002) 104 Cal. App. 4th 645, 654, 128 Cal. Rptr. 2d 365* (abuse of discretion standard applicable in motions for summary judgment involving determination by trial court of equitable subrogation); *CentennialIns. Co. v. United States Fire Ins. Co. (2001) 88 Cal. App. 4th 105, 111, 105 Cal. Rptr. 2d 559* (abuse of discretion standard applicable in motions for summary adjudication involving determination by trial court of appropriate method of allocating defense costs among multiple liability insurance carriers, each insuring same insured); *Prata v. Superior Court (2001) 91 Cal. App. 4th 1128, 1135, 111 Cal. Rptr. 2d 296* (abuse of discretion standard applicable on review of motion for summary adjudication involving determination by trial court that the cause of action was not suitable as a class action under California Unfair Competition Law pursuant to *Bus. & Prof. Code § 17200 et seq.*)]. In all other circumstances, it is legally and procedurally incorrect to apply an abuse of discretion standard [*Angell v. Peterson Tractor, Inc. (1994) 26 Cal. Rptr. 2d 541* ; *Schrader v. Scott (1992) 8 Cal. App. 4th 1679, 1683, 11 Cal. Rptr. 2d 433]* .

[b] Independent Review Standard

The appellate court conducts a de novo review to determine whether any triable issues exist [*Republic Indemnity Co. v. Schofield (1996) 47 Cal. App. 4th 220, 225, 54 Cal. Rptr. 2d 637* ; *Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 579, 37 Cal. Rptr. 2d 653* ; *Fireman's Fund Ins. Co. v. Maryland Casualty Co. (1994) 21 Cal. App. 4th 1586, 1595, 26 Cal. Rptr. 2d 762* ; *see* *Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 334, 100 Cal. Rptr. 2d 352, 8 P.3d 1089]* . In so doing, the appellate court considers all of the evidence set forth in the supporting and opposing papers, except that to which objections have been made and sustained by the trial court [*Artiglio v. Corning Inc. (1998) 18 Cal. 4th 604, 612, 76 Cal. Rptr. 2d 479, 957 P.2d 1313* ; *see also* *Wilkins v. National Broadcasting Co. (1999) 71 Cal. App. 4th 1066, 1074, 84 Cal. Rptr. 2d 329* (in conducting de novo review, appellate court considers only facts properly before trial court at time it ruled on motion)]. Because a summary judgment motion raises only questions of law regarding the construction and effect of the supporting and opposing papers, the appellate court independently reviews them on appeal, applying the same analysis required of the trial court [*Barisich v. Lewis (1990) 226 Cal. App. 3d 12, 15-16, 275 Cal. Rptr. 331* ; *Royster v. Cushman (1989) 213 Cal. App. 3d 65, 68, 261 Cal. Rptr. 458* ; *see also Aetna Health Plans of Cal., Inc. v. Yucaipa-Calimesa Joint Unified School Dist. (1999) 72 Cal. App. 4th 1175, 1187, 85 Cal. Rptr. 2d 672* (appellate court reviews issues of law de novo); *accord* *Suidan v. County of San Diego (1999) 72 Cal. App. 4th 916, 921, 85 Cal. Rptr. 2d 535]* . Conversely stated, although the appellate court must review a summary

judgment motion by the same standards as the trial court, the appellate court independently determines as a matter of law the construction and effect of the facts presented [*Sellery v. Cressey (1996) 48 Cal. App. 4th 538, 543, 55 Cal. Rptr. 2d 706* ; *see also Sangster v. Paetkau (1998) 68 Cal. App. 4th 151, 163, 80 Cal. Rptr. 2d 66* (appellate court reviews evidence before trial court and independently determine its effect as matter of law); *Quigley v. First Church of Christ Scientist (1998) 65 Cal. App. 4th 1027, 1036, 76 Cal. Rptr. 2d 792* (appellate court examines facts presented to trial court and determines their effect as matter of law)].

Thus, the appellate court in practical effect assumes the role of the trial court and redetermines the merits of the motion [*Martin Marietta Corp. v. Insurance Co. of North America (1995) 40 Cal. App. 4th 1113, 1121, 47 Cal. Rptr. 2d 670* ; *see Wolf v. Mitchell, Silberberg & Knupp (1999) 76 Cal. App. 4th 1030, 1035, 90 Cal. Rptr. 2d 792* (appellate review follows same analysis required of trial court); *Oliver v. County of Los Angeles (1998) 66 Cal. App. 4th 1397, 1403, 78 Cal. Rptr. 2d 641* (appellate court applies same rules that trial court required to apply)]. The appellate court is notbound by the trial court's stated reasons. The appellate court reviews the trial court's ruling, not its rationale [*Bernstein v. Consolidated American Ins. Co. (1995) 37 Cal. App. 4th 763, 769, 43 Cal. Rptr. 2d 817* ; *see Harris v. Mothers Against Drunk Driving (1995) 40 Cal. App. 4th 16, 20, 46 Cal. Rptr. 2d 833* (court considers validity of judgment, not reasons for which it was granted); *see also 537.43[3][a]*]. Moreover, in reviewing the matter de novo, the appellate court grants no particular deference to the trial court's ruling in order to independently determine whether the party was entitled to judgment as a matter of law [*Romero v. American President Lines, Ltd. (1995) 38 Cal. App. 4th 1199, 1203, 45 Cal. Rptr. 2d 421* ; *see Marshak v. Ballesteros (1999) 72 Cal. App. 4th 1514, 1517, 86 Cal. Rptr. 2d 1* ; *Estate of Brenzikofer (1996) 49 Cal. App. 4th 1461, 1466, 57 Cal. Rptr. 2d 401]* .

Examining evidence in light of summary judgment standards is far different from applying the substantial evidence test that often governs an appeal. In the context of judgment after trial, the evidence need only be sufficient to support the judgment for the winning party, even though the evidence might, in another reasonable mind, also have supported the judgment for the losing party. In the context of summary judgment, by contrast, the evidence must by incapable of supporting a judgment for the losing party to validate the summary judgment. Thus, even though it may appear that a trial court took a reasonable view of the evidence, a summary judgment cannot properly be affirmed unless a contrary view would be unreasonable as a matter of law in the circumstances presented [*Binder v. Aetna Life Ins. Co. (1999) 75 Cal. App. 4th 832, 838, 89 Cal. Rptr. 2d 540*].

In determining the propriety of a summary judgment, the appellate court is limited to those facts shown by the evidentiary materials submitted, aswell as those admitted and uncontested in the pleadings [*Spray, Gould & Bowers v. Associated Internat. Ins. Co. (1999) 71 Cal. App. 4th 1260, 1266, 84 Cal. Rptr. 2d 552* ; *Aloha Pacific, Inc. v. California Ins. Guarantee Assn. (2000) 79 Cal. App. 4th 297, 307, 93 Cal. Rptr. 2d 148* (appellate review of summary judgment is limited to facts contained in documents presented to trial court); *see also Rubenstein v. Rubenstein (2000) 81 Cal. App. 4th 1131, 1151 n.10, 97 Cal. Rptr. 2d 707* (validity of summary judgment is to be determined solely by sufficiency of affidavits before court when motion was heard, and appellate court will consider only facts before trial court at time it ruled on motion)].

The court must reassess the legal significance and effect of the papers that the parties submitted in connection with the motion [*Martin Marietta Corp. v. Insurance Co. of North America (1995) 40 Cal. App. 4th 1113, 1121, 47 Cal. Rptr. 2d 670*]. The moving party's affidavits and declarations are strictly construed whereas the opposing party's affidavits and declarations are liberally construed. All doubts are resolved against the moving party [*Bernstein v. Consolidated American Ins. Co. (1995) 37 Cal. App. 4th 763, 769, 43 Cal. Rptr. 2d 817* ; *see Kelly v. First Astri Corp. (1999) 72 Cal. App. 4th 462, 471, 84 Cal. Rptr. 2d 810* (same rules with regard to moving and opposing party's evidence generally); *Pieper v. Commercial Underwriters Ins., Co. (1997) 59 Cal. App. 4th 1008, 1015, 69 Cal. Rptr. 2d 551* (construction of papers); *Van Dyke v. Dunker & Aced (1996) 46 Cal. App. 4th 446, 451, 53 Cal. Rptr. 2d 862* ; *Campanano v. California Medical Center (1995) 38 Cal. App. 4th 1322, 1327, 45 Cal. Rptr. 2d 606* (doubts about propriety of granting motion resolved in opposing party's favor); *see also § 537.33[2][f]*]. Conversely stated, all doubts whether any triable issues of fact exist are to be resolved in favor of the party opposing summary judgment [*Martinez*

v. County of Los Angeles (1996) 47 Cal. App. 4th 334, 341, 54 Cal. Rptr. 2d 772 ; *see also Jang v. State Farm Fire & Casualty Co. (2000) 80 Cal. App. 4th 1291, 1295, 95 Cal. Rptr. 2d 917* (any doubts regarding propriety of awarding summary judgment are resolved in favor of party opposing summary judgment)].

The court seeks to find contradictions in the evidence or in inferences reasonably deducible from the evidence, which raise a triable issue of material fact [*Assilzadeh v. California Federal Bank (2000) 82 Cal. App. 4th 399, 409, 98 Cal. Rptr. 2d 176* (summary judgment for defendants affirmed)]. The court must consider the bare evidence and the reasonable inferences deducible from the evidence, and determine whether the evidence is sufficient to support a potential judgment in favor of the opposing party. The court therefore must consider what inferences favoring the opposing party a factfinder could reasonably draw from the evidence [*Binder v. Aetna Life Ins. Co. (1999) 75 Cal. App. 4th 832, 839-840, 89 Cal. Rptr. 2d 540*].

The court considers uncontradicted inferences reasonably deducible from the evidence. If, however, the record can support competing inferences, or if the facts are not yet sufficiently developed, an ultimate finding cannot be made prior to a hearing on the merits and summary judgment is precluded [*Artiglio v. Corning Inc. (1998) 18 Cal. 4th 604, 612, 615, 76 Cal. Rptr. 2d 479, 957 P.2d 1313*]. Thus, the court must consider presumptions and draw inferences from the facts adduced if the inference is the only one that may be drawn. The court, however, has no power in a summary proceeding to weigh one inference against another or against other evidence [*Murillo v. Rite Stuff Foods, Inc. (1998) 65 Cal. App. 4th 833, 841, 77 Cal. Rptr. 2d 12* ; *Pieper v. Commercial Underwriters Ins., Co. (1997) 59 Cal. App. 4th 1008, 1015, 69 Cal. Rptr. 2d 551*].

The court accepts as undisputed facts only those portions of the moving party's evidence that are not contradicted by the opposing party's evidence. In other words, the facts alleged in the evidence by the party opposing summary judgment, and the reasonable inferences drawn therefrom, must be accepted as true [*Sutherland v. Barclays American/Mortgage Corp. (1997) 53 Cal. App. 4th 299, 309, 61 Cal. Rptr. 2d 614* ; *accord Kelsey v. Waste Management of Alameda County (1999) 76 Cal. App. 4th 590, 594, 90 Cal. Rptr. 2d 510* ; *Cross v. Bonded Adjustment Bureau (1996) 48 Cal. App. 4th 266, 278, 55 Cal. Rptr. 2d 801* ; *see City of Santa Cruz v. Pacific Gas & Electric Co. (2000) 82 Cal. App. 4th 1167, 1176, 99 Cal. Rptr. 2d 198* (court regards facts as undisputed if not contradicted by opposing party's evidence)]. The court, however, does not decide the merits of the factual issue themselves [*Marquez v. Enterprise Rent-A-Car (1997) 53 Cal. App. 4th 319, 322, 61 Cal. Rptr. 2d 557* ; *see City of Santa Cruz v. Pacific Gas & Electric Co. (2000) 82 Cal. App. 4th 1167, 1188, 99 Cal. Rptr. 2d 198* (court's function is limited to issue finding not issue determination)].

The appellate court applies the same three-step analysis required of the trial court [*Tahoe Vista Concerned Citizens v. Counter of Placer (2000) 81 Cal. App. 4th 577, 587-588, 96 Cal. Rptr. 2d 880* ; *Monteleone v. Allstate Ins. Co. (1996) 51 Cal. App. 4th 509, 515* ; *Sweat v. Hollister (1995) 37 Cal. App. 4th 603, 607, 43 Cal. Rptr. 2d 399* ; *Katz v. Chevron Corp. (1994) 22 Cal. App. 4th 1352, 1364, 27 Cal. Rptr. 2d 681* ; *see also Ojavan Investors, Inc. v. California Coastal Com. (1997) 54 Cal. App. 4th 373, 385, 62 Cal. Rptr. 2d 803* (same three step analysis for appeal of summary adjudication of issue)]:

- The court identifies the issues framed by the pleadings.

- It determines whether the moving party has established facts sufficient to negate the opponent's claim and justify a judgment in the moving party's favor.

- If so, it determines whether the opposition demonstrates that a triable issue of material fact exists.

Some recent cases have stated the second step in the above analysis to be that the appellate court determines whether:

- The moving party has met its statutory burden of proof [*see, e.g., Renna v. County of Fresno (2000) 78 Cal. App. 4th 1, 5, 92 Cal. Rptr. 2d 586* ; *Zavala v. Arce (1997) 58 Cal. App. 4th 915, 926, 68 Cal.*

Rptr. 2d 571 ; *see also* *Miscione v. Barton Development Co. (1997) 52 Cal. App. 4th 1320, 1324-1325, 61 Cal. Rptr. 2d 280]* .

- The moving party's showing has established facts which justify a judgment in the movant's favor [*see, e.g.,* *FNB Mortgage Corp. v. Pacific General Group (1999) 76 Cal. App. 4th 1116, 1126, 90 Cal. Rptr. 2d 841* ; *Oliver v. AT&T Wireless Services (1999) 76 Cal. App. 4th 521, 528, 90 Cal. Rptr. 2d 491]* .

- Whether the moving party's showing has satisfied the moving party's burden of proof and justifies a judgment in the moving party's favor [*see, e.g.,* *Tibor v. Superior Court (1997) 52 Cal. App. 4th 1359, 1369, 61 Cal. Rptr. 2d 326* ; *Brantley v. Pisaro (1996) 42 Cal. App. 4th 1591, 1602, 50 Cal. Rptr. 2d 431]* .

Although the opinions in these cases did not address the reason for this divergence from the language used in earlier cases, it appears to take into account the unsettled issue of the moving party's burden of proof under the 1992 and 1993 amendments to *Code Civ. Proc. § 437c* [*but see* *Arciniega v. Bank of San Bernardino (1997) 52 Cal. App. 4th 213, 225, 60 Cal. Rptr. 2d 495* (second step calls for evaluation of the moving defendant's effort to meet its burden of showing that plaintiff's cause of action has no merit or that there is a complete defense to it; this phase has not changed, in practical effect, as a result of the 1992 and 1993 amendments to § 437c); criticized on another point in *Rice v. Crow (2000) 81 Cal. App. 4th 725, 726, 737-741, 97 Cal. Rptr. 2d 110]* . For discussion of moving party's burden of proof, see *§ 537.33[2][d]*. Other recent appellate decisions, however, continue to state the second step in the analysis as indicated above, that is, the appellate court determines whether the moving party has established facts sufficient to negate the opponent's claim and justify a judgment in the moving party's favor [*see, e.g.,* *Victor v. Hedges (1999) 77 Cal. App. 4th 229, 234, 91 Cal. Rptr. 2d 466* ; *City of San Jose v. Department of Health Services (1998) 66 Cal. App. 4th 35, 40, 77 Cal. Rptr. 2d 609* ; *Ojavan Investors, Inc. v. California Coastal Com. (1997) 54 Cal. App. 4th 373, 385, 62 Cal. Rptr. 2d 803* ; ; *Bashi v. Wodarz (1996) 45 Cal. App. 4th 1314, 1318, 53 Cal. Rptr. 2d 635]* . The Supreme Court has not directly considered the issue (of what sort of evidence is sufficient to shift the burden under California's summary judgment statute) and has persisted in its use of the terminology of the older cases, thus perpetuating the doubts of the courts still contending that the historic requirement of "proving the negative" continues to burden the moving party [*Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 81-82, 81 Cal. Rptr. 2d 360*]. Not all recent cases, however, are relevant to this question, because summary judgment motions filed and ruled on by a trial court prior to the effective date of the 1992 amendments to *Code Civ. Proc. § 437c* (January 1, 1993) are subjectto the standard of review according to the statute as it stood in 1992, prior to amendment [*see* *Truck Ins. Exchange v. Bennett (1997) 53 Cal. App. 4th 75, 80, 61 Cal. Rptr. 2d 497*].

In any event, if the defendant claims that the plaintiff cannot establish the cause of action pled because the defendant's affirmative evidence discloses facts that negate the existence of an essential element of the plaintiff's claim by proving the contrary is true, the court should evaluate defendant's evidence under the same strict standards which were held to apply to a defendant's attempt to disprove an element of the plaintiff's cause of action before the 1992 and 1993 amendments to *Code Civ. Proc. § 437c*, in order to avoid unjustly depriving the plaintiff of a trial [*Tibor v. Superior Court (1997) 52 Cal. App. 4th 1359, 1368, 61 Cal. Rptr. 2d 326*].

Moreover, the standard of independent review on appeal is applicable regardless of which rule for shifting burdens of production of evidence governs at trial. Of course, once a party bears the initial burden of demonstrating entitlement to a judgment as a matter of law, the opposing party cannot defeat summary judgment by attempting to raise a factual dispute as to immaterial issues [*Romero v. American President Lines, Ltd. (1995) 38 Cal. App. 4th 1199, 1202-1203, 45 Cal. Rptr. 2d 421*]. A summary judgment motion will not be defeated by the presence of a factual dispute unless the fact in dispute is material [*Romero v. American President Lines, Ltd. (1995) 38 Cal. App. 4th 1199, 1202-1203, 45 Cal. Rptr. 2d 421*], that is, it relates to a claim or defense in issue which could make a difference in the outcome [*Los Angeles Nat. Bank v. Bank of Canton (1991) 229 Cal. App. 3d 1267, 1274, 280 Cal. Rptr 831* ; *see also* *Allyson v.*

Department of Transportation (1997) 53 Cal. App. 4th 1304, 1317-1321, 62 Cal. Rptr. 2d 490 (summary judgment in favor of defendant granted when defendant's filings in support of its motion were sufficient to provide factual basis to make its affirmative defense available and thereby shift burden to plaintiff to demonstrate a triable issue of material fact concerning it and although plaintiff's filings in an effort to carry plaintiff's burden were extensive, none of plaintiff's filings were even remotely addressed to the dispositive issue framed by the pleadings; plaintiff's filings were all addressed to nonissues); *Sutherland v. Barclays American/Mortgage Corp. (1997) 53 Cal. App. 4th 299, 317, 61 Cal. Rptr. 2d 614* (papers filed in response to defendant's motion for summary judgment may not create issue outside the pleadings and are not a substitute for an amendment to the pleadings)].

Furthermore, the appellate court may bypass the three step analysis described above if the appellant does not contend that there are any disputed issues of material fact. When the sole issue raised on appeal is whether the trial court's ruling on an issue on law was erroneous, the appellate court need not address the issue of whether any triable issues of material fact exist [*Henriksen v. City of Rialto (1993) 20 Cal. App. 4th 1612, 1617 n.2, 25 Cal. Rptr. 2d 308* (over dissent)]. The analysis is also unnecessaryif the court need decide de novo only the question of the legal significance of the facts adduced by one party because the trial court sustained an objection to the other party's evidence [*Beane v. Paulsen (1993) 21 Cal. App. 4th 89, 92-93, 26 Cal. Rptr. 2d 486* (objection to plaintiff's opposing affidavit sustained by trial court; also holding plaintiff cannot challenge this evidentiary ruling for first time in reply brief on appeal)].

[3] Scope of Review

[a] Affirmance on Any Legal Basis

The appellate court should affirm the trial court's judgment if it is correct on any theory of law applicable to the case, including but not limited to the theory the trial court adopted, provided the facts are undisputed [*Fireman's Fund Ins. Co. v. Maryland Casualty Co. (1994) 21 Cal. App. 4th 1586, 1595, 26 Cal. Rptr. 2d 762* ; *see Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1490, 82 Cal. Rptr. 2d 359*]. The court must affirm so long as any of the grounds urged either on appeal or in the trial court, entitle the moving party to summary judgment [*Fireman's Fund Ins. Co. v. Maryland Casualty Co. (1994) 21 Cal. App. 4th 1586, 1595, 26 Cal. Rptr. 2d 762* ; *Ochoa v. California State University (1999) 72 Cal. App. 4th 1300, 1304, 85 Cal. Rptr. 2d 768* (appellate court may affirm grant of summary judgment on any ground properly raised below, whether or not addressed by trial court); *Oliver v. County of Los Angeles (1998) 66 Cal. App. 4th 1397, 1403, 78 Cal. Rptr. 2d 641* (if appellate court finds there is no triable issue of material fact, court affirms summary judgment if it is correct on any legal theory whether on not trial court adopted that theory, and whether it was raised in trial court or first addressed on appeal); *cf. Kramer v. State Farm Fire & Casualty Co. (1999) 76 Cal. App. 4th 332, 90 Cal. Rptr. 2d 301* (appellate court may affirm on any legally correct theory provided plaintiffs had adequate opportunity to address theory in lower court)]. Even if the trial court granted summary judgment on an incorrect basis, the appellate court must affirm if it would have been proper on another ground [*Salazar v. Southern Cal. Gas Co. (1997) 54 Cal. App. 4th 1370, 1376, 63 Cal. Rptr. 2d 522* ; *Barkley v. City of Blue Lake (1996) 47 Cal. App. 4th 309, 313, 54 Cal. Rptr. 2d 679* ; *see also Oliver v. AT&T Wireless Services (1999) 76 Cal. App. 4th 521, 528, 90 Cal. Rptr. 2d 491* (if summary judgment was properly granted on any ground, appellate court must affirm regardless of whether trial court's reasoning correct); *Barton v. Elexsys Internat., Inc. (1998) 62 Cal. App. 4th 1182, 1187-1188, 73 Cal. Rptr. 2d 212* (if summary judgment is proper on grounds other those articulated by trial court, appellate court must nevertheless affirm)].

[b] Consideration of Legal Arguments Not Presented Below

An appellate court may consider a matter involving an issue of law on undisputed facts for the first time on appeal even if a party did not raise or argue the issue in the trial court. It makes no difference that the issue was first raised on appeal by the court rather than the parties, so long as the parties have been given a reasonable opportunity to address it [*Tsemetzin v. Coast Federal Savings & Loan Assn. (1997) 57 Cal. App. 4th 1334, 1341 n.6, 67 Cal. Rptr. 2d 726* ; *see McManis v. San Diego Postal Credit Union (1998) 61 Cal. App. 4th 547, 559, 71 Cal. Rptr. 2d 617* (rule that Court of

Appeal will not consider points not raised in appellate brief largely for appellate court's convenience); *Barczewski v. Commonwealth Land Title Ins. Co. (1989) 210 Cal. App. 3d 406, 410, 258 Cal. Rptr. 386* (matters of law that will support trial court's ruling may be considered on appeal even if they were not presented in trial court); *see also Neverkovec v. Fredericks (1999) 74 Cal. App. 4th 337, 347 n.6, 87 Cal. Rptr. 2d 856* (defendant's objection to plaintiff's reliance on theory that was not raised in plaintiff's summary judgment papers was proper and court had discretion to deem argument waived, but under circumstances choose to address issue, noting that defendant had opportunity to respond to it below); *cf. Renna v. County of Fresno (2000) 78 Cal. App. 4th 1, 6 n.1, 92 Cal. Rptr. 2d 586* (issues raised for first time in reply brief will not be considered on appeal); *Kramer v. State Farm Fire & Casualty Co. (1999) 76 Cal. App. 4th 332, 90 Cal. Rptr. 2d 301* (appellate court may affirm on any legally correct theory provided plaintiffs had adequate opportunity to address theory in lower court); *Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1489, 82 Cal. Rptr. 2d 359* (as general rule, party cannot raise new theory of liability on appeal); *Ochoa v. Pacific Gas & Electric Co. (1998) 61 Cal. App. 4th 1480, 1488 n.3, 72 Cal. Rptr. 2d 232* (arguments not asserted below are waived and will not be considered for first time on appeal; moreover, if issue is not supported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by reviewing court is unnecessary); *216 Sutter Bay Associates v. County of Sutter (1997) 58 Cal. App. 4th 860, 876, 68 Cal. Rptr. 2d 492* (issue waived for failure to brief it under a separate heading); *Locke v. Warner Bros., Inc. (1997) 66 Cal. Rptr. 2d 921* (ordinarily, appellants' failure to raise an issue in their opening brief waives issue on appeal)]. That is, the appellate court examines the facts presented to the trial court and independently determines their effect as a matter of law [*Stratton v. First Nat. Life Ins. Co. (1989) 210 Cal. App. 3d 1071, 1083, 258 Cal. Rptr. 721* (reversing summary judgment)]. Nonetheless, review is limited to issues that have been adequately raised and supported in plaintiffs' brief; issues not raised in appellant's brief are deemed waived or abandoned [*Reyes v. Kosha (1998) 65 Cal. App. 4th 451, 466 n.6, 76 Cal. Rptr. 2d 457* ; *see also ML Direct, Inc. v. TIG Specialty Ins. Co. (2000) 79 Cal. App. 4th 137, 146, 93 Cal. Rptr. 2d 846* (appellate court declined to reach two arguments raised for first time by appellants in their reply brief)].

In contrast, the appellate court, however, must consider only those facts before the trial court, disregarding any new factual allegations made forthe first time on appeal. Thus, possible theories that were not fully developed, factually presented and argued to the trial court cannot create a triable issue of material fact that may be raised or considered on appeal [*Ashdown v. Ameron Internat. Corp. (2000) 83 Cal. App. 4th 868, 874, 100 Cal. Rptr. 2d 20* ; *Sangster v. Paetkau (1998) 68 Cal. App. 4th 151, 163, 80 Cal. Rptr. 2d 66* ; *Havstad v. Fidelity National Title Ins. Co. (1997) 58 Cal. App. 4th 654, 661, 68 Cal. Rptr. 2d 487* ; *see Barczewski v. Commonwealth Land Title Ins. Co. (1989) 210 Cal. App. 3d 406, 410* (decisions resting on factual matters must first be addressed in trial court)].

[c] No Consideration of Evidence or Objections Not Raised Below

An appellate court may not consider evidentiary objections not raised in the trial court [*see Code Civ. Proc. § 437c(b)(5), (d); Weil v. Federal Kemper Life Assurance Co. (1994) 7 Cal. 4th 125, 149 n.9, 27 Cal. Rptr. 2d 316, 866 P.2d 774* ; *see also § 537.25[4]*]. All objections to the form and substance of the moving and opposing papers must first be made in the trial court and not on appeal by the parties or by the appellate court [Stats. 1990, ch. 1561, § 1]. However, in reviewing summary judgment, as in any other appeal, if a party's position depends on patently inadmissible evidence admitted over a proper objection, a reviewing court is empowered, and indeed obliged, to acknowledge the error and disregard the evidence [*Mamou v. Trendwest Resorts, Inc. (2008) 165 Cal. App. 4th 686, 711, 81 Cal. Rptr. 3d 406]* .

A reviewing court will not consider either additional facts not presented below or issues of law unsupported by the existing evidence [*City of Oakland v. Hassey (2008) 163 Cal. App. 4th 1477, 1489 n.5, 78 Cal. Rptr. 3d 621* (appellate court may properly decline to take judicial notice under *Evid Code §§ 452* and *459* of a matter that should have been presented to the trial court for its consideration in the first instance); *Green v. Green (1963) 215 Cal. App. 2d 37, 46, 30 Cal. Rptr. 23*]. The reviewing court is limited to facts shown by the evidentiary material submitted, as well as those admitted and uncontested in the pleadings [*Sanchez v. Swinerton & Walberg Co. (1996) 47 Cal. App. 4th 1461, 1466, 55 Cal. Rptr. 2d 415* ; *see Monteleone v. Allstate Ins. Co. (1996) 51 Cal. App. 4th 509, 514* (appellate court limited to

facts presented in documents submitted to trial court); *Della Zoppa v. Della Zoppa (2001) 86 Cal. App. 4th 1144, 1149, 103 Cal. Rptr. 2d 901*]. It can consider only those facts before the trial court disregarding any new allegations on appeal [*Uriarte v. United States Pipe & Foundry Co. (1996) 51 Cal. App. 4th 780, 790, 59 Cal. Rptr. 2d 332*]. Thus, possible theories that were not fully developed or factually presented to the trial court cannot create a triable issue on appeal [*Zubia v. Farmers Ins. Exchange (1993) 14 Cal. App. 4th 790, 799, 18 Cal. Rptr. 2d 65* ; *American Continental Ins. Co. v. C & Z Timber Co. (1987) 195 Cal. App. 3d 1271, 1281, 241 Cal. Rptr. 466* ; *see Waisbren v. Peppercorn Productions, Inc. (1995) 41 Cal. App. 4th 246, 263, 48 Cal. Rptr. 2d 437* (plaintiff whose opposition papers in trial court did not make legal argument and whose separate statement did not set forth facts in support of that argument waived it as basis for opposing defendants summary judgment motion); *see also Sanchez v. Swinerton & Walberg Co. (1996) 47 Cal. App. 4th 1461, 1465, 55 Cal. Rptr. 2d 415* (opposing party may not raise issue for first time on appeal); *Crow v. State of California (1990) 222 Cal. App. 3d 192, 207, 271 Cal. Rptr. 349* (issues raised and then abandoned in the trial court cannot be considered on appeal)].

[4] When Reviewing Court May Direct Trial Court to Enter Judgment

When it appears from the record as a matter of law that there is only one proper judgment on undisputed facts, the reviewing court may direct the trial court to enter that judgment [*Conley v. Matthes (1997) 56 Cal. App. 4th 1453, 1459 n.7, 66 Cal. Rptr. 2d 518* (trial court directed to enter summary judgment in favor of appellant although they had not brought summary judgment motion in trial court, but only opposed it)].

[5] Lack of Statement of Reasons in Trial Court Opinion

While a trial court's failure to provide a sufficient statement of reasons is not automatic grounds for reversal, an appellate court may reverse a trial court's granting of summary adjudication where the court makes no oral of written statement for the reasons for its decision and the appellate court is prevented from undertaking a meaningful review of the issues [*Santa Barbara Pistachio Ranch v. Chowchilla Water District (2001) 88 Cal. App. 4th 439, 449, 105 Cal. Rptr. 2d 856* (defendant's successful motion for summary adjudication reversed)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentAppellate ReviewAppealabilityCivil ProcedureSummary JudgmentAppellate ReviewStandards of ReviewCivil ProcedureAppealsReviewabilityPreservation for ReviewCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionCivil ProcedureAppealsStandards of ReviewDe Novo Review

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Chapter 537 SUMMARY JUDGMENT
PART II. LEGAL BACKGROUND

47-537 California Forms of Pleading and Practice--Annotated § 537.44

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§ 537.44 Review of Summary Proceeding by Peremptory Writ

[1] When Summary Judgment or Summary Adjudication Has Been Denied

Any order entered under *Code Civ. Proc. § 437c*, except the entry of summary judgment, may be reviewed by petition to an appropriate reviewing court for a peremptory writ [*Code Civ. Proc. § 437c(m)(l)*]. Thus, a petition for a peremptory writ of mandate under *Code Civ. Proc. § 437c(m)(l)* is the appropriate means to obtain immediate review of otherwise nonappealable orders denying motions for summary judgment or summary adjudication [*see, e.g., West Shield Investigations & Security Consultants v. Superior Court (2000) 82 Cal. App. 4th 935, 946, 98 Cal. Rptr. 2d 612* ; *Travelers Casualty & Surety Co. v. Superior Court (1998) 63 Cal. App. 4th 1440, 1450, 75 Cal. Rptr. 2d 54* ; *see also Sierra Craft, Inc. v. Magnum Enterprises, Inc. (1998) 64 Cal. App. 4th 1252, 1256, 75 Cal. Rptr. 2d 681* (order denying summary judgment not appealable under *Code Civ. Proc. § 904.1*; reviewable only by petition for extraordinary writ); *but see Federal Deposit Ins. Corp. v. Dintino (2008) 167 Cal. App. 4th 333, 343, 84 Cal. Rptr. 3d 38* (holding order denying summary judgment or summary adjudication may be reviewed on direct appeal from a final judgment entered after trial); *Exxon Corp. v. Superior Court (1997) 51 Cal. App. 4th 1672, 1679-1680, 60 Cal. Rptr. 2d 195* (pretrial writ review of denial of defendant's motion for summary adjudication on various causes of action was appropriate when issues ruled on by trial court contain heart of plaintiffs' case and trial might well be simplified if it is found that trial court erred)].

ILLUSTRATION:

Mandate When Motion Denied. A movant for summaryjudgment submits supporting affidavits that are sufficient to sustain judgment. The opposing party does not by counter-affidavit show facts sufficient to present a triable issue of fact. The trial court denies the motion. Is mandate proper to compel the trial court to grant the motion? Yes [*see Rose v. Fife (1989) 207 Cal. App. 3d 760, 764-765 n.4, 255 Cal. Rptr. 440*].

Code Civ. Proc. § 437c(m)(l) codifies prior decisional law, but does not otherwise change the standards employed by appellate courts in deciding whether or not to entertain a writ of mandate on its merits [*Parsons Manufacturing Corp. v. Superior Court (1984) 156 Cal. App. 3d 1151, 1156 n.1, 203 Cal. Rptr. 419*]. The standard of review on a peremptory writ is the same as that applicable on appeal [*see § 537.43[2][a]* (abuse of discretion standard of review); *Parsons Manufacturing Corp. v. Superior Court (1984) 156 Cal. App. 3d 1151, 1156-1157, 203 Cal. Rptr. 419*].

On review of a denial of a motion for summary judgment, the appellate court may compel the trial court to issue an order granting the motion if it determines that such an order is proper [*Reader's Digest Assn. v. Superior Court (1984) 37 Cal. 3d 244, 690 P. 2d 610 ,; see Travelers Casualty & Surety Co. v. Superior Court (1998) 63 Cal. App. 4th 1440, 1450, 75 Cal. Rptr. 2d 54* (directing trial court to vacate order denying defendants summary adjudication motion and to enter new and different order granting motion as to particular causes of action); *accord Exxon Corp. v. Superior Court (1997) 51 Cal. App. 4th 1672, 1679-1680, 60 Cal. Rptr. 2d 195*]. When the superior court's ruling on summary judgment will result in a trial on nonactionable claims, a writ of mandate will lie to preserve the resources of the court and parties [*Feminist Women's Health Center v. Superior Court (1997) 52 Cal. App. 4th 1234, 1238, 61 Cal. Rptr. 2d 187* ; *see West Shield Investigations & Security Consultants v. Superior Court (2000) 82 Cal. App. 4th 935, 946, 98 Cal. Rptr. 2d 612*]. Similarly, a writ of mandate may issue to prevent trial of nonactionable claims after the erroneous denial of a motion for summary adjudication [*Travelers Casualty & Surety Co. v. Superior Court (1998) 63 Cal. App. 4th 1440, 1450, 75 Cal. Rptr. 2d 54*].

Before issuing a peremptory writ in the first instance, the petitioner or the appellate court must notify the party adversely affected that the issuance of the writ is being sought or considered. In addition, the appellate court, absent exceptional circumstances, should not issue the peremptory without having received or solicited opposition from the party adversely affected [*Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 180, 203 Cal. Rptr. 626, 681 P.2d 893* .]

[2] When Summary Adjudication Has Been Granted

An order granting a summary adjudication is not an appealable order, but it may be reviewed by mandate [*City of Oakland v. Superior Court(1996) 45 Cal. App. 4th 740, 750, 53 Cal. Rptr. 2d 120* ; *see, e.g., Kendall-Jackson Winery, Ltd. v. Superior Court (1999) 76 Cal. App. 4th 970, 974, 989, 90 Cal. Rptr. 2d 743* ; *Southern Cal. Edison Co. v Superior Court (1995) 37 Cal. App. 4th 839, 843, 44 Cal. Rptr. 2d 227*]. Review is limited to the facts contained in the documents presented to the trial court [*Federal Deposit Ins. Corp. v. Superior Court (1997) 54 Cal. App. 4th 337, 345, 62 Cal. Rptr. 2d 713*]. Usually an interim order must await review on appeal from a final judgment. In cases of significant legal impact, however, an appellate court may consider a petition for an extraordinary writ, with the appellate court having broad discretion to grant or deny the writ [*City of Oakland v. Superior Court (1996) 45 Cal. App. 4th 740, 750, 53 Cal. Rptr. 2d 120*].

A trial court has no discretion on a motion for summary adjudication and must either grant the motion if no triable issue of material fact exists, or deny the motion if a triable issue of material fact exists. A trial court that errs has made an error in law which automatically constitutes an abuse of discretion. Under these circumstance it may be proper to obtain relief by means of mandate. If it appears that the trial court has erred, the appellate court may exercise its discretion to entertain the writ to avoid unnecessary trial court proceedings [*City of Oakland v. Superior Court (1996) 45 Cal. App. 4th 740, 751, 53 Cal. Rptr. 2d 120*].

If the order granting summary adjudication effectively disposes of the entire case, it may be appealable [*see California Ass'n of Psychology Providers v. Rank (1990) 51 Cal. 3d 1, 9, 270 Cal. Rptr. 796, 793 P.2d 2*]. For discussion of when an appeal may be appropriate, see *§ 537.43[1][b]*.

If a case is dismissed for failure to diligently prosecute, the plaintiff cannot, on appeal of the order of dismissal, obtain review of an earlier, nonappealable summary adjudication order that would otherwise have been reviewed on an appeal from a final judgment on the merits [*Vernon v. Great Western Bank (1996) 51 Cal. App. 4th 1007, 1013-1015, 59 Cal. Rptr. 2d 350* (noting that if the dismissal is reversed, the summary adjudication order would be reviewable later in an appeal from the final judgment)].

[3] Time Limits for Seeking Review

On entry of any order under *Code Civ. Proc. § 437c* except the entry of summary judgment, a party may, within 20 days after service on him or her of a written notice of entry of the order, petition an appropriate reviewing court for a peremptory writ [*Code Civ. Proc. § 437c(m)(l)*]. This 20-day period is extended as follows [*Code Civ. Proc. § 437c(m)(l)*]:

- When service is by mail, by five days if the place of address is in California, by 10 days if the place of address is outside California, and by 20 days if outside the United States.

- When service is by facsimile transmission, Express Mail, or another method of overnight delivery, by two court days.

The limitation period of *Code Civ. Proc. § 437c(m)(l)* is mandatory and jurisdictional [*see Eldridge v. Superior Court (1989) 208 Cal. App. 3d 1350, 1353, 256 Cal. Rptr. 724* ; *see also Sentry Ins. Co. v. Superior Court (1989) 207 Cal. App. 3d 526, 529-530, 255 Cal. Rptr. 13* (express statutory time limit does not apply to petition for review of related motions to shorten time for hearing summary judgment motion and to continue trial date to allow for summary judgment hearing; such petition is subject to the defense of laches)].

Ordinarily, counsel for the prevailing party will serve a copy of the notice of entry of the trial court's order on counsel for the adverse party or on the party if he or she has no attorney [*see Code Civ. Proc. §§ 1015, 1019.5(a)*]. However, the mailing of a copy of the court's minute order by the court clerk constitutes written notice of entry of the order and is sufficient to commence the running of the 20-day period under *Code Civ. Proc. § 437c(m)(l)*. When this is done, an additional notice by counsel is unnecessary to commence the running of the 20-day period [*see Schmidt v. Superior Court (1989) 207 Cal. App. 3d 56, 60, 254 Cal. Rptr. 827* (decided under prior version of *Code Civ. Proc. § 437c(m)(l)* that provided for 10-day, instead of 20-day, initial notice period); *see also Woo v. Superior Court (1999) 75 Cal. App. 4th 169, 173, 89 Cal. Rptr. 2d 20* (date of service by mail by regular trial clerk on all parties of the final signed ruling held to be date of written notice of order denying motion for purpose of computing time under *Code Civ. Proc. § 437c(m)(l)* despite earlier service by mail by substitute trial clerk of draft ruling not signed by trial judge together with original proof of service)].

The same is true when the clerk mails a file-stamped copy of an order denying a motion for summary adjudication. Notice by counsel under such circumstances is unnecessary to provide notice of entry of the order under *Code Civ. Proc. § 437c(m)(l)*. Notice by counsel would, however, be necessary under *Code Civ. Proc. § 1019.5*, unless waived by the parties [*Eldridge v. Superior Court (1989) 208 Cal. App. 3d 1350, 1353 n.1, 256 Cal. Rptr. 724*].

If the clerk serves on a party an unfiled copy of the order, or any order that does not indicate that it has been entered, that order does not constitute notice of entry of the order under *Code Civ. Proc. § 437c*(*l*) [*Eldridge v. Superior Court (1989) 208 Cal. App. 3d 1350, 1353, 256 Cal. Rptr. 724*].

The superior court may, for good cause, and prior to the expiration of the initial period, extend the time for one additional period not to exceed 10 days [*Code Civ. Proc. § 437c(m)(l)*]. An order granting an extension of time to file is timely if it is issued within the initial period [*Schmidt v. Superior Court (1989) 207 Cal. App. 3d 56, 61, 254 Cal. Rptr. 827*].

The filing in the trial court of a motion for reconsideration under *Code Civ. Proc. § 1008* does not automatically extend the time limit for filing the writ petition [*see Schmidt v. Superior Court (1989) 207 Cal. App. 3d 56, 61, 254 Cal. Rptr. 827*].

Thus, in light of the above, when a superior court case is transferred to municipal court after a plaintiff's surviving causes of action fall below the superior court's jurisdictional amount, a plaintiff may seek writ of review of any summary adjudication and transfer order within the period specified in *Code Civ. Proc. § 437c(m)(l)* in an attempt to retain the matter in superior court. If the plaintiff does not seek a writ, or a writ is denied, and the plaintiff elects to appeal from the superior court's final disposition of the matter, the plaintiff may move the superior court to enter a final judgment as to the summarily adjudicated causes of action if the court has not already entered its final judgment sua sponte. The plaintiff must then timely appeal from that final superior court judgment without waiting for the municipal court's disposition of the remaining causes of action since the courts of appeal ordinarily do not have jurisdiction over municipal court judgments, and thus, there would be no purpose in delay [*Eckhart v. Genuine Parts Distributors (1997) 53 Cal. App. 4th 1340, 1345, 62 Cal. Rptr. 2d 487* (rejecting *Uptain v. Duarte (1988) 206 Cal. App. 3d 1258, 254 Cal. Rptr. 150* , which held that a party may file a notice of appeal from a superior court's partial dismissal order when a case is transferred to municipal court despite the absence of an actual final judgment by the superior court, as being and inconsistent with efficient working of judicial system and contrary to the rule that a partial dismissal order is nonappealable and as unecessary given other adequate procedures for appellate review)].

[4] Reviewing Court to Permit Supplemental Briefs in Certain Situations

Effective January 1, 2003, *Code Civ. Proc. § 437c(m)(2)* provides that before a reviewing court affirms an order granting summary judgment or summary adjudication on a ground not relied upon by the trial court, the reviewing court shall afford the parties an opportunity to present their views on the issue by submitting supplemental briefs. The statute provides that the supplemental briefing may include an argument that additional evidence relating to the ground exists, but that the party has not had an adequate opportunity to present the evidence or to conduct discovery on the issue. The new code subsection further provides that the court may reverse or remand based upon the supplemental briefing to allow the parties to present additional evidence or to conduct discovery on the issue. If the court fails to allow supplemental briefing, a rehearing shall be ordered upon timely petition of any party.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentAppellate ReviewGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureAppealsReviewabilityTime Limitations

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Chapter 537 SUMMARY JUDGMENT
PART II. LEGAL BACKGROUND

47-537 California Forms of Pleading and Practice--Annotated §§ 537.45-537.49

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[Reserved]

§§ 537.45[Reserved]

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PART III. RESEARCH GUIDE

47-537 California Forms of Pleading and Practice--Annotated § 537.50

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§ 537.50 Related Matthew Bender Publications

For memoranda of points and authorities supporting and opposing motions for summary judgment, see California Points and Authorities, Ch. 221, *Summary Judgments* (Matthew Bender).

For memoranda of points and authorities supporting or opposing motions for summary judgment in particular actions and fact situations, see the *General Index* to California Points and Authorities (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentMotions for Summary JudgmentCivil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentSupporting MaterialsGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 537 SUMMARY JUDGMENT
PART III. RESEARCH GUIDE

47-537 California Forms of Pleading and Practice--Annotated § 537.51

AUTHOR: Hon. Patti S. Kitching Barbara A. Reeves Charles Pereyra-Suarez Contributing Editors Justice Kitching, an Associate Justice of the California Court of Appeal, Second Appellate District, Division Three, was formerly a Judge of the Los Angeles Superior Court, where her assignments included the law and motion department. Barbara A. Reeves is a partner with Morrison & Foerster, Los Angeles, California. Her areas of litigation expertise include intellectual property, securities, fraud, contract, international trade, antitrust, environmental coverage, and white-collar criminal defense. Charles Pereyra-Suarez is a partner in McKenna & Cuneo and heads the Litigation Department in the Los Angeles office. He also has served as a judge pro tem of the Los Angeles County Municipal and Superior Courts since 1986. This chapter was adapted from California Practice Handbook: Pretrial Disposition (Matthew Bender), Litigation Section, Los Angeles County Bar Association, Handbook Editor; Hon. Patti S. Kitching, Barbara A. Reeves, Charles Pereyra-Suarez, Contributing Editors.

§ 537.51 State Statutes

Summary judgment under *Code Civ. Proc. § 437c* not available in consumer class action commenced under *Civ. Code § 1781(a). Civ. Code § 1781(c)*

Motions and proceedings for summary judgment and summary adjudication. *Code Civ. Proc. § 437c*

Motion for summary judgment by defendant as precluding later motion for security under *Code Civ. Proc. 1029.6*, and vice versa. *Code Civ. Proc. § 1029.6(e), (f)*

Recovery of defense costs incurred in opposing bad faith or unreasonable motion for summary judgment in civil actions for indemnity or contribution or actions under California Tort Claims Act (*Gov. Code § 810 et seq.*). *Code Civ. Proc. § 1038*

Motions for summary judgment in actions for unlawful detainer and forcible entry. *Code Civ. Proc. § 1170.7*; *see Code Civ. Proc. § 437c(p), (q), (r)*

Judicial notice. *Evid. Code §§ 451-453*

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSanctionsBaseless FilingsBad Faith MotionsEvidenceJudicial NoticeGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerTortsPublic Entity LiabilityLiabilityState Tort Claims ActsRemedies

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§ 537.52 California Rules of Court

Time for filing proof of service. *Cal. Rules of Ct., Rule 3.1300(c)*

Latest time that paper may be filed; late papers. *Cal. Rules of Ct., Rule 3.1300(d), (e)*

Place of filing absent local rule as clerk's office. *Cal. Rules of Ct., Rule 3.1302(a)*

Time of hearings in general. *Cal. Rules of Ct., Rule 3.1304*

Restrictions on oral testimony at hearings. *Cal. Rules of Ct., Rule 3.1306(a)*

Request to present oral testimony. *Cal. Rules of Ct., Rule 3.1306(b)*

Invoking judicial notice. *Cal. Rules of Ct., Rule 3.1306(c)*

Format requirements for summary judgment or summary adjudication. *Cal. Rules of Ct., Rule 3.1350*

Form and manner of objecting to evidence in summary judgment proceeding. *Cal. Rules of Ct., Rules 3.1352, 3.1354*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedurePleading & PracticeService of ProcessTime LimitationsGeneral OverviewCivil ProcedureSummary JudgmentGeneral OverviewEvidenceJudicial NoticeGeneral Overview

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§ 537.53 Local Court Rules

NOTE:

Local Rules Preempted. The California Rules of Court exclusively govern motions and the form and format of papers; local rules concerning these fields, among others, are preempted and should be considered null and void [*Cal. Rules of Ct., Rule 3.20*].

[1] Los Angeles County

Procedure for invoking judicial notice. Los Angeles Co. Super. Ct. Rules, Rule 9.2

[2] San Francisco City and County

Procedure for invoking judicial notice. San Francisco Uniform Local Ct. Rules, Rule 8.9

Requirements regarding summary judgment and summary adjudication. San Francisco Uniform Local Ct. Rules, Rule 8.11

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentGeneral OverviewEvidenceJudicial NoticeGeneral OverviewGovernmentsCourtsRule Application & Interpretation

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§ 537.54 Decisions

[1] Amendment of Pleadings

If either party finds, on hearing of summary judgment motion, that his or her pleading is not adequate, either by way of allegation or denial, court as permitted to, and should, permit party to amend; but absent some request for amendment, no occasion exists to inquire about possible issues not raised by pleadings. *College Hospital, Inc. v. Superior Court (1994) 8 Cal. 4th 704, 719, n.5, 34 Cal. Rptr. 2d 898, 882 P.2d 894* ; *Bostrom v. County of San Bernardino (1995) 35 Cal. App. 4th 1654, 42 Cal. Rptr. 2d 669* ; *Woodland Hills Homeowners Organization v. Los Angeles Community College Dist. (1990) 218 Cal. App. 3d 79, 89 n.4, 266 Cal. Rptr. 767*

To create triable issue of material fact, opposition evidence must be directed to issues raised by pleadings; in negligence action arising from off-road accident, court rejected plaintiff's implied contention that he could seek leave to amend his pleading for first time on appeal and that trial court erred by not considering his allegations outside his complaint that defendant's conduct was reckless, where plaintiff did not assert on appeal, nor did record show, that he sought leave to amend his complaint before hearing on defendant's summary judgment motion; likewise, plaintiff's contention that primary assumption of risk doctrine did not bar his action because dune buggy driver owed him statutory duties of care under *Veh. Code §§ 38305* and *38316* was procedurally defective because he failed to allege in complaint that driver's conduct violated any statutory duties owed to him; although motorcyclist argued in written opposition to

summary judgment motion that driver breached legal duties imposed by *Veh. Code §§ 38305* and *38316*, he made no showing on appeal that he sought leave of court, before summary judgment motion hearing, to amend his complaint to allege such claims. *Distefanov. Forester (2001) 85 Cal. App. 4th 1249, 1264-1266, 102 Cal. Rptr. 2d 813* (summary judgment for defendant affirmed)

Motion for summary judgment must be directed to issues raised by the pleadings; papers filed in response to defendant's motion for summary judgment may not create issues outside pleadings and are not substitute for amendment to pleadings. *Tsemetzin v. Coast Federal Savings & Loan Assn. (1997) 57 Cal. App. 4th 1334, 1342, 67 Cal. Rptr. 2d 726*

[2] Availability of Summary Judgment

[a] On Motion Only

On appeal from summary judgment, reviewing court as lacking jurisdiction to reverse with instruction to enter judgment for opposing party if latter failed to move for summary judgment. *Dvorin v. Appellate Dep't of Superior Court (1975) 15 Cal. 3d 648, 650-651, 125 Cal. Rptr. 771, 542 P.2d 1363*

[b] On Stipulation

Proceeding for summary judgment as proper when parties agree on facts and merely seek resolution of issues of law. *T.M. Cobb Co. v. County of Los Angeles (1976) 16 Cal. 3d 606, 612, 128 Cal. Rptr. 655, 547 P.2d 431* ; *Dixon v. Salvation Army (1983) 142 Cal. App. 3d 463, 464, 191 Cal. Rptr. 111* ; *County of Riverside v. Idyllwild County Water Dist. (1978) 84 Cal. App. 3d 655, 657, 148 Cal. Rptr. 650*

Mere fact that both sides move for summary judgment as not establishing that there is no triable issue of material fact; trial court as empowered to make an independent determination on this point before proceeding to decide any questions of law. *Coast Elevator Co. v. State Bd. of Equalization (1975) 44 Cal. App. 3d 576, 583-584, 118 Cal. Rptr. 818* (disapproved on another ground in *Culligan Water Conditioning v. State Bd. of Equalization (1976) 17 Cal. 3d 86, 93 n.4, 130 Cal. Rptr. 321, 550 P.2d 593*)

[c] Procedural Limitations

Case management order in complex litigation case was invalid to extent it precluded party from filing *Code Civ. Proc. § 437c* motion by setting up procedure for resolving choice of law issues involved in dispositive motions before motions themselves could be filed, contravened section 437c; once party has filed motion, however, under facts presented, court had inherent power to defer hearing of motion until it first decided myriad choice of law issues potentially involved in case; trial court may not establish procedure for deferred hearing of section 437c motions in every complex case; each case must be examined individually to determine propriety of case management order issued in that case. *First State Ins. Co. v. Superior Court (2000) 79 Cal. App. 4th 324, 330-336, 94 Cal. Rptr. 2d 104*

When court of appeal decided, on the merits of the parties arguments, that trial court correctly entered judgment, held that it would serve no useful purpose at that point for court of appeal to reverse on basis of trial court denial of oral argument at hearing. *Victor v. Hedges (1999) 77 Cal. App. 4th 229, 244-245, 245 n.18, 91 Cal. Rptr. 2d 466* (summary judgment for defendants affirmed)

Oral argument required on summary adjudication motions. *Gwartz v. Superior Court (1999) 71 Cal. App. 4th 480, 482, 83 Cal. Rptr. 2d 865* (following *Mediterranean Construction Co. v State Farm Fire & Casualty Co. (1998) 66*

Cal. App. 4th 257, 265, 77 Cal. Rptr. 2d 781)

Local court policy forcing party wishing to make *Code Civ. Proc. § 437c* motion for summary judgment to consult first with trial judge and other party and agree on procedure different from that provided by statute improperly interferes with party's right to move for summary judgment or summary adjudication of issue at any time pursuant to established procedures, and is invalid. *Lokeijak v. City of Irvine (1998) 65 Cal. App. 4th 341, 344, 76 Cal. Rptr. 2d 429*

Because summary judgment is drastic remedy, it is important that all procedural requirements be satisfied before trial court grants it; thus, local rules may not provide shortcut for these requirements; local court rule allowing court to grant summary judgment to party opposing motion without having made cross motion was inconsistent with *Code Civ. Proc. § 437c* and thus, invalid. *Sierra Craft, Inc. v. Magnum Enterprises, Inc. (1998) 64 Cal. App. 4th 1252, 1256, 75 Cal. Rptr. 2d 681*

Amended complaint as superseding original complaint; therefore, grant of summary judgment on first complaint after amended complaint had been filed as error and order as void. *Perry v. Atkinson (1987) 195 Cal. App. 3d 14, 18, 240 Cal. Rptr. 402*

Hearing on motion for summary judgment less than 45 days before trial as not violating statutory time frame of *Code Civ. Proc. § 437c* when scheduled pursuant to court order based on good cause shown. *Mann v. Columbia Pictures, Inc. (1982) 128 Cal. App. 3d 628, 632-633, 180 Cal. Rptr. 522* (construing *Code Civ. Proc. § 437c* prior to 1983 amendment changing time period to 30 days)

Summary judgment is available before defendant has filed answer, so long as defendant has otherwise made general appearance. *Snider v. Snider (1962) 200 Cal. App. 2d 741, 746-747, 19 Cal. Rptr. 709*

[d] Antitrust Cases

While summary judgment should be used sparingly in complex antitrust cases, caution does not equal prohibition, and summary judgment remains available to defendants in antitrust cases in appropriate instances. *Fisherman's Wharf Bay Cruise Corp. v. Superior Court (2003) 114 Cal. App. 4th 309, 321, 7 Cal. Rptr. 3d 628*

[e] Mandamus Proceedings

Summary adjudication is not available in mandamus proceedings in which court's review is limited to the evidence contained in the administrative record; court must review all evidence already in record in disposing of claim that agency's decision is not supported by the record. *Dunn v. County of Santa Barbara (2006) 135 Cal. App. 4th 1281, 1292, 38 Cal. Rptr. 3d 316*

[3] Burden of Proof

[a] In General

Burden of persuasion remains with the party moving for summary judgment. When the defendant moves for summary judgment, in those circumstances in which the plaintiff would have the burden of proof by a preponderance of the evidence, thedefendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true or the defendant must establish that an elementof the claim cannot be established, by presenting evidence that the plaintiff does not possess and cannot reasonably obtain, needed evidence. *Kahn v. East Side Union High School Dist. (2003) 31 Cal. 4th 990, 1003, 4 Cal. Rptr. 3d 103, 75 P.3d 30*

Defendant meets burden of persuasion by showing that one or more elements of plaintiff's cause of action cannot be established or that there is complete defense to that cause of action; although defense is no longer required to conclusively negate an element of cause of action, defendant must show through evidence and not merely point out, that plaintiff does not possess and cannot reasonably obtain needed evidence; if burden is met, burden shifts to plaintiff to present evidence making out prima facie showing of existence of a triable issue of material fact. *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 850-855, 107 Cal. Rptr. 2d 841, 24 P.3d 493*

Applicable burden of proof for a summary judgment motion is same as it would be at trial. *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 851, 107 Cal. Rptr. 2d 841, 24 P.3d 493*

Moving plaintiff meets burden if he or she proves each element of the cause of action; moving plaintiff need not disprove any defense asserted by defendant. *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 853, 107 Cal. Rptr. 2d 841, 24 P.3d 493* (dicta)

Plaintiff sued the owners of an apartment complex after she was criminally assaulted on the premises and claimed that defendant's failure to take proper security precautions was the proximate cause of her damages; motion for summary judgment granted because plaintiff was unable to provide evidence of causation since she had no evidence showing the identity of her assailants, whether they were trespassers or tenants, whether the security gate was broken, or whether defendant could reasonably have warned the public of unspecified dangers from unknown assailants; declaration of plaintiff's security expert based on same evidence was equally speculative since he equally unaware of assailants' identities and his opinion regarding causation was too tenuous to create a triable issue. *Saelzler v. Advanced Group 400 (2001) 25 Cal. 4th 763, 780-781, 107 Cal. Rptr. 2d 617*

Amended language of *Code Civ. Proc. § 437c* like its federal counterpart, now places initial burden on moving party, and shifts it to opposing party on showing that one or more elements of cause of action cannot be established. *Saelzler v. Advanced Group 400 (2001) 25 Cal. 4th 763, 767-768, 107 Cal. Rptr. 2d. 617, 23 P.3d 1143* , quoting with approval *Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 71-72, 83-84, 81 Cal. Rptr. 2d 360* (reversing judgment of court of appeal with directions to affirm award of summary judgment for defendants)

Defendant adduced, in support of its motion for summary judgment, affirmative evidence which, unless materially contradicted or rebutted, would establish that each of plaintiff's causes of action lacked merit; burden then shifted to plaintiff to show existence of one or more triable issues of material fact and as to each cause of action plaintiff submitted or pointed to evidence which, in plaintiff's view, indicated such triable issues; thus, as to each count of plaintiff's complaint, issue on appellate review is simply whether, and to what extent, evidence submitted for and against motion for summaryjudgment discloses issues warranting trial. *Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 335 n.7, 100 Cal. Rptr. 2d 352, 8 P.3d 1089* (summary judgment for defendant proper except as to one claim; remanded to court of appeal)

Under 1992 and 1993 amendments to *Code Civ. Proc. § 437c*, defendant moving for summary judgment has met burden of showing that cause of action has no merit if that party has shown that one or more elements of plaintiff's cause of action cannot be established; once defendant satisfies this obligation, burden shifts to plaintiff to show that a triable issue of one or more material facts exist to that cause of action or a defense thereto; both trial court and appellate apply these principles in resolving summary judgment motions. *Green v. Ralee Engineering Co. (1998) 19 Cal. 4th 66, 72, 78 Cal. Rptr. 2d 16, 960 P.2d 1046* (summary judgment for defendant reversed)

Moving defendant meets burden of showing lack of merit of plaintiff's claim by negating one of the elements of plaintiff's cause of action. *Dekens v. Underwriters Laboratories, Inc. (2003) 107 Cal. App. 4th 1177, 1185, 132 Cal. Rptr. 2d 699*

For summary judgment purposes, a deposition objection and instruction not to answer are not the equivalent of a factually devoid response, and therefore cannot be used to shift the burden from the moving defendant to the plaintiff. *Gaggero v. Yura (2003) 108 Cal. App. 4th 884, 892-893, 134 Cal. Rptr.2d 313* .

Moving party's "simply pointing to" absence of evidence supporting plaintiff's position is not in itself enough to obtain summary judgment in its favor and there must be some "affirmative showing" by moving defendant that plaintiff could not obtain such evidence, before summary judgment would be proper; in cases in which opposing party (usually plaintiff) has been thwarted in attempt to obtain evidence that might create issue of material fact, or discovery is incomplete, motion for summary judgment should not be granted; thus conclusory statements in declarations from three attorneys and company executive stating that alter ego and agency allegations of complaint were untrue were insufficient to furnish basis for granting summary judgment to defendants, nor did they shift burden of proof to plaintiff. *Krantz v. BT Visual Images, L.L.C. (2001) 89 Cal. App. 4th 164, 170-175, 107 Cal. Rptr. 2d 209* (reversing partial summary judgment/summary adjudication for defendants)

Defendant seeking summary judgment bears initial burden of proving cause of action has no merit by showing that one or more elements of plaintiff's cause of action cannot be established or there is complete defense; once defendant's burden is met, burden shifts to plaintiff to show that triable issue of fact exists as to that cause of action; in employment discrimination action each of decision makers who decided not to rehire former employee explained in declaration under penalty of perjury specific job-related reasons why he was not qualified for position at issue and why candidate selected for position was better qualified--at this point, to avoid summary judgment, plaintiff had to offer substantial evidence that employer's stated nondiscriminatory reason for adverse action was untrue or pretextual, or evidence employer acted with discriminatory animus, or combination of two,such that reasonable trier of fact could conclude employer engaged in intentional discrimination; employee in this situation cannot simply show employer's decisionwas wrong, mistaken, or unwise but must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in employer's proffered legitimate reasons for its action that reasonable factfinder could rationally find them unworthy of credence and, therefore, infer that employer did not act for asserted nondiscriminatory reasons. *Morgan v. Regents of University of California (2000) 88 Cal. App. 4th 52, 74-80, 105 Cal. Rptr. 2d. 652* (summary judgment for defendant affirmed)

If defendant's moving papers establish prima facie showing that justifies judgment, burden then shifts to plaintiff to demonstrate existence of material factual issue; defendant's papers are strictly construed, while plaintiff's papers are liberally construed, and court must be convinced that under no possible hypothesis within reasonable purview of complaint's allegations is there material question of fact that requires examination by trial; if defendant fails to meet this burden, it is unnecessary to examine plaintiff's opposing evidence; motion must be denied. *City of Santa Cruz v. Pacific Gas & Electric Co. (2000) 82 Cal. App. 4th 1167, 1175-1176, 99 Cal. Rptr. 2d 198* (summary judgment for defendants reversed as to some defendants and affirmed as to other defendants)

Defendant moving for summary judgment may disprove at least one essential element of plaintiff's cause of action or show that plaintiff cannot establish an element of cause of action; once moving party has met that burden, opposing party bears burden of presenting evidence that there is triable issue of fact as to any essential element of cause of action. *Martinez v. Bank of America (2000) 82 Cal. App. 4th 883, 887-888, 98 Cal. Rptr. 2d 576* (summary judgment for defendant affirmed)

Moving party bears burden of establishing by declarations and evidence, complete defense to plaintiff's action or absence of essential element of plaintiff's case; moving party must demonstrate that under no hypothesis is there material factual issue requiring trial; when defendant, as moving party, makes that showing, burden of proof shifts to plaintiff, as opposing party, to show, by responsive separate statement and admissible evidence, that triable issues of fact exist. *Assilzadeh v. California Federal Bank (2000) 82 Cal. App. 4th 399, 408, 98 Cal. Rptr. 2d 176* (summary judgment for defendants affirmed)

Summary judgment motions are granted if all papers submitted show there is no triable issue as to any material fact and moving party is entitled to judgment as matter of law; moving defendant meets this burden by negating essential element of plaintiff's case, by establishing complete defense, or by demonstrating absence of evidence to support plaintiff's case; once moving defendant has met this initial burden, burden shifts to plaintiff to show that triable issue of one or more material facts exists; thus, until defendant in first instance establishes right to relief defendant sought, plaintiff has no burden to produce evidence or to disprove anything at all. *Rubenstein v. Rubenstein (2000) 81 Cal. App. 4th 1131, 1142, 1152, 97 Cal. Rptr. 2d 707* (summary judgment for defendant reversed)

Defendant must show that under no possible hypothesis within reasonable purview of complaint's allegations is there material fact that requires examination by trial; if defendant makes that showing, court must look at plaintiff's papers to determine whether they demonstrate existence of triable, material factual issue. *Dimock v. Emerald Properties (2000) 81 Cal. App. 4th 868, 873-874, 97 Cal. Rptr. 2d 255* (summary judgments for defendants reversed)

Moving defendant is not entitled to summary judgment unless he or she negates all theories of liability pleaded by plaintiff. *Juarez v. Boy Scouts of America, Inc. (2000) 81 Cal. App. 4th 377, 393, 397, 97 Cal. Rptr. 2d 12* (summary judgment for defendants affirmed except for one cause of action against two defendants that was reversed)

Defendant moving for summary judgment meets its burden of proof when it shows there is complete defense to action; once defendant does so, burden shifts to plaintiff to show existence of triable issue of fact with respect to that defense; moving party's affidavits are strictly construed and opposing party's are liberally construed. *Alvarez v. State of California (2000) 79 Cal. App. 4th 720, 727, 95 Cal. Rptr. 2d 719* (summary judgment for defendant affirmed)

In legal malpractice action, plaintiff's nonresponsive answer to interrogatory did not constitute "factually devoid" discovery to shift burden to plaintiff on question of causation of plaintiff's damages, since discovery did not call for information on that subject, or for other information from which information on that subject could be deduced; to extent nonresponsive information was provided which might have born on question of causation, since it was not called for by interrogatory, it would be speculation to determine what response would have been provided to question squarely asking about plaintiff's damages; court cannot assume that all information was provided to an interrogatory that was not propounded. *Gulf Ins. Co. v. Berger, Kahn,Shafton, Moss, Figler, Simon & Gladstone (2000) 79 Cal. App. 4th 114, 125, 133-136, 93 Cal. Rptr. 2d 534* (summary judgment for defendant reversed)

Defendant seeking summary judgment must prove either affirmative defense, disprove at least one element of plaintiff's cause of action, or show that some such element cannot be established; opposing party need not prove his or her case; it is enough to show that a triable issue of material exists. *Government Employees Ins. Co. v. Superior Court (2000) 79 Cal. App. 4th 95, 100, 93 Cal. Rptr. 2d 820* (review by writ proceeding; trial court should have granted summary judgment for defendant)

Pleadings define issues to be considered on motion for summary judgment; as to each claim framed by complaint, defendant must present facts to negate essential element or establish defense; only then will burden shift to plaintiff to demonstrate existence of triable, material issue of fact. *American Golf Corp. v. Superior Court (2000) 79 Cal. App. 4th 30, 35, 93 Cal. Rptr. 2d 683* (review by writ proceeding; trial court directed to enter new and different order granting summary judgment for defendant)

Moving defendant must demonstrate through admissible evidence that one or more essential elements of the cause of action cannot be established; once defendant has made such a showing, burden shifts to plaintiff to produce evidence that a triable issue of fact exists as to an essential element of cause of action. *Renna v. County of Fresno (2000) 78 Cal. App. 4th 1, 5, 92 Cal. Rptr. 2d 586* (summary judgment for defendant affirmed)

Moving party bears burden of establishing, by declarations and evidence, complete defense to plaintiff's action or absence of essential element of plaintiff's case; moving party must demonstrate that under no hypothesis is there

material factual issue requiring trial; when moving party makes that showing, burden shifts to opposing party to show, by responsive separate statement and admissible evidence, that triable issues of fact exist. *Ostayan v. Serrano Reconveyance Co. (2000) 77 Cal. App. 4th 1411, 1418, 92 Cal. Rptr. 2d 577* (summary judgment for defendants affirmed)

To prevail on summary judgment motion, defendant must show that one or more elements of plaintiff's cause of action cannot be established or that there is complete defense to that cause of action. *Pardee Construction Co. v. Insurance Co. of the West (2000) 77 Cal. App. 4th 1340, 1349 n.3, 92 Cal. Rptr. 2d 443* (judgment for three defendants whose motions for judgment on pleadings were granted after summary adjudication in their favor reversed as to two of them with directions that trial court grant plaintiff's motions for summary adjudication; judgment for remaining defendant affirmed)

When plaintiff is moving party, appellate court determines whether plaintiff has met its burden under former *Code Civ. Proc. § 437c(o)(1)* (*see now Code Civ. Proc. § 437(p)*) of showing there is no defense to cause of action because admissible evidence produced by plaintiff proves each element of cause of action entitling party to judgment on that cause of action; if moving party has met its statutory burden of proof and summary judgment motion prima facie justifies a judgment, burden shifts to opposing party and appellate court determines whether that party has met its burden under *Code Civ. Proc. § 437c*; when defendants are opposing parties, appellate court determines whether they have met their burden under former Code Civ. Proc.§ 437c(o)(1)(2) (*see now Code Civ. Proc. § 437c(p)*), of producing admissible evidence showing that a triable issue of one or more material facts exists as to that cause of action or a defense to it. *Riverside County Community Facilities Dist. v. Bainbridge 17 (1999) 77 Cal. App. 4th 644, 653, 92 Cal. Rptr. 2d 29* (summary judgment for plaintiff affirmed)

Defendant moving for summary judgment must demonstrate that one or more elements of cause of action cannot be established or that there is complete defense to that cause of action; it is then up to plaintiff to show that triable issue of material fact exists as to that cause of action or defense; defendants did not meet their burden on their summary judgment motion with regard to element of duty while plaintiff in plaintiff's motion for summary adjudication met its burden of completely disposing of issue of duty. *Novak v. Low, Ball & Lynch (1999) 77 Cal. App. 4th 278, 281, 285, 285 n.5, 91 Cal. Rptr. 2d 453* (summary judgment for defendants reversed and trial court directed to grant summary adjudication of issue of duty for plaintiff)

When defendant attorneys' summary judgment motion attempted to show complete defense because plaintiff trust beneficiary was not real party in interest and burden shifted to plaintiff to set forth specific facts showing that triable issue of material fact existed to defense relied on, plaintiff did not have to offer evidence proving claims to establish standing, but rather to establish facts showing that plaintiff was real party in interest for purposes of asserting those claims and seeking those damages. *Wolf v. Mitchell, Silberberg & Knupp (1999) 76 Cal. App. 4th 1030, 1041, 90 Cal. Rptr. 2d 792* (summary judgment for defendants reversed)

With regard to summary adjudication motion, moving party plaintiff had to show there was no evidence to support defendant's unclean hands affirmative defense; once plaintiff met this burden, burden shifted to defendant to set forth specific facts showing triable issue of material fact existed as to defense. *Kendall-Jackson Winery, Ltd. v. Superior Court (1999) 76 Cal. App. 4th 970, 978, 90 Cal. Rptr. 2d 743* (summary adjudication in plaintiff's favor overturned on writ of mandate)

In medical malpractice cases, when defendant doctor moves for summary judgment and supports motion with expert declaration that his or her conduct fell within community standard of care, he or she is entitled to summary judgment unless plaintiff comes forward with conflicting expert evidence. *Hanson v. Grode (1999) 76 Cal. App. 4th 601, 603-604, 607, 90 Cal. Rptr. 2d 396* (summary judgment for defendants reversed)

To prevail on motion for summary judgment, defendant must demonstrate plaintiff's cause of action has no merit; this

requirement can be satisfied by showing either one or more of its elements cannot be established or that complete defense exists to it; once defendant meets this requirement, burden shifts to plaintiff to demonstrate a triable issue of material fact exists. *Brinton v. Bankers Pension Services, Inc. (1999) 76 Cal. App. 4th 550, 555, 90 Cal. Rptr. 2d 469* (summary judgment for defendant affirmed)

Even though plaintiff bears burden of proof at trial, moving defendant bears initial burden of showing lack of any triable factual issue; responding plaintiff has no evidentiary burden unless moving defendant has first met its initial burden; only after moving defendant meets its initial burden does burden shift to plaintiff to demonstrate existence of triable issue. *Binder v. Aetna Life Ins. Co. (1999) 75 Cal. App. 4th 832, 839-840, 89 Cal. Rptr. 2d 540* (summary judgment for defendant reversed)

Moving party bears burden of proving that claims of adverse party are entirely without merit on any legal theory; opposition must demonstrate only existence of at least one triable issue of fact and all doubts as to propriety of granting motion must be resolved in favor of party opposing motion. *Campbell v. Derylo (1999) 75 Cal. App. 4th 823, 826, 89 Cal. Rptr. 2d 519* (summary judgment for defendant reversed)

Defendant moving for summary judgment may establish that an essential element of cause of action is absent by reliance on pleadings, competent declarations, binding judicial admission contained in allegations of plaintiff's complaint, responses or failure to respond to discovery, and testimony of witnesses at noticed depositions; plaintiff may not rely on his or her pleadings alone, but must file opposition to motion, with affidavits setting forth specific facts demonstrating that triable issue of material fact exists as to cause of action or defense; thus, when parties have had sufficient opportunity adequately to develop their factual cases through discovery and defendant has made a sufficient showing that plaintiff's action has no merit, to avert summary judgment plaintiff must produce substantial responsive evidence sufficient to establish existence of triable issue of material fact on issues raised by plaintiff's cause of action. *Eisenberg v. Alameda Newspapers, Inc. (1999) 74 Cal. App. 4th 1359, 1375-1376, 88 Cal. Rptr. 2d 802* (summary judgment for defendants affirmed)

To obtain summary judgment on ground that general release has discharged third party from liability, third party must affirmatively show parties intended to release him or her; burden of proof is on third party under both contract law and summary judgment statute; when defendant moved for summary judgment contending general release relieved defendant from liability and plaintiff responded that extrinsic evidence showed parties never intended to release defendant, even if release was sufficient to shift burden of proof to plaintiff, extrinsic evidence before court raised triable issue regarding parties' intent to release defendant. *Neverkovec v. Fredericks (1999) 74 Cal. App. 4th 337, 341-344, 349, 87 Cal. Rptr. 2d 856* (summary judgment for defendant reversed)

Under the 1992-1993 amendments to *Code Civ. Proc. § 437c*, defendant seeking summary judgment need only demonstrate plaintiff's case has no merit to shift burden to plaintiff to demonstrate existence of triable issue of material fact. *Myricks v. Lynwood Unified School Dist. (1999) 74 Cal. App. 4th 231, 238, 87 Cal. Rptr. 2d 734* (summary judgment for defendants affirmed)

Moving defendant's burden does not shift until defendant carries initial burden to show essential element of cause of action cannot be established; if moving defendant argues that it has complete defense to plaintiff's cause of action, defendant has initial burden to show undisputed facts support each element of affirmative defense; once it does so, burden shifts to plaintiff to show issue of fact concerning at least one element of defense; in employment discrimination action, once employer makes sufficient showing of legitimate reason for discharge, then discharged employee seeking to avert summary judgment must demonstrate by additional facts or legal argument that defendant's showing was in fact insufficient or by competent evidentiary materialsthat there was triable issue of fact material to defendant's showing; with respect to latter choice, employee must produce substantial responsive evidence that employer's showing was untrue or pretextual; speculation cannot be regarded as substantial responsive evidence. *Hanson v. Lucky Stores, Inc. (1999) 74 Cal. App. 4th 215, 223-225, 87 Cal. Rptr. 2d 487* (summary judgment for defendant affirmed)

If motion for summary judgment is supported by affidavits sufficient to sustain motion, burden shifts to party opposing motion to show triable issue of material fact exists; party cannot avoid summary judgment based on mere speculation and conjecture, but must produce admissible evidence raising a triable issue of material fact. *Vournas v. Fidelity Nat. Tit. Ins. Co. (1999) 73 Cal. App. 4th 668, 672 86 Cal. Rptr. 2d 490* (summary judgment for defendant affirmed)

Moving defendant may meet burden of showing cause of action has no merit by proving either (1) one or more elements of cause of action cannot be established, or (2) there is complete defense to cause of action; once that burden has been met, burden shifts to plaintiff to show existence of triable issue of one or more material facts concerning that cause of action or defense; because summary judgment drastic procedure that deprives losing party of trial on merits, defendant moving for summary judgment must conclusively negate the necessary elements of plaintiff's case or demonstrate that under no hypothesis is there material issue of fact. *Smith v. Maldonado (1999) 72 Cal. App. 4th 637, 644, 85 Cal. Rptr. 2d 397* (summary judgment for defendants affirmed)

Burden on defendant moving for summary judgment based on assertion of affirmative defense is heavier than burden to show one or more elements of plaintiff's action cannot be established; instead of merely submitting evidence to negate single element of plaintiff's cause of action, or offering evidence that plaintiff does not have evidence to create issue of fact as to one or more elements of case, defendant has initial burden to show undisputed facts support each element of affirmative defense; defendant must demonstrate that under no hypothesis is there material factual issue requiring trial; if defendant does not meet this burden, motion must be denied; only if defendant meets this burden does burden shift to plaintiff to show issue of fact concerning at least one element of defense; moreover, submission of evidence that is equivocal, or from which conflicting inferences may be drawn is insufficient to meet movant's burden. *Anderson v. Metalclad Insulation Corp. (1999) 72 Cal. App. 4th 284, 289-290, 297, 85 Cal. Rptr. 2d 331* (summary judgment for defendant reversed)

Defendant seeking summary judgment bears initial burden of showing that one or more elements of plaintiff's cause of action cannot be established or there is complete defense; once defendant's burden has been met, burden shifts to plaintiff to show triable issue of fact exists as to that cause of action; plaintiff alleging discriminatory termination under California's antidiscrimination statutory scheme must be able to survive burden-shifting analysis set forth in *McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792, 802-804, 93 S. Ct. 1817, 36 L. Ed.2d 668* , under which employee must first establish prima facie case of age discrimination, and if successful, employer must offer legitimate non-age-based reason for adverse employment action; if employer does not, employee prevails, but if employer does, burden shifts back to employee to meet ultimate obligation to prove reason for action was age discrimination; California courts have disagreed on exact showing required by employee to avoid summary judgment in face of employer's evidence of non-age-based reason for adverse action; under predominant view, followed by court, to avoid summary judgment, employee must produce substantial evidence that employer's stated nondiscriminatory reason for adverse action was untrue or pretextual or that employer acted with discriminatory animus, or a combination of both, such that reasonable trier of fact could conclude employer engaged in intentional discrimination; to avoid summary judgment, plaintiff had to do more than establish prima facie case and deny credibility of defendant's witnesses; plaintiff needed to produce specific, substantial evidence of pretext, which plaintiff failed to do. *Horn v. Cushman & Wakefield Western, Inc. (1999) 72 Cal. App. 4th 798, 805-807, 817* (summary judgment for defendant affirmed)

Defendant who relies on contract terms in moving for summary judgment need not establish contract is not unconscionable, unless plaintiff's complaint alleged facts suggesting unconscionability; thus, when complaint alleged defendant's interpretation of its own contract would violate public policy, but complaint contained no factual allegations of unconscionability, plaintiffs in opposing summary judgment had burden to show unconscionability. *Williams v. California Physicians' Service (1999) 72 Cal. App. 4th 722, 742, 85 Cal. Rptr. 2d 497* (summary judgment for defendant affirmed)

In action for negligence, premises liability, and negligent infliction of emotional distress, when defendant's only

evidence offered in support of motion for summary adjudication was that injury occurred on public street over which defendant had no control and not on defendant's property, defendant did not satisfy its burden to negate duty of care; defendant did not offer any evidence to show injury was not foreseeable, injury was not actually suffered, or slope of driveway and configuration of sidewalk, play area and driveway was not closely connected to injury, or to negate any of other *Rowland v. Christian (1968) 69 Cal. 2d 108, 113, 70 Cal. Rptr. 97, 443 P.2d 561* factors. *Barnes v. Black (1999) 71 Cal. App. 4th 1473, 1477, 1479, 84 Cal. Rptr. 2d 634* (summary adjudication for defendant reversed)

Under current version of summary judgment statute, moving defendant need not support motion with affirmative evidence negating essential element of responding party's case; moving defendant may, through factually vague discovery responses or otherwise, point to absence of evidence to support plaintiff's case; when that is done, burden shifts to plaintiff to present evidence showing there is triable issue of material fact; if plaintiff is unable to meet his or her burden of proof regarding essential element of case, all other facts are rendered immaterial. *Wilkins v. National Broadcasting Co. (1999) 71 Cal. App. 4th 1066, 1074, 84 Cal. Rptr. 2d 329* (summary judgment for defendants affirmed)

Defendant has met burden of showing cause of action has no merit if defendant has shown one or more elements of cause of action, even if not separately stated, cannot be established, or that there is complete defense to that cause of action. *Armato v. Baden (1999) 71 Cal. App. 4th 885, 893, 84 Cal. Rptr 2d 294* (summary judgments for defendants affirmed)

Defendant may rely on plaintiff's factually inadequate discovery answers to seek summary adjudication of particular cause of action; if plaintiff fails toadduce evidence during discovery to support factual allegations of complaint, burden shifts to plaintiff and motion may be granted if plaintiff does not set forth specific facts to show triable issue of material fact. *Lazar v. Hertz Corp. (1999) 69 Cal. App. 4th 1494, 1506-1508* (summary adjudication for defendants affirmed)

On summary judgment, moving defendant may rely on factually devoid discovery responses to shift burden of proof pursuant to *Code Civ. Proc. § 437c(o)(2)*; once burden shifts as result of factually devoid discovery responses, plaintiff must set forth specific facts that prove existence of triable issue of material fact; if plaintiff fails to do so, summary judgment must be granted; distinguishing cases in which factually devoid discovery responses were not sufficient to shift burden of proof; in this case, by reference to plaintiffs' factually devoid discovery responses, defendant showed plaintiffs could not establish at least one element of their case; plaintiffs failed to present evidence in response sufficient to create triable issue of material fact regarding plaintiff's deceased husband's exposure to asbestos-containing products related to defendant. *Chaknova v. Wilbur-Ellis Co (1999) 69 Cal. App. 4th 962, 974-978, 81 Cal. Rptr. 2d 871* (summary judgment for defendant affirmed)

Defendant meets its burden if it negates essential element of plaintiff's case, or establishes complete defense, or if it demonstrates absence of evidence to support plaintiff's case; once moving defendant has met its initial burden, burden shifts to plaintiff to show triable issue of one or more material facts exists. *Berry v. Society of Saint Pius X (1999) 69 Cal. App. 4th 354, 365, 81 Cal. Rptr. 2d 574* (summary judgment for defendants affirmed)

What quantum of evidence is needed to trigger the evidentiary burden shifting concerning summary judgment procedure in California is issue of law. *Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 70, 81 Cal. Rptr. 2d 360* (summary judgment for defendant reversed)

Question of what sort of evidence is sufficient to shift burden under California's summary judgment statute said to be unsettled; apparent majority of appellate courts accept proposition that defendant can meet burden of proof by showing plaintiff has no evidence to support case; minority view suggests defendant must do more than merely argue there is absence of evidence and must produce affirmative evidence to show that plaintiff cannot establish prima facie case; cases reviewed and reconciled; court did not decide whether more cautious view is better one because trial court's ruling was incorrect under either approach; moving defendant had conducted no discovery, and in deposition by other

defendants, plaintiff was not asked any question concerning moving defendant, so that, since plaintiff's duty to answer completely only extended so far as reasonable ambit of questions asked, it was possble plaintiff had more information concerning the moving defendant and unlike other cases, the court could not infer from incomplete or evasive responses to discovery that plaintiffs had no other facts to support the case. *Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 80-84, 81 Cal. Rptr. 2d 360* (summary judgment for defendant reversed)

Defendant who is moving party bears burden of showing one or more elements of cause of action cannot be established or there is complete defense; unless defendant meets its burden, plaintiff has no obligation to demonstrate there is triable issue of fact. *LeVine v. Weis (1998) 68 Cal. App. 4th 758, 763, 80 Cal. Rptr. 2d 439* (summary adjudication for defendant reversed, but in all other respects judgment affirmed)

When parties had sufficient opportunity adequately to develop their factual cases through discovery and defendant has made sufficient showing to establish prima facie case in defendant's favor, plaintiff, to avert summary judgment, must produce substantial responsive evidence sufficient to establish triable issue of material fact on merits of defendant's showing; for this purpose, responsive evidence that gives rise to no more than mere speculation cannot be regarded as substantial and is insufficient to establish triable issue of material fact. *Sangster v. Paetkau (1998) 68 Cal. App. 4th 151, 162-163, 80 Cal. Rptr. 2d 66* (summary judgment for defendants affirmed)

When motion for summary judgment is supported by affidavits sufficient to sustain motion, burden of showing triable issue of fact shifts to party opposing motion; under 1992 and 1993 amendments to *Code Civ. Proc. § 437c*, defendant moving for summary judgment meets burden of showing cause of action has no merit if defendant shows one or more elements of plaintiff's cause of action can not be established; once moving defendant satisfies this obligation, burden shifts to plaintiff to demonstrate triable issue of material fact as to existence of element or elements challenged by defendants; to do so, plaintiff may not rely on mere allegations of its pleadings, but must show by specific facts that requisite triable issue of material fact is present; under former *Code Civ. Proc. § 437c(o)(2)* (*see now Code Civ. Proc. § 437c(p)*) defendant seeking summary judgment has two means to shift burden of proof to plaintiff to produce evidence creating triable issue of fact, i.e., defendant may rely on factually insufficient discovery responses by plaintiff to show plaintiff cannot establish essential element of cause of action, or defendant may use tried and true technique of negating (i.e., disproving) essential element of plaintiff's cause of action; if showing by defendant does not support judgment in defendant's favor, however, burden does not shift and motion must be denied without regard to plaintiff's showing. *Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal. App. 4th 1509, 1524, 1533-1535, 80 Cal. Rptr. 2d 94* (summary judgments for defendants both affirmed and reversed)

Courts impose more stringent burdens on one opposing motion in defamation and invasion of privacy cases and require showing of high probability that plaintiff will ultimately prevail in case; absent such showing, courts are inclined to grant motion and do not permit case to proceed beyond summary judgment stage. *Alszeh v. Home Box Office (1998) 67 Cal. App. 4th 1456, 1460, 80 Cal. Rptr. 2d 16* (summary judgment for defendant affirmed)

Moving party bears burden of establishing, by declarations and evidence, a complete defense to plaintiff's action or the absence of an essential element of plaintiff's case. *Old Republic Ins. Co. v. Superior Court (1998) 66 Cal. App. 4th 128, 141-142, 77 Cal. Rptr. 2d 642* (peremptory writ issued directing trial court to grant defendants' motions for summary judgment)

Defendant meets burden on motion if that party proved there is complete defense to cause of action; once defendant met that burden, burden shifts to plaintiff to show that triable issue of one or more material facts exists. *Crookall v. Davis, Punelli, Keathley & Willard (1998) 65 Cal. App. 4th 1048, 1057, 77 Cal. Rptr. 2d 250* (summary judgment for defendants reversed)

To secure summary judgment, moving defendant may prove an affirmative defense, disprove at least one essential element of plaintiff's cause of action, or show element of cause of action cannot be established; defendant must show

that under no possible hypothesis within reasonable purview of allegations of complaint is there a material question of fact that requires examination by trial. *Murillo v. Rite Stuff Foods, Inc. (1998) 65 Cal. App. 4th 833, 840, 77 Cal. Rptr. 2d 12* (summary judgment for defendant reversed)

Case governed by 1993 amendments to *Code Civ. Proc. § 437c*, under which defendant's burden could be met only by showing that one or more elements of cause of action cannot be established, or there is complete defense to cause of action; once defendant has met burden, burden shifts to plaintiff to show triable issue of one or more material facts exists as to cause of action. *First Street Plaza Partners v. City of Los Angeles (1998) 65 Cal. App. 4th 650, 659, 76 Cal. Rptr. 2d 626* (summary judgment for defendant affirmed)

When party subject to claim of collateral estoppel is party moving for summary judgment, it has burden of showing opponent cannot establish prerequisites for collateral estoppel. *Schaefer/Karpf Productions v. CNA Ins. Companies (1998) 64 Cal. App. 4th 1306, 1314 n.2, 76 Cal. Rptr. 2d 42* (summary judgment for defendant affirmed)

Moving party bears burden of establishing, by declarations and evidence, a complete defense to plaintiff's action or absence of essential element of plaintiff's case; moving party must demonstrate that under no hypothesis is there a material factual issue requiring a trial; when defendant, as moving party, makes that showing, burden of proof shifts to plaintiff, as opposing party, to show by responsive separate statement and admissible evidence, that triable issues of fact exist. *Shapiro v. Sutherland (1998) 64 Cal. App. 4th 1534, 1543, 76 Cal. Rptr. 2d 101* (summary judgment in favor of defendant's reversed)

Clear from 1992 amendment that a defendant have "shown that one or more elements of the cause of action ... cannot be established" (§ 437c, former subd. (n)(2), Stats. 1992, ch. 1348, § 1, now subd. (o)), that defendant must make affirmative showing in support of defendants' motion; such a showing connotes something significantly more than simply pointing out to court that there is absence of evidence; before burden of producing even prima facie case should shift to plaintiff in advance of trial, defendant who cannot negate an element of plaintiff's case should be required to produce direct or circumstantial evidence that plaintiff not only does not have but cannot reasonably expect to obtain prima facie case; but when such showing can be made it is both fair to defendant and consistent with efficient administration of justice that plaintiff be called upon, on risk of summary judgment, to make prima facie case. *Travelers Casualty & Surety Co. v. Superior Court (1998) 63 Cal. App. 4th 1440, 1452, 1453, 75 Cal. Rptr. 2d 54*

Defendant seeking summary judgment has met burden of showing that cause of action has no merit if that party has shown that one or more elements of the cause of action cannot be established or that there is complete defense to cause of action; once defendant's burden met, burden shifts to plaintiff to show that a triable issue of fact exists as to that cause of action. *Depew v. Crocodile Enterprises, Inc. (1998) 63 Cal. App. 4th 480, 485, 73 Cal. Rptr. 2d 673* (summary judgment for defendant affirmed)

To be entitled to judgment as matter of law, moving party must show by admissible evidence that action has no merit or there is no defense to it; defendant meets this burden by showing that one or more elements of cause of action cannot be established or that there is complete defense to action; once defendant meets this showing, burden shifts to plaintiff to show that a triable issue of material fact exists as to that cause of action. *Barton v. Elexsys Internat., Inc. (1998) 62 Cal. App. 4th 1182, 1187, 73 Cal. Rptr. 2d 212* (summary judgment for defendant affirmed)

Moving defendant bears burden of establishing, by declaration and evidence, complete defense to plaintiff's action or absence of essential element of plaintiff's case; moving party must demonstrate that under no hypothesis is there a material factual issue requiring trial; when moving party makes that showing, burden of proof shifts to opposing party to show, by responsive separate statement and admissible evidence, that triable issues of fact exist. *Nissel v. Certain Underwriters at Lloyd's of London (1998) 62 Cal. App. 4th 1103, 1110, 73 Cal. Rptr. 2d 174* (summary judgment for defendant affirmed)

If moving defendant does not meet burden, plaintiff need not make any showing at all. *Pepperell v. Scottsdale Ins. Co. (1998) 62 Cal. App. 4th 1045, 1054, 73 Cal. Rptr. 2d 164* (summary judgment for defendant reversed; remanded for further proceedings)

Defendant is entitled to summary judgment if record establishes as matter of law that none of plaintiff's asserted causes of action can prevail; to succeed, defendant must present facts to negate essential element of each claim as framed by complaint or to establish defense; only then must plaintiff demonstrate existence of triable, material issue of fact. *City of South Lake Tahoe v. Superior Court (1998) 62 Cal. App. 4th 971, 975, 73 Cal. Rptr. 2d 146* (summary judgment for plaintiffs overturned by writ of mandate); *Federico v. Superior Court (1997) 59 Cal. App. 4th 1207, 1210, 69 Cal. Rptr. 2d 370* (denial of defendant's motion for summary judgment overturned by writ of mandate)

Moving plaintiff, must meet its statutory obligation under former *Code Civ. Proc. § 437c(o)(1)* (*see now Code Civ. Proc. § 437c(p)*) by producing admissible evidence of each element of cause of action entitling party to judgment on that cause. *San Diego Unified Port Dist. v. Gallagher (1998) 62 Cal. App. 4th 501, 503, 73 Cal. Rptr. 2d 30* (summary judgment for plaintiff reversed; remanded for further proceedings)

To secure summary judgment, moving defendant may prove affirmative defense, disprove at least one essential element of plaintiff's cause of action, or show that element of cause of action cannot be established; defendant must show that under no possible hypothesis within reasonable purview of allegations of complaint is there material question of fact which requires examination by trial; moving defendant bears burden of proving absence of any triable issue of material fact, even though burden of proof as to a particular issue may be on plaintiff at trial; once moving party has met itsburden, opposing party bears burden of presenting evidence that there is triable issue of fact as to any essential element of cause of action. *Ochoa v. Pacific Gas & Electric Co. (1998) 61 Cal. App. 4th 1480, 1485, 72 Cal. Rptr. 2d 232* (summary judgment for defendant affirmed)

Although appellate court must strictly construe moving party's papers and liberally construe those of the opposing party, latter bears burden of showing triable issues of fact exist. *Leon v. Family Fitness Center (#107), Inc. (1998) 61 Cal. App. 4th 1227, 1231* (summary judgment for defendant reversed; remanded for further proceedings)

To secure summary judgment, moving defendant may prove affirmative defense, disprove at least one essential element of plaintiff's cause of action, or show that element of cause of action cannot be established; notwithstanding strict construction given moving party's evidence and liberal construction given to that of opposing party, opponent has burden of showing triable issues of material fact exist; he or she may not rely on pleadings; complete failure of proof concerning essential element of nonmoving party's case necessarily renders all other facts immaterial. *Montgomery v. Cal. Accountants Mutual Ins. Co. (1998) 61 Cal. App. 4th 854, 858, 72 Cal. Rptr. 2d 39* (summary judgment for defendant affirmed)

For purposes of *Code Civ. Proc. § 437c*, moving defendant is statutorily treated as plaintiff and hence must present sufficient facts to make out prima facie case of nonliability; moving defendant must prove affirmative defense, disprove at least one essential element of plaintiff's cause of action or show that element of cause of action cannot be established; defendant must show that under no possible hypothesis within reasonable purview of allegations of the complaint is there material question of fact which requires examination by trial; if defendant makes that showing, court must look to plaintiff's papers to determine whether they demonstrate existence of triable, material issue of fact; counter affidavits and declarations need not prove opposition case; they suffice if they disclose triable issue. *McManis v. San Diego Postal Credit Union (1998) 61 Cal. App. 4th 547, 554, 558-559, 71 Cal. Rptr. 2d 617* (summary judgment for multiple defendants reversed as to one of them)

Defendant is entitled to summary judgment if record establishes as matter of law that none of plaintiff's asserted causes of action can prevail; when defendant demonstrates that cause of action has no merit because one or more elements of that cause of action cannot be established, burden shifts to plaintiff to show with specific facts that triable issue of one

or more material facts exist as to that cause of action. *Maxwell v. Fire Ins. Exchange (1998) 60 Cal. App. 4th 1446, 1448-1449, 70 Cal. Rptr. 2d 866* (summary judgment for defendant affirmed)

Defendant may meet its burden of establishing plaintiff's cause of action has no merit in one of two ways; by showing that one or more elements of cause of action, even if not separately pleaded, cannot be established, or that there is complete defense to cause of action. *Pensinger v. Bowsmith, Inc. (1998) 60 Cal. App. 4th 709, 718, 70 Cal. Rptr. 2d 531* (summary adjudication for defendant affirmed in part and reversed as to other causes of action)

To defeat defendant's summary judgment motion, when burden shifts to plaintiff to establish existence of genuine issue of material fact as to existence of element challenged by defendant, plaintiff must show specific facts and cannot rely on pleadings. *Snyder v. United States Fidelity & Guaranty Co. (1997) 60 Cal. App. 4th 561, 565, 70 Cal. Rptr. 2d 498* (summary adjudication for defendant reversed in part and affirmed as to other causes of action)

Moving defendant bears burden of proving absence of any triable issue of material fact, even though burden of proof as to particular issue may be on plaintiff at trial; once moving party has met its burden, opposing party bears burden of presenting evidence that there is no triable issue of fact as to any essential element of cause of action. *Pieper v. Commercial Underwriters Ins., Co. (1997) 59 Cal. App. 4th 1008, 1015, 69 Cal. Rptr. 2d 551* (summary judgment for defendant affirmed)

Moving party's burden on motion for summary judgment is only to negate existence of triable issues of fact in fashion that entitles that party to judgment on issues raised by pleadings; he or she is not required to refute liability on some theoretical possibility not included in pleadings; what issues are material is determined mainly by pleadings, rules of pleading, and substantive law relating to particular kind of case. *Waschek v. Department of Motor Vehicles (1997) 59 Cal. App. 4th 640, 644, 69 Cal. Rptr. 2d 296* (remanded to trial court for order granting summary judgment to defendant)

Defendant moving party meets its burden of showing that cause of action has no merit if it shows that one or more elements of cause of action cannot be established; to do this, party may note that discovery has disclosed no evidence to support one or more of elements of cause of action; although defendant does not address a point in its moving papers, it may in its reply papers adopt the plaintiff's own evidence to demonstrate that no triable issue of material fact exists and defendant is entitled to summary adjudication. *216 Sutter Bay Associates v. County of Sutter (1997) 58 Cal. App. 4th 860, 875-881, 68 Cal. Rptr. 2d 492* (summary judgment for defendant affirmed)

Moving defendant bears burden of establishing, by declaration and evidence, complete defense to plaintiff's action or absence of essential element of plaintiff's case; moving party must demonstrate that under no hypothesis is there material factual issue requiring trial; when moving party makes that showing, burden of proof shifts to opposing party to show, by responsive separate statement and admissible evidence, that triable issues of fact exist; burden of defendant moving for summary judgment only requires that defendant negate plaintiff's theories of liability as alleged in complaint; moving party need not refute liability on some theoretical possibility not included in pleading. *Tsemetzin v. Coast Federal Savings & Loan Assn. (1997) 57 Cal. App. 4th 1334, 1342, 67 Cal. Rptr. 2d 726* (summary judgment for defendant reversed)

Defendant meets its burden on summary judgment motion if it negates essential element of plaintiff's cause of action, or establishes complete defense, or demonstrates absence of evidence to support plaintiff's case; once moving defendant has met its initial burden, burden shifts to plaintiff to show triable issue of one or more material facts exist. *Locke v. Warner Bros., Inc. (1997) 57 Cal. App. 4th 354, 361, 66 Cal. Rptr. 2d 921* (summary judgment for defendant reversed in part and affirmed as to other causes)

Defendant moving for summary judgment has burden of negating necessary element of plaintiff's case, and demonstrating that under no hypothesis is there material issue of fact that requires process of trial; to do that, defendant

may rely either on affirmative evidence or discovery responses of plaintiff showing absence of evidence necessary to establish at least one essential element of plaintiff's case; once defendant carries this substantive burden, burden shifts back to plaintiff to show triable issue of one or more material facts exists as to plaintiff's case; all doubts as to whether there is any triable issue of fact are to be resolved in favor of party opposing summary judgment. *Zelda, Inc. v. Northland Ins. Co. (1997) 56 Cal. App. 4th 1252, 1258-1259, 66 Cal. Rptr. 2d 356* (summary judgment for plaintiff affirmed)

Moving defendant may rely on factually devoid discovery responses to shift burden of proof pursuant to *Code Civ. Proc. § 437c(o)(2)*; once burden shifts as result of factually devoid discovery responses, plaintiff must set forth specific facts which prove existence of triable issue of material fact. *Department of Industrial Relations v. UI Video Stores, Inc. (1997) 55 Cal. App. 4th 1084, 1090, 64 Cal. Rptr. 2d 457* (summary judgment for defendant reversed)

For defendant to prevail, it must show that one or more elements of plaintiff's cause of action cannot be established or that defendant has complete defense to plaintiff's cause of action; if defendant meets that burden, burden of proof shifts to plaintiff to show that a triable issue of one or more material facts exist. *Kurinij v. Hanna & Morton (1997) 55 Cal. App. 4th 853, 863, 64 Cal. Rptr. 2d 324* (summary judgment for defendant on complaint and cross complaint affirmed)

Summary judgment on defendant's motion is proper if defendant either proves affirmative defense or disproves at least one essential element of plaintiff's cause of action or if defendant shows that an element of cause of action cannot be established; defendant must show that under no possible hypothesis within reasonable purview of complaint's allegations is there material question of fact that requires examination by trial. *Salazar v. Southern Cal. Gas Co. (1997) 54 Cal. App. 4th 1370, 1376, 63 Cal. Rptr. 2d 522* (summary judgment for defendant affirmed)

Defendants have initial burden on summary judgment to show that one or more elements of cause of action cannot be established, or there is complete defense to that cause of action; once defendant has met that burden, burden shifts to plaintiff to show that triable issue of one or more material facts exists as to that cause of action; nothing in language of 1992 amendments of *Code Civ. Proc. § 437c(n)(2)* (*see now Code Civ. Proc. § 437c(p)*) abrogates this well-established summary judgment requirement that initial burden rests with moving party. *Prilliman v. United Air Lines, Inc. (1997) 53 Cal. App. 4th 935, 956, 62 Cal. Rptr. 2d 142* (summary judgment for defendant affirmed as to one plaintiff and reversed as to another)

Even on motion for summary judgment by insurer, burden remains on insured to prove that its claim falls within scope of basic coverage of policy. *Golden Security Thrift & Loan Assn. v. First American Title Ins. Co. (1997) 53 Cal. App. 4th 250, 255, 61 Cal. Rptr. 2d 442* (summary judgment for defendant affirmed)

Legislature has given federal flavor to nature of moving party's prima facie case; previously, moving party could establish its prima facie entitlement to judgment only by demonstrating existence of facts which negated element of opponent's case; now moving party may also establish its prima facie entitlement to judgment by demonstrating its opponent's discovery responses are devoid of evidence to support an element of opponent's case. *Rio Linda Unified School Dist. v. Superior Court (1997) 52 Cal. App. 4th 732, 735, 740, 60 Cal. Rptr. 2d 710* (denial of defendant's summary judgment motion overturned on writ of mandate)

Under new method for establishing prima facie entitlement to judgment, moving party must demonstrate a negative, *i.e.*, that there is no evidence to support an element of opponent's case; this is akin to burden of appellant in proving there is no substantial evidence to support judgment; it is incumbent on appellant who claims evidentiary insufficiency to set forth evidence supporting judgment and indicate why it is insufficient; if party contends some particular issue of fact has no support in record, it must set forth all material evidence on point and not merely evidence favorable to it; mere reference in statement of undisputed facts to existence of inadmissible discovery responses does not waive contemporaneously raised objection to that evidence in accompanying points and authorities. *Rio Linda Unified School Dist. v. Superior Court (1997) 52 Cal. App. 4th 732, 735, 739-740, 60 Cal. Rptr. 2d 710* (denial of defendant's

summary judgment motion overturned on writ of mandate)

Summary judgment is appropriate if all papers submitted show there is no triable issue of any material fact and that moving party is entitled to judgment as a matter of law; a defendant seeking summary judgment has met its burden of showing that a cause of action has merit if defendant demonstrates that one or more elements of the cause of action cannot be established; once defendant seeking summary judgment meets this burden, the burden shifts to the plaintiff to show that a triable issue of material exists as to that cause of action; plaintiff may not rely on mere allegations or denials of its pleading, but must set forth the specific facts that demonstrate existence of the triable issue of material fact; issue of fact cannot be created by speculation, imagination, conjecture, or guess work but can only be created by a conflict of evidence. *Lee v. Crusader Ins. Co. (1996) 49 Cal. App. 4th 1750, 1756, 57 Cal. Rptr. 2d 550* (summary judgment for defendant affirmed)

Defendant who meets initial burden of establishing that action has no merit is entitled to summary judgment unless plaintiff demonstrates existence of triable issue of material fact; plaintiff generally cannot defeat well-founded summary judgment motion without setting forth specific facts controverting motion. *Mary Morgan, Inc. v. Melzark (1996) 49 Cal. App. 4th 765, 770, 57 Cal. Rptr. 2d 4* (summary judgment for defendants affirmed)

Moving defendant bears burden of proving absence of any triable issue of material fact even though plaintiff has burden of proof as to that issue at trial; defendant, however, need only demonstrate absence of triable issue of material fact as to those bases of liability plaintiff has pleaded; once moving party has met its burden, opposing party bears burden of presenting evidence that there is triable issue of fact as to any essential element of causeof action. *Sanchez v. Swinerton & Walberg Co. (1996) 47 Cal. App. 4th 1461, 1465, 55 Cal. Rptr. 2d 415* (summary judgment for defendants affirmed)

Defendant must conclusively negate necessary element in plaintiff's case or establish complete defense; when evidence presented by defendant does not support judgment in defendant's favor, motion must be denied without looking at opposing evidence, if any, submitted by plaintiff. *Bashi v. Wodarz (1996) 45 Cal. App. 4th 1314, 1318, 53 Cal. Rptr. 2d 635* (summary judgment for defendant reversed)

1992 and 1993 amendments to *Code Civ. Proc. § 437c* were not intended to abrogate defendant's burden on summary judgment motion to respond to all of plaintiff's theories of liability reflected in complaint even if not separately pleaded; although plaintiff who has pleaded several causes of action based on same set of facts need only sustain its burden on one theory to prevail at trial, defendant who seeks summary judgment must define all theories alleged in complaint and challenge each factually; defendant as the moving party has burden to show it is entitled to judgment on all theories of liability asserted by plaintiff. *Lopez v. Superior Court (1996) 45 Cal. App. 4th 705, 713-714, 717, 52 Cal. Rptr. 2d 821* (grant of defendant's summary judgment motion overturned on writ of mandate; although holding in *Hunter v. Pacific Mechanical Corp. (1995) 37 Cal. App. 4th 1282, 44 Cal. Rptr. 2d 335* , restated as law, court held *Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 37 Cal. Rptr. 2d 653* , line of cases, including *Hunter*, inapplicable because defendant failed to meet its initial burden on summary judgment of addressing plaintiff's primary theory of premises liability)

Defendant moving for summary judgment must conclusively negate element in plaintiff's case or establish complete defense and thereby demonstrate that under no hypothesis is there material factual issue requiring trial. *Frank and Freedus v. Allstate Ins. Co. (1996) 45 Cal. App. 4th 461, 468, 52 Cal. Rptr. 2d 678* (summary judgment for defendants affirmed); *Brown v. California Pension Administrators & Consultants, Inc. (1996) 45 Cal. App. 4th 333, 339, 52 Cal. Rptr. 2d 788* (summary judgment for defendants affirmed)

Under former *Code Civ. Proc. § 437c(o)(2)* (*see now Code Civ. Proc. § 437c(p)(2)*) requirement that a defendant "has shown that one or more elements of the cause of action ... cannot be established," defendant must make affirmative showing to support his or her motion, which showing connotes something significantly more than pointing out to court

that there is an absence of evidence; defendant who cannot negate element in plaintiff's case should be required to produce direct or circumstantial evidence that plaintiff not only does not have but cannot reasonably expect to obtain a prima facie case; when defendant makes such showing, burden to make prima facie case shifts to plaintiff. *Addy v. Bliss & Glennon (1996) 44 Cal. App. 4th 205, 214, 51 Cal. Rptr. 2d 642* (summary judgment for defendant affirmed; court disagreed with and did not follow *Hunter v. Pacific Mechanical Corp. (1995) 37 Cal. App. 4th 1282, 1287-1289, 44 Cal. Rptr. 2d 335*); *Hagen v. Hickenbottom (1995) 41 Cal. App. 4th 168, 183-184, 48 Cal. Rptr. 2d 197* (summary judgment for defendant reversed; questioning conclusion in *Hunter*)

Under former *Civ. Proc. § 437c(o)(2)* (*see now Code Civ. Proc. § 437c(p)(2)*), moving defendant has two means by which to shift the burden of proof to plaintiff to produce a triable issue of fact: (1) defendant may rely on plaintiff's factually insufficient discovery responses to show that plaintiff cannot establish an essential element of plaintiff's cause of action, or (2) defendant may negate, that is, disprove, essential element in plaintiff's cause of action. *Brantley v. Pisaro (1996) 42 Cal. App. 4th 1591, 1598, 50 Cal. Rptr. 2d 431* (summary judgment for defendant reversed)

Defendants who moves for summary judgment must prove either that affirmative defense bars every cause of action pleaded in complaint or disprove at least one essential element of each cause of action; moving party must show that under no possible hypothesis within reasonable purview of allegations in complaint is there material question of fact that requires examination at trial; motion must be denied if defendant as moving party fails to satisfy its burden. *Martin Marietta Corp. v. Insurance Co. of North America (1995) 40 Cal. App. 4th 1113, 1121, 47 Cal. Rptr. 2d 670* (summary judgment for defendant reversed)

Recent statutory amendments adopted burden-shifting characteristics of federal law for California summary judgment motions; although moving party always initially bears burden of establishing absence of genuine issue of material fact, when nonmoving party bears burden of proof on an issue at trial the moving party need not support its summary judgment motion with evidence negating an essential element of the nonmoving party's case to satisfy its burden; moving party may simply point to absence of evidence to support nonmoving party's case; nonmoving party must then set forth specific facts by affidavits (or declarations) or admissible discovery material showing there is genuine issue for trial; in action for asbestos-related injury enough for defendant to show through factually vague discovery responses that plaintiff lacked any probative evidence on critical element of causation, that is, defendant could effectively show that element of causation could not be established by pointing to an absence of evidence to support that element; burden than shifted to plaintiff to come forward with evidence necessary to prove triable issue of material fact existed with regard to element of causation which plaintiff did not do; summary judgment in defendant's favor affirmed. *Hunter v. Pacific Mechanical Corp. (1995) 37 Cal. App. 4th 1282, 1284, 1286-1288, 44 Cal. Rptr. 2d 335* (summary judgment for defendant affirmed); *but see Addy v. Bliss & Glennon (1996) 44 Cal. App. 4th 205, 214, 51 Cal. Rptr. 2d 642* (summary judgment for defendant affirmed); *Hagen v. Hickenbottom (1995) 41 Cal. App. 4th 168, 183-184, 48 Cal. Rptr. 2d 197* (summary judgment for defendant reversed)

Close examination of legislative history as suggesting intent was to apply the burden shifting characteristics of *Fed. R. Civ. Proc., Rule 56,* as interpreted in *Celotex Corp. v. Catrett (1986) 477 U.S. 317, 322-328, 106 S. Ct. 2548* , to California summary judgment motions. *Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 590, 37 Cal. Rptr. 2d 653* (denial of defendant's summary judgment motion overturned on writ of mandate)

Moving defendant may rely on plaintiff's factually devoid discovery responses to shift burden of proof to plaintiff to set forth specific facts proving existence of triable issue of material fact. *Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 590, 37 Cal. Rptr. 2d 653* (summary judgment for defendant affirmed)

Fact that prior case law held a moving defendant had duty to negate an essential element of an adversary's cause of action and that Legislature chose not to utilize the term "negate" in amending summary judgment statute reflects intention to change the long-standing duty of a moving defendant. *Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 586, n.8, 37 Cal. Rptr. 2d 653* (dicta; summary judgment for defendant affirmed)

Judicial notice or evidentiary admission or concession by pleader/adversary as able to support motion and thrust burden on pleader to come forward with facts in rebuttal. *Columbia Casualty Co. v. Northwestern Nat. Ins. Co. (1991) 231 Cal. App. 3d 457, 468, 282 Cal. Rptr. 389* (prior law; summary judgment for cross defendant reversed)

Only if it can be determined that moving party's declaration, considered in light of issues raised by pleadings, would, standing alone, support summary judgment does court look to any counteraffidavits and counterdeclarations; if court finds that there are no triable issues of fact, determination of motion for summary judgment as then becoming question of law; whenever court must rule on motion for summary judgment, factual issue guidelines for motion as fixed by reference solely to pleadings. *Danieley v. Goldmine Ski Associates, Inc. (1990) 218 Cal. App. 3d 111, 118-119, 266 Cal. Rptr. 749* (summary judgment for defendant affirmed); *see also People v. Van Horn (1990) 218 Cal. App. 3d 1378, 1397, 267 Cal. Rptr. 804* (summary judgment in favor of plaintiffs affirmed)

Opposing party as required to show only existence of triable issue of fact, not ability to prevail at trial. *Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal. App. 3d 593, 608, 176 Cal. Rptr. 824* (prior law; summary judgment for defendant affirmed as to some causes of action and reversed as to others)

[b] Effect of Admissions on Burden of Proof

A defendant may provide affirmative evidence that the plaintiff lacks any factual support for the plaintiff's claims through an admission by the plaintiff that extensive discovery has yielded nothing. *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 854-855, 107 Cal. Rptr. 2d 841, 24 P.3d 493* ; *Tran v. Farmers Group, Inc. (2002) 104 Cal. App. 4th 1202, 1215, 128 Cal. Rptr. 2d 728*

Admission against interest as entitled to greater weight than evidentiary allegations in affidavits or declarations. *D'Amico v. Board of Medical Examiners (1974) 11 Cal. 3d 1, 21-22, 112 Cal. Rptr. 786, 520 P.2d 10* ; *Advanced Micro Devices, Inc. v. Great American Surplus Lines Ins. Co. (1988) 199 Cal. App. 3d 791, 800, 245 Cal. Rptr. 44*

D'Amico rule is limited to situations where credible discovery admissions are contradicted only by self-serving declarations of a party; there is a vast difference between written discovery admissions and responses given by a lay opponent in a deposition; court erred in granting summary judgment based on statements made by plaintiff in deposition testimony in that court refused to consider evidence that contradicted or shed light on plaintiff's testimony. *Scalf v. D.B. Log Homes, Inc. (2005) 128 Cal. App. 4th 1510, 1523, 27 Cal. Rptr. 3d 826*

Defense granted summary adjudication on cause of action for clean up costs of groundwater contamination where lack of evidence on damages shown by plaintiff's interrogatory responses admitting it was unable to attribute damages to any particular cause, event, or time. *Golden Eagle Refinery Co. v. Associated Internat. Ins. Co. (2001) 85 Cal. App. 4th 1300, 1311-1312, 102 Cal. Rptr. 2d 834*

California courts do not permit party to defeat summary judgment by declaration contradicting that party's previous deposition testimony; credibility of deposition admissions valued so highly that controverting affidavits may be disregarded as irrelevant, inadmissible or evasive. *Wilkins v. National Broadcasting Co. (1999) 71 Cal. App. 4th 1066, 1082, 84 Cal. Rptr. 2d 329* (summary judgment for defendants affirmed)

Party cannot create issue of fact by declaration that contradicts his or her prior discovery responses; in determining whether any triable issue of material facts exists, trial court may, in its discretion, give great weight to admissions made in deposition and disregard contradictory and self-serving affidavits of party; admissions against interest have very high credibility value; this is especially true when admission was obtained not in normal course of human activities and affairs but in context of established pretrial procedure whose purpose is to elicit facts; distinguishing cases that held

declarations that contradict earlier discovery responses may sometimes be considered; trial court did not abuse discretion in ruling contradictory statements in plaintiff's declaration must be disregarded, and therefore those statements failed to raise triable issue of fact. *Benavidez v. San Jose Police Dept. (1999) 71 Cal. App. 4th 853, 860-863, 84 Cal. Rptr. 2d 157* (summary judgment for defendants affirmed)

D'Amico v. Board of Medical Examiners (1994) 11 Cal. 3d 1, 22, 520 P.2d 10 , recognized admissions against interest have very high credibility value; Supreme Court has consistently refused to allow triable issue of fact to be conjured by submission of affidavit contradicting declarant's prior deposition testimony; *Price v. Wells Fargo Bank (1989) 213 Cal. App. 3d 465, 482* , however, was first of several cases pointing out that *D'Amico* should be viewed with caution; *Price* court refused to concede that admissions should be shielded from careful examination in light of entire record and held summary judgment should not be based on tacit admissions or fragmentary and equivocal concessions; court viewed record before it with equal caution. *Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 77-78, 81 Cal. Rptr. 2d 360* (summary judgment for defendant reversed)

Admission in complaint that party acted within course and scope of employment will not bind plaintiff on summary judgment if plaintiff offers countervailing evidence in opposition to summary judgment motion; when broad arbitration clause with limited nonpertinent exceptions extended to every type of dispute arising from plaintiff's employment, and defendant employees relied on allegations in plaintiff's complaint that they were acting within course and scope of their employment at all relevant times, employee defendants met their initial burden of showing a defense to plaintiff's claims against them, causing burden to shift back to plaintiff to show that triable issue of material fact existed whether arbitration agreement applied. *24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal. App. 4th 1199, 1211, 78 Cal. Rptr. 2d 533* (trial court directed to vacate order denying summary judgment and to grant summary judgment to all but one defendant)

A party cannot evade summary judgment by submitting declaration contradicting that party's prior deposition testimony. *Guthrey v. State of California (1998) 63 Cal. App. 4th 1108, 1120, 75 Cal. Rptr. 2d 27*

To extent descriptions in plaintiff's declaration submitted in opposition to motion for summary judgment are contradicted plaintiff's discovery responses, they must be disregarded; admissions or concessions made duringcourse of discovery govern and control over contrary declarations lodged at hearing on motion for summary judgment. *Barton v. Elexsys Internat., Inc. (1998) 62 Cal. App. 4th 1182, 1191-1192, 73 Cal. Rptr. 2d 212*

Declaration on summary judgment that is inconsistent with prior deposition testimony can be disregarded. *First Fid. Thrift & Loan Assn. v. Alliance Bank (1998) 60 Cal. App. 4th 1433, 1437 n.2, 71 Cal. Rptr. 2d 295* (finding declaration was not inconsistent)

Defendant moving for summary judgment may rely on allegations in plaintiff's complaint that are judicial admissions; as such, they are conclusive concessions of truth of a matter and have effect of removing it from issues; contradictory evidence is limited to that which collaterally attacks the prior judicial admission on basis of mistake, inadvertence, or lack of authority. *Barr v. ACandS, Inc. (1997) 57 Cal. App. 4th 1038, 1055-1056, 67 Cal. Rptr. 2d 494*

Judicial admission is binding and dispositive without further evidence; consideration of such admissions is proper on summary judgment and may overcome evidence even when opposing party seeks to contradict prior admission; trial court, however, has discretion to disregard admissions. *Kurinij v. Hanna & Morton (1997) 55 Cal. App. 4th 853, 871, 64 Cal. Rptr. 2d 324* (summary judgment for defendants on complaint and its cross complaint affirmed)

When party in discovery has made admission that justifies summary judgment in opponent's favor, that party cannot attempt to defeat summary judgment motion by submitting declaration contradicting the admission; judicial admission not accorded as broad an application as admission made in course of discovery. *Prilliman v. United Air Lines, Inc. (1997) 53 Cal. App. 4th 935, 961-962, 62 Cal. Rptr. 2d 142*

Defendant permitted to rely on plaintiff's form interrogatory answers and admissions, which contained no evidence to support a theory of defendant's liability, as evidentiary basis for its separate statement supporting summary judgment motion, thus shifting burden to plaintiff to prove existence of triable issue of material fact. *Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 576, 37 Cal. Rptr. 2d 653*

Admission of party as receiving unusual deference in summary judgment proceedings and as binding absent credible explanation of inconsistent position taken by party. *People ex rel. Dept. of Transportation v. Ad Way Signs, Inc. (1993) 14 Cal. App. 4th 187, 200, 17 Cal. Rptr. 2d 496* ; *FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 396, 282 Cal. Rptr. 508*

Summary judgment as not based on tacit admissions or ambiguous allegation in unverified complaint that are contradicted by other credible evidence, such as in deposition testimony. *Kirby v. Albert D. Seeno Construction Co. (1992) 11 Cal. App. 4th 1059, 1066-1067, 14 Cal. Rptr. 2d 604*

Statement taken from allegations in party's pleading as constituting admission that may be considered on motion for summary judgment. *Aim Insurance Co. v. Culcasi (1991) 229 Cal. App. 3d 209, 213 n.1, 280 Cal. Rptr. 766*

Admissions against interest as having very high credibility value, especially when admission is obtained not in normal course of human activities and affairs but in context of an established pretrial procedure whose purpose is to elicit facts; thus, on motion for summary judgment, such admission as entitled to deference not normally accorded evidentiary allegations in affidavits. *Sandoval v. Mercury Ins. Group (1991) 229 Cal. App. 3d 1, 10, 278 Cal. Rptr. 533*

In summary judgment motions, law allows reliance on adversaries' pleadings; defendant may rely on allegation of complaint in addition to his or her declarations, there being no need that defendant's declaration repeat matters already asserted in complaint; judicial admission in pleading, either by affirmative allegation or by failure to deny an allegation, is different from evidentiary admission; judicial admission is not merely evidence of fact, but is conclusive concession of truth of matter that has effect of removing it from issues. *Troche v. Daley (1990) 217 Cal. App. 3d 403, 409, 266 Cal. Rptr. 34*

Plaintiff who made admission in deposition that defeated cause of action, but who made contrary statement in subsequent answers to interrogatories, as not entitled to rely on contradictions in his own testimony to create triable issue of fact. *Rivera v. Southern Pacific Transportation Co. (1990) 217 Cal. App. 3d 294, 299-300, 266 Cal. Rptr. 11*

When defendant can establish his or her defense with plaintiff's admission sufficient to pass strict construction test imposed on party moving for summary judgment, credibility of admission as valued so highly that any contradicting affidavits may be disregarded as irrelevant, inadmissible, or evasive; no reason as existing to draw distinction between attempt to counter admission by affidavit and attempt to counter admission by changing content of answer given by party directly in deposition, especially when there is no assertion original answer was incorrectly transcribed or question was misleading or ambiguous; in both changed affidavit and changed deposition cases, credibility of parties as held up for examination by contradicting statements, first of which constitutes reliable admission against interest; trial court as permitted to accept first and reject latter of these contrary positions. *Wagner v. Glendale Adventist Medical Center (1989) 216 Cal. App. 3d 1379, 1391, 265 Cal. Rptr. 412*

[c] Effect of Presumption Affecting Burden of Proof

Absent contradictory evidence by nonmoving party, *Evid. Code § 604* presumption establishing fact in favor of moving party as justifying summary judgment. *Security Pac. Nat. Bank v. Associated Motor Sales (1980) 106 Cal. App. 3d 171, 178-180*

[4] Collateral Estoppel

Summary judgment is appropriate remedy when doctrine of collateral estoppel refutes all triable issues of fact suggested by pleadings and supporting documents. *Kelly v. Vons Companies, Inc. (1998) 67 Cal. App. 4th 1329, 1335, 79 Cal. Rptr. 2d 763* (summary judgment for defendant affirmed)

When plaintiff's declaration in support of plaintiff's claim contained statements regarding matters which had been adjudicated administratively against plaintiff collateral estoppel principles applied. *Guthrey v. State of California (1998) 63 Cal. App. 4th 1108, 1120, 75 Cal. Rptr. 2d 27*

Summary judgment as appropriate remedy when principle of collateral estoppel refutes all triable issues of fact suggested by pleadings and supporting documents. *Lewis v. County of Sacramento (1990) 218 Cal. App. 3d 214, 217, 266 Cal. Rptr. 678*

[5] Constitutionality

Summary judgment procedure under *Code Civ. Proc. § 437c* as not violating constitutional rights to trial by jury, to subpoena witnesses, and to cross examine witnesses. *Scott v. Farrar (1983) 139 Cal. App. 3d 462, 467, 188 Cal. Rptr. 823* ; Bank of America, etc. v. *Oil Well S. Co. (1936) 12 Cal. App. 2d 265, 268, 270, 55 P.2d 885*

[6] Conduct of Hearing

Where party opposing summary judgment attempted to argue, at hearing, that deposition testimony created a triable issue of fact, trial court did not abuse its discretion in failing to consider the testimony; deposition had taken place before opposition was due but opposing party failed to include testimony with opposition. *Wall Street Network, Ltd. v. New York Times Co. (2008) 164 Cal. App. 4th 1171, 1188-1189, 80 Cal. Rptr. 3d 6*

When trial court refused to allow counsel to present oral argument at hearing and court of appeal decided, on the merits of the parties arguments, that trial court correctly entered judgment, held that it would serve no useful purpose at that point for court of appeal to reverse on basis of such a claimed deficiency in trial court's handling of motion. *Victor v. Hedges (1999) 77 Cal. App. 4th 229, 244-245, 245 n.18, 91 Cal. Rptr. 2d 466* (summary judgment for defendants affirmed)

On summary judgment motion oral hearing required at which counsel has opportunity to persuade court and respond to inquires; judges have discretion regarding how hearing is to be conducted, but cannot do away with oral argument altogether; although litigants are not given right to present testimony at hearing, there are no restrictions against oral argument (*see Cal. Rules of Ct., Rule 3.1306* (formerly Rule 323). *Mediterranean Construction Co. v. State Farm Fire & Casualty Co. (1998) 66 Cal. App. 4th 257, 259-260, 263-265, 77 Cal. Rptr. 2d 781* ; *see Gwartz v. Superior Court (1999) 71 Cal. App. 4th 480, 482, 83 Cal. Rptr. 2d 865* (following *Mediterranean Construction Co.*)

[7] Continuance

A continuance is not necessarily required simply because the opposing party claims that to file substantive opposition might violate his right against self incrimination; rather, the opposing party must show that his *fifth amendment* rights would in fact be violated and that he was unable to present any other substantive opposition to the motion. *Fisher v. Gibson (2001) 90 Cal. App. 4th 275, 283-284, 109 Cal. Rptr. 2d 145*

Trial court was not required to continue summary judgment motion under *Code Civ. Proc. § 437c(h)* because plaintiff's continuance was not included in timely opposition to summary judgment motion and plaintiffs failed to establish that facts essential to justifying opposition might exist but could not be presented before hearing. *Thatcher v. Lucky Stores, Inc. (2000) 79 Cal. App. 4th 1081, 1083, 94 Cal. Rptr. 2d 575* (summary judgment for defendant affirmed)

When moving party raises new arguments in its reply papers, opposing party entitled to move orally at hearing for postponement to give it sufficient time to respond; similarly, oral motion for continuance can be made at hearing to allow sufficient time to amend pleading when it becomes apparent at that time that defects in pleading can be remedied. *Mediterranean Construction Co. v. State Farm Fire & Casualty Co. (1998) 66 Cal. App. 4th 257, 264, 77 Cal. Rptr. 2d 781*

Code Civ. Proc. § 437c requirement that hearing be continued if necessary to obtain facts essential to opposition as not applicable when party presents opposition they consider complete, but in improper format; continuance as in court's discretion, which was not abused by denying motion made at hearing seven weeks after reply papers had objected to form of opposition, and effect of denial was not to terminate party's action on purely procedural grounds. *Lucas v. George T. R. Murai Farms, Inc. (1993) 15 Cal. App. 4th 1578, 1586-1587, 19 Cal. Rptr. 2d 436*

Code Civ. Proc. § 437c as mandating continuance of summary judgment hearing on good faith showing by affidavit that continuance is needed to obtain facts essential to justify opposition to motion. *O'Laskey v. Sortino (1990) 224 Cal. App. 3d 241, 251, 273 Cal. Rptr. 674*

Plaintiff's request for continuance under *Code Civ. Proc. § 437c(h)* as properly denied for purpose of obtaining contract on which complaint was based, when plaintiff should have attached contract to complaint two years prior, and when plaintiff could easily have obtained contract within that two years' time. *Hartenstine v. Superior Court (1987) 196 Cal. App. 3d 206, 221, 241 Cal. Rptr. 756* ; *cf. Frazee v. Seely (2001) 95 Cal. App. 4th 627, 115 Cal. Rptr. 2d 780* (request for continuance under *Code Civ. Proc. § 437c(h)* timely filed, court noting that even if the plaintiff had two years from the time she filed her first amended complaint to the filing of defendant's motion for summary judgment, she was given less than one month to oppose the motion)

[8] Cross Complaints

Cross defendant seeking summary adjudication as required only to offer evidence to disprove allegations of cross complaint; cross complainant who wishes to offer a different factual assertion from that alleged in cross complaint as required to move to amend cross complaint prior to hearing on summary adjudication motion. *580 Folsom Associates v. Prometheus Development Co. (1990) 223 Cal. App. 3d 1, 18, 272 Cal. Rptr. 227*

[9] Discovery Products and Matters Subject to Judicial Notice

Prior judgment subject to judicial notice as sufficient to support motion for summary judgment on ground of collateral estoppel or res judicata. *Comora v. Comprehensive Care Corp. (1983) 140 Cal. App. 3d 369, 373, 189 Cal. Rptr. 538* ; *Columbus Line, Inc. v. Gray Line Sight-Seeing Companies Associated, Inc. (1981) 120 Cal. App. 3d 622, 630-631, 174 Cal. Rptr. 527*

Reliance on answers to interrogatories and on regulations subject to judicial notice as proper on motion for summary judgment. *Stevens v. Cessna Aircraft Co. (1981) 115 Cal. App. 3d 431, 434, 170 Cal. Rptr. 925*

[10] Duty of Court

Trial court is not required to accept parties' characterization as to what matters constitute issues of fact or law in summary judgment proceeding. *GoodGovernment Group of Seal Beach, Inc. v. Superior Court (1978) 22 Cal. 3d 672, 679 n.3, 150 Cal. Rptr. 258, 586 P.2d 572*

Matter to be determined by trial court in considering motion for summary judgment is whether parties have presented any facts that give rise to triable issue of fact; trial court is not authorized to determine that fact issue itself. *Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal. 3d 842, 851-852, 94 Cal. Rptr. 785, 484 P.2d 953* ; *Stationers Corp. v. Dun & Bradstreet, Inc. (1965) 62 Cal. 2d 412, 417, 42 Cal. Rptr. 449, 398 P.2d 785* ; *Crocker Nat. Bank v. Emerald (1990) 221 Cal. App. 3d 852, 858, 270 Cal. Rptr. 699*

Trial court's primary duty in deciding motion for summary judgment is to determine whether triable issue of fact exists; fact issue finding rather than fact issue determination is pivot on which summary judgment law turns. *Walsh v. Walsh (1941) 18 Cal. 2d 439, 441-442, 116 P.2d 62* ; *Torres v. County of Los Angeles (1989) 209 Cal. App. 3d 325, 329, 257 Cal. Rptr. 211* ; *Spradlin v. Cox (1988) 201 Cal. App. 3d 799, 805, 247 Cal. Rptr. 347* ; *Bartlett v. State of California (1988) 199 Cal. App. 3d 392, 397, 245 Cal. Rptr. 32*

In declaratory relief action to obtain judicial interpretation of rights under insurance policy, trial court must decide if triable issue of fact exists; if none does and sole remaining issue is one of law, it is trial court's duty to determine issue of law. *Northland Ins. Co. v. Briones (2000) 81 Cal. App. 4th 796, 800, 802, 97 Cal. Rptr. 2d 127* (summary judgment for plaintiff affirmed)

Trial court must decide if triable issue of fact exists; if none does, and sole remaining issue is one of law, it is duty of trial court to determine issue of law. *Aloha Pacific, Inc. v. California Ins. Guarantee Assn. (2000) 79 Cal. App. 4th 297, 307, 93 Cal. Rptr. 2d 148* (judgment for defendant entered pursuant to stipulation following denial of plaintiff's motion for summary judgment affirmed)

Court's sole function on motion for summary judgment is to determine from submitted evidence whether there is triable issue as to any material fact. *Riverside County Community Facilities Dist. v. Bainbridge 17 (1999) 77 Cal. App. 4th 644, 653, 92 Cal. Rptr. 2d 29* (summary judgment for plaintiff affirmed)

Defendant's summary judgment motion asks court to determine, based on papers submitted by parties, whether there remains triable issue of material fact or whether undisputed facts warrant judgment as matter of law, either because at least one element of each alleged cause of action cannot be established or because complete defense exists. *Nicole M. v. Sears, Roebuck & Co. (1999) 76 Cal. App. 4th 1238, 1242, 90 Cal. Rptr. 2d 922* (summary judgment for defendant affirmed)

Trial judge determines whether triable issues exist by examining affidavits and evidence, including any reasonable inferences that may be drawn from facts. *Vournas v. Fidelity Nat. Tit. Ins. Co. (1999) 73 Cal. App. 4th 668, 672 86 Cal. Rptr. 2d 490* (summary judgment for defendant affirmed)

Court's sole function on motion for summary judgment is to determine from submitted evidence whether there is triable issue of any material fact. *Kelly v. First Astri Corp., (1999) 72 Cal. App. 4th 462, 470, 84 Cal. Rptr. 2d 810* (summary judgment for defendants affirmed)

Trial court's function in ruling on summary judgment motion is merely to determine whether issues of fact exist and not to decide merits of issues themselves. *Hayward Area Planning Assn. v. Alameda County Transportation Auth. (1999) 72 Cal. App. 4th 95, 110, 84 Cal. Rptr. 2d 744* (summary judgment for defendants reversed)

When there is no material issue of fact to be tried and sole question before court is one of law, it is duty of trial court to hear and determine issue of law. *Armato v. Baden (1999) 71 Cal. App. 4th 885, 893, 84 Cal. Rptr 2d 294* (summary

judgments for defendants affirmed)

Whether triable issue of material fact exists does not turn on trial court's discretion; motion for summary judgment shall be granted if all papers submitted show there is no triable issue as to any material fact and moving party entitled to judgment as matter of law. *Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1490, 82 Cal. Rptr. 2d 359* (summary judgment for defendant reversed)

Court focuses on issue finding; it does not resolve fact issues; court seeks to find contradictions in evidence, or in inferences reasonably deducible from evidence, that raise triable issue of material fact. *Oliver v. County of Los Angeles (1998) 66 Cal. App. 4th 1397, 1403, 78 Cal. Rptr. 2d 641* (summary judgment for defendant affirmed)

Trial court in ruling on motion for summary judgment is merely to determine whether evidence requiring fact-weighing procedures of trial exist, not to decide the merits of the issues themselves. *Kovatch v. California Casualty Management Co. (1998) 65 Cal. App. 4th 1256, 1266, 77 Cal. Rptr. 2d 217*

Summary judgment is granted if all papers submitted show that there is no triable issue of any material fact and moving party is entitled to judgment as matter of law; trial court's function in ruling on motion is merely to determine whether triable issues of fact exist, not to decide merits of issues themselves. *Furla v. Jon Douglas Co. (1998) 65 Cal. App. 4th 1069, 1076-1077, 76 Cal. Rptr. 2d 911*

Referral to commissioner for report and recommendation on pending motion for summary judgment as inappropriate; commissioner's authority under *Code Civ. Proc. § 259* to take proof and report findings exceeds court's role in summary judgment, which is limited to determining whether factual issues exist. *International Jet Ski Boating Assn., Inc. v. Superior Court (1991) 232 Cal. App. 3d 112, 116, 283 Cal. Rptr. 33*

When there is no factual dispute, function of appellate court in reviewing summary judgment as same as that of trial court: to determine whether moving party is entitled to judgment as matter of law. *Mounts v. Uyeda (1991) 227 Cal. App. 3d 111, 115, 277 Cal. Rptr. 730*

In ruling on motion for summary judgment, trial court, although it seeks to identify triable issues without engaging in any determinations of fact, as required to some extent to weigh evidence in determining whether factual issues asserted relate to material fact, and as required to determine what inferences are reasonably deducible from evidence. *Price v. Wells Fargo Bank (1989) 213 Cal. App. 3d 465, 474, 261 Cal. Rptr. 735*

[11] Evidence

[a] Affiant's Credibility

Expert's affidavit directly conflicting with expert's prior report did not constitute substantial evidence of the existence of a triable issue of fact. *Alvis v. County of Ventura (2009) 178 Cal. App. 4th 536, 549, 100 Cal. Rptr. 3d 494*

A party may not submit a declaration that contradicts a previous statement made under oath in order to create a triable issue of material fact. *Tesco Controls, Inc. v. Monterey Mechanical Co. (2004) 124 Cal. App. 4th 780, 798 n.6, 21 Cal. Rptr. 3d 751*

Trial court may not weigh evidence in manner of factfinder to determine whose version is more likely true; nor may trial court grant summary judgment based on court's evaluation of credibility. *Binder v. Aetna Life Ins. Co. (1999) 75 Cal. App. 4th 832, 840, 89 Cal. Rptr. 2d 540* (summary judgment for defendant reversed)

Court as generally unable to resolve questions about declarant's credibility in summary judgment proceeding, unless admissions against interest have been made that justify disregard of any dissimulation. *Magnolia Square Homeowners Assn. v. Safeco Ins. Co. (1990) 221 Cal. App. 3d 1049, 1056, 271 Cal. Rptr. 1*

Declarant's statement, credibility of which is destroyed by prior admission or other conclusive evidence, as not effective to raise triable issue of fact. *Hoover Community Hotel Development Corp. v. Thomson (1985) 167 Cal. App. 3d 1130, 1137, 213 Cal. Rptr. 750*

Summary judgment as proper, despite question as to credibility of declarant, because denial of motion on such ground was within trial court's discretion under *Code Civ. Proc. § 437c(e)* and opposing party failed to show abuse of discretion. *Allen v. McMillion (1978) 82 Cal. App. 3d 211, 215-216, 147 Cal. Rptr. 77*

[b] Admissible Evidence Required

A declaration that does not comply with *Code Civ. Proc. § 2015.5* is not admissible in support of or to oppose a summary judgment motion; the declaration must either state on its face that it was executed in California or state that it is declared under the laws of the state of California. *Kulshrestha v. First Union Commercial Corp. (2004) 33 Cal. 4th 601, 618, 15 Cal. Rptr. 3d 793, 93 P.3d 386* (summary judgment for defendant affirmed)

Expert doctor's opinion based solely on his review of medical records had no evidentiary value where records were not authenticated and placed before the court; as a result, defendant's summary judgment motion had no evidentiary basis and was reversed. *Garibay v. Hemmatt (2008) 161 Cal. App. 4th 735*

Transcripts do not qualify as declarations sufficient to defeat summary judgment because they contain no statement that the information contained therein is based upon personal knowledge [*Code Civ. Proc. § 437c(d)*]. That the transcripts show statements by the interviewees, responding affirmatively to the question whether their statements were true under penalty of perjury, does not convert the statements into admissible affidavits or declarations. Evidence containing hearsay is not admissible evidence and will not raise a triable issue defeating summary judgment [*Code Civ. Proc. § 437c(d)*; *Evid. Code § 1200*]. An investigator's declaration cannot convert inadmissible hearsay into admissible evidence. *Stockinger v. Feather River Community College (2003) 111 Cal. App. 4th 1014, 1026-1027, 4 Cal. Rptr. 3d 385*

Cases dismissing expert declarations in connection with summary judgment motions do so on basis that declarations established that opinions were either speculative, lacked foundation, or were stated without sufficient certainty; not so in this case, however, because expert affidavit established matters relied upon in expressing opinion, opinion rested on matters of type reasonably relied upon, and it established bases for opinion. *Sanchez v. Hillerich & Bradsby Co. (2002) 104 Cal. App. 4th 703, 718, 128 Cal. Rptr. 2d 529*

Expert opinion is worth no more than reasons on which it rests; opinion unsupported by reasons or explanations does not establish absence of material fact issue for trial, as required for summary judgment. *Golden Eagle Refinery Co. v. Associated International Ins. Co (2001) 85 Cal. App. 4th 1300, 1315, 102 Cal. Rptr. 2d 834* (summary adjudication for defendant affirmed)

Moving party bears burden of establishing by declarations and evidence, complete defense to plaintiff's action or absence of essential element of plaintiff's case; moving party must demonstrate that under no hypothesis is there material factual issue requiring trial; when moving defendant makes that showing, burden of proof shifts to plaintiff to show, by responsive separate statement and admissible evidence, that triable issues of fact exist. *Assilzadeh v. California Federal Bank (2000) 82 Cal. App. 4th 399, 408, 98 Cal. Rptr. 2d 176* (summary judgment for defendants affirmed)

Moving party bears burden of establishing, by declarations and evidence, complete defense to plaintiff's action or absence of essential element of plaintiff's case; when moving party makes that showing, burden shifts to opposing party to show, by responsive separate statement and admissible evidence, that triable issues of fact exist. *Ostayan v. Serrano Reconveyance Co. (2000) 77 Cal. App. 4th 1411, 1418, 92 Cal. Rptr. 2d 577* (summary judgment for defendants affirmed)

Kelley v. Trunk (1998) 66 Cal. App. 4th 519, 78 Cal. Rptr. 2d 122 , which suggests that even on summary judgment, expert's declaration must set forth excruciating detail of factual basis for opinion stated therein, is unsupported; court declined to follow it. *Hanson v. Grode (1999) 76 Cal. App. 4th 601, 608 n.6, 90 Cal. Rptr. 2d 396* (summary judgment for defendants reversed)

Trial court committed error in admitting over objection expert's declaration in support of plaintiffs' motion for summary judgment that was conclusory in that it provided no factual data to support expert's opinion; under facts, error deemed harmless. *Jordan v. Department of Motor Vehicles (1999) 75 Cal. App. 4th 449, 469-470, 89 Cal. Rptr. 2d 333* (summary judgment for plaintiffs affirmed except as to two orders that exceeded trial court's jurisdiction)

Party cannot avoid summary judgment based on mere speculation and conjecture, but must produce admissible evidence raising triable issue of material fact. *Vournas v. Fidelity Nat. Tit. Ins. Co. (1999) 73 Cal. App. 4th 668, 672 86 Cal. Rptr. 2d 490* (summary judgment for defendant affirmed); *Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal. App. 4th 1509, 1524, 80 Cal. Rptr. 2d 94* (summary judgments for defendants both affirmed and reversed)

Courts are highly critical and cautious when expert offers legal conclusions as to ultimate facts in guise of expert opinion; retired field training policeoffice's declaration to extent it drew legal conclusions rejected. *Benavidez v. San Jose Police Dept. (1999) 71 Cal. App. 4th 853, 865, 84 Cal. Rptr. 2d 157* (summary judgment for defendants affirmed)

Regarding motion for summary adjudication concerning taking claim, critical portions of declaration submitted on plaintiff's behalf constituted little more than unsupported conclusions and opinions and did not constitute competent factual proof required to raise issue material fact. *Toigo v. Town of Ross (1998) 70 Cal. App. 4th 309, 324, 329, 82 Cal. Rptr. 2d 649* (summary adjudication for defendants affirmed)

Motion for summary judgment must be decided on admissible evidence in form of affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice can be taken; supporting and opposing affidavits and declarations must show personal knowledge and competency; affidavits and declarations must recite evidentiary facts, not ultimate facts or legal conclusions. *Guthrey v. State of California (1998) 63 Cal. App. 4th 1108, 1119-1120, 75 Cal. Rptr. 2d 27*

Declarations based on information and belief are insufficient to satisfy burden of either moving or opposing party on motion for summary judgment or adjudication. *Lopez v. University Partners (1997) 54 Cal. App. 4th 1117, 1124, 63 Cal. Rptr. 2d 359*

Issue of fact cannot be created by speculation, imagination, conjecture, or guess work but can only be created by conflict of evidence. *Lee v. Crusader Ins. Co. (1996) 49 Cal. App. 4th 1750, 1756, 57 Cal. Rptr. 2d 550*

Issue of fact cannot be created by speculation, conjecture, imagination or guess-work nor can it be raised by cryptic, broadly phrased, and conclusory assertions, or by mere possibilities, or by allegations in complaint; only conflict of evidence can create issue of fact; moreover when no affidavits or declarations are filed in opposition to motion for summary judgment court is entitled to accept as true facts alleged in movant's affidavits and declarations, provided they are within personal knowledge of affiant or declarant and are facts to which he or she could competently testify. *Lyons v. Security Pacific Nat. Bank (1995) 40 Cal. App. 4th 1001, 1014, 48 Cal. Rptr. 2d 174*

Issue of fact as created only by conflict of evidence and as not created by speculation, conjecture, imagination, or guess work; further, issue of fact as not raised by cryptic, broadly phrased, and conclusory assertions, or mere possibilities; thus, although court, in determining motion for summary judgment, does not try case, court as bound to consider competency of evidence presented. *Sinai Memorial Chapel v. Dudler (1991) 231 Cal. App. 3d 190, 196-197, 282 Cal. Rptr. 263*

Opinions or conclusions in opposing party's declaration as not sufficient to create triable issue of fact so as to defeat motion for summary judgment; opposing party's burden as being to set forth evidentiary facts that disclose existence of triable factual issue. *Barisich v. Lewis (1990) 226 Cal. App. 3d 12, 22, 275 Cal. Rptr. 331*

Opposition to summary judgment as deemed insufficient when it is essentially conclusionary, argumentative, or based on conjecture and speculation. *Buehler v. Alpha Beta Co. (1990) 224 Cal. App. 3d 729, 733, 274 Cal. Rptr. 14*

Although issues are framed by pleadings, motion as required to be decided on admissible evidence in form of affidavits, declarations, admissions, answers to interrogatories, depositions, and matters subject to judicial notice. *Spradlin v. Cox (1988) 201 Cal. App. 3d 799, 805, 247 Cal. Rptr. 347*

Factually disembodied and hypothetical legal proposition as inappropriate for summary judgment or summary adjudication. *Jones v. Los Angeles Community College Dist. (1988) 198 Cal. App. 3d 794, 810, 244 Cal. Rptr. 37*

Even though not pleaded by plaintiff, evidence of fraud and undue influence could have been offered at trial to prove vitiation from affirmative defense of release; therefore, to prevail on those issues at summary judgment, plaintiff was required to present by declarations, or reference to other available probative evidence, sufficient factual recitations to make prima facie case on those issues. *Hoffman v. Sports Car Club of America (1986) 180 Cal. App. 3d 119, 126, 225 Cal. Rptr. 359*

[c] Inferences From Evidence

In legal malpractice action, defendant moving for summary judgment had to show that in underlying premises liability case, plaintiff could not have established the element of causation; court held that plaintiff did present sufficient evidence to create a triable issue of fact with respect to causation based on the fact that the inferences from the circumstantial evidence that were favorable to plaintiff were more reasonable than those against her. *Ambriz v. Kelegian (2007) 146 Cal. App. 4th 1519, 1536, 53 Cal. Rptr. 3d 700* In antitrust context, inferences drawn from ambiguous evidence implying conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, meet opposing party's burden. *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 852, 107 Cal. Rptr. 2d 841, 24 P.3d 493*

In determining whether papers show that no triable issue exists as to any material fact, court must consider all evidence and all inferences reasonably deducible from evidence, except that summary judgment shall not be granted on inferences reasonably deducible from evidence if contradicted by other inferences or evidence that raise triable issue as to any material fact. *Martinez v. Bank of America (2000) 82 Cal. App. 4th 883, 887, 98 Cal. Rptr. 2d 576* (summary judgment for defendant affirmed)

In determining whether moving papers show there is no triable issue as to any material fact, court must consider all evidence set forth in papers and all inferences reasonably deducible from evidence. *Culligan v. State Comp. Ins. Fund (2000) 81 Cal. App. 4th 429, 433-434, 96 Cal. Rptr. 2d 656* (summary judgment for defendant affirmed)

Appellate court considers all evidence set forth in supporting and opposition papers, except that to which objections

have been made and sustained by court, and all uncontradicted inferences reasonably deducible from evidence. *Victor v. Hedges (1999) 77 Cal. App. 4th 229, 234, 91 Cal. Rptr. 2d 466* (summary judgment for defendants affirmed)

Facts alleged in evidence of party opposing summary judgment and reasonableinferences therefrom must be accepted as true; plaintiff opposing summary judgment is entitled to all favorable inferences that may reasonably be derived from plaintiff's expert declaration. *Hanson v. Grode (1999) 76 Cal. App. 4th 601, 603-604, 607, 90 Cal. Rptr. 2d 396* (summary judgment for defendants reversed)

Facts alleged in evidence of party opposing summary judgment and reasonable inferences therefrom must be accepted as true. *Kelsey v. Waste Management of Alameda County (1999) 76 Cal. App. 4th 590, 594, 90 Cal. Rptr. 2d 510* (summary judgment for defendant reversed)

Court must consider bare evidence and reasonable inferences deducible from evidence and determine whether evidence is sufficient to support potential judgment in favor of opposing party; court must therefore consider what inferences favoring opposing party factfinder could reasonably draw from evidence; while viewing evidence in this manner court must bear in mind that its primary function is to identity issues rather than to determine issues; only when inferences are indisputable may court decide issues as matter of law; if evidence is in conflict, factual issues must be resolved by trial. *Binder v. Aetna Life Ins. Co. (1999) 75 Cal. App. 4th 832, 839-840, 89 Cal. Rptr. 2d 540*

Code Civ. Proc. § 437c(c) requires trial court to grant summary judgment if all papers and affidavits submitted, together with all inferences reasonably deducible from evidence and uncontradicted by other inferences or evidence, show there is no triable issue as to any material fact and that moving party is entitled to judgment as matter of law; in action for breach of implied-in-fact employment contract, plaintiff's allegations of unspecified representations or understandings about plaintiff's tenure were all conclusory, in that they purported to establish ultimate conclusion by inference without alleging the evidentiary facts necessary actually to demonstrate that conclusion; because conclusory assertions failed to provide factual evidence necessary to overcome presumption of at-will employment, they were insufficient as matter of law either to controvert that presumption, or to support cause of action for breach of implied-in-fact contract. *Eisenberg v. Alameda Newspapers, Inc. (1999) 74 Cal. App. 4th 1359, 1374-1375, 1390, 88 Cal. Rptr. 2d 802* (summary judgment for defendants affirmed)

In determining whether papers show there is no triable issue as to any material fact court must consider all of evidence set forth in papers and all inferences reasonably deducible from evidence. *Aetna Health Plans of Cal., Inc. v. Yucaipa-Calimesa Joint Unified School Dist. (1999) 72 Cal. App. 4th 1175, 1186, 85 Cal. Rptr. 2d 672* (summary judgment for cross-defendant affirmed)

Submission of evidence that is equivocal, or from which conflicting inferences may be drawn is insufficient to meet movant's burden. *Anderson v. Metalclad Insulation Corp. (1999) 72 Cal. App. 4th 284, 297, 85 Cal. Rptr. 2d 331* (summary judgment for defendant reversed)

In determining whether moving papers show there is no triable issue of any material fact court must consider all the evidence and all inferences reasonably deducible from evidence, except summary judgment cannot be granted on inferences reasonably deducible from evidence, if contradicted by other inferences or evidence, which raise triable issue as to any material fact. *Bardin v. Lockheed Aeronautical Systems Co. (1999) 70 Cal. App. 4th 494, 499, 82 Cal. Rptr. 2d 726* (summary judgment for defendants affirmed)

Trial judge determines whether triable issues exist by examining affidavits and evidence, including any reasonable inferences that may be drawn from the facts. *Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal. App. 4th 1509, 1524, 80 Cal. Rptr. 2d 94* (summary judgments for defendants both affirmed and reversed)

On appeal from grant of summary judgment, appellate court states facts and draws inferences most favorable to party

against whom trial court grantedjudgment. *See Van Dyke v. S.K.I. Ltd. (1998) 67 Cal. App. 4th 1310, 1313 n.2, 79 Cal. Rptr. 2d 775* (summary judgment for defendants reversed)

Court focuses on issue finding; it does not resolve fact issues; court seeks to find contradictions in evidence, or in inferences reasonably deducible from evidence, that raise triable issue of material fact. *Oliver v. County of Los Angeles (1998) 66 Cal. App. 4th 1397, 1403, 78 Cal. Rptr. 2d 641* (summary judgment for defendant affirmed)

Trial judge determines whether triable issues of fact exist by reviewing affidavits and evidence before him or her and reasonable inferences that may be drawn from those facts; facts alleged in evidence of party opposing summary judgment and reasonable inferences therefrom must be accepted as true. *Kovatch v. California Casualty Management Co. (1998) 65 Cal. App. 4th 1256, 1266, 1268, 77 Cal. Rptr. 2d 217* (disapproved in *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 853 n.19, 107 Cal. Rptr. 2d 841, 24 P.3d 493* , to extent language suggests that the defendant is required to conclusively negate an element of plaintiff's cause of action to meet burden)

Court must consider presumptions and draw inferences from facts adduced where the inference is only reasonable one which may be drawn; court has no power in summary judgment proceeding, however, to weigh one inference against another or against other evidence. *Murillo v. Rite Stuff Foods, Inc. (1998) 65 Cal. App. 4th 833, 841, 77 Cal. Rptr. 2d 12*

Court must consider presumptions and draw inferences from facts adduced if inference is the only one that may be drawn; court, however, has no power in a summary proceeding to weigh one inference against another or against other evidence. *Pieper v. Commercial Underwriters Ins., Co. (1997) 59 Cal. App. 4th 1008, 1015, 69 Cal. Rptr. 2d 551*

When opposition to motion for summary judgment is based on inferences, those inferences must be reasonably deducible from the evidence, and not derived from speculation, conjecture, imagination, or guesswork. *Waschek v. Department of Motor Vehicles (1997) 59 Cal. App. 4th 640, 647, 69 Cal. Rptr. 2d 296* ; *O'Neil v. Dake (1985) 169 Cal. App. 3d 1038, 1044, 215 Cal. Rptr. 732*

In determining whether papers show there is no triable issue as to a material fact, court must consider all evidence and all inferences reasonably deducible from the evidence, except summary judgment cannot be granted on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact. *Brundage v. Hahn (1997) 57 Cal. App. 4th 228, 234, 66 Cal. Rptr. 2d 830*

Mere conclusions of law or fact are insufficient to satisfy evidentiary requirements forsummary judgment, and summary judgment based on inferences which are contradicted by other inferences as improper. *Bryant v. Bakshandeh (1991) 226 Cal. App. 3d 1241, 1245, 277 Cal. Rptr. 379*

Under *Code Civ. Proc. § 1856(d)* (parol evidence rule), court's determination whether writing is intended by parties as final expression of their agreement is not necessarily one of fact precluding grant of summary judgment; intent is not subjective mental state of contracting party and question of fact as presented only when there are conflicting inferences about actions of parties. *FPI Development, Inc. v. Nakashima (1991) 231 Cal. App. 3d 367, 391, 282 Cal. Rptr. 508*

In ruling on motion for summary judgment, trial court is to some extent required to weigh evidence in determining whether factual issues asserted relate to material fact, and as required to determine what inferences are reasonably deducible from evidence. *Woodland Hills Homeowners Organization v. Los Angeles Community College Dist. (1990) 218 Cal. App. 3d 79, 88, 266 Cal. Rptr. 767*

In ruling on motion for summary judgment, trial court is not limited to a search for facts on particular issue, but may draw inferences regarding that issue from relevant facts set forth in affidavits; trial court is to consider all inferences reasonably deducible from evidence, and lack of triable issue of fact may be established by inference if inference is only

reasonable one that can be drawn from evidence for and against motion. *Fidelity National Title Ins. Co. v. Miller (1989) 215 Cal. App. 3d 1163, 1172, 264 Cal. Rptr. 17*

Trial court lacks power to weigh one inference against another or against other evidence in proceeding for summary judgment. *Saylin v. California Ins. Guarantee Assn. (1986) 179 Cal. App. 3d 256, 261, 224 Cal. Rptr. 493* ; *Hooks v. Southern Cal. Permanente Medical Group (1980) 107 Cal. App. 3d 435, 441-442, 165 Cal. Rptr. 741*

Summary judgment is proper when moving party has made prima facie showing of entitlement thereto, and only triable issues of fact raised by opposition to motion are based on inferences not reasonably deducible from evidence before court. *O'Neil v. Dake (1985) 169 Cal. App. 3d 1038, 1044-1045, 215 Cal. Rptr. 732*

Summary judgment is improper when supporting inference contradicted by another inference raising triable issue of fact. *Hepp v. Lockheed-California Co. (1978) 86 Cal. App. 3d 714, 717-718, 150 Cal. Rptr. 408*

[d] No Reliance on Party's Own Pleadings

Opposing party may not rely on mere allegations or denials of pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 849, 107 Cal. Rptr. 2d 841, 24 P.3d 493*

Moving party cannot rely on unsupported allegations in his or her own pleadings to prove case, if evidence accompanying the summary judgment motion is otherwise deficient. *Lipson v. Superior Court (1982) 31 Cal. 3d 362, 374, 182 Cal. Rptr. 629, 644 P.2d 822* ; *Joslin v. Marin Mun. Water Dist. (1967) 67 Cal. 2d 132, 147, 60 Cal. Rptr. 377, 429 P.2d 889*

Plaintiff cannot rely on allegations in verified complaint to controvert defendant's affidavits. *Vesely v. Sager (1971) 5 Cal. 3d 153, 169, 95 Cal. Rptr. 623, 486 P.2d 151* , disapproved on other grounds in *Strong v. Cabrol (1984) 37 Cal. 3d 720, 724, 209 Cal. Rptr. 347, 691 P.2d 1013*

Parties cannot rely on own pleadings in lieu of or to cure deficient affidavits, but as able to rely on adverse party's pleaded allegations to establish facts not contained in their own affidavits. *Parker v. Twentieth Century-Fox Film Corp. (1970) 3 Cal. 3d 176, 181, 89 Cal. Rptr. 737, 474 P.2d 689* ; *Slobojanv. Western Travelers Life Ins. Co. (1969) 70 Cal. 2d 432, 437, 74 Cal. Rptr. 895, 450 P.2d 271*

Plaintiff may not rely on mere allegations or denials of its pleadings to show triable issue of material facts exists. *Culligan v. State Comp. Ins. Fund (2000) 81 Cal. App. 4th 429, 434, 96 Cal. Rptr. 2d 656* (summary judgment for defendant affirmed)

Under former *Code Civ. Proc. § 437c(o)(2)* (*see now Code Civ. Proc. § 437c(p)(2)*) plaintiff may not rely on mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, must set forth specific facts showing that a triable issue of material fact exists as to cause of action or defense to it. *Juarez v. Boy Scouts of America, Inc. (2000) 81 Cal. App. 4th 377, 393, 97 Cal. Rptr. 2d 12* (summary judgment for defendants affirmed except for one cause of action against two defendants that was reversed); *City of Oceanside v. Superior Court (2000) 81 Cal. App. 4th 269, 274, 96 Cal. Rptr. 2d 621* (denial of defendants' motion for summary judgment overturned by writ of mandate)

Once moving defendant has met his or her burden of showing plaintiff's cause of action has no merit by showing one or more elements of cause of action cannot be established, plaintiff, to demonstrate triable issue of material fact as to existence of element or elements challenged by defendant may not rely on mere allegations of its pleadings and instead

must show by specific facts that requisite triable issue of material fact is present. *Carlton v. Quint (2000) 77 Cal. App. 4th 690, 698-699, 91 Cal. Rptr. 2d 844* (summary judgment for defendants affirmed)

Plaintiff opposing summary judgment motion may not rely on his or her pleadings alone, but must file opposition to motion, with affidavits setting forth specific facts demonstrating that triable issue of material fact exists as to cause of action or defense. *Eisenberg v. Alameda Newspapers, Inc. (1999) 74 Cal. App. 4th 1359, 1375, 88 Cal. Rptr. 2d 802* (summary judgment for defendants affirmed)

To defeat motion for summary judgment, plaintiff must show specific facts and cannot rely on allegations of the pleadings. *Horn v. Cushman & Wakefield Western, Inc. (1999) 72 Cal. App. 4th 798, 805* (summary judgment for defendant affirmed)

Plaintiff may not rely on mere allegations or denials of its pleadings to show triable issue of material fact exists, but must instead set forth specific facts showing that triable issue of material fact exists. *Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 69, 81 Cal. Rptr. 2d 360* (summary judgment for defendant reversed)

Although party cannot rely on its pleadings on summary judgment, party seeking or opposing summary judgment can rely on admissions of material fact in opposing party's pleading. *24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal. App. 4th 1199, 1211, 78 Cal. Rptr. 2d 533* (trial court directed to vacate order denyingsummary judgment and to grant summary judgment to all but one defendant)

Party cannot rely on allegations in his or her own pleadings, even if verified, to make or supplement required evidentiary showing within summary judgment context. *Cornelius v. Los Angeles County Etc. Authority (1996) 49 Cal. App. 4th 1761, 1768, 57 Cal. Rptr. 2d 618*

Party opposing summary judgment as unable to rely on its pleadings but must make independent showing by proper declaration or by reference to deposition or other discovery product that there is sufficient proof of matters alleged to raise triable question of fact if moving party's evidence, standing alone, is sufficient to entitle party to judgment. *Buehler v. Alpha Beta Co. (1990) 224 Cal. App. 3d 729, 733, 274 Cal. Rptr. 14*

[e] Objections to Evidence

A trial court presented with timely evidentiary objections in proper form must expressly rule on each individual objection or else objections are deemed waived and objected-to evidence is included in record. *Demps v. San Francisco Housing Authority (2007) 149 Cal. App. 4th 564, 578, 57 Cal. Rptr. 3d 204*

Code Civ. Proc. § 437c(b)(5) and *(d)* give the parties the right to waive evidentiary objections; therefore, the trial court erred in interposing and sustaining its own hearsay objection to the moving party's evidence and on appeal the court considered all of the evidence. *Andrews v. Mobile Aire Estates (2005) 125 Cal. App. 4th 578, 587 n.6, 22 Cal. Rptr. 3d 832*

A trial court must rule on properly made evidentiary objections regardless of whether the motion for summary judgment is granted or denied. *Vineyard Springs Estates, LLC v. Superior Court (2004) 120 Cal. App. 4th 633, 642, 15 Cal. Rptr. 3d 587* (order denying defendant's summary judgment motion vacated and trial court ordered to rule on evidentiary objections proffered by defendant and reconsider motion for summary judgment)

Summary judgment or adjudication evidentiary objections on which trial judge fails to rule are deemed waived on appeal; however, issues are preserved for review when it would be fruitless or idle act for attorney to object; when, after filing written evidentiary objections, counsel on two separate hearing dates requested judge to rule on them, it would

have been fruitless or idle act to have interposed third oral request for ruling, so written objections were preserved for appellate review. *City of Long Beach v. Farmers & Merchants Bank (2000) 81 Cal. App. 4th 780, 783-785, 97 Cal. Rptr. 2d 140* (summary judgment for defendants affirmed)

Parties did not secure rulings to evidentiary objections raised in trial court, and as result, objections waived and appellate court treats all evidence as having been properly admitted. *PMC, Inc. v. Kadisha (2000) 78 Cal. App. 4th 1368, 1378, 93 Cal. Rptr. 2d 663* (summary judgment for defendants reversed)

Litigants who raise evidentiary objections at hearing, as opposed to written objections in advance, must arrange for court reporter to attend hearing to record objections for record (Cal. Rules of Ct., Rules 343, 345) (re-numbered Rules *3.1350, 3.1354*). *Mediterranean Construction Co. v. State Farm Fire & Casualty Co. (1998) 66 Cal. App. 4th 257, 263-264, 77 Cal. Rptr. 2d 781*

Assuming that trial court, on defendant's motion for summary judgment, should have stricken supporting declaration of defendant's president based on lack of personal knowledge, court's grant of summary judgment was proper based on other relevant evidence, consisting of plaintiff's deposition and parties' written agreement, which was before court and showed plaintiffs had no cause of action. *Korens v. R. W. Zukin Corp. (1989) 212 Cal. App. 3d 1054, 1062, 261 Cal. Rptr. 137*

Plaintiff opposing motion for summary judgment waives any claim of error relating to trial court's failure to consider its written objections to admissibility of evidence submitted in support of motion, when plaintiff did not specifyany objection that should have been, but was not, sustained, to plaintiff's prejudice. *Hoover Community Hotel Development Corp. v. Thomson (1985) 167 Cal. App. 3d 1130, 1133-1134, 213 Cal. Rptr. 750*

Party appealing from summary judgment was precluded from claiming that trial court erred in considering certain evidence submitted in support of motion when appellant raised no objection to that evidence in trial court and had himself relied on that evidence in opposing motion. *O'Connor v. Bloomer (1981) 116 Cal. App. 3d 385, 390 n.2, 172 Cal. Rptr. 128*

[f] Statements in Memorandum

It is not required that the memorandum of points and authorities cites to the evidence in the record; it is sufficient that the statement of undisputed facts cites to the record. *Basich v. Allstate Insurance Co. (2001) 87 Cal. App. 4th 1112, 1118, 105 Cal. Rptr. 2d 153*

On hearing of motion for summary judgment, counsel's representations of fact in memorandum of points and authorities as not constituting evidence, even if opposing party makes no objection to them; party as having no obligation to object either in writing or orally until actual evidence is submitted, and failure to object as not converting statements into evidence. *Vaughn v. Dame Construction Co. (1990) 223 Cal. App. 3d 144, 146-147 n.2, 272 Cal. Rptr. 261*

[g] Testimony From Other Cases

Although defendants interposed evidentiary objections to expert's declaration, record did not show trial court ever formally ruled on any objections; accordingly, all evidence submitted was available for trial court's consideration; nevertheless, presumed on appeal from summary judgment that judge has not relied on irrelevant or incompetent evidence; courts highly critical and must be cautious when expert offers legal conclusions as to ultimate facts in guise of expert opinion; to extent declaration drew legal conclusions, court rejected declaration. *Benavidez v. San Jose Police Dept. (1999) 71 Cal. App. 4th 853, 864-865, 84 Cal. Rptr. 2d 157* (summary judgment for defendants affirmed)

Testimony from criminal trial (transcript testimony of individual and deposition transcript of investigator) may not be used to support motion for summary judgment when testimony subject *Evid. Code § 1292* objection; following *Gatton v. A.P. Green Services, Inc. (1998) 64 Cal. App. 4th 688, 694, 75 Cal. Rptr. 2d 523* . *L&B Real Estate v. Superior Court (1998) 67 Cal. App. 4th 1342, 1346-1348, 79 Cal. Rptr. 2d 759* (writ proceeding seeking to set aside order denying defendants' summary judgment motion denied)

Summary judgment contemplates use of deposition transcripts, subject to admissibility objections made and sustained by the court; deposition excerpt from another case offered by plaintiff in opposition to summary judgment motion held inadmissible under *Evid. Code 1292(a)*, governing admissibility of testimony from another case; such deposition testimony can not be treated as a declaration to avoid requirement of Section 1292(a). *Gatton v. A.P. Green Services, Inc. (1998) 64 Cal. App. 4th 688, 692-697, 75 Cal. Rptr. 2d 523* (criticizing *Williams v. Saga Enterprises, Inc. (1990) 225 Cal. App. 3d 142, 149, 274 Cal. Rptr. 901*)

Trial court, in ruling on defendant's motion for summary judgment in action based on automobile accident, did not err in considering partial reporter's transcript, presented by plaintiff, of testimony of witness in criminal prosecution of third party based on same accident. *Williams v. Saga Enterprises, Inc. (1990) 225 Cal. App. 3d 142, 148-152, 274 Cal. Rptr. 901*

[h] Written Documents

Written documents incorporated by reference into affidavit or declaration as required to conform to rules of evidence, including those relating to authentication (*Evid. Code § 1400 et seq.*) and to best-evidence rule (*Evid. Code § 1500 et seq.*). *Dugar v. Happy Tiger Records, Inc. (1974) 41 Cal. App. 3d 811, 815, 116 Cal. Rptr. 412*

Averments in affidavits or declaration that depend on written documents as incompetent evidence without attachment of original document, or certified or authenticated copy of original, unless good cause for nonproduction is shown. *Miller & Lux, Inc. v. Bank of America (1963) 212 Cal. App. 2d 719, 725, 28 Cal. Rptr. 401*

[i] Contradiction or Repudiation of Prior Statements

In action against county as result of massive landslide after heavy rains, alleging causes of action for a dangerous condition of public property, nuisance, and inverse condemnation, although trial court admitted plaintiff's expert's declaration into evidence over county's objection that opinions expressed in his declaration were without foundation and some of them contradicted his prior statements, trial court properly found declaration did not constitute substantial evidence so as to raise triable issue of fact, where declaration asserted that slide started at bottom of cliff when wall erected by county failed, which directly contradicted his prior statement in report to insurance company that failure started as landslide in upper reaches and then flowed at rapid rate down to developed area below, and earlier statement that slide started in upper reaches of cliff directly undercut premise on which his entire declaration was based without explanation, and where, although prior statement was not in form of testimony under oath, court could not accept as substantial evidence of triable issue of fact declaration that directly contradicted declarant's prior statement, when contradiction was unexplained. *Alvis v. County of Ventura (2009) 178 Cal. App. 4th 536, 548-549, 100 Cal. Rptr. 3d 494*

[12] Federal Rule Compared

1992 and 1993 amendments to *Code Civ. Proc. § 437c* moved California summary judgment law closer to federal law, and California law nowconforms largely, but not completely, to federal counterpart; California has adopted

burden-shifting characteristics of federal law; however, unlike federal law, California moving defendant must present evidence, not merely point out, that plaintiff does not possess, and cannot reasonable obtain needed evidence; parties' burden of persuasion and/or production on summary judgment is dependent on burden of proof at trial. *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 848-849, 851, 853-854, 107 Cal. Rptr. 2d 841, 24 P.3d 493*

Code Civ. Proc. § 437c, unlike *Fed. R. Civ. P., Rule 56*, does not permit court to enter summary judgment on its own motion and requires moving party to support motion with evidence; former *Code Civ. Proc. § 437c(c), (o)(2)* (*see now Code Civ. Proc. § 437c(p)*) implies need for concrete evidence from moving party and expressly requires moving party to supply more than bare assertions, whether alleged in pleading or by way of argument, that opposing party has no evidence to support particular claim; no California case has concluded that party moving for summary judgment can simply argue there is absence of facts to support opposing party's case. *Scheiding v. Dinwiddie Construction Co. (1999) 69 Cal. App. 4th 64, 71-76, 80-81, 81 Cal. Rptr. 2d 360* (summary judgment for defendant reversed)

Recent statutory amendments adopted burden-shifting characteristics of federal law for California summary judgment motions. *Hunter v. Pacific Mechanical Corp. (1995) 37 Cal. App. 4th 1282, 1284-1288, 44 Cal. Rptr. 2d 335* ; *but see Addy v. Bliss & Glennon (1996) 44 Cal. App. 4th 205, 214, 51 Cal. Rptr. 2d 642* (court disagreed with and did not follow *Hunter v. Pacific Mechanical Corp.*)

Close examination of legislative history as suggesting intent was to apply the burden shifting characteristics of *Fed. R. Civ. Proc., Rule 56*, as interpreted in *Celotex Corp. v. Catrett (1986) 477 U.S. 317, 322-328, 106 S. Ct. 2548* , to California summary judgment motions. *Union Bank v. Superior Court (1995) 31 Cal. App. 4th 573, 590-591, 37 Cal. Rptr. 2d 653* (declining to address other issues concerning how federal rule or *Celotex* analysis may apply to California summary judgments motions)

Standards for summary judgment as basically same under California and federal law; for purposes of summary judgment, California court as required to consider all inferences reasonably deducible from evidence submitted, strictly construe moving party's affidavits, and liberally construe counteraffidavits; similarly, federal court as reading record in light most favorable to nonmoving party. *Buenavista v. City and County of San Francisco (1989) 207 Cal. App. 3d 1168, 1172-1173 n.2, 255 Cal. Rptr. 329*

[12A] Issues Raised in Prior Motion for Summary Adjudication

Trial court properly exercised its discretion in determining that *Code Civ. Proc. § 437c(f)(2)* did not bar summary judgment because operative motion addressed issue not raised by prior motion, where in its order denying prior motion trial court expressly stated that motion's failure to address elements of fraud was basis for its denial and operative summary judgment motion addressed previously omitted issue, asserting that defendant was entitled to judgment because plaintiff committed fraud on application for health insurance and specifically identified elements of fraud established by undisputed evidence. Even assuming operative summary judgment motion did not assert a new issue, trial court had inherent authority to reconsider sua sponte its prior order denying defendant's second motion for summary judgment, and record supported conclusion that trial court effectively sua sponte reconsidered its prior order denying defendant's second motion for summary judgment, where at time it denied second summary judgment motion, trial court had already determined that it would reconsider its order if defendant could demonstrate that there was no triable issue of fact as to each element of fraud, and where that reconsideration may have been prompted by motion filed in violation of *Code Civ. Proc. § 437c(f)(2)* did not alter trial court's inherent authority to reconsider its prior order denying summary judgment. *Nieto v. Blue Shield of California Life & Health Ins. (2010) 181 Cal. App. 4th 60, 71-75, 103 Cal. Rptr. 3d 906*

[13] Local Court Rules

Order issued by San Francisco Superior Court providing for expedited summary judgment for asbestos cases was invalid due to conflict with *Code Civ. Proc. § 437c*; court's order permitted summary judgment on 60 days' notice when statute mandates 75 days' notice; order also impermissibly shifted the burden of producing evidence to the nonmoving party. *Boyle v. CertainTeed Corp. (2006) 137 Cal. App. 4th 645, 653-655, 40 Cal. Rptr. 3d 501*

Local rules are valid only if not inconsistent with higher authority such as statutes, state rules of court, or case law; local rule that authorized court to grant summary judgment based solely on absence of opposition, without a preliminary finding that moving party has met its initial burden of proof conflicted with statutory and case law construing *Code Civ. Proc. § 437c* and was invalid as applied to motions for summary judgment. *Thatcher v. Lucky Stores, Inc. (2000) 79 Cal. App. 4th 1081, 1084-1087, 94 Cal. Rptr. 2d 575* (summary judgment for defendant affirmed)

Local rule or policy in conflict with statewide statute, rule of law, or Judicial Counsel rule is invalid; Orange County Superior Court Department 17's policy of forcing party wishing to make summary judgment motion to consult first with trial judge and other party and agree on procedure different from that provided in *Code Civ. Proc. § 437c* improperly interfered with party's right to move for summary judgment or summary adjudication of issue at any time pursuant to established procedures, and thus policy is invalid. *Lokeijak v. City of Irvine (1998) 65 Cal. App. 4th 341, 344, 76 Cal. Rptr. 2d 429*

Because summary judgment is drastic remedy important that all procedural requirements be satisfied before trial court grants it; thus, local rules may not provide shortcut for these requirements; local court rule not consistent with *Code Civ. Proc. § 437c* is invalid and judgment resulting from invocation of its procedures reversed. *Sierra Craft, Inc. v. Magnum Enterprises, Inc. (1998) 64 Cal. App. 4th 1252, 1256, 75 Cal. Rptr. 2d 681*

[14] Materiality of Disputed Facts

To be material for purposes of summary judgment proceeding, fact must relate to some claim or defense in issue under pleadings and must also be essential to judgment in some way. Riverside County Community Facilities Dist. v. Bainbridge 17 *(1999) 77 Cal. App. 4th 644, 653, 92 Cal. Rptr. 2d 29* (summary judgment for plaintiff affirmed)

For practical proposes, issue of material fact is one which, in context of circumstances of case, warrants time and cost of factfinding by trial. *Eisenberg v. Alameda Newspapers, Inc. (1999) 74 Cal. App. 4th 1359, 1375, 88 Cal. Rptr. 2d 802* (summary judgment for defendants affirmed)

Plaintiff cannot defeat summary judgment motion by producing evidence to support claims outside issues framed by pleadings. *Vournas v. Fidelity Nat. Tit. Ins. Co. (1999) 73 Cal. App. 4th 668, 674 n.6, 86 Cal. Rptr. 2d 490* (summary judgment for defendant affirmed)

Party cannot successfully resist summary judgment on theory which is not pleaded in complaint. *Hobson v. Raychem Corp. (1999) 73 Cal. App. 4th 614, 629, 86 Cal. Rptr. 2d 497* (summary judgment for defendant affirmed)

In conducting appellate review, complaint measures materiality of facts tendered in defendant's challenge to plaintiff's cause of action. *Marshak v. Ballesteros (1999) 72 Cal. App. 4th 1514, 1517, 86 Cal. Rptr. 2d 1* (summary judgment for defendant affirmed)

It is complaint that measures scope of issues material to summary judgment proceeding. *Williams v. California Physicians' Service (1999) 72 Cal. App. 4th 722, 728, 85 Cal. Rptr. 2d 497* (summary judgment for defendant affirmed)

Fact to be material must relate to a claim or defense that is in issue and must also be necessary to judgment somehow. *Kelly v. First Astri Corp. (1999) 72 Cal. App. 4th 462, 470, 84 Cal. Rptr. 2d 810* (summary judgment for defendants

affirmed)

For practical purposes, issue of material fact is one which in context and circumstances of case warrants time and cost of factfinding by trial; in other words, not every issue of fact is worth submission to jury; purpose of summary judgment is to separate cases in which there are material issues of fact meriting trial from those in which there are no such issues. *Sangster v. Paetkau (1998) 68 Cal. App. 4th 151, 162, 80 Cal. Rptr. 2d 66* (summary judgment for defendants affirmed)

Material facts are those that relate to issues in case as framed by pleadings. *Barton v. Elexsys Internat., Inc. (1998) 62 Cal. App. 4th 1182, 1187, 73 Cal. Rptr. 2d 212* (summary judgment for defendant affirmed)

Complete failure of proof concerning an essential element of nonmoving party's case necessarily renders all other facts immaterial. *Montgomery v. Cal. Accountants Mutual Ins. Co. (1998) 61 Cal. App. 4th 854, 858, 72 Cal. Rptr. 2d 39* (summary judgment for defendant affirmed)

What issues are material is determined mainly by the pleadings, rules of pleading, and substantive law relating to particular kind of case. *Waschek v. Department of Motor Vehicles (1997) 59 Cal. App. 4th 640, 644, 69 Cal. Rptr. 2d 296* (remanded to trial court for order granting summary judgment to defendant)

To prevent summary judgment, disputed facts must be material, that is, to relate to claim or defense in issue that could make a difference in outcome. *Los Angeles Nat. Bank v. Bank of Canton (1991) 229 Cal. App. 3d 1267, 1274, 280 Cal. Rptr. 831*

Defendant's motion for summary judgment addresses legal question whether there are undisputed material facts that foreclose plaintiff's right to relief; materiality is measured by law applicable to legal theories put in issue by complaint. *Anderson v. Heart Federal Sav. & Loan Assn. (1989) 208 Cal. App. 3d 202, 210, 256 Cal. Rptr. 180*

Summary judgment is proper when opposing party shows existence of conflict only as to facts not material to moving party's showing. *LaRosa v. Superior Court (1981) 122 Cal. App. 3d 741, 745, 176 Cal. Rptr. 224*

Mere presence of inadmissible evidence concerning immaterial fact in declaration supporting motion for summary judgment is not valid ground to deny motion otherwise well taken. *Overland Plumbing, Inc. v. Transamerica Ins. Co. (1981) 119 Cal. App. 3d 476, 481, 174 Cal. Rptr. 1*

[15] Motion for Judgment on the Pleadings

Defendants' summary judgment motion used to test whether complaint stated cause of action treated as motion for judgment on the pleadings when time for demurrer had passed. *American Airlines, Inc. v. County of San Mateo (1996) 12 Cal. 4th 1110, 1117-1118, 51 Cal. Rptr. 2d 251, 912 P.2d 1198*

When motion for summary judgment challenges sufficiency of pleadings rather than evidence supporting allegations, it is tantamount to motion for judgment on pleadings and may be treated as such by trial court; practical effect is that in granting judgment on pleadings, trial court may give plaintiff opportunity to amend complaint even when no motion to amend has been filed. *Taylor v. Lockheed Martin Corp. (2000) 78 Cal. App. 4th 472, 479, 92 Cal. Rptr. 2d 873* (summary judgment for defendants affirmed in part and reversed in part)

Court may treat hearing on motion for summary judgment as motion for judgment on the pleadings when complaint on its face shows defect and may grant opposing party leave to file amended complaint correcting defect. *Hobson v. Raychem Corp. (1999) 73 Cal. App. 4th 614, 625, 86 Cal. Rptr. 2d 497* (summary judgment for defendant affirmed)

Motion for summary judgment that argues pleadings do not support claim is evaluated as motion for judgment on the pleadings, and tests whether complaint is sufficient to state cause of action. *Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal. App. 4th 1509, 1532, 80 Cal. Rptr. 2d 94* (summary judgments for defendants both affirmed and reversed)

Motion for summary judgment as treated as motion for judgment on the pleadings when defendant fails to establish facts supporting grant of summary judgment as uncontroverted; defendant's motion as necessarily testing sufficiency of complaint. *Coca-Cola Bottling Co. v. Superior Court (1991) 233 Cal. App. 3d 1273, 1291-1292, 286 Cal. Rptr. 855*

[16] Motion for New Trial

Motion for new trial is available in cases in which no issue of fact actually tried. *Carney v. Simmonds (1957) 49 Cal. 2d 84, 88-91, 315 P.2d 305*

There is authority for proposition that motion for new trial will lie following a grant of summary judgment. *Victor v. Hedges (1999) 77 Cal. App. 4th 229, 245, 91 Cal. Rptr. 2d 466*

[17] Nature of Summary Judgment

Summary judgment is drastic measure that deprives losing party trial on merits; it should therefore be used with caution, so that it does not become a substitute fortrial. *Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1107, 252 Cal. Rptr. 122, 762 P.2d 46* (summary judgment for defendants affirmed); *Cortez v. Vogt (1997) 52 Cal. App. 4th 917, 925-926, 60 Cal. Rptr. 2d 841* (summary judgment for defendant reversed); *see Salazar v. Southern Cal. Gas Co. (1997) 54 Cal. App. 4th 1370, 1376, 63 Cal. Rptr. 2d 522* (summary judgment for defendants affirmed); *cf. Alszeh v. Home Box Office (1998) 67 Cal. App. 4th 1456, 1460, 80 Cal. Rptr. 2d 16* (summary judgment favored remedy in defamation and invasion of privacy cases)

Because summary judgment denies adverse party trial, it should be granted with caution. *Assilzadeh v. California Federal Bank (2000) 82 Cal. App. 4th 399, 409, 98 Cal. Rptr. 2d 176* (summary judgment for defendants affirmed)

Summary judgment is drastic procedure and should be used with caution. *Jang v. State Farm Fire & Casualty Co. (2000) 80 Cal. App. 4th 1291, 1295, 95 Cal. Rptr. 2d 917* (summary judgment for cross-defendant affirmed)

Summary judgment process should be used with caution because it is drastic measure depriving losing party of trial on merits. *Campbell v. Scripps Bank (2000) 78 Cal. App. 4th 1328, 1333 n.2, 93 Cal. Rptr. 2d 635* (summary judgment for defendants affirmed except as to improperly awarded attorney fees)

Because summary judgment denies adverse party a trial, it should be granted with caution. *Oliver v. County of Los Angeles (1998) 66 Cal. App. 4th 1397, 1403, 78 Cal. Rptr. 2d 641* (summary judgment for defendant affirmed)

Although summary judgment is drastic procedure, should be used with caution, and should be granted only if there is no issue of triable fact, justice requires that a defendant be as much entitled to be rid of unmeritorious lawsuit as plaintiff is entitled to maintain good one. *Leon v. Family Fitness Center (#107), Inc. (1998) 61 Cal. App. 4th 1227, 1232* (summary judgment for plaintiff reversed); *Aronson v. Kinsella (1997) 58 Cal. App. 4th 254, 269-270, 68 Cal. Rptr. 2d 305* (summary judgment for defendant affirmed); *Appalachian Ins. Co. v. McDonnell Douglas Corp. (1989) 214 Cal. App. 3d 1, 11, 262 Cal. Rptr. 716* (summary judgment for defendants affirmed; denial of summary judgment for defendants on specified grounds also affirmed)

Summary judgment is drastic procedure and should be used with caution. *Murillo v. Rite Stuff Foods, Inc. (1998) 65*

Cal. App. 4th 833, 840, 77 Cal. Rptr. 2d 12 (summary judgment for defendant reversed); *Pieper v. Commercial Underwriters Ins., Co. (1997) 59 Cal. App. 4th 1008, 1015, 69 Cal. Rptr. 2d 551* (summary judgment for defendant affirmed)

Summary judgment motion is directed to issues framed by pleadings; moving party must establish he or she is entitled to entry of judgment as matter of law. *Harper v. Wausau Ins. Co. (1997) 56 Cal. App. 4th 1079, 1084, 66 Cal. Rptr. 2d 64* (summary judgment for defendant reversed)

Summary judgment as determination that there is no factual dispute and that one party is entitled to judgment as matter of law; such judgment as being as final and conclusive a determination of merits of lawsuit as a judgment after trial and hence as res judicata once final. *Stuart v. Lilves (1989) 210 Cal. App. 3d 1215, 1219, 258 Cal. Rptr. 780* (reversing denial of motion to vacate foreign judgment based on prior summary judgment in California court on same issue)

Despite enactment of *Code Civ. Proc. § 437c(c)* imposing affirmative duty on trial court to grant motion for summary judgment under certain circumstances, Supreme Court as continuing to admonish that summary judgment is "drastic" remedy "to be used with caution." *Advanced Micro Devices, Inc. v. Great American Surplus Lines Ins. Co. (1988) 199 Cal. App. 3d 791, 795, 245 Cal. Rptr. 44* (summary judgment for defendant affirmed)

[18] Purpose of Summary Judgment

Purpose of summary judgment is to provide courts with mechanism to cut through parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. *Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 843, 107 Cal. Rptr. 2d 841, 24 P.3d 493* (order granting new trial, which effectively operated as denial of defendants' motion for summary judgment reversed and court ordered to enter summary judgment in defendants' favor)

Code Civ. Proc. § 437c(f) (summary adjudication) was enacted to stop piecemeal adjudication of facts that did not completely dispose of substantive area. *Catalano v. Superior Court (2000) 82 Cal. App. 4th 91, 97, 97 Cal. Rptr. 2d 842* (partial granting of summary adjudication for cross-defendants overturned by writ of mandate)

Summary judgment motions are to expedite litigation and eliminate needless trials. *Rubenstein v. Rubenstein (2000) 81 Cal. App. 4th 1131, 1142, 97 Cal. Rptr. 2d 707* (summary judgment for defendant reversed)

Purpose of summary judgment motion is to discover whether parties possess evidence requiring fact-weighing procedures of a trial. *City of Oceanside v. Superior Court (2000) 81 Cal. App. 4th 269, 273, 96 Cal. Rptr. 2d 621* (denial of defendants' motion for summary judgment overturned by writ of mandate)

Summary judgment process undertakes to expedite litigation and eliminate needless trials. *Campbell v. Scripps Bank (2000) 78 Cal. App. 4th 1328, 1333 n.2, 93 Cal. Rptr. 2d 635* (summary judgment for defendants affirmed except as to improperly awarded attorney fees)

Summary judgment process undertakes to expedite litigation and eliminate needless trials; process, however, should be used with caution because it is drastic measure depriving losing party of trial on merits. *Pardee Construction Co. v. Insurance Co. of the West (2000) 77 Cal. App. 4th 1340, 1349 n.3, 92 Cal. Rptr. 2d 443* (judgment for three defendants whose motions for judgment on pleadings were granted after summary adjudication in their favor reversed as to two of them with directions that trial court grant plaintiff's motions for summary adjudication; judgment for remaining defendant affirmed)

Purpose of summary judgment is to separate those cases in which there are material issues of fact meriting trial from

those in which there are no such issues. *Eisenberg v. Alameda Newspapers, Inc. (1999) 74 Cal. App. 4th 1359, 1375, 88 Cal. Rptr. 2d 802* (summary judgment for defendants affirmed)

Purpose of summary judgment is to penetrate through pleadings to ascertain, by means of affidavits, presence or absence of triable issues of material fact. *Vournas v. Fidelity Nat. Tit. Ins. Co. (1999) 73 Cal. App. 4th 668, 672 86 Cal. Rptr. 2d 490* (summary judgment for defendant affirmed); *Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal. App. 4th 1509, 1524, 80 Cal. Rptr. 2d 94* (summary judgments for defendants both affirmed and reversed)

Summary judgment motions are to expedite litigation and eliminate needless trials. *Berry v. Society of Saint Pius X (1999) 69 Cal. App. 4th 354, 365, 81 Cal. Rptr. 2d 574* (summary judgment for defendants affirmed)

Purpose of summary judgment is to separate cases in which there are material issues of fact meriting trial from those in which there are no such issues. *Sangster v. Paetkau (1998) 68 Cal. App. 4th 151, 162, 80 Cal. Rptr. 2d 66* (summary judgment for defendants affirmed)

Policy behind summary judgment scheme is to promote and protect administration of justice, and expedite litigation by elimination of needless trials; summary judgment statute plainly contemplates circumstances in which one is defendant entitled to judgment even though others are not. *24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal. App. 4th 1199, 1208, 78 Cal. Rptr. 2d 533* (writ proceeding; trial court directed to vacate order denying summary judgment in defendants' favor and to grant summary judgment to all but one defendant)

Summary judgment procedure aims to discover whether there is evidence requiring fact-weighing procedures of trial. *Kovatch v. California Casualty Management Co. (1998) 65 Cal. App. 4th 1256, 1266, 77 Cal. Rptr. 2d 217*

Summary judgment motions are to expedite litigation and eliminate needless trials. *Locke v. Warner Bros., Inc. (1997) 57 Cal. App. 4th 354, 361, 66 Cal. Rptr. 2d 921* (summary judgment for defendant reversed in part and affirmed as to other causes)

Policy underlying motions for summary judgment and summary adjudication of issues is to promote and protect administration of justice and expedite litigation by elimination of needless trials. *Brundage v. Hahn (1997) 57 Cal. App. 4th 228, 234, 66 Cal. Rptr. 2d 830* (summary judgment for defendant affirmed)

Purpose of summary judgment is to permit party to show that material factual claims arising from pleadings are not in dispute and need not be tried; function of pleadings is to delimit scope of issues; function of affidavits and declarations is to disclose whether triable issue of fact exists within the issues as delimited by pleadings. *Fortier v. Los Rios Community College Dist. (1996) 45 Cal. App. 4th 430, 433, 52 Cal. Rptr. 2d 812* (summary judgment for defendant affirmed)

Purpose of summary judgment procedure as being to penetrate evasive language and adept pleading and ascertain the existence or absence of triable issues of fact, not to determine merits of issues themselves. *Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1107, 252 Cal. Rptr. 122, 762 P.2d 46* (summary judgment for defendant affirmed); *Chern v. Bank of America (1976) 15 Cal. 3d 866, 873, 127 Cal. Rptr. 110, 544 P.2d 1310* (summary judgment affirmed as to one cause of action and reversed as to another); *St. Mary Medical Center v. Superior Court (1997) 50 Cal. App. 4th 1531, 1538, 58 Cal. Rptr. 2d 182* (writ of mandate ordering court to allow expert testimony limited to foundational issues in motion for summary judgment)

Purpose of motion for summary judgment as being to determine if there are any triable issues of material fact or whether moving party is entitled to judgment as matter of law. *Miller v. Bechtel Corp. (1983) 33 Cal. 3d 868, 874, 191 Cal. Rptr. 619, 663 P.2d 177* (summary judgment for defendants affirmed); *see also Starkman v. Mann Theatres Corp. (1991) 227 Cal. App. 3d 1491, 1495, 278 Cal. Rptr. 543* (summary judgment for defendant affirmed); *Petersen*

v. Securities Settlement Corp. (1991) 226 Cal. App. 3d 1445, 1451, 277 Cal. Rptr. 468 (summary judgment for defendant affirmed); *Violette v. Shoup (1993) 16 Cal. App. 4th 611, 619, 20 Cal. Rptr. 2d 358* (summary judgment for defendants affirmed)

Aim of summary judgment procedure is to discover, through media of affidavits, whether parties possess evidence requiring weighing procedures of trial. *Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal. 3d 842, 851, 94 Cal. Rptr. 785, 484 P.2d 953* (summary judgment for defendant reversed); *Stationers Corp. v. Dun & Bradstreet, Inc. (1965) 62 Cal. 2d 412, 417, 42 Cal. Rptr. 449, 398 P.2d 785* (summary judgment for defendants reversed); *Life v. County of Los Angeles (1991) 227 Cal. App. 3d 894, 898, 278 Cal. Rptr. 196* (summary judgment for defendants affirmed); *Spradlin v. Cox (1988) 201 Cal. App. 3d 799, 805, 247 Cal. Rptr. 347* (summary judgment for defendants reversed); *Oakland-Alameda County Coliseum, Inc. v. Oakland Raiders, Ltd. (1988) 197 Cal. App. 3d 1049, 1055, 243 Cal. Rptr. 300* (summary judgment for plaintiff affirmed)

Purpose of summary judgment as expediting litigation by avoiding needless trials. *Troche v. Daley (1990) 217 Cal. App. 3d 403, 407, 266 Cal. Rptr. 34* (summary judgment for defendant affirmed); *Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd. (1983) 147 Cal. App. 3d 309, 313, 195 Cal. Rptr. 90* (summary judgment for defendants reversed); *see also Los Angeles Nat. Bank v. Bank of Canton (1991) 229 Cal. App. 3d 1267, 1274, 280 Cal. Rptr. 831* (summary judgment for defendant reversed)

[19] Questions of Law

Plaintiff's negligence claims involved initial issue of whether defendants owed plaintiff duty of care--question of law for court. *Paz v. State of California (2000) 22 Cal. 4th 550, 557, 93 Cal. Rptr. 2d 703, 994 P.2d 975* (summary judgment for defendants upheld)

In action for negligence, while precise nature and extent of duty is question of law, it depends on nature and extent of act undertaken, a question of fact, so if record can support competing inferences or if facts are not yet sufficiently developed, ultimate finding on existence of duty cannot be made prior to hearing on merits and summary judgment is precluded; record in case would not support finding of duty. *Artiglio v. Corning Inc. (1998) 18 Cal. 4th 604, 615, 617, 76 Cal. Rptr. 2d 479, 957 P.2d 1313* (summary judgment for defendant affirmed)

In a negligence action where an unlicensed roofer sued the homeowner who employed him, the only issue in defendant's summary judgment motion was whether a particular section of the Labor Code excluded plaintiff as an employee for purposes of worker's compensation law; because a different Labor Code section operated to allow the tort action, the evidentiary burden never shifted to plaintiff and the trial court erred in granting defendant's motion. *Mendoza v. Brodeur (2006) 142 Cal. App. 4th 72, 81, 47 Cal. Rptr. 3d 310* (summary judgment for defendant reversed)

In secondary assumption of risk case, comparing relative fault of plaintiff and defendants is question of fact that must be resolved by trier of fact and cannot be resolved by way of summary judgment motion. *Sanchez v. Hillerich & Bradsby Co. (2002) 104 Cal. App. 4th 703, 715, 128 Cal. Rptr. 2d 529*

Generally, statute of limitations issues raise questions of fact that must be tried; however, when uncontradicted facts are susceptible of only one legitimate inference, summary judgment is proper. *Kline v. Turner (2001) 87 Cal. App. 4th 1369, 1374, 105 Cal. Rptr. 2d 699* (summary judgment for defendants affirmed)

Where trial court grants summary judgment solely on basis of its interpretation of statutory and case law, it is well settled that interpretation and application of statutory scheme to undisputed set of facts is question of law that is subject to de novo review on appeal; in such case, appellate court is not bound by trial court's interpretation of statutory scheme. *City of San Diego v. Dunkl (2001) 86 Cal. App. 4th 384, 395, 103 Cal. Rptr. 2d 269* (summary judgment for plaintiffs

affirmed)

Summary judgment is properly granted if there is no triable issue of material fact and issues raised by pleadings may be decided as matter of law; challenge to subject matter jurisdiction of court may properly be brought on summary judgment; likewise, interpretation of statute, including its preemptive effect, is question of law that may be considered on summary judgment. *Garofalo v. Princess Cruises, Inc. (2001) 85 Cal. App. 4th 1060, 1068, 102 Cal. Rptr. 2d 754* (summary judgment for defendant affirmed)

Construing and applying language of insurance policy presents pure issue of law. *Peerless Lighting Corp. v. American Motorists Ins. Co. (2000) 82 Cal. App. 4th 995, 1005-1006, 98 Cal. Rptr. 2d 753* (summary judgment for plaintiff reversed)

Concerning alleged misrepresentations and fraudulent concealment, question of materiality and justifiable reliance constitutes questions of fact that cannot be resolved by summary adjudication, unless undisputed facts leave no room for reasonable difference of opinion. *West Shield Investigations & Security Consultants v. Superior Court (2000) 82 Cal. App. 4th 935, 957, 98 Cal. Rptr. 2d 612* (denial of defendants' motions for summary adjudication overturned by writ of mandate)

Court determines whether duty of care exists as matter of law. *Martinez v. Bank of America (2000) 82 Cal. App. 4th 883, 894, 98 Cal. Rptr. 2d 576* (summary judgment for defendant affirmed)

Operative facts were undisputed and dispositive issue was purely legal issue involving statutory interpretation and application of statute to undisputed facts which appellate court reviews de novo. *Manibog v. MediaOne of Los Angeles, Inc. (2000) 81 Cal. App. 4th 1366, 1369, 98 Cal. Rptr. 2d 297* (summary judgment for defendant reversed)

Interpretation of insurance policy is question of law. *Northland Ins. Co. v. Briones (2000) 81 Cal. App. 4th 796, 802, 97 Cal. Rptr. 2d 127* (summary judgment for plaintiff affirmed); *Pardee Construction Co. v. Insurance Co. of the West (2000) 77 Cal. App. 4th 1340, 1351, 92 Cal. Rptr. 2d 443* (judgment on pleadings for defendants granted after summary adjudication in their favor reversed as to two defendants with directions to grant plaintiff's motions for summary adjudication; judgment for remaining defendant affirmed); *Williams v. California Physicians' Service (1999) 72 Cal. App. 4th 722, 728, 85 Cal. Rptr. 2d 497* (summary judgment for defendant affirmed; citing *Waller v. Truck Ins. Exchange, Inc. (1995) 11 Cal. 4th 1, 18, 44 Cal. Rptr. 2d 370, 900 P.2d 619*); *Old Republic Ins. Co. v. Superior Court (1998) 66 Cal. App. 4th 128, 142, 156, 77 Cal. Rptr. 2d 642* (denial of defendants' motions for summary judgment overturned by writ of mandate); *Nissel v. Certain Underwriters at Lloyd's of London (1998) 62 Cal. App. 4th 1103, 1110, 73 Cal. Rptr. 2d 174* (summary judgment for defendant affirmed); *Lebas Fashion Imports of USA, Inc. v. ITT Hartford Ins. Group (1996) 50 Cal. App. 4th 548, 555, 59 Cal. Rptr. 2d 36* (summary judgment for defendant reversed)

Whether legal duty is present in particular case is question of law for court; in general, issue of defendant's negligence presents question of fact for jury; defendant's negligence may be determined as matter of law if reasonable jurors following law could draw only one conclusion from evidence presented; in appropriate case, defendant's lack of negligence may be determined as matter of law. *Lindstrom v. Hertz Corp. (2000) 81 Cal. App. 4th 644, 648, 652, 96 Cal. Rptr. 2d 874* (summary adjudication for defendant affirmed)

While it is province of jury, as trier of fact, to determine whether unreasonable risk of harm was foreseeable under particular facts of given case, trial court must still decide as matter of law whether there was duty in first place, even if that determination includes consideration of foreseeability. *Juarez v. Boy Scouts of America, Inc. (2000) 81 Cal. App. 4th 377, 402, 97 Cal. Rptr. 2d 12* (summary judgment for defendants affirmed except for one cause of action against two defendants that was reversed)

In action for damages based on dangerous condition of public property, whether each element of design immunity

exists is question of law. *Alvarez v. State of California (2000) 79 Cal. App. 4th 720, 727-728, 95 Cal. Rptr. 2d 719* (summary judgment for defendant affirmed)

Summary judgment motion raises only questions of law regarding construction and effect of supporting and opposing papers. *Hernandez v. California Hospital Medical Center (2000) 78 Cal. App. 4th 498, 502, 93 Cal. Rptr. 2d 97* (summary judgment for defendant reversed); *Barisich v. Lewis (1990) 226 Cal. App. 3d 12, 15, 275 Cal. Rptr. 331* (summary judgment for plaintiff affirmed)

Whether duty of care exists is question of law for court. *Butcher v. Truck Ins. Exchange (2000) 77 Cal. App. 4th 1442, 1451, 92 Cal. Rptr. 2d 521* (summary judgment for defendants reversed)

Issue of fact becomes one of law and loses its triable character if undisputed facts leave no room for reasonable difference of opinion. *Ostayan v. Serrano Reconveyance Co. (2000) 77 Cal. App. 4th 1411, 1418, 92 Cal. Rptr. 2d 577* (summary judgment for defendants affirmed); *Old Republic Ins. Co. v. Superior Court (1998) 66 Cal. App. 4th 128, 142, 156, 77 Cal. Rptr. 2d 642* (denial of defendants' motions for summary judgment overturned by writ of mandate); *Nissel v. Certain Underwriters at Lloyd's of London (1998) 62 Cal. App. 4th 1103, 1110, 73 Cal. Rptr. 2d 174* (summary judgment for defendant affirmed); *Shapiro v. Sutherland (1998) 64 Cal. App. 4th 1534, 1543, 76 Cal. Rptr. 2d 101* (summary judgment for defendants reversed)

Whether defense of res judicata applies under facts of case poses question of law which court considers de novo on appeal. *Allstate Ins. Co. v. Mel Rapton, Inc. (2000) 77 Cal. App. 4th 901, 907, 92 Cal. Rptr. 2d 151* (summary judgment for defendant affirmed)

With regard to *Evid. Code § 669(a)(3), (4)*, whether death or injury involved in action resulted from occurrence of nature statute was designed to prevent and whether plaintiff was one of class of persons for whose protection statute was adopted are questions of law. *Victor v. Hedges (1999) 77 Cal. App. 4th 229, 235, 91 Cal. Rptr. 2d 466* (summary judgment for defendants affirmed)

Duty, being question of law, is particularly amenable to resolution by summary judgment. *Nicole M. v. Sears, Roebuck & Co. (1999) 76 Cal. App. 4th 1238, 1243, 90 Cal. Rptr. 2d 922* (summary judgment for defendant affirmed); *Quigley v. First Church of Christ Scientist (1998) 65 Cal. App. 4th 1027, 1036, 76 Cal. Rptr. 2d 792* (summary judgment for defendant affirmed)

Resolution of statute of limitations defense normally is factual question for trier of fact; summary judgment is proper, however, if court can draw only one legitimate inference from uncontradicted evidence regarding the limitation question. *FNB Mortgage Corp. v. Pacific General Group (1999) 76 Cal. App. 4th 1116, 1126, 90 Cal. Rptr. 2d 841* (summary judgment for cross-defendant affirmed)

If facts are undisputed and admit only one conclusion, summary judgment may be entered on issues that otherwise would be submitted to the jury; thus, issue of existence of implied-in-fact contract not to terminate except for good cause may appropriately be resolved as matter of law given undisputed facts of particular case. *Eisenberg v. Alameda Newspapers, Inc. (1999) 74 Cal. App. 4th 1359, 1386-1387, 88 Cal. Rptr. 2d 802* (summary judgment for defendants affirmed)

As matter of constitutional law, media statements on matters of public interest, including statements of opinions which reasonably imply knowledge of facts, must be provable as false before there can be liability under state defamation law; whether statement contains provable false factual assertions is question of law for trial court to decide; it is essential element of defamation that publication be of false statement of fact rather than opinion; issue whether communication was statement of fact or opinion is question of law to be decided by court. *Eisenberg v. Alameda Newspapers,Inc. (1999) 74 Cal. App. 4th 1359, 1382-1383, 88 Cal. Rptr. 2d 802* (summary judgment for defendants affirmed)

When facts are undisputed, issue is one of law and appellate court is free to draw its own conclusions of law from undisputed facts. *Ziman v. Fireman's Fund Ins. Co. (1999) 73 Cal. App. 4th 1382, 1387, 87 Cal. Rptr. 2d 397* (summary judgment for defendant affirmed)

In negligence action, existence of duty of care owed by defendant to plaintiff is legal issue that is particularly amenable to resolution by summary judgment. *Vournas v. Fidelity Nat. Tit. Ins. Co. (1999) 73 Cal. App. 4th 668, 672 86 Cal. Rptr. 2d 490* (summary judgment for defendant affirmed)

Because determining whether primary assumption of risk doctrine applies resolves question of whether duty of care exists, it is legal question for court to decide. *Record v. Reason (1999) 73 Cal. App. 4th 472, 479, 86 Cal. Rptr. 2d 547*

When facts are undisputed, determination whether activity is "hazardous recreational activity" under *Gov. Code § 831.7* is question of law for court. *Ochoa v. California State University (1999) 72 Cal. App. 4th 1300, 1306-1307, 85 Cal. Rptr. 2d 768* (summary judgment for defendant affirmed)

Question whether statement is reasonably susceptible to defamatory interpretation is question of law for trial court; only once court has determined statement is reasonably susceptible to defamatory interpretation does it become question for trier of fact whether or not it was so understood. *Smith v. Maldonado (1999) 72 Cal. App. 4th 637, 644, 85 Cal. Rptr. 2d 397* (summary judgment for defendants affirmed)

Question of existence of legal duty of care in given factual situation presents question of law to be determined by court alone. *Armato v. Baden (1999) 71 Cal. App. 4th 885, 893, 84 Cal. Rptr 2d 294* (summary judgments for defendants affirmed)

Existence of duty is question of law; whether police owed duty to plaintiffs was question of law for trial court. *Benavidez v. San Jose Police Dept. (1999) 71 Cal. App. 4th 853, 859, 865, 84 Cal. Rptr. 2d 157* (summary judgment for defendants affirmed)

Whether or not to apply judicial estoppel is question of law for trial court that can be made in context of summary judgment motion when none of facts material to court's decision to apply judicial estoppel disputed. *Drain v. Betz Laboratories, Inc. (1999) 69 Cal. App. 4th 950, 959 n.8, 81 Cal. Rptr. 2d 864* (summary judgment for defendants affirmed)

Whether an enactment is intended to impose mandatory duty within meaning of *Gov. Code § 815.6* is question of law for court. *Becerra v. County of Santa Cruz (1999) 68 Cal. App. 4th 1450, 1458, 81 Cal. Rptr. 2d 165* (summary judgment for defendant affirmed)

Probable cause element of malicious prosecution action requires objective judicial determination of reasonableness of defendant's prior lawsuit and existence or absence of probable cause is question of law to be determined by court from facts; question for trial court is whether on basis of facts known to defendant prosecution of prior action was tenable. *Sangster v. Paetkau (1998) 68 Cal. App. 4th 151, 164, 80 Cal. Rptr. 2d 66* (summary judgment defendants favor affirmed)

Whether published material is reasonably susceptible of interpretation that implies a provable false assertion of fact, which is dispositive question in defamation action, is a question of law for court. *Alszeh v. Home Box Office (1998) 67 Cal. App. 4th 1456, 1461, 80 Cal. Rptr. 2d 16* (summary judgment for defendant favor affirmed)

In context of primary assumption of risk, determination of what constitutes inherent risk is legal question for court. *Van Dyke v. S.K.I. Ltd. (1998) 67 Cal. App. 4th 1310, 1315, 79 Cal. Rptr. 2d 775* (summary judgment for defendants

reversed)

Insurance policy interpretation is generally question of law; duty to defend is contractual in nature and determination of duty is matter of law appropriate for summary adjudication. *Fidelity & Deposit Co. v. Charter Oak Fire Ins. Co. (1998) 66 Cal. App. 4th 1080, 1086-1087, 78 Cal. Rptr. 2d 429* (summary judgment for defendant favor affirmed)

Application of manager's privilege is most amenable to resolution by summary judgment. *Halvorsen v. Aramark Uniform Services, Inc. (1998) 65 Cal. App. 4th 1383, 1392, 77 Cal. Rptr. 2d 383* (summary judgment for defendant affirmed)

Formulation of standard of care is question of law for court; once court has formulated standard, its application to facts of case is task for trier of fact if reasonable minds might differ as to whether defendants' conduct conformed to standard; only if circumstances permit no reasonable doubt about whether attorney's conduct did or did not violate standard of care, may court as matter of law resolve question whether attorney breached duty to clients. *Crookall v. Davis, Punelli, Keathley & Willard (1998) 65 Cal. App. 4th 1048, 1067, 77 Cal. Rptr. 2d 250* (summary judgment for defendants reversed)

With regard to causes of action based on negligence or negligent misrepresentation, trial court erroneously resolved disputed issues instead of merely spotting them when it concluded that defendant had reasonable grounds to believe house was 5,500 square feet, defendant breached no duty to plaintiff in failing to discover house was not that size, and plaintiff did not justifiably rely on defendants' representations. *Furla v. Jon Douglas Co. (1998) 65 Cal. App. 4th 1069, 1077, 76 Cal. Rptr. 2d 911* (summary judgment for defendant reversed)

With regard to negligence per se, whether injury resulted from occurrence of nature statute was designed to prevent and whether plaintiff was one of persons for whose protection statute was adopted are questions of law; whether party to action violated statute is generally question of fact; similarly, question whether violation proximately caused or contributed to plaintiff's injury usually matter for jury decision. *Reyes v. Kosha (1998) 65 Cal. App. 4th 451, 462-463, 76 Cal. Rptr. 2d 457*

Interpretation of statutes and administrative regulations presents question of law which is subject to independent review on appeal. *Farm Sanctuary, Inc. v. Department of Food & Agriculture (1998) 63 Cal. App. 4th 495, 501, 74 Cal. Rptr. 2d 75* (denial of plaintiff's summary judgment motion, and based on parties' stipulation entry of judgment in defendant's favor, affirmed)

Ordinarily, determination whether employee acted within scope of employment presents question of fact; it becomes question of law, however, when facts are undisputed and no conflicting inferences are possible. *Depew v. Crocodile Enterprises, Inc. (1998) 63 Cal. App. 4th 480, 489, 73 Cal. Rptr. 2d 673* (summary judgment for defendant affirmed)

Existence of dangerous condition usually is question of fact, but may be resolved as question of law if reasonable minds can come to but one conclusion. *City of South Lake Tahoe v. Superior Court (1998) 62 Cal. App. 4th 971, 979, 73 Cal. Rptr. 2d 146* (summary judgment for plaintiffs overturned by writ of mandate)

Existence and scope of duty is question of law for court. *Linden Partners v. Wilshire Linden Associates (1998) 62 Cal. App. 4th 508, 518, 73 Cal. Rptr. 2d 708* (summary adjudication for plaintiffs affirmed)

Interpretation and application of statutory scheme to undisputed set of facts is question of law that is subject to de novo review on appeal; accordingly, appellate court is not bound by trial court's interpretation. *Lenane v. Continental Maritime of San Diego, Inc. (1998) 61 Cal. App. 4th 1073, 1079, 72 Cal. Rptr. 2d 121* (summary judgment for defendant reversed)

Generally, whether defendant was negligent constitutes fact for jury to decide; however, when reasonable jurors could draw only one conclusion from evidence presented, lack of negligence may be determined as matter of law, and summary judgment granted. *Federico v. Superior Court (1997) 59 Cal. App. 4th 1207, 1214, 69 Cal. Rptr. 2d 370* (denial of defendant's motion for summary judgment overturned by writ of mandate)

Question of whether agreement has been integrated, and thus whether parol evidence doctrine applies, is whether parties intended their writing to serve as exclusive embodiment of their agreement; question is one of law. *Wedeck v. Unocal Corp. (1997) 59 Cal. App. 4th 848, 862-863, 69 Cal. Rptr. 2d 501* (summary judgment for defendant affirmed)

Issue of fact becomes one of law and loses its triable character if the undisputed facts leave no room for a reasonable difference of opinion. *Tsemetzin v. Coast Federal Savings & Loan Assn. (1997) 57 Cal. App. 4th 1334, 1342, 67 Cal. Rptr. 2d 726* (summary judgment for defendant reversed)

Whether duty of care exists is question of law for courts; question of whether person reasonably relied on another's representations normally question of fact, although in some instances it can be decided as matter of law; when insured alleged agent mislead him regarding extent of coverage for losses of business personal property provided by insurance policy he purchased, genuine issues of triable fact existed whether agent made representations, and if so, whether they were sufficient to impose special duty on insurer. *Paper Savers, Inc. v. Nacsa (1996) 51 Cal. App. 4th 1090, 1092, 1095, 1103, 59 Cal. Rptr. 2d 547*

In first party claim alleging bad faith of insurer, reasonableness of insurer's claims handling conduct while ordinarily question of fact becomes question of law when evidence is undisputed and only one inference can be drawn from evidence. *Lee v. Crusader Ins. Co. (1996) 49 Cal. App. 4th 1750, 1757, 57 Cal. Rptr. 2d 550*

While resolution of statute of limitation issue normally question of fact, when uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment proper. *Romano v. Rockwell Internat., Inc. (1996) 14 Cal. 4th 479, 487, 59 Cal. Rptr. 2d 20, 926 P. 2d 1114*

It is pure question of law when only dispute is over legal effect and significance of undisputed facts. *Schaefer Dixon Associates v. Santa Ana Watershed Project Authority (1996) 48 Cal. App. 4th 524, 531, 55 Cal. Rptr. 2d 698*

On motion for summary judgment concerning libel action, issue whether communication was a statement of fact or opinion and whether plaintiff was a public figure were questions of law to be determined by court. *Copp v. Paxton (1996) 45 Cal. App. 4th 829, 837, 845, 52 Cal. Rptr. 2d 831*

When facts are undisputed, court can resolve question of law in accordance with general summary judgment principles; absent factual dispute as to meaning of policy language, the interpretation, construction and application of insurance contract is strictly issue of law. *Homestead Ins. Co. v. American Empire Surplus Lines Ins. Co. (1996) 44 Cal. App. 4th 1297, 1300-1301, 52 Cal. Rptr. 2d 268*

Since interpretation of statutes is a matter of law, usual rules of summary judgment on appeal do not apply. *Massa v. Southern Cal. Rapid Transit Dist. (1996) 43 Cal. App. 4th 1217, 1220, 51 Cal. Rptr. 2d 164*

Because existence of primary assumption of risk is dependent on existence of legal duty, and because duty is issue of law to be decided by court, applicability of that defense is amenable to resolution by summary judgment. *Bushnell v. Japanese-American Religious & Cultural Center (1996) 43 Cal. App. 4th 525, 528, 50 Cal. Rptr. 2d 671*

Trial court's determination of whether ambiguity exists in contract is question of law subject to independent review on appeal; trial court's resolution of ambiguity is also question of law if no parol evidence admitted or if parol evidence not in conflict; if, however, parol evidence is in conflict, trial court's resolution of conflict is question of fact that must be

upheld if supported by substantial evidence; if parol evidence contradictory, factual question arises that should not be decided by summary judgment. *WYDA Associates v. Merner (1996) 42 Cal. App. 4th 1702, 1710, 1713, 50 Cal. Rptr. 2d 323*

When material facts are not in dispute in summary judgment motion, but parties simply disputed legal significance of material facts, that is, whether defendant's conduct came within meaning of phrase "causes to be sold, any alcoholic beverage, to any obviously intoxicated minor" as used in *Bus. & Prof. Code § 25602.1*, liability turned on question of statutory interpretation which was question of law to be decided in summary judgment motion. *Hernandez v. Modesto Portuguese Pentecost Assn. (1995) 40 Cal. App. 4th 1274, 1279, 48 Cal. Rptr. 2d 229* ; *see Monastra v. Konica Business Machines, U.S.A., Inc. (1996) 43 Cal. App. 4th 1628, 1635, 51 Cal. Rptr. 2d. 528* (when facts undisputed, whether, and how, bulk sales and fraudulent transfer statutes applies to facts is question of law which court reviews independently)

Motions for summary judgment raise only questions of law; construction of Unruh Civil Rights Act (*Civ. Code § 51*), that is, whether Mothers Against Drunk Driving is a business entity under the act, raised question of law for court to decide. *Harris v. Mothers Against Drunk Driving (1995) 40 Cal. App. 4th 16, 20, 46 Cal. Rptr. 2d 833*

Trial court must decide if triable issue of fact exists; if none exists and sole remaining issue is one of law, it is trial court's duty to determine issue of law. *City of South El Monte v. Southern Cal. Joint Powers Ins. Authority (1995) 38 Cal. App. 4th 1629, 1645, 45 Cal. Rptr. 2d 729*

When operative facts are undisputed, question of application of statute of limitations as matter of law, and summary judgment as proper if facts show that action is time barred as matter of law. *Love v. Fire Ins. Exchange (1990) 221 Cal. App. 3d 1136, 1142-1143, 271 Cal. Rptr. 246*

Whether duty exists is legal question. *City of El Segundo v. Bright (1990) 219 Cal. App. 3d 1372, 1376, 269 Cal. Rptr. 1*

Since construction of statute and question of whether it applies present solely question of law, that question is appropriately determined on motion for summary judgment. *Neighbours v. Buzz Oates Enterprises (1990) 217 Cal. App. 3d 325, 329, 265 Cal. Rptr. 788*

[20] Review by Appeal

[a] Affirmance on Any Legal Basis

Trial court's stated reasons supporting its ruling do not bind appellate court as appellate court reviews ruling, not its rationale; consequently, if summary judgment was properly granted on any ground, appellate court must affirm regardless of whether trial court's reasoning correct. *Oliver v. AT&T Wireless Services (1999) 76 Cal. App. 4th 521, 528, 90 Cal. Rptr. 2d 491* (summary judgment for defendants affirmed)

Because appellate review is de novo, if summary judgment was proper, even if granted for incorrect reasons, appellate court affirms. *Deschene v. Pinole Point Steel Co. (1999) 76 Cal. App. 4th 33, 39, 90 Cal. Rptr. 2d 15* (summary judgment for defendant reversed as to two causes of action and otherwise affirmed)

Appellate court is not bound by trial court's stated reasons, if any, supporting its ruling; appellate court reviews ruling, not the rationale. *Hanson v. Lucky Stores, Inc. (1999) 74 Cal. App. 4th 215, 223, 87 Cal. Rptr. 2d 487* (summary judgment for defendant affirmed); *Prilliman v. United Air Lines, Inc. (1997) 53 Cal. App. 4th 935, 951, 62 Cal. Rptr. 2d 142* (summary judgment for defendant affirmed as to one plaintiff and reversed as to other)

Appellate court reviews trial court's ruling, not its rationale; accordingly, if trial court's decision is correct on any legal theory, judgment will be affirmed. *Marshak v. Ballesteros (1999) 72 Cal. App. 4th 1514, 1517, 86 Cal. Rptr. 2d 1* (summary judgment for defendant affirmed)

Appellate court may affirm grant of summary judgment on any ground properly raised below, whether or not addressed by trial court. *Ochoa v. California State University (1999) 72 Cal. App. 4th 1300, 1304, 85 Cal. Rptr. 2d 768* (summary judgment for defendant affirmed)

When there is sufficient legal ground to support granting of motion, order will be upheld regardless of grounds relied on by trial court *Benavidez v. San Jose Police Dept. (1999) 71 Cal. App. 4th 853, 859, 84 Cal. Rptr. 2d 157* (summary judgment for defendants affirmed); *Becerra v. County of Santa Cruz (1999) 68 Cal. App. 4th 1450, 1457, 81 Cal. Rptr. 2d 165* (summary judgment for defendant affirmed)

When there is no genuine issue of material fact, appellate court should affirm trial court's judgment if it is correct on any theory of law applicable to case. *Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1490, 82 Cal. Rptr. 2d 359* (summary judgment for defendant reversed)

Appellate court may affirm summary judgment for reasons different from trial court's reasons. *Bunnell v. Department of Corrections (1998) 64 Cal. App. 4th 1360, 1367, 76 Cal. Rptr. 2d 58*

If summary judgment is proper on grounds other those articulated by trial court, appellate court must nevertheless affirm. *Barton v. Elexsys Internat., Inc. (1998) 62 Cal. App. 4th 1182, 1187-1188, 73 Cal. Rptr. 2d 212* (summary judgment for defendant affirmed)

On appeal, reviewing court examines facts and independently determines their effect as matter of law; although trial court may grant summary judgment on one basis, appellate court may affirm judgment under another; appellate court is not bound by trial court's stated reasons, if any, supporting its ruling; it reviews ruling, not rationale; only if defendant makes requisite showing does the appellate court need to examine plaintiff's opposing papers to determine if they demonstrate existence of triable issue of material fact. *Salazar v. Southern Cal. Gas Co. (1997) 54 Cal. App. 4th 1370, 1376, 63 Cal. Rptr. 2d 522*

Summary judgment is affirmed on appeal if there was any legal basis on which trial court may have granted it, even if trial court used incorrect ground for its decision. *Hine v. Dittrich (1991) 228 Cal. App. 3d 59, 62, 278 Cal. Rptr. 330* ; *Perez v. 222 Sutter St. Partners (1990) 222 Cal. App. 3d 938, 943 n.4, 272 Cal. Rptr. 119* ; *Troche v. Daley (1990) 217 Cal. App. 3d 403, 407-408, 266 Cal. Rptr. 34* ; *Mosher v. Mayacamas Corp. (1989) 215 Cal. App. 3d 1, 4, 263 Cal. Rptr. 373*

Summary judgment based on erroneous determination that issue was moot as nonetheless upheld if correct on any theory of law applicable to case. *Farron v. City and County of San Francisco (1989) 216 Cal. App. 3d 1071, 1074, 265 Cal. Rptr. 317*

[b] Arguments Not Raised in Trial Court

Appellate court will only consider those facts that were before the trial court when it ruled on the motion; this in turn means the facts contained in the parties separate statement. If the fact is not set forth in the separate statement, it does not exist. *Mills v. Forestex Co. (2003) 108 Cal. App. 4th 625, 134 Cal. Rptr. 2d 273*

A judgment granting or denying summary judgment may be affirmed on any correct legal theory provided opposing

party had opportunity to address it below. *Vallely Investments, L.P. v. BancAmerica Commercial Corp. (2001) 88 Cal. App. 4th 816, 821, 106 Cal. Rptr. 2d 689* (reversing summary judgment for assignee of lease with directions that judgment for lessor be entered in action by lessor seeking declaratory judgment as to terms of lease)

Plaintiff sought recovery for injuries suffered while "off-roading;" defendant contended that plaintiff's action was barred by the doctrine of primary assumption of the risk, in that collisions were an inherent risk in the sport of "off-roading;" plaintiff's complaint pled only that defendant was negligent; it did not allege recklessness; on appeal, plaintiff argued that the evidence supported a claim of recklessness, which would avoid the defense of primary assumption of the risk; court of appeal held that the trial court was correct in deciding the case based on the pleadings, and held that the plaintiff should have sought leave to amend the complaint prior to the hearing on the summary judgment motion. *Distefano v. Forester (2001) 85 Cal. App. 4th 1249, 1264-1265, 102 Cal. Rptr. 2d 813*

If, in deciding appeal, court finds there is no issue of material fact, court affirms summary judgment if it is correct on any legal theory applicable to case, whether or not that theory was adopted by trial court, and whether it was raised by defendant in trial court or first addressed on appeal. *Assilzadeh v. California Federal Bank (2000) 82 Cal. App. 4th 399, 409, 98 Cal. Rptr. 2d 176* (summary judgment for defendants affirmed)

Appellate court declined to reach two arguments raised for first time by appellants because they were not raised until appellants filed their reply brief. *ML Direct, Inc. v. TIG Specialty Ins. Co. (2000) 79 Cal. App. 4th 137, 146, 93 Cal. Rptr. 2d 846*

Issues raised for first time in reply brief will not be considered on appeal. *Renna v. County of Fresno (2000) 78 Cal. App. 4th 1, 6 n.1, 92 Cal. Rptr. 2d 586* (summary judgment for defendant affirmed)

Appellate court may affirm on any legally correct theory provided plaintiffs had adequate opportunity to address theory in lower court. *Kramer v. State Farm Fire & Casualty Co. (1999) 76 Cal. App. 4th 332, 336, 90 Cal. Rptr. 2d 301* (summary judgment for defendant affirmed)

Defendant's objection to plaintiff's reliance on theory that was not raised in plaintiff's summary judgment papers was proper, and court had discretion to deem argument waived, but under circumstances choose to address issue, which had been raised in two principal authorities cited by defendant on appeal and issue had also been briefed in motion papers of another plaintiff, not party to appeal, which had given plaintiff opportunity to respond to it below. *Neverkovec v. Fredericks (1999) 74 Cal. App. 4th 337, 347 n.6, 87 Cal. Rptr. 2d 856* (summary judgment for defendant reversed)

As general rule, party cannot raise new theory of liability on appeal; further, on appeal, plaintiff cannot properly raise new theory in reply brief. *Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1489, 82 Cal. Rptr. 2d 359* (summary judgment for defendant reversed)

Appellate court may consider only those facts that were before trial court, and disregard any new factual allegations made for first time on appeal; potential theories that could theoretically create triable issues of material fact may not be raised or considered on appeal unless they were factually presented, fully developed and argued to trial court. *Sangster v. Paetkau (1998) 68 Cal. App. 4th 151, 163, 80 Cal. Rptr. 2d 66* (summary judgment for defendants affirmed)

Although review of summary judgment is de novo, it is limited to issues that have been adequately raised and supported in plaintiffs' brief; issues not raised in appellant's brief are deemed waived or abandoned. *Reyes v. Kosha (1998) 65 Cal. App. 4th 451, 466 n.6, 76 Cal. Rptr. 2d 457*

Appellate court may consider matter involving issue of law on undisputed facts for first time on appeal notwithstanding party did not raise or argue issue in trial court; it makes no difference that issue was first raised on appeal by court rather than parties, so long as parties given reasonable opportunity to address it. *Tsemetzin v. Coast Federal Savings & Loan*

Assn. (1997) 57 Cal. App. 4th 1334, 1341 n.6, 67 Cal. Rptr. 2d 726 (summary judgment for defendant reversed)

Appellate court declined to address plaintiff's contention concerning recognition of new cause of action raised for first time on appeal; complaint did not plead such theory of liability, and issue was not addressed during summary judgment proceedings; motion for summary judgment must be directed to issues raised by pleadings; papers filed in response to defendant's motion for summary judgment may not create issue outside pleadings and are not substitute for amendment of pleadings; defendant is not required to refute liability on some theoretical possibility not included in pleadings. *Sutherland v. Barclays American/Mortgage Corp. (1997) 53 Cal. App. 4th 299, 317, 61 Cal. Rptr. 2d 614*

When trial court granted defendant's motion for summary judgment based on statute of limitations in case turning on when plaintiff became aware of construction defect involving drainage, plaintiff as unable to switch on appeal to rely on different defect; precluded by waiver, theory of trial, and failure to mention that different defect in separate statement of disputed fact. *North Coast Business Park v. Nielsen Construction Co. (1993) 17 Cal. App. 4th 22, 28-32, 21 Cal. Rptr. 2d 104*

Because moving party's burden on motion for summary judgment is only to negate existence of triable issues of fact in fashion that entitles it to judgment on issues raised by pleadings, rule forbidding raising new issue for first time on appeal as taking on added significance in summary judgment proceedings; moving party as not required to refute liability on some theoretical possibility not included in pleadings; accordingly, it would be unfair to party who successfully moved for summary judgment to permit opposing party on appeal to raise new theory not included in pleadings. *Munro v. Regents of University of California (1989) 215 Cal. App. 3d 977, 989, 263 Cal. Rptr. 878*

[c] Denial if Triable Issue Exists

Task of reviewing court as being to determine, in light of general rules governing summary judgment procedure in trial court, whether evidence discloses triable issue. *Corwin v. Los Angeles Newspaper Service Bureau, Inc. (1971) 4 Cal. 3d 842, 852, 94 Cal. Rptr. 785, 484 P.2d 953*

In reviewing summary judgment, appellate court as determining whether facts shown by parties give rise to triable issue of fact; in making this determination, court as strictly construing moving party's papers, while liberally construing those of opposing party. *Jacobs v. Fire Ins. Exchange (1991) 227 Cal. App. 3d 584, 589, 278 Cal. Rptr. 52* ; *see also Farley v. El Tejon Unified School Dist. (1990) 225 Cal. App. 3d 371, 375, 274 Cal. Rptr. 780*

On appeal from summary judgment, reviewing court as required to liberally construe facts in light most favorable to party who opposed motion; in examining evidence, appellate court as not determining if evidence is strong or weak, but only if sufficient evidence has been presented to raise triable issues of fact. *Ralph Andrews Productions, Inc. v. Paramount Pictures Corp. (1990) 222 Cal. App. 3d 676, 679, 682, 271 Cal. Rptr. 797*

Function of appellate court on review of summary judgment ruling as essentially same as that of trial court, whose function is merely to determine whether triable issues of fact exist, and not to decide merits of issues themselves. *Guardianship of Ethan S. (1990) 221 Cal. App. 3d 1403, 1415, 271 Cal. Rptr. 121*

Possible theories not fully developed or factually presented to trial court as not creating triable issue of fact on appeal from summary judgment. *City of Oceanside v. McKenna (1989) 215 Cal. App. 3d 1420, 1432, 264 Cal. Rptr. 275*

[d] Order Denying Summary Judgment

Order denying summary judgment not appealable under *Code Civ. Proc. § 904.1*; reviewable only by petition for extraordinary writ. *Sierra Craft, Inc. v. Magnum Enterprises, Inc. (1998) 64 Cal. App. 4th 1252, 1256, 75 Cal. Rptr.*

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Order denying motion for summary judgment as nonappealable. *Los Angeles Nat. Bank v. Bank of Canton (1991) 229 Cal. App. 3d 1267, 1269 n.2, 280 Cal. Rptr. 831*

Rule as axiomatic that, to review order on motion for summary judgment, reviewing court must have copy of actual order and not proposed order; having copy as particularly important in connection with review of denial of motion, because trial court is required to state basis for denial and evidence that shows facts are controverted. *State Farm Fire & Casualty Co. v. Superior Court (1989) 215 Cal. App. 3d 1455, 1464, 264 Cal. Rptr. 512*

[e] Order Granting Summary Judgment

While a trial court's failure to provide a sufficient statement of reasons is not automatic grounds for reversal, an appellate court may reverse a trial court's granting of summary adjudication where the court makes no oral of written statement for the reasons for its decision and the appellate court is prevented from undertaking a meaningful review of the issues. *Santa Barbara Pistachio Ranch v. Chowchilla Water District (2001) 88 Cal. App. 4th 439, 449, 105 Cal. Rptr. 2d 856*

Order granting summary judgment is not appealable order or judgment; in interest of justice and to avoid delay, court construed plaintiff's appeal as having been taken from summary judgment rather than from order. *Zavala v. Arce (1997) 58 Cal. App. 4th 915, 924 n.7, 68 Cal. Rptr. 2d 571* (summary judgment for defendant reversed)

Order granting summary judgment is not itself appealable; appeal lies only from ensuing judgment of dismissal; thus, order granting *Code Civ. Proc. § 473* motion to vacate order granting summary judgment was reviewable on appeal from posttrial judgment. *Garcia v. Hejmadi (1997) 58 Cal. App. 4th 674, 680, 68 Cal. Rptr. 2d 228* (reversing judgment on basis that order granting summary judgment was improperly vacated)

Order granting summary judgment is nonappealable; however, in interests of justice and to avoid delay, court treated order as summary judgment in favor of defendant. *United Fidelity Life Ins. Co. v. Emert (1996) 49 Cal. App. 4th 941, 944-947, 57 Cal. Rptr. 2d 14*

On appeal from summary judgment when no formal judgment was entered but order granting motion for summary judgment was obviously intended as final disposition, and matter has been fully briefed on appeal, appellate court may, in interest of judicial economy, treat order as incorporating final judgment. *Amstone v. Peninsular Fire Ins. Co. (1991) 226 Cal. App. 3d 1019, 1022, n.2, 277 Cal. Rptr. 260*

Appeal from order granting motion for summary judgment, rather than from judgment itself, as improper. *Buehler v. Alpha Beta Co. (1990) 224 Cal. App. 3d 729, 731 n.1, 274 Cal. Rptr. 14* ("generously" treating appeal from order as appeal from subsequently filed judgment)

Order granting motion for summary judgment as nonappealable, but when judgment has in fact been entered, appellate court as empowered to honor appeal as one taken from judgment itself. *Rivera v. Southern Pacific Transportation Co. (1990) 217 Cal. App. 3d 294, 297, 266 Cal. Rptr. 11*

Order granting or denying motion for summary judgment as not appealable; appeal as lying only from judgment entered following such order. *Rogness v. English Moss Joint Venturers (1987) 194 Cal. App. 3d 190, 192 n.2, 239 Cal. Rptr. 387*

Order granting summary judgment as not appealable when judgment never entered; however, plaintiff's appeal treated

as petition for writ of mandate because Code Civ. Proc. § 473c provides that decision is reviewable by mandate, issues were fully briefed and argued, and no protest to appeal was made by defendants. *Witchell v. De Korne (1986) 179 Cal. App. 3d 965, 969 n.1, 225 Cal. Rptr. 176*

Order granting motion for partial summary judgment as appealable when one of several parties seeks review of disposition that as to him or her leaves no issue to be determined. *Etienne v. DKM Enterprises, Inc. (1982) 136 Cal. App. 3d 487, 489, 186 Cal. Rptr. 321*

[f] Standard of Review

On appeal after motion for summary judgment is granted, appellate court reviews record de novo, considering all evidence set forth in moving and opposing papers except that to which objections have been made and sustained; defendant adduced, in support of its motion for summary judgment, affirmative evidence which, unless materially contradicted or rebutted, would establish that each of plaintiff's causes of action lacked merit; burden then shifted to plaintiff to show existence of one or more triable issues of material fact and as to each cause of action plaintiff submitted or pointed to evidence which, in plaintiff's view, indicated such triable issues; thus, as to each count of plaintiff's complaint, issue on appellate review is simply whether, and to what extent, evidence submitted for and against motion for summary judgment discloses issues warranting a trial. *Guz v. Bechtel Nat., Inc. (2000) 24 Cal. 4th 317, 334, 335 n.7, 100 Cal. Rptr. 2d 352, 8 P.3d 1089* (summary judgment for defendant proper except as to one claim; remanded to court of appeal)

Appellate court reviews moving papers independently to determine whether there is triable issue as to any material fact and whether moving party is entitled to judgment as matter of law. *Galanty v. Paul Revere Life Ins. Co. (2000) 23 Cal. 4th 368, 374, 97 Cal. Rptr. 2d 67, 1 P.3d 658* (summary judgment for defendant reversed)

Appellate court reviews trial court's decision de novo, considering all evidence parties offered in support or against motion, and uncontradicted inferences reasonably deducible from evidence, except that to which court sustained objections. *Paz v. State of California (2000) 22 Cal. 4th 550, 557, 93 Cal. Rptr. 2d 703, 994 P.2d 975* (summary judgment for defendants upheld)

Rulings on summary judgments motions are examined de novo, including rulings granting such motions. *Peatros v. Bank of America (2000) 22 Cal. 4th 147, 176, 91 Cal. Rptr. 2d 659, 990 P.2d 539* (summary judgment for defendant reversed)

Rulings on summary judgments motions are examined de novo, including rulings granting such motions; thus, court of appeal did not err when it reviewed superior court's order granting defendant's summary judgment motion independently. *Norgart v. Upjohn Co. (1999) 21 Cal. 4th 383, 404, 87 Cal. Rptr. 2d 453, 981 P.2d 79* (summary judgment for defendant reversed on statute of limitation issue; remanded for proceedings consistent with Supreme Court's opinion)

On appeal appellate court conducts independent review of trial court's resolution of questions of law. *Green v. Ralee Engineering Co. (1998) 19 Cal. 4th 66, 72, 78 Cal. Rptr. 2d 16, 960 P.2d 1046* (summary judgment for defendant reversed; remanded for proceedings consistent with Supreme Court's decision)

Appellate court reviews trial court's decision de novo, considering all the evidence set forth in supporting and opposing papers, except that to which objections have been made and sustained, and all uncontradicted inferences reasonably deducible from evidence. *Artiglio v. Corning Inc. (1998) 18 Cal. 4th 604, 612, 76 Cal. Rptr. 2d 479, 957 P.2d 1313* (summary judgment for defendant affirmed)

On appeal, reviewing court exercises independent judgment deciding whether moving party established undisputed facts that negate opposing party's claim or state complete defense. *Romano v. Rockwell Internat., Inc. (1996) 14 Cal. 4th 479, 487, 59 Cal. Rptr. 2d 20, 926 P. 2d 1114* (summary judgment for defendant reversed)

Abuse of discretion standard is applicable in motions for summary judgment involving determination by trial court of equitable subrogation. *Dieden v. Schmidt (2002) 104 Cal. App. 4th 645, 654, 128 Cal. Rptr. 2d 365*

Trial court ruling on motion for summary judgment is subject to de no review; appellate court review is limited to facts shown in affidavits supporting and opposing motion and uncontested factual affidavits set forth in pleadings; moving party's affidavits are strictly construed, and opponent's affidavits are liberally construed; due to drastic nature of summary judgment, any doubts about granting propriety of motion must be resolved in favor of party opposing motion; appellate court independently determines construction and effect of facts presented to trial court as matter of law. *Kolodge v. Boyd (2001) 88 Cal. App. 4th 349, 355-356, 105 Cal. Rptr. 2d 749* (reversing summary judgment for defendant)

On appeal, appellate court reviews trial court's decision to grant or deny summary judgment motion de novo, on basis of examination of evidence before trial court and by independent determination of its effect as matter of law; appellate court is not bound by trial court's stated reasons or rationale, but reviews summary judgment without deference to trial court'sdetermination of questions of law; appellate court must consider all evidence properly identified in papers submitted, except that to which objections have been made and sustained by court. *Jennifer M. v. Redwood Women's Health Center (2001) 88 Cal. App. 4th 81, 86-86, 105 Cal. Rptr. 2d 544* (summary adjudication for defendant affirmed)

Trial court order granting summary judgment is subject to de novo review, and appellate court was not bound by trial court's ruling that statute of limitations was tolled in attorney malpractice action. *Carlson v. Blatt (2001) 87 Cal. App. 4th 646, 649, 105 Cal. Rptr. 2d 42* (summary judgment for defendant affirmed on grounds that action was barred by statute of limitations; trial court had granted summary judgment on alternate collateral estoppel grounds)

Rulings on motions for summary judgment are reviewed de novo. *Grover v. Bay View Bank (2001) 87 Cal. App. 4th 452, 455, 104 Cal. Rptr. 2d 677* (summary judgment for defendant affirmed)

Trial court ruling on summary judgment is subject to de novo review, and appellate court must strictly construe moving papers and liberally construe materials offered in opposition; evidence in support of and in opposition to motion must be viewed in light most favorable to party against whom summary judgment was entered; due to drastic nature of procedure, all doubts about propriety of granting motion must be resolved in favor of its denial. *Asplund v. Selected Investments in Financial Equities, Inc. (2001) 86 Cal. App. 4th 26, 36-37, 103 Cal. Rptr. 2d 34* (summary judgment for defendant affirmed)

As summary judgment motion raises only questions of law regarding construction and effect of supporting and opposing papers, appellate court independently applies same three-step analysis required of trial court, thus appellate court: (1) identifies issues framed by pleadings; (2) determines whether moving party's showing established facts that negate opponent's claim and justifies judgment in moving party's favor; and (3) if it does, determines whether opposition demonstrates existence of triable, material factual issue. *Garofalo v. Princess Cruises, Inc. (2001) 85 Cal. App. 4th 1060, 1068, 102 Cal. Rptr. 2d 754* (summary judgment for defendant affirmed)

Summary judgment motion is appealable under *Code Civ. Proc. §§ 437c* and *904*; because summary judgment raises only questions of law, appellate court exercises de novo review to determine whether defendant has negated necessary element of plaintiff's case or demonstrated that there is no triable issue of material fact; in doing so, appellate court views evidence in light most favorable to opposing party and resolves any doubts as to granting motion in opposing party's favor. *Schooler v. State of California. (2001) 85 Cal. App. 4th 1004, 1008-1009, 102 Cal. Rptr. 2d 343* (summary judgment for defendant affirmed)

On appeal, reviewing court exercises its independent judgment; appellate court's function in summary proceeding is limited to issue finding, not issue determination. *City of Santa Cruz v. Pacific Gas & Electric Co. (2000) 82 Cal. App. 4th 1167, 1175-1176, 1188, 99 Cal. Rptr. 2d 198* (summary judgment for defendants reversed as to some defendants and affirmed as to other defendants)

Appellate court reviews grant of summary judgment de novo by examining pleadings parties presented to trial court in support of, and in opposition to, motion; because there was no dispute as to relevant facts, appellate court exercises its independent judgment as to their legal effect; thus, appellate court's sole task in case before it was to construe and apply language of insurance policy, which presents pure question of law. *Peerless Lighting Corp. v. American Motorists Ins. Co. (2000) 82 Cal. App. 4th 995, 1005, 98 Cal. Rptr. 2d 753* (summary judgment for plaintiff reversed)

Because motion for summary judgment or summary adjudication involves only questions of law, standard of review is de novo; first, appellate court reviews motion to determine whether defendant has met its initial burden to establish that one or more causes of action in complaint has no merit, by showing that one or more elements of cause of action cannot be established, or that there is complete defense to it; second, if defendant has met this initial burden, court examines whether plaintiff has shown, by setting forth specific facts, that triable issue of facts exists as to that cause of action or defense; in making its review, appellate court need not defer to trial court's decision; appellate court not bound by trial court's stated reasons, if any, supporting its reasons; court reviews ruling, not its rationale. *West Shield Investigations & Security Consultants v. Superior Court (2000) 82 Cal. App. 4th 935, 946, 98 Cal. Rptr. 2d 612* (peremptory writ of mandate issued directing trial court to vacate order denying defendants' motions for summary adjudication and to issue new order granting summary adjudication as to various causes of action; in all other respects, petitions for relief denied)

In reviewing propriety of summary judgment, appellate court independently reviews record that was before trial court; appellate court must determine whether facts as shown by parties give rise to triable issue of material fact; in making this determination, moving party's affidavits are strictly construed while those of opposing party are liberally construed; court accepts as undisputed facts only those portions of moving party's evidence that are not contradicted by opposing party's evidence; in other words, facts alleged in evidence of party opposing summary judgment and reasonable inferences therefrom must be accepted as true. *ECC Construction, Inc. v. Ganson (2000) 82 Cal. App. 4th 572, 575, 98 Cal. Rptr. 2d 292* (summary judgment for defendants affirmed)

After examining documents supporting summary judgment motion in trial court, appellate court independently determines their effect as matter of law; as summary judgment motion raises only questions of law regarding construction and effect of supporting and opposing papers, appellate court independently applies same three-step analysis as required of trial court; appellate court identifies issues framed by pleadings, determines whether moving party's showing establishes facts that negate opponent's claim and justify judgment in moving party's favor, and, if it does, court finally determines whether opposition demonstrates existence of triable, material factual issue; declarations of moving party are strictly construed, those of opposing party are liberally construed, and doubts as to whether summary judgment should be granted must be resolved in opposing party's favor; court focuses on issue finding; it does not resolve issues of fact; court seeks to find contradictions in evidence or in inferences reasonable deducible from evidence, which raise triable issue of material fact; if, in deciding appeal, court finds there is no issue of material fact, court affirms summary judgment if it is correct on any legal theory applicable to case, whether ornot that theory was adopted by trial court, and whether it was raised by defendant in trial court or first addressed on appeal. *Assilzadeh v. California Federal Bank (2000) 82 Cal. App. 4th 399, 408-409, 98 Cal. Rptr. 2d 176* (summary judgment for defendants affirmed)

Appellate court reviews motion for summary judgment de novo, applying same standard as trial court. *Manibog v. MediaOne of Los Angeles, Inc. (2000) 81 Cal. App. 4th 1366, 1369, 98 Cal. Rptr. 2d 297* (summary judgment for defendant reversed)

Trial Court's stated reasons for its ruling do not bind appellate court, appellate court reviews ruling, not its rationale; after examining facts before trial judge on summary judgment motion, appellate court independently determines their effect as matter of law; validity of summary judgment is to be determined solely by sufficiency of affidavits before court when motion was heard, and appellate court will consider only facts before trial court at time it ruled on motion. *Rubenstein v. Rubenstein (2000) 81 Cal. App. 4th 1131, 1143, 1151 n.10, 97 Cal. Rptr. 2d 707* (summary judgment for defendant reversed)

Appellate court reviews record de novo. *Dimock v. Emerald Properties (2000) 81 Cal. App. 4th 868, 874, 97 Cal. Rptr. 2d 255* (summary judgments for defendants reversed)

On appeal from summary judgment, reviewing court is not bound by trial court's construction of contract when that construction was not based on credibility of conflicting extrinsic evidence as to which trial court was in better position to form a judgment; thus, when there is no extrinsic evidence, when the extrinsic evidence is not conflicting or when conflicting evidence is of a written nature only, reviewing court is not bound by rulings of trial court but rather must make its own independent interpretation of written contract; on appeal, appellate court must conduct de novo review to determine whether there are any triable factual issues; likewise, because interpretation of insurance policy is question of law, appellate court must make independent determination of language used in contract under consideration. *Northland Ins. Co. v. Briones (2000) 81 Cal. App. 4th 796, 802, 97 Cal. Rptr. 2d 127* (summary judgment for plaintiff affirmed)

Trial court's ruling on motion for summary judgment is subject to de novo review. *Rice v. Crow (2000) 81 Cal. App. 4th 725, 732, 97 Cal. Rptr. 2d 110* (summary judgment for defendants reversed); *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone (2000) 79 Cal. App. 4th 114, 125, 93 Cal. Rptr. 2d 534* (summary judgment for defendant reversed)

Standard of review of grant of summary adjudication of issues is same as that applied to summary judgments; because defendant obtained summary adjudication in its favor, appellate court reviews record de novo to determine if defendant conclusively negated a necessary element of plaintiff's case or demonstrated that under no hypothesis is there a material fact that requires process of trial. *Lindstrom v. Hertz Corp. (2000) 81 Cal. App. 4th 644, 648, 96 Cal. Rptr. 2d 874* (summary adjudication for defendant affirmed)

On review of summary judgment in defendant's favor, appellate court reviews record de novo to determine whether defendant has conclusively negated necessary element of plaintiff's case or demonstrated that under no hypothesis is there material issue that requires process of trial; because trial court's determination is one of law based on papers submitted, appellate court must make its own independent determination regarding construction and effect of supporting and opposing papers; appellate court applies same three-step analysis required of trial court; court begins by identifying issues framed by pleadings, then determines whether moving party's showing has established facts that justify judgment in movant's favor; when motion prima facie justifies judgment, final step is to determine whether opposition demonstrates existence of triable, material factual issue; because appellate court reviews trial court's grant of summary judgment de novo, plaintiff's arguments citing *Code Civ. Proc. § 437c(g)* to fault trial court's decision for failing to distinguish it was ruling on an affirmative defense and not merits of first cause of action, and for failing to specify reasons for its ruling and refer to evidence showing no triable issue of fact exist, were of no moment. *Tahoe Vista Concerned Citizens v. Counter of Placer (2000) 81 Cal. App. 4th 577, 587-588, 594 n.7, 96 Cal. Rptr. 2d 880* (summary judgment for defendants affirmed)

Summary judgment rulings are reviewed de novo including those granting motion; appellate court independently interprets written contract when no extrinsic evidence and related credibility questions were presented below; interpretation of written instrument is essentially judicial function to be exercised according to generally accepted canons of interpretation so that purposes of instrument may be given effect; possibility that conflicting inferences can be drawn from uncontroverted evidence does not relieve appellate court of its duty independently to interpret instrument.

Culligan v. State Comp. Ins. Fund (2000) 81 Cal. App. 4th 429, 434, 96 Cal. Rptr. 2d 656 (summary judgment for defendant affirmed)

Appellate court reviews trial court's ruling on defendant's motion for summary judgment under independent review standard; appellate court must independently determine construction and effect of facts presented to trial judge as matter of law. *Juarez v. Boy Scouts of America, Inc. (2000) 81 Cal. App. 4th 377, 393, 97 Cal. Rptr. 2d 12* (summary judgment for defendants affirmed except for one cause of action against two defendants that was reversed)

Under *Code Civ. Proc. § 437c(c)*, motion for summary judgment must be granted if all papers submitted show there is no triable issue as to any material fact and moving party is entitled to judgment as matter of law; appellate court conducts de novo review to determine if there are any genuine issues of material fact; appellate court makes its own independent determination of construction and effect of papers submitted, and validity of ruling is reviewable irrespective of reasons stated; court strictly construes moving party's papers and liberally construes opposing party's papers; doubts as to propriety of summary judgment should be resolved against moving party. *City of Oceanside v. Superior Court (2000) 81 Cal. App. 4th 269, 273, 96 Cal. Rptr. 2d 621* (petition for peremptory writ of mandate seeking reversal of order denying defendants' motion for summary judgment granted)

Appellate court reviews de novo trial court's award of summary judgment; any doubts regarding propriety of awarding summary judgment are resolved in favor of party opposing summary judgment. *Jang v. State Farm Fire & Casualty Co. (2000) 80 Cal. App. 4th 1291, 1295, 95 Cal. Rptr. 2d 917* (summary judgment for cross-defendant affirmed)

Appellate court reviews de novo trial court's decision to grant summary judgment. *Alvarez v. State of California (2000) 79 Cal. App. 4th 720, 727, 95 Cal. Rptr. 2d 719* (summary judgment for defendant affirmed); *Carlton v. Quint (2000) 77 Cal. App. 4th 690, 699, 91 Cal. Rptr. 2d 844* (summary judgment for defendants affirmed); *Hanson v. Lucky Stores, Inc. (1999) 74 Cal. App. 4th 215, 223, 87 Cal. Rptr. 2d 487* (summary judgment for defendant affirmed)

Appellate review of summary judgment is limited to facts contained in documents presented to trial court; appellate court exercises independent judgment as to legal effect of undisputed facts disclosed by parties' papers. *Aloha Pacific, Inc. v. California Ins. Guarantee Assn. (2000) 79 Cal. App. 4th 297, 307, 93 Cal. Rptr. 2d 148* (judgment for defendant entered pursuant to stipulation following denial of plaintiff's motion for summary judgment affirmed)

In reviewing order granting summary judgment, appellate court must assume role of trial court and redetermine merits of motion; while appellate court must review summary judgment motion by same standards as trial court, it must independently determine as matter of law construction and effect of facts presented. *ML Direct, Inc. v. TIG Specialty Ins. Co. (2000) 79 Cal. App. 4th 137, 141, 93 Cal. Rptr. 2d 846* (summary judgment for defendant affirmed)

Appellate court reviews orders granting or denying summary judgment motion de novo; appellate court exercises independent assessment of trial court's ruling, applying same legal standard as trial court in determining whether there are any genuine issues of material fact or whether moving party is entitled to judgment as matter of law. *American Golf Corp. v. Superior Court (2000) 79 Cal. App. 4th 30, 35, 93 Cal. Rptr. 2d 683* (denial of defendant's motion for summary judgment overturned on writ of mandate)

In determining whether defendant has satisfied his or her initial burden of proof under former *Code Civ. Proc. § 437c(o)(2)* (*see now Code Civ. Proc. § 437c(p)(2)*), appellate court decides de novo whether issue of material fact exists and whether moving party was entitled to summary judgment as matter of law; in other words, appellate court must assume role of trial court and reassess merits of motion; in doing so, appellate court will consider only facts properly before trial court at time it ruled on motion; court carries out its appellate function by applying same three-step analysis required of trial court; first, appellate court identities issues framed by pleadings; second, appellate court determines whether moving party's showing has satisfied his or her burden of proof and justifies judgment in movant's favor; when summary judgment motion prima facie justifies judgment, third and final step is to determine whether opposition

demonstrates existence of triable issue of material fact. *Inter Mountain Mortgage, Inc. v. Sulimen (2000) 78 Cal. App. 4th 1434, 1439, 93 Cal. Rptr. 2d 790* (summary judgment for defendants reversed)

On review of motion for summary judgment in defendant's favor, appellate court reviews record de novo to determine if defendant has conclusively negated necessary element of plaintiff's case or demonstrated that under no hypothesis is there material issue of fact that requires process of trial; evidence of moving party is strictly construed and that of opponent is liberally construed, and any doubts as to propriety of granting motion are resolved in favor of party opposing motion; mindful that summary judgment motion raises on questions of law, appellate court independently reviews parties supporting and opposing papers and applies same standard as trial court in determining whether triable issue of material fact exists. *Campbell v. Scripps Bank (2000) 78 Cal. App. 4th 1328, 1333 n.2, 93 Cal. Rptr. 2d 635* (summary judgment for defendants affirmed except as to improperly awarded attorney fees)

In reviewing propriety of summary judgment, appellate court independently reviews record that was before trial court; court must determine whether facts shown by parties give rise to triable issue of material fact. *Wagner v. City of South Pasadena (2000) 78 Cal. App. 4th 943, 947, 93 Cal. Rptr. 2d 91* (summary judgment for defendant affirmed)

On appeal from summary judgment, appellate court conducts independent review, applying same three-step process as trial court; appellate court first looks to pleadings to identify elements of cause of action for which relief is sought; court then examines moving party's motion to see whether it shows that one or more elements of cause of action cannot be established or that there is complete defense to that cause of action; if moving party has made requisite showing, burden shifts to party opposing motion to set forth specific facts to show that a triable issue of one or more material facts exists as to that cause of action or defense thereto; if opposing party fails to sustain this burden, summary judgment is proper. *Burroughs v. Precision Airmotive Corp. (2000) 78 Cal. App. 4th 681, 688, 93 Cal. Rptr.2d 124* (judgment for defendant, entered after summary adjudication motion granted, affirmed)

On appeal from grant of summary judgment, appellate court reviews record de novo and independently determines if motion was properly granted; appellate court uses same standards and rules as trial court in deciding propriety of motion; three-step analysis is used in reviewing motion for summary judgment; first, appellate court must identity issues framed by pleadings; second, court determines whether moving party has met its statutory burden of proof; third step is to determine if opposing party has demonstrated that triable issue of fact exists as to cause of action. *Renna v. County of Fresno (2000) 78 Cal. App. 4th 1, 5, 92 Cal. Rptr. 2d 586* (summary judgment for defendant affirmed)

After examining documents supporting summary judgment motion in trial court, appellate court independently determines their effect as matter of law. *Ostayan v. Serrano Reconveyance Co. (2000) 77 Cal. App. 4th 1411, 1418, 92 Cal. Rptr. 2d 577* (summary judgment for defendants affirmed)

On review of summary judgment in favor of defendant, appellate court reviews record de novo to determine if defendant has conclusively negated a necessary element of plaintiff's case or demonstrated that under no hypothesis is there material issue of fact that requires process of trial; appellate court independently reviews parties's supporting and opposing papers and applies same standard as does trial court to determine if a triable issue of material fact exists; first step in reviewing summary judgment in favor of defendant is to identify issues framed by pleadings since it is those allegations to which motion must respond by establishing complete defense or otherwise showing there is no factual basis for relief on any theory reasonably contemplatedby complaint. *Pardee Construction Co. v. Insurance Co. of the West (2000) 77 Cal. App. 4th 1340, 1349 n.3, 92 Cal. Rptr. 2d 443* (judgment for three defendants whose motions for judgment on pleadings were granted after summary adjudication in their favor reversed as to two of them with directions that trial court grant plaintiff's motions for summary adjudication; judgment for remaining defendant affirmed)

In reviewing grant of summary judgment appellate review is de novo, and appellate court independently reviews record before trial court; in practical effect, appellate court assumes role of trial court and applies same rules and standards that

govern trial court's determination of motion for summary judgment; because granting of summary judgment motion involves pure questions of law, appellate court is required to reassess legal significance and effect of papers presented by parties in connection with motion; appellate court applies same three-step analysis required of trial court in ruling on motion for summary judgment; first, court identities issues framed by pleadings; second, court determines whether moving party has met its statutory burden of proof; finally, if moving party has met its statutory burden of proof and summary judgment motion prima facie justifies judgment, burden shifts to opposing party and court determines whether that party has met its burden under *Code Civ. Proc. § 437c*. Riverside County Community Facilities Dist. v. Bainbridge 17 *(1999) 77 Cal. App. 4th 644, 653, 92 Cal. Rptr. 2d 29* (summary judgment for plaintiff affirmed); *Kelly v. First Astri Corp. (1999) 72 Cal. App. 4th 462, 470-471, 84 Cal. Rptr. 2d 810* (summary judgment for defendants affirmed)

Granting of summary judgment motion by superior court is subject to independent review; appellate court considers all evidence set forth in supporting and opposition papers, except that to which objections have been made and sustained by court, and all uncontradicted inferences reasonable deducible from evidence; appellate court applies same three-step analysis required of trial court; first, court identifies issues framed by pleadings; second, court determines whether moving party's showing has established facts that negate the opponent's claim and justify judgment in movant's favor; when a summary judgment motion prima facie justifies a judgment, third step is to determine whether the opposition demonstrates existence of triable, material factual issue. *Victor v. Hedges (1999) 77 Cal. App. 4th 229, 234, 91 Cal. Rptr. 2d 466* (summary judgment for defendants affirmed)

Because trial court's determination is one of law based on papers submitted, appellate court must make its own independent determination regarding construction and effect of supporting and opposing papers; appellate court applies same three-step analysis required of trial court; court begins by identifying issues framed by pleadings; court then determines if moving party's showing has established facts that justify judgment in movant's favor; when summary judgment motion prima facie justifies judgment, final step is to determine if opposition demonstrates existence of a triable, material factual issue. *FNB Mortgage Corp. v. Pacific General Group (1999) 76 Cal. App. 4th 1116, 1125-1126, 90 Cal. Rptr. 2d 841* (summary judgment for cross-defendant affirmed); *Oliver v. AT&T Wireless Services (1999) 76 Cal. App. 4th 521, 528, 90 Cal. Rptr. 2d 491* (summary judgment for defendants affirmed)

Trial court's determination of summary judgment motion is reviewed do novo; this review follows same analysis required of trial court under *Code Civ. Proc. § 437c*. *Wolf v. Mitchell, Silberberg & Knupp (1999) 76 Cal. App. 4th 1030, 1035, 90 Cal. Rptr. 2d 792* (summary judgment for defendants reversed)

In reviewing propriety of summary judgment, appellate court independently reviews record that was before trial court; appellate court must determine whether facts as shown by parties gives rise to triable issue of fact. *Hanson v. Grode (1999) 76 Cal. App. 4th 601, 603-604, 606-607, 90 Cal. Rptr. 2d 396* (summary judgment for defendants reversed)

In reviewing propriety of a summary judgment, appellate court independently reviews record that was before trial court. *Kelsey v. Waste Management of Alameda County (1999) 76 Cal. App. 4th 590, 594, 90 Cal. Rptr. 2d 510* (summary judgment for defendant reversed)

Appellate court reviews trial court's decision de novo, independently examining both the evidence and its legal effect. *Brinton v. Bankers Pension Services, Inc. (1999) 76 Cal. App. 4th 550, 555, 90 Cal. Rptr. 2d 469* (summary judgment for defendant affirmed)

Appellate court independently reviews lower court's determinations that no triable issue of fact existed and that defendant was entitled to judgment as matter of law. *Kramer v. State Farm Fire & Casualty Co. (1999) 76 Cal. App. 4th 332, 336, 90 Cal. Rptr. 2d 301* (summary judgment for defendant affirmed)

Examining evidence in light of summary judgment standards is far different from applying substantial evidence test that often governs appeal; in context of judgment after trial evidence need only be sufficient to support judgment for

winning party, even though evidence might, in another reasonable mind, also have supported judgment for losing party; in context of summary judgment, by contrast, evidence must by incapable of supporting judgment for losing party in order to validate summary judgment; thus, even though it may appear that trial court took reasonable view of evidence, summary judgment cannot properly be affirmed unless contrary view would be unreasonable as matter of law in circumstances presented. *Binder v. Aetna Life Ins. Co. (1999) 75 Cal. App. 4th 832, 838-840, 89 Cal. Rptr. 2d 540* (summary judgment for defendant reversed)

On appeal from order granting summary judgment, appellate court conducts de novo examination of record to determine whether moving party was entitled to summary judgment as matter of law or whether genuine issues of material fact remain; appellate court independently reviews party's papers supporting and opposing motion, using same method of analysis as trial court. *Campbell v. Derylo (1999) 75 Cal. App. 4th 823, 826, 89 Cal. Rptr. 2d 519* (summary judgment for defendant reversed)

On appeal, appellate court exercises its independent judgment in determining whether there are no triable issues of material fact and moving party thus is entitled to judgment as matter of law. *Bennett v. Shahhal (1999) 75 Cal. App. 4th 384, 388, 89 Cal. Rptr. 2d 272* (summary judgment for defendant affirmed)

On appeal, appellate court reviews trial court's decision to grant or deny summary judgment de novo, on basis of examination of evidence before trialcourt and appellate court's independent determination of its effect as matter of law; appellate court also independently reviews trial court's determinationof questions of law. *Eisenberg v. Alameda Newspapers, Inc. (1999) 74 Cal. App. 4th 1359, 1376, 88 Cal. Rptr. 2d 802* (summary judgment for defendants affirmed)

Appellate court reviews trial court's ruling de novo, assuming role of trial court and redetermining merits of motion. *Neverkovec v. Fredericks (1999) 74 Cal. App. 4th 337, 344, 87 Cal. Rptr. 2d 856* (summary judgment for defendant reversed)

In reviewing propriety of summary judgment, appellate court independently reviews record that was before trial court to determine whether the facts as shown by parties give rise to triable issue of material fact. *DiLoreto v. Board of Education (1999) 74 Cal. App. 4th 267, 275, 87 Cal. Rptr. 2d 791* (summary judgment for defendants affirmed)

After examining facts before trial judge on a summary judgment motion, appellate court independently determines their effect as matter of law. *Myricks v. Lynwood Unified School Dist. (1999) 74 Cal. App. 4th 231, 237, 87 Cal. Rptr. 2d 734* (summary judgment for defendants affirmed)

After examining facts before trial judge on summary judgment motion, appellate court independently determines their effect as matter of law; when facts are undisputed, issue is one of law and appellate court is free to draw its own conclusions of law from undisputed facts. *Ziman v. Fireman's Fund Ins. Co. (1999) 73 Cal. App. 4th 1382, 1387, 87 Cal. Rptr. 2d 397* (summary judgment for defendant affirmed)

Appellate court, in reviewing trial court's grant of summary judgment motion, makes de novo determination of whether there is triable issue of fact and whether moving party is entitled to judgment as matter of law. *Westoil Terminals Co. v. Harbor Ins. Co. (1999) 73 Cal. App. 4th 634, 638, 86 Cal. Rptr. 2d 636* (summary judgment for defendants reversed)

On review of summary judgment in defendant's favor, appellate court reviews record de novo to determine whether there is material issue of fact that requires trial; court examines record and determines appeal according to rules of appellate review for grant of summary judgment; because determining whether primary assumption of risk doctrine applies resolves question of whether duty of care exists, it is legal question for court to decide; appellate court determines de novo scope of duty. *Record v. Reason (1999) 73 Cal. App. 4th 472, 479, 86 Cal. Rptr. 2d 547*

In reviewing grant of summary judgment, appellate court determines de novo whether there is genuine issue of material fact and whether moving party is entitled to judgment as matter of law; trial court's determination is accorded no deference; in conducting review, complaint measures materiality of facts tendered in defendant's challenge to plaintiff's cause of action. *Marshak v. Ballesteros (1999) 72 Cal. App. 4th 1514, 1517, 86 Cal. Rptr. 2d 1* (summary judgment for defendant affirmed)

Appellate court reviews trial court's ruling on motion for summary judgment de novo; appellate court reviews trial court's ruling and not its reasoning. *Mitroff v. United Services Automobile Assn. (1999) 72 Cal. App. 4th 1230, 1237, 85 Cal. Rptr. 2d 759* (summary judgment for defendant affirmed)

Appellate court exercises independent judgment as to legal effect of undisputed facts disclosed by parties' papers; in so doing, appellate court applies same three-step analysis required by trial court; first appellate court identifies issues framed by pleadings; second, court determines whether moving party has established facts that negate opponent's claim and justify judgment in movant's favor; finally, if summary judgment motion prima facie justifies judgment, court determines whether opposition demonstrates existence of a triable, material factual issue; appellate court reviews issues of law de novo. *Aetna Health Plans of Cal., Inc. v. Yucaipa-Calimesa Joint Unified School Dist. (1999) 72 Cal. App. 4th 1175, 1186-1187, 85 Cal. Rptr. 2d 672* (summary judgment for cross-defendant affirmed)

Appellate court reviews trial judge's decision to grant summary judgment de novo; trial judge's stated reason for granting summary judgment is not binding on appellate court because appellate court reviews its ruling, not its rationale; moreover, appellate court reviews unambiguous terms of insurance agreement de novo. *Reliance Nat. Indemnity Co. v. General Star Indemnity Co. (1999) 72 Cal. App. 4th 1063, 1073-1075, 85 Cal. Rptr. 2d 627* (summary judgment for defendants affirmed)

Appellate court examines facts presented on superior court's summary judgment/summary adjudication motion and independently determines their effect as matter of law; appellate court also conducts independent review of trial court's determination of questions of law; court not bound by trial court's stated reasons, if any supporting ruling; court reviews ruling, not its rationale. *Suidan v. County of San Diego (1999) 72 Cal. App. 4th 916, 921, 85 Cal. Rptr. 2d 535* (summary judgment for defendant affirmed)

Appellate court reviews de novo trial court's decision to grant summary judgment and is not bound by trial court's stated reasons or rationales; appellate court reviews determination of trial court, not its rationale. *Horn v. Cushman & Wakefield Western, Inc. (1999) 72 Cal. App. 4th 798, 805, 807* (summary judgment for defendant affirmed)

On appeal, court reviews trial court's decision to grant summary judgment de novo, on basis of court's independent examination of evidence and determination of its effect as matter of law; appellate court not bound by trial court's stated reasons or rationale, and reviews summary judgment without deference to its determinations of questions of law. *Smith v. Maldonado (1999) 72 Cal. App. 4th 637, 644, 85 Cal. Rptr. 2d 397* (summary judgment for defendants affirmed)

Appellate court reviews summary judgment de novo; appellate court reviews ruling, not rationale, and is not bound by trial court's reasons supporting ruling; review in appellate court, however, limited to issues raised on appeal. *City of Burbank v. Burbank-Glendale-Pasadena Airport Authority (1999) 72 Cal. App. 4th 366, 373, 85 Cal. Rptr. 2d 28* (summary judgment for defendant reversed)

On appeal of grant of summary adjudication, appellate court examines facts presented to trial court and determine their effect as matter of law; court independently assesses correctness of trial court's ruling, applying same legal standard as trial court; court construes moving party's affidavits strictly and opponent's affidavits liberally, and resolve any doubts as to propriety of granting motion in favor of opponent. *Barnes v. Black (1999) 71 Cal. App. 4th 1473, 1477, 84 Cal. Rptr. 2d 634* (summary adjudication for defendant reversed)

In determining propriety of summary judgment, appellate court is limited to facts shown by evidentiary materials submitted, as well as those admittedand uncontested in pleadings; appellate court exercises independent judgment in determining whether there are no triable issues of material fact and moving party thus entitled to judgment as matter of law. *Spray, Gould & Bowers v. Associated Internat. Ins. Co. (1999) 71 Cal. App. 4th 1260, 1266, 84 Cal. Rptr. 2d 552* (summary judgment for defendant reversed)

When reviewing trial court's decision to grant summary judgment, appellate court must identify issues framed by pleadings and determine if moving party established facts that negate opposing party's facts and justify judgment in moving party's favor; when moving party's facts justify judgment, appellate court determine's if opposing party demonstrated existence of triable issue of material fact. *City of Morgan Hill. v. Brown (1999) 71 Cal. App. 4th 1114, 1121, 84 Cal. Rptr. 2d 361* (summary judgment for plaintiff affirmed)

Review of summary judgment involves pure matters of law which appellate court reviews independently; in conducting this de novo review, appellate court considers only facts properly before trial court at time it ruled on motion; because summary judgment motion raises only issues of law regarding construction and effect of supporting and opposing papers, court of appeal independently applies same three-step analysis required by trial court; appellate court identifies issues framed by pleadings, determines whether moving party's showing established facts that negate opponent's claim and justify judgment in moving party's favor, and if it does, appellate court finally determines whether opposition demonstrates existence of a triable, material factual issue; basic question raised on defense motion for summary judgment and on review of such judgment is same in privacy action against media defendants as in other cases; does motion record demonstrate existence of triable issue of facts, or was defense entitled to judgment as matter of law. *Wilkins v. National Broadcasting Co. (1999) 71 Cal. App. 4th 1066, 1074, 84 Cal. Rptr. 2d 329* (summary judgment for defendants affirmed)

Since summary judgment motions raise only questions of law regarding construction and effect of supporting and opposing papers, appellate court independently reviews them on appeal, applying same three-step analysis required by trial court; first, appellate court identifies issues framed by pleadings; second, court determines whether moving party's showing has negated opponent's claim, justifying judgment in movant's favor; if so, third and final step is to determine whether opposition has demonstrated existence of triable, material factual issue. *Langer v. Redevelopment Agency (1999) 71 Cal. App. 4th 998, 1002, 84 Cal. Rptr. 2d 19* (summary judgment for defendant affirmed); *City of San Jose v. Department of Health Services (1998) 66 Cal. App. 4th 35, 40, 77 Cal. Rptr. 2d 609* (summary judgment for plaintiff affirmed); *Pepperell v. Scottsdale Ins. Co. (1998) 62 Cal. App. 4th 1045, 1054, 73 Cal. Rptr. 2d 164* (summary judgment for defendant reversed); *Waschek v. Department of Motor Vehicles (1997) 59 Cal. App. 4th 640, 644, 69 Cal. Rptr. 2d 296* (remanded to trial court for order granting summary judgment to defendant)

In reviewing grant of summary judgment, appellate court must make its own independent determination of construction and effect of papers submitted. *Armato v. Baden (1999) 71 Cal. App. 4th 885, 893, 84 Cal. Rptr 2d 294* (summary judgments for defendants affirmed)

Because summary judgment motion raises only questions of law, appellate court reviews supporting and opposing papers independently to determine whether there is triable issue of fact as to any material fact; in so doing, appellate court applies same analysis required of trial court; first, appellate court identifies issues framed by pleadings; second, court determines whether moving party's showing has established facts that negate opponents' claim and justify judgment in movant's favor; third and final step is to determine whether opposition demonstrates existence of triable, material factual issue; when there is sufficient legal ground to support granting motion, order will be upheld regardless of grounds relied on by trial court. *Benavidez v. San Jose Police Dept. (1999) 71 Cal. App. 4th 853, 859, 84 Cal. Rptr. 2d 157* (summary judgment for defendants affirmed); *Becerra v. County of Santa Cruz (1999) 68 Cal. App. 4th 1450, 1457, 81 Cal. Rptr. 2d 165* (summary judgment for defendant affirmed)

Appellate court applies de novo standard of review to summary judgment by analyzing construction and effect of supporting papers in same manner as does trial court. *California Pacific Homes, Inc. v. Scottsdale Ins. Co. (1999) 70 Cal. App. 4th 1187, 1191, 83 Cal. Rptr. 2d 328* (summary adjudication for plaintiff affirmed)

When construction of statute at issue on review of summary judgment, appellate court independently reviews statute to determine validity of judgment. *Wilson, McCall & Daoro v. American Qualified Plans, Inc. (1999) 70 Cal. App. 4th 1030, 1035, 83 Cal. Rptr. 2d 192* (summary judgment on defendants' cross complaints for cross-defendant affirmed; summary judgment on cross complainant's cross complaint for cross defendant reversed)

On appeal from judgment after order granting summary adjudication, appellate court independently reviews trial court's record to determine if triable issue of material fact exists; court accepts as fact only those portions of defendants's evidence that is not contradicted by plaintiff's evidence; thus, court deems facts alleged by plaintiff, the party opposing summary judgment, and reasonable inferences court can make from those facts to be true; court reviews those facts and independently determines their effect as matter of law; appellate court's task is to determine whether alleged facts provide any basis for liability on defendant's part, regardless of nature of cause of action; defendant entitled to summary adjudication if record establishes plaintiff's cause of action cannot succeed as matter of law.

Lazar v. Hertz Corp. (1999) 69 Cal. App. 4th 1494, 1506-1508, 82 Cal. Rptr. 2d 368 (summary adjudication for defendants affirmed)

On appeal, appellate court independently assesses correctness of trial court's ruling; appellate court construes moving party's affidavits strictly, opponents affidavit's liberally, and resolve doubts about propriety of granting motion in favor of party opposing it. *Bardin v. Lockheed Aeronautical Systems Co. (1999) 70 Cal. App. 4th 494, 500, 82 Cal. Rptr. 2d 726* (summary judgment for defendants affirmed)

Motion for summary adjudication proceeds in all respects as motion for summary judgment; on appeal, appellate court review is de novo. *Toigo v. Town of Ross (1998) 70 Cal. App. 4th 309, 324, 82 Cal. Rptr. 2d 649* (summary adjudication for defendants affirmed)

Trial court's summary judgment ruling is subject to independent review; only exception to independent review standard applies when appellate courtreviews trial court's exercise of discretion as allowed under *Code Civ. Proc. § 437c(e). Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1490, 82 Cal. Rptr. 2d 359* (summary judgment for defendant reversed)

In determining whether defendant satisfied burden of proof under former *Code Civ. Proc. § 437c(o)(2)* (*see now Code Civ. Proc. § 437c(p)(2)*), appellate court assumes role of trial court and reassesses merits of motion; in so doing, appellate court considers only facts properly before trial court at time it ruled on motion; appellate court independently reviews admissibility of testimony. *L&B Real Estate v. Superior Court (1998) 67 Cal. App. 4th 1342, 1346, 79 Cal. Rptr. 2d 759* (writ proceeding seeking to set aside order denying defendants' summary judgment motion denied)

Appellate court independently reviews trial court's judgment when all relevant facts are undisputed. *Martell v. Antelope Valley Hospital Medical Center (1998) 67 Cal. App. 4th 978, 980-981, 79 Cal. Rptr. 2d 329* (summary judgment for defendant affirmed)

In reviewing propriety of summary judgment, appellate court independently reviews record before trial court; appellate court must determine whether facts as shown by parties give rise to triable issue of material fact. *Cheyanna M. v. A.C. Nielsen Co. (1998) 66 Cal. App. 4th 855, 861, 78 Cal. Rptr. 2d 335* (summary judgment for defendant reversed); *Depew v. Crocodile Enterprises, Inc. (1998) 63 Cal. App. 4th 480, 485, 73 Cal. Rptr. 2d 673* (summary judgment for defendant affirmed)

After examining documents supporting summary judgment motion in trial court, appellate court independently determines their effect as matter of law. *Old Republic Ins. Co. v. Superior Court (1998) 66 Cal. App. 4th 128, 141, 77 Cal. Rptr. 2d 642* (denial of defendants' motions for summary judgment overturned by writ of mandate)

Whether papers raise triable issue of material fact reviewed de novo by appellate court, unbound by trial court's decision; trial court erroneously resolved issues instead of spotting them. *Furla v. Jon Douglas Co. (1998) 65 Cal. App. 4th 1069, 1076-1077, 76 Cal. Rptr. 2d 911* (summary judgment for defendant reversed)

Appellate court reviews trial court's decision to grant defendant summary judgment de novo; appellate court reviews the ruling, not rationale; appellate court applies same three-step analysis used by superior court; court identifies the issues framed by pleadings, determines whether moving party has negated opponent's claim, and determines whether opposition has demonstrated existence of triable, material factual issue. *Silva v. Lucky Stores, Inc. (1998) 65 Cal. App. 4th 256, 261, 76 Cal. Rptr. 2d 382* (summary judgment for defendants affirmed)

After examining documents supporting summary judgment motion in trial court, appellate court independently determines their effect as matter of law; as summary judgment motion raises only questions of law regarding construction and effect of supporting and opposing papers, appellate court independently applies the same three-step analysis required by trial court; court identifies issues framed by pleadings, determines whether moving party's showing establishes facts that negate opponent's claim and justify judgment in moving party's favor, and, if it does, appellate court finally determines whether opposition demonstrated existence of triable, material factual issue. *Shapiro v. Sutherland (1998) 64 Cal. App. 4th 1534, 1543, 76 Cal. Rptr. 2d 101* (summary judgment for defendants reversed)

When trial court sustains hearsay objection to deposition transcript in connection with summary judgment motion, appellate court independently reviews deposition's admissibility and legal effect of facts properly presented. *Gatton v. A.P. Green Services, Inc. (1998) 64 Cal. App. 4th 688, 692, 75 Cal. Rptr. 2d 523*

When reviewing trial court's decision to grant summary judgment, appellate court must identify issues framed by pleadings, and determine whether moving party has established facts which negate opposing party's facts and justify judgment in moving party's favor; when moving party's facts prima facie justify judgment, appellate court determines whether opposing party has demonstrated the existence of triable issue of material fact. *Odello Brothers v. County of Monterey (1998) 63 Cal. App. 4th 778, 785, 73 Cal. Rptr. 2d 903* (summary judgment for defendant affirmed as to one cause of action and reversed as to another)

Because summary judgment involves pure matters of law, appellate court reviews summary judgment ruling de novo; if summary judgment is proper on grounds other those articulated by trial court, appellate court must affirm. *Barton v. Elexsys Internat., Inc. (1998) 62 Cal. App. 4th 1182, 1187-1188, 73 Cal. Rptr. 2d 212* (summary judgment for defendant affirmed)

On review of summary judgment in defendant's favor, appellate court reviews record de novo to determine whether defendant has conclusively negated necessary element of plaintiff's case or demonstrated that under no hypothesis is there material issue of fact that requires process of trial; review begins with pleadings that define issues to be considered; as to each claim as framed by complaint, defendant must present facts to negate essential element or to establish defense; only then does burden shift to plaintiff to demonstrate existence of triable, material issue of fact; if burden has shifted, final step in appellate court's review is to determine if filings in opposition raise triable issue of material fact; if they do, motion must be denied and if they do not, motion must be granted. *Quintilliani v. Mannerino (1998) 62 Cal. App. 4th 54, 59-60, 72 Cal. Rptr. 2d 359* (summary judgment for defendant reversed in part and affirmed as to other causes of action)

On review of summary judgment in defendant's favor, appellate court reviews record de novo to determine whether defendant has conclusively negated necessary element of plaintiff's case or demonstrated that under no hypothesis is

there material issue of fact that requires process of trial; although appellate court must strictly construe moving party's papers and liberally construe those of opposing party, latter bears burden of showing triable issues of fact exist; all doubts resolved in favor of party opposing judgment. *Leon v. Family Fitness Center (#107), Inc. (1998) 61 Cal. App. 4th 1227, 1231-1232* (summary judgment for defendant reversed)

In evaluating propriety of grant of summary judgment, appellate court review is de novo and appellate court independently reviews record before trial court; in practical effect, appellate court assumes role of trial court and applies same rules and standards which govern trial court's determination of summary judgment motion; interpretation and application of statutoryscheme to undisputed set of facts is question of law which is subject to de novo review on appeal; accordingly, appellate court is not bound by trial court's interpretation. *Lenane v. Continental Maritime of San Diego, Inc. (1998) 61 Cal. App. 4th 1073, 1079, 72 Cal. Rptr. 2d 121* (summary judgment for defendant reversed)

In determining propriety of summary judgment, reviewing court is limited to facts shown by evidentiary materials submitted, as well as those admitted and uncontested in the pleadings; reviewing court exercises its independent judgment in determining whether there are no triable issues of material fact and moving party thus is entitled to judgment as matter of law; reviewing court must uphold judgment if it is correct on any ground, regardless of reason trial court gave. *Montgomery v. Cal. Accountants Mutual Ins. Co. (1998) 61 Cal. App. 4th 854, 858-859, 72 Cal. Rptr. 2d 39* (summary judgment for defendant affirmed)

Appellate court is not bound by trial court's reasons for its judgment; appellate court is required to consider de novo all papers submitted as it reviews ruling. *Maxwell v. Fire Ins. Exchange (1998) 60 Cal. App. 4th 1446, 1450, 70 Cal. Rptr. 2d 866* (summary judgment for defendant affirmed)

When reviewing motion for summary judgment on appeal, appellate court determines de novo whether issue of material fact exists and whether moving party was entitled to summary judgment as matter of law; in other words, appellate court must assume role of trial court and redetermine merits of motion; in so doing, court must strictly scrutinize moving party's papers; declarations of party opposing summary judgment, however, are liberally construed to determine existence of triable issues of fact; all doubt whether any material, triable issues of fact exist are resolved in favor of party opposing summary judgment; appellate review is limited to determine if there is evidence requiring fact weighing procedures of trial; court does not decide merits of issues themselves; review is limited to facts contained in documents presented to trial court; court exercises independent judgment as to legal effect of undisputed facts disclosed by parties' papers; in so doing court applies same three-step analysis required in trial court; first, court identifies issues framed by pleadings; second, court determines whether moving party's showing establishes facts that negate opponent's claim and justify judgment in moving party's favor; finally, if motion prima facia justifies judgment, court determines whether opposition demonstrates existence of triable, material factual issue. *Pensinger v. Bowsmith, Inc. (1998) 60 Cal. App. 4th 709, 717-718, 70 Cal. Rptr. 2d 531* (summary adjudication for defendant affirmed in part and reversed as to other causes)

Typically, plaintiff's theory of liability determines analysis to be applied on summary judgment motion. *Jackson v. County of Los Angeles (1997) 60 Cal. App. 4th 171, 180, 70 Cal. Rptr. 2d 96* (summary judgment for defendant affirmed)

In reviewing propriety of summary judgment, appellate court independently reviews record that was before trial court; court must determine if facts as shown by parties give rise to triable issue of material fact. *Jackson v. County of Los Angeles (1997) 60 Cal. App. 4th 171, 178-179, 70 Cal. Rptr. 2d 96* (summary judgment for defendant affirmed); *Mercury Casualty Co. v. Hertz Corp. (1997) 59 Cal. App. 4th 414, 418-419, 69 Cal. Rptr. 2d 9* (summary judgment for defendant affirmed); *A-H Plating, Inc. v. American National Fire Ins. Co. (1997) 57 Cal. App. 4th 427, 434-435, 67 Cal. Rptr. 2d 113* (summary judgment for defendants reversed); *Derderian v. Dietrick (1997) 56 Cal. App. 4th 892, 897, 65 Cal. Rptr. 2d 800* (summary judgment for defendant affirmed)

In determining propriety of summary judgment, reviewing court is limited to facts shown by evidentiary materials submitted, as well as those admitted and uncontested in pleadings; trial court must consider all evidence set forth in parties' papers, and summary judgment granted if all papers submitted show there is no triable issue of material fact in action, thereby entitling moving party to judgment as matter of law; appellate court exercises independent judgment in determining whether there are no triable issues of material fact and moving party thus is entitled to judgment as matter of law. *Pieper v. Commercial Underwriters Ins., Co. (1997) 59 Cal. App. 4th 1008, 1016, 69 Cal. Rptr. 2d 551* (summary judgment for defendant affirmed)

Review of grant of summary judgment is de novo and appellate court independently reviews record before the trial court; because granting of summary judgment motion under *Code Civ. Proc. § 437c* involves pure question of law, appellate court is required to reassess legal significance and effect of papers parties presented in connection with motion; court applies same three-step analysis required by trial court in ruling on motion for summary judgment; first, court identifies issues framed by pleadings because court's sole function on motion for summary judgment is to determine from submitted evidence whether there is a triable issue as to any material fact; fact to be material must relate to a claim or defense that is in issue; second, court determines whether moving party met its statutory burden of proof (1) under former *Code Civ. Proc. § 437c(o)(1)* (*see now Code Civ. Proc. § 437c(p)*) if plaintiff or cross complainant is the moving party, in which case he or she must produce admissible evidence of each element of the cause of action entitling the party to judgment on that cause of action, or (2) under former *Code Civ. Proc. § 437c(o)(2)* (*see now Code Civ. Proc. § 437c(p)*) if defendant or cross-defendant is the moving party, in which case he or she must produce admissible evidence showing that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action; finally, if moving party has met its statutory burden of proof and summary judgment motion prima facie justifies judgment, appellate court determines whether opposing party has met its burden of demonstrating existence of triable issue of one or more material facts as to that cause of action or defense thereto; in making this determination, appellate court strictly construes evidence of moving party and liberally construes that of opponent, and any doubts as to propriety of granting motion should be resolved in favor of party opposing motion. *Zavala v. Arce (1997) 58 Cal. App. 4th 915, 925-926, 68 Cal. Rptr. 2d 571* (summary judgment for defendant reversed)

In reviewing order granting summary judgment, reviewing court must assume role of trial court and redetermine merits of motion; although appellate court must review summary judgment motion by same standard as trial court, it must independently determine as matter of law construction and effect of facts presented. *Rosen v. Nations Title Ins. Co. (1997) 56 Cal. App. 4th 1489, 66 Cal. Rptr. 2d 714* (summary judgment for defendant affirmed); *Podolsky v. First Healthcare Corp. (1996) 50 Cal. App. 4th 632, 642, 58 Cal. Rptr. 2d 89* (summary judgment for defendant reversed); *Sellery v. Cressey (1996) 48 Cal. App. 4th 538, 543, 55 Cal. Rptr. 2d 706*

Trial court's grant of summary judgment is reviewed de novo for error; although trial court is required to specify reasons for its ruling, appellate court will treat trial court's failure to specify reasons for its ruling as harmless error because appellate court reviews trial court's ruling, not its rationale. *Conley v. Matthes (1997) 56 Cal. App. 4th 1453, 1459-1460, 66 Cal. Rptr. 2d 518* (summary judgment for plaintiff reversed and remanded to enter judgment in defendant's favor)

Appellate court reviews trial judge's decision to grant summary judgment de novo; trial judge's stated reason for granting summary judgment not binding on appellate court because appellate court reviews its ruling, not its rationale. *Harper v. Wausau Ins. Co. (1997) 56 Cal. App. 4th 1079, 1085, 66 Cal. Rptr. 2d 64* (summary judgment for defendant reversed)

Appellate court makes its own independent determination of the construction and effect of papers submitted; court guided by traditional rules of summary judgment which direct that court construe evidence of moving party strictly and that of opposing party liberally. *Kurinij v. Hanna & Morton (1997) 55 Cal. App. 4th 853, 863-864, 64 Cal. Rptr. 2d 324*

Review of order granting summary adjudication is limited to facts contained in documents presented to trial court; reviewing court accepts as true facts alleged in affidavits against whom summary adjudication was ordered and exercises independent judgment as to legal effect of undisputed facts disclosed by parties' papers. *Federal Deposit Ins. Corp. v. Superior Court (1997) 54 Cal. App. 4th 337, 344-345, 62 Cal. Rptr. 2d 713*

In appellate court, first step is an analysis of pleadings, i.e., complaint and answer, including affirmative defenses it may contain; next step calls for evaluation of defendant's effort to meet burden of showing that plaintiff's cause of action has no merit or that there is complete defense to it; this showing can rely on filings by plaintiff in opposition; once prima facie showing is made and hence burden has been met, it shifts to plaintiff to show that triable issue of material fact exists within framework fixed by pleadings; once burden has shifted, it must next be determined if filings in opposition succeeded in raising a triable issue of material fact; if they did, motion must be denied; if they did not, motion must be granted; appellate court's review precisely mirrors what occurs in trial court, i.e., court makes a de novo evaluation which, after it be shown that there are no disputed issues of material facts, requires legal determination of moving party's entitlement to judgment. *Allyson v. Department of Transportation (1997) 53 Cal. App. 4th 1304, 1316-1318, 62 Cal. Rptr. 2d 490*

On appeal from trial court's grant of defendant's motion for summary judgment, appellate court reviews trial court's decision de novo, applying rule that defendant is entitled to summary judgment if record establishes as matter of law that none of plaintiff's asserted causes of action can prevail; first step of review begins with appellate court's analysis of pleadings; court next evaluates defendant's effort to meet its burden of showing that plaintiff's cause of action has no merit or that there is a complete defense to it; once defendant has met that burden, burden shifts to plaintiff to show that triable issue of material fact exist as to its complaint; if filings in opposition raise triable issues of fact motion must be denied; if they do not, motion must be granted. *Miscione v. Barton Development Co. (1997) 52 Cal. App. 4th 1320, 1324-1325, 61 Cal. Rptr. 2d 280*

Appellate review of motion for summary adjudication is de novo and appellate court reviews only ruling, not its rationale; on appeal from motion for summary judgment, appellate court conducts its own independent review of the moving and opposition papers and applies same standard as trial court in determining whether motion was properly granted. *Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners (1997) 52 Cal. App. 4th 867, 873, 881, 884, 60 Cal. Rptr. 2d 830*

Standard of review has been variously recited in literally hundreds of cases before 1992 and 1993 amendments to *Code Civ. Proc. § 437c*; these amendments did not change certain aspects of standard of review; review is same as that prescribed by trial court, i.e., appellate court determines de novo whether moving party was entitled to summary judgment as matter of law; first step in review begins with analysis of pleadings, next step calls for evaluation of moving defendant's effort to meet its burden of showing that plaintiff's cause of action has no merit, or that there is complete defense to it; once defendant has met that burden, it shifts to plaintiff to show that triable issue of material fact exists as to its cause of action or defense to it; final step if burden has shifted is to determine if filings in opposition raise triable issue of material fact; if they do, motion must be denied and if they do not, motion must be granted. *Arciniega v Bank of San Bernardino (1997) 52 Cal. App. 4th 213, 224, 225, 60 Cal. Rptr. 2d 495* (criticized on another point in *Rice v. Crow (2000) 81 Cal. App. 4th 725, 726, 737-741, 97 Cal. Rptr. 2d 110*)

When construction of statute at issue, appellate court independently reviews statute to determine validity of judgment. *County of Alameda v. Pacific Gas & Electric Co. (1997) 51 Cal. App. 4th 1691, 1698, 60 Cal. Rptr. 2d 187*

When trial court concluded that because defendant was fugitive from justice it had been impossible for the People to conduct discovery and under *Code Civ. Proc. § 437c(h)* denied defendant's motion for summary judgment without prejudice allowing defendant to renew his motion after discovery took place, appellate court must evaluate validity of order denying summary judgment on basis of record as it existed at time trial court considered motion. *People v.*

$4,503 United States Currency (1996) 49 Cal. App. 4th 1743, 1746-1749, 57 Cal. Rptr. 2d 467

In evaluating correctness of ruling under *Code Civ. Proc. § 437c*, appellate court must independently review record before trial court; because grant or denial of motion under *Code Civ. Proc. § 437c* involves pure questions of law, appellate court is required to reassess legal significance and effect of papers that parties submitted in connection with motion; appellate court applies same three-step analysis required by trial court; first, court determines issues framed by the pleadings; second, court determines if moving party's showing has established facts that negate opponent's claim and justify judgment in movant's favor; third, if summary judgment motion prima facie justifies judgment, court determines if opposition demonstratesexistence of triable material factual issue; court in practical effect assumes trial court's role and redetermines motion's merits; in doing that, court must rigidly scrutinize moving parties' papers. *Ranchwood Communities Limited Partnership v. Jim Beat Construction Co. (1996) 49 Cal. App. 4th 1397, 1408, 57 Cal. Rptr. 2d 386*

Parties arguments and evidence considered de novo on appeal; no deference given to trial court's ruling. *Estate of Brenzikofer (1996) 49 Cal. App. 4th 1461, 1466-1468, 57 Cal. Rptr. 2d 401* (summary judgment for respondent estate reversed in proceedings under *Prob. Code § 9860* seeking specific performance of agreement to convey property)

Although moving party has burden of proving its right to summary judgment in trial court, on appeal from summary judgment, appellant bears burden of showing error; absent such showing, appellate court presumes judgment is correct; moreover, under *Cal. Const., art. VI, § 13*, to obtain reversal, appellant must establish error resulted in miscarriage of justice. *Frank and Freedus v. Allstate Ins. Co. (1996) 45 Cal. App. 4th 461, 474, 52 Cal. Rptr. 2d 678*

Appellate court will only reverse superior court judgment if it is based on erroneous conclusion of law; when facts do not conflict and issues involve proper application of statute or administrative regulation, reviewing court is not bound by trial court's determination. *Suzuki v. City of Los Angeles (1996) 44 Cal. App. 4th 263, 269, 51 Cal. Rptr. 2d 880*

Appellate court in reviewing order granting summary judgment de novo gives no particular deference to trial court's ruling in order to independently determine if defendants are entitled to judgment as matter of law; standard of independent review applies despite shifting burdens of production of evidence that govern at trial; of course, once party bears initial burden of demonstrating entitlement to judgment as matter of law, opposing party cannot defeat summary judgment by attempting to raise factual dispute as to immaterial issues; summary judgment motion will not be defeated by factual dispute unless fact in dispute is material one. *Romero v. American President Lines, Ltd. (1995) 38 Cal. App. 4th 1199, 1202-1203, 45 Cal. Rptr. 2d 421*

When continuance is not mandatory because conditions of *Code Civ. Proc. § 437c(h)* not met, appellate court reviews trial court's denial of continuance under abuse of discretion standard. *Scott v. CIBA Vision Corp. (1995) 38 Cal. App. 4th 307, 313-314, 326, 44 Cal. Rptr. 2d 902*

Motion for summary judgment or summary adjudication involves no form of discretion; if trial court errs in ruling on motion, error is one of law; to claim that court has abused its discretion under those circumstances is procedurally and legally incorrect. *Street v. Superior Court (1990) 224 Cal. App. 3d 1397, 1402, 274 Cal. Rptr. 595*

To extent appellate court (1) reviews judgment granting summary adjudication of issues as a matter of law, review is de novo; and (2) reviews decision of trial court as to disputed question of fact, decision must be sustained on appeal if there is any substantive evidence to support decision. *Lough v. Coal Oil, Inc. (1990) 217 Cal. App. 3d 1518, 1525, 266 Cal. Rptr. 611*

[21] Review by Mandate

Before issuing peremptory writ in first instance after review of order denying summary judgment, petitioner or appellate court must notify party adversely affected that issuance of writ is being sought or considered, and appellate court, absent exceptional circumstances, is required to receive or solicit opposition to petition for writ. *Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 180, 203 Cal. Rptr. 626, 681 P.2d 893* ; *Homestead Savings v. Superior Court (1986) 179 Cal. App. 3d 494, 499, 224 Cal. Rptr. 554*

Order denying motion for summary judgment or summary adjudication may be reviewed by petition for writ of mandate; when trial court's erroneous denial of motion will result in trial on nonactionable claims, writ of mandate will issue. *West Shield Investigations & Security Consultants v. Superior Court (2000) 82 Cal. App. 4th 935, 946, 98 Cal. Rptr. 2d 612* (denial of defendants' motions for summary judgment overturned by writ of mandate)

Order denying summary judgment is not appealable under *Code Civ. Proc. § 904.1*; reviewable only by petition for extraordinary writ. *Sierra Craft, Inc. v. Magnum Enterprises, Inc. (1998) 64 Cal. App. 4th 1252, 1256, 75 Cal. Rptr. 2d 681*

When trial court's denial of motion for summary judgment will result in trial of nonactionable claims, writ of mandate will issue; similarly, writ of mandate may issue to prevent trial of nonactionable claims after erroneous denial of motion for summary adjudication. *Travelers Casualty & Surety Co. v. Superior Court (1998) 63 Cal. App. 4th 1440, 1450, 75 Cal. Rptr. 2d 54*

Pretrial writ review of denial of defendant's motion for summary adjudication on various causes of action held appropriate, even though some causes will remain and trial will go forward even if writ granted by appellate court, when issues ruled on by trial court contain heart of plaintiffs' case and trial might well be simplified if it is found that trial court erred. *Exxon Corp. v. Superior Court (1997) 51 Cal. App. 4th 1672, 1679-1680, 60 Cal. Rptr. 2d 195*

Mandate is available to review denial of summary judgment recommended by commissioner to whom motion was referred; commissioner is authorized under *Code Civ. Proc. § 259* to take proof and report findings on matters of fact, but court's function on summary judgment motion is limited to determining whether triable issues exist, which is question of law; thus, referral of motion to commissioner for that purpose, absent stipulation of parties, is inappropriate. *International Jet Ski Boating Assn., Inc. v. Superior Court (1991) 232 Cal. App. 3d 112, 116, 283 Cal. Rptr. 33*

When plaintiff does not file pleadings or exhibits in opposition to defendant's motion for summary judgment, does not appear at hearing on motion, does not file preliminary opposition to petition for writ of mandate arising from denial of motion, and, when notified that appellate court was considering issuing peremptory writ in first instance, does not take advantage of court's invitation to file opposition, appellate court takes as undisputed facts set forth in defendant's summary judgment motion and supporting documents. *Gilmore v. Superior Court (1991) 230 Cal. App. 3d 416, 418, 281 Cal. Rptr. 343*

When trial court grants summary adjudication, reviewing court views supporting affidavits narrowly and opposing affidavits broadly; doubts as to propriety of granting motion are resolved in favor of party opposing motion; toextent reviewing court reviews judgment granting summary adjudication as matter of law, review is de novo. *Monte Vista Development Corp. v. Superior Court (1991) 226 Cal. App. 3d 1681, 1684-1685, 277 Cal. Rptr. 608*

Argument requiring resolution of factual issues must be raised in trial court first, but former *Code Civ. Proc. § 437c(l)* (*see now Code Civ. Proc. § 437c(m)(1)*) does not require motion for reconsideration to be made before seeking mandate review, and making motion as not tolling time prescribed by former *Code Civ. Proc. § 437c(l)* (*see now Code Civ. Proc. § 437c(m)(1)*) for seeking writ review. *State Farm Fire & Casualty Co. v. Superior Court (1989) 210 Cal. App. 3d 604, 610-611, 258 Cal. Rptr. 413* ; *Schmidt v. Superior Court (1989) 207 Cal. App. 3d 56, 61, 254 Cal. Rptr. 827*

Service by court clerk of copy of order on motion for summary adjudication of issues constitutes written notice of entry

of order within meaning of former *Code Civ. Proc. § 437c*(*l*) (*see now Code Civ. Proc. § 437c(m)(1)*) and commences period in which to petition for writ review under that statute; additional service of notice of entry of order by counsel is unnecessary in that case to start running of section 437c(*l*) limitation period. *Eldridge v. Superior Court (1989) 208 Cal. App. 3d 1350, 1353, 1353 n.2, 256 Cal. Rptr. 724* (service of file-stamped copy of order); *Schmidt v. Superior Court (1989) 207 Cal. App. 3d 56, 60, 254 Cal. Rptr. 827* (service of copy of minute order; both cases decided under former *Code Civ. Proc. § 437c(f)*)

Trial court's order extending time for petitioning for writ review that states that it appears to court that good cause exists to extend time for filing petition for peremptory writ to court of appeal, absent any contrary evidence, is sufficient against contention that order was invalid because petitioner failed to make showing of good cause on the record. *Schmidt v. Superior Court (1989) 207 Cal. App. 3d 56, 62, 254 Cal. Rptr. 827*

Petition for writ of mandate to review order granting summary judgment not subject to time limitations of former *Code Civ. Proc. § 437c*(*l*) (*see now Code Civ. Proc. § 437c(m)(1)*). *City of Fresno v. Superior Court (1984) 156 Cal. App. 3d 1137, 1142, 202 Cal. Rptr. 313*

[22] Ruling on Motion

While resolution of statute of limitation issue normally question of fact, when uncontradicted facts established through discovery are susceptible of only one legitimate inference, summary judgment is proper. *Romano v. Rockwell Internat., Inc. (1996) 14 Cal. 4th 479, 487, 59 Cal. Rptr. 2d 20, 926 P. 2d 1114*

In ruling on motion for summary judgment, any doubts as to propriety of granting motion are resolved in favor of party opposing motion. *Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1107, 252 Cal. Rptr. 122, 762 P.2d 46* ; *Pender v. Radin (1994) 23 Cal. App. 4th 1807, 1813, 29 Cal. Rptr. 2d 36* ; *Violette v. Shoup (1993) 16 Cal. App. 4th 611, 619, 20 Cal. Rptr. 2d 358* ; *Hohe v. San Diego Unified Sch. Dist. (1990) 224 Cal. App. 3d 1559, 1568, 274 Cal. Rptr. 647* ; *Ralph Andrews Productions, Inc. v. Paramount Pictures Corp. (1990) 222 Cal. App. 3d 676, 682, 271 Cal. Rptr. 797*

Court did not improperly rule on defendant's second motion for summary judgment where court denied first motion for summary judgment on grounds that defendant had a duty to plaintiff; second motion was based on separate legal theory relating to assumption of risk to negate claim of duty; additionally, there was a change of law following the ruling on the first motion. *Patterson v. Sacramento City Unified School Dist. (2007) 155 Cal. App. 4th 821, 827, 66 Cal. Rptr. 3d 337*

Wording of *Code Civ. Proc. § 437c(c)* imposes *mandatory* duty on trial court to grant motion for summary judgment if there is no triable issue of material fact and moving party is entitled to judgment as matter of law; although former statute gave trial court discretion to deny motion, this discretion is now abrogated. *Jennifer M. v. Redwood Women's Health Center (2001) 88 Cal. App. 4th 81, 86-86, 105 Cal. Rptr. 2d 544* (summary adjudication for defendant affirmed)

Trial court may properly grant summary judgment when evidence in support of moving party establishes there is no issue of fact to be tried and that party is entitled to judgment as matter of law; if trial court determines there is no triable issue of fact, it determines legal issues in case. *Peerless Lighting Corp. v. American Motorists Ins. Co. (2000) 82 Cal. App. 4th 995, 1005, 98 Cal. Rptr. 2d 753* (summary judgment for plaintiff reversed)

Trial court must grant summary judgment motion if all papers submitted show no triable issue as to any material facts exist and moving party is entitled to judgment as matter law; in determining whether papers show that no triable issue exists as to any material fact, court must consider all evidence and all inferences reasonably deducible from evidence, except that summary judgment will not be granted on inferences reasonably deducible from evidence, if contradicted by

other inferences or evidence, that raise triable issue as to any material fact. *Martinez v. Bank of America (2000) 82 Cal. App. 4th 883, 887, 98 Cal. Rptr. 2d 576* (summary judgment for defendant affirmed)

Summary judgment must be granted if all papers submitted show there is no triable as to any material fact and moving party is entitled to judgment as matter of law; defendant must show that under no possible hypothesis within reasonable purview of complaint's allegations is there material fact that requires examination by trial; if defendant makes such showing, court must look at plaintiff's papers to determine whether they demonstrate existence of triable, material factual issue. *Dimock v. Emerald Properties (2000) 81 Cal. App. 4th 868, 873-874, 97 Cal. Rptr. 2d 255* (summary judgments for defendants reversed)

Summary judgment motion must be granted if all papers submitted show there is no triable issue as to any material fact and moving party is entitled to judgment as matter of law; defendant is entitled to summary judgment if necessary element of plaintiff's case cannot be established or there is complete defense to cause of action. *Tahoe Vista Concerned Citizens v. Counter of Placer (2000) 81 Cal. App. 4th 577, 587, 96 Cal. Rptr. 2d 880* (summary judgment for defendants affirmed)

Motion for summary judgment must be granted if all papers submitted show there is no triable issue as to any material fact and moving party is entitled to judgment as matter of law; in determining whether moving papers show there is no triable issue as to any material fact court must consider all evidence set forth in papers and all inferences reasonably deducible from evidence. *Culligan v. State Comp. Ins. Fund (2000) 81 Cal. App. 4th 429, 433-434, 96 Cal. Rptr. 2d 656* (summary judgment for defendant affirmed)

Defendant is not entitled to summary judgment unless that moving party negates all theories of liability pleaded by plaintiff. *Juarez v. Boy Scouts of America, Inc. (2000) 81 Cal. App. 4th 377, 397, 97 Cal. Rptr. 2d 12* (summary judgment for defendants affirmed except for one cause of action against two defendants that was reversed)

Summary judgment is proper only where there is no triable issue as to any material fact and moving party is entitled to judgment as matter of law; moving papers are strictly construed while opposing papers are liberally construed; any doubts regarding propriety of awarding summary judgment are resolved in favor of party opposing summary judgment. *Jang v. State Farm Fire & Casualty Co. (2000) 80 Cal. App. 4th 1291, 1295, 95 Cal. Rptr. 2d 917* (summary judgment for cross-defendant affirmed)

Summary judgment is properly granted when papers show there is no triable issue as to any material fact and moving party is entitled to judgment as matter of law. *Alvarez v. State of California (2000) 79 Cal. App. 4th 720, 727, 95 Cal. Rptr. 2d 719* (summary judgment for defendant affirmed)

Summary judgment is granted when all papers submitted show there is no triable issue as to any material fact and that moving party is entitled to judgment as matter of law. *PMC, Inc. v. Kadisha (2000) 78 Cal. App. 4th 1368, 1372, 93 Cal. Rptr. 2d 663* (summary judgment for defendants reversed)

Summary judgment should be granted only when moving party entitled to judgment as matter of law. *Campbell v. Scripps Bank (2000) 78 Cal. App. 4th 1328, 1333 n.2, 93 Cal. Rptr. 2d 635* (summary judgment for defendants affirmed except as to improperly awarded attorney fees)

Summary judgment may only be granted when no triable issue exists as to any material fact and moving party is entitled to judgment as matter of law. *Ostayan v. Serrano Reconveyance Co. (2000) 77 Cal. App. 4th 1411, 1417-1418, 92 Cal. Rptr. 2d 577* (summary judgment for defendants affirmed)

To prevail on summary judgment motion, defendant must show that one or more elements of plaintiff's cause of action cannot be established or that there is complete defense to that cause of action; summary judgment should only be

granted when moving party is entitled to judgment as matter of law; moving party's evidence is strictly construed and opponent's evidence is liberally construed, and any doubts as to propriety of granting motion are to be resolved in favor of party opposing motion. *Pardee Construction Co. v. Insurance Co. of the West (2000) 77 Cal. App. 4th 1340, 1349 n.3, 92 Cal. Rptr. 2d 443* (judgment for three defendants whose motions for judgment on pleadings were granted after summary adjudication in their favor reversed as to two of them with directions that trial court grant plaintiff's motions for summary adjudication; judgment for remaining defendant affirmed)

Under *Code Civ. Proc. § 437c(c)*, motion for summary judgment shall be granted if all papers submitted show there is no triable issue as to any material fact and that moving is entitled to judgment as matter of law; court strictly construes evidence of moving party and liberally construes that of opponents, and any doubts as to propriety of granting motion should be resolved in favor of party opposing motion. *Riverside County Community Facilities Dist. v. Bainbridge 17 (1999) 77 Cal. App. 4th 644, 653, 92 Cal. Rptr. 2d 29* (summary judgment for plaintiff affirmed)

Motion for summary judgment properly granted if papers submitted show there is no triable issue as to any material fact and that moving party is entitled to judgment as matter of law; defendant entitled to summary judgment if necessary element of plaintiff's cause of action cannot be established or if complete defense to cause of action exists. *FNB Mortgage Corp. v. Pacific General Group (1999) 76 Cal. App. 4th 1116, 1125, 90 Cal. Rptr. 2d 841* (summary judgment for cross-defendant affirmed)

Motion for summary judgment properly granted if papers show there is no triable issue as to any material fact and moving party is entitled to judgment as matter of law; defendant is entitled to summary judgment if a necessary element of plaintiff's cause of action cannot be established or if complete defense to the cause of action exists; summary judgment appropriate when discovery has produced admission or concession on part of party opposing summary judgment that demonstrates there is no factual issue to be tried. *Oliver v. AT&T Wireless Services (1999) 76 Cal. App. 4th 521, 528, 536, 90 Cal. Rptr. 2d 491* (summary judgment for defendants affirmed)

Court must consider bare evidence and reasonable inferences deducible from evidence and determine whether evidence is sufficient to support potential judgment in favor of opposing party; court must consider what inferences favoring opposing party factfinder could reasonably draw from evidence; while viewing evidence in this manner court must bear in mind that its primary function is to identity issues rather than to determine issues; only when inferences are indisputable may court decide issues as matter of law; if evidence is in conflict, factual issue must be resolved by trial; trial court may not weigh evidence in manner of factfinder to determine whose version is more likely true; nor may trial court grant summary judgment based on court's evaluation of credibility; moreover, trial court may not grant summary judgment for defendant simply on its opinion that plaintiff's claims are "implausible," if reasonable factfinder could find for plaintiff on evidence presented *Binder v. Aetna Life Ins. Co. (1999) 75 Cal. App. 4th 832, 839-840, 89 Cal. Rptr. 2d 540* (summary judgment for defendant reversed)

Code Civ. Proc. § 437c(c) requires trial court to grant summary judgment if all papers and affidavits submitted, together with all inferences reasonably deducible from evidence and uncontradicted by other inferences or evidence, show there is no triable issue as to any material fact and that moving party is entitled to judgment as matter of law. *Eisenberg v. Alameda Newspapers, Inc. (1999) 74 Cal. App. 4th 1359, 1374-1375, 88 Cal. Rptr. 2d 802* (summary judgment for defendants affirmed)

Summary judgment appropriate only when no material issue of fact exists or when record establishes as matter of law that cause of action asserted against party cannot prevail. *Myricks v. Lynwood Unified School Dist. (1999) 74 Cal. App. 4th 231, 237, 87 Cal. Rptr. 2d 734* (summary judgment for defendants affirmed)

Summary judgment is appropriate only when no material issue of fact exists or when record establishes as matter of law that cause of action asserted against party cannot prevail. *Ziman v. Fireman's Fund Ins. Co. (1999) 73 Cal. App. 4th 1382, 1387, 87 Cal. Rptr. 2d 397* (summary judgment for defendant affirmed)

Motion for summary judgment must be granted if all papers submitted show there is no triable issue as to any material fact and moving party entitled to judgment as matter of law; in determining whether moving papers show there is no triable issue of any material fact court must consider all evidence set forth in papers and all inferences reasonably deducible from evidence. *Hobson v. Raychem Corp. (1999) 73 Cal. App. 4th 614, 622, 86 Cal. Rptr. 2d 497* (summary judgment for defendant affirmed)

Cause of action cannot be established if undisputed facts presented by defendant prove the contrary of plaintiff's allegations as matter of law. *Marshak v. Ballesteros (1999) 72 Cal. App. 4th 1514, 1518, 86 Cal. Rptr. 2d 1* (summary judgment for defendant affirmed)

Trial court must grant summary judgment when all papers and affidavits submitted, together with all inferences reasonable from evidence that are not contradicted by other inferences or evidence, show there is no triable issue as to any material fact and moving party is entitled to judgment as matter of law. *Smith v. Maldonado (1999) 72 Cal. App. 4th 637, 644, 85 Cal. Rptr. 2d 397* (summary judgment for defendants affirmed)

If defendant's declarations in support of motion for summary judgment demonstrate absence of essential element of plaintiff's case, and plaintiff's declarations submitted in reply do not show triable issue of fact as to that element, no amount of factual conflicts on other aspects of case will affect result and motion for summary judgment should be granted. *See Armato v. Baden (1999) 71 Cal. App. 4th 885, 893, 84 Cal. Rptr 2d 294* (summary judgments for defendants favor affirmed)

Motion for summary judgment must be granted if all papers submitted show there is no triable issue as to any material fact and moving party is entitled to judgment as matter of law; in determining whether moving papers show there is no triable issue of any material fact court must consider all the evidence and all inferences reasonably deducible from evidence, except summary judgment cannot be granted on inferences reasonably deducible from evidence, if contradicted by other inferences or evidence, which raise triable issue as to any material fact. *Bardin v. Lockheed Aeronautical Systems Co. (1999) 70 Cal. App. 4th 494, 499, 82 Cal. Rptr. 2d 726* (summary judgment for defendants affirmed)

Whether triable issue of material fact exists does not turn on trial courts discretion; motion for summary judgment must be granted if all papers submitted show there is no triable issue as to any material fact and moving party is entitled to judgment as matter of law. *Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1490, 82 Cal. Rptr. 2d 359* (summary judgment for defendant reversed)

Under *Code Civ. Proc. § 437c(c)*, trial court required to grant summary judgment if all papers and affidavits submitted, together with all inferences reasonable deducible from evidence and uncontradicted by other inferences or evidence, show there is no triable issue as to any material fact and that moving party entitled to judgment as matter of law. *Sangster v. Paetkau (1998) 68 Cal. App. 4th 151, 163, 80 Cal. Rptr. 2d 66* (summary judgment for defendants affirmed)

Trial judge determines whether triable issues exist by examining affidavits and evidence, including any reasonable inferences that may be drawn from facts; evidence of moving party is strictly construed and evidence of opposing party is liberally construed; doubts as to propriety of granting motion must be resolved in favor of party opposing motion. *Crouse v. Brobeck, Phleger & Harrison (1998) 67 Cal. App. 4th 1509, 1524, 80 Cal. Rptr. 2d 94* (summary judgments for defendants both affirmed and reversed)

Trial court in ruling on motion for summary judgment is merely to determine issues of fact exist, not to decide the merits of issues themselves; trial judge determines whether triable issues of fact exist by reviewing affidavits and evidence before him or her and reasonable inferences that may be drawn from those facts; facts alleged in evidence of party opposing summary judgment and reasonable inferences therefrom must be accepted as true. *Kovatch v.*

California Casualty Management Co. (1998) 65 Cal. App. 4th 1256, 1266, 1268, 77 Cal. Rptr. 2d 217

Summary judgment must be granted if all papers submitted show that there is no triable issue of any material fact and the moving party is entitled to judgment as a matter of law; trial court's function in ruling on motion for summary judgment is merely to determine existence of such issues of fact, not to decide the merits of the issues themselves. *Furla v. Jon Douglas Co. (1998) 65 Cal. App. 4th 1069, 1076-1077, 76 Cal. Rptr. 2d 911*

Motion for summary judgment must be granted if all papers submitted show there is no triable issue as to any material fact and moving party entitled to judgment as matter of law; moving party's affidavits are strictly construed, opponents affidavits are liberally construed, and doubts about propriety of granting motion are resolved in favor of party opposing it. *Crookall v. Davis, Punelli, Keathley & Willard (1998) 65 Cal. App. 4th 1048, 1057, 77 Cal. Rptr. 2d 250*

Defendant is entitled to summary judgment if record establishes as matter of law that none of plaintiff's asserted causes of action can prevail; to succeed, defendant must conclusively establish complete defense or negate necessary element of plaintiff's case and demonstrate that under no hypothesis is there material issue of fact that requires process of trial. *Molko v. Holy Spirit Assn. (1988) 46 Cal. 3d 1092, 1107, 252 Cal. Rptr. 122, 762 P.2d 46* ; *Johnson v. Stratlaw, Inc. (1990) 224 Cal. App. 3d 1156, 1160, 274 Cal. Rptr. 363* ; *McGough v. University of San Francisco (1989) 214 Cal. App. 3d 1577, 1581, 263 Cal. Rptr. 404*

Granting motion for summary judgment is error if any triable issue of fact exists. *Bigbee v. Pacific Tel. & Tel. Co. (1983) 34 Cal. 3d 49, 56, 192 Cal. Rptr. 857, 665 P.2d 947*

Trial court must consider all evidence set forth in parties' papers, and summary judgment granted if all papers submitted show there is no triable issue of material fact in the action, thereby entitling moving party to judgment as matter of law. *Pieper v. Commercial Underwriters Ins., Co. (1997) 59 Cal. App. 4th 1008, 1016, 69 Cal. Rptr. 2d 551*

Court has inherent power to grant summary judgment on ground not explicitly tendered by moving party when parties' separate statements of material facts and supporting evidence demonstrate absence of triable issue of fact, and opposing party has had chance to respond to legal ground and show there is triable issue of material fact. *216 Sutter Bay Associates v. County of Sutter (1997) 58 Cal. App. 4th 860, 875-881, 68 Cal. Rptr. 2d 492*

In determining whether papers show there is no triable issue as to material fact, court must consider all evidence and all inferences reasonably deducible from evidence, except summary judgment may not be granted on inferences reasonably deducible from evidence, if contradicted by otherinferences or evidence, that raise triable issue as to any material fact. *Brundage v. Hahn (1997) 57 Cal. App. 4th 228, 234, 66 Cal. Rptr. 2d 830*

All doubts as to whether there is any triable issue of fact are to be resolved in favor of party opposing summary judgment. *Zelda, Inc. v. Northland Ins. Co. (1997) 56 Cal. App. 4th 1252, 1259, 66 Cal. Rptr. 2d 356*

Sole declaration of party opposing summary judgment motion which raises triable issue of fact is sufficient to deny motion; *Code Civ. Proc. § 437c(e)* does not allow trial court to weigh credibility of declaration submitted by party opposing summary judgment motion and then grant motion, except where declaration is facially so incredible as matter of law that moving party otherwise would be entitled to summary judgment. *Estate of Housley (1997) 56 Cal. App. 4th 342, 359-360, 65 Cal. Rptr. 2d 628*

Although defendant initially complained that trial court order did not meet requirements of *Code Civ. Proc. § 437c(g)* in that it insufficiently specified what evidence was in conflict, reviewing court believed that absent demand for greater specificity in trial court, offer sufficed procedurally. *Exxon Corp. v. Superior Court (1997) 51 Cal. App. 4th 1672, 1679, 60 Cal. Rptr. 2d 195*

Appellate court in reviewing summary judgment must consider only facts before court disregarding any new allegations on appeal; possible theories not fully developed or factually presented to trial court cannot create triable issue on appeal. *Uriarte v. United States Pipe & Foundry Co. (1996) 51 Cal. App. 4th 780, 790, 59 Cal. Rptr. 2d 332*

If trial court determines that no triable issue of fact exists, but only one of law exists, it is trial court's duty to determine the issue of law. *Monteleone v. Allstate Ins. Co. (1996) 51 Cal. App. 4th 509, 514*

Because summary judgment is drastic procedure and should be used with caution, moving party's papers strictly construed, while opposing party's papers liberally construed; court must consider presumptions and draw inferences from facts adduced when inference only reasonable one that may be drawn; court, however, has no power in summary proceeding to weigh one inference against another or against other evidence; moreover, assertion based solely on conjecture or speculation is insufficient to avoid summary judgment. *Sanchez v. Swinerton & Walberg Co. (1996) 47 Cal. App. 4th 1461, 1465-1466, 55 Cal. Rptr. 2d 415*

Court views evidence on sham guaranty defense in light most favorable to party opposing motion for summary adjudication; factual question whether person is true guarantor or principal obligor in guarantor's guise. *River Bank America v. Diller (1995) 38 Cal. App. 4th 1400, 1420-1424, 45 Cal. Rptr. 2d 790*

Whenever court must rule on motion for summary judgment, factual issue guidelines for motion as precisely fixed by reference solely to pleadings. *Kishida v. State of California (1991) 229 Cal. App. 3d 329, 334, 280 Cal. Rptr. 62*

Denying or granting motion for summary judgment as not involving exercise of discretion; if pleadings and evidence before court demonstrate that there is no triable issue of fact, denial of motion as error in law. *Marriage & Family Center v. Superior Court (1991) 228 Cal. App. 3d 1647, 1649, 279 Cal. Rptr. 475*

Trial court's obligation in ruling on summary judgment motion as being to determine whether issues of fact exist, not to decide merits of issues; when making that determination, trial court as required to strictly construe affidavits of moving party, and liberally construe those of opponent. *Jackson v. Deft, Inc. (1990) 223 Cal. App. 3d 1305, 1313, 273 Cal. Rptr. 214* ; *see also Buehler v. Alpha Beta Co. (1990) 224 Cal. App. 3d 729, 733, 274 Cal. Rptr. 14*

Issue that is abstractly one of fact as resolved by summary judgment if moving party's declarations fully establish claim or defense and opponent's declarations fail to rebut it; otherwise stated, issue of fact as becoming one of law and losing its triable character if undisputed facts leave no room for reasonable difference of opinion. *People v. Van Horn (1990) 218 Cal. App. 3d 1378, 1397, 267 Cal. Rptr. 804*

Trial court as erring in granting summary judgment on ground some facts underlying allegations in complaint did not exist when complaint was filed if they did exist when motion was heard; defect in pleading as disregarded if it no longer exists when summary judgment motion is made. *Virgin v. State Farm Fire & Casualty Co. (1990) 218 Cal. App. 3d 1372, 1375-1376, 267 Cal. Rptr. 704*

In ruling on motion for summary judgment, trial court as not required to limit its decision to analysis of specific argument presented; if another valid and legal reason to support summary judgment motion exists, trial court as permitted to rely on it when it can do so without depriving responding party of fair hearing. *Barczewski v. Commonwealth Land Title Ins. Co. (1989) 210 Cal. App. 3d 406, 413, 258 Cal. Rptr. 386*

[22A] Service of Motion

A court cannot shorten the 75-day notice period required for a motion for summary judgment under *Code Civ. Proc. § 437c(a)* by issuing a general order providing for an expedited summary judgment on 60 days' notice. *Boyle v.*

CertainTeed Corp. (2006) 137 Cal. App. 4th 645, 653-655, 40 Cal. Rptr. 3d 501

When increasing the 75 days' notice required for a summary judgment motion by two court days for overnight delivery, the two court days are added on at the end of the 75-day period. *Barefield v. Washington Mutual Bank (2006) 136 Cal. App. 4th 299, 303, 38 Cal. Rptr. 3d 858*

A court cannot shorten the 75-day notice requirement for summary judgment motion under *Code Civ. Proc. § 437c(a),* but the statute does give the court the authority to shorten the 60-day period after the opposing party's general appearance to file the motion, and to shorten the 30-day period before the trial date for hearing on the motion. *McMahon v. Superior Court (2003) 106 Cal. App. 4th 112, 115-118, 130 Cal. Rptr. 2d 407*

[22B] Setting Aside Summary Judgment

The court may not set aside summary judgment under the authority of the mandatory portion of *Code Civ. Proc. § 473(b),* which requires that the court set aside a default if the attorney files an affidavit stating the default was the result of the attorney's mistake, inadvertence, surprise or neglect; mandatory provision of *Code Civ. Proc. § 473(b)* only empowers a court to set aside a default judgment or a dismissal and not a summary judgment. Prieto v. Loyola Marymount University *(2005) 132 Cal. App. 4th 290, 295, 33 Cal. Rptr. 3d 639*

[23] Speaking Motion to Dismiss or Strike Superseded

Nonstatutory "speaking motion," based on trial court's inherent right to strike or dismiss a complaint made to appear by extraneous evidence as sham or based on false allegations, as wholly superseded by summary judgment procedure under *Code Civ. Proc. § 437c*. *Vesely v. Sager (1971) 5 Cal. 3d 153, 167-168, 95 Cal. Rptr. 623, 486 P.2d 151* , disapproved on other grounds, *Strang v. Cabrol (1984) 37 Cal. 3d 720, 724, 209 Cal. Rptr. 347, 691 P.2d 1013*

[23A] Separate Statement of Material Facts

Trial court did not abuse its discretion by declining to reject defendant's summary judgment motion based on absence of headings within separate statement of material facts on ground that separate statement of material facts did not separately identify each cause of action, claim, issue of duty, or affirmative defense, and each supporting material fact claimed to be without dispute with respect to the cause of action, claim, issue of duty, or affirmative defense, where defendant used format contained in *Cal. Rules of Ct., Rule 3.1350(h)* and requirement for separately identified issues was required only for supporting and opposing separate statements in a motion for summary adjudication and defendant's motion sought summary judgment, rather than summary adjudication of subissue. Even if some additional headings had been required, court's power to deny summary judgment on basis of failure to comply with *Cal. Rules of Ct., Rule 3.1350* was discretionary, not mandatory, and facts critical to ruling were adequately identified, and plaintiffs did not explain how any alleged deficiency in defendant's separate statement of material facts impaired their ability to marshal evidence to show that material facts were in dispute as to proper application of statute of limitations. *Truong v. Glasser (2009) 181 Cal. App. 4th 102, 118, 103 Cal. Rptr. 3d 811*

[24] Sufficiency of Pleadings

Purpose of summary procedure as not being to test sufficiency of pleadings, but to determine if triable issues raised by them are real or merely the product of adept pleading. *Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 595-597, 125 Cal. Rptr. 557, 542 P.2d 981* ; *Coyne v. Krempels (1950) 36 Cal. 2d 257, 262, 223 P.2d 244*

Defendant's motion for summary judgment as necessarily including test of sufficiency of complaint; when motion is used to test whether complaint states cause of action, court as applying rule applicable to demurrers and accepting allegations of complaint as true. *Valdez v. City of Los Angeles (1991) 231 Cal. App. 3d 1043, 1055, 282 Cal. Rptr. 726*

Motion by defendant for summary judgment as necessarily including test of sufficiency of pleadings; when pure issue of law is raised, motion aseffectively one for judgment on pleadings. *Taylor v. California State Auto Assn. Inter-Ins. Bureau (1987) 194 Cal. App. 3d 1214, 1223, 240 Cal. Rptr. 107*

[25] Summary Adjudication

Ruling that denies or grants summary adjudication is subject to independent review by appellate court; such order resolves pure question of law: whether there is any triable issue as to any material fact and, if not, whether moving party is entitled to adjudication in his or her favor as matter of law. *Certain Underwriters at Lloyd's of London v. Superior Court (2001) 24 Cal. 4th 945, 972, 103 Cal. Rptr. 2d 672* (appellate court judgment directing trial court to vacate its order denying insurers' motion for summary adjudication on issue of duty to indemnify and make new order granting summary adjudication for insurers affirmed)

Summary adjudication in malicious prosecution action was improper under *Code Civ. Proc. § 437c(f)* where defendant sought summary adjudication of the issue of whether it had probable cause to bring one of two claims in the underlying lawsuit. Although there were two causes of action in the underlying lawsuit, the malicious prosecution action involved only one "primary right" for purposes of summary adjudication. *Hindin v. Rust (2004) 118 Cal. App. 4th 1247, 1258, 13 Cal. Rptr. 3d 668* (appellate court reversed trial court's order of summary adjudication of malicious prosecution action as to one of two causes of action in underlying lawsuit).

Summary adjudication motion is subject to same rules and procedures as summary judgment motion, and both are reviewed de novo; specifically, appellate court independently reviews order granting summary adjudication of insurer's duty to defend and resulting judgment; interpretation of insurance policy as applied to undisputed facts is question of law for appellate court, which is not bound by trial court's construction. *Lomes v. Hartford Financial Services Group, Inc. (2001) 88 Cal. App. 4th 127, 131, 105 Cal. Rptr. 2d 471* (order granting plaintiff summary adjudication of declaratory relief claim regarding defendant insurer's duty to defend reversed and remanded for entry of judgment for insurer)

Insurer's motion for summary adjudication of issue of punitive damages was not procedurally defective due to failure to repeat citations to record in support of its motion in its memorandum of points and authorities, where insurer submitted comprehensive statement of undisputed material facts, which separately identified punitive damages claim and each supporting material fact claimed to be without dispute with respect to that claim, and separate statement of undisputed material facts specifically identified evidence in support of each undisputed fact with appropriate citation to record; if, in fact, trial court viewed evidence submitted by insured in opposition to motion for summary adjudication with clear-and-convincing standard in mind, it did so properly; if plaintiff is going to prevail on punitive damage claim, he or she can only do so by establishing malice, oppression or fraud by clear and convincing evidence, and thus, any evidence submitted in response to motion for summary adjudication must necessarily meet that standard. *Basich v. Allstate Ins. Co. (2001) 87 Cal. App. 4th 1112, 1118-1121, 105 Cal. Rptr. 2d 153* (order granting insurer's motion for summary adjudication of issues concerning punitive damages affirmed, judgment of nonsuit reversed and remanded on other grounds)

Summary adjudication motion is subject to same rules and procedures as summary judgment motion and both are reviewed de novo; summary adjudication is properly granted when evidence in support of moving party establishes that there is no issue of fact to be tried as to particular cause of action, affirmative defense, claim for damages or issue of duty; aim of procedure is to discover whether parties possess evidence requiring weighing procedures of trial; for

plaintiff or cross-complainant to prevail, such party must show there is no material factual dispute with respect to one or more causes of action; trial court must decide if triable issue of fact exists--if none does, and sole remaining issue is one of law, it is trial court's duty to determine issue of law. *6 Angels, Inc. v. Stuart-Wright Mortgage, Inc. (2001) 85 Cal. App. 4th 1279, 1283, 102 Cal. Rptr. 2d 711* (summary adjudication for plaintiff affirmed)

Code Civ. Proc. § 437c(f) does not allow piecemeal adjudication of claim for punitive damages; basic concept of summary adjudication is meant to dispose of entire substantive area; summary adjudication is not properly granted as a piecemeal disposition of some of asserted facts within claim for punitive damages, but may only be granted when entire claim for punitive damages is eliminated; court, however, did not decide if summary adjudication must eliminate all claims for punitive damages in one action when there are separate and distinct claims for punitive damages, having nothing to do with one another, yet contained within one complaint. *Catalano v. Superior Court (2000) 82 Cal. App. 4th 91, 92, 95, 97-98* & n.5, *97 Cal. Rptr. 2d 842* (partial granting of summary adjudication for cross-defendants overturned on writ of mandate)

Summary adjudication of affirmative defense is properly granted when there is no triable issue of material fact as to defense and moving party is entitled to judgment as matter of law; moving party plaintiff had to show there was no evidence to support defendant's unclean hands affirmative defense; once plaintiff met this burden, burden shifted to defendant to set forth specific facts showing triable issue of material fact existed as to defense; on review, appellate court independently assesses correctness of trial court's ruling applying same legal standards as trial court; appellate court construes moving plaintiff's papers strictly and defendant's liberally and resolves any doubt as to propriety of granting motion in favor of defendant. *Kendall-Jackson Winery, Ltd. v. Superior Court (1999) 76 Cal. App. 4th 970, 977-978, 90 Cal. Rptr. 2d 743* (summary judgment in plaintiff's favor overturned on writ of mandate)

Grant of summary adjudication is reviewed de novo; appellate review guided by *Code Civ. Proc. § 437c* which provides in *Code Civ. Proc. § 437c(b)* and *(f)* that a motion for summary adjudication of a cause of action may only be granted when, considering all the evidence set forth in papers and inferences reasonably deducible therefrom, it has been demonstrated that there is no triable issue as to any material fact as to that cause of action; appellate court first looks to pleadings and decides whether defendant has presented facts to negate essential element of, or to establish a defense to, each cause of action sought to be adjudicated; if so, appellate court then determines whether plaintiff has demonstrated existence of triable, material issue offact. *Casey v. Overhead Door Corp. (1999) 74 Cal. App. 4th 112, 118, 87 Cal. Rptr. 2d 603* (summary adjudication for defendant affirmed but judgment for defendant after nonsuit reversed concerning dismissal of cross complaint for indemnity)

Summary adjudication properly granted when there is no triable issue of material fact as to cause of action and moving party is entitled to judgment as matter of law; defendant entitled to summary adjudication when it shows one or more elements of plaintiff's cause of action cannot be established. *Barnes v. Black (1999) 71 Cal. App. 4th 1473, 1477, 84 Cal. Rptr. 2d 634* (summary adjudication for defendant reversed)

Oral argument required on summary adjudication motions. *Gwartz v. Superior Court (1999) 71 Cal. App. 4th 480, 482, 83 Cal. Rptr. 2d 865* (following *Mediterranean Construction Co. v State Farm Fire & Casualty Co. (1998) 66 Cal. App. 4th 257, 265, 77 Cal. Rptr. 2d 781* ; writ of mandate issued commanding trial court to vacate order denying defendants' motion for summary adjudication and to hear and decide motion)

To establish entitlement to summary adjudication, moving party must establish that cause of action is without merit by negating essential element or by establishing complete defense; motion for summary adjudication proceeds in all respects as motion for summary judgment. *Toigo v. Town of Ross (1998) 70 Cal. App. 4th 309, 324, 82 Cal. Rptr. 2d 649* (summary adjudication for defendants affirmed)

Defendant is entitled to summary adjudication if defendant meets burden of showing cause of action is meritless because one or more elements of cause of action cannot be established; once defendant has met burden, burden shifts to

plaintiff to show that triable issue of material fact actually exists about cause of action; on motion for summary adjudication, defendant may rely on plaintiff's factually inadequate discovery answers to seek summary adjudication of particular cause of action; if plaintiff fails to adduce evidence during discovery to support factual allegations of complaint, burden shifts to plaintiff and motion may be granted if plaintiff does not set forth specific facts to show a triable issue of material fact; defendant is entitled to summary adjudication if record establishes plaintiff's cause of action cannot succeed as matter of law. *Lazar v. Hertz Corp. (1999) 69 Cal. App. 4th 1494, 1506-1507* (summary adjudication for defendants affirmed)

Code Civ. Proc. § 437c(g) requires statement of triable issues of fact when court denies motion for summary judgment and statement of reasons when motion granted; subdivision, however, does not purport to apply to motions for summary adjudication (*but see Bernstein v. Consolidated American Ins. Co. (1995) 37 Cal. App. 4th 763, 774, 43 Cal. Rptr. 2d 817* , applying section to denial of summary adjudication). *Van Dyke v. S.K.I. Ltd. (1998) 67 Cal. App. 4th 1310, 1319 n.12, 79 Cal. Rptr. 2d 775* (summary judgment for defendants reversed with direction to hear motion for summary adjudication)

Summary judgment, not summary adjudication, is appropriate remedy when defendant establishes affirmative defense to all claims against defendant. *24 Hour Fitness, Inc. v. Superior Court (1998) 66 Cal. App. 4th 1199, 1216 n.12, 78 Cal. Rptr. 2d 533* (writ proceeding; trial court directed to vacate order denying summary judgment in defendants' favor and to grant summary judgment to all but one defendant)

On motion for summary adjudication under *Code Civ. Proc. § 437c(f)*, court may rule whether defendant owes or does not owe duty to plaintiff without regard for dispositive effect of that ruling on other issues in the litigation, except that ruling must completely dispose of issue of duty. *Linden Partners v. Wilshire Linden Associates (1998) 62 Cal. App. 4th 508, 519-522, 73 Cal. Rptr. 2d 708*

Law and motion judge had no authority under new statute to find no triable issues of fact remained with respect to delineated issues of fact without drawing legal conclusion from those facts that conclusively disposed of cause of action or issue of duty; moreover under former versions of Code *Civ. Proc. § 437c*, courts have held that when summary of issues granted by one judge and remaining issues are tried by different judge, second judge is bound by first judge's determination, and losing party may not seek relitigation of decided issues before second judge; assuming without deciding this is still law, however, this rule does not relieve appellant of his or her usual duty to raise issue at trial to preserve if for appeal. *Rooz v. Kimmel (1997) 55 Cal. App. 4th 573, 592-594, 64 Cal. Rptr. 2d 177*

On motion for summary adjudication trial court must decide if triable issue of fact exists; if none does, and sole remaining issue is one of law, it is trial court's duty to determine issue of law. *Federal Deposit Ins. Corp. v. Superior Court (1997) 54 Cal. App. 4th 337, 344-345, 62 Cal. Rptr. 2d 713*

When plaintiffs pleaded their case by combining causes of action, defendant remained entitled to present summary adjudication motions that disposed of allegations that would have formed single cause of action if properly pleaded. *Exxon Corp. v. Superior Court (1997) 51 Cal. App. 4th 1672, 1688 n.11, 60 Cal. Rptr. 2d 195*

Trial court must grant summary adjudication when moving party establishes right to entry of judgment as matter of law; summary judgment mandatory when no triable issue as to material fact exists and if documentation submitted on motion entitles moving party to judgment as matter of law; when defendants seek summary judgment, their supporting documentation must either establish complete defense to plaintiff's action or demonstrate absence of essential element of plaintiff's case; if defendants do so, and plaintiffs opposing documentation does not show either a triable issue of fact with respect to defense or that essential element exists, summary judgment should be granted; these principles apply to appellate court's review of summary judgment ruling, which is conducted de novo; for summary judgment to be granted, moving party must show that under no possible hypothesis within the reasonable purview of the complaint's allegations is there material fact that requires examination by trial. *Exxon Corp. v. Superior Court (1997) 51 Cal. App.*

4th 1672, 1679, 60 Cal. Rptr. 2d 195

Ordinarily, order granting summary adjudication is reviewable on appeal from judgment entered after trial; however, on appeal from order dismissing case for failure to diligently prosecute, there can be no review of earlier, nonappealable summary adjudication orders that would otherwise be reviewed on appeal from final judgment on merits. *Vernon v. Great Western Bank (1996) 51 Cal. App. 4th 1007, 1013-1015, 59 Cal. Rptr. 2d 350*

Appeal is proper when order granting summary adjudication as to one cause of action effectively disposes of entire case. *Belio v. Panorama Optics, Inc. (1995) 33 Cal. App. 4th 1096, 39 Cal. Rptr. 2d 737* ; *see California Ass'n of Psychology Providers v. Rank (1990) 51 Cal. 3d 1, 9, 270 Cal. Rptr. 796, 793 P.2d 2*

Abuse of discretion to grant summary adjudication of declaratory relief action that consisted of issues selected from other causes of action and that did not adjudicate the entirety of any cause of action. *Hood v. Superior Court (1995) 33 Cal. App. 4th 319, 324, 39 Cal. Rptr. 2d 296*

Review of order granting summary adjudication of issues as bound by rules applicable to review of summary judgments. *McDaniel v. Gile (1991) 230 Cal. App. 3d 363, 371, 281 Cal. Rptr. 242*

Matters summarily adjudicated as utilizing same procedural rules as summary judgment motions. *Starkman v. Mann Theatres Corp. (1991) 227 Cal. App. 3d 1491, 1495, 278 Cal. Rptr. 543*

Requirements of *Code Civ. Proc. § 437c(b)* and *(c)* regarding evidentiary objections as applicable to motions for summary adjudication under *Code Civ. Proc. § 437c(f)*. *Haskell v. Carli (1987) 195 Cal. App. 3d 124, 130, 240 Cal. Rptr. 439* (decided under prior law)

Summary adjudication as improperly granted when notice of motion was for summary judgment only. *Gonzales v. Superior Court (1987) 189 Cal. App. 3d 1542, 1546, 235 Cal. Rptr. 106* (decided under prior law)

Trial court as permitted to adjudicate only those issues specified by motion for summary adjudication. *Homestead Savings v. Superior Court (1986) 179 Cal. App. 3d 494, 498-499, 224 Cal. Rptr. 554* (decided under prior law)

Trial court judge subsequently assigned to action as precluded from reviewing issues already determined by summary adjudication. *Conway v. Bughouse, Inc. (1980) 105 Cal. App. 3d 194, 202-203, 164 Cal. Rptr. 585* (decided under prior law)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentAppellate ReviewGeneral OverviewCivil ProcedureSummary JudgmentBurdens of Production & ProofGeneral OverviewCivil ProcedureSummary JudgmentEvidenceCivil ProcedureSummary JudgmentHearingsGeneral OverviewCivil ProcedureSummary JudgmentMotions for Summary JudgmentGeneral OverviewCivil ProcedureSummary JudgmentPartial Summary JudgmentsCivil ProcedureSummary JudgmentStandardsGeneral OverviewCivil ProcedureSummary JudgmentTime LimitationsCivil ProcedureRemediesWritsCommon Law WritsMandamus

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 537 SUMMARY JUDGMENT
PART III. RESEARCH GUIDE

47-537 California Forms of Pleading and Practice--Annotated § 537.55

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§ 537.55 Law Reviews

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Legal Topics:

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Legal Topics:

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§§ 537.57[Reserved]

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PART IV. PROCEDURAL CHECKLIST

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§ 537.60 Moving Party

[1] Preliminary Determinations

☐ Evaluate sufficiency of the pleadings and determine whether alternatives to summary judgment or adjudication might be more appropriate, e.g.:

- ☐ Demurrer.
- ☐ Motion to strike all or part of a pleading.
- ☐ Motion for judgment on the pleadings.
- ☐ Motion for separate trial of special defenses.

☐ Determine whether any issue of law is susceptible of resolution on summary judgment.

☐ Evaluate discovery to date to determine whether further evidence is needed.

☐ Determine that no genuine issue of material fact remains disputed.

☐ Evaluate strategic advantages and disadvantages, chances of success, timing, and costs of moving for summary judgment.

☐ Attempt to obtain a stipulation of undisputed facts pertinent to the motion.

[2] Motion Procedure

☐ Papers to be prepared:

☐ Notice of motion and motion [FORMS: *§§ 537.70, 537.71*].*§ 537.72*

☐ Evidence in support of motion [FORM: *§ 537.72*]:

☐ Supporting affidavits or declarations [*see Code Civ. Proc. § 437c(b)(1)*; FORM: § *537.73*].

☐ Include all necessary facts for summary judgment or summary adjudication, stated as evidentiary facts, not ultimate facts or conclusions. Attach as exhibits copies of any additional documentary evidence or discovery.

☐ Include facts showing declarant's personal knowledge of and competency to testify to the evidentiary facts stated.

☐ Separate statement of undisputed material facts [*see Code Civ. Proc. § 437c(b)(1)*; FORMS: §§ *537.74, 537.75*].

☐ Request for judicial notice, if appropriate [for a form, *see, Ch. 321, § 321.60*]:

☐ Include a copy of the material. If it is part of the court's file, include a statement specifying the part of the file to be judicially noticed, and arrange with the clerk to have the file in the courtroom at the hearing [*Cal. Rules of Ct., Rule 3.1306(b)*].

☐ Include a copy of the material. If it is part of the court's file, include a statement specifying the part of the file to be judicially noticed, and arrange with the clerk to have the file in the courtroom at the hearing [*Cal. Rules of Ct., Rule 3.1306(c)*].

☐ Supporting memorandum.

☐ Proposed order, if required by local rule [FORMS: §§ 537.81, 637.84].

☐ Declaration or certificate re proof of service of moving papers [*see Code Civ. Proc. § 1013a*].

☐ Copies of papers to be prepared:

☐ Original to be filed with court.

☐ One office copy.

☐ One copy for service on each party who has appeared in case.

☐ Additional copies as required by local court rule.

☐ Service:

☐ Select hearing date for motion, allowing sufficient time for service. Hearing date must be no later than 30 days before date of trial, unless court for good cause orders otherwise [*Code Civ. Proc. § 437c(a)*]. Some courts require that the hearing date be cleared with the calendar or law and motion clerk.

☐ Attach declaration or certificate re proof of service to each copy of papers served.

☐ Do not serve notice and other papers until 60 days have elapsed since opposing party's general appearance, unless court issues order allowing earlier service [*see Code Civ. Proc. §§ 437c(a), 1005.5*].

☐ Serve copies of notice of motion and supporting papers at least 75calendar days before scheduled hearing, unless otherwise ordered [*Code Civ. Proc. § 437c(a)*];

☐ Service may be by regular mail [*Code Civ. Proc. §§ 1012, 1013(a), (b)*], Express Mail [*Code Civ. Proc. § 1013(c), (d)*], by delivery in person or substituted personal service [*Code Civ. Proc. § 1011*], or in some instances by Fax [*Code Civ. Proc. §§ 1010.5, 1012.5, 1013(e), (f)*; *Cal. Rules of Ct., Rule 2.304(b)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. or electronic service [*see Code Civ. Proc. § 1010.6(a)(6)*].

☐ The 75-day notice period is increased when service is mail, by five days if address is within California, by 10 days if address is within U.S., or by 20 days if address is outside U.S. [*Code Civ. Proc. § 437c(a)*].

☐ The 75-day notice period is increased by two court days when service is by Fax, express mail, or overnight delivery [*Code Civ. Proc. § 437c(a)*] or electronic service [*see Code Civ. Proc. § 1010.6(a)(6)*].

☐ Filing:

☐ Submit original of notice of motion and supporting papers to court clerk for filing.

☐ File notice of motion and supporting papers at least 16 court days before hearing, unless otherwise ordered [*Code Civ. Proc. § 1005(b)*].

☐ Submit office copy to clerk to be stamped together with the original. Office copy may thus serve as check on the contents of the papers, if any filed originals are lost; it may also provide ready resolution of any dispute over the file date.

☐ Pay motion filing fee [*see Gov. Code § 26830*].

☐ File proof of service of the moving papers no later than five calendar days before the hearing date [*see Cal. Rules of Ct., Rule 3.1300(c)*].

☐ Reply papers:

☐ If opposition papers are served and filed, moving party determines whether to submit reply papers, e.g.:

☐ Reply memorandum and,

☐ If appropriate, supplemental evidence and statement of material facts.

☐ If reply is desirable, prepare reply papers in as many copies as original papers.

☐ Include any objections to opposing papers or opposing party's evidence.

☐ File original papers directly with clerk of appropriate department at least five days before hearing date [*Code Civ. Proc. § 437c(b)(4)*]. Have office copy stamped together with original to serve as check of contents and file date.

☐ Reply papers must be served by personal delivery, facsimile transmission, express mail or other means reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers are filed [*Code Civ. Proc. §§ 437c(b)(4), 1005(c)*].

Legal Topics:

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

Civil ProcedureSummary JudgmentBurdens of Production & ProofMovantsCivil ProcedureSummary JudgmentNoticesCivil ProcedureSummary JudgmentStandardsGeneral OverviewCivil ProcedureSummary JudgmentSupporting MaterialsGeneral OverviewCivil ProcedureSummary JudgmentTime Limitations

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 537 SUMMARY JUDGMENT
PART IV. PROCEDURAL CHECKLIST

47-537 California Forms of Pleading and Practice--Annotated § 537.61

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§ 537.61 Opposing Party

[1] Preliminary Determinations

☐ Evaluate moving papers to determine whether it may be desirable to submit opposing papers, e.g., opposing memoranda of points and authorities and opposing declarations or other evidence.

☐ Determine whether moving papers were timely filed and served.

☐ Check sufficiency of supporting papers, e.g., statement of material facts, as possible ground for continuance.

☐ Determine whether any material fact is in dispute.

☐ Evaluate whether further discovery is needed to oppose motion; if so, consider request for continuance.

[2] Opposition Procedure

☐ If opposition is not desirable, consider serving and filing a Notice of Nonopposition. This may be required in some local courts.

☐ If opposition is desirable, prepare opposing papers in as many copies as original papers.

☐ Opposing memorandum.

☐ Include any objections to moving papers or moving party's evidence [*see § 537.25[4]*; Forms: §§ 537.86, 537.87].

☐ Separate statement of disputed and undisputed material facts [*Code Civ. Proc. § 437c(b)(3)*; FORMS: *§§ 537.77, 537.78*].

☐ Evidence in opposition to motion, if appropriate [FORM: *§ 537.79*]:

☐ Declarations or other evidence [*see § 537.60[2]* and FORM: *§ 537.76*].

☐ Request for judicial notice, if notice is to be requested [for a form, see Ch. 321, *Judicial Notice*].

☐ Include a copy of the material. If it is part of the court's file, include a statement specifying the part of the file to be judicially noticed, and arrange with the clerk to have the file in the courtroom at the hearing [*Cal. Rules of Ct., Rule 3.1306(c)*].

☐ File original papers directly with clerk of appropriate department not less than 14 days before scheduled or continued hearing date [*Code Civ. Proc. § 437c(b)(2)*]. Have office copy stamped together with original to serve as check of contents and file date.

☐ Serve copies not less than 14 days before scheduled or continued hearing date [*Code Civ. Proc. § 437c(b)(2)*]. Opposition papers must be served by personal delivery, facsimile transmission, express mail or other means reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers are filed. [*Code Civ. Proc. §§ 437c(b)(2), (6), 1005(c)*].

☐ Evaluate reply papers, if any, for timeliness, sufficiency, etc. Prepare to argue in rebuttal to any points raised in reply.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentOppositionGeneral OverviewCivil ProcedureSummary JudgmentOppositionMemoranda in OppositionCivil ProcedureSummary JudgmentOppositionMotions for Additional DiscoveryCivil ProcedureSummary JudgmentOppositionSupporting MaterialsCivil ProcedureSummary JudgmentTime Limitations

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Chapter 537 SUMMARY JUDGMENT
PART IV. PROCEDURAL CHECKLIST

47-537 California Forms of Pleading and Practice--Annotated § 537.62

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§ 537.62 Hearing on Motion

☐ If a party desires to submit motion without an appearance, prepare, serve, and file a notice of nonappearance in same number of copies as notice of motion [*see Cal. Rules of Ct., Rule 3.1304(c)*].

☐ If possible, obtain any tentative ruling [*see Cal. Rules of Ct., Rule 3.1308*],

☐ Consult local rules for procedure, if any, for appearing at hearing and stipulating to or contesting the tentative ruling.

☐ If a party desires to appear by telephone, arrange for telephone appearance [*see Code Civ. Proc. § 367.5*; Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.1 *see also Cal. Rules of Ct., Rule 3.670*].

☐ If appropriate, attend hearing.

☐ After the ruling:

☐ Unless the parties waive notice or court orders otherwise, the prevailing party must mail or deliver the proposed order to the other party for approval as conforming to the court's order [*Cal. Rules of Ct., Rule 3.1312(a)*].

☐ Within five days after the mailing or delivery of proposed order, the other party must notify prevailing party as to whether the proposed order is approved, stating any reasons for disapproval. Failure to provide timely notification to the prevailing party constitutes approval. *Code Civ. Proc. § 1013*, extending time requirements when service is by mail, does not apply [*Cal. Rules of Ct., Rule 3.1312(a)*].

☐ On expiration of the 5-day approval period, the prevailing party must "promptly" transmit the proposed order to the court, together with a summary of any responses of other parties or a statement that no responses were received [*Cal. Rules of Ct., Rule 3.1312(b)*]. Any other party may prepare and submit a proposed order if the prevailing party fails to do so as required by *Cal. Rules of Ct., Rule 3.1312(a)* and *(b)* [*Cal. Rules of Ct., Rule 3.1312(c)*].

☐ After the order is signed, unless court orders otherwise, request conformed copies of original order, and serve these copies, with proof of service, on all parties or their attorneys, unless each party has waived such notice of order and waiver was noted in court's minutes [*see Code Civ. Proc. § 1019.5(a)*].

☐ File proof of service of notice.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSummary JudgmentHearingsGeneral Overview

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47-537 California Forms of Pleading and Practice--Annotated §§ 537.63-537.69

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[Reserved]

§§ 537.63[Reserved]

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47-537 California Forms of Pleading and Practice--Annotated § 537.70

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§ 537.70 Notice of Motion and Motion for Summary Judgment [Code Civ. Proc. § 437c]

[1] FORM Notice of Motion and Motion for Summary Judgment [Code Civ. Proc. § 437c]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION BY
vs.	)	_____ [*name*] FOR
_____ [*name*],	)	_____ [SUMMARY JUDGMENT
Defendant.	)	*or* SUMMARY JUDGMENT OR ALTERNAT-
	)	IVELY, FOR SUMMARY ADJUDICATION][, SEP-
	)	ARATE STATMENT OF UNDISPUTED FACTS,
	)	SUPPORTING MEMORANDUM (AND) SUP-
	)	PORTING EVIDENCE (AND REQUEST FOR JU-
		DICIAL NOTICE)]
		Date: _____
		Time: _____
		Location: _____

Judge: _____
Date Action Filed: _____
Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* plaintiff] will, and hereby does, move for an order that judgment be entered in favor of _____ [*specify moving party, e.g.,* plaintiff] and against _____ [*specify opposing party, e.g.,* defendant _____ (*name*)] as prayed for in _____ [*specify pleading, e.g.,* plaintiff's First Amended Complaint]. The motion is made on the grounds that _____ [there is no defense to the action *or* the action has no merit], there is no triable issue of material fact and _____ [*specify moving party, e.g.,* plaintiff] is entitled to judgment as a matter of law. [In the alternative, _____ (*specify moving party, e.g.,* plaintiff) will, and hereby does, move for an order granting summary adjudication in favor of _____ (*specify moving party, e.g.,* plaintiff) and against _____ (*specify opposing party, e.g.,* defendant _____ (*name*)) as to _____ (*specifically state cause of action, affirmative defense, claim for punitive damages, or issue of duty, e.g.,* plaintiff's First Cause of Action and defendant's First and Second Affirmative Defenses to the First Cause of Action). The alternative motion is made on the grounds that _____ (*specify, e.g.,* as to plaintiff's First Cause of Action, there is no defense thereto; as to defendant's First and Second Affirmative Defenses to the First Cause of Action of the Complaint, there is no merit).]

The motion [and alternative motion] is/are based on this notice of motion, the attached declaration(s) of _____ [*name(s)*], [the affidavit(s) of _____ (*name(s)*),] [the admission(s) of _____ (*name(s)*),] [the deposition(s) of _____ (*name(s)*),] [the answers to interrogatories by _____ (*name(s)*),] [the attached request for judicial notice], the attached separate statement of undisputed material facts, the attached supporting memorandum the papers, records, and file herein, and such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The notice of motion and motion in [1], *above*, is for use by a party to give notice and move for summary judgment [*Code Civ. Proc. § 437c(a)*]. The form includes optional language for use to move in the alternative for summary adjudication of one or more causes of action within an action, an affirmative defense, a claim for punitive damages, or the issue of whether one or more defendants owed a duty to one or more plaintiffs [*Code Civ. Proc. § 437c(f)(1)*].

[3] Summary Adjudication

A party moving for and giving notice of a motion for summary judgment should consider whether summary adjudication of some part of the action would be desirable if the summary judgment motion is denied. The court may grant such alternative relief only when it has been specifically sought by the moving party [*Code Civ. Proc. § 437c(f)*; *see Motevalli v. Los Angeles Unified Sch. Dist.(2004) 122 Cal. App. 4th 97, 114, 18 Cal. Rptr. 3d 562* ; *Gonzales v. Superior Court (1987) 189 Cal. App. 3d 1542, 1545-1546, 235 Cal. Rptr. 106* (decided under former *Code Civ. Proc. § 437c(f)*)].

Summary adjudication may be requested in the alternative with respect to one or more causes of action within an action, an affirmative defense, a claim for punitive damages, or the issue of whether one or more defendants owed a duty to one or more plaintiffs [*Code Civ. Proc. § 437c(f)*]. For further discussion and a form of notice ofmotion for summary adjudication alone, see *§ 537.71*.

[4] Caption

The title of the paper in the caption includes an optional phrase to be included if the motion seeks summary adjudication in the alternative to summary judgment.

If other documents are attached to the notice of motion and motion, the title in the caption must list the nature or title of all of the attached papers [*see Cal. Rules of Ct., Rule 3.1110(b)*]. Thus, the caption also includes optional language to use if other papers that must accompany the motion are combined in the same document [*see* § [5][a], *below*]. If the supporting evidence exceeds 25 pages, it must be separately bound [*see Cal. Rules of Ct., Rule 3.1350(g)* (documents supporting motion)].

[5] Supporting Papers

[a] Papers Required

Except as provided in Code Civ. Proc. § 537c(r) and *Cal. Rules of Ct., Rule 3.1351*, the papers required on a motion for summary judgment or summary adjudication, or both, are as follows [*Cal. Rules of Ct., Rule 3.1350(c)*]:

- Separate statement of undisputed material fact [for forms, *see §§ 537.74* and *537.75*].
- Memorandum in support of the the motion [for forms, *see* California Points and Authorities, Ch. 221, *Summary Judgments* (Matthew Bender)].
- Evidence in support of the motion [for a form, *see § 537.72*].
- Request for judicial notice, if appropriate [for forms, *see* Ch. 321, *Judicial Notice*].

[b] Statement of Undisputed Material Facts

The supporting papers must include a separate statement setting forth plainly and concisely all material facts which the moving party contends are undisputed, with a reference following each fact to the supporting evidence [*Code Civ. Proc. § 437c(b)(1)*]. For further discussion and a form of statement of undisputed fact, see *§ 537.21[3]* and *§§ 537.74* and *537.75*.

[c] Evidence in Support of Motion

In addition to the memorandum, the notice of motion and motion must be accompanied by and based on supporting evidence in the form of declarations, affidavits, admissions, depositions, answers to interrogatories or matters subject to judicial notice [*Code Civ. Proc. § 437c(b)(1)*; *see Code Civ. Proc. § 1005(b)*]. For a form of supporting declaration, see

§ 537.73. For a form of cover sheet for the evidence, see *§ 537.72*.

For further discussion as to evidentiary requirements in general, see *§ 537.24[1][a] et seq., and § 537.25[3]*.

[d] Judicial Notice

If judicial notice is sought of any matter under *Evid. Code § 452*, a separate request for judicial notice in support of the motion must be included in the moving papers [*Cal. Rules of Ct., Rule 3.1350(c)*; *see Cal. Rules of Ct., Rule 3.1113(l)*]. Copies of any matter subject to judicial notice under *Evid. Code § 452* must accompany the notice of motion and motion, unless the matter is part of a file in the court in which the motion will be heard. In the latter instance, the moving party should attach a writing specifying the part of the court file sought to be judicially noticed, and arrange with the clerk to have the file in the courtroom when the motion is heard [*Cal. Rules of Ct., Rule 3.1306(c)*; *see Evid. Code § 453(b)(1)*].

Any incorporation by reference of matter in the court's file must set forth with specificity the exact matter to which reference is being made and may not incorporate the entire file [*Code Civ. Proc. § 437c(b)(7)*].

For discussion and forms of request for judicial notice, see Ch. 321, *Judicial Notice* .

[6] Filing and Service of Notice

A motion for summary judgment may be made, i.e., filed [*see Code Civ. Proc. § 1005.5*], at any time after 60 days have elapsed since the general appearance in the action or proceeding of each party against whom the motion is directed, or at such earlier time after such general appearance as the court, with or without notice and on good cause shown, may direct [*Code Civ. Proc. § 437c(a)*]. For further discussion, see *§ 537.23*.

The notice and motion and supporting papers must be served on all other parties to the action at least 75 days before the appointed hearing date, which must be no later than 30 days before the date of trial, unless the court for good cause orders otherwise. When service is by mail, the 75-day notice period is increased by five days if the place of address is within California, 10 days if outside California but within the United States, or 20 days if outside the United States. If service is by facsimile transmission, Express Mail, or other overnight delivery, the 75-day period is extended by two days [*Code Civ. Proc. § 437c(a)*]. For further discussion, see *§ 537.22*.

For discussion and forms relating to manner and proof of service, see Ch. 518, *Service of Summons and Papers* .

Different time requirements apply if the underlying action is for unlawful detainer or forcible entry, or for consumer-class relief under *Civ. Code § 1781(a)* [*see Code Civ. Proc. §§ 437c(q), (r), 1170.7*; *Civ. Code § 1781(c)*]. For further discussion see *§ 537.18[1]*.

[7] Time for Filing Responsive Pleading Not Affected

Filing of the notice of motion and motion does not extend the time within which a party must otherwise file a responsive pleading [*Code Civ. Proc. § 437c(a)*].

[8] Cross References

For forms and discussion relating to motions for summary judgment in particular actions or proceedings, see specific chapters and the General Index in this set

For further discussion and forms relating to noticed motions in general, see Ch. 372, *Motions and Orders* .

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47-537 California Forms of Pleading and Practice--Annotated § 537.71

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§ 537.71 Notice of Motion and Motion for Summary Adjudication of Cause of Action, Defense, Claim for Punitive Damages, or Issue of Duty [Code Civ. Proc. § 437c(f)]

[1] FORM Notice of Motion and Motion for Summary Adjudication of Cause of Action, Defense, Claim for Punitive Damages, or Issue of Duty [Code Civ. Proc. § 437c(f)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION BY
vs.	)	_____ [*name*] FOR SUMMARY
_____ [*name*],	)	ADJUDICATION[, SEPARATE STATMENT OF
Defendant.	)	UNDISPUTED FACTS, SUPPORTING MEMOR-
	)	ANDUM (AND) SUPPORTING EVIDENCE (AND
	)	REQUEST FOR JUDICIAL NOTICE)]
	)	Date: _____
	)	Time: _____
		Location: _____
		Judge: _____

Date Action Filed: _____
Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant] _____ [*name*] will, and hereby does, move for an order granting summary adjudication in favor of _____ [*specify moving party, e.g.,* defendant] and against _____ [*specify opposing party, e.g.,* plaintiff _____ (*name*)] with respect to _____ [*specifically state cause or causes of action, affirmative defense, claim for punitive damages, or issue of whether one or more defendants owed a duty to one or more plaintiffs, e.g.,* the First and Fifth Causes of Action of plaintiff's First Amended Complaint, the claim for punitive damages set out in the Second Cause of Action of plaintiff's FirstAmended Complaint]. The motion is made on the grounds that _____ [*specify, e.g.,* there is no merit to the First and Fifth Causes of Action of plaintiff's First Amended Complaint and no merit to the claim for punitive damages set out in the Second Cause of Action of plaintiff's First Amended Complaint.]

The motion is based on this notice of motion, the attached declaration(s) of _____ [*name(s)*], [the affidavit(s) of _____ (*name(s)*),] [the admission(s) of _____ (*name(s)*),] [the deposition(s) of _____ (*name(s)*),] [the answers to interrogatories by _____ (*name(s)*),] [the attached request for judicial notice], the attached separate statement of undisputed material facts, the attached supporting memorandum, the papers, records, and file herein, and such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The notice of motion and motion in [1], *above*, is for use by a party to move for summary adjudication with respect to one or more causes of action within an action, an affirmative defense, a claim for punitive damages, or the issue of whether one or more defendants owed a duty to one or more plaintiffs [*Code Civ. Proc. § 437c(f)(1)*]. A motion may be made by itself or as an alternative to a motion for summary judgment [*Code Civ. Proc. § 437c(f)*]. For a form of notice of motion and motion for summary adjudication as an alternative to summary judgment, see *§ 537.70*.

[3] Required Supporting Papers; Service Requirements

For discussion of required supporting papers and of service and filing requirements, see *§ 537.70[5]* et seq.

[4] Summary Adjudication

If any party contends that one or more causes of action within an action has no merit or that there is no defense thereto or that there is no merit to an affirmative defense as to any cause of action, or both, or that there is no merit to a claim

for damages under *Civ. Code § 3294* (that is, a claim for punitive damages), or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs, then he or she may move for summary adjudication as to that cause or causes of action, that affirmative defense, that claim for damages, or that issue of duty [*Code Civ. Proc. § 437c(f)(1)*].

For discussion of availability of summary adjudication, see *§ 537.17[1]*.

A motion for summary adjudication proceeds in all procedural respects as a motion for summary judgment [*Code Civ. Proc. § 437c(f)(2)*]. For discussion of that procedure, see *§ 537.20* et seq.

A number of trial courts have adapted recommendations and requirements regarding motions for summary adjudication. Local rules should therefore be consulted in all cases.

[5] Proposed Order

In addition to the usual supporting papers, local rules may require or recommend that any motion for summary adjudication be accompanied by a proposed order [*see, e.g.,* San Francisco Uniform Local Ct. Rules, Rule 8.11]. For further discussion and a form of such order, see *§ 537.84*.

[6] Cross References

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, §§ 229, 230, 239-249 (4th ed. 1997)

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47-537 California Forms of Pleading and Practice--Annotated § 537.72

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§ 537.72 Evidence Supporting Motion for Summary Judgment or Adjudication--Cover [Cal. Rules of Ct., Rule 3.1350(c)(4), (g)]

[1] FORM Evidence Supporting Motion for Summary Judgment or Adjudication--Cover [Cal. Rules of Ct., Rule 3.1350(c)(4), (g)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	EVIDENCE IN SUPPORT OF
vs.	)	_____ [*moving party's*] MOTION
_____ [*name*],	)	FOR _____ [SUMMARY JUDG-
Defendant.	)	MENT *or* SUMMARY ADJUDICATION *or* SUM-
	)	MARY JUDGMENT OR IN THE ALTERNATIVE
	)	SUMMARY ADJUDICATION]
	)	Date: _____
	)	Time: _____
		Location: _____
		Judge: _____

Date Action Filed: _____
Trial Date: _____

_____

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[*List contents*]

[2] Use of Form

The form in [1], *above*, may be used as the cover sheet for the evidence in support of a motion for summary judgment or summary adjudication [*see Cal. Rules of Ct., Rule 3.1350(c)(4), (g)*].

If the supporting evidence execceds 25 pages, the evidence must be separately bound and must include a table of contents [*see Cal. Rules of Ct., Rule 3.1350(g)*].

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47-537 California Forms of Pleading and Practice--Annotated § 537.73

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§ 537.73 Declaration in Support of Motion for Summary Judgment or Summary Adjudication [Code Civ. Proc. § 437c]

[1] FORM Declaration in Support of Motion for Summary Judgment or Summary Adjudication [Code Civ. Proc. § 437c]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	DECLARATION OF _____
_____ [*name*],	)	[*name*] IN SUPPORT OF MOTION FOR SUM-
Plaintiff,	)	MARY _____ [JUDGMENT *or*
vs.	)	ADJUDICATION *or*
_____ [*name*],	)	JUDGMENT OR SUMMARY ADJUDICATION]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____

Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* the plaintiff in the above-entitled action *or other statement as appropriate*].

2. _____ [*Here and in subsequent paragraphs state evidentiary facts with particularity, to establish in whole or in part each element necessary to support an order for summary judgment and/or summary adjudication, as desired*].

3. _____ [*Here state evidentiary facts with particularity, to establish that the declarant has personal knowledge of the foregoing facts and is competent to testify to such facts under oath*].

[4. I have personal knowledge of the foregoing facts, and if called as a witness can and will competently testify to them under oath.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form of declaration in [1], *above*, is for use to support a notice of motion and motion for summary judgment, summary adjudication, or summary judgment or adjudication in the alternative [*see Code Civ. Proc. §§ 437c(b)(1), (f), 2015.5*; for forms of notice of motion and motion, *see §§ 537.70* and *537.71*]. Evidence must be presented in support of the motion. In addition to presenting evidence by means of declarations, it may be presented by affidavits, answers to interrogatories, depositions, admissions, and matters subject to judicial notice [*Code Civ. Proc. § 437c(b)(1)*].

One of the required documents on a motion for summary judgment is the "Evidence in support of [*moving party's*] motion for summary judgment or summary adjudication or both" [*Cal. Rules Ct., Rule 3.1350(c)(4)*]. In that a declaration supporting the motion is evidence, the declaration should be included under the evidence cover sheet [for a form of cover sheet for the evidence, *see § 537.72*].

[3] Sufficiency Requirements

Declarations must be based on personal knowledge, set forth admissible evidence, and affirmatively show that the declarant is competent to testify to the facts stated [*Code Civ. Proc. § 437c(d)*]. They must state evidentiary facts; unsupported ultimate facts or conclusions are insufficient [*Guthrey v. State of California (1998) 63 Cal. App. 4th 1108, 1120, 75 Cal. Rptr. 2d 27* ; *Colby v. Schwartz (1978) 78 Cal. App. 3d 885, 889, 144 Cal. Rptr. 624]* . Evidentiary facts showing the declarant's personal knowledge and competency must be stated [*Roy Brothers Drilling Co. v. Jones (1981) 123 Cal. App. 3d 175, 181-182, 176 Cal. Rptr. 449* ; *Dixon v. Grace Lines, Inc. (1972) 27 Cal. App. 3d 278, 289, 103 Cal. Rptr. 595* ; *see Guthrey v. State of California (1998) 63 Cal. App. 4th 1108, 1120, 75 Cal. Rptr. 2d 27*]. The conclusion that the declarant has personal knowledge and is competent to testify need not be stated [*Roy Brothers Drilling Co. v. Jones (1981) 123 Cal. App. 3d 175, 182, 176 Cal. Rptr. 449*]. If desired, Optional

Paragraph 4 in the form provides such a statement. If, however, it appears from the declaration that it is unlikely the declarant has personal knowledge of the statements he or she avers to be true, the declaration may not be salvaged by a conclusionary statement that the declarant has personal knowledge of the statements. For further discussion, see *§ 537.24[1][a]* et seq.

[4] Incorporation of Documentary Evidence

Documentary evidence should be incorporated by reference into a declaration, and must otherwise conform to the rules of evidence [*Dugar v. Happy Tiger Records, Inc. (1974) 41 Cal. App. 3d 811, 815, 116 Cal. Rptr. 412* ; *Miller & Lux, Inc. v. Bank of America (1963) 212 Cal. App. 2d 719, 725, 28 Cal. Rptr. 401*]. Any incorporation by reference of matter in the court's file must set forth with specificity the exact matter to which reference is being made and may not incorporate the entire file [*Code Civ. Proc. § 437c(b)(7)*].

For further discussion, see *§ 537.24[1][d]*.

[5] Sanctions

If at any time the court determines that an affidavit (or declaration) has been presented in bad faith or solely for the purpose of delay, the court shall order the party presenting such affidavit to pay the other party the amount of reasonable expenses which the filing of the affidavit caused such other party to incur [*Code Civ. Proc. § 437c(j)*]. For further discussion, see *§ 537.38[1]*.

Sanctions will not be imposed under *Code Civ. Proc. § 437c(j)* except on notice contained in a party's papers, or on the court's own noticed motion, and after an opportunity to be heard [*Code Civ. Proc. § 437c(j)*]. The *form in § 537.80* may be used to provide the notice required for recovery of reasonable expenses under *Code Civ. Proc. § 437c(j)*. Alternatively, this form of declaration may be modified to incorporate such notice [*see Code Civ. Proc. § 437c(j)* (separate noticed motion not expressly required)].

[6] Cross References

For further discussion and forms concerning affidavits and declarations, see Ch. 15, *Affidavits, Certificates, and Declarations* .

[7] Text References

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, §§ 196, 200, 202-205, 208, 211, 213, 215, 218, 220, 221 (4th ed. 1997)

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 537 SUMMARY JUDGMENT
PART V. FORMS

47-537 California Forms of Pleading and Practice--Annotated § 537.74

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§ 537.74 Statement of Undisputed Material Facts Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c(b)(1); Cal. Rules of Ct., Rule 3.1350(c), (d), (h), (i)]

[1] FORM Statement of Undisputed Material Facts Supporting Motion for Summary Judgment [Code Civ. Proc. § 437c(b); Cal. Rules of Ct., Rule 3.1350(c), (d), (h), (i)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF _____'S [*moving party*] MOTION FOR SUMMARY _____ [JUDGMENT *or* JUDGMENT OR SUMMARY ADJUDICATION]
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____

Date Action Filed: _____
Trial Date: _____

_____

_____ [*Identify moving party, e.g.,* Plaintiff] _____ [*name*] in the above-entitled _____ [action *or* proceeding] submits the following undisputed material facts pursuant to *Code of Civil Procedure Section 437c(b)(1)* in support of plaintiff's motion for _____ [summary judgment *or* summary judgment or in the alternative summary adjudication with respect to _____ (*specifically state cause of action, affirmative defense, claim for damages, or issue of duty verbatim as stated in notice of motion*)].

[*If the motion involves more than one cause of action or affirmative defense, organize the material facts into sections accordingly, identifying the source of each section, e.g.:*]

I. As to the First Cause of Action, alleged in plaintiff's First Amended Complaint and denied by defendant's Amended Answer thereto:

Moving Party's Undisputed Material Facts and Supporting Evidence:	Opposing Party's Response and Supporting Evidence:
1. _____ [*Give reference to the evidence submitted in support of the motion which supports the contention that such fact is undisputed, e.g.,* Defendant Smith answer at 2:3-4. Jones declaration, 2:1-13; contract, Ex. A to Jones declaration.]	
2. Jones declaration, 3:1-15. Smith deposition, 31:4-14.	[2]
[3. *Set forth any additional material facts contended to be undisputed in this and succeeding numbered paragraphs*].	[3]

_____ [*signature*]
_____ [*name/title*]

[2] Use of Form

The form in [1], *above*, outlines the format for a statement of undisputed facts for use by a party moving for summary judgment. It must set forth these facts plainly and concisely, followed in each case by a clear reference to the evidence supporting the motion [*Code Civ. Proc. § 437c(b)(1)*; *Cal Rules of Ct., Rule 3.1350(c), (d), (h)*]. For a form to use if the motion is for summary adjudication, see *§ 537.75*.

The "separate statement" requirement of *Code Civ. Proc. § 437c(b)(1)* does not expressly require that the statement be prepared as a separate document or paper, as distinguished from a statement that is merely separate from and in addition to the supporting evidence. Nevertheless, one court of appeal has held that this requirement is not satisfied by a memorandum, and that the statement must be a totally discrete section separate and apart from the memorandum itself. Ideally, it should be in a separately bound or filed document not physically attached to the memorandum [*Blackman v. Burrows (1987) 193 Cal. App. 3d 889, 894-895, 238 Cal. Rptr. 642* ; *see also Cal. Rules of Ct., Rule 3.1350(c)*].

A simple notice of joinder in a motion for summary judgment is insufficient to satisfy the requirements of *Code Civ. Proc. § 437c(b)(1)*; each moving party must support their motion for summary judgment with a separate statement responding to each of the material facts contended by the moving party to be undisputed, and indicating whether the opposing party agrees or disagrees that those facts areundisputed [*Frazee v. Seely (2001) 95 Cal. App. 4th 627, 636, 115 Cal. Rptr. 2d 780*].

[3] Format of Papers

This form reflects the specific guidelines regarding the format of separate statements that are found in *Cal. Rules of Ct., Rule 3.1350(d), (h)*. The statement must separately identify each cause of action, claim, issue of duty or affirmative defense, and each supporting material fact claimed to be without dispute with respect to the cause of action, claim, issue of duty, or affirmative defense [*Cal. Rules of Ct., Rule 3.1350(d)*]. Effective January 1, 2008, *Cal. Rule of Ct., Rule 3.1350(d)* still requires a two-column format, but now requires the moving party to state in numerical sequence the undisputed material facts in the first column followed by the evidence that establishes those undisputed facts in that same column. Citation to the evidence in support of each fact must include reference to the exhibit, title, and page, and line numbers [*Cal. Rules of Ct., Rule 3.1350(d)*]. *Rule 3.1350(h)* provides an example of this format.

[4] Providing Electronic Version

A party must provide an electronic version of its separate statement to any other party or the court within 3 days of a request to do so [*Cal. Rules of Ct., Rule 3.1350(i)*]. The electronic version may be provided in any form on which the parties agree; however, if the parties are unable to agree on the form, the responding party must provide the electronic version of the separate statement that it used to prepare the document filed with the court. Pursuant to this rule, a party is not required to create an electronic version or any new version of any document for the purpose of transmission to the requesting party [*Cal. Rules of Ct., Rule 3.1350(i)*].

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PART V. FORMS

47-537 California Forms of Pleading and Practice--Annotated § 537.75

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§ 537.75 Statement of Undisputed Material Facts Supporting Motion for Summary Adjudication [Code Civ. Proc. § 437c(b)(1); Cal. Rules of Ct., Rule 3.1350(c), (d), (h), (i)]

[1] FORM Statement of Undisputed Material Facts Supporting Motion for Summary Adjudication [Code Civ. Proc. § 437c(b); Cal. Rules of Ct., Rule 3.1350(c), (d), (h), (i)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF _____'S [*moving party*] MOTION FOR SUMMARY ADJUDICATION
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

_____ [*Identify moving party, e.g.,* Plaintiff] _____ [*name*] in the above-entitled _____ [action *or* proceeding] submits the following undisputed material facts pursuant to *Code of Civil Procedure Section 437c(b)(1)* in support of plaintiff's motion for summary adjudication with respect to _____ (*specifically state cause of action, affirmative defense, claim for damages, or issue of duty verbatim as stated in notice of motion*)].

[*Specify cause of action, defense, claim for damages, or issue of duty that is subject of motion, e.g.:*]
ISSUE 1--THE FIRST CAUSE OF ACTION FOR NEGLIGENCE IS BARRED BECAUSE PLAINTIFF EXPRESSLY ASSUMED THE RISK OF INJURY

Moving Party's Undisputed Material Facts and Supporting Evidence:	Opposing Party's Response and Supporting Evidence:
1. _____ [*Set forth plainly and concisely each material fact contended to be undisputed, separately numbered, e.g.,* Plaintiff was injured while mountain climbing on a trip with Any Company USA.]	[1]
2. _____ [*Give reference to the evidence submitted in support of the motion which supports the contention that such fact is undisputed, e.g.,* Plaintiff's deposition, 12:3-4.]	[2]
3. [*Set forth additional facts, separately numbered, e.g.,* Before leaving on the mountain climbing trip, plaintiff signed a complete waiver of liability.	[3]
4. Smith declaration, 5:4-5; waiver of liability, Ex. A to Smith declaration.	
[5. *Set forth any additional material facts contended to be undisputed in this and succeeding numbered paragraphs*].	[5]

_____ [*signature*]
_____ [*name/title*]

[2] Use of Form

The form in [1], *above*, outlines the format for a statement of undisputed facts for use by a party moving for summary adjudication. It must set forth these facts plainly and concisely, followed in each case by a clear reference to the evidence supporting the motion [*Code Civ. Proc. § 437c(b)(1)*; *Cal Rules of Ct., Rule 3.1350(c), (d), (h)*].

For additional discussion of the format requirements for a separate statement of undisputed facts, and the requirements of providing an electronic version to another party or the court, see *§ 537.74[2]* et seq.

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47-537 California Forms of Pleading and Practice--Annotated § 537.76

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§ 537.76 Declaration in Opposition to Motion for Summary Judgment or Summary Adjudication [Code Civ. Proc. § 437c]

[1] FORM Declaration in Opposition to Motion for Summary Judgment or Summary Adjudication [Code Civ. Proc. § 437c]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	DECLARATION OF _____
_____ [*name*],	)	[*name*] OPPOSING MOTION FOR SUMMARY
Plaintiff,	)	_____ [JUDGMENT *or*
vs.	)	ADJUDICATION *or* JUDGMENT OR SUMMARY
_____ [*name*],	)	ADJUDICATION]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____

Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* the defendant in the above-entitled action *or other statement as appropriate*].

2. _____ [*Here and in subsequent paragraphs state evidentiary facts with particularity, to show either triable issue of material fact or triable controversy as to specified issues which would justify denial of motion for summary judgment or summary adjudication, respectively*].

3. _____ [*Here state evidentiary facts with particularity, to establish that the declarant has personal knowledge of the foregoing facts, and that the declarant, if called as a witness, is competent to testify to such facts under oath*].

[4. I have personal knowledge of the foregoing facts, and if called as a witness can and will competently testify to them under oath.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____

_____ [*signature*]
_____ [*typed name*]

CAUTION:
Sanctions may be imposed for filing a declaration in bad faith or solely for purposes of delay [*Code Civ. Proc. § 437c(j)*].

[2] Use of Form

The form of declaration in [1], *above*, is for use to oppose a notice of motion for summary judgment or summary adjudication [*see Code Civ. Proc. §§ 437c(b), 2015.5*]. The opposition may also, when appropriate, consist of evidence set forth in affidavits, answers to interrogatories, depositions, admissions, and matters subject to judicial notice [*Code Civ. Proc. § 437c(b)(2)*].

One of the required documents on a motion for summary judgment is the "[*Opposing party's*] evidence in opposition to [moving party's] motion for summary judgment or summary adjudication or both" [*Cal. Rules Ct., Rule 3.1350(e)(3)*]. In that a declaration opposing the motion is evidence, the declaration should be included under the evidence cover sheet [for a form of cover sheet for the evidence, *see § 537.79*].

[3] Other Opposing Papers

Except as provided in Code Civ. Proc. § 537c(r) and *Cal. Rules of Ct., Rule 3.1351*, the opposition must include a separate statement which responds to the moving party's statement of facts claimed to be undisputed [*Cal. Rules of Ct., Rule 3.1350(e)*]. For further discussion and a form of such statement, see *§§ 537.77* and *537.78*.

A memorandum opposing the motion must also be included [*Cal. Rules of Ct., Rules 3.1113, 3.1350(e)*].

[4] Cross Motion for Affirmative Relief

The form relates only to opposition on the ground that a triable issue of fact exists. Opposing counsel should be aware that a cross motion for summary judgment or summary adjudication of issues is necessary before the court may grant such affirmative relief in favor of the opposing party [*see Code Civ. Proc. § 437c(a), (f)*; *Dvorin v. Appellate Dep't of Superior Court (1975) 15 Cal. 3d 648, 650-651, 125 Cal. Rptr. 771, 542 P.2d 1363*]. The forms in *§§ 537.70 -537.74* may be adapted for this purpose.

[5] Opposition on Grounds of Unavailable Evidence

Opposing counsel may wish to seek an order denying or continuing the motion on the basis of a declaration or affidavit that shows that facts essential to justify opposition may exist, but cannot then be presented for reasons stated [*Code Civ. Proc. § 437c(h)*]. For discussion of the required showing, see *§ 537.36*].

[6] Service and Filing

The opposition must be filed and copies served at least 14 days before the time appointed for the hearing unless the court for good cause orders otherwise. Effective January 1, 2003, opposition papers must be served by personal delivery, facsimile transmission, express mail or other means reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing papers or reply papers are filed [*Code Civ. Proc. §§ 437c(b)(2), 1005(c)*]. Exceptions to these time requirements, applicable in some actions for unlawful detainer or forcible entry, are discussed in *§ 537.18[1]*.

[7] Cross References

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, §§ 197-199, 201, 203-206, 212-216 (4th ed. 1997)

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§ 537.77 Statement of Disputed and/or Undisputed Material Facts Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c(b)(3); Cal. Rules of Ct., Rule 3.1350(e), (f), (h), (i)]

[1] FORM Statement of Disputed and/or Undisputed Material Facts Opposing Motion for Summary Judgment [Code Civ. Proc. § 437c(b); Cal. Rules of Ct., Rule 3.1350(e), (f), (h), (i)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	_____'S [*opposing party*] SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN OPPOSITION TO _____'S [*moving party*] MOTION FOR SUMMARY _____ [JUDGMENT *or* JUDGMENT OR SUMMARY ADJUDICATION]
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____

Judge: _____
Date Action Filed: _____
Trial Date: _____

_____

_____ [*Identify opposing party, e.g.,* Defendant] _____ [*name*] in the above-entitled _____ [action *or* proceeding] submits this separate statement in opposition to the separate statement of undisputed material facts of _____ [*identify moving party, e.g.,* plaintiff _____ (*name*)] pursuant to *Code Civ. Proc. Section 437c(b)(3)*:

[*Respond separately to each material fact that the moving party contends to be undisputed, indicating agreement or disagreement with contention as to undisputed nature of each fact, and indicating ground for any disagreement, as in the following example*]

Moving Party's Undisputed Material Facts and Alleged Supporting Evidence:	Opposing Party's Response and Evidence:
1. _____ [*Set forth verbatim and in same order each material fact said by moving party to be without substantial controversy and the alleged supporting evidence, e.g.,* Plaintiff Jones and defendant Smith reached an agreement whereby Smith would construct a house for Jones in exchange for Jones' payment to Smith of $130,000. The contract called for Smith to complete construction of the house by March 11, 1999. Defendant Smith answer at 2:3-4. Jones declaration, 2:1-13; contract, Ex. A to Jones declaration].	_____ [*Respond opposite the opposing party's contention; if disputed, state nature of dispute and admissible evidence that supports position that fact is controverted, e.g.,* Undisputed].
2. _____ [*Set forth additional facts and evidence, e.g.,* On December 15, 1997, prior to completion of the house's exterior framing, Smith stopped all construction on the house. Jones declaration, 3:1-15. Smith deposition, 31:4-14]	_____ [*Respond opposite the opposing party's contention; if disputed, state nature of dispute and admissible evidence that supports position that fact is controverted, e.g.,* Disputed. Plaintiff's evidence was taken out of context. Later portions of the Smith deposition show that Smith began to complete the exterior framing on December 18, 1997, but was instructed by plaintiff to leave the property and not return. Deposition of Smith, Ex. 2(a) at 31:15-27, 32:1-15]. _____ [Reference objection number if written objection has been submitted to the evidence in support of this fact, e.g., See Objection No. 1. Do not restate or reargue evidentiary objections].

[3. *Set out any additional responses to moving party's facts in this and successively numbered paragraphs in the same two column format.*]

[*ADD if raising additional issues*]

_____ [*Identify opposing party, e.g.,* Defendant _____ (*name*)] also contends that the following material fact(s) is/are disputed:

1. _____ [*Set forth plainly and concisely additional material facts not mentioned by moving party, if any, that opposing party contends are disputed*].	_____ [*Refer to admissible evidence that shows existence of triable dispute regarding that fact*].

[2. *Set forth any additional disputed facts in this and succeeding numbered paragraphs*].

_____ [*signature*]
_____ [*name/title*]

[2] Use of Form

The form in [1], *above*, outlines a format for a statement of disputed and undisputed material facts for use by a party opposing a motion for summary judgment [*see Code Civ. Proc. § 437c(b)(3)*; *Cal. Rules of Ct., Rule 3.1350(e), (h)*]. The opposing party must respond to every fact in the moving party's separate statement [*Cal. Rules of Ct., Rule 3.1350(f)*]. For a form to use if the motion is for summary adjudication, see *§ 537.78*.

In accordance with the prescribed two column format, the opposing separate statement must set out the moving party's alleged undisputed facts and evidence and state whether the fact is disputed or undisputed [*Cal. Rules of Ct., Rule 3.1350(f)*]. Any disputed facts must be followed by a reference to supporting evidence that indicates the existence of a triable dispute as to that fact [*Code Civ. Proc. § 437c(b)(3)*; *Cal. Rules of Ct., Rule 3.1350(f)*]. For example, if one of the material facts stated by the moving party is supported by an inference reasonably deducible from the supporting evidence, opposing counsel might dispute that fact if reference can be made to a contradictory inference [*see Code Civ. Proc. § 437c(c)*]. Alternative means of expressing disagreement reflected in this form are discussed in [4], *below*.

In addition to the response, the opposing party must include any additional material facts that he or she contends are disputed, stating each one plainly and concisely, followed by a reference to supporting evidence [*Code Civ. Proc. § 437c(b)(3)*].

The opposing party preferably should quote each of the facts set forth in the moving papers. If the opposing party admits any of the statements set forth in the moving separate statement, the admission should be clearly stated [*Blackman v. Burrows (1987) 193 Cal. App. 3d 889, 895, 238 Cal. Rptr. 642*].

For discussion of the court's discretion under former *Code Civ. Proc. § 437c(b)* [*now see Code Civ. Proc. § 437c(b)(3)*] to grant summary judgment based on opposing party's failure to file a proper separate statement [*see Thatcher v. Lucky Stores, Inc. (2000) 79 Cal. App. 4th 1081, 1086, 94 Cal. Rptr. 2d 575*], see *§ 537.25[2]*.

[3] Format of Papers

The two column format must be used and the opposing party must respond to every fact claimed to be undisputed by the moving party [*Cal. Rules of Ct., Rule 3.1350(f), (h)*]. The opposing separate statement must set out each of the moving party's alleged undisputed facts verbatim on the left side of the page, with the evidence said by the moving party to establish that fact, complete with moving party's references to exhibits set out below each fact. On the right side of the page directly opposite the moving party's facts and evidence, the opposing party's response must state whether the fact is disputed or undisputed and, if disputed, state the nature of the dispute and describe the evidence that supports the position that the fact is controverted. That evidence must be supported by citation to exhibit, title, and page, and line numbers in the evidence submitted [*Code Civ. Proc. § 437c(b)(3), Cal. Rules of Ct., Rule 3.1350(f)*]. Counsel is required to follow that format in filling out this form.

[4] Objections to Evidence in Support of the Motion

[a] Manner of Objecting

The requirement of a responding statement appears to be designed to provide the court with a summary, with references, of evidence that shows the existence of a triable dispute. Objections to the sufficiency of the moving party's evidence, as distinguished from objections to the contention that it is undisputed, should be fully discussed in the memorandum [*see* California Points and Authorities, Ch. 221, *Summary Judgments*]. However, counsel may also wish to include a brief reference to the following types of objections in the responding statement, particularly when these objections apply to a material fact that is asserted as undisputed by the moving party and as to which no disputing evidence exists.

[b] As Inadmissible

The court cannot consider evidence to which objections have been made and sustained [*Code Civ. Proc. § 437c(c)*]. Objections to the admissibility of supporting evidence will be deemed waived if not made in the opposing papers or orally at the hearing [*Code Civ. Proc. § 437c(b)(5)*]. The better practice is to submit written objections. Effective January 1, 2007, the Rules of Court contain specific format requirements for written objections. The written objections must be served and filed separately from other papers in opposition to the motion. Objections on specific evidence may be referenced by the objection number in the right column of a separate statement in opposition to a motion, but the objections must not be restated or reargued in the separate statement [*Cal. Rules of Ct., Rule 3.1354(b)*]. For further discussion, see *§ 537.25[3]*. For further discussion, see *§ 537.25[3]*.

[c] As Declaration by Sole Witness or Affirming Declarant's State of Mind

The court has discretion to deny a motion when the only proof of a material fact offered in support of the motion is an affidavit or declaration made by an individual who was the sole witness to the fact, or when a material fact is an individual's state of mind, or lack thereof, and the fact is sought to be established solely by that individual's affirmation [*Code Civ. Proc. § 437c(e)*]. This form includes optional language that disputes a given fact on the ground that it is based solely on such proof. For further discussion, see *§ 537.34[4][a]*.

[d] As Disputed by Evidence Not Then Available

The court may deny or continue a motion if opposing declarations or affidavits show that disputing evidence may exist but cannot be then presented [*Code Civ. Proc. § 437c(h)*]. An opposing party's statement of disputed facts asserting lack of knowledge and claiming that fact is "disputed" is insufficient when opposing party hasnot requested continuance to conduct further discovery or otherwise explained its ignorance [*City of Hope Nat. Medical Center v. Superior Court (1992) 8 Cal. App. 4th 633, 636 n.1, 10 Cal. Rptr. 2d 465*]. This form includes optional language that disputes a given fact on the ground that it may be disputed by evidence that cannot be presently submitted. For further discussion, see *§ 537.76[5]*.

[5] Providing Electronic Version

Effective January 1, 2002, a party must provide an electronic version of its separate statement to any other party or the court within 3 days of a request to do so [*Cal. Rules of Ct., Rule 3.1350(i)*]. The electronic version may be provided in any form on which the parties agree; however, if the parties are unable to agree on the form, the responding party must provide the electronic version of the separate statement that it used to prepare the document filed with the court. Pursuant to this rule, a party is not required to create an electronic version or any new version of any document for the purpose of transmission to the requesting party [*Cal. Rules of Ct., Rule 3.1350(i)*].

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47-537 California Forms of Pleading and Practice--Annotated § 537.78

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§ 537.78 Statement of Disputed and/or Undisputed Material Facts Opposing Motion for Summary Adjudication [Code Civ. Proc. § 437c(b)(3); Cal. Rules of Ct., Rule 3.1350(e), (f), (h), (i)]

[1] FORM Statement of Disputed and/or Undisputed Material Facts Opposing Motion for Summary Adjudication [Code Civ. Proc. § 437c(b); Cal. Rules of Ct., Rule 3.1350(e), (f), (h), (i)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	_____'S [*opposing party*] SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS IN OPPOSITION TO MOTION FOR SUMMARY ADJUDICATION
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

_____ [*Identify opposing party, e.g.,* Defendant] _____ [*name*] in the above-entitled _____ [action *or* proceeding] submits this separate statement in opposition to the separate statement of undisputed material facts of _____ [*identify moving party, e.g.,* plaintiff _____ (*name*)] pursuant to *Code Civ. Proc. Section 437c(b)*:

[*Respond separately to each material fact that the moving party contends to be undisputed, indicating agreement or disagreement with contention as to undisputed nature of each fact, and indicating ground for any disagreement, as in the following example*]

[*Specify cause of action, defense, claim for damages, or issue of duty that is subject of motion, e.g.:*]
ISSUE 1--THE FIRST CAUSE OF ACTION FOR NEGLIGENCE IS BARRED BECAUSE PLAINTIFF EXPRESSLY ASSUMED THE RISK OF INJURY

Moving Party's Undisputed Material Facts and Alleged Supporting Evidence:	Opposing Party's Response and Evidence:
1. _____ [*Set forth verbatim and in same order each material fact said by moving party to be without substantial controversy and the alleged supporting evidence, e.g.,* Plaintiff was injured while mountain climbing on a trip with Any Company USA. Plaintiff's deposition, 12:3-4].	_____ [*Respond opposite the opposing party's contention; if disputed, state nature of dispute and admissible evidence that supports position that fact is controverted, e.g.,* Undisputed].
2. _____ [*Set forth additional facts and evidence, e.g.,* Before leaving on the mountain climbing trip, plaintiff signed a complete waiver of liability. Smith declaration, 5:4-5; waiver of liability, Ex. A to Smith declaration.]	_____ [*Respond opposite the opposing party's contention; if disputed, state nature of dispute and admissible evidence that supports position that fact is controverted, e.g.,* Disputed. Plaintiff did not sign the waiver of liability; his signature on the waiver is forged. Jones declaration, 3:6-7].

[3. *Set out any additional responses to moving party's facts in this and successively numbered paragraphs in the same two column format.*]

[*ADD if raising additional issues*]

_____ [*Identify opposing party, e.g.,* Defendant _____ (*name*)] also contends that the following material fact(s) is/are disputed:

1. _____ [*Set forth plainly and concisely additional material facts not mentioned by moving party, if any, that opposing party contends are disputed*].	_____ [*Refer to admissible evidence that shows existence of triable dispute regarding that fact*].

[2. *Set forth any additional disputed facts in this and succeeding numbered paragraphs*].

_____ [*signature*]
_____ [*name/title*]

[2] Use of Form

The form in [1], *above*, outlines a format for a statement of disputed and undisputed material facts for use by a party opposing a motion for summary adjudication [*see Code Civ. Proc. § 437c(b)(3)*; *Cal. Rules of Ct., Rule 3.1350, (h)*]. The opposing party must respond to every fact in the moving party's separate statement [*Cal. Rules of Ct., Rule 3.1350(f)*]. For a form to use if the motion is for summary judgment, see *§ 537.77*.

For additional discussion of the format requirements for a separate statement of undisputed facts by the party opposing a motion for summary judgment or summary adjudication, and the requirements of providing an electronic version to another party or the court, see *§ 537.77[2]* et seq.

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Chapter 537 SUMMARY JUDGMENT
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47-537 California Forms of Pleading and Practice--Annotated § 537.79

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§ 537.79 Evidence Opposing Motion for Summary Judgment or Adjudication--Cover [Cal. Rules of Ct., Rule 3.1350(e)(3), (g)]

[1] FORM Evidence Opposing Motion for Summary Judgment or Adjudication--Cover [Cal. Rules of Ct., Rule 3.1350(e)(3), (g)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	_____ [*opposing party's*] EVID-
vs.	)	ENCE IN OPPOSITION TO _____
_____ [*name*],	)	[*moving party's*] MOTION FOR
Defendant.	)	_____ [SUMMARY JUDGMENT
	)	*or* SUMMARY ADJUDICATION *or* SUMMARY
	)	JUDGMENT OR IN THE ALTERNATIVE SUM-
	)	MARY ADJUDICATION]
	)	Date: _____
		Time: _____
		Location: _____

Judge: _____
Date Action Filed: _____
Trial Date: _____

_____

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[*List contents*]

[2] Use of Form

The form in [1], *above*, may be used as the cover sheet for the evidence in opposition to a motion for summary judgment or summary adjudication [*see Cal. Rules of Ct., Rule 3.1350(e)(3), (g)*].

If the evidence in oppostion to the motion execceds 25 pages, the evidence must be separately bound and must include a table of contents [*see Cal. Rules of Ct., Rule 3.1350(g)*].

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47-537 California Forms of Pleading and Practice--Annotated § 537.80

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§ 537.80 Notice of Motion, Motion, and Supporting Declaration for Order Imposing Monetary Sanctions [Code Civ. Proc. § 437c]

[1] FORM Notice of Motion, Motion, and Supporting Declaration for Order Imposing Monetary Sanctions [Code Civ. Proc. § 437c]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER FOR PAYMENT OF EXPENSES AS SANCTIONS, SUPPORTING DECLARATION OF _____ [*name*], AND SUPPORTING MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____

Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* plaintiff] will, and hereby does, move for an order awarding reasonable expenses in the amount of $_____, to be paid by _____ [*identify party presenting affidavits or declarations, e.g.,* defendant, _____ (*name*)]. The motion is made on the ground that _____ [*describe action that is basis of motion for sanctions, e.g.,* the declaration filed by defendant in this case on July 1, 1997, was presented in bad faith].

The motion is based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the supporting memorandum served and filed with it, on the records and file in this action, and on any evidence that may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*Specify party who presented affidavit(s), e.g.,* Defendant _____ (*name*)] _____ [*specify conduct, e.g,* presented the declaration of _____ (*name*) on July 1, 1994, in support of a motion for summary judgment in the above-entitled action with knowledge that statements contained in paragraphs 3 and 5 of that declaration were untrue. Defendant's attorney _____ (*name*) admitted to the court that there was no factual basis for these statements at the hearing on the motion for summary judgment on _____ (*date*)].

3. As a result of this conduct, _____ [*specify moving party, e.g.,* plaintiff] has incurred expenses in the sum of $_____ as follows _____ [*itemize expenses showing that each was incurred as a result of the specified conduct*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion*.]

Respectfully submitted,
_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form of notice of motion, motion, and supporting declaration in [1], *above*, is for use by a party seeking an order imposing monetary sanctions against another party for expenses incurred as a result of that other party's presentation, in bad faith or solely for purposes of delay, of an affidavit or declaration in connection with a motion for summary judgment or summary adjudication [*Code Civ. Proc. § 437c(j)*].

A separate noticed motion for sanctions is not required so long as notice is contained in other papers [*Code Civ. Proc. § 437c(j)*]. This form may therefore be modified for inclusion in other papers.

A memorandum must be filed and a copy served with the foregoing notice of motion [*see Code Civ. Proc. §§ 1005(b), 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*].

For further discussion, see *§ 537.38[1]*.

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47-537 California Forms of Pleading and Practice--Annotated § 537.81

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§ 537.81 Order Granting Motion for Summary Judgment [Code Civ. Proc. § 437c]

[1] FORM Order Granting Motion for Summary Judgment [Code Civ. Proc. § 437c]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER GRANTING _____'S
vs.	)	[*moving party*] MOTION FOR SUMMARY JUDG-
_____ [*name*],	)	MENT
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

The motion(s) of _____ [*specify prevailing party, e.g.,* plaintiff] [and _____ (*specify opposing party making cross-motion, e.g.,* defendant)] for summary judgment was/were heard by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

Having considered all the evidence set forth in the papers submitted, and the inferences reasonably deducible therefrom, except that to which objection was sustained, the Court determines that there is no triable issue as to any material fact and that _____ (*specify prevailing party, e.g.,* plaintiff) is entitled to judgment as a matter of law, for the following reasons:

1. _____ [Plaintiff *or* Defendant], in support of his/her/its motion, proffered evidence that _____ [established each element necessary to sustain judgment in his/her/its favor *or* (refuted a necessary element of plaintiff's cause of action *and/or* established an affirmative defense to plaintiff's cause of action)], as follows: _____ [*specify material facts claimed by moving party with reference to their location in the supporting papers*].

2. _____ [Plaintiff *or* Defendant], in opposition to _____ [defendant's *or* plaintiff's] motion, _____ [proffered no evidence *or* proffered evidence as follows: _____ (*specify facts claimed by opposing party with reference to their location in the opposing papers*)]. [This evidence proffered in opposition to _____ (defendant's *or* plaintiff's) motion, is not sufficient to raise a triable issue of fact in that _____ (*specify, e.g.,* it constitutes inadmissible hearsay, to which objection at the hearing was duly made and sustained).]

[*ADD, if the court is also denying the opposing party's cross motion(s) for summary judgment and/or adjudication*]

The Court further determines that the cross motion of _____ [*specify opposing party making cross motion, e.g.,* defendant] for an order granting _____ [summary judgment *and/or* summary adjudication] should be denied for the following reasons: _____ [*state reasons for denial as required under Code Civ. Proc. § 437c(g); for examples of reasons, see the form in § 537.85*].

[The Court further determines that the _____ (declaration(s) *and/or* affidavit(s)) of _____ (*name(s)*) presented by _____ (*specify opposing party, e.g.,* defendant) _____ was/were presented _____ (in bad faith *and/or* solely for the purpose of delay).]

Accordingly,

IT IS ORDERED that the motion of _____ [*specify prevailing party, e.g.,* plaintiff] for summary judgment be, and hereby is, granted and that judgment be entered providing that _____ [*specify prevailing party, e.g.,* plaintiff] _____ [*specify judgment, e.g.,* recover from defendant the sum of $_____, with (interest thereon _____ (*specify rate, e.g.,* at the legal rate) from and after _____ (*date*), and) his/her costs in the sum of $ _____].

[*ADD, if the court is also denying an alternative motion for summary adjudication by the prevailing party, and/or is denying the opposing party's cross motion(s) for summary judgment and/or adjudication*]

IT IS FURTHER ORDERED that _____ [the alternative motion of _____ (*specify moving party, e.g.,* plaintiff) for an order granting summary adjudication *and/or* the cross-motion of _____ (*specify opposing party making cross-motion, e.g.,* defendant) for an order granting _____ (summary judgment *and/or* summary adjudication)] be, and hereby is, denied.

[IT IS FURTHER ORDERED that _____ (*specify opposing party, e.g.,* defendant) pay _____ (*specify moving party, e.g.,* plaintiff) the sum of $ _____ as the amount of reasonable expenses incurred by _____ (*specify moving party, e.g.,* plaintiff) as a result of the filing of the _____ (declaration(s) *and/or* affidavit(s)) referred to above.]
Dated: _____.

_____[*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, is for use when the court grants a motion for summary judgment and requires counsel to prepare and submit aproposed order. If the court permits the order and judgment to be combined in the same paper, the *form in § 537.82* should be used. Otherwise, if the order granting the motion terminates the action as between at least two parties, as illustrated in this form, a formal judgment should be prepared and submitted to the judge for signature [for a form of formal judgment, *see § 537.83*; *see also § 537.82[2]* et seq.].

The form includes optional language for use when the court denies an alternative motion by the prevailing party, a cross motion by the opposing party, or both. It also includes optional language for use when the court imposes sanctions under *Code Civ. Proc. § 437c(j)* [*see* discussion in *§ 537.38[1]*.

For a form for use when the motion for summary judgment or summary adjudication is denied, see *§ 537.85*.

[3] Specification of Reasons

On granting a motion for summary judgment, on the ground that there is no triable issue of material fact, the court is required, by written or oral order, to specify the reasons for its determination. The order must specifically refer to the evidence proffered in support of, and if applicable in opposition to, the motion that indicates that no triable issue exists [Code Civ. Proc. 473c(g); *see § 537.37[2]*].

[4] Notice of Order

The prevailing party must give notice of the court's order granting or denying the motion to all other parties or their attorneys in the manner provided by *Code Civ. Proc. § 1010 et seq.*, unless notice is waived by all parties in open court and is entered in the minutes [*Code Civ. Proc. § 1019.5(a)*]. For further discussion and forms of notice and proof of service, see Ch. 372, *Motions and Orders* , and Ch. 518, *Service of Summons and Papers* .

[5] Cross References

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, § 227 (4th ed. 1997)

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§ 537.82 Order Granting Motion for Summary Judgment and Judgment [Code Civ. Proc. § 437c]

[1] FORM Order Granting Motion for Summary Judgment and Judgment [Code Civ. Proc. § 437c]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER GRANTING MOTION FOR SUMMARY
Defendant.	)	JUDGMENT AND JUDGMENT
	)	
	)	

The motion(s) of _____ [*specify prevailing party, e.g.,* plaintiff] [and _____ (*specify opposing party making cross motion, e.g.,* defendant)] for summary judgment was/were heard by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by

counsel _____ [*name*].

Having considered all the evidence set forth in the papers submitted, and the inferences reasonably deducible therefrom, except that to which objection was sustained, the Court determines that there is no triable issue as to any material fact and that _____ [*specify prevailing party, e.g.,* plaintiff] is entitled to judgm ent as a matter of law, for the following reasons:

1. _____ [Plaintiff *or* Defendant], in support of his/her/its motion, proffered evidence that _____ [established each element necessary to sustain judgment in his/her/its favor *or* (refuted a necessary element of plaintiff's cause of action *and/or* established an affirmative defense to plaintiff's cause of action)], as follows: _____ [*specify material facts claimed by moving party with reference to their location in the supporting papers*].

2. _____ [Plaintiff *or* Defendant], in opposition to _____ [defendant's *or* plaintiff's] motion, _____ [proffered no evidence *or* proffered evidence as follows: _____ (*specify facts claimed by opposing party with reference to their location in the opposing papers*)]. [This evidence proffered in opposition to _____ (defendant's *or* plaintiff's) motion is not sufficient to raise a triable issue of fact in that _____ (*specify, e.g.,* it constitutes inadmissible hearsay, to which objection at the hearing was duly made and sustained).]

[*ADD, if the court is also denying the opposing party's cross motion(s) for summary judgment and/or adjudication*]

The Court further determines that the cross motion of _____ [*specify opposing party making cross motion, e.g.,* defendant] for an order granting _____ [summary judgment *and/or* summary adjudication] should be denied for the following reasons: _____ [*state reasons for denial as required under Code Civ. Proc. § 437c(g); for examples of reasons, see the form in § 537.85*].

[The Court further determines that the _____ (declaration(s) *and/or* affidavit(s)) of _____ (*name(s)*) presented by _____ (*specify opposing party, e.g.,* defendant) _____ was/were presented _____ (in bad faith *and/or* solely for the purpose of delay).]

Accordingly,

[*ADD, if the court is denying an alternative motion for summary adjudication by the prevailing party, and/or is denying the opposing party's cross motion(s) for summary judgment and/or adjudication* :]

IT IS ORDERED that _____ [the alternative motion of _____ (*specify moving party, e.g.,* plaintiff) for an order granting summary judgment *and/or* the cross motion of _____ (*specify opposing party making cross motion, e.g.,* defendant) for an order granting _____ (summary judgment *and/or* summary adjudication)] be, and hereby is, denied.

IT IS [FURTHER] ORDERED, ADJUDGED, AND DECREED that the motion of _____ [*specify prevailing party, e.g.,* plaintiff] be, and hereby is, granted [and, further, that _____ (*specify opposing party, e.g.,* defendant) pay _____ (*specify moving party, e.g.,* plaintiff) the sum of $_____ as the amount of reasonable expenses incurred by _____ (*specify moving party, e.g.,* plaintiff) as a result of the filing of the hereinabove referred to _____ (declaration(s) *and/or* affidavit(s))].

IT IS [FURTHER] ORDERED, ADJUDGED, AND DECREED that _____ [*specify judgment rendered, e.g.,* plaintiff _____ (*plaintiff's full name*) shall recover from defendant _____ (*defendant's full name*) the principal sum of $ _____, plus interest at the rate of _____ (*specify, e.g.,* eight percent) from _____ (*date*) to date hereof in the sum of $_____, for a total sum of $ _____].
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The combined form of order and judgment in [1], *above*, is for use when the trial court grants a motion for summary judgment, requires the preparation of a formal order granting the motion, and does not require that the order and judgment be set forth in separate papers [*see Code Civ. Proc. § 437c(k)*, and discussion in [3], *below*]. In this event, it would appear that the better practice would be to use the combined form to avoid unnecessary duplication and to avoid any possibility of conflict between the order and the judgment. If the order and judgment are combined, the paper should, as in the caption of the form, be clearly identified as a judgment [*see Rogness v. English Moss Joint Venturers (1987) 194 Cal. App. 3d 190, 192 n.2, 239 Cal. Rptr. 387*].

If the court requires presentation of a formal order granting the motion separate from the judgment, use the *forms in §§ 537.81* and *537.83*.

The form includes optional language for use when the court denies an alternative motion by the prevailing party, a cross motion by the opposing party, or both. It also includes optional language for use when the court imposes sanctions under *Code Civ. Proc. § 437c(j)* [*see* discussion in *§ 537.38[1]*].

[3] Entry of Judgment and Notice of Entry

Except when a separate judgment may be awarded properly in the action, no final judgment can be entered on a motion for summary judgment prior to the termination of the action, but the final judgment must, in addition to any matters determined in the action, award judgment as established by the summary judgment proceeding [*Code Civ. Proc. § 437c(k)*]. For situations in which a separate judgment may properly be awarded, see discussion in *§ 537.43[1]*. In most contested actions or special proceedings, the party submitting a judgment for entry must prepare and mail a copy of the notice of entry of judgment to all parties who have appeared in the action or proceeding and must file with the court the original notice of entry of judgment together with the proof of service by mail [*Code Civ. Proc. § 664.5(a)*].

For further discussion of entry of judgment and notice of entry of judgment, see *§ 537.42*.

[4] Review After Entry of Judgment

A summary judgment, once entered, is appealable [*Code Civ. Proc. §§ 437c(m), 904.1(a)(1), 904.2*]. For further discussion relating to appeal, see *§ 537.43[1]* et seq. For discussion of post-judgment challenges in the trial court, see *§ 537.40*.

[5] Cross References

For discussion and forms concerning notice and entry of judgments generally, see Ch. 318, *Judgments* .

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, §§ 227, 232, 233, 235, 229, 248 (4th ed. 1997).

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Chapter 537 SUMMARY JUDGMENT
PART V. FORMS

47-537 California Forms of Pleading and Practice--Annotated § 537.83

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§ 537.83 Summary Judgment [Code Civ. Proc. § 437c]

[1] FORM Summary Judgment [Code Civ. Proc. § 437c]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	JUDGMENT
Defendant.	)	
	)	
	)	

_____

On _____ [*date*], the court granted the motion of _____ [*specify moving party, e.g.,* plaintiff] made under *Code of Civil Procedure Section 437c* on the ground that _____ [there is no defense to the action *or* the action has no merit] for an order that judgment be entered for _____ [

specify moving party, e.g., plaintiff] and against _____ [*specify opposing party, e.g.,* defendant]. In accordance with that order,

IT IS ORDERED, ADJUDGED, AND DECREED that _____ [*specify judgment rendered, e.g.,* plaintiff _____ (*plaintiff's full name*) shall recover from defendant _____ (*defendant's full name*) the principal sum of $_____, plus interest at the rate of _____ (*specify, e.g.,* eight percent) from _____ (*date*) to date hereof in the sum of $ _____, for a total sum of $ _____].
Dated:_____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of proposed judgment in [1], *above*, is for use by a party whose motion for summary judgment under *Code Civ. Proc. § 437c* has been granted and the judgment either terminates the entire action or is a separate judgment that may be awarded properly [*see Code Civ. Proc. § 437c(k)* and § 537.82[2] et seq.]. For a form of formal order granting the motion for summary judgment, see *§ 537.81*. For a combined form of order granting the motion and the summary judgment, see *§ 537.82*.

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Chapter 537 SUMMARY JUDGMENT
PART V. FORMS

47-537 California Forms of Pleading and Practice--Annotated § 537.84

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§ 537.84 Order Granting Motion for Summary Adjudication of Cause of Action, Defense, Claim for Punitive Damages, or Issue of Duty [Code Civ. Proc. § 437c]

[1] FORM Order Granting Motion for Summary Adjudication of Cause of Action, Defense, Claim for Punitive Damages, or Issue of Duty [Code Civ. Proc. § 437c]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [*specify moving party, e.g.,* plaintiff] for an order granting summary adjudication

[and, alternatively, for an order granting summary judgment], [and the motion of _____ (*specify opposing party making cross motion, e.g.,* defendant) for an order granting _____ (summary judgment *and/or* summary adjudication)] was/were heard by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On consideration of all the evidence set forth in the papers submitted, and the inferences reasonably deducible therefrom, except that to which objection was sustained, the Court makes the following determinations for the reasons specified:

1. There is no triable issue as to any material fact and _____ [*specify prevailing party, e.g.,* plaintiff] is entitled as a matter of law to summary adjudication in his/her/its favor and against _____ [*identify opposing party, e.g.,* defendant] on _____ [*specify first matter on which summary adjudication is granted, e.g.,* the First Cause of Action of plaintiff's First Amended Complaint] for the following reasons:

a. _____ [Plaintiff *or* Defendant], in support of his/her/its motion for summary adjudication on this _____ [cause of action *or* affirmative defense *or* claim for punitive damages *or* issue of duty], proffered evidence that established each necessary element of this _____ [cause of action *or* affirmative defense *or* claim for punitive damages *or* issue of duty] as follows: _____ [*specify material facts claimed by moving party with reference to their location in the supporting papers*].

b. _____ [Plaintiff *or* Defendant], in opposition to _____ [defendant's *or* plaintiff's] motion, _____ [proffered no evidence *or* proffered evidence as follows: _____ (*specify facts claimed by opposing party with reference to their location in the opposing papers*)]. [Theforegoing evidence proffered in opposition to _____ (defendant's *or* plaintiff's) motion is not sufficient to raise a triable issue of fact in that _____ (*specify, e.g.,* it constitutes inadmissible hearsay, to which objection at the hearing was duly made and sustained).]

[2. *Set out any additional matters on which summary adjudication is granted, if any, in this and succeeding numbered paragraphs.*]

[*ADD, if the court is also denying summary adjudication of additional matters that were included in the prevailing party's motion, and/or is denying an alternative motion for summary judgment by the prevailing party, and/or is denying the opposing party's cross motion(s) for summary judgment and/or adjudication*]

The Court further determines that _____ [the motion of _____ (*specify moving party, e.g.,* plaintiff) for an order granting summary adjudication with respect to _____ (*specify additional matter included in the motion, e.g.,* the claim for punitive damages set out in the Fourth Cause of Action of plaintiff's First Amended Complaint) *and/or* the alternative motion of _____ (*specify moving party, e.g.,* plaintiff) for an order granting summary judgment *and/or* the cross motion of _____ (*specify opposing party making cross motion, e.g.,* defendant) for an order granting _____ (summary judgment *and/or* summary adjudication)] should be denied for the following reasons: _____ [*state reasons for denial as required under Code Civ. Proc. § 437c(g); for examples of reasons, see the form in § 537.85[1]*].

[The Court further determines that the _____ (declaration(s) *and/or* affidavit(s)) of _____ (*name(s)*) presented by _____ (*specify opposing party, e.g.,* defendant) _____ was/were presented _____ (in bad faith *and/or* solely for the purpose of delay).]

Accordingly,

IT IS ORDERED that the motion for an order granting summary adjudication be, and hereby is, granted in favor of _____ [*specify moving party, e.g.,* plaintiff] and against _____ [*specify opposing party, e.g.,* defendant _____ (*name*)] with respect to _____ [*specify matter(s) on which summary adjudication is granted, e.g.,* the First and Fifth Causes of Action of plaintiff's First Amended Complaint], and that this adjudication shall be carried into any final judgment subsequently entered in this _____ [action *or* proceeding].

[*ADD, if the court is also denying summary adjudication of additional matters that were included in the prevailing party's motion, and/or is denying an alternative motion for summary judgment by the prevailing party, and/or is denying the opposing party's cross motion(s) for summary judgment and/or adjudication*]

IT IS FURTHER ORDERED that _____ [the motion of _____ (*specify moving party, e.g.,* plaintiff) for an order granting summary adjudication with respect to _____ (*specify additional matter included in the motion, e.g.,* the claim for punitive damages set out in the Fourth Cause of Action of plaintiff's First Amended Complaint) *and/or* the alternative motion of _____ (*specify moving party, e.g.,* plaintiff) for an order granting summary judgment *and/or* the cross motion of _____ (*specify opposing party making cross motion, e.g.,* defendant) for an order granting _____ (summary judgment *and/or* summary adjudication)] be, and hereby is, denied.

[IT IS FURTHER ORDERED that _____ (*specify opposing party, e.g.,* defendant) pay _____ (*specify moving party, e.g.,* plaintiff) the sum of $ _____ as the amount of reasonable expenses incurred by _____ (*specify moving party, e.g.,* plaintiff) as a result of the filing of the _____ (declaration(s) *and/or* affidavit(s)) referred to above.]
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form in [1], *above,* is for use when the court grants a motion for summary adjudication under *Code Civ. Proc. § 437c(f)* [for forms of notice of motion and motion, *see §§ 537.70* and *537.71*] and directs counsel to prepare and submit a proposed order.

The form includes optional language for use when the court denies the motion for summary adjudication with respect to certain matters, or denies the prevailing party's alternative motion for summary judgment, or denies cross motions by the opposing party. It also includes optional language for use when the court imposes sanctions under *Code Civ. Proc. § 437c(j)* [*see* discussion in *§ 537.38[1]*].

Some trial courts require or recommend that a proposed order be submitted with any motion for summary adjudication [*see, e.g.,* San Francisco Uniform Local Ct. Rules, Rule 8.11]. A proposed order should be framed as if the motion were granted with respect to all causes of actions, defenses, claims for punitive damages, or issues of duty sought to be adjudicated.

[3] Specification of Reasons

On the grant of a motion for summary judgment, on the ground that there is no triable issue of material fact, the court is required, by written or oral order, to specify the reasons for its determination. The order must specifically refer to the

evidence proffered in support of, and if applicable in opposition to, the motion that indicates that no triable issue exists [Code Civ. Proc. 473c(g); *see also Code Civ. Proc. § 437c(f)(2)* (motion for summary adjudication to proceed in all procedural respects as a motion for summary judgment); *see § 537.37[2]*].

[4] Cross References

Witkin, California Procedure, vol. 6, *Proceedings Without Trial,* §§ 156-157 (4th ed. 1997)

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Chapter 537 SUMMARY JUDGMENT
PART V. FORMS

47-537 California Forms of Pleading and Practice--Annotated § 537.85

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§ 537.85 Order Denying Motion for Summary Judgment and/or Summary Adjudication of Cause of Action, Defense, Claim for Punitive Damages, or Issue of Duty [Code Civ. Proc. § 437c]

[1] FORM Order Denying Motion for Summary Judgment and/or Summary Adjudication of Cause of Action, Defense, Claim for Punitive Damages, or Issue of Duty [Code Civ. Proc. § 437c]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [*specify moving party, e.g.,* plaintiff] for an order granting

_____ [summary judgment *or* summary adjudication *or* summary judgment or, in the alternative, summary adjudication] was heard by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On consideration of all the evidence set forth in the papers submitted, and the inferences reasonably deducible therefrom, except that to which objection has been sustained, the Court determines that the motion should be denied for the reason(s) that:

[*EITHER*]

A triable controversy exists with respect to the following material fact(s), as indicated:

1. _____ [*Specify all material fact(s) presenting a triable controversy and refer specifically to supporting and opposing evidence that indicates the existence of such controversy, e.g.,* That the defendant knew, or had reason to know, of defective condition of furnace when she rented the premises to plaintiff. (Declaration of _____ (*name*), pp 13:23-19:7; Declaration of _____ (*name*), pp 2:15-8:4)].

[2. *Specify additional triable controversies in this and succeeding numbered paragraphs; if denying motion for summary adjudication of cause of action, defendant's duty, punitive damages claim, or affirmative defense in its entirety, specify the matter for which summary adjudication is sought (i.e., cause of action, affirmative defense, claim for punitive damages, or issue of duty) as to which the controversy exists*.]

[*OR*]

The evidence submitted by _____ [*specify moving party, e.g., plaintiff*] in support of the motion is insufficient to show that he/she is entitled tojudgment as a matter of law, in that: _____ [*specify insufficiency, e.g.,* The supporting Declaration of _____ (*name*) includes no admissible evidence, and the remaining Declaration of Plaintiff alone fails to establish that the defendant proximately caused the injury suffered by plaintiff].

[*OR*]

_____ [*Specify moving party, e.g.,* Plaintiff] failed to comply with the requirement of a separate statement, and the Court exercises its discretion to deny the motion on this ground.

[*OR*]

It appears from the declaration(s) of _____ [*name(s*)], submitted in opposition to the motion, that facts essential to justify opposition may exist but could not, for good cause shown, be presented at the hearing. The Court exercises its discretion to deny the motion on this ground.

[*OR*]

_____ [*Specify any other reasons for the determination, e.g.,* One of the material facts contended to be undisputed by _____ (*specify moving party, e.g.,* plaintiff) is the negligent conduct of defendant

estate's decedent, and the only evidence of this fact is stated in the declaration of plaintiff, the sole remaining witness to that fact. The Court exercises its discretion to deny the motion on this ground.

[*CONTINUE*]

Accordingly,

IT IS ORDERED that the motion of _____ [*specify moving party, e.g.,* plaintiff] for an order granting _____ [summary judgment *or* summary adjudication *or* summary judgment or, in the alternative, summary adjudication] be denied.

[*OPTIONAL*]

The Court further determines that the _____ [declaration(s) *or* affidavit(s)] of _____ [*name(s*)] presented by _____ [*specify moving party, e.g.,* plaintiff] _____ was/were presented _____ [in bad faith *or* solely for the purpose of delay].

Accordingly,

IT IS FURTHER ORDERED that _____ [*specify moving party, e.g.,* plaintiff] pay _____ [*specify opposing party, e.g.,* defendant] the sum of $ _____ as the amount of reasonable expenses incurred as a result.
Dated:_____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of proposed order in [1], *above*, is for use by the party opposing summary judgment or summary adjudication if the motion is denied. Local rules should be consulted, insofar as some courts require the prevailing party to submit a proposed order, while others may not [*see, e.g.,* San Francisco Uniform Local Ct. Rules, Rule 8.11]. It is recommended that opposing counsel prepare and submit a proposed order of denial in any case, to assist the court in stating the reasons for its decision on denial of a motion for summary judgment or summary adjudication, as required under *Code Civ. Proc. § 437c(g)* [*see* Weir and Brown, *Braces for the Old Tiger's New Teeth*, 4(7) Calif. Law. 20, 22 (1984)]. Optional language is included for use when the court, on its own or the opposing party's motion, imposes sanctions for filing a declaration in bad faith [*Code Civ. Proc. § 437c(j)*]. For further discussion of sanctions, including additional statutory grounds to recover costs, fees, and expenses, see *§ 537.38[1]*.

[3] Statement of Grounds for Denial

On the denial of a motion for summary judgment on the ground that there is a triable issue with respect to one or more material facts, the court is required to state each issue determined to be triable and refer specifically to the evidence supporting and opposing the motion that indicates the existence of the controversy [*Code Civ. Proc. § 437c(g)*; *see § 537.37[1], above; see also Code Civ. Proc. § 437c(f)(2)* (motion for summary adjudication shall proceed in all procedural respects as a motion for summary judgment)].

The court must also state its reasons for any other determination [*Code Civ. Proc. § 437c(g)*]. Thus, this form includes

alternate language suggesting other, less common grounds for denial. For example, the court has discretion to deny a motion not supported by the required separate statement of undisputed facts [*Code Civ. Proc. § 437c(b)(1)*]. It may also deny a motion when the only proof of a material fact is the declaration of a sole witness, or an affirmation by a person as to his or her own mental state [*Code Civ. Proc. § 437c(e)*]. A third discretionary ground for denial is a showing that facts justifying opposition may exist but cannot be then presented [*Code Civ. Proc. § 437c(h)*]. While a mere continuance is the more likely result in this case, denial may be necessary, for example, when the continued date is less than thirty days before the date set for trial [*Code Civ. Proc. § 437c(a)*]. Another suggested ground for denial is simply the moving party's failure to meet his or her burden of proof [*see Vesely v. Sager (1971) 5 Cal. 3d 153, 170, 95 Cal. Rptr. 623, 486 P.2d 151 , disapproved on other grounds in Strang v. Cabrol (1984) 37 Cal. 3d 720, 724, 209 Cal. Rptr. 347, 691 P.2d 1013*]. For further discussion concerning the various grounds for denial, see *§ 537.34[1]* et seq.

[4] Notice of Order

The prevailing party must serve notice of the order on all other parties, unless the court orders otherwise or notice is waived by all parties in open court and is entered in the minutes [*Code Civ. Proc. § 1019.5(a)*]. For further discussion and forms of such notice and proof of service, see Ch. 372, *Motions and Orders* , and Ch. 518, *Service of Summons and Papers* .

[5] Review

An order denying a motion for summary judgment or summary adjudication of issues is not appealable, but may be reviewed by petition for writ of mandate [*Code Civ. Proc. § 437c(m)(l)*]. A motion for reconsideration is also available in the trial court [*see Code Civ. Proc. § 1008*]. For further discussion, see *§ 537.39* et seq.

[6] Text References

Witkin, California Procedure, vol. 6, *Proceedings Without Trial*, §§ 223-236, 248 (4th ed. 1997)

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47-537 California Forms of Pleading and Practice--Annotated § 537.86

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§ 537.86 Written Objections to Evidence in Support of or in Opposition to Motion for Summary Judgment or Summary Adjudication [Cal. Rules of Ct., Rule 3.1354(b)]

[1] FORM Written Objections to Evidence in Support of or in Opposition to Motion for Summary Judgment or Summary Adjudication [Cal. Rules of Ct., Rule 3.1354(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[name],	)	NO. _____
Plaintiff, vs. _____[name],	)	_____'S [moving party or opposing party] WRITTEN OBJECTIONS TO _____'S [moving party or opposing party] EVIDENCE IN_____ [SUPPORT OF or OPPOSITION TO] MOTION FOR SUMMARY_____ [JUDGMENT OR SUMMARY JUDGMENT OR IN THE ALTERNATIVE SUMMARY ADJUDICATION]
Defendant.	)	Date: _____

Time: _____
Location: _____
Judge: _____
Date Action Filed:_____
Trial Date: _____

_____

_____ [*Identify party making written objections, e.g.,* Plaintiff] _____ [*name*] submits the following written objections to _____'s [*identify party whose evidence is objected to, e.g.,* Defendant] evidence _____ [in support of *or* in opposition to] _____'s [*identify party filing motion, e.g.,* Defendant] motion for _____ [summary judgment or summary judgment *or* in the alternative summary adjudication] pursuant to *Cal. Rules of Ct., Rule 3.1354(b).*

[EITHER]
Objections to _____[*Identify document in which specific material objected to is located, e.g.,* Jackson Declaration dated April 1, 2007]

Objection Number 1
[Objections must be numbered consecutively]

"_____." [*Quote or set forth the objectionable statement or material,e.g.,* Johnson told me that no widgets were ever received]. (_____, page _____, lines _____.) [*State the exhibit, title, page, and line number of the material objected to, e.g.,* Jackson Declaration, page 3, lines 7-8].

Grounds for Objection 1: _____ [*State the grounds for the objection, along with a citation to the evidentiary rule, e.g.,* Hearsay (*Evid. Code § 1200*); lack of personal knowledge (*Evid. Code § 702(a)*)].

Objection Number 2

"_____." [*Quote or set forth the objectionable statement or material, e.g.,* A lot of people find widgets to be very useful]. (_____, page _____, lines _____.) [*State the exhibit, title, page, and line number of the material objected to, e.g.,* Jackson Declaration, page 17, line 5].

Grounds for Objection 2: _____ [*State the grounds for the objection, along with a citation to the evidentiary rule, e.g.,* Irrelevant (*Evid. Code §§ 210, 350-351*)].

[OR]

Objections to _____
[*Identify document in which specific material objected to is located, e.g.,* Jackson Declaration dated April 1, 2007]

Material Objected to: Grounds for Objection:

1. _____, page _____, lines _____ [*State the exhibit, title, page, and line number of the material objected to, e.g.,* Jackson Declaration, page 3, lines 7-8]: "_____." [Quote or set forth the objectionable statement or material, e.g., Johnson told me that no widgets were ever received].	_____ [*State the grounds for the objection, along with a citation to the evidentiary rule, e.g.,* Hearsay (Evid. Code § 1200); lack of personal knowledge (Evid. Code § 702(a))].
2. _____, page _____, lines _____ [*State the exhibit, title, page, and line number of the material objected to, e.g.,* Jackson Declaration, page 17, line 5]: "_____" [Quote or set forth the objectionable statement or material, e.g., A lot of people find widgets to be very useful].	_____ [*State the grounds for the objection, along with a citation to the evidentiary rule, e.g.,* Irrelevant (Evid. Code §§ 210, 350-351)].

_____[signature]
_____[name/title]

[2] Use of Form

The form in [1], above, outlines the required format for written objections to the moving or opposing party's evidence in support of or in opposition to a motion for summary judgment or summary adjudication. Effective January 1, 2007, written objections to evidence must follow one of the above formats and must [*Cal. Rules of Ct., Rule 3.1354(b)*]:

- Identify the name of the document in which the specific material objected to is located;
- State the exhibit, title, page, and line number of the material objected to;
- Quote or set forth the objectionable statement or material; and
- State the grounds for each objection to that statement or material.

The objections also must be numbered consecutively [*Cal. Rules of Ct., Rule 3.1354(b)*]. A party submitting written objections to evidence must submit with the objections a proposed order. For additional discussion of the format requirements for written evidentiary objections, see *§ 537.25[4][b]*. For a form of proposed order on written objections, see *§ 537.87*.

[3] Time for Filing and Service

Unless otherwise excused by the court on a showing of good cause, all written objections to evidence in support of or in opposition to a motion for summary judgment or summary adjudication must be and filed at the same time as the objecting party's opposition or reply papers are served and filed [*Cal. Rules of Ct., Rule 3.1354(a)*].

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47-537 California Forms of Pleading and Practice--Annotated § 537.87

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§ 537.87 Order on Written Objections to Evidence in Support of or in Opposition to Motion for Summary Judgment or Summary Adjudication [Cal. Rules of Ct., Rule 3.1354(c)]

[1] FORM Order on Written Objections to Evidence in Support of or in Opposition to Motion for Summary Judgment or Summary Adjudication [Cal. Rules of Ct., Rule 3.1354(c)]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[name],	)	
Plaintiff, vs. _____[name],	)	NO. _____ ORDER
Defendant.	)	
	)	
	)	

_____

[EITHER]
Objections to _____
[*Identify document in which specific material objected to is located, e.g.,*

Jackson Declaration dated April 1, 2007]

Objection Number 1
[*Objections must be numbered consecutively*]

"_____." [*Quote or set forth the objectionable statement or material, e.g.,* Johnson told me that no widgets were ever received]. (_____, page _____, lines _____,) [*State the exhibit, title, page, and line number of the material objected to, e.g.,* Jackson Declaration, page 3, lines 7-8].

Grounds for Objection 1: _____ [*State the grounds for the objection, along with a citation to the evidentiary rule, e.g.,* Hearsay (*Evid. Code § 1200*); lack of personal knowledge (*Evid. Code § 702(a)*)].

Court's Ruling on Objection 1: Sustained: _____

Overruled: _____

Objection Number 2

"_____." [*Quote or set forth the objectionable statement or material, e.g.,* A lot of people find widgets to be very useful]. (_____, page _____, lines _____.) [*State the exhibit, title, page, and line number of the material objected to, e.g.,* Jackson Declaration, page 17, line 5].

Grounds for Objection 2: _____ [*State the grounds for the objection, along with a citation to the evidentiary rule, e.g.,* Irrelevant (*Evid. Code §§ 210, 350-351*)].

Court's Ruling on Objection 2: Sustained: _____

Overruled: _____

[OR]

Objections to _____
[*Identify document in which specific material objected to is located, e.g.,*
Jackson Declaration dated April 1, 2007]

Material Objected to:	Grounds for Objection:	Ruling on the Objection
1. _____, page _____, lines _____ [*State the exhibit, title, page, and line number of the material objected to, e.g.,* Jackson Declaration, page 3, lines 7-8]:	_____ [*State the grounds for the objection, along with a citation to the evidentiary rule, e.g.,* Hearsay (Evid. Code § 1200); lack of personal knowledge (Evid. Code § 702(a))].	Sustained: _____
"_____." [*Quote or set forth the objectionable statement or material, e.g.,*		Overruled: _____

Johnson told me that no widgets were ever received]		
2. _____, page _____, lines _____ [*State the exhibit, title, page, and line number of the material objected to, e.g.,* Jackson Declaration, page 17, line 5]:	_____ [*State the grounds for the objection, along with a citation to the evidentiary rule, e.g.,* Irrelevant (Evid. Code §§ 210, 350-351)].	Sustained: _____
"_____" [*Quote or set forth the objectionable statement or material, e.g.,* A lot of people find widgets to be very useful].		Overruled: _____

Date: _____ _____

Judge of the Superior Court

[2] Use of Form

The form in [1], above, is for use when a party submits written objections to another party's evidence. Effective January 1, 2007, a party submitting written objections to evidence must submit with the objections a proposed order following one of the above formats [*Cal. Rules of Ct., Rule 3.1354(c)*]. The ordermust include places for the court to indicate whether it has sustained or overruled each objection and it must include a place for the judge's signature.

For additional discussion of the format requirements for proposed orders on evidentiary objections, see *§ 537.25[4][d]*. For a form of written objections, see *§ 537.86*.

California Forms of Pleading and Practice--Annotated

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 538 SURETYSHIP, BONDS, AND UNDERTAKINGS

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Chapter 538 SURETYSHIP, BONDS, AND UNDERTAKINGS

PART I. SCOPE

47-538 California Forms of Pleading and Practice--Annotated § 538.01

§ 538.01 Scope of Chapter

This chapter discusses suretyship contracts generally, addressing the rights and duties of all three parties involved [*see § 538.10* et seq.]. It includes forms to be used by the surety to provide notices to the creditor revoking a continuing guaranty [*see § 538.160*] and demanding that the creditor proceed against the principal [*see § 538.161*]. A form of notice by the surety to the principal of an action of the principal's obligation is also included [*see § 538.172*]. In addition, this chapter includes forms of complaints for the surety to compel performance or reimbursement by the principal [*see §§ 538.162* and *538.163*] and to seek contribution from cosureties [*see § 538.165*]. Also included are forms of notice of motion, supporting declaration, and order to determine the liability of a joint judgment debtor [*see §§ 538.166 -538.168*]. This chapter also contains forms of complaints against the surety by the creditor on a continuing guaranty [*see § 538.169*] and on a guaranty of collectibility [*see § 538.170*], and allegations for use in a complaint based on a guaranty of accounts receivable [*see § 538.171*]. In addition, there are forms to be used by the surety as affirmative defenses based on material alteration of the principal obligation [*see §§ 538.173*, *538.174*], failure to proceed against principal on demand [*see § 538.175*], and nonreliance on the guaranty [*see § 538.176*].

For discussions and forms relating to surety insurance, see Ch. 308, *Insurance* . For discussion, procedures, and forms relating to indemnity based on express agreements and contribution, see Ch. 300, *Indemnity and Contribution* . For discussion and forms concerning contractors and their sureties, see Ch. 104, *Building Contracts* . For discussion of promissory notes and endorsements and accommodation parties to them, see Ch. 385, *Negotiable Instruments* .

This chapter also discusses the procedural rules relating to executing and objecting to statutory bonds and undertakings, and to substituting sureties and releasing sureties, as well as to deposits in lieu of bond [*see § 538.40* et seq.]. These rules are generally applicable to all statutory bonds and undertakings. Additional procedural requirements of statutes that provide for bonds or undertakings in particular proceedings are discussed in the chapters relating to those proceedings (*see, e.g.,* Ch. 43, *Appeal: Stay of Proceedings* , Ch. 283, *Guardianship and Conservatorship: Bonds* , and Ch. 446, *Probate: Bonds--Increase and Decrease During Administration*).

This analysis includes the following forms:

- Statutory bond or undertaking [*see § 538.190*].

- Declaration of personal surety's qualifications [*see § 538.191*].

- Notice of motion objecting to the sufficiency of a bond or undertaking [*see § 538.192*] and supporting declaration [*see § 538.193*].

- Order determining the sufficiency of a bond or undertaking [*see § 538.194*].

- Notice of motion for order determining that a bond or undertaking has become insufficient or is excessive [*see § 538.195*], and supporting declaration [*see § 538.196*].

- Order to show cause why an order for a new, additional, or supplemental bond should not issue [*see § 538.197*], and order for a new, additional, or supplemental bond or reducing bond [*see § 538.198*].

- Application [*see § 538.199*] and notice of hearing on an application [*see § 538.200*] to release a surety from a bond.

- Application [*see § 538.201*] and notice of hearing on an application [*see § 538.202*] for an order substituting sureties.

- Orders for releasing and substituting sureties [*§§ 538.203, 538.204*].

- Notice of cancellation or withdrawal of surety from a bond [*see § 538.205*].

This chapter also deals with the enforcement of liability on statutory bonds [*see § 538.80* et seq.]. It includes a notice of motion [*see § 538.220*] and order [*see § 538.221*] directing sale of bearer bonds or notes that were deposited in lieu of bond, and a notice of motion, supporting declaration, and judgment to enforce liability on a bond that was given in an action or proceeding [*see §§ 538.222 -538.224*]. It also includes forms of complaints and allegations to enforce the liability of a surety on an official bond [*see § 538.225*], on a fidelity bond [*see §§ 538.226* and *538.227*], on an executor's or administrator's bond [*see §§ 538.228 -538.230*], and on a bond given to support a preliminary injunction for damages that might be suffered by the person who was enjoined [*see § 538.231*]. It includes a complaint by a surety for declaratory relief against claimants on a statutory bond and against the principal's indemnitor [*see § 538.232*] and a form of cross complaint by a surety to compel an agency to exhaust security in an action on a licensee's bond [*see § 538.233*]. It also includes a declaration for an enforcement lien [*see § 538.234*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityCivil ProcedureRemediesBondsSuretiesProceduresContracts LawDebtor & Creditor RelationsContracts LawTypes of ContractsGuaranty Contracts

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§ 538.02 Cross References

For forms of complaint against contractors and their sureties, see Ch. 104, *Building Contracts* .

For a discussion of and forms relating to express indemnity agreements and contribution among joint obligors and debtors, see Ch. 299, *Indemnity and Contribution* .

For forms of complaint against an insurer to compel performance on the surety insurance contract, see Ch. 308, *Insurance* .

For a discussion of and forms for use in promissory notes and endorsers, see Ch. 385, *Negotiable Instruments* .

For a discussion relating to the jurisdiction of small claims court over guarantor defendants, see Ch. 526, *Small Claims* .

For discussion and forms of acknowledgment, see Ch. 9, *Acknowledgments* .

For discussion and a procedural guide relating to filing an undertaking to stay execution of trial court proceedings by perfecting an appeal, see Ch. 43, *Appeal: Stay of Proceedings* .

For discussion of the procedure for and forms relating to the filing of an undertaking in attachment proceedings, see Ch. 62, *Attachment* .

For discussion and forms relating to performance bonds, see Ch. 104, *Building Contracts* .

For discussion, a procedural guide, and forms relating to filing of an undertaking and exception to sureties in a claim and delivery action, see Ch. 119, *Claim and Delivery* .

For discussion relating to an undertaking given in contempt proceedings, see Ch. 135, *Contempt* .

For discussion and forms relating to bonds given for removal of a civil action, see Ch. 265, *Federal Courts: Jurisdiction*

and Removal .

For discussion relating to the transferee giving an undertaking in an action by a creditor to set aside a fraudulent conveyance, see Ch. 270, *Fraudulent Conveyances* .

For discussion, a procedural guide, and forms relating to bonds given by guardians and conservators, see Ch. 283, *Guardianship and Conservatorship: Bonds* , and Ch. 290D, *Guardianship and Conservatorship: Actions Against Guardians, Conservators, and Sureties* .

For discussion and forms relating to rights of indemnified after adverse judgment for performing acts for which was indemnified, see Ch. 300, *Indemnity and Contribution* .

For discussion, a procedural guide, and forms relating to giving undertakings for temporary restraining orders and preliminary injunctions, see Ch. 303, *Injunctions* .

For discussion and forms relating to surety insurance, see Ch. 308, *Insurance* .

For discussion and form of notice of motion to expunge notice of lis pendens from record on giving of undertaking, see Ch. 348, *Lis Pendens* .

For discussion of the release of the surety of a notary, see Ch. 390, *Notaries Public* .

For discussion and forms relating to the increase and decrease of administrator's bonds, see Ch 446, *Probate: Bonds--Increase and Decrease During Administration* .

For discussion and a procedural guide regarding the filing of an undertaking in a quo warranto action, see Ch. 483, *Quo Warranto* .

For discussion and form of bond given by receiver, see Ch. 486, *Receivers* .

For discussion and forms relating to a surety's right to subrogation, see Ch. 536, *Subrogation* .

For discussion and forms relating to actions on performance bonds, see Ch. 104, *Building Contracts* .

For discussion and forms relating to bonds given by guardians and conservators, see Ch. 283, *Guardianship and Conservatorship: Bonds* , and Ch. 290D, *Guardianship and Conservatorship: Actions Against Guardians, Conservators, and Sureties* .

For discussion, a procedural guide, and forms relating to enforcement of undertakings given in proceedings for temporary restraining orders and preliminary injunctions, see Ch. 303, *Injunctions* .

For discussion and forms relating to actions on payment bonds for private works, see Ch. 361, *Mechanics' Liens* .

For discussion, a procedural guide, and forms regarding actions on public works payment bonds, see Ch. 481, *Public Works* .

For discussion and forms relating to a surety's right to subrogation, see Ch. 536, *Subrogation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsSuretiesGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesAccommodationContracts LawContract Conditions & ProvisionsIndemnityContracts LawDebtor & Creditor RelationsContracts LawTypes of ContractsGuaranty Contracts

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[Reserved]

§§ 538.03[Reserved]

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§ 538.10 Governing Statutes

Suretyship is governed by *Civ. Code §§ 2787-2856*. The statute of limitations for an action against a surety is contained in *Code Civ. Proc. § 359.5*. *Code Civ. Proc. § 1050* allows an action by a surety to compel the principal to perform. The effect of a judgment against an officer or other person who has received a bond or covenant of indemnity against liablity for an act on the persons who executed a bond or covenant is governed by *Code Civ. Proc. § 1055*. The binding effect of a judgment against a surety on the principal is governed by *Code Civ. Proc. § 1912*. Procedures for requiring contribution from joint judgment debtors are contained in *Code Civ. Proc. §§ 881-883*. The rights and obligations of accommodation parties to negotiable instruments are governed by *Com. Code § 3419* and, depending on whether the accommodation party signs as a maker or endorser, *Com. Code § 3412* or *3415*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsContracts LawThird PartiesJoint & Several ContractsContracts LawTypes of ContractsGuaranty ContractsGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 538.11 Definitions

[1] Surety and Guarantor Interchangeable

The terms "surety" and "guarantor" are used interchangeably in this part. Any former distinctions between the terms were abolished by the statute that now defines them [*Morgan Creek Residential v. Kemp (2007) 153 Cal. App. 4th 675, 685, 63 Cal. Rptr. 3d 232* ; *Wiener v. Van Winkle (1969) 273 Cal. App. 2d 774, 786, 78 Cal. Rptr. 761]* . They are defined as one who promises to answer for the debt, default, or miscarriage of another or who hypothecates property as security therefor [*Civ. Code § 2787*; *but see Com. Code § 3419(d)* (with respect to negotiable instruments, rights of "guarantor," who guarantees collection rather than payment, as different from those of ordinary accommodation party)].

[2] Surety, Creditor, and Principal

The tripartite relationship in suretyship involves parties known as "surety," "creditor," and "principal." The creditor is the one to whom the obligation is owed. The surety agrees to answer for the debt of the "principal" or "principal debtor" who is the person that owes the original debt [*First National Insurance Co. v. Cam Painting, Inc. (2009) 173 Cal. App. 4th 1355, 1364-1365, 93 Cal. Rptr. 3d 808* ; *Josephian v. Lion (1924) 66 Cal. App. 650, 661, 227 P. 204* ; *cf. Com. Code § 3419(a)* (negotiable instrument terminology: "accommodation party" and "party accommodated")].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsContracts LawThird PartiesJoint & Several ContractsContracts LawTypes of ContractsGuaranty Contracts

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§ 538.12 Nature of Suretyship

[1] In General

Suretyship contracts are collateral to the original contract binding the principal debtor and creditor and give rise to a separate and independent obligation [*Palm Springs S. & S. Inc. v. Bering (1963) 213 Cal. App. 2d 177, 181, 28 Cal. Rptr. 526]* . The suretyship relation arises when two persons are under an obligation to the same creditor, but one of them bears the ultimate burden of the obligation. The obligor ultimately responsible for the debt is the principal and the other is the surety. Whether one is the surety depends not on the relation with the creditor so much as his or her relation with the principal debtor. If asked to pay, the surety may bring an action against the principal for indemnification. The creditor views them both as primarily liable [*Matthews v. Hinton (1965) 234 Cal. App. 2d 736, 740-741, 44 Cal. Rptr. 692]* .

When a principal obligor purports to take on additional liability as guarantor, nothing is added to the primary obligation [*Torrey Pines Bank v. Hoffman (1991) 231 Cal. App. 3d 308, 319-320, 282 Cal. Rptr. 354]* . For example, when individual trustees purported to guarantee a note payable by the trust, the court found substantial identity between the individual guarantors and the debtor trust. There was in fact no guarantee, and the trustees were deemed primary obligors [*Torrey Pines Bank v. Hoffman (1991) 231 Cal. App. 3d 308, 320-321, 282 Cal. Rptr. 354* (case decided prior to enactment of *Prob. Code § 18000* and governed by prior case law under which trustees are personally liable on a contract unless the contract stipulated otherwise)]. The correct inquiry is whether the purported debtor is anything other than an instrumentality used by the purported guarantor and whether that instrumentality actually removed the individuals from their status as obligors under another name [*Torrey Pines Bank v. Hoffman (1991) 231 Cal. App. 3d 308, 320, 282 Cal. Rptr. 354]* .

[2] Guaranty of Promissory Note

A guarantor of a negotiable instrument is a type of accommodation party, defined as one who signs as maker, drawer, acceptor, or endorser for the benefit of another, although a guarantor may become one by signing an instrument that includes language indicating that the signer is acting as guarantor or surety. An accommodation party is obligated to pay the instrument in the capacity in which he or she signs [*Com. Code § 3419(a)-(c)*]. For further discussion and forms

relating to accommodation parties to negotiable instruments, see Ch. 385, *Negotiable Instruments* .

If the guarantor's signature on a negotiable instrument is accompanied by language indicating unambiguously that he or she is guaranteeing collection rather than payment of the obligation of another party to the instrument, the guarantor is obliged to pay the amount due on the instrument to a person entitled to enforce the instrument only if (1) execution of judgment against the principal has been returned unsatisfied, (2) the principal is insolvent or is in an insolvency proceeding, (3) the principal cannot be served with process, or (4) it is otherwise apparent that payment cannot be obtained from the principal [*Com. Code § 3419(d)*].

A guarantor or accommodation party who pays the instrument is entitled to reimbursement from the principal ("accommodated party") and is entitled to enforce the instrument against the principal [*Com. Code § 3419(e)*].

[3] Distinguished From Endorsement of Negotiable Instruments

Suretyships differ from endorsements of negotiable instruments. Endorsement is primarily a means of transferring or negotiating an instrument [*see Com. Code §§ 3201(b), 3204, 3205(a), (b)*]. If the maker or drawer does not pay the instrument when due, the endorser is liable to the person entitled to enforce the instrument [*see Com. Code § 3415(a)*]. Unlike sureties, endorsers must be given notice of dishonor (or notice must be waived or excused) before they are liable to pay the instrument [*Com. Code §§ 3415(c), 3503(a)*].

The obligation of one who endorses a negotiable instrument for purposes of becoming an accommodation party (surety) is the same as that of one who endorses the instrument simply to transfer or negotiate it [*Com. Code § 3419(b)*]. For further discussion and forms relating to negotiable instruments, see Ch. 385, *Negotiable Instruments* .

[4] Distinguished From Indemnity

California law recognizes a distinction between an agreement to indemnify and a guaranty. Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person [*Civ. Code § 2772*]. A surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor [*Civ. Code § 2787*]. A guarantor makes a direct promise to perform the principal's obligation in the event that the principal fails to perform. An indemnitor does not make a direct promise to perform the principal's obligation; the indemnitor promises to reimburse the indemnitee for losses suffered or to hold the indemnitee harmless [*Trust One Mortgage Corp. v. Invest America Mortgage Corp. (2005) 134 Cal. App. 4th 1302, 1309, 37 Cal. Rptr. 3d 83]* .

Another distinction is that the promise in an indemnity contract is an original and not a collateral undertaking, whereas a surety contract is secondary and can only exist if there is some principal liability to which it is collateral [*Somers v. United States Fidelity & Guaranty Co. (1923) 191 Cal. 542, 547, 217 P. 746]* . For further discussion and forms relating to indemnity, see Ch. 300, *Indemnity and Contribution* .

[5] Distinguished From Letter of Credit

A letter of credit [*see Com. Code § 5103(a)* (definition)] is not a form of suretyship obligation [*Civ. Code § 2787*]. Generally, a surety's liability for an obligation is secondary to, and derivative of, the liability of the principal for that obligation. By contrast, the liability of the issuer of a letter of credit to the letter's beneficiary is direct and independent of the underlying transaction between the beneficiary and the issuer's customer [*see Western Security Bank v. Superior Court (1997) 15 Cal. 4th 232, 246-247, 62 Cal. Rptr. 2d 243, 933 P. 2d 507* ; *Morgan Creek Residential v. Kemp (2007) 153 Cal. App. 4th 675, 685-686, 63 Cal. Rptr. 3d 232* ; *DBJJJ, Inc. v. National City Bank (2004) 123 Cal. App. 4th 530, 534, 19 Cal. Rptr. 3d 904]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesAccommodationCommercial Law (UCC)Letters of Credit (Article 5)IssuersObligationsGeneral OverviewContracts LawContract Conditions & ProvisionsIndemnityContracts LawDebtor & Creditor RelationsContracts LawTypes of ContractsGuaranty Contracts

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§ 538.13 Types of Suretyship Obligation

[1] Unconditional

A suretyship obligation is to be deemed unconditional unless its terms import some condition precedent to the liability of the surety [*Civ. Code § 2806*]. If there is nothing in the terms of the guaranty or in the facts and circumstances of the case to import any condition precedent to the liability of the surety, the surety's obligations are unconditional [*Cooke v. Mesmer (1912) 164 Cal. 332, 342, 128 P. 917]* . In an unconditional suretyship, the surety's liability is coextensive with that of the principal [*Standard Oil Co. v. Houser (1950) 101 Cal. App. 2d 480, 488, 225 P.2d 539]* .

[2] Conditional

Any matter can be made a condition precedent to the surety's liability [*see Schwab v. Bridge (1915) 27 Cal. App. 204, 206-207, 149 P. 603]* . For example, a guaranty for payment "provided that the amount may be due and presented" by a specified date is a conditional guaranty [*Schwab v. Bridge (1915) 27 Cal. App. 204, 205, 207, 149 P. 603]* .

Conditions precedent are not favored by the law and are strictly construed against one seeking to rely on them. If the terms employed in the contract are clear and certain, however, and there is nothing to show a contrary intention, the liability of a surety cannot be extended by implication beyond the terms of the contract [*Schwab v. Bridge (1915) 27 Cal. App. 204, 207, 149 P. 603]* .

Although conditions precedent will not be implied, when they are present, they are adhered to strictly. Any conditions must be precisely fulfilled without regard to whether or not prejudice results. Thus, a surety who was entitled by contract to immediate notice of any act or omission that might cause liability was not liable when notice was not received for five weeks [*Union Indemnity Co. v. Lang (9th Cir. 1934) 71 F.2d 901, 906]* .

[3] Limited

The suretyship contract defines the obligation of the surety. A surety may limit the amount for which he or she will be liable, or the time for which the guaranty will run, or may limit liability to a single transaction between the principal

debtor and the creditor, as distinguished from a continuing guaranty [*Berg Metals Corp. v. Wilson (1959) 170 Cal. App. 2d 559, 569, 339 P.2d 869]* . The limitations in the contract will be upheld. For example, a clause in which the surety agreed to pay an amount not exceeding $75,000 was interpreted by the court to mean that the liability of the surety was limited to that amount under any circumstance [*Bank of America National Trust and Savings Ass'n v. Sage (1936) 13 Cal. App. 2d 171, 175, 56 P.2d 565]* .

A continuing guaranty may be limited as to the amount guaranteed [*Berg Metals Corp. v. Wilson (1959) 170 Cal. App. 2d 559, 569-570, 339 P.2d 869* ; *see also § 538.13[5][b]*].

[4] Guaranty of Collectibility

A guaranty to the effect that an obligation is good or collectible imports that the debtor is solvent and that the demand is collectible by the usual legal proceedings [*Civ. Code § 2800*]. This type of guaranty is distinct because the liability of the surety does not arise at the same time as that of the principal debtor. A guarantor of collectibility does not become liable until after the creditor, by the use of due and reasonable diligence, has become unable to collect the debt from the principal debtor [*Ohio Electric Car Co. v. LeSage (1920) 182 Cal. 450, 455, 188 P. 982* ; *see § 538.143[2][c]*].

[5] Continuing

[a] Defined

A guaranty relating to a future liability of the principal under successive transactions that either continue his or her liability or from time to time renew it after it has been satisfied is a continuing guaranty [*Civ. Code § 2814*]. A continuing guaranty contemplates a succession of liabilities for which, as they accrue, the guarantor becomes liable. It is prospective in operation and is generally intended to provide security in respect to future transactions, within certain limits [*Goldman v. Dangerfield (1929) 101 Cal. App. 67, 75, 281 P. 400]* .

Whether or not a guaranty is continuing is determined from the surrounding circumstances. When the suretyship agreement provides a standing credit to the principal, to be used either indefinitely or for a given period, it is deemed a continuing guaranty. Unless the terms fairly imply that the guarantor's liability is to be limited, the guaranty is seen as continuing until it is revoked. A continuing guaranty need not be a guaranty of a specific contract, but can arise when the surety guarantees all the principal's charges incurred through a succession of transactions with the creditor [*Standard Oil Co. v. Houser (1950) 101 Cal. App. 2d 480, 487, 225 P.2d 539]* . For example, when the principals of a corporation executed personal guarantees of payment on the corporation's commercial lease, the guaranty agreements were continuing guaranties of performance under the lease that also applied to lease amendments [*Central Building, LLC v. Cooper (2005) 127 Cal. App. 4th 1053, 1055, 26 Cal. Rptr. 3d 212]* .

[b] Unconditional or Limited

Civ. Code § 2814 contains no restriction concerning the conditional or unconditional nature of a continuing guaranty. A continuing guaranty for all the charges made by the principal without regard to the terms of the sales, is a continuing unconditional guaranty [*see Standard Oil Co. v. Houser (1950) 101 Cal. App. 2d 480, 487-488, 225 P.2d 539* ; *see also Central Building, LLC v. Cooper (2005) 127 Cal. App. 4th 1053, 1059-1060, 26 Cal. Rptr. 3d 212* (principals' personal guarantees of payment on corporation's commercial lease held to be continuing guaranties that applied to lease amendments in absence of limiting language in agreements)].

A continuing guaranty subject to a dollar limitation is not conditional so as to limit the amount of credit to be given to the debtor and to relieve the surety of liability in the event the limit is exceeded. Rather, it limits only the amount of the surety's liability, and the surety may still be liable for that amount even though the principal debtor has at various times contracted and paid debts equal to or greater than the amount of the guaranty [*Berg Metals Corp. v. Wilson (1959) 170 Cal. App. 2d 559, 569-571, 339 P.2d 869]* .

[c] Revocation by Surety

A continuing guaranty may be revoked at any time by the guarantor, in respect to future transactions, unless there is a continuing consideration as to such transactions that he or she does not renounce [*Civ. Code § 2815*; *see § 538.160*]. The guarantor cannot revoke the guaranty once it has been acted on and benefited the principal [*Nielsen v. Davidson (1924) 66 Cal. App. 442, 444, 226 P. 835]* . A continuing guaranty does not cover renewals, after revocation, of obligations that were covered by the guaranty at the time of revocation [*Southern Cal. First Nat. Bank v. Olsen (1974) 41 Cal. App. 3d 234, 240, 116 Cal. Rptr. 4]* .

The legislative intent implicitly underlying *Civ. Code § 2815* was to protect guarantors from seemingly unending continuing guarantees of loans to debtors that were frequently beyond the control of the guarantors. *Civ. Code § 2815* allows a guarantor to effectively limit his or her losses by "freezing" his or her liability for only those advances made up to the time of the revocation. Thus, a guarantor who learns that the debtor's financial condition has drastically changed for the worse, can exercise the right to revoke his or her continuing guaranty under *Civ. Code § 2815* [*Pearl v. General Motors Acceptance Corp. (1993) 13 Cal. App. 4th 1023, 1030, 16 Cal. Rptr. 2d 805]* .

A guarantor may waive the protections of *Civ. Code § 2815*, but the waiver must be specific and clear, so that a guarantor knows on execution of the document that he or she will not have any right to revoke the guaranty as to any future advances, and thus, that the guarantor may essentially have no control over his or her ultimate responsibility for the debtor's borrowings [*Pearl v. General Motors Acceptance Corp. (1993) 13 Cal. App. 4th 1023, 1031, 1032, 16 Cal. Rptr. 2d 805]* . The language that *Pearl* held insufficient to waive the guarantor's right of revocation was in the pledge agreement that secured the guaranty and stated that the agreement "shall remain in full force and effect until all obligations owing to Pledgee by Borrowers have been satisfied" and that the agreement would terminate on satisfaction of all such obligations. The court found the quoted language unclear as to whether it was intended to preclude other means of termination or revocation of the agreement. It could mean that the pledge (and guaranty) would remain effective as to all advances made to the borrower prior to any termination under *Civ. Code § 2815* [*Pearl v. General Motors Acceptance Corp. (1993) 13 Cal. App. 4th 1023, 1032, 16 Cal. Rptr. 2d 805]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsConditions PrecedentContracts LawDebtor & Creditor RelationsContracts LawThird PartiesJoint & Several ContractsContracts LawTypes of ContractsGuaranty Contracts

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§ 538.14 Creation of Suretyship

[1] By Contract

Unless notice of acceptance is expressly required, an offer to become a surety may be accepted by acting on it or by acceptance on other consideration. An unconditional suretyship obligation is binding on the surety without notice of acceptance [*Civ. Code § 2795*]. The creation of a suretyship does not require the knowledge or consent of the principal debtor [*Civ. Code § 2788*].

[2] Consideration

The requirement of consideration can be satisfied in either of two ways. If a suretyship is created at the same time as the original obligation or with the acceptance of the creditor and forms a part of the consideration of the original obligation, no separate consideration is needed. In all other suretyships, there must be a consideration distinct from that of the original contract [*Civ. Code § 2792*].

[3] Statute of Frauds

Civ. Code § 2794 lists cases in which the promise to answer for the obligation of another is deemed an original obligation and does not require a writing. All other suretyship obligations must be in writing and signed by the surety. Although suretyships require consideration, the writing need not express the consideration [*Civ. Code §§ 1624(a)(2), 2793*; *see* Ch. 530, *Statute of Frauds*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawConsiderationGeneral OverviewContracts LawDebtor & Creditor RelationsContracts LawStatutes of FraudsRequirementsGeneral OverviewContracts LawThird PartiesJoint & Several ContractsContracts LawTypes of ContractsGuaranty Contracts

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Chapter 538 SURETYSHIP, BONDS, AND UNDERTAKINGS
PART II. LEGAL BACKGROUND
A. Suretyship

47-538 California Forms of Pleading and Practice--Annotated § 538.15

§ 538.15 Consumer Contract Awareness Act of 1990

[1] Guarantor Must Be Provided With Copy of Guaranty

Except as otherwise provided in *Civ. Code § 1799.206(b)* (multiple guarantors), a seller must deliver a copy of a consumer contract guaranty to the guarantor at the time the consumer contract guaranty is signed by the guarantor at the seller's place of business. If the consumer contract guaranty is not signed by the guarantor at the seller's place of business and the seller has not provided a copy of the consumer contract guaranty for the guarantor that the guarantor is able to keep, the seller must mail or deliver a copy of the consumer contract guaranty to the guarantor within 10 calendar days after the seller receives the signed consumer contract guaranty. In any case, the copy of the contract provided to the guarantor must not contain any blank spaces to be completed after the guarantor signs the guaranty, must contain the signature of the seller if it provides for such signature, and may also contain the signature of the guarantor [*Civ. Code § 1799.206(a)*; *see also Civ. Code § 1799.201(a), (b), (g)* (defining "consumer," "consumer contract," and "guarantor")].

If more than one guarantor has signed the consumer contract guaranty, the seller may comply with *Civ. Code § 1799.206(a)* by mailing or delivering the copy to any one of the guarantors who reside at the same address. A copy must also be mailed or delivered to any other guarantor who has signed the consumer contract guaranty and who does not reside at the same address [*Civ. Code § 1799.206(b)*].

[2] Liability; Evidence for Rescission

A seller who fails to comply with *Civ. Code § 1799.206* is liable to the guarantor for any actual damages suffered by the guarantor as a result of that failure. This remedy is nonexclusive and is in addition to any other remedies or penalties available under other California laws [*Civ. Code § 1799.206(c)*]. Failure to comply with *Civ. Code § 1799.206* does not create a new basis for rescission, but is admissible to establish a basis for the rescission of the consumer contract guaranty otherwise authorized by law [*Civ. Code § 1799.206(d)*].

[3] Definitions

A "consumer contract guaranty" within the meaning of the Consumer Contract Awareness Act of 1990 is a writing prepared by the seller and signed, or to be signed, by a guarantor that guarantees the obligation of a natural person under a consumer contract [*Civ. Code § 1799.201(c)*; *see also Civ. Code § 1799.201(a), (h)* (defining "consumer" and "seller")].

A "consumer contract" within the meaning of the Act is a writing prepared by a seller and, except as provided in *Civ. Code § 1799.202(c)* (signature cards and safe deposit or safekeeping agreements), signed, or to be signed, by a consumer that provides (1) for the sale or lease of goods or services that are purchased or leased primarily for personal, family, or household purposes, or (2) for extension of credit, the proceeds of which are used primarily for personal, family, or household purposes, except that a consumer credit application is not considered a consumer contract for purposes of this provision [*Civ. Code § 1799.201(b)*].

"Services" within the meaning of the Act means work, labor, and services, including depository services and other banking services [*Civ. Code § 1799.201(i)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Acts & PracticesState RegulationContracts LawDebtor & Creditor RelationsContracts LawThird PartiesJoint & Several ContractsContracts LawTypes of ContractsGuaranty Contracts

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47-538 California Forms of Pleading and Practice--Annotated § 538.16

§ 538.16 Interpretation of Suretyship Contracts

[1] In General

In interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts. Except as provided in *Civ. Code § 2794* (promises to answer for obligation of another that are deemed original obligations of promisor), the position of a surety to whom consideration moves is the same as that of one who is gratuitous [*Civ. Code § 2837*]. For a discussion of *Civ. Code § 2794, see* Ch. 530, *Statute of Frauds* .

If the terms of the assumption of liability are not settled, it will be implied that the surety has assumed no greater risk than other sureties in similar contracts in the same locale [*Civ. Code § 2799*; *see Schmitt v. Insurance Co. of North America (1991) 230 Cal. App. 3d 245, 255-262, 281 Cal. Rptr. 261* (differentiating insurance contract and suretyship agreement in context of statutory bond)].

[2] "Principal" May Prove to Be Surety

One who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he or she is in fact a surety, except as against persons who have acted on the faith of his or her apparent character of principal [*Civ. Code § 2832*; *see Caito v. United California Bank (1978) 20 Cal. 3d 694, 701, 144 Cal. Rptr. 751, 576 P.2d 466* ; *Quality Wash Group V LTD. v. Hallak (1996) 50 Cal. App. 4th 1687, 1700-1701, 58 Cal. Rptr. 2d 592]* . It is not necessary for the surety to show that the creditor accepted him or her as surety [*Civ. Code § 2832*]. For example, property owners who executed a deed of trust in favor of a developer's construction lender sufficiently pleaded that they were sureties rather than principal obligors when their allegations included the fact that the bank's officer considered them third parties, the construction loan agreement and note were signed by the developer alone, and the deed of trust identified the secured obligation as that of the developer and expressly provided that the owners had no personal liability for debt [*Mead v. Sanwa Bank California (1998) 61 Cal. App. 4th 561, 570-572, 71 Cal. Rptr. 2d 625* (declining to follow *Matthews v. Hinton (1965) 234 Cal. App. 2d 736, 44 Cal. Rptr. 692* due to Matthews reliance on cases abrogated by 1939 legislation)]. This doctrine has been applied in cases in which there was evidence that, to the knowledge of the creditor, the third party (claimed to be the principal in fact) had agreed with the maker of the promissory note to pay the obligation to the creditor [*Beverly Hills Nat. Bank v. Glynn (1968) 267 Cal. App. 2d 859,*

869, 73 Cal. Rptr. 808] .

Even though the apparent principal may establish an equitable lien against the actual principal, however, a purchaser or encumbrance in good faith for value and without actual or constructive notice will take priority over such an undisclosed lien [*see Caito v. United California Bank (1978) 20 Cal. 3d 694, 701-702, 144 Cal. Rptr. 751, 576 P.2d 466]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract InterpretationGeneral OverviewContracts LawDebtor & Creditor RelationsContracts LawThird PartiesJoint & Several ContractsContracts LawTypes of ContractsGuaranty Contracts

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47-538 California Forms of Pleading and Practice--Annotated § 538.17

§ 538.17 Liability of Surety

[1] When Liability Arises

[a] Unconditional Obligation

A surety who has assumed liability for payment or performance is liable to the creditor immediately on the default of the principal and without demand or notice [*Civ. Code § 2807*; *but see Com. Code §§ 3415(c), 3503(a)* (contra rule for accommodation endorser of negotiable instrument)]. Thus, if the guaranty is absolute and unconditional, the liability of the guarantor is fixed when the principal obligation matures. It is not predicated on exhaustion by the creditor of his or her remedies against the debtor or on the exhaustion of other security for the debt; it is immaterial whether the debtor can or cannot pay the debt [*Bank of America National Trust & Savings Assn. (1947) 81 Cal. App. 2d, 1, 7, 81 Cal. App. 2d 1, 183 P.2d 385]* . Notice of the default is not a condition precedent to the liability of the surety, and the bringing of an action against the surety, with its attendant process, consititutes sufficient notice of the default [*Bloom v. Bender (1957) 48 Cal. 2d 793, 799-800, 313 P.2d 568]* . However, notice may be made a condition precedent to a surety's liability [*see* *Schwab v. Bridge (1915) 27 Cal. App. 204, 206-207, 149 P. 603* (guaranty for payment "provided that the amount may be due and presented" by a specified date is a conditional guaranty)]. Otherwise, *Civ. Code § 2807* (and *Civ. Code § 2808*) places the primary burden on the surety to discover whether a default has occurred [*Baralat Development Co. v. Lichter (1987) 191 Cal. App. 3d 933, 936, 236 Cal. Rptr. 701]* .

[b] Conditional Obligation

When one assumes liability as surety on a conditional obligation, his or her liability is commensurate with that of the principal [*Civ. Code § 2808*; *see, e.g.,* *First National Insurance Co. v. Cam Painting, Inc. (2009) 173 Cal. App. 4th 1355, 1367, 93 Cal. Rptr. 3d 808* (surety liable for fees for which principal would have been liable); *National Technical Systems v. Superior Court (2002) 97 Cal. App. 4th 415, 423-424, 118 Cal. Rptr. 2d 465* (finding that surety's liability on stop notice release bond extended to attorney fees to which subcontractor was entitled under subcontract)].

A surety on a conditional obligation is not entitled to notice of the principal's default unless the surety is unable, through reasonable diligence, to acquire information of the default and the creditor has actual notice thereof [*Civ. Code § 2808*].

[c] Principal's Obligation on Installment Plan

If the payment guaranteed is to be paid on an installment plan, the surety's liability for each monthly payment becomes fixed and unconditional as each payment becomes due. For example, a surety of payment of alimony and child support obligations became liable as each payment became due, without regard to the creditor's remedies against the principal debtor [*Glickman v. Collins (1975) 13 Cal. 3d 852, 862, 120 Cal. Rptr. 76]* .

[d] Guaranty of Collectibility

A guaranty to the effect that an obligation is good or is collectible imports that the debtor is solvent and that the demand is collectible by the usual legal proceedings, if taken with reasonable diligence [*Civ. Code § 2800*]. A guaranty of collectibility is unlike other suretyships because it requires that the creditor must first proceed against the principal and provide notice to the surety. It is equivalent to a guaranty that the obligation is collectible by due course of law, and the surety is bound only on condition that the creditor uses due diligence to collect the debt from the principal debtor and gives the surety notice of the principal's default [*see Citizens' Nat'l Trust & Sav. Bank v. Seaboard Surety Corp. (1935) 4 Cal. App. 2d 766, 768-769, 41 P.2d 956* ; *cf. Com. Code § 3419(d)* (guaranty of collection of negotiable instrument)].

A guaranty that an obligation is good or collectible is not discharged by failure to proceed against the principal debt or any collateral security for its payment, however, if no part of the debt could have been collected by these means [*Civ. Code § 2801*; *see Com. Code § 3419(d)(4)* (guaranty of collection of negotiable instrument)]. The removal of the principal from California, leaving no property in the state from which the obligation may be satisfied, is equivalent to the insolvency of the principal in its effect on the rights and obligations of the guarantor [*Civ. Code § 2802*; *cf. Com. Code § 3419(d)(1), (3)* (guaranty of collection of negotiable instrument)]. Thus, if the usual legal proceedings are not taken, the surety is discharged unless no part of the debt could have been collected thereby or unless the principal debtor has moved from the state leaving no property therein from which the obligation may be satisfied [*Ohio Electric Car Co. v. LeSage (1920) 182 Cal. 450, 454, 188 P. 982]* . For a complaint by a creditor against a surety on a guaranty of collectibility, *see § 538.170*.

[2] Extent of Surety's Obligation

[a] Determined by Contract

The surety will be held liable on the terms of the surety contract, and not the principal contract. The courts cannot impose on the sureties another or different contract from that which the parties made [*De Luca v. Budke (1956) 138 Cal. App. 2d 565, 568, 292 P.2d 298]* . Although the express terms of the surety contract control, they are tempered by the rules of contract law, which will be applied in construing the suretyship agreement [*Southern Cal. First Nat. Bank v. Olsen (1974) 41 Cal. App. 3d 234, 241, 116 Cal. Rptr. 4]* . However, if the surety so elects and is permitted, either by the contract itself or by permission of the creditor, to step into the place of the principal and perform on the contract after breach by the principal, the surety will be subject to the principal's liabilities [*Caron v. Andrew (1955) 133 Cal. App. 2d 402, 411, 284 P.2d 544]* . For complaints and allegations for use by the creditor against the surety, *see §§ 538.169 -538.171*. The obligation of a surety must be neither larger in amount nor in other respects more burdensome than that of the principal; if, in its terms, it exceeds it, it is reducible in proportion to the principal obligation [*Civ. Code § 2809*]. Because the liability of the surety is commensurate with that of the principal, if the principal is not liable on the obligation, neither is the surety [*U. S. Leasing Corp. v. DuPont (1968) 69 Cal. 2d 275, 290, 70 Cal. Rptr. 393, 444 P.2d 65* (surety that guaranteed lessee's performance under equipment lease held not liable for lessor's losses in buying equipment pursuant to lease commitment letter because principal's liability under the lease itself never accrued)].

A surety contract is not a contract of indemnity (or a liability insurance policy), since the undertaking of a contract of indemnity against loss is not to answer for the debt, default, or misconduct of another, as is the undertaking of a surety contract, but rather to make good the loss resulting to the indemnitee from that debt. The two types of contracts are

conceptually and legally distinct [*Washington International Ins. Co. v. Superior Court (1998) 62 Cal. App. 4th 981, 989, 73 Cal. Rptr. 2d 282* ; *Airlines Reporting v. U.S. Fidelity (1995) 31 Cal. App. 4th 1458, 1463-1465, 37 Cal. Rptr. 2d 563]* .

[b] Attorney's Fees and Costs as Obligations

Attorneys' fees are not recoverable as costs, damages, or otherwise unless there is express statutory or contractual authority for them [*Ralston-Purina Co. v. Carter (1962) 210 Cal. App. 2d 372, 379, 26 Cal. Rptr. 690]* . A provision in a guaranty calling for the surety to pay reasonable attorney's fees and all other costs and expenses incurred in the enforcement of the guaranty will be enforced [*Guild Wineries & Distilleries v. Land Dynamics (1980) 103 Cal. App. 3d 966, 979, 163 Cal. Rptr. 348]* . A surety cannot be held liable for attorney's fees, however, on the basis of an attorney's fees clause contained in an agreement that is ancillary to the contract that is guaranteed [*see Chinn v. Penn (1918) 179 Cal. 153, 155-156, 175 P. 687* ; *Ralston-Purina Co. v. Carter (1962) 210 Cal. App. 2d 372, 379-380, 26 Cal. Rptr. 690]* . For example, a guaranty of a promissory note cannot be extended by implication to cover an obligation for attorney's fees that is contained only in the mortgage that secures the note [*Chinn v. Penn (1918) 179 Cal. 153, 155-156, 175 P. 687* ; *but cf. McConnell v. Herbert (1934) 2 Cal. 2d 66, 70-71, 38 P.2d 781* (finding that guaranty was made in relation to both note and deed of trust)]. Furthermore, a surety cannot be liable for an award of attorney's fees in addition to the fixed penal sum of its bond unless the contract provision in the undertaking specifically so provides [*Lawrence Tractor Co., Inc. v. Carlisle Ins. Co. (1988) 202 Cal. App. 3d 949, 953-954, 249 Cal. Rptr. 150]* .

[c] Interest as Obligation

A surety may be held liable for interest, even if it increases the surety's total liability to an amount in excess of the bond [*Burns v. Massachusetts etc. Ins. Co. (1944) 62 Cal. App. 2d 972, 975, 146 P.2d 29]* . A fundamental distinction is made, however, in the computation of interest when the total amount will exceed the amount of the bond. For interest that does not bring the total liability beyond the penalty of the bond, the surety is liable under the bond obligation for the principal's debt. In that case, the interest runs the same as it does against the principal, usually from the date the principal violates the obligation that the surety is securing [*Burns v. Massachusetts etc. Ins. Co. (1944) 62 Cal. App. 2d 972, 975, 146 P.2d 29]* . For interest in excess of the penalty of the bond, the surety is liable only for its own default and not for the default of the principal. Thus, in that case, the surety may be liable for the full amount of the bond plus interest from the time performance became due from the surety itself, as damages for its own failure to pay the penalty when payment was due [*Burns v. Massachusetts etc. Ins. Co. (1944) 62 Cal. App. 2d 972, 975-976, 146 P.2d 29]* .

[d] Liability for Deficiency After Nonjudicial Foreclosure of Security Interest in Debtor's Real Property

If the creditor first resorts to nonjudicial foreclosure of a security interest in the debtor's real property, then ordinarily the creditor is estopped from suing the surety to recover a deficiency [*Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 46-47, 71 Cal. Rptr. 64* ; *see § 538.21[4]*]. However, the surety may explicitly waive, or could be found to have waived, this estoppel defense against an action by the creditor to recover a deficiency [*Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 48, 71 Cal. Rptr. 64*].

When the surety can be liable for a deficiency after nonjudicial foreclosure of a security interest in the debtor's real property, California's antideficiency statutes [*see Code Civ. Proc. §§ 580a et seq., 726*] do not protect the surety. Those statutes are concerned solely with actions for recovery of deficiency judgments on the principal obligation [*Bank of Am. v. Hunter (1937) 8 Cal. 2d 592, 598, 67 P.2d 99* ; *Mariners Sav. Loan Assn. v. Neil (1971) 22 Cal. App. 3d 232, 234, 99 Cal. Rptr. 238*], and have no application in an action against a surety [*Talbott v. Hustwit (2008) 164 Cal. App. 4th 148, 151-152, 78 Cal. Rptr. 3d 703* (surety who provided loan guaranty could not complain when, in lender's suit against surety for deficiency after lender's nonjudicial foreclosure sale of debtor's real property collateral, trial court refused to apply *Code Civ. Proc. § 580a* for surety's benefit)].

[3] Security Held by Surety

A creditor is entitled to the benefit of everything that a surety has received from the debtor by way of security for the performance of the obligation and may, on the maturity of the obligation, compel the application of such security to its satisfaction [*Civ. Code § 2854*].

[4] Effect of Disability of Principal

A surety is liable, notwithstanding any mere personal disability of the principal, even though the disability is such as to make the contract void against the principal. The surety is not liable if for any other reason there is no liability on the part of the principal at the time of the execution of the contract or if the liability of the principal thereafter ceases, unless the surety has assumed liability with knowledge of the existence of the defense [*Civ. Code § 2810*; *see, e.g., WRI Opportunity Loans II, LLC v. Cooper (2007) 154 Cal. App. 4th 525, 542-544, 65 Cal. Rptr. 3d 205* (insofar as guaranteed debt for interest is unenforceable on ground of usury, guarantor's contract cannot be construed or enforced so as to waive guarantor's right to raise that defense, since promise to pay usurious interest is illegal and therefore cannot be enforced on any theory)].

To avoid double recovery by the creditor, *Civ. Code § 2810* further provides that, if the principal is not liable because of mere personal disability, recovery back by the creditor of any res that formed all or part of the consideration for the contract shall have the effect on the liability of the surety that is attributed to the recovery back of such a res under the law of sales generally.

[5] Effect of Discharge of Principal by Operation of Law

A surety is not exonerated by the discharge of his or her principal by operation of law, without the intervention or omission of the creditor [*Civ. Code § 2825*]. The expiration of the statute of limitations on the principal's obligation, however, may also exonerate the surety [*see Code Civ. Proc. § 359.5*; *see also § 538.19[5]*].

[6] Effect of Delay by Creditor

Mere delay by the creditor to proceed against the principal, or to enforce any other remedy, does not exonerate a surety [*Civ. Code § 2823*]. For example, under *Civ. Code § 2823*, a creditor holding a note with an optional acceleration clause is not required to bring an action to have the entire amount declared due, because forbearance alone does not release a surety [*Oleson v. Tellson (1971) 21 Cal. App. 3d 671, 674, 98 Cal. Rptr. 668]* .

[7] Effect of Indemnification by Principal

A surety who has been indemnified by the principal is liable to the creditor to the extent of the indemnity, notwithstanding that the creditor, without the assent of the surety, may have modified the contract or released the principal [*Civ. Code § 2824*].

Civ. Code § 2819, relating to exoneration of the surety by modification of the principal obligation, also provides that the surety is not exonerated to the extent that the surety has been indemnified by the principal. In construing *Civ. Code § 2819*, a federal court has held that, for the surety to be indemnified and thus still bound after a modification, the surety must have received the indemnified amount, physical collateral, or a lien on property [*Texaco Refining & Marketing v. Aetna Cas. & Sur. (9th Cir. 1990) 895 F.2d 637, 640]* . A mere promise that the principal will indemnify the surety is not sufficient. That promise is already imposed by law by *Civ. Code § 2847* [*see § 538.163*]. Any other interpretation would create an exception that swallows the rule and thus would make every suretyship relation one in which the surety was indemnified [*Texaco Refining & Marketing v. Aetna Cas. & Sur. (9th Cir. 1990) 895 F.2d 637, 640]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsContracts LawThird PartiesJoint & Several ContractsContracts LawTypes of ContractsGuaranty Contracts

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§ 538.18 Creditor's Judgment Against Principal Alone Is Not Conclusive Against Surety

Code Civ. Proc. § 1912 articulates the way in which the principal on a suretyship contract may be bound by a judgment against the surety; it says nothing about binding the surety when the principal has alone been sued on the contract for the faithful performance of which the surety has executed and given the bond. This is due to the intrinsic characteristic of a suretyship undertaking. The surety is bound only by the terms of the contract and is entitled to stand on the letter of the undertaking [*Mahana v. Alexander (1927) 88 Cal. App. 111, 119-123, 263 P. 260]* . A judgment against the principal is not conclusive in a separate action against the surety [*Kane v. Mendenhall (1936) 5 Cal. 2d 749, 751, 56 P.2d 498* ; *see National Technical Systems v. Superior Court (2002) 97 Cal. App. 4th 415, 421-422, 118 Cal. Rptr. 2d 465* (concluding that surety was not bound by judgment subcontractor obtained against general contractor)].

Similarly, if the principal and the surety are sued in the same action and the principal allows a default judgment to be entered against it, the surety still has the opportunity to be heard in defense, at least when the particular terms of the undertaking do not bind the surety to any judgment entered against the principal or permit the principal to conduct the defense [*All Bay Mill & Lumber Co. v. Surety Co. (1989) 208 Cal. App. 3d 11, 17-18, 255 Cal. Rptr. 790]* .

For a discussion of *Code Civ. Proc. § 1912* as it applies to judgment against surety, see *§ 538.21[5]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-538 California Forms of Pleading and Practice--Annotated § 538.19

§ 538.19 Termination of Surety's Liability

[1] Affirmative Defense

Termination of liability is an affirmative defense that must be pleaded by the surety [*Standard Oil Co. v. Houser (1950) 101 Cal. App. 2d 480, 488, 225 P.2d 539* ; *see §§ 538.173, 538.175*, and 22 for affirmative defense allegations that the surety has been exonerated from liability].

[2] Change in Contract

A surety is exonerated, except as provided in *Civ. Code § 2822(b)* (discussed, under *§ 538.19[3]*) and except insofar as he or she may be indemnified by the principal, if, by any act of the creditor, without the consent of the surety, the original obligation of the principal is altered in any respect or the remedies or rights of the creditor against the principal, in respect thereto, are in any way impaired or suspended [*Civ. Code § 2819*; *see §§ 538.173, 538.175*]. A change or minor alteration unrelated to the original obligation or the creditor's remedies or rights will not dictate exoneration; it is an alteration of the obligation or of the remedies that controls [*Newhouse v. Getz (1935) 8 Cal. App. 2d 113, 114, 47 P.2d 306* ; *see FM Conner v. Conner (1999) 76 Cal. App. 4th 646, 650-652, 90 Cal. Rptr. 2d 687* (nothing creditor did or failed to do in bankruptcy proceeding rose to level of prejudicing surety or exonerating surety on guarantee)]. Any alteration of these elements will exonerate the surety, even if they are to the surety's advantage [*Ralston-Purina Co. v. Carter (1962) 210 Cal. App. 2d 372, 378, 26 Cal. Rptr. 690]* . It follows that the surety need not be prejudiced by material changes in the principal's obligation to be exonerated [*Texaco Refining & Marketing v. Aetna Cas. & Sur. (9th Cir. 1990) 895 F.2d 637, 639-640* (applying California law; relying on *First Congregational Church of Christ v. Lowrey (1917) 175 Cal. 124, 126, 165 P. 440* ; distinguishing *Roberts v. Security Trust & Sav. Bank (1925) 196 Cal. 557, 565, 238 P. 673* , as only applicable to guarantees of construction contracts that allow for modification or changes in the work as it progresses; and distinguishing *United States v. Reliance Ins. Co. (9th Cir. 1986) 799 F.2d 1382, 1385* , as based not on California law but on federal common law)].

The surety is exonerated under Com. Code § 2819 by "cessation of the principal's liability" when some act of the creditor impairs or bars a remedy [*see R.P. Richards, Inc. v. Chartered Construction Corporation (2000) 83 Cal. App. 4th 146, 154-155, 99 Cal. Rptr. 2d 425* (subcontractor's negotiated release of general contractor from claim for payment

under bonded obligation and acceptance of unbonded obligation under settlement agreement, without surety's consent, fully extinguished general's bonded obligation to subcontractor which constituted impairment of subcontractor's rights and remedies against surety; under Com. Code § 2819, this had legal consequence of exonerating surety on bonded obligation)].

The surety is not exonerated by an alteration of the principal's original obligation or by the impairment or suspension of any of the creditor's rights or remedies against the principal, if the surety agrees to the alteration. The surety's consent may be given before, at the time of, or after the alteration [*Bloom v. Bender (1957) 48 Cal. 2d 793, 801, 313 P.2d 568* ; *State Bd. of Equalization v. Carleton (1990) 223 Cal. App. 3d 1607, 1610-1611, 273 Cal. Rptr. 436]* . The surety is not obligated to inform the creditor that it will not consent to a proposed modification of the principal obligation, nor can it be estopped from relying on its failure to consent to a modification unless the creditor reasonably relied on some act or misrepresentation by the surety [*Texaco Refining & Marketing v. Aetna Cas. & Sur. (9th Cir. 1990) 895 F.2d 637, 640-641* (applying California law; surety specifically warned creditor not to rely on continued guarantee if proposed modification was executed)].

That a promise by a creditor is for any cause void or voidable at his or her option will not prevent it from altering the obligation or suspending or impairing the remedy within the meaning of *Civ. Code § 2819* [*Civ. Code § 2820*].

Civ. Code §§ 2819 and *2820* must be read together. Decisions in California have followed the common law rule and held that an agreement to extend time does not exonerate a surety unless the extension is for a definite period. Thus, before an extension can be deemed a material alteration that, without a showing of detriment or prejudice, operates to discharge the surety as a matter of law, the agreement to extend time, though void or voidable at the option of the creditor, must be for a definite period [*Wise v. Clapper (1968) 257 Cal. App. 2d 770, 775-776, 65 Cal. Rptr. 231]* .

Rescission of an agreement altering the original obligation of a debtor or impairing the remedy of a creditor does not restore the liability of a surety who has been exonerated by the agreement [*Civ. Code § 2821*].

[3] Acceptance of Part Performance

The creditor's acceptance of anything in partial satisfaction of an obligation reduces the obligation of the surety in the same measure as that of the principal, but does not otherwise effect it [*Civ. Code § 2822(a)*].

Similarly, for purposes of *Civ. Code §§ 2819* and *2822*, if the creditor agrees to accept from the principal debtor a sum less than the balance owed on the original obligation, without the surety's prior consent and without any other change in the underlying agreement between the creditor and the principal debtor, the surety remains obligated for the lesser sum agreed on by the principal and the creditor [*Civ. Code § 2822(b)*]. *Civ. Code § 2822(b)*, enacted as an urgency measure effective July 19, 1993, is declaratory of existing law [Stats. 1993, ch. 149, §§ 3, 4].

[4] Performance or Offer of Performance

Performance of the principal obligation, or an offer of such performance duly made as provided in the Civil Code, exonerates a surety [*Civ. Code § 2839*; *see also Civ. Code §§ 1473-1505* (extinction of obligations by performance or offer of performance)]. The surety has the legal right to pay the debt and then proceed against the principal. Thus, if the creditor refuses a tender of money by the surety, the surety is exonerated from liability [*O'Conor v. Morse (1896) 112 Cal. 31, 35-36, 44 P. 305]* .

The Restatement of Security notes that the tender of performance can be by either the principal or the surety. However, if, at the time of the tender, the creditor reasonably believes that the surety is a principal, there is no discharge [Restatement of Security § 116]. The offer must be made to the creditor or to a person authorized by the creditor to receive what is due under the obligation [*Civ. Code § 1488*]. If the offer of performance is accepted and performance

occurs, the obligation of all persons liable is extinguished [*Civ. Code § 1474*]. If the offer is not accepted, only the surety is discharged. The principal is not discharged by tender [Restatement of Security § 116, comment a; for a further discussion of offer of performance, *see* Ch. 140, *Contracts*].

[5] Expiration of Statute of Limitations

If the obligations under a surety bond are conditioned on performance of the principal, the expiration of the statute of limitations with respect to the obligations of the principal, other than the obligations of the principal under the bond, will also bar an action against the principal or surety under the bond, unless the terms of the bond provide otherwise [*Code Civ. Proc. § 359.5*; note that *Regents of University of Cal. v. Hartford Acci. & Indem. Co. (1978) 21 Cal. 3d 624, 639, 147 Cal. Rptr. 486, 581 P.2d 197* , which held that the running of the statute of limitations on the principal obligation did not exonerate the surety under *Civ. Code § 2825*, was decided prior to the enactment of *Code Civ. Proc. § 359.5*]. Nevertheless, a written waiver of the limitation period executed by the surety before the expiration of the applicable limitation period will extend the limitation period for four years from the date it would ordinarily expire [*Code Civ. Proc. § 360.5*; *California First Bank v. Braden (1989) 216 Cal. App. 3d 672, 676-677, 264 Cal. Rptr. 820]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsContracts LawDefensesStatutes of LimitationsContracts LawPerformancePartial PerformanceGeneral OverviewContracts LawThird PartiesJoint & Several ContractsContracts LawTypes of ContractsGuaranty Contracts

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PART II. LEGAL BACKGROUND
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47-538 California Forms of Pleading and Practice--Annotated § 538.20

§ 538.20 Rights of Surety Against Creditor

[1] In General

The law governing suretyships is statutory in nature, reflecting common law rules or a reaction to the common law. The protections afforded the surety against the creditor are the enactment of rules developed in equity to give relief from the common law doctrine that permitted the creditor to enforce remedies against the surety without reference to his or her rights against the principal [*State Ath. Com. v. Mass. Bonding etc. Co. (1941) 46 Cal. App. 2d 823, 829, 117 P.2d 75]* .

A surety may also hold the creditor to the requirement of *Com. Code § 1309*, which provides that acceleration under and agreement that allows the creditor to accelerate payment or performance "at will" or "when it deems itself insecure" is only proper when the creditor in good faith believes that the prospect of payment or performance is impaired [*United States v. Grayson (9th Cir. 1989) 879 F.2d 620, 623* (interpreting California law for guidance and finding that, even though collection officer received bonus for collection, debtor's failure to make installment payments for over one year and projection of substantial losses required finding of reasonable belief that prospect of repayment was impaired)]. The burden of establishing lack of good faith is on the party against whom the power has been exercised, usually the debtor [*Com. Code § 1309*].

[2] Requiring Proceedings Against Principal

A surety may require the creditor, subject to *Code Civ. Proc. § 996.440* (enforcement of liability on bond given in action or proceeding by motion without independent action), to proceed against the principal or to pursue any other remedy in the creditor's power that the surety cannot pursue and that would lighten the surety's burden; if the creditor neglects to do so, the surety is exonerated to the extent to which the surety is thereby prejudiced [*Civ. Code § 2845*; *see § 538.161*]. For a discussion of *Code Civ. Proc. § 996.440*, see *§ 538.84[4]*.

As a prerequisite to exoneration under [Code Civ. Proc. § 2845], the surety must make a demand that the creditor proceed against the principal. In the absence of such demand, the creditor may maintain an action against the surety [*see United California Bank v. Maltzman (1974) 44 Cal. App. 3d 41, 54, 118 Cal. Rptr. 299]* . A surety who demands that

the creditor foreclose on security for the debt may, however, not be exonerated under *Civ. Code § 2845* if the surety has ample resources to satisfy the obligation to the creditor and pursue foreclosure directly against the principal [*see Katz v. Haskell (1961) 196 Cal. App. 2d 144, 152, 16 Cal. Rptr. 453]* .

A knowing waiver of the protection of this enforcement statute is not against public policy and is allowed [*American Guaranty Corp. v. Stoody (1964) 230 Cal. App. 2d 390, 395, 41 Cal. Rptr. 69]* .

[3] Benefit of Security Given by Principal

[a] In General

A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor or by a cosurety at the time of entering into the contract of suretyship or acquired by him or her afterwards, whether or not the surety was aware of the security [*Civ. Code § 2849*]. Thus, after noting the provisions of *Civ. Code § 2809* (surety's obligation commensurate with principal's), the primary liability of the principal, and *Civ. Code § 2849*, a surety company was held entitled to have a cash deposit made by the principal applied in reduction of its liability on the bond [*State Ath. Com. v. Mass. Bonding etc. Co. (1941) 46 Cal. App. 2d 823, 828-829, 117 P.2d 75]* .

Civ. Code § 2849 is frequently linked with *Civ. Code § 2845* and the protections of both may be waived, frequently using the same language [*Brunswick Corp. v. Hays (1971) 16 Cal. App. 3d 134, 138, 93 Cal. Rptr. 635* ; *see also § 538.20[2]*].

If a surety has waived *Civ. Code §§ 2845* and *2849* in a limited guaranty contract, the proceeds from the sale of property that is repossessed on default only exonerates the surety to the extent that the proceeds of the sale exceed that amount of the original debt that was not covered by the limited guaranty [*Brunswick Corp. v. Hays (1971) 16 Cal. App. 3d 134, 139, 93 Cal. Rptr. 635]* .

[b] On Limited Continuing Guaranty

In the case of a limited continuing guaranty, the surety is not relieved of liability when the creditor receives more than the amount of the limited guaranty from the sale of securities, because a continuing guaranty limited as to amount is not exhausted even though the prinicpal contracts and pays debts equal to or greater than the sum stipulated in the guaranty [*Bank of America Nat'l Trust & Savings Asso. v. Hunter (1937) 8 Cal. 2d 592, 596-597, 67 P.2d 99]* .

[c] Principal's Security Applied Before Surety's Security

Whenever property of a surety is hypothecated with property of the principal, the surety is entitled to have the property of the principal first applied to the discharge of the obligation [*Civ. Code § 2850*].

[d] Effect of Creditor's Failure to Preserve Security

The Restatement of Security provides that, if the creditor has security from the principal and knows of the surety's obligation, the surety's obligation is reduced pro tanto if the creditor surrenders or releases the security, willfully or negligently harms it, or fails to take reasonable action to preserve its value at a time when the surety does not have an opportunity to take such action [Restatement of Security § 132]. Restatement of Security § 132 may provide some guidance in California, but no reported opinion in California has applied this rule, and its relevance may be tempered by Restatement of Security § 131, which provides that a creditor with a security interest in principal's property may compel performance by the surety before resorting to that security, except under narrowly prescribed circumstances [Restatement of Security § 131]. This is a very different rule from California law, which allows the surety to compel the creditor proceed against the principal's security first [*Civ. Code §§ 2849* (surety entitled to benefit of securities held), *2850* (property of surety applied first); *see also § 538.20[3]*]. On the other hand, the California rule does not seem to be

incompatible with Restatement of Security § 132.

[e] Demand Made of Creditor

A demand is required to compel a creditor to enforce the obligation against security given by the principal before pursuing the surety [*Sukut-Coulson, Inc. v. Allied Canon Co. (1978) 85 Cal. App. 3d 648, 655, 149 Cal. Rptr. 711* ; *see Garrett v. Bomash (1935) 10 Cal. App. 2d 288, 291, 51 P.2d 1100* (dicta)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-538 California Forms of Pleading and Practice--Annotated § 538.21

§ 538.21 Rights of Surety Against Principal

[1] Compel Performance

A surety may compel his or her principal to perform the obligation when due [*Civ. Code § 2846*]. Once the obligation becomes payable, the surety, before paying the obligation and whether or not he or she has been sued by the creditor, may maintain an action against the principal debtor to compel performance or payment, the creditor being made a codefendant, provided the creditor can himself or herself enforce performance and neglects or refuses to do so [*Eastin v. Roberts, Carpenter & Co. (1937) 19 Cal. App. 2d 567, 571, 66 P.2d 224]* .

If the creditor sues the surety to recover the obligation, the surety may cross complain against the principal to compel the principal to perform [*Eastin v. Roberts, Carpenter & Co. (1937) 19 Cal. App. 2d 567, 571, 66 P.2d 224* ; *Code Civ. Proc. § 1050* (surety's action to compel principal's performance)]. For a form for a complaint for use by the surety against the principal to compel performance, *see § 538.162*.

[2] Quia Timet

The common law prejudgment remedy of quia timet (literally, "because he fears") is still available to a surety. It is an action for equitable relief in the nature of a writ of prevention [*Archbishop of S.F. v. Shipman (1886) 69 Cal. 586, 589, 11 P. 343* ; *Escrow Agents' Fidelity Corp. v. Superior Court(1992) 4 Cal. App. 4th 491, 493-494, 5 Cal. Rptr. 2d 698]* . Statutory remedies such as injunction, lis pendens, attachment, and claim and delivery have replaced quia timet in most areas except the fidelity and insurance industry. After the debt for which it is liable has become due, without paying or being called on to pay it, the surety may file a bill in the nature of quia timet to compel the principal to exonerate it from liability by payment or performance, provided no rights of the creditor are prejudiced thereby [*see Civ. Code § 2846*; *Code Civ. Proc. § 1050*; *Escrow Agents' Fidelity Corp. v. Superior Court (1992) 4 Cal. App. 4th 491, 495, 5 Cal. Rptr. 2d 698* ; *see also Fireman's Fund Insurance Co. v. S.E.K. Construction Co. (10th Cir. 1971) 436 F.2d 1345, 1349* (denying relief because principal was not in default under completion bond)]. The action allows the surety to prevent the principal from dissipating the funds necessary to pay or perform the bonded obligation if the surety knows it will be called on to pay the debt or to perform the obligation on bond, suspects that the principal has some or all of the necessary funds to do so, and fears that the principal may abscond with those funds [*Escrow Agents' Fidelity*

Corp. v. Superior Court (1992) 4 Cal. App. 4th 491, 495-496, 5 Cal. Rptr. 2d 698] .

Code Civ. Proc. § 1050 incorporates some aspects of quia timet, but not all of them [*see Gagossian v. Arakelian (1908) 9 Cal. App. 571, 573, 99 P. 1113* (dealing with portion of section relating to adverse claim on property, quia timet did not lie without allegation that plaintiff apprehended danger to property)]. Similarly, a guarantor who has a contract with the principal may obtain a writ of attachment in an action to compel the principal to perform its obligation to the creditor [*see Karn v. Wills (1942) 50 Cal. App. 2d 604, 606-609, 123 P.2d 640* (attachment in action under *Civ. Code § 2846*)], but a surety whose bond does not take the form of a contract with the principal may not.

[3] Reimbursement

If a surety satisfies the principal obligation, or any part of it, whether with or without legal proceedings, the principal is bound to reimburse what he or she has disbursed, including necessary costs and expenses. However, the surety has no claim for reimbursement against other persons, though they may have been benefited by his or her act, except as prescribed by *Civ. Code § 2848* (contribution by cosureties) [*Civ. Code § 2847*; *Top Cat Productions, Inc. v. Michael's Los Feliz (2002) 102 Cal. App. 4th 474, 478, 125 Cal. Rptr. 2d 553* ; *see § 538.22*].

The principal will not be required to reimburse the surety for costs and expenses in defending an unsuccessful suit by the creditor on a bond in the absence of an agreement between the surety and the principal for those costs and expenses. *Civ. Code § 2847* presupposes the existence of a legal obligation against the principal, and the subsequent satisfaction or discharge of some part of that obligation by the surety before necessary costs and expenses of the latter may be recovered [*Pacific Indemnity Co. v. Harper (1939) 14 Cal. 2d 379, 386, 94 P.2d 586]* .

Reimbursement is not dependent on legal proceedings, but it will only be allowed if it can be shown that liability was clearly established and that a suit would have been a mere formality [*Ragghianti v. Sherwin (1961) 196 Cal. App. 2d 345, 351, 16 Cal. Rptr. 583]* . The payments must have been made under a legal obligation and not on a mere voluntary basis [*Schlitz v. Thomas (1923) 61 Cal. App. 635, 638, 216 P. 51]* .

Full payment and performance by the surety extinguishes the primary obligation. The parties involved then have new rights and liabilities. The principal is to reimburse the surety for the moneys expended, with legal interest, though not according to the terms of the primary obligation. The surety then has the right to an action in assumpsit on the implied promise of the principal to make him or her whole [*Berrington v. Williams (1966) 244 Cal. App. 2d 130, 134, 52 Cal. Rptr. 772]* .

For a complaint by a surety seeking reimbursement from the principal, *see § 538.163*.

[4] Subrogation

A surety, on satisfying the obligation of the principal, is entitled to enforce every remedy that the creditor then has against the principal to the extent of reimbursing what he or she has expended [*Civ. Code § 2848*].

The principle on which this right of subrogation is founded applies when one person, not a volunteer, pays a debt for which another is primarily answerable and that, in equity and good conscience, should have been discharged by the latter. This doctrine is applied liberally to promote justice [*Meyer Koulish Co. v. Cannon (1963) 213 Cal. App. 2d 419, 423-424, 28 Cal. Rptr. 757]* . The right to subrogation is not prospective and will not require assets to be held in reserve pending subrogation. A person is not entitled to be subrogated to the rights of the creditor until the claim of the creditor has been paid [*Hausmann v. Farmers Ins. Exchange (1963) 213 Cal. App. 2d 611, 615, 29 Cal. Rptr. 75]* . For further discussion and forms relating to subrogation, see Ch. 536, *Subrogation* .

One of the creditor's rights, which the surety can acquire through subrogation by paying the debt, is the right to pursue

judicial foreclosure of a security interest in the debtor's real property that stands as collateral for the debt. In a judicial foreclosure action, the surety can obtain a deficiency judgment against the debtor [*Code Civ. Proc. § 726(b)*]; thus, the surety will have an opportunity to be made whole. However, if the creditor first resorts to nonjudicial foreclosure of a security interest in the debtor's real property, without allowing the surety to pay the debt and become subrogated to the creditor's rights, the surety becomes unable to acquire any rights by subrogation from the creditor, because the nonjudicial sale both eliminates the security interest (leaving nothing to support a judicial foreclosure action) and, under *Code of Civ. Proc. § 580d*, precludes the possibility of a deficiency judgment against the debtor [*Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 45, 71 Cal. Rptr. 64* ; *see generally Western Sec. Bank v. Superior Court (1997) 15 Cal. 4th 232, 248, 62 Cal. Rptr. 2d 243, 933 P.2d 507* (explaining *Gradsky* holding)]. Because the creditor has an implicit duty not to impair the surety's remedies against the debtor, the creditor is estopped from suing the surety for a deficiency after electing nonjudicial foreclosure [*Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 46-47, 71 Cal. Rptr. 64*]. The estoppel is raised as a matter of law, to prevent the creditor from recovering from the surety after the creditor has exercised an election of remedies that destroys the surety's subrogation rights against the principal debtor [*Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 41, 71 Cal. Rptr. 64*]. However, the surety may explicitly waive, or can be found to have waived, this estoppel defense against an action by the creditor to recover a deficiency from the surety [*Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 48, 71 Cal. Rptr. 64* ; *see Civ. Code § 2856* (waivers by sureties); California Legal Forms, Ch. 79, *Suretyship, Guaranty, and Indemnity* (Matthew Bender), § 79.20].

[5] Conclusiveness on Principal of Judgment Against Surety

Whenever, pursuant to *Code Civ. Proc. § 1908-1911*, a party is bound by a record and that party stands in the relation of a surety for another, the latter is also bound from the time that he or she has notice of the action or proceeding and an opportunity at the surety's request to join in the defense [*Code Civ. Proc. § 1912* (referring to "the last four sections," which would literally be *Code Civ. Proc. §§ 1908.5-1911*; however, when *Code Civ. Proc. § 1912* was enacted, "the last four sections" were *Code Civ. Proc. §§ 1908-1911* and, when *Code Civ. Proc. § 1908.5* was subsequently added, *Code Civ. Proc. § 1912* was not amended, so it appears that the reference refers back to *Code Civ. Proc. § 1908*)]. For a form for giving notice, *see § 538.172*.

[6] Payment of Attorney's Fees

Attorney's fees are not recoverable as costs, damages, or otherwise unless there is express statutory or contractual authority for them [*Ralston-Purina Co. v. Carter (1962) 210 Cal. App. 2d 372, 379, 26 Cal. Rptr. 690]* . A surety will be entitled to recover attorney's fees and expenses incurred in defending its liability, as well as in an action against the principal to collect them, if these costs are specified in the contract between the surety and principal. This provision will be upheld even if the principal is discharged from liability to the creditor [*Maurice Merc. Co. v. American Emp. Ins. Co. (1934) 140 Cal. App. 354, 359-360, 35 P.2d 1047]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-538 California Forms of Pleading and Practice--Annotated § 538.22

§ 538.22 Contribution Among Cosureties

A surety, on satisfying the principal obligation, is entitled to require all his or her cosureties to contribute thereto, without regard to the order of time in which they became cosureties [*Civ. Code § 2848*].

When one of several joint judgment debtors pays more than his or her proportionate share of the judgment, he or she is entitled to obtain a proportionate contribution from those jointly liable and may bring suit against one or more of his or her codefendants on the implied contract of each obligor to the other so that they will share the burden equally. This basic principle of contribution applies to cosureties who are jointly and severally liable to pay the principal obligation. The right to contribution against cosureties is an obligation implied by law and is governed by equitable principles [*Overholser v. Glynn (1968) 267 Cal. App. 2d 800, 807, 73 Cal. Rptr. 628]* . The right to contribution is acquired as soon as a surety pays more than his or her share but not until then [*Jackson v. Lacy (1940) 37 Cal. App. 2d 551, 559, 100 P.2d 313]* .

Equitable contribution between sureties allows for loss sharing among co-obligors that share the same level of liability on the same risk as to the same principal. The principle of equity on which the right of contribution is founded applies only when the parties are under a common burden of liability. Under fundamental principles of equity, a person who has paid no more than his or her just proportion of a debt cannot obtain contribution from a co-debtor, even if the co-debtor has paid nothing. A corrollary to this rule is that equality of liability among persons whose respective situations are not equal is inequitable [*Morgan Creek Residential v. Kemp (2007) 153 Cal. App. 4th 675, 684-685, 63 Cal. Rptr. 3d 232]* . For example, a party that provided an unconditional letter of credit as security and then paid the promised amount could not then compel contribution from sureties that provided guaranties, because liabilities inherent in those two kinds of security are markedly different. In order to recover, "plaintiff has to be able to allege it shared the same level of liability with defendants ... in order to sue them for contribution" [*Morgan Creek Residential v. Kemp (2007) 153 Cal. App. 4th 675, 689, 63 Cal. Rptr. 3d 232]* .

Persons may be cosureties for the same debt and may be required to share the loss, even if their liabilities originate in separate contracts. Their obligations will be controlled by contract law. However, if equity demands that one should bear the ultimate burden rather than the other, they stand in the position of successive sureties. Their exact relationship

will depend on the inferences to be drawn from their contracts and the circumstances of the case [*Continental Casualty Co. v. Hartford Acci. & Indem. Co. (1966) 243 Cal. App. 2d 565, 570, 52 Cal. Rptr. 533]* . For a form of complaint by a surety against a cosurety for contribution, *see § 538.165*. For forms for use in a proceeding seeking an order for repayment from joint judgment debtors, *see §§ 538.166 -538.168*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsContracts LawThird PartiesJoint & Several ContractsContracts LawTypes of ContractsGuaranty Contracts

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47-538 California Forms of Pleading and Practice--Annotated § 538.23

§ 538.23 Procedure for Seeking Rights After Judgment

[1] Statutory Authority for Repayment

If two or more judgment debtors are jointly liable on a money judgment and if the judgment is based on an obligation of one judgment debtor as surety for another and the surety satisfies all or any part of the judgment, whether voluntarily or through enforcement procedures, the surety may compel repayment from the principal [*Code Civ. Proc. § 882(b)*].

[2] Statutory Authority for Contribution

If two or more judgment debtors are jointly liable on a money judgment, a judgment debtor who has satisfied more than his or her due proportion of the judgment, whether voluntarily or through enforcement procedures, may compel contribution from another judgment debtor who has satisfied less than his or her due proportion of the judgment [*Code Civ. Proc. § 882(a)*].

[3] Noticed Motion After Judgment

A judgment debtor entitled to compel repayment or contribution may apply on noticed motion to the court that entered the judgment for an order determining liability for contribution or repayment. The application shall be made at any time before judgment is satisfied in full or within 30 days thereafter [*Code Civ. Proc. § 883(a)*]. The proper interpretation of the phrase "the judgment is satisfied in full" means complete satisfaction of the entire judgment [*Borba Farms, Inc. v. Acheson (1988) 197 Cal. App. 3d 597, 604, 606, 242 Cal. Rptr. 880]* . Thus, a motion for contribution made by a joint judgment debtor more than 30 days after his or her partial satisfaction of the judgment is considered timely filed, absent a showing that partial satisfaction of the judgment is accepted by the plaintiff as full payment of the judgment [*see Borba Farms, Inc. v. Acheson (1988) 197 Cal. App. 3d 597, 604, 606, 242 Cal. Rptr. 880* (decided before 1998 amendment of section 883(a) to increase 10 day period to 30 days)].

The order determining liability for repayment or contribution entitles the judgment debtor to the benefit of the judgment to enforce the liability, including every remedy that the judgment creditor has against the persons liable, to the extent of the liability [*Code Civ. Proc. § 883(b)*]. Nothing in *Code Civ. Proc. § 883(a)* or *(b)* limits any other remedy that a

judgment debtor entitled to repayment or contribution may have [*Code Civ. Proc. § 883(c)*].

In the notice of motion for an order determining liability, the judgment debtor seeking relief should allege payment of more than his or her proportionate share, what his or her proportion is, and what the proportion of the joint codebtor is. The defendant should then have an opportunity to meet this issue of fact by affidavit or evidence, and, after a hearing in which the evidence is heard, the court should determine from the evidence how much more than his or her proportion one judgment debtor has paid, issue an order so determining, and order execution issued thereon [*Stowers v. Fletcher (1948) 84 Cal. App. 2d Supp. 845, 190 P.2d 338]* . This remedy afforded a joint judgment debtor is not exclusive, but cumulative, and the joint judgment debtor may instead choose to take an assignment from the judgment creditor [*Tucker v. Nicholson (1938) 12 Cal. 2d 427, 430, 84 P.2d 1045]* . The cases cited above involved former *Code Civ. Proc. § 709*, which has been replaced by *Code Civ. Proc. §§ 881-883*. Because no substantive changes were made in this area, the results should be the same under the new statutes. For forms for use in seeking an order against a joint judgment debtor, *see §§ 538.166 -538.168*.

Legal Topics:

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

§§ 538.24[Reserved]

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1. Statutory Bonds And Undertakings

47-538 California Forms of Pleading and Practice--Annotated § 538.40

§ 538.40 Governing Statutes

Statutory bonds and undertakings are regulated by the Bond and Undertaking Law (*Code Civ. Proc. §§ 995.010-996.560*). The execution, filing, approval, effect, and sufficiency of sureties are governed by *Code Civ. Proc. §§ 995.310-995.670*. Bonds to the State of California are governed by *Code Civ. Proc. § 995.810-995.850*. Objections to bonds are governed by *Code Civ. Proc. §§ 995.910-996.030*, and the substitution and release of sureties, including the giving of a new, additional, or supplemental bond, are governed by *Code Civ. Proc. §§ 996.110-996.360*. Deposits in lieu of bond are governed by *Code Civ. Proc. §§ 995.710-995.770*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-538 California Forms of Pleading and Practice--Annotated § 538.41

§ 538.41 Public Entities and Officers Exempted From Bond Requirements

Notwithstanding any other statute, if a statute provides for a bond in an action or proceeding, including but not limited to a bond for issuance of a restraining order or injunction, appointment of a receiver, or stay of enforcement of a judgment on appeal, the following public entities and officers are not required to give the bond and have the same rights, remedies, and benefits as if the bond were given [*Code Civ. Proc. § 995.220*]:

- The State of California or the people of the state, a state agency, department, division, commission, board, or other entity of the state, or a state officer in an official capacity or on behalf of the state.

- A county, city, or district, or public authority, public agency, or other political subdivision in California, or an officer of the local public entity in an official capacity or on behalf of the local public entity.

- The United States or an instrumentality or agency of the United States, or a federal officer in an official capacity or on behalf of the United States or an instrumentality or agency of the United States.

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§ 538.42 Reduction in or Waiver of Bond by Beneficiary

The beneficiary of a bond given in an action or proceeding may in writing consent to the bond in an amount less than the amount required by statute or may waive the bond [*Code Civ. Proc. § 995.230*].

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§ 538.43 Waiver of Bond in Case of Indigency

If the court determines that the principal is unable to give a bond because the principal is indigent and is unable to obtain sufficient personal sureties or sufficient admitted surety insurers, the court may waive a provision for a bond and make the appropriate orders as if the bond were given. In exercising its discretion to waive the bond, the court shall consider all factors it deems relevant, including but not limited to the character of the action or proceeding, the nature of the beneficiary, whether public or private, and the potential harm to the beneficiary if the provision for the bond is waived [*Code Civ. Proc. § 995.240*; *see also Conover v. Hall (1974) 11 Cal. 3d 842, 846-847, 852, 114 Cal. Rptr. 642, 523 P.2d 682* ; *Roberts v. Superior Court (1968) 264 Cal. App. 2d 235, 241, 70 Cal. Rptr. 226* (superior court as having authority to waive mandatory bond requirement of *Gov. Code § 947* for indigents); *County of Sutter v. Superior Court (1966) 244 Cal. App. 2d 770, 775, 53 Cal. Rptr. 424* (common law authority of courts to waive security for indigents)].

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§ 538.44 Procedural Requirements Under Bond and Undertaking Law

[1] Contents

The bond must be written, signed by the sureties under oath, and must include all of the following [*Code Civ. Proc. § 995.320(a)*]:

- A statement that the sureties are jointly and severally liable on the obligations of the statute providing for the bond.

- The address at which the principal and sureties may be served with notices, papers, and other documents under *Code Civ. Proc. §§ 995.010-996.560*.

- If the amount of the bond is based on the value of property or an interest in property, a description of the property or interest, and the principal's estimate of the value of the property or interest, (or if given pursuant to the estimate of the beneficiary or court, the value as so estimated).

The sureties on the bond or undertaking are liable to the extent provided by statute. Nonessential language in a statutory bond is surplusage and without effect. Conditions in the bond that exceed the statutory requirements may be disregarded and the bond otherwise sustained [*Lewin v. Anselmo (1997) 56 Cal. App. 4th 694, 699, 65 Cal. Rptr. 2d 682* (relying in part on *Code Civ. Proc. § 995.380(a), discussed under § 538.49*].

For a form for a statutory bond or undertaking, *see § 538.190*.

[2] Number of Sureties; Execution

Unless the statute providing for the bond requires execution by an admitted surety insurer, a bond must be executed by two or more sufficient personal sureties or by one sufficient admitted surety insurer or by any combination of sufficient personal sureties and admitted surety insurers [*Code Civ. Proc. § 995.310*]. The bond must be signed by the sureties

under oath [*Code Civ. Proc. § 995.320(a)*].

A bond executed by personal sureties must be accompanied by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of qualifications of each surety [*Code Civ. Proc. § 995.520(a)*; for a discussion of those qualifications, *see § 538.51*; for form of declaration of qualifications of personal surety, *see § 538.191*].

[3] Filing

A bond given in an action or proceeding must be filed with the court unless the statute providing for the bond requires that the bond be given to another person [*Code Civ. Proc. § 995.340(a)*]. If the statute providing for the bond requires that the bond be given to an officer, the officer must file the bond with the court unless the statute provides otherwise [*Code Civ. Proc. § 995.340(b)*]. A bond filed with the court is preserved in the office of the clerk of the court [*Code Civ. Proc. § 995.340(c)*].

[4] Service on Beneficiary

At the time a bond is given, the principal must serve a copy of the bond on the beneficiary. An affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of service must be given and filed with the bond [*Code Civ. Proc. § 995.370*]. Service must be made in the same manner as service of process in civil actions generally [*Code Civ. Proc. § 995.030*; *see* Ch. 518, *Service of Summons and Papers*].

[5] Registration

When a bond given in an action or proceeding is filed with the court, the clerk must enter the date and amount of the bond and the names of the sureties on the bond in the register of actions [*Code Civ. Proc. § 995.350(a)*].

[6] Approval

Approval of a bond is not necessary for the bond to become effective unless the statute providing for the bond requires that the bond be approved by the court or officer [*Code Civ. Proc. § 995.410(a)*]. If approval of the bond is required by statute, the court or officer may approve or disapprove the bond on the basis of the affidavit (or declaration under *Code Civ. Proc. § 2015.5*) or certificate of the sureties or may require the attendance of witnesses and the production of evidence and may examine the sureties under oath regarding their qualifications [*Code Civ. Proc. § 995.410(b)*]. If court approval of a bond is required in a superior court case, the judge, at chambers, may approve a bond or undertaking [*Code Civ. Proc. § 166(a)(5)*]. A court commissioner may also take and approve, subject to supervision of the court, bonds and undertakings in actions or proceedings [*Code Civ. Proc. § 259(c)*]. A bond in an amount greater than that required by statute may be approved [*Code Civ. Proc. § 995.410(c)*].

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§ 538.45 When Bond Becomes Effective

Unless the statute providing for a bond provides that the bond becomes effective at a different time, a bond is effective at the time it is given, or if the statute requires that the bond be approved, at the time it is approved [*Code Civ. Proc. § 995.420(a)*].

The surety can not add surplusage to the bond language that would give them time to rescind the bond unilaterally [*Lewin v. Anselmo (1997) 56 Cal. App. 4th 694, 700, 65 Cal. Rptr. 2d 682* (language handwritten on appeal bond purported to give sureties 15 days to rescind was ineffective and sureties were bound)].

If the statute providing for a bond states that the bond becomes effective at a time other than the time it is given or approved, the bond is effective at the time provided unless an objection is made to the bond before that time, in which case the bond becomes effective when the court makes an order determining that the bond is sufficient [*Code Civ. Proc. § 995.420(b)*; for discussion of objection and court determination of sufficiency of bonds, *see § 538.123[4][i]*].

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§ 538.46 Withdrawing Bond From Court File

A bond given in an action or proceeding may be withdrawn from the file and returned to the principal on order of the court only if either the beneficiary so stipulates or the bond is no longer in force and effect and the time during which the liability on the bond may be enforced has expired [*Code Civ. Proc. § 995.360*]. If the bond or undertaking is the original one, it may be withdrawn from the files and delivered to the party by whom it was filed on order of the court only if all parties interested in the obligation so stipulate, or on a showing that the purpose for which it was filed has been abandoned without any liability having been incurred [*Cal. Rules of Ct., Rule 3.1130(c)*].

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§ 538.47 Term of Bond

[1] In General

A bond remains in force and effect until the earliest of the following events [*Code Civ. Proc. § 995.430*]:

- The sureties withdraw from or cancel the bond or a new bond is given in place of the original bond.
- The purpose for which the bond was given is satisfied or the purpose is abandoned without any liability having been incurred.
- A judgment of liability on the bond that exhausts the amount of the bond is satisfied.
- The term of the bond expires.

Unless the statute providing for a bond prescribes a fixed term, the bond is continuous [*Code Civ. Proc. § 995.430(d)*].

[2] For License or Permit

The term of a bond given as a condition of a license or permit is continuous. The bond remains in full force and effect and runs concurrently with the license or permit period and any and all renewals, or until cancellation or withdrawal of the surety from the bond [*Code Civ. Proc. § 995.440*].

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§ 538.48 Premium on Bond Recoverable as Costs

If a statute allows costs to a party in an action or proceeding, the costs shall include all of the following [*Code Civ. Proc. § 995.250*]:

- The premium on a bond reasonably paid by the party pursuant to a statute that provides for the bond in the action or proceeding.

- The premium on a bond reasonably paid by the party in connection with the action or proceeding, unless the court determines that the bond was unnecessary.

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§ 538.49 Defect in Bond

If a bond does not contain the substantial matter or conditions required by the Bond and Undertaking Law (*Code Civ. Proc. §§ 995.010-996.560*) or by the statute providing for the bond, or if there are any defects in the giving or filing of the bond, the bond is not void so as to release the principal and sureties from liability [*Code Civ. Proc. § 995.380(a)*].

The beneficiary, in proceedings to enforce the liability on the bond, may suggest the defect in the bond, or its giving or filing, and enforce the liability against the principal and the persons who intended to become and were included as sureties on the bond [*Code Civ. Proc. § 995.380(b)*]. For discussion and forms relating to liability of principals and sureties on bond and enforcement of that liability, see *§ 538.80* et seq. (discussion) and § 538.220 et seq. (forms).

Legal Topics:

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§ 538.50 Evidence of Bond

If a bond is recorded pursuant to a statute, a certified copy of the record of the bond with all affidavits, acknowledgments, endorsements, and attachments may be admitted in evidence in an action or proceeding with the same effect as the original, without further proof [*Code Civ. Proc. § 995.260*]. If a bond is lost, the entries in the register of actions are prima facie evidence of the giving of the bond in the manner required by statute [*Code Civ. Proc. § 995.350(b)*].

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§ 538.51 Sufficiency of Personal Sureties

A personal surety on a bond is sufficient if all of the following conditions are satisfied [*Code Civ. Proc. § 995.510(a)*]:

- The surety is a person other than the principal, and is not an officer of the court nor a member of the State Bar.

- The surety is a resident, and either an owner of real property or householder, within California.

- The surety is worth the amount of the bond in real or personal property, or both, situated in California, over and above all debts and liabilities, exclusive of property exempt from enforcement of a money judgment.

If the amount of the bond exceeds $10,000 and is executed by more than two personal sureties, the worth of a personal surety may be less than the amount of the bond, as long as the aggregate worth of all sureties executing the bond is twice the amount of the bond [*Code Civ. Proc. § 995.510(b)*].

A bond executed by personal sureties must be accompanied by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of qualifications of each surety [*Code Civ. Proc. § 995.520(a)*; for form of declaration of qualifications of personal surety, *see § 538.191*].

Nothing in the Bond and Undertaking Law [*Code Civ. Proc. § 995.010 et seq.*] prohibits a transfer of property to create a personal surety [*see Buzgheia v. Leasco Sierra Grove (1994) 30 Cal. App. 4th 766, 771, 36 Cal. Rptr. 2d 144* (husband's nonfraudulent transfer of his separate property to wife as her separate property so wife would have sufficient assets to act as surety did not violate Bond and Undertaking Law)].

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§ 538.52 Admitted Surety Insurers

[1] In Lieu of Personal Surety

If a statute provides for a bond with any number of sureties, one sufficient admitted surety insurer may become and must be accepted as sole surety on the bond [*Code Civ. Proc. § 995.610(a)*]. The admitted surety insurer is subject to all the liabilities and entitled to all the rights of personal sureties [*Code Civ. Proc. § 995.610(b)*].

[2] Two or More Sureties for Aggregate Amount of Bond

Two or more admitted surety insurers may be sureties on a bond by executing the same or separate bonds for amounts aggregating the required amount of the bond, and each admitted surety insurer is jointly and severally liable to the extent of the amount of the liability assumed by it [*Code Civ. Proc. § 995.620*; for statutory form of bond or undertaking, *see § 538.190*].

[3] Conditions for Acceptance or Approval of Admitted Surety Insurer

An admitted surety insurer will be accepted or approved by the court or officer as surety on a bond without further acknowledgment if the bond is executed in the name of the surety insurer under penalty of perjury or the fact of the bond's execution is duly acknowledged before an officer authorized to take and certify acknowledgments, and either one of the following conditions, at the surety insurer's option, is satisfied [*Code Civ. Proc. § 995.630*]:

- A copy of the transcript or record of the unrevoked appointment, power of attorney, bylaws, or other instrument that entitles or authorizes the person who executed the bond to do so for and in behalf of the insurer, is filed in the office of the clerk of the county in which the court or officer is located. The entitling instrument must be duly certified by the proper authority and attested by the seal of the insurer.

- A copy of a power of attorney is attached to the bond. For form of statutory bond, *see § 538.190*.

There is no requirement that the officer taking the acknowledgment be an officer of California. An acknowledgment taken outside of California is sufficient in California as long as it was taken in accordance with the laws of the place where the acknowledegment was made [*see Civ. Code § 1189(b)*].

[4] Issuance of Certificate of Authority by County Clerk

On request by any person, the county clerk of any county must issue any of the following certificates, based on the clerk's review of the Department of Insurance web site (www.insurance.ca.gov) [*Code Civ. Proc. § 995.640*]:

- A certificate stating whether a surety is admitted or if the certificate of authority of an admitted surety insurer, issued by the Insurance Commissioner and authorizing the insurer to transact surety insurance has been surrendered, revoked, canceled, annulled, or suspended, and in the event that it has, whether or not renewed authority has been granted. In issuing the certificate, the county clerk must rely solely on the information furnished by the Insurance Commissioner pursuant to *Ins. Code §§ 12070-12073* (requirement that Insurance Commissioner provide clerk with information regarding identity and status of all admitted surety insurers in state and that clerk maintain index of such information).

- A certificate stating whether a copy of the transcript or record of the unrevoked appointment, power of attorney, bylaws, or other instrument, duly certified by the proper authority and attested by the seal of an admitted surety insurer, entitling or authorizing the person who executed a bond to do so for and on behalf of the insurer, is on file in the office of the clerk.

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§ 538.53 Corporate Sureties: Acceptance or Approval

A corporation will not be accepted or approved as surety on a bond or undertaking unless the following conditions are met [*Cal. Rules of Ct., Rule 3.1130(a)*]:

- The Insurance Commissioner has certified the corporation as being admitted to do business in California as a surety insurer;

- There is filed in the office of the clerk a copy, duly certified by the proper authority, of the transcript or record of appointment entitling or authorizing the person or persons purporting to execute the bond or undertaking for and in behalf of the corporation to act in the premises; and

- The bond or undertaking has been executed under penalty of perjury as provided in *Code Civ. Proc. § 995.630*, or the fact of execution of the bond or undertaking by the officer or agent of the corporation purporting to become surety has been duly acknowledged before an officer of California authorized to take and certify acknowledgements. For the statutory form for a bond or undertaking, *see § 538.190*.

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§ 538.54 Deposit in Lieu of Bond

[1] Authorized

A principal, instead of giving a bond, may deposit money or certain property with the officer except to the extent the statute providing for the bond precludes a deposit in lieu of bond or limits the form of deposit [*Code Civ. Proc. § 995.710(a)*; for a listing of the property that may be used, see *§ 538.54[4]*]. Deposit in lieu of bond is not available for deposits with the Secretary of State [*Code Civ. Proc. § 995.710(a), (e)*]. Any principal who made a deposit with the Secretary of State pursuant to *Code Civ. Proc. § 995.710* prior to January 1, 1999, may continue to utilize that deposit in lieu of a bond pursuant to section 995.710 and the statute that prescribes a bond; however, the deposit will not be renewable pursuant to *Code Civ. Proc.§ 995.710* [*Code Civ. Proc. § 995.710(e)*].

[2] Amount of Deposit

The deposit must be in an amount or have a face value, or in the case of bearer bonds or bearer notes have a market value, equal to or in excess of the amount that would be required to be secured by the bond if the bond were given by an admitted surety insurer. Notwithstanding any other provision of the Bond and Undertaking Law, in the case of a deposit of bearer bonds or bearer notes other than in an action or proceeding, the officer may, in the officer's discretion, require that the amount of the deposit be determined not by the market value of the bonds or notes but by a formula based on the principal amount of the bonds or notes [*Code Civ. Proc. § 995.710(b)*].

[3] Terms of Deposit

The deposit must be accompanied by an agreement executed by the principal authorizing the officer to collect, sell, or otherwise apply the deposit to enforce the principal's liability on the deposit. The agreement shall include the address at which the principal may be served with notices, papers, and other documents under this chapter [*Code Civ. Proc. § 995.710(c)*].

The officer may prescribe terms and conditions to implement *section 995.710* [*Code Civ. Proc. § 995.710(d)*].

[4] Property That May Be Used for Deposit

The principal may use any of the following property for a deposit in lieu of a bond [*Code Civ. Proc. § 995.710(a)*]:

- Lawful money of the United States. The money must be maintained by the officer in an interest-bearing trust account.

- Bearer bonds or bearer notes of the United States or the State of California.

- Certificates of deposit payable to the officer, not exceeding the federally insured amount, issued by banks or savings associations authorized to do business in this state and insured by the Federal Deposit Insurance Corporation.

- Savings accounts assigned to the officer, not exceeding the federally insured amount, together with evidence of the deposit in the savings accounts with banks authorized to do business in this state and insured by the Federal Deposit Insurance Corporation.

- Investment certificates or share accounts assigned to the officer, not exceeding the federally insured amount, issued by savings associations authorized to do business in this state and insured by the Federal Deposit Insurance Corporation.

- Certificates for funds or share accounts assigned to the officer, not exceeding the guaranteed amount, issued by a credit union, as defined in *Fin. Code § 14002*, whose share deposits are guaranteed by the National Credit Union Administration or guaranteed by any other agency approved by the Department of Financial Institutions.

[5] Interest Paid on Deposit

If no proceedings are pending to enforce the liability of the principal on the deposit, the officer must do the following [*Code Civ. Proc. § 995.740*]:

- Pay quarterly to the principal, on demand, any interest on the deposit, when earned in accordance with the terms of the account or certificate.

- Deliver to the principal, on demand, any interest coupons attached to bearer bonds or bearer notes as the interest coupons become due and payable, or pay annually any interest payable on the bonds or notes.

[6] Return of Deposit

A deposit given in lieu of a bond must be returned to the principal at the earliest of the following times [*Code Civ. Proc. § 995.770*]:

- On substitution of a sufficient bond for the deposit. The bond will be in full force and effect for all liabilities incurred, and for acts, omissions, or causes existing or which arose during the period the deposit was in effect.

- The time provided by *Code Civ. Proc. § 995.360* for return of a bond.

- The time provided by statute for return of the deposit.

[7] Payment of Amount of Liability on Deposit

The principal must pay the amount of the liability on the deposit within 30 days after the date on which the judgment of liability becomes final [*Code Civ. Proc. § 995.750(a)*].

If the deposit was given to stay enforcement of a judgment on appeal, the principal must pay the amount of the liability on the deposit, including damages and costs awarded against the principal on appeal, within 30 days after the filing of the remittitur from the appellate court in the court from which the appeal is taken [*Code Civ. Proc. § 995.750(b)*].

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§ 538.55 Bonds to the State of California

[1] In General

Bonds to the State of California are bonds executed to, in favor of, in the name of, or payable to the State of California or the people of the state, including but not limited to official bonds [*see Code Civ. Proc. § 995.810*]. A bond given in an action or proceeding to the State of California must be approved by the court and any party for whose benefit the bond is given may object to the bond [*Code Civ. Proc. § 995.840*].

[2] Official Bonds

Except as otherwise provided by statute, a bond given by an officer of the court for the faithful discharge of the officer's duties and for obedience to the orders of the court must be given to the State of California [*Code Civ. Proc. § 995.820*].

[3] Beneficiary Not Specified

If a statute providing for a bond or a court order pursuant to the statute does not specify the beneficiary of the bond, the bond must be to the State of California [*Code Civ. Proc. § 995.830*].

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47-538 California Forms of Pleading and Practice--Annotated § 538.56

§ 538.56 Objections to Bonds

[1] In General

The procedure for objecting to bonds is limited to bonds given in an action or proceeding, in which there are adversary parties and a court to resolve disputes. In other situations the officer required to approve a bond or undertaking must do so without the objection procedure [*see* Law Revision Commission comment to *Code Civ. Proc. § 995.910*].

If the amount of the bond is increased voluntarily or by agreement of the parties to satisfy an objection to the bond made in an action or proceeding, and the bond is given in an amount greater than the amount required by statute or by order of the court or officer pursuant to statute, the liability of the surety on the bond will not be limited, as it otherwise would be, to the amount required by statute or by order of the court or officer [*Code Civ. Proc. § 996.470(b)*].

[2] Grounds

The beneficiary may object to a bond on the grounds that the sureties are insufficient, the amount of the bond is insufficient, or the bond, from any other cause, is insufficient [*Code Civ. Proc. § 995.920*; for forms for noticed motion and declaration in support of motion objecting to sufficiency of bond, *see §§ 538.192* and *538.193*].

[3] Objection to Sufficiency of Bond Based on Market Value

If a ground for objection is that the value of property or an interest in property on which the amount of the bond is based exceeds the value estimated in the bond, the objection must state the beneficiary's estimate of the market value of the property or interest in property [*Code Civ. Proc. § 995.940(a)*; *see § 538.192*]. If the principal accepts the beneficiary's estimate of the market value and immediately files an increased bond based on the estimate, no hearing will be held on that ground for the objection, and the beneficiary will be bound by the estimate of the market value of the property or interest in property [*Code Civ. Proc. § 995.940(b)*].

[4] Procedure for Making Objection

The objection must be made within 10 days after service of a copy of the bond on the beneficiary or such other time as is required by the statute providing for the bond [*Code Civ. Proc. § 995.930(b)*]. Service on the principal of the notice of motion and proof of service are made pursuant to *Code Civ. Proc. §§ 1010-1013a* [*see* Recommendation Relating to Statutory Bonds and Undertakings, 16 Cal. L. Revision Comm'n Reports 501, 537 (1982)]. The amount of notice required is less than that for notices of motion in general [*see, e.g., Code Civ. Proc. § 1005*]. Unless the parties otherwise agree, the hearing on an objection must be held not less than two or more than five days after service of the notice of motion on the principal [*Code Civ. Proc. § 995.950(a)*].

[5] Waiver of Objection

If no objection is made within the time required by statute, the beneficiary is deemed to have waived all objections to the bond except on a showing of good cause for failure to make the objection within the time required by statute or of changed circumstances [*Code Civ. Proc. § 995.930(c)*].

[6] Hearing on Objection

The hearing must be conducted in the manner that the court determines is proper. The court may permit witnesses to attend and testify and evidence to be procured and introduced as in the trial of a civil case [*Code Civ. Proc. § 995.950(b)*]. If the value of property or an interest in property is a ground for the objection, the court will estimate its value. The court may appoint one or more disinterested persons to appraise property or an interest in property for the purpose of estimating its value [*Code Civ. Proc. § 995.950(c)*]. A court commissioner is also empowered to determine any objections to a bond or undertaking [*Code Civ. Proc. § 259(c)*].

[7] Determination of Sufficiency of Bond by Court

After the hearing on the objection, the court will make an order determining the sufficiency or insufficiency of the bond [*Code Civ. Proc. § 995.960(a)*; for a form for an order determining the sufficiency of a bond, *see § 538.194*].

If the court determines that the bond is insufficient, it must specify in what respect the bond is insufficient, and order that a bond with sufficient sureties and in a sufficient amount be given within five days. If a sufficient bond is not given within the required time, the court will on ex parte motion order that all rights obtained by giving the original bond immediately cease [*Code Civ. Proc. § 995.960(b)(1)*]. If a bond is in effect, and the court determines that the bond is insufficient, the bond remains in effect until a sufficient bond is given in its place, or until the time in which to give a sufficient bond expires, whichever occurs first. If the time in which to give a sufficient bond expires, the original bond remains in full force and effect for (1) all liabilities incurred before expiration, and (2) acts, omissions, or causes existing or that arose before expiration [*Code Civ. Proc. § 995.960(b)(2)*]. In the case of a bond that becomes effective at a time other than the time it is given or approved (*see, e.g., Civ. Code § 3449, Code Civ. Proc. § 720.610 et seq.*), the bond will not become effective if objection is made to it before the effective date, and will become effective only at the time following the hearing on the objection when the court makes an order determining that the bond is sufficient [*see Code Civ. Proc. § 995.420(b)*]. If the court determines that such a bond is insufficient, there is no bond in effect until a sufficient bond is given in its place.

If the court determines that a bond is sufficient, no future objection to the bond may be made except on a showing of changed circumstances [*Code Civ. Proc. § 995.960(c)*].

[8] Objection to Sufficiency of Admitted Surety Insurer

A person who objects to the sufficiency of an admitted surety insurer must attach to and incorporate in the objection one or both of the following [*Code Civ. Proc. § 995.650*]:

- The certificate of the clerk of the county in which the court is located stating that the insurer is not listed as an admitted surety insurer on the web site of the Department of Insurance or that the insurer's certificate of authority has been surrendered, revoked, canceled, annulled, or suspended and has not been renewed.

- An affidavit (or declaration under *Code Civ. Proc. § 2015.5*) stating facts that establish the insufficiency of the insurer. For a declaration in support of the motion objecting to the sufficiency of a bond, *see § 538.193*.

If an objection is made to the sufficiency of an admitted surety insurer on a bond or if the bond of an admitted surety insurer is required to be approved, the insurer must submit to the court or officer the following documents [*Code Civ. Proc. § 995.660(a)*]:

- The original, or a certified copy, of the unrevoked appointment, power of attorney, bylaws, or other instrument entitling or authorizing the person who executed the bond to do so, within 10 calendar days of the insurer's receipt of a request to submit the instrument.

- A certified copy of the certificate of authority of the insurer issued by the Insurance Commissioner, within 10 calendar days of the insurer's receipt of a request to submit the copy.

- A certificate from the clerk of the county in which the court or officer is located stating that the certificate of authority of the insurer has not been surrendered, revoked, canceled, annulled, or suspended, or, in the event that it has, that renewed authority has been granted, within 10 calendar days of the insurer's receipt of the certificate.

- Copies of the insurer's most recent annual statement and quarterly statement filed with the Department of Insurance pursuant to *Ins. Code § 900 et seq.*, within 10 calendar days of the insurer's receipt of a request to submit the statements.

If the above documents are submitted in compliance with *Code Civ. Proc. § 995.660(a)*, and if it appears that the bond was duly executed, that the insurer is authorized to transact surety insurance in California, and that its assets exceed its liabilities in an amount equal to or in excess of the amount of the bond, the insurer is sufficient and shall be accepted or approved as surety on the bond. The approval or acceptance is subject to the limitation set forth in *Ins. Code § 12090* (admitted surety insurer may not become surety on undertaking when its liability amounts to more than 10 percent of its capital) [*Code Civ. Proc. § 995.660(b)*].

No public agency may require an admitted surety insurer to comply with any requirements other than those in *Code Civ. Proc. § 995.660*, described above, whenever an objection is made to the sufficiency of the admitted surety insurer on the bond or if the bond is required to be approved [*Code Civ. Proc. § 995.670(a)* (applicable to bond executed, filed, posted, furnished, or otherwise given as security pursuant to California statute or any law or ordinance of a public agency)]. "Public agency," for these purposes, refers to the state, any agency or authority, city, county, city and county, district, municipal or public corporation, or any instrumentality of them [*Code Civ. Proc. § 995.670(b)*].

Notwithstanding *Code Civ. Proc. §§ 995.660* and 995.970, however, the California Integrated Waste Management Board, the State Water Resources Control Board, and the Department of Toxic Substances Control may require, in order to comply with Subtitle C or D of the federal Resource Conservation and Recovery Act of 1976 [*see 42 U.S.C. § 6901 et seq.*], an admitted surety insurer to be listed in Circular 570 issued by the United States Treasury [*Code Civ. Proc. § 995.675*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsObjectionsCivil ProcedureRemediesBondsSuretiesGeneral OverviewGovernmentsLegislationStatutory Remedies & Rights

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§ 538.57 Subsequent Insufficiency of Bond or Sureties

[1] Given in Action or Proceeding

If a bond is given in an action or proceeding, the court may determine that the bond is or has from any cause become insufficient because the sureties are insufficient or because the amount of the bond is insufficient [*Code Civ. Proc. § 996.010(a)*]. The court determination is made on motion supported by affidavit (or declaration under *Code Civ. Proc. § 2015.5*) or on the court's own motion. The motion is deemed to be an objection to the bond, and notice of motion is given and the motion is heard in the same manner as an objection to the bond [*Code Civ. Proc. § 996.010(b)*; for form of noticed motion for order determining bond has become insufficient, *see § 538.195*; for discussion of the procedure for determining an objection to bond, *see § 538.123[4][i]*].

If the court determines that the bond is insufficient, the court shall order that a sufficient new, additional, or supplemental bond be given within a reasonable time but not less than five days after the hearing. The court order is subject to any limitations in the statute providing for the bond [*Code Civ. Proc. § 996.010(c)*; for form of order for sufficient new, additional, or supplemental bond, *see § 538.198*].

If a sufficient bond is not given within the time required by court order, all rights obtained by giving the original bond immediately cease and the court on ex parte motion will so order [*Code Civ. Proc. § 996.010(d)*].

[2] Given Other Than in Action or Proceeding

If a bond is given other than in an action or proceeding and it is shown by affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of a credible witness or it otherwise comes to the attention of the officer that the bond is or has from any cause become insufficient because the sureties are insufficient or because the amount of the bond is insufficient, the officer may serve an order on the principal to appear and show cause why the officer should not make a determination that the bond is insufficient. The hearing on the order to show cause must be not less than three or more than 10 days after service of the order on the principal [*Code Civ. Proc. § 996.020(a)*; for form of declaration showing bond has become insufficient, *see § 538.196*; for form of order to appear and show cause why a determination that the bond is

insufficient should not be made, *see § 538.197*].

If the principal fails to appear or show good cause on the date of the hearing, the officer may determine that the bond is insufficient and order a sufficient new, additional, or supplemental bond to be given [*Code Civ. Proc. § 996.020(b)*; for form of order for sufficient new, additional, or supplemental bond, *see § 538.198*].

If a sufficient bond is not given within 10 days after the order, the officer shall make an order vacating the rights obtained by giving the original bond, including declaring vacant any office and suspending or revoking any license or certificate for which the bond was given. Any office vacated, license suspended or revoked, or any other rights lost will not be reinstated until a new, additional, or supplemental bond is given [*Code Civ. Proc. § 996.020(c)*].

Legal Topics:

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§ 538.58 Reduction of Excessive Bond

The court, if a bond is given or ordered in an action or proceeding, or the officer, if a bond is given or ordered other than in an action or proceeding, may determine that the amount of the bond is excessive. If so, the court or officer may order the amount reduced to an amount that in the discretion of the court or officer appears proper under the circumstances. The order is subject to any limitations in the statute providing for the bond [*Code Civ. Proc. § 996.030(a)*; for form of order determing bond is excessive and reducing bond, *see § 538.198*].

The determination as to whether or not a bond is excessive is made on motion or affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of the principal in the same manner as a motion or affidavit or declaration under *Code Civ. Proc. § 996.010* or *Code Civ. Proc. § 996.020* that a bond is insufficient [for discussion of procedure under *Code Civ. Proc. § 996.010*, *see* Subsequent Insufficiency of Bond or Sureties--Given in Action or Proceeding, *above*; for discussion of procedure under *Code Civ. Proc. § 996.020*,--Given in Other Than Action or Proceeding, *above*]. The notice of motion or the order to show cause made pursuant to affidavit or declaration must be served on the beneficiary [for declaration showing bond is excessive, *see § 538.196*; for form of notice of motion for order determining bond is excessive and reducing bond, *see § 538.195*]. The determination of the court or officer is made in the same manner and pursuant to the same procedures as a determination under *Code Civ. Proc. § 996.010* or *Code Civ. Proc. § 996.020* that a bond is insufficient [*Code Civ. Proc. § 996.030(b)*; for form of order reducing bond on determination of excessiveness, *see § 538.198*; for procedure for determination of subsequent insufficiency of bond, *see § 538.123[4][i]*].

If the court or officer determines that the bond is excessive, the principal may give a new bond for the reduced amount. The sureties may be the same sureties as on the original bond [*Code Civ. Proc. § 996.030(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 538.59 New, Additional, and Supplemental Bonds

[1] When Given

The principal must give a new, additional, or supplemental bond if the court or officer orders that a new, additional, or supplemental bond be given [*Code Civ. Proc. § 996.210(a)*; for form of order for sufficient new, additional, or supplemental bond, *see § 538.198*].

The principal may give a new bond if a surety withdraws from or cancels the original bond or to obtain the release of sureties from liability on the original bond [*Code Civ. Proc. § 996.210(b)*].

[2] Form and Contents

A new, additional, or supplemental bond must be in the same form and have the same obligation as the original bond. It must be in all other respects the same as the original bond, and be in the amount necessary for the purpose for which the new, additional, or supplemental bond is given [*Code Civ. Proc. § 996.220(a)*; for statutory form of bond or undertaking, *see § 538.190*].

In addition to any other requirements, a supplemental bond must recite the names of the remaining original sureties, the name of the new surety, and the amount for which the new surety is liable. The supplemental bond must be for the amount for which the original surety was liable on the original bond [*Code Civ. Proc. § 996.220(b)*].

[3] Applicable Provisions

A new, additional, or supplemental bond is subject to all the provisions applicable to the original bond, and to the provisions of the Bond and Undertaking Law (*Code Civ. Proc. §§ 995.010-996.560*) including, but not limited to, the provisions governing giving and objecting to a bond and liabilities and enforcement procedures [*Code Civ. Proc. § 996.230*; for discussion of objecting to bond, *see* discussion under Objections to Bond,].

[4] Effect of New Bond

If a new bond is given in place of the original bond, the original bond remains in full force and effect for liabilities incurred before, and for acts, omissions, or causes existing or which arose before, the new bond became effective [*Code Civ. Proc. § 996.240(a)*].

The sureties on the original bond are not liable for any act, default, or misconduct of the principal or other breach of the condition of the bond that occurs after, or for any liabilities on the bond that arise after, the new bond becomes effective [*Code Civ. Proc. § 996.240(b)*].

[5] Effect of Additional or Supplemental Bond

An additional or supplemental bond does not discharge or affect the original bond. The original bond remains in full force and effect as if the additional or supplemental bond had not been given [*Code Civ. Proc. § 996.250(a)*].

After an additional or supplemental bond is given, the principal and sureties are liable on either or both bonds for injury caused by breach of any condition of the bonds. Subject to *Code Civ. Proc. § 996.250(c)*, the beneficiary may enforce the liability on either bond or may enforce the liability separately on both bonds and recover separate judgments of liability on both [*Code Civ. Proc. § 996.250(b)*].

If the beneficiary recovers separate judgments of liability on both bonds for the same cause of action, the beneficiary may enforce both judgments. The beneficiary may collect, by execution or otherwise, the costs of both proceedings to enforce the liability on the bonds and the amount actually awarded to the beneficiary on the same cause of action in only one of the proceedings. No double recovery is allowed [*Code Civ. Proc. § 996.250(c)*].

If the sureties on either bond have been compelled to pay any sum of money on account of the principal, they are entitled to recover from the sureties on the remaining bond a distributive part of the sum paid in the proportion that the amounts of the bonds bear one to the other and to the sums paid [*Code Civ. Proc. § 996.250(d)*].

Legal Topics:

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§ 538.60 Release and Substitution of Sureties on Bond Given in Action or Proceeding

[1] Application

A surety on a bond given in an action or proceeding may at any time apply to the court for an order to be released from liability on the bond [*Code Civ. Proc. § 996.110(a)*; for form of application for release, *see § 538.199*].

If a surety applies for release from liability on a bond, the principal on the bond may then apply to the court for an order that another surety be substituted for the original surety [*Code Civ. Proc. § 996.110(b)*; for forms of application and notice of hearing on application for substitution of sureties, *see §§ 538.201* and *538.202*].

The applicant must serve on the principal or surety (other than the applicant) and on the beneficiary a copy of the application and a notice of hearing on the application [*Code Civ. Proc. § 996.110(c)*]. Service is made in the same manner as service of process in civil actions generally (*see Code Civ. Proc. §§ 413.10-417.40*) [*Code Civ. Proc. § 995.030*]. Service must be made not less than 15 days before the date set for hearing [*Code Civ. Proc. § 996.110(c)*].

[2] Hearing on Application

On the hearing of the application, the court will determine whether or not injury to the beneficiary would result from substitution or release of the surety. If the court determines that release would not reduce the amount of the bond or the number of sureties below the minimum required by the statute providing for the bond, substitution of a sufficient surety is not necessary and the court must order the release of the surety. If the court determines that no injury would result from substitution of the surety, the court must order the substitution of a sufficient surety within a reasonable time [*Code Civ. Proc. § 996.120*].

At the time of substitution of a sufficient surety, the court must order the release of the original surety from liability on the bond [*Code Civ. Proc. § 996.130(b)*].

[3] Effect of Release and Substitution

[a] Liability of Substitute Surety

If a substitute surety is given, the substitute surety is subject to all the provisions of the Bond and Undertaking Law (*Code Civ. Proc. §§ 995.010-996.560*), including but not limited to the provisions governing insufficient and excessive bonds [*Code Civ. Proc. § 996.130(a)*].

[b] Liability of Released Surety

If a surety is released from liability on a bond, the bond remains in full force and effect for all liabilities incurred before, and for acts, omissions, or causes existing or which arose before, the release. Legal proceedings may be had therefor in all respects as though there had been no release [*Code Civ. Proc. § 996.150(a)*].

The surety is not liable for any act, default, or misconduct of the principal or other breach of the condition of the bond that oc curs after, or for any liabilities on the bond that arise after, the release [*Code Civ. Proc. § 996.150(b)*].

[4] Failure to Give Sufficient Substitute Surety

If the principal does not give a sufficient substitute surety within the time ordered by the court, or within a longer time consented to by the surety, all rights obtained by giving the original bond immediately cease. On ex parte motion the court will issue an order to that effect [*Code Civ. Proc. § 996.140*].

The release of a surety does not affect the bond as to the remaining sureties, or alter or change their liability in any respect [*Code Civ. Proc. § 996.150(c)*].

[5] No Release Without Court Order

Under *Code Civ. Proc. § 996.110* a court order is required to effectively release a surety on a statutory bond. A release of a surety voluntarily signed by the beneficiary of the bond does not release the surety [*Snyder v. Untied States Fidelity & Guaranty Co. (1997) 60 Cal. App. 4th 561, 569, 70 Cal. Rptr. 2d 498* (release of guardianship bond ineffective)].

Legal Topics:

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§ 538.61 Cancellation of Bond or Withdrawal of Sureties Other Than in Action or Proceeding

[1] Applicability

The provisions of *Code Civ. Proc. §§ 996.310-996.360* govern cancellation of or withdrawal of a surety from a bond given other than in an action or proceeding [*Code Civ. Proc. § 996.310*].

[2] Notice of Cancellation or Withdrawal

A surety may cancel or withdraw from a bond by giving a notice of cancellation or withdrawal to the officer to whom the bond was given, notwithstanding *Code Civ. Proc. § 995.030* (service to be made in same manner as service of process in civil actions generally). At the same time the surety gives notice of cancellation or withdrawal, the surety must mail or deliver a copy of the notice of cancellation or withdrawal to the principal [*Code Civ. Proc. § 996.320*; for form of notice of cancellation or withdrawal of surety, *see § 538.205*].

[3] Effective Date of Cancellation or Withdrawal

Cancellation or withdrawal of a surety is effective at the earliest of the following times [*Code Civ. Proc. § 996.330*]:

- 30 days after notice of cancellation or withdrawal is given.
- If a new surety is substituted for the original surety, the date the substitution becomes effective.
- If a new bond is given, the date the new bond becomes effective.

[4] Effect of Cancellation or Withdrawal

If the principal does not give a new bond within 30 days after notice of cancellation or withdrawal is given, all rights obtained by giving the original bond immediately cease, any office for which the bond is given is vacant, any

commission for which the bond is given is revoked, and any license or registration for which the bond is given is suspended [*Code Civ. Proc. § 996.340(a)*].

A person whose license or registration is suspended cannot operate or carry on business pursuant to the license or registration during the period of suspension. A license or registration that is suspended may be revived only by the giving of a new bond during the license or registration period in which the cancellation or withdrawal occurred [*Code Civ. Proc. § 996.340(b)*].

[5] When New Bond Not Required

If the withdrawal of a surety does not reduce the amount of the bond or the number of sureties below the minimum required by the statute providing for the bond, no new bond is required or necessary to maintain the original bond in effect [*Code Civ. Proc. § 996.350*].

[6] Liability of Surety on Cancellation or Withdrawal

If a surety cancels or withdraws from a bond, the bond remains in full force and effect for all liabilities incurred before, and for acts, omissions, or causes existing or which arose before, the cancellation or withdrawal. Legal proceedings may be had therefor in all respects as though there had been no cancellation or withdrawal [*Code Civ. Proc. § 996.360(a)*].

The surety is not liable for any act, default, or misconduct of the principal or other breach of the condition of the bond that occurs after, or for any liabilities on the bond that arise after, the cancellation or withdrawal [*Code Civ. Proc. § 996.360(b)*].

The cancellation or withdrawal does not affect the bond as to the remaining sureties, or alter or change their liability in any respect [*Code Civ. Proc. § 996.360(c)*].

Legal Topics:

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[Reserved]

§§ 538.62[Reserved]

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§ 538.80 Governing Statutes

Statutory bonds and undertakings are regulated by the Bond and Undertaking Law (*Code Civ. Proc. §§ 995.010-996.560*; for a discussion of the applicability of that law, *see* the discussion in the General Introduction to this Part under Applicability of Bond and Undertaking Law). Actions and motions to enforce statutory bonds are governed generally by *Code Civ. Proc. §§ 996.410-996.560*. Liability of sureties and principals is regulated by *Civ. Code §§ 2806-2811* and by *Code Civ. Proc. § 996.470*.

Legal Topics:

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§ 538.81 Liability of Principal

[1] Not Limited to Amount of Bond

Except as otherwise provided by statute, the liability of the principal is not limited to the amount of the bond [*Code Civ. Proc. § 996.470(a)*; *e.g., Franke v. BAM Bldg. Co. (2009) 172 Cal. App. 4th 224, 230-231, 91 Cal. Rptr. 3d 212* (principal's liability on undertaking given pursuant to *Code Civ. Proc. § 720.260(c)* for enforcement of judgment was not limited by statute; principal's letter purporting to limit liability as provided in obsolete language of superseded statute was ineffectual)].

[2] Application of Deposit to Liability of Principal

If the principal does not pay the amount of the liability on the deposit within the time prescribed in *Code Civ. Proc. § 995.750*, the deposit will be collected, sold, or otherwise applied to the liability, on order of the court that entered the judgment of liability. The order will be made on five days' notice to the parties [*Code Civ. Proc. § 995.760(a)*].

Bearer bonds or notes without a prevailing market price will be sold at public auction. Notice of sale must be served on the principal. Bearer bonds or notes having a prevailing market price may be sold at private sale at a price not lower than the prevailing market price [*Code Civ. Proc. § 995.760(b)*].

The deposit must be distributed in the following order [*Code Civ. Proc. § 995.760(c)*]:

- First, to pay the cost of collection, sale, or other application of the deposit.
- Second, to pay the judgment of liability of the principal on the deposit.
- Third, the remainder, if any, must be returned to the principal.

Legal Topics:

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47-538 California Forms of Pleading and Practice--Annotated § 538.82

§ 538.82 Liability of Sureties

Notwithstanding any other statute other than *Code Civ. Proc. § 996.480* (discussed in *§ 538.83*), the aggregate liability of a surety to all persons for all breaches of the condition of a bond is limited to the amount of the bond [*Code Civ. Proc. § 996.470(a)* ; *see Franke v. BAM Building Co. (2009) 172 Cal. App. 4th 224, 230-231, 91 Cal. Rptr. 3d 212* (analyzing statute)]. A surety's liability may be further limited by the statute providing for the bond or undertaking [*see, e.g., Bus. & Prof. Code § 7071.11(a)* (liability on claim for wages and fringe benefits on contractor's bond, other than a bond required by *Bus. & Prof. Code § 7071.8*, limited to $4,000)]. Nothing in the Bond and Undertaking Law is intended to limit the liability of a surety pursuant to any other statute [*Code Civ. Proc. § 996.475*]. Thus, a surety may be liable for costs of suit [*see Code Civ. Proc. § 1032*], in addition to the amount of the bond, when the surety is a losing party to litigation determining that the principal breached a condition of the bond [*Harris v. Northwestern National Ins. Co. (1992) 6 Cal. App. 4th 1061, 1064-1066, 8 Cal. Rptr. 2d 234]* .

However, the bond's language read in light of the applicable statutes determines the rights and liabilities under a surety bond. If a surety makes a contract with the law before him or her, the law enters into and becomes a part of the agreement. Moreover, a surety can raise all defenses that the principal can raise and must pay on the bond only if the claimant establishes, without reference to the bond, the principal's legal obligation to pay. Under *Civ. Code § 2809* a surety is not liable on the obligation if the principal is not liable on the obligation [*Royster Construction Co. v. Urban West Communities (1995) 40 Cal. App. 4th 1158, 1168-1169, 47 Cal. Rptr. 2d 684]* . Thus, for example, when an owner of land subject to a mechanic's lien posts bonds pursuant to *Civ. Code § 3143* to release the property from the lien and the bonds do not provide for the recovery of attorney fees, recovery of attorney fees, whether as damages or costs, has been held barred against the surety on the *Civ. Code § 3143* mechanic's lien release bonds because attorney fees are not recoverable in mechanic's lien foreclosure actions and by law the obligation of a surety on a *Civ. Code § 3143* mechanic's lien release bond is the same as that of the principal/property owner [*Royster Construction Co. v. Urban West Communities (1995) 40 Cal. App. 4th 1158, 1171, 47 Cal. Rptr. 2d 684* (holding in case did not determine whether attorney fees were recoverable against mechanic's lien release bond pursuant to *Code Civ. Proc. § 996.480*, which provides special rules when principal's liability previously established by a final judgment, time for appeal has expired and separate suit thereafter brought against surety, as that procedure not employed in case)].

If a bond is given in an amount greater than the amount required by statute or by order of the court or officer pursuant to statute, the liability of the surety on the bond is limited to the amount required by statute or by order of the court or officer, unless the amount of the bond has been increased voluntarily or by agreement of the parties to satisfy an objection to the bond made in an action or proceeding [*Code Civ. Proc. § 996.470(b)*].

If a bond contains a stipulation pursuant to *Code Civ. Proc. § 995.520(d)* that the liability of a personal surety is limited to the worth of the surety, the liability of the surety is limited to the amount stipulated [*Code Civ. Proc. § 996.470(c)(1)*]. The surety's liability is also limited to the amount stipulated when the bond contains a stipulation that the liability of the surety is an amount less than the amount of the bond given pursuant to a statute that provides that the liability of sureties in the aggregate amount need not exceed the amount of the bond [*Code Civ. Proc. § 996.470(c)(2)*].

A subcontractor may recover from a surety any attorney's fees provided for in a subcontract, and ordered by a court, as long as the total recovery against the surety does not exceed the penal sum of the bond [*T&R Painting Constr. v. St. Paul Fire & Marine Ins. Co. (1994) 23 Cal. App. 4th 738, 29 Cal. Rptr. 2d 199]* .

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§ 538.83 Voluntary Payment by Surety

If the nature and extent of the liability of the principal is established by final judgment of a court and the time for appeal has expired or, if an appeal is taken, the appeal is finally determined and the judgment is affirmed, a surety may make payment on a bond without waiting for enforcement of the bond. The amount of the bond will be reduced to the extent of any payment made by the surety in good faith [*Code Civ. Proc. § 996.480(a)(1)*]. If the beneficiary makes a claim for payment on a bond given in an action or proceeding after the liability of the principal has been so established, and the surety fails to make payment, the surety is liable for costs incurred in obtaining a judgment against the surety, including a reasonable attorney's fee and interest on the judgment from the date of the claim, notwithstanding *Code Civ. Proc. § 996.470* (limitation of amount of surety's liability) [*Code Civ. Proc. § 996.480(a)(2)*].

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§ 538.84 Enforcement of Liability on Bond

[1] Jurisdiction Over Surety

A surety on a bond given in an action or proceeding submits itself to the jurisdiction of the court in all matters affecting its liability on the bond [*Code Civ. Proc. § 996.420(a)*]. *Code Civ. Proc. § 996.420(a)* does not, however, apply to a bond of a public officer or fiduciary [*Code Civ. Proc. § 996.420(b)*].

[2] By Beneficiary

The beneficiary may enforce the liability on a bond against both the principal and the sureties [*Code Civ. Proc. § 996.410(a)*]. If the beneficiary is a class of persons, any person in the class may enforce the liability on a bond in the person's own name, without assignment of the bond [*Code Civ. Proc. § 996.410(b)*].

[3] By Injured Beneficiaries When Bond Is to State of California

The liability on a bond to the State of California or the people of California may be enforced by or for the benefit of, and in the name of, any and all persons for whose benefit the bond is given, who are damaged by breach of the condition of the bond [*Code Civ. Proc. § 995.850(a)*]. A person described in *Code Civ. Proc. § 995.850(a)* may, in addition to any other remedy, enforce the liability on the bond in the person's own name, without assignment of the bond [*Code Civ. Proc. § 995.850(b)*].

[4] By Motion

If a bond is given in an action or proceeding, the liability on the bond may be enforced on motion made in the court without the necessity of an independent action [*Code Civ. Proc. § 996.440(a)*; for a form of notice of motion, *see § 538.222*]. Any attempt to enforce a right, for example, enforcement of payment of a judgment, constitutes an action or proceeding for the purposes of *Code Civ. Proc. § 996.440* [*see Mark Briggs & Associates Inc. v. Kinestar, Inc. (1983) 143 Cal. App. 3d 483, 486, 192 Cal. Rptr. 21]* . Common law bonds as well as statutory bonds may be enforced by

motion [*see Mark Briggs & Associates Inc. v. Kinestar, Inc. (1983) 143 Cal. App. 3d 483, 488, 192 Cal. Rptr. 21* ; for discussion and forms relating to common law bonds, *see* Part I, *above*]. The motion may not be made until after entry of the final judgment in the action or proceeding in which the bond is given and the time for appeal has expired or, if an appeal is taken, until the appeal is finally determined [*Code Civ. Proc. § 996.440(b)*; *see, e.g., Satinover v. Dean (1988) 202 Cal. App. 3d 1298, 1301, 249 Cal. Rptr. 277* (motion premature when action still pending for trial)]. The motion may not be made or notice of motion served more than one year after the later of the preceding dates [*Code Civ. Proc. § 996.440(b)*].

Notice of motion must be served on the principal and sureties at least 30 days before the time set for hearing of the motion. The notice must state the amount of the claim and must be supported by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) setting forth the facts on which the claim is based [*Code Civ. Proc. § 996.440(c)*]. The supporting affidavits or declarations must conform to the standards prescribed for an affidavit or declaration made pursuant to *Code Civ. Proc. § 437c* (supporting and opposing affidavits or declarations to be made on personal knowledge, set forth admissible evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein) [*Code Civ. Proc. § 995.040*]. The notice and affidavits or declarations shall be served in accordance with any procedure authorized by *Code Civ. Proc. §§ 1010-1020* [*Code Civ. Proc. § 996.440(c)*; for discussion of *Code Civ. Proc. §§ 1010-1020, see* Ch. 518, *Service of Summons and Papers*].

Judgment will be entered against the principal and sureties in accordance with the motion unless the principal or sureties serve and file affidavits or declarations in opposition to the motion showing such facts as may be deemed by the judge hearing the motion to be sufficient to present a triable issue of fact. If such a showing is made, the issues to be tried shall be specified by the court. Trial is by the court and must be set for the earliest date convenient to the court, allowing sufficient time for such discovery proceedings as may be requested [*Code Civ. Proc. § 996.440(d)*]. The requirement for a court trial should not be construed to deny the right to a jury trial on a bond or undertaking executed pursuant to prior law to the extent constitutionally required [*see* Law Revision Commission comment to *Code Civ. Proc. § 996.440*].

The principal and sureties cannot obtain a stay of the proceedings pending determination of any conflicting claims among beneficiaries [*Code Civ. Proc. § 996.440(e)*].

[5] By Civil Action

[a] Parties

The liability on a bond may also be enforced by an independent civil action [*Code Civ. Proc. § 996.430(a)*; for forms of complaints, *see §§ 538.225 -538.231*]. Both the principal and the sureties must be joined as parties to the action [*Code Civ. Proc. § 996.430(a)*].

A cause of action on a bond may be transferred and assigned as other causes of action [*Code Civ. Proc. § 996.430(c)*].

[b] Jurisdiction

If the bond was given in an action or proceeding, the action is commenced in the court in which the action or proceeding was pending. If the bond was given other than in an action or proceeding, the action is commenced in any court of competent jurisdiction, and the amount of damage claimed in the action, not the amount of the bond, determines the jurisdictional classification of the case [*Code Civ. Proc. § 996.430(b)*; *see Code Civ. Proc. §§ 85, 86(a)* (case in which demand is $25,000 or less is limited civil case)].

[c] Statute of Limitations

The general statute of limitations for an action on a bond or undertaking is four years [*Code Civ. Proc. § 337*]. However, specific statutes may provide for different limitation periods [*see, e.g., Fin. Code § 12212* (2 years)].

Any provision in a bond that attempts by contract to shorten the limitation period prescribed by *Code Civ. Proc. § 337* or other statute for the commencement of an action on the bond, or the one-year period prescribed by *Code Civ. Proc. § 996.440(b)* for a motion to enforce a bond, is not valid unless the principal, beneficiary, and surety accept the shorter provision [*Code Civ. Proc. § 996.450*].

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§ 538.85 Judgment of Liability on Bond

A judgment of liabilty on a bond, notwithstanding *Civ. Code § 2845* (surety can require creditor to proceed against principal), will be in favor of the beneficiary and against both the principal and sureties, and will obligate each of them jointly and severally [*Code Civ. Proc. § 996.460(a)*].

The amount of the judgment is determined by the court [*Code Civ. Proc. § 996.460(b)*]. To recover the full amount of the bond, the evidence must show that the plaintiff is damaged in that amount [*see Oakdale Irr. Dist. v. Beard (1920) 47 Cal. App. 66, 69, 190 P. 224]* .

The beneficiary can recover only the penal sum of the bond from the surety but may recover more from the principal [*see Code Civ. Proc. § 996.470(a)*]. The judgment will include costs to the extent provided in *Code Civ. Proc. § 1021 et seq.* [*see* Law Revision Commission comment to *Code Civ. Proc. § 996.460*]. The judgment may not include an award of attorney's fees on account of the bond-enforcement proceedings unless attorney's fees are authorized by a contract (such as the bond) or a statute other than the bond-enforcement statutes (which do not authorize fees) [*Franke v. BAM Bldg. Co. (2009) 172 Cal. App. 4th 224, 236-237, 91 Cal. Rptr. 3d 212]* . A judgment that does not exhaust the full amount of the bond decreases the amount of the bond but does not discharge the bond. The liability on the bond may be enforced thereafter from time to time until the amount of the bond is exhausted [*Code Civ. Proc. § 996.460(c)*].

The judgment may be enforced by the beneficiary directly against the sureties. Any right of subrogation of a surety against the principal or any right of a surety to compel the principal to satisfy the judgment is not affected [*Code Civ. Proc. § 996.460(d)*].

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§ 538.86 Enforcement of Judgment

[1] In General

A judgment of liability on a bond may be enforced in the same manner and to the same extent as other money judgments [*Code Civ. Proc. § 996.495*].

[2] On Bond to State of California by Enforcement Lien

[a] Establishing Lien

In a proceeding for the benefit of the state, if the person enforcing the liability on a bond executed to, in favor of, or payable to the State of California or the people of the State of California, including but not limited to an official bond, desires a lien against defendant's property on judgment of liability, he or she may file an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) with the court for a lien on real property of defendant [*see Code Civ. Proc. §§ 996.510, 996.520, 996.550*].

The affidavit or declaration must state the following [*Code Civ. Proc. § 996.520*]:

- The bond was executed by the defendant or one or more of the defendants and designating whom.
- The bond is one to which *Code Civ. Proc. §§ 996.510-996.560* applies.
- The defendant or defendants have real property or an interest in real property and designating the county or counties in which the real property is situated.
- The liability is being enforced for the benefit of the state.

The clerk receiving the affidavit must certify to the recorder of the county in which the real property is situated all of the

following [*Code Civ. Proc. § 996.530*]:

- The names of the parties.
- The court in which the proceedings are pending.
- The amount claimed.
- The date of commencement of the proceedings.

On receiving the certificate, the county recorder will endorse on it the time of its receipt [*Code Civ. Proc. § 996.540(a)*]. The certificate must be filed and recorded in the same manner as notice of the pendency of an action affecting real property [*Code Civ. Proc. § 996.540(b)*; for discussion and forms relating to giving notice of a pending action affecting real property, *see* Ch. 348, *Lis Pendens*].

Any judgment recovered is a lien on all real property belonging to the defendant situated in any county in which the certificate is filed, dating from the filing of the certificate [*Code Civ. Proc. § 996.550(a)*]. The lien is for the amount for which the owner of the real property is liable on the judgment [*Code Civ. Proc. § 996.550(b)*].

[b] Effect of Lien on Pending Sale of Property

If an agreement to sell real property affected by the lien, created by the filing of the certificate, was made before the filing of the certificate, the purchase price under the agreement was not due until after the filing of the certificate, and the purchaser is otherwise entitled to specific performance of the agreement, the court, in an action to compel specific performance of the agreement, must order the purchaser to pay the purchase price, or so much of the purchase price as may be due, to the State Treasurer, and to take the State Treasurer's receipt for payment. On payment, the purchaser is entitled to enforcement of specific performance of the agreement. The purchaser takes the real property free from the lien created by the filing of the certificate. The State Treasurer must hold the payment pending the proceedings referred to in the certificate. The payment is subject to the lien created by the filing of the certificate [*Code Civ. Proc. § 996.560*].

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§ 538.87 Effect of Payment

Payment by a surety of the amount of a bond constitutes a full discharge of all the liability of the surety on the bond [*Code Civ. Proc. § 996.490(a)*]. Each surety is liable for contribution to cosureties who have made payment in proportion to the amount for which each surety is liable [*Code Civ. Proc. § 996.490(b)*].

Partial payment of a claim by a surety is not considered satisfaction of the claim and the beneficiary may enforce the liability on the bond. If a right is affected or a license is suspended or revoked until payment of a claim, the right continues to be affected and the license continues to be suspended or revoked until the claim is satisfied in full [*Code Civ. Proc. § 996.480(b)*].

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[Reserved]

§§ 538.88[Reserved]

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§ 538.100 California Points and Authorities

For forms of memoranda supporting and opposing complaint for contribution among joint obligors, see California Points and Authorities, Ch. 115, *Indemnity and Contribution* (Matthew Bender)

For forms of memoranda supporting and opposing a general demurrer to a complaint against surety by creditor on principal obligation, see California Points and Authorities, Ch. 222, *Suretyship* (Matthew Bender)

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§ 538.101 California Legal Forms

For forms of license, permit, and miscellanceous bonds and guaranty agreements, see California Legal Forms, Ch. 79, *Suretyship, Guaranty, and Indemnity* (Matthew Bender)

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§ 538.102 State Statutes

Definition of suretyship. *Civ. Code §§ 2787, 2788*

Creation and interpretation of suretyship. *Civ. Code §§ 2792-2802*

Liability of surety. *Civ. Code §§ 2806-2811*

Continuing guaranty. *Civ. Code §§ 2814, 2815*

Exoneration of surety. *Civ. Code §§ 2819-2825*

Position of surety. *Civ. Code §§ 2832-2856*

Statute of limitations on principal's obligation in conditional surety as affecting surety. *Code Civ. Proc. § 359.5*

Good faith release, dismissal, or covenant not to sue or not to enforce judgment as discharging coobligor to whom it was given from liability for any contribution to coobligors. *Code Civ. Proc. § 877(b)*

Determination that settlement was made in good faith as barring any further claims of coobligors against settling coobligor for equitable comparative contribution or for partial or comparative indemnity, based on comparative negligence or comparative fault. *Code Civ. Proc. § 877.6(c)*

Contribution among joint obligors. *Code Civ. Proc. §§ 881-883*

Action by surety to compel principal to pay. *Code Civ. Proc. § 1050*

Indemnified public officer's rights. *Code Civ. Proc. § 1055*

Time of notice binding surety. *Code Civ. Proc. § 1912*

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§ 538.103 Decisions

[1] Apparent Principal as Surety

Owners of property who executed deed of trust in favor of developer's construction lender sufficiently pleaded that they were sureties rather than principal obligors; allegations included fact that bank's officer considered them third parties, construction loan agreement and note were signed by developer alone, and deed of trust identified secured obligation as being that of developer and expressly provided that owners had no personal liability for debt. *Mead v. Sanwa Bank California (1998) 61 Cal. App. 4th 561, 571-572, 71 Cal. Rptr. 2d 625*

Knowledge of creditor that funds lent to principal will be lent to third persons as not making principal surety for third person borrowers. *Beverly Hills Nat. Bank v. Glynn (1968) 267 Cal. App. 2d 859, 869, 73 Cal. Rptr. 808*

One who appears to be principal as able to show that is surety except as against persons who acted in good faith belief. *Josephian v. Lion (1924) 66 Cal. App. 650, 661, 227 P. 204*

Parol evidence as available to show apparent principal is surety. *Josephian v. Lion (1924) 66 Cal. App. 650, 661, 227 P. 204*

One who signed furniture sale agreement as cosigner, who neither bought nor possessed furniture, and who only agreed to pay should purchaser be unable to pay as allowed to invoke *Civ. Code § 2832*. *Wexler v. McLucas (1975) 48 Cal. App. 3d Supp. 9, 121 Cal. Rptr. 453*

[2] Assignability of Suretyship Contracts

Assignability of surety agreement as assumed unless there is plain intent to restrict guarantor's liability to original creditor. *Champion Home Builders Co. v. Sipes (1990) 219 Cal. App. 3d 1415, 1422, 269 Cal. Rptr. 75*

Assignment of personal guaranty as not required to be in writing to be enforceable. *Champion Home Builders Co. v. Sipes (1990) 219 Cal. App. 3d 1415, 1422-1423, 269 Cal. Rptr. 75*

Creditor's assignment of debt as also transferring guarantor's obligation on debt because, under *Civ. Code § 1084*, transfer of thing also transfers incidents of thing. *Champion Home Builders Co. v. Sipes (1990) 219 Cal. App. 3d 1415, 1423-1424, 269 Cal. Rptr. 75*

[3] Attorney's Fees

Guarantors under agreement that contained attorney's fee provision as entitled to recover attorney's fees expended to vacate out-of-state judgment domesticated to California judgment; guarantors as prevailing parties, and basis of recovery as underlying contract, not judgment. *Rainier National Bank v. Bodily (1991) 232 Cal. App. 3d 83, 86, 282 Cal. Rptr. 926*

[4] Consideration Required

Present or future lending of money as sufficient consideration to support guaranty of loan made before execution of continuing guaranty. *Oakland Bank of Commerce v. Washington (1970) 6 Cal. App. 3d 793, 796, 86 Cal. Rptr. 276*

Written guaranty as implying consideration. *Bank of America v. Granger (1931) 115 Cal. App. 210, 219*

[5] Continuing Guaranty

Because each extension of credit based on revocable continuing guaranty of credit creates new suretyship contract, creditor as owing continuing duty of disclosure to surety. *Sumitomo Bank of Cal. v. Iwasaki (1968) 70 Cal. 2d 81, 93, 73 Cal. Rptr. 564, 447 P.2d 956*

Limitation as to amount of guarantor's liability without limitation of liability to specific transaction or series of transactions as continuing guaranty. *Berg Metals Corp. v. Wilson (l959) 170 Cal. App. 2d 559, 570, 339 P.2d 869*

Limitation on amount of guarantor's continuing guaranty as not applying to dealings between creditor and principal; their exceeding of that amount as not breach of suretyship agreement. *Berg Metals Corp. v. Wilson (1959) 170 Cal. App. 2d 559, 570, 339 P.2d 869*

[6] Defenses of Surety

Frustration of purpose doctrine were not applicable to payee's acceleration of note after payor's default; guarantors were not able to claim their purpose was frustrated because their purpose in extending guaranty was to obtain loan for their company, which they did; occurrence of default is basic assumption on which contract was made. *United States v. Grayson (9th Cir. 1989) 879 F.2d 620, 624* (interpreting California law for guidance)

Defense of impossibility unavailable to guarantors; that defense is never available merely because supervening events deprive promisor of ability to perform; fact that payee was unable to pay loan when accelerated is not objective impossibility. *United States v. Grayson (9th Cir. 1989) 879 F.2d 620, 624*

[7] General or Special Guaranty

Special guaranty names definite person as obligee and is only enforceable by that person; general guaranty does not name specific obligee and passes with transfer of note. *Niederer v. Ferreira (1987) 189 Cal. App. 3d 1485, 1501, 234 Cal. Rptr. 779*

[8] Interpretation of Suretyship Contracts

[a] Rules of Contract Apply

Loan guarantee is not contract of adhesion if there was no evidence of unequal bargaining power and borrower/guarantor was not in distress at time terms were negotiated and had opportunity to "shop around" for different arrangement. *Stevenson v. Oceanic Bank (1990) 223 Cal. App. 3d 306, 318-319, 272 Cal. Rptr. 757*

Guaranty agreement including waiver of limitation period to extent permitted by law as not ambiguous so as to require construction against drafter if only ambiguity was in statute describing permissible extent of waiver. *California First Bank v. Braden (1989) 216 Cal. App. 3d 672, 675-676, 264 Cal. Rptr. 820*

All applicable laws in existence when agreement is made are part of agreement as fully as if incorporated in it; thus, statute describing permissible extent of waiver of limitation period [*Code Civ. Proc. § 360.5*] is not to be excluded as inadmissible extrinsic evidence in interpreting guaranty agreement. *California First Bank v. Braden (1989) 216 Cal. App. 3d 672, 675-676, 264 Cal. Rptr. 820*

Guaranty properly interpreted as legal obligation to pay all sums due on promissory note and not as mere guarantee as to creditworthiness of maker, if language clear and unambiguous. *Niederer v. Ferreira (1987) 189 Cal. App. 3d 1485, 1499, 234 Cal. Rptr. 779*

Suretyship contracts are governed by rules applicable to contracts. *Top Cat Productions, Inc. v. Michael's Los Feliz (2002) 102 Cal. App. 4th 474, 477, 125 Cal. Rptr. 2d 553* ; *Superior Wholesale Elec. Co. v. Cameron (1968) 264 Cal. App. 2d 488, 492, 70 Cal. Rptr. 636* ; *White v. Indemnity Ins. Co. (1966) 246 Cal. App. 2d 160, 162, 54 Cal. Rptr. 630*

If intent of parties cannot be determined from instrument, rule of construction allows resort to surrounding circumstances. *Superior Wholesale Elec. Co. v. Cameron (1968) 264 Cal. App. 2d 488, 492, 70 Cal. Rptr. 636*

Any uncertainty or ambiguity in contract prepared by guarantor is interpreted and construed in other party's favor. *Superior Wholesale Elec. Co. v. Cameron (1968) 264 Cal. App. 2d 488, 493, 70 Cal. Rptr. 636*

Suretyship contract is read to give effect to mutual intent of parties, to every part of contract, and to favor operation and effectivenes. *White v. Indemnity Ins. Co. (1966) 246 Cal. App. 2d 160, 162, 54 Cal. Rptr. 630*

[b] Integration of Documents

Loan agreement and guarantee were separate; term from loan agreement requiring purchase orders or letters of credit to support advances under line of credit was not to be incorporated into guarantee agreement when it would have been inconsistent with specific term of guarantee agreement that allowed lender to change terms of indebtedness without notice or demand to guarantor. *Stevenson v. Oceanic Bank (1990) 223 Cal. App. 3d 306, 317-318, 272 Cal. Rptr. 757*

Bond given for faithful performance of contract, to which it refers, binds surety for labor and materials as if surety was party to original contract, and provisions of original contract become provisions of bond. *Culbertson v. Cizek (1964) 225 Cal. App. 2d 451, 467, 37 Cal. Rptr. 548*

Physical attachment of original contract as not required at time surety signs surety agreement when surety agreement expressly refers to contract and surety has knowledge of contents of original contract. *Davenport v. Stratton (1944) 24 Cal. 2d 232, 243, 149 P.2d 4*

When guaranty for lease is made while extension agreement on lease is in effect, all three instruments must be considered as one for purpose of interpretation. *Davenport v. Stratton (1944) 24 Cal. 2d 232, 244, 149 P.2d 4*

[9] Liability of Surety

Principal's default referred to in *Civ. Code §§ 2807* and *2787* (surety's liability without demand or notice; surety, guarantor defined) is principal's default on underlying obligation, not at trial because of legal disability having nothing to do with underlying obligation. *Kalfountzos v. Hartford Fire Ins. Co. (1995) 37 Cal. App. 4th 1655, 1659-1660* (fact that contractor's corporate status had been suspended, causing contractor to default on subcontractor action against it, did not preclude contractor's surety from raising contractor's defenses and set-offs)

Under *Civ. Code § 2807*, liability of surety accrues immediately on default of principal. *ITT Diversified Credit Corp. v. Highlands Insurance Co. (1987) 191 Cal. App. 3d 301, 307, 236 Cal. Rptr. 433*

Subcontractor's negotiated release of general contractor from claim for payment under bonded obligation and acceptance of unbonded obligation under settlement agreement, without surety's consent, fully extinguished general's bonded obligation to subcontractor, constituting impairment of subcontractor's rights and remedies against surety; under *Civ. Code § 2819*, this had legal consequence of exonerating surety on bonded obligation. *R.P. Richards, Inc. v. Chartered Construction Corporation (2000) 83 Cal. App. 4th 146, 154-155, 99 Cal. Rptr. 2d 425*

Civ. Code § 2819 (exonerating surety when creditor, without surety's consent, alters original obligation of principal or impairs remedies or rights of creditor against principal) was not applicable to discharge liability of surety on ground that stipulated judgment extended time for debtor to make certain payments, because extension applied only to payment of amounts other than those guaranteed by surety's redelivery bond under *Code Civ. Proc. § 515.020*. *ITT Diversified Credit Corp. v. Highlands Insurance Co. (1987) 191 Cal. App. 3d 301, 304-310, 236 Cal. Rptr. 433*

Suretyship is among classes of businesses intended by legislature to be regulated under Insurance Code; obligee under surety bond was able to bring action against its surety for engaging in unfair claims settlement practices in violation of *Ins. Code § 790.03(h)*. *General Ins. Co. v. Mammoth Vista Owners' Assn. (1985) 174 Cal. App. 3d 810, 824-827, 220 Cal. Rptr. 291* ; *but see* *Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58* (prospectively abrogating private third-party standing under *Ins. Code § 790.03*)

Express terms of suretyship contract limits the liability of surety. *U. S. Leasing Corp. v. DuPont (1968) 69 Cal. 2d 275, 289, 70 Cal. Rptr. 393, 444 P.2d 65* ; *Bloom v. Bender (1957) 48 Cal. 2d 793, 803, 313 P.2d 568*

Guaranty of performance of lease does not include guaranty of performance of related lease agreeement even when guaranty required by lease. *U. S. Leasing Corp. v. DuPont (1968) 69 Cal. 2d 275, 287, 70 Cal. Rptr. 393, 444 P.2d 65*

Suretyship contract limits surety's obligations which cannot be changed after execution unless allowed by contract. *U. S. Leasing Corp. v. DuPont (1968) 69 Cal. 2d 275, 289, 70 Cal. Rptr. 393, 444 P.2d 65*

Actual payment of obligation by principal, distinguished from release by creditor with consent of surety or discharge by operation of law, exonerates surety. *Durgin v. Kaplan (1968) 68 Cal. 2d 81, 89, 65 Cal. Rptr. 158, 436 P.2d 70*

Surety remains liable even though statute of limitations had run on principal debt. *Bloom v. Bender (1957) 48 Cal. 2d 793, 798, 313 P.2d 568*

Bar of remedy against principal debtor does not prevent creditor's right of recovery against guarantor. *Gottschalk v. Draper Companies (1972) 23 Cal. App. 3d 828, 831, 100 Cal. Rptr. 434*

Recovery barred by *Code Civ. Proc. § 580b* does not bar action against surety. *Gottschalk v. Draper Companies (1972) 23 Cal. App. 3d 828, 831, 100 Cal. Rptr. 434*

Surety of second guaranty on purchase agreement who knew that was guaranteeing balance due on original note was prohibited from later changing nature of guaranty. *Elster's Sales v. Longo (1970) 4 Cal. App. 3d 216, 222, 84 Cal. Rptr. 83*

Surety remains fully liable when obligation of principal discharged in bankruptcy. *Superior Wholesale Elec. Co. v. Cameron (1968) 264 Cal. App. 2d 488, 494, 70 Cal. Rptr. 636*

Surety is not liable on any contract not within terms of surety agreement. *Ralston-Purina Co. v. Carter (1962) 210 Cal. App. 2d 372, 378, 26 Cal. Rptr. 690*

Liability of surety accrues at same time as principal. *Brock v. Western Nat. Indem. Co. (1955) 132 Cal. App. 2d 10, 16, 281 P.2d 571*

Surety's inability to designate how payment of judgment shall be applied allows partial payment of judgment to be applied to part of judgment for which surety is not liable when payment is not specifically designated for any part of judgment. *Giordano v. American Fidel. & Cas. Co. (1950) 97 Cal. App. 2d 309, 313, 217 P.2d 444*

Prepayment of sums by principal to surety does not invoke application of *Civ. Code § 2824* when principal was released from further liability and obligation to pay never arose. *Maurice Merc. Co. v. American Emp. Ins. Co. (1934) 140 Cal. App. 354, 359, 35 P.2d 1047*

Offer of performance by surety does not exonerate surety when time for performance fixed by contract, and offer not within specified time. *Garvey School Dist. v. Paul (1920) 50 Cal. App. 75, 81, 194 P. 711*

[10] Liability of Person Signing Guarantee--Under Principle of Descriptio Personae

Court required to interpret document consistent with expressed intent of parties under objective standard; addition of "Pres." after defendant's signature did not change legal effect of document as defendant's personal guaranty; to interpret document as a guaranty by corporate general partner was objectively unreasonable because corporation was already liable without guaranty and that interpretation would render guaranty a nullity. *Home Federal Savings & Loan Assn. v. Ramos (1991) 229 Cal. App. 3d 1609, 1613-1614, 284 Cal. Rptr. 1*

Under principle of descriptio personae, which is well recognized in California law, corporate officer who signed guaranty of sublease, which referred to him by name as "guarantor" and specified that he jointly, severally, unconditionally, and irrevocably guaranteed corporation's rental obligations, was individually liable under guaranty for corporation's unpaid rent; words "vice president," added to defendant's signature in guaranty of sublease agreement, were merely descriptive and, as a matter of law under principle of descriptio personae (term descriptive of person rather than relationship in which agreement is signed), did not alter his personal obligation under guaranty agreement. *Sebastian International, Inc. v. Peck (1987) 195 Cal. App. 3d 803, 808, 240 Cal. Rptr. 911*

[11] Notice Requirements

Notice to surety of principal's default is not expressly or impliedly required under *Civ. Code § 2807* as condition precedent to recovery on guaranty. *Baralat Development Co. v. Lichter (1987) 191 Cal. App. 3d 933, 936, 236 Cal. Rptr. 701*

Surety guaranteeing payment of sales and use taxes is not required to receive notice of default from government; surety could have required principal, who received direct notice of default to so inform surety. *American Fidelity Fire Ins. Co. v. State Bd. of Equalization (1973) 34 Cal. App. 3d 51, 56, 109 Cal. Rptr. 545 , cert. denied, 415 U.S. 990 (1974)*

Unconditional guaranty is binding on guarantor without notice of acceptance. *Davenport v. Stratton (1944) 24 Cal. 2d 232, 243, 149 P.2d 4*

Guarantor is not entitled to receive notice of principal's default, especially when contract specifies notice not required. *Davenport v. Stratton (1944) 24 Cal. 2d 232, 244, 149 P.2d 4*

[12] Prospective in Nature

When suretyship concerns matter usually contemplated as arising in future, it is interpreted prospectively, not retrospectively, unless subject of guaranty is past transaction and language of surety is broad enough to allow retrospective application. *People v. Great American Ins. Co. (1963) 222 Cal. App. 2d 552, 560, 35 Cal. Rptr. 267*

All guaranties are prospective in operation as general rule, although parties may provide otherwise. *Steiner Lumber Co. v. Sapp (1963) 216 Cal. App. 2d 800, 803, 31 Cal. Rptr. 276*

Guaranties are prospective and not retrospective in operation, unless parties expressly or impliedly indicate otherwise. *Bank of America Nat'l Trust & Sav. Asso. v. Kelsey (1935) 6 Cal. App. 2d 346, 44 P.2d 617*

[13] Remedies of Surety Against Cosureties

Obligation of cosurety is unaffected by surety entitled to contribution having foregone or postponed payment by another cosurety. *Overholser v. Glynn (1968) 267 Cal. App. 2d 800, 809, 73 Cal. Rptr. 628*

Payment by first of two successive sureties subrogates that surety to creditor's rights on bond and enabling him or her to enforce it against second surety. *Continental Casualty Co. v. Hartford Acci. & Indem. Co. (1966) 243 Cal. App. 2d 565, 571, 52 Cal. Rptr. 533*

Sureties last in time on successive sets of sureties on different bonds given in judicial proceedings are primarily liable. *Hickey v. Santos (1960) 179 Cal. App. 2d 418, 419, 3 Cal. Rptr. 840*

Successive sureties are liable in inverse order of their undertaking. *Hickey v. Santos (1960) 179 Cal. App. 2d 418, 419, 3 Cal. Rptr. 840*

Surety on appeal bond who paid judgment does not have right to contribution from surety on release of attachment bond when original surety has no knowledge and did not participate in proceedings after trial court's judgment. *Hickey v. Santos (1960) 179 Cal. App. 2d 418, 419, 3 Cal. Rptr. 840*

[14] Remedies of Surety Against Creditor

Protection afforded debtor under antideficiency laws or estoppel is not available to surety who waived enforcement protections in cases where creditor proceeds against surety first on action compelling payment on surety debt and later elects to sell secured property through nonjudicial foreclosure. *Krueger v. Bank of America (1983) 145 Cal. App. 3d 204, 213, 193 Cal. Rptr. 322*

Guarantor is able by express contract to either waive or be estopped to raise the "no deficiency judgment" provisions of *Code Civ. Proc. § 580d*. *Aruba Bonaire Curacao Trust Co. v. United California Bank (1973) 32 Cal. App. 3d 281, 285, 107 Cal. Rptr. 924* ; *Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 48, 71 Cal. Rptr. 64*

Surety is permitted to waive rights under *Civ. Code §§ 2845* and *2849* in suretyship contract. *Brunswick Corp. v. Hays (1971) 16 Cal. App. 3d 134, 138, 93 Cal. Rptr. 635* ; *Wiener v. Van Winkle (1969) 273 Cal. App. 2d 774, 787, 78 Cal. Rptr. 761* ; *American Guaranty Corp. v. Stoody (1964) 230 Cal. App. 2d 390, 395, 41 Cal. Rptr. 69*

Surety's waiver of his or her rights under *Civ. Code §§ 2809* and *2845* forecloses him or her from asserting them against creditor after creditor had chosen course of action not in surety's best interests. *Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 44, 71 Cal. Rptr. 64*

Creditor is obligated not to release to prejudice of indemnitor, any property which comes under its control and which can be used to satisfy liability of surety. *Massachusetts Bonding Etc. Co. v. Osborne (1965) 233 Cal. App. 2d 648, 663, 43 Cal. Rptr. 761*

Creditor is required to resort to security when claim is secured by trust deed. *Hartman v. Smith (1963) 219 Cal. App. 2d 415, 417, 33 Cal. Rptr. 147*

Subrogee acquires same right as creditor and will be required to resort to security if creditor is. *Hartman v. Smith (1963) 219 Cal. App. 2d 415, 417, 33 Cal. Rptr. 147*

[15] Remedies of Surety Against Principal

[a] Generally

Materialman named on joint check who endorsed it is unable to collect from surety when unpaid by general contractor since this would penalize principal by requiring a double payment. *Post Bros. Constr. Co. v. Yoder (1977) 20 Cal. 3d 1, 8, 141 Cal. Rptr. 28, 569 P.2d 133*

Rights of guarantor to compel payment by debtor are available only when relationship is that of guarantor-principal. *Goodman v. Severin (1969) 274 Cal. App. 2d 885, 894, 79 Cal. Rptr. 555*

Writ of attachment is available to surety against principal in suretyship relationship. *Karn v. Wills (1942) 50 Cal. App. 2d 604, 609, 123 P.2d 640*

[b] Reimbursement

Surety could seek reimbursement only from party that applied for bond, not all parties that benefitted from bond in underlying action. *Top Cat Productions, Inc. v. Michael's Los Feliz (2002) 102 Cal. App. 4th 474, 478, 125 Cal. Rptr. 2d 553*

Surety is unable to pay claim against principal and purchase it, because payment extinguishes it, leaving nothing to

purchase. *Berrington v. Williams (1966) 244 Cal. App. 2d 130, 135, 52 Cal. Rptr. 772*

Surety has ability to assign right to reimbursement to assignee who takes subject to defenses available to principal obligor. *Berrington v. Williams (1966) 244 Cal. App. 2d 130, 135, 52 Cal. Rptr. 772*

Deficiency judgment against surety is not prevented by *Civ. Code § 2847* and as not allowing reimbursement from principal. *Heckes v. Sapp (1964) 229 Cal. App. 2d 549, 555, 40 Cal. Rptr. 485*

Surety who deposited funds in blocked account from which there were no disbursements is not allowed to charge interest. *Burge v. Michael (1963) 213 Cal. App. 2d 780, 785, 29 Cal. Rptr. 290*

Surety has right to reimbursement only, no right to recover interest on surety deposit unless agreed otherwise. *Burge v. Michael (1963) 213 Cal. App. 2d 780, 785, 29 Cal. Rptr. 290*

[16] Subrogation

In action between insured and third-party tortfeasors, in which surety is party, settlement between insured and tortfeasor that derogates rights of surety is not permitted; determination of surety's rights against tortfeasors is required prior to settlement. *Conservatorship of Edwards (1988) 198 Cal. App. 3d 1176, 1183-1185, 244 Cal. Rptr. 330*

Person primarily liable on obligation is unable to plead absence of any negligence or wrongdoing to escape subrogation. *Meyer Koulish Co. v. Cannon (1963) 213 Cal. App. 2d 419, 425, 28 Cal. Rptr. 757*

Surety's discharge of claim against principal discharges any lien that secures that claim. *United States Fid. & Guar. Co. v. Oak Grove Union School Dist. (1962) 205 Cal. App. 2d 226, 231, 22 Cal. Rptr. 907*

Owner's premature payment to contractor in disregard of stop notice relieves surety from protecting owner pro tanto and entitling surety to receive from owner amount which owner has contributed to contractor's default, which amount surety would not have been required to pay had owner complied with stop notice. *United States Fidelity & Guaranty Co. v. Oak Grove Union School Dist. (1962) 205 Cal. App. 2d 226, 232-233, 22 Cal. Rptr. 907*

Absent owner's fraud in bringing about issuance of bond, surety who has paid claims of valid lien claimants is subrogated to rights of former lien claimants as against principal but not as against property. *Filippi v. McMartin (1961) 188 Cal. App. 2d 135, 139, 10 Cal. Rptr. 180*

Surety on fidelity bond does not have right of subrogation unless equities in favor of surety are superior to those of third party who participated in wrongful act against principal. *Liberty Mut. Ins. Co. v. Kleinman (1957) 149 Cal. App. 2d 404, 406, 308 P.2d 347*

[17] Surety's Liability for Fees, Costs, and Interest

Interest on principal amount is proper when principal amount due was definite and fixed and consisted merely of charges for items in excess of amount earned by subcontractor. *Glens Falls Indem. Co. v. Basich Bros. Const. Co. (9th Cir. 1948) 165 F.2d 649, 652 , cert. denied, 334 U.S. 833*

Guarantors of promissory note providing for attorneys' fees secured by deed of trust are liable for attorneys' fees during trial and appeal. *Heckes v. Sapp (1964) 229 Cal. App. 2d 549, 555, 40 Cal. Rptr. 485*

Words "promissory notes" contained in guaranty agreement do not imply an obligation to pay attorney's fees.

Ralston-Purina Co. v. Carter (1962) 210 Cal. App. 2d 372, 380, 26 Cal. Rptr. 690

Guarantor of rental payments is required to pay attorney's fees when lease provided for attorney's fees and guaranty contract stated that guarantor would pay any rent due and perform any covenants in event principal failed to do so. *Grace v. Croninger (1922) 56 Cal. App. 659, 667-668, 206 P. 130*

[18] Termination of Liability

[a] In General

Creditor's acceptance of release from principal, in mistaken belief that only surety was liable, terminated surety's liability. *Schmitt v. Insurance Co. of North America (1991) 230 Cal. App. 3d 245, 259, 281 Cal. Rptr. 261* ; see *Civ. Code § 2810*

Civ. Code § 2822 (reduction of surety's obligation by creditor's acceptance of anything in partial satisfaction of principal's obligation) requires creditor to clearly exercise cash-in-lieu of securities option at time of confirmation of bankruptcy plan or else be charged with acceptance of stock received; forced option as necessary to protect surety from being insurer of creditor's speculative holding of stock. *Durgin v. Kaplan (1968) 68 Cal. 2d 81, 83, 65 Cal. Rptr. 158, 436 P.2d 70*

Creditor's knowledge of guarantor's death revokes continuing guaranty with respect to future advances. *American City Bank v. Tourtelot (1978) 86 Cal. App. 3d 585, 590, 150 Cal. Rptr. 361*

[b] Alteration of Obligation

Changes in performance required because of poor workmanship do not alter surety contract for performance. *City of Sacramento v. Trans Pacific Industries, Inc. (1979) 98 Cal. App. 3d 389, 400, 159 Cal. Rptr. 514*

Stipulated agreement between creditor and principal after default on promissory note is not alteration of original note, but creation of new and independent agreement. *Impac Imported Parts & Accessories Corp. v. Rattray (1979) 95 Cal. App. 3d 792, 797, 157 Cal. Rptr. 226*

Stipulated judgment reducing amount of debt, thereby changing surety's exposure, is not alteration because surety's obligation remained unchanged. *V.I.P. Agency of No. Cal., Inc. v. Duffy Electronics, Inc. (1979) 92 Cal. App. 3d 849, 852, 155 Cal. Rptr. 45*

Stipulated judgment transforming immediate obligation to pay into schedule of deferred payments is alteration of obligation of principal and of rights and remedies of creditor. *V.I.P. Agency of No. Cal., Inc. v. Duffy Electronics, Inc. (1979) 92 Cal. App. 3d 849, 853, 155 Cal. Rptr. 45*

No difference between extension of time of payment and renewal as concerning rights of guarantor in continuing guaranty. *American City Bank v. Tourtelot (1978) 86 Cal. App. 3d 585, 591, 150 Cal. Rptr. 361* ; *Rodabaugh v. Kauffman (1921) 53 Cal. App. 676, 682, 200 P. 747*

In surety contract which had clause allowing changes without notice to surety and clause not allowing additional indebtedness after notice of revocation, revocation by surety controls clause. *Southern Cal. First Nat. Bank v. Olsen (1974) 41 Cal. App. 3d 234, 241, 116 Cal. Rptr. 4*

Extension of time is one of more technical defenses, but still valid. *Wise v. Clapper (1968) 257 Cal. App. 2d 770,*

774, 65 Cal. Rptr. 231

Extension of time for payment is material alteration of guaranty contract. *Wise v. Clapper (1968) 257 Cal. App. 2d 770, 774, 65 Cal. Rptr. 231* ; *Mortgage Finance Corp. v. Howard (1962) 210 Cal. App. 2d 569, 572, 26 Cal. Rptr. 917*

Attempt by creditor to charge surety with items for which surety was not liable is not alteration. *Ralston-Purina Co. v. Carter (1962) 210 Cal. App. 2d 372, 378, 26 Cal. Rptr. 690*

Contract provisions allowing changes and substitutions determine that no alterations result. *American Trust Co. v. Jones (1933) 130 Cal. App. 651, 655, 20 P.2d 346*

[c] Exoneration

Nothing creditor did or failed to do in bankruptcy proceeding rose to level of prejudicing surety or exonerating surety on guarantee; creditor not required to waive claim if it would jeopardize enforcement of personal guarantee. *FM Conner v. Conner (1999) 76 Cal. App. 4th 646, 650-652, 90 Cal. Rptr. 2d 687*

Lessor's settlement and general release of partners of sublessee exonerated guarantors of lease and sublease because creditor, and thus guarantors, would no longer have any rights against sublessee. *Bennett v. Leatherby (1992) 3 Cal. App. 4th 449, 452-453, 4 Cal. Rptr. 2d 340* ; *see Civ. Code § 2819*

[19] Waiver of Civ. Code § 2809 Defense

Civ. Code § 2809 (obligation of a surety may be neither larger in amount nor in other respects more burdensome than that of principal) is not only waivable but could be waived on basis of very vague clause in guaranty agreement; nothing in rule prevents surety from agreeing that its liability will remain even though some future event eliminates principal's obligation. *Bloom v. Bender (1957) 48 Cal. 2d 793, 802-804, 313 P.2d 568* ; *River Bank America v. Diller (1995) 38 Cal. App. 4th 1400, 1414-1415, 45 Cal. Rptr. 2d 790*

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§ 538.104 Law Reviews

Note, " *Regents of the University of California v. Hartford Accident & Indemnity Co.:* Running of Statute of Limitations in Favor of a Principal Does Not Exonerate a Surety," *67 Cal. L. Rev. 563 (1979)*

Comment, "Exonerating the Surety: Implications of the California Antideficiency Scheme," *57 Cal. L. Rev. 218 (1969)*

Rintala, "California's Anti-Deficiency Legislation and Suretyship Law: The Transversion of Protective Statutory Schemes," *17 UCLA L. Rev. 245 (1969)*

Johns and Steffen, "The After-Acquired Surety: Commercial Paper," *59 Cal. L. Rev. 1459 (1971)*

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§ 538.105 Text References

Witkin, California Procedure, Vol. 3, *Actions,* § 504 et seq.; Vol. 8, *Enforcement of Judgment,* § 479 et seq.; Vol. 9, *Appeal,* § 269 et seq. (4th ed. 1997)

Witkin, Summary of California Law, vol. 1, *Contracts,* §§ 217, 372, 111; vol. 4, *Negotiable Instruments,* §§ 51, 68-72; vol. 4, *Security Transactions in Real Property,* §§ 194, 195, 202; vol. 13, *Equity,* §§ 183-185 (10th ed. 2005)

Restatement Security §§ 82-164

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[Reserved]

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§ 538.120 California Points and Authorities

For a memorandum of points and authorities relating to an objection to an undertaking given for attachment, see California Points and Authorities, Ch. 23, *Attachment* (Matthew Bender)

For a memorandum of points and authorities relating to the modification of a bond in a shareholder's derivative suit, see California Points and Authorities, Ch. 52, *Corporations* (Matthew Bender)

For memoranda of points and authorities relating to bonds as costs and to the relief of an indigent plaintiff from bond requirements, see California Points and Authorities, Ch. 60, *Costs* (Matthew Bender)

For a memorandum of points and authorities relating to the validity of a preliminary injunction granted without an undertaking, see California Points and Authorities, Ch. 116, *Injunctions* (Matthew Bender)

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§ 538.121 California Legal Forms

For discussion and forms relating to bonds and undertakings generally, see California Legal Forms, Ch. 79, *Suretyship, Guaranty and Indemnity* (Matthew Bender)

For legal forms of public works payment bonds and labor and material payment bonds, see California Legal Forms, Ch. 31, *Construction Contracts and Financing* (Matthew Bender)

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§ 538.122 California Real Estate

California Real Estate Law and Practice, Ch. 112, *Guaranty and Suretyship* ; Ch. 453, *Payment Bonds* (Matthew Bender)

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§ 538.123 State Statutes

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[2] Admitted Surety Insurer

Certification of admitted surety insurers. *Ins. Code §§ 12070-12073*

Admitted surety insurer as prohibited from being surety when liability thereon is more than 10 percent of its capital and surplus. *Ins. Code § 12090*

[3] Approval of Bonds

Judge's power to approve bonds and undertakings. *Code Civ. Proc. §§ 166(a)(5), 995.410*

Court commissioner's power to approve bonds and undertakings. *Code Civ. Proc. §§ 259(c), 995.410*

[4] Bond and Undertaking Law

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Manner of service. *Code Civ. Proc. § 995.030*

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Interchangeability of bonds and undertakings. *Code Civ. Proc. § 995.210*

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[b] Exemptions and Waivers

Bond not required of public entity or officer. *Code Civ. Proc. § 995.220*

Waiver of bond. *Code Civ. Proc. §§ 995.230, 995.240*

[c] Execution and Filing of Bond

Execution. *Code Civ. Proc. § 995.310*

Contents. *Code Civ. Proc. § 995.320*

Form of bond in action or proceeding. *Code Civ. Proc. § 995.330*

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Defect in bond. *Code Civ. Proc. § 995.380*

[d] Approval and Effect of Bond

Approval. *Code Civ. Proc. § 995.410*

Effective date. *Code Civ. Proc. § 995.420*

Term of bond. *Code Civ. Proc. §§ 995.430, 995.440*

[e] Qualifications of surety

Qualifications of surety. *Code Civ. Proc. § 995.510*

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[f] Admitted Surety Insurers

Admitted surety insurer in lieu of personal sureties. *Code Civ. Proc. § 995.610*

Joint and several liability. *Code Civ. Proc. § 995.620*

Approval of admitted surety insurer's bond. *Code Civ. Proc. § 995.630*

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Objection to sufficiency of admitted surety insurer. *Code Civ. Proc. § 995.650*

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Specific state agencies that may impose additional requirement on admitted surety insurer for compliance with federal law. *Code Civ. Proc. § 995.675*

[g] Deposit in Lieu of Bond

Deposit of money, certificates of deposit, investment certificates, savings accounts, and bearer bonds or notes in lieu of bonds. *Code Civ. Proc. § 995.710(a)*

Value of deposit. Code Civ. Proc. § 996.710(b)

Agreement for collection, sale, or other application of deposit. Code Civ. Proc. § 996.710(c)

Valuation of market value of bearer bonds or notes. *Code Civ. Proc. § 995.720*

Effect of deposit. *Code Civ. Proc. § 995.730*

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Enforcement against deposit. *Code Civ. Proc. § 995.760*

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[h] Bonds to State of California

Applicability of *Code Civ. Proc. §§ 995.810-995.850*. *Code Civ. Proc. § 995.810*

Bond by officer of the court as to State of *California. Code Civ. Proc. § 995.820*

Bond without specified beneficiary as to State of *California. Code Civ. Proc. § 995.830*

Court approval. *Code Civ. Proc. § 995.840(a)*

[i] Objections to Bonds

Party, for whose benefit bond is given, as permitted to object to bond. *Code Civ. Proc. § 995.840(b)*

Applicability of *Code Civ. Proc. §§ 995.910-995.960* as limited to bonds given in action or proceeding. *Code Civ. Proc. § 995.910*

Grounds for objection. *Code Civ. Proc. § 995.920*

Procedure. *Code Civ. Proc. § 995.930*

Objection to sufficiency of bond based on market value. *Code Civ. Proc. § 995.940*

Hearing. *Code Civ. Proc. § 995.950*

Determination of sufficiency. *Code Civ. Proc. § 995.960*

[j] Subsequent Insufficiency or Excessiveness of Bonds

Subsequent insufficiency of bond or undertaking in action or proceeding. *Code Civ. Proc. § 996.010*

Subsequent insufficiency of bond or undertaking other than in action or proceeding. *Code Civ. Proc. § 996.020*

Excessive bond or undertaking. *Code Civ. Proc. § 996.030*

[k] Release and Substitution of Surety

Application for release of surety. *Code Civ. Proc. § 996.110(a)*

Application for substitution of surety. *Code Civ. Proc. § 996.110(b)*

Service of application for release and substitution of surety. *Code Civ. Proc. § 996.110(c)*

Hearing on application for release and substitution of surety. *Code Civ. Proc. § 996.120*

Effect of substitition on substitute surety. *Code Civ. Proc. § 996.130(a)*

Order for release of original surety on substitution of sufficient surety. *Code Civ. Proc. § 996.130(b)*

Consequences of failure to give substitute surety. *Code Civ. Proc. § 996.140*

Liability of released surety. *Code Civ. Proc. § 996.150*

[l] New, Additional, or Supplemental Bonds

When given. *Code Civ. Proc. § 996.210*

Contents. *Code Civ. Proc. § 996.220*

All provisions applicable to original bond as applying. *Code Civ. Proc. § 996.230*

Effect of new bond. *Code Civ. Proc. § 996.240*

Effect of additional or supplemental bond. *Code Civ. Proc. § 996.250*

[5] Cancellation of Bond or Withdrawal of Sureties

Code Civ. Proc. §§ 996.310-996.360 as applicable to bond given other than in action or proceeding. *Code Civ. Proc. § 996.310*

Notice of cancellation or withdrawal. *Code Civ. Proc. § 996.320*

Effective date. *Code Civ. Proc. § 996.330*

Effect. *Code Civ. Proc. § 996.340*

New bond as not required when surety withdraws unless amount of bond or number of sureties reduced below minimum required by state providing for bond. *Code Civ. Proc. § 996.350*

Liability of surety on cancellation or withdrawal from bond. *Code Civ. Proc. § 996.360*

[6] Service

Service of summons. *Code Civ. Proc. §§ 413.10-417.40*

Service of notice of motion. *Code Civ. Proc. §§ 1010-1013a*

[7] Filing

Time for filing notice of motion; accompaning papers. *Code Civ. Proc. § 1005(b)*

[8] Papers

Declaration in lieu of affidavit. *Code Civ. Proc. § 2015.5*

Corporate officers certificate. *Corp. Code § 173*

[9] Definition

Credit union defined. *Fin. Code § 14002*

Legal Topics:

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§ 538.124 California Rules of Court

Prerequisites to acceptance of corporate sureties. *Cal. Rules of Ct., Rule 3.1130(a)*

Officers of court and attorneys as not allowed to be sureties. *Cal. Rules of Ct., Rule 3.1130(b)*

Withdrawal of bonds and undertakings. *Cal. Rules of Ct., Rule 3.1130(c)*

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§ 538.125 Local Court Rules

Exparte order increasing bond of personal representative in probate proceeding. Los Angeles Co. Super. Ct. Rules, Rule 10.57

Bonding on petition for authority to borrow money in probate proceeding. Los Angeles Co. Super. Ct. Rules, Rule 10.77

Bond on sale of real property in probate proceeding. Los Angeles Co. Super. Ct. Rules, Rule 10.92

Inventory and appraisment to show sufficiency of bond in probate proceeding. Los Angeles Co. Super. Ct. Rules, Rules 10.57, 10.105

Legal Topics:

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

Failure to object to sufficiency of surety within 10 days as constituting waiver of right to do so on appeal from trial court's order granting stay of enforcement of judgment on giving undertaking. *Chodos v. Insurance Co. of North America (1981) 126 Cal. App. 3d 81, 84-85, 178 Cal. Rptr. 829*

Undertaking as not expressly required for temporary restraining order, but called for by better practice. *Biasca v. Superior Court (1924) 194 Cal. 366, 368, 228 P. 861*

Undertakings and bonds as treated same by statute. *Canfield v. Bates (1859) 13 Cal. 606, 608*

For purposes of waiving bond for indigents, distinction as existing between inability to pay court fees and inability to obtain sureties on undertaking. *Fuller v. State of California (1969) 1 Cal. App. 3d 664, 666, 82 Cal. Rptr. 78*

Surety bond given pursuant to requirements of particular statute as incorporating statutory provisions which become part of it. *Frank Curran Lbr. Co. v. Eleven Co. (1969) 271 Cal. App. 2d 175, 182, 76 Cal. Rptr. 753*

Bond as binding obligation in writing to pay specified sum of money either on date certain or on happening of specified future event. *Karsh v. Fidelity Union Casualty Co. (1932) 119 Cal. App. 543, 546, 6 P.2d 980*

Attachment undertaking as constituting original, independent, and absolute contract on part of sureties. *Heine v. Wright (1926) 76 Cal. App. 338, 344, 244 P. 955*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 538.127 Law Reviews

Review of Selected 1982 California Legislation, "Civil Procedure; Statutory Bonds and Undertakings," *14 Pacific L.J. 466 (1983)*

Moss, "Bond Practices," 44 State B.J. 537 (1969) (discussing contractors' performance bonds)

Note, "Insurance--Fidelity Bonds--Interpretation--Extent of Coverage--Cumulative or Non-Cumulative," *20 So. Cal. L. Rev. 226 (1947)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 538.128 Text References

Witkin, California Procedure, Vol. 9, *Appeal*, § 237 et seq. (4th ed. 1997)

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[Reserved]

§§ 538.129[Reserved]

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§ 538.140 California Points and Authorities

For memoranda relating to actions against a surety, see California Points and Authorities, Ch. 222, *Suretyship*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 538.141 California Real Estate

California Real Estate Law and Practice, Ch. 112, *Guaranty and Suretyship* ; Ch. 453, *Payment Bonds*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 538.142 State Statutes

[1] Affidavits

Standards for affidavit under *Code Civ. Proc. §§ 995.010-996.560*. *Code Civ. Proc. § 995.040*

[2] Costs

Costs. *Code Civ. Proc. §§ 1021 et seq.*

[3] Enforcement of Judgment

[a] General

Enforcement of judgment of liability on bond. *Code Civ. Proc. § 996.495*

[b] Enforcement Lien in Proceeding Against Bond to State of California

Applicability of enforcement lien provisions (*Code Civ. Proc. §§ 996.510-996.560*). *Code Civ. Proc. § 996.510*

Affidavit filed in proceedings for benefit of state to enforce liability on bond to State of *California. Code Civ. Proc. § 996.520*

Certification. *Code Civ. Proc. § 996.530*

Recordation of certificate. *Code Civ. Proc. § 996.540*

Judgment of liability on bond to State of California as lien on real property belonging to defendant. *Code Civ. Proc. § 996.550*

Agreement to sell real property made before filing of certificate creating lien as enforceable by buyer on payment of purchase price to State Treasurer; payment as subject of lien. *Code Civ. Proc. § 996.560*

[4] Enforcement of Liability

Persons entitled to enforce liability on bond. *Code Civ. Proc. § 995.850*

Beneficiary as entitled to enforce liability against principal and sureties. *Code Civ. Proc. § 996.410*

Enforcement of liability on bond by civil action. *Code Civ. Proc. § 996.430*

Enforcement of liability on bond by noticed motion. *Code Civ. Proc. § 996.440*

Judgment of liability. *Code Civ. Proc. § 996.460*

Voluntary payment by surety after judgment against principal. *Code Civ. Proc. § 996.480*

Surety's payment of amount of bond as fully discharging all liability of surety; surety liable for contribution to cosureties. *Code Civ. Proc. § 996.490*

[5] Jurisdiction

Jurisdiction over surety. *Code Civ. Proc. § 996.420*

[6] Liability

Limitation on liability on contractor's bond. *Bus. & Prof. Code § 7071.11*

Stipulation in bond exceeding $10,000 limiting liability of surety. *Code Civ. Proc. § 995.520(d)*

Limitation on liability of surety. *Code Civ. Proc. § 996.470*

Bond and Undertaking Law as not intended to limit liability of surety pursuant to any other statute. Code Civ. Proc. § 995.475

[7] Notices

Requisites of notices, filing and service of papers. *Code Civ. Proc. §§ 1010-1020*

[8] Statutes of Limitation

Statute of limitation for contracts. *Code Civ. Proc. § 337*

Provisions in bond attempting to shorten applicable statute of limitation as invalid unless principal, beneficiary, and surety accept provision. *Code Civ. Proc. § 996.450*

Statute of limitation for action on bond of licensed casher or seller of checks as two years. *Fin. Code § 12212*

[9] Summary Judgment

Summary judgment. *Code Civ. Proc. § 437c*

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§ 538.143 Decisions

[1] Action or Proceeding

Any enforcement of right as constituting "action or proceeding" for purposes of *Code Civ. Proc. § 996.440*. *Mark Briggs & Associates, Inc. v. Kinestar, Inc. (1983) 143 Cal. App. 3d 483, 486, 192 Cal. Rptr. 21*

[2] Appeal Bonds

[a] Accrual of Right of Action

Right of action on undertaking on appeal to stay execution as accruing on affirmance of judgment to which action relates. *Charles F. Harper Co. v. DeWitt Mortg. & Realty Co. (1938) 10 Cal. 2d 467, 470, 75 P.2d 65* ; *Clark v. Smith (1885) 66 Cal. 645, 646, 4 P. 689*

Action for enforcement of liability on undertaking given to obtain stay as not available while supersedeas or order staying execution of judgment is in force. *Parnell v. Hancock (1874) 48 Cal. 452, 454*

Sureties on appeal bond as parties to original action but in different position than defendants, and plaintiff as not able to execute judgment against sureties without motion to enter judgment against them. *Charles F. Harper Co. v. DeWitt Mortg. & Realty Co. (1938) 10 Cal. 2d 467, 469, 75 P.2d 65* (bond given under former *Code Civ. Proc. § 942*; now see *Code Civ. Proc. §§ 917.1, 996.440*)

[b] Appeal from Order on Appeal Bond

Order denying motion to enter judgment against surety based on appeal bond as appealable order. *Merritt v. J.A. Stafford Co. (1968) 68 Cal. 2d 619, 623, 68 Cal. Rptr. 447, 440 P.2d 927*

Judgment against surety on appeal bond as not appealable by surety because judgment against surety is consent judgment. *Hood v. Verdugo Lumber Co. (1933) 219 Cal. 558, 560, 27 P.2d 897*

[c] Liability of Surety

Surety as liable on appeal bond even though bond is for inadequate amount to stay execution under former *Code Civ. Proc. § 942* (now see *Code Civ. Proc. § 917.1*) when judgment creditor does not seek execution prior to affirmance of judgment; parties as able to agree to stay in consideration of posting bond for less than statutory amount. *Merritt v. J.A. Stafford Co. (1968) 68 Cal. 2d 619, 625, 68 Cal. Rptr. 447, 440 P.2d 927*

Appeal bond posted under *Code Civ. Proc. § 917.1* does not automatically obligate surety to pay all postjudgment interest and costs awarded on appeal, together with amount of judgment, if total payout would exceed face amount of bond; respondent, however, is entitled to move under *Code Civ. Proc. § 996.010* to increase amount of bond if it fails to cover interest and costs accruing during long appeal. *Grant v. Superior Court (1990) 225 Cal. App. 3d 929, 935, 939, 275 Cal. Rptr. 564*

Former *Code Civ. Proc. § 942*, now *Code Civ. Proc. § 917.2*, providing for stay of money judgment pending appeal on giving of undertaking by corporate surety for one and one half times amount of judgment or order, as obligating surety to pay only that part of judgment covered by insurance policy and not more. *Merritt v. J. A. Stafford Co. (1970) 9 Cal. App. 3d 822, 825-826, 88 Cal. Rptr. 630*

[d] Statute of Limitations

Obligation of sureties on appeal bond as accruing from affirming of judgment to which it relates and as subject to limitation period of *Code Civ. Proc. § 337*, relating to actions on instruments in writing. *Charles F. Harper Co. v. DeWitt Mortg. & Realty Co. (1938) 10 Cal. 2d 467, 470, 75 P.2d 65*

[3] Attorney's Fees

Attachment and injunction bonds as permitting recovery of attorney fees and costs when defense of primary action is only effective way to secure relief against attachment or injunction. *Reachi v. National Auto. & Cas. Co.,(1951) 37 Cal. 2d 808, 812-813, 236 P.2d 151* ; *Byard v. Nat. Auto. & Cas. Ins. Co. (1963) 218 Cal. App. 2d 622, 624, 32 Cal. Rptr. 613* ; *Russell v. United Pacific Ins. Co. (1963) 214 Cal. App. 2d 78, 88-89, 29 Cal. Rptr. 346*

Surety on *Civ. Code § 3143* mechanic's lien release bonds that do not provide for the recovery of attorney's fees is not liable for attorney's fees, either as damages or costs, because attorney's fees are not recoverable in mechanic's lien foreclosure actions, and, by law, obligation of surety on section 3143 mechanic's lien release bond is same as that of principal/property owner; not deciding whether attorney's fees are recoverable against mechanic's lien release bond pursuant to *Code Civ. Proc. § 996.480*, which provides special rules when principal's liability was previously established by final judgment, time for appeal has expired and separate suit is thereafter brought against surety. *Royster Construction Co. v. Urban West Communities (1995) 40 Cal. App. 4th 1158, 1169 n.9, 1171, 47 Cal. Rptr. 2d 684*

Attorney's fees and court costs are damages within meaning of former Code Civ. Proc. § 1190.1(h) (now see *Civ. Code § 3083*), requiring bond for damages arising from attachment of funds by stop payment notice. *Systems Inv. Corp. v. National Auto. & Cas, Ins. Co. (1972) 25 Cal. App. 3d 1057, 1061, 102 Cal. Rptr. 378*

[4] Banker's Blanket Bond

Insurance company was not liable on Banker's Blanket Bond, insuring loss due to extension of credit by bank in good faith based on forged instrument, for loss suffered by bank because bank did not rely on credit of person whose signature was forged but on credit and guarantee of others involved in transaction, and forgery was not proximate cause of loss. *Continental Bank v. Phoenix Ins. Co. (1972) 24 Cal. App. 3d 909, 913, 101 Cal. Rptr. 392*

Surety liable on Banker's Blanket Bond when evidence shows beyond possible contradiction that bank extended credit in reliance on guaranty and forgery was proximate cause of bank's loss. *Jones v. Fireman's Fund Ins. Co. (1969) 270 Cal. App. 2d 779, 784, 76 Cal. Rptr. 97*

[5] Commencement of Cause of Action

Action to recover on bond given to obtain temporary restraining order commences when motion filed under former *Code Civ. Proc. § 535* (now see *Code Civ. Proc. § 996.440*) in lieu of common law independent lawsuit. *Allen v. Pitchess (1973) 36 Cal. App. 3d 321, 329, 111 Cal. Rptr. 658*

[6] Common Law Bonds

Undertaking to secure stay of execution of summary judgment is common law rather than statutory bond. *Moore v. Ohio Casualty Ins. Co. (1983) 140 Cal. App. 3d 988, 992-993, 189 Cal. Rptr. 829*

[7] Conditions Precedent to Suit

Appropriate judicial decree in equity case or by probate court establishing fact of breach by principal (guardian, executor, or administrator) and amount due is necessary before surety can be held liable on guardians', executors', or administrators' bond. *Richardson v. Royal Indemnity Co. (1943) 21 Cal. 2d 557, 560, 134 P.2d 1*

Surety on bonds to ensure payment of sales and use taxes required by State Board of Equalization is liable for penalties assessed against defaulting taxpayers even though surety was not given advance notice which would enable it to pay tax before penalty imposed. *American Fidelity Fire Ins. Co. v. State Bd. of Equalization (1973) 34 Cal. App. 3d 51, 55-56, 109 Cal. Rptr. 545*

Gov. Code § 4209, requiring written notice within 90 days as condition precedent to suit against surety on prime contractor's bond, is not applicable to state. *State of California ex rel. Dept. of Employment v. General Ins. Co. (1970) 13 Cal. App. 3d 853, 861, 96 Cal. Rptr. 744*

[8] Construction of Bonds

Doubts as to meaning of provisions in Banker's Blanket Bond are resolved against insurer. *Jones v. Fireman's Fund Ins. Co. (1969) 270 Cal. App. 2d 779, 784, 76 Cal. Rptr. 97*

[9] Fraudulent Promise by Surety

Plaintiff, beneficiary of undertaking given pursuant to former *Code Civ. Proc. § 540* (now see *Code Civ. Proc. § 489.310*) to release assets attached by Plaintiff, had no cause of action for fraud against surety, which failed to pay

subsequent judgment against defendants to whom assets were released. *Bezaire v. Fidelity & Deposit Co. (1970) 12 Cal. App. 3d 888, 892-893, 91 Cal. Rptr. 142*

[10] Notary Public's Bond

Surety on notary public's bond was liable for official misconduct and neglect of notary when notary certified to person being present who was in fact absent for purposes of perpetrating fraud on plaintiffs. *Lewis v. Agricultural Ins. Co. (1969) 2 Cal. App. 3d 285, 292, 82 Cal. Rptr. 509*

Surety bond of notary public is official bond (*Gov. Code § 8212*) on which liability of surety is no greater than that of notary (*Gov. Code § 8214*), and when primary obligation on official bond is barred or in any legal way was extinguished, surety is relieved. *Breckenridge v. Mason (1967) 256 Cal. App. 2d 121, 130, 64 Cal. Rptr. 201*

[11] Period Covered by Bond

Fidelity bond covering losses discovered during bond period does not cover losses resulting from employees' acts known to employer prior to effective date of bond even though employer failed to understand dishonest or fraudulent nature of acts or that acts came within policy provisions until after effective date of bond. *USLIFE Savings & Loan Assn. v. National Surety Corp. (1981) 115 Cal. App. 3d 336, 344-345, 171 Cal. Rptr. 393*

Surety on statutory sales tax bond guaranteeing payment to state of sales and use taxes is liable for interest, penalties, and costs based on sales ransactions resulting in unpaid taxes occurring prior to but assessed after cancellation of bond. *People v. Pacific Employers Ins. Co. (1973) 36 Cal. App. 3d 296, 300, 111 Cal. Rptr. 350*

[12] Preliminary Injunction Bond

When corporate surety issued preliminary injunction bond based on application and promise of indemnity issued by one of several plaintiffs, defendants prevailed and sought judgment on bond, and surety claimed right to indemnity against all plaintiffs, the only plaintiff liable to surety was the one who applied for bond; surety's indemnity rights are matter of contract. *Top Cat Productions v. Michael's Los Feliz (2002) 102 Cal. App. 4th 474, 476, 125 Cal. Rptr. 2d 553*

[13] Proration of Losses and Costs

When each of two bonds covering same risk purport to be excess insurance to other insurance, neither excess clause is given effect, but loss is prorated in proportion to coverage; and defense costs required under bonds to be paid by insurer are required to be shared between them pro rata in proportion to respective coverage. *Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc. (1978) 83 Cal. App. 3d 593, 608, 148 Cal. Rptr. 57* (involving brokers' blanket bonds)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiability

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47-538 California Forms of Pleading and Practice--Annotated § 538.144

§ 538.144 Statute of Limitations

Claimant under subcontractor's bond to which he or she is not a party as bound by one-year period of limitation contained in bond which by its terms extended to "any claimant." *Sanders v. American Casualty Co. (1969) 269 Cal. App. 2d 306, 308-309, 74 Cal. Rptr. 634*

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§ 538.145 Law Reviews

Review of Selected 1982 California Legislation, "Civil Procedure; Statutory Bonds and Undertakings," *14 Pacific L.J. 466 (1983)*

Moss, "Bond Practices," 44 State B.J. 537 (1969) (discussing contractors' performance bonds)

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§ 538.146 Text References

Witkin, California Procedure, Vol. 9, *Appeal*, § 237 et seq. (4th ed. 1997)

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[Reserved]

§§ 538.147[Reserved]

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47-538 California Forms of Pleading and Practice--Annotated § 538.160

§ 538.160 Notice by Surety to Creditors of Revocation of Continuing Guaranty [Civ. Code § 2815]

[1] FORM Notice by Surety to Creditors of Revocation of Continuing Guaranty [Civ. Code § 2815]

TO: _____, [*specify name and address*]

Please take notice that I, the undersigned, hereby revoke the written agreement of continuing guaranty of the credit of _____ [*name of principal*]. The guaranty was made pursuant to the agreement signed by me on _____ [*date*]. This revocation shall be effective _____ [immediately *or* on _____ (*date*)].
Dated: _____.

_____ [*signature*]

[2] Use of Form

This notice is for use by a surety on a continuing guaranty to give notice to creditors of the principal that the surety is revoking the guaranty and will no longer guarantee the principal's credit [*see Civ. Code § 2815*]. Unless the suretyship agreement says that notice of revocation must be in writing, no specific form is required, but it is advisable to provide written notice prior to the date revocation becomes effective.

See the discussion in *§ 538.13[5][c]*.

The fact that a guaranty agreement is secured by a pledge of personal property does not mean that application of *Civ. Code § 2815* is precluded by Division 8 of the Commercial Code [*Com. Code § 8101 et seq.*], relating to investment securities, or by Division 9 [*Com. Code § 9101 et seq.*]. The pledge of stock or personal property is subject to Division 8 or 9, but the Commercial Code is not the exclusive source of applicable statutory provisions. Under *Com. Code § 1103(b), Civ. Code § 2815* is not displaced but is a "supplemental body of law" that continues to apply [*Pearl v. General Motors Acceptance Corp. (1993) 13 Cal. App. 4th 1023, 1033, 16 Cal. Rptr. 2d 805]* .

[3] State Statutes

Revocation of continuing guaranty. *Civ. Code § 2815*

[4] Decisions

Former *Com. Code § 9201* (*now see Com. Code § 9201*), setting forth rules for effectiveness of security agreement, did not preclude exercise of guarantor's rights under *Civ. Code § 2815* with respect to continuing guaranty that was secured by pledge of stock. *Pearl v. General Motors Acceptance Corp. (1993) 13 Cal. App. 4th 1023, 1033, 16 Cal. Rptr. 2d 805*

Former *Com. Code § 9204(3)* (*now see Com. Code § 9204(c)*) did not preclude revocation of pledge agreement (and continuing guaranty that it secured) under *Civ. Code § 2815* with respect to future advances, but merely enabled provision that authorized future advances under security agreement. *Pearl v. General Motors Acceptance Corp. (1993) 13 Cal. App. 4th 1023, 1033, 16 Cal. Rptr. 2d 805*

Guaranty contract clause that provides that revocation is not effective until creditor receives written notice is not binding when purpose of guaranty no longer exists and circumstances so indicate. *Bank of America v. Waters (1962) 209 Cal. App. 2d 635, 637-638, 26 Cal. Rptr. 9*

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§ 538.161 Notice by Surety to Creditor to Proceed Against Principal [Civ. Code § 2845]

[1] FORM Notice by Surety to Creditor to Proceed Against Principal [Civ. Code § 2845]

TO: _____ [*name*], creditor of _____, [*name of principal*].

Please take notice that the undersigned is unwilling to continue as surety on the obligation of _____ [*name*] as principal. The terms of the guaranty are as follows: [*set out description of obligation*].

You are hereby requested and required to proceed against the principal for the satisfaction of this obligation on which the undersigned is surety, and you are advised that your failure to do so may relieve the undersigned of any obligation as surety.
Dated: _____.

_____ [*signature*]

[2] Use of Form

This notice is for use by the surety to require the creditor to proceed against the principal before looking to the surety for satisfaction of the obligation [*see Civ. Code § 2845*]. This demand is no mere formality, for implicit in the demand is recognition by the surety of its obligation, and, in effect, its admission of liability to the creditor. If the surety elects not to make this demand, that election is binding and the surety may not make the demand at the time of trial [*Sukut-Coulson, Inc. v. Allied Canon Co. (1978) 85 Cal. App. 3d 648, 655, 149 Cal. Rptr. 711]* . The surety's demand under *Civ. Code § 2845* is subject to *Code Civ. Proc. § 996.440*, which allows the creditor to enforce the surety's liability on the bond on a motion to the court without the necessity of an independent action [*see Civ. Code § 2845*].

[3] State Statutes

Surety may require creditor to proceed against principal. *Civ. Code § 2845*

[4] Decisions

Creditor is required to proceed against principal before proceeding against surety, if surety has so demanded. *Moffett v. Miller (1953) 119 Cal. App. 2d 712, 713-714, 260 P.2d 215*

Clause of contract waived benefits of *Civ. Code § 2845*. *Brunswick Corp. v. Hays (1971) 16 Cal. App. 3d 134, 138-139, 93 Cal. Rptr. 635*

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47-538 California Forms of Pleading and Practice--Annotated § 538.162

§ 538.162 Complaint by Surety Against Principal to Compel Performance [Civ. Code § 2846; Code Civ. Proc. § 1050]

[1] FORM Complaint by Surety Against Principal to Compel Performance [Civ. Code § 2846; Code Civ. Proc. § 1050]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT OF SURETY TO COMPEL PER-
[and DOES I through _____,]	)	FORMANCE
Defendant[s].	)	
	)	
	)	

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was _____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a resident of _____ County, California *or* a corporation duly organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), California].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained.]

[3. (Plaintiff is informed and believes and thereon alleges that) (A)t all times herein mentioned, each of the defendants was the agent of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of that agency and with the permission and consent of his/her codefendants.]

4. On or about _____ [*date*], at _____ [*city and state*], defendant and _____ [*name of creditor*] entered into a written agreement, a copy of which is attached as Exhibit A and incorporated by reference.

5. On or about _____ [*date*], plaintiff and defendant entered into a written suretyship agreement[, a copy of which is attached as Exhibit B and incorporated by reference].

6. By the terms of the contract between defendant and _____ [*name of creditor*], defendant promised to _____ [*set forth what defendant promised to do or the terms of payment if it was a promisssory note, e.g.,* pay to _____ (*name of creditor*) $5000 at _____ per cent interest on or before _____ (*date*)].

7. By the terms of the suretyship agreement plaintiff undertook to satisfy defendant's obligation on the contract with _____ [*name of creditor*] in the event of defendant's default thereon.

[8. _____ (*Allege satisfaction of any conditions to defendant's liability to the creditor, e.g.,* (*name of creditor*) delivered merchandise to defendant on or before _____ [*date*], as required by the contract between them).]

9. Defendant has defaulted on his/her contractual obligations with _____ [*name of creditor*], in that _____ [*set out facts showing default, e.g.,* payment of defendant's note is past due and a balance of $5700 remains unpaid, $5500 of which is principal and $200 is interest].

[10. _____ (*Allege satisfaction of any conditions precedent to plaintiff's liability, if suretyship agreement was conditional, e.g.,* On or about _____ (*date*), _____ (*name of creditor*) gave plaintiff notice of principal's failure to pay the $5700 within 5 days after it became due on _____ (*date*), as required by the suretyship agreement).]

11. As a result of defendant's failure to perform, and unless defendant is compelled to perform his/her contractual obligations, plaintiff _____ [may *or* will] be compelled to pay _____ [*name of creditor*] $_____, for the sum owed to _____ [*name of creditor*] by defendant [*allege any additional liabilities, e.g.,* plus the creditor's attorney's fees as provided for in the underlying obligation].

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For an order compelling defendant to perform the obligations of the contract with _____ [*name of creditor*], the performance of which plaintiff guaranteed;

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

This complaint is for use by the surety to compel the principal to perform on the original contract, the performance of which is guaranteed by the surety. An action may be brought by one person against two or more persons for the purpose of compelling one to satisfy a debt due to the other for which plaintiff is bound as surety [*see Civ. Code § 2846*; *Code Civ. Proc. § 1050*]. The surety can maintain the action to compel performance after the obligation has become due, before the surety has paid, and whether or not the creditor has sued the surety [*see also Karn v. Wills (1942) 50 Cal. App. 2d 604, 606-609, 123 P.2d 640* (action under *Civ. Code § 2846*; guarantor who has contract with principal can obtain writ of attachment in action against principal to compel performance of its obligation to creditor)]. For situations in which prejudgment relief ancillary to an injunction or imposition of constructive trust may be available to sequester funds of an obligor that may be necessary to perform the bonded obligation, see discussion in *§ 538.21[2]*.

With appropriate modifications, the form may be used by the surety as a cross complaint against the principal when the surety has been sued on the obligation by the creditor [*see Eastin v. Roberts, Carpenter & Co. (1937) 19 Cal. App. 2d 567, 571, 66 P.2d 224]* .

[3] Creditor May Be Codefendant

The surety may name the creditor as a codefendant in the action against the principal if the creditor can enforce the principal's performance and neglects or refuses to do so [*Eastin v. Roberts, Carpenter & Co. (1937) 19 Cal. App. 2d 567, 571, 66 P.2d 224]* .

[4] Allegations

The complaint alleges:

- Defendant's residence or place of business for purposes of venue (Paragraph 1) [*see Code Civ. Proc. § 395(a)*].
- The execution of a suretyship agreement (Paragraph 5) [*see Civ. Code § 2793*].
- An original obligation on the part of the principal (Paragraph 4).
- The terms of the suretyship agreement and the obligation for which the surety became liable (Paragraphs 6, 7).

- The damages that will occur if relief is not granted (Paragraph 11) [*see Code Civ. Proc. § 425.10*].

- The principal's default (Paragraph 9) [*see Civ. Code § 2846*].

The form also includes paragraphs for optional use to allege:

- Fictitious names of defendants (Paragraph 2) [*see Code Civ. Proc. § 474* and Ch. 20, *Allegations Commonly Used*];

- The agency relationship of defendants (Paragraph 3) [*see* Ch. 427, *Principal and Agent*]; and

- The existence and satisfaction of any conditions precedent to the principal's liability (Paragraph 8) and, if the suretyship agreement was conditional, to the surety's liability (Paragraph 10) [*see Civ. Code §§ 2807, 2808, 2846*].

[5] Verification

Although verification of this complaint is not required [*see* Code Civ. Proc. § 1128.7(a)], Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[6] Jurisdiction

The superior court has jurisdiction of the action [*see Cal. Const. art. VI, § 10*]. The governing statutes do not expressly specify whether or not an action by a surety under *Civ. Code § 2846* to compel a principal to perform an obligation can be a limited civil case [*see Code Civ. Proc. §§ 85, 86, 88*]. Such an action is equitable in nature [*see Josephian v. Lion (1924) 66 Cal. App. 650, 657, 227 P. 204]* , however, and since relief under *Civ. Code § 2846* is not included in the list of cases in equity that are limited civil cases [*see Code Civ. Proc. §§ 85, 86(b)*], such an action will be an unlimited civil case unless it comes within one of the categories of cases in equity that are specifically designated as limited civil cases. These categories are the following [*Code Civ. Proc. § 86(b)*]:

- Cases to try title to personal property when the amount involved is not more than $25,000.

- Cases when equity is pleaded as a defensive matter in any case that is otherwise a limited civil case.

- Cases to vacate a judgment or order of the court obtained in a limited civil case through extrinsic fraud, mistake, inadvertence, or excusable neglect.

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[7] State Statutes

Surety's right to compel principal to perform obligations. *Civ. Code § 2846*

Action by surety to compel principal to pay. *Code Civ. Proc. § 1050*

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47-538 California Forms of Pleading and Practice--Annotated § 538.163

§ 538.163 Complaint by Surety Against Principal for Reimbursement [Civ. Code § 2847]--General Form With Common Count

[1] FORM Complaint by Surety Against Principal for Reimbursement [Civ. Code § 2847]--General Form With Common Count

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT BY SURETY AGAINST PRINCIP-
_____ [*name*], [and DOES I	)	AL FOR REIMBURSEMENT
through _____,]	)	[Amount demanded _____
Defendant[s].	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST COUNT
(Reimbursement)

1. [*Capacity and residence of defendant. See § 538.162, Paragraph 1.*]

[2. *Fictitious name allegation. See § 538.162, Paragraph 2.*]

[3. *Agency allegation. See § 538.162, Paragraph 3.*]

[*EITHER*]

4. On or about _____ [*date*], at _____ [*city and state*], _____ [*name of defendant*] and _____ [*name of creditor*] entered into a written agreement[, a copy of which is attached hereto as Exhibit A and made a part hereof].

5. On or about _____ [*date*], at _____ [*city and state*], plaintiff and defendant entered into a written suretyship agreement[, a copy of which is attached hereto as Exhibit B and made a part hereof]. By the terms of the suretyship agreement plaintiff undertook to satisfy the obligation of _____ [*name of principal*] on the contract with _____ [*name of creditor*] in the event of default by _____ [*name of principal*] thereon.

6. Thereafter, on or about _____ [*date*], plaintiff received from _____ [*name of creditor*] notice of default by defendant and demand for payment of the amount of defendant's liability thereunder. [A copy of the demand and notice is attached as Exhibit C and incorporated by reference.] As surety for defendant, plaintiff was required to, and did, pay the sum of $_____ to _____ [*name of creditor*] on or about _____ [*date*], in full satisfaction of the amount due. [A copy of the receipt is attached as Exhibit D and incorporated by reference.]

[*OR, if suretyship arises out of promissory note*]

4. On or about _____ [*date*], at _____ [*city and state*], _____ [*name of defendant*] executed a promissory note in favor of _____ [*name of creditor*] in the amount of $_____, due on _____ [*date*], and bearing interest at the rate of _____ percent per annum. [A copy of the note is attached as Exhibit A and incorporated by reference.]

5. Plaintiff wrote _____ [*set forth words by which plaintiff guaranteed payment of the note, e.g.,* "payment guaranteed"] and signed his/her name on the reverse side of the promissory note as guarantor and became liable as a guarantor thereon.

6. Defendant failed to pay the note when it became due on _____ [*date*], in accordance with its terms, after demand for payment had been made by _____ [*name of creditor*]. By reason of the guaranty thereon, plaintiff was compelled to, and did on _____ [*date*], pay to _____ [*name of creditor*] the sum of $_____ in full payment of the note, that amount being the principal amount and interest then due thereon at the rate of _____ percent per annum in the sum of $_____.

[*OR, if suretyship arises out of bond obligation*]

4. On or about _____ [*date*], at _____ [*city and state*], _____ [*name of defendant*] and _____ [*name of obligee*] entered into a written agreement[, a copy of which is attached as Exhibit A and incorporated by reference]. That agreement contains provisions setting forth the requirement that _____ [*name of principal*] obtain a bond as security for performance.

5. On or about _____ [*date*], plaintiff became surety for defendant on a _____ [*type*

] bond in favor of _____ [*name of creditor*], and in consideration therefor defendant agreed and promised in writing to indemnify plaintiff and save him/her harmless from all damages, costs, and charges which he/she might sustain by reason of becoming surety for defendant. [A copy of the bond is attached as Exhibit B and incorporated by reference.]

6. Plaintiff executed and delivered the bond and duly performed all the conditions in the indemnity agreement, and on or about _____ [*date*], plaintiff under and pursuant to the terms of the bond, was compelled to and did pay, by reason of the bond, the sum of $_____ in satisfaction and discharge thereof.

[*CONTINUE*]

[7. Plaintiff has demanded that defendant repay this sum to plaintiff, but defendant has failed and refused to repay any part of this amount. (A copy of the demand is attached as Exhibit E and incorporated by reference.)]

SECOND COUNT

(Common Count)

8. Plaintiff refers to and herein incorporates Paragraphs 1-3 of the First Count.

9. _____ [Within the last _____ (two *or* four) years *or* On or about _____ (*date*)], at _____ [*city*], California, defendant became indebted to plaintiff in the sum of $_____ for money paid, laid out, and expended for defendant at his/her instance and request.

10. Neither the whole nor part of this sum has been paid, [except the sum of $_____,] although demand therefor has been made, and there is now due, owing, and unpaid the sum of $_____, with interest thereon at the rate of _____ percent per annum from _____ [*date*].

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For the sum of $_____;

2. For interest on the above named sum at the rate of _____ percent per annum from _____ [*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 538.162.*]

[2] Use of Form

This complaint is for use by a surety in seeking reimbursement for what he or she has disbursed on behalf of the principal, including necessary costs and expenses [*see Civ. Code § 2847*]. To be entitled to reimbursement, the surety must have made his or her payments under compulsion or a legal obligation and not merely voluntarily [*Schlitz v. Thomas (1923) 61 Cal. App. 635, 638, 216 P. 51]* . The complaint includes a common count for money lent or paid, based on the equitable notion that money be refunded to a plaintiff when the defendant repudiates the contract. One who is compelled by reason of a legal liability, to pay an obligation which another in equity and good conscience should pay, may recover from that other person the money so paid; the law implies a request on the part of that other person and a promise to pay [*Pioneer Title Ins. Co. v. Guttman (1959) 175 Cal. App. 2d 116, 120, 345 P.2d 577* ; for further discussion of common counts, *see* Ch. 121, *Common Counts*].

[3] Allegations

The complaint sets forth two counts as a basis for recovering money owed by defendant to plaintiff. The First Count specifically alleges:

- The original obligation between the principal and the creditor (alternative Paragraphs 4).

- The plaintiff's status as guarantor of the defendant's performance of original obligation (alternative Paragraphs 5).

- The defendant's default and the amount paid by plaintiff (alternative Paragraphs 6) [*see Civ. Code § 2847*; *Schlitz v. Thomas (1923) 61 Cal. App. 635, 638, 216 P. 51]* .

The complaint may also allege that a demand has been made of and refused by defendant (Paragraph 7).

The Second Count alleges:

- The amount of defendant's indebtedness to plaintiff (Paragraph 9).

- There has been no payment by defendant (Paragraph 10).

[4] Statute of Limitations

The indebtedness of the principal accrues at the time of payment by the surety [*Davies v. Torrance (1922) 188 Cal. 179, 180, 204 P. 820]* . An action for reimbursement, as well as the common count for money paid, must be brought within four years from the time the cause of action arises [*Code Civ. Proc. § 337*].

[5] Cross References

For discussion and forms relating to promissory notes in general, see Ch. 385, *Negotiable Instruments*

For discussion and forms relating to the pleading of common counts, see Ch. 121, *Common Counts*

For discussion and forms relating to express and implied contractual indemnity, see Ch. 300, *Indemnity and Contribution*

[6] State Statutes

Surety's right to reimbursement for disbursements on principal's behalf. *Civ. Code § 2847*

Surety subrogated to rights of creditor on payment of principal's obligation. *Civ. Code § 2848*

Amount due, plus interest, of detriment caused by breach of obligation to pay money. *Civ. Code § 3302*

Four-year statute of limitations in actions on written obligation. *Code Civ. Proc. § 337*

[7] Decisions

Accommodation maker [*now see Com. Code § 3419(a)*] who pays negotiable instrument has same rights under former *Com. Code § 3415(5)* [*now see Com. Code § 3419(e)*] as guarantor to enforce note against principal ("party accommodated") in accordance with its terms, including right to recover attorney's fees and interest at note rate rather than legal rate. *Flojo Internat., Inc. v. Lassleben (1992) 4 Cal. App. 4th 713, 721-722, 6 Cal. Rptr. 2d 99* (payee assigned note to accommodation maker after payment)

One who is not volunteer, who pays debt for which another is primarily liable, is entitled to subrogation. *Stein v. Simpson (1951) 37 Cal. 2d 79, 83, 230 P.2d 816*

Surety could sue only party that applied for bond, not all parties covered by bond in underlying action for injunction. *Top Cat Productions, Inc. v. Michael's Los Feliz (2002) 102 Cal. App. 4th 474, 478, 125 Cal. Rptr. 2d 553*

Assignment to surety of creditor's rights against principal is not condition precedent to reimbursement of surety. *Ingalls v. Bell (1941) 43 Cal. App. 2d 356, 367-368, 110 P.2d 1068*

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 538 SURETYSHIP, BONDS, AND UNDERTAKINGS
PART IV. FORMS
A. Suretyship

47-538 California Forms of Pleading and Practice--Annotated § 538.164

§ 538.164 Affirmative Defense to Action by Surety Against Principal for Reimbursement [Civ. Code § 2847]--Express Agreement to Reimburse from Specific Funds

[1] FORM Affirmative Defense to Action by Surety Against Principal for Reimbursement [Civ. Code § 2847]--Express Agreement to Reimburse from Specific Funds

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. At all times herein mentioned, defendant was, and now is, the owner of _____ [*describe asset which was to be used to reim burse plaintiff e.g.,* certain real property located in _____ County, California, and more particularly described as follows: _____ (*set forth legal description of property*)].

2. At all times herein mentioned, the reasonable value of that _____ [*specify asset, e.g.,* real property] was, and now is, $_____.

3. After the execution of the contract between _____ [*name of creditor*] and defendant and _____ [at the time of *or* after] the guaranty thereof by plaintiff, [on or about _____ (*date*),] plaintiff and defendant agreed that plaintiff would pay the obligation on the principal contract to _____ [*name of creditor*] when it became due, and that defendant would sell the above-described property _____ [within a reasonable time *or* a stated period] and reimburse plaintiff from the proceeds of the sale [with interest at the rate of _____ percent per annum.] [A copy of that agreement is attached as Exhibit A and incorporated by reference.]

4. _____ [A reasonable period *or* That specified period of time] has not yet elapsed, and the _____ [*specify asset, e.g.,* real property] has not yet been sold. Defendant has at all times since the agreement exerted his/her best efforts to sell the _____ [*specify asset, e.g.,* real property], and continues to do so by _____ [*set forth methods employed by defendant in selling the asset, e.g.,* listing

it with the largest real estate agent in the area].

[2] Use of Form

This affirmative defense is for use by a principal in an answer to a complaint by the surety seeking reimbursement for money paid on behalf of principal [*see Civ. Code § 2847*]. Although this defense is based on an agreement involving the sale of an asset as the source of reimbursement, with appropriate modifications, the form can be used when there has been any type of agreement made between the surety and principal concerning the source of reimbursement.

[3] State Statutes

Surety's right to reimbursement for disbursements on principal's behalf. *Civ. Code § 2847*

[4] Decisions

Express agreement concerning reimbursement is controlling between surety and principal. *Berrington v. Williams (1966) 244 Cal. App. 2d 130, 135, 52 Cal. Rptr. 772*

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47-538 California Forms of Pleading and Practice--Annotated § 538.165

§ 538.165 Complaint by Surety Against Cosurety for Contribution [Civ. Code § 2848]

[1] FORM Complaint by Surety Against Cosurety for Contribution [Civ. Code § 2848]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR CONTRIBUTION
_____ [*name*], [and DOES I	)	[Amount demanded _____
through _____,]	)	(exceeds *or* does not exceed) $10,000]
Defendant[s].	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 538.162, Paragraph 1.*]

[2. *Fictitious name allegation. See § 538.162, Paragraph 2.*]

[3. *Agency allegation. See § 538.162, Paragraph 3.*]

4. On or about _____ [*date*], at _____ [*city and state*] _____ [*name of principal*] and _____ [*name of creditor*] entered into a written agreement, a copy of which is attached as Exhibit A and incorporated by reference.

[*EITHER*]

5. On or about _____ [*date*], at _____ [*city and state*], plaintiff and defendant entered into a written suretyship agreement with _____ [*name of principal*], a copy of which is attached as Exhibit B and incorporated by reference.

[*OR*]

5. On or about _____ [*date*], plaintiff entered into a written suretyship agreeement with _____ [*name of principal*], a copy of which is attached as Exhibit B and incorporated by reference.

6. On or about _____ [*date*], defendant entered into a written suretyship agreeement with _____ [*name of principal*], a copy of which is attached as Exhibit C and incorporated by reference.

[*CONTINUE*]

7. By the terms of the suretyship agreement[s] plaintiff and defendant undertook to satisfy the obligation of _____ [*name of principal*] on the contract with _____ [*name of creditor*] in the event that _____ [*name of principal*] defaulted thereon.

8. _____ [*Name of principal*] did default on his/her contractual obligations with _____ [*name of creditor*], in that _____ [*set out facts showing default, e.g.,* payment of defendant's note is past due and a balance of $5700 remains unpaid, $5500 of which is principal and $200 is interest].

9. On or about _____ [*date*], and by reason of the default of _____ [*name of principal*], plaintiff was required to pay, and did pay, $_____, the entire amount due to _____ [*name of creditor*] under his/her/its contract with _____ [*name of principal*].

10. On or about _____ [*date*], plaintiff demanded payment from defendant of his/her share of the amount plaintiff had paid on the obligation of _____ [*name of principal*] to _____ [*name of creditor*]. Defendant has made no payments to plaintiff.

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For the sum of $_____;

2. For interest on the above named sum at the rate of _____ percent per annum from _____ [*date*];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 538.162.*]

[2] Use of Form

This complaint is for use by a surety who has paid the principal's obligation to the creditor to obtain contribution from a cosurety [*see Civ. Code § 2848*]. The surety can maintain the action to require contribution after the surety has paid the amount due. A surety who has paid nothing cannot recover from the cosureties for their share of the debt [*Hosking v. Spartan Properties, Inc. (1969) 275 Cal. App. 2d 152, 157, 79 Cal. Rptr. 893]* . The procedure provided under *Code Civ. Proc. §§ 881-883* (contribution among joint judgment debtors) is also available to the surety if the obligation for which the surety seeks contribution was reduced to a judgment before the surety paid it [*see Code Civ. Proc. § 882(a)*].

A common count for money lent or paid may be added to the complaint. For a further discussion of the use of common counts, see Ch. 121, *Common Counts* .

[3] Allegations

The complaint alleges:

- The existence of the principal's obligation to the creditor (Paragraph 4).

- The execution of the suretyship agreement (first alternative Paragraph 5) or agreements (second alternative Paragraph 5 and Paragraph 6) by which plaintiff and defendant became liable [*see Civ. Code § 2793*].

- The terms of the suretyship agreement (Paragraph 7).

- The default by the principal and the payment of the obligation by plaintiff (Paragraphs 8, 9) [*see Civ. Code § 2848*; *Hosking v. Spartan Properties, Inc. (1969) 275 Cal. App. 2d 152, 157, 79 Cal. Rptr. 893]* .

- Plaintiff's demand of defendant's share of the obligation (Paragraph 10) [*see Civ. Code § 2848*].

For discussion of and forms relating to contribution among joint judgment debtors, see Ch. 300, *Indemnity and Contribution*

[4] State Statutes

Right to contribution from cosureties. *Civ. Code § 2848*

Right to contribution from joint judgment debtor. *Code Civ. Proc. §§ 881-883*

[5] Decisions

Letter of credit applicant has different level of liability from guarantors, and therefore has no viable claim for contribution against guarantors. *Morgan Creek Residential v. Kemp (2007) 153 Cal. App. 4th 675, 687-689, 63 Cal. Rptr. 3d 232*

Equal liability of guarantors of corporate indebtedness. *Booth v. Friedman (1927) 82 Cal. App. 174, 179, 255 P. 222*

Right of guarantor to contribution against coguarantors is an obligation implied by law and governed by equitable principles. *Overholser v. Glynn (1968) 267 Cal. App. 2d 800, 807, 73 Cal. Rptr. 628*

[6] Cross References

For a related form, *see § 538.162*.

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47-538 California Forms of Pleading and Practice--Annotated § 538.166

§ 538.166 Proceedings for Order Determining Liability of Joint Judgment Debtor for Repayment--By Surety Against Principal [Code Civ. Proc. § 883]--Notice of Motion

[1] FORM Proceedings for Order Determining Liability of Joint Judgment Debtor for Repayment--By Surety Against Principal [Code Civ. Proc. § 883]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER DETERMINING LIABILITY OF JOINT
vs.	)	JUDGMENT DEBTOR FOR REPAYMENT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name of principal*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* defendant _____ (*name of surety*)] will, and hereby does, move for an order determining

the liability of defendant _____ [*name of principal*] for repayment to defendant _____ [*name of surety*] on the joint judgment rendered herein in the sum of $_____. The motion will be made on the grounds that _____ [defendant _____ (*name of surety*) paid the sum of $_____ to plaintiff in (partial) satisfaction of the judgment *or* pursuant to a writ of execution and levy, _____ (*describe property*) owned by defendant _____ (*name of surety*) was sold and the sum of $_____ was applied to the satisfaction of the judgment]; and that defendant _____ [*name of surety*] is liable for this amount only as surety for defendant _____ [*name of principal*].

The motion will be based on this notice of motion, on the declaration(s) of _____[*name(s*)] and the supporting memorandum served and filed herewith, on the papers, records, and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*signature*]
Attorney for _____ [*moving party*]

CAUTION:

A supporting memorandum must be filed and a copy served with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This notice of motion is for use by a surety in proceedings to compel repayment from the principal when the principal and surety are jointly liable on a money judgment and the surety has satisfied the judgment or any part of it [*see Code Civ. Proc. § 882(b)*]. With appropriate modifications in the description of the parties, this form can also be used by a surety seeking contribution from a cosurety when the cosureties are jointly liable on a money judgment and the surety has satisfied the judgment or any part of it [*see Code Civ. Proc. § 882(a)*]. The motion is made to the court that entered the judgment, and may be made at any time before the judgment is satisfied in full or within 10 days thereafter [*see Code Civ. Proc. § 883*]. For a further discussion of this right of the surety, see *§ 538.23*.

[3] Cross References

For a discussion of and forms relating to contribution among joint judgment debtors, see Ch. 300, *Indemnity and Contribution*

[4] California Points and Authorities

For a discussion of and forms for use in motions supporting or opposing contribution, see California Points and Authorities, Ch. 115, *Indemnity and Contribution* (Matthew Bender)

[5] State Statutes

Surety's right to repayment of partial or total satisfaction of judgment against cosurety. *Code Civ. Proc. §§ 882(a), 883*

Surety's right to repayment of partial or total satisfaction of judgment against principal. *Code Civ. Proc. §§ 882(b), 883*

[6] Decisions

Joint judgment debtor's motion for contribution made more than number of days specified by statute after partial satisfaction of judgment was timely filed, absent showing that plaintiff accepted partial satisfaction of judgment as full payment of judgment, because phrase "the judgment is satisfied in full" under *Code Civ. Proc. § 883(a)* means complete satisfaction of entire judgment. *Borba Farms, Inc. v. Acheson (1988) 197 Cal. App. 3d 597, 604, 606, 242 Cal. Rptr. 880*

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47-538 California Forms of Pleading and Practice--Annotated § 538.167

§ 538.167 Proceedings for Order Determining Liability of Joint Judgment Debtor for Repayment--By Surety Against Principal [Code Civ. Proc. § 883]--Declaration in Support of Motion

[1] FORM Proceedings for Order Determining Liability of Joint Judgment Debtor for Repayment--By Surety Against Principal [Code Civ. Proc. § 883]--Declaration in Support of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____
vs.	)	[*name*] IN SUPPORT OF MOTION FOR ORDER
_____ [*name*],	)	DETERMINING LIABILITY OF JOINT JUDG-
Defendant.	)	MENT DEBTOR FOR REPAYMENT
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		[Trial Date: _____]

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* defendant _____ (*name*) in the above-entitled action *or other statement as appropriate*].

2. On _____ [*date*], a judgment in the sum of $_____ was rendered against

defendants _____ [*names*] _____ [*set forth nature of obligation, e.g.,* for failure to pay a promissory note].

On _____ [*date*], _____ [I paid the sum of $_____ to plaintiff in (partial) satisfaction of the judgment *or* pursuant to a writ of execution and levy, _____ (*describe property*) owned by me was sold, and the sum of $_____ therefrom was applied to the satisfaction of the judgment].

I am liable for the amount _____ [paid *or* applied from the proceeds of the sale of my property] only as surety for defendant _____ [*name of principal*] because _____ [*specify facts giving rise to suretyship relationship, e.g.,* _____ (*name of principal*) was the maker of the promissory note, and I endorsed it as a surety only, with the inscription "payment guaranteed by" preceding my name, and I am therefore entitled to repayment].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

This declaration is for use by a surety to support a notice of motion for an order determining the liability of a principal or cosurety who is a joint judgment debtor with the surety [*Code Civ. Proc. §§ 882, 883*].

[3] State Statutes

Surety's right to contribution for partial or total satisfaction of judgment against cosurety. *Code Civ. Proc. §§ 882(a), 883*

Surety's right to repayment for partial or total satisfaction of judgment against principal. *Code Civ. Proc. §§ 882(b), 883*

[4] Cross References

For a related form, *see § 538.166*.

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47-538 California Forms of Pleading and Practice--Annotated § 538.168

§ 538.168 Proceedings for Order Determining Liability of Joint Judgment Debtor for Repayment [Code Civ. Proc. § 883]--Order Granting Motion

[1] FORM Proceedings for Order Determining Liability of Joint Judgment Debtor for Repayment [Code Civ. Proc. § 883]--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER GRANTING MOTION DETERMINING
Defendant.	)	LIABILITY OF JOINT JUDGMENT DEBTOR FOR
	)	REPAYMENT
	)	

_____

The motion of _____ [*identify party, e.g.,* defendant _____ (*name of surety*)] for an order determining liability for repayment came on regularly for hearing by the court on _____ [*date*]. _____ [*defendant surety*] appeared by counsel _____ [*name*]; _____ [*defendant principal*] appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and defendant _____ [*name of principal*] is determined to be liable for repayment to defendant _____ [*name of surety*] in the sum of $_____, including $_____ interest on the obligation in favor of defendant _____ [*name of surety*].

Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This order is for use when the court grants a motion by a surety for an order determining the liability of a principal or cosurety who is a joint judgment debtor with the surety [*see Code Civ. Proc. §§ 882, 883*].

The order determining liability for contribution or repayment entitles the judgment debtor to the benefit of the judgment to enforce the liablity, including every remedy that the judgment creditor has against the persons liable, to the extent of the liability [*Code Civ. Proc. § 883(b)*].

[3] Cross References

For a related form, *see § 538.166*.

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47-538 California Forms of Pleading and Practice--Annotated § 538.169

§ 538.169 Complaint by Creditor Against Surety--On Continuing Guaranty [Civ. Code § 2814]

[1] FORM Complaint by Creditor Against Surety--On Continuing Guaranty [Civ. Code § 2814]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT BY CREDITOR AGAINST SURETY
_____ [*name*], [and DOES I	)	ON CONTINUING GUARANTY
through _____,]	)	[Amount demanded _____
Defendant[s].	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 538.162, Paragraph 1.*]

[2. *Fictitious name allegation. See § 538.162, Paragraph 2.*]

[3. *Agency allegation. See § 538.162, Paragraph 3.*]

4. On or about _____ [*date*], at _____ [*city and state*], _____ [*name of surety*] made, executed, and delivered to plaintiff an instrument designated a continuing guaranty[, a copy of which is attached as Exhibit A and incorporated by this reference].

5. _____ [*Allege pertinent part of agreement, e.g.,* In the guaranty defendant unconditionally

guaranteed all present and future obligations of _____ (*name of principal*), including all indebtedness and liability of every nature then owing, or thereafter to be incurred by _____ (*name of principal*)].

6. The purpose of this guaranty was to induce plaintiff to _____ [*set forth reason for guaranty, e.g.,* extend credit to _____ (*name of principal*)].

7. Plaintiff acted in reliance on the guaranty and _____ [*name of principal*] is now indebted to plaintiff in the sum of $_____ for _____ [*set forth the reason for the indebtedness, e.g.,* the extension of credit in the amount of $5000 on _____ (*date*), at 15 percent interest per annum]. This sum is now due, owing, and unpaid.

8. No part of this sum has been paid by _____ [*name of principal*]. Defendant has not paid any of the sum due under the provisions of the guaranty. There is now due, owing, and unpaid from defendant the principal sum of $_____, plus interest thereon, at the rate of _____ percent per annum from _____ [*date*].

[9. It is provided in the guaranty that should any action be brought to enforce the guaranty, defendant will pay additional sums for costs of suit, including reasonable attorney's fees. Plaintiff has been obliged to institute and prosecute this action to enforce the guaranty. (The sum of $_____ is a reasonable attorney's fee to be allowed herein.)]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For the sum of $_____;

2. For interest on the above named sum at the rate of _____ percent per annum from _____ [*date*];

[3. For reasonable attorney's fees _____ (of $_____ *or* according to proof);]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 538.162.*]

[2] Use of Form

This complaint is for use by a creditor against the surety to enforce a continuing guaranty [*Civ. Code § 2814*]. The form can be used for a continuing guaranty on an extension of credit, goods on credit, or services rendered on credit.

[3] Allegations

This complaint alleges:

- The execution of a continuing guaranty by defendant and its relevant terms (Paragraphs 4, 5) [*see Civ. Code § 2814*; *see also Central Building, LLC v. Cooper (2005) 127 Cal. App. 4th 1053, 1055, 26 Cal. Rptr. 3d 212* (principals' personal guarantees of payment on corporation's commercial lease held to be continuing guaranties that also applied to lease amendments)].

- The purpose of the guaranty (Paragraph 6).

- Plaintiff's reliance on the guaranty and the amount now owing (Paragraph 7) [*see Bank of America v. Waters (1962) 209 Cal. App. 2d 635, 639, 26 Cal. Rptr. 9* and *Code Civ. Proc. § 425.10*].

- That the amount owed remains unpaid (Paragraph 8).

The complaint includes an optional paragraph for use if the agreement provides for the recovery of attorney's fees (Paragraph 9). Use of this paragraph may be unnecessary as such fees are recoverable as part of costs [*see Civ. Code § 1717*].

[4] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 70613(b)*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[5] State Statutes

Continuing guaranty defined. *Civ. Code § 2814*

Liability of guarantors, generally. *Civ. Code §§ 2806-2811*; *Com. Code § 3419*

[6] Decisions

Writ of attachment may issue on guaranty regardless of whether principal obligation is secured, if guarantor has waived right to require creditor to proceed first against security given for principal obligation. *United Cent. Bank v. Superior Court (Chang) (2009) 179 Cal. App. 4th 212, 215, 101 Cal. Rptr. 3d 395* (guarantor expressly waived right to require lender to proceed first against real property security for loan; lender was entitled to writ of attachment against guarantor's real property, if lender satisfied requirements of *Code Civ. Proc. § 484.090*)

Personal guaranty agreements on corporation's commercial lease given by principals of corporation were continuing guarantee of performance under lease that also applied to lease amendments. *Central Building, LLC v. Cooper (2005) 127 Cal. App. 4th 1053, 1055, 26 Cal. Rptr. 3d 212*

Complaint alleging (1) guaranty, (2) principal's default, (3) creditor's notification to surety of that default, and (4) surety's failure to remit funds in payment of guaranty was sufficient against affirmative defense of failure to state cause of action. *Torrey Pines Bank v. Superior Court (1989) 216 Cal. App. 3d 813, 819, 265 Cal. Rptr. 217* (mandating grant of summary judgment in favor of creditor)

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47-538 California Forms of Pleading and Practice--Annotated § 538.170

§ 538.170 Complaint by Creditor Against Guarantor of Accounts Receivable Sold to Creditor--Guaranty of Collectibility [Civ. Code § 2800]--General Form

[1] FORM Complaint by Creditor Against Guarantor of Accounts Receivable Sold to Creditor--Guaranty of Collectibility [Civ. Code § 2800]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT ON GUARANTY OF COLLECTIB-
_____ [*name*],	)	ILITY
[and DOES I through _____,]	)	[Amount demanded _____
Defendant[s].	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 538.162, Paragraph 1.*]

[2. *Doe allegation. See § 538.162, Paragraph 2.*]

[3. *Agency allegation. See § 538.162, Paragraph 3.*]

4. On or about _____ [*date*], at _____ [*city and state*], plaintiff and _____ [*name of principal*] entered into a contract, by which plaintiff agreed to purchase and

_____ [*name of principal*] agreed to sell _____ [*describe contract for sale of business, e.g.,* for $_____, payable on consummation of the sale, the business known as _____ (*name*) located at _____ (*address*), _____ County, California]. [A copy of that contract is attached as Exhibit A and incorporated by reference.]

5. The contract provided that the assets of the business to be sold included _____ [*describe accounts receivable included in sale, e.g.,* all accounts receivable of the business not more than 90 days old appearing on the books of the business on the date of the contract].

6. On or about _____ [*date*], at _____ [*city and state*], defendant _____ [*name of surety*] made, executed, and delivered to plaintiff a written guaranty[, a copy of which is attached as Exhibit B and incorporated by reference]. In the guaranty _____ [*name of surety*] expressly guaranteed to plaintiff that all the above described accounts receivable were good and collectible.

7. Plaintiff has fully performed all the provisions of the contract which he/she was to perform and the sale of the business was consummated on _____ [*date*].

8. _____ [*Specify the account receivable included within the contract which is the subject of the action, e.g.,* an account receivable not more than 90 days old and appearing on the books on the contract date was the account owing by _____ (*name*) in the sum of $_____ for goods, wares, and merchandise before that time sold and delivered to him/her by defendant in the usual course of the business].

9. On _____ [*date*], plaintiff gave _____ [*name of debtor*] notice of the assignment of the account and demanded payment thereof. _____ [*Name of debtor*] failed and refused, and still fails and refuses, to pay any part of that debt.

10. On _____ [*date after demand*] plaintiff commenced an action against _____ [*name of debtor*] in the _____Court of _____, No. _____, entitled _____ v. _____, for the recovery of that account and $_____ as damages.

11. _____ [*Set forth reasons why plaintiff was unable to collect the debt through the usual legal proceedings, e.g.,* On _____ (*date*), _____ (*name of debtor*) filed in the United States District Court for the _____ District of California, _____ Division, his/her voluntary petition in bankruptcy, proceeding In Bankruptcy Number _____ of that court. Plaintiff and defendant were listed as unsecured creditors for the ammount of the account receivable and no assets that were not exempt from execution were listed on the schedules of assets and liabilities].

[12. Plaintiff duly and properly filed a creditor's claim in those bankruptcy proceedings for the amount of that account receivable. No part of that claim has been paid, and on _____ (*date*), the United States District Court granted _____ [*name of debtor*] a discharge in bankruptcy.]

13. Thereafter, on _____ [*date*], plaintiff demanded payment by defendant of that account receivable. No part of this has been paid and there is now due, owing, and unpaid from defendant to plaintiff $_____ on that account receiveable and the guarantee thereof.

[14. The guaranty executed by defendant provides that any expense, legal or otherwise, incurred by the plaintiff in enforcing payment of the accounts by reason of any dispute between principal and its customers shall be chargeable to, and payable by, defendant. Plaintiff has incurred legal expense in retaining an attorney to enforce payment of the accounts receivable assigned to him/her by principal. Additional attorney's fees and enforcement expenses will be incurred. The full amount of these fees and expenses is unknown at this time. Plaintiff will ask leave of court to amend

his/her complaint to conform with the proof offered at the time of trial with respect to the losses sustained through these fees and expenses.]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For the sum of $_____;

2. For interest on the above-named sum at the rate of _____ percent per annum from _____ [*date*];

[3. For reasonable attorney's fees and costs according to proof;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 538.162.*]

[2] Use of Form

This complaint is for use by a creditor to recover damages from a surety who has guaranteed that accounts receivable assigned to the creditor in connection with the sale of a business are good or collectible [*see Civ. Code § 2800*].

[3] Allegations

The complaint sets forth facts demonstrating the creditor's inability to recover the debt as a basis for recovery of money from the guarantor. The complaint specifically alleges that:

- The plaintiff and the principal entered into a contract for the sale of a business, including accounts receivable (Paragraphs 4, 5).

- The defendant executed a guaranty which guaranteed that the accounts receivable were good and collectible (Paragraph 6) [*see Civ. Code § 2800*].

- The plaintiff performed on the contract (Paragraphs 7, 8, and 9).

- Facts demonstrating that no part of the debt could be collected, using bankruptcy of the debtor as an example (Paragraphs 10, 11, 12, and 13) [*see Civ. Code § 2800*; *Ohio Electric Car Co. v. LeSage (1920) 182 Cal. 450, 455, 188 P. 982]* .

An optional allegation for attorney's fees for enforcement of the guaranty is included for use if the guaranty included a provision for them (Paragraph 14) [*see Civ. Code § 1717*].

[4] Prior Legal Proceedings Prerequisite

A complaint on a guaranty of collectibility is required to allege legal proceedings were taken against the debtor [*Ohio Electric Car Co. v. LeSage (1920) 182 Cal. 450, 455, 188 P. 982]* . An allegation merely that an unsuccessful attempt

was made to collect the accounts is not sufficient. There must also be an allegation that the accounts were not good or collectible or that the claims had been reduced to judgment, and execution thereon returned unsatisfied, or that the debtors were insolvent and it would be futile to prosecute them [*Nimmo v. Fitzgerald (1927) 202 Cal. 565, 567, 261 P. 1015]* .

[5] State Statutes

Guaranty that obligation is good or collectible imports that it is collectible by usual legal proceedings taken with reasonable diligence. *Civ. Code § 2800*

Failure to institute legal proceedings does not bar recovery if no part of debt could have been recovered thereby. *Civ. Code § 2801*

Removal of principal and property from State does not excuse guarantor. *Civ. Code § 2802*

[6] Decisions

Guaranty of collectibility is distinct from guaranty of payment. *Pierce v. Merrill (1900) 128 Cal. 464, 471, 61 P. 64* ; *Menefee v. Robert A. Klein & Co. (1932) 121 Cal. App. 294, 295-296, 9 P.2d 219*

Complaint on guaranty of collectibility must allege legal proceedings were taken. *Ohio Electric Car Co. v. LeSage (1920) 182 Cal. 450, 454-455, 188 P. 982*

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47-538 California Forms of Pleading and Practice--Annotated § 538.171

§ 538.171 Allegations--Guaranty of Accounts Receivable Sold to Creditor

[1] FORM Allegations--Guaranty of Accounts Receivable Sold to Creditor

1. On or about _____ [*date*], at _____ [*city and state*], plaintiff and defendant _____ [*name of principal*] entered into a written contract, by which plaintiff agreed to purchase all accounts for merchandise sold by _____ [*name of principal*], on the terms and conditions set forth therein. A copy of that contract is attached hereto as Exhibit A and made part hereof.

2. On or about _____ [*date*], at _____ [*city and state*], defendant _____ [*name of surety*] made, executed, and delivered to plaintiff a written guaranty, a copy of which is attached hereto as Exhibit B and made a part hereof. In the guaranty _____ [*name of surety*] guaranteed to plaintiff prompt and faithful performance of all the promises, warranties, and representations made by _____ [*name of principal*] in the sales agreement, or to be made in the bills of sale of the accounts receivable.

3. Between _____ [*date*], and _____ [*date*], _____ [*name of principal*], under the terms of the contract, executed and delivered to plaintiff bills of sale of accounts receivable, representing and warranting that merchandise had been sold and delivered, and that accounts receivable were due, owing, and payable to _____ [*name of principal*], in the sum of $_____, for which plaintiff paid him/her the sum of $_____, after deducting a factoring fee of $_____.

4. Those accounts receivable are not collectible because _____ [*specify reason why accounts are not collectible, e.g.,* they were false, fictitious, and nonexistent in that _____ (*name of principal*) did not sell or deliver merchandise to the persons named in the bills of sale, and no accounts receivable were due, owing, and payable as set forth in those bills of sale], and by reason thereof plaintiff has sustained a loss and damage in the sum of $_____, plus (*e.g.,* a factoring fee of $_____)].

[2] Use of Form

These allegations are for use in a complaint by the creditor against the surety of a contract for the sale of accounts receivable. By guaranteeing the contract, the surety promises to answer for the debt, de fault, or miscarriage of the principal [*see Civ. Code § 2787*]. The allegations may be inserted in place of Paragraphs 4-9 in *see § 538.170*. Because these allegations deal with a general suretyship, unlike *see § 538.170* which involves a guaranty of collectibility, the creditor need not allege that legal proceedings were first taken against the principal debtor, and Paragraphs 10-13 of *see § 538.170* may be omitted [*see § 538.17[2][b]*]. This form is adapted from the facts in *Refinance Corp. v. Northern Lbr. Sales (1958) 163 Cal. App. 2d 73, 329 P.2d 109* .

[3] Allegations

These allegations allege:

- An agreement between the principal and plaintiff (Paragraph 1).
- That defendant is guarantor for the principal (Paragraph 2) [*see Civ. Code § 2806*].
- Performance of the contract (Paragraph 3).
- Fraud by the principal leading to damage to plaintiff (Paragraph 4) [*see Civ. Code § 2807*].

[4] State Statutes

Definition of surety. *Civ. Code § 2787*

Liabilities of surety. *Civ. Code §§ 2806-2810*

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47-538 California Forms of Pleading and Practice--Annotated § 538.172

§ 538.172 Notice by Surety to Principal of Action Against Surety on Principal's Obligation [Code Civ. Proc. § 1912]

[1] FORM Notice by Surety to Principal of Action Against Surety on Principal's Obligation [Code Civ. Proc. § 1912]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	NOTICE TO PRINCIPAL OF ACTION ON OB-
_____ [*name*], [and DOES I	)	LIGATION
through _____,]	)	[*Code Civ. Proc. § 1912*]
Defendant[s].	)	
	)	

_____

TO: _____ [*name of principal debtor*],

Please take notice that on _____ [*date*], you _____ [*set out agreement guaranteed by surety, e.g.,* executed a promissory note in the amount of $_____ payable to _____ (*name of creditor*) at _____ percent interest per annum by _____ (*date*)].

I/We hereby give you notice that the above-entitled action has been commenced by _____ [*name of creditor*] against me/us as your _____ [guarantor *or* surety] based on your failure to perform your obligation in that agreement. The action claims you are in default through your failure to _____ [*set out default, e.g.,* pay the promissory note].

You are hereby given notice of the pendency of this action and are requested and required by the undersigned to appear and defend this action on your own behalf and on behalf of the undersigned. In the event you fail to do so you will be bound by the record in this action pursuant to *Section 1912 of the California Code of Civil Procedure.*

Summmons in the above-entitled action was served on the undersigned on _____ [*date*], at _____ [*city*], _____ County, California. Accordingly, appearance will be due by _____ [*date*].
Dated: _____

_____ [*signature*]

[2] Use of Form

This form is a notice for use by a surety to inform the principal that the creditor has instituted legal proceedings against the surety based on the principal's obligations. The principal who receives notice of the creditor's action against the surety and is given the opportunity to join in the defense is bound by the results of that action [*see Code Civ. Proc. § 1912*]. For further discussion of *Code Civ. Proc. § 1912*, see *§ 538.21[5]*.

[3] State Statute

Notice by surety to principal of action on obligation. *Code Civ. Proc. § 1912*

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47-538 California Forms of Pleading and Practice--Annotated § 538.173

§ 538.173 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Creditor's Action Against Surety--Surety Exonerated by Material Alteration of Principal Obligation [Civ. Code § 2819]--Manner of Payment Altered

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Creditor's Action Against Surety--Surety Exonerated by Material Alteration of Principal Obligation [Civ. Code § 2819]--Manner of Payment Altered

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. The agreement between plaintiff as creditor and _____ [*name*] as the principal debtor [, attached to plaintiff's complaint as Exhibit A,] provided that _____ [*describe manner of payment prescribed in original agreement, e.g.,* (*name of principal debtor*), when he/she sold products supplied by plaintiff, was to invoice all its customers for the products, with each invoice bearing a notation that it was assigned to plaintiff and that payment was to be made to plaintiff].

2. On or about _____ [*date*], plaintiff and _____ [*name of principal debtor*] agreed _____ [orally *or* in writing] to modify the agreement by changing the method of payment _____ [*specify new manner of payment, e.g.,* to a simple open book account payable within 30 days after delivery to principal obligor of each item of merchandise by plaintiff].

3. At all times herein mentioned subsequent to the making of the second agreement, plaintiff and _____ [*name of principal debtor*] acted pursuant thereto _____ [*specify actions taken, e.g.,* by treating all obligations thereafter incurred by _____ (*name of principal debtor*) with plaintiff as an open book account payable 30 days after delivery of each item therein contained].

4. The second agreement was made and the subsequent acts of plaintiff and _____ [*name of principal debtor*] pursuant thereto were performed without defendant's consent.

[5. The indebtedness alleged in plaintiff's complaint was incurred by _____ (*name of principal debtor*) subsequent to the making of the second agreement and was treated by plaintiff and _____ (*name of principal debtor*) as _____ (*e.g.*, items on an open book account due and payable within 30 days after delivery).]

6. By reason of the second agreement and the acts of the parties pursuant thereto the original obligation guaranteed by defendant has been materially altered, and defendant is discharged from all liability thereon.

[2] Use of Form

This affirmative defense is for use by a surety in an answer to a complaint by a creditor when the original obligation of the principal has been altered by changing the mannner of payment. The surety is exonerated, except so far as he or she may be indemnified by the principal, or except to the extent of any accord as provided in *Civ. Code § 2822(b)*, if by any act of the creditor, without the surety's consent, the principal's original obligation is altered in any respect [*Civ. Code § 2819*; for further discussion, see *§ 538.19[2]*]. Exoneration is a matter to be pleaded and proved as an affirmative defense [*City of Sacramento v. Trans Pacific Industries, Inc. (1979) 98 Cal. App. 3d 389, 399, 159 Cal. Rptr. 514]* .

For use when a continuing guaranty is involved, this foregoing form of affirmative defense includes the allegation that the debt sued on was incurred after the principal obligation was modified (Paragraph 5) [*see Hill & Morton, Inc. v. Coughlan (1963) 214 Cal. App. 2d 545, 549-550, 29 Cal. Rptr. 550]* .

[3] State Statutes

Acts of creditor altering principal obligation of his/her rights or remedies against principal debtor discharges surety. *Civ. Code § 2819*

[4] Decisions

Payment wired from debtor to creditor day before execution of modification agreement but not applied until after execution and without which creditor would not have agreed to modification was part of modification, not part of original obligation; thus, when payment was set aside as preference and creditor had to disgorge it to debtor's trustee in bankruptcy, surety was not obligated to pay disgorged amount. *Texaco Refining & Marketing v. Aetna Cas. & Sur. (9th Cir. 1990) 895 F.2d 637, 640* (applying California law)

Change in method of payment from assignment of invoices to open account is material change exonerating surety from liability. *Hill & Morton, Inc. v. Coughlan (1963) 214 Cal. App. 2d 545, 549-550, 29 Cal. Rptr. 550*

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47-538 California Forms of Pleading and Practice--Annotated § 538.174

§ 538.174 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Creditor's Action Against Surety--Surety Exonerated by Material Alteration of Principal Obligation [Civ. Code § 2819]--Extension of Time for Payment

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Creditor's Action Against Surety--Surety Exonerated by Material Alteration of Principal Obligation [Civ. Code § 2819]--Extension of Time for Payment

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that

1. The agreement between plaintiff as creditor and _____ [*name*] as the principal debtor [, attached to plaintiff's complaint as Exhibit A,] provided that _____ [*describe time of payment prescribed in orginal agreement, e.g.,* (*name of principal debtor*) was to make installment payments of $_____ on the first of each month every month until _____ (*date*), when the account would be paid in full].

2. On or about _____ [*date*], at _____ [*city and state*], plaintiff and _____ [*name of principal debtor*] entered into a _____ [written *or* oral] agreement, [a copy of which is attached hereto as Exhibit B and made a part hereof,] extending the time for payment by _____ [*name of principal debtor*] of the obligation guaranteed by defendant from the final payment date of _____ [*date*], to _____ [*date*], in consideration of _____ [*specify consideration, e.g.,* the sum of $_____].

3. At all times herein mentioned subsequent to the making of the second agreement, plaintiff and _____ [*name of principal debtor*] acted pursuant thereto _____ [*describe actions, e.g.,* having a final payment due date of _____ (*date*)].

4. [*Second agreement was made without defendant's knowledge or consent. See § 538.173, Paragraph 4.*]

5. [*Second agreement as material alteration. See § 538.173, Paragraph 6.*]

[2] Use of Form

This form of affirmative defense is for use by a surety in an answer to a complaint by a creditor when the original obligation of the principal has been altered by changing the time of payment [*see Civ. Code § 2819*].

[3] Decisions

Taxpayer's execution of waivers, which allowed SBE to issue deficiency determination beyond the statutory deadline, was material alteration. *State Bd. of Equalization v. Carleton (1990) 223 Cal. App. 3d 1607, 1610, 273 Cal. Rptr. 436* (surety was not exonerated because original suretyship agreement consented to waivers)

[4] Cross References

For a related form, *see § 538.173*.

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47-538 California Forms of Pleading and Practice--Annotated § 538.175

§ 538.175 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Creditor's Action Against Surety--Creditor Failed After Demand to Proceed Against Principal Debtor [Civ. Code § 2845]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Creditor's Action Against Surety--Creditor Failed After Demand to Proceed Against Principal Debtor [Civ. Code § 2845]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. On _____ [*date*], at _____, _____ County, California, defendant served on plaintiff a written demand, [a copy of which is attached hereto as Exhibit A and made a part hereof,] requiring plaintiff to proceed against _____ [*name of principal debtor*], who is the person primarily liable on the obligation alleged in plaintiff's complaint and the person for whom defendant was surety on that obligation.

2. At the time the demand was served on plaintiff, the obligation was due and payable, and _____ [*name of principal debtor*] [was present in California and] had sufficient assets over and above those exempt from execution to discharge that obligation.

3. Plaintiff disregarded that demand, and failed to commence action against _____ [*name of principal debtor*] on the obligation or in any other way to proceed against _____ [*name of principal debtor*] to satisfy the obligation.

4. _____ [*Specify reasons why defendant surety has been prejudiced by plaintiff's failure to pursue the principal debtor, e.g.,* _____ (*name of principal debtor*) has, since the time of the demand, (left the State of California,) disposed of his/her assets, and, defendant is informed and believes and on such information and belief alleges, become insolvent].

[2] Use of Form

This form of affirmative defense is for use by a surety in an answer to a complaint by a creditor when the creditor has failed to proceed against the principal after being requested to do so by the surety. The surety may require the creditor to proceed against the principal or pursue any other remedy in the creditor's power which the surety cannot pursue, and which would lighten the surety's burden; and if the creditor fails to do so, the surety is exonerated to the extent to which the surety is prejudiced [*Civ. Code § 2845*; for further discussion, *see § 538.20[2]*].

[3] State Statutes

Removal of principal from state leaving no property is equivalent to insolvency in its effect on rights and obligations of one who is guarantor that obligation is good or collectible. *Civ. Code § 2802*

Surety is exonerated to extent he or she is prejudiced by creditor's failure to proceed against principal debtor after demand to do so has been made. *Civ. Code § 2845*

[4] Decisions

Creditor must proceed against principal debtor before being able to secure judgment against surety after surety has demanded that creditor proceed against principal. *Moffett v. Miller (1953) 119 Cal. App. 2d 712, 713, 260 P.2d 215*

Surety who demands that creditor foreclose on security for debt is not exonerated under *Civ. Code § 2845* if surety has ample resources to satisfy obligation to creditor and pursue foreclosure directly against principal. *Katz v. Haskell (1961) 196 Cal. App. 2d 144, 152, 16 Cal. Rptr. 453*

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47-538 California Forms of Pleading and Practice--Annotated § 538.176

§ 538.176 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Creditor's Action Against Surety on Guaranty [Civ. Code § 2814]--Nonreliance on Guaranty

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Creditor's Action Against Surety on Guaranty [Civ. Code § 2814]--Nonreliance on Guaranty

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. _____ [*Set forth circumstances showing that the plaintiff did not rely on compliance with the conditions attached to the contract e.g.,* The contract between plaintiff and _____ (*name of principal*), (a copy of which is attached hereto as Exhibit B and made part hereof,) provided that, as security for the performance, _____ (*name of principal*) would deliver to plaintiff duly executed instruments of security or guaranty, and would comply with all terms, conditions, and provisions set forth in such instruments. Immediately following this printed portion of the contract plaintiff typed the words "-Not Applicable-."]

2. In fact plaintiff did not rely on the written guaranty dated _____ [*date*], executed by defendant, in performing the contract with _____ [*name of principal*].

[2] Use of Form

This affirmative defense is for use by a surety in an answer to a complaint by a creditor when the principal contract specifies that there is to be a guaranty of performance and the creditor's actions indicate nonreliance on the duly executed guaranty. Since a creditor's right to enforce a contract of guaranty is dependent on credit being extended in reliance on the guaranty, nonreliance should serve as a valid defense [*see Bank of America v. Waters (1962) 209 Cal. App. 2d 635, 639, 26 Cal. Rptr. 9]* .

[3] State Statutes

Continuing guaranty defined. *Civ. Code § 2814*

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[Reserved]

§§ 538.177[Reserved]

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B. Bonds And Undertakings
1. Statutory Bonds And Undertakings

47-538 California Forms of Pleading and Practice--Annotated § 538.190

§ 538.190 Statutory Form of Bond or Undertaking Given in Action or Proceeding [Code Civ. Proc. §§ 995.320, 995.330]

[1] FORM Statutory Form of Bond or Undertaking Given in Action or Proceeding [Code Civ. Proc. §§ 995.320, 995.330]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	_____ [BOND *or*
_____ [*name*],	)	UNDERTAKING]
Defendant.	)	
	)	
	)	

_____

WHEREAS the _____ [*identify party*, e.g., plaintiff] desires to give _____ [a bond *or* an undertaking] for _____ [*state purpose*] as provided by _____ [*specify code sections requiring bond or undertaking*];

[*EITHER, if sureties and principal are jointly and severally liable*]

NOW, THEREFORE, the undersigned principal, _____ [*name of principal*] and _____ [surety *or* sureties], _____ [*name(s) of surety or sureties*] hereby obligate ourselves, jointly and severally, to _____ [*name of beneficiary*] under the statutory obligations, in the amount of $_____.

[*OR, if principal is not signing bond*]

NOW, THEREFORE, the undersigned _____ [surety *or* sureties], _____ [*name(s) of surety or sureties*] hereby obligate(s) myself/ourselves [, jointly and severally,] to _____ [*name of beneficiary*] under the statutory obligations, in the amount of $_____.

[*ADD, if surety limits liability*]

NOW, THEREFORE, the undersigned surety, _____ [*name of surety with limited liability*], hereby obligates itself to _____ [*name of beneficiary*] under the statutory obligations, in the amount of $_____ [*amount less than amount of bond or undertaking*].

[*ADD, if amount of bond is based on value of property or interest in property*]

The [interest in] property on which the amount of this _____ [bond *or* undertaking] is based, and which is relied on by the _____ [surety *or* sureties] as qualifying them on the _____ [bond *or* undertaking] is as follows: _____ [*describe the property or properties or interest in property*].

The estimate of the _____ [principal *or* beneficiary *or* court] as to the fair market value of the above-described [interest in] property is as follows: _____ [*specify fair market value of each property or interest*].

[*CONTINUE*]

The addresses at which the principal and sureties may be served with notices, papers, and other documents are:

_____ [*name of surety*] _____ [*address*]

_____ [*name of surety*] _____ [*address*]

_____ [*name of principal*] _____ [*address*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*] _____ [*signature of surety*]

_____ [*date*] _____ [*signature of surety*]

_____ [*date*] _____ [*signature of principal*]

[*ADD, if surety limits liability*]

STIPULATION LIMITING LIABILITY OF SURETIES

The aggregate worth of all sureties executing the _____ [bond *or* undertaking] herein is $_____, which is twice the amount of the _____ [bond *or* undertaking]. Therefore, pursuant to *Code of Civil Procedure Section 995.520(d)*;

IT IS HEREBY STIPULATED AND AGREED by and between the [principal and] sureties hereto, that the liability of _____ [*name of surety*] on the _____ [bond *or* undertaking] herein is limited to the worth of _____ [*name of surety*] as stated in the accompanying declaration of _____ [*name of surety*].
Dated: _____.

_____ [*signature of surety*]
_____ [*signature of surety*]
_____ [*signature of surety*]
_____ [*signature of principal*]

[2] Use of Form

The foregoing form of bond or undertaking is for use when a statute requires a bond or undertaking to be filed in action or proceeding. It is substantially in the form set forth in *Code Civ. Proc. §§ 995.320* and *995.330*. For additional or superseding requirements for a bond or undertaking filed in a particular proceeding see the specific statute providing for the bond or undertaking.

[3] Contents of Bond

A bond must be in writing signed by the sureties under oath. It must include a statement that the sureties are jointly and severally liable on the obligations of the statute providing for the bond, and the address at which the principal and sureties may be served with notices, papers, and other documents under the Bond and Undertaking Law (*Code Civ. Proc. §§ 995.010-996.560*) [*Code Civ. Proc. § 995.320(a)(1), (2)*]. If the amount of the bond is based on the value of property or an interest in property, a description of the property or interest, and either the principal's estimate of the value of the property or interest, or, if given pursuant to the estimate of the beneficiary or court, the value as so estimated, must also be given in the bond [*Code Civ. Proc. § 995.320(a)(3)*].

[4] Declaration of Qualifications

A bond that is given by personal sureties must be accompanied by a declaration of qualifications of each surety [*Code Civ. Proc. § 995.520*; *see § 538.191*].

[5] Stipulations Limiting Liability

If the amount of the bond exceeds $10,000 and is executed by more than two personal sureties, the affidavit may state that a personal surety is worth less than the amount of the bond and the bond may stipulate that the liability of the surety is limited to the worth of the surety stated in the affidavit, so long as the aggregate worth of all sureties executing the bond is twice the amount of the bond [*Code Civ. Proc. § 995.520(d)*].

[6] California Legal Forms

For forms of bonds and undertakings for use in other than an action or proceeding, e.g., license or workers compensation bonds, see California Legal Forms, Ch. 79, *Suretyship, Guaranty, and Indemnity*

[7] State Statutes

Bond and Undertaking Law. *Code Civ. Proc. §§ 995.010-996.560*

Contents of bond. *Code Civ. Proc. § 995.320*

Form of bond. *Code Civ. Proc. § 995.330*

Bond and undertaking interchangeable. *Code Civ. Proc. § 995.210*

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Chapter 538 SURETYSHIP, BONDS, AND UNDERTAKINGS
PART IV. FORMS
B. Bonds And Undertakings
1. Statutory Bonds And Undertakings

47-538 California Forms of Pleading and Practice--Annotated § 538.191

§ 538.191 Declaration [Code Civ. Proc. § 2015.5] of Qualifications of Personal Surety [Code Civ. Proc. § 995.520]

[1] FORM Declaration [Code Civ. Proc. § 2015.5] of Qualifications of Personal Surety [Code Civ. Proc. § 995.520]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	DECLARATION OF _____ [*name*]
_____ [*name*],	)	OF
Defendant.	)	QUALIFICATIONS OF SURETY
	)	[*Code Civ. Proc. §§ 995.520, 2015.5*]
	)	

_____

I, _____ [*name*], declare:

1. I am one of the personal sureties who executed the _____ [bond *or* undertaking] pursuant to _____ [*specify code sections requiring bond or undertaking*] in the above-entitled matter and make this declaration in support of the _____ [bond *or* undertaking].

2. I am not an officer of the court or a member of the State Bar of California and am a resident and _____ [an owner of real property *or* householder] in California. My occupation is: _____ [*specify*]. My residence address is: _____ [*street address and city*]; my business address is: _____ [*street address and city*].

[*EITHER*]

3. I am worth $_____, the amount of the _____ [bond *or* undertaking], in _____ [real *and/or* personal] property situated in California, over and above all my debts and liabilities, exclusive of property exempt from enforcement of a money judgment.

[*OR, if the amount of the bond exceeds $10,000, is executed by more than two sureties, and the aggregate worth of all sureties executing the bond is twice the amount of the bond*]

3. I am worth $_____, which is an amount less than the amount of the _____ [bond *or* undertaking], as provided in Sec tions 995.510(b) and *995.520(d) of the Code of Civil Procedure*, in _____ [real *and/or* personal property] situated in California, over and above all my debts and liabilities, exclusive of property exempt from enforcement of a money judgment.

[*AND, if the amount of the bond exceeds $5,000*]

4. The property belonging to me and relied on by me as qualifying me on the _____ [bond *or* undertaking], and my best estimate of the fair market value of each item of property, is as follows: _____ [*describe sufficiently for identification of each item, and estimate fair market value of each item*].

5. The nature of my interest in each item of property is _____ [*specify, e.g.*, owner in fee].

[*EITHER*]

6. The property is subject to no charges or liens, of public record or otherwise, known to me. Nor is the property subject to any impediment or cloud known to me on the free right of possession, use, benefit, or enjoyment.

[*OR*]

6. The property is subject to the following charges and/or liens: _____ [*specify, giving amounts*]. Other than the foregoing charges and/or liens, the property is not subject to any other impediments or cloud known to me on the free right of possession, use, benefit, or enjoyment.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature of surety*]

[2] Use of Form

This declaration of qualifications is for use by a personal surety giving a bond or undertaking. Any bond or undertaking given by personal sureties must be accompanied by a declaration of the qualifications of each surety [*Code Civ. Proc. § 995.520*].

[3] Contents of Declaration

The affidavit (or declaration under *Code Civ. Proc. § 2015.5*) must contain all of the following information [*Code Civ. Proc. § 995.520(b)*]:

- The name, occupation, residence address, and business address (if any) of the surety.

- A statement that the surety is a resident, and either an owner of real property or householder, within California.

- A statement that the surety is worth the amount of the bond in real or personal property, or both, situated in California, over and above all debts and liabilities, exclusive of property exempt from enforcement of a money judgment.

If the amount of the bond exceeds $5,000, the affidavit or declaration must contain, in addition to the information required by *Code Civ. Proc. § 995.520(b)*, all of the following information [*Code Civ. Proc. § 995.520(c)*]:

- A description sufficient for identification of real and personal property situated in California, and the nature of the surety's interest therein that qualifies the surety on the bond.

- The surety's best estimate of the fair market value of each item of property.

- A statement of any charge or lien and its amount, known to the surety, whether of public record or not, against any item of property.

- Any other impediment or cloud known to the surety on the free right of possession, use, benefit, or enjoyment of the property.

If the amount of the bond exceeds $10,000 and is executed by more than two sureties, the affidavit or declaration may state that the surety is worth less than the amount of the bond and the bond may stipulate that the liability of the surety is limited to the worth of the surety stated in the affidavit or declaration, as long as the aggregate worth of all sureties executing the bond is twice the amount of the bond [*Code Civ. Proc. § 995.520(d)*].

[4] State Statutes

Worth of personal surety may be less than amount of bond. *Code Civ. Proc. § 995.510(b)*

Declaration of qualification of personal surety. *Code Civ. Proc. § 995.520*

Declarations. *Code Civ. Proc. § 2015.5*

[5] Cross References

For general forms for declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

For a related form, *see § 538.190*.

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47-538 California Forms of Pleading and Practice--Annotated § 538.192

§ 538.192 Notice of Motion Objecting to Bond or Undertaking [Code Civ. Proc. §§ 995.910-995.960]--Amount of Bond or Undertaking Insufficient or Sureties Insufficient [Code Civ. Proc. § 995.920]

[1] FORM Notice of Motion Objecting to Bond or Undertaking [Code Civ. Proc. §§ 995.910-995.960]--Amount of Bond or Undertaking Insufficient or Sureties Insufficient [Code Civ. Proc. § 995.920]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION OBJECTING TO SUFFICIENCY OF BOND OR UNDERTAKING
vs.	)	
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

To _____ [*identify party, e.g.*, plaintiff], _____ [*name of principal*] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], California,

_____ [*specify party, e.g.*, defendant], _____ [*name of beneficiary*] will, and hereby does, move for an order determining the sufficiency of the _____ [bond *or* undertaking] given for _____ [*state purpose*] as provided by _____ [*specify code sections requiring bond or undertaking*]; and _____ [*specify relief desired, e.g.*, increasing the amount of the _____ (bond *or* undertaking) from $_____ to $_____, which _____ (*specify party, e.g.*, defendant) estimates would be a sufficient amount for the _____ (bond *or* undertaking) *and/or* requiring that sufficient sureties on the _____ (bond *or* undertaking) be provided]. The motion will be made on the ground(s) that _____ [_____(*name(s*)), the _____ (surety *or* sureties) on the above-mentioned _____ (bond *or* undertaking) is/are insufficient because _____ (*specify reason(s) for insufficiency of sureties*) *and/or* the amount of the _____ (bond *or* undertaking) is insufficient because _____ (*specify why amount is insufficient*) *and/or* the _____ (bond *or* undertaking) is insufficient because _____ (*specify any other cause for insufficiency*)].

[*ADD, if a ground for objection is that the value of property or an interest in property on which the amount of the bond is based exceeds the value estimated on the bond*]

The estimate of _____ [*name of beneficiary*], of the fair market value of the _____ [property *or* interest in the property] on which the amount of the above-mentioned _____ [bond *or* undertaking] is based is $_____.

[*CONTINUE*]

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s*)] [, on the attached certificate of the county clerk], on the memorandum of points and authorities served and filed herewith, on the papers and records, and file herein, and on such oral and documentary evidence as may be presented on the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

CAUTION:
A supporting memorandum must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; see *Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This notice of motion is for use by the beneficiary of a bond or undertaking given in an action or proceeding to object to the sufficiency of the bond or undertaking [*Code Civ. Proc. §§ 995.910, 995.920*]. The beneficiary may object to a bond on the grounds that the sureties are insufficient, that the amount of the bond is insufficient, or that the bond, from any other cause is insufficient [*Code Civ. Proc. § 995.920*].

The form may be used to object to the sufficiency of personal sureties or admitted surety insurers, but an objection to

the sufficiency of an admitted surety insurer must include one or both of the following: (1) the county clerk's certificate stating that the insurer is not listed as an admitted surety insurer on the web site of the Department of Insurance or (2) an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) stating facts that establish insufficiency of the insurer [*see Code Civ. Proc. § 995.650*]. For further discussion of objecting to sufficiency of admitted surety insurer, see *§ 538.56[8]*.

[3] Form of Objection

The objection must be in writing and must be made by noticed motion. The notice of motion must specify the precise grounds for the objection, and if a ground for the objection is that the amount of the bond is insufficient, the notice of motion must state the reason for the insufficiency and include an estimate of the amount that would be sufficient [*Code Civ. Proc. § 995.930(a)*].

Although the statute requires objections to be made by "noticed motion," a court of appeal has held that an ex parte motion constitutes substantial compliance if the principal and the court had actual notice of the objection and the other requirements of the statute were met [*ABBA Rubber Co. v. Seaquist (1991) 235 Cal. App. 3d 1, 11-13, 286 Cal. Rptr. 518]* .

[4] Time for Objection

The objection must be made within 10 days after service of a copy of the bond on the beneficiary or such other time as is required by the statute providing for the bond [*Code Civ. Proc. § 995.930(b)*]. Service on the principal of the objection and notice of motion and proof of service are made pursuant to *Code Civ. Proc. §§ 1010-1013a* [*see* Law Revision Commission comment to *Code Civ. Proc. § 995.930*; for discussion, a procedural guide, and forms relating to service of summons and proof of service, *see* Ch. 518, *Service of Summons and Papers*]. Unless the parties otherwise agree, the hearing on the objection will be held not less than two or more than five days after service of the notice of motion [*Code Civ. Proc. § 995.950(a)*].

[5] Cross References

For general forms for notices of motion, see Ch. 372, *Motions and Orders*

[6] State Statutes

Objections to bonds and undertakings generally. *Code Civ. Proc. §§ 995.910-995.960*

Objection to sufficiency of admitted surety insurers. *Code Civ. Proc. § 995.650*

Time within which to object to sufficiency of sureties. *Code Civ. Proc. § 995.930(b)*

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47-538 California Forms of Pleading and Practice--Annotated § 538.193

§ 538.193 Declaration in Support of Motion Objecting to Bond or Undertaking [Code Civ. Proc. §§ 995.910-995.960]--Amount of Bond or Undertaking Insufficient or Sureties Insufficient [Code Civ. Proc. § 995.920]

[1] FORM Declaration in Support of Motion Objecting to Bond or Undertaking [Code Civ. Proc. §§ 995.910-995.960]--Amount of Bond or Undertaking Insufficient or Sureties Insufficient [Code Civ. Proc. § 995.920]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____
vs.	)	[*name*] IN SUPPORT OF MOTION OBJECTING
_____ [*name*],	)	TO SUFFICIENCY OF BOND OR UNDERTAK-
Defendant.	)	ING
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* the defendant and beneficiary] on a _____ [bond *or* undertaking] in the amount of $_____ given by plaintiff as principal in the above-entitled

action.

[*EITHER, if objecting to amount of bond or undertaking*]

2. That $_____, the amount of the _____ [bond *or* undertaking] given for _____ [*state purpose*] as provided by _____ [*state code sections requiring bond or undertaking*], is insufficient because _____ [*state reason bond is insufficient*]. A _____ [bond *or* undertaking] in the amount of $_____ would be sufficient.

[*AND/OR, if objection is made to value of property on which bond is based*]

2. That the property on which the _____ [bond *or* undertaking] is based has a value of $_____. The value estimated in the _____ [bond *or* undertaking] was $_____. The true value of the property therefore exceeds the value estimated in the _____ [bond *or* undertaking].

[*AND/OR, if objecting to sufficiency of a surety*]

2. That _____ [*name of surety*], the surety on the _____ [bond *or* undertaking], is insufficient because _____ [*state reason surety is insufficient, e.g.,* the assets of _____ (*name of surety*) do not exceed his/her/its liabilities in an amount equal to or in excess of the amount of the _____ (bond *or* undertaking)].

[*AND/OR, if objecting to sufficiency of admitted surety insurer on ground of non-certification*]

2. That the clerk of the above-entitled Court issued to me a certificate [, which is attached hereto,] stating that the certificate of authority of _____ [*name of admitted surety insurer*] issued by the Insurance Commissioner authorizing the insurer to transact surety insurance has been _____ [surrendered *or* revoked *or* canceled *or* annulled *or* suspended] and that renewed authority has not been granted.

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature of declarant*]

[2] Use of Form

This declaration is for use by the beneficiary for submission to the court when objecting to the sufficiency of the amount of the bond or undertaking or to the sufficiency of the sureties giving the bond or undertaking [*see Code Civ. Proc. § 995.930*]. The declaration includes the grounds for the objection [*see Code Civ. Proc. §§ 995.650, 995.920*]. If the ground for objection is that the value of property or an interest in property on which the amount of the bond is based exceeds the value estimated in the bond, the declaration must include a statment of the beneficiary's estimate of the market value of the property or interest in property [*see Code Civ. Proc. § 995.940(a)*].

An affidavit or declaration made under the Bond and Undertaking Law (*Code Civ. Proc. §§ 995.010-996.560*) must conform to the standards prescribed for an affidavit made pursuant to *Code Civ. Proc. § 437c* [*Code Civ. Proc. § 995.040*]. *Code Civ. Proc. § 437c(d)* requires that supporting and opposing affidavits or declarations must be made by any person on personal knowledge, must set forth admissible evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein [*Code Civ. Proc. § 437c(d)*].

[3] State Statutes

Declaration in lieu of affidavit. *Code Civ. Proc. § 2015.5*

[4] Cross References

For general forms for affidavits and declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

For a related form, *see § 538.192*.

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47-538 California Forms of Pleading and Practice--Annotated § 538.194

§ 538.194 Order Determining Sufficiency or Insufficiency of Bond or Undertaking [Code Civ. Proc. § 995.960]

[1] FORM Order Determining Sufficiency or Insufficiency of Bond or Undertaking [Code Civ. Proc. § 995.960]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER DETERMINING SUFFICIENCY OR IN-
Plaintiff,	)	SUFFICIENCY OF BOND OR UNDERTAKING
vs.	)	[*Code Civ. Proc. § 995.960*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

The motion of _____ [*identify party, e.g.*, defendant] _____ [*name of beneficiary*] objecting to the sufficiency of the _____ [bond *or* undertaking] for _____ [*state purpose of bond or undertaking*] as provided by _____ [*specify code sections requiring bond or undertaking*] came on regularly for hearing before this court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*] and defendant appeared by counsel _____ [*name*].

The court, having considered the objection of _____ [*moving party*], and the _____ [affidavit(s) *or* declaration(s)], and other documents in support of and in opposition to the

motion, having heard the arguments of counsel, and being fully advised in the matter, finds that the _____ [bond *or* undertaking] is _____ [sufficient and is _____ (approved *or* accepted) by the Court *or specify in what respect the bond is insufficient, e.g.*, insufficient in amount)].

[*AND, if the court determines the bond is sufficient*]

IT IS, THEREFORE, ORDERED that the motion be, and hereby is, denied.

[*OR, if the court determines the bond is insufficient*]

IT IS, THEREFORE, ORDERED that the motion be, and hereby is, granted and that a _____ [bond *or* undertaking] in the amount of $_____ and with sufficient sureties be given by _____ [*identify party, e.g.*, plaintiff], _____ [*name of principal*].

IT IS FURTHER ORDERED that all rights obtained by giving the original _____ [bond *or* undertaking] in the above-entitled action shall immediately cease unless the _____ [bond *or* undertaking] herein required shall be executed and filed on or before _____ [*date within 5 days after date order made*].
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form is for use to determine the sufficiency of the bond or undertaking given in an action or proceeding. If the court determines that the bond or undertaking is insufficient, it court must specify in what respect the bond or undertaking is insufficient and order that a bond with sufficient sureties and in a sufficient amount be given within five days [*Code Civ. Proc. § 995.960(b)(1)*].

[3] State Statutes

Order determining sufficiency of bond or undertaking. *Code Civ. Proc. § 995.960*

Order defined. *Code Civ. Proc. §§ 1003, 1064*

[4] Cross References

For general forms for orders, see Ch. 372, *Motions and Orders*

For related forms, *see §§ 538.192* and *538.193*.

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47-538 California Forms of Pleading and Practice--Annotated § 538.195

§ 538.195 Notice of Motion for Order--Determining Bond or Undertaking Has Become Insufficient [Code Civ. Proc. § 996.010(a), (b)] and for Sufficient New, Additional, or Supplemental Bond [Code Civ. Proc. § 996.010(c)] or Determining Bond or Undertaking Is Excessive and Reducing Amount [Code Civ. Proc. § 996.030(a)]

[1] FORM Notice of Motion for Order--Determining Bond or Undertaking Has Become Insufficient [Code Civ. Proc. § 996.010(a), (b)] and for Sufficient New, Additional, or Supplemental Bond [Code Civ. Proc. § 996.010(c)] or Determining Bond or Undertaking Is Excessive and Reducing Amount [Code Civ. Proc. § 996.030(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION FOR ORDER AND MOTION _____ [FOR SUFFICIENT NEW, ADDITIONAL, OR SUPPLEMENTAL *or* REDUCING] _____ [BOND *or* UNDERTAKING]
vs.	)	
_____ [*name*],	)	
Defendant.	)	[_____ (*Code Civ. Proc. § 996.010(a)-(c) or Code Civ. Proc. § 996.030(a)*)]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

To _____ [*specify party, e.g.*, plaintiff] and his/her attorney of record:

[*EITHER, if bond is insufficient*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division)] _____ of this court, located at _____ [*street address*], _____ [*city*], California, _____ [*specify moving party, e.g.*, defendant _____ (*name*)] will, and hereby does, move for an order determining that the amount of the bond given in the above-entitled action _____ [is *or* has become] insufficient so that a new, additional, or supplemental bond may be required. The motion will be made on the grounds that the _____ [surety *or* amount of the bond] is insufficient because _____ [*specify precisely changed circumstances causing insufficiency, e.g.*, one of the sureties filed for bankruptcy on _____ [*date*].

[*OR, if bond is excessive*]

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division)] _____ of this court, located at _____ [*street address*], _____ [*city*], California, _____ [*specify moving party, e.g.*, defendant _____ (*name*)] will move for an order determining that the amount of the bond given in the above-entitled action _____ [is *or* has become] excessive so that a new bond may be required. The motion will be made on the grounds that the amount of the bond is excessive because _____ [*specify precise grounds for objection to amount of bond, e.g.*, defendant's estimate of expenses which may be incurred in connection with the action is unreasonably high].

[*CONTINUE*]

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name*(s)] and the memorandum of points and authorities served and filed herewith, on the papers and records on file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

CAUTION:

A supporting memorandum must be served and filed with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. § 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* . The motion must also be supported by affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*Code Civ. Proc. §§ 996.010(b), 1005, 1010*; for a form of declaration, *see § 538.196*].

[2] Use of Form

This notice of motion is for use by a beneficiary when a bond or undertaking given in an action or proceeding has from any cause become insufficient [*see Code Civ. Proc. § 996.010*]. The form may also be used by the principal to move for an order reducing the amount of the bond or undertaking [*see Code Civ. Proc. § 996.030*]. The motion is heard and notice of motion is given in the same manner as an objection to a bond or undertaking pursuant to *Code Civ. Proc. §§ 995.910-995.960* [*Code Civ. Proc. §§ 996.010(b), 996.030(b)*]. The motion may be brought when circumstances have changed making the bond or undertaking insufficient or excessive or when good cause can be shown for having failed to make an objection to the bond or undertaking within 10 days after service of a copy of the bond on the beneficiary or as is required by the statute providing for the bond [*see Code Civ. Proc. §§ 995.930(b), (c), 996.010*].

Since the motion is deemed to be an objection to the bond and notice is given in the same manner as an objection to the bond, the grounds for the motion should be specified precisely, and if a ground is that the amount of the bond is insufficient, the reason for the insufficiency and an estimate of the amount that would be sufficient should be stated [*see Code Civ. Proc. §§ 995.930(a), 996.010(b)*].

[3] Cross References

For general forms of noticed motions, see Ch. 372, *Motions and Orders*

[4] State Statutes

Objections to bonds. *Code Civ. Proc. §§ 995.910-995.960*

Insufficient bond in action or proceeding. *Code Civ. Proc. § 996.010*

Excessive bonds. *Code Civ. Proc. § 996.030*

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47-538 California Forms of Pleading and Practice--Annotated § 538.196

§ 538.196 Declaration Showing Bond or Undertaking is Insufficient [Code Civ. Proc. §§ 996.010(b), 996.020(a)] or Excessive [Code Civ. Proc. § 996.030(b)]

[1] FORM Declaration Showing Bond or Undertaking is Insufficient [Code Civ. Proc. §§ 996.010(b), 996.020(a)] or Excessive [Code Civ. Proc. § 996.030(b)]

SUPERIOR COURT OF CALIFORNIA,

COUNTY OF _____

	)	
	)	NO. _____
	)	DECLARATION OF _____
_____ [*name*],	)	[*name*] SHOWING _____
Plaintiff,	)	[BOND *or* UNDERTAKING]
vs.	)	_____
_____ [*name*],	)	[INSUFFICIENT *or* EXCESSIVE]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

I, _____ [*name*], declare:

1. I am _____ [the defendant and beneficiary *or* the plaintiff and principal] on a _____ [bond or undertaking] in the amount of $_____ given in the above-entitled action.

2. That _____ [*specify the reason that the bond has become insufficient or that the bond is excessive, e.g.*, _____ (*name*), one of the sureties, filed for bankruptcy on _____ (*date*) *or* defendant's estimate of expenses which may be incurred in connection with the action is unreasonably high in that _____ (*specify supporting facts*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature of declarant*]

[2] Use of Form

This declaration is for use in support of a motion for an order determining that a bond or undertaking given or ordered in an action or proceeding has become insufficient or is excessive [*Code Civ. Proc. §§ 996.010, 996.030*]. This declaration may also be used to show that the bond or undertaking given other than in an action or proceeding has from any cause become insufficient because the sureties are insufficient or because the amount of the bond or undertaking is insufficient, or when the amount of the bond or undertaking is excessive [*Code Civ. Proc. §§ 996.020(a), 996.030(b)*].

An affidavit or declaration made under the Bond and Undertaking Law (*Code Civ. Proc. §§ 995.010-996.560*) must conform to the standards prescribed for an affidavit made pursuant to *Code Civ. Proc. § 437c* [*Code Civ. Proc. § 995.040*]. *Code Civ. Proc. § 437c(d)* requires that supporting and opposing affidavits or declarations must be made by any person on personal knowledge, must set forth admissible evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein [*Code Civ. Proc. § 437c(d)*].

[3] State Statutes

Affidavit showing bond or undertaking became insufficient. *Code Civ. Proc. §§ 996.010(b), 996.020(a)*

Affidavit showing bond or undertaking excessive. *Code Civ. Proc. § 996.030(b)*

Declarations in lieu of affidavit. *Code Civ. Proc. § 2015.5*

[4] Cross References

For general forms of affidavits and declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

For a related form, *see § 538.195*.

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B. Bonds And Undertakings
1. Statutory Bonds And Undertakings

47-538 California Forms of Pleading and Practice--Annotated § 538.197

§ 538.197 Order to Appear and Show Cause Why Determination of Insufficiency [Code Civ. Proc. § 996.020(a)] or Excessiveness [Code Civ. Proc. § 996.030(b)] of Bond or Undertaking Should Not Be Entered--Bond or Undertaking Given in Other Than Action or Proceeding

[1] FORM Order to Appear and Show Cause Why Determination of Insufficiency [Code Civ. Proc. § 996.020(a)] or Excessiveness [Code Civ. Proc. § 996.030(b)] of Bond or Undertaking Should Not Be Entered--Bond or Undertaking Given in Other Than Action or Proceeding

ORDER FOR _____ [PRINCIPAL *or* BENEFICIARY] TO APPEAR AND SHOW CAUSE WHY DETERMINATION OF _____ [INSUFFICIENCY *or* EXCESSIVENESS] OF _____ [BOND *OR* UNDERTAKING] SHOULD NOT BE ENTERED

To: _____ [*name of person required to appear*]:

IT IS HEREBY ORDERED that you appear before _____ [*specify officer to whom the bond was given or with whom a copy of the bond is filed or who is required to determine the sufficiency of the sureties or to approve the bond*], at _____ [*street address*], _____ [*city*], California, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, then and there to show cause, if any, why _____ [*specify same officer as above*] should not make a determination that the _____ [bond *or* undertaking] you gave for _____ [*state purpose*] pursuant to _____ [*specify code section requiring bond or undertaking*] is _____ [insufficient *or* excessive].
Dated: _____.

_____ [*signature*]
_____ [*title of officer*]

[2] Use of Form

This form is for use when a bond has been given or ordered in other than an action or proceeding, to order the principal to appear and show cause why a determination that the bond is insufficient should not be made, or to order the beneficiary to appear and show cause why a determination that the bond is excessive should not be made. The form is used by the officer to whom the bond was given or with whom a copy of the bond is filed or who is required to determine the sufficiency of the sureties or approve the bond [*Code Civ. Proc. §§ 995.160, 996.020(a), 996.030(a), (b)*]. The officer may serve an order to determine insufficiency of a bond if it is shown by the affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of a credible witness or it otherwise comes to the attention of the officer that the bond is or has become insufficient because the sureties are insufficient or because the amount of the bond is insufficient [*Code Civ. Proc. § 996.020(a)*]. A determination that a bond is excessive is made on affidavit or declaration of the principle in the same manner as an affidavit or declaration for a determination under *Code Civ. Proc. §§ 996.010-996.030* that a bond is insufficient [*Code Civ. Proc. § 996.030(b)*].

The order to show cause must name a day not less than three or more than 10 days after service [*Code Civ. Proc. § 996.020(a)*].

[3] Service

An order to show cause why a determination that the bond or undertaking is insufficient should not be made is served on the principal [*Code Civ. Proc. § 996.020(a)*]. An order to show cause why a determination that the amount of the bond or undertaking is excessive should not be made is served on the beneficiary [*Code Civ. Proc. § 996.030(b)*]. Service is made in the same manner as service of process in civil actions generally [*Code Civ. Proc. § 995.030*; *see Code Civ. Proc. §§ 413.10-417.40*].

[4] Failure to Appear

If, on the day named, the principal fails to appear or fails to show good cause why a determination that the bond or undertaking is insufficient should not be made, the officer may determine that the bond is insufficient and order a sufficient new, additional, or supplemental bond to be given [*Code Civ. Proc. § 996.020(b)*; *see Code Civ. Proc. § 996.030(b)* (determination of excessiveness of bond to be made in same manner and pursuant to same procedure as determination of insufficiency)].

[5] State Statutes

Affidavit of credible witness showing that bond or undertaking given in other than action or proceeding has become insufficient. *Code Civ. Proc. § 996.020(a)*

Affidavit of principal showing that bond or undertaking is excessive. *Code Civ. Proc. § 996.030(b)*

Declaration in lieu of affidavit. *Code Civ. Proc. § 2015.5*

[6] Cross References

For general forms of orders, see Ch. 372, *Motions and Orders*

For a related form, *see § 538.196*.

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1. Statutory Bonds And Undertakings

47-538 California Forms of Pleading and Practice--Annotated § 538.198

§ 538.198 Order for Sufficient New, Additional, or Supplemental Bond or Undertaking on Determination of Insufficiency of Bond or Undertaking [Code Civ. Proc. § 996.010(c)] or Reducing the Amount of the Bond or Undertaking on Determination of Excessiveness [Code Civ. Proc. § 996.030(a)]

[1] FORM Order for Sufficient New, Additional, or Supplemental Bond or Undertaking on Determination of Insufficiency of Bond or Undertaking [Code Civ. Proc. § 996.010(c)] or Reducing the Amount of the Bond or Undertaking on Determination of Excessiveness [Code Civ. Proc. § 996.030(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER _____ [FOR SUFFICIENT NEW, ADDITIONAL, OR SUPPLEMENTAL *or* REDUCING AMOUNT OF] _____ [BOND *or* UNDERTAKING] [_____ (*Code Civ. Proc. § 996.010(c) or Code Civ. Proc. § 996.030(a)*)]
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

The motion of _____ [*identify party, e.g.*, defendant] _____ [*name*] for an order _____ [requiring a sufficient new, additional, or supplemental *or* reducing the amount of the] _____ [bond *or* undertaking] came on regularly for hearing before this court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*] and defendant appeared by counsel _____ [*name*].

The court, having considered the _____ [affidavit(s) *or* declaration(s)], and other documents in support of and in opposition to the motion, having heard the arguments of counsel, and being fully advised in the matter finds that the _____ [bond *or* undertaking] filed by _____ [*identify party, e.g.*, plaintiff] is _____ [insufficient *or* excessive].

IT IS, THEREFORE, ORDERED that the motion be, and hereby is, granted.

[*EITHER*]

IT IS FURTHER ORDERED that a _____ [new *or* additional *or* supplemental] _____ [bond *or* undertaking] in the amount of $_____, and with sufficient sureties, be executed and filed on or before _____ [*date within a reasonable time not less than five days after date of order*], and that all rights obtained by giving the original _____ [bond *or* undertaking] in the above-entitled action shall immediately cease unless the _____ [bond *or* undertaking] herein required is executed and filed on or before _____ [*date mentioned above*].

[*OR*]

IT IS FURTHER ORDERED that the _____ [bond *or* undertaking] on file in the above-entitled action be reduced to the amount of $_____, and that in order to comply with this order, _____ [*identify party, e.g.*, plaintiff], _____ [*name of principal*], may give a new bond for the reduced amount, and that the sureties may be the same sureties as on the original bond.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form is for use to grant a motion to require a new, additional, or supplemental bond or undertaking or to reduce the amount of the bond or undertaking when the bond or undertaking has become insufficient or has been determined to be excessive. When the bond is given or ordered in an action or proceeding, the court determination is made on noticed motion of a party [*Code Civ. Proc. §§ 996.010(b), 996.030(b)*; *see § 538.195*]. The determination that a bond or undertaking has become insufficient or is excessive may also be made by the court on its own motion [*Code Civ. Proc. § 996.010(b)*].

This form may be modified for use when the bond has been given or ordered in other than an action or proceeding and the officer to whom the bond is given or with whom a copy of the bond is filed or who is required to determine the sufficiency of the sureties or approve the bond makes a determination of insufficiency or excessiveness on an order to show cause [*see Code Civ. Proc. §§ 995.160, 996.020(a), 996.030(a), (b)*; *see § 538.197*].

[3] Failure to Give Sufficient Bond

If a sufficient bond is not given within the time required by the court order, all rights obtained by giving the original bond immediately cease. The court will issue an order to that effect on ex parte motion by the beneficiary [*see Code Civ. Proc. § 996.010(d)*; for general forms of ex parte application, *see* Ch. 372, *Motions and Orders*]. If the bond or undertaking was given in other than an action or proceeding and an officer issued an order for a sufficient new, additional, or supplemental bond and a sufficient bond is not given within 10 days after the order, the officer will make an order vacating the rights obtained by giving the original bond, including declaring vacant any office and suspending or revoking any license or certificate for which the bond was given [*Code Civ. Proc. § 996.020*].

[4] Reduced Bond

If the bond is determined to be excessive, the principal may give a new bond for the reduced amount. The sureties may be the same as on the original bond [*Code Civ. Proc. § 996.030(c)*].

[5] State Statutes

Insufficient and excessive bonds. *Code Civ. Proc. §§ 996.010-996.030*

New, additional, and supplemental bonds. *Code Civ. Proc. §§ 996.210-996.250*

Order determining insufficiency and for sufficient new, additional or supplemental bond. *Code Civ. Proc. §§ 996.010(c), 996.020(b)*

Order determining excessiveness and reducing amount. *Code Civ. Proc. § 996.030(a)*

Order defined. *Code Civ. Proc. §§ 1003, 1064*

[6] Cross References

For general forms of orders, see Ch. 372, *Motions and Orders*

For related forms, *see §§ 538.195 -538.197*.

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47-538 California Forms of Pleading and Practice--Annotated § 538.199

§ 538.199 Application by Surety for Order Releasing Surety [Code Civ. Proc. § 996.110(a)]

[1] FORM Application by Surety for Order Releasing Surety [Code Civ. Proc. § 996.110(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	APPLICATION FOR ORDER RELEASING
_____ [*name*],	)	SURETY [AND SUPPORTING DECLARATION
Plaintiff,	)	OF _____
vs.	)	(*name*)]
_____ [*name*],	)	[*Code Civ. Proc. § 996.110(a)*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

_____ [*Name of surety to be released*], surety on the bond of _____ [*identify party who is principal, e.g.*, plaintiff] _____ [*name*], hereby applies for an order, to be made after hearing, to be released from liability on the bond filed in this _____ [action *or* proceeding]. This application is made on the grounds that _____ [*specify reason for seeking release*] and that _____ [release would not reduce the amount of the bond or the number of sureties below the minimum required by the statute providing for the bond *or* no injury would result to the beneficiary from substituttion of a

sufficient surety].

[DECLARATION]

[1. _____ (*In this and successively numbered paragraphs, set out the facts supporting the application*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

CAUTION:
A notice of hearing on the application must be served with it [*Code Civ. Proc. § 996.110*; *see § 538.200*]. A supporting memorandum should also be served and filed with this notice of application [*see Code Civ. Proc. §§ 1003, 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*; for discussion and forms, *see* Ch. 417, *Points and Authorities*].

[2] Use of Form

This application is for use by a surety on a bond or undertaking given in an action or proceeding who applies for release from liability on the bond or undertaking. The surety may apply for release at any time and must serve on the principal and the beneficiary a copy of the application and a notice of hearing on the application [*Code Civ. Proc. § 996.110(a), (c)*; for form of notice of hearing on the application, *see § 538.200*]. Release of the surety does not relieve the surety of liability arising prior thereto [*Code Civ. Proc. § 996.150(a)*]. As a matter of practice, the supporting affidavit (or declaration under *Code Civ. Proc. § 2015.5*) may be included in the application. If not included, for a general form of declaration in support of a motion or application, see Ch. 372, *Motions and Orders* .

[3] Cross References

For discussion and forms relating to applications for orders generally, see Ch. 372, *Motions and Orders* .

[4] Statutes

Service as to be in same manner as in civil actions generally. *Code Civ. Proc. § 995.030*

Release of surety from bond or undertaking given in action or proceeding. *Code Civ. Proc. § 996.110*

Hearing on application. *Code Civ. Proc. § 996.120*

Order of release on substitution of surety. *Code Civ. Proc. § 996.130(b)*

Liability of released surety. *Code Civ. Proc. § 996.150*

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47-538 California Forms of Pleading and Practice--Annotated § 538.200

§ 538.200 Notice of Hearing on Application by Surety for Order Releasing Surety [Code Civ. Proc. § 996.110(a), (c)]

[1] FORM Notice of Hearing on Application by Surety for Order Releasing Surety [Code Civ. Proc. § 996.110(a), (c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF HEARING ON APPLICATION FOR
Plaintiff,	)	ORDER RELEASING SURETY
vs.	)	[*Code Civ. Proc. § 996.110(a), (c)*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]
_____		

To _____ [*identify party who is principal, e.g.*, plaintiff], _____ [*name*], and to _____ [*name*], his/her attorney of record, and to _____ [*identify party who is beneficiary, e.g.*, defendant], _____ [*name*], and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that _____ [*moving party*] has filed an application for an order to be

released as surety, a copy of which is attached hereto and made a part hereof, and that a hearing on the application will be held in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], on _____ [*date*], at _____ [*time*].

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Use of Form

This form of notice of hearing is for use by a surety on a bond or undertaking given in an action or proceeding who applies for re lease from liability on the bond or undertaking to give notice to the principal and the beneficiary that an application for release from liability on the bond or undertaking has been filed and will be heard on the date and at the time specified. The notice of hearing on the application is served on the principal and beneficiary together with a copy of the application not less than 15 days before the date set for hearing [*Code Civ. Proc. § 996.110(c)*; *see Code Civ. Proc. §§ 413.10-417.40, 995.030* (manner of service); for a discussion of potential confict between the notice period required for this application and the notice period on a principal's application for an order substituting a new surety, *see § 538.202[3]*].

[3] Cross References

For related forms, *see §§ 538.199, 538.201 -538.204*.

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47-538 California Forms of Pleading and Practice--Annotated § 538.201

§ 538.201 Application by Principal for Order Substituting Sureties [Code Civ. Proc. § 996.110(b)]

[1] FORM Application by Principal for Order Substituting Sureties [Code Civ. Proc. § 996.110(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	APPLICATION FOR ORDER SUBSTITUTING SURETIES [AND SUPPORTING DECLARATION OF _____ (*name*)] [*Code Civ. Proc. § 996.110(b)*]
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		[Trial Date: _____]

_____

_____ [*Identify party who is principal, e.g.*, Plaintiff] _____ [*name*], hereby applies for an order, to be made after hearing, substituting _____ [*name of proposed surety*] for _____ [*name of original surety*], surety on the bond of _____ [*identify party who is principal, e.g.*, plaintiff] _____ [*name*]. This application is made on the ground that the surety has sought release from the bond or undertaking.

[DECLARATION]

[1. _____ (*In this and successively numbered paragraphs, set out the facts supporting the application*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

CAUTION:
A notice of hearing on the application must be served with it [*Code Civ. Proc. § 996.110*; *see § 538.202*]. A supporting memorandum should also be served and filed with this notice of application [*see* Code *Civ. Proc. §§ 1003, 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*; for discussion and forms, *see* Ch. 417, *Points and Authorities*].

[2] Use of Form

This application is for use by a principal to apply for the substitution of sureties. The principal may apply for substitution if a surety has applied for release from the bond or undertaking and must serve on the surety and the beneficiary a copy of the application and a notice of hearing on the application [*Code Civ. Proc. § 996.110(b), (c)*; for form of notice of hearing on the application, *see § 538.202*].

[3] Statutes

Application by principal for substitution of sureties. *Code Civ. Proc. § 996.110(b)*

Hearing on application. *Code Civ. Proc. § 996.120*

Liability of substitute surety. *Code Civ. Proc. § 996.130(a)*

Failure to give substitute surety. *Code Civ. Proc. § 996.140*

[4] Cross References

For related forms, *see §§ 538.199, 538.200, 538.202 -538.204*.

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47-538 California Forms of Pleading and Practice--Annotated § 538.202

§ 538.202 Notice of Hearing on Application By Principal for Order Substituting Sureties [Code Civ. Proc. § 996.110(b), (c)]

[1] FORM Notice of Hearing on Application By Principal for Order Substituting Sureties [Code Civ. Proc. § 996.110(b), (c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF HEARING ON APPLICATION FOR
Plaintiff,	)	ORDER SUBSTITUTING SURETIES
vs.	)	[*Code Civ. Proc. § 996.110(b), (c)*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

To _____ [*identify party who is beneficiary, e.g.*, plaintiff], _____ [*name*], and to _____ [*name*], his/her attorney of record, and to _____ [*name of surety*] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that _____ [*moving party*] has filed an application for an order to substitute another surety for the original surety on the bond or undertaking filed in this action or proceeding, a copy of

which is attached hereto and made a part hereof, and that a hearing on the application will be held in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], on _____ [*date*], at _____ _____ [*time*],
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

[2] Use of Form

This notice of hearing on the application for substitution of sureties is for use by a principal to give notice to the surety and the beneficiary that an application for substitution of sureties has been filed and that it will be heard on the date and time specified [*Code Civ. Proc. § 996.110(c)*].

[3] Notice Period

The notice of hearing on the application is served on the surety and beneficiary together with a copy of the application not less than 15 days before the date set for hearing [*Code Civ. Proc. § 996.110(c)*; *see Code Civ. Proc. §§ 413.10-417.40, 995.030* (manner of service)].

The requirement that both the surety applying for release and the principal applying for an order substituting a new surety must give at least 15 days notice of hearing makes for an apparent potential conflict [*see Code Civ. Proc. § 996.110*]. Since the principal's application is made in response to the surety's application for release [*see Code Civ. Proc. § 996.110(b)*], it would be possible that the principal's application for substitution could not be timely served in order to be decided at the time of the hearing on the surety's application for release. This is an anomolous situation, in that *Code Civ. Proc. § 996.120*, relating to the order the court may make "upon the hearing of the application," requires the court to consider factors relating to both release and substitution, and thus seems to contemplate a single hearing. It is not clear how this conflict would be resolved when it arises. However, since the two applications may be complementary, counsel for the surety may desire to give enough notice of the hearing on the application for release so that the principal's application for substitution can be heard at the same time.

[4] Cross References

For a related form, *see § 538.201*.

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47-538 California Forms of Pleading and Practice--Annotated § 538.203

§ 538.203 Order for Substitution of Sufficient Surety Within Reasonable Time [Code Civ. Proc. § 996.120]

[1] FORM Order for Substitution of Sufficient Surety Within Reasonable Time [Code Civ. Proc. § 996.120]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	ORDER FOR SUBSTITUTION OF SUFFICIENT
Plaintiff,	)	SURETY
vs.	)	[*Code Civ. Proc. § 996.120*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

The application of _____ [*name of applicant*] for an order _____ [releasing him/her/it from liability on the _____ [bond *or* undertaking] of _____ [*identify party who is principal, e.g.*, plaintiff] _____ [*name*] filed in this _____ [action *or* proceeding] came on regularly for hearing by the court on _____ [*date*]. _____ [*Name of surety*] appeared by counsel _____ [*name*]; _____ [*name(s) of principal and/or beneficiary or beneficiaries*] appeared by counsel _____ [*name(s)*].

On proof made to the court, the court has determined that release of the surety would reduce the _____

[amount of the bond *or* number of sureties] below the minimum required by the statute providing for the bond, and that substitution of a sufficient surety is necessary, therefore

IT IS ORDERED that _____ [*name of principal*], the principal on the bond, shall provide a sufficient surety to be substituted for _____ [*name of surety requesting release*] within _____ [*specify reasonable time period*].
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use to order the substitution of a sufficient surety within such time as appears reasonable when a surety applies for release from liability on a bond, and the principal has not applied for substitution of another surety for the original surety [*see Code Civ. Proc. § 996.110*].

If the court determines that release of the surety would not reduce the amount of the bond or the number of sureties below the minimum required by the statute providing for the bond, substitution is not necessary and the court must order release of the surety [*Code Civ. Proc. § 996.120*]. If the court determines that no injury would result from substitution of the surety, the court must order the substitution of a sufficient surety within a reasonable time [*Code Civ. Proc. § 996.120*]. The surety requesting release will not be released until a sufficient surety is substituted [*see Code Civ. Proc. § 996.130(b)*]; *see also § 538.204* for an order releasing the surety].

[3] State Statutes

Order for substitution of sufficient surety within reasonable time. *Code Civ. Proc. § 996.120*

Release of surety on substitution of sufficient surety. *Code Civ. Proc. § 996.130(b)*

[4] Cross References

For related forms, *see §§ 538.199 -538.202, 538.204*.

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47-538 California Forms of Pleading and Practice--Annotated § 538.204

§ 538.204 Order Granting Application for Release and/or Substitution of Surety [Code Civ. Proc. § 996.120]

[1] FORM Order Granting Application for Release and/or Substitution of Surety [Code Civ. Proc. § 996.120]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER GRANTING APPLICATION(S) FOR
_____ [*name*],	)	_____ [RELEASE *and/or*
Plaintiff,	)	SUBSTITUTION OF SURETY]
vs.	)	[*Code Civ. Proc. § 996.120*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

The application(s) of _____ [*name(s) of applicant(s)*] for an order _____ [releasing _____ (*name of surety requesting release*) from liability *and/or* substituting _____ (*name of surety to assume liability*) for _____ (*name of surety requesting release*) as surety] on the _____ [bond *or* undertaking] of _____ [*identify party who is principal, e.g.,* plaintiff] _____ [*name*] filed in this _____ [action *or* proceeding] came on regularly for hearing by the court on _____ [*date*]. _____ [*Name(s) of surety and/or principal*] appeared by counsel _____ [*name(s)*]; _____ [*name(s) of beneficiary or*

beneficiaries] appeared by counsel _____ [*name(s*)].

On proof made to the satisfaction of the court that the application(s) ought to be granted,

IT IS ORDERED that the application(s) be, and it/they hereby is/are, granted and _____ [_____ (*name of surety requesting release*) is released from liability *and/or* (*name of surety assuming liability*) is substituted for _____ (*name of surety requesting release*)] on the _____ [bond *or* undertaking] of _____ [*identify party who is principal, e.g.*, plaintiff] _____ [*name*] filed in this _____ [action *or* proceeding].
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use to order the release of a surety and/or the substitution of a sufficient surety [*see Code Civ. Proc. § 996.120*]. It appears that an application for release of a surety and an application for substitution of sureties may be heard either separately or at the same time [*see Code Civ. Proc. §§ 996.110, 996.120*].

The court will only order release of the surety if no injury to the beneficiary would result from release of the surety. The court will order release of the surety without requiring substitution of a sufficient surety if release would not reduce the amount of the bond or the number of sureties below the minimum required by the statute providing for the bond. If the court determines that (1) the release of the surety would reduce the amount of the bond or the number of sureties below the minimum required by the statute providing for the bond and (2) no injury would result from substitution of the surety, and the principal has applied for substitution of sureties, the court will order both the release of the surety and the substitution of sureties. If, however, the principal has not applied for substitution of sureties under these circumstances, the court will first order substitution of sureties within such time as appears reasonable [*see Code Civ. Proc. § 996.120*; *see § 538.203*]. On substitution of a sufficient surety, the court will order the release and substitution of the surety [*Code Civ. Proc. § 996.130(b)*].

[3] State Statutes

Order of release and/or substitution of surety. *Code Civ. Proc. § 996.120*

[4] Cross References

For related forms, *see §§ 538.199 -538.203*.

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B. Bonds And Undertakings
1. Statutory Bonds And Undertakings

47-538 California Forms of Pleading and Practice--Annotated § 538.205

§ 538.205 Notice of Cancellation of or Withdrawal of Surety From Bond or Undertaking Given Other Than in Action or Proceeding [Code Civ. Proc. §§ 996.310, 996.320]

[1] FORM Notice of Cancellation of or Withdrawal of Surety From Bond or Undertaking Given Other Than in Action or Proceeding [Code Civ. Proc. §§ 996.310, 996.320]

TO: _____ [*specify board, officer, or other person authorized to approve or receive bond*]:

The undersigned is [a] surety on the _____ [bond *or* undertaking] of _____ [licensee *or* permittee], given on _____ [*date*], pursuant to Section _____ of the _____ Code.

Please take notice that the undersigned _____ [cancels *or* withdraws from] the bond and thus hereby terminates all liability under said bond.
Dated: _____

_____ [*signature of surety*]

[2] Use of Form

This form is for use by a surety to cancel or withdraw from a bond or undertaking given other than in an action or proceeding. The notice of cancellation or withdrawal is given to the officer to whom the bond was given in the same manner that the bond was given, notwithstanding *Code Civ. Proc. § 995.030* (manner of service of papers under Bond and Undertaking Law). The surety shall at the same time mail or deliver a copy of the notice of cancellation or withdrawal to the principal [*Code Civ. Proc. § 996.320*].

Cancellation or withdrawal of a surety is effective at the earliest of the following times: (1) 30 days after notice of cancellation or withdrawal is given, (2) if a new surety is substituted for the original surety, the date the substitution becomes effective, or (3) if a new bond is given, the date the new bond becomes effective [*Code Civ. Proc. § 996.330*].

[3] Statutes

Notice of cancellation or withdrawal of surety from bond or undertaking given in other than action or proceeding. *Code Civ. Proc. § 996.320*

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47-538 California Forms of Pleading and Practice--Annotated §§ 538.206-538.219

[Reserved]

§§ 538.206[Reserved]

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2. Enforcement Of Liability On Statutory Bonds

47-538 California Forms of Pleading and Practice--Annotated § 538.220

§ 538.220 Notice of Motion for Order Directing Collection, Sale, or Other Application of Deposit to Principal's Liability [Code Civ. Proc. § 995.760]

[1] FORM Notice of Motion for Order Directing Collection, Sale, or Other Application of Deposit to Principal's Liability [Code Civ. Proc. § 995.760]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR
vs.	)	_____ [COLLECTION OF
_____ [*name*],	)	DEPOSIT *or* SALE OF DEPOSIT *or* APPLICA-
Defendant.	)	TION OF DEPOSIT TO LIABLITY]
	)	[*Code Civ. Proc. § 995.760*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.*, defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon

thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party who is beneficiary, e.g.*, plaintiff] will, and hereby does, move for an order to _____ [collect *or* sell *or* apply to _____ (*specify party who is principal, e.g.*, defendant's) liability] the _____ [*specify items deposited in lieu of bond or undertaking, e.g.*, bearer bonds] that _____ [*specify party who is principal, e.g.*, defendant] deposited in lieu of the _____ [bond *or* undertaking] that he/she was required to file pursuant to _____ [*specify code section requiring bond or undertaking*]. The motion will be made on the ground that 30 days have expired from _____ [*date*], the date the _____ [judgment of liability became final *or* remittitur from the appellate court was filed in this court] and _____ [*specify party, e.g.*, defendant] has not paid the judgment.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

CAUTION:

A supporting memorandum is required to be served and filed with the foregoing notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; see *Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, *see* Ch. 417, *Points and Authorities* .

[2] Use of Form

This notice of motion is for use by the beneficiary of a deposit made in lieu of a bond or undertaking to apply for an order directing the collection, sale, or other application of the deposit to the liability when the principal has not paid the amount of liability on the deposit within 30 days after the date on which a judgment of liability becomes final or if the deposit was given to stay enforcement of a judgment on appeal, within 30 days after the filing of the remittitur from the appellate court in the court from which the appeal was taken [*Code Civ. Proc. §§ 995.750, 995.760(a)*].

Notice must be given to the parties at least five days before an order can issue. Application for the order is made to the court that entered the judgment of liability against the principal [*Code Civ. Proc. § 995.760(a)*]. For a general form of declaration in support of a motion, see Ch. 372, *Motions and Orders* .

[3] Sale of Bearer Bonds or Bearer Notes

Bear bonds or notes without a prevailing market price are required to be sold at public auction, with notice of the sale being served on the principal. Bearer bonds or notes having a prevailing market price may be sold at private sale at a price not lower than the prevailing market price [*Code Civ. Proc. § 995.760(b)*].

[4] Cross References

For discussion and forms relating to notices of motions generally, see Ch. 372, *Motions and Orders* .

[5] Statutes

Noticed motion. *Code Civ. Proc. § 1010*

Motion for order directing colection, sale, or other application of deposit to liability. *Code Civ. Proc. § 995.760*

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47-538 California Forms of Pleading and Practice--Annotated § 538.221

§ 538.221 Order Directing Collection, Sale, or Other Application of Deposit to Principal's Liability [Code Civ. Proc. § 995.760]

[1] FORM Order Directing Collection, Sale, or Other Application of Deposit to Principal's Liability [Code Civ. Proc. § 995.760]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER DIRECTING _____
_____ [*name*],	)	[COLLECTION OF
Plaintiff,	)	DEPOSIT *or* SALE OF DEPOSIT *or* APPLICA-
vs.	)	TION OF DEPOSIT TO LIABILITY]
_____ [*name*],	)	[*Code Civ. Proc. § 995.760*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

The motion of _____ [*identify party, e.g.*, plaintiff] for an order to _____ [collect *or* sell *or* apply to _____ (*specify party who is principal, e.g.*, defendant's) liability] the _____ [*specify items deposited in lieu of bond or undertaking, e.g.*, bearer bonds] that _____ [*specify party who is principal, e.g.*, defendant] deposited in lieu of the

_____ [bond *or* undertaking] that he/she was required to file pursuant to _____ [*specify code section requiring bond or undertaking*], came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that the _____ [*specify items deposited in lieu of bond or undertaking, e.g.,* bearer bonds] be _____ [collected *or* sold *or specify other method of application to liability*] and the proceeds be distributed as provided in *Section 995.760(c) of the Code of Civil Procedure.*
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use to order the collection, sale, or other application a deposit made in lieu of a bond or undertaking to the liability on the bond. The order is made by the court that entered the judgment of liability [*Code Civ. Proc. § 995.760(a)*].

For discussion of the sale of bearer bonds or notes and the distribution of the deposit, see *§ 538.81[2]*.

For discussion of payment by the principal of liability on a deposit, see *§ 538.54[7]*.

[3] Statutes

Order directing sale of bearer bonds or notes deposited in lieu of bond or undertaking. *Code Civ. Proc. § 995.760*

[4] Cross References

For a related form, *see § 538.220*.

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47-538 California Forms of Pleading and Practice--Annotated § 538.222

§ 538.222 Notice of Motion for Judgment Enforcing Liability on Bond or Undertaking Given in Action or Proceeding [Code Civ. Proc. § 996.440]

[1] FORM Notice of Motion for Judgment Enforcing Liability on Bond or Undertaking Given in Action or Proceeding [Code Civ. Proc. § 996.440]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	NOTICE OF MOTION FOR JUDGMENT ENFOR-
_____ [*name*],	)	CING LIABILITY ON _____
Plaintiff,	)	[BOND *or* UNDERTAKING]
vs.	)	[*Code Civ. Proc. § 996.440*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*name(s)*], _____ [surety *or* sureties] on the _____ [bond *or* undertaking] of _____ [*identify party who is principal, e.g.*, plaintiff], and to _____ [*name*] his/her/their attorney(s) of record, and to _____ [*identify party who is principal, e.g.*, plaintiff] and to _____ [*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in _____ [(Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*identify party who is beneficiary, e.g.*, defendant] _____ [*name*] will move for an order for judgment against _____ [*name(s)*], as _____ [surety *or* sureties], and _____ [*name of principal*] in the sum of $_____, based on your liability on the bond of _____ [*identify party who is principal, e.g.*, plaintiff] _____ [*name*], that was filed in this _____ [action *or* proceeding] as provided by _____ [*specify code section requiring bond or undertaking*]. The motion will be made on the ground that judgment has been entered in the above-entitled _____ [action *or* proceeding], and that _____ [the judgment is final and the time for appeal expired *or* appeal of the judgment was finally determined on _____ (*date*)].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*], and the memorandum of points and authorities served and filed herewith, on the papers and records on file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status*]

CAUTION:
A supporting memorandum and supporting affidavits (or declarations under *Code Civ. Proc. § 2015.5*) are required to be served and filed with the foregoing notice of motion [*see Code Civ. Proc. §§ 996.440(c), 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For a form of supporting declararion, *see § 538.223*.

[2] Use of Form

This notice of motion is for use by a beneficiary to enforce the liability on a bond or undertaking given in an action or proceeding [*Code Civ. Proc. § 996.440*]. The notice is required to state the amount of the claim and to be supported by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) setting forth the facts on which the claim is based [*Code Civ. Proc. § 996.440(c)*; for a general form of declaration in support of a motion, *see* Ch. 372, *Motions and Orders*].

If the original bond or undertaking was found to have become insufficient under *Code Civ. Proc. § 996.010* or to be excessive under *Code Civ. Proc. § 996.030* and a new bond was given or ordered, the enforcement may be had on the original bond for all acts, omissions, or causes that arose up until the time the new bond was issued. Enforcement may be had on the new bond for all acts, omissions, or causes that arose after the new bond was filed [*see Code Civ. Proc. § 996.240*]. If the original bond was found to have become insufficient under *Code Civ. Proc. § 996.010* and an additional or supplemental bond was given, the beneficiary may seek enforcement of either or both the original bond and the additional or supplemental bond [*see Code Civ. Proc. § 996.250*].

[3] Time for Making Motion

The motion cannot be made until after entry of the final judgment in the action or proceeding in which the bond is given and the time for appeal has expired, or, if an appeal is taken, until the appeal is finally determined. The motion shall not be made more than one year after the later of the preceding dates [*Code Civ. Proc. § 996.440(b)*]. No provision in a bond is valid that attempts by contract to shorten the period prescribed in *Code Civ. Proc. § 996.440(b)* unless the principal, beneficiary, and surety accept a provision for a shorter period in a bond [*Code Civ. Proc. § 996.450*].

[4] Service

The notice of motion must be served on the principal and sureties at least 30 days before the time set for hearing. The notice and accompanying affidavits or declarations shall be served in accordance with any procedure authorized by *Code Civ. Proc. §§ 1010-1020* [*Code Civ. Proc. § 996.440(c)*; *see* Ch. 518, *Service of Summons and Papers*]. Notice of motion may not be served more than one year after the later of entry of the final judgment in the action or proceeding in which the bond is given and the time for appeal has expired, or, if an appeal is taken, after the appeal is finally determined [*Code Civ. Proc. § 996.440(b)*].

[5] Entry of Judgment

Judgment will be entered against the principal and sureties in accordance with the motion unless the principal or sureties serve and file opposing affidavits (or declarations under *Code Civ. Proc. § 2015.5*) sufficient to present a triable issue of fact, in which case the court will specify issues to be tried by the court [*Code Civ. Proc. § 996.440(d)*].

[6] Cross References

For forms of notice of motion and judgment enforcing liability on a bond or undertaking given on a preliminary injunction, see Ch. 303, *Injunctions*

For discussion and forms of noticed motion generally, see Ch. 372, *Motions and Orders*

[7] Statutes

Subsequent insufficiency of bond or undertaking. *Code Civ. Proc. § 996.010*

Excessive bond or undertaking. *Code Civ. Proc. § 996.030*

Effect of new bond. *Code Civ. Proc. § 996.240*

Effect of additional or supplemental bond. *Code Civ. Proc. § 996.250*

Beneficiary as entitled to enforce liability on bond or undertaking. *Code Civ. Proc. § 996.410*

Jurisdiction over surety. *Code Civ. Proc. § 996.420*

Motion to enforce liability on bond or undertaking. *Code Civ. Proc. § 996.440*

Judgment of liability. *Code Civ. Proc. § 996.460*

[8] Decisions

Motion to enforce liability on deposit posted in lieu of bond was brought prematurely because action in which undertaking was granted was still pending for trial. *Satinover v. Dean (1988) 202 Cal. App. 3d 1298, 1301, 249 Cal. Rptr. 277*

Common law bonds and statutory bonds in action or proceeding as enforceable by motion. *Mark Briggs & Associates Inc. v. Kinestar, Inc. (1983) 143 Cal. App. 3d 483, 488, 192 Cal. Rptr. 21*

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47-538 California Forms of Pleading and Practice--Annotated § 538.223

§ 538.223 Declaration in Support of Motion for Judgment Enforcing Liability on Bond or Undertaking Given in Action or Proceeding [Code Civ. Proc. § 996.440]

[1] FORM Declaration in Support of Motion for Judgment Enforcing Liability on Bond or Undertaking Given in Action or Proceeding [Code Civ. Proc. § 996.440]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	DECLARATION OF _____ [*name*]
_____ [*name*],	)	IN
Plaintiff,	)	SUPPORT OF MOTION FOR JUDGMENT EN-
vs.	)	FORCING LIABILITY ON _____
_____ [*name*],	)	[BOND *or* UNDERTAKING]
Defendant.	)	[*Code Civ. Proc. § 996.440*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, the defendant] and beneficiary on a _____

[bond *or* undertaking] in the amount of $_____ given by plaintiff as principal in the above-entitled _____ [action *or* proceeding] pursuant to _____ [*specify code section requiring bond or undertaking*].

2. _____ [*Describe condition of bond or undertaking or damages against which bond or undertaking was to protect beneficiary*].

3. _____ [*Set forth facts showing breach of condition of bond or undertaking or how beneficiary incurred damages within coverage of bond or undertaking*].

4. Judgment in the above-entitled _____ [action *or* proceeding] has been entered in favor of _____ (*identify party who is beneficiary, e.g.*, defendant), _____(*name*).

[*EITHER, if no appeal was taken*]

5. The judgment is final and the time for appeal expired on _____ [*date*].

[*OR, if an appeal was taken*]

5. The appeal of the judgment has been finally determined in favor of _____ [*identify party who is beneficiary, e.g.*, defendant, _____ (*name*)], on _____ [*date*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature of declarant*]

[2] Use of Form

This declaration is for use by the beneficiary to support a motion a judgment enforcing liability of plaintiff and the surety on the bond or undertaking filed in the action or proceeding [*Code Civ. Proc. § 996.440(c)*]. The declaration is served with the notice of motion [*see Code Civ. Proc. § 996.440(c)*].

[3] State Statutes

Affidavit supporting notice of motion to enforce bond or undertaking as required. *Code Civ. Proc. § 996.440(c)*

Declaration in lieu of affidavit. Code Civ. Proc. § 1015.5

[4] Cross References

For a related form, *see § 538.222*.

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47-538 California Forms of Pleading and Practice--Annotated § 538.224

§ 538.224 Judgment Enforcing Liability on Bond or Undertaking Given in Action or Proceeding [Code Civ. Proc. § 996.440]

[1] FORM Judgment Enforcing Liability on Bond or Undertaking Given in Action or Proceeding [Code Civ. Proc. § 996.440]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	JUDGMENT ENFORCING LIABILITY ON
_____ [*name*],	)	_____
Defendant.	)	[BOND *or* UNDERTAKING]
	)	[*Code Civ. Proc. § 996.440*]
	)	

_____

The motion of _____ [*identify party who is beneficiary, e.g.*, defendant] _____ [*name*] for a judgment enforcing the liability of _____ [*identify party who is principal, e.g.*, plaintiff] and of _____ [*name(s)*], _____ [surety *or* sureties] on the _____ [bond *or* undertaking] of _____ [*identify party who is principal, e.g.*, plaintiff], which was filed on _____ [*date*], in this _____ [action *or* proceeding] as provided by _____ [*specify code section requiring bond or undertaking*] came on regularly for hearing by this court this date. Plaintiff appeared by counsel _____ [*name*]; _____ [*name(s)*], _____ [surety *or* sureties], appeared by counsel _____ [*name(s)*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfection of the court, and good cause appearing therefor,

IT IS ADJUDGED, ORDERED, AND DECREED that _____ [*identify party who is beneficiary, e.g.*, defendant], _____ [*name*], recover $_____ on the _____ [bond *or* undertaking] given by _____ [*name of principal*] as principal in this _____ [action *or* proceeding] pursuant to _____ [*specify code section requiring bond or undertaking*], [together with _____ ($_____ in interest from _____ [*date*], to the date of this judgment *and/or* $_____ for attorney's fees *and/or* $_____ for costs)], from _____ [*identify party who is principal, e.g.*, plaintiff], _____ [*name*], and from his/her _____ [surety *or* sureties], _____ [*name(s) of surety or sureties*], who are jointly and severally liable therefor.
Dated: _____.

_____ [*signature*]
Judge of the [Superior] Court

[2] Use of Form

This form of judgment is for use to order the enforcement of the principal's and surety's liability on a bond or undertaking given in an action or proceeding after a final judgment has been entered in that action or proceeding [*Code Civ. Proc. § 996.440*].

Judgment will be entered against the principal and sureties in accordance with the motion unless the principal or sureties serve and file opposing affidavits (or declarations under *Code Civ. Proc. § 2015.5*) sufficient to present a triable issue of fact, in which case the court will specify issues to be tried by the court [*Code Civ. Proc. § 996.440(d)*].

[3] State Statutes

Judgment in favor of beneficiary as to be for joint and several liability of principal and sureties. *Code Civ. Proc. § 996.460(a)*

Judgment as to be in amount determined by court *Code Civ. Proc. § 996.460(b)*

Recovery of interest, attorney's fees, and costs against surety. *Code Civ. Proc. § 996.480(a)(2)*

Enforcement of judgment as in same manner and extent as other money judgment. *Code Civ. Proc. § 996.495*

[4] Cross References

For discussion and forms relating to judgment and to notice of entry of judgments, see Ch. 318, *Judgments*

For discussion, a procedural guide, and forms relating to enforcement of money judgments, see Ch. 254, *Executions and Enforcement of Judgments*

For a related form, *see § 538.222*.

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47-538 California Forms of Pleading and Practice--Annotated § 538.225

§ 538.225 Complaint for Enforcement of Liability [Code Civ. Proc. § 996.430] on Official Bond

[1] FORM Complaint for Enforcement of Liability [Code Civ. Proc. § 996.430] on Official Bond

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR ENFORCEMENT OF LIABIL-
_____ [*name(s)*], [and DOES I	)	ITY ON OFFICIAL BOND
through _____,]	)	[*Code Civ. Proc. § 996.430*]
Defendants.	)	
	)	

_____

Plaintiff alleges:

[*EITHER*]

1. Defendant _____ [*name of surety*] is now, and at all times herein mentioned was, a resident of _____County, California [, in the _____ (name) _____ (Municipal Court *or* Judicial) District.

[*OR*]

1. Defendant _____ [*name of surety*] is now, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of _____ [*specify state*], authorized to engage and engaged in the surety insurance business in the State of California with its principal place of business in _____County, California.

2. During all times mentioned herein defendant _____ [*name of principal*] was, and still is, _____ [a *or* the] duly _____ [elected *or* appointed], qualified, and acting _____ [*describe official title or capacity, e.g.*, notary public] of _____ [*specify public entity*], and is now, and at all times herein mentioned was, a resident of _____County, California [, residing at _____ (*street address and if any, city*)].

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is liable on the _____ (bond *or* undertaking) herein described.)]

[4. (Plaintiff is informed and believes and thereon alleges that) (A)t all times therein mentioned defendant _____ (*name*) was the agent (and employee) of defendant _____ (*name*), and (in doing the things hereinafter alleged,) was acting within the course and scope of such agency (and employment) and with permission and consent of his/her codefendant.]

5. On or about _____ [*date*], defendant _____ [*name of principal*], and defendant(s) _____ [*name of surety or sureties*], as surety, duly executed a _____ [bond *or* undertaking] in the sum of $_____, conditioned on the faithful discharge of the official duties of _____ [*name of defendant principal*]. _____ [A copy of the _____ (bond *or* undertaking) is attached hereto, marked Exhibit "A," and is by reference made a part hereof *or* The _____ (bond *or* undertaking) provides "_____" (*set forth terms of bond in full*)].

6. At all times herein mentioned, the _____ [bond *or* undertaking] was in full force and effect.

7. _____ [*Name of principal*] breached the conditions of the _____ [bond *or* undertaking] by _____ [*state facts showing principal's failure to faithfully discharge his/her official duties in breach of the bond or undertaking, e.g.*, forging the name of _____ (*fictitious name*) to the jurat on a certificate of business fictitious firm name, using his/her official seal. The certificate stated that defendant _____ (*name of principal*) was the owner of _____ (*name of business*), when in fact he/she was an employee of _____ (*name of business*), which was owned by _____ (*name of real buisness owner*). By use of the certificate of business fictitious firm name, bearing the forgery, _____ (*name of principal*) was able to open a bank account with the plaintiff in the name of _____ (*name of business*) and to process checks aggregating to $_____ payable to _____ (*name of business*) through the bank account.]

8. As a proximate result of defendant's breach _____ [*specify damages suffered, e.g.*, plaintiff guaranteed the validity of the endorsements on the checks, and became liable to _____ (*name of business owner*) in the amount of $_____ (*specify aggregate amount of checks*)].

[9. On or about _____ (*date*), plaintiff presented to _____ (*name of public entity*) by _____ (delivering *or* mailing) a claim to the _____ (clerk *or* secretary *or* auditor) for the damages suffered by him/her by reason of the above-described occurence, all in compliance with the requirements of *Section 905 of the Government Code*. A copy of the claim is attached hereto as Exhibit "B" and made a

part hereof.]

[10. On or about _____ (*date*), _____ [*name of public entity*] _____ [rejected the claim in its entirety *or* allowed the claim in the amount of $_____ and rejected it as to the remainder *or* failed to act on the claim within 45 days after its presentation, so that the claim was thus deemed rejected under the terms of *Section 912.4 of the Government Code*.]

11. Defendants _____ [*name of sureties*], before the commencment of this action, on _____ [*date*], were notified of plaintiff's claim for damages suffered as above stated, and were then and there requested by the plaintiff to pay said damages, or so much of said damages as were covered by their _____ [bond *or* undertaking].

WHEREFORE, plaintiff prays for judgment against the defendant(s) and each of them, as follows:

1. For damages in the amount of $_____.

2. For costs; and

3. For such other and further relief as the court may deem proper.

[*Verification, if desired. See § 538.162.*]

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

This complaint is for use by persons who are injured or aggrieved by the wrongful act or default of an officer whose performance is the subject of a bond or undertaking to enforce liability on the bond or undertaking [*Code Civ. Proc. § 996.430*].

Both the principal and the sureties must be joined as parties to the action [*Code Civ. Proc. § 996.430(a)*].

The fact situation used for illustration in this form is adapted from *Bank of America v. Dowdy (1960) 186 Cal. App. 2d 690, 9 Cal. Rptr. 779* .

[3] Jurisdiction

If the bond was given in an action or proceeding, the action must be commenced in the court in which the action or proceeding was pending. If the bond was given other than in an action or proceeding, the action shall be commenced in any court of competent jurisdiction, and the amount of damage claimed in the action, not the amount of the bond, determines the jurisdictional classification of the case [*Code Civ. Proc. § 996.430(b)*; *see Code Civ. Proc. §§ 85, 86(a)* (case in which demand is $25,000 or less is limited civil case)].

[4] Standing to Sue

Liability on the bond may be enforced by the beneficiary against both the principal and sureties [*Code Civ. Proc. § 996.410(a)*]. If the beneficiary is a class of persons, any person in the class may enforce the liability on the bond in the

person's own name, without assignment of the bond [*Code Civ. Proc. § 996.410(b)*].

Liability on a bond to the State of California may be enforced by or for the benefit of, and in the name of, any and all persons for whose benefit the bond is given who are damaged by breach of the condition of the bond [*Code Civ. Proc. § 995.850(a)*]. A person described in *Code Civ. Proc. § 995.850(a)* may in addition to any other remedy the person has, enforce the liability on the bond in the person's own name, without assignment of the bond [*Code Civ. Proc. § 995.850(b)*].

[5] Allegations

This complaint alleges the followoing:

- The residence and capacity of defendant surety as either a personal or corporate surety (Paragraphs 1);

- The defendant principal's residence and status as a public official (Paragraph 2);

- The execution and delivery of the bond to secure the defendant principal's performance, incorporating the attached bond by reference (Paragraph 5) [*see Mendocino County v. Morris (1867) 32 Cal. 145, 148* ; *Ghiradelli v. Bourland (1867) 32 Cal. 585, 589* ; *San Francisco S. Co. v. Aetna I. Co. (1907) 7 Cal. App. 98, 98-99, 93 P. 888]* ;

- The term of the bond (Paragraph 6) [*see Code Civ. Proc. §§ 995.420, 996.360*];

- Breach of the conditions of the bond (Paragraph 7) [*see Mendocino C. v. Morris (1867) 32 Cal. 145, 148]* ;

- Damages resulting from the breach (Paragraph 8) [*Vilhac v. S. & I.R.R. Co. (1878) 53 Cal. 208, 212]* ; and

- The surety's refusal to pay (Paragraph 11). Optional paragraphs are included to allege fictitious defendants (Paragraph 3) [*see Code Civ. Proc. § 474*; *see* Ch. 20, *Allegations Commonly Used*]; and agency (Paragraph 4) [*see generally* Ch. 427, *Principal and Agent*].

Optional allegations for use if the action is subject to a claims requirement are also included (Paragraphs 9, 10) [for a discussion of claims against public entities and officers, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*].

[6] Statute of Limitations

The action must be commenced within four years [*see Code Civ. Proc. § 337*].

[7] Tolling of Statute of Limitations

The statute of limitations may be tolled during pendency of an interrelated administrative proceeding in cases in which the administrative proceeding may be dispositive of essential elements of the cause of action. The cause of action does not accrue for statute of limitations purposes until the final determination of the interrelated administrative proceeding [*Olson v. County of Sacramento (1974) 38 Cal. App. 3d 958, 965, 113 Cal. Rptr. 664]* .

[8] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification also will preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[9] State Statutes

Statute of limitations. *Code Civ. Proc. § 337*

Enforcement of liability on bond given to State of *California. Code Civ. Proc. § 995.850*

Standing to sue. *Code Civ. Proc. §§ 995.850, 996.410*

Joinder of parties. *Code Civ. Proc. § 996.430(a)*

Jurisdiction. *Code Civ. Proc. § 996.420*

Liability of principal and sureties. *Code Civ. Proc. §§ 996.410-996.495*

Action on bond or undertaking. *Code Civ. Proc. § 996.430*

[10] Decisions

One who is injured or aggrieved by the wrongful act or default of a public officer in his or her official capacity may bring suit on the officer's official bond. *Fernelius v. Pierce (1943) 22 Cal. 2d 226, 242-245, 138 P.2d 12* ; *Mendocino C. v. Morris (1867) 32 Cal. 145, 148* .

Complaint need not be solely on bond. *Kane v. Mendenhall (1936) 5 Cal. 2d 749, 752-753, 56 P.2d 498*

Sufficiency of complaint on official bond is determined by reference to provisions of statute under which suit is brought and not by resort to principles of common law. *People v. Love (1864) 25 Cal. 520, 529*

Notary's signing of fictitious name to jurat is official misconduct covered by bond given under *Gov. Code §§ 8212-8214*. *Bank of America v. Dowdy (1960) 186 Cal. App. 2d 690, 693-694, 9 Cal. Rptr. 779*

[11] Cross References

For form relating to action on public payment bond, see Ch. 481, *Public Works*

For a related form, *see § 538.222*.

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 538 SURETYSHIP, BONDS, AND UNDERTAKINGS
PART IV. FORMS
B. Bonds And Undertakings
2. Enforcement Of Liability On Statutory Bonds

47-538 California Forms of Pleading and Practice--Annotated § 538.226

§ 538.226 Complaint by Employer to Enforce Liability of Surety on Blanket or Fidelity Bond [Fin. Code § 215; 10 Cal. Code Reg. §§ 10.3513, 10.4462, 10.14182]--Blanket Bond Covering Employee Embezzling Funds

[1] FORM Complaint by Employer to Enforce Liability of Surety on Blanket or Fidelity Bond [Fin. Code § 215; 10 Cal. Code Reg. §§ 10.3513, 10.4462, 10.14182]--Blanket Bond Covering Employee Embezzling Funds

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], [and DOES I	)	COMPLAINT FOR ENFORCEMENT OF LIABIL-
through _____,]	)	ITY ON BOND
Defendant(s).	)	
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 538.225, Paragraphs 2.*]

[2. *Fictitious name allegation, if appropriate. See § 538.225, Paragraph 4.*]

[3. *Agency allegation, if appropriate. See § 538.225, Paragraph 5.*]

4. On _____ [*date*], defendant made, executed, and delivered to Plaintiff, as beneficiary, defendant's _____ [bond *or* undertaking] in the penal sum of $_____, whereby defendant

agreed to pay any direct financial loss that plaintiff might sustain by reason of _____ [*specify acts insured against, e.g.*, any act of larceny, embezzlement, theft, or any other fraudulent or dishonest act, wrongful abstraction or willful missapplication] committed during the term of the _____ [bond *or* undertaking] by any of plaintiff's employees listed on a schedule entitled "Covered Employees" attached to the _____ [bond *or* undertaking]. A copy of the _____ [bond *or* undertaking] is attached hereto, marked Exhibit "_____," and is by reference made a part hereof.

5. At all times herein mentioned, the _____ [bond *or* undertaking] was in full force and effect.

6. At all times herein mentioned, _____ [*name of employee*] was employed by plaintiff as _____ [*title of position*] at _____ [*name and address of company*], _____ County, California.

7. At all times herein mentioned, _____ [*name of employee*] was one of plaintiff's employees listed on the schedule entitled "Covered Employees" attached to the _____ [bond *or* undertaking] and covered thereby.

8. During the term of the _____ [bond *or* undertaking], _____ [*specify time period, e.g.*, from on or about _____ (*date*), to on or about _____ (*date*)], _____ [*name of employee*] wrongfully, fraudulently, and dishonestly took, withheld, and willfully misapplied to his/her own use certain sums of money belonging to plaintiff in the approximate amount of $_____.

9. By reason of the wrongful, fraudulent, and dishonest acts of _____ [*name of employee*] and the willful misapplication of those sums by him/her, plaintiff has sustained a direct financial loss in the sum of $_____.

[*If bond requires that defendant be notified within a specified period after discovery of the loss, add*]

10. On _____ [*date*], plaintiff acquired knowledge of the loss and promptly thereafter, on _____ [*date*], notified defendant thereof in writing. A copy of the notice is attached hereto, marked Exhibit "_____," and is by reference made a part hereof.]

[*CONTINUE*]

11. Plaintiff has fully performed all provisions of the _____ [bond *or* undertaking] to be performed on its part and on _____ [*date*], demanded in writing that defendant reimburse him/her/it for the full amount of the loss. A copy of said demand is attached hereto, marked Exhibit "_____," and is by reference made a part hereof. Notwithstanding said demand, defendant failed and refused, and still fails and refuses, to do so, and no part of the claimed sum has been paid.

WHEREFORE, plaintiff prays for judgment against the defendant as follows:

1. For damages in the amount of $_____ [, together with interest thereon at the legal rate (from and after _____ (*date*))].

2. For costs; and

3. For such other and further relief as the court may deem proper. f

[*Verification, if desired. See § 538.162.*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

This complaint is for use by an employer that is a bank against a surety insurer on a blanket bond for enforcement of the surety's liability on the bond when a covered employee has embezzled funds from the employer and the loss was discovered during the period of the bond [*see Fin. Code § 215*; *10 Cal. Code Reg. §§ 10.3513(a), 10.4462(a), 10.14182(a)* (blanket bond requirement)]. The action is subject to the Bond and Undertaking Law, which applies to bonds given pursuant to any California statute except to the extent the statute prescribes a different rule or is inconsistent [*see Code Civ. Proc. § 995.020*; *see also Code Civ. Proc. § 995.180* (defining statute to include administrative regulation promulgated pursuant to statute)].

Both the principal and the sureties must be joined as parties to the action [*Code Civ. Proc. § 996.430(a)*].

[3] Allegations

This complaint alleges in pertinent part:

- The execution of a bond to ensure plaintiff against financial loss (Paragraph 4).

- The period of time during which the bond was in full force and effect (Paragraph 5).

- Employment by the plaintiff of the person causing plaintiff's financial loss (Paragraph 6).

- Coverage of the person causing plaintiff's financial loss under the bond (Paragraph 7) [*Piggly Wiggly Yuma Co. v. Indemnity Co. (1931) 116 Cal. App. 541, 544, 3 P.2d 15]* .

- The wrongful acts of the employee consitituing a breach of the conditions covered by the bond during the term of the bond (Pargraph 8).

- Loss suffered by plaintiff employer (Paragraph 9) [*Piggly Wiggly Yuma Co. v. Indemnity Co. (1931) 116 Cal. App. 541, 544, 3 P.2d 15]* .

- The plaintiff's discovery of the loss caused by the employee (Paragraph 10) [*Pacific Coast A. Bureau v. Insurance Co. (1931) 115 Cal. App. 583, 586-587, 2 P.2d 218]* .

- Plaintiff notification of the surety regarding the loss (Paragraph 11) [*USLIFE Savings & Loan Assn. v. National Surety Corp. (1981) 115 Cal. App. 3d 336, 344-345, 171 Cal. Rptr. 393]* .

[4] Decisions

Insured under blanket employee's fidelity discovery bond not bound to give notice to insurer until knowledge of some specific fraudulent or dishonest act committed by its employees is acquired. *USLIFE Savings & Loan Assn. v. National Surety Corp. (1981) 115 Cal. App. 3d 336, 344-345, 171 Cal. Rptr. 393*

When insured learns of facts constituting alleged dishonesty suspicions are converted to knowledge which cannot be ignored and constitute discovery for purposes of notifying insurer. *USLIFE Savings & Loan Assn. v. National Surety Corp. (1981) 115 Cal. App. 3d 336, 345, 171 Cal. Rptr. 393*

Ignorance of policy provisions as not an excuse for failing to notify insurer when employer has discovered dishonest or fraudulent act of employee. *USLIFE Savings & Loan Assn. v. National Surety Corp. (1981) 115 Cal. App. 3d 336, 345, 171 Cal. Rptr. 393*

Fidelity bond, covering losses discovered during bond period, as not covering losses resulting from employees' acts known to employer prior to effective date of bond even though employer failed to understand dishonest or fraudulent nature of acts or that acts came within policy provisions until after effective date of bond. *USLIFE Savings & Loan Assn. v. National Surety Corp. (1981) 115 Cal. App. 3d 336, 344-345, 171 Cal. Rptr. 393*

Essential allegations in action by employer against surety on employee' indemnity bond. *Piggly Wiggly Yuma Co. v. Indemnity Co. (1931) 116 Cal. App. 541, 544, 3 P.2d 15*

Discovery of misappropriation by employer as necessary. *Pacific Coast A. Bureau v. Insurance Co. (1931) 115 Cal. App. 583, 586-587, 2 P.2d 218*

[5] Cross References

For discussion of recovery of interest in actions on contracts, see Ch. 177, *Damages*

For a related form, *see § 538.225*.

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 538 SURETYSHIP, BONDS, AND UNDERTAKINGS
PART IV. FORMS
B. Bonds And Undertakings
2. Enforcement Of Liability On Statutory Bonds

47-538 California Forms of Pleading and Practice--Annotated § 538.227

§ 538.227 Allegations--Fidelity Bond Given by Individual Employee

[1] FORM Allegations--Fidelity Bond Given by Individual Employee

1. As a condition of employment _____ [*name of employee*] was required by plaintiff to and, at all times herein mentioned did, maintain on deposit with plaintiff payable to plaintiff a fidelity bond duly executed by _____ [*name of employee*] as principal and defendant as surety in the penal sum of $_____ conditioned on the faithful performance by the employee of the duties of _____ [*state title of position, e.g.*, cashier] and guaranteeing repayment to plaintiff of any direct financial loss incurred by reason of the wrongful, unlawful, fraudulent, or dishonest acts of the employee.

2. Plaintiff discovered the loss and the wrongful, fraudulent, and dishonest acts of the employee on or about _____ [*date*], and on _____ [*date*], sent defendant a written notice demanding that defendant reimburse it for the full amount of the loss. A copy of the notice is attached hereto, marked Exhibit "_____," and is by reference made a part hereof. Notwithstanding the notice, defendant failed and refused, and still fails and refuses to pay the same, or any part thereof, and no part of said sum has been paid.

[2] Use of Form

The allegations in this form may be used in a complaint to enforce the liability of a surety on a fidelity bond when the bond is guaranteeing the performance of an individual employee. The first allegation should be substituted for Paragraph 4 in *see § 538.226*, Paragraph 7 of *see § 538.226* should be deleted, and the second allegation should be substituted for Paragraphs 9 and 10 of *see § 538.226*.

[3] Cross References

For related forms, *see §§ 538.225* and *538.226*.

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47-538 California Forms of Pleading and Practice--Annotated § 538.228

§ 538.228 Complaint to Enforce Liability [Code Civ. Proc. § 996.430] Against Surety Based on Bond or Undertaking Guaranteeing Performance of Personal Representative [Code Civ. Proc. §§ 996.410, 996.460]--By Heir or Devisee for Failure of Personal Representative to Pay Distributive Share of Estate [Prob. Code §§ 11603(b), 11605, 11750]

[1] FORM Complaint to Enforce Liability [Code Civ. Proc. § 996.430] Against Surety Based on Bond or Undertaking Guaranteeing Performance of Personal Representative [Code Civ. Proc. §§ 996.410, 996.460]--By Heir or Devisee for Failure of Personal Representative to Pay Distributive Share of Estate [Prob. Code §§ 11603(b), 11605, 11750]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	(Suretyship)
through _____,]	)	
Defendants.	)	
	)	

Plaintiff alleges:

1. [*Capacity of and/or residence of defendant surety. See § 538.225, Paragraph 1.*]

2. [*Capacity and residence of defendant principal. See § 538.225, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 538.225, Paragraph 4.*]

[4. *Agency allegation, if appropriate. See § 538.225, Paragraph 5.*]

[*EITHER*]

5. On _____ [*date*], _____ [*name of decedent*] died a resident of _____ County, California, leaving a last will and testament, a copy of which is attached, marked Exhibit "_____," and made a part of this complaint by reference, whereby _____ [*specify distribution of estate, e.g.*, all the residue of her estate was devised and bequeathed to plaintiff].

[*OR*]

5. On _____ [*date*], _____ [*name of decedent*] a resident of _____County, California, died intestate, leaving as his/her only surviving heirs at law _____ [*list names and relationship to deceased of all heirs, e.g.*, Jane Doe, her mother, Sally Smith, her sister], and Plaintiff, _____ [*state relationship of plaintiff to deceased, e.g.*, her brother].

[*CONTINUE*]

6. On _____ [*date*], on application duly made, the Superior Court of _____ County, California, in probate proceedings NO. _____, entitled "Estate of _____, deceased," duly made its order admitting the _____ [will *or* estate] to probate and ordering that letters _____ [testamentary *or* of administration] issue to _____ [*name*] as personal representative on his/her taking the oath required by law and giving a bond or undertaking in the amount of $_____ if executed by an authorized surety, or in twice that amount if executed by personal sureties.

7. Pursuant to that order, _____ [*name of defendant personal representative*], as principal, and _____ [*name of defendant surety*], as surety, duly executed, acknowledged, and filed with the clerk of that Court on _____ [*date*] their bond in the sum of $_____, conditioned on the faithful performance by _____ [*name of defendant personal representative*], and letters _____ [testamentary *or* of administration] were then and there duly issued to _____ [*name of defendant personal representative*], as _____ [executor *or* administrator]. A copy of the bond is attached, marked Exhibit "_____," and is by reference made a part of this complaint.

8. On issuance of the letters _____ [testamentary *or* of administration] _____ [*name*], as personal representative, commenced performing his/her duties and collecting and receiving the assets of the estate.

9. Thereafter, on _____ [*date*], the Court made and entered its decree of distribution in the estate, whereby the sum of $_____ was distributed to plaintiff as his/her distributive share of the estate. A certified copy of the decree is attached, marked Exhibit "_____," and is by reference made a part of this complaint.

10. Plaintiff has demanded that _____ [*name*], the personal representative, pay to him/her the sum of $_____ so distributed to him/her by the decree of distribution, but the personal representative failed and refused, and still fails and refuses, to so do, and the whole sum remains unpaid.

11. Subsequently, plaintiff demanded that _____ [*name of surety*], as surety on the performance bond

of _____ [*name*], the personal representative, pay to him/her the sum of $_____ ordered to be distributed to him/her by the decree of distribution, and which the personal representative failed and refused to pay, but _____ [*name of surety*] also failed and refused, and still fails and refuses, to so do, and the whole sum remains unpaid.

12. As a direct and proximate result of defendant's actions, plaintiff has been caused to incur attorney's fees [according to proof *or* in the sum of $_____].

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the amount of $_____;

2. For interest at the legal rate [from and after _____ (*date*)];

3. For costs of suit herein incurred;

4. For reasonable attorney's fees _____ [according to proof *or* in the sum of $_____]; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 538.162.*]

[2] Use of Form

This form is for use by an heir or devisee to recover damages from a surety based on a bond or undertaking guaranteeing the performance of a personal representative who fails to pay the distributive share of the estate [*see Code Civ. Proc. §§ 995.020, 996.430*; *Prob. Code §§ 11603(b), 11605* (decree of distribution), 11750]. With specified exceptions, persons to whom letters testamentary or of administration are issued must execute a bond for the benefit of interested persons guaranteeing that he or she will faithfully perform the duties of the personal representative [*Prob. Code § 8480(a), (b)*]. If two or more persons are appointed, the court may require either a separate bond from each, or a joint and several bond. If a joint bond is furnished, the liability on the bond is joint and several [*Prob. Code § 8480(a)*].

The action is to be commenced in the court in which the application for probate of the will was filed and which issued the letters testamentary or of administration [*see Code Civ. Proc. § 996.430(b)*]. Before an action can be maintained against a surety on the bond or undertaking, however, the liability of the personal representative must be finally determined by the Probate Court [*Nickals v. Stanley (1905) 146 Cal. 724, 726, 81 P. 117* ; *Estate of Dwyer (1959) 168 Cal. App. 2d 264, 268, 335 P.2d 718]* .

Both the principal and the sureties must be joined as parties to the action [*Code Civ. Proc. § 996.430(a)*].

[3] Allegations

The complaint alleges in pertinent part:

- The death and disposition of the estate of decedent (Paragraphs 5).

- Probate of the estate (Paragraph 6) [*see Richardson v. Royal Indemnity Co. (1943) 21 Cal. 2d 557, 560, 134 P.2d 1]* .

- The execution and delivery of the bond and issuance of letters testamentary or letters of administration (Paragraph 7) [*see Prob. Code § 8480(a), (b)*; *Evans v. Gerken (1894) 105 Cal. 311, 312, 38 P. 725]* .

- Collection of assets of the estate (Paragraph 8).

- The court order for distribution of the estate (Paragraph 9) [*see Prob. Code §§ 11603(b), 11605*].

- Failure to distribute plaintiff's share of the estate and plaintiff's demand that the executor or administrator distribute the share (Paragraph 10) [*see Prob. Code § 11750*].

- Plaintiff's demand that the surety make payment on the bond and incurring of attorney's fees to obtain judgment against the surety (Paragraphs 11, 12) [*see Code Civ. Proc. § 996.480(a)(2)*].

[4] Related Points and Authorities

For points and authorities relating to guardian's or conservator's bond, see California Points and Authorities, Ch. 106, *Guardianship and Conservatorship* (Matthew Bender)

[5] State Statutes

Liability on bond is enforceable by beneficiary against both principal and surety. *Code Civ. Proc. § 996.410*

Action to enforce liability on bond. *Code Civ. Proc. § 996.430*

Principal and surety are jointly and severally liable. *Code Civ. Proc. § 996.460*

Action against sureties on guardian's or conservator's bond is barred unless commenced within four years after discharge or removal of guardian or conservator, or within four years from date order surcharging guardian or conservator becomes final, whichever is later. *Prob. Code § 2333(b)*

In any case, action on guardian's or conservator's bond is barred unless commenced within six years from date judgment under *Prob. Code § 2103* or later of the orders under *Prob. Code § 2333(b)* becomes final, notwithstanding *Prob. Code § 2103(b)* (nonfinality of judgment or order obtained by fraud, conspiracy, or misrepresentation). *Prob. Code § 2333(c)*

Bond of personal representative required for issuance of letters testamentary or letters of administration. *Prob. Code § 8480*

Court decree naming persons and proportions of estate each entitled to; right of those persons to sue for respective shares. *Prob. Code §§ 11603(b), 11605, 11750*

[6] Decisions

Action against surety on guardians', executors', and administrators' bonds is not maintainable until liability of principal (guardian, executor, or administrator) has been judicially determined in estate proceedings by *Probate Court. Richardson v. Royal Indemnity Co. (1943) 21 Cal. 2d 557, 560, 134 P.2d 1* ; *Nickals v. Stanley (1905) 146 Cal. 724, 726, 81 P. 117* ; *Price v. Fireman's Fund Ins. Companies (1987) 193 Cal. App. 3d 1536, 1540-1541, 239 Cal. Rptr. 158*

Allegations regarding approval of bond by judge, filing or recordation of bond, and attachment of certificate of justification is not required for complaint to stand up against general demurrer when complaint alleges executor's appointment, issuance of letters testamentary on execution of bond according to law, and fact that executor and appellants duly made and executed bond as required by order. *Evans v. Gerken (1894) 105 Cal. 311, 312, 38 P. 725*

Action against surety does not exist until liability of executor or administrator has been finally determined by Probate Court. *Estate of Dwyer (1959) 168 Cal. App. 2d 264, 268, 335 P.2d 718*

[7] Cross References

For discussion and forms relating to bonds by executor or administrator, see Ch. 446, *Probate: Bonds--Increase and Decrease During Administration* .

For discussion, procedure, and forms relating to bonds given by guardians and conservators, see Ch. 283, *Guardianship and Conservatorship: Bonds* , and Ch. 290D, *Guardianship and Conservatorship: Actions Against Guardians, Conservators, and Sureties*

For a related form, *see § 538.225*.

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2. Enforcement Of Liability On Statutory Bonds

47-538 California Forms of Pleading and Practice--Annotated § 538.229

§ 538.229 Allegations--By Personal Representative to Recover Assets Charged to Former Personal Representative [Prob. Code § 9822]

[1] FORM Allegations--By Personal Representative to Recover Assets Charged to Former Personal Representative [Prob. Code § 9822]

1. On _____ [*date*], the Court made an order revoking the letters _____ [testamentary *or* of administration] issued to _____ [*name of defendant personal representative*], the personal representative, and ordering him/her to render a full final report and accounting of his/her administration of the estate.

2. Thereafter, on _____ [*date*], plaintiff was duly appointed and on _____ [*date*], duly qualified and entered on the duties of administrator of the estate [with the will annexed] as successor to _____ [*name of defendant personal representative*].

3. On _____ [*date*], _____ [*name of defendant personal representative*], the personal representative, filed his/her final account and report with the Court. After hearings on the account, the Court, on _____ [*date*], made an order adjudging _____ [*name of defendant personal representative*], the personal representative, to be chargeable with assets of the estate remaining in his/her hands of the value of $_____, and ordering that he/she pay and deliver these assets to plaintiff as administrator of the estate. A copy of the order is attached, marked Exhibit "_____," and is by reference made a part of this complaint.

4. No part of the assets[, except assets listed on the accounting as having a value of $_____,] have been paid or delivered to plaintiff by _____ [*name of defendant personal representative*], and there is now due, owing, and unpaid from him/her to plaintiff as administrator the sum of $_____.

[2] Use of Form

The allegations in this form are for use in a complaint against the surety on a personal representative's bond. The

allegations are for use by a successor administrator to plead the liability of the personal representative for the assets of the estate [*see Prob. Code § 9822*]. The allegations may be substituted for Paragraphs 9 and 10 of *see § 538.228*. The complaint sufficiently alleges nonpayment of the predecessor personal representative when it alleges that neither the predecessor nor anyone on his or her behalf has accounted for the sum or any part of it [*Moody v. Pacific Surety Co. (1919) 41 Cal. App. 287, 289, 182 P. 802]* .

[3] Allegations

The allegations in the form allege that:

- The personal representative's authority to administer the estate has been revoked and that the court ordered a full accounting (Paragraph 1) [*Prob. Code §§ 8500-8505, 8873*].

- A successor administrator has been given the authority to administer the estate (Paragraph 2) [*Prob. Code § 8522*].

- The original personal representative has submitted an accounting and has been found liable for estate assets (Paragraph 3) [*see Prob. Code § 10952*].

- The original personal representative has failed of to pay over these assets to the successor administrator (Paragraph 4) [*see Prob. Code §§ 8525, 9822, 10952*].

[4] Statutes

Interested person defined. *Prob. Code § 48*

Personal representative defined. *Prob. Code § 58*

Liability of former personal representative or surety as continuing until accounting and delivery of all property to successor administrator. *Prob. Code § 8525*

Personal representative as permitted to maintain action on bond of former personal representative for benefit of interested persons. *Prob. Code § 9822*

Former personal representative as required to file account not later than 60 days after termination of authority, unless court extends time. *Prob. Code § 10952*

[5] Decisions

Previous action against estate of deceased administrator as not required for maintaining action in equity for accounting against surety on bond. *Slater v. McAvoy (1899) 123 Cal. 437, 439, 56 P. 49*

Failure to pay over to successor for three years all of funds of estate in possession at time of removal as administrator as ample evidence of flagrant breach of trust. *Moody v. Pacific Surety Co. (1919) 41 Cal. App. 287, 290, 182 P. 802*

[6] Cross References

For a related form, *see § 538.228*.

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47-538 California Forms of Pleading and Practice--Annotated § 538.230

§ 538.230 Allegations--By Creditor of Estate to Recover Claim Ordered Paid [Prob. Code § 11424]

[1] FORM Allegations--By Creditor of Estate to Recover Claim Ordered Paid [Prob. Code § 11424]

1. The notice of decedent's death and of the petition to administer the estate was duly published in _____ [*name of newspaper*], a newspaper of general circulation printed and published in _____ [*specify city or county*], the _____ [city *or* county] in which _____ [decedent resided at the time of his/her death *or* decedent's property is located]. The first publication thereof was made on _____ [*date*].

2. Plaintiff _____ [did *or* did not] receive notice of the administration of decedent's estate from the personal representative.

3. During his/her lifetime, decedent _____ [*name of decedent*] became indebted to plaintiff in the sum of $_____, together with interest on that amount, at the rate of _____ percent per annum from _____ [*date*].

[*EITHER*]

4. On _____ [*date*], within four months after the first issuance of letters, plaintiff duly filed a claim with the court for $_____, the full amount of the aforementioned debt.

[*OR*]

4. On _____ [*date*], within 60 days after the date notice of administration was given to Plaintiff, plaintiff duly filed a claim with the court for $_____, the full amount of the aforementioned debt.

[*CONTINUE*]

5. On _____ [*date*], the personal representative served written notice on plaintiff of the rejection of his/her claim. Plaintiff, on _____ [*date*], filed an action in the _____ Court of _____ County, No. _____, entitled _____, for recovery of the claim.

6. On _____ [*date*], the Court in that action rendered its judgment[, which was on _____ (*date*) duly entered in Judgment Book _____ at page _____ of the records of _____ Court,] awarding plaintiff $_____ [, the full amount of the claim].

7. A certified copy of the judgment was duly filed in the probate proceedings. On _____ [*date*], the Superior Court of _____ County, in which probate was pending, made an order whereby it settled [first and] final account of the personal representative and ordered, among other things, that the personal representative pay to plaintiff the amount of the judgment, to wit, the sum of $_____. A copy of the order is attached, marked Exhibit "_____," and is by reference made a part of this complaint.

8. Plaintiff has demanded that the personal representative pay to him/her the sum of $_____ as provided in the order settling the personal representative's [first and] final account, but the personal representative has failed and refused to do so and no part of the sum [except for the sum of $_____] has been paid to plaintiff.

[2] Use of Form

The allegations in this form are for use in a complaint against the surety on a personal representative's bond. The allegations in the foregoing form may be used to plead the liability of a personal representative to a creditor of the estate for the recovery of a claim that has been ordered to be paid [*Code Civ. Proc. § 996.430*; *Prob. Code § 11424*]. The allegations may be substituted for Paragraphs 9-10 of *see § 538.228*.

[3] Allegations

This form alleges:

- That notice was given to creditors and whether or not plaintiff received notice from the personal representative (Paragraphs 1, 2) [*see Prob. Code §§ 8100-8125, 9001, 9050-9054*].

- That a debt was owed to plaintiff from decedent (Paragraph 3) [*see Prob. Code §§ 9000, 11401(a)*].

- That the creditor filed a timely claim for payment of the debt (Paragraph 4) [*see Prob. Code §§ 9100 et seq., 9351*].

- That plaintiff's claim was rejected by the personal representative and an action was filed by plaintiff (Paragraph 5) [*see Prob. Code §§ 9250-9256, 9353, 9354*].

- That judgment was entered against the personal representative for the debt (Paragraph 6) [*see Prob. Code § 11420*].

- That copy of the judgment was submitted to the Probate Court, which ordered the personal representative to pay the judgment (Paragraph 7) [*see Prob. Code § 11429*].

- That the personal representative failed to pay the judgment (Paragraph 8) [*see Prob. Code § 11424*].

[4] State Statutes

Definition of personal representative. *Prob. Code § 58*

Notice to creditors. *Prob. Code § 9050 et seq.*

Priority of payment of claims. *Prob. Code § 11420*

Individual liability of personal representatives and sureties on claims ordered paid. *Prob. Code § 11424*

Conclusiveness of order for payment of debts and distribution after settlement of final account. *Prob. Code § 11429*

[5] Cross References

For a related form, *see § 538.228*.

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47-538 California Forms of Pleading and Practice--Annotated § 538.231

§ 538.231 Complaint [Code Civ. Proc. § 425.10] for Damages to Enforce Liability of Surety [Code Civ. Proc. § 996.430] on Bond or Undertaking Given to Support Preliminary Injunction [Code Civ. Proc. § 529]--By Person Enjoined

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages to Enforce Liability of Surety [Code Civ. Proc. § 996.430] on Bond or Undertaking Given to Support Preliminary Injunction [Code Civ. Proc. § 529]--By Person Enjoined

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*], [and DOES I	)	(Suretyship)
through _____,]	)	
Defendants.	)	
	)	

_____

Plaintiff alleges:

1. [*Capacity of plaintiff. See § 538.225, Paragraph 1.*]

2. [*Capacity and residence of defendant surety. See § 538.225, Paragraphs 2.*]

[3. *Fictitious name allegation, if appropriate. See § 538.225, Paragraph 4.*]

[4. *Agency allegation, if appropriate. See § 538.225, Paragraph 5.*]

5. On _____ [*date*], _____ [*name of defendant principal*] filed a complaint against plaintiff in the Superior Court of the State of California for the County of _____, No. _____, entitled _____, wherein _____ [*name of defendant principal*] prayed for preliminary and permanent injunctions restraining plaintiff from _____ [*specify what plaintiff was to be restrained from doing*].

6. On _____ [*date*], an order to show cause why a preliminary injunction, restraining plaintiff from _____ [*specify what plaintiff was to be restrained from doing*] and ordering plaintiff to show cause, if any, before the court on _____ [*date*], why a preliminary injunction should not be issued in the action enjoining plaintiff from committing the above acts during the pendency of the action. A copy of the order to show cause is attached hereto, marked Exhibit "_____," and is by reference made a part hereof.

7. On _____ [*date*], the Court heard the order to show cause, and after receiving evidence and arguments thereon, made an order that on filing with it by _____ [*name of defendant principal*] of a written undertaking as provided in *Section 529 of the Code of Civil Procedure* in the penal sum of $_____ a preliminary injunction as prayed for in the complaint would be granted.

8. Pursuant to the order, on _____ [*date*], _____ [*name of defendant principal*] filed in the court the written undertaking of _____ [*name of defendant surety*] guaranteeing payment to plaintiff of any damages, not exceeding the sum of $_____, that plaintiff might sustain by reason of the preliminary injunction if the court finally decided that _____ [*name of defendant principal*] was not entitled thereto. A copy of the undertaking is attached hereto, marked Exhibit "_____," and is by reference made a part hererof.

9. On the filing of the undertaking above described, the court issued a preliminary injuction restraining plaintiff during the pendency of the action from _____ [*specify what plaintiff was restrained from doing*]. A copy of the preliminary injunction is attached hereto, marked Exhibit "_____," and is by reference made a part hererof.

10. Thereafter, _____ [*date*], _____ the court rendered a judgment, duly entered on _____ [*date*], in Judgment Book _____ at page _____ of the records of the court, discharging the preliminary injunction and adjudging that _____ [*name of defendant principal*] take nothing by reason of the complaint on file in the action. A copy of the judgment is attached hereto, marked Exhibit "_____," and is by reference made a part hererof.

11. By reason of the preliminary injunction, plaintiff was _____ [*specify manner in which plaintiff was damaged, e.g.*, prevented from occupying or renting his/her dwelling house located at _____ [*address*] California, having a reasonable rental value of $_____ per month for a period of 15 days] to his/her damage in the sum of $_____.

12. By reason of the preliminary injunction, plaintiff has incurred attorney's fees and expenses in the sum of $_____ in procuring a final decision dissolving the preliminary injunction, that sum being the reasonable value of such services.

WHEREFORE, plaintiff prays judgment as follows:

1. For damages in the amount of $_____;

2. For costs of suit herein incurred;

3. For reasonable attorney's fees in the sum of $_____; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 538.162.*]

[2] Use of Form

This form of complaint is for use by a beneficiary of a bond or undertaking that was given on the granting of a preliminary injunction to recover from the surety damages sustained by reason of the injunction after the court has finally decided that the applicant was not entitled to the injunction [*Code Civ. Proc. §§ 529, 996.430*].

Both the principal and the sureties shall be joined as parties to the action [*Code Civ. Proc. § 996.430(a)*].

[3] Allegations

This form alleges in pertinent part:

- The filing of an action in which preliminary injunctive relief was granted (Paragraph 5).
- The acts that were sought to be restrained (Paragraph 6) [*Lambert v. Haskell (1889) 80 Cal. 611, 614-615, 22 P. 327]* .
- he making of an order requiring an undertaking with specified conditions (Paragraph 7) [*Lambert v. Haskell (1889) 80 Cal. 611, 614, 22 P. 327]* .
- he giving of the undertaking in compliance with the order (Paragraph 8) [*Lambert v. Haskell (1889) 80 Cal. 611, 614, 22 P. 327]* .
- Issuance of the preliminary injunction, including a statement of the acts it restrained (Paragraph 9).
- Adjudication of the action and discharge of the preliminary injunction (Paragraph 10).
- Damages incurred by the plaintiff as a result of the preliminary injunction (Paragraph 11) [*Lambert v. Haskell (1889) 80 Cal. 611, 618-619, 22 P. 327]* .

[4] Attorney's Fees

Attorney's fees and costs incurred by the plaintiff in resisting the prior action may be recovered (Paragraph 12) [*Russell v. United Pacific Ins. Co. (1963) 214 Cal. App. 2d 78, 88-89, 29 Cal. Rptr. 346]* . However, since the bond or undertaking pertains only to the preliminary injunction, plaintiff cannot recover attorney's fees accruing after a permanent injunction is entered, such as fees incurred on appeal from the final decree. In addition, the fees recoverable are not those expended for the defense of the suit, but only those expended solely or principally in procuring dissolution of the injunction [*see* *Lambert v. Haskell (1889) 80 Cal. 611, 622-624, 22 P. 327]* .

[5] Surety's Right to Indemnity

In one case, a corporate surety issued a preliminary injunction bond based on the application and promise of indemnity issued by one of several plaintiffs. The defendant prevailed and sought judgment on the bond, and the surety claimed a right to indemnity against all of the plaintiffs and demanded a judgment in which all of the plaintiffs were made jointly and severally liable with the surety. The appellate court held that the surety's indemnity rights were a matter of contract, and therefore the only plaintiff liable to the surety was the one who applied for the bond [*Top Cat Productions v. Michael's Los Feliz (2002) 102 Cal. App. 4th 474, 476, 478, 125 Cal. Rptr. 2d 553* (under *Code Civ. Proc. § 529(a)*, "applicant" does not include all named plaintiffs without regard to which of them applied for undertaking)].

[6] Statutes

Grounds for issuance of provisional injunctions. *Code Civ. Proc. § 526*

Bond required prior to grant of preliminary injunction. *Code Civ. Proc. § 529*

[7] Decisions

Attorney's fees and costs recoverable as damages from sureties on injunction bond. *Russell v. United Pacific Ins. Co. (1963) 214 Cal. App. 2d 78, 88-89, 29 Cal. Rptr. 346*

Final judgment denying permanent injunction was prima facie final decision that preliminary injunction should not have issued. *Rice v. Cook (1891) 92 Cal. 144, 147-148, 28 P. 219*

It is necessary to allege acts sought to be restrained, pendency of injunction suit with specified conditions, making of order requiring undertaking, giving of undertaking in complainace with order, conditions of liability, and damages. *Lambert v. Haskell (1889) 80 Cal. 611, 614-619, 22 P. 327*

Profits which would have been made during time business was closed due to injunction found to be recoverable. *Lambert v. Haskell (1889) 80 Cal. 611, 618-619, 22 P. 327*

In indemnity action, surety could sue only party that applied for undertaking, not all parties covered by undertaking. *Top Productions, Inc. v. Michael's Los Feliz (2002) 102 Cal. App. 4th 474, 478, 125 Cal. Rptr. 2d 553*

[8] Cross References

For forms for notices of motion and judgments enforcing liability on a bond or undertaking given on a preliminary injunction, see Ch. 303, *Injunctions*

For a related form, *see § 538.225*.

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47-538 California Forms of Pleading and Practice--Annotated § 538.232

§ 538.232 Complaint for Damages [Civ. Code § 3333] and for Declaratory Relief--By Surety Against Claimants on Statutory Bond and Against Principal's Indemnitor

[1] FORM Complaint for Damages [Civ. Code § 3333] and for Declaratory Relief--By Surety Against Claimants on Statutory Bond and Against Principal's Indemnitor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], [and DOES I	)	COMPLAINT FOR DECLARATORY RELIEF
through _____,]	)	AND DAMAGES
Defendants.	)	
	)	

_____

Plaintiff alleges:

[*EITHER*]

1. Plaintiff _____ [*name of surety*] is now, and at all times herein mentioned was, a resident of _____ County, California.

[*OR*]

1. Plaintiff _____ [*name of surety*] is now, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of _____ [*specify state*], authorized to engage and engaged in the surety insurance business in the State of California with its principal place of business in _____ County, California.

[*CONTINUE*]

[2. Defendant _____ (*name*) is (, and at all times mentioned herein was,) _____ (*state capacity, if other than individual, and residence of defendant, e.g.*, a resident of *or* a corporation organized and existing under the laws of the State of _____ with its principal place of business in) _____ County, California (, at _____ (*street address, and if any, city*))].

[3. *Fictitious name allegation, if appropriate. See § 538.225, Paragraph 4.*]

[4. *Agency allegation, if appropriate. See § 538.225, Paragraph 5.*]

5. On _____ [*date*], _____ [*name of principal*] applied to plaintiff for the execution of a _____ [bond *or* undertaking] to _____ [*name of person or entity receiving bond, e.g.*, the State of California] covering _____ [*set out coverage of bond*].

6. In order to assist _____ [*name of principal*] in obtaining the _____ [bond *or* undertaking], and in consideration of the execution of the _____ [bond *or* undertaking] by Plaintiff, defendant _____ [*name of indemnitor*], on _____ [*date*], made, executed, and delivered to plaintiff a general indemnity agreement. [A copy of the agreement is attached hereto, marked Exhibit "_____," and made a part hereof by reference.]

7. In consideration of the execution of the application by _____ [*name of principal*], and the execution of the indemnity agreement by defendant _____ [*name of indemnitor*], Plaintiff, as surety, executed and delivered to _____ [*name of public agency requiring the bond or undertaking*], on _____ [*date*], a _____ [bond *or* undertaking] as requested by the application. [A copy of the _____ (bond *or* undertaking) is attached hereto, marked Exhibit "_____," and made a part hereof by reference.]

8. An actual controversy has arisen relating to the legal rights and duties of plaintiff and defendants under the _____ [bond *or* undertaking] and the indemnity agreement.

9. Claims under the _____ [bond *or* undertaking] have been made against the plaintiff by defendants _____ [*names of claimants*] based on the alleged failure of the principal _____ [*name of principal*] to _____ [*specify acts for which principal was bonded and failed to do*].

10. The claims made by defendants are as follows: _____ [*specify names of claimants and the claim of each*]. The total amount of the claims made by defendant claimants is $_____, and the limit of the liability of plaintiff to all defendant claimants and to all other persons who may have claims under the _____ [bond *or* undertaking] is $_____.

11. Plaintiff desires a judicial determination of the liability of plaintiff to the defendants who have made claims against the _____ [bond *or* undertaking], and of the rights and duties of the defendant _____ [*name of indemnitor*] under the indemnity agreement; and that the court determine and declare the amounts, if any, of

plaintiff's liability to each of the defendants who have made claims against it under the _____ [bond *or* undertaking], and the liability, if any, of the defendant _____ [*name of indemnitor*] to the plaintiff.

WHEREFORE, plaintiff prays for a declaratory judgment declaring and adjudicating the respective rights and duties of the plaintiff and the defendants under the above-described _____ [bond *or* undertaking] and indemnity agreement.

If the court determines that the plaintiff is indebted to any of the defendants who have made claims against plaintiff under the _____ [bond *or* undertaking], that the court determine the amount to be paid to each of the defendants, and that plaintiff's liability to all defendants be limited to the sum of $_____.

If the court determines that the defendant _____ [*name of indemnitor*] is liable to the plaintiff under the indemnity agreement, that plaintiff have judgment against said defendant _____ [*name of indemnitor*] for the amount of plaintiff's liability to the other defendants; together with plaintiff's costs and expenses and reasonable attorney's fees to be fixed by the court.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 538.162.*]

[2] Use of Form

This form of complaint is for use by a surety to obtain declaratory relief adjudicating the rights and duties, under a bond or undertaking and an indemnification agreement, of the surety, the principal's creditors, and a third party who has agreed to indemnify the surety for losses related to the surety's bond or undertaking [*Code Civ. Proc. § 1060*].

[3] Allegations

This form alleges in pertinent part [*Code Civ. Proc. §§ 1060, 1061*]:

- The principal's application to plaintiff for a bond or undertaking (Paragraph 5).
- Execution of the indemnity agreement (Paragraph 6).
- Execution of the bond or undertaking (Paragraph 7).
- Existence of an actual controversy over creditors' claims against plaintiff (Paragraphs 8-10).
- Desire for judicial adjudication (Paragraph 11).

[4] Cross References

For forms relating to declaratory relief generally, see Ch. 182, *Declaratory Relief*

[5] Statutes

Declaratory relief. *Code Civ. Proc. § 1060*

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§ 538.233 Cross Complaint [Code Civ. Proc. § 425.10] by Surety to Compel Public Agency to Exhaust Collateral Security Deposited by Licensee [Civ. Code § 2850] in Action by Creditor and Public Agency Against Surety on Licensee's Bond

[1] FORM Cross Complaint [Code Civ. Proc. § 425.10] by Surety to Compel Public Agency to Exhaust Collateral Security Deposited by Licensee [Civ. Code § 2850] in Action by Creditor and Public Agency Against Surety on Licensee's Bond

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	
_____ [*name*], [and DOES I	)	
through _____],	)	NO. _____
Defendants.	)	CROSS COMPLAINT TO COMPEL AGENCY TO
_____ [*name*],	)	EXHAUST COLLATERAL SECURITY
Cross Complainant,	)	[*Civ. Code § 2850*]
vs.	)	
_____ [*name*],	)	
Cross Defendant.	)	
	)	

_____

Plaintiff alleges:

1. Cross complainant _____ [*name of beneficiary*] is the beneficiary on the _____

[bond *or* undertaking] given by _____ [*name of principal*] for _____ [*state purpos*
e] required to be filed as provided by _____ [*specify code section requiring bond or undertaking*].

2. At all times herein mentioned, cross defendant was, and now is, a public agency of the State of California authorized to license, regulate, and supervise persons and entities in this State engaged in the business of _____ [*specify business agency regulates, e.g.*, wrestling clubs].

3. At all times herein mentioned, _____ [*name of principal*] was a person engaged in the business of _____ [*specify type of business, e.g.*, wrestling clubs] in California and duly licensed as such by cross defendant.

4. Rule _____, duly adopted by cross defendant, provides that each person licensed to conduct business California as a _____ [*specify type of business, e.g.*, wrestling club] must at all times maintain with cross defendant a surety bond in a penal sum equal to _____ [*specify sum, e.g.*, one-half of the annual gross receipts of the club] to guarantee the payment by such person of _____ [*specify what bond is to guarantee, e.g.*, all damages arising from faulty management].

5. At all times herein mentioned, there was, and now is, on deposit and in full force and effect with cross defendant a surety bond in the penal sum of $_____ executed by cross complainant as surety and _____ [*name of principal*], as principal, guaranteeing the payment by _____ [*name of principal*] of _____ [*specify what bond is to guarantee, e.g.*, all damages arising from faulty management].

6. On or about _____ [*date*], cross defendant notified _____ [*name of principal*] that, pursuant to Rule _____, the above-mentioned bond was no longer adequate in amount and that unless _____ [*name of principal*] deposited with cross defendant additional security in the sum of $_____, his/her license to conduct business in California as a _____ [*specify type of business, e.g.*, wrestling club] would be revoked.

7. Pursuant to such notice and demand, _____ [*name of principal*] deposited with the cross defendant on _____ [*date*], the sum of $_____ cash, lawful money of the United States, for the purpose of guaranteeing payment by him/her of _____ [*specify what deposit is to guarantee, e.g.*, all damages arising from faulty management] and received a receipt therefor. A copy of the receipt is attached hereto, marked Exhibit "_____," and made a part hereof by reference.

8. On _____ [*date*], subsequent to the deposit, cross defendant and _____ [*name of creditor*] filed a complaint herein against cross complainant as surety on the above-mentioned bond alleging that _____ [*name of principal*] had breached the condition of the bond and that there is now due, owing, and unpaid from _____ [*name of principal*] to _____ [*name of creditor*] the sum of $_____ [*state amount*] in payment of _____ [*specify obligation for which payment was guaranteed in bond, e.g*, damages arising from faulty management].

9. The sum of $_____ deposited by _____ [*name of principal*] on _____ [*date*], remains on deposit with cross defendant and has not been applied by cross defendant toward the discharge of any obligation owed by _____ [*name of principal*] for the payment of _____ [*specify what bond is to guarantee, e.g.*, all damages arising from faulty management] or otherwise.

WHEREFORE, cross complainant prays:

1. That if judgment be rendered on the complaint herein against defendant and cross complainant, cross defendant be required and directed to pay and apply said sum of $_____ deposited with it together with interest thereon in pro tanto exoneration of the liability of defendant and cross complainant on such judgment; and

2. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 538.162.*]

[2] Use of Form

This form is for use by a surety to cross complain in an action by a creditor and public agency against the surety on a licensee's bond to have the money deposited by the principal applied toward the liability of the surety [*see Civ. Code §§ 2849, 2850*].

[3] Allegations

This cross complaint alleges in pertinent part [*State Ath. Com. v. Mass. Bonding etc. Co. (1941) 46 Cal. App. 2d 823, 828-829, 117 P.2d 75]* :

- The capacity of the cross defendant as a public agency (Paragraph 2).
- That the principal is engaged in a business regulated by cross defendant (Paragraph 3).
- The cross defendant's requirement that a bond be deposited with it in order to conduct the regulated business (Paragraph 4).
- That the principal deposited with cross defendant a bond on which cross complainant was surety (Paragraph 5).
- That the principal increased the deposit on cross defendant's demand (Paragraphs 6, 7).
- The instigation of a suit against the cross complainant by the cross defendant and the creditors for a specified sum (Paragraph 8).
- The cross defendant's retention of the deposit and failure to pay the principal's creditors from the deposit (Paragraph 9).

[4] Statutes

Surety as entitled to benefit of any security given to creditor by principal. *Civ. Code § 2849*

Surety as entitled to have property of principal hypothecated to creditor applied in discharge of obligation. *Civ. Code § 2850*

[5] Decisions

Additional security deposited by principal with state regulatory agency as applied to reduce liability of surety. *State Ath. Com. v. Mass. Bonding etc. Co. (1941) 46 Cal. App. 2d 823, 828-829, 117 P.2d 75*

[6] Cross References

For a related form, *see § 538.225*.

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 538 SURETYSHIP, BONDS, AND UNDERTAKINGS
PART IV. FORMS
B. Bonds And Undertakings
2. Enforcement Of Liability On Statutory Bonds

47-538 California Forms of Pleading and Practice--Annotated § 538.234

§ 538.234 Declaration [Code Civ. Proc. § 2015.5] by Plaintiff for Issuance of Enforcement Lien [Code Civ. Proc. § 996.520]--In Proceedings for the Benefit of the State to Enforce Liability on a Bond

[1] FORM Declaration [Code Civ. Proc. § 2015.5] by Plaintiff for Issuance of Enforcement Lien [Code Civ. Proc. § 996.520]--In Proceedings for the Benefit of the State to Enforce Liability on a Bond

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	PLAINTIFF'S DECLARATION FOR ISSUANCE
vs.	)	OF ENFORCEMENT LIEN
_____ [*name*],	)	[*Code Civ. Proc. § 996.520*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Trial Date: _____]

_____

I, _____ [*name*], declare:

1. The _____ [bond *or* undertaking] for _____ [*state purpose of bond or undertaking*] as provided by _____ [*specify code section requiring bond or undertaking*] was executed by _____ [*name(s) of defendant(s*)], _____ [the defendant(s) *or* one of the defendants *or* some of the defendants] in the above-entitled action for enforcement of liability on the bond.

2. The _____ [bond *or* undertaking] was executed _____ [to *or* in favor of *or*

payable to] the (People of the) State of California.

3. _____ [*Name of defendant(s*)] has/have _____ [real property *or* an interest in real property] in _____ [County *or* Counties].

4. The liability on the _____ [bond *or* undertaking] is being enforced for the benefit of the State of California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature of surety*]

[2] Use of Form

This form of declaration is for use by a person enforcing the liability on a bond or undertaking executed to, in favor of, or payable to the State of California or the People of the State of California, including but not limited to an official bond, to obtain a lien against defendant's property on judgment of liability [*Code Civ. Proc. §§ 996.510, 996.520*]. For a discussion of enforcement of judgments and obtaining an enforcement lien, see *§ 538.86[2]*.

[3] Cross References

For general forms of declarations, see Ch. 16, *Affidavits, Certificates, and Declarations*

[4] Statutes

Affidavit for enforcement lien. *Code Civ. Proc. § 996.520*

Declarations in lieu of affidavit. *Code Civ. Proc. § 2015.5*

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[RESERVED]

Chapter 539[RESERVED]

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AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

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§ 540.530 Petition to State Board of Equalization for Redetermination of Sales or Use Tax [Rev. & Tax. Code §§

6538, 6561, 6561.5]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Service of Petition

[6] Statute of Limitations

[7] Hearing and Determination

[8] State Statutes

§ 540.531 Claim for Refund of Sales or Use Taxes [Rev. & Tax. Code §§ 6902, 6904]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Signature

[5] Statute of Limitations

[6] Interest and Penalties

[7] Cross References

[8] State Statutes

[9] Decisions

§ 540.532 Complaint for Refund of Sales or Use Taxes [Rev. & Tax. Code § 6933]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction, Venue, and Service

[6] Statute of Limitations

[7] Application of Judgment and Interest

[8] State Statutes

[9] Decisions

§§ 540.533-540.549 [Reserved]

§ 540.550 Complaint for Determination of Residency to Avoid Liability for California Personal Income Tax [Rev. & Tax. Code § 19381]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Prerequisites to Suit

[5] Statute of Limitations

[6] Jurisdiction and Venue

[7] Verification

[8] Collection of Tax During Pendency of Action

[9] Attorney's Fees and Costs

[10] State Statutes

[11] Decisions

[12] Law Reviews

§ 540.551 Complaint for Refund of Personal Income Tax [Rev. & Tax. Code § 19382]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Prerequisites to Suit

[5] Statute of Limitations

[6] Jurisdiction and Venue

[7] Service

[8] Interest and Attorney's Fees

[9] State Statutes

[10] Decisions

[11] Text References

[12] Cross References

§ 540.552 Complaint for Refund of Corporation Taxes Assessed by FTB [Rev. & Tax. Code § 19382] Against Unitary Business [Rev. & Tax. Code §§ 25120-25141]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Prerequisites to Suit

[5] Statute of Limitations

[6] Jurisdiction and Venue

[7] Interest and Attorney's Fees

[8] California Constitution

[9] State Statutes

[10] Decisions

[11] Cross References

§§ 540.553-540.569 [Reserved]

§ 540.570 Complaint for Damages Based on Reckless Disregard of SBE or FTB Published Procedures [Rev. & Tax. Code §§ 7099, 21021]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction and Venue

[6] Plaintiff's Negligence Considered in Calculating Damages

[7] Plaintiff Penalized for Frivolous Position

[8] Cross References

[9] Administrative Regulations

Robert D. Schindewolf
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FOOTNOTES:
(n99)Footnote *. Robert D. Schindewolf, Contributing Author. Updating contributed by and Lawrence M. Freiser, J.D.

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 540 TAXES AND ASSESSMENTS
PART I. SCOPE

47-540 California Forms of Pleading and Practice--Annotated § 540.01

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§ 540.01 Scope of Chapter

This chapter discusses the administrative and judicial remedies available for contesting three types of taxes:

- Local ad valorem property taxes and assessments, including discussion of:
  - The structure and administration of the state property tax system.
  - Taxpayers' administrative remedies for contesting taxes and assessments, including claims for refunds.
  - Judicial remedies available to taxpayers (including suits for refunds) and to purchasers.
  - Suits to perfect title in property acquired by tax deeds and sales.

Forms include forms for refund claims [*§§ 540.510, 540.511*], and a general form for refund suit [*§ 540.512*].

- State and local sales and use taxes and local business license taxes based on gross receipts, including discussion of:
  - Sales and use taxes imposed by the State of California and local entities.
  - Local business taxes based on gross receipts.
  - Administrative and judicial remedies available to contest determinations and overpayment of tax.

- The nature and administration of sales and use taxes.
- Deficiency and jeopardy determinations.
- Interest and penalties, petitions for redetermination of proposed assessments.
- The remedies used by the State Board of Equalization (SBE) to collect delinquent sales and use taxes.
- Taxpayer's remedies for overpayment of sales and use taxes.

Forms include a petition for redetermination of sales and/or use tax [*§ 540.530*], a claim for refund [*§ 540.531*], and a complaint seeking refund of sales and use taxes [*§ 540.532*].

- California personal income taxes and corporation taxes, including discussion of:
  - Tax returns.
  - Tax assessments.
  - The administrative and judicial remedies available to individual and corporate taxpayers for challenging personal income tax and corporation tax determinations of the Franchise Tax Board.
  - The collection methods and judicial remedies available to the FTB is also included.

Forms include complaints for a determination of residency to avoid California personal income tax [*§ 540.550*], a refund of personal income taxes [*§ 540.551*], and a refund of franchise taxes assessed against a unitary business [*§ 540.552*].

This chapter also discusses administrative and judicial remedies available under the Property Taxpayers' *Bill of Rights* and Taxpayers' *Bill of Rights*, including the following:

- The remedies available under the various Taxpayers' *Bill of Rights* acts enacted to protect California taxpayers.
- The Morgan Property Taxpayers' *Bill of Rights* [*Rev. & Tax. Code §§ 5900 et seq.*], which is applicable to local ad valorem property taxes.
- The Harris-Katz California Taxpayers' *Bill of Rights* [*Rev. & Tax. Code § 7080 et seq.*], applicable to sales and use taxes.
- The Katz-Harris Taxpayers' *Bill of Rights* Act [*Rev. & Tax. Code § 21001 et seq.*], applicable to personal income taxes and corporation taxes.
- Portions of the Taxpayers' *Bill of Rights* Act of 1999, enacted by Stats. 1999, ch. 931 (including *Rev. & Tax. Code §§ 19226* and *19443*), applicable to personal income taxes and corporation taxes, and other related sections enacted by Stats. 1999, ch. 348 (including *Rev. & Tax. Code § 19225*), also applicable to personal income taxes and bank and corporation taxes.

- A form for a complaint for damages resulting from the reckless disregard of published procedures by an officer or employee of the State Board of Equalization (hereinafter referred to as the SBE) or the Franchise Tax Board (hereinafter referred to as the FTB) [*§ 540.570*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesAdministration & ProceedingsCredits, Overassessments & RefundsTax LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTax LawState & Local TaxesReal Property TaxGeneral OverviewTax LawState & Local TaxesSales TaxGeneral OverviewTax LawState & Local TaxesUse TaxGeneral Overview

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Chapter 540 TAXES AND ASSESSMENTS
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47-540 California Forms of Pleading and Practice--Annotated § 540.02

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.02 Cross References

For discussion and a form for a complaint by a good-faith improver, see Ch. 279, *Good Faith Improver of Real Property*

For discussion and forms for complaints for use in seeking a declaration of theillegality of a tax, see Ch. 182, *Declaratory Relief*

For a form for a complaint alleging breach of lease covenant by failure to pay taxes, see Ch. 332, *Landlord and Tenant: The Tenancy*

For discussion and form for a complaint to foreclose lien by remainderman against life tenant who failed to pay taxes, see Ch. 344, *Life Estates and Remainders*

For discussion and forms relating to taxpayers' actions under *Code Civ. Proc. § 526a* to enjoin unlawful expenditure of public funds, see Ch. 466, *Public Entities and Officers: Taxpayers's Actions*

For discussion of the immunity of public entities and employees from liability under *Gov. Code § 860.2* for injury caused by the institution of proceedings incidental to the assessment or collection of a tax or to the interpretation or application of any tax law, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

For discussion of city license taxes other than those based on gross receipts, see Ch. 471B, *Licensing by Public Agencies*

For a general form for a quiet title complaint and a form for a quiet title complaint for use by a purchaser of tax-defaulted property, see Ch. 482, *Quieting Title*

For discussion and forms relating to taxpayers' actions under *Code Civ. Proc. § 526a* to enjoin unlawful expenditure of public funds, see Ch. 466, *Public Entities and Officers: Taxpayer's Actions*

For a general form of quiet title complaint, and for a form of quiet title complaint for use by a purchaser of tax-defaulted property, see Ch. 482, *Quieting Title*

For discussion and forms relating to attachment, see Ch. 62, *Attachment* , Ch. 276, *Garnishment*

For discussion and forms relating to executions, see Ch. 254, *Executions and Enforcement of Judgments*

For a discussion and forms relating to enforcement of judgments, see *Ch. 318, Judgments, § 318.90* et seq.

For discussion and forms relating to liens, see Ch. 342, *Liens and Wage Preferences*

For forms for use in seeking declaratory relief in challenging local licensing ordinances, see Ch. 471B, *Licensing by Public Agencies*

For discussion and forms of claims against public entities, other than those provided by the Revenue and Taxation Code, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

For discussion and forms relating to bonds and undertakings, see Ch. 538, *Suretyship, Bonds, and Undertakings*

For discussion and forms relating to attachment, see Ch. 62, *Attachment* , and Ch. 276, *Garnishment*

For discussion of tax issues involved in dissolution of marriage, see Ch. 227, *Dissolution of Marriage: Tax Effects of Dissolution*

For discussion and forms relating to executions, see Ch. 254, *Executions and Enforcement of Judgments*

For a discussion and forms relating to enforcement of judgments, see *Ch. 318, Judgments, § 318.90* et seq.

For discussion and forms relating to liens, see Ch. 342, *Liens and Wage Preferences*

For discussion and forms relating to estate taxes, see Ch. 452, *Probate: Proration of Estate and Generation-Skipping Transfer Taxes* , and Ch. 453, *Probate: Estate Tax*

For discussion and forms relating to bonds and undertakings, see Ch. 538, *Suretyship, Bonds, and Undertakings*

For discussion relating to levies generally, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.

For discussion relating to liens in general, see *Ch. 342, Liens and Wage Preferences, § 342.10* et seq.

For discussion and forms relating to invasion of privacy and collection of information by state agencies generally, see *Ch. 429, Privacy, § 429.60* et seq.

For discussion relating to access of information in public agency files, see Ch. 470C, *Public Records Act* , and Ch. 471, *Investigations by Public Agencies*

For discussion relating to service of summons and complaint on the State of California, see Ch. 518, *Service of Summons and Papers*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesBondsSuretiesLiabilityFamily LawMarital Termination & Spousal SupportTaxationGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsClaims By & AgainstReal Property LawEstatesFuture InterestsRemaindersReal Property LawNonmortgage LiensGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsTax LawState & Local TaxesEstate & Gift TaxEstate TaxGeneral Overview

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47-540 California Forms of Pleading and Practice--Annotated §§ 540.03-540.09

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

[Reserved]

§§ 540.03[Reserved]

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Chapter 540 TAXES AND ASSESSMENTS
PART II. LEGAL BACKGROUND
A. IN GENERAL

47-540 California Forms of Pleading and Practice--Annotated § 540.10

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.10 Power to Tax

A tax is a charge on persons, property, or activities to raise money for public purposes [*City of Glendale v. Trondsen (1957) 48 Cal. 2d 93, 103, 308 P.2d 1* ; *Perry v. Washburn (1862) 20 Cal. 318, 350]* . To be valid, a tax need not be expended for purposes particularly beneficial to the taxpayer. It is enough that the taxpayer receive the benefit of living in an organized society established by the devotion of taxes to public purposes [*see Carmichael v. Southern Coal & Coke Co. (1936) 301 U.S. 495, 521, 57 S. Ct. 868, 81 L. Ed. 1245* ; *Barwise v. Sheppard (1936) 299 U.S. 33, 39, 57 S. Ct. 70, 81 L. Ed. 23* ; *Modern Barber Col. v. Cal. Emp. Stab. Com. (1948) 31 Cal. 2d 720, 724, 192 P.2d 916]* . All taxes must be levied for a public purpose. A tax, or an act providing for a tax, for a private purpose is unconstitutional [*see City of Los Angeles v. Lewis (1917) 175 Cal. 777, 779-780, 167 P. 390]* .

The California tax system is set forth in the California Constitution, mainly Articles XIII, XIII A, XIII B, XIII C, and XIII D, and in the Revenue and Taxation Code. The Legislature cannot delegate the power to tax to a private entity, nor may the power to tax be surrendered or suspended by grant or contract [*Cal. Const., art. XI, § 11, art. XIII, § 31*; *see Howard Jarvis Taxpayers' Assn. v. Fresno Metropolitan Projects Authority (1995) 40 Cal. App. 4th 1359, 48 Cal. Rptr. 2d 269* (construing and discussing history of *Cal. Const., art. XI, § 11*)]. The Legislature cannot impose taxes for local purposes but may authorize local governments to impose them [*Cal. Const., art. XIII, § 24*]. Local governments have no inherent taxing power; they have only such power as granted by the state Constitution or by the Legislature [*Sacramento Mun. Utility Dist. v. County of Solano (1997) 54 Cal. App. 4th 1163, 1166, 63 Cal. Rptr. 2d 286]* . Article XIII of the California Constitution provides the basic framework, including some exemptions, for property taxes and income taxes and delegates to the Legislature other powers necessary to carry out the specified provisions [*Cal. Const., art. XIII, §§ 1-21, 26, 33*]. Actions for tax refunds must be brought in the manner prescribed by the Legislature [*Cal. Const., art. XIII, § 32*; *see Woosley v. State of California (1992) 3 Cal. 4th 758, 789, 13 Cal. Rptr. 2d 30, 838 P.2d 758* ; *Flying Dutchman Park, Inc. v. City and County of San Francisco (2001) 93 Cal. App. 4th 1129, 113 Cal. Rptr. 2d 690]* .

Article XIII A of the California Constitution was added by Proposition 13 in June 1978, and places limitations on

certain taxes. Article XIII B of the California Constitution was added by Proposition 4 in November 1979, and places spending limitations on state and local government. Articles XIII C and XIII D of the California Constitution were added by Proposition 218in November, 1996, and together constitute the Right to Vote on Taxes Act, and restrict the power of local governments to impose both general and special taxes without voter approval [*see Cal. Const., art. XIII C, § 2*; *see also Gov. Code § 53720 et seq.*, added by Proposition 62 in 1986 on voter approval of taxes] and to require a procedure that precludes the imposition of taxes, assessments, fees, and charges on any parcel of property or on any person as an incident of property ownership over the protest of a majority of affected property owners [*see Cal. Const., art. XIII D, §§ 3, 4*]. Although *Gov. Code § 53724*, as part of Proposition 62, requires that a taxing ordinance first be approved by a two-thirds vote of all members of the legislative body of the local government or district before it is submitted to voters for their approval, a court has held that a charter city's constitutional authority over the conduct of its own elections overrides that provision. Therefore, the court held valid a gross receipts tax on the sale of firearms that had been submitted to the voters after only a majority vote of the City Council, in accordance with the city's charter and municipal code [*Trader Sports, Inc. v. City of San Leandro (2001) 93 Cal. App. 4th 37, 112 Cal. Rptr. 2d 677]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawIncome TaxGovernmentsLegislationSpecial ActsTax LawState & Local TaxesGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsCredits, Overassessments & Refunds

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A. IN GENERAL

47-540 California Forms of Pleading and Practice--Annotated § 540.11

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.11 Limitations on the Power to Tax

[1] Discrimination

The power of state and local governments to tax is not without limitations. No taxpayer or group of taxpayers can be singled out for discriminatory treatment that would amount to a violation of the *equal protection clause* [*Hillsborough Township v. Cromwell (1946) 326 U.S. 620, 623, 66 S. Ct. 445, 90 L. Ed. 358* ; *City of Alameda v. Premier Communications Network, Inc. (1984) 156 Cal. App. 3d 148, 154, 202 Cal. Rptr. 684* , *cert. denied, 469 U.S. 1073* (invalidating tax that was "differentially burdensome" on instrumentalities of speech or press, such as subscription television services, as interference with *First Amendment* rights); *Ferran v. City of Palo Alto (1942) 50 Cal. App. 2d 374, 378, 122 P.2d 965]* .

[2] Imports and Exports

State and local governments are prohibited from imposing any tax on exports or from taxing instrumentalities of the federal government without the consent of Congress [U.S. *Const., art. I, § 10*, cl. 2, art. VI; McColloch v. Maryland (1819) 17 U.S. 316, 425-438, 4 L. Ed. 579 ; *see also TRW Space & Defense Sector v. County of Los Angeles (1996) 50 Cal. App. 4th 1703, 1710-1714, 58 Cal. Rptr. 2d 602* (improper tax on property owned by federal government distinguished from constitutionally permissible use tax on private party using tax exempt real or personal property owned by federal government for party's own beneficial personal use and advantage)]. The original package doctrine was abrogated in 1976, allowing a nondiscriminatory local personal property tax to beimposed on imports,but California has since exempted business inventories from taxation [*Rev. & Tax. Code § 219*; *Michelin Tire Corp. v. Wages (1976) 423 U.S. 276, 296-301, 96 S. Ct. 535, 46 L. Ed. 2d 495* ; *see American Smelting etc. Co. v. County of Contra Costa (1969) 271 Cal. App. 2d 437, 469-481, 77 Cal. Rptr. 570* (upholding nondiscriminatory property tax on imports stored in bonded warehouse); *R.J. Reynolds Tobacco Co. v. Durham County (1986) 479 U.S. 130, 143-155, 107 S. Ct. 499, 93 L. Ed. 2d 449 (North Carolina property tax)]* .

[3] Interstate Commerce

The commerce clause and the *Fourteenth Amendment due process clause of the Federal Constitution* limit the imposition of state and local taxes. State or local taxes may not place an undue burden on interstate commerce [U.S. *Const., art. I, § 8, cl. 3*]. In addition, the due process clause requires some minimum contact between the taxing entity and the transaction [*see Allied-Signal v. Director, Tax Div. (1992) 504 U.S. 768, 112 S. Ct. 2251, 119 L. Ed. 2d 533, 545]* . These constitutional limitations are separate but may overlap. However, a tax that meets the minimum contacts requirement may not have the substantial nexus that is required under the commerce clause [*Quill Corporation v. State of North Dakota (1992) 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91, 102* (state use tax on out-of-state mail order business with no physical presence in state does not violate due process clause but does violate commerce clause by unduly burdening interstate commerce)].

For property taxation, the commerce clause requires apportionment of the tax based on the amount of time the property is in the county [*Standard Oil Co. v. Peck (1952) 342 U.S. 382, 384, 72 S. Ct. 309, 96 L. Ed. 427, 63 Ohio Law Abs. 559* ; *Flying Tiger Line, Inc. v. County of Los Angeles (1958) 51 Cal. 2d 314, 317-318, 333 P.2d 323* ; *GeoMetrics v. County of Santa Clara (1982) 127 Cal. App. 3d 940, 947-948, 179 Cal. Rptr. 850]* .

For sales and use taxes, the commerce clause and the due process clause require that the transaction taxed have sufficient nexus with the taxing state [*Quill Corporation v. State of North Dakota (1992) 504 U.S. 298, 305-313, 112 S. Ct. 1904, 119 L. Ed. 2d 91* (nexus requirements imposed by due process and commerce clause not identical); *National Geographic v. Cal. Equalization Bd. (1977) 430 U.S. 551, 554, 97 S. Ct. 1386, 51 L. Ed. 2d 631* ; *cf. Rev. & Tax. Code § 6203(c)-(e)* (when retailer deemed doing business in California for purpose of collecting use tax); *Borders Online v. State Bd. of Equalization (2005) 129 Cal. App. 4th 1179, 1195, 1201, 29 Cal. Rptr. 3d 176* (internet bookseller that promoted sales by allowing books to be returned for credit or exchange at California stores of affiliated company was doing business in California for purposes of *Rev. & Tax. Code § 6203(c)(2)*, and that conclusion was consistent with commerce clause nexus requirement)].

In addition to requiring sufficient nexus, the commerce clause prohibits state taxes that discriminate against interstate commerce by imposing a greater tax burden on an out-of-state transaction than on a local transaction. Thus, a use tax on out-of-state purchases violates the interstate commerce clause if it imposes a greater tax burden than a sales tax imposes on local purchases [*Woosley v. State of California (1992) 3 Cal. 4th 758, 780, 13 Cal. Rptr. 2d 30, 838 P.2d 758* (discriminatory license feesand use tax on passenger vehicles originally sold outside California); *see also General Motors Corp. v. City and County of San Francisco (1999) 69 Cal. App. 4th 448, 451-454, 81 Cal. Rptr. 2d 544* (business tax that discriminates between in-city manufacturers and out-of-city manufacturers violates state and federal commerce protections); *Ceridian Corp. v. Franchise Tax Bd. (2000) 85 Cal. App. 4th 875, 887-888, 102 Cal. Rptr. 2d 611* (statute providing deduction for insurance subsidiary dividends only to corporations domiciled in California and limiting the amount of the deduction according to a formula based on the subsidiary's gross receipts, payroll and property within the state held to violate the Commerce Clause)]. For both income taxes and sales and use taxes, a four-pronged test determines the validity of a tax on interstate commerce. The tax must [*Complete Auto Transit, Inc. v. Brady (1977) 430 U.S. 274, 287, 97 S. Ct. 1076, 51 L. Ed. 2d 326* ; *see Quill Corporation v. State of North Dakota (1992) 504 U.S. 298, 311-314, 112 S. Ct. 1904, 119 L. Ed. 2d 91* ; *Jordan v. Department of Motor Vehicles (1999) 75 Cal. App. 4th 449, 460, 89 Cal. Rptr. 2d 333]* :

- Be applied to an activity with a substantial nexus with the taxing state;
- Be fairly apportioned;
- Not discriminate against interstate commerce; and
- Be fairly related to the services provided by the state.

[4] Foreign Commerce

The U.S. Constitution provides limits on a state's taxation of foreign commerce that are similar to the restrictions on interstate commerce [U.S. *Const., art. I, § 8, cl. 3*]. In determining the validity of a tax on foreign commerce, a court must consider the four factors set forth in *Complete Auto* [*Complete Auto Transit, Inc. v. Brady (1977) 430 U.S. 274, 287, 97 S. Ct. 1076, 51 L. Ed. 2d 326* ; *see § 540.11[3]*], plus two additional factors. That is, in addition to deciding whether a tax is valid because it meets the nexus, apportionment, nondiscrimination, and relation-to-state-services requirements presented in *Complete Auto*, a court must ask whether the tax avoids either of the following [*Japan Line, Ltd. v. County of Los Angeles (1979) 441 U.S. 434, 451-453, 99 S. Ct. 1813, 60 L. Ed. 2d 336]* :

- Creating a substantial risk of international multiple taxation, notwithstanding apportionment; or

- Preventing the federal government from speaking with one voice whenregulating commercial relations with foreign governments.

The California Supreme Court has held that formula (payroll, property, and sales) apportionment of the income of a foreign-parent unitary business does not violate the foreign commerce clause of the U.S. Constitution. Various tax treaties and agreements indicate the federal government's intent not to prohibit states from using this method of taxing multinational enterprises. The Court reversed a court of appeal's decision holding that the formula was unconstitutional under the foreign commerce clause, but remanded the case for further proceedings to consider whether the cost of furnishing the financial data required by the formula violated the taxpayer's constitutional rights to due process and nondiscrimination [*Barclays Bank Internat., Ltd. v. Franchise Tax Bd. (1992) 2 Cal. 4th 708, 742, 8 Cal. Rptr. 2d 31, 829 P.2d 279* ; *see Barclays Bank Internat. Ltd. v. Franchise Tax Board (1992) 10 Cal. App. 4th 1742, 1766, 14 Cal. Rptr. 2d 537* (holding on remand that burden of complying with worldwide combined reporting regulations, properly applied, does not violate rights to due process or nondiscrimination); *see § 540.11[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawCongressional Duties & PowersCommerce ClauseCommerce With Other NationsConstitutional LawCongressional Duties & PowersCommerce ClauseInterstate CommerceGeneral OverviewConstitutional LawEqual ProtectionFull & Equal BenefitTax LawState & Local TaxesGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsFederal Preemption

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47-540 California Forms of Pleading and Practice--Annotated § 540.12

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.12 Anti-Injunction Provisions

Both federal and California law contain anti-injunction provisions prohibiting injunctions to restrain collection of state or local taxes. Under federal law, federal district courts cannot enjoin, suspend or restrain the assessment, levy or collection of any tax under state law when a plain, speedy and efficient remedy may be had in state court [*28 U.S.C. § 1341*]. Although not explicit, *28 U.S.C. § 1341* bars actions for declaratory as well as injunctive relief [*Franchise Tax Bd. v. Alcan Aluminum (1990) 493 U.S. 331, 338, 110 S. Ct. 661, 107 L. Ed. 2d 696]* . Moreover, neither federal nor state courts may award injunctive or declaratory relief against a state tax under 28 U.S.C. § 1983 when an adequate remedy at law exists absent extraordinary circumstances. For example, equity might be invoked if the enforcement of the tax would lead to a multiplicity of suits (only in case of real risk of numerous suits between the same parties involving the same issues of law or fact), or produce irreparable injury or throw a cloud on title. A state may, of course, authorize state courts to issue injunctions and declaratory judgments even when a legal remedy exists [*National Private Truck Council, Inc. v. Oklahoma Tax Comm'n (1995) 515 U.S. 582, 588-592, 591 n.6, 115 S. Ct. 2351, 132 L.Ed 2d 509* ; *see also Writers Guild of America, West, Inc. v. City of Los Angeles (2000) 77 Cal. App. 4th 475, 478-480, 91 Cal. Rptr. 2d 603* (rule prohibiting injunctive and declaratory relief under 28 U.S.C. § 1983 applied to city tax; no multiplicity of suit situation or irreparable injury shown); *General Motors Corp. v. City and County of San Francisco (1999) 69 Cal. App. 4th 448, 458, 81 Cal. Rptr. 2d 544* (an adequate state remedy precludes equitable relief under *42 U.S.C. § 1983* in every court and thus precludes associated recovery of attorney fees)].

Under state law, a court cannot issue legal or equitable process against the state or any officer of the state to prevent or enjoin collection of any tax [*Cal. Const., art. XIII, § 32*]. This constitutional rule applies only to actions against the state or an officer of the state; it does not apply to an action against a local governmental entity, such as a city, or an officer of a local entity [*City of Anaheim v. Superior Court (Priceline.com, Inc.) (2009) 179 Cal. App. 4th 825, 828, 102 Cal. Rptr. 3d 171* (when city attempted to collect transient-occupancy tax from numerous on-line travel companies, city could not invoke constitutional pay-first rule, and could not point to any ordinance or other legal ground for pay-first requirement, in support of city's demurrer to companies' petition for writ of mandate and declaratory judgment, which sought to prevent collection of that tax)]. Numerous state statutes concerning specific taxes also contain anti-injunction

provisions [*see, e.g., Rev. & Tax. Code §§ 4807* (property taxes), *6931* (sales and use taxes), *19381* (personal income and bank and corporation tax)]. Some of these provisions also prohibit suits for declaratory relief [*see Rev. & Tax. Code § 6931*; *Casey v. Bonelli (1949) 93 Cal. App. 2d 253, 254, 208 P.2d 723]* .

Generally, the only remedy available to the taxpayer is to pay the tax and sue for refund [*but see Brown v. County of Los Angeles (1999) 72 Cal. App. 4th 665, 670, 85 Cal. Rptr. 2d 414* (regarding payment of documentary transfer taxes, despite availability of action at law for refund, declaratory judgment in taxpayer's favor upheld when taxpayer frequently purchased property at trustee's sales and without declaratory judgment, county could continue to tax taxpayer at wrong rate; *Cal. Const. art. XIII, § 32*, applies to actions against state, not local governments; *Rev. & Tax. Code § 4807* applies to actions when taxpayer attacks property tax, not to actions involving excise tax); *American President Lines, Ltd. v. Zolin (1995) 38 Cal. App. 4th 910, 919-921, 45 Cal. Rptr. 2d 370* (although *Cal. Const., art. XIII, § 32*, requires payment of tax before challenging it, it does not require suit for refund when legislature has provided procedures for challenging tax; administrative mandamus appropriate procedure under *Veh. Code § 8202* for contesting DMV's fleet registration fees)]. Similarly, an entity that controls the taxpayer, such as a parent corporation, even if it has a separate injury, has no remedy but to cause the taxpayer to pay the tax and claim and sue for refund [*Franchise Tax Bd. v. Alcan Aluminium, Ltd. (1990) 493 U.S. 331, 338-341, 110 S. Ct. 661, 107 L. Ed. 2d 696* (result might be different if California courts held, as none have yet done, that only foreign parent had standing to raise foreign commerce clause challenges)]. In all cases, a claim for refund is a prerequisite to a suit for refund [*Rev. & Tax. Code §§ 5140, 6933, 19382*]. In addition, if a property tax refund is based on a valuation error, the taxpayer must first apply to the local board of equalization for a reduction of assessment [*Stenocord Corp. v. City etc. of San Francisco (1970) 2 Cal. 3d 984, 987, 88 Cal. Rptr. 166, 471 P.2d 966 , superseded by statute as stated in 47 Cal. 4th 1298* ; *Star-Kist Foods, Inc. v. Quinn (1960) 54 Cal. 2d 507, 509-510, 6 Cal. Rptr. 545, 354 P.2d 1] , superseded by statute as stated in 47 Cal. 4th 1298* . For discussion of when it is or is not necessary to seek a reduction of an assessment, see *§ 540.90[3]*.

If a state penalizes taxpayers for failure to remit taxes in timely fashion, thus requiring them to pay a tax before obtaining review of the tax's constitutionality, federal due process principles require that the postdeprivation procedure provide a clear and certain remedy [*McKesson Corp. v. Division of Alcoholic Beverages & Tobacco (1990) 496 U.S. 18, 45, 110 S. Ct. 2238, 110 L. Ed. 2d 17* (reversing Florida Supreme Court, which had enjoined future collection of discriminatory tax but did not provide refund); *see General Motors Corp. v. City and County of San Francisco (1999) 69 Cal. App. 4th 448, 81 Cal. Rptr. 2d 544* (plaintiff's remedy for city's imposition of unconstitutional tax was refund of all taxes illegally collected; *McKesson* discussed)]. *McKesson* specifies three ways in which a state may provide a clear and certain remedy. They are [*see Ceridian Corp. v. Franchise Tax Bd. (2000) 85 Cal. App. 4th 875, 888, 102 Cal. Rptr. 2d 611]* :

- Refunding the discriminatory portion of the tax to the taxpayer;
- Imposing a retroactive assessment on other taxpayers previously favored by a discriminatory tax; or
- A combination of refund and retroactive assessment.

If the retroactive assessment cannot lawfully be collected because the statute of limitations has run, a refund is the appropriate remedy [*Ceridian Corp. v. Franchise Tax Bd. (2000) 85 Cal. App. 4th 875, 889, 102 Cal. Rptr. 2d 611]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsGeneral OverviewCivil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsTax Anti-Injunction ActGovernmentsState & Territorial GovernmentsClaims By & AgainstTax LawState & Local TaxesAdministration & ProceedingsCredits, Overassessments & RefundsTax LawState & Local TaxesAdministration & ProceedingsJudicial Review

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47-540 California Forms of Pleading and Practice--Annotated § 540.13

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.13 Information Practices Act

The Franchise Tax Board is subject to the requirements and remedial provisions of the Information Practices Act [*Civ. Code § 1798 et seq.*], under which every state agency (with limited exceptions) is required to limit the collection and retention of personal information to what is necessary to accomplish the agency's specific purpose. Damages can be recovered, in an appropriate case, for a violation of the act (provided the notice requirement of the Government Claims Act is met). Injunctive relief against violation of the act is available, and the legal prohibitions against enjoining the collection of taxes [*see § 540.12*] do not prevent giving effect to the act's provision for injunctive relief in an action against the FTB [*Bates v. Franchise Tax Bd. (2004) 124 Cal. App. 4th 367, 373, 387, 21 Cal. Rptr. 3d 285]* . For discussion and forms for use in actions under the Information Practices Act, see *Ch. 429, Privacy, § 429.60* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationPersonal InformationAgency RequirementsInformation CollectionAdministrative LawGovernmental InformationPersonal InformationAgency RequirementsNoticeAdministrative LawGovernmental InformationPersonal InformationEnforcementRemediesDamagesAdministrative LawGovernmental InformationPersonal InformationEnforcementRemediesInjunctive ReliefTax LawState & Local TaxesFranchise TaxGeneral Overview

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47-540 California Forms of Pleading and Practice--Annotated § 540.14

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.14 Limitation On Damages Under 42 U.S.C. § 1983

Actions under *42 U.S.C. § 1983* challenging state taxation are barred, whether the action seeks damages or equitable relief, and whether brought in federal or state court, if adequate state remedy exists [*General Motors Corp. v. City and County of San Francisco (1999) 69 Cal. App. 4th 448, 460, 81 Cal. Rptr. 2d 544* ; for discussion of prohibition against injunctive and declaratory relief against state taxes under section 1983 when an adequate state remedy exists, *see § 540.12*]. Similarly, an action under *42 U.S.C. § 1983* challenging municipal taxation may not be maintained when an adequate state remedy exists [*General Motors Corp. v. City and County of San Francisco (1999) 69 Cal. App. 4th 448, 460-461, 81 Cal. Rptr. 2d 544* (taxpayer entitled to full refund, which is adequate remedy, precluding any relief or attorney fees under federal civil rights law); *accord Union Oil Co. v. City of Los Angeles (2000) 79 Cal. App. 4th 383, 392-395, 94 Cal. Rptr. 2d 81* ; *see also Writers Guild of America, West, Inc. v. City of Los Angeles (2000) 77 Cal. App. 4th 475, 478-480, 91 Cal. Rptr. 2d 603* (court without jurisdiction to hear plaintiff's claims insofar as they were based on 28 U.S.C. § 1983)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawImmunity From LiabilityGeneral OverviewCivil Rights LawSection 1983 ActionsGovernment ActionsGovernmentsState & Territorial GovernmentsClaims By & AgainstTax LawState & Local TaxesAdministration & ProceedingsCredits, Overassessments & RefundsTax LawState & Local TaxesAdministration & ProceedingsJudicial Review

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47-540 California Forms of Pleading and Practice--Annotated § 540.15

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.15 Federal Practice

This chapter does not purport to deal with federal taxation. For comprehensive treatment of that subject, see Rabkin and Johnson, Federal Income, Gift and Estate Taxation (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawGeneral OverviewTax LawFederal Estate & Gift TaxesGeneral OverviewTax LawFederal Income Tax ComputationGeneral OverviewTax LawFederal Tax Administration & ProcedureGeneral OverviewTax LawFederal Taxpayer GroupsGeneral Overview

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[Reserved]

§§ 540.16[Reserved]

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47-540 California Forms of Pleading and Practice--Annotated § 540.30

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.30 Governing Law

Taxation of real and personal property is governed by Cal. Const., arts. XIII, XIII A, and XIII B, *Rev. & Tax. Code §§ 1-5911*, and 18 Cal. Code Reg. §§ 1-1051.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesAdministration & ProceedingsAssessmentsTax LawState & Local TaxesPersonal Property TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxGeneral Overview

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47-540 California Forms of Pleading and Practice--Annotated §§ 540.31-540.49

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

[Reserved]

§§ 540.31[Reserved]

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47-540 California Forms of Pleading and Practice--Annotated § 540.50

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.50 Structure of California Property Tax System

[1] Operation

Generally, all property in California is subject to property tax in proportion to its full value [*Cal. Const., art. XIII, § 1*; *Rev. & Tax. Code §§ 201, 401*]. Intangible property is exempt [*Cal. Const., art. XIII, § 2*; *Rev. & Tax. Code § 212*]. Taxable property includes possessory and ownership interests, both legal and equitable, in real property and ownership interests in personal property [*Rev. & Tax. Code §§ 103-107, 115*; *General Dynamics Corp. v. County of Los Angeles (1958) 51 Cal. 2d 59, 64-65, 330 P.2d 794* ; *see also Rev. & Tax. Code § 2188.4*; *American Airlines, Inc. v. County of Los Angeles (1976) 65 Cal. App. 3d 325, 328-329, 135 Cal. Rptr. 261* ("mere expectation" without option to renew lease required tax to be based only on remaining lease term)].

A taxable possessory interest includes a leasehold interest in exempt property [*Tilden v. County of Orange (1949) 89 Cal. App. 2d 586, 588, 201 P.2d 86]* .Damages may be recoverable by the lessee if a state or local public entity lessor fails to disclose in the lease contract that the interest created may be taxable [*Rev. & Tax. Code § 107.6*].

[2] Administration

[a] Local and State Functions

Property taxes are administered, assessed, and collected by county governments and charter cities, except for certain state functions [*Rev. & Tax. Code §§ 121, 128, 404*]. The state's functions are limited to equalizing the assessment rolls among the counties, assessing publicly owned property subject to local taxation and property of railroad, telephone, electric generation facilities, and utility companies, providing regulatory and advisory services for counties, and performing certain appellate functions [*Cal. Const., art. XIII, §§ 11, 19*; *Rev. & Tax. Code §§ 100, 108, 109, 401.5, 721-868*]. Equalization among counties refers to uniformity of appraisal practices and assessed values throughout the state [*see Rev. & Tax. Code § 401.5*].

[b] Tax Rolls and Tax Rates

Each county assessor must complete the assessment roll for the county and deliver it to the county auditor by July 1 of each year [*Rev. & Tax. Code §§ 616, 617*]. Thereafter, each county board of equalization meets to equalize the values of all property on the local assessment roll by adjusting individual assessments [*Cal. Const., art. XIII, § 16*].

Real and personal property are assessed separately, but the rate for personal property cannot be higher than that for real property in the same jurisdiction [*Cal. Const., art. XIII, §§ 2, 13*]. Assessed property is placed on a secured or unsecured tax roll [*Rev. & Tax. Code §§ 75.10, 75.11, 107, 109, 134*]. The tax rate for the secured roll is set by the county or city every budget year. That rate is also the rate for the unsecured roll for the next year [*Cal. Const., art. XIII, § 12*; *Gov. Code § 29100*; *Rev. & Tax. Code §§ 75.41(a), 109, 134, 2151*].

Taxes are assessed to the person having the interest in the property on the lien date. If the owner cannot be determined, the property is assessed to unknown owners [*Rev. & Tax. Code §§ 401, 401.3, 405(a), 611*].

[3] In Lieu Taxes

Certain types of property are subject to in lieu taxes rather than to property taxes because the property involved has been subject to nonuniform or inequitable taxation under the local property tax system [*see Rev. & Tax. Code § 5701*]. The primary in lieu taxes are the racehorse tax, motor vehicle license fees, the private railroad car tax, and the timber yield tax [*Rev. & Tax. Code §§ 5701-5790* (racehorse tax), *10701-11108* (vehicle license fee), *11201-11702* (railroad car tax), *38101-38908* (timber yield tax)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-540 California Forms of Pleading and Practice--Annotated § 540.51

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.51 Proposition 13

[1] Limitation on Property Tax

In June 1978, California voters passed Proposition 13, which added Article XIIIA to the California Constitution and limited the power of cities, counties, and special districts to levy ad valorem real property taxes. The combined maximum of ad valorem taxes that may be levied on real property by all taxing agencies is one percent of the property's full cash value [*Cal. Const., art. XIII A, § 1(a)*]. The one-percent limitation does not apply to ad valorem property taxes or special assessments levied either to pay indebtedness that was approved by the voters prior to July 1, 1978, or to make annual payments for the principal and interest on any bonded indebtedness for acquisition or improvement of real property if that indebtedness was approved after June 4, 1986 by a two-thirds vote [*Cal. Const., art. XIII A, § 1(b)*; *see Rev. & Tax. Code §§ 93(c), 95(c)*].

Under Proposition 13, assessors must assess all taxable property at 100% of its full value [*Rev. & Tax. Code § 401*]. Section 2(a) of article XIII A requires a rollback of values to the assessor's appraisal of full cash value as shown on the 1975-76 tax rolls. The assessed value of real property may only be increased by an inflation factor of not more than two percent per year. However, real property may be reassessed if the property is purchased, newly constructed, or changes ownership [*Cal. Const., art. XIII A, § 2(a), (b)*; *see Rev. & Tax. Code §§ 110.1(f), 2212* (establishing inflator)]. For the purpose of *Cal. Const., art. XIII A, § 2(a)*, the term "purchased," "newly constructed," and "change in ownership," however, has exclusions [*see, e.g., Cal. Const., art. XIII A, § 2(a), (c), (d), (g), (h)*; *see also Rev. & Tax. Code §§ 60-74.6* for definitions and exclusions and discussion *§ 540.53[3]*].

[2] U.S. Supreme Court Approval of Disparities Created by Proposition 13

Proposition 13 creates disparities in property tax assessment in neighborhoods because full reassessments are limited to properties that are purchased, are newly constructed, or change ownership. However, the U.S. Supreme Court held that these disparities were not unconstitutional under the *Equal Protection Clause* because they were justified by two

rational policy considerations. First, the state has a legitimate interest in local neighborhood preservation, continuity, and stability. Therefore, the state can legitimately decide to structure its property tax system to discourage rapid turnover in ownership of homes and businesses to inhibit displacement of lower income families and to prevent newer chain operations from replacing established businesses. Second, the state can legitimately conclude that a new owner at the time of acquiring property does not have the same reliance interest as an existing owner in protection against higher taxes. Unlike an existing owner, who has vested expectations in existing tax levels, a new owner is aware of the scope of future tax liability and can decide not to buy if the tax liability is too high. An existing owner does not have the option not to buy and may be forced to sell or divert income to pay higher taxes [*Nordlinger v. Hahn (1992) 505 U.S. 1, 112 S. Ct. 2326, 120 L. Ed. 2d 1, 13-14* ; *see Northwest Financial, Inc. v. State Bd. of Equalization (1991) 229 Cal. App. 3d 198, 202-203, 280 Cal. Rptr. 24* ; *R.H. Macy & Co. v. Contra Costa County (1991) 226 Cal. App. 3d 352, 360-366, 276 Cal. Rptr. 530]* .

[3] Prohibition Against Imposition of New Taxes to Avoid Limits of Proposition 13

[a] Exception for Taxes Approved by Two-Thirds Vote

To prevent the imposition of new taxes to make up for the decrease in property taxes resulting from Sections 1 and 2 of Article XIII A, Sections 3 and 4 prohibit new ad valorem real property taxes and new sales or transaction taxes on real property sales and place other restrictions on state or local taxes.

Section 3 restricts state taxes by providing that any changes in state taxes enacted for the purpose of increasing revenues collected pursuant to them, whether by increased rates or changes in methods of computation, must be imposed by not less than two-thirds of all members of the Legislature and by forbidding any new ad valorem taxes on real property, or sales or transaction taxes on the sale of real property [*Cal. Const., art. XIII A, § 3*; *see Sinclair Paint Co. v. State Bd. of Equalization (1997) 15 Cal. 4th 866, 870, 872-875, 64 Cal. Rptr. 2d 447, 937 P.2d 1350* (regulatory fee imposed under police power distinguished from tax requiring two-third majority vote)].

Section 4 contains a similar restriction for local entities by providing that cities, counties, and special districts, by a two-thirds vote of the qualified electors of the district, may impose special taxes on the district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within the city, county or special district [*Cal. Const., art. XIII A, § 4*; *see Sinclair Paint Co. v. State Bd. of Equalization (1997) 15 Cal. 4th 866, 872-873, 64 Cal. Rptr. 2d 447, 937 P.2d 1350* ; *see also Gov. Code §§ 53722, 53723* (enacted as part of Proposition 62 in 1986: no local government or district may impose any special tax without approval by two thirds of voters voting in election on issue; majority voter approval is required for all new general taxes); *Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 261, 45 Cal. Rptr. 2d 207, 902 P.2d 225* (upholding constitutionality of Proposition 62)].

In additon, Cal. Const., art. XIII D, also limits the power of local governments and special districts to assess any tax, assessment, fee, or charge on a parcel of property or on a person as an incident of property ownership without approval of the property owners other than as allowed by Article XIII A or by exceptions within Article XIII D itself [*see Cal. Const., art. XIII D, §§ 2, 3*; *see also* Cal. Const., art. XIII C (election required for local government general and special taxes); *Silicon Valley Taxpayers' Assn. v. Santa Clara County Open Space Authority (2008) 44 Cal. 4th 431, 448, 79 Cal. Rptr. 3d 312, 187 P.3d 37* (underlying purpose of Proposition 218 was to limit government's power to exact revenue as well as to curtail traditional deference accorded legislative enactments regarding fees, assessments, and charges; therefore, burden-to-demonstrate provision in *Cal. Const., art. XIII D, § 4(f),* is to be liberally construed in light of other provisions in Proposition 218, and courts should exercise their independent judgment in reviewing local agency decisions that have determined whether benefits are special and whether assessments are proportional to special benefits within meaning of Proposition 218)].

The question of who are the "qualified electors" mentioned in Section 4 of Article XIII A is not answered specifically in

that article or elsewhere in the constitution, or in any statute. The issue implicates the rights of nonresident property owners since, if they are not "qualified electors" and so are not able to vote, they could be powerless to avoid the burden of a tax. A California court of appeal concluded that the constitutional requirement is for approval by two thirds of the registered voters--who necessarily must be residents--of the "district" (that is, the city, county, or special district) where the election is held, who vote in the election. Moreover, while such a requirement disenfranchises nonresident property owners, it passes the rational basis test for equal protection under both the federal constitution and the state constitution [*Neilson v. City of California City (2005) 133 Cal. App. 4th 1296, 1312-1317, 35 Cal. Rptr. 3d 453*].

[b] Local Agencies Considered Special Districts Subject to Two-Thirds Vote Requirement

Under Proposition 218, enacted in the November 1996 election, no local government may impose, extend, or increase a general tax without a majority vote of the electorate or impose, extend, or increase a special tax without a two-thirds vote of the electorate [*Cal. Const., art. XIII C, § 2*].

Local government is expansively defined to include cities, counties, city and county, including a chartered city or county, or any special district, or any other local or regional governmental entity [*Cal. Const., art. XIII C, § 1(b)*]. "Special district" is in turn defined to mean an agency of the state, formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited geographic boundaries, including, but not limited to, school districts and redevelopment agencies [*Cal. Const., art. XIII C, § 1(c)*].

Under Proposition 218, all taxes are either general (for general governmental purposes) or special (for specific purposes, including any tax for specific purposes that is placed in general fund) [*Cal. Const., art. XIII C, § 1(a), (d)*], and special districts have no power to impose a general tax [*Cal. Const., art. XIII C, § 2*]. However, *Cal. Const., art. XIII A, § 4*, does authorize special districts to impose special taxes with a two-thirds vote.

Proposition 218 also enacted Cal. Const., art. XIII D, under which no agency (defined the same as a local govenment is in Article XIII C) may assess any tax,assessment, fee, or charge on a parcel of property or on a person as an incident of property ownership without approval of the property owners other than as allowed by Article XIII A or by exceptions within Article XIII D itself [*see Cal. Const., art. XIII D, §§ 2-4*].

Even before enactment of Proposition 218, a line of cases had held that a local agency is a special district that cannot impose a special tax without the approval of two thirds of its qualified electors, if the agency was created to replace revenues lost by reason of the restrictions of Proposition 13 [*Rider v. County of San Diego (1991) 1 Cal. 4th 1, 11, 2 Cal. Rptr. 2d 490, 820 P.2d 1000* (discussing factors to consider in determining whether agency was so created)].

Moreover, under Proposition 62, a statutory initiative adopted by the voters in1986 that added *Gov. Code §§ 53720-53730* requiring voter approval of all new local taxes, no local government or district may impose any special tax without the approval of two thirds of the voters voting in an election on the issue [*Gov. Code § 53722*], nor may they impose any general tax without the approval of a majority of the voters voting in an election on the issue [*Gov. Code § 53723*]. Unlike Proposition 13, Proposition 62 does not use the term "special district," but uses the broader term "district" throughout. Thus, Proposition 62 applies not just to "special districts," but to any "district" [*Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 235, 45 Cal. Rptr. 2d 207, 902 P.2d 225]* . For the purpose of Proposition 62, "district" is defined to mean an agency of the state, formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries [*Gov. Code § 53720(b)*] and "local government" is defined to mean any county, city, city and county, including a chartered city or county, or any public or municipal corporation [*Gov. Code § 53720(a)*; *but see Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 260-261, 45 Cal. Rptr. 2d 207, 902 P.2d 225* (in holding *Gov. Code § 53722* constitutional court assumed arguendo that Proposition 62 is constitutionally inapplicable to charter cities)]. Accordingly, when a challenged tax is held invalid under *Gov. Code § 53722*, the court need not reach the question whether it is also invalid under Proposition 13 [*Santa Clara County Local Transportation Authority v.*

Guardino (1995) 11 Cal. 4th 220, 261, 45 Cal. Rptr. 2d 207, 902 P.2d 225] . The continued imposition of a tax that has not been approved by voters may be challenged under Proposition 62 at any time. Suits are not restricted to challenging only the enactment of the tax itself, but may be brought at any time to challenge the continued imposition of a tax. The validity of a tax may be challenged within three years after the collection of the tax, even if more than three years have passed since the tax measure was adopted [*Howard Jarvis Taxpayers Assn. v. City of La Habra (2001) 25 Cal. 4th 809, 107 Cal. Rptr. 2d 369, 23 P.3d 601]* .

Proposition 218 added Cal. Const., arts. XIII C, XIIID, which are similar to the statutory amendments made by Proposition 62, to ensure that voter approval requirements would apply to charter cities as well as other local taxing authorities [*McBrearty v. City of Brawley (1997) 59 Cal. App. 4th 1441, 1449 n.9, 69 Cal. Rptr. 2d 862* ; *see Burbank-Glendale-Pasadena Airport Authority v. City of Burbank (1998) 64 Cal. App. 4th 1217, 1226-1227, 76 Cal. Rptr. 2d 297* (until 1996, *Gov. Code § 53723* did not apply to general taxes imposed by charter cities; in practical effect, Cal. Const., art. XIII C added by Proposition 218 in November 1996 requires charter cities to obtain voter approval of general taxes first imposed or increased after January 1, 1995)].

Proposition 218 buttresses Proposition 13's limitations on ad valorem property taxes and special taxes by placing analogous restrictions on assessments, fees, and charges so that a special assessment cannot be imposed without a two-thirds vote [*Howard Jarvis Taxpayers Assn v. City of Riverside (1999) 73 Cal. App. 4th 679, 682, 86 Cal. Rptr. 2d 592* (Street Light Assessment District held exempt from Proposition 218 under *Cal.Const., art. XIII D, § 5(a)*); *Howard Jarvis Taxpayers Assn. v. City of Salinas (2002) 98 Cal. App. 4th 1351, 121 Cal. Rptr. 2d 228* (storm drainage fee was not for sewer or water services and was therefore subject to taxpayer approval under Proposition 218 before it could be imposed)].

A business improvement district assessment to fund property-related improvements and activities imposed on business owners within a business improvement district established under the Parking and Business Improvement Area Law of 1989 [*Sts. & Hy. Code § 36500 et seq.*] has been held not subject to Proposition 218 because it did not constitute an assessment as defined in *Cal. Const., art. XIII D, § 2(b),* which is limited to real property assessments [*Howard Jarvis Taxpayers Assn. v. City of San Diego (1999) 72 Cal. App. 4th 230, 235-238, 84 Cal. Rptr. 2d 804]* .

Similarly, a city ordinance imposing an inspection fee on private landlords is not subject to the procedural requirements of Proposition 218 because the fee is imposed on landlords not in their capacity as landowners, but in their capacity as business owners; the exaction is more in the nature of a fee for a business license than a charge against property [*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal. 4th 830, 840, 102 Cal. Rptr. 2d 719, 14 P.3d 930]* .

[c] Distinction Between General and Special Tax

Proposition 13 does not define the term "special taxes." Proposition 218, however, provides that all taxes are either general (for general governmental purposes) or special (for specific purposes), and specifically provides that even if a tax for specific purposes is placed in the general fund, it is nonetheless a special tax [*Cal. Const., art. XIII C, § 1(a), (d)*; *see also Gov. Code § 53721* (similar, but not identical, Proposition 62 definitions of general and special taxes); *Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 224-234, 45 Cal. Rptr. 2d 207, 902 P.2d 225* (local agency's proposed sales tax to fund certain transportation projects held to be special tax)].

Proposition 218 has been applied so that the hallmark of special taxes is the specification of the purposes for which the revenue will be used. If a city, for instance, proposes a flat rate parcel tax--that is, a property-based tax that is not an ad valorem tax (therefore, the burden is not limited by Proposition 13)--in order to raise money for specified purposes; for example, "to pay for police, fire and recreational services, and to repair streets, parks, water line replacement and repair, and building maintenance," and at an election the proposal receives the prescribed two-thirds approval vote, then the tax is a "special tax" because it was proposed for "specific purposes" [*see Cal. Const., art. XIII C, § 1(d)* (definition)], and it

is a valid tax because two thirds of the voters in the election approved it [*Neilson v. City of California City (2005) 133 Cal. App. 4th 1296, 1308, 35 Cal. Rptr. 3d 453* ; *see Cal. Const., art. XIII C, § 2(d)* (approval requirement)]. Moreover, whether a single purpose is specified or numerous purposes are specified, the tax is a "special tax" by virtue of the specification of how the revenue will be used [*Howard Jarvis Taxpayers Assn. v. City of Roseville (2003) 106 Cal. App. 4th 1178, 1185, 132 Cal. Rptr. 2d 1]* . Even if so many purposes are specified that the list verges on comprising most of the functions of government, that would not necessarily make the tax in effect a "general tax" since the intent behind Proposition 218 was to enable voters to control how property tax revenue is to be spent if the tax is not an ad valorem tax [*see Neilson v. City of California City (2005) 133 Cal. App. 4th 1296, 1310-1312, 35 Cal. Rptr. 3d 453]* .

Case law prior to the passage of Proposition 218 has construed the term "special taxes." In *City and County of San Francisco v. Farrell (1982) 32 Cal. 3d 47, 57, 184 Cal. Rptr. 713, 648 P.2d 935* , the term "special taxes" as used in Proposition 13 was construed to mean taxes that are levied for a special purpose rather than a levy placed in the general fund to be used for general governmental purposes [*see Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 233-234, 45 Cal. Rptr. 2d 207, 902 P.2d 225]* . *Thereafter, in Rider v. County of San Diego (1991) 1 Cal. 4th 1, 15, 2 Cal. Rptr. 2d 490, 820 P.2d 1000* , which involved a sales tax imposed by the San Diego County Regional Facility Financing Agency for the purpose of financing the construction and operation of criminal detention and courthouse facilities in the county, the term "special taxes" as used in Proposition 13 was construed to mean a tax leviedto fund a specific governmental project or program, such as the construction and financing of the county's justice facilities [*see Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 234, 45 Cal. Rptr. 2d 207, 902 P.2d 225]* . It has been noted that *Rider* did not effectively overrule *Farrell*, but that *Rider* simply carved out an exception to the "general funds rule" set forth in *Farrell*. Under both *Farrell* and *Rider*, the essence of a special tax is that its proceeds are earmarked or dedicated in some manner to a specific project or projects. That is not the case with funds placed in a city's general fund, which are available for use by any of the city's legitimate functions and are allocated during the general budgeting process in light of changing priorities and conditions [*Neecke v. City of Mill Valley (1995) 39 Cal. App. 4th 946, 956, 46 Cal. Rptr. 2d 266]* . The court in *Neecke* concluded that when a tax is levied by a general purpose agency (unlike in *Rider*) and the proceeds are deposited into a general fund, the tax is not a special tax subject to the two-thirds voter approval requirement of Proposition 13, § 4 (*Cal. Const., art. XIII A, § 4*) [*Neecke v. City of Mill Valley (1995) 39 Cal. App. 4th 946, 959, 46 Cal. Rptr. 2d 266* (municipal services tax, to be used for any and all municipal purposes levied on privilege of occupying real property) *see Coleman v. County of Santa Clara (1998) 64 Cal. App. 4th 662, 669-670, 75 Cal. Rptr. 2d 516* (involving sales tax said to be indistinguishable from tax in *Neecke*)]. Note that the tax involved in *Neeke* may be in violation of the later-enacted *Cal. Const., art. XIII D, § 6(b)(5).*

Moreover, under *Gov. Code § 50076*, which was enacted to implement the authorization granted by Proposition 13, § 4, to cities, counties and special districts to impose special taxes [*Beaumont Investors v. Beaumont-Cherry Valley Water Dist. (1985) 165 Cal. App. 3d 227, 235, 211 Cal. Rptr. 567]* , a special tax does not include any fee that does not exceed the reasonable cost of providing the service or regulatory activity for which it is charged and that is not levied for general revenue purposes. Thus, any fee that falls within the definition of a service or regulatory fee under *Gov. Code § 50076* is not a special tax under Proposition 13 and is exempt from its two-thirds voter approval requirement [*Beaumont Investors v. Beaumont-Cherry Valley Water Dist. (1985) 165 Cal. App. 3d 227, 235, 211 Cal. Rptr. 567]* . The levying entity has the burden of establishing that the fee does not exceed the cost of the service, facility, or regulatory activity for which it is imposed [*Beaumont Investors v. Beaumont-Cherry Valley Water Dist. (1985) 165 Cal. App. 3d 227, 235-236, 211 Cal. Rptr. 567* ; *see Gov. Code § 66017(a)* (development fees), (b) (other requirements to contest development fees); *but see Brydon v. East Bay Mun. Utility Dist. (1994) 24 Cal. App. 4th 178, 191, 29 Cal. Rptr. 2d 128* (noting that *Knox v. City of Orland (1992) 4 Cal. 4th 132, 146-147, 14 Cal. Rptr. 2d 159, 841 P.2d 144* cast substantial doubt about propriety of shifting burden of proof to agency)].

Furthermore, an assessment on behalf of a business improvement district established under the Parking and Business Improvement Area Law of 1989 (*Sts. & Hy. Code § 36500 et seq.*), against business owners within the district, has been held not to constitute a special tax within the meaning of *Cal. Const., art. XIII A, § 4* [*Evans v. City of San Jose (1992)*

3 Cal. App. 4th 728, 737-739, 4 Cal. Rptr. 2d 601 (although not a true special assessment, same reasons for exempting regulatory and development fee cases and special assessment cases from reach of *Cal. Const., art. XIII A, § 4* applied); *see Howard Jarvis Taxpayers Assn. v. City of San Diego (1999) 72 Cal. App. 4th 230, 238-240, 84 Cal. Rptr. 2d 804* (same holding concerning Proposition 218)].

Because of the close interlocking relationship between the various sections of Cal. Const., art. XIII A, the "special tax" case concerning Cal. Const., art. XIII A, § 4, may be helpful, though not conclusive, in deciding whether fees imposed by a statute enacted by the state Legislature are in legal effect taxes enacted for the purpose of increasing revenue under *Cal. Const., art. XIII A, § 3*, and therefore subject to a two-thirds majority vote. The reasons why particular fees are, or are not, "special taxes" under *Cal. Const., art. XIII A, § 4*, may apply equally to *Cal. Const., art. XIII A, § 3*, cases [*Sinclair Paint Co. v. State Bd. of Equalization (1997) 15 Cal. 4th 866, 873, 64 Cal. Rptr. 2d 447, 937 P.2d 1350]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawEqual ProtectionFull & Equal BenefitGovernmentsLegislationInitiative & ReferendumGovernmentsLocal GovernmentsFinanceTax LawState & Local TaxesAdministration & ProceedingsAssessmentsTax LawState & Local TaxesReal Property TaxAssessment & ValuationAssessment Methods & Timing

California Forms of Pleading and Practice--Annotated

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 540 TAXES AND ASSESSMENTS
PART II. LEGAL BACKGROUND
B. PROPERTY TAXES AND ASSESSMENTS
2. Structure and Administration of Property Tax System

47-540 California Forms of Pleading and Practice--Annotated § 540.52

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.52 Exemptions

[1] Sources and Types of Exemptions

The California Constitution expressly exempts some property from taxation and permits the Legislature to provide for the exemption of other property [*Cal. Const., art. XIII, §§ 3, 4*]. Statutory exemptions are governed by *Rev. & Tax. Code § 201 et seq.* Although not true exemptions, property tax assistance or postponement of payment of property tax is available to taxpayers who are over the age of 62 or blind or disabled [*Rev. & Tax. Code § 20501 et seq.*]. This chapter does not cover the substance of specific property exemptions.

Property tax exemptions are basically of two types: (1) those based on the status of the property itself, and (2) those based on the status of the property owner and the use to which the property is put. Affidavits of exemption are required for exemptions based on the status of the owner [*see, e.g., Rev. & Tax. Code §§ 252, 253.5* (homeowners' exemption), *254.5* (welfare and veterans' organization exemptions)]. Property tax exemptions based on the status of the property do not require affidavits of exemption. For example, affidavits of exemption are not required for growing crops, business inventories, or householder's personal property [*Cal. Const., art. XIII, § 3(h)*; *Rev. & Tax. Code § 219*; *18 Cal. Code Reg. § 134*].

[2] Exemption Procedures

Procedures for claiming exemptions are governed by *Rev. & Tax. Code § 251 et seq.* Filing deadlines vary for different exemptions. Many counties have their own required forms for each type of exemption. Counsel should check with the local assessor's office to determine if the county has its own exemption forms. The writ of mandate procedure may be used to compel the county assessor to allow inspection of a claim of exemption filed by another taxpayer and the assessor's ruling thereon [*Gallagher v. Boller (1964) 231 Cal. App. 2d 482, 492-493, 41 Cal. Rptr. 880]* .

[3] Proving Entitlement to Exemption

The burden is on the taxpayer to prove entitlement to an exemption [*Stewart v. United States (9th Cir. 1939) 106 F.2d 405, 407-408 , rev'd on other grounds, 311 U.S. 60* ; *Sterigenics Internat. v. County of Orange (1996) 47 Cal. App. 4th 1541, 1545, 55 Cal. Rptr. 2d 319* ; *Smith-Rice Heavy Lifts, Inc. v. County of Los Angeles (1967) 256 Cal. App. 2d 190, 195, 63 Cal. Rptr. 841]* . Any doubt as to whether an exemption comes within the terms of the exemption is resolved against the right to an exemption [*Sterigenics Internat. v. County of Orange (1996) 47 Cal. App. 4th 1541, 1545, 55 Cal. Rptr. 2d 319]* . Ambiguities in statutory language, however, are resolved in favor of the taxpayer [*United States v. Merchants Nat'l Trust & Sav. Bank (9th Cir. 1939) 101 F.2d 399]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesAdministration & ProceedingsGeneral OverviewTax LawState & Local TaxesPersonal Property TaxExempt PropertyGeneral OverviewTax LawState & Local TaxesPersonal Property TaxExempt PropertyLimitationsTax LawState & Local TaxesPersonal Property TaxExempt PropertyRequirements for Exempt StatusTax LawState & Local TaxesReal Property TaxGeneral Overview

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47-540 California Forms of Pleading and Practice--Annotated § 540.53

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.53 Assessment Procedures

[1] Taxpayer Reporting

Anyone who owns taxable personal property, other than a manufactured home subject to *Rev. & Tax. Code § 5800 et seq.*, having an aggregate cost of $100,000 or more for any assessment year must file a property statement showing property and values as of the lien date. Anyone who is not otherwise required to file a property statement must file a statement if requested by the assessor [*Rev. & Tax. Code §§ 441(a), 448*]. The assessor may also require any person in the county to file an affidavit showing his or her name, place of residence or business, and whether he or she is the owner of any taxable property, or to provide a real property description [*Rev. & Tax. Code §§ 453, 456*]. With limited exceptions, all information requested by the assessor or furnished in the property statement is confidential [*Rev. & Tax. Code §§ 408, 451*; *see Rev. & Tax. Code § 408.3* (availability to public of property characteristics information)]. There are penalties for failure to provide property statements and requested information [*Rev. & Tax. Code §§ 441(b), 463, 506, 531*]. There are also provisions allowing for amendment of the statement without penalty [*see Rev. & Tax. Code § 441 (i), (j)*]. Assessors may also accept the filing of property statements by electronic media, including (but not limited to) computer modem, magnetic media, optical disk and fax machine. In lieu of signature and penalty of perjury declarations otherwise required [*see Rev. & Tax. Code § 441(a), (b)*], property statements filed using electronic media must be authenticated pursuant to methods specified by the assessor and approved by the SBE [*Rev. & Tax. Code § 441(k)*].

[2] Change in Ownership Statements

Buyers or transferees of real property or mobile homes subject to local property taxes must file change in ownership statements under penalty of perjury with the recorder when the transfer document is recorded [*Rev. & Tax. Code § 480*; *see also Rev. & Tax. Code §§ 480.5* (reporting by owner of tax-exempt property), 480.6 (holder of possessory interest in real property owned by state or local government entity not required to report with respect to renewal of that interest; rather, state or local governmental entity fee owner in which taxable possessory interest created is required to do

reporting), 480.7 (reporting by insurance companies regarding real estate held in separate account established pursuant to *Ins. Code § 10506*)].

There is no penalty for failure to file a change in ownership statement. However, there is a penalty for failure to file the statement within 45 days after a written request to do so by the assessor [*Rev. & Tax. Code § 482(a)*].

[3] Change in Ownership Defined

A change in ownership is any transfer of a present interest, the value of which is substantially equal to the value of the fee. A change in ownership includes the creation of any lease for more than 35 years, including renewal options [*Rev. & Tax. Code §§ 60, 61(c)*; *see Steinhart v. County of Los Angeles (2010) 47 Cal. 4th 1298, 13201322, 104 Cal. Rptr. 3d. 195, 223 P.3d 57* (when grantor trust became irrevocable on grantor's death, and grantor's beneficial interest passed to life tenant and remainder beneficiaries, grantor's original "transfer of bare legal title to [herself] as trustee" did not constitute change in ownership, but post-death transfer of beneficial interest was change in ownership even though trust would continue to hold title during existence of life estate); *Reilly v. City & County of San Francisco (2006) 142 Cal. App. 4th 480, 498, 48 Cal. Rptr. 3d 291* (with respect to real property held in trust, change of ownership occurs when one income beneficiary who is not entitled to exclusion from change-in-ownership treatment is succeeded by another such beneficiary); *Leckie v. County of Orange (1998) 65 Cal. App. 4th 334, 337-339, 76 Cal. Rptr. 2d 426* (life estate transferred to nonspouse third party constituted change of ownership; conversely, no change of ownership when instrument creating life estate reserves life estate in transferor or transferor's spouse); *Empire Properties v. County of Los Angeles(1996) 44 Cal. App. 4th 781, 785-789, 52 Cal. Rptr. 2d 69* (change of ownership occurred when family trust became irrevocable, not when family revocable trust created; construing *Rev. & Tax. Code §§ 60, 61(g)* and *18 Cal. Code Reg. §§ 462.001, 462.160*); *E. Gottschalk & Co., Inc. v. County of Merced (1987) 196 Cal. App. 3d 1378, 242 Cal. Rptr. 526* (reassessment not prohibited by fact that initial lease term was for only 30 years, excluding renewal options)]. A change in control of a corporation or other legal entity is a change in ownership and must be reported to the SBE [*Rev. & Tax. Code §§ 64, 480.1, 480.2*].

When an exclusion to the definition of "change in ownership" applies, failure to file a timely claim for exemption from reassessment when required has been held to bar a claim for a tax refund [*see Empire Properties v. County of Los Angeles (1996) 44 Cal. App. 4th 781, 789-791, 52 Cal. Rptr. 2d 69* (taxpayer who filed untimely claim for exemption from reassessment under *Rev. & Tax. Code § 63.1* based on parent/child exclusion not entitled to exclusion, or to refund of property taxes)].

[4] Assessor Powers and Audits

Assessors have subpoena and audit powers [*Rev. & Tax. Code §§ 468-470*]. The assessor must annually conduct a significant number of audits of the books and records of taxpayers engaged in a profession, trade, or business who own, claim, possess, or control locally assessable trade fixtures and business tangible personal property in the county [*Rev. & Tax. Code § 469(a)*]. Half of the audits must be performed on taxpayers selected from a pool of taxpayers that have the largest assessments of locally assessable trade fixtures and business tangible personal property in the county [*Rev. & Tax. Code § 469(b)(1)*]. The other half must be selected in a manner that is fair and equitable to all taxpayers and may be based on evidence of under-reporting as determined by the assessor [*Rev. & Tax. Code § 469(b)(2)*]. The assessor is not required to audit a taxpayer that is fully exempt from property taxation, however [*Rev. & Tax. Code § 469(a)(2)*].

[5] Valuation

[a] Interest Valued

Property generally is appraised at the value of the unencumbered fee simple interest. Thus, easements, leases, and other separate ownership interests in the property are disregarded and interest holders are left to agree privately about the division of property taxes [*City of Desert Hot Springs v. County of Riverside (1979) 91 Cal. App. 3d 441, 452-454,*

154 Cal. Rptr. 297 ; County of Sacramento v. Assessment Appeals Bd. No. 2 *(1973) 32 Cal. App. 3d 654, 665-666, 108 Cal. Rptr. 434* ; *see Rev. & Tax. Code §§ 2188-2188.2, 2188.4, 2821* (application by owner of interest for separate valuation)].

The following types of property are not appraised based on the unencumbered fee simple interest [*Rev. & Tax. Code §§ 104(b), 107-107.6, 107.8*; *De Luz Homes, Inc. v. County of San Diego (1955) 45 Cal. 2d 546, 563, 290 P.2d 544* ; *City of Desert Hot Springs v. County of Riverside (1979) 91 Cal. App. 3d 441, 449-452, 154 Cal. Rptr. 297* ; *see Rev. & Tax. Code §§ 2188.3, 2188.5-2188.10* (valuing interests in condominiums, cooperatives, timeshares, etc.)]:

- Taxable possessory interests of nonexempt parties in lands owned by exempt entities.
- Possessory interests in the extraction of oil, gas, and minerals.
- Prescriptive or appropriative rights to divert water for nonriparian or nonoverlying uses.

[b] Personal Property

The taxable value of personal property, determined annually, is its market value or the price for which the property could be sold on the lien date. The value of property in the course of production or distribution must include trade level adjustments [*18 Cal. Code Reg. § 10*; *Xerox Corp. v. County of Orange (1977) 66 Cal. App. 3d 746, 752-756, 136 Cal. Rptr. 583]* .

Moveable personal property can acquire a tax situs in a state other than the domicile state, and in such cases, the property tax must be fairly apportioned between the two states [*Auerbach v. Los Angeles County Assessment Appeals Bd. (2008) 167 Cal. App. 4th 1415, 1423, 1426, 85 Cal. Rptr. 3d 118* (aircraft established taxable situs in Nevada during relevant tax year, and some tax apportionment between California and Nevada was appropriate; apportionment resulting in aggregate taxes that were based on more than 100 percent of value was not unconstitutional; Los Angeles County assessor's apportionment method was rationally related to opportunities, benefits, and protections conferred on or afforded to taxpayer based on presence of its aircraft in California during tax year)].

[c] Real Property

The taxable value of real property is the lesser of the "factored base year value," the full cash value determined on the lien date, or the valuedetermined under the disaster relief provisions [*Rev. & Tax. Code § 51*; *see § 540.53[5][d]*]. The "base year value" compounded annually by the inflation factor is the "factored base year value" [*Rev. & Tax. Code § 51(a)(1)*; *see Rev. & Tax. Code §§ 110* (defining "full cash value" or "fair market value"), *170, 181-191* (disaster relief provisions)]. The "base year value" is either (1) the fair market value on March 1, 1975, or (2) for property that has been purchased, newly constructed, or subject to a change of ownership after March 1, 1975, the fair market value as of the date of purchase, change in ownership, or completion of construction [*Rev. & Tax. Code §§ 75-75.13, 110.1*; *see Shafer v. State Bd. of Equalization (1985) 174 Cal. App. 3d 423, 426-432, 220 Cal. Rptr. 59* (upholding validity of (1) 1983 amendments to *Rev. & Tax. Code §§ 75.10, 75.11* (changing timing of supplemental assessments), and (2) *Rev. & Tax. Code § 75.12* (governing assessment of new construction)); *see also Rev. & Tax. Code § 75.10(b)* ("new construction" includes removal of structure from land)].

PRACTICE TIP:

Application for Reassessment and Disaster Relief. A county board of supervisors, by ordinance, may allow a taxpayer to apply for reassessment of property that was damaged or destroyed without the taxpayer's fault. Property is eligible for reassessment, if the damage or destruction was caused by any of the following events:

- A major misfortune or calamity in an area or region subsequently proclaimed by the governor to be in a state of disaster;

- A misfortune or calamity; or

- With respect to a possessory interest in land owned by the state or federal government, a misfortune or calamity that has caused the permit or other right to enter upon the land to be suspended or restricted.

The taxpayer must file the application for reassessment within the time specified in the ordinance, or, if no time is specified, within 12 months after the misfortune or calamity. The taxpayer must deliver a written application to the assessor that is executed under the penalty of perjury and shows the condition and value of the property immediately after the damage or destruction and the dollar amount of damage.

If the assessor determines that within the preceding 12 months a property has suffered damage caused by misfortune or calamity that may qualify the property owner for relief under an adopted ordinance, but no one has filed an application for reassessment of the property, the assessor must provide the last known owner of the property with an application for reassessment. The property owner must file the completed application within 60 days after notification by the assessor, but in no case more than 12 months after the occurrence of the damage. If the property owner does not apply for reassessment after being notified, the assessor may, with the approval of the board of supervisors, reassess the property and notify the last owner of the reassessment [*see Rev. & Tax. Code § 170(a)-(l)*].

[d] Transfers of Base Year Value

Transferring property's base year value to replacement property is permitted in two situations [*see Rev. & Tax. Code §§ 69, 69.5*]. First, taxpayers who are eligible for the homeowner's exemption and who are either over the age of 55 or severely and permanently disabled may transfer the base year value of their principal residence to a replacement dwelling. The replacement property must be of equal or lesser value, purchased or newly constructed within two years of the sale or substantial damage or destruction of the original property, and located in the same county as the original property [*Rev. & Tax. Code § 69.5(a)(1), (b)*]. If the replacement dwelling purchased in part and newly constructed in part, then for the purpose of determining whether it is of "equal or lesser value" compared with the original property, the date the replacement dwelling "is purchased or newly constructed" is either the date of purchase or the date of completion of construction, whichever is later [*Rev. & Tax. Code § 69.5(g)(5)*]. Therefore, when a replacement dwelling has been newly constructed on land that the taxpayer purchased many years earlier--land that, therefore, has an artificially low base-year value because of Proposition 13--the land and the structure must be valued, as a unit, as of the date of completion of construction [*Wunderlich v. County of Santa Cruz (2009) 178 Cal. App. 4th 680, 686, 696, 100 Cal. Rptr. 3d 598]* . That valuation does not deprive the taxpayer of the protection of Proposition 13 for the land; the land retains its low base-year value for property tax purposes. However, the taxpayer cannot gain the additional tax relief provided by *Rev. & Tax. Code § 69.5* if, when the land and the structure are valued together as of the completion of construction, the replacement dwelling's value does not meet the "equal or lesser value" test of the statute [*Wunderlich v. County of Santa Cruz (2009) 178 Cal. App. 4th 680, 699, 100 Cal. Rptr. 3d 598]* .

Additionally, replacement dwellings purchased or constructed in a different county may qualify for this transfer of base year value if the county in which the replacement dwelling is located has adopted an ordinance permitting the transfer [*see Cal. Const., art. XIII A, § 2(a)*; *Rev. & Tax. Code § 69.5(a)(1), (2), (b)*; *see also Rev. & Tax. Code § 69.5(g)(2)* (base year value defined if owner does not rebuild on original property after substantial damage or destruction)].

The second situation in which base year value may be transferred involves the base year value of property substantially damaged or destroyed by a disaster declared by the Governor. In this situation, the property's base year value may be

transferred to comparable replacement property acquired or newly constructed in the same county within five years after the disaster [*Rev. & Tax. Code § 69(a)*]. This five-year period applies to any comparable replacement property that is acquired or newly constructed as a replacement for property substantially damaged or destroyed by a disaster occurring on or after July 1, 2003, and to the determination of base year values for the 2003-2004 fiscal year and fiscal years thereafter [*Rev. & Tax. Code § 69(d)(3)*; Stats. 2006, ch. 317]. A three-year replacement period applied to any comparable replacement property that was acquired or newly constructed as a replacement for property substantially damaged or destroyed by a disaster occurring on or after October 20, 1991, and to the determination of base year values for the 1991-1992 fiscal year and fiscal years thereafter until the 2003-2004 fiscal year [*Rev. & Tax. Code § 69(d)(2)*; Stats. 1993, ch. 1053], except that a five-year period applied in the case of the Northridge earthquake [*Rev. & Tax. Code § 69(a)*], which occurred January 17, 1994. The approval of Proposition 171 in 1993 now allows the transfer of base year value of property destroyed in a disaster to replacement property outside the county where the original property was located, under conditions similar to those applying to transfers by taxpayers who are over 55 or disabled [*Cal. Const., art. XIII A, § 2(e), (f)*, as amended by Proposition 171].

[e] Methods of Valuation

Real property is appraised at its full value, which is its fair market value or its full cash value [*Cal. Const., art. XIII, § 1(a), art. XIII A, § 2*; *Rev. & Tax. Code §§ 110, 110.1, 110.5, 401*; *see Rev. & Tax. Code § 110(b)* (presumptions regarding purchase price as fair market value); *Huson v. County of Ventura (2000) 80 Cal. App. 4th 1131, 1135-1136, 96 Cal. Rptr. 2d 116* (applying *Section 110(b)* presumption that value of improvements financed by special assessment is included in purchase price to place burden on assessor to rebut presumption that purchase price reflects fair market value); *Mola Development Corp. v. Orange County Assessment Appeals Bd. (2000) 80 Cal. App. 4th 309, 311 & n.1, 312, 316-318, 327, 95 Cal. Rptr. 2d 546* (determining assessed valuation for vacant, functionally unimproved contaminated commercial property generating no income on lien date)]. Value depends on the property's highest and best use [*Dressler v. County of Alpine (1976) 64 Cal. App. 3d 557, 567, 134 Cal. Rptr. 554]* . With few exceptions, such as restricted timberland, wildlife habitat, oil and gas properties, and historical property, no specific methods of ascertaining value are prescribed by law, although the SBE has established regulations governing appraisals [*see Rev. & Tax. Code §§ 401.8, 401.10, 401.13, 423, 423.3, 423.5, 423.7, 423.8, 434.5, 435, 439.2, 439.3*; *18 Cal. Code Reg. §§ 2-4, 6, 8, 20, 21, 27-29, 41, 51-58*; *see generally* on valuation *Rev. & Tax. Code §§ 401.6, 402.1,402.2, 402.5, 402.9, 403*]. The SBE regulations require assessors to consider one or more of the following approaches: the comparative sales approach, the cost approach, and the income approach [*18 Cal. Code Reg. § 3(a), (c), (e)*]. Appraisals are invalid only if appraisers use arbitrary methods, abuse their discretion, or fail to follow standards prescribed by law [*Bret Harte Inn, Inc. v. City and County of San Francisco (1976) 16 Cal. 3d 14, 23, 127 Cal. Rptr. 154, 544 P.2d 1354* ; *see Exxon Mobil Corporation v. County of Santa Barbara (2001) 92 Cal. App. 4th 1347, 112 Cal. Rptr. 2d 751* (county erred in not valuing oil and gas production facilities using special valuation method set forth in *18 Cal. Code Reg. § 468*); *Mitchell v. County of Los Angeles (1997) 60 Cal. App. 4th 497, 503-506, 70 Cal. Rptr. 2d 476* (assessor's failure to abide by *18 Cal. Code Reg. § 4(d)* requiring adjustments to comparable sales data made assessor's evidence legally incompetent)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesAdministration & ProceedingsAssessmentsTax LawState & Local TaxesPersonal Property TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationAssessment Methods & TimingTax LawState & Local TaxesReal Property TaxAssessment & ValuationValuation

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AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.54 Tax Certificates

[1] Sale of Right to Receive Delinquent Taxes

Under *Rev. & Tax. Code § 4501 et seq.*, a county may sell tax certificates that entitle the buyer to receive all amounts in respect of a delinquency in connection with secured roll property or property on the supplemental roll [*see Rev. & Tax. Code §§ 4505, 4511, 4521*]. The objective is to allow counties the option of selling outstanding secured roll property tax accounts receivable to realize immediate cash to meet the ongoing services required for county government [1995 Stats., ch. 189, § 10]. When the tax collector receives payment of the tax, whether by payment, redemption, or sale, the tax collector in turn pays the holder of the tax certificate [*see Rev. & Tax. Code § 4524*].

[2] No Effect on Taxpayer's Rights or Liability

Nothing in the law governing Tax Certificates [*Rev. & Tax. Code § 4501 et seq.*; *see § 540.54[1]*] reduces, changes, affects, or otherwise alters the rights of any property owner or taxpayer that exist in the absence of that law. Under no circumstance may the property owner or taxpayer be required to paymore than would have been owed if the sale of a tax certificate had not occurred [*Rev. & Tax. Code § 4513*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsFinanceTax LawState & Local TaxesAdministration & ProceedingsCollectionTax LawState & Local TaxesPersonal Property TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxCollectionMethods & Timing

California Forms of Pleading and Practice--Annotated

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PART II. LEGAL BACKGROUND
B. PROPERTY TAXES AND ASSESSMENTS
2. Structure and Administration of Property Tax System

47-540 California Forms of Pleading and Practice--Annotated § 540.55

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§ 540.55 Temporary Payment Relief for Service Members in Iraq and Afghanistan

Temporary relief from property tax liability is available under *Mil. & Vet. Code § 800 et seq.* to a member of the U.S. military reserve or California national guard called to active duty as a result of the Iraq conflict pursuant to the Authorization for Use of Military Force Against Iraq Resolution of 2002 [Pub. L. No. 107-243] or the Afghanistan conflict pursuant to Presidential Order No. 13239. Such a service member is called a "reservist" in the statutes [*Mil. & Vet. Code § 803*].

In addition to any other benefits provided by law and to the extent permitted by federal law, any member of the U.S. military reserve or the California national guard who is called to active duty after February 9, 2005, as a part of the Iraq and Afghanistan conflicts may defer, while serving on active duty, any payment of property tax or any special assessment of in-lieu property tax imposed on real property that is assessed on residential property owned by the reservist and used as that reservist's primary place of residence on the date the reservist was ordered to active duty [*Mil. & Vet. Code § 800(a)(6)*; *see Mil. & Vet. Code § 800(b),(d)* (procedure to obtain deferment; deferment period)].

Mil. & Vet. Code § 800 et seq. will not apply to any active duty voluntarily served after the close of the Iraq or Afghanistan conflicts or to any reservist on active duty as part of the Iraq or Afghanistan conflicts before January 1, 2006 [*Mil. & Vet. Code § 809*]. *Mil. & Vet. Code § 800 et seq.* will apply only to an obligation that was incurred prior to the date a member of the U.S. military reserve or California national guard was called to active duty as part of the Iraq and Afghanistan conflicts [*Mil. & Vet. Code § 811*].

During the deferment period, the reservist may defer the payment of principal and interest. No penalties may be imposed on the nonpayment of principal or interest during this period. No interest may be charged or accumulated on the principal or interest on which the payment was delayed. No foreclosure or repossession of property on which payment has been deferred may take place during the period [*Mil. & Vet. Code § 804*].

A stay, postponement, or suspension under *Mil. & Vet. Code § 800 et seq* of the payment of any tax liability of a person in military service may not provide the basis for affecting credit ratings, denial or revocation of credit, or a change by a lender in the terms of an existing credit arrangement [*Mil. & Vet. Code § 805*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Military & Veterans LawServicemembersSoldiers & Sailors Civil Relief ActMilitary & Veterans LawServicemembersU.S. National GuardTax LawState & Local TaxesAdministration & ProceedingsGeneral OverviewTax LawState & Local TaxesPersonal Property TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxGeneral Overview

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47-540 California Forms of Pleading and Practice--Annotated §§ 540.56-540.69

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

[Reserved]

§§ 540.56[Reserved]

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3. Taxpayers' Administrative Remedies

47-540 California Forms of Pleading and Practice--Annotated § 540.70

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§ 540.70 Application to Reduce Assessment

[1] Availability

Taxpayers may apply to the county board of equalization or assessment appeal board for a reduction in assessment value, including both base year value and current taxable value [*see Rev. & Tax. Code §§ 80, 1603*; *see Cal. Const., art. XIII, § 16, , Rev. & Tax. Code § 1620* (assessment appeals boards)].

The application to reduce an assessment satisfies the due process requirement that a tax statute must provide an opportunity for the taxpayer to be heard before the tax becomes final [*see Nickey v. Mississippi (1934) 292 U.S. 393, 396, 54 S. Ct. 743* ; *Midstate Theatres, Inc. v. Board of Supervisors (1975) 46 Cal. App. 3d 204, 208, 119 Cal. Rptr. 894]* .

A decline in the value of real property after the purchase may lead to a successful application [*see Rev. & Tax. Code § 51* (taxable value as lesser of base year value factored for inflation or fair market value on lien date)].

The county board of equalization, or, if provided by ordinance, the assessment appeals board, must also hear applications for reduction of assessment if the issue is whether a change in ownership has occurred or whether the property is newly constructed within the meaning of *Rev. & Tax. Code §§ 70-74.6*. The availability ofthis administrative procedure does not alter, modify, or eliminate the right of a taxpayer to a trial de novo in the superior court with regard to the legal issue of whether or not the property has undergone a change of ownership or been newly constructed so as to require reassessment [*Rev. & Tax. Code § 1605.5*].

If an audit of the books and records of any profession, trade, or business pursuant to *Rev. & Tax Code § 469* [*see § 540.53[4]*] discloses property subject to an escaped assessment for any year, then the original assessment of all property of the assessee at the location of the profession, trade, or business for that year is subject to review, equalization, and

adjustment by the county board of equalization or assessment appeals board [*Rev. & Tax. Code § 1605(e)*; *e.g., County of Los Angeles v. Raytheon Co. (2008) 159 Cal. App. 4th 27, 36-38, 70 Cal. Rptr. 3d 788* (escape assessment directed to property of long-term lessee of real property allows lessee or its successor in interest to reopen prior assessments not only with respect to its own property but also as to leased property)]. The right to administrative review exists when an audit discloses underassessments that are offset against overassessments, so that no escape assessment is actually levied (i.e., enrolled) [*Heavenly Valley v. El Dorado County Bd. of Equalization (2000) 84 Cal. App. 4th 1323, 1342, 101 Cal. Rptr. 2d 591]* .

[2] Time for Filing

[a] Statutory Period

Applications for reduction of an assessment must be filed during the period from July 2 to September 15, inclusive. An application mailed and postmarked by September 15 is considered timely filed [*Rev. & Tax. Code § 1603(b)(1)*]. If September 15 falls on a Saturday, Sunday, or legal holiday, an application mailed and postmarked on the next business day is deemed to have been timely filed [*Rev. & Tax. Code § 1603(b)(4)*]. If the county's offices are closed for business on September 15 before 5 p.m., or for that entire day, that day is considered a legal holiday for purposes of *Rev. & Tax. Code § 1603* [*Rev. & Tax. Code § 1603(b)(4)*]. In addition, the filing period is extended to November 30 if the county assessor does not provide, by August 1, the required statutory notice [*see Rev. & Tax. Code § 619*] to all assessees of real property on the local secured roll of the assessed value of their real property on the completed local roll. That assessed value must include the annual increases in assessed value caused solely by Constitutionally permitted inflation increases [*Rev. & Tax. Code § 1603(b)(3)*].

There may be situations, however, when the periods specified in *Rev. & Tax. Code § 1603(b)* are not controlling [*see, e.g., Metropolitan Culinary Services, Inc. v. County of Los Angeles (1998) 61 Cal. App. 4th 935, 940-942, 944-948, 71 Cal. Rptr. 2d 859* (when county incorrectly computed base year value for 1992-1993 resulting in overtaxation for 1992-1993 and all subsequent years and corrected method of calculation effective for 1995-1996 assessment, but not as to 1992-1993 or 1993-1994 assessments, and taxpayer filed applications for reductions of 1992-1993 and 1993-1994 assessments and s for both of those years, limitation periods of *Rev. & Tax. Code §§ 51.5(b)* and *80* rather than that of *Rev. & Tax. Code § 1603* applied)].

The period during which assessment protests will be accepted and the place where they may be filed must be disclosed to the taxpayer on the assessment notice [*Rev. & Tax. Code § 619*; *see Rev. & Tax. Code § 75.31(d)* (supplemental assessments); *see also Rev. & Tax. Code §§ 621* (when alternative published lists of assessments in newspapers authorized), *1601(c)* (publication in newspaper)]. An application is timely filed if the taxpayer does not receive the notice of assessment described in *Rev. & Tax. Code § 619* at least 15 calendar days before the deadline for filing the application for reduction, and the taxpayer files the application within the earlier of either 60 days after receiving the notice of assessment or 60 days after the tax bill was mailed. An application filed during this extended period must be accompanied by an affidavit declaring under penalty of perjury that the the taxpayer did not receive the notice of assessment at least 15 calendar days before the deadline for filing the application for reduction [*Rev. & Tax. Code § 1603(b)(2)*].

On the recommendation of the assessor and the clerk of the county board of equalization, the board of supervisors may adopt a resolution providing that an application may be filed within 60 days of the mailing of the notice of the assessor's response to a request for reassessment pursuant to *Rev. & Tax. Code § 51(a)(2)*, if all of the following conditions are met [*Rev. & Tax. Code § 1603(d)(1)-(6)*]:

- The request for reassessment was submitted in writing to the assessor in the form prescribed by the SBE and includes all the information that is prescribed by the SBE.

- The request for reassessment was made on or before the immediately preceding March 15.

- The assessor's response to the request for reassessment was mailed on or after September 1 of the calendar year in which the request for reassessment was made.

- The assessor did not reduce the assessment in question in the full amount as requested.

- The application for changed assessment is filed on or before December 31 of the year in which the request for reassessment was filed.

- The application for reduction in assessment is accompanied by a copy of the assessor's response to the request for reassessment.

[b] Supplemental Assessments

Supplemental assessments are designed to allow for adjustment of taxes resulting from changes in assessed value due to changes in ownership and completion of new construction at the time they occur [*see Rev. & Tax. Code §§ 75, 75.11*].

Generally, a taxpayer must file an appeal of a supplemental assessment (that is, an application for reduction) within 60 days of the date of mailing printed on the notice of assessment, or the postmark date of the notice, whichever is later. However, in the case of Los Angeles County or a county in which the board of supervisors has adopted the provisions of *Rev. & Tax. Code § 1605(c)* (under which a board of supervisors may by resolution require that an application under *Rev. & Tax. Code § 1603(a)* befiled with the clerk no later than 60 days after the date of mailing printed on the tax bill, or the postmark date of the tax bill, whichever is later), taxpayers must file an appeal of the supplemental assessment within 60 days of the date of mailing printed on the tax bill, or the postmark date of the bill, whichever is later [*Rev. & Tax. Code § 75.31(c)(2)*]. In either case, for purposes of equalization proceedings, the supplemental assessment is considered an assessment made outside the regular assessmentperiod as provided in *Rev. & Tax. Code § 1605* [*Rev. & Tax. Code § 75.31(c)(1), (2)*].

If the taxpayer does not receive notice in accordance with *Rev. & Tax. Code § 75.31* at least 15 days before the deadline to file the application described in *Rev. & Tax. Code § 1603*, the taxpayer, or his or her agent,may file an application within 60 days of the date of mailing printed on the tax bill, or the postmark date of the bill, whichever is later along with an affidavit declaring under penalty of perjury that the notice was not timely received [*Rev. & Tax. Code § 75.31(c)(3)(A)*].

[c] Escape Assessments

Escape assessments apply to property that escaped assessment altogether or was undervalued and captures the taxes that were lost and, depending on the reason for the escape, potential penalties and interest [*see Rev. & Tax. Code § 531*; *see also Rev. & Tax. Code §§ 51.5, 501 et seq.*].

For escape assessments made under *Rev. & Tax. Code § 501 et seq.*, or *Rev. & Tax. Code § 531 et seq.*, an application for reduction must be filed with the clerk no later than 60 days of the date of mailing printed on the notice of assessment, or the postmark of the notice, whichever is later. However, for counties in which the board of supervisors has adopted a resolution in accordance with *Rev. & Tax. Code § 1605(c)*, and Los Angeles County [*see Gov. Code §§ 28020, 28022*], such an application must be filed within 60 days of the date of mailing printed on the tax bill or the postmark of the tax bill, whichever is later [*Rev. & Tax. Code § 1605(b)*].

If the taxpayer does not receive notice of assessment described in *Rev. & Tax. Code § 534* at least 15 days before the deadline to file the application described in *Rev. & Tax. Code § 1603*, the taxpayer, or his or her agent, may file the

application within 60 days of the date of mailing printed on the tax bill or the postmark date of the tax bill, whichever is later, along with an affidavit declaring under penalty of perjury that the notice was not timely received [*Rev. & Tax. Code § 1605(b)*].

[d] Stipulation to Assessment Error

A taxpayer may file an application for reduction of an assessment within 12 months after the month in which the taxpayer is notified of the assessment, if the taxpayer or his or her agent and the assessor stipulate that there is an error in the assessment as a result of the exercise of the assessor's judgment in determining the full cash value of the property. In addition, a written stipulation in accordance with *Rev. & Tax. Code § 1607* regarding the full cash value and the assessed value must be filed [*Rev. & Tax. Code §§ 75.31(c)(3)(B)* (supplemental assessment), *1603(c)* (assessment), *1605(b)* (escape assessment); *see § 540.70[11][b]*].

[3] Application Procedure

[a] Forms and Verification

A taxpayer must submit an application for reduction of an assessment in the form prescribed by the SBE [*Rev. & Tax. Code § 1603(a)*; *see Rev.& Tax. Code § 1605(b)* (supplemental and escape assessments); *see also Rev. & Tax. Code § 1603(g)* (clerk of county board of equalization may accept electronically filed application for changed assessment containing electronic signature)]. The county must provide the application form free of charge [*18 Cal. Code Reg. § 305(c)*]. The application must be made by the taxpayer or by his or her agent [*Rev. & Tax. Code § 1603(a)*] and signed under penalty of perjury [*Rev. & Tax. Code § 1603(f)* (required statutory language for signature block); *18 Cal. Code Reg. § 305(b)*].

Although the terms "taxpayer" or "agent" are used in this text, *Rev. & Tax. Code § 1603(a)* refers to the party affected or agent making the application. Under *Rev. & Tax. Code § 1603(f)*, the person signing the application certifies or declares that he or she is either (1) owner of property or a person affected (that is, a person having direct economic interest in the payment of taxes on that property)--"The Applicant"; (2) an agent authorized by applicant; or (3) a retained and authorized California attorney [*Rev. & Tax. Code § 1603(f)*; *see 18 Cal. Code Reg. § 305(a)* (application is filed by person affected or person's agent, or relative mentioned in *18 Cal. Code Reg. § 317*, *i.e.*, taxpayer's spouse, child, or parent); *see also 18 Cal. Code Reg. §§ 301(g)* (defining person affected or party affected), *317* (persons who can appear on applicant's behalf at hearing); for requirements when an agent makes the application, *see* discussion *§ 540.70[3][b]*].

If a duplicate application for reduction in assessment is filed with the county board, the clerk may accept only the first application for reduction filed by or on behalf of the taxpayer, and may reject any duplicate application for reduction [*Rev. & Tax. Code § 1603.5(a)*]. For this purpose, "duplicate application for reduction" means an application for reduction filed by an applicant, or the applicant's attorney or agent on his or her behalf, subsequent to an application for reduction previously filed by or on behalf of the same applicant, that seeks the same relief with respect to the same property for the same year in issue. A subsequent application for reduction that seeks to amend a previously filed application for reduction is not considered a duplicate application for reduction for this purpose [*Rev. & Tax. Code § 1603.5*].

[b] Agent Authorization

When the application is made by an agent, other than an authorized attorney licensed to practice law in California who has been retained and authorized by the taxpayer to file the application, written authorization to so act must be filed with the application. An agent is deemed to have been duly authorized by the taxpayer to file an application if the taxpayer's written authorization is on the application or attached to each application at the time it is filed with the board [*18 Cal. CodeReg. § 305(a)(1)* (also specifying required content of authorization)].

If the taxpayer is a corporation, limited partnership, or limited liability company, the agent authorization must be signed by an officer or authorized employee of the business entity [*18 Cal. Code Reg. § 305(a)(3)*; *see also 18 Cal. Code Reg. § 305(b)(1)* (person signing application for corporate taxpayer states under penalty of perjury, among other things, that person is officer of corporation, or employee of corporation who has been designated in writing by board of directors or corporate officers to represent corporation on property tax matters)].

If a photocopy of the original authorization is attached to the application, the agent must be prepared to submit an original signed authorization if requested by the board. The application form must show that the agent's authorization was attached to the application [*18 Cal. Code Reg. § 305(a)(2)*].

An agent must have authorization to file an application at the time the application is filed. Retroactive authorizations are not permitted [*18 Cal. Code Reg. § 305(a)(2)*].

None of following persons may represent an applicant for compensation on any application for equalization filed pursuant to *Rev. & Tax. Code § 1603*, in the county in which the person serves or is employed: any current member or alternate member of the assessment appeals board; any current assessment hearing officer; any current employee of the office of the clerk of the county board of equalization or assessment appeals board; any current employee of the county counsel who advises the assessment appeals board or represents the assessor before the assessment appeals board; any current employee of the assessor's office, if representing the applicant would be a conflict of interest under *Rev. & Tax. Code § 1365* [*Rev. & Tax. Code § 1612.5*; *see Rev. & Tax. Code §§ 1624.3, 1636.2* (same, for current or alternate member of assessment appeals board or current assessment hearing officer)].

[c] Request for Findings

The application for a reduction in assessment must contain a notice that written findings of fact established in the hearing on the application are available on written request at the requester's expense. The application form must provide an appropriate place for the taxpayer to request findings [*Rev. & Tax. Code § 1603(e)*; *18 Cal. Code Reg. § 305(c)(2)*]. A taxpayer requesting findings must pay, before conclusion of the hearing, any reasonable fee or deposit required by the county to cover the expenses of preparing the findings [*Rev. & Tax. Code § 1611.5*]. A taxpayer waives the right to obtain findings if the taxpayer does not request written findings either on the application or in a separate written request made before the hearing begins [*Rev. & Tax. Code §§ 1603(e), 1611.5*].

[d] Information Required of Applicant

A taxpayer applying for a reduction in assessment must provide all of the following information [*18 Cal. Code Reg. § 305(c)(1)(A)-(G)*]:

- The taxpayer's name and address.
- The name and address of the taxpayer's agent, if any.
- If the taxpayer is represented by an agent, both the taxpayer's actual mailing address and the agent's mailing address.
- The taxpayer's written authorization for an agent, if any, to act on the taxpayer's behalf.
- A description of the property involved that is sufficient to identify it on the assessment roll.
- The taxpayer's opinion of the property's value on the valuation date of the assessment year in issue.

- The roll value on which the assessment of the property is based.

- The facts the taxpayer relies on, other than merely the amount of the tax or the amount of the assessed value increase, to support the claim that the board should change the assessed value, base year value, or classification of the property.

An application that does not contain all the required information is invalid and cannot be accepted by the board. The clerk must promptly notify the taxpayer and, if applicable, the taxpayer's agent, that the application is invalid, and the taxpayer or taxpayer's agent must be given a reasonable opportunity to correct any errors or omissions [*18 Cal. Code Reg. § 305(c)(4)*]. The taxpayer, or the taxpayer's agent, may not amend the application after the filing deadline if the effect of the amendment is to request relief additional to or different in nature from the relief originally requested [*18 Cal. Code Reg. § 305(e)(2)(B)*; *see Helene Curtis, Inc. v. Assessment Appeals Bd. (1999) 76 Cal. App. 4th 124, 129-132, 90 Cal. Rptr. 2d 31* (validity of *18 Cal. Code Reg. § 305(e)* upheld); *see also 18 Cal. Code Reg. § 305(e)(2)* (when application can be amended after filing period has expired; procedure)]. An application is adequate if the board can determine from the application the nature of the claim, for the purpose of investigating the claim prior to the hearing [*Midstate Theatres, Inc. v. Board of Supervisors (1975) 46 Cal. App. 3d 204, 209, 119 Cal. Rptr. 894* ; *see Metropolitan Culinary Services, Inc. v. County of Los Angeles (1998) 61 Cal. App. 4th 935, 944-945, 71 Cal. Rptr. 2d 859* (notice sufficient); *cf. Helene Curtis, Inc. v. Assessment Appeals Bd. (1999) 76 Cal. App. 4th 124, 129-132, 90 Cal. Rptr. 2d 31* (applications that only stated challenges to escape assessments of personal property and fixtures inadequate to challenge to underlying real property assessments)].

The value of the property established for purposes of determining the amount of documentary transfer tax due will not be binding on the determination of the value of that property for property tax purposes by the county assessor, by an assessment appeals board, or by a court of law reviewing property tax values established by an assessment appeals board--whether the amount of documentary transfer tax is determined by an administrative appeal process or established by a court [*Rev. & Tax. Code § 11935(b)*].

[e] Application as Claim for Refund

A taxpayer who applies for a reduction of an assessment may elect to have the application for reduction treated as a claim for refund. The taxpayer makes the election simply by stating in the application that it is intended to be a claim forrefund. Making such an election means that the taxpayer does not have to file a later claim for refund. A taxpayer that does not make the election will have to file a timely claim for refund as a prerequisite to bringing a suit for refund [*Rev. & Tax. Code § 5097(b)*]. Counsel should exercise caution, however, in making this election and relying solely on the application for reduction, because no recovery in ajudicial action is allowed for a ground not stated in the claim for refund [*Rev. & Tax. Code § 5142(a)*; *see § 540.90[5]*].

If the taxpayer makes the election, the claim for refund is deemed denied, and the six-month limitations period for filing a suit for refund begins running, on the later of either (1) the date the final installment of the assessment becomes delinquent or (2) the date the board of equalization makes its final determination on the taxpayer's application for reduction [*Rev. & Tax. Code § 5141(c)*; *see § 540.90[9]*].

[4] Prehearing Discovery

[a] Availability of Records and Market Data

Prehearing discovery for an application for reduction of an assessment is limited. The assessment rolls, records of transfers and certain market data may be all that a taxpayer can obtain [*see § 540.70[5]*]. The taxpayer cannot obtain a subpoena to take depositions, and the board of equalization does not consider depositions for any purposes. However, if

the assessor proposes to introduce evidence to support a higher assessed value than was placed on the roll, he or she must inform the taxpayer of the higher assessed value and the supporting evidence at least 10 days before the hearing [*Rev. & Tax. Code § 1609.4*].

The local assessment roll or a copy of the roll is available for review during regular business hours [*Rev. & Tax. Code § 1602*]. Records of all transfers in the county during the preceding two years are available for inspection for a modest fee (lesser of actual costs or $10) [*Rev. & Tax. Code § 408.1*]. The assessor must provide any market data in his or her possession to the taxpayer and permit the taxpayer or the taxpayer's representative to inspect at the assessor's office any information and records relating to the appraisal and assessment of the taxpayer's property. For this purpose, "market data" means any information in the assessor's possession, whether or not required to be kept or prepared by the assessor, relating to the sale of any property, if the assessor has based the assessment, in whole or in part, on that sale [*Rev. & Tax. Code § 408(d), (e)*; *see Rev. & Tax. Code § 408.3* (availability of information on property characteristics)].

[5] Exchange of Information

[a] Availability

Because prehearing discovery is so limited, counsel should, if the taxpayer's property qualifies, request an exchange of information [*Rev. & Tax. Code §§ 408, 1606, 1609.4*; *see Hunt-Wesson Foods, Inc. v. County of Stanislaus (1969) 273 Cal. App. 2d 92, 95-98, 77 Cal. Rptr. 832* (denying request to order taking of depositions)]. Under *Rev. & Tax. Code § 1606*,any taxpayer may initiate an exchange of information regardless of the amount of the assessment. An assessor can also request an exchange of information, however, only if the value of the property at issue as shown on the current assessment roll, without regard to exemptions, is more than $100,000 [*Rev. & Tax. Code § 1606(a)*; *see State Bd. of Equalization v. Ceniceros (1998) 63 Cal. App. 4th 122, 127, 130, 73 Cal. Rptr. 2d 539]* . A request for exchange of information may be made at any time up to 30 days before the hearing [*Rev. & Tax. Code § 1606(a)*].

There may also be local rules governing exchange of information [*see, e.g.*, Riverside County's Rule 10, concerning requests for the production of information directed by the assessor to the taxpayer and vice versa, which although conflicting with *Rev. & Tax. Code § 1606* was upheld in *State Bd. of Equalization v. Ceniceros (1998) 63 Cal. App. 4th 122, 130, 133, 73 Cal. Rptr. 2d 539* , as not being preempted by state law, because counties are expressly authorized to adopt rules governing assessment appeal hearings and Rule 10 is consistent with *Rev. & Tax. Code § 441*].

[b] Information That Must Be Exchanged

The party who requests an exchange of information under *Rev. & Tax. Code § 1606* must submit the following information to the other party in writing [*Rev. & Tax. Code § 1606(a)*]:

- The basis of the requesting party's opinion of the property's value.

- If the opinion of value is to be supported by evidence of comparable sales, information identifying the property sold with sufficient certainty (for example, by an assessor's parcel number, street address, or legal description), the approximate date of the sale, the applicable zoning, the price paid, and the terms of the sale, if known.

- If the opinion of value is to be supported by evidence based on an income study, information relating to income, expenses, and the capitalization method.

- If the opinion of value is to be supported by evidence of replacement costs, information relating to the date of construction, type of construction, replacement cost of construction, obsolescence, allowance for extraordinary use of machinery and equipment, and depreciation allowances.

If the requesting party supplies the above information within the specified time,the other party must provide the requesting party with similar information pertaining to the other party's opinion of value. The other party must provide this information within 15 days before the hearing [*Rev. & Tax. Code § 1606(b)*].

For discussion of local rules governing exchange of information, see *§ 540.70[5]*.

[c] Effect of Exchange of Information

If an exchange of information has occurred under *Rev. & Tax. Code § 1606*, neither party may introduce evidence in the hearing on matters not exchanged without the consent of the other party. A party may introduce new material at the hearing relating to information obtained from the other party, but doing so entitles the other party to a continuance [*Rev. & Tax. Code § 1606*; *see Bank of America v. County of Fresno (1981) 127 Cal. App. 3d 295, 307, 179 Cal. Rptr. 497]* .

[6] Prehearing Conference

A county board of supervisors may establish prehearing conferences. If the board does so, it must also adopt rules of procedure for the conferences. A prehearing conference may be set by the clerk at the request of a taxpayer or the taxpayer's agent, the assessor, or at the direction of the appeals board [*18 Cal. Code Reg. § 305.2(a)*].

The purpose of a prehearing conference is to resolve issues such as, but not limited to [*18 Cal. Code Reg. § 305.2(a)*]:

- Clarifying and defining the issues.
- Determining the status of exchange of information requests.
- Stipulating to matters on which agreement has been reached.
- Combining applications into a single hearing.
- Bifurcating the hearing issues.
- Scheduling a date for a hearing officer or the board to consider evidence on the merits of the application.

The clerk of the board must set the matter for a prehearing conference and notify the taxpayer or the taxpayer's agent and the assessor of the time and date of the conference. Notice of the time, date, and place of the conference must be given not less than 30 days before the conference, unless the assessor and the taxpayer stipulate orally or in writing to a shorter notice period [*18 Cal. Code Reg. § 305.2(b)*].

[7] Notice of Hearing

The clerk of the county board of equalization must give the taxpayer, or the taxpayer's designated representative, notice of the time, date and place of the hearing not less than 45 days prior to the hearing, unless the assessor and the taxpayer, or the taxpayer's designated representative, stipulate orally or in writing to a shorter notice period [*Rev. & Tax. Code § 1605.6*].

If for any reason the hearing on the application is vacated, the board must give the taxpayer, or the taxpayer's designated representative, notice of the new time, date and place of the hearing not less than 10 days prior to the new hearing date, unless the assessor and the taxpayer, or thetaxpayer's designated representative, stipulate orally or in writing to a shorter

notice period, or the application has been heard by a hearing officer in accordance with *Rev. & Tax. Code §§ 1636-1641.2* [*Rev. & Tax. Code § 1605.6*; *see 18 Cal. Code Reg. § 307* (specifying circumstances in which shorter notice may be given); *but see Aerospace Corp. v. State Bd. of Equalization (1990) 218 Cal. App. 3d 1300, 1311, 267 Cal. Rptr. 685* (agency has no discretion to promulgate regulation inconsistent with statute; regulation that alters or amends statute or enlarges or impairs its scope is void); *Purdue Frederick Co. v. State Bd. of Equalization (1990) 218 Cal. App. 3d 1021, 1028, 267 Cal. Rptr. 482* (regulation promulgated to implement statute cannot change statute contrary to Legislature's intent)].

A notice of hearing also must warn the taxpayer that the finding of assessed value at the hearing may result in a higher value being assessed to the property than the value being contested [*18 Cal. Code Reg. § 307*; *see Rev. & Tax. Code § 1610.8*].

At the option of the county board of equalization, the *Rev. & Tax. Code § 1605.6* notice may be electronically transmitted, if requested in writing by the taxpayer, to an electronic address designated by the taxpayer. The clerk may also opt to electronically transmit the *Rev. & Tax. Code § 1605.6* notice to the assessor, if requested by the assessor, to an electronic address designated by the assessor [*Rev. & Tax. Code § 1605.6*].

[8] Board's Failure to Grant Timely Hearing

[a] Taxpayer's Reduced Value Becomes Assessed Value

If the board fails to hear evidence and make a final determination on an application for reduction within two years after its timely filing, the taxpayer's opinion of value set forth in the application becomes the property's assessed value [*Rev. & Tax. Code § 1604(c)*; *see United Enterprises, LTD v. Assessment Appeals Bd. (1994) 22 Cal. App. 4th 152, 164-165, 27 Cal. Rptr. 2d 279* (taxpayer's opinion of value became assessed value due to county's failure to act on application for reduction within two years pursuant to *Rev. & Tax. Code § 1604*)]. This two year period may be extended either by mutual agreement of the parties in writing, or on the record, to the extension of the time for the hearing [*Rev. & Tax. Code § 1604(c)(1)*], or by consolidation for hearing of the taxpayer'sapplication with another application by the same taxpayer with respect to which an extension of time for the hearing has been granted pursuant to *Rev. & Tax. Code § 1604(c)(1)* [*Rev. & Tax. Code § 1604(c)(2)*]. However, an application cannot be consolidated without the taxpayer's written consent after the two-year period has expired or after a previously agreed upon extension has expired [*Rev. & Tax. Code § 1604(c)(2)*]. Moreover, when the parties mutually attempt to extend the two year period, there may be circumstances that estop a taxpayer from claiming the benefit of the two year rule [*see, e.g., Stocker Resources, Inc. v. Assessment Appeals Bd. (1996) 49 Cal. App. 4th 391, 393, 397-400, 57 Cal. Rptr. 2d 28* (taxpayer estopped from claiming benefit of two year rule due to intentionally misleading manner in which taxpayer's attorney modified board's standardized waiver form)].

The two-year period is extended by 90 days if, within 90 days of its expiration, a taxpayer or his or her agent objects to an assessment appeals board member pursuant to *Rev. & Tax. Code § 1624.4* or applies for a hearing officer's recommendation to be heard before the county board pursuant to *Rev. & Tax. Code § 1641.1* [*Rev. & Tax. Code § 1641.2*].

The two-year period is also extended if the assessor is granted a continuance at an assessment appeals board hearing on the basis that the taxpayer introduced information at the hearing that the taxpayer had failed to provide to the assessor when the assessor requested it under *Rev. & Tax. Code § 441(d)*. The extension is for a period equal to the continuance [*Rev. & Tax. Code § 441(h)*].

The two-year period also is extended if the taxpayer is granted a continuance at an assessment appeals board hearing on the basis that the assessor introduced information at the hearing that the assessor had failed to provide to the taxpayer when the taxpayer requested it under *Rev. & Tax. Code § 408(d)* or *(e)*. The extension is for a period equal to the

continuance [*Rev. & Tax. Code § 408(f)(3)*].

The taxpayer's opinion of value does not need to be adopted when the board has held a hearing and made a final decision on jurisdictional grounds. Thus, the requirements of a hearing and determination are met even if the board makes an erroneous determination that it lacks jurisdiction to hear the merits of the administrative appeal, such that no hearing on the merits is held within the two-year period [*Heavenly Valley v. El Dorado County Bd. of Equalization (2000) 84 Cal. App. 4th 1344-1347, 1342, 101 Cal. Rptr. 2d 591]* .

The board remains empowered to decide the application after expiration of the two-year period (as extended) [*cf. Rev. & Tax. Code § 1604(d)(1)*, discussed in *§ 540.70[8][b]*]. The two-year period is not a "limitation period" (except in the sense of limiting the board's power to impose a different valuation than the applicant's until the board decides the application for reduction). Expiration of the period does not prevent the board from acting on an application; rather, it operates as a milestone to encourage completion of the process. Accordingly, if reinstatement of a procedurally terminated application is necessary in order for the board to make a determination on the merits, the board may reinstate the application after expiration of the two-year period [*Helene Curtis, Inc. v. Los Angeles County Assessment Appeals Bds. (2004) 121 Cal. App. 4th 29, 40, 16 Cal. Rptr. 3d 658]* . Nevertheless, the taxpayer could be subject to an estoppel rule, as in *Stocker Resources* [*Stocker Resources, Inc. v. Assessment Appeals Bd. (1996) 49 Cal. App. 4th 391, 57 Cal. Rptr. 2d 28]* , cited *above* [*Helene Curtis, Inc. v. Los Angeles County Assessment Appeals Bds. (2004) 121 Cal. App. 4th 29, 16 Cal. Rptr. 3d 658* ("As in *Stocker*, these facts manifest a 'wrongful misleading silence' by [the taxpayer] with respect to its failure to satisfy the board's conditions for reinstatement, as well as ignorance by the board of that refusal, justifying recognition of an estoppel to claim the benefits" of *Rev. & Tax. Code § 1604(c)*].

The reduction in assessment does not apply if the the taxpayer has failed to provide full and complete information or if litigation relating to the issues in the application is pending. The reduction in value does not take effect until two years after the close of the filing period during which the application was made [*Rev. & Tax. Code § 1604(c)*].

[b] Change in Value Once Board Makes Final Determination

The applicant's opinion of value is to be placed on the assessment roll when the county board fails to act on the application within two years [*see Rev. & Tax. Code § 1604(d)*].

- If the application requests a reduction of the base-year value for real property, then the applicant's opinion of value remains on the roll until the county board makes a final determination on the application. No increased or escape taxes may be levied for the tax years during which the county board has failed to act, except those required by a purchase, a change in ownership, new construction, or application of the inflation factor to the taxpayer's opinion of value [*Rev. & Tax. Code § 1604(d)(1)*].

- If the application is based on anything else, then the applicant's opinion of value is placed on the assessment roll for the tax year or years covered by the application [*Rev. & Tax. Code § 1604(d)(2)*]. (Therefore, a new application would have to be filed respecting any subsequent tax year.)

[9] Burden of Proof

The assessor is presumed to have properly performed his or her duties and assessed all property on a fair and equal basis. Therefore, the burden of proof generally is on the taxpayer to prove that the property has been incorrectly assessed [*18 Cal. Code Reg. § 321(a)*; *American Airlines, Inc. v. County of San Mateo (1996) 12 Cal. 4th 1110, 1127, 1135, 51 Cal. Rptr. 2d 251, 912 P.2d 1198* ; *Fujitsu Microelectronics, Inc. v. Assessment Appeals Bd. (1997) 55 Cal. App. 4th 1120, 1126, 64 Cal. Rptr. 2d 465* ; *Bank of America v. County of Fresno (1981) 127 Cal. App. 3d 295, 312, 179 Cal. Rptr. 497* ; *Griffith v. County of Los Angeles (1968) 267 Cal. App. 2d 837, 842, 73 Cal. Rptr. 773* ; *see Rev. & Tax. Code § 1610.8*].

The presumption does not apply, and the assessor therefore bears the burden of supporting the assessment, if the application involves an owner-occupied single-family dwelling and the taxpayer has supplied all the information required in the application for reduction [*Rev. & Tax. Code § 167*; *18 Cal. Code Reg. § 321(d)*; *Mitchell v. County of Los Angeles (1997) 60 Cal. App. 4th 497, 500, 70 Cal. Rptr. 2d 476* ; *see Rev. & Tax. Code § 110(b)* (presumptions regarding purchase price as fair market value); *Huson v. County of Ventura (2000) 80 Cal. App. 4th 1131, 1135-1136, 96 Cal. Rptr. 2d 116* (applying *Rev. & Tax. Code § 110(b)* presumption that value of improvements financed by special assessment is included in purchase price, placing burden on assessor to rebut presumption that purchase price reflects fair market value); *see also 18 Cal. Code Reg. § 321(e)* (in hearing involving change of ownership, except as provided in *Rev. & Tax. Code § 110*, purchase price is rebuttably presumed to be full cash value; party seeking to rebut presumption bears burden of proof)].

The assessor also bears the burden of establishing the basis for imposition of any penalty assessment [*18 Cal. Code Reg. § 321(a)*].

[10] Valuation

County assessors generally are required to participate in equalization hearings challenging any individual assessment. At an equalization hearing, the board is bound by the same principles of valuation that are legally applicable to the assessor [*Plaza Hollister Ltd. Partnership v. County of San Benito (1999) 72 Cal. App. 4th 1, 18, 84 Cal. Rptr. 2d 715]* . Moreover, the county board of equalization, rather than the courts, are the proper tribunal for exercising judgment on valuation questions concerning individual assessments on the local roll [*Plaza Hollister Ltd. Partnership v. County of San Benito (1999) 72 Cal. App. 4th 1, 23, 84 Cal. Rptr. 2d 715* ; for discussion of when the court will remand to board of equalization, see *§ 540.90[11][b]*)].

A taxpayer seeking a reduction of the assessed value of real property cannot limit the equalization board's inquiry and decision to just one of the two components--land value and improvements value--making up the full value for assessment purposes [*see 18 Cal. Code Regs. § 324(b)* (board's authority to determine full value of property is not limited by applicant's request for relief)]. Since the board's legal duty is to equalize the assessment of real property on the local roll by determining the full value of each parcel [*Rev. & Tax. Code § 1610.8*], including both land and improvements [*18 Cal. Code Regs. § 324(a)*], a taxpayer cannot complain when that is what the board does, regardless of whether the taxpayer wished to limit consideration to the value of the land only or the value of improvements only [*Schoenberg v. County of Los Angeles Assessment Appeals Bd. (2009) 179 Cal. App. 4th 1347, 1353-1354, 102 Cal. Rptr. 3d 86]* .

[11] Necessity for Appearance at Hearing

[a] Exception for Stipulations

The taxpayer or the taxpayer's agent must appear at the hearing and answer under oath all questions pertinent to the inquiry unless the taxpayer and assessor have stipulated to the value of the property [*Rev. & Tax. Code § 1607*; *18 Cal. Code Reg. § 317* (also specifying who may appear at hearing on taxpayer's behalf and procedure)]. Generally, no reduction of an assessment may be granted without such an appearance by the taxpayer or the taxpayer's agent [*Rev. & Tax. Code § 1607*; *18 Cal. Code Reg. § 316*]. This rule has been held not to impair any right of the taxpayer [*Williamson v. Payne (1938) 25 Cal. App. 2d 497, 503-505, 77 P.2d 900]* .

[b] Requirements for and Effect of Stipulation

A stipulation as to the value of the property in question, which may allow a reduction of assessment without the personal appearance of the taxpayeror the taxpayer's agent, must be signed by the assessor and the county legal officer on behalf of the county and by the taxpayer or the taxpayer's agent. It must stipulate as to the full cash value and the

assessed value of the property and set forth facts on which the reduction in value is premised.

At the hearing, the board may accept the stipulation, waive the appearance of the taxpayer or the taxpayer's agent, and change the assessed value, or it may reject the stipulation and reschedule the hearing [*Rev. & Tax. Code §§ 1607, 1610.8*].

[c] Waiver of Appearance

If the board has previously considered the issues raised by the application and the taxpayer so requests, the board may waive the taxpayer's appearance. In this situation, the board must give the taxpayer written notice of its decision promptly after its decision is made [*Rev. & Tax. Code § 1608*].

[12] Hearing Before Assessment Hearing Officer

A taxpayer may request a hearing before a hearing officer if the application for reduction involves property that either (1) has a total assessed value of less than $500,000; or (2) is a single-family dwelling, condominium, cooperative, or multiple-family dwelling of four units or less, regardless of value [*Rev. & Tax. Code § 1637*]. A taxpayer may be represented in the hearing by an attorney. The assessor may be represented by an attorney only if the taxpayer is represented [*Rev. & Tax. Code § 1638*]. Other procedural and evidentiary rules are the same as those in a hearing before the board [*see § 540.70[13]*], except that hearings before an assessment officer are conducted in an informal manner [*Rev. & Tax. Code §§ 1637, 1638*]. Whether the hearing officer's recommendation must be accepted by the board or whether the assessor may file a protest requesting a new hearing by the board is a matter of county option [*Rev. & Tax. Code §§ 1640.1, 1641.1, 1641.5*; *but see 64 Ops. Cal. Att'y Gen. 690 (1981)* (opinion that *Rev. & Tax. Code § 1641* requiring adoption of hearing officer's recommendation is inconsistent with *Cal. Const., art. XIII, § 16*)].

[13] Hearing Before County Board of Equalization

[a] Record of Proceedings

Equalization hearings before a county board of equalization generally are open to the public, although the board may deliberate in private. Taxpayers who fear the exposure of trade secrets may seek to have the portion of the hearing relating to those matters closed [*Rev. & Tax. Code § 1605.4*]. The board must make a record of the hearing. It must provide a transcript or an audio recording of the hearing to any party, at the party's expense, if requested within 60 days after the board's final determination [*Rev. & Tax. Code § 1611*]. If the county does not regularly employ a public stenographer, the taxpayer may request one at his or her own expense [*18 Cal. Code Reg. § 312(c)*].

[b] Evidence and Witnesses

Equalization hearings are not required to be conducted in accordance with the technical rules of evidence [*Rev. & Tax. Code § 1609*]. The taxpayer may request the board to issue subpoenas for the attendance of witnessess and production of evidence at the hearing [*18 Cal. Code Reg. § 322*]. Records and information in the assessor's office relating to other taxpayers may not be compelled to be produced except on court order [*Rev. & Tax. Code § 408(e)(3)*; *see Rev. & Tax. Code § 408.3* (availability of property characteristics information)]. Either the taxpayer or the assessor can subpoena an employee of the SBE to appear, but must pay $200 for each day the employee's attendance is required [*Rev. & Tax. Code § 1609.5(b)*]. If the taxpayer subpoenaed the employee and the taxpayer prevails, the board may reimburse the taxpayer for this witness fee [*Rev. & Tax. Code § 1609.5(d)*].

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For related research and practice materials, see the following legal topics:
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47-540 California Forms of Pleading and Practice--Annotated § 540.71

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.71 Claim for Refund

[1] Final Administrative Remedy

After a taxpayer has exhausted the assessment appeals process [*see § 540.70*], generally the only action available to the taxpayer is payment of the taxes and filing a claim for refund [*see Rev. & Tax. Code §§ 5096-5099*]. No injunction, writ of mandate, or other legal or equitable process is available to prevent or enjoin collection of property taxes by local authorities [*Rev. & Tax. Code § 4807*]. Federal injunctive relief is seldom available [*28 U.S.C. § 1341*; *see § 540.91[6]*].

The process of obtaining a refund is distinct from the process of seeking a reduced assessment by filing an application for equalization. However, an application for a reduction in an assessment filed pursuant to *Rev. & Tax. Code § 1603* serves as a claim for refund under *Rev. & Tax. Code § 5097* if the taxpayer stated in the application that the application is intended to constitute a claim for refund [*Plaza Hollister Ltd. Partnership v. County of San Benito (1999) 72 Cal. App. 4th 1, 34, 34 n.20, 84 Cal. Rptr. 2d 715* (for discussion of electing to have an application for reduction treated as a claim for refund, see *§ 540.70[3][e]*)]. The timely filing of a proper claim for refund is a statutory prerequisite to a refund action [*Plaza Hollister Ltd. Partnership v. County of San Benito (1999) 72 Cal. App. 4th 1, 34, 84 Cal. Rptr. 2d 715* (for discussion of the period for filing refund claim generally, see *§ 540.71[6]*)].

[2] Prerequisites to Filing Claim

A taxpayer may file a claim for refund against a board of supervisors after payment of a contested assessment [*Rev. & Tax. Code § 5096*]. However, a taxpayer need not have filed an application for reduction of assessment if an assessor's audit discloses that an assessment is erroneously high and there is no proposed escape assessment against which the excess tax can be offset. In this situation, the assessor must notify the taxpayer of the amount of the excess and that the taxpayer may file a claim for cancellation or refund with the county under *Rev. & Tax. Code § 5096* or *5096.7*, and the claim for refund can be paid without further valuation proceedings [*Rev. & Tax. Code § 533(b)*; *Focus Cable of Oakland, Inc. v. County of Alameda (1985) 173 Cal. App. 3d 519, 526-528, 219 Cal. Rptr. 95]* .

[3] Grounds for Refund by Board of Supervisors

The grounds for a refund by a board of supervisors of taxes paid before or after delinquency are limited to the following [*Rev. & Tax. Code § 5096*]:

- Taxes were paid more than once.
- Taxes were erroneously or illegally collected.
- Taxes were illegally assessed or levied.
- Taxes were incorrect because of clerical error by the assessor or incorrect information about the property supplied by the taxpayer.
- Taxes were paid on assessed improvements that did not exist on the lien date.
- Taxes were paid on assessments in excess of the property's equalized value as determined by the county board of equalization.
- Taxes were paid on assessments of trade fixtures and tangible business personal property in excess of the value of the property as determined in certain audits.

County tax collectors or auditors may grant refunds based on grounds not listed above [*see § 540.71[5]*].

A suit for refund of taxes is limited to the grounds stated in the claim for refund [*Rev. & Tax. Code § 5142(a)*; *see § 540.90[5]*]. Therefore, any refund claim should state every possible ground of recovery to preserve the availability of those grounds should the taxpayer later decide to initiate a refund suit. The current statutory refund procedure does not specifically provide for retroactive amendment of a refund claim to include new grounds that the taxpayer wishes to allege in a refund suit, but judicial interpretation of prior refund procedures indicates that a refund claim may be amended [*see Georgia-Pacific Corp. v. County of Butte (1974) 37 Cal. App. 3d 461, 476-477, 112 Cal. Rptr. 327]* . Therefore, the practitioner should consider attempting to amend the initial claim if new grounds are discovered.

[4] Content and Filing of Claim

A refund claim must be in writing, must specify whether all or only part of the assessment is being contested, must state the grounds of the claim, and must be verified by the taxpayer or by the taxpayer's guardian, conservator, executor, or administrator [*Rev. & Tax. Code §§ 5097, 5097.02*; *see Prob. Code § 1490*; *see also* discussion *§ 540.71[3]*]. The claim must be filed with the board of supervisors. Several counties provide their own refund claim forms that must be used. Otherwise, *see § 540.510* for a sample refund claim form.

[5] Refunds by Tax Collector or County Auditor

The refund claim requirements discussed in *§ 540.71[3]* apply to claims filed with a board of supervisors. In addition, a tax collector or county auditor may make a refund in limited circumstances. The tax collector or the auditor may refund any taxes paid either before or after delinquency within four years after the date of payment in any of the following cases [*Rev. & Tax. Code § 5097.2*]:

- The taxes were paid more than once.
- The amount paid exceeds the amount due on the property as shown on the roll.

- The amount paid exceeds the amount due as a result of corrections to the roll or cancellations after the taxes were paid.

- The claim for refund (made under penalty of perjury) is for less than $10.

- The amount paid exceeds the amount due as a result of a reduction attributable to a hearing before an assessment appeals board or an assessment appeals officer.

Several counties provide their own refund claim forms that must be used. Otherwise, see *§ 540.511* for a sample refund claim form.

[6] Statute of Limitations Applicable to Refund Claim

A trial court has no authority to order a refund of tax payments for which a claim was not timely filed [*Plaza Hollister Ltd. Partnership v. County of San Benito (1999) 72 Cal. App. 4th 1, 34-36, 84 Cal. Rptr. 2d 715* ; *accord, JPMorgan Chase Bank v. City & County of San Francisco (2009) 174 Cal. App. 4th 1201, 1213-1214, 94 Cal. Rptr. 3d 906* (state court may not apply judicial doctrine of equitable tolling so as to extend limitation period specified in statute respecting state tax-refund procedures)].

When an application for a reduction in an assessment or for equalization of an assessment has been duly filed [*see Rev. & Tax. Code § 1603*; § 540.70] in which the applicant does not state that the application is intended to constitute a claim for a refund, the applicant may file a separate claim for refund, which is timely if filed within whichever of the following time periods is applicable [*Rev. & Tax. Code § 5097(b)*]:

- If the board of supervisors makes a final determination on the application, and mails a written notice of its determination to the applicant, in which the board advises the applicant to file a claim for refund within six months after the date of the board's final determination, then the claim must be filed within that period [*Rev. & Tax. Code § 5097(a)(3)(B)*]. If the notice does not advise the applicant to file a claim for refund, then the claim must be filed within one year after the date of the board's final determination [*Rev. & Tax. Code § 5097(a)(3)(A)(i)*].

- If the board of supervisors fails to hear evidence and fails to make a final determination on the application, then the claim must be filed not later than one year after expiration of the two-year period starting when the application was filed [*Rev. & Tax. Code § 5097(a)(3)(A)(ii)*; *see Rev. & Tax. Code § 1604(c)* (reference period of two years)].

When the applicant does state, in the duly filed application, that the application for a reduction in an assessment or for equalization of an assessment is intended to constitute a claim for a refund, the claim is timely if the application is filed within the last-ending of the following periods [*Rev. & Tax. Code § 5097(a)(2), (b)*; *see Hanjin Int'l Corp. v. Los Angeles County Metro. Transp. Auth. (2003) 110 Cal. App. 4th 1109, 2 Cal. Rptr. 3d 373* (four-year limitation period of *Rev. & Tax. Code § 5097(a)(2)* applied to special benefits assessments)]:

- Four years after making the payment sought to be refunded;

- One year after the tax collector's mailing of a notice of overpayment [*see Rev. & Tax. Code § 2635*];

- The period specified by the applicant and the assessor in an agreement to extend the limitation period regarding an escape assessment [*see Rev. & Tax. Code § 532.1*]; or

- 60 days after the date of a notice by the auditor that a correction in the assessment roll will result in a reduction of an assessment that would entitle the assessee to a refund [*see Rev. & Tax. Code § 4836(a)*].

If the applicable period is the four-year period after making the payment sought to be refunded, and the taxpayer paid the tax in installments, the determinative date is the date of payment of the last installment. If a court is unable to ascertain the actual date of payment from the record, it is assumed to be the date the unpaid taxes become delinquent, rather than the date the taxes are due [*McDougall v. County of Marin (1962) 208 Cal. App. 2d 65, 69-70, 25 Cal. Rptr. 107*].

If a retroactive constitutional amendment provides an exemption from tax that did not exist when taxes were collected, a taxpayer must file a claim for refund based on the constitutional amendment within four years after the date the amendment becomes effective [*Rev. & Tax. Code § 5096.5*].

For a discussion of the statute of limitations applicable to refund claims relating to assessments whose validity was determined by an assessor's declaratory relief judgment under *Rev. & Tax. Code § 538*, see *§ 540.91[5]*.

[7] Denial of Refund Claim

If the board of supervisors denies a claim for refund, the taxpayer may file a suit for refund within six months after the denial [*Rev. & Tax. Code § 5141(a)*]. The taxpayer may treat a claim for refund as denied if the board does not act on the claim within six months after the claim is filed, but the taxpayer is not required to do so. The statute of limitations for filing a suit for refund does not begin to run if the board does not act on the claim [*Rev. & Tax. Code § 5141(b)*; *see § 540.90[9]*].

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47-540 California Forms of Pleading and Practice--Annotated §§ 540.72-540.89

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[Reserved]

§§ 540.72[Reserved]

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47-540 California Forms of Pleading and Practice--Annotated § 540.90

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§ 540.90 Suits for Refund of Taxes

[1] Available Remedy

Generally, the only judicial remedy available to recover property taxes after a refund claim has been denied is a suit for refund of taxes [*see Rev. & Tax. Code § 5140*]. Other remedies may be available if unusual circumstances exist [*see § 540.426[10]*]. For a sample complaint for a suit for refund of property taxes, *see § 540.512*.

[2] Who May Bring Suit

Only the "person who paid the tax" (or, if that person was an individual, his or her guardian or conservator, the executor of his or her will, or the administrator of his or her estate) may sue for a refund. "No other person may bring such an action; but if another should do so, judgment shall not be rendered for the plaintiff" [*Rev. & Tax. Code § 5140*]. Thus, if the tax (or penalty) in question was paid for the benefit of the "taxpayer" by someone other than the taxpayer, then that other person, who actually paid the tax, has standing to sue for a refund, and the taxpayer (even though being a real party in interest) has no standing to sue for a refund [*IBM Personal Pension Plan v. City & County of San Francisco (2005) 131 Cal. App. 4th 1291, 1304, 32 Cal. Rptr. 3d 656]* . For example, when the trustee of a corporate pension plan actually paid tax, the plan itself had no standing to sue for refund; only trustee had standing [*IBM Personal Pension Plan v. City & County of San Francisco (2005) 131 Cal. App. 4th 1291, 1304, 32 Cal. Rptr. 3d 656]* .

However, in some instances, a class action may be appropriate [*Thomas v. City of East Palo Alto (1997) 53 Cal. App. 4th 1084, 1095, 62 Cal. Rptr. 2d 185* (action could be maintained as class action when individual taxpayers who were parties to action had filed separate administrative claims for tax refunds with city, all making the same legal claim against the city; distinguishing *Woosley v. State of California (1992) 3 Cal. 4th 758, 788-789, 13 Cal. Rptr. 2d 30, 838 P.2d 758* and *Neecke v. City of Mill Valley (1995) 39 Cal. App. 4th 946, 960-965, 46 Cal. Rptr. 2d 266* , which precluded proceeding by way of class action when not every member of the proposed class had filed a separate administrative refund claim); *see State of California Ex Rel Dept. of Motor Vehicles v. Superior Court (1998) 66 Cal.*

App. 4th 421, 432-433, 78 Cal. Rptr. 2d 88 (implementing *Woosley*; *Woosley* recognized validity of class actions to seek refunds of sales and use taxes; *Neecke* did not address requirements of class actions on behalf of taxpayers who filed individual claims)].

[3] Exhaustion of Administrative Remedies

[a] Prerequisite to Suit

A taxpayer must have exhausted administrative remedies before seeking judicial relief [*Stenocord Corp. v. City etc. of San Francisco (1970) 2 Cal. 3d 984, 987-988, 88 Cal. Rptr. 166, 471 P.2d 966 , superseded by statute as stated in 47 Cal. 4th 1298* ; *Star-Kist Foods, Inc. v. Quinn (1960) 54 Cal. 2d 507, 509-510, 6 Cal. Rptr. 545, 354 P.2d 1 , superseded by statute as stated in 47 Cal. 4th 1298* ; *Plaza Hollister Ltd. Partnership v. County of San Benito (1999) 72 Cal. App. 4th 1, 29-33, 84 Cal. Rptr. 2d 715* ; *C. H. B. Foods, Inc. v. County of Los Angeles (1987) 195 Cal. App. 3d 821, 823-826, 241 Cal. Rptr. 18]* .

A taxpayer has exhausted administrative remedies if the taxpayer has filed both an application for reduction of assessment [*but see § 540.90[3][c]*] and a claim for refund [*see Rev. & Tax. Code§ 5142(a), (b)*; *see also Rev. & Tax. Code § 5148* (different procedures for state-assessed property); *cf. CAT Partnership v. County of Santa Cruz (1998) 63 Cal. App. 4th 1071, 1079-1081, 74 Cal. Rptr. 2d 652* (policies underlying exhaustion requirement were fully satisfied even though one of taxpayers was not a formal applicant to proceeding before assessment appeals board; to conclude under facts that taxpayer failed to exhaust administrative remedies would exalt form over substance and require court to ignore reality of what happened before assessment appeals board)].

A taxpayer has the burden of establishing that he or she has exhausted administrative remedies [*Westinghouse Elec. Corp. v. County of Los Angeles (1974) 42 Cal. App. 3d 32, 37, 116 Cal. Rptr. 742]* . For discussion of the procedures for filing an application for reduction or a claim for refund, see § None.

[b] Application for Reduction of Assessment Required

If the valuation of property is at issue, the taxpayer must have sought a reduction of the contested assessment from the county board of equalization before filing suit [*Rev. & Tax. Code §§ 619, 1601(c), 1603(b)*; *Stenocord Corp. v. San Francisco (1970) 2 Cal. 3d 984, 987, 88 Cal. Rptr. 166 , superseded by statute as stated in 47 Cal. 4th 1298* ;*see § 540.70*]. This prerequisite to suit applies even if the taxpayer challenges the assessment as "arbitrary" or void on constitutional grounds [*Stenocord Corp. v. City etc. of San Francisco (1970) 2 Cal. 3d 984, 988, 88 Cal. Rptr. 166, 471 P.2d 966 , superseded by statute as stated in 47 Cal. 4th 1298* ; *Star-Kist Foods, Inc. v. Quinn (1960) 54 Cal. 2d 507, 511, 6 Cal. Rptr. 545, 354 P.2d 1 , superseded by statute as stated in 47 Cal. 4th 1298* ; *but see Rev. & Tax. Code § 5142(b)* (stipulation as satisfying application requirement for exhaustion of administrative remedies if valuation is not at issue)]. It also applies even if it is obvious from the circumstances that the taxpayer will lose before the board of equalization. Thus, reduction must be sought if the assessment ratio is discriminatory and an appeal to the board is certain to be fruitless because of its decisions in prior cases [*Westinghouse Elec. Corp. v. County of Los Angeles (1974) 42 Cal. App. 3d 32, 39-40, 116 Cal. Rptr. 742* ; *Virtue Bros. v. County of Los Angeles (1966) 239 Cal. App. 2d 220, 230-231, 48 Cal. Rptr. 505 , cert. denied, 385 U.S. 820]* .

[c] Application for Reduction in Assessment Not Required

[i] Valuation Issues Not Involved

Although a taxpayer usually must seek a reduction in any contested assessment as part of exhausting administrative remedies prior to filing suit [*Stenocord Corp. v. City etc. of San Francisco (1970) 2 Cal. 3d 984, 987, 88 Cal. Rptr. 166, 471 P.2d 966 , superseded by statute as stated in 47 Cal. 4th 1298* ; *see § 540.90*], this rule does not necessarily apply to a suit involving nonvaluation issues. In this situation, counsel should consider an application for reduction

combined with a stipulation with the assessor to avoid the necessity of going through the entire application and hearing process. The taxpayer and assessor must stipulate that the application involves only nonvaluation issues, indicate the assessment values based on the taxpayer's and assessor's respective opinions, and submit the stipulation to the board. If board accepts the stipulation, then the taxpayer is deemed to have exhausted administrative remedies with respect to the application for reduction. However, the taxpayer must still file a claim for refund [*Rev. & Tax. Code § 5142(b)*].

[ii] Assessment a Nullity as Matter of Law

A taxpayer does not need to seek a reduction in assessment before bringing a suit for a refund if the taxpayer claims that the assessment in issue is a nullity as a matter of law. An assessment is null as a matter of law, and a request for reduction in assessment is excused, in any of the following situations:

- The property is tax exempt (county boards do not have jurisdiction to grant or deny exemptions or to consider allegations that claims for exemption were improperly denied) [*see 18 Cal. Code Reg. § 302(b)*; *Exchange Bank v. County of Sonoma (1976) 59 Cal. App. 3d 608, 610, 131 Cal. Rptr. 216* ; *Japan Food Corp. v. County of Sacramento (1976) 58 Cal. App. 3d 891, 895-897, 130 Cal. Rptr. 392* (no factual issue existed with respect to valuation in both cases)].

- The property is nonexistent [*Associated Oil Co. v. County of Orange (1935) 4 Cal. App. 2d 5, 9-11, 40 P.2d 887* (erroneous assessment did not relate to overvaluation of property actually owned, but to property that did not exist); *but see El Tejon Cattle Co. v. County of San Diego (1967) 252 Cal. App. 2d 449, 456, 60 Cal. Rptr. 586* (appeal to county board of equalization required if question existed as to extent of personal property that had been assessed)].

- The property is located outside the jurisdiction [*Parrott & Co. v. City and County of San Francisco (1955) 131 Cal. App. 2d 332, 336-337, 280 P.2d 881* ; *see Stenocord Corp. v. City etc. of San Francisco (1970) 2 Cal. 3d 984, 987, 88 Cal. Rptr. 166, 471 P.2d 966] , superseded by statute as stated in 47 Cal. 4th 1298* .

- The taxpayer does not own the property on which the tax is levied [*Parr-Richmond Industrial Corp. v. Boyd (1954) 43 Cal. 2d 157, 165, 272 P.2d 16]* .

- The statute under which the tax is levied is unconstitutional [*Star Kist Foods, Inc. v. Quinn (1960) 54 Cal. 2d 507, 511, 6 Cal. Rptr. 545, 354 P.2d 1* ; *cf. Security-First Nat. Bk. v. County of L.A. (1950) 35 Cal. 2d 319, 321, 217 P.2d 946 , cert. denied, 340 U.S. 891* (reduction application is required when property misclassified and tax on property as misclassified was claimed to be unconstitutionally discriminatory)].

- The taxpayer is contesting inherent deficiencies in assessment procedures for which administrative remedies are not provided by statute; this exception usually arises if taxpayers in a class action seek a writ of mandamus requiring an assessor to increase or correct the assessments of other property owners, and judicial relief may be granted without first requesting a review of assessments by the board of equalization [*TRIM, Inc. v. County of Monterey (1978) 86 Cal. App. 3d 539, 544-545, 150 Cal. Rptr. 351* (class action); *Knoff v. City and County of San Francisco (1969) 1 Cal. App. 3d 184, 199, 81 Cal. Rptr. 683* (taxpayer suit)].

- The assessor has nullified the original assessment by arriving at a new assessed value in the course of an audit [*Rev. & Tax. Code § 533(a)*; *Focus Cable of Oakland, Inc. v. County of Alameda (1985) 173 Cal. App. 3d 519, 526-528, 219 Cal. Rptr. 95]* .

However, even if one of the above situations applies, a taxpayer still must file a claim for refund [*Rev. & Tax. Code § 5142(b)*; *see § 540.453[2]*]. Moreover, although an application for reduction of assessment is not required in the above situations, counsel should consider having the taxpayer file the application nevertheless. The distinction between a question of law, which is reviewable by a court without exhaustion of administrative remedies, and a question of fact orvaluation, which requires exhaustion, is unclear in some cases. Exhausting administrative remedies by applying for a reduction of assessment prevents dismissal of the suit if the court finds that a question of valuation is indeed involved.

[4] Payment of Taxes

[a] Prerequisite to Suit

In addition to exhausting administrative remedies [*see § 540.90[3]*], a taxpayer must pay contested property taxes in full before initiating a suit for refund [*Cal. Const., art. XIII, § 32*; *Sherman v. Quinn (1948) 31 Cal. 2d 661, 665, 192 P.2d 17* ; *see Rev. & Tax. Code §§ 5096, 5140*]. Except in the case of a redemption plan [*see § 540.90[4][b]*], payment of only one installment does not meet this requirement [*Rev. & Tax. Code §§ 5140, 5145*; *Faix, Ltd. v. County of Los Angeles (1976) 54 Cal. App. 3d 992, 1000-1003, 127 Cal. Rptr. 182]* . Although no cases interpret this issue under the current refund action statute, cases interpreting prior law hold that delinquent payment of taxes is not a bar to a refund suit, provided payment is in full [*McHugh v. County of Santa Cruz (1973) 33 Cal. App. 3d 533, 542-543, 109 Cal. Rptr. 149]* .

If contesting only a portion of the assessment, the taxpayer still should make timely payment of any uncontested portion. Even if the taxpayer receives a favorable judgment regarding the contested portion of an assessment, the taxpayer is liable for penalties and interest for delinquent payment of any portion of the assessment not found to be void [*Rev. & Tax. Code § 5144*].

[b] Exception for Installment Redemption Plans

An owner of property who has entered into an installment redemption plan pursuant to *Rev. & Tax. Code § 4216 et seq.* to pay delinquent taxes may begin a refund suit without paying all taxes due, if a claim for the first installment paid under the plan of redemption is rejected [*Rev. & Tax. Code § 5145(a)*] and if all of the following requirements are met:

- The taxpayer files suit within six months after the date the claim for the paid installment is rejected [*Rev. & Tax. Code § 5145(a)*].

- The taxpayer keeps the installment redemption plan current [*Rev. & Tax. Code § 5145(b)*].

- The taxpayer makes the first installment payment of the delinquent taxes under the plan within six months after the date of delinquency [*Rev. & Tax. Code § 5145(a)(1)*].

- The taxpayer files a bond or other security (including pledged property) with the county tax collector if the unpaid tax liability remaining after the first installment payment, including interest and penalties to the date of filing, exceeds two-thirds of the full value of the property on which the taxes are a lien, as of the last equalized assessment roll. Alternatively, the taxpayer may pledge other property with the county tax collector as security; the value of the bond or security must equal the excess unpaid tax liability [*Rev. & Tax. Code § 5145(a)(2)*].

If the owner does not recover the disputed taxes in the suit, the taxpayer must pay additional interest to the city or county equal to the difference between the amount of interest paid under the installment plan and the amount of interest that would have been earned by the city or county in the impound account on the entire amount of taxes determined to be due had the taxes been paid on the regular delinquency dates [*Rev. & Tax. Code § 5145(c)*; *see Gov. Code § 26906.1*

(providing for impound of taxes subject to claim or suit for refund)].

[c] Exception for First Installment Paid Under Installment Plan for Payment of Escape Assessment

With regard to installment plans initiated by written requests filed with the tax collector, notwithstanding that all taxes on a property have not been paid in full, the property owner may bring an action in accordance with *Rev. & Tax. Code § 5140* at any time within six months after the rejection of a claim for the refund of the first installment that is paid under an installment plan for payment of escape assessments that is entered pursuant to *Rev. & Tax. Code § 4837.5* [*Rev. & Tax. Code § 5145.5(a), (d)(2)*]. The right to maintain such an action, however, terminates if the assessee defaults with respect to any obligation in the installment plan for payment of the escape assessment [*Rev. & Tax. Code § 5145.5(b)*]. Moreover, *Rev. & Tax. Code § 5145.5* does not apply in cases where the penalty pursuant to *Rev. & Tax. Code § 503* has been added to the escape assessment and upheld by the appeals board or the county board of equalization [*Rev. & Tax. Code § 5145.5(d)(1)*].

If the owner does not recover the amount of taxes in dispute in the suit, the owner must pay additional interest to the county or city in an amount equal to the difference between the amount of interest he or she has paid under *Rev. & Tax. Code § 506* and the amount of interest that the county or city would have earned in the impound account in connection with the entire amount of tax determined by the court to be due if that amount has been paid prior to delinquency [*Rev. & Tax. Code § 5145.5(c)*].

[5] Claim for Refund as Limiting Issues

A taxpayer's claim for refund limits the issues that may be considered in the refund suit. Recovery is limited to the grounds specified in the refund claim [*Rev. & Tax. Code §§ 5140, 5142(a)*; *see Mission Housing Development Co. v. City and County of San Francisco (2000) 81 Cal. App. 4th 522, 527* ; *see also Metropolitan Culinary Services, Inc. v. County of Los Angeles (1998) 61 Cal. App. 4th 935, 946, 71 Cal. Rptr. 2d 859* (claims for refunds with attached exhibits were detailed enough to put county on notice of ground); *cf. Helene Curtis, Inc. v. Assessment Appeals Bd. (1999) 76 Cal. App. 4th 124, 129-132, 90 Cal. Rptr. 2d 31* (applications for tax reductions that only stated challenges to escape assessments of personal property and fixtures held not to include challenges to underlying real property assessment)]. The defendant in the refund suit can be expected to assert that the plaintiff's complaint alleges a ground not specified in the filed claim for refund. In that event, the court should liberally construe the claim for refund, and should find the complaint sufficient when it alleges a ground that is logically implied by the statements in the claim for refund, even if that ground is not explicitly stated in the claim for refund [*Korean Air Lines Co., Ltd. v. Countyof Los Angeles (2008) 162 Cal. App. 4th 552, 557 n.3, 76 Cal. Rptr. 3d 26*].

If the claim for refund relates only to a portion of the assessment, the suit may be based only on that portion [*Rev. & Tax. Code § 5143*; *see Mission Housing Development Co. v. City and County of San Francisco (2000) 81 Cal. App. 4th 522, 527, 97 Cal. Rptr. 2d 8* (reading *Rev. & Tax. Code §§ 5142* and *5143* together, taxpayer who files refund action can recover no more than amount taxpayer sought in underlying claim)]. If the claim and suit contest only a portion of the assessment, the taxpayer must pay the uncontested portion of the assessment before delinquency to avoid penalty and interest [*see Rev. & Tax. Code § 5144*; [4][a], *above*]. For discussion of the trial court's lack of authority to order a refund for tax payments when a claim was not timely filed, see *§ 540.90[6]*.

[6] Jurisdiction and Priority

A refund suit must be commenced in the superior court (but not in the small claims division) of the county in which the property is located [*Rev. & Tax. Code § 5140*]. A refund suit is entitled to scheduling priority in the civil action docket [*Rev. & Tax. Code § 5148*].

In a tax refund action under *Rev. & Tax. Code § 5141 et seq.*, the filing of a timely claim for refund is a precondition to

the court's exercise of jurisdiction. Thus, a trial court has no authority to order a refund for taxpayments for which a claim was not timely filed [*Plaza Hollister Ltd. Partnership v. County of San Benito (1999) 72 Cal. App. 4th 1, 34-36, 84 Cal. Rptr. 2d 715]* .

[7] Defendants

The proper defendant in a suit for refund is the county or the city that levied the taxes [*Rev. & Tax. Code § 5140*]. If a county collected the taxes in question for a city, the action must be brought against the county for recovery of those taxes. After the county receives the summons and complaint, it must notify the city within 30 days. The taxpayer must pay the county a fee to cover the county's cost of notifying the city. This fee is not recoverable by the taxpayer, and no judgment entered in favor of a taxpayer may provide for recovery of this fee. The city has the option of intervening in the action. Whether or not the city intervenes, any judgment for the taxpayer is rendered exclusively against the county. The county can recover from the city or other tax entity the amount of any city or other refunds required by the judgment. The county may also postpone payment of the judgment and interest on it until the next apportionment of property tax revenue following the date of the judgment. Interest accrues during this deferral period unless the county and the taxpayer agree otherwise [*Rev. & Tax. Code § 5146* ("county" includes a city and county)].

The SBE is the appropriate defendant in suits for refunds of taxes on state-assessed property, property that has been found ineligible for the welfare exemption, and on certain property owned by local California government entities outside their boundaries [*Rev. & Tax. Code § 5146*; *see Cal. Const., art. XIII, § 11*].

[8] Service of Summons Within One Year

A summons must be served and returned within one year after the filing of a suit for refund to avoid dismissal, either on the court's own motion or on the motion of a defendant. Dismissal may be avoided by the filing of a written stipulation extending time. Dismissal may also be avoided if the county either (1) performs an act constituting a general appearance or answers within the one-year period, or (2) after the one-year period, answers and participates in discovery without raising the objection [*Rev. & Tax. Code § 5147*; *Southern Pac. Transportation Co. v. State Bd. of Equalization (1985) 175 Cal. App. 3d 438, 441-444, 221 Cal. Rptr. 12* (rejecting reasoning of *Ford Motor, below*); *Synanon Foundation, Inc. v. County of Marin (1982) 133 Cal. App. 3d 607, 614-615, 184 Cal. Rptr. 129* ; *but see Ford Motor Co. v. County of Tulare (1983) 145 Cal. App. 3d 688, 692-694, 193 Cal. Rptr. 511* (dismissal proper for failure to return summons though service had been made and answer filed within one year)].

Rev. & Tax. Code § 5147, the statute requiring service of summons within one year to avoid dismissal, does not violate equal protection or due process, does not deprive a taxpayer of his or her day in court, and does bear a reasonable relationship to a legitimate state interest, namely, requiring persons seeking refunds to proceed expeditiously [*Emberton v. County of San Diego (1986) 186 Cal. App. 3d 268, 270-272, 230 Cal. Rptr. 572]* .

[9] Statute of Limitations Applicable to Refund Suit

The statute of limitations for filing a suit for refund, other than one brought under *Rev. & Tax. Code § 5148* (state-assessed property), is six months from the date the refund claim is denied in whole or in part [*Rev. & Tax. Code § 5141(a)*]. A taxpayer may treat a claim as denied if the board of supervisors fails to act on the claim within six months after the date the claim is filed [*Rev. & Tax. Code § 5141(b)*]. There is no statutory limit on the time within which a taxpayer may initiate suit if the board of supervisors has not acted on a claim for refund [*see Rev. & Tax. Code § 5141*].

If a taxpayer's application for reduction of assessment is also a claim for refund [*see § 540.70[3][e]*], the claim for refund is deemed denied on later of either (1) the date the final installment of the assessment becomes delinquent (April 10 for secured roll) or (2) the date on which the board of equalization makes its final determination on the application [*Rev. & Tax. Code §§ 2705, 5141(c)*].

[10] Scope of Judicial Review

[a] Presumption of Correctness

In reviewing a property tax assessment, the court must presume the assessor properly performed his or her duty and that, consequently, the assessment was both regularly and correctly made. Thus, the taxpayer has the burden of proving the property was improperly assessed [*Texaco Producing, Inc. v. County of Kern (1998) 66 Cal. App. 4th 1029, 1046, 1051, 78 Cal. Rptr. 2d 433* ; for further discussion of presumption and burden of proof, see *§ 540.70[9]*].

The scope of judicial review in a suit for refund varies, depending on whether the challenge is to the result reached by a county board of equalization after applying a sound valuation method or to the validity of the valuation method itself.

[b] Substantial Evidence Rule Applies to Application of Sound Valuation Method

In a taxpayer's suit for refund, if the challenge is merely one of incorrect application of a sound valuation method, a court may overturn the board's decision only if no substantial evidence supports it [*Bret Harte Inn, Inc. v. City and County of San Francisco (1976) 16 Cal. 3d 14, 23, 127 Cal. Rptr. 154, 544 P.2d 1354* ; *Fujitsu Microelectronics, Inc. v. Assessment Appeals Bd. (1997) 55 Cal. App. 4th 1120, 1126, 64 Cal. Rptr. 2d 465* (valuation supported by substantial evidence); *Hunt-Wesson Foods, Inc. v. County of Alameda (1974) 41 Cal. App. 3d 163, 168-169, 177, 116 Cal. Rptr. 160* (reversing trial court for using improper standard); *see Madonna v. County of San Luis Obispo (1974) 39 Cal. App. 3d 57, 61, 113 Cal. Rptr. 916* (valuation not supported by substantial evidence)].

A trial court's review in such a case is restricted to the record presented to the board, and the court cannot independently weigh evidence of valuation [*Bank of America v. Mundo (1951) 37 Cal. 2d 1, 5, 229 P.2d 345* ; *Pacific Grove-Asilomar Operating Corp. v. County of Monterey (1974) 43 Cal. App. 3d 675, 681, 117 Cal. Rptr. 874* ; *see also Dominguez Energy v. County of Los Angeles (1997) 56 Cal. App. 4th 839, 852, 65 Cal. Rptr. 2d 766]* . The taxpayer has no right to a trial de novo in the superior court to resolve conflicting issues of fact concerning the taxable value of the property [*Texaco Producing, Inc. v. County of Kern (1998) 66 Cal. App. 4th 1029, 1047, 78 Cal. Rptr. 2d 433]* .

[c] Soundness of Valuation Method as Question of Law

If a taxpayer's suit for refund does not merely challenge the correctness of the board's application of a sound method of validation [*see § 540.90[10][b]*] but instead challenges the soundness of the method of valuation itself, the suit presents a question of law. In this situation, a court may review the board's decision for arbitrariness, abuse of discretion, or failure to follow standards prescribed by law. [*Bret Harte Inn, Inc. v. City and County of San Francisco (1976) 16 Cal. 3d 14, 23, 127 Cal. Rptr. 154, 544 P.2d 1354* ; *Exxon Mobil Corporation v. County of Santa Barbara (2001) 92 Cal. App. 4th 1347, 112 Cal. Rptr. 2d 751* (using *de novo* standard of review, appellate court affirmed superior court's finding that the county erred in not valuing oil and gas production facilities using special valuation method set forth in *18 Cal. Code Reg. § 468*); *Huson v. County of Ventura (2000) 80 Cal. App. 4th 1131, 1134, 96 Cal. Rptr. 2d 116* (if underlying valuation methodology is challenged, issue is one of law subject to de novo review both by superior court and on appeal); *Texaco Producing, Inc. v. County of Kern (1998) 66 Cal. App. 4th 1029, 1046-1047, 78 Cal. Rptr. 2d 433* ; *Dominguez Energy v. County of Los Angeles (1997) 56 Cal. App. 4th 839, 852, 65 Cal. Rptr. 2d 766]* . In this case, the trial court may take evidence on the validity of the valuation method [*Dominguez Energy v. County of Los Angeles (1997) 56 Cal. App. 4th 839, 852, 65 Cal. Rptr. 2d 766]* .

[d] Ambiguities in Applying Substantial Evidence Rule

The distinction between an inappropriate application of a sound method of valuation (in which case a reviewing court is limited by the substantial evidence rule) and an illegal method of valuation (in which case a reviewingcourt may freely admit new evidence) is unclear. In addition, this issue may not be clarified in a particular case until the appellate court renders its decision [*see Prudential Ins. Co. v. City and County of San Francisco (1987) 191 Cal. App. 3d 1142,*

1143-1148, 236 Cal. Rptr. 869 ; *see also American Sheds, Inc. v. County of Los Angeles (1998) 66 Cal. App. 4th 384, 392, 78 Cal. Rptr. 2d 58* (characterization of issue presents subtle if not semantic question)]. Therefore, although both types of challenges may be combined in a suit for refund, counsel should be prepared to make a complete record before the board of equalization and consider that hearing the final forum.

[e] Board Procedural Deficiencies

Taxpayers may challenge procedural deficiencies in a board's action in a reviewing court on constitutional grounds, and the reviewing court is not restricted by the substantial evidence rule. The following procedural deficiencies may invalidate a board of equalization determination:

- Hearings by less than a majority of the board [*Universal Consol. Oil Co. v. Byram (1944) 25 Cal. 2d 353, 360-364, 153 P.2d 746]* ;

- Taking of evidence outside the presence of the taxpayer [*Bandini Estate Co. v. Los Angeles (1938) 28 Cal. App. 2d 224, 231, 82 P.2d 185 , disapproved on other grounds in Universal Consol. Oil Co. v. Byram (1944) 25 Cal. 2d 353, 363, 153 P.2d 746]* ; or

- Refusal to admit relevant evidence [*Georgia-Pacific Corp. v. County of Butte (1974) 37 Cal. App. 3d 461, 475-476, 112 Cal. Rptr. 327]* .

[11] Judgment by Court

[a] Relief Granted

The relief granted by a reviewing court in a refund suit depends on the proceedings and findings of fact. If the court finds an assessment void in whole or in part, it may render a judgment for the taxpayer for the amount of taxes paid on the portion of the assessment that is void. If the taxes recovered, and any interest, penalties, or costs thereon, were paid after delinquency, the portion of penalties, interests, or costs allocable to the recovered taxes is also recoverable. Any portion of the assessment not found void, if paid after delinquency, still carries penalties, interests, and costs [*Rev. & Tax. Code §§ 5144, 5149.5*].

[b] Remand to Board of Equalization

If the court finds an assessment void in whole or in part, no remand of the case to the board of equalization is necessary because no question of valuation remains to be decided. A reviewing court also need not remand a case if uncontradicted evidence at the board hearing establishes any of the following: (1) the valuation of the property, (2) the taxpayer does notown the property, (3) the property does not exist, or (4) the assessment is due to a mathematical error, evident from the board's transcript, that can easily be recalculated [*Bret Harte Inn, Inc. v. City and County of San Francisco (1976) 16 Cal. 3d 14, 26-27, 127 Cal. Rptr. 154, 544 P.2d 1354* ; *Parr-Richmond IndustrialCorp. v. Boyd (1954) 43 Cal. 2d 157, 165, 272 P.2d 16* ; *see CAT Partnership v. County of Santa Cruz (1998) 63 Cal. App. 4th 1071, 1088-1089, 74 Cal. Rptr. 2d 652* (remand unnecessary when recalculation did not involve factual questions, but essentially just subtracting improper portion and adjusting resulting figures)].

Remand to the county board of equalization for rehearing is the proper relief if the board has used an invalid method of valuing property, procedural due process has been denied, or there is an unresolved issue of property valuation [*Simms v. County of Los Angeles (1950) 35 Cal. 2d 303, 318, 217 P.2d 936* ; *Universal Cons. Oil Co. v. Byram (1944) 25 Cal. 2d 353, 363-364, 153 P.2d 746* ; *Norby Lumber Co. v. County of Madera (1988) 202 Cal. App. 3d 1352, 1366-1367, 249 Cal. Rptr. 646* ; *see CAT Partnership v. County of Santa Cruz (1998) 63 Cal. App. 4th 1071, 1088, 74 Cal. Rptr. 2d 652* (remand generally required if refund determination depends on exercise of valuation functions and does not simply involve mathematical computations; remand unnecessary under facts of case); *Mitchell v. County of Los*

Angeles (1997) 60 Cal. App. 4th 497, 503-506, 70 Cal. Rptr. 2d 476 (remand required when comparable sales evidence on which assessor relied was held to be legally incompetent)]. The reviewing court may retain jurisdiction to render an appropriate judgment in conformity with the board of equalization's ruling [*Simms v. County of Los Angeles (1950) 35 Cal. 2d 303, 318, 217 P.2d 936]* .

[c] Interest

A taxpayer is entitled to interest of nine percent per year on taxes ordered refunded, and the accured interest is included in the judgment. Interest accrues from the later of either (1) the date the claim for refund is filed or (2) the date the taxes or the installments in question are paid, to the date judgment is entered [*Rev. & Tax. Code § 5150*]. If the taxpayer recovers penalties in a refund suit, interest is paid at the same rate for refunded taxes from the date the refund claim is filed to the date judgment is entered [*Rev. & Tax. Code § 5150.5*]. Only simple interest, not compounded interest, is recoverable [*Lilli Ann Corp. v. City and County of San Francisco (1977) 70 Cal. App. 3d 162, 198-199, 138 Cal. Rptr. 759]* .

[d] Attorney's Fees

[i] Arbitrary and Capricious Action by Board of Equalization

In addition to other relief granted, a taxpayer who prevails in a refund suit may collect attorney's fees up to $7,500 under the statutory provision granting costs in civil actions resulting from administrative proceedings.This relief is available only if (1) it is shown that the board of equalization's decision was the result of arbitrary and capricious action or conduct and (2) the taxpayer is personally obligated to pay the attorney's fees [*see Gov. Code § 800(a)*].

Whether action is arbitrary and capricious depends on the facts in each case [*see American President Lines, Ltd. v. Zolin (1995) 38 Cal. App. 4th 910, 934, 45 Cal. Rptr. 2d 370* (decision under *Gov. Code § 800* essentially one of fact within trial court's sound discretion); *Reeves v. City of Burbank (1979) 94 Cal. App. 3d 770, 776, 156 Cal. Rptr. 667* (arbitrary and capricious finding essentially one of fact)]. The board's action is arbitrary and capricious if, for example, the board's assessment is unsubstantiated by any evidence in the transcript, or the board's procedures in handling applications for reduction in assessment are constitutionally deficient [*Midstate Theatres Inc. v. Board of Supervisors (1975) 46 Cal. App. 3d 204, 211-212, 119 Cal. Rptr. 894* ; *Madonna v. County of San Luis Obispo (1974) 39 Cal. App. 3d 57, 61, 113 Cal. Rptr. 916]* . If the board fails to make findings on request or if findings made are found by a reviewing court to be so deficient that remand to the board is ordered to secure reasonable compliance with the elements of findings required by *Rev. & Tax. Code § 1611.5*, the board's action will be deemed arbitrary and capricious so as to support an award of attorney's fees against the county for the services necessary to obtain proper findings [*Rev. & Tax. Code § 1611.6*]. If attorney's fees are allowed under *Rev. & Tax. Code § 1611.6*, the dollar limitation of Rev. & Tax. Code § 800 will not apply [*Rev. & Tax. Code § 1611.6*].

An award of attorney's fees must be requested in the prayer of the complaint and supported by appropriate allegations of arbitrary and capricious action.

[ii] Assessor's Failure to Seek Declaratory Relief in Lieu of Making Assessment

Reasonable attorney's fees may also be awarded in a successful recovery suit if the court finds all of the following [*Rev. & Tax. Code §§ 538, 5152*; *Prudential Ins. Co. v. City and County of San Francisco (1987) 191 Cal. App. 3d 1142, 1157-1159, 236 Cal. Rptr. 869* ("void" in *Rev. & Tax. Code § 5152* as having ordinary meaning of invalid, erroneous); *see § 540.91[5]*]:

- The assessment or a portion of it is void;
- The assessment or a portion of it was made in violation of a specific provision of the California

constitution, of a Revenue and Taxation Code provision pertaining to property taxation, or of a rule or regulation of the board; and

- The assessor should have sought a declaratory judgment in lieu of making the assessment.

If attorney's fees could be awarded under both *Rev. & Tax. Code § 5152* and *Gov. Code § 800*, the award should be made under *Rev. & Tax. Code§ 5152* in accordance with the rule that when two statutes govern a particular subject, application of the specific one over the general one is favored [*Prudential Ins. Co. v. City and County of San Francisco (1987) 191 Cal. App. 3d 1142, 1160-1161, 236 Cal. Rptr. 869]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityExhaustion of RemediesAdministrative LawJudicial ReviewStandards of ReviewSubstantial EvidenceGovernmentsLocal GovernmentsClaims By & AgainstTax LawState & Local TaxesAdministration & ProceedingsCredits, Overassessments & RefundsTax LawState & Local TaxesAdministration & ProceedingsJudicial Review

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 540 TAXES AND ASSESSMENTS
PART II. LEGAL BACKGROUND
B. PROPERTY TAXES AND ASSESSMENTS
4. Judicial Remedies Available to Taxpayers and Purchasers

47-540 California Forms of Pleading and Practice--Annotated § 540.91

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.91 Other Judicial Remedies to Contest Assessments

[1] Limited Availability

Only in very limited circumstances are judicial remedies other than a refund suit available to taxpayers seeking to contest property valuation or assessment and collection of property taxes. Injunctions, writs of mandate, or other legal or equitable processes generally are not available to prevent or enjoin collection of property taxes by local authorities [*Cal. Const., art. XIII, § 32*; *Rev. & Tax. Code § 4807*], because the availability of a suit for refund after payment of contested taxes is deemed to be a speedy and adequate remedy at law [*Star-Kist Foods Inc. v. Quinn (1960) 54 Cal. 2d507, 512, 6 Cal. Rptr. 545, 354 P.2d 1 , superseded by statute as stated in 47 Cal. 4th 1298* ; *Security-First Nat. Bk. v. Bd. of Supervisors (1950) 35 Cal. 2d 323, 327, 217 P.2d 948* ; *Mystery Mesa Mission Christian Church, Inc. v. Assessment Appeals Bd. (1976) 63 Cal. App. 3d 37, 39-40, 133 Cal. Rptr. 565]* . The general prohibition against equitable process to restrain collection of taxes also extends to state-assessed property [*Pacific Gas & Electric Co. v. State Bd. of Equalization (1980) 27 Cal. 3d 277, 281-283, 165 Cal. Rptr. 122, 611 P.2d 463* ; *see Western Oil & Gas Ass'n v. State Bd. of Equalization (1987) 44 Cal. 3d 208, 242 Cal. Rptr. 334, 745 P.2d 1360* (judicial intervention granting prepayment relief limited to those situations in which it is clear that under no circumstances can government prevail)].

[2] Writ of Mandate

Mandate is available only if the taxpayer has no adequate remedy at law, such as improper application of assessment procedures by the officials involved [*Bunker v. County of Orange (2002) 103 Cal. App. 4th 542, 126 Cal. Rptr. 2d 825* (suit seeking order to direct county to comply with property tax collection statutes and adopt valuations set forth in applications for reduction of assessment, and to send notices required by statutes); *Howard Jarvis Taxpayers Assn. v. City of Roseville (2002) 97 Cal. App. 4th 637, 119 Cal. Rptr. 2d 91* ; *TRIM, Inc. v. County of Monterey (1978) 86 Cal. App. 3d 539, 545-546, 150 Cal. Rptr. 351* (class action to require all properties in jurisdiction to be assessed at fair market value); *Midstate Theatres Inc. v. Board of Supervisors (1975) 46 Cal. App. 3d 204, 213, 119 Cal. Rptr. 894*

(proceeding to require board of equalization to accept and set for hearing proper amended application for reduction of assessment); *Knoff v. City and County of San Francisco (1969) 1 Cal. App. 3d 184, 195-197, 81 Cal. Rptr. 683* (taxpayer suit to require cessation of fraudulent assessment practices)]. Mandate may also be sought to challenge the continued imposition of a tax that has not been properly approved by the voters [*Howard Jarvis Taxpayers Assn v. City of La Habra (2001) 25 Cal. 4th 809, 107 Cal. Rptr. 2d 369, 23 P.3d 601]* .

Mandate is the appropriate remedy to compel disclosure by the assessor of nonconfidential records such as another taxpayer's claim of exemption and the assessor's ruling thereon [*Gov. Code §§ 6250-6259*; *Gallagher v. Boller (1964) 231 Cal. App. 2d 482, 494, 41 Cal. Rptr. 880]* . For discussion and forms relating to writs of mandate, see Ch. 358, *Mandate and Prohibition* .

If a local board refuses to provide a fact-finding hearing when the taxpayer duly requests one and is entitled to one, or if a local board conducts a flawed fact-finding hearing (for instance, relevant evidence is improperly excluded or cannot with reasonable diligence be produced), the appropriate judicial remedy is a proceeding for administrative mandate pursuant to *Code Civ. Proc. § 1094.5* [*see, e.g., Helene Curtis, Inc. v. Los Angeles County Assessment Appeals Bds. (2004) 121 Cal. App. 4th 29, 37, 16 Cal. Rptr. 3d 658]* . For discussion of that proceeding, see Ch. 474, *Availability of Judicial Review of Agency Decisions* .

[3] Writ of Certiorari

A writ of certiorari or review is available to contest the decision of a board of equalization only if the board has exceeded its jurisdiction, there is no appeal, and the taxpayer has no speedy and adequate remedy at law [*Code Civ. Proc. § 1068(a)*]. It extends only to acts in excess of jurisdiction and to procedural deficiencies such as fraud, not to errors in exercising valid jurisdiction. Therefore, claims of incorrect valuation are not reviewable by a writ of certiorari unless they assert jurisdictional defects [*McClelland v. Board of Supervisors (1947) 30 Cal. 2d 124, 129-130, 180 P.2d 676* ; *Delucia v. County of Merced (1968) 257 Cal. App. 2d 620, 622-623, 65 Cal. Rptr. 177* ; *Rickard v. Council of Santa Barbara (1920) 49 Cal. App. 58, 62, 192 P. 726]* . If no such defects are asserted, the existence of a refund suit with recovery of interest provides an adequate remedy at law, thereby precluding issuance of the writ [*Jillson v. Board of Supervisors (1963) 221 Cal. App. 2d 192, 194-195, 34 Cal. Rptr. 419* ; *see Birch v. Board of Supervisors (1923) 191 Cal. 235, 235, 215 P. 903]* . For discussion and forms relating to writs of certiorari, see Ch. 492, *Review (Certiorari), Writ of.*

[4] Injunction

Although *Code Civ. Proc. § 526a* provides an injunctive remedy for taxpayers seeking to prevent illegal expenditure of tax funds, the availability of a refund suit, the specific statutory prohibition of injunction to challenge the tax collection process, and strong public policy against enjoining tax collection prevent the use of this type of injunction to restrain purportedlyillegal tax collection [*Cal. Const., art. XIII, § 32*; *Rev. & Tax. Code §§ 4807, 5140*; *Daar v. Alvord (1980) 101 Cal. App. 3d 480, 485-486, 161 Cal. Rptr. 658* ; *see California v. Grace Brethren Church (1982) 457 U.S. 393, 411-416 n. 10, 102 S. Ct. 2498, 73 L. Ed. 2d 93, 108-111* (review of California provisions)].

[5] Declaratory Relief

Although declaratory relief generally is unavailable to contest property tax assessments and collections, *Rev. & Tax. Code § 4808* allows a taxpayer to seek a declaration that locally assessed or collected property taxes are illegal or unconstitutional [*see Rev. & Tax. Code § 4808*; *Howard Jarvis Taxpayers Assn. v. City of Roseville (2002) 97 Cal. App. 4th 637, 647-650, 119 Cal. Rptr. 2d 91* (Proposition 218 applied to city's in-lieu franchise fee for water, sewer, and refuse collection; fee violated Proposition 218 because revenue from fee was placed in city's general fund, rather than being used only for purpose for which it was imposed, and because there was no evidence that fee reasonably represented cost of providing services); *Faix, Ltd. v. County of Los Angeles (1976) 54 Cal. App. 3d 992, 1004, 127*

Cal. Rptr. 182 ; *Montgomery Ward & Co. v. Welch (1936) 17 Cal. App. 2d 127, 131-134, 61 P.2d 790]* . The taxpayer must bring the action within 30 days after the delinquency date of a property tax bill or installment, in the superior court in the county in which the property is located. Relief is limited to a declaration that the taxes in question are unconstitutional or invalid. The judgment is obtained through the same procedure as that used to obtain a writ of mandate. Payment of taxes cannot be postponed while the suit is pending [*Rev. & Tax. Code § 4808*; *see Oneto v. City of Fresno (1982) 136 Cal. App. 3d 460, 186 Cal. Rptr. 299]* . A declaratory relief action is given precedence on the court's calendar [*Rev. & Tax. Code § 5149*].

In addition, an assessor is required to seek declaratory relief if the assessor believes a tax provision is invalid or will result in denial of an exemption to five or more taxpayers. Potential taxpayers and other assessors are allowed to intervene to the greatest extent practicable [*Rev. & Tax. Code § 538(a)*; *see Shafer v. State Bd. of Equalization (1985) 174 Cal. App. 3d 423, 426, 220 Cal. Rptr. 59* (procedure employed by 51 assessors to determine validity of *Rev. & Tax. Code §§ 75.10-75.12*)]. If the validity of an assessment is upheld, a taxpayer assessed pursuant to this provision may file a claim for refund within 60 days after notice of the assessment, regardless of the time limit otherwise provided by *Rev. & Tax. Code § 5097* for refund claims [*Rev. & Tax. Code § 538(c)*; *see § 540.71[6]*].

[6] Federal Relief

[a] When Available

Although the Tax Injunction Act (*28 U.S.C. § 1341*) requires federal courts generally to abstain from exercising equitable jurisdiction in statetax matters, federal court jurisdiction may be invoked in a refund suit for property taxes. Jurisdiction may be based on diversity of citizenship or on the existence of a federal question [*28 U.S.C. §§ 1331, 1332*; *Georgia-Pacific Corp. v. County of Mendocino (N.D. Cal. 1972) 340 F. Supp. 1061, 1064-1065 , aff'd sub nom. International Paper Co. v. County of Siskiyou (9th Cir. 1974) 515 F.2d 285* ; *see Georgia-Pacific Corp. v. County of Mendocino (1973) 357 F. Supp. 380* (supplemental decision)]. The federal court looks to California law to decide issues presented and considers how the California Supreme Court would determine the issues [*Commissioner v. Bosch (1967) 387 U.S. 456, 464, 87 S. Ct. 1776, 18 L. Ed. 2d 886* ; *Georgia-Pacific Corp. v. County of Mendocino (N.D. Cal. 1972) 340 F. Supp. 1061, 1066 , aff'd sub nom. International Paper Co. v. County of Siskiyou (9th Cir. 1974) 515 F.2d 285]* .

A federal court may also address constitutional issues, and may prohibit state taxation of property owned by the United States or its instrumentalities [McCulloch v. Maryland (1819) 17 U.S. (4 Wheat.) 316, 425-438, 4 L. Ed. 579 ; *United States v. Boyd (1964) 378 U.S. 39, 44, 84 S. Ct. 1518, 12 L. Ed. 2d 713]* .

[b] Equitable Relief

Equitable relief under federal law is rarely available to contest property tax collections and assessments. The Federal Tax Injunction Act (*28 U.S.C. § 1341*)and the principle of comity bar federal courts from granting injunctive and declaratory relief in state property tax cases. Generally, the principle of comity also bars damages relief under the Civil Rights Act (*42 U.S.C. § 1983*) in claims of allegedly unconstitutional administration of state tax systems. The availability of relief in state courts also precludes federal equitable relief [*Fair Assessment in Real Estate Ass'n v. McNary (1981) 454 U.S. 100, 102 S. Ct. 177, 70 L. Ed. 2d 271]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesDeclaratory JudgmentsAdministrative LawJudicial ReviewRemediesInjunctive ReliefAdministrative LawJudicial ReviewRemediesMandamusCivil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsTax Anti-Injunction ActCivil ProcedureU.S. Supreme Court ReviewState Court DecisionsTax LawState & Local TaxesAdministration & ProceedingsAssessmentsTax LawState & Local

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47-540 California Forms of Pleading and Practice--Annotated § 540.92

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.92 Suits to Quiet Title

[1] Default and Sale of Property for Unpaid Tax

Default and sale of property is one method to collect unpaid property taxes. "Tax-defaulted property" [*Rev. & Tax. Code §§ 126(a), (b), 3371-3375*] that has been in default for five years is subject to a power of sale for nonpayment of taxes [*Rev. & Tax. Code §§ 126(c), 3691-3731.1*]. The property may be redeemed until the close of business on the last day prior to the date the sale begins. Redemption requires payment of all taxes, penalties and costs due [*Rev. & Tax. Code §§ 3707(a)(1), 4101, 4102*; *see also Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal. 4th 26, 39, 77 Cal. Rptr. 2d 709, 960 P.2d 513* (owners right to redeem terminates at close of business on last business day before sale set)]. The right of redemption revives if the property is not sold [*Rev. & Tax. Code § 3707(d)*].

[2] Who May or Should Bring Quiet Title Action

A person redeeming tax-defaulted property, or anyone claiming through the redemptioner, may maintain a quiet title action [*Rev. & Tax. Code § 4113*]. In addition, an owner may bring an action to quiet title against the lien of taxes, if the taxes have been cancelled [*Rev. & Tax. Code § 4990.3*]. Because the process of collecting unpaid property either by sale or redemption clouds the title of the property, owners of property that has gone through this process, either as purchasers or redeemers, may need to file suit to quiet title [*see § 540.92[3]*]. Purchasers of tax-defaulted property have the additional option of a suit to determine adverse claims *see Rev. & Tax. Code § 3950 et seq.*; *see also § 540.92[5]*].

[3] General Quiet Title Action by Owner

[a] Actions and Time Limits

An original owner's remedy for an alleged invalidity or irregularity in the default and sale of property for unpaid taxes may be a quiet title action under the general provisions of *Code Civ. Proc. § 760.010 et seq.* or an action to set aside a

deed [*see Johnson v. Alma Investment Co. (1975) 47 Cal. App. 3d 155, 120 Cal. Rptr. 503* (quiet title); *Banas v. Transamerica Title Ins. Co. (1982) 133 Cal. App. 3d 845, 848, 852, 184 Cal. Rptr. 262* (cancellation of deed)].

Any action based on an alleged invalidity of a deed issued to a taxing agency because of delinquent property taxes or assessments must be brought within one year after the date of execution of the deed [*Rev. & Tax. Code § 175*; *see Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal. 4th 26, 54, 77 Cal. Rptr. 2d 709, 960 P.2d 513]* . The statute of limitations for any action based on the alleged invalidity or irregularity of any proceeding for the sale of tax-deeded property to a private party by a taxing authority under *Rev. & Tax. Code §§ 3691-3731.1* is within one year after the date of execution of the tax collector's deed [*Rev. & Tax. Code § 3725*; *see Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal. 4th 26, 40, 77 Cal. Rptr. 2d 709, 960 P.2d 513]* . The tax collector's deed presumably is the deed from the taxing authority to the purchaser and not the deed by which the taxing authority received title from the defaulting original owner [*see Rev. & Tax. Code §§ 3708-3711*].

The limitation period for a quiet title action making a jurisdictional attack on a tax deed (based on the alleged invalidity or irregularity of any proceeding for the sale) cannot begin to run while the plaintiff is in undisturbed possession of the property [*Kaufman v. Gross & Co. (1979) 23 Cal. 3d 750, 755, 153 Cal. Rptr. 577, 591 P.2d 1229]* and is without adequate notice that title to the property has been transferred for nonpayment of taxes [*McCaslin v. Hamblen (1951) 37 Cal. 2d 196, 199, 231 P.2d 1]* . Therefore, when the statute of limitations is asserted in defense of the action, the crucial issue is determination of the date on which the plaintiff's possession of the property was disturbed by actual or constructive receipt of adequate notice of the tax sale. In order for the crucial date to be the date the plaintiff received any material notice from the tax collector, it is necessary at least for the notice to show the plaintiff's name (not some other person's name) as the owner of the property [*Mayer v. L&B Real Estate (2008) 43 Cal. 4th 1231, 1240, 78 Cal. Rptr. 3d 62, 185 P.3d 43* (also suggesting that tax collector's notice could be ineffective for limitation purposes if stated amount of unpaid tax on annual basis does not reasonably agree with plaintiff's yearly tax bill or if legal description does not apparently apply to plaintiff's property)].

Rev. & Tax. Code § 177(a) allows a property owner to begin a proceeding based on the alleged invalidity or irregularity of any deed issued on the sale of property by any taxing agency in the enforcement of delinquent property taxes or assessments, or a proceeding based on the alleged invalidity or irregularity of any proceedings leading up to such a deed. The owner must commence either proceeding within one year after the date of recording the deed rather than the date of its execution [*Rev. & Tax. Code § 177(a)*]. However, *Rev. & Tax. Code § 177* does not extend the time to bring an action for proceedings governed by *Rev. & Tax. Code § 3725* [*Rev. & Tax. Code § 177(d)*].

For discussion regarding whether one must have legal title to maintain a quiet title action and for a form of complaint to quiet title, see Ch. 482, *Quieting Title* . For a form of complaint to cancel a deed and quiet title, see Ch. 184, *Deeds* .

[b] Reimbursement Costs

A property owner who successfully brings a quiet title action must reimburse a good faith purchaser or successor in interest under a void tax deed for taxes, penalties, and costs incurred in securing title under the tax deed [*Rev. & Tax. Code § 3728*; *see Newcomb v. City of Newport Beach (1938) 12 Cal. 2d 235, 238-239, 83 P.2d 21* ; *Johnson v. Alma Investment Co. (1975) 47 Cal. App. 3d 155, 163, 120 Cal. Rptr. 503* ; *Roma v. Elbert, Ltd. (1946) 73 Cal. App. 2d 338, 341, 166 P.2d 294]* . In addition, the owner must reimburse a purchaser or successor for any permanent improvements made that increase the value of the property [*Rev. & Tax. Code § 3728*]. If the ownerfails to pay the purchaser or successor in interest the amounts ordered by the court within six months after the court's order, a new tax deed to the property is issued, and the court quiets title to the purchaser or successor in interest. The new title is conclusively presumed valid against future claims of parties to the lawsuit and their successors in interest [*Rev. & Tax. Code § 3728.1*].

[4] Quiet Title Action by Purchaser

One who has purchased tax-defaulted property from the tax collector or a successor in interest may bring a quiet title action [*Rev. & Tax. Code § 3727*; *see Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal. 4th 26, 40, 77 Cal. Rptr. 2d 709, 960 P.2d 513* (purchaser at tax sale or other person in privity may bring suit to quiet title to property)]. Service of process must be made on the tax collector of the county in which the real property is located [*Rev. & Tax. Code § 160*]. If the action is unsuccessful and the tax deed is held void, the purchaser is entitled to be reimbursed by the owner of the property for taxes, penalties, and costs of acquiring title, as well as for any permanent improvements made [*Rev. & Tax. Code § 3728*]. The purchaser is also entitled to recover from the county any amount paid as purchase price in excess of the amounts reimbursed by the owner of the property. The purchaser must present his or her claim against the county within one year after the judgment holding the tax deed void [*Rev. & Tax. Code § 3729*]. The more common action by a purchaser of tax-defaulted property is a suit to determine adverse claims to, or clouds on, the title to the property [*Rev. & Tax. Code § 3950*; *see § 540.92[5]*].

[5] Suit by Purchaser to Determine Adverse Claims

[a] Requirements

One who purchases tax-defaulted property from the tax collector or a successor in interest may bring an action to determine adverse claims to, or clouds on, the title to the property. Before bringing the action, the purchaser must have paid all subsequent taxes [*Rev. & Tax. Code § 3950*]. All persons with known interests in the property arising before the date of the deed from the tax collector must be joined as defendants [*Rev. & Tax. Code § 3951*]. Unknown defendants and the tax collector may also be added as defendants [*Rev. & Tax. Code §§ 3951-3955*]. Notice of the suit must be filed in the county recorder's office within 10 days after the filing of the complaint, and a copy of the summons must be posted on the property within 30 days of issuance of the summons [*Rev. & Tax. Code §§ 3956, 3958*].

In the suit, the court may determine the rights of all the parties to the action, but no decree may be granted by default unless the court receives proof of alleged facts [*Rev. & Tax. Code §§ 3962, 3963*]. If the defendants are found to have no interest in the property, the purchaser is entitled to a decree quieting title that is conclusive against the served defendants and successors in interest [*Rev. & Tax. Code §§ 3967, 3968*]. The court may order sale or partition of the property, if the court finds that the defendants have an interest in the property [*Rev. & Tax. Code § 3965*]. The purchaser in this situation is entitled to be reimbursed by the owner of the property for taxes, penalties, and costs of acquiring title, as well as for any permanent improvements made [*Rev. & Tax. Code § 3728*].

[b] Special Assessments

In a suit by a purchaser to determine adverse claims that involves special assessments, the payee on any bond representing an assessment, the owner of the special assessment shown by the treasurer's records, and the treasurer who is custodian of the funds of the special assessment must be made defendants in the suit [*Rev. & Tax. Code § 3955*]. Persons claiming any other type of special assessment lien may be made defendants [*Rev. & Tax. Code §§ 3951, 3954*].

If the court determines that none of the defendants has any interest in the property, the title of the purchaser under the tax deed is quieted, and the decree directs that the treasurer cancel the special assessment on his or her records [*Rev. & Tax. Code § 3967*]. If the court determines that any of the defendants has an interest in the property, it may order a sale or partition of the property [*Rev. & Tax. Code § 3964*]. If the interest of a defendant is based on a special assessment, the court decree establishing the rights of the defendant must also order the treasurer to cancel the special assessment [*Rev. & Tax. Code § 3966*]. If a sale of property is ordered, proceeds of the sale belonging to unknown special assessment owners or persons claiming an interest in the special assessment must be paid to the treasurer [*Rev. & Tax. Code § 3965*].

[c] Whether Purchaser of Tax-Defaulted Property at Tax Sale Limited to Remedies Provided by Revenue and Taxation Code

Authority is split as to whether a purchaser of tax-defaulted property from a public entity at a tax sale is limited to the remedies provided for in the Revenue and Taxation Code. One line of authority has held that the purchaser's remedies provided by the Revenue and Taxation Code are exclusive [*Van Petten v. County of San Diego (1995) 38 Cal. App. 4th 43, 44 Cal. Rptr. 2d 816 (Fourth Dist., Div. One)* ; *Craland, Inc. v. State of California (1989) 214 Cal. App. 3d 1400, 1407-1408, 263 Cal. Rptr. 255 (Second Dist., Div. One)* ; *see People v. Chambers (1951) 37 Cal. 2d 552, 561-562, 233 P.2d 557* ; *see also Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal. 4th 26, 40, 77 Cal. Rptr. 2d 709, 960 P.2d 513* (stating rule); *Routh v. Quinn (1942) 20 Cal. 2d 488, 490-491, 127 P.2d 1* ; *Bell v. County of Los Angeles (1928) 90 Cal. App. 602, 605-606, 266 P. 291 (Third Dist.)]* . Under this line of authority, common law contractual remedies are not available to a purchaser of tax-defaulted real property at a public tax sale [*Van Petten v. County of San Diego (1995) 38 Cal. App. 4th 43, 51, 44 Cal. Rptr. 2d 816* (purchaser at tax sale entitled to refund of purchase money paid only when court determines tax deed void (*Rev. & Tax. Code § 3729*) or property should not have been sold (*Rev. & Tax. Code § 3731*); there is no statutory remedy of rescission or refund based on misrepresentation and breach of contract theories); *Craland Inc. v. State of California (1989) 214 Cal. App. 3d 1400, 1407-1408, 263 Cal. Rptr. 255* (state and county not subject to contractual liability)]. There is contrary authority, however, that has held that a purchaser's statutory remedies arenot exclusive [*Schultz v. County of Contra Costa (1984) 157 Cal. App. 3d 242, 245, 203 Cal. Rptr. 760* (First Dist., Div. Five; judgment of rescission in favor of purchaser based on mutual mistake of fact affirmed; purchaser bought parcel with intention of building residence, but subsequently discovered parcel unbuildable)].

[6] Action by Good-Faith Improver of Property

A person who makes an improvement on land in the mistaken belief that he or she owns the land may bring an action or file a cross complaint in a pending action for relief based on the improvements made. The court may adjust the rights, equities, and interests of the good-faith improver, the owner of the land, and other interested parties in order to bring "substantial justice" to the parties under the circumstances. The intent of the statute is to protect the owner of the property from pecuniary loss while at the same time avoiding unjust enrichment from the improvement made by the good-faith improver [*Code Civ. Proc. §§ 871.1-871.7*; *Kaufman v. Gross & Co. (1979) 23 Cal. 3d 750, 760-761, 153 Cal. Rptr. 577, 591 P.2d 1229]* .

If a person is barred by the statute of limitations from bringing a quiet title action, the only available remedy may be an action to recover as a good-faith improver of the property. An action as a good-faith improver may also be the sole available remedy against a subsequent owner of the property if there is no jurisdictional defect arising from lack of notice in earlier proceedings granting a deed to the subsequent owner. The statute of limitations for such a suit is one year after the date the good-faith improver discovers that he or she is not the owner of the land on which the improvements have been made [*Code Civ. Proc. §§ 340(e), 871.1-871.7*]. For further discussion and a form for a complaint by a good-faith improver, see Ch. 279, *Good Faith Improver of Real Property* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesTax DeedsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsTax LawState & Local TaxesAdministration & ProceedingsCollectionTax LawState & Local TaxesReal Property TaxCollectionTax Deeds & Tax SalesTax LawState & Local TaxesReal Property TaxCollectionTax Liens

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47-540 California Forms of Pleading and Practice--Annotated §§ 540.93-540.109

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[Reserved]

§§ 540.93[Reserved]

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47-540 California Forms of Pleading and Practice--Annotated § 540.110

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.110 Governing Law

The California Sales and Use Tax Law is contained in *Rev. & Tax. Code § 6001 et seq.* Sales and use taxes imposed by California cities, counties, county regional justice facilities financing agencies, redevelopment agencies, and transit districts are governed by *Rev. & Tax. Code §§ 7200 et seq.* and *7251 et seq.* City ordinances relating to the licensing of businesses for purposes of revenue and regulation are governed by *Gov. Code §§ 37100-37101.7*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesSales TaxGeneral OverviewTax LawState & Local TaxesUse TaxGeneral Overview

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§§ 540.111[Reserved]

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C. SALES AND USE TAXES
2. Nature and Administration of Sales and Use Taxes

47-540 California Forms of Pleading and Practice--Annotated § 540.130

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.130 Nature and Structure of California Sales and Use Taxes

[1] Sales Tax

Sales and use taxes are excise or privilege taxes [*City of Pomona v. State Bd. of Equalization (1959) 53 Cal. 2d 305, 309, 1 Cal. Rptr. 489, 347 P.2d 904* ; *Douglas Aircraft Co., Inc. v. Johnson (1939) 13 Cal. 2d 545, 551-554, 90 P.2d 572* ; *Ingels v. Riley (1936) 5 Cal. 2d 154, 156, 53 P.2d 939* ; *see Yamaha Corp. of America v. State Bd. of Equalization (1999) 73 Cal. App. 4th 338, 347, 86 Cal. Rptr. 2d 362]* .

A sales tax is not imposed on the sale itself or on the transaction, but on the retailer's gross receipts from retail sales for the privilege of makingthose sales within the state [*Standard Oil Co. v. State Bd. of Equalization (1965) 232 Cal. App. 2d 91, 94-95, 42 Cal. Rptr. 543* ; *Roth Drug, Inc. v. Johnson (1936) 13 Cal. App. 2d 720, 730, 57 P.2d 1022* ; *see Rev. & Tax. Code §§ 6006, 6007, 6011, 6012* (definitions of sale, sales price, retail sale, and gross receipts)].

The sales tax is the direct obligation of the retailer, even though the retailer may pass it on to the consumer [*Civ. Code § 1656.1*; *Yosemite Park & Curry Co. v. Johnson (1938) 10 Cal. 2d 770, 771, 76 P.2d 1191* ; *Roth Drug, Inc. v. Johnson (1936) 13 Cal. App. 2d 720, 730, 57 P.2d 1022* ; *but see Diamond National v. State Equalization Bd. (1976) 425 U.S. 268, 96 S. Ct. 1530, 47 L. Ed. 2d 780 (California sales tax is tax on purchaser)]* .

A sale for resale is excluded from the definition of a retail sale [*see Rev. & Tax. Code § 6007*]. *Rev. & Tax. Code § 6001 et seq.* include many narrow provisions addressing transactions that do or do not consititute sales under the Sales and Use Tax Law [*see, e.g., Rev. & Tax. Code §§ 6010.4, 6010.6* (both relating to motion picture production), 6010.9 (relating to certain custom computer programs)].

[2] Use Tax

The use tax is an excise tax imposed on any taxpayer who purchases tangible personal property from any retailer for

storage, use, or other consumption in California [*Rev. & Tax. Code §§ 6201, 6202*; *see Rev. & Tax. Code §§ 6008-6010, 6015, 6019* (definitions of storage, use, purchase, and retailer)]. Sales and use taxes are mutually exclusive but complementary, and are designed to exact equal tax based on the percentage of the purchase price of the property in question [*Agnew v. State Board of Equalization (1999) 21 Cal. 4th 310, 315 n.3, 87 Cal. Rptr. 2d 423, 981 P.2d 52* ; *see Rev. & Tax. Code § 6401*]. Use tax is intended to supplement sales tax by imposing an equivalent tax burden on salesnot subject to the California sales tax. One of the chief purposes of the use tax is to help California retailers, who are subject to the sales tax, to compete on an equal footing with their out-of-state competitors, who are exempt from the sales tax [*Rivera v. City of Fresno (1971) 6 Cal. 3d 132, 138, 98 Cal. Rptr. 281, 490 P.2d 793* ; *Atchison etc. Ry. Co. v. State Bd. of Equalization (1956) 139 Cal. App. 2d 411, 422, 294 P.2d 181* ; *see Yamaha Corp. of America v. State Bd. of Equalization (1999) 73 Cal. App. 4th 338, 347, 86 Cal. Rptr. 2d 362]* .

The purchaser is primarily liable for payment of the tax, and remains liable until the tax is paid or until the seller provides a receipt indicating that the seller has paid the tax [*Rev. & Tax. Code § 6202*]. Every retailer, at the time of making a sale, must collect the use tax from the purchaser and provide a receipt indicating that the tax has been collected [*Rev. & Tax. Code § 6203*]. Although this provision makes the retailer an agent of the state for collection of the tax, it does not shift the direct burden of the tax from the purchaser to the retailer, nor does it relieve the purchaser of theprimary liability for the tax [*Brandtjen & Kluge v. Fincher (1941) 111 P.2d 979* ; *see Felt & Tarrant Mfg. Co. v. Gallagher (1939) 306 U.S. 62, 66, 59 S. Ct. 376, 83 L. Ed. 488]* .

The use tax does not apply to property that is to be resold or to property that is subject to California sales tax [*Rev. & Tax. Code §§ 6007, 6202, 6401*; *In re Los Angeles Lumber Products Co. (S.D. Cal. 1942) 45 F. Supp. 77, 85-86* ; *Hawley v. Johnson (1943) 58 Cal. App. 2d 232, 238-239, 136 P.2d 638]* . In calculating the use tax, credit is generally allowed for sales and use taxes imposed by other states [*Rev. & Tax. Code § 6406*].

[3] Application to Bankruptcy Liquidation Sale

Although the Ninth Circuit had held for 30 years that the state of California could not impose a sales or use tax on a bankruptcy liquidation sale, the United States Supreme Court has abrogated that rule and held that the tax may be imposed [*California State Board of Equalization v. Sierra Summit (1989) 490 U.S. 844, 109 S. Ct. 2228, 104 L. Ed. 2d 910, 917-920* (abrogating rule of *California State Board of Equalization v. Goggin (9th Cir. 1957) 245 F.2d 44* , *cert. denied, 353 U.S. 961*) (*Goggin II*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 540 TAXES AND ASSESSMENTS
PART II. LEGAL BACKGROUND
C. SALES AND USE TAXES
2. Nature and Administration of Sales and Use Taxes

47-540 California Forms of Pleading and Practice--Annotated § 540.131

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§ 540.131 Local Sales, Use, and Licensing Taxes

[1] Local Sales and Use Taxes

Local government entities, such as cities, counties, and districts, may impose local sales and use taxes and transactions and use taxes. These taxes are in addition to the state sales and use tax law [*Rev. & Tax. Code §§ 7200 et seq., 7251 et seq., 7285 et seq.*]. A county may levy a utility user tax on the consumption of electricty, gas, water, sewer, telephone, and cable television services in the unincorporated area of the county [*Rev. & Tax. Code § 7284.2*; *see also Rev. & Tax. Code § 7284.4*]. A city, county, or city and county may impose a graffiti prevention tax on the privilege of selling at retail within its jurisdiction aerosol paint containers, containers of any other marking substance, certain felt tip markers, and other marking instruments. The taxing entity must use the proceeds of the tax to remove and prevent graffiti [*Rev. & Tax. Code § 7287 et seq.*].

However, the authority of a local entity to levy transactions and use taxes may be subject to the restrictions of Proposition 13 even though the entity does not have the authority to levy property taxes [*see Rider v. County of San Diego (1991) 1 Cal. 4th 1, 13-15, 18, 2 Cal. Rptr. 2d 490, 820 P.2d 1000* ; *see Cal. Const., art. XIII A, § 4*; *see also § 540.451[3]*]. The Supreme Court has held that a local agency was a special district within the meaning of section 4 of Proposition 13 [*Cal. Const., art. XIII A, § 4*], and therefore a sales tax adopted by the agency was invalid because it was not adopted by a two-thirdsmajority of the voters, as required for special taxes by section 4 [*Rider v. County of San Diego (1991) 1 Cal. 4th 1, 13-15, 18, 2 Cal. Rptr. 2d 490, 820 P.2d 1000* (prospective application to other agencies to be determined on case-by-case basis)].

Moreover, under Proposition 218, adopted by the voters in 1996, which added Cal. Const., art. XIII C, and Proposition 62, adopted by the voters in 1986, which added *Gov. Code §§ 53720-53730*, all new local general and special taxes must be approved by a vote of the local electorate [*Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 233, 45 Cal. Rptr. 2d 207, 902 P.2d 225* ; *see also McBrearty v. City of Brawley (1997) 59*

Cal. App. 4th 1441, 1449 n.5, 69 Cal. Rptr. 2d 862 (Proposition 218 added Cal. Const., arts. XIII C, XIII D, which are similar to statutory amendments created by Proposition 62, to ensure voter approval requirements apply to charter cities)]. No local government or district may impose any special tax without the approval of two thirds of the voters voting in an election on the issue [*see Cal. Const., art. XIII C, § 2(d)*; *Gov. Code § 53722*; *see Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 233-238, 45 Cal. Rptr. 2d 207, 902 P.2d 225]* , nor may they impose any general tax without the approval of a majority of the voters voting in an election on the issue [*see Cal. Const., art. XIII C, § 2(b)*; *Gov. Code § 53723*; *see Burbank-Glendale-Pasadena Airport Authority v. City of Burbank (1998) 64 Cal. App. 4th 1217, 1226-1227, 76 Cal. Rptr. 2d 297* (Cal. Const., art. XIII C, requires charter cities to obtain voter approval of general taxes first imposed or increased after January 1, 1995); for further discussion, *see § 540.51[3][b], [c]*].

Any local sales and use tax must be enacted in accordance with a uniform state standard and include provisions such as incorporation of the state sales and use tax laws into the local sales and use tax ordinances and contracting with the SBE for the administration of the tax [*Rev. & Tax. Code §§ 7202, 7203*; *see Rev. & Tax. Code §§ 7204, 7204.3* (collection and administration by SBE)]. If a county adoptsa sales tax ordinance, it must adopt a complementary use tax [*Rev. & Tax. Code § 7203*]. A local sales and use tax must exclude from the amount subject to tax any state sales or use tax imposed on the retailer or consumer [*Rev. & Tax. Code §§ 7202(f), 7203(d)*].

[2] Licensing Taxes

Cities may license, for regulation and for revenue, every lawful business transacted within the city, including shows, games, and exhibitions [*Bus. & Prof. Code § 16000*; *Gov. Code § 37101*]. Similarly, a county may license, for revenue and regulation, and impose a license tax on, every kind of lawful business transacted in the unincorporated areas of the county."Business" includes shows, exhibitions, and games [*Gov. Code § 37101(b)*; *Rev. & Tax. Code § 7284*]. However, the performance of a governmental function by a public agency does not constitute the transaction of business within the meaning of *Rev. & Tax. Code § 7284* so as to authorize the licensing and taxation of that business and thus *Rev. & Tax. Code § 7284* does not authorize taxation of governmental functions performed by public entities [*Sacramento Mun. Utility Dist. v. County of Solano (1997) 54 Cal. App. 4th 1163, 1165, 1170 n.3, 63 Cal. Rptr. 2d 286* (Solano County precluded from imposing business license tax against Sacramento Municipal Utility District for electrical energy produced by District's power plant in Solano County)].

Business license taxes based on gross receipts taxes must be limited to receipts attributable to activity within the city [*Volkswagen Pacific, Inc. v. City of Los Angeles (1972) 7 Cal. 3d 48, 57-59, 101 Cal. Rptr. 869, 496 P.2d 1237* ; *General Motors Corp. v. City of Los Angeles (1971) 5 Cal. 3d 229, 238, 95 Cal. Rptr. 635, 486 P.2d 163* ; *but see City of Los Angeles v. Belridge Oil Co. (1954) 42 Cal. 2d 823, 830, 271 P.2d 5* (tax upheld although only negotiations took place in city)]. Any license tax imposed on a business operating both within and outside the taxing jurisdiction must be fairly apportioned to reflect the portion of the taxed activity actually carried on within the taxing jurisdiction [*Gov. Code § 37101(b)*; *Rev. & Tax. Code § 7284*]. If a noncomplying license tax ordinance were amended so as to provide for necessary and sufficient apportionment, the amendment would effect a substantive (rather than procedural) change, and normally it could not be applied retroactively; therefore, any taxes that were not collected in past years under the former ordinance would remain uncollectible under the amended ordinance [*City of Modesto v. National Med, Inc. (2005) 128 Cal. App. 4th 518, 526-530, 27 Cal. Rptr. 3d 215]* . "Differentially burdensome" taxation of instrumentalities of speech or press, such as subscription television services, is prohibited as an interference with *First Amendment* rights [*Minneapolis Star v. Minnesota Comm. of Rev. (1983) 460 U.S. 575, 581-583, 103 S. Ct. 1365, 75 L. Ed. 2d 295* ; *City of Alameda v. Premier Communications Network, Inc. (1984) 156 Cal. App. 3d 148, 157, 202 Cal. Rptr. 684* ; *but see City of Corona v. Corona etc. Independent (1953) 115 Cal. App. 2d 382, 389-390, 252 P.2d 56* (tax upheld)].

The state Department of Alcoholic Beverage Control is granted exclusive power under the California Constitution to collect license fees or occupational taxes related to alcoholic beverage sales [*Cal. Const., art. XX, § 22*; *see City of*

Oakland v. Superior Court (1996) 45 Cal. App. 4th 740, 759, 53 Cal. Rptr. 2d 120] . Liquor licenses are not subject to local license or occupational taxes *City of Oakland v. Superior Court (1996) 45 Cal. App. 4th 740, 759, 53 Cal. Rptr. 2d 120]* . Courts have recognized a distinction, however, between municipal revenue taxes that may be preempted by state law and fees that a city may properly impose pursuant to its regulatory authority to control and supervise a business that poses an unusual burden on the local entity for services. Thus, a city's ordinance addressing nuisance problems associated with alcoholic beverage sales establishments and requiring existing alcoholic beverage retailers to pay a fee to administer enforcement of the ordinance's requirements has been construed as a regulatory ordinance and the ordinance's fees have been heldnot to constitute a license tax prohibited by *Cal. Const., art. XX, § 22* [*City of Oakland v. Superior Court (1996) 45 Cal. App. 4th 740, 759-767, 53 Cal. Rptr. 2d 120]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-540 California Forms of Pleading and Practice--Annotated § 540.132

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§ 540.132 Administration of State Sales and Use Tax

[1] Permits and Registration

Every person who desires to conduct business as a seller in California must obtain a seller's permit from the SBE for each place of business [*Rev. & Tax. Code § 6066*; *18 Cal. Code Reg. § 1699*; *see Rev. & Tax. Code §§ 6006.5, 6007, 6014, 6015, 6019* (definitions of occasional sale, retail sale, seller, and retailer)]. A person or entity making more than two retail sales of tangible personal property in any 12-month period is a retailer [*Rev. & Tax. Code § 6019*]. The SBE interprets these provisions to require a seller's permit if a person or entity makes either three or more sales for substantial amounts in any 12-month period or a substantial number of sales for relatively small amounts. [*Rev. & Tax. Code §§ 6006.5(a), 6019*; *18 Cal. Code Reg. § 1595(a)*].

Every retailer selling tangible personal property in California for use, storage or other consumption in California must register with the SBE, giving the name and address of all agents and offices in California [*Rev. & Tax. Code § 6226*; *18 Cal. Code Reg. § 1684*]. Retailers are deemed to be doing business in California for purposes of registration and use tax collection if they have a sufficient nexus with California [*see 18 Cal. Code Reg. §§ 1620(b), 1684*; *National Geographic v. Cal. Equalization Bd. (1977) 430 U.S. 551, 555-556, 97 S. Ct. 1386, 51 L. Ed. 2d 631* (maintenance of advertising office); *Scripto v. Carson (1960) 362 U.S. 207, 210-212, 80 S. Ct. 619, 4 L. Ed. 2d 660* (traveling salespeople)]. Sales to residents of a state solicited by mailing catalogues and flyers, advertisements in nationalperiodicals, and telephone calls and delivered by common carrier or by mail from out of state are an insufficient nexus to impose a duty on seller to collect use tax [*Quill Corporation v. State of North Dakota (1992) 504 U.S. 298, 311-314, 112 S. Ct. 1904, 119 L. Ed. 2d 91]* .

The use of a computer server on the internet to create or to maintain a world wide web page or site by an out-of-state retailer will not be considered a factor in determining whether the retailer has a substantial nexus with California. No internet service provider, on-line service provider, internetwork communication service provider, or other internet

access service provider, or world wide web hosting services is deemed the agent or representative of any out-of-state retailer as a result of the service provider maintaining or taking orders via a web page or site on a computer server that is physically located in California [*18 Cal. Code Reg. § 1684(a)*].

PRACTICE TIP:

Procedures For Application For Permit. A prospective seller must apply for a seller's permit for each place of business on the formprescribed by the SBE by providing the name under which the applicant transacts or intends to transact business, the location of his or her place or places of business, and any other information as the board may require. The application must be authenticated in a form or pursuant to methods as may be prescribed by the SBE. The application must state that the applicant will actively engage in or conduct business as a seller of tangible personal property [*Rev. & Tax. Code § 6066(a)*]. The application may be filed using electronic media as prescribed by the SBE [*Rev. & Tax. Code § 6066(b), (c)*].

A nonprofit organization selling for its own account must obtain a permit, unless the organization is otherwise exempt from permit requirements by specific stipulations of statutory or regulatory law [*see 18 Cal. Code Reg. § 1597*].

The SBE can revoke or suspend a seller's permit for failure to comply with the Sales and Use Tax Law. Revocation requires that the permit holder be afforded a hearing on 10 days' notice requiring the holder to show cause why the permit should not be revoked [*Rev. & Tax. Code § 6070*].

[2] Resale Certificate

It is generally presumed that all gross receipts from sales are subject to sales tax [*Rev. & Tax. Code § 6091*]. It is also presumed that tangible personal property sold for delivery in California is sold for storage, use, or other consumption in this state [*Rev. & Tax. Code § 6241*]. These presumptions do not apply if the seller takes a resale certificate from the purchaser. A seller taking a resale certificate in good faith is relieved from liability for sales tax or from the duty of collecting use tax [*Rev. & Tax. Code §§ 6091-6095, 6241-6249*; *18 Cal. Code Reg. § 1668(a)*].

A purchaser who gives a resale certificate for property that is not going to be resold is liable for the amount of sales tax that would otherwise be due and could also be subject to penalties for intentional disregard of rules, fraud, or intent to evade tax [*Rev. & Tax. Code §§ 6094.5, 6484, 6485*; *see 18 Cal. Code Reg. § 1668(g)*].

A wholesaler who has notice of the suspension or revocation of a retailer's seller's permit and continues accepting the retailer's resale certificate is also liable for the sales tax *[62 Ops. Cal. Att'y Gen. 336 (1979)]* .

[3] Direct Payment Permit

A person who holds a valid seller's permit may obtain a direct payment permit. Holders of direct payment permits need not pay sales tax to retailers from whom they make purchases. Direct payment permit holders instead report and pay the retailer's liability directly to the SBE [*Rev. & Tax. Code §§ 7051.1, 7051.2*].

[4] Exemptions

A variety of exemptions allow a seller or purchaser to exclude the sales price of the exempt item from computations of sales or use tax [*Rev. & Tax. Code § 6351 et seq.*]. The exemptions are based on various constitutional or public policy grounds [*see, e.g., Chevron U.S.A., Inc. v. State Bd. of Equalization (1997) 53 Cal. App. 4th 289, 295-296, 61 Cal. Rptr. 2d 608* (*Rev. & Tax. Code § 6396*, which exempts from California sales taxes gross receipts from the sale of personal property if the property is delivered outside the state, designed to accommodate federal constitutional restrictions on state taxation of sales in interstate commerce; for discussion of impact of various provisions of the

Federal Constitution on state and local governments power to tax, *see § 540.11*)]. Some require issuance and presentation of an exemption certificate by the purchaser, whereas others do not [*see 18 Cal. Code Reg. §§ 1521.4, 1570, 1587, 1590, 1594, 1598, 1603, 1614, 1621, 1668, 1805, 1823.5, 1825*].

Some of the more significant exemptions from sales and use tax include the following:

- Gross receipts from sales, use, storage, or consumption whose taxation is prohibited by either federal law or the California Constitution [*Rev. & Tax. Code § 6352*].

- Gross receipts from sales, use, storage, or consumption of gas, electricity, and water delivered to consumers, and liquefied petroleum gas used for household or agricultural purposes [*Rev. & Tax. Code § 6353*].

- Food and farm products, but not prepared meals [*Rev. & Tax. Code §§ 6358, 6359, 6359.1-6359.7*; *18 Cal. Code Reg. §§ 1602-1603*].

- Medicine and other specified medical products [*Rev. & Tax. Code §§ 6369-6369.5, 6371*].

- Tangible personal property other than certain fuel and petroleum products sold to common carriers for out-of-state use, and, until 2014, the sale of fuel and petroleum products to a water common carrier for immediate shipment outside California [*Rev. & Tax. Code § 6385*; *18 Cal. Code Reg. § 1621*].

- Certain aircraft fuel [*Rev. & Tax. Code §§ 6357-6357.1*].

- Gross receipts from sales, use, storage, or consumption of vehicles, vessels, and any related equipment used to provide public transportation services, until January 1, 2004 [Rev. & Tax. Code § 6368.6].

[5] Successor's Liability

A successor in interest of a retailer must withhold enough of the purchase price to cover the amount of sales or use tax due until the former owner produces either a receipt from the SBE showing that the tax hasbeen paid or a certificate showing that no tax is due [*Rev. & Tax. Code § 6811*; *see also 18 Cal. Code Reg. § 1702(a)* (when duty to withhold arises)]. The SBE issues the certificate that no tax is due after taxes have been paid or after security has been given for their payment [*Rev. & Tax. Code § 6813*].

The SBE must either issue the certificate or mail notice of the amount of tax due within 60 days after the latest of the following dates [*Rev. & Tax. Code § 6812(b)*]:

- The date it receives a written request from the purchaser for a certificate.

- The date of the sale of the business or stock of goods.

- The date the former owner's records are made available for audit.

Failure of the SBE to mail the notice within that time releases the successor from further liability to withhold the purchase price [*Rev. & Tax. Code § 6812(c)*; *see 18 Cal. Code Reg. § 1702(c)* (purchaser released from further obligation if purchaser (1) obtains certificate from SBE stating no taxes, interest or penalties due from predecessor, or (2) makes written request to SBE for certificate and, within time specified in regulation, SBE does not either issue it or mail to purchaser notice of amount of tax, interest and penalties that must be paid as condition for certificate's

issuance)].

A successor who fails to withhold is liable, to the extent of the purchase price, for all taxes, interest, and penalties owing by the predecessor even though they may not have been determined against the predecessor at the time of the sale [*Rev. & Tax. Code § 6812(a)*; *18 Cal. Code Reg. § 1702(b)*].

[6] Security

The SBE may require a seller to deposit security if it is necessary to insure compliance with sales and use tax provisions [*Rev. & Tax. Code § 6701*]. The SBE must hold in trust any security in the form of cash, government bonds, or insured deposits in banks or savings and loan institutions and use it solely to ensure compliance with sales and use tax provisions [*Rev. & Tax. Code § 6701*]. The SBE fixes the amount of the security. However, the security cannot exceed a maximum amount. For persons filing returns for quarterly periods, that maximum is the lesser of twice the person's average liability or $50,000. For persons filing returns for monthly periods, that maximum is the lesser of three times the person's average liability or $50,000 [*Rev. & Tax. Code § 6701* (different maximum amounts apply if SBE has revoked seller's permit)]. Security held by the board must be released after a three-year period in which the person has filed all returns and paid all tax to the state or any amount of tax required to be collected and paid to the state within the time required [*Rev. & Tax. Code § 6701*].

The surety and its principal, the taxpayer, may contract for any commencement date for the surety's bond covering payment of sales and use tax, and the bond's effectiveness is not dependent on receipt of evidence of the bond by the SBE or the SBE's approval of the bond [*People v. Great American Ins. Co. (1973) 222 Cal. App. 2d 552, 556-557, 35 Cal. Rptr. 267]* . Due process does not require that the SBE give notice of the taxpayer's default to the surety, even if notice would have allowed the surety to minimize its exposure by paying the tax before any penalty was imposed [*American Fidelity Fire Ins. Co. v. State Bd. of Equalization (1973) 34 Cal. App. 3d 51, 55, 109 Cal. Rptr. 545]* .

[7] Returns and Records

Sellers and others liable for tax generally must file sales and use tax returns showing gross receipts, the amount of tax, and any other information the SBE deems necessary, and pay the tax due quarterly, on or before the last day of the month succeeding each quarterly period [*Rev. & Tax. Code §§ 6451-6454*].

The SBE may grant extensions of up to one month for filing the return and paying the tax due if the extension is applied for before the original due date for the return and payment [*Rev. & Tax. Code § 6459(a)*]. The SBE may grant extensions of more than one month to creditors of the State of California who have not been paid because of the state's failure to adopt a budget in a timely manner, if the state has not adopted a budget by July 1 [*Rev. & Tax. Code § 6459(b)*]. Interest is charged on the "late" tax if the SBE grants an extension [*Rev. & Tax. Code §§ 6459(a), 6591.5*]. However, for extensions granted to creditors of the state, no interest is due on the portion of tax payment equal to the amount owed the creditor by the state on the due date of the tax payment [*Rev. & Tax. Code §§ 6459(b), 6591.5*]. If a taxpayer's estimated measure of tax liability averages $17,000 or more per month, the SBE may require prepayments. If the taxpayer's estimated tax liability averages $20,000 or more per month, prepayment by electronic funds transfer under procedures prescribed by the board mayapply [*see Rev. & Tax. Code §§ 6470-6479.5*].

A person who is not otherwise required to hold a seller's permit or register with the SBE [*see Rev. & Tax. Code § 6452.1(i)(1)*] may elect to report "qualified use tax" on that person's California income tax return [*Rev. & Tax. Code § 6452.1(a), (b)*, effective for purchases of tangible personal property made on or after 1/1/03 in tax years beginning on or after that date, and on or before 12/31/09 (*see Rev. & Tax. Code § 6452.1(i)(2)*)]. The election is irrevocable [*Rev. & Tax. Code § 6452.1(c)*]. The return must be the person's timely filed original return [Rev. & Tax. Code § 5452.1(d)(1)]. "Qualified use tax" means the California use tax imposed that has not been paid to a retailer holding a seller's permit or certificate of registration [*Rev. & Tax. Code § 6452.1(d)(2)(A)*]. The term does not include use tax that is imposed on a

lessee of tangible personal property. It also does not includeuse tax that applies to mobilehomes, registered commercial coaches, certain trailers, or to vehicles, vessels, or aircraft [*Rev. & Tax. Code § 6452.1(d)(2)(B)*]. The qualified use tax must be reported on and remitted with the person's California income tax return that is required to be filed for the tax year in which the liability for the qualified use tax was incurred [*Rev. & Tax. Code § 6452.1(e)*]. Sales and use tax penalties, refund, and credit provisions apply to use tax reported as qualified use tax on an income tax return [*Rev. & Tax. Code § 6452.1(f)*].

[8] Recordkeeping Requirements

Sellers, retailers, lessors and lessees of tangible personal property for use in California, and persons storing, using, or otherwise consuming in California tangible personal property from a retailer must maintain for four years records showing all of the following information [*Rev. & Tax. Code § 7053*; *18 Cal. Code Reg. § 1698*]:

- Gross receipts from sales or rental payments, including services that are part of the sale or lease, made within California.
- Supporting documentation for all deductions claimed.
- The total purchase price of the property purchased for sale, consumption, or lease in California.

In addition, these records must include normal accounting books and supporting documents such as bills of lading, receipts, invoices, and cash register tapes, as well as all schedules or work papers used in connection with the preparation of the returns. All records must be available on request by the SBE and failure to maintain them is considered evidence of negligence or intent to evade tax. Microfilm of primary ledgers and journals is not acceptable, although microfilm of supporting documents, such as invoices, is acceptable if verification standards are met. Taxpayers using automated data processing systems for tax accounting must have systems that meet SBE requirements [*see 18 Cal. Code Reg. § 1698*].

[9] Audits and Investigations

The SBE has broad statutory authority to enforce the sales and use tax and to adopt rules and regulations relating to its administration and enforcement [*Rev. & Tax. Code § 7051*]. In conjunction with this power, the SBE may conduct investigations to verify the accuracy of a tax return or to determine the amount of tax liability if no return has been filed. The SBE may examine the books, papers, records, and equipment of any person selling tangible personal property and any person liable for the use tax. The character of a taxpayer's business may also be investigated [*Rev. & Tax. Code § 7054*].

The SBE's examination and investigation power extends to persons other than the taxpayer that is being audited and to examinations and investigations outside California. For example, the SBE can require a person otherthan the taxpayer to submit the names and addresses of purchasers of tangible personal property, the sales price of the property, the dates of sale, and other relevant information [*Rev. & Tax. Code §§ 7054, 7055*].

However, under the Harris-Katz California Taxpayers' *Bill of Rights*, an officer or employee of the SBE may not knowingly authorize or conduct an investigation or surveillance for a purpose that is not related to tax administration [*Rev. & Tax. Code § 7092*; for further discussion, *see* § *540.360* et seq.].

[10] Managed Audit Program

Taxpayers with relatively simple sales and used tax returns may, but are not required to [*see Rev. & Tax. Code § 7076(b)*], participate in a managed audit program [*Rev. & Tax. Code § 7076 et seq.*]. Taxpayers that meet statutory

criteria [*Rev. & Tax. Code § 7076.1*] are allowed to participate in the program. If an SBE identifies an underpayment of tax during any audit under the program, interest on the underpayment is imposed at a rate that is one-half the rate of interest that would otherwise be charged for the underpayment [*Rev. & Tax. Code § 7076.4*]. A taxpayer may participate in the program only if all the following criteria are met [*Rev. & Tax. Code § 7076.1*]:

- The taxpayer's business involves few or no statutory exemptions.
- The taxpayer's business involves a single or small number of clearly defined taxability issues.
- The taxpayer is taxed under the Sales and Use Tax Law and agrees to participate in the managed audit program.
- The taxpayer has the resources to comply with the managed audit instructions provided by the board.

[11] Rules and Regulations

The SBE has the power to adopt and enforce rules and regulations relating to the administration and enforcement of the sales and use tax laws. The SBE also has the discretion to apply retroactively the rules and regulations it adopts [*Rev. & Tax. Code § 7051*]. Rules and regulations promulgated by the SBE are subject to the procedural requirements of *Gov. Code §§ 11346-11347.5* [*Pacific Southwest Airlines v. State Bd. of Equalization (1977) 73 Cal. App. 3d 32, 35-37, 140 Cal. Rptr. 543]* .

The SBE has no authority to promulgate a regulation that is inconsistent with the governing statute. Regulations that alter or amend the statute or enlarge or impair its scope are void, and courts not only may, but must, strike them down [*Aerospace Corp.v. State Bd. of Equalization (1990) 218 Cal. App. 3d 1300, 1311, 267 Cal. Rptr. 685* (holding invalid former version of *18 Cal. Code Reg. § 1618*, which specifies when title to overhead materials passes to government)].

[12] Recomputation of Tax by SBE

If the SBE determines that the tax due shown on a return is incorrect, it may compute and determine what it believes is the correct amount of tax on the basis of whatever information is in its possession. It may make one or more deficiency determinations of the amount due for one or more periods [*Rev. & Tax. Code § 6481*].

If the SBE concludes that the taxpayer's books and records are inadequate, it may determine the tax liability using what it considers the best available information and method. The burden is on the taxpayer to establish that the books and records are adequate or that a different method of calculating the tax would be better [*Rev. & Tax. Code §§ 6481, 7053, 7054*; *18 Cal. Code Reg § 1698*; *Maganini v. Quinn (1950) 99 Cal. App. 2d 1, 4-7, 221 P.2d 241]* . The SBE is not limited to a review of books and records in conducting an audit, but may also look behind the books and review original records, such as purchase invoices, sales slips, cash register tapes, and inventory records [*People v. Schwartz (1947) 31 Cal. 2d 59, 64, 187 P.2d 12* ; *Maganini v. Quinn (1950) 99 Cal. App. 2d 1, 4-7, 221 P.2d 241* ; *Rathjen Bros. v. Collins (1942) 50 Cal. App. 2d 765, 768-773, 123 P.2d 925]* .

A complete set of books and records that are internally consistent may not be sufficient to overcome the presumption of correctness that attaches to the SBE's determination of deficiency. The burden is still on the taxpayer to explain any discrepancy between the books and records and the SBE's determination. The SBE is authorized to compute and determine the amount of tax due on the basis of any information within its possession [*Riley B's, Inc. v. State Bd. of Equalization (1976) 61 Cal. App. 3d 610, 614-617, 132 Cal. Rptr. 520]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesAdministration & ProceedingsAudits & InvestigationsTax LawState & Local TaxesAdministration & ProceedingsCollectionTax LawState & Local TaxesSales TaxExemptionsTax LawState & Local TaxesSales TaxImposition of TaxTax LawState & Local TaxesUse TaxImposition of Tax

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C. SALES AND USE TAXES
2. Nature and Administration of Sales and Use Taxes

47-540 California Forms of Pleading and Practice--Annotated §§ 540.133-540.149

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

[Reserved]

§§ 540.133[Reserved]

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3. Deficiency and Jeopardy Determinations

47-540 California Forms of Pleading and Practice--Annotated § 540.150

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.150 Deficiency Assessments

[1] Audit

The first stage of a deficiency assessment is an audit of the taxpayer. In the audit, the SBE may review books, papers, records, equipment, and other data in determining whether a taxpayer has correctly determined sales and use tax liability [*Rev. & Tax. Code § 7054*]. At the conclusion of the audit, the auditor will usually give the taxpayer an informal explanation of the proposed adjustments. If no agreement is reached at that time, the taxpayer has two other opportunities for informal review and negotiation: (1) the taxpayer can request a conference with the auditor's supervisor; and (2) when the taxpayer receives the audit report, the SBE invites the taxpayer to meet with a local Board representative, usually the principal auditor in the district, before the proposed deficiency audit is assessed and billed [*see* Audits, SBE Publication 76 (September 2007)]. SBE Publication 76 is available online at www.boe.ca.gov/pdf/pub76.pdf.

[2] Formal Deficiency Notice Requirements

[a] Service

If the SBE makes a deficiency determination, it must give the taxpayer written notice within the applicable period of limitations [*see § 540.152*]. The SBE's Notice of Determination may be personally served, but typically it is served by mail. The giving of notice of the deficiency is complete at the time of mailing. The SBE's established practice is to have the date on the notice coincide with the date of actual mailing. The notice must be addressed to the retailer or user at the address that appears in the records of the SBE [*Rev. & Tax. Code §§ 6486, 6487*].

If the party being served is a corporation, a notice is sufficient if it is addressed to the corporation. The notice need not be directed to particular individuals acting on behalf of the corporation in the specific matter involved, even if the SBE has knowledge of those individuals [*Pacific Gas & Electric Co. v. State Bd. of Equalization (1955) 134 Cal. App. 2d*

149, 152-153, 285 P.2d 305] . Personal service of a notice on a corporation may be made by delivering the notice to any person designated in the Corporations Code or the Code of Civil Procedure to receive service of a summons and complaint in a civil action [*see Code Civ. Proc. §§ 416.10, 416.20*].

[b] Notice to Successors in Interest

The SBE enforces the obligation of a successor in interest for unpaid taxes [*see § 540.132[5]*] by serving a Notice of Successor Liability on the successor. This not ice is served in the same manner as prescribed for service of a Notice of Deficiency Determination and must be served not later than three years after the date the SBE is notified of the purchase of the business or the stock of goods [*Rev. & Tax. Code §§ 6486, 6814(a)*; *see People v. Gabriel (1943) 57 Cal. App. 2d 788, 791-794, 135 P.2d 378* (decided under prior law)].

[c] Notice to Sureties

The statutes requiring notice of deficiency determinations [*see, e.g., Rev. & Tax. Code § 6486*] do not provide for notice to sureties who write bonds as security for taxes [*see Rev. & Tax. Code § 6701*; *see also § 540.132[6]*]. The lack of such notice is constitutional, even though notice to a surety would allow the surety to pay the asserted liability, avoid penalties, and reduce the amount of interest due [*American Fidelity Fire Ins. Co. v. State Bd. of Equalization (1973) 34 Cal. App. 3d 51, 55, 109 Cal. Rptr. 545]* .

The form of suretyship agreement used by the SBE contains the surety's advance consent to waivers or modifications of the liability negotiated between the taxpayer and the SBE. Thus, the surety will not be exonerated pursuant to *Civ. Code § 2819* if the taxpayer waives the statutory deadline for issuance of a deficiency determination [*State Bd. of Equalization v. Carleton (1990) 223 Cal. App. 3d 1607, 1610-1611, 273 Cal. Rptr. 436]* .

[d] Notice Regarding Estates

If a taxpayer dies, the SBE is required to issue a Notice of Determinations for anydeficiency arising before death within four months after receiving a written request, in the form required by the SBE, from a fiduciary of the taxpayer's estate or trust or any other person liable for any portion of the tax [*Prob. Code § 9201(b)*; *Rev. & Tax. Code § 6487.1*]. The statutory requirement that creditors file claims against decedents within four months after the publication of notice does not apply to the audit and assessment of sales and use tax liabilities [*People v. Hochwender (1942) 20 Cal. 2d 181, 183-184, 124 P.2d 823]* .

[3] Determination if No Return Is Filed

If a taxpayer who is liable for sales or use tax fails to file a tax return, the SBE may estimate either the taxpayer's gross receipts (for sales tax) or (2) the total sales price of tangible personal property (for use tax). The estimate is made for those periods for which no return is filed, and may be based on any information in the SBE's possession. The SBE must compute and determine the amount of tax due based on its estimate. In addition, the SBE must impose a penalty equal to 10 percent of the tax due [*Rev. & Tax. Code § 6511*]. If the taxpayer's failure to file is due to fraud or to an intent to evade tax, an additional penalty of 25 percent of the tax due is added to the 10 percent penalty [*Rev. & Tax. Code § 6514*].

In making its determination, the SBE may offset any overpayments the taxpayer has made for other periods and any interest on those overpayments against the underpayments, penalties, and interest on the underpayments [*Rev. & Tax. Code § 6512*].

Promptly after making its determination, the SBE must give the taxpayer written notice of the estimate, determination, and penalty. The notice must be served personally or by mail in the same manner as service of the notice of a deficiency determination [*Rev. & Tax. Code § 6515*; *see § 540.150[2]*].

[4] Finality of Deficiency Determination

The SBE's determination becomes final 30 days after service of the notice of determination, unless the person against whom it is made or another person directly interested files a petition for redetermination during that 30-day period [*Rev. & Tax. Code § 6561*; *see § 540.453[9]*; *see also § 540.530*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesAdministration & ProceedingsAudits & InvestigationsTax LawState & Local TaxesAdministration & ProceedingsDeficienciesTax LawState & Local TaxesAdministration & ProceedingsFailure to File ReturnTax LawState & Local TaxesSales TaxFailure to Pay TaxTax LawState & Local TaxesUse TaxFailure to Pay Tax

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47-540 California Forms of Pleading and Practice--Annotated § 540.151

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.151 Jeopardy Determination

[1] Notice

The SBE may determine a taxpayer's sales and use tax liability and declare the tax due immediately whenever it believes collection of the tax will be jeopardized by delay. The SBE must note on the face of the determination that collection will be jeopardized by delay [*Rev. & Tax. Code § 6536*]. The SBE must give the taxpayer notice of a jeopardy determination by either personal service or service by mail in the same manner as a notice of a deficiency determination [*Rev. & Tax. Code § 6539*; *see § 540.150[2]*].

[2] Finality of Jeopardy Determinations

A jeopardy assessment is due and payable immediately [*Rev. & Tax. Code § 6536*]. Jeopardy determinations not paid within 10 days after service of notice become final and subject to interest and penalties, unless during that 10-day period the taxpayer has filed a petition for redetermination and posted security in the amount required by the SBE. Except for the shorter filing period and the requirement of posting security, the procedures applicable to redetermination of a jeopardy assessment are the same as those for redeterminations of deficiency determinations [*Rev. & Tax. Code §§ 6537, 6538*; *see § 540.453[9]*; *see also § 540.530*].

[3] Application for Administrative Hearing

[a] Procedure

A taxpayer against whom a jeopardy determination has been made may, with or without complying with the requirements of *18 Cal. Code Reg. § 5222.4* (which concerns a petition for redetermination), apply for an administrative hearing [*18 Cal. Code Reg. § 5225*]. Thus, for example, if the jeopardy determination becomes final because the taxpayer either does not timely file a petition for redetermination or fails to post adequate security, an alternative

procedure for an administrative hearing is available. Under this alternative procedure, a taxpayer served with notice of a jeopardy determination may apply for an administrative hearing for one or more of the following purposes [*Rev. & Tax. Code § 6538.5*; *18* Cal. Code Reg. § 5225(a); *see Dupuy v. Superior Court (1975) 15 Cal. 3d 410, 415-416, 124 Cal. Rptr. 900, 541 P.2d 540*]:

- To establish that the determination is excessive;
- To establish that the sale of property that may be seized after issuance of the jeopardy determination or any part thereof should be delayed, pending the administrative hearing, because the sale would result in irreparable injury to the taxpayer;
- To request the release of all or a part of the seized property to the taxpayer;
- To request a stay of collection activities; or
- To request administrative review of any other issue raised by the jeopardy determination.

The application for an administrative hearing must be in writing, be filed within 30 days after service of the notice of jeopardy determination, and state the specific factual and legal grounds on which it is founded. The taxpayer does not have to post security to file the application and to obtain a hearing [*Rev. & Tax. Code § 6538.5*; *18* Cal. Code Reg. § 5228(a)]. However, if the taxpayer does not deposit security within the 10-day period for filing a petition for redetermination, the filing of the application will not stay collection activities except sale of the seized property. The seized property cannot be sold without the owner's consent during the first 30 days after service of the notice of jeopardy determination nor while a timely application for an administrative hearing is pending [*Rev. & Tax. Code §§ 6538, 6538.5*; *18* Cal. Code Reg. §§ 5227, 5228(b), (c)]. Storage of the property during the period the application is pending is at the applicant's expense [*18 Cal. Code Reg. § 5228(b)*].

If the taxpayer fails to file a timely application but can show reasonable cause for the failure, the SBE may nevertheless allow the late filing of an application and grant an administrative hearing [*Rev. & Tax. Code § 6538.5*; *18* Cal. Code Reg. § 5226(c)].

The filing of an application does not affect the finality date of the determination, the penalty, or interest [*Rev. & Tax. Code §§ 6537, 6538.5*].

[b] Conduct of Administrative Hearing

On receipt of an application for administrative hearing, SBE staff will promptly acknowledge its receipt, assign the application to the Appeals Division for an appeals conference, schedule an appeals conference, and notify the applicant regarding the date, time, and location of the appeals conference [*18 Cal. Code Reg. § 5229(a)*]. For discussion of the appeals conference and procedures, see *§ 540.190[4]*.

[c] Notice and Conduct of SBE Hearing

On completion of the appeals conference, Appeals Division staff will notify the applicant of the issuance of a decision and recommendation [*see § 540.151[3][d]*]. If the applicant disagrees with the decision and recommendation in whole or in part, the applicant may request an oral hearing before the SBE. If an oral hearing is granted, the matter will be scheduled for hearing as soon as practicable [*18 Cal. Code Reg. § 5229(c)*]. For discussion of the oral hearing before the SBE, see *§ 540.190[4]*.

[d] Administrative Hearing Determination and Notices

On completion of the appeals conference, Appeals Division staff will promptly issue a determination as to each issue raised in the application and provide notice of the determination to the applicant in a document called a decision and recommendation. Appeals Division staff may find that the applicant is not entitled to the requested relief, or may issue one or more of the following orders [*18 Cal. Code Reg. § 5229(b)*]:

- That the sale of the property will irreparably damage the applicant and that the property shall not be sold.

- That the property, or a portion of it, be released to the applicant or to the person from whom it was seized.

- That the tax as determined is excessive and that the amount of the determination be reduced.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesAdministration & ProceedingsAssessmentsTax LawState & Local TaxesSales TaxFailure to Pay TaxTax LawState & Local TaxesUse TaxFailure to Pay Tax

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47-540 California Forms of Pleading and Practice--Annotated § 540.152

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.152 Statute of Limitations on Notice of Deficiency Determinations

[1] If Return Is Filed

The SBE must mail notices of deficiency determinations with respect to quarterly returns within the later of either (1) three years after the end of the calendar month following the quarterly period or (2) three years after the return is filed. For returns filed on an annual basis, the SBE must mail notices within the later of either (1) three years after the end of the calendar month following the end of the year or (2) three years after the filing of the return [*Rev. & Tax. Code § 6487*; *see also Rev. & Tax. Code § 6487.2* (special rules for determinations issued to individuals who are general partners in partnership, whose withdrawal from partnership causes change in ownership, and who fail to notify SBE of withdrawal); *see also Rev. & Tax. Code § 6487.3* (special limitations rules for taxpayers that elect to report qualified use tax on their California income tax returns in accordance with *Rev. & Tax. Code § 6452.1*)]. These time periods are computed by excluding the first day and including the last. If the last day of the specified number of days falls on a Saturday, Sunday, or holiday, an action is timely if it is taken on the first following day that is not a Saturday, Sunday, or holiday [STC Rul. 465.0142 (2/17/77) CCH Cal. Tax Rptr. P 63-510.76].

Although the SBE usually does not permit a statute of limitations to run in the course of an audit, taxpayers should take the statute of limitations into account before making a voluntary payment if a notice of deficiency has not been issued. A voluntary payment may stop imposition of interest on taxes due, but any voluntary payment made cannot be recovered even if the statute of limitations runs before the SBE issues a notice of deficiency [*Owens-Corning Fiberglas Corp. v. State Bd. of Equalization (1974) 39 Cal. App. 3d 532, 536, 114 Cal. Rptr. 515]* .

The taxpayer must file a return or the three-year period of limitations does not begin to run [*Rev. & Tax. Code § 6487(a), (b)*]. An early attorney general opinion held that the filing of a blank return or a return that fails to include any information concerning sales that are potentially subject to the sale or use tax does not start the running of the statute of limitations. To start the running of the statute of limitations, the return must disclose facts that enable the SBE to

determine the taxpayer's sales and use tax liability *[2 Ops. Cal. Att'y Gen. 335, 336 (1943)]* . Completion in good faith of only the sales tax portion of the combined Sales and Use Tax Return, leaving blanks in the use tax portion, is a sufficient return to start the running of the statute of limitations against the SBE [*People v. Universal Film Exchanges (1950) 34 Cal. 2d 649, 655-656, 213 P.2d 697* (overruling *9 Ops. Cal. Att'y Gen. 269, 271 (1947)* , which required affirmative entry such as "none" or "0," or line or cross on use tax portion of return); *see Rev. & Tax. Code § 6453* (contents of returns)].

A special rule applies if a purchaser satisfies all of the following conditions [*Rev. & Tax. Code § 6487.06(b)*]:

- The purchaser voluntarily files an individual use tax return for tangible personal property purchased from a retailer outside California for storage, use, or other consumption in California.

- The purchaser resides or is located in California and has not previously registered with the SBE or filed an individual use tax return with the SBE or reported an amount on his or her individual California income tax return.

- The purchaser is not engaged in business in California as a retailer.

- The purchaser has not been contacted by the SBE regarding failure to report the use tax.

- The SBE has determined that the purchaser's failure to file an individual use tax return or to otherwise report, or pay the use tax, was due to reasonable cause and was not caused by reason of negligence, intentional disregard of the law, or an intent to evade use taxes.

If the above conditions apply, then, notwithstanding *Rev. & Tax. Code § 6487*, theperiod during which a deficiency determination may be mailed to the purchaser is limited to three years after the last day of the calendar month following the quarterly period for which the amount is proposed to be determined [*Rev. & Tax. Code § 6487.06(a)*]. However, this does not apply to purchases of vehicles, vessels, or aircraft [*Rev. & Tax. Code § 6487.06(d)*]. If the SBE makes a determination that the purchaser's failure to timely report or remit the tax is due to reasonable cause or to circumstances beyond the purchaser's control, the purchaser may be relieved of any penalties imposed under the Sales and Use Tax Law. A purchaser seeking relief from penalties must file a statement, signed under penalty of perjury, setting forth the facts that form the basis for the claim for relief [*Rev. & Tax. Code § 6487.06(c)*].

[2] If No Return Is Filed

If the taxpayer has failed to file a return for a particular period, the SBE may mail a notice of deficiency determination within eight years after the end of the month following either the quarterly period or the one-year period, depending on whether the taxpayer files quarterly or annual returns [*Rev. & Tax. Code § 6487(a)*].

[3] Fraud or Intent to Evade Tax

None of the periods of limitation governing service of a notice of deficiency apply if the deficiency is based on fraud or on an intent to evade sales and use tax statutes or regulations. Fraud is an actual, intentional wrongdoing, and an intent to evade requires a specific purpose to evade a tax that is believed to be owed. The SBE has the burden of proving fraud [*Marchica v. State Board of Equalization (1951) 107 Cal. App. 2d 501, 509, 237 P.2d 725]* .

[4] Extension of Period of Limitation

The period within which the SBE is required to mail a notice of deficiency determination can be extended if the SBE obtains the taxpayer's consent in writing. The SBE can also obtain subsequent agreements to extend the time further.

However, the taxpayer's consent must be obtained before the time has otherwise expired. Once the period of limitation has expired, it cannot be reopened [*Rev. & Tax. Code § 6488*].

[5] Effect of Notice of Deficiency of Other Tax

Neither the three-year nor the eight-year limitation period begins to run on a sales tax deficiency, even if the SBE has issued a timely use tax determination for the same property. Likewise, neither period of limitation begins to run on a use tax deficiency, even if the SBE has issued a timely sales tax determination for the same property [*Rev. & Tax. Code § 6487(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsTax LawState & Local TaxesAdministration & ProceedingsDeficienciesTax LawState & Local TaxesAdministration & ProceedingsTax Avoidance & EvasionTax LawState & Local TaxesSales TaxFailure to Pay TaxTax LawState & Local TaxesUse TaxFailure to Pay Tax

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AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

[Reserved]

§§ 540.153[Reserved]

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4. Interest and Penalties

47-540 California Forms of Pleading and Practice--Annotated § 540.170

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.170 Interest

[1] When Applied

Both the taxpayer and the SBE must pay interest on certain amounts. Taxpayers must pay interest on sales and tax deficiencies that arise from the following:

- Failure to timely pay tax [*Rev. & Tax. Code § 6591*; *see also Rev. & Tax. Code § 6592.5* (prepayments)].
- Deficiency determinations [*Rev. & Tax. Code § 6482*].
- Determinations after failure to file returns [*Rev. & Tax. Code § 6513*].
- Jeopardy determinations [*Rev. & Tax. Code § 6537*].
- Extensions of time [*Rev. & Tax. Code § 6459*].

The SBE must pay the taxpayer interest on overpayments of sales and use tax that arise from the following:

- Offsets [*Rev. & Tax. Code § 6512*].
- Refunds and credits [*Rev. & Tax. Code §§ 6907, 6908*].
- Refund judgments for taxpayers [*Rev. & Tax. Code § 6936*].

[2] Statutory Rate of Interest

The statutory rate of interest on deficiencies is an adjusted annual rate, which is based on the rate of interest imposed on underpayments of federal income taxes [*I.R.C. § 6621*], plus three percentage points. The adjusted annual rate is redetermined every six months [*Rev. & Tax. Code § 6591.5(a)-(c)*]. The statutory rate of interest on overpayments also changes every six months, based on the bond equivalent rate of 13-week treasury bills established at the first auction held during either January or July [*Rev. & Tax. Code § 6591.5(d)*]. The amount of interest, or any other amount determined by reference to that amount of interest, is computed as simple interest, not compound interest [*Rev. & Tax. Code § 6591.5(e)*].

Deficiency determinations other than penalties, whether arising from an examination of a return or from a determination made by the SBE without a return, bear interest at the statutory rate from the last day of the month following the quarterly period in which the tax deficiency should have been included in a return until the date of payment [*Rev. & Tax. Code §§ 6481, 6482, 6511, 6513, 6591.5(b)*].

If the SBE grants the taxpayer an extension of time to file a return and pay tax, interest at the statutory rate accrues from the date on which the tax would have been due and payable had the SBE not granted the extension [*Rev. & Tax. Code § 6459*; *18 Cal. Code Reg. § 1703(b)(4)*]. However, if the SBE has granted an extension to a creditor of the state of California who has not been paid because of the state's failure to adopt a budget, no interest is due on the portion of tax payment equal to the amount owed the creditor by the state on the due date of the tax payment [*Rev. & Tax. Code § 6459(b)*; *see § 540.132*].

Taxpayers with an underpayment who are participating in an audit under the managed audit program are subject to interest on the underpayment at a rate that is one-half the rate of interest that would otherwise be charged for the underpayment [*Rev. & Tax. Code § 7076.4*; *see § 540.132[10]*].

[3] Interest on Jeopardy Determinations

If the SBE makes a jeopardy determination and the tax determined to be due is notpaid within 10 days after service of the notice, interest atthe statutory rate on both the tax and the 10 percent penalty for failure to timely pay tax accrues from the date the tax would ordinarily have been due [*Rev. & Tax. Code §§ 6537, 6591, 6591.5*; *see also § 540.151*].

[4] Interest on Overpayments

If a taxpayer has paid more sales and use tax than is due, the SBE must pay the taxpayer interest on the overpayment at the statutory rate [*Rev. & Tax. Code § 6907*]. If a determination covers several tax periods, some of which involve overpayments to be offset against the underpayments, the interest is computed separately on the overpayments and the underpayments [*Rev. & Tax. Code §§ 6483, 6512*; *see Rev. & Tax. Code §§ 6591, 6907* (interest on underpayments, overpayments, respectively)]. However, if the SBE determines that the taxpayer has made any overpayment intentionally or by reason of carelessness, the SBE cannot pay interest on that overpayment [*Rev. & Tax. Code § 6908(a)*; *18 Cal. Code Reg. § 1703(b)(5)(B)*; *see also § 540.230[3][c]*].

[5] Disaster Relief From Payment of Interest

The SBE may relieve a taxpayer of the payment of interest if the SBE finds that the failure to make a return or pay tax due is caused by a disaster and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect [*Rev. & Tax. Code § 6593*]. Although the original purpose of this statute was to provide relief for those who suffered damage from the rains, floods and mudslides caused by the storms of early 1980, the statutory language now applies to all disasters [*see Rev. & Tax. Code § 6593*]. This relief from payment of interest applies only to interest imposedon the following [*Rev. & Tax. Code § 6593*; *see also Rev. & Tax. Code §§ 6459, 6480.4, 6513, 6591, 6592.5*]:

- Taxpayers that have received extensions of time to pay tax or file a return.

- Motor vehicle fuel distributors, brokers, or retailers that fail to timely remit prepayments and credits to the SBE.

- Taxpayers for whom a determination is made because they failed to file returns.

- Taxpayers that have failed to pay taxes.

- Taxpayers that have been relieved of the penalties for failure to make timely prepayments.

Taxpayers are not relieved of interest added with respect to deficiency determinations [*Rev. & Tax. Code §§ 6482, 6593*]. A taxpayer seeking relief from payment of interest must set forth the facts on which the claim for relief is based in a statement under penalty of perjury filed with the SBE [*Rev. & Tax. Code § 6593*].

[6] Estoppel

Although the conduct of representatives of the SBE cannot estop the state from collecting taxes that are properly due and owing, the SBE can be estopped from collecting interest imposed on a deficiency [*Fischbach & Moore, Inc. v. State Bd. of Equalization (1981) 117 Cal. App. 3d 627, 632, 172 Cal. Rptr. 923* ; *Market St. Ry. Co. v. State Board of Equalization (1955) 137 Cal. App. 2d 87, 103, 290 P.2d 20]* . In *Fischbach & Moore*, the taxpayer had relied on a specific, published legal interpretation by the SBE, and the court considered it inequitable and unjustifiable to impose interest on the deficiency. Whether other courts estop the collection of interest on acknowledged deficiencies may well depend on the conduct by the SBE that created the potential estoppel [*Fischbach & Moore, Inc. v. State Bd. of Equalization (1981) 117 Cal. App. 3d 627, 632-633, 172 Cal. Rptr. 923* ; *but see King v. State Bd. of Equalization (1972) 22 Cal. App. 3d 1006, 1016, 99 Cal. Rptr. 802* (taxpayer's estoppel argument rejected)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesAdministration & ProceedingsAssessmentsTax LawState & Local TaxesAdministration & ProceedingsCredits, Overassessments & RefundsTax LawState & Local TaxesAdministration & ProceedingsDeficienciesTax LawState & Local TaxesSales TaxFailure to Pay TaxTax LawState & Local TaxesUse TaxFailure to Pay Tax

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C. SALES AND USE TAXES
4. Interest and Penalties

47-540 California Forms of Pleading and Practice--Annotated § 540.171

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.171 Penalties

[1] Imposition

A taxpayer may be subject to penalties for any of the following:

- Failure to timely pay tax or the amount of a deficiency or jeopardy determination [*Rev. & Tax. Code §§ 6476-6478, 6487, 6511, 6514, 6514.1, 6537, 6565, 6591*, 6597].

- Failure to file a return [*Rev. & Tax. Code §§ 6511, 6591*].

- Negligence, intentional disregard of laws or regulations, fraud, or intent to evade tax [*Rev. & Tax. Code §§ 6484, 6485*].

- Evasion of tax by registering vehicles, vessels, or aircraft outside California [*Rev. & Tax. Code § 6485.1*].

- Evasion of taxes by failure to obtain a seller's permit [*Rev. & Tax. Code § 7155*].

Most penalties are 10 percent of the tax due [*see, e.g., Rev. & Tax. Code §§ 6484, 6511, 6537, 6591*], with three important exceptions. Failure to file a return or pay tax that is due to fraud incurs a 25 percent penalty [*Rev. & Tax. Code §§ 6485, 6514*]. Failure to make timely remittance of sales tax collected from buyers incurs a 40 percent penalty [*Rev. & Tax. Code § 6597(a)*]. Evasion of tax either by registration of an aircraft, vessel, or vehicle outside California or by failure to obtain a seller's permit in any period for which tax liability exceeds $1000 incurs a 50 percent penalty [*Rev. & Tax. Code §§ 6485.1, 6514.1, 7155*].

[2] Relief for Reasonable Cause

If the SBE finds that a taxpayer's failure to file a return or pay tax is due to reasonable cause and circumstances beyond the taxpayer's control and occurs notwithstanding the exercise of ordinary care and the absence of willful neglect, it can relieve a taxpayer of various penalties involving failure to pay or collect tax due, untimely tax payments, or failure to file returns [*Rev. & Tax. Code §§ 6592(a), 6597(a)(2)(b)*; *18 Cal. Code Reg. § 1703(c)(8)*]. This relief is not available for either (1) the 10 percent penalty imposed if any part of a deficiency determination is due to negligence or intentional disregard of statutes and regulations, or the 25 percent penalty imposed if any part of a deficiency determination is due to fraud or intent toevade statutes or regulations [*Rev. & Tax. Code § 6592(a)*; *see Rev. & Tax. Code §§ 6484, 6485*].

A taxpayer seeking relief from penalties must file a statement with the SBE setting forth under penalty of perjury the facts on which the claim for relief is based. These facts should show that the failure was due to reasonable cause and circumstances beyond the taxpayer's control, and was not a result of the taxpayer's willful neglect [*Rev. & Tax. Code § 6592(b), 18 Cal. Code Reg. § 1703(c)(8)*]. The SBE usually grants first requests for relief, but subsequent, repetitive requests for relief require a strong showing by the taxpayer. The SBE must establish criteria that provides for efficient resolution of requests for relief under *Rev. & Tax Code § 6592* [*Rev. & Tax. Code § 6592(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesAdministration & ProceedingsFailure to File ReturnTax LawState & Local TaxesAdministration & ProceedingsFailure to Pay TaxTax LawState & Local TaxesAdministration & ProceedingsTax Avoidance & EvasionTax LawState & Local TaxesSales TaxFailure to Pay TaxTax LawState & Local TaxesUse TaxFailure to Pay Tax

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47-540 California Forms of Pleading and Practice--Annotated § 540.172

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.172 Relief From Taxes, Interest, and Penalties for Reliance on SBE Advice

Taxpayers who fail to file a timely tax return or pay tax due because of their reasonable reliance on written advice from the SBE may be relieved from taxes, interest, and penalties. Relief is available if the SBE finds that (1) the taxpayer requested advice from the SBE in writing regarding whether a particularly described activity or transaction was subject to tax; (2) the SBE responded in writing advising the taxpayer whether the activity or transaction was subject to tax or stating the conditions under which it could be subject to tax; (3) in reliance on the SBE's written advice, the taxpayer either failed to charge or collect sales or use tax from a customer or failed to pay use tax; and (4) the tax liability applies to a transaction or activity that occurred before the SBE either rescinded or modified its original advice or before a change in the law. A taxpayer seeking relief must file with the SBE a copy of the taxpayer's written request, a copy of the SBE's written advice, a statement under penalty of perjury of the facts on which the claim for relief is based, and any other information the SBE requires [*Rev. & Tax. Code § 6596*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstTax LawState & Local TaxesAdministration & ProceedingsFailure to File ReturnTax LawState & Local TaxesAdministration & ProceedingsFailure to Pay TaxTax LawState & Local TaxesSales TaxFailure to Pay TaxTax LawState & Local TaxesUse TaxFailure to Pay Tax

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47-540 California Forms of Pleading and Practice--Annotated §§ 540.173-540.189

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

[Reserved]

§§ 540.173[Reserved]

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5. Petition for Redetermination

47-540 California Forms of Pleading and Practice--Annotated § 540.190

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.190 Petition for Redetermination

[1] In General

The procedures discussed here apply to redeterminations of both jeopardy determinations and deficiency determinations, although there are additional important procedural requirements applicable only to jeopardy determination discussed in *§ 540.151[3]*.

A person against whom a California sales or use tax determination has been made or any person directly interested may challenge the determination by filing with the SBE a written petition for a redetermination [*Rev. & Tax. Code § 6561*; *18* Cal. Code Reg. § 5210(a); *see § 540.530*]. A taxpayer cannot bypass the petition for redetermination by seeking a judicial determination that no tax is payable because of the prohibition against injunction and other processes to prevent collection of the sales and use tax [*Rev. & Tax. Code § 6931*; *Casey v. Bonelli (1949) 93 Cal. App. 2d 253, 254-255, 208 P.2d 723*]. The only other way a taxpayer can contest a deficiency is to pay the tax and file a claim for refund [*Rev. & Tax. Code § 6933*; *see § 540.231*].

Although no statute explicitly requires a petition for redetermination as a prerequisite to suit, case law considers the filing of a petition for redetermination one of the administrative remedies that taxpayers must exhaust before filing suit to contest an assessment or seek a refund [*People v. West Publishing Co. (1950) 35 Cal. 2d 80, 87-88, 216 P.2d 441*].

The SBE has the power to conduct a second examination after a petition for redetermination has been filed, and there is no limitation on the amount that it can assert as a deficiency. Thus, a taxpayer that files a petition for redetermination risks a second audit that may increase the amount of the asserted deficiency. [*Rev. & Tax. Code §§ 6481, 6563*; *Maganini v. Quinn (1950) 99 Cal. App. 2d 1, 5-8, 221 P.2d 241*].

[2] Time to File

A petition for redetermination of a deficiency determination must be filed within 30 days after service of the notice of determination. If it is not filed within the 30-day period, the SBE's determination becomes final [*Rev. & Tax. Code § 6561*]. A petition for redetermination of a jeopardy determination must be filed and security posted within 10 days, rather than 30 days, after service of the SBE's notice [*Rev. & Tax. Code § 6538*; *18* Cal. Code Reg. § 5222.6(a); *see § 540.151[2]*].

[3] Form and Contents

The petition must be in writing and set forth the specific grounds relied on [*see § 540.530[1]*]. The petition may, however, be amended to set forth additional grounds at any time before the SBE issues its order or decision on the petition [*Rev. & Tax. Code § 6561.5*; *18* Cal. Code Reg. § 5212.5]. No particular form of petition is prescribed; it can be in the form of letter. The SBE provides a simple form, which can be downloaded from, or completed on-line at, the SBE's web site at http://www.boe.ca.gov/pdf/boe416.pdf. That form may be used but is not required [*18 Cal. Code Reg. § 5212(c)*].

The petition must be signed by the petitioner or the petitioner's authorized representative [*18 Cal. Code Reg. § 5212(a)(4)*]. A request for an appeals conference or an oral hearing, or both, should be included in the petition [*18 Cal. Code Reg. § 5212(b)*].

Once a petition for redetermination is assigned to the appropriate section or group based on the type of tax or fee at issue [*see 18 Cal. Code Reg. § 5216*], SBE staff from the assigned section or group will promptly send the petitioner a letter acknowledging receipt of the petition for redetermination and providing the contact information for the assigned section or group [*18 Cal. Code Reg. § 5217(b)*]. The SBE must give the petitioner 10 days' notice of the time and place of hearing [*Rev. & Tax. Code § 6562*].

[4] Hearings

[a] Informal Appeals Conference

If the petition for redetermination is referred to the Appeals Division for an appeals conference, SBE staff will contact the petitioner to verify and update the petitioner's contact information and to inquire as to whether the petitioner would prefer that the appeals conference be held at a specific location. Unless the petitioner indicates a preference, the appeals conference will be held in the district office where the SBE's initial action occurred, which ultimately generated the petition for redetermination [*18 Cal. Code Reg. § 5260*]. Staff will prepare and mail to the petitioner a notice that will include the date, time, and location of the appeals conference. The notice will be accompanied by a response form, which the petitioner should complete and return within 15 days of the date the notice was mailed to the petitioner. Also within that 15-day period, the petitioner should submit any arguments and documentary evidence, not previously submitted, on which the petitioner will rely [*18 Cal. Code Reg. § 5261(a)-(c)*].

Appeals conferences are not recorded by the SBE. If the petitioner intends to record the appeals conference, the petitioner must check the appropriate box on the response form and agree to provide a copy of any recording or transcript to the Appeals Division on request [*18 Cal. Code Reg. § 5261(d)*].

The appeals conference can be (but will not necessarily be) rescheduled or postponed on the petitioner's request [*see 18 Cal. Code Reg. § 5262*]. Also, the petitioner can arrange to expedite the appeals conference [*see 18 Cal. Code Reg. § 5263*].

The appeals conference will be held by an Appeals Division staff person having no prior involvement in the matter being discussed at the appeals conference. It is the responsibility of that staff person to take a fresh look at the law and the facts and make his or her own objective recommendation [*18 Cal. Code Reg. § 5264(a)*; *see generally 18 Cal. Code*

Reg. § 5264(b)-(f) (nature and conduct of conference; parties; petitioner's failure to appear)]. Within 90 days, usually, after the conference, the staff person will send, to all parties, a report (called "Decision and Recommendation") that contains the following: a concise statement of each issue raised by the petitioner, the position of SBE staff in the appropriate department on each issue raised by the petitioner, a statement of the relevant law applicable to each issue raised by the petitioner, a clear application of the relevant law to all the relevant information presented to the Appeals Division staff person, the staff person's conclusions and recommendations after applying the relevant law to all of the relevant information, and a summary of any additional information or documentation that was not presented to the staff person but which might be relevant to a resolution of the issues raised by the petitioner [*18 Cal. Code Reg. § 5265(a),(c)*].

The petitioner or another party may obtain a reconsideration of an adverse decision and recommendation or may obtain an oral hearing before the SBE respecting the petitioner's or other party's disagreement with the decision and recommendation [*18 Cal. Code Reg. § 5266*].

[b] Formal Hearings

If the taxpayer requests an oral hearing before the SBE, a notice of the hearing setting forth the date, time, and place is sent to the taxpayer at least 10 days before the hearing date [*Rev. & Tax. Code § 6562*]. The SBE is required to hold regular meetings each month at times and places within the state as the chairperson directs--but at least one regular meeting must be held in Sacramento each quarter--and may hold special meetings at such times and places as the chairperson directs [*Gov. Code § 15609*]. In practice, the SBE's workload fluctuates throughout the year, with the number of cases scheduled in the Los Angeles area significantly exceeding the number of cases heard in Sacramento or elsewhere; therefore, the board has flexibility to hold hearings in other locations in the state, which may be necessary to better serve taxpayers or to balance the workload for both staff and board members in preparations for those meetings. The SBE tries to accommodate a taxpayer's request that the hearing take place at a particular meeting location. In any event, the taxpayer should promptly complete the portion of the notice entitled "Response to Notice of Hearing" indicating whether or not the taxpayer will make an appearance at the time and place designated.

The hearing is recorded, but the record is not transcribed unless the taxpayer requests that it be transcribed [*18 Cal. Code Reg. § 5572(c)(1)*]. The taxpayer's written request may be submitted by fax or e-mail (one of those methods is preferred by SBE staff) or by regular mail or hand delivery [*18 Cal. Code Reg. § 5572(c)(2), (4)*]. The taxpayer bears the expense for preparing the transcript [*18 Cal. Code Reg. § 5572(c)(3)*].

Although rules of evidence are not strictly applied at SBE hearings, the evidence the taxpayer presents should be relevant and as direct as possible. The SBE's counsel may cross-examine witnesses, and individual members of the SBE may also question witnesses [*see 18 Cal. Code Reg. §§ 5523.5(a), 5523.6*]. The SBE can also issue subpoenas compelling the attendance of witnesses or the production of books, records, accounts, and other papers [*Gov. Code § 15613*; *18* Cal. Code Reg. § 5523.5(b)]. The SBE may continue the hearing from time to time as necessary [*Rev. & Tax. Code § 6562*].

[5] Decision of SBE

The SBE may either decrease or increase the amount of the determination, although the SBE may increase the amount only if it asserts a claim for the increase at or before the formal SBE hearing on the taxpayer's petition for redetermination [*Rev. & Tax. Code § 6563*; STC Rul. 465.0020 (1/5/61) CCH Cal. Tax Rptr. P 63-510.71]. Thus, the SBE may increase the amount of an asserted deficiency after the preliminary hearing [*Rev. & Tax. Code § 6563*]. The SBE must specify the information on which it bases any increase [*Rev. & Tax. Code § 6563(c)*], and, unless the determination or the increase is based on fraud or an intent to evade, must assert the increase within the following limitation periods:

- For any taxpayer whose taxable base is less than $10 million in each calendar quarter to which the determination applies, within the later of either three years after the first deficiency determination or three years after records requested by the SBE were made available [*Rev. & Tax. Code § 6563(a)(1)*];

- For any other taxpayer, within the later of either eight years after the first deficiency determination or eight years after records requested by the SBE were made available [*Rev. & Tax. Code § 6563(a)(2)*]; or

- For all taxpayers, any period mutually agreed on by the taxpayer and the SBE [*Rev. & Tax. Code § 6563(b)*].

[6] When Decision Becomes Final

The SBE's order or decision on a petition for redetermination becomes final 30 days after it is served on the petitioner [*Rev. & Tax. Code § 6564*], unless a timely petition for rehearing is filed [*see 18 Cal. Code Reg. 5561(a)*; § 540.190[7]].

Service of the notice of the order or decision of the SBE can be made personally or in the same manner as prescribed for notices of deficiency determinations [*Rev. & Tax. Code § 6566*; *see § 540.150[2]*].

[7] Petition for Rehearing

A petition for rehearing may be filed within 30 days of the date on which notice of the SBE's decision is mailed to the taxpayer. The petition must either identify an irregularity in the proceedings that prevented the fair consideration of the matter, identify an accident or surprise that occurred, which ordinary caution could not have prevented, identify newly discovered, relevant evidence, which the taxpayer could not have reasonably discovered and provided prior to the SBE's decision, or demonstrate that there is insufficient evidence to justify the decision or that the decision is contrary to law [*18 Cal. Code Reg. § 5561(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationReview of Initial DecisionsTax LawState & Local TaxesAdministration & ProceedingsAssessmentsTax LawState & Local TaxesAdministration & ProceedingsDeficienciesTax LawState & Local TaxesSales TaxFailure to Pay TaxTax LawState & Local TaxesUse TaxFailure to Pay Tax

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5. Petition for Redetermination

47-540 California Forms of Pleading and Practice--Annotated §§ 540.191-540.209

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

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§§ 540.191[Reserved]

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6. SBE's Remedies to Collect Tax

47-540 California Forms of Pleading and Practice--Annotated § 540.210

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.210 SBE's Collection Remedies

[1] Remedies Other Than Lawsuit

The SBE has a variety of remedies, including the imposition of liens, available to it for the collection of sales and use tax [*Rev. & Tax. Code §§ 6701-6830*]. All these remedies are cumulative and no action taken by either the attorney general or the SBE constitutes an election to pursue one remedy to the exclusion of any others [*Rev. & Tax. Code § 6827*]. These remedies include the following:

- The SBE may serve a notice to withhold on any person or entity having possession of personal property or credits of the taxpayer, requiring the person served to freeze the responsible party's assets for 60 days or until the SBE consents to a transfer [*Rev. & Tax. Code § 6702*; *see also Code Civ. Proc. §§ 706.070-706.084* (earnings withholding orders for taxes)].

- The SBE may serve a notice of levy on any person or entity having possession or control of any credits or other personal property belonging to a retailer or other person liable for tax, requiring the party served to withhold from the credits or personal property the amount of any tax, interest, or penalties due or liability incurred, and to transmit the amount to the SBE [*Rev. & Tax. Code § 6703*; *see also Code Civ. Proc. §§ 688.010-688.050* (enforcement of state tax liability pursuant to warrant or notice of levy)].

- The SBE can obtain a judgment in favor of the state by filing a certificate with the office of the Clerk of the Superior Court of Sacramento County, or any county and requesting entry of judgment; the certificate shows the amount of tax, interest, and penalty due and the name and address of the person liable, the judgment is enforceable in the same manner as other judgments, and a recorded abstract constitutes a lien for 10 years that may be extended by rerecording [*Gov. Code § 7172*; *Rev. & Tax. Code §§ 6736-6740*; *see also Code Civ. Proc. § 688.110* (enforcement of judgment for taxes)].

- The amount of taxes owed, including interest, penalties, and costs, becomes a perfected and enforceable lien on the real and personal property of the person liable at the time the obligation becomes due and payable [*Rev. & Tax. Code § 6757(a)*]; this lien may be accorded priority over other claims if, for real property, the SBE has recorded it or if, for personal property, the SBE has filed a notice of lien with the Secretary of State [*Gov. Code §§ 7170, 7171*].

- The SBE may issue a warrant for enforcement of any liens and collection of any amounts owing; the warrant is directed to a sheriff, marshal, or the California Highway Patrol, and has the same effect and is levied in the same manner as a writ of execution [*Rev. & Tax. Code § 6776*; *see also Code Civ. Proc. §§ 688.010-688.050* (enforcement of state tax liability pursuant to warrant or notice of levy)].

- The SBE may seize and sell at public auction any nonexempt property of a retailer [*Rev. & Tax. Code §§ 6796-6799*].

For a discussion of a sales and use taxpayer's rights relating to a tax lien or levy, see *§ 540.404*.

[2] Suit for Tax

The SBE may bring an action in the name of the people of the State of California for the collection of delinquent taxes, penalties, and interest [*Rev. & Tax. Code § 6711*]. The SBE may bring its suit (1) within three years after the tax becomes due and payable, (2) within three years after the tax becomes delinquent, or (3) while a lien is in force as the result of either the recording of an abstract under *Rev. & Tax. Code § 6738* or the recording or filing of a notice of state tax lien under *Gov. Code § 7171* [*Rev. & Tax. Code § 6711*; *see § 540.210*]. If either of the three-year periods has passed, the SBE may no longer bring an action against the taxpayer personally, whether or not a recorded lien exists. If a recorded lien exists, the SBE can, of course, bring an action to enforce the lien [*People v. Garg (1993) 16 Cal. App. 4th 357, 362-364, 20 Cal. Rptr. 2d 80]* .

The SBE may bring its action in the courts of California or any other state or in federal court, and may obtain a writ of attachment as provided in the Code of Civil Procedure [*Rev. & Tax. Code §§ 6711-6713*; for discussion of writs of attachment,*see* Ch. 62, *Attachment*]. In the action, the SBE's certificate showing the delinquency is prima facie evidence of the determination of the tax or the amount of the tax, of the delinquency of the amounts set forth, and of the compliance by the SBE with all provisions relating to the computation and determination of amounts owed [*Rev. & Tax. Code § 6714*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstReal Property LawNonmortgage LiensTax LiensTax LawState & Local TaxesAdministration & ProceedingsCollectionTax LawState & Local TaxesSales TaxFailure to Pay TaxTax LawState & Local TaxesUse TaxFailure to Pay Tax

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AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

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§§ 540.211[Reserved]

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7. Taxpayers' Remedies for Overpayment of Tax

47-540 California Forms of Pleading and Practice--Annotated § 540.230

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.230 Taxpayers' Remedies for Tax Overpayment

[1] Situations Generating Overpayment

There are generally two situations in which a taxpayer may seek to recover overpayments of sales and use taxes, penalties, and interest. First, a taxpayer may erroneously overassess its tax liability, and on discovery of the error seek to recover the overpayment from the SBE. To do so, the taxpayer must first file a claim for refund with the SBE. If the SBE denies any part of the claim or fails to act on it within six months after it is filed, the taxpayer may commence a suit for refund [*Rev. & Tax. Code §§ 6932-6934*].

In the second situation, a taxpayer may receive a notice of determination from the SBE and challenge the alleged deficiency by petitioning for a redetermination [*see Rev. & Tax. Code § 6561*; *see § 540.453[9]*]. If the taxpayer is unsuccessful or if the determination becomes final without the taxpayer's having petitioned for redetermination, the taxpayer must pay the deficiency and file a claim for refund. As in the first situation, the taxpayer may then begin a suit for refund if the SBE denies the claim or fails to act on it within six months [*Rev. & Tax. Code §§ 6564, 6565, 6932-6934*].

Claims for refunds are discussed in *§ 540.231*. Suits for refund are discussed in *§ 540.232*.

[2] Intervention of Local Entity in Refund Process

A local entity for which the SBE has collected and administered local sales and use taxes must repay to the SBE the local tax portion of any refund allowed by SBE to a taxpayer. Nevertheless, the local entity has no right to notice of, or to participate or intervene in, refund proceedings initiated by retailer-taxpayers within the local entity's jurisdiction. It also has no right to seek to vacate the SBE's decision to grant a refund [*City of Gilroy v. State Bd. of Equalization (1989) 212 Cal. App. 3d 589, 602-605, 260 Cal. Rptr. 723]* .

However, the local entity may initiate proceedings for declaratory relief, injunction, or writ of mandate with respect to future collection of the tax [*City of Gilroy v. State Bd. of Equalization (1989) 212 Cal. App. 3d 589, 605-610, 260 Cal. Rptr. 723* ; *County of Sonoma v. State Board of Equalization (1987) 195 Cal. App. 3d 982, 989-990, 241 Cal. Rptr. 215]* . Similarly, a local entity has standing to bring proceedings for declaratory relief, injunction, or writ of mandate with respect to any attempts by the SBE to collect the local portion of any refund granted, which the SBE usually accomplishes by withholding offsets from current local taxes collected [*City of Gilroy v. State Bd. of Equalization (1989) 212 Cal. App. 3d 589, 605-610, 260 Cal. Rptr. 723]* .

Because of the dual functions of the SBE in administering the sales and use tax program at both the state and local level, the doctrine of collateral estoppel does not bar proceedings by a local entity brought after a refund determination is final to the taxpayer [*City of Gilroy v. State Bd. of Equalization (1989) 212 Cal. App. 3d 589, 605-607, 260 Cal. Rptr. 723]* . Although privity is usually found if an agent is party to the original proceeding, and the SBE essentially functions as the local entity's agent in collecting the tax, the SBE's function with respect to refund determinations is not to advocate or advance the local entity's position but to ascertain the facts and determine the correct application of the law [*City of Gilroy v. State Bd. of Equalization (1989) 212 Cal. App. 3d 589, 606-607, 260 Cal. Rptr. 723]* .

[3] Refunds and Credits

[a] In General

The SBE may issue refunds and credits on finding an overpayment of taxes, penalties, or interest. Refunds are distinguished from credits in that refunds are direct payments to taxpayers, whereas credits are offsets against taxes due and payable. Overpayments of taxes, penalties, or interest must be credited against any amounts due and payable by the taxpayer. Any remaining balance is then refunded [*Rev. & Tax. Code § 6901*; *see also Rev. & Tax. Code § 6935* (providing for similar offset in judgments against SBE); *see* discussion *§ 540.170[4]*, and *§ 540.232[7]*]. If an overpayment is in excess of $50,000, the SBE must obtain approval of the State Board of Control before issuing either a credit or refund [*Rev. & Tax. Code § 6901*].

[b] Issued to Retailer and Returned to Purchaser

Credits and refunds are issued only to the taxpayer or to his or her successors, administrators, or executors [*Rev. & Tax. Code § 6901*]. Because the retailer is the taxpayer of sales tax, refunds of sales tax are made to retailers [*Rev. & Tax. Code §§ 6051, 6901*; *Decorative Carpets, Inc. v. State Board of Equalization (1962) 58 Cal. 2d 252, 254-255, 23 Cal. Rptr. 589, 373 P.2d 637]* . If a retailer collects an excessive amount of sales tax from its customers and pays it over to the SBE, the SBE must issue a refund to the retailer, but the refund is conditioned on satisfactory proof that the retailer has returned or will return the refunded amount to the retailer's customers [*18 Cal. Code Reg. § 1700(b)(2), (3)*; *Decorative Carpets, Inc. v. State Board of Equalization (1962) 58 Cal. 2d 252, 255-256, 23 Cal. Rptr. 589, 373 P.2d 637]* . One exception to this rule is that interstate airline carriers are treated as the retailer, and have standing pursuant to *Rev. & Tax. Code §§ 6385* and *6421* to seek and sue for refunds of sales taxes paid by the seller with respect to fuel purchased by the carrier and apportioned between intrastate and extrastate use [*Delta Air Lines v. State Bd. of Equalization (1989) 214 Cal. App. 3d 518, 525-528, 262 Cal. Rptr. 803* (amount of sales tax retailer collects is based on estimates provided by carrier of fuel used to reach first out-of-state destination)].

A retailer is under a statutory duty to return excessive sales tax reimbursements to customers once the SBE has notified the retailer or the customer that it has ascertainedan excess. A customer may, under certain circumstances, bring an action against a retailer to compel the retailer to seek a refund [*Rev. & Tax. Code § 6901.5*; *Javor v. State Bd. of Equalization (1974) 12 Cal. 3d 790, 802-803, 117 Cal. Rptr. 305, 527 P.2d 1153 (SBE joined as defendant with retailers)* , *disapproved on other grounds*, *Woosley v. State (1992) 3 Cal. 4th 758, 792* ; *but see State Bd. of Equalization v. Superior Court (Petroleum Contractors) (1980) 111 Cal. App. 3d 568, 570-571, 169 Cal. Rptr. 3* (SBE not joined because administrative remedies not exhausted)].

The purchaser is primarily liable for the use tax and may pay the tax either directly to the SBE or through the retailer [*Rev. & Tax. Code §§ 6202, 6203*]. If a purchaser overpays use tax to a retailer who is required to collect the tax and who gives the purchaser a receipt, the SBE credits or refunds the overpayment directly to the purchaser [*Rev. & Tax. Code § 6901*].

[c] Interest on Refunds and Credits

The SBE must pay interest on overpayments of tax from the last day of the calendar month following the quarterly period for which the overpayment was made. However, a taxpayer is not entitled to a refund or credit of any interest that the taxpayer paid with respect to the credited or refunded amount [*Rev. & Tax. Code § 6907*]. Because a taxpayer receives interest from the close of the taxable period, regardless of when the taxpayer actually made the payment, a refund of any interest paid by the taxpayer would, in effect, compensate the taxpayer for the period prior to actual payment of the disputed amount. Therefore, a taxpayer is entitled to interest only for the period commencing with the actual payment [*see Rev. & Tax. Code §§ 6482, 6907*].

Interest on refunds runs to the earlier of either (1) the last day of the calendar month following the date on which the SBE notifies the taxpayer, if the taxpayer has not already filed a claim, that a claim may be filed, or (2) the date on which the SBE approves the taxpayer's claim for refund [*Rev. & Tax. Code § 6907(a)*]. Interest on credits runs for the same period as does the interest computed on the amount against which the credit is applied, exactly offsetting interest on underpayments due from the taxpayer with interest on overpayments due to the taxpayer for the same taxable periods [*Rev. & Tax. Code § 6907(b)*; *see § 540.512[8]*].

The SBE cannot allow interest if it determines that the taxpayer has intentionally or carelessly made an overpayment [*Rev. & Tax. Code§ 6908(a)*]. Otherwise, taxpayers would use the state as an investment vehicle when the statutory interest rate is attractive. For the same reason, if a taxpayer who has filed a claim for refund requests the SBE to defer action on the claim, the SBE may condition any deferral of action on a waiver of interest during the deferral period [*Rev. & Tax. Code § 6908(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationReview of Initial DecisionsGovernmentsState & Territorial GovernmentsClaims By & AgainstTax LawState & Local TaxesAdministration & ProceedingsCredits, Overassessments & RefundsTax LawState & Local TaxesSales TaxGeneral OverviewTax LawState & Local TaxesUse TaxGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 540 TAXES AND ASSESSMENTS
PART II. LEGAL BACKGROUND
C. SALES AND USE TAXES
7. Taxpayers' Remedies for Overpayment of Tax

47-540 California Forms of Pleading and Practice--Annotated § 540.231

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§ 540.231 Claim for Refund

[1] Time for Filing

Timely filing of a claim for refund, either on discovery of an erroneously self-assessed overpayment or after payment of a deficiency or jeopardy determination which has become final [*see Rev. & Tax. Code § 6902(a)*], is a jurisdictional prerequisite to bringing a suit for refund after denial of the claim [*Rev. & Tax. Code § 6932*]. Failure to file a timely claim is a waiver of the right to a refund or a credit of the overpayment [*Rev. & Tax. Code § 6905*]. Furthermore, the SBE may not approve a refund or credit unless the taxpayer has filed a timely claim [*Rev. & Tax. Code § 6902*]. A claim is timely if filed if within the latest of the following three periods [*Rev. & Tax. Code § 6902(a)*]:

- Three years after the last day of the month following the close of the taxable period for which the overpayment was made;

- Six months after the date that the overpayment was made; or

- If the claim is for amounts paid pursuant to an SBE deficiency or jeopardy determination or a determination after a failure to file a return, six months from the date the determination becomes final [*see §§ 540.150[4], 540.151[2]*].

If taxes are paid in installments or by a combination of involuntary collections and installments, the six-month limitation commences with each partial payment. If the taxpayer waits until all payments are made to file a claim for refund, only payments made during the six months before the filing date may be claimed [*Chahine v. State Bd. of Equalization (1990) 222 Cal. App. 3d 485, 489-490, 272 Cal. Rptr. 56* ; *but see State Bd. of Equalization v. Superior Court (1985) 39 Cal. 3d 633, 638-643, 217 Cal. Rptr. 238, 703 P.2d 1131* (suit for refund as not maintainable on basis of partial payment but only after entire amount is paid)].

In an audit, the taxpayer may agree to extend the time during which the SBE may issue a deficiency determination [*Rev. & Tax. Code § 6488*]. In exchange, that person receives additional opportunities to obtain credits and refunds for the taxable periods covered by the extension. The SBE may approve a credit for a taxable period covered by the extension without a formal claim [*Rev. & Tax. Code § 6902(a)(2)* (for taxpayers filing annually)]. In the typical case, the SBE credits overpayments found in such a taxable period against underpayments found in other audited periods. If overpayments exceed underpayments or the SBE fails to properly credit the overpayments, the taxpayer may obtain a refund, but only if the taxpayer files a refund claim before the extension expires [*see Rev. & Tax. Code § 6902(b)*].

A taxpayer must protect the right to any overpayments uncovered in an audit. Regardless of whether the taxpayer has executed an extension, the taxpayer should take care to file refund claims for any taxable period in which an overpayment is found before the limitations period expires. Taxpayers should consider executing an extension to obtain additional time to file a refund claim. If the audit uncovers overpayments for any taxable period, some additional time to file refund claims may be valuable [*see Holland Furnace Co. v. State Bd. of Equalization (1960) 177 Cal. App. 2d 672, 674-675, 2 Cal. Rptr. 606* (refund claim for erroneously self-assessed overpayments discovered during audit as time-barred because provision barring claims not filed within six months from finality of determination does not apply to self-assessed overpayments)].

[2] Procedure for Filing and Determination

A claim for refund must be in writing and must specify the grounds on which theclaim is founded [*Rev. & Tax. Code § 6904*; *18* Cal. Code Reg. § 5232(a)(1)]. The claim must be carefully drafted and must assert all possible grounds for recovery because any subsequent refund suit will be limited to the grounds set forth in the claim [*Rev. & Tax. Code § 6933*]. It must be signed by the taxpayer or the taxpayer's authorized representative [*18 Cal. Code Reg. § 5232(a)*; *see § 540.531*]. A taxpayer who disagrees with the SBE staff's denial of a refund claim may request an appeals conference or a formal hearing [*18 Cal. Code Reg. § 5235(d)(3)*]. Requests will be liberally granted; however, a request may be denied if the taxpayer has already been provided with an appeals conference and oral hearing on the same issue, and the taxpayer does not submit any additional arguments or evidence [*18 Cal. Code Reg. § 5236*]. The conference and hearing procedures are the same as for redetermination requests [*see § 540.190[4]*].

The SBE must notify a claimant within 30 days of its disallowance of a refund claim in the manner prescribed for service of notice of a deficiency determination [*Rev. & Tax. Code § 6906*; *see § 540.150[2]*]. If the SBE fails to mail notice of action on a claim within six months after the claim is filed, the claimant may, prior to the mailing of notice, consider the claim denied and bring a court action for refund of the overpayment [*Rev. & Tax. Code § 6934*; *see § 540.232[1]*].

[3] Class Claims

A claim filed for or on behalf of a class of taxpayers must meet all of the following requirements [*Rev. & Tax. Code § 6904(b)*]:

- Be accompanied by written authorization from each taxpayer sought to be included in the class;
- Be signed by each taxpayer or taxpayer's authorized representative; and
- State specific grounds on which the claim is founded.

Rev. & Tax. Code § 6904 does not create an express or implied duty to disclose the names and addresses of a class of taxpayers. It is the class representatives' responsibility to identify the class members and provide evidence of each member's consent to representation before filing a class action [*McCabe v. Snyder (1999) 75 Cal. App. 4th 337,*

340-341, 89 Cal. Rptr. 2d 315] . Thus, the Department of Motor Vehicles had no duty to disclose the names and addresses of those who paid a smog impact fee in order to facilitate a class claim [*McCabe v. Snyder (1999) 75 Cal. App. 4th 337, 345, 89 Cal. Rptr. 2d 315* (even if there were implied duty to disclose the names and addresses, disclosure would be prohibited under *Rev. & Tax. Code § 7056(a)(1)*)].

The SBE has developed special procedures for handling class claims. The representative claiming a refund on behalf of himself or herself and other members of a class must establish the following [*18 Cal. Code Reg. § 5239(b)*]:

- The benefits of a class proceeding;

- The existence and composition of the class including a description of the members sufficient to identify the persons making up the class, the approximate number of persons in the class, and the manner in which and time when the class members shall be identified and notified of the pendency of the combined claim;

- The issues of law and fact common to all class members and those that are not, and the appropriate number of class members affected by each issue that is not common to all;

- The representative's written authority to act for each class member, including authorization for the Board staff to release to the representative any confidential information in the Board's files that may be required in connection with the claim, and which may include a separate claim for refund by the class member or may state that the class member joins in the combined claim;

- That the representative is a member of the class and when and how the representative became a member with any unique legal or factual issues pertaining to the representative's claim and any differences between the representative's status as a class member and that of any other class member being described;

- The ability of the representative to protect fairly and adequately the interest of each class member. and that the representative's interests are not antagonistic to members of the class; and

- When requested by the Board staff, that each class member has been notified of the pendency of the claim and each member has had a reasonable opportunity to join in or be excluded from the combined claim.

If the Board staff finds that the claim is a proper combined claim, it must act on the claim in the same manner, to the greatest extent possible, as on any other claim. If the Board staff finds that the claim is not a proper combined claim, it must act only on claims by individual members and notify the representative that the claim is not valid as to others [*18 Cal. Code Reg. § 5239(c)(1)*]. Before the SBE issues a refund to any class member, the amount of that member's overpayment must be established. The representative or member must furnish or make available to the Board's staff all contracts, documents, or records (or copies of them) necessary to verify the overpayment and the amount of overpayment. If all contracts, documents, or records are not presented to or made available to the Board's staff, the representative or member is deemed to have failed to exhaust the administrative remedies [*18 Cal. Code Reg. § 5239(c)(2)*].

Failure to commence a court action within 90 days after the mailing of a notice of the Board's action on a refund claim as provided in the tax law pursuant to which the claim was filed constitutes a waiver of any demand against the state on account of alleged overpayments, except as to persons who have not been previously notified of the claim and persons who have notified the Board staff that they desire to be excluded from the combined claim. Moreover, a waiver does not apply with respect to persons involved in a claim to the extent it has been declared invalid as distinguished from persons

as to whom a claim has been denied [*18 Cal. Code Reg. § 5239(d)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesAdministration & ProceedingsCredits, Overassessments & RefundsTax LawState & Local TaxesSales TaxGeneral OverviewTax LawState & Local TaxesUse TaxGeneral Overview

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47-540 California Forms of Pleading and Practice--Annotated § 540.232

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§ 540.232 Suit for Refund

[1] Sole Judicial Remedy

No injunction, writ of mandate, or other process may be issued to prevent or enjoin the collection of sales and use taxes, nor may a taxpayer obtaina declaratory judgment that a tax should not be collected [*Rev. & Tax. Code § 6931*; *Casey v. Bonelli (1949) 93 Cal. App. 2d 253, 254-255, 208 P.2d 723* ; *see Cal. Const., art. XIII, § 32* (court may not issue legal or equitable process against state or any officer of state to prevent or enjoin collection of tax)]. Thus, a refund action pursuant to *Rev. & Tax. Code §§ 6931-6937* is a taxpayer's only state judicial remedy.

The federal courts may not enjoin, suspend, or restrain the assessment, levy, or collection of a state tax if a plain, speedy, and efficient remedy is available in the state courts [*28 U.S.C. § 1341*; *see Jerron West, Inc. v. California State Bd. of Equalization (9th Cir. 1997) 129 F.3d 1334, 1337-1339]* . Except in bankruptcy proceedings, a taxpayer's right to claim and to sue for a refund of sales and use taxes is an adequate remedy and federal relief must be denied [*California State Board of Equal. v. Coast Radio Prod. (9th Cir. 1955) 228 F.2d 520, 523-524* ; *Corbett v. Printers & Publishers Corporation (9th Cir. 1942) 127 F.2d 195, 196-197* ; *see Jerron West, Inc. v. California State Bd. of Equalization (9th Cir. 1997) 129 F.3d 1334, 1337-1339* ; *see also Arkansas v. Farm Credit Servs. (1997) 520 U.S. 821, 823-824, 117 S. Ct. 1776, 138 L. Ed. 2d 34* (under exception to section 1341 established by case law, statute does not constrain power of federal courts if United States sues to protect itself or its instrumentalities; exception not applicable under facts)].

[2] Prerequisites to Suit

The timely filing of a refund claim with the SBE is a prerequisite to a refund suit [*Rev. & Tax. Code § 6932*]. Failure to file a timely refund claim is a waiver of any right to recover the overpayment [*Rev. & Tax. Code § 6905*]. Furthermore, failure to exhaust administrative remedies such as filing a timely refund claim and assisting the SBE when necessary in evaluating it is a jurisdictional bar to court proceedings. For example, a court may refuse to hear a case in which a refund claim was timely filed if the claimant refuses to provide the SBE with necessary facts [*Barnes v. State Bd. of*

Equalization (1981) 118 Cal. App. 3d 994, 1001-1002, 173 Cal. Rptr. 742] .

A taxpayer cannot bring a refund suit until the disputed tax has been paid in full. A suit for a refund cannot be maintained on the basis of partial payment of the tax or deficiency [*State Bd. of Equalization v. Superior Court (1985) 39 Cal. 3d 633, 638-643, 643 n.10, 217 Cal. Rptr. 238, 703 P.2d 1131* (disapproving *Snoozie Shavings, Inc. v. State Bd. of Equalization (1975) 97 Cal. App. 3d 771, 158 Cal. Rptr. 866* , and *Schaffer v. State Bd. of Equalization (1952) 109 Cal. App. 2d 574, 241 P.2d 46* , to extent inconsistent)].

The payment of accrued interest on a tax deficiency is not a prerequisite to either an administrative refund claim or a subsequent action for refundof taxes [*Agnew v. State Board of Equalization (1999) 21 Cal. 4th 310, 314-315, 321 n.8, 333-334, 87 Cal. Rptr. 2d 423, 981 P.2d 52* (court did not consider whether SBE may require prepayment of interest as precondition to consideration of challenge directed only to an interest assessment)].

Presumably a penalty is treated in the same way as interest and need not be paid before either an administrative refund claim or a subsequent action for refund of taxes [*see Agnew v. State Board of Equalization (1999) 21 Cal. 4th 310, 323-334, 87 Cal. Rptr. 2d 423, 981 P.2d 52* ; *Chen v. Franchise Tax Board (1998) 75 Cal. App. 4th 1110, 1119-1120, 90 Cal. Rptr. 2d 268]* .

In any event, the taxpayer should consider paying any assessed penalty and interest before or at the time of filing a claim for refund to foreclose the possibility of any collection activity being commenced by the SBE to collect them.

[3] Statute of Limitations

To be timely, a suit for refund must be filed within 90 days after the mailing of the notice of the SBE's action on a refund claim. Failure to bring an action within this period constitutes a waiver of any right to the overpayment [*Rev. & Tax. Code § 6933*]. If the SBE fails to mail notice of action on a claim within six months after the claim is filed, the claimant may consider the claim denied and may file suit at any time before the SBE mails the notice [*Rev. & Tax. Code § 6934*].

[4] Class Actions

A class action can be used to obtain refunds of sales and use taxes [*Javor v. State Board of Equalization (1974) 12 Cal. 3d 790, 797, 117 Cal. Rptr. 305, 527 P.2d 1153* (class action against retailers and SBE by purchasers of motor vehicles and equipment based on sales tax overcharge), *disapproved on other grounds*, *Woosley v. State (1992) 3 Cal. 4th 758, 792*]. The class would comprise persons who timely filed valid claims for refunds [*see Woosley v. State (1992) 3 Cal. 4th 758, 788, 13 Cal. Rptr. 2d 30, 838 P.2d 758* ; State *ex rel. Dept. of Motor Vehicles v. Superior Court (Woosley) (1998) 66 Cal. App. 4th 421, 434, 78 Cal. Rptr. 2d 88*].

A class action for tax refunds cannot be based on a class claim for refunds if the statutes governing the tax in question do not authorize the filing of a class claim for refunds [*Woosley v. State (1992) 3 Cal. 4th 758, 788, 13 Cal. Rptr. 2d 30, 838 P.2d 758]* . The statutes governing sales and use taxes, however, do authorize the filing of a class claim for refunds [*see Rev. & Tax. Code § 6904(b)*].

[5] Jurisdiction and Venue

A suit against the SBE for refund of sales and use tax may be filed in the superior court in any city in which the attorney general has an office (San Francisco,Sacramento, Los Angeles, and San Diego) [*Rev. & Tax. Code § 6933*; *see People v. Pacific Employers Ins. Co. (1973) 36 Cal. App. 3d 296, 300, 111 Cal. Rptr. 350* ; *Cal. Emp. etc. Com. v. Citizens etc. Bk. (1946) 73 Cal. App. 2d 915, 916-917, 167 P.2d 752]* . The action is not a limited civil case [*see Code Civ. Proc. § 86(a)(1)*].

[6] Grounds and Burden of Proof

An action for a refund is limited to the grounds set forth in the refund claim [*Rev. & Tax. Code § 6933*; *see Swaggart v. Calif. Equalization Bd. (1990) 493 U.S. 378, 110 S. Ct. 688, 107 L. Ed. 2d 796, 814-815* (refusingto determine Commerce and Due Process Clauses issues because not stated in claim); *Atari, Inc. v. State Bd. of Equalization (1985) 170 Cal. App. 3d 665, 671-673, 216 Cal. Rptr. 267* ; *but see Preston v. State Bd. of Equalization (2001) 25 Cal. 4th 197, 206-207, 105 Cal. Rptr. 2d 407, 19 P.3d 1148* (courts may consider contention that is intertwined with contentions expressly raised in refund claim); *see § 540.532*].

A refund suit is a proceeding de novo and not an appeal from the denial of a refund claim [*Marchica v. State Board of Equalization (1951) 107 Cal. App. 2d 501, 512-513, 237 P.2d 725]* . The taxpayer has the burden of proof [*Riley B's, Inc. v. State Bd. of Equalization (1976) 61 Cal. App. 3d 610, 616, 132 Cal. Rptr. 520* ; *Maganini v. Quinn (1950) 99 Cal. App. 2d 1, 8, 221 P.2d 241]* . If the SBE asserts taxpayer fraud in order to avoid the bar of the statute of limitations on the issuance of notices of determination, the SBE has the burden of proving fraud [*Marchica v. State Board of Equalization (1951) 107 Cal. App. 2d 501, 510, 237 P.2d 725* ; *see § 540.152[3]*].

[7] Applicability of Doctrine of Equitable Setoff

In a suit for a refund of taxes, the SBE may raise the doctrine of equitable setoff to defeat or reduce the taxpayer's refund. Thus, when a taxpayer files a timely claim for a refund of overpayment of use taxes for a stated period, notwithstanding that the statute of limitations has run barring a deficiency against the taxpayer concerning underpayments of use taxes on other transactions, the SBE has the power to set off, against any refund due, that taxpayer's time-barred underpayments of use tax for the same period [*Sprint Communications Co. v. State Bd. of Equalization (1995) 40 Cal. App. 4th 1254, 1259-1262, 47 Cal. Rptr. 2d 399]* . The SBE can properly credit and set off underpayment of taxes barred by the statute of limitations in one quarter against an overpayment of taxes in another quarter, so long as both setoffs and overpayments occurred during the period put in issue by the taxpayer's refund request [*Sprint Communications Co. v. State Bd. of Equalization (1995) 40 Cal. App. 4th 1254, 1264, 47 Cal. Rptr. 2d 399]* . A taxpayer's agreement extending the SBE's statutory time to mail notice of use tax deficiencies for the period encompassing both its claim period and a stated additional period does not, however, subject that taxpayer's overpayment refunds to setoff for underpayment of time-barred use taxes occurring thereafter [*Sprint Communications Co. v. State Bd. of Equalization (1995) 40 Cal. App. 4th 1254, 1257, 1264-1265, 47 Cal. Rptr. 2d 399* (with regard to exposing refund claim to setoff for underpayments occurring during extension periods, without deciding court noted that it was difficult to see why same equitable setoff principles applicable to refund claim period would not apply)]. For limitation on the SBE's right to setoff, see *§ 540.305*.

[8] Judgment for Taxpayer and Interest

A judgment may not be rendered for an assignee or anyone other than the taxpayer [*Rev. & Tax. Code § 6937*]. If judgment is rendered for the taxpayer, the amount of the judgment is first credited against any outstanding sales or use tax liability, and the balance is directly refunded [*Rev. & Tax. Code § 6935*; *see also Rev. & Tax. Code § 6901* (providing for similar offset for refund claims); *but see Javor v. State Bd. of Equalization (1977) 73 Cal. App. 3d 939, 950-951, 141 Cal. Rptr. 226* (SBE not permitted to credit overpayments of sales taxes against retailers' current liabilities if overpayments are to be refunded to customers), *disapproved on other grounds, Woosley v. State (1992) 3 Cal. 4th 758, 792]* .

Interest is allowed at the statutory rate on any amount illegally collected, and runs from the date the overpayment was made to the date that credit is allowed or, in the case of a refund, to a date determined by the SBE not more than 30 days preceding the date of the refund warrant [*Rev. & Tax. Code § 6936*; *see Rev. & Tax. Code § 6591.5* (interest rate); *see § 540.512[8]*].

[9] Litigation Costs

[a] Under Revenue and Taxation Code

In any civil proceeding brought in a court of record in California by or against the State of California in connection with the determination, collection, or refund of any tax, interest, or penalty, the prevailing party may be awarded a judgment for reasonable litigation costs including reasonable [*Rev. & Tax. Code § 7156(a), (c)(1)*]:

- Court costs;

- Expert witness expenses (rate of compensation not to exceed a rate in excess of the highest rate of compensation for expert witnesses paid by the state of California);

- Cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case; and

- Attorney fees (rate of compensation not to exceed $75 per hour unless the court finds that a cost of living increase or a special factor, such as the limited availability of qualified counsel for the proceeding, justifies a higher rate).

To recover litigation costs, the taxpayer must have exhausted all administrative remedies prior to suit [*Rev. & Tax. Code § 7156(b)(1)*]. The taxpayer must also show that the position of the State of California was not substantially justified and substantially prevail either as to the amount in controversy or with respect to the most significant issue or set of issues presented [*Rev. & Tax. Code § 7156(c)(2)(A)*].

Litigation costs may not be awarded with respect to any portion of the civil proceeding during which the prevailing party has unreasonably protracted that proceeding [*Rev. & Tax. Code § 7156(b)(4)*]. Moreover, noaward of litigation costs may be made with respect to any declaratory relief proceeding [*Rev. & Tax. Code § 7156(b)(3)*].

The term "prevailing party" does not include the State of California or any creditor of the taxpayer [*Rev. & Tax. Code § 7156(c)(2)(A)*].

Litigation expenses awarded to a taxpayer under *Rev. & Tax. Code § 7156* are not subject to an offset by the state under *Gov. Code §§ 12419.4* and *12419.5* against taxes owed, or claimed to be owed, by the taxpayer. A contrary rule would effectively nullify *Rev. & Tax. Code § 7156* and would thereby undermine an important mechanism for the enforcement of the citizen protections created by the Harris-Katz California Taxpayers' *Bill of Rights* (*Rev. & Tax. Code §§ 7080-7099*) [*Garg v. People ex rel State Bd. of Equalization (1997) 53 Cal. App. 4th 199, 202-203, 215, 61 Cal. Rptr. 2d 376]* . The Harris-Katz California Taxpayers' *Bill of Rights* is discussed in *§§ 540.360* and *540.400 -540.407*.

[b] Under Code of Civil Procedure

Notwithstanding any other provisions of law, when the state is a party, costs must be awarded against it on the same basis as against any other party [*Code Civ. Proc. § 1028*]. Since *Code Civ. Proc. § 1028* applies notwithstanding "any other provisions of law," its application is not foreclosed by *Rev. & Tax. Code § 7156* [*see § 540.232[9][a]*] in an action against the state under the Revenue and Taxation Code [*Agnew v. State Bd. of Equalization (2005) 134 Cal. App. 4th 899, 912, 36 Cal. Rptr. 3d 464]* . In a taxpayer's suit for a refund, for instance, even if the taxpayer cannot recover costs under *Rev. & Tax. Code § 7156*, it is possible that the taxpayer could recover costs under *Code Civ. Proc. § 1028*. Among possibly applicable statutes in this context are *Code Civ. Proc. §§ 998* and *1032*:

- Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to

recover costs in any action or proceeding [*Code Civ. Proc. § 1032(b)*]. The "prevailing party" includes the party with a net monetary recovery, a defendant in whose favor a dismissal is entered, a defendant when neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant [*Code Civ. Proc. § 1032(a)(4)*].

- The costs allowed under *Code Civ. Proc. § 1032* must be withheld or augmented as provided in *Code Civ. Proc. § 998* [*Code Civ. Proc. § 998(a)*].

If an offer made by a plaintiff is not accepted, and the defendant fails to obtain a more favorable judgment or award in any action or proceeding, then the court or arbitrator has discretion to require the defendant to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in the preparation for trial or arbitration of the case or during trial or arbitration, or both, by the plaintiff, in addition to plaintiff's costs [*Code Civ. Proc. § 998(d)*]. In a taxpayer's suit for a refund, if the taxpayer offered to settle, and the state rejected the offer but failed to obtain a more favorable judgment, then the taxpayer may invoke this provision so as to recover expert witness costs in addition to other costs [*Agnew v. State Bd. of Equalization (2005) 134 Cal. App. 4th 899, 912-913, 36 Cal. Rptr. 3d 464]* .

Costs are recoverable under *Code Civ. Proc. § 1032(b)* unless some other statute expressly provides otherwise. There is no such express exception in *Rev. & Tax. Code § 7156*, which therefore does not preclude the application of *Code Civ. Proc. § 1032(b)*. Indeed, *Rev. & Tax. Code § 7156* complements, rather than supplants, the more general cost statutes of the Code of Civil Procedure. Under the cost-shifting provision of *Rev. & Tax. Code § 7156*, a prevailing taxpayer in a refund action is eligible for attorney's fees in addition to costs and expenses. However, if a prevailing taxpayer fails to meet the requirements of *Rev. & Tax. Code § 7156* [*see § 540.232[9][a]*], the taxpayer would be entitled to an award of costs only, under the general rule of *Code Civ. Proc. § 1032(b)*, with possible augmentation under *Code Civ. Proc. § 998(d)* [*Agnew v. State Bd. of Equalization (2005) 134 Cal. App. 4th 899, 913-915, 36 Cal. Rptr. 3d 464]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityGeneral OverviewCivil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsTax Anti-Injunction ActCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsCredits, Overassessments & RefundsTax LawState & Local TaxesAdministration & ProceedingsJudicial Review

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PART II. LEGAL BACKGROUND
C. SALES AND USE TAXES
7. Taxpayers' Remedies for Overpayment of Tax

47-540 California Forms of Pleading and Practice--Annotated §§ 540.233-540.249

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

[Reserved]

§§ 540.233[Reserved]

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1. In General

47-540 California Forms of Pleading and Practice--Annotated § 540.250

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.250 Governing Law

The California Personal Income Tax Law is contained in *Rev. & Tax. Code §§ 17001-18180*. The California Corporation Tax Law is contained in *Rev. & Tax. Code §§ 23001-25141*. Administration of franchise and income tax laws, including the Personal income Tax Law and the Corporation Tax Law, is governed by *Rev. & Tax. Code §§ 18401-19802*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesFranchise TaxGeneral OverviewTax LawState & Local TaxesIncome TaxCorporations & Unincorporated AssociationsGeneral OverviewTax LawState & Local TaxesIncome TaxIndividuals, Estates & TrustsGeneral Overview

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1. In General

47-540 California Forms of Pleading and Practice--Annotated §§ 540.251-540.269

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

[Reserved]

§§ 540.251[Reserved]

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47-540 California Forms of Pleading and Practice--Annotated § 540.270

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.270 Personal Income Tax

[1] Who Must File Returns

California individual income tax returns must be filed with the FTB by persons who have any of the following items of income [*Rev. & Tax. Code §§ 18407, 18501*]:

- Adjusted gross income (from all sources) over $8,000 if single or $16,000 if married.
- Gross income over $10,000 if single or $20,000 if married, regardless of adjusted gross income.

The amounts noted above are to be indexed for inflation for taxable years beginning on or after January 1, 1996 [*Rev. & Tax. Code § 18501(d)*]. Fortaxable years beginning on or after January 1, 1999, the FTB must also recompute the above amounts to take into account the senior exemption credit under *Rev. & Tax. Code § 17054(c)* and the dependent credit under *Rev. & Tax. Code § 17054(d)* [*Rev. & Tax. Code § 18501(c), (e)*].

If an individual is unable to make a return required under *Rev. & Tax. Code § 18501*, the return of that individual must be made by a duly authorized agent, his or her committee, guardian, fiduciary, or other person charged with the care of the person or property of the individual. This requirement, however, does not apply in the case of a receiver of property appointed by authority of law in possession of only a part of an individual's property [*Rev. & Tax. Code § 18505.6*].

The executor or administrator of a deceased taxpayer, or other person charged with the property of that decedent, must file a California income tax return on behalf of the decedent for (1) the year of death, regardless of the amount of the decedent's income, and (2) any prior years for which the decedent should have, but did not, file returns [*Rev. & Tax. Code §§ 18505(g), 18505.3*]. Minors are subject to the same minimum income filing guidelines as adults. The earnings of a child must be reported on a separate income tax return and included in the child's gross income, regardless of

whether the child receives the income [*Rev. & Tax. Code § 17081*; *see I.R.C. § 73*].

[2] Time for Filing Returns

A California income tax return for a calendar year is generally due by April 15 of the following year [*Rev. & Tax. Code § 18566*]. A fiscal year return must be filed on or before the fifteenth day of the fourth month following the close of the fiscal year [*Rev. & Tax. Code § 18566*]. The returns are filed with the FTB in Sacramento. If a taxpayer fails to file a return within 60 days after the FTB issues a notice and demand for the return, the FTB may petition the courts for a writ of mandate to require the taxpayer to file a return [*Rev. & Tax. Code § 19710*].

Taxpayers filing individual tax returns are given an automatic six-month extension of time to file a return without submitting a written request for an extension, if the taxpayer files the return within six months of its original due date [*Rev. & Tax. Code § 18567*; F.T.B. Notice 91-3 (Nov. 1, 1991); FTB Form 3519 (automatic extension)]. An extension of time to file is not an extension of time for payment of tax owed [*Rev. & Tax. Code § 18567(b)*; *see* FTB Form 3519]. Taxpayers who are residing or traveling abroad on the ordinary due date of the return are given automatic extensions until June 15 for filing, and members of the United States armed forces or the merchant marine who are outside the United States on the ordinary due date (and their spouses) are given a 180-day extension after returning to the United States [*Rev. & Tax. Code §§ 18567(a), 18570, 18571* (adopting federal provisions in *I.R.C. § 7508* regarding return filing extensions for certain military personnel and their spouses)].

[3] Amended Returns

A taxpayer may file an amended return as a claim for refund or credit for taxes overpaid within the later of [*see Rev. & Tax. Code § 19306*; *18 Cal. Code Reg § 19322*]:

- Four years from the date the original return was filed (if filed within the time prescribed by *Rev. & Tax. Code § 18567* or *18604*, whichever is applicable);

- Four years after the last day prescribed for filing the original return (determined without regard to any extension of time for filing the return); or

- One year after the date of the overpayment.

A taxpayer must file an amended California return within six months after filing an amended federal return, but only if the changes would increase the amount of California tax owed by the taxpayer [*Rev. & Tax. Code § 18622(b)*].

Similarly, if (1) the Commissioner of Internal Revenue or other officer of the United States or other competent authority corrects or changes any item required to be shown on a federal tax return for any year or (2) a renegotiation of a contract or subcontract with the United States results in a change in gross income or dedu Notice 91-3 (Nov. 1, 1991) Rev. & Tax. Code § 18567(b) Rev. & Tax. Code §§ 18567(a) 18571 I.R.C. § 7508 Rev. & Tax. Code § 19306 18 Cal. Code Reg § 19322 Rev. & Tax. Code § 18567 18604 Rev. & Tax. Code § 18622(b)ctions, the taxpayer must report to the FTB each change or correction, or the results of a negotiation [*Rev. & Tax. Code § 18622(a)*]. This report is normally made as an amended return, and the taxpayer must file it within six months after the final federal determination of each change, correction, or renegotiation [*see Rev. & Tax. Code § 18622(a)*]. The date of each final federal determination is the date on which each adjustment or resolution resulting from an IRS examination is assessed under *I.R.C. § 6203* [*Rev. & Tax. Code § 18622(d)*]. However, the taxpayer need not report changes or corrections unless they increase the amount of tax payable [*see Rev. & Tax. Code § 18622(a)*].

The discussion of *Rev. & Tax. Code § 18622* above reflects amendments to *Rev. & Tax. Code § 18622* by Stats. 1999, ch. 987, § 56. These amendments apply to federal determinations that become final as defined in *Rev. & Tax. Code §*

18622(d), on or after January 1, 2000 [Stats. 1999, ch. 987, § 105]. As amended, *Rev. & Tax. Code § 18622(a)*, requires the taxpayer to a change or correction to any item required to be shown on a federal tax return; formerly the reporting requirement extended only to changes or corrections to the gross income or deductions reported on the federal return.

If a taxpayer required to report a change or correction to the FTB under *Rev. & Tax. Code § 18622(a)* does so within six months after the final federal determination, or the IRS reports that change or correction within that period, the FTB has within two years from the date the notice was filed with the FTB by the taxpayer or IRS, or within the period specifiedin *Rev. & Tax. Code §§ 19057, 19058*, or *19065*, whichever period expires later, to make a proposed deficiency assessment resulting from those adjustments [*Rev. & Tax. Code § 19059(a)*]. The date of each final federal determination is the date on which each adjustment or resolution resulting from an IRS examination is assessed under *I.R.C. § 6203* [*Rev. & Tax. Code § 18622(d)*].

Similarly, if a taxpayer required to file an amended return with the FTB under *Rev. & Tax. Code § 18622(b)* does so within six months of filing an amended return with the Commissioner of Internal Revenue, the FTB has within two years from the date the amended return was filed with the FTB by the taxpayer, or within the period specified in *Rev. & Tax. Code §§ 19057, 19058*, or *19065*, whichever period expires later, to make a proposed deficiency assessment [*Rev. & Tax. Code § 19059(b)*].

If, however, the taxpayer fails to report a change or correction or fails to file an amended return as required by *Rev. & Tax. Code § 18622*, the FTB may make a proposed deficiency assessment resulting from the adjustments at any time. Moreover, if a taxpayer or the IRS reports a change or correction or files an amended return as required by *Rev. & Tax. Code § 18622* after the six month periods specified in that section have elapsed, the FTB has within four years from the date the change or correction was reported by the taxpayer or IRS, or the amended return was filed, to make a proposed deficiency assessment resulting from the proposed adjustment [*Rev. & Tax. Code § 19060(a), (b)*; *see also Rev. & Tax. Code § 18622(c)* (content of taxpayer's notification to FTB)].

Although the time periods specified in *Rev. & Tax. Code §§ 19059* and *19060* may have been complied with, for individual taxpayers concerning taxable years ending after October 10, 1999, however, including those required by *Rev. & Tax. Code § 18622(a)* to report a change or correction by the Commissioner of Internal Revenue or other officer of the United States or other competent authority, under *Rev. & Tax. Code § 19116* the FTB must suspend the imposition of interest, penalty, addition to tax, or additional amount if the FTB fails to give notice as specified in that section within the appropriate period [*see Rev. & Tax. Code § 19116(a), (b), (e), (g)*]. The suspension will be applied selectively, however [*see Rev. & Tax. Code § 19116(c),(d)* (item-by-item application; amounts not subject to suspension)], and the suspension is not required for taxpayers with taxable income greater than $200,000 that have been contacted by the FTB regarding the use of a potentially abusive tax shelter [*Rev. & Tax. Code § 19116(f)*, effective for notices sent after January 1, 2004].

In affording the FTB a four year limitation period in which to notify a taxpayer of a state tax deficiency assessment, *Rev. & Tax. Code § 19057* by its terms does not establish an outer time limit for notification by the FTB in all circumstances. Instead, an alternative limitation period applies when, after the taxpayer files a tax return, the IRS intervenes and finally determines that the taxpayer's federal taxable income and tax liability are greater than reported in the federal return for a particular tax year, with resulting increases in state taxable income and the amount of state income tax computed on it for the same period. In the event of such an intervention by the IRS, either *Rev. & Tax. Code § 19059* or *Rev. & Tax. Code § 19060* provides the alternative period during which the FTB may notify the taxpayer of a deficiency assessment. The duration of that period depends on whether and when the taxpayer reported to the FTB the final results of the IRS examination of the taxpayer's return [*Ordlock v. Franchise Tax Bd. (2006) 38 Cal. 4th 897, 902, 44 Cal. Rptr. 3d 212, 135 P.3d 628]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-540 California Forms of Pleading and Practice--Annotated § 540.271

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.271 Corporation Tax

[1] Who Must File Returns

Every taxpayer who is subject to any tax under the Corporation Tax Law must file a tax return [*Rev. & Tax. Code §§ 18407, 18601(a)*]. Taxes imposed under the Corporation Tax Law include:

- The corporation franchise tax [*see Rev. & Tax. Code § 23151*].
- The corporation income tax [*see Rev. & Tax. Code § 23501*].
- The corporation alternative minimum tax [*see Rev. & Tax. Code § 23400*]
- The tax on unrelated business income of otherwise-exempt nonprofit organizations [*see Rev. & Tax. Code § 23731*].
- The tax on income of an otherwise-exempt political organization from sources other than contributions, dues, and political fund-raising events [*see Rev. & Tax. Code § 23701r*].
- The tax on income of an otherwise-exempt homeowners' association from sources other than membership dues, fees, and assessments [*see Rev. & Tax. Code § 23701t* (includes time-share association)].

A principal officer of the taxpayer must sign any required return under penalty of perjury. If a receiver, bankruptcy trustee, or assignee is operating the property or business of a bank or corporation, that person must make the return [*Rev. & Tax. Code §§ 18606(a), 18621*].

[2] Time for Filing Returns

A taxpayer subject to the income or franchise tax is required to file an annual return on or before the 15th day of the third month following the close of its "taxable year" [*Rev. & Tax. Code § 18601(a)*]. For purposes of the franchise tax [*see Rev. & Tax. Code §§ 23101 et seq.*], the term "taxable year" means the calendar year, or the fiscal year for which the tax is payable [*Rev. & Tax. Code § 23041(a), (c)*]. For purposes of the tax on limited partnerships [*see Rev. & Tax. Code §§ 23081 et seq.*], the corporation income tax [*see Rev. & Tax. Code §§ 23501 et seq.*], or the tax imposed on exempt corporations [*see Rev. & Tax. Code §§ 23701 et seq.*], the term "taxable year" is the calendar year or the fiscal year upon the basis of which the net income is computed [*Rev. & Tax. Code § 23041(b), (c)*].

A "taxable year" can also be a period of less than 12 months [*Rev. & Tax. Code § 23041(d)*]. When referring to a calendar or fiscal year beginning before January 1, 2000, upon the basis of which the net income is computed, the term "taxable year" means "income year" [*Rev. & Tax. Code § 23041(e)*; *see Rev. & Tax. Code § 23042(a)* for a definition of "income year"; a legislative change in terminology enacted in 2000 gave "income year" and "taxable year" the same meaning for calendar and fiscal years beginning on or after January 1, 2000, but under a transitional rule, for the first taxable year beginning on or after January 1, 2000, the term "taxable year" had two meanings, as explained at Stats. 2000, ch. 862, § 227].

For taxpayers required to file a return for a short period under *Rev. & Tax. Code § 24634*, however, the due date for the short period return is the same as the due date of the federal tax return that includes the taxpayer's net income for that short period, or the due date specified in *Rev. & Tax. Code § 18601(a)* if no federal return is required to be filed that would include the net income for that short period [*Rev. & Tax. Code § 18601(c)*]. Moreover, farmers' or fruit growers', or like associations organized and operated in whole or in part on a co-operative or mutual basis must file returns on or before the 15th day of the ninth month following the close of their taxable year [*Rev. & Tax. Code § 18601(b)*; *see Rev. & Tax. Code § 24404*].

The FTB may grant a reasonable extension of time, of up to seven months from the return's original due date, for filing any return required under the Bank and Corporation Tax Law [*Rev. & Tax. Code § 18604(a)*]. The grant of an extension of time to file a return, however, does not extend the time for payment of taxes due beyond the original due date for the return [*Rev. & Tax. Code § 18604(b)*].

[3] Amended Returns

A bank and corporation taxpayer must file an amended California return if the taxpayer files an amended federal income tax return. The amended California return must be filed within six months after the amended federal return is filed [*Rev. & Tax. Code § 18622(b)*]. Similarly, if (1) the Commissioner of Internal Revenue or other officer of the United States or other competent authority corrects or changes any item required to be shown on a federal tax return, or (2) a renegotiation of a contract or subcontract with the United States results in a change in gross income or deductions, the taxpayer must report to the FTB each change or correction, or the results of a negotiation, within six months after each final federal determination of the change or correction or renegotiation and either concede the accuracy of the determination or state why it is erroneous [*Rev. & Tax. Code § 18622(a)*]. The date of each final federal determination is the date on which each adjustment or resolution resulting from an IRS examination is assessed under *I.R.C. § 6203* [*Rev. & Tax. Code § 18622(d)*].

If a taxpayer required to report a change or correction to the FTB under *Rev. & Tax. Code § 18622(a)* does so within six months after the final federal determination, or the IRS reports that change or correction within that period, the FTB has within two years from the date the notice was filed with the FTB by the taxpayer or IRS, or within the period specified in *Rev. & Tax. Code §§ 19057, 19058*, or *19065*, whichever period expires later, to make a proposed deficiency assessment resulting from those adjustments [*Rev. & Tax. Code § 19059(a)*].

Similarly, if a taxpayer required to file an amended return with the FTB under *Rev. & Tax. Code § 18622(b)* does so within six months of filing an amended return with the Commissioner of Internal Revenue, the FTB has within two years from the date the amended return was filed with the FTB by the taxpayer, or within the period specified in *Rev. & Tax. Code §§ 19057*, *19058*, or *19065*, whichever period expires later, to make a proposed deficiency assessment [*Rev. & Tax. Code § 19059(b)*].

If, however, the taxpayer fails to report a change or correction or fails to file an amended return as required by *Rev. & Tax. Code § 18622*, theFTB may make a proposed deficiency assessment resulting from the adjustments at any time. Moreover,if a taxpayer or the IRS reports a change or correction or files an amended return as required by *Rev. & Tax. Code § 18622* after the six month periods specified in that section have elapsed, the FTB has within four years from the date the change or correction was reported by the taxpayer or IRS, or the amended return was filed, to make a proposed deficiency assessment resulting from the proposed adjustment [*Rev. & Tax. Code § 19060(a)*, *(b)*; *see also Rev. & Tax. Code § 18622(c)* (content of taxpayer's notification to FTB); Appeal of Pullman Company (SBE, 3/28/72) CCH Cal. Tax Rptr. P 204-749 (after reporting period expired, inadequate notice by taxpayer to FTB of IRS changes treated as failure to report change or correction; applying prior law); Appeal of Market Lessor's Inc. (SBE, 9/12/68) CCH Cal. Tax Rptr. P 203-962 (before reporting period expired, inadequate notice by taxpayer to FTB of IRS changes treated as insufficient compliance with reporting requirement; applying prior law)].

The discussion of *Rev. & Tax. Code §§ 18622*, *19059* and *19060* above reflects the amendments to those sections by Stats. 1999, ch. 987, §§ 56, 71 and 72. The amendments apply to federal determinations that become final as defined in *Rev. & Tax. Code § 18622(d)*, on or after January 1, 2000 [Stats. 1999, ch. 987, § 105]. As amended, *Rev. & Tax. Code § 18622(a)*, requires the taxpayer to a change or correction to any item required to be shown on a federal tax return; formerly the reporting requirement extended only to changes or corrections to the gross income or deductions reported on the federal return. The amendments also added subdivision (d) defining "final federal determination." Also, under the former version of the section, a bank or corporate taxpayer did not have to report changes or corrections if they did not increase the amount of tax payable for any year. Before *Rev. & Tax. Code §§ 19059* and *19060* were amended, there were no provisions for IRS reporting as specified in those sections. Thus, with regard to final federal determinations as defined in *Rev. & Tax. Code § 18622(d)*, on or after January 1, 2000, if the IRS reports to the FTB as specified in those sections, those reports have the same effect as if the taxpayer had done so.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesAdministration & ProceedingsGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsCredits, Overassessments & RefundsTax LawState & Local TaxesIncome TaxCorporations & Unincorporated AssociationsGeneral OverviewTax LawState & Local TaxesIncome TaxCorporations & Unincorporated AssociationsImposition of Tax

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47-540 California Forms of Pleading and Practice--Annotated § 540.272

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.272 Overview of Audits and Assessments

[1] Audits

The FTB has broad authority to audit taxpayer records to determine correct tax liability [*Rev. & Tax. Code § 19504*]. It has the power (1) to examine any books, papers, records, or other data relevant to tax liabilities, (2) to require the attendance of the taxpayer or the taxpayer's agents for an audit examination, and (3) to issue subpoenas to any person in connection with any facts or records relevant to the determination of tax [*Rev. & Tax. Code § 19504*; *see Franchise Tax Board v. Firestone Tire & Rubber Co. (1978) 87 Cal. App. 3d 878, 881, 151 Cal. Rptr. 460]* . When examining a return, the FTB may not use financial status or economic reality examination techniques to determine the existence of unreported income of any taxpayer unless the FTB has a reasonable indication that there is a likelihood of unreported income [*Rev. & Tax. Code § 19504(e)*]. If the FTB examines the taxpayer's return and determines that additional tax is due, the FTB is empowered to assess the taxpayer for that tax [*Rev. & Tax. Code § 19032 et seq.*].

[2] Assessments

[a] Grounds and Procedures

The FTB may make an assessment of additional tax, along with any applicable interest and penalties, if (1) the taxpayer's computation of tax liability is mathematically incorrect [*see* FTB Leg. Rul. 384 (4/1/75) CCH Cal. Tax Rptr. P 205-236]; (2) a state or federal audit results in a redetermination of tax liability [*see* Appeal of Schneider (SBE, 8/1/80) CCH Cal. Tax Rptr. P 206-482; *cf. Wertin v. Franchise Tax Bd. (1998) 68 Cal. App. 4th 961, 965-966, 80 Cal. Rptr. 2d 644* (deficiency assessment after IRS adjusted taxpayers' federal return)]; (3) the taxpayer fails to file a return; or (4) the taxpayer files an incomplete or false return [*see* Appeal of Hahn (SBE, 11/16/81) CCH Cal. Tax Rptr. P 400-031].

The FTB generally proceeds to assess the tax due by (1) notifying the taxpayer of a mathematical error and requesting

payment, (2) notifying the taxpayer of a proposed deficiency assessment, or (3) making an estimated assessment [*see §§ 540.273, 540.274*].

[b] Presumption of Correctness of Assessment

The findings of the FTB in assessing taxes are prima facie correct [*see* Appeal of Livingston (SBE, 12/13/71) CCH Cal. Tax Rptr. P 204-711; *see also Todd v. McColgan (1949) 89 Cal. App. 2d 509, 514, 201 P.2d 414* (burden on taxpayer to establish error)]. Taxpayers, therefore, have the burden of producing sufficient evidence to overcome the resulting presumption of correctness [Appeal of Mason (SBE, 3/30/81) CCH Cal. Tax Rptr. P 206-604; Appeal of Nesbit (SBE, 12/11/79) CCH Cal. Tax Rptr. P 206-277; *see also Wertin v. Franchise Tax Bd. (1998) 68 Cal. App. 4th 961, 966, 975-976, 80 Cal. Rptr. 2d 644* (presumption of regularity overcome when deficiency notice showed FTB did not comply with requirement that when taxpayer's return is available taxing agency must review return before issuing deficiency notice); *cf.* Stats. 2000, ch. 414, §§ 1, 2 (amending *Rev. & Tax. Code § 19033* to clarify FTB's powers to issue deficiency assessments after *Wertin* holding)]. The presumption is not overcome by the unsupported statements of the taxpayer [Appeal of Cookston (SBE, 9/29/81) CCH Cal. Tax Rptr. P 400-046]. Constitutional arguments are generally not sufficient to rebut the presumption [*see* Appeal of Bagley (SBE, 11/18/80) CCH Cal. Tax Rptr. P 206-452].

This presumption of correctness applies to assessments based on either FTB audits or federal audit reports [Appeal of Durso (SBE, 11/18/80) CCH Cal. Tax Rptr. P 206-454; Appeal of Castillo (SBE, 3/4/80) CCH Cal. Tax Rptr. P 206-298; *see also Rev. & Tax. Code § 18622*].

[c] More Than One Assessment for Year

The FTB is not barred from proposing more than one timely deficiency assessment for the same taxable year, even if the taxpayer paid the first assessment [Appeal of Pyle (SBE, 9/25/79) CCH Cal. Tax Rptr. P 206-257; *see also* FTB Leg. Rul. 265 (9/17/64) CCH Cal. Tax Rptr. P 202-555].

[d] Time Limitation on Assessments

Generally, the FTB may not assess or collect a deficiency for a taxable year unless it mails notice of a deficiency assessment to the taxpayer within four years after the date on which the return for the year in question was filed [*Rev. & Tax. Code § 19057*; *see also Rev. & Tax. Code § 19066*]. If the taxpayer consents during this four-year period to extend the period for assessment beyond the applicable period, the FTB may make an assessment at any time during the extended period [*Rev. & Tax. Code § 19067(a)*].

Effective January 1, 2001, the FTB must notify the taxpayer of the taxpayer's right to refuse to extend the expiration of the time prescribed for the mailing of a notice of a proposed deficiency assessment, or to limit that extension to a particular period of time, on each occasion when the taxpayer is requested to provide the taxpayer's consent [*Rev. & Tax. Code § 19067(b), (c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesAdministration & ProceedingsAssessmentsTax LawState & Local TaxesAdministration & ProceedingsAudits & InvestigationsTax LawState & Local TaxesAdministration & ProceedingsDeficienciesTax LawState & Local TaxesIncome TaxGeneral Overview

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47-540 California Forms of Pleading and Practice--Annotated § 540.273

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.273 Estimated Assessments if No Return or False or Fraudulent Return Filed

[1] Issuance

If a taxpayer has not filed a complete return or has filed a false or fraudulent return with an intent to evade tax, the FTB may require the taxpayer to file a complete return, estimate the taxpayer's income from any available information, and issue an estimated assessment of tax based on that information [*Rev. & Tax. Code § 19087(a)*; Appeal of Hesbon (SBE, 11/16/81) CCH Cal. Tax Rptr. P 400-084; *see* Appeal of Ramfjeld & Co., Inc. (SBE, 1/6/81) CCH Cal. Tax Rptr. P 206-491; *see also* Appeal of Rose (SBE, 10/27/81) CCH Cal. Tax Rptr. P 206-695].

[2] Basis of Estimate

An estimated assessment of tax may be based on any available information concerning the amount of a taxpayer's income [*Rev. & Tax. Code § 19087(a)*]. The most frequently used sources of information are federal audit reports and W-2 information returns [*see* Appeal of McCaw (SBE, 3/3/82) CCH Cal. Tax Rptr. P 400-140; Appeal of Means (SBE, 5/19/81) CCH Cal. Tax Rptr. P 206-625].

[3] Form of Assessment

An estimated assessment is issued in the form of a notice of proposed deficiency assessment. The procedural rules applicable to deficiency assessment, including the rights of protest and appeal, apply equally to estimated assessments [*Rev. & Tax. Code § 19087(b)*; *see § 540.274*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-540 California Forms of Pleading and Practice--Annotated § 540.274

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.274 Proposed Deficiency Assessment if Return Filed

[1] Issuance and Contents

The FTB may issue a notice of a proposed deficiency assessment (hereinafter referred to as an NPA) if the tax reported on the original return is less than the tax disclosed by the FTB's examination of the return [*Rev. & Tax. Code §§ 19033(a), 19034(a)*]. Effective January 1, 2000, each notice must include the date determined by the FTB as the last day on which the taxpayer may file a written protest under *Rev. & Tax. Code § 19041*. Failure to include this date, however, does not invalidate a notice that is otherwise valid [*Rev. & Tax. Code § 19034(b), (c)*]. The NPA contains both the reasons for the proposed assessment and the computation of additional tax due [*Rev. & Tax. Code §§ 19033(a), 19034*]. In no case can the determination of the deficiency be arbitrary or without foundation [*Rev. & Tax. Code § 19033(a)*]. If an NPA is based on a federal audit report, a statement on the NPA to that effect is considered sufficient notice to the taxpayer of the basis of the assessment [Appeal of Crosno (SBE, 1/9/79) CCH Cal. Tax Rptr. P 206-083; *cf. Wertin v. Franchise Tax Bd. (1998) 68 Cal. App. 4th 961, 973-976, 80 Cal. Rptr. 2d 644* (notwithstanding IRS adjustment to taxpayers' federal return, when taxpayers' state return is available FTB must comply with requirement that taxing agency review return before issuing deficiency notice)].

For NPA's issued on or after January 1, 2001, if the original or amended return or related electronically stored return data has been destroyed or cannot be located after reasonable effort, the taxpayer on request from the FTB must provide to the FTB a paper or electronic copy of the return in question. If the taxpayer fails to provide the return within 30 days, which may be extended an additional 30 days for reasonable cause, from the date of the request, the *Rev. & Tax. Code § 19033(b)(1)* requirement that the FTB examine the original or amended return or related electronically storedreturn data in connection with the determination of a proposed deficiency assessment under *Rev. & Tax. Code § 19033(a)* does not apply [*Rev. & Tax. Code § 19033(b)(2), (d)*]. For definition of "electronically stored return data" as used in *Rev. & Tax. Code § 19033, see Rev. & Tax. Code § 19033(c)*.

For NPA's issued on or after January 1, 2008, the notice of proposed deficiency must be mailed in a manner that includes a postmark, that is, a postal marking made on a letter, package, or postcard indicating the date on which the item is delivered to the U.S. Postal Service [*Rev. & Tax. Code § 19033(e), (f)*].

[2] Definition of "Deficiency"

A "deficiency" is defined as the difference between the correct tax due and the amount shown on the return, plus prior assessments, less any rebates, credits, refunds, or other repayments [*Rev. & Tax. Code § 19043*].

[3] When and to Whom Notice of Proposed Assessment Must Be Sent

Generally, the FTB must send an NPA within four years after the date on whichthe return was filed [*Rev. & Tax. Code § 19057*; *see also Rev. & Tax. Code § 19066*]. A certificate of mailing of an NPA by the FTB or State Board of Equalization (hereinafter referred to as the SBE) is prima facie evidence of the assessment of the deficiency and notice thereof [*Rev. & Tax. Code § 19050*; *see* Appeal of Anderson (SBE, 9/29/81) CCH Cal. Tax Rptr. P 400-066]. The FTB is required to send only one joint NPA to a married couple who have filed a joint return unless either spouse notifies the FTB that the couple has established separate residences. In that case, the FTB must mail duplicate originals of the joint NPA to each spouse [*Rev. & Tax. Code § 19035*].

[4] Finality of Assessment

A deficiency assessment becomes final 60 days after the NPA is issued unless the taxpayer files a protest with the FTB within that time [*Rev. & Tax. Code §§ 19042*; *see § 540.277*]. When an assessment has become final, it is due and payable within 15 days of the date the FTB issues its notice and demand for payment [*Rev. & Tax. Code §§ 19049* as amended by Stats. 1997, ch. 600, § 5 (amendments made by act adding subdivision operative for notices issued on or after January 1, 1998)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-540 California Forms of Pleading and Practice--Annotated § 540.275

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.275 Jeopardy Assessments

[1] Authorized if Collection or Assessment in Jeopardy

The FTB is authorized to issue a jeopardy assessment whenever it determines that the assessment or collection of tax, including deficiencies, for any current or past year will be jeopardized in whole or in part. The notice of jeopardy assessment constitutes a demand for payment and, if no deficiency assessment has been previously issued, it also constitutes an NPA pursuant to *Rev. & Tax. Code § 19033* [*Rev. & Tax. Code § 19081*; *see* Appeal of Marshak (SBE, 3/31/82) CCH Cal. Tax Rptr. P 400-183]. A finding of jeopardy by the FTB is presumptive evidence in subsequentproceedings that the assessment or collection of tax or deficiency was in jeopardy when the finding was made [*Rev. & Tax. Code § 19086*].

The FTB also has authority, in the case of tax for a current period, to find that the assessment or collection of that tax will be jeopardized in whole or in part by the delay and therefore to (1) declare the taxpayer's taxable period immediately terminated, and (2) make immediate demand for payment of the tax for the terminated period [*Rev. & Tax. Code § 19082*].

[2] Authorized for Possession of Large Sums of Cash

If a person in physical possession of cash in excess of $10,000 does not claim the cash as his or hers, or as belonging to another person who acknowledges ownership, the FTB may presume that the cash represents gross income and may issue a jeopardy assessment [*Rev. & Tax. Code § 19093(a)*].

[3] Limitation Concerning Jeopardy Assessment and Levy

For taxes assessed and levies made after October 10, 1999, unless the Chief Counsel of the FTB (or the Chief Counsel's delegate) personally approves in writing the assessment or levy, no jeopardy assessment can be made under *Rev. & Tax.*

Code §§ 19081-19093 and no levy can be issued less than 30 days after the earlier of the following [*Rev. & Tax. Code § 19084(a)(1)(A), (d)* (subdivisions added by Stats. 1999, ch. 931, § 16); *see* Stats. 1999, ch. 931, § 40 (effective date)]:

- A notice and demand is mailed or issued for payment under *Rev. & Tax. Code § 19081*.
- Notice and demand for a return and payment is mailed or issued under *Rev. & Tax. Code § 19082*.

[4] Notice of Jeopardy Assessment

Within five days after the date the FTB mails or issues a jeopardy assessment under *Rev. & Tax. Code § 19081* or a demand for payment of tax for any terminated period under *Rev. & Tax. Code § 19082*, the FTB must mail or issue the taxpayer a written statement of the information on which it relies in issuing the jeopardy assessment or demand [*Rev. & Tax. Code § 19084(a)(1)(B)*].

[5] Collection and Stay of Collection Before Finality

A jeopardy assessment is immediately due and payable, and the FTB may commence collection proceedings when it issues the assessment [*Rev. & Tax. Code § 19083(a)*]. Although the FTB may initiate collection procedures and seize the taxpayer's property without administrative hearing, it cannot sell the taxpayer's property without a prior administrative hearing, evenif the taxpayer cannot post security [*Dupuy v. Superior Court (1975) 15 Cal. 3d 410, 415-418, 124 Cal. Rptr. 900, 541 P.2d 540* (sale without prior administrative hearing violative of due process)].

A taxpayer may stay collection of a jeopardy assessment until it becomes final by filing a bond with the FTB in an amount equal to the amount of tax and interest the taxpayer desires to have stayed [*Rev. & Tax. Code §§ 19083(b)*]. The taxpayer may file security other than a bond in an amount determined necessary by the FTB, but this amount cannot be more than double the amount of tax and interest assessed [*Rev. & Tax. Code § 19083(b)*]. Once the taxpayer has filed the bond or other security, collection is stayed to the extent of the amount covered by the security, and the period of limitation on any action to collect the tax is tolled during the stay [*Rev. & Tax. Code § 19083(c), (e)*].

The FTB may itself stay collection of the assessment if it finds that jeopardy nolonger exists [*Rev. & Tax. Code § 19083(d)*]. However, the taxpayer can waive the stay of collection by payment of any part of the assessment, and, to the extent the assessment is abated, the FTB must proportionately reduce the bond or other security at the taxpayer's request [*Rev. & Tax. Code § 19083(c)*].

[6] Petition for Review

[a] As Not Staying Collection

A taxpayer issued a jeopardy assessment may petition the FTB to review whether its findings pursuant to *Rev. & Tax. Code §§ 19081* (assessment or collection jeopardized) or 19082 (termination of current taxable period) are reasonable under the circumstances. The taxpayer must file the petition within 30 days after the date on which the taxpayer is furnished with the written statement required by *Rev. & Tax. Code § 19084(a)(1)(B)* [*see § 540.475[8]*], or 30 days after the last day of the period within which the FTB must furnish that statement. The petition for review must state the grounds on which it is based and does not operate as a stay of collection. Collection can be stayed only by the bond or security procedure described in *Rev. & Tax. Code § 19083* [*Rev. & Tax. Code § 19084(a)(2)*; *see § 540.275[5]*]. A petition for review is considered a protest pursuant to *Rev. & Tax. Code § 19041* [*Rev. & Tax. Code § 19084(a)(2)*; *see § 540.277*]. If the petition for review requests an oral hearing, the FTB must grant an oral hearing to the taxpayer or the taxpayer's authorized representative [*Rev. & Tax. Code § 19084(a)(4)*]. If the taxpayer does not file a petition for review within the 30-day period, the finding of jeopardy becomes final [*Rev. & Tax. Code § 19084(a)(3)*].

[b] Burdens of Proof on Review

On a petition for review of a jeopardy assessment, the FTB must consider all relevant factors, including, but not limited to, the likelihood thatcollection will be jeopardized, the assets of the taxpayer, and the amount of the assessment as it relates to whether jeopardy exists [*Rev. & Tax. Code § 19084(a)(6)*]. The FTB has the burden of proving whether a jeopardy exists as to collection of the tax [*Rev. & Tax. Code § 19084(a)(4)*]. The taxpayer has the burden of proving the correct amount of the assessment for purposes of determining jeopardy status [*Rev. & Tax. Code § 19084(a)(6)*].

[c] Administrative Appeal to SBE of FTB's Determination on Review

[i] Time for Filing

The FTB must make its determination on review within 90 days after the filing of the petition for review unless the taxpayer makes a written request for additional time [*Rev. & Tax. Code § 19084(a)(5)*]. The taxpayer may appeal the FTB's determination on review to the SBE within 60 days after whichever of the following is earlier: (1) the day the FTB notifies the taxpayer of its determination on review, or (2) one day after the 90-day period prescribed by *Rev. & Tax. Code § 19084(a)(5)* within which the FTB is required to make its determination [*Rev. & Tax. Code § 19084(b)*; *see Rev. & Tax. Code §§ 19046*, 19085; *18 Cal. Code Reg. § 5410 et seq.* (SBE procedure)].

[ii] Effect of Appeal

If the taxpayer does not file an appeal within the applicable 60-day period, the FTB's determination is final. Filing of a notice of appeal does not operate to stay collection. Collection can be stayed only by the bond or security procedure described by *Rev. & Tax. Code § 19083* [*Rev. & Tax. Code § 19084(b)(2)*; *see § 540.275[5]*].

[iii] Procedures for Appeal

The appellant may request an oral hearing, but in the absence of a request, the appeal will be decided without a hearing [*18 Cal. Code Reg. §§ 5440, 5441*]. The burdens of proof and relevant factors are the same on review by the SBE as at the FTB review [*Rev. & Tax. Code § 19084(b)(3), (5)*; *see Rev. & Tax. Code § 19084(a)(4), (6)*; *see § 540.275[6][b]*].

The SBE must determine within 60 days after the filing of an appeal whether the issuance of the jeopardy assessment, or the demand pursuant to *Rev. & Tax. Code § 19081* (assessment or collection jeopardized) or 19082 (termination of current taxable period) is reasonable under the circumstances [*Rev. & Tax. Code § 19084(b)(3)*]. If either party requests an extension of the 60-day period and establishes reasonable grounds for the extension, the SBE can grant an extension of not more than 30 days [*Rev.& Tax. Code § 19084(b)(6)*]. The SBE's failure to make its determination within the 60-day period or any extended period is deemed denial of the taxpayer's appeal [*Rev. & Tax. Code § 19084(b)(4)*]. If the SBE determines that jeopardy status does not apply to any part of the assessment, it may modify the amount of the assessment to which the jeopardy attaches [*Rev. & Tax. Code § 19084(b)(4)*].

The SBE's decision becomes final if neither the FTB nor the taxpayer begins a civil action within the 60-day period provided by *Rev. & Tax. Code § 19084(c)(1)* [*see § 540.275[6][d]*]. The filing of a civil action does not operate to stay collection [*Rev. & Tax. Code § 19084(c)(2)*].

[d] Judicial Review of FTB's Decision on Administrative Appeal

[i] In General

Either the taxpayer or the FTB may bring a civil action against the other in thesuperior court for a judicial determination as to whether the issuance of the jeopardy assessment, or the demand pursuant to *Rev. & Tax. Code § 19081* (assessment or collection jeopardized) or 19082 (termination of current taxable period) is reasonable under the circumstances. The civil action must be brought within 60 days after whichever of the following is earlier: (1) the day

the SBE notifies the taxpayer of its determination, or (2) if the SBE fails to make a timely determination, one day after the 60-day period prescribed by *Rev. & Tax. Code § 19084(b)(3), (6)* for the SBE to make its determination [*Rev. & Tax. Code § 19084(c)(1)*].

These civil actions must be filed in superior court in the counties of Los Angeles, San Francisco, San Diego, or Sacramento [*Rev. & Tax. Code § 19084(c)(7)*]. The requirements of *Rev. & Tax. Code §§ 19387* (service) and 19389 (Attorney General as counsel for FTB) apply [*Rev. & Tax. Code § 19084(c)(7)*].

The burdens of proof and relevant factors are the same in the civil action as in administrative appeals before the FTB and SBE [*Rev. & Tax. Code § 19084(c)(3), (5)*; *see Rev. & Tax. Code § 19084(a)(4), (6)*; *see § 540.275[6][b]*].

[ii] Time for Court's Decision

Within 60 days after proper service is made, the superior court must determine whether issuance of the jeopardy assessment or the demand pursuant to *Rev. & Tax. Code § 19081* (assessment or collection jeopardized) or 19082 (termination of current taxable period) is reasonable under the circumstances [*Rev. & Tax. Code § 19084(c)(3)*]. If either the taxpayer or the FTB requests an extension of the 60-day period and establishes reasonable grounds for the extension, the superior court can grant an extension of not more than 30 days [*Rev. & Tax. Code § 19084(c)(6)*].

Legal Topics:

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47-540 California Forms of Pleading and Practice--Annotated § 540.276

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.276 Estoppel

A taxpayer may argue that the FTB should be estopped from imposing tax because the taxpayer acted on incorrect or misleading information provided by the FTB. However, the FTB cannot be estopped from imposing tax, although estoppel may prevent imposition of interest and penalties if grave injustice would otherwise result [*Fischbach & Moore, Inc., v. State Bd. of Equalization (1981) 117 Cal. App. 3d 627, 632, 172 Cal. Rptr. 923* ; *Market S. R. Co. v. California State Board of Equalization (1955) 137 Cal. App. 2d 87, 100-101, 290 P.2d 20* ; *but see Rev. & Tax. Code § 21012* (relief from tax liability if taxpayer reasonably relied on written advice from FTB); *see § 540.404[1]*].

Legal Topics:

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47-540 California Forms of Pleading and Practice--Annotated § 540.277

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.277 Protest and Appeal of Deficiency Assessment

[1] Filing of Protest by Taxpayer

Taxpayers may contest a proposed deficiency assessment of either personal income tax or bank or corporation tax by filing a protest with the FTB. The protest must be in writing, specify the grounds on which it is based, and be mailed to the FTB within 60 days after the date the proposed deficiency assessment was mailed [*Rev. & Tax. Code § 19041(a)*]. With regard to any notice of proposed deficiency assessment mailed after December 31, 1999, any protest filed with the FTB on or before the last date specified for filing that protest by the FTB in the notice of proposed deficiency assessment (according to *Rev. & Tax. Code § 19034*) must be treated as timely filed [*Rev. & Tax. Code § 19041(b), (c)*].

The rights of protest and appeal do not apply to assessments involving only a mathematical error [*Rev. & Tax. Code § 19051*].

[2] Action by FTB

Once a protest is filed, the FTB must reconsider its assessment of the deficiency and, if the taxpayer requests it, grant the taxpayer an oral hearing. The FTB may make a decision on only a part of the protest, and the remaining part continues to be under protest until the FTB acts on it [*Rev. & Tax. Code § 19044*].

[3] Appeal of FTB's Decision to SBE

The FTB's action on a protest, whether in whole or in part, becomes final 30 days after the FTB mails its notice of action, unless the taxpayer appeals to the SBE within the 30-day period beginning on the date the FTB mails its notice of action to the taxpayer [*Rev. & Tax. Code § 19045(a)*; *see Rev. & Tax. Code §§ 19046, 19047* and 18 Cal. Code Reg. §§ 5010-5012, 5070-5087 on appeal procedure]. With regard to any FTB notice of action on theprotest mailed after December 31, 1999, any appeal to the SBE by the taxpayer on or before the date for filing an appeal specified in the

notice (under *Rev. & Tax. Code § 19045(b)(1)*) must be treated as timely filed [*Rev. & Tax. Code § 19045(b)(2)*].

If the taxpayer appeals to the SBE, the SBE's decsion becomes final 30 days after its determination unless the taxpayer seeks a rehearing during that period. If the taxpayer seeks a rehearing, the SBE's determination on the rehearing is final 30 days after the SBE issues it [*Rev. & Tax. Code § 19048*]. Once the SBE's decision is final, the tax must be paid. Payment is a prerequisite to the filing of a claim for refund and eventually an action for refund [*Rev. & Tax. Code §§ 19042, 19049, 19306, 19382*; *see § 540.71*; see also *§ 540.300* et seq.].

[4] Payment of Protested Deficiency During Protest and Appeal Process

If the taxpayer decides to pay the protested deficiency assessment before theSBE issues its decision (for example, with or after the filing of the protest or after filing the appeal to the SBE), the protest or appeal is treated as a claim for refund or an appeal from the denial of a claim for refund [*Rev. & Tax. Code § 19335*]. In this situation, a taxpayer is bound in a subsequent suit for refund by the grounds stated in the protest [*Rev. & Tax. Code § 19382*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-540 California Forms of Pleading and Practice--Annotated § 540.278

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.278 Claim for Refund

[1] Requirements

A taxpayer must file a written claim for refund with the FTB before the taxpayer may file a suit for refund. The claim must be in writing, signed by the taxpayer or the taxpayer's authorized representative, and must state the grounds on which it is based. There are additional requirements for class claims [*Rev. & Tax. Code §§ 19322, 19382*; *see Cal. Const., art. III, § 3.5*; *Shiseido Cosmetics (America) Ltd. v. Franchise Tax Bd. (1991) 235 Cal. App. 3d 478, 488-492, 286 Cal. Rptr. 690* (written claim for refund must be filed even if only ground on which refund is sought is constitutional and therefore beyond jurisdiction of FTB, and even if ground is well known to FTB because of lengthy protest negotiations and stipulations)]. The purpose of *Rev. & Tax. Code § 19322* is to put FTB on notice of a claim [*Wertin v. Franchise Tax Bd. (1998) 68 Cal. App. 4th 961, 976-977, 80 Cal. Rptr. 2d 644* (letter to FTB clearly stating that letter constituted claim for refund complied with statute, which requires no particular form)].

A claim for refund generally must be filed within the later of (1) four years from the date the original return was filed (if filed within the time prescribed by *Rev. & Tax. Code § 18567* or *18604*, whichever is applicable), (2) four years after the last day prescribed for filing the original return (determinedwithout regard to any extension of time for filing the return), or (3) one year after the date of the overpayment [*Rev. & Tax. Code § 19306*; *cf. Rev. & Tax. Code §§ 19307* (filed return as claim for refund concerning withholding and estimated taxes if filed in specified period), *19311* (period for filing claim for credit or refund when change or correction was made or allowed by IRS)]. However, a claim for credit or refund based on worthless debts may be filed within seven years after the due date of the return for the year for which the claim is filed [*Rev. & Tax. Code § 19312*]. For an individual taxpayer, the period for filing a claim for refund may be extended during the period that the taxpayer is unable to manage financial affairs due to a physical or mental impairment that is terminal or expected to last at least 12 continuous months [*Rev. & Tax. Code § 19316*].

A claim for refund that meets the requirements of *Rev. & Tax. Code § 19322*, but that is made when the entire tax

assessed or asserted has not been paid, constitutes a claim only for purposes of tolling the time periods in *Rev. & Tax. Code § 19306*. For all other purposes, such a claim is deemed to be filed on the date that the full amount of the tax is paid. However, no credit or refund may be made or allowed for any payment made more than seven years before the date that the full amount of the tax is paid [*Rev. & Tax. Code § 19322.1*].

Notwithstanding any other provision in the Personal Income Tax Law [*Rev. & Tax. Code § 17001 et seq.*] or the Bank and Corporation Tax Law [*Rev. & Tax. Code § 23001 et seq.*], the provisions of *I.R.C. § 6603*, relating to deposits made to suspend the running of interest on potential underpayments, will apply, except as otherwise provided [*see Rev. & Tax. Code § 19041.5(b)* (how to construe reference to "30-day letter" in federal statute)]. A deposit will not be considered a payment of tax for purposes of filing an amended return as a claim for a refund [*see Rev. & Tax. Code § 19306*], converting a protest to an action on a claim for a refund [*see Rev. & Tax. Code § 19335*], or filing an action for a refund [*see Rev. & Tax. Code § 19384*], until either of the following occurs [*Rev. & Tax. Code § 19041.5(a)*; *see Rev. & Tax. Code § 19041.5(c)* (treatment of amount held by FTB as deposit in nature of cash bond prior to October 7, 2005)]:

- The taxpayer provides a written statement to the FTB specifying that the deposit is a payment of tax for purposes of the applicable code section.

- The deposit is used to pay a final tax liability.

[2] FTB's Action on Claim

The FTB is required to notify the taxpayer if it disallows the taxpayer's claim for refund [*Rev. & Tax. Code § 19323(a)*] and effective 180 days after October 10, 1999, must provide an explanation for the disallowance [*Rev. & Tax. Code § 19323(a), (b)* (as amended by Stats. 1999, ch. 931, § 24; *see* Stats. 1999, ch. 931 § 40 (effective date)]. If the taxpayer does not receive a notice of action on a refund claim within six months after filingit, the taxpayer may treat the claim as denied and either appeal to the SBE or file suit for a refund [*Rev. & Tax. Code §§ 19331, 19385*; *see Rev. & Tax. Code §§ 19332, 19333, 19334* and 18 Cal. Code Reg. §§ 5010-5012, 5070-5087 on SBE appeal procedure]. If the FTB disallows a claim, the taxpayer may appeal the disallowance to the SBE [*Rev. & Tax. Code §§ 19324, 19333, 19334*].

[3] Effect of Claim on Suit for Refund

A taxpayer's suit for refund is limited to the grounds stated in the claim for refund. Therefore, a claim for refund should raise all possible grounds for the claim [*Rev. & Tax. Code § 19382*; *but see Montgomery Ward & Co. v. Franchise Tax Board (1970) 6 Cal. App. 3d 149, 85 Cal. Rptr. 890* (grounds not in claim considered because intertwined)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.279 Carryovers

If the Franchise Tax Board determines that the amount of a carryover disclosedby a taxpayer on an original or amended return is more than the amount of the carryover disclosed by its own examination, it may mail a notice to the taxpayer of the proposed carryover adjustment. For this purpose, "carryover" is defined as the amount of a credit, loss, deduction, or other item that is shown on an original or amended return for carry forward to a subsequent taxable year. Procedures similar to those that apply to a proposed deficiency assessment apply to carryovers, including protest and appeal rights. The proposed adjusted carryover amount, which becomes final after the Board makes a determination, is binding and conclusive, and the taxpayer must report that final amount on an original or amended return for any subsequent year [*Rev. & Tax. Code § 19043.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesAdministration & ProceedingsAssessmentsTax LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTax LawState & Local TaxesAdministration & ProceedingsTaxpayer ProtestsTax LawState & Local TaxesIncome TaxCorporations & Unincorporated AssociationsImposition of TaxTax LawState & Local TaxesIncome TaxIndividuals, Estates & TrustsImposition of Tax

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47-540 California Forms of Pleading and Practice--Annotated §§ 540.280-540.299

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

[Reserved]

§§ 540.280[Reserved]

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47-540 California Forms of Pleading and Practice--Annotated § 540.300

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.300 Jurisdiction of Superior Court

[1] Limitations

The superior court has jurisdiction of tax assessment and collection disputes if the taxpayer has first exhausted administrative remedies and paid the disputed tax [*Cal. Const, art. XIII, § 32*; *Rev. & Tax. Code §§ 19381, 19382*; *see Milhous v. Franchise Tax Bd. (2005) 131 Cal. App. 4th 1260, 32 Cal. Rptr. 3d 640* ("pay first, litigate later" rule embodied in *Rev. & Tax. Code § 19382* does not affect court's fundamental jurisdiction and can be waived); *see also Agnew v. State Bd. of Equalization (1999) 21 Cal. 4th 310, 333, 87 Cal. Rptr. 2d 423, 981 P.2d 52* (adjudication of validity of tax is not barred until interest, as well as tax, is paid); *California Logistics, Inc. v. State of Cal. (2008) 161 Cal. App. 4th 242, 250, 73 Cal. Rptr. 3d 825* (doctrine of collateral estoppel cannot take precedence over *Cal. Const, art. XIII, § 32,* and require courts to provide relief which that constitutional provision specifically prohibits)]. Such an action is not a limited civil case [*see Code Civ. Proc. § 86(a)(1)*]. The single exception to the exhaustion of administrative remedies rule is the jurisdiction of the superior courts of Sacramento, Los Angeles, and San Francisco to determine the issue of the taxpayer's residency and to dismiss an assessment of personal income tax based on alleged California residence without a taxpayer first having to pay the assessed tax [*Rev. & Tax. Code § 19381*; *see* discussion *§ 540.302*].

A superior court may not hear actions to prevent or enjoin assessment or collection of any tax and does not have the power to set aside a closing agreement between the taxpayer and the FTB [*Cal. Const., art. XIII, § 32*; *Rev. & Tax. Code §§ 19381, 19441*; *see § 540.300[2]*]. Taxpayers cannot attempt to circumvent this rule by seeking a declaratory judgment that a tax is not legally collectible [*Casey v. Bonelli (1949) 93 Cal. App. 2d 253, 255, 208 P.2d 723]* . The superior court also does not have jurisdiction to order the return of property seized pursuant to a tax claim by the state that is prima facie valid. The taxpayer's only remedy is to exhaust administrative remedies challenging the tax assessment [*Mason v. Superior Court of Los Angeles County (1981) 121 Cal. App. 3d 876, 882, 175 Cal. Rptr. 462]* . The prohibition against injunction actions has been held constitutional on the ground that the refund procedures are a

plain, speedy, and efficient remedy at law [*Aronoff v. Franchise Tax Board (9th Cir. 1965) 348 F.2d 9, 10* ; *see 28 U.S.C. § 1341*].

Moreover, mandamus relief has been denied based on a refund action being deemed an adequate remedy at law [*Nast v. State Bd. of Equalization (1996) 46 Cal. App. 4th 343, 346-348, 53 Cal. Rptr. 2d 592]* .

[2] Closing Agreements

Superior court jurisdiction does not extend to any issue that is included in a closing agreement between the taxpayer and the FTB. A closing agreement is a written agreement that settles any matter arising under the California tax laws. Once made, an approved closing agreement may not be reopened or modified by the state, nor may the state or the taxpayer bring any suit, action, or proceeding to annul, modify, or set it aside except on a showing of fraud, malfeasance, or misrepresentation of a material fact [*Rev. & Tax. Code § 19441(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityJurisdiction & VenueCivil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTax LawState & Local TaxesAdministration & ProceedingsSettlementsTax LawState & Local TaxesAdministration & ProceedingsTaxpayer Protests

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47-540 California Forms of Pleading and Practice--Annotated § 540.301

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.301 Federal Court Jurisdiction

[1] District Courts

United States district courts may hear state tax questions involving federal issues, but may not enjoin, suspend, or restrain the assessment, levy, or collection of any state tax unless the taxpayer does not have a plain, speedy, and efficient remedy in the state courts [*28 U.S.C. § 1341*; *Rosewell v. La Salle Nat'l Bank (1981) 450 U.S. 503, 512, 101 S. Ct. 1221, 67 L. Ed. 2d 464* ; *see also Arkansas v. Farm Credit Servs. (1997) 520 U.S. 821, 823-824, 117 S. Ct. 1776, 138 L. Ed. 2d 34* (under another exception to jurisdictional bar of *28 U.S.C. § 1341* established by cases applies when United States sues to protect itself or its instrumentalities; exception inapplicable under facts)]. The California refund procedures relating to both the California Personal Income Tax Law and the Bank and Corporation Tax Law have been found to be adequate remedies at law, thereby precluding federal injunctive relief for those taxes [*Capitol Industries-EMI, Inc. v. Bennett (9th Cir. 1982) 681 F.2d 1107, 1112-1118* ; *Aronoff v. Franchise Tax Board (9th Cir. 1965) 348 F.2d 9, 11]* .

California administrative procedures and suits for refunds, however, are available only to California taxpayers [*Rev. & Tax. Code §§ 19381, 19382*]. These remedies are not available to nontaxpayers who may be indirectly harmed by a tax assessment. Nevertheless, an action for declaratory or injunctive relief by an entity other than the taxpayer is barred by *28 U.S.C. § 1341* (federal anti-injunction provision) if the plaintiff has discretion over and controls thetaxpayer. Thus, a foreign parent corporation that was an indirect sole shareholder of a company against which the FTB assessed California bank and corporation taxes could not maintain an action for declaratory or injunctive relief with respect to imposition of those taxes [*Franchise Tax Bd. v. Alcan Aluminum (1990) 493 U.S. 331, 110 S. Ct. 661, 107 L. Ed. 2d 696, 705-707]* . Moreover, even if the taxpayer can overcome the anti-injunction provision, the federal court may hold the action in abeyance under the abstention doctrine if a state court resolution of the law would render the federal grounds moot [*see Capitol Industries-EMI, Inc v. Bennett (9th Cir. 1982) 681 F.2d 1107, 1121 n.34*].

[2] Removal Jurisdiction

Removal jurisdiction to federal court from state courts is also restricted. A federal defense, such as preemption of federal law over state law, will not allow a taxpayer to remove to a federal court an action by the FTB in a state court to collect taxes, even if the federal defense is anticipated in the FTB's complaint [*Franchise Tax Bd. v. Laborers Vac. Trust (1983) 463 U.S. 1, 13-14, 103 S. Ct. 2841, 77 L. Ed. 2d 420]* .

[3] U.S. Supreme Court

Apart from suits brought in federal district courts, federal court jurisdiction is limited to U.S. Supreme Court review of suits for refund that have been prosecuted to the California Supreme Court [*see 28 U.S.C. § 1341*; *Container Corporation of America v. Franchise Tax Board (1983) 463 U.S. 159, 103 S. Ct. 2933, 77 L. Ed. 2d 545* ; *Complete Auto Transit Inc. v. Brady (1977) 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityJurisdiction & VenueCivil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsTax Anti-Injunction ActCivil ProcedureU.S. Supreme Court ReviewGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTax LawState & Local TaxesAdministration & ProceedingsTaxpayer Protests

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47-540 California Forms of Pleading and Practice--Annotated § 540.302

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.302 Residency Determinations

Individual taxpayers receiving notice of a deficiency assessment based on alleged California residency may seek a judicial declaration of residency or nonresidency without first paying the tax assessed [*Code Civ. Proc. § 1060.5*]. However, before bringing the suit, the taxpayers must first exhaust their administrative remedies [*Rev. & Tax. Code § 19381*; *see § 540.550*]. The taxpayer must first (1) timely file a written protest with the FTB and (2) timely appeal the FTB's denial of the protest to the SBE [*Rev. & Tax. Code §§ 19041, 19045, 19381*; *see* discussion in Subpart B under Protest and Appeal of Deficiency Assessment].

The taxpayer must file a suit for determination of residency within 60 days after the SBE's determination of the taxpayer's appeal becomes final [*Rev. & Tax. Code § 19381*; *see Franchise Tax Bd. v. Superior Court (1989) 212 Cal. App. 3d 1343, 1349, 261 Cal. Rptr. 236* (dismissal of deficiency assessment as not authorized by *Code Civ. Proc. § 1060.5* or *Rev. & Tax. Code § 19381* in action for determination of residency)]. The determination of the SBE becomes final 30 days after the date of determination unless the taxpayer or the FTB files a petition for rehearing during that time, in which case the SBE's determination becomes final 30 days after issuance of its opinion on the petition for rehearing [*Rev. & Tax. Code § 19048*]. Collection of all except jeopardy assessed taxes is stayed during the pendency of the suit for residency determination [*Rev. & Tax. Code § 19381*].

Although collection of any tax is postponed until completion of an action for determination of residency, actions for residency determination are not barred by *Cal. Const., art. XIII, § 32*, which prohibits any injunction delaying payment of any tax. *Cal. Const., art. XIII, § 32*, only prohibits issuance of legal or equitable process in any proceeding in any court to prevent or enjoin collection of tax. The postponement or prevention of collection involved in a residency determination is valid because it is granted by the statute, not the court [*Franchise Tax Bd. v. Superior Court (1989) 212 Cal. App. 3d 1343, 1346-1349, 261 Cal. Rptr. 236]* . However, a judgment against the FTB dismissing a deficiency assessment cannot be granted in a residency determination, because that relief is not authorized by *Code Civ. Proc. § 1060.5* or *Rev. & Tax. Code § 19381* [*Franchise Tax Bd. v. Superior Court (1989) 212 Cal. App. 3d 1343, 1349, 261*

Cal. Rptr. 236] .

The superior courts of Sacramento, Los Angeles, and San Francisco counties have jurisdiction to hear suits for determination of residency [*Code Civ. Proc. § 1060.5*; *Rev. & Tax. Code § 19381*]. An action for determination of residency is entitled to preference on the trial calendar [*Code Civ. Proc. § 1062.3*; *Franchise Tax Bd. v. Superior Court (1989) 212 Cal. App. 3d 1343, 1349, 261 Cal. Rptr. 236]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityExhaustion of RemediesCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTax LawState & Local TaxesAdministration & ProceedingsTaxpayer ProtestsTax LawState & Local TaxesIncome TaxIndividuals, Estates & TrustsImposition of Tax

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47-540 California Forms of Pleading and Practice--Annotated § 540.303

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.303 Suit for Refund

[1] In General

After paying the tax and receiving the FTB's denial of a claim for refund, any taxpayer claiming that the tax computed and assessed is void in whole or in part may bring suit against the FTB for the recovery of any part of the amount paid [*Rev. & Tax. Code §§ 19381, 19382*]. A taxpayer may also bring a suit for refund if the taxpayer's claim for refund is deemed disallowed because of the FTB's failure to mail a notice of action on the claim [*see Rev. & Tax. Code § 19385*; *see § 540.552[4]*]. If the taxpayer's suit seeks a refund of a tax liability satisfied by the credit of an overpayment, the credit is treated as a payment at the time the credit is allowed [*Rev. & Tax. Code § 19383*].

At trial, the taxpayer has the burden to prove by a preponderance of the evidence that the taxpayer is entitled to the refund claimed. The trial court determines "de novo" whether the taxpayer has met this burden [*Tenneco West, Inc. v. Franchise Tax Bd. (1991) 234 Cal. App. 3d 1510, 1520, 286 Cal. Rptr. 354]* .

[2] Prerequisites to Suit

The primary prerequisites for challenging an assessment of additional personal income or bank and corporation tax are [*Rev. & Tax. Code §§ 19381, 19382*; *see* discussion in *§ 540.71*; *see also Rev. & Tax. Code § 19041.5(a)(1), (2)* discussed in *§ 540.552[5]*]:

- The payment of the tax at issue; and
- The submission of a claim for refund to the FTB.

However, the "pay first, litigate later" rule embodied in *Rev. & Tax. Code § 19382* does not affect a court's fundamental jurisdiction and can be waived. Therefore, if the FTB fails to raise the issue in the trial court, the taxpayer's suit may

continue to judgment; the FTB may not raise the issue for the first time on appeal [*Milhous v. Franchise Tax Bd. (2005) 131 Cal. App. 4th 1260, 1267B* 1268, *32 Cal. Rptr. 3d 640]* .

A suit contesting a personal income tax assessment based on an individual residency determination, however, may be heard without the taxpayer first having to pay the tax [*Rev. & Tax. Code § 19381*; *see § 540.302*].

Payment of accrued interest on a tax deficiency is not a prerequisite to either an administrative refund claim or a subsequent action for refund of taxes [*Agnew v. State Board of Equalization (1999) 21 Cal. 4th 310, 314-315, 321 n.8, 333-334, 87 Cal. Rptr. 2d 423, 981 P.2d 52* (construing *Cal. Const. art. XIII, § 32*, and *Rev. & Tax. Code § 6931*; SBE's prepayment policy may not be enforced insofar as it requires prepayment of interest before tax refund claim will be considered; court did not consider whether SBE may require prepayment of interest as precondition to consideration of challenge directed only to an interest assessment); *see Chen v. Franchise Tax Board (1998) 75 Cal. App. 4th 1110, 1113-1114, 1117-1124, 90 Cal. Rptr. 2d 268* (given plain language of *Cal. Const., art. XIII, § 32*, and *Rev. & Tax. Code § 19382* and definition of tax in *Rev. & Tax. Code § 23036*, word "tax" does not include interest and therefore payment of accrued interest is not jurisdictional prerequisite to action for refund of franchise axes paid; court did not reach question of whether penalties must be paid before refund action will lie)]. Presumably a penalty is treated in the same way as interest in this regard and need not be paid before an administrative refund claim or a subsequent action for refund of taxes [*see Agnew v. State Board of Equalization (1999) 21 Cal. 4th 310, 323-334, 87 Cal. Rptr. 2d 423, 981 P.2d 52* ; *Chen v. Franchise Tax Board (1998) 75 Cal. App. 4th 1110, 1119-1120, 90 Cal. Rptr. 2d 268* ; *but see* FTB Notice, No. 97-8 (9/4/97), CCH Cal. Tax Rptr., 1995-1999 Transfer Binder, P 402-940 (providing for consideration of claim when tax principal, additions to tax and penalties has been paid in full before or together with claim for refund)]. In any event, depending on circumstances, the taxpayer may desire to make payment of interest and any penalty assessed before or at the time of filing a claim for refund, or before suit if not done earlier, to stop the accrual of interest. Moreover, payment of such amounts will thereafter avoid the possibility of any collection activity being commenced by the FTB.

An amount set forth in a notice of proposed assessment is not an assessed tax that is due, and a taxpayer need not pay such an amount before seeking a refund after payment of a tax claimed to be illegal [*City Nat'l Corp. v. Franchise Tax Bd. (2007) 146 Cal. App. 4th 1040, 1046, 53 Cal. Rptr. 3d 411]* . The Revenue and Taxation Code provides a procedure by which a proposed assessment becomes a final assessment that is due and payable [*see Rev. & Tax. Code § 19041 et seq.*; *see also § 540.274* et seq.], including [*City Nat'l Corp. v. Franchise Tax Bd. (2007) 146 Cal. App. 4th 1040, 1045-1046, 53 Cal. Rptr. 3d 411]* :

- A notice of proposed assessment;
- A protest period;
- A response to a taxpayer's protest;
- An administrative appeal period;
- A decision on an appeal;
- A rehearing notice period;
- Possibly a rehearing; and
- A grace period, after determination (and appeal and rehearing), before the proposed assessment becomes a final assessment.

Payment then becomes due 15 days after notice to the taxpayer and a demand for payment [*Rev. & Tax. Code § 19049(a)*].

[3] Statute of Limitations

A taxpayer must file a suit for refund against the FTB within the latest of the following [*Rev. & Tax. Code § 19384*]:

- Four years after the date prescribed for filing the return;
- One year after the date the tax was paid;
- 90 days after notice of action by the FTB on a claim for refund; or
- 90 days after the determination (including the issuance of a decision, opinion, or dismissal) by the SBE on appeal from the action of the FTB on a claim for refund becomes final under *Rev. & Tax. Code § 19334*.

Failure to bring suit within the applicable time limit acts as a complete bar to the recovery of any taxes [*Rev. & Tax. Code § 19390*].

Notwithstanding any other provision in Personal Income Tax Law (*Rev. & Tax.Code § 17001 et seq.*), the Bank and Corporation Tax Law (*Rev. & Tax. Code § 23001 et seq.*) or Part 10.2 of Division 2 of the Revenue and Taxation Code (*Rev. & Tax. Code § 18401 et seq.*), relating to the administration of franchise and income tax laws, any amount paid as a tax or in respect of a tax that is paid after the mailing of a notice of deficiency assessment and designated by the taxpayer as a deposit in the nature of a cash bond made to stop the running of interest, is not considered a paymentof tax for purposes of filing a claim for refund under *Rev. & Tax. Code § 19306*, or an action under *Rev. & Tax. Code § 19384*, until either of the following occur [*Rev. & Tax. Code § 19041.5(a)(1), (2)*; *e.g., Fujitsu IT Holdings, Inc. v. Franchise Tax Board (2004) 120 Cal. App. 4th 459, 486, 15 Cal. Rptr. 3d 473]* :

- The taxpayer provides to the FTB a written statement specifying that the deposit will be a payment of tax for purposes of *Rev. & Tax. Code § 19306, 19335*, or *19384*.
- The deficiency assessed becomes due and payable in accordance with *Rev. & Tax. Code § 19049*.

[4] Grounds for Suit

A taxpayer's suit for refund is limited to the grounds stated in the claim for refund [*Rev. & Tax. Code § 19382*; *but see Montgomery Ward & Co. v. Franchise Tax Board (1970) 6 Cal. App. 3d 149, 85 Cal. Rptr. 890* (grounds not in claim considered because intertwined)].

For complaints for refunds of personal income tax and for bank and corporation tax based on impermissible application of the unitary method, *see §§ 540.551* and *540.552*, respectively.

[5] Service

The summons and complaint of a suit for refund must be served on the FTB or its executive officer. A second copy of both must be delivered to the FTB, but this requirement is not jurisdictional [*Rev. & Tax. Code § 19387*]. The summons must notify the person served that he or she is being served on behalf of the FTB under " *Code Civ. Proc. § 416.50* (public entity)" [*see* box number 3 on face of Judicial Council summons form].

[6] Venue

Taxpayers may file suit against the FTB in the superior court of any county in California where the California Attorney General maintains an office. [*Rev. & Tax. Code § 19388*]. This includes San Francisco, Sacramento, Los Angeles, and San Diego counties.

[7] Who Defends Suit

The FTB is represented by the State Attorney General or its own staff counsel in a refund action [*Rev. & Tax. Code § 19389*].

[8] Res Judicata and Other Defenses

In any suit for refund, the doctrine of res judicata applies only if the tax liability involved is for the same year that was involved in a previously decided case [*Rev. & Tax. Code § 19802(a)*]. The FTB may assert in defenseonly those unpaid liabilities of the taxpayer for the same year that are evidenced by (1) a final proposed assessment, (2) a notice of tax due, or (3) a final notice of action [*Rev. & Tax. Code § 19802(b)* (specifically overruling *Pope Estate Company v. Johnson (1941) 43 Cal. App. 2d 170, 173-175, 110 P.2d 481*)]. These unpaid liabilities may be asserted in addition to the defenses or relief sought in the action. The taxpayer need not assert any refund claim for the same year, if the claim resulted from a federal audit adjustment that was made after the taxpayer filed the suit for refund [*Rev. & Tax. Code § 19802(b)*].

The FTB, the courts, and other administrative officers are not bound by determinations made by other state officers or agencies in determining any issue of law or fact involving personal income or bank and corporations tax [*Rev. & Tax. Code § 19801*; *see also Lennane v. Franchise Tax Bd. (1996) 51 Cal. App. 4th 1180, 1186 n.3, 59 Cal. Rptr. 2d 602]* .

[9] General Civil Procedure Rules Apply

Once the complaint is filed and set for hearing in the appropriate court, all the normal rules of court under the Code of Civil Procedure apply [*see Rev. & Tax. Code § 19413*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstTax LawState & Local TaxesAdministration & ProceedingsCredits, Overassessments & RefundsTax LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTax LawState & Local TaxesAdministration & ProceedingsTaxpayer ProtestsTax LawState & Local TaxesIncome TaxGeneral Overview

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47-540 California Forms of Pleading and Practice--Annotated § 540.304

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.304 Interest on Judgments Against FTB

Any judgment in favor of a taxpayer for an overpayment of tax includes interest [*Rev. & Tax. Code § 19391*] at the statutory rate [*Rev. & Tax. Code § 19521*].

Interest accrues from the date the overpayment of tax was paid or collected to the date it is credited to the taxpayer's account [*Rev. & Tax. Code § 19391*]. Alternatively, if the FTB issues a refund check, interest accrues from the date the tax was paid or collected to a date no more than 30 days before the check is issued. The FTB determines the cutoff date within this 30-day period [*Rev. & Tax. Code § 19391*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewGovernmentsState & Territorial GovernmentsClaims By & AgainstTax LawState & Local TaxesAdministration & ProceedingsCredits, Overassessments & RefundsTax LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTax LawState & Local TaxesIncome TaxGeneral Overview

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47-540 California Forms of Pleading and Practice--Annotated § 540.305

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.305 Litigation Costs

In any civil proceeding brought in a court of record in California by or against the State of California in connection with the determination, collection, or refund of any tax, interest, or penalty, the prevailing party may be awarded a judgment for reasonable litigation costs [*Rev. & Tax. Code § 19717(a)*; *but see Northwest Energetic Servs., LLC v. California Franchise Tax Bd. (2008) 159 Cal. App. 4th 841, 869-875, 71 Cal. Rptr. 3d 642* (*Rev. & Tax. Code § 19717* is not exclusive means of recovering attorney's fees in tax refund suit; on appropriate facts, fees could be recovered under *Code Civ. Proc. §§ 1021.5, 1032*, and *1033.5*); *accord, Ventas Fin. I, LLC v. Franchise Tax Bd. (2008) 165 Cal. App. 4th 1207, 1234-1235, 81 Cal. Rptr. 3d 823] . Rev. & Tax. Code § 19717* was amended in 1999 by Stats. 1999, ch. 931, § 33. Under *Rev. & Tax. Code § 19717(g)*, the amendments are operative for costs incurred and services performed more than 180 days after October 10, 1999, the effective date of the amendments. Citations in the discussion below indicates which provisions were amended or added by that legislation.

The recoverable costs are:

- Reasonable court costs [*Rev. & Tax. Code § 19717(c)(1)(A)*].

- Expert witness expenses (rate of compensation not to exceed the highest rate of compensation for expert witnesses paid by the state of California) [*Rev. & Tax. Code § 19717(c)(1)(B)(i)*].

- Cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case [*Rev. & Tax. Code § 19717(c)(1)(B)(ii)*].

- Attorney fees, with the rate of compensation not to exceed $125 per hourunless the court finds that a cost of living increase or a special factor, such as the limited availability of qualified counsel for the proceeding, the difficulty of the issues presented in the case, or the local availability of tax expertise,

justifies a higher rate, with the $125 rate to be adjusted annually for increases in cost of living beginning with calendar year 2001 [*Rev. & Tax. Code § 19717(c)(1)(B)(iii)* (specific dollar amount and annual adjustment provision as amended by Stats. 1999, ch. 931, § 33)]. Moreover, the court may award reasonable attorney fees in excess of the attorney fees paid or incurred if the fees are less than the reasonable attorneys' fees because the attorney is representing the prevailing party for no fee or for a fee which, taking into account all the facts and circumstances, is no more than a nominal fee [*Rev. & Tax. Code § 19717(c)(1)(B)(iv)* (subdivision added by Stats. 1999, ch. 931, § 33)]. *Rev. & Tax. Code § 19717(c)(1)(B)(iv)* applies only if the award is paid to the attorney or the attorney's employer [*Rev. & Tax. Code § 19717(c)(1)(B)(iv)*].

To recover litigation costs, the taxpayer must have exhausted all administrative remedies prior to suit, including the filing of an appeal as provided in *Rev. & Tax. Code § 19324* [*Rev. & Tax. Code § 19717(b)(1)*; *see also Wertin v. Franchise Tax Bd. (1998) 68 Cal. App. 4th 961, 979, 80 Cal. Rptr. 2d 644* (appeal requirement not retroactive to refund action commenced before requirement was mandated)]. Any failure to agree to an extension of the time for the assessment of any tax will not be taken into account for purposes of determining whether the prevailing party meets the requirements of the preceding sentence [*Rev. & Tax. Code § 19717(b)(1)*].

The taxpayer almost must substantially prevail with respect to either (1) the amount in controversy, or (2) the most significant issue or set of issues presented [*Rev. & Tax. Code § 19717(c)(2)(A)*]. However, if the lawsuit consists of related claims, and the taxpayer has won substantial relief, the trial court has discretion to award the taxpayer attorney's fees for discrete issues, even if the issues for which fees are awarded do not represent the bulk of the amount in controversy or the most significant issues in the case [*Fujitsu IT Holdings, Inc. v. Franchise Tax Board (2004) 120 Cal. App. 4th 459, 488, 15 Cal. Rptr. 3d 473]* .

A party is not treated as the prevailing party if the State of California establishes that its position in the proceeding was substantially justified [*Rev. & Tax. Code § 19717(c)(2)(B)(i)*]. In determining whether the state'sposition was substantially justified, the court must take into account whether the FTB has lost in any California Court of Appeal in another district on substantially similar issues, as reflected in a decision certified for publication [*Rev. & Tax. Code § 19717(c)(2)(B)(iv)* (subdivision added by Stats. 1999, ch. 931, § 33)]. Moreover, "substantially justified" has been defined to mean justified to a degree that would satisfy a reasonable person, or that has a reasonable basis both in law or fact. This is an objective standard that does not depend on an analysis of the subjective motivations of the government in taking the position it did [*Wertin v. Franchise Tax Bd. (1998) 68 Cal. App. 4th 961, 977, 80 Cal. Rptr. 2d 644* ; *see, e.g., Fujitsu IT Holdings, Inc. v. Franchise Tax Board (2004) 120 Cal. App. 4th 459, 487-488, 15 Cal. Rptr. 3d 473* (FTB's position was not substantially justified)]. The State's position is presumed not to be substantially justified if the FTB did not follow its "applicable published guidance" in the administrative proceeding. This presumption may be rebutted [*Rev. & Tax. Code § 19717(c)(2)(B)(ii)*]. "Applicable published guidance" means either (1) a regulation, legal ruling, notice, information release, or announcement, or (2) any chief counsel ruling or determination letter issued to a taxpayer [*Rev. & Tax. Code § 19717(c)(2)(B)(iii)*]. Any determination under *Rev. & Tax. Code § 19717(c)(2)(B)* as to whether a party is a prevailing party must be made either by the court or an agreement of the parties [*Rev. & Tax. Code § 19717(c)(2)(C)*].

Litigation costs may not be awarded with respect to any portion of the civil proceeding during which the prevailing party has unreasonably protracted that proceeding [*Rev. & Tax. Code § 19717(b)(3)*].

The term "prevailing party" does not include the State of California or any creditor of the taxpayer [*Rev. & Tax. Code § 19717(c)(2)(A)*].

Rev. & Tax. Code § 19717 contemplates dual determinations for trial and appeal as to the right to litigation costs. Under *Rev. & Tax. Code § 19717(e)*, an order granting or denying an award in whole or in part must be incorporated as part of the decision or judgment in the case and so becomes subject to appeal in the same manner as the decision or

judgment. This implies that an award is applied for and determined first at the trial level, even though an appeal may follow. *Rev. & Tax. Code § 19717* also impliedly envisions a second award being determined after appeal proceedings, for litigation costs incurred on appeal. On a reapplication for costs following appeal, a court in the second determination is not bound by the determination of substantial justification made in connection with the first application. Therefore, if a taxpayer is awarded litigation costs at the close of trial proceedings (*e.g.*, summary judgment on the merits), it having been determined that the FTB's position was not substantially justified, a court after an appeal may deny the taxpayer litigation costs incurred on appeal finding that the FTB's position was substantially justified [*Lennane v. Franchise Tax Bd. (1996) 51 Cal. App. 4th 1180, 1188, 59 Cal. Rptr. 2d 602]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewGovernmentsState & Territorial GovernmentsClaims By & AgainstTax LawState & Local TaxesAdministration & ProceedingsCredits, Overassessments & RefundsTax LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTax LawState & Local TaxesIncome TaxGeneral Overview

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47-540 California Forms of Pleading and Practice--Annotated § 540.306

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.306 Application of Credits and Refunds

The FTB first applies the full or any partial amount of a judgment for refund of taxes and interest to any other taxes or interest owed by the taxpayer [*Rev. & Tax. Code § 19392*]. In addition, refunds and overpayments may be applied to anyamount owed by the taxpayer to any state agency [*see Gov. Code §§ 12419.3-12419.5*; *see also Del Costello v. State of California (1982) 135 Cal. App. 3d 887, 890, 185 Cal. Rptr. 582* ; *Tyler v. California (1982) 134 Cal. App. 3d 973, 975-976, 185 Cal. Rptr. 49* (refund applied against welfare payments made on behalf of taxpayer's minor child)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesAdministration & ProceedingsCollectionTax LawState & Local TaxesAdministration & ProceedingsCredits, Overassessments & RefundsTax LawState & Local TaxesIncome TaxGeneral Overview

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47-540 California Forms of Pleading and Practice--Annotated § 540.307

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.307 Illegal Taxes

The FTB must cancel a tax levied against a taxpayer that is later found to be illegal. The FTB, however, will maintain a record of the assessment and the reason the assessment was made [*Rev. & Tax. Code § 19431*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-540 California Forms of Pleading and Practice--Annotated §§ 540.308-540.319

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

[Reserved]

§§ 540.308[Reserved]

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47-540 California Forms of Pleading and Practice--Annotated § 540.320

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.320 Remedies to Collect Tax

[1] In General

The FTB has a variety of remedies for the collection of personal income and bank and corporation taxes [*Rev. & Tax. Code §§ 18631 et seq., 19201 et seq., 19371 et seq.*], including the following:

- Orders to withhold delinquent taxes served on any person or employer in control of a delinquent taxpayer's assets [*Rev. & Tax. Code §§ 18670, 18672* (failure to transmit taxes to FTB makes person served liable for those amounts); *see also Code Civ. Proc. §§ 706.070-706.084* (earnings withholding order for taxes); *see § 540.320[3]*].

- Bringing suit to collect delinquent taxes [*Rev. & Tax. Code § 19371*; *see § 540.320[2]*].

- Contracting with private debt collection agencies to recover delinquent taxes and bring tax recovery suits in the FTB's name [*Rev. & Tax. Code § 19376*].

- Obtaining a judgment in favor of the state by filing a certificate with any county clerk and requesting entry of judgment; a recorded abstract constitutes a lien for 10 years, which may be extended by rerecording [*Gov. Code § 7172*; *Rev. & Tax. Code §§ 19201-19209*; *see also Code Civ. Proc. § 688.110* (enforcement of judgment for taxes)].

- A perfected and enforceable lien on the real and personal property of the taxpayer [*Rev. & Tax. Code § 19221*], which may be accorded priority over other claims by recording (for real property) or by filing a notice of lien with the Secretary of State (for personal property) [*Gov. Code §§ 7170-7174*; *see also Rev. & Tax. Code § 19253* (regarding priorities)].

- After recording a lien or obtaining a judgment by certificate, issuing a warrant for collection that has the force and effect of a writ of execution and directs law enforcement officials to attach and sell the property subject to the lien [*Rev. & Tax. Code §§ 19231-19235*; *see also Code Civ. Proc. §§ 688.010-688.050* (enforcement of state tax liability pursuant to warrant or notice of levy); for further discussion and forms relating to enforcement of judgments, *see* Ch. 254, *Executions and Enforcement of Judgments*].

- Bringing suit to recover amounts erroneously issued as refunds or allowed as credits, including interest accruing from the date of the refund or allowance [*Rev. & Tax. Code § 19411*].

- Seeking a writ of mandate to compel a taxpayer to file a return [*Rev. & Tax. Code § 19710*].

- After a determination has become final, seizing a taxpayer's personal property and selling it at public auction [*Rev. & Tax. Code §§ 19262, 19263*].

All these remedies are cumulative. An election by the FTB to pursue a particular remedy for collection does not preclude the use of any other remedy [*Rev. & Tax. Code § 19251*].

For a discussion of a personal income or bank and corporation taxpayer's rights relating to a tax lien or levy, see *§ 540.404*.

[2] Suit to Collect Taxes

The FTB may bring an action to recover any taxes, penalties, and interest from any taxpayer owing taxes to the state [*Rev. & Tax. Code §§ 19371*]. The suit may be brought in any California court, courts of another state, federal court, or courts of a foreign country [*Rev. & Tax. Code §§ 19371, 19375*]. The action is prosecuted by the Attorney General or by counsel for the FTB [*Rev. & Tax. Code §§ 19372, 19375*]. Any suit brought in the California courts is tried in Sacramento County unless the court, with the consent of the prosecutor, orders a change of venue [*Rev. & Tax. Code §§ 19372, 19411, 19412*].

The FTB must bring the suit within 10 years after the tax liability is determined, or within the period during which a lien is in force as the result either of recording an abstract of judgment or of recording or filing a notice of state tax lien under *Gov. Code § 7171* [*Rev. & Tax. Code §§ 19203, 19371*].

In the action, a certificate issued by the FTB showing the tax delinquency isprima facie evidence of the levy of the tax, of its delinquency, and of compliance by the FTB with all provisions of the tax laws concerning computation and levy of the tax [*Rev. & Tax. Code § 19374*]. A writ of attachment may be issued ex parte as provided by *Code Civ. Proc. § 485.010* without a showing of great or irreparable injury to the plaintiff otherwise required for such a writ [*Rev. & Tax. Code § 19373*].

[3] Withholding Orders

The FTB may serve a notice to withhold, *i.e.*, a withholding order on a person in control of that taxpayer's assets without any prior notification to the taxpayer that a certain amount of taxes are due. The only prerequisite for a withholding order is that the taxpayer owe taxes, interest, or penalties [*Rev. & Tax. Code § 18670*; *Bradbury v. Kaiser (1992) 3 Cal. App. 4th 1257, 1260, 5 Cal. Rptr. 2d 325* (decided under former *Rev. & Tax. Code § 18817*, now *Rev. & Tax. Code § 18670*)].

A tax lien and a withholding order are not the same and are governed by different articles and sections of the Revenue

and Taxation Code. Unlike the section governing tax liens [*see Rev. & Tax. Code § 19221*], withholding orders [*see Rev. & Tax. Code § 18670*] are not subject to the Government Code, including *Gov. Code § 7170* [*Bradbury v. Kaiser (1992) 3 Cal. App. 4th 1257, 1260, 5 Cal. Rptr. 2d 325* (construing former *Rev. & Tax. Code §§ 18817, 18881, 18931*, now *Rev. & Tax. Code §§ 18670, 19221, 19251*)]. Thus, although a judgment lien on personal property has priority over a state tax lien when the judgment lien is perfected before the FTB files a notice of tax lien with the Secretary of State (as provided for in *Gov. Code §§ 7170(c)(2), 7171*), an FTB withholding order served prior to the perfection of the judgment lien has priority over the judgment lien [*Bradbury v. Kaiser (1992) 3 Cal. App. 4th 1257, 1260, 5 Cal. Rptr. 2d 325]* .

When the FTB seeks to collect taxes by directing a notice to withheld pursuant to *Rev. & Tax. Code § 18670* to a person or entity in possession of monies owed to a taxpayer, the taxpayer may not claim the exemptions available to a judgment debtor. *Code Civ. Proc. § 688.030* does not authorize a tax debtor to claim exemptions when the tax is being sought pursuant to a notice to withhold [*Hepner v. Franchise Tax Bd. (1997) 52 Cal. App. 4th 1475, 1476, 1485, 61 Cal. Rptr. 2d 341]* .

PRACTICE TIP:

Offers in Compromise. A taxpayer who is unable to pay the entire tax liability may make an offer in compromise to the FTB. If the FTB approves the offer, the taxpayer is relieved of the taxpayer's current outstanding tax liability [*see § 540.403*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-540 California Forms of Pleading and Practice--Annotated §§ 540.321-540.339

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

[Reserved]

§§ 540.321[Reserved]

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47-540 California Forms of Pleading and Practice--Annotated § 540.340

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.340 Allocation and Apportionment

The taxation of corporations by a state is generally restricted to source taxation. A state may tax corporate income only to the extent income can be assigned to sources within that state's boundaries. For a corporation doing business in a single state, the source of its income is restricted to the single state. If a corporation does not restrict its activities to a single state, however, the states are required to determine what portion of the corporation's income is derived from or attributable to sources within each state's boundaries. This determination is made through the process of allocation and apportionment [*see* Keesling and Warren, *The Unitary Concept in the Allocation of Income, 12 Hastings L.J. 42 (1960)*].

"Allocation" refers to the direct assignment of income to a particular jurisdiction [*Rev. & Tax. Code §§ 25123-25127*]. This concept presupposes that an activity can be isolated and is separate and distinct from other activities, and that the income from that activity may also be isolated and determined separately from other income.

"Apportionment" refers to the assignment of income through the use of a mathematical formula [*see Rev. & Tax. Code § 25123-25128*]. A ratio or percentage is calculated to represent a taxpayer's presence within each state. The income attributable to a state is determined by multiplying the taxpayer's total income from all sources (other than that which can be directly allocated to a single jurisdiction) by this ratio or percentage. California has adopted a four factor apportionment formula using the taxpayer's property factor, the taxpayer's payroll factor, and twice the taxpayer's sales factor [*Rev. & Tax. Code §§ 25128-25140*], except for an apportioning trade or business that derives more than 50 percent of its gross business receipts from conducting one or more qualified business activities specified in *Rev. & Tax. Code § 25128(c)*, such as agricultural activities or activities relating to the production, refining, or processing of oil, natural gas, or mineral ore. These taxpayers must use three factor formula (property factor, payroll factor, and sales factor) that all taxpayers were required to use before 1993 [*Rev. & Tax. Code § 25128(b), (c), (d)*; *see* former *Rev. & Tax. Code § 25128*; *see also Rev. & Tax. Code § 25141* (three factor formula for professional athletic team)].

Corporate income is business income subject to allocation and apportionment if it is income arising from transactions and activity in the regular course of the corporation's trade or business, including income from tangible and intangible property if the acquisition, management, and disposition of the property constituteintegral parts of the corporation's regular trade or business operations [*Rev. & Tax. Code § 25120(a)*]. California-taxable business income is determined by applying both a transactional test and a functional test. Under the transactional test, income is business income if it arises from transactions and activity in the regular course of a trade or business. Under the functional test, income is business income if the acquisition, management, and disposition of property are integral parts of the taxpayer's regularbusiness operations. The reversion of surplus pension plan assets did not meet the transactional test because it was an extraordinary occurrence. However, it met the functional test because it constituted property maintained and operated by the taxpayer to retain an attract employees, and was therefore integral to the taxpayer's business operations [*Hoechst Celanese Corp. v. Franchise Tax Bd. (2001) 25 Cal. 4th 508, 535, 106 Cal. Rptr. 2d 548, 22 P.3d 324]* . The gain from the sale of all of the stock of a subsidiary is properly considered business income under the functional test if the parent corporation's control and use of the subsidiary contributed materially to the parent corporation's production of business income prior to the sale [*Jim Beam Brands Co. v. Franchise Tax Bd. (2005) 133 Cal. App. 4th 514, 524-530, 34 Cal. Rptr. 3d 874]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-540 California Forms of Pleading and Practice--Annotated § 540.341

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.341 Unitary Business Doctrine

Apportioning the business income of a single corporate taxpayer deriving income from sources both within and outside of California is a process of applying the mathematical formula to the taxpayer's total income. Nevertheless, many corporations doing business in more than one state or country do so through subsidiary companies or other related entities. The unitary business doctrine allows a taxing authority to treat a business that is conducted by related taxpayers and that earns income from both within and outside the state as a single unit in determining the income attributable to the state. A finding that a business is unitary may require the related taxpayers to file a combined report showing their combined income for the purposes of apportionment [*Rev. & Tax. Code §§ 25102, 25104*; *see generally Citicorp North American Inc. v. Franchise Tax Bd. (2000) 83 Cal. App. 4th 1403, 1410, 1411* & n.5, 1412, *100 Cal. Rptr. 2d 509* (discussing definition of unitary business and statutory apportionment formula, although after tax years in question statutory apportionment formula changed in ways not relevant to case)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-540 California Forms of Pleading and Practice--Annotated § 540.342

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.342 Criteria to Determine Whether Entities Are Unitary

[1] Two California Tests

The existence of a unitary business is established if all three of the following characteristics are present [*Butler Brothers v. McColgan (1941) 17 Cal. 2d 664, 667-668, 111 P.2d 334* ; *Dental Ins. Consultants, Inc. v. Franchise Tax Bd. (1991) 1 Cal. App. 4th 343, 348, 1 Cal. Rptr. 2d 757* ; *see Citicorp North American Inc. v. Franchise Tax Bd. (2000) 83 Cal. App. 4th 1403, 1411 n.5, 100 Cal. Rptr. 2d 509]* :

- Unity of ownership;
- Unity of operation evidenced by central purchasing, management, advertising, and accounting departments; and
- Unity of use in the centralized executive force and general system of operations.

A unitary business also exists if the operation of the portion of the business conducted in California is dependent on or contributes to the operation of the business outside California [*Edison California Stores v. McColgan (1947) 30 Cal. 2d 472, 481, 183 P.2d 16* ; *Dental Ins. Consultants, Inc. v. Franchise Tax Bd. (1991) 1 Cal. App. 4th 343, 348, 1 Cal. Rptr. 2d 757* ; *see Citicorp North American Inc. v. Franchise Tax Bd. (2000) 83 Cal. App. 4th 1403, 1411 n.5, 100 Cal. Rptr. 2d 509]* . These two tests (three unities versus contribution and dependency) are not mutually exclusive, and application of either to a particular set of facts should result in the same conclusion [*Dental Ins. Consultants, Inc. v. Franchise Tax Bd. (1991) 1 Cal. App. 4th 343, 348, 1 Cal. Rptr. 2d 757]* .

Suggesting that there may be some conflict in the case law regarding the relationship of the three-unities test and the dependency-or-contribution test, one California court chose to follow cases indicating that the two tests are alternatives.

The court reasoned that while the presence of the three unities definitely establishes that a business is unitary, the California Supreme Court had not held, in *Butler Brothers* [*see Butler Brothers v. McColgan (1941) 17 Cal. 2d 664, 111 P.2d 334* , cited *above*] that unity cannot exist if one of the three factors is absent [*A.M. Castle & Co. v. Franchise Tax Bd. (1995) 36 Cal. App. 4th 1794, 1805, 43 Cal. Rptr. 2d 340* (citing cases implying that three-unities test is essential part of more general dependency-or-contribution test)]. In the case before it, that court concluded that three businesses were unitary because two of the three unities clearly existed, indicating that the businesses were unitary under the dependency-or-contribution test [*A.M. Castle & Co. v. Franchise Tax Bd. (1995) 36 Cal. App. 4th 1794, 1807, 1809-1810, 43 Cal. Rptr. 2d 340]* .

[2] U.S. Supreme Court's Test

In determining whether a unitary business exists, the U.S. Supreme Court uses a test of "functional integration, centralization of management, and economies of scale" [*see generally MeadWestvaco Corp. v. Illinois Dep't of Revenue (2008)553U.S.16, 128 S. Ct. 1498, 170 L. Ed. 2d 404, 412-416* (explaining "the principles that we have developed for determining whether a multistate business is unitary")]. However, California is not required to adopt this test because the two tests used by the California courts and taxing authorities do not infringe the constitutional rights of out-of-state businesses [*Dental Ins. Consultants, Inc. v. Franchise Tax Bd. (1991) 1 Cal. App. 4th 343, 348, 1 Cal. Rptr. 2d 757]* .

[3] Burden on Taxpayer

Whether businesses are unitary is a question of law. The taxpayer has the burden of showing that the FTB's decision was incorrect [*Dental Ins. Consultants, Inc. v. Franchise Tax Bd. (1991) 1 Cal. App. 4th 343, 348, 1 Cal. Rptr. 2d 757* ; *see also Citicorp North American Inc. v. Franchise Tax Bd. (2000) 83 Cal. App. 4th 1403, 1415, 1427, 100 Cal. Rptr. 2d 509* (when unitary business is established, taxpayer challenging FTB's apportionment method must show formula allocation method wasarbitrary and unreasonable; proper characterization of nature of income, however, is primarily factual issue)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-540 California Forms of Pleading and Practice--Annotated § 540.343

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.343 Worldwide Combined Reporting

[1] Required by California

Use of the unitary concept to apportion the business income of businesses involved in worldwide activities has long been permitted under the U.S. Constitution [*Matson Nav. Co. v. SBE (1935) 3 Cal. 2d 1, 5-6, 43 P.2d 805 , aff'd, 297 U.S. 441, 56 S. Ct. 553, 80 L. Ed. 791 (1936)]* , and California requires foreign subsidiaries of domestic corporations [*Anaconda Co. v. FTB (1982) 130 Cal. App. 3d 15, 24-25, 181 Cal. Rptr. 640]* and foreign-country parent corporations and their subsidiaries [Appeal of Ito Cariani Sausage Co., Inc., 3 SBE 954 (SBE Apr. 5, 1983)] to file under the unitary method. The Uniform Division of Income for Tax Purposes Act (UDITPA) defines "state" to include foreign countries and political divisions of foreign countries [*Rev. & Tax. Code § 25120(g)*].

[2] Domestic-Parent Corporations

The United States Supreme Court has upheld worldwide combined reporting by domestic parent corporations. The Court held that California's three-factor formula apportionment may require domestic parent corporations to include factors from foreign subsidiaries in their combined reports, even though multiple taxation may result [*Container Corporation of America v. Franchise Tax Board (1983) 463 U.S. 159, 187-189, 103 S. Ct. 2933, 77 L. Ed. 2d 545]* .

[3] Foreign-Parent Corporations

Several foreign parent corporations have challenged in federal court the FTB's right to include their operations in a combined report prepared for their subsidiaries. In all but one case, their efforts have been rejected because they are not the taxpayer and therefore have no standing [*Shell Petroleum N.V. v. Graves (N.D. Cal. 1983) 570 F. Supp. 58, 61-62 , aff'd, 709 F.2d 593 (9th Cir. 1983)]* . One federal court did hold that the foreign parent corporations had alleged injuries to themselves, both independently and as stockholders of their subsidiaries, and that these injuries were sufficient to confer standing [*Alcan Aluminum v. Franchise Tax Bd. (7th Cir. 1989) 860 F.2d 688, 699-700]* . The U.S.

Supreme Court has brought an end to this conflict among the federal circuits by ruling that these foreign parent corporations may not bring their challenges in the federal courts. Instead, they must seek relief in the California courts, which offer them a plain, speedy, and efficient remedy [*Franchise Tax Bd. v. Alcan Aluminum (1990) 493 U.S. 331, 339-340, 110 S. Ct. 661, 107 L. Ed. 2d 696]* .

However, these corporations have not been successful in the California courts. The California Supreme Court has held that application of the worldwide unitary method of taxation (referred to by the court as formula pportionment) to a unitary group with a foreign parent corporation does not violate the Foreign Commerce Clause of the U.S. Constitution. The Court, after analyzing United States Supreme Court opinions from the last 70 years, concluded that the formula apportionment method was not inherently inequitable, that both this method and the arm's-length/separate accounting method have their advantages and drawbacks, that neither method is technically superior to the other, and that the U.S. Supreme Court has not announced any theoretical constitutional preference for either method. Either of the two methods is constitutionally permissible as long as the chosen method does not unreasonably and arbitrarily attribute to the taxing state a percentage of the taxpayer's income that is completely disproportionate to the amount of business the taxpayer transacts in that state [*Barclays Bank Internat., Ltd. v. Franchise Tax Bd. (1992) 2 Cal. 4th 708, 720, 8 Cal. Rptr. 2d 31, 829 P.2d 279]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-540 California Forms of Pleading and Practice--Annotated § 540.344

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.344 Water's-Edge Election

[1] As Alternative to Worldwide Combined Reporting

Taxpayers that have income from activities both within and outside California must pay a tax measured by their net income derived from or attributable to sources within California [*Rev. & Tax. Code § 25101*]. If the taxpayer is part of a unitary business, the income of the entire business is considered when applying this measure of tax. Business income of the unitary enterprise is apportioned using a formula based on the taxpayer's property, payroll, and sales [*Rev. & Tax. Code § 25120 et seq.*]. This method of taxation, known as the worldwide combined reporting method, had engendered considerable controversy, and, beginning in 1988, California has offered corporations subject to worldwide combined reporting who meet the criteria specified in *Rev. & Tax. Code § 25110(b)(2)* an alternative method of computing their California tax liability known as the water's-edge election [*Rev. & Tax. Code § 25110 et seq.*].

The California water's-edge election does not eliminate California's unitary taxation concepts, does not replace the concept of worldwide combined reporting, and does not allow taxpayers to limit their unitary combined group to include only U.S. corporations. This method permits a group of corporations to elect to exclude from the unitary group any foreign-nation or foreign-possessions corporation having less than 20 percent of its business activity within the United States [*Rev. & Tax. Code § 25110(a)*] and permits a partial deduction of dividends received by members of the water's-edge group from certain excluded foreign corporations and a complete deduction of dividends received from certain specified construction projects [*Rev. & Tax. Code § 24411*; *see* Stats. 1996, ch. 954, Legislative Counsel's Digest, no. (27)].

[2] Making Water's-Edge Election

A water's-edge election is made on an original, timely filed return for the year of the election [*Rev. & Tax. Code § 25113(a)*, effective for tax years beginning on or after 1/1/03]. The election is considered valid if the tax is computed in a manner consistent with a water's-edge election, and a written notification of election is filed with the return on a form

prescribed by the FTB [*Rev. & Tax. Code § 25113(a)*]. Under regulations, the FTB may also accept the filing of other objective evidence that supports the conclusion that a water's-edge election was intended in lieu of notification on the designated form [*Rev. & Tax. Code § 25113(a)(2)*]. In general, a water's-edge election is effective only if it is made by every member of the self-assessed combinedreporting group that is subject to taxation [*Rev. & Tax. Code § 25113(b)*].

A water's-edge election remains effective until terminated [*Rev. & Tax. Code § 25113(c)(12)*]. The election may be terminated without the consent of the FTB after it has been in effect for at least 84 months. The termination must be made on an original, timely filed return for the first year in which the water's-edge election is to be terminated. To be effective, the termination must be made in a specified manner by every taxpayer that is a member of the water's-edge group [*Rev. & Tax. Code § 25113(c)(9)*]. A water's-edge election may be terminated before the 84-month period has elapsed, but only with the consent of the FTB. A request for termination must be made at the time and in the manner specified by the FTB [*Rev. & Tax. Code § 25113(c)(10)*]. Except for certain deemed elections [*see* Reg § 25113(c)(2), (c)(4), (c)(5)], if a water's-edge election is terminated, another election may not be made for any taxable year that begins within the 84-month period following the last day of the election period that was terminated. The FTB, however, may waive this prohibition for good cause [*Rev. & Tax. Code § 25113(c)(11)*].

For years beginning before January 1, 2003, the water's-edge election was made by contract with the FTB for a rolling 84-month term [*Rev. & Tax. Code § 25111(a)*]. To the extent that a taxpayer would have been required to file on a water's-edge basis in its first taxable year beginning on or after January 1, 2003, pursuant to a water's-edge election made in a prior year, the terms of *Rev. & Tax. Code § 25111* may not apply and the election is deemed to have been made under the terms of *Rev. & Tax. Code § 25113*. However, the commencement date of the election made in a prior year under *Rev. & Tax. Code § 25111* continues to be treated as the commencement date of the water's-edge election period [*Rev. & Tax. Code § 25111(f)*].

A water's-edge election obligates the taxpayer to comply with a multitude of procedural criteria, most of which are aimed at ensuring that dealings with unitary corporations excluded from the water's-edge group are conducted at arm's length and that income and factors are not artificially shifted to entities that are outside of the water's-edge group [*Rev. & Tax. Code §§ 25110(b), 25112(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesIncome TaxCorporations & Unincorporated AssociationsImposition of TaxTax LawState & Local TaxesIncome TaxCorporations & Unincorporated AssociationsLimitations

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D. INCOME TAX
5. State Taxation of Corporate Income

47-540 California Forms of Pleading and Practice--Annotated § 540.345

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.345 Use of Method Other Than Unitary Method or Water's-Edge Election

A taxpayer may petition the FTB under *Rev. & Tax. Code § 25137* for authorization to use a method other than the unitary method for reporting and assesssment of business income. The taxpayer must establish that the unitary method does not fairly represent the extent of the taxpayer's business activity in California [*Rev. & Tax. Code § 25137*; *McDonnell Douglas Corp. v. Franchise Tax Bd. (1968) 69 Cal. 2d 506, 512, 72 Cal. Rptr. 465, 468, 446 P.2d 313]* .

The FTB may require a separate accounting in respect to all or any part of the taxpayer's business activity, if reasonable; the exclusion of any one or more of the factors; the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in California; or the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income [*Rev. & Tax. Code § 25137*]. In that event, the FTB has the burden of proving by clear and convincing evidence that (1) the approximation provided by the standard formula is not a fair representation, and (2) its proposed alternative is reasonable [*Microsoft Corp. v. Franchise Tax Bd. (2006) 39 Cal. 4th 750, 764-765, 47 Cal. Rptr. 3d 216, 139 P. 3d 1169]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesIncome TaxCorporations & Unincorporated AssociationsImposition of TaxTax LawState & Local TaxesIncome TaxCorporations & Unincorporated AssociationsLimitations

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47-540 California Forms of Pleading and Practice--Annotated §§ 540.346-540.359

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

[Reserved]

§§ 540.346[Reserved]

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1. In General

47-540 California Forms of Pleading and Practice--Annotated § 540.360

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.360 Governing Law

The Morgan Property Taxpayers' *Bill of Rights* [*Rev. & Tax. Code §§ 5900-5911*] sets out taxpayers' rights with respect to property taxes. This act is referred to in this chapter as the "Property Taxpayers' *Bill of Rights*."

The Harris-Katz California Taxpayers' *Bill of Rights* [*Rev. & Tax. Code §§ 7080-7099*] sets out taxpayers' rights with respect to sales and use taxes, whereas the Katz-Harris Taypayers' *Bill of Rights* Act [*Rev. & Tax. Code § 21001 et seq.*] sets out taxpayers' rights with respect to personal income taxes and corporation taxes. These latter two acts are substantively very similar. Accordingly, when discussed collectively in this chapter, they are sometimes referred to as simply "The Taxpayers' *Bill of Rights*."

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesAdministration & ProceedingsGeneral OverviewTax LawState & Local TaxesPersonal Property TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxGeneral OverviewTax LawState & Local TaxesSales TaxGeneral OverviewTax LawState & Local TaxesUse TaxGeneral Overview

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47-540 California Forms of Pleading and Practice--Annotated §§ 540.361-540.379

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

[Reserved]

§§ 540.361[Reserved]

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47-540 California Forms of Pleading and Practice--Annotated § 540.380

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.380 Purpose of Property Taxpayers' Bill of Rights

The Property Taxpayers' *Bill of Rights* is intended to promote the proper assessment and collection of property taxes throughout California by advancing, to the extent feasible, uniform practices of property tax appraisal and assessment [*Rev. & Tax. Code § 5901(d)*]. It is also intended to provide taxpayers with fair and understandable explanations of their rights and duties with respect to property taxation, prompt resolution oflegitimate questions and appeals regarding their property taxes, and prompt corrections of errors in property tax assessments [*Rev. & Tax. Code § 5911(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesAdministration & ProceedingsAssessmentsTax LawState & Local TaxesAdministration & ProceedingsCollectionTax LawState & Local TaxesPersonal Property TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral Overview

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47-540 California Forms of Pleading and Practice--Annotated § 540.381

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.381 Property Taxpayers' Advocate

[1] Designation and Responsibilities

The Property Taxpayers' *Bill of Rights* requires the executive officer of the SBE to designate a Property Taxpayers' Advocate [*Rev. & Tax. Code § 5904(a), (b)*], hereinafter referred to as "the advocate." The advocate reports directly to the executive officer of the SBE [*Rev. & Tax. Code § 5904(b)*], and is responsible for reviewing the adequacy of procedures for both (1) the distribution of information regarding property tax assessment matters among the SBE, assessors, and taxpayers, and (2) the prompt resolution of inquiries from assessors, the SBE, and taxpayers, and taxpayer complaints and problems [*Rev. & Tax. Code § 5904(a)*].

[2] Specific Duties

[a] Education and Information

The advocate is responsible for reviewing the adequacy of (1) educational and informational programs on property tax assessment matters for the benefit of the SBE, assessors, local boards of equalization and assessment appeals boards, and taxpayers, and (2) property tax informational pamphlets and other written materials that explain, in simple and nontechnical language, various matters related to property taxation such as exemptions and appeal procedures [*Rev. & Tax. Code § 5905*].

If requested to do so by a county assessor, the advocate must assist the assessor in providing education and instruction to the assessor's staff and to local taxpayers for the purpose of promoting both taxpayer understanding of and compliance with the property tax laws and also, to the extent feasible, statewide uniformity in the application of property tax laws [*Rev. & Tax. Code § 5908*].

[b] Review of Tax Forms and Statements

The advocate must periodically review property tax statements and forms prescribed by the SBE to determine whether the forms and statements and their instructions promote or discourage taxpayer compliance and whether they are necessary or germane to assessment [*Rev. & Tax. Code § 5906(a)*].

[c] Review of Complaints and Identification of Areas of Conflict

Another of the advocate's duties involves reviewing taxpayer complaints and identifying areas of recurrent conflict between taxpayers and assessment officers. The review must include, but is not limited to, (1) theadequacy and timeliness of responses to taxpayers' written complaints and requests for information, (2) the adequacy and timeliness of corrections to the assessment rolls and issuance of refunds, (3) the timeliness, fairness, and accessibility of hearings and decisions by the SBE and by county boards of equalization or assessment appeals boards, and (4) the application of penalties and interest that result from the assessor's failure to request information or the taxpayer's reliance on advice from the SBE or the assessor [*Rev. & Tax. Code § 5906(b)*].

[d] Performance Evaluation of Employees

The evaluation of state and local officers and employees who are responsible for the appraisal or assessment of property cannot be based solely on the dollar value of assessments enrolled or property taxes collected. However, their evaluation may be based on the propriety and application of the methodology they use in arriving at a value determination [*Rev. & Tax. Code § 5907*].

[e] Recommending Standardization of Interest Rates and Statute of Limitations

The advocate must make recommendations to the SBE regarding standardizing the interest rates applicable to escape assessments and property tax refunds [*see § 540.71*] and statutes of limitations. These standardizations are to put property taxpayers on an equal basis with taxing authorities [*Rev. & Tax. Code § 5910*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-540 California Forms of Pleading and Practice--Annotated § 540.382

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.382 Relief From Penalties and Interest if Taxpayer Relied on Assessor's Written Advice

Taxpayers may send written requests to county assessors for written rulings regarding the property tax consequences of an actual or planned transaction or the property tax liability of a specific property [*Rev. & Tax. Code § 5909(a)*]. If a taxpayer's failure to report information timely or to pay amounts of tax when due directly results from the taxpayer's reasonable reliance on the county assessor's written ruling, the taxpayer is relieved of any penalties and any interest assessed or accrued with respect to the property taxes not timely paid. A taxpayer's failure directly results from the taxpayer's reasonable reliance on the assessor's written ruling only if (1) the taxpayer's written request for advice fully described all the relevant facts and circumstances pertaining to the property or transaction, and (2)the county assessor's written ruling specifically stated the property tax consequences of the transaction or the property tax liability of the property [*Rev. & Tax. Code § 5909(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesAdministration & ProceedingsAssessmentsTax LawState & Local TaxesAdministration & ProceedingsCollectionTax LawState & Local TaxesAdministration & ProceedingsFailure to Pay TaxTax LawState & Local TaxesPersonal Property TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral Overview

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47-540 California Forms of Pleading and Practice--Annotated §§ 540.383-540.399

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

[Reserved]

§§ 540.383[Reserved]

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47-540 California Forms of Pleading and Practice--Annotated § 540.400

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.400 Purpose of Taxpayers' Bill of Rights

The Taxpayers' *Bill of Rights* is intended to ensure that the rights, privacy, and property of California taxpayers are adequately protected during the process of tax assessment and collection. It is also intended to promote improved self-assessment by clarifying tax laws and by better informing the public of the proper application of those laws. Taxpayers' *Bill of Rights* provisions apply to the FTB with respect to its administration of the Personal Income Tax Law and Corporation Tax law [*Rev. & Tax. Code §§ 21001-21027*]. Separate, but similar, Taxpayers' *Bill of Rights* provisions also exist with respect to property taxes [*Rev. & Tax. Code §§ 5900-5911*], and to various taxes administered by the SBE, including Sales and Use Tax Law [*Rev. & Tax. Code §§ 7081-7099*] the Motor Vehicle Fuel License Tax Law [*Rev. & Tax. Code §§ 8260-8277*], the Use Fuel Tax Law [*Rev. & Tax. Code §§ 9260-9277*], the Cigarette and Tobacco Products Tax Law [*Rev. & Tax. Code §§ 30458-30459.7*], the Alcoholic Beverage Tax Law [*Rev. & Tax. Code §§ 32460-32476*], the Energy Resources Surcharge Law [*Rev. & Tax. Code §§ 40200-40216*] the Emergency Telephone Users' Surcharge Law [*Rev. & Tax. Code §§ 41160-41176*], the Hazardous Substances Tax Law [*Rev. & Tax. Code § 43511-43527*], the Solid Waste Disposal Site Cleanup and Maintenance Fee Law [*Rev. & Tax. Code §§ 45856-45872*], the Oil Spill Response Prevention and Administration Fees Law [*Rev. & Tax. Code §§ 46611-46627*], the Underground Storage Tank Maintenance Fee Law [*Rev. & Tax. Code §§ 50156.1-50156.18*] and the Fee Collection Procedures Law [*Rev. & Tax. Code §§ 55321-55337*].

The following discussion covers the taxes for which the Taxpayers' *Bill of Rights* comes up the most often--for the FTB with respect to its administration of the Personal Income Tax Law and Corporation Tax Law, and for the SBE with respect to its administration of the Sales and Use Tax Law.

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesAdministration & ProceedingsGeneral OverviewTax LawState & Local TaxesIncome

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47-540 California Forms of Pleading and Practice--Annotated § 540.401

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.401 Taxpayer Education and Information

The SBE, with respect to its administration of sales and use taxes, and the FTB are required to implement taxpayer education programs that target taxpayer or industry groups identified in an annual survey relating to recurrent taxpayer noncompliance [*see Rev. & Tax. Code §§ 7084, 7085, 21005, 21006*]. They must also prepare brief but comprehensive statements that explain procedures, remedies, rights, and obligations of the SBE or FTB and taxpayers and provide these statements with the initial notice of audit, the notice of proposed additional taxes, any subsequent notice of tax due, or other substantive notices, and with the tax return booklets that are mailed annually to individuals and corporations [*see Rev. & Tax. Code §§ 7086, 21007*]. Additionally, the FTB must include an appropriate statement in tax booklets informing taxpayers they may berequested by the FTB to furnish a copy of California or federal tax returns that are subject of or related to a federal audit [*Rev. & Tax. Code § 21007*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-540 California Forms of Pleading and Practice--Annotated § 540.402

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

[Reserved]

§ 540.402[Reserved]

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47-540 California Forms of Pleading and Practice--Annotated § 540.403

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.403 Improvement and Reform of Tax Administration

[1] Taxpayers' Rights Advocates

The Taxpayers' *Bill of Rights* requires both the SBE, with respect to its administration of sales and use taxes, and FTB to establish a position of Taxpayers' Rights Advocate (referred to hereinafter as "the advocate") [*Rev. & Tax. Code §§ 7083(a), 21004(a)*]. These advocates report directly to the executive officer of their respective regulatory board [*Rev. & Tax. Code §§ 7083(b), 21004(a)*].

The advocates are responsible for coordinating or facilitating the resolution of taxpayer complaints and problems, including complaints regarding unsatisfactory treatment of taxpayers by employees of their respective regulatory boards [*Rev. & Tax. Code §§ 7083(a), 21004(a)*]. They must give highest priority to reviewing and taking prompt action, including stayingactions, if taxpayers have suffered or will suffer irreparable loss as the result of SBE or FTB action [*see Rev. & Tax. Code §§ 7083(a), 21004(b)* (also providing that applicable statutes of limitation are tolled during pendency of stay and that any penalties and interest that would otherwise accrue are not affected by granting of stay)].

Until January 1, 2012, the FTB advocate may review and grant an application for relief from any penalty, fee, addition to tax, or interest assessed on a taxpayer because of any of the following [*Rev. & Tax. Code § 21004(c)(1)*; *see Rev. & Tax. Code § 21004(g)* (sunset date)]:

- Erroneous action or erroneous inaction by the FTB in processing documents filed or payments made by taxpayers;

- Unreasonable delay caused by the FTB; or

- Erroneous written advice that does not qualify for relief under *Rev. & Tax. Code § 21012* [*see §*

540.404[1]].

The advocate may act on any application for relief received by the advocate after 2008, regardless of the tax year involved [2008 Stats., ch. 305, § 13].

Relief may be granted by the FTB advocate only if (1) no significant aspect of that error or delay can be attributed to the taxpayer involved and (2) relief is not available under any other provision of the Personal Income Tax Law [*Rev. & Tax. Code § 17001 et seq.*] or the Corporation Tax Law [*Rev. & Tax. Code § 23001 et seq.*], including any relief granted under any regulation or other administrative pronouncement of the FTB [*Rev. & Tax. Code § 21004(c)(2)*]. A refund may not be paid as a result of relief granted by the advocate unless the applicable statute of limitations, with respect to filing a claim for refund, remains open as of the date the basis for providing relief is reflected in a written communication received by the advocate [*Rev. & Tax. Code § 21004(c)(4)*]. When relief is granted, it will be made a matter of public record in the office of the executive officer of the FTB, including the taxpayer's name, the totalamount involved, the amount payable or refundable due to the error or delay, and a summary of why the relief is warranted [*Rev. & Tax. Code § 21004(c)(3)(B)*].

The chief counsel of the FTB must concur in the granting of relief by the advocate in any case in which the aggregate amount of relief exceeds $500, and the chief counsel must notify the FTB in any case in which the aggregate amount exceeds $7,500 [*Rev. & Tax. Code § 21004(c)(3)(A)*; *see Rev. & Tax. Code § 21004(e)* (annual cost-of-living adjustments of those amounts)]. No other entity may participate in the grant or denial of relief pursuant to *Rev. & Tax. Code § 21004(c)* [*Rev. & Tax. Code § 21004(d)*]. Notwithstanding any other law or rule of law, all determinations made under *Rev. & Tax. Code § 21004(c)* are not subject to review in any administrative or judicial proceeding [*Rev. & Tax. Code § 21004(f)*].

In addition, the SBE and FTB are required to consult with the advocate in specified instances [*see Rev. & Tax. Code §§ 7088(a), 21009(a)* (development and implementation of performance evaluation programs); *Rev. & Tax. Code § 21005* (development and implementation by FTB of taxpayer education and information program)].

[2] Performance Evaluation of Employees

The SBE, with respect to its administration of sales and use taxes, and FTB are each required to develop and implement programs that evaluate the performance of individual officers or employees with respect to their contact with taxpayers. Each board must develop its program in coordination with its advocate [*see § 540.403[1]*] and must report to the Legislature on implementation of the program [*Rev. & Tax. Code §§ 7088, 21009*; *see also Rev. & Tax. Code §§ 7087, 21008* (prohibiting use of tax revenues to evaluate individual officers or employees or to impose or suggest production quotas or goals)].

[3] Delay Reduction in Processing Taxpayer Claims and Petitions

The SBE, with respect to its administration of sales and use taxes, and FTB are required to develop and implement plans, in cooperation with the advocate and with other specified agencies and groups, to reduce the time required by the SBE to resolve petitions for redetermination and s and the time required by the FTB to resolve, protests, and appeals. These plans must include a determination of standard time frames and a special review of cases that take more time than the appropriate standard time frame [*Rev. & Tax. Code §§ 7089, 21010*].

[4] Prohibition Against Nontax Surveillance and Investigation

Officers or employees of either the SBE or FTB who are acting in connection with any law administered by their respective board are prohibited from knowingly authorizing, requiring, or conducting any investigation of or surveillance over any person for purposes not connected with tax administration [*Rev. & Tax. Code §§ 7092(a),*

21014(a)]. A person violating this prohibition is subject to disciplinary action under the State Civil Service Act (*Gov. Code § 18500 et seq.*), including dismissal from office or discharge from employment [*Rev. & Tax. Code §§ 7092(b), 21014(b)*; for further discussion regarding disciplinary proceedings in general, *see* Ch. 118, *Civil Service*]. For the purposes of this prohibition, "investigation" refers to any oral or written inquiry directed to any person, organization, orgovernmental agency, whereas "surveillance" refers to monitoring of people, places, or events by means of electronic interception, overt or covert observations or photography, and the use of informants [*Rev. & Tax. Code §§ 7092(e), 21014(e)*].

The prohibition against investigation or surveillance for purposes not connected with tax administration does not apply to any otherwise lawful investigation concerning organized crime activities [*Rev. & Tax. Code §§ 7092(c), 21014(c)*]. The prohibition is also not intended to restrict, prohibit, or prevent the exchange of information if a person is being investigated for multiple violations that include sales and use, personal income, or bank and corporations tax violations [*Rev. & Tax. Code §§ 7092(d), 21014(d)*]. Additionally, the provisions of *Rev. & Tax. Code § 21014* may not be construed to prohibit FTB audits on behalf of the Fair Political Practices Commission for purposes of enforcing the Political Reform Act of 1974 (*Gov. Code §§ 81000-81016*) or to prohibit the FTB from carrying out its duties with respect to laws other than tax laws [*Rev. & Tax. Code § 21014(f)*].

[5] Procedural Safeguards

[a] Relating to Protest Hearings

Protest hearing procedural safeguards of the SBE with respect to its administration of sales and use taxes, and of the FTB, are similar. Procedures before SBE hearing officers or before FTB audit or legal staff must include all of the following safeguards [*Rev. & Tax. Code §§ 7090, 21011*]:

- Any hearing must be held at a reasonable time at an FTB or SBE office that is convenient to the taxpayer ("when possible," in the case of FTB hearings).

- The hearing may be recorded only if prior notice is given to the taxpayer and the taxpayer is entitled to receive a copy of the recording.

- The taxpayer must be informed prior to any hearing that he or she has a right to have his or her designated agent present at the hearing.

[b] Relating to Suspension or Revocation of Sales Tax Permit or Corporate Privileges

The SBE may not suspend or revoke a seller's permit under *Rev. & Tax. Code § 6070* (failure to comply with sales tax provisions, rules, and regulations), or under *Rev. & Tax. Code § 6072* (not actively conducting business as a seller of tangible personal property), unless the SBE has mailed a notice preliminary to suspension or revocation indicating that the permit will be suspended or revoked by a certain date under the applicable section. The SBE must mail the notice to the taxpayer at least 60 days before the date specified for suspension or revocation [*Rev. & Tax. Code § 7098*; *see also § 540.132*].

Similarly, the FTB may not suspend a taxpayer's corporate powers, rights, and privileges under *Rev. & Tax. Code §§ 23301* (failure to pay taxes, penalties, or interest), *23301.5* (failure to file a return), or *23775* (failure of exempt corporation to file required returns or statements or to pay amounts due), unless the FTB has maileda notice preliminary to suspension indicating that the taxpayer will be suspended by a certain date under the applicable section. The FTB must mail the notice at least 60 days before the date specified for suspension [*see Rev. & Tax. Code §§ 21020, 23302(b)*].

[6] Settlement of Civil Tax Matter Disputes by FTB

The executive officer and the chief counsel of the FTB may jointly approve a settlement of any civil tax matter in dispute involving a disputed tax liability of $7,500 or less [*Rev. & Tax. Code § 19442(b)(3), (h)*]. The $7,500 figure is subject to inflation adjustments after 2003 [*Rev. & Tax. Code § 19442(b)(3)*]. Before 2003, the limit was $5,000 [*Rev. & Tax. Code § 19442(b)(3)*, before amendment by 2002 Cal. Stats., ch. 258].

Settlements entered into pursuant to *Rev. & Tax. Code § 19442* are final and nonappealable, except on a showing of fraud or misrepresentation with respect to a material fact [*Rev. & Tax. Code § 19442(f)(1)*]. A settlement may include any matters that may be included in a closing agreement [*Rev. & Tax. Code § 19442(f)(2)*], and a settlement approved by the FTB is final and conclusive to the same extent as a closing agreement [*Rev. & Tax. Code § 19442(g)(4)*]. A settlement does not preclude assessments or refunds related to federal adjustments [*Rev. & Tax. Code § 19442(f)(3)*; *see Rev. & Tax. Code §§ 19059, 19060, 19311*].

[7] Settlement of Civil Tax Matter Disputes by SBE

Except as provided for in *Rev. & Tax. Code § 7093.5(b)(3)*, the executive director of the SBE, or chief counsel if authorized by the executor director, may recommend to the SBE settlement of any civil tax matter dispute involving sales and use taxes, if the executive director or chief counsel submits the recommendation to the Attorney General [*Rev. & Tax. Code § 7093.5(b)(1), (2), (h)*]. Under *Rev. & Tax. Code § 7093.5(b)(3)*, a settlement of any civil sales and use tax matter in dispute involving a reduction of tax or penalties in settlement, the total of which reduction of tax and penalties in settlement does not exceed $5,000, may be approved by the executive director and chief counsel jointly. The executive director must notify the SBE, itself, of any settlement approved under this subdivision [*Rev. & Tax. Code § 7093.5(b)(3)*]. The SBE has similar settlement authority under other taxes as well [*see Rev. & Tax. Code § 9271* (Use Fuel Tax); *Rev. & Tax. Code § 30459.1* (Cigarette and Tobacco Products Tax); *Rev. & Tax. Code § 32471* (Alcoholic Beverage Tax); *Rev. & Tax. Code § 40211* (Energy Resources Surcharge); *Rev. & Tax. Code § 41171* (Emergency Telephone Users' Surcharge); *Rev. & Tax. Code § 43522* (Hazardous Substances Tax); *Rev. & Tax. Code § 45857* (Solid Waste Disposal Site Cleanup and Maintenance Fee); *Rev. & Tax. Code § 46622* (Oil Spill Response Prevention and Administration Fees); *Rev. & Tax. Code § 50156.11* (Underground Storage Tank Maintenance Fee); *Rev. & Tax. Code § 55323* (Fee Collection Procedures Law)].

[8] Compromise of Final Tax Liability by FTB

[a] Reduction in Tax Liability $7,500 or Less

The executive officer and chief counsel of the FTB, jointly, or their delegates, may compromise any final tax liability in which the reduction of tax is $7,500 or less [*Rev. & Tax. Code § 19443(a)(1)*].

[b] Reduction in Tax Liability in Excess of $7,500

Except as provided in *Rev. & Tax. Code § 19443(a)(3)*, the FTB, on recommendation by its executive officer and chief counsel, jointly, may compromise a final tax liability involving a reduction in tax in excess of $7,500. Any recommendation for approval of an offer in compromise that is not either approved or disapproved by the FTB, itself, within 45 days of the submission of the recommendation is deemed approved [*Rev. & Tax. Code § 19443(a)(2)*].

The FTB, itself, may by resolution delegate to the executive officer and the chief counsel, jointly, the authority to compromise a final tax liability in which the reduction of tax is in excess of $7,500 but less than $10,000 [*Rev. & Tax. Code § 19443(a)(3)*].

[c] Final Tax Liability Defined

"Final tax liability" for this purpose means any final tax liability arising under Personal Income Tax Law (*Rev. & Tax.*

Code § 17001 et seq.) or the Corporation Tax Law (*Rev. & Tax. Code § 23001 et seq.*) or related interest, additions to tax, penalties, or other amounts assessed under Part 10.2 of Division 2 of the Revenue and Taxation Code (*Rev. & Tax. Code § 18401 et seq.*) [*Rev. & Tax. Code § 19443(b)*].

[d] Conditions Required for Compromise

For an amount to be compromised under *Rev. & Tax. Code § 19443*, the following conditions must exist [*Rev. & Tax. Code § 19443(c)(1)(A), (B), (2)*]:

- The taxpayer must establish that:
  - The amount offered in payment is the most that can be expected to be paid or collected from the taxpayer's present assets or income; and
  - The taxpayer does not have reasonable prospects of acquiring increased income or assets that would enable the taxpayer to satisfy a greater amount of the liability than the amount offered, within a reasonable period of time.
- The FTB must determine that acceptance of the compromise is in the best interest of the state.

A determination by the FTB that it would not be in the best interest of the state to accept an offer in compromise in satisfaction of a final tax liability is not subject to administrative appeal or judicial review [*Rev. & Tax. Code § 19443(d)*].

[e] Notification of Action

The FTB must notify the taxpayer in writing when an offer of compromise is either accepted or rejected, or the terms and conditions of a compromise agreement are fulfilled [*Rev. & Tax. Code § 19443(e)*].

[f] Effect on Spouse's Liability

In cases of joint and several liability, the acceptance of an offer of compromise fromone spouse does not relieve the other spouse of liability, but does reduce the amount of the liability by the amount of the accepted offer [*see Rev. & Tax. Code § 19443(f)*].

[g] Rescission of Compromise

Several grounds exist for rescinding a compromise under *Rev. & Tax. Code § 19443* [*see Rev. & Tax. Code § 19443(h)*]. If the compromise is rescinded, the liability is restored without regard to any statute of limitations that might otherwise apply. No portion of the amount offered in the compromise will be refunded [*see Rev. & Tax. Code § 19443(h)*].

[9] Compromise of Final Sales and Use Tax Liability by SBE

After 2002, the executive director and chief counsel of the SBE, or their delegates, may compromise any final tax liability in which the reduction of tax $7,500 or less [*Rev. & Tax. Code § 7093.6(a)(1)*]. In general, the SBE, upon recommendation by its executive director and chief counsel, jointly, may also compromise a final tax liability involving a reduction in tax in excess of $7,500. Any recommendation for approval of an offer in compromise that is not either approved or disapproved within 45 days of the submission of the recommendation is deemed approved [*Rev. & Tax. Code § 7093.6(a)(2)*]. The SBE, itself, may by resolution delegate to the executive director and the chief counsel, jointly, the authority to compromise a final tax liability in which the reduction of tax is in excess of $7,500, but less than

$10,000 [*Rev. & Tax. Code § 7093.6(a)(3)*].

Ordinarily, offers in compromise may be considered only for liabilities that were generated from a business that has been discontinued or transferred, when the taxpayer making the offer no longer has a controlling interest or association with the transferred business or has a controlling interest or association with a similar type of business as the transferred or discontinued business [*Rev. & Tax. Code § 7093.6(c)(1)*]. Until January 1, 2013, the offers-in-compromise program is extended also to owners of businesses that may otherwise have to sell or discontinue their businesses because of their inability to pay in full a final tax liability that arose from transactions in which the taxpayers did not collect that tax [*see Rev. & Tax. Code § 7093.6(c)(2), (3), (d)-(g), (p)*].

Compromises are available only if the taxpayer establishes that the amount offered in payment is the most that can be paid or collected from the taxpayer's present assets or income, and that the taxpayer does not have reasonable prospects of acquiring increased income or assets that would enable the taxpayer to satisfy a greater amount of the liability than the amount offered, within a reasonable period of time [*Rev. & Tax. Code § 7093.6(h)*]. When more than one taxpayer is liable for the debt, such as with spouses or partnerships or other business combinations, the acceptance of an offer in compromise from one liable taxpayer does not relieve the other taxpayer(s) from paying the entire liability. However, the amount of the liability must be reduced by the amount of the accepted offer [*Rev. & Tax. Code § 7093.6(k)*].

Any compromise may be rescinded, all compromised liabilities reestablished (without regard to any statute of limitations that otherwise may be applicable), and no portion of the amount offered in compromise refunded, if any person has concealed from the SBE any property belonging to the estate of any taxpayer or other person liable for the tax, or received, withheld, destroyed, mutilated, or falsified any book, document, or record or made any false statement, relating to the estate or financial condition of the taxpayer or other person liable for the tax. Rescission also can occur of a taxpayer fails to comply with any of the terms and conditions relative to the offer [*Rev. & Tax. Code § 7093.6(m)*]. Criminal penalties may also apply [*Rev. & Tax. Code § 7093.6(n)*].

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3. Taxpayers' Bill of Rights

47-540 California Forms of Pleading and Practice--Annotated § 540.404

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§ 540.404 Administrative Remedies

[1] Relief Based on Taxpayer's Reasonable Reliance on Written Advice From FTB

[a] Extent of Relief

A personal income tax taxpayer or a corporation tax law taxpayer may be relieved of taxes assessed or any interest, additions to tax, and penalties, if the taxpayer's failure to make a timely return or payment is due to reasonable reliance on written advice from the FTB [*see Rev. & Tax. Code § 21012*; for discussionof incorrect or misleading information giving rise to a defense of estoppel, *see § 540.276*].

If the failure is due to reasonable reliance on a legal ruling by the chief counsel of the FTB, relief is available for taxes assessed as well as any added interest, additions to tax, or penalties [*Rev. & Tax. Code § 21012(a)(1)*; *see also Rev. & Tax. Code § 21012(h)* (rulings of chief counsel must be issued as provided in published guidelines)]. However, if the failure is due to reasonable reliance on written advice other than a chief counsel ruling, relief is available only for interest, additions to tax, or penalties, not for taxes [*Rev. & Tax. Code § 21012(a)(2)*]. In either case, relief is available only if the FTB finds that certain conditions are satisfied [*Rev. & Tax. Code § 21012(a)*; *see* discussion *§ 540.404[2]*].

The FTB may waive only the portion of the tax, penalties, interest, and additions to tax that is attributable to actions that the taxpayer (1) takes after receipt of the written advice of the FTB, and (2) makes in reasonable reliance on the advice [*Rev. & Tax. Code § 21012(g)*].

[2] Conditions for Relief

To obtain relief under *Rev. & Tax. Code § 21012(a)* for taxes, interest, additions to tax, and penalties resulting from a taxpayer's reasonable reliance on written advice from the FTB [*see § 540.404*], all of the following conditions must be met:

- The taxpayer, or the taxpayer's representative, requests in writing that the FTB advise whether a particular activity or transaction is subject to tax under the tax laws administered by the FTB, and the request fully describes the specific facts and circumstances of the activity or transaction, specifically states if it is a request for a legal ruling, and does not contain a misrepresentation or omission of any material fact [*Rev. & Tax. Code § 21012(b), (f)*].

- The FTB responds in writing to the taxpayer's request, stating whether or not the described activity or transaction is subject to tax, or stating the conditions under which the activity or transaction is subject to tax; if the advice is a chief counsel ruling, the ruling is signed by the chief counsel or his or her designee [*Rev. & Tax. Code § 21012(b)(2)*].

- In reasonable reliance on the FTB's written advice, the taxpayer does not remit the tax due [*Rev. & Tax. Code § 21012(b)(3)*].

- The liability for taxes applies to a particular activity or transaction that occurred before the FTB rescinded or modified the advice given to the taxpayer by sending written notice to the taxpayer of the rescinded or modified advice [*Rev. & Tax. Code § 21012(b)(4)*].

- The tax consequences expressed in the FTB's written advice are not subsequently changed by any of the following: (1) a change in statutory or case law, (2) a change in federal interpretation in cases where the FTB's written advice is predicated on federal interpretation, or (3) a change in material facts or circumstances relating to the taxpayer [*Rev. & Tax. Code § 21012(b)(5)*; *see also Rev. & Tax. Code § 21012(e)*(written advice issued under *Rev. & Tax. Code § 21012* must include declaration that tax consequences expressed therein are subject to change for any reason set out in *Rev. & Tax. Code § 21012(b)(5)* and that taxpayer has duty to be aware of possible changes)].

[a] Procedure for Obtaining Relief

A taxpayer seeking relief for reliance on FTB written advice must file with the FTB a copy of the taxpayer's written request, a copy of the FTB's written advice, a statement signed under penalty of perjury setting forth the facts on which the claim is based, and any other information required by the FTB [*Rev. & Tax. Code § 21012(c)*]. Only the taxpayer making the written request is entitled to rely on the FTB's written advice to that taxpayer [*Rev. & Tax. Code § 21012(d)*].

[3] Reimbursement of Expenses Related to SBE Hearings Involving Sales and Use Taxes

Every taxpayer is entitled to be reimbursed for any reasonable fees and expenses related to a hearing before the SBE, involving sales and use taxes if all of the following conditions are met [*Rev. & Tax. Code § 7091(a)*]:

- The taxpayer files a claim for fee and expenses with the SBE within one year of the date the decision of the SBE becomes final.

- The SBE, in its sole discretion, finds that the action taken by the SBE staff was unreasonable.

- The SBE decides that the taxpayer be awarded a specific amount of fees and expenses related to the hearing, in an amount determined by the SBE in its sole discretion.

In making its determination whether staff action was unreasonable, the SBE is required to consider whether the taxpayer has established that the position of the staff was not substantially justified [*Rev. & Tax. Code § 7091(b)*].

Reimbursement is limited to the fees and expenses incurred after the date of the notice of determination, jeopardy determination, or a claim for refund [*Rev. & Tax. Code § 7091(c)(1)*]. However, if the the SBE finds that the SBE staff was unreasonable with respect to certain issues and reasonable with respect to others,the amount of reimbursed fees and expenses are limited to those that relate to the issues concerning which the staff was unreasonable [*Rev. & Tax. Code § 7091(c)(2)*]. Any proposed award by the SBE pursuant to *Rev. & Tax. Code § 7091* must be available as a public record for at least 10 days before the effective date of the award [*Rev. & Tax. Code § 7091(d)*].

Regulations on reimbursement claim procedure and the deadline for filing reimbursement claim are set out in *18 Cal. Code Reg. § 5600 et seq.*

[4] Reimbursement of Expenses Related to Appeal Before SBE

A taxpayer may appeal the FTB's decision on a protest involving the Personal Income Tax Law or the Corporation Tax Law to the SBE [*Rev. & Tax. Code § 19045(a)*].

Every taxpayer is entitled to be reimbursed for any reasonable fees and expenses related to such an appeal before the SBE if all of the following conditions are met [*Rev. & Tax. Code § 21013(a)(1)(A), (B)*]:

- The taxpayer files a claim for fees and expenses with the SBE.
- The SBE, in its sole discretion, finds that the action taken by the FTB staff was unreasonable.

Fees and expenses incurred in cases in which an appeal has been filed, but resolved before the FTB's written statement of its position has been submitted to the SBE, are not reimbursible under *Rev. & Tax Code § 21013* [*Rev. & Tax. Code § 21013(a)(2)(A)*].

Fees may be awarded in excess of the fees paid or incurred if the fees are less than the reasonable fees because an individual representing the taxpayer is entitled to be reimbursed for no fee or for a fee which, taking into account all the facts and circumstances, is no more than a nominal fee. [*Rev. & Tax. Code § 21013(a)(2)(B), (e)*].

To determine whether the FTB staff has been unreasonable, the SBE must consider whether the FTB has established that its position in the appeal was substantially justified [*Rev. & Tax. Code § 21013(b)(1)*]. The FTB's position shall be presumed not to be substantially justified if its staff did not follow its applicable published guidance in the appeal. This presumption may be rebutted. [*Rev. & Tax. Code § 21013(b)(2)*]. The term "applicable published guidance" means either (1) a regulation, legal ruling, notice, information release, announcement, or (2) any chief counsel ruling or determination letter issued to a taxpayer [*Rev. & Tax. Code § 21013(b)(3)*].

The SBE is required to determine the amount of reimbursed fees and expenses [*Rev. & Tax. Code § 21013(c)*]. Reimbursement is limited to fees and expenses incurred after the date of filing an appeal of a notice of action with respect to a deficiency assessment, a jeopardy assessment, or a denial of a claim for refund [*Rev. & Tax. Code § 21013(c)(1)*]. However, if the SBE finds that the FTB staff was unreasonable with respect to certain issues and reasonable with respect to others, the amount of reimbursed fees and expenses are limited to those that relate to the issues concerning which the staff was unreasonable [*Rev. & Tax. Code § 21013(c)(2)*].

Any proposed determination by the SBE under *Rev. & Tax. Code § 21013* must be available as a public record for at least 10 days before the effective date of the determination [*Rev. & Tax. Code § 21013(d)*].

Regulations on reimbursement claim procedure and the deadline for filing a reimbursement claim are set out in *18 Cal. Code Reg. § 5600 et seq.*

[5] Relief From Recording of Tax Lien

[a] Preliminary Notice

The SBE and the FTB are required to mail a preliminary notice to the taxpayer at least 30 days prior to the filing or recording of state tax liens under *Gov. Code § 7150 et seq.* The notice must specify the statutory authority for filing or recording the lien, indicate the earliest date that the lien may be filed or recorded, and state the remedies available to the taxpayer to prevent the filing or recording. If tax liens are filed for the same liability in multiple counties, only one preliminary notice is required [*Rev. & Tax. Code § 7097(a), 21019(a)*]. These provisions do not apply, however, to jeopardy assessments under sales and use tax, personal income tax, or bank and corporation tax provisions [*see Rev. & Tax. Code §§ 7097(b), 21019(b)*].

The FTB may not file or record the lien if the taxpayer, within 30 days after receiving the preliminary notice, demonstrates to the FTB by substantial evidence that a filing or recording of a lien would be in error [*Rev. & Tax. Code § 21019(b)*].

[b] Notice of Filing and Recording of Lien; Administrative Review

[i] Operative Date

The amount of any unpaid California personal income tax or corporation tax becomes a perfected and enforceable state tax lien [*Rev. & Tax. Code § 19221(a)*]. *Rev. & Tax. Code § 19225* specifies notice requirements and administrative review for those liens.

[ii] Notice

Section 19225 requires the FTB to notify in writing the person whose failure to pay a liability under the Personal Income Tax Law or Corporation Tax Law of the filing or recording of a notice of state tax lien as provided for in GovernmentCode, Title 1, Division 7, Chapter 14 (*Gov. Code § 7150 et seq.*) or Chapter 14.5 (*Gov. Code § 7220 et seq.*) [*Rev. & Tax. Code §§ 19221, 19225(a)(1)*]. The notice must be mailed in accordance with *Civ. Code § 2885* no later than five business days after the filing of the notice of lien [*Rev. & Tax. Code § 19225(a)(2)*]. The notice must specify, in simple nontechnical terms, all of the following:

- The amount of unpaid tax [*Rev. & Tax. Code § 19225(a)(3)(A)*].

- The person's right to request a review during the 15-day period beginning on the day after the five-day period described in *Rev. & Tax. Code § 19225(a)(2)* [*Rev. & Tax. Code § 19225(a)(3)(B)*].

- The independent departmental administrative review available to the taxpayer regarding the lien and the procedures to obtain that review [*Rev. & Tax. Code § 19225(a)(3)(C)*].

- The procedures relating to the release of liens on property [*Rev. & Tax. Code § 19225(a)(3)(D)*].

[iii] Independent Administrative Review

An independent departmental administrative review under *Rev. & Tax. Code § 19225(b)* must be conducted by an officer or employee, or officers or employees, that have had no prior involvement with respect to the unpaid tax specified in *Rev. & Tax. Code § 19225(a)(3)(A)* before the first review under *Rev. & Tax. Code § 19225* or *21015.5* [*Rev. & Tax. Code § 19225(b)(3)*]. A taxpayer may waive this requirement [*Rev. & Tax. Code § 19225(b)(3)*].

Administrative review under *Rev. & Tax. Code § 19225(b)(3)* is not subject to the administrative adjudication

provisions of the Administrative Procedure Act (*Gov. Code § 11400 et seq.*) [*Rev. & Tax. Code § 19225(b)(3)*].

To the extent practicable, a review under *Rev. & Tax. Code § 19225* must be held in conjunction with a review under *Rev. & Tax. Code § 21015.5* [*Rev. & Tax. Code § 19225(b)(4)*. For purposes of *section 19225, Rev. & Tax. Code § 21015.5(c),* which relates to matters that may be considered in the review, applies [*Rev. & Tax. Code § 19225(c)*]. For discussion of *Rev. & Tax Code § 21015.5, see § 540.404[6]*)].

A person is entitled to only one review under *Rev. & Tax. Code § 19225* with respect to the taxable period to which the unpaid tax specified in *Rev. & Tax. Code § 19225(a)(3)(A)* relates [*Rev. & Tax. Code § 19225(b)(2)*].

[c] Release of Lien

If the SBE determines that a lien was filed in error, it must mail a release to the taxpayer and the entity recording the lien as soon as possible, but no later than seven days, after the determination of error and receipt of the lien recording information. The release must contain a statement that the lien was filed in error. If the erroneous lien is obstructing a lawful transaction, the SBE must immediately issue a release of the lien to the taxpayer and the entity recording the lien [*Rev. & Tax. Code § 7097(c)*]. When the SBE releases a lien erroneously filed, it must mail notice of that fact to the taxpayer, and on the taxpayer's request, it must mail a copy of the release to the major credit reporting companies in the county where the lien was filed [*Rev. & Tax. Code § 7097(d)*]. Moreover, the SBE may release or subordinate a lien if the board determines that the release or subordination will facilitate the collection of the tax liability or will be in the state's and taxpayer's best interest [*Rev. & Tax. Code § 7097(e)*].

If the FTB determines that a lien was filed or recorded in error, it must mail a release to the taxpayer and the entity recording the lien as soon as possible, but no later than seven *working* days, after the later of either the determination of error or the receipt of the lien recording information. The release must contain a statement that the lien was filed in error. If theerroneous lien is obstructing a lawful transaction, the FTB must immediately issue a release of the lien to the appropriate party. On the request of the taxpayer, the FTB must mail a copy of the release to the major credit reporting companies in the county where the lien was filed [*Rev. & Tax. Code § 21019(c)*].

Rev. & Tax. Code § 21019(d) provides that the procedures described in *Rev. & Tax. Code § 21019(c)* do not apply to liens that are filed or recorded either:

- Not in accordance with administrative procedures, or

- After the taxpayer has entered into an installment payment agreement under *Rev. & Tax. Code § 19008* to satisfy the tax liability for which the lien was filed or recorded, unless the agreement provides for the filing or recording of the lien.

Rev. & Tax. Code § 21019(e) provides that if the FTB determines that a release of lien will facilitate the collection of the tax liability or will be in the taxpayer and state's best interest, the FTB must mail a release of that lien to the taxpayer and the entity recording the lien. Subsection (e) further provides that if the lien is obstructing a lawful transaction and its release will facilitate the collection of the tax liability, or will be in the taxpayer and state's best interest, the FTB must:

- Issue a release of lien to the appropriate party, and

- On the taxpayer's request, mail a copy of the release to the credit reporting companies, financial institutions, or any creditor whose name and address is provided by the taxpayer.

Rev. & Tax. Code § 21019(f) establishes that *Section 21019* does not limit the circumstances in which the FTB may release a lien, and provides that the FTBmay release a lien under any circumstances to facilitate the collection of the tax liability or, if that release is in the taxpayer and state's best interest, and take action associated with the release of that lien it deems appropriate.

[i] Request By Owner Who Is Not Person Whose Unsatisfied Liability Gave Rise to Lien

Rev. & Tax. Code § 19226 was enacted in 1999, operative October 10, 1999 [*Rev. & Tax. Code § 19226(g)*; Stats. 1999, ch. 931, §§ 21, 40]. Under section 19226, at the request of the owner whose property is subject to any lien under *Rev. & Tax. Code § 19221*, the FTB must issue a release of lien from that property if the owner is not the person whose unsatisfied liability gave rise to the lien and the owner either [*Rev. & Tax. Code § 19226(a)(1)(2)*]:

- Deposits with the FTB an amount of money equal to the value of the state's interest (as determined by the FTB) in the property.

- Furnishes a bond acceptable to the FTB in a like amount.

The FTB must refund the amount so deposited, pay interest at the overpayment rate under *Rev. & Tax. Code § 19521*, and release the bond, to the extent the FTB determines that either of the following apply [*Rev. & Tax. Code § 19226(b)(1)(2)*]:

- The unsatisfied liability giving rise to the lien can be satisfied from a source other than the property for which the deposit or bond is made.

- The value of the state's interest in the property is less than the FTB's prior determination of the value.

If a release is issued under *Rev. & Tax. Code § 19226*, the owner may, within 60 days after the day on which the release is issued, request the FTB for an independent administrative review as provided in *Rev. & Tax. Code § 19226(f)* to determine whether the value of the state's interest, if any, is less the FTB's prior determination of the value. No other action may be brought by the owner for a determination [*Rev. & Tax. Code § 19226(d)(1)(2)*].

The administrative review under *Rev. & Tax. Code § 19226(f)*, is not subject to the administrative adjudication provisions of the Administrative Procedure Act (*Gov. Code § 11400 et seq.*) [*Rev. & Tax. Code § 19226(f)*].

If the review determines that the FTB's previous determination of value of the state's interest in the property for purposes of section 19226 exceeds the actual value of the state's interest, the board must provide a refund of the amount deposited and a release of the bond, to the extent that the aggregate of the amounts thereof exceeds the value so determined [*Rev. & Tax. Code § 19226(f)*]. In the case of a refund issued under *Rev. & Tax. Code § 19226(f)*, interest must be allowed at the rate prescribed for overpayments from the date the FTB receives the amount to the date of the refund [*Rev. & Tax. Code § 19226(f)*].

If no request is made under *Rev. & Tax. Code § 19226(d)* within the period prescribed, the FTB must do both of the following within 60 days after the expiration of the period [*Rev. & Tax. Code § 19226(c)*]:

- Apply the amount deposited or collected on the bond, to the extent necessary to satisfy the unsatisfied liability secured by the lien.

- Refund, with interest at the overpayment rate under *Rev. & Tax. Code § 19521*, any portion of the amount deposited which is not used to satisfy the liability.

Rev. & Tax. Code § 19226 does not limit the circumstances in which the FTB may release a lien under any circumstances to facilitate the collection of the tax liability or, if that release is in the best interest of the taxpayer and the state, take any action associated with the release of that lien it deems appropriate [*Rev. & Tax. Code § 19226(e)*].

[6] Relief From Tax Levy

[a] Notice Before Levy

Rev. & Tax. Code § 21015.5 was enacted in 1999, operative for any collection action initiated 180 days after January 1, 2000 [*Rev. & Tax. Code § 21015.5(g)*, Stats. 1999, ch. 348, § 2].

Under *Rev. & Tax. Code § 21015.5*, no levy may be made on any property or property right of any person unless the FTB has notified the person in writing of his or her rights as described in *Rev. & Tax. Code § 21015.5(a)(3)(C)* before the levy is made [*Rev. & Tax. Code § 21015.5(a)(1)*]. Except as provided in *Rev. & Tax. Code 21015.5(f)*, the notice is required only once for the taxable period to which the unpaid tax specified in *Rev. & Tax. Code § 21015.5(a)(3)(A)* relates [*Rev. & Tax. Code § 21015.5(a)(1)*]. The notice is not required, however, if the unpaid tax for which notice would otherwise be required under *Rev. & Tax. Code § 21015.5(a)(1)* is consolidated for collection purposes with a preexisting unpaid tax for which notice has been given under *Rev. & Tax. Code § 21015.5(a)(1)* [*Rev. & Tax. Code § 21015.5(a)(1)*].

If the FTB holds in abeyance the collection of a liability, imposed under the Personal Income Tax Law (*Rev. & Tax. Code 17001 et seq.*) or Part 10.2 of Division 2 of the Revenue and Taxation Code(*Rev. & Tax. Code § 18401 et seq.*), relating to the administration of franchise and income tax laws, that is final and otherwise due and payable, for a period in excess of six months from the date the hold is first placed on the account, the FTB must thereafter mail to the taxpayer a notice before issuing a levy or filing or recording a notice of state tax lien [*Rev. & Tax. Code § 21015.5(f)*].

The notice must be made by first-class mail to the address of record not less than 30 days before the day of the first levy with respect to the amount of the unpaid tax for the taxable period. Notice under *Rev. & Tax. Code § 21015.5(a)(1)* is not required if previous mail to the same address was returned undelivered with no forwarding address [*Rev. & Tax. Code § 21015.5(a)(2)*].

The notice must specify, in simple and nontechnical terms, all of the following [*Rev. & Tax. Code § 21015.5(a)(3)*]:

- The amount of unpaid tax.
- A telephone number to call in the event of any questions.
- The right of the person to request a review during the 30-day period described *Rev. & Tax. Code § 21015.5(a)(2).*
- The proposed action or actions that may be taken by the Franchise Tax Board and the rights of the person with respect to the action or actions, including a brief statement that sets forth all of the following:
    - The provisions of California law relating to levy and sale of property.
    - The procedures applicable to the levy and sale of property under California law.
    - The independent departmental administrative review available to the taxpayers with

respect to the levy and sale and the procedures to obtain that review (for discussion of this review, see *§ 540.404[6][b][i]*).

- The alternatives available to taxpayers that could prevent levy on property, including installment agreements under *Rev. & Tax. Code § 19008*.

- California legal requirements and procedures with respect to the release of levy.

If review is requested under *Rev. & Tax. Code § 21015.5(a)(3)(C)*, the levy actions that are the subject of the requested review must be suspended while the review is pending. In no event shall any period expire before the 15th day after the day on which there is a final determination in the review [*Rev. & Tax. Code § 21015.5(d)*].

Rev. & Tax. Code § 21015.5 does not apply if the board has made a finding under *Rev. & Tax. Code § 19081* or *19082* that the collection of tax is in jeopardy except that the taxpayer must be given the opportunity for the review described in *Rev. & Tax. Code § 21015.5* within a reasonable period of time after the levy [*Rev. & Tax. Code § 21015.5(e)*].

[b] Independent Departmental Administrative Review

When a taxpayer has requested a review under *Rev. & Tax. Code § 21015.5(a)(3)(C)*, an independent departmental administrative review must be conducted by an officer or employee, or officers or employees, who have had no prior involvement with respect to the unpaid tax specified in *Rev. & Tax. Code § 21015.5(a)(3)(A)* before the first review under *Rev. & Tax. Code § 21015.5* or *§ 19225* [*Rev. & Tax. Code § 21015.5(b)(3)*]. A taxpayer may waive the requirement of *Rev. & Tax. Code § 21015.5(b)(3)*. Administrative review under *Rev. & Tax. Code § 21015.5(b)(3)* is not subject to the administrative adjudication provisions of the Administrative Procedure Act (*Gov. Code § 11400 et seq.*) [*Rev. & Tax. Code § 21015.5(b)(3)*].

The person or persons conducting the independent departmental administrative review must obtain verification that the requirements of any applicable law or administrative procedures have been met by the FTB [*Rev. & Tax. Code § 21015.5(c)(1)*].

The taxpayer may raise during the review any relevant issue relating to the unpaid tax or the lien, including any of the following [*Rev. & Tax. Code § 21015.5(c)(2)(A)-(C)*]:

- Appropriate spousal defenses.

- Challenges to the appropriateness of collection actions.

- Offers of collection alternatives, that may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise.

The determination of the person or persons conducting the review under *Rev. & Tax. Code § 21015.5(c)* must take into consideration all of the following [*Rev. & Tax. Code § 21015.5(c)(3)(A)-(C)*]:

- The verification presented under *Rev. & Tax. Code § 21015.5(c)(1)*.

- The issues raised by the taxpayer under *Rev. & Tax. Code § 21015.5(c)(2)*.

- Whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action not be more intrusive than necessary.

An issue may not be raised during the review if (1) the issue was raised and considered at a previous review under *Rev. & Tax. Code § 21015.5* or in any other administrative or judicial proceeding, in which the person seeking to raise the issue participated meaningfully [*Rev. & Tax. Code § 21015.5(c)(4)(A), (B)*]. This restriction does not apply to any issue with respect to a change incircumstances of that person that affects the determination [*Rev. & Tax. Code § 21015.5(c)(4)*].

A person is entitled to only one review under *Rev. & Tax. Code § 21015.5* with respect to the taxable period to which the unpaid tax specified *Rev. & Tax. Code § 21015.5(a)(3)(A)* relates [*Rev. & Tax. Code § 21015.5(b)(2)*].

[c] Release of Levy

The SBE must release any levy or notice to withhold issued pursuant to sales and use tax provisions (*Rev. & Tax. Code § 6001 et seq.*) on any property if the expense of the sale process exceeds the liability for which the levy is made [*Rev. & Tax. Code § 7094(a)*]. Similarly, the Taxpayers' Rights Advocate may order the release of any lien or notice to withhold issued pursuant to the sales and use tax provisions or, within 90 days from the receipt of funds pursuant to a levy or notice to withhold, order the return of any amount up to $1,500 of moneys received, on his or her finding that the levy or notice to withhold threatens the health or welfare of the taxpayer or the taxpayer's spouse, dependents, or family [*Rev. & Tax. Code § 7094(b)*].

With regard to the Personal Income Tax Law [*see Rev. & Tax. Code § 17001 et seq.*] and the Bank and Corporation Tax Law [*see* Rev. & Tax. Code § 23100 et seq.], the FTB must release any levy issued pursuant to Revenue and Taxation Code Part 10.2 (*Rev. & Tax. Code § 18401 et seq.*) on any property in the event of any circumstances deemed appropriate by the FTB, including but not limited to the following [*Rev. & Tax. Code § 21016(a)*]:

- The expense of the sale process to the state exceeds the liability for which the levy is made [*Rev. & Tax. Code § 21016(a)(1)*].

- The Taxpayers' Rights Advocate orders the release of the levy upon his or her finding that the levy threatens the health or welfare of the taxpayer, or the taxpayer's spouse, dependents, or family [*Rev. & Tax. Code § 21016(a)(2)*].

- The proceeds from the sale would not result in a reasonable reduction of the debt [*Rev. & Tax. Code § 21016(a)(3)*].

- The levy was issued not in accordance with administrative procedures [*Rev. & Tax. Code § 21016(a)(4)*].

- The taxpayer has entered into an installment payment agreement under *Rev. & Tax. Code § 19008* to satisfy the tax liability for which the levy was made, unless that or another agreement allows for the levy [*Rev. & Tax. Code § 21016(a)(5)*].

- The release of the levy will facilitate the collection of the tax liability or will be in the best interest of the taxpayer and the state [*Rev. & Tax. Code § 21016(a)(6)*].

The release provisions of *Rev. & Tax. Code §§ 7094* and *21016* do not apply, however, to the seizure of any property as a result of a jeopardy assessment [*Rev. & Tax. Code §§ 7094(d), 21016(c)*].

In the case of a levy on salary or wages payable to or received by the taxpayer, in accordance with The Wage Garnishment Law (*Code Civ. Proc. § 706.010 et seq.*), on agreement with the taxpayer that the tax is not collectible, the FTB must release the levy as soon as practicable [*Rev. & Tax. Code § 21016(d)* (subdivision added by Stats. 1999, ch.

931, § 35); *see Rev. & Tax. Code § 21016(e)* (1999 amendments operative for salary or wages subject to levy on or after October 10, 1999)]. *Rev. & Tax. Code § 21016(d)*, however, does not apply if the debt for which the levy is issued has been discharged from collectibility under *Gov. Code § 16301.6*, except if the debt is satisfied [*Rev. & Tax. Code § 21016(d)*].

[d] Return of Property or Proceeds from Sale

Except in cases in which the board finds collection of the tax to be in jeopardy, if any property has been levied on, the property or the proceeds from the property's sale must be returned to the taxpayer if the board determines any one of the following [*Rev. & Tax. Code § 7094.1(a)(1)-(3)*]:

- The levy on the property was not in accordance with the law.

- The taxpayer has entered into and is in compliance with an installment payment agreement pursuant to *Rev. & Tax. Code § 6832* to satisfy the tax liability for which the levy was imposed, unless that or another agreement allows for the levy.

- The return of the property will facilitate the collection of the tax liability or will be in the state's and taxpayer's best interest.

Property returned under *Rev. & Tax. Code § 7094.1(a)(1), (2)* is subject to the provisions of *Rev. & Tax. Code § 7096* [*Rev. & Tax. Code § 7094.1(b)*; for discussion of *Rev. & Tax. Code § 7096*; *see § 540.404[6][f]*)].

[e] Notice of Exemptions From Levy Prior to Sale

The SBE and FTB are not permitted to sell seized property until the taxpayer is first notified in writing of the exemptions provided in *Code Civ. Proc. § 703.010 et seq.* [*Rev. & Tax. Code §§ 7094(b), 21016(b)*; *see also Rev. & Tax. Code §§ 7095, 21017* (exemptions must be adjusted to reflect changes in California Consumer Price Index that are more than 5 percent higher than any previous adjustment)].

[f] Claim to Recover Consequential Charges

[i] Reimbursement by FTB

A person may file a claim with the FTB for reimbursement of charges or fees imposed on the person by an unrelated business entity as the direct result of an erroneous levy, erroneous processing action, or erroneous collection action by the FTB. Charges that may be reimbursed include an unrelated business entity's usual and customary charge for complying with the levy instructions and reasonable charges for overdrafts that are a direct consequence of the erroneous levy, erroneous processing action, or erroneous collection action, and are paid by the person and not waived by the unrelated business entity or otherwise reimbursed. Each claimant applying for reimbursement must file a claim in the form prescribed by the FTB. In order to grant a claim, the FTB must determine that all of the following conditions have been satisfied [*Rev. & Tax. Code § 21018(a)*]:

- The erroneous levy, erroneous processing action, or erroneous collection action was caused by an error made by the FTB.

- Prior to the erroneous levy, erroneous processing action, or erroneous collection action, the person responded to all contacts by the FTB and provided any requested information or documentation sufficient to establish the person's position. The SBE may waive this provision for reasonable cause.

- The charge or fee has not been waived by the unrelated business entity or otherwise reimbursed.

A claim must be filed within 90 days from the date of the erroneous levy, erroneous processing action, or erroneous collection action. Within 30 days from the date the claim is received, the FTB must respond to the claim. If the FTB denies the claim, the claimant must be notified in writing of the reasons for denial of the claim. The FTB may extend the period for filing a claim under *Rev. & Tax. Code § 21018* [*Rev. & Tax. Code § 21018(b)*].

Charges and fees that may be reimbursed under the authority of *Rev. & Tax. Code § 21018* are limited to the usual and customary charges and fees imposed by a business entity in the ordinary course of business [*Rev. & Tax. Code § 21018(c)*].

[ii] Reimbursement by SBE

A taxpayer may file a claim with the SBE for reimbursement of bank charges and any other reasonable third-party check charge fees incurred by the taxpayer as the direct result of an erroneous levy or notice to withhold by the SBE. Bank and third-party charges include a financial institution's or third party's customary charge for complying with the levy or notice-to-withhold instructions and reasonable charges for overdrafts that are a direct consequence of the erroneous levy or notice to withhold. The charges are those paid by the taxpayer and not waived or reimbursed by the financial institution or third party. Each claimant applying for reimbursement must file a claim in the form prescribed by the SBE. In order to grant a claim, the SBE must determine that both of the following conditions have been satisfied [*Rev. & Tax. Code § 7096(a)*]:

- The erroneous levy or notice to withhold was caused by the SBE's error.

- Prior to the levy or notice to withhold, the taxpayer responded to all contacts by the SBE and provided any requested information or documentation sufficient to establish the taxpayer's position. The SBE may waive this provision for reasonable cause.

A claim under *Rev. & Tax. Code § 7096* must be filed within 90 days from the date of the levy or notice to withhold. Within 30 days from the date the claim is received, the SBE must respond to the claim. If the SBE denies the claim, the taxpayer must be notified in writing of the reasons for denial of the claim [*Rev. & Tax. Code § 7096(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationReview of Initial DecisionsTax LawState & Local TaxesAdministration & ProceedingsCredits, Overassessments & RefundsTax LawState & Local TaxesAdministration & ProceedingsTax LiensTax LawState & Local TaxesAdministration & ProceedingsTaxpayer Protests

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E. TAXPAYERS' BILL OF RIGHTS
3. Taxpayers' Bill of Rights

47-540 California Forms of Pleading and Practice--Annotated § 540.405

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.405 No Levy on Principal Residence of Innocent Investor

No levy is to be made on the principal residence or proceeds from a transaction involving the principal residence of an innocent investor, if the basis for the levy is an underpayment for any taxable year beginning on or before December 31, 2000, and is attributable to an abusive tax shelter. In addition, a lien on that property, or the proceeds of the sale of that property, must be released on notification to the FTB [*Rev. & Tax. Code § 21015.6*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawNonmortgage LiensTax LiensTax LawState & Local TaxesAdministration & ProceedingsTax Avoidance & EvasionTax LawState & Local TaxesAdministration & ProceedingsTax Liens

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47-540 California Forms of Pleading and Practice--Annotated § 540.406

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.406 Cause of Action for Reckless Disregard of Published Procedures

If an officer or employee of the SBE or FTB recklessly disregards procedures published by the respective board, a taxpayer aggrieved by the action or omission may bring an action for damages in superior court against the State of California [*Rev. & Tax. Code §§ 7099(a), 21021(a)*]. For a form of complaint based on reckless disregard of a published procedure, *see § 540.570*.

If the state is found liable, the taxpayer may recover actual and direct monetary damages sustained as a result of the actions or omissions [*Rev. & Tax. Code §§ 7099(b)(1), 21021(b)(1)*]. The state is also liable to the taxpayer for reasonable litigation costs, as defined by applicable Revenue and Taxation Code cost provisions [*Rev. & Tax. Code §§ 7099(b)(2), 21021(b)(2)*; *see Rev. & Tax. Code §§ 7156* (costs in sales and use tax proceedings), *19717* (costs in personal income tax and bank and corporation tax proceedings)].

In awarding damages for reckless disregard of published procedures, the courtis required to take into consideration any negligence or omissions by the taxpayer that contributed to the damages [*Rev. & Tax. Code §§ 7099(c), 21021(c)*]. Moreover, if it appears to the court that the taxpayer's position in an action for reckless disregard of published procedures is frivolous, the court may impose a penalty against the taxpayer of up to $10,000. The penalty must be paid on notice and demand from the SBE or FTB, as applicable, and is collected as if it were sales and use tax, personal income tax, or bank and corporation tax [*see Rev. & Tax. Code § 7099(d), 21021(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstTax LawState & Local TaxesAdministration & ProceedingsGeneral Overview

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47-540 California Forms of Pleading and Practice--Annotated § 540.407

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.407 Cause of Action Against State for Settlement or Compromise in Exchange for Disclosure of Information

If any officer or employee of the FTB intentionally settles the determination or compromises the collection of any tax due from an attorney, certified public accountant, or tax preparer (as defined in *Rev. & Tax. Code § 19169(b)*) representing a taxpayer, in exchange for information conveyed by the taxpayer to the attorney, certified public accountant, or tax preparer for purposes of obtaining advice concerning the taxpayer's tax liability, the taxpayer may bring a civil action for damages against the State of California in superior court [*Rev. & Tax. Code § 21022(a)*; *see Rev. & Tax. Code § 21022(g)* (section operative for actions files on or after January 1, 1998)]. The civil action is the exclusive remedy for recovering damages from the acts described in *Rev. & Tax. Code § 21022(a)* [*Rev. & Tax. Code § 21022(a)*]. As an exception to this rule, the civil action is not available with respect to information conveyed to an attorney, certified public accountant, or tax preparer for the purpose of perpetrating a fraud or crime [*Rev. & Tax. Code § 21022(f)*].

If the defendant is found liable, the liability to the plaintiff is the lesser of $500,000 or the sum of the actual direct economic damages sustained by the plaintiff as a proximate result of the information disclosure, and the costs of the action [*Rev. & Tax. Code § 21022(b)(1)(2)*]. Damages, however, do not include the taxpayer's liability for any civil or criminal penalties or other losses attributable to incarceration or the imposition of other criminal sanctions [*Rev. & Tax. Code § 21022(c)*].

Notwithstanding any other provision of law, an action to enforce liability created under *Rev. & Tax. Code § 21022(a)* may be brought without regard to the amount in controversy, and may be brought only within two years after the date the actions creating the liability would have been discovered by the exercise of reasonable care [*Rev. & Tax. Code § 21022(d)*].

On certification of the executive officer of the FTB, or the executive officer's delegate, that criminal charges have been

filed against the taxpayer, the court before which an action under *Rev. & Tax. Code § 21022(a)* is pending must stay all proceedings with respect to the action, pending the resolution of those criminal charges [*Rev. & Tax. Code § 21022(e)*]. Certification authorized by *Rev. & Tax. Code § 21022(a)* must comply with the requirements of *Rev. & Tax. Code § 19542* (restriction on disclosure of amount of income and other particulars) [*Rev. & Tax. Code § 21022(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstTax LawState & Local TaxesAdministration & ProceedingsAudits & InvestigationsTax LawState & Local TaxesAdministration & ProceedingsSettlements

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47-540 California Forms of Pleading and Practice--Annotated § 540.408

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.408 Attorney-Client Privilege Extends to Taxpayer-Practitioner Communications

The same statutory protections of confidentiality that apply to a communication between a taxpayer and an attorney [*see Evid. Code § 950 et seq.*] apply also to a communication between a taxpayer and a federally authorized tax practitioner (see below) with respect to tax advice (see below), to the extent that the communication would be considered a privileged communication if it were between a client and an attorney. A federally authorized tax practitioner has the legal obligation and duty to maintain confidentiality with respect to such a communication [*Rev. & Tax Code §§ 7099.1(a)(1), 21028(a)(1)*]. The privilege is effective with regard to communications made on or after January 16, 2009 [*Rev. & Tax Code §§ 7099.1(c), 21028(c)*] and, under previously enacted temporary versions of the governing code sections, also with regard to communications made from September 13, 2000, until January 16, 2009 [*see* Stats. 2000, ch. 438; Stats. 2003, ch. 654, 656; Stats. 2004, ch. 412].

"Federally authorized tax practitioner" means any individual who is authorized under federal law to practice before the IRS [*Rev. & Tax Code §§ 7099.1(a)(3)(A), 21028(a)(3)(A)*; *see 31 U.S.C. § 330*; *31 C.F.R. § 10.3* (persons who may become federally authorized tax practitioners include certified public accountants, enrolled agents, and enrolled actuaries)]. "Tax advice" means advice given by an individual with respect to a state tax matter, including federal tax advice related to a state tax matter; and "federal tax advice" means advice given by individuals within the scope of their authority to practice before the IRS on noncriminal matters [*Rev. & Tax Code §§ 7099.1(a)(3)(B), 21028(a)(3)(B)*].

The privilege may be asserted, in noncriminal tax proceedings only, before the Board of Equalization or the Franchise Tax Board [*Rev. & Tax Code §§ 7099.1(a)(2), 21028(a)(2)*]. However, the privilege does not apply to written communications between tax practitioners and certain corporate representatives regarding the promotion of corporate tax shelters [*Rev. & Tax Code §§ 7099.1(b), 21028(b)*; *see Rev. & Tax Code §§ 7099.1(a)(3)(c), 21028(a)(3)(c)* ("tax shelter" defined)]. In addition, the privilege may not be asserted to prevent the disclosure of information in any proceeding to discipline the holder of any license or right to practice by any governmental agency [*Rev. & Tax Code §§ 7099.1(b), 21028(b)*].

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47-540 California Forms of Pleading and Practice--Annotated §§ 540.409-540.419

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

[Reserved]

§§ 540.409[Reserved]

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47-540 California Forms of Pleading and Practice--Annotated § 540.420

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.420 California Legal Forms

For discussion and exemption applications forms relating to welfare, charitable, and educational exemptions, see California Legal Forms, Ch. 13C, *Nonprofit Corporations and Associations*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewTax LawState & Local TaxesPersonal Property TaxExempt PropertyGeneral OverviewTax LawState & Local TaxesReal Property TaxGeneral Overview

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47-540 California Forms of Pleading and Practice--Annotated § 540.421

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.421 California Real Estate

For a discussion of the tax implications of acquiring and disposing of real property, see California Real Estate Law and Practice, Ch. 130, *Acquisition and Basis* ; Ch. 131, *Depreciation* ; Ch. 132, *Disposition*

For a more detailed discussion of the valuation methods and assessment process, see California Real Estate Law and Practice, Ch. 401, *Valuation and Assessment*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawProperty ValuationReal Property LawPurchase & SaleGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationAssessment Methods & TimingTax LawState & Local TaxesReal Property TaxAssessment & ValuationValuation

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47-540 California Forms of Pleading and Practice--Annotated § 540.422

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.422 Federal Constitution

State and local taxes prohibited from placing undue burden on interstate commerce. U.S. *Const., art. I, § 8, cl. 3*

States prohibited from taxing exports. U.S. *Const., art. I, § 10, cl. 2*

Federal government and instrumentalities are exempt from state taxation. U.S. Const., art. VI

State and local taxes that unduly burden free press or free speech are prohibited. *U.S. Const., amend. I*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawCongressional Duties & PowersCommerce ClauseInterstate CommerceGeneral OverviewConstitutional LawRelations Among GovernmentsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of FreedomTax LawState & Local TaxesAdministration & ProceedingsGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsFederal Preemption

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47-540 California Forms of Pleading and Practice--Annotated § 540.423

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.423 California Constitution

[1] Property Subject to Tax

All property in California is subject to property tax at full value unless exempt. *Cal. Const., art. XIII, § 1*

Real and personal property must be assessed separately; rate for personal property as not permitted to be higher than that for real property in same jurisdiction. *Cal. Const., art. XIII, §§ 2, 13*

Values of all property on local roll must be equalized. *Cal. Const., art. XIII, § 16*

Court action to enjoin or prevent collection of tax prohibited; action to recover tax claimed to have been illegally collected, with interest, authorized. *Cal. Const., art. XIII, § 32*

[2] Proposition 13 and Other Constitutional Limitations

Combined maximum of ad valorem taxes that may be levied on real property by all taxing agencies is one percent of property's full cash value; one percentlimitation is not applicable to ad valorem property taxes or special assessments levied to pay indebtedness approved by voters prior to July 1, 1978, or to bonded indebtedness for acquisition or improvement of real property approved on or after July 1, 1978 by two-thirds vote. *Cal. Const., art. XIII A, §§ 1(a), (b)*

After rollback to assessor's appraisal of full cash value as shown on the 1975-1976 tax rolls, assessed value of real property may be increased only (1) by inflation factor not to exceed 2 percent per year or (2) if property is purchased, newly constructed, or changes ownership after March 1, 1975. *Cal. Const., art. XIII A, § 2*

Ability of cities, counties, and "special districts" to impose special taxes is limited by requiring two-thirds voter

approval. *Cal. Const., art. XIII A, § 4*

Cities, counties, and special districts are prohibited from imposing new ad valorem real property taxes and sales or transaction taxes on real property. *Cal. Const., art. XIII A, § 4*

Limitations on local governments concerning special and general taxes. Cal. Const., art. XIII C

Restrictions concerning property taxes, assessments, fees or charges and procedures for assessments and new or increased fees or charges. Cal. Const., art. XIII D

[3] Reassessment Exclusions

Exclusions from definition of "newly constructed," "purchases," and "change in ownership" that trigger reassessment. *Cal Const., art. XIII A, § 2(a), (c), (d), (g), (h)*; *see also Rev. & Tax. Code §§ 60-74.6*

[4] Transfer of Base Year Values

Legislature is empowered to allow persons over age 55 or with severe and permanent disability to transfer base year value of principal residence to replacement dwelling. *Cal. Const., art. XIII A, § 2(a)*; *see Rev. & Tax. Code § 69.5*

Legislature is authorized to provide for transfer of base-year value of property destroyed or damaged by disaster to comparable replacement property. *Cal. Const., art. XIII A, § 2(e), (f)*; *see Rev. & Tax. Code § 69*

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesAdministration & ProceedingsAssessmentsTax LawState & Local TaxesPersonal Property TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationAssessment Methods & TimingTax LawState & Local TaxesReal Property TaxAssessment & ValuationValuation

California Forms of Pleading and Practice--Annotated

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 540 TAXES AND ASSESSMENTS
PART III. RESEARCH GUIDE
A. PROPERTY TAXES AND ASSESSMENTS

47-540 California Forms of Pleading and Practice--Annotated § 540.424

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.424 Federal Statutes

Imposition of property tax on national banks is authorized. *12 U.S.C. § 548*

Federal court diversity and federal question jurisdiction. *28 U.S.C. §§ 1331, 1332*

Tax Injunction Act prohibits federal courts from enjoining assessment, levy, or collection of state tax if plain, speedy, and efficient remedy available in state courts. *28 U.S.C. § 1341*

Lands owned or held in trust for American Indians is exempt from state or local taxation. *28 U.S.C. § 1360(b)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesState TaxCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsAnti-Injunction ActGovernmentsNative AmericansTaxationTax LawState & Local TaxesReal Property TaxGeneral Overview

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47-540 California Forms of Pleading and Practice--Annotated § 540.425

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.425 State Statutes

[1] Actions by Owners and Purchasers of Tax-Defaulted Property

Quiet title action by owner. *Code Civ. Proc. § 760.010 et seq.*

Action by good faith improver of real property. *Code Civ. Proc. §§ 871.1-871.7*

Quiet title action by purchaser of tax-defaulted property. *Rev. & Tax. Code §§ 160, 3727-3729*

Suit by purchaser to determine adverse claims. *Rev. & Tax. Code §§ 3950-3972*

Owner's action to contest validity of deed to taxing agency because of delinquency of property taxes. *Rev. & Tax. Code § 175*

Original owner's action alleging invalidity of or irregularity in proceedings for sale of tax-defaulted property by taxing agency to private party. *Rev. & Tax. Code § 3725*

Authority of board of supervisors to rescind erroneous tax sale. *Rev. & Tax. Code § 3731*

Redemptioner's quiet title action. *Rev. & Tax. Code § 4113*

[2] Information to Assessor

Information requested by or furnished to assessor is confidential. *Rev. & Tax. Code §§ 408, 451, 481*; *but see Rev. & Tax. Code § 408.3* (property characteristic information is public record)

Property statements are required. *Rev. & Tax. Code §§ 441, 448, 453, 456*

Penalties for failure to provide statements and requested information. *Rev. & Tax. Code §§ 441(b), 463, 482, 506, 531*

Electronic filing of property statements. *Rev. & Tax. Code § 441(k)*

Simplified procedure for manager in control of fleet of fractionally owned aircraft to file statement covering all aircraft that have acquired situs in California, at all airport locations. *Rev. & Tax. Code § 441(l)*

Simplified procedure for commercial air carriers to file statements covering their taxable personal property (including aircraft) and fixtures at all airport locations. *Rev. & Tax. Code § 441(m)*

[3] Change in Ownership

Definitions of and exclusions from change in ownership triggering reassessment. *Rev. & Tax. Code §§ 60-68*

Change in ownership statements are required. *Rev. & Tax. Code §§ 480-480.6*

[4] Property Taxpayer's Bill of Rights

The Morgan Property Taxpayer's *Bill of Rights*, creating Property Taxpayer's Advocate. *Rev. & Tax. Code § 5900 et seq.*

[5] Proposition 62

Requirement that local taxes be approved by vote of local electorate. *Gov. Code §§ 53720-53730*

Two-thirds voter approval requirement for a local government or district to impose a special tax. *Gov. Code § 53722*

Majority voter approval requirement for a local government or district to impose a general tax. *Gov. Code § 53723*

[6] Reduction of Assessment

Applications to county board of equalization for reduction of assessment. *Rev. & Tax. Code §§ 1601-1721*

Damages as authorized for failure of state or local public entity lessor to disclose in lease that leasehold interest is taxable. *Rev. & Tax. Code § 107.6*

Taxpayers' redemption rights. *Rev. & Tax. Code §§ 3707, 4101-4379*

Assessment and collection of assessments on floating homes. *Rev. & Tax. Code §§ 2189.7, 2189.8*

Tax collector is required to send notice of removal of invalid lien for recording after owner presents evidence of erroneously recorded lien; recorder as required to forward to owner. *Rev. & Tax. Code § 2196*

[7] Refunds

Interest and attorney's fees are authorized on certain refunds. *Rev. & Tax. Code §§ 1611.6, 5150-5152*

Suits for refund of real property taxes. *Rev. & Tax. Code §§ 5140-5149.5*

[8] Transfer of Base Year Value

Transfer of base year value of property destroyed or damaged in disaster. *Rev. & Tax. Code § 69*

Transfer of base year value for principal residence of person over 55 years of age or with severe and permanent disability to replacement dwelling. *Rev. & Tax. Code § 69.5*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawDeedsTypesTax DeedsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsTax LawState & Local TaxesAdministration & ProceedingsAssessmentsTax LawState & Local TaxesAdministration & ProceedingsCredits, Overassessments & RefundsTax LawState & Local TaxesReal Property TaxCollectionTax Deeds & Tax Sales

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47-540 California Forms of Pleading and Practice--Annotated § 540.426

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.426 Decisions

[1] Administrative Procedures

18 Cal. Code Reg. § 468 requires assignment of base year value on lien date following acquisition of lease to develop geothermal sources rather than treating geothermal steam project as ongoing new construction. *Phillips Petroleum Co. v. County of Lake (1993) 15 Cal. App. 4th 180, 193, 18 Cal. Rptr. 2d 765*

State Board of Equalization's notice to taxpayer of findings (*Rev. & Tax. Code § 744(a)*) after hearing of petition for reassessment must specify method of valuation used; if more than one method is used, criteria for weighting methods must also be set forth. *Southern Pac. Transportation Co. v. State Bd. of Equalization (1987) 191 Cal. App. 3d 938, 949-952, 959, 237 Cal. Rptr. 191*

Rev. & Tax. Code §§ 1603, 1605 and *18 Cal. Code Reg. § 305* do not limit term "regular assessment period" to specific tax year; thus, escape assessments for prior tax years issued on June 20 are made within regular assessment period and application for equalization of those escape assessments filed on September 14 is timely. *Pacific Mutual Life Ins. Co. v. County of Orange (1985) 187 Cal. App. 3d 1141, 1150-1151, 232 Cal. Rptr. 233*

Validity of escape assessments was properly before assessment appeals board even though taxpayer's application for equalization did not furnish unsecured bill number in space provided but only gave parcel number. *Pacific Mutual Life Ins. Co. v. County of Orange (1985) 187 Cal. App. 3d 1141, 1149-1150, 232 Cal. Rptr. 233*

Assessment appeals board has right to determine its own jurisdiction. *Focus Cable of Oakland, Inc. v. County of Alameda (1985) 173 Cal. App. 3d 519, 525, 219 Cal. Rptr. 95*

[2] Change in Ownership

[a] Corporations

Rev. & Tax. Code § 64(c), defining changes in ownership of corporate property for purposes of tax reassessment under Cal. Const., art. XIII A, applies to subsidiaries of acquired corporations notwithstanding legislature's failure to use term "subsidiary" in statute; acquisition of subsidiary's parent corporation effects indirect change in ownership of subsidiary's real property, rendering property subject to reassessment. *Title Ins. & Trust Co. v. County of Riverside (1989) 48 Cal. 3d 84, 91-99, 255 Cal. Rptr. 670, 767 P.2d 1148*

Corporation obtaining control of another corporation is change in ownership; fact that majority shareholders of acquired corporation own majority of acquiring corporation was irrelevant. *Kraft, Inc. v. County of Orange (1990) 219 Cal. App. 3d 1104, 1107-1109, 268 Cal. Rptr. 643*

Rev. & Tax. Code § 64(b) unambiguously requires affiliation from beginning until end of transaction to qualify as reorganization excluded from reassessment; thus, corporate reorganization not involving entities affiliated after reorganization constitutes change in ownership under *Rev. & Tax. Code § 64(c)* that was properly reassessed. *Pueblos Del Rio South v. City of San Diego (1989) 209 Cal. App. 3d 893, 907-908, 257 Cal. Rptr. 578*

Change in ownership under *Rev. & Tax. Code § 64(c)* occurs, and reassessment is proper, on merger of parent holding company if original parent's shareholders became minority shareholders of surviving parent. *Sav-On Drugs, Inc. v. County of Orange (1987) 190 Cal. App. 3d 1611, 1617-1621, 236 Cal. Rptr. 100*

Although merger was nontaxable event under both federal and California income tax law, exemption of *Rev. & Tax. Code § 64(c)* was not applicable because all merged entities were not members of affiliated group prior to merger. *Sav-On Drugs, Inc. v. County of Orange (1987) 190 Cal. App. 3d 1611, 1617-1621, 236 Cal. Rptr. 100*

Rev. & Tax. Code § 64(c) is not unconstitutional denial of equal protection to corporations. *Sav-On Drugs, Inc. v. County of Orange (1987) 190 Cal. App. 3d 1611, 1623-1626, 236 Cal. Rptr. 100*

[b] Leases as Change in Ownership

Although leases generally are not taxable under *Rev. & Tax. Code § 11911*, 35-year lease has sufficient longevity to approximate transfer in fee constituting taxable change in ownership under *Rev. & Tax. Code § 61(c)*; however, same rule is applicable to 20-year lease with 10-year option to renew. *Thrifty Corp. v. County of Los Angeles (1989) 210 Cal. App. 3d 881, 884-886, 258 Cal. Rptr. 585*

Lease providing for automatic extension of term of lease if city passes charter amendment and city's passage of amendment does not constitute change in ownership triggering revaluation of possessory interest in tax-exempt property. *Wrather Port Properties, Ltd. v. County of Los Angeles (1989) 209 Cal. App. 3d 517, 522, 257 Cal. Rptr. 266*

[c] Limited Liability Companies; Partnerships

When member of limited liability company satisfies company-funding obligation by conveying real property to LLC, that change in ownership is, for property tax purposes, a 100 percent change in ownership because entire "beneficial use" of property [*see Rev. & Tax. Code § 60*] has been transferred from member to LLC; consequently, entire property can be reassessed. *Fashion Valley Mall, LLC v. County of San Diego (2009) 176 Cal. App. 4th 871, 885-887, 98 Cal. Rptr. 3d 327*

Majority partner's two-step acquisition of full fee interest in general partnership's sole asset, parcel of real property, was change in ownership under *Rev. & Tax. Code § 61*; acquisition consisted of majority partner's purchase of interests of minority partners, followed by partnership's transfer of title to sole remaining partner. *Zapara v. County of Orange (1994) 26 Cal. App. 4th 464, 470, 31 Cal. Rptr. 2d 555*

[d] Requirements

Change in ownership allowing reassessment of apartment building occurs at time of transaction between owner and buyer if buyer was unable to convert to cooperative on time to make payments when they were due, sale documents were absolute on their face, buyer sold fractional interests to individual investors, one of whom subsequently conveyed interest to third party, and seller initiated foreclosure proceedings. *Cal-American Income Property Fund II v. County of Los Angeles (1989) 208 Cal. App. 3d 109, 114-116, 256 Cal. Rptr. 21*

Transfer of bare legal title from record lessee of property to its beneficial owner is not a change in ownership triggering reassessment. *Parkmerced Co. v. City and County of San Francisco (1983) 149 Cal. App. 3d 1091, 1094-1095, 197 Cal. Rptr. 401*

[e] Sale and Leaseback

Sale and leaseback of property is change in ownership; sale-leaseback is transfer of present interest in property, including beneficial use of it, value of which is substantially equal to value of fee interest. *Pacific Southwest Realty Co. v. County of Los Angeles (1991) 1 Cal. 4th 155, 162-165, 2 Cal. Rptr. 2d 536, 820 P.2d 1046*

Corporation's sale of property, subject to three 50-year leases to corporation's subsidiary that were not in existence at time of sale but were made a condition of sale, constitutes change in ownership; transaction is subject to property tax reassessment under step transaction doctrine if each step was taken to achieve ultimate result of sale and leaseback. Crow-Winthrop Operating Partnership v. *County of Orange (1992) 10 Cal. App. 4th 1848, 1856-1858, 13 Cal. Rptr. 2d 696*

True sale-leaseback that is not a financing transaction constitutes change in ownership; sale and leaseback are two separate transfers. *Industrial Indemnity Co. v. City and County of San Francisco (1990) 218 Cal. App. 3d 999, 1004-1006, 267 Cal. Rptr. 445*

[f] Sale of Development Rights

Sale of transferable development rights is transfer of present interest in real property and thus as taxable change in ownership. *Mitsui Fudosan (U.S.A.), Inc. v. County of Los Angeles (1990) 219 Cal. App. 3d 525, 529-530, 268 Cal. Rptr. 356*

[g] Trusts

Change of ownership occurred when family trust became irrevocable, not when family revocable trust was created. *Empire Properties v. County of Los Angeles (1996) 44 Cal. App. 4th 781, 785-789, 52 Cal Rptr. 2d 69*

Termination of trust does not constitute change in ownership of real property triggering reassessment under *Cal. Const., art. XIII A, § 2(a)*. *Allen v. Sutter County Bd. of Equalization (1983) 139 Cal. App. 3d 887, 890-892, 189 Cal. Rptr. 101*

[3] Characterization of Property as Personal or Real

Item is fixture and thus real property if reasonable person would consider item to be permanent part of property taking into account annexation, adaptation, and other objective manifestations of permanence. *Crocker National Bank v. City and County of San Francisco (1989) 49 Cal. 3d 881, 885-888, 264 Cal. Rptr. 139, 782 P.2d 278*

General-purpose fungible data processing equipment that was plugged in and readily moveable is personal property because it is not a fixture. *Crocker National Bank v. City and County of San Francisco (1989) 49 Cal. 3d 881, 889-891, 264 Cal. Rptr. 139, 782 P.2d 278*

Franchise right to locate cable on public streets and right of way is possessory interest in real property and assessment is governed by principles set forth in *California Constitution. CAT Partnership v. County of Santa Cruz (1998) 63 Cal. App. 4th 1071, 1081, 74 Cal. Rptr. 2d 652*

Computer systems not attached to property, except to power source by standardized plugs and cables, is personal property despite major alterations to real property to accommodate computer system. *Allstate Ins. Co. v. County of Los Angeles (1984) 161 Cal. App. 3d 877, 890-892, 207 Cal. Rptr. 888*

[4] Escape Assessments

Escape assessments are deficiency assessments, assessed retroactively to remedy omissions or errors in original assessment of taxable property; property on assessment roll that has escaped assessment is assessed on discovery at its value on lien date for year which it escaped assessment; if taxpayer seeks review of both escape assessment and valuation of other property at location, taxpayer must so state in application; applications for tax reductions which only stated challenges to escape assessments of personal property and fixtures held not to include challenges to underlying real property at business location; issue was not failure to identify precise legal basis for reduction, but rather failure to seek reduction of values of roperty other than escape assessments. *Helene Curtis, Inc. v. Assessment Appeals Bd. (1999) 76 Cal. App. 4th 124, 128 n.1, 129-132, 90 Cal. Rptr. 2d 31*

Although county delayed too long in seeking supplemental assessments under 1993 version of *Rev. & Tax. Code § 75.11* for the 1988-1989 assessment year, county not barred from changing properties' base year values and from seeking escape assessments; 1992 legislation setting limitation period on assessor's right to recover supplemental assessments in *Rev. & Tax. Code § 75.11*, did not affect limitations period for levying escape assessments established in *Rev. & Tax. Code § 532* and interpreted in *Blackwell Homes v. County of Santa Clara (1991) 226 Cal. App. 3d 1009, 277 Cal. Rptr. 251* ; base-year values not involving assessor's exercise of judgment as to value can be corrected at any time under *Rev. & Tax. Code § 51.5*; escape assessments, however, can be levied only within time limits specified in *Rev. & Tax. Code §§ 51.5(a), (b), 532*; under *Rev. & Tax. Code § 532* in effect in 1993, escape assessments not subject to penalty had to be made within four years after July 1 of assessment year, as defined in *Rev. & Tax. Code § 118*, in which property escaped taxation or was underassessed; if interpretation in *Dreyer's Grand Ice Cream, Inc. v. County of Alameda (1986) 178 Cal. App. 3d 1174, 1180, 224 Cal. Rptr. 285 (First Dist.)* , prevailed, no escape assessments could have been levied because, under *Dreyer's* interpretation, only timely escape assessments are those made within four years of year when new base year value determined; however, court applied language of *Rev. & Tax. Code § 532* and its interpretation in *Blackwell Homes*, which disagreed with *Dreyer's* interpretation of Section 532, in holding that escape assessments for last four years were timely because they did not involve assessor's judgment as to value and because they were made within four years of July 1 of assessment years involved; 1994 and 1995 amendments to *Rev. & Tax. Code § 532* inapplicable to case; when assessor has taken no action to adjust base value year, he or she has not exercised judgment as to value; escape assessments also not barred by *Code Civ. Proc. § 338(a)*. *Montgomery Ward & Co. v. County of Santa Clara (1996) 47 Cal. App. 4th 1122, 1132-1139, 55 Cal. Rptr. 2d 261*

Four-year limitation period of *Rev. & Tax. Code § 532* governing period within which escape assessments can be made commences on lien date as of which original (base year) assessment was determined, not from discovery or from end of tax year in which property escaped assessment; escape assessment made on February 26, 1981, based on incorrect assessments for 1976-1977 through 1980-1981 is barred, because limitation period commenced on March 1, 1976. *Dreyer's Grand Ice Cream, Inc. v. County of Alameda (1986) 178 Cal. App. 3d 1174, 1180-1182*

[5] Exemptions

Cal. Const., art. XIII, § 3(b) exempts property owned by public entities from both regular property taxation and special assessments; water district user fee is special assessment within exemption, because proceeds used for capital improvements. *San Marcos Water Dist. v. San Marcos Unified School Dist. (1986) 42 Cal. 3d 154, 163-165, 228 Cal. Rptr. 47, 720 P.2d 935*

Former Rev. & Tax. Code § 225 (exempting personal property manufactured or produced (1) outside California for transhipment out of U.S. or (2) outside U.S. for transhipment out of state) is void for discriminating against domestic companies operating wholly within U.S.; undue burden on interstate commerce is violation of *commerce clause*. *Star-Kist Foods, Inc. v. County of Los Angeles (1986) 42 Cal. 3d 1, 15-16, 227 Cal. Rptr. 391, 719 P.2d 987*

Replacement parts that computer company kept for use in fulfilling its maintenance and repair duties under flat-fee extended service contracts with its customers (both those that bought computers and those that leased computers) could not be exempted from property taxation under *Rev. & Tax. Code § 219* (exemption for business inventories) because those replacement parts, which company held in what computer industry denotes as "rotable pool" (because parts are swapped out and replaced by salvageable parts removed from customers' computers), were not goods intended for sale or lease in ordinary course of business [*see Rev. & Tax. Code § 129* (definition of business inventories); *18 Cal. Code Reg. § 133* (same)]; moreover, company had treated those parts as capital assets, not as inventory, for income tax purposes. *Amdahl Corp. v. County of Santa Clara (2004) 116 Cal. App. 4th 604, 613-614, 10 Cal. Rptr. 3d 486*

While statutes granting property tax exemptions are generally construed strictly, words describing exemption need not be given their narrowest possible meaning; property of nonprofessional service enterprises constitutes exempt business inventory under *Rev. & Tax. Code § 129* and *18 Cal. Code Reg. § 133* if it is delivered incidental to rendition of service, whether goods are delivered to customer or to third party designated by customer; form letters sent by collection service to debtors held to qualify as exempt business inventory, and were not excludable office supplies under *18 Cal. Code Reg. § 133(b)*. *Transworld Systems, Inc. v. County of Sonoma (2000) 78 Cal. App. 4th 713, 715-718, 93 Cal. Rptr. 2d 165*

Under *Cal. Const. art. XIII, §§ 1, 2*, only Legislature, with two-thirds of membership of each housing concurring, may classify personal property for exemption; had SBE, in 1996 amendment of *18 Cal. Code Reg. § 152*, concerning taxability of computer programs, created exemption where none existed, or adopted rule inconsistent with Legislature's intent, regulation would be invalid; however, SBE merely clarified *Rev. & Tax. Code §§ 995* and *995.2*; thus, SBE acted properly to enforce state property tax law and prescribe regulations to govern assessors; amendment of regulation enjoys presumption of correctness and burden is on assessor to demonstrate its invalidity. *Hahn v. State Board of Equalization (1999) 73 Cal. App. 4th 985, 996-997, 87 Cal. Rptr. 2d 282*

Statutes granting exemption from taxation are to be strictly construed to avoid enlarging or extending the concession beyond the plain meaning of the language used granting it; burden is on party claiming exemption to show it clearly comes within terms authorizing exemption and any doubt must be resolved against right to an exemption; cobalt 60 held not to come within business inventory exemption of *Rev. & Tax. Code § 219*. *Sterigenics Internat. v. County of Orange (1996) 47 Cal. App. 4th 1541, 1543, 55 Cal. Rptr. 2d 319*

Request for parent/child exemption from reassessment of real property was untimely under *Rev. & Tax. Code § 63.1(e)(1)* when not filed within three years after October 5, 1987, the date the family trust became irrevocable; *Rev. & Tax. Code § 63.1(e)(1)* applicable to transfers between parents and their children occurring before September 30, 1990. *Empire Properties v. County of Los Angeles (1996) 44 Cal. App. 4th 781, 789-791, 52 Cal Rptr. 2d 69*

Cal. Const., art. XIII, § 4(c) and *Rev. & Tax. Code § 203.5*, which grant exemption to specified museums and do not require property to be used for specified purpose, were applicable during time property devised to museum was subject to probate administration; interest in property passed to exempt entity on testator's death. *California Academy of Sciences v. County of Fresno (1987) 192 Cal. App. 3d 1436, 1440-1442, 238 Cal. Rptr. 154*

Neither exemption of *Rev. & Tax. Code § 33* for blood, blood products, and human tissue, nor welfare exemption of *Rev. & Tax. Code § 214* exempt personal property of commercial supplier of blood and derivative pharmaceutical products used to store blood or to manufacture derivatives. *Alpha Therapeutic Corp. v. County of Los Angeles (1986) 179 Cal. App. 3d 265, 270-273, 224 Cal. Rptr. 498*

Rev. & Tax. Code § 214 (exemption for property owned and operated for charitable purposes) applies to leasehold interests whether or not underlying fee is owned by public entity. *Tri-Cities Children's Center, Inc. v. Board of Supervisors (1985) 166 Cal. App. 3d 589, 592-593, 212 Cal. Rptr. 541*

[6] Federal Law and Jurisdiction

State may not impose real estate taxes in manner that discriminates against interstate commerce; otherwise generally applicable state property tax violates Commerce Clause (U.S. *Const., art. 1, § 8, cl. 3*) when exemption for property owned by charitable institutions excludes organizations operated principally for benefit of nonresidents; although camp does not make profit, it is engaged in commerce not only as purchaser, but also as provider of goods and services. *Camps Newfound/Owatonna v. Harrison (1997) 520 U.S. 564, 117 S. Ct 1590, 137 L. Ed. 2d 852, 859, 861-864, 869-874*

Federal district court has jurisdiction under former *49 U.S.C. § 11503* (*now 49 U.S.C. § 11501*) to determine claim of overvaluation of railroad property even if overvaluation not alleged to result from discriminatory intent. *Burlington No. R. Co. v. Okla. Tax Comm'n (1987) 481 U.S. 454, 460-464, 107 S. Ct. 1855, 95 L. Ed. 2d 404*

Whether tax is within now-repealed exemption of former 49 U.S.C. § 1513(d)(3) is question of federal law; tax on airline flight property, imposed to exclusion of any other tax on that property and proceeds of which are wholly used for airport and aeronautical purposes, is within now-repealed exemption of former 49 U.S.C. § 1513(d)(3). *Western Air Lines, Inc. v. Board of Equalization (1987) 480 U.S. 123, 107 S. Ct. 1038, 94 L. Ed. 2d 112, 119, 121-123*

When ownership of government contractor's overhead property vested in government pursuant title-passing clauses included in the government contracts, property was not subject to a county's ad valorem property tax. *Hughes Aircraft Co. v. County of Orange (2002) 96 Cal. App. 4th 540, 117 Cal. Rptr. 2d 601*

[7] Interest and Attorney's Fees

If attorney's fees can be awarded under both *Rev. & Tax. Code § 5152* and *Gov. Code § 800*, award is made under more specific statute (*Rev. & Tax. Code § 5152*). *Prudential Ins. Co. v. City and County of San Francisco (1987) 191 Cal. App. 3d 1142, 1160-1161, 236 Cal. Rptr. 869*

"Void" as used in *Rev. & Tax. Code § 5152* has ordinary meaning of invalid, erroneous; judicial finding of voidness is

not required in order to award attorney's fees for application of improper valuation method. *Prudential Ins. Co. v. City and County of San Francisco (1987) 191 Cal. App. 3d 1142, 1157-1159, 236 Cal. Rptr. 869*

Rev. & Tax. Code § 5151 does not violate due process or equal protection by paying interest on refunds due to reduction of assessed value only if interest of $10 or more is owed. *Cohan v. Alvord (1984) 162 Cal. App. 3d 176, 184, 186, 208 Cal. Rptr. 421*

Only simple interest, not compound interest, is recoverable. *Lilli Ann Corp. v. City and County of San Francisco (1977) 70 Cal. App. 3d 162, 198-199, 138 Cal. Rptr. 759*

Assessment unsubstantiated by any evidence is so arbitrary and capricious as to warrant award of attorney's fees. *Madonna v. County of San Luis Obispo (1974) 39 Cal. App. 3d 57, 61-62, 113 Cal. Rptr. 916*

[8] Interests Valued

Ownership interest rather than possessory interest in personal property is taxable. *General Dynamics Corp. v. County of Los Angeles (1958) 51 Cal. 2d 59, 65-66, 330 P.2d 794*

Intangibles associated with realty, such as zoning, permits, and licenses, may not be taxed as real property, but may, to extent they affect real property's value, properly contribute to assessment of fair market value. *American Sheds, Inc. v. County of Los Angeles (1998) 66 Cal. App. 4th 384, 392, 78 Cal. Rptr. 2d 58*

Franchise right to do business is valuable but nonassessable portion of franchise; franchise right to locate cable on public streets and right of way is possessory interest in real property and their assessment is governed by principles set forth in *California Constitution. CAT Partnership v. County of Santa Cruz (1998) 63 Cal. App. 4th 1071, 1081, 74 Cal. Rptr. 2d 652*

Right to engage in cable television business is intangible asset not subject to taxation; value of intangible interest is properly considered in valuing tangible possessory interests. *County of Stanislaus v. Assessment Appeals Bd. (1989) 213 Cal. App. 3d 1445, 1453-1455, 262 Cal. Rptr. 439*

Commercial rafting company's exclusive and profitable use of river pursuant to permit issued by county constitutes taxable possessory interest; taxation of possessory interest, together with additional taxation of land underlying river, do not constitute double taxation. *Scott-Free River Expeditions, Inc. v. County of El Dorado (1988) 203 Cal. App. 3d 896, 904-913, 250 Cal. Rptr. 504*

Cable television company's easement allowing it to construct improvements along, under, or over city streets and rights-of-way are a taxable possessoryinterest, even though city's interest not taxable. *Cox Cable San Diego, Inc. v. County of San Diego (1986) 185 Cal. App. 3d 368, 383-388, 229 Cal. Rptr. 839*

Option of seller to repurchase property for failure of owner/purchaser to construct improvements as not allowing discounted appraisal; property are required to be appraised as unencumbered fee simple. *Carlson v. Assessment Appeals Bd. I (1985) 167 Cal. App. 3d 1004, 1013, 213 Cal. Rptr. 555*

Entire burglar alarm system properly taxable as real property of seller although minor components, title to which passed to subscribers, were permanently attached to subscribers' real property and major components were removable improvements; assessment of entire burglar alarm systems to seller despite assessment of virtually identical fire alarm systems to subscribers was not arbitrary or discriminatory. *Morse Signal Devices v. County of Los Angeles (1984) 161 Cal. App. 3d 570, 579-582, 207 Cal. Rptr. 742*

"Mere expectation" without option to renew lease requires tax to be based only on remaining lease term. *American Airlines, Inc. v. County of Los Angeles (1976) 65 Cal. App. 3d 325, 326-328, 135 Cal. Rptr. 261*

Appropriative and prescriptive water rights are assessed separately and therefore as exception to fee valuation practice. *Faix, Ltd. v. County of Los Angeles (1976) 54 Cal. App. 3d 992, 998-999, 127 Cal. Rptr.182*

[9] Methods of Valuation

Airlines alleging that their property was assessed at higher ratio to true market value than ratio applying to other commercial and industrial property in county stated claim for de facto assessment ratio discrimination in violation of former 49 U.S.C. App. § 1513(d) of the Airport and Airway Improvement Act of 1982 (now see *49 U.S.C. § 40116(d)*); to prevail on claim, airlines must demonstrate that any unassessed and underassessed personal property results from practice or policy on assessor's part that is either targeted to disadvantage or that has an unreasonable disparate effect on the airlines. *American Airlines, Inc. v. County of San Mateo (1996) 12 Cal. 4th 1110, 1116, 1132-1136, 51 Cal. Rptr. 2d 251, 912 P.2d 1198*

Method of valuation of leasehold interests in tax exempt property as proper. *Forster Shipbuilding. Co. v. County of Los Angeles (1960) 54 Cal. 2d 450, 455-456, 6 Cal. Rptr. 24, 353 P.2d 736, 12 O.&G.R. 1213 De Luz Homes, Inc. v. County of San Diego (1955) 45 Cal. 2d 546, 562-563, 290 P.2d 544*

Writ of mandate granted to assessor to require appraiser, in applying band-of-investment method in valuing Section 515 low-income housing, to use a 1 percent interest rate in computing debt portion of capitalization rate, which was actual interest rate paid by property owners, even though promissory notes stated a different interest rate. *Bontrager v. Siskiyou County Assessment Appeals Bd. (2001) 97 Cal. App. 4th 325, 118 Cal. Rptr. 2d 182*

How pollution cleanup costs are to be handled in property tax valuations is essentially question of methodology, that is, one of law. *Mola Development Corp. v. Orange County Assessment Appeals Bd. (2000) 80 Cal. App. 4th 309, 316, 327, 95 Cal. Rptr. 2d 546*

Possessory interest to sell food in municipal stadium was not properly valued byincome capitalization method if entire income was capitalized and notjust income attributable to value of possessory interest. *Service America Corp. v. County of San Diego (1993) 15 Cal. App. 4th 1232, 1240, 19 Cal. Rptr. 2d 165*

At equalization hearing, board bound by same principles of valuation that are legally applicable to assessor. *Plaza Hollister Ltd. Partnership v. County of San Benito (1999) 72 Cal. App. 4th 1, 18, 84 Cal. Rptr. 2d 715*

When market data is available, preferred method of valuing real property is by reference to sales prices of comparable properties; however, due to unique nature of oil and gas property interests, specialized appraisal techniques are required; thus, modified capitalization of income approach is most commonly accepted valuation method; assessor's experts properly valued subject property using both comparable sales and discounted future income. *Texaco Producing, Inc. v. County of Kern (1998) 66 Cal. App. 4th 1029, 1035-1036, 1045, 1051, 78 Cal. Rptr. 2d 433*

Preferred method of valuing cable television possessory interest is income method, capitalized to annual rent, using appropriate capitalization rate; in determining fair market value, enforceable restrictions on property may be taken into account; enforceable restrictions include virtually any governmental restriction designed to serve interest of public health, safety, morals and/or general public welfare; only enforceable governmental restrictions affect fair market value. *CAT Partnership v. County of Santa Cruz (1998) 63 Cal. App. 4th 1071, 1081-1087, 74 Cal. Rptr. 2d 652*

There are three basic methods of determining full cash value of property: (1) market data method, (2) income method, and (3) cost method. *Fujitsu Microelectronics, Inc. v. Assessment Appeals Bd. (1997) 55 Cal. App. 4th 1120, 1124, 64 Cal. Rptr. 2d 465*

Valuation on basis of particular use owner is making of property is contrary to law; valuation on basis of highest and best use as required. *Pacific Mutual Life Ins. Co. v. County of Orange (1987) 187 Cal. App. 3d 1141, 1148-1148, 232 Cal. Rptr. 233*

Reproduction or replacement cost method is not proper method for valuation of office building if sales and income data is available; income approach is preferred. *Pacific Mutual Life Ins. Co. v. County of Orange (1987) 187 Cal. App. 3d 1141, 1146, 1148-1148, 232 Cal. Rptr. 233* (building was substantial over-improvement and suffered from considerable functional obsolescence)

Historical cost is not proper method for valuation of railroad property if industry regulating railroad does not use historical cost as rate base. *Southern Pacific Transportation Co. v. State Bd. of Equalization (1987) 191 Cal. App. 3d 938, 957, 237 Cal. Rptr. 191*

Assessor may use discretion in method of valuation of property as long as assessor is subject to requirements of uniformity and fairness. *ITT World Communications, Inc. v. County of Santa Clara (1980) 101 Cal. App. 3d 246, 251-252, 162 Cal. Rptr. 186*

Valuation formula used in assessing timberlands is proper. *Georgia-Pacific Corp. v. County of Butte (1974) 37 Cal. App. 3d 461, 469-472, 112 Cal. Rptr. 327*

Method of valuation of right to appropriate water is proper. *County of Tuolumne v. State Board of Equalization (1962) 206 Cal. App. 2d 352, 367-368, 24 Cal. Rptr. 113*

[10] Other Judicial Remedies to Contest Assessments

Fire protection district lacked standing to seek writ of mandate against county assessment appeals board decision upholding lower assessed valuation of taxpayer's real property; district could not assert standing as beneficially interested party or on public interest ground of being governmental entity charged with enforcing a particular statute. *Sacramento County Fire Protection Dist. v. Sacramento County Assessment Appeals Bd. (1999) 75 Cal. App. 4th 327, 331, 333-336, 89 Cal. Rptr. 2d 215*

Assessor may seek writ review of adverse equalization decision. *Plaza Hollister Ltd. Partnership v. County of San Benito (1999) 72 Cal. App. 4th 1, 18, 84 Cal. Rptr. 2d 715*

Trial court properly ruled that action could be maintained as class action when individual taxpayers who were parties to the action had filed separate administrative claims for tax refunds with the city, all making the same legal claim against the city. *Thomas v. City of East Palo Alto (1997) 53 Cal. App. 4th 1084, 1095, 62 Cal. Rptr. 2d 185* (distinguishing *Neecke v. City of Mill Valley (1995) 39 Cal. App. 4th 946, 960-965, 46 Cal. Rptr. 2d 266*)

Class action held precluded in tax refund case brought pursuant to *Rev. & Tax. Code §§ 5097, 5140*; filing administrative claim under *Rev. & Tax. Code § 5097* is prerequisite for bringing action for refund under *Rev. & Tax. Code § 5140*; neither of these statutes provide for class claim or suit. *Neecke v. City of Mill Valley (1995) 39 Cal. App. 4th 946, 960-965, 46 Cal. Rptr. 2d 266*

Although *Cal. Const., art. XIII, § 32* requires payment of tax before challenging it, it does not require suit for refund

when legislature has provided procedures for challenging tax; administrative mandamus appropriate procedure under *Veh. Code § 8202* for contesting DMV's fleet registration fees. *American President Lines v. Zolin (1995) 38 Cal. App. 4th 910, 919-921, 45 Cal. Rptr. 2d 370*

Peremptory writ of mandate to command assessment appeals board to conduct further hearings on taxpayer's request for award of attorney's fees. *Main & Von Karman Associates v. County of Orange (1994) 23 Cal. App. 4th 337, 344, 28 Cal. Rptr. 2d 432*

Mandate to change assessments is unavailable even though tax refund is not sought, because effect of changing assessment would be lower taxes in future. *Merced County Taxpayers' Assn. v. Cardella (1990) 218 Cal. App. 3d 396, 400-401, 267 Cal. Rptr. 62*

Trial court improperly denied building industry association's petition for writ of mandate against school district boards that had invalidly imposed exactions on developers of new residential housing as special taxes or development fees. *California Bldg. Industry Assn. v. Governing Bd. (1988) 206 Cal. App. 3d 212, 232-240, 253 Cal. Rptr. 497*

Trial court properly granted writ of mandate setting aside local agency formationcommission resolution relieving certain homeowners of property taxes as condition of detachment from local water agency, because resolution was contrary to controlling state law. *Antelope Valley-East Kern Water Agency v. Local Agency Formation Com. (1988) 204 Cal. App. 3d 990, 994-996, 251 Cal. Rptr. 593*

Availability of relief in state courts precludes federal equitable relief under Civil Rights Act (*42 U.S.C. § 1983*) in claims of allegedly unconstitutional administration of state tax systems. *Fair Assessment in Real Estate v. McNary (1981) 454 U.S. 100, 116, 102 S. Ct. 177, 70 L. Ed. 2d 271*

Petition for writ of mandate is proper method for county to review assessment board's improper finding that property was valueless. *County of San Diego v. Assessment Appeals Bd. No. 2 (1983) 148 Cal. App. 3d 548, 553-558, 195 Cal. Rptr. 895*

Mandate to order revaluation of property or reassessment of taxes generally is not available, because suit for refund constitutes speedy and adequate remedy at law. *Malibu West Swimming Club v. Flournoy (1976) 60 Cal. App. 3d 161, 164-165, 131 Cal. Rptr. 279* ; *County of Sacramento v. Assessment Appeals Bd. No. 2 (1973) 32 Cal. App. 3d 654, 672-673, 108 Cal. Rptr. 434*

Mandate is issuable to compel assessor to exercise discretion to appraise property lawfully, but not to compel board of equalization to increase assessment after it had already exercised its discretion with respect to assessment in question. *Stevens v. Fox Realty Corp. (1972) 23 Cal. App. 3d 199, 205-206, 100 Cal. Rptr. 63*

[11] Property Valuation

Rev. & Tax. Code § 75.12(a)(3), referring to new construction that cannot be functionally used or occupied when it becomes available for use, logically can never be applied in determining date of completion for purpose of setting value of new construction that is subject to property tax; however, State Board of Equalization regulation on determining date of completion in that situation [*see 18 Cal. Code Reg. § 463.500*] can be applied. *Georgiev v. County of Santa Clara (2007) 151 Cal. App. 4th 1428, 1438-1440, 60 Cal. Rptr. 3d 752*

Statutory presumption that purchase price in arm's length sale is rebuttably presumed to be property's fair market value for purposes of property tax valuation [*see Rev. & Tax. Code § 110(b)*] applies to sealed bid purchases, as well as to actively negotiated prices. *Maples v. Kern County Assessment Appeals Bd. (2002) 103 Cal. App. 4th 172, 126 Cal*

Rptr 2d 585

Favorable contract agreement that gave an independent power producer above-market prices for its electricity output from a cogeneration power facility could be taken into account in valuing facility, because property may be assessed and valued by assuming presence of intangible assets or rights necessary to put property to beneficial or productive use. *Watson Cogeneration Company v. County of Los Angeles (2002) 98 Cal. App. 4th 1066, 120 Cal. Rptr. 2d 421*

Under *Cal. Const., art. XIII A, § 2* and *Rev. & Tax. Code § 50*, county must reassess real property at new base year value when property is subject to change in ownership or new construction; under *Rev. & Tax. Code § 110.1*, base year value is determined by fair market value of property, as of date of transfer or completion of construction; *Rev. & Tax. Code § 110(b)* creates rebuttable presumption that amount of improvement bond is included in purchase price placing burden on assessor to rebut presumption that purchase price reflects fair market value; 1998 amendment of *Rev. & Tax. Code § 110(b)* adding presumption applied to plaintiff's claim, which was pending when amendment was enacted. *Huson v. County of Ventura (2000) 80 Cal. App. 4th 1131, 1135-1137, 96 Cal. Rptr. 2d 116*

For vacant, functionally unimproved contaminated commercial property generating no income on lien date, assessed valuation is price at which willing buyer and willing seller would consummate open market sale of property considering its polluted condition; deducting cleanup costs is acceptable surrogate to gauge true open market value of property where propertyis vacant and not generating income; dispositive question is not who has liability for cleanup costs, but whether, and to what extent property value was affected by contamination; thus, open market value of this unimproved property for tax valuation was best approximated by subtracting present value of cost of cleanup, without adding expected contributions from third parties back into cleanup costs; simple present value cost-of-cure deduction from fair market value of nonincome producing land as if uncontaminated is not only way to approximate open market value of contaminated property for tax purposes; adequate comparables for contaminated property would be another way, if assessor could ever find one. *Mola Development Corp. v. Orange County Assessment Appeals Bd. (2000) 80 Cal. App. 4th 309, 311, 95 Cal. Rptr. 2d 546 & n.1, 312, 316-318, 327*

Property subject to general property taxation is assessed at its full value, i.e., price at which property would transfer if exposed for sale on open market between knowledgeable parties in equal bargaining positions; *18 Cal. Code Reg. §§ 2-8* set forth various approaches assessor is to use in estimating this full value. *Texaco Producing, Inc. v. County of Kern (1998) 66 Cal. App. 4th 1029, 1035, 78 Cal. Rptr. 2d 433*

Intangibles associated with realty, such as zoning, permits, and licenses, may, to extent they affect real property's value, properly contribute to assessment of fair market value. *American Sheds, Inc. v. County of Los Angeles (1998) 66 Cal. App. 4th 384, 392, 78 Cal. Rptr. 2d 58*

In determining fair market value, enforceable restrictions on property may be taken into account; enforceable restrictions include virtually any governmental restriction designed to serve interest of public health, safety, morals and/or general public welfare; assessment appeals board erred in taxing certain rate protection provisions included as part of cable operators' franchise agreements with local governments because rate protection agreements were enforceable restrictions not subject to taxation. *CAT Partnership v. County of Santa Cruz (1998) 63 Cal. App. 4th 1071, 1075-1076, 1082-1088, 74 Cal. Rptr. 2d 652*

When assessor relies on comparable sales approach to value, assessor must comply with *18 Cal. Code Reg. § 4* to ensure statewide uniformity in appraisal practices and to assure property is assessed at its full value. *Mitchell v. County of Los Angeles (1997) 60 Cal. App. 4th 497, 503, 70 Cal. Rptr. 2d 476*

Oil and gas leases, which involve income-producing property, are ordinarily evaluated based on income capitalization method of appraisal; environmental protection statutes which require oil and gas lease operator to take measures to prevent or repair contamination can be restrictions on land use that affect value within meaning of *Rev. & Tax. Code §*

402.1; existence of specific enforcement order is not prerequisite under *Rev. & Tax. Code § 402.1* to taxpayer's showing that land is subject to restrictions imposed by government which affect its value. *Dominguez Energy v. County of Los Angeles (1997) 56 Cal. App. 4th 839, 854, 65 Cal. Rptr. 2d 766*

Property tax value of oil and gas rights on federal land is not reducible by value ofroyalties absent a showing that royalties could not be renegotiated on subsequent renewals because of specific lease provisions. *Oryx Energy Co. v. County of Kern (1993) 17 Cal. App. 4th 48, 59, 21 Cal. Rptr. 2d 221*

Assessor properly recognized and valued gas storage rights on lien date following their discovery. *Tenneco West, Inc. v. County of Kern (1987) 194 Cal. App. 3d 596, 239 Cal. Rptr. 612*

18 Cal. Code Reg. § 4 requires obligation at other than market rate assumed as part of purchase price to be adjusted to its cash equivalent. *Prudential Ins. Co. v. City and County of San Francisco (1987) 191 Cal. App. 3d 1142, 1149-1155, 236 Cal. Rptr. 869*

Sales tax is element of value of equipment, whether leased or sold to consumers, under trade level theory of property tax assessment. *County of San Diego v. Assessment Appeals Bd. No. 2 (1983) 148 Cal. App. 3d 548, 553-558, 195 Cal. Rptr. 895*

Acquisition value of real property provided for in Cal. Const., art. XIII A (Proposition 13) for purposes of property taxation do not exceed fair market value of property under *Cal. Const., art. XIII, § 1(a)*. *State Bd. of Equalization v. Board of Supervisors (1980) 105 Cal. App. 3d 813, 823, 164 Cal. Rptr. 739*

[12] Proposition 13

[a] Application

Proposition 13 prohibits county from levying property taxes in excess of one percent to pay a money judgment under *Harb. & Nav. Code § 6361* (tax levy to raise sum required by port district for all purposes) and *Gov. Code §§ 970-971* (provision of funds to pay judgments). *Ventura Group Ventures, Inc. v. Ventura Port Dist. (2001) 24 Cal. 4th 1089, 1101-1102, 104 Cal. Rptr. 2d 53*

Fees imposed under *Health & Safety Code § 105310* (part of Childhood Lead Poisoning Prevention Act of 1991), enacted by simple majority vote of Legislature, held to be bona fide regulatory fees, not taxes that required enactment by two-thirds majority vote under *Cal. Const., art. XIII A, § 3*, because Legislature imposed the fees to mitigate actual or anticipated adverse effects of fee payers' operations, and under the Act the fees must bear reasonable relationship to those effects. *Sinclair Paint Co. v. State Bd. of Equalization (1997) 15 Cal. 4th 866, 870, 873-881, 64 Cal. Rptr. 2d 447, 937 P.2d 1350*

When challenged tax held invalid under *Gov. Code § 53722*, court need not reach question whether it is also invalid under Proposition 13. *Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 261, 45 Cal. Rptr. 2d 207, 902 P.2d 225*

Valuation limitations of Proposition 13, Cal. Const., art. XIII A, apply to taxable lands of public entity located outside its jurisdictional boundaries. *City and County of San Francisco v. County of San Mateo (1995) 10 Cal. 4th 554, 559, 574, 41 Cal. Rptr. 2d 888, 896 P.2d 181*

Public utility property, which is not taxed as real property or as personal property by local authority but which is subject to "unit tax" assessed and apportioned by SBE, is not within Cal. Const., art. XIII A and therefore not subject to

assessment rollback to 1975-76 level. *ITT World Communications, Inc. v. City & County of San Francisco (1985) 37 Cal. 3d 859, 865-871, 210 Cal. Rptr. 226, 693 P.2d 811*

Even if constitutional provision may be self executing, reasonable legislation enacted to facilitate its operation is valid; legislature has power to enact statutes providing for reasonable regulation and control of rights granted under constitutional provisions. *Plaza Hollister Ltd. Partnership v. County of San Benito (1999) 72 Cal. App. 4th 1, 28, 84 Cal. Rptr. 2d 715*

Under facts, utility lien imposed by ordinance was neither special tax nor special assessment and thus not governed by Cal. Const., art. XIII A; however, ordinance violated California statutory law and was not exempt under municipal affairs doctrine. *Isaac v. City of Los Angeles (1998) 66 Cal. App. 4th 586, 595-601, 77 Cal. Rptr. 2d 752*

Surcharge on landfill deposits that did not exceed the reasonable cost of the program was not a special tax subject to Proposition 13 requirement of two-thirds voter approval. *City of Dublin v. County of Alameda (1993) 14 Cal. App. 4th 264, 284, 17 Cal. Rptr. 2d 845*

City's increase of real estate transfer tax from 0.75 percent to 0.95 percent was not barred by *Cal. Const., art. XIII A, § 4* because it was general tax. *Cohn v. City of Oakland (1990) 223 Cal. App. 3d 261, 263-264, 272 Cal. Rptr. 714*

Emissions-based formula adopted by air pollution control district to recover indirect costs by apportioning them among stationary pollution sources required to obtain operating permits was regulatory fee for reasonable cost of providing necessary services, and not special tax prohibited by *Cal. Const., art. XIII A, § 4*. *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist. (1988) 203 Cal. App. 3d 1132,1145-1149, 250 Cal. Rptr. 420*

Rev. & Tax. Code § 50 (providing that reassessed value reflecting change in ownership is not entered on tax roll until lien date next following date of actual transfer) did not violate of Cal. Const., art. XIII A; later enactment of *Rev. & Tax. Code § 75* (providing for supplemental assessment to avoid delay) did not render *Rev. & Tax. Code § 50* invalid. *Vacu-Dry Co. v. County of Sonoma (1987) 190 Cal. App. 3d 947, 951-952, 235 Cal. Rptr. 712*

Although complaint was filed in 1979, relief on claim that improper method was used to determine "rollback" 1975 lien date base year value was barred by requirement of former *Rev. & Tax. Code § 110.1(b)* [*see now Rev. & Tax. Code § 110.1(c)*] that all rollback values be determined by June 30, 1980. *Swicegood v. Rush (1986) 178 Cal. App. 3d 119, 125-127, 223 Cal. Rptr. 627*

Property occupied but not completed on 1975-1976 lien date is still within *Cal. Const., art. XIII A, § 2(a)* and not properly assessable at then current market value; for purposes of *Cal. Const., art. XIII A, § 2(a)*, date of completion is date property or portion thereof is available for use. *Frederick v. County of Sonoma (1986) 176 Cal. App. 3d 1243, 1244-1245, 222 Cal. Rptr. 684*

1983 amendments to *Rev. & Tax. Code §§ 75.10, 75.11* only changed timing of supplemental assessments, and did not impose new tax, and therefore is valid. *Shafer v. State Bd. of Equalization (1985) 174 Cal. App. 3d 423, 426-429, 220 Cal. Rptr. 59*

Cal. Const., art. XIII A, §§ 1, 2 neither revoked nor conflicted with *Cal. Const., art. XIII, § 10* and *Rev. & Tax. Code § 52(c)*, exempting golf courses fromvaluation at highest and best use; nonprofit golf courses qualifying for exemption are entitled to both assessment based on actual use and rollback to 1975-76 valuation. *Los Angeles Country Club v. Pope (1985) 175 Cal. App. 3d 278, 285-288, 220 Cal. Rptr. 584*

18 Cal. Code Reg. § 468 method for valuation of oil and gas reserves, which treats additions to proved reserves the same as newly constructed additions to real property, and which allows reduction of appraised value to account for

annual depletion, is constitutional and not in violation of Cal. Const., art. XIII A. *Lynch v. State Bd. of Equalization (1985) 164 Cal. App. 3d 94, 114-118, 210 Cal. Rptr. 335*

City incorporated after effective date of Proposition 13 is entitled to share county's documentary real property transfer tax revenues; sharing is not "new tax" within meaning of *Cal. Const., art. XIII A, § 4*. *City of Cathedral City v. County of Riverside (1985) 163 Cal. App. 3d 960, 964-965, 210 Cal. Rptr. 60*

[b] Previously Approved Indebtedness

City library tax based on 1937 charter provision is previously-approved indebtedness within exception of *Cal. Const., art. XIII A, § 1(b)* and therefore is permissible ad valorem tax exceeding one percent limitation. *Patton v. City of Alameda (1985) 40 Cal. 3d 41, 44-48, 219 Cal. Rptr. 1, 706 P.2d 1135*

School district override assessments under former *Educ. Code § 42244* (repealed July 24, 1979) is not previously-approved indebtedness within exception of *Cal. Const., art. XIII A, § 1(b)*. *Arvin Union School Dist. v. Ross (1985) 176 Cal. App. 3d 189, 199-201, 221 Cal. Rptr. 720*

[c] Special Assessments

Port district did not have independent authority to impose assessment under *Harb. & Nav. Code § 6365(d)(2)* to raise funds needed to satisfy judgment obtained against district because the assessment would not specially benefit parcels on which it would be imposed. *Ventura Group Ventures, Inc. v. Ventura Port District (2001) 24 Cal. 4th 1089, 1106-1107, 104 Cal. Rptr. 2d 53, 16 P.3d 717*

City ordinance imposing inspection fee on private landlords is not subject to Proposition 218's procedural requirements because it is imposed on landlords in their capacity as business owners, not as landowners, exaction is more in nature of fee for business license than charge against property. *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal. 4th 830, 840, 102 Cal. Rptr. 2d 719, 14 P.3d 930*

Assessment for park maintenance was valid special assessment and not special tax subject to Proposition 13 limitations. *Knox v. City of Orland (1992) 4 Cal. 4th 132, 142, 14 Cal. Rptr. 2d 159, 841 P.2d 144*

Supplemental assessment to cover increased costs of placing overhead utility lines underground failed to satisfy proportionality requirement imposed by *Cal. Const., art. XIII D, § 4(a)*, which mandates that no assessment shall exceed reasonable cost of proportional special benefit conferred on parcel. *Town of Tiburon v. Bonander (2009) 180 Cal. App. 4th 1057, 1063, 103 Cal. Rptr. 3d 485*

Minimum charge imposed on parcels with connections to water district's utility systems, for basic cost of providing water or sewer service regardless of actual use, was not special assessment and did not require ballot approval by affected owners because it was charge for immediately available property-related water or sewer service as defined in *Cal. Const., art. XIII D, § 6(b)(4)*. *Paland v. Brooktrails Township Community Services Dist. Bd. of Directors (2009) 179 Cal. App. 4th 1358, 1362, 102 Cal. Rptr. 3d 270*

Storm drainage fee was not for sewer or water services and therefore was subject to taxpayer approval under Proposition 218 before it could be imposed. *Howard Jarvis Taxpayers Assn. v. City of Salinas (2002) 98 Cal. App. 4th 1351, 121 Cal. Rptr. 2d 228*

Proposition 218 applied to city's in-lieu franchise fee for water, sewer, and refuse collection; fee violated Proposition 218 because revenue from the fee was placed in city's general fund, rather than being used only for purpose for which it

was imposed, and because there was no evidence that fee reasonably represented cost of providing the services. *Howard Jarvis Taxpayers Assn. v. City of Roseville (2002) 97 Cal. App. 4th 637, 119 Cal. Rptr. 2d 91*

Special assessment is lien imposed on real property by public entity to finance public improvement; local governments commonly form special assessment districts that sell tax-exempt improvement bonds to investors; bond proceeds pay for onsite improvements, such as streets and utility services, that enhance land value; purchaser of parcel generally assumes outstanding improvement bond balance associated with his or her parcel. *Huson v. County of Ventura (2000) 80 Cal. App. 4th 1131, 1135 n.2, 96 Cal. Rptr. 2d 116*

Proposition 218, which added Cal. Const., arts. XIII C, XIII D in November 1996, changed rule that special assessment was not special tax that could be imposed without two-thirds vote; preexisting assessments must subject to exemptions comply with Proposition 218 by July 1, 1997; exemptions include, under *Cal. Const., art. XIII D, § 5(a),* assessment imposed exclusively to finance maintenance and operation expenses for sidewalks or streets; preexisting streetlighting assessment is exempt under Proposition 218; although Proposition 218 did not expressly exempt streetlighting assessments, it does not violate evident intent to hold that streetlighting assessment is exempt as an expense of operation of streets and sidewalks. *Howard Jarvis Taxpayers Assn v. City of Riverside (1999) 73 Cal. App. 4th 679, 682, 684-686, 86 Cal. Rptr. 2d 592*

Business improvement district assessment to fund property-related improvements and activities imposed on business owners within district established under the Parking and Business Improvement Area Law of 1989 (*Sts. & Hy. Code § 36500 et seq.*) treated as special assessment not subject to two thirds voter approval requirement of Proposition 218. *Howard Jarvis Taxpayers Assn. v. City of San Diego (1999) 72 Cal. App. 4th 230, 235-238, 84 Cal. Rptr. 2d 804*

Special assessments are made to complete specific public improvement in designated district and are compulsory charges placed on specific real property; they are made under express legislative authority for purpose of defraying cost of proposed local public improvements; because local improvement will benefit only certain properties, general public is not required to subsidize it through general tax levy; thus, special assessment is not really tax but benefit to specific property financed through public credit; in contrast, although special taxes are also taxes levied for special purpose, they need not be earmarked to benefit particular property; special taxes are prohibited by *Cal. Const., art. XIII A § 4* unless approved by two-thirds vote of qualified electors of entity seeking to impose tax; special assessments are exempt from limitations on special taxes because Proposition 13 is aimed at general government tax levies and overspending; amount of special assessment may not exceed benefit accruing to affected property; thus, if property assessed receives no special benefit, levy is prohibited special tax. *Isaac v. City of Los Angeles (1998) 66 Cal. App. 4th 586, 595-596, 77 Cal. Rptr. 2d 752*

School district override assessments under former *Educ. Code § 42244* (repealed July 24, 1979) are not permissible special district assessment under *Cal. Const., art. XIII A, § 4,* because based on value of real property. *Arvin Union School Dist. v. Ross (1985) 176 Cal. App. 3d 189, 198-199, 221 Cal. Rptr. 720*

Special assessment to finance local improvements, unlike special tax, is not subject to *Cal. Const., art. XIII A, § 4* requirement of two-thirds voter approval; special assessment is distinguished by fact that improvements financed thereby specially benefit property assessed. *City of Larkspur v. Marin County Flood Control etc. Dist. (1985) 168 Cal. App. 3d 947, 955-956, 214 Cal. Rptr. 689*

[d] Special Tax

Levy imposed by city primarily for purpose of recovering cost of collecting and administering city's general business tax was not "fee" or "special tax" but was general tax, which was subject to Proposition 218's majority-vote limitation, and was void under Proposition 218 because it was imposed without approval by majority vote of qualified voters in

city. *Weisblat v. City of San Diego (2009) 176 Cal. App. 4th 1022, 1045, 98 Cal. Rptr. 3d 366*

City-imposed "fee," which ordinance required to be paid by every subscriber to telephone service within city, was not actually user fee but was special tax, and so was subject to Proposition 218 requirement for validation by local election, because persons who paid so-called fee received no benefit that was not received by everyone who did not pay (and thus by general public), negating single distinguishing feature of user fee. *Bay Area Cellular Tel. Co. v. City of Union City (2008) 162 Cal. App. 4th 686, 690, 695, 75 Cal. Rptr. 3d 839*

Charges imposed for water services are not special taxes that require voter approval under Proposition 218. *Howard Jarvis Taxpayers Assn. v. City of Los Angeles (2000) 85 Cal. App. 4th 79, 83, 101 Cal. Rptr. 2d 905*

Amounts levied by community facilities district under Mello-Roos Community Facilities Act of 1982 (*Gov. Code § 53311 et seq.*) were special taxes, not special assessments, within meaning of Act as matter of law; any doubts as to whether Legislature intended provisions of Act to prevail over existing case law and other authorities was dispelled by 1986 enactment of *Gov. Code § 53312*, providing for provisions of Act to prevail over other provisions of law. *Riverside County Community Facilities Dist. v. Bainbridge 17 (1999) 77 Cal. App. 4th 644, 654-659, 92 Cal. Rptr. 2d 29*

Assessment on behalf of business improvement district established under the Parking and Business Improvement Area Law of 1989 (*Sts. & Hy. Code § 36500 et seq.*), against business owners within the district held not to constitute special tax and thus not subject to Proposition 218. *Howard Jarvis Taxpayers Assn. v. City of San Diego (1999) 72 Cal. App. 4th 230, 238-240, 84 Cal. Rptr. 2d 804*

Term "special taxes" under Proposition 13 construed in *City and County of San Francisco v. Farrell (1982) 32 Cal. 3d 47, 57, 184 Cal. Rptr. 713, 648 P.2d 935* , to mean taxes levied for special purpose rather than levy placed in general fund to be used for general governmental purposes, whereas, in *Rider v. County of San Diego (1991) 1 Cal. 4th 1, 15, 2 Cal. Rptr. 2d 490, 820 P.2d 1000* , "special taxes" as used in Proposition 13 construed to mean tax levied to fund a specific governmental project or program, such as construction and financing of county's justice facilities; under Proposition 62, all taxes are either special or general; special taxes are taxes imposed for specific purposes whereas general taxes are taxes imposed for general governmental purposes; local agency's proposed sales tax to fund certain transportation projects held to be special tax under Proposition 62. *Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 226-227, 231-234, 45 Cal. Rptr. 2d 207, 902 P.2d 225* ; *Gov. Code § 53721*

Tax is not saved from being special tax by being deposited in agency's general fund and not earmarked for special purpose within agency, if agency has special and limited governmental purpose. *Rider v. County of San Diego (1991) 1 Cal. 4th 1, 13-15, 2 Cal. Rptr. 2d 490, 820 P.2d 1000* (constructing and operating county's justice facilities)

Although special taxes are taxes levied for special purpose, they need not be earmarked to benefit particular property; special taxes prohibited by *Cal. Const., art. XIII A § 4* unless approved by two-thirds vote of qualified electors of entity seeking to impose tax. *Isaac v. City of Los Angeles (1998) 66 Cal. App. 4th 586, 595-596, 77 Cal. Rptr. 2d 752*

Rider v. County of San Diego (1991) 1 Cal. 4th 1, 2 Cal. Rptr. 2d 490, 820 P.2d 1000 , construed not to have effectively overruled *City and County of San Francisco v. Farrell (1982) 32 Cal. 3d 47, 184 Cal. Rptr. 713, 648 P.2d 935* , but simply to have carved out exception to "general funds rule" set forth in *Farrell*; under both cases, essence of special tax is that its proceeds are earmarked or dedicated in some manner to specific project or projects; that is not case with funds placed in city's general fund, which are available for use by any of the city's legitimate functions and are allocated during the general budgeting process in light of changing priorities and conditions; tax levied by general purpose agency (unlike in *Rider*) with proceeds deposited into general fund is not special tax subject to two thirds voter approval requirement of Proposition 13, § 4 (*Cal. Const., art. XIII A, § 4*). *Neecke v. City of Mill Valley (1995) 39 Cal.*

App. 4th 946, 956, 959, 46 Cal. Rptr. 2d 266

Special taxes are collected and earmarked for special purpose, not general fund; although county may deduct costs of collecting special tax pursuant to *Gov. Code §§ 53340, 53340.5*, county cannot withhold delinquency penalties. *City of Camarillo v. County of Ventura (1994) 26 Cal. App. 4th 1351, 1356, 31 Cal. Rptr. 2d 920*

Real estate transfer tax is general tax rather than special tax subject to Proposition 13 two-thirds voter approval requirement. *Fisher v. County of Alameda (1993) 20 Cal. App. 4th 120, 125, 24 Cal. Rptr. 2d 384*

Landfill fee is special assessment and not special tax subject to Proposition 13 two-thirds voter approval requirements. *Kern County Farm Bureau v. County of Kern (1993) 19 Cal. App. 4th 1416, 1420, 23 Cal. Rptr. 2d 910*

Real estate transfer tax increase is increase of general tax rather than special tax subject to Proposition 13 two-thirds voter approval requirement. *Fielder v. City of Los Angeles (1993) 14 Cal. App. 4th 137, 142, 17 Cal. Rptr. 2d 630*

Special tax for fire and police protection levied under authority of *Gov. Code § 53978* after approval by two-thirds of voters is not prohibited ad valorem tax in excess of maximum rate because fee was not based on value of property but on type of zone property was in. *Heckendorn v. City of San Marino (1986) 42 Cal. 3d 481, 487-489, 229 Cal. Rptr. 324, 723 P.2d 64*

Library district empowered by *Educ. Code § 19600* to levy taxes on property is "special district" within meaning of *Cal. Const., art. XIII A, § 4*; two-thirds majority voter approval requirement of *Cal. Const., art. XIII A, § 4* does discriminate against education, nor as abridging fundamental right to education. *Altadena Library Dist. v. Bloodgood (1987) 192 Cal. App. 3d 585, 588-592, 237 Cal. Rptr. 649*

Under ordinance requiring owner who demolishes or converts residential hotel units to provide equal number of replacement units or to pay "in lieu" fee to city for construction of replacement units, neither construction costs nor "in lieu" fee werespecial tax because neither exceeded reasonable cost of regulatory land use activity or became part of general revenues. *Terminal Plaza Corp. v. City and County of San Francisco (1986) 177 Cal. App. 3d 892, 906-907, 223 Cal. Rptr. 379* (ordinance invalid on other grounds)

To bring fee within scope of *Gov. Code § 50076*, burden of proof is on water district to establish that fee was reasonably related to services for which it was imposed; if reasonable relationship is not proved, fee is "special tax" under *Cal. Const., art. XIII A, § 4*, requiring two-thirds vote. *Beaumont Investors v. Beaumont-Cherry Valley Water Dist. (1985) 165 Cal. App. 3d 227, 234-235, 238, 211 Cal. Rptr. 567*

Gate fees imposed by county on school districts for use of county's solid waste disposal site were neither special tax nor special assessment. *Anaheim City School District v. County of Orange (1985) 164 Cal. App. 3d 697, 700-701, 210 Cal. Rptr. 722*

If school district could not pay special assessment levied for street improvements, county's levy of "pass-through" tax under *Sts. & Hy. Code § 5302.5* on private property owners in school district to pay school's assessment violated one-percent limitation of *Cal. Const., art. XIII A, § 1*, and required two-thirds voter approval under *Cal. Const., art. XIII A, § 4*. *City of San Marcos v. Board of Supervisors (1984) 159 Cal. App. 3d 355, 357-358, 205 Cal. Rptr. 566*

[13] Publicly Owned Land

City's interest in nuclear power plant is taxable because construction occured prior to acquisition; under terms of agreement, acquisition date of city's interest was date when participation agreement was signed, not date on which

agreement in principal was reached or that appeared on agreement. *City of Anaheim v. County of San Diego (1987) 190 Cal. App. 3d 695, 701-703, 235 Cal. Rptr. 572*

Improvements owned by local government outside its boundaries was taxable if taxable when acquired by local government or if constructed by local government to replace improvements that were taxable when acquired; improvements that were newly constructed after acquisition and they were not substitute or replacement for taxable improvement were not taxable. *City of Anaheim v. County of San Diego (1987) 190 Cal. App. 3d 695, 697, 235 Cal. Rptr. 572*

[14] Redemption

On redemption of property in redevelopment area, community redevelopment agency is entitled to share in penalties and interest in same proportion as it shared in taxes. *Community Redevelopment Agency v. Bloodgood (1986) 182 Cal. App. 3d 342, 345-345, 226 Cal. Rptr. 924*

[15] Refund

Reading *Rev. & Tax. Code §§ 5142* and *5143* together, taxpayer who files refund action can recover no more than amount taxpayer sought in his orher underlying claim; thus, when taxpayers did not seek refund based on lower property values they had originally sought in application for reduction of assessment, but based on somewhat higher values submitted at hearing before assessment appeals board, taxpayers could only file suit to recover, and court could only award, amount taxpayers submitted in claim for refund; correction of base-year figure does not automatically entitle taxpayer to refund; refunds are governed by separate provisions of code, and taxpayer may only recover refund by complying with those provisions. *Mission Housing Development Co. v. City and County of San Francisco (2000) 81 Cal. App. 4th 522, 527-528, 97 Cal. Rptr. 2d 8*

Process of obtaining refund is distinct from process of seeking reduced assessment by filing application for equalization; however, application for reduction in assessment filed pursuant to *Rev. & Tax. Code § 1603* serves as claim for refund under *Rev. & Tax. Code § 5097* if taxpayer stated in application that application was intended to constitute claim for refund; timely filing of proper claim for refund statutory prerequisite to refund action. *Plaza Hollister Ltd. Partnership v. County of San Benito (1999) 72 Cal. App. 4th 1, 34, 34 n.20, 84 Cal. Rptr. 2d 715*

When county incorrectly computed base year value for 1992-1993 resulting in overtaxation for that and subsequent years and corrected method of calculation effective for 1995-1996 assessment, but not as to 1992-1993 or 1993-1994 assessments, and taxpayer filed applications for reductions of 1992-1993 and 1993-1994 assessments and s for both of those years, although taxpayer's applications were timely filed under *Rev. & Tax. Code § 51.5*, under *Rev. & Tax. Code § 80* taxpayer can only receive refund for year in which appeal was made, and thereafter. *Metropolitan Culinary Services, Inc. v. County of Los Angeles (1998) 61 Cal. App. 4th 935, 942-944, 946-948, 71 Cal. Rptr. 2d 859*

Right to refund is applicable only to tax year for which application was made, although changed base-year value was established in prior year. *Osco Drug, Inc. v. County of Orange (1990) 221 Cal. App. 3d 189, 193-195, 272 Cal. Rptr. 14*

[16] Request for Reduction in Assessment

[a] When Not Required

Claim for refund is substitute for request for reduction in assessment if assessment is void on basis of attempting to tax

property not subject to taxation. *Stenocord Corp. v. City etc. of San Francisco (1970) 2 Cal. 3d 984, 987, 88 Cal. Rptr. 166, 471 P.2d 966 , superseded by statute as stated in 47 Cal. 4th 1298*

Exhaustion of administrative remedies is fundamental prerequisite of judicial jurisdiction in all California administrative agency matters; under circumstances of case, policies underlying exhaustion requirement were fully satisfied even though one of taxpayers was not formal applicant to proceeding before assessment appeals board. *CAT Partnership v. County of Santa Cruz (1998) 63 Cal. App. 4th 1071, 1079-1081, 74 Cal. Rptr. 2d 652*

No application for reduction of assessment is needed if assessor's audit discloses overassessment and notice of overassessment is required to begiven to taxpayer pursuant to *Rev. & Tax. Code § 533*. *Focus Cable of Oakland, Inc. v. County of Alameda (1985) 173 Cal. App. 3d 519, 526-528, 219 Cal. Rptr. 95*

[b] When Required

Administrative remedies must be exhausted before commencement of suit for refund. *Security-First Nat. Bk. v. County of L.A. (1950) 35 Cal. 2d 319, 320-321, 217 P.2d 946 , cert. denied, 340 U.S. 891*

Ordinarily, taxpayer seeking relief from erroneous assessment must exhaust administrative remedies before resorting to court. *Metropolitan Culinary Services, Inc. v. County of Los Angeles (1998) 61 Cal. App. 4th 935, 943, 71 Cal. Rptr. 2d 859*

Reduction in assessment due to assessment appeal operates only for year in which appeal is taken and prospectively thereafter under *Rev. & Tax. Code § 80(a)(5)*; that appeal reveals error in determining base value in earlier year does not entitle taxpayer to refund for prior year for which taxpayer did not file timely request for refund; court declines to exercise equitable powers to correct unquestioned overassessment when taxpayer failed to meet statutory conditions for obtaining specific legal remedies provided by Legislature. *Sea World, Inc. v. County of San Diego (1994) 27 Cal. App. 4th 1390, 33 Cal. Rptr. 2d 194*

Entitlement to four-percent valuation under *Rev. & Tax. Code § 227* (documented vessel used only for commercial fishing) is determinable by assessment appeal; failure to seek reduction of assessment by appeal to assessment appeals board was fatal; application for reduction of supplementary assessment do not relate back to include appeal of original escape assessment. *County of San Diego v. Lafayette Steel Co. (1985) 164 Cal. App. 3d 690, 694-696, 210 Cal. Rptr. 493*

Taxpayer has burden of establishing that administrative remedies have been exhausted. *Westinghouse Elec. Corp. v. County of Los Angeles (1974) 42 Cal. App. 3d 32, 37, 116 Cal. Rptr. 742*

[17] Restrictions on Property and Valuation

Environmental protection statutes which require oil and gas lease operator to take measures to prevent or repair contamination can be restrictions on land use that effect value within meaning of *Rev. & Tax. Code § 402.1*; existence of specific enforcement order is not prerequisite under *Rev. & Tax. Code § 402.1* to taxpayer's showing that land is subject to restrictions imposed by government which affect its value. *Dominguez Energy v. County of Los Angeles (1997) 56 Cal. App. 4th 839, 853-854, 65 Cal. Rptr. 2d 766*

Valuation of restricted property without considering restrictions was proper if restrictions did not affect property's highest and best use for aviation industrial purposes. *McDonnell Douglas Corp. v. County of Los Angeles (1990) 219 Cal. App. 3d 715, 725-728, 268 Cal. Rptr. 294*

Assessor properly basing assessment on fair market value rents if existing rents of purchased property were below market rate. *Dennis v. County of Santa Clara (1989) 215 Cal. App. 3d 1019, 1026-1030, 263 Cal. Rptr. 887*

Property subject to below-market lease was properly assessed by treating it as if taxpayers had not given up their right to possession or had negotiated going rent. *Clayton v. County of Los Angeles (1972) 26 Cal. App. 3d 390, 392-393, 102 Cal. Rptr. 687*

[18] Scope of Judicial Review

Any factual determinations made by administrative agency are binding on appellate court if supported by substantial evidence; when issues involve proper application of statute or administrative regulation, trial court's legal conclusions are not binding on appellate court; when assessor uses an approved valuation method, his or her findings and determinations of value based on the appropriate assessment method are presumed correct and will be sustained if supported by substantial evidence; if underlying valuation methodology is challenged, however, issue is one of law subject to de novo review both by superior court and on appeal. *Huson v. County of Ventura (2000) 80 Cal. App. 4th 1131, 1134, 96 Cal. Rptr. 2d 116*

Challenge to valuation method if no disputed facts exist as question of law subject to de novo review in superior court. *Service America Corp. v. County of San Diego (1993) 15 Cal. App. 4th 1232, 1235, 19 Cal. Rptr. 2d 165*

If taxpayer claims only that assessor and Board of Equalization erroneously applied valid method of determining full cash value, trial court may review only record presented to board; trial court may overturn board's decision only when no substantial evidence supports it, in which case actions by board are deemed so arbitrary as to constitute deprivation of property without due process; if taxpayer challenges validity of valuation method itself, trial judge is faced with question of law whether challenged method of valuation is arbitrary, in excess of discretion, or in violation of standards prescribed by law; when reviewing equalization determination properly before it in refund action, court may correct assessment and grant tax refund if value calculable as matter of law without remanding to county board of equalization; however, if judgment must still be exercised as to value, remand to local board of equalization is required; thus, when stipulated judgment entered into between Board of Supervisors acting on county's behalf and taxpayer, to extent it represented an exercise of judgment as to value, it improperly invaded constitutional authority of Board of Equalization and granted relief that court had no authority to grant under any circumstances. *Plaza Hollister Ltd. Partnership v. County of San Benito (1999) 72 Cal. App. 4th 1, 24-26, 84 Cal. Rptr. 2d 715*

In reviewing property tax assessment, court must presume assessment regularly and correctly made; taxpayer has burden of proving property was improperly assessed; if taxpayer claims valid appraisal method erroneously applied, trial court is limited to reviewing administrative record and may overturn assessment appeals board's decision only if there is no substantial evidence in administrative record to support it; taxpayer has no right to trial de novo in superior court to resolve conflicting issues of fact concerning taxable value of property; if taxpayer challenges validity of valuation method tself, court faced with question of law and need not determine if there was substantial evidence to support assessment appeals board's decision, but rather must inquire whether challenged valuation method is arbitrary, in excess of discretion, or in violation of standards prescribed by law. *Texaco Producing, Inc. v. County of Kern (1998) 66 Cal. App. 4th 1029, 1046-1047, 78 Cal. Rptr. 2d 433*

If plaintiff claims only that assessor or board erroneously applied valid method of determining full cash value, trial court may review only record presented to boardand may overturn board's decision only when no substantial evidence supports it; if taxpayer challenges validity of valuation method itself, trial judge faced with question of law as to whether method of valuation is arbitrary, in excess of discretion, or in violation of standards prescribed by law; claim that board improperly included intangibles in valuation raised only claim of error in applying correct calculation method. *American Sheds, Inc. v. County of Los Angeles (1998) 66 Cal. App. 4th 384, 392-394, 78 Cal. Rptr. 2d 58*

(distinguishing cases in which treatment of intangibles presented question of law)

Appellate court reviews question of fact resolved in administrative proceeding under substantial evidence standard; questions of law are subject to de novo review; assessment appeals board's selection of valuation method must be sustained unless it is arbitrary, in excess of discretion, or in violation of law. *CAT Partnership v. County of Santa Cruz (1998) 63 Cal. App. 4th 1071, 1079, 74 Cal. Rptr. 2d 652*

Whether assessor failed to comply with State Board Equalization rules requiring adjustments to comparable sales data (under *18 Cal. Code Reg. § 4(d)*) was question of law with de novo review. *Mitchell v. County of Los Angeles (1997) 60 Cal. App. 4th 497, 500, 70 Cal. Rptr. 2d 476*

Taxpayer's challenge on ground assessor's method of valuation of oil and gas lease violated *Rev. & Tax. Code § 402.1* held to present question of law for de novo review; if taxpayer claims assessor and assessment appeals board erroneously applied valid appraisal method, trial court is limited to reviewing administrative record and may overturn board's decision only if there is no substantial evidence in record to support it; if taxpayer challenges validity of valuation method itself, trial judge is faced with question of law and may take evidence on validity of method and may overturn assessment if challenged method of valuation is arbitrary, in excess of jurisdiction, or in violation of standards prescribed by law. *Dominguez Energy v. County of Los Angeles (1997) 56 Cal. App. 4th 839, 852-853, 65 Cal. Rptr. 2d 766*

While court may have no jurisdiction to establish land value of property for assessment purposes, it does have power to review specific valuations and methods of valuation employed where it is alleged there was failure to follow standards prescribed by *Legislature. People ex rel Dept. of Conservation (1996) 48 Cal. App. 4th 233, 256, 55 Cal. Rptr. 2d 610*

Question when "change in ownership" occurred so as to trigger reassessment mechanisms of Proposition 13 is question of law. *Empire Properties v. County of Los Angeles (1996) 44 Cal. App. 4th 781, 785, 52 Cal Rptr. 2d 69*

When validity of valuation method is reviewed to determine whether method is arbitrary, in excess of discretion, or in violation of standards prescribedby law, issue is question of law; appellate court can examine these matters de novo. *Pacific Mutual Life Ins. Co. v. State Bd. of Equalization (1996) 41 Cal. App. 4th 1153, 1161, 49 Cal. Rptr. 2d 99*

Independent review rather than substantial evidence is applicable standard of review to be applied to question of whether tax in issue is special tax for purpose of Proposition 13, § 4 (*Cal. Const., art. XIII A, § 4*). *Neecke v. City of Mill Valley (1995) 39 Cal. App. 4th 946, 953, 46 Cal. Rptr. 2d 266*

Trial court erred in weighing evidence and entering judgment establishing taxable value of subject property, resulting in refund of taxes; trial court was required to remand matter to local board of equalization for further proceedings if local board has used improper method of value or has failed to use proper criteria in valuing property, and there is no evidence or there is conflict in evidence from which proper value can or should be made. *Norby Lumber Co. v. County of Madera (1988) 202 Cal. App. 3d 1352, 1366-1367, 249 Cal. Rptr. 646*

Court of appeal not allowed to determine amount of tax due, but, after determining proper method to be used for valuation, was required to remand to board of assessment appeals for determination of fair market value. *Prudential Ins. Co. v. City and County of San Francisco (1987) 191 Cal. App. 3d 1142, 1161-1162, 236 Cal. Rptr. 869*

Scope of review in superior court is limited to determining if substantial evidence supports assessment; if it does not, taxpayer is not entitled to trial de novo in superior court, but is entitled to remand to board of assessment appeals for consideration of additional evidence. *Kaiser Center, Inc. v. County of Alameda (1987) 189 Cal. App. 3d 978, 982-984, 234 Cal. Rptr. 603*

If challenge is merely one of incorrect valuation of property, board's decision may be overturned only if no substantial evidence supports it. *Cochran v. Board of Supervisors (1978) 85 Cal. App.3d 75, 80, 149 Cal. Rptr. 304*

Challenge to valuation method is question of law not invoking "substantial evidence" standard in trial court's review of board's decision; challenge to the method of valuation is reviewable for arbitrariness, abuse of discretion, or failure to follow standards prescribed by law, with new evidence admissible in superior court to establish deficiencies in board's determination. *Meyers v. County of Alameda (1977) 70 Cal. App. 3d 799, 804, 139 Cal. Rptr. 165*

Substantial evidence supported board's decision accepting assessor's valuation despite assessor's using only six comparative sales whereas taxpayer's appraiser used 17. *Westlake Farms, Inc. v. County of Kings (1974) 39 Cal. App. 3d 179, 185-186, 114 Cal. Rptr. 137*

Trial court's review is restricted to record presented to the board; board's determination of merits is conclusive if supported by substantial evidence; court is not permitted to independently weigh evidence of valuation. *Glidden Company v. County of Alameda (1970) 5 Cal. App. 3d 371, 378-379, 85 Cal. Rptr. 88*

[19] Situs for Taxation of Personal Property

County's refusal to prorate or apportion taxpayer's tax liability based on actual time property was located in state did not violate due process, equalprotection, and commerce clauses of United States Constitution when taxpayer's business property was located in county as of statutory lien date and taxpayer sought partial refund of ad valorem property taxes because taxpayer relocated entire business and inventory to State of Nevada 38 days after commencement of fiscal tax year; under California law, taxing agency's right to taxes becomes fixed as of lien date of fiscal year to which they relate; tax lien date is simply practical method for determining that taxpayer enjoyed benefit of governmental services during year preceding assessment; taxpayer's property was permanently situated in and had its sole taxsitus in California as of lien date. *Seegmiller v. County of Nevada (1997) 53 Cal. App. 4th 1397, 1400-1404, 62 Cal. Rptr. 2d 238*

Ship with home port in Alaska, under repair in county for 11 months of year but outside county on lien date, is properly taxable by county. *County of San Diego v. Lafayette Steel Co. (1985) 164 Cal. App. 3d 690, 694, 210 Cal. Rptr. 493*

[20] Statute of Limitations

When three-year limitations period for actions on a liability created by statute applied [*see Code Civ. Proc. 338(a)*], validity of utility users' fee that was not approved by voters could be challenged under Proposition 62 within three years after collection of tax, even if more than three years had passed since tax measure was adopted. *Howard Jarvis Taxpayers Assn v. City of La Habra (2001) 25 Cal. 4th 809, 107 Cal. Rptr. 2d 369, 23 P.3d 601*

[21] Supplemental Assessments

Although county delayed too long in seeking supplemental assessments under 1993 version of *Rev. & Tax. Code § 75.11(d)(1)*, county not barred from changing properties' base year values and from seeking escape assessments pursuant to *Rev. & Tax. Code § 51.5*. *Montgomery Ward & Co. v. County of Santa Clara (1996) 47 Cal. App. 4th 1122, 1132-1138, 55 Cal. Rptr. 2d 261*

Rev. & Tax. Code § 75.12, delaying supplemental assessment of newly constructed property, is valid legislative shift of timing of tax burden from contractors' inventory to buyer, and as not creating impermissible distinctions, nor taxing similar properties at different rates, nor violative of equal protection. *Shafer v. State Bd. of Equalization (1985) 174 Cal. App. 3d 423, 429-432, 220 Cal. Rptr. 59*

Exclusion of fixtures from supplemental assessments under former *Rev. & Tax. Code § 75.5* does not create impermissible exemption but as only affecting timing of full assessments, which is proper exercise of legislative power. *Shafer v. State Bd. of Equalization (1985) 174 Cal. App. 3d 423, 432-433, 220 Cal. Rptr. 59*

[22] Structure of California Property Tax System

City held to have unconstitutionally imposed and collected property tax not apportioned according to value as required by *Cal. Const., art. XIII, § 1*, when new parcel tax was imposed on all real property by ordinance passedby majority rather than two-thirds vote of city voters, and tax was not levied on assessed value or appraised value of parcels, but imposed flat fee per parcel of land depending on type of parcel; valid excise tax distinguished. *Thomas v. City of East Palo Alto (1997) 53 Cal. App. 4th 1084, 1088-1095, 62 Cal. Rptr. 2d 185*

City "parcel tax" falling due annually at fixed times. not apportioned by type and extent of municipal services, approved by just over 50 percent of city voters, and designed to raise revenue for enhancement and maintenance of municipal services, was non-ad valorem general property tax invalid under *Cal. Const. art. XIII, § 1*. *City of Oakland v. Digre (1988) 205 Cal. App. 3d 99, 104-111, 252 Cal. Rptr. 99*

[23] Tax Sales

Authority for tax collector to sell tax defaulted property, effect of tax deed, owners right to redemption, right of purchaser at tax sale or person in privity to bring quiet title action, and various limitation periods discussed; cases holding that where tax statute provides remedy that remedy is exclusive also discussed. *Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal. 4th 26, 39-41, 52-53, 77 Cal. Rptr. 2d 709, 960 P.2d 513*

County's sole reliance on lot report, which would not provide notice of documents recorded after creation of a lien, did not constitute reasonable effort to obtain last known mailing address of parties of interest under *Rev. & Tax. Code § 3701*; once county became aware bank had not received notice regarding tax sale, it knew that mailing notice to defunct post office address was futile; at that time, county should have made reasonable efforts to notify bank about tax sale at alternate address; effort would have been minimal as bank's address could be easily obtained; because county failed to make any effort at all to renotify bank about tax sale, bank's due process rights were violated and it had right to set aside tax sale. *Bank of America v. Giant Inland Empire R.V. Center, Inc. (2000) 78 Cal. App. 4th 1267, 1272-1273, 1275-1276, 1281, 93 Cal. Rptr. 2d 626*

Common law contractual remedies not available to purchaser of tax-defaulted real property at public tax sale; purchaser of tax-defaulted property from public entity at tax sale limited to remedies provided for in *Revenue and Taxation Code. Van Petten v. County of San Diego (1995) 38 Cal. App. 4th 43, 51, 44 Cal. Rptr. 2d 816*

Statutory remedies for relief from tax sale as exclusive; purchaser does not have contractual cause of action for failure of state and county to disclose physical defects in property purchased. *Craland Inc. v. State of California (1989) 214 Cal. App. 3d 1400, 1404-1408, 263 Cal. Rptr. 255*

Tax sale is subject to rescission by buyer for mistake if buyer, after having made reasonable investigation. did not know that property was undevelopable. *Schultz v. County of Contra Costa (1984) 157 Cal. App. 3d 242, 245-249, 203 Cal. Rptr. 760*

Partial owner and claimant of excess proceeds of tax sale is entitled only to proportionate amount even though other partial owners made no claim. *First Corporation Inc. v. County of Santa Clara (1983) 146 Cal. App. 3d 841, 844-847, 194 Cal. Rptr. 752*

Rev. & Tax. Code § 2951, authorizing seizure and sale of taxpayer's property to pay unsecured taxes, deprived taxpayer of due process for failure to provide administrative hearing prior to sale. *T.M. Cobb Co. v. County of Los Angeles (1976) 16 Cal. 3d 606, 613-616, 128 Cal. Rptr. 655, 547 P.2d 431*

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California Forms of Pleading and Practice--Annotated

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 540 TAXES AND ASSESSMENTS
PART III. RESEARCH GUIDE
A. PROPERTY TAXES AND ASSESSMENTS

47-540 California Forms of Pleading and Practice--Annotated § 540.427

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.427 Attorney General Opinions

Members of public have right to address SBE at taxpayers' appeal hearing; public agency employee on behalf of agency may address SBE at taxpayer's appeal hearing. *80 Ops. Cal. Att'y Gen. 247 (1997)*

When property owner applies to assessment appeals board for reduction in propety taxes, assessor audits property and agrees to reduction, issues refund, and adjusts assessment roll so that valuation dispute between owner and assessor is resolved, board may still increase audit valuation. *80 Ops. Cal. Att'y Gen. 225 (1997)*

Nonprofit hospital earning excessive surplus revenue nonetheless qualified for welfare exemption under *Rev. & Tax. Code § 214*. *71 Ops. Cal. Att'y Gen. 107 (1988)*

County assessor is required to produce information contained in property tax records otherwise confidential under *Rev. & Tax. Code §§ 408, 451,* and *481,* pursuant to IRS summons if federal interest in disclosure outweighs state interest in confidentiality. *68 Ops. Cal. Att'y Gen. 209 (1985)*

County tax collector is prohibited from accepting for current expenditure voluntarily prepaid property tax to be applied against future tax liability. *68 Ops. Cal. Att'y Gen. 223 (1985)*

Rev. & Tax. Code § 1641 requiring setting of values recommended by assessment hearing officer, is inconsistent with *Cal. Const., art. XIII, § 16* provisions for equalizing assessed values. *64 Ops.Cal. Att'y Gen. 690 (1981)*

County assessor is not allowed to enter private property against will of owner nor to obtain administrative inspection warrant to assess property. *61 Ops. Cal. Att'y Gen. 524 (1978)*

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Administrative LawAgency AdjudicationReview of Initial DecisionsTax LawState & Local TaxesAdministration & ProceedingsGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsAssessmentsTax LawState & Local TaxesAdministration & ProceedingsAudits & InvestigationsTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral Overview

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 540 TAXES AND ASSESSMENTS
PART III. RESEARCH GUIDE
A. PROPERTY TAXES AND ASSESSMENTS

47-540 California Forms of Pleading and Practice--Annotated § 540.428

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.428 Law Reviews

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Doherty, *Judicial Review of Property Tax Disputes, 24 U.S.F. L. Rev. 155 (1989)*

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Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesAdministration & ProceedingsAssessmentsTax LawState & Local TaxesAdministration & ProceedingsCollectionTax LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral OverviewTax LawState & Local TaxesReal Property TaxCollectionGeneral Overview

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47-540 California Forms of Pleading and Practice--Annotated § 540.429

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.429 Text References

Witkin, Summary of California Law, vol. 9, *Taxation*, § 163 (10th ed. 2005)

Legal Topics:

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47-540 California Forms of Pleading and Practice--Annotated §§ 540.430-540.449

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

[Reserved]

§§ 540.430[Reserved]

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47-540 California Forms of Pleading and Practice--Annotated § 540.450

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.450 Federal Constitution

State and local taxes as prohibited from placing undue burden on interstate commerce. U.S. *Const., art. I, § 8, cl. 3*

States as prohibited from taxing exports. U.S. *Const., art. I, § 10, cl. 2*

Federal government and instrumentalities as exempt from state taxation. U.S. Const., art. VI

Prohibition on state taxes which unduly burden free press or free speech. *U.S. Const., amend. I*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawCongressional Duties & PowersCommerce ClauseInterstate CommerceGeneral OverviewConstitutional LawRelations Among GovernmentsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of FreedomTax LawState & Local TaxesAdministration & ProceedingsGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsFederal Preemption

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47-540 California Forms of Pleading and Practice--Annotated § 540.451

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.451 California Constitution

Limitations on taxation of banks and insurance companies. *Cal. Const., art. XIII, §§ 27, 28*

Cities and counties, in accordance with legislative authority, are empowered to contract regarding apportionment of sales and use taxes imposed by them. *Cal. Const., art. XIII, § 29*

Court action to enjoin or prevent collection of tax is prohibited; action to recover tax claimed to have been illegally collected is authorized. *Cal. Const., art. XIII, § 32*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsGeneral OverviewGovernmentsLocal GovernmentsFinanceTax LawState & Local TaxesSales TaxImposition of TaxTax LawState & Local TaxesUse TaxImposition of TaxTax LawState & Local TaxesUse TaxLimitations

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47-540 California Forms of Pleading and Practice--Annotated § 540.452

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.452 Federal Statutes

Tax Injunction Act prohibits federal courts from enjoining assessment, levy, or collection of state tax when a plain, speedy, and efficient remedy may be had in the state courts. *28 U.S.C. § 1341*

Public Law 86-272 restricts state taxation of income from the sales of tangible personal property in interstate commerce when taxpayer's activities in the state are limited to solicitation of orders for tangible personal property. *15 U.S.C. § 381*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsTax Anti-Injunction ActTax LawState & Local TaxesSales TaxExemptions

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47-540 California Forms of Pleading and Practice--Annotated § 540.453

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.453 State Statutes

[1] Audits and Administration

Returns and payments generally are due quarterly, on or before last day of month succeeding each quarterly period. *Rev. & Tax. Code §§ 6451-6454*

Extensions are available for filing return and payment of tax; interest payable on "late" return. *Rev. & Tax. Code §§ 6459, 6591.5*

Election to report qualified use tax on individual's California income tax return. *Rev. & Tax. Code § 6452.1*

SBE is authorized to determine correct tax and issue deficiency determinations on available information. *Rev. & Tax. Code § 6481*

Deficiency determinations are subject to three-year limitation when return is filed or, if no return filed, to eight-year limitation. *Rev. & Tax. Code § 6487*

Deficiency determinations for taxpayers that elect to report qualified use tax on their California income tax returns is generally three years, or six years if there is a gross understatement of qualified use tax. *Rev. & Tax. Code § 6487.3*

Penalty applicable to deficiency determinations for intentional or fraudulent failure to file returns. *Rev. & Tax. Code §§ 6511, 6514*

SBE is authorized to require seller to deposit security. *Rev. & Tax. Code § 6701*

SBE's broad authority includes power to adopt rules and regulations, to employ accountants, auditors, investigators,

assistants, and to conduct hearings and investigations. *Rev. & Tax. Code §§ 7051-7055*

Information on sales and use tax return are privileged. *Rev. & Tax. Code § 7056*

Special audit rules under managed audit program. *Rev. & Tax. Code §§ 7076-7076.5*

[2] Claim for Refund

Interest is recoverable on unintentional overpayments. *Rev. & Tax. Code §§ 6591.5, 6907, 6908*

Credits and refunds are issued only to taxpayer or taxpayer's successors, administrators, or executors. *Rev. & Tax. Code § 6901*

Limitation period for refund claim is latest of three years from end of month following close of the taxable period, six months from date of overpayment, or, for recovery of amounts paid pursuant to SBE determination, six months from date determination becomes final. *Rev. & Tax. Code § 6902(a)*

Credit or refund on ground that storage, use, or other consumption of property is exempt from use tax is not allowed unless person establishes that vendor has paid state sales tax. *Rev. & Tax. Code § 6903*

Form and content of refund claim. *Rev. & Tax. Code § 6904*

Effect of failure to timely file refund claim. *Rev. & Tax. Code § 6905*

Service of notice of disallowance of claim by SBE. *Rev. & Tax. Code § 6906*

[3] Duties of Retailers

Every retailer, at time of making sale, is required to collect use tax from purchaser and provide receipt indicating that use tax has been collected. *Rev. & Tax. Code § 6203*

Every retailer selling tangible personal property in California for use, storage, or other consumption in California is required to register with SBE. *Rev. & Tax. Code § 6226*

Successor in interest of retailer is required to withhold enough of purchase price to cover amount of sales or use tax due. *Rev. & Tax. Code § 6811*

[4] Exemptions

Acquisition sale and leaseback executed after 1990 and before 1995 is neither sale nor purchase for purposes of sales and use tax. *Rev. & Tax. Code § 6010.65*

Exemptions from sales and use tax. *Rev. & Tax. Code § 6351 et seq.*

Exemption of gross receipts from sales, use, storage, or consumption of items taxation of which is prohibited by federal law or California Constitution. *Rev. & Tax. Code § 6352*

Exemption of gross receipts from sales, etc. of gas, electricity, and water to consumers through mains, and liquefied

petroleum gas used for household or agricultural purposes. *Rev. & Tax. Code § 6353*

Exemption of gross receipts from sales, etc., of farm equipment and machinery used primarily for agricultural purposes. *Rev. & Tax. Code § 6356.5*

Exemption of gross receipts from sales, etc., of equipment and machinery for off-road use in commercial timber harvesting operations. *Rev. & Tax. Code § 6356.6*

Exemption of gross receipts from sales, etc., of diesel fuel used in farming and food processing. *Rev. & Tax. Code § 6357.1*

Exemption of gross receipts from sales, etc., of racehorse breeding stock. *Rev. & Tax. Code § 6358.5*

Exemption of gross receipts from sales, etc. of food products other than prepared meals. *Rev. & Tax. Code §§ 6359-6359.2, 6359.4, 6359.7*

Exemptions for gross receipts from sales, etc. of medicines and medical products. *Rev. & Tax. Code §§ 6369-6369.5, 6371*

Exemptions for gross receipts from sales, etc. of items sold to common carriers for out-of-state use. *Rev. & Tax. Code § 6385*

[5] Imposition and Collection of Tax

Sales tax is direct obligation of retailer, although retailer may pass it on to consumer. *Civ. Code § 1656.1*

Retailer is any person or entity making more than two retail sales of tangible personal property in any 12-month period. *Rev. & Tax. Code § 6019*

Sales tax is excise tax on privilege of selling tangible personal property at retail in *California. Rev. & Tax. Code §§ 6051, 6051.5*

Presumptions of taxability are inapplicable when seller takes a resale certificate from purchaser in good faith. *Rev. & Tax. Code §§ 6091-6095, 6241-6249*

Use tax is excise tax imposed on any taxpayer who purchases tangible personal property from any retailer for storage, use, or other consumption in *California. Rev. & Tax. Code §§ 6201, 6201.5, 6202*

Distributors of motor vehicle fuel subject to motor vehicle fuel license tax law (*Rev. & Tax. Code § 7301 et seq.*) is required to collect prepayment of sales and use tax from person to whom fuel is first distributed. *Rev. & Tax. Code §§ 6471.4, 6480 et seq.*

[6] License Taxes

City imposing license tax is required to apportion tax on business operating both within and outside city to fairly reflect proportion of taxed activity taking place within city. *Bus. & Prof. Code § 16000*; *Gov. Code § 37101(b)*

To protect taxpayer's privacy, receipt for business license tax based on gross receipts is not permitted to include amount of gross receipts or cost of tax. *Bus. & Prof. Code §§ 16110-16112*

City is required to pay prejudgment interest from date of payment of tax to taxpayer who prevails on claim that tax is illegal. *Civ. Code § 3287*

Cities are authorized to license, for regulation and for taxation, every lawful business transacted within city, including shows, games, and exhibitions. *Gov. Code § 37101(a)*

[7] Local Sales and Use Taxes

City sales or use tax must be imposed in same manner and on same tax base as prescribed under *Rev. & Tax. Code §§ 7200-7212*, relating to uniform local sales and use taxes. *Gov. Code § 37101*

Local sales and use taxes are limited to 1.25 percent of gross receipts or sales prices, respectively. *Rev. & Tax. Code §§ 7202(a), 7203*

Local sales and use tax ordinances are required to incorporate state sales and use tax laws and to provide for administration by SBE. *Rev. & Tax. Code §§ 7202(b)-(d), 7203(a), (b)*

Local sales and use tax ordinance is required to exclude any state sales or use tax from amount subject to tax. *Rev. & Tax. Code §§ 7202(f), 7203(d)*

County adopting sales tax ordinance is required to adopt complementary use tax. *Rev. & Tax. Code § 7203*

Refunds of unconstitutional taxes. *Rev. & Tax. Code § 7275 et seq.*

County is authorized to levy utility user tax (electricity, gas, water, sewer, telephone, and cable television) on services in unincorporated areas. *Rev. & Tax. Code § 7284.2*; *see Rev. & Tax. Code § 7284.4* (voter approval required if required by other law)

County is authorized to impose license tax on business transacted in unincorporated areas if tax on business operating both within and outside those areas fairly reflects portion of taxed activity taking place within taxing jurisdiction. *Rev. & Tax. Code § 7284(b)*

Transactions and use tax are leviable by county or authority established by board of supervisors, with voter approval, at rate of 0.25 percent or multiple thereof. *Rev. & Tax. Code §§ 7285, 7285.5*

Combined rate of transactions and use taxes in any county is limited to 2 percent. *Rev. & Tax. Code § 7251.1*

Any city is authorized to levy, increase, or extend a transactions and use tax for general purposes at rate of 0.25 percent or a multiple thereof. *Rev. & Tax. Code §§ 7285.9-7285.92*

If approved by two thirds of electors, city or county or city and county is permitted to impose graffiti prevention tax. *Rev. & Tax. Code § 7287 et seq.*

Two-thirds voter approval requirement for local government or district to impose special tax. *Gov. Code § 53722*

Majority voter approval requirement for local government or district to impose general tax. *Gov. Code § 53723*

[8] Penal Provisions

Engaging in business as seller without permit or after permit has been suspended or revoked is misdemeanor. *Rev. & Tax. Code § 6071*

Providing resale certificate for property not being resold in regular course of business is misdemeanor. *Rev. & Tax. Code § 6094.5*

Failure of retailers to collect use taxes from purchasers and give receipts is misdemeanor. *Rev. & Tax. Code §§ 6203, 6205-6207*

Alteration, unauthorized issuance or use, or forgery of exemption certificate is misdemeanor. *Rev. & Tax. Code § 6422.1*

Failure to make return or making false or fraudulent return is misdemeanor. *Rev. & Tax. Code §§ 6452(c), 7152, 7153*

Violation of Sales and Use Tax Law is misdemeanor. *Rev. & Tax. Code §§ 7153, 7154*

Violation with intent to defeat or evade determination of $25,000 or more of tax due within 12-month period is felony. *Rev. & Tax. Code § 7153.5*

False statement by person selling vehicle is misdemeanor, subjecting person to liability for tax and to penalty. Veh. Code § 12112

[9] Petition for Redetermination

Petition for redetermination after jeopardy determinations is required to be filed within 10 days and to be accompanied by security. *Rev. & Tax. Code §§ 6537, 6538*

Administrative hearing after jeopardy determinations is required to be filed within 30 days; security as not required. *Rev. & Tax. Code § 6538.5*

Petition for a redetermination is authorized and required to be filed within 30 days after service of notice of determination; petitioner who so requests is entitled to hearing. *Rev. & Tax. Code §§ 6561-6562*

[10] SBE's Remedies for Collection

Tax lien is authorized and entitled to priority when recorded (real property) or filed (personal property) with Secretary of State. *Gov. Code §§ 7170, 7171*

Lien on all real property of person liable within county of recording lasts 10 years and may be extended by rerecording in any county. *Gov. Code § 7172*; *Rev. & Tax. Code §§ 6738, 6757*

SBE may obtain information available in records of Department of Industrial Relations that indicates retail establishment is operating without seller's permit. *Lab. Code § 64.5*

SBE is authorized to issue notice to withhold, requiring any person having possession or control of credits or personal property of delinquent taxpayer to freeze assets for 60 days or until prior consent to transfer is received from SBE. *Rev. & Tax. Code § 6702(a)*

SBE is authorized to levy on credits or other personal property of person liable for tax equal to amount of tax, interest, or penalties due. *Rev. & Tax. Code § 6703*

SBE is empowered to bring action for collection of amounts owed. *Rev. & Tax. Code §§ 6711-6713*

In action for tax, SBE certificate is prima facie evidence of deliquency and of compliance by SBE with all provisions relating to computation and determination of amounts owed. *Rev. & Tax. Code § 6714*

Judgment for state is obtained by filing certificate with the office of the Clerk of the Superior Court of Sacramento County, or any county, and requesting entry within 10 years after tax is due. *Rev. & Tax. Code §§ 6736-6740*

SBE is authorized to issue warrant for amounts owing; warrant as levied in same manner and having same effect as a writ of execution. *Rev. & Tax. Code § 6776*

SBE is authorized to seize and sell at public auction any nonexempt property of retailer. *Rev. & Tax. Code §§ 6796-6799*

SBE's remedies are cumulative; no action taken by Attorney General or SBE as election of one remedy to exclusion of others. *Rev. & Tax. Code § 6827*

[11] Suit for Refund

Injunction or other legal or equitable process to prevent collection of tax is prohibited. *Rev. & Tax. Code § 6931*

Refund claim is required. *Rev. & Tax. Code § 6932*

Suit for refund is authorized after denial of refund claim or if SBE fails to act on claim within six months of its filing. *Rev. & Tax. Code §§ 6932-6934*

Statute of limitations applicable to suit for refund is 90 days from SBE's mailing of notice of its action on claim for refund. *Rev. & Tax. Code § 6933*

Judgment for taxpayer is first credited against taxes owing, with refund of remainder. *Rev. & Tax. Code § 6935*

Allowance of interest in refund suit. *Rev. & Tax. Code § 6936*

Judgment is only rendered in favor of taxpayer. *Rev. & Tax. Code § 6937*

Litigation costs including expert witness and attorney's fees. *Rev. & Tax. Code § 7156*

Legal Topics:

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47-540 California Forms of Pleading and Practice--Annotated § 540.454

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.454 Administrative Regulations

Registration requirements. *18 Cal. Code Reg. § 1684*

Record maintenance requirements. *18 Cal. Code Reg. § 1698*

Successor liability for sales and use taxes. *18 Cal. Code Reg. § 1702*

Refund claim requirements. *18 Cal. Code Reg. § 5230 et seq.*

Class refund claim requirements. *18 Cal. Code Reg. § 5239*

Administrative hearings for persons against whom jeopardy determinations have been made. *18 Cal. Code Reg. §§ 5221 et seq., 5260 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-540 California Forms of Pleading and Practice--Annotated § 540.455

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.455 Decisions

[1] Administrative Regulations

Legislature properly delegated some discretion to SBE to adopt rules and regulations relating to sales and use tax; if statute gives administrative agency power to adopt regulations, regulations as required to be consistent with statute and reasonably necessary to effect its purpose. *Engs Motor Truck Co. v. State Bd. of Equalization (1987) 189 Cal. App. 3d 1458, 1466, 235 Cal. Rptr. 117*

In interpreting statute and testing validity of regulation, administrative agency's construction is entitled to great weight and should be upheld if it is reasonable. *Engs Motor Truck Co. v. State Bd. of Equalization (1987) 189 Cal. App. 3d 1458, 1466, 235 Cal. Rptr. 117*

Validity of SBE's interpretation of regulation is question of law for appellate court; validity of regulation itself is presumed, and appellate review is limited to determination whether regulation is arbitrary, capricious, or without reasonable or rational basis. *Parfums-Corday, Inc. v. State Bd. of Equalization (1987) 187 Cal. App. 3d 630, 636, 232 Cal. Rptr. 56*

[2] Assumption of Liabilities

Transfer of encumbered property to commencing partnership is taxable sale to extent of liability assumed by partnership. *Cal-Metal Corp. v. State Bd. of Equalization (1984) 161 Cal. App. 3d 759, 765-769, 207 Cal. Rptr. 783*

Transaction in which purchaser assumes loans owed by seller on property subject to outstanding leases is subject to use tax. Newco Leasing, Inc. v. State Bd. of *Equalization (1983) 143 Cal. App. 3d 120, 126-127, 191 Cal. Rptr. 588*

[3] Attorney's Fees

Rev. & Tax. Code § 7156 did not support award of attorney's fees in favor of life insurance companies who filed suit challenging authority of SBE to impose new insurance premiums tax rates under Gov. Code § 12202.1 and challenging method of calculation that SBE used to determine new tax rates for those years; although court concluded method used by SBE in computing tax rate was invalid, *Rev. & Tax. Code § 7156* pertains only to suits involving sales and use taxes; moreover, plaintiffs were not entitled to attorney's fees under private attorney general statute, *Code Civ. Proc. § 1021.5*, because plaintiffs brought suit for their own strong personal economic interests; and award of attorney's fees is not justified under *Code Civ. Proc. § 1021.5* if public benefit gained from suit and important public right enforced by suit are coincidental to plaintiff's personal monetary gain. *Pacific Mutual Life Ins. Co. v. State Bd. of Equalization (1996) 41 Cal. App. 4th 1153, 1165, 49 Cal. Rptr. 2d 99*

Rev. & Tax. Code § 7156(e) (sale and use tax only) requires order granting or denying attorney's fees (usually separate post-trial order on motion for costs) to be reflected in judgment (amendment of judgment may be required), and, to avoid separate appeals, creates exception to *Code Civ. Proc. § 904.1(a)(2)* in that postjudgment order on issue is not separately appealable. *Tetra Pak, Inc. v. State Bd. of Equalization (1991) 234 Cal. App. 3d 1751, 1761-1762, 286 Cal. Rptr. 529*

To overcome denial of attorney's fees requested under *Rev. & Tax. Code § 7156(a)(2), (c)(1)(A)* (sale and use tax only), taxpayer must establish that trial court abused its discretion in finding that SBE's position was not substantially justified by proving that trial court exceeded bounds of reason on record with all reasonable inferences against actions of Board and ruling of trial court. *Tetra Pak, Inc. v. State Bd. of Equalization (1991) 234 Cal. App. 3d 1751, 1763-1764, 286 Cal. Rptr. 529*

[4] Basis of Tax

[a] Leases; Sales and Leasebacks

Sale of leased equipment to lessee prior to end of lease term is sale rather than modification of lease. *Framingham Acceptance Corp. v. State Bd. of Equalization (1987) 191 Cal. App. 3d 461, 463-464, 236 Cal. Rptr. 771*

Sale and leaseback of cargo cranes was transfer of tangible personal property subjecting seller/lessee to sales tax; character of asset in hands of seller at time of sale is determinative; installation of property by seller on buyer's real property so that it becomes fixture does not altering result for sales tax purposes; fact that buyer is subject to ad valorem tax on property is irrelevant for sales tax purposes. *United States Lines, Inc. v. State Bd. of Equalization (1986) 182 Cal. App. 3d 529, 535-540, 227 Cal. Rptr. 347* (distinguishing *Cedars-Sinai Medical Center v. State Bd. of Equalization (1984) 162 Cal. App. 3d 1182, 1189, 208 Cal. Rptr. 837* as involving two sales, only one of which was subject to sales tax)

Sales of equipment by hospital to equipment leasing companies and leaseback was financing device not subject to sales or use tax. *Cedars-Sinai Medical Center v. State Bd. of Equalization (1984) 162 Cal. App. 3d 1182, 1188-1190, 208 Cal. Rptr. 837* (sales tax was paid on sale from vendor to hospital)

[b] Services and Labor

Mixed sale in which computer and optional service contract were sold at same time for single undifferentiated price on invoice, was only partially taxable; computer sale was taxable, while service-contract sale was not taxable. *Dell, Inc. v. Superior Court (2008) 159 Cal. App. 4th 911, 930, 71 Cal. Rptr. 3d 905*

Sales of sandpaper, masking tape, and paint thinner to auto repair shops were not sales for resale exempt from sales tax under *18 Cal. Code Reg. § 1546*, because sale requires property to be furnished, and supplies at issue were consumed in repair service rather than being furnished to customer. *Modern Paint and Body Supply, Inc. v. State Bd. of Equalization (2001) 87 Cal. App. 4th 703, 709, 104 Cal. Rptr. 2d 784*

Signs permanently affixed or attached to realty, structures, or buildings were fixtures under *18 Cal. Code Reg. § 1521* if they did not lose their identity as signs when installed and could be removed without damaging or destroying the structure to which they were attached. *Richard Boyd Indus. v. State Bd. of Equalization (2001) 89 Cal. App. 4th 706, 717-718, 107 Cal. Rptr. 2d 520*

No sales tax was due on income from rental of paging devices because "true object" of transaction was to provide paging service; customers paid flat fee even though Public Utility Commission required company to book income separately for service, maintenance, and equipment rental, *18 Cal. Code Reg. § 1501* contains no provision for allocating incidental rental income from services, so no tax could be imposed on rental portion. *MCI Airsignal, Inc. v. State Bd. of Equalization (1991) 1 Cal. App. 4th 1527, 1530-1532, 1532-1533, 2 Cal. Rptr. 2d 746*

Charges imposed by water conditioning company for replacing depleted water purification tanks with regenerated tanks was taxable sale under *18 Cal. Code Reg. § 1546* (receipt of repaired or reconditioned property identical to property repaired or reconditioned constitutes taxable sale). *Continental Water Conditioning Co. v. State Bd. of Equalization (1989) 207 Cal. App. 3d 783, 785-787, 255 Cal. Rptr. 98*

Under *Rev. & Tax. Code § 6011(a)(2), (b)(1), (c)(3)* and *18 Cal. Code Reg. § 1521(b)(2)(B), (c)(6),* contractor is retailer of fixtures it installs and is subject to sales tax on price of components plus labor for preinstallation assembly and fabrication (including jobsite fabrication), but not including installation labor. *Coast Elevator Co. v. State Bd. of Equalization (1986) 186 Cal. App. 3d 206, 208-213, 230 Cal. Rptr. 376*

[c] Tangible Personal Property

Transfers of tangible artwork are taxable transfers of tangible property and constitute taxable leases under *Rev. & Tax. Code §§ 6006(g)* and *6006.3*; the tangible artwork was physically useful and essential in ultimate production of books and rubber stamps incorporating the copyright in the artwork, and without physical artwork, contracts transferring that artwork were essentially useless. *Preston v. State Bd. of Equalization (2001) 25 Cal. 4th 197, 211-212, 105 Cal. Rptr. 2d 407, 19 P.3d 1148*

Agreements transferring artwork to be reproduced in books and used on rubber stamps are technology transfer agreements under *Rev. & Tax. Code §§ 6011(c)(10)* and *6012(c)(10),* so that only portion of artist's income attributable to temporary transfer of tangible artwork is taxable. Preston v. State Bd. of Equalization (2001) *25 Cal. 4th 197, 213-214, 105 Cal. Rptr. 2d 407, 19 P.3d 1148*

Completed film negatives and master recordings are tangible personal property for sales tax purposes if physically useful in manufacturing process, despite being valued in part for intellectual content. *Simplicity Pattern Co. v. State Bd. of Equalization (1980) 27 Cal. 3d 900, 912, 167 Cal. Rptr. 366, 615 P.2d 555*

For purposes of Sales and Use Tax Law, electricity is tangible personal property; however, coal that is burned to generate electricity is not thereby physically incorporated into that electricity, and when that electricity is sold to consumers, that coal does not become resold in those sales; therefore, power-generating companies are liable for usetax on coal bought outside California for use in *California. Searles Valley Minerals Operations, Inc. v. State Bd. of Equalization (2008) 160 Cal. App. 4th 514, 523-526, 72 Cal. Rptr. 3d 857*

[d] What Constitutes Sales Price and Gross Receipts

Rev. & Tax. Code §§ 6011, 6012, defining "sales price" and "gross receipts," do not authorize either deduction or exclusion from original sales price forsubsequent "adjustment" of sales price; refunds of sales and use taxes to utility companies that received price adjustments in settlement of antitrust litigation were erroneous. *Southern California Edison Co. v. State Bd. of Equalization (1972) 7 Cal. 3d 652, 658-662, 102 Cal. Rptr. 766, 498 P.2d 1014*

Contractor-manufacturer was not permitted to recover sales tax paid pursuant to *Rev. & Tax. Code §§ 6011* and 6151 on self-manufactured components because assessment was based on calculated retail price for components that was properly determined by examining bid sheets and calculating all anticipated contract costs and profits. *Montgomery Elevator Co. v. State Bd. of Equalization (1981) 118 Cal. App. 3d 887, 890-892* *Northrup Corp. v. State Bd. of Equalization (1980) 110 Cal. App. 3d 132, 137, 167 Cal. Rptr. 707*

[5] City Gross Receipts and Licensing Taxes

[a] Apportionment

Apportionment was not required to reflect fact that employment agency placed worker, as independent contractor, with company outside of city where agency maintained its office because all of agency's receipts under that contract were attributable to work it did from its office in city. *Programming-Enterprises, Inc. v. City of Los Angeles (1989) 215 Cal. App. 3d 281, 289-292, 263 Cal. Rptr. 558*

Apportionment of gross receipts tax on finance charge income from retail credit sales on basis that 50 percent of finance charge income was attributable to retail sale at out-of-city stores and 50 percent was attributable to in-city accounting office functions, was arbitrary, capricious, and unconstitutional, because far more finance charge activity occurred at out-of-city stores than at accounting center. *May Dept. Stores Co. v. City of Los Angeles (1988) 204 Cal. App. 3d 1368, 1376, 251 Cal. Rptr. 873*

Licensee who challenges method of apportionment has burden to show, by clear and convincing evidence, that extraterritorial values are being taxed; objective of apportionment is avoidance of multiple taxation. *Park'N Fly of San Francisco, Inc. v. City of South San Francisco (1987) 188 Cal. App. 3d 1201, 1210-1211, 234 Cal. Rptr. 23*

Apportionment is not necessary if parking lot was within city, parking was only service for which licensee charged customers, and no charge was made for shuttle service from lot to airport despite fact that shuttle services accounted for 67 percent of business expenses. *Park'N Fly of San Francisco, Inc. v. City of South San Francisco (1987) 188 Cal. App. 3d 1201, 1211-1212, 234 Cal. Rptr. 23*

[b] Basis and Rate of Tax

Contracts terms made employment agency not true agent and therefore imposition of gross receipts tax on all sums collected by agency from company (as opposed to net retained after payment to worker) was proper. *Programming-Enterprises, Inc. v. City of Los Angeles (1989) 215 Cal. App. 3d 281, 288-289, 263 Cal. Rptr. 558*

Gross receipts tax imposed on licensee that operated parking lot, charged customers only for parking, and operated free shuttle service from lot to airport was not a subterfuge for per-acre tax because tax was based on gross receipts from taxable transaction. *Park'N Fly of San Francisco, Inc. v. City of South San Francisco (1987) 188 Cal. App. 3d 1201, 1215, 234 Cal. Rptr. 23*

Services performed after passage of title of component parts to U.S. government were part of sale and therefore taxable at lower rate for selling and manufacturing business rather than at higher rate for "other trade or occupation not specifically taxed." *ITT Gilfillan, Inc. v. City of Los Angeles (1977) 72 Cal. App. 3d 421, 429-430, 140 Cal. Rptr. 193*

City tax on baseball game tickets to finance renovations to stadium was valid despite provision in stadium lease that baseball team cannot be required to pay for alterations or improvements to stadium. *National Exhibition Co. v. City and County of San Francisco (1972) 24 Cal. App. 3d 1, 6-11, 100 Cal. Rptr. 757*

[c] Constitutional Issues (Commerce, Discrimination, Equal Protection, Free Speech, Import-Export)

City was not empowered to impose license tax (calculated on annual business activity) on federal savings bank; nondiscriminatory treatment of state-chartered and federally chartered financial institutions is matter of statewide concern that requires prohibition on local taxation of financial institutions [*see Rev. & Tax. Code § 23182* (uniform "in lieu" tax on financial corporations)]. *California Fed. Savings & Loan Assn. v. City of Los Angeles (1991) 54 Cal. 3d 1, 19-25, 283 Cal. Rptr. 569, 812 P.2d 916*

Imposition of gross receipts tax on company storing goods in customs-bonded warehouse for sale to airlines and ships travelling to foreign locations did not violate Import-Export Clause (U.S. *Const., art. I, § 10, cl. 2*) because tax did not prevent federal government from collecting customs duties and did not single out imports for tax; tax did not violate Commerce Clause (U.S. *Const., art. I, § 8, cl. 3*) because tax met four factors (nexus, fair apportionment, nondiscrimination, and fair relation to services provided) of *Complete Auto Transit, Inc. v. Brady (1977) 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326, 331* . *City of Los Angeles v. Marine Wholesale/Warehouse Co. (1993) 15 Cal. App. 4th 1834, 1844, 1846, 19 Cal. Rptr. 2d 664*

Business tax that discriminates between in-city manufacturers and out-of-city manufacturers violates state and federal commerce protections. *General Motors Corp. v. City and County of San Francisco (1999) 69 Cal. App. 4th 448, 451-454, 81 Cal. Rptr. 2d 544*

Equal protection rights of employment agency were not violated by imposing gross receipts tax at higher rate than that imposed on temporary help agencies because agency gave its workers choice of being its employee or independent contractor. *Programming-Enterprises, Inc. v. City of Los Angeles (1989) 215 Cal. App. 3d 281, 292-293, 263 Cal. Rptr. 558*

City tax on movie theaters and adult bookstores impermissibly burdened activities protected by *U.S. Const., amend. I*, and thus was unconstitutional as applied; although tax appears to apply to broad range of businesses, in reality burden falls disproportionately on businesses engaged in free speech, thus discriminating against those engaged in protected speech. *United Artists Communications, Inc. v. City of Montclair (1989) 209 Cal. App. 3d 245, 252-253, 257 Cal. Rptr. 124*

Gross receipts tax is neither discriminatory nor confiscatory even though only two companies were in class and taxpayer accounted for 16 percent of city's total business license tax revenue; differing rates of tax may be imposed on different classes provided classification is reasonable; tax is not discriminatory if burden falls equally on all members of same class. *Park'N Fly of San Francisco, Inc. v. City of South San Francisco (1987) 188 Cal. App. 3d 1201, 1213-1215, 234 Cal. Rptr. 23*

Local tax on admission prices of sporting events, movie theaters, concerts, shows, museums, performances, displays, and exhibitions within city limits was invalid and violated of rights of free speech and equal protection if plaintiffs' movie theaters were only existing or contemplated entities subject to tax. *Festival Enterprises, Inc. v. City of Pleasant Hill (1986) 182 Cal. App. 3d 960, 963-966, 227 Cal. Rptr. 601*

[d] In Lieu Tax on Insurance Companies

Cal. Const., art. XIII, § 28(f) prohibited city from imposing tax on income from rental properties or parking lot operated by insurance company and tax on use of electrical power in company's building; under *Cal. Const., art. XIII, § 28(f)*, insurance companies (except those issuing title and marine insurance) pay tax on gross premiums in lieu of all other taxes and licenses except taxes on real estate and motor vehicles. *Mutual Life Ins. Co. v. City of Los Angeles (1990) 50 Cal. 3d 402, 406, 417, 267 Cal. Rptr. 589, 787 P.2d 996*

[e] Preemption by State or Federal Law

Cal. Const., art. XX, § 22, grants state Department of Alcoholic Beverage Control exclusive power to collect license fees or occupational taxes related to alcoholic beverage sales and to tax those sales; liquor licenses are not subject to local license or occupational taxes, and local tax on alcoholic beverage sales is preempted by state law; however, municipality may impose fees pursuant to its police powers if business imposes unusual burden on city services; city ordinance addressing nuisance problems associated with alcoholic beverage sales establishments and requiring existing alcoholic beverage retailers to pay fee to administer enforcement of ordinance construed as regulatory ordinance and fees held not to constitute prohibited license tax; fee also held not to be impermissible tax imposed to pay general revenue to city, but regulatory fee intended to defray cost of providing and administering hearing process set out in ordinance. *City of Oakland v. Superior Court (1996) 45 Cal. App. 4th 740, 759-767, 53 Cal. Rptr. 2d 120*

Imposition of gross receipts tax on company storing goods in customs-bonded warehouse was not preempted by federal law governing customs-bonded warehouses because tax does not defeat purpose of federal law (giving importers flexibility to sell goods domestically or reexport them without prepaying customs duties) and taxpayer not type of importer federal law waspassed to assist; taxpayer's goods were sold to airlines and ships to be consumed during travel outside U.S. and taxpayer therefore had no domestic market. *City of Los Angeles v. Marine Wholesale/Warehouse Co. (1993) 15 Cal. App. 4th 1834, 1843, 19 Cal. Rptr. 2d 664*

Municipal ordinance imposing excise tax on purchase of alcoholic beverages sold by retailer for consumption on premises was invalid because state has preempted field of alcoholic beverage consumption. *Century Plaza Hotel Co. v. City of Los Angeles (1970) 7 Cal. App. 3d 616, 620-626, 87 Cal. Rptr. 166*

[f] Proposition 13 Restriction on Special Taxes

When challenged tax is held invalid under *Gov. Code § 53722* (Proposition 62), court need not reach the question of whether it is also invalid under Proposition 13. *Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 261, 45 Cal. Rptr. 2d 207, 902 P.2d 225*

Validity of sales tax increase approved by simple majority of voters in 1996 general elections upheld; tax was general tax not subject to supermajority voter approval requirements applicable to special taxes under Proposition 13 (*Cal. Const., art. XIII A, § 4*) and Proposition 62 (*Gov. Code § 53722*). *Coleman v. County of Santa Clara (1998) 64 Cal. App. 4th 662, 669-672, 75 Cal. Rptr. 2d 516*

Gross receipts tax imposed on car rental companies that serviced airport was not "special tax" within meaning or requirements of *Cal. Const., art. XIII A, § 4*, or *Gov. Code § 50076*, but as authorized by *Gov. Code §§ 50474, 26360*; amount of tax (nine percent) was fair and reasonable apportionment of general operation of airport and differential recognizes disadvantages of off-site location. *Alamo Rent-A-Car, Inc. v. Board of Supervisors (1990) 221 Cal. App. 3d 198, 205, 207-208, 272 Cal. Rptr. 19*

[g] Proposition 62 Restriction on Special Taxes

Gov. Code § 53722, part of Proposition 62, which requires two-thirds voter approval of voters voting in election on issue for local government or district to impose a special tax, held constitutional. *Santa Clara County Local Transportation Authority v. Guardino (1995) 11 Cal. 4th 220, 238, 261, 45 Cal. Rptr. 2d 207, 902 P.2d 225*

Validity of sales tax increase (Measure B tax) approved by simple majority of voters in 1996 general elections upheld; Measure B was general tax not subject to supermajority voter approval requirements applicable to special taxes under *Cal. Const., art. XIIIA, § 4* (Proposition 13), and its statutory counterpart *Gov. Code § 53722* (Proposition 62). *Coleman v. County of Santa Clara (1998) 64 Cal. App. 4th 662, 669-672, 75 Cal. Rptr. 2d 516*

[h] Remedies

Taxpayer suit to claim refund of city business taxes is subject to prior filing of claim for refund and is subject to six-month limitation of *Gov. Code § 945.6*. *Volkswagen Pacific, Inc. v. City of Los Angeles (1972) 7 Cal. 3d 48, 60-63, 101 Cal. Rptr. 869, 496 P.2d 1237*

Civ. Code § 3287(a) is only basis for payment of interest on retailer's judgment for refund of gross receipts tax; thus, retailer is entitled to interest at legal rate, not at rate city charged on delinquent gross receipts taxes. *May Dept. Stores Co. v. City of Los Angeles (1988) 204 Cal. App. 3d 1368, 1378-1379, 251 Cal. Rptr. 873*

Licensee is required to exhaust administrative remedies for reclassification but is entitled to maintain action for declaratory relief challenging constitutionality of ordinance if administrative remedy did not provide forum for raising constitutional issues. *Park'N Fly of San Francisco, Inc. v. City of South San Francisco (1987) 188 Cal. App. 3d 1201, 1207-1209, 234 Cal. Rptr. 23*

If taxpayer pays tax by mistake, prejudgment interest provided by *Civ. Code § 3287* does not begin to accrue until taxpayer discovers mistake and demands refund. *Todd Shipyards Corp. v. City of Los Angeles (1982) 130 Cal. App. 3d 222, 227, 181 Cal. Rptr. 652*

Trial court was in error by issuing alternative writ of mandate and determining absence of another adequate remedy in suit to compel SBE to transmit to petitioner city sales taxes erroneously distributed to another city. *City of Culver City v. State Bd. of Equalization (1972) 29 Cal. App. 3d 404, 409-412, 105 Cal. Rptr. 602*

[i] Statute of Limitations on Collection

Period within which city must commence action to collect business tax is three-year limitation period of former *Code Civ. Proc. § 338(1)* (*now see Code of Civ. Proc. § 338(a)*); period begins on date cause of action accrues, which is date taxes become delinquent. *City of Los Angeles v. Belridge Oil Co. (1954) 42 Cal. 2d 823, 833-834, 271 P.2d 5* ; *City of Los Angeles v. A.E.C. Los Angeles (1973) 33 Cal. App. 3d 933, 941, 109 Cal. Rptr. 519*

[j] Who Is Taxed

Numerous partnerships and corporations, each consisting of same two individuals and formed to take title to single real estate investment, were properly disregarded; for purpose of municipal gross receipts tax, single entity was partnership encompassing all real estate lending and investment activity of two individuals. *Roscoe Terrace v. City of Los Angeles (1985) 170 Cal. App. 3d 559, 565-569, 216 Cal. Rptr. 237*

City is prohibited from assessing gross receipts of commercially inseparable and integrated activity because two businesses each taxable at different rates. *ITT Gilfillan, Inc. v. City of Los Angeles (1977) 72 Cal. App. 3d 421, 429, 140 Cal. Rptr. 193*

[6] Consideration Required for Taxable Sale

No consideration, and therefore no sale, is involved if parent corporation remained jointly liable for divisions' liabilities after transfer of divisions to subsidiaries. *Macrodyne Industries, Inc. v. State Board of Equalization (1987) 192 Cal. App. 3d 579, 582-583, 237 Cal. Rptr. 537*

Consideration for sale is not required to be money. *United States Lines, Inc. v. State Bd. of Equalization (1986) 182 Cal. App. 3d 529, 539-540, 227 Cal. Rptr. 347*

[7] Delegation of Taxing Power

Retail transactions and use tax authorized by former Fresno Metropolitan Projects Act (former *Gov. Code § 68056 et seq.*) violated *Cal. Const., art. XI, § 11(a)*, restriction against delegation to private person or body of power to levy tax; Fresno Metropolitan Projects Authority, created under Act constituted "private body" to which Legislature unlawfully delegated power to levy tax, and therefore, tax was unconstitutional. *Howard Jarvis Taxpayers' Assn. v. Fresno Metropolitan Projects Authority (1995) 40 Cal. App. 4th 1359, 1363, 1375, 1389, 1396, 48 Cal. Rptr. 2d 269*

[8] Exemptions From Tax

[a] Burden on Taxpayer to Establish Eligibility for Exemptions

Statutes granting exemption from taxation must be reasonably, but strictly, construed against taxpayer; taxpayer has burden of showing that taxpayer clearly comes within exemption; exemption will not be inferred from doubtful statutory language; when statute contains express enumeration of exemptions, additional exemptions should not be presumed; plaintiff corporation failed to meet burden of establishing that *Rev. & Tax. Code § 33* afforded it exemption from franchise taxes. *Alpha Therapeutic Corp. v. Franchise Tax Bd. (2000) 84 Cal. App. 4th 1, 3 n.1, 5-8, 12, 100 Cal. Rptr. 2d 548*

Burden is on taxpayer to show entitlement to exemption; rule of strict construction for exemption statutes is not applicable to exemption created by *U.S. Constitution. McDonnell Douglas Corp. v. State Bd. of Equalization (1992) 10 Cal. App. 4th 1413, 1420, 13 Cal. Rptr. 2d 399* (finding exemption under import-export clause of U.S. Constitution (U.S. Const., art. I, § 10, *cl. 2*))

Burden is on taxpayer to show that activity falls within exemption; exemption statutes are strictly construed so as not to enlarge exemption beyond plain meaning of statute. *Parfums-Corday, Inc. v. State Bd. of Equalization (1987) 187 Cal. App. 3d 630, 637, 232 Cal. Rptr. 56*

Taxpayer is required to maintain records to support asserted exemption. *Paine v. State Bd. of Equalization (1982) 137 Cal. App. 3d 438, 443-444, 187 Cal. Rptr. 47*

[b] Charitable Organizations

Charitable organization that does not qualify for property tax exemption under *Rev. & Tax. Code § 214* is eligible for

sales tax exemption under *Rev. & Tax. Code § 6375* if it meets statutory requirements. *Good Shepherd Lutheran Home v. State Bd. of Equalization (1983) 139 Cal. App. 3d 876, 883-886, 189 Cal. Rptr. 242*

[c] Common Carriers

State tax on air fuel sold to foreign charter carrier is neither violative of commerce clause nor inconsistent with U.S.-Canada agreement regulating air charter service; agreement governs only imposition of federal taxes. *Wardair Canada v. Florida Dep't of Revenue (1986) 477 U.S. 1, 3-5, 8-13, 106 S. Ct. 2369, 91 L. Ed. 2d 1* ; *cf. Rev. & Tax. Code §§ 6357, 7389(a)* (excepting carrier licensed by California, U.S., or foreign government from definition of aircraft jet fuel user)

Taxpayer's use of aircraft as unscheduled air taxi qualified taxpayer as common carrier under regulatory definition [*see 18 Cal. Code Reg. § 1593(a)(2), (c)*], even though it was not commercial aircraft used for scheduled airline operations; based on its use by common carrier, that aircraft was exempt from sales tax; therefore, sales tax on that aircraft should not have been taken into account by county assessor for purpose of property taxation. *Auerbach v. Los Angeles County Assessment Appeals Bd. (2008) 167 Cal. App. 4th 1428, 1431, 1432 n.3, 1441, 85 Cal. Rptr. 3d 105*

18 Cal. Code Reg. § 1621(d)(1), as implemented from and after January 1, 1978, prohibiting application of overpayments as offsets to underpayments and requiring corrected bills of lading to be timely filed by sellers seeking exemption for common carriers, is valid. *Delta Air Lines v. State Bd. of Equalization (1989) 214 Cal. App. 3d 518, 530-531, 262 Cal. Rptr. 803*

Exemption of *Rev. & Tax. Code § 6385* is inapplicable to freight car wheel sales by wholly-owned subsidiary to common carrier parent if wheels not transported directly outside of state. *Southern Pacific Equip. Co. v. State Bd. of Equalization (1971) 16 Cal. App. 3d 302, 307-308, 94 Cal. Rptr. 107*

[d] Containers

Sales and use tax exemption for returnable containers (*Rev. & Tax. Code § 6364(c)*) does not apply to manufacturer's original sale of returnable containers to bottler that purchases bottles to use and reuse in presenting its product for resale; *section 6364(c),* as specific statute, takes precedence over general exemption for sales for resale, so that sale is not exempt under either specific or general provision. *Associated Beverage Co. v. Board of Equalization (1990) 224 Cal. App. 3d 192, 216, 273 Cal. Rptr. 639*

Vending machine operator is exempted by *Rev. & Tax. Code § 6364(a)* from sales or use tax on nonreturnable cups it purchased from supplier and sold with beverages dispensed from machines; *Rev. & Tax. Code § 6359.4* neither precludes vending machine operator from being seller nor abolishes exemption provided by *Rev. & Tax. Code § 6364(a*); *18 Cal. Code Reg. § 1574(b)(2)(B)* held invalid to extent it would render vending machine operator liable for use tax on cups. *Canteen Corp. v. State Bd. of Equalization (1985) 174 Cal. App. 3d 952, 957-963, 220 Cal. Rptr. 306*

[e] Drugs and Medicines

Antiseptic skin scrub used by physicians and hospital personnel is "medicine" within exemption of *Rev. & Tax. Code § 6369(a)* and *18 Cal. Code Reg. § 1591,* even if it is not used directly on patients, because it is used to mitigate and prevent disease and to benefit patients. *Purdue Frederick Co. v. State Bd. of Equalization (1990) 218 Cal.App. 3d 1021, 1026-1029, 267 Cal. Rptr. 482*

[f] Exemption Certificates

Rev. & Tax. Code § 6421 (statement of buyer to seller that property will be used in manner to exempt gross receipts from tax) does not shift liability for tax to buyer if basis of claimed exemption was delivery outside California because retailer is able to know and control place of delivery; failure to apply *Rev. & Tax. Code § 6421* to this situation as not depriving retailer of due process. *Engs Motor Truck Co. v. State Bd. of Equalization (1987) 189 Cal. App. 3d 1458, 1472-1476, 235 Cal. Rptr. 117*

[g] Federal Constitutional Provisions

Tennessee sales tax on leases of cargo containers used exclusively in international commerce did not violate federal Import-Export Clause or Foreign Commerce Clause because it was generally applicable sales tax that bore no relation to importation and did not divert import revenues from federal government or create risk of multiple taxation. *Itel Containers v. Huddleston (1993) 507 U.S. 60, 74-78, 113 S. Ct. 1095, 122 L. Ed. 2d 421*

Imposition of sales and use taxes on sales of religious books, tapes, records, and other merchandise by religious organization does not violate Free Exercise or *Establishment Clause of First Amendment*. *Swaggart v. Calif. Equalization Bd. (1990) 493 U.S. 378, 110 S. Ct. 688, 107 L. Ed. 2d 796, 807-811, 814*

California sales tax is unconstitutional as to leases of tangible personal property to United States if legal incidence of tax is on United States. *United States v. California Bd. of Equalization (9th Cir. 1981) 650 F.2d 1127, 1132*

Subjecting gifts to California's use tax did not contravene dormant commerce clause when taxpayer in business of selling musical instruments purchased instruments outside California without paying taxes, placed instruments in resale inventory, and later delivered them to common carrier for transportation to donees outside California as promotional gifts; taxation of gifts to out-of-state donees did not violate fair apportionment prong of four prong test stated in for validity of state tax levied on property in interstate commerce. *Yamaha Corp. of America v. State Bd. of Equalization (1999) 73 Cal. App. 4th 338, 365-369, 86 Cal. Rptr. 2d 362*

Aircraft parts sold to Mexican airline to service its airplanes are exempt from state sales tax under import-export clause (U.S. *Const., art. I, § 10, cl. 2*); exemption applies to article manufactured and sold for export to foreign country if certainty of foreign destination is plain at time title passes. *McDonnell Douglas Corp. v. State Bd. of Equalization (1992) 10 Cal. App. 4th 1413, 1420-1425, 13 Cal. Rptr. 2d 399*

Denial of exemption from sales tax conferred on regularly published newspapers and periodicals under *Rev. & Tax. Code § 6362* to publisher of shopping guide devoted primarily to advertising is constitutionally permissible. *Redwood Empire Publishing Co. v. State Bd. of Equalization (1989) 207 Cal. App. 3d 1334, 1339-1344, 255 Cal. Rptr. 514*

Sales of religious literature by nonprofit religious corporation is exempt from sales tax under *Free Exercise Clause* of *U.S. Const., Amend. I*, but organization, as consumer of materials used to make literature, remains liable for use tax unless receipts for materials could be produced. *Institute in Basic Youth Conflicts, Inc. v. State Bd. of Equalization (1985) 166 Cal. App. 3d 1093, 1106-1107, 1109, 213 Cal. Rptr. 98*

[h] Food and Meals

Sale of nonreusable menus to hospitals is not within exemption of *Rev. & Tax. Code § 6363.6* for meals and food products sold to hospitals, even though *18 Cal. Code Reg. § 1503*, defining that exemption, extended to straws, napkins, and similar nonreusable paper products. American Hospital Supply Corp. v. State Bd. of *Equalization (1985) 169 Cal. App. 3d 1088, 1091-1094, 215 Cal. Rptr. 744*

Denying exemption to all food products sold for immediate consumption on or near location where parking facilities provided as constitutional. *Henry's Restaurants of Pomona, Inc. v. State Bd. of Equalization (1973) 30 Cal. App. 3d 1009, 1016-1021, 106 Cal. Rptr. 867*

[i] Fuel

Petroleum coke from manufacturing used as fuel source in lieu of coal in industrial facility as "waste byproduct" within exemption of *Rev. & Tax. Code § 6358.1*, even if it has minimal commercial value. *Union Oil Co. v. State Bd. of Equalization (1990) 224 Cal. App. 3d 665, 672, 274 Cal. Rptr. 76*

[j] Lottery Tickets

Sale of tickets by printer to Lottery Commission is subject to sales tax; before sale by retailer to participant who pays for chance to win prize, printed matter is not "lottery ticket" within meaning of *Gov. Code § 8880.68*. *City of Gilroy v. State Bd. of Equalization (1989) 212 Cal. App. 3d 589, 598-599, 602-604, 260 Cal. Rptr. 723*

[k] Marketing Aids

Former 18 Adm C § 1670(c) (*now see 18 Cal. Code Reg. § 1670(b)*) and its limitation of exemption to marketing aids for which separate charge is made, or for which price of other merchandise is increased, is valid. *Wallace Berrie & Co. v. State Bd. of Equalization (1985) 40 Cal. 3d 60, 67-71, 219 Cal. Rptr. 142, 707 P.2d 204* ; *Parfums-Corday, Inc. v. State Bd. of Equalization (1987) 187 Cal. App. 3d 630, 636-637, 232 Cal. Rptr. 56*

Catalogue sealed inside game cartridge package which contained no directions is not exempt as marketing aid under former 18 Adm C § 1670(c) (*now see 18 Cal. Code Reg. § 1670(b)*); finding that catalogue was advertisement was supported by evidence. *Atari, Inc. v. State Bd. of Equalization (1985) 170 Cal. App. 3d 665, 673-675, 216 Cal. Rptr. 267* ; *but see Rev. & Tax. Code § 6379.5* (added by Stats. 1986, ch. 1515)

[l] Master Records and Tapes

Exemption of *Rev. & Tax. Code § 6362.5* for master record tapes is not retroactive. *Capitol Records, Inc. v. State Bd. of Equalization (1984) 158 Cal. App. 3d 582, 592, 204 Cal. Rptr. 802*

[m] Sales to Federal Government

Electrical contractor did not qualify for exemptions from sales tax under *Rev. & Tax. Code §§ 6381* or *6384* (property purchased in performance of contract for, or sales of personal property to, United States Government) if uninterruptible power supply systems and generators used to perform government contract were fixtures rather than machinery. *Overhead Electric Co. v. State Bd. of Equalization (1991) 227 Cal. App. 3d 1230, 1236, 278 Cal. Rptr. 112*

Rev. & Tax. Code § 6381, exempting gross receipts from sale of tangible personal property to United States, is applicable to overhead materials purchased by contractor for performance of research contract pursuant to provision in contract regarding time title passes. *Aerospace Corp. v. State Bd. of Equalization (1990) 218 Cal. App. 3d 1300, 1309-1313, 267 Cal. Rptr. 685*

Sales of equipment, instruments, and piping used in modification of gas tank setting facilities owned by United States are constituted taxable sales of fixtures under *Rev. & Tax. Code § 6384* (applying tax to sales of property to United

States if contract is for improvements on or to real property in California) and *18 Cal. Code Reg. § 1521* (dividing personal property in construction between "materials" and "fixtures"). *C.R. Fedrick, Inc. v. State Bd. of Equalization (1988) 204 Cal. App. 3d 252, 258-270, 251 Cal. Rptr. 305*

Gross receipts of sales to national banks are taxable because incidence of tax falls on retailer, not on bank; during period for which state was prohibited from taxing gross receipts of sales to national banks, state is able to impose tax on gross receipts of sales to state banks. *Hibernia Bank v. State Bd. of Equalization (1985) 166 Cal. App. 3d 393, 399-400, 403, 212 Cal. Rptr. 556*

[n] Watercraft

Gross receipts from sale of ferry boats that carried primarily intrastate passengers are not within exemption of *Rev. & Tax. Code § 6368*; principal use for interstate passengers is required to qualify for exemption. *Campbell Industries v. State Bd. of Equalization (1985) 167 Cal. App. 3d 863, 868-870, 213 Cal. Rptr. 533*

[9] Federal Law and Entities

Federal government had no grounds for recovering state sales and use taxes it claims were wrongfully assesed against indemnified federal contractor. *United States v. California (1993) 507 U.S. 746, 113 S. Ct. 1784, 123 L. Ed. 2d 528*

State tax on gross receipts received by non-Indian construction company from tribal school board for construction of Indian school on reservation was preempted by federal regulatory scheme and express federal policy. *Ramah Navajo School Board, Inc. v. Bureau of Revenue (1982) 458 U.S. 832, 846, 102 S. Ct. 3394, 73 L. Ed. 2d 1174*

Non-Indian building contractor that bought construction materials from non-Indian vendors and had those materials delivered to construction site on Indian land was not exempt from California sales tax on those transactions; tribe's interest in obtaining construction services from non-Indians at competitive discount, by strategy to circumvent state sales tax, did not outweigh California's interest in raising general funds for its treasury. *Barona Band of Mission Indians v. Yee (9th Cir. 2008) 528 F.3d 1184, 1186, 1193-1194*

Sales or solicitations of sales of tangible personal property in state on behalf of taxpayer by independent contractor do not subject taxpayer to state taxation, nor does maintenance of an office in state by independent contractor whose activities on behalf of taxpayer in state consist solely of making sales, or soliciting orders for sales, of tangible personal property [*15 U.S.C.§ 381(c)*]; subsidiary of taxpayer that is an integral part of taxpayer's business, and that does not hold itself out as independent contractor, is not considered an independent contractor for this purpose. *Reader's Digest Assn. v. Franchise Tax Bd. (2001) 94 Cal. App. 4th 1240, 115 Cal. Rptr. 2d 53* (interpreting *15 U.S.C. § 381(d)(1)*)

[10] Personal Liability for Unpaid Taxes of Entity

Personal liability for unpaid sales taxes may be imposed on responsible persons who are no longer with a terminating entity that owes sales and use tax at time of termination, including corporate officers who resigned and sold their corporate stock more than one year before corporation's termination. *S.B.E. v. Wirick (2001) 93 Cal. App. 4th 411, 112 Cal. Rptr. 2d 919*

[11] Occasional Sales

Liquidating industrial corporation's sale of its engineering division's assets, including its software library, was not

exempt from sales tax under *Rev. & Tax. Code §§ 6006.5(a)* (occasional sales) and 6010.9 (computer program sales and purchases); division of corporate entity engaging in number of substantially similar sales during preceding 12 months into unincorporated departments or divisions did not transform the departments or divisions into separate legal entities for tax purposes; computer programs, once created and in possession of original customer, constituted tangible personal assets, the subsequent sale of which cannot be characterized as a "service" transaction exempt from tax. *Touche Ross & Co., v. State Bd. of Equalization (1988) 203 Cal. App. 3d 1057, 1061-1067, 250 Cal. Rptr. 408*

In determining whether series of sales occurred, seller includes subdivisions, divisions, regions, and departments of seller. *Chemed Corp. v. State Bd. of Equalization (1987) 192 Cal. App. 3d 967, 974-975, 237 Cal. Rptr. 627*

Single sale, concededly "at retail," of substantially all assets is not exempt occasional sale; if assets sold were suited to retail sale, seller is required by *Rev. & Tax. Code § 6066* to obtain seller's permit; *Rev. & Tax. Code § 6006.5(a)* limits occasional sales to sales of property not held or used by seller in course of activities for which permit is required. *Santa Fe Energy Co. v. State Bd. of Equalization (1984) 160 Cal. App. 3d 176, 179-182, 206 Cal. Rptr. 499*

Occasional sale exemption of *Rev. & Tax. Code § 6006.5* is unavailable if sale in question is one in series of sales made sufficient in number, scope, and character to require holding of seller's permit. *Hotel Del Coronado Corp. v. State Bd. of Equalization (1971) 15 Cal. App. 3d 612, 619, 92 Cal. Rptr. 456*

Single transaction constituting occasional sale is not subject to sales tax. *Glass-Tite Industries, Inc. v. State Bd. of Equalization (1968) 266 Cal. App. 2d 691, 694, 72 Cal. Rptr. 244*

[12] Remedies

[a] Available to SBE

Rev. & Tax. Code § 19714, in empowering SBE to impose penalty if taxpayer started or maintained proceedings primarily for delay, or if taxpayer's position was frivolous or groundless, or if taxpayer unreasonably failed to pursue available administrative remedies, does not violate constitutional right of free speech. *Neufeld v. State Bd. of Equalization (2004) 124 Cal. App. 4th 1471, 1473, 22 Cal. Rptr. 3d 423*

Marital agreement transmuting community property earnings to separate property for each spouse in attempt to avoid one spouse's tax debt held fraudulent and unenforceable under *Fam. Code § 851* and *Civ. Code § 3439.04(a)* so as not to defeat earnings withholding order for taxes. *State Bd. of Equalization v. Woo (2000) 82 Cal. App. 4th 481, 483-484, 98 Cal. Rptr. 2d 206*

Action against surety is timely filed if commenced within period during which lien was in force; surety is liable whether or not named on certificate; demand of surety by SBE is not condition precedent to surety's liability. *State Bd. of Equalization v. Balboa Ins. Co. (1979) 89 Cal. App. 3d 499, 503-505, 155 Cal. Rptr. 205*

Rev. & Tax. Code §§ 6811, 6812, relating to successor's liability for sales and use taxes, as interpreted and applied to transaction between parent and subsidiary corporations. *Knudsen Dairy Products Co. v. State Bd. of Equalization (1970) 12 Cal. App. 3d 47, 53-58, 90 Cal. Rptr. 533*

Sales taxes, pursuant to *Rev. & Tax. Code § 6756*, and state disability and unemployment insurance taxes, pursuant to *Unemp. Ins. Code §§ 986, 1701*, is entitled to priority in payment if insolvency is involved. *Stewart v. State of California (1969) 272 Cal. App. 2d 345, 350, 77 Cal. Rptr. 418*

Purchaser of business is liable for due and unpaid sales tax liabilities of seller even if determinations are not issued

until after purchase. *People v. Buckles (1943) 57 Cal. App. 2d 76, 78-81, 134 P.2d 8*

[b] Available to Taxpayer

Failure to provide jeopardy-assessed taxpayer who does not post security a presale administrative hearing violates due process; sale of seized property is enjoined until taxpayer's administrative hearing. *Dupuy v. Superior Court (1975) 15 Cal. 3d 410, 417-418, 124 Cal. Rptr. 900, 541 P.2d 540*

Payment of accrued interest on tax deficiency is not prerequisite to administrative refund claim or subsequent action for refund of taxes (disapproving contrary language in *Garg v. People ex rel. State Bd. of Equalization (1997) 53 Cal. App. 4th 199, 208, 61 Cal. Rptr. 2d 376*); thus, SBE's prepayment policy may not be enforced insofar as it requires prepayment of interest before tax refund claim will be considered; court, however, did not consider whether SBE may require prepayment of interest when challenge is directed only to an interest assessment. *Agnew v. State Board of Equalization (1999) 21 Cal. 4th 310, 314-315, 321 n.8, 333-334, 87 Cal. Rptr. 2d 423, 981 P.2d 52*

Actions for damages or equitable relief under *42 U.S.C. § 1983* challenging state or municipal taxation are barred, whether brought in federal or state court, if adequate state remedy exists; although business tax that discriminates between in-city and out-of-city manufacturers violates state and federal commerce protections, taxpayer barred from maintaining section 1983 action for damages in state court because taxpayer entitled to fullrefund; tax refund provides adequate remedy precluding any relief or attorney's fees under federal civil rights law. *General Motors Corp. v. City and County of San Francisco (1999) 69 Cal. App. 4th 448, 451, 460-461, 81 Cal. Rptr. 2d 544*

Sales tax offset is inappropriate method for disbursing invalidly collected supplemental sales taxes; SBE is required to retain these invalidly collected tax revenues to meet refund claims, if any. *Rider v. County of San Diego (1992) 11 Cal. App. 4th 1410, 1421, 14 Cal. Rptr. 2d 885* (on remand following Supreme Court invalidation in *Rider v. County of San Diego (1991) 1 Cal. 4th 1, 13-15, 18, 2 Cal. Rptr. 2d 490, 820 P.2d 1000* of supplemental sales tax designed to fund county regional justice financing agency)

Taxpayers, but not agency, are entitled to attorneys's fees under common fund theory in suit successfully challenging supplemental sales tax under Proposition 13. *Rider v. County of San Diego (1992) 11 Cal. App. 4th 1410, 1423, 1426, 14 Cal. Rptr. 2d 885* (on remand following Supreme Court invalidation in *Rider v. County of San Diego (1991) 1 Cal. 4th 1, 13-15, 18, 2 Cal. Rptr. 2d 490, 820 P.2d 1000* of supplemental sales tax designed to fund county regional justice financing agency)

[c] Doctrine of Equitable Setoff

In suit for refund of taxes, SBE may raise doctrine of equitable setoff to defeat or reduce taxpayer's refund. *Sprint Communications Co. v. State Bd. of Equalization (1995) 40 Cal. App. 4th 1254, 1259-1262, 47 Cal. Rptr. 2d 399*

[13] Retention of Title to Property

If tooling was used in shipment of airplane parts and manufacturer expected to be compensated for it by buyer, sales tax as properly assessed on transfer even though contract provided that seller was to retain legal title as security for purchase. *Northrop Corp. v. State Bd. of Equalization (1980) 110 Cal. App. 3d 132, 137, 167 Cal. Rptr. 707*

[14] Use or Delivery of Property in California

Subjecting gifts to California's use tax did not contravene dormant commerce clause when taxpayer in business of selling musical instruments purchased instruments outside California without paying taxes, placed instruments in resale inventory, and later removed them from inventory to make promotional gifts and delivered them to common carrier for transportation to donees outside California; no impermissible risk of multiple taxation resulted from Board's interpretation of use tax statutes that gifts of personal property be deemed made in California and subject to California use tax if (a) that property was purchased without payment of sales tax, and (b) delivered to common carrier for transportation to donee inside or outside California. *Yamaha Corp. of America v. State Bd. of Equalization (1999) 73 Cal. App. 4th 338, 365, 368-369, 86 Cal. Rptr. 2d 362*

Retailer is liable for tax, and exemption of *Rev. & Tax. Code § 6396* (delivery outside of California) is not applicable to trucks delivered in California even though buyers filed statements with DMV stating they took delivery in other states; actual delivery outside California as necessary for exemption. *Engs Motor Truck Co. v. State Bd. of Equalization (1987) 189 Cal. App. 3d 1458, 1464-1472, 235 Cal. Rptr. 117*

No tax is due under *Rev. & Tax. Code § 6009.1* if property only moves through California for consumption elsewhere; however, if property has some functional purpose in California, even if substantially consumed in interstate commerce outside California, use tax as payable. *Parfums-Corday, Inc. v. State Bd. of Equalization (1987) 187 Cal. App. 3d 630, 638, 232 Cal. Rptr. 56*

Storage of marketing aids in California is sufficient use to subject purchaser/wholesaler, which then packaged them in displays and forwarded them outside California, to tax. *Parfums-Corday, Inc. v. State Bd. of Equalization (1987) 187 Cal. App. 3d 630, 638, 232 Cal. Rptr. 56*

Sales of goods to common carrier for use out-of-state are subject to sales tax if contract provides for delivery in *California. Satco, Inc. v. State Bd. of Equalization (1983) 144 Cal. App. 3d 12, 16-19, 192 Cal. Rptr. 449*

Use tax does not depend on duration of use in California but on fact of any substantial use in *California. Western Contracting Corp. v. State Bd. of Equalization (1968) 265 Cal. App. 2d 568, 574, 71 Cal. Rptr. 472*

Rev. & Tax. Code § 6246 establishes presumption that property brought to California by purchaser was purchased for use in this state; presumption as overcome if purchaser demonstrates that property was purchased with intention to use it elsewhere, but not overcome by showing that purchaser had no intention to use specific property in California if nature of purchaser's business shows that property might be used in *California. Western Contracting Corp. v. State Bd. of Equalization (1968) 265 Cal. App. 2d 568, 575, 71 Cal. Rptr. 472*

[15] Who Is Seller

Sales taxes was properly imposed on soft drink bottler for its sales to vending machine customers who failed to furnish bottler with valid resale certificates; vending machine operators as agents of seller, who is "distributor" under *Rev. & Tax. Code § 6015*. *Associated Beverage Co. v. Board of Equalization (1990) 224 Cal. App. 3d 192, 208, 273 Cal. Rptr. 639*

Status of seller within meaning of *Rev. & Tax. Code § 6014* is determined solely by suitability of product for retail salability, not by intent of purchaser; fact that goods have not actually been sold at retail is of no consequence; if assets sold are suited to retail sale, seller is required by *Rev. & Tax. Code § 6066* to obtain seller's permit. *Santa Fe Energy Co. v. State Bd. of Equalization (1984) 160 Cal. App. 3d 176, 180-182, 206 Cal. Rptr. 499* ; *Davis Wire Corp. v. State Bd. of Equalization (1976) 17 Cal. 3d 761, 764-765, 132 Cal. Rptr. 133, 553 P.2d 229*

California corporation was liable for sales tax as distributor when it received and warehoused boxes of greeting cards in

California and shipped cards to various salespeople based on orders it received from its parent corporation. *Sunshine Art Studios of California, Inc. v. State Bd. of Equalization (1974) 39 Cal. App. 3d 223, 227-228, 114 Cal. Rptr. 24*

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-540 California Forms of Pleading and Practice--Annotated § 540.456

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.456 Law Reviews

Nowak and Rotunda, *Sales and Use Tax Credits, Discrimination Against Interstate Commerce, and the Useless Multiple Tax Concept, 20 U.C. Davis L. Rev. 273 (1987)*

Stetson, *The California Sales Tax: An Analysis of the "Occasional Sale," 7 Pac. L.J. 30 (1976)*

Note, *Constitutional Limitations on the Power to Tax: Alco Parking Corp. v. Pittsburg, 26 Hastings L.J. 215 (1974)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-540 California Forms of Pleading and Practice--Annotated § 540.457

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.457 Text References

Witkin, Summary of California Law, vol. 9, *Taxation* (10th ed. 2005)

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[Reserved]

§§ 540.458[Reserved]

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47-540 California Forms of Pleading and Practice--Annotated § 540.470

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.470 California Family Law

For discussion of tax issues involved in dissolution of marriage, see Kirkland, Lurvey & Richmond, California Family Law Practice and Procedure, Ch. 160, *Tax Effects of Dissolution* (Matthew Bender 2d ed.)

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportTaxation

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47-540 California Forms of Pleading and Practice--Annotated § 540.471

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.471 California Legal Forms

For discussion, exemption applications, and annual information return forms relating to welfare, charitable and educational exemptions, see California Legal Forms, Ch. 13C, *State and Federal Taxes: Applications for Exemptions and Annual Returns* (Matthew Bender)

For forms for marital agreements, including provisions with respect to taxes, see California Legal Forms, Ch. 108, *Antenuptial Agreements* ; Ch. 109, *Postnuptial Agreements* ; and Ch. 110, *Marital Settlement Agreements* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-540 California Forms of Pleading and Practice--Annotated § 540.472

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.472 California Constitution

Court action to enjoin or prevent collection of tax is prohibited; action to recover tax claimed to have been collected illegally is authorized. *Cal. Const., art. XIII, § 32*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureFederal & State InterrelationshipsAnti-Injunction ActsGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsCollectionTax LawState & Local TaxesAdministration & ProceedingsCredits, Overassessments & RefundsTax LawState & Local TaxesAdministration & ProceedingsTaxpayer Protests

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47-540 California Forms of Pleading and Practice--Annotated § 540.473

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.473 Federal Statutes

Federal courts are prohibited from enjoining assessment, levy, or collection of state tax if plain, speedy, and efficient remedy available in state courts. *28 U.S.C. § 1341*

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-540 California Forms of Pleading and Practice--Annotated § 540.474

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.474 State Statutes

[1] Corporation Tax

Returns generally. *Rev. & Tax. Code §§ 18601 et seq., 18621 et seq.*

Estimated tax. *Rev. & Tax. Code § 19021 et seq.*

Deductions. *Rev. & Tax. Code § 24341 et seq.*

Business income derived from California sources is taxable under unitary method or water's-edge election. *Rev. & Tax. Code § 25110 et seq.* (water's-edge election), *25120 et seq*. (unitary method)

Petition for alternative formula for assessing business income. *Rev. & Tax. Code § 25137*

[2] Personal Income Tax

Computation of taxable income. *Rev. & Tax. Code § 17071 et seq.*

Deductions generally. *Rev. & Tax. Code §§ 17073, 17073.5, 17076, 17201 et seq.*

Standard deduction. *Rev. & Tax. Code §§ 17073(c), 17073.5*

California incorporation of portions of Internal Revenue Code regarding deductions. *Rev. & Tax. Code § 17201*

Estates, trusts, beneficiaries, and decedents. *Rev. & Tax. Code § 17731 et seq.*

Partners and partnerships. *Rev. & Tax. Code § 17851 et seq.*

Limited partnerships. *Rev. & Tax. Code § 17935 et seq.*

Limited liability companies. *Rev. & Tax. Code § 17941 et seq.*

Registered limited liability partnerships and foreign limited liability partnerships. *Rev. & Tax. Code § 17948 et seq.*

Taxation of nonresidents. *Rev. & Tax. Code § 17951 et seq.*

Returns generally. *Rev. & Tax. Code § 18501 et seq., 18621 et seq.*

Signing spouse's name on personal income tax return is misdemeanor. *Rev. & Tax. Code § 19701.5*

[3] Provisions Common to Personal Income Taxes and to Corporation Taxes

Filing of returns by electronic technology permitted. *Rev. & Tax. Code § 18621.5*

Withholding. *Rev. & Tax. Code § 18631 et seq.*

Payment of tax by check or credit card. *Rev. & Tax. Code § 19005*

Assessments and closing agreements. *Rev. & Tax. Code § 19031 et seq.*

Jeopardy assessments. *Rev. & Tax. Code § 19081 et seq.*

Interest, penalties, and additions to tax. *Rev. & Tax. Code §§ 19131 et seq., 19701 et seq.*

Penalties for paying tax with bad check. *Rev. & Tax. Code § 19134* (adopting *I.R.C. § 6657*)

Lien of tax. *Rev. & Tax. Code § 19221 et seq.*

Warrant for collection of tax. *Rev. & Tax. Code § 19231 et seq.*

State's remedies cumulative. *Rev. & Tax. Code § 19251*

Priorities of tax claims. *Rev. & Tax. Code § 19253*

Seizure and sale of taxpayer's property. *Rev. & Tax. Code §§ 19262, 19263*

Claim for refund. *Rev. & Tax. Code § 19301 et seq.*

Interest on judgment for refund. *Rev. & Tax. Code §§ 19340, 19391, 19521*

Suit for tax. *Rev. & Tax. Code § 19371 et seq.*

No injunction or writ of mandate is issuable to enjoin state or any its officer fromassessing or collecting tax. *Rev. & Tax. Code § 19381*

Suit for refund. *Rev. & Tax. Code § 19381 et seq.*

Action by FTB for erroneous refund. *Rev. & Tax. Code §§ 19120, 19411 et seq.*

Litigation costs. *Rev. & Tax. Code § 19717*

Res judicata binds FTB only on determinations involving taxpayer's liability for same year. *Rev. & Tax. Code § 19802*

Burden of FTB to produce reasonable and probative information for appeals filed under *Rev. & Tax. Code § 19045* (deficiency assessments) or § 19324 (refund claims).*Rev. & Tax. Code § 21024*

Legal Topics:

For related research and practice materials, see the following legal topics:
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47-540 California Forms of Pleading and Practice--Annotated § 540.475

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.475 Decisions

[1] Attorney's Fees

Attorney's fees properly granted to taxpayers when Franchise Tax Board's position not substantially justified; when taxpayer's return available, Franchise Tax Board may not assess or collect deficiency without relying on return. *Wertin v. Franchise Tax Bd. (1998) 68 Cal. App. 4th 961, 976-978, 80 Cal. Rptr. 2d 644* ; *see* Stats. 2000, ch. 414, §§ 1, 2 (*Rev. & Tax. Code § 19033* amended to clarify FTB's powers to issue deficiency assessments after *Wertin* holding)

Attorney's fees properly denied to taxpayer who prevailed against the Franchise Tax Board when Board's position was substantially justified; trial court did not abuse discretion in denying attorney's fees to prevailing taxpayer. *McDonnell Douglas Corp. v. Franchise Tax Bd. (1994) 33 Cal. Rptr. 2d 129* (applying *Rev. & Tax. Code § 26491*)

[2] Bankruptcy

Assessment of personal income taxes is final for bankruptcy purposes when Notice of Proposed Assessment becomes final, which occurs 60 days after mailing if taxpayer does not file protest. *In re King (9th Cir. 1992) 961 F.2d 1423, 1424-1425, 1427*

Income taxes that are assessed within 240 days of filing of bankruptcy petition or are assessed after petition filed are not dischargeable in bankruptcy; 240-day period increased if offer in compromise with respect to tax made within 240 days after assessment is pending; state income tax deficiency assessed for bankruptcy discharge purposes when assessment contained in notice of proposed deficiency assessment becomes final, either through passage of time or at end of an appeal period; this is point at which state, the taxing sovereign, has formally acted to finally fix tax liability. *Schatz v. Franchise Tax Bd. (1999) 69 Cal. App. 4th 595, 597, 600, 81 Cal. Rptr. 2d 719*

[3] Constitutional Issues

Rev. & Tax. Code § 17043, which imposes additional 1 percent tax on any personal taxable income exceeding $1 million, for purpose of maintaining funding of mental health services for all Californians at 2003 levels [*see* Prop. 63 (Nov. 4, 2004)], does not arbitrarily discriminate against wealthy individuals, since income tax may be rationally based on taxpayer's income level and ability to pay, and there is no need to show that particular taxpayer personally benefits from tax assessed for public good; taxpayers earning more than $1 million annually do not compose "suspect class" for purpose of determining whether issue requires strict-scrutiny constitutional analysis. *Jensen v. Franchise Tax Bd. (2009) 178 Cal. App. 4th 426, 431, 100 Cal. Rptr. 3d 408*

Rev. & Tax. Code § 24410, which allows only corporations that are domiciled in California to deduct certain insurance company dividends, and limits the deduction to dividends paid from California sources, violated Commerce Clause and was therefore unconstitutional. *Ceridian Corp. v. F.T.B. (2000) 85 Cal. App. 4th 875, 102 Cal. Rptr. 2d 611*

[4] Credits

Statutory provisions for income tax credits are narrowly construed against taxpayer. *William Lyon Co. v. Franchise Tax Board (1992) 4 Cal. App. 4th 267, 275-277, 5 Cal. Rptr. 2d 680*

[5] Deductions

Deduction under *Rev. & Tax. Code § 24405* (for organization operated as cooperative or on mutual basis) is not conditioned on taxpayer's actual issuance of refunds, rebates, or dividends to its members, but is available to nonprofit service corporation that uses its capital surplus consistent with nonprofit motive to keep dues and service costs as low as possible. *California State Auto. Assn. v. Franchise Tax Bd. (1987) 191 Cal. App. 3d 1253, 1262, 237 Cal. Rptr. 44*

[6] Employer's Liability for Withholding

Drivers who drove trucks owned and leased by carrier were employees, not independent contractors, even though permitted to select their own routes, times, and speeds; employer's good faith belief was insufficient under former *Rev. & Tax. Code § 18815* (*now see Rev. & Tax. Code § 18668(a)*) to absolve penalty for failure to withhold. *In re Brown (9th Cir. 1984) 743 F.2d 664, 666-670*

Damages awarded in wrongful termination action are not wages subject to withholding, because no ongoing employment relationship existed and plaintiffs did not seek and were not awarded back pay. *Lisec v. United Airlines, Inc. (1992) 10 Cal. App. 4th 1500, 1507, 11 Cal Rptr. 2d 689*

[7] FTB's Remedies

Order to withhold (former *Rev. & Tax. Code § 18817*; *now see Rev. & Tax. Code § 18670*) served on police department after seizure of property have priority over fraudulent assignment of those items to attorney and over forfeiture of seized items; service of order to withhold deprives court of jurisdiction to make any other disposition of property specified in order. *Franchise Tax Board v. Superior Court (1985) 168 Cal. App. 3d 970, 975-978, 215 Cal. Rptr. 36*

[8] Jeopardy Assessments

Statutory provisions [former *Rev. & Tax. Code § 18641 et seq.*; *now see Rev. & Tax. Code § 19081 et seq.*] violate due process for failure to provide presale administrative hearing to jeopardy-assessed taxpayer who does not post security; sale of seized property enjoined until taxpayer's administrative hearing. *Dupuy v. Superior Court (1975) 15 Cal. 3d 410, 417, 124 Cal. Rptr. 900*

After administrative hearing on jeopardy assessment, sale of taxpayer's seized assets no longer enjoinable. *Hunter-Reay v. Franchise Tax Board (1983) 140 Cal. App. 3d 875, 880, 189 Cal. Rptr. 810*

[9] Mandamus Relief

Mandamus relief denied because refund action deemed adequate remedy at law; trial court properly sustained demurrer to petition for writ of mandate filed under *Code Civ. Proc. § 1094.5* without leave to amend. *Nast v. State Bd. of Equalization (1996) 46 Cal. App. 4th 343, 346-348, 53 Cal. Rptr. 2d 592*

[10] Privacy of Income Tax Returns

Public policy exception to privilege against disclosure of tax return information permits party to marriage dissolution proceeding to discover both corporate tax returns of closely-held corporation in which spouse was 30 percent shareholder and corporation's payroll tax returns for spouse, but not corporation's payroll tax returns for other employees. *Schnabel v. Superior Court (1993) 5 Cal. 4th 704, 723, 21 Cal. Rptr. 2d 200, 854 P.2d 1117*

Privilege against requiring disclosure of income tax returns or information contained in them [*see Rev. & Tax. Code § 19542*] is not limited to adversarial proceedings and is not waived by property owner who made administrative application for rent increase. *King v. Mobile Home Rent Review Bd. (1989) 216 Cal. App. 3d 1532, 1537-1539, 265 Cal. Rptr. 624*

[11] Privacy of Personal Association

Anti-injunction provision (*Cal. Const., art. XIII, § 32*) does not prevent court from asserting limited jurisdiction in action by FTB to enforce administrative subpoena under former *Rev. & Tax. Code § 19254* (*now see Rev. & Tax. Code § 19504*) even though such a subpoena is first step in collection of tax and integral part of tax collection process; court allowed to consider private club's associational privacy defense to producing membership lists. *Pacific Union Club v. Superior Court (1991) 232 Cal. App. 3d 60, 70, 283 Cal. Rptr. 287* .

[12] Unitary Business

Unitary business is one that receives income from or attributable to sources both within and without state; unitary business is generally defined as two or more business entities that are commonly owned, and integrated in way that transfers value among affiliated entities; if unitary business exists, taxesare apportioned by formula to allocate to California for taxation its fair share of taxable values of taxpayer; in calculating corporate franchise taxes of unitary business, FTB apportions income generated by unitary business based on relationship of combined income to income derived from California sources; computing income of unitary business that is allocable to one state by use of reasonable formula does not result in impermissible tax on extraterritorial values; although constitutional limits on state's ability to tax interstate businesses exist, they allow states wide latitude to choose method of apportionment; main restrictions on state's ability to tax are (1) a minimal connection between activities of business and taxing state, and (2) income attributed to state for tax purposes must be rationally related to values connected to taxing state; thus, when state's method of apportionment represents rough approximation of corporation's income that is reasonably related to

activities conducted within taxing state, no violation exists; when state's methods appear to reach only profits earned in state, and taxpayer failed to show method of apportionment was inherently arbitrary, or that its application produced an unreasonable result, state's action is within constitutional bounds. *Citicorp North American Inc. v. Franchise Tax Bd. (2000) 83 Cal. App. 4th 1403, 1411 & n.5, 1415, 1426*

Majority ownership of affiliated corporations held by family, rather than by single individual or entity, satisfies "unity of ownership" prerequisite for application of unitary business classification of *Rev. & Tax. Code § 25105*. *Rain Bird Sprinkler Mfg. Corp. v. Franchise Tax Bd. (1991) 229 Cal. App. 3d 784, 788-790, 280 Cal. Rptr. 362*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationPersonal InformationGeneral OverviewTax LawState & Local TaxesAdministration & ProceedingsAssessmentsTax LawState & Local TaxesAdministration & ProceedingsJudicial ReviewTax LawState & Local TaxesIncome TaxCorporations & Unincorporated AssociationsImposition of TaxTax LawState & Local TaxesIncome TaxIndividuals, Estates & TrustsImposition of Tax

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PART III. RESEARCH GUIDE
C. INCOME TAX

47-540 California Forms of Pleading and Practice--Annotated § 540.476

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.476 Law Reviews

Lobenhofer, *The Income Taxation of Exchanges of Property for Private Annuities: History and a Proposal*, *21 Pac. L.J. 271 (1990)*

Strand, *Periodicity and Accretion Taxation: Norms and Implementation*, *99 Yale L.J. 1817 (1990)*

Bankman, *The Case Against Passive Investments: A Critical Appraisal of the Passive Loss Restrictions*, *42 Stan. L. Rev. 15 (1989)*

Rands, *Incorporation Under the Federal Tax Laws*, *22 Loy. L.A.L. Rev. 985 (1989)*

O'Kelley, *Tax Policy for Post-Liberal Society: A Flat-Tax-Inspired Redefinition of the Purpose and Ideal Structure of a Progressive Income Tax*, *58 S. Cal. L. Rev. 727 (1985)*

Keesling, *A Current Look at the Combined Report and Uniformity in Allocation Practices*, *42 J. Tax'n 106 (1975)*

Lohr-Schmidt, *Developing Jurisdictional Standards for State Taxation of Multistate Corporate Net Income*, *22 Hastings L.J. 1035 (1971)*

Keesling and Warren, *California's Uniform Division of Income for Tax Purposes Act, Part II*, *15 UCLA L. Rev. 655 (1968)*

Keesling and Warren, *California's Uniform Division of Income for Tax Purposes Act, Part I*, *15 UCLA L. Rev. 156 (1967)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesIncome TaxGeneral OverviewTax LawState & Local TaxesIncome TaxCorporations & Unincorporated AssociationsGeneral OverviewTax LawState & Local TaxesIncome TaxCorporations & Unincorporated AssociationsImposition of TaxTax LawState & Local TaxesIncome TaxIndividuals, Estates & TrustsGeneral Overview

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47-540 California Forms of Pleading and Practice--Annotated § 540.477

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.477 Text References

Witkin, Summary of California Law, vol. 9, *Taxation* (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesGeneral Overview

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47-540 California Forms of Pleading and Practice--Annotated §§ 540.478-540.489

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

[Reserved]

§§ 540.478[Reserved]

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47-540 California Forms of Pleading and Practice--Annotated § 540.490

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.490 Federal Income Tax

For discussion of procedures for obtaining an extension of time for filing a federal income tax return, see J. Rabkin & M. Johnson, Federal Income, Gift and Estate Taxation, Ch. 71, *Returns, Deficiencies, and Refunds*, § 71.01A[7] (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Tax Administration & ProcedureAdministrationTax Payment & Tax Return Requirements (IRC secs. 6071-6091, 6151-6167)Extensions of Time

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47-540 California Forms of Pleading and Practice--Annotated § 540.491

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.491 State Statutes

[1] Cause of Action Based on Settlement or Compromise in Exchange for Disclosure of Information

Cause of action against state of California based on settlement or compromise in exchange for disclosure of information provided to taxpayer's attorney, certified public accountant, or tax preparer. *Rev. & Tax. Code § 21023*

[2] Cause of Action for Disregard of Published Procedures

Cause of action in superior court is available against state for damages resulting from reckless disregard of published SBE or FTB procedures by SBE or FTB staff; penalty for frivolous action. *Rev. & Tax. Code §§ 7099, 21021*

[3] Compromise of Final Tax Liability

Compromise of final tax liability by executive officer and chief counsel of FTB, jointly, or by FTB. *Rev. & Tax. Code § 19443*

[4] FTB's Burden of Producing Reasonable and Probative information Concerning Amount Assessed

For appeals filed under *Rev. & Tax. Code § 19045* (deficiency assessments) or 19324 (s), FTB has burden of producing reasonable and probative information, in addition to information described in *Rev. & Tax. Code § 21024(a)*, concerning amount assessed if taxpayer complies with specified conditions. *Rev. & Tax. Code § 21024*

[5] Investigation and Surveillance

Investigation and surveillance for purpose not related to tax administration is prohibited; exceptions. *Rev. & Tax. Code §§ 7092, 21014*

[6] Notice and Release of Tax Liens and Tax Levys

Circumstances requiring release of levy. *Rev. & Tax. Code §§ 7094(a), (b), (d), 21016(a), (c)*

Notice and adjustment of levy exemptions under Code Civ. Proc. § 703.010 et seq. *Rev. & Tax. Code §§ 7094(b), 7095*, 21016(b), *21017*

Reimbursement of bank and third-party charges as result of erroneous tax levy. *Rev. & Tax. Code §§ 7096, 21018*

Preliminary notice of tax liens. *Rev. & Tax. Code §§ 7097(a), (b), 21019(a), (c), (d), (e), (f)*

FTB notice of filing and recording of lien and independent departmental administrative review. *Rev. & Tax. Code § 19225*

Request for release of lien by owner who is not person whose unsatisfied liability gave rise to lien. *Rev. & Tax. Code § 19226*

FTB notice before levy and independent departmental administrative review. *Rev. & Tax. Code § 21015.5*

Release of tax lien filed in error. *Rev. & Tax. Code § 21019(c), (d), (e), (f)*

FTB as not permitted to file or record lien if taxpayer demonstrates by substantial evidence that filing or recording of lien would be in error. *Rev. & Tax. Code § 21019(b)*

[7] Notice of Suspension or Revocation

Preliminary notice of revocation or suspension of permit or of suspension of taxpayer under *Rev. & Tax. Code § 6070* (failure to comply with sales tax provisions, rules, and regulations), *6072* (not actively conducting business as a seller of tangible personal property), *23301* (failure to pay bank and corporation taxes, penalties, interest), *23301.5* (failure to file bank and corporation tax return), or *23775* (failure of exempt corporation to file required returns or statements, or to pay amounts due). *Rev. & Tax. Code §§ 7098, 21020, 23302(b)*

[8] Protest Hearing Procedures

Protest hearings are required to be held at reasonable time and convenient place; recording of hearing as permitted only if prior notice to taxpayer and taxpayer entitled to receive copy of recording; and taxpayer as required to be informed of right to have attorney, accountant, or other designated agent present. *Rev. & Tax. Code §§ 7090, 21011*

[9] Reimbursement of Expenses Relating to SBE Hearing

Taxpayer is entitled to reimbursement of reasonable fees and expenses relating to hearing before SBE if SBE in its sole discretion finds the action taken by FTB staff was unreasonable. *Rev. & Tax. Code § 7091*

[10] Reimbursement of Expenses Related to Appeal Before SBE

Taxpayer entitled to reimbursement of reasonable fees and expenses relating to appeal before SBE if SBE in its sole discretion finds that action taken by FTB staff was unreasonable. *Rev. & Tax. Code § 21013*

[11] Relief Based on Reliance on Written FTB Advice

Availability of and procedure for obtaining relief from tax, interest, additions to tax, and penalties based on taxpayer's reasonable reliance on written advice of FTB. *Rev. & Tax. Code § 21012*

[12] Settlement of Minor Tax Disputes

SBE is permitted to settle matters involving disputed tax liability within amount set by statute, on approval of State Board of Control. *Rev. & Tax. Code § 7093*

[13] Taxpayers' Rights Advocate

Taxpayers' Rights Advocate within SBE and FTB is responsible for coordinating or facilitating resolution of taxpayer complaints and problems, and is required to give priority to reviewing and taking prompt action, including staying actions, if taxpayers have suffered or will suffer irreparable loss as the result of SBE or FTB action. *Rev. & Tax. Code §§ 7083, 21004*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsClaims By & AgainstTax LawState & Local TaxesAdministration & ProceedingsAudits & InvestigationsTax LawState & Local TaxesAdministration & ProceedingsSettlementsTax LawState & Local TaxesAdministration & ProceedingsTax LiensTax LawState & Local TaxesAdministration & ProceedingsTaxpayer Protests

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D. TAXPAYERS' BILL OF RIGHTS

47-540 California Forms of Pleading and Practice--Annotated §§ 540.492-540.509

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

[Reserved]

§§ 540.492[Reserved]

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A. PROPERTY TAXES AND ASSESSMENTS

47-540 California Forms of Pleading and Practice--Annotated § 540.510

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.510 Claim for Refund of Illegally Collected Taxes Filed With Board of Supervisors [Rev. & Tax. Code §§ 5096(b), 5097]

[1] FORM Claim for Refund of Illegally Collected Taxes Filed With Board of Supervisors [Rev. & Tax. Code §§ 5096(b), 5097]

TO THE BOARD OF SUPERVISORS, [CITY AND] COUNTY OF _____, CALIFORNIA:
CLAIM FOR REFUND OF REAL PROPERTY TAXES

Claimant alleges:

[*EITHER*]

1. I am the owner of the following described real property situated in _____ County, California:_____ [*give legal description or otherwise describe*].

[*OR*]

1. I am the duly appointed_____ [guardian *or* conservator *or* executor *or* administrator of the estate] of_____ [*name*], who [is and] was at all times herein mentioned the owner of the following described real property situated in _____ County, California:_____ [*give legal description or otherwise describe*].

[*CONTINUE*]

[2. On or about_____ [*date*], I(, on behalf of the owner,) filed a _____ (declaration *or* affidavit) of exemption for the above-described property with, and in the form provided by, the Office of the Assessor of _____ County, California, as required by Section _____ of the Revenue and Taxation Code. A copy of the _____ (declaration *or* affidavit) is attached as Exhibit A and incorporated by reference.]

3. On or about_____ [*date*],_____ [*name*], Assessor of _____County, assessed taxes against_____ [me *or* the owner] on the above-described property in the amount of $_____ for the fiscal year _____. The assessment is evidenced by a tax bill that_____ [I *or* the owner] received in the U.S. mail from the office of the assessor. A copy of the bill is attached as Exhibit B and incorporated by reference.

4._____ [I *or* The owner] paid the taxes in full by check(s) dated _____ [and _____] in the amount(s) of $_____ [and $_____]._____ [A copy *or* Copies] of the cancelled check(s)_____[is *or* are] attached as Exhibit C and incorporated by reference.

5. I hereby claim a refund of real property taxes levied against the above-described property for the fiscal year ending_____ [*date*], _____ [in full *or* in the amount of $_____] on the ground that _____ [*describe factual and legal bases for claim of refund of assessment, e.g.,* the above-described real property is, and at all times herein mentioned was held and used exclusively by _____ (me *or* the owner) as a cemetery for the burial and other permanent deposit of human dead and as such is exempt from taxation under the provisions of *Article XIII, Section 3, subdivision (g) of the Constitution* of the State of California and of *Section 204 of the Revenue and Taxation Code*.]

6. No refund of the taxes, or any part thereof, has previously been made.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature of claimant*]

CAUTION:

Before using this form counsel should consult the clerk of the board of supervisors in the county in which the property is located. Many counties have printed refund claim forms that must be used. This form may be used if the county does not provide refund claim forms.

[2] Use of Form

This form is for use by a taxpayer, by the executor or administrator of the taxpayer's estate, or by the taxpayer's conservator or guardian, to claim a refund of real property taxes from the board of supervisors of the county in which the real property is situated [*Prob. Code § 1490*; *Rev. & Tax. Code § 5097(a)(1)*]. Optional Paragraph 2 should be used if one of the grounds for claiming a refund is that the property is exempt under a provision that requires the filing of declaration or affidavit or exemption [*see, e.g., Rev. & Tax. Code § 254* (church)]. Illegality of an assessment due to the property's qualifying for an exemption is one of the seven possible grounds for claiming a refund and is illustrated by the factual example in Paragraph 5 of the form [*see Rev. & Tax. Code § 5096(c)*]. For further discussion of the possible grounds for claiming a refund, see the Introduction, Subpart C, *§ 540.71[3]*.

[3] Other Refunds Available

A county tax collector or county auditor can refund taxes without an order of the board of supervisors [*see Rev. & Tax. Code § 5097.2*; *see also § 540.511*]. A county board of supervisors has authority to order a refund of city or revenue district taxes collected by county officers [*Rev. & Tax. Code §§ 5099, 5101*]. Although no statute authorizes a claim for refund made to a city's governing body, the statute authorizing a suit for refund refers to denial of a refund by a city council [*see Rev. & Tax. Code §§ 5096, 5140*].

[4] Application for Reduction of Assessment

If a claim for refund involves an issue of valuation (improper assessment), the taxpayer must have sought a reduction of the assessment prior to bringing a suit for a refund [*Stenocord Corp. v. City etc. of San Francisco (1970) 2 Cal. 3d 984, 988, 88 Cal. Rptr. 166, 471 P.2d 966 , superseded by statute as stated in 47 Cal. 4th 1298* ; *see § 540.70[1]*]. An application for reduction of assessment filed under *Rev. & Tax. Code § 1603* in which the taxpayer states that the application is intended to be a claim for refund is a sufficient claim for refund [*Rev. & Tax. Code § 5097(b)*].

[5] Requirements of Claim

A refund claim must be in writing, specify whether all or only part of the assessment is being contested, state the grounds of the claim, and be verified [*Rev. & Tax. Code §§ 5097, 5097.02*; *see Prob. Code § 1490*]. The claim should list all possible grounds because a later suit for refund may be maintained only on the grounds set forth in the claim [*Rev. & Tax. Code § 5142(a)*; *see § 540.90[5]*].

[6] Statute of Limitations

With certain exceptions, a refund claim against a board of supervisors must be filed within four years after the date of the payment sought to be refunded [*Rev. & Tax. Code §§ 5096, 5097(a)(2)*; *see § 540.71[6]*]. Some cities may have adopted shorter claim periods, however [*see Pasadena Hotel Development Venture v. City of Pasadena (1981) 119 Cal. App. 3d 412, 414-415, 174 Cal. Rptr. 52]* .

[7] State Statutes

Authorization of and grounds for presentation to board of supervisors of claim for refund of property taxes. *Rev. & Tax. Code § 5096*

Contents and formalities of refund claims. *Rev. & Tax. Code §§ 5097*, 5079.02

Suit for refund is maintainable only on grounds specified in claim for refund. *Rev. & Tax. Code § 5142(a)*

Recovery of interest, and applicable interest rate, on refund exceeding $10. *Rev. & Tax. Code § 5151*

[8] Decisions

Payment of contested taxes and claim for refund were required before court could consider whether *Rev. & Tax. Code §§ 2191.3, 2191.4* allowed recordation ofcertificates of delinquency of personal property taxes more than 10 years after tax was assessed and extension of original lien by second recording more than 10 years after original certificate was recorded. *McKendry v. County of Kern (1986) 180 Cal. App. 3d 1165, 1168-1170, 226 Cal. Rptr. 45*

Claim for refund reciting facts of discovery of original overassessment in course of new audit and appraisal regarding, and hearing on reduction of, escape assessment sufficiently set forth basis of claim even though *Rev. & Tax. Code § 533*

was never mentioned therein as statutory ground for refund; taxpayer was entitled to refund without application for reduction of original assessment. *Focus Cable of Oakland, Inc. v. County of Alameda (1985) 173 Cal. App. 3d 519, 526-528, 219 Cal. Rptr. 95*

City ordinance requiring claims for tax refunds to be filed within one year after accrual of cause of action is proper and bars action for refund of personal property taxes if claim is not timely filed. *Pasadena Hotel Development Venture v. City of Pasadena (1981) 119 Cal. App. 3d 412, 414-415, 174 Cal. Rptr. 52*

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PART IV. FORMS
A. PROPERTY TAXES AND ASSESSMENTS

47-540 California Forms of Pleading and Practice--Annotated § 540.511

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.511 Claim for Refund of Taxes Filed With County Auditor [Rev. & Tax. Code §§ 5097, 5097.2]

[1] FORM Claim for Refund of Taxes Filed With County Auditor [Rev. & Tax. Code §§ 5097, 5097.2]

TO THE COUNTY AUDITOR, [CITY AND] COUNTY OF _____, CALIFORNIA:
CLAIM FOR REFUND OF REAL PROPERTY TAXES

Claimant alleges:

[*EITHER*]

1. I am the owner of the following described real property situated in _____ County, California:_____ [*give legal description or otherwise describe*].

[*OR*]

1. I am the duly appointed_____ [guardian *or* conservator *or* executor *or* administrator of the estate] of_____ [*name*], who [is and] was at all times herein mentioned the owner of the following described real property situated in _____County, California:_____ [*give description of property*].

[*CONTINUE*]

2. On or about_____ [*date*],_____ [*name*], Assessor of _____County, assessed taxes against_____ [me *or* the owner] on the above-described property in the amount of $_____ for the fiscal year _____. The assessment is evidenced by a tax bill that_____ [I *or* the owner] received in the U.S. mail from the office of the assessor. A copy of the bill is attached as Exhibit A and incorporated by reference.

3. _____ [I *or* The owner] paid the taxes in full by check(s) dated _____ [and _____] in the amount(s) of $_____ [and $_____]._____ [A copy *or* Copies] of the cancelled check(s)_____ [is *or* are] attached as Exhibit B and incorporated by reference.

4. I hereby claim a refund of real property taxes levied against the above-described property for the fiscal year ending_____ [*date*], _____ [in full *or* in the amount of $_____] on the ground(s) that_____ [the taxes were paid more than once *and/or* the amount paid exceeds the amount due on the property as shown on the roll *and/or* the amount paid exceeds the amount due on the property as the result of correction to the roll or cancellations ordered by the board of supervisors after the taxes were paid *and/or* the amount paid exceeds the amount due on the property as the result of a reduction attributable to a hearing before an assessment appeals board orassessment hearing officer *and/or* the amount claimed as a refund is less than $10.00], as follows:_____[*state facts that demonstrate each ground being asserted for refund*].

5. No refund of the taxes, or any part thereof, has previously been made.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature of claimant*]

CAUTION:

Before using this form counsel should consult the county auditor or county tax collector in the county in which the property is located. Many counties have printed refund claim forms that must be used. This form may be used when the county does not provide refund claim forms.

[2] Use of Form

This form is for use by a taxpayer, by the executor or administrator of the taxpayer's estate, or by the taxpayer's conservator or guardian, to claim a refund of property taxes from the county auditor or county tax collector in the county in which the real property is situated. The grounds alleged in Paragraph 4 are the only grounds on which a county auditor can refund taxes without an order of the board of supervisors [*Rev. & Tax. Code § 5097.2*]. *see § 540.510* for a form of claim for use if a refund is sought from the board of supervisors.

[3] Cross References

See also Comments and References to *§ 540.510*.

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PART IV. FORMS
A. PROPERTY TAXES AND ASSESSMENTS

47-540 California Forms of Pleading and Practice--Annotated § 540.512

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.512 Complaint for Refund of Property Taxes [Rev. & Tax. Code § 5140]

[1] FORM Complaint for Refund of Property Taxes [Rev. & Tax. Code § 5140]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ [Sacramento *or* Los Angeles *or* San Francisco *or* San Diego]

_____ [*name*],	)	
Plaintiff,	)	
	)	
vs.	)	
	)	NO. _____
[CITY AND] COUNTY OF	)	COMPLAINT FOR REFUND OF
_____, [STATE	)	_____ [PROPERTY]
BOARD OF	)	TAXES
EQUALIZATION],	)	
Defendant.	)	
	)	
	)	

Plaintiff alleges:

1. Plaintiff is and at all times herein mentioned was a citizen of the state of California [*or allege other capacity, e.g.,* a nonprofit corporation duly organized and existing under the laws of California for the sole purpose of providing emergency and transitional shelter to women and children who are the victims of domestic violence].

2. Defendant_____ [City *and/or* County *and/or relevant taxing agencies*] is and at all times mentioned herein has been a _____ [*specify, e.g.,* political subdivision *or* municipal corporation existing under the laws *or* municipal corporation duly chartered under the _____ (statutes *or* constitution)] of the State of California.

[3. Defendant State Board of Equalization is, and at all times herein mentioned was, an agency of the State of California charged by law with the duty of determining the eligibility of applicants for welfare exemptions.]

4. The property herein described is, and at all times herein mentioned was, irrevocably dedicated to and exclusively used for charitable purposes as follows: _____ (*describe charitable purpose, e.g.,* to provide emergency and transitional shelter to women and children who are the victims of domestic violence). Plaintiff's duly adopted articles of incorporation and bylaws provide for plaintiff's charitable purposes and provide that plaintiff's property is irrevocably dedicated only to those purposes. Copies of the articles and bylaws are attached as Exhibits A and B, respectively, and incorporated by reference.]

5. On or about_____ [*date*], plaintiff timely filed with_____[*name*], Assessor of defendant county, an annual affidavit, a claim for the welfare exemption, [and] a valid organizational clearance certificate, as required by *Sections 254, 254.5, 254.6,* and *259.5 of the Revenue and Taxation Code* (*add if applicable:*, and financial statements as requested in writing by the assessor under *Section 254.5(a) of the Revenue and Taxation Code*). Copies of the annual affidavit, the claim for exemption, and the valid organizational clearance certificate are attached as Exhibits C, D, and E respectively, and incorporated by reference. (*Add if applicable:* Copies of all financial statements requested in writing by the assessor are attached as Exhibit F and incorporated by reference).]

6. On or about_____ [*date*],_____ [*name*], Assessor of defendant county, assessed taxes to plaintiff on the following described real property situated in defendant county:_____ [*give legal description or otherwise describe*]. Taxes were assessed in the amount of $_____ for the tax year(s) _____. The assessment is evidenced by a tax bill, a copy of which is attached as Exhibit G, and incorporated by reference. In making the assessment on the described real property, the assessor _____ [*state grounds on which claim for refund is based, i.e., one of the grounds enumerated in Rev. & Tax. Code § 5096, but limited to those grounds previously stated in the claim for refund, e.g., Rev. & Tax. Code § 5096* assessed the described real property at a full cash value of $_____. The equalized value of the property as determined pursuant to *Section 1610.8 of the Revenue and Taxation Code* by the county board of equalization is $_____]. The_____ [*describe erroneous act, e.g.,* overvaluation of the property] resulted in an_____ [overassessment *or* overpayment] of taxes in the sum of $_____.

7. On or about_____ [*date*], plaintiff, pursuant to *Section 1603 of the Revenue and Taxation Code,* timely filed a verified application for a reduction in the assessment with the_____ [board of supervisors *or* assessment appeals board]. A copy of the verified application is attached as Exhibit H and incorporated by reference. The application was denied on or about_____ [*date*]. A copy of the findings of fact made by the board in denying the application is attached as Exhibit I and incorporated by reference.]

8. On or about_____ [*date*], plaintiff paid the taxes in full by check(s) dated_____ [*date*][, and_____ [*date*],] in the amount(s) of $ _____ [and $_____]._____[A copy *or* Copies] of the cancelled check(s)_____ [is *or* are] attached as Exhibit(s) J and K and incorporated by reference.

9. Thereafter, on or about_____ [*date*], which was within_____ [*describe applicable limitation period, e.g.,* four years after making the payment sought to be refunded], plaintiff, pursuant to *Section 5097 of the Revenue and Taxation Code,* timely filed with the_____ [board of supervisors *or* county tax

collector *or* county auditor] a written and verified claim for refund of $_____, which represents the_____ [overassessment *or* overpayment] of property taxes resulting from the_____ [*describe error, e.g.*, overassessment]. A copy of the claim for refund is attached as Exhibit L and incorporated by reference. The claim for refund _____ [was denied on or about _____ (*date*) *or* has not been acted on by the _____ (board of supervisors *or* county auditor *or* county tax collector) for six months since its filing and plaintiff elects to consider the inaction as a rejection of the claim].

9. Plaintiff stated in his/her application for reduction of assessment, Exhibit _____, above, that the application was intended as a claim for refund.

10. No refund of the taxes, or any part thereof, has previously been made to, or applied for the benefit of, plaintiff.

WHEREFORE, plaintiff prays for judgment against defendant county as follows:

1. For the sum of $_____, or such larger amount as provided by law;

2. For interest as provided by law;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[2] Use of Form

This complaint is for use by the taxpayer, the taxpayer's guardian or conservator, or the executor or administrator of the taxpayer's estate,against a county, city, or other relevant taxing agency to recover a refund of real property taxes under *Rev. & Tax. Code § 5140*. The grounds for refund that may be stated in this complaint are limited to the grounds stated in the claim for refund. In addition to stating the grounds for refund, the complaint must allege that a claim for refund was filed, and that taxes have been paid in full [*Rev. & Tax. Code § 5142*; *see Rev. & Tax. Code § 5096*]. If an error in valuation is the basis for the refund, the complaint must also allege that an application for reduction of assessment was filed and denied [*Stenocord Corp. v. City etc. of San Francisco (1970) 2 Cal. 3d 984, 988, 88 Cal. Rptr. 166, 471 P.2d 966 , superseded by statute as stated in 47 Cal. 4th 1298* ; for further discussion, *see § 540.70[1]*]. If the claim for refund challenged the validity of only a portionof the assessment, only that portion of the assessment may be the subject of the suit for refund [*Rev. & Tax. Code § 5143*].

The county is the proper defendant for recovery of city taxes collected by that county [*Rev. & Tax. Code § 5146*]. Refunds of assessments of various improvement or service districts are governed by a variety of specific statutory provisions. Counsel should consult the relevant governing statutes to determine which entities must be named as defendants [*see, e.g., Gov. Code § 53978*; *Health & Safety Code §§ 13899, 13911-13915* (fire districts)]. If the State Board of Equalization (SBE) reviewed the assessment pursuant to *Cal. Const., art. XIII, § 11*, the SBE must be joined in the action. The SBE must also be joined if the refund claimed is based on the denial by the SBE of the welfare exemption of *Rev. & Tax. Code § 254.5* (optional Paragraph 3) [*Rev. & Tax. Code § 5146*].

If an exemption is the ground for the refund, allegations should be added setting forth the facts establishing entitlement to the exemption (optional Paragraph 4). If the exemption is one that must be applied for, the complaint must allege timely submission of the claim for exemption and any documents that must accompany the claim, including a valid organizational clearance certificate (optional Paragraph 5) [*see, e.g., Rev. & Tax. Code §§ 254*, 254.4, *254.5, 254.6, 259.5*; *see § 540.52[2], [3]*].

[3] Allegations

Besides the allegations of capacity (Paragraphs 1-3), the complaint alleges all of the following:

- The error claimed and the amount of overpayment caused by the error (Paragraph 6) [*see Rev. & Tax. Code §§ 5096, 5140, 5142*].

- If an error in valuation is the basis of the refund claim, the filing of an application for reduction of assessment and denial of that application (optional Paragraph 7) [*Rev. & Tax. Code § 5142*; *Stenocord Corp.v. City etc. of San Francisco (1970) 2 Cal. 3d 984, 88 Cal. Rptr. 166, 471 P.2d 966] , superseded by statute as stated in 47 Cal. 4th 1298* .

- The payment of the taxes in question (Paragraph 8) [*see Rev. & Tax. Code § 5096*].

- The filing of a claim for refund and the denial or rejection through inaction of the claim (first alternative Paragraph 9) [*Rev. & Tax. Code § 5141(a), (b)*] or the plaintiff's application for reduction of assessment constituting a claim for refund (second alternative Paragraph 9).

- The fact that no refund has been paid to or applied for the benefit of plaintiff (Paragraph 10).

[4] Verification

A public entity need not verify its answer even though the complaint is verified [*see Code Civ. Proc. § 446*]. However, the verification of a complaint against a public entity in superior court does preclude a general denial [*see Code Civ. Proc. § 431.30(d)*].

[5] Statute of Limitations

A suit for refund, other than one brought under *Rev. & Tax. Code § 5148* (state-assessed property), must be commenced within six months after the denial, in whole or in part, of a claim for refund [*Rev. & Tax. Code § 5141(a)*]. If no notice of action on a claim for refund, other than an application for reduction of assessment intended to be a claim, is mailed within six months after the filing of the claim, the taxpayer may consider the claim rejected and bring a suit for refund [*Rev. & Tax. Code § 5141(b)*]. If the taxpayer has filed an application for reduction of assessment intended as a claim for refund, the claim is deemed denied on the later of either (1) the date that the final installment of taxes on the assessment becomes delinquent or (2) the date the final determination is made on the application [*Rev. & Tax. Code § 5141(c)*].

[6] Jurisdiction, Venue, and Service

An action for refund is brought in the superior court (but not in the small claims division) in the county or city and county that is the defendant [*Code Civ. Proc. § 394(a)*; *Rev. & Tax. Code § 5140*]. If a county is named as a defendant because it collected the taxes in question for a city, the county is the defendant to be served. When the county receives the summons and complaint, it must notify the city within 30 days. The taxpayer must pay the county a fee to cover the county's cost of notifying the city. The city may intervene in the action or not [*Rev. & Tax. Code § 5146*].

[7] Mandatory Dismissal for Failure to Serve Summons Within One Year

Summons in an action for refund of property taxes must be served and returned within one year after the date of the filing of the complaint. Otherwise, the action must be dismissed on the court's own motion or on the motion of the defendant. The time for service and return of summons may be extended by the filing of a written stipulation [*Rev. & Tax. Code § 5147*]. The county's right to dismissal is waived if the county performs an act constituting a general appearance or answers within the one-year period or if, after the one-year period has passed, the county answers and participates in discovery without raising the objection [*Southern Pac. Transportation Co. v. State Bd. of Equalization (1985) 175 Cal. App. 3d 438, 441-444, 221 Cal. Rptr. 12* ; *Synanon Foundation, Inc. v. County of Marin (1980) 133 Cal. App. 3d 607, 614-615,184 Cal. Rptr. 129* ; *but see Ford Motor Co. v. County of Tulare (1983) 145 Cal. App. 3d 688, 692-694, 193 Cal. Rptr. 511]* .

[8] Interest

A taxpayer generally is entitled to interest on taxes recovered in a suit forrefund, and the interest accrued is included in the judgment, if the amount of interest is at least $10. Interest is generally paid at the greater of 3 percent or the county pool apportioned rate [*Rev. & Tax. Code § 5151(a)*; *see Rev. & Tax. Code § 5153* (differing method of interest computation if auditor impounds revenue)]. Interest accrues from the later of either (1) the date the claim for refund is filed or (2) the date the taxes or the installments in question are paid [*Rev. & Tax. Code § 5151(c)(1)*]. Interest is paid through the date that is 30 days before the date of mailing or personal delivery of the refund payment [*Rev. & Tax. Code § 5151(d)*].

[9] Attorney's Fees

In addition to other relief granted, a taxpayer who prevails in a refund suit in which the board's decision was the result of arbitrary and capricious action or conduct may collect attorney's fees of up to $7,500 under the statutory provision granting costs in civil actions resulting from administrative proceedings. This relief is available only if the taxpayer is personally obligated to pay the attorney's fees [*Gov. Code § 800(a)*]. Arbitrary and capricious action is not defined and depends on the facts in each case [*see Reeves v. City of Burbank (1979) 94 Cal. App. 3d 770, 776, 156 Cal. Rptr. 667* (city ordinance itself "arbitrary and capricious")].

[10] Cross References

For discussion and allegations of attorney's fees under *Gov Code § 800*, see *Ch. 474C, Procedures in Reviewing Agency Decisions, § 474C.13[6]*

[11] State Statutes

Court finding assessment void in whole or in part is empowered to render judgment for taxpayer for amount of taxes paid on void portion of assessment; portion of assessment not found void carries interest, penalties, and costs if paid after delinquency *Rev. & Tax. Code § 5144*

Owner of property that entered into installment redemption plan to pay delinquent taxes is entitled to commence refund suit, without paying all taxes due, when claim for first installment paid under plan of redemption is rejected. *Rev. & Tax. Code § 5145*

Refund suit is entitled to scheduling priority. *Rev. & Tax. Code § 5149*

[12] Decisions

[a] Dismissal for Failure to Return Summons Within One Year

Rev. & Tax. Code § 5147 does not violate of equal protection or due process, does not deprive refund-seeker of day in court, and bears reasonable relationship to legitimate state interest of requiring persons seeking refunds to proceed expeditiously. *Emberton v. County of San Diego (1986) 186 Cal. App. 3d 268, 270-272, 230 Cal. Rptr. 572*

Dismissal held proper; county's filing of motion to transfer almost simultaneously with filing of answer dos not lull plaintiff into failing to comply with return requirement and did not provide basis for estoppel. *Emberton v. County of San Diego (1986) 186 Cal. App. 3d 268, 272-273, 230 Cal. Rptr. 572*

Two-month delay between expiration of year and county's filing of motion for dismissal under *Rev. & Tax. Code § 5147* was not unreasonable and was not reason to deny dismissal. *Emberton v. County of San Diego (1986) 186 Cal. App. 3d 268, 273, 230 Cal. Rptr. 572*

[b] Interest and Attorney's Fees

If attorney's fees can be awarded under both *Rev. & Tax. Code § 5152* and *Gov. Code § 800*, award should be made under *Rev. & Tax. Code § 5152*. *Prudential Ins. Co. v. City and County of San Francisco (1987) 191 Cal. App. 3d 1142, 1160-1161, 236 Cal. Rptr. 869*

"Void" as used in *Rev. & Tax. Code § 5152* has ordinary meaning of invalid or erroneous; judicial finding of voidness is not required to award attorney's fees for application of improper valuation method. *Prudential Ins. Co. v. City and County of San Francisco (1987) 191 Cal. App. 3d 1142, 1157-1159, 236 Cal. Rptr. 869*

Failure to set reduction of assessment applications for hearing is possible basis for award of attorney's fees. *Midstate Theatres Inc. v. Board of Supervisors (1975) 46 Cal. App. 3d 204, 212, 119 Cal. Rptr. 894*

Assessment unsubstantiated by any evidence was so arbitrary and capricious as to warrant award of attorney's fees. *Madonna v. County of San Luis Obispo (1974) 39 Cal. App. 3d 57, 62, 113 Cal. Rptr. 916*

[c] Payment Required to Contest Tax

In addition to exhausting administrative remedies, taxpayer is required to pay contested property taxes in full before initiating suit for refund. *Sherman v. Quinn (1948) 31 Cal. 2d 661, 665, 192 P.2d 17*

Payment requirement is unsatisfied by payment of only one installment. *Faix, Ltd. v. County of Los Angeles (1976) 54 Cal. App. 3d 992, 1001, 127 Cal. Rptr. 182*

Delinquent payment of taxes is no bar to refund suit. *McHugh v. County of Santa Cruz (1973) 33 Cal. App. 3d 533, 540, 109 Cal. Rptr. 149*

[d] Scope of Judicial Review

Challenge to valuation method is question of law not restricting trial court by "substantial evidence" standard from reviewing board's decision; challenge to method of valuation is reviewable for arbitrariness, abuse of discretion, or failure to follow standards prescribed by law; new evidence is admissible in superior court to establish deficiencies in board's determination. *Bret Harte Inn, Inc. v. San Francisco (1976) 16 Cal. 3d 14, 22, 127 Cal. Rptr. 154, 544 P.2d*

1354 ; *De Luz Homes, Inc. v. County of San Diego (1955) 45 Cal. 2d 546,*

Court of appeal is not authorized to determine amount of tax due, but, after determining proper method to be used for valuation, must remand to board of assessment appeals for determination of fair market value. *Prudential Ins. Co. v. City and County of San Francisco (1987) 191 Cal. App. 3d 1142, 1161-1162, 236 Cal. Rptr. 869*

Scope of review in superior court is limited to determining whether substantial evidence supports assessment; if it does not, taxpayer is not entitled to trial de novo in superior court but to remand to board of assessment appeals for consideration of additional evidence. *Kaiser Center, Inc. v. County of Alameda (1987) 189 Cal. App. 3d 978, 982-984, 234 Cal. Rptr. 603*

Taxpayer is successful in challenging board's valuation of property if no evidence supports board's valuation. *Madonna v. County of San Luis Obispo (1974) 39 Cal. App. 3d 57, 61, 113 Cal. Rptr. 916*

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 540 TAXES AND ASSESSMENTS
PART IV. FORMS
A. PROPERTY TAXES AND ASSESSMENTS

47-540 California Forms of Pleading and Practice--Annotated §§ 540.513-540.529

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

[Reserved]

§§ 540.513[Reserved]

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 540 TAXES AND ASSESSMENTS
PART IV. FORMS
B. SALES AND USE TAXES

47-540 California Forms of Pleading and Practice--Annotated § 540.530

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.530 Petition to State Board of Equalization for Redetermination of Sales or Use Tax [Rev. & Tax. Code §§ 6538, 6561, 6561.5]

[1] FORM Petition to State Board of Equalization for Redetermination of Sales or Use Tax [Rev. & Tax. Code §§ 6538, 6561, 6561.5]
TO: Petitions Section, MIC:38

STATE BOARD OF EQUALIZATION
P.O. Box 942879
Sacramento, CA 94279-0038
Attention: Petition Unit.
PETITION FOR REDETERMINATION OF _____ [SALES *and/or* USE] TAX

Re: Determination_____ [*insert any numbers or symbols from SBE's notice of determination*] dated _____

Regarding liability of
_____
_____
_____
[*taxpayer name and address*]

Petitioner alleges:

1. On_____ [*date*], petitioner was served with a notice of deficiency of_____ [sales *and/or* use] taxes determined against him/her/it pursuant to *Section 6481 of the Revenue and Taxation Code*.

1. On_____ [*date*], petitioner was served with a notice of estimate, determination, and penalty

resulting from nonpayment of California_____ [sales *and/or* use] taxes, determined against him/her/it pursuant to *Section 6511 of the Revenue and Taxation Code*.

1. Petitioner is a person directly interested in the tax determination made against_____ [*name of person against whom determination was made*] on_____ [*date*], pursuant to Section_____ [*6481 or 6511*] of the Revenue and Taxation Code in that _____ [*state reason petitioner is directly interested, e.g.*, petitioner is a successor in interest to the business formerly owned by _____ (*name of person against whom determination was made*) and therefore is liable for outstanding taxesincurred during the operation of the business by its predecessor during the period covered by the determination].

2. The determination was, and is, erroneous in that _____ [*set forth facts and legal theory in detail, e.g.*, the good faith acceptance of a resalecertificate from the purchaser relieves the seller of liability for sales tax under *Section 6092 of the Revenue and Taxation Code*. At the time of the sale of the property that is the subject of the determination, _____ (Petitioner *or* Petitioner's predecessor) in good faith accepted a valid resale certificate from _____ (*name of purchaser*), who was then engaged in the business of selling tangible personal property and held a valid state seller's permit. _____ (Petitioner *or* Petitioner's predecessor) has retained this certificate for inspection by the State Board of Equalization].

3. Petitioner requests that an appeals conference and a hearing on this petition be scheduled and that the determination be _____ [annulled *or* revised as follows: _____].

[4. Petitioner tenders herewith _____ (*describe security or bond, e.g.*, the bond of _____ (*name of surety*) in the penal sum of $_____ in favor of the State of California) to stay collection of amounts determined by the State Board of Equalization to be in jeopardy during the pendency of this redetermination.]

Dated: _____.
_____ [*signature*]

[2] Use of Form

This form of petition is for use by a person against whom a deficiency determination has been made, or by a person directly interested in a deficiency determination made against another person, to initiate a redetermination [*Rev. & Tax. Code §§ 6538, 6561*]. Although no statute explicitly requires a petition for redetermination as a prerequisite to suit, case law considers the filing of a petition for redetermination one of the administrative remedies that taxpayers must exhaust before filing suit to contest an assessment or seek a refund [*People v. West Publishing Co. (1950) 35 Cal. 2d 80, 87-88, 216 P.2d 441]* .

It should be noted that a taxpayer that files a petition for redetermination risks a second audit. The SBE has the power to conduct a second examination after the petition is filed, and there is no limitation on the amount that the SBE can assert as a deficiency [*Rev. & Tax. Code §§ 6481, 6563*; *Maganini v. Quinn (1950) 99 Cal. App. 2d 1, 5-7, 221 P.2d 241* ; *see § 540.530[7]*].

[3] Allegations

The petition must be in writing and must set forth the specific grounds on which it relies. The petition may be amended to set forth additionalgrounds at any time before the SBE issues its order or decision on the petition [*Rev. & Tax. Code § 6561.5*; *see also* Appeals Procedures, Sales and Use Taxes and Special Taxes, SBE Publication 17, p. 2-3 (July 1999) (petition can be in form of simple letter; it must identify amounts wished to be contested and state specific grounds or reasons why tax or fee not owed; petition should also include tax or fee program account number)].

The form alleges:

- The taxpayer's name and address and the date and any symbols set forth on the notice of determination (caption).

- Either the service of a notice of deficiency determination (first alternative Paragraph 1) or a notice of determination of nonpayment of taxes (second alternative Paragraph 1), or petitioner's standing as a person directly interested (third alternative Paragraph 1) [*Rev. & Tax. Code §§ 6481, 6511, 6561*].

- A statement of the relevant facts and the legal argument showing the determination to be erroneous (Paragraph 2) [*Rev. & Tax. Code § 6561.5*].

- A request for an appeals conference and a hearing (Paragraph 3) [*see Rev. & Tax. Code § 6562* (oral hearing shall be granted if requested in petition)].

- The posting of security, which is an optional allegation that is necessary if the determination involves jeopardy assessments (Paragraph 4) [*Rev. & Tax. Code § 6538*].

[4] Verification

The petition need not be verified, but should be signed by the petitioner or the petitioner's account or attorney [*see 18 Cal. Code Reg. § 5212(a)(4)* (signed by petitioner or petitioner's "authorized representative")]. If the person representing the taxpayer is neither an attorney nor a certified public accountant, the SBE in practice requires written proof of authority. Apparently, the proof may be a formal power of attorney or a letter from the petitioner confirming the representative's authority.

[5] Service of Petition

The SBE encourages the use of electronic means (facsimile, e-mail, etc.) for the filing of petitions and related documents. Instructions are provided on the SBE website at http://www.boe.ca.gov [*18 Cal. Code Reg. § 5216(a)*]. The petition may instead be hand-delivered to the SBE headquarters in Sacramento or mailed to Petitions Section, MIC:38, State Board of Equalization, P.O. Box 942879, Sacramento, California 94279-0038 [*18 Cal. Code Reg. § 5216(b)(1)*]. The use of certified mail with a return receipt requested, date stamped at the post office, is recommended.

[6] Statute of Limitations

A petition for redetermination that does not involve a jeopardy assessment mustbe filed within 30 days after service of the notice of determination [*Rev. & Tax. Code § 6561*]. A petition for redetermination of a deficiency determination concerning payment for cigarette tax stamps or meter register settings, however, must be filed within 10 days, rather than 30 days, after service of the notice of determination and security must be deposited at the time of filing the petition [*Rev. & Tax. Code §§ 30174, 30175*]. In the case of a determination involving a jeopardy assessment (which must be noted on the face of the determination), the petition for redetermination must be filed within 10 days after service of the notice of determination, and, within that 10 days, the petitioner must deposit with the SBE whatever security the SBE deems necessary [*Rev. & Tax. Code § 6538*].

[7] Hearing and Determination

The SBE must consider a timely filed petition and, if requested in the petition, grant an oral hearing on 10 days' notice of the time and place of the hearing. The SBE may continue the hearing from time to time as necessary [*Rev. & Tax. Code § 6562*]. In practice, the SBE generally holds an informal preliminary appeals conference [*see § 540.190[4]*].

The SBE is authorized to increase or decrease the amount of the determination before it becomes final, but the amount may be increased only if the SBE asserts a claim for the increase at or before the hearing [*Rev. & Tax. Code § 6563(a)*; *see § 540.190[5]*]. The SBE must specify the information on which it bases its increase [*Rev. & Tax. Code § 6563(c)*].

The SBE's order on the petition becomes final 30 days after service of notice of the order on the petitioner, at which time the determination becomes due and payable [*Rev. & Tax. Code §§ 6564, 6565*].

[8] State Statutes

Service of notice of deficiency determination. *Rev. & Tax. Code § 6486*

Determination when no return is filed. *Rev. & Tax. Code §§ 6511-6515*

Jeopardy determinations. *Rev. & Tax. Code §§ 6536-6539*

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B. SALES AND USE TAXES

47-540 California Forms of Pleading and Practice--Annotated § 540.531

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.531 Claim for Refund of Sales or Use Taxes [Rev. & Tax. Code §§ 6902, 6904]

[1] FORM Claim for Refund of Sales or Use Taxes [Rev. & Tax. Code §§ 6902, 6904]

To: Refunds Section, MIC:39
State Board of Equalization
P.O. Box 942879
Sacramento, California 94279-0039

CLAIM FOR REFUND

Re: Account No. _____

_____ [*name of person required to file the return*] hereby claims a refund of_____ [sales *and/or* use] taxes and interest [and penalties] thereon, in the total amount of $_____[, which sum represents _____ (partial payments *and/or* involuntary collections) _____ (made *and/or* effected) between _____ (*date within past six months*) and the date of this claim on liability,] for the following:

(1) Overpayment of taxes for the taxable period _____, to_____ [*dates*], in the amount of $_____; [and]

[(2) _____ percent penalty for _____ (*specify applicable penalty, e.g.,* fraud or evasion) in the amount of $_____; (and)]

[(3) Interest on the _____ (overpayment *and/or* penalty) in the amount of $_____.]

The specific grounds on which the claim is founded are as follows: _____ [*specify, e.g.,* The gross receipts from the sale of hot prepared food products sold by caterers to air carriers engaged in interstate or foreign commerce for consumption by passengers of the air carrier are exempt from sales and use taxes under *Revenue and Taxation Code Section 6359.1*. The overpayment referred to above results from the inclusion in gross receipts of $_____ representing sales by claimant of hot prepared food products to _____ (*names*), air carriers engaged in interstate and foreign commerce, for consumption by their passengers].

Date: _____.
_____ [*authorized signature*]

[2] Use of Form

This form is for use by a taxpayer (or a person required to file a return) as a first step in seeking a refund of state and/or local sales or use taxes [*see Rev. & Tax. Code §§ 6902, 6904(a), 7202(b)-(d), 7203(a)*]. A suit for refund of sales and usetax may not be maintained until a claim for refund has been filed and the SBE has either denied the claim or failed to act on it for six months [*Rev. & Tax. Code §§ 6932, 6934*]. The bracketed text in the first paragraph is for use if the tax or a deficiency assessment has been partially paid in installments or by a combination of involuntary collections and installments. The six-month limitation of *Rev. & Tax. Code § 6902(a)* (*see § 540.552[5]*) commences with each partial payment. If the taxpayer waits until all payments are made to file a claim for refund, only payments made during the six months before the filing date may be refunded [*Chahine v. State Bd. of Equalization (1990) 222 Cal. App. 3d 485, 489-490, 272 Cal. Rptr. 56* ; *cf.* *State Bd. of Equalization v. Superior Court (1985) 39 Cal. 3d 633, 638-643, 217 Cal. Rptr. 238, 703 P.2d 1131* (suit for refund as not maintainable on basis of partial payment but only after entire amount is paid)].

The payment of accrued interest on a tax deficiency is not a prerequisite to either an administrative refund claim or a subsequent action for refund of taxes [*see* *Agnew v. State Board of Equalization (1999) 21 Cal. 4th 310, 314-315, 321 n.8, 323-330, 333-334, 87 Cal. Rptr. 2d 423, 981 P.2d 52* (court did not consider whether SBE may require prepayment of interest as precondition to challenge directed only to an interest assessment)]. Presumably a penalty is treated in the same way as interest in this regard and need not be paid before an administrative refund claim or a subsequent action for refund of taxes [*see* *Agnew v. State Board of Equalization (1999) 21 Cal. 4th 310, 323-334, 87 Cal. Rptr. 2d 423, 981 P.2d 52* ; *Chen v. Franchise Tax Board (1998) 75 Cal. App. 4th 1110, 1119-1120, 90 Cal. Rptr. 2d 268]* . In any event, the taxpayer should consider paying any assessed penalty and interest before or at the time of filing a claim for refund to foreclose the possibility of any collection activity being commenced by the SBE to collect them.

This form is not sufficient for a claim filed for or on behalf of a class of taxpayers [*see Rev. & Tax. Code § 6904(b)*].

Many city charters or ordinances make the filing of a claim a prerequisite to suit against the city to recover business taxes on gross receipts [*see* *Cal. Cigarette Concessions v. City of Los Angeles (1960) 53 Cal. 2d 865, 868, 3 Cal. Rptr. 675, 350 P.2d 715]* . If the city or county ordinance makes no provisions for the filing of claims, a claim is nontheless required and is governed by *Gov. Code § 900 et seq.* [*Volkswagen Pacific, Inc. v. City of Los Angeles (1972) 7 Cal. 3d 48, 60-63, 101 Cal. Rptr. 869, 496 P.2d 1237]* . The foregoing form can be adapted for use as a claim against a city.

The SBE has a form of refund claim, but its use is not mandatory [*see Rev. & Tax. Code § 6904*].

[3] Allegations

A refund claim must state the specific grounds on which the claim is founded [*Rev. & Tax. Code § 6904(a)*]. All of the facts and legal arguments on which the taxpayer relies must be carefully presented because a subsequent refund suit is

limited to the grounds presented in the claimfor refund [*see Rev. & Tax. Code § 6933*; *see Swaggart v. Calif. Equalization Bd. (1990) 493 U.S. 378, 110 S. Ct. 688, 107 L. Ed. 2d 796, 814-815* (refusing to determine Commerce and Due Process Clauses issues because not stated in claim); *Chahine v. State Bd. of Equalization (1990) 222 Cal. App. 3d 485, 488, 272 Cal. Rptr. 56* (refusing to consider due process issues not raised in claim); *but see Preston v. State Bd. of Equalization (2001) 25 Cal. 4th 197, 206-207, 105 Cal. Rptr. 2d 407, 19 P.3d 1148* (courts may consider contention that is intertwined with contentions expressly raised in refund claim)]. A statement that the tax was "erroneously and illegally" collected and computed is insufficient [*King v. State Bd. of Equalization (1972) 22 Cal. App. 3d 1006, 1014-1015, 99 Cal. Rptr. 802]* .

[4] Signature

A claim for refund must be signed by the taxpayer or the taxpayer's authorized representative [*18 Cal. Code Reg. § 5232(a)*]. If a corporate or fictitious business name is appropriate, it should be used and followed by an authorized signature.

[5] Statute of Limitations

A claim for refund must be filed with SBE by the latest of the following dates [*Rev. & Tax. Code § 6902(a)*; *see § 540.231*]:

- Three years after the last day of the month following the close of the taxable period for which the overpayment was made;

- Six months after the date that the overpayment was made; or

- If the person required to file the return is seeking recovery of amounts paid pursuant to an SBE determination (including jeopardy determinations), six months from the date the determination became final.

[6] Interest and Penalties

Penalties are discussed in *§ 540.320[1]*. The provisions for interest on refunds are discussed in *§§ 540.170[2], 540.230[3][a]*.

[7] Cross References

For discussion and forms of claims against public entities, other than those provided by the Revenue and Taxation Code, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

[8] State Statutes

Approval of State Board of Control as required before SBE can refund in excess of $50,000. *Rev. & Tax. Code § 6901*

Failure to file timely claim for refund as waiver. *Rev. & Tax. Code § 6905*

Person claiming exemption from use tax based on payment of sales tax as required to prove that vendor paid sales tax. *Rev. & Tax. Code § 6903*

SBE as required to serve notice of disallowance of claim for refund within 30 days of its action on claim. *Rev. & Tax.*

Code § 6906

[9] Decisions

Taxpayer who fails to provide SBE with adequate documentation for determination of claim for refund is barred by failure to exhaust administrative remedies from bringing suit for refund. *Duffy v. State Bd. of Equalization (1984) 152 Cal. App. 3d 1156, 1174-1175, 199 Cal. Rptr. 886* ; *Barnes v. State Bd. of Equalization (1981) 118 Cal. App. 3d 994, 1001-1002* ;

Notice of disallowance of claim is not required to be directed to particular individuals acting on behalf of corporation in specific matter involved, even if SBE has knowledge of those individuals; notice addressed to corporation is sufficient. *Pacific Gas & Electric Co. v. State Bd. of Equalization (1955) 134 Cal. App. 2d 149, 152-153, 285 P.2d 305*

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 540 TAXES AND ASSESSMENTS
PART IV. FORMS
B. SALES AND USE TAXES

47-540 California Forms of Pleading and Practice--Annotated § 540.532

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.532 Complaint for Refund of Sales or Use Taxes [Rev. & Tax. Code § 6933]

[1] FORM Complaint for Refund of Sales or Use Taxes [Rev. & Tax. Code § 6933]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ [Sacramento *or* Los Angeles *or* San Francisco *or* San Diego]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
STATE BOARD OF EQUALIZATION,	)	COMPLAINT FOR REFUND OF
Defendant.	)	_____ [SALES *and/or* USE]
	)	TAXES
	)	

Plaintiff alleges:

1. At all times mentioned herein, plaintiff was and is a corporation organized and existing under and by virtue of the laws of the State of California [*or other appropriate allegations of residence and capacity*].

2. Defendant State Board of Equalization is, and at all material times herein was, an agency of the State of California charged by law with the duty of administering the California Sales and Use Tax Law. This action is brought against defendant under authority of *Revenue and Taxation Code Section 6933*.

3. Plaintiff filed California Sales and Use Tax returns with defendant when due for all quarters of each calendar year

since_____ [*date*], reported taxes payable on each such return, and paid the taxes so reported to defendant when due.

4. On or about_____ [*date*], defendant audited certain records of plaintiff, and sent plaintiff a Notice of Determination under the Sales and Use Tax Law, dated_____ [*date*], stating that a deficiency in sales and use taxes in the amount of $_____, [a _____ percent penalty for _____ (*specify, e.g.,* fraud or evasion) in the amount of $_____,] and interest in the amount of $_____ as of the date of the Notice of Determination were due, for the period commencing _____, and ending_____ [*dates*].

5. On_____ [*date*], plaintiff timely filed a Petition for Redetermination with defendant, requesting a hearing. On_____ [*date*], a hearing before defendant was held. On_____ [*date*], plaintiff received a Notice of Action on Petition for Redetermination from defendant denying the petition and assessing a deficiency in the amounts as follows:

a. Deficiency in sales and use taxes for the period _____, to _____ [*dates*]	$_____
b. Interest on the deficiency at _____ percent to _____ [*date*]	$_____
[c. _____ percent penalty for _____ (*specify, e.g.,* fraud or evasion)	$_____]
Total Assessment:	$_____

6. On_____ [*date*], plaintiff paid the amount of $_____ [*specify the amount and what it represents e.g.,* representing the assessed tax, penalty and interest under the deficiency assessment].

[7. No part of the deficiency determined by defendant was due to fraud or to intentional disregard of or intent to evade the Sales and Use Tax Law or any rules and regulations adopted under the law. The fraud penalty of $_____ was erroneously and unlawfully imposed.]

[8. Of the total asserted deficiency in taxes of $_____, $_____ was imposed for the period commencing _____, and ending_____ [*dates*]. That portion of the deficiency ($_____) is, and was, barred by the three-year statute of limitations under *Section 6487 of the Revenue and Taxation Code*. Interest, which was paid by plaintiff on that amount to_____ [*date*], totals $_____.]

9. The asserted deficiency of $_____ for the period commencing _____, and ending_____ [*dates*], was erroneously and illegally determined by defendant in that_____ [*briefly state reason, e.g.,* exempt transactions as well as transactions for which plaintiff had accepted resale certificates in good faith were included in the gross receipts on which taxes were imposed], as is more fully set out in the Claim for Refund, a copy of which is attached hereto as Exhibit "A," and incorporated herein as if set out in full.

10. On or about_____ [*date*], plaintiff discovered that it had erroneously assessed its sales and use tax liability for the period _____, to_____ [*date*], and had made an overpayment of $_____ on_____ [*date*]. The error was occasioned by_____ [*briefly state reason, e.g.,* the inclusion in the sales base on which taxes were calculated of exempt transactions and transactions for which plaintiff had accepted resale certificates in good faith], as is more fully set out in the Claim for

Refund, a copy of which is attached hereto as Exhibit "A," and incorporated herein as if set out in full.

11. The claim for refund of the amounts_____ [paid *or* overpaid] as alleged in Paragraph_____ [6 *or* 10] above was timely filed with defendant on_____ [*date*]. The claim for refund _____ [was denied on or about_____ [*date*] *or* has not been acted on by defendant for six months since its filing and plaintiff elects to consider the inaction as a rejection of the claim]._____ [*Further allege nature and adverse results of any other hearing held. Show that all administrative remedies that were available to plaintiff were exhausted and that plaintiff cooperated with SBE in providing information necessary for the evaluation of the claim, resulting in a denial of plaintiff's claim for refund.*]

12. Neither the whole, nor any portion of the amounts paid by plaintiff as alleged above have been refunded to, or applied for the benefit of plaintiff.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____, or such larger amount as provided by law;

2. For interest as provided by law; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Use of Form

This form of complaint is for use by a taxpayer to recover state and/or local sales and use taxes, plus any applicable penalties and interest, from the SBE [*see Rev. & Tax. Code §§ 6933, 7202(b), (d), 7203(a)*]. It can be adapted for use either if the assessment was the result of an audit and deficiency determination [*see* Paragraphs 4-9] or if taxes were erronously self-assessed [*see* Paragraph 10]. Counsel should choose the appropriate paragraphs according to the facts involved and renumber the remaining paragraphs accordingly.

[3] Allegations

The complaint contains allegations of residence and of capacity of both plaintiff and defendant (Paragraphs 1, 2) and allegations that returns have been filed and taxes paid for the taxable periods at issue (Paragraph 3). The following allegations of receipt of a Notice of Determination from the SBE are appropriate only in situations involving deficiency determination. They allege:

- Interest and penalty for fraud or evasion (Paragraph 4).

- Timely filing of a Petition for Redetermination; of hearing on the petition for redetermination; of receipt of a Notice of Action on Petition for Redetermination unfavorable to plaintiff specifying the amount of tax, interest, and penalty determined (Paragraph 5).

- That plaintiff paid the tax, and other amounts if paid (Paragraph 6).

- That the determination for the contested period was illegally imposed (Paragraph 9). It is not

sufficient simply to state that taxes were erroneously imposed. However, the grounds specified in the claim for refund limit the relief which can be granted in the action, and therefore a brief statement of those grounds and incorporation of the claim is sufficient [*King v. State Bd. of Equalization (1972) 22 Cal. App. 3d 1006, 1015, 99 Cal. Rptr. 802* ; *see Preston v. State Bd. of Equalization (2001) 25 Cal. 4th 197, 206-207, 105 Cal. Rptr. 2d 407, 19 P.3d 1148* (court may consider contention that is intertwined with contentions expressly raised in refund claim)].

Optional allegations are also included pertaining to the bar of the statute of limitations on the assessment of the deficiency (optional Paragraph 8) [*see Rev. & Tax. Code § 6487*], and to the assessment of a penalty for fraud or evasion (portions of Paragraphs 4 and 5 and optional Paragraph 7).

If the overpayment was erroneously self-assessed, Paragraph 10 should be used in place of Paragraphs 4-9. Paragraph 10 alleges discovery of the erroneously self-assessed taxes in the amount and for the period specified.

The form includes allegations, which must be used in either situation, of the timely filing of the claim for refund and cooperation in its evaluation, including incorporation of the claim into the complaint, of the denial of the claim or election to deem the SBE's inaction on the claim for six months as a denial (Paragraph 11), and that no part of the overpaid tax or assessment has been refunded to plaintiff or applied to other liabilities of plaintiff (Paragraph 12) [*see Rev. & Tax. Code §§ 6932-6935*; *see also Honeywell, Inc. v. State Bd. of Equalization (1975) 48 Cal. App. 3d 897, 906, 122 Cal. Rptr. 237* (failure to allege election to deem six months' inaction as a denial resulted in trial court's erroneous determination that suit for refund was premature)].

With regard to Paragraph 6, it has been held that payment of accrued interest on a tax deficiency is not a prerequisite to either an administrative refund claim or a subsequent action for refund of taxes [*Agnew v. State Board of Equalization (1999) 21 Cal. 4th 310, 314-315, 321 n.8, 333-334, 87 Cal. Rptr. 2d 423, 981 P.2d 52* (construing *Cal. Const. art. XIII, § 32*, and *Rev. & Tax. Code § 6931*; SBE's prepayment policy may not be enforced insofar as it requires prepayment of interest before a tax refund claim will be considered; court did not consider whether SBE may require prepayment of interest as precondition to consideration of challenge directed only to an interest assessment)]. Presumably a penalty is treated in the same way as interest in this regard and need not be paid before an administrative refund claim or a subsequent action for refund of taxes [*see Agnew v. State Board of Equalization (1999) 21 Cal. 4th 310, 323-334, 87 Cal. Rptr. 2d 423, 981 P.2d 52* ; *Chen v. Franchise Tax Board (1998) 75 Cal. App. 4th 1110, 1119-1120, 90 Cal. Rptr. 2d 268]* . In any event, the taxpayer should consider paying any assessed penalty and interest before or at the time of filing a claim for refund to foreclose the possibility of any collection activity being commenced by the SBE to collect them.

[4] Verification

Verification of this complaint is not required. A public entity or officer need not verify its answer even though the complaint is verified [*see Code Civ. Proc. § 446*]. However, verification of a complaint does preclude a general denial [*see Code Civ. Proc. § 431.30(d)*].

[5] Jurisdiction, Venue, and Service

The action may be brought in the superior court in any city or city and county in which the State attorney General has an office [*Rev. & Tax. Code § 6933*]. The action is not a limited civil case [*see Code Civ. Proc. § 86(a)(1)*]. The Attorney General maintains offices in Sacramento, Los Angeles, San Diego, and San Francisco counties.

Personal service of the summons and complaint may be made by delivering a copy of them to the Chairperson of the Board, or to the Executive Director or Acting Executive Director in his or her absence, or to any person designated to accept service by the Executive Director, at 450"N" Street, Sacramento, California 95814 [*see Code Civ. Proc. § 416.50*

]. Service by mail may be made by mailing a copy of the summons and complaint along with two copies of a notice of acknowledgement and a return envelope, postage prepaid, to the above-named persons [*see Code Civ. Proc. § 415.30*].

[6] Statute of Limitations

A suit for refund must be filed within 90 days after the date of mailing of the SBE's Notice of Action on the Claim for Refund or all are deemed waived [*Rev. & Tax. Code § 6933*]. If the SBE fails to mail notice of action on the claim within six months after the date of filing of the claim, the taxpayer may treat the nonaction as a denial and file suit for refund [*Rev. & Tax. Code § 6934*]. In this situation, the taxpayer could also, after the six-month period had elapsed, wait for the SBE to mail notice and then bring an action within 90 days of the mailing [*see* Code Commission Notes to *Rev. & Tax. Code § 6934*].

[7] Application of Judgment and Interest

If judgment is rendered for the taxpayer, the amount of the judgment is first credited against any outstanding sales or use tax liability of thetaxpayer, with the balance being directly refunded to the taxpayer [*Rev. & Tax. Code § 6935*].

Interest is allowed at the rate and for the period discussed in *§ 540.232[8]* [*Rev. & Tax. Code § 6936*; *see Rev. & Tax. Code § 6591.5* (modified adjusted rate);*see §§ 540.170[1], [2], [4]*; *540.230[3][c]*].

[8] State Statutes

Prohibition against injunction or other process to prevent collection of tax. *Rev. & Tax. Code § 6931*

[9] Decisions

Standard of court's review of challenge to validity of regulation is whether regulation is arbitrary, capricious, or without rational basis. *Wallace Berrie & Co. v. State Bd. of Equalization (1985) 40 Cal. 3d 60, 66, 219 Cal. Rptr. 142, 707 P.2d 204* ; *Delta Air Lines v. State Bd. of Equalization (1989) 214 Cal. App. 3d 518, 524-525, 528-529, 262 Cal. Rptr. 803*

Although refund claim only indirectly raised challenge to validity of regulation, SBE'S failure to raise alleged jurisdictional defect at trial and proffer of proposed finding that regulation was not arbitrary, capricious, or patently unreasonable estopped SBE from asserting on appeal that taxpayer failed to exhaust administrative remedies. *Wallace Berrie & Co. v. State Bd. of Equalization (1985) 40 Cal. 3d 60, 66 n.2, 219 Cal. Rptr. 142, 707 P.2d 204*

Suit for refund cannot be maintained on basis of partial payment of disputed tax; entire amount must be paid prior to suit. *State Bd. of Equalization v. Superior Court (1985) 39 Cal. 3d 633, 638-643, 217 Cal. Rptr. 238, 703 P.2d 1131* (disapproving *Snoozie Shaving, Inc. v. State Board of Equalization (1975) 97 Cal. App. 3d 771, 158 Cal. Rptr. 866* , and *Schaffer v. State Bd. of Equalization (1952) 109 Cal. App. 2d 574, 241 P.2d 46* to extent inconsistent); *but see Chahine v. State Bd. of Equalization (1990) 222 Cal. App. 3d 485, 489-490, 272 Cal. Rptr. 56* (as required to be filed within six months of each partial payment)

Standard of court's review of validity of SBE regulation is whether regulation was arbitrary or capricious or had no reasonable or rational basis; SBE interpretation of regulation is question of law and thus subject to broader review standard. *Culligan Water Conditioning v. State Bd. of Equalization (1976) 17 Cal. 3d 86, 92-93, 130 Cal. Rptr. 321, 550 P.2d 593* ; *Cal-Metal Corp. v. State Bd. of Equalization (1984) 161 Cal. App. 3d 759, 763-764, 207 Cal. Rptr. 783*

Interstate airline carriers have standing pursuant to *Rev. & Tax. Code §§ 6385, 6421* to seek and sue for refunds of sales

taxes paid by seller of fuel purchased by carrier and apportioned, on basis of estimate provided by carrier to retailer, between intrastate and extrastate use. *Delta Air Lines, Inc. v. State Bd. of Equalization (1989) 214 Cal. App. 3d 518, 525-528, 262 Cal. Rptr. 803*

Purchaser who can reach refund to vendor who has claim pending has remedy and thus lacks standing to sue for refund of sales tax if vendor was actual taxpayer. *State Bd. of Equalization v. Superior Court (1980) 111 Cal. App. 3d 568, 571, 169 Cal. Rptr. 3*

Voluntary payment is not recoverable even if deficiency determination was issued after limitation period runs. *Owens-Corning Fiberglas Corp. v. State Bd. of Equalization (1974) 39 Cal. App. 3d 532, 536-538, 114 Cal. Rptr. 515*

SBE is barred from retention of deficiency assessed after limitation period if it did not meet its burden of proof regarding fraud, which would have extended limitation period. *Marchica v. State Board of Equalization (1951) 107 Cal. App. 2d 501, 512-513, 237 P.2d 725*

Failure to file correct return and omission of items that should have been included held insufficient to establish fraud. *Marchica v. State Board of Equalization (1951) 107 Cal. App. 2d 501, 507-510, 237 P.2d 725*

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B. SALES AND USE TAXES

47-540 California Forms of Pleading and Practice--Annotated §§ 540.533-540.549

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

[Reserved]

§§ 540.533[Reserved]

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PART IV. FORMS
C. INCOME TAX

47-540 California Forms of Pleading and Practice--Annotated § 540.550

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.550 Complaint for Determination of Residency to Avoid Liability for California Personal Income Tax [Rev. & Tax. Code § 19381]

[1] FORM Complaint for Determination of Residency to Avoid Liability for California Personal Income Tax [Rev. & Tax. Code § 19381]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF
_____ [SACRAMENTO *or* LOS ANGELES *or* SAN FRANCISCO]

_____ [*name*],	)	
Plaintiff,	)	
	)	
vs.	)	NO. _____
	)	COMPLAINT FOR DETERMINATION OF RESID-
FRANCHISE TAX BOARD,	)	ENCY TO AVOID LIABILITY FOR CALIFORNIA
Defendant.	)	PERSONAL INCOME TAX
	)	
	)	

Plaintiff alleges:

1. At all times mentioned herein, plaintiff _____ [*name*] was and is a resident of the State of _____ [*state of residence*].

2. Defendant Franchise Tax Board is and at all times mentioned herein was an agency of the State of California, organized and existing under and by virtue of the laws of the state, particularly *Government Code Sections 15700-15702*. Defendant is empowered to assess and collect taxes under the Personal Income Tax Law of the State of California.

3. Jurisdiction is conferred on this court to hear and determine this suit for determination of residency against defendant by the provisions of *Revenue and Taxation Code Section 19381* and of *Code of Civil Procedure Section 401*.

4. During the calendar year _____, plaintiff was a resident of the State of _____. Plaintiff has been a resident of the State of _____ since_____ [*date*]. During the calendar year _____, plaintiff _____ [*give specific facts establishing residency in state other than California, e.g.,* maintained a home in _____ (*state*), and all of his/her family, including plaintiff's children, their families, and plaintiff's grandchildren resided in that state. Plaintiff maintained all of his/her business interests in _____ (*state*) during this period, including his/her investment interests, checking and savings accounts, and real property investments. Plaintiff maintained the majority of his/her social contacts in _____ (*state*) during this period, including his/her membership in various professional associations, including, but not limited to, _____ (*specify*). In addition,plaintiff's long-standing personal physician, attorney, and stock broker are professionals licensed by the State of _____, and plaintiff's automobile was and is registered and insured in that state]. Plaintiff also filed a resident personal income tax return for the calendar year _____ in the State of _____.

5. On_____ [*date*], plaintiff traveled to _____, California for purposes of _____ [*give reason for being in California demonstrating intention that the stay was temporary, e.g.,* vacation and visiting friends who reside in the area. Plaintiff rented a house located at _____ Street, _____, California. Plaintiff also opened a bank account, numbered _____, with _____ (*name and location of bank*), for use in paying expenses during his/her visit in California]. Plaintiff's intention was to remain in California _____ [*specify period of time plaintiff intended to stay in state, e.g.,* for _____ months, or until _____ (*date*)]. During the time plaintiff remained in California, plaintiff engaged in no income-earning activities, made no investments in California, established no business or professional ties in California, formed no important social ties in this state, and engaged in no acts or transactions inconsistent with his/her intention of being in California as a visitor.

6. On_____ [*date*], defendant issued to plaintiff a Notice of Deficiency Assessment, No. _____, which determined that plaintiff owed California personal income tax of $_____ for the calendar year _____, plus interest of $_____, for a total balance due of $_____, on the basis that plaintiff was a resident of the State of California during the calendar year. A copy of the Notice of Deficiency Assessment is attached as Exhibit A and incorporated by reference.

7. On_____ [*date*], pursuant to *Sections 19041* and *19381 of the Revenue and Taxation Code*, plaintiff filed a Protest of Deficiency Assessment with defendant. A copy of the Protest is attached as Exhibit B, and incorporated by reference. Plaintiff by this reference hereby expressly realleges each and every allegation and fact made or stated in the Protest of Deficiency Assessment and all exhibits attached thereto.

8. Defendant denied plaintiff's Protest of Deficiency Assessment by a Notice of Action on Cancellation, Credit, or Refund dated _____. The Notice of Action is attached as Exhibit C and incorporated by reference.

9. Plaintiff appealed the action of defendant by filing a Notice of Appeal with the California State Board of Equalization dated _____. A copy of the Notice of Appeal is attached as Exhibit D and incorporated by reference.

On_____ [*date*], the California State Board of Equalization rejected plaintiff's appeal from the defendant's determination.

10. This action is brought against defendant on the grounds that its ruling of_____ [*date*], disallowing in its entirety plaintiff's Protest of Deficiency Assessment for calendar year _____ based on plaintiff's alleged California residency is erroneous, unconstitutional, and without authorityof law. By these reasons, plaintiff alleges that the whole, and every part, of the proposed deficiency assessment for personal income tax for calendar year _____ is illegal.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a declaration that plaintiff has been a nonresident of California for the calendar year _____, and

2. For reasonable attorney's fees;

3. For costs of suit incurred herein; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Use of Form

This complaint is for use by a resident of a state other than California for a determination of residency [*Code Civ. Proc. § 1060.5*; *Rev. & Tax. Code § 19381*; *see Franchise Tax Bd. v. Superior Court (1989) 212 Cal. App. 3d 1343, 1349, 261 Cal. Rptr. 236* (dismissal of deficiency assessment as not authorized by *Code Civ. Proc. § 1060.5* or *Rev. & Tax. Code § 19381* in action for determination of residency)]. The FTB is the proper defendant. A suit for determination of residency is the only lawsuit a taxpayer may file under the California Personal Income Tax Law without first having paid the disputed tax involved [*see Franchise Tax Bd. v. Superior Court (1989) 212 Cal. App. 3d 1343, 1346-1349, 261 Cal. Rptr. 236* (postponement of collection of tax is valid and constitutional; *see § 540.302*]. The form is for use in determining residency and tax liability for only a single year [*see Rev. & Tax. Code § 19381*]. The complaint may be modified for use if tax liability of more than one year is contested. If the suit involves determinations for more than one year, the facts regarding each year's residency should be set forth in a separate Cause of Action. Each should follow the format of this form, either incorporating matters alleged in the first cause of action or alleging specific facts regarding the residency determination for that year.

An action for determination of residency is entitled to preference on the trial calendar [*Code Civ. Proc. § 1062.3*; *Franchise Tax Bd. v. Superior Court (1989) 212 Cal. App. 3d 1343, 1349, 261 Cal. Rptr. 236]* .

[3] Allegations

A determination of residency is made on the basis of all the facts and circumstances in each case. Besides the usual allegations as to plaintiff'sresidency and the FTB's status, capacity, and jurisdiction (Paragraphs 1-3) [*see Rev. & Tax. Code § 19381*], a cause of action must include allegations of all the facts that support plaintiff's status as a resident of another state (Paragraph 4), and allegations that show that plaintiff's purpose for being in California was temporary or transitory (Paragraph 5). The factual material in the foregoing complaint is a narrow example, and facts alleged in any

particular cause of action must be adapted to fit the facts and circumstances of each individual plaintiff.

Other essential allegations are the FTB's issuance of a Notice of Deficiency Assessment and the plaintiff's protest of same (Paragraphs 6, 7) [*see Rev. & Tax. Code § 19381*], the FTB's denial of the protest (Paragraph 8) [*Rev. & Tax. Code § 19381*], plaintiff's appeal of the denial of the protest to the SBE, the SBE's decision adverse to plaintiff, and plaintiff's institution of this action within 60 days after the SBE's adverse decision became final (Paragraph 9) [*Rev. & Tax. Code § 19381*]. The grounds addressed in the suit are limited to the grounds specified in the original protest [*Rev. & Tax. Code § 19381*].

[4] Prerequisites to Suit

Although a nonresident does not have to pay a deficiency before commencing suit to determine residency, he or she must first exhaust available administrative remedies [*Rev. & Tax. Code § 19381*], which include the following:

- Filing a written protest with the FTB within 60 days after the date the deficiency assessment was mailed [*Rev. & Tax. Code § 19041(a)*], and

- Appealing the FTB's denial of the protest to the SBE within 30 days after the date the FTB's action on the protest is mailed [*Rev. & Tax. Code § 19045(a)*].

The FTB must include the deadline for filing a protest in notices of proposed deficiency assessment mailed after December 31, 1999. Any protest filed with the FTB on or before that deadline must be treated as timely filed [*Rev. & Tax. Code § 19034(b)-(c), 19041(b), (c)*]. Similarly, with regard to any FTB notice of action on the protest mailed after December 31, 1999, any appeal to the SBE by the taxpayer on or before the date for filing an appeal specified in the notice (under *Rev. & Tax. Code § 19045(b)(1)*) must be treated as timely filed [*Rev. & Tax. Code § 19045(b)(2)*].

[5] Statute of Limitations

A suit for determination of residency must be commenced within 60 days afterthe determination of the SBE becomes final [*Rev. & Tax. Code § 19381*]. The determination of the SBE becomes final 30 days after the date of determination unless the taxpayer or the FTB files a petition forrehearing during that time, in which case the SBE's determination becomes final 30 days after issuance of its opinion on the petition for rehearing [*Rev. & Tax. Code § 19048*].

[6] Jurisdiction and Venue

Suits for determination of residency may be brought only in the superior courts of San Francisco, Sacramento, and Los Angeles counties as unlimited civil cases [*Code Civ. Proc. §§ 85, 86, 1060.5*; *Rev. & Tax. Code § 19381*].

[7] Verification

A public entity need not verify its answer even though the complaint is verified [*see Code Civ. Proc. § 446*]. However, the verification of a complaint against a public entity in an unlimited civil case in superior court does preclude a general denial [*see Code Civ. Proc. § 431.30(d)*].

[8] Collection of Tax During Pendency of Action

No tax based solely on the residence of an individual may be collected until 60 days after the SBE's action on the individual's appeal becomes final. If the individual commences an action under *Rev. & Tax. Code § 19381* during that 60-day period, no tax can be collected during the pendency of that action unless collection as a jeopardy assessment would otherwise be proper [*Rev. & Tax. Code § 19381*; *see Franchise Tax Bd. v. Superior Court (1989) 212 Cal. App. 3d 1343, 1346-1349, 261 Cal. Rptr. 236* (postponement of collection of tax as valid and constitutional; *see § 540.302*)].

[9] Attorney's Fees and Costs

Litigation costs including attorney fees are payable to a taxpayer who is a prevailing party [*Rev. & Tax. Code § 19717*; *see § 540.305*].

[10] State Statutes

Nonresidents and part-year residents, except those defined as heads of household, are required to pay tax on income derived from sources in *California. Rev. & Tax. Code § 17041(b), (i)*

Head of household defined. *Rev. & Tax. Code § 17042*

Certain credits are proportionally available to part-year residents and nonresidents. *Rev. & Tax. Code § 17055*

Gross income of nonresidents. *Rev. & Tax. Code §§ 17951-17955*

Nonresidents are entitled to certain credits for taxes paid to state of residence. *Rev. & Tax. Code § 18002*

[11] Decisions

California resident who intended to move to Colorado at time he sold securities but who had not actually moved as of date of sale was still California resident for purpose of being taxed on gain from sale. *Noble v. Franchise Tax Bd. (2004) 118 Cal. App. 4th 560, 569, 13 Cal. Rptr. 3d 363* (detailing facts supporting that conclusion)

[12] Law Reviews

Note, *Personal Income Tax--Vacation Homeowners in State for Transitory Purpose Retain Nonresident Status Despite Spending More Time In California Than in Home State-- Klemp v. Franchise Tax Board, 45 Cal. App. 3d 870, 119 Cal. Rptr. 821 (1975) , 16 Santa Clara L. Rev. 176 (1975)*

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California Forms of Pleading and Practice--Annotated

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 540 TAXES AND ASSESSMENTS
PART IV. FORMS
C. INCOME TAX

47-540 California Forms of Pleading and Practice--Annotated § 540.551

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.551 Complaint for Refund of Personal Income Tax [Rev. & Tax. Code § 19382]

[1] FORM Complaint for Refund of Personal Income Tax [Rev. & Tax. Code § 19382]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF
_____ [LOS ANGELES *or*
SAN FRANCISCO *or* SACRAMENTO *or* SAN DIEGO]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
	)	COMPLAINT FOR REFUND OF PERSONAL IN-
FRANCHISE TAX BOARD,	)	COME TAXES
Defendant.	)	
	)	
	)	

Plaintiff alleges:

1. At all times mentioned herein, plaintiff_____ [*name*] was and is a resident of the State of California.

2. [*Allegation of status and capacity of defendant Franchise Tax Board. see § 540.550, Paragraph 2.*]

3. Jurisdiction is conferred on this court to hear and determine this suit for refund of taxes against defendant as a case of

unlimited jurisdiction by the provisions of *Revenue and Taxation Code Section 19382* and of *Code of Civil Procedure Sections 86(a)* and *401*. Venue is proper pursuant to *Revenue and Taxation Code Section 19388* in that the Attorney General maintains an office in this county.

4. During calendar year _____, plaintiff _____ [*allege facts and circumstances supporting plaintiff's claim for refund, whether based on entitlement to deduction or credit, or to have income taxed as capital gain rather than ordinary income, e.g.,* incurred expenses totaling $_____, which amounts were personally spent by plaintiff in the course of his/her business, and which were ordinary and necessary automobile, advertising, travel, and entertainment expenses. The amounts were entered in the books of the business]. A schedule detailing these amounts is attached as Exhibit A and incorporated by reference. Plaintiff kept records and receipts for the amounts_____ [spent *and/or* contributed *and/or* lost]. A copy of these records and receipts is attached as Exhibit B and incorporated by reference.

5. On or about_____ [*date*], pursuant to the California Personal Income Tax Law, plaintiff filed with defendant a return of income for the calendar year ending_____ [*date*]. In that return, _____ [*describe parts of return about which defendant has proposed a deficiency assessment, e.g.,* plaintiff took as a deduction from gross income the amount of $_____ as ordinary and necessary business expenses, under the circumstances and in the manner alleged in Paragraph 4 above]. The return was accompanied by a remittance payable to the order of defendant in the amount of $_____, which sum constituted the full amount of personal income tax shown on the return to be due from plaintiff to defendant for the calendar year.

6. On_____ [*date*], defendant issued to plaintiff a Notice of Proposed Deficiency Assessment, No. _____, which determined that plaintiff owed California personal income tax of $_____ for calendar year _____, plus interest of $_____, for a total balance due of $_____. The notice was based on_____ [*specify basis for alleged deficiency, e.g.,* defendant's proposed disallowance of the deductions from gross income taken by plaintiff in the calendar year for ordinary and necessary business expenses] in the manner and amounts as set forth above. A copy of the Notice of Proposed Deficiency Assessment is attached as Exhibit C and incorporated by reference.

[7. On _____ (*date*), within 60 days after the mailing of the Notice of Proposed Deficiency Assessment, plaintiff filed a protest with defendant against the additional tax proposed to be assessed. A copy of the protest is attached as Exhibit D and incorporated by reference. Plaintiff by this reference hereby expressly realleges each and every allegation and fact made or stated in the protest and all exhibits attached to it.]

[8. Defendant denied plaintiff's protest by a Notice of Action on Cancellation, Credit, or Refund dated _____. The Notice of Action is attached as Exhibit E and incorporated by reference.]

[9. Plaintiff appealed the action of defendant by filing a Notice of Appeal with the California State Board of Equalization dated _____. A copy of the Notice of Appeal is attached as Exhibit F and incorporated by reference. On _____ (*date*), the State Board of Equalization rejected plaintiff's appeal from the determination of defendant. A copy of the State Board of Equalization's notice of determination of the appeal is attached as Exhibit G and incorporated by reference.]

10. On_____ [*date*], plaintiff mailed a remittance payable to the order of defendant in the full amount of the proposed deficiency assessment [, together with interest,] in the total sum of $_____.

11. On_____ [*date*], plaintiff filed with defendant its Claim for Refund in the amount of $_____, plus interest, and in the Claim for Refund set forth the grounds on which plaintiff rests its claim for the recovery ofthat amount. A copy of the Claim for Refund and the exhibits attached to it is attached as

Exhibit H and incorporated by reference. Plaintiff by this reference hereby expressly realleges, without setting forth at length herein, each and every allegation and fact made or stated in the Claim for Refund and the exhibits attached to it.

[12. On _____ (*date*), defendant denied plaintiff's Claim for Refund. A copy of the denial of the Claim for Refund by defendant is attached as Exhibit I and incorporated by reference.]

[12. Defendant took no action on the Claim for Refund within six months after the date of its filing, and plaintiff has elected to deem the claim denied.]

[13. Within _____ (*either* 90 days after receipt of defendant's denial of the refund claim *or* six months after the claim was filed and deemed disallowed because of defendant's failure to send a notice of action on the claim), plaintiff appealed the denial of the claim to the State Board of Equalization. A copy of the Notice of Appeal is attached as Exhibit J and incorporated by reference. On _____ (*date*), plaintiff received a notice of determination from the State Board of Equalization upholding the defendant's denial of the claim. A copy of the State Board of Equalization's notice of determination of the appeal is attached as Exhibit K and incorporated by reference.]

14. This action is brought against defendant on the grounds that the proposed additional deficiency assessment of_____ [*date*], and the disallowance in its entirety of plaintiff's claim for refund of the amount so paid by plaintiff to defendant on_____ [*date*], is erroneous, illegal, and without authority of law for the reasons stated in the claim.

15. No refund of the amounts paid by plaintiff as alleged above, or any part thereof, has been made to or applied for the benefit of plaintiff or anyone acting on his/her behalf.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the amount of $_____;

2. For interest on that sum from and after_____ [*date of payment of assessed tax and penalties, if any*];

3. For reasonable attorney's fees;

4. For costs of suit incurred herein; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Use of Form

This complaint is for use by an individual taxpayer to obtain a refund of personal income tax from the FTB [*see Rev. & Tax. Code § 19382*]. Thefacts illustrated in the form involve the denial of deductions for business expenses. The form also contests tax liability for only a single year, but may be modified for use if tax liability of more than one year is contested. If the suit involves a refund for more than one year, the suit for each year's refund should be set forth in a separate cause of action. Each cause of action should follow the format of this form and either incorporate matters alleged in the first cause of action or allege specific facts regarding the refund for that year. With appropriate changes, this form can be used to seek a refund of bank and corporation taxes.

[3] Allegations

The complaint alleges the following:

- Plaintiff's status and residency (Paragraph 1).
- Defendant's status and statutory authority (Paragraph 2) [*see Gov. Code §§ 15700-15702*].
- Jurisdiction and venue (Paragraph 3) [*see Code Civ. Proc. § 401*; *Rev. & Tax. Code § 19382*].
- The facts and circumstances supporting plaintifff's position on the amount of tax owed (Paragraph 4).
- Plaintiff's filing of a return and payment of tax claimed by plaintiff as the proper amount due (Paragraph 5).
- Issuance by the FTB of a Notice of Proposed Deficiency (Paragraph 6).
- Payment by plaintiff of all taxes, and if paid, interest, demanded by the FTB (Paragraph 10).
- Plaintiff's timely filing of a claim for refund and incorporation of the grounds stated in the claim (Paragraph 11) [*Rev. & Tax. Code § 19382*].
- The FTB's denial of that claim or inaction on the claim for more than six months (optional Paragraphs 12).
- The illegality of the FTB's deficiency assessment (Paragraph 14).
- That no refund has been made to or applied for the benefit of plaintiff (Paragraph 15).

The form also includes optional allegations that plaintiff filed a written protest of the assessment, that the protest was denied by the FTB, and that plaintiff filed an appeal with the SBE that was also rejected (Paragraphs 7-9) [*Rev. & Tax. Code §§ 19041, 19045, 19046*]. It also includes an optional allegation that plaintiff appealed the FTB's denial of the claim for refund to the SBE (Paragraph 13) [*see Rev. & Tax. Code §§ 19324, 19331*]. These administrative remedies do not have to be exhausted prior to filing a suit for refund, because the statutes governing protests and appeals from denied protests or claims are not mandatory [*see Rev. & Tax. Code §§ 19041, 19045, 19324(a)*], and because the only prerequisites for a refund suit are the payment of tax and the denial of a claim for refund [*Rev. & Tax. Code § 19382*; *see § 540.552[4]*].

With regard to Paragraph 10, dealing with payment of a penalty and interest, *see § 540.90[4][a]*.

[4] Prerequisites to Suit

Unless a notice of deficiency is based on an individual's alleged California residency, a taxpayer must pay all taxes demanded by the FTB and file a claim for refund before a refund suit may be brought [*Rev. & Tax. Code §§ 19381, 19382*; *but see Milhous v. Franchise Tax Bd. (2005) 131 Cal. App. 4th 1260, 1267-1268, 32 Cal. Rptr. 3d 640* ("pay first, litigate later" rule embodied in *Rev. & Tax. Code § 19382* does not affect court's fundamental jurisdiction and can be waived)]. Payment of accrued interest on a tax deficiency, however, is not a prerequisite to either an administrative refund claim or a subsequent action for refund of taxes [*Agnew v. State Board of Equalization (1999) 21 Cal. 4th 310, 314-315, 321 n.8, 333-334, 87 Cal. Rptr. 2d 423, 981 P.2d 52* (construing *Cal. Const. art. XIII, § 32*, and *Rev. & Tax. Code § 6931*; SBE's prepayment policy may not be enforced insofar as it requires prepayment of interest before tax

refund claim will be considered; court did not consider whether SBE may require prepayment of interest as precondition to consideration of challenge directed only to an interest assessment); *see Chen v. Franchise Tax Board (1998) 75 Cal. App. 4th 1110, 1113-1114, 1117-1124, 90 Cal. Rptr. 2d 268* (given plain language of *Cal. Const., art. XIII, § 32*, and *Rev. & Tax. Code § 19382* and definition of tax in *Rev. & Tax. Code § 23036*, word "tax" does not include interest and therefore payment of accrued interest is not jurisdictional prerequisite to action for refund of franchise taxes paid; court did not reach question of whether penalties must be paid before refund action will lie)]. Presumably a penalty is treated in the same way as interest in this regard and need not be paid before an administrative refund claim or a subsequent action for refund of taxes [*see Agnew v. State Board of Equalization (1999) 21 Cal. 4th 310, 323-334, 87 Cal. Rptr. 2d 423, 981 P.2d 52* ; *Chen v. Franchise Tax Board (1998) 75 Cal. App. 4th 1110, 1119-1120, 90 Cal. Rptr. 2d 268* ; *but see* FTB Notice, No. 97-8 (9/4/97), CCH Cal. Tax Rptr., 1995-1999 Transfer Binder, P 402-940 (providing for consideration of claim when tax principal, additions to tax and penalties has been paid in full before or together with claim for refund)]. In any event, depending on circumstances, the taxpayer may desire to make payment of interest and any penalty assessed before or at the time of filing a claim for refund, or before suit if not done earlier, to stop the accrual of interest. Moreover, payment of such amounts will thereafter avoid the possibility of any collection activity being commenced by the FTB. For further discussion concerning prerequisites to suit, *see § 540.303[2]*.

The grounds for recovery by suit are limited to the grounds raised in the claim for refund [*Rev. & Tax. Code § 19382*]. If the FTB does not mail a notice of action on a refund claim within six months after the taxpayer files the claim, the taxpayer may deem the claim denied and file suit for refund [*Rev. & Tax. Code § 19385*].

For a form for a complaint for determination of residency and a description of the administrative remedies required to be exhausted before seeking such a determination, *see § 540.550*.

[5] Statute of Limitations

A suit for refund against the FTB must be filed within the latest of the following [*Rev. & Tax. Code § 19384*]:

- Four years after the last date prescribed for the filing of the return;
- One year after the date the tax was paid;
- Ninety days after notice of action by the FTB on a claim for refund; or
- Ninety days after the determination (including the issuance of a decision, opinion, or dismissal) by the SBE on appeal from the action of the FTB on a claim for refund becomes final under *Rev. & Tax. Code § 19334* (as amended by Stats. 1999, ch. 605, § 3); *see* Stats. 1999, ch. 605, § 4 (amendment operative for SBE determinations that become final under *Rev. & Tax. Code 19334* on or after January 1, 2000; before amendment this period was 90 days after a final notice of action by the SBE on an appeal from the FTB's decision).

The claim for refund itself must be filed within the later of [*Rev. & Tax. Code § 19306*]:

- four years from the date the original return was filed (if filed within the time prescribed by *Rev. & Tax. Code § 18567* or *18604*, whichever is applicable);
- four years after the last day prescribed for filing the original return (determined without regard to any extension of time for filing the return); or
- one year after the date of the overpayment.

The FTB's determination on the claim for refund is final 90 days after the FTB's mailing of notice of its action unless the taxpayer appeals within this period to the SBE [*Rev. & Tax. Code § 19324 et seq.*]. If the taxpayer appeals to the SBE, the SBE's determination is final 30 days after its decision, unless within that period a rehearing is sought. If a rehearing is sought, the determination is final 30 days after the decision on the petition for rehearing [*Rev. & Tax. Code § 19334*].

[6] Jurisdiction and Venue

Taxpayers may file suit against the FTB in the superior court of any county in California where the California Attorney General maintains an office; i.e., in the counties of San Francisco, Sacramento, Los Angeles, and San Diego [*Rev. & Tax. Code § 19388*]. The action is not a limited civil case [*see Code Civ. Proc. § 86(a)(1)*].

[7] Service

The summons and complaint of a suit for refund must be served on the FTB or its executive officer. Personal service on the FTB is not necessary, and the FTB will acknowledge receipt of the summons and complaint. A second copy of both must be delivered to the FTB, but this requirement is not jurisdictional [*Rev. & Tax. Code § 19387*]. The summons must notify the person served that they are being served on behalf of the FTB under *Code Civ. Proc. § 416.50* (public entity) [*see Code Civ. Proc. § 416.50*].

[8] Interest and Attorney's Fees

Interest and attorney's fees are payable to a taxpayer who is the prevailing party [*Rev. & Tax. Code §§ 19391, 19521, 19717*; *see* §§ *540.304, 540.305*].

[9] State Statutes

Deductions generally. *Rev. & Tax. Code §§ 17073, 17073.5, 17076, 17201 et seq.*

Standard deduction. *Rev. & Tax. Code §§ 17073(c), 17073.5*

Deductions for trade or business expense. *Rev. & Tax. Code §§ 17201, 17222, 17224*

Protest of assessment and appeal. *Rev. & Tax. Code §§ 19041-19048*

Claim for refund. *Rev. & Tax. Code § 19301 et seq.*

Interest on judgment for refund. *Rev. & Tax. Code §§ 19340, 19521*

[10] Decisions

Taxpayers could not maintain class action suit without complying with requirement of *Rev. & Tax. Code § 19322* that administrative claim be accompanied by written authorization from each class member; provision allowing taxpayer to file suit if FTB fails to mail timely notice of action on refund claim (*Rev. & Tax. Code § 19385*) does not require FTB to notify taxpayer that administrative claim is defective; doctrine of substantial compliance is unavailable to cure defect. *Farrar v. Franchise Tax Bd. (1993) 15 Cal. App. 4th 10, 21, 18 Cal. Rptr. 2d 611* (affirming trial court denial of class certification in tax refund action).

"Protest" letter in writing that states position on overpayment satisfies statutory requirements for refund claim.

Newman v. Franchise Tax Bd. (1989) 208 Cal. App. 3d 972, 979-980, 256 Cal. Rptr. 503

Refunds and overpayments are first applied to any amount owed by taxpayer to any state agency. *Del Costello v. State of California (1982) 135 Cal. App. 3d 887, 890, 185 Cal. Rptr. 582* ; *Tyler v. California (1982) 134 Cal. App. 3d 973, 975-976, 185 Cal. Rptr. 49*

Superior court is without jurisdiction to order return of property seized pursuant to tax claim by state that is prima facie valid; taxpayer mustexhaust administrative remedies challenging tax assessment. *Mason v. Superior Court of Los Angeles County (1981) 121 Cal. App. 3d 876, 882, 175 Cal. Rptr. 462*

Taxpayer cannot circumvent rule that superior courts may not hear actions to prevent or enjoin assessment or collection of any tax by seeking declaratory judgment that tax is not legally collectible. *Casey v. Bonelli (1949) 93 Cal. App. 2d 253, 255, 208 P.2d 723*

Taxpayers have burden of producing sufficient evidence to overcome presumption of correctness of FTB's findings; presumption not overcome by unsupported statements of taxpayer. Appeal of Cookston (SBE, 9/29/81) CCH Cal. Tax. Rptr. P 400-046; Appeal of Mason (SBE, 3/30/81) CCH Cal. Tax. Rptr. P 206-604

[11] Text References

Witkin, Summary of California Law, vol. 9, *Taxation* (10th ed. 2005)

[12] Cross References

See also Comments and References to *§ 540.550*.

California Forms of Pleading and Practice--Annotated

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 540 TAXES AND ASSESSMENTS
PART IV. FORMS
C. INCOME TAX

47-540 California Forms of Pleading and Practice--Annotated § 540.552

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.552 Complaint for Refund of Corporation Taxes Assessed by FTB [Rev. & Tax. Code § 19382] Against Unitary Business [Rev. & Tax. Code §§ 25120-25141]

[1] FORM Complaint for Refund of Corporation Taxes Assessed by FTB [Rev. & Tax. Code § 19382] Against Unitary Business [Rev. & Tax. Code §§ 25120-25141]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF
_____ [LOS ANGELES *or*
SAN FRANCISCO *or* SACRAMENTO *or* SAN DIEGO]

_____ [*name*],	)	
Plaintiff,	)	
	)	
vs.	)	NO. _____
	)	COMPLAINT FOR REFUND OF CORPORATION
FRANCHISE TAX BOARD,	)	TAX
Defendant.	)	
	)	
	)	

_____

Plaintiff alleges:

1. At all times mentioned herein, plaintiff was and is a corporation organized and existing under and by virtue of the laws of the State of _____, with its principal offices in the State of California [*or allege other capacity*

and extent of business operations in California].

2. Defendant Franchise Tax Board is and at all times mentioned herein was an agency of the State of California, organized and existing under and by virtue of the laws thereof, particularly *Government Code Sections 15700-15702*. Defendant is empowered to assess and collect taxes under the Corporation Tax Law of California and to make refund of overpayment of such taxes and interest.

3. Jurisdiction is conferred on this court to hear and determine this suit for refund of taxes and interest against defendant as a case of unlimited jurisdiction by the provisions of *Revenue and Taxation Code Section 19382* and of *Code of Civil Procedure Sections 86(a)* and *401*.

4. Venue is proper pursuant to *Revenue and Taxation Code Section 19388* in that the Attorney General maintains an office in this county.

5. Plaintiff appeals from an assessment of tax for_____ [*allege amounts and the calendar or fiscal years to which they pertain*]. These amount(s), plus any and all interest and penalties, have been paid by plaintiff in full.

6. During the_____ [calendar *or* fiscal] year(s)_____ [*specify year(s)*], plaintiff owned a controlling interest in subsidiary corporation located in_____ [*specify state(s)*]. With respect to each subsidiary, stock not owned by plaintiff is owned by _____ [*specify, e.g.*, othermajor stockholders and individual investors]. A schedule of the subsidiaries, including the amount of stock of each subsidiary owned by plaintiff, is attached hereto, marked Exhibit "A," and made a part hereof. These subsidiaries are hereinafter referred to collectively as the "foreign subsidiaries."

7. During the_____ [calendar *or* fiscal] year(s)_____ [*specify year(s)*], plaintiff was engaged in the_____ [*describe plaintiff's business enterprises*]. All of plaintiff's_____ [*describe all divisions of plaintiff's business enterprises, e.g.,* manufacturing, production, research, and sales facilities, as well as all administrative and executive offices,] were located in_____ [*name of city and/or county*], California. All operations and facilities of plaintiff were entirely separate, distinct, and independent from those of the foreign subsidiaries. [*Include additional allegations such as no sales or loans between plaintiff and foreign subsidiaries, etc., as appropriate* .]

8. During the_____ [calendar *or* fiscal] year(s)_____ [*specify year(s)*], the foreign subsidiaries operated as self-sustaining operational units, in the business of _____ [*describe business enterprises of foreign subsidiaries, e.g.,* manufacturing and selling _____ (*describe product*)]. Each foreign subsidiary in each state operated as an integrated unit from_____ [*describe divisions of enterprise, e.g.,* production through sales]. _____ [*Specify locations where sales were made or services provided, e.g.,* Sales of finished products were made within the state where they were manufactured by the foreign subsidiaries or were exported to Japan, and sales operations were performed as a part of the total operation within _____ (*state(s)*)]. All operations and facilities of the foreign subsidiaries, including_____ [*describe divisions of foreign subsidiaries, e.g.,* manufacturing, research, executive, administrative, and sales functions], were entirely separate, distinct, and independent from those of plaintiff. There was no mutual dependence or contribution between plaintiff and the foreign subsidiaries, nor was plaintiff in any way unitary with or a part of the business activities of the foreign subsidiaries.

9. On_____ [*dates*], plaintiff made estimated_____ [franchise *or* corporation income] tax payments in the amounts of $_____, $_____, $_____, and $_____, respectively, for the taxable year _____. On_____ [*date*], plaintiff timely filed with defendant a_____ [franchise *or* corporation income] tax return for the taxable year _____ and included a payment of

$_____. A copy of this tax return is attached hereto, marked Exhibit "B," and made a part hereof.

10. On_____ [*date*], defendant issued to plaintiff a Notice of Additional Tax Proposed to Be Assessed, No. _____, which determined that plaintiff owed additional_____ [franchise *or* corporation income] tax of $_____ for the taxable year _____, on the basis that plaintiff was engaged in a unitary business with respect to the foreign subsidiaries[*include any other matters included in notice, if any*]. A copy of the notice is attached hereto, marked Exhibit "C," and made a part hereof.

[11. (*Protest filed by plaintiff against proposed assessment, including exhibit. see § 540.551, paragraph 7.*)]

[12. (*Allege, if appropriate, receipt of a request for additional information from the Franchise Tax Board on specified date and the submission of the requested additional information on specified date; include exhibit.*)]

[13. (*Denial of plaintiff's protest by defendant, including exhibit. See § 540.551, paragraph 8.*)]

[14. (*Appeal by plaintiff of denial to State Board of Equalization and rejection of appeal, including exhibits. see § 540.551, paragraph 9.*)]

15. On_____ [*date*], plaintiff paid to defendant additional_____ [franchise *or* corporation income] tax for taxable year _____ in the amount of $_____, plus interest of $_____, for a total payment of $_____. A copy of the check, the letter of plaintiff's counsel accompanying payment, and the receipt of defendant is attached, marked Exhibit "H," and made a part hereof.

16. On_____ [*date*], plaintiff filed with defendant its Claim for Refund in the amount of $_____[, plus interest,] and in the claim set forth the grounds on which plaintiff rests its claim for the recovery of the amount. A copy of the Claim for Refund, including exhibits attached to it, is attached hereto, marked Exhibit "I," and made a part hereof. Plaintiff by this reference hereby expressly realleges, without setting them forth at length herein, each and every allegation and fact made or stated in the Claim for Refund and exhibits attached to it.

17. Defendant denied plaintiff's Claim for Refund by a Notice of Action on Cancellation, Credit, or Refund dated _____. The Notice of Action is attached hereto, marked Exhibit "J," and made a part hereof.

18. This complaint contests the inclusion of the foreign subsidiaries in the unitary base for apportionment purposes. Attached hereto, marked Exhibit "K," and made a part hereof, is a summary sheet setting forth plaintiff's computations of_____ [franchise *or* corporation income] tax for the taxable year(s) _____, based on the exclusion of the foreign subsidiaries from the unitary base.

19. Defendant has purported to determine that the business of plaintiff was unitary with the businesses of the foreign subsidiaries for_____ [franchise *or* corporation income] tax purposes. Accordingly, defendant has required, under *Revenue and Taxation Code Section 25101*, that the income of plaintiff be combined with the income of the foreign subsidiaries and that the apportionment factors (property, payroll, and sales) of plaintiff and the foreign subsidiaries be used in apportioning combined income to California for_____ [franchise *or* corporation income] tax purposes. [*Include other allegations of actions by defendant with regard to subsidiaries, as appropriate, such as inclusion of foreign dividends or capital gains.*]The direct and proximate result of the determination of defendant has been to apportion a greater amount of plaintiff's income to California, including income that has no relationship to plaintiff's activities in California. The determination increased the total California_____ [franchise *or* corporation income] tax payable by plaintiff for the taxable year(s) in question by the amount of the refund claimed by plaintiff in this cause of action.

20. By virtue of the proceedings described in Paragraphs 9 through 17, defendant has, on the theory set forth in Paragraph 19 above, imposed, collected, and retained_____ [franchise *or* corporation income] tax [and interest] exceeding that which was legally due in the amount of $_____. The State of California is not authorized or permitted to impose, collect, or retain the $_____, or any part thereof, for the reasons set forth in Paragraphs 1 through 19, above, [and in Paragraphs 21 and 22, below,] which are more fully set forth in the Claim for Refund, Exhibit "I," above.

21. Neither the provisions of *Revenue and Taxation Code Section 25101* nor any other statutory provisions permit the use of the apportionment formula proposed by defendant, described in Paragraph 19, above. On the contrary, the determination of defendant, as described above, and the imposition, collection, or retention of the amount of refund, or any part of it, claimed by plaintiff was and is entirely unauthorized by law.

22. Neither the Constitution of the State of California nor the Constitution of the United States authorizes or permits the State of California to impose, collect, or retain the amount of refund, or any part thereof, claimed by plaintiff in this cause of action. Without limiting the general application of the foregoing allegations of this paragraph, (a) the apportionment formula proposed by defendant, as described above, violates the rights and privileges of plaintiff under the *due process clause of the Fourteenth Amendment of the United States Constitution* and the due process clause of *Section 13 of Article I of the California Constitution*, in that, among other things, under the apportionment formula, defendant is taxing property and income from business activities not situated within its boundaries; (b) the proposed apportionment formula, as describedabove, violates the rights and privileges of plaintiff under the *equal protection clause of the Fourteenth Amendment of the United States Constitution* and the principles of equal protection as implied in *Article I, Sections 7* and *20, of the California Constitution* in that, among other things, under the apportionment formula, defendant is applying a different apportionment formula to plaintiff than it is applying to other taxpayers similarly situated; and (c) the application of the proposed formula to plaintiff, as described above, a corporation extensively engaged in interstate operations, also imposes a prohibitive burden on interstate and foreign commerce in violation of Article I, Section 8, Clause 3, of the United States Constitution.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____, or such larger amount as provided by law;

2. For interest on that sum as provided by law, from and after_____ [*date(s) of payment of assessed deficiency*];

3. For reasonable attorney's fees;

4. For costs of suit incurred herein; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[2] Use of Form

This complaint is for use by a corporate taxpayer doing business in California to seek a refund of additional taxes assessed against it as a result of the FTB's application of the worldwide unitary method of taxation after the plaintiff has filed a tax return based on only its California business operations [*Rev. & Tax. Code § 19382*; *see Rev. & Tax. Code §*

25120 et seq. (unitary method)]. The taxpayer is alleging that it is not unitary with its out-of-state subsidiaries and that its income and loss and that of the subsidiary companies should not be combined for apportionment purposes. The term "foreign" in the complaint refers to companies that are not organized and operating under the laws of the State of California. It may be used to refer to companies that are organized and operating under the laws of another state, the District of Columbia, the Commonwealth of Puerto Rico, and territory or possession of the United States, to companies based outside of the United States, or to both [*Rev. & Tax. Code § 25120(g)*].

A corporate taxpayer may wish to be treated as completely separate and distinct from its subsidiaries for tax purposes or it may wish to be treated as a single unitary business (for example, to take advantage of losses from another part of the business) [*see Dental Ins. Consultants, Inc. v. Franchise Tax Bd. (1991) 1 Cal. App. 4th 343, 348, 1 Cal. Rptr. 2d 757]* . To modify the form for use if the taxpayer and its subsidiaries wish to be treated as a unitary business, the allegations in Paragraphs 7 and 8 should be changed to describe the unitary factors, contribution and dependency, and interrelationship of the plaintiff and the other entities claimed to comprise the unitary group. Paragraphs 18 through 22 must also be amended to allege the opposite of the allegations used in this example.

For purposes of the franchise tax [*see Rev. & Tax. Code §§ 23101 et seq.*], the term "taxable year" means the calendar year, or the fiscal year for which the tax is payable [*Rev. & Tax. Code § 23041(a), (c)*]. For purposes of the tax on limited partnerships [*see Rev. & Tax. Code §§ 23081 et seq.*], the corporation income tax [*see Rev. & Tax. Code §§ 23501 et seq.*], or the tax imposed on exempt corporations [*see Rev. & Tax. Code §§ 23701 et seq.*],the term "taxable year" is the calendar year or the fiscal year upon the basis of which the net income is computed [*Rev. & Tax. Code § 23041(b), (c)*]. A "taxable year" can also be a period of less than 12 months [*Rev. & Tax. Code § 23041(d)*]. When referring to a calendar or fiscal year beginning before January 1, 2000, upon the basis of which the net income is computed, the term "taxable year" means "income year." [*Rev. & Tax. Code § 23041(e)*; *see Rev. & Tax. Code § 23042(a)* for a definition of "income year"; a legislative change in terminology enacted in 2000 gave "income year" and "taxable year" the same meaning for calendar and fiscal years beginning on or after January 1, 2000, but under a transitional rule, for the first taxable year beginning on or after January 1, 2000, the term "taxable year" had two meanings, as explained at Stats. 2000, ch. 862, § 227].

This form contests a unitary assesment for only one taxable year, but may be modified for use if tax liability for more than one taxable year is contested. If the suit involves a refund for more than one year, the suit for each year's refund should be set forth in a separate cause of action. Each cause of action should be separately labeled and follow the format of the cause of action alleged in the form. Pertinent facts from the first cause of action may be incorporated by reference into the following causes of action [*see* sample forms of incorporation by reference in Ch. 20, *Allegations Commonly Used*].

To modify the form for use when affiliated entities other than plaintiff's subsidiaries are claimed to comprise the unitary business, the allegations in Paragraph 6 should be changed to describe the nature of plaintiff's business relationship to all of the other members of the unitary business. If the unitary business is not a manufacturing enterprise, Paragraph 7 should be changed to describe the nature and separate operation of the plaintiff's own business and Paragraph 8 should be changed to describe the nature and separate operation ofthe businesses of the other entities claimed by the FTB to comprise the unitary business.

[3] Allegations

The complaint alleges:

- Plaintiff's status and residency (Paragraph 1).
- Defendant's status and statutory authority (Paragraph 2).

- Jurisdiction and venue (Paragraphs 3, 4) [*Code Civ. Proc. § 401*; *Rev. & Tax. Code § 19382*].

- Plaintiff's ownership of foreign subsidiaries (Paragraph 6).

- Facts demonstrating the separate nature of plaintiff's California business activity (Paragraph 7).

- Facts demonstrating the separate nature of the foreign subsidiaries' business activities outside California (Paragraph 8).

- Plaintiff's filing of appropriate returns and payment of California estimated and annual taxes (Paragraph 9).

- The issuance of a Notice of Proposed Assessment by the FTB based on a determination that plaintiff and its subsidiaries comprised a unitary business (Paragraph 10).

- Plaintiff's protest of the Notice of Proposed Assessment (*see* optional Paragraph 7 in *§ 540.551*) [*Rev. & Tax. Code § 19041*].

- The FTB's denial of the protest (*see* optional Paragraph 8 in *§ 540.551*) [*Rev. & Tax. Code §§ 19044, 19045*].

- Plaintiff's optional appeal to the SBE and the SBE's subsequent determination (*see* optional Paragraph 9 in *§ 540.551*) [*Rev. & Tax. Code §§ 19045, 19047, 19048*].

- Plaintiff's payment of the additional tax, and if paid, interest (Paragraph 15). On payment of penalty and interest, see discussion in *§ 540.552[4]*.

- Plaintiff's filing of a claim for refund (Paragraph 16) [*Rev. & Tax. Code § 19322*].

- The FTB's denial of the claim for refund (Paragraph 17) [*Rev. & Tax. Code § 19382*].

- Plaintiff's contention as to how its tax liability should have been calculated (Paragraph 18).

- The FTB's contentions as to how the tax should be calculated and the illegality and impropriety of the FTB's calculations (Paragraphs 19, 21),

- The amount of tax, and if paid, interest, claimed to be excessive (Paragraph 20).

- Constitutional objections to the FTB's method of assessment as violative of plaintiff's due process and equal protection rights and unlawfully burdening foreign and interstate commerce (Paragraph 22) [U.S. Const., art. I, § 8; *U.S. Const., amend. XIV*; *Cal. Const., art. I, §§ 7, 13, 20*].

[4] Prerequisites to Suit

A taxpayer must pay all taxes claimed by the FTB, file a claim for refund with the FTB, and await denial of the claim before instituting a suit for refund [*Rev. & Tax. Code § 19382*; *but see Milhous v. Franchise Tax Bd. (2005) 131 Cal. App. 4th 1260, 1267-1268, 32 Cal. Rptr. 3d 640* ("pay first, litigate later" rule embodied in *Rev. & Tax. Code § 19382* does not affect court's fundamental jurisdiction and can be waived)]. If the FTB fails to mail a notice of action on any refund claim within six months after the claim is filed, the taxpayer may consider the claim disallowed and bring an action against the FTB [*Rev. & Tax. Code § 19385*]. The grounds for recovery by suit are limited to those grounds

raised in the claim for refund [*Rev. & Tax. Code § 19382*].

Payment of accrued interest on a tax deficiency is not a prerequisite to either an administrative refund claim or a subsequent action for refund of taxes [*Agnew v. State Board of Equalization (1999) 21 Cal. 4th 310, 314-315, 321 n.8, 333-334, 87 Cal. Rptr. 2d 423, 981 P.2d 52* (construing *Cal.Const. art. XIII, § 32*, and *Rev. & Tax. Code § 6931*; SBE's prepayment policy may not be enforced insofar as it requires prepayment of interest before tax refund claim will be considered; court did not consider whether SBE may require prepayment of interest as precondition to consideration of challenge directed only to an interest assessment); *see Chen v. Franchise Tax Board (1998) 75 Cal. App. 4th 1110, 1113-1114, 1117-1124, 90 Cal. Rptr. 2d 268* (given plain language of *Cal. Const., art. XIII, § 32*, and *Rev. & Tax. Code § 19382* and definition of tax in *Rev. & Tax. Code § 23036*, word "tax" does not include interest and therefore payment of accrued interest is not jurisdictional prerequisite to action for refund of franchise taxes paid; court did not reach question of whether penalties must be paid before refund action will lie)]. Presumably a penalty is treated in the same way as interest in this regard and need not be paid before an administrative refund claim or a subsequent action for refund of taxes [*see Agnew v. State Board of Equalization (1999) 21 Cal. 4th 310, 323-334, 87 Cal. Rptr. 2d 423, 981 P.2d 52* ; *Chen v. Franchise Tax Board (1998) 75 Cal. App. 4th 1110, 1119-1120, 90 Cal. Rptr. 2d 268* ; *but see* FTB Notice, No. 97-8 (9/4/97), CCH Cal. Tax Rptr., 1995-1999 Transfer Binder, P 402-940 (providing for consideration of claim when tax principal, additions to tax and penalties has been paid in full before or together with claim for refund)]. In anyevent, depending on circumstances, the taxpayer may desire to make payment of interest and any penalty assessed before or at the time of filing a claim for refund, or before suit if not done earlier, to stop the accrual of interest. Moreover, payment of such amounts will avoid the possibility thereafter of any collection activity being commenced by the FTB.

An amount set forth in a notice of proposed assessment is not an assessed tax that is due, and a taxpayer need not pay such an amount before seeking a refund after payment of a tax claimed to be illegal [*City Nat'l Corp. v. Franchise Tax Bd. (2007) 146 Cal. App. 4th 1040, 1046, 53 Cal. Rptr. 3d 411]* . The Revenue and Taxation Code provides a procedure by which a proposed assessment becomes a final assessment that is due and payable [*see Rev. & Tax. Code § 19041 et seq.*; *see also § 540.274* et seq.], including [*City Nat'l Corp. v. Franchise Tax Bd. (2007) 146 Cal. App. 4th 1040, 1045-1046, 53 Cal. Rptr. 3d 411]* :

- A notice of proposed assessment;
- A protest period;
- A response to a taxpayer's protest;
- An administrative appeal period;
- A decision on an appeal;
- A rehearing notice period;
- Possibly a rehearing; and
- A grace period, after determination (and appeal and rehearing), before the proposed assessment becomes a final assessment.

Payment then becomes due 15 days after notice to the taxpayer and a demand for payment [*Rev. & Tax. Code § 19049(a)*].

A written claim for refund must be filed even if the only ground on which the refund is sought is constitutional and

therefore beyond the jurisdiction of the FTB [*see Cal. Const., art. III, § 3.5*; *Shiseido Cosmetics (America) Ltd. v. Franchise Tax Board (1991) 235 Cal. App. 3d 478, 488-491, 286 Cal. Rptr. 690]* , and even if the ground is well known to the FTB because of lengthy protest negotiations and stipulations [*Shiseido Cosmetics (America) Ltd. v. Franchise Tax Board (1991) 235 Cal. App. 3d 478, 492, 286 Cal. Rptr. 690* (negotiations and stipulations for over 6 years)].

[5] Statute of Limitations

A suit against the FTB for refund of bank and corporation tax must be filed within the latest of the following [*Rev. & Tax. Code § 19384*]:

- Four years after the last date prescribed for filing the return;
- One year after the date the tax was paid;
- Ninety days after notice of action by the FTB on a claim for refund; or
- Ninety days after the determination (including the issuance of a decision, opinion, or dismissal) by the SBE on appeal from the action of the FTB on a claim for refund becomes final under *Rev. & Tax. Code § 19334* (as amended by Stats. 1999, ch. 605, § 3); *see* Stats. 1999, ch. 605, § 4 (amendment operative for SBE determinations that become final under *Rev. & Tax. Code § 19334* on or after January 1, 2000; before amendment this period was 90 days after a final notice of action by the SBE on an appeal from the FTB's decision).

The claim for refund itself must have been filed within the later of (1) four years from the date the original return was filed (if filed within the time prescribed by *Rev. & Tax. Code § 18567* or *18604*, whichever is applicable), (2) four years after the last day prescribed for filing the original return (determined without regard to any extension of time for filing the return), or (3) one year after the date of the overpayment [*Rev. & Tax. Code § 19306*].

[6] Jurisdiction and Venue

Taxpayers may file suit against the FTB in the superior court of any county in California where the California Attorney General maintains an office; that is, in the counties of San Francisco, Sacramento, Los Angeles, and San Diego [*Code Civ. Proc. § 401*; *Rev. & Tax. Code § 19388*]. The action is not a limited civil case [*see Code Civ. Proc. § 86(a)(1)*].

[7] Interest and Attorney's Fees

Interest and attorney's fees are payable to a taxpayer that is the prevailing party [*Rev. & Tax. Code §§ 19391, 19521, 19717*; *see §§ 540.304, 540.305*].

[8] California Constitution

Court action to enjoin or prevent collection of tax is prohibited; action to recover tax claimed to have been illegally collected is authorized. *Cal. Const., art. XIII, § 32*

[9] State Statutes

Business income derived from California sources is taxable under unitary method or water's-edge election. *Rev. & Tax. Code §§ 25110 et seq.* (water's-edge election), 25120, 25140 (unitary method)

Deficiency assessment is final if no written protest filed by taxpayer within 60 days after mailing of Notice of Proposed Assessment by FTB. *Rev. & Tax. Code §§ 19041(a), 19042*

Protest filed with FTB on or before last date FTB specified for filing that protest in notice of proposed deficiency assessment (according to *Rev. & Tax. Code § 19034*) to be treated as timely filed. *Rev. & Tax. Code § 19041(b), (c)* (effective January 1, 2000)

No injunction or writ of mandate is issuable to enjoin state, or any state officer, from assessing or collecting tax. *Rev. & Tax. Code § 19381*

[10] Decisions

Foreign-based companies are unable to bring challenges against California's worldwide combined reporting method in federal courts; relief must be sought in California courts, which offer plain, speedy, and efficient remedy. *Franchise Tax Bd. v. Alcan Aluminium, Ltd. (1990) 493 U.S. 331, 339-340, 110 S. Ct. 661, 107 L. Ed. 2d 696*

California's three-factor formula apportionment, which requires worldwide reporting, donot violate constitutional prohibitions, despite fact that it would sometimes result in multiple taxation. *Container Corporation of America v. Franchise Tax Board (1983) 463 U.S. 159, 170-171, 103 S. Ct. 2933, 77 L. Ed. 2d 545*

Fact that same business is operated in several jurisdictions is indicia of unitary business. *Container Corporation of America v. Franchise Tax Board (1983) 463 U.S. 159, 178, 103 S. Ct. 2933, 77 L. Ed. 2d 545*

Increase of 14 percent in taxation under unitary formula from result under separate accounting method is not sufficient to constitute violation of Commerce Clause. *Container Corporation of America v. Franchise Tax Board (1983) 463 U.S. 159, 184, 103 S. Ct. 2933, 77 L. Ed. 2d 545*

Foreign parent of Delaware subsidiary operating in California has no standing to protest unitary assessment against its subsidiary. *EMI, Ltd. v. Bennett (9th Cir. 1984) 738 F.2d 994, 998* ; *Shell Petroleum, N.V. v. Graves (9th Cir. 1983) 709 F.2d 593, 595-596*

Unitary business is one that receives income from or attributable to sources both within and without state; unitary business is generally defined as two or more business entities that are commonly owned, and integrated in a way that transfers value among affiliated entities; if unitary business exists, taxes are apportioned by formula to allocate to California for taxation its fair share of taxable values of taxpayer; in calculating corporate franchise taxes of unitary business, FTB apportions income generated by unitary business based on relationship of combined income to income derived from California sources. *Citicorp North American Inc. v. Franchise Tax Bd. (2000) 83 Cal. App. 4th 1403, 1411 & n.5*

Application of worldwide unitary tax method resulting in apportionment of 70 percent more business income to California than separate accounting does not violate foreign commerce clause of U.S. Constitution or *Rev. & Tax. Code § 25137*. *Colgate-Palmolive Co. v. Franchise Tax Bd. (1992) 10 Cal. App. 4th 1768, 1787, 13 Cal. Rptr. 2d 761*

Income from installment sales must be apportioned according to factors in year of sale, not year in which income was received. *Tenneco West, Inc. v. Franchise Tax Bd. (1991) 234 Cal. App. 3d 1510, 1538, 286 Cal. Rptr. 354*

If business's operation within state is dependent on or contributes to business's operation outside state, enterprise is unitary. *Tenneco West, Inc. v. Franchise Tax Bd. (1991) 234 Cal. App. 3d 1510, 1519, 1525, 286 Cal. Rptr. 354*

Unitary nature of business is definitely established by presence of unity of ownership, unity of operation, and unity of use. *Tenneco West, Inc. v. Franchise Tax Bd. (1991) 234 Cal. App. 3d 1510, 1525, 286 Cal. Rptr. 354*

Family companies operated in California and Colorado and involved in two distinct types of business were unitary because single, functional, integrated unit created by having all managerial control, accounting, payroll, insurance, pension, primary banking, major purchasing, and advertising in California for both lines of business. *Mole-Richardson Co. v. Franchise Tax Board (1990) 220 Cal. App. 3d 889, 895, 269 Cal. Rptr. 662* .

[11] Cross References

See also Comments and References to *§ 540.551*.

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 540 TAXES AND ASSESSMENTS
PART IV. FORMS
C. INCOME TAX

47-540 California Forms of Pleading and Practice--Annotated §§ 540.553-540.569

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

[Reserved]

§§ 540.553[Reserved]

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 540 TAXES AND ASSESSMENTS
PART IV. FORMS
D. TAXPAYERS' BILL OF RIGHTS

47-540 California Forms of Pleading and Practice--Annotated § 540.570

AUTHOR: Robert D. Schindewolf Lawrence M. Freiser, J.D.

§ 540.570 Complaint for Damages Based on Reckless Disregard of SBE or FTB Published Procedures [Rev. & Tax. Code §§ 7099, 21021]

[1] FORM Complaint for Damages Based on Reckless Disregard of SBE or FTB Published Procedures [Rev. & Tax. Code §§ 7099, 21021]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
	)	
vs.	)	NO. _____
	)	COMPLAINT FOR DAMAGES
THE STATE OF	)	(Reckless Disregard of Published Procedures)
CALIFORNIA,	)	
Defendant.	)	
	)	
	)	

Plaintiff alleges:

1. _____ [*Allege identity and capacity of plaintiff, e.g.,* Plaintiff _____ (*name*) is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), _____ (*county*)].

2. Defendant State of California is, and at all times mentioned herein was, a sovereign state of the United States of America. This action is brought against defendant under authority of Section _____ [*7099 or 21021*] of the Revenue and Taxation Code.

3. At all times mentioned herein, _____[*name*] was an _____ [officer *or* employee] of the _____ [State Board of Equalization *or* Franchise Tax Board] (hereinafter "the Board"), an agency of defendant State of California charged by law with the duty of administering the California _____ [Sales and Use Tax Law *or* Bank and Corporation Tax Law *or* Personal Income Tax Law].

4. On or about _____ [*date*], the Board published procedures _____ [*set forth the source and nature of procedures that are the subject of the litigation, e.g.,* under *Section 17000.30 of Title 18 of the Code of Regulations* that prohibit designated employees from making any government decision that he/she knows or has reason to know will have a reasonably material financial effect on the official].

5. On or about _____ [*date*], _____ [*name of officer or employee*] recklessly disregarded the procedure hereinabove set forth by_____[*specify reckless act or omission*].

6. As a proximate result of the recklessness of_____[*name of officer or employee*], plaintiff has sustained actual and direct monetary damages in that_____ [*set forth the nature of the monetary damages*]. Plaintiff has been damaged, therefore, in the sum of $_____.

7. _____ [*Allege compliance with appropriate claim provisions, e.g.,* On or about _____ (*date*), plaintiff presented to the State Board of Control by _____ (delivering *or* mailing) a claim to said board for the injuries, losses, and damages suffered and incurred by him/her by reason of the above-described occurrence, all in compliance with the requirements of *Section 905 of the Government Code*. A copy of the claim is attached hereto as Exhibit A and made a part hereof.]

8. _____ [*Set forth board action on the claim, e.g.,* On or about _____ (*date*), the State Board of Control rejected the claim in its entirety *or* allowed the claim in the amount of $_____ and rejected it as to the remainder *or* failed to act on the claim within the period of 45 days after its presentation, and the claim was thus deemed rejected, under the provisions of *Section 912.4 of the Government Code*, at the expiration of the 45-day period, on _____ (*date*)].

WHEREFORE, plaintiff prays judgment as follows:

1. For actual and direct damages in the sum of $_____;

2. For reasonable litigation costs pursuant to Section _____ [*7099(b)(2) or 21021(b)(2)*] of the Revenue and Taxation Code, according to proof; and

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By:_____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff_____[*name*]

[2] Use of Form

This complaint is for use by a taxpayer to allege a cause of action for damages under *Rev. & Tax. Code § 7099* or *21021*

. The basis for the causeof action is that plaintiff has suffered injury as the result of conduct by an officer or employee of either the SBE or FTB that constitutes reckless disregard of procedures published by that particular agency. For further discussion, see *§ 540.406*.

Depending on the particular facts giving rise to plaintiff's damages, the plaintiff may consider alleging a companion cause of action against the public employee under an independent tort theory. For a discussion of actions against public employees generally, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[3] Allegations

This includes an initial paragraph alleging the plaintiff's identity and capacity as appropriate (Paragraph 1). This paragraph may be used to identify the plaintiff's status as taxpayer, for example, as a retailer under sale and use tax provisions [*see Rev. & Tax. Code §§ 6051, 6201-6203*], or as a nonexempt corporation, bank, or financial corporation under corporation tax law [*see Rev. & Tax. Code §§ 23151, 23181-23182*]. The complaint also alleges the capacity of the defendant State of California and the statutory basis for the state's liability (Paragraph 2) [*see Rev. & Tax. Code §§ 7099(a)* (action is properly brought against state if based on conduct of officer or employee of SBE), 21021(a) (action is properly brought against state if based on conduct of officer or employee of FTB); *see also Gov. Code § 815(a)* (public entity is not liable except as provided by statute)].

The complaint then alleges the essential elements of a cause of action under *Rev. & Tax. Code § 7099* or *21021*:

- The offending person is an officer or employee of either the SBE or the FTB (Paragraph 3).
- the SBE or FTB published a certain procedure (Paragraph 4).
- the officer or employee recklessly disregarded that procedure (Paragraph 5).
- the reckless act or omission of the officer or employee caused plaintiff to incur actual and direct monetary damages (Paragraph 6).

The complaint also includes an essential allegation that the plaintiff has complied with government claim provisions (Paragraphs 7 and 8). Claims for money or damages against the state for an injury for which the state is liable must be presented in accordance with *Gov. Code §§ 900-915.4* [*Gov. Code § 905.2*]. The sample allegations in the form refer to presenting a claim in accordance with *Gov. Code § 905*. Care should be taken to comply with any other applicable claims provisions [*see, e.g., Rev. & Tax. Code §§ 6932* (claim for refund or credit of sales or use taxes), 19382 (payment of tax and denial of claim for refund of personal income and bank and corporation tax)].

[4] Verification

Verification of this complaint is not required. A public entity need not verify its answer even if the complaint is verified [*Code Civ. Proc. §§ 92(b), 446*].However, verification of complaint precludes a general denial [*Code Civ. Proc. § 431.30(d)*].

[5] Jurisdiction and Venue

An action under *Rev. & Tax. Code § 7099* or *21021* is brought in the superior court [*Rev. & Tax. Code §§ 7099(a), 21021(a)*].

In actions against the state, generally, the state attorney general may demand that the place of trial be changed to Sacramento County [*Gov. Code §§ 955* (also stating exception if property takenfor public use), *955.2* (stating exception

if injury to person or personal property occurred)]. However, the action against the state may be commenced in any city or city and county in which the attorney general has an office [*see Code Civ. Proc. § 401(1)*]. Hence, the proper venue is either Sacramento, San Diego, San Francisco, or Los Angeles [*see Harris v. Alcoholic Bev. Etc. Appeals Bd. (1961) 197 Cal. App. 2d 759, 766, 18 Cal. Rptr. 151* ; *see also McPheeters v. Board of Med. Examiners (1946) 74 Cal. App. 2d 46, 49, 168 P.2d 65]* .

[6] Plaintiff's Negligence Considered in Calculating Damages

In awarding damages under *Rev. & Tax. Code §§ 7099(b)(1), 21021(b)(1)*, the court must take into consideration any negligence or omissions on the part of the plaintiff that contributed to the damages [*Rev. & Tax. Code §§ 7099(c), 21021(c)*].

[7] Plaintiff Penalized for Frivolous Position

The court may impose a penalty of up to $10,000 if it finds that the plaintiff's position in the proceedings is frivolous. The penalty is collected as a tax [*Rev. & Tax. Code §§ 7099(d), 21021(d)*].

[8] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, § 177.40* et seq.

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to actions against public entities generally, see Ch. 464, *Public Entities and Officers: California Tort Claims Act*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms for verification, see Ch. 572, *Verification*

[9] Administrative Regulations

SBE hearing procedure. *18 Cal. Code Reg. §§ 5260 et seq., 5510 et seq.*

Conflict of Interest Code for FTB. *18 Cal. Code Reg. § 17000.30*

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Chapters 541-543 [RESERVED]

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[RESERVED]

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 544 TAXICABS

47-544 California Forms of Pleading and Practice--Annotated 544.syn

§ 544.syn Synopsis to Chapter 544: TAXICABS

§ 544.01 Scope of Chapter

§ 544.02 Cross References

§§ 544.03-544.09 [Reserved]

§ 544.10 Governing Law

§ 544.11 Taxicab as Common Carrier

§ 544.12 Taxicab as Public Utility

[1] In General

[2] Licensing and Regulation by Local Authority

[a] Power to Regulate

[b] Multi-City Carriers

[c] Taxicab Permit as License or Privilege

[d] Regulation as Not Antitrust Violation

[e] Location of Taxicab Stands

[f] Judicial Review of Regulatory Decisions

§ 544.13 Duty to Passenger

[1] Highest Degree of Care

[2] Creation of Carrier-Passenger Relationship

[3] Duration of Carrier-Passenger Relationship

§ 544.14 Passenger's Reciprocal Obligations

§ 544.15 Proof of Ownership

§ 544.16 Negligence Actions by Passenger

[1] Injury While Boarding or Alighting

[2] Injury From Violation of Traffic or Safety Rule

[3] Injury From Sudden Movement of Taxicab

[4] Concurrent Negligence of Taxicab Driver and Other Motorist

[5] Res Ipsa Loquitur

§ 544.17 Assault Actions

§ 544.18 Requirement of Owner's Ability to Respond in Damages

[1] Statutory Requirement

[2] No Uninsured Motorist Coverage Requirement

§§ 544.19-544.29 [Reserved]

§ 544.30 Related Texts from LexisNexis

§ 544.31 State Constitution

§ 544.32 State Statutes

[1] General Provisions

[2] Equipment

[3] Miscellaneous

[4] Regulation

§ 544.33 Decisions

[1] Duty of Care to Passengers

[2] Negligence

[3] Regulation

§ 544.34 Law Reviews

§ 544.35 Text References

§§ 544.36-544.39 [Reserved]

§ 544.40 Essential Allegations

§§ 544.41-544.49 [Reserved]

§ 544.50 Complaint for Damages [Civ. Code § 3333] for Personal Injury and Property Damage [Civ. Code § 1714(a), 2100]--By Passenger Against Owner and Driver of Taxicab and Owner and Driver of Another Vehicle--Collision

[1] FORM

[2] Use of Form

[3] Jurisdiction

[4] Allegations

[5] Specifying Amount of Damages

[6] Verification

[7] Cross References

§ 544.51 Complaint for Damages [Civ. Code § 3333] for Wrongful Death of Passenger [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Entitled Person(s) Against Owner and Driver of Taxicab and Owner and Driver of Another Vehicle--Collision

[1] FORM

[2] Use of Form

[3] Allegations

[4] Wrongful Death Actions

[5] Cross References

§ 544.52 Allegation--Injury to Passenger While Boarding or Alighting Taxicab

[1] FORM

[2] Use of Form

[3] Examples of Negligent Acts

§ 544.53 Allegation--Injury to Passenger Caused by Sudden Stop

[1] FORM

[2] Use of Form

§ 544.54 Allegations--Injury to Passenger Before Boarding Taxicab But After Initiation of Driver-Passenger Relationship

[1] FORM

[2] Use of Form

§ 544.55 Allegation--Injury to Passenger Caused by Violation of Traffic or Safety Rule by Driver

[1] FORM

[2] Use of Form

[3] Examples of Negligent Acts

§ 544.56 Allegations--Injury to Passenger Caused by Failure to Provide Seat Belts

[1] FORM

[2] Use of Form

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47-544 California Forms of Pleading and Practice--Annotated § 544.01

§ 544.01 Scope of Chapter

This chapter discusses the duties and liabilities of taxicabs as common carriers, the licensing and regulation of taxicabs, and contains forms for use by passengers injured or killed by the negligent operation of taxicabs.

It includes forms of complaint for use by passengers for personal injury and wrongful death against a taxicab company and its driver, and a third party automobile driver involved in a collision with the taxicab [*see §§ 544.50* and *544.51*].

It also includes allegations that can be used in the complaint set out in *§ 544.50* for passengers injured:

- While boarding or alighting from a taxicab [*see § 544.52*].
- By a sudden stop of a taxicab [*see § 544.53*].
- Before boarding [*see § 544.54*].
- When a cab driver violates a traffic or safety rule [*see § 544.55*].
- Because of the failure to provide seatbelts in a taxicab [*see § 544.56*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceStandards of CareSpecial CareCommon CarriersTortsTransportation TortsMotor VehiclesMotor CarriersTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState & Local RegulationTransportation LawCommercial VehiclesLicensing & Registration

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47-544 California Forms of Pleading and Practice--Annotated § 544.02

§ 544.02 Cross References

For discussion and forms for use in actions involving injuries caused by common carriers of persons generally, see Ch. 109, *Carriers* . For discussion of actions involving automobile collisions and automobile passengers generally, see Ch. 80, *Automobiles: Overview* to Ch. 87A, *Automobiles: Post Trial* .

For more general discussion and forms regarding negligence and wrongful death generally, see Ch. 380, *Negligence* ; and Ch. 181, *Death and Survival Actions* , respectively.

Other coverage that may be of interest includes:

- For a form of complaint to bring an action by a passenger for assault and battery against a carrier of persons for reward, see Ch. 58, *Assault and Battery*

- For discussion and forms related to licensing generally, see Ch. 471B, *Licensing by Public Agencies*

- For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewGovernmentsLocal GovernmentsLicensesTortsTransportation TortsMotor VehiclesGeneral OverviewTortsWrongful Death & Survival ActionsGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral Overview

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47-544 California Forms of Pleading and Practice--Annotated §§ 544.03-544.09

[Reserved]

§§ 544.03[Reserved]

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47-544 California Forms of Pleading and Practice--Annotated § 544.10

§ 544.10 Governing Law

The regulation of public utilities generally is governed by *Cal. Const. art. XII, §§ 1-9*. The duties of carriers of persons for reward are set out in *Civ. Code §§ 2100-2104*. The definition of common carrier is set out in *Civ. Code § 2168*, and the general duties of common carriers of persons are set out in *Civ. Code §§ 2180-2191*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawUtility CompaniesGeneral OverviewTortsNegligenceStandards of CareSpecial CareCommon CarriersTortsTransportation TortsGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral Overview

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47-544 California Forms of Pleading and Practice--Annotated § 544.11

§ 544.11 Taxicab as Common Carrier

Everyone who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he or she thus offers to carry [*Civ. Code § 2168*]. A taxicab company that holds itself out to serve those who apply for transportation is a common carrier, and as such is held to the highest degree of care [*Bezera v. Associated Oil Co. (1931) 117 Cal. App. 139, 143, 3 P.2d 622]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceStandards of CareSpecial CareCommon CarriersTortsTransportation TortsMotor VehiclesMotor CarriersTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCommercial VehiclesGeneral Overview

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47-544 California Forms of Pleading and Practice--Annotated § 544.12

§ 544.12 Taxicab as Public Utility

[1] In General

Private corporations and persons that own, operate, control, or manage a line, plant, or system for the transportation of people or property, directly or indirectly to or for the public, and common carriers, are public utilities subject to control by the legislature [*Cal. Const. art. XII, § 3*; *see People ex rel. Freitas v. City & County of San Francisco (1979) 92 Cal. App. 3d 913, 923, 155 Cal. Rptr. 319]* . A taxicab company, because it is a common carrier [*see § 544.11*], is a public utility [*see Pub. Util. Code § 216(a)*].

[2] Licensing and Regulation by Local Authority

[a] Power to Regulate

Municipalities have the power to license, regulate, and set rates for taxicabs operating within their boundaries [*People ex rel. Freitas v. City & County of San Francisco (1979) 92 Cal. App. 3d 913, 921-925, 155 Cal. Rptr. 319* ; *Veh. Code § 21100(b)* (conferring power on local authorities to license and regulate vehicles for hire and drivers of passenger vehicles for hire); *but see People v. Levering (1981) 122 Cal. App. 3d Supp. 19, 176 Cal. Rptr. 297* (ordinance requiring city permit for vehicles for hire as unconstitutional legislation in area preempted by state law)]. As common carriers, taxicabs may be subject to rate regulation by the state legislature through the Public Utilites Commission [*see Cal. Const. art. XII, §§ 3-8*]. However, in *People ex rel. Freitas*, the court stated that the legislature had not claimed jurisdiction over this area, nor had it sought control of it, and that absent an assertion by the state of its authority to regulate taxicab rates, cities have the power to do so [*People ex rel. Freitas v. City and County of San Francisco (1979) 92 Cal. App. 3d 913, 924, 155 Cal. Rptr. 319]* . The *Freitas* court based its decision in part on a previous holding, *In re Martinez* [*In re Martinez (1943) 22 Cal. 2d 259, 262, 138 P.2d 10* , *overruled on other grounds, People v. Western Air Lines, Inc. (1954) 42 Cal. 2d 621, 268 P.2d 723]* , which held that the legislature intended to exempt taxicabs from state regulation [*People ex rel. Freitas v. City & County of San Francisco (1979) 92 Cal. App. 3d 913, 924, 155 Cal. Rptr. 319]* . The court also stated that the legislature manifested its intention not to give the Public Utilities Commission the power to regulate taxicab fares if they are already licensed and regulated by a city, by exempting taxicabs from regulation under the Passenger Charter-Party Carriers' Act [*see Pub. Util. Code §§ 5351-5419*; *Pub. Util. Code § 5353(g)*; *People ex rel. Freitas v. City & County of San Francisco (1979) 92 Cal. App. 3d 913, 923,*

155 Cal. Rptr. 319] .

[b] Multi-City Carriers

When license and permit fees are imposed by a city on multi-city carriers that do business both within and outside of the city imposing the fee, the fee must be apportioned in a manner that fairly reflects that proportion of the activity that is actually carried on within the jurisdiction imposing the fee [*City of Los Angeles v. Shell Oil Co. (1971) 4 Cal. 3d 108, 124, 93 Cal. Rptr. 1, 480 P.2d 953* ; *People ex rel. Flournoy v. Yellow Cab Co. (1973) 31 Cal. App. 3d 41, 46, 106 Cal. Rptr. 874]* .

[c] Taxicab Permit as License or Privilege

The use of streets by taxicabs is a privilege that may be granted or withheld without violating either due process or equal protection. The privilege may be granted exclusively or nonexclusively to render public services [*In re Petersen (1958) 51 Cal. 2d 177, 182-183, 331 P.2d 24* ; for discussion, *see* [e], *below*]. A license or permit to engage in the taxicab business, issued by the city pursuant to its police power, does not convey a vested property right [*O'Connor v. Superior Court (1979) 90 Cal. App. 3d 107, 114, 153 Cal. Rptr. 306]* . Thus, in one case, a police commission decision to grant 110 new taxicab permits was upheld because it was for the purpose of public convenience and necessity and presented no controversy touching on the impairment of vested rights [*Luxor Cab Co. v. Cahill (1971) 21 Cal. App. 3d 551, 558, 98 Cal. Rptr. 576]* . Similarly, a measure adopted by popular vote that required all existing taxicab permitees to surrender their permits in exchange for new permits that were nonassignable and nontransferable was held not to impair unconstitutionally the obligation of contracts or take property without just compensation because the permitees did not possess a vested right in the taxicab permits generally, or in the transferability of those permits [*O'Connor v. Superior Court (1979) 90 Cal. App. 3d 107, 114-115, 153 Cal. Rptr. 306]* .

[d] Regulation as Not Antitrust Violation

A city sued by a taxicab company for antitrust violations resulting from the city's regulation and licensing of taxicab operations is exempt from liability under the Sherman Antitrust Act [*15 U.S.C. § 1*] if the city has met the test for the state action exemption under the Sherman Act [*Golden State Transit Corp. v. City of Los Angeles (CD Cal. 1983) 563 F. Supp. 169, 171-172]* . The two-fold test requires a showing that (1) the state has a policy to displace competition with regulation; and (2) the state has actively supervised the implementation of the restraint. In the case of taxicab regulation, California has an affirmative policy of displacing competition, as shown by the authorization of state regulation and licensing of taxicabs under the Constitution and the Public Utiltity Code, and the delegation of that power to municipalities [*Golden State Transit Corp v. City of Los Angeles (CD Cal. 1983) 563 F. Supp. 169, 171-172* ; see *Cal Const. art. XII, § 4*; *Pub. Util. Code §§ 5353(g), 5360*].

A city may not be sued under the California antitrust law, the Cartwright Act [*Bus. & Prof. Code §§ 16750-16761*], for violations regarding the regulation and licensing of taxicab companies because a city, as a political subdivision of the state, does not meet the definition of "person" for purposes of being sued as a defendant under the Act [*People ex rel. Freitas v. City & County of San Francisco (1979) 92 Cal. App. 3d 913, 920-921, 155 Cal. Rptr. 319* ; *see Bus. & Prof. Code § 16702*].

[e] Location of Taxicab Stands

Local authorities may by ordinance license and regulate the location of stands on streets and highways for use by taxicabs and other public carriers for hire in their respective jurisdictions. No such ordinance is effective as to any state highway until approved in writing by the Department of Transportation, but that approval is not required if maintenance of a state highway is delegated by the Department to a city [*Veh. Code § 21112*].

A city ordinance allowing exclusive cabstands to be designated to permitee companies has been constitutionally upheld

against due process and equal protection challenges on the grounds (1) that it could promote the constant availability of cabs while avoiding the traffic obstruction and disorderly solicitation of one customer by competitors that could result from an excessive supply of cabs and (2) that the use of the highways by a common carrier is merely a privilege. Further, the government has power to grant exclusive rights to engage in services of a public character as contrasted with an ordinary business or profession [*In re Petersen (1958) 51 Cal. 2d 177, 182-183, 331 P.2d 24* , appeal dism. *360 U.S. 314, 79 S. Ct. 1294, 3 L. Ed. 2d 1259* (ordinance giving police chief discretion to designate and issue permits for the exclusive use of specified cabstands by a single taxicab company)]. The power to establish exclu sive stands has also been upheld as a regulation conducive to the general welfare comparable to the granting of an exclusive franchise [*In re Petersen (1958) 51 Cal. 2d 177, 182-183, 331 P.2d 24* , appeal dism. *360 U.S. 314, 79 S. Ct. 1294, 3 L. Ed. 2d 1259* ; *People v. Galena (1937) 24 Cal. App. 2d Supp. 770, 70 P.2d 724]* .

[f] Judicial Review of Regulatory Decisions

The procedure for review of a municipality's decision regarding the issuance, revocation, or denial of taxicab permits is by writ of mandate [*see Code Civ. Proc. §§ 1084-1087*; *O'Connor v. Superior Court (1979) 90 Cal. App. 3d 107, 110, 153 Cal. Rptr. 306]* or, for review of the decision of an administrative agency, by administrative mandamus [*see Code Civ. Proc. §§ 1094.5, 1094.6*; *Luxor Cab Co. v. Cahill (1971) 21 Cal. App. 3d 551, 558, 98 Cal. Rptr. 576]* . For forms for use in preparing a traditional writ of mandate, see Ch. 358, *Mandate and Prohibition* . For forms for use in preparing a writ of mandate to review an administrative proceeding, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawSherman ActCoverageExemptionsEnergy & Utilities LawUtility CompaniesGeneral OverviewGovernmentsLocal GovernmentsLicensesTransportation LawCarrier Duties & LiabilitiesState & Local RegulationTransportation LawCommercial VehiclesLicensing & Registration

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47-544 California Forms of Pleading and Practice--Annotated § 544.13

§ 544.13 Duty to Passenger

[1] Highest Degree of Care

Every one who offers to the public to carry persons, property, or messages (except for telegraphic messages), is a common carrier of whatever he or she offers to carry [*Civ. Code § 2168*]. Thus, a taxicab operator as a common carrier of passengers is subject to the provisions of *Civ. Code §§ 2168-2191* regarding, among other things, the handling of baggage and payment of fares.

A carrier of persons for reward must provide vehicles that are safe for the purposes for which they are used, and the carrier will not be excused for default in this respect by any degree of care [*Civ. Code § 2101*]. The carrier must also avoid overloading or overcrowding of the vehicle [*Civ. Code § 2102*]. Passengers must be given all usual and reasonable accommodations by the carrier, and they must be treated with civility and given a reasonable degree of attention [*Civ. Code § 2103*]. The carrier must also travel at reasonable rates of speed, and without any unreasonable delay or deviation from the proper route [*Civ. Code § 2104*].

A taxicab company, as a common carrier, is subject to the highest degree of care [*Bezera v. Associated Oil Co. (1931) 117 Cal. App. 139, 143, 3 P.2d 622* ; *see § 544.11*]. In addition, any carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill [*Civ. Code § 2100*; *see Butigan v. Yellow Cab Co. (1958) 49 Cal. 2d 652, 657, 320 P.2d 500]* .

The standard of care for a common carrier, that is a carrier that customarily and daily cruises the streets for patronage and awaits calls of the public for transportation, is to provide the utmost care and diligence for the safety of the passenger [*Civ. Code § 2100*; *Butigan v. Yellow Cab Co. (1958) 49 Cal. 2d 652, 657, 320 P.2d 500* ; *Hopkins v. Yellow Cab Co. (1952) 114 Cal. App. 2d 394, 396-398, 250 P.2d 330]* . That standard is distinguished from the standard for private carriers, which is to provide only ordinary care for the passenger's safety. A common carrier becomes a private carrier when the common carrier contracts to render a special service for a group of individuals or a public agency [*Hopkins v. Yellow Cab Co. (1952) 114 Cal. App. 2d 394, 397-398, 250 P.2d 330]* .

For discussion of duty of common carrier of persons for reward generally, see Ch. 106, *Buses and Streetcars* .

[2] Creation of Carrier-Passenger Relationship

The relationship of carrier and passenger may begin before the passenger actually enters the taxicab. The relationship is established when a person who intends in good faith to become a passenger goes to a depot, waiting room, or other place designated as the site of departure, and by some action taken by the carrier, the carrier indicates acceptance of the passenger as a traveler. Additionally, if the carrier assumes the responsibility of conducting the person who has become a passenger to the point of departure of the transporting vehicle, then the relation of passenger and carrier exists during that period [*Grier v. Ferrant (1944) 62 Cal. App. 2d 306, 311, 144 P.2d 631]* .

[3] Duration of Carrier-Passenger Relationship

The rule requiring a common carrier to provide the passenger with the highest degree of care pertains to the contract of carriage and remains in effect until the passenger reaches a place outside the sphere of any activity of the carrier that might reasonably constitute a mobile or animated hazard to the passenger. The rule applies to disputes over the fare between a cab driver and a passenger. While they remain in each other's presence actively carrying on the dispute, the passenger is not discharged under the contract of carriage, and the carrier, its agents, and employees are still bound to exercise the highest degree of care in refraining from initiating conduct that would jeopardize the passenger's safety [*Dayton v. Yellow Cab Co. (1948) 85 Cal. App. 2d 740, 745, 193 P.2d 959]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceStandards of CareSpecial CareCommon CarriersTortsTransportation TortsMotor VehiclesMotor CarriersTransportation LawCarrier Duties & LiabilitiesGeneral Overview

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§ 544.14 Passenger's Reciprocal Obligations

Passengers have a reciprocal obligation to use all reasonable care within their power for their own safety and to accord the same civility to the carrier, its agents, and employees as is required from the carrier to the passengers. Thus, a cab driver who is attacked by an aggressor passenger, whether in a dispute over the fare or otherwise, has the same right to self-protection as would anyone else [*Dayton v. Yellow Cab Co. (1948) 85 Cal. App. 2d 740, 745-746, 193 P.2d 959]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsDefensesDefense of Self & OthersTortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsTransportation TortsMotor VehiclesMotor CarriersTransportation LawCarrier Duties & LiabilitiesGeneral Overview

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§ 544.15 Proof of Ownership

In a case in which the ownership of the taxicab is in dispute, evidence that the company's name was painted on the cab is sufficient proof of ownership [*Tieman v. Red Top Cab Co. (1931) 117 Cal. App. 40, 45, 3 P.2d 381]* . Thus, in a case involving an accident, it was held that a taxicab painted with the distinctive colors of the taxicab company and bearing the name of the company on its sides was sufficient proof of ownership of the cab by the company that used those distinctive signs and markings, despite the company's contrary evidence that it had no franchise in the city in which the accident occurred, that it owned no taxicabs, that it had no stands from which cabs were dispatched, and that the driver of the cab was not a member of the company's drivers' association [*Smith v. Deutsch (1948) 89 Cal. App. 2d 419, 420-421, 200 P.2d 802]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDemonstrative EvidenceGeneral OverviewTortsTransportation TortsMotor VehiclesMotor CarriersTransportation LawCommercial VehiclesGeneral OverviewTransportation LawCommercial VehiclesLicensing & Registration

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47-544 California Forms of Pleading and Practice--Annotated § 544.16

§ 544.16 Negligence Actions by Passenger

[1] Injury While Boarding or Alighting

A cab driver does not breach his or her duty to the passengers when he or she discharges them from the taxicab away from the curb, when there is no danger of either the passengers being hit by passing vehicles or of injury to them due to the condition of the street. Neither is there a duty to assist passengers as they get out of a taxi [*Bua v. G.I. Taxi Co. (1960) 186 Cal. App. 2d 612, 615-616, 9 Cal. Rptr. 118]* . However, depending on the particular facts and circumstances, a taxicab operator may be found negligent for the manner in which he or she picks up or discharges passengers. For example, a jury verdict holding a cab driver liable for injuries incurred by the passenger when the driver parked the taxicab diagonally to the curb without warning the passenger that the cab was not parallel to the curb was upheld on appeal [*Healy v. Yellow Cab Co. (1939) 32 Cal. App. 2d 479, 480-481, 90 P.2d 116]* .

The carrier can also be held liable for injuries incurred by a passenger who is on the way to the cab but who has not yet boarded, in certain circumstances. If the relationship of carrier and passenger has already been established [*see § 544.13[2]*], the carrier may be held liable to a passenger who is injured on his or her way to boarding the taxicab while being escorted or conducted by the carrier or the carrier's agent. For example, a handicapped man who went to a waiting room designated for loading and discharging taxicab passengers was injured while en route to the taxicab. The passenger was not taken to the usual site for boarding, which was directly in front of the waiting room, but was escorted, without physical assistance, down a wet, slippery sidewalk 150 feet or more to a waiting cab. The court held that the passenger-carrier relationship existed and that the award to the passenger was proper [*Grier v. Ferrant (1944) 62 Cal. App. 2d 306, 311-313, 144 P.2d 631]* .

For a form of allegation that a passenger was injured by the taxicab driver's negligence while boarding or alighting the taxicab, see *§ 544.52*.

[2] Injury From Violation of Traffic or Safety Rule

It is proper for a court to instruct the jury that the violation of a traffic ordinance or statute raises a presumption that the one committing the violation was negligent. For example, in a case in which a city ordinance prohibited the parking of vehicles more than eighteen inches from the curb, a verdict of negligence was upheld against a taxicab driver and the

cab company for injuries to a passenger and her husband, who was not a passenger, when the cab was hit by a car while the cab was parked across a driveway, sticking out several feet into the street [*Sipperly v. San Diego Yellow Cabs, Inc. (1949) 89 Cal. App. 2d 645, 649-652, 201 P.2d 543]* .

Negligence can also be shown by the fact that a driver is driving at an excessive speed in a situation in which care and caution should be exercised. A taxicab company was found concurrently liable with a railway company for injuries to a passenger when the taxicab was hit by a train because, although the railroad should have had warning signals at the crossing, the cab driver did not stop before crossing and instead proceeded at an excessive rate of speed across the tracks [*Deshotel v. Atchison, Topeka & Santa Fe Ry. Co. (1956) 144 Cal. App. 2d 224, 231, 300 P.2d 910]* . Similarly, a taxicab driver was found negligent for injuries incurred by a passenger in a collision at an intersection because the cab driver had been driving at an excessive rate of 50 miles per hour, and additionally because, in violation of the law, he had not yielded the right of way to the other driver [*Roy v. Mission Taxi Co. (1950) 101 Cal. App. 2d 438, 447-449, 225 P.2d 920]* .

For a form of allegation that a passenger was injured by the taxicab driver's negligence in violating a traffic or safety rule, see *§ 544.55*.

[3] Injury From Sudden Movement of Taxicab

If a taxicab makes a sudden jerk or lurch or moves while the driver is still in his or her seat at the wheel, and a passenger who is exercising due care in the act of leaving the cab is injured because of the movement, the court may find that the proximate cause of the injuries was the driver's negligence [*Pedrow v. Federoff (1926) 77 Cal. App. 164, 171, 247 P. 212]* . Likewise, a driver may be found negligent for suddenly moving the door that the passenger is holding while being assisted into the taxicab, causing the passenger to lose his or her balance and fall [*Riis v. Yellow Cab Co. (1938) 29 Cal. App. 2d 25, 26, 83 P.2d 959]* .

For related forms of allegations, see *§§ 544.52 -544.54*.

[4] Concurrent Negligence of Taxicab Driver and Other Motorist

Concurrent liability may be imposed on both the taxicab company and its driver and the driver of another vehicle involved in an accident for injuries incurred by the taxicab passenger, if both drivers are concurrently negligent and each is a proximate cause of the accident [*Deshotel v. Atchison, Topeka & Santa Fe Ry. Co. (1956) 144 Cal. App. 2d 224, 231, 300 P.2d 910]* .

For example, both the cab driver and the driver of the vehicle that hit it from behind were found liable to the taxicab passengers in a case in which the cab driver failed to signal and the other motorist failed to stop and avoid the collision [*Stark v. Yellow Cab Co. (1949) 90 Cal. App. 2d 217, 218-219, 202 P.2d 802]* . In another case a truck driver and the taxicab driver were found concurrently negligent for failing to exercise due care in entering an intersection and avoiding a collision between the two vehicles [*Roy v. Mission Taxi Co. (1950) 101 Cal. App. 2d 438, 444-445, 225 P.2d 920]* .

For a forms of complaint against a cab driver and the driver of another vehicle, see *§§ 544.50* (personal injury) and *544.51* (wrongful death).

[5] Res Ipsa Loquitur

The doctrine of res ipsa loquitur may be used by a passenger to raise a presumption of negligence on the part of the carrier in a case in which the passenger is uncertain as to what occurred to cause the injury, the taxicab was under the exclusive management and control of the carrier and its agents at the time of the injury, and the accident would not have occurred if those in control of the vehicle used proper care [*see* *Taylor v. Luxor Cab Co. (1952) 112 Cal. App. 2d 46,*

52-53, 246 P.2d 45] . The fact that the accident involved another vehicle not under the control of the carrier does not prevent the use of the doctrine of res ipsa loquitur [*Stark v. Yellow Cab Co. (1949) 90 Cal. App. 2d 217, 220-221, 202 P.2d 802]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceProofRes Ipsa LoquiturElementsGeneral OverviewTortsNegligenceProofRes Ipsa LoquiturElementsControlTortsNegligenceProofViolations of LawSafety CodesTortsTransportation TortsMotor VehiclesMotor CarriersTransportation LawCarrier Duties & LiabilitiesGeneral Overview

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§ 544.17 Assault Actions

A carrier owes to the passenger the highest degree of care in refraining from initiating conduct that would jeopardize the passenger's safety. The rule of utmost care and diligence set forth in *Civ. Code § 2100* includes the case of a dispute over the fare between a cab driver and a passenger [*Dayton v. Yellow Cab Co. (1948) 85 Cal. App. 2d 740, 745, 193 P.2d 959* ; *see Civ. Code § 2100*; *see also* discussions in *§ 544.13*]. The carrier also has a duty to provide the highest degree of care to protect the passenger from the unprovoked assaults of the other passengers [*see* *Lewis v. South S.F. Yellow Cab Co. (1949) 93 Cal. App. 2d 849, 852, 210 P.2d 62]* .

A taxicab company that employs a driver who has assaulted a passenger is liable as a principal if the assault takes place in the course of the driver-agent's employment. It is immaterial whether or not the assault was authorized by the employer if it is committed by the driver in the course of his or her employment [*Connell v. Clark (1948) 88 Cal. App. 2d 941, 944-945, 200 P.2d 26]* .

For a form of complaint for damages for assault and battery brought by a passenger against an agent of a common carrier that may be adapted for use by a taxicab passenger, see Ch. 109, *Carriers* . For a form of complaint for damages for assault and battery brought by a passenger against a carrier of persons for reward, see Ch. 58, *Assault and Battery* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAssault & BatteryGeneral OverviewTortsNegligenceStandards of CareSpecial CareCommon CarriersTortsTransportation TortsMotor VehiclesMotor CarriersTransportation LawCarrier Duties & LiabilitiesGeneral Overview

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47-544 California Forms of Pleading and Practice--Annotated § 544.18

§ 544.18 Requirement of Owner's Ability to Respond in Damages

[1] Statutory Requirement

Every owner of a vehicle used in the transportation of passengers for hire, including taxicabs, when the operation of the vehicle is not subject to regulation by the Public Utilities Commission, must maintain, whenever he or she may be engaged in conducting those operations, proof of financial responsibility resulting from the ownership or operation of the vehicle and arising by reason of personal injury to, or death of, any one person, of at least $15,000, and subject to the limit of $15,000 for each person injured or killed, of at least $30,000 for such injury to, or death of, two or more persons in any one accident, and for damages to property of at least $5,000 resulting from one accident [*Veh. Code § 16500*].

Proof of financial responsibility may be maintained by any of the following methods [*Veh. Code § 16500*]:

(1) being insured under a motor vehicle liability policy against such liability;

(2) obtaining a bond of the same kind and containing the same provisions as bonds specified in *Veh. Code § 16434*;

(3) depositing $35,000 with the Department of Motor Vehicles, to be deposited in a special deposit account with the State Controller; or

(4) qualifying as a self-insurer under *Veh. Code § 16503*.

A taxicab owner may not use or give permission to another to use any vehicle used in the transportation of persons or property in the conduct of a business without maintaining proof of financial responsibility as required by *Veh. Code §§ 16500-16503* [*Veh. Code § 16502*]. All vehicles used in the transportation of persons or property in the conduct of a business, except vehicles subject to regulation by the Public Utilities Commmission, that are registered in the name of any person convicted of violating *Veh. Code § 16502* must be suspended from registration until the owner maintains proof of financial responsibility [*see Veh. Code § 16503*].

Veh. Code §§ 16500-16503 do not prevent local authorities, within the reasonable exercise of their police power, from adopting rules and regulations, by ordinance or resolution, licensing and regulating the operation of any vehicle for hire and the drivers of passenger vehicles for hire [*Veh. Code § 16501*].

[2] No Uninsured Motorist Coverage Requirement

Taxicab companies are not required to include uninsured motorist coverage in their liability insurance policies. Although taxicab companies, as common carriers, have the duty to use the utmost care and diligence for the safety of their passengers under *Civ. Code § 2100*, that duty does not include securing and carrying uninsured motorist coverage. The risk of injury to a passenger in a taxi cab by an uninsured motorist may be foreseeable, but the legislature, under *Ins. Code § 11580.2(b)*, expressly exempted automobiles used as public conveyances from the requirement of carrying uninsured motorist insurance. Thus, a taxicab company that procures a liability insurance policy pursuant to *Veh. Code § 16500*, but intentionally waives uninsured motorist coverage, is not liable to an injured passenger based on failure to carry that coverage [*Brown v. All Am. Cab Co. (1976) 57 Cal. App. 3d 896, 897-898, 129 Cal. Rptr. 495]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawMotor Vehicle InsuranceCoverageCompulsory CoverageProof of Financial ResponsibilityInsurance LawMotor Vehicle InsuranceCoverageUninsured MotoristsGeneral OverviewTortsTransportation TortsMotor VehiclesMotor CarriersTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCommercial VehiclesGeneral Overview

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47-544 California Forms of Pleading and Practice--Annotated §§ 544.19-544.29

[Reserved]

§§ 544.19[Reserved]

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47-544 California Forms of Pleading and Practice--Annotated § 544.30

§ 544.30 Related Texts from LexisNexis

For memoranda of points and authorities for use in actions involving carriers, see California Points and Authorities, Ch. 33, *Carriers* (Matthew Bender)

For memoranda of points and authorities for use in actions involving assault actions generally, see California Points and Authorities, Ch. 21, *Assault and Battery* (Matthew Bender)

For memoranda of points and authorities for use in actions involving negligence actions generally, see California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender)

For forms of interrogatories for use in actions involving carriers, see Bender's Forms of Discovery, *Carriers* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAssault & BatteryGeneral OverviewTortsNegligenceGeneral OverviewTortsTransportation TortsMotor VehiclesMotor CarriersTransportation LawCarrier Duties & LiabilitiesGeneral Overview

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47-544 California Forms of Pleading and Practice--Annotated § 544.31

§ 544.31 State Constitution

Regulation of public utilities generally. *Cal. Const. art. XII, §§ 1-9*

Classification of public utilities subject to control by Legislature. *Cal. Const. art. XII, § 3*

Control of rates, regulations by Public Utilities Commission. *Cal. Const. art. XII, § 4*

Local regulation of public utilities. *Cal. Const. art. XII, § 8*

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawAdministrative ProceedingsGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsRatemakingEnergy & Utilities LawUtility CompaniesGeneral Overview

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47-544 California Forms of Pleading and Practice--Annotated § 544.32

§ 544.32 State Statutes

[1] General Provisions

Carriers, generally. *Civ. Code §§ 2085-2090*

Carriage of persons for reward, generally. *Civ. Code §§ 2100-2104*

Higher duty of carriers of persons for reward. *Civ. Code §§ 2100*

Common carriers, generally. *Civ. Code §§ 2168-2178*

Common carrier defined. *Civ. Code § 2168*; *Pub. Util. Code § 211*

Common carriers of persons, generally. *Civ. Code §§ 2180-2191*

[2] Equipment

Rule prohibiting operation of private passenger motor vehicle on highway unless all passengers sixteen years of age or older are restrained by safety belt as inapplicable to operator of taxicab, as defined, when driving on a city street; operator of taxicab as not permitted to operate taxicab unless passengers six years of age or older or weighing 60 pounds or more in front seat are properly restrained by safety belt. *Veh. Code § 27315(d)(1),(3)*

Operator of limousine for hire as not permitted to operate vehicle unless passengers six years of age or older or weighing 60 pounds or more in front seat are properly restrained by safety belt. *Veh. Code § 27315(d)(2)*

Owner or operator of taxicab or limousine for hire as required to maintain safety belts in good working order for use of occupants. *Veh. Code § 27315(f)*

[3] Miscellaneous

Taxicab driver misdirecting hotel guest to other accommodations as guilty of misdemeanor. *Penal Code § 649*

[4] Regulation

Definition of public utility. *Pub. Util. Code § 211, 216(a)*

Exclusion of taxicabs from provisions of Charter-Party Carriers' Act (*Pub. Util. Code §§ 5351-5412*). *Pub. Util. Code § 5353(g)*

Power of local authorities to regulate and license passenger vehicles for hire. *Veh. Code § 21100(b)*

Power of local authorities to regulate taxicab stands. *Veh. Code § 21112*

Exceptions to rules against stopping, standing, or parking for taxicabs and other carriers. *Veh. Code § 22500(b),(e)*

Power of peace officer, public officer, or employee to impound and retain possession of taxicab when officer arrests person for unlicensed operation of taxicab and when offense occurred at public airport, within 100 feet of public airport, or within two miles of California/Mexico international border. *Gov. Code § 53075.6*

Authority of local governments to investigate and sanction taxicab services operating without a valid license, certificate, or permit. *Gov. Code §§ 53075.7-53075.9*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsLicensesTortsNegligenceStandards of CareSpecial CareCommon CarriersTortsTransportation TortsMotor VehiclesMotor CarriersTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState & Local Regulation

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47-544 California Forms of Pleading and Practice--Annotated § 544.33

§ 544.33 Decisions

[1] Duty of Care to Passengers

Person who rented limousine and who was abandoned while drunk, clad only in swim suit, and without personal effects or any way to get home, as not stating cause of action for tortious breach of covenant of good faith and fair dealing, but as able to state causes of action for breach of contract (possibly including damages for emotional distress), for conversion, and for breach of statutory obligations imposed by *Civ. Code § 2100* and *Pub. Util. Code §§ 2106, 5360, 5382*. *Rogoff v. Grabowski (1988) 200 Cal. App. 3d 624, 633-634, 246 Cal. Rptr. 185*

[2] Negligence

Taxicab, as carrier of persons for reward, must use utmost care and diligence for their safe carriage and to provide everything necessary for that purpose. *Butigan v. Yellow Cab Co. (1958) 49 Cal. 2d 652, 657, 320 P.2d 500* ; *Hopkins v. Yellow Cab Co. (1952) 114 Cal. App. 2d 394, 396-398, 250 P.2d 330*

Evidence that company's name was painted on cab as sufficient proof of ownership. *Smith v. Deutsch (1948) 89 Cal. App. 2d 419, 420-421, 200 P.2d 802* ; *Tieman v. Red Top Cab Co. (1931) 117 Cal. App. 40, 45, 3 P.2d 381*

Question of taxicab company's liability for failure to provide visible seat belts to passenger, and whether that constituted a proximate cause of passenger's injuries was question for jury. *McNeil v. Yellow Cab Co. (1978) 85 Cal. App. 3d 116, 147 Cal. Rptr. 733*

Res ipsa loquitur applies in case in which plaintiff taxicab passenger was unaware of circumstances of accident between taxicab and other vehicle. *Formosa v. Yellow Cab Co. (1939) 31 Cal. App. 2d 77, 85-86, 87 P.2d 716*

Plaintiff taxicab passenger, although aware of many circumstances of occurrence of accident, may rely on duty of utmost care and res ipsa loquitur. *Dieterle v. Yellow Cab Co (1939) 34 Cal. App. 2d 97, 100, 93 P.2d 171*

Taxicab, as common carrier, as owing highest degree of care to passengers. *Bezera v. Associated Oil Co. (1931) 117 Cal. App. 139, 143, 3 P.2d 622*

[3] Regulation

Grounds of complaint to recover overcharges allegedly made by defendant taxicab company constituted proper class action. *Daar v. Yellow Cab Co. (1967) 67 Cal. 2d 695, 715, 63 Cal. Rptr. 724, 433 P.2d 732*

Ordinance allowing police chief discretion to designate and issue permits to certain taxicab companies for use of exclusive cabstands is permissible. *In re Petersen (1958) 51 Cal. 2d 177, 182-183, 331 P.2d 24* , appeal dism. *360 U.S. 314, 79 S. Ct. 1294, 3 L. Ed. 2d 1259*

Incentives for drivers of clean air taxicabs adopted by city in furtherance of its goal of cleaner air at the airport were part of a pilot program and were regulatory acts pursuant to the city's police power. A government entity may not contract away its right to exercise the police power in the future, and the city was free to subsequently adjust incentives downward where the facts did not show that the city promised not to amend the incentive program. *Cotta v. City and County of San Francisco (2007) 157 Cal. App. 4th 1550, 1561* , Cal. Rptr. 3d 612

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceStandards of CareSpecial CareCommon CarriersTortsTransportation TortsMotor VehiclesMotor CarriersTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState & Local RegulationTransportation LawCommercial VehiclesGeneral Overview

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47-544 California Forms of Pleading and Practice--Annotated § 544.34

§ 544.34 Law Reviews

Strachan, *Taxi Law,* 118 Sol. J. 176 (1974)

Eckert, *The Los Angeles Taxi Monopoly: An Economic Inquiry, 43 So. Cal. L. Rev. 407 (1970)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawMonopolizationGeneral OverviewTortsTransportation TortsMotor VehiclesMotor CarriersTransportation LawCarrier Duties & LiabilitiesGeneral OverviewTransportation LawCommercial VehiclesGeneral Overview

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§ 544.35 Text References

Witkin, Summary of California Law, vol. 2, *Insurance*, §§ 180, 181, 187-189, 200-204, 212, 315 (10th ed. 2005)

Legal Topics:

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

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47-544 California Forms of Pleading and Practice--Annotated §§ 544.36-544.39

[Reserved]

§§ 544.36[Reserved]

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PART III. ESSENTIAL ALLEGATIONS

47-544 California Forms of Pleading and Practice--Annotated § 544.40

§ 544.40 Essential Allegations

Complaints by passengers against taxicab owners and their operators should include the following allegations:

- Status or business of defendant as carrier of persons for reward and common carrier in order to establish the highest duty of care [*see Civ. Code §§ 2100, 2168*; *Bezera v. Associated Oil Co. (1931) 117 Cal. App. 139, 143, 3 P.2d 622]* ;

- Status of the injured person as a person carried for reward (paying passenger) at the time of injury [*see Dayton v. Yellow Cab Co. (1948) 85 Cal. App. 2d 740, 744, 193 P.2d 959* ; *Grier v. Ferrant (1944) 62 Cal. App. 2d 306, 311, 144 P.2d 631]* .

- Ownership of taxicab [*see Smith v. Deutsch (1948) 89 Cal. App. 2d 419, 420-421, 200 P.2d 802* ; *Tieman v. Red Top Cab Co. (1931) 117 Cal. App. 40, 45, 3 P.2d 381]* .

- Agency or employee status of driver or others who acted negligently [*see Smith v. Deutsch (1948) 89 Cal. App. 2d 419, 424-425, 200 P.2d 802]* .

- Breach of duty by the carrier, its agents, and employees (e.g., negligent operation, maintenance, etc., of taxicab) that was a proximate cause of injury to the passenger [*see Butigan v. Yellow Cab Co. (1958) 49 Cal. 2d 652, 659, 320 P.2d 500]* .

NOTE:

Although some pleaders have attempted in carrier-passenger cases to state causes of action for breach of contract as well as in tort, it appears that if the complaint sets out a breach of duty and consequent injury as the gravamen of the action, the carrier's violation of its obligation to safely carry arises out of tort and not contract [*see* *Basler v. Sacramento Elec., Gas & Ry. Co. (1913) 166 Cal. 33, 36, 134 P. 993* ; *Williamson v. Pacific Greyhound Lines (1944) 67 Cal. App. 2d 250, 256, 153 P.2d 990]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceStandards of CareSpecial CareCommon CarriersTortsTransportation TortsMotor VehiclesMotor CarriersTransportation LawCarrier Duties & LiabilitiesGeneral Overview

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47-544 California Forms of Pleading and Practice--Annotated §§ 544.41-544.49

[Reserved]

§§ 544.41[Reserved]

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PART IV. FORMS

47-544 California Forms of Pleading and Practice--Annotated § 544.50

§ 544.50 Complaint for Damages [Civ. Code § 3333] for Personal Injury and Property Damage [Civ. Code § 1714(a), 2100]--By Passenger Against Owner and Driver of Taxicab and Owner and Driver of Another Vehicle--Collision

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injury and Property Damage [Civ. Code § 1714(a), 2100]--By Passenger Against Owner and Driver of Taxicab and Owner and Driver of Another Vehicle--Collision

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR PERSONAL
_____ [*names*], [and DOES 1	)	INJURY [AND PROPERTY DAMAGE]
through _____,]	)	(Negligence)
Defendants.	)	[LIMITED CIVIL CASE]
	)	[Amount demanded _____
		(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. Defendant _____ [*name of cab driver*] is, and at all times herein mentioned was, a resident of _____ [*city*] _____ County, California.

[*EITHER*]

2. Defendant _____ [*name of cab company*] is, and at all times herein mentioned was, a corporation

duly organized and existing under the laws of the State of California with its principal place of business in _____ [*city*], _____ County, California.

[*OR*]

2. Defendant _____ [*name of cab company*] is, and at all times herein mentioned was, a _____ (partnership *or* unincorporated association), doing business as _____ [*fictitious name*], with its partners conducting business in _____ [*city*], _____ County, California. [Defendants _____ (*names*) are, and at all times herein mentioned were, members of that _____ (partnership *or* unincorporated association) (and are, and at all times herein mentioned were, residents of _____ County, California)].

[*OR*]

2. Defendant _____ [*name of cab company*] is, and at all times herein mentioned was, a sole proprietorship, owned by _____ [*name*], who at all times herein mentioned conducted business in _____ [*city*], _____ County, California.

3. Defendant _____ [*name of automobile driver*] is, and at all times herein mentioned was, a resident of _____ [*city*], _____ County, California.

[4. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and based thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by that negligence.]

[5. (Plaintiff is informed and believes and thereon alleges that) (A)t all times herein mentioned each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting in the course and scope of such agency and employment.]

6. Defendant _____ [*name of cab company*] is, and at all times herein mentioned was, a common carrier of passengers for reward, and as such offered the use of taxicabs owned by him/her/it with drivers employed by him/her/it to the public for hire.

7. Defendant _____ [*name of cab driver*] was at all times herein mentioned an employee of defendant _____ [*name of cab company*], and in the commission of the acts here alleged was acting in the scope and course of his/her employment and with the permission and consent of his/her codefendant(s).

8. Defendant _____ [*name of cab company*] is, and at all times herein mentioned, was the owner of a taxicab known as _____ [*name of taxi company, e.g.,* Blue & White] Cab No. _____ [*specify*], bearing California license No. _____ [*specify*], hereafter referred to as "the taxicab."

9. Defendant(s) _____ [*name(s) of owner(s) of other car*] [, and each of them], was/were the owner(s) of a certain _____ [*year, make, model of vehicle*] motor vehicle, California license No. _____ [*specify*], hereafter referred to as _____ [*make of vehicle, e.g.,* "the Chrysler"].

[*EITHER*]

10. Defendant _____ [*name of owner*] was driving and operating _____ [*make of vehicle, e.g.*, "the Chrysler"] at the time of the collision alleged in this complaint.

[*OR*]

10. [Plaintiff is informed and believes and thereon alleges that] [A]t the time of the collision herein alleged defendant _____ [*name of driver*] was driving and operating _____ [*make of vehicle, e.g.*, "the Chrysler"] [with the knowledge, permission, and consent of _____ (*name of owner*)].

11. On or about _____ [*date*], at or about _____ [*time*], defendants _____ [*name of cab company*] and _____ [*name of cab driver*] were transporting plaintiff as a passenger for hire in the taxicab, and defendant _____ [*cab driver*] was driving the taxicab in a general _____ [*specify*] direction on _____ [*name of street*] in _____ [*city*], _____ County, California. At or about that same time, defendant _____ [*name of automobile driver*] was driving _____ [*specify vehicle, e.g.*, the Chrysler] in a general _____ [*specify*] direction on _____ [*name of street*]. Both drivers operated, entrusted, controlled, and maintained their vehicles so negligently that as a proximate result of that negligence, the vehicles collided at _____ [s *pecify intersection or location of collision*], causing plaintiff to suffer severe personal injuries, as hereafter alleged.

12. As a proximate result of the negligence of defendants, and each of them, plaintiff was injured as follows: _____ [*describe injuries incurred by plaintiff*]. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has suffered general damages.

13. As a further proximate result of the negligence of defendants, and each of them, plaintiff has been required to and has in curred [and will continue to incur] expenses for services of physicians and surgeons, hospital care, and other medical services and supplies.

14. As a further proximate result of the negligence of defendants, and each of them, plaintiff's earning capacity has been greatly impaired, both in the past and in the present.

[15. As a further proximate result of the negligence of defendants, and each of them, plaintiff's _____ (*describe personal property*) was _____ (damaged *or* destroyed), all to plaintiff's damage in the sum of $_____.]

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

[4. For damage to personal property _____ (according to proof *or* in the sum of

$_____);]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of complaint is for use by a passenger to bring an action for personal injuries against a taxicab owner and driver and the owner and driver of another vehicle for injuries sustained by the passenger in a collision between the taxicab and the other automobile. The carrier and driver of other vehicle involved in an accident are concurrently liable if both drivers are at fault [*see Deshotel v. Atchison, Topeka & Santa Fe Ry. Co. (1956) 144 Cal. App. 2d 224, 231, 300 P.2d 910* ; *Stark v. Yellow Cab Co. (1949) 90 Cal. App. 2d 217, 218-220, 202 P.2d 802* ; *see § 544.16[4]*]. It includes optional allegations to seek damages for property damage in addition to personal injury.

The allegations set forth in *§§ 544.52 -544.56*, which refer to specific circumstances under which the injury occured, may be added to this complaint, if appropriate.

[3] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[4] Allegations

The complaint alleges:

- The defendants' residence and capacity (Paragraphs 1-3).

- The responsibility of fictitiously named defendants sued pursuant to *Code Civ. Proc. § 474* (optional Paragraph 4).

- That the defendants are agents of one another (optional Paragraph 5).

- That defendant cab company is a common carrier, which gives rise to the legal duty to provide passengers with a high degree of care pursuant to *Civ. Code § 2100* (Paragraph 6) [*see Civ. Code § 2168* (every one who offers to public to carry persons is common carrier)].

- That the cab driver was an agent of the cab company, acting within the course of his or her employment, for purposes of applying vicarious liability to the cab company (Paragraph 7) [*see Civ. Code § 2338* (responsibility of principal for agent's negligence)].

- That the cab company was the owner of the cab involved in the collision (Paragraph 8).

- That the other automobile involved in the collision was owned by the other named defendant (Paragraph 9).

- That the owner or a third person was driving the other automobile involved in the collision (alternative Paragraphs 10).

- That defendant automobile driver was negligent with regard to plaintiff, and that defendants cab owner and driver were negligent and breached the duty owed to passengers for hire by their negligence (Paragraph 11).

- That defendants' negligence was the proximate cause of injuries suffered by plaintiff (Paragraph 12).

- That plaintiff incurred damages and expenses as a proximate result of defendants' negligence (Paragraphs 13, 14, and optional Paragraph 15).

[5] Specifying Amount of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages must for anything other than personal injury or wrongful death (for example, property damage) be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the

complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and ficticious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms illustrating format of complaints generally, see Ch. 123, *Complaints and Cross Complaints*

For a discussion of the law and forms relating to damages recoverable in tort actions, see Ch. 177, *Damages*

For alternative forms of prayers, see Ch. 420, *Prayers*

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Chapter 544 TAXICABS
PART IV. FORMS

47-544 California Forms of Pleading and Practice--Annotated § 544.51

§ 544.51 Complaint for Damages [Civ. Code § 3333] for Wrongful Death of Passenger [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Entitled Person(s) Against Owner and Driver of Taxicab and Owner and Driver of Another Vehicle--Collision

[1] FORM Complaint for Damages [Civ. Code § 3333] for Wrongful Death of Passenger [Code Civ. Proc. § 377.60] Based on Negligence [Civ. Code §§ 1714(a), 2100]--By Entitled Person(s) Against Owner and Driver of Taxicab and Owner and Driver of Another Vehicle--Collision

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name(s)*], [as _____ (*specify capacity*, *e.g.*, Personal Representative of the Estate of _____ (*name*), Deceased,] Plaintiff(s), vs. _____ [*names*], [and DOES 1 through _____,] Defendants.	)))))))	NO. _____ COMPLAINT FOR DAMAGES (Wrongful Death) [LIMITED CIVIL CASE] [Amount demanded _____ (exceeds *or* does not exceed) $10,000]

Plaintiff(s) alleges/allege:

1. _____ [Plaintiff(s) *or* The person(s) listed below] is/are entitled to bring an action for the wrongful death of _____ [*name of decedent*] (hereinafter, "decedent") pursuant to *Code of Civil Procedure Section 377.60*, based on his/her/their relationship to decedent, as follows:

Name(s)	Relationship to Decedent
_____	_____
___	
_____	_____
___	
_____	_____
___	

[_____ (*If one or more persons are required to establish additional facts, such as that there is no surviving spouse, domestic partner, child, or issue of deceased child, or that the person was dependent on decedent, in order to be entitled to bring a wrongful death action under Code Civ. Proc. § 377.60, specify facts that satisfy applicable requirement.*)]

[*ADD, if decedent's personal representative is maintaining action on behalf of one or more entitled persons*]

Plaintiff _____ [*name*] is the duly appointed, qualified, and acting personal representative of the estate of decedent, and brings this action on behalf of _____ [all of the above-listed persons entitled to bring a cause of action for the wrongful death of decedent *or* the following person(s) entitled to bring an action for the wrongful death of decedent: _____ (*specify person(s) on whose behalf personal representative is maintaining action*)].

2. [*Capacity and residence of defendants. See § 544.50[1], Paragraphs 1, 2, and 3.*]

[3. *Fictitious name allegation, if appropriate. See § 544.50[1], Paragraph 4.*]

[4. *Agency allegation, if appropriate. See § 544.50[1], Paragraph 5.*]

5. [*Allegation that defendant cab company is common carrier. See § 544.50[1], Paragraph 6.*]

6. [*Agency allegation. See § 544.50[1], Paragraph 7.*]

7. [*Allegation that defendant cab company owned and controlled cab involved in accident. See § 544.50[1], Paragraph 8.*]

8. [*Allegation that other named defendant owned automobile involved in accident. See § 544.50[1], Paragraph 9.*]

9. [*Allegation identifying operator or other automobile. See § 544.50[1], alternative Paragraphs 10.*]

10. On or about _____ [*date*], at or about _____ [*time*], defendants _____ [*name of cab company*] and _____ [*name of cab driver*] were transporting decedent as a passenger for hire in the taxicab, and defendant _____ [*cab driver*] was driving the taxicab in a general _____ [*specify*] direction on _____ [*name of street*]. At or about that same time, defendant _____ [*name of automobile driver*] was driving _____ [*specify vehicle, e.g.*, the Chrysler] in a general _____ [*specify*] direction on _____ [*name of street*]. Both drivers operated, entrusted, controlled, and maintained their vehicles so negligently that as a proximate result of that negligence, the vehicles collided at _____ [*specify intersection or location of collision*], and decedent sustained severe injuries from which he/she thereafter died.

11. As a proximate result of the negligence of defendants, and each of them, decedent died on _____ [*date*].

12. As a proximate result of the negligence of defendants, and each of them, and the death of decedent, plaintiff(s) has/have sustained pecuniary loss resulting from the loss of the society, comfort, attention, services, and support of decedent.

13. As a further proximate result of the negligence of defendant, and each of them, and the death of decedent, plaintiff _____ [*name of person incurring expense*] has incurred funeral and burial expenses.

WHEREFORE, plaintiff(s) prays/pray judgment against defendants, and each of them, as follows:

1. For general damages according to proof;

2. For funeral and burial expenses for _____ [*name of person incurring expense*] according to proof;

3. For loss of earnings according to proof;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*party's status*]

[*Verification, if desired. See § 544.50[1].*]

[2] Use of Form

The form of complaint in [1], *above*, is for use by persons entitled by statute to bring a wrongful death action, or by the decedent's personal representative on their behalf, based on the death of a decedent who had been a passenger in defendants' taxicab, against a taxicab owner and driver and the owner and driver of another vehicle for the wrongful death of decedent caused by a collision between the taxicab and the other automobile [*see Code Civ. Proc. § 377.60*].

There is a presumption in a wrongful death action that the decedent exercised due care at time of death. The presumption applies unless the testimony of a person offering evidence is totally irreconcilable with the presumption [*Brandelius v. City & County of San Francisco (1957) 47 Cal. 2d 729, 736, 306 P.2d 432* (cable cars); *Wahrenbrock v. Los Angeles Transit Lines (1948) 84 Cal. App. 2d 236, 241-242, 190 P.2d 272* (buses)].

[3] Allegations

The complaint alleges:

- The identity of persons entitled under the statute to bring a wrongful death cause of action and their relationship to the decedent and, if the action is brought by the personal representative of the decedent's estate on behalf of these entitled persons, the capacity of the personal representative to do so (Paragraph 1) [*see Code Civ. Proc. § 377.60*].

- That defendant automobile driver was negligent with regard to plaintiff and that defendants cab owner and driver were negligent and breached the duty owed to passengers for hire by their negligence, proximately causing the death of decedent (Paragraphs 10, 11) [*Civ. Code § 1714(a)*].

- That plaintiffs incurred pecuniary damages, including expenses for decedent's burial (Paragraphs 12, 13) [*Krouse v. Graham (1977) 19 Cal. 3d 59, 67, 137 Cal. Rptr. 863, 562 P.2d 1022* (damages limited to pecuniary loss); *Francis v. Sauve (1963) 222 Cal. App. 2d 102, 124, 34 Cal. Rptr. 754* (funeral expenses)].

[4] Wrongful Death Actions

When the death of a person is caused by the wrongful act of negligence of another, certain persons, or the decedent's personal representative on their behalf, may bring an action for damages against the person causing the death and any other person responsible (or against the personal representatives of such persons) [*Code Civ. Proc. § 377.60*]. *Code Civ. Proc. § 377.60* permits decedent's surviving spouse, domestic partner, children, and issue of deceased children to bring a wrongful death action without qualification and permits others to bring an action under specified circumstances. For forms of allegations establishing that specific classes of persons are entitled to bring a wrongful death action, including allegations that are required of plaintiffs who are not the decedent's surviving spouse, domestic partner, children, or issue of deceased children, see Ch. 181, *Death and Survival Actions* .

If a plaintiff is a minor, a guardian ad litem must be appointed for the purposes of the action, unless the minor already has a guardian [*see Code Civ. Proc. § 372*]. For discussion and forms relating to appointment of a guardian ad litem generally, see Ch. 291, *Guardians ad Litem* .

In a wrongful death action, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under *Code Civ. Proc. § 377.34* (survival actions). The court must determine the respective rights in an award of the persons entitled to assert the cause of action [*Code Civ. Proc. § 377.61*]. An action under *Code Civ. Proc § 377.30* (survival actions) may be joined with a wrongful death action arising out of the same wrongful act or neglect [*Code Civ. Proc. § 377.62(a)*]. In addition, a wrongful death action and a survival action under *Code Civ. Proc § 377.31* (survival of pending actions) arising out of the same wrongful act or neglect may be consolidated for trial as provided in *Code Civ. Proc. § 1048* (consolidation of actions) [*Code Civ. Proc. § 377.62(b)*].

[5] Cross References

For general information and cross references relating to complaints, see *§ 544.50[2]* et seq.

For alternative complaints and allegations for use in wrongful death actions, see Ch. 181, *Death and Survival Actions*

For discussion and forms relating to appointment of a guardian ad litem generally, see Ch. 291, *Guardians ad Litem*

For forms of interrogatories for use in wrongful death actions generally, see Bender' s Forms of Discovery, *Death Actions* (Matthew Bender)

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47-544 California Forms of Pleading and Practice--Annotated § 544.52

§ 544.52 Allegation--Injury to Passenger While Boarding or Alighting Taxicab

[1] FORM Allegation--Injury to Passenger While Boarding or Alighting Taxicab

On or about _____ [*date*], at or about _____ [*time*], defendants _____ [*name of cab company*] and _____ [*name of cab driver*] were in the process of receiving plaintiff as a passenger for hire in their taxicab, operated by defendant _____ [*name of cab driver*]. On that date, as plaintiff was in the process of _____ [boarding *or* alighting] the taxicab, defendant _____ [*name of cab driver*] so negligently and carelessly managed, maintained, operated, drove, and controlled the taxicab and the equipment thereon that plaintiff was caused to be thrown to the ground, sustaining severe personal injuries as hereinafter set forth.

[2] Use of Form

The allegation in [1], *above*, is for use in a complaint seeking damages [*Civ. Code § 3333*] for personal injury and property damage [*Civ. Code 1714(a), 2100*] by a passenger against a taxicab company and its driver for injuries caused by the driver's negligence while the passenger was boarding or alighting the taxicab [*see Healy v. Yellow Cab Co. (1939) 32 Cal. App. 2d 479, 480-481, 90 P.2d 116* ; *Riis v. Yellow Cab Co. (1938) 29 Cal. App. 2d 25, 26, 83 P.2d 959* ; for further discussion, *see § 544.16[1]*].

The allegation should be inserted in place of Paragraph 11 in the form in *§ 544.50[1]*. Paragraphs 3, 9, and 10 should be deleted from that form because they refer to a third party defendant automobile driver, which is not relevant to this allegation against the taxicab company and its driver.

[3] Examples of Negligent Acts

Examples of negligence that may underlie this form include:

- Starting a vehicle while a passenger is boarding it [*Spearman v. California S. R. Co. (1881) 57 Cal. 432* ; *Nilson v. Oakland Traction Co. (1909) 10 Cal. App. 103, 101 P. 413]* .

- Failing to warn an alighting passenger that the cab is not parallel to curb when the driver parked the taxicab diagonally to curb. *Healy v. Yellow Cab Co. (1939) 32 Cal. App. 2d 479, 480-481, 90 P.2d 116*

- Suddenly moving the door that the passenger is holding while being assisted into the taxicab, causing the passenger to lose balance and fall. *Riis v. Yellow Cab Co. (1938) 29 Cal. App. 2d 25, 26, 83 P.2d 959*

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47-544 California Forms of Pleading and Practice--Annotated § 544.53

§ 544.53 Allegation--Injury to Passenger Caused by Sudden Stop

[1] FORM Allegation--Injury to Passenger Caused by Sudden Stop

On or about _____ [*date*], at or about _____ [*time*], defendants _____ [*name of cab company*] and _____ [*name of cab driver*] were transporting plaintiff as a passenger for hire in the taxicab, and defendant _____ [*cab driver*] was driving the taxicab in a general _____ [*specify*] direction on _____ [*name of street*]. On that date, defendant _____ [*name of cab driver*] so negligently and carelessly managed, maintained, operated, drove, and controlled the taxicab and the equipment thereon, that it stopped suddenly, proximately causing plaintiff to be thrown in and about the taxicab, and proximately causing plaintiff to sustain severe personal injuries as hereinafter set forth.

[2] Use of Form

The allegation in [1], *above*, is for use in a complaint seeking damages [*Civ. Code § 3333*] for personal injury and property damage [*Civ. Code 1714(a), 2100*] by a passenger against a taxicab company and its driver for injuries caused by the driver's negligence in suddenly stopping the taxicab, while the passenger was being transported in the taxicab [*see Acosta v. Southern Cal. Rapid Transit Dist. (1970) 2 Cal. 3d 19, 27-28, 84 Cal. Rptr. 184, 465 P.2d 72* (sudden, violent jerk of bus caused injury to passenger); *Pedrow v. Federoff (1926) 77 Cal. App. 164, 171, 247 P. 212* (sudden movement or jerk of taxicab while passenger was alighting caused injury to passenger)].

The allegation should be inserted in place of Paragraph 11 in the form in *§ 544.50[1]*. Paragraphs 3, 9, and 10 should be deleted from that form because they refer to the liability of a third party defendant automobile driver, which is not relevant to this allegation against the taxicab company and its driver.

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47-544 California Forms of Pleading and Practice--Annotated § 544.54

§ 544.54 Allegations--Injury to Passenger Before Boarding Taxicab But After Initiation of Driver-Passenger Relationship

[1] FORM Allegations--Injury to Passenger Before Boarding Taxicab But After Initiation of Driver-Passenger Relationship

1. On or about _____ [*date*], at or about _____ [*time*], plaintiff presented himself/herself at the place provided by defendant _____ [*name of cab company*] designated as a place of departure for taxicabs belonging to defendant _____ [*name of cab company*] for the purpose of becoming a passenger in defendant's taxicab. At that time, defendant _____ [*name of cab company*], through its duly authorized agent _____ [*name of agent or cab driver*], indicated acceptance of plaintiff as a passenger for hire.

2. At that time, while en route to the taxicab for the purpose of boarding the taxicab as a passenger for hire, defendants negligently caused plaintiff to suffer severe personal injuries in that _____ [*specify defendants' negligence, e.g.,* defendant _____ (*name of agent or cab driver*), parked the taxicab too far away from the boarding area and undertook to assist and conduct plaintiff to the site of departure of the taxicab, but so negligently and carelessly assisted and conducted plaintiff as to cause plaintiff to _____ (*specify negligent act, e.g.,* slip and fall on icy pavement, thereby incurring severe personal injuries).]

[2] Use of Form

The allegations in [1], *above,* are for use in a complaint seeking damages [*Civ. Code § 3333*] for personal injury and property damage [*Civ. Code §§ 1714(a), 2100*] by a passenger against a taxicab company and its driver for injuries caused by the negligence of the company and the driver while the passenger was en route to board the taxicab [*see Grier v. Ferrant (1944) 62 Cal. App. 2d 306, 311-313, 144 P.2d 631* ; for further discussion, *see 544.13[2]*].

The allegations should be inserted in place of Paragraph 11 in the form in *§ 544.50[1]*. Paragraphs 3, 9, and 10 should be deleted from that form because they refer to the liability of a third party defendant automobile driver, which is not relevant to this allegation against the taxicab company and its driver.

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47-544 California Forms of Pleading and Practice--Annotated § 544.55

§ 544.55 Allegation--Injury to Passenger Caused by Violation of Traffic or Safety Rule by Driver

[1] FORM Allegation--Injury to Passenger Caused by Violation of Traffic or Safety Rule by Driver

On or about _____ [*date*], at or about _____ [*time*], defendants _____ [*name of cab company*] and _____ [*name of cab driver*] were transporting plaintiff as a passenger for hire in the taxicab, and defendant _____ [*cab driver*] was driving the taxicab in a general _____ [*specify*] direction on _____ [*name of street*]. At that time, defendant _____ [*cab driver*] _____ [*describe traffic or safety rule violation, e.g.,* drove the taxicab in excess of the posted speed limit of 25 miles per hour]. Defendants operated, entrusted, controlled, and maintained the taxicab so negligently that as a proximate result of that negligence, the taxicab _____ [*specify accident that occurred, e.g.,* went out of control, hitting a tree], causing plaintiff to suffer severe personal injuries, as hereafter alleged.

[2] Use of Form

The allegation in [1], *above,* is for use in a complaint seeking damages [*Civ. Code § 3333*] for personal injury and property damage [*Civ. Code 1714(a), 2100*] by a passenger against a taxicab company and its driver for injuries caused by the driver's negligence caused by driving the taxicab in violation of a traffic or safety rule, while the passenger was being transported in the taxicab [*see Sipperly v. San Diego Yellow Cabs, Inc. (1949) 89 Cal. App. 2d 645, 649-652, 201 P.2d 543* ; for further discussion, *see § 544.16[2]*].

The allegation should be inserted in place of Paragraph 11 in the form in *§ 544.50[1]*. Paragraphs 3, 10, and 11 should be deleted from that form if the resulting accident did not involve a negligent third party automobile driver.

[3] Examples of Negligent Acts

Examples of negligence that may render the cab driver and company liable to a passenger as contemplated by this form include:

- Failing to stop before crossing railroad tracks and proceeding at an excessive rate of speed across the

tracks [*Deshotel v. Atchison, Topeka & Santa Fe Ry. Co. (1956) 144 Cal. App. 2d 224, 231, 300 P.2d 910]* .

- Parking across a driveway, sticking out several feet into a street, in violation of a city ordinance prohibiting the parking of vehicles more than eighteen inches from curb [*Sipperly v. San Diego Yellow Cabs, Inc. (1949) 89 Cal. App. 2d 645, 649-652, 201 P.2d 543* (liable for injuries to passenger and her husband, who was not a passenger, when improperly parked cab was hit by car)].

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47-544 California Forms of Pleading and Practice--Annotated § 544.56

§ 544.56 Allegations--Injury to Passenger Caused by Failure to Provide Seat Belts

[1] FORM Allegations--Injury to Passenger Caused by Failure to Provide Seat Belts

1. The taxicab was not equipped with [visible] passenger seat belts.

2. As a further proximate result of the negligence of defendants, and each of them, in failing to equip the taxicab with [visible] seat belts for the protection of passengers, the injuries incurred by plaintiff in the collision were aggravated in that plaintiff was not restrained from being thrown forward and tossed about the cab, resulting in plaintiff's sustaining severe personal injuries [_____ *specify particular injuries resulting from lack of seat belt restraint, e.g.*, and specifically causing plaintiff's head to strike the dashboard, resulting in plaintiff's incurring a fractured skull and numerous lacerations].

[2] Use of Form

The allegation in [1], *above*, is for use in a complaint seeking damages [*Civ. Code § 3333*] for personal injury and property damage [*Civ. Code §§ 1714(a), 2100*] by a passenger against a taxicab company and its driver for injuries caused by the failure to provide the passenger with sealtbelt restraints or for failure to provide the passenger with seatbelt restraints that are visible for his/her use.

This allegation is based on a case that held that whether or not the failure of a taxicab company to provide visible seat belts to a passenger constituted a proximate cause of his injuries was a question of fact for the jury to decide [*McNeil v. Yellow Cab Co. (1978) 85 Cal. App. 3d 116, 118, 147 Cal. Rptr. 733]* .

The owner or operator of a taxicab or limousine for hire must maintain safety belts in good working order for use of occupants of the vehicle [*see Veh. Code § 27315(f)*]. Moreover, the operator of a taxicab or limousine is not permitted to operate taxicab or limousine unless passengers four years of age or older or weighing 40 pounds or more in front seat are properly restrained by safety belt [*see Veh. Code § 27315(f)*]. Violation of these requirements does not establish negligence as a matter of law or negligence per se for comparative fault purposes, but negligence may be proven as a fact without regard to the violation [*see Veh. Code § 27315(j)*].

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[1] FORM

[2] Use of Form

[3] Allegations

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[6] Specification of Damages

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[8] Cross References

§ 545.61 Allegation--Errors or Omissions in Telegram [Civ. Code § 2162]--By Sender or Recipient Against Telegraph Company

[1] FORM

[2] Use of Form

§§ 545.62-545.69 [Reserved]

§ 545.70 Complaint for Damages [Civ. Code § 3333] for Personal Injury and Property Damage Based on Negligence [Civ. Code § 1714(a)]--Failure of Telegraph or Telephone Corporation to Properly Construct or Maintain Equipment or Facilities [Pub. Util. Code §§ 451, 2106]--Maintaining Defective Pole

[1] FORM

[2] Use of Form

[3] Allegations

[4] Specifying Amount of Damages

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[7] Cross References

§ 545.71 Allegations--Telephone Corporation's Failure to Properly Construct or Maintain Equipment or Facilities [Pub. Util. Code § 451]--Negligently Installed or Maintained Telephone Lines

[1] FORM

[2] Use of Form

[3] Allegations

§ 545.72 Allegations--Telephone Corporation's Failure to Properly Construct or Maintain Equipment or Facilities [Pub. Util. Code § 451]--Telephone Booth Improperly Sited in Dangerous Location

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 545.73 Allegations--Telephone Corporation's Failure to Properly Construct or Maintain Equipment or Facilities [Pub. Util. Code § 451]--Negligent Maintenance of Telephone Switchboard

[1] FORM

[2] Use of Form

[3] Allegations

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PART I. SCOPE

47-545 California Forms of Pleading and Practice--Annotated § 545.01

§ 545.01 Scope of Chapter

This chapter provides discussion and forms relating to the duties and rights of telephone and telegraph corporations in connection with the provision of services. Topics discussed include causes of action available against a corporation for breach of these duties, as well as limitations on their liability [*see §§ 545.10 -545.19*], actions that the corporation may have against third parties for damages to corporate property [*see § 545.30*], and liability for the unlawful use of automated telephone equipment [*see § 545.31*].

The chapter also provides a Research Guide [*see § 545.40* et seq.] and the following forms:

- Complaint for damages from the failure or refusal to send a telegram [*see § 545.60*] and an allegation relating to errors or omissions in a telegram [*see § 545.60*].

- Complaint for damages based on negligence from the failure of the telegraph or telephone corporation to properly construct or maintain a pole [*see § 545.70*] and alternative allegations relating to negligent construction or maintenance of:

  - Wires [*see § 545.71*].

  - Telephone booth in a dangerous location [*see § 545.72*].

  - Telephone switchboard [*see § 545.73*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawTelephone ServicesGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsGeneral OverviewEnergy & Utilities LawUtility CompaniesLiabilityTortsBusiness TortsGeneral OverviewTortsNegligenceDutyGeneral Overview

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§ 545.02 Cross References

Additional information regarding tort actions involving telephone and telegraph communication may be found in the following chapters:

- For discussion and forms relating to actions based on negligence, see Ch. 380, *Negligence* .

- For discussion and forms relating to the duty of care owed invitees by owners and possessors of property, and premises liability generally, see Ch. 421, *Premises Liability* .

- For discussion and forms relating to the vicarious liability of an employer for the wrongful acts of employees, see Ch. 248, *Employer's Liability for Employee's Torts* .

- For discussion and forms relating to actions for intentional or negligent infliction of emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress* .

- For discussion and forms relating to actions involving negligently manufactured equipment and products generally, see Ch. 460, *Products Liability* .

For discussion and forms relating to the negligence of an electrical company in constructing and maintaining poles and wires, see Ch. 277, *Gas and Electricity* .

Information relating to the regulation of telephone communication, may be found in the following chapters:

- For discussion and forms relating to the jurisidiction of and proceedings before the Public Utilities Commission, see Ch. 480, *Public Utilities* .

- For discussion and forms relating to the termination of public utility service generally, see Ch. 277, *Gas Electricity* .

- For discussion regarding the regulation of telephonic sellers by *Bus. & Prof. Code § 17511 et seq.* and the regulation of information-access service businesses under *Bus. & Prof. Code § 17539.5 et seq.*, see Ch. 14, *Advertising* .

- For discussion relating to limitations on a telephone or telegraph corporation's disclosure of personal information regarding its residential customers or subscribers, and on wrongful interception of telephonic or telegraphic communications, see Ch. 429, *Privacy* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawTelephone ServicesGeneral OverviewEnergy & Utilities LawUtility CompaniesGeneral OverviewTortsNegligenceGeneral OverviewTortsPremises Liability & PropertyGeneral OverviewTortsProducts LiabilityGeneral Overview

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§ 545.03 Governing Law

Telephone corporations and lines and telegraph corporations and lines are defined in *Pub. Util. Code §§ 233-236*. Rights and obligations of public utilities in general are set forth in *Pub. Util. Code §§ 451-632*. The duty to transmit messages and the priority in transmission is governed by *Civ. Code §§ 2207-2209*. The liability of a utility in small claims court for delay of service connection or repair is governed by *Civ. Code § 1722*. A general duty of care by a carrier of messages for reward is covered by *Civ. Code § 2162*.

The power to regulate telephone and telegraph services is conferred on the legislature, and by the legislature on the Public Utilities Commission (hereinafter the Commission) by *Cal. Const., art. XII, §§ 3, 5, 6,* and *8* and *Pub. Util. Code §§ 216, 233-236, 701*. Judicial review of Commission decisions is governed by *Pub. Util. Code §§ 1756-1767*. *Pub. Util. Code § 2106* authorizes civil actions by individuals or corporations against any public utility based on the utility's unlawful activity. *Pub. Util. Code §§ 7951* and *7952* authorize actions by a telephone or telegraph corporation for both willful and negligent injury to corporate property. *Pub. Util. Code § 453(a)-(c)* prohibits discrimination by public utilities as to rates, deposit amounts, charges, service, facilities, or in any other respect. Criminal penalties against a party for failure to relinquish a party line in an emergency are set forth in *Penal Code § 384*.

Legal Topics:

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

§§ 545.04[Reserved]

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§ 545.10 Duty of Care in Provision of Services and Equipment

[1] Duties

Every public utility is required to furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public [*Pub. Util. Code § 451*].

A telephone company owes a duty of care to persons rightfully using telephone equipment to maintain the equipment in a reasonably safe condition, and to exercise reasonable care to protect the user from injury [*see Jaehne v. Pacific Tel. & Tel. Co. (1951) 105 Cal. App. 2d 683, 688, 234 P.2d 165]* .

A telephone company also has a duty to make a reasonable inspection of its poles to see that they are safe and able to withstand the strain of normal weather conditions or other ordinary tests of strength [*Keller v. Pacific Tel. & Tel. Co. (1934) 2 Cal. App. 2d 513, 519, 38 P.2d 182]* .

[2] Liability for Breach

By furnishing an appliance for the use of others, the company ordinarily assumes a duty to furnish a proper and reasonably safe appliance. The company is liable for breach of this duty when injury results to one using the appliance. This doctrine is based on the duty to exercise ordinary care that is due to everyone under the principles declared in the Civil Code [*Jaehne v. Pacific Tel. & Tel. Co. (1951) 105 Cal. App. 2d 683, 688, 234 P.2d 165* ; *see Civ. Code §§ 1708, 1714(a), 3281*].

For example, improper siting of a telphone booth in a potentially dangerous location can amount to actionable negligence against the telephone company; similarly, defective design and maintenance of the booth may also give rise to tort liability [*Bigbee v. Superior Court (1979) 93 Cal. App. 3d 451, 454, 155 Cal. Rptr. 545 , appeal after remand, Bigbee v. Pacific Tel. & Tel. Co. (1983) 34 Cal. 3d 49, 192 Cal. Rptr. 857, 665 P.2d 947]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 545.11 Liability for Service Delay

[1] Subscriber Notification Requirements

Utilities must inform their subscribers of their right to service connection or repair within a four-hour period, if the subscriber's presence is required, by offering the four-hour period at the time the subscriber calls for service connection or repair. Whenever a subscriber contracts with a utility for a service connection or repair, the parties have agreed that the subscriber must be present, and the subscriber has requested a four-hour appointment, the utility and the subscriber must agree, prior to the date of service connection or repair, on the time for the commencement of the four-hour period for the service connection or repair [*Civ. Code § 1722(c)(1)*].

[2] Small Claims Action for Damages

If the service connection or repair is not commenced within the specified four-hour period, except for delays caused by unforeseen or unavoidable circumstances beyond the control of the utility, the subscriber may bring an action in small claims court against the utility for lost wages, expenses actually incurred, or other actual damages not exceeding a total of $600 [*Civ. Code § 1722(c)(2)*].

In the action, logs and other business records maintained by the utility or its agents in the ordinary course of business are prima facie evidence of the time period specified for the commencement of the service connection or repair and of the time that the utility attempted to make the service connection or repair, or of a diligent attempt by a utility to notify the subscriber of delay caused by unforeseen or unavoidable occurrences [*Civ. Code § 1722(c)(4)*].

[3] Waiver Void

Any provision of a delivery or service contract in which the consumer or subscriber agrees to modify or waive any of the rights afforded under *Civ. Code § 1722* are void as contrary to public policy [*Civ. Code § 1722(d)*].

[4] Defenses

No action is considered valid if the subscriber was not present when, within the specified period, the utility attempted to make the service connection or repair or made a diligent attempt to notify the subscriber by telephone or in person of its inability to do so because of unforeseen or unavoidable occurrences beyond its control. If notification is by telephone, the utility or its agent must leave a telephone number for a return telephone call by the subscriber to the utility or its agent, to enable the subscriber to arrange a new two-hour period for service connection or repair [*Civ. Code § 1722(c)(3)*].

It is also a defense to the action if a diligent attempt was made by the utility to notify the subscriber of delay caused by unforeseen or unavoidable occurrences beyond the control of the utility and if the utility commenced service within a newly agreed on two-hour period [*Civ. Code § 1722(c)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 545.12 Duty to Transmit or Deliver Messages

[1] By Telegraph Company

[a] General Rule

A carrier of messages by telegraph must, if it is practicable, transmit every such message immediately on its receipt. If this is not practicable, and several messages accumulate, the carrier must transmit them in the following order [*Civ. Code § 2207*]:

- Messages from public agents of the United States or California, on public business.
- Messages intended in good faith for immediate publication in newspapers, and not for any secret use.
- Messages giving information relating to the sickness or death of any person.
- Other messages in the order in which they were received.

Every agent, operator, or employee of any telegraph or telephone office, who willfully postpones the transmission out of its order, is guilty of a misdemeanor [*Pub. Util. Code § 7904*].

[b] Transmission of Defamatory Telegrams

Telegraph companies have no right of censorship except in specific instances enumerated in *Pub. Util. Code § 7904* (discussed under [2], *below*), and do not have the right to refuse to transmit telegrams that may allegedly be libelous [*see Mason v. Western Union Tel. Co. (1975) 52 Cal. App. 3d 429, 439, 125 Cal. Rptr. 53]* . Even if the required transmission of the message is held to be a publication, it would be privileged under *Civ. Code § 47(c)*, which states that a privileged publication or broadcast is one made in a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give

the information. In the absence of actual knowledge to the contrary, the telegraph company has a right to presume that both the sender and the addressee of telegrams submitted for transmission are interested persons as defined by *Civ. Code § 47(c)* and that, in transmitting such telegrams, it is engaging in a privileged act [*Mason v. Western Union Tel. Co. (1975) 52 Cal. App. 3d 429, 438, 125 Cal. Rptr. 53* (construing prior version of *Civ. Code § 47*)].

Telegraph companies are also shielded from liability for intentional infliction of emotional distress arising from transmission of a defamatory telegram. Because transmission is required by law, the company's conduct in sending the message cannot be held to be unreasonable, and will therefore not support an action for intentional infliction of emotional distress. Nor will transmission of defamatory telegrams support an action for invasion of privacy, since, again, transmission is required by law, and no communication is made to the public in general [*see Mason v. Western Union Tel. Co. (1975) 52 Cal. App. 3d 429, 440, 125 Cal. Rptr. 53]* .

[c] Transmission of False Telegraph Messages

A telegraph company and its agents must exercise ordinary care and prudence to prevent the transmission of a false telegram and any damages that may result. When a telegraph message requesting the payment of funds from a bank to a particular person is sent, the agent of the telegraph company has a duty to exercise ordinary care and prudence in determining the identity of the sender, and the recipient has a right to rely on this duty. The company will be held liable if the agent is guilty of negligence in failing to ascertain that identity [*see Bank of Cal. v. Western Union Tel. Co. (1877) 52 Cal. 280, 288]* .

The telegraph company is also liable for the wilful and fraudulent transmission of a dispatch by the agent in the name of another [*see Bank of Cal. v. Western Union Tel. Co. (1877) 52 Cal. 280, 288]* . The agent has a duty to prevent an unauthorized person from using telegraph equipment to perpetrate a fraud, and the company will be held liable for any such fraud whether the agent acted wilfully or negligently in allowing the unauthorized use [*see Bank of Cal. v. Western Union Tel. Co. (1877) 52 Cal. 280, 291-292]* .

[2] By Company Other Than Telegraph

A common carrier of messages other than by telegraph must transmit messages in the order received, except messages from agents of the United States or California on public business, which must always be given priority. However, the carrier may fix on certain times for the simultaneous transmission of messages previously received [*Civ. Code § 2208*].

[3] Communications From Other Telegraph and Telephone Corporations

Every telephone and telegraph corporation operating in California must receive, transmit, and deliver, without discrimination or delay, the conversations and messages of every other such corporation with whose line a physical connection has been made [*Pub. Util. Code § 558*].

[4] Damages and Penalty for Failure to Transmit Message

Every person whose message is refused or postponed, contrary to the provisions of *Civ. Code §§ 2168-2209*, is entitled to recover from the carrier his or her actual damages, plus $50 [*Civ. Code § 2209*; *see also Pub. Util. Code § 7904* (willfully refusing or neglecting to send or to deliver message as misdemeanor)].

[5] Exceptions to Duty

Pub. Util. Code § 7904 is not to be construed to require a message to be received, transmitted, or delivered, unless the charges have been paid or tendered. Nor does it require the sending, receiving, or delivery of any message counseling, aiding, abetting, or encouraging treason against the government of the United States or of California, or other resistance to lawful authority, or any message calculated to further any fraudulent plan or purpose, or to instigate or encourage the

perpetration of any unlawful act, or to facilitate the escape of any criminal or person accused of crime [*Pub. Util. Code § 7904*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawRelated Legal IssuesDefamationCommunications LawTelephone ServicesGeneral OverviewEnergy & Utilities LawUtility CompaniesLiabilityTortsIntentional TortsDefensesGeneral OverviewTortsNegligenceDutyGeneral Overview

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§ 545.13 Standard of Care in Transmitting Messages

A carrier of messages for reward has a statutory duty to use great care and diligence in the transmission and delivery of messages [*Civ. Code § 2162*]. Great care and diligence include the employment of proper instruments and competent operators [*Hart v. Western Union Tel. Co. (1885) 66 Cal. 579, 582, 6 P. 637]* . However, damages for breach of this duty of care is likely to be restricted to an amount authorized under the limitation of liability tariff provisions filed by the company with the Commission [*see Waters v. Pacific Tel. Co. (1974) 12 Cal. 3d 1, 11-12, 114 Cal. Rptr. 753, 523 P.2d 1161* ; *Trammell v. Western Union Tel. Co. (1976) 57 Cal. App. 3d 538, 556, 129 Cal. Rptr. 361* ; *Stern v. General Tel. Co. (1975) 50 Cal. App. 3d 538, 541, 123 Cal. Rptr. 373]* . These provisions are discussed in *§ 545.16*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 545.14 No Strict Liability or Implied Warranty for Provision of Services

There is no strict liability or implied warranty liability for damages incurred in connection with the provision of telephone or telegraph services. The general rule that those who sell services for the guidance of others in their economic, financial, and personal affairs are not liable for breach of implied warranty in the absence of negligence or intentional misconduct applies to companies providing communications services [*see Stuart v. Crestview Mut. Water Co. (1973) 34 Cal. App. 3d 802, 811, 110 Cal. Rptr. 543* ; *Gautier v. General Tel. Co. (1965) 234 Cal. App. 2d 302, 306, 44 Cal. Rptr. 404]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 545.15 Duty of Care in Preparation of Directory

[1] General Rule

The preparation and delivery of telephone directories is not considered related to the business of transmitting and delivering messages but is an established convenience and service for those of the public who use the facilities furnished for transmission by themselves of their own messages. As to these messages, the telephone company is not a common carrier, and is charged in the preparation of the directory with the exercise of ordinary care and is liable as a public service corporation for the breach of its contract to include its subscriber's name in the directory [*Riaboff v. Pacific Tel. & Tel. Co. (1940) 39 Cal. App. 2d Supp. 775, 102 P.2d 465]* .

When damages are sought for negligent omissions or errors in a directory advertisement, however, liability is likely to be limited by the particular tariff provision filed by the company. Tariff liability limitations are discussed generally in *§ 545.16*. In a typical situation, damages are limited to a pro rata abatement of the charge for the listing in such a degree as the error or omission affects the entire advertisement, and in the case of omission of an entire advertisement, the credit allowance is an abatement of the entire charge [*see Davidian v. Pacific Tel. & Tel. Co. (1971) 16 Cal. App. 3d 750, 753-754, 94 Cal. Rptr. 337* ; *Cole v. Pacific Tel. & Tel. Co. (1952) 112 Cal. App. 2d 416, 417, 246 P.2d 686]* .

[2] Regulation of Telephone Directories

Except as provided by *Pub. Util. Code § 728.2(b)* (considering advertising revenues and expenses as part of rate-making for other services), the Commission has no jurisdiction or control over classified telephone directories or commercial advertising included as part of the corporation's alphabetical telephone directories. In particular, the Commission does not have jurisdiction over the form and content of the advertising in the alphabetical and classified directories, or over the form and content of the directories in which the advertising appears, or over directory advertising practices. Neither does the Commission have jurisdiction over the determination of the geographic areas served by those directories, or over complaints by any corporation or person regarding directory advertising [*Pub. Util. Code § 728.2(b)(2)*].

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§ 545.16 Limitation of Damages Under Tariff Provisions

[1] General Rule

[a] Tariff Provisions

Recovery of damages against a telephone or telegraph company may be limited in certain instances by tariff provisions filed with the Commission. In order to determine whether a provision limiting liability applies to a particular case and if so, what the specific limitations are, counsel should consult the tariff provisions filed with the Commission by the particular utility as part of its franchise.

[b] Contract Theory

Prior to creation of the Commission in California, courts considered the issue of limitation of liability on the basis of contract theory [*see Coit v. Western Union Tel. Co. (1900) 130 Cal. 657, 661 63 P. 83* ; *Hart v. Western Union Tel. Co. (1885) 66 Cal. 579, 580-581, 584 6 P. 637]* . Due to the Commission's present use of liability limitation provisions contained in the tariff schedules filed by each utility, however, the contract theory is no longer applicable to determination of the limitation issue [*see Trammell v. Western Union Tel. Co. (1976) 57 Cal. App. 3d 538, 553 n.5, 129 Cal. Rptr. 361]* . Currently all telephone and telegraph corporations must file schedules with the Commission showing all rates, tolls, rentals, charges, and classifications collected or enforced, or to be collected or enforced, together with all rules, contracts, privileges, and facilities which in any manner affect or relate to rates, tolls, rentals, classifications, or service [*Pub. Util. Code § 489*]. These schedules include provisions limiting a corporation's liability in instances of negligence in the provision of services to specified credit allowances. The tariff provisions limiting liability may apply to acts of gross negligence as well as to ordinary negligence [*Stern v. General Tel. Co. (1975) 50 Cal. App. 3d 538, 542, 123 Cal. Rptr. 373]* .

[c] Force and Effect of Law

The limitation of liability provisions, when applicable, have the force and effect of law [*Trammell v. Western Union Tel. Co. (1976) 57 Cal. App. 3d 538, 549-550, 129 Cal. Rptr. 361]* . The subject of limitations on liability has long been

considered a proper subject for Commission regulation and supervision, and the use of a credit allowance provision as a means of limiting liability is taken into account in setting reasonable rates for service by the utility. Although actions for damages against utilities for unlawful acts are authorized by *Pub. Util. Code § 2106*, claims for damages for particular classes of actions in excess of the credit allowances contained in the tariff provisions are barred [*Waters v. Pacific Tel. Co. (1974) 12 Cal. 3d 1, 4-6, 114 Cal. Rptr. 753, 523 P.2d 1161* ; for discussion of *Pub. Util. Code § 2106, see 545.19*].

[d] Binding on Public

The limitation of liability provisions are binding on the public generally, and on the recipient as well as the sender of a message. The fact that a person might not have been aware of the provisions as filed does not affect their application [*Trammell v. Western Union Tel. Co. (1976) 57 Cal. App. 3d 538, 552-553, 129 Cal. Rptr. 361]* .

[e] Questions of Reasonableness

Questions of reasonableness regarding the tariff provisions must first be directed to the Commission. If a party is dissatisfied with the Commission's decision, he or she is free to invoke the extraordinary remedy of a writ of mandamus from the court of appeal or California Supreme Court to the Commission [*Cole v. Pacific Tel. & Tel. Co., (1952) 112 Cal. App. 2d 416, 420, 246 P.2d 686* ; *see Pub. Util. Code §§ 1756, 1759*].

[f] Liability for Intentional or Illegal Conduct

The Commission has ordered by rule that tariffs expressly provide for liability for willful misconduct, fraud, or violations of law [P.U.C. Decision No. 77406; *see Pink Dot, Inc. v. Teleport Commc'ns Group (2001) 89 Cal. App. 4th 407, 413, 107 Cal. Rptr. 2d 392]* . Although the terms of a filed tariff will generally govern a utility's liability for damages, a utility cannot shield itself from liability for such intentional or illegal conduct simply by failing to include the mandated language in the tariff [*Pink Dot, Inc. v. Teleport Commc'ns Group (2001) 89 Cal. App. 4th 407, 413-415, 107 Cal. Rptr. 2d 392]* .

[2] Procedure for Asserting Limitation of Liability Provisions

Limitation of liability provisions, when applicable, may be asserted by a telephone or telegraph corporation either in a motion for partial summary judgment limiting damages to the specified credit allowance, or in a motion for nonsuit if the plaintiff waives the allowance [*see Waters v. Pacific Tel. Co. (1974) 12 Cal. 3d 1, 5-6, 114 Cal. Rptr. 753, 523 P.2d 1161]* . The provisions may also be relied on in a demurrer to the complaint [*see Davidian v. Pacific Tel. & Tel. Co. (1971) 16 Cal. App. 3d 750, 751-752, 757, 94 Cal. Rptr. 337]* , or, if damages are awarded by a jury, in seeking a motion for judgment notwithstanding the verdict [*see Trammell v. Western Union Tel. Co. (1976) 57 Cal. App. 3d 538, 553-554, 558, 129 Cal. Rptr. 361]* .

Legal Topics:

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§ 545.17 Liability for Personal Injuries or Property Damage

[1] General Rule

A telephone or telegraph company will be held liable for personal injuries or property damage caused by the negligence of its agent or employee occurring during the discharge of his or her job duties [*see Rabe v. Western Union Tel. Co. (1926) 198 Cal. 290, 293, 301, 244 P. 1077]* . For discussion and forms relating to liability of an employer for the negligence of employees generally, see Ch. 248, *Employer's Liability for Employee's Torts* , and Ch. 380, *Negligence* .

[2] Exception to Liability for Removal of Obstructions

A telephone or telegraph company may remove from the streets used in the exercise of their franchise any object or thing that will, if permitted to exist, prevent proper and efficient service by them to the public. Thus, a telegraph company may trim trees if necessary for safe and proper transmission of messages over its wires passing through the trees without liability to the owner of the trees unless it is shown that the telegraph company destroyed more branches and limbs than necessary [*Altpeter v. Postal Tel.-Cable Co. (1917) 32 Cal. App. 738, 741-742, 747, 164 P. 35]* .

[3] Wrongful Death Actions

A wrongful death action against a utility is governed by *Code Civ. Proc. § 377.60*, and *Pub. Util. Code § 2106* does not provide independent authority for an action that would allow recovery of punitive damages, which are not recoverable under *Code Civ. Proc. § 377.60* [*Vander Lind v. Superior Court (1983) 146 Cal. App. 3d 358, 367, 194 Cal. Rptr. 209* ; for further discussion and forms relating to wrongful death actions, see Ch. 181, *Death and Survival Actions*].

[4] No Liability for Act Compelled by Commission Order

A telephone utility will be shielded from liability in tort if the injury resulted from acts by the utility under compulsion of a Public Utilities Commission order [*Brian T. v. Pacific Bell (1989) 210 Cal. App. 3d 894, 904, 258 Cal. Rptr. 707]* . For example, if a telephone company permits sexually explicit "976" telephone information services in compliance with a Commission decision barring the company from disconnecting such services, the utility cannot be held liable in

tort for providing such services [*Brian T. v. Pacific Bell (1989) 210 Cal. App. 3d 894, 904-909, 258 Cal. Rptr. 707]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 545.18 Liability for Discrimination

[1] In Rates, Services, and Other Respects

No public utility may, as to rates, charges, service, facilities, or in any other respect, make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage [*Pub. Util. Code § 453(a)*; *see also* Pub. Util. Code § 429 (misdemeanor for intentional failure to collect or remit specified fees and surcharges)]. In addition, no public utility may prejudice, disadvantage, or require different rates or deposit amounts from a person because of ancestry, medical condition, marital status or change in marital status, or any other characteristic listed or defined in *Gov. Code § 11135*, [*Pub. Util. Code § 453(b)*]. Also, no public utility may establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either between localities or between classes of service [*Pub. Util. Code § 453(c)*].

The Commission may determine any question of fact arising under *Pub. Util. Code § 453* [*Pub. Util. Code § 453(e)*]. A person who has exhausted all administrative remedies with the Commission may institute a suit for injunctive relief and reasonable attorney's fees in cases of an alleged violation of *Pub. Util. Code § 453(b)*. If successful in litigation, the prevailing party will be awarded attorney's fees [*Pub. Util. Code § 453(b)*].

[2] In Employment

Pub. Util. Code § 453(a) is not limited to a prohibition of rate or service-oriented discrimination, but also extends to the employment practices of a public utility [*see Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal. 3d 458, 478, 156 Cal. Rptr. 14, 595 P.2d 592]* . Arbitrary exclusion of qualified individuals from employment opportunities by a state protected public utility also violates the state constitutional rights of the victims of the discrimination. Such arbitrary discrimination will support an action for damages against the utility under *Pub. Util. Code § 2106* (discussed in *§ 545.19*), in which an ancillary request for injunctive relief may also be maintained. It may also be the basis for a cause of action against the utility for interfering with its employees' political rights in violation of *Lab. Code §§ 1101, 1102* [*see Gay Law Students Assn. v. Pacific Tel. & Tel. Co. (1979) 24 Cal. 3d 458, 486-487, 156 Cal. Rptr. 14, 595 P.2d 592]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawGeneral OverviewCommunications LawTelephone ServicesGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewEnergy & Utilities LawUtility CompaniesLiabilityEnergy & Utilities LawUtility CompaniesRatesGeneral Overview

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§ 545.19 Jurisdiction of State Courts

Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done either by the Constitution, state law, or Commission order or decision, will be liable to the persons or corporations affected thereby for all resulting loss, damages, or injury. If the court finds that the act or omission was wilful, it may also award exemplary damages. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person [*Pub. Util. Code § 2106*].

To harmonize *Pub. Util. Code § 2106* with *Pub. Util. Code § 1759*, which restricts courts from interfering with the Commission, *Pub. Util. Code § 2106* has been held to only authorize actions which will not interfere with or obstruct the Commission in carrying out its own policies. Thus, actions for damages in excess of specified credit allowances as set forth in approved tariff schedules are barred by *Pub. Util. Code § 1759*. For example, in an action for negligent failure to provide adequate telephone service, the trial court properly granted the defendant telephone company's motion for partial summary judgment to limit damages awarded to plaintiff to the fixed service charges for the period involved, as provided in the defendant's tariff schedule approved by the Commission [*Waters v. Pacific Tel. Co. (1974) 12 Cal. 3d 1, 4, 11-12, 114 Cal. Rptr. 753, 523 P.2d 1161]* .

On the other hand, when the Commission has not expressed any policy against suits of a particular nature, such as suits based on the fraud or wilful misconduct of the utility, an action for damages may be maintained in court pursuant to *Pub. Util. Code § 2106* [*see* *Empire W. v. Southern Cal. Gas Co. (1974) 12 Cal. 3d 805, 811, 811 n. 4, 117 Cal. Rptr. 423, 528 P.2d 31* (fraudulent misrepresentations by gas utility regarding matters not covered in published tariffs made to induce business of prospective customer as actionable; citing Commission decision involving telephone utility); *Koponen v. Pacific Gas & Electric Co. (2008) 165 Cal. App. 4th 345, 358, 81 Cal. Rptr. 3d 22* (suit against electric utility for unauthorized use of right-of-way on plaintiffs' property not barred when commission had made no determination that utility had complied with private right-of-way agreements or easements); *Pink Dot, Inc. v. Teleport Commc'ns Group (2001) 89 Cal. App. 4th 407, 418, 107 Cal. Rptr. 2d 392* (claims brought in court against telephone utility alleging fraud and false representations permitted under *Pub. Util. Code § 2106*)]. Conversely, claims brought under the unfair competition statute or the False Advertising Act must be adjudicated in court and may not be

adjudicated by the Commission [*Greenlining Inst. v. Public Utils. Comm'n (2002) 103 Cal. App. 4th 1324, 1329, 1333, 127 Cal. Rptr. 2d 736* ; *see Bus. & Prof. Code §§ 17204, 17535*].

If the PUC does not possess exclusive regulatory authority over a matter, district attorneys are authorized to initiate actions against public utilities that have violated the law, even while an action is pending with the PUC based on the same factual allegations [*People ex rel. Orloff v. Pacific Bell (2003) 31 Cal. 4th 1132, 1151, 7 Cal. Rptr. 3d 315, 80 P.3d 201]* . If the case concerns consumer fraud, such as a case brought under the unfair competition statute, district attorneys are authorized to prosecute the action in court if disclosure of investigative materials by the PUC would not jeopardize its own investigation or authority. If disclosure of those materials would impede the PUC's own investigation, the district attorney is required to await disclosure pending further PUC action [*People ex rel. Orloff v. Pacific Bell (2003) 31 Cal. 4th 1132, 1151, 7 Cal. Rptr. 3d 315, 80 P.3d 201]* . In addition, if relief awarded by a trial court would render ineffective or moot the relief, orders, or policies previously rendered by the PUC, such an action would interfere with the regulatory powers of the PUC and would be precluded [*People ex rel. Orloff v. Pacific Bell (2003) 31 Cal. 4th 1132, 1151, 7 Cal. Rptr. 3d 315, 80 P.3d 201]* . However, the mere potential for inconsistent finding of fact or conclusions of law, without evidence that those inconsistencies would impede or interfere with the efforts of the PUC, does not rob a trial court of jurisdiction over a suit brought against a utility, especially if coordination of efforts between the PUC and the district attorney could avoid any actual conflict [*People ex rel. Orloff v. Pacific Bell (2003) 31 Cal. 4th 1132, 1153, 7 Cal. Rptr. 3d 315, 80 P.3d 201]* .

No recovery under *Pub. Util. Code § 2106* will in any manner affect a recovery by the state of the penalties provided by *Pub. Util. Code §§ 201-2115* [*Pub. Util. Code § 2106*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCommunications LawTelephone ServicesGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthorityEnergy & Utilities LawUtility CompaniesLiabilityTortsDamagesPunitive DamagesAvailabilityGeneral Overview

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[Reserved]

§§ 545.20[Reserved]

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47-545 California Forms of Pleading and Practice--Annotated § 545.30

§ 545.30 Liability of Third Parties to Telephone or Telegraph Company

[1] Intentional Damage

Any person who wilfully and maliciously does any injury to telegraph or telephone property is liable to the corporation for three times the amount of actual damages sustained thereby, to be recovered in any court of competent jurisdiction [*Pub. Util. Code § 7951*].

[2] Negligent Damage

Any person who injures or destroys, through want of proper care, any necessary or useful facility or equipment of any telegraph or telephone corporation, is liable to the corporation for all damages sustained thereby. The measure of damages to the injured or destroyed facility or equipment is the cost to repair or replace the property injured or destroyed including direct and allocated costs for labor, materials, supervision, supplies, tools, taxes, transportation, administrative and general expense, and other indirect or overhead expenses, less credit, if any, for salvage, as determined by the telephone or telegraph corporation in conformity with a system of accounts established by the Commission. The specifying of the measure of damages for the facility or equipment does not preclude the recovery of such other damages occasioned thereby as may be authorized by law [*Pub. Util. Code § 7952*]. Depreciation is not to be considered in measuring damages under *Pub. Util. Code § 7952* [*see Pacific Gas & Elec. Co. v. Alexander (1979) 90 Cal. App. 3d 253, 256-257, 153 Cal. Rptr. 319* ; *Pacific Gas & Elec. Co. v. Mounteer (1977) 66 Cal. App. 3d 809, 812-813, 136 Cal. Rptr. 280]* .

[3] Underwater Cables

Any vessel which, by dragging its anchor or otherwise breaks, injures, or destroys any underwater cable of a telegraph or telephone corporation, subjects its owner to liability for the damages sustained thereby [*Pub. Util. Code § 7952*]. The corporation cannot recover for such damage, however, unless it previously placed a marker on the bank of the waters under which the cable is placed, indicating the place where the cable lies [*Pub. Util. Code § 7953*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawTelephone ServicesGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewEnergy & Utilities LawUtility CompaniesGeneral OverviewTortsDamagesCompensatory DamagesProperty DamageAward Calculations

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47-545 California Forms of Pleading and Practice--Annotated § 545.31

§ 545.31 Liability for Unlawful Use of Automated Telephone Equipment

Under state law, the use of an automatic dialing-announcing device, which randomly or sequentially dials telephone numbers and plays prerecorded messages, has been prohibited between specified hours. Withexceptions, persons who violate the provision are subject to disconnection of phone service and a fine [*see Pub. Util. Code §§ 2871, 2872, 2876*].

These provisions have been preempted, however, by more restrictive provisions under the federal Telephone Consumer Protection Act of 1991 (*47 U.S.C.S. § 227*) [*see 47 U.S.C.S. § 227(e)*]. The Act, effective December 20, 1991, prohibits certain practices involving the use of telephone equipment. It includes a provision that makes it unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States, to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party [*47 U.S.C.S. § 227(b)(1)(B)* (exception applies when call is initiated for emergency purposes or is exempted by rule or order by FCC relating to specified classes of calls)]. The Act also provides for a private action in state court to enjoin the violation or, either additionally or as an alternative, to recover the greater of the amount of actual monetary loss or $500 in damages. A court may also award up to three times the amount of the monetary loss or damages if it finds the violation to be willful or knowing [*47 U.S.C.S. § 227(b)(3)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawPrivacyTelephone Consumer Protection ActCommunications LawTelephone ServicesGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewEnergy & Utilities LawUtility CompaniesLiability

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[Reserved]

§§ 545.32[Reserved]

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§ 545.40 Related Titles From LEXIS Publishing

For memoranda of points and authorities relating to actions for negligence generally, see California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender)

For memoranda of points and authorities relating to the general liability of an owner or possessor of public property, as well as to the intervention of third persons in causing injuries to users of the property, see California Points and Authorities, Ch. 190, *Premises Liability* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityGeneral Overview

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§ 545.41 State Constitution

Authority of municipalities to provide public works for furnishing communication services. *Cal. Const., art. XI, § 9*

Providers of telephone and telegraph facilities as public utilities subject to regulation by legislature. *Cal. Const., art. XII, § 3*

Limitation on municipality's power to regulate matters over which Legislature grants regulatory power to Commission. *Cal. Const., art. XII, § 8*

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawTelephone ServicesGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthorityGovernmentsLocal GovernmentsDuties & Powers

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§ 545.42 State Statutes

[1] Crimes Involving Telephone Systems

Publication of telephone number for facsimile machine in commercial directory of telephone numbers without written consent of subscriber as infraction punishable by fine. *Bus. & Prof. Code § 22600(d)*

Sale of cordless telephone, manufactured after January 1, 1992, without increased protection from unintentional line seizure and dialing, and protection from unintentional ringing, as defined, as unlawful. *Bus. & Prof. Code § 22760*

Penalty for failure to relinquish party line. *Penal Code § 384*

Willful sending of false or forged telegraph or telephone message with intent to deceive, injure, or defraud. *Penal Code § 474*

Fraud in obtaining telephone or telegraph services. *Penal Code § 502.7*

Destruction or removal of telephone poles and wires as misdemeanor. *Penal Code § 591*

Altering meaning of message as malicious mischief. *Penal Code § 620*

Invasion of privacy by electronic eavesdropping. *Penal Code §§ 630-637.2*

Making obscene, threatening, or annoying telephone calls. *Penal Code § 653m*

Telephone corporation as permitted to list telephone number as number for facsimile machine in its alphabetical or classified directory only if requested to do so by subscriber. *Pub. Util. Code § 728.4*

Criminal sanctions for use or appropriation for profit or advantage of information derived from private message. *Pub. Util. Code § 7903*

Making obscene or harassing calls in interstate or foreign telephone communication. *47 U.S.C.S. § 223*

[2] Definitions

Telephone line. *Pub. Util. Code § 233*

Telephone corporation. *Pub. Util. Code § 234*

Telegraph line. *Pub. Util. Code § 235*

Telegraph corporation. *Pub. Util. Code § 236*

[3] Discrimination

Discrimination by utility prohibited. *Pub. Util. Code § 453(a)-(c)*

[4] Electronic Eavesdropping

Interception of wire, electronic digital pager, or electronic cellular telephone communications. *Penal Code § 629.50 et seq.*

Records of discovery of devices installed for purpose of overhearing communications. *Pub. Util. Code § 7905*

Investigation of measures taken to insure privacy of communications. *Pub. Util. Code § 7906*

[5] Jurisdiction and Regulation

Commission as having general power to regulate public utilities, including telegraph and telephone companies. *Pub. Util. Code §§ 216(a), 701*

Public adviser to assist persons testifying before Commission. *Pub. Util. Code § 321*

Annual work plan access guide to scheduled ratemaking proceedings and other commission decisions. *Pub. Util. Code § 321.6*

Establishing rates for telephone or telegraph corporation. *Pub. Util. Code § 461.2*

Commission jurisdiction over telephone directories. *Pub. Util. Code § 728.2(b)*

Provision of telephone service by nonpublic utility. *Pub. Util. Code §§ 741.2, 741.3*

Billing and collection services. *Pub. Util. Code § 742.5*

Judicial review by Supreme Court or court of appeal of Commission decisions. *Pub. Util. Code § 1756 et seq.*

Prohibition of interference with performance of Commission duties by courts. *Pub. Util. Code § 1759*

Award of fees and expenses for public utility customers that intervene in commission hearings for purpose of modifying or influencing rates. *Pub. Util. Code §§ 1801-1808*

Actions against utilities for damages. *Pub. Util. Code § 2106*

Required provision of equipment and devices for disabled and deaf or severely hearing impaired. *Pub. Util. Code § 2881*

Mobile telephony carriers required to provide Commission with information regarding service quality and customer complaints. *Pub. Util Code § 2885.6(a)*

Commission's revocation or suspension of mobile telephony carrier's authority for failure to supply information regarding service quality and customer complaints. *Pub. Util. Code § 2885.6(b)*

Establishment of pricing system for mobile telephony service. *Pub. Util. Code § 2886*

Telephone companies required to provide pricing and service information, access to live operators, quality standards, and information regarding regulatory process under Telecommunications Customer Service Act of 1993. *Pub. Util. Code §§ 2895-2897*

Retention or surrender of powers over utility corporations by municipalities to Commission. *Pub. Util. Code §§ 2901-2907*

Authority of Attorney General to seek forfeiture of local franchise for noncompliance. *Pub. Util. Code § 6016*; *see Gov. Code § 12527* (appointment of receiver in action by Attorney General in name of people of state of California)

[6] Telephone and Telegraph Company Property

[a] Construction and Maintenance

Authority of telephone or telegraph corporation to condemn private property. *Pub. Util. Code §§ 233, 235, 616, 617*

Access to utility facilities by disabled persons; duty to furnish and maintain equipment and facilities as necessary to promote public safety.. *Civ. Code § 54.1(a)*; *Pub. Util. Code § 451*

Duty of telephone corporation to give public notice before removing public telephone. *Pub. Util. Code § 728.3*

Required construction and maintenance of connecting lines. *Pub. Util. Code § 766*

Issuance of certificates of convenience. *Pub. Util. Code §§ 1001, 1002*

Authority of telegraph or telephone corporation to construct lines along public roads, highways, or waterways. *Pub. Util. Code § 7901*

[b] Injury to Property

Treble damages for malicious injury to telegraph or telephone property. *Pub. Util. Code § 7951*

Liability for negligent injury or destruction of telegraph or telephone property or facility; measure of damages. *Pub. Util. Code § 7952*

Marking of underwater telegraph and telephone lines as prerequisite to recovery of money damages. *Pub. Util. Code § 7953*

Regulations governing electric wires or cables on poles used to conduct electricity. *Pub. Util. Code §§ 8026-8038*

[7] Telegraph Messages

Duty of proper delivery by carrier of messages for reward. *Civ. Code § 2161*

Care and diligence required by carrier of messages for reward. *Civ. Code § 2162*

Priority and preferences in order of transmission of messages. *Civ. Code §§ 2207, 2208*

Damages for delaying or refusing messages. *Civ. Code § 2209*

Refusal to transmit messages as misdemeanor. *Pub. Util. Code § 7904*

[8] Termination of Telephone Service

Disconnection of telephone service required if person has received order to correct unlawful advertising of work covered by *Bus. & Prof. Code § 7085 et seq.* (governing contractors) in alphabetical or classified directory and person has failed to comply. *Bus. & Prof. Code § 7099.10*

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawPrivacyGeneral OverviewCommunications LawRelated Legal IssuesIndecency & ObscenityCommunications LawTelephone ServicesGeneral OverviewCriminal Law & ProcedureCriminal OffensesFraudWire FraudGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsAuthority

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§ 545.43 Administrative Regulations

Safety and health standards for telecommunication centers and field operations. *8 Cal. Code Reg §§ 8600-8618*

Commission rules of practice and procedure. *20 Cal. Code Reg § 1.1 et seq.*

Forms of proceedings before Commission. *20 Cal. Code Reg § 18.1*

Legal Topics:

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

[1] Duty of Care in Provision of Services and Equipment

Commission orders pursuant to *Pub. Util. Code § 8037*, to enforce *Pub. Util. Code § 8001 et seq.*, as not applicable to nonutilities such as those owned by *United States. Henderson v. United States (9th Cir. 1986) 827 F.2d 1233, 1237-1238 , amended, 846 F.2d 1233*

In personal injury action based on negligence and strict liability for injuries plaintiff sustained when telephone booth he was using was hit by drunk driver, question whether or not risk that car might crash into phone both located near street and injure individual in booth was reasonably foreseeable as triable issue of fact precluding summary judgment. *Bigbee v. Pacific Tel. & Tel. Co. (1983) 34 Cal. 3d 49, 52-55, 57, 59-60, 192 Cal. Rptr. 857, 665 P.2d 947*

Complaint alleging cause of action for personal injuries for improper siting of telephone booth in potentially dangerous location as capable of amounting to actionable negligence and as withstanding demurrer; classification of whether or not intervening act (drunk driver striking booth) consituted superseding cause as presenting question of fact. *Bigbee v. Superior Court (1979) 93 Cal. App. 3d 451, 453-454, 456, 155 Cal. Rptr. 545 , appeal after remand, Bigbee v. Pacific Tel. & Tel. Co. (1983) 34 Cal. 3d 49, 192 Cal. Rptr. 857, 665 P.2d 947*

Absent showing that tree trimmer had actual knowledge that telephone lines were not sufficiently secured, trimmer as not charged with assuming risk that fallen tree trunk would fly into air as result of tension in wires. *Carr v. Pacific Tel. Co. (1972) 26 Cal. App. 3d 537, 543, 103 Cal. Rptr. 120*

Wilful refusal or neglect to send message or postponement of transmission in violation of *Pub. Util. Code § 7904* as not requiring evil intent, but as implying purpose or willingness to commit act and knowledge of nature of act; allegations of negligence as insufficient to support civil cause of action for nuisance based on *Pub. Util. Code § 7904*. *Gautier v. General Tel. Co. (1965) 234 Cal. App. 2d 302, 308, 44 Cal. Rptr. 404* (dicta)

Supplier of chattel for another to use for supplier's business purposes as having duty to exercise reasonable care to make chattel safe for use for which it is supplied, including duty to reasonably inspect. *Garner v. Pacific Elec. Ry. Co.*

(1962) 202 Cal. App. 2d 720, 728, 21 Cal. Rptr. 352

Duty of telephone corporation to maintain telephone switchboard in reasonably safe condition. *Jaehne v. Pacific Tel. & Tel. Co. (1951) 105 Cal. App. 2d 683, 687, 234 P.2d 165*

Transit company maintaining poles along heavily traveled highway as having duty to select and maintain poles sufficiently strong to withstand ordinary weather conditions and other tests of strength likely to be encountered along busy highway; demurrer as improperly sustained to complaint by pedestrian alleging that she was struck by rotten pole which broke off when hit by automobile negligently driven by third party. *Gibson v. Garcia (1950) 96 Cal. App. 2d 681, 683, 687, 216 P.2d 119*

Telephone company as liable for damages when negligently maintained telephone pole fell and injured plaintiffs' decedent; question whether reasonable person should have anticipated that old telephone pole with six inches of sound timber in center but decayed at surface, near ground, to depth of one and one half inches, was in dangerous condition as issue for jury. *Keller v. Pacific Tel. & Tel. Co. (1934) 2 Cal. App. 2d 513, 519, 38 P.2d 182*

Telephone company as liable in wrongful death action when decedent was swept from top of trailer by low telephone wire. *Zurich Ins. Co. v. Coachella Valley Home Tel. & Tel. Co. (1931) 119 Cal. App. 65, 67-68, 5 P.2d 943*

Person maintaining telephone wires as having duty to exercise ordinary care in their construction and maintenance in reasonably safe condition to permit of ordinary travel; party claiming wire was too low as requried to show that it is usual and customary for vehicles of equal or greater height to pass under it. *Schleif v. Grigsby (1927) 88 Cal. App. 174, 179, 263 P. 255*

Placing and maintaining guy wire securing telephone pole within line of travel without anything to attract attention or observation of person approaching in darkness as negligence. *Grant v. Sunset Tel. & Tel. Co. (1908) 7 Cal. App. 267, 269-273 94 P. 368*

[2] Duty to Transmit Messages

Limitation of liability provisions as applicable to false report of delivery of telegram. *Trammell v. Western Union Tel. Co. (1976) 57 Cal. App. 3d 538, 556, 129 Cal. Rptr. 361*

Wilful refusal or neglect to send message or postponement of transmission as implying purpose or willingness to commit act and knowledge of nature of act; evil intent as not required. *Gautier v. General Tel. Co. (1965) 234 Cal. App. 2d 302, 308, 44 Cal. Rptr. 404*

[3] Jurisdiction of State Courts

California trial court had jurisdiction over consumers' action against phone company alleging that company deceived plaintiffs into paying monthly equipment rental fee for telephones that plaintiffs did not have or for telephones whose values were much less than the cumulative amount of rentals paid, without adequately telling plaintiffs what fee actually covered. *Cundiff v. GTE Cal. Inc. (2002) 101 Cal. App. 4th 1395, 1406-1407, 125 Cal. Rptr. 2d 445*

Writ of mandamus to Supreme Court, rather than motion for injunction in superior court, as appropriate method for seeking injunctive relief calling for Public Utilities Commission to modify previous decision, made pursuant to *Pub. Util. Code § 2884*, regarding public access to sexually explicit telephone information messages. *Brian T. v. Pacific Bell (1989) 210 Cal. App. 3d 894, 900-901, 258 Cal. Rptr. 707*

Jurisdiction of superior court as limited to situations in which relief sought would not hinder or frustrate Public Utility Commission's declared supervisory and regulatory policies. *Brian T. v. Pacific Bell (1989) 210 Cal. App. 3d 894, 900-901, 258 Cal. Rptr. 707*

[4] Liability of Third Persons for Injuring Telephone or Telegraph Company Property

When negligent driver damages utility pole, depreciation as not conisidered in determining damages under *Pub. Util. Code § 7952*. *Pacific Gas & Elec. Co. v. Alexander (1979) 90 Cal. App. 3d 253, 256-257, 153 Cal. Rptr. 319* ; *Pacific Gas & Elec. Co. v. Mounteer (1977) 66 Cal. App. 3d 809, 812-813, 136 Cal. Rptr. 280*

Road building contractor as having duty to ascertain existence of underground communications cable on side of public road and to protect utilities, and contractor as liable for damages to cable resulting from negligent disregard of plans and specifications. *Pac. Tel. & Tel. Co. v. Granite Constr. Co. (1964) 225 Cal. App. 2d 765, 768-769, 37 Cal. Rptr. 727*

[5] Limitation of Damages Under Tariff Provisions

"Violation of law" exception to tariff limitation on liability as interpreted to apply to intentional torts, not to negligent compliance with PUC order. *Pacific Bell v. Colich (1988) 198 Cal. App. 3d 1225, 1243-1244, 244 Cal. Rptr. 714*

Tariff provision limiting telephone utility's liability for negligence as barring third-party defendant from seeking equitable indemnity or contribution from concurrently negligent utility for damages arising out of interruption of plaintiff's telephone service. *Pacific Bell v. Colich (1988) 198 Cal. App. 3d 1225, 1230, 1234-1235, 244 Cal. Rptr. 714*

Limitation of liability provisions filed with Commission by telegraph company, as inherent part of rates established in company's tariff, as having force and effect of law, and as binding on public generally, including senders, recipients, and addressees of telegrams, whether or not such persons have knowledge of provisions; tlegraph company as liable only to extent of tariff provisions to recipient of telegram notifying him of job opportunity when telegram was negligently delivered to wrong address. *Trammell v. Western Union Tel. Co. (1976) 57 Cal. App. 3d 538, 551, 129 Cal. Rptr. 361*

Jurisdiction of complaints regarding limitation of liability provisions as vested in *Commission. Waters v. Pacific Tel. Co. (1974) 12 Cal. 3d 1, 4, 4 n. 1, 114 Cal. Rptr. 753, 523 P.2d 1161*

Rule filed with Commission by telephone company limiting liability for omissions in advertisments or directory listings, if reasonable, as binding on subscribers and other persons. *Riaboff v. Pacific Tel. & Tel. Co. (1940) 39 Cal. App. 2d Supp. 775, 102 P.2d 465*

Tariff provision limiting telephone company's liability for interruption of service to credit allowance as applicable to gross as well as ordinary negligence. *Stern v. General Tel. Co. (1975) 50 Cal. App. 3d 538, 541-542, 123 Cal. Rptr. 373*

Limitation of liability by tariff for negligent deletion of customer's professional listing from classified directory as not unlawful. *Hall v. Pacific Tel. & Tel. Co. (1971) 20 Cal. App. 3d 953, 954-955, 98 Cal. Rptr. 128* ; *Davidian v. Pacific Tel. & Tel. Co. (1971) 16 Cal. App. 3d 750, 752-757, 94 Cal. Rptr. 337* Liability of telegraph company for errors in telegraph message. *Hart v. Western Union Tel. Co. (1885) 66 Cal. 579, 581-582, 6 P. 637* (decided prior to creation of PUC in California; limitation of damages on contract theory held inapplicable by *Trammell v. Western Union Tel. Co. (1976) 57 Cal. App. 3d 538, 553 n.5, 129 Cal. Rptr. 361*)

[6] Regulation of Obscene or Indecent Calls

47 U.S.C.S. § 223(b), banning indecent and obscene interstate commercial telephone messages, as unconstitutional insofar as statute bans messages that are indecent, but not obscene. *Sable Communications of California, Inc. v. FCC (1988) 492 U.S. 115, 109 S. Ct. 2829, 106 L. Ed. 2d 93, 108*

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawRelated Legal IssuesIndecency & ObscenityCommunications LawTelephone ServicesGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsPublic Utility CommissionsGeneral OverviewEnergy & Utilities LawUtility CompaniesLiabilityTortsNegligenceDutyGeneral Overview

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§ 545.45 Law Reviews

Private Damage Actions Against Telephone Companies For Inadequate Service (1975) *9 U.S.F. L. Rev. 561*

Baum, Statutory Controls of Damages In Commercial Transactions. (1960) *12 Hast. L.J. 191*

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawTelephone ServicesGeneral OverviewEnergy & Utilities LawUtility CompaniesLiabilityTortsBusiness TortsGeneral OverviewTortsNegligenceDutyGeneral Overview

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[Reserved]

§§ 545.46[Reserved]

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47-545 California Forms of Pleading and Practice--Annotated § 545.60

§ 545.60 Complaint for Damages [Civ. Code §§ 3294, 3333] Based on Unlawful Conduct of Public Utility [Pub. Util. Code § 2106]--Failure or Refusal to Transmit Telegram [Civ. Code §§ 2207, 2209]--By Sender or Recipient Against Telegraph Corporation

[1] FORM Complaint for Damages [Civ. Code §§ 3294, 3333] Based on Unlawful Conduct of Public Utility [Pub. Util. Code § 2106]--Failure or Refusal to Transmit Telegram [Civ. Code §§ 2207, 2209]--By Sender or Recipient Against Telegraph Corporation

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*], [and DOES 1	)	[Amount demanded _____
through _____,] Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
_____		

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a telegraph corporation organized and existing under the laws of the State of _____, and authorized to do business, and doing business in the State of California with its principal place of business in _____ [*city*], _____ County, California.

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as

herein alleged were proximately caused by such defendants.)]

[3. Plaintiff is informed and believes and thereon alleges that at all times mentioned herein defendant(s) _____ (*name(s)*) (and DOES 1-_____,) was/were the agent(s) and employee(s) of defendant _____ (*name*), and [in doing the things hereinafter alleged] was/were acting within the course and scope of such agency and employment.]

4. On or about _____ [*date*], at approximately _____ [*time*], _____ [*name of sender of message*] delivered the following telegram to defendants's office located at _____ [*street address and if any, city*], _____County, California, for transmission to _____ [*name of recipient*]: _____ [*set out pertinent text of telegram*].

5. Defendant[s, and each of them], accepted this telegram for transmission in return for the standard compensation demanded and paid, and thereby undertook the obligation to use great care and diligence in the transmission and delivery of the telegram, as required by *Sections 2162, 2207*, and *2208 of the Civil Code*.

6. Defendant[s, and each of them,] _____ [failed to transmit and deliver *or* delayed transmission and delivery of] the telegram, in that _____ [*allege facts showing intentional failure or delay in transmission or delivery of telegram, e.g.,* the messenger wilfully forged the addressee's name to the receipt acknowledging delivery of the telegram], which was _____ [not received until _____ (*time*), on _____ (*date*) *or* never received].

7. The _____ [failure *or* refusal] to transmit the telegram was without justification and constitutes a violation of defendants' duty to transmit messages immediately on receipt as required by *Section 2207 of the Civil Code*.

8. As a proximate result of defendant's violation of its/their duty, plaintiff suffered mental anguish and emotional and physical distress, sustaining injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. As a result of such injuries, plaintiff has suffered general damages.

[9. As a further result of defendants' violation of its/their duty, plaintiff has sustained damage to his/her goodwill and business reputation, and was deprived of the opportunity to practice his/her usual livelihood, and thereby lost earnings to his/her damage].

[10. Defendants' refusal to transmit the telegram was wilfull, wanton, and malicious, and justifies the awarding of exemplary damages]. WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For general damages according to proof;

2. For _____ [*specify special damages, e.g.,* damages for loss of earnings] according to proof;

[3. For exemplary damages;]

4. For payment of the penalty authorized by *Section 2209 of the Civil Code* in the sum of $50;

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form of complaint in [1], *above*, is for use to seek damages under *Pub. Util. Code § 2106* for a telegraph corporation's intentional failure or refusal to transmit a telegram.

The action may be brought in any court of competent jurisdiction by any corporation or person to recover for loss, damage, or injury caused by a public utility's unlawful conduct or failure to comply with Constitutional provisions, state statutes, or Commission orders or decisions [*see Pub. Util. Code § 2106*].

The ground for the complaint is the telegraph company's failure or refusal to transmit the telegram as required by statute [*see Civ. Code § 2207*; *Trammell v. Western Union Tel. Co. (1976) 57 Cal. App. 3d 538, 549-556, 129 Cal. Rptr. 361* (damages limited by tariff when action is merely based on negligence; dicta that limitation also applies in case of gross negligence)].

[3] Allegations

The complaint in [1], *above*, alleges:

- The defendant corporation's capacity and principal place of business (Paragraph 1), which may be the basis for venue [*see Code Civ. Proc. § 395.5*].

- Doe defendants, if applicable (Paragraph 2).

- The requisite agency/employee relationship between defendants in order to establish vicarious liability, if applicable (Paragraph 3) [*see generally* Ch. 427, *Principal and Agent*].

- The submission of the message to be delivered at defendants' business office, which may also be the basis for venue (Paragraph 4) [*see Code Civ. Proc. § 395(a)*].

- Facts establishing defendants' duty to transmit the telegram (Paragraph 5) [*see Civ. Code § 2207*].

- Facts establishing defendant's negligent or wilful breach of its duty to plaintiff (Paragraphs 6 and 7).

- Plaintiff's damages resulting from defendants' conduct (Paragraphs 8 and 9) [*see Pub. Util. Code § 2106*].

- For optional use if plaintiff seeks exemplary damages, the wilful, wanton, and malicious conduct of defendants warranting exemplary damages (Paragraph 10) [*see Civ. Code § 3294*].

[4] Limitation of Damages in Negligence Actions

Recovery of damages by a plaintiff in a negligence action brought pursuant to *Pub. Util. Code § 2106* is likely to be limited by provisions in approved tariff schedules filed by the utility with the Commission that set a specific amount of credit or damages to be paid for negligence. Although actions for damages against utilities for unlawful acts are authorized by *Pub. Util. Code § 2106*, claims for damages in excess of the credit allowances contained in the tariff provisions are barred [*Waters v. Pacific Tel. Co. (1974) 12 Cal. 3d 1, 4, 6, 114 Cal. Rptr. 753, 523 P.2d 1161* ; *see Trammell v. Western Union Tel. Co. (1976) 57 Cal. App. 3d 538, 549, 129 Cal. Rptr. 361]* .

In order to ascertain whether a provision exists to limit a defendant's monetary liability in a negligence action, counsel should consult the tariff schedule filed by the particular utility with the Commission.

[5] Jurisdiction

Dual jurisdiction over actions involving all public utilities is vested in the Commission and state courts. Courts generally have jurisdiction over tort actions against public utilities, unless the Commission has passed on the very matter asserted by the action [*see City of Union City v. Southern Pac. Co. (1968) 261 Cal. App. 2d 277, 280-281, 67 Cal. Rptr. 816]* . Once the Commission has assumed jurisdiction over a public utility for the purpose of administering the law applicable to the activities of the utility, the Commission has exclusive jurisdiction [*Citizens Utils. Co. v. Superior Court (1976) 56 Cal. App. 3d 399, 407, 128 Cal. Rptr. 582* ; *but see Stepak v. American Tel. & Tel. Co. (1986) 186 Cal. App. 3d 633, 635, 641-646, 231 Cal. Rptr. 37* (court as not divested of jurisdiction if Commission exceeds its jurisdiction)].

[6] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[7] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[8] Cross References

For an allegation relating to a mistake or omission in a telegram, that may be used in the form of complaint in [1], *above*, see *§ 545.61*

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For alternative allegations of damages, see Ch. 177, *Damages*

For discussion and forms relating to actions for intentional or negligent infliction of emotional distress, see Ch. 362, *Mental Suffering and Emotional Distress*

For alternative forms of prayers and verifications, see Ch. 420, *Prayers* and Ch. 572, *Verification* , respectively

For discussion and forms relating to complaints before the Public Utilities Commission, see Ch. 480, *Public Utilities*

For memoranda of points and authorities relating to negligence actions, see California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender)

For memoranda of points and authorities relating to determining the proper amount of damages in tort actions, see California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

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47-545 California Forms of Pleading and Practice--Annotated § 545.61

§ 545.61 Allegation--Errors or Omissions in Telegram [Civ. Code § 2162]--By Sender or Recipient Against Telegraph Company

[1] FORM Allegation--Errors or Omissions in Telegram [Civ. Code § 2162]--By Sender or Recipient Against Telegraph Company

6. Defendant[s, and each of them], negligently _____ [omitted certain text from *or* caused an error in the text of] the telegram so as to cause the telegram to read as follows: _____ [*set out pertinent text of telegram*].

[2] Use of Form

The form of allegation in [1], *above*, is for use by a sender or recipient of a telegram in a negligence action against a telegraph corporation based on errors or omissions in a telegram [*Civ. Code § 2162*; *Pub. Util. Code § 2106*]. To complete the complaint, this allegation should be inserted in place of form in Paragaph 6 of the *§ 545.60*. Paragraphs 7 and 10 should be also omitted from the form in *§ 545.60*.

For discussion of a telegraph corporation's liability for errors or omissions in telegrams, see *§§ 545.13* and *545.16*.

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[Reserved]

§§ 545.62[Reserved]

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47-545 California Forms of Pleading and Practice--Annotated § 545.70

§ 545.70 Complaint for Damages [Civ. Code § 3333] for Personal Injury and Property Damage Based on Negligence [Civ. Code § 1714(a)]--Failure of Telegraph or Telephone Corporation to Properly Construct or Maintain Equipment or Facilities [Pub. Util. Code §§ 451, 2106]--Maintaining Defective Pole

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injury and Property Damage Based on Negligence [Civ. Code § 1714(a)]--Failure of Telegraph or Telephone Corporation to Properly Construct or Maintain Equipment or Facilities [Pub. Util. Code §§ 451, 2106]--Maintaining Defective Pole

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR PERSONAL INJURY AND
_____ [*name(s)*], [and DOES 1	)	PROPERTY DAMAGE
through _____], Defendant(s).	)	(Negligence)
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is, and at all times herein mentioned was, a _____ [telephone *or* telegraph] corporation organized and existing under the laws of the State of _____, and authorized to do business, and doing business, in the State of California with its principal place of business at _____ [*street address and if any, city*], _____ County, California.

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names

and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by that negligence.)]

[3. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned defendant(s) _____ (*name(s)*) (and DOES 1-_____,) was/were the agent(s) and employee(s) of defendant _____ (*name*), and in doing the things hereinafter alleged was/were acting within the course and scope of such agency and employment.]

4. At all times herein mentioned, defendant[s, and each of them], owned, maintained, controlled, and managed a telephone pole located _____[*describe location of pole, e.g,* one foot from the North _____ (curb *or* edge) of _____ (*street*) twenty feet East of the intersection of _____ and _____ (*streets*)] in _____ [*city and/or county*], California.

5. On or about _____ [*date*], plaintiff was _____ [*allege facts showing status and activity of plaintiff placing him/her in class of persons to whom defendant owed duty of care, e.g.,* parking his/her car in a spot lined on the street for parking _____ (*specify distance*) from defendant's telephone pole on the _____ (*compass direction*) side of _____ (*street*). As plaintiff was parking, the accelerator on his/her car jammed, propelling the car into defendant's telephone pole, which broke off at the ground and snapped at another point near the top. One piece of the pole struck plaintiff's automobile, damaging it and injuring plaintiff].

6. At all times herein mentioned, defendant[s, and each of them] negligently constructed and maintained the above-described telephone pole in such weak and defective condition, as to cause it to fall and strike _____ [*specify, e.g.,* plaintiff's car], proximately causing the injuries and damages described below.

7. As a proximate result of the negligence of defendant[s, and each of them], plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has suffered general damages.

8. As a further proximate result of the negligence of defendant[s, and each of them], plaintiff has incurred [, and will continue to incur,] medical and related expenses.

9. As a further proximate result of the negligence of defendant[s, and each of them], plaintiff's earning capacity has been greatly impaired, both in the past and present.

10. As a further proximate result of the negligence of defendant[s, and each of them], plaintiff's _____ [*describe personal property*] was _____ [damaged *or describe damage, e.g.,* destroyed beyond repair, all to plaintiff's damage in the sum of $_____]. [*If property was not destroyed, add:* Plaintiff _____ (has expended *or* must expend) $_____ for repair of the damaged property, which is a reasonable sum for the repair.]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

4. For damage to personal property _____ [according to proof *or* in the sum of $_____];

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[2] Use of Form

The form of complaint in [1], *above*, is for use in seeking damages for personal injury and property damage proximately caused by defendant's negligent maintenance of a defective telephone pole, which it should have anticipated would be likely to endanger persons or property. A telephone company has a duty to select and maintain sound poles which may be reasonably expected to withstand ordinary strain of weather conditions or other ordinary tests of strength, and to make reasonable inspection of its poles to ascertain that they are safe [*Keller v. Pacific Tel. & Tel. Co. (1934) 2 Cal. App. 2d 513, 519, 38 P.2d 182]* .

Depending on the facts of the case, counsel may wish to delete paragraphs of the complaint that do not apply. For instance, if no property damage is involved, Paragraph 10 of the complaint, as well as Paragraph 4 of the prayer, would be omitted.

[3] Allegations

The complaint in [1], *above*, alleges:

- The defendant corporation's capacity and principal place of business, which may be the basis for venue (Paragraph 1) [*see Code Civ. Proc. §§ 395(a), 395.5*].

- Facts regarding defendant's ownership and control over the telephone pole and plaintiff's status and activity that establish defendant's duty of care toward plaintiff, as well as the location of the accident, which may also be the basis for venue (Paragraphs 4 and 5).

- Acts or omissions of defendant constituting a breach of the duty owed plaintiff and causing injury to plaintiff (Paragraph 6).

- Plaintiff's damages (Paragraphs 7-10) [*see Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 513-514, 150 Cal. Rptr. 1, 585 P.2d 851* (general allegations of negligence, proximate causation, and resulting injury and damages are sufficient)].

The form also includes paragraphs for optional use to allege fictitiously named defendants (Paragraph 2) [*see* Ch. 20,

Allegations Commonly Used] and the requisite agency relationship in order to establish vicarious liability, if applicable (Paragraph 3) [*see* Ch. 427, *Principal and Agent*].

[4] Specifying Amount of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[5] Venue

In an action for injury to person or personal property or for death from wrongful act or negligence, either the county in which the injury occurs or the county in which the defendants, or some of them, reside at the commencement of the action is a proper county for trial of the action [*Code Civ. Proc. § 395(a)*]. A corporation may be sued in the county where its obligation or liability arises, or the breach occurs, or in the county where the principal place of business of the corporation is situated [*Code Civ. Proc. § 395.5*].

[6] Wrongful Death Actions

In an appropriate case, the allegations in this form regarding defendant's duty of care and breach may be used in a complaint for wrongful death arising from a telephone or telegraph corporation's negligence in constructing or maintaining a telephone pole. For discussion and forms relating to wrongful death actions generally, see Ch. 181, *Death and Survival Actions* .

[7] Cross References

For alternative forms of allegations for use in this form, see *§§ 545.71 -545.73*.

For further discussion of other related subjects, see *§ 545.60*.

For discussion and forms relating to liability for negligently locating utility poles and wires so as to create a hazard, see Ch. 277, *Gas and Electricity*

For discussion and forms relating to actions based on negligence generally, as well as on the vicarious liability of an employer for the wrongful acts of employees, see Ch. 380, *Negligence*

For discussion and forms relating to products liability, see Ch. 460, *Products Liability*

For memoranda of points and authorities relating to actions for negligence generally, see California Points and

Authorities, Ch. 165, *Negligence* (Matthew Bender)

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§ 545.71 Allegations--Telephone Corporation's Failure to Properly Construct or Maintain Equipment or Facilities [Pub. Util. Code § 451]--Negligently Installed or Maintained Telephone Lines

[1] FORM Allegations--Telephone Corporation's Failure to Properly Construct or Maintain Equipment or Facilities [Pub. Util. Code § 451]--Negligently Installed or Maintained Telephone Lines

4. At all times herein mentioned, _____ [*name of street or other roadway*], was, and now is, a public thoroughfare running in a general _____ [*specify direction, e.g.,* North and South] direction in _____ [*city and/or county*], California.

5. At all times herein mentioned, defendant[s, and each of them], owned, maintained, controlled, managed, and operated certain telephone lines over and across the above-mentioned public thoroughfare at or near _____ [*specify location*].

6. On or about _____ [*date*], plaintiff _____ [*allege facts showing status and activity of plaintiff placing him/her in class of persons to whom defendant owed duty of care, e.g.,* was operating riding on top of a load of hay in the back of a truck which was traveling in a northerly direction along the above-mentioned public thoroughfare].

7. At this time and place, defendant[s, and each of them] so negligently owned, maintained, and controlled the telephone lines _____ [*allege condition creating hazard, e.g.,* that the lines ran only _____ (*specify height of lines above roadway*) above the roadway], so as to cause _____ [*allege the result of defendants' negligence, e.g.,* the lines to strike plaintiff and knock him/her to the pavement], proximately causing the injuries and damages described below.

[2] Use of Form

The form of allegations in [1], *above,* is for use in a complaint seeking damages for personal injury against a telephone company for failure to properly construct or maintain equipment or facilities, when the plaintiff has been injured by low telephone lines [*see Schleif v. Grigsby (1927) 88 Cal. App. 174, 179, 263 P. 255* ; *see also Pub. Util. Code § 8026 et seq.* (regulations governing electric wires or cables on poles used to conduct electricity)]. The allegations should be

inserted in place of Paragaphs 4-6 in the *form in § 545.70*, and the remaining Paragraphs of that form renumbered accordingly.

[3] Allegations

The allegations set forth [*see Schleif v. Grigsby (1927) 88 Cal. App. 174, 179-181, 263 P. 255]* :

- The public nature of the thoroughfare across and along which defendant's lines are located (Paragraph 4).

- Defendant's ownership, construction, and maintenance of the telephone lines (Paragraph 5).

- Facts regarding plaintiff's status and activities which establish the duty owed by defendant to plaintiff (Paragraph 6).

- The actions or omissions of defendant that constituted the breach of duty and that proximately caused plaintiff's injuries (Paragraph 7).

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47-545 California Forms of Pleading and Practice--Annotated § 545.72

§ 545.72 Allegations--Telephone Corporation's Failure to Properly Construct or Maintain Equipment or Facilities [Pub. Util. Code § 451]--Telephone Booth Improperly Sited in Dangerous Location

[1] FORM Allegations--Telephone Corporation's Failure to Properly Construct or Maintain Equipment or Facilities [Pub. Util. Code § 451]--Telephone Booth Improperly Sited in Dangerous Location

4. At all times herein mentioned, defendant[s, and each of them], owned, maintained, controlled, managed, and operated a public telephone booth located at _____ [*street address or location*], _____ [*city and/or county*], California, for the purpose of inviting members of the public to use the facility to place telephone calls.

5. Defendant[s, and each of them], failed to exercise due care and diligence in locating and constructing the above-mentioned telephone booth in that _____ [*allege facts demonstrating the dangerous location of the booth, e.g.,* it is located in a parking lot fifteen feet from the curb of a major thoroughfare on which traffic habitually travels at a high rate of speed, creating an unreasonable risk of harm to anyone using the telephone booth. No physical barrier exists between the booth and the street in order to protect persons using the booth].

[6. Further, defendant[s, and each of them], so defectively designed and/or manufactured the above-mentioned telephone booth, or so negligently installed or maintained it, that the door to the booth jammed and stuck, trapping plaintiff inside so that he/she could not escape from the booth.]

7. On or about _____ [*date*], plaintiff, as a member of the public invited to use defendant's facilities, entered the above-mentioned telephone booth to make a call.

8. After plaintiff entered the booth, and as a result of defendant's negligent siting [, design, manufacturing, installation, and maintenance] of it, plaintiff suffered physical injuries described below when a vehicle operated by _____ [*name*] crashed into the booth. [Plaintiff would have been able to escape from the path of the vehicle if the telephone booth door had not jammed and trapped him/her inside the booth.]

[2] Use of Form

The form of allegations in [1], *above*, is for use in a complaint seeking personal injury damages against a telephone

company for negligently placing a telephone booth in a dangerous location. The allegations should be inserted in place of Paragaphs 4-6 in the form in *§ 545.70*, and the remaining Paragraphs of that form renumbered accordingly.

[3] Allegations

The allegations set forth [*see Bigbee v. Pacific Tel. & Tel. Co. (1983) 34 Cal. 3d 49, 52-53, 57-58, 192 Cal. Rptr. 857, 665 P.2d 947* ; *Bigbee v. Superior Court (1979) 93 Cal. App. 3d 451, 453-456, 155 Cal. Rptr. 545]* :

- The defendant's ownership, construction, and maintenance of the telephone booth (Paragraph 4).
- Defendant's negligence in placement of the booth in a dangerous location (Paragraph 5).
- Facts showing plaintiff's status and activities which establish the duty owed by defendant to plaintiff (Paragraph 7).
- The actions or omissions of defendant that constituted the breach of duty and that proximately caused plaintiff's injuries (Paragraphs 6, 8).

[4] Cross References

For discussion and forms relating to actions against automobile drivers and owners, see Ch. 80, *Automobiles: Overview* to Ch. 87A, *Automobiles: Post Trial*

For discussion and a form of complaint relating to negligent siting of utility poles, see Ch. 277, *Gas and Electricity*

For discussion and forms relating to the duty of care owed invitees by owners and possessors of property, and premises liability generally, see Ch. 421, *Premises Liability*

For memoranda of points and authorities relating to the general liability of an owner or possessor of public property, as well as the intervention of third persons in causing injuries to users of the property, see California Points and Authorities, Ch. 178, *Premises Liability* (Matthew Bender)

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Volume 47: Subrogation thru Telephone and Telegraph Communication-Chs. 536-546
Chapter 545 TELEPHONE AND TELEGRAPH COMMUNICATION
PART IV. FORMS

47-545 California Forms of Pleading and Practice--Annotated § 545.73

§ 545.73 Allegations--Telephone Corporation's Failure to Properly Construct or Maintain Equipment or Facilities [Pub. Util. Code § 451]--Negligent Maintenance of Telephone Switchboard

[1] FORM Allegations--Telephone Corporation's Failure to Properly Construct or Maintain Equipment or Facilities [Pub. Util. Code § 451]--Negligent Maintenance of Telephone Switchboard

4. On or about _____ [*date*], defendant[s, and each of them], provided and installed a telephone switchboard in _____ [*specify location*], for use by _____ (*name of person or business to use switchboard*) pursuant to a _____ (*specify arrangement, e.g.,* leasing agreement) with _____ (*name of person or business to use switchboard*)].

5. At all times herein mentioned, defendant[s, and each of them], owned, maintained, and repaired the above-mentioned telephone switchboard pursuant to the _____ (*specify arrangement, e.g.,* lease).

6. On or about _____ [*date*], plaintiff was [*allege facts showing status and activity of plaintiff placing him/her in class of persons to whom defendant owed duty of care, e.g.,* employed by _____ (*name of person or business to use switchboard*) to operate the above-mentioned telephone switchboard].

7. At all times herein mentioned, defendant[s, and each of them] negligently inspected, repaired, and maintained the telephone switchboard so as to cause _____ [*allege the result of defendants' negligence, e.g.,* the switchboard to short-circuit and give plaintiff an electrical shock], proximately causing the injuries and damages described below.

[2] Use of Form

The allegations in [1], *above*, are for use in a complaint seeking personal injury damages against a telephone company for negligently installing, inspecting, repairing, and maintaining a telephone switchboard. The allegations should be inserted in place of Paragaphs 4-6 in the form in *§ 545.70*, and the remaining Paragraphs of that form renumbered accordingly.

[3] Allegations

The allegations set forth [*see Jaehne v. Pacific Tel. & Tel. Co. (1951) 105 Cal. App. 2d 683, 685-687, 234 P.2d 165* (duty of telephone corporation to maintain telephone switchboard in reasonably safe condition); *see also Garner v. Pacific Elec. Ry. Co. (1962) 202 Cal. App. 2d 720, 728, 21 Cal. Rptr. 352* (supplier of chattel for another to use for supplier's business purposes as having duty to exercise reasonable care to make chattel safe for use for which it is supplied, including duty to reasonably inspect)]:

- The furnishing of the switchboard equipment by defendant under an arrangement pursuant to which defendant continued to own and maintain the equipment (Paragraphs 4,5).

- Facts regarding plaintiff's status and activities which establish the duty owed by defendant to plaintiff (Paragraph 6)

- The actions or omissions of defendant that constituted the breach of duty and that proximately caused plaintiff's injuries (Paragraph 7).

[4] Cross References

For discussion and forms relating to workers' compensation claims by employees injured while operating an employer's equipment, see Ch. 577, *Workers' Compensation*

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Chapter 546 [RESERVED]

47-546 California Forms of Pleading and Practice--Annotated Chapter 546

[RESERVED]

Chapter 546[RESERVED]

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Chapter 547 THEATERS, SHOWS, AND AMUSEMENT PLACES

48-547 California Forms of Pleading and Practice--Annotated 547.syn

§ 547.syn Synopsis to Chapter 547: THEATERS, SHOWS, AND AMUSEMENT PLACES

§ 547.01 Scope of Chapter

§ 547.02 Cross References

§§ 547.03through 547.09 [Reserved]

§ 547.10 Governing Law

§ 547.11 Regulation of Theaters

§ 547.12 Obscene Films as Public Nuisance

§ 547.13 Possessor's Liability to Entrants

§ 547.14 Duty to Enforce MPAA Film Ratings Runs Only to Parents

§ 547.15 Detention by Movie Theater Owner for Operating Unauthorized Video Device

§ 547.16 Access to Places of Public Amusement

[1] All Persons

[2] Physically Disabled Persons

[3] Persons Carrying in or Operating Video Recording Devices

§ 547.17 Standard of Care for Amusement Rides

§§ 547.18through 547.29 [Reserved]

§ 547.30 Related Matthew Bender Publications

[1] California Points and Authorities

[2] Bender's Forms of Discovery

§ 547.31 State Statutes

[1] Access to Places Open to Public

[2] Crimes

[3] Damages

[4] Employment Regulations

[5] Government Regulations

[6] Health and Safety Regulations

[7] Proprietor's Liability

[8] Statutes of Limitations

[9] Venue

§ 547.32 Decisions

[1] Amusement Rides

[2] Fairs and Resorts

[3] Movie Theaters

[a] Access

[b] Attracting Violence

[c] Premises

§ 547.33 Text References

§§ 547.34through 547.49 [Reserved]

§ 547.50 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injury (and Property Damage) Based on Negligence [Civ. Code § 1714(a)]--By Person on Premises to Audition Against One in Control of Premises--Negligent Management, Control, and Operation of Premises

[1] FORM

[2] Use of Form

[3] Allegations

[4] Specification of Damages

[5] Cross References

§ 547.51 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injury (and Property Damage) Based on Negligence [Civ. Code § 1714(a)]--By Person on Premises Against Owner of Place of Amusement and Concessionaire--Negligent Control, Supervision, and Operation of Premises

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 547.52 Allegation--Personal Injury Caused By Defendants' Negligence [Civ. Code § 1714(a)]--Defective Amusement Park Device

[1] FORM

[2] Use of Form

[3] Cross References

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Chapter 547 THEATERS, SHOWS, AND AMUSEMENT PLACES
PART I. SCOPE

48-547 California Forms of Pleading and Practice--Annotated § 547.01

§ 547.01 Scope of Chapter

This chapter discusses and contains forms for use in actions against owners or operators of theaters, amusement parks, and other resort facilities. Included are a complaint for personal injury and property damage due to negligent management, control, and operation of premises [*see § 547.50*], a complaint for personal injury and property damage due to negligent control, supervision, and operation of premises [*see § 547.51*], and an allegation of personal injury caused by a defective amusement park device [*see § 547.52*].

For discussion and forms relating to negligence generally, see Ch. 380, *Negligence* . For forms and discussion relating to the general liability of the owner of premises, see Ch. 421, *Premises Liability* . For discussion and forms relating to the liability of the owner of other types of recreational premises, see Ch. 273, *Games, Sports, and Athletics* . For discussion and forms specific to injuries caused by slipping and falling, see Ch. 525, *Slip and Fall* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceActionsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityActivities & ConditionsSlip & Fall InjuriesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesAmusement Parks

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48-547 California Forms of Pleading and Practice--Annotated § 547.02

§ 547.02 Cross References

For discussion and forms relating to outdoor and billboard advertising standards, see Ch. 14, *Advertising* .

For discussion and forms relating to liquor licensing and abatement of unlawful selling of alcohol, see Ch. 18, *Alcoholic Beverage Licenses* .

For discussion and forms relating to actions for assault and battery, see Ch. 58, *Assault and Battery* .

For discussion and forms relating to personal injury actions alleging negligence of carriers of persons for reward, see Ch. 106, *Buses and Streetcars* .

For discussion and forms relating to discrimination in business establishments, see Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

For discussion and forms relating to liability of premises with elevators, see Ch. 244, *Elevators and Escalators* .

For discussion and forms relating to actions for false imprisonment, see Ch. 257, *False Imprisonment* .

For discussion and forms relating to liability of operators of parks and stadiums to participants and spectators, see Ch. 273, *Games, Sports, and Athletics* .

For discussion and forms relating to maintenance of hotel premises, see Ch. 297, *Hotels and Motels* .

For discussion and forms relating to a public entity's power to require a license to operate a business, see Ch. 471B, *Licensing by Public Agencies* .

For discussion and forms relating to production and distribution of motion pictures, see Ch. 370, *Motion Pictures* .

For discussion and forms relating to negligence, see Ch. 380, *Negligence* .

For discussion and forms relating to obscenity as a public nuisance, see Ch. 391, *Nuisance* .

For discussion and forms relating to premises liability generally, see Ch. 421, *Premises Liability* .

For discussion and forms relating to a public entity's power to require a license to operate a business, see Ch. 471B, *Licensing by Public Agencies* .

For discussion and forms relating to injury to student due to negligent maintenance or dangerous condition of school property, see Ch. 514, *Schools: Injuries to Students* .

For discussion and forms relating to slips and falls, see the Ch. 525, *Slip and Fall* .

For discussion and forms relating to the regulation of property use for specific purposes, see Ch. 579, *Zoning and Planning* .

For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicensesReal Property LawZoning & Land UseGeneral OverviewTortsIntentional TortsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityGeneral OverviewTortsTransportation TortsMotor VehiclesMotor Carriers

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48-547 California Forms of Pleading and Practice--Annotated §§ 547.03through 547.09

[Reserved]

§§ 547.03[Reserved]

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48-547 California Forms of Pleading and Practice--Annotated § 547.10

§ 547.10 Governing Law

The liability for harm caused by want of ordinary care or skill in the management of property and person is governed by *Civ. Code § 1714(a)*. As proprietor of the premises, the operator's liability to entrants on those premises is governed by the principles enunciated in *Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561* . *Civ. Code §§ 51-52* provide that all persons shall have equal privileges in business establishments. Special provisions regarding access to premises by the physically disabled are contained in *Civ. Code §§ 54-55.1* and *Health & Safety Code §§ 19952-19959*. Entities operating amusement rides must comply with the safety provisions codified in *Lab. Code §§ 7900-7915*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawProtection of Disabled PersonsGeneral OverviewCivil Rights LawPublic FacilitiesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesReasonable CareTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesAmusement Parks

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48-547 California Forms of Pleading and Practice--Annotated § 547.11

§ 547.11 Regulation of Theaters

Expression through a motion picture is within the free speech and press guarantees of the *First* and *Fourteenth Amendments to the U.S. Constitution*. Those guarantees are not diminished if a business for profit is involved. This protection is not a blanket immunity, however, and a municipality may impose reasonable regulations on the conduct of an economic enterprise, including a motion picture theater. Even if *First Amendment* rights are being exercised on the premises, a commercial entrepreneur must comply with reasonable regulations under the police power. The requirement of obtaining a license to engage in the motion picture business is a reasonable means of assuring compliance with police power regulations [*Burton v. Municipal Court (1968) 68 Cal. 2d 684, 689-690, 68 Cal. Rptr. 721, 441 P.2d 281]* . For further discussion of a public entity's power to license, see Ch. 471B, *Licensing by Public Agencies* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawRelated Legal IssuesGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechFree PressGeneral OverviewGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsPolice Power

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48-547 California Forms of Pleading and Practice--Annotated § 547.12

§ 547.12 Obscene Films as Public Nuisance

A state may restrain the exhibition of obscene material, including films, by application of public nuisance statutes (*Civ. Code §§ 3479, 3480*; *Penal Code §§ 370, 371*) [*People ex rel. Busch v. Projection Room Theater (1976) 17 Cal. 3d 42, 49-55, 130 Cal. Rptr. 328, 550 P.2d 600]* . For discussion of abatement of obscene films as a public nuisance, and the inapplicability of the Red Light Abatement Law (*Penal Code §§ 11225-11235*) to their exhibition in theaters, see Ch. 391, *Nuisance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawRelated Legal IssuesIndecency & ObscenityConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechObscenityReal Property LawTortsNuisanceRemediesSummary AbatementReal Property LawTortsNuisanceTypesPublic Nuisance

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48-547 California Forms of Pleading and Practice--Annotated § 547.13

§ 547.13 Possessor's Liability to Entrants

The fundamental test of a possessor's liability to an entrant on the land in accordance with *Civ. Code § 1714(a)* is whether in the management of the property the possessor has acted as a reasonable person in view of the probability of injury to others. Although the status of the entrant may have some bearing on the liability, it is not determinative [*Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561* ; *Jamison v. Mark C. Bloome Co. (1980) 112 Cal. App. 3d 570, 575, 169 Cal. Rptr. 399]* . For further discussion of the liability of the possessor to entrants for injuries sustained on the premises, see Ch. 421, *Premises Liability* . For further discussion of the liability of owners of stadiums for injuries to spectators of athletic events, see Ch. 273, *Games, Sports, and Athletics* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesReasonable CareTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesSports Facilities

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48-547 California Forms of Pleading and Practice--Annotated § 547.14

§ 547.14 Duty to Enforce MPAA Film Ratings Runs Only to Parents

The voluntary film-rating system of the Motion Picture Association of America (MPAA) is intended to provide parents with assistance in determining whether a particular film would be appropriate viewing for their child. Therefore, the duty of a movie theater to enforce these ratings is a duty owed to parents of children who view films at a theater, rather than to the public at large. Based on this rationale, the court of appeal held that a theater owed no duty to the murder victim of a child who was allowed to see a violent R-rated film without being accompanied by a parent, even though the child shot his victim immediately after leaving the theater and was apparently inspired by the violence in the movie [*Delgado v. American Multi-Cinema, Inc. (1999) 72 Cal. App. 4th 1403, 1405-1407, 85 Cal. Rptr. 2d 838]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawContent RegulationGeneral OverviewTortsNegligenceDutyGeneral Overview

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48-547 California Forms of Pleading and Practice--Annotated § 547.15

§ 547.15 Detention by Movie Theater Owner for Operating Unauthorized Video Device

The owner or operator of a movie theater (as well as the agents, employees, consignees, lessees and officers of the owner or operator) may detain a person for a reasonable time to conduct an investigation, in a reasonable manner, if the owner or operator has probable cause to believe that the person has been attempting to operate a video recording device in the theater without the authority of the owner or operator [*Penal Code § 490.5(f)(1),(g)(3)*]. The theater owner or operator may use a reasonable amount of nondeadly force, if necessary for self-protection and to prevent the person's escape or the loss of property [*Penal Code § 490.5(f)(2)*]. During the period of detention, the theater owner or operator may examine any item in plain view that the theater owner or operator has probable cause to believe was recorded on the theater premises, may request the person detained to surrender the item voluntarily, and, if the person refuses, may search packages, shopping bags, handbags, or other property (but not clothing) in the person's immediate vicinity to recover the item [*Penal Code § 490.5(f)(4)*].

In any civil action brought by the detained person because of the detention, the defendant may raise as a defense that the theater owner oroperator (or the agents, employees, consignees, lessees and officers of the owner or operator) who detained that person has probable cause to believe that the person was attempting to operate a video recording device without the authority of the theater owner or operator [*Penal Code § 490.5(f)(7), (g)(3)*]. For discussion of civil actions for assault or false imprisonment, see Ch. 58, *Assault and Battery* , and Ch. 257, *False Imprisonment* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawRelated Legal IssuesGeneral OverviewCriminal Law & ProcedureSearch & SeizureWarrantless SearchesPrivate SearchesTortsIntentional TortsAssault & BatteryGeneral OverviewTortsIntentional TortsDefensesDefense of PropertyTortsIntentional TortsFalse ImprisonmentGeneral Overview

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48-547 California Forms of Pleading and Practice--Annotated § 547.16

§ 547.16 Access to Places of Public Amusement

[1] All Persons

The Unruh Civil Rights Act provides that all persons are entitled to the full and equal accommodations and services in all business establishments of every kind [*Civ. Code § 51*]. For a further discussion of the Unruh Civil Rights Act, see Ch. 116, *Civil Rights: Discrimination in Business Establishments* .

[2] Physically Disabled Persons

Any person or public or private entity who owns or manages places of public amusement and resort must provide seating or accommodations for physically disabled persons in a variety of locations within the facility. The extent of that variety must comply with fire and panic safety requirements of the State Fire Marshall and must provide the physically disabled with a choice of admission prices otherwise available to the general public. Readily removable seats may be installed in wheelchair spaces when the spaces are not required to accommodate wheelchair users [*Health & Safety Code § 19952*]. Actions to enjoin violations of *Health & Safety Code § 19952* may be brought by any aggrieved or potentially aggrieved person or a district attorney, a city attorney, a county counsel if the district attorney does not bring an action, the Department of Rehabilitation acting through the Attorney General, or the Attorney General [*Health & Safety Code §§ 19953, 19954*]. Physically disabled persons are also entitled to full and equal access to places of public accommodation, amusement or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law or regulation, and applicable alike to all persons [*Civ. Code §§ 54-55.1*].

Beginning in 2004, a violation of these provisions also subjects the offender to a civil penalty of $2,500 for each violation, with additional amounts imposed for those offenders who remain in violation for more than 90 days [*see Health & Safety Code § 19958.6*].

[3] Persons Carrying in or Operating Video Recording Devices

The owner or operator of a movie theater (as well as the agents, employees, consignees, lessees and officers of the owner or operator) may refuse admission to any person who refuses or fails to surrender possession of a video recording device that the person has brought into the theater. The theater owner or operator may also request that any person

operating a video recording device in the theater leave the premises and offer to refund the price paid for admission [*Penal Code § 490.5(f)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawProtection of Disabled PersonsGeneral OverviewCivil Rights LawPublic FacilitiesScopeCommunications LawRelated Legal IssuesGeneral Overview

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48-547 California Forms of Pleading and Practice--Annotated § 547.17

§ 547.17 Standard of Care for Amusement Rides

The owner and operator of a roller coaster in an amusement park is subject to the liabilities of a common carrier that has accepted passengers for hire. Thus, a jury is properly instructed that an operator and owner of an amusement ride is charged with the utmost care and diligence required of a common carrier of persons under *Civ. Code § 2100* [*Barr v. Venice Giant Dipper Co., Ltd. (1934) 138 Cal. App. 563, 564, 32 P.2d 980* ; see *Pontecorvo v. Clark (1928) 95 Cal. App. 162, 176-177, 272 P. 591* (conceding without deciding that roller coaster was common carrier)]. If passengers for hire in a transportation and amusement facility are injured, the doctrine of res ipsa loquitur can be applied because of the special relationship existing between the plaintiff as passenger and the defendant as carrier [*Kohl v. Disneyland, Inc. (1962) 201 Cal. App. 2d 780, 783-784, 20 Cal. Rptr. 367]* . For further discussion of the standard of care imposed on a carrier by *Civ. Code § 2100*, see Ch. 106, *Buses and Streetcars* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawRelated Legal IssuesGeneral OverviewTortsNegligenceStandards of CareSpecial CareCommon CarriersTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesAmusement Parks

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48-547 California Forms of Pleading and Practice--Annotated §§ 547.18through 547.29

[Reserved]

§§ 547.18[Reserved]

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48-547 California Forms of Pleading and Practice--Annotated § 547.30

§ 547.30 Related Matthew Bender Publications

[1] California Points and Authorities

For memoranda of points and authorities relating to general principles and measures of damages in tort actions, see California Points and Authorities, Ch. 65, *Damages*, § 177.40 et seq.

For memoranda of points and authorities relating to motions in negligence actions generally, see California Points and Authorities, Ch. 165, *Negligence*

For memoranda of points and authorities relaing to premises liability, see California Points and Authorities, Ch. 178, *Premises Liability*

[2] Bender's Forms of Discovery

For forms of interrogatories relating to actions involving carriers, see Bender's Forms of Discovery, *Carriers*

For forms of interrogatories relating to actions involving injuries occuring on recreatonal areas, see Bender's Forms of Discovery, *Parks, Playgrounds and Other Recreational Areas*

For forms of interrogatories relating to actions involving personal injuries, see Bender's Forms of Discovery, *Personal Injuries*

For forms of interrogatories relating to actions for injuries due to falls on possessor's premises, see Bender's Forms of Discovery, *Slip and Fall*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesGeneral OverviewTortsNegligenceGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityActivities & ConditionsSlip & Fall InjuriesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesGeneral Overview

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Chapter 547 THEATERS, SHOWS, AND AMUSEMENT PLACES
PART III. RESEARCH GUIDE

48-547 California Forms of Pleading and Practice--Annotated § 547.31

§ 547.31 State Statutes

[1] Access to Places Open to Public

All persons are entitled to full accommodations in all business establishments. *Civ. Code §§ 51-52*

Physically disabled persons have same right of access to and use of public places. *Civ. Code §§ 54-55.1*

Access to places of public amusement by physically handicapped persons. *Health & Safety Code §§ 19952-19954*

Access to public accommodations by physically handicapped persons. *Health & Safety Code §§ 19955-19959*

Theater owner has right to refuse admission to person unwilling to surrender video recording device, and to request person operating device on premises to leave. *Penal Code § 490.5*

[2] Crimes

Ticket scalping is misdemeanor. *Penal Code § 346*

Discharge of injurious substance in amusement place is unlawful. *Penal Code § 375*

[3] Damages

Compensatory damages for tort. *Civ. Code § 3333*

[4] Employment Regulations

Security required of employers in theatrical productions. *Lab. Code § 271*

Employment of minors, including specific provisions regarding appearances in entertainment activities. *Lab. Code §§ 1308.7, 1390-1399*

Responsibilty of employer to provide safe place of employment. *Lab. Code §§ 6400-6413.5*

[5] Government Regulations

County and city licensing authority for businesses, including shows and exhibitions. *Bus. & Prof. Code §§ 16000-16104*

Licensing and regulating ticket sellers. *Bus. & Prof. Code § 22500 et seq.*

Authority of nonprofit theater company to sell alcholic beverages under specified conditions. *Bus. & Prof. Code §§ 23039, 24045.7*

Authority of nonprofit symphony association to sell alcholic beverages under specified conditions. *Bus. & Prof. Code § 24045.85*

Authority for county to operate schools for presentation and instruction in theatrical arts. *Pub. Res. Code §§ 5140, 5141.1*

[6] Health and Safety Regulations

Sanitation requirements for drinking water at public places. *Health & Safety Code §§ 3700-3704*

Fire prevention requirements specific to places of public assemblage. *Health & Safety Code §§ 13115-13120, 13143*

Manufacturer's license not necessary for pyrotechnic-licensed person to use fireworks in theater production. *Health & Safety Code § 12603*

Smoking prohibited except in lobby of publicly owned buildings to which general public is admitted for entertainment purposes. *Health & Safety Code § 25943*

Sanitary conditions required in theaters. *Lab. Code §§ 2260-2263*

Amusement Rides Safety Law. *Lab. Code §§ 7900-7915*

[7] Proprietor's Liability

Liability for injury to another caused by lack of ordinary care. *Civ. Code § 1714(a)*

Liability as carriers of persons. *Civ. Code §§ 2100-2104*

Movie theater owner who detains person has defense to civil action brought by detained person, if theater owner had probable cause to believe that detained person was attempting unauthorized operation of video recording device on theater premises. *Penal Code § 490.5*

[8] Statutes of Limitations

Two-year statute of limitations for personal injury resulting from negligence. *Code Civ. Proc. § 335.1*; *see* former Code Civ. Proc. § 340(3) (one-year period prior to 2003)

Four-year statute of limitations for injury caused by deficient planning or construction of improvement to real property. *Code Civ. Proc. § 337.1*

Three-year statute of limitations for injury to personal property. *Code Civ. Proc. § 338*

[9] Venue

Venue for negligence action. *Code Civ. Proc. § 395(a)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawProtection of Disabled PersonsGeneral OverviewCivil Rights LawPublic FacilitiesGeneral OverviewGovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsPolice PowerTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesGeneral Overview

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48-547 California Forms of Pleading and Practice--Annotated § 547.32

§ 547.32 Decisions

[1] Amusement Rides

Proprietor or operator of amusement park is liable to patron for injuries resulting from negligence of concessionaire if it is shown that failure to exercise supervision proximately resulted in injuries. *McCordic v. Crawford (1943) 23 Cal. 2d 1, 6-7, 142 P.2d 7* (defective strap on ride); *Basye v. Craft's Golden State Shows (1941) 43 Cal. App. 2d 782, 788-789, 111 P.2d 746* (man's eye injured in shooting gallery accident)

Proprietor of amusement park has duty to use reasonable care both in original letting of space and in subsequent inspection and supervision of concession. *Johnstone v. Panama Pac. Int'l Exposition Co. (1921) 187 Cal. 323, 329, 202 P. 34* (woman hit by electric car operated by patron of concessionaire)

Doctrine of res ipsa loquitur is applicable if transportation and amusement ride caused injuries to passengers. *Kohl v. Disneyland, Inc. (1962) 201 Cal. App. 2d 780, 782-783, 20 Cal. Rptr. 367*

Common carrier standard of care is applicable to amusement facility horse and buggy ride if passengers are accepted for hire. *Kohl v. Disneyland, Inc. (1962) 201 Cal. App. 2d 780, 782-784, 20 Cal. Rptr. 367*

Common carrier burden of care is met if defendant proved exercise of due care in all areas that reasonably might have been cause of negligence. *Kohl v. Disneyland, Inc. (1962) 201 Cal. App. 2d 780, 782-784, 20 Cal. Rptr. 367*

Jury instructions on assumption of risk, followed by instructions regarding age, experience, and capacity to understand and know danger, were appropriate in personal injury action by 9-year-old passenger injured on astro jet amusement ride, if defendant had presented evidence indicating accident was unlikely to occur without some action by passenger. *Lyle v. Disneyland, Inc. (1960) 178 Cal. App. 2d 18, 22-23, 2 Cal. Rptr. 704* (decided prior to *Li v. Yellow Cab Co.*

(1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226 , which established comparative negligence)

Res ipsa loquitur as applicable to amusement device causing injury when it is under management of defendant and accident is such as in ordinary course of things does not happen if those who had management used proper care. *Davidson v. Long Beach Pleasure Pier Co. (1950) 99 Cal. App. 2d 384, 388, 221 P.2d 1005*

Public amusement park proprietor as owing duty of using reasonable care to see that patrons are not injured. *Potts v. Crafts (1935) 5 Cal. App. 2d 83, 84, 42 P.2d 87*

Patron of amusement device as assuming any risk naturally and obviously arising from proper use and operation of device if it is properly designed, constructed, and maintained; patron as not obliged to make critical examination to determine saftey of device, but has right to assume that those in charge have exercised due care in inspection. *Chardon v. Alameda Park Co. (1934) 1 Cal. App. 2d 18, 21, 23, 36 P.2d 136*

Operator of roller coaster in amusement park as subject to liabilities of common carrier when paid passengers are accepted. *Barr v. Venice Giant Dipper Co., Ltd. (1934) 138 Cal. App. 563, 564, 32 P.2d 980*

Proprietor of amusement park is responsible for negligence of concessionaires. *Szasz v. Joyland Co. (1927) 84 Cal. App. 259, 263, 257 P. 871* (boy lost eye in shooting gallery accident)

[2] Fairs and Resorts

Owner is required to use ordinary care for safety of entrants and give reasonable notice or warning of danger arising from condition not readily apparent; owner is entitled to assume that entrant will perceive that which would be obvious to ordinary use of entrant's own senses, and is not required to give entrant notice or warning of obvious danger. *Curland v. Los Angeles County Fair Ass'n (1953) 118 Cal. App. 2d 691, 695-696, 258 P.2d 1063* (entrant's tripping over axle bracing light standard was not caused by defendant's negligence)

Resort owner was liable for tree falling on automobile parked in driveway used for ingress and egress to resort; dangerous condition of tree was apparent to owner from obvious decay and disintegration over lengthy period of time. *Harvey v. Machtig (1925) 73 Cal. App. 667, 672-674, 239 P. 78*

[3] Movie Theaters

[a] Access

Movie theater's refusal to allow person in wheelchair to sit in aisle in violation of fire regulations, and offering choice of being lifted into standard theater seat or sitting close to screen, was not actionable discrimination. *Marsh v. Edwards Theatres Circuit, Inc. (1976) 64 Cal. App. 3d 881, 889-892, 134 Cal. Rptr. 844*

Civ. Code § 54.1 requires operator to open its doors on equal basis to all that can avail themselves of facilities without violation of other valid laws and regulations; *Civ. Code § 54.1* alone does not require modification of facilities to allow for use of handicapped persons. *Marsh v. Edwards Theatres Circuit, Inc. (1976) 64 Cal. App. 3d 881, 892, 134 Cal.*

Rptr. 844

Gov. Code § 4450 and *Health & Safety Code §§ 19955, 19956,* and *19959* express legislative intent that affirmative conduct is required of proprietor only if new facilities are constructed or existing facilities are altered. *Marsh v. Edwards Theatres Circuit, Inc. (1976) 64 Cal. App. 3d 881, 888, 134 Cal. Rptr. 844*

Theater manager's refusal to admit African-American patron into seating area of theater was actionable under *Civ. Code §§ 51, 52*. *Prowd v. Gore (1922) 57 Cal. App. 458, 460-461, 207 P. 490*

[b] Attracting Violence

Film producers were not negligent in failing to warn movie theater patrons that allegedly violent movie would attract persons who were prone to violence and carried weapons. *Bill v. Superior Court (1982) 137 Cal. App. 3d 1002, 1011-1014, 187 Cal. Rptr. 625*

[c] Premises

Owner is required to have either actual or constructive knowledge of dangerous condition or by exercise of ordinary care must have been able to discover condition before liability for dangerous condition brought about by third persons will be imposed; negligence is founded on failure to exercise ordinary care in discovering and remedying defect. *Beal v. Blumenfeld Theatres, Inc. (1960) 177 Cal. App. 2d 192, 193-194, 2 Cal. Rptr. 110*

Theater's rule requiring its ushers to illuminate patrons' way was indicative of its recognition of standard of care required by dim lighting. *Beal v. Blumenfeld Theatres, Inc. (1960) 177 Cal. App. 2d 192, 194-195, 2 Cal. Rptr. 110*

Trial court properly found no negligence in action brought by 82-year-old woman knocked down, while waiting in ticket line, by boys playing in theater lobby. *McIntyre v. Doe & Roe (1954) 125 Cal. App. 2d 285, 286-287, 270 P.2d 21*

Drive-in theater had duty to use reasonable care in installation, inspection, and maintenance of portable electric heaters provided for its customers; theater was not responsible for defective condition of interior switch of heater apparent only through use of special screwdriver possessed only by manufacturer. *Post v. Alameda Amusement Co. (1953) 117 Cal. App. 2d 588, 592, 256 P.2d 580*

Movie theater was negligent for failing to take reasonable precautions for safety of patrons; failure to exercise diligence in knowing condition of every part of premises and every object in theater with which patron might reasonably be expected to come in contact and probability that patrons will not discover invisible or concealed hazards in darkness of theater were factors indicating negligence. *Mattox v. Isley (1952) 111 Cal. App. 2d 774, 778, 245 P.2d 664*

Theater operator was required to possess and reasonably exercise superior knowledge of dangers incident to facilities and premises and to have sufficient personnel to maintain theater in reasonably safe condition. *Travis v. Metropolitan Theatres Corp. (1949) 91 Cal. App. 2d 664, 667, 205 P.2d 475*

Theater operator had duty to anticipate and guard against lurking perils, inspect premises and facilities, and keep aisles and other passageways free from substances that might cause person to slip, especially if theater is open to persons at all times of day and night. *Travis v. Metropolitan Theatres Corp. (1949) 91 Cal. App. 2d 664, 667, 205 P.2d 475*

Theater was negligent for slip and fall caused by vomit on floor adjacent to seat if exercise of ordinary care would have revealed its presence. *Travis v. Metropolitan Theatres Corp. (1949) 91 Cal. App. 2d 664, 668, 205 P.2d 475*

Slip and fall on theater restroom floor caused by water and paper towels was negligence if manager had knowledge of dangerous condition and provided neither remedy nor warning. *Newman v. Fox W. Coast Theatres (1948) 86 Cal. App. 2d 428, 432-433, 194 P.2d 706*

Theater operator was required to use reasonable care to keep premises in reasonably safe condition and give warning of concealed perils; operator was not liable for injury resulting from obvious danger. *Matherne v. Los Feliz Theatre (1942) 53 Cal. App. 2d 660, 665-667, 128 P.2d 59*

Theater maintaining parking lot for patrons was required to exercise reasonable care in providing for safety of patrons; maintenance of subsurface ramp adjacent to parking lot without warning of its existence or otherwise protecting patrons unable to see in dark was substantial proof of negligence. *Martin v. Fox W. Coast Theatres Corp. (1940) 41 Cal. App. 2d 925, 929-930, 108 P.2d 29*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawProtection of Disabled PersonsGeneral OverviewTortsNegligenceStandards of CareSpecial CareCommon CarriersTortsPremises Liability & PropertyGeneral Premises LiabilityActivities & ConditionsGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesAmusement Parks

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§ 547.33 Text References

3 Cal. Jur. 3d, *Amusements and Exhibitions*, §§ 6-17

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityPremisesRecreational FacilitiesAmusement Parks

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[Reserved]

§§ 547.34[Reserved]

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48-547 California Forms of Pleading and Practice--Annotated § 547.50

§ 547.50 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injury (and Property Damage) Based on Negligence [Civ. Code § 1714(a)]--By Person on Premises to Audition Against One in Control of Premises--Negligent Management, Control, and Operation of Premises

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injury (and Property Damage) Based on Negligence [Civ. Code § 1714(a)]--By Person on Premises to Audition Against One in Control of Premises--Negligent Management, Control, and Operation of Premises

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR PERSONAL
_____ [*name*], [and DOES 1	)	INJURY [AND PROPERTY DAMAGE]
through _____],	)	(Negligence)
Defendant[s].	)	
	)	

_____

Plaintiff alleges:

1. Defendant _____[*name*] is, and at all times mentioned was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a resident of _____ County, California *or* a corporation organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), California].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and alleges that each of the fictitiously named

defendants is negligently responsible in some manner for the occurrences alleged, and that plaintiff's injuries as alleged were proximately caused by that negligence.)]

[3. (Plaintiff is informed and believes and thereon alleges that) (A)t all times herein mentioned each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of such agency and employment.]

4. On or about _____[*date*], plaintiff was auditioning _____ [*specify purpose and location of audition, e.g.,* for a role as a dancer in a show at defendant's nightclub located at _____[*city and county*], California].

5. At said time and place, defendant[s, and each of them], _____[*allege facts showing defendant's ownership, possession, or control of the premises and the instrumentality causing the accident, e.g.,* was the owner and operator of the nightclub and was conducting the auditions on a dimly lit stage which could be raised and lowered through use of a switch accessible only to defendant and his/her employees].

6. At the above-mentioned time and place, defendant[s, and each of them,] negligently and carelessly maintained, controlled, and operated the premises by _____[*allege acts or omissions of defendant, e.g.,* allowing the stage to remain in a lowered position when plaintiff was entering the stage to perform her audition] so as to cause _____[*allege the result of defendant's negligence constituting breach of duty owed plaintiff, e.g.,* plaintiff to fall from the club floor level to the basement level when she stepped from the stairs to the expected location of the stage] and to proximately cause the injuries and damages described below.

7. As a proximate result of the negligence of defendant[s, and each of them,] plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervous system and person, all of which injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believes and thereon alleges that such injuries will result in some permanent disability to him/her.] As a result of such injuries, plaintiff has suffered general damages.

8. As a further proximate result of the negligence of defendant[s, and each of them], plaintiff has incurred, and will continue to incur, medical and related expenses.

9. As a further proximate result of the negligence of defendant[s, and each of them], plaintiff's earning capacity has been greatly impaired, both in the past and present.

[10. As a further proximate result of the negligence of defendant(s, and each of them), plaintiff's _____ (*describe personal property*) was _____ (damaged *or describe damges, e.g.,* destroyed beyond repair, all to plaintiff's damages in the sum of $_____). (*If property was not destroyed, add:* Plaintiff _____ (has expended *or* must expend) $_____ for repair of such (damaged) _____ (describe personal property), which is a reasonable sum for such repair.)]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them], as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

3. For loss of earnings according to proof;

[4. For damage to personal property _____ (in the sum of $_____);]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____[*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date and place*]
_____ [*signature*]

[2] Use of Form

This form of complaint may be used by a person auditioning on the premises of another against the one in control of the premises to obtain damages for personal injuries and property damage proximately caused by negligence in the maintenance, management, or operation of the premises. The basis of liability is *Civ. Code § 1714(a)*, which provides that every one is responsible for injuries occasioned by the lack of ordinary care or skill in the management of his or her property. This form is adapted from the fact situation in *Gastine v. Ewing (1944) 65 Cal. App. 2d 131, 150 P.2d 266* . For discussion of the liabilty of those who control premises to persons entering the premises, see Ch. 421, *Premises Liability* .

[3] Allegations

The complaint alleges all of the following:

- The residence of defendant (Paragraph 1) and the place of the accident (Paragraphs 4, 5), either of which may be the basis for venue [*see Code Civ. Proc. § 395(a)*];

- The negligence and fictitious names of defendants sued pursuant to *Code Civ. Proc. § 474* [*see* Ch. 20, *Allegations Commonly Used*];

- The requisite agency relationship in order to establish vicarious liability, if applicable (Paragraph 3) [*see* Ch. 380, *Negligence* , and Ch. 427, *Principal and Agent*];

- Facts showing a legal duty of care owed by defendant controller of the premises to plaintiff entrant (Paragraphs 4, 5);

- The act or omission by defendant constituting a breach of the duty owed plaintiff (Paragraph 6) [*see Civ. Code § 1714(a)*]; and

- The plaintiff's damages, consisting of general damages (Paragraph 7), as well as medical expenses (Paragraph 8), loss of earnings and earning capacity (Paragraph 9), and property damage (Paragraph 10) [*see Civ. Code §§ 3281, 3333*].

For a discussion of the elements of actionable negligence generally, see Ch. 380, *Negligence* .

[4] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included--for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

[5] Cross References

For a discussion of the law and forms relating to damages recoverable in tort actions, see Ch. 177, *Damages*

For a discussion of the law and forms relating to negligence, generally, see Ch. 380, *Negligence*

For a discussion of the law and forms relating to duties and liabilities of possessors or owners of land to others coming on the premises, see Ch. 421, *Premises Liability*

For a discussion of the law and forms relating to slips and falls due to dangerous condition of premises, see Ch. 525, *Slip and Fall*

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48-547 California Forms of Pleading and Practice--Annotated § 547.51

§ 547.51 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injury (and Property Damage) Based on Negligence [Civ. Code § 1714(a)]--By Person on Premises Against Owner of Place of Amusement and Concessionaire--Negligent Control, Supervision, and Operation of Premises

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] for Personal Injury (and Property Damage) Based on Negligence [Civ. Code § 1714(a)]--By Person on Premises Against Owner of Place of Amusement and Concessionaire--Negligent Control, Supervision, and Operation of Premises

[*Caption. See § 547.50[1].*]

Plaintiff alleges:

1. [*Capacity and residence of defendant. See § 547.50[1], Paragraph 1.*]

[2. *Fictitious name allegation. See § 547.50[1], Paragraph 2.*]

[3. *Agency allegation. See § 547.50[1], Paragraph 3.*]

4. At all times herein mentioned defendant _____[*name of owner of place of amusement*] was the _____[*specify proprietary interest, e.g.,* owner and operator] of _____[*specify type of amusement, e.g.,* a carnival] business _____[*specify name and the location of the business when venue is based on this fact*].

5. At all times herein mentioned defendant _____[*name of concessionaire*] was the _____[*specify proprietary interest, e.g.,* owner and operator] of the concession known as _____[*specify name of concession, e.g.,* Sharp Eye Shooting Gallery] in the above-named place of amusement.

6. At all times herein mentioned, defendants invited members of the general public, including plaintiff, to enter the

premises known as _____[*name of place of amusement*] as participants and spectators of the activities thereon.

7. On or about _____[*date*], plaintiff _____[*allege facts showing plaintiff's status as patron, e.g.,* paid the required admission price, and walked through the arcade area, stopping to watch the shooting at Sharp Eye Shooting Gallery].

8. At said time and place, defendant _____[*name of owner of amusement place*] and defendant _____[*name of concessionaire*] negligently and carelessly operated, supervised, controlled, and maintained _____[*name of concession*] so as to cause _____[*allege the result of defendants' negligence constituting breach of duty owed plaintiff, e.g.,* a fragment of a bullet fired by a patron of the shooting gallery to strike plaintiff in the eye and to proximately cause the injuries and damages described below].

9. [*General damages allegation. See § 547.50[1], Paragraph 7.*]

10. [*Allegation of medical expenses. See § 547.50[1], Paragraph 8.*]

11. [*Allegation of impairment of earning capacity. See § 547.50[1], Paragraph 9.*]

12. [*Allegation of property damages, if appropriate. See § 547.50[1], Paragraph 10.*]

[*Prayer, signature, and, if desired, verification. See § 547.50[1].*]

[2] Use of Form

This complaint is for use if the plaintiff, as a patron on defendant's premises, sustains personal injuries and property damage proximately caused by the negligence of a concessionaire on defendant's property. Both the proprietor of the premises and the concessionaire may be held liable for damages. The duty of exercising care, and the responsibility for the negligence of independent concessionaires, are extended by law to the owner, the occupier, or the one in possession of the premises on which the amusement is being operated [*McCordic v. Crawford (1943) 23 Cal. 2d 1, 6-7, 142 P.2d 7* ; *Basye v. Craft's Golden State Shows (1941) 43 Cal. App. 2d 782, 788-789, 111 P.2d 746]* .

Although this complaint involves a patron of an amusement place, it may be modified for use in a similar setting or by a person with a different status. Even though the status of plaintiff as an invitee, a licensee, or a trespasser no longer determines the issue of duty, the facts surrounding the status are relevant in assessing defendant's liability [*Rowland v. Christian (1968) 69 Cal. 2d 108, 119, 70 Cal. Rptr. 97, 443 P.2d 561]* . For discussion of the principles of liability owed by owners of premises to entrants generally, see Ch. 421, *Premises Liability* . This form is adapted from the fact situation in *Basye v. Craft's Golden State Shows (1941) 43 Cal. App. 2d 782, 111 P.2d 746* . For discussion of the liabilty of property owners for the negligence of independent contractors, see Ch. 421, *Premises Liability* .

[3] Allegations

This complaint alleges all of the following:

- The location of the accident and the ability of defendant owner of the place of amusement to supervise the premises (Paragraph 4) [*McCordic v. Crawford (1943) 23 Cal. 2d 1, 6-7, 142 P.2d 7* ; see *Code Civ. Proc. § 395(a)* as possible basis of venue];

- The responsibility of defendant concessionaire to operate the concession in a safe manner (Paragraph 5) [*Basye v. Craft's Golden State Shows (1941) 43 Cal. App. 2d 782, 788-789, 111 P.2d 746]* ;

- Facts showing a legal duty of care owed by defendants as controllers of the premises to plaintiff entrant (Paragraphs 6, 7) [see *McCordic v. Crawford (1943) 23 Cal. 2d 1, 6-7, 142 P.2d 7]* ; and

- The act or omission by defendants constituting a breach of the duty owed to the plaintiff (Paragraph 8) [see *Civ. Code § 1714(a)*].

[4] Cross References

See also *§ 547.50*

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Chapter 547 THEATERS, SHOWS, AND AMUSEMENT PLACES
PART IV. FORMS

48-547 California Forms of Pleading and Practice--Annotated § 547.52

§ 547.52 Allegation--Personal Injury Caused By Defendants' Negligence [Civ. Code § 1714(a)]--Defective Amusement Park Device

[1] FORM Allegation--Personal Injury Caused By Defendants' Negligence [Civ. Code § 1714(a)]--Defective Amusement Park Device

1. At the above-mentioned time and place, defendant _____[*name of concessionaire*] and defendant _____[*name of owner of amusement place*] operated an amusement ride known as _____[*specify name of amusement ride, e.g.,* Tilly's Tilt A Whirl]. The device for this ride was defective in that _____[*allege facts indicating the nature of the defect, e.g.,* the safety bar holding passengers secure did not remain stable, but was released while the ride was in motion]. A reasonable inspection would have revealed this defect.

2. As a proximate result of the defective nature of this device, it _____[*allege the result of the defective device which caused injury to plaintiff, e.g.,* released the safety bar on the car in which plaintiff was a passenger and allowed plaintiff to be thrown from the car before the car was stationary, proximately causing the injuries and damages described below].

[2] Use of Form

This allegation is for use by plaintiff if plaintiff, as a patron on defendant's premises, sustains personal injuries proximately caused by a defective device on an amusement ride. The proprietor of a public place of amusement is required to maintain in a reasonably safe condition, every contrivance used in its premises, and to properly inspect and supervise the same [*Davidson v. Long Beach Pleasure Pier Co. (1950) 99 Cal. App. 2d 384, 387, 221 P.2d 1005]* . If through failure to perform that legal duty any devices are allowed to become in fact unsafe, which results in injury to a patron, the proprietor's knowledge or ignorance of the defect is immaterial [*Chardon v. Alameda Park Co. (1934) 1 Cal. App. 2d 18, 21-22, 36 P.2d 136]* . This allegation is adapted from the fact situation in *Davidson v. Long Beach Pleasure Pier Co. (1950) 99 Cal. App. 2d 384, 221 P.2d 1005* .

When appropriate, this allegation can be used in § 547.51 and may be substituted for Paragraph 8. For discussion of the application of strict liability, see Ch. 460, *Products Liability* .

[3] Cross References

See also *§ 547.51*

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48-548 California Forms of Pleading and Practice--Annotated § 548.01

§ 548.01 Scope of Chapter

This chapter discusses and contains forms dealing with actions between title insurers and title insurance policy holders relating to the insurer's liability under title insurance policies.

The forms included are:

- Complaints and allegations for use in an action by a title insurance policyholder for indemnification under the policy [*see* §§ 548.50-548.52].

- Complaints and cross complaint for use by a title insurance policyholder to enforce the insurer's obligation to defend, on the policyholder's behalf, an action impugning the insured title [*see* §§ 548.53-548.54].

- Affirmative defense allegations for use by a title insurer in an action against it by a policy holder to enforce alleged obligations under the policy [*see* §§ 548.55-548.59].

Title insurance policies may insure title to personal as well as real property [*see Ins. Code §§ 104, 12340.1*]. However, this chapter is limited to the discussion of policies insuring title to real property.

For discussion and forms relating to escrow, see Ch. 253, *Escrows* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawTitle QualityGeneral Overview

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48-548 California Forms of Pleading and Practice--Annotated § 548.02

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- For discussion and forms relating to contracts generally, see Ch. 140, *Contracts* .
- For discussion, forms, and allegations relating to damages generally, see Ch. 177, *Damages* .
- For discussion and forms relating to declaratory relief generally, see Ch. 182, *Declaratory Relief* .
- For discussion and forms relating to escrow, see Ch. 253, *Escrows* .
- For discussion and forms relating to insurance generally, see Ch. 308, *Insurance* .
- For discussion relating to joint tenancy and life estates, see Ch. 316, *Joint Tenancy and Tenancy in Common* , and Ch. 344, *Life Estates and Remainders* .
- For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions* .
- For discussion relating generally to defects in or encumbrances on real estate titles, see the following chapters:

Ch. 240, *Easements*

Ch. 342, *Liens and Wage Preferences*

Ch. 482, *Quieting Title*

Ch. 555, *Trust Deeds and Real Property Mortgages*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureRemediesGeneral OverviewContracts LawGeneral OverviewInsurance LawGeneral OverviewReal Property LawGeneral Overview

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[Reserved]

§§ 548.03[Reserved]

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§ 548.10 Governing Statutes

Title insurance is generally governed by *Ins. Code § 12340 et seq.*

Legal Topics:

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

"Insurance" is defined as a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event [*Ins. Code § 22*]. "Title insurance" is defined as a contract insuring, guaranteeing, or indemnifying owners of real or personal property, or the holders of liens or encumbrances on the property, or others interested in the property against loss or damage suffered by reason of the following [*Ins. Code §§ 104, 12340.1*; *see King v. Stanley (1948) 32 Cal. 2d 584, 590, 197 P.2d 321 , overruled in part, Patel v. Liebermensch (2008) 45 Cal. 4th 344, 86 Cal. Rptr. 3d 366, 197 P.3d 177* ; *Radian Guar., Inc. v. Garamendi (2005) 127 Cal. App. 4th 1280, 1289, 26 Cal. Rptr. 3d 464]* .

- Liens or encumbrances on or defects in the title to the property.
- Invalidity or unenforceability of any liens or encumbrances on the property.
- Incorrectness of searches relating to the title to real or personal property.

A "title policy" is defined as any written instrument by means of which title insurance liability is assumed [*Ins. Code § 12340.2*]. A "title insurer" is defined as any company issuing title policies as insurer, guarantor, or indemnitor [*Ins. Code § 12340.4*; *see Ins. Code § 12340.3* (defining business of title insurance)]. An "underwritten title company" is defined in the Insurance Code as any corporation engaged in the business of preparing title searches, title examinations, title reports, certificates, or abstracts of title on the basis of which a title insurer writes title policies [*Ins. Code § 12340.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawTitle QualityGeneral Overview

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48-548 California Forms of Pleading and Practice--Annotated § 548.12

§ 548.12 Regulation of Title Insurance

Ins. Code §§ 12340-12417 generally govern the title insurance industry. For a detailed discussion of these regulations, see California Real Estate Law and Practice, Ch. 92 (Matthew Bender). Apart from these provisions, title insurance is substantially unregulated by statute in California.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 548.13 Policy Forms

[1] In General

Although California law does not prescribe the terms of title insurance policies [*see Overholtzer v. Northern Counties Ins. Co. (1953) 116 Cal. App.2d 113, 122, 253 P. 2d 116]* , it does require that every licensed title insurer file copies of all of its regularly issued policies with the California Insurance Commissioner [*Ins. Code § 12401.1*]. Regularly issued title policies used California today are prepared and recommended by the American Land Title Association (ALTA) and the California Land Title Association (CLTA). These are voluntary associations of title insurers that prepare and recommend standard policy forms for the use of title insurance companies. CLTA publishes the *CLTA Policy & Indorsement Forms Book* (Revised ed. 1971), a loose-leaf compendium that includes all of the CLTA-recommended title insurance reports, guarantees, policies, and indorsements, and many of the ALTA-recommended forms. The compendium corresponds to the master file of ALTA and CLTA standard forms on file in the office of the California Insurance Commissioner. It is widely used by title insurers and underwritten title companies throughout the state. Copies may be purchased from the CLTA at its offices in Sacramento.

The discussion and forms in this chapter are based primarily on the CLTA Standard Coverage Policy (1990), the ALTA Loan Policy (10-17-92), and the ALTA Owner's Policy (10-17-92). These standard title insurance policies are commonly used in California, and are approved for use by members of the California Land Title Association (CLTA). The most widely used title insurance policy in California is the CLTA Standard Coverage Policy--1990. This is a joint-protection policy that is issued to owners of real property and to noninstitutional lenders. The ALTA Loan Policy (10-17-92) is widely used to offer extended coverage to institutional lenders on real property, while the ALTA Owner's Policy (10-17-92) is used to offer extended coverage to commercial landowners. These forms are published in the CLTA's *Policy & Indorsement Forms Book* (Revised ed. 1971). In addition, the full text of each of these forms appears (with analyis) in California Legal Forms, Ch. 26A (Matthew Bender). These three forms, as well as other title insurance forms used in California) are also discussed at length in California Real Estate Law and Practice, Ch. 92 (Matthew Bender), and California Insurance Law and Practice, Ch. 39 (Matthew Bender).

[2] Basic Nature of Coverage

The coverage provided by the CLTA Standard Coverage Policy--1990, the ALTA Loan Policy (10-17-92), and the

ALTA Owner's Policy (10-17-92) is based primarily on matters that are shown by the public records. The policies define "public records" to mean records established under state statutes at the date of policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge [Conditions and Stipulations, P 1(h)]. In effect, the policies insure against loss or damage that may be suffered as a result of any inaccuracy in the title information that they report, which information is derived primarily from the public records. However, the policies also affordprotection through their vesting and defects, liens, and encumbrances clauses [*see § 548.14[1], [2]*] against important off-record losses, such as forgery of a deed or the incapacity of a party to execute or deliver a deed [*see generally* California Insurance Law and Practice, Ch. 39 (Matthew Bender)].

Title insurance protects only against liens, defects, and encumbrances that are already in existence at the time the policy is issued, and does not protect against defects that may arise later [*Rosen v. Nations Title Ins. Co. (1997) 56 Cal. App. 4th 1489, 1501, 66 Cal. Rptr. 2d 714]* . Thus, for example, in one case a bankrupt developer obtained, with the bankruptcy court's permission, a "priming lien loan" in order to finish its construction project. The loan was secured by trust deeds that took priority over the original construction loan lender's trust deeds. After the developer defaulted on the priming loan and the priming loan lender began foreclosure proceedings, the original lender brought an action for a declaration that the priming loan lender's trust deeds should be subordinated to the bank's trust deeds. The action was based on the developer's failure to use the priming loan proceeds in accordance with the bankruptcy court's order, and the priming loan lender's negligent failure to monitor the developer's use of the loan funds. The appellate court found that the priming loan lender's title insurer had no duty to defend the declaratory judgment action, because the conduct giving rise to the action, the priming loan lender's alleged negligence, occurred only after the title policy was issued [*Rosen v. Nations Title Ins. Co. (1997) 56 Cal. App. 4th 1489, 1497-1501, 66 Cal. Rptr. 2d 714]* .

[3] CLTA Standard Coverage Policy

The CLTA Standard Coverage Policy (1990) is a "joint protection policy" that is widely used to protect the titles of owners of and noninstitutional lenders on real property. Although the policy insures principally against title defects revealed in the public records, it also affords important protection against off-record title risks [*see, e.g., Elysian Inv. Group v. Stewart Title Guar. Co. (2002) 105 Cal. App. 4th 315, 317, 129 Cal. Rptr. 2d 372* (standard CLTA policy of title insurance, insuring against loss or damage sustained by insured by reason of title being vested other than in insured, any defect in or lien or encumbrance on title, unmarketability of title, and lack of right of access to and from the land); *see also* California Insurance Law and Practice, Ch. 39 (Matthew Bender)].

[4] ALTA Loan Policy

The ALTA Loan Policy (10-17-92) is widely used to provide title insurance for mortgage and trust deed liens in California. This policy can be issued to provide "extended coverage" by eliminating five exceptions that are routinely included in the CLTA Standard Coverage Policy [Schedule B, Exceptions from Coverage, Part I; *see § 548.17*] but are optional in the ALTA Loan Policy (10-17-92). By eliminating these exceptions, the insurer is in effect accepting responsibility of inspecting (and in some cases surveying) the land [*see California Insurance Law and Practice, § 39.41* (Matthew Bender)]. When an insurer is willing to issue an ALTA Loan Policy without these exceptions, the policy provides valuable coverage that is not available under the CLTA Standard Coverage Policy (1990).

[5] ALTA Owner's Policy

The ALTA Owner's Policy (10-17-92) is an "extended coverage" policy for owners of land rather than lenders. Its terms are substantially identical to those of the ALTA Loan Policy (10-17-92), with the exception of provisions in the latter policy that are appropriate only for lenders on real property. When an insurer is willing to issue the ALTA Owner's Policy (10-17-92) without the five exceptions routinely included in the CLTA Standard Coverage Policy (1990) [*see* [4], *above*], the policy will give the insured valuable additional title insurance protection [*see Elysian Inv. Group v. Stewart Title Guar. Co. (2002) 105 Cal. App. 4th 315, 318 n.1, 129 Cal. Rptr. 2d 372* (ALTA additionally insures

against off-record defects, including rights of parties in possession and not shown on public records, water rights, and discrepancies or conflicts in boundary lines and shortages in areas not reflected in public record); *see also* California Insurance Law and Practice, Ch. 39 (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawIndustry RegulationPolicy FormsGeneral OverviewInsurance LawIndustry RegulationState Insurance Commissioners & DepartmentsGeneral OverviewInsurance LawProperty InsuranceTitle InsuranceReal Property LawTitle QualityGeneral Overview

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§ 548.14 Policy Protection for Owners and Lenders

[1] Vesting

The CLTA Standard Coverage Policy (1990), the ALTA Loan Policy (10-17-92), and the ALTA Owner's Policy (10-17-92) insure against loss or damage, not exceeding the amount of insurance stated in the policy, that the insured may sustain or incur by reason of title to the estate or interest described in the policy being vested other than as stated in the policy [Insuring Clause, P 1]. This provision was held to cover resulting loss when a policy erroneously described the insured property as being held by the insured as joint tenants when it was in fact held by them as tenants in common [*Hall v. San Jose Abstract & Title Ins. Co. (1959) 172 Cal. App. 2d 421, 423-424, 430, 342 P.2d 362* (surviving cotenant not required to show that deceased cotenant would have left his one-half property interest to her had he been aware of true status of title)].

[2] Defects, Liens, or Encumbrances

The CLTA Standard Coverage Policy, the ALTA Loan Policy (10-17-92), and the ALTA Owner's Policy (10-17-92) insure against loss or damage, notexceeding the amount of insurance stated in the policy, that the insured may sustain or incur by reason of any defect in or lien or encumbrance on the title [Insuring Clause, P 2].

Defects, liens, and encumbrances covered by this provision include mortgages [*Macfarlane v. Faulkner (1934) 1 Cal. App. 2d 722, 723-724, 37 P.2d 161]* , easements [*Overholtzer v. Northern Counties Ins. Co. (1953) 116 Cal. App. 2d 113, 116, 253 P.2d 116]* , abstracts of judgment [*Lang v. Klinger (1973) 34 Cal. App. 3d 987, 991-993, 110 Cal. Rptr. 532]* , tax liens [*National Holding Co. v. Title Ins. & Trust Co. (1941) 45 Cal. App. 2d 215, 220-222, 113 P.2d 906]* , and declarations of homestead [*Viotti v. Giomi (1964) 230 Cal. App. 2d 730, 739, 41 Cal. Rptr. 345]* . If the deed conveying the insured property to the policy holder is shown to be a forgery which invalidates the transfer of title, the resulting loss also constitutes an indemnifiable defect under the policy [*Coast Mut. Building-Loan Asso. v. Security Title Ins. & Guarantee Co. (1936) 14 Cal. App. 2d 225, 230, 57 P.2d 1392* (forgery of deed not covered by policy exception for off-record defects)]. A recorded notice of default on a senior trust deed listed as an exception in the policy is not a defect in or lien on the title of a junior lienholder and is not covered [*Glavinich v. Commonwealth Land Title Ins. Co. (1984) 163 Cal. App. 3d 263, 269-270, 209 Cal. Rptr. 266]* .

Title insurance policies do not insure against defects that reduce the value of land, unless those defects are related to the title. Thus, approval by a local municipality of a subdivision map that effectively rendered the land unimprovable and therefore valueless was held not to be covered under the policy when the insured title to the land was not itself affected [*Hocking v. Title Ins. & Trust Co. (1951) 37 Cal. 2d 644, 652, 234 P.2d 625]* . Similarly, a title insurer was not obligated to defend on the insured's behalf a lawsuit alleging that the insured had acquired title in a tortious manner, but not impugning the title itself [*Safeco Title Ins. Co. v. Moskopoulos (1981) 116 Cal. App. 3d 658, 665-666, 172 Cal. Rptr. 248]* .

Title insurance policies insure only against liens, defects, and encumbrances in existence at the time the policy is issued, and do not insure against any changes in the condition of title after the policy is issued. For example, a title insurer has no duty to defend an action to subordinate an insured lender's trust deeds, based on conduct occurring after the title insurance policy has issued [*Rosen v. Nations Title Ins. Co. (1997) 56 Cal. App. 4th 1489, 1493-1502, 66 Cal. Rptr. 2d 714]* .

[3] Unmarketability of Title

The CLTA Standard Coverage Policy, the ALTA Loan Policy (10-17-92), and the ALTA Owner's Policy (10-17-92) insure against loss or damage, not exceeding the amount of insurance stated in the policy, that the insured may sustain or incur by reason of unmarketability of the title [Insuring Clause, P 3]. A marketable title is a title that a reasonable buyer of real property, well-informed as to the facts and their legal consequences and willing and anxious to perform the contract, would, in the exercise of the prudence that business persons ordinary bring to bear on such transactions, be willing to accept [*Hocking v. Title Ins. & Trust Co. (1951) 37 Cal. 2d 644, 649, 234 P.2d 625]* . A marketable title must be sufficiently free from defects to enable the holder to retain the property, to possess it in peace, and, when the time comes to sell it, to be reasonably sure that no flaw or doubt will arise to disturb its market value [*Mertens v. Berendsen (1931) 213 Cal. 111, 113, 1 P.2d 440]* . A marketable title must embrace both the legal and equitable estates, be free from unknown encumbrances, and be defensible and salable [*Palos Verdes Corp. v. Housing Auth. (1962) 202 Cal. App. 2d 827, 838, 21 Cal. Rptr. 225]* .

The concept of marketable title is distinct from the market value of land. The marketability of a title does not depend on the marketability (or value) of the land, but on the condition of the title. One can hold perfect title to land that is valueless or have marketable title to land that is itself worthless [*Hocking v. Title Ins. & Trust Co. (1951) 37 Cal. 2d 644, 651, 234 P.2d 625]* . Conditions that affect the physical condition or usability of land (such as the presence of hazardous substances) do not affect the marketability of the title, even though they may adversely affect the market value of the land. This is the case even when purchasers of the land could be held liable for the costs of cleaning up the hazardous materials, or when a governmental agency could at some future time impose a lien against the land as security for payment of those costs. Since the purpose of title insurance is to protect the insured against defects in the title to the land and not against loss arising from physical damage to the land, the insured can never recover for a problem merely relating to the physical condition of the land [*Lick Mill Creek Apartments v. Chicago Title Ins. Co. (1991) 231 Cal. App. 3d 1654, 1662-1664, 283 Cal. Rptr. 231]* . If, however, a governmental agency imposes a lien on the land to enforce payment of the cleanup costs for hazardous materials, coverage for that lien will be afforded by the policy, unless it is listed as an exception [*see* *Lick Mill Creek Apartments v. Chicago Title Ins. Co. (1991) 231 Cal. App.3d 1654, 1662-1664, 283 Cal. Rptr. 231]* .

[4] Lack of Access

The CLTA Standard Coverage Policy, the ALTA Loan Policy (10-17-92), and the ALTA Owner's Policy (10-17-92) insure against loss or damage, not exceeding the amount of insurance stated in the policy, that the insured may sustain or incur by reason of lack of a right of access to and from the land [Insuring Clause, P 4]. The right of access is the right of a landowner to get into the street on which his or her property abuts and, from there, in a reasonable manner, to the general system of public streets [*Breidert v. Southern Pac. Co. (1964) 61 Cal. 2d 659, 663, 39 Cal. Rptr. 903, 394*

P.2d 719] . The policies do not cover lack of access if the lack is not shownby the public records and could be ascertained by inspecting the land [Schedule B, Exceptions from Coverage, Part I, P 2; *see* discussion under *§ 548.17[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityMarketable TitleGeneral OverviewReal Property LawTitle QualityMarketable TitleDefects & Encroachments

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48-548 California Forms of Pleading and Practice--Annotated § 548.15

§ 548.15 Policy Protection for Lenders Only

[1] Invalidity of Mortgage

The CLTA Standard Coverage Policy (1990) insures against certain losses that can be suffered only by insured lenders. For example, it insures against loss or damage, not exceeding the amount of insurance stated in the policy, that the insured may sustain or incur by reason of the invalidity or unenforceability of the lien of the insured mortgage upon the title [Insuring Clause, P 5]. The ALTA Loan Policy (10-17-92), which is issued only to lenders, insures against the same risk [Insuring Clause, P 5]. For purposes of these policies, a mortgage also includes a deed of trust, trust deed, or other security instrument [Conditions and Stipulations, P 1(e)].

[2] Prior Liens or Encumbrances

The CLTA Standard Coverage Policy (1990) and the ALTA Loan Policy (10-17-92) insure against loss or damage, not exceeding the amount of insurance stated in the policy, that an insured lender may sustain or incur by reason of the priority of any lien or encumbrance over the lien of the insured mortgage [Insuring Clause, P 6].

A title policy does not *guarantee* against an undisclosed senior lien or other defect. It merely *indemnifies* against those liens; that is, it covers those instances when the lender cannot recoup the amount of its loan because of the senior lien [*Karl v. Commonwealth Land Title Ins. Co. (1993) 20 Cal. App. 4th 972, 979, 24 Cal. Rptr. 2d 912 , citing Cale v. Transamerica Title Ins. (1990) 225 Cal. App. 3d 422, 275 Cal. Rptr. 107* , and *Lawrence v. Chicago Title Ins. Co. (1987) 192 Cal. App. 3d 70, 237 Cal. Rptr. 264* ; see *Title Ins. Co. v. XWarehouse Lending Corp. (2009) 177 Cal. App. 4th 106, 113, 98 Cal. Rptr. 3d 801* (compensable loss limited by terms and conditions of policy)]. Thus, "loss" does not include diminution of profits potentially obtainable from the resale of property [*Karl v. Commonwealth Land Title Ins. Co. (1993) 20 Cal. App. 4th 972, 977-983, 24 Cal. Rptr. 2d 912]* . For example, a lender who paid a tax lien in order to preserve its junior security interest during foreclosure did not suffer a loss because the price it obtained in selling the foreclosed property covered both its loan and the amount paid on the tax lien. There was no coverage under the title policy for the undisclosed tax lien because it did not reduce the amount available to cover the insured's secured loan, even though the insured did not make as much profit on the resale because it paid the lien [*Karl v. Commonwealth Land Title Ins. Co. (1993) 20 Cal. App. 4th 972, 977-983, 24 Cal. Rptr. 2d 912]* .

A title policy does not protect a senior lienholder against the possibility that an existing junior lien will gain court-ordered priority after the title policy has been issued, if the priority is granted because of acts that occurred after the title policy was issued [*Rosen v. Nations Title Ins. Co. (1997) 56 Cal. App. 4th 1489, 1493-1502, 66 Cal. Rptr. 2d 714]* .

[3] Invalidity of Assignment

The CLTA Standard Coverage Policy (1990) insures against loss or damage, not exceeding the amount of insurance stated in the policy, that an insured lender may sustain or incur by reason of the invalidity or unenforceability of any assignment of the insured mortgage or deed of trust shown in Schedule B of the policy, or the failure of an assignment shown in Schedule B to vest title to the insured mortgage or deed of trust in the named insured assignee free and clear of all liens [Insuring Clause, P 7]. The ALTA Loan Policy (10-17-92) insures against the identical risk [Insuring Clause, P 9].

[4] ALTA Coverage for Labor and Material Liens

The ALTA Loan Policy (10-17-92) insures against loss or damage, not exceeding the amount of insurance stated in the policy, that the insured may sustain or incur by reason of lack of priority of the lien of the insured mortgage over any statutory lien for services, labor, or material arising from an improvement or work related to the land which was (a) contracted for or commenced before the date of the policy or (b) commenced after the date of the policy and financed in whole or part by proceeds of the indebtedness secured by the insured mortgage which at the date of the policy the insured had advanced or was obligated to advance [Insuring Clause, P 7].

[5] ALTA Coverage for Street Improvement Assessments

The ALTA Loan Policy (10-17-92) insures against loss or damage, not exceeding the amount of insurance stated in the policy, that the insured may sustain or incur by reason of any assessments for street improvements under construction or completed at the date of policy which as of or after that date had gained priority over the lien of the insured mortgage or deed of trust [Insuring Clause, P 8].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawNonmortgage LiensMechanics' LiensReal Property LawNonmortgage LiensTax LiensReal Property LawTitle QualityGeneral Overview

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§ 548.16 Exclusions

[1] In General

The CLTA Standard Coverage Policy--1990, the ALTA Loan Policy (10-17-92), and the ALTA Owner's Policy (10-17-92) all contain a list of Exclusions from Coverage. The exclusions, which are matters for which the insurer will not pay loss or damage, costs, attorneys' fees or expenses, generally consist of defects, liens, or encumbrances that are not shown by the public records. If an occurrence is clearly not within a policy's coverageclause, it need not be specifically excluded [*Rosen v. Nations Title Ins. Co. (1997) 56 Cal. App. 4th 1489, 1497, 66 Cal. Rptr. 2d 714]* .

Exclusions are not the same as exceptions [*see § 548.17*]. Exclusions are standardized matters that the insurer elects in all cases to exclude from the coverage of the particular policy, while exceptions are recitations of matters that the insurer elects not to cover under the particular policy. Exclusions generally do not require any title search of the insured property; they are the same for all policies of the same type issued by the same insurer. Exceptions, on the other hand, are often (although not always) matters that are discovered through a title search and that the insurer elects to except from the policy coverage. When exceptions are listed in a title insurance policy, they are tailored to the circumstances of the particular policy [*see* Burke, *Law of Title Insurance*, 2d ed. (Little, Brown & Co., 1993), §§ 3.1, 16.1].

[2] Governmental Regulations and Police Power

The CLTA Standard Coverage Policy (1990), the ALTA Loan Policy (10-17-92), and the ALTA Owner's Policy (10-17-92) exclude coverage for loss or damage arising by reason of any law, ordinance, or governmental regulation (including building or zoning laws) restricting, regulating, prohibiting, or relating to [Exclusions from Coverage, P 1(a)]:

- The occupancy, use, or enjoyment of the land.
- The character, dimensions, or location of any improvements on the land.
- A separation in ownership or change in the dimensions or area of the land.

- Environmental protection laws, ordinances, or governmental regulations.

This exclusion also applies to the effect of any violation of any of the above laws, except to the extent that a notice of the enforcement of any of these laws or a notice of a defect, lien, or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at the date of policy. The policies also exclude coverage for any governmental police power not excluded by the rules stated above, except to the extent that a notice of the exercise of the power or a notice of a defect, lien, or encumbrance resulting from a violation affecting the land has been recorded in the public records at the date of policy [Exclusions from Coverage, P 1(b)]. For discussion, see *California Insurance Law and Practice, § 39.40[8][a]* (Matthew Bender).

[3] Eminent Domain

The CLTA Standard Coverage Policy (1990), the ALTA Loan Policy (10-17-92), and the ALTA Owner's Policy (1990) exclude coverage for loss or damage arising by reason of rights of eminent domain, unless notice of the exercise of those rights has been recorded in the public records at the date of policy. This exclusion does not apply to any taking that has occurred before the date of policy and that would be binding on the rights of a purchaser for value without knowledge [Exclusions from Coverage, P 2].

[4] Defects Agreed to by Insured

The CLTA Standard Coverage Policy (1990), the ALTA Loan Policy (10-17-92), and the ALTA Owner's Policy (10-17-92) exclude coverage for loss or damage arising by reason of defects, liens, encumbrances, adverse claims, or other matters suffered, assumed, or agreed to by the insured claimant, whether or not they are recorded in the public records at the date of policy [Exclusions from Coverage, P 3(a)]. A defect is not "created" by the insured for this purpose unless it was intentionally created and the insurer had no reasonable opportunity to discover it [*Hansen v. Western Title Ins. Co. (1963) 220 Cal. App. 2d 531, 535-536, 33 Cal. Rptr. 668]* .

[5] Defects Not Disclosed to Insurer

The CLTA Standard Coverage Policy (1990), the ALTA Loan Policy (10-17-92), and the ALTA Owner's Policy (10-17-92) exclude coverage for loss or damage arising by reason of defects, liens, encumbrances, adverse claims, or other matters not known to the insurer and not recorded in the public records at the date of policy, but known to the insured and not disclosed in writing to the insurer before the date the insured became an insured under the policy [Exclusions from Coverage, P 3(b)].

This exclusion applies only if the insured knew of the defect, lien, or other matter complained of before the policy was issued, and only if the insured's knowledge was actual rather than constructive [Conditions and Stipulations, § 1(e) ("knowledge" and "known" defined as actual knowledge)]. If the policy was procured for the insured by an agent, however, the agent's actual knowledge concerning defects in the title may be imputed to the insured [*Vernon v. Title Guar. & Trust Co. (1935) 7 Cal. App. 2d 171, 174, 46 P.2d 191]* . The standard policy exception for defects known to the insured has been held to be sufficiently unambiguous and to correspond sufficiently with the expectations of the insured so as not to require or permit interpretation in favor of the insured [*Stearns v. Title Ins. & Trust Co. (1971) 18 Cal. App. 3d 162, 170, 95 Cal. Rptr. 682]* .

[6] Defects Resulting in No Loss or Damage

The CLTA Standard Coverage Policy (1990), the ALTA Loan Policy (10-17-92), and the ALTA Owner's Policy (10-17-92) exclude coverage for loss or damage arising by reason of defects, liens, encumbrances, adverse claims, or other matters resulting in no loss or damage to the insured claimant [Exclusions from Coverage, P 3(c)]. This exclusion is consistentwith the principle that a title insurance policy is a contract of indemnity and that the insurer's duty to indemnify the insured arises only after the insured has suffered loss or damage covered by the policy [*Cale v.*

Transamerica Title Ins. (1990) 225 Cal. App. 3d 422, 425-426, 275 Cal. Rptr. 107] . If no loss or damage has been suffered, the insurer has no duty to indemnify the insured [*Hawkins v. Oakland Title Ins. & Guar. Co. (1958) 165 Cal. App. 2d 116, 122-123, 331 P. 2d 742]* .

[7] Defects Arising After Date of Policy

The CLTA Standard Coverage Policy (1990), the ALTA Loan Policy (10-17-92), and the ALTA Owner's Policy (10-17-92) exclude coverage for loss or damage arising by reason of defects, liens, encumbrances, adverse claims, or other matters attaching or created after the date of policy [Exclusions from Coverage, P 3(d)]. This exclusion is consistent with the rule that a title insurance policy insurers a title only as of a given instant of time (a specified time on the date of policy) [*see* *Rosen v. Nations Title Ins. Co. (1997) 56 Cal. App. 4th 1489, 1499, 66 Cal. Rptr. 2d 714* ; *see also* Schedule A].

[8] Loss Suffered Because Insured Did Not Pay Value

The CLTA Standard Coverage Policy (1990), the ALTA Loan Policy (10-17-92), and the ALTA Owner's Policy (10-17-92) exclude coverage for loss or damage arising by reason of defects, liens, encumbrances, adverse claims, or other matters resulting in loss or damage that would not have been sustained if the insured had paid value for the insured mortgage or deed of trust, or for the estate or interest insured by the policy [Exclusions from Coverage, P 3(e)]. This exclusion is based on the California rule that recording protects only purchasers and encumbrances for good faith and for valuable consideration [*see Civ. Code § 1214*]. The effect of this exclusion is to limit the protection of the policy to persons who are also entitled to the protection of the recording laws [*see* Rooney, *Title Insurance: A Primer for Attorneys, 14 Real. Prop., Prob. & Tr. J. 608, 615 (1979)*].

[9] Failure to Comply With "Doing Business Laws"

The CLTA Standard Coverage Policy (1990) and the ALTA Loan Policy (10-17-92) exclude coverage for loss or damage arising by reason of unenforceability of the lien of the insured mortgage or deed of trust because of the inability or failure of the insured at the date of policy, or the inability or failure of any subsequent owner of the indebtedness, to comply with applicable doing business laws of the state in which the land is situated [Exclusions from Coverage, P 4].

[10] Violation of Usury or Truth-in-Lending Laws

The CLTA Standard Coverage Policy (1990) and the ALTA Loan Policy (10-17-92) exclude coverage for loss or damage arising by reason of any invalidity or unenforceability of the lien of the insured mortgage or deed of trust that arises out of the transaction evidenced by the insured mortgage or deed of trust and that is based upon usury or any consumer credit protection or truth in lending law [Exclusions from Coverage, P 5].

[11] Claims Arising Out of Creditors' Rights Laws

The CLTA Standard Coverage Policy (1990) excludes coverage for any claim arising by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws. However, this exclusion applies only if the claim arises out of the transaction vesting the insured estate or interest in the insured or, if the insured is a lender, creating the lender's insured interest [Exclusions from Coverage, P 6]. The ALTA Loan Policy (10-17-92) contains a substantially identical exclusion [Exclusions from Coverage, P 7].

[12] Mechanics Liens

The ALTA Loan Policy (10-17-92) contains one exclusion that is not found in the CLTA Standard Coverage Policy (1990). This is for mechanics liens arising from improvement or work contracted for and commenced after the date of policy and not financed in whole or in part by proceeds of the insured indebtedness which the insured has advanced or

is obligated to advance at the date of policy [Exclusions from Coverage, P 6].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceInsurance LawProperty InsuranceTitle Insurance ExclusionsReal Property LawTitle QualityGeneral Overview

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§ 548.17 Exceptions

[1] In General

The CLTA standard Coverage Policy--1990, the ALTA Loan Policy (10-17-92), and the ALTA Owner's Policy (10-17-92) all contain a list of exceptions from coverage [Schedule B, Exceptions from Coverage]. Exceptions, like Exclusions [*see § 548.16, above*], are matters as to which the insurer does not insure against loss or damage and for which it will not pay costs, attorneys's fees or expenses.

[2] Taxes or Assessments Not Shown as Liens

The CLTA Standard Coverage Policy (1990) excepts from coverage taxes or assessments that are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records [Schedule B, Exceptions from Coverage, Part I, P 1]. The same policy excepts proceedings by a public agency that may result in taxes or assessments, or notices of such proceedings, whether or not shown by the records of the agency or the public records [Schedule B, Exceptions from Coverage, Part I, P 1].

This exception is not routinely included in the ALTA Loan Policy (10-17-92) or the Alta Owner's Policy (10-17-92). However, those forms give the insurer the option of including the exception if it chooses [Schedule B, Exceptions from Coverage, Part I, P 1].

A previous owner's payment under protest of taxes owned on the property does not extinguish the tax lien; consequently a subsequent reassessment imposed on the land will be deemed to be covered because it appears on the public record by virtue of the preexisting tax lien [*National Holding Co. v. Title Ins. & Trust Co. (1941) 45 Cal. App. 2d 215, 221-222, 113 P.2d 906]* .

[3] Facts That Could Be Ascertained by Inspecting Land

The CLTA Standard Coverage Policy (1990) excepts from coverage any facts, rights, interests, or claims that are not shown by the public records but that could be ascertained by an inspection of the land or that may be asserted by persons in possession of the land [Schedule B, Exceptions from Coverage, Part I, P 2]. Although this exception is not

routinely included in the ALTA Loan Policy (10-17-92) or the Alta Owner's Policy (10-17-92), it can be included at the option of the insurer [Schedule B, Exceptions from Coverage, Part I, P 2]. This exception would appear to be sufficient to deny coverage for loss of title due to adverse possession or prescription by third parties [*see Bothin v. California Title Ins. Co. (1908) 153 Cal. 718, 722-723, 96 P. 500* (interpreting similar language in nonstandard policy)].

[4] Easements, Liens, or Encumbrances Not Shown by Public Records

The CLTA Standard Coverage Policy (1990) excepts from coverage easements, liens, or encumbrances, or claims thereof, that are not shown by the public records [Schedule B, Exceptions from Coverage, Part I, P 3]. This exception is not routinely included in the ALTA Loan Policy (10-17-92) or the Alta Owner's Policy (10-17-92), although the insurer has the option of including it if it chooses to do so [Schedule B, Exceptions from Coverage, Part I, P 3].

[5] Mining Clams, Reservations in Patents, Water Rights

The CLTA Standard Coverage Policy (1990) excepts from coverage unpatented mining claims, reservations or exceptions in patents or in acts authorizing the issuance of patents, and water rights and claims or title to water, whether or not any of these matters are shown by the public records [Schedule B, Exceptions from Coverage, Part I, P 4]. This exception is not routinely included in the ALTA Loan Policy (10-17-92) or the Alta Owner's Policy (10-17-92). However, those forms give the insurer the option of including it if it chooses to do so [Schedule B, Exceptions from Coverage, Part I, P 4].

[6] Variable Exceptions

The CLTA Standard Coverage Policy (1990), the ALTA Loan Policy (10-17-92), and the ALTA Owner's Policy (10-17-92) all provide space for listing particular matters that will not be covered under the policy. These generally consist of tax liens, encumbrances, covenants, conditions, restrictions, and similar matters that are discovered in the course of searching the title and that the insurer chooses not to insure against. Generally, these matters will have been reviewed by the prospective insured before the policy is issued (by inspecting a preliminary report), and the prospective insured will have agreed to accept the title subject to these exceptions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceInsurance LawProperty InsuranceTitle Insurance ExclusionsReal Property LawNonmortgage LiensGeneral OverviewReal Property LawTitle QualityGeneral Overview

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§ 548.18 Notice to Insurer

[1] Policy Requirement

The CLTA Standard Coverage Policy--1990, the ALTA Loan Policy (10-17-92), and the ALTA Owner's Policy (10-17-92) containdetailed requirements as to notices that must be given by the insured to the insurer.

The policies require the insured to promptly notify the insurer in writing in case of any litigation in which a third party asserts a claim adverse to the insured title that is insured against by the policy [Conditions and Stipulations, PP 3, 4(a)]. Prompt written notice is also required whenever knowledge comes to the insured of any claim of title or interest adverse to the title to the estate or interest, or the lien of the insured mortgage, and for which the insurer might be liable under the policy [Conditions and Stipulations, P 3]. The same notice is required if title to the estate or interest, or the lien of the insured mortgage, is rejected as unmarketable [for discussion, *see § 548.14[3]*].

[2] Prejudice to Insurer

If prompt written notice is not given as required by the policy, and if the failure to give the required notice prejudices the insurer, the insurer's liability will terminate with regard to the matter or matters for which the notice was required [Conditions and Stipulations, P 3]. However, actual prejudice to the insurer must be shown before failure to give notice will excuse the insurer from fulfilling its obligations under the policy [*Moe v. Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 289, 302, 98 Cal. Rptr. 547]* . The insurer has the burden of showing actual prejudice [*Moe v. Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 289, 302, 98 Cal. Rptr. 547]* . The lack of prejudice may be established by showing that even though the insured did not give notice as required by the policy, the insurer had actual or constructive knowledge of the facts giving rise to the insured loss [*Moe v. Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 289, 302, 98 Cal. Rptr. 547]* or that it is the insurer's routine practice to take no immediate action on matters reported to it by its policy holders even when written notice is given as required by the policy [*Hall v. San Jose Abstract & Title Ins. Co. (1959) 172 Cal. App. 2d 421, 423-424, 430, 342 P.2d 362]* .

[3] Proof of Loss or Damage

In addition to written notice, the CLTA Standard Coverage Policy (1990), the ALTA Loan Policy (10-17-92), and the

ALTA Owner's Policy (10-17-92) all require the insured to furnish the insured with a proof of loss or damage within 90 days after the insured ascertains facts giving rise to loss or damage covered by the policy. The proof of loss must be signed and sworn to by each insured claimant. It must describe the defect, lien, encumbrance, or other matter that constitutes the basis of loss or damage and must state, to the extent possible, the basis of calculating the amount of the loss or damage. If the insurer is prejudiced by the failure of an insured to furnish the required proof of loss or damage, the insurer's obligation to that insured under the policy, including any liability or obligation to defend, prosecute, or continue any litigation with regard to the matter or matters requiring proof of loss or damage, will terminate [Conditions and Stipulations, P 5].

The insurer may also require the insured to submit to reasonable examination under oath by an authorized representative of the insurer and to produce records, books, ledgers, checks, correspondence, and memoranda for examination at reasonable times and places designated by any authorized representative of the insurer. The insured may also be required to grants its written permission for an authorized representative of the insurer to examine, inspect, and copy records, books, ledgers, checks, correspondence, and memoranda in the custody or control of a third party. If an insured fails with respect to any claim to submit to oath, to produce records, or to grant permission for inspection of records held by a third party as required by the policy, the insured's liability under the policy will terminate with respect to that claim, unless the insured's failure is sanctioned by law or governmental regulation [Conditions and Stipulations, P 5].

[4] Waiver of Prompt Notice Condition

All defects in a notice of loss or in a preliminary proof of loss, which the insured might remedy, and which the insurer omits to specify to the insured without unnecessary delay as grounds of objection, are waived [*Ins. Code § 553*]. Moreover, a delay in presenting a notice or proof of loss to an insurer is waived if it is caused by the insurer's own act, or if the insurer fails to object promptly and specifically on that ground [*Ins. Code § 554*]. Thus, the prompt notice provision in a title insurance policy is waived when the insured provides the insurer with oral notice of loss or damage and the insurer does not promptly inform the insured that the notice is not adequate [*Lagomarsino v. San Jose Abstract & Title Ins. Co. (1960) 178 Cal. App. 2d 455, 459-460, 3 Cal. Rptr. 80* (objection not raised until trial five years after claim)].

An insurer may also waive the prompt notice requirement by denying liability under the policy on substantive grounds [*Lagomarsino v. San Jose Abstract & Title Ins. Co. (1960) 178 Cal. App. 2d 455, 459-460, 3 Cal. Rptr. 80]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsNotice to InsurersActual Knowledge & NoticeInsurance LawClaims & ContractsNotice to InsurersPrejudice to InsurerInsurance LawProperty InsuranceObligationsLossesInsurance LawProperty InsuranceObligationsNotice RequirementsInsurance LawProperty InsuranceTitle Insurance

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§ 548.19 Construction Against Insurer

Title insurance policies are subject to the general rule of insurance contract construction requiring that doubts as to the reading of policy provisions are to be resolved against the insurer, and that when semantically possible the insurance contract is to be given a reading that will fairly achieve the policy's object of indemnifying the insured for losses relating to the insurance. [*White v. Western Title Ins. Co. (1985) 40 Cal. 3d 870, 881, 221 Cal. Rptr. 509, 710 P.2d 309]* . Under this rule of construction, a title policy that ambiguously referred to two monuments in describing the insured property's boundaries was interpreted to favor liability under the policy [*Lagomarsino v. San Jose Abstract & Title Ins. Co. (1960) 178 Cal. App. 2d 455, 463-464, 3 Cal. Rptr. 80]* . Similarly, a "small print" clause located inconspicuously in the body of a policy that provided for termination of coverage on full payment of the insured trust deed was interpreted to apply only when the payment was final and unconditional, which in fact terminated the risks insured by the policy [*Paramount Props. Co. v. Transamerica Title Ins. Co. (1970) 1 Cal. 3d 562, 569, 83 Cal. Rptr. 394, 463 P.2d 746]* .

Clauses relating to exclusions from or exceptions to the insurer's underlying obligations under the policy are construed strictly against the insurer and liberally in favor of the insured [*Paramount Props. Co. v. Transamerica Title Ins. Co. (1970) 1 Cal. 3d 562, 569, 83 Cal. Rptr. 394, 463 P.2d 746]* . However, an unambiguous exception will not be defeated by this rule of construction [*Stearns v. Title Ins. & Trust Co. (1971) 18 Cal. App. 3d 162, 170, 95 Cal. Rptr. 682]* . The court in *Stearns* questioned the appropriateness of the rule of construction in the case of standard title insurance policy exceptions. An insured who has purchased a standard coverage policy excluding certain risks can also purchase, for an additional cost, extended coverage to include the excepted risks. In other words, standard title insurance coverage does not have the earmarks of a contract of adhesion that is the usual basis for applying the rule of construction [*Stearns v. Title Ins. & Trust Co. (1971) 18 Cal. App. 3d 162, 170, 95 Cal. Rptr. 682]* .

The rule does not require extension of coverage to risks not covered by the policy when no reasonable construction of the policy would yield such a result [*Safeco Title Ins. Co. v. Moskopoulos (1981) 116 Cal. App. 3d 658, 665-666, 172 Cal. Rptr. 248* (coverage not extended to lawsuit alleging that insured title was acquired by intentionally tortious means)].

For discussion concerning the construction of insurance policies generally, see Ch. 308, *Insurance* ; see also *California*

Insurance Law and Practice, Ch. 8, The Insurance Contract, § 8.02 (Matther Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsPolicy InterpretationAmbiguous TermsConstruction Against InsurersInsurance LawProperty InsuranceTitle InsuranceReal Property LawTitle QualityGeneral Overview

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§ 548.20 Insurer's Duty to Indemnify

[1] Action Under Policy

If the insured title proves defective, the insured has a right to bring a contract action to recover on the policy [*see Title Ins. & Trust Co. v. Los Angeles (1923) 61 Cal. App. 232, 236, 214 P. 667]* . For discussion of an additional action that the insured may bring for violation of an implied covenant of good faith and fair dealing, see *§ 548.23*.

[2] Absolute Liability of Insurer

The insurer's liability under a title insurance policy is based on its undertaking to indemnify the insured for the defect rather than on any lack of skill or negligence on the part of the insurer in failing to discover the defect [*J. H. Trisdale, Inc. v. Shasta County Title Co. (1956) 146 Cal. App. 2d 831, 836-837, 304 P.2d 832* ; see *Hawkins v. Oakland Title Ins. & Guar. Co. (1958) 165 Cal. App. 2d 116, 127, 331 P.2d 742* (indemnification clause in policy as not constituting representation that title not defective)]. Thus, it appears that negligence of the insured in failing to discover a defect in the title is not a bar to an action on the title insurance policy [see *J. H. Trisdale, Inc. v. Shasta County Title Co. (1956) 146 Cal. App. 2d 831, 836-837, 304 P.2d 832]* . However, the CLTA Standard Coverage Policy (1990) excepts from coverage any facts, rights, interests, or claims that are not shown by the public records but that could be ascertained by an inspection of the land or that may be asserted by persons in possession of the land [Schedule B, Exceptions from Coverage, Part I, P 2]. This exception is not routinely included in the ALTA Loan Policy (10-17-92) or the ALTA Owner's Policy (10-17-92), although those forms give the insurer of including it [Schedule B, Exceptions from Coverage, Part I, P 2; for discussion, *see § 548.17[3]*].

If the policy mistakenly describes a title more valuable than the one actually held by the insured, the insurer is held to guarantee the title as written in the policy. The insured need not show that the loss resulting from the title company's mistaken reporting of the title in the policy and preliminary title report would not have occurred had the true title been known [*Hall v. San Jose Abstract & Title Ins. Co. (1959) 172 Cal. App. 2d 421, 428-429, 342 P.2d 362]* .

[3] Amount of Indemnification

[a] Reduction in Value of Interest

An insured owner is entitled to recover an amount equivalent to the diminution in the market value of the property caused by the title defect insured against by the title insurance policy, up to the limits of coverage stated in the policy. The proper time for evaluating this diminution in value is the time when the defect is discovered. The diminution must be measured by how the property was being used at the time the defect was discovered [*Overholtzer v. Northern Counties Ins. Co. (1953) 116 Cal. App. 2d 113, 130, 253 P.2d 116]* .

An insured lender is entitled to recover for any part of the insured lien that it is unable to collect because of the title defect insured against. If, for example, the defect insured against is a senior lien that the insurer failed to disclose in the policy, the insured is entitled to recover any part of the insured lien that cannot be collected because of the existence of the senior lien [*Cale v. Transamerica Title Ins. (1990) 225 Cal. App. 3d 422, 426-428, 275 Cal. Rptr. 107]* . However, the insured must prove that the undisclosed senior lien made it impossible to collect (or to collect fully) on the insured lien [*Cale v. Transamerica Title Ins. (1990) 225 Cal. App. 3d 422, 426-428, 275 Cal. Rptr. 107]* . The mere existence of the senior lien does not automatically prove that the insured will not be able to collect the junior lien, as it may be possible to collect that lien even after the discovery of the senior lien. If the value of the land is great enough to satisfy both liens, and if the insured is able to collect the insured lien after the senior lien has been satisfied, the insured will not have suffered a loss covered by the policy. This rule recognizes the fundamental difference between recovery under an owner's policy and recovery under a lender's policy. Under an owner's policy, the insured owner is entitled to recover any diminution in the value of the insured land that is ascribable to the undisclosed defect; under a lender's policy, however, the insured is entitled to recover only that part of the insured lien that is not repaid because of the undisclosed defect [*Cale v. Transamerica Title Ins. (1990) 225 Cal. App. 3d 422, 426-428, 275 Cal. Rptr. 107]* .

[b] Physical Interference Not Required

Actual physical interference with the use of the property need not be shown if a cloud on the insured's title created by the defect causes a diminution in market value [*Overholtzer v. Northern Counties Ins. Co. (1953) 116 Cal. App. 2d 113, 127, 253 P.2d 116]* .

[c] Cost of Removing Defect

As an alternative to determining an insured's damages by the reduction in the property's market value caused by a title defect, the damages may be measured by the cost to the insured of removing the title defect [*see National Holding Co. v. Title Ins. & Trust Co. (1941) 45 Cal. App. 2d 215, 225, 113 P.2d 906]* .

[d] Other Damages

An insured who is compelled to pay expenses for maintenance or improvements on the insured property but is prevented from collecting rents or evicting existing tenants because of a defect in the insured title is entitled to resulting damages even if there is no evidence that the defect in the title prevented the insured from selling the property [*Nebo, Inc. v. Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 222, 227-228, 98 Cal. Rptr. 237]* .

Damages such as carrying costs are only recoverable if they were caused by the title defect. They are not recoverable if the delay was caused by the assertion of uncovered claims [*Native Sun Inv. Group v. Ticor Title Ins. Co. (1987) 189 Cal. App. 3d 1265, 1273-1274, 235 Cal. Rptr. 34]* .

[4] Establishment of Title by Insurer

The CLTA Standard Coverage Policy (1990), the ALTA Loan Policy (10-17-92), and the ALTA Owner's Policy (10-17-92) all give the insurer the option of instituting and prosecuting any action or proceeding or doing any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest or the lien of the insured mortgage, as insured, or to prevent or reduce loss or damage to an insured. Any action taken must be at the insurer's

own cost [Conditions and Stipulations, P 4(a)].

The title may be established by removing an alleged defect, lien or encumbrance, curing the lack of a right of access to or from the land, or curing any claim of unmarketability of title. If any of these actions are taken in a reasonably diligent manner, the insurer will avoid any liability for loss or damage under the policy [Conditions and Stipulations, PP 4(b), 8(a)]. What constitutes a reasonably diligent manner is a question of fact, depending on the situation of the parties, the nature of the transaction, and the facts of the particular case. The trial court is entitled to consider expenses and financial hardship suffered by the insured in the period before title was perfected in determining whether title was established within a reasonable time [*Nebo, Inc. v. Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 222, 228, 98 Cal. Rptr. 237* (time found not reasonable when insurer delayed over three years in order to wait for appeal in related litigation, with knowledge that insured was suffering hardship as consequence)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 548.21 Insurer's Duty to Defend or Secure Title

[1] Duty to Defend

The CLTA Standard Coverage Policy (1990), the ALTA Loan Policy (10-17-92), and the ALTA Owner's Policy (10-17-92) all obligate the insurer to provide for the defense of the insured in any litigation in which a third party asserts a claim adverse to the insured title or interest. The defense must be provided upon written request of the insured, at the insurer's own cost, and without unreasonable delay [Conditions and Stipulations, P 4(a); *see Paramount Props. Co. v. Transamerica Title Ins. Co. (1970) 1 Cal. 3d 562, 571, 83 Cal. Rptr. 394, 463 P.2d 746* (enforcing duty to defend)]. The insurer has the right to select counsel of its choice, subject to the right of the insured to object for reasonable cause [Conditions and Stipulations, P 4(a)].

[2] Affirmative Action to Clear Title

A title insurer may be required to take affirmative action to remove a possible cloud on the insured title even though the party making a claim adverse to the title chooses not to litigate it. Affirmative action may consist of filing an action to quiet title or of compromising the claim with the third party [*see Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 941-942, 122 Cal. Rptr. 470]* . *Jarchow* interpreted a pre-1973 version of CLTA Standard Policy that specifically obligated the insurer either to provide a defense for the insured in any litigation against the insured title or to take appropriate action to establish the title. The current standard policies contain only the requirement that the insurer provide a defense and do not also require the insurer to take such action as may be appropriate to establish the title. However, *Jarchow* stated that the obligation to defend and the obligation to take other appropriate action are kindred duties designed to achieve the same objective, both of which must be equally accessible to the insured [*Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 941-942, 122 Cal. Rptr. 470]* . Moreover, in reaching its conclusion the *Jarchow* court applied the rule that insurance policies must be construed to give the insured the protection that he or she reasonably had a right to expect [*see § 548.19*]. The court stated that the insured had a reasonable expectation that the insurer would file a quiet title action in accordance with to its policy obligations [*Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 941, 944, 122 Cal. Rptr. 470]* . Thus, although it is not clearly established by case law, it may be argued that the insurer's obligation to take affirmative action applies under the present version of the standard policies.

If the insurer's obligation to take affirmative action does apply, the rules applicable to the insured's duty to defend also apply to the duty to take affirmative action [*Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 941-942, 122 Cal. Rptr. 470* ; *see* discussion under [3], *below*].

[3] When Duty Arises

[a] Defect Arguably Covered

An insurer's duty to defend arises whenever the insurer ascertains facts that raise the possibility that the insurer is liable under the policy. In the case of title insurance, this requirement is met when the insurer is notified of pending litigation based on an alleged title defect that is arguably covered by the policy [*Paramount Props. Co. v. Transamerica Title Ins. Co. (1970) 1 Cal. 3d 562, 571, 83 Cal. Rptr. 394, 463 P.2d 746* ; *see* *Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 944, 122 Cal. Rptr. 470* (duty to quiet title matures when insurer notified of existence of covered defect)]. The duty to defend is fixed by facts that the insurer learns not only from the insured, but also from the complaint in the pending litigation and from other sources as well [*Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 944, 122 Cal. Rptr. 470]* . The nature of the pleadings in the pending litigation is not determinative of whether or not the insurer is potentially liable so as to give rise to a duty to defend [*see* *Stearns v. Title Ins. & Trust Co. (1971) 18 Cal. App. 3d 162, 167-169, 95 Cal. Rptr. 682* (holding no duty to defend on facts)].

[b] Risks Clearly Not Covered by Policy

The nature and kind of risk covered by the policy is a limitation on the duty to defend. Thus, the insurer has no duty to defend if the defect on which the suit is based is clearly outside the scope of the policy [*Barczewski v. Commonwealth Land Title Ins. Co. (1989) 210 Cal. App. 3d 406, 410-413, 258 Cal. Rptr. 386* ; *SafecoTitle Ins. Co. v. Moskopoulos (1981) 116 Cal. App. 3d 658, 664-665, 172 Cal. Rptr. 248]* . There also is no duty to defend if the alleged defect clearly comes within one of the exceptions set out in the policy [*Stearns v. Title Ins. & Trust Co. (1971) 18 Cal. App. 3d 162, 167-169, 95 Cal. Rptr. 682* (suit clearly fell into standard exceptions for off-record boundary disputes and off-record defects known to insured but not disclosed to insurer); *but see* *Paramount Props. Co. v. Transamerica Title Ins. Co. (1970) 1 Cal. 3d 562, 571, 83 Cal. Rptr. 394, 463 P.2d 746* (insurer not excused from duty when facts known to it did not clearly show whether alleged defect excepted from coverage)]. A title insurer does not have a duty to provide a defense against an off-record claim based on alleged fraudulent activities of its insured [*Barczewski v. Commonwealth Land Title Ins. Co, (1989) 210 Cal. App. 3d 406, 410-412, 258 Cal. Rptr. 386]* .

[3A] Burden of Proof

In an action based on the insurer's refusal to provide a defense, the burden is on the insured to bring a claim within the basic scope of coverage. To prevail, the insured must prove that a potential for coverage exists, while the insurer must prove the absence of such a potential [*Rosen v. Nations Title Ins. Co. (1997) 56 Cal. App. 4th 1489, 1497, 66 Cal. Rptr. 2d 714* (quoting *Montrose Chem. Corp. v. Superior Court (1993) 6 Cal. 4th 287, 300, 24 Cal. Rptr. 2d 467, 861 P. 2d 1153*)].

[4] Continuing Duty After Settlement Reached

The insurer's duty to defend continues to apply even if the insured has, in the proper exercise of its duty, reached a settlement with the party asserting a title defect, if that party subsequently attempts to abrogate the settlement to the detriment of the insured [*see* *Paramount Props. Co. v. Transamerica Title Ins. Co. (1970) 1 Cal. 3d 562, 569, 83 Cal. Rptr. 394, 463 P.2d 746]* .

[5] Liability for Damages During Litigation

Policy provisions permitting the insurer, at its own expense and without undue delay, to litigate defects in title to final

determination in a court of last resort do not relieve the insurer from liability for actual damages resulting from the defect while litigation proceeds [*Nebo, Inc. v. Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 222, 228, 98 Cal. Rptr. 237]* .

[6] Liability for Wrongful Refusal to Defend

[a] General Damages

The rules generally governing an insurer's obligation to defend an insured are applicable to title insurance [*see* *Kapelus v. United Title Guar. Co. (1971) 15 Cal. App. 3d 648, 653, 93 Cal. Rptr. 278]* . Thus, a title insurer defaulting on its duty to defend under the title policy becomes liable for the expenses properly incurred by the insured in defending the title on its own [*Paramount Props. v. Transamerica Title Ins. Co. (1970) 1 Cal. 3d 562, 571-572, 83 Cal. Rptr. 394, 463 P.2d 746]* . It appears that a title insurer's wrongful refusal to defend also automatically renders the insurer liable for any adverse judgment, even when the judgment was rendered on a theory not within the policy coverage [*see Kapelus v. United Title Guar. Co. (1971) 15 Cal. App. 3d 648, 653, 93 Cal. Rptr. 278]* . A title insurer who has wrongfully refused to defend is bound not only by the judgment, but also as to all material findings of fact relating to the issue of coverage [*see* *Geddes & Smith, Inc. v. St. Paul Mercury Indem. Co. (1959) 51 Cal. 2d 558, 561, 334 P.2d 881* ; *see also* *Hogan v. Midland Nat'l Ins. Co. (1970) 3 Cal. 3d 553, 565, 91 Cal. Rptr. 153, 476 P.2d 825* ; *Kapelus v. United Title Guar. Co. (1971) 15 Cal. App. 3d 648, 653, 93 Cal. Rptr. 278]* .

[b] Liability Limited to Actual Loss

A policy provision limiting the insurer's liability to the actual loss suffered by the insured may limit the insurer's liability for wrongful refusal to defend [*see* CLTA Standard Coverage Policy (1990), ALTA Loan Policy (10-17-92), ALTA Owner's Policy (10-17-92), Conditions and Stipulations, P 7 (actual monetary loss or damage sustained or incurred by insured claimant)]. For example, an insurer refused to defend in a bankruptcy proceeding in which the federal court found that the insured held only a mortgage on the insured property rather than a fee title as recited in the policy. In a subsequent state action based on the insurer's refusal to defend, the court of appeal held that under the federal court's ruling the insured's actual loss resulting from the bankruptcy was limited to loss of the mortgage interest. Citing the title policy clause limiting the insurer's liability to actual loss, the court declined to impose liability for loss of the purported fee interest on the insurer [*Kapelus v. United Title Guar. Co. (1971) 15 Cal. App. 3d 648, 654, 93 Cal. Rptr. 278]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceObligationsDefenseInsurance LawProperty InsuranceTitle InsuranceReal Property LawTitle QualityGeneral Overview

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§ 548.22 Cross Complaint Against Insurer by Insured Defendant

An insured under a title insurance policy who is sued in a quiet title action based on defects or other conditions insured against in the policy may cross complain against the insurer for a declaration that the insurer is obligated to defend the action on the insured's behalf or to indemnify the insured for any losses stemming from the quiet title action [*Hansen v. Western Title Ins. Co. (1963) 220 Cal. App. 2d 531, 33 Cal. Rptr. 668]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 548.23 Tort Action for Insurer's Bad Faith Breach

[1] In General

If a title insurer wrongfully fails to fulfill its obligations under the policy, the insured may have a tort action for breach of the covenant of good faith and fair dealing that is implied by law in every insurance policy [*White v. Western Title Ins. Co. (1985) 40 Cal. 3d 870, 885-890, 221 Cal. Rptr. 509, 710 P.2d 309]* . For example, an insurer's wrongful refusal to quiet title when notified of a potential defect covered by the policy may constitute a bad faith breach [*Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 940-941, 122 Cal. Rptr. 470]* . Since the *Jarchow* court spoke of the duty to act affirmatively to cure a title defect as being virtually identical with the duty to defend the title in a litigation, it appears that refusal to defend the title may also be a bad faith breach [*see* *Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 941-942, 122 Cal. Rptr. 470* ; *see* discussion under *§ 548.21[2]*].

A title company's general duty of good faith and fair dealing extends beyond the commencement of litigation, and a title insurer can be liable for breach of that duty by failing to make reasonable settlement offers and failing to appraise the loss until the issue of liability has been settled. Settlement offers are admissible to establish such liability. The damages recoverable may include litigation expenses in obtaining policy benefits [*White v. Western Title Ins. Co. (1985) 40 Cal. 3d 870, 883-884, 221 Cal. Rptr. 509, 710 P.2d 309]* .

[2] Damages for Emotional Distress

An insured may recover for any emotional distress suffered as a result of an insurer's bad faith breach of a title insurance policy [*Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 940, 122 Cal. Rptr. 470]* .

One court has suggested that a bad faith breach of a title insurance agreement must result in substantial damages apart from those due to emotional distress before damages for emotional distress may be awarded [*see* *Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 945, 122 Cal. Rptr. 470* (citing cases relying on general insurance law)]. This requirement may be satisfied by expenses and demands on time and energy incurred by an insured in prosecuting a quiet title action after the insurer wrongfully refused to bring the action. The substantial damages required need not themselves be compensable in order to enable compensation for emotional injury [*Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 945, 122 Cal. Rptr. 470]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilityRemediesEmotional Distress DamagesInsurance LawProperty InsuranceTitle InsuranceReal Property LawTitle QualityGeneral Overview

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§ 548.24 Liability to Third Party for Negligent Recording

A title insurance company is liable to a third party for negligently recording an unrecordable document that slanders the title of the third party. Thus, a title company was held liable for recording a memorandum of lease, at the request of the purported lessee, even though it had not been signed by the purported lessor. The applicable bases for liability were present in that the recording was intended to affect the purported lessor, it was foreseeable that the purported lessor would be damaged, the purported lessor was injured, the title insurer's act and the harm were closely connected, the title company's action was deserving of moral blame, and the imposition of liability will serve the public interest by making title companies more accountable [*Seeley v. Seymour (1987) 190 Cal. App. 3d 844, 860-862, 237 Cal. Rptr. 282]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 548.25 No Liability to Incidental Beneficiaries

A title insurer has no liability under a title policy to an incidental beneficiary on whom the parties did not intend to confer a benefit. Since the sole purpose of a title insurance policy is to ensure that the insured's title is free of any defects or other specified risks, it is unlikely that anyone except a named insured under a title insurance policy would ever be entitled to recover under the policy [*see Kenny v. Safeco Title Ins. Co. (1980) 113 Cal. App. 3d 557, 561-562, 169 Cal. Rptr. 808* ; *Walters v. Marler (1978) 83 Cal. App. 3d 1, 33, 147 Cal. Rptr. 655]* . Thus, the seller of an insured property is not entitled to recover as a third-party beneficiary under a title insurance policy issued to the buyer, regardless of whether occurrence of the condition insured against caused harm to the seller [*see Kenny v. Safeco Title Ins. Co. (1980) 113 Cal. App. 3d 557, 561-562, 169 Cal. Rptr. 808* ; *Walters v. Marler (1978) 83 Cal. App. 3d 1, 33, 147 Cal. Rptr. 655]* .

Similarly, title companies are normally liable under a tort theory for negligently providing title information only if the injured party is the person for whose guidance the information was prepared [*Smith v. Commonwealth Land Title Ins. Co. (1986) 177 Cal. App. 3d 625, 630-631, 223 Cal. Rptr. 339]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 548.26 Statute of Limitations

The Code of Civil Procedure provides that an action founded on a contract evidenced by a policy of title insurance or an abstract or guaranty of title must be filed within two years of accrual of the action, provided that such an action shall not be deemed to have accrued until discovery of the loss or damage suffered by the aggrieved party under the policy [*Code Civ. Proc. § 339(1)*; *see Code Civ. Proc. § 312* (civil actions as required to be commenced within periods after accrual of action as specified in *Code Civ. Proc. §§ 312-365*)]. Under *Code Civ. Proc. § 339(1)*, the limitation period runs from actual discovery of loss or damage, not from a point in time when loss or damage could have been discovered [*Hansen v. Western Title Ins. Co. (1963) 220 Cal. App. 2d 531, 538, 33 Cal. Rptr. 668* (dating limitations period from filing of claim adverse to title by third party); *see also Herbert A. Crocker & Co. v. Transamerica Title Ins. Co. (1994) 27 Cal. App. 4th 1722, 1728-1730, 33 Cal. Rptr. 2d 313* ("actual harm" was discovered in 1970 when owners first expressed concern over possible existence of municipal rights in property, not in 1989 when city claimed ownership of portion or property)].

When a claim is based on failure to defend, the limitation period accrues when the insurer refuses the tender of defense. However, the period is equitably tolled until the underlying action is terminated by final judgment, at which time the insured has two years to bring the action for failure to defend [*Lambert v. Commonwealth Land Title Ins. Co. (1991) 53 Cal. 3d 1072, 1076-1080, 282 Cal. Rptr. 445, 811 P.2d 737]* . If the insured does not make a demand under the policy or commence an action against the title insurer within two years after the underlying action is initiated, however, the underlying action does not toll the statute of limitations. Thus, an insured who did not notify the title insurer until more than two years after the underlying action was commenced, but who commenced an action within nine months after the title insurer ultimately denied coverage, was barred by the statute of limitations [*Tabachnick v. Ticor Title Ins. Co. (1994) 24 Cal. App. 4th 70, 77, 29 Cal. Rptr. 2d 59]* .

The two-year statute of limitations under *Code Civ. Proc. § 339(1)* is equitably tolled while the insurer determines whether to honor or reject a timely filed claim under the policy [*Forman v. Chicago Title Ins. Co. (1995) 32 Cal. App. 4th 998, 999-1000, 38 Cal. Rptr. 2d 790]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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48-548 California Forms of Pleading and Practice--Annotated § 548.27

§ 548.27 Subrogation

Under the CLTA Standard Coverage Policy (1990), the ALTA Loan Policy (10-17-92), and the ALTA Owner's Policy (10-17-92), an insured who has settled and paid a claim under the policy is subrogated to and entitled to all of the rights and remedies that the insured claimant would have had against any person or property in respect to the claim had the policy not been issued [Conditions and Stipulations, P 12(a)]. If payment on account of a claim does not fully cover the insured's loss, the insurer is subrogated as to a part of the loss. If the insured claimant is an owner, the insurer is subrogated to the insured in the proportion that the insurer's payment bears to the whole amount of the loss. If the insured is a mortgagee or a beneficiary under a deed of trust, the insurer is subrogated to all of the insured's rights and remedies after the insured has recovered its principal, interest, and costs of collection [Conditions and Stipulations, P 12(a)].

The insurer is not automatically entitled on subrogation to recover the full amount of any settlement that it has made with the insured, but is limited to recovering the amount that the insured would have been entitled to recover on direct action. The amount of the settlement is only presumptive evidence, subject to rebuttal by contrary evidence and proof, of the amount to which the insured would have been entitled in a direct action. The presumptive evidentiary character of the settlement does not relieve the insurer of the burden of establishing the basis of the settlement in order to fix the amount of damages to be awarded in a subrogation action [*American Title Co. v. Anderson (1975) 52 Cal. App. 3d 255, 260-261, 125 Cal. Rptr. 24]* . For discussion of subrogation generally, see Ch. 536, *Subrogation* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsSubrogationGeneral OverviewInsurance LawClaims & ContractsSubrogationGeneral OverviewInsurance LawProperty InsuranceTitle InsuranceReal Property LawTitle QualityGeneral Overview

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48-548 California Forms of Pleading and Practice--Annotated § 548.28

§ 548.28 Negligent Misrepresentation of Title

[1] No Liability Based on Title Policy

The title insurance policy itself is not a representation that the contingencies insured against will not occur. Thus, a title insurer cannot be liable for negligent misrepresentation on the basis of recitations in the title insurance policy [*Walters v. Marler (1978) 83 Cal. App. 3d 1, 18-19, 147 Cal. Rptr. 655]* . One court has suggested a contrary view, imposing liability on a title insurer for negligent failure to report a title defect in the policy [*Banville v. Schmidt (1974) 37 Cal. App. 3d 92, 104-105, 112 Cal. Rptr. 126]* . However, the court in *Banville* also stated that it was of significance to the controversy before it that the premium paid for the policy was imposed for a title search and examination as well as for title insurance [*Banville v. Schmidt (1974) 37 Cal. App. 3d 92, 105, 112 Cal. Rptr. 126]* . Thus, it appears that the *Banville* opinion may be read as imposing liability for the insurer's negligent performance as an abstractor rather than as an insurer [*Walters v. Marler (1978) 83 Cal. App. 3d 1, 18-19, 147 Cal. Rptr. 655* (distinguishing *Banville* on this ground)].

[2] No Liability for Preliminary Title Report

A preliminary title report is a document that is prepared by a title company for the purpose of showing the condition of a particular title as a preliminary to the issuance of a title insurance policy. The report lists all of the matters that would be excepted from coverage if a title policy were issued on the date of the report. It thus apprises prospective purchasers or lenders of any defects, liens, encumbrances, or other matters that should be considered when dealing with the property. It also gives the owner (who is often seeking to either sell or borrow on the property) an opportunity to remove or otherwise resolve any matters that the purchase or lender finds unacceptable [*see* California Insurance Law and Practice, Ch. 39, *Title Insurance* (Matthew Bender)].

Before 1981, the California courts had developed a cause of action for negligence in making the title search, on the theory that the preliminary title report constituted an abstract of title on which the insured may rely and for which the insurer is liable apart from any liability assumed through the title insurance policy. This cause of action was independent of the contract of action on the title policy [*see* *J. H. Trisdale Inc. v. Shasta County Title Co. (1956) 146 Cal. App. 2d 831, 837, 304 P.2d 832]* . In 1981, however, the Legislature enacted *Ins. Code § 12340.11*, which defines "preliminary reports," "commitments," or "binders" as reports furnished in connection with an application for title

insurance and as offers to issue a title policy subject to the stated exceptions set out in the reports and other matters that may be incorporated by reference in the reports. The reports defined in *Ins. Code § 12340.11* are not abstracts of title, nor are any of the rights, duties, or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report. Any such report may not be construed or constitute a representation as to the condition of title to real property, but shall constitute a statement of terms and conditions on which the issuer is willing to issue its title policy if the offer is accepted [*Ins. Code § 12340.11*]. On request, however, a title insurance company may provide coverage against loss or damage under the terms, conditions, and stipulations of the title insurance policy for any monetary lien set forth in the preliminary report [*Ins. Code § 12414.30(b)*; *see Ins. Code § 12340.11(c)* (*Ins. Code § 12414.30* does not modify any provisions of *Ins. Code § 12340.11*)].

The effect of the Legislature's distinction between abstracts of title and preliminary reports in *Ins. Code §§ 12340.10* and *12340.11* is that title insurance companies are not liable for negligence in the preparation of preliminary reports. The preliminary report is merely reflective of the terms on which the insurer is willing to issue a policy. A customer may not rely on a preliminary report and is insured only by the issued policy [*Southland Title Corp. v. Superior Court (1991) 231 Cal. App. 3d 530, 536-538, 282 Cal. Rptr. 425]* . But note that *Ins. Code § 12340.11* is not applicable to preliminary reports procured before its effective date of January 1, 1982 [*White v. Western Title Ins. Co. (1985) 40 Cal. 3d 870, 884, 221 Cal. Rptr. 509, 221 Cal. Rptr. 509, 710 P.2d 309]* .

[3] Liability for Abstract of Title

An "abstract of title" is a written representation, provided pursuant to contract, whether written or oral, that is intended to be relied on by the person who has contracted for the receipt of the representation, listing recorded conveyances, instruments, or documents which, under the laws of California, impart constructive notice with respect to the chain of title to the real property described in the abstract. An abstract of title is not a title policy as defined in *Ins. Code § 12340.2* (defining title policy) [*Ins. Code § 12340.10*]. An abstract of title may be furnished by a title insurance company or title company as a service above and apart from issuance of a title insurance policy [*see* 4 California Real Estate Law and Practice, ch. 92, *Title Insurance*].

An abstractor is hired because of his or her professional skill, and must use the degree of care commensurate with the professional skill. Unlike a title insurer who can define the extent of its liability under the insurance policy, the abstractor must report all matters that could affect its client's interests and that are readily discoverable from those public records ordinarily examined when a reasonably diligent title search is made [*Contini v. Western Title Ins. Co. (1974) 40 Cal. App. 3d 536, 545-546, 115 Cal. Rptr. 257]* .

An abstractor may be held liable only for those damages that are proximately caused by his or her failure to abstract the title properly [*Garton v. Title Ins. & Trust Co. (1980) 106 Cal. App. 3d 365, 380, 165 Cal. Rptr. 449]* . Proximate cause of damagesto the buyer who contracted for an abstract of title exists when escrow on the sale would not have closed if the true state of the title had been reported, and when there are no legal causes supervening [*Contini v. Western Title Ins. Co. (1974) 40 Cal. App. 3d 536, 545-546, 115 Cal. Rptr. 257* ; *Banville v. Schmidt (1974) 37 Cal. App. 3d 92, 104-105, 112 Cal. Rptr. 126* (forseeable intervening causes not superseding)]. Whether a title abstractor's negligence is the proximate cause of resulting damages is ordinarily a question of fact [*Garton v. Title Ins. & Trust Co. (1980) 106 Cal. App. 3d 365, 380, 165 Cal. Rptr. 449]* .

[4] Preliminary Report and Abstract of Title Distinguished

Before the enactment of *Ins. Code § 12340.11* in 1981 [*see* [2], *above*], it could be difficult to distinguish between a preliminary title report and an abstract of title, and the courts sometimes treated the two reports identically [*see Garton v. Title Ins. & Trust Co. (1980) 106 Cal. App. 3d 365, 380-381, 165 Cal. Rptr. 449]* . However, the enactment of that section, together with extensive revisions in the standard preliminary report form approved by the California Land Title Association, have more sharply delineated the differences between these documents.

The CLTA Preliminary Report Form (Rev. 1-1-95) states on its face that it is issued solely for the purpose of facilitating the issuance of a policy of title insurance and that no liability is assumed by the report. It also states that if it is desired that liability be assumed before the issuance of a title insurance policy, a binder or commitment should be requested [California Land Title Association, Policy & Indorsement Forms Book (Revised ed. 1971), Section E, Form 1]. This language makes it all but impossible to treat a properly drafted preliminary title report as an abstract of title, or to impose liability for abstractor's negligence on a title company who prepares and issues such a report [*see* California Insurance Law and Practice, Ch. 39, *Title Insurance* (Matthew Bender); California Real Estate Law and Practice, Ch. 92. *Title Insurance* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceObligationsDisclosureInsurance LawProperty InsuranceTitle InsuranceReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityMarketable TitleAbstractsTortsBusiness TortsFraud & MisrepresentationNegligent MisrepresentationGeneral Overview

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§ 548.29 Title Insurer's Liability for Refusal to Insure Property Acquired by Tax Deed

The California Supreme Court has held that under certain circumstances, a title insurer could incur liability for the categorical refusal to issue title insurance with respect to property acquired by tax deed, that is, property that defaults to the state for failure to pay assessed taxes, then is transferred to a private buyer. Reversing a court of appeal decision sustaining demurrers in favor of the title insurance companies, the Supreme Court held that the buyer of property pursuant to a tax-sale deed could possibly state causes of action against title insurers for unfair competition and intentional interference with contractual relations based on this conduct [*Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 42, 77 Cal. Rptr. 2d 709, 960 P.2d 513]* .

Insurers who conspire to deny title insurance for tax-defaulted parcels may be in violation of the Cartwright Act (*Bus. & Prof. Code § 16720*) for restraint of trade. Although the Supreme Court acknowledged that an insurer has no duty to do business with, or to issue a policy of insurance to any applicant, a title insurer may incur liability for conspiring with other title insurers to deny title insurance on titles derived from tax deeds [*Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 48-51, 77 Cal. Rptr. 2d 709, 960 P.2d 513]* .

Bus. & Prof. Code § 16720 prohibits a "trust," defined as "acts by two or more persons... to create or carry out restrictions in trade or commerce." Insurance is commerce within the meaning of that statute. Although refusing to sell a product to a consumer does not itself violate the Cartwright Act, when that refusal is the result of a combination, agreement, or conspiracy to make that product unavailable in a given market, a prohibited restraint of trade may be found [*Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 48-51, 77 Cal. Rptr. 2d 709, 960 P.2d 513]* . The Court noted that among other complaint allegations in this case, an allegation that the title insurers "manipulated" the market by first representing that insurance is necessary, and then refusing to issue it on tax-deeded parcels, implies a purpose to restrain trade in, and depress the market of that property [*Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 50, 77 Cal. Rptr. 2d 709, 960 P.2d 513]* .

In so holding, the Supreme Court reaffirmed its decision that the Unfair Insurance Practices Act (*Ins. Code § 790 et seq.*) is not the exclusive remedy against insurers for unfair business practices, and that rights and remedies applicable to businesses generally, including the Cartwright Act, apply to insurance companies [*Quelimane Co. v. Stewart Title Guar.Co. (1998) 19 Cal. 4th 26, 42-51, 77 Cal. Rptr. 2d 709, 960 P.2d 513* ; *see Manufacturers Life Ins. Co. v.*

Superior Court (1995) 10 Cal. 4th 257, 267, 41 Cal. Rptr. 2d 220, 895 P.2d 56] . The exclusivity provisions applicable specifically to title insurance companies on which the court of appeal erroneously relied, are relevant only to rate-making activities [*Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 42-51, 77 Cal. Rptr. 2d 709, 960 P.2d 513* ; *see Ins. Code §§ 12414.26, 12414.29*].

The Supreme Court also held that a title insurer may incur liability for false advertising by representing that it will issue title insurance on any property with title, and then refusing to insure tax deeds [*Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 54-55, 77 Cal. Rptr. 2d 709, 960 P.2d 513* ; *see Bus. & Prof. Code §§ 17200, 17500-17581*].

Furthermore, a cause of action for intentional interference with an existing contract may be stated by pleading the following elements [*Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 45, 77 Cal. Rptr. 2d 709, 960 P.2d 513* ; *see also* California Torts, Ch. 40, *Fraud, Deceit and Other Business Torts* (Matthew Bender)]:

- A valid contract between plaintiff and a third party;
- Defendant's knowledge of that contract;
- Defendant's intentional acts designed to induce a breach or disruption of the contractual relationship;
- Actual breach or disruption of the contractual relationship; and
- Resulting damage.

The California Supreme Court has held that a plaintiff (in this case, a financial institution) may state a cause of action for this tort against a title insurer by alleging that: (1) the plaintiff had a contract with a prospective purchaser regarding tax-deeded property; (2) the defendant had knowledge of the contract (in this case, impliedly, by refusing to issue a title insurance policy unless the purchaser initiated a quiet title action); (3) the purchaser then failed to complete payment for the property, i.e., that disruption of the contractual relationship occurred; (4) the plaintiff incurred damages in the lost benefits of the transactions and related legal costs; and (5) specifically, that "defendants ... have deliberately, willfully, and intentionally interfered with the contractual relations of purchasers of land and sellers who are members of the public owning land purchased through a tax sale, including, but not limited to, Plaintiffs herein" [*Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 56 57, 77 Cal. Rptr. 2d 709, 960 P.2d 513]* .

The Supreme Court, however, refused to hold that a title insurer may be liable for negligence for the categorical refusal to provide insurance with respect to tax-defaulted property. The Court noted that no special relationship exists between the property owner and the title insurer giving rise to a duty to issue a policy of title insurance to a member of the public purchasing that property. Further, the insurers have no duty to the property owner to ensure that it does not suffer financial losses in its efforts to sell the property [*Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 59 60, 77 Cal. Rptr. 2d 709, 960 P.2d 513* ; *see also* California Torts, Chs. 1, 4 (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawPrivate ActionsCosts & Attorney FeesState RegulationInsurance LawProperty InsuranceObligationsGeneral OverviewInsurance LawProperty InsuranceTitle InsuranceReal Property LawTitle QualityGeneral OverviewTax LawState & Local TaxesReal Property TaxCollectionTax Deeds & Tax Sales

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[Reserved]

§§ 548.30[Reserved]

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§ 548.40 Matthew Bender Publications

[1] California Points and Authorities

For memoranda of points and authorities relating to contracts generally, see California Points and Authorities, Ch. 50, *Contracts*

For memoranda of points and authorities relating to damages in contract actions generally, see California Points and Authorities, Ch. 65, *Damages*

For memoranda of points and authorities relating to decalaratory relief, see California Points and Authorities, Ch. 67, *Declaratory Relief*

For memoranda of points and authorities relating to actions involving insurance, see California Points and Authorities, Ch. 120, *Insurance*

For memoranda of points and authorities relating to actions involving defects in or encumbrances on real estate titles, see California Points and Authorities, Ch. 198, *Quieting Title* , and Ch. 230, *Trust Deeds and Real Property Mortgages*

[2] California Legal Forms

For discussion and forms relating to title insurance, see California Legal Forms, Ch. 26A, *Title Insurance* (Matthew Bender)

[3] California Real Estate

For discussion and forms relating to title insurance, see California Real Estate Law and Practice, Ch. 92, *Title Insurance* (Matthew Bender)

[4] California Insurance Law and Practice

For discussion and forms relating to title insurance, see California Insurance Law & Practice, Ch. 39, *Title Insurance* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureRemediesDamagesGeneral OverviewContracts LawGeneral OverviewInsurance LawGeneral OverviewInsurance LawProperty InsuranceTitle InsuranceReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 548.41 State Statutes

[1] In General

Buyer's Choice Act. *Civ. Code § 1103.20, et seq.*

Seller of residential property (four or fewer dwellings) prohibited from requiring as condition of selling property, that title insurance covering property or escrow service be purchased by buyer from particular title insurer or escrow agent. *Civ. Code § 1103.22*

General provisions governing business of title insurance. Ins. Code. §§ 12340-12418

[2] Definitions

Title insurance. *Ins. Code § 12340.1*

Title insurance policy. *Ins. Code § 12340.2*

Business of title insurance. *Ins. Code § 12340.3*

Title insurer. *Ins. Code § 12340.4*

Abstract of title. *Ins. Code § 12340.10*

Preliminary title report, commitment, or binder. *Ins. Code § 12340.11*

[3] Preliminary Title Searches

Abstract of title distinguished from preliminary title report, commitment, or binder. *Ins. Code §§ 12340.10, 12340.11*

Preliminary title report, commitment, or binder does not represent condition of title. *Ins. Code § 12340.11*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsBindersInsurance LawProperty InsuranceTitle InsuranceReal Property LawTitle QualityMarketable TitleAbstracts

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§ 548.42 Decisions

Title insurer that categorically refuses to issue title insurance with respect to property acquired by tax deed may, depending on its business practices, be liable to purchaser of tax-deeded property for unfair competition and intentional interference with contractual relations. *Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 42, 77 Cal. Rptr. 2d 709, 960 P.2d 513*

Title insurance policy that excluded water rights excluded only unrecorded water rights and not recorded water rights. *White v. Western Title Ins. Co. (1985) 40 Cal. 3d 870, 880-882, 221 Cal. Rptr. 509, 710 P.2d 309*

Ambiguities in title insurance policy are construed against insured, and policy is to be construed so as to fulfill reasonable expectations of insured. *White v. Western Title Ins. Co. (1985) 40 Cal. 3d 870, 880-882, 221 Cal. Rptr. 509, 710 P.2d 309*

Provisions of *Ins. Code § 12340.1* defining preliminary report are inapplicable to preliminary reports issued before statute's effective date of January 1, 1982. *White v. Western Title Ins. Co. (1985) 40 Cal. 3d 870, 883-884, 221 Cal. Rptr. 509, 710 P.2d 309*

Clauses relating to exclusions from or exceptions to title insurance policy construed strictly against insurer and liberally in favor of insured so as to satisfy public's and insured's reasonable expectations under policy. *Paramount Props. Co. v. Transamerica Title Ins. Co. (1970) 1 Cal. 3d 562, 569, 83 Cal. Rptr. 394, 463 P.2d 746*

Title insurance insures losses suffered by reason of liens or encumbrances on, or defects in title to property; invalidity or unenforceability of liens or encumbrances on land; or incorrectness of searches relating to title. *First American Title Ins. Co. v. XWarehouse Lending Corp. (2009) 177 Cal. App. 4th 106, 113, 98 Cal. Rptr. 3d 801*

In California, domestic title insurers may issue title policies and may also insure: (1) identity, due execution, and validity of any note or bond secured by mortgage; (2) identity, due execution, validity, and recording of any mortgage; or (3) identity, due execution, and validity of evidences of indebtedness issued by California, or by any political

subdivision or district, or by any private or public corporation. *Title Ins. Co. v. XWarehouse Lending Corp. (2009) 177 Cal. App. 4th 106, 113 n.5, 98 Cal. Rptr. 3d 801* (citing *Ins. Code § 12390*)

Title insurance is contract for indemnity under which insurer is obligated to indemnify insured against losses sustained in event that specific contingency, e.g., discovery of lien or encumbrance affecting title, occurs; when contingency insured against under policy occurs, title insurer is not, by that fact alone, liable to insured for damages in contract or tort, but rather is obligated to indemnify insured under terms of policy. *Title Ins. Co. v. XWarehouse Lending Corp. (2009) 177 Cal. App. 4th 106, 113, 98 Cal. Rptr. 3d 801*

When insured is defined as owner of indebtedness secured by insured mortgage, and each successor to ownership of indebtedness, there must have been valid underlying indebtedness in existence for title insurer to be liable under policy; because there was no transfer of funds between mortgage group and named borrowers that created indebtedness secured by insured mortgage, victim of mortgage group's fraud did not meet definition of insured under title insurance policies. *Title Ins. Co. v. XWarehouse Lending Corp. (2009) 177 Cal. App. 4th 106, 116-117, 98 Cal. Rptr. 3d 801*

Arbitration clause in title insurance policy unenforceable if arbitration was not mentioned in preliminary title report and if that report referred to policy different than one actually issued by insurer; arbitration clause not incorporated by reference into preliminary report and not binding on insured; however, remaining provisions of policy that were included in preliminary report are valid. *Kleveland v. Chicago Title Ins. Co. (2006) 141 Cal. App. 4th 761, 765, 46 Cal. Rptr. 3d 314*

"Lien protection" insurance, offered by mortgage guaranty carrier as "less expensive alternative to title insurance" protecting lenders from borrower's default for range of losses, including "losses due to undisclosed liens," was actually title insurance, which only title insurance carriers permitted to sell. *Radian Guar., Inc. v. Garamendi (2005) 127 Cal. App. 4th 1280, 1288-1293, 26 Cal. Rptr. 3d 464*

Recording of "notice of buildings, structures, or premises classified as either hazardous, substandard or a nuisance" did not constitute defect in or lien or encumbrance on title, nor did it cause title to be unmarketable under CLTA standard policy. *Elysian Inv. Group v. Stewart Title Guar. Co. (2002) 105 Cal. App. 4th 315, 321-324, 129 Cal. Rptr. 2d 372*

Title insurance policy issued to mortgage lender providing coverage for losses caused by dishonest or fraudulent acts of employees, but requiring that those employees gain financial benefit of at least $2,500, did not provide coverage for losses to lender based on employees' fraud because lender provided no proof of $2,500 minimum gain; losses also not covered bysecond title insurer covering only defect in title. *Mortgage Assocs., Inc. v. Fid. & Deposit Co. of Md. (2002) 105 Cal. App. 4th 28, 33-38, 129 Cal. Rptr. 2d 365*

Title policy insuring lack of right of access to insured's property did not cover lack of physical or practical access; because insured owned parcels adjacent to parcel in question, insured had access from adjacent parcels, although insured had no easement through third-party's property, which provided the only vehicular access to and from public street. *Magna Enters. v. Fidelity Nat'l Title Ins. Co. (2002) 104 Cal. App. 4th 122, 125-127, 127 Cal. Rptr. 2d 681*

Title insurer had no duty to defend action to quiet title in private road used by insured as means of ingress and egress to their lots, because policy applied only to land described in policy, road was not included in description, and policy explicitly did not cover any interest in abutting streets or roads. *Havstad v. Fidelity Nat'l Title Ins. Co. (1997) 58 Cal. App. 4th 654, 658-661, 68 Cal. Rptr. 2d 487*

Title insurer had no duty to defend action brought by junior lienholder for declaration that its trust deeds had priority over insured's trust deeds, because action arose out of events occurring after title insurance policy was issued. *Rosen v. Nations Title Ins. Co. (1997) 56 Cal. App. 4th 1489, 1493-1502, 66 Cal. Rptr. 2d 714*

Two-year statute of limitations under *Code Civ. Proc. § 339(1)* is equitably tolled while insurer determines whether to honor or reject timely filed claim under policy. *Forman v. Chicago Title Ins. Co. (1995) 32 Cal. App. 4th 998, 999-1000, 38 Cal. Rptr. 2d 790*

Cause of action for abstractor's negligence accrued in 1970 when property owners sent letter to title insurance company expressing concern that then-recent title policy indicated possible existence of municipal rights in property that did not appear in previous policy, not in 1989 when city claimed ownership of portion of property. *Herbert A. Crocker & Co. v. Transamerica Title Ins. Co (1994) 27 Cal. App. 4th 1722, 1728-1730, 33 Cal. Rptr. 2d 313*

Purchaser's cause of action against title insurance company accrued when purchaser of New Jersey condominium unit discovered that tenant of property had protected status under New Jersey law (when underlying New Jersey suit was filed), and statute of limitations began to run at that time; purchaser's failure to make demand under policy or commence action against title insurer within two years thereafter resulted in action being barred by applicable statute of limitations under *Code Civ. Proc. § 339(1)*; subsequent commencement of action within nine months after title insurer ultimately denied coverage did not preserve cause of action. *Tabachnick v. Ticor Title Ins. Co.(1994) 24 Cal. App. 4th 70, 77, 29 Cal. Rptr. 2d 59*

Recorded conditional use permit not excluded from coverage as zoning because conditional use permit is not law of general application and only applies to specific property. *Delaware v. Continental Land Title Co. (1993) 16 Cal. App. 4th 992, 1001-1002, 20 Cal. Rptr 2d 438*

Title insurer liable for bad faith denial of coverage without investigation, when insurer's recordation of wild deed caused necessity of litigation. *Stalberg v. Western Title Ins. Co. (1991) 230 Cal. App. 3d 1223, 1223, 282 Cal. Rptr. 43*

When lender is insured, damages are incurred only when property is sold and security is inadequate to repay lender. *Cale v. Transamerica Title Ins. (1990) 225 Cal. App. 3d 422, 426-428, 275 Cal. Rptr. 107*

Title insurance company that failed to report prior lien held liable only for payment of difference between amount insured received at foreclosure sale and full amount of loan, interest, and costs. *Lawrence v. Chicago Title Ins. Co. (1987) 192 Cal. App. 3d 70, 75, 237 Cal. Rptr. 264*

Title insurance company not liable for punitive damages for negligently disbursing funds in breach of fiduciary duty, when evidence failed to show conscious disregard for plaintiff's rights. *Flyer's Body Shop Profit Sharing Plan v. Ticor Title Ins. Co. (1986) 185 Cal. App. 3d 1149, 1153-1155, 230 Cal. Rptr. 276*

Title insurer not liable for negligence to person whom insurer did not intend to influence by policy. *Smith v. Commonwealth Land Title Ins. Co. (1986) 177 Cal. App. 3d 625, 631, 223 Cal. Rptr. 339*

Ins. Code §§ 12340.10, 12340.11 are prospective only and are not applicable to title insurance policy issued prior to their effective date. *Glavinich v. Commonwealth Land Title Ins. Co. (1984) 163 Cal. App. 3d 263, 271-272, 209 Cal. Rptr. 266*

Title insurance policy covering junior trust deed does not cover loss due to subsequent nonjudicial foreclosure of senior trust deed; recordation of notice of default and notice of sale under senior trust deed neither makes junior trust deed unmarketable nor constitutes defect in, or encumbrance on junior trust deed. *Glavinich v. Commonwealth Land Title Ins. Co. (1984) 163 Cal. App. 3d 263, 269-270, 209 Cal. Rptr. 266*

Insurer has no duty to defend if defect on which suit is based is clearly outside scope of policy. *Safeco Title Ins. Co. v. Moskopoulos (1981) 116 Cal. App. 3d 658, 664-665, 172 Cal. Rptr. 248* (suitrelating to tortious manner of acquiring

insured title rather than to title itself)

Third parties not named in policy as third party beneficiaries are not entitled to recover under policy. *Kenny v. Safeco Title Ins. Co. (1980) 113 Cal. App. 3d 557, 561-562, 169 Cal. Rptr. 808* ; *Walters v. Marler (1978) 83 Cal. App. 3d 1, 33, 147 Cal. Rptr. 655*

Insured has tort action for breach of implied covenant of good faith and fair dealing when insurer breached policy; wrongful refusal to quiet title when notified of potential defect is bad faith breach. *Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 940, 122 Cal. Rptr. 470*

Insured entitled to recover diminution in market value of property caused by title defect, up to policy limits; diminution in value measured at time when defect is discovered. *Overholtzer v. Northern Counties Ins. Co. (1953) 116 Cal. App. 2d 113, 130, 253 P.2d 116*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawClaims & ContractsPolicy InterpretationGeneral OverviewInsurance LawProperty InsuranceObligationsDefenseInsurance LawProperty InsuranceTitle InsuranceInsurance LawProperty InsuranceTitle Insurance ExclusionsReal Property LawTitle QualityGeneral Overview

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48-548 California Forms of Pleading and Practice--Annotated § 548.43

§ 548.43 Law Reviews

Note, *Common-Law Bad Faith in White v. Western Title Insurance Co: The Duty Continues, 21 Loy. L.A. L. Rev. 399 (1987)*

Comment, *Title Insurance and Railroad Rights of Way: Caveat Emptor! 12 Pac. L.J. 1099 (1981)*

Curtis, *Title Assurance in Sales of California Residential Realty: A Critique of Title Insurance and Title Covenants With Suggested Reforms, 7 Pac. L.J. 1 (1976)*

Tuohey, *Negligent Infliction of Emotional Distress Arising From a Breach of Contract: Jarchow v. Transamerica Title Insurance Company, 8 Sw. U. L. Rev. 655 (1976)*

Note, *Jarchow v. Transamerica Title Insurance Company: A Trend Toward Strict Liability for Emotional Distress in the Insurance Industry, 12 Cal. W. L. Rev. 591 (1976)*

Egan, *Title Insurance for Condominiums, 14 Hastings L.J. 210 (1963)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawBad Faith & Extracontractual LiabilityRemediesEmotional Distress DamagesInsurance LawProperty InsuranceTitle InsuranceReal Property LawTitle QualityGeneral OverviewTortsIntentional TortsIntentional Infliction of Emotional DistressRemedies

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48-548 California Forms of Pleading and Practice--Annotated § 548.44

§ 548.44 Text References

Miller & Starr, Current Law of California Real Estate, Vol. 2, Ch. 12, *Title Insurance and Escrows*, §§ 12:1-12:82

Witkin, Summary of California Law, Vol. 12, *Real Property*, §§ 352-368 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawProperty InsuranceTitle InsuranceReal Property LawGeneral OverviewReal Property LawPurchase & SaleEscrowReal Property LawTitle QualityGeneral Overview

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[Reserved]

§§ 548.45[Reserved]

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48-548 California Forms of Pleading and Practice--Annotated § 548.50

§ 548.50 Complaint for Damages [Civ. Code §§ 3300, 3302]--Breach of Insurance Policy Agreement--Action by Insured Against Insurer for Indemnity

[1] FORM Complaint for Damages [Civ. Code §§ 3300, 3302]--Breach of Insurance Policy Agreement--Action by Insured Against Insurer for Indemnity

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____[*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Breach of Insurance Contract)
[and DOES 1 through _____,]	)	[LIMITED CIVIL CASE]
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	

_____

Plaintiff alleges:

1. Defendant_____[*name*] is, and at all times mentioned herein was, a corporation duly organized and existing under the laws of the State of California, [with its principal place of business in this state situated in _____ County,] and authorized [by the California Insurance Commissioner] to engage in and engaging in the business of insuring title to real property in the State of California.

[2. Defendants Doe 1 through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. (Plaintiff is informed and believes and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged,

and that plaintiff's damages as herein alleged were proximately caused by those defendants.)]

3. On_____[*date*], in _____ County, California, defendant, for a valuble consideration, issued to plaintiff its written policy of title insurance No. _____, a copy of which is attached hereto, marked Exhibit "A," and made a part hereof.

4. By the express terms of the above-mentioned policy, defendant insured plaintiff against any loss or damage sustained or incurred by plaintiff, not exceeding $_____, by reason of _____ [*specify pertinent risks covered by policy, e.g.* any defect in, lien or encumbrance on, orunmarketablility of the title] to a _____ [*specify nature of estate or interest insured, e.g.*, fee estate in] the real property described in the policy held at the date of the above mentioned policy by plaintiff['s mortagagee]. The real property referred to in the policy is located in _____ County, California, and is more particularly described in the policy as follows:_____[*give description of property*].

5. [*Allege occurrence of contingency insured against. See § 548.51 for choice of appropriate allegations that may be inserted here*.]

6. The occurrence of the above-described _____ [defect *or specify other covered risk*] is covered by the above-described policy pursuant to_____[*specify provisions of policy showing coverage*] of the policy.

7. Plaintiff discovered the facts giving rise to the loss, as described below, by reason of the above-described _____ [defect *or specify other covered risk*] on or about_____[*date*].

[*EITHER*]

8. On_____[*specify date showing prompt notification of insurer after discovery of defect or substantial damage*], plaintiff notified defendant in writing of the loss as required by the above-described policy.

[*OR*]

8. _____ [*Specify facts showing waiver of prompt notice requirement by defendant, e.g.,* On _____ (*date*), plaintiff orally informed defendant of the above-mentioned loss and the facts giving rise to it and defendant did not at this or any subseqent time inform plaintiff that the oral notification was inadequate].

[*CONTINUE*]

9. Plaintiff has performed each and every act and thing required by plaintiff to be performed under the terms and conditions of the above-mentioned policy.

[*EITHER*]

10. At the time when plaintiff discovered the above-described _____ [defect *or specify other covered risk*], plaintiff's interest in the above-described property had a reasonable value of $_____. As a proximate result of the existence of the above-described _____ [defect *or specify other covered risk*], the value of plaintiff's interest in the property has been reduced to $_____.

[*OR*]

10. Plaintiff was compelled to pay out a sum of $ _____ in order to _____ [*specify action to remove defect, e.g.*, satisfy the tax lien against the insured property].

[*CONTINUE*]

11. At the time of the filing of this action, defendant has not quieted or perfected plaintiff's title to the above-described property so as to eliminate or mitigate plaintiff's losses as described above, and defendant has refused to indemnify plaintiff for plaintiff's above-described losses under the terms of the above-mentioned policy.

[12. In refusing to fulfill its obligations under the above-described policy, defendant acted in violation of the covenant of good faith and fair dealing that is implied by law in the above-mentioned policy.]

[13. In committing the acts described in this complaint, defendant(s), and each of them, acted in conscious disregard of the rights of plaintiff(s) and others and were guilty of _____ (malice *and/or* oppression *and/or* fraud) in that _____ (*specify facts constituting malice, oppression, or fraud*). The conduct of defendant(s) warrants an assessment of punitive damages in an amount appropriate to punish defendant(s) and deter others from engaging in similar wrongful conduct.]

[14. As a proximate result of defendant's conduct, plaintiff has suffered emotional distress in that _____ (*describe nature of emotional distress*), all to plaintiff's damage.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the sum of $_____[*specify amount of insured's covered losses, up to policy limit*] with interest thereon at the legal rate from and after_____[*specify date on which plaintiff became entitled to indemnity*], until paid;

[2. For general damages;]

[3. For exemplary or punitive damages;]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I,_____[*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of complaint is for use by an insured under a real property title insurance policy in an action against the title insurer to recover under the policy when a defect in the title or other contingency covered by the policy has been discovered and the insurer has refused to indemnify the insured for the loss. For discussion of coverage under the CLTA Standard Coverage Policy (1990), the ALTA Loan Policy (10-17-92), and the ALTA Owner's Policy (10-17-92), see *§§ 548.14* and *548.15*. Counsel should insert the specific pertinent risks insured against by the policy into Paragraph 4 of this form. For sample allegations of such title defects or other facts giving rise to covered losses, see *§ 548.51*.

If the insurer ultimately perfected the insured title, this form may be combined with a form of allegation stating that the insurer delayed unreasonably in perfecting title [*see § 548.52*]. If the insurer has refused to defend the insured title as required by the policy, this form may also be combined with a form of complaint against a title insurer for breach of its duty to defend [*see § 548.53*].

[3] Allegations

The form alleges:

- Capacity and location of defendant (Paragraph 1).
- Fictitious defendant allegation (Paragraph 2).
- The issuance of a title insurance policy (Paragraph 3).
- The coverage of the policy and the policy limits (Paragraph 4).
- The occurrence of a defect or other contingency insured against (Paragraph 5).
- That the alleged contingency is covered by the policy (Paragraph 6).
- The date on which plaintiff discovered facts giving rise to the claimed loss (Paragraph 7).
- Plaintiff's compliance with conditions of policy (Paragraphs 8 and 9) [*Wilson v. Pacific Coast Title Ins. Co. (1951) 106 Cal. App. 2d 599, 603, 235 P.2d 431]* .
- The losses resulting from the occurrence of the covered defect or other contingency (Paragraph 10) [*see Overholtzer v. Northern Counties Ins. Co. (1953) 116 Cal. App. 2d 113, 130, 253 P.2d 116]* .

- Defendant's failure to perfect title or indemnify plaintiff for the losses (Paragraph 11).

As an optional allegation, for use if plaintiff is seeking damages for bad faith breach, punitive damages, or damages for emotional distress, the form also alleges:

- Defendant's violation of an implied-in-law covenant of good faith and fair dealing (optional Paragraph 12) [*Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 940, 122 Cal. Rptr. 470]* .

- Malice, fraud, or oppression by defendant (optional Paragraph 13) [*Civ. Code § 3294*].

- Emotional distress resulting from defendant's conduct (optional Paragraph 14) [*Jarchow v. Transamerica Title Ins. Co. (1975) 48 Cal. App. 3d 917, 940, 122 Cal. Rptr. 470]* .

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

The superior court has jurisdiction of the action, which is classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it is classified as a limited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86*].

In limited civil cases, the caption must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

In a breach of contract action, proper venue is in the county where the defendant resides, where the contract was to be performed, or where the contract was entered into. The county in which the obligation was incurred shall be deemed to be the county in which it is to be performed unless there is a special contract writing to the contrary [*see Code Civ. Proc. § 395(a)*]. If the defendant in the contract action is a corporation, the action may also be brought in the county in which the corporation has its principal place of business [*see Code Civ. Proc. § 395.5*].

[6] Exemplary Damages

No claim for punitive damages may state an amount sought regardless of thenature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, as well as fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to contracts generally, see Ch. 140, *Contracts*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to insurance generally, see Ch. 308, *Insurance*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

For discussion relating generally to defects in or encumbrances on real estate titles, see the following chapters:

Ch. 240, *Easements*

Ch. 342, *Liens and Wage Preferences*

Ch. 482, *Quieting Title*

Ch. 555, *Trust Deeds and Real Property Mortgages*

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48-548 California Forms of Pleading and Practice--Annotated § 548.51

§ 548.51 Allegations--Examples of Particular Risks Covered by Policy

[1] FORM Allegations--Examples of Particular Risks Covered by Policy

[*EITHER, if recorded defect, lien, or encumbrance exists that is not excepted by policy*]

1. On_____[*date*],[*specify date of policy's issuance*], there was of record in the Office of the Recorder of _____ County, California, recorded on_____[*date*], in Book _____ at page _____ of the Official Records of the above-named county, a[n] _____ [*specify defect, lien, or encumbrance on record, e.g.,* deed conveying to Acme Gas and Electric Corporation, an electrical power company, an easement for the erection of power lines and towers across the insured property described in this complaint].

[*OR, if defect, lien, or encumbrance excepted to in policy does not exist as described*]

1. The title insurance policy described in this complaint excepts from coverage in Schedule B a[n] _____ [*specify defect, lien, or encumbrance excepted from coverage, e.g.,* easement for the erection of telephone transmission lines owned by Beta Telephone Corporation, a telephone transmission company]. However, the _____ [*specify defect, lien, or encumbrance excepted from coverage, e.g.,* easement] does not in fact exist as described in the policy, but instead is _____ [*describe how defect, lien, or encumbrance is held differently than as excepted in the policy, e.g.,* owned by Acme Gas and Electric Corporation, for the purpose of erecting power lines and towers across the insured property, as recorded in the Office of the Recorder of _____ County, California, on_____[*date*], in Book _____ at page _____ of the Official Records of the above-named county].

2. The _____ [*specify defect, lien, or encumbrance not excepted from coverage, e.g.,* easement owned by Acme Gas and Electric Corporation], as described above, constitutes a greater detriment to the value of plaintiff's

interest in the property described in this complaint than would the _____ [*specify defect, lien, or encumbrance excepted from coverage, e.g.,* easement for the erection of telephone lines owned by Beta Telephone Corporation] in that _____ [*describe greater detriment, e.g.,* use of the easement by Acme Gas and Electric Corporation for construction of high power electrical transmission lines would constitute a greater impediment to plaintiff's use of the property than would use of the easement by Beta Telephone Corporation for construction of low power telephone transmission lines].

[*OR, if title not vested as described in policy*]

1. The title insurance policy mentioned in this complaint describes the title to be insured as _____ [*specify title described in policy, e.g.,* a joint tenancy held by plaintiff together with _____ (*name of cotenant*)]. Unbeknownst to plaintiff at the time of issuance of the policy mentionedin this complaint, plaintiff's title _____ [is *or* was] in fact _____ [*specify true title, e.g.,* a tenancy in common, held together with _____ (*name of cotenant*)].

[2. As a result of the fact that plaintiff held the above-described property as _____ (*specify true title, e.g.,* a tenant in common) rather than as _____ (*specify title described in policy, e.g.,* a joint tenant), _____ (*specify any loss resulting from title not being vested as described in the policy, e.g.,* one half of the interest in the property failed to pass to plaintiff on the death of _____ (*name of cotenant*), thus causing plaintiff to suffer damges in the sum of $ _____).]

[*OR, if all or part of insured property owned by another person*]

1. At the time of the issuance of the title policy mentioned in this complaint, [a portion of] the insured property described in the policy, as mentioned in this complaint, was in fact and unbeknownst to plaintiff owned by_____[*name of true owner of all or part of property*]. At the time the policy was issued, this defect was a matter of public record, having been recorded on_____[*date*], in Book _____ at page _____ of the Official Records in the Office of the Recorder of _____ County, California.

[2] Use of Form

This form alleges examples of specific title defects, liens, encumbrances, or the occurrence of other contingencies covered the CLTA Standard Coverage Policy (10-17-92), the ALTA Loan Policy (10-17-92), and the ALTA Owner's Policy (10-17-92) [for discussion, *see §§ 548.14* and *548.15*]. The sample allegations included in this form may be inserted, when appropriate, into Paragraph 5 of the general form of complaint for indemnification under a title insurance policy [*see § 548.50[1]*].

If the second alternative set of allegations is used, alleging that the title actually held is not vested as described in the policy, optional Paragraph 2 of this set concerning a resulting loss should be substituted for Paragraph 10 of the form in *§ 548.50[1]*.

For discussion of possible title defects or contingencies other than those set out in the form, see *§§ 548.14* and *548.15*. For discussion of risks excepted from coverage under the standard title insurance policies, see *§ 548.17*.

[3] Allegations

The first alternative set of allegations alleges the existence of a recorded defect, lien, or encumbrance that is not

excepted to by the policy (Alternative Paragraph 1) [*J. H. Trisdale, Inc. v. Shasta County Title Co (1956) 146 Cal. App. 2d 831, 835-836, 304 P.2d 832]* .

The second alternative set of allegations alleges the existence of a defect, lien, or encumbrance that is excepted to by the policy but that is, in fact, different from the policy description (Alternative Paragraph 1) [*see Overholtzer v. Northern Counties Ins. Co. (1953) 116 Cal. App. 2d 113, 116, 253 P.2d 116]* , and alleges the greater detriment resulting from this difference (Alternative Paragraph 2) [*J. H. Trisdale, Inc. v. Shasta County Title Co. (1956) 146 Cal. App. 2d 831, 835-836, 304 P.2d 832]* .

The third alternative set of allegations alleges that the insured title is, in fact, vested differently than as described in the policy (Alternative Paragraph 1), and alleges the losses incurred by the insured as a result (Alternative Paragraph 2) [*see Hall v. San Jose Abstract & Title Ins. Co. (1959) 172 Cal. App. 2d 421, 423-424, 430, 342 P.2d 362]* .

The fourth alternative set of allegations alleges that all or part of the insured property is owned by another person (Alternative Paragraph 1) [*see Lagomarsino v. San Jose Abstract & Title Ins. Co. (1960) 178 Cal. App. 2d 455, 3 Cal. Rptr. 80]* .

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§ 548.52 Allegations--Insurer Delayed Unreasonably in Perfecting Title

[1] FORM Allegations--Insurer Delayed Unreasonably in Perfecting Title

1. Defendant did not remove the above-described impediment in plaintiff's title until_____[*date*], _____ [*specify time elapsed since notice given of defect, e.g.,* over three years] after plaintiff notified defendant in writing of the existence of the impediment. During this period plaintiff incurred losses, which defendant had knowledge of, in the sum of $_____ as a result of the continued existence of the impediment in that _____ [*specify circumstances showing losses, e.g.,* plaintiff was compelled to pay maintenance expenses and taxes on improvements on the insured property but was prevented from collecting rents from the tenants or evicting the tenants for nonpayment of rent]. Defendant's delay in removing the impediment to plaintiff's title was not reasonable under the circumstances.

[2] Use of Form

This form is for use by a policy holder in an action against a title insurer to allege that the policy holder suffered loss as a result of an unreasonable delay by the title insurer in removing an impediment to the insured's title [*see Nebo, Inc. v. Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 222, 228, 98 Cal. Rptr. 237* ; for further discussion, *see § 548.20[4]*]. It may be incorporated into the form in *§ 548.50[1]*, the general form of complaint for indemnification under a title insurance policy, by replacing the allegation set forth in Paragraph 11 with this allegation, and by deleting the allegation set forth in Paragraph 10 to the extent that it is inconsistent with this allegation.

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48-548 California Forms of Pleading and Practice--Annotated § 548.53

§ 548.53 Complaint for Damages [Civ. Code § 3300]--Breach of Insurance Policy Agreement--Action by Insured Against Insurer for Failure to Defend Title

[1] FORM Complaint for Damages [Civ. Code § 3300]--Breach of Insurance Policy Agreement--Action by Insured Against Insurer for Failure to Defend Title

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Breach of Insurance
_____ [*name*], [and DOES 1	)	Contract)
through_____,]	)	[LIMITED CIVIL CASE]
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. [*Status and location of defendant. See § 548.50[1], Paragraph 1.*]

2. [*Fictitious defendant allegation. See § 548.50[1], Paragraph 2.*]

3. [*Issuance of title insurance policy by defendant. See § 548.50[1], Paragraph 3.*]

4. [*Terms of title insurance policy. See § 548.50[1], Paragraph 4.*]

5. The above-described policy provides that, upon written request by the insured, the defendant shall, at its own cost and

without unreasonable delay, provide for the defense of the plaintiff in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien, or encumbrance or other matter insured against by the policy.

6. On_____[*date*],_____[*name of third party that filed action against insured*] filed an action against plaintiff herein, asserting a claim adverse to the _____ [title *or* interest] as insured by the above-described policy and alleging that_____[*specify allegations based on defect in defendant's title to, or lien or encumbrance on, the insured property*]. Summons and a copy of_____[*name of third party that filedaction*]'s complaint were served on plaintiff herein on_____[*date*]. A copy of the complaint is attached hereto, marked Exhibit "B," and made a part hereof.

7. On_____[*date*] [*specify date within notification period set out in policy*], in accordance with the terms of the above-described policy, plaintiff notified defendant in writing of the action by_____[*name of third party suing plaintiff*] and requested that defendant defend the action.

8. The facts alleged in above-described complaint[, together with additional facts provided to defendant by plaintiff,] were sufficient, at the time when plaintiff made its demand to defendant that it defend the action, to raise the possibility that defendant is obligated by the above-described policy to defend plaintiff's title, in that _____ [*specify facts and circumstances showing possiblity of defendant's obligation to defend, e.g.,* the title defect alleged in the above-described complaint is covered by the policy, pursuant to _____ (*specify applicable policy provisions*), and the defect is not definitely within any exception to coverage set out in the policy].

9. Plaintiff has performed each and every act and thing required to be performed by plaintiff under the terms and conditions of the above-described policy.

10. _____ [On _____ (*date*), defendant informed plaintiff that it would not *or* Defendant has not responded to plaintiff's request that it] defend the above-described action on plaintiff's behalf. Defendant has taken no steps towards defending the above-described action on plaintiff's behalf.

11. As a proximate result of defendant's failure to defend the above-described action on plaintiff's behalf, plaintiff has had to defend the action on his/her own behalf, and has in doing so incurred $ _____ in reasonable and necessary legal fees and costs.

[12. After defending the above-described action in his/her own behalf, plaintiff has sustained a judgment against himself/herself in the above-described action, causing plaintiff to suffer damages in the sum of $ _____.]

[13. *Allegation of bad faith breach. See § 548.50[1], Paragraph 12.*]

[14. *If plaintiff is alleging bad faith breach and is seeking punitive damages, allegation of malice, fraud, or oppression. See § 548.50[1], Paragraph 13.*]

[15. *Allegation of emotional distress damages. See § 548.50[1], Paragraph 14.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For general damages in the sum of the sum of $ _____;

[2. For exemplary or punitive damages in the sum of $ _____;]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____[*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 548.50[1].*]

[2] Use of Form

This form of complaint is for use by the holder of a real property title insurance policy in an action against the title insurer for damages when the insurer has refused to defend the insured's title in an action by a third party. A title insurer has a duty to defend an action against the insured if (1) the action involves an alleged defect, lien, encumbrance, or other matter insured against by the policy; and (2) the insurer ascertains facts that raise the possibility that it is liable under the policy [CLTA Standard Coverage Policy (1990), ALTA Loan Policy (10-17-92), ALTA Owner's Policy (10-17-92), Conditions and Stipulations, P 4(a); *see Paramount Props. Co. v. Transamerica Title Ins. Co. (1970) 1 Cal. 3d 562, 571, 83 Cal. Rptr. 394, 463 P.2d 746* (duty to defend applies when question as to whether policy exception applies to defect raised by third-party action)]. A title insurer that defaults on its duty to defend under the title policy becomes liable for the expenses properly incurred by the insured in defending the title on its own [*Paramount Props. Co. v. Transamerica Title Ins. Co. (1970) 1 Cal. 3d 562, 571-572, 83 Cal. Rptr. 394, 463 P.2d 746]* . It also appears that a title insurer's wrongful refusal to defend automatically renders the insurer liable for any adverse judgment, even when the judgment was rendered on a theory not within the policy coverage [*see Kapelus v. United Title Guar. Co. (1971) 15 Cal. App. 3d 648, 653, 93 Cal. Rptr. 278]* .

This form may also be combined, when appropriate, with a form of complaint for indemnification pursuant to a titleinsurance policy for damages resulting from a cloud on the insured title [for a form, *see § 548.50*].

[3] Allegations

The form alleges:

- That the policy provides for the insured's duty to defend the insured title (Paragraph 5).
- An action by a third party alleging a defect in plaintiff's title (Paragraph 6).
- Plaintiff's written request that defendant defend the title (Paragraph 7).
- Facts known to defendant that raise the possibility of defendant insurer's obligation to defend under the policy (Paragraph 8) [*Paramount Props. Co. v. Transamerica Title Ins. Co. (1970) 1 Cal. 3d 562, 571, 83 Cal. Rptr. 394, 463 P.2d 746]* .

- Plaintiff's compliance with all conditions and terms of the policy (Paragraph 9).

- Defendant's refusal to defend the action (Paragraph 10).

- Expenses incurred by plaintiff in defending the action on its own behalf as damages (Paragraph 11) [*Paramount Props. Co. v. Transamerica Title Ins. Co. (1970) 1 Cal. 3d 562, 571-572, 83 Cal. Rptr. 394, 463 P.2d 746]* .

When appropriate, an optional allegation may be used to allege damages resulting from an adverse judgment against plaintiff after defending the third-party action on his or her own behalf (Paragraph 12) [*see Kapelus v. United Title Guar. Co. (1971) 15 Cal. App. 3d 648, 653, 93 Cal. Rptr. 278]* .

[4] Cross References

For general references relating to complaints, see *§ 548.50[6]*

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48-548 California Forms of Pleading and Practice--Annotated § 548.54

§ 548.54 Cross Complaint for Declaratory Relief [Code Civ. Proc. §§ 1060, 1061] by Insured Against Title Insurer for Declaration of Insurer's Duty to Defend and Indemnify Insured Against Quiet Title Action Brought by Third Party

[1] FORM Cross Complaint for Declaratory Relief [Code Civ. Proc. §§ 1060, 1061] by Insured Against Title Insurer for Declaration of Insurer's Duty to Defend and Indemnify Insured Against Quiet Title Action Brought by Third Party

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	
_____ [*name*],	)	
Defendant,	)	NO. _____
_____	)	CROSS COMPLAINT FOR DECLARATORY RE-
_____[*name*],	)	LIEF
Cross Complainant,	)	(Breach of Insurance
vs.	)	Contract)
_____ [*name*], [and DOES 1	)	
through_____,]	)	
Cross Defendant(s).	)	
	)	

_____

Defendant and cross complainant alleges:

1. Cross defendant_____[*name*] is, and at all times mentioned herein was, a corporation duly

organized and existing under the laws of the State of California[, with its principal place of business in this state situated in _____ County,] and authorized [by the California Insurance Commissioner] to engage in and engaging in the business of insuring title to real property in the State of California.

[2. Defendant and cross complainant is ignorant of the true names and capacities of cross defendants sued herein as DOES 1- _____, inclusive, and therefore sues these defendants by such fictitious names. Defendant and cross complainant will amend this complaint to allege their true names and capacities whenthese are ascertained. Defendant and cross complainant is informed and believes, and based thereon alleges, that each of the above-mentioned fictitiously named cross defendants is responsible in some manner, whether directly or by imputation, for the damages herein alleged.]

3. On_____[*date*], in _____ County, California, cross defendant, for a valuable consideration, issued to defendant and cross complainant its written policy of title insurance No. _____, a copy of which is attached hereto, marked Exhibit "A," and made a part hereof.

4. By the express terms of the above-mentioned policy, cross defendant insured defendant and cross complainant against any loss or damage sustained or incurred by cross complainant, not exceeding $ _____, by reason of _____ [*specify pertinent risks covered by policy, e.g.,* any defect in, lien or encumbrance on, or unmarketablility of the title] to _____ [*specify nature of estate or interest insured, e.g.,* a fee estate in] the real property described in the policy held at the date of the above-mentioned policy by defendant and cross complainant['s mortagagee]. The real property referred to in the policy is located in _____ County, California, and is more particularly described in the policy as follows:_____[*specify description of property*].

5. The above-mentioned policy provides that upon written request by the insured, the defendant shall, at its own cost and without unreasonable delay, provide for the defense of the plaintiff in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien, or encumbrance or other matter insured against by the policy.

6. On_____[*date*] _____[*name*], plaintiff herein, filed the above entitled action to quiet title against defendant and cross complainant, asserting a claim adverse to the _____ [title *or* interest] as insured by the above-described policy and alleging that _____ [*specify allegations based on defect in defendant and cross complainant's title to, or lien or encumbrance on, the insured property, e.g.,* plaintiff is the real owner of the above-mentioned property]. Summons and a copy of plaintiff's complaint were served on defendant and cross complainant on_____[*date*].

7. On_____[*date*] [*specify date within notification period set out in policy*], in accordance with the terms of the above-mentioned policy, defendant and cross complainant notified cross defendant in writing of the above entitled action and requested that cross defendant defend the action.

8. Cross complainant has performed each and every act and thing required to be performed by him/her under the terms and conditions of the policy.

9. _____ [On _____ (*date*), cross defendant informed cross complainant that it would not *or* Cross defendant has not responded to cross complainant's request that it] defend the above entitled action on defendant and cross complainant's behalf. Cross defendant has taken no steps towards defending the above entitled action on cross complainant's behalf.

10. A controversy exists between cross complainant and cross defendant relative to their legal rights and duties under the above-mentioned policy as to the following points: _____ [*state facts showing controversy, e.g.,*

Cross Complainant contends that the cause of action alleged in plaintiff's complaint herein is founded on an alleged defect, lien, or encumbrance insured against by the policy, and that therefore cross defendant is obligated to defend this action and indemnify cross complainant for any loss or damage that he/she may sustain in the action. Cross defendant contends that the cause of action alleged by plaintiff is not founded on an alleged defect, lien, or encumbrance insured against by the policy and that cross defendant is therefore not obligated to defend the action or indemnify cross complainant for any loss or damage that he/she may sustain in the action].

11. Cross complainant desires a judicial determination of his/her rights and duties and a declaration as to whether cross defendant is obligated under the above-mentioned policy to defend the action herein or to indemnify cross complainant for any losses resulting from the action.

12. A judicial determination of cross complainant's rights under the above-mentioned policy is necessary and appropriate at this time in order to avoid circuity and multiplicity of action that will otherwise result if cross defendant must defend the above entitled action and then bring a separate action against cross defendant on the policy.

WHEREFORE, defendant and cross complainant prays judgment against cross defendant as follows:

1. For a declaration of cross complainant's rights under the title insurance policy;

2. For a declaration that cross defendant is obligated to defend the action herein on behalf of cross complainant and to indemnify cross complainant for any loss or damage cross complainant may sustain in the action;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Defendant

and Cross Complainant

VERIFICATION

I,_____[*name*], am the cross complainant in the above-entitled action. I have read the foregoing cross complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____[*signature*]

[2] Use of Form

This form of cross complaint is for use by a defendant in a quiet title action to bring, as cross complainant, a cross action against his or her title insurer for a judicial determination that the title insurer is obligated to defend the principal action on the defendant's behalf and to indemnify the defendant for any loss suffered in the action [*see, e.g., Hansen v. Western Title Ins. Co. (1963) 220 Cal. App. 2d 531, 532, 33 Cal. Rptr. 668]* .

[3] Allegations

The form alleges:

- The capacity of cross defendant (Paragraph 1).
- A fictitious cross defendant allegation (Paragraph 2).
- The issuance of a title insurance policy by cross defendant to cross complainant (Paragraph 3).
- The coverage of the title insurance policy (Paragraph 4).
- The policy provision obligating cross defendant to defend the action on cross complainant's behalf (Paragraph 5).
- The filing of the action to quiet title against cross complainant's title (Paragraph 6).
- That cross complainant gave proper notice of the filing of the action to cross defendant and gave proper request to cross defendant that it defend the action on cross complainant's behalf (Paragraph 7).
- Cross complainant's performance of all duties and conditions under the policy (Paragraph 8).
- Cross defendant's refusal to defend the action on cross complainant's behalf (Paragraph 9).
- The existence of actual controversy as to whether cross defendant is required to defend action on cross complainant's behalf and to indemnify cross complainant for damages sustained in the action (Paragraph 10) [*see City of Alturas v. Gloster (1940) 16 Cal. 2d 46, 48, 104 P.2d 810* (actual controversy required for declaratory relief)].
- That cross complainant desires a declaration of his or her rights and duties under the policy (Paragraph 11) [*see Code Civ. Proc. § 1060*].
- That a present declaration of plaintiff's rights and duties is necessary and appropriate (Paragraph 12) [*see Code Civ. Proc. §§ 1060, 1061*].

[4] Cross References

For discussion and forms relating to declaratory relief actions generally, see Ch. 182, *Declaratory Relief*

For additional references relating to complaints generally, see *§ 548.50[6]*

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48-548 California Forms of Pleading and Practice--Annotated § 548.55

§ 548.55 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Insured Failed to Give Timely Written Notice of Adverse Claim of Loss

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Insured Failed to Give Timely Written Notice of Adverse Claim of Loss

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. The policy of title insurance issued to plaintiff by defendant provides that all of its provisions are subject to the Conditions and Stipulations set forth in the policy. A true and correct copy of that policy is attached hereto, marked Exhibit "A," and made a part hereof.

[*INCLUDE plaintiff failed to provide written notice:*]

2. Paragraph _____ [*number, e.g.,* 3] of the Conditions and Stipulations of that policy provides that _____ [*specify provisions requiring prompt written notice, e.g.,* the insured shall notify the insurer promptly in writing (i) in case of litigation in which a third party asserts a claim adverse to the title or interest as insured, (ii) in case the insured learns of any adverse claim or interest which might cause loss or damage for which the insurer might be liable under the policy, or (iii) if title to the estate or interest or the lien of the insured mortgage is rejected as unmarketable].

[*INCLUDE if plaintiff failed to provide proof of loss or damage:*]

3. Paragraph _____ [*number, e.g.,* 5] of the Conditions and Stipulations of that policy provides that _____ [*specify provisions requiring proof of loss or damage, e.g.,* each insured claimant must furnish a proof of loss or damage signed and sworn to by each insured within 90 days after the insured claimant ascertains facts

giving rise to the loss or damage. The proof of loss or damage must describe the defect in, or lien or encumbrance on the title, or other matter insured against by the policy that constitutes the basis of the loss or damage and must state, to the extent possible, the basis of calculating the amount of the loss or damage].

[*INCLUDE if plaintiff failed to provide written notice:*]

4. [Defendant is informed and believes and thereon alleges that] [P]plaintiff became aware on or about_____[*date*] that _____ [*specify facts requiring plaintiff to give prompt written notice, e.g.,* John J. White had initiated litigation asserting a claim adverse to the title or interest as insured *or* William R. Brown had asserted an adverse claim or interest to the title or interest as insured, which adverse claim might cause loss or damage for which the defendant might be liable under the policy *or* title to the estate or interest as insured was rejected as unmarketable]. Plaintiff did not provide defendant with written notice of this _____ [litigation *or* adverse claim or interest *or* rejection] until_____[*date*], or _____ [*specify time, e.g.,* more than 180 days] after becoming aware of it.

[*INCLUDE if plaintiff failed to provide proof of loss or damage:*]

5. [Defendant is informed and believes and thereon alleges that] [P]plaintiff ascertained the facts giving rise to the loss or damage complained of in the complaint on or about_____[*date*], in that plaintiff learned on or about that date that _____ [*specify facts requiring plaintiff to give prompt written notice, e.g.,* John J. White had initiated litigation asserting a claim adverse to the title or interest as insured *or* William R. Brown had asserted an adverse claim or interest to the title or interest as insured, which adverse claim might cause loss or damage for which the defendant might be liable under the policy *or* title to the estate or interest as insured was rejected as unmarketable]. Plaintiff did not provide defendant with a proof of loss or damage as required by the policy until[*date*] , or _____ [*specify length of time, e.g.,* more than 180 days] after ascertaining the facts giving rise to the loss or damage.

[*INCLUDE if plaintiff purported to provide oral notice:*]

6. When plaintiff purported to provide defendant with oral notice _____ [*specify facts of purported oral notice, e.g.,* that litigation had been commenced asserting a claim adverse to the title or interest as insured *or* that William R. Brown had asserted an adverse claim or interest to the title or interest as insured *or* that title to the estate or interest as insured had been rejected as unmarketable], defendant's _____ [employee *or* agent] promptly informed plaintiff that oral notice did not comply with the requirements of the policy and was not satisfactory to defendant.

[*CONTINUE:*]

7. Plaintiff's failure to provide defendant with _____ [written notice *or* proof of loss or damage *or* written notice and proof of loss or damage] as required by the policy has prejudiced defendant, in that _____ [*specify facts, e.g.,* defendant was thereby prevented from promptly investigating the facts of the matters alleged in the complaint and taking necessary action to establish the title].

[2] Use of Form

This form is an affirmative defense to a complaint by a title insurance policy holder against a title insurer for failure to

fulfill its obligations under the policy. The defense alleges that the plaintiff failed to comply with the written notice and proof of loss or damage requirements of the policy.

The CLTA Standard Coverage Policy (1990), the ALTA Loan Policy (10-17-92), and the ALTA Owner's Policy (10-17-92) all require the insured to promptly notify the insurer in writing in case of any litigation in which a third party asserts a claim adverse to the insured title that is insured against by the policy [Conditions and Stipulations, PP 3, 4(a)]. Prompt written notice is also required whenever knowledge comes to the insured of any claim of title or interest adverse to the title to the estate or interest, or the lien of the insured mortgage, and for which the insurer might be liable under the policy [Conditions and Stipulations, P 3]. Similarly, prompt written notice is required if title to the estate or interest, or the lien of the insured mortgage, is rejected as unmarketable. For discussion of these requirements, *§ 548.18*.

The policies also require the insured to furnish the insurer with a proof of loss or damage within 90 days after the insured ascertains facts giving rise to loss or damage covered by the policy. The proof of loss must be signed and sworn to by each insured claimant. It must describe the defect, lien, encumbrance, or other matter that constitutes the basis of loss or damage and must state, to the extent possible, the basis of calculating the amount of the loss or damage [Conditions and Stipulations, P 5]. For further discussion of these requirements, see *§ 548.18[3]*.

If the insurer is prejudiced by the failure of an insured to give prompt written notice or to furnish the required proof of loss or damage, the insurer's obligation to that insured under the policy, including any liability or obligation to defend, prosecute, or continue any litigation with regard to the matter or matters requiring proof of loss or damage, will terminate [Conditions and Stipulations, PP 3, 5].

If more than one affirmative defense is set out in the answer, each defense must be separately stated and numbered [*Code Civ. Proc. § 431.30(g)* (separate statement); *Cal. Rules of Ct., Rule 2.112* (separate numbering)]. If the complaint set out more than one cause of action, the affirmative defense must refer to the cause of action it is intended to answer [*Code Civ. Proc. § 431.30(g)*].

[3] Allegations

This form alleges:

- That the policy is subject to the Conditions and Stipulations set forth in it (Paragraph 1).
- The terms of the policy requirement for prompt written notice (Paragraph 2).
- The terms of the policy requirement for proof of loss or damage (Paragraph 3).
- That plaintiff failed to give the required prompt writtennotice (Paragraph 4).
- That the plaintiff failed to furnish the required proof of loss or damage (Paragraph 5).
- If plaintiff purported to give oral notice, that the plaintiff was advised that oral notice was inadequate (Paragraph 6).
- That defendant was prejudiced by plaintiff's failure to give the required notice and/or proof of loss or damage (Paragraph 7).

It may be appropriate in some cases to allege both failure to give written notice and failure to furnish proof of loss. In other cases, it may be appropriate to allege failure to give notice or failure to furnish proof of loss, but not both. The form may be modified as appropriate to the circumstances of the case. The allegations relating to oral notice should be

made only when the conforms to the facts of the case [*see Lagomarsino v. San Jose Abstract & Title Ins. Co. (1960) 178 Cal. App. 2d 455, 459-460, 3 Cal. Rptr. 80* ; *§ 548.18[4]*].

[4] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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48-548 California Forms of Pleading and Practice--Annotated § 548.56

§ 548.56 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Off-Record Defect Known to Insured Not Disclosed to Insurer

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Off-Record Defect Known to Insured Not Disclosed to Insurer

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. _____ [*Specify applicable policy provisions, e.g.,* Paragraph 3(a) of the Exclusions from Coverage] of the policy of title insurance issued by defendant to plaintiff expressly excludes from coverage, and provides that defendant will not pay loss or damage, costs, attorneys' fees or expenses which arise by reason of, any defects, liens, encumbrances, adverse claims or other matters not known to the defendant, not recorded in the public records at date of policy, but known to the plaintiff and not disclosed in writing to the defendant by the plaintiff prior to the date the plaintiff became an insured under the policy.

2. The _____ [defect *or* lien *or* encumbrance *or describe other matter*] alleged in Paragraph _____ of the complaint was notknown to the defendant and was not recorded in the public records at the date of policy,_____[*date*].

3. [Defendant is informed and believes and thereon alleges that] [T]he _____ [defect *or* lien *or* encumbrance *or describe other matter*] alleged in Paragraph _____ of the complaint was known to the plaintiff and not disclosed in writing to the defendant by the plaintiff prior to the date the plaintiff became an insured under the policy (Paragraph 3).

[2] Use of Form

This form of affirmative defense allegation is for use by a title insurer to include in an answer to a complaint by its policy holder based on the insurer's alleged failure to fulfill its obligations under the policy. The defense is based on the language of the CLTA Standard Coverage Policy (1990), the ALTA Loan Policy (10-17-92), and the ALTA Owner's

Policy (10-17-92), all of which exclude coverage for defects, liens, encumbrances, adverse claims, or other matters not known to the insurer, not recorded in the public records at the date of policy, but known to the insured claimant and not disclosed in writing to the insurer by the insured claimant prior to the date the insured claimant became an insured under the policy [Exclusions from Coverage, P 3(b)]. If the title insurance policy was procured for the insured by an agent, the form may be adapted to allege the agent's knowledge of and failure to communicate existence of the recorded title impediment [*see Vernon v. Title Guar. & Trust Co. (1935) 7 Cal. App. 2d 171, 174, 46 P.2d 191]* .

[3] Allegations

This form alleges:

- The terms of the applicable policy exclusion (Paragraph 1).

- That the defect, lien, encumbrance, adverse claim, or other matter complained of was not known to the insurer and was not recorded in the public records at the date of policy (Paragraph 2).

- That the defect, lien, encumbrance, adverse claim, or other matter was known to the plaintiff and not disclosed in writing to the defendant prior to the date the plaintiff became an insured under the policy.

[4] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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48-548 California Forms of Pleading and Practice--Annotated § 548.57

§ 548.57 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Off-Record Defect Ascertainable by Inspection or Inquiry

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Off-Record Defect Ascertainable by Inspection or Inquiry

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. _____ [*Specify provision of policy setting out exclusion of known defects, e.g.,* Schedule B] of the policy of title insurance issued by defendant to plaintiff expressly excludes from coverage any title defects not included in a public record that are ascertainable by inspection of the insured property or inquiry of the parties in possession. [_____ (*Specify part of policy containing definitions, e.g.,* Paragraph 1(h) of the Conditions and Stipulations of)] [T]he policy defines the term "public record" for purposes of the policy to mean those records that by law impart constructive notice of matters relating to the land.

2. As of_____[*date*],the date on which the alleged policy was issued, the _____ [*specify defect, e.g.,* adverse possession claim of _____ (*name of third party adverse possessor*)] did not appear in any public record that by law imparts constructive notice of its existence and was ascertainable by an inspection of the insured property.

[2] Use of Form

This form of affirmative defense allegation is for use by a title insurer for inclusion in an answer to a complaint by its policy holder based on the insurer's alleged failure to fulfill its obligations under the policy. The basis for the defense is that the alleged defect in title for which the policy holder claims indemnification is excluded from coverage because it is not part of any public record and is ascertainable by inspection of the insured property or inquiry of the parties in possession of it [*see Bothin v. California Title Ins. Co. (1908) 153 Cal. 718, 722-723, 96 P. 500* (claim of adverse possessor excluded from coverage]. It is assumed that the underlying policy is based on the CLTA Standard Coverage Policy (1990) or is an ALTA-based policy that excepts coverage for off-record defects [*see* [3], *below*].

[3] ALTA Standard Policies

In contrast to the CLTA Standard Coverage Policy (1990), the ALTA Loan Policy (10-17-92) and the ALTA Owner's Policy (10-17-92) do not automatically except off-record defects ascertainable by inspection or inquiry. Rather, the exception of these defects is optional, and therefore not all ALTA policies may contain such an exception [for discussion, *see §§ 548.13[4]* and *548.17*; *see also Kenny v. Safeco Title Ins. Co. (1980) 113 Cal. App. 3d 557, 560-562, 169 Cal. Rptr. 808]* .

[4] Allegations

This form alleges:

- The policy exclusion of off-record defects ascertainable by an inspection of the property or by inquiry (Paragraph 1); and

- The fact that the alleged defect was off-record and was ascertainable by inspection of the property or by inquiry of the parties in possession (Paragraph 2).

[5] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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48-548 California Forms of Pleading and Practice--Annotated § 548.58

§ 548.58 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Alleged Reduction in Value of Land Not Due to Title Defect

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Alleged Reduction in Value of Land Not Due to Title Defect

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. The title insurance policy alleged by plaintiff contains no provisions insuring the value of the land itself, but only insures against loss or damage sustained or incurred by reason of defects, liens, encumbrances, or other matters affecting plaintiff's title to the land.

2. The loss alleged by plaintiff in his/her complaint is the result of the independent conduct of _____ [*name of third party; e.g,* the municipality of _____ (*name*)] in _____ [*specify conduct of third party that rendered plaintiff's land valueless, e.g.,* approving a subdivision map without assessing costs for road building against property owners, thus rendering plaintiff's land valueless without street access]. This conduct does not constitute a defect, lien, encumbrance, or other matter affecting plaintiff's title to the land and thus is not covered by the title insurance policy.

[2] Use of Form

This form of affirmative defense allegation is for use by a title insurer for inclusion in an answer to a complaint by its policy holder based on the insurer's alleged failure to fulfill its obligations under the policy. The basis for the defense is that the alleged loss, for which the policy holder claims indemnification, is not covered because it is not a defect, lien, encumbrance, or other matter affecting plaintiff's title to the land [*Hocking v. Title Ins. & Trust Co. (1951) 37 Cal. 2d 644, 652, 234 P.2d 625]* .

[3] Allegations

This affirmative defense alleges:

- That a reduction in land value for reasons other than a defect in the insured title is not covered by the policy (Paragraph 1).

- That the loss complained of by plaintiff was a loss of value in the land itself, caused by actions of third parties and not by a defect in title (Paragraph 2).

[4] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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48-548 California Forms of Pleading and Practice--Annotated § 548.59

§ 548.59 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Insured Not Obligated to Defend Action--Litigation Based on Insured's Tortious Acquisition of Title Rather Than on Title Itself

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Insured Not Obligated to Defend Action--Litigation Based on Insured's Tortious Acquisition of Title Rather Than on Title Itself

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that the action against plaintiff described in the complaint does not raise the possibility that defendant may be liable under the title insurance policy that defendant issued to plaintiff because the action is based on plaintiff's alleged tortious conduct in acquiring the property, not on any alleged defect in title that is insured by the policy.

[2] Use of Form

This form of affirmative defense allegation is for use by a title insurer for inclusion in an answer to a complaint by its policy holder based on the insurer's alleged refusal to defend an action against the policy holder pursuant to the terms of the policy. The basis for the defense is that the insurer is not obligated to defend an action on the policy holder's behalf when the action is based on the policy holder's alleged tortious conduct in acquiring title to the property and is not directed against the insured title itself [*Safeco Title Ins. Co. v. Moskopoulos (1981) 116 Cal. App. 3d 658, 664-665, 172 Cal. Rptr. 248]* .

[3] Cross References

For discussion and forms relating to answers generally, see Ch. 26, *Answers*

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[1] FORM

[2] Use of Form

[3] Allegations

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[1] FORM

[2] Use of Form

[3] Cross References

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[1] FORM

[2] Use of Form

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[1] FORM

[2] Use of Form

§ 549.95 Affirmative Defense--Fair Use [15 U.S.C. § 1115(b)(4)]

[1] FORM

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[1] FORM

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[1] FORM

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§ 549.98 Affirmative Defense--Use of Plaintiff's Trade or Service Mark Violates Federal Antitrust Laws [15 U.S.C. § 1115(b)(7)]

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[2] Use of Form

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[1] FORM

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[1] FORM

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§ 549.101 Proceedings to Seize Goods Bearing and Used in Production of Counterfeit Marks From Persons Using

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[1] FORM

[2] Use of Form

[3] Content of Application

[4] Content of Affidavit

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[1] FORM

[2] Use of Form

[3] Content of Order

[4] Grounds for Issuance of Order

[5] Time for Seizure

[6] Confidentiality of Seizure and Information Seized

[7] Protective Order With Respect to Discovery of Seized Records

[8] Postseizure Hearing

[9] Cross References

§ 549.103 Complaint for Damages, Profits, and Injunctive and Other Equitable Relief [Code Civ. Proc. §§ 526, 527; Bus. & Prof. Code § 14250(a)]--Action for Infringement [Bus. & Prof. Code § 14245] and Dilution [Bus. & Prof. Code § 14247] of Service Mark Registered Under Model State Trademark Law [Bus. & Prof. Code § 14200 et seq.]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Cross References

§ 549.104 [Reserved]

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[1] FORM

[2] Use of Form

[3] Waiver of Requirement of Notice to Defendant

[4] Required Showing of Good Cause and Probable Success on the Merits

[5] Requirement That Plaintiff Post Undertaking

[6] Cross References

§ 549.106 Proceedings to Seize Counterfeit Goods From Persons Manufacturing, Displaying for Sale, or Selling Counterfeit Goods [Bus. & Prof. Code § 14250(b)]--Order [Code Civ. Proc. § 1003] Granting Ex Parte Application

[1] FORM

[2] Use of Form

[3] Contents of Order

[4] Cross References

§ 549.107 Complaint for Temporary and Permanent Injunctive Relief [Bus. & Prof. Code § 14402; Code Civ. Proc. §§ 526, 527] for Unfair Competition and Trade Name Infringement [Bus. & Prof. Code § 14401 et seq.]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Elements of Cause of Action

[a] In General

[b] Secondary Meaning

[c] Similar Name or Design

[d] Public Confusion

[5] Verification

[6] Cross References

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Chapter 549 TRADEMARKS AND TRADE NAMES
PART I. SCOPE

48-549 California Forms of Pleading and Practice--Annotated § 549.01

§ 549.01 Scope of Chapter

This chapter discusses and contains forms relating to infringement, dilution, and unfair competition involving trademarks, service marks, and trade names. The introduction is divided into three parts. The first part discusses federal law; the second part discusses California law on trademarks and service marks; the third part discusses California law on trade names. For discussion and forms relating to other aspects of unfair competition, see Ch. 565, *Unfair Competition* . For discussion and forms covering torts relating to appropriation of a person's name or likeness under common law or *Civil Code § 3344*, see Ch. 429, *Privacy* .

The chapter contains forms relating to infringement actions seeking equitable and monetary relief, including:

- A cease and desist letter [*see § 549.90*].
- A complaint for infringement of a federally registered trademark [*see § 549.91*].
- Federal statutory affirmative defenses to an infringement suit [*see §§ 549.92 -549.100*].
- Ex parte applications for an order to seize goods bearing and used in the production of counterfeits of a federally registered trademark [*see §§ 549.101, 549.102*] or a trademark registered under the California trademark law [*see §§ 549.105, 549.106*].
- A complaint [*see § 549.103*] for use in an action for infringement of a service mark registered under the California trademark law.
- A complaint for statutory infringement of a trade name and for unfair competition based on confusion of source [*see § 549.107*].

Legal Topics:

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

Trademark LawDilution of Famous MarksGeneral OverviewTrademark LawFederal Unfair Competition LawGeneral OverviewTrademark LawInfringement ActionsGeneral OverviewTrademark LawInfringement ActionsRemediesGeneral OverviewTrademark LawSpecial MarksTrade NamesGeneral OverviewTrademark LawSpecial MarksTrade NamesInfringement

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48-549 California Forms of Pleading and Practice--Annotated § 549.02

§ 549.02 Cross References

For jurisdictional allegations in complaints filed in federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For discussion, a procedural checklist, and forms relating to injunctive relief, see Ch. 303, *Injunctions*

For discussion and forms relating to literary property and copyright, see Ch. 349, *Literary Property and Copyright*

For discussion and forms relating to patents, see Ch. 411, *Patents and Inventions*

For discussion and forms covering torts relating to appropriation of a person's name or likeness under common law or *Civil Code § 3344*, see Ch. 429, *Privacy*

For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions*

For discussion and forms relating to unfair competition, see Ch. 565, *Unfair Competition*

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawTrade Practices & Unfair CompetitionGeneral OverviewCivil ProcedureGeneral OverviewCivil ProcedureJurisdictionGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewCopyright LawGeneral OverviewPatent LawGeneral OverviewTortsIntentional TortsInvasion of PrivacyGeneral Overview

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A. In General

48-549 California Forms of Pleading and Practice--Annotated § 549.10

§ 549.10 Governing Law

The ownership, protection, and registration of trademarks and trade names are governed on the federal level by the Trademark Act of 1946, commonly called the Lanham Act [*15 U.S.C. § 1051 et seq.*; *see § 549.20*], and on the state level by the Model State Trademark Law [*Bus. & Prof. Code § 14200 et seq.*; *see § 549.50*] and by *Bus. & Prof. Code § 14401 et seq.*, concerning trade names and other designations [*see § 549.70*]. Actions based on the unfair imitation of a name or designation that is not susceptible to exclusive use are governed by *Bus. & Prof. Code § 17200 et seq.* and common law unfair competition principles [*see, e.g., Ball v. American Trial Lawyers Assn. (1971) 14 Cal. App. 3d 289, 300-302, 92 Cal. Rptr. 228*]. For a listing of additional statutes protecting a variety of trade, product, and association names, labels, and devices, see *§ 549.83[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawTrade Practices & Unfair CompetitionGeneral OverviewTrademark LawFederal Unfair Competition LawLanham ActGeneral OverviewTrademark LawProtection of RightsGeneral OverviewTrademark LawProtection of RightsRegistrationFederal RegistrationTrademark LawProtection of RightsRegistrationState RegistrationTrademark LawSpecial MarksTrade NamesRegistration

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§ 549.20 Lanham Act

[1] Coverage

The Lanham Act [*15 U.S.C. § 1051 et seq.*] is the exclusive source of federal law governing infringement of trade, service, collective, and certification marks registered on the principal and supplemental registers of the United States Patent and Trademark Office [*Intern. Order of Job's Daughters v. Lindeburg & Co. (9th Cir. 1980) 633 F.2d 912, 915-916*]. The objectives of trademark law are to protect consumers from being misled as to the source of products, to prevent impairment of a trademark's value to its owner, and to achieve the preceding objectives in a manner consistent with free competition [*E-Systems, Inc. v. Monitek, Inc. (9th Cir. 1983) 720 F.2d 604, 607*]. To this end, the intent of the Lanham Act is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks, to protect registered marks used in commerce from interference by state or territorial legislation, and to protect persons engaged in commerce against unfair competition. Furthermore, the act is intended to prevent fraud and deception in commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks. Finally, the act is intended to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade names, and unfair competition entered into between the United States and foreign nations [*15 U.S.C. § 1127*].

[2] Definitions

[a] Trademark

"Trademark" means any word, name, symbol, or device, or any combination thereof, used by a person, or which a person has a bona fide intention to use in commerce and applies to register on the principal register established by the Lanham Act, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown [*15 U.S.C. § 1127*].

[b] Service Mark

"Service mark" means any word, name, symbol, or device, or any combination thereof, used by a person, or which a

person has a bona fide intention to use in commerce and applies to register on the principal register established by the Lanham Act, to identify and distinguish the services of one person, including a unique service, from the services of others and to indicate the source of services, even if that source is unknown. Titles, character names, and other distinctive features of radio or television programs may be registered as service marks notwithstanding that they, or the programs, may advertise the goods of the sponsor [*15 U.S.C. § 1127*].

[c] Certification Mark

"Certification mark" means any word, name, symbol, or device, or any combination thereof, used by a person other than its owner, or which its owner has a bona fide intention to permit a person other than the owner to use in commerce and files an application to register on the principal register established by the Lanham Act, to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of that person's goods or services; or to certify that the work or labor on the goods or services was performed by members of a union or other organization [*15 U.S.C. § 1127*].

Certification marks differ from trademarks in a number of significant ways. Certification marks are subject to cancellation if the owner produces or markets goods on which the mark appears, permits use of the mark for purposes other than to certify, or discriminately refuses to certify the goods of anyone meeting the standards the mark denotes [*15 U.S.C. § 1064(5)*]. The mark holder's duty to license all who qualify makes certification a form of limited compulsory licensing. The Lanham Act makes clear that certification marks serve other public interests in addition to the prevention of public confusion. The provisions for certification-mark cancellation illustrate the legislative intent to protect a further public interest in free and open competition among producers and distributors of the certified product. By requiring certification mark holders to license all persons meeting the certification criteria, the Lanham Act ensures that the market will include as many participants as can produce conforming goods. By preventing mark holders from becoming market participants, the Act removes incentives for mark holders to engage in anti-competitive conduct. The Lanham Act's cancellation provisions thus appear designed to promote free competition in the market for certified products [*Idaho Potato Comm'n v. G&T Terminal Packaging, Inc. (9th Cir. 2005) 425 F.3d 708, 716-717*].

[d] Collective Mark

"Collective mark" means a trademark or service mark used by the members of a cooperative, an association, or other collective group or organization or which a cooperative, association, or other collective group or organization has a bona fide intention to use in commerce and applies to register on the principal register established by the Lanham Act. It includes marks used to indicate membership in a union, association, or other organization [*15 U.S.C. § 1127*].

[e] Trade Name

"Trade name" means any name used by a person to identify his or her business or vocation [*15 U.S.C. § 1127*]. The term "commercial name" means "trade name," and the two terms are used interchangeably [*15 U.S.C. § 1127*].

[f] Mark

"Mark" means any trademark, service mark, collective mark, or certification mark [*15 U.S.C. § 1127*].

[g] Registered Mark

"Registered mark" means a mark registered in the United States Patent and Trademark Office under *15 U.S.C. § 1051 et seq.* The term "marks registered in the Patent and Trademark Office" means "registered mark," and the two terms are used interchangeably [*15 U.S.C. § 1127*].

[h] Person

"Person" means the applicant or other natural person entitled to a benefit or privilege or rendered liable under the provisions of *15 U.S.C. § 1051 et seq.*, and includes a firm, corporation, union, association, or other organization capable of suing and being sued in a court of law [*15 U.S.C. § 1127*].

"Person" also includes the United States, all agencies and instrumentalities of the United States, and all individuals, firms, corporations, other persons acting for the United States and with the authorization and consent of the United States, and any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity [*15 U.S.C. §§ 1114(1)(b), 1127*]. Any State, and any such instrumentality, officer, or employee, is subject to the provisions of *15 U.S.C. § 1051 et seq.*(trademarks) in the same manner and to the same extent as any nongovernmental entity.

[i] Applicant

"Applicant" includes the applicant's legal representatives, predecessors, successors, and assigns [*15 U.S.C. § 1127*].

[j] Registrant

"Registrant" includes the registrant's legal representatives, predecessors, successors, and assigns [*15 U.S.C. § 1127*].

[k] Use in Commerce

"Commerce" means all commerce that may lawfully be regulated by Congress [*15 U.S.C. § 1127*]. "Commerce" includes intrastate commerce that affects interstate commerce [*Thompson Tank & Mfg. Co. v. Thompson (9th Cir. 1982) 693 F.2d 991, 993*].

"Use in commerce" means the bona fide use of a mark in the ordinary course of trade and does not include use made merely to preserve a right in a mark. A mark on goods is deemed in use in commerce when (1) it is placed in any manner on the goods or their containers or the displays associated with them, or on the tags or labels affixed to them, or if the nature of the goods make such placement impracticable, then on documents associated with the goods or their sale; and (2) the goods are sold or transported in commerce. A mark on services is deemed in use in commerce when it is used or displayed in the sale or advertising of services and the services are rendered in commerce, or the services are rendered in more than one state or in the United States and a foreign country and the person rendered the services is engaged in commerce in connection with the services [*15 U.S.C. § 1127*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Trademark LawFederal Unfair Competition LawLanham ActGeneral OverviewTrademark LawFederal Unfair Competition LawLanham ActScopeTrademark LawSpecial MarksCertification MarksTrademark LawSpecial MarksCollective MarksTrademark LawSpecial MarksService MarksGeneral OverviewTrademark LawSpecial MarksTrade NamesGeneral Overview

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 549 TRADEMARKS AND TRADE NAMES
PART II. LEGAL BACKGROUND
B. Federal Trademark Law

48-549 California Forms of Pleading and Practice--Annotated § 549.21

§ 549.21 Subject Matter of Marks

[1] Purpose

The function of a trade or service mark is twofold: (1) to identify the goods or services of one person, and (2) to distinguish those goods or services from those of another. If, therefore, a word, name, symbol, or device does not identify or distinguish, it is not registrable under the Lanham Act [*see 15 U.S.C. § 1127*; *Two Pesos, Inc. v. Taco Cabana, Inc. (1992) 505 U.S. 763, 768, 112 S. Ct. 2753, 120 L. Ed. 2d 615*].

[2] Strength of Mark

The validity and degree of protection a mark will be accorded is determined by its strength and distinctiveness [*Saratoga Vichy Spring Co., Inc. v. Lehman (N.D.N.Y. 1979) 491 F. Supp. 141, 148]* . The relative strength of a mark is especially important in actions for infringement of a trade or service mark, because the strength or weakness of a plaintiff's mark is one factor courts consider in determining whether a likelihood of confusion, as between plaintiff's mark and defendant's allegedly infringing mark, exists in the minds of the relevant purchasing public [*see Golden Door, Inc. v. Odisho (N.D. Cal. 1977) 437 F. Supp. 956, 963]* . For discussion of the role of the likelihood of confusion in actions for trade and service mark infringement, see *§ 549.24[2]*.

Courts have devised classification schemes for determining the relative strength or weakness of a given mark for the purpose of determining eligibility for trademark status and the degree of protection afforded the mark against infringement [*Golden Door, Inc. v. Odisho (N.D. Cal. 1977) 437 F. Supp. 956, 963-964*]. In the Ninth Circuit, marks are categorized, in ascending order of strength, as generic, descriptive, suggestive, and arbitrary or fanciful [*Surgicenters of America, Inc. v. Medical Dental Surgeries, Co. (9th Cir. 1979) 601 F.2d 1011, 1014*]. The United States Supreme Court has also followed this categorization scheme for evaluating the strength of marks under the Lanham Act [*see Two Pesos, Inc. v. Taco Cabana, Inc. (1992) 505 U.S. 763, 768, 112 S. Ct. 2753, 120 L. Ed. 2d 615*].

The theory behind the differentiation between strong and weak marks is that weak marks consist of terms in common usage and have meaning (other than as trademarks) in the English language. Additionally, weak marks consist of terms

in widespread use as marks for many different products and services [*Alpha Industries, Inc. v. Alpha Steel Tube & Shapes, Inc. (9th Cir. 1980) 616 F.2d 440, 445-446*]. The likelihood that a consumer will identify a mark with the products or services of only one producer is extremely low when the mark in issue is comprised of terms commonly and frequently used throughout the consumer's field of linguistic and commercial experience [*see, e.g., Carter-Wallace, Inc. v. Procter & Gamble Co. (9th Cir. 1970) 434 F.2d 794, 802* (upholding defendant's use of the word "sure," which was part of both plaintiff's trademarked slogan and slogans used by others in advertising related products)]. A mark may be strengthened by extensive advertising, length of time in business, public recognition, and uniqueness [*Century 21 Real Estate Corp. v. Sandlin (9th Cir. 1988) 846 F.2d 1175, 1179*].

A strong mark is an inherently distinctive mark and will be afforded the widest ambit of protection from infringing uses [*AMF, Inc. v. Sleekcraft Boats (9th Cir. 1979) 599 F.2d 341, 349 , abrogated in part on other grounds, Mattel, Inc. v. Walking Mountain Prods. (9th Cir. 2003) 353 F.3d 792, 810 n.19*]. A strong mark is one that is used only in a fictitious, arbitrary, or fanciful manner. Because of this unique usage, it is entitled to greater protection than a weak mark [*J. B. Williams Co. v. Le Conte Cosmetics, Inc. (9th Cir. 1975) 523 F.2d 187, 192*]. "Dutch Boy" is an example of a strong mark when not used geographically or descriptively but in a fictitious, arbitrary, and fanciful manner as the trademark for paint products [*National Lead Co. v. Wolfe (9th Cir. 1955) 223 F.2d 195, 199]* . The fact that the origin of a word is unknown, coupled with an absence of evidence that the word has any meaning of its own, is evidence of a strong mark [*see J. B. Williams Co. v. Le Conte Cosmetics, Inc. (9th Cir. 1975) 523 F.2d 187, 192*]. If a name is truly arbitrary, strange, and fanciful, it is more specially and peculiarly significant and suggestive of one person's goods than when it is used frequently by many and in different kinds of businesses [*Sunbeam Lighting Co. v. Sunbeam Corp. (9th Cir. 1950) 183 F.2d 969, 972-973*].

The differentiation between strong and weak marks turns on whether the word in issue is general or fanciful. General, non-fanciful words applied to, used, and registered as trademarks for a large number and variety of products by numerous manufacturers are deemed weak and are narrowly protected [*Sunbeam Furniture Corp. v. Sunbeam Corp. (9th Cir. 1951) 191 F.2d 141, 144*]. A mark is deemed weak if it is a word meaningful in common usage or if, pictorially, it is a common decoration [*Sid Berk, Inc. v. Uniroyal, Inc. (C.D. Cal. 1977) 425 F. Supp. 22, 30*].

[3] Generic Marks

No incontestable right can be acquired in a mark that is the generic name for all or part of the goods or services for which the mark is registered [*15U.S.C § 1065(4)*; *e.g., Kendall-Jackson Winery, Ltd. v. E. & J. Gallo Winery (9th Cir. 1998) 150 F.3d 1042, 1048* (plaintiff's grape-leaf design for its wine bottle label was generic, and defendant was entitled to judgment as matter of law on plaintiff's trademark infringement claims)]. In addition, a registered mark may be canceled at any time if the mark becomes the generic name for all or part of the goods or services for which it is registered [*15 U.S.C § 1064(3)*]. If the mark becomes the generic name for only a portion of all of the goods or services for which the mark is registered, the cancellation extends only to those goods or services for which the mark has become the generic name [*see 15 U.S.C § 1064(3)*].

At common law, generic terms normally are not subject to appropriation as trademarks, although a strong showing of secondary meaning may be sufficient to grant a right to exclusive use. When federal registration has been canceled because a mark is found to be generic, it is almost impossible to establish the secondary meaning required for common law trademark protection [*Keebler Co. v. Rovira Biscuit Corp. (1st Cir. 1980) 624 F.2d 366, 374, 376* ; *but see Self-Realization Fellowship Church v. Ananda Church of Self-Realization (9th Cir. 1995) 59 F.3d 902, 913* (federal registration restored)].

The test for determining whether a registered mark has become the generic name of goods or services in connection with which it has been used is based on the primary significance of a registered mark to the relevant public, not on purchaser motivation [*15 U.S.C. § 1064(3)* (overruling the reasoning of *Anti-Monopoly, Inc. v. General Mills Fun Group (9th Cir. 1982) 684 F.2d 1316*); *see also Kellogg Co. v. National Biscuit Co. (1938) 305 U.S. 111, 118, 59 S.*

Ct. 109, 83 L. Ed. 73].

A registered mark will not be deemed to be the generic name of goods or services solely because the mark is also used as a name of or to identify a unique product or service [*15 U.S.C. § 1064(3)*; *see also 15 U.S.C. § 1127* (definitions of "trademark" and "service mark")]. Neither is a registered mark invalidated merely because it is composed of generic words [*see Self-Realization Fellowship Church v. Ananda Church of Self-Realization (9th Cir. 1995) 59 F.3d 902, 912*].

A trademark can be attacked as generic either offensively, as in an action for declaratory judgment [*Anti-Monopoly, Inc. v. General Mills Fun Group (9th Cir. 1982) 684 F.2d 1316*], or defensively, as an affirmative defense to an action for infringement [*Surgicenters of America, Inc. v. Medical Dental Surgeries, Co. (9th Cir. 1979) 601 F.2d 1011*].

There is a presumption in favor of the validity of a registered trademark, and the burden of proof is on one who attacks a mark as generic. The presumption can be overcome by a showing of a preponderance of the evidence that the term was or has become generic [*see Vuitton et Fils S.A. v. J. Young Enterprises, Inc. (9th Cir. 1981) 644 F.2d 769, 775-776* (burden of proof) and *Coca-Cola Co. v. Overland, Inc. (9th Cir. 1982) 692 F.2d 1250, 1253* (generic nature of mark)]. Acceptable evidence of the genericness of a term in the minds of the consuming public includes dictionary definitions, consumer surveys, and responses to cease and desist letters [*see, e.g., Surgicenters of America, Inc. v. Medical Dental Surgeries, Co. (9th Cir. 1979) 601 F.2d 1011, 1017*].

Moreover, against a claim that a mark is or has become generic, the validity of the mark is to be determined by viewing it as a whole, rather than focusing on its components. The composite mark may be a distinguishing mark even though its components individually could not be registered [*Reno Air Racing Ass'n v. McCord (9th Cir. 2006) 452 F.3d 1126, 1135]* .

[4] Descriptive Marks

[a] When Registrable

A descriptive mark describes the qualities or characteristics of a good or service. Only by acquiring a secondary meaning, that is, by becoming distinctive of the applicant's goods or services, can a descriptive mark become registrable [*Park'N Fly, Inc. v. Dollar Park & Fly, Inc. (1985) 469 U.S. 189, 194, 105 S. Ct. 658, 83 L. Ed. 2d 582* ; *15 U.S.C. § 1052(e)*]. An example of a descriptive (or merely descriptive) mark is the service mark "Park'N Fly" as applied to airport parking and shuttle bus service [*Park'N Fly v. Dollar Park & Fly (9th Cir. 1983) 718 F.2d 327, 331*]. Once secondary meaning is established, the protection afforded to a descriptive mark should be commensurate with the degree of consumer association proven [*AMF, Inc. v. Sleekcraft Boats (9th Cir. 1979) 599 F.2d 341, 349 n.12*].

[b] Secondary Meaning

Secondary meaning, a term that is not found in the Lanham Act, is achieved when a mark has become distinctive of an applicant's goods in commerce. It is the means by which descriptive (or deceptively misdescriptive) and primarily geographically descriptive (or deceptively misdescriptive) marks, together with marks that are primarily merely surnames, are registrable on the principal register in the United States Patent and Trademark Office [*15 U.S.C. § 1052(e),(f)*; *Park'N Fly, Inc. v. Dollar Park & Fly, Inc. (1985) 469 U.S. 189, 183-194, 105 S. Ct. 658, 83 L. Ed. 2d 582*].

An otherwise descriptive mark may achieve protectable status whenever the quality of distinctiveness has been acquired through a demonstrated secondary meaning [*North Carolina Dairy Foundation, Inc. v. Foremost-McKesson, Inc. (1979) 92 Cal. App. 3d 98, 107, 154 Cal. Rptr. 794*]. Protection is extended when, in addition to the literal meaning of the words used, a subsequent significance is added and becomes in the marketplace its usual and primary significance.

Secondary meaning is said to attach when the descriptive words used in connection with a product have acquired a general understanding in the relevant marketplace area identifying that product with a unique or particular source. The crucial element is the mental association in the buyer's mind between the mark used in connection with the product or service, and a single source of origin. The buyer need not actually know the name of the source, but must directly associate the mark with but one, though anonymous, source [*North Carolina Dairy Foundation, Inc. v. Foremost-McKesson, Inc. (1979) 92 Cal. App. 3d 98, 108, 154 Cal. Rptr. 794*]. As long as the primary significance of the descriptive term in the minds of the buying public is shown to be the product source rather than the product, then trademark protection will be available under the secondary meaning doctrine [*see* *Kellogg Co. v. National Biscuit Co. (1938) 305 U.S. 111, 118, 59 S. Ct. 109, 83 L. Ed. 73*].

Whether a descriptive term or mark has acquired a secondary meaning is a question of fact [*Levi Strauss & Co. v. Blue Bell, Inc. (9th Cir. 1985) 778 F.2d 1352, 1355*]. To determine whether a descriptive mark has secondary meaning, the finder of fact considers the following [*Transgo, Inc. v. AjacTransmission Parts Corp. (9th Cir. 1985) 768 F.2d 1001, 1015* ; *see, e.g.,* *Yellow Cab Co. v. Yellow Cab of Elk Grove, Inc. (9th Cir. 2005) 419 F.3d 925, 930* ("Here, Yellow Cab of Sacramento presented to the district court various declarations detailing the history of the Yellow Cab of Sacramento, customer confusion concerning the companies, advertising data and other evidence addressing the *Levi Strauss* factors.")]:

- Whether actual purchasers of the product bearing the claimed trademark associate the trademark with the producer.
- The degree and manner of advertising under the claimed trademark.
- The length and manner of use of the claimed trademark.
- Whether use of the claimed trademark has been exclusive.

[5] Suggestive Marks

A suggestive mark suggests rather than describes an ingredient, quality, or characteristic requiring imagination, thought, and perception to determine the nature of the goods or services [*Park'N Fly. v. Dollar Park & Fly (9th Cir. 1983) 718 F.2d 327, 329*]. The Ninth Circuit considers that the imagination test is the primary criterion for evaluating distinctiveness in this context [*Zobmondo Entm't, LLC v. Falls Media, LLC (9th Cir. 2010) 602 F.3d 1108, 2010 U.S. App. LEXIS 8559, at *17]* . The legal standard is whether "a mental leap is required" to understand the mark's relationship to the product. The issue is one of fact, namely, what consumers will understand the mark to mean (by making that mental leap). Generally, the application of the imagination test will be "informed by expert testimony offered at trial suggesting how consumers will view" the mark [*Zobmondo Entm't, LLC v. Falls Media, LLC (9th Cir. 2010) 602 F.3d 1108, 2010 U.S. App. LEXIS 8559, at *18-*20* (noting that "comprehensive consumer surveys" would be helpful evidence)].

An example of a suggestive trademark is "Slickcraft," as applied to boats [*AMF, Inc. v. Sleekcraft Boats (9th Cir. 1979) 599 F.2d 341, 349 , abrogated in part on other grounds,* *Mattel, Inc. v. Walking Mountain Prods. (9th Cir. 2003) 353 F.3d 792, 810 n.19*]. A suggestive term is entitled to registration on the principal register without proof of secondary meaning [*Surgicenters of America, Inc. v. Medical Dental Surgeries, Co. (9th Cir. 1979) 601 F.2d 1011, 1015*]. Because a suggestive mark is, by definition, less distinctive than an arbitrary or fanciful mark, it is a comparatively weak mark [*AMF, Inc. v. Sleekcraft Boats (9th Cir. 1979) 599 F.2d 341, 349 , abrogated in part on other grounds,* *Mattel, Inc. v. Walking Mountain Prods. (9th Cir. 2003) 353 F.3d 792, 810 n.19*]. As such, it is entitled to a restricted range of protection from infringement. Thus, only if a weak mark and an alleged infringing mark are quite similar and the goods that both identify closely related, will infringement be found [*AMF, Inc. v. Sleekcraft Boats (9th Cir. 1979) 599 F.2d 341, 350 , abrogated in part on other grounds,* *Mattel, Inc. v. Walking Mountain Prods. (9th Cir.*

2003) 353 F.3d 792, 810 n.19].

[6] Distinction Between Descriptive and Suggestive Marks

The line separating descriptive marks from suggestive marks is not a bright one, and thus courts have devised criteria for defining the two. These criteria include the imaginativeness of the suggestion; for example, how immediate and direct the thought process is from mark to product or service; whether granting the trademark owner a limited monopoly will, in fact, inhibit legitimate use of the mark by other sellers; whether the mark is actually viewed by the public as an indication of the product's origin or as a self-serving description of it [*AMF, Inc. v. Sleekcraft Boats (9th Cir. 1979) 599 F.2d 341, 349 , abrogated in part on other grounds, Mattel, Inc. v. Walking Mountain Prods. (9th Cir. 2003) 353 F.3d 792, 810 n.19* ; *see GoTo.com, Inc. v. Walt Disney Co. (9th Cir. 2000) 202 F.3d 1199, 1207* (logo comprising words "Go" and "To" in white letters enclosed in green circle with ".com" in black letters trailing over circle's edge was suggestive trademark for search-engine web site)].

This is sometimes called the "competitors' needs" test (or simply the needs test). If competitors have a great need to use a mark, the mark is probably descriptive; on the other hand, if the suggestion made by the mark is "so remote and subtle that it is really not likely to be needed by competitive sellers" to describe their goods or services, that tends to indicate that the mark is suggestive. This test is related to the imagination test because the more imagination is required to associate the mark with a product or service, the less likely is it that the mark will be needed by competitors to describe their products or services [*Zobmondo Entm't, LLC v. Falls Media, LLC (9th Cir. 2010) 602 F.3d 1108, 2010 U.S. App. LEXIS 8559, at *21-*22]* .

Whether a mark is suggestive or merely descriptive is often a crucial question in a trademark case and can present complex issues of fact. Therefore, "summary judgment is ordinarily disfavored" in that context [*Zobmondo Entm't, LLC v. Falls Media, LLC (9th Cir. 2010) 602 F.3d 1108, 2010 U.S. App. LEXIS 8559, at *34]* .

[7] Arbitrary or Fanciful Marks

An arbitrary or fanciful term is usually applied to words invented or coined solely for their use as trademarks. Such terms enjoy all the rights accorded to suggestive terms without the need for debating whether the term is merely descriptive [*Surgicenters of America, Inc. v. Medical Dental Surgeries (9th Cir. 1979) 601 F.2d 1011, 1015*]. Because a coined term is inherently distinctive, it is a strong mark and as such will be afforded the widest ambit of protection from infringing uses [*AMF, Inc. v. Sleekcraft Boats (9th Cir. 1979) 599 F.2d 341, 349 , abrogated in part on other grounds, Mattel, Inc. v. Walking Mountain Prods. (9th Cir. 2003) 353 F.3d 792, 810 n.19*].

For example, the trademark "Black & White" as applied to Scotch whiskey is arbitrary and fanciful because it is not descriptive and indicates nothing having the qualities of black and white [*Fleischmann Distilling Corp. v. Maier Brewing Co. (9th Cir. 1963) 314 F.2d 149, 154*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Trademark LawSpecial MarksService MarksGeneral OverviewTrademark LawSubject MatterDescriptive & Laudatory TermsDeterminationsTrademark LawSubject MatterDistinctivenessDeterminationsTrademark LawSubject MatterNamesGeneric NamesTestsTrademark LawSubject MatterStrengthTrademark LawSubject MatterSuggestive Terms

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§ 549.22 Ownership of Marks

[1] Personal Property

As a type of intellectual property, trademarks have long been recognized as intangible personal property [*Beech-Nut Packing Co. v. P. Lorillard Co. (1927) 273 U.S. 629, 47 S. Ct. 481, 71 L. Ed. 810*]. A trademark is a form of business property, and a trademark owner has a property right only insofar as is necessary to prevent consumer confusion as to who produced the goods, and to facilitate differentiation of the trademark owner's goods [*International Order of Job's Daughters v. Lindeburg & Co. (9th Cir. 1980) 633 F.2d 912, 919*].

It is possible, but would be unusual, for two or more persons to own a trademark jointly and use the trademark in separate businesses [*see generally Iskenderian v. Iskenderian (2006) 144 Cal. App. 4th 1162, 1170-1172, 51 Cal. Rptr. 3d 163]* .

[2] Transfer

[a] In General

Any registered mark, or any mark for which a registration application has been filed, is assignable with the goodwill of the business in which the mark is used or with that part of the goodwill of the business connected with the use of and symbolized by the mark. Nevertheless, no application to register a mark under *15 U.S.C. § 1051(b)* (application based on bona fide intention to use mark) is assignable prior to the filing of the verified statement of use under *15 U.S.C. § 1051(d)*, except to a successor to the business of the application, or portion thereof, to which the mark pertains, if that business is ongoing and existing. In any assignment authorized by *15 U.S.C. § 1060*, it is not necessary to include the goodwill of the business which is connected with the use of any other mark used in the business and which is symbolized by that mark or by the name or style under which the business is conducted [*see 15 U.S.C. § 1060(a)(1)*].

Because a property right in trademark exists only as a right appurtenant to the business in connection with which a mark is used, there are no rights in trademark that can be transferred apart from the business with which the mark is associated [*Mister Donut of America, Inc. v. Mr. Donut, Inc. (9th Cir. 1969) 418 F.2d 838, 842*].

The seller of a mark has a special duty to avoid confusion with a name that he or she has sold [*Plough, Inc. v. Kreis Laboratories (9th Cir. 1963) 314 F.2d 635, 639*].

[b] Licensor's Duty to Maintain Quality Control

A trademark may be licensed, but when it is, the trademark licensor owes an affirmative duty to the public to assure that, in the hands of a licensee, the mark continues to represent goods or services of the same pre-license quality. The major purpose of this duty, known as "quality control," is to protect the public [*Edwin K. Williams & Co. v. Edwin K. Williams & Co.-East (9th Cir. 1976) 542 F.2d 1053, 1059]* .

A finding of insufficient control by a licensor over its licensee essentially effects a forfeiture of the licensing agreement, although the amount of control required varies with the circumstances. A person asserting insufficient control must meet a high burden of proof, and a licensee should not be permitted to resist quality control and then assert lack of quality control to invalidate a license [*Edwin K. Williams & Co. v. Edwin K. Williams & Co.-East (9th Cir. 1976) 542 F.2d 1053, 1059-1060]* .

In a case of so-called "naked licensing," in which the trademark owner failed to exercise adequate quality control over the licensee--for instance (taking an extreme example), by failing to provide for quality control in the license agreement at all or by relinquishing that duty in the licensing agreement, and failing to attempt any actual quality control--a court may find that the owner has abandoned the trademark. In such a case, the owner would be estopped from asserting rights to the trademark. Such an abandonment is purely involuntary, a forfeiture of trademark rights, since it need not be shown that the trademark owner had any subjective intent to abandon the mark. Accordingly, the proponent of a naked-license theory of abandonment faces a "stringent standard" of proof [*Barcamerica Int'l USATrust v. Tyfield Imps., Inc. (9th Cir. 2002) 289 F.3d 589, 598* ("what matters is that Barcamerica played no meaningful role in holding the [product] to a standard of quality--good, bad, or otherwise")].

[3] Tacking Doctrine

The Ninth Circuit recognizes that a trademark owner may claim priority in a mark based on the first-use date of a similar, but technically distinct, mark--but only if consumers consider both as the same mark. This "constructive use" theory is known as the "tacking doctrine" because the trademark owner essentially seeks to tack the first-use date in the earlier mark onto the subsequent mark. Tacking should be allowed if two marks are so similar that consumers generally would regard them as essentially the same. In such a case, the new mark serves the same identification function as the old mark. Giving the trademark owner the same rights in the new mark as in the old mark helps to protect source identifying trademarks from appropriation by competitors and thus furthers the trademark law's objective of reducing the costs that customers incur in shopping and making purchasing decisions. Without tacking, a trademark owner's priority in the mark would be reduced each time the owner made the slightest alteration to the mark, which would discourage altering the mark in response to changing consumer preferences, evolving aesthetic developments, or new advertising and marketing styles [*Brookfield Communications, Inc. v. West Coast Entertainment Corp. (9th Cir. 1999) 174 F.3d 1036, 1047-1048]* .

Thus, the tacking doctrine enables the owner of a mark to maintain a prior right to use the mark even though the appearance of the mark has been changed over time. When the tacking doctrine applies, the various changes in the mark's appearance over time will not support an infringer's defense of abandonment [*see § 549.28[3]*], and the date of first use of the original mark will be carried forward to establish priority for each version of the mark over time.

The standard for allowing tacking is considerably stricter than the standard for determining the likelihood-of-confusion element of an infringement claim [*see § 549.24[2]*]. The two marks must create the same, continuing commercial impression, and the later mark must not materially differ from or alter the character of the earlier mark. The earlier mark

must be the legal equivalent of the later mark: they must be so indistinguishable that the consumer would consider them to be the same mark [*Brookfield Communications, Inc. v. West Coast Entertainment Corp. (9th Cir. 1999) 174 F.3d 1036, 1048* ; *see One Indus., LLC v. Jim O'Neal Distrib. (9th Cir. 2009) 578 F.3d 1154, 1162* (cases in which tacking was not allowed, and one case in which it was allowed)].

The Ninth Circuit holds that whether tacking applies should be analyzed as a question of fact--bearing in mind that a question of fact may be resolved as a matter of law when reasonable minds cannot differ and the evidence permits only one conclusion [*Quiksilver, Inc. v. Kymsta Corp. (9th Cir. 2006) 466 F.3d 749, 759]* .

[4] Standing to Sue for Infringement

The standard test of ownership in trademark law is priority of use. To acquire ownership of a trademark, it is not enough to have invented the mark first or even to have registered it first; the party claiming ownership must have been the first to actually use the mark in the sale of goods or services [*Sengoku Works v. RMC Int'l (9th Cir. 1996) 96 F.3d 1217, 1219* (registrant merely has advantage of presumption of ownership, which can be rebutted by nonregistrant's proof of prior use); *see § 549.20[2]* (definitions of trademark, service mark, and like terms in Lanham Act)]. Accordingly, ownership of an unregistered trademark, as well as ownership of a registered mark, is sufficient to establish standing under the Lanham Act [*Halicki Films v. Sanderson Sales & Mktg. (9th Cir. 2008) 547 F.3d 1213, 1226*].

The plaintiff need only show ownership of the mark for any class of products; it is not necessary to show ownership of the mark for a class of products competing directly with the defendant's products. Indeed, competition between the parties' products is not an issue at all, since the crux of an infringement claim is the likelihood of confusion as to the source or sponsorship of products [*see 15 U.S.C. §§ 1114(1), 1125(a)(1)*; *see also §§ 549.24[2], 549.26[1][a]*], and competition is just one factor to be weighed in determining that issue [*Halicki Films v. Sanderson Sales & Mktg. (9th Cir. 2008) 547 F.3d 1213, 1228*]. The question of whether the products on which the allegedly infringing mark appears are sufficiently related to goods sold by the plaintiff, such that the defendant's actions qualify as infringement, goes to the merits of the plaintiff's claim, not the plaintiff's standing to sue [*Halicki Films v. Sanderson Sales & Mktg. (9th Cir. 2008) 547 F.3d 1213, 1227-1228*].

In addition, a third possible basis for Lanham Act standing is that the plaintiff is a nonowner with a cognizable commercial interest in the allegedly infringed mark, such as merchandising rights respecting trademarked products. If a court determines that the plaintiff in an infringement action cannot establish ownership of the mark through prior use (and therefore does not have standing on that basis), the court must then consider the plaintiff's argument that the plaintiff is a nonowner with a commercial interest in the allegedly misused mark that is likely to be harmed [*Halicki Films v. Sanderson Sales & Mktg. (9th Cir. 2008) 547 F.3d 1213, 1227*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Trademark LawConveyancesGeneral OverviewTrademark LawConveyancesLicensesTrademark LawProtection of RightsConveyancesGeneral OverviewTrademark LawProtection of RightsPriorityTacking

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48-549 California Forms of Pleading and Practice--Annotated § 549.23

§ 549.23 Registration of Marks

[1] Purpose

The purpose of trademark registration laws is twofold: to protect the interests not only of those who own and use registered names and marks, but also those of consumers who rely on representations in purchasing goods or services [*Finance Co. of America v. BankAmerica Corp. (D. Md. 1980) 493 F. Supp. 895, 903*].

The Lanham Act provides for the registration of trademarks [*15 U.S.C. § 1051*], service marks [*15 U.S.C. § 1053*], collective marks, and certification marks [*15 U.S.C. § 1054*]. The right to register a mark flows from either actual use of the mark in commerce or a "bona fide intention to use" the mark in commerce [*see 15 U.S.C. § 1051(b)*; *see* [4][a], *below*].

[2] Principal and Supplemental Registers

A mark may be registered on either or both of two registers: the principal register and the supplemental register [*see 15 U.S.C. §§ 1051-1054, 1091*-1096]. The procedural and substantive rights discussed in this chapter relate to marks registered on the principal register, and most of these rights are expressly limited to marks registered on the principal register [*see 15 U.S.C. § 1094*]. Registration of a mark on the supplemental register does not enlarge the substantive rights of the registrant and does not add anything to the common law rights which the registrant owns [*Gilson, Trademark Protection and Practice, Ch. 3, Establishing Trademark Rights, § 3.04[2]* (Matthew Bender); *15 U.S.C. § 1094*]. Registration of a mark on the supplemental register does not preclude registration on the principal register. In addition, registration of a mark on the supplemental register does not constitute an admission that the mark has not acquired distinctiveness [*15 U.S.C. § 1095*].

[3] Evidentiary Effect of Registration

Registration of a mark on the principal register (or under either the Trademark Act of 1881 or the Trademark Act of 1905) and owned by a party to an action is admissible prima facie evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the validity of the registrant's exclusive

right to use the mark in commerce on or in connection with the goods or services specified in the registration, subject to any conditions or limitations stated therein [*15 U.S.C. § 1115(a)*].

To the extent that the right to use the registered mark has become incontestable under *15 U.S.C. § 1115(a)* [*see* [7], *below*] the registration is conclusive, not merely prima facie, evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the validity of the registrant's exclusive right to use the mark in commerce. The conclusive evidence relates to the exclusive right to use the mark on or in connection with the goods or services specified in the affidavit of incontestability [*see* [7], *below*] or in the renewal application filed under *15 U.S.C. § 1059* [*see* [11], *below*] if the goods or services specified in the renewal are fewer in number, subject to any conditions or limitations in the registration or affidavit or renewal application. Conclusive evidence of the right to use the registered mark is subject to proof of infringement, as defined in *15 U.S.C. § 1114*, and is subject to the affirmative defenses or defects enumerated in *15 U.S.C. § 1115(b)* [*15 U.S.C. § 1115(b)*; *see § 549.28[1]*].

[4] Application

[a] Based on Actual or Intended Use of Mark

An application to register a trademark is made to the Patent and Trademark Office [*15 U.S.C. § 1051(a)(1)*]. Service marks, collective marks, and certification mark are registrable in the same manner and with the same effect as are trademarks [*15 U.S.C. §§ 1053, 1054*].

The owner of a trademark used in commerce may apply to register the trademark by filing a verified application, together with a drawing of the mark and the required number of specimens or facsimiles of the mark, paying the prescribed fee, and complying with any applicable rules or regulations [*15 U.S.C. § 1051(a)*]. The mark must have been in lawful use in commerce [*CreAgri, Inc. v. USANA Health Sciences, Inc. (9th Cir. 2007), 474 F.3d 626, 630* (using mark in commerce, but in violation of FDA-enforced label requirements, could not count as use in commerce sufficient for registration on principal register)].

As an alternative procedure, a person who has a bona fide intention, under circumstances showing the person's good faith, to use a trademark in commerce may apply to register the trademark by filing an application and verified statement paying the prescribed fee, and complying with any applicable rules or regulations [*15 U.S.C. § 1051(b)*]. The applicant must intend to use the mark in the ordinary course of trade and not merely reserve a right in the mark [*see 15 U.S.C. § 1127* ("use in commerce" defined)]. The application must specify, among other things, the goods in connection with which the applicant has a bona fide intention to use the mark, the applicant's domicile and citizenship, and a drawing of the mark [*15 U.S.C. § 1051(b)(2)*]. The verified statement must make specified declarations about the legitimacy of the applicant's rights to use the mark and the bona fides of any intention to do so [*15 U.S.C. § 1051(b)(3)*]. Unless the registration is successfully opposed [*see* [5], *below*], a notice of allowance is issued to the applicant. Within six months after issuance of the notice of allowance, the applicant must file a verified statement, containing specific information required by statute, that the mark is in use in commerce, together with the prescribed fee and the number of specimens or facsimiles of the mark required by the Commissioner [*15 U.S.C. § 1051(d)(1)*]. Failure to file a timely statement of use results in abandonment of the application, unless it can be shown to the satisfaction of the Commissioner that the delay in responding was unintentional, in which case the time for filing may be extended for a period not to exceed the period specified for filing a statement of use [*15 U.S.C. § 1051(d)(4)*]. However, the Commissioner must, on written request from the applicant before the six-month period expires, extend by an additional six months the time for filing the statement of use. Thereafter, the Commissioner may further extend the time for filing, based on a showing of good cause and satisfaction of other statutory requirements, for additional periods aggregating not more than 24 months [*15 U.S.C. § 1051(d)(2)*]. Subject to examination and acceptance of the statement of use, a certificate of registration is issued [*15 U.S.C. § 1051(d)(1)*; *see* [6][a], *below*].

[b] Constitutes Constructive Use of Mark

Contingent on the registration of a mark on the principal register, the filing of the application to register the mark constitutes constructive use of the mark, conferring a right of priority, nationwide in effect, on or in connection with the goods or services specified in the registration against any other person, except for a person whose mark has not been abandoned and who, prior to filing, has (1) used the mark, (2) filed an application to register the mark that is pending or has resulted in registration of the mark, or (3) filed a foreign application to register the mark on the basis of which he or she has acquired a right of priority, and files an application in a timely manner under *15 U.S.C. § 1126(d)* to register the mark that is pending or has resulted in registration of the mark [*15 U.S.C. § 1057(c)*].

[5] Contested Proceedings Objecting to Application

There are three different types of contested trial-type administrative proceedings before the Trademark Trial and Appeal Board in connection with an application to register a mark in which the applicant's right to the exclusive use of a mark or the extent of the right to use a mark may be determined. They are opposition, interference, and concurrent use proceedings [*see 15 U.S.C. §§ 1052(d), 1063, 1066, 1067*]. Opposition and interference proceedings are usually based on the likelihood of confusion with other goods or services bearing a mark that has already been federally registered or previously used in the United States or for the registration of which another has previously applied. A mark that when used would cause dilution under 15 U.S.C. § 115(c) may be refused registration only pursuant a proceeding brought under *15 U.S.C. § 1063* [*15 U.S.C. § 1052(a)*]. In each proceeding, the issue is normally priority of use, but the rights of the parties to registration may also be determined [*15 U.S.C. §§ 1063, 1066*; *see Wells Fargo & Co. v. Stagecoach Properties, Inc. (9th Cir. 1982) 685 F.2d 302, 305, 306* ; *37 C.F.R. §§ 2.91(a), 2.96*]. In concurrent use proceedings, concurrent registrations may be issued to more than one person using the same or similar marks if confusion is not likely to result, or if a court has made a final determination that more than one person is entitled to use the same or similar marks [*15 U.S.C. § 1052(d)*]. For a discussion of practice and procedure in these proceedings, see *Gilson, Trademark Protection and Practice, § 3.05* (Matthew Bender).

[6] Certificate of Registration

[a] Issuance

When a mark is registered on the Principal Register, the Patent and Trademark Office issues a certificate of registration to the registrant [*15 U.S.C. § 1057(a)*; *37 C.F.R. § 2.151*]. A record of the registration is kept in the Patent and Trademark Office [*15 U.S.C. § 1057(a)*]. On fulfillment of statutorily specified conditions, a certificate may issue to the assignee of an applicant or registrant [*15 U.S.C. § 1057(d)*]. Certificates may be canceled, amended, disclaimed, or corrected [*15 U.S.C. § 1057(e), (g), (h)*; *37 C.F.R. §§ 2.171-2.176*].

[b] Evidentiary Effect of Certificate

The certificate of registration is prima facie evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate, subject to any conditions and limitations stated therein [*15 U.S.C. § 1057(b)*]. Copies of the certificate, as well as copies of any records, books, papers, or drawings belonging to the Patent and Trademark Office and relating to marks, are evidence when duly authenticated and certified by the Patent and Trademark Office in all cases in which the originals would be evidence [*15 U.S.C. § 1057(f)*].

[c] Duration

A certificate of registration remains in effect for 10 years, except that the registration of any mark will be canceled by the Commissioner for failing to comply with *15 U.S.C. § 1058(b)* on the expiration of the following time period, as applicable:

- For registrations issued pursuant to the Trademark Act of 1946, at the end of six years following the date of registration.

- For registrations published under *15 U.S.C. § 1062(c)* pertaining to registrations under prior laws, at the end of six years following the date of publication.

- For all registrations, at the end of each successive 10-year period following the date of registration.

During the one-year period immediately preceding the end of the applicable time period set forth in *15 U.S.C. § 1058(a)*, the owner of the registration should pay a prescribed fee and file in the Patent and Trademark Office an affidavit setting forth those goods or services recited in the registration on or in connection with which the mark is, alternatively, in use in commerce and such number of specimens or facsimiles showing current use of the mark as may be required by the Commissioner, or not in use in commerce and showing that any such nonuse is due to special circumstances that excuse the nonuse and is not due to any intention to abandon the mark [*15 U.S.C. § 1058(b)*]. The owner may make the required submissions within a grace period of six months after the end of the applicable time period [*15 U.S.C. § 1058(c)(1)*], and if a submission is deficient, the deficiency may be corrected after the statutory time period and within the time prescribed after notification of the deficiency [*15 U.S.C. § 1058(c)(2)*], provided in each instance a surcharge prescribed by the Commissioner is paid.

15 U.S.C. § 1058, as amended by Pub. L. No. 105-330, § 105, applies to a registration for trademark issued or renewed for a 20-year term if the expiration date of the registration is on or after the effective date of that amendment [*see 15 U.S.C. § 1058*].

[7] Affidavit of Incontestability (Section 15 Affidavit)

Under certain conditions and for certain purposes, a registrant's right to exclusive use of a registered mark may become incontestable. However, a registrant's incontestable right to exclusive use of a registered mark does not preclude cancellation of the mark on any grounds enumerated in *15 U.S.C. § 1064(3)* or *(5)* [*15 U.S.C. § 1065*; *see* [8], *below*]. Incontestability also does not preclude the assertion of the following defenses [*15 U.S.C. § 1115(b)*]:

- The registration or incontestable right to use the mark was obtained fraudulently.

- The mark has been abandoned.

- The registered mark is being used, by or with the permission of the registrant or a person in privity with the registrant, so as to misrepresent the source of the goods or services on or in connection with which the mark is used.

- The name, term, or device charged to be an infringement is used as other than a trade or service mark (for example, fair use).

- The mark charged to be an infringement was adopted without knowledge of the registrant's prior use and has been used continuously from a date prior to (1) the date of constructive use of the mark established pursuant to *15 U.S.C. § 1057(c)* [*see* [4][b], *above*]; (2) the registration of the mark under the Lanham Act if the application of registration is filed before November 16, 1989; or (3) publication of the registered mark under *15 U.S.C. § 1062(c)*.

- The mark charged to be an infringement was registered and used before registration or publication under *15 U.S.C. § 1062(c)* of the registrant's mark and has not been abandoned.

- The mark has been or is being used to violate federal antitrust laws.
- Equitable principles, including laches, estoppel, and acquiescence, are applicable.

A registrant initiates this statutory benefit by filing an affidavit with the Patent and Trademark Office [*15 U.S.C. § 1065(3)*; *see 37 C.F.R. § 2.167* (contents of affidavit)].

The affidavit may be filed within the year following any period of five consecutive years subsequent to registration during which the mark has been, and still is, continuously used in commerce in connection with the goods or services specified in the registration [*15 U.S.C. § 1065(3)*].

In addition to filing the affidavit, there must be no final decision adverse to the registrant's claim of ownership in the mark as to the goods or services for which incontestability is sought, or adverse to the registrant's right to either register or keep its mark on the register [*15 U.S.C. § 1065(1)*; *see Robi v. Five Platters, Inc. (9th Cir. 1990) 918 F.2d 1439, 1444*]. Additionally, there must be no proceeding pending involving these rights in either the Patent and Trademark Office or in a court and not finally disposed of [*15 U.S.C. § 1065(2)*]. No right of incontestability can be acquired in a generic mark [*15 U.S.C. § 1065(4)*].

Any false statements made in the affidavit may jeopardize not only the incontestability claim but also the underlying registration. Filing a fraudulent incontestability affidavit provides a basis for canceling the registration itself [*Robi v. Five Platters, Inc. (9th Cir. 1990) 918 F.2d 1439, 1444*].

A descriptive mark that has become incontestable is conclusively presumed to have acquired secondary meaning [*see § 549.21[4][b]* (discussion of effect of secondary meaning)]. In other words, a defendant in a trademark infringement action cannot assert that an incontestable mark is invalid because it is descriptive and lacks secondary meaning. Moreover, when the holder of an incontestable mark is complaining that the most salient feature of its mark (but not the mark itself) is being imitated and that a likelihood of confusion may result, the holder of the mark does not have to show that the salient feature, apart from the mark, has acquired secondary meaning. Rather, the conclusive presumption that the mark has acquired secondary meaning extends to the most salient feature of the mark [*KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc. (9th Cir. 2005) 408 F.3d 596, 606*].

[8] Cancellation

[a] In General

Any person who believes that he or she is or will be damaged by registration of a mark on the Principal Register may petition to cancel registration of a mark [*15 U.S.C. § 1064*]. Cancellation is available only within certain time limits and against certain marks [*see 15 U.S.C. § 1064*].

The legal issue in a cancellation proceeding is the right to register a mark [*Flavor Corporation of America v. Kemin Industries, Inc. (8th Cir. 1974) 493 F.2d 275, 279*]. A trademark owner who misses the opportunity to institute opposition proceedings against a pending registration may still avail itself of the remedy of cancellation of the offending registered mark [*Goodyear Tire & Rubber Co. v. Commissioner of Patents (D.D.C. 1965) 238 F. Supp. 509, 511*].

The Lanham Act requires only that, in order to establish standing, the petitioner must plead and prove facts showing a real interest in the proceeding. No simple test can be applied for what must be proved. The petitioner must be more than an intermeddler with a personal interest, and there must be a real controversy between the parties. Allegations alone do not establish standing. The petitioner must show a real and rational basis for believing that, unless the registration in question is canceled, harm will ensue to the petitioner, stemming from an actual commercial or pecuniary interest in the

petitioner's own mark. Interest assertions will vary with the facts surrounding each cancellation dispute; therefore, a petitioner's standing must be scrutinized case by case [*Halicki Films v. Sanderson Sales & Mktg. (9th Cir. 2008) 547 F.3d 1213, 1229-1230*].

[b] Time Limits

Cancellation of a mark registered under the Lanham Act is available only within five years of the date of registration of the mark [*15 U.S.C. § 1064(1)*].

If the mark was registered under a prior trademark act, cancellation is available only within five years of the date of publication of the mark, but if the mark has not been published or its registration was obtained in any manner contrary to statute, cancellation is available at any time [*15 U.S.C. §§ 1062(c), 1064(2)*-(4)].

[c] Grounds for Cancellation

Cancellation of any mark registered under either the Lanham Act or prior trademark acts, including a mark that has achieved incontestability status, is available at any time on the following grounds [*15 U.S.C. § 1064*; *Sterling Brewers, Inc. v. Schenley Industries, Inc. (C.C.P.A. 1971) 441 F.2d 675, 677*]:

- The mark becomes generic [*15 U.S.C. § 1064(3)*].

- The mark is abandoned [*15 U.S.C. § 1064(3)*].

- The mark's registration is obtained fraudulently [*15 U.S.C. § 1064(3)*; *see Robi v. Five Platters, Inc. (9th Cir. 1990) 918 F.2d 1439, 1444* (required showing for cancellation of registered mark on basis of fraud)].

- The mark's registration is obtained contrary to the provisions for registration of collective and certification marks [*15 U.S.C. §§ 1054, 1064(3)*].

- The mark consists of immoral, deceptive, or scandalous matter, or of matter that may disparage or falsely suggest a connection with persons (living or dead), institutions, beliefs, or national symbols, or bring them into disrepute [*15 U.S.C. §§ 1052(a), 1064(3)*].

- The mark consists of (or any simulation of) the flag, coat of arms, or other insignia of the United States, any state or municipality, or of any foreign nation [*15 U.S.C. §§ 1052(b), 1064(3)*].

- The mark consists of a name, portrait, or signature identifying a particular living individual without the individual's written consent [*15 U.S.C. §§ 1052(c), 1064(3)*].

- The mark consists of the name, signature, or portrait of a deceased president of the United States during the life of his or her surviving spouse without the written consent of the surviving spouse [*15 U.S.C. §§ 1052(c), 1064(3)*].

- The mark is being used by or with the permission of the registrant so as to misrepresent the source of the goods or services in connection with which the mark is used [*15 U.S.C. § 1064(3)*].

- The mark would be likely to cause dilution of a famous mark by blurring or tarnishment under *15 U.S.C. § 1125(c)* [*15 U.S.C. § 1052(f)*].

[d] Procedure

A cancellation proceeding is commenced by the timely filing of a petition for cancellation together with the required fee in the Patent and Trademark Office [*37 C.F.R. § 2.111*]. A cancellation proceeding is a contested, trial-type, administrative proceeding conducted before the Trademark Trial and Appeal Board [*15 U.S.C. § 1067*]. For a discussion of practice and procedure in cancellation proceedings, see *Gilson, Trademark Protection and Practice, §§ 3.05, 8.12* (Matthew Bender).

In any action involving a registered mark, a court may order the cancellation of a mark's registration, in whole or in part [*15 U.S.C. § 1119*; *see Gracie v. Gracie (9th Cir. 2000) 217 F.3d 1060, 1066* (trial court is required to order cancellation of registered mark if court does not reject jury verdict that mark was invalid)]. The registration may be canceled by direct attack, or by collateral attack in any action in which the validity of a mark is properly in issue [*Dymo Industries, Inc. v. Tapeprinter, Inc. (9th Cir. 1964) 326 F.2d 141, 143* ; *see Star-Kist Foods, Inc. v. P.J. Rhodes & Co. (9th Cir. 1984) 735 F.2d 346, 348* ; *Duggan's Funeral Service, Inc. v. Duggan's Serra Mortuary, Inc. (2000) 80 Cal. App. 4th 151, 158-159, 95 Cal. Rptr. 2d 253* (federally registered trademark was properly ordered to be canceled in superior court action based on trademark infringement and unfair competition)].

[9] Administrative Appeal

Any applicant may appeal a final decision of the examiner in charge of the registration of marks to the Trademark Trial and Appeal Board [*15 U.S.C. § 1070*; *37 C.F.R. §§ 2.141-2.144*].

[10] Judicial Review

Any applicant, party to an inter partes proceeding, registrant who has filed a Section 8 affidavit of continuous use or excusable nonuse [*see 15 U.S.C. § 1058*], or applicant for registration renewal may, if dissatisfied with the decision of the Commissioner or the Trademark Trial and Appeal Board, appeal either to the United States Court of Appeals for the Federal Circuit or commence a civil action in U.S. district court [*15 U.S.C. § 1071(a),(b)*]. If a party opts for appeal and an adverse party then elects to have all further proceedings conducted in a civil action in the district court, the appeal must be dismissed, and the appellant then has 30 days within which to file an action in district court, in default of which the decision appealed from governs further proceedings in the case [*15 U.S.C. § 1071(a)(1)*]. Venue in the district court action lies in accordance with general statutory provisions for venue in the federal courts, unless there are adverse parties residing in a plurality of districts not embraced by the same state, or an adverse party residing in a foreign country, in which case venue lies in the U.S. district court for the District of Columbia [*15 U.S.C. § 1071(b)(4)*; *Besuner v. Faberge, Incorporated (N.D. Ohio 1974) 379 F. Supp. 278, 279* ; *see 28 U.S.C. § 1391(b),(c)* (venue in federal courts)].

[11] Renewal

A registration may be renewed for successive 10-year periods on payment of a prescribed fee and filing of a verified renewal application [*15 U.S.C. §§ 1059, 1113*]. A renewal application may be filed at any time within one year before the end of each successive 10-year period, or it may be made within a six-month grace period after the end of each such period on payment of a fee and surcharge [*15 U.S.C. § 1059(a)*]. Any deficiency in an application may be corrected within the time prescribed, after notification and on payment any surcharge. If the renewal of a registration is refused, the registrant must be notified as to the reasons [*15 U.S.C. § 1059(b)*]. Department of Commerce regulations provide for the renewal of registrations granted under previous trademark acts [*37 C.F.R. § 2.181*]. The regulations also provide detailed instructions as to the contents of renewal applications and for procedure on refusal of a renewal application [*37 C.F.R. §§ 2.183, 2.184*].

[12] Nonregistrable Marks

[a] Statutory Exclusions

The Lanham Act prohibits registration on the principal register of the following types of marks:

- Any mark consisting of immoral, deceptive, or scandalous matter; or of matter that may disparage, bring into contempt or disrepute, or falsely suggest a connection with persons (living or dead), institutions, beliefs, or national symbols [*15 U.S.C. § 1052(a)*].

- Any mark consisting of, or any simulation of, the flag, coat of arms, or other insignia of the United States, any state or municipality, or any foreign nation [*15 U.S.C. § 1052(b)*].

- Any mark consisting of a name, portrait, or signature identifying a particular living individual, except by his or her written consent; or the name, signature, or portrait of a deceased U.S. President during the life of his or her surviving spouse, if any, except by the written consent of the surviving spouse [*15 U.S.C. § 1052(c)*].

- Any mark, other than one for which concurrent registrations have issued, so resembling either a mark previously registered or a mark or trade name previously used in the United States by another, not abandoned in either case, as to be likely to cause confusion, mistake, or deception when used on or in connection with the applicant's goods [*see 15 U.S.C. § 1052(d)*; *see § 549.23[5]*].

- Any mark that, when used on or in connection with the applicant's goods, has no secondary meaning and is merely a surname, merely descriptive (or deceptively misdescriptive) of those goods, or primarily geographically descriptive of those goods [*see 15 U.S.C. § 1052(e)(1), (2), (4), (f)*; *see also § 549.21[4]*].

- Any mark that, when used on or in connection with the applicant's goods, is "primarily geographically deceptively misdescriptive," unless the mark became distinctive of the applicant's goods in commerce (that is, acquired secondary meaning) before December 8, 1993 [*see 15 U.S.C. § 1052(e)(3), (f)*].

An applicant for registration on the principal register may be required to, or may voluntarily, disclaim an unregistrable component of a mark otherwise registrable [*15 U.S.C. § 1056(a)*]. The effect of this disclaimer is to disavow any exclusive right to the use of a specified word, phrase, or design outside of its use within a composite mark [*In re Franklin Press, Inc. (C.C.P.A. 1979) 597 F.2d 270, 273*]. Disclaimer does not otherwise prejudice or affect an applicant's present or future rights in the disclaimed material [*15 U.S.C. § 1056(b)*].

A mark that would be likely to cause dilution of a famous mark by blurring or by tarnishment under *15 U.S.C. § 1125(c)* [*see 15 U.S.C. § 1125(c)(2)* (definitions)] may be refused registration, but only pursuant to an opposition proceeding brought under *15 U.S.C. § 1063* [*15 U.S.C. § 1052(f)*].

[b] Color

While the courts have traditionally held that color alone cannot be registered as a trademark, the Lanham Act permits the registration of color alone as a trademark if that color has attained a secondary meaning [*Qualitex Co. v. Jacobson Products Co. (1995) 514 U.S. 159, 163-164, 115 S. Ct. 1300, 131 L. Ed. 2d 248* ; *see In re Owens-Corning Fiberglas Corp. (Fed. Cir. 1985) 774 F.2d 1116, 1127-1128* (color pink could be registered as trademark for insulation when trademark applicant had invested large sums in advertising its pink insulation and when there was no competitive need for others to use that color)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Trademark LawProtection of RightsRegistrationFederal RegistrationTrademark LawProtection of RightsRegistrationIncontestabilityGeneral OverviewTrademark LawProtection of RightsRegistrationPower of CourtsTrademark LawProtection of RightsRegistrationPrincipal RegisterTrademark LawProtection of RightsRegistrationSupplemental RegisterTrademark LawU.S. Trademark Trial & Appeal Board ProceedingsGeneral Overview

California Forms of Pleading and Practice--Annotated

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Chapter 549 TRADEMARKS AND TRADE NAMES
PART II. LEGAL BACKGROUND
B. Federal Trademark Law

48-549 California Forms of Pleading and Practice--Annotated § 549.24

§ 549.24 Infringement of Registered Marks

[1] Confusion, Mistake, or Deception

Any person who, without the registrant's consent, uses in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services, which in connection with that use is likely to cause confusion, mistake, or deception, is liable in a civil action for infringement by the mark's owner [*15 U.S.C. § 1114(1)(a)*].

Any person who, without the registrant's consent, reproduces, counterfeits, copies, or colorably imitates a registered mark and applies the reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce in connection with the sale, offering for sale, distribution, or advertising of goods or services and which, used in those connections is likely to cause confusion, mistake, or deception, is liable in a civil action for infringement by the mark's owner [*15 U.S.C. § 1114(1)(b)*]. However, the registrant may not recover profits or damages in such an action unless the infringing acts are committed with knowledge that the imitation is intended to be used to cause confusion, mistake, or deception [*15 U.S.C. § 1114(1)(b)*].

Usually an infringement action is commenced by the holder of a well-known trademark in order to squelch an opportunistic use of a lesser-known similar mark. However, in an appropriate case, the plaintiff may be the holder of the lesser-known (but senior) trademark and be motivated by a genuine anxiety about the possible deleterious effects of confusion of the marks in the minds of potential customers [*see, e.g., Dreamwerks Production Group, Inc. v. SKG Studio (9th Cir. 1998) 142 F.3d 1127, 1128-1132* (plaintiff, which conducted relatively small convention-management business using science-fiction and adventure themes under senior trademark "Dreamwerks," had viable cause of action against major entertainment company doing business under junior trademark "DreamWorks SKG," and district court erred in granting defendant's motion for summary judgment)]. Thus, in the Ninth Circuit, courts will recognize two distinct kinds of claims in the trademark infringement context: claims based on "forward confusion" and claims based on "reverse confusion." Forward confusion occurs when consumers believe that goods bearing the junior mark came from, or were sponsored by, the senior mark holder. In the senior mark holder's infringement action on a forward

confusion claim, therefore, to avoid an adverse summary judgment, the senior mark holder must raise a material question of fact regarding whether the buying public thought that the senior mark holder was either the source of, or was sponsoring, the junior mark holder's product line. Reverse confusion occurs when consumers dealing with the senior mark holder believe that they are doing business with the junior one. Therefore, to survive a summary judgment motion on a reverse confusion claim, the senior mark holder would have to raise a question of material fact as to whether consumers believed that the junior mark holder was either the source of, or was a sponsor of, the senior mark holder's wares [*Surfvivor Media, Inc. v. Survivor Prods. (9th Cir. 2005) 406 F.3d 625, 630*]. In reverse confusion cases, the inquiry focuses on the strength of the junior mark, which is closely related to how much the market is saturated by the junior mark [M2 *Software, Inc. v. Madacy Entm't (9th Cir. 2005) 421 F.3d 1073, 1089*].

For a complaint asserting a cause of action for infringement of a federally registered trade or service mark, see *§ 549.91*.

[2] Likelihood of Confusion

[a] Marks Used in Commerce Generally

The test in an infringement suit under the Lanham Act is whether defendant's use of a given mark creates a likelihood of confusion as to the source of the goods or services offered in the mind of the average consumer [*15 U.S.C. § 1114*; *Westinghouse Elec. v. Gen. Circuit Breaker & Elec. (9th Cir. 1997) 106 F.3d 894, 899-900* (copying of mark is not necessary element of infringement claim, which may be based on defendant's confusing use of plaintiff's actual mark); *Golden Door, Inc. v. Odisho (N.D. Cal. 1977) 437 F. Supp. 956, 963 , aff'd, 646 F.2d 347 (9th Cir. 1980)*]. In determining whether likelihood of confusion exists, courts in the Ninth Circuit should consider the following, non-exclusive factors [*Official Airline Guides, Inc. v. Goss (9th Cir. 1993) 6 F.3d 1385, 1391* ; *see Mallard Creek Industries, Inc. v. Morgan (1997) 56 Cal. App. 4th 426, 434-438, 65 Cal. Rptr. 2d 461* (identical factors are applied under California law)], which are commonly known as the *Sleekcraft* factors [*see AMF Inc. v. Sleekcraft Boats (9th Cir. 1979) 599 F.2d 341* , 348-349, *abrogated in part on other grounds, Mattel, Inc. v. Walking Mountain Prods. (9th Cir. 2003) 353 F.3d 792, 810 n.19*]:

- The strength of the plaintiff's mark.
- The proximity of the plaintiff's and defendant's goods or services.
- The similarity of the marks.
- Any evidence of actual confusion.
- The types of marketing channels used--and particularly whether the Internet is a marketing channel [*see § 549.24[2][b]*].
- The type of goods and degree of care likely to be exercised by purchasers.
- The defendant's intent in selecting the mark.
- The likelihood of expansion of product lines.

Unless properly used, this long list of factors has the potential to befuddle the inquiry. The list of factors is not a scorecard--whether a party "wins" a majority of the factors is not the point. Nor should the factors be rigidly weighed. Some factors are much more helpful than others, and the relative importance of each individual factor will be case-specific. It is often possible to reach a conclusion with respect to likelihood of confusion after considering only a subset of the factors [*Thane Int'l, Inc. v. Trek Bicycle Corp. (9th Cir. 2002) 305 F.3d 894, 901*]. However, while a

likelihood-of-confusion determination ultimately may rest on a subset of factors, evidence of relatively important factors must be considered as part of that set. In the context of two subjectively dissimilar marks, evidence of actual confusion and evidence defining the context in which the goods are sold is particularly relevant [*Jada Toys, Inc. v. Mattel, Inc. (9th Cir. 2008) 518 F.3d 628, 632-633, 637*]. Although it may be true that very dissimilar marks will rarely present a significant likelihood of confusion, dissimilarity alone does not obviate the need to inquire into evidence of other important factors. Only on such an inquiry may a court ensure that its judgment as to the likelihood of confusion is fully informed and without error [*Jada Toys, Inc. v. Mattel, Inc. (9th Cir. 2008) 518 F.3d 628, 633-634*].

The Lanham Act's "likelihood of confusion" standard is predominantly factual in nature. Therefore, summary judgment for the defendant (junior mark holder) would be inappropriate when a jury could reasonably conclude that most of the *Sleekcraft* factors weigh in favor of the plaintiff (senior mark holder). Granting a motion for summary judgment based on only one factor (or fewer than most of the factors) would be an abuse of discretion [*Wendt v. Host Int'l, Inc. (9th Cir. 1997) 125 F.3d 806, 812*]. On the other hand, a court may properly grant a motion for summary judgment in favor of the defendant if, in opposing the motion for summary judgment, the plaintiff fails to produce any admissible evidence tending to show a likelihood of confusion, or fails to address any of the *Sleekcraft* factors required for a likelihood-of-confusion analysis [*Applied Info Scis. Corp. v. Inc. (9th Cir. 2007) 511 F.3d 966, 973*], or if an analysis of the *Sleekcraft* factors supports the conclusion that there is no triable issue as to the likelihood of confusion [*M2 Software, Inc. v. Madacy Entm't (9th Cir. 2005) 421 F.3d 1073, 1080*].

Likelihood of confusion, and thus infringement, is established when the competing marks are similar in appearance, sound, or meaning; the marketing channels and trade areas overlap; plaintiff's mark is relatively strong; and the class of goods or services involved is similar. Evidence of actual confusion is strong evidence that future confusion is likely, but the absence of such evidence is not dispositive [*Official Airline Guides, Inc. v. Goss (9th Cir. 1993) 6 F.3d 1385, 1393*]. For discussion of the classification of marks according to relative strength or weakness, see *§ 549.21[2]*.

Although intent is not a required element of proof in an infringement suit, when an infringer knowingly adopts a mark similar to another's, reviewing courts presume that defendant can accomplish its purpose and that the public will be deceived [*Official Airline Guides, Inc. v. Goss (9th Cir. 1993) 6 F.3d 1385, 1394* ; *Pacific Telesis v. International Telesis (9th Cir. 1993) 994 F.2d 1364, 1369* ; *AMF Inc. v. Sleekcraft Boats (9th Cir. 1979) 599 F.2d 341, 354* , *abrogated in part on other grounds, Mattel, Inc. v. Walking Mountain Prods. (9th Cir. 2003) 353 F.3d 792, 810 n.19*].

The rubric "likelihood of confusion" encompasses what is called initial-interest confusion, that is, customer confusion that creates initial interest in a competitor's product. Although it might be dispelled before an actual sale occurred, initial interest confusion impermissibly capitalizes on the goodwill associated with a mark and is therefore actionable trademark infringement [*Playboy Enters. v. Netscape Communs. Corp. (9th Cir. 2004) 354 F.3d 1020, 1025*].

[b] Marks Used in Internet Marketing

When the plaintiff and the defendant both use the Internet as a marketing channel, case law in the Ninth Circuit holds that three of the *Sleekcraft* factors [*see § 549.24[2][a]*] predominate, namely (1) the similarity of the parties' marks, (2) the relatedness (or proximity) of the parties' goods or services, and (3) the parties' simultaneous use of the Internet as a marketing channel. Therefore, if the two marks are confusingly similar, and the goods or services offered by the plaintiff and defendant are related, and both the plaintiff and the defendant use the Internet as a marketing channel, then the trier of fact should find that the plaintiff has proved a likelihood of confusion, unless the remaining factors weigh strongly in the defendant's favor [*Internet Specialties West, Inc. v. Milon-Digiorgio Enters. (9th Cir. 2009) 559 F.3d 985, 989]* . In the Ninth Circuit, those three factors sometimes are called the "Internet troika" in cases in which the Internet is used as a marketing channel.

[3] Innocently Infringing Printer, Publisher, or Distributor

If an infringer is engaged solely in the business of printing the mark for others and establishes that he or she was an innocent infringer, the owner of the right infringed may only obtain an injunction against future printing, and not monetary relief, against that particular infringer [*15 U.S.C. § 1114(2)(A)*].

Moreover, if the infringement complained of is contained in or is part of paid advertising matter in a newspaper, magazine, or other similar periodical, or in an electronic communication as defined in *18 U.S.C. § 2510(12)* (radio, television, and other transmissions affecting interstate or foreign commerce), the remedies of the owner of the right infringed as against the innocently infringing publisher or distributor is limited to an injunction against the presentation of the advertising matter in future issues of the periodical or in future transmissions of the electronic communication. In addition, injunctive relief in respect of an issue of a periodical or transmission of an electronic communication is not available if it would delay the delivery of the particular issue or transmission after its regular time of delivery, when the delay would be due to the method by which the publication and distribution is customarily conducted in accordance with sound business practice and not due to any method adopted to evade *15 U.S.C. § 1114* or to prevent or delay issuance of an injunction or restraining order with respect to the infringing matter [*15 U.S.C. § 1114(2)(B),(C)*].

[4] Jurisdiction

The U.S. district courts and the state courts have concurrent jurisdiction in all actions arising under the Lanham Act [*15 U.S.C. § 1121*; *28 U.S.C. § 1338(a)*]. Thus, an action may, but need not, be brought in U.S. district court. Neither diversity of citizenship nor a specific amount in controversy is required for federal court jurisdiction of Lanham Act cases [*15 U.S.C. § 1121*].

The United States, all agencies and instrumentalities of the United States, and all individuals, firms, corporations or other persons acting for the United States with authorization and consent, are not immune from suit in federal or state courts by any person for a violation of the Lanham Act [*15 U.S.C. § 1122(a)*]. States, their instrumentalities, and officers or employees acting within the scope of official duty, also are not immune from suit in federal court [*15 U.S.C. § 1122(b)*], whether under the *Eleventh Amendment* or any other doctrine of sovereign immunity.

A plaintiff in an infringement suit bears the burden both of making an initial prima facie showing of jurisdictional facts at the pleading stage and of proving those facts by a preponderance of the evidence at trial [*Wells Fargo & Co. v. Wells Fargo Exp. Co. (9th Cir. 1977) 556 F.2d 406, 430 n.24*].

A district court generally should not decline to accept jurisdiction of a trademark declaratory relief action, on primary jurisdiction grounds, pending the completion of related proceedings before the Trademark Trial and Appeal Board (TTAB). Some situations might justify declining to accept jurisdiction of a declaratory-relief action when related TTAB proceedings are pending; specifically, when the district-court action involves only the issue of whether a mark is entitled to registration, it might make more sense to resolve the registration claims at the TTAB first. On the other hand, if the purpose of the declaratory relief action is to preclude a potential infringement claim, that situation would require the district court to resolve many or all of the related registration issues, and it would waste everyone's time not to settle the registration issues in district court. The deciding factor should be efficiency; the district court should accept jurisdiction if that course is more efficient [*Rhoades v. Avon Prods. (9th Cir. 2007) 504 F.3d 1151, 1162, 1164-1165*].

In the event of a trademark infringement claim against a member of an Indian tribe, a question could arise regarding whether a tribal court might have jurisdiction. The jurisdictional issue could be difficult to resolve if the infringing activity occurred entirely on land within the tribe's reservation. However, when the holder of a federally registered trademark asserted a claim against a member of an Indian tribe for trademark infringement through worldwide Internet sales and off-reservation sales--that is, when the infringement claim was based on activities beyond the reservation boundary--the tribal court was held not to have jurisdiction [*Philip Morris USA, Inc. v. King Mt. Tobacco Co. (9th Cir. 2009) 552 F.3d 1098, 2009 U.S. App. LEXIS 907, at *27-*32* (tribe members, acting through corporation created under tribal law, produced cigarettes in packages similar to famous Marlboro brand's packaging, which were sold and

shipped to off-reservation buyers through websites and by mail)].

[5] Monetary Relief

[a] In General

The prevailing plaintiff in an infringement action must be awarded, subject to the provisions of *15 U.S.C. §§ 1111* and *1114* and subject to the principles of equity, defendant's profits, plaintiff's damages, and costs of the action [*15 U.S.C. § 1117(a)*]. *15 U.S.C. § 1111* provides that if a registrant does not display along with its mark, notice that the mark is registered, the registrant cannot recover profits or damages unless the defendant has actual notice of the registration [*15 U.S.C. § 1111*]. For discussion of *15 U.S.C. § 1114*, see *§ 549.24[1]* and *[3]*.

In assessing profits, plaintiff need only prove defendant's sales. In assessing damages, the court may award an amount up to three times the amount of plaintiff's actual damages. Plaintiff is entitled to its costs in the action if it prevails [*15 U.S.C. § 1117(a)*]. The fact that the defendant did not profit from an infringement does not preclude the plaintiff from recovering damages [*Intel Corp. v. Terabyte Int'l (9th Cir. 1993) 6 F.3d 614, 621*]. The court may also award damages pursuant to the Lanham Act in addition to damages provided under other statutes [*Nintendo of America, Inc. v. Dragon Pacific Int'l (9th Cir. 1994) 40 F.3d 1007, 1011*] (treble damages awarded under the Lanham Act in addition to statutory damages under copyright law for sales which simultaneously infringed plaintiff's copyright and trademark).

In exceptional cases, a court may award reasonable attorney's fees to the prevailing party [*15 U.S.C. § 1117(a)*]. An award of attorney's fees has been generally considered discretionary even if the award fits within the statutory standard of an exceptional case. Although *15 U.S.C. § 1117(a)* contains no definition of "exceptional cases," in the Ninth Circuit, these cases involve conduct that is extraordinary, malicious, fraudulent, deliberate, willful, wanton, or oppressive [*Intel Corp. v. Terabyte Int'l (9th Cir. 1993) 6 F.3d 614, 621* ; *International Olympic Committee v. San Francisco Arts & Athletics (9th Cir. 1986) 781 F.2d 733, 738 , aff'd on other grounds, 483 U.S. 522 (1987)* (action for injunctive relief under former *36 U.S.C. § 380*, now *36 U.S.C. § 220506*, and seeking attorney's fees under *15 U.S.C. § 1117(a)*); *Transgo, Inc. v. Ajac Transmission Parts Corp. (9th Cir. 1985) 768 F.2d 1001, 1026* (action for injunctive relief and damages for false designation of origin under *15 U.S.C. § 1125(a)* and seeking attorney's fees under *15 U.S.C. § 1117(a)*)]. Additionally, in assessing an award under *15 U.S.C. § 1117(a)*, a court should examine both the reasonableness of and the necessity for time spent in a given case [*Intel Corp. v. Terabyte Int'l (9th Cir. 1993) 6 F.3d 614, 623* ; *International Olympic Committee v. San Francisco Arts & Athletics (9th Cir. 1986) 781 F.2d 733, 739 , aff'd on other grounds, 483 U.S. 522 (1987)* ; *see, e.g., Earthquake Sound Corp. v. Bumper Indus. (9th Cir. 2003) 352 F.3d 1210, 1220* (district court did not abuse discretion in awarding attorney's fees to plaintiff after successful motion for summary judgment; also, plaintiff was entitled to award of further fees after successfully responding to defendant's appeal from district court's order awarding fees)].

In a case involving both Lanham Act claims and non-Lanham Act claims, the prevailing party can recover fees under *15 U.S.C. § 1117(a)* only for work related to the Lanham Act claims. Apportionment of the total fees requested, between the Lanham Act work and the non-Lanham Act work, is required--even though the result could be somewhat inexact, depending on the relevant facts--unless the Lanham Act claims and non-Lanham Act claims are inextricably intertwined and the court finds that even an estimated adjustment would be meaningless [*Gracie v. Gracie (9th Cir. 2000) 217 F.3d 1060, 1069-1070* (case was remanded for apportionment as well as development of adequate record to establish reasonableness of total fee award)].

When the complaint alleges facts sufficient to support the conclusion that the defendant's conduct was extraordinary, malicious, fraudulent, deliberate, willful, wanton, or oppressive, then if the court enters the defendant's default and awards attorney's fees to the plaintiff, the plaintiff's entitlement to attorney's fees (but not the appropriate amount) is thus established, because in consequence of the default, all well-pleaded allegations in the complaint must be taken as true [*Derek Andrew, Inc. v. Poof Apparel Corp. (9th Cir. 2008) 528 F.3d 696, 702*].

[b] Counterfeit Mark

When a violation of *15 U.S.C. § 1114(1)(a)* (counterfeit marks) or *36 U.S.C. § 220506* (relating to use of Olympic name and logos) consists of intentionally using a mark or designation, knowing that the mark or designation is a counterfeit mark (as defined in *15 U.S.C. § 1116(d)*; *see § 549.24[7]*), in connection with the sale, offering for sale, or distribution of goods or services, the court, unless it finds extenuating circumstances, must enter judgment for three times the defendant's profits or plaintiff's damages, whichever is greater, together with a reasonable attorney's fee in assessing damages under *15 U.S.C. § 1117(a)*. An offer to sell is sufficient, without more, to establish liability, and such an offer could not be protected under the *First Amendment* as legitimate commercial speech because the underlying transaction (selling counterfeit goods) would be unlawful [*Levi Strauss & Co. v. Shilon (9th Cir. 1997) 121 F.3d 1309, 1312-1313* (plaintiff obtained injunction together with award of attorney's fees and investigation costs; defendant had offered to produce and sell, but never actually possessed, counterfeit goods)]. The court may award prejudgment interest on the amount [*15 U.S.C. § 1117(b)*]. At any time before final judgment is rendered, the plaintiff may elect for the court to award statutory damages instead of the actual damage and profits awardable under *15 U.S.C. § 1117(a)* [*15 U.S.C. § 1117(c)*]. If the court finds that the use of the counterfeit mark was willful, the court may award up to $2 million for each type of goods sold or offered for sale under each counterfeit mark [*15 U.S.C. § 1117(c)(2)*].

[6] Injunctive Relief

In an infringement action, a court has discretion to grant an injunction according to equitable principles, and on such terms as it deems reasonable to prevent the violation of any right of the registrant, or to prevent a violation under *15 U.S.C. § 1125(a)* or *(c)* [*15 U.S.C. § 1116(a)*]. However, whereas the scope of an injunction is initially left to the discretion of the trial court, an injunction will not be awarded if any lesser relief will protect the owner of the mark [*International Olympic Committee v. San Francisco Arts & Athletics (9th Cir. 1986) 781 F.2d 733, 737 , aff'd on other grounds, 483 U.S. 522 (1987)*]. Any injunction may include a provision directing defendant to file with the court and serve on plaintiff a report in writing and under oath setting forth the manner and form in which defendant has complied with the terms of the injunction. Any injunction so issued is enforceable by proceedings to punish for contempt, or otherwise [*15 U.S.C. § 1116(a)*].

Once a court has enjoined the infringement of a trademark--for example, if the court ordered the defendant to cease and desist from making, distributing, selling, or advertising any product that was a simulation, reproduction, counterfeit, copy, or colorable imitation of the plaintiff's trademarked design--the court may enforce its decree in a contempt proceeding. The plaintiff, having already obtained a judgment establishing that the defendant infringed the plaintiff's trademark, is not required to muster all of the evidence that would be needed to make out an original infringement case, in order to prove contempt. For example, in order to establish a violation of the decree based on the defendant making and selling a colorable imitation, the plaintiff need not prove the same likelihood of consumer confusion that would be required in an original infringement case. The defendant cannot be allowed to make minimal changes in the offending product in order to test the outer boundaries of the judgment; the defendant has a duty to stay well away from the plaintiff's trademark. If the defendant crosses that line, the court would not abuse its discretion by holding the defendant in contempt [*Wolfard Glassblowing Co. v. Vanbragt (9th Cir. 1997) 118 F.3d 1320, 1322-1323*].

[7] Seizure of Goods and Counterfeit Marks

As used in *15 U.S.C. § 1051 et seq.*, a "counterfeit" is a spurious mark that is identical with, or substantially indistinguishable from, a mark registered on either the principal or the supplemental register in the United States Patent and Trademark Office [*15 U.S.C. § 1127*]. As used in *15 U.S.C. § 1116(d)*, the term "counterfeit mark" is further defined to mean either of the following:

- A counterfeit of a mark that is registered on the principal register for goods or services sold, offered for sale, or distributed and that is in use, whether or not the person against whom relief is sought knew

the mark was registered [*15 U.S.C. § 1116(d)(1)(B)(i)*].

- A spurious designation that is identical with, or substantially indistinguishable from, a symbol, emblem, trademark, trade name, or insignia of the U.S. or International Olympic Committee [*15 U.S.C. § 1116(d)(1)(B)(ii)*; *36 U.S.C. § 220506*].

However, the term "counterfeit mark" does not include any mark or designation used on or in connection with goods or services if the manufacturer or producer was, at the time of manufacture or production, authorized to use the mark or designation for the type of goods or services so manufactured or produced, by the holder of the right to use the mark or designation [*15 U.S.C. § 1116(d)(1)(B)*].

A court, on ex parte application by a plaintiff in an infringement action under *15 U.S.C. § 1114(1)(a)* or an action under *36 U.S.C. § 220506*, involving use of a counterfeit mark in connection with the sale, offering for sale, or distribution of goods or services, may grant an order providing for the seizure of goods and counterfeit marks involved, together with the means of making the marks, and records documenting the manufacture, sale, or receipt of items involved in the actions [*15 U.S.C. § 1116(d)(1)(A)*]. The application for the order must be based on an affidavit or on the verified complaint establishing facts sufficient to support the findings of fact and conclusions of law required for the order [*15 U.S.C. § 1116(d)(3)(A)*; *see §§ 549.101, 549.102*].

A U.S. district court's denial of a motion for an ex parte seizure order would not be appealable under *28 U.S.C. § 1292(a)(1)* (appeal from interlocutory orders) because it would be neither an automatically appealable literal refusal of an injunction nor a practical denial of ultimate injunctive relief [*In re Lorillard Tobacco Co. (9th Cir. 2004) 370 F.3d 982, 983* (seizure order cannot be characterized as injunction)].

A person who suffers damage by reason of a wrongful seizure has a cause of action against the applicant for the order under which seizure was made and is entitled to recover appropriate relief, including damages, punitive damages, and reasonable attorney's fees [*15 U.S.C. § 1116(d)(11)*].

[8] Equitable Relief

[a] Destruction of Goods

A court may order delivery to the court and destruction of any material in defendant's possession bearing the registered mark or any reproduction, counterfeit, copy, or colorable imitation of mark. The court also may order that all means of making the mark, or reproductions, counterfeits, copies, and imitations be delivered to the court and destroyed [*15 U.S.C. § 1118*]. The party seeking an order under *15 U.S.C. § 1118* for destruction of articles seized under *15 U.S.C. § 1116(d)* must give 10 days notice to the United States attorney for the judicial district in which the order is sought (unless good cause is shown for lesser notice). If destruction may affect evidence of an offense against the United States, the United States attorney may seek a hearing on destruction or participate in any hearing otherwise to be held with respect to the destruction [*15 U.S.C. § 1118*; for discussion of *15 U.S.C. § 1116(d)*, *see §§ 549.101, 549.102*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Trademark LawInfringement ActionsGeneral OverviewTrademark LawInfringement ActionsDefensesGeneral OverviewTrademark LawInfringement ActionsJurisdictionGeneral OverviewTrademark LawInfringement ActionsRemediesGeneral OverviewTrademark LawLikelihood of ConfusionGeneral Overview

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PART II. LEGAL BACKGROUND
B. Federal Trademark Law

48-549 California Forms of Pleading and Practice--Annotated § 549.25

§ 549.25 Remedy for Fraudulent Registration

Any person who procures registration of a mark by a false or fraudulent declaration or representation, oral or written, or by any false means, is liable in a civil action by any person injured thereby for any damages sustained [*15 U.S.C. § 1120*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Trademark LawProtection of RightsRegistrationFraudulent Registration

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48-549 California Forms of Pleading and Practice--Annotated § 549.26

§ 549.26 Action Under Lanham Act Section 43(a) for Improper Use of Mark or False Description, Representation, or Designation of Origin (Unfair Competition)

[1] General Statutory Prohibition Against Conduct Likely to Cause Confusion, Mistake, or Deception

[a] In General

Lanham Act Section 43(a) (*15 U.S.C. § 1125(a)*) provides, in part, that any person who uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact on or in connection with any goods, services, or container for goods is liable in a civil action if the use is likely to cause confusion or mistake, or to deceive as to the affiliation, connection, or association of the user with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person. The action may be brought by any person who believes he or she is likely to be damaged by such use [*15 U.S.C. § 1125(a)(1)(A)*]. It is evident from the plain language of the statute, in its definition of the term "any person," that Congress intended to authorize suits against state officials, as well as suits against private persons, under the Lanham Act [*Sofamor Danek Group, Inc. v. Brown (9th Cir. 1997) 124 F.3d 1179, 1185* ; *see 15 U.S.C. § 1125(a)(2)* ("As used in this subsection, the term 'any person' includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.")].

In a complaint under *15 U.S.C. § 1125(a)(1)* seeking to hold a defendant liable for representing to others that someone (such as the plaintiff) infringed the defendant's patent, the plaintiff must show, in addition to the circumstances contemplated by the statute, that the defendant's representation was made in bad faith. The purpose of this bad-faith requirement is to permit a patent holder to assert rights in good faith without fear that doing so might violate the Lanham Act or state tort laws. This requirement for a showing of bad faith has been held to apply not only to the patent holder but also to persons who act in concert to enforce the patent holder's rights, such as attorneys who draft letters and wholesale distributors who forward those letters to retailers on the patent holder's behalf [*Fisher Tool Co. v. Gillet Outillage (9th Cir. 2008) 530 F.3d 1063, 1068-1069* (at defendant's direction, attorney prepared letters, addressed "To Whom It May Concern," expressing attorney's "strong opinion" that plaintiff's pliers infringed defendant's patent and

threatening that defendant would sue anyone who sold plaintiff's pliers; defendant's U.S. distributor forwarded these letters to its customers; plaintiff alleged that patent infringement claim was false but failed to allege that it was made in bad faith)].

Lanham Act Section 43(a) encompasses a broader range of unfair practices than does an action for trademark infringement under *15 U.S.C. § 1114* [*Two Pesos, Inc. v. Taco Cabana, Inc. (1992) 505 U.S. 763, 112 S. Ct. 2753, 120 L. Ed. 2d 615, 623*]. As further discussed below, it encompasses common-law unfair competition actions for "passing off" and "reverse passing off" [*see Summit Mach. Tool Mfg. v. Victor CNC Systems (9th Cir. 1993) 7 F.3d 1434, 1437*], as well as actions for infringement of unregistered trademarks and "trade dress" [*see Two Pesos, Inc. v. Taco Cabana, Inc. (1992) 505 U.S. 763, 112 S. Ct. 2753, 120 L. Ed. 2d 615, 623, 625*].

However, Section 43(a) does not have boundless application as a remedy for unfair trade practices. It is not a codification of the law of unfair competition, but can apply only to the kinds of unfair trade practices prohibited by its text [*Dastar Corp. v. Twentieth Century Fox Film Corp. (2003) 539 U.S. 23, 123 S. Ct. 2041, 156 L. Ed. 2d 18, 27* ; *see, e.g., Freecycle Network, Inc. v. Oey (9th Cir. 2007) 505 F.3d 898, 904-905* ("trademark disparagement" is not actionable under Section 43(a), although *product* disparagement or trademark *infringement* could be actionable)].

The Lanham Act contains no provision preventing the use of a trademarked term in its generic sense, nor does the Lanham Act prevent an individual from expressing an opinion that a mark should be considered generic or from encouraging others to use the mark in its generic sense. Rather, the use of a mark in its generic sense is actionable under the Lanham Act only when that use also satisfies the elements of a specified cause of action (such as infringement, false designation of origin, false advertising, or dilution). A mark owner's mere disagreement with an individual's opinion that the mark should be considered generic and frustration with the individual's activities in support of that opinion would not render the individual liable under the Lanham Act [*Freecycle Network, Inc. v. Oey (9th Cir. 2007) 505 F.3d 898, 906*].

[b] Passing Off or Reverse Passing Off

The statutory references to the "origin" of goods or services or commercial activities [*see 15 U.S.C. § 1152(a)*] covers the origin of production as well as geographic origin [*Dastar Corp. v. Twentieth Century Fox Film Corp. (2003) 539 U.S. 23, 123 S. Ct. 2041, 156 L. Ed. 2d 18, 27*]. Thus, the cause of action for false designation of origin under Lanham Act Section 43(a) encompasses the common law action for passing off [*Transgo, Inc. v. Ajac Transmission Parts Corp. (9th Cir. 1985) 768 F.2d 1001, 1021*]. Regardless of the type of activity sought to be remedied, the actionable conduct must be not only unfair but also, in some discernible way, competitive [*see Halicki v. United Artists Communications, Inc. (9th Cir. 1987) 812 F.2d 1213, 1214*].

The most natural understanding of the phrase "origin of goods" as used in Section 43(a) is that it connotes the source of wares; therefore, the phrase refers to the person who is the producer of some tangible product sold in the marketplace. Moreover, the phrase is incapable of connoting a person or entity that originated whatever ideas or communications the goods may embody or contain [*Dastar Corp. v. Twentieth Century Fox Film Corp. (2003) 539 U.S. 23, 123 S. Ct. 2041, 156 L. Ed. 2d 18, 28-29* ("such an extension [to an originator of embodied ideas] would not only stretch the text, but it would be out of accord with the history and purpose of the Lanham Act and inconsistent with precedent.")]. "The consumer who buys a branded product does not automatically assume that the brand-name company is the same entity that came up with the idea for the product, or designed the product, and typically does not care whether it is. The words of the Lanham Act should not be stretched to cover matters that are typically of no consequence to purchasers" [*Dastar Corp. v. Twentieth Century Fox Film Corp. (2003) 539 U.S. 23, 123 S. Ct. 2041, 156 L. Ed. 2d 18, 30*]. The law of copyright, rather than trademark law, protects whatever property interests a person may have in the kinds of goods (such as books, video tapes, audio tapes, films, and so on) that embody intellectual products [*see Dastar Corp. v. Twentieth Century Fox Film Corp. (2003) 539 U.S. 23, 123 S. Ct. 2041, 156 L. Ed. 2d 18, 30-33*].

Passing off may be either express or implied [*Lamothe v. Atlantic Recording Corp. (9th Cir. 1988) 847 F.2d 1403, 1406*]. Express passing off occurs when a person or enterprise labels goods with a mark identical to that of another person or enterprise, or otherwise expressly misrepresents that the goods originated with another person or enterprise [*Transgo, Inc. v. Ajac Transmission Parts Corp. (9th Cir. 1985) 768 F.2d 1001, 1020*]. Implied passing off occurs when a person or enterprise uses a competitor's advertising material, or a sample or photograph of the competitor's product, to impliedly represent that the product being sold is made by the competitor [*Lamothe v. Atlantic Recording Corp. (9th Cir. 1988) 847 F.2d 1403, 1406*].

The language of Section 43(a) with respect the "origin" of goods or services or commercial activities is amply inclusive, moreover, of "reverse passing off" [*Dastar Corp. v. Twentieth Century Fox Film Corp. (2003) 539 U.S. 23, 123 S. Ct. 2041, 156 L. Ed. 2d 18, 27*]. A person may incur liability under Section 43(a) for express or implied reverse passing off. Express reverse passing off occurs when one person removes the name or mark on another party's product and sells that product under a name chosen by that person [*see Summit Mach. Tool Mfg. v. Victor CNC Systems (9th Cir. 1993) 7 F.3d 1434, 1437* ; *Litchfield v. Spielberg (9th Cir. 1984) 736 F.2d 1352, 1357-1358*]. Implied reverse passing off occurs when the wrongdoer removes or obliterates the name of the source from another party's product and sells the product in an unbranded state [*Lamothe v. Atlantic Recording Corp. (9th Cir. 1988) 847 F.2d 1403, 1406* (prior law)]. A party may also be guilty of reverse palming off when he or she sells or offers for sale another's product that has been modified slightly and then labeled with a different name [*Summit Mach. Tool Mfg. v. Victor CNC Systems (9th Cir. 1993) 7 F.3d 1434, 1437*].

A claim for reverse palming off requires the plaintiff to establish that the defendant made a "bodily appropriation" of the plaintiff's product and then sold it under defendant's name or some other name. Mere "substantial similarity" between the plaintiff's product and the defendant's is not sufficient to establish reverse palming off [*see Summit Mach. Tool Mfg. v. Victor CNC Systems (9th Cir. 1993) 7 F.3d 1434, 1438* ; *see also Shaw v. Lindheim (9th Cir. 1990) 919 F.2d 1353, 1364-1365*]. However, a finding that the products were *not* substantially similar necessarily compels the conclusion that there was no bodily appropriation [*see Summit Mach. Tool Mfg. v. Victor CNC Systems (9th Cir. 1993) 7 F.3d 1434, 1438*].

[c] Infringement of Unregistered Marks

Lanham Act Section 43(a) also protects qualifying unregistered trademarks against infringement [*Two Pesos, Inc. v. Taco Cabana, Inc. (1992) 505 U.S. 763, 112 S. Ct. 2753, 120 L. Ed. 2d 615, 623* ; *see Transgo, Inc. v. Ajac Transmission Parts Corp. (9th Cir. 1985) 768 F.2d 1001, 1013*]. The principles for determining whether an unregistered mark qualifies for protection and has been infringed are generally the same as those that apply to actions for infringement of a registered mark [*see Two Pesos, Inc.v. Taco Cabana, Inc. (1992) 505 U.S. 763, 112 S. Ct. 2753, 120 L. Ed. 2d 615, 623* ; *Century 21 Real Estate Corp. v. Sandlin (9th Cir. 1988) 846 F.2d 1175, 1178*]. For discussion of principles determining the protectability of marks, see *§ 549.21[2]*. For discussion of what constitutes infringement of a registered mark, see *§ 549.24[1],[2]*.

[d] Infringement of Trade Dress

"Trade dress" refers to the total image of a product or service and may include such features as size, shape, color, color combinations, texture, or graphics [*International Jensen v. Metrosound U.S.A. (9th Cir. 1993) 4 F.3d 819, 822* ; *see Two Pesos, Inc. v. Taco Cabana, Inc. (1992) 505 U.S. 763, 112 S. Ct. 2753, 120 L. Ed. 2d 615, 621 n.1*]. Federal courts have held that a seller's adoption of a trade dress that is confusingly similar to a competitor's constitutes a form of unfair competition that is actionable under Lanham Act Section 43(a) [*International Jensen v. Metrosound U.S.A. (9th Cir. 1993) 4 F.3d 819, 822* ; *see Two Pesos, Inc. v. Taco Cabana, Inc. (1992) 505 U.S. 763, 112 S. Ct. 2753, 120 L. Ed. 2d 615, 623-628*].

To recover for trade dress infringement under Section 43(a), the plaintiff must establish that its trade dress (1) is

non-functional, (2) is either inherently distinctive or has acquired secondary meaning, and (3) is likely to be confused with a competitor's products by members of the consuming public [*International Jensen v. Metrosound U.S.A. (9th Cir. 1993) 4 F.3d 819, 823* ; *see Two Pesos, Inc. v. Taco Cabana, Inc. (1992) 505 U.S. 763, 112 S. Ct. 2753, 120 L. Ed. 2d 615, 624-625*]. Trade dress is functional if it is essential to the product's use or affects the cost or quality of the product [*International Jensen v. Metrosound U.S.A. (9th Cir. 1993) 4 F.3d 819, 823* ; *HWE, Inc. v. JB Research, Inc. (9th Cir. 1993) 993 F.2d 694, 696*]. For trade dress not registered on the principal register, the person who asserts trade-dress protection has the burden of proving that the matter sought to be protected is not functional [*15 U.S.C. § 1125(a)(3)*; *see TrafFix Devices, Inc. v. Marketing Displays, Inc. (2001) 532 U.S. 23, 121 S. Ct. 1255, 1260, 149 L. Ed. 2d 164* (expired utility patent that covered features now claimed as trade dress has vital significance in resolving trade-dress infringement claim because utility patent is strong evidence that features claimed in it are functional)].

In an action for infringement of unregistered trade dress under Section 43(a), a product's *design* (which is not the same as *packaging*) is distinctive, and therefore protectable, only on a showing of secondary meaning [*Wal-Mart Stores, Inc. v. Samara Bros. (2000) 529 U.S. 205, 216, 120 S. Ct. 1339, 146 L. Ed. 2d 182* ; *see Art Attacks Ink, LLC v. MGA Entm't Inc. (9th Cir. 2009) 581 F.3d 1138, 1145-1146* (reasonable jury could not have found secondary meaning based on plaintiff's evidence and arguments respecting purchaser perception, advertising, extent and exclusivity of use, and actual confusion); *Leatherman Tool Group v. Cooper Indus. (9th Cir. 1999) 199 F.3d 1009, 1014* (overall appearance of product is not protectable as trade dress, at least as against competitor that clearly marks its own very similar product with distinct name and uses distinct packaging)].

Regarding defenses to claims of infringement of trade dress, the Ninth Circuit holds that the fair use defense, as it applies in the trademark context, is equally applicable in the trade dress context. In particular, the Ninth Circuit's distinction between classic fair use and nominative fair use [*see § 549.28[5]*] would apply. A defendant's use is classic fair use where the defendant has used the plaintiff's trade dress to describe or identify the defendant's own product and not at all to describe or identify the plaintiff's product. Likewise, a defendant's use is nominative where he or she used the plaintiff's trade dress to describe or identify the plaintiff's product, even if the defendant's ultimate goal is to describe or identify his or her own product [*Mattel, Inc. v. Walking Mountain Prods. (9th Cir. 2003) 353 F.3d 792, 809*].

[2] False Advertising

Lanham Act Section 43(a) also provides that any person who uses in commerce any false designation of origin, false or misleading description of fact, or false or misleading representation of fact on or in connection with any goods, services, or container for goods is liable in a civil action if the designation, description, or representation occurs in commercial advertising or promotion and misrepresents the nature, characteristics, qualities, or geographic origin of his or her goods, services, or commercial activities. Liability also results when the designation, description, or representation misrepresents the goods, services, or commercial activities of another person, such as a competitor [*see 15 U.S.C. § 1125(a)(1)(B)*; *see, e.g., Southland Sod Farms v. Stover Seed Co. (9th Cir. 1997) 108 F.3d 1134, 1139-1140*].

Only commercial competitors have standing to sue for a violation of *15 U.S.C. § 1125(a)(1)(B)*. In order to have standing pursuant to the false advertising prong of Section 43(a), a plaintiff must show not only a commercial injury based on a misrepresentation about a product, but also that the injury is "competitive," meaning harmful to the plaintiff's ability to compete with the defendant [*Jack Russell Terrier Network v. American Kennel Club, Inc. (9th Cir. 2005) 407 F.3d 1027, 1037* (regional club of dog owners had no standing to sue national club with which it was affiliated because it was not commercial competitor of national club); *Barrus v. Sylvania (9th Cir. 1995) 55 F.3d 468, 470* (consumer did not have standing)].

A prima facie case requires a showing of all of the following facts [*Jarrow Formulas, Inc. v. Nutrition Now, Inc. (9th Cir. 2002) 304 F.3d 829, 835 n.4* ; *Southland Sod Farms v. Stover Seed Co. (9th Cir. 1997) 108 F.3d 1134, 1139* ; *see, e.g., Newcal Indus. v. Ikon Office Solution (9th Cir. 2008), 513 F.3d 1038, 1054* ("[t]he complaint sufficiently alleges all elements of a Lanham Act violation, including several false statements of fact that were allegedly disseminated to

the relevant market's consumers. The district court correctly held that statement (a) constitutes puffery, but statements (b)-(e) should have survived the motion to dismiss and must therefore be remanded for evidentiary development.")]:

- The defendant made a false statement about either the plaintiff's product or the defendant's own product.
- The statement was made in a commercial advertisement or promotion.
- The statement actually deceived or has the tendency to deceive a substantial segment of its audience.
- The deception is material, in that it is likely to influence the purchasing decision.
- The defendant caused its false statement to enter interstate commerce.
- The plaintiff has been or is likely to be injured as a result of the false statement, either by direct diversion of sales from the plaintiff to the defendant or by a lessening of goodwill associated with the plaintiff's product.

The defendant may raise laches as a defense, and for that purpose, the applicable limitation period under California law [*see* [4], *below*] is the three-year period for fraud under *Code Civ. Proc. § 338(d)* [*Jarrow Formulas, Inc. v. Nutrition Now, Inc. (9th Cir. 2002) 304 F.3d 829, 838*]. The plaintiff may counter with evidence of the defendant's unclean hands; however, the plaintiff can escape laches under the unclean hands doctrine only if the court is left with a firm conviction that the defendant acted with a fraudulent intent in making the challenged claim [*Jarrow Formulas, Inc. v. Nutrition Now, Inc. (9th Cir. 2002) 304 F.3d 829, 842*].

[3] Remedies

[a] Monetary Relief

The prevailing plaintiff in an action for a violation under Lanham Act Section 43(a) (*15 U.S.C. § 1125(a)*) must be awarded, subject to the provisions of *15 U.S.C. § 1111* (owner of registered mark cannot recover damages absent legal or actual notice of registration) and *15 U.S.C. § 1114* (printer, publisher, or distributor committing innocent violation not liable for damages) and subject to the principles of equity, defendant's profits, plaintiff's damages, and costs of the action. In assessing profits, plaintiff need only prove defendant's sales. In assessing damages, the court may award an amount up to three times the amount of plaintiff's actual damages. Plaintiff is entitled to its costs in the action if it prevails. In addition, a court may award reasonable attorney's fees to the prevailing party in "exceptional cases" [*15 U.S.C. 1117(a)*].

In a suit for damages under Lanham Act Section 43(a), actual evidence of some injury resulting from the defendant's conduct is an essential element of the plaintiff's case [*Harper House, Inc. v. Thomas Nelson, Inc. (9th Cir. 1989) 889 F.2d 197, 210*]. Thus, even though the amount of damages can be presumed when incapable of exact determination, and even though the Ninth Circuit accepts surrogate measures of damages in cases of palming off [*see Harper House, Inc. v. Thomas Nelson, Inc. (9th Cir. 1989) 889 F.2d 197, 209, 209 n.8*], the plaintiff may not recover any damages if he or she fails to prove that the defendant's actions caused the claimed harm [*Harper House, Inc. v. Thomas Nelson, Inc. (9th Cir. 1989) 889 F.2d 197, 209*].

15 U.S.C. § 1117(a) became effective November 16, 1989 [for discussion of amendments contained in the Trademark Law Revision Act of 1988, *see § 549.20[1]*]. Before that date, the provisions for monetary relief contained in former *15 U.S.C. § 1117(a)* appeared on their face only to apply cases involving registered trademarks [*see Transgo, Inc. v. Ajac Transmission Parts Corp. (9th Cir. 1985) 768 F.2d 1001, 1025* ; *see also § 549.24[5][a]*]. However, several circuits

held that the remedies authorized by *15 U.S.C. § 1117(a)* applied to Lanham Act Section 43(a) [*see Transgo, Inc. v. Ajac Transmission Parts Corp. (9th Cir. 1985) 768 F.2d 1001, 1026* ; *see also Rickard v. Auto Publisher, Inc. (11th Cir. 1984) 735 F.2d 450, 457-458* (attorney's fees)].

[b] Injunction

A court has discretion to grant an injunction according to equitable principles and on such terms as it deems reasonable to prevent a violation under *15 U.S.C. § 1125(a)* [*15 U.S.C. § 1116(a)*]. For discussion of the permissible scope of injunctive relief under *15 U.S.C. § 1116(a)*, see *§ 549.24[6]*.

Because of the possibility that a competitor may suffer future injury, and in furtherance of the rationale of consumer protection underlying Lanham Act Section 43(a), a competitor need not prove injury when suing to enjoin conduct that violates Section 43(a) [*Harper House, Inc. v. Thomas Nelson, Inc. (9th Cir. 1989) 889 F.2d 197, 210*]. This is in contrast to the rule applicable in a suit for damages under Section 43(a) that injury must be proved [*see* [3][a], *above*].

[c] Other Equitable Relief

A court may order delivery to the court and destruction of any material in defendant's possession bearing the word, term, name, symbol, device, combination thereof, designation, description, or representation that is the subject of a violation of *15 U.S.C. § 1125(a)*. The court may also order that all means of making them be delivered to the court and destroyed [*15 U.S.C. § 1118*].

[d] Against Innocently Violating Printer, Publisher, or Distributor

If a person liable under *15 U.S.C. § 1125(a)* is engaged solely in the business of printing the violating matter for others and establishes that he or she was an innocent violator, the person bringing the action may only obtain an injunction against future printing, and not monetary relief, against that particular violator [*15 U.S.C. § 1114(2)(A)*]. For further discussion of the limitations on injunctions obtained under *15 U.S.C. § 1114*, which before November 16, 1989, applied only to infringement actions, see *§ 549.24[3]*.

[4] Statute of Limitation and Laches

It is uncertain whether Congress intended to allow a statute of limitations defense in an action under *15 U.S.C. § 1125(a)*. There is no limitation provision in the Lanham Act. It is possible that the legislative intent was for courts to borrow the limitation period from the most closely analogous action under state law; it is also possible that Congress intended for laches to be the only defense based on untimeliness. (Relief for a violation of *15 U.S.C. § 1125(a)* is "subject to the principles of equity" [*15 U.S.C. § 1117(a)*].) While the question remains undecided, the Ninth Circuit, in accord with several other circuits, follows the rule that if a claim under *15 U.S.C. § 1125(a)* is filed within the limitation period for the most closely analogous action under state law, there is a strong presumption that laches is not applicable; if the claim is filed after that analogous limitation period has expired, the presumption is that laches is a bar to suit [*Jarrow Formulas, Inc. v. Nutrition Now, Inc. (9th Cir. 2002) 304 F.3d 829, 837*].

The presumption that laches applies is triggered if any part of the claimed wrongful conduct occurred beyond the borrowed limitation period. That period runs from the time the plaintiff knew or should have known about the cause of action under *15 U.S.C. § 1125(a)* [*Jarrow Formulas, Inc. v. Nutrition Now, Inc. (9th Cir. 2002) 304 F.3d 829, 837*]; *accord, Magic Kitchen LLC v. Good Things Int'l, Ltd. (2007) 153 Cal. App. 4th 1144, 1159, 63 Cal. Rptr. 3d 713* (conclusion that laches presumptively barred plaintiff's claim of trade dress infringement was not affected by fact that complaint demanded prospective injunctive relief)]. Even if the plaintiff alleges that a family of products infringed on the plaintiff's trademark or trade dress, the delay still is measured, for the purpose of laches, from the time the plaintiff became aware of the conduct that is claimed to be infringement, not from the introduction of each individual product [*Magic Kitchen LLC v. Good Things Int'l, Ltd. (2007) 153 Cal. App. 4th 1144, 1159-1160, 63 Cal. Rptr. 3d 713*].

When laches presumptively applies (and if the defendant duly raised laches as a defense), the defendant is entitled to show that the plaintiff's delay in filing suit was unreasonable, and the defendant would suffer prejudice caused by the delay if the suit were to continue [*see Jarrow Formulas, Inc. v. Nutrition Now, Inc. (9th Cir. 2002) 304 F.3d 829, 838*]. The plaintiff is then entitled to rebut the evidence by showing that the defendant has unclean hands [*see Jarrow Formulas, Inc. v. Nutrition Now, Inc. (9th Cir. 2002) 304 F.3d 829, 842*].

On the other hand, because laches is an equitable defense, laches will not bar a suit if the public has a strong interest in having the suit proceed. Indeed, the public's interest is of overriding importance, and as such, should be considered apart from any presumption of laches [*Jarrow Formulas, Inc. v. Nutrition Now, Inc. (9th Cir. 2002) 304 F.3d 829, 840*]. Nevertheless, in order to ensure that laches remains a viable defense to Lanham Act claims, the public's interest will trump laches only when the suit concerns allegations that the product is harmful or otherwise a threat to public safety and well being [*Jarrow Formulas, Inc. v. Nutrition Now, Inc. (9th Cir. 2002) 304 F.3d 829, 841*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionFalse AdvertisingLanham ActAntitrust & Trade LawConsumer ProtectionLikelihood of ConfusionFalse Designation of OriginGovernmentsLegislationStatutes of LimitationsTime LimitationsTrademark LawFederal Unfair Competition LawFalse AdvertisingElementsTrademark LawFederal Unfair Competition LawFalse Designation of OriginElementsTrademark LawFederal Unfair Competition LawFalse Designation of OriginPalming OffTrademark LawFederal Unfair Competition LawFalse Designation of OriginReverse Palming OffTrademark LawFederal Unfair Competition LawLanham ActRemediesTrademark LawFederal Unfair Competition LawTrade Dress ProtectionGeneral Overview

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B. Federal Trademark Law

48-549 California Forms of Pleading and Practice--Annotated § 549.27

§ 549.27 Action to Prevent Dilution of Famous Mark

[1] What Is Famous Mark

A mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner [*15 U.S.C. § 1125(c)(2)(A)*]. In determining whether a mark possesses the requisite degree of recognition, the court may consider all relevant factors, including the following [*see, e.g., Jada Toys, Inc. v. Mattel, Inc. (9th Cir. 2008) 518 F.3d 628, 635* ("[h]ere, a reasonable trier of fact could conclude that the HOT WHEELS mark is famous: it has been in use for over thirty-seven years; 350 million dollars have been expended in advertising the mark; three billion HOT WHEELS units have been sold since the inception of the mark; and HOT WHEELS are sold in all fifty states and throughout the world.")]:

- The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties [*15 U.S.C. § 1125(c)(2)(A)(i)*];

- The amount, volume, and geographic extent of sales of goods or services offered under the mark [*15 U.S.C. § 1125(c)(2)(A)(ii)*];

- The extent of actual recognition of the mark [*15 U.S.C. § 1125(c)(2)(A)(iii)*]; and

- Whether the mark was registered under the Trademark Act of March 3, 1881, or the Trademark Act of February 20, 1905, or on the principal register [*15 U.S.C. § 1125(c)(2)(A)(iv)*].

To meet the requirement that the mark be famous for purpose of protection under the anti-dilution statute, a mark must be "truly prominent and renowned" [*Avery Dennison Corp. v. Sumpton (9th Cir. 1999) 189 F.3d 868, 875]* . The limitation on dilution protection created by this narrow definition, like the "identical or nearly identical" requirement [*see § 549.27[5]*], is critical because dilution protection is the most potent form of trademark protection and could lead to over-protecting trademarks [*Thane Intern., Inc. v. Trek Bicycle Corp. (9th Cir. 2002) 305 F.3d 894, 908]* . Nevertheless, marks famous in only a limited geographic area or a specialized market segment can be famous for

purposes of the anti-dilution statute. The statute protects a mark that is famous within a niche market, insofar as the alleged diluter uses the mark within that market [*Avery Dennison Corp. v. Sumpton (9th Cir. 1999) 189 F.3d 868, 877]* .

[2] Famous Mark Owner's Action

[a] Right to Injunction

Subject to the principles of equity, the owner of a famous mark [*see § 549.27[1]*] that is distinctive, inherently or through acquired distinctiveness, may obtain an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring [*see 15 U.S.C. § 1125(c)(2)(B)* (definition); § 549.27[3]] or dilution by tarnishment [*see 15 U.S.C. § 1125(c)(2)(C)* (definition); § 549.27[4]] of the famous mark, regardless of the presence or absence of actual or likely confusion, or of competition, or of actual economic injury [*15 U.S.C. § 1125(c)(1)*; *but see 15 U.S.C. § 1125(c)(7)* (nothing in *15 U.S.C. § 1125(c)* impairs, modifies, or supersedes applicability of U.S. patent laws)].

[b] Similar California Law

California law is similar [*see Bus. & Prof. Code § 14247 et seq.*] and can be applied to both registered marks and common law marks [*see § 549.57*]. For a form of complaint under California law, see *§ 549.103*.

[c] Bar of Action Against Owner of Valid Registration

The ownership by a person of a valid registration under the Trademark Act of March 3, 1881, or the Trademark Act of February 20, 1905, or on the principal register under the current Trademark Act is a complete bar to an action against that person, with respect to that mark, that is brought by another person under the common law or a statute of a state and seeks to prevent dilution by blurring or dilution by tarnishment [*15 U.S.C. § 1125(c)(6)(A)*]. It also is a complete bar to an action against that person, with respect to that mark, that asserts any claim of actual or likely damage or harm to the distinctiveness or reputation of a mark, label, or form of advertisement [*15 U.S.C. § 1125(c)(6)(B)*].

[d] Additional Remedies

In an action brought under *15 U.S.C. § 1125(c)*, the owner of the famous mark is entitled to injunctive relief as set forth in *15 U.S.C. § 1116* [*see § 549.24[6], [7]*]. The owner of the famous mark also is entitled to the remedies set forth in *15 U.S.C. § 1117(a)* [*see § 549.24[5]* (recovery of the defendant's profits, damages and costs, and attorney's fees)] and *15 U.S.C. § 1118* [*see § 549.24[8]* (destruction of infringing articles)], subject to the discretion of the court and the principles of equity, if the following conditions are satisfied [*15 U.S.C. § 1125(c)(5)*]:

- The mark or trade name that is likely to cause dilution by blurring or dilution by tarnishment was first used in commerce by the person against whom the injunction is sought after the date of enactment of the Trademark Dilution Revision Act of 2006 [*15 U.S.C. § 1125(c)(5)(A)*].

- In a claim arising under *15 U.S.C. § 1125(c)* by reason of dilution by blurring, the person against whom the injunction is sought willfully intended to trade on the recognition of the famous mark [*15 U.S.C. § 1125(c)(5)(B)(i)*].

- In a claim arising under *15 U.S.C. § 1125(c)* by reason of dilution by tarnishment, the person against whom the injunction is sought willfully intended to harm the reputation of the famous mark [*15 U.S.C. § 1125(c)(5)(B)(ii)*].

[e] Burden of Proof for Trade-Dress Dilution

In a civil action for trade-dress dilution under the Trademark Act, for trade dress not registered on the principal register, the person who asserts trade-dress protection has the burden of proving that the claimed trade dress, taken as a whole, is not functional and is famous. If the claimed trade dress includes any mark or marks registered on the principal register, the person who asserts trade-dress protection has the burden of proving that the unregistered matter, taken as a whole, is famous separate and apart from any fame of the registered marks [*15 U.S.C. § 1125(c)(4)*].

[3] Dilution by Blurring

Dilution by blurring is association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark [*15 U.S.C. § 1125(c)(2)(B)*]. In determining whether a mark or trade name is likely to cause dilution by blurring, the court may consider all relevant factors, including the following [*see, e.g., Jada Toys, Inc. v. Mattel, Inc. (9th Cir. 2008) 518 F.3d 628, 636*]:

- The degree of similarity between the mark or trade name and the famous mark [*15 U.S.C. § 1125(c)(2)(B)(i)*];

- The degree of inherent or acquired distinctiveness of the famous mark [*15 U.S.C. § 1125(c)(2)(B)(ii)*];

- The extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark [*15 U.S.C. § 1125(c)(2)(B)(iii)*];

- The degree of recognition of the famous mark [*15 U.S.C. § 1125(c)(2)(B)(iv)*];

- Whether the user of the mark or trade name intended to create an association with the famous mark [*15 U.S.C. § 1125(c)(2)(B)(v)*]; and

- Any actual association between the mark or trade name and the famous mark [*15 U.S.C. § 1125(c)(2)(B)(vi)*].

[4] Dilution by Tarnishment

Dilution by tarnishment is association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark [*15 U.S.C. § 1125(c)(2)(C)*].

[5] Required Identity of Plaintiff's and Defendant's Marks

The defendant must have used essentially the same mark that the plaintiff claims to have been diluted, not just a similar one. The parties' marks "must be identical or close thereto" [*Thane Int'l, Inc. v. Trek Bicycle Corp. (9th Cir. 2002) 305 F.3d 894, 905]* . For marks to be nearly identical, they must be similar enough that a significant segment of the target group of customers will see the two marks as essentially the same [*see, e.g., Jada Toys, Inc. v. Mattel, Inc. (9th Cir. 2007) 496 F.3d 974, 982* (28 percent of respondents in one consumer survey, and 7 percent in another survey, believed that defendant's product was made or at least licensed by plaintiff; reasonable trier of fact could conclude that this evidence was sufficient to establish the existence of actual dilution)]. A dilution claim alleges a form of appropriation and so implies the defendant's adoption of the plaintiff's mark itself, not the use of a similar mark. A dilution action protects the distinctiveness of a particular mark whether or not the parties' products compete or consumer confusion exists [*Thane Int'l, Inc. v. Trek Bicycle Corp. (9th Cir. 2002) 305 F.3d 894, 906]* .

Looking at the matter from the other side of the equation, when the two marks are not identical, the mere fact that

consumers mentally associate the junior user's mark with the famous mark is not sufficient to establish actionable dilution. Such mental association will not necessarily reduce the capacity of the famous mark to identify the goods of its owner, which is the statutory requirement for dilution [Moseley v. V Secret Catalogue, Inc. (2003) 537 U.S. 418, 433, 123 S. Ct. 1115, 155 L. Ed. 2d 1] .

[6] Immunity for Certain Uses of Famous Marks

[a] Fair Use

Any fair use is not actionable as dilution by blurring or dilution by tarnishment under *15 U.S.C. § 1125*. Fair use includes a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person other than as a designation of source for the person's own goods or services, including use in connection with either (1) advertising or promotion that permits consumers to compare goods or services or (2) identifying and parodying, criticizing, or commenting on the famous mark owner or the goods or services of the famous mark owner [*15 U.S.C. § 1125(c)(3)(A)*].

[b] News Reporting and Commentary

All forms of news reporting and news commentary are not actionable as dilution by blurring or dilution by tarnishment under *15 U.S.C. § 1125* [*15 U.S.C. § 1125(c)(3)(B)*].

[c] Noncommercial Use

Any noncommercial use of a mark is not actionable as dilution by blurring or dilution by tarnishment under *15 U.S.C. § 1125* [*15 U.S.C. § 1125(c)(3)(C)*].

Noncommercial use refers to a use that consists entirely of noncommercial, or fully constitutionally protected, speech [*Mattel, Inc. v. MCA Records, Inc. (9th Cir. 2002) 296 F.3d 894, 905* ; *see, e.g., Nissan Motor Co. v. Nissan Computer Corp. (9th Cir. 2004) 378 F.3d 1002, 1007* (injunction prohibiting Nissan Computer Corporation from linking its website visitors to other websites that presented disparaging or negative commentary about Nissan Motor Company because of ongoing trademark dispute was content-based restriction on noncommercial speech and thus was inconsistent with *First Amendment*)].

[d] First-Sale Doctrine

Repackaging a trademarked product for resale without removing the trademark is lawful under the so-called first-sale doctrine [*see generally Sebastian Intern. v. Longs Drug Stores (9th Cir. 1995) 53 F.3d 1073, 1074]* , as long as the repackaged product bears an appropriate notice to inform buyers that the reseller, not the trademark owner, packaged the product for sale [*Enesco Corp. v. Price/Costco, Inc. (9th Cir. 1998) 146 F.3d 1083, 1085-1086]* . However, the first-sale doctrine might not provide a defense in a case where, once the defendant's product is in the hands of customers, there is a likelihood that members of the public who then see the product in use will confuse the product's originator with the trademark owner [*Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc. (9th Cir. 2010) 603 F.3d 1133, 2010 U.S. App. LEXIS 9277, at *5-*6* (seller of marquee license plates, to which seller affixed genuine Volkswagen badges that seller had acquired lawfully but without permission for that use, could not rely on first-sale doctrine because there was likelihood of "post-purchase confusion among observers who see the plates on purchasers' cars")].

Legal Topics:

For related research and practice materials, see the following legal topics:
Trademark LawDilution of Famous MarksBlurringTrademark LawDilution of Famous MarksEvidenceTrademark

LawDilution of Famous MarksFactorsTrademark LawDilution of Famous MarksFederal Trademark Dilution ActTrademark LawDilution of Famous MarksState Antidilution Statutes

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 549 TRADEMARKS AND TRADE NAMES
PART II. LEGAL BACKGROUND
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48-549 California Forms of Pleading and Practice--Annotated § 549.28

§ 549.28 Defenses

[1] In General

The Lanham Act establishes defenses available in infringement actions, depending on the status of the mark in question [*see 15 U.S.C. § 1115*]. Any mark issued on the principal register that has not become incontestable, or any mark issued under prior trademark acts, is subject to any legal or equitable defenses or claims of defects that might have been asserted if the mark had not been registered [*15 U.S.C. § 1115(a)*].

Marks that have achieved incontestability status are ostensibly subject only to those defenses expressed by statute and discussed below [*see 15 U.S.C. § 1115(b)*]. These defenses are, of course, also valid against any mark of which the right to use is not incontestable [*15 U.S.C. § 1115(a)*].

Registration is prima facie evidence of the validity of the registered mark [*15 U.S.C. § 1115(a)*]. Cases may equate "prima facie evidence" with a "presumption" of validity of the mark or of the registrant's protected right to use the mark, and may also speak in terms of shifting an evidentiary burden (whether the burden of proof or the burden of producing evidence) from the registrant to a person that is allegedly infringing the mark. The plaintiff in an infringement action with a registered mark is given the prima facie or presumptive advantage on the issue of validity, thus shifting the burden of production defendant to prove otherwise [*Tie Tech, Inc. v. Kinedyne Corp. (9th Cir. 2002) 296 F.3d 778, 783*]. The defendant then bears the burden with respect to invalidity. The presumption of validity is "a strong one," and the burden on the defendant to overcome the presumption is "heavy" [*Zobmondo Entm't, LLC v. Falls Media, LLC (9th Cir. 2010) 602 F.3d 1108, 2010 U.S. App. LEXIS 8559, at *15]* . Once the presumption of validity is overcome, however, the mark's registration is merely evidence "of registration," nothing more. This approach can be characterized as rebutting the prima facie case or "piercing the presumption" [*Tie Tech, Inc. v. Kinedyne Corp. (9th Cir. 2002) 296 F.3d 778, 783* ; *see Vuitton et Fils S.A. v. J. Young Enterprises, Inc. (9th Cir. 1981) 644 F.2d 769, 775*].

A descriptive mark that has become incontestable is conclusively presumed to have acquired secondary meaning. In other words, a defendant in a trademark infringement action cannot assert that an incontestable mark is invalid because it is descriptive and lacks secondary meaning. Moreover, when the holder of an incontestable mark is complaining that

the most salient feature of its mark (but not the mark itself) is being imitated and that a likelihood of confusion may result, the holder of the mark does not have to show that the salient feature, apart from the mark, has acquired secondary meaning. Rather, the conclusive presumption that the mark has acquired secondary meaning extends to the most salient feature of the mark [*KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc. (9th Cir. 2005) 408 F.3d 596, 606*].

The trial court should award reasonable attorney's fees to the defendant [*see 15 U.S.C. § 1117(a)* (court "in exceptional cases may award reasonable attorney fees" to prevailing party)] if the plaintiff's case was either groundless, unreasonable, vexatious, or pursued in bad faith [*see Cairns v. Franklin Mint Co. (9th Cir. 2002) 292 F.3d 1139, 1156*].

[2] Registration or Incontestable Right to Use Fraudulently Obtained

It is an affirmative defense to an action for infringement of a registered mark, regardless of whether it has achieved incontestable status, that registration of the mark was fraudulently obtained. In addition, that the incontestable right to use a mark was fraudulently obtained is an affirmative defense that may be asserted against an incontestable mark [*15 U.S.C. § 1115(b)(1)*].

[3] Abandonment

It is an affirmative defense to an action for infringement of a registered mark, regardless of whether it has achieved incontestable status, that the registrant has abandoned the mark [*15 U.S.C. § 1115(b)(2)*].

A mark is deemed abandoned when its use has been discontinued with intent not to resume. Intent not to resume may be inferred from circumstances. Nonuse for three consecutive years is prima facie abandonment. "Use" of a mark means the bona fide use of that mark made in the ordinary course of trade, and not made merely to reserve a right in a mark. A mark is also deemed abandoned when any course of conduct of the owner causes the mark to become the generic name for the goods or services on or in connection with which it is used, or otherwise to lose its significance as a mark. However, purchaser motivation is not a test for determining abandonment of a mark [*15 U.S.C. § 1127*].

To show abandonment by nonuse, the party claiming abandonment must prove both the trademark owner's discontinuance of trademark use and the owner's intent not to resume such use [*Grocery Outlet, Inc. v. Albertson's Inc. (9th Cir. 2007) 497 F.3d 972]* .

Because "trademark" is defined under *15 U.S.C. § 1127* in part by the "bona fide intention to use [it] in commerce," and because both "use in commerce" and "use" for the purposes of abandonment mean "bona fide use ... in the course of ordinary trade," the meaning of "use" for the purposes of abandonment necessarily signifies "use in commerce" and thus includes the placement of a mark on goods sold or transported. Thus *15 U.S.C. § 1127* provides that "use" of a trademark defeats an allegation of abandonment when the use (1) includes placement on goods sold or transported in commerce, (2) is bona fide, (3) is made in the ordinary course of trade, and (4) is not made merely to reserve a right in the mark [*Electro Source, LLC v. Brandess-Kalt-Aetna Group, Inc. (9th Cir. 2006) 458 F.3d 931, 936* (trademark holder was small, troubled business that continued to transport and sell trademarked goods in ordinary course of trade as part of good faith effort to deplete inventory; trademark was not abandoned during time that effort was underway)].

[4] Misrepresentation

It is an affirmative defense to an action for infringement of a registered mark, regardless of whether it has achieved incontestable status, that the mark is being used, by or with the permission of the registrant or a person in privity with the registrant, so as to misrepresent the source of the goods or services on or in connection with which the mark is used [*15 U.S.C. § 1115(b)(3)*].

[5] Fair Use

Use by one person of the registered mark of another as other than a trade or service mark is known as fair use. Use of a party's individual name in his or her own business, or of the individual name of anyone in privity with that party, is a fair use when the name is used as other than a trade or service mark and, as such, is an affirmative defense to an action for infringement of a registered mark regardless of whether it has achieved incontestable status. Use of a term or device charged to be an infringement, as other than a trade or service mark, that is descriptive of and used fairly and in good faith only to describe goods or services or their geographic origin is also fair use and an affirmative defense to an action for infringement of a registered mark, regardless of whether it has achieved incontestable status [*15 U.S.C. § 1115(b)(4)*].

The Ninth Circuit denotes the fair use defense outlined in *15 U.S.C. § 1115(b)(4)* as classic fair use, in order to distinguish a defense that the court calls "nominative fair use" [*see Cairns v. Franklin Mint Co. (9th Cir. 2002) 292 F.3d 1139, 1150*]. To establish a nominative fair-use defense, the defendant must prove that (1) the plaintiff's product or service in question is not readily identifiable without use of the plaintiff's trademark, (2) the defendant used only as much of the mark as was reasonably necessary to identify the plaintiff's product or service, and (3) the defendant did nothing that would, in conjunction with using the mark, suggest sponsorship or endorsement of the defendant's product by the plaintiff [*see New Kids on the Block v. News America Pub., Inc. (9th Cir. 1992) 971 F.2d 302, 308*]. What is reasonably necessary to identify the plaintiff's product differs from case to case. If the description of the defendant's product depends on the description of the plaintiff's product, more use of the plaintiff's trademark is reasonably necessary to identify the plaintiff's product than in cases in which the description of the defendant's product does not depend on the description of the plaintiff's product [*Cairns v. Franklin Mint Co. (9th Cir. 2002) 292 F.3d 1139, 1151*].

The nominative fair use analysis is appropriate when the defendant used the plaintiff's mark to describe the plaintiff's product, even if the defendant's ultimate goal is to describe the defendant's own product. (This is in fact the standard case of nominative fair use. Only rarely, if ever, will a defendant choose to refer to the plaintiff's product unless that reference ultimately helps to describe the defendant's own product.) The classic fair use analysis is appropriate when the defendant has used the plaintiff's mark only to describe the defendant's own product, and not at all to describe the plaintiff's product [*Cairns v. Franklin Mint Co. (9th Cir. 2002) 292 F.3d 1139, 1151*].

The defendant asserting fair use has no burden to prove the absence of a likelihood of confusion because the plaintiff, alleging infringement, has the burden to prove that confusion is likely--that is, likelihood of confusion is part of the plaintiff's prima facie case [*KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc. (2004) 543 U.S. 111, 125 S. Ct. 542, 551, 160 L. Ed. 2d 440*]. Likelihood of confusion exists when consumers viewing the mark would probably assume that the goods it represents are associated with the source of a different product identified by a similar mark [*Clicks Billiards, Inc. v. Sixshooters, Inc. (9th Cir. 2001) 251 F.3d 1252, 1265*]. A finding of likelihood of confusion requires that confusion be probable, not just a possibility [*Murray v. Cable NBC (9th Cir. 1996) 86 F.3d 858, 861*]. The Ninth Circuit generally relies on an eight-factor test in determining whether a likelihood of confusion exists [*see § 549.24[2]*].

The strength of the plaintiff's mark and the extent of likely or actual confusion are important factors in determining whether a use is fair. Surveys and other evidence relating to the perceptions of prospective purchasers therefore are relevant to the application of the defense, and a use that is likely to create substantial confusion ordinarily will not be considered a fair use [*see KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc. (9th Cir. 2005) 408 F.3d 596, 608* (invoking section of restatement that Supreme Court cited with approval)]. However, surveys in trademark cases are admissible only if conducted according to accepted principles [*Prudential Ins. Co. v. Gibraltar Financial Corp. (9th Cir. 1982) 694 F.2d 1150, 1156*]. Evidence of a survey should be excluded if the survey's creator does not qualify as an expert on designing or analyzing consumer surveys [*M2 Software, Inc. v. Madacy Entm't (9th Cir. 2005) 421 F.3d 1073, 1087*] or if the proponent fails to show that the survey was conducted in accordance with generally accepted survey principles and that the results were used in a statistically correct manner [*Keith v. Volpe (9th Cir. 1988) 858 F.2d 467, 480*].

Additional factors for consideration in determining the fairness of the use are the descriptive nature of the term for the product or service being offered by the defendant, the availability of alternative descriptive terms, the extent of the use of the term prior to the registration of the trademark, and any differences among the times and contexts in which the defendant has used the term [*KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc. (9th Cir. 2005) 408 F.3d 596, 609*].

[6] Prior Use

It is an affirmative defense to an action for infringement of a registered mark, regardless of whether it has achieved incontestable status, that an alleged infringing mark was adopted without knowledge of the registrant's prior use, and used continuously by the alleged infringer, or those in privity with it, from a date prior to (A) the date of constructive use of the mark established pursuant to *15 U.S.C. § 1057(c)* [*see § 549.23[4][b]*]; (B) the registration of the mark under the Lanham Act if the application of registration is filed before November 16, 1989; or (C) publication of the registered mark under *15 U.S.C. § 1062(c)*. This defense is applicable only in the geographical area in which prior continuous use is proved [*15 U.S.C. § 1115(b)(5)*]. This defense is akin to the common law "innocent use" defense. However, unlike the common law defense, this statutory defense does not include a remoteness element. It is not necessary that the area where the defendant's mark enjoyed recognition based on the defendant's reputation, advertising, and sales--the defendant's "zone of reputation" as the Ninth Circuit calls it--must have been remote from the area where the plaintiff's mark was in use (the plaintiff's zone of reputation) [*Quiksilver, Inc. v. Kymsta Corp. (9th Cir. 2006) 466 F.3d 749, 761-762]* .

[7] Prior Registration and Use

It is an affirmative defense to an action for infringement of a mark, regardless of whether it has achieved incontestable status, that an alleged infringing mark was registered and used prior to registration, or publication under *15 U.S.C. § 1062*, of the plaintiff's mark, and not abandoned. This defense is applicable only in the geographical area in which the mark was used prior to registration and publication of plaintiff's mark [*15 U.S.C. § 1115(b)(6)*].

[8] Mark Use Violates Federal Antitrust Laws

It is an affirmative defense to an action for infringement of a registered mark, regardless of whether it has achieved incontestable status, that a plaintiff's mark has been or is being used to violate the antitrust laws of the United States [*15 U.S.C. § 1115(b)(7)*].

[9] Mark Is Functional

It is an affirmative defense to an action for infringement of a registered trademark that a plaintiff's mark is functional [*15 U.S.C. § 1115(b)(8)*; *Tie Tech, Inc. v. Kinedyne Corp. (9th Cir. 2002) 296 F.3d 778, 782*]. A trademark is functional when it is essential to the use or purpose of the defendant's product or when it affects the cost or quality of the product [*TrafFix Devices, Inc. v. Marketing Displays, Inc. (2001) 532 U.S. 23, 33, 121 S. Ct. 1255, 149 L. Ed. 2d 164*]. To determine whether a product feature is functional, a court in the Ninth Circuit typically considers the following four factors [*see Disc Golf Ass'n, Inc. v. Champion Discs, Inc. (9th Cir. 1998) 158 F.3d 1002, 1006*]:

- Whether advertising touts the utilitarian advantages of the design.

- Whether the particular design results from a comparatively simple or inexpensive method of manufacture.

- Whether the design yields a utilitarian advantage.

- Whether alternative designs are available.

Once functionality is established, there is no need to engage in speculation about other design possibilities [*TrafFix Devices, Inc. v. Marketing Displays, Inc. (2001) 532 U.S. 23, 33, 121 S. Ct. 1255, 149 L. Ed. 2d 164*]. Therefore, the existence of alternative designs cannot negate a trademark's functionality [*Talking Rain Beverage Co. v. South Beach Beverage Co. (9th Cir. 2003), 349 F.3d 601, 603* (district court correctly found that trademark was functional and therefore invalid)]. But the existence of alternative designs may indicate whether the trademark itself embodies functional or merely ornamental aspects of the product [*see TrafFix Devices, Inc. v. Marketing Displays, Inc. (2001) 532 U.S. 23, 34, 121 S. Ct. 1255, 149 L. Ed. 2d 164*].

There is a so-called doctrine of aesthetic functionality, which holds that if the plaintiff's trademark, placed on the defendant's goods, is actually what consumers wish to purchase--in other words, a purely aesthetic feature of the plaintiff's product (the trademark) is "functional," in trademark-law context, when placed on the defendant's product--it is, therefore, unprotected by trademark law in the circumstances of the defendant's use. The Ninth Circuit has concluded that this theory does not provide a defense in an action to enforce the trademark against such poaching. The fact that consumers tend to like the plaintiff's trademark or find it aesthetically pleasing does not justify the defendant's placing of that trademark on the defendant's goods for the purpose of appealing to consumers' fancy. The defendant will have to make a case for functionality by showing that maintaining trademark protection (that is, disallowing the defendant's use of the trademark) would impose on the defendant a "significant non-reputation-related competitive disadvantage" [*Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc. (9th Cir. 2006) 457 F.3d 1062, 1064, 1072* (defendant sold key rings and license plate holders bearing car makers' famous trademarks)].

[10] Equitable Defenses

Defenses based on equitable principles, including laches, estoppel, and acquiescence, are available in an action to enforce an incontestable mark [*15 U.S.C. § 1115(b)(9)*]. Under prior law, the Ninth Circuit allowed equitable defenses, despite the apparently limiting language of the former statute [*see Pyrodyne Corp. v. Pyrotronics Corp. (9th Cir. 1988) 847 F.2d 1398, 1402*].

Unclean hands is a defense to a Lanham Act infringement suit [*see Worden v. Cal. Fig Syrup Co. (1903) 187 U.S. 516, 528, 23 S. Ct. 161, 47 L. Ed. 282* ("it is essential that the plaintiff should not in his trade mark, or in his advertisements and business, be himself guilty of any false or misleading representation")]. To make out an unclean hands defense, a trademark defendant must demonstrate that the plaintiff's conduct was inequitable and that the conduct related to the subject matter of the plaintiff's claims. To show that a trademark plaintiff's conduct was inequitable, the defendant must show that the plaintiff used the trademark to deceive consumers [*Japan Telecom, Inc. v. Japan Telecom America, Inc. (9th Cir. 2002) 287 F.3d 866, 870*].

The defense of laches can defeat an otherwise valid claim under the Lanham Act. The court must balance the following six factors to determine whether the trademark owner's delay in filing suit was unreasonable and that, therefore, the suit is barred [*Tillamook Country Smoker, Inc. v. Tillamook County Creamery Ass'n (9th Cir. 2006) 465 F.3d 1102, 1108* ; *E-Systems, Inc. v. Monitek, Inc. (9th Cir. 1983) 720 F.2d 604, 607]* :

- The strength and value of the trademark rights asserted.
- The senior user's diligence in enforcing the mark.
- The harm to the senior user if relief is denied.
- Whether the junior user acted in good faith ignorance of the senior user's rights.

- The degree of competition between the senior and junior user.

- The extent of harm suffered by the junior user because of the senior user's delay in asserting its rights.

[11] First Amendment Rights

Trademark rights do not entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view. Were courts to ignore the expressive value that some marks assume, trademark rights would grow to encroach on the zone protected by the *First Amendment*. The trademark owner does not have the right to control public discourse whenever the public imbues the mark with a meaning beyond its source-identifying function [*Mattel, Inc. v. MCA Records, Inc. (9th Cir. 2002) 296 F.3d 894, 900*].

The use of a trademark in the title or content of an artistic (literary, musical, pictorial, etc.) work, by a person having no right to do so as owner or licensee of the mark, does not violate the Lanham Act unless the mark as used has no artistic relevance to the work whatsoever or, if it has some artistic relevance, unless the mark as used explicitly misleads as to the source or the content of the work [*E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc. (9th Cir. 2008), 547 F.3d 1095, 1099-1100* (extending rule from *MCA Records* to cover content as well as title of artistic work); *Mattel, Inc. v. MCA Records, Inc. (9th Cir. 2002) 296 F.3d 894, 902* (use of mark in title)]. The threshold test, whether use of the mark has no artistic relevance to the work whatsoever, sets the bar to a *First Amendment* defense extremely low: the defense is available unless the artistic contribution of the mark to the work can be said to be nothing at all [*E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc. (9th Cir. 2008) 547 F.3d 1095, 1100* ("In other words, the level of [artistic] relevance merely must be above zero.")].

[12] Statutory Exemption From Liability for Skipping Portions of Movies Viewed at Home

[a] Household Viewer's Right to Skip Objectionable Video and Audio Portions

The Family Movie Act of 2005 [Pub. L. No. 109-9, § 201 et seq. (Apr. 27, 2005)] authorizes a household viewer of a movie (whether the movie is being broadcast on television or is being played from a videotape or disc) to use any suitable technology for the purpose of skipping objectionable video and audio portions of the movie [*see 17 U.S.C. § 110(11)*]. For discussion, see Ch. 349, *Literary Property* . Any person who engages in such conduct [*see 17 U.S.C. § 110(11)*] and who complies with the requirements set forth in that provision is not liable on account of that conduct for a violation of any right under the Lanham Act [*15 U.S.C. § 1114(3)(A)*].

This exemption does not preclude liability, nor may it be construed to restrict the defenses or limitations on rights granted under the Lanham Act, of a person for conduct not described in *17 U.S.C. § 110(11)*, even if that person also engages in conduct described in that provision [*15 U.S.C. § 1114(3)(A)*].

[b] Manufacturer, Licensee, or Licensor of Technology to Skip Portions

A manufacturer, licensee, or licensor of technology that enables the skipping of limited portions of audio or video content of a motion picture as described in § 549.28[12][a] is not liable on account of that manufacture or license for a violation of any right under the Lanham Act, if the manufacturer, licensee, or licensor ensures that the technology provides a clear and conspicuous notice at the beginning of each performance that the performance of the motion picture is altered from the performance intended by the director or copyright holder of the motion picture. This limitation on liability is inapplicable to a manufacturer, licensee, or licensor of technology that fails to comply with the foregoing provision [*15 U.S.C. § 1114(3)(B)*].

The requirement to provide notice applies only with respect to technology manufactured after the end of the 180-day period beginning on the date of the enactment of the Family Movie Act of 2005 [*15 U.S.C. § 1114(3)(C)*], that is, after

October 24, 2005 [*see § 549.28[12][a]*].

Any failure by a manufacturer, licensee, or licensor of technology to qualify for the exemption noted in this subsection or in § 549.28[12][a] [*see 15 U.S.C. § 1114(3)(A),(B)*] may not be construed to create an inference that any such person engaged in conduct described in *17 U.S.C. § 110(11)* [*see § 549.28[12][a]*] is liable for trademark infringement by reason of that conduct [*15 U.S.C. § 1114(3)(D)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Trademark LawInfringement ActionsDefensesGeneral OverviewTrademark LawInfringement ActionsDefensesArtistic RelevanceTrademark LawInfringement ActionsDefensesFair UseGeneral OverviewTrademark LawInfringement ActionsDefensesFirst UseTrademark LawInfringement ActionsDefensesLachesTrademark LawProtection of RightsAbandonmentGeneral OverviewTrademark LawProtection of RightsRegistrationIncontestabilityEffects

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§ 549.29 Remedies for Internet-Related Infringement

[1] Governing Law

The Anticybersquatting Consumer Protection Act [Pub. L. 106-113, app. I, § 3001 et seq. (Nov. 29, 1999)] added *15 U.S.C. § 1125(d)* [*see* Pub. L. 106-113, div. B, § 1000(a)(9) (Nov. 29, 1999)] to the Lanham Act and created a cause of action to suppress a practice known as cybersquatting [*see § 549.29[2], [3]*]. Cybersquatting has been described as "the Internet version of a land grab" [*Interstellar Starship Services, Ltd. v. Epix, Inc. (9th Cir. 2002) 304 F.3d 936, 946*]. Cybersquatters register well known brand names as Internet domain names in order to force the rightful owners of the marks to pay for the right to engage in electronic commerce under their own name. Congress enacted the ACPA because cybersquatting threatened the continued growth and vitality of the Internet as a platform for communication, electronic commerce, education, entertainment, and countless yet-to-be-determined uses [*Interstellar Starship Services, Ltd. v. Epix, Inc. (9th Cir. 2002) 304 F.3d 936, 946* (quoting S. Rep. No. 106-140, at 8 (1999))].

[2] Civil Action to Suppress Cybersquatting

[a] Basis of Liability

A person is liable in a civil action by the owner of a mark, including a personal name that is protected as a mark under *15 U.S.C. § 1125*, if, without regard to the goods or services of the parties, that person (1) has a bad faith intent to profit from that mark, including a personal name that is protected as a mark under *15 U.S.C. § 1125*, and *(2)* registers, traffics in, or uses a domain name that either [*15 U.S.C. § 1125(d)(1)(A)*]:

- In the case of a mark that is distinctive at the time of registration of the domain name [*see* Lahoti v. VeriCheck, Inc. (9th Cir. 2009) 586 F.3d 1190, 1200 (finding of distinctiveness can be based, in part, on fact that similar mark, which is used for same or similar goods or services, is registered in U.S. Patent and Trademark Office)], is identical or confusingly similar to that mark;

- In the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark; or

- Is a trademark, word, or name protected by reason of *18 U.S.C. § 706* (Red Cross sign or insignia) or *36 U.S.C. § 220506* (names, seals, emblems, and badges connected with Olympic games and similar games).

The person is liable for using the domain name only if the person is the domain name registrant or the registrant's authorized licensee [*15 U.S.C. § 1125(d)(1)(D)*].

Liability under *15 U.S.C. § 1125(d)* exists regardless of whether the domain name [*see 15 U.S.C. § 1127* (definition)] was registered before, on, or after the date of enactment of the Anticybersquatting Consumer Protection Act [Pub. L. 106-113, app. I, § 3010 (Nov. 29, 1999)], which added *15 U.S.C. § 1125(d)* [*see* Pub. L. 106-113, div. B, § 1000(a)(9) (Nov. 29, 1999)]. (However, see *§ 549.29[2][b]* regarding a time limitation on damages.) On the other hand, nothing in the Anticybersquatting Consumer Protection Act affects any defense available to a defendant under the Lanham Act, including any defense under *15 U.S.C. § 1125(c)(3)* [Pub. L. 106-113, app. I, § 3008 (Nov. 29, 1999); *see § 549.27[6][a] -[c]*].

Trafficking in domain names refers to transactions that include, but are not limited to, sales, purchases, loans, pledges, licenses, exchanges of currency, and any other transfer for consideration or receipt in exchange for consideration [*15 U.S.C. § 1125(d)(1)(E)*].

In determining whether a person has a bad faith intent, the court may consider factors such as, but not limited to, the following [*15 U.S.C. § 1125(d)(1)(B)(i)*; *see Interstellar Starship Services, Ltd. v. Epix, Inc. (9th Cir. 2002) 304 F.3d 936, 946-947* (quoting Second and Fourth Circuits to effect that the most important grounds for finding bad faith are the unique circumstances of the case, which do not fit neatly into the specific factors enumerated by Congress)]:

- The trademark or other intellectual property rights of the person, if any, in the domain name.

- The extent to which the domain name consists of the legal name of the person or a name that is otherwise commonly used to identify that person.

- The person's prior use, if any, of the domain name in connection with the bona fide offering of any goods or services.

- The person's bona fide noncommercial or fair use of the mark in a site accessible under the domain name.

- The person's intent to divert consumers from the mark owner's online location to a site accessible under the domain name that could harm the goodwill represented by the mark, either for commercial gain or with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site.

- The person's offer to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used, or having an intent to use, the domain name in the bona fide offering of any goods or services, or the person's prior conduct indicating a pattern of such conduct [*see, e.g., Panavision Intern., L.P. v. Toeppen (9th Cir. 1998) 141 F.3d 1316, 1323*].

- The person's provision of material and misleading false contact information when applying for the registration of the domain name, the person's intentional failure to maintain accurate contact information, or the person's prior conduct indicating a pattern of such conduct.

- The person's registration or acquisition of multiple domain names which the person knows are identical or confusingly similar to marks of others that are distinctive at the time of registration of such domain names, or dilutive of famous marks of others that are famous at the time of registration of such domain names, without regard to the goods or services of the parties.

- The extent to which the mark incorporated in the person's domain name registration is or is not distinctive and famous within the meaning of *15 U.S.C. § 1125(c)* [*see 15 U.S.C. § 1125(c)(2)(A)*; § 549.27[1] (what is famous mark)].

For example, a bad faith intent was properly found when the defendant never used the domain name in connection with a bona fide offering of goods and services, but instead earned income if customers clicked on links when visiting the domain name website, some of which directed them to the plaintiff's competitors; the defendant then asked for as much as $72,500 to sell the domain name to the plaintiff even though the defendant had no interests associated with the name, and it was undisputed that the defendant was a repeat cybersquatter who had registered hundreds of domain names resembling distinctive or famous trademarks and had been admonished by judicial bodies for doing so [Lahoti v. VeriCheck, Inc. (9th Cir. 2009) 586 F.3d 1190, 1202-1203] .

However, bad faith intent may not be found in any case in which the court determines that the person believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful [*15 U.S.C. § 1125(d)(1)(B)(ii)*]. This safe harbor defense is not available to a defendant who was previously declared to be a cybersquatter in a judicial proceeding in which the defendant advanced, unsuccessfully, the same defenses he or she is asserting in the present case, who used the domain name to send potential customers to the plaintiff's competitors, and who was willing to sell the domain name only for an exorbitant profit. Such a defendant is unlikely to have had a legitimate belief that the use of the domain name in the present case was wholly lawful [Lahoti v. VeriCheck, Inc. (9th Cir. 2009) 586 F.3d 1190, 1203] .

[b] Relief

In a civil action involving the registration, trafficking, or use of a domain name under *15 U.S.C. § 1125(d)(1)*, the court may order the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark [*15 U.S.C. § 1125(d)(1)(C)*], and the plaintiff may obtain injunctive relief [*see 15 U.S.C. § 1116(a)*], the same as for a violation of *15 U.S.C. § 1125(a)* [*see § 549.26[3][b]*]. Only upon proving the rigorous elements of cybersquatting under the ACPA have plaintiffs successfully forced the transfer of an infringing domain name. Even in egregious cases of cybersquatting, however, the district court retains discretion to fashion appropriate relief, and it need not force the transfer of the offending domain name [*Interstellar Starship Services, Ltd. v. Epix, Inc. (9th Cir. 2002) 304 F.3d 936, 948* (stating that injunction crafted by district court was "particularly proper")].

The plaintiff is entitled as well to recover profits, damages, costs, and attorney's fees [*see 15 U.S.C. § 1117(a)*], the same as for a violation of *15 U.S.C. § 1125(a)* [*see § 549.26[3][a]*]. The plaintiff may elect, at any time before final judgment is rendered by the trial court, to recover, instead of actual damages and profits, an award of statutory damages in the amount of not less than $1,000 and not more than $100,000 per domain name, as the court considers just [*15 U.S.C. § 1117(d)*; *see Office Depot, Inc. v. Zuccarini (9th Cir. 2010) 596 F.3d 696, 2010 U.S. App. LEXIS 4052, at *11-*16* (judgment for damages can be enforced through writ of execution and levy on defendant's inventory of domain names, if any, since domain name is property subject to execution; for purposes of levying on domain name, it is located where registry is located and also where registrar located)]. However, neither actual damages nor statutory damages can be recovered with respect to the registration, trafficking, or use of a domain name that occurred before the date of enactment of the Anticybersquatting Consumer Protection Act [Pub. L. 106-113, app. I, § 3010 (Nov. 29, 1999)].

The civil action authorized by *15 U.S.C. § 1125(d)(1)* and any remedy available in the action are in addition to any other

civil action or remedy otherwise applicable [*15 U.S.C. § 1125(d)(3)*; *see Interstellar Starship Services, Ltd. v. Epix, Inc. (9th Cir. 2002) 304 F.3d 936, 948* (court has discretion to fashion any remedy which alleviates plaintiff's grievance)].

[c] Limitation of Remedy Against Domain Name Registrar

A domain name registrar, a domain name registry, or other domain name registration authority is not liable for monetary relief or, except as stated below, for injunctive relief, to any person, regardless of whether the domain name is finally determined to infringe or dilute the mark, on account of refusing to register, removing from registration, transferring, temporarily disabling, or permanently canceling a domain name in compliance with a court order under *15 U.S.C. § 1125(d)* or in the implementation of a reasonable policy by the registrar, registry, or authority prohibiting the registration of a domain name that is identical to, confusingly similar to, or dilutive of another's mark [*15 U.S.C. § 1114(2)(D)(i)(I),(ii)*].

If the registrar, registry, or other registration authority takes an action described above based on a knowing and material misrepresentation by any other person that a domain name is identical to, confusingly similar to, or dilutive of a mark, then the person making the knowing and material misrepresentation is liable for any damages, including costs and attorney's fees, incurred by the domain name registrant as a result of that action. The court may also grant injunctive relief to the domain name registrant, including the reactivation of the domain name or the transfer of the domain name to the domain name registrant [*15 U.S.C. § 1114(2)(D)(iv)*].

A domain name registrant whose domain name has been suspended, disabled, or transferred under a policy described above, on notice to the mark owner, may file a civil action to establish that the registration or use of the domain name by the registrant is not unlawful under the Lanham Act. The court may grant injunctive relief to the domain name registrant, including the reactivation of the domain name or transfer of the domain name to the domain name registrant [*15 U.S.C. § 1114(2)(D)(v)*]. Otherwise, the domain name registrar, domain name registry, or other domain name registration authority may be subject to injunctive relief only if the registrar, registry, or other registration authority has either [*15 U.S.C. § 1114(2)(D)(i)(II)*]:

- Not expeditiously deposited with a court, in which an action has been filed regarding the disposition of the domain name, documents sufficient for the court to establish the court's control and authority regarding the disposition of the registration and use of the domain name;

- Transferred, suspended, or otherwise modified the domain name during the pendency of the action, except on order of the court; or

- Willfully failed to comply with any such court order.

A domain name registrar, domain name registry, or other domain name registration authority is not liable for damages under *15 U.S.C. § 1114* [*see § 549.24*] for the registration or maintenance of a domain name for another, absent a showing of bad faith intent to profit from that registration or maintenance of the domain name [*15 U.S.C. § 1114(2)(D)(iii)*].

[3] In Rem Action

The owner of a mark may file an in rem civil action against a domain name in the federal judicial district in which the domain name registrar, domain-name registry, or other domain-name authority that registered or assigned the domain name is located if the domain name violates any right of the owner of a mark registered in the Patent and Trademark Office, or protected under *15 U.S.C. § 1125(a)* or*(c)*, and the court finds that the owner either [*15 U.S.C. § 1125(d)(2)(A)*]:

- Is not able to obtain in personam jurisdiction over a person who would have been a defendant in a civil action; or

- Through due diligence was not able to find a person who would have been a defendant in a civil action by both (1) sending a notice of the alleged violation and intent to proceed in rem to the registrant of the domain name at the postal and e-mail address provided by the registrant to the registrar and also (2) publishing notice of the action as the court may direct promptly after filing the action.

The circumstances enumerated above will be deemed to constitute service of process [*15 U.S.C. § 1125(d)(2)(B)*].

In an in rem action, a domain name is deemed to have its situs in the federal judicial district in which either (1) the domain name registrar, registry, or other domain name authority that registered or assigned the domain name is located, or (2) documents sufficient to establish control and authority regarding the disposition of the registration and use of the domain name are deposited with the court [*15 U.S.C. § 1125(d)(2)(C)*].

The remedies in an in rem action are limited to a court order for the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark. On receipt of written notification of a filed, stamped copy of a complaint filed by the owner of a mark in a proper U.S. district court, the domain name registrar, domain name registry, or other domain-name authority must [*15 U.S.C. § 1125(d)(2)(D)(i)*]:

- Expeditiously deposit with the court documents sufficient to establish the court's control and authority regarding the disposition of the registration and use of the domain name to the court; and

- Not transfer, suspend, or otherwise modify the domain name during the pendency of the action, except upon order of the court.

The domain name registrar or registry or other domain name authority is not liable for injunctive or monetary relief in the in rem action, except in the case of bad faith or reckless disregard, which includes a willful failure to comply with the court's order [*15 U.S.C. § 1125(d)(2)(D)(ii)*].

The in rem action authorized by *15 U.S.C. § 1125(d)(1)* and any remedy available in the action are in addition to any other civil action or remedy otherwise applicable [*15 U.S.C. § 1125(d)(3)*]. The in rem jurisdiction established as described above is in addition to any other jurisdiction that otherwise exists, whether in rem or in personam [*15 U.S.C. § 1125(d)(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Computer & Internet LawTrademark ProtectionCivil Infringement ActionsDeterminationsComputer & Internet LawTrademark ProtectionCivil Infringement ActionsJurisdiction & VenueComputer & Internet LawTrademark ProtectionCivil Infringement ActionsRemediesDamagesComputer & Internet LawTrademark ProtectionCivil Infringement ActionsRemediesInjunctive ReliefComputer & Internet LawTrademark ProtectionProtection of RightsInternet Domain Names

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[Reserved]

§§ 549.30[Reserved]

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§ 549.50 Governing Law

[1] Model State Trademark Law; Trademarks and Service Marks Unit

California's former Trademark Law [former *Bus. & Prof. Code § 14200 et seq.*] was superseded, effective January 1, 2008, by the Model State Trademark Law, codified at *Bus. & Prof. Code § 14200 et seq.* If any provision of the Model State Trademark Law, or the application of any provision to any person or circumstance, is held invalid, the remainder of the Model State Trademark Law is not to be affected by that holding [*Bus. & Prof. Code § 14265*]. The Model State Trademark Law does not affect any suit, proceeding, or appeal pending on January 1, 2008 [*Bus. & Prof. Code § 14270*].

The intent of the Model State Trademark Law is to provide a system of state trademark registration and protection substantially consistent with the federal system of trademark registration and protection under the federal Lanham Act [*15 U.S.C. § 1051 et seq.; see § 549.20*]. To that end, the construction given the Lanham Act should be examined as nonbinding authority for interpreting and construing the Model State Trademark Law [*Bus. & Prof. Code § 14272*].

The Model State Trademark Law is administered by the Trademarks and Service Marks Unit in the Secretary of State's office [*see Bus. & Prof. Code § 14202(j)*], which is referred to in this chapter as the Trademarks Unit. It has a web site at http://www.sos.ca.gov/business/ts/.

[2] Other Statutory Protections

California law also offers protection for container brands [*see Bus. & Prof. Code § 14427*], laundry supply designations [*see Bus. & Prof. Code § 14482*], and association insignia [*see Corp. Code § 21301*].

[3] Common Law

Nothing in the Model State Trademark Law adversely affects the rights or the enforcement of rights in marks acquired in good faith at any time within common law [*Bus. & Prof. Code § 14259*].

Although registration of a trademark constitutes presumptive evidence of ownership, registration is not a required condition to establish a protectable proprietary interest under common law rules [*North Carolina Dairy Foundation, Inc. v. Foremost-McKesson, Inc. (1979) 92 Cal. App. 3d 98, 106-107 n.5, 154 Cal. Rptr. 794*].

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§ 549.51 Definitions

[1] Trademark

"Trademark" means any word, name, symbol, or device, or any combination of those, used by a person to identify and distinguish the goods of that person, including a unique product, from those manufactured or sold by others, and to indicate the source of the goods, even if that source is unknown [*Bus. & Prof. Code § 14202(a)*].

A trademark is intangible personal property [*see Civ. Code §§ 655, 658, 663*].

[2] Service Mark

"Service mark" means any word, name, symbol, or device, or any combination of those, used by a person to identify and distinguish the services of that person, including a unique service, from the services of others, and to indicate the source of the services, even if that source is unknown. Titles, character names used by a person, and other distinctive features of radio or television programs may be registered as service marks notwithstanding that they, or the programs, may advertise the goods of the sponsor [*Bus. & Prof. Code § 14202(b)*].

[3] Mark

"Mark" includes any trademark or service mark entitled to registration under the Model State Trademark Law, whether registered or not [*Bus. & Prof. Code § 14202(c)*].

[4] Trade Name

"Trade name" means any name used by a person to identify a business or vocation of that person [*Bus. & Prof. Code § 14202(d)*]. A trade name cannot be registered as such under the Model State Trademark Law, but a trade name that qualifies as a trademark or service mark may be registered as a mark.

A trade name is personal property [*Balesteri v. Holler (1978) 87 Cal. App. 3d 717, 722, 151 Cal. Rptr. 229*].

California law offers special protection for trade names, including farm names [*see § 549.70* et seq.].

[5] Person

The term "person" and any other word or term used to designate the applicant or other party entitled to a benefit or privilege or rendered liable under the provisions of the Model State Trademark Law includes a juristic person as well as a natural person. The term "juristic person" includes a firm, partnership, corporation, union, association, or other organization capable of suing and being sued in a court of law [*Bus. & Prof. Code § 14202(e)*].

[6] Applicant

"Applicant" means the person filing an application for registration of a mark under the Model State Trademark Law, and the legal representatives, successors, or assigns of the person [*Bus. & Prof. Code § 14202(f)*].

[7] Registrant

"Registrant" means the person to whom the registration of a mark under the Model State Trademark Law is issued, and the legal representatives, successors, or assigns of the person [*Bus. & Prof. Code § 14202(g)*].

[8] Use

"Use" means the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For the purposes of the Model State Trademark Law, a mark is deemed to be in use if it is used on either of the following [*Bus. & Prof. Code § 14202(h)*]:

- On goods when it is placed in any manner on the goods or other containers or the displays associated with the goods or on the tags or labels affixed to the goods, containers, or displays or, if the nature of the goods makes that placement impracticable, on documents associated with the goods or their sale, and the goods are sold or transported in commerce in California; or

- On services when it is used or displayed in the sale or advertising of services and the services are rendered in California.

[9] Abandoned

"Abandoned" means that either of the following has occurred [*Bus. & Prof. Code § 14202(i)*]:

- Use of a mark has been discontinued with intent not to resume that use. Intent not to resume the use may be inferred from circumstances. Nonuse for two consecutive years constitutes prima facie evidence of abandonment.

- Any course of conduct of the owner, including acts of omission as well as commission, that causes the mark to lose its significance as a mark.

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§ 549.52 Registration of Mark

[1] Application

Subject to the limitations set forth in the Model State Trademark Law, any person who uses a mark may file with the Trademarks Unit an application for registration of that mark [*Bus. & Prof. Code § 14207(a)*]. However, a mark by which the goods or services of any applicant for registration may be distinguished from the goods or services of others cannot be registered if it meets any of the criteria specified in *Bus. & Prof. Code § 14205* [*see § 549.53[1]*].

[2] Certificate of Registration

[a] Issuance and Content of Certificate

On compliance by the applicant with the requirements of the Model State Trademark Law, the Trademarks Unit must cause a certificate of registration to be issued and delivered to the applicant. The certificate of registration must be issued under the signature of the Secretary of State and the seal of the state, and show the following information [*Bus. & Prof. Code § 14215(a)*]:

- The name and business address and, if a corporation, the state of incorporation, or if a partnership, the state in which the partnership is organized and the names of the general partners, as specified by the Trademarks Unit, of the person claiming ownership of the mark.

- The date claimed for the first use of the mark anywhere and the date claimed for the first use of the mark in California.

- The class of goods or services and a description of the goods or services on or in connection with which the mark is used.

- A reproduction of the mark.

- The registration date and the term of the registration of the mark [*see* [c], *below*].

[b] Evidentiary Effect

Any certificate of registration issued by the Trademarks Unit under the provisions of the Model State Trademark Law, or a copy of a certificate duly certified by the Trademarks Unit, is admissible in evidence as competent and sufficient proof of the registration of the mark in any action or judicial proceeding in any California court [*Bus. & Prof. Code § 14215(b)*; *Cytanovich Reading Center v. Reading Game (1984) 162 Cal. App. 3d 107, 111, 208 Cal. Rptr. 412*].

[c] Term of Registration

A registration of mark pursuant to the Model State Trademark Law is effective for a term of five years from the date of registration, and may be renewed for successive periods of five years [*Bus. & Prof. Code § 14217(a), (b)*; *see § 549.55[1]*].

Any registration in force under the former law when the Model State Trademark Law became effective, January 1, 2008, was automatically extended for the unexpired term of the registration under the former law, becoming eligible for renewal under the Model State Trademark Law on expiration of that term [*Bus. & Prof. Code § 14217(c)*].

[3] Public Access to Records

The Trademarks Unit is required to keep for public examination a record of all marks registered or renewed under the Model State Trademark Law, as well as a record of all related documents recorded pursuant to *Bus. & Prof. Code § 14220* [*Bus. & Prof. Code § 14225*].

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§ 549.53 Impediments to Registration

[1] Marks That Cannot Be Registered

[a] Immoral, Deceptive, or Scandalous Matter

A mark cannot be registered if it consists of or comprises immoral, deceptive, or scandalous matter [*Bus. & Prof. Code § 14205(a)*].

[b] Disparaging Matter

A mark cannot be registered if it consists of or comprises matter that may disparage or falsely suggest a connection with persons living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute [*Bus. & Prof. Code § 14205(b)*].

[c] Government Flag, Emblem, or Insignia

A mark cannot be registered if it consists of or comprises the flag or coat of arms or other insignia of the United States of America, of any state or municipality, or of any foreign nation, or any simulation of any of those [*Bus. & Prof. Code § 14205(c)*].

[d] Living Individual's Identity

A mark cannot be registered if it consists of or comprises the name, signature, or a portrait identifying a particular living individual, except by the individual's written consent [*Bus. & Prof. Code § 14205(d)*]. For discussion of *Civ. Code § 3344.1*, governing rights to the use of a deceased person's name, voice, signature, photograph, or likeness, see *Ch. 429, Privacy, § 429.30* et seq.

[e] Confusing Mark

A mark cannot be registered if it consists of or comprises a mark that so resembles a mark registered in California or a mark or trade name previously used by another and not abandoned, as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion or mistake, or to deceive [*Bus. & Prof. Code § 14205(f)*; *see Bus. & Prof. Code § 14202(i)* (definition of "abandoned"); § 549.51[9]].

[2] Nondistinctive Mark

A mark cannot be registered if it consists of a mark that is any of the following [*Bus. & Prof. Code § 14205(e)*; *Cytanovich Reading Center v. Reading Game (1984) 162 Cal. App. 3d 107, 111, 208 Cal. Rptr. 412*]:

- When used on or in connection with the goods or services of the applicant, is merely descriptive or deceptively misdescriptive of them.

- When used on or in connection with the goods or services of the applicant, is primarily geographically descriptive or deceptively misdescriptive of them.

- Is primarily merely a surname, provided, however, that this will not prevent the registration of a mark used by the applicant that has become distinctive of the applicant's goods or services.

Bus. & Prof. Code § 14205(e) does not prevent the registration of a mark that, as used in California by the applicant, has become distinctive of the applicant's goods or services, that is, has acquired secondary meaning [*North Carolina Dairy Foundation, Inc. v. Foremost-McKesson, Inc. (1979) 92 Cal. App. 3d 98, 107, 154 Cal. Rptr. 794*]. The Trademarks Unit may accept as evidence that the mark has become distinctive, as used on or in connection with the applicant's goods or services, proof of continuous use of it as a mark by the applicant in California for the five years before the date the claim of distinctiveness is made [*Bus. & Prof. Code § 14205(e)*].

Marks are often classified by the courts in five categories of increasing distinctiveness: generic, descriptive, suggestive, arbitrary, and fanciful [*Two Pesos, Inc. v. Taco Cabana, Inc. (1992) 505 U.S. 763, 112 S. Ct. 2753, 120 L. Ed. 2d 615, 623-624* ; *Park'N Fly, Inc. v. Dollar Park & Fly, Inc. (1985) 469 U.S. 189, 194, 196, 105 S. Ct. 658, 83 L. Ed. 2d 582*]. These categories are discussed (in the context of the Lanham Act) at § 549.21.

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§ 549.54 Denial of Application

[1] Right to Amend and Resubmit Application

If an applicant is found not to be entitled to registration, the Trademarks Unit must advise the applicant of that fact and state the reasons why. The applicant has a reasonable period of time, as specified by the Trademarks Unit, in which to reply or to amend the application, in which event the application must be re-examined. This procedure may be repeated until the Trademarks Unit finally refuses registration of the mark or the applicant fails to reply or amend within the specified period, whereupon the application will be deemed to have been abandoned [*Bus. & Prof. Code § 14209(e)*].

[2] Judicial Review

If the Trademarks Unit finally refuses registration of the mark, the applicant may seek a writ of mandamus to compel registration. A writ may be granted, but without costs to the Trademarks Unit, on proof that all statements in the application are true and that the mark is otherwise entitled to registration [*Bus. & Prof. Code § 14209(f)*].

Actions in mandamus to compel registration of a mark pursuant to the Model State Trademark Law must be brought in the superior court [*Bus. & Prof. Code § 14254(a)*]. The proceeding must be based solely on the record before the Trademarks Unit [*Bus. & Prof. Code § 14254(b)*].

For discussion of, and forms for use in, an action for a writ of mandamus to compel registration of a mark, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

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§ 549.55 Procedures After Registration

[1] Renewal of Term

On application filed within six months before the expiration of the current term of registration, in a manner complying with the requirements of the Trademarks Unit, the registration may be renewed for a term of five years from the end of the expiring term [*Bus. & Prof. Code § 14217(a)*], and may be renewed for successive periods of five years in like manner [*Bus. & Prof. Code § 14217(b)*].

[2] Cancellation of Registration

[a] Request by Registrant or Assignee

The Trademarks Unit must cancel a registration concerning which the Trademarks Unit receives a voluntary request for cancellation from the registrant or the assignee of record [*Bus. & Prof. Code § 14230(a)*]. See [4], *below*, for discussion of assignments.

[b] Unrenewed Term

The Trademarks Unit must cancel a registration granted under the Model State Trademark Law and not renewed in accordance with the provisions of the Model State Trademark Law [*Bus. & Prof. Code § 14230(b)*]. See [1], *above*, for discussion of renewal.

[c] Judicial Order or Finding

An action to require cancellation of a mark registered pursuant to the Model State Trademark Law may be brought in the superior court [*Bus. & Prof. Code § 14254(a)*].

In an action for cancellation, the Secretary of State must not be made a party to the proceeding but must be notified of the filing of the complaint by the clerk of the court in which it is filed and must be given the right to intervene in the

action [*Bus. & Prof. Code § 14254(b)*].

In any action brought against a nonresident registrant, service may be effected on the Secretary of State as agent for service of the registrant in accordance with the procedures established for service on nonresident corporations and business entities under *Code Civ. Proc. §§ 416.10-416.40* and *Corp. Code §§ 2110, 2111*, and *2114* [*Bus. & Prof. Code § 14254(c)*].

The Trademarks Unit must cancel a registration if cancellation is ordered on any ground by a court of competent jurisdiction [*Bus. & Prof. Code § 14230(d)*], and must cancel a registration concerning a mark with regard to which a court of competent jurisdiction finds any of the following [*Bus. & Prof. Code § 14230(c)*]:

- The registered mark has been abandoned [*see Bus. & Prof. Code § 14202(i)* (definition of "abandoned"); § 549.51[9]].

- The registrant is not the owner of the mark.

- The registration was granted improperly.

- The registration was obtained fraudulently.

- The mark is or has become the generic name for the goods or services, or a portion of them, for which it has been registered.

- The registered mark is so similar to a mark registered by another person in the U.S. Patent and Trademark Office before the date of the filing of the application for registration by the registrant under the Model State Trademark Law as to be likely to cause confusion or mistake, or to deceive, and has not been abandoned [*see Bus. & Prof. Code § 14202(i)* (definition of "abandoned"); § 549.51[9]]. However, should the registrant prove that the registrant is the owner of a concurrent registration of a mark in the U.S. Patent and Trademark Office covering an area including California, the registration under the Model State Trademark Law may not be canceled for that area of the state.

[d] Check for Fee Is Dishonored

The Trademarks Unit must cancel a registration or renewal if a check or other remittance accepted in payment of the filing fee is not paid on presentment. However, the Trademarks Unit must give written notice to the registrant before cancellation for this reason, and then must allow 30 days from the date of the notification letter for payment by cashier's check or the equivalent [*Bus. & Prof. Code § 14230(e)*].

[e] Confusing Mark

Within six months of the date of registration, the Trademarks Unit must cancel a registration issued in violation of the proscription of *Bus. & Prof. Code § 14205(f)* against registration of a confusing mark [*Bus. & Prof. Code § 14230(f)*]. See *§ 549.53[1][e]* for discussion of that proscription.

[3] Fraudulent Registration

Any person who, either for himself or herself or on behalf of another person, procures the filing or registration of any mark pursuant to the Model State Trademark Law by knowingly making any false or fraudulent representation or declaration, either orally or in writing, or by any other fraudulent means, is liable to pay all damages sustained as a consequence of the filing or registration, to be recovered by or on behalf of the person injured, in any court of

competent jurisdiction [*Bus. & Prof. Code § 14240*].

[4] Assignment of Registration

Any mark and its registration under the Model State Trademark Law can be assigned along with the goodwill of the business in which the mark is used, or with that part of the goodwill of the business connected with the use of and symbolized by the mark [*Bus. & Prof. Code § 14220(a)*]. An application may be filed with the Trademarks Unit for recordation of the assignment. When an assignment has been recorded by the Trademarks Unit, the record is prima facie evidence of the execution of the assignment [*Bus. & Prof. Code § 14220(d)*]. An assignment of any registration under the Model State Trademark Law is void as against any subsequent purchaser for valuable consideration without notice, unless it is recorded with the Trademarks Unit within three months after the date of assignment or before the subsequent purchase [*Bus. & Prof. Code § 14220(a)*].

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§ 549.56 Infringement of Mark

[1] Mark Must Be Registered in California

Under the Model State Trademark Law, causes of action and judicial remedies [*see* [2], [3], *below*] based on infringement of a mark are limited to cases of infringement of marks that are registered under the California law. However, the owner of a mark not registered in California could have a common law remedy if the mark owner is harmed by infringement [*see Bus. & Prof. Code § 14259* (nothing in Model State Trademark Law adversely affects rights or enforcement of rights in marks acquired in good faith at any time within common law)].

Provisions in the Model State Trademark Law regarding infringement of marks reflect provisions in the Lanham Act [*see 15 U.S.C. § 1114*], which are discussed in *§ 549.24*.

[2] Causes of Action

[a] Infringing Use of Mark

A person is subject to a civil action by the owner of a mark registered under the Model State Trademark Law [*see* [3][a], *below*] if the person uses, without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of the mark in connection with the sale, distribution, offering for sale, or advertising of any goods or services on or in connection with which the use is likely to cause confusion or mistake, or to deceive, as to the source of origin of such goods or services [*Bus. & Prof. Code § 14245(a)(1)*].

[b] Reproduction and Application of Mark That Results in Infringement

A person is subject to a civil action by the owner of a mark registered under the Model State Trademark Law [*see* [3][a], *below*] if the person reproduces, counterfeits, copies, or colorably imitates the mark and applies the reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used on or in connection with the sale or other distribution in California of any goods or services. The owner of the mark is not entitled to recover profits or damages [*see* [3][b], *below*] unless the acts have been committed

with knowledge that the mark is intended to be used to cause confusion or mistake, or to deceive [*Bus. & Prof. Code § 14245(a)(2)*].

[c] Facilitation of Infringing Use of Mark

A person is subject to a civil action by the owner of a mark registered under the Model State Trademark Law [*see* [3][a], *below*] if the person knowingly facilitated, enabled, or otherwise assisted a person to manufacture, use, distribute, display, or sell any goods or services bearing any reproduction, counterfeit, copy, or colorable imitation of the mark, without the consent of the owner of the mark [*Bus. & Prof. Code § 14245(a)(3)*].

Any act by that person is presumed to have been taken knowingly following delivery to that person, by personal delivery, courier, or certified mail return receipt requested, of a written demand to cease and desist that is accompanied by all of the following [*Bus. & Prof. Code § 14245(a)(3)*]:

- A copy of the certificate of registration;
- A copy of the reproduction, counterfeit, copy, or colorable imitation of the registered mark; and
- A statement, made under penalty of perjury, by the owner of the registered mark, or by an officer of the corporation that owns the registered mark or by legal counsel for the owner of the registered mark, that includes all of the following:
  - The name or description of the infringer;
  - The product or service and mark being or to be infringed;
  - The dates of the infringement; and
  - Any other reasonable information to assist the recipient to identify the infringer.

This presumption does not affect the mark owner's burden of showing that there was infringement in violation of the Model State Trademark Law [*Bus. & Prof. Code § 14245(a)(4)*].

A landlord or property owner that provides, rents, leases, or licenses the use of real property where any goods or services bearing any reproduction, counterfeit, copy, or colorable imitation of a mark registered under the Model State Trademark Law are sold, offered for sale, or advertised, is liable on the facilitation theory if the landlord or property owner had control of the property and knew, or had reason to know, of the infringing activity [*Bus. & Prof. Code § 14245(a)(5)*].

[3] Judicial Remedies

[a] In General

A person who is subject to a civil action by the owner of a registered mark because of infringement of the mark as provided in *Bus. & Prof. Code § 14245(a)* [*see* [2], *above*] is thus subject to the remedies provided in *Bus. & Prof. Code § 14250* [*Bus. & Prof. Code § 14245(a)*]. Those remedies are described in *Bus. & Prof. Code § 14250* as being remedies for harm resulting from infringement by counterfeiting of a mark, which is but one of the kinds of infringing activity proscribed in *Bus. & Prof. Code § 14245(a)*.

"Counterfeit" in this context means a spurious trademark, service mark, collective mark, or certification mark that is

identical to, or substantially indistinguishable from, a registered mark that is used on or in connection with goods or services or any labels or packaging or components [*Bus. & Prof. Code § 14202(n)*]. (Collective marks and certification marks are types of marks defined in the Lanham Act [*see 15 U.S.C. § 1127*]; for definitions, see *§ 549.20[2][c], [d]*.)

The legislative intent appears to be as follows:

- For infringement of any kind proscribed in *Bus. & Prof. Code § 14245(a)* [*see* [2], *above*], the owner of the infringed mark may sue for an injunction together with damages and an order for disgorgement of illicitly gained profits, plus penalties [*see* [b], *below*].

- Additionally, for infringement by counterfeiting:

  - The owner of the infringed mark may obtain an order for the destruction of goods and other things bearing the counterfeit mark [*see* [c], *below*].

  - The owner of the infringed mark may also obtain an order for the pre-judgment seizure of goods and other things bearing the counterfeit mark [*see* [d], *below*].

  - In the event of a wrongful pre-judgment seizure, the owner of the infringed mark can be liable for damages [*see* [e], *below*].

For a form for a complaint by a mark owner based on infringement of a service mark registered under the Model State Trademark Law, see *§ 549.103*.

[b] Injunction, Compensation, and Penalties

Any owner of a mark registered under the Model State Trademark Law may proceed by suit to enjoin the manufacture, use, display, or sale of any counterfeits; in a case not involving a counterfeit mark, to enjoin whatever infringing activity is the cause of action [*see* [a], *above*]. Any court of competent jurisdiction also may grant injunctions to restrain the manufacture, use, display, or sale (or other infringing activity). The court may require the defendants to pay to the owner up to three times the profits from, and up to three times all damages suffered by reason of, the wrongful manufacture, use, display, sale [*Bus. & Prof. Code § 14250(a)*], or other infringing activity.

[c] Destruction of Counterfeits

If, in any action brought under *Bus. & Prof. Code § 14250*, the court determines that any goods in the possession of or services offered by a defendant bear or consist of a counterfeit mark [*see* [a], *above*], the court must order the destruction of any goods, labels, packaging or components, bearing the counterfeit mark and of all instrumentalities used in the production of the counterfeit goods, including, but not limited to, any items, objects, tools, machines, or equipment. Alternatively, after obliteration of the counterfeit mark, the court may dispose of those materials by ordering their transfer to the state, a civil claimant, an eleemosynary institution, or any appropriate private person other than the person from whom the materials were obtained [*Bus. & Prof. Code § 14250(a)*].

[d] Pre-Judgment Seizure of Counterfeits

The court, on motion or ex parte application by a plaintiff in a suit to enjoin the manufacture, use, display, or sale of counterfeits, may order seizure of any goods, labels, packaging or any components bearing the counterfeit mark [*see* [a], *above*], and all instrumentalities used in the production of the counterfeit goods, including, but not limited to, any items, objects, tools, machines, or equipment, from persons manufacturing, displaying for sale, or selling the goods, on a showing of good cause and a probability of success on the merits and on the posting of an undertaking pursuant to *Bus.*

& Prof. Code § 14250(e) [*see below*]. If it appears from the ex parte application that there is good reason for proceeding without notification to the defendant, the court, for good cause shown, may waive the requirement of notice for the ex parte proceeding. The order of seizure must specifically set forth all of the following [*Bus. & Prof. Code § 14250(b)*]:

- The date or dates on which the seizure is ordered to take place.
- A description of the counterfeit goods to be seized.
- The identity of the persons or class of persons to effect seizure.
- A description of the location or locations at which seizure is to occur.
- A hearing date, not more than 10 court days after the last date on which seizure is ordered, at which any person from whom goods are seized may appear and seek release of the seized goods.

Any person from whom seizure is effected must be served with the order at the time of seizure [*Bus. & Prof. Code § 14250(b)*].

For an ex parte application and an order, see *§§ 549.105*, *549.106*.

The court must set the amount of the undertaking required by *Bus. & Prof. Code § 14250(b)* in accordance with the probable recovery of damages, costs, and expenses under *Bus. & Prof. Code § 14250(c)* [*see § 549.56[3][e]*], if it is ultimately determined that the goods seized were not counterfeit [*Bus. & Prof. Code § 14250(e)*]. Any person entitled to recover under *Bus. & Prof. Code § 14250(c)* may object, within 30 days after the date of seizure, to the undertaking on the ground that the surety is insufficient or the amount of the undertaking is insufficient [*Bus. & Prof. Code § 14250(f)*].

The motion or application filed pursuant to *Bus. & Prof. Code § 14250(b)* must include a statement advising the person from whom the goods are seized that the undertaking has been filed, informing that person of the right to object to the undertaking on the ground that the surety is insufficient or the amount of the undertaking is insufficient, and advising that person that an objection to the undertaking must be made within 30 days after the date of seizure [*Bus. & Prof. Code § 14250(g)*].

[e] Damages for Wrongful Seizure of Goods

Any person who causes seizure of goods that are not counterfeit [*see § 549.56[3][a]*], *above*] is liable in an amount equal to the following [*Bus. & Prof. Code § 14250(c)*]:

- Any damages proximately caused, to any person having a financial interest in the seized goods, by the seizure of goods that are not counterfeit.
- Costs incurred in defending against seizure of noncounterfeit goods.
- On a showing that the person causing the seizure to occur acted in bad faith. expenses, including reasonable attorney's fees expended in defending against the seizure of any noncounterfeit or noninfringing goods.
- Punitive damages, if warranted.

A person entitled to recover pursuant to *Bus. & Prof. Code § 14250(c)* may seek a recovery by cross-claim or motion made in the trial court and served pursuant to *Code Civ. Proc. § 1011*. The person may join any surety on an

undertaking posted pursuant to *Bus. & Prof. Code § 14250(b)* [*see § 549.56[3][d]*], and any judgment of liability will bind both the person directly liable and the surety, jointly and severally, but the liability of the surety is limited to the amount of the undertaking [*Bus. & Prof. Code § 14250(d)*].

[f] Nuisance Abatement Action Targeting Place Where Counterfeiting Occurred

Until January 1, 2015, if there is a conviction for a violation of *Penal Code § 350(a)(2)* (willfully manufacturing, intentionally selling, or knowingly possessing for sale, 1,000 or more articles bearing any counterfeit of a mark registered with the Secretary of State or registered on the Principal Register of the U.S. Patent and Trademark Office), then a nonresidential building or place used by the convicted person in committing that violation is deemed a nuisance which may be enjoined, abated, and prevented, and for which damages may be recovered, whether it is a public or private nuisance [*Bus. & Prof. Code § 17800(a),(c)*; *see Bus. & Prof. Code § 17802* (sunset provision)]. The district attorney of the county where the nuisance exists, or any city attorney in the county, or any citizen of California who resides in the county, may maintain an action to abate and prevent the nuisance and to perpetually enjoin the person conducting or maintaining it, and the owner, lessee, or agent of the building or place, in or on which the nuisance exists, from directly or indirectly maintaining or permitting it. The complaint must be verified unless filed by the district attorney or a city attorney [*Penal Code § 11226*]. An owner must be provided with 30 days' notice prior to the filing of an action to abate the nuisance [*Bus. & Prof. Code § 17800(a)*]. For discussion and forms for use in an action to abate a nuisance, see Ch. 391, *Nuisance* .

[4] Limitation of Remedies Against Innocent Infringers

[a] In General

Notwithstanding any other provision of the Model State Trademark Law, the remedies given to the owner of a mark because of infringement proscribed in *Bus. & Prof. Code § 14245(a)* [*see § 549.56[2], [3]*] are limited when the defendant is deemed to be an innocent infringer or violator [*Bus. & Prof. Code § 14245(b)*].

An innocent infringer or innocent violator is a person who is described in *Bus. & Prof. Code § 14245(b)* [*see § 549.56[4][b], [c]*] and whose acts were committed without knowledge that the infringing mark was intended to be used to cause confusion or mistake, or to deceive [*Bus. & Prof. Code § 14245(c)*].

[b] Commercial Printers

If an infringer or violator is engaged solely in the business of printing the mark or violating matter for others and establishes that he or she was an innocent infringer or innocent violator, the owner of the right infringed is entitled only to an injunction against future printing of the mark by the innocent infringer or innocent violator [*Bus. & Prof. Code § 14245(b)(1)*].

[c] Publishers and Distributors of Periodicals and Electronic Communications

If the infringement complained of is contained in, or is part of, paid advertising matter in a newspaper, magazine, or other similar periodical, or in an electronic communication as defined in *18 U.S.C. § 2510(12)*, the remedies of the owner of the right infringed against the publisher or distributor of the newspaper, magazine, or other similar periodical or electronic communication are confined to an injunction against the presentation of the advertising matter in future issues of the newspapers, magazines, or other similar periodicals or in further transmissions of the electronic communication. This limitation applies only to innocent infringers and innocent violators, however [*Bus. & Prof. Code § 14245(b)(2)*].

Injunctive relief is not available to the owner of the right infringed with respect to an issue of a newspaper, magazine, or other similar periodical or electronic communication containing infringing matter if restraining the dissemination of the

infringing matter in any particular issue of the periodical or in an electronic communication would delay the delivery of the issue or transmission of the electronic communication after the regular time for delivery and the delay would be due to the method by which publication and distribution of the periodical or transmission of the electronic communication is customarily conducted in accordance with sound business practice, and not to any method or device adopted for the evasion of *Bus. & Prof. Code § 14245* or to prevent or delay the issuance of an injunction or restraining order with respect to the infringing matter [*Bus. & Prof. Code § 14245(b)(3)*].

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§ 549.57 Dilution of Famous Mark

[1] Definitions

[a] Famous Mark

A mark is "famous" for purposes of California law if it is widely recognized by the general consuming public of California, or a geographic area of California, as a designation of the source of the goods or services purveyed the mark's owner. In determining whether a mark is famous, a court may consider factors including, but not limited to, all of the following [*Bus. & Prof. Code § 14247(a)*]:

- The duration, extent, and geographic reach of advertising and publicity of the mark in California, whether advertised or publicized by the owner or third parties;

- The amount, volume, and geographic extent of sales in California of goods or services offered under the mark;

- The extent of actual recognition of the mark in California; and

- Whether the mark is the subject of a state registration in California, or a federal registration under the Act of March 3, 1881, or under the Act of February 20, 1905, or on the principal register under the Trademark Act of 1946 (the Lanham Act), as amended [*15 U.S.C. § 1051 et seq.*; *see § 549.23[2]*].

A mark can be famous and subject to actionable dilution whether or not it is registered under California law or federal law.

[b] Dilution

"Dilution" means dilution by blurring or dilution by tarnishment, regardless of the presence or absence of any of the following [*Bus. & Prof. Code § 14202(k)*]:

- Competition between the owner of the famous mark and other parties;
- Actual or likely confusion, mistake, or deception; or
- Actual economic injury.

"Dilution by blurring" means association arising from the similarity between a mark or a trade name and a famous mark that impairs the distinctiveness of the famous mark [*Bus. & Prof. Code § 14202(l)*]. "Dilution by tarnishment" means association arising from the similarity between a mark or a trade name and a famous mark that harms the reputation of the famous mark [*Bus. & Prof. Code § 14202(m)*].

This concept of dilution and a judicial remedy [*see § 549.57[2]*] and fair use defenses [*see* [3], *below*] reflect provisions in the Lanham Act [*see 15 U.S.C. § 1125(c)*], which are discussed in *§ 549.27*.

[2] Cause of Action and Remedy

Subject to the principles of equity, an owner of a mark that is famous and distinctive, whether inherently or through acquired distinctiveness, is entitled to an injunction against another person's commercial use of a mark or trade name if that use begins after the mark has become famous and is likely to cause dilution of the famous mark [*Bus. & Prof. Code § 14247(a)*]. The owner of the famous mark is entitled to injunctive relief throughout the geographic area in which the mark is found to have become famous prior to commencement of the junior use, but not beyond the borders of California [*Bus. & Prof. Code § 14247(b)*].

If the person against whom injunctive relief is sought willfully intended to cause dilution of the famous mark, the owner also is entitled to the relief set forth in *Bus. & Prof. Code § 14250* [*see* discussion in *§ 549.56[4]*], subject to the discretion of the court and the principles of equity [*Bus. & Prof. Code § 14247(b)*].

[3] Defenses

[a] Fair Use

The following acts do not constitute causes of action under *Bus. & Prof. Code § 14247* [*Bus. & Prof. Code § 14247(b)*]:

- Any fair use, including a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person other than as a designation of source for the person's own goods or services, including use in connection with either of the following:
    - Advertising or promotion that permits consumers to compare goods or services [*see Bus. & Prof. Code § 14202(o)* (definition of "comparative commercial advertising" as use of competitor's trademark in advertising to compare relative qualities of competitive goods)]; or
    - Identifying and parodying, criticizing, or commenting on, the famous mark owner or the goods or services of the famous mark owner.
- Noncommercial use of the mark.
- All forms of news reporting and news commentary.

[b] Ornamental Use on Goods

The former version of the California Trademark Law provided that "[a]ny person who uses or unlawfully infringes upon a mark registered under this chapter or under Title 15 of the United States Code, other than in an otherwise noninfringing manner, either on the person's own goods or services or to describe the person's own goods or services, *irrespective of whether the mark is used primarily as an ornament, decoration, garnishment, or embellishment on or in products, merchandise, or goods,* for the purpose of enhancing the commercial value of, or selling or soliciting purchases of, products, merchandise, goods, or services, without prior consent of the owner of the mark, shall be subject to an injunction against that use by the owner of the mark" [former *Bus. & Prof. Code § 14335(a)* (emphasis added)].

The same provision was originally in the bill for enactment of the Model State Trademark Law, assigned to *Bus. & Prof. Code § 14245* as subdivision (d) [*see* AB 1484, 2007-2008 Reg. Sess.]. However, the Senate Judiciary Committee reported: "Numerous parties have expressed concern about the lack of an ornamental use exemption in this bill. In fact, the current language appears to make the ornamental use of a mark actionable. Ornamental use refers to the use of a trademark as a design, rather than as an identifier. Consumers may, in turn, purchase goods containing that trademark based upon the aesthetic nature of the mark, not any representation that the mark is making about the quality of the goods" [Senate Judiciary Cmte., Analysis of AB 1484, 2007-2008 Reg. Sess., p. 17 (July 11, 2007)]. Subsequently, the provision was removed, and no such provision was in the bill as finally adopted. This legislative history could be cited as indicating an intent that mere ornamental use of a registered mark should not be a cause of action (and that it should be a defense against a charge of infringement) under the Model State Trademark Law.

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[Reserved]

§§ 549.58[Reserved]

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§ 549.70 Registration

[1] Trade Name Registration and Presumptions

[a] Fictitious Business Name Statement

Filing a fictitious business name statement, when required pursuant to *Bus. & Prof. Code § 17910*, creates a rebuttable presumption that the registrant has the exclusive right to use as a trade name, in the county of filing, that fictitious business name and any other confusingly similar trade name [*Bus. & Prof. Code § 14411*]. To avail itself of this presumption, the registrant must be both the first to file the fictitious name in the county and actually engaged in business or trade using that fictitious business name, or a confusingly similar name, in that county. This presumption is one affecting the burden of producing evidence [*Bus. & Prof. Code § 14411*]. It is applicable until the fictitious business name is abandoned or otherwise expires, and the registrant files no new fictitious business name statement [*Bus. & Prof. Code § 14412*; *see Bus. & Prof. Code §§ 17920, 17922* (duration, expiration, and abandonment of fictitious business name statements)]. In the case of assignment or transfer, the presumption does not apply unless the assignee or transferee files an original fictitious business name statement [*Bus. & Prof. Code § 14412*]. Nothing in *Bus. & Prof. Code § 14401 et seq.* (trade names and designations) is to be construed as requiring or prohibiting the filing of any fictitious business name statement if one is not required or prohibited by *Bus. & Prof. Code § 17910* (persons required to file fictitious business name statements) [*Bus. & Prof. Code § 14414*].

The filing of a fictitious business name statement pursuant to *Bus. & Prof. Code § 17910* does not, of itself, authorize the use in California of a fictitious name in violation of the rights of another established under *Bus. & Prof. Code § 14401 et seq.*, or under the Lanham Act [*15 U.S.C. § 1501 et seq.*]or common law, including rights in a trade name [*Bus. & Prof. Code § 14418*].

[b] Corporate Name

A rebuttable presumption that a corporation has the exclusive right to use as a trade name, in California, the corporate name as contained in the articles or certificate, as well as any confusingly similar trade name, arises from any of the following [*Bus. & Prof. Code § 14415*]:

- A domestic corporation's filing of articles of incorporation pursuant to *Corp. Code § 200*;

- A foreign corporation's obtaining of a certificate of qualification pursuant to *Corp. Code §§ 2105* and *2106*; or

- The continuing authority of a foreign corporation pursuant to *Corp. Code § 2102* to transact business in California.

A corporation may avail itself of the above presumption if the corporation is the first to file articles or to obtain a certificate containing the corporate name and also is actually engaged in business using that corporate name or one confusingly similar. The presumption thus created affects the burden of producing evidence [*Bus. & Prof. Code § 14415*].

[c] Conflict Between Corporation and Registrant of Fictitious Business Name

If, as to the same or a confusingly similar trade name in a given county, both a corporation entitled to the rebuttable presumption created by *Bus. & Prof. Code § 14415* [*see § 549.70[1][b]*] and a registrant entitled to the benefit of the presumption created by *Bus. & Prof. Code § 14411* [*see § 549.70[1][a]*] seek, each for itself, to avail itself of its respective presumption of exclusive use as against the other, then the party filing or obtaining a certificate of qualification first in time and being actually engaged in business using the name is entitled to the presumption of exclusive use as against the other in that county [*Bus. & Prof. Code § 14416*].

The mere filing of articles of incorporation does not authorize the use in California of a corporate name in violation of the rights of another, including rights in a trade name, under the Lanham Act [*15 U.S.C. § 1051 et seq.*], the Model State Trademark Law [*Bus. & Prof. Code § 14200 et seq.*], the fictitious business name law [*Bus. & Prof. Code § 17900 et seq.*], or the common law [*Bus. & Prof. Code § 14417*].

[2] Farm Name Registration

Any farm owner or lessee in California, on payment of a fee to the Secretary of State, may have the name of the farm registered in a register kept by the Secretary of State for that purpose. The owner or lessee is entitled to receive a certificate of registration [*Bus. & Prof. Code § 14461*].

The registration has the same effect as the registration of a trademark under the Model State Trademark Law [*Bus. & Prof. Code § 14463*]. Thus, any person selling or marketing products grown on the farm may use the name of the farm as a trademark on the farm's products, in the same manner as provided for other trademarks and subject to the same rights and duties [*Bus. & Prof. Code § 14462*].

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48-549 California Forms of Pleading and Practice--Annotated § 549.71

§ 549.71 Judicial Remedy

[1] Infringement of Trade Name

Trade name infringement is broadly defined as any use of a trade name in violation of the rights defined in *Bus. & Prof. Code § 14401 et seq.* [*see Bus. & Prof. Code § 14402*]. It is not per se unlawful to use a name similar to that of an established business. The test for determining whether use of that name may be enjoined is whether the similarity between the two names will deceive or confuse the public. Proof of actual deception is not required; probability or likelihood is sufficient [*In re Marriage of Shelton (1981) 118 Cal. App. 3d 811, 814-815, 173 Cal. Rptr. 629*].

[2] Infringement as Unfair Competition

Under the common law of unfair competition, the equitable doctrine of secondary meaning protects any trade name or design that may not be exclusively appropriated as a trademark, if it has nonetheless become associated in the public mind with one person's business as the source of goods or services [*see Ball v. American Trial Lawyers Assn. (1971) 14 Cal. App. 3d 289, 300-304, 92 Cal. Rptr. 228* ; *Family Record Plan, Inc. v. Mitchell (1959) 172 Cal. App. 2d 235, 242-243, 342 P.2d 10*]. In other words, when one person adopts and uses a trade name or design that acquires this secondary meaning or association in the public mind, any subsequent imitation of that name or design by another, with the effect of confusing or deceiving buyers as to the origin of goods or services, may be enjoined as unfair competition, even though the original name is unprotected by trademark, copyright, or patent [*see Cytanovich Reading Center v. Reading Game (1984) 162 Cal. App. 3d 107, 113, 208 Cal. Rptr. 412*].

The common law defenses of abandonment and laches are available in trade name infringement actions [*California Western School of Law v. California Western University (1981) 125 Cal. App. 3d 1002, 1006, 1011, 178 Cal. Rptr. 685*].

For a complaint for unfair competition and trade name infringement, see *§ 549.107*. For further discussion of actions for unfair competition, see Ch. 565, *Unfair Competition* .

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48-549 California Forms of Pleading and Practice--Annotated § 549.72

§ 549.72 Loss of Rights by Abandonment

A person may relinquish ownership of a trade name by abandoning it [*California Western School of Law v. California Western University (1981) 125 Cal. App. 3d 1002, 1011, 178 Cal. Rptr. 685*]. Trade name abandonment is not defined by statute in California. However, the California Supreme Court has defined abandonment in this context as meaning general abandonment to the public. Abandonment, in the sense of forfeiture of the name, must be strictly proved, and must be shown affirmatively and positively as affecting the interests of the public. Use of a trade name is not abandoned by temporary disuse, absent a showing of general abandonment to the public [*Nolan Bros. Shoe Co. v. Nolan (1900) 131 Cal. 271, 276, 63 P. 480* ; *cf. Carter-Wallace, Inc. v. Procter & Gamble Company (9th Cir. 1970) 434 F.2d 794, 804* (single instance of use of mark is sufficient against claim of abandonment)].

The declaration of bankruptcy by the corporate owner of a trade name is some evidence of intent to abandon the name, but is not conclusive [*Leventhal v. Ollie Morris Equip. Corp. (1960) 184 Cal. App. 2d 553, 560, 7 Cal. Rptr. 911*]. The use of other trade names for a short period of time in connection with one used continuously for a long period of time does not, in itself, prove abandonment or weaken the effect of the name used for the longer period [*Nolan Bros. Shoe Co. v. Nolan (1900) 131 Cal. 271, 276, 63 P. 480*]. Conducting business continuously under several fictitious names containing one or more of the words or names in a trade name does not constitute abandonment of the trade name [*Weatherford v. Eytchison (1949) 90 Cal. App. 2d 379, 386, 202 P.2d 1040*].

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48-549 California Forms of Pleading and Practice--Annotated §§ 549.73-549.79

[Reserved]

§§ 549.73[Reserved]

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48-549 California Forms of Pleading and Practice--Annotated § 549.80

§ 549.80 Related Texts From LEXIS Publishing

For memoranda supporting an application for a temporary restraining order or preliminary injunction restraining trademark and trade name infringement, see California Points and Authorities, Ch. 116, *Injunctions* (Matthew Bender)

Gilson on Trademarks (Matthew Bender)

California Forms of Jury Instruction, Ch. 33A, Matthew Bender Unfair Competition Instructions, MB 3300A.60 et seq. (Matthew Bender)

For forms and instructions relating to applications for, and renewal and assignment of, California trademark and service mark registrations, see California Legal Forms, Ch. 103B, *Trademarks* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Trademark LawGeneral OverviewTrademark LawInfringement ActionsRemediesEquitable ReliefPreliminary InjunctionsTrademark LawInfringement ActionsRemediesEquitable ReliefTemporary Restraining OrdersTrademark LawProtection of RightsRegistrationGeneral OverviewTrademark LawProtection of RightsRegistrationRenewal

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48-549 California Forms of Pleading and Practice--Annotated § 549.81

§ 549.81 Federal Constitution

Commerce clause as basis for federal trademark legislation. U.S. *Const., art. I, § 8, cl. 3*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawCongressional Duties & PowersCommerce ClauseGeneral OverviewTrademark LawFederal Unfair Competition LawGeneral Overview

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§ 549.82 Federal Statutes

[1] Actions

Display of mark registration symbol is prerequisite to recovery of profits and damages in infringement suits. *15 U.S.C. § 1111*

Infringement of marks. *15 U.S.C. § 1114*

Affirmative defenses. *15 U.S.C. § 1115*

Injunctive relief for infringement of marks or false representations. *15 U.S.C. § 1116*

Injunctions enforceable by proceedings to punish for contempt, or otherwise. *15 U.S.C. § 1116(a)*

Seizure of goods bearing counterfeit marks. *15 U.S.C. § 1116(d)*

Cause of action for wrongful or attempted wrongful seizure of goods. *15 U.S.C. § 1116(d)(11)*

Attorney's fees recoverable, in exceptional cases, by prevailing party in suits for infringement or false representation. *15 U.S.C. § 1117(a)*

Costs recoverable in suits for infringement or false representation. *15 U.S.C. § 1117(a)*

Defendant's profits and treble damages recoverable in suits for infringement or false representation. *15 U.S.C. § 1117(a)*

Attorney's fees recoverable in infringement suits involving use of counterfeit marks. *15 U.S.C. § 1117(b)*

Treble damages or defendant's profits recoverable in infringement suits involving use of counterfeit marks. *15 U.S.C. §*

1117(b)

Statutory damages recoverable in infringement suits involving use of counterfeit marks. *15 U.S.C. § 1117(c)*

Destruction of infringing marks and materials. *15 U.S.C. § 1118*

Power of court, in action involving registered mark, to determine right to registration, order cancellation of registration, restore canceled registration, and otherwise rectify register as to registrations of any party to action. *15 U.S.C. § 1119*

False or fraudulent procurement of registration is basis for civil action for damages. *15 U.S.C. § 1120*

Federal court jurisdiction. *15 U.S.C. § 1121*

False designations of origin and false descriptions of goods or services is basis for civil action. *15 U.S.C. § 1125*

Injunction and other remedies obtainable against dilution of famous marks. *15 U.S.C. § 1125(c)*

Use, without consent of U.S. Olympic Committee, of specified words and symbols adopted for exclusive use by USOC is subject to civil action by USOC for remedies in Lanham Act. *36 U.S.C. § 220506*

[2] Criminal Offenses

Trafficking in goods or services using counterfeit marks is criminal offense. *18 U.S.C. § 2320*

[3] Importation of Goods

Prohibition against importation of goods bearing infringing mark or name. *15 U.S.C. § 1124*

Prohibition against importation of goods bearing false designations of origin or false descriptions. *15 U.S.C. § 1125*

Importation, without mark owner's consent, of foreign-made merchandise bearing registered trademark owned by United States citizen or entity is prohibited. *19 U.S.C. § 1526(a)*

[4] Incontestability of Right to Use Mark

Incontestability. *15 U.S.C. § 1065*

Affirmative defenses valid against incontestable mark. *15 U.S.C. § 1115(b)*

[5] Jurisdiction and Venue in Federal Court

Jurisdiction over appeals from and civil actions arising out of decisions of Trademark Trial and Appeal Board and Commissioner of Patents and Trademarks. *15 U.S.C. § 1071*

Federal court subject matter jurisdiction in actions arising under the Lanham Act. *15 U.S.C. § 1121*

General federal question jurisdiction. *28 U.S.C. § 1331*

Federal district court has original jurisdiction of any civil action for unfair competition when joined with substantial and related claim under federal trademark laws. *28 U.S.C. § 1338*

Original jurisdiction in federal district court in any action arising under any act of Congress relating to trademarks. *28 U.S.C. § 1338*

Venue generally in actions commenced in federal court. *28 U.S.C. §§ 1391, 1392*

[6] Patent and Trademark Office Procedure

Verification and acknowledgment of documents under *15 U.S.C. §§ 1051-1127*. *15 U.S.C. § 1061*

Inter partes proceedings. *15 U.S.C. §§ 1067-1069*

Trademark Trial and Appeal Board authorized to conduct inter partes proceedings and hear ex parte appeals. *15 U.S.C. §§ 1067, 1070*

Judicial review and ex parte appeals. *15 U.S.C. § 1071*

Fees and charges assessed by Patent and Trademark Office. *15 U.S.C. § 1113*

Commissioner of Patents and Trademarks obligated to make rules and regulations for conduct of proceedings in Patent and Trademark Office. *15 U.S.C. § 1123*

[7] Registration of Marks

Application for registration of marks. *15 U.S.C. §§ 1051, 1091*

Concurrent registration of marks. *15 U.S.C. § 1052*

Subject matter of registrable marks. *15 U.S.C. §§ 1052, 1091*

Service marks are registrable. *15 U.S.C. § 1053*

Collective and certification marks are registrable. *15 U.S.C. § 1054*

Related companies. *15 U.S.C. § 1055*

Disclaimer of unregistrable portions of marks. *15 U.S.C. § 1056*

Certificates of registration. *15 U.S.C. §§ 1057, 1093*

Application to register mark constitutes constructive use of mark; rights of priority. *15 U.S.C. § 1057(c)*

Duration of registration; affidavit of continued use or excusable nonuse. *15 U.S.C. § 1058*

Cancellation proceedings. *15 U.S.C. §§ 1058, 1064, 1067, 1092*

Renewal of registration. *15 U.S.C. § 1059*

Assignment of marks and registrations. *15 U.S.C. § 1060*

Publication of marks. *15 U.S.C. §§ 1062, 1092*

Opposition proceedings. *15 U.S.C. §§ 1063, 1067*

Interference proceedings. *15 U.S.C. §§ 1066, 1067*

Concurrent use proceedings. *15 U.S.C. § 1067*

Constructive notice of mark ownership. *15 U.S.C. § 1072*

Notice of mark registration. *15 U.S.C. § 1111*

Classification of goods and services for registration. *15 U.S.C. § 1112*

Evidentiary effect of registration on principal register. *15 U.S.C. § 1115*

[8] Supplemental Register

Registration on supplemental register. *15 U.S.C. §§ 1091-1096*

Marks registered on supplemental register is subject to cancellation. *15 U.S.C. § 1092*

Marks registered on supplemental register is not subject to opposition. *15 U.S.C. § 1092*

Registration on supplemental register does not preclude registration on principal register. *15 U.S.C. § 1095*

[9] Treaties and Conventions

International treaties and conventions. *15 U.S.C. § 1126*

Provisions implementing Madrid Protocol (concerning international registration of marks), which are in force in United States on and after November 2, 2003. *15 U.S.C. § 1141 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesCounterfeitingGeneral OverviewTrademark LawInfringement ActionsDefensesGeneral OverviewTrademark LawInfringement ActionsJurisdictionGeneral OverviewTrademark LawInfringement ActionsRemediesGeneral OverviewTrademark LawProtection of RightsRegistrationFederal Registration

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§ 549.83 State Statutes

[1] Trademarks and Service Marks

Model State Trademark Law. *Bus. & Prof. Code § 14200 et seq.*

Definitions. *Bus. & Prof. Code § 14202*

Marks that may not be registered. *Bus. & Prof. Code § 14205*

Application for registration of mark. *Bus. & Prof. Code § 14207*

Application procedures in Secretary of State's office. *Bus. & Prof. Code § 14209*

Issuance of certificate of registration. *Bus. & Prof. Code § 14215*

Renewal of registration. *Bus. & Prof. Code § 14217*

Assignment of registration; change of registrant's name; recordation of related instruments. *Bus. & Prof. Code § 14220*

Records to be kept in Secretary of State's office. *Bus. & Prof. Code § 14225*

Cancellation of registration. *Bus. & Prof. Code § 14230*

Classification of goods and services for purposes of registration of marks. *Bus. & Prof. Code § 14235*

Fraudulent registration. *Bus. & Prof. Code § 14240*

Causes of action and defenses respecting counterfeit goods or services. *Bus. & Prof. Code § 14245*

Causes of action and defenses respecting dilution of famous marks. *Bus. & Prof. Code § 14247*

Injunctive relief, damages, and seizure of goods in case of counterfeit goods or services. *Bus. & Prof. Code § 14250*

No effect on criminal law. *Bus. & Prof. Code § 14252*

Judicial proceedings to require cancellation or compel registration of mark. *Bus. & Prof. Code § 14254*

Preservation of common law rights. *Bus. & Prof. Code § 14259*

Fees paid to Secretary of State are not refundable. *Bus. & Prof. Code § 14260*

Provisions of law are severable. *Bus. & Prof. Code § 14265*

Pending suits and proceedings are not affected. *Bus. & Prof. Code § 14270*

[2] Trade Names

"Trade name" defined. *Bus. & Prof. Code § 14202(d)*

Transfer of trade name. *Bus. & Prof. Code § 14401*

Infringement of trade name is basis for injunctive relief. *Bus. & Prof. Code § 14402*

Misuse of container bearing trade name of another with intent to defraud or deceive is misdemeanor. *Bus. & Prof. Code § 14403*

Removal, concealment, destruction, or defacement of trade name of another with intent to defraud or deceive is misdemeanor. *Bus. & Prof. Code § 14404*

Registration of trade name. *Bus. & Prof. Code § 14411 et seq.*

[3] Miscellaneous

[a] In General

Geographical name as trademark or brand on milk product is not prohibited in certain circumstances. *Food and Agric. Code § 37224*

Container labeling requirements for pharmaceutical products. *Bus. & Prof. Code § 4047.5*

Labeling of petroleum products. *Bus. & Prof. Code § 13480 et seq.*

Container brands. *Bus. & Prof. Code § 14425 et seq.*

Farm name as trademark. *Bus. & Prof. Code § 14460 et seq.*

Laundry supply designations. *Bus. & Prof. Code § 14480 et seq.*

Names of associations other than trade names. *Bus. & Prof. Code § 14492 et seq.*; *Corp. Code § 21300 et seq.*

Effect of mark or label on articles of American Indian labor. *Bus. & Prof. Code § 17569 et seq.*

Quality marks applied to precious metal products. *Bus. & Prof. Code § 22100 et seq.*

Fees for registering trademark or service mark. *Gov. Code § 12193*

Labor organizations have exclusive right to ownership, use, and control of labels or trademarks on adoption and registration in *California. Lab. Code § 1014-1016*

Motor vehicles required to bear trademarks in certain circumstances. *Veh. Code §§ 24006, 27900*

[b] Unfair Competition

Action for injunctive relief and for civil penalties based on unfair competition. *Bus. & Prof. Code § 17200 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 549.84 Federal Administrative Regulations

[1] Registration

Application for registration of trade or service mark. *37 C.F.R. §§ 2.6, 2.21*-2.58, 2.61-2.69, 2.99

Publication. *37 C.F.R. §§ 2.80-2.84, 2.153*-2.156

Classification of goods and services. *37 C.F.R. §§ 2.85-2.87, 6.1*-6.4

Certificate of registration. *37 C.F.R. §§ 2.151, 2.171*-2.176

Reregistration of marks registered under prior trademark acts. *37 C.F.R. § 2.158*

Affidavit of continued use or excusable nonuse. *37 C.F.R. §§ 2.160-2.166, 2.168(a)*

Affidavit of incontestability. *37 C.F.R. §§ 2.167-2.168*

Duration and renewal of registration. *37 C.F.R. §§ 2.181-2.184*

Assignment of trade or service mark. *37 C.F.R. §§ 2.185-2.187*

[2] Contested Proceedings

Interference proceedings. *37 C.F.R. §§ 2.91-2.98, 2.116*

Concurrent use proceedings. *37 C.F.R. §§ 2.99, 2.116(b)*

Opposition proceedings. *37 C.F.R. §§ 2.101-2.107*

Cancellation of registration. *37 C.F.R. §§ 2.111-2.115*

Procedure. *37 C.F.R. §§ 2.116-2.136*

Appeals and judicial review. *37 C.F.R. §§ 2.141-2.145*

Petitions to Commissioner of Patents and Trademarks. *37 C.F.R. §§ 2.146-2.148*

Legal Topics:

For related research and practice materials, see the following legal topics:
Trademark LawProtection of RightsRegistrationFederal RegistrationTrademark LawProtection of RightsRegistrationIncontestabilityAffidavit RequirementTrademark LawProtection of RightsRegistrationPower of CourtsTrademark LawProtection of RightsRegistrationPublicationTrademark LawProtection of RightsRegistrationRenewal

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§ 549.85 Decisions

[1] Abandonment

Singing group was entitled to exclusive use of name "The Platters" to exclusion of former group member who dropped out. *Robi v. Reed (9th Cir. 1999) 173 F.3d 736*

Mark-licensor's exercise of sufficient quality control over licensee's use of mark in connection with licensee's product or service defeated claim of abandonment of licensor's rights in mark. *Transgo, Inc. v. Ajac Transmission Parts Corp. (9th Cir. 1985) 768 F.2d 1001, 1017-1018*

Abandonment of trademark, being in nature of forfeiture, requires strict proof. *Prudential Ins. Co. v. Gibraltar Financial Corp. (9th Cir. 1982) 694 F.2d 1150, 1156*

[2] Attorney's Fees

Plaintiff's election, in case based on counterfeit mark, to receive statutory damages under *15 U.S.C. § 1117(c)* precludes award of attorney's fees under *15 U.S.C. § 1117(b)*. *K & N Eng'g, Inc. v. Bulat (9th Cir. 2007) 510 F.3d 1079, 1083*

Award of attorney fees under Lanham Act was required to include finding that hours expended were reasonable and that hourly rates were customary. *Intel Corp. v. Terabyte Int'l (9th Cir. 1993) 6 F.3d 614, 623*

Trial court's omission to award attorneys' fees and treble damages under *15 U.S.C. § 1117* was proper under circumstances. *Lindy Pen Co., Inc. v. Bic Pen Corp. (9th Cir. 1993) 982 F.2d 1400, 1409*

Attorneys' fees available under *15 U.S.C. § 1117(a)* in exceptional cases were available when jury awarded punitive damages on common law voice appropriation claim based on specific finding that defendants had acted with oppression, fraud, or malice. *Waits v. Frito-Lay, Inc. (9th Cir. 1992) 978 F.2d 1093, 1111*

Case was exceptional within meaning of *15 U.S.C. § 1117*, thus warranting award of attorney fees, when defendants' conduct was flagrant and wilful and compounded by refusal to provide discovery. *Playboy Enterprises, Inc. v. Baccarat Clothing Co., Inc. (9th Cir. 1982) 692 F.2d 1272, 1276-1277*

Attorneys' fees were not available when legal issues presented were novel and auto-accessory manufacturer's use of auto manufacturer's marks, while deliberate, was but without intent to deceive public. *Plasticolor Molded Products v. Ford Motor Co. (C.D. Cal. 1989) 713 F. Supp. 1350 , vacated, due to settlement of parties, see 767 F. Supp. 1036*); *see Sega Enterprises Ltd. v. Accolade, Inc. (N.D. Cal. 1992) 785 F. Supp. 1392, 1400* (Judge Kosinski's discussion in *Plasticolor* was "enlightened authoritative commentary" although opinion has been vacated)

[3] Cancellation of Mark Registration

Cancellation of mark registration is proper when there is valid ground why mark should not be registered and petitioner for cancellation has standing; proof of actual damage is only relevant, not requisite, to establish standing. *Star-Kist Foods, Inc. v. P.J. Rhodes & Co. (9th Cir. 1984) 735 F.2d 346, 348*

[4] Collective Mark

Trademark protection of collective mark does not extend past first sale of product; purchaser who resells genuine products under producer's true trademark violates no provisions of Lanham Act. *Sebastian Int'l v. Longs Drug Stores Corp. (9th Cir. 1995) 53 F.3d 1073, 1076*

[5] Color

Color alone may be entitled to trademark registration and protection when color has attained secondary meaning. *Qualitex Co. v. Jacobson Products Co. (1995) 514 U.S. 159, 115 S. Ct. 1300, 131 L. Ed. 2d 248, 254*

[6] Common Law Rights

Issue of material fact, namely whether electronic manufacturer's advertising using Vanna White robot had appropriated celebrity's name or likeness to defendant's advantage, precluded summary judgment in favor of manufacturer on celebrity's common law right-of-publicity claim. *White v. Samsung Electronics America, Inc. (9th Cir. 1992) 971 F.2d 1395, 1397*

[7] Composite Mark

Validity and distinctiveness of composite mark is determined by viewing trademark as whole as it appears in marketplace; not by reviewing validity of its component parts. *Self-Realization Fellowship Church v. Ananda Church of Self-Realization (9th Cir. 1995) 59 F.3d 902, 912*

Composite mark must be examined in its entirety, rather than piece-by-piece. *Rodeo Collection, Ltd. v. West Seventh (9th Cir. 1987) 812 F.2d 1215, 1218*

[8] Contributory Infringement

Credit card company is not contributorily or vicariously liable for trademark infringement by owners of web sites that

use wrongly appropriated trademarks, when company merely processes credit card payments to those web sites by internet users. *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n (9th Cir. 2007) 494 F.3d 788, 806-808*

Sale of generic replacement parts that fit only "Rolex" watches constituted contributory trademark infringement. *Rolex Watch, U.S.A., Inc. v. Michel Co. (9th Cir. 1999) 179 F.3d 704, 712*

Manufacturer or distributor who intentionally induces another to infringe trademark or who continues to supply product to one it knows or has reason to know is engaging in infringement is contributorily responsible for any harm resulting from such deceit. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc. (1982) 456 U.S. 844, 854, 102 S. Ct. 2182, 72 L. Ed. 2d 606* ; *Sealy, Inc. v. Easy Living, Inc. (9th Cir. 1984) 743 F.2d 1378, 1382*

Determination of contributory infringement turns on defendant's intent and knowledge of its distributors' wrongful activities; manufacturer can escape liability for contributory infringement of trademark by taking effective measures to prevent infringing uses by its distributors. *Sealy, Inc. v. Easy Living, Inc. (9th Cir. 1984) 743 F.2d 1378, 1382*

[9] Defenses

Presumption of laches arose when plaintiff's infringement action was commenced more than four years after plaintiff became aware that both parties offered same services (Internet access, e-mail, and web hosting) in same geographic area under remarkably similar names; since prudent business person should recognize likelihood of confusion to consumers in such circumstances, plaintiff was not entitled to wait until defendant's business grew large enough to constitute real threat, and then sue for trademark infringement; however, plaintiff's suit was not barred by laches because defendant could not show prejudice, having failed to prove either efforts at building its business around its asserted trademark or important reliance on publicity of its mark. *Internet Specialties West, Inc. v. Milon-Digiorgio Enters. (9th Cir. 2009) 559 F.3d 985, 991-992*

Woman who was former *Playboy* magazine "Playmate of the Year" made permissible, nominative fair use of that label and publisher's associated trademarks because her uses implied no current sponsorship or endorsement by publisher but only served to identify her truthfully as former "Playmate of the Year"; however, use of "PMOY" as watermark image on her web site could have been infringement or dilution of trademark. *Playboy Enters. v. Welles (9th Cir. 2002) 279 F.3d 796, 803, 805*

Neutral principles of trademark infringement such as regular factors courts employ to determine infringement, and neutral defenses such as prior use of marks, were available to enable district court to decide dispute in religious order over rights to intellectual property without violating *First Amendment*. *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar (9th Cir. 1999) 179 F.3d 1244, 1249*

Parabolic chain design of disc-golf target was functional thus precluding trademark or trade dress protection. *Disc Golf Association, Disc Golf Ass'n v. Champion discs, Inc. (9th Cir. 1998) 158 F.3d 1002*

Parody defense was unavailable in action under *15 U.S.C. § 1125(a)* for ad spoofing Vanna White and "Wheel of Fortune" TV show to sell *Samsung VCRs. White v. Samsung Electronics America, Inc. (9th Cir. 1992) 971 F.2d 1395, 1401*

Commercial user is entitled to nominative fair use defense when it uses trademark to describe plaintiff's product, rather than its own, and meets three-part test. New Kids on the Block v. News America Pub., Inc. (9th Cir. 1993) 971 F.2d 302, 308 (newspapers conducted popularity polls of musical group by asking readers to call 900 telephone lines; that was nominative fair use of group's trademark)

Functionality defense is unavailable unless alleged violator uses most effective method reasonably available for eliminating likelihood of confusion consistent with functional use of mark. *Plasticolor Molded Products v. Ford Motor Co. (C.D. Cal. 1989) 713 F. Supp. 1329, 1339 , vacated,* due to settlement by parties, see *767 F. Supp. 1036*); *see Sega Enterprises Ltd. v. Accolade, Inc. (N.D. Cal. 1992) 785 F. Supp. 1392, 1400* (Judge Kosinski's discussion in *Plasticolor* was "enlightened authoritative commentary" although opinion has been vacated)

Lanham Act defenses are not available to plaintiff in action under *36 U.S.C. § 380* for unauthorized use of words or symbols of U.S. Olympic Committee, despite availability of Lanham Act remedies. *International Olympic Committee v. San Francisco Arts & Athletics (9th Cir. 1986) 781 F.2d 733, 736 , aff'd, 483 U.S. 522 (1987)*

Significant delay in seeking preliminary injunctive relief was merely factor bearing on irreparable injury and did not bar relief. *Nutro Products, Inc. v. Cole Grain Co. (1992) 3 Cal. App. 4th 860, 866, 5 Cal. Rptr. 2d 41*

Factors in determining whether laches will bar relief in suits for injunctive relief for trademark infringement under the Lanham Act are: (1) strength and value of trademark rights asserted, (2) plaintiff's diligence in enforcing mark, (3) harm to senior user if relief denied, (4) good faith ignorance by junior user, (5) competition between senior and junior users, and (6) extent of harm suffered by junior user because of senior user's delay. *E-Systems, Inc. v. Monitek, Inc (9th Cir. 1983) 720 F.2d 604, 607*

Laches is available as equitable defense in suit for injunctive relief for trademark infringement under the Lanham Act. *Prudential Ins. Co. v. Gibraltar Financial Corp. (9th Cir. 1982) 694 F.2d 1150, 1152*

[10] Descriptive Marks

There is no magic formula for distinctiveness, thus every case must be decided on its facts; substantial evidence supported finding that product name was suggestive rather than descriptive and therefore protectable. *Nutro Products, Inc. v. Cole Grain Co. (1992) 3 Cal. App. 4th 860, 867-868, 5 Cal. Rptr. 2d 41*

[11] Dilution of Mark or Name

[a] In General

Even if plaintiff's mark was distinctive and incontestible within five years of registration, it must also have become famous before defendant's first commercial use in order to be entitled to protection against dilution; first use for purposes of Federal Trademark Dilution Act [*15 U.S.C. § 1125(c)*] is that use which is arguably offending, because any commercial use of famous mark is diluting regardless of whether it is confusing or combined with other identifiers. *Nissan Motor Co. v. Nissan Computer Corp. (9th Cir. 2004) 378 F.3d 1002, 1007*

Finding by trial court that "FRUIT OF THE LOOM" trademark was not diluted by FRUIT CUPS or FRUIT FLOPS, and finding that "FRUIT" apart from "FRUIT OF THE LOOM" was not strong enough mark to be protected under state antidilution law, were not clearly erroneous. *Fruit of The Loom, Inc. v. Ken Girouard (9th Cir. 1993) 994 F.2d 1359, 1362*

Likelihood of confusion was not element of cause of action for injunctive relief under former *Bus. & Prof. Code § 14330* (*now see Bus. & Prof. Code §§ 14202(k), 14247*). *Levi Strauss & Co. v. Blue Bell, Inc. (9th Cir. 1985) 778 F.2d 1352, 1362* ; *Monte Carlo Shirt, Inc. v. Daewoo International (America) (9th Cir. 1983) 707 F.2d 1054, 1058*

Auto manufacturer failed to introduce evidence that auto-accessories manufacturer's use of its marks on auto floor mats diluted distinctive quality of those marks. *Plasticolor Molded Products v. Ford Motor Co. (C.D. Cal. 1989) 713 F.*

Supp. 1329, 1344 vacated due to settlement by parties, (*granting summary judgment on counterclaim for dilution; see Plasticolor Molded Products, Inc. v. Ford Motor Co. (1991) 767 F. Supp. 1036*); *see Sega Enterprises Ltd. v. Accolade, Inc. (N.D. Cal. 1992) 785 F. Supp. 1392, 1400* (Judge Kosinski's discussion in *Plasticolor* was "enlightened authoritative commentary" although opinion has been vacated)

Federal trademark law does not preempt California's dilution statute. *Plasticolor Molded Products v. Ford Motor Co. (C.D. Cal. 1989) 713 F. Supp. 1329, 1346* (vacated due to settlement by parties, *see Plasticolor Molded Products, Inc. v. Ford Motor Co. (1975) 767 F. Supp. 1036*); *see Sega Enterprises Ltd. v. Accolade, Inc. (N.D. Cal. 1992) 785 F. Supp. 1392, 1400* (Judge Kosinski's discussion in *Plasticolor* was "enlightened authoritative commentary" although opinion has been vacated)

Manufacturer of animal identification tags that advertised plaintiff's tags as its own was possibly liable for unfair competition or trademark infringement but was not liable for tort of disparagement (which would exclude insurance coverage). *Aetna Casualty & Surety Co. v. Centennial Ins. Co. (9th Cir. 1988) 838 F.2d 346, 351-352* (action between primary and excess insurance carriers with underlying action alleging dilution)

Dilution doctrine grants protection to strong, well-recognized marks absent likelihood of confusion if defendant's use is such as to tarnish, degrade, or dilute distinctive quality of plaintiff's mark. *Lindy Pen Co., Inc. v. Bic Pen Corp. (C.D. Cal. 1982) 550 F. Supp. 1056, 1061*

[b] Cybersquatting

District court erred in granting injunction when findings that trademarked names "Avery" and "Dennison" were famous and use of avery.net and dennison.net was commercial were erroneous as matter of law. *Avery Dennison Corporation v. Sumption (9th Cir. 1999) 189 F.3d 868*

[12] Discovery

Discovery by defendant that reveals other potential infringers is irrelevant under law of Ninth Circuit and California in federal and state actions for trademark infringement and dilution. *Century 21 Real Estate Corp. v. Sandlin (9th Cir. 1988) 846 F.2d 1175, 1181*

[13] False Advertising

Consumers do not have standing to bring action for false advertising under *Lanham Act. Barrus v. Sylvania (9th Cir. 1995) 55 F.3d 468, 470*

[14] False Descriptions and Designations of Origin

Inherently distinctive trade dress is protected under *15 U.S.C. § 1125(a)*; secondary meaning is not required. *Two Pesos, Inc. v. Taco Cabana, Inc. (1992) 505 U.S. 763, 112 S. Ct. 2753, 120 L. Ed. 2d 615, 623* (affirming lower court rulings that one fast-food Mexican restaurant chain infringed on trade dress of another by using similar motif)

Action under *15 U.S.C. § 1125(a)(1)(B)*, on claim that defendant made false and deceptive statements in commercial advertisement about defendant's product, cannot be maintained on allegation that defendant's statements violated federal Food, Drug, and Cosmetic Act, in absence of conclusion by FDA that alleged violation occurred. *PhotoMedex, Inc. v. Irwin (9th Cir. 2010) 601 F.3d 919, 2010 U.S. App. LEXIS 7640, at *9*

Claim for reverse passing off under *15 U.S.C. § 1125* requires that defendant made "bodily appropriation" of plaintiff's product; bodily appropriation was necessarily precluded when trial court found that defendant's product was not substantially similar to plaintiff's. *Summit Mach. Tool Mfg. v. Victor CNC Systems (9th Cir. 1993) 7 F.3d 1434, 1438*

Factual findings by district court supported legal conclusion that defendant had violated federal trademark law by using plaintiff's registered service mark in connection with offering of services so as to falsely describe or represent mark. *Pacific Telesis Group v. International Telesis Communications (9th Cir. 1993) 994 F.2d 1364, 1369*

15 U.S.C. § 1125(a) does not require actual competition in traditional sense in false endorsement claim based on unauthorized use of celebrity's identity. *Waits v. Frito-Lay, Inc. (9th Cir. 1992) 978 F.2d 1093, 1107* (action against manufacturer that imitated voice of well-known singer in radio commercial)

False endorsement claims, including those premised on unauthorized imitation of entertainer's distinctive voice, were cognizable under *15 U.S.C. § 1125(a)* both before and after 1988 amendments. *Waits v. Frito-Lay, Inc. (9th Cir. 1992) 978 F.2d 1093, 1107* (action against manufacturer that imitated voice of well-known singer in radio commercial)

Genuine issue of material fact as to whether electronic manufacturer's advertising using Vanna White robot created likelihood of confusion as to celebrity's endorsement of product precluded summary judgment in favor of manufacturer on celebrity's action under *15 U.S.C. § 1125(a)*. *White v. Samsung Electronics America, Inc. (9th Cir. 1992) 971 F.2d 1395, 1401*

Musical group had no cause of action against newspapers for violation of *15 U.S.C. § 1125(a)*, forbidding use of false designations of origin and false advertising, when newspapers conducted popularity polls of musical group by asking readers to call 900 telephone lines; newspapers' nominative fair use of group's trademark did not imply endorsement by musical group. *New Kids on the Block v. News America Pub., Inc. (9th Cir. 1992) 971 F.2d 302, 308* (affirming summary judgment in favor of defendant newspapers)

Advertisers' unauthorized use of imitation of professional singer's distinctive voice in song used in product advertisement was not unfair competition under former *15 U.S.C. § 01125* when advertisers were not in competition with singer. *Midler v. Ford Motor Co. (9th Cir. 1988) 849 F.2d 460, 462-463*

Licensees were liable under former *15 U.S.C. § 1125(a)* for either affixing incomplete designation of authorship to goods or services or, with knowledge of false designation of origin, causing goods or services to be transported or used in interstate commerce. *Lamothe v. Atlantic Recording Corp. (9th Cir. 1988) 847 F.2d 1403, 1408*

In releasing sheet music in which music and lyrics were attributed solely to one of three coauthors and thereby depriving remaining two authors of recognition and profits, defendant was engaged in express reverse palming off actionable as false designation of origin under former *15 U.S.C. § 1125(a)*. *Lamothe v. Atlantic Recording Corp. (9th Cir. 1988) 847 F.2d 1403, 1407-1408*

Theaters' advertisement of PG-rated film as R-rated was not actionable false description of goods under former *15 U.S.C. § 1125(a)* when film producer allegedly injured by advertisement could not show that injury was linked to competition. *Halicki v. United Artists Communications, Inc. (9th Cir. 1987) 812 F.2d 1213, 1214*

15 U.S.C. § 1125(a) is applicable not only to cases of palming off, passing off, or economic equivalent, but also to false advertising regarding goods and services of advertiser in interstate commerce. *U-Haul International, Inc. v. Jartran, Inc. (9th Cir. 1982) 681 F.2d 1159, 1160-1162*

Actor states cause of action against film distributors for violation of *15 U.S.C. § 1125(a)*, forbidding use of false

designations of origin and false descriptions or representations in advertising and sale of goods and services, when film distributors allegedly removed actor's name from both film credits and advertising material in connection with film. *Smith v. Montoro (9th Cir. 1981) 648 F.2d 602, 607*

Mark registration not required for recovery, under *15 U.S.C. § 1125*, for false designation of origin because dispositive question is whether party has reasonable interest in protection from false advertising. *New West Corp. v. NYM Co. of California, Inc. (9th Cir. 1979) 595 F.2d 1194, 1198*

[15] Geographic Terms

Geographic term ordinarily are not subject to exclusive ownership, but injunction available to prevent use of composit marks employing geographic term. *Cebu Association of California, Inc. v. Santo Nino de Cebu USA, Inc. (1979) 95 Cal. App. 3d 129, 135, 137, 157 Cal. Rptr. 102*

In trade name infringement action, plaintiff is required to show that its geographical name has taken on, in public mind, something more than strict geographical meaning, so that when name is used member of public would not think primarily of any hospital in Tustin, but of plaintiff's hospital in particular. *Tustin Community Hospital, Inc. v. Santa Ana Community Hospital Assn. (1979) 89 Cal. App. 3d 889, 906, 153 Cal. Rptr. 76*

[16] Gray Market Goods

Gray market goods are foreign-manufactured goods, bearing valid U.S. trademarks, that are imported into United States without consent of U.S. trademark holder. *K Mart Corp. v. Cartier, Inc. (1988) 486 U.S. 281, 285, 108 S. Ct. 1811, 100 L. Ed. 2d 313*

Prohibition of *19 U.S.C. § 1526(a)* against importation, without mark owner's consent, of foreign-made merchandise bearing registered trademark owned by U.S. citizen or entity is inapplicable when same person or entity owns both foreign and domestic trademarks or when foreign and domestic trademark owners are subject to common ownership or control. *K Mart Corp. v. Cartier, Inc. (1988) 486 U.S. 281, 291, 294, 108 S. Ct. 1811, 100 L. Ed. 2d 313* (construing *19 C.F.R. § 133.21(c)(1), (2)*)

Prohibition of *19 U.S.C. § 1526(a)* against importation, without mark owner's consent, of foreign-made merchandise bearing registered trademark owned by U.S. citizen or entity is applicable to prohibit importation of merchandise when mark owner consents to use of mark on, but not to importation of, merchandise. *K Mart Corp. v. Cartier, Inc. (1988) 486 U.S. 281, 291, 294, 108 S. Ct. 1811, 100 L. Ed. 2d 313*

Bureau of Customs and Border Protection, after seizing imported merchandise on ground that it bore counterfeit mark, may impose civil penalty on importer of that merchandise [*19 U.S.C. § 1526(e), (f)*] even though owner of registered mark does not manufacture or sell same type of merchandise. *United States v. Able Time, Inc. (9th Cir. 2008) 545 F.3d 824, 826-827*

[17] Incontestability

Court's equitable powers do not encompass substantive challenges to validity of incontestable marks on grounds that marks lack secondary meaning. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc. (1985) 469 U.S. 189, 105 S. Ct. 658, 83 L. Ed. 2d 582, 593*

Infringement of federally registered incontestable mark is not defensible on grounds that mark is merely descriptive,

and holder of mark is able to rely on incontestability of mark to enjoin infringement. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc. (1985) 469 U.S. 189, 105 S. Ct. 658, 83 L. Ed. 2d 582, 594*

Power of courts to cancel registrations and otherwise rectify register under *15 U.S.C. § 1119* is subject to specific Lanham Act provisions concerning incontestability. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc. (1985) 469 U.S. 189, 105 S. Ct. 658, 83 L. Ed. 2d 582, 593*

Equitable defenses are available in action to enforce incontestable mark. *Pyrodyne Corp. v. Pyrotronics Corp. (9th Cir. 1988) 847 F.2d 1398, 1402* (laches and estoppel; former law); *Prudential Ins. Co. v. Gibraltar Financial Corp. (9th Cir. 1982) 694 F.2d 1150, 1153* (laches; former law)

[18] Infringing Acts

Defendant's sale of computer chips manufactured by plaintiff with plaintiff's trademark on them, after falsely relabelling them as "fast" chips, constituted infringement of plaintiff's trademark. *Intel Corp. v. Terabyte Int'l (9th Cir. 1993) 6 F.3d 614, 620*

[19] Likelihood of Confusion

In action under *36 U.S.C. § 380* for unauthorized commercial or promotional use of "Olympic" and various Olympic symbols, U.S. Olympic Committee and International Olympic Committee are not required to prove that contested use is likely to cause confusion. *San Fran. Arts & Athletics v. United States Olympic Committee (1987) 483 U.S. 522, 107 S. Ct. 2971, 97 L. Ed. 2d 427, 444*

Automobile-related advertising on website of Nissan Computer Corporation (owned by individual named Uzi Nissan) constituted infringement of Nissan Motor Company's trademark because of initial-interest confusion (that is, use of "Nissan" mark in automobile-related advertising captured attention of consumers interested in Nissan-brand vehicles), but non-automobile-related advertising did not. *Nissan Motor Co. v. Nissan Computer Corp. (9th Cir. 2004) 378 F.3d 1002, 1007*

Use of confusingly similar logo on web site is actionable under Lanham Act. *GoTo.com, Inc. v. Walt Disney Co. (9th Cir. 2000) 202 F.3d 1199, 1209*

Use of confusingly similar mark in web site metatags or domain name is actionable under *Lanham Act. Brookfield Communications, Inc. v. West Coast Entertainment Corp. (9th Cir. 1999) 174 F.3d 1036, 1055*

Use of second-level domain name in web-site address is trademark infringement if web-site operator uses name confusingly similar to valid, protectable trademark. *Intersetllar Starship Services, Ltd. v. Epix Incorporated (9th Cir. 1999) 184 F.3d 1107*

Application of eight-factor test for likelihood of confusion supported trial court's finding of likelihood of confusion as to only one of defendant's uses of plaintiff's arbitrary mark. *Official Airline Guides, Inc. v. Goss (9th Cir. 1993) 6 F.3d 1385, 1395*

Factual findings by trial court supported legal conclusion that defendant had violated federal trademark law by using plaintiff's registered service mark in connection with offering of services that was likely to cause confusion. *Pacific Telesis Group v. International Telesis Communications (9th Cir. 1993) 994 F.2d 1364, 1369*

Finding by trial court that no likelihood of confusion existed between clothing manufacturer's marks and use of FRUIT

CUPS and FRUIT LOOPS by manufacturer of boutique items was not clearly erroneous. *Fruit of The Loom, Inc. v. Ken Girouard (9th Cir. 1993), 994 F.2d 1359, 1362*

Ninth Circuit eight-factor test for assessing likelihood of confusion in trademark infringement cases is guide that is neither exhaustive nor conclusive. *Metro Pub. Ltd. v. San Jose Mercury News (9th Cir. 1993) 987 F.2d 637, 640*

Trial court was not required to consider all factors relative to likelihood of confusion in granting preliminary injunctive relief in trademark infringement action. *MAI Systems Corp. v. Peak Computer, Inc. (9th Cir. 1993) 991 F.2d 511, 523*

Evidence was sufficient to support jury finding that consumers were likely to be misled by radio commercial into believing that well-known singer endorsed SalsaRio Doritos. *Waits v. Frito-Lay, Inc. (9th Cir. 1992) 978 F.2d 1093, 1111*

Manufacturer of computer video game, not competitor, was responsible for consumer confusion when its trademark was imbedded in functional device available to and used by competitor in manufacture of compatible video game programs. *Sega Enterprises Ltd. v. Accolade, Inc. (9th Cir. 1992) 977 F.2d 1510, 1528* (dissolving preliminary injunction in favor of manufacturer)

Likelihood of confusion can be found whenever consumers are likely to assume that mark is associated with another source or sponsor because of similarities between two marks; and it may be established by showing that 70 percent of infringing mark's target population associated both marks with one product. *Academy of Motion Picture Arts v. Creative House (9th Cir. 1991) 944 F.2d 1446, 1456*

Surveys demonstrating absence of actual confusion among specified segment of population did not necessarily defeat likelihood of confusion when defendant franchisee lawfully operated under plaintiff franchisor's name before operating under subsequent infringing name. *Century 21 Real Estate Corp. v. Sandlin (9th Cir. 1988) 846 F.2d 1175, 1181*

Neither actual confusion nor intent is necessary to finding of likelihood of confusion in federal trademark infringement action. *Century 21 Real Estate Corp. v. Sandlin (9th Cir. 1988) 846 F.2d 1175, 1178*

Finding of likelihood of confusion is not automatic, even though more readily made, when goods compete in same markets and marks are very similar, because additional factors must be considered in determining likelihood of confusion. *Lindy Pen Co. v. Bic Pen Corp. (9th Cir. 1986) 796 F.2d 254, 255*

Postsale inspection does not negate or cure initial similarity between trademarks of pens sold through telephone order market, absent evidence in trial court showing that postsale inspection is likely to uncover and rectify prior confusion of marks. *Lindy Pen Co. v. Bic Pen Corp. (9th Cir. 1986) 796 F.2d 254, 256*

Whether confusion is likely is factual determination woven into law and routinely treated as issue of fact in various procedural contexts. *Levi Strauss & Co. v. Blue Bell, Inc. (9th Cir. 1985) 778 F.2d 1352, 1356*

Showing of likely buyer confusion as to source, origin, or sponsorship of goods is part of cause of action for common law infringement of trademark. *Monte Carlo Shirt, Inc. v. Daewoo Internatonal (America) (9th Cir. 1983) 707 F.2d 1054, 1058*

Factors for consideration in determination of likelihood of confusion. *Lindy Pen Co. v. Bic Pen Corp. (C.D. Cal. 1982) 550 F. Supp. 1056, 1060-1061*

Infringement not shown when no evidence is produced to show customer was misled about origin, sponsorship, or endorsement of jewelry when evidence showed that other jewelers sold unlicensed jewelry bearing emblem of women's

fraternal organization. *International Order of Job's Daughters v. Lindeburg & Co. (9th Cir. 1980) 633 F.2d 912, 920*

Trademark infringement established "as a matter of hornbook law" when defendant's mark was likely to and did cause confusion, mistake, and deception as to origin of product, when appearance of plaintiff's product had acquired secondary meaning identifying plaintiff as source, and when defendant deliberately intended to pass off his goods as those of plaintiff. *Tveter v. AB Turn-O-Matic (9th Cir. 1980) 633 F.2d 831, 838*

Mixed use of trademark, both as source indication and as functional element, was infringement when likelihood of confusion existed as to source or sponsorship at point of sale or when alleged infringer did not take reasonable steps to eliminate likelihood of confusion after sale. *Plasticolor Molded Products v. Ford Motor Co. (C.D. Cal. 1989) 713 F. Supp. 1329, 1333-1339* (lawsuit by plastic products manufacturer seeking declaratory judgment of right to use Ford Motor Company trademarks on auto accessories it produces) (vacated due to settlement by parties, *see 767 F. Supp. 1036*); *see Sega Enterprises Ltd. v. Accolade, Inc. (N.D. Cal. 1992) 785 F. Supp. 1392, 1400* (Judge Kosinski's discussion in *Plasticolor* was "enlightened authoritative commentary" although opinion has been vacated)

[20] Misappropriation

Country-western singer had no claim of misappropriation against television producer whose use of singer's name for one of television show's characters was totally unrelated to singer's notoriety. *Newton v. Thomason (9th Cir. 1994) 22 F.3d 1455, 1461*

Musical group had no cause of action against newspapers for commercial or common law misappropriation when newspapers conducted popularity polls of musical group by asking readers to call 900 telephone lines. *New Kids on the Block v. News America Pub., Inc. (9th Cir. 1993) 971 F.2d 302, 308* (affirming summary judgment in favor of defendants)

Newspapers had complete defense under *Civ. Code § 3344(d)* to commercial and common law misappropriation when they used name of musical group in connection with news, public affairs, or sports broadcast or account that was materially true. *New Kids on the Block v. News America Pub., Inc. (9th Cir. 1993) 971 F.2d 302, 308* (newspaper popularity poll asking readers to call 900 telephone line with follow-up story on results)

When commercial liability insurance policy covers liability for "advertising injury" resulting from "misappropriation of advertising ideas or style of doing business" but excludes injury arising out of "oral or written publication of material whose first publication took place before the beginning of the policy period," that exclusion embraces trademark infringement if it began before policy went into force. *Kim Seng Co. v. Great Am. Ins. Co. (2009) 179 Cal. App. 4th 1030, 1037-1039, 101 Cal. Rptr. 3d 537*

Standard commercial liability insurance policy's explicit coverage of liability for "advertising injury" resulting from "misappropriation of advertising ideas or style of doing business" can be construed as extending to insured's liability for trademark infringement. *Lebas Fashion Imports of USA, Inc. v. ITT Hartford Ins. Group (1996) 50 Cal. App. 4th 548, 565, 59 Cal. Rptr. 2d 36*

[21] Prior Use

Even though mere advertising, absent more, is insufficient to establish priority of use, totality of defendant's actions surrounding use and adoption of mark prior to advertising product bearing mark was sufficient to show prior use. *New West Corp. v. NYM Co. of California, Inc. (9th Cir. 1979) 595 F.2d 1194, 1200*

On dissolution of partnership formed by franchisor and franchisee under agreement that did not grant, assign, or sell

any name to partnership, franchisee was permitted to continue using partnership name; unregistered name was not thing of value bestowed by franchisor, but franchisor was entitled to money compensation for contributions that enhanced name. *Neptune Society Corp. v. Longanecker (1987) 194 Cal. App. 3d 1233, 1245-1246, 240 Cal. Rptr. 117*

[22] Profits

Appellate court order for accounting of profits on remand did not entitle defendant to accounting when trial court found award of profits was not appropriate because defendant's infringement was innocent and without intent to capitalize on plaintiff's trade name. *Lindy Pen Co., Inc. v. Bic Pen Corp. (9th Cir. 1993) 982 F.2d 1400, 1405-1407*

In trademark infringement action, defendant was required to pay to successful plaintiff amount earned on sale of counterfeit goods at cost, even though amount was not strictly "profit," in order to remove incentive for defendant to ship goods after discovering they were counterfeit. *Polo Fashions, Inc. v. Dick Bruhn, Inc. (9th Cir. 1986) 793 F.2d 1132, 1135*

Trial court abused discretion in denying award of profits to plaintiff when defendants' profits were established at trial as $120,000 and court awarded damages of only $12,750. *Playboy Enterprises, Inc. v. Baccarat Clothing Co. (9th Cir. 1982) 692 F.2d 1272, 1275*

Auto manufacturer was entitled to accounting of profits from sales of auto floor mats bearing its trademarks before mats were re-packaged to eliminate consumer confusion. *Plasticolor Molded Products v. Ford Motor Co. (C.D. Cal. 1989) 713 F. Supp. 1329, 1349-1350* (lawsuit by plastic products manufacturer seeking declaratory judgment of right to use Ford Motor Company trademarks on auto accessories it produces) (vacated due to settlement by parties, *see 767 F. Supp. 1036*); *see Sega Enterprises Ltd. v. Accolade, Inc. (N.D. Cal. 1992) 785 F. Supp. 1392, 1400* (Judge Kosinsk's discussion in *Plasticolor* was "enlightened authoritative commentary" although opinion has been vacated)

[23] Purpose of Trademark Law

Historical and modern purpose of trademark law is to identify manufacturer or sponsor of goods or provider of service and prevent products from free-riding on rivals' marks; infringement laws do not apply to non-trademark use of mark. *New Kids on the Block v. News America Pub., Inc. (9th Cir. 1993) 971 F.2d 302, 305* (affirming summary judgment in favor of defendant newspapers conducting telephone polls on popularity of plaintiff musical group)

[24] Remedies

[a] In General

Trademark remedies are guided by tort law principles, including general rule that damages must be established with reasonable certainty. *Lindy Pen Co., Inc. v. Bic Pen Corp. (9th Cir. 1993) 982 F.2d 1400, 1407* (trademark infringement action by one pen manufacturer against another)

Trial court has broad discretion within which to fashion remedy for federal trademark law violation. *Lindy Pen Co., Inc. v. Bic Pen Corp. (9th Cir. 1993) 982 F.2d 1400, 1411*

Purpose of trademark is to identify manufacturer or sponsor of product; trademark law protects features that identify product source but not features that serve as functional components of product. *Plasticolor Molded Products v. Ford Motor Co. (C.D. Cal. 1989) 713 F. Supp. 1329, 1339* (vacated due to settlement by parties, *see Plasticolor Molded Products, Inc. v. Ford Motor Co. (1991) 767 F. Supp. 1036*); *see Sega Enterprises Ltd. v. Accolade, Inc. (N.D. Cal.*

1992) 785 F. Supp. 1392, 1400 (Judge Kosinski's discussion in *Plasticolor* was "enlightened authoritative commentary" although opinion has been vacated)

Distinction between source identification and function is blurred when mark and product come from same or similar industries and can serve both elements simultaneously. *Plasticolor Molded Products v. Ford Motor Co. (C.D. Cal. 1989) 713 F. Supp. 1329, 1333* (lawsuit by plastic products manufacturer seeking declaratory judgment of rights to use Ford Motor Company trademarks on auto accessories it produces) (vacated due to settlement by parties, *see 767 F. Supp. 1036*); *see Sega Enterprises Ltd. v. Accolade, Inc. (N.D. Cal. 1992) 785 F. Supp. 1392, 1400* (Judge Kosinski's discussion in *Plasticolor* was "enlightened authoritative commentary" although opinion has been vacated)

[b] Damages

Plaintiff is required to establish damages by presenting competent evidence of its lost profits or defendant's unjust enrichment arising from infringement. *Lindy Pen Co., Inc. v. Bic Pen Corp. (9th Cir. 1993) 982 F.2d 1400, 1409*

Damages awarded under *15 U.S.C. § 1125(a)* are duplicative of damages awarded on common law misappropriation claim for fair market value of services. *Waits v. Frito-Lay, Inc. (9th Cir. 1992) 978 F.2d 1093, 1107* (vacating duplicative damages award)

[c] Injunctive Relief

Injunction prohibiting Nissan Computer Corporation from linking its website visitors to other websites that presented disparaging or negative commentary about Nissan Motor Company (because of on-going trademark dispute) was content-based restriction on noncommercial speech and thus was inconsistent with *First Amendment*. *Nissan Motor Co. v. Nissan Computer Corp. (9th Cir. 2004) 378 F.3d 1002, 1007*

Likelihood of confusion is sufficient ground for injunction under federal trademark law. *Pacific Telesis Group v. International Telesis Communications (9th Cir. 1993) 994 F.2d 1364, 1369*

Showing of irreparable harm, required for injunctive relief, is ordinarily presumed once plaintiff in trademark infringement case has demonstrated likelihood of confusion. *Metro Pub. Ltd. v. San Jose Mercury News (9th Cir. 1993) 987 F.2d 637, 640*

In trademark infringement action in which plaintiff seeks preliminary injunction, plaintiff's showing of likelihood of confusion ordinarily raises presumption that plaintiff will suffer irreparable harm if injunctive relief is not granted. *Vision Sports, Inc. v. Melville Corp. (9th Cir. 1989) 888 F.2d 609, 612 n.3*

Injunctive relief is remedy of choice for federal and state trademark infringement actions, since there is no adequate remedy at law for injury caused by defendant's continuing infringement; broad injunction is especially appropriate when infringing use is for similar service. *Century 21 Real Estate Corp. v. Sandlin (9th Cir. 1988) 846 F.2d 1175, 1180* (upholding injunction in state and federal infringement actions)

Even though plaintiff in trademark infringement action is unable to introduce concrete evidence that defendants are likely to infringe again, grant of injunction is proper when defendants willfully violated plaintiff's trademark rights and refused to stop doing so until plaintiff brought suit. *Polo Fashions, Inc. v. Dick Bruhn, Inc. (9th Cir. 1986) 793 F.2d 1132, 1135-1136*

Injunction that provides defendant with fair and well-defined notice of prohibited conduct does not violate *U.S. Const., amend. I*, because commercial speech may be regulated when content is otherwise false or misleading. *Transgo, Inc. v.*

Ajac Transmission Parts Corp. (9th Cir. 1985) 768 F.2d 1001, 1022

Plaintiff entitled to preliminary injunction in trademark case when he or she demonstrates either probable success on merits and possibility of irreparable injury or existence of serious questions going to merits and that balance of hardships tips sharply in plaintiff's favor; probability of success on merits of cause of action for mark infringement is shown by existence of likelihood of confusion as to source of goods or services. *Sardi's Restaurant Corp. v. Sardie (9th Cir. 1985) 755 F.2d 719, 723*

[25] Review

Trademark infringement and antidilution cases are fact-driven; findings of trial court are reversible only if appellate court has firm and definite conviction that trial court erred. *Fruit of The Loom, Inc. v. Ken Girouard (9th Cir. 1993), 994 F.2d 1359, 1361* ; *Pacific Telesis Group v. International Telesis Communications (9th Cir. 1993) 994 F.2d 1362, 1367*

Appellate court reviewing summary judgment for defendants in trademark infringement action is required to consider viability of state claims and avoid reaching constitutional issues, if possible. *New Kids on the Block v. News America Pub., Inc. (9th Cir. 1993) 971 F.2d 302, 305* (action by musical group against newspapers that conducted popularity polls of musical group by asking readers to call 900 telephone lines)

In Ninth Circuit, trial court's preliminary injunction is reversible only if trial court abused its discretion, based its decision on erroneous legal standard, or based its decision on clearly erroneous findings of fact. *Vision Sports, Inc. v. Melville Corp. (9th Cir. 1989) 888 F.2d 609, 612*

In Ninth Circuit, standard of review in granting summary judgment on state trademark infringement claim is same as for corresponding federal claim: questions of state law are reviewed de novo, and conclusions regarding likelihood of confusion are reviewed under clearly erroneous standard. *Century 21 Real Estate Corp. v. Sandlin (9th Cir. 1988) 846 F.2d 1175, 1180*

In Ninth Circuit, trial court's finding of likelihood of confusion in federal trademark infringement action is reviewed under clearly-erroneous standard. *Levi Strauss & Co. v. Blue Bell, Inc. (9th Cir. 1985) 778 F.2d 1352, 1355*

[26] Secondary Meaning

Factors considered in determining whether secondary meaning was achieved. *Levi Strauss & Co. v. Blue Bell, Inc. (9th Cir. 1985) 778 F.2d 1352, 1358* ; *Transgo, Inc. v. Ajac Transmission Parts Corp. (9th Cir. 1985) 768 F.2d 1001, 1015*

Registration on supplemental register does not bar registrant from establishing secondary meaning in subsequent litigation against alleged infringers using mark at time of registration. *California Cooler, Inc. v. Loretto Winery, Ltd. (9th Cir. 1985) 774 F.2d 1451, 1452, 1454*

Plaintiff's trademark acquired secondary meaning in marketplace and as distinctive of garments in commerce so that defendant's use of projecting label in edge of rear patch pocket of its pants would likely cause confusion, mistake, or deception as to proper source. *Levi Strauss & Co. v. Blue Bell, Inc. (9th Cir. 1980) 632 F.2d 817, 820-821, 822*

Basic element of secondary meaning is mental recognition in buyers' and potential buyers' minds that products connected with symbol or device emanate from or are associated with same source. *Lindy Pen Co., Inc. v. Bic Pen Corp. (C.D. Cal. 1982) 550 F. Supp. 1056, 1062*

Defendants' assertion that plaintiff acquired no protectible secondary meaning, because words were identified with multiple sources, was only relevant to factual determination and was not adequate basis for sustaining demurrer to well-pleaded complaint. *Lutz v. De Laurentiis (1989) 211 Cal. App. 3d 1317, 1323-1324, 260 Cal. Rptr. 106*

[27] Service Marks

Even though rights in service mark may be acquired by use of mark in advertising alone, it does not follow that test for determining infringement must differ from that applied to trademarks or service marks acquired by more than advertising alone, and courts consistently interpret *15 U.S.C. § 1053* (same protection to trademarks and service marks) to mean that identical standards govern trademark and service mark infringement cases. *Nutri/System, Inc. v. Con-Stan Industries, Inc. (9th Cir. 1987) 809 F.2d 601, 604*

Neither telephone number that alphanumerically represents word "READ" nor alphanumeric representation of "READ" in conjunction with numerical prefix constituted trade or service mark of reading improvement service under former *Bus. & Prof. Code §§ 14206* and *14207* (*now see Bus. & Prof. Code § 14202(a)* and *(b)*). *Cytanovich Reading Center v. Reading Game (1984) 162 Cal. App. 3d 107, 112, 208 Cal. Rptr. 412*

Person appearing in chicken costume was not equivalent to service mark because only stationary and unchanging marks are entitled to trademark or service mark protection. *KGB, Inc. v. Giannoulas (1980) 104 Cal. App. 3d 844, 856-857, 164 Cal. Rptr. 571*

[28] Settlement Agreements

Under settlement agreement by which one party acknowledges validity of other party's trademark and agrees not to infringe mark in return for other party's promise to waive past damages for infringement, party acknowledging mark's validity is estopped from raising defense of mark's invalidity in subsequent infringement litigation involving mark. *MWS Wire Industries, Inc. v. California Fine Wire (9th Cir. 1986) 797 F.2d 799, 803-804*

[29] Trade-Dress Infringement

Whether color per se qualifies for trademark protection is legal question to be reviewed de novo. *Qualitex Co. v. Jacobson Products, Inc. (9th Cir. 1994) 13 F.3d 1297, 1301*

Use of the same color in sound speaker component did not infringe plaintiff's trade dress when there was no likelihood of confusion on the part of consumers. *International Jensen v. Metrosound U.S.A. (9th Cir. 1993) 4 F.3d 819, 825*

Trade-dress infringement is not found when all elements of massage table are essential to use of table and, therefore, functional. *HWE, Inc. v. JB Research, Inc. (9th Cir. 1993) 993 F.2d 694, 696*

Claim of trade-dress infringement may be sufficient basis to invoke duty of defendant's liability insurer to defend under policy provision covering advertising injury. *El-Com Hardware, Inc. v. Fireman's Fund Ins. Co. (2001) 92 Cal. App. 4th 205, 219, 111 Cal. Rptr. 2d 670*

[30] Transfer of Mark or Name

Trade name was specifically transferred for limited period of time only or, alternatively, until purchase price was paid

when bill of sale for business transferred trade name for period of 10 years or until amount due and owing was paid. *Balesteri v. Holler (1978) 87 Cal. App. 3d 717, 723, 151 Cal. Rptr. 229*

[31] Unfair Competition

Mere possibility that consumer may be misled by television producer's use of singer's name was not enough to establish cause of action for unfair competition under Lanham Act [*15 U.S.C. § 1125(a)*]. *Newton v. Thomason (9th Cir. 1994) 22 F.3d 1455, 1461-1462*

State unfair competition laws that seek to prevent reverse palming off are not preempted by federal copyright or patent law. *Summit Mach. Tool Mfg. v. Victor CNC Systems (9th Cir. 1993) 7 F.3d 1434, 1441*

Musical group had no cause of action against newspapers for unfair competition when newspapers conducted popularity polls of musical group by asking readers to call 900 telephone lines; newspapers are entitled to nominative fair use defense to allegations of trademark infringement. *New Kids on the Block v. News America Pub., Inc. (9th Cir. 1993) 971 F.2d 302, 308* (affirming summary judgment in favor of defendant newspapers)

Judgment for plaintiff on common law unfair competition claim was upheld on evidence in record supporting establishment of product's secondary meaning in relevant market and defendant's copying of nonfunctional aspects of product. *Lifshitz v. Walter Drake & Sons, Inc. (9th Cir. 1986) 806 F.2d 1426, 1430*

Bus. & Prof. Code §§ 17200-17208 provide cause of action substantially parallel to federal trademark law. *Plasticolor Molded Products v. Ford Motor Co. (C.D. Cal. 1989) 713 F. Supp. 1329, 1341* (denying summary judgment on cross-claims for unfair competition and deceptive trade practices in action by plastics manufacturer for declaratory relief regarding right to use Ford Motor Company marks in auto accessories it produces) (vacated due to settlement by parties, *see Plasticolor Molded Products, Inc. v. Ford Motor Co. (1991) 767 F. Supp. 1036*); *see Sega Enterprises Ltd. v. Accolade, Inc. (N.D. Cal. 1992) 785 F. Supp. 1392, 1400* (Judge Kosinski's discussion in *Plasticolor* was "enlightened authoritative commentary" although opinion has been vacated)

Use of similar alphanumeric telephone number that is likely to confuse potential customers as to source of services is possible basis of unfair competition claim. *Cytanovich Reading Center v. Reading Game (1984) 162 Cal. App. 3d 107, 114, 208 Cal. Rptr. 412*

Laches available as defense in action to enjoin unfair competition based on confusion of source of goods or services. *Tustin Community Hospital, Inc. v. Santa Ana Community Hospital Assn. (1979) 89 Cal. App. 3d 889, 894, 153 Cal. Rptr. 76* ; *McCord v. Plotnick (1951) 108 Cal. App. 2d 392, 395-396, 239 P.2d 32*

Elements of cause of action for injunctive relief for unfair competition in use of trade name. *Cowles Magazines & Broadcasting, Inc. v. Elysium, Inc. (1967) 255 Cal. App. 2d 731, 733, 63 Cal. Rptr. 507*

[32] Unregistered Trademarks

Federal trademark law applies to unregistered trademarks. *Metro Pub. Ltd. v. San Jose Mercury News (9th Cir. 1993) 987 F.2d 637, 640*

Title of newspaper column can acquire trademark status and protection under federal trademark law. *Metro Pub. Ltd. v. San Jose Mercury News (9th Cir. 1993) 987 F.2d 637, 640*

Legal Topics:

For related research and practice materials, see the following legal topics:
Trademark LawDilution of Famous MarksGeneral OverviewTrademark LawInfringement ActionsGeneral OverviewTrademark LawLikelihood of ConfusionGeneral OverviewTrademark LawProtection of RightsGeneral OverviewTrademark LawSubject MatterGeneral Overview

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§ 549.86 Law Reviews

Dittersdorf & Richard, *A Teamwork Approach to Trademark Protection,* 41(8) Prac. Law. 73 (1995)

Friscia & Cohen, *Trademark Use of Corporate Names,* 41(2) Prac. Law. 19 (1995)

Comment, *The Trouble With Trademark, 99 Yale L.J. 759 (1990)*

Note, *"Do You Want to Dance" Around the Law? Learn the Latest Steps From the Ninth Circuit in Midler v. Ford Motor Company, 23 Loy. L.A. L. Rev. 601 (1990)*

Note, *K Mart Corp. v. Cartier, Inc.: The Gray Market Controversy Becomes Black and White, 19 Sw. U.L. Rev. 141 (1990)*

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Burgunder, *Trademark Registration of Product Colors: Issues and Answers, 26 Santa Clara L. Rev. 581 (1986)*

Comment, *Guarding the Olympic Gold: Protecting the Marketability of Olympic Trademarks Through Section 110 of the Amateur Sports Act of 1978, 16 Sw. U. L. Rev. 461 (1986)*

Comment, *Incontestability: The Park'N Fly Decision, 33 UCLA L. Rev. 1149 (1986)*

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Folsom and Teply, *A Comparative View of the Law of Trademarked Generic Words, 6 Hastings Int'l & Comp. L. Rev. 1 (1982)*

Bramson, *Intellectual Property as Collateral-- Patents, Trade Secrets, Trademarks and Copyrights,* 36 The Business Lawyer 1567 (1981)

Osborne, *How to Prevent Trademarks from Becoming Generic,* 27(3) The Practical Lawyer 81 (1981)

Weinstein, *How to: Acquiring and protecting trademark rights,* 56 S. Bar J. 314 (1981)

Evenson and Osborne, *When Should a Mark Be Registered?* 26(3) The Practical Lawyer 81 (1980)

Folsom and Teply, *Trademarked Generic Words, 89 Yale L.J. 1323 (1980)*

Comment, *Trademark Preliminary Injunctive Relief, 16 Cal. West. L. Rev. 90 (1980)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Trademark LawGeneral OverviewTrademark LawFederal Unfair Competition LawLanham ActGeneral OverviewTrademark LawProtection of RightsRegistrationGeneral OverviewTrademark LawProtection of RightsRegistrationIncontestabilityGeneral OverviewTrademark LawSubject MatterColors

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§ 549.87 Text References

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Witkin, Summary of California Law, vol. 13, *Personal Property*, §§ 81-89, Vol. 13, *Equity*, §§ 78-80, 98-104 (10th ed. 2005)

Restatement Torts, §§ 711-756

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedureEquityGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedureRemediesProvisional RemediesGeneral OverviewTortsGeneral Overview

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[Reserved]

§§ 549.88[Reserved]

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§ 549.90 Cease and Desist Letter Demanding That Infringer Stop Using Owner's Trademark or Service Mark on Goods Provided or in Connection With Services Rendered by Infringer--From Owner's Attorney to Infringer

[1] FORM Cease and Desist Letter Demanding That Infringer Stop Using Owner's Trademark or Service Mark on Goods Provided or in Connection With Services Rendered by Infringer--From Owner's Attorney to Infringer

Re: Use of the _____ [trademark *or* service mark *or both*] _____ [*describe client's mark*]

Dear _____ [*infringer's name or name of officer, member, etc., of infringing entity*]:

This firm represents _____ [*client's name*]. It has recently come to our attention that _____ [you *or name of infringing entity*] _____ [have *or* has] _____ [*specify infringing act, e.g.,* recently opened a bakery] in _____ [*city*], _____ [*state, if client's mark is federally registered*], using the term _____ [*describe infringing term*].

You may be unaware that our client _____ [*specify nature of goods and/or services with which client's mark is identified, e.g.,* has owned and operated a bakery] under the _____ [*specify type of client's mark, e.g.,* service mark] _____ [*describe client's mark*] in _____ [*city and, if client's mark is federally registered, state*], for _____ [*specify length of time, e.g.,* the past 25 years]. Our client also owns the _____ [*specify type of client's mark, e.g.,* service] mark _____ [*describe client's mark*], which is registered in the _____ [*specify location of registration, e.g.,* United States Patent and Trademark Office *or* Office of the Secretary of State of California *or both*] under Registration No[s]. _____ [and _____, respectively].

Our client advertises and promotes the _____ [*specify type of client's mark, e.g.,* service mark] _____ [*describe client's mark*] _____ [*specify territorial extent of client's advertising and promotion of mark, e.g.,* _____ nationwide *or* statewide *or* throughout California, western Nevada, and Arizona]. As a direct result of these efforts, together with favorable patron recommendations and media

reviews, our client has developed extensive and valuable goodwill in the mark. Your use of the term _____ [*describe infringing term*], however innocent, for services that are in direct competition with those of our client _____ [*describe effect of infringer's use of its term on client's business, e.g.,* (is likely to cause *or* has caused) _____ (confusion *or* deception *or* mistake, *or a combination of both*) among our client's patrons (and _____ *specify others, if any, e.g.,* suppliers)]. [_____ *set forth specific examples of clientele confusion, deception, or mistake, if applicable.*]

Your continued use of the term _____ [*describe infringing term*] in connection with your _____ [*specify infringing activity, e.g.,* bakery] _____ [will result *or* has resulted] in the dilution and loss of our client's goodwill, thereby violating enforceable trademark rights acquired by our client's prior adoption, use, and registration of the mark _____ [*describe client's mark*]. Accordingly, in order to protect these rights, on behalf of our client we demand that you immediately cease and desist from any and all further use of the term _____ [*describe infringing term*] in connection with your _____ [*specify nature of infringer's goods and/or services, e.g.,* bakery].

If you give us your immediate written assurance that you will change your term to one which is not _____ [an imitation of *or* confusingly similar to] our client's mark, our client is willing to afford you sufficient time in which to phase out your existing term and phase in a new one. If you are not willing to make this change, we must assume that your selection of the term _____ [*describe infringing term*] is a deliberate, intentional attempt to trade on the goodwill of our client.

We look forward to hearing from you as soon as possible in anticipation of an amicable resolution of this matter.

Sincerely yours,

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for _____ [*typed name*]

[2] Use of Form

The letter in [1], *above,* is for use by the owner of a registered trade or service mark to request a party whose use of the mark infringes the owner's rights to cease and desist from the infringing activity. While a cease and desist letter may resolve the dispute, it may also be a tactical first step in an infringement suit.

If, in a complaint for infringement of a federally registered mark [*see § 549.91*], it is pleaded that plaintiff sent defendant such a letter and that the letter informs defendant that plaintiff's mark is registered in the United States Patent and Trademark Office, this is tantamount to an allegation of actual notice of registration [*15 U.S.C. § 1111*].

If it is additionally pleaded that defendant continues to infringe plaintiff's mark despite defendant's receipt of such a letter, the allegation may tend to show the ongoing nature of defendant's infringement and plaintiff's resultant lack of an adequate remedy at law for defendant's infringing activities [*15 U.S.C. §§ 1114, 1116, 1118*]. Such an allegation may also tend to show that defendant's infringement is intentional, wilful, or deliberate. While such a showing is not required in order to prevail on a claim of infringement, it is probative of the likelihood of confusion [*see AMF Inc.v. Sleekcraft Boats (9th Cir. 1979) 599 F.2d 341, 354]* . Deliberate or wilful infringement constitutes some of the exceptional circumstances necessary for recovery of attorney fees in infringement suits under the Lanham Act [*15 U.S.C. §§ 1114, 1117*; *Sealy, Inc. v. Easy Living, Inc. (9th Cir. 1984) 743 F.2d 1378, 1384]* .

[3] Cross References

Responses to cease and desist letters as evidence of consuming public's perception of genericness of mark.
Surgicenters of America v. Medical Dental Surgeries (9th Cir. 1979) 601 F.2d 1011, 1017

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§ 549.91 Complaint [Fed. R. Civ. P., Rule 7(a); Code Civ. Proc. § 425.10] for Damages [15 U.S.C. § 1117] and Injunctive Relief [15 U.S.C. §§ 1116, 1118; Civ. Code § 3422; Code Civ. Proc. §§ 526, 527] in Action for Trademark and Service Mark Infringement [15 U.S.C. § 1114]

[1] FORM Complaint [Fed. R. Civ. P., Rule 7(a); Code Civ. Proc. § 425.10] for Damages [15 U.S.C. § 1117] and Injunctive Relief [15 U.S.C. §§ 1116, 1118; Civ. Code § 3422; Code Civ. Proc. §§ 526, 527] in Action for Trademark and Service Mark Infringement [15 U.S.C. § 1114]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____ [*name*],

[*OR*]

UNITED STATES DISTRICT COURT,
_____ DISTRICT OF CALIFORNIA

_____ [*name*]	)	
Plaintiff, vs.	)	
_____ [*name*],	)	NO. _____
[and DOES I through _____,]	)	COMPLAINT FOR DAMAGES AND INJUNCT-
Defendant[s].	)	IVE RELIEF
	)	
	)	

_____

Plaintiff alleges:

[1. Plaintiff is, and at all times mentioned herein was, _____ (*state capacity and residence of plaintiff, or other basis of venue, for example*, a resident of _____ County, California *or* a corporation duly incorporated and existing under the laws of the State of _____ (*for example*, Pennsylvania), with its principal place of business in _____ (*city and state, for example*, Philadelphia, Pennsylvania)).]

[2. Defendant is, and at all times mentioned herein was, _____ (*state capacity and residence of plaintiff, or other basis of venue, for example*, a resident of _____ County, California *or* a corporation duly incorporated and existing under the laws of the State of California with its principal place of business in _____ (*city*), _____ County, California).]

[3. This action arises under the Lanham Act, Act of July 5, 1946, 60 Stat. 427, *USC, Title 15, Sections 1051-1127*. Jurisdiction is vested in this Court by virtue of 15 U.S.C. § 1121 and *28 U.S.C. § 1338*.]

[4. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend the complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes, and thereon alleges, that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries herein alleged were proximately caused by their conduct.)]

[5. Plaintiff is informed and believes, and thereon alleges, that at all times herein mentioned, each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of such agency and employment.]

6. At all material times herein, plaintiff has been and is engaged in _____ [*describe goods produced or services rendered in interstate commerce, for example*, the manufacture and interstate wholesale distribution of boys' and young men's clothing] under the _____ [trade *or* service] mark "_____" [*specify plaintiff's mark*].

7. Plaintiff first adopted and used the _____ [trade *or* service] mark "_____" [*specify plaintiff's mark*] to identify its _____ [goods *or* services] on or about _____ [*date of plaintiff's first adoption and use of the mark*].

8. Plaintiff registered "_____" [*specify plaintiff's mark*] as its _____ [trade *or* service] mark in the United States Patent and Trademark Office on _____ [*date of registration*], under United States _____ [Trade *or* Service] Mark Registration No. _____ [*registration number*]. Plaintiff owns the registration, which is and continues to be in full force and effect. Plaintiff displays _____ [*describe how plaintiff provides notice of its mark registration, for example*, the registration symbol (R) *or* the words "Registered in U.S. Patent and Trademark Office" *or* "Reg. U.S. Pat. & Tm. Off."] with its trademark. A certified copy of plaintiff's certificate of registration is attached as Exhibit "A" and incorporated by reference.

9. Plaintiff has used the _____ [trade *or* service] mark "_____" [*specify plaintiff's mark*] continuously since _____ [*date*], to identify _____ [*describe plaintiff's goods or services, for example*, its suits, sport coats and other garments in the boys' and young men's size range 13 to 20, and its sport coats in men's sizes 36 to 42]. In this connection, plaintiff uses its _____ [trade *or* service] mark _____ [*describe plaintiff's use of its mark, for example*, on labels in the garments that it manufactures and distributes]. A specimen of _____ [*describe specimen, for example*, one of plaintiff's

garment labels] on which its _____ [trade *or* service] mark appears is attached as Exhibit "B" and incorporated by reference.

10. Plaintiff has been _____ [*identify areas in which plaintiff engages in business using the mark, for example*, selling its boys' and men's garments to various retail outlets in _____ (*describe location of store or areas served by plaintiff*) since _____ [*date*]. In addition, plaintiff has had a permanent sales representative in _____ (*describe representative's territory*) promoting the sale of the full line of products bearing plaintiff's _____ (trade *or* service) mark "_____" (*specify plaintiff's mark*), since _____ [*date*].]

11. Plaintiff's _____ [*goods or services, for example*, garments] have been and continue to be extensively advertised and sold throughout _____ [*identify geographical area in which plaintiff engages in business using the mark*], including _____ [*forum state*], under the _____ [trade *or* service] mark "_____" [*specify plaintiff's mark*]. By virtue of advertising and sales, together with consumer acceptance and recognition, plaintiff's mark identifies plaintiff's garments only, and distinguishes them from garments manufactured and sold by others. Plaintiff's mark has thus become and is a valuable asset symbolizing plaintiff, its quality _____ [goods *or* services] and its goodwill.

12. [Plaintiff is informed and believes, and thereon alleges, that] [d]efendant, with at least constructive notice of plaintiff's ownership of the _____ [trade *or* service] mark "_____" [*specify plaintiff's mark*], _____ [*describe goods or services provided by defendant, for example*, owns and has operated a retail men's clothing store] under the name "_____" [*specify name*] in _____ [*describe location of store or areas served by defendant*] since _____ [*date of defendant's first use of the name*].

13. _____ [*Allege specific manner in which defendant uses the name, for example*, (Plaintiff is informed and believes, and thereon alleges, that) [d]efendant uses the name "_____" (*specify name*) on its store-front, merchandise bags, and sales receipts. It also uses the name on labels attached to suits, sport coats, and other garments sold by it to the public. It is applied generally to men's garments and particularly to men's suits and sport coats in the same size range and with the same type of styling as the men's suits and sport coats manufactured and distributed by plaintiff under plaintiff's trademark.] A specimen _____ [*describe specimen, for example*, of one of defendant's garment labels] on which the name "_____" [*specify name*] appears is attached as Exhibit "C" and incorporated by reference.

14. [Plaintiff is informed and believes, and thereon alleges, that] [d]efendant's name, "_____" [*specify name*], is _____ [*describe infringing nature of defendant's name, for example*, a colorable imitation] of plaintiff's registered _____ [trade *or* service] mark. Defendant uses the name "_____" [*specify name*] in _____ [interstate commerce *or* a manner substantially affecting interstate commerce] in connection with the sale, offering for sale, distribution, and advertising of its _____ [*specify defendant's goods or services, for example*, men's garments]. As such, defendant's use of the name "_____" [*specify name*], is likely to cause confusion, mistake, or deception among consumers as to the source, quality, and nature of defendant's goods.

[15. On or about _____ (*date*), plaintiff, by letter, advised defendant of plaintiff's ownership of both the _____ [trade *or* service] mark "_____" (*specify plaintiff's mark*) and the registration therefor, and requested defendant to immediately cease and desist from further use of the name "_____" (*specify defendant's name*) as either a trade name or a _____ [trade *or* service] mark. Defendant has failed and refused, and continues to fail and refuse, to comply with plaintiff's request.]

16. [Plaintiff is informed and believes and thereon alleges that] [a]s a proximate result of advantage accruing to

defendant's business from plaintiff's nationwide advertising, sales, and consumer recognition, and as a proximate result of _____ [confusion *or* deception *or* mistake *or combination thereof*] caused by defendant's wrongful advertising and sale of its goods, as hereinabove alleged, bearing the name "_____" [*describe defendant's name*], defendant has made substantial _____ [sales *and/or* profits] in the approximate amount of $_____.

17. As a proximate result of advantage accruing to defendant's business from plaintiff's nationwide advertising, sales, and consumer recognition, and as a proximate result of _____ [confusion *or* deception *or* mistake *or combination thereof*] caused by defendant's wrongful advertising and sale of its goods, as alleged above, bearing the name "_____" [*describe defendant's name*], _____ [*allege plaintiff's damages, for example*, plaintiff has been deprived of substantial sales of its _____ (*describe goods or services, for example*, garments) in the approximate amount of $ _____, and has been deprived of the value of its trademark as a commercial asset, in the approximate amount of $ _____].

18. [Plaintiff is informed and believes and thereon alleges that] [u]nless restrained by this Court, _____ [*specify grounds for permanent, and if desired preliminary, injunctive relief, for example*, defendant will continue to infringe plaintiff's registered _____ (trade *or* service) mark, thus engendering a multiplicity of judicial proceedings, and pecuniary compensation will not afford plaintiff adequate relief for the damage to its _____ (trade *or* service) mark in the public perception].

WHEREFORE, Plaintiff prays:

[1. For an order requiring defendant[s] to show cause, if they have any, why they should not be enjoined as set forth below, during the pendency of this action;]

2. For a [temporary restraining order, a preliminary injunction, and a] permanent injunction, all enjoining defendant[s, and each of them,] and his/her/their agents, servants, and employees, and all persons acting under, in concert with, or for him/her/them from:

> (a) Using the name "_____" [*specify name*] in connection with _____ [*describe defendant's business, for example*, its retail men's clothing business] in _____ [*location of defendant's store or geographical area in which defendant does business*], and from using the name "_____" [*specify name*] _____ [on *or* in connection with] any _____ [*specify goods or services, for example*, garments] _____ [sold *or* rendered] in such business;
>
> (b) Otherwise infringing plaintiff's _____ [trade *or* service] mark;
>
> (c) Causing likelihood of confusion, deception, or mistake as to the source, nature, or quality of defendant's _____ [goods *or* services];

3. For an order directing defendant[s, and each of them,] to file with this Court and serve on plaintiff within _____ [*number, for example*, 30] days after service of an injunction, a report in writing under oath, setting forth in detail the manner and form in which defendant[s] has/have complied with the injunction;

4. For an order requiring defendant[s, and each of them,] to deliver up and destroy all _____ [*infringing materials, for example*, garment labels, literature, advertising, and other material] bearing the infringing designations;

5. For all of defendant's profits derived from its infringement of plaintiff's _____ [trade *or* service]

mark;

6. For three times the amount of plaintiff's actual damages caused by defendant's infringement of plaintiff's _____ [trade *or* service] mark;

7. For plaintiff's reasonable attorney fees expended in this action;

8. For costs of suit incurred herein; and

9. For such other and further relief as the Court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

_____ [*address*]

[*ADD, if verification desired in action in state court*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[*ADD, if verification desired in action in federal court*]

VERIFICATION

State of _____) ss.:
County of _____)

_____

_____ [*Name of plaintiff*], being duly sworn, deposes and says that he/she resides at _____ [*plaintiff's residence*], that he/she is the plaintiff herein, and that he/she has read the foregoing complaint and knows the contents thereof and that the same are true of his/her own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he/she believes them to be true.

_____ [*signature of plaintiff*]

_____ [*typed name*]

Subscribed and sworn to before me this _____ day of _____.

_____ [*signature of notary*]

[*seal of notary*]

[2] Use of Form

The complaint in [1], *above*, is for use by a plaintiff in a suit filed in federal or state court for damages and injunctive relief for infringement of a trademark or service mark that has been registered in the United States Patent and Trademark Office [*15 U.S.C. § 1114*].

This form is adapted from the facts in *Chips'N Twigs, Inc. v. Prives (N.D. Cal. 1963) 226 F. Supp. 529* .

[3] Allegations

This complaint includes optional allegations to identify the capacity and residence of plaintiff and defendant (Paragraphs 1, 2) [*see Fed. R. Civ. P., Rule 9* (unnecessary to aver the capacity of a party to sue or be sued or the legal existence of an organized association of persons that is made a party, except to the extent required to show jurisdiction); *see* [9], *below*]. It also contains optional paragraphs for use to allege fictitious names of unknown defendants (Paragraph 4) [*Code Civ. Proc. § 474*; *see* Ch. 20, *Allegations Commonly Used*], and an agency relationship between the defendants (Paragraph 5) [*see* Ch. 427, *Principal and Agent*].

If the complaint is filed in federal court, it must include an allegation of the court's jurisdiction over the subject matter of the action (Paragraph 3) [*Fed. R. Civ. P. Rule 8(a)(1)*; *15 U.S.C. § 1121*; *28 U.S.C. § 1338*]. Local court rule may govern the allegation of federal jurisdiction. For further discussion, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

This complaint also alleges:

- Plaintiff and defendant's production of goods or rendition of services in interstate commerce or in commerce substantially affecting interstate commerce (Paragraphs 6 and 14) [*15 U.S.C. §§ 1114, 1127*; *Wells Fargo & Co. v. Wells Fargo Express Co. (9th Cir. 1977) 556 F.2d 406, 427* ; *Ronson Art Metal Works, Inc. v. Hilton Lite Corp. (N.D. Cal. 1953) 111 F. Supp. 691, 693]* .

- The fact and date of plaintiff's first adoption and use of its trade or service mark to establish

ownership of the mark (Paragraph 7) [*15 U.S.C. § 1051*; *Tillamook County Creamery Asso. v. Tillamook Cheese & Dairy Asso. (9th Cir. 1965) 345 F.2d 158, 160 , cert. denied, 382 U.S. 903, 86 S. Ct. 239, 15 L. Ed. 2d 157]* .

- Plaintiff's registration of its mark (Paragraph 8) [*15 U.S.C. §§ 1051, 1114*].

- That plaintiff gave notice of registration when using the mark so as to give defendant constructive notice of plaintiff's ownership of the mark (Paragraph 8) [*15 U.S.C. §§ 1072, 1111, 1117*].

- Defendant's use of plaintiff's mark (Paragraphs 12 and 13) [*15 U.S.C. § 1114*].

- Facts to establish likelihood of confusion (Paragraphs 9-14) [*15 U.S.C. § 1114*].

- Defendant's profits and plaintiff's damages (Paragraphs 16 and 17) [*15 U.S.C. §§ 1114, 1116, 1117*].

- Grounds for preliminary and permanent injunctive relief (Paragraph 18) [*15 U.S.C. §§ 1114, 1116*; *Civ. Code § 3422* (permanent relief); *Code Civ. Proc. § 526* (preliminary relief); *see § 549.91[5], below*].

The complaint provides for the inclusion of three exhibits:

- A certified copy of plaintiff's certificate of trademark or service registration (Paragraph 8).

- A specimen of plaintiff's trademark or service mark (Paragraph 9).

- A specimen of defendant's name or mark (Paragraph 11) [*Fed. R. Civ. P., Rule 10(c)*].

The complaint includes an optional allegation of defendant's failure and refusal to cease and desist using its infringing mark or name, despite plaintiff's request that it do so (Paragraph 15). For a discussion of the effect of such a letter in an infringement suit, see *§ 549.90*.

[4] Proof of Infringement

While a plaintiff need not show actual cases of confusion to prevail on a claim of infringement, the likelihood of confusion or mistake must be demonstrated by more than a showing of a mere trace of confusion [*Everest & Jennings, Inc. v. E & J Mfg. Co. (9th Cir. 1959) 263 F.2d 254]* . For a discussion of factors considered by courts in assessing likelihood of confusion and infringement, see *§ 549.24[2]*.

In the Ninth Circuit, courts will recognize two distinct kinds of claims in the trademark infringement context: claims based on "forward confusion" and claims based on "reverse confusion." Forward confusion occurs when consumers believe that goods bearing the junior mark came from, or were sponsored by, the senior mark holder. In the senior mark holder's infringement action on a forward confusion claim, therefore, to avoid an adverse summary judgment, the senior mark holder must raise a material question of fact regarding whether the buying public thought that the senior mark holder was either the source of, or was sponsoring, the junior mark holder's product line. Reverse confusion occurs when consumers dealing with the senior mark holder believe that they are doing business with the junior one. Therefore, to survive a summary judgment motion on a reverse confusion claim, the senior mark holder must raise a question of material fact as to whether consumers believed that the junior mark holder was either the source of, or was a sponsor of, the senior mark holder's wares. The senior mark holder may sue on both kinds of claims if both are supported by the evidence [*see Surfvivor Media, Inc. v. Survivor Prods. (9th Cir. 2005) 406 F.3d 625, 630-631]* .

[5] Injunctive Relief

When seeking a preliminary injunction in a trademark infringement action, the plaintiff must establish all of the following [*Marlyn Nutraceuticals v. Mucos Pharma GmbH & Co. (9th Cir. 2009) 571 F.3d 873, 876*]:

- The plaintiff is likely to succeed on the merits. In considering the likelihood of success on the merits, the trial court must apply the rule that to be liable for trademark infringement, the defendant must have (1) used in commerce (2) any word, false designation of origin, false or misleading description, or representation of fact, which (3) was likely to cause confusion or misrepresented the characteristics of the defendant's or another person's goods or services. The court should consider the *Sleekcraft* factors [*AMF, Inc. v. Sleekcraft Boats (9th Cir. 1979) 599 F.2d 341, 348-349* ; *see § 549.24[2]*] in determining whether there a likelihood of confusion. Once the plaintiff has carried the burden of showing a likelihood of success on the merits, the burden shifts to the defendant to show a likelihood that a affirmative defense will succeed [*Perfect 10, Inc. v. Amazon.com, Inc. (9th Cir. 2007) 508 F.3d 1146, 1158]* .

- The plaintiff is likely to suffer irreparable harm in the absence of preliminary injunctive relief. Irreparable injury may be presumed from a showing of likelihood of success on the merits [*El Pollo Loco, Inc. v. Hashim (9th Cir. 2003) 316 F.3d 1032, 1038]* .

- The balance of equities tips in the plaintiff's favor.

- A preliminary injunction is in the public interest.

Ordinarily a preliminary injunction will be solely prohibitive, that is, will order the defendant merely to cease and desist with respect to infringing activities. Rarely the injunction may be mandatory as well, that is, may order the defendant to take some affirmative action, which in an appropriate case could be to effectuate a product recall so as to retrieve infringing goods that were distributed to resellers and end-users. To justify ordering a recall, the trial court must first be satisfied that the usual standards for a prohibitory preliminary injunction have been met; then, in addition, the court must consider three factors: (1) whether the infringement by the defendant was willful or intentional; (2) whether the risk of confusion to the public and injury to the plaintiff is greater than the burden of the recall to the defendant; and (3) whether there is a substantial risk of danger to the public because of the defendant's infringing activity. If the court finds that leaving the infringing product in the hands of resellers and end-users will cause a substantial risk of danger to the public, the court should order a recall [*Marlyn Nutraceuticals v. Mucos Pharma GmbH Co. (9th Cir. 2009) 571 F.3d 873, 878-879*].

Local court rules should be consulted with respect to the procedure for obtaining injunctive relief in the federal district courts.

[6] Verification in State Court

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[7] Verification in Federal Court

Pleadings in federal court need not be verified or accompanied by affidavit unless specifically provided by rule or statute [*Fed. R. Civ. P., Rule 11*]. Thus, a verified pleading does not thereby automatically require an opposing party to verify subsequent or responsive pleadings unless specifically required by rule or statute [*Fed. R. Civ. P., Rule 11*].

However, an applicant for an ex parte temporary restraining order must proceed by either verified complaint or affidavit [*Fed. R. Civ. P., Rule 65(b)*]. In such an action, the applicant must present verified facts, by either complaint or separate supporting affidavit(s) showing that immediate and irreparable injury, loss, or damage to the applicant will result before the adverse party or its attorney can be heard in opposition to the application [*Fed. R. Civ. P., Rule 65(b)*]. Additionally, the applicant must certify to the court, in writing, both the applicant's efforts, if any, to give notice to the opposing party, and reasons supporting the applicant's claim that notice should not be required [*Fed. R. Civ. P., Rule 65(b)*].

Fed. R. Civ. P., Rule 65(b) does not expressly require a verified complaint when accompanied by supporting affidavits [*Fed. R. Civ. P., Rule 65(b)*]. An unverified complaint, coupled with a supporting affidavit stating the affiant's source of information for the complaint and the fact that affiant prepared the complaint has been held to be sufficient to meet the requirements of the rule [*Brown v. Bernstein (M.D. Pa. 1943) 49 F. Supp 497, 499*].

[8] Signing of Pleadings in Federal Court

Every pleading of a party represented in federal court must be signed by at least one attorney of record in the attorney's individual name, or by the party, if not represented by an attorney [*Fed. R. Civ. P., Rule 11(a)*]. Every paper must state the signer's address and telephone number, if any [*Fed. R. Civ. P., Rule 11(a)*]. The party signing the pleading is representing to the court that, to the best of his or her knowledge, information and belief, there is good ground to support the pleading and it is not being presented for an improper purpose [*Fed. R. Civ. P., Rule 11(b)*]. If a pleading is signed in violation of *Fed. R. Civ. P., Rule 11(b)*, the court may impose sanction to deter such conduct [*Fed. R. Civ. P., Rule 11(c)*].

[9] Federal Jurisdiction and Venue

Both the United States district courts and the state courts have concurrent, original subject matter jurisdiction in all actions arising under the Lanham Act [*15 U.S.C. § 1121*; *28 U.S.C. § 1338(a)*]. Thus, an action may, but need not, be brought in United States District Court. Neither diversity of citizenship nor a specific amount in controversy is required for federal court jurisdiction of Lanham Act cases [*15 U.S.C. § 1121*].

In an action arising under the Lanham Act, venue is in [*28 U.S.C. § 1391(b)*; *see also 28 U.S.C. § 1392*]:

- A judicial district where any defendant resides if all defendants reside in the same state;

- A judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or

- A judicial district in which any defendant may be found if there is no district in which the action may otherwise be brought.

For venue purposes, a defendant corporation's residence is any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a state that has more than one judicial district and in which the defendant corporation is subject to personal jurisdiction, the corporation is deemed to reside in any district in that state where it has sufficient contacts to subject it to personal jurisdiction were that district a separate state. If there is no such district, the corporation is deemed to reside in the district within which it has the most significant contacts [*28 U.S.C. §*

1391(c)]. An alien defendant may be sued in any judicial district [*28 U.S.C. § 1391(d)*].

[10] Pendent Jurisdiction Over State Claim

A cause of action for infringement or dilution of a trade or service mark registered in California may also be included, under principles of pendent jurisdiction, in a complaint in federal court for infringement of a federally registered mark [*Golden Door, Inc. v. Odisho (N.D. Cal. 1977) 437 F. Supp. 956, 962 , aff'd, (9th Cir. 1980) 646 F.2d 347]* .

[11] State Jurisdiction

Concurrent with the United States district courts, the superior court has original subject matter jurisdiction of trademark infringement actions [*Shores v. Chip Steak Co. (1955) 130 Cal. App. 2d 620, 625, 279 P.2d 591]* . The superior court has jurisdiction whether the trademark in question is registered under the laws of California or under the Lanham Act [*Shores v. Chip Steak Co. (1955) 130 Cal. App. 2d 620, 626, 279 P.2d 591]* .

The case will not qualify as a limited civil case because the relief sought (a permanent injunction) is not exclusively of a type described in any statute either classifying an action or special proceeding as a limited civil case or providing that an action or special proceeding is within the original jurisdiction of the former municipal court [*see Code Civ. Proc. § 85*].

[12] Statute of Limitations

The Lanham Act [*15 U.S.C. § 1051 et seq.*] contains no statute of limitations. Therefore, a federal court considering the question must look to the law of the forum state for a statutory limitation period that best effectuates federal trademark policy. In so doing, the court may look to the local statute bearing the closest resemblance to the federal statute involved, and may then apply that state limitation period to the federal statute in issue [*Griffin v. Pacific Maritime Association (9th Cir. 1973) 478 F.2d 1118, 1119*].

The Model State Trademark Law [*Bus. & Prof. Code § 14200 et seq.*] also contains no statute of limitations, and California courts do not appear to have determined which limitation period applies. While it is unclear, therefore, which limitation period applies to the tort of trademark infringement, the two-year period of limitations in *Code Civ. Proc. § 339(1)* applies to the tort of conversion or of misappropriation of intangible interests [*Salveson v. Western States Bankcard Ass'n (N.D. Cal. 1981) 525 F. Supp. 566, 584]* .

[13] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion of jurisdictional allegations in federal courts, see Ch. 265, *Federal Courts: Jurisdiction and Removal*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms for verification, see Ch. 572, *Verification*

Gilson, Trademark Protection and Practice, Ch. 8, *Trademark Infringement Litigation* Ch. 10, *Appendix* , § 10.06 (Matthew Bender)

Moore, Frumer, and Hall, Moore's Manual--Federal Practice Forms, Ch. 10, *Plaintiff's Pleading* , Forms 10:89.1, 10:89.3, 10:89.5, 10:89.6, 10:90.1D, 10:90.1F (Matthew Bender)

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Chapter 549 TRADEMARKS AND TRADE NAMES
PART IV. FORMS

48-549 California Forms of Pleading and Practice--Annotated § 549.92

§ 549.92 Affirmative Defense--Registration or Incontestable Right to Use Mark Obtained Fraudulently [15 U.S.C. § 1115(b)(1)]

[1] FORM Affirmative Defense--Registration or Incontestable Right to Use Mark Obtained Fraudulently [15 U.S.C. § 1115(b)(1)]

AS A [_____ (*if more than one, specify number, for example*, FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, for example*, SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that plaintiff obtained the _____ [registration of *or* incontestable right to use] the _____ [trademark *or* service mark] _____ [*describe plaintiff's mark*] fraudulently.

[2] Use of Form

The affirmative defense in *§ 549.92[1], above* , is for use in an answer to a complaint for infringement of a federally registered trade or service mark. The defense raises the issue that the plaintiff obtained the mark or obtained the incontestable right to use the mark, or both, fraudulently [*15 U.S.C. § 1115(b)(1)*]. The plaintiff's right to exclusive use of its mark may be rebutted by the preponderance of evidence showing a specific defect in the registration of plaintiff's mark [*Keebler Co. v. Rovira Biscuit Corp. (1st Cir. 1980) 624 F.2d 366, 373]* .

[3] Cross References

For discussion and forms relating to answers in general, see Ch. 26, *Answers*

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48-549 California Forms of Pleading and Practice--Annotated § 549.93

§ 549.93 Affirmative Defense [Fed. R. Civ. P., Rule 8(c)]--Abandonment of Mark by Registrant [15 U.S.C. § 1115(b)(2)]

[1] FORM Affirmative Defense [Fed. R. Civ. P., Rule 8(c)]--Abandonment of Mark by Registrant [15 U.S.C. § 1115(b)(2)]

AS A [_____ (*if more than one, specify number, for example*, FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, for example*, SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that plaintiff has intentionally abandoned its _____ [trademark *or* service mark], _____ [*describe plaintiff's mark*].

[2] Use of Form

The affirmative defense in [1], *above*, is for use in an answer to a complaint for infringement of a federally registered trade or service mark to raise the defense that the plaintiff has abandoned the mark [*15 U.S.C. § 1115(b)(2)*; *see 15 U.S.C. § 1127* (abandonment defined)].

The burden of proof rests with the defendant claiming abandonment of a trademark [*Exxon Corp. v. Humble Exploration Co., Inc. (N.D. Tex. 1981) 524 F. Supp. 450, 464]* .

To prove abandonment of trademark there must be proof of intent to abandon [*Tillamook County Creamery Asso. v. Tillamook Cheese & Dairy Asso. (9th Cir. 1965) 345 F.2d 158, 162* ; *Airwick Industries, Inc. v. Alpkem Corp. (D. Ore. 1974) 384 F. Supp. 1027, 1033* (intent required)]. The Lanham Act requires two elements for an abandonment: nonuse and a concurrent intent to abandon [*McCabe-Powers Auto Body Co. v. American Truck Equipment Co. (D. Ore. 1957) 150 F. Supp. 194, 199* ; *see 15 U.S.C. § 1127*].

Nonuse for three consecutive years is prima facie evidence of abandonment [*15 U.S.C. § 1127*; *see*. *Star-Kist Foods, Inc. v. P.J. Rhodes & Co. (9th Cir. 1985) 769 F.2d 1393, 1396* (prima facie case is also presumption that may be rebutted by showing valid reasons for nonuse or by proving lack of intent to abandon); *Saratoga Vichy Spring Co. v. Lehman (2d Cir. 1980) 625 F.2d 1037, 1043]* . Abandonment of trademark, being in the nature of a forfeiture, must be strictly proved [*P. A. B. Produits Et Appareils de Beaute v. Satinine Societa in Nome Collettive di S.A. e M. Usellini*

(C.C.P.A. 1978) 570 F.2d 328, 332-333] . A single instance of use is sufficient against a claim of abandonment of mark if the use is made in good faith [*Carter-Wallace, Inc. v. Procter & Gamble Co. (9th Cir. 1970) 434 F.2d 794, 804]* . Intent not to resume use is inferable from circumstances [*15 U.S.C. § 1127*].

A mark is also deemed abandoned if the owner, by any course of conduct, including acts of omission as well as commission, causes the mark to become a generic name or otherwise to lose its significance as a mark. Purchaser motivation is not test for determining this type of abandonment [*15 U.S.C. § 1127*].

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48-549 California Forms of Pleading and Practice--Annotated § 549.94

§ 549.94 Affirmative Defense--Misrepresentation of Source of Goods or Services [15 U.S.C. § 1115(b)(3)]

[1] FORM Affirmative Defense--Misrepresentation of Source of Goods or Services [15 U.S.C. § 1115(b)(3)]

AS A [_____ (*if more than one, specify number, for example*, FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, for example*, SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that _____ [plaintiff *and/or* (*name(s), if known, and relationship to plaintiff of person(s) who have used mark with plaintiff's permission or are in privity with plaintiff, for example*, John Doe, a licensee of plaintiff's mark)] has/have misrepresented the source of the _____ [goods *or* services] in connection with which the _____ [trademark *or* service mark] _____ [*describe plaintiff's mark*] is used.

[2] Use of Form

The affirmative defense in [1], *above*, is for use in an answer to a complaint for infringement of a federally registered trade or service mark to raise the defense of misrepresentation of the source of goods or services in connection with which the mark is used [*15 U.S.C. § 1115(b)(3)*; *see § 549.28[4]*].

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48-549 California Forms of Pleading and Practice--Annotated § 549.95

§ 549.95 Affirmative Defense--Fair Use [15 U.S.C. § 1115(b)(4)]

[1] FORM Affirmative Defense--Fair Use [15 U.S.C. § 1115(b)(4)]

AS A [_____ (*if more than one, specify number, for example*, FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, for example*, SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that its use of _____ [*specify name, term, or device charged to be an infringement*] is a use as other than a trade or service mark in that

[*EITHER*]

_____ [*specify term, or device charged to be an infringement*] is descriptive of, and is used by defendant fairly and in good faith only to describe its _____ [goods *or* services *or* the geographic origin of its goods or services] to its users.

[*OR*]

_____ [*specify name alleged to be an infringement*] is the individual name of _____ [defendant *and/or* (*name(s), if known, and relationship to defendant of person(s) who are in privity with defendant, for example*, John Doe, defendant's partner)] and is used as such by defendant in his/her own business.

[2] Use of Form

The affirmative defense in [1], *above*, is for use in an answer to a complaint for infringement of a federally registered trade or service mark to raise the defense of fair use [*15 U.S.C. § 1115(b)(4)*; for a discussion of what constitutes fair use, *see § 549.28[5]*].

In a trademark infringement suit, defendant has the burden of establishing the validity of a fair use defense [*King-Size, Inc. v. Frank's King Size Clothes, Inc. (S.D. Tex. 1982) 547 F. Supp. 1138, 1164]* . In proving fair use, defendant must

show that it is making good faith, non-trademark use of the name, term, or device in issue, and is therefore using it only to describe its product rather than to associate it with a manufacturer [*Sierra On-Line, Inc. v. Phoenix Software, Inc. (9th Cir. 1984) 739 F.2d 1415, 1423]* . The defense, in essence, forbids a trademark registrant from appropriating a descriptive term for its exclusive use and preventing others from accurately describing a characteristic of their goods or services [*Soweco, Inc. v. Shell Oil Co. (5th Cir. 1980) 617 F.2d 1178, 1185]* . By its terms, this statutory defense applies only to registered trademarks that have become incontestable through the passage of time [*Sierra On-Line, Inc. v. Phoenix Software, Inc. (9th Cir. 1984) 739 F.2d 1415, 1423]* . However, the statutory defense has been held to be simply a restatement of the common law defense of fair use; which, by virtue of *15 U.S.C. § 1115(a)*, is available in actions not involving marks that have achieved incontestability status [*M. B. H. Enterprises, Inc. v. WOKY, Inc. (7th Cir. 1980) 633 F.2d 50, 52 n.2* ; *see also Sierra On-Line, Inc. v. Phoenix Software, Inc. (9th Cir. 1984) 739 F.2d 1415, 1423]* .

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48-549 California Forms of Pleading and Practice--Annotated § 549.96

§ 549.96 Affirmative Defense--Prior Use [15 U.S.C. § 1115(b)(5)]

[1] FORM Affirmative Defense--Prior Use [15 U.S.C. § 1115(b)(5)]

AS A [_____ (*if more than one, specify number, for example*, FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, for example*, SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. Defendant first adopted the _____ [trademark *or* service mark] _____ [*describe defendant's mark, use of which is charged as an infringement*] to identify its _____ [goods *or* services] on _____ [*date*] without knowledge of plaintiff registrant's prior use thereof. The date of defendant's adoption of its _____ [trademark *or* service mark] is prior to _____ [*date*] the registration date of plaintiff's _____ [trademark *or* service mark].

2. Defendant has used its _____ [trademark *or* service mark] _____ [*describe defendant's mark*] _____ [on its goods *or* in connection with its services] continuously since the date of first adoption, hereinabove alleged.

[2] Use of Form

The affirmative defense in [1], *above*, is for use in an answer to a complaint for infringement of a federally registered trade or service mark to raise the defense of prior use. This defense applies only for the geographic area in which such continuous prior use as alleged by defendant is proved [*15 U.S.C. § 1115(b)(5)*; *AMF Inc. v. Sleekcraft Boats (9th Cir. 1979) 599 F.2d 341, 346 n.4* ; *Mister Donut of America, Inc. v. Mr. Donut, Inc. (9th Cir. 1969) 418 F.2d 838, 843]* . The defense applies if defendant can establish that it adopted its mark without knowledge of plaintiff's prior use, and that it has used its mark continuously from a date prior to plaintiff's registration of plaintiff's mark [*Casual Corner Associates, Inc. v. Casual Stores of Nevada, Inc. (9th Cir. 1974) 493 F.2d 709, 714]* . It is the defendant's burden to raise and prove this defense [*AMF, Inc. v. Sleekcraft Boats (9th Cir. 1979) 599 F.2d 341, 346 n.4*].

If the defendant establishes innocent pre-registration use of a federal mark, a federal injunction will not issue to restrain use of the mark in the geographical area where prior use was proven [*Golden Door, Inc. v. Odisho (9th Cir. 1980) 646*

F.2d 347, 351] .

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48-549 California Forms of Pleading and Practice--Annotated § 549.97

§ 549.97 Affirmative Defense--Prior Registration and Use [15 U.S.C. § 1115(b)(6)]

[1] FORM Affirmative Defense--Prior Registration and Use [15 U.S.C. § 1115(b)(6)]

AS A [_____ (*if more than one, specify number, for example*, FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, for example*, SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that it adopted, registered, and used the trademark [*or* service mark] _____ [*describe defendant's mark, use of which is charged as an infringement*] prior to the registration of plaintiff's _____ [trademark *or* service mark] _____ [*describe plaintiff's mark*]. Defendant first adopted the _____ [trademark *or* service mark] _____ [*describe defendant's mark*] to identify its _____ [goods *or* services] on _____ [*date*]. Defendant first used the _____ [trademark *or* service mark] _____ [*describe defendant's mark*] to identify its _____ [goods *or* services] on _____ [*date*]. Defendant registered its _____ [trademark *or* service mark] _____ [*describe defendant's mark*] on the Principal Register in the United States Patent and Trademark Office on _____ [*date*] under United States Trade Mark Registration No. _____. A certified copy of defendant's certificate of registration is attached as Exhibit "_____" and incorporated by reference.

[2] Use of Form

The affirmative defense in [1], *above*, is for use in an answer to a complaint for infringement of a federally registered trade or service mark to raise the defense of prior registration and use. This defense applies only for the geographic area in which defendant's mark was used prior to plaintiff's registration of its mark [*15 U.S.C. § 1115(b)(6)*]. This defense is permitted only when defendant's mark is also registered [*United States Jaycees v. Chicago Junior Asso. of Commerce & Industry (N.D. Ill. 1981) 505 F. Supp. 998, 1001 n.2*].

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48-549 California Forms of Pleading and Practice--Annotated § 549.98

§ 549.98 Affirmative Defense--Use of Plaintiff's Trade or Service Mark Violates Federal Antitrust Laws [15 U.S.C. § 1115(b)(7)]

[1] FORM Affirmative Defense--Use of Plaintiff's Trade or Service Mark Violates Federal Antitrust Laws [15 U.S.C. § 1115(b)(7)]

AS A [_____ (*if more than one, specify number, for example*, FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, for example*, SECOND) CAUSE OF ACTION], defendant alleges that plaintiff _____ [is using *or* has used] its _____ [trademark *or* service mark] to violate the antitrust laws of the United States.

[2] Use of Form

The affirmative defense in [1], *above*, is for use in an answer to a complaint for infringement of a federally registered trade or service mark to raise the defense that the mark has been or is being used to violate the antitrust laws of the United States [*15 U.S.C. § 1115(b)(7)*].

The essential element of an antitrust misuse defense is proof that the mark itself is the basic and fundamental vehicle required and used to accomplish the alleged antitrust violation [*Helene Curtis Industries, Inc. v. Church & Dwight Co. (7th Cir. 1977) 560 F.2d 1325, 1337]* . It is not enough merely to prove that merchandise bearing the mark has been used in furtherance of antitrust violations [*Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena (S.D.N.Y. 1969) 298 F. Supp. 1309, 1315]* .

Plaintiff's registration of multiple marks for its products, mass advertising, massive sales, and bringing of a trademark infringement suit based on colorable similarity rather than on exact identity, did not constitute an antitrust violation because these activities comprise aggressive competition and promotion that antitrust laws seek to protect [*Drop Dead Co. v. S. C. Johnson & Son, Inc. (9th Cir. 1963) 326 F.2d 87, 96]* .

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48-549 California Forms of Pleading and Practice--Annotated § 549.99

§ 549.99 Affirmative Defense--Plaintiff's Trademark or Service Mark Is Functional [15 U.S.C. § 1115(b)(8)]

[1] FORM Affirmative Defense--Plaintiff's Trademark or Service Mark Is Functional [15 U.S.C. § 1115(b)(8)]

AS A [_____ (*if more than one, specify number, for example,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, for example,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff is not entitled to exclusive use in commerce of the alleged _____ [trademark *or* service mark] because it is functional, that is, _____ [*set forth brief factual description of nature of functionality that serves as basis of defense*].

[2] Use of Form

The affirmative defense in [1], *above,* may be pleaded in an action for infringement of a federally registered trademark or service mark, when the plaintiff is not entitled to the exclusive use of the mark in commerce because the mark is functional [*see 15 U.S.C. § 1115(b)(8)*].

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48-549 California Forms of Pleading and Practice--Annotated § 549.100

§ 549.100 Affirmative Defense--Laches, Estoppel, or Acquiescence [15 U.S.C. § 1115(b)(9)]

[1] FORM Affirmative Defense--Laches, Estoppel, or Acquiescence [15 U.S.C. § 1115(b)(9)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that plaintiff _____ [*specify, e.g.,* consented to defendant's use of the (trade *or* service) mark during the period _____ to _____ (*dates*)], and therefore plaintiff's action is barred by the equitable principle(s) of _____ [*specify, e.g.,* laches].

[2] Use of Form

The affirmative defense in [1], *above,* is for use in an answer to a complaint for infringement of a federally registered trade or service mark to raise the equitable defenses of laches, estoppel, or acquiescence [*15 U.S.C. § 1115(b)(9)*: for discussion, *see § 549.28[10]*].

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48-549 California Forms of Pleading and Practice--Annotated § 549.101

§ 549.101 Proceedings to Seize Goods Bearing and Used in Production of Counterfeit Marks From Persons Using Counterfeit Marks in Connection With Sale, Offering for Sale, or Distribution of Goods [15 U.S.C. § 1116(d)] Ex Parte Application for Order [Fed. R. Civ. P., Rule 7(b)(1)]

[1] FORM Proceedings to Seize Goods Bearing and Used in Production of Counterfeit Marks From Persons Using Counterfeit Marks in Connection With Sale, Offering for Sale, or Distribution of Goods [15 U.S.C. § 1116(d)] Ex Parte Application for Order [Fed. R. Civ. P., Rule 7(b)(1)]

UNITED STATES DISTRICT COURT
_____ DISTRICT OF CALIFORNIA

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	EX PARTE APPLICATION FOR ORDER FOR
[and DOES I through _____,]	)	SEIZURE OF GOODS BEARING AND USED IN
Defendant(s).	)	THE PRODUCTION OF COUNTERFEIT MARKS
	)	
	)	

1. Plaintiff _____ [*name*] hereby applies for an order of seizure of all _____ [*specify goods, e.g.,* shirts, blouses, and any other articles of clothing] bearing counterfeits of plaintiff's "_____" [*specify plaintiff's mark*] _____ [trademark *or* service mark], together with all _____ [*specify, e.g.,* plates and molds] used in making the counterfeit marks, and all records documenting the manufacture, sale, or receipt of things involved in defendant's use of counterfeits of plaintiff's mark in

connection with defendant's _____ [sale *and/or* offering for sale *and/or* distribution of] _____ [*specify goods or services, e.g.,* shirts and blouses], as more particularly appears from the _____ [verified complaint *or* affidavit(s) of _____ (*name(s) of affiant*(*s*)], attached hereto.

2. The above-described matter is located at _____ [*provide street address and particular description of premises at which matter is to be seized*].

3. Seizure of the above-described matter is to occur on _____ [*date*].

4. Plaintiff has posted $_____ as security pursuant to Title *15 of United States Code, Section 1116(d)(4)(A)*.

5. Plaintiff requests the court to set the postseizure hearing required under Title *15 of United States Code, Section 1116(d)(10)* for _____ [*date*] [*specify date within 5 days of date that this application is to be heard*].

6. Plaintiff bases its application on the ground that plaintiff has a civil action against defendant arising under _____ [Title *15 of United States Code, Section 1114(1) or* Title *36 of United States Code, Section 380*], with respect to a violation that consists of using a counterfeit mark in connection with the _____ [sale *or* offering for sale *or* distribution *or any combination thereof*] of goods and that the relief sought is authorized by Title *15 of United States Code, Section 1116(d)*.

7. In making this application, plaintiff relies on the _____ [verified complaint *or* affidavit(s) of _____ (*name(s) of affiant(s)*)], attached hereto[, and his/her/its memorandum of points and authorities attached hereto] [, and the papers filed with the court in the above-entitled action].

8. Plaintiff's proposed order is attached hereto.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

_____ [*address of attorney*]

[2] Use of Form

The ex parte application in [1], *above*, is for use to apply for an ex parte order, without notice, for the seizure of goods bearing counterfeits of plaintiff's trademark or service mark, the means of making those counterfeits, and records documenting the manufacture, sale, or receipt of things involved in the use of the counterfeit marks in connection with the sale, offering for sale, or distribution of goods [*15 U.S.C. § 1116(d)(1)(A)*]. The form may be adapted for use when the counterfeits are used in connection with the sale, offering for sale, or distribution of services [*see 15 U.S.C. § 1116(d)(1)(A)*].

The remedy of seizure of goods bearing counterfeit marks is available in infringement actions arising under *15 U.S.C. § 1114*, and in actions arising under *36 U.S.C. § 220506* (prohibiting unauthorized use of symbols, emblems, trademarks, trade names, or insignia of the United States Olympic Committee or of the International Olympic Committee), when the

infringement consists of the defendant's use of counterfeits of plaintiff's trade or service mark [*15 U.S.C. § 1116(d)(1)(A)*]. The remedy is only available when plaintiff's mark is registered on the principal register in the United States Patent and Trademark Office, when plaintiff's mark is in use, and when defendant uses the counterfeit on the same goods or in connection with the same services for which plaintiff uses the genuine mark [*15 U.S.C. § 1116(d)(1)(B)*].

The application for an order of seizure must be based on an affidavit or the verified complaint [*15 U.S.C. § 1116(d)(3)(A)*]. Thus, if the material statements required to support the petition are included in the complaint and the compliant was verified, the affidavit is not necessary. For a complaint for infringement of a federally registered trademark, see *§ 549.91*. For an order to seize goods bearing and used in the production of counterfeit marks, see *§ 549.102*.

Procedure on ex parte applications will be affected by local court rules, which should be consulted.

[3] Content of Application

Plaintiff's application must contain the following information, which is also required to be set forth in the seizure order [*15 U.S.C. § 1116(d)(3)(B), (5)(B)*-(E)]:

- A particular description of the matter to be seized, and a description of each place at which the matter is to be seized.

- The time period, ending no later than seven days after the date on which the order is issued, during which the seizure is to be made.

- The amount of security required to be provided by plaintiff under *15 U.S.C. § 1116(d)(4)(A)*.

- A date for the hearing, required under *15 U.S.C. § 1116(d)(10)*, at which time plaintiff must prove that the facts supporting the court's findings of fact and conclusions of law necessary to support the seizure order are still in effect.

In federal court, an application for any order must be by motion which, unless made during a hearing or trial, must be made in writing, must state with particularity the grounds therefor, and must set forth the relief or order sought [*Fed. R. Civ. P., Rule 7(b)(1)*]. The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by the Federal Rules of Civil Procedure [*Fed. R. Civ. P., Rule 7(b)(2)*].

[4] Content of Affidavit

The affidavit (or verified complaint) must establish facts sufficient to support the findings of fact and conclusions of law required for an order of seizure of goods and counterfeit marks [*15 U.S.C. § 1116(d)(3)(A)*; *see 15 U.S.C. § 1116(d)(4)(B)*; *see 15 U.S.C. § 1061* (acknowledgments and verifications of papers required under *15 U.S.C. §§ 1051-1127*)]. For an enumeration and discussion of the findings of fact and conclusions of law that the seizure order must contain, see *§ 549.102*.

[5] Requirement of Notice to United States Attorney

The court has no power to receive an application for a seizure order unless the applicant has given such notice of the application as is reasonable under the circumstances to the United States attorney for the judicial district in which the seizure order is sought. The United States attorney for that district may participate in the proceedings arising under the application if the proceedings may affect evidence of an offense against the United States. The court may deny the

application if it determines that the public interest in a potential prosecution so requires [*15 U.S.C. § 1116(d)(2)*].

[6] Requirement of Posting of Security

The court has no power to grant the application for a seizure order unless the applicant provides security, which the court determines to be adequate, for the payment of such damages as any person may be entitled to recover as a result of a wrongful seizure or wrongful attempted seizure under *15 U.S.C. 1116(d)* [*15 U.S.C. 1116(d)(4)(A)*]. Because counsel for plaintiff will not know, at the time of drafting the application or motion for the seizure order, the amount at which the court will set the security required by *15 U.S.C. § 1116(d)(4)(A)*, counsel should leave the amount blank and fill in the blank when the court sets the amount and orders the seizure.

[7] Cross References

For discussion and forms for affidavits, see Ch. 15, *Affidavits, Certificates, and Declarations*

For discussion and forms for ex parte motions or applications for orders, see Ch. 372, *Motions and Orders*

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48-549 California Forms of Pleading and Practice--Annotated § 549.102

§ 549.102 Proceedings to Seize Goods Bearing and Used in Production of Counterfeit Marks From Persons Using Counterfeit Marks in Connection With Sale, Offering for Sale, or Distribution of Goods [15 U.S.C. § 1116(d)]--Order Granting Ex Parte Application [15 U.S.C. § 1116(d)(1)(A)]

[1] FORM Proceedings to Seize Goods Bearing and Used in Production of Counterfeit Marks From Persons Using Counterfeit Marks in Connection With Sale, Offering for Sale, or Distribution of Goods [15 U.S.C. § 1116(d)]--Order Granting Ex Parte Application [15 U.S.C. § 1116(d)(1)(A)]

UNITED STATES DISTRICT COURT
_____ DISTRICT OF CALIFORNIA

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER GRANTING EX PARTE APPLICATION
[and DOES I through _____,]	)	FOR ORDER FOR SEIZURE OF GOODS BEAR-
Defendant(s).	)	ING AND USED IN THE
	)	PRODUCTION OF COUNTERFEIT MARKS
	)	

The ex parte application of plaintiff for an order of seizure of goods bearing and used in the production of counterfeit marks was heard by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*] [; the United States appeared by the United States attorney for the _____ District of California, _____ (*name*)].

The court makes the following findings of fact and conclusions of law:

1. An order, other than an ex parte seizure order is not adequate to achieve the purposes of Title *15 of United States Code, Section 1114*.

2. Plaintiff has not publicized the requested seizure.

3. Plaintiff is likely to succeed in showing that defendant _____ [*name*] used counterfeits of plaintiff's "_____" [*specify plaintiff's mark*] _____ [trademark *or* service mark] in connection with the _____ [sale *and/or* offering for sale *and/or* distribution of _____ (*specify goods bearing counterfeits of plaintiff's mark, e.g.,* shirts and blouses)].

4. An immediate and irreparable injury will occur to plaintiff as a result of defendant's _____ [sale *and/or* offering for sale *and/or* distribution of _____ (*specify goods bearing counterfeits of plaintiff's mark, e.g.,* shirts and blouses)] if seizure is not ordered.

5. The harm to plaintiff of denying the application for this order outweighs the harm to the legitimate interests of defendant _____ [*name*] of granting the application.

6. Defendant _____ [*name*] [, or persons acting in concert with him/her/it,] will _____ [*specify manner in which defendant will make material inaccessible to court, e.g.,* destroy, move, hide, or otherwise make this matter inaccessible to the court] if plaintiff proceeds on notice to defendant.

Application having been made, and the court having made the foregoing findings of fact and conclusions of law,

IT IS ORDERED that the application be, and it hereby is, granted and ordered that the United States Marshal, or other federal, state, or local law enforcement officer, serve a copy of this order on defendant _____ [*name*].

IT IS FURTHER ORDERED that the United States Marshal, or other federal, state, or local law enforcement officer, seize all _____ [*specify goods bearing counterfeits of plaintiff's mark, all items used in making the counterfeit marks, and all records documenting the manufacture, sale, or receipt of things involved in defendant's use of counterfeits of plaintiff's mark*]. These items are located at _____ [*describe each place at which matter is to be seized*].

IT IS FURTHER ORDERED that the United States Marshal, or other federal, state, or local law enforcement officer, in the company of plaintiff's counsel, seize the above described matter on or before _____ [*specify date no later than seven days after the date on which the order is issued*].

IT IS FURTHER ORDERED that the above-described matter, when seized, be individually tagged for identification.

IT IS FURTHER ORDERED that the above-described matter, when seized, be impounded in the custody [and control] of _____ [*specify, e.g.,* plaintiff] until further order of the court.

IT IS FURTHER ORDERED that all matter seized and impounded be accessible to all parties and their counsel for _____ [*specify reasons why parties are to be allowed access, e.g.,* inspection and inventory] during regular business hours.

IT IS FURTHER ORDERED that plaintiff post $_____ as security for issuance of this order.

IT IS FURTHER ORDERED that hearing is set for _____ [*specify date no sooner than 10, and not*

later than 15, days after the order is issued], when plaintiff shall appear and bear the burden of proving that the facts supporting these findings of fact and conclusions of law are still in effect.

IT IS FURTHER ORDERED that this order, together with all supporting documents, be sealed until such time as defendant _____ [*name*] has an opportunity to contest this order, except that defendant _____ [*name*] shall have access to this order and supporting documents after the seizure has been carried out.
Dated: _____.

_____ [*signature*]
Judge of the Court

[2] Use of Form

The order in [1], *above*, is for use to order seizure of goods bearing counterfeits of plaintiff's trademark or service mark, the means of making those counterfeits, and records documenting the manufacture, sale, or receipt of things involved in the use of the counterfeit marks in connection with the sale, offering for sale, or distribution of goods [*15 U.S.C. § 1116(d)(1)(A)*]. The form may be adapted for use when the counterfeit are used in connection with the sale, offering for sale, or distribution of services [*see 15 U.S.C. § 1116(d)(1)(A)*].

[3] Content of Order

The order must set forth [*15 U.S.C. § 1116(d)(5)*]:

- The findings of fact and conclusions of law required for the order.
- A particular description of the matter to be seized, and a description of each place at which the matter is to be seized.
- The time period, which must end no later than seven days after the date on which the order is issued, during which the seizure is to be made.
- The amount of security required to be provided under *15 U.S.C. § 1116(d)(4)(A)*.
- A date for the post-seizure hearing required under *15 U.S.C. § 1116(d)(10)*.

The court must order a United States marshal or other federal, state, or local law enforcement officer to serve a copy of the order and then to carry out the seizure under the order. Any materials seized under *15 U.S.C. § 1116(d)* must be taken into the custody of the court [*15 U.S.C. § 1116(d)(7)*]. However, for practical storage reasons, they may be remanded to the custody of plaintiff or plaintiff's agent.

The opening paragraph of the form includes an optional statement to be used if the United States attorney for the judicial district in which the order is sought appeared at the hearing on the application [*see 15 U.S.C. § 1116(d)(2)*].

Local rules should be consulted.

[4] Grounds for Issuance of Order

The court has no power to grant the application for the seizure order unless the following clearly appears from specific facts [*15 U.S.C. § 1116(d)(4)(B)*]:

- An order other than an ex parte seizure order is not adequate to achieve the purposes of *15 U.S.C. § 1114* (action for infringement of registered mark);

- The applicant has not publicized the requested seizure;

- The applicant is likely to succeed in showing that the defendant used a counterfeit mark in connection with the sale, offering for sale, or distribution of the same goods or services in connection with which the applicant uses the genuine mark;

- An immediate and irreparable injury will occur to the applicant if the seizure is not ordered;

- The matter to be seized will be located at the place identified in the application;

- The harm to the applicant of denying the application outweighs the harm to defendant's legitimate interests of granting the application; and

- Defendant, or persons acting in concert with him, her, or it, would destroy, move, hide, or otherwise make the matter inaccessible to the court, if the applicant were to proceed on notice to defendant.

[5] Time for Seizure

The order must specify the time period within which the seizure is to be made. That time period must end no later than seven days after the date on which the order is issued [*15 U.S.C. § 1116(d)(5)(C)*]. A United States marshal or other federal, state, or local law enforcement officer serves a copy of order and then carries out the seizure [*15 U.S.C. § 1116(d)(9)*]. The seized materials are taken into the custody of court [*15 U.S.C. § 1116(d)(7)*].

[6] Confidentiality of Seizure and Information Seized

The court must take appropriate action to protect defendant from publicity, by or at the behest of plaintiff, about the order and any seizure thereunder [*15 U.S.C. § 1116(d)(6)*]. The seizure order, together with the supporting documents, must be sealed until defendant has an opportunity to contest the order. However, defendant must have access to the order and supporting documents after the seizure has been carried out [*15 U.S.C. § 1116(d)(8)*].

When appropriate, the court must issue orders to protect defendant from undue damage from the disclosure of trade secrets or other confidential information during the course of the seizure, including orders restricting the applicant's access (or any agent or employee of the applicant) to the trade secrets or confidential information [*15 U.S.C. § 1116(d)(9)*].

[7] Protective Order With Respect to Discovery of Seized Records

The court must enter an appropriate protective order with respect to discovery and use of any records or information seized. The protective order must provide for appropriate procedures to ensure that confidential, private, proprietary, or privileged information contained in such records is not improperly disclosed or used [*15 U.S.C. § 1116(d)(7)*].

[8] Postseizure Hearing

The court must hold a hearing, unless hearing is waived by all the parties, on the date set in the order of seizure. That date must be not sooner than 10 and not later than 15 days after the order is issued, unless the applicant shows good cause for another date, or unless defendant consents to another date for hearing. At the hearing, the party obtaining the order must prove that the facts supporting the findings of fact and conclusions of law necessary to support the order are

still in effect. If that party fails to meet that burden, the court must dissolve or appropriately modify the order [*15 U.S.C. § 1116(d)(10)(A)*]. In connection with the hearing, the court may make such orders modifying the time limits for discovery under the Federal Rules of Civil Procedure as may be necessary to prevent frustration of the purposes of the hearing [*15 U.S.C. § 1116(d)(10)(B)*].

A person damaged by wrongful seizure or attempted wrongful seizure has a cause of action for the resulting damages and expenses [*see 15 U.S.C. § 1116(d)(11)*].

[9] Cross References

See also *§ 549.101*

For discussion and forms relating to orders, see Ch. 372, *Motions and Orders*

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Chapter 549 TRADEMARKS AND TRADE NAMES
PART IV. FORMS

48-549 California Forms of Pleading and Practice--Annotated § 549.103

§ 549.103 Complaint for Damages, Profits, and Injunctive and Other Equitable Relief [Code Civ. Proc. §§ 526, 527; Bus. & Prof. Code § 14250(a)]--Action for Infringement [Bus. & Prof. Code § 14245] and Dilution [Bus. & Prof. Code § 14247] of Service Mark Registered Under Model State Trademark Law [Bus. & Prof. Code § 14200 et seq.]

[1] FORM Complaint for Damages [Bus. & Prof. Code § 14340(a)], Profits [Bus. & Prof. Code § 14340(a)], and Injunctive and Other Equitable Relief [Code Civ. Proc. §§ 526, 527; Bus. & Prof. Code §§ 14330, 14335(a), 14340(a)]--Action for Infringement [Bus. & Prof. Code §§ 14320, 14330(b)] and Dilution [Bus. & Prof. Code § 14330(a)] of Service Mark Registered Under the California Trademark Law [Bus. & Prof. Code §§ 14200-14342]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DAMAGES, PROFITS, AND
[and DOES I through _____,]	)	INJUNCTIVE AND OTHER EQUITABLE RELIEF
Defendant(s).	)	(Service Mark Infringement and Dilution)
	)	
	)	

Plaintiff alleges:

FIRST COUNT

(Infringement of Mark)

[1. *Plaintiff's capacity and residence, if appropriate. See § 549.91, Paragraph 1.*]

[2. *Defendant's capacity and residence, if appropriate. See § 549.91, Paragraph 2.*]

[3. *Fictitious defendant allegation, if appropriate. See § 549.91, Paragraph 4.*]

[4. *Agency allegation, if appropriate. See § 549.91, Paragraph 5.*]

5. At all material times, plaintiff was and is engaged in _____ [*describe services rendered, e.g.,* the operation of a residential health and beauty spa, the sale of health and fitness services, and beauty counseling, including hair styling] in California under the service mark "_____" [*specify plaintiff's mark*].

6. Plaintiff first adopted and used the service mark "_____" [*specify plaintiff's mark*] to identify his/her/its services on _____ [*date*].

7. Plaintiff registered "_____" [*specify plaintiff's mark*] as his/her/its service mark in the Office of the Secretary of State of the State of California on _____ [*date*], under State of California Service Mark Registration No. _____. Plaintiff owns the registration, which is and continues to be in full force and effect. A certified copy of plaintiff's certificate of registration is attached as Exhibit "_____" and incorporated by reference.

8. Plaintiff has used the mark continuously since _____ [*date*], to identify his/her/its _____ [*describe plaintiff's services, e.g.,* health and beauty spa services]. In this connection, plaintiff uses his/her/its mark _____ [*describe plaintiff's use of the mark, e.g.,* in the advertising and promotion, throughout California, of health and beauty services]. A specimen of _____ [*describe specimen, e.g.,* one of plaintiff's advertisements] on which his/her/its service mark appears is attached as Exhibit "_____" and incorporated by reference.

9. Defendant _____ [*describe services rendered and geographical market served by defendant, e.g.,* owns and has operated two beauty salons in _____ (*city*)], California, under the name "_____" [*specify name*], since _____ [*date*]. A specimen _____ [*describe specimen, e.g.,* of one of defendant's advertisements] on which the name "_____" [*specify name*] appears is attached as Exhibit "_____" and incorporated by reference.

10. Defendant's name is _____ [*describe infringing nature of defendant's name, e.g.,* a colorable imitation of] plaintiff's registered service mark. Defendant uses the name "_____" [*specify name*] in connection with the sale, offering for sale, and advertising of his/her/its _____ [*specify defendant's services, e.g.,* hair cutting and styling services]. As such, defendant's use of the name "_____" [*specify name*] is likely to cause confusion, mistake, or deception among consumers as to the source or origin of plaintiff's services.

11. [Plaintiff is informed and believes, and thereon alleges, that] [D]efendant uses the name "_____" [*specify name*] _____ [*describe specific uses of the name, e.g.,* on store-fronts and doors, appointment cards, and sales receipts. Defendant uses the name, as well, in promotional materials and advertisements in connection with the sale of hair cutting and styling services].

12. There exists an overlap in plaintiff's and defendant's trade areas, in that both plaintiff's and defendant's services are

advertised and rendered in the same market(s) in California. [Additionally, plaintiff draws patrons from defendant's trade area.]

13. There exists an overlap in the nature of services rendered by plaintiff and defendant, in that both plaintiff and defendant are engaged in _____ [*specify similarity of services rendered, e.g.,* the sale of hair cutting and styling services].

14. Plaintiff's services have been and are extensively advertised, publicized, and sold throughout California, including _____ [*specify location of defendant's business*], under his/her/its service mark. By virtue thereof, together with consumer acceptance and recognition of the service mark "_____" [*specify plaintiff's mark*], plaintiff's mark identifies plaintiff's services only, and distinguishes them from those of others.

15. [Plaintiff is informed and believes and thereon alleges that] [A]s a proximate result of advantage accruing to defendant's business from plaintiff's statewide advertising, sales, and consumer recognition, and as a proximate result of _____ [confusion *or* deception *or* mistake, *or any combination thereof*] caused by defendant's advertising and sale of his/her/its services bearing the name "_____" [*specify defendant's name*], defendant has made profits in the approximate amount of $_____.

16. As a proximate result of advantage accruing to defendant's business from plaintiff's statewide advertising, sales, and consumer recognition, and as a proximate result of _____ [confusion *or* deception *or* mistake, *or any combination thereof*] caused by defendant's advertising and sale of his/her/its services bearing the name "_____" [*specify defendant's name*], plaintiff has been deprived of substantial sales of his/her/its services in the approximate amount of $ _____.

[17. On _____ [*date*], plaintiff advised defendant in writing of plaintiff's ownership of the service mark "_____" (*specify plaintiff's mark*), and the registration therefor, and requested defendant to immediately cease and desist from further use of the name "_____" (*specify defendant's name*) as either a trade name or service mark. Defendant has failed and refused, and continues to fail and refuse, to comply with plaintiff's request.]

18. Defendant's use of the name "_____" [*specify defendant's name*], is an infringement of plaintiff's registered mark, to plaintiff's general damage.

[19. *Allegation of grounds for injunctive relief. See § 549.91, Paragraph 18.*]

SECOND COUNT
(Dilution of Famous Mark)

20. Plaintiff refers to and incorporates herein Paragraphs 1 through _____ of its First Count.

21. Plaintiff's mark is, and since _____ [*date before defendant's infringing use began*] continuously has been, widely recognized by the general consuming public of California as a designation of the source of plaintiff's services. Association arising from the similarity between defendant's mark and plaintiff's famous mark is likely to impair the distinctiveness _____ [*add, if appropriate:* and to harm the reputation] of plaintiff's mark.

[22. Defendant willfully intended to cause dilution of plaintiff's famous mark.]

WHEREFORE, Plaintiff prays:

1. For an order requiring defendant to show cause why he/she/it should not be enjoined as hereinafter set forth, during the pendency of this action.

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant and his/her/its agents, servants, and employees, and all persons acting under, in concert with, or for him/her/it from using or displaying the name "_____" [*specify defendant's name*], or any reproduction, counterfeit, copy, or colorable imitation of plaintiff's "_____" [*specify plaintiff's mark*] service mark, in connection with _____ [*specify services, e.g.,* hair cutting and styling services] in California.

3. For an order declaring plaintiff to be the exclusive owner, in the State of California, of the "_____" [*specify plaintiff's mark*] service mark.

4. For an order declaring plaintiff's registration, under the Model State Trademark Law, of the "_____" [*specify plaintiff's mark*] service mark to be valid.

5. For an order requiring defendant to deliver up and destroy all _____ [*specify infringing materials, e.g.,* stationery, promotional literature, advertising and other material] bearing the infringing [and diluting] designations.

6. For three times the amount of defendant's profits derived from infringement of plaintiff's mark.

7. For three times the amount of plaintiff's actual damages suffered by reason of defendant's infringement of plaintiff's mark.

8. For costs of suit incurred herein.

9. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 549.91.*]

[2] Use of Form

This complaint is for use in a California state court by a plaintiff who is seeking to recover damages, the defendant's profits, and injunctive and other equitable relief for infringement of a service mark registered in California [*Bus. & Prof. Code §§ 14245, 14250*].

The complaint includes a count seeking injunctive relief for the dilution of the plaintiff's mark, which may be included if the plaintiff's mark is a famous mark [*see Bus. & Prof. Code § 14247*]. The cause of action in this count is available to protect a mark either registered in California or valid at common law.

The form may be adapted for use in cases involving only trademarks or both trademarks and service marks.

Each of the counts in this complaint may be included, under principles of pendent jurisdiction, in a complaint filed in

federal court for infringement of a federally registered trademark or service mark [*Golden Door, Inc. v. Odisho (N.D. Cal. 1977) 437 F. Supp. 956, 962 , aff'd, (9th Cir. 1980) 646 F.2d 347* ; *see § 549.91*]. Each of the counts in this form also may be combined with a state claim of unfair competition under *Bus. & Prof. Code § 17200 et seq.* For a complaint for unfair competition and infringement of trade name under California law, see *§ 549.107*.

[3] Allegations

This complaint alleges:

- Plaintiff's and defendant's rendition of services and use of their respective marks or names in connection with their businesses in California (Paragraphs 5, 8, and 9) [*see Bus. & Prof. Code §§ 14202(h), 14245* and discussion in *§ 549.56[2][a]*].

- Plaintiff's ownership of its service mark, through allegations of the fact and date of plaintiff's first adoption and use of its mark (Paragraph 6) [*see Bus. & Prof. Code § 14202(h)*].

- The fact and date of plaintiff's registration of its mark, and the registration number issued for it (Paragraph 7) [*see Bus. & Prof. Code §§ 14215, 14245* and discussion in *§ 549.52[2]*].

- Defendant's infringement of plaintiff's mark (Paragraph 10) [*see Bus. & Prof. Code § 14245* and discussion in *§ 549.56[2]*].

- The likelihood of confusion resulting from infringement (Paragraphs 11-13) [*see Bus. & Prof. Code § 14245(a)* and discussion in *§ 549.56[2]*].

- Defendant's profits and plaintiff's damages (Paragraphs 15 and 16) [*see Bus. & Prof. Code § 14250(a)* (up to three times defendant's profits and three times plaintiff's damages can be recovered in infringement suit) and discussion in *§ 549.56[3][b]*].

- Grounds for preliminary and permanent injunctive relief (Paragraph 19) [*see Bus. & Prof. Code § 14250(a)* and discussion in *§ 549.56[3][b]*; *Civ. Code § 3422* (permanent relief); *Code Civ. Proc. § 526* (preliminary relief)].

The complaint provides for attaching three exhibits: a certified copy of plaintiff's certificate of registration of the mark (Paragraph 7) [*see Bus. & Prof. Code § 14215* and discussion in *§ 549.52[2]*]; a specimen of plaintiff's mark (Paragraph 8); and a specimen of defendant's name or mark (Paragraph 9).

The complaint includes an optional allegation of defendant's failure and refusal to cease and desist using its infringing mark or name, despite plaintiff's request that it do so (optional Paragraph 17) [*see Bus. & Prof. Code § 14245(a)(3)* and discussion in *§ 549.56[2][c]*]. This allegation also serves to show the ongoing nature of defendant's infringement and plaintiff's resulting lack of an adequate remedy at law for defendant's infringing activities [*see Civ. Code § 3422(1), (3)*; *see also Code Civ. Proc. § 526(a)(4), (6)*].

As part of the relief, the complaint prays for destruction of all counterfeit marks, the means of making them, and any matter bearing them [*Bus. & Prof. Code § 14250(a)* and discussion in *§ 549.56[3][c]*].

In the second count, the complaint adds allegations to support a claim of dilution of plaintiff's mark, assuming it qualifies as a famous mark (Paragraphs 21 and 22) [*see Bus. & Prof. Code § 14247* and discussion in *§ 549.57*].

[4] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Cross References

See also *§ 549.91*

For a discussion and forms for use in actions involving false advertising, see Ch. 14, *Advertising*

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48-549 California Forms of Pleading and Practice--Annotated § 549.104

[Reserved]

§ 549.104[Reserved]

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48-549 California Forms of Pleading and Practice--Annotated § 549.105

§ 549.105 Proceedings to Seize Counterfeit Goods From Persons Manufacturing, Displaying for Sale, or Selling Counterfeit Goods [Bus. & Prof. Code § 14250(b)]--Ex Parte Application for Order

[1] FORM Proceedings to Seize Counterfeit Goods From Persons Manufacturing, Displaying for Sale, or Selling Counterfeit Goods [Bus. & Prof. Code § 14340(b)]--Ex Parte Application for Order

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	EX PARTE APPLICATION FOR ORDER OF
_____ [*name*],	)	SEIZURE OF COUNTERFEIT GOODS AND SUP-
[and DOES I through _____,]	)	PORTING DECLARATION OF
Defendant(s).	)	_____ [*name*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		[Trial Date: _____]

_____

1. Plaintiff _____ [*name*] applies for an order of seizure of _____ [*specify all goods, articles, or other matter bearing counterfeit marks and/or all means of making the marks*] in the possession or control of defendant.

2. Good reason exists for proceeding without notification to defendant in that _____ [*specify, e.g.,* defendant's prior acts have shown that defendant would destroy, move, hide, or otherwise make the goods sought to be seized inaccessible to the court if plaintiff proceeded on notice].

3. Plaintiff makes this application on the grounds that good cause exists for the seizure, and that plaintiff has the probability of success on the merits in the above-entitled action to enjoin defendant from manufacturing, using, displaying, or selling counterfeits.

4. Defendant is hereby advised, pursuant to *Business and Professions Code Section 14250(g)*, that plaintiff has filed an undertaking in the amount of $_____ with the Court.

5. Defendant is further advised, pursuant to *Business and Professions Code Section 14250(g)*, that he/she has the right to object to the undertaking on the grounds that either the surety or the amount of the undertaking is insufficient. If defendant objects to the undertaking, he/she must do so on or before _____ [*specify date within 30 days after date of seizure of goods*].

_____ [*date*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

[*Declaration in support of ex parte application for order of seizure, if necessary*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

I am the _____ [*identify declarant's relationship to the action, e.g.,* plaintiff] in the above-entitled action.

_____ [*State, in as many paragraphs as necessary, facts establishing (1) that defendant manufactures, uses, displays, or sells counterfeits of plaintiff's mark; (2) defendant's means of making counterfeit marks, goods, articles, and/or other matter bearing counterfeit marks; (3) defendant's possession or control of counterfeit goods; and (4) that defendant's activities constitute infringement of plaintiff's mark, likelihood of injury to plaintiff's business reputation, and/or dilution of distinctive quality of plaintiff's mark*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form is for use by a plaintiff seeking an order of seizure of counterfeits of trade or service marks registered under the Model State Trademark Law, the means of making the counterfeit marks, and all goods, articles, or other matter bearing the marks, collectively known as "counterfeit goods" [*see Bus. & Prof. Code § 14250(a), (b)*; *see also Bus. & Prof. Code § 14250(n)* ("counterfeit" defined)]. The counterfeit goods may be seized from persons manufacturing, displaying for sale, or selling the goods. Plaintiff may proceed either on motion or ex parte application, in a suit to enjoin the manufacture, use, display, or sale of counterfeits of its mark [*Bus. & Prof. Code § 14250(b)*]. For discussion and forms relating to motions and supporting declarations, see Ch. 372, *Motions and Orders* .

[3] Waiver of Requirement of Notice to Defendant

If it appears from plaintiff's ex parte application that there is good reason for proceeding without notification to defendant, the court may, for good cause shown, waive the requirement of notice for the ex parte proceeding [*Bus. & Prof. Code § 14250(b)*].

For discussion and forms relating to the requirement that an affidavit or declaration showing notice or attempted notice to opposing party or counsel or reason why notice should not be required to be submitted with ex parte application for order under *Cal. Rules of Ct., Rule 3.1204(b)*, see Ch. 372, *Motions and Orders* .

[4] Required Showing of Good Cause and Probable Success on the Merits

Plaintiff must make a showing of both good cause for the order and a probability of success on the merits of its suit to enjoin the manufacture, use, display, or sale of counterfeits of its mark [*Bus. & Prof. Code § 14250(b)*]. By verified complaint and/or declaration, plaintiff should therefore set forth facts showing the following:

- Defendant's manufacture, use, display, or sale of counterfeits of plaintiff's registered trade or service mark [*Bus. & Prof. Code § 14250(b)*].

- Defendant's means of making the counterfeit marks, goods, articles, and/or other matter bearing the counterfeit marks [*Bus. & Prof. Code § 14250(a)*].

- Defendant's possession or control of the counterfeit goods [*Bus. & Prof. Code § 14250(a)*].

- Defendant's activities constitute infringement of plaintiff's mark, likelihood of injury to plaintiff's business reputation, and/or dilution of the distinctive quality of plaintiff's mark [*see Bus. & Prof. Code §§ 14245, 14247*].

[5] Requirement That Plaintiff Post Undertaking

Before obtaining the seizure order, plaintiff must post an undertaking [*Bus. & Prof. Code § 14250(b)*]. The court must set the amount of the undertaking in accordance with the probable recovery of damages, costs, and expenses in an action by any person having a financial interest in the seized goods and who is damaged by the seizure of goods that are not counterfeit, if it is ultimately determined that the goods seized are not counterfeit [*Bus. & Prof. Code § 14250(c), (e)*]. Because counsel for plaintiff will not know, at the time of drafting the application or motion for the seizure order, the amount at which the court will set the undertaking, counsel should leave the amount blank and fill in the blank when the court sets the amount and orders the seizure.

A person entitled to recover damages for wrongful seizure of the goods [*see Bus. & Prof. Code § 14250(c)*] may object

to the undertaking within 30 days of the seizure [*Bus. & Prof. Code § 14250(f)*], and the motion or application for the seizure order must advise defendant of the following [*Bus. & Prof. Code § 14250(g)*]:

- That the undertaking has been filed.

- That defendant has the right to object to the undertaking on the grounds that the surety or the amount of the undertaking is insufficient.

- That the objection to the undertaking must be made within 30 days after the date of seizure of the goods.

For a discussion of an action for damages for wrongful seizure, see *§ 549.57[c]*.

[6] Cross References

For discussion of procedures applicable to undertakings, see *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.40* et seq.

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48-549 California Forms of Pleading and Practice--Annotated § 549.106

§ 549.106 Proceedings to Seize Counterfeit Goods From Persons Manufacturing, Displaying for Sale, or Selling Counterfeit Goods [Bus. & Prof. Code § 14250(b)]--Order [Code Civ. Proc. § 1003] Granting Ex Parte Application

[1] FORM Proceedings to Seize Counterfeit Goods From Persons Manufacturing, Displaying for Sale, or Selling Counterfeit Goods [Bus. & Prof. Code § 14250(b)]--Order [Code Civ. Proc. § 1003] Granting Ex Parte Application

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER GRANTING MOTION FOR ORDER OF
vs.	)	SEIZURE OF COUNTERFEIT GOODS
_____ [*name*],	)	Date: _____
[and DOES I through _____,]	)	Time: _____
Defendant[s].	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	[Trial Date: _____]

_____

The application of _____ [*identify party*, *e.g.*, plaintiff] for an order of seizure of counterfeit goods was heard by the court ex parte _____ [*date*], good cause being shown why defendant should not be notified, and the court having therefore waived the requirement of notice of the proceeding to defendant. Plaintiff appeared by counsel _____ [*name*].

On proof made, together with good cause and plaintiff's probability of success on the merits shown to the satisfaction of the court that the application ought to be granted,

IT IS ORDERED that the application be, and it hereby is, granted and ordered that all counterfeit marks, all means of making them, and all goods, articles, or other matter bearing the counterfeits that are in the possession or control of defendant shall be seized.

IT IS FURTHER ORDERED that the seizure shall take place on _____ [*date*]. The goods to be seized are more particularly described as follows: _____ [*description of counterfeit goods to be seized*]. The _____ [*identity of the persons or class of persons to effect seizure*] shall effect seizure of the counterfeit goods described above. The location(s) at which seizure is to occur is/are particularly described as follows: _____ [*describe location(s) at which seizure is/are to occur*]. Defendant shall be served with a copy of this order at the time of seizure.

IT IS FURTHER ORDERED that hearing is set for _____ [*date not more than 10 court days after the last date on which seizure is ordered*], at which time defendant may appear before this court and seek release of the above-described seized counterfeit goods.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is for use to order seizure of counterfeits of trade or service marks registered under the Model State Trademark Law, the means of making the counterfeit marks, and all goods, articles, or other matter bearing the marks [*Bus. & Prof. Code § 14250(b)*].

[3] Contents of Order

The order must specifically set forth [*Bus. & Prof. Code § 14250(b)*]:

- The date or dates on which the seizure is ordered to take place.
- A description of the counterfeit goods to be seized.
- The identity of the persons or class of persons to effect seizure.
- A description of the location or locations at which seizure is to occur.
- A hearing date not more than 10 court days after the last date on which seizure is ordered, at which any person from whom goods are seized may appear and seek release of the seized goods.

Any person from whom seizure is effected must be served with the order at the time of seizure [*Bus. & Prof. Code § 14250(b)*].

[4] Cross References

See also *§ 549.104*

For discussion and forms relating to orders, see Ch. 372, *Motions and Orders*

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48-549 California Forms of Pleading and Practice--Annotated § 549.107

§ 549.107 Complaint for Temporary and Permanent Injunctive Relief [Bus. & Prof. Code § 14402; Code Civ. Proc. §§ 526, 527] for Unfair Competition and Trade Name Infringement [Bus. & Prof. Code § 14401 et seq.]

[1] FORM Complaint for Temporary and Permanent Injunctive Relief [Bus. & Prof. Code §§ 14402, 17203; Code Civ. Proc. §§ 526, 527] for Unfair Competition [Bus. & Prof. Code §§ 17200-17208] and Trade Name Infringement [Bus. & Prof. Code § 14401 et seq.]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR INJUNCTION
[and DOES I through _____,]	)	(Unfair Competition and Trade Name Infringement)
Defendant(s).	)	
	)	
	)	

Plaintiff alleges:

[1. *Identity and capacity of plaintiff. See § 549.91, Paragraph 1.*]

[2. *Identity and capacity of defendant. See § 549.91, Paragraph 2.*]

[3. *Fictitious name allegation. See 549.91, Paragraph 4.*]

4. Plaintiff is, and at all times mentioned herein has been, engaged in the _____ [business *or* nonprofit activity] of _____ [*specify, e.g.,* selling and renting snow skis and skiing equipment].

5. Plaintiff has continuously done business under the [corporate and] trade name _____ [*specify, e.g.,* Western Ridge, Inc.] since _____ [*date*]. Plaintiff has built up valuable goodwill in this trade name, and it has come to be associated exclusively with plaintiff's business by the public generally throughout _____ [*specify market, marketing area, or territory, e.g.,* Northern California], as reflected by _____ [*allege facts showing that plaintiff's trade name has acquired secondary meaning, e.g.,* extensive advertising and promotion in this area from _____ [*date*], to the present time, resulting in approximately _____ individual sales and rentals to customers during that period].

6. Defendant _____ [*name*] is engaged in the business of _____ [*specify, e.g.,* selling backpacking, camping, and skiing equipment], [with its principal place of business] located at _____ [*specify address and city*], _____ County, California. After plaintiff's adoption and use of the trade name _____ [*specify, e.g.,* Western Ridge, Inc.], defendant, on or about _____ [*date*], began doing business under the trade name _____ [*specify, e.g.,* West Ridge Supplies]. Defendant's trade name is substantially similar to that of plaintiff, and defendant's use of that name creates a likelihood that plaintiff's customers, potential customers, and the public generally will be confused or misled as to the source of goods or services in that _____ [*specify, e.g.,* they are likely to believe that defendant's business is identical to or affiliated with that of plaintiff].

7. Defendant threatens to [and unless restrained will] continue to use the trade name _____ [*specify, e.g.,* West Ridge Supplies], as a result of which the public generally will be misled and deceived into believing that _____ [*specify, e.g.,* defendant's business is identical to or affiliated with that of plaintiff], all to the irreparable injury of plaintiff's business and goodwill and to the unjust enrichment of defendant]. Plaintiff has no adequate remedy at law in that _____ [*specify, e.g.,* it is extremely difficult to ascertain the amount of damages to plaintiff's business and goodwill].

8. On _____ [*date*], plaintiff _____ [*allege facts raising presumption of plaintiff's right of exclusive use of the trade name under Bus. & Prof. Code § 14411 et seq., e.g.,* filed articles of incorporation under *Section 200 of the Corporations Code* containing its corporate and trade name _____ (*specify, e.g.,* Western Ridge, Inc.)].

9. Defendant's continuing use of the confusingly similar trade name _____ [*specify, e.g.,* Western Ridge, Inc.], constitutes an infringement and violation of plaintiff's rights in his/her/its trade name.

10. Unless restrained by this Court, defendant threatens to and will continue to use the trade name _____ [*specify, e.g.,* West Ridge Supplies] in violation of plaintiff's rights.

WHEREFORE, plaintiff prays for judgment against defendant as follows:

1. For an order requiring defendant to show cause, if any they have, why he/she/it should not be enjoined as set forth below, during the pendency of this action.

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant from _____ [*specify, e.g.,* continuing to use the name West Ridge Supplies as his/her/its trade name].

3. For his/her costs incurred.

4. For any other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 549.91*.]

[2] Use of Form

This complaint is for use by a plaintiff to state a cause of action for injunctive relief for common law unfair competition based on defendant's use of a trade name that is confusingly similar to plaintiff's trade name and for trade name infringement [*see Bus. & Prof. Code §§ 14401, 14402*]. This form may be combined, when appropriate, with federal or state claims for trademark or service mark infringement, as an alternate ground for injunctive relief [*see §§ 549.91, 549.103*].

For further discussion and forms relating to injunctive relief in general, including the procedure and additional forms for obtaining preliminary injunctive relief, see Ch. 303, *Injunctions* .

[3] Allegations

This complaint for injunctive relief alleges the following [Cowles Magazines & Broadcasting, Inc. v. Elysium, Inc. (1967) 255 Cal. All. 2d 731, 733, *255 Cal. App. 2d 731, 63 Cal. Rptr. 507*]:

- Plaintiff's prior adoption and use of a trade name that has acquired secondary meaning with the public (Paragraphs 4 and 5) [*see* [4][a], [b], *below*].

- Subsequent adoption and use of a confusingly similar trade name by the defendant, creating the likelihood of public confusion (Paragraph 6) [*see* [4][c], [d], *below*].

- Injury to the plaintiff unless defendant is enjoined from further use of the confusingly similar trade name (Paragraph 7).

- The basis of plaintiff's presumptive right to exclusive use of that name [*see Bus. & Prof. Code § 14411 et seq.*; *see § 549.70*] and defendant's infringement or violation of plaintiff's right (Paragraphs 8 and 9) [*see § 549.71*], as a basis for injunctive relief [*Bus. & Prof. Code § 14402*].

[4] Elements of Cause of Action

[a] In General

An action for trade name infringement as unfair competition must allege [*see Sunset House Distributing Corp. v. Coffee Dan's Inc. (1966) 240 Cal. App. 2d 748, 753, 50 Cal. Rptr. 49* ; *Dino, Inc. v. Boreta Enterprises, Inc. (1964) 226 Cal. App. 2d 336, 338-339, 38 Cal. Rptr. 167*]:

- Prior adoption and use of the plaintiff's trade name such that it has acquired secondary meaning;

- Subsequent use of a confusingly similar name by the defendant;
- The likelihood of public confusion; and
- That the plaintiff has been or is likely to be damaged by the defendant].

Despite the phrase "unfair competition," direct competition between the parties is not a necessary element; the emphasis is on "unfair" use of a confusingly similar name [*see Ball v. American Trial Lawyers Assn. (1971) 14 Cal. App. 3d 289, 303, 92 Cal. Rptr. 228*].

It is not necessary to show fraud or an otherwise culpable mental state on the defendant's part if only injunctive relief is sought [*Tomlin v. Walt Disney Productions (1971) 18 Cal. App. 3d 226, 235-236, 96 Cal. Rptr. 118* ; *see Ball v. American Trial Lawyers Assn. (1971) 14 Cal. App. 3d 289, 303-304, 306, 92 Cal. Rptr. 228*]. On the other hand, if damages are sought, they must be specifically pleaded and proved and must be coupled with a showing that they are the result of (1) the defendant's failure to take reasonable precautions to prevent public confusion, (2) with the intent to deceive the public as to the source of the goods of service [*see Tomlin v. Walt Disney Productions (1971) 18 Cal. App. 3d 226, 235-236, 96 Cal. Rptr. 118* ; *Gordon v. Warner Bros. Pictures, Inc. (1969) 269 Cal. App. 2d 31, 39, 74 Cal. Rptr. 499*].

[b] Secondary Meaning

"Secondary meaning" is established by showing that one person has adopted and used a particular name in reference to his or her goods and services with the result that the name has come to be identified exclusively with those goods or services by the relevant branch of the purchasing public. The existence of secondary meaning is a question of fact determined under all the circumstances; mere priority of use or use for a particular period of time is not in itself determinative [*Gordon v. Warner Bros. Pictures, Inc. (1969) 269 Cal. App. 2d 31, 36-37, 74 Cal. Rptr. 499* ; *Family Record Plan, Inc. v. Mitchell (1959) 172 Cal. App. 2d 235, 243, 342 P.2d 10* ; *see Dino, Inc. v. Boreta Enterprises, Inc. (1964) 226 Cal. App. 2d 336, 341, 38 Cal. Rptr. 167* (noting cases in which 27 years' use was held insufficient and five months' use was sufficient for secondary meaning to attach)]. However, the duration and continuity of prior use is a relevant factor, as are the extent of advertising and promotion of the original name, sales figures showing the number of people who have purchased goods or services associated with the original name, and identification of the parties' respective markets or marketing areas [*North Carolina Dairy Foundation, Inc. v. Foremost-McKesson, Inc. (1979) 92 Cal. App. 3d 98, 109-110, 154 Cal. Rptr. 794* ; *Cowles Magazines & Broadcasting, Inc. v. Elysium, Inc. (1967) 255 Cal. App. 2d 731, 735, 63 Cal. Rptr. 507*]. Proof of secondary meaning is sufficient if it is shown that a substantial segment of the buying population associates the name or design with a single source, even if that source is anonymous [*North Carolina Dairy Foundation, Inc. v. Foremost-McKesson, Inc. (1979) 92 Cal. App. 3d 98, 108, 110, 154 Cal. Rptr. 794*].

Common, generic, geographic, or descriptive words that cannot be exclusively appropriated as a trademark may nonetheless acquire secondary meaning [*see California Western School of Law v. California Western University (1981) 125 Cal. App. 3d 1002, 1009, 178 Cal. Rptr. 685*]. However, fanciful or arbitrary words are entitled to stronger protection, because it is easier for subsequent users to adopt a dissimilar name [*Metro-Goldwyn-Mayer, Inc. v. Lee (1963) 212 Cal. App. 2d 23, 31, 27 Cal. Rptr. 833*].

Determining the relevant "public" is material in establishing secondary meaning. Generally, it must be a segment of the population that comprises enough people to contradistinguish them from a few [*Metro-Goldwyn-Mayer, Inc. v. Lee (1963) 212 Cal. App. 2d 23, 31, 27 Cal. Rptr. 833* ; *see Ball v. American Trial Lawyers Assn. (1971) 14 Cal. App. 3d 289, 308, 306, 92 Cal. Rptr. 228* (segment of public relevant to determine public confusion distinguished from smaller segment of public relevant to establish secondary meaning)].

[c] Similar Name or Design

The similarity of names is intertwined with the likelihood of confusion. In other words, the names need not be identical so long as they are sufficiently similar to create a likelihood of confusion or deception [*Hair v. McGuire (1961) 188 Cal. App. 2d 348, 353, 10 Cal. Rptr. 414*]. Similarity is determined on the basis of the total effect of the name, rather than on comparison of individual words [*Ball v. American Trial Lawyers Assn. (1971) 14 Cal. App. 3d 289, 303-304, 306, 92 Cal. Rptr. 228* ; *see, e.g.,* *Cowles Magazines & Broadcasting, Inc. v. Elysium, Inc. (1967) 255 Cal. App. 2d 731, 737-738, 63 Cal. Rptr. 507* ("Nude Look" is not per se confusingly similar to "Look" when both words in former name are given equal emphasis)].

[d] Public Confusion

Proof of actual confusion is not required, as long as a probability or likelihood of confusion is shown. The likelihood of public confusion, in turn, ordinarily is a factual question to be determined under all the circumstances [*Ball v. American Trial Lawyers Assn. (1971) 14 Cal. App. 3d 289, 308, 310, 92 Cal. Rptr. 228* ; *see* *Schwartz v. Slenderella Systems of California, Inc. (1954) 43 Cal. 2d 107, 112, 271 P.2d 857*]. The test is essentially whether a person of ordinary intelligence could reasonably be deceived or confused [*Hair v. McGuire (1961) 188 Cal. App. 2d 348, 353, 10 Cal. Rptr. 414*].

Close similarity between names or actual instances of public confusion are not necessarily determinative, although each will support a finding of likelihood of confusion [*Schwartz v. Slenderella Systems of California, Inc. (1954) 43 Cal. 2d 107, 112, 271 P.2d 857* ; *Hair v. McGuire (1961) 188 Cal. App. 2d 348, 353, 10 Cal. Rptr. 414*].

Although direct competition is not an element of the action in itself [*see* [a], *above*], the likelihood of confusion is most strongly shown by the fact that the parties are in direct competition in the same locality or that they deal in articles or services so similar that the public might reasonably conclude that the plaintiff had merely enlarged the scope of his or her basic operations. In other situations, the plaintiff must plead and prove special circumstances peculiar to the two businesses involved, from which confusion would be likely to result [*Tomlin v. Walt Disney Productions (1971) 18 Cal. App. 3d 226, 235, 236, 96 Cal. Rptr. 118*].

[5] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see* *E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[6] Cross References

See also*§§ 549.91, 549.103*

For further discussion concerning actions for unfair competition in general, see Ch. 565, *Unfair Competition*

For memoranda supporting an application for a temporary restraining order or preliminary injunction restraining unfair competition based on trade name infringement, see California Points and Authorities, Ch. 116, *Injunctions* (Matthew Bender)

Witkin, California Procedure, vol. 3, *Actions*, § 741; vol. 5, *Pleading*, §§ 735, 786; vol. 6, *Provisional Remedies*, § 312 (4th ed. 1996-1997)

Witkin, Summary of California Law, vol. 13, *Equity* (10th ed. 2005)

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§§ 550.03through 550.09 [Reserved]

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§ 550.15 Nature of Trespass Act

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[2] Intentional

[3] Result of Ultrahazardous Activity

§ 550.16 Nature of Injury

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[2] Placing or Leaving Foreign Matter on Land

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§ 550.17 Subsurface Trespass

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[3] Election of Remedies

[a] One or Successive Actions

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[2] Accrues

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[b] Permanent Trespass

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[h] Mental Distress

[4] Exemplary Damages

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[1] Consent

[a] Express

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[3] Entry Under Color of Authority

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§§ 550.23through 550.29 [Reserved]

§ 550.30 Related Matthew Bender Publications

[1] California Points and Authorities

[2] California Real Estate

§ 550.31 State Statutes

[1] Attorney's Fees

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[3] Consent

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[a] Generally

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[5] Defenses

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§ 550.33 Law Reviews

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§§ 550.35through 550.39 [Reserved]

§ 550.40 Complaint for Damages for Trespass to Real Property and for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)], and Permanent Injunction [Civ. Code § 3422]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Specification of Damages

[5] Verification

[6] Pleading Possession

[7] Jurisdiction and Venue

[8] Attorney's Fees

[9] Cross References

§ 550.41 Complaint for Damages for Trespass to Real Property Easement and for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)] and Permanent Injunctions [Civ. Code § 3422]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Cross References

§ 550.42 Complaint for Damages for Trespass to Real Property and for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)] and Permanent Injunction [Civ. Code § 3422] and for Conversion of Personal Property [Civ. Code § 3336]

[1] FORM

[2] Use of Form

[3] Allegations

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§ 550.43 Complaint for Damages for Trespass to Personal Property

[1] FORM

[2] Use of Form

[3] Allegations

§ 550.44 Allegation--Plaintiff's Right to Possession When Not in Actual Possession and Not Owner of Property

[1] FORM

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§ 550.45 Allegation--Plaintiff's Right to Cost of Restoration That Exceeds Diminution in Value

[1] FORM

[2] Use of Form

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§ 550.46 Allegation--Defendant Acted With Knowledge That Trespass Was Substantially Certain Result

[1] FORM

[2] Use of Form

§ 550.47 Allegation--Plaintiff Entitled to Cost of Damages Plus Costs to Prevent Further Harm

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§ 550.48 Affirmative Defense--Action Barred by Statute of Limitations

[1] FORM

[2] Use of Form

[3] Cross References

§ 550.49 Affirmative Defense--Consensual Entry--Express Consent

[1] FORM

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§ 550.50 Affirmative Defense--Consensual Entry--Implied Consent

[1] FORM

[2] Use of Form

§ 550.51 Affirmative Defense--Entry for Necessity

[1] FORM

[2] Use of Form

§ 550.52 Affirmative Defense--Constitutional Right to Free Expression of Ideas in Public Forum

[1] FORM

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48-550 California Forms of Pleading and Practice--Annotated § 550.01

§ 550.01 Scope of Chapter

This chapter discusses actions for trespass to real property. The chapter contains the following forms:

- Forms of complaint for damages for trespass [*see* §§ 550.40-550.43].
- Forms of allegation for use by the plaintiff [*see* §§ 550.44-550.47].
- Forms of affirmative defenses [*see* §§ 550.48-550.52].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsTrespass to Real PropertyTortsPremises Liability & PropertyTrespassGeneral OverviewTortsPremises Liability & PropertyTrespassDefensesGeneral OverviewTortsPremises Liability & PropertyTrespassRemediesDamagesGeneral Overview

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48-550 California Forms of Pleading and Practice--Annotated § 550.02

§ 550.02 Cross References

- For discussion and forms pertaining to encroachments on adjoining land, see Ch. 11, *Adjoining Landowners* .

- For discussion and forms pertaining to trespassing animals, see Ch. 23, *Animals: Civil Liability* .

- For an affirmative defense that an act was committed to protect land from trespasser, see Ch. 58, *Assault and Battery* .

- For discussion and forms pertaining to boundary disputes, see Ch. 101, *Boundaries* .

- For discussion and forms pertaining to recovery of possession of personal property, see Ch. 119, *Claim and Delivery* .

- For discussion and forms pertaining to conversion of personal property, see Ch. 150, *Conversion* .

- For discussion and forms pertaining to pleading the nature and extent of tort damages, see Ch. 177, *Damages* .

- For discussion and forms pertaining to the existence and obstruction of easements, see Ch. 240, *Easements* .

- For discussion and forms pertaining to actions to recover possession of real property, see Ch. 241, *Ejectment* .

- For forms of complaint for damages to real property resulting from blasting, see Ch. 256, *Explosives* .

- For discussion and forms pertaining to trespass to the person, see Ch. 257, *False Imprisonment* .

- For discussion and forms pertaining to encroaching fences, see Ch. 266, *Fences* .

- For discussion and forms pertaining to property damage caused by negligence in allowing a fire to spread, see Ch. 267, *Fires* .

- For discussion and forms pertaining to injuries to person or property from gas or electricity, see Ch. 277, *Gas and Electricity* .

- For discussion and forms pertaining to procedures for seeking injunctive relief, see Ch. 303, *Injunctions* .

- For discussion and forms pertaining to property damage involving irrigation systems, see Ch. 315, *Irrigation* .

- For discussion and forms pertaining to actions to regain possession of real property and actions against forcible entry and forcible detainer, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

- For a form of complaint for damages suffered by remainderman by life tenant's injury to inheritance, see Ch. 344, *Life Estates and Remainders* .

- For discussion and forms pertaining to the removal of timber, see Ch. 350, *Logs and Timber* .

- For discussion and forms pertaining to actions involving trespass to the person, see Ch. 357, *Malicious Prosecution and Abuse of Process* .

- For forms of complaint for damages suffered by trespass involving mines and mining, see Ch. 363, *Mining* .

- For discussion and forms for use in nuisance actions involving real property, see Ch. 391, *Nuisance* .

- For a form of complaint for subsurface trespass from slant drilling of well, see Ch. 393, *Oil and Gas* .

- For discussion and forms pertaining to pollution as a trespass, see Ch. 418, *Pollution and Environmental Matters* .

- For discussion and forms pertaining to actions against possessors of real property, see Ch. 421, *Premises Liability* .

- For discussion and forms relating to damage caused by flood waters, surface waters, and the escape of impounded waters, see Ch. 575, *Waters* .

- For discussion and forms pertaining to actions for trespass of personal privacy rights resulting from unlawful search and seizure, see Ch. 429, *Privacy* .

- For a form of complaint against a public entity for nuisance which may include trespass, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

- For discussion and forms for use in resolving questions of title to real property, see Ch. 482,

Quieting Title .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersGeneral OverviewTortsDamagesGeneral OverviewTortsIntentional TortsConversionRemediesTortsPremises Liability & PropertyTrespassGeneral OverviewTortsPremises Liability & PropertyTrespassDefensesGeneral Overview

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[Reserved]

§§ 550.03[Reserved]

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48-550 California Forms of Pleading and Practice--Annotated § 550.10

§ 550.10 Governing Law

Trespass and its resultant liability is defined by case law [*see Wilson v. Interlake Steel Co. (1982) 32 Cal. 3d 229, 185 Cal. Rptr. 280, 649 P.2d 922* ; *Girard v. Ball (1981) 125 Cal. App. 3d 772, 178 Cal. Rptr. 406]* .

The statute of limitations on trespass actions is governed by *Code Civ. Proc. § 338(b)*. The period applicable to trespass on oil or gas wells is governed by *Code Civ. Proc. § 3493*/4, and on timber by *Civ. Code § 3346(c)*.

Compensatory damages for trespass are governed by *Civ. Code § 3333*. Punitive damages may be awarded for trespass under *Civ. Code § 3294(a)*. Damages for the wrongful occupation of land, under some circumstances, are governed by *Civ. Code § 3334*.

Crimes relating to trespass are set out in *Penal Code §§ 552-558.1*, and *602-603*.

Prob. Code § 9651 establishes immunity from both civil and criminal liability for a decedent's personal representative who takes possession of real or personal property in the good faith belief that it is part of decedent's estate.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesProperty CrimesBurglary & Criminal TrespassCriminal TrespassGeneral OverviewReal Property LawTortsTrespass to Real PropertyTortsPremises Liability & PropertyTrespassGeneral OverviewTortsPremises Liability & PropertyTrespassDefensesStatutes of LimitationsTortsPremises Liability & PropertyTrespassRemediesDamagesGeneral Overview

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48-550 California Forms of Pleading and Practice--Annotated § 550.11

§ 550.11 Trespass as Tort

Trespass is an unlawful interference with possession of property [*Girard v. Ball (1981) 125 Cal. App. 3d 772, 788, 178 Cal. Rptr. 406]* . The essence of trespass is an unauthorized entry onto the land of another [*Civic W. Corp. v. Zila Indus., Inc. (1977) 66 Cal. App. 3d 1, 16, 135 Cal. Rptr. 915* ; *Miller & Desatnik Mgmt. Co. v. Bullock (1990) 270 Cal. Rptr. 600]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsTrespass to Real PropertyTortsPremises Liability & PropertyTrespassGeneral OverviewTortsPremises Liability & PropertyTrespassElements

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48-550 California Forms of Pleading and Practice--Annotated § 550.12

§ 550.12 Trespass as Crime

Trespass under statutorily described circumstances may be a misdemeanor. Unauthorized entry on industrial property which has posted signs, unauthorized entry on prescribed areas belonging to the University of California, and placement of advertisements on public property are misdemeanor trespasses [*Penal Code §§ 552-558.1*]. In addition to these very specific activities and those that parallel tort trespass (for example, *Penal Code § 602(m)* includes entry and occupation without the owner's consent as a misdemeanor), misdemeanor trespass activities include, but are not limited to, refusing to leave a public building of a public agency after hours, wilfully obstructing attendance at college classes, intentionally interfering with a lawful business by obstructing or intimidating those attempting to carry on the business or their customers, and peddling without permission at publicly owned airports [*Penal Code §§ 602-603*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesProperty CrimesBurglary & Criminal TrespassCriminal TrespassGeneral OverviewCriminal Law & ProcedureCriminal OffensesProperty CrimesBurglary & Criminal TrespassCriminal TrespassElementsCriminal Law & ProcedureCriminal OffensesProperty CrimesBurglary & Criminal TrespassCriminal TrespassPenalties

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48-550 California Forms of Pleading and Practice--Annotated § 550.13

§ 550.13 Distinguished From Conversion

Conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his or her rights therein. It requires the plaintiff to show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of the property [*Zaslow v. Kroenert (1946) 29 Cal. 2d 541, 549-550, 176 P.2d 1]* . If the conduct does not amount to a substantial interference with the possession or the right thereto, but consists of intermeddling with or use of or damages to the personal property, the owner has a cause of action for trespass. For example, a person who has removed personal property from an apartment and placed it in storage in the owner's name, without any attempt to claim any ownership interest in the property, may be charged with trespass to the property, but not conversion, which requires an assertion of ownership right [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 610, 12 Cal. Rptr. 488, 361 P.2d 20]* .

Although a lesser interference may be actionable as a trespass to personal property, or trespass to chattels, than would be actionable as a conversion, some actual injury must have occurred to state an action for trespass to chattels. There must be some interference with the possessor's use or possession of the personal property or interference with some other legally protected interest in that property [*Intel Corp. v. Hamidi (2003) 30 Cal. 4th 1342, 1351, 1 Cal. Rptr. 3d 32, 71 P.3d 296]* . In one case, for example, the California Supreme Court held that the tort did not encompass the mass sending of e-mails to the employees of a large corporation because the e-mails neither damaged nor impaired the functioning of the corporation's computer system [*Intel Corp. v. Hamidi (2003) 30 Cal. 4th 1342, 1347, 1 Cal. Rptr. 3d 32, 71 P.3d 296* (loss of employee time spent reading and responding to messages was insufficient to support recovery)]. The Court distinguished cases in which mass e-mails actually adversely effected the performance of a computer system, or threatened to do so, which might support a cause of action for trespass to chattels [*see Intel Corp. v. Hamidi (2003) 30 Cal. 4th 1342, 1353-1356, 1 Cal. Rptr. 3d 32, 71 P.3d 296]* .

For a further discussion of conversion, see Ch. 150, *Conversion* . For a form of complaint for conversion combined with trespass, see *§ 550.42*; see *§ 550.43* for a form of complaint for trespass to personal property.

Legal Topics:

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

Real Property LawTortsTrespass to Real PropertyTortsIntentional TortsConversionElementsTortsPremises Liability & PropertyTrespassElements

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§ 550.14 Encroachment as Form of Trespass

A trespass on a neighbor's property may involve an encroachment, or a gradual entrance that is continuing; most frequently occurring throughthe intrusion of structures or trees. For a further discussion of encroachments, see Ch. 11, *Adjoining Landowners* . An encroachment or other trespass that obstructs the free use of the property and interferes with the comfortable use of that property may also constitute a nuisance [*see Civ. Code § 3479*]. For a further discussion of nuisance, see Ch. 391, *Nuisance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersEncroachmentsReal Property LawTortsTrespass to Real PropertyTortsPremises Liability & PropertyTrespassElements

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48-550 California Forms of Pleading and Practice--Annotated § 550.15

§ 550.15 Nature of Trespass Act

[1] Generally

There is no liability for a trespass unless the trespass is intentional, the result of recklessness or negligence, or the result of engaging in an extrahazardous activity [*Wilson v. Interlake Steel Co. (1982) 32 Cal. 3d 229, 233, 185 Cal. Rptr. 280, 649 P.2d 922* ; *Gallin v. Poulou (1956) 140 Cal. App. 2d 638, 645, 295 P.2d 958]* . The essence of a cause of action for trespass is an unauthorized entry onto the land of another [*Civic W. Corp. v. Zila Indus., Inc. (1977) 66 Cal. App. 3d 1, 16, 135 Cal. Rptr. 915]* .Peaceable entry on land by consent is not trespass [*Girard v. Ball (1981) 125 Cal. App. 3d 772, 788, 178 Cal. Rptr. 406* ; for further discussion, *see § 550.22[1]*]. For discussion of recovery of damages for trespass or injury to property caused by negligence, see Ch. 177, *Damages* , and Ch. 380, *Negligence* .

[2] Intentional

Every unauthorized entry on another's property is a trespass and any person who makes such an entry is a trespasser. A trespasser is one who goes on the premises of another without invitation, express or implied, and does so out of curiosity, or for his or her own purposes or convenience, and not in the performance of any duty to the owner. It is not necessary that one making such an entry should have any unlawful intent [*Bauman v. Beaujean (1966) 244 Cal. App. 2d 384, 389, 53 Cal. Rptr. 55* ; *Miller v. National Broad. Co. (1986) 187 Cal. App. 3d 1463, 1480-1481, 232 Cal. Rptr. 668]* . Although intent to trespass is an essential element of a cause of action for trespass, intent to cause damage is not, and the trespasser is liable for the damage caused even though that damage was neither intended nor foreseen [*Meyer v. Pacific Employers Ins. Co. (1965) 233 Cal. App. 2d 321, 326, 43 Cal. Rptr. 542]* . Even a child of tender years may be a trespasser [*Fullerton v. Conan (1948) 87 Cal. App. 2d 354, 355-356, 197 P.2d 59* (five-year-old girl)].

The doing of an act that will, to a substantial certainty, result in the entry of foreign matter on another's land suffices for an intentional trespass to land on which liability may be based. An intent to harm is not required [*Roberts v. Permanente Corp. (1961) 188 Cal. App. 2d 526, 530-531, 10 Cal. Rptr. 519* ; Restatement of Torts § 158].

[3] Result of Ultrahazardous Activity

Liability for trespass may be the result of engaging in an extrahazardous activity [*see* *Wilson v. Interlake Steel Co.*

(1982) 32 Cal. 3d 229, 233, 185 Cal. Rptr. 280, 649 P.2d 922] . An activity is ultrahazardous when it necessarily involves a risk of serious harm that cannot be eliminated by the exercise of the utmost care, and is not a matter of common usage [*Luthringer v. Moore (1948) 31 Cal. 2d 489, 498-499, 190 P.2d 1]* . The ultrahazardous nature of the activity may be used to support the intent necessary for an action in trespass, but trespass is not the exclusive remedy for one sustaining injury from such an activity. An action for strict liability directly based on the ultrahazardous activity would be a likely remedy to pursue in such a case [*see* *Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 56 Cal. Rptr. 128* (action for damages based on negligence and strict liability)].

An early case found liability for trespass without any negligence on the part of the defendant, essentially the result of an ultrahazardous activity, in an action involving the blow-out of an oil well [*Green v. General Petroleum Corp. (1928) 205 Cal. 328, 331-335* , (deposit of oil, sand, mud, and rocks on the plaintiff's land)]. This type of strict liability extends to invasions caused by vibrations resulting from dynamite blasting because there is no reason for differentiating between responsibility for damages done by physical projectiles or missiles and responsibility for damage done by vibration or concussion [*McKenna v. Pacific Elec. Ry. Co. (1930) 104 Cal. App. 538, 543, 286 P. 445]* .

Blasting in urban areas and diversion of water are two activities for which landowners can be held strictly liable for their actions [*see* *Alonso v. Hills (1950) 95 Cal. App. 2d 778, 783, 214 P.2d 50* , and *Parker v. Larsen (1890) 86 Cal. 236, 238* ; *Smith v. East Bay Mun. Util. Dist. (1954) 122 Cal. App. 2d 613, 622-623, 265 P.2d 610* , respectively]. For further discussion and forms relating to ultrahazardous activities, see Ch. 256, *Explosives* , Ch. 380, *Negligence* , and Ch. 421, *Premises Liability* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsInherently Dangerous ActivitiesReal Property LawTortsTrespass to Real PropertyTortsPremises Liability & PropertyTrespassElementsTortsStrict LiabilityAbnormally Dangerous ActivitiesGeneral Overview

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§ 550.16 Nature of Injury

[1] Direct or Indirect

Trespasses may be committed by consequential and indirect injuries as well as by direct and forcible injuries [*Wilson v. Interlake Steel Co. (1982) 32 Cal. 3d 229, 185 Cal. Rptr. 280]* . Thus, home owners may recover for damages caused by vibrations and noises emanating from a nearby plant, even though the defendant did not cause the direct entry of matter onto their land [*McNeill v. Redington (1944) 67 Cal. App. 2d 315, 320, 154 P.2d 428]* , and a negligent invasion by fire which causes damage to real property constitutes a trespass [*Elton v. Anheuser-Busch Beverage Group, Inc. (1996) 50 Cal. App. 4th 1301, 1305, 58 Cal. Rptr. 2d 303]* .

There is no distinction between trespass by forcible injury and trespass committed by consequential and indirect injury [*Smith v. Lockheed Propulsion Co. (1967) 247 Cal. App. 2d 774, 784, 56 Cal. Rptr. 128]* . However, without an injury or entry with the requisite intent it appears that there will not be an actionable trespass [*Gallin v. Poulou (1956) 140 Cal. App. 2d 638, 641-644, 295 P.2d 958* ; for further discussion of actionable trespass, *see § 550.15[1]*]. For discussion and forms relating to the primary means of redressing these wrongs, see Ch. 256, *Explosives* , Ch. 380, *Negligence* , and Ch. 421, *Premises Liability* .

[2] Placing or Leaving Foreign Matter on Land

Trespass may be the result of the defendant's personally intruding on the plaintiff's land and leaving objects behind. For example, entry by abuilding contractor and unauthorized dumping of building materials is a trespass, not just by the person, but by the deposited materials [*Dandoy v. Oswald Bros. Paving Co. (1931) 113 Cal. App. 570, 571, 298 P. 1030]* . Trespass may also occur by allowing items to remain on property beyond the time they were authorized to be left there; there is no requirement that the original entry of either the person or the material be a trespass [*Herond v. Bonsall (1943) 60 Cal. App. 2d 152, 155-156, 140 P.2d 121* (restaurant equipment left by tenant after expiration of lease)].

A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing that a person has tortiously placed there, whether or not that person has the ability to remove it [*Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App. 4th 334, 345, 23 Cal. Rptr. 2d 377* ; *Mangini v. Aerojet-Gen. Corp. (1991) 230*

Cal. App. 3d 1125, 1148, 281 Cal. Rptr. 827 ; *Restatement (Second) of Torts § 161(1)*]. Therefore, a property owner who discharges hazardous waste on or otherwise pollutes his or her own property has committed a continuing trespass against later owners because causing a public nuisance by contaminating soil and groundwater is tortious conduct [*Newhall Land & Farming Co. v. Superior Court (1993) 19 Cal. App. 4th 334, 346-347, 23 Cal. Rptr. 2d 377* ; *see also Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1148, 281 Cal. Rptr. 827* ; *but see Capogeannis v. Superior Court (1993) 12 Cal. App. 4th 668, 675, 15 Cal. Rptr. 2d 796* (no trespass because creating public nuisance not "tortious" conduct if no special injury to plaintiff differing in kind from injury to general public)]. For discussion of torts, including trespass, based on pollution, see Ch. 418, *Pollution and Environmental Matters* .

[3] Causing Entry of Tangible Matter on Land

Trespass may occur without a personal physical entry by the trespasser. For example, fumes, vapors, dust, dirt, sediment, lint, and waste materials emitted into the atmosphere by the defendant, resulting in an injurious coating on the plaintiff's property constitute a trespass and injury to real property [*Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 273, 288 P.2d 507* ; for discussion of the obstruction of another's comfortable enjoyment of his or her property, see Ch. 391, *Nuisance*].

Not every entry of matter on the land of another constitutes an actionable trespass. However, the doing of an act that will to a substantial certainty result in the entry of foreign matter on another's land suffices to establish an intentional trespass to land on which liability may be based [*Roberts v. Permanente Corp. (1961) 188 Cal. App. 2d 526, 530-531, 10 Cal. Rptr. 519]* .

[4] Causing Entry of Intangible Matter on Land

Trespass may be predicated on the intrusion of noise, odor, or light only if it is accompanied by the deposit of particulate matter on the plaintiff's property or actual physical damage to the plaintiff's property [*San Diego Gas & Elec. Co. v. Superior Court (1996) 13 Cal. 4th 893, 936, 55 Cal. Rptr. 2d 724* (electromagnetic fields); *Wilson v. Interlake Steel Co. (1982) 32 Cal. 3d 229, 232-233, 185 Cal. Rptr. 280, 649 P.2d 922]* . All intangible intrusions alone, such as noise, odor, or light, are dealt with as nuisance cases, not trespass [*Wilson v. Interlake Steel Co. (1982) 32 Cal. 3d 229, 232-233, 185 Cal. Rptr. 280, 649 P.2d 922]* . For a further discussion of nuisance generally, see Ch. 391, *Nuisance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsTrespass to Real PropertyTortsPremises Liability & PropertyTrespassGeneral OverviewTortsPremises Liability & PropertyTrespassElements

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§ 550.17 Subsurface Trespass

An invasion of a person's interest in the subsurface level of the property constitutes an actionable trespass. The plaintiff may recover damages for the trespass and wrongful removal of ore from an underground mine by the defendant [*Lightner Mining Co. v. Lane (1911) 161 Cal. 689, 692-693, 120 P. 771* ; *Whittaker v. Otto (1967) 248 Cal. App. 2d 666, 674-675, 56 Cal. Rptr. 836]* . It is also a trespass for the lessee to a mineral lease to inject waste water into its wells without the lessor's permission, if the waste water spreads into and damages the lessor's reserved mineral estate [*Cassinos v. Union Oil Co. (1993) 14 Cal. App. 4th 1770, 1778]* . Similarly, wastewater produced through use of unlined percolation ponds during oil extraction can constitute a continuing trespass if it seeps into the groundwater of an adjacent landowner [*Starrh & Starrh Cotton Growers v. Aera Energy LLC (2007) 153 Cal. App. 4th 583, 595-596, 63 Cal. Rptr. 3d 165]* .

The slant drilling of a well and extraction of oil from beneath the surface of another's land is a trespass for which damages can be collected [*Union Oil Co. v. Domengeaux (1939) 30 Cal. App. 2d 266, 270]* . Actions for trespass resulting from slant drilling are governed by *Code Civ. Proc. § 3493*/4 and have a much shorter statute of limitations than other types of trespass. For further discussion, see Ch. 393, *Oil and Gas* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawExploration, Discovery & RecoveryGeophysical TrespassReal Property LawAdjoining LandownersOil & GasReal Property LawTortsTrespass to Real PropertyTortsPremises Liability & PropertyTrespassGeneral OverviewTortsPremises Liability & PropertyTrespassElements

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§ 550.18 Trespass of Airspace

Land includes free or occupied space for an indefinite distance upwards, subject to limitations on the use of airspace imposed and rights in the use of airspace granted by law [*Civ. Code § 659*]. A temporary invasion of airspace by aircraft over the land of another is privileged, however, as long as it does not unreasonably interfere with persons or property on the land [*Pacific Gas & Elec. Co. v. Peterson (1969) 270 Cal. App. 2d 434, 438, 75 Cal. Rptr. 673]* . Unreasonable interference has not been defined, and there is no definite yardstick that may be used in determining how low an airplane may fly over the property of others in landing or taking off; however, flying at low altitudes incident to landing and taking off may constitute trespass, as it may cause more than mere apprehension of injury. Extensive low flying may be a substantial interference with the occupant's enjoyment ofthe land and injunctive relief may be appropriate [*Anderson v. Souza (1952) 38 Cal. 2d 825, 839-840, 243 P.2d 497]* . For further discussion of overflight, see Ch. 16, *Airplanes and Airports* , and Ch. 391, *Nuisance*].

A proper and beneficial use of the airspace above an owner's land may not be interfered with except for necessary police regulation in the interest and for the safety and protection of the public [*Strother v. Pacific Gas & Elec. Co. (1949) 94 Cal. App. 2d 525, 536, 211 P.2d 624* (action for personal injuries due to plane crash into high power wires, court noting that plane was trespassing and defendant was not negligent)]. Even if a landowner may, in fact, reasonably anticipate an invasion of the property, in law the landowner is entitled to assume that possession will not be interfered with and that his or her right to the use of the property is paramount [*Strother v. Pacific Gas & Elec. Co. (1949) 94 Cal. App. 2d 525, 529, 211 P.2d 624]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawTortsTrespass to Real PropertyTortsPremises Liability & PropertyTrespassElementsTortsTransportation TortsAir TransportationGeneral Overview

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48-550 California Forms of Pleading and Practice--Annotated § 550.19

§ 550.19 Action for Trespass

[1] Jurisdiction and Venue

The proper county for an action in trespass is the county where the real property is located [*Code Civ. Proc. § 392*]. In limited civil cases, a court may issue only temporary restraining orders and preliminary injunctions. Therefore, if permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*]. If the issue of title or the right of possession is so involved that it must be decided in order to determine the case, the case would be an unlimited civil case, whether or not the involvement may be merely incidental [*Morrissey v. Morrissey (1923) 191 Cal. 782, 784* (holding under prior law that superior court has original jurisdiction)].

[2] Proper Person to Bring Action

The proper party plaintiff in an action for trespass to real property is the person in actual possession [*Lightner Mining Co. v. Lane (1911) 161 Cal. 689, 694-695, 120 P. 771* ; *Williams v. Goodwin (1974) 41 Cal. App. 3d 496, 509, 116 Cal. Rptr. 200]* . Whether or not the plaintiff's relationship to the land amounts to possession is a question of fact to be determined by the jury, unless it can be said as a matter of law that the evidence on that issue is palpably insufficient to support a verdict for the plaintiff [*Williams v. Goodwin (1974) 41 Cal. App. 3d 496, 509, 116 Cal. Rptr. 200]* .

A tenant's possession, while it continues, is as complete for all purposes of redress against wrongdoers as is the possession of the owner [*Strohlburg v. Jones (1889) 78 Cal. 381, 383]* . Even though not in possession, a person with a vested future possessory interest may bring an action for damages resulting from trespass. For example, one who had executed a lease for future possession of the land, as well as the right to harvest the crop then growing on the land, was entitled to bring an action for trespass when the defendant's trespass damaged the crop prior to the plaintiff's taking possession of the land [*Wolfsen v. Hathaway (1948) 32 Cal. 2d 632, 642-644, 198 P.2d 1] , disapproved on other grounds, Flores v. Arroyo (1961) 56 Cal. 2d 492, 15 Cal. Rptr. 87, 364 P.2d 263* . For an allegation for use by one not in actual possession, see *§ 550.44*.

The plaintiff in a trespass action must prove the fact of possession of the premises, but need not prove the right to possession, unless the defendant raises it as an issue [*Williams v. Goodwin (1974) 41 Cal. App. 3d 496, 508, 116 Cal.*

Rptr. 200] . Furthermore, a defendant who is a mere stranger to the title will not be allowed to question the title of a plaintiff in possession of the land. It is only when the trespasser claims title, or claims under the real owner, that he or she is allowed to attack the title of the plaintiff whose peaceable possession has been disturbed [*Lightner Mining Co. v. Lane (1911) 161 Cal. 689, 695, 120 P. 771]* . Moreover, a plaintiff in peaceable possession may even be entitled to an award of at least nominal damages for trespass against the owner of the property even though the plaintiff's possession is wrongful, because the owner is not entitled to regain the property by self-help [*Allen v. McMillion (1978) 82 Cal. App. 3d 211, 218-219, 147 Cal. Rptr. 77* ; *see* Ch. 333, *Landlord and Tenant: Eviction Actions*].

[3] Election of Remedies

[a] One or Successive Actions

If the trespass is permanent, all damages, past and prospective, are recoverable in one action [*Rankin v. DeBare (1928) 205 Cal. 639, 641, 271 P. 1050]* . If from the character of the trespass it is not to be presumed that the wrongful conduct will be continued, successive trespasses give rise to separate causes of action, and an action may be brought at any time to recover the damages that have accrued within the statutory period. In doubtful cases the plaintiff should have an election to treat the trespass as either permanent or not [*Polin v. Chung Cho (1970) 8 Cal. App. 3d 673, 678, 87 Cal. Rptr. 591* ; for further discussion, *see § 550.20[2][b]-[d]*].

[b] Damages or Ejectment

Ejectment is the action used to recover possession of the land when the plaintiff in possession has been ousted by the defendant [*Fuller v. Fuller (1917) 176 Cal. 637, 638, 169 P. 369]* . A plaintiff suing for ejectment must claim damages for withholding possession in the same action or will be deemed to have waived his or her claim to damages [*McCaffrey v. Wiley (1951) 103 Cal. App. 2d 621, 623-624, 230 P.2d 152* ; *see Code Civ. Proc. § 740* (action for recovery of property); for further discussion and forms, see Ch. 241, *Ejectment* , and Ch. 482, *Quieting Title*].

When the defendant has allegedly invaded and occupied the plaintiff's property, the plaintiff can either sue for trespass and recover damages, or in ejectment and have a judgment of ouster and damages, or for an injunction to restrain the continued occupation [*Slater v. Shell Oil Co. (1943) 58 Cal. App. 2d 864, 869, 137 P.2d 713]* . If the plaintiff elects to sue for both past and prospective damages, however, he or she is deemed to have waived the invasion and consented to the continued occupancy of the land [*Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 269, 288 P.2d 507* ; *Slater v. Shell Oil Co. (1943) 58 Cal. App. 2d 864, 869, 137 P.2d 713]* .

If a plaintiff brings an action to recover damages to personal or real property resulting from trespassing on lands either under cultivation or intended or used for the raising of livestock, and the plaintiff prevails, he or she is entitled to reasonable attorney's fees in addition to other costs, and in addition to any liability for damages imposed by law [*Code Civ. Proc. § 1021.9*]. Attorney fees may be recovered even for a subsurface trespass to a right that runs appurtenant to cultivated surface land [*Starrh & Starrh Cotton Growers v. Aera Energy LLC (2007) 153 Cal. App. 4th 583, 606-608, 63 Cal. Rptr. 3d 165* ; *see § 550.17*]. Evidence that plaintiff had used the property for livestock purposes in the past may be probative of plaintiff's intended use for the same purposes in the future, even if the property was not under cultivation or being used for livestock purposes at the time the damage was sustained [*Kelly v. CB&I Constructors, Inc. (2009) 179 Cal. App. 4th 442, 465, 102 Cal. Rptr. 3d 32]* .

For a general form of complaint seeking damages for trespass, see *§ 550.40[1]*.

[4] Injunctive Relief

[a] Availability

The general rule is that an injunction will not lie to restrain mere trespasses on the land, for the simple reason that an

action at law will ordinarily afford an ample and adequate remedy for the wrong. Nor is it the usual practice to permit an action for injunctive relief to be substituted for an action of ejectment [*see Harmon v. DeTurk (1917) 176 Cal. 758, 761-762, 169 P. 680]* .

An act of trespass that is neither continuous nor threatened to be continuous will not give rise to injunctive relief [*Church of Christ of Long Beach v. Harper (1927) 83 Cal. App. 41, 46]* . An injunction will issue, however, to enjoin continuing trespasses for which monetary or other legal remedies are inadequate [*Reitz v. Wollwert (1933) 217 Cal. 406, 409-410, 19 P.2d 3]* . An injunction is also appropriate if the wrongful acts, if continuous, would give rise to an easement or servitude [*Fairrington v. Dyke Water Co. (1958) 50 Cal. 2d 198, 201, 323 P.2d 1001]* . A continuing trespass occurs if the entry onto the land of another is not permanent in character. For example, when the maintenance of an encroachment is abatable, the law does not presume that the encroachment will be permanently maintained. The maintenance of that encroachment is a continuing trespass or nuisance [*Kafka v. Bozio (1923) 191 Cal. 746, 750-751, 218 P. 753]* . If the action constituting trespass may be discontinued at any time, it is considered continuing in character [*Phillips v. City of Pasadena (1945) 27 Cal. 2d 104, 107, 162 P.2d 625]* . For further discussion of continuing trespasses and the statute of limitations, see *§ 550.20[2][c]*.

For a discussion of the effect of zoning ordinances on the availability of injunctive relief, see Ch. 391, *Nuisance* .

[b] Discretion to Grant Relief

The court has some discretion in determining whether to grant or to deny an injunction. In exercising that discretion, the court considers and weighs the relative hardships. To deny an injunction, the following factors must be present [*Christensen v. Tucker (1952) 114 Cal. App. 2d 554, 562-563, 250 P.2d 660]* :

- The defendant must be innocent; the plaintiff's conduct will be examined to ascertain any responsibility for the situation.

- Although the injunction will be granted regardless of the injury to the defendant if the plaintiff will suffer irreparable injury by the encroachment, it may not be granted when the rights of the public will be adversely affected.

- The hardship to the defendant by the granting of the injunction must be greatly disproportionate to the hardship caused by the plaintiff by the continuance of the encroachment. If an encroachment is an intentional trespass, the court cannot deny a mandatory injunction and has no right to weigh and balance the conveniences of the parties [*Strodel v. Wilcox (1955) 137 Cal. App. 2d 781, 785, 291 P.2d 95]* .

For a further discussion of the forms and procedures used in injunctions, see Ch. 303, *Injunctions* . For a complaint for trespass that includes injunctive relief, see *§ 550.40[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsPremises Liability & PropertyTrespassGeneral OverviewTortsPremises Liability & PropertyTrespassRemediesDamagesGeneral OverviewTortsPremises Liability & PropertyTrespassRemediesInjunctionsTortsProcedureCommencement & ProsecutionSubject Matter JurisdictionTortsProcedureCommencement & ProsecutionVenue

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§ 550.20 Statutes of Limitations

[1] Period of Limitation

The time for bringing an action for trespass on or injury to real property is three years [*Code Civ. Proc. § 338(b)*]. An action involving the drilling of oil or gas wells from a surface location on land not owned by the aggrieved party must be brought within 180 days [*Code Civ. Proc. § 349*3/4; *see* Ch. 393, *Oil and Gas*]. The time limitation for wrongful injuries to timber, trees, or underwood arising from any trespass committed while acting in reliance on an improper boundary line is five years from the date of trespass [*Civ. Code § 3346*; *see* Ch. 350, *Logs and Timber*].

The time limitation is the same whether the plaintiff seeks an injunction or damages, since it is the nature of the cause of action, and not the form of the action, that determines the applicability of the statute of limitations [*Williams v. Southern P. R. Co. (1907) 150 Cal. 624, 628, 89 P. 599]* . For an affirmative defense based on the running of the statute of limitations, see *§ 550.48*.

[2] Accrues

[a] Generally

The period of limitation runs from the date the cause of action accrues, which is the time of injury, not from the time the plaintiff discovered who caused the injury [*Gale v. McDaniel (1887) 72 Cal. 334, 335, 13 P. 871* ; *Polin v. Chung Cho (1970) 8 Cal. App. 3d 673, 676-677, 87 Cal. Rptr. 591]* . Neither is the running of the statute affected by the plaintiff's ignorance of the trespass [*Castelletto v. Bendon (1961) 193 Cal. App. 2d 64, 65, 13 Cal. Rptr. 907]* . A cause of action for consequential damages resulting from an underground trespass does not arise, however, until there is surface damage that would put a reasonable person on notice of the trespass [*Oakes v. McCarthy Co. (1968) 267 Cal. App. 2d 231, 254-255, 73 Cal. Rptr. 127]* .

[b] Permanent Trespass

If the trespass is permanent in nature, all damages, past and prospective, are recoverable in one action, and the entire cause of action accrues when the trespass is committed [*Rankin v. DeBare (1928) 205 Cal. 639, 641, 271 P. 1050* ;

Williams v. Southern P. R. Co. (1907) 150 Cal. 624, 626, 89 P. 599] . An example of a permanent trespass is the construction and operation of a railroad [*Williams v. Southern P. R. Co. (1907) 150 Cal. 624, 626, 89 P. 599]* .

[c] Continuing Trespass

The statute of limitations for trespass begins to run from the time of entry, but in a continuing trespass, all damages incurred within the three years immediately prior to filing the action may be recovered; the date of the original entry does not serve to totally bar recovery [*Lindberg v. Linder (1933) 133 Cal. App. 213, 217-218, 23 P.2d 842* (continued storage of rubbish on lot despite repeated requests to remove it)]. When a continuing or recurring injury results from a continuing trespass, there is not only a cause of action for the original wrong, arising when the wrong is committed, but also separate and successive causes of actions because the consequential damages arise as and when they are sustained; therefore, so long as the cause of the injury exists and the damages continue to occur, the plaintiff is not barred from recovering for those damages that have accrued within the statutory period beyond the action, even though a cause of action based solely on the original wrong may be barred [*Kafka v. Bozio (1923) 191 Cal. 746, 751-752, 218 P. 753]* . For further discussion of encroachments and other continuing trespasses, see Ch. 11, *Adjoining Landowners* and Ch. 391, *Nuisance* .

[d] Isolated Incident Trespass

A trespass that is not permanent and presumed not to be continuing provides a new cause of action at each moment of continuance and successive actions may be brought, provided that the plaintiff has not permitted a right by prescription to vest in the defendant [*Williams v. Southern P. R. Co. (1907) 150 Cal. 624, 626, 89 P. 599]* . For example, the defendant's sporadic rather than continuous use of a road that the defendant did not build, maintain, or use for long periods of time has been held not to be a permanent trespass [*Carbine v. Meyer (1954) 126 Cal. App. 2d 386, 390-391, 272 P.2d 849]* . The courts are inclined to resolve any doubts as to the permanency of the trespass in favor of the right to successive actions [*Carbine v. Meyer (1954) 126 Cal. App. 2d 386, 390, 272 P.2d 849]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawTortsTrespass to Real PropertyTortsPremises Liability & PropertyTrespassDefensesStatutes of LimitationsTortsProcedureStatutes of LimitationsAccrual of ActionsContinuous TortsTortsProcedureStatutes of LimitationsAccrual of ActionsOccurrence of Tort

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 550 TRESPASS
PART II. LEGAL BACKGROUND

48-550 California Forms of Pleading and Practice--Annotated § 550.21

§ 550.21 Compensatory Damages

[1] Statutory Authority

Compensation for the damages resulting from the tort of trespass is governed by *Civ. Code § 3333* [*Linforth v. San Francisco Gas & Elec. Co. (1909) 156 Cal. 58, 62, 63, 103 P. 320]* . *Civ. Code § 3333* provides that the measure of damages for the breach of an obligation not arising from contract, except when otherwise expressly provided by the Civil Code, is the amount that will compensate for all the detriment proximately caused, whether it could have been anticipated or not [*Civ. Code § 3333*].

The detriment caused by the wrongful occupation of real property, in cases not embraced by the statutes governing eminent domain, holdover tenant, or unlawful detainer, is deemed to include the value of the use of the property for the time of occupation, not exceeding five years next preceding the commencement of the action to enforce the right to damages, the reasonable cost of repair or restoration of the property to its original condition, and the costs of recovering possession [*Civ. Code § 3334(a)*]. For these purposes, the value of the use of the property is the greater of either: (1) the reasonable rental value of that property, or (2) the benefits obtained by the person wrongfully occupying the property by reason of that wrongful occupation [*Civ. Code § 3334(b)*]. However, if the wrongful occupation of real property is the result of a mistake of fact by the wrongful occupier, the value of the use of the property is deemed to be the reasonable rental value of the property [*Civ. Code § 3334(c)*]. Constructive notice of the true facts to a defendant who lacks actual notice is sufficient to defeat a finding that defendant acted under a mistake of fact [*Bailey v. Outdoor Media Group (2007) 155 Cal. App. 4th 778, 794, 66 Cal. Rptr. 3d 322* (lis pendens put defendant on constructive notice as to true status of right to leasehold)]. Restoration costs may be recovered under *Civ. Code § 3334* only if restoration is possible and economically feasible in light of all the competing interests [*Starrh & Starrh Cotton Growers v. Aera Energy LLC (2007) 153 Cal. App. 4th 583, 599-602, 63 Cal. Rptr. 3d 165]* .

For purposes of determining the benefits obtained by the person wrongfully occupying the property under *Civ. Code § 3334(b)*, "benefits" are not obtained unless the trespass provided the trespasser with a financial or business advantage [*Watson Land Co. v. Shell Oil Co. (2005) 130 Cal. App. 4th 69, 77, 29 Cal. Rptr. 3d 343]* . The avoidance of remediation costs by a trespasser who dumps some material on the property cannot be recovered as a "benefit obtained" by the trespasser, although the remediationcosts themselves can be recovered under *Civ. Code § 3334(a)*, which allows

recovery for the reasonable cost of repair or restoration [*Watson Land Co. v. Shell Oil Co. (2005) 130 Cal. App. 4th 69, 78, 29 Cal. Rptr. 3d 343]* . Profits obtained by the trespasser by virtue of the decision to trespass may be recovered as a "benefit obtained," although the plaintiff must provide evidence specifically linking the profits to the decision to trespass [*Starrh & Starrh Cotton Growers v. Aera Energy LLC (2007) 153 Cal. App. 4th 583, 602-604, 63 Cal. Rptr. 3d 165]* . If the defendant presents credible evidence of the expenses incurred, the trial court may offset those amounts against the gross income generated to determine gross profits. However, if the defendant does not present evidence of appropriate expenses, the trial court may award damages based on gross revenue as the benefit obtained by the trespass [*Bailey v. Outdoor Media Group (2007) 155 Cal. App. 4th 778, 788, 66 Cal. Rptr. 3d 322]* .

For a further discussion and forms relating to the nature and extent of tort damages, see Ch. 177, *Damages* . For further discussion of unlawful detainer, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

[2] Recovery of Prospective Damages

If a trespass is of a permanent nature, the plaintiff may recover all damages, past and prospective, in one action, but when the trespass is temporary in character, the plaintiff may recover only those damages that have accrued up to the time of the commencement of the action, since it is not to be presumed that the trespass will continue [*Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 269, 288 P.2d 507]* .

[3] Measurement

[a] Generally

There is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property; whatever formula is most appropriate to compensate the injured party for the loss sustained in the particular case will be adopted [*Heninger v. Dunn (1980) 101 Cal. App. 3d 858, 862, 162 Cal. Rptr. 104]* . An early case described the measure of damages as an amount of money that will fully compensate for all detriment proximately caused [*Empire Co. v. Bonanza Co. (1885) 67 Cal. 406, 408, 7 P. 810]* . Among the measures used to compensate damages are: the difference in the value of the real property immediately before and immediately after the injury; the cost of making repairs; the loss of use of the property; lost profits; loss of prospective profits; increased operating expenses pending repairs; and present and prospective damages that are the natural, necessary, or reasonable incident of the taking of the property [*Frustuck v. City of Fairfax (1963) 212 Cal. App. 2d 345, 367, 28 Cal. Rptr. 357]* .

[b] Permanent Versus Temporary Damage

When the injury to real property is permanent, damages are measured by the depreciation in the market value of the property, but when the injury is temporary in character the general measure of damages is the difference in the rental or usable value of the premises before and after the injury [*Guttinger v. Calaveras Cement Co. (1951) 105 Cal. App. 2d 382, 387, 233 P.2d 914]* .

[c] Cost of Restoration or Depreciation in Value of Real Property

The measure of damages is the cost of restoring the property to its prior condition unless the cost of restoration exceeds the value of the property prior to the trespass, in which case the value of the property is the proper measure [*Green v. General Petroleum Corp. (1928) 205 Cal. 328, 336, 270 P. 952* (deposit of debris)]. The value of the use of the premises for the period during which the owner is deprived of use is frequently awarded in addition to the cost of repair [*Natural Soda Prod. Co. v. City of Los Angeles (1943) 23 Cal. 2d 193, 201, 143 P.2d 12]* . When the plaintiff establishes damages as the depreciation in the value of his or her property caused by acts of the defendant, unless the defendant can show that the cost of restoration would be less than the depreciation in value, depreciation will be the measure of damages [*Herzog v. Grosso (1953) 41 Cal. 2d 219, 226, 259 P.2d 429* (destruction of roadway easement by owner of servient tenement)].

Restoration costs may be awarded even though they exceed the decrease in market value if there is a reason personal to the owner for restoring the original condition. Destruction of shade or ornamental trees that were of personal value to the owner comes within the personal reason exception and if a restoration could be achieved at a cost that was not unreasonable in relation to the damage inflicted and the value of the land prior to the trespass, the court should exercise its discretion and award these restoration costs [*Heninger v. Dunn (1980) 101 Cal. App. 3d 858, 863-866, 162 Cal. Rptr. 104]* .

The reasonableness of the restoration costs must be decided on a case-by-case basis and cannot be determined through a mechanical comparison of damage awards in other cases [*Kelly v. CB&I Constructors, Inc. (2009) 179 Cal. App. 4th 442, 453, 102 Cal. Rptr. 3d 32]* . In one case, for example, even though the pre-damage value of the property was estimated at no more than $1.8 million, restoration costs of almost $3 million were upheld on appeal when that was the amount that would be required to allow plaintiff to make the property safe and habitable by his family, and the property was unmarketable in its current condition due to damage caused by the defendant [*Kelly v. CB&I Constructors, Inc. (2009) 179 Cal. App. 4th 442, 454, 102 Cal. Rptr. 3d 32]* . For a form alleging a personal reason justifying restoration costs, see *§ 550.45*.

[d] Damage to Fixtures

If the thing destroyed, although it is part of the realty, has a value that can be accurately ascertained without reference to the soil on which it stands or out of which it grows, the recovery may be the value of the thing thus destroyed or the cost of its repair [*Menzies v. Geophysical Serv., Inc. (1953) 116 Cal. App. 2d 419, 423, 254 P.2d 51* (damage to well)].

[e] Damage to Building

When a building is injured by a trespasser, the measure of damages is the cost of repairing or restoring the building to its former condition if the injury is of a character that this may be done at a reasonable cost, an allowance also being made for loss of rental during the reasonable time required to make these repairs [*Linforth v. San Francisco Gas & Elec. Co. (1909) 156 Cal. 58, 62, 63, 103 P. 320]* .

[f] Lost Profits

Damages for loss of profits will depend on whether there is a satisfactory basis for estimating what the probable earnings would have been had there been no tort. If there has been operating experience sufficient to permit a reasonable estimate of probable income and expense, damages for loss of prospective profits are awarded [*Natural Soda Prod. Co. v. City of Los Angeles (1943) 23 Cal. 2d 193, 199, 143 P.2d 12]* .

[g] Other Consequential Damages

Civ. Code § 3333 has been interpreted to hold the trespasser liable for all damages proximately caused by the trespass [*Hawthorne v. Siegel (1891) 88 Cal. 159, 163, 25 P. 1114]* . A trespasser is liable for all injurious consequences flowing from the trespass which are the natural and proximate result of the trespassing conduct [*Duval v. Rowell (1954) 269 P.2d 142]* . If the court finds that an intentional trespass occurred, the trespasser is liable for all the consequences,whether or not they were intentional or foreseeable [*Meyer v. Pacific Employers Ins. Co. (1965) 233 Cal. App. 2d 321, 326, 43 Cal. Rptr. 542]* . As long as there is factual support for the injuries, there is considerable discretion allowed in fixing the amount of consequential damages [*Skupen v. Imperial Irrigation Dist. (1939) 33 Cal. App. 2d 392, 395, 91 P.2d 910]* .

[h] Mental Distress

Regardless of whether the occupant of land has sustained physical injury, the occupant may recover damages for the

discomfort and annoyance of the occupant and the members of the occupant's family and for mental suffering occasioned by fear for the safety of the occupant and his or her family when such discomfort or suffering has been proximately caused by a trespass [*Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 272-275, 288 P.2d 507* ; *Acadia, Cal., Ltd. v. Herbert (1960) 54 Cal. 2d 328, 337, 5 Cal. Rptr. 686]* .

Annoyance and discomfort damages intended to compensate a plaintiff for the loss of peaceful occupation and enjoyment of real property may only be awarded to a plaintiff who was an occupant, that is, a resident on the property, at the time the damage was sustained. A person who was merely storing personal property on the premises is not entitled to damages for annoyance and discomfort [*Kelly v. CB&I Constructors, Inc. (2009) 179 Cal. App. 4th 442, 456-459, 102 Cal. Rptr. 3d 32]* .

[4] Exemplary Damages

A tort, such as trespass, committed by mistake, in the assertion of a supposed right, or without any wrong intentions, and without such recklessness as evinces malice or a conscious disregard of the rights of others, does not warrant punitive damages [*Lyles v. Perrin (1897) 119 Cal. 264, 266, 51 P. 332* ; *Roth v. Shell Oil Co. (1960) 185 Cal. App. 2d 676, 682, 8 Cal. Rptr. 514]* . An award of exemplary damages cannot be based on mere speculation; it depends instead on a definite showing of a willingness to vex, harass, or injure consistent with a wrongful intent to injure [*Wolfsen v. Hathaway (1948) 32 Cal. 2d 632, 650, 198 P.2d 1 , disapproved on other grounds, Flores v. Arroyo (1961) 56 Cal. 2d 492, 15 Cal. Rptr. 87, 364 P.2d 263* ; *Roth v. Shell Oil Co. (1960) 185 Cal. App. 2d 676, 682, 8 Cal. Rptr. 514]* .

For example, exemplary damages were held to be appropriate in a trespass action when the defendant had painted out advertising signs and harassed the plaintiff by soliciting actions by the district attorney and the city planning commission, all of which were dismissed [*Brenner v. Haley (1960) 185 Cal. App. 2d 183, 188, 8 Cal. Rptr. 224]* . Exemplary damages were also properly awarded when the defendant had bulldozed and removed roadbed over which the plaintiff had the right to travel and for which a temporary restraining order forbidding interference had been obtained [*Donnell v. Bisso Bros. (1970) 10 Cal. App. 3d 38, 45, 88 Cal. Rptr. 645]* . For a further discussion of exemplary damages and when they are available, see Ch. 177, *Damages* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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48-550 California Forms of Pleading and Practice--Annotated § 550.22

§ 550.22 Defenses

[1] Consent

[a] Express

Trespass involves an unauthorized entry. When there is a consensual entry, there is no tort, because lack of consent is an element of the wrong [*Civic W. Corp. v. Zila Indus., Inc. (1977) 66 Cal. App. 3d 1, 16-17, 135 Cal. Rptr. 915]* . There is no specified form of consent required. For an affirmative defense based on express consent, see *§ 550.49*.

[b] Consent Included in Conditional Sale Contract

A clause in a conditional sale contract allowing the seller to take possession of equipment by process of law or otherwise has been deemed a consent to enter the premises for the purposes of repossession [*Williams v. General Elec. Credit Corp. (1958) 159 Cal. App. 2d 527, 532-533, 323 P.2d 1046]* . Consent obtained in this manner may be subject to constitutional limitations, however, since prejudgment replevin statutes which allowed a deprivation of property without a hearing prior to repossession have been held invalid [*Fuentes v. Shevin (1972) 407 U.S. 67, 96, 92 S. Ct. 1983, 32 L. Ed. 2d 556]* .

[c] Implied Consent

Every person, by implication invites others to come to his or her house as they may have proper occasion either of business or courtesy or information or other purpose. Custom must determine what the limit is of that implied invitation [*Duval v. Rowell (1954) 269 P.2d 142]* . The circumstances and habits of the vicinity may imply an invitation to enter. For example, an invitation was implied when the owner of the only telephone within 12 miles, who was in the habit of delivering messages to people, entered the premises to deliver a message [*Duval v. Rowell (1954) 269 P.2d 142]* . For an affirmative defense based on implied consent, see *§ 550.50*.

[d] Exceeding Limited Consent

A trespass may occur if the person entering pursuant to a limited consent proceeds to exceed those limits by divergent

conduct on the land of another. A conditional or restricted consent to enter land creates a privilege to do so only in so far as the condition or restriction is complied with [*Civic W. Corp. v. Zila Indus., Inc. (1977) 66 Cal. App. 3d 1, 17, 135 Cal. Rptr. 915]* . Consent may be limited as to purpose or place. A consent for entry to secure collateral and sell it was exceeded when the defendantentered the premises, ejected the employees, and changed the locks [*Civic W. Corp. v. Zila Indus., Inc. (1977) 66 Cal. App. 3d 1, 17, 135 Cal. Rptr. 915]* . Another example of a consent which was exceeded was the dumping of 5,000 cubic yards of earth and rocks over the entire unoccupied portion of a lot after viewing a sign for "dirt wanted--dump on fill" [*Hancock v. George R. Curtis Paving Co. (1931) 114 Cal. App. 624, 627, 300 P. 65]* .

Trespass may also result by exceeding a consent that is limited as to time. The trespass occurs the moment the privilege is abused or any act hostile to the interests of the owner is committed. For example, one who continued to graze sheep on property after the date given to remove them was a trespasser [*Rogers v. Duhart (1893) 97 Cal. 500, 506]* .

[2] Necessity

One is privileged to enter and remain on land in the possession of another if it reasonably appears to be necessary to prevent serious harm to the land or chattels of the other party, unless the actor has reason to know that the one for whose benefit the actor enters is unwilling that he or she shall take such action [*People v. Parra (1973) 30 Cal. App. 3d 729, 732-733, 106 Cal. Rptr. 531]* . Necessity often justifies an action that would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose [*People v. Roberts (1956) 47 Cal. 2d 374, 377, 303 P.2d 721]* . Although both *Parra* and *Roberts* involved entry by police officers, nothing in the language used in those cases indicated that the necessity privilege is limited to police officers. An early case involved a mayor who trespassed, acting in good faith and under necessity, to prevent the spread of fire. In finding him not liable, the court spoke in general terms and in no way based its holdings on public authority, rather it was the emergency nature of the situation that was determinative [*Surocco v. Geary (1853) 3 Cal. 69, 73* , 58 Amer. Dec. 385].

Restatement (Second) of Torts divides necessity into two parts: public (threat to the general public) and private (threat to an individual). *People v. Parra (1973) 30 Cal. App. 3d 729, 732-733, 106 Cal. Rptr. 531* , uses language parallel to *Restatement (Second) of Torts § 197*, which is the private necessity provision. The public necessity provision is broader in its scope, and contains no language regarding reasonableness in time or manner or unwilling beneficiary, but subjects the actor to liability for any harm done [*Restatement (Second) of Torts §§ 196, 197*].

[3] Entry Under Color of Authority

The entry of a law enforcement officer on the land of another in the lawful discharge of his or her duties, as a general rule, is not wrongful and, therefore, not actionable as a trespass [*Uptown Enters. v. Strand (1961) 195 Cal. App. 2d 45, 52, 15 Cal. Rptr. 486]* . A good faith and reasonable belief that there is a felon on the premises is recognized as a defense to a trespass action for entry without a warrant [*Williams v. Gould (9th Cir. 1973) 486 F.2d 547, 548]* . Entry to business premises for the purpose of harassing the owner, giving the business a bad reputation, compelling the owner to change a lawful business policy, or unjustifiably interfering with the business relations between the owner and patrons is unauthorized, wrongful, and actionable as a trespass [*Uptown Enters. v. Strand (1961) 195 Cal. App. 2d 45, 52, 15 Cal. Rptr. 486]* .

[4] Entry to Abate Nuisance

If a private nuisance results from a mere omission of the wrongdoer, and cannot be abated without entering on the land, reasonable notice must be given to the wrongdoer before entering to abate it [*Civ. Code § 3503*]. Although the statute does not state that the entry to abate is privileged, and no trespass will occur from so doing, this interpretation appears logical, and is supported by *Restatement (Second) of Torts § 201*. Notice will be deemed given in a case of continuing,

visible public nuisance, and no specific notice to abate is necessary when there have been protests and notices before the suit is commenced [*City of Turlock v. Bristow (1930) 103 Cal. App. 750, 755-756, 284 P. 962* (irrigation ditch was overgrown and obstructed flow of water)].

[5] Entry to Care for Animal

In case any domestic animal is at any time impounded and continues to be without necessary food and water for more than 12 consecutive hours, it is lawful for any person, as may be necessary, to enter into and on any area in which the animal is confined and supply it with necessary food and water as long as it remains so confined. This person is not liable for the entry [*Penal Code § 597e*].

[6] Entry by Landlord to Enforce Liens

Keepers of furnished and unfurnished apartment houses, apartments, cottages, or bungalow courts have a lien on the baggage and other property belonging to their tenants for the proper charges due from these tenants or guests. The lien may be enforced only after final judgment, but during the pendency of the proceeding, the landlord may take possession of the baggage and property on a court order. On this order, the landlord shall have the right to enter peaceably the quarters used by the tenant without liability, including any possible claim of liability for conversion, trespass, or forcible entry [*Civ. Code § 1861a*].

[7] Immunity of Decedent's Personal Representative

A personal representative who in good faith takes into possession real or personal property, and reasonably believes that the property is part of the decedent's estate, is neither criminally nor civilly liable for doing so [*Prob. Code § 9651(a)*]. However, the personal representative must make reasonable efforts to determine the true nature of and title to the property taken into possession [*Prob. Code § 9651(b)*].

During his or her possession, the personal representative is entitled to receive all rents, issues, and profits of the property. If the personal representative determines later that the property is not part of the decedent's estate, the personal representative must deliver the property, or cause it to be delivered, to the person legally entitled to it, together with all rents, issues, and profits of the property received by the personal representative, less any expenses incurred in protecting and maintaining the property and in collecting the rents, issues, and profits. The personal representative may request court approval before delivering the property [*Prob. Code § 9651(c)*].

For a form of affirmative defense based on *Prob. Code § 9651*, see Ch. 150, *Conversion* .

[8] Constitutional Right to Free Expression of Ideas in Public Forum

The California Constitution [*Cal. Const., art. I, §§ 2, 3*] guarantees the right of free speech and prohibits any law abridging this right. This right may be exercised in any public forum, which includes not only public streets and shopping areas, but also large private shopping centers that are open to the public and are the functional equivalent of the traditional town center. Therefore, persons who engage in such constitutionally protected free speech activities as leafletting, picketing, or soliciting signatures on petitions are not trespassing if their activities occur in a public forum, are orderly and reasonable, and do not interfere with normal business operations [*see Robins v. Pruneyard Shopping Ctr. (1979) 23 Cal.3d 899, 910-911, 153 Cal. Rptr. 854, 592 P.2d 341 , aff'd, 447 U.S. 74, 81, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980)]* .

However, public forums do not include the property of individual homeowners or retail establishments that are more modest than large suburban shopping malls [*Robins v. Pruneyard Shopping Ctr. (1979) 23 Cal.3d 899, 910, 153 Cal. Rptr. 854, 592 P.2d 341 , aff'd, 447 U.S. 74, 81, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980)]* . Private parking areas of relatively small medical facilities are not the equivalent of a public forum because the medical center's tenants offer

services only to specific clientele, rather than inviting members of the public to congregate, relax, seek out entertainment, browse, and shop. Moreover, unlike even a modest retail establishment, medical centers serve mainly prearranged clientele, are not fully open to the local community, and do not provide services that are essential to all community members. Consequently, the owners and the tenants of this type of private property may exclude anti-abortion picketers, as trespassers, from the parking areas [*Allred v. Harris (1993) 14 Cal. App. 4th 1386, 1391-1392, 18 Cal. Rptr. 2d 530* ; *see also Planned Parenthood v. Wilson (1991) 234 Cal. App. 3d 1662, 1668, 286 Cal. Rptr. 427* ; *Allred v. Shawley (1991) 232 Cal. App. 3d 1489, 1501-1502, 284 Cal. Rptr. 140]* .

[9] Entry by Tenants' Rights Activist

A person entering onto residential real property, on the occupant's invitation, during reasonable hours or because of emergency circumstances, for the purpose of providing information regarding tenants' rights or to participate in a tenants' association, is not liable in any criminal or civil action for trespass [*Civ. Code § 1942.6*].

Legal Topics:

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

§§ 550.23[Reserved]

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§ 550.30 Related Matthew Bender Publications

[1] California Points and Authorities

For memoranda of points and authorities relating to motions in proceedings involving tort damages, see California Points and Authorities, Ch. 65, *Damages* , Pt. I (Matthew Bender)

For memoranda of points and authorities relating to motions in support of and opposition to injunctions, see California Points and Authorities, Ch. 116, *Injunctions* (Matthew Bender)

For memoranda of points and authorities relating to motions in trespass actions, see California Points and Authorities, Ch. 225, *Trespass* (Matthew Bender)

[2] California Real Estate

For discussion of the substantive and procedural aspects of trespass, see 11 California Real Estate Law and Practice, ch. 384, *Trespass and Waste*, §§ 384.01-384.04 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 550.31 State Statutes

[1] Attorney's Fees

Prevailing plaintiff as entitled to attorney's fees in action to recover damages to personal or real property resulting from trespassing on lands either under cultivation or intended or used for the raising of livestock. *Code Civ. Proc. § 1021.9*

[2] Crimes

Trespass as criminal act. *Penal Code §§ 552-558.1, 602-603*

[3] Damages

Damages for vandalism. *Civ. Code § 1721*

Punitive. *Civ. Code § 3294*

Compensatory. *Civ. Code § 3333*

Wrongful occupation of land. *Civ. Code § 3334*

Wrongful holdover by tenant. *Civ. Code § 3335*

Conversion of personal property. *Civ. Code §§ 3336, 3337*

Statement reserving right to recover punitive damages in default judgment. *Code Civ. Proc. § 425.115*

[4] Injunctive Relief

Grounds for issuing injunction. *Code Civ. Proc. § 526*

Procedure for obtaining preliminary injunction. *Code Civ. Proc. § 527*

[5] Objections to Complaint

Grounds for objection to complaint. *Code Civ. Proc. § 430.10*

When objections made by demurrer or answer. *Code Civ. Proc. § 430.30*

[6] Public Emergency

Local authority as allowed on private road without permission to make necessary repairs after declaration of local emergency. *Sts. & Hy. Code § 969.5*

[7] Statutes of Limitations

Injuries to timber. *Civ. Code § 3346(c)*

Trespass or injury to real property. *Code Civ. Proc. § 338(b)*

Conversion. *Code Civ. Proc. § 338(b), (c)*

Trespass to oil or gas wells. *Code Civ. Proc. § 349*3/4

[8] Venue

Actions involving real property. *Code Civ. Proc. § 392*

Tort actions. *Code Civ. Proc. 395(a)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesProperty CrimesBurglary & Criminal TrespassCriminal TrespassGeneral OverviewTortsPremises Liability & PropertyTrespassDefensesStatutes of LimitationsTortsPremises Liability & PropertyTrespassRemediesDamagesGeneral OverviewTortsPremises Liability & PropertyTrespassRemediesInjunctionsTortsProcedureCommencement & ProsecutionVenue

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Chapter 550 TRESPASS
PART III. RESEARCH GUIDE

48-550 California Forms of Pleading and Practice--Annotated § 550.32

§ 550.32 Decisions

[1] Abortion Clinic

Injunction against anti-abortion picketers trespassing in private parking area of small medical center as proper because property was not public forum. *Allred v. Harris (1993) 14 Cal. App. 4th 1386, 1391-1392, 18 Cal. Rptr. 2d 530*

[2] Adjoining Land

Defendant's compliance with zoning code does not preclude recovery for damages for trespassory invasions of another's property caused by manufacturing or commercial use. *Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 271, 288 P.2d 507* ; *Roberts v. Permanente Corp. (1961) 188 Cal. App. 2d 526, 529, 10 Cal. Rptr. 519*

Adjoining landowner injured by encroaching tree limbs and roots allowed to cut off intruding parts or to sue for damages and abatement, but not allowed to trespass and cut down trees. *Fick v. Nilson (1950) 98 Cal. App. 2d 683, 685, 220 P.2d 752*

Vibrations from defendant's plant operations causing injuries to nearby residences constitutes cause of action for invasion of property. *McNeill v. Redington (1944) 67 Cal. App. 2d 315, 319, 154 P.2d 428*

[3] Consent

Dumping of oil and waste products from oil wells by lessee in lease for mining and removing oil and gas is continuing trespass without right, giving rise to separate and successive causes of action. *Bourdieu v. Seaboard Oil Corp. (1940) 38 Cal. App. 2d 11, 21-22, 100 P.2d 528*

[4] Damages

[a] Generally

Civ. Code § 2224 (involuntary trust) is applicable to cases of trespass; imposition of constructive trust on proceeds of trespass is allowed when trespasser removes something of value from land on which defendant trespassed. *Santa Clarita Water Co. v. Lyons (1984) 161 Cal. App. 3d 450, 460-463, 207 Cal. Rptr. 698*

Trespass and injury to property is not inextricably linked; both actionable injury to real property with no trespass on it and actionable trespass on real property without injury to property as possible. *Polin v. Chung Cho (1970) 8 Cal. App. 3d 673, 676, 87 Cal. Rptr. 591*

Jury verdict finding trespass but no damages, either nominal or compensatory, is incomplete verdict and judgment thereon is nullity; nominal damages as implied in trespass and finding trespass without any damages is inconsistent. *Costerisan v. Melendy (1967) 255 Cal. App. 2d 57, 60, 62 Cal. Rptr. 800*

[b] Compensatory

Discomfort and annoyance suffered by plaintiffs is injury directly and proximately caused by defendant's invasion in form of fumes, dust, and waste material. *Kornoff v. Kingsburg Cotton Oil Co. (1955) 45 Cal. 2d 265, 272, 288 P.2d 507*

Costs of reasonable efforts in avoiding and preventing further injuries from trespass is recoverable. *Pac. Tel. & Tel. Co. v. Granite Constr. Co. (1964) 225 Cal. App. 2d 765, 769, 37 Cal. Rptr. 727*

Award of compensatory damages remains intact and not reversible by the appellate court unless award suggests at first blush, passion, prejudice, or corruption on part of jury. *Brenner v. Haley (1960) 185 Cal. App. 2d 183, 188, 8 Cal. Rptr. 224*

Rental value of premises is measure of damages in case of trespass by lessee leaving restaurant equipment after expiration of lease. *Herond v. Bonsall (1943) 60 Cal. App. 2d 152, 156*

Person owning land on which soil was dumped is entitled to recover costs of removal even if value of land was not affected by trespass. *Dandoy v. Oswald Bros. Paving Co. (1931) 113 Cal. App. 570, 572*

Costs of restoration is recoverable even if plaintiff has not restored land to its prior condition. *Dandoy v. Oswald Bros. Paving Co. (1931) 113 Cal. App. 570, 572*

Damages for trespass and destruction of pasturage used for grazing, when grass cannot be severed and marketed separately from land, is measured by reasonable rental value. *Miller & Lux Inc. v. Pinelli (1927) 84 Cal. App. 42, 51*

Damages from trespass and destruction of crops is measured by market value of estimated crop, taking into consideration condition of maturity of product at time of injury. *Miller & Lux Inc. v. Pinelli (1927) 84 Cal. App. 42, 47*

[c] Mental Distress

Damages for mental suffering caused by fear for safety of family members and visitors after defendant caused grade of easement road to be dangerously steepened is recoverable in action for trespass. *Herzog v. Grosso (1953) 41 Cal. 2d 219, 225-226, 259 P.2d 429*

[d] Nominal Damages

Nominal damages are presumed for every trespass on real property. *Empire Co. v. Bonanza Co. (1885) 67 Cal. 406, 409, 7 P. 810*

Trespass without injury justifies only nominal damages. *Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 136, 95 Cal. Rptr. 728*

[e] Punitive

Officer has no authority to break into dwelling for service of process and as able to be liable for trespass for doing so; innocent superior is not responsible for malice of officer and not liable for punitive damages unless he or she has ratified conduct of officer. *Foley v. Martin (1904) 142 Cal. 256, 260-261*

Malice supporting punitive damages found when trespasser acted with unmistakably conscious disregard for property rights of another by persisting in trespassing activities after being told to desist, building permanent improvements after being warned that they would be encroachments, destroying survey monument, and repeatedly asserting right to do as he wished on other's land. *Goshgarian v. George (1984) 161 Cal. App. 3d 1214, 1224-1226, 208 Cal. Rptr. 321* (amount of punitive damages reduced on appeal due to jury passion and prejudice)

Punitive damages awardable if trespass is committed from wanton or malicious motives, or reckless disregard of rights of others, or under circumstances of great hardship or oppression. *Krieger v. Pacific Gas & Elec. Co. (1981) 119 Cal. App. 3d 137, 148, 173 Cal. Rptr. 751* ; *Haun v. Hyman (1963) 223 Cal. App. 2d 615, 620*

Punitive damages in action for trespass justified by evidence showing that defendant repainted gasoline pumps, painted out company colors on building, and removed lighting without any notice or any communication withplaintiffs. *Roth v. Shell Oil Co. (1960) 185 Cal. App. 2d 676, 683, 8 Cal. Rptr. 514*

Punitive damages in action for trespass justified by evidence showing that plaintiff had posted three "no trespassing" signs with his name and address on property, that defendants entered without permission and maintained powder magazine within 200 feet of plaintiff's cabin, and injured his personal property. *Smpardos v. Piombo Constr. Co. (1952) 111 Cal. App. 2d 415, 420-423, 244 P.2d 435*

[5] Defenses

[a] Consent

Consent for landlord to enter and make necessary repairs does not allow landlord to make extensive alterations requiring much longer time; landlord's exceeding consent is act of trespass. *Dwyer v. Carroll (1890) 86 Cal. 298, 302-304, 24 P. 1015*

Peaceable entry on land with consent of owner and possessor is not trespass. *Girard v. Ball (1981) 125 Cal. App. 3d 772, 788, 178 Cal. Rptr. 406*

Entry to repossess personal property allowed by contract is consensual entry, not trespass. *Civic W. Corp. v. Zila Indus., Inc. (1977) 66 Cal. App. 3d 1, 17, 135 Cal. Rptr. 915*

Entry of premises to repossess equipment sold without permission or consent of the buyer is trespass; unauthorized entry is trespass even if made to effect valid recovery of personal property. *Cornell v. Sennes (1971) 18 Cal. App. 3d 126, 136, 95 Cal. Rptr. 728*

Agreement to neighbor's construction of improvement that would incidentally result in detriment to both properties and violation of Health and Safety Code is implied consent to trespass by building additional encroachment to remedy detrimental condition. *Strodel v. Wilcox (1955) 137 Cal. App. 2d 781, 783-786, 291 P.2d 95*

Revoking of temporary permit of occupation withdraws consent to occupation and continued occupation is trespass. *Red Bluff v. Southern Pac. Co. (1919) 44 Cal. App. 667, 674*

[b] Necessity

Necessity justifies action which would otherwise be trespass; necessity is act which reasonably appears necessary for preserving life or property. *People v. Roberts (1956) 47 Cal. 2d 374, 377, 303 P.2d 721* ; *People v. Neth (1970) 5 Cal. App. 3d 883, 888, 86 Cal. Rptr. 12*

[c] No Trespass

Actions by immigration officers in approaching plaintiff's ranch, calling to workers, asking them if they were in country illegally, and arresting them without entering plaintiff's land is not even theoretical trespass. *Taylor v. Fine (S.D. Cal. 1953) 115 F. Supp. 68, 70*

Coowner of real property is not liable for trespass committed by other coowner, unless actively participating in or ratifying it. *Daly v. Smith (1963) 220 Cal. App. 2d 592, 604, 33 Cal. Rptr. 920*

[6] Easements

Owner of servient tenement allowed to make any use of land that does not interfere unreasonably with easement; interference with use of easement is actionable. *Herzog v. Grosso (1953) 41 Cal. 2d 219, 224-225, 259 P.2d 429*

[7] Extrahazardous Activity

Construction of garage in apartment house without evidence of unusual methods is not extrahazardous activity for which actor may be liable in trespass. *Gallin v. Poulou (1956) 140 Cal. App. 2d 638, 645, 295 P.2d 958*

Blasting in populated areas is ultrahazardous activity for which actor is held strictly liable in damages. *Alonso v. Hills (1950) 95 Cal. App. 2d 778, 783, 214 P.2d 50*

Blasting in remote areas where there is little danger of injury is not ultrahazardous activity and negligence or tortious intent must be shown before actor will be held liable. *Alonso v. Hills (1950) 95 Cal. App. 2d 778, 783, 214 P.2d 50*

[8] Intent to Trespass

Intentional character of actions as essential element of trespass; intent to cause damage irrelevant. *Meyer v. Pacific Employers Ins. Co. (1965) 233 Cal. App. 2d 321, 326, 43 Cal. Rptr. 542*

Using land in way that causes intrusion of flood waters and sediment on land of others is trespass for which defendant is liable only if it is intentional, result of recklessness or negligence, or resulting from ultrahazardous activity. *Dufour v. Henry J. Kaiser Co. (1963) 215 Cal. App. 2d 26, 30, 29 Cal. Rptr. 871*

Doing of act which will to substantial certainty result in entry of foreign matter on another's land is sufficient intent for trespass. *Roberts v. Permanente Corp. (1961) 188 Cal. App. 2d 526, 530-531, 10 Cal. Rptr. 519*

Mistake in location of boundary line is not relieving actor of liability for trespass. *Youdall v. Kaufman (1921) 55 Cal. App. 363, 367*

[9] Possession

Possessor with right to possession is allowed to use reasonable means to repel trespasser. *Jensen v. Shadburne (1956) 145 Cal. App. 2d 624, 626-627, 302 P.2d 824*

[10] Statute of Limitations

Action for trespass is required to be brought within three years of act. *Robinson v. Southern Cal. Ry. Co. (1900) 129 Cal. 8, 11, 61 P. 947* ; *Gale v. McDaniel (1887) 72 Cal. 334, 335, 13 P. 871*

Code Civ. Proc. § 338(b) (statute of limitations for trespass or injury to real property) applies to acts of trespass that do not involve taking or damaging private property for public use; *Code Civ. Proc. §§ 318* and *319* (time limitations for action for possession or title) applies when inverse condemnation or taking or damaging valuable property right for public use occurs. *Garden Water Corp. v. Fambrough (1966) 245 Cal. App. 2d 324, 328, 53 Cal. Rptr. 862* ; *Frustuck v. City of Fairfax (1963) 212 Cal. App. 2d 345, 374, 28 Cal. Rptr. 357*

Encroachment of permanent building is permanent trespass, and action for all damages suffered, past as well as prospective, must be brought within three years of time of trespass. *Tracy v. Ferrera (1956) 144 Cal. App. 2d 827, 828, 301 P.2d 905* ; *Bertram v. Orlando (1951) 102 Cal. App. 2d 506, 509, 227 P.2d 894*

Successive entries on different parcels of land when original entry does not affect all land constitutes new and different cause of action for damages. *Bourdieu v. Seaboard Oil Corp. (1940) 38 Cal. App. 2d 11, 17-20, 100 P.2d 528*

[11] Trespass Above Land

Entry into immediate reaches of airspace next to land and entry that is substantial interference with owner's actual use and enjoyment of land are both necessary to support a claim of trespass resulting from flight in airspace above another's land. *Drennen v. County of Ventura (1974) 38 Cal. App. 3d 84, 87-88, 112 Cal. Rptr. 907*

Temporary invasion of airspace by aircraft over land of another is privileged as long as it does not unreasonably interfere with persons or property on land. *Pacific Gas & Elec. Co. v. Peterson (1969) 270 Cal. App. 2d 434, 438, 75 Cal. Rptr. 673* ; *Sneed v. County of Riverside (1963) 218 Cal. App. 2d 205, 210, 32 Cal. Rptr. 318*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawAdjoining LandownersEncroachmentsReal Property LawTortsTrespass to Real PropertyTortsPremises Liability & PropertyTrespassDefensesGeneral OverviewTortsPremises Liability & PropertyTrespassElementsTortsPremises Liability & PropertyTrespassRemediesDamagesGeneral Overview

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48-550 California Forms of Pleading and Practice--Annotated § 550.33

§ 550.33 Law Reviews

Comment, *Remedies for Intangible Intrusions: The Distinction Between Trespass and Nuisance Actions Against Lawfully Zoned Businesses in California, 17 U.C. Davis. L. Rev. 389 (1983)*

Comment, *Liability for the Invasion of a Landowner's Rights by Geophysical Exploration, 18 Cal. West L. Rev. 460 (1982)*

Evans, Marjorie and Kratter, L.M., *A New Tort: Mass Trespass by Air Pollution*, 8 C.T.L.J. 33 (1970)

Vogel, Charles, *Student Demonstrations, Trespass Laws, Private Colleges, 43 L.A. Bar Bull. 457 (1968)*

Note, *Privileged Entry Onto Farm Property for Union Organizers, 19 Hastings L.J. 413 (1968)*

Note, *The Use of Trespass Laws to Enforce Private Policies of Discrimination, 16 Hastings L.J. 445 (1965)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawExploration, Discovery & RecoveryGeophysical TrespassReal Property LawAdjoining LandownersEncroachmentsReal Property LawTortsNuisanceGeneral OverviewTortsPremises Liability & PropertyTrespassDefensesConstitutional ConsiderationsTortsPremises Liability & PropertyTrespassDefensesPrivilege

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48-550 California Forms of Pleading and Practice--Annotated § 550.34

§ 550.34 Text References

Witkin, California Procedure, vol. 3, *Actions*, §§ 548-556; vols. 4 & 5, *Pleading*, §§ 48-49, 590-592, 968; vol. 6, *Provisional Remedies*, §§ 305-306 (4th ed. 1997)

Witkin, Summary of California Law, vol. 5, *Torts*, §§ 693-698, vol. 6, *Torts*,, §§ 1588, 1726-1737 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureGeneral OverviewCivil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedureRemediesProvisional RemediesGeneral OverviewTortsGeneral Overview

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[Reserved]

§§ 550.35[Reserved]

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PART IV. FORMS

48-550 California Forms of Pleading and Practice--Annotated § 550.40

§ 550.40 Complaint for Damages for Trespass to Real Property and for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)], and Permanent Injunction [Civ. Code § 3422]

[1] FORM Complaint for Damages for Trespass to Real Property and for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)], and Permanent Injunction [Civ. Code § 3422]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES[, TEMPORARY
_____ [*name*],	)	RESTRAINING ORDER, AND PRELIMINARY
Defendant.	)	(AND PERMANENT) INJUNCTION(S)]
	)	(Trespass)
	)	

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, the _____ [*specify proprietary interest, e.g.,* owner] and in possession of certain real property consisting of land [and _____ (*describe improvements, if any, e.g.,* a single family house)] at _____ [*address*], _____ County, California, and more particularly described as follows: _____ [*give legal description*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the

fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's injuries as herein alleged were proximately caused by such defendants.)]

[3. (Plaintiff is informed and believes and thereon alleges that) (A)t all times herein mentioned, each of the defendants was the agent of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of such agency and with the permission and consent of his/her codefendants.]

4. On or about _____ [*date*], [and continuing to the present time], defendant[s, and each of them] without plaintiff's consent _____ [*specify the act of trespass, e.g.,* entered the above described land of which plaintiff is the owner and possessor, leveled a portion of the premises, constructed a powder magazine 200 feet from plaintiff's dwelling, and used the premises for general construction purposes].

5. As a proximate result of the _____ [*specify trespassory conduct, e.g.,* defendant's entry onto the plaintiff's land, leveling of a portion of the premises, construction of a powder magazine 200 feet from plaintiff's dwelling, and use of the premises for general construction purposes], _____ [*specify injury and appropriate measure of damages, e.g.,* plaintiff's property was damaged to such an extent that repairs were necessary to restore the land (and _____ (*describe improvements, if any, e.g.,* a single family house) to _____ (its *or* their) prior condition all to plaintiff's damage in the sum of $_____)].

[6. As a (further) proximate result of the _____ (*specify trespassory conduct, e.g.,* defendant's entry onto plaintiff's land, maintenance of a construction headquarters there, construction and maintenance of a powder magazine 200 feet from plaintiff's dwelling), plaintiff _____ (*specify physical injury and/or mental distress experienced by plaintiff, e.g.,* suffered discomfort and annoyance and experienced mental suffering caused by fear for his safety). (*If plaintiff has experienced physical manifestations of this distress, allege and specify the personal injuries suffered, e.g.,* Plaintiff sustained injuries to his/her nervous system (and person), all of which injuries have caused (, and continue to cause,) plaintiff great mental, physical, and nervous pain and suffering.) As a result of _____ (*specify nature of plaintiff's injury, e.g.,* this mental distress), plaintiff has suffered general damages.]

[7. As a further proximate result of the _____ (*specify trespassory conduct, e.g.,* defendant's entry onto plaintiff's land, maintenance of a construction headquarters there, construction and maintenance of a powder magazine 200 feet from plaintiff's dwelling), _____ (*allege any special damages, e.g.,* plaintiff has incurred, and will continue to incur, medical and related expenses.)]

[8. The aforementioned acts of the defendant were willful and _____ (oppressive *or* fraudulent *or* malicious *or any combination thereof*) in that _____ (*allege facts indicating presence of oppression, fraud, malice, or any combination thereof, e.g.,* defendant constructed and maintained the powder magazine 200 feet from plaintiff's dwelling with knowledge that plaintiff resided there, and despite plaintiff's warnings that the defendant was trespassing, and in conscious disregard of plaintiff's physical safety and mental well being). Plaintiff is therefore entitled to punitive damages.]

[9. Defendant's wrongful conduct _____ (*describe conduct, e.g.,* in maintaining the powder magazine construction site), unless and until enjoined and restrained by order of this court, will _____ (*specify particular facts establishing grounds for preliminary injunctive relief, e.g.,* causegreat and irreparable injury through the ongoing injury to the property and will deprive plaintiff of peace of mind and a safe and secure dwelling).]

[10. Plaintiff has no adequate remedy at law for the injuries _____ (currently being suffered *or* which are threatened) in that _____ (*specify any additional facts tending to show grounds for permanent injunctive relief, e.g.,* defendant will continue to maintain the powder magazine and construction site on plaintiff's land unless restrained and plaintiff would be required to maintain a multiplicity of judicial proceedings to protect his

interests.]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For general damages for property damage in the sum of $_____;

[2. For general damages for _____ (personal injury *and/or* mental distress) according to proof;]

[3. For special damages _____ (*specify, e.g.,* for medical and related expenses) according to proof;]

[4. For punitive damages;]

[5. For an order requiring defendant to show cause, if he/she has any, why he/she should not be enjoined as hereinafter set forth, during the pendency of this action;]

[6. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all requiring defendant and his/her agents, servants, and employees, and all persons acting under, in concert with, or for him/her:

a. To refrain from _____ (*specify each of the acts, courses of conduct, and conditions defendants are to be prohibited from doing, commencing, continuing, or maintaining, e.g.,* continuing to trespass on plaintiff's land and from maintaining a powder magazine or construction headquarters thereon);

b. To _____ (*specify each of the acts, courses of conduct, and conditions defendants are to be commanded to do or undertake, e.g.,* remove the powder magazine and construction headquarters from plaintiff's property and restore the property to its original condition prior to the entrance of defendant);]

7. For costs of suit herein incurred;

[8. For reasonable attorney's fees _____ (of $_____ *or* according to proof); and]

9. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form is a general form of complaint for use by a plaintiff who is seeking damages for trespass to real property and can be used to obtain preliminary and permanent injunctive relief as well [*see Civ. Code §§ 3294, 3333*; *Code Civ. Proc. §§ 526, 527(a)*]. An action in trespass may be brought by the person in possession, whether or not that person is the owner [*Williams v. Goodwin (1974) 41 Cal. App. 3d 496, 508, 116 Cal. Rptr. 200* (resident watchman's action in trespass for personal injuries caused by trespassing bull was proper); *see § 550.19[2]*]. It is not clear, however, to what extent a possessor who is not the owner may recover for damages to the real property, as opposed to personal injury caused by the trespass. Actionable trespass may be based on the defendant's entry or on his or her causing another person or foreign matter to enter on the property, but there will be no liability unless the trespass is intentional, the result of recklessness or negligence, or the result of engaging in an extrahazardous activity [*see Gallin v. Poulou (1956) 140 Cal. App. 2d 638, 645, 295 P.2d 958* ; for a form alleging trespass by causing the entry of foreign matter, *see § 550.46*].

With appropriate modifications, this form can be used in actions seeking a variety of damages and forms of relief. When the trespass involves occupation of the land, the plaintiff can sue for damages, or in ejectment and have a judgment of ouster and damages, or for an injunction to restrain the continued occupation [*Slater v. Shell Oil Co. (1943) 58 Cal. App. 2d 864, 869, 137 P.2d 713* ; *see § 550.19[3]*].

The form can include a request for damages to a building or other improvement on the land. If a business is involved, damages may include lost profits [*Natural Soda Prod. Co. v. City of Los Angeles (1943) 23 Cal. 2d 193, 199, 143 P.2d 12* ; *see § 550.21*]. This form is adapted from the fact situation in *Smpardos v. Piombo Constr. Co. (1952) 111 Cal. App. 2d 415, 244 P.2d 435* .

[3] Allegations

A complaint for damages for trespass must allege facts showing the following:

- Plaintiff's possession of the real property and a description of the real property [*Lightner Mining Co. v. Lane (1911) 161 Cal. 689, 694-695, 120 P. 771* ; *Williams v. Goodwin (1974) 41 Cal. App. 3d 496, 509, 116 Cal. Rptr. 200]* .

- The nature and circumstances of the trespass [*Gomez v. Reed (1918) 178 Cal. 759, 763, 174 P. 658]* .

- The damages proximately caused by the trespass [*Gomez v. Reed (1918) 178 Cal. 759, 763, 174 P. 658]* .

This complaint alleges (1) facts showing plaintiff's protectible right or interest (Paragraph 1) [*see Lightner Mining Co. v. Lane (1911) 161 Cal. 689, 694-695, 120 P. 771* ; *see § 550.19[2]*], (2) the actions by the defendant constituting a trespass on the plaintiff's property (Paragraph 4) [*see Wilson v. Interlake Steel Co. (1982) 32 Cal. 3d 229, 233, 185 Cal. Rptr. 280, 649 P.2d 922]* , and (3) damages proximately caused by the defendant's trespass (Paragraph 5) [*see Civ. Code § 3333*].

The complaint includes optional paragraphs for use to allege (1) fictitious names of defendants (Paragraph 2) [*see Code Civ. Proc. § 474*; *see* Ch. 20, *Allegations Commonly Used*], and (2) the agency relationship of defendants (Paragraph 3) [*see* Ch. 427, *Principal and Agent*].

Optional paragraphs are also included to allege (1) that plaintiff suffered personal injury or mental distress or both as a result of the trespass (Paragraph 6) [*see Acadia, Cal., Ltd. v. Herbert (1960) 54 Cal. 2d 328, 337, 5 Cal. Rptr. 686* ; *see* Ch. 362, *Mental Suffering and Emotional Distress*], (2) special damages (Paragraph 7), and (3) facts showing that punitive damages are appropriate (Paragraph 8) [*see Civ. Code § 3294*].

Optional paragraphs for use to obtain injunctive relief allege (1) facts to support preliminary injunctive relief (Paragraph 9) [*see Code Civ. Proc. § 527(a)*; *E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1]* , and (2) any additional facts necessary to support permanent injunctive relief (Paragraph 10) [*see Civ. Code § 3422*; *Code Civ. Proc. § 526*; *see* Ch. 303, *Injunctions*].

[4] Specification of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], see Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[5] Verification

Verification [*see Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*]. Otherwise, verification of a complaint is not required [*see Code Civ. Proc. § 128.7(a)*], but verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* . Although a court may issue temporary restraining orders and preliminary injunctions in a limited civil case, if permanent injunctive relief is sought, the action is classified as an unlimited civil case [*see Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85(b), 86(a)(8)*]. For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

[6] Pleading Possession

The proper party plaintiff in an action for trespass to real property is the person in actual possession. No averment of title in the plaintiff is necessary [*Lightner Mining Co. v. Lane (1911) 161 Cal. 689, 694-695, 120 P.771* ; *Smith v. Cap Concrete, Inc. (1982) 133 Cal. App. 3d 769, 774, 184 Cal. Rptr. 308* ; *see Allen v. McMillion (1978) 82 Cal. App. 3d 211, 218-219, 147 Cal. Rptr. 77* (plaintiff in wrongful, peaceable possession may recover nominal damages against the owner for trespass)]. If the complaint alleges only plaintiff's ownership or actual possession or right of possession and no more, the allegation would be good against demurrer and the defendant would be required to set up ownership in itself as a defense. However, if a complaint, in addition to alleging ownership, alleges facts on which the purported ownership rests, the general allegation of ownership becomes a mere conclusion of law and the plaintiff is bound by any weakness in the specific facts alleged [*Shusett, Inc. v. Home Sav. & Loan Ass'n (1964) 231 Cal. App. 2d 146, 150, 41 Cal. Rptr. 622]* .

For example, a complaint alleging that the plaintiff had actual possession pursuant to a lease, with the lease attached to the complaint, did not state facts sufficient to constitute a cause of action for trespass because there was no allegation that the plaintiff had performed his obligations under the lease so as to establish his right of possession under it [*Nichols v. Drew (1948) 88 Cal. App. 2d 301, 302-303, 198 P.2d 707]* . Thus, counsel should exercise care if making any specific allegations as to the plaintiff's right to possession. However, more recent case law suggests that a peaceable but wrongful possessor may be entitled to recover at least nominal damages even against the rightful owner [*see Allen v. McMillion (1978) 82 Cal. App. 3d 211, 218-219, 147 Cal. Rptr. 77]* . For further discussion of the possessory interest necessary to maintain an action for trespass, see *§ 550.19[2]*.

[7] Jurisdiction and Venue

For a discussion of jurisdiction and venue, see *§ 550.19[1]*

[8] Attorney's Fees

If the action is to recover damages to personal or real property resulting from trespassing on lands either under cultivation or intended or used for the raising of livestock, a prevailing plaintiff is entitled to reasonable attorney's fees in addition to other costs, and in addition to any liability for damages imposed by law [*Code Civ. Proc. § 1021.9*]. An optional prayer for attorney's fees is provided in the form for the purpose of requesting these fees (Paragraph 8).

[9] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used* .

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions* .

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints* .

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages* .

For discussion and forms relating to actions to recover possession of real property, see Ch. 241, *Ejectment* .

For forms of complaint for damages to real property resulting from blasting, see Ch. 256, *Explosives* .

For discussion, a procedural guide, and forms relating to the procedures for seeking injunctive relief, see Ch. 303, *Injunctions* .

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter* .

For discussion and forms relating to the removal of timber, see Ch. 350, *Logs and Timber* .

For discussion and forms for use in nuisance actions involving real property, see Ch. 391, *Nuisance* .

For alternative forms of prayers, see Ch. 420, *Prayers* .

For forms of complaints for damages resulting from trespassing waters, see Ch. 421, *Premises Liability* .

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers* .

For forms of allegations showing proper venue, see Ch. 571, *Venue* .

For alternative forms of verification, see Ch. 572, *Verification* .

For memoranda of points and authorities relating to general principals and measure of damages in tort actions, see California Points and Authorities, Ch. 65, *Damages* , Pt. I (Matthew Bender).

For memoranda of points and authorities relating to motions in support of and opposition to injunctions, see California Points and Authorities, Ch. 116, *Injunctions* (Matthew Bender).

For memoranda of points and authorities relating to motions in trespass actions, see California Points and Authorities, Ch. 225, *Trespass* (Matthew Bender).

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 550 TRESPASS
PART IV. FORMS

48-550 California Forms of Pleading and Practice--Annotated § 550.41

§ 550.41 Complaint for Damages for Trespass to Real Property Easement and for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)] and Permanent Injunctions [Civ. Code § 3422]

[1] FORM Complaint for Damages for Trespass to Real Property Easement and for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)] and Permanent Injunctions [Civ. Code § 3422]

[*Caption. See § 550.40[1].*]

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, the _____ [*specify proprietary interest, e.g.,* owner] and in possession of certain real property consisting of land [and _____ (*describe improvements, e.g.,* a single family dwelling)] at _____ [*address*], _____ County, California, and more particularly described as follows: _____ [*give legal description*].

2. _____ [*Name of defendant*] is, and at all times herein mentioned was, the owner of certain real property located at _____ [*address*], _____ County, California, and more particularly described as follows: _____ [*give legal description*].

3. Plaintiff is, and at all times herein mentioned was, the _____ [*specify proprietary interest, e.g.,* owner] and in possession of an easement appurtenant to his/her real property described above. This easement consists of _____ [*describe easement, e.g.,* a six-foot wide right of way over the Northeast corner of defendant's lot for use as an access road to plaintiff's lot)], and more particularly described as follows: _____ [*give legal description*].

[4. *Fictitious name allegation. See § 550.40[1], Paragraph 2.*]

[5. *Agency allegation. See § 550.40[1], Paragraph 3.*]

6. On or about _____ [*date*], [and continuing to the present time,] defendant[s, and each of them] unreasonably _____ [interfered with *or* obstructed] plaintiff's easement by _____ [*specify the act affecting easement, e.g.,* altering the roadway and using it for the passage of trucks and other heavy equipment necessary for logging operations]. The act of the defendant[s, and each of them] _____ [has resulted *or* if allowed to continue, will result] in the obstruction of the plaintiff's easement right by _____ [*specify the manner in which obstruction has or will occur, e.g.,* the construction of a dirt and gravel fill over a creek and maintenance of that fill in such a way that it has become soft, full of deep ruts and impassable for plaintiff's use].

7. As a proximate result of _____ [*specify trespassory conduct, e.g.,* the excessive use and alteration of the roadway by the defendant], plaintiff sustained damages _____ [*specify damages, e.g.,* by being forced to make road repairs in the sum of $_____ to avoid damage to his/her vehicles *and/or* has been deprived of ingress and egress from his/her real property during the time the road is impassible].

[8. *Mental distress allegation. See § 550.40[1], Paragraph 6.*]

[9. *Special damages allegation. See § 550.40[1], Paragraph 7.*]

[10. *Punitive damage allegation. See § 550.40[1], Paragraph 8.*]

[11. *Continuing trespass causing great and irreparable allegation. See § 550.40[1], Paragraph 9.*]

[12. *Inadequate legal remedy allegation. See § 550.40[1], Paragraph 10.*]

[*Prayer. See § 550.40[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff _____ [*name*]

[*Verification. See § 550.40[1].*]

[2] Use of Form

This form is a general form of complaint for use by a plaintiff to seek damages for trespass to an easement and can be used to obtain preliminary and permanent injunctive relief as well [*see Civ. Code § 3333*]. This form is adapted from the fact situation in *Roth v. Cottrell (1952) 112 Cal. App. 2d 621, 246 P.2d 958* . For further discussion and forms relating to actions for interference with easements, and to quiet title to easements, see Ch. 240, *Easements* .

For further discussion pertaining to an action for trespass, see *§ 550.40[2]-[9]*.

[3] Allegations

The complaint alleges (1) the plaintiff's proprietary interest in, and possession of easement and the land appurtenant to the easement (Paragraphs 1, 3) [*see Roth v. Cottrell (1952) 112 Cal. App. 2d 621, 623, 246 P.2d 958]* ; (2) the

defendant's ownership of the servient tenement (Paragraph 2) [*see Ames v. Prodon (1967) 252 Cal. App. 2d 94, 100, 60 Cal. Rptr. 183]* ; (3) facts showing the defendant's interference or obstruction with the easement (Paragraph 6); and (4) damages proximately caused by the defendant's trespass (Paragraph 7) [*see Civ. Code § 3333*].

[4] Verification

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff tothe relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* .Although a court may issue temporary restraining orders and preliminary injunctions in a limited civil case, if permanent injunctive relief is sought, the action is classified as an unlimited civil case [*see Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85(b), 86(a)(8)*]. For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

[5] Cross References

For discussion and forms relating to actions involving easements, see Ch. 240, *Easements* .

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 550 TRESPASS
PART IV. FORMS

48-550 California Forms of Pleading and Practice--Annotated § 550.42

§ 550.42 Complaint for Damages for Trespass to Real Property and for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)] and Permanent Injunction [Civ. Code § 3422] and for Conversion of Personal Property [Civ. Code § 3336]

[1] FORM Complaint for Damages for Trespass to Real Property and for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)] and Permanent Injunction [Civ. Code § 3422] and for Conversion of Personal Property [Civ. Code § 3336]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES[, TEMPORARY
_____ [*name*],	)	RESTRAINING ORDER, AND PRELIMINARY
Defendant.	)	(AND PERMANENT) INJUNCTION(S)]
	)	(Trespass and Conversion)
	)	

Plaintiff alleges:

FIRST COUNT
(Trespass)

1. Plaintiff is, and at all times herein mentioned was, the _____ [*specify proprietary interest, e.g.,* owner] and in possession of certain real property consisting of land and _____ [*describe*

improvements, e.g., a sawmill with various items of milling equipment, including 300 feet of conveyor chain, pulleys, shafts, sprockets and assorted pieces of iron] at _____ [*address*], _____ County, California, and more particularly described as follows: _____ [*give legal description*].

[2. *Fictitious name allegation. See § 550.40[1], Paragraph 2.*]

[3. *Agency allegation. See § 550.40[1], Paragraph 3.*]

4. On or about _____ [*date*], [and continuing to the present time], defendant[s, and each of them] wrongfully and unlawfully _____ [*specify the act of trespass, e.g.,* entered the above described land, removed boards from the mill building, entered the mill, and removed several items of equipment, severing some of the items from their foundation within the mill].

5. As a proximate result of the _____ [*specify trespassory conduct, e.g.,* entry onto the plaintiff's land, entry of and damage to the mill building, and forcible removal of equipment], plaintiff's property was damaged to such an extent that repairs were necessary to restore the land and _____ [*specify improvements, e.g.,* the sawmill] to their prior condition_____ [in the sum of $_____, which is the cost of restoring the land and the _____ (*specify improvements, e.g.,* sawmill) to their original condition].

[6. *Mental distress allegation. See § 550.40[1], Paragraph 6.*]

[7. *Special damages allegation. See § 550.40[1], Paragraph 7.*]

[9. *Continuing trespass causing great and irreparable injury allegation. See Form 1, Paragraph 9.*]

[10. *Inadequate legal remedy allegation. See § 550.40[1], Paragraph 10.*]

SECOND COUNT
(Conversion)

11. Plaintiff refers to and herein incorporates Paragraphs 1-5 and Paragraph 7 of the First Count.

12. _____ [*Allege defendant's capacity and residence, e.g.,* Defendant _____ (*name*) is, and at all times herein mentioned was, a resident of _____ County, California.]

13. On or about _____ [*date*], and at _____ [*city*], _____ County, California, the _____ [*specify items mentioned above which were removed from plaintiff's property, e.g.,* 300 feet of conveyor chain, pulleys, shafts, sprockets and assorted pieces of iron] had a value of $_____.

14. On or about _____ [*date*], defendant _____ [*set forth the details of defendant's conversion of the property, e.g.,* trespassed on plaintiff's property, entered the sawmill, removed the items from the sawmill, installed those items for use in his plant and] converted the same to his/her own use.

[*EITHER*]

15. As a proximate result of defendant's conversion, plaintiff has sustained a loss of $_____ [*specify an amount equal to the value of the property converted, plus interest*].

[*OR*]

15. As a proximate result of defendant's conversion, plaintiff _____ [*set forth injuries suffered which are the natural, reasonable, and proximate results of the conversion, e.g.,* has suffered from the loss of use of the equipment, including lost profits due to an inability to mill without the essential equipment], all to plaintiff's damage in the sum of $_____.

[*CONTINUE*]

[16. Between the time of defendant's conversion of the above mentioned property to his/her own use and the filing of this action, plaintiff _____ (*specify time and money properly expended in pursuit of the converted property, e.g.,* spent three hours in contacting the sheriff and accompanying officers to the site of defendant's plant to identify the equipment and spent $_____ on gasoline and long distance telephone calls), all to plaintiff's damage in the sum of $_____).]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows

On the FIRST COUNT:

1. For general damages [for property damage] in the sum of $_____;

[2. For general damages for personal injury _____ (according to proof *or* in the sum of $_____);]

[3. For special damages _____ (*specify, e.g.,* for medical and related expenses _____ (according to proof or in the sum of $_____);]

[4. For punitive damages;]

[5. For an order requiring defendant to show cause, if any he/she has, why he/she should not be enjoined as hereinafter set forth, during the pendency of this action;]

[6. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant and his/her agents, servants, and employees, and all persons acting under, in concert with, or for him/her from _____ (*specify each of the acts, courses of conduct, and conditions defendants are to be prohibited from doing, commencing, continuing, or maintaining, e.g.,* continuing to trespass on plaintiff's land and mill and removing equipment from the mill);]

On the SECOND COUNT:

[7. For the value of the property converted in the sum of $_____;]

[8. For interest at the legal rate on this sum pursuant to *Section 3336 of the Civil Code*, from and after _____ (*date*);]

[9. For damages for the proximate and foreseeable loss resulting from defendant's conversion in the sum of $_____;]

[10. For damages for time and money properly expended in pursuit of the converted property in the sum of $_____;]

[11. For punitive damages;]

On all COUNTS:

12. For costs of suit herein incurred;

[13. For reasonable attorney's fees _____ (of $_____ *or* according to proof); and]

14. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification. See § 550.40[1].*]

[2] Use of Form

This form is a general form of complaint for use by a plaintiff to seek damages for trespass to real property and damages for the removal and conversion of property from that real property [*see Civ. Code § 3333*]. It can be used to obtain preliminary and permanent injunctive relief for the trespass in addition to the damages. This form is adapted from the fact situation in *Holm Timber Indus. v. Plywood Corp. (1966) 242 Cal. App. 2d 492, 51 Cal. Rptr. 597* . For a further discussion of conversion, see Ch. 150, *Conversion* .

For further discussion pertaining to an action for trespass, see *§ 550.40[2]-[9]*.

[3] Allegations

The first cause of action of the complaint alleges (1) the plaintiff's proprietary interest in, and possession of the real property and improvements and personal property thereon (Paragraph 1); (2) the nature of the defendant's wrongful conduct (Paragraph 4) [*see Wilson v. Interlake Steel Co. (1982) 32 Cal. 3d 229, 233, 185 Cal. Rptr. 280, 649 P.2d 922]* ; and (3) damages proximately caused by the defendant's trespass (Paragraph 5) [*see Civ. Code § 3333*].

The second cause of action of the complaint incorporates by reference the paragraphs setting forth the nature of the plaintiff's interest, the wrongful conduct of the defendant, and the optional paragraphs alleging fictitious names, agency, and punitive damages. The second cause of action alleges (1) the defendant's capacity (Paragraph 12) [*see Code Civ. Proc. § 395*]; (2) the value of the property (Paragraph 13) [*see Oakes v. Suelynn Corp. (1972) 24 Cal. App. 3d 271, 279, 100 Cal. Rptr. 838]* ; and (3) the defendant's conversion of the property (Paragraph 14) [*see Jordan v. Talbot (1961) 55 Cal. 2d 597, 610, 12 Cal. Rptr. 488, 361 P.2d 20]* . It also includes alternate allegations for the measure of damages (Paragraph 15) [*see Civ. Code § 3336*]; and (2) compensation for the expenditures made in pursuit of the property (Paragraph 16) [*see Civ. Code § 3336*].

[4] Venue

Actions for trespass to real property are properly held in the county in which the property is located [*Code Civ. Proc. §*

392]. The residence of the defendant, however, is the proper place for trial in tort actions, including conversion [*Haurat v. Superior Court (1966) 241 Cal. App. 2d 330, 333, 50 Cal. Rptr. 520* ; *see Code Civ. Proc. § 395(a)*]. Thus, when these causes of action are combined, a conflict over the place of venue may result. When a personal cause of action is joined with one that is local in nature, the defendant is entitled to have the proceeding transferred to the county of his or her residence [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 605, 328 P.2d 953]* . Thus, in drafting the complaint, counsel should be aware of any potential conflict relating to venue and prepare accordingly. For a further discussion of venue, see Ch. 571, *Venue* .

[5] Damages

The usual measure of damages in a trespass action is the cost to restore the property, although the cases have allowed recovery of a variety of damages [*Green v. General Petroleum Corp. (1928) 205 Cal. 328, 336, 270 P. 952* ; for a further discussion of damages in trespass cases, see *§ 550.21*]. The measure of damages for conversion is ordinarily the value of the property converted at the time and place of conversion with interest from that time. The alternative measure is an amount sufficient to indemnify the party injured for the loss that is the natural, reasonable, and proximate result of the wrongful act and that a proper degree of prudence on the plaintiff's part would not have avoided [*In re Brian S. (1982) 130 Cal. App. 3d 523, 530, 181 Cal. Rptr. 778* ; *see Civ. Code § 3336*]. This alternative measure of damages is appropriate when damages based on the value of the property would be unjust [*Myers v. Stephens (1965) 233 Cal. App. 2d 104, 116, 43 Cal. Rptr. 420]* .

[6] Verification

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* .Although a court may issue temporary restraining orders and preliminary injunctions in a limited civil case, if permanent injunctive relief is sought, the action is classified as an unlimited civil case [*see Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85(b), 86(a)(8)*]. For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

[7] Attorney's Fees

If the action is to recover damages to personal or real property resulting from trespassing on lands either under cultivation or intended or used for the raising of livestock, a prevailing plaintiff is entitled to reasonable attorney's fees in addition to other costs, and in addition to any liability for damages imposed by law [*Code Civ. Proc. § 1021.9*]. An optional prayer for attorney's fees is provided in the form for the purpose of requesting these fees when appropriate.

[8] Cross References

For discussion and forms relating to conversion of personal property, see ch. 150, *Conversion* .

For discussion and forms relating to issues and procedures of venue, see Ch. 571, *Venue* .

For memoranda of points and authorities in support of and opposition to motions for change of venue, see California Points and Authorities, Ch. 238, *Venue* (Matthew Bender).

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Chapter 550 TRESPASS
PART IV. FORMS

48-550 California Forms of Pleading and Practice--Annotated § 550.43

§ 550.43 Complaint for Damages for Trespass to Personal Property

[1] FORM Complaint for Damages for Trespass to Personal Property

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES[, TEMPORARY
_____ [*name*],	)	RESTRAINING ORDER, AND PRELIMINARY
Defendant.	)	(AND PERMANENT) INJUNCTION(S)]
	)	(Trespass to Personal Property)
	)	

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, the _____ [*specify proprietary interest, e.g.,* owner] and in possession of certain personal property more particularly described as _____ [*set forth a description of the property which was the object of the trespass, e.g.,* a 1965 Bonanza Beechcraft airplane, Model No. K-25 bearing FAA Registration No. _____].

2. _____ [*Allege defendant's capacity and residence, e.g.,* Defendant _____ (*name*) is, and at all times herein mentioned was, a resident of _____ County, California].

[3. *Fictitious name allegation. See § 550.40[1], Paragraph 2.*]

[4. *Agency allegation. See § 550.40[1], Paragraph 3.*]

5. On or about _____ [*date*], defendant[s, and each of them,] without plaintiff's consent _____ [*specify the act of trespass, e.g.*, took possession of the airplane while it was on a runway at _____ Airport in _____ County, California, attempted to fly it, hit two levees, and crashed the airplane in a dump], thereby intermeddling with plaintiff's use of _____ [*specify the property, e.g.*, the airplane].

[*EITHER, if property destroyed*]

6. On or about _____ [*date of the trespass*] the _____ [*specify the property trespassed on, e.g.,*. airplane] had a value of $_____. The acts of the defendant[s, and each of them] caused the total destruction of the _____ [*specify the property trespassed on, e.g.*, airplane], the replacement cost of which is $_____.

[*OR, if property damaged*]

6. As a proximate result of the _____ [*specify trespassory conduct, e.g.*, intermeddling without plaintiff's consent to plaintiff's possession of the airplane and the damage done to the airplane], _____ [*set forth damages proximately caused by the trespass, e.g.*, the plaintiff expended $_____ to repair the airplane and lost profits by not having use of the airplane in his/her business as a private air charter service].

[*CONTINUE*]

[7. *Punitive damage allegation. See § 550.40[1], Paragraph 8.*]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For general damages _____ [according to proof *or* in the sum of $_____];

[2. For punitive damages;]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 550.40[1].*]

[2] Use of Form

This form is a general form of complaint for use by a plaintiff to seek damages for trespass to personal property [*see Civ. Code § 3333*]. This complaint is adapted from the fact situation in *Fresno Air Serv. v. Wood (1965) 232 Cal. App.*

2d 801, 43 Cal. Rptr. 276 .

The tort of trespass to personal property is very similar to conversion, although there are important differences which make proper usage of the appropriate tort claim imperative. Trespass to personal property involves intermeddling with the property of another rather than interfering with ownership or possession, which is conversion [*see Jordan v. Talbot (1961) 55 Cal. 2d 597, 610, 12 Cal. Rptr. 488, 361 P.2d 20* ; *see § 550.13*]. Damages in actions for trespass to personal property are the actual damages suffered by reason of the impairment of the property or the loss of its use [*Jordan v. Talbot (1961) 55 Cal. 2d 597, 610, 12 Cal. Rptr. 488, 361 P.2d 20]* . Damages for conversion are statutorily defined and may, in some circumstances, merit a greater recovery [*see Civ. Code § 3336* (damages for conversion)].

For further discussion pertaining to an action for trespass, see *§§ 550.40[2]-[9], 550.42[2]-[5]*.

[3] Allegations

This complaint alleges (1) facts showing the plaintiff's interest in the property (Paragraph 1); (2) the capacity of the defendant, which may be a basis of venue (Paragraph 2); (3) the nature of the defendant's wrongful conduct (Paragraph 5); and (4) proximately caused damages (alternative Paragraphs 5) [*see Civ. Code § 3333*; *see Jordan v. Talbot (1961) 55 Cal. 2d 597, 610, 12 Cal. Rptr. 488, 361 P.2d 20]* .

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48-550 California Forms of Pleading and Practice--Annotated § 550.44

§ 550.44 Allegation--Plaintiff's Right to Possession When Not in Actual Possession and Not Owner of Property

[1] FORM Allegation--Plaintiff's Right to Possession When Not in Actual Possession and Not Owner of Property

Plaintiff is, and at all times herein mentioned was, the _____ [*specify proprietary interest, e.g.,* lessee under a lease from _____ (*name of owner*), the owner of the real property, dated _____ and was entitled to actual possession of that land commencing on _____ [*date*]. (A copy of that lease is attached hereto as Exhibit A and made a part hereof.)] _____ [*Specify the future possessory interest under an existing and valid obligation, e.g.,* By the terms of that lease, plaintiff possessed a future possessory interest in the crop in cultivation on the land on the date the lease was executed]. The real property described in the _____ [*specify the form of existing obligation, e.g.,* lease] is located at _____ [*address*], _____ County, California, and more particularly described as follows: _____ [*give legal description*].

[2] Use of Form

This allegation is for use by the plaintiff in a complaint for trespass to real property to allege the plaintiff's protectible interest in the property when the plaintiff is not in possession of the property. The person in actual possession of the property is the proper party plaintiff in an action for trespass to real property [*Williams v. Goodwin (1974) 41 Cal. App. 3d 496, 509, 116 Cal. Rptr. 200]* . One complaining of trespass who is not in possession of the land should allege the reason for the interest possessed which dictates allowing the action to go forward [*see Wolfsen v. Hathaway (1948) 32 Cal. 2d 632, 642-643, 198 P.2d 1] , disapproved on other grounds, Flores v. Arroyo (1961) 56 Cal. 2d 492, 15 Cal. Rptr. 87, 364 P.2d 263* . When using this allegation, it should replace Paragraph 1 in § 550.40[1].

The allegation is adapted from the fact situation in *Wolfsen v. Hathaway (1948) 32 Cal. 2d 632, 198 P.2d 1 , disapproved on other grounds, Flores v. Arroyo (1961) 56 Cal. 2d 492, 15 Cal. Rptr. 87, 364 P.2d 263* .

For further discussion pertaining to an action for trespass, see *§ 550.40[2]-[9]*.

[3] Cross References

For discussion of rights of remainderman to prevent injury to the reversionary interest or waste by life tenant and form of complaint for damages suffered, see Ch. 344, *Life Estates and Remainders* .

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48-550 California Forms of Pleading and Practice--Annotated § 550.45

§ 550.45 Allegation--Plaintiff's Right to Cost of Restoration That Exceeds Diminution in Value

[1] FORM Allegation--Plaintiff's Right to Cost of Restoration That Exceeds Diminution in Value

As a proximate result of the _____ [*specify trespassory conduct, e.g.,* bulldozing and building a rough road on the plaintiff's land], plaintiff's land was damaged to such an extent that repairs would be necessary to restore the land to its prior condition because _____ [*specify manner of damages to land, e.g.,* 225 trees were killed or damaged and the surrounding undergrowth was destroyed]. The cost of restoring the land to its original state is [$_____, an amount that is] reasonable and not excessive in relation to the prior value of the land[, which was $_____]; the acts of defendant[s, and each of them,] diminished the value of plaintiff's land by [$_____, which is] an amount less than the amount required for restoration. Plaintiff has a personal reason for restoring the original condition of the land in that _____ [*specify the personal reason, e.g.,* plaintiff enjoyed the land and the natural forest and had purposely kept the land in its natural state].

[2] Use of Form

This allegation is for use by the plaintiff in a complaint for trespass to real property to allege that he or she should recover the cost of restoration of the property even though that cost exceeds the diminution of the value of the property. The general rule is that if the cost of restoration exceeds the diminution in value, the value of the property is the proper measure of damages [*Green v. General Petroleum Corp. (1928) 205 Cal. 328, 336, 270 P. 952]* . As an exception to this rule, restoration costs in excess of the decrease in value may be recovered if there is a reason personal to the owner for restoring the original condition. The cost of restoration must be reasonable and not excessive in relation to the damage inflicted on the land or its value prior to the trespass. If the costs are excessive, the court may allow costs for the reasonable approximation of the land's former condition rather than restoration to the identical condition [*Heninger v. Dunn (1980) 101 Cal. App. 3d 858, 865, 162 Cal. Rptr. 104* ; *see § 550.21[3][c]*].

The allegation is adapted from the fact situation in *Heninger v. Dunn (1980) 101 Cal. App. 3d 858, 162 Cal. Rptr. 104* . When appropriate, this allegation can be used in *§ 550.40[1]* and may be substituted for Paragraph 5. Counsel may wish to include a statement alleging the dollar amount of the diminution in value to make the complaint more specific.

For further discussion pertaining to an action for trespass, see *§ 550.40[2]-[9]*.

[3] Cross References

For discussion and forms relating to pleading the nature and extent of tort damages, see Ch. 177, *Damages*

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48-550 California Forms of Pleading and Practice--Annotated § 550.46

§ 550.46 Allegation--Defendant Acted With Knowledge That Trespass Was Substantially Certain Result

[1] FORM Allegation--Defendant Acted With Knowledge That Trespass Was Substantially Certain Result

On or about _____ [*date*], [and continuing to the present time], defendant[s, and each of them,] _____ [*specify act that resulted in the entry of foreign matter on plaintiff's land, e.g.,* operated his/her cement plant and quarry in such a manner that dust and other substances escaped therefrom and settled on plaintiff's property]. The act of defendant[s, and each of them,] was done with the knowledge that that act would, to a substantial certainty, result in _____ [*set forth results of the actions that constituted trespass, e.g.,* dust and other substances being deposited on plaintiff's property].

[2] Use of Form

This allegation is for use by the plaintiff in a complaint for trespass to real property to allege that the defendant caused foreign material to enter on the plaintiff's property. The doing of an act that will to a substantial certainty result in the entry of foreign matter on another's land suffices for an intentional trespass to land on which liability may be based [*Roberts v. Permanente Corp. (1961) 188 Cal. App. 2d 526, 530-531, 10 Cal. Rptr. 519]* .

The allegation is adapted from the fact situation in *Roberts v. Permanente Corp. (1961) 188 Cal. App. 2d 526, 530-531, 10 Cal. Rptr. 519* . When appropriate, this allegation can replace Paragraph 4 in *§ 550.40[1]*.

For further discussion pertaining to an action for trespass, see *§ 550.40[2]-[9]*.

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48-550 California Forms of Pleading and Practice--Annotated § 550.47

§ 550.47 Allegation--Plaintiff Entitled to Cost of Damages Plus Costs to Prevent Further Harm

[1] FORM Allegation--Plaintiff Entitled to Cost of Damages Plus Costs to Prevent Further Harm

As a proximate result of the _____ [*specify trespassory conduct, e.g.,* defendant's acts in road construction that trespassed on plaintiff's underground communications cable, and damaged the cable in three different locations], plaintiff's property was damaged to such an extent that repairs were necessary to restore _____ [*specify the property damaged, e.g.,* the cable] to its prior condition, in the sum of $_____, which is the cost of restoring it to its original state. Plaintiff incurred additional costs _____ [*specify the actions taken by plaintiff to avert further harm, e.g.,* in relocating the cables] in the sum of $_____, which is the reasonable cost of _____ [*specify act taken to prevent further harm, e.g.,* relocating the cable].

[2] Use of Form

This allegation is for use by the plaintiff in a complaint for trespass to real property to allege that the defendant caused injury to plaintiff's property and that the plaintiff should recover damages for costs incurred to prevent further harm in addition to the damages directly caused by the defendant's actions. A person who has already suffered injury by the tort of another is entitled to recover for expenditures reasonably made or harm suffered in a reasonable effort to avert further harm. There must be reasonable grounds for believing that further injury would result [*Pac. Tel. & Tel. Co. v. Granite Constr. Co. (1964) 225 Cal. App. 2d 765, 769, 37 Cal. Rptr. 727]* .

The allegation is adapted from the fact situation in *Pac. Tel. & Tel. Co. v. Granite Constr. Co. (1964) 225 Cal. App. 2d 765, 37 Cal. Rptr. 727* . When its use is appropriate, this allegation can be used instead of Paragraph 5 in *§ 550.40[1]*.

For further discussion pertaining to an action for trespass, see *§ 550.40[2]-[9]*.

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48-550 California Forms of Pleading and Practice--Annotated § 550.48

§ 550.48 Affirmative Defense--Action Barred by Statute of Limitations

[1] FORM Affirmative Defense--Action Barred by Statute of Limitations

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that the cause of action set forth in the complaint herein appears from the allegations thereof, and particularly from the allegations of Paragraph[s] _____ thereof, to be barred by the provisions of *Section 338(b) of the Code of Civil Procedure.*

[2] Use of Form

This form of affirmative defense is for use by a defendant in an answer to a complaint of trespass to real property when the statute of limitations has run on the trespassing act. If it appears on the face of the complaint that the statute has run, a demurrer may be made, using the same language [*Code Civ. Proc. § 430.30*]. The time for bringing an action for trespass on or injury to real property is three years [*Code Civ. Proc. § 338(b)*; *see § 550.20*]. Actions involving the drilling of oil or gas wells from a surface location on land not owned by the aggrieved party must be brought within 180 days [*Code Civ. Proc. § 349*3/4; *see* Ch. 393, *Oil and Gas*]. The time limitation for wrongful injuries to timber, trees, or underwood arising from any trespass committed while acting in reliance on an improper boundary line is five years from the date of trespass [*Civ. Code § 3346*; *see* Ch. 350, *Logs and Timber*].

[3] Cross References

For discussion and additional forms relating to limitations of actions, see Ch. 345, *Limitation of Actions* .

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48-550 California Forms of Pleading and Practice--Annotated § 550.49

§ 550.49 Affirmative Defense--Consensual Entry--Express Consent

[1] FORM Affirmative Defense--Consensual Entry--Express Consent

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

1. _____ [*Describe the consent given, e.g.,* On or about _____ [*date*], plaintiff executed a security agreement to secure notes given to defendant(, a copy of which is attached hereto as Exhibit A and made a part hereof). Paragraph _____ of that security agreement provides that in the event of a default by plaintiff, defendant has the right to enter onto plaintiff's premises, take possession of the assets designated as collateral by the security agreement, and remain on the premises in order to sell the collateral to satisfy the debt].

2. _____ [*Describe how defendant acted consistently with the consent, e.g.,* On _____ [*date*], plaintiff failed to make payment and defaulted on the note. Thereafter, on _____ [*date*], and in accordance with the terms and consent to entry given by plaintiff in the security agreement, defendant entered plaintiff's premises and took possession of the collateral].

[2] Use of Form

This form of affirmative defense is for use by a defendant in an answer to a complaint of trespass to real property when the plaintiff expressly consented to the defendant's entry. When there is a consensual entry, there is no tort of trespass, because lack of consent is an element of the wrong. A conditional or restricted consent to enter land creates a privilege to do so only in so far as the condition or restriction is complied with [*Civic W. Corp. v. Zila Indus., Inc. (1977) 66 Cal. App. 3d 1, 17, 135 Cal. Rptr. 915* ; *see § 550.22[1]*]. The form is adapted from the fact situation in *Civic W. Corp. v. Zila Indus., Inc. (1977) 66 Cal. App. 3d 1, 135 Cal. Rptr. 915* .

Although consent to enter has been deemed given in a conditional sales contract allowing repossession by the seller [*see Williams v. General Elec. Credit Corp. (1958) 159 Cal. App. 2d 527, 532-533, 323 P.2d 1046]* , this type of consent may be an unconstitutional deprivation of property [*see Fuentes v. Shevin (1972) 407 U.S. 67, 96, 92 S. Ct. 1983, 32*

L. Ed. 2d 556 ; *see also § 550.22[1][b]*].

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48-550 California Forms of Pleading and Practice--Annotated § 550.50

§ 550.50 Affirmative Defense--Consensual Entry--Implied Consent

[1] FORM Affirmative Defense--Consensual Entry--Implied Consent

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

1. An implied consent to enter plaintiff's property existed because _____ [*set forth the circumstances giving rise to implied consent, e.g.,* it is the custom of residents in the locale to accept the defendant's courtesy, as the owner of the only telephone within many miles, of receiving telephone messages and delivering them to the residents of the area].

2. _____ [*Describe defendant's actions consistent with the implied consent, e.g.,* On or about _____ [*date*], when defendant entered on plaintiff's farm, it was to deliver such a message to a tenant on the farm in accordance with the custom and habit in the locale].

[2] Use of Form

This form of affirmative defense is for use by a defendant in an answer to a complaint of trespass to real property when there was an implied consent to enter. Every person, by implication invites others to come to his or her house as they may have proper occasion either of business, or courtesy, or information, or some other purpose. Custom must determine what the limit is of that implied invitation [*Duval v. Rowell (1954) 269 P.2d 142* ; *see § 550.22[1][c]*]. This affirmative defense is adapted from the fact situation in *Duval v. Rowell (1954) 269 P.2d 142* .

For further discussion of affirmative defense, see *§ 550.49[2]*.

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48-550 California Forms of Pleading and Practice--Annotated § 550.51

§ 550.51 Affirmative Defense--Entry for Necessity

[1] FORM Affirmative Defense--Entry for Necessity

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

1. _____ [*Describe the details of the necessity involving the preservation of life or property, e.g.,* Defendant was outside the apartment of the plaintiff and heard several moans and groans from within the apartment indicating that someone might be in distress].

2. _____ [*Set forth defendant's response to this threat to life or property, e.g.,* Defendant entered the apartment to look for the person in distress].

[2] Use of Form

This form of affirmative defense is for use by a defendant in an answer to a complaint of trespass to real property when defendant's trespass was prompted by a necessity to preserve life or property. Necessity often justifies an action that would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose [*People v. Roberts (1956) 47 Cal. 2d 374, 377, 303 P.2d 721* ; *see § 550.22[2]*]. The form is adapted from the fact situation in *People v. Roberts (1956) 47 Cal. 2d 374, 377, 303 P.2d 721* .

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48-550 California Forms of Pleading and Practice--Annotated § 550.52

§ 550.52 Affirmative Defense--Constitutional Right to Free Expression of Ideas in Public Forum

[1] FORM Affirmative Defense--Constitutional Right to Free Expression of Ideas in Public Forum

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that he/she was not trespassing on plaintiff's property because the defendant was exercising his/her constitutional right to free expression of ideas by [*describe the details of the defendant's activities, e.g.,* handing out leaflets to passing pedestrians]. Defendant was entitled to exercise his/her right on plaintiff's property, which is a public forum because [*set forth facts showing that plaintiff's property is a public forum, e.g.,* the property is a large regional shopping center containing 65 shops, 10 restaurants, and a movie theater, that is open to the public, draws large numbers of people, and has a largely public character].

[2] Use of Form

This affirmative defense may be set forth in the answer [*Code Civ. Proc. § 431.30*] to a complaint for trespass to real property if the plaintiff's property is a public forum and the defendant was exercising the constitutional right to free expression of ideas. This defense applies only if the expression was reasonable, orderly, and did not interfere with the normal business operations at the plaintiff's property. Private property is a public forum only if it is the functional equivalent of such traditional public forums as the public streets and sidewalks of a town's or city's business center. The property of individual homeowners or retail establishments that are more modest than large suburban shopping malls are not public forums [*Robins v. Pruneyard Shopping Ctr. (1979) 23 Cal.3d 899, 910, 153 Cal. Rptr. 854, 592 P.2d 341 , aff'd, 447 U.S. 74, 81, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980)]* , and neither are the private parking areas of relatively small medical facilities [*Allred v. Harris (1993) 14 Cal. App. 4th 1386, 1391-1392, 18 Cal. Rptr. 2d 530* ; *see also Planned Parenthood v. Wilson (1991) 234 Cal. App. 3d 1662, 1668, 286 Cal. Rptr. 427* ; *Allred v. Shawley (1991) 232 Cal. App. 3d 1489, 1501-1502, 284 Cal. Rptr. 140]* .

For discussion of this defense, see *§ 550.22[8]*.

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§ 551.01 Scope of Chapter

This chapter discusses generally the rules applicable to civil trials and those proceedings before trial closely related to the trial.

Part II discusses the law and procedure relating to trial's and is divided into subparts as follows:

- The notice of trial [Subpart B; *§ 551.20 et seq*.].
- The chambers conference with the judge immediately before trial [Subpart C; *§ 551.40 et seq*.].
- The order in which the trial proceeds [Subpart D; *§ 551.50 et seq*.].
- Evidence [Subpart E; *§ 551.60 et seq*.].
- The burden of proof and of producing evidence [Subpart F; *§ 551.90 et seq*.].
- Presumptions and inferences [Subpart G; *§ 551.100 et seq*.].
- Witnesses [Subpart H; *§ 551.110 et seq*.].
- Argument to the jury [Subpart I; *§ 551.140 et seq*.].
- Mistrial [Subpart J; *§ 551.150 et seq*.].
- Closing proceedings and sealing records [Subpart K; § 551.160 et seq.].

Part III contains five procedural checklists noting matters counsel should consider in preparing for trial and trying a case:

- Checklist of pretrial proceedings [*§ 551.220*].
- Checklist of general matters concerning trial [*§ 551.221*].
- Checklist of objections and motions to exclude evidence or to strike testimony [*§ 551.222*].
- Checklist of common motions during trial [*§ 551.223*].
- Checklist of the order in which trial proceeds [*§ 551.224*].

The chapter also includes the following forms:

- A notice of time set for trial [*§ 551.250*].
- A notice of motion for an order appointing an expert witness, a supporting declaration, and an order granting the motion [*§§ 551.251-551.253*].
- A stipulation by counsel for the use at trial of photocopies of writings in lieu of the originals [*§ 551.254*].
- A notice of motion for an order setting aside the submission of a case and reopening it for additional evidence, a supporting declaration, an opposing declaration, and an order granting the motion [*§§ 551.255-551.258*].
- A combined request for the return of exhibits, depositions, and administrative records introduced or filed in the trial of an action, an order granting the request, and a receipt for their return [*§ 551.259*].
- The Judicial Council form of request to conduct film and electronic media coverage of an action and an order on the request [*§ 551.260*].
- A form of motion and related forms for use in proceedings to seal otherwise public court records [*§ 551.261-551.263*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsMotions for MistrialEvidenceGeneral OverviewEvidenceTestimonyPresentation of Evidence

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§ 551.02 Cross References

- For discussion and forms relating to separate trial of affirmative defenses, Ch. 3, *Abatement of Actions, § 3.110 et seq.*

- For discussion and forms for use in contractual arbitration, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration , et seq.*

- For discussion and forms for use in judicial arbitration, Ch. 36, *Judicial Arbitration* .

- For discussion and forms relating to trial by referees, see Ch. 38, *Reference* .

- For discussion and forms relating to contempt of court, see Ch. 135, *Contempt* .

- For discussion and forms relating to continuances of trial, see Ch. 136, *Continuances* .

- For discussion and forms for use in making a pretrial exchange of lists of expert witnesses and their reports and writings pursuant to *Code Civ. Proc. § 2034* (*Code Civ. Proc. § 2034.210 et seq.*, effective July 1, 2005), see Ch. 198, *Discovery: Exchange of Expert Witness Information* .

- For discussion and forms relating to motions for judgment on the pleadings, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

- For discussion of when case must be brought to trial or retrial, see Ch. 212, *Dismissal* .

- For discussion and forms for use in securing appointment of a guardian ad litem for a minor or incompetent party, see Ch. 291, *Guardians ad Litem* .

- For discussion and forms relating to trial by court commissioners and temporary judges, see Ch. 317, *Judges* .

- For discussion and forms for use in disqualifying a judge from trying a case, see Ch. 317, *Judges* .

- For discussion and forms relating to juries, see Ch. 322, *Juries and Jury Selection* .

- For discussion and forms relating to jury instructions, see Ch. 326, *Jury Instructions* .

- For discussion and forms relating to jury verdicts and directed verdicts, see Ch. 326A, *Jury Verdicts* .

- For discussion and forms relating to motions for judgment notwithstanding the verdict, new trial, and vacating a judgment and entering a new and different judgment, see Ch. 371, *Motions After Trial* .

- For discussion and forms relating to motions in limine, see Ch. 373, *Motions in Limine* .

- For discussion and forms relating to motions for nonsuit and judgment, see Ch. 389, *Nonsuit and Motions for Judgment* .

- For discussion and forms relating to pretrial proceedings, including trial setting and settlement conferences in superior court, see Ch. 425, *Pretrial Proceedings* .

- For discussion of and forms for use for bifurcation of trial, see Ch. 425, *Pretrial Proceedings* .

- For discussion and forms relating to the judge's statement of decision in a court trial, see Ch. 529, *Statement of Decision* .

- For discussion and forms for use in securing the presence of witnesses and evidence by subpoena, see Ch. 535, *Subpoena* .

- For other discussion and forms relating to litigation, see Ch. 125, *Consolidation, Severance, and Coordination of Actions* , Ch. 174, *Costs and Attorney's Fees* , Ch. 205, *Defaults and Default Judgments* , Ch. 190-200, *Discovery* , Ch. 265, *Federal Courts: Jurisdiction and Removal* , Ch. 318, *Judgments* , Ch. 324, *Jurisdiction: Subject Matter* , Ch. 520, *Settlement and Release* , Ch. 524, *Shortening and Extension of Time* , Ch. 534, *Submitted Controversy (Agreed Case*), Ch. 537, *Summary Judgment* , Ch. 571, *Venue* .

- For a trial-organizing tool containing suggested voir dire questions, opening statements, motions, objections to evidence, responses to objections, and closing argument, all supported by extensive authority and including quotations setting forth the courts' rationales, see California Trial Guide (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudicial OfficersGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersContinuancesCivil ProcedureTrialsJury TrialsGeneral Overview

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[Reserved]

§§ 551.03[Reserved]

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A. Governing Law

48-551 California Forms of Pleading and Practice--Annotated § 551.10

§ 551.10 Governing Law

[1] Notice and Conduct of Trial

Notice of trial is required by *Code Civ. Proc. § 594* [*see § 551.250*].

Trial by jury is governed generally by *Code Civ. Proc. § 607 et seq.* The qualification of persons to act as jurors and excuses from jury service are governed by *Cal. Const., art. I, § 4, Code Civ. Proc. §§ 203,* 204, and *Cal. Rules of Ct., Rule 2.1008*. The selection of jurors and the formation of the jury are governed by *Code Civ. Proc. § 190 et seq.* and Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.25. Jury instructions are governed by *Code Civ. Proc. §§ 224, 607a-609, 612.5,* and *Cal. Rules of Ct., Rule 2.1050 et seq*. The province of the court and jury is governed by *Evid. Code §§ 310-312*.

Trial by the court is governed generally by *Code Civ. Proc. § 631 et seq.* The court's statement of decision is governed by *Code Civ. Proc. §§ 632* and *634* and *Cal. Rules of Ct., Rule 3.1590*.

Except as otherwise provided by law, the order in which a trial is required to proceed is governed by *Code Civ. Proc. § 607* [*Code Civ. Proc. §§ 607, 631.7*]. The order of proof is governed by *Evid. Code § 320*. The burden of proof and the burden of producing evidence are governed by *Evid. Code § 500 et seq.*

[2] Evidence

The admission, exclusion, and weight of evidence are governed by *Evid. Code § 350 et seq.* and presumptions and inferences by *Evid. Code § 600 et seq.* Privileges arising out of various relationships that affect the admissibility of evidence are governed by *Evid. Code § 900 et seq.* and evidence affected or excluded by extrinsic policies by *Evid. Code § 1100 et seq.* Witnesses, including their competency, the method and scope of their examination, and their credibility, as well as interpreters and translators are governed by *Evid. Code § 700 et seq.* Expert and other opinion testimony and blood tests to determine paternity are governed by *Evid. Code § 800 et seq.* and *Fam. Code § 7550 et seq.* Hearsay evidence and exceptions to the hearsay rule are governed by *Evid. Code § 1200 et seq.* The authentication and proof of writings, the admissibility of secondary evidence of writings, and the admissibility and effect of official

writings affecting property are governed by *Evid. Code § 1400 et seq.* Judicial notice is governed by *Evid. Code § 450 et seq.*; see Ch. 321, *Judicial Notice* ; *see also 1 California Trial Guide, § 20.60* (Matthew Bender). The Evidence Code also contains rules for its construction and defines various words and phrases used in the code [*see Evid. Code §§ 1-12, 100-260*, respectively].

Other codes also include statutes that govern evidence. The statute of frauds is set forth in *Civ. Code § 1624* and additional statutes of frauds governing particular transactions are *Code Civ. Proc. § 1974* and *Com. Code §§ 2201, 2326(3)*, and *9203(b)*. *Code Civ. Proc. §§ 2074-2077* contain miscellaneous provisions relating to evidence in particular cases. Other provisions relating to evidence include the following:

- *Code Civ. Proc. § 1856* (the parol evidence rule) [*see also Code Civ. Proc. §§ 1857-1866* (construction of writings); *Com. Code § 2202* (parol evidence rule applicable to contracts for sale of goods)].

- *Code Civ. Proc. § 1950*, which prevents the removal from the office in which it is kept of the record of a conveyance of real property, or any other record, a transcript of which is admissible in evidence, except on a court order in cases in which inspection of the record is essential to the just determination of the cause.

- *Code Civ. Proc. §§ 1952-1952.3*, relating to the retention, destruction, and return of exhibits by the court.

- *Com. Code § 1206*, providing that whenever the Commercial Code creates a presumption with respect to a fact or provides that a fact is "presumed," the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence.

Code Civ. Proc. § 1932 abolishes the distinction between sealed and unsealed private writings.

Code Civ. Proc. § 651 authorizes a view during trial of the property that is the subject of the litigation, or the place where any relevant event occurred, or any object, demonstration, or experiment a view of which is relevant and admissible in evidence.

[3] Witnesses

The term "witness" is defined in *Code Civ. Proc. § 1878*. The definition includes an interpreter [*People v. Lem Deo (1901) 132 Cal. 199, 201, 64 P. 265* ; *see Evid. Code § 750*].

The three modes in which the testimony of witnesses may be taken are set out in *Code Civ. Proc. § 2002*, and *Code Civ. Proc. §§ 2003-2005* define the three modes. Additional provisions relating to witnesses are set forth under [2], *above*. The state constitution provides that a person is not incompetent to be a witness because of his or her opinions on religious beliefs [*Cal. Const., art. I, § 4*].

[4] Oaths and Affirmations

Persons who may administer an oath or affirmation and the form of oral oaths and affirmations administered to witnesses are set out in *Code Civ. Proc. §§ 2093, 2094*. The form of the oath administered to jurors is set out in *Code Civ. Proc. § 232*. Affidavits, declarations under penalty of perjury, and written affirmations in lieu of an oath are covered by *Code Civ. Proc. §§ 17, 2002(1), 2003*, and *2009-2015.6*, and *Evid. Code §§ 165* and *710*. For discussion and forms see Ch. 392, *Oaths and Affirmations* , and Ch. 15, *Affidavits, Certificates, and Declarations* .

[5] Motions During Trial

Motions that may be made during trial are governed by a variety of statutes, court rules, and case law. For governing law relating to motions for mistrial, see *§ 551.150*. For statutes governing motions during trial, see *§ 551.202[10]* [*see also §§ 551.206[3]*, *551.223*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedureTrialsJury TrialsGeneral OverviewEvidenceCompetencyAffirmations & OathsEvidenceProcedural ConsiderationsGeneral OverviewEvidenceTestimonyGeneral Overview

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48-551 California Forms of Pleading and Practice--Annotated § 551.11

§ 551.11 Oral Motions

Motions made at trial are normally made orally without notice and need not be supported by affidavits, declarations, or points and authorities. Counsel should, of course, be prepared to submit authorities supporting or opposing the motion, as the case may be, if the court requests them or if they are necessary to establish or oppose the ground of the motion.

A form of oral motion is as follows: "If it please the court, I move _____ [*specify order sought, e.g.,* for (an order of) mistrial *or* that the witness's answer be stricken (from the record)] on the ground(s) _____ [*specify, e.g.,* of prejudicial misconduct of counsel *or* it is nonresponsive (to the question asked)]."

If the motion is made in a jury trial and is one that should be made out of the jury's hearing (for example, a motion for nonsuit), the motion should be prefaced by the following: "If it please the court, may counsel approach the bench for the purpose of making a motion." If permission is granted, counsel will approach the side bench where counsel may make the motion. If argument is required and permitted, the judge may withdraw with counsel to chambers to hear it.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewCivil ProceduresPleading & PracticeMotion PracticeContent & FormCivil ProceduresTrialsGeneral Overview

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48-551 California Forms of Pleading and Practice--Annotated § 551.12

§ 551.12 "Trial" Defined

The word "trial" is not defined by statute in California, although "new trial" is defined as a reexamination of an issue of fact in the same court after a trial and decision by a jury, court, or referee [*Code Civ. Proc. § 656*]. A judicial definition of trial first pronounced by the California Supreme Court in 1881 and often repeated in whole or in part defines a trial as "the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause for the purpose of determining such issue. When a court hears and determines any issue of fact or of law for the purpose of determining the rights of the parties, it may be considered a trial" [*Tregambo v. Comanche M. and M. Co. (1881) 57 Cal. 501, 505* ; *see, e.g., Enterprise Ins. Co. v. Mulleague (1987) 196 Cal. App. 3d 528, 538, 241 Cal. Rptr. 846* ; *Venzor v. Santa Barbara Elks Lodge (1976) 56 Cal. App. 3d 209, 213-214, 128 Cal. Rptr. 353]* .

Legal Topics:

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

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48-551 California Forms of Pleading and Practice--Annotated §§ 551.13-551.19

[Reserved]

§§ 551.13[Reserved]

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48-551 California Forms of Pleading and Practice--Annotated § 551.20

§ 551.20 When Required

Either party may bring an issue to trial or to a hearing and, in the absence of the adverse party, proceed with the case and take a dismissal of the action, or a verdict, or judgment, as the case may require, unless the court for good cause otherwise directs [*Code Civ. Proc. § 594(a)*]. However, if the issue to be tried is an issue of fact, proof shall first be made to the satisfaction of the court that the adverse party had 15 days' notice of the trial (or five days' in an unlawful detainer proceeding) as provided in *Code Civ. Proc. § 594(b)*, discussed in *§ 551.21* If the adverse party served the notice of trial on the party seeking the dismissal, verdict, or judgment at least five days prior to the trial, the adverse party is deemed to have had such notice [*Code Civ. Proc. § 594(a)*; *see Berris & Seaton v. Meyers (1984) 163 Cal. App. 3d Supp. 54, 59-60 , 210 Cal. Rptr. 444]* .

The purpose of this notice provision is to enable the parties to prepare for trial, and to prevent the possibility of a judgment by default being taken against a party who has been unable to appear by reason of insufficient notice of the time of trial. No matter how thoroughly the parties prepare for trial *before* a trial date is set, there are certain preparations that can occur only *after* a trial date is set, such as subpoenaing and scheduling the availability of witnesses, scheduling the availability of counsel, and making any necessary arrangement for the transportation of witnesses, parties, counsel, and exhibits. *Code Civ. Proc. § 594(a)* reflects a legislative determination that 15 days is the minimum period parties should be allowed for these preparations, and that the court lacks authority to proceed in the absence of a party who has not received this minimum period for preparation [*Au-Yang v. Barton (1999) 21 Cal. 4th 958, 962-963, 90 Cal. Rptr. 2d 227, 987 P.2d 697* ; *see also Bird v. McGuire (1963) 216 Cal. App. 2d 702, 715, 31 Cal. Rptr. 386* (purpose is to protect parties against trials, judgments, or dismissals in their excusable absence)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral Overview

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48-551 California Forms of Pleading and Practice--Annotated § 551.21

§ 551.21 Notice by Court Clerk or Party

The court clerk is required to serve the notice of trial on all the parties by mail not less than 20 days prior to the date set for trial (or 10 days in an unlawful detainer proceeding). If the clerk fails to serve the notice, the notice of trial may be served by mail by any party on the adverse party not less than 15 days prior to the date set for trial (or 10 days in an unlawful detainer proceeding) [*Code Civ. Proc. § 594(b)*; *see § 551.250*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewGovernmentsCourtsClerks of Court

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48-551 California Forms of Pleading and Practice--Annotated § 551.22

§ 551.22 Mail Service Does Not Extend Time in Unlawful Detainer Proceeding

Code Civ. Proc. § 1013 (relating to extensions of time when service is by mail) does not extend the notice of trial requirements under *Code Civ. Proc. § 594(a)*, discussed in *§ 551.20*, for unlawful detainer proceedings [*Code Civ. Proc. § 594(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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48-551 California Forms of Pleading and Practice--Annotated § 551.23

§ 551.23 Shortening Time

A court may not shorten the length of time for notice prescribed by *Code Civ. Proc. § 594(a)*, discussed in *§ 551.20*, although the period may be shortened by waiver or by the consent of the parties [*Au-Yang v. Barton (1999) 21 Cal. 4th 958, 963, 90 Cal. Rptr. 2d 227, 987 P.2d 697* ; *Campanella v. Takaoka (1984) 160 Cal. App. 3d 504, 511, 206 Cal. Rptr. 745 , overruled on other grounds,* *Salas v. Sears, Roebuck & Co. (1986) 42 Cal. 3d 342, 346, 228 Cal. Rptr. 504, 721 P.2d 590]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral Overview

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48-551 California Forms of Pleading and Practice--Annotated § 551.24

§ 551.24 Effect of Failure to Give Notice

Code Civ. Proc. § 594, requiring service of notice of trial and, when the adverse party fails to appear, proof of service, is mandatory [*Au-Yang v. Barton (1999) 21 Cal. 4th 958, 963, 90 Cal. Rptr. 2d 227, 987 P.2d 697]* .

A failure to give notice is a proper ground for granting a new trial either on the theory that there has been an "error in law" [*see Code Civ. Proc. § 657(7)*] or that lack of notice constituted an "[i]rregularity in the proceedings of the court by which either party was prevented from having a fair trial" [*see Code Civ. Proc. § 657(1)*; *Gordon v. Gordon (1956) 145 Cal. App. 2d 231, 233-234, 302 P.2d 355* ; *see Campanella v. Takaoka (1984) 160 Cal. App. 3d 504, 511, 206 Cal. Rptr. 745* , *overruled on other grounds, Salas v. Sears, Roebuck & Co. (1986) 42 Cal. 3d 342, 346, 228 Cal. Rptr. 504, 721 P.2d 590* (compliance with *Code Civ. Proc. § 594* is mandatory and jurisdictional)].

Although the minimum notice requirement is mandatory, a showing that the absent party had at least 15 days' *actual* notice of the time set for trial is sufficient to satisfy the requirements of *Code Civ. Proc. § 594* [*Parker v. Dingman (1975) 48 Cal. App. 3d 1011, 1016, 122 Cal. Rptr. 309* ; *People ex rel. Dept. Pub. Wks. v. Busick (1968) 259 Cal. App. 2d 744, 748, 66 Cal. Rptr. 532]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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48-551 California Forms of Pleading and Practice--Annotated § 551.25

§ 551.25 Proof of Notice

The party seeking to proceed with trial in the absence of the opposing party has the burden of proving compliance with the mandatory 15-day notice requirement of *Code Civ. Proc. § 594(a)* [*Au-Yang v. Barton (1999) 21 Cal. 4th 958, 963, 90 Cal. Rptr. 2d 227, 987 P.2d 697]* .

Code Civ. Proc. § 594(b) provides that if notice is served by the clerk, proof thereof may be made by introduction into evidence of the clerk's certificate pursuant to *Code Civ. Proc. § 1013a(4)* or other competent evidence; if notice is served by a party, proof may be made either by the introduction into evidence of an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) or certificate pursuant to *Code Civ. Proc. § 1013a(1)* or *(2)*, or by other competent evidence [*Code Civ. Proc. § 594(b)*; for discussion of service of papers and a form of proof of service by mail, see Ch. 518, *Service of Summons and Papers*].

Other competent evidence that would prove service would include, for example, a party's admission that he or she had actual notice of trial for the required period coupled with documentary evidence before the trial court showing conclusively that due and regular notice of trial had been given [*see Kalmus v. Kalmus (1951) 103 Cal. App. 2d 405, 418, 230 P.2d 57 , cert. denied, 342 U.S. 903 (1952)* ; *see also City etc. of San Francisco v. Carraro (1963) 220 Cal. App. 2d 509, 520-521, 33 Cal. Rptr. 696* (oral stipulation of counsel in open court setting case for trial)].

If no competent evidence that notice of trial was served on defendant as required by *Code Civ. Proc. § 594(a)* is actually introduced before the court at the time set for trial, a judgment for plaintiff will be reversed, because proof that defendant was given statutory notice is essential to the trial court's jurisdiction to proceed in the defendant's absence [*Irvine National Bank v. Han (1982) 130 Cal. App. 3d 693, 694, 697, 181 Cal. Rptr. 864* (plaintiff failed to place notice of trial in evidence at trial or to request court to take judicial notice of file in case which contained notice of trial)]. A judgment entered after a trial held in a party's absence without the notice prescribed by *Code Civ. Proc. § 594(a)* is not merely error, but is an act in excess of the court's jurisdiction [*Irvine National Bank v. Han (1982) 130 Cal. App. 3d 693, 697, 181 Cal. Rptr. 864* ; *Wilson v. Goldman (1969) 274 Cal. App. 2d 573, 577, 79 Cal. Rptr. 309]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedureTrialsGeneral Overview

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48-551 California Forms of Pleading and Practice--Annotated § 551.26

§ 551.26 Resumption of Trial Following Continuance

Code Civ. Proc. § 594 does not apply to the resumption of trial following a continuance, and when the case is continued to a specified day, no further notice, written or oral, is necessary. The general rule in such a case is that after notice of trial in the first instance has been properly given, it becomes the duty of all interested parties to keep themselves informed by diligent inquiry of subsequent continuances of the hearing [*In re Phillip F. (2000) 78 Cal. App. 4th 250, 256-257, 92 Cal. Rptr. 2d 693* ; *City of San Diego v. Walton (1947) 80 Cal. App. 2d 206, 212-213, 181 P.2d 424]* .

Trial counsel have a duty to use reasonable diligence to ascertain the date to which a partial trial is continued when it is necessary to continue the further trial to a date other than the date that counsel agreed on or have been advised of in open court. But when counsel does act diligently, but to no avail, to ascertain the date to which trial has been continued, the failure to give counsel some form of notice of the trial date and the resumption of the trial in his or her absence is a denial of due process of law [*Parker v. Dingman (1975) 48 Cal. App. 3d 1011, 1016-1018, 122 Cal.Rptr. 309]* . The resumption of a continued matter without some proof that the absent party has been notified is an abuse of discretion, and due process requires that the manner and content of the renotice provide some reasonable assurance that the party is informed of the continued trial date within a reasonable period prior to resumption of trial [*In re Phillip F. (2000) 78 Cal. App. 4th 250, 257, 92 Cal. Rptr. 2d 693]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersContinuancesConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of Protection

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48-551 California Forms of Pleading and Practice--Annotated § 551.27

§ 551.27 Notice When Trial Date Is Advanced

When a trial is "trailed" or continued to later date, the 15-day notice of *Code Civ. Proc. § 594(a)* is not required because the absent party's opportunities to plan and prepare for trial are unlikely to be harmed by the continuance. That party will have had sufficient time to compete trial preparations by the original date, and will have learned of the continued date either on appearing at the original trial date or through reasonable diligence [*see Au-Yang v. Barton (1999) 21 Cal. 4th 958, 965, 90 Cal. Rptr. 2d 227, 987 P.2d 697* and discussion in *§ 551.26*]. These considerations do not apply, however, when a trial date is *advanced*. In the latter situation, a failure to comply with the 15-day notice requirement *is* likely to result in prejudice to the absent party's trial preparations and planning. Thus, a party who obtains an order advancing the trial date must comply with *Code Civ. Proc. § 594(a)* by giving the opposing party 15 days' notice of the new trial date [*see Au-Yang v. Barton (1999) 21 Cal. 4th 958, 965, 90 Cal. Rptr. 2d 227, 987 P.2d 697]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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48-551 California Forms of Pleading and Practice--Annotated §§ 551.28-551.39

[Reserved]

§§ 551.28[Reserved]

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48-551 California Forms of Pleading and Practice--Annotated § 551.40

§ 551.40 Conduct of Conference

Immediately before trial, the judge normally meets informally with counsel to confer about the case, although some courts otherwise requiring a before-trial conference may dispense with the conference in a nonjury short cause. The meeting is normally held in the judge's chambers, but may be held in open court if that is the preference of the judge or counsel. Normally, the judge's courtroom clerk will be present to take notes, but whether a court reporter is present and reports the entire proceedings depends on the judge and the rules or policies of the court in which the trial is held. Some judges prefer that the entire proceedings be reported. Other judges prefer to cover the preliminary matters informally without a reporter present, and to call in the reporter only after the parties have agreed to admit or stipulate to certain matters and the judge is prepared to rule on other matters [*see, e.g.*, Los Angeles Co. Super. Ct. Rules, Rule 7.9(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesPretrial Conferences

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§ 551.41 Matters Covered

[1] Generally

The general purposes of the conference are to enable the judge (1) to become familiar with the nature of the case, (2) to acquaint counsel with the court's ground rules, (3) to secure agreements and stipulations of the parties that may better define or narrow the issues to be tried, (4) to resolve in advance any procedural problems that may arise in the course of the trial, and (5) to rule on any matters that should be disposed of before the commencement of the trial [*see generally* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.2 (CJER 1981); as to court's ground rules and trial management, *see generally* Cal. Rules of Ct., Stds. Jud. Admin., Std. 2.20].

Ordinarily, the judge will seek to obtain from counsel arrangements, admissions, and stipulations that will permit the trial to proceed in an orderly, expeditious, and fair manner with a minimum risk of error.

[2] Specific Matters

The specific matters covered at the conference will depend on the nature of the case, the complexity of the issues, and the number of parties [*see* discussion in [3], *below*]. In all cases, the conference will normally cover [*see generally* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, §§ 3.2, 3.6, 3.9(1), (3)-(5), (7), 3.12 (CJER 1981); as to court's ground rules and trial management, *see generally* Cal. Rules of Ct., Appen., Stds. Jud. Admin., Std. 2.20]:

- The identity of the parties and counsel.

- The number and names of witnesses to be called for purposes other than impeachment.

- Whether the judge is acquainted with any of the parties or witnesses or is disqualified from trying the case for any cause listed in *Code Civ. Proc. § 170.1* or under the Code of Judicial Conduct [for a discussion of the disqualification of judges for cause, *see* Ch. 317, *Judges* , Pt. III].

- The court's ground rules.
- Whether the issues in the case may be narrowed or modified by stipulations, admissions, or motions.

[3] Examples of Specific Matters

Specific matters that may be considered or covered in any given case include the following [*see generally* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, §§ 3.7-3.15 (CJER 1981); as to court's ground rules and trial management, *see generally* Cal. Rules of Ct., Stds. Jud. Admin., Std. 2.20]:

(1) (*Continuance*) Any requests for a continuance [*see Code Civ. Proc. §§ 595-596, 1024*; *Cal. Rules of Ct., Rule 3.1332*; California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.9(2) (CJER 1981); *see also* Ch. 136, *Continuances*].

(1A) (*Motions Affecting Trial Date*) A motion to advance, specially set, or reset a case for trial [*see Cal. Rules of Ct., Rule 3.1335*].

(2) (*Guardian ad Litem*) Whether there is any need to appoint a guardian ad litem for any minor or incompetent party [*see Code Civ. Proc. § 373*; *see also* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.9(5) (CJER 1981)]. For discussion and forms for use in securing appointment of a guardian ad litem for a minor or incompetent party, see Ch. 291, *Guardians Ad Litem* .

(3) (*Parties*) The status of named or fictitiously named parties [*see Code Civ. Proc. § 474*], that is, whether they have all been served, whether any have been dismissed from the action, whether they have answered and/or are in default, and whether any defaults have been entered [*see* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.9(5) (CJER 1981)].

(4) (*Pleadings*) (a) Whether any causes of action have been dismissed; (b) whether any law and motion, discovery, or summary judgment proceedings have resulted in the dismissal or the striking of any pleading or portion of a pleading or the adjudication of any factual or legal issues; and (c) the status and effect of any pending cross complaints, setoffs, credits against judgment, liens, or pleadings in intervention [*see* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.9(6), (7)(b), (d) (CJER 1981)].

(5) (*Reduction of Issues*) Whether the number of issues to be tried can be reduced by dismissal of one or more causes of action by request of a party, whether stipulations can be reached as to those issues about which there is no controversy, and whether stipulations can be reached as to facts not in controversy or waiving a foundation, or other objections, as to the admissibility of testimony, tests, or experiments [*see* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.9(7)(a)-(c) (CJER 1981)].

(6) (*Unusual Legal Issues or Fact Determinations*) Whether any unusual legal issues are anticipated, whether any unusual evidentiary fact determinations are likely to arise during trial, and whether there are any other anticipated evidentiary problems [*see* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.9(14) (CJER 1981)].

(7) (*Severance or Consolidation of Actions*) Whether any actions should be severed or other actions consolidated with the present case [*see, e.g., Code Civ. Proc. §§ 377.62(b)* (consolidation of wrongful death and survival cases), *379.5* (severance of permissively joined parties), 1048 (severance and consolidation of actions generally); *see also* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.9(9) (CJER 1981) (adding that these matters, however, should usually have

been raised at the pretrial or trial setting conference)]. For additional statutes authorizing severance or consolidation, a discussion of the grounds, and a procedural checklist, *see* Ch. 125, *Consolidation, Severance, and Coordination of Actions* .

(8) (*Bifurcation of Trial*) Whether good cause exists to try (a) a special defense, such as the statute of limitations, a prior judgment, another action pending, or other defense not involving the merits of the action but constituting a bar or ground of abatement before the other issues in the case [*see Code Civ. Proc. §§ 597, 597.5*]; (b) equitable issues, such as the equitable defenses of laches, unclean hands, waiver, and equitable estoppel, before the legal issues in the case; or (c) an issue or part of an issue before the other issue, part of an issue, or issues in the case, for example, to try the issue of liability before the issue of damages [*see Code Civ. Proc. § 598*; *see also* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.9(9) (CJER 1981); discussion of bifurcation in Ch. 425, *Pretrial Proceedings* .

(9) (*Interpreters and Translators*) Whether an interpreter for any witness or translator to translate or decipher a writing will be required [*see Evid. Code § 750 et seq.*; California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.9(10)(d) (CJER 1981); *see also* discussion in *§§ 551.115* and *551.116*].

(10) (*Expert Witnesses*) (a) Whether counsel have exchanged lists of the names, reports, and writings of expert witnesses [*see Code Civ. Proc. § 2034*(*Code Civ. Proc. § 2034.210 et seq.* effective July 1, 2005); *see also Kennemur v. State of California (1982) 133 Cal. App. 3d 907, 917-919, 184 Cal. Rptr. 393]* ; (b) whether there is to be any limitation on the number of expert witnesses [*see Evid. Code § 723*; and *(c)* whether any of the parties plan to propound hypothetical questions to any expert witness and, if so, whether the question should be prepared in writing and submitted in advance to the trial judge [*see* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.9(10)(b) (CJER 1981)].

(11) (*Exhibits*) Whether counsel have complied with any local court rules or policies (a) requiring counsel to exchange lists of exhibits (except those they anticipate in good faith will be used for impeachment or tactical surprise); (b) requiring counsel to furnish copies of critical documents to the court and counsel; (c) requiring counsel to make available before trial to parties requesting themcopies of other documents on the exhibit list; (d) relating to the procedure to be followed in the case of dangerous or bulky exhibits; (e) relating to organizing and pretrial marking of exhibits; (f) concerning the marking of exhibits; and (g) relating to the uniform method of marking exhibits [*see* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.9(11)(b) (CJER 1981)].

(12) (*Additional Matters Relating to Exhibits*) (a) Whether a copy or other substitute for an original exhibit may or should be used (for example, a copy of an original document that has been lost or a substitute for an inherently dangerous exhibit); (b) whether counsel will stipulate to the admissibility of any exhibits; and (c) whether any special arrangements are required for special exhibits (for example, for showing X-rays, or playing video or audiotapes), maps, or diagrams, or for handling dangerous or bulky exhibits, or for protecting trade secrets [*see* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.9(11)(c)-(e) (CJER 1981)].

(13) (*Stipulations re Return of Exhibits*) Whether the parties will stipulate as to the return of the exhibits [*see Code Civ. Proc. §§ 283(1), 1952(a)*; *see also* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.9(11)(f) (CJER 1981)].

(14) (*View of Scene, Property, or Demonstration*) Whether the court should during trial order a view by the trier of fact of (1) the property that is the subject of the litigation; (2) the place where any relevant

event occurred; or (3) any relevant object, demonstration, or experiment that is admissible in evidence and cannot with reasonable convenience be viewed in the courtroom [*see Code Civ. Proc. § 651*; *see also* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.9(12) (CJER 1981)].

(15) (*Depositions*) Whether depositions are to be used during trial. If so, whether they are subject to any objection, and, if they are, whether the ground of objection has been waived by failure to make a timely objection or motion to suppress or can be cured by the opponent's waiver of the objection [*see Code Civ. Proc. § 2025(m)* (*Code Civ. Proc. § 2025.460* effective July 1, 2005) (waivers of errors and irregularities for failure to object or move to suppress in a timely manner), (u) (*Code Civ. Proc. § 2025.620* operative July 1, 2005) (use of depositions at trial)]. In addition, what the effect is, if any, on the admissibility of the contents of a deposition because of any failure of the proponent to have complied with any rule or policy of the court requiring notification to the other parties of any changes made in a deposition by the deponent [*see* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.9(13) (CJER 1981)].

(16) (*Opening Statements and Presentation of Evidence in Multiple Party Cases*) In a case having multiple plaintiffs or multiple defendants represented by different counsel, the order in which counsel will make their opening statements and present their evidence if counsel do not agree among themselves [*see Code Civ.Proc. § 607(8)* (referring expressly to multiple defendants); *Evid. Code § 320* (judge as regulating order of proof)].

(17) (*Limitations on Examination*) Any limitations on the examination of a witness [*see, e.g., Evid. Code §§ 352* (exclusion of time-consuming, prejudicial, confusing, or misleading evidence), 721(b) (limitation on cross-examination of expert witness), 765 (control of court over interrogation of witness), 773 (scope of cross-examination and rule applicable to cross-examination of witness by party whose interest is not adverse to party calling witness), 787 (evidence of specific instances of conduct tending only to prove character trait as inadmissible on issue of credibility), and 788 (admissibility of felony conviction and inadmissibility of expunged felony conviction to attack credibility); *see also* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.9(10)(f), 3.12; ch. 8, *Witnesses*, §§ 8.31, 8.32, 8.34, 8.57, 8.65, 8.66 (CJER 1981)]. For a discussion, procedural checklist, and forms for use in making motions in limine, see Ch. 373, *Motions in Limine* .

(18) (*Order of Cross Examination in Multiple Party Cases*) The order of cross-examination in multiple party cases [*see Evid. Code §§ 320* (power of court to regulate order of proof), *776(b)* (cross-examination by other parties of party called and examined by adverse party); *see also* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.9(10)(e) (CJER 1981)].

(19) (*Daily Transcripts*) Whether counsel intend to request a daily transcript of the trial, and if so the number of copies to be prepared and who will pay for them [*see* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.9(16) (CJER 1981)].

(20) (*Other Special Arrangements*) Whether any special arrangements, other than those already mentioned, are required for counsel, parties, or witnesses [*see* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.9(19) (CJER 1981)].

(21) (*Estimate of Trial Length*) What each counsel's estimate is of the length of the trial [*see* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, §§ 3.9(15), 3.10(5)(c) (CJER 1981)].

(22) (*Time Problems*) Whether there are any time problems that are likely to occur during trial because of other commitments of the court, counsel, or witnesses [*see* California Judges Benchbook--Civil Trials,

ch. 3, *Conference Before Trial*, § 3.9(15) (CJER 1981)].

(23) (*Preliminary Motions*) Whether any preliminary motions will be made, such as a motion to exclude witnesses from the courtroom [*see Evid. Code § 777*; *see also* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.9(17) (CJER 1981)].

(24) (*Time limits*) Reasonable time limits [*see* Cal. Rules of Ct., Stds. Jud. Admin., Std. 2.20(b)(2)].

(25) (*Time of commencement and hours set for trial*) The time trial will start each day and the number of hours set each day for the trial [*see* Cal. Rules of Ct., Stds. Jud. Admin., Std. 2.20(b)(3), (4), (6)].

(26) (*Use of technology*) Technology that may be used in the presentation of evidence and managing the trial [*see* Cal. Rules of Ct., Stds. Jud. Admin., Std. 2.20(b)(5)].

(27) (*Scheduling arguments on legal issues*) Whether arguments on legal issues will be scheduled at the beginning or end of the day, so as not to interrupt the presentation of evidence [*see* Cal. Rules of Ct., Stds. Jud. Admin., Std. 2.20(b)(7)].

(28) (*Sidebar conferences*) When sidebar conferences will be permitted and their length [*see* Cal. Rules of Ct., Stds. Jud. Admin., Std. 2.20(b)(8)].

[4] Settlement

Another matter that may arise is whether settlement should be further explored [*see* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.7 (CJER 1981)]. However, to avoid a motion to disqualify, the judge should not engage in settlement discussion unless the parties consent. The policy of the Los Angeles County Superior Court in this regard is as follows: Although the trial court may request counsel to further explore settlement, it should not itself engage in settlement discussions if any party objects. If all counsel and parties agree to settlement discussion with the trial judge and to waive any right to assert any disqualification that they might otherwise allege from it, such agreements and waivers should be sufficiently broad to expressly permit the trial judge to discuss the anticipated evidence and dollar amounts offered and demanded, not only with all counsel present, but also with counsel and the litigants separately and in confidence. If a settlement is not reached, the trial court may proceed to trial unless it believes its disqualification is required by law or its impartiality might reasonably be questioned. If a settlement is reached, ordinarily the terms of the settlement and the parties' consent to it, as well as the consent of counsel, should be stated on the record [Los Angeles Co. Super. Ct. Rules, Rule 8.21]. For a discussion of settlement generally, see Ch. 520, *Settlement and Release* . For a discussion of the pretrial settlement conference with the judge, see Ch. 425, *Pretrial Proceedings* .

[5] Additional Matters in Jury Trials

Additional matters that may be covered when a jury trial has been requested include the following [*see, generally*, Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.25(b); Los Angeles Co. Super. Ct. Rules, Rule 8.20; California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.10 (CJER 1981)]:

- Whether a jury trial has been properly demanded and fees timely posted [*see* Los Angeles Co. Super. Ct. Rules, Rule 8.20; for a discussion of when trial by jury may be had, a form of demand and a form of waiver of jury trial, and forms for use in moving for a jury trial, or vacating the setting of a jury trial, when the right is not guaranteed, *see* Ch. 322, *Juries and Jury Selection*].

- Whether the parties will waive a jury trial.

- Whether there are any motions in limine that must be ruled on before voir dire examination and opening statements by counsel [*see* Los Angeles Co. Super. Ct. Rules, Rule 8.92; for a discussion of motions in limine, *see* Ch. 373, *Motions in Limine*]. Some judges may require any motion in limine to be presented in writing with a proposed order [*see* California Judges Benchbook--Civil Trials, ch. 3, *Conference Before Trial*, § 3.14 (CJER 1981)].

- Whether counsel will stipulate to trial by fewer than 12 jurors [*see Cal. Const., art. I, § 16*; *Code Civ. Proc. § 220*; Los Angeles Co. Super. Ct. Rules, Rule 8.20(c)].

- The number of alternate jurors, if any, to be called [*see Code Civ. Proc. § 234*; Los Angeles Co. Super. Ct. Rules, Rule 8.20(d)].

- Whether counsel will stipulate to excuse jurors who express a desire not to sit because of potential length of the trial running beyond expiration of their jury service term [*see* Los Angeles Co. Super. Ct. Rules, Rule 8.20(e)].

- The text of a brief statement of the case suitable to be read by the trial judge to the panel of prospective jurors [*see* Los Angeles Co. Super. Ct. Rules, Rule 8.20(b)].

- The areas of proposed voir dire interrogation to be directed to prospective jurors and any limits to be imposed by the judge on voir dire examination by counsel [*see* Los Angeles Co. Super. Ct. Rules, Rule 8.20(a)]. Some courts may require that any party requesting the trial judge to voir dire the prospective jurors with questions that are not set forth in Cal. Rules of Ct., Appen., Div. I, § 8(c) and (d) prepare and submit to the court the proposed questions in writing and furnish copies for the other parties [*see* Los Angeles Co. Super. Ct. Rules, Rule 8.20(h)].

- Whether any part of the voir dire should be conducted by written questions (for example, questions that might be embarrassing to a juror).

- Whether any counsel contends the case is one of "unusual circumstances" or contains "unique or complex elements, legal or factual" within the meaning of Cal. Rules of Ct., Appen., Div. I, § 8 (relating to examination of prospective jurors in civil cases), such that usually improper voir dire questions may be asked [*see* Los Angeles Co. Super. Ct. Rules, Rule 8.20(a)]. If so, the judge might require prior submission to him or her in writing of the questions to be asked.

- In multiple-party cases, the order in which counsel will conduct their supplemental voir dire examination of prospective jurors [*see* Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.25(a)(2)].

- In multiple-party cases, whether there are issues as to the number of "sides" and allocation of peremptory challenges within the meaning of *Code Civ. Proc. § 231* and, if so, whether stipulations may be reached with regard to them [*see* Los Angeles Co. Super. Ct. Rules, Rule 8.20(f)].

- Whether there should be a limited preinstruction of the jury [*see Westover v. Los Angeles (1942) 20 Cal. 2d 635, 639, 128 P.2d 350* ; *Kelly v. Trans Globe Travel Bureau, Inc. (1976) 60 Cal. App. 3d 195, 203-204, 131 Cal. Rptr. 488]* .

- Whether in longer trials trial days will be scheduled to permit jurors time for personal business. When a trial involves a jury, the trial judge should manage proceedings with particular emphasis upon the needs of the jury [*see* Cal. Rules of Ct., Stds. Jud. Admin., Std. 2.20(a), (b)(9)].

[6] Stipulations Relating to Jury, Substitute Judge, and Stay of Execution of Judgment

The parties may also be encouraged to stipulate in writing to the following [*see* Los Angeles Co. Super. Ct. Rules, Rule 8.20(g)]:

- Unless called to the attention of the court, all jurors shall be deemed to be in the jury box and in their proper places on court's reconvening after e ach recess and adjournment.

- After having given the admonition required by *Code Civ. Proc. § 611* (admonition required when jury is permitted to separate), the court at each subsequent recess or adjournment need not repeat or remind the jury of the admonition given.

- The court, in the absence of any counsel, may do any of the following:

  - On the jury's request, read to the jury any or all instructions previously given, have read to the jury any portions of the evidence given in the trial, or supply the jury with any of the exhibits received in evidence;

  - Call the jury into the courtroom to ascertain whether or not a verdict is probable, to receive the verdict of the jury, and to poll the jury; and

  - In the event of the jury's failure to reach a verdict, permit the jurors to separate and resume their deliberations on the morning of the next court day or such other time as may be fixed by the court.

- In the absence of the trial judge after the original submission of the case to the jury, any judge of the court may act in the place and stead of the absent trial judge to and including the time the jury is discharged.

- In the event judgment is for plaintiff, a stay of execution may be issued to be effective for a period of 10 days after any motion for new trial is determined or the time to file a notice of intention to move for a new trial has expired.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewCivil ProcedurePretrial MattersConferencesPretrial ConferencesCivil ProcedureTrialsJury TrialsJurorsGeneral Overview

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C. Before-Trial Conference

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[Reserved]

§§ 551.42[Reserved]

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48-551 California Forms of Pleading and Practice--Annotated § 551.50

§ 551.50 Jury Trial

[1] In General

The order of proceedings after the jury has been sworn is set forth in *Code Civ. Proc. § 607* and is to be followed unless the court in its discretion rules otherwise [*Reely v. Chapman (1960) 177 Cal. App. 2d 260, 263, 2 Cal. Rptr. 188* ; see *McLellan v. McLellan (1972) 23 Cal. App. 3d 343, 353, 100 Cal. Rptr. 258* ; *see also Evid. Code § 320* (court has discretion to "regulate order of proof," except as otherwise provided by law)]. *Code Civ. Proc. § 607* provides that when the jury has been sworn, the trial must proceed in the following order, unless the court, for special reasons, otherwise directs:

- The plaintiff may state the issue and plaintiff's case (commonly known as giving an opening statement).
- The defendant may then state the defense if he or she so wishes, or wait until after plaintiff has produced his or her evidence.
- The plaintiff must then produce the evidence on his or her part.
- The defendant may then open the defense if he or she has not done so previously.
- The defendant may then produce the evidence on his or her part.
- The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permits them to offer evidence on their original case.
- When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument.

- If serveral defendants having separate defenses appear by different counsel, the court must determine their relative order in the evidence and argument.

- The court may then charge the jury.

[2] Legal, Equitable, and Factual Issues

There are two rules of precedence that are generally followed with respect to issues. They are: (1) in a jury trial, issues of law should be tried by the court before issues of fact [*see Code Civ. Proc. § 592*; *Evid. Code § 310(a)*]; and (2) if a case involves both legal and equitable issues, the equitable issues are tried first [*see, e.g., Jaffe v. Albertson Co. (1966) 243 Cal. App. 2d 592, 609, 53 Cal. Rptr. 25* ; *Dills v. Delira Corp. (1956) 145 Cal. App. 2d 124, 129, 302 P.2d 397* ; *see also People v. Bestline Prod., Inc. (1976) 61 Cal. App. 3d 879, 916, 132 Cal. Rptr. 767* (whether case is tried by court or jury when legal and equitable issues cannot be severed as depending on whether the relief sought is essentially equitable or legal in nature); and discussion in Subpart C, *above*]. If the decision on the trial of equitable issues is determinative of the legal issues, a jury trial on the legal issues is obviated. If not, the jury trial on the remaining issues will follow [*Jaffe v. Albertson Co. (1966) 243 Cal. App. 2d 592, 609, 53 Cal. Rptr. 25]* .

For further discussion of the order of proceedings, see *551.224*.

[3] Opening Statement

In a jury trial, *Code Civ. Proc. § 607* confers the right to make an opening statement. The trial court has discretion only as to control of the order and timing of the opening statement. It is an abuse of the court's discretion to prohibit parties from making any opening statement [*see Shippy v. Peninsula Rapid Transit Co. (1925) 197 Cal. 290, 294, 240 P. 785* (abuse of discretion to allow jurors to vote on whether they wanted to hear closing argument)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsGeneral OverviewCivil ProcedureTrialsJury TrialsProvince of Court & JuryCivil ProcedureTrialsOpening StatementsGeneral Overview

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48-551 California Forms of Pleading and Practice--Annotated § 551.51

§ 551.51 Court Trial

[1] In General

Ordinarily, unless the court otherwise directs, the trial of a civil action tried by the court without a jury is required to proceed in the order specified in *Code Civ. Proc. § 607* for jury trials, discussed in *§ 551.50* [*Code Civ. Proc. § 631.7*].

[2] Opening Statement

In a nonjury trial, the action proceeds in the order specified in *Code Civ. Proc. § 607* "unless the court otherwise directs" [*Code Civ. Proc. § 631.7*]. The court thus has discretion to refuse to hear opening statements [*cf. Gunn v. Superior Court (1946) 76 Cal. App. 2d 203, 205, 173 P.2d 328* (amount of time parties are allowed for closing argument before court sitting without a jury, or whether argument is allowed at all, are matters within trial court's discretion)].

[3] Reopening Case

In a trial by the court, the court has broad discretion to reopen the matter before final judgment in order to receive additional evidence. It may do so even over the objection of the litigants and does not violate their rights when adequate notice is given [*Howard Contracting, Inc. v. G.A. MacDonald Construction Co. (1998) 71 Cal. App. 4th 38, 59, 83 Cal. Rptr. 2d 590]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureTrialsBench TrialsCivil ProcedureTrialsOpening StatementsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewEvidenceTestimonyPresentation of Evidence

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[Reserved]

§§ 551.52[Reserved]

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48-551 California Forms of Pleading and Practice--Annotated § 551.60

§ 551.60 Definitions

[1] "Shall" and "May"

As used in the Evidence Code, "shall" is mandatory and "may" is permissive [*Evid. Code § 11*].

[2] Other Evidence Code Terms

For the purposes of the Evidence Code, the following words and phrases have the meanings indicated unless the provision or context otherwise requires [*Evid. Code § 100*]:

"Action" includes a civil and a criminal action [*Evid. Code § 105*].

"Civil action" includes civil proceedings [*Evid. Code § 120*].

"Conduct" includes all active and passive behavior, both verbal and nonverbal [*Evid. Code § 125*].

"Declarant" is a person who makes a statement [*Evid. Code § 135*].

"The hearing" means the hearing at which a question under the Evidence Code arises and not some earlier or later hearing [*Evid. Code § 145*]. The definition includes not only a trial, but also other hearings, such as preliminary hearings and posttrial proceedings [*see* Cal. Law Revision Commission Comment to *Evid. Code § 145* in annotated codes].

"Law" includes constitutional, statutory, and decisional law [*Evid. Code § 160*].

"Oath" includes affirmation or declaration under penalty of perjury [*Evid. Code § 165*].

"Perceive" means to acquire knowledge through one's senses [*Evid. Code § 170*].

"Person" includes a natural person, firm, association, organization, partnership, business trust, corporation, limited liability company, or public entity [*Evid. Code § 175*].

"Personal property" includes money, goods, chattels, things in action, and evidences of debt [*Evid. Code § 180*].

"Proof" is the establishment by evidence of a requisite degree of belief concerning a fact in the mind of the trier of fact or the court [*Evid. Code§ 190*]. The disjunctive reference to the trier of fact or the court is needed because even when the jury is the trier of fact the court is required to determine preliminary questions of fact on the basis of proof [*see* Cal. Law Revision Commission Comment to *Evid. Code § 190* in annotated codes].

"Property" includes both real and personal property [*Evid. Code § 185*].

"Public employee" means an officer, agent, or employee of a public entity [*Evid. Code § 195*].

"Public entity" includes a nation, state, county, city and county, city, district, public authority, public agency, or any other political subdivision or public corporation, whether foreign or domestic [*Evid. Code § 200*].

"Real property" includes lands, tenements, and hereditaments [*Evid. Code § 205*].

"State" means the State of California, unless applied to the different parts of the United States. In the latter case, it includes any state, district, commonwealth, territory, or insular possession of the United States [*Evid. Code § 220*].

"Statement" means either an oral or written verbal expression or nonverbal conduct of a person intended by him or her as a substitute for oral or written verbal expression [*Evid. Code § 225*].

"Statute" includes a treaty and a constitutional provision [*Evid. Code § 230*].

"Trier of fact" includes (a) the jury and (b) the court when the court is trying an issue of fact other than one relating to the admissibility of evidence [*Evid. Code § 235*; *see, e.g., People v. Rodriguez (2005) 133 Cal. App. 4th 545, 552-556, 34 Cal. Rptr. 3d 886* (under *Evid. Code § 235*, jury, as trier of fact, could, under *Evid. Code § 1417*, compare exemplar of criminal defendant's handwriting with handwriting on disputed documents to compare signatures and, based on comparison, reasonably conclude, beyond reasonable doubt, and without benefit of testimony from handwriting expert, that questioned signatures were made by defendant)].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceGeneral OverviewEvidenceProcedural ConsiderationsRule Application & Interpretation

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§ 551.61 "Evidence" Defined

The Evidence Code defines "evidence" as meaning testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact [*Evid. Code § 140*]. The word is broadly defined to include not only testimony of witnesses and tangible objects, but also sights (such as a jury or court view of a place or the appearance of a person), sounds (such as a voice demonstrated for the jury), and any other thing that may be presented as a basis of proof [*see* Cal. Law Revision Commission Comment to *Evid. Code § 140* in annotated codes; *see also, e.g., Gates v. McKinnon (1941) 18 Cal. 2d 179, 182-183, 114 P.2d 576* (view of accident scene)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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48-551 California Forms of Pleading and Practice--Annotated § 551.62

§ 551.62 "Direct Evidence" and "Circumstantial Evidence" Distinguished

Evidence may be direct or circumstantial. "Direct evidence" is evidence that directly proves a fact, without an inference or presumption, and that in itself, if true, conclusively establishes that fact [*Evid. Code § 410*; *see California Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 Cal. App. 3d 1, 44, 221 Cal. Rptr. 171* ; *People v. Crawford (1967) 253 Cal. App. 2d 524, 529, 61 Cal. Rptr. 472 , cert. denied, 390 U.S. 1006 (1968)]* .

"Circumstantial evidence" is that which is applied to the principal fact indirectly, or through the medium of other facts, from which the principal fact is inferred [*People v. Crawford (1967) 253 Cal. App. 2d 524, 529-530, 61 Cal. Rptr. 472 , cert. denied, 390 U.S. 1006 (1968)]* . Thus, circumstantial evidence is evidence that has influenced the minds of the jury (or other trier of fact) in arriving at the belief that a certain matter is a fact although no witness has testified directly that it is a fact [*People v. Castellano (1978) 79 Cal. App. 3d 844, 860, 145 Cal. Rptr. 264]* .

The fact that evidence is circumstantial does not mean it cannot be substantial. Relevant circumstantial evidence is admissible in California (see discussion in *§ 551.66[1]*), and the jury is entitled to accept persuasive circumstantial evidence even when contradicted by direct testimony [*Hasson v. Ford Motor Co. (1977) 19 Cal. 3d 530, 548, 138 Cal. Rptr. 705, 564 P.2d 857 , disapproved on other grounds in Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 34 Cal. Rptr. 2d 607, 882 P.2d 298]* .

For a related jury instruction on direct and indirect evidence, see *Judicial Council of California Civil Jury Instructions, CACI No. 202* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsCircumstantial & Direct Evidence

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48-551 California Forms of Pleading and Practice--Annotated § 551.63

§ 551.63 Judicial Notice

Judicial notice is governed by *Evid. Code § 450 et seq.* For discussion of judicial notice, see Ch. 321, *Judicial Notice* ; *see also California Trial Guide, § 20.60* (Matthew Bender).

Legal Topics:

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

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48-551 California Forms of Pleading and Practice--Annotated § 551.64

§ 551.64 View of Property, Scene, Object, Demonstration, or Experiment

If the court finds a view would be proper and would aid the trier of fact in its determination of the case, it may, on its own motion or the motion of a party, order a view of any of the following [*Code Civ. Proc. § 651(a)*]:

- The property that is the subject of litigation.
- The place where any relevant event occurred.
- Any object, demonstration, or experiment, a view of which is relevant and admissible in evidence in the case and that cannot with reasonable convenience be viewed in the courtroom.

On such occasion, the entire court, including the judge, jury if any, court reporter if any, and any necessary officers shall proceed to the place, property, object, demonstration, or experiment to be viewed. The court shall be in session throughout the view. At the view, the court may permit testimony of witnesses, and the proceedings at the view shall be recorded to the same extent as the proceedings in the courtroom [*Code Civ. Proc. § 651(b)*].

The view constitutes evidence in the case and may be used alone or with other evidence to support a judgment [*see Hutcherson v. Alexander (1968) 264 Cal. App. 2d 126, 131, 70 Cal. Rptr. 366* ; *Smith v. Smith (1955) 135 Cal. App. 2d 100, 105, 286 P.2d 1009]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewEvidenceProcedural ConsiderationsGeneral Overview

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§ 551.65 Order of Presenting Evidence

Except as otherwise provided by law, the trial regulates the order of proof in its discretion [*Evid. Code § 320*]. Such discretion includes, for example, ordering a separate trial of an affirmative defense [*Finley v. Superior Court (2000) 80 Cal. App. 4th 1152, 1162, 96 Cal. Rptr. 2d 128* ; *see also* further discussion and forms in *Ch. 3, Abatement of Actions, § 3.110* et seq.].

For discussion of the general order of presenting evidence in a jury trial, as provided under *Code Civ. Proc. § 607*, see Subpart E, "Order of Proceedings," under *§ 551.50[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersSeparate TrialsCivil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJury TrialsGeneral OverviewEvidenceTestimonyPresentation of Evidence

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§ 551.66 Admissibility of Evidence

[1] Relevant Evidence

No evidence is admissible except relevant evidence [*Evid. Code § 350*]. "Relevant evidence" is evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action [*Evid. Code § 210*]. Except as otherwise provided by statute, all relevant evidence is admissible [*Evid. Code § 351*]. Thus, a party is entitled to have received in evidence all relevant evidence that tends to prove or disprove any material issue raised by the pleadings. Although it is within the sound discretion of the trial court to define the issues and direct the order of proof (*see Evid. Code § 320*), this may not be done so as to preclude a party from adducing relevant evidence that tends to prove or disprove any material issue [*Foster v. Keating (1953) 120 Cal. App. 2d 435, 451, 261 P.2d 529]* .

In sum, only relevant evidence is admissible and it must tend logically, naturally, and by reasonable inference to establish a material fact. The substantive law of the case primarily determines what constitutes a material, disputed fact. The law vests wide discretion in the trial court to decide the relevance of proffered evidence, and the appellate courts traditionally defer to a trial court's determination unless there appears to be a clear abuse of discretion on a matter of such significance that an injustice has occurred [*Mesnick v. Caton (1986) 183 Cal. App. 3d 1248, 1262-1263, 228 Cal. Rptr. 779* ; *see also Cal. Const., art. VI, § 13*; *see, e.g.,* *Kardly v. State Farm Mut. Auto. Ins. Co. (1995) 31 Cal. App. 4th 1746, 1752-1753, 37 Cal. Rptr. 2d 612* (in insured's action against insurer for bad faith in denying claim, reversible error for trial court to exclude clearly relevant evidence of why insurer closed claim file)].

In civil cases, otherwise relevant evidence is not rendered inadmissible because it was illegally seized or obtained. There is no exclusionary rule for such evidence in civil cases [*Ecker v. Raging Waters Group, Inc. (2001) 87 Cal. App. 4th 1320, 1329, 105 Cal. Rptr. 2d 320* (no legal impediment to trial court's consideration of relevant videotape seized by private citizen)].

[2] Evidence Admitted for Limited Purpose

In a jury trial, when evidence is admissible as to one party or for one purpose and is inadmissible as to another party or

another purpose, the court on request shall restrict the evidence to its proper scope and instruct the jury accordingly [*Evid. Code § 355*; for related jury instructions, see *Judicial Council of California Civil Jury Instructions, CACI No. 206, 207* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions]. The request for a limiting instruction (or a more limiting instruction if the one given is insufficient) should be made at the time the evidence is offered [*see Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 580, 140 Cal. Rptr. 330]* .

[3] Part of Evidence Only Presented by Party

When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party [*Evid. Code § 356*; *see Gallaher v. Superior Court (1980) 103 Cal. App. 3d 666, 672, 162 Cal. Rptr. 389]* .

[4] Letter Read Into Evidence

When a letter is read in evidence, the answer may be given [*Evid. Code § 356*].

[5] Detached Evidence

When a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing that is necessary to make it understood also may be given in evidence [*Evid. Code § 356*; *see Gallaher v. Superior Court (1980) 103 Cal. App. 3d 666, 672, 162 Cal. Rptr. 389]* .

[6] Polygraph Test Results

Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, cannot be admitted into evidence in any criminal proceeding, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether in juvenile or adult court, unless all parties stipulate to the admission of the results [*Evid. Code § 351.1(a)*; *see People v. Wilkinson (2004) 33 Cal. 4th 821, 842-852, 16 Cal. Rptr. 3d 420, 94 P.3d 551* (because of categorical prohibition of *Evid. Code § 351.1*, trial court did not err in refusing to conduct *Kelly-Frye* hearing on proposed evidence regarding polygraph test)].

Polygraph tests are not considered by the California courts to have achieved such a high degree of reliability that they may be received in evidence without the stipulation of the parties. But they are admissible pursuant to the stipulation of the parties [*Robinson v. Wilson (1974) 44 Cal. App. 3d 92, 103, 118 Cal. Rptr. 569* (paternity case)]. See general discussion in [10], *below*.

[7] Photographs

Photographic evidence in a proper case may be used as substantive evidence [*Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park (1975) 45 Cal. App. 3d 519, 530, 119 Cal. Rptr. 559* (holding photographs properly excluded because relevance not shown)].

[8] Videotapes

A videotape of a plaintiff's daily activities is admissible as relevant to the plaintiff's medical needs and the extent of the plaintiff's pain and suffering [*Jones v. City of Los Angeles (1993) 20 Cal. App. 4th 436, 445, 24 Cal. Rptr. 2d 528]* .

A videotaped reconstruction of an automobile accident is admissible when the conditions shown on the tape are "substantially similar" to those that existed when the accident took place [*see DiRosario v. Havens (1987) 196 Cal.*

App. 3d 1224, 1231-1233, 242 Cal. Rptr. 423] . Even if a dramatized reconstruction not meeting this standard is admitted into evidence, the error is harmless when the videotape affords visual confirmation of the testimony of other witnesses [*DiRosario v. Havens (1987) 196 Cal. App. 3d 1224, 1233, 242 Cal. Rptr. 423]* .

[9] Experimental Evidence

Experimental evidence is admissible when it (1) is relevant, (2) was obtained under conditions substantially similar to those to which it is sought to be applied, and (3) will not cause undue delay in the trial or confusion for the jury [*Hasson v. Ford Motor Co. (1977) 19 Cal. 3d 530, 548-549, 138 Cal. Rptr. 705, 564 P.2d 857]* . A test or experiment is not admissible as evidence if it is based on a theory that contradicts unrebutted testimony or assumes a fact that has no support in the record [*Ehrhardt v. Brunswick, Inc. (1986) 186 Cal. App. 3d 734, 740, 231 Cal. Rptr. 60]* .

[10] Scientific Evidence

Evidence based on a new scientific technique, theory, or process is admissible if the technique, theory, or process meets a test commonly termed the " *Kelly/Frye*" test, based on the California Supreme Court's decision in *People v. Kelly (1976) 17 Cal. 3d 24, 37, 130 Cal. Rptr. 144* , and the germinal case of *Frye v. United States (D.C.Cir. 1923) 293 F. 1013, 1014* [, *People v. Leahy (1994) 8 Cal. 4th 587, 612, 34 Cal. Rptr. 2d 663, 882 P.2d 321* (citing *People v. Kelly (1976) 17 Cal. 3d 24, 37, 130 Cal. Rptr. 144, 549 P.2d 1240*)]. Under the *Kelly/Frye* test, scientific evidence is admissible when the following three prongs are satisfied:

- The technique must have gained general acceptance in its field (the technique is generally accepted by a typical cross-section of the relevant scientific community).

- The testimony regarding the technique and its application must be offered by a properly qualified expert.

- Correct scientific procedures must have been used in the particular case.

The first prong of the test--general acceptance--is satisfied once a trial court's decision to admit evidence based on a new scientific technique has been affirmed on appeal by a published appellate decision, at least until new evidence is presented reflecting a change in the attitude of the scientific community [*People v. Kelly (1976) 17 Cal. 3d 24, 32, 130 Cal. Rptr. 144, 549 P.2d 1240* ; *see, e.g, People v. Williams (1996) 46 Cal. App. 4th 1767, 1778-1779, 54 Cal. Rptr. 2d 521* ("segmentation" process of enhancing photographic images to create more discernible image is reliable)].

A *Kelly/Frye* hearing is not required for new devices for already established scientific methods; it only applies to new methodologies [*People v. Nolan (2002) 95 Cal. App. 4th 1210, 1215, 116 Cal. Rptr. 2d 331* (urinalysis); *People v. Bury (1996) 41 Cal. App. 4th 1194, 1202, 49 Cal. Rptr. 2d 107* (breath testing for alcohol)].

For additional discussion of the *Kelly/Frye* analysis as it relates to expert testimony, see *§ 551.70[2][a][ii]*.

[11] Witness's State of Mind

A witness may competently testify to his or her own state of mind when the witness's state of mind is relevant to any issue in the case [*Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 583, 140 Cal. Rptr. 330]* .

[12] Character or Character Traits

Except as otherwise provided by statute, any otherwise admissible evidence (including evidence in the form of an opinion, evidence of reputation, and evidence of specific instances of conduct) is admissible to prove a person's character or a character trait [*Evid. Code § 1100*]. But evidence of a person's character or a character trait is not

admissible in a civil action when offered to prove the person's conduct on a specified occasion, except as otherwise provided by statute [*Evid. Code § 1101(a)*; *see* *Blackburn v. Superior Court (1993) 21 Cal. App. 4th 414, 430, 27 Cal. Rptr. 2d 204]* . Nor is evidence of a person's character trait with respect to care or skill admissible to prove the quality of the person's conduct on a specified occasion [*Evid. Code § 1104*; *see* *Stafford v. United Farm Workers (1983) 33 Cal. 3d 319, 325, 188 Cal. Rptr. 600, 656 P.2d 564* ; *Brokopp v. Ford Motor Co. (1977) 71 Cal. App. 3d 841, 851, 139 Cal. Rptr. 888]* . It is a fundamental rule of evidence that one cannot prove the commission of an act by showing the commission of similar acts by the same person at other times and under other circumstances; such evidence is simply not relevant [*Brokopp v. Ford Motor Co. (1977) 71 Cal. App. 3d 841, 851, 139 Cal. Rptr. 888* ; *Larson v. Larsen (1925) 72 Cal. App. 169, 172, 236 P. 979]* .

This does not prevent the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than the person's disposition to commit such acts [*Evid. Code § 1101(b)*; *see* *Rufo v. Simpson (2001) 86 Cal. App. 4th 573, 584-587, 103 Cal. Rptr. 2d 492* (evidence of defendant's prior abuse of spouse whom he allegedly killed was admissible in wrongful death action brought by her heirs as relevant to motive, intent, and identity); *Andrews v. City and County of San Francisco (1988) 205 Cal. App. 3d 938, 944-945, 252 Cal. Rptr. 716* (prior episodes of abusive misconduct by police officer as tending to show that plaintiff's injuries were product of officer's intent and malice)]. Nor does it affect the admissibility of evidence offered to support or attack the credibility of a witness [*Evid. Code § 1101(c)*; *see* discussion in *§ 551.123*].

Evidence of a person's character or a character trait that does not relate to the person's conduct or the quality of the conduct on a specific occasion [*see Evid. Code §§ 1101, 1104*] is relevant in three situations: (1) when offered on the issue of the person's credibility as a witness; (2) when offered as circumstantial evidence of the person's conduct in conformity with his or her character or character trait; and (3) when the person's character or a trait of his or her character is an ultimate fact in dispute in the action [*see* Cal. Law Revision Commission Comment to *Evid. Code § 1100* in annotated codes; *see also* *Carr v. Pacific Tel. Co. (1972) 26 Cal. App. 3d 537, 544, 103 Cal. Rptr. 120]* .

[13] Habit or Custom

Any otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom [*Evid. Code § 1105*].

[14] Other Accidents

Evidence of other accidents is admissible to prove a defective condition, knowledge, or the cause of an accident, provided that the circumstances of the other accidents are similar and not too remote [*Ault v. International Harvester Co. (1974) 13 Cal. 3d 113, 121-122, 117 Cal. Rptr. 812, 528 P.2d 1148* ; *see also* *Brake v. Beech Aircraft Corp. (1986) 184 Cal. App. 3d 930, 937-938, 229 Cal. Rptr. 336* (computer analysis and accident report on prior performance and malfunction of product properly excluded as hearsay)]. Moreover, the court may admit evidence regarding the absence of prior similar claims in cases concerning negligence or strict products liability [*Benson v. Honda Motor Co. (1994) 26 Cal. App. 4th 1337, 1344]* . See also the discussion in *§ 551.68[4][a]*.

For further discussion of negligence and products liability actions, see respectively Ch. Ch. 380, *Negligence* , and Ch. 460, *Products Liability* .

Legal Topics:

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

FormatsEvidenceRelevanceGeneral OverviewEvidenceScientific EvidenceGeneral OverviewEvidenceScientific EvidencePolygraphs

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 551 TRIAL
PART II. LEGAL BACKGROUND
E. Evidence

48-551 California Forms of Pleading and Practice--Annotated § 551.67

§ 551.67 Stipulations of Parties

In the course of a trial, counsel may stipulate to a number of matters for a variety of reasons. Common stipulations include those in which counsel agree to the authenticity of an exhibit, the qualifications of an expert, that certain alleged or asserted facts are true, that certain testimony would be given if a particular witness were called to testify, and so forth [*see, e.g., Linsk v. Linsk (1969) 70 Cal. 2d 272, 277, 74 Cal. Rptr. 544, 449 P.2d 760]* .

Some courts require that oral offers to stipulate in jury trials be made outside the hearing of the jurors. Any stipulation reached by counsel is then stated in its exact terms to the jury, and the court advises the jury that any stipulated fact is conclusively presumed to be true as to the party or parties entering into the stipulation [*see* Los Angeles Co. Super. Ct. Rules, Rule 8.43, 8.44].

For further discussion and forms of stipulations, including a form of stipulation of facts, see Ch. 533, *Stipulations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceJudicial AdmissionsAdmissions During Trials

California Forms of Pleading and Practice--Annotated

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48-551 California Forms of Pleading and Practice--Annotated § 551.68

§ 551.68 Exclusion of Evidence

[1] Irrelevant Evidence

Irrelevant evidence should be excluded [*see Evid. Code § 351*; *see also* Los Angeles Co. Super. Ct. Rules, Rule 8.89 (court should exclude irrelevant evidence on its own motion)]. Evidence is relevant if it has any tendency in reason to prove a material disputed fact [*People v. Waidla (2000) 22 Cal. 4th 690, 718, 94 Cal. Rptr. 2d 396, 996 P.2d 46* ; *see Evid. Code § 210* and discussion in *§ 551.66[1]*].

[2] Probative Value Outweighed by Undue Prejudice, Confusion, or Delay

Moreover, the court in its discretion may exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will (1) necessitate undue consumption of time or (2) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury [*Evid. Code § 352*; *see People v. Holt (1972) 28 Cal. App. 3d 343, 353, 104 Cal. Rptr. 572 , cert. denied, 413 U.S. 921 (1973)* (undue prejudice; disapproved on another point in *Evans v. Superior Court (1974) 11 Cal. 3d 617, 625 n. 6, 114 Cal. Rptr. 121, 522 P.2d 681*); *see also Hrnjak v. Graymar, Inc. (1971) 4 Cal. 3d 725, 728-734, 94 Cal. Rptr. 623, 484 P.2d 599* (weighing probative value against prejudicial impact)].

Evidence is substantially more prejudicial than probative, and therefore subject to exclusion under *Evid. Code § 352*, when it poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome [*People v. Waidla (2000) 22 Cal. 4th 690, 724, 94 Cal. Rptr. 2d 396, 996 P.2d 46]* .

Evid. Code § 352 gives the trial court broad discretion to exclude otherwise admissible evidence [*Garfield v. Russell (1967) 251 Cal. App. 2d 275, 279, 59 Cal. Rptr. 379]* . The court may exclude the evidence on its own initiative, but if it fails to do so, counsel must, if the evidence is to be excluded, request the court to do so; the objection that the court failed to exclude the evidence cannot be raised for the first time on appeal [*Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 581, 582, 140 Cal. Rptr. 330]* .

A trial court, in making a determination whether certain evidence is substantially more prejudicial than probative, need

not expressly weigh prejudice against probative value, or even expressly state that it had done so [*People v. Waidla (2000) 22 Cal. 4th 690, 724 n.6, 94 Cal. Rptr. 2d 396, 996 P.2d 46* (stating that this is the current rule and language to the contrary in any of its other decisions is no longer valid)].

In the Los Angeles County Superior Court, the court on its own motion should exclude evidence excludable under *Evid. Code § 352* [Los Angeles Co. Super. Ct. Rules, Rule 8.89 (court should also exclude irrelevant evidence on its own motion but ordinarily should not exclude evidence on its own motion when inadmissible on other grounds)].

[3] Relevant Evidence Objectionable on Other Grounds

Particular testimony that is relevant may be excluded on other specific grounds enumerated in the Evidence Code, for example:

- The witness is not competent to testify to a particular matter (e.g., witness lacks personal knowledge) [*see Evid. Code § 702*; *Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 582, 140 Cal. Rptr. 330* (witness's speculation regarding another person's state of mind absent proper evidence, such as declarations or conduct, is both incompetent and irrelevant and properly excluded by court on its own initiative); see also discussion in *§ 551.121[2]*].

- The question calls for the opinion of a nonexpert witness or of an expert witness beyond the area of his or her expertise [*see Evid. Code §§ 800, 801*, and discussion in *§ 551.70*].

- The answer is privileged [*see Evid. Code §§ 900-1070*; and discussion in *§ 551.118*].

- The answer is hearsay [*see Evid. Code § 1200(b)*; and discussion in *§ 551.71*].

- The evidence is cumulative [*see Evid. Code § 765*; discussed in *§ 551.121[3]*].

An agreement between parties that evidence will not be admissible at trial, such as evidence of settlement negotiations, is enforceable so long as the agreement was not obtained by fraud, misrepresentation, mistake of fact, or excusable neglect, there is no substantial change in circumstances making enforcement of the agreement unfair to a party, and the agreement does not violate public policy [*Tower Acton v. Los Angeles County Waterworks Dist. No. 37 (2002) 105 Cal. App. 4th 590, 600-602, 129 Cal. Rptr. 2d 640* (agreement enforceable)].

[4] Specific Evidence

[a] Subsequent Safety Measures

When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of the subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event [*Evid. Code § 1151*].

Evid. Code § 1151 by its own terms excludes evidence of subsequent remedial or precautionary measures only when the evidence is offered to prove negligence or culpable conduct. Thus it does not apply to an action based on strict liability in tort [*Ault v. International Harvester Co. (1974) 13 Cal. 3d 113, 117-121, 117 Cal. Rptr. 812, 528 P.2d 1148* ; *Magnante v. Pettibone-Wood Mfg. Co. (1986) 183 Cal. App. 3d 764, 766-767, 228 Cal. Rptr. 420* ; for further discussion of products liability, see Ch. 460, *Products Liability* [*see also* California Products Liability Actions (Matthew Bender) and *California Trial Guide, § 50.30* (Matthew Bender)].

If remedial measures are taken by someone not a party to the action, *Evid. Code § 1151* still operates to exclude any

evidence of those measures if the nonparty's negligence is an issue in the action, if no strict liability theory has been asserted against the nonparty, and if a determination that the nonparty was negligent will have a direct effect on the amount of damages that the nonparty will be required to pay [*Santilli v. Otis Elevator Co. (1989) 215 Cal. App. 3d 210, 214, 263 Cal. Rptr. 496* (nonparty employer's workers' compensation lien against employee's jury award would be reduced by percentage of responsibility that jury allocates to employer for employee's injury)].

Evid. Code § 1151 refers to subsequent actions taken to repair or correct a problem, as distinguished from subsequent factual inquiries undertaken to determine whether repair or correction is necessary. Consequently, hospital peer review committee inquiries, undertaken to investigate physician misconduct, do not constitute subsequent remedial measures that would be subject to exclusion in a malpractice action under *Evid. Code § 1151*, particularly since such inquiries are addressed by the more specific disclosure and admissibility restrictions of *Evid. Code § 1157* [*Fox v. Kramer (2000) 22 Cal. 4th 531, 544, 548, 93 Cal. Rptr. 2d 497, 994 P.2d 343* ; for discussion of *Evid. Code § 1157, see* Ch. 295, *Hospitals*].

[b] Offer to Compromise or Offer From Humanitarian Motives

Evidence that a person has, in compromise or from humanitarian motives, furnished, offered, or promised to furnish money or any other thing, act, or service to another who has, or claims to have, sustained or claims that he or she will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the person's liability for the loss or damage or any part of it [*Evid. Code § 1152(a)*; for related jury instruction on evidence of settlement, see *Judicial Council of California Civil Jury Instructions, CACI No. 217* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions]. However, this does not affect the admissibility of evidence of (1) partial satisfaction of an asserted claim or demand without questioning its validity when the evidence is offered to prove the validity of the claim, or (2) a debtor's payment or promise to pay all or a part of his or her preexisting debt when the evidence is offered to prove the creation of a new duty on his or her part or a revival of the preexisting duty [*Evid. Code § 1152(c)*].

The purpose of *Evid. Code § 1152* is to avoid deterring parties from making offers of settlement and to facilitate candid discussion that may lead to settlement of disputes [*Fieldson Associates, Inc. v. Whitecliff Labs., Inc. (1969) 276 Cal. App. 2d 770, 773, 81 Cal. Rptr. 332]* . The section does not apply, however, to statements that are in no way connected with any attempt of compromise or are statements of fact independent of an offer of compromise. Accordingly, evidence relative to the issue of whether there has been an accord and satisfaction is not subject to the objection that it violates the rule excluding offers of compromise. Moreover, the statements of a party against whom a claim is made that he or she is willing to settle the claim, when not connected with an offer of compromise, may be proved as an admission against interest [*Moving Picture etc. Union v. Glasgow Theaters, Inc. (1970) 6 Cal. App. 3d 395, 402, 86 Cal. Rptr. 33]* .

Evid. Code § 1152(a) does not bar evidence of settlement if the evidence is offered to establish a fact other than the liability of the settling party. Therefore, for example, if a codefendant sends a letter of apology to plaintiff under the terms of a settlement agreement in a libel action, the letter is admissible in the trial against a nonsettling codefendant as evidence that the allegedly libelous statements made about plaintiff were false [*Carney v. Santa Cruz Women Against Rape (1990) 221 Cal. App. 3d 1009, 1023-1024, 271 Cal. Rptr. 30]* .

If an offer to compromise is admitted in an action for breach of the covenant of good faith and fair dealing or for violation of *Ins. Code § 790.03(h)*, then at the request of the party against whom the evidence is admitted, or at the request of the party who made the admitted compromise offer, evidence relating to any other offer or counteroffer to compromise the same or substantially the same claimed loss or damages also is admissible for the same purpose as the initial evidence regarding settlement. Other than as may be admitted in an action for breach of the covenant of good faith and fair dealing or violation of *Ins. Code § 790.03(h)*, evidence of settlement offers is not admissible in a motion for a new trial, in any proceeding involving an additur or remittitur, or on appeal [*Evid. Code § 1152(b)*; *but see*

Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58 (prospectively abrogating private third-party standing under *Ins. Code § 790.03*); *see also* discussion in *Ch. 308, Insurance, § 308.10 et seq.*]. For a form of complaint alleging a violation of *Ins. Code § 790.03(h)*, see *Ch. 308, Insurance, § 308.10 et seq.* For discussion and forms relating to a breach of the covenant of good faith and fair dealing, see Ch. 140, *Contracts* , General Introduction and Pt. I.

[c] Evidence and Documents in Mediation of Dispute

[i] Admissibility and Discovery in General

Except as otherwise provided in *Evid. Code § 1115 et seq.*, when persons engage in a mediation or a mediation consultation [*see Evid. Code § 1115(a), (c)*], evidence of anything said, any admission made, or any writing [*see Evid. Code § 250*] prepared for, during, or pursuant to the mediation or mediation consultation is not admissible or subject to discovery. Disclosure of such evidence or writing may not be compelled in any proceeding in which, pursuant to law, testimony can be compelled to be given. All communications, negotiations, or settlement discussions by participants in the course of a mediation or a mediation consultation are confidential [*Evid. Code § 1119*].

Evidence otherwise admissible or subject to discovery outside of a mediation or a mediation consultation is not inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation. The mediation provisions [*Evid. Code § 1115 et seq.*] do not limit any of the following [*Evid. Code § 1120*:

- The admissibility of an agreement to mediate a dispute.

- The effect of an agreement not to take a default or an agreement to extend the time within which to act or refrain from acting in a pending civil action.

- Disclosure of the mere fact that a mediator has served, is serving, will serve, or was contacted about serving as a mediator in a dispute.

No one may submit to a court or other adjudicative body, nor may a court or other adjudicative body consider, any report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning the mediation, other than a report that is mandated by court rule or other law and that states only whether an agreement was reached, unless all parties to the mediation expressly agree otherwise, either in writing or orally in accordance with *Evid. Code § 1118* [*Evid. Code § 1121*].

[ii] Exception by Agreement

A communication or a writing, as defined in *Evid. Code § 250*, that is made or prepared for the purpose of, or in the course of, or pursuant to, a mediation or a mediation consultation is not made inadmissible, or protected from disclosure, by the mediation provisions [*Evid. Code § 1115 et seq.*] if either:

- All persons who participate in the mediation expressly agree in writing, or orally in accordance with *Evid. Code § 1118*, to its disclosure.

- It was prepared by or on behalf of fewer than all the mediation participants, and those participants expressly agree in writing, or orally in accordance with *Evid. Code § 1118*, to its disclosure, and it does not disclose anything said or done or any admission made in the course of the mediation.

The agreement of the mediator to disclosure binds any person who the mediator designated to assist in the mediation or

to communicate with the participants in preparation for the mediation [*Evid. Code § 1122*].

[iii] Written Settlement Agreement

A written settlement agreement prepared in the course of or pursuant to a mediation is not made inadmissible, or protected from disclosure, by the mediation provisions [*Evid. Code § 1115 et seq.*] if the agreement is signed by the settling parties and either [*Evid. Code § 1123*]:

- The agreement provides that it is admissible or subject to disclosure, or words to that effect.
- The agreement provides that it is enforceable or binding, or words to that effect.
- All parties to the agreement expressly agree in writing, or orally in accordance with *Evid. Code § 1118* to its disclosure.
- The agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

[iv] Oral Agreement

An oral agreement made in the course of or pursuant to a mediation is not made inadmissible, or protected from disclosure, by the mediation provisions [*Evid. Code § 1115 et seq.*] if either [*Evid. Code § 1124*:

- The agreement is in accordance with *Evid. Code § 1118*.
- The agreement is in accordance with *Evid. Code § 1118(a)*, *(b)*, and *(d)* and all parties to the agreement expressly agree, in writing, or orally in accordance with *Evid. Code § 1118*, to disclosure of the agreement.
- The agreement is in accordance with *Evid. Code § 1118(a)*, *(b)*, and *(d)* and the agreement is used to show fraud, duress, or illegality that is relevant to an issue in dispute.

[v] End of Mediation for Purposes of Confidentiality

For purposes of confidentiality under the mediation provisions [*Evid. Code § 1115 et seq.*], if a mediation *fully* resolves a dispute, the mediation ends when either:

- The parties execute a written settlement agreement that fully resolves the dispute.
- An oral agreement that fully resolves the dispute is reached in accordance with *Evid. Code § 1118*.
- The mediator, consistent with *Evid. Code § 1121*, signs and provides the mediation participants with a writing that states the mediation is terminated, or words to that effect.
- A party, consistent with *Evid. Code § 1121*, provides the mediator and the other mediation participants with a writing stating that the mediation is terminated, or words to that effect.
- For 10 calendar days, unless that time is shortened or extended by agreement of the mediator and the parties, there is no communication between the mediator and any of the parties to the mediation relating to the dispute.

In a mediation involving more than two parties, the mediation may continue as to the remaining parties or may be terminated in accordance with this procedure [*Evid. Code § 1125(a)*]. Additionally, if a mediation *partially* resolves a dispute, the mediation ends when either [*Evid. Code § 1125(b)*:

- The parties execute a written settlement agreement that partially resolves the dispute.

- An oral agreement that partially resolves the dispute is reached in accordance with *Evid. Code § 1118*.

These provisions do not preclude a party from ending a mediation without reaching an agreement, nor do they otherwise affect the extent to which a party may terminate a mediation [*Evid. Code § 1125(c)*]. Anything said, any admission made, or any writing that is inadmissible, protected from disclosure, and confidential under the mediation provisions [*Evid. Code § 1115 et seq.*] before a mediation ends remains inadmissible, protected from disclosure, and confidential to the same extent after the mediation ends [*Evid. Code § 1126*].

[vi] Costs and Attorney's Fees

If a person subpoenas or otherwise seeks to compel a mediator to testify or produce a writing, as defined in *Evid. Code § 250*, and the court or other adjudicative body determines that the testimony or writing is inadmissible or protected from disclosure under *Evid. Code § 1115 et seq.*, the court or adjudicative body making the determination must award reasonable attorney's fees and costs to the mediator against the person seeking the testimony or writing [*Evid. Code § 1127*].

[vii] Sanctions for References During Subsequent Trial

Any reference to a mediation during any subsequent trial is an irregularity in the proceedings of the trial for the purposes of *Code Civ. Proc. § 657*. Any reference to a mediation during any other subsequent noncriminal proceeding is grounds for vacating or modifying the decision in that proceeding, in whole or in part, and granting a new or further hearing on all or part of the issues, if the reference materially affected the substantial rights of the party requesting relief [*Evid. Code § 1128*].

For further discussion of mediation, including enforcement of settlements reached through mediation, see Ch. 31, *Mediation* .

[d] Offer to Discount Claim

Evidence that a person has accepted, offered, or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements in negotiation thereof, is not admissible to prove the invalidity of the claim or any part of it [*Evid. Code § 1154*].

[e] Offer for Civil Resolution of Criminal Matter

Evidence of an offer for civil resolution of a criminal matter pursuant to *Code Civ. Proc. § 33*, relating to civil actions resulting from crimes against property, or admissions made in the course of or negotiations for the offer are not admissible in any action [*Evid. Code § 1153.5*].

[f] Guilty Plea

Evidence of a guilty plea, later withdrawn, or of an offer to plead guilty to a crime charged or any other crime, by the defendant in a criminal action is not admissible in any action or any proceeding of any nature [*Evid. Code § 1153*].

[g] Liability Insurance

Evidence that a person was, at the time a harm was suffered by another, insured wholly or partially against loss arising from liability for that harm is not admissible to prove negligence or other wrongdoing [*Evid. Code § 1155*]. The purpose of this exclusion is to prevent the prejudicial use of evidence of liability insurance in an action against the insured. Based on an assumption that a private cause of action could be brought against insurers for violation of the Unfair Practices Act [*Ins. Code § 790 et seq.*], it was once held that a joint trial against the insured for negligence and against the insurer for violating its duties under the Unfair Practices Act would violate both the letter and spirit of *Evid. Code § 1155* [*Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal. 3d 880, 891, 153 Cal. Rptr. 842, 592 P.2d 329* , overruled prospectively in *Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58* (final October 17, 1988) (no private right of action exists against insurers for violation of Unfair Practices Act)]. Notwithstanding the reasoning behind this rule, one suing an insured for injuries suffered as a result of an insured's alleged negligence may properly join the insured's liability insurer in a cause of action for fraud and conspiracy in obtaining from plaintiff a release freeing the insured from all claims arising out of the incident, provided the issues are bifurcated and the jury trying the issue of liability is afforded no knowledge of the tortfeasor's insurance coverage [*Johnson v. Threats (1983) 140 Cal. App. 3d 287, 290-291* ; *see* *Ahmed v. Peterson (1986) 186 Cal. App. 3d 374, 377, 230 Cal. Rptr. 636* (cause of action against tortfeasor's insurer for breach of oral contract)].

[h] Evidence Obtained by Illegal Eavesdropping or Recording

Evidence obtained as a result of eavesdropping on or recording a confidential communication in violation of *Penal Code § 632* is not admissible in an action, except as proof in an action or prosecution for violation of the criminal statute [*Penal Code § 632(d)*]. *Penal Code § 632* is violated by intentionally eavesdropping on or recording a confidential communication by means of any electronic amplifying or recording device, without the consent of all parties [*Penal Code § 632(a)*]. A confidential communication generally includes any communication carried on in circumstances that may reasonably indicate that any party to the communication desires it to be confined to the parties thereto [*see Penal Code § 632(c)*].

Penal Code § 632 applies to participatory monitoring of confidential communications, such as the tape recording of a telephone conversation by one conversant without the consent of the other [*Frio v. Superior Court (1988) 203 Cal. App. 3d 1480, 1485, 1498, 250 Cal. Rptr. 819]* . Illegal recordings, as well as any notes prepared from illegal recordings, are not admissible [*Frio v. Superior Court (1988) 203 Cal. App. 3d 1480, 1492, 250 Cal. Rptr. 819]* . However, *Penal Code § 632(d)* does not exclude the *independent present recollection* of the tape-recording party. Further, use of an illegal recording merely to refresh the recollection of the tape-recording party does not render the refreshed testimony inadmissible [*Frio v. Superior Court (1988) 203 Cal. App. 3d 1480, 1498, 250 Cal. Rptr. 819]* . For further discussion of refreshing the recollection of a witness, see Subpart G.

If the tape-recording party's testimony is admitted, the illegally obtained evidence may not be used to impeach the witness who was recorded. However, if the testimony is excluded, the tape-recording party may not use the *Penal Code § 632(d)* sanction as a license to lie, and the illegally obtained evidence can be used for impeachment purposes [*Frio v. Superior Court (1988) 203 Cal. App. 3d 1480, 1496-1497, 1498-1499, 250 Cal. Rptr. 819]* .

[5] Morbidity or Mortality Studies and Proceedings and Records of Health Care Committees

Although subject to discovery, morbidity and mortality studies of an in-hospital medical or medical-dental staff committee of a licensed hospital or of a mental health quality assurance committee established in compliance with *Welf. & Inst. Code §§ 4070* and *5624* are admissible in evidence only as provided in *Evid. Code §§ 1156(c)* (relating to original medical or dental records of a patient) and 1156.1(c) (relating to original medical or psychiatric records of a patient) [*Evid. Code §§ 1156(a), 1156.1(a)*].

Welf. & Inst. Code § 4070 was amended and *Welf. & Inst. Code § 5624* was repealed by 1991 legislation [Stats. 1991, ch. 89, §§ 32 and 108, respectively]. The cross reference to those sections in *Evid. Code § 1156.1(a)* was not corrected. The changes to section 4070 and repeal of section 5624 will become inoperative if the Commission on State Mandates determines (and the Director of Finance does not appeal from the determination) or a California appellate court determines that any provision of Stats. 1991, ch. 89, is a state-mandated local program requiring state reimbursement to a local agency or school district.

For when the records and proceedings of hospital staff committees responsible for evaluating and improving the quality of care, or of specified medical, and other health related, society review committees, or of an organized committee of a nonprofit medical care foundation or professional standards review organization, are admissible in evidence, see *Evid. Code §§ 1157, 1157.5* and Ch. 295, *Hospitals* [*see also Evid. Code §§ 1157.6* (relating to mental health quality assurance committees) and *1157.7* (relating to committees established by local government agency to monitor, evaluate, and report necessity, quality, and level of specialty health services)].

[6] Testimony of Particular Witness

A particular witness may be excluded from testifying on grounds other than those enumerated above. For example, a party who failed to exchange his or her list of expert witnesses pursuant to a pretrial demand may be prohibited from calling any expert witnesses to testify, except for purposes of impeachment [*see Code Civ. Proc. § 2034.300*; *see also Muller v. Fresno Community Hospital & Medical Center (2009) 172 Cal. App. 4th 887, 906, 91 Cal. Rptr. 3d 617* (effect of failure to designate witness or include in designation all information required by *Code Civ. Proc. § 2034.260*)] or percipient testimony [*Province v. Center for Women's Health & Family Birth (1993) 20 Cal. App. 4th 1673, 1684, 25 Cal. Rptr. 2d 667]* . "Impeachment" in this context means to call in question the veracity of a witness by means of evidence adduced for such purpose or the adducing of proof that a witness is unworthy of belief; it does not mean calling an expert witness to express an opinion contrary to that expressed by another expert witness [*Kennemur v. State of California (1982) 133 Cal. App. 3d 907, 921-922, 184 Cal. Rptr. 393* (distinguishing impeachment from general rebuttal; for further discussion, see Ch. 198, *Discovery: Exchange of Expert Witness Information*]. As another example, the court may exclude the testimony of a witness at trial if the witness's name was willfully excluded from an answer to an interrogatory seeking the names of all witnesses [Thoren v. Johnston & Washer (197 *29 Cal. App. 3d 270, 273-274, 105 Cal. Rptr. 276]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsMediation EvidenceEvidenceRelevanceGeneral OverviewEvidenceRelevanceCompromise & Settlement NegotiationsEvidenceRelevanceConfusion, Prejudice & Waste of TimeEvidenceRelevanceSubsequent Remedial Measures

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 551 TRIAL
PART II. LEGAL BACKGROUND
E. Evidence

48-551 California Forms of Pleading and Practice--Annotated § 551.69

§ 551.69 Evidence of Market Value of Property

The manner of showing the market value of real property or of any interest in it or of personal property valued as a unit is set forth in *Evid. Code §§ 810-824*. For a discussion of these statutes, see Ch. 247, *Eminent Domain* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEminent Domain ProceedingsValuation

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48-551 California Forms of Pleading and Practice--Annotated § 551.70

§ 551.70 Opinion Evidence

[1] Lay Witness

Unless a witness is testifying as an expert, his or her testimony in the form of an opinion is limited to an opinion that is (1) rationally based on the witness's perception and helpful to a clear understanding of his or her testimony or (2) otherwise permitted by law [*Evid. Code § 800*].

An example of an opinion permitted by law is the opinion of a property owner or the owner's spouse of the value of the property or of the property interest being valued [*see Evid. Code § 813(a)(2)*]. A lay witness may also express an opinion that a person was "drunk," that people engaged in a discussion were "angry," that an impact was strong enough to jar a passenger from a seat, or that someone appeared to be "trying to break up a fight" [*see Osborn v. Mission Ready Mix (1990) 224 Cal. App. 3d 104, 113, 273 Cal. Rptr. 457]* . Lay opinions of this type are admissible when matters observed by the witness are too complex or subtle to be conveyed accurately without resorting to conclusory descriptions or when the facts underlying the witness's opinion cannot be made sufficiently palpable to the jury so that the jury's means of forming an opinion based on those facts are practically equal to those of the witness [*Osborn v. Mission Ready Mix (1990) 224 Cal. App. 3d 104, 112-113, 273 Cal. Rptr. 457]* .

The credit and weight to be given such evidence and its effect, as well as the resolution of any conflicts between the testimony of an owner as to value and that of an expert witness, is for the trier of fact [*Windeler v. Scheers Jewelers (1970) 8 Cal. App. 3d 844, 853, 88 Cal. Rptr. 39]* . For another example, see discussion in [4], *below*.

Although permissible opinion testimony based on the witness's perception is admissible, a question asking a lay witness to testify to facts the witness has not personally perceived or to give an opinion not based on the witness's perception calls for an answer based on speculation or conjecture and is objectionable on that ground [*see, e.g., People v. Glancy (1956) 142 Cal. App. 2d 669, 680, 299 P.2d 18]* .

[2] Expert Witness

[a] Limitation on Opinion Evidence

[i] General Parameters

As to when expert witnesses may be called to testify, see discussion in *§ 551.121[12]*. The opinion testimony of an expert is limited to an opinion that is related to a subject sufficiently beyond common experience that an expert's opinion would assist the trier of fact [*Evid. Code § 801(a)*; *see, e.g.,* *Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 567, 34 Cal. Rptr. 2d 607, 882 P.2d 298* (where minimum safety of product is within common knowledge of lay jurors, expert witnesses may not be used to demonstrate what ordinary consumer would or should expect); *Carney v. Santa Cruz Women Against Rape (1990) 221 Cal. App. 3d 1009, 1025, 271 Cal. Rptr. 30* (expert evidence of rape trauma syndrome was not admissible to explain type of behavior lay juror normally would associate with sexual assault); *Box v. California Date Growers Assn. (1976) 57 Cal. App. 3d 266, 274, 129 Cal. Rptr. 146]* . In addition, the opinion must be one that is based on matter (including the expert's special knowledge, skill, experience, training, and education) perceived by or personally known to the expert or made known to the expert at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied on by an expert in forming an opinion on the subject to which his or her testimony relates, unless the expert is precluded by law from using such matter as a basis for his or her opinion [*Evid. Code § 801(b)*; *see* *People v. Mickey (1991) 54 Cal. 3d 612, 685-688, 286 Cal. Rptr. 801, 818 P.2d 84* , *cert. denied,* *121 L. Ed. 2d 32]* . Thus, an expert must base his or her opinion either on facts personally observed or on hypotheses that find support in the evidence. An expert may not base his or her opinion on conjecture, but may, for example, identify a causative force by a process of eliminating other causes [*People v. Sundlee (1977) 70 Cal. App. 3d 477, 484, 138 Cal. Rptr. 834* (cause of fire); *see* *People v. Bassett (1968) 69 Cal. 2d 122, 143 n. 21, 70 Cal. Rptr. 193, 443 P.2d 777* , and *McGuire v. Baird (1937) 9 Cal. 2d 353, 354-356, 70 P.2d 915* (on use of hypothetical questions in examining an expert)].

An expert's opinion may be based on matter that is not admissible as evidence, such as hearsay [*Evid. Code § 801(b)*; *Notrica v. State Comp. Ins. Fund (1999) 70 Cal. App. 4th 911, 932-933, 83 Cal. Rptr. 2d 89* (expert witness, who gave opinion as to why insurance carrier had changed its reserve guideline, based opinion, in part, on interview with insurer's president that appeared in trade publication); *In re Marriage of LaBass & Munsee (1997) 56 Cal. App. 4th 1331, 1338, 66 Cal. Rptr. 2d 393* (hearsay)]. If hearsay, it must be of a type reasonably relied upon by professions in the field in forming an opinion on the subject [*People ex rel. Dept. of Transportation v. Caluser/Wells Partnership (2002) 95 Cal. App. 4th 1066, 1085, 116 Cal. Rptr. 2d 240* ; *Korsak v. Atlas Hotels, Inc. (1992) 2 Cal. App. 4th 1516, 1524, 3 Cal. Rptr. 2d 833]* . However, when the opinion is based in part on inadmissible hearsay statements, it is improper for the proponent of the testimony to solicit evidence of the substance of the statements on direct examination [*Korsak v. Atlas Hotels, Inc. (1992) 2 Cal. App. 4th 1516, 1525-1527, 3 Cal. Rptr. 2d 833* (error to permit expert witness to testify about informal survey he took regarding hotel maintenance practices to prove that hotel had failed to meet standard of care owed to its guests)]. When an expert has relied on matter that constitutes a proper basis for an opinion but is otherwise inadmissible, the court on request must at least instruct the jury that the matter is admitted only for the limited purpose of showing the basis for the expert's opinion [*People v. Coleman (1985) 38 Cal. 3d 69, 92, 211 Cal. Rptr. 102, 695 P.2d 189]* .

For a related jury instruction on expert witness testimony, see *Judicial Council of California Civil Jury Instructions, CACI No. 219* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions.

[ii] Scientific Techniques

The witness's testimony may be based upon scientific techniques if those techniques are generally accepted by a typical cross-section of the relevant scientific community. This test is known as the *Kelly/Frye* foundational showing [*People v. Leahy (1994) 8 Cal. 4th 587, 612, 34 Cal. Rptr. 2d 663, 882 P.2d 321* (citing *People v. Kelly (1976) 17 Cal. 3d 24, 37, 130 Cal. Rptr. 144, 549 P.2d 1240*); *see also* discussion in *§ 551.66[10]*]. The *Kelly* rule does not apply to the personal opinions of an expert [*People v. McDonald (1984) 37 Cal. 3d 351, 372-373, 208 Cal. Rptr. 236, 690 P.2d 709* ; *Arreola v. County of Monterey, 99 Cal. App. 4th 722, 750, 122 Cal. Rptr. 2d 38* ; *Wilson v. Phillips (1999) 73*

Cal. App. 4th 250, 254-256, 86 Cal. Rptr. 2d 204] .

An absolute unanimity of views, however, is not required; it is sufficient that a clear majority of the members of that community support the technique [*People v. Leahy (1994) 8 Cal. 4th 587, 612, 34 Cal. Rptr. 2d 663, 882 P.2d 321* (citing *People v. Guerra (1984) 37 Cal. 3d 385, 418, 208 Cal. Rptr. 162, 690 P.2d 635]* . Although it is questionable whether the testimony of a single witness can represent the views of an entire community, published writings in scholarly treatises and journals can be used in lieu of live testimony [*People v. Leahy (1994) 8 Cal. 4th 587, 611, 34 Cal. Rptr. 2d 663, 882 P.2d 321* (citing *People v. Kelly (1976) 17 Cal. 3d 24, 37, 130 Cal. Rptr. 144, 549 P.2d 1240* and *People v. Shirley (1982) 31 Cal. 3d 18, 55-56, 181 Cal. Rptr. 243, 723 P.2d 1354 , cert. denied, 459 U.S. 860*)].

Although the United States Supreme Court discarded the " *Frye*" rule, on which California's " *Kelly-Frye"* rule is based [*Daubert v. Merrell Dow Pharms., Inc. (1993) 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469* (admissibility of scientific evidence in federal courts should be determined under broader standards contained in Fed. R. *Evid. 702*), the California Supreme Court rejected the *Daubert* analysis for purposes of determining the admissibility of evidence of *new scientific techniques* and reaffirmed the " *Kelly-Frye*" analysis [*People v. Leahy (1994) 8 Cal. 4th 587, 598-605, 34 Cal. Rptr. 2d 663, 882 P. 2d 321]* . The court did not, however, address the question of whether *Daubert* factors could be used in determining the *reliability* of an expert's testimony under *Evid. Code § 801(b)*. The United States Supreme Court subsequently expanded *Daubert* to "testimony based on 'technical' and 'other specialized' knowledge," i.e., to all expert testimony, holding that a trial court may consider *Daubert* factors when doing so will help determine the reliability of an expert's testimony [*Kumho Tire Co. v. Carmichael (1999) 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238, 246]* . Whether the *Kumho* decision may have an impact on the admissibility of expert testimony in California remains to be seen.

[iii] Experimental Evidence

On the admissibility of an expert's conclusions based on an experiment conducted by him or her that lacked adequate foundation and was not conducted under substantially similar conditions to those involved in the lawsuit, see *Solis v. Southern Cal. Rapid Transit Dist. (1980) 105 Cal. App. 3d 382, 390, 164 Cal. Rptr. 343* .

[iv] Opinion on Issue of Law

Expert opinion on an issue of law is, as a general rule, prohibited in a jury trial. The manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion. Expert opinions as to the application of the law to particular facts usurps the duty of the trial court to instruct the jury on the law as applicable to the facts [*see, e.g., Summers v. A.L. Gilbert Co. (1999) 69 Cal. App. 4th 1155, 1160, 1185, 82 Cal. Rptr. 2d 162* (trial court erred in admitting lawyer's opinion on whether defendant had nondelegable duty and other legal issues); *Cooper Companies v. Transcontinental Ins. Co. (1995) 31 Cal. App. 4th 1094, 1100, 37 Cal. Rptr. 2d 508* (meaning of insurance policy is question of law about which expert opinion testimony is inappropriate)].

[b] Opinion Based in Whole or in Part on Opinion or Statement of Another Person

If an expert testifies that his or her opinion is based in whole or in part on the opinion or statement of another person, the adverse party may call and examine the other person as if under cross examination. But this does not apply if the person on whose opinion or statement the expert relied is (1) a party, (2) a person identified with a party within the meaning of *Evid. Code § 776(d)* (discussed in *§ 551.121[11]*), or (3) a witness who has testified in the action concerning the subject matter of the opinion or statement on which the expert relied [*Evid. Code § 804(a), (b)*]. *Evid. Code § 804* neither makes admissible an expert opinion that is inadmissible because it is based in whole or in part on the opinion or statement of another person nor makes inadmissible an otherwise admissible expert opinion because it is based on the opinion or statement of a person who is unavailable for examination pursuant to *Evid. Code § 804(a)* [*Evid. Code § 804(c), (d)*]. If an expert does rely in part on the opinions of others, the expert may be cross-examined as

to the content of those opinions, but it is improper to solicit the information on direct examination if the statements are inadmissible [*Mosesian v. Pennwalt Corp. (1987) 191 Cal. App.3d 851, 864, 866, 236 Cal. Rptr. 778* (objection to admission of inadmissible hearsay was waived and was otherwise not prejudicial)].

[3] Basis of Opinion and Exclusion When Improperly Based

A witness testifying in the form of an opinion may, on direct examination, state the reasons for the opinion and the matter on which it is based unless the witness is precluded by law from using such reasons or matter as a basis for the opinion [*Evid. Code § 802*]. In addition, an expert may read to the jury excerpts of the material relied upon when context is needed to understand it [*Notrica v. State Comp. Ins. Fund (1999) 70 Cal. App. 4th 911, 933, 83 Cal. Rptr. 2d 89* (expert witness, who gave opinion as to why insurance carrier had changed its reserve guideline, based opinion, in part, on interview with defendant's president that appeared in trade publication; expert read portions of article to jury)]. The court may require that a witness testifying in the form of an opinion be first examined concerning the matter on which the opinion is based [*Evid. Code § 802*; *see* discussion in *§ 551.76*].

If an expert's opinion is based on considerations that are partially proper and partially improper, the trial court has discretion to admit or exclude the evidence [*Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 578, 140 Cal. Rptr. 330]* . However, the court may, and on the objection of a party must, exclude testimony in the form of an opinion based in whole or significant part on matter that is not a proper basis for the opinion. In that case, the witness may, if there remains a proper basis for the opinion, state the opinion after excluding from consideration the matter determined to be improper [*Evid. Code § 803*].

[4] Opinion of Sanity

A witness may state his or her opinion as to the sanity of a person when (1) the witness is an intimate acquaintance of the person whose sanity is in question; or (2) the witness was a subscribing witness to a writing, the validity of which is in dispute, signed by the person whose sanity is in question and the opinion relates to the sanity of the person at the time the writing was signed; or (3) the witness is qualified to testify in the form of an opinion under *Evid. Code § 800*, discussed in [1], *above*, or *Evid. Code § 801*, discussed in [2][a], *above* [*Evid. Code § 870*].

[5] Opinion Embracing Issue to Be Decided by Trier of Fact

The fact that otherwise admissible opinion testimony embraces the ultimate issue to be decided by the trier of fact does not make it objectionable [*Evid. Code § 805*; *see* *People v. Doss (1992) 4 Cal. App. 4th 1585, 1596, 6 Cal. Rptr. 2d 590* ; *Miller v. Los Angeles County Flood Control Dist. (1973) 8 Cal. 3d 689, 702, 106 Cal. Rptr. 1, 505 P.2d 193* (involving expert witness); *see also* *Kennemur v. State of California (1982) 184 Cal. Rptr. 393* (holding trial court did not err in precluding expert witness from testifying on ultimate issue of fact when jurors were fully capable of deciding that fact on basis of their own experience)].

[6] Effect of Failure to Object to Opinion or Conclusion

Incompetent testimony, such as a conclusion, if received without objection, takes on the attributes of competent proof when considered on the question of sufficiency of the evidence to support a judgment or verdict. Technically incompetent evidence admitted without objection must be given as much weight in the reviewing court in reviewing the sufficiency of the evidence as if it were competent [*see* *Berry v. Chrome Crankshaft Co. (1958) 159 Cal. App. 2d 549, 552, 324 P.2d 70]* .

Legal Topics:

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

ProcessEvidenceTestimonyExpertsUltimate IssueEvidenceTestimonyLay WitnessesOpinion TestimonyGeneral OverviewEvidenceTestimonyLay WitnessesOpinion TestimonyPersonal Perceptions

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48-551 California Forms of Pleading and Practice--Annotated § 551.71

§ 551.71 Hearsay Evidence

[1] In General

"Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying and that is offered to prove the truth of the matter asserted [*Evid. Code § 1200(a)*]. For the meaning of "statement," see definitions under *§ 551.60[2]*.

Implied assertions are hearsay. For example, while executing a search warrant for evidence of possession of a controlled substance for sale, an officer answers the phone and hears the caller ask to buy drugs. The caller's questions and statements are hearsay, but case law, recognized and accepted when the Evidence Code was adopted and continuing thereafter, has created an exception to the hearsay rule for this reliable type of evidence [*People v. Morgan (2005) 125 Cal. App. 4th 935, 940-947, 23 Cal. Rptr. 3d 224]* .

The admissibility or inadmissibility of hearsay evidence is governed by *Evid. Code § 1200 et seq.* However, these sections are not to be construed as repealing by implication any other statute relating to hearsay evidence [*Evid. Code § 1205*].

[2] Hearsay Rule and Result of Failure to Object

Except as provided by law, hearsay evidence is inadmissible. This is known as "the hearsay rule" [*Evid. Code § 1200(b), (c)*]. The rule embraces both written and oral expressions, and applies to electronic sound and video recordings, which are included in the definition of "writings" under *Evid. Code § 250*, discussed in *§ 551.73* [*People v. Sundlee (1977) 70 Cal. App. 3d 477, 483, 138 Cal. Rptr. 834]* .

Inadmissible hearsay evidence that is admitted without objection is nevertheless competent and sufficient to sustain a judgment [*see Taylor v. Hizer (1973) 30 Cal. App. 3d 846, 850, 106 Cal. Rptr. 603 , disapproved on other grounds in Busching v. Superior Court (1974) 12 Cal. 3d 44, 115 Cal. Rptr. 241, 524 P.2d 369* ; *Berry v. Chrome Crankshaft Co. (1958) 159 Cal. App. 2d 549, 552, 324 P.2d 70]* . For the distinction between hearsay and nonhearsay evidence, see California Trial Guide, Unit 40, *Hearsay* (Matthew Bender).

[3] Exceptions to Hearsay Rule

The following are excepted from the hearsay:

- Confessions and admissions [*Evid. Code §§ 1220-1228*].

- Declarations against interest [*Evid. Code § 1230*].

- Prior statements of witnesses [*Evid. Code §§ 1235-1238*; *see Sherrell v. Kelso (1981) 172 Cal. Rptr. 667]* .

- Spontaneous, contemporaneous, and dying declarations [*Evid. Code §§ 1240-1242*].

- Statements of mental or physical state [*Evid. Code §§ 1250-1252*].

- Statements relating to wills and to claims against estates [*Evid. Code §§ 1260, 1261*].

- Business records [*Evid. Code §§ 1270-1272*].

- Official records and other official writings [*Evid. Code §§ 1280-1284*].

- Former testimony [*Evid. Code §§ 1290-1293*].

- Judgments [*Evid. Code §§ 1300-1302*].

- Family history [*Evid. Code §§ 1310-1316*].

- Reputation and statements concerning community history, property interests, and character [*Evid. Code §§ 1320-1324*].

- Dispositive instruments and ancient writings [*Evid. Code §§ 1330, 1331*].

- Commercial, scientific, and similar publications [*Evid. Code §§ 1340, 1341*].

- Statements of the infliction or threat of physical injury upon the declarant made at or near the time of the infliction or threat of physical injury to a physician, nurse, paramedic, or to a law enforcement official [*Evid. Code § 1370*; *see People v. Pantoja (2004) 122 Cal. App. 4th 1, 8-15, 18 Cal. Rptr. 3d 492]* . "At or near" denotes a time close to the infliction of the injury, which in most circumstances will be within hours or days, rather than weeks or months [*People v. Quitiquit (2007) 155 Cal. App. 4th 1, 9-10, 65 Cal. Rptr. 3d 674* (statement about physical injury made almost two months after its infliction did not satisfy statutory time limit)].

- Elder and dependent adults exception (if declarant is unavailable as a witness) [*Evid. Code § 1380*; *see People v. Tatum (2003) 108 Cal. App. 4th 288, 295-300, 133 Cal. Rptr. 2d 267* ; *but see People v. Pirwani (2004) 119 Cal. App. 4th 770, 782-787, 14 Cal. Rptr. 3d 673* (*Evid. Code § 1380* as applied in criminal action was unconstitutional, because out-of-court testimonial statements by witnesses to law enforcement officials were barred by *Sixth Amendment's Confrontation Clause* even if there had been judicial determination that statement bore particularized guarantees of trustworthiness, unless defendant had prior opportunity to cross-examine witness and witness was unavailable to testify at trial)].

Exceptions to the hearsay rule are not limited to those enumerated in the Evidence Code but also may be found in other codes and decisional law. Even if a statute does not explicitly create a hearsay exception, an implicit exception may exist if the hearsay evidence is sufficiently competent, reliable, and trustworthy and if there is an indication that the Legislature intended to admit the evidence and to allow a court to rely on it in reaching a decision [*see In re Malinda S. (1990) 51 Cal. 3d 368, 376-378, 382, 272 Cal. Rptr. 787, 795 P. 2d 1244]* .

For a discussion of the exceptions to the hearsay rule, see *California Trial Guide, § 40.20 et seq.* (Matthew Bender).

[4] Hearsay Statement Consisting of One or More Statements Within Hearsay Exception

A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that evidence of the statement is hearsay evidence if the hearsay evidence consists of one or more statements that each meets the requirements of an exception to the hearsay rule [*Evid. Code § 1201*]. Thus, use of two or more exceptions to the hearsay rule to make double or multiple hearsay evidence admissible is proper [*People v. Perez (1978) 83 Cal. App. 3d 718, 730, 148 Cal. Rptr. 90]* .

[5] Evidence of Hearsay Declarant's Credibility

Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by the declarant received in evidence as hearsay evidence is admissible for the purpose of attacking the credibility of the declarant, even though he or she is not given and has not had an opportunity to explain or to deny the inconsistent statement or other conduct [*Evid. Code § 1202*]. The purpose of this provision is one of fairness to the party against whom the hearsay evidence was admitted without opportunity to cross-examine or impeach the unavailable hearsay declarant; it merely permits impeaching evidence without the necessity that the declarant be given an opportunity to explain or to deny the inconsistency [*see People v. Ross (1979) 92 Cal. App. 3d 391, 406, 154 Cal. Rptr. 783]* .

In addition, any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing [*Evid. Code § 1202*]. The purpose of this provision is to ensure that the unavailability of a hearsay declarant will not prevent introduction of relevant evidence that would have been admissible had the declarant been in court [*People v. Marquez (1979) 88 Cal. App. 3d 993, 998, 152 Cal. Rptr. 200]* .

For the purposes of this rule, the deponent of a deposition taken in the action in which it is offered is deemed to be a hearsay declarant [*Evid. Code § 1202*].

Evid. Code § 1202 deals with the impeachment of a declarant whose hearsay statement is in evidence and does not apply to the impeachment of a witness who has testified [*People v. Williams (1976) 16 Cal. 3d 663, 668, 128 Cal. Rptr. 888, 547 P.2d 1000* ; on impeachment of witness based on prior inconsistent statement, see discussion in *§ 551.121[9]*].

[6] Examination of Hearsay Declarant

The declarant of a statement admitted as hearsay evidence may be called and examined by any adverse party as if under cross-examination concerning the statement [*Evid. Code § 1203(a)*]. But this does not apply if the declarant is a party, a person identified with a party within the meaning of *Evid. Code § 776(d)* (discussed in *§ 551.121[11]*), or a witness who has testified in the action concerning the subject matter of the statement [*Evid. Code § 1203(b)*]. Nor does it apply if the statement is one described in *Evid. Code §§ 1220-1228* (confessions and admissions), *1235-1238* (prior statements of witnesses), or *1300-1302* (judgments) [*Evid. Code § 1203(c)*].

However, a statement otherwise admissible as hearsay evidence is not made inadmissible by *Evid. Code § 1203* because

the declarant who made the statement is unavailable for examination pursuant to *Evid. Code § 1203(a)* [*Evid. Code § 1203(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceHearsayGeneral OverviewEvidenceHearsayCredibility of DeclarantsGeneral OverviewEvidenceHearsayExceptionsGeneral OverviewEvidenceHearsayHearsay Within HearsayEvidenceHearsayRule ComponentsGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 551 TRIAL
PART II. LEGAL BACKGROUND
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48-551 California Forms of Pleading and Practice--Annotated § 551.72

§ 551.72 "Unavailable as a Witness" Defined

Several Evidence Code provisions use the term "unavailable as a witness" when referring to statements made by a nonwitness declarant, that is, to the admissibility or use of hearsay evidence [*see, e.g., Evid. Code §§ 804(d)* (expert opinion testimony based on statements of others), *1230* (declaration against interest as exception to hearsay rule), *1310* (statement of declarant concerning his or her own family history as exception to hearsay rule)]. The phrase is defined as meaning a declarant who is any of the following [*Evid. Code § 240(a)*]:

- Exempted or precluded on the ground of privilege from testifying concerning the matter to which his or her statement is relevant [*Evid. Code § 240(a)(1)*]. For a discussion of privileges, see Ch. 191, *Discovery: Privileges and Other Discovery Limitaitons* .

- Disqualified from testifying to the matter [*Evid. Code § 240(a)(2)*].

- Dead or unable to attend or to testify at the hearing because of then-existing physical or mental illness or infirmity [*Evid. Code § 240(a)(3)*]. Expert testimony establishing that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify or is unable to testify without suffering substantial trauma may constitute a sufficient showing of "unavailability" within the meaning of *Evid. Code § 240(a)(3)* [*Evid. Code § 240(c)*]. Appellate courts should independently review a trial court's determination that a witness is unavailable due to then existing mental illness or infirmity or because crime-induced mental trauma renders the witness unable to testify without suffering substantial trauma [*People v. Winslow (2004) 123 Cal. App. 4th 464, 469-473, 19 Cal. Rptr. 3d 872]* .

- Absent from the hearing and the court is unable to compel his or her attendance by its process [*Evid. Code § 240(a)(4)*].

- Absent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process [*Evid. Code § 240(a)(5)*].

> Whether reasonable diligence is shown is a factual question and what constitutes reasonable diligence to secure the presence of a witness depends on the facts of the individual case [*see Gordon v. D & G Escrow Corp. (1975) 48 Cal. App. 3d 616, 624, 122 Cal. Rptr. 150* (using "due" diligence as synonymous with "reasonable" diligence and holding trial court did not err in excluding declarations against interest when all efforts to find declarant were "stale" with possible exception of telephone directory check)].

A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by the procurement or wrongdoing of the proponent of his or her statement for the purpose of preventing the declarant from attending or testifying [*Evid. Code § 240(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceHearsayUnavailabilityAbsence of DeclarantsEvidenceHearsayUnavailabilityInability to TestifyGeneral OverviewEvidenceHearsayUnavailabilityInability to TestifyDeathEvidenceHearsayUnavailabilityInability to TestifyDisabilityEvidenceHearsayUnavailabilityPrivileges

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48-551 California Forms of Pleading and Practice--Annotated § 551.73

§ 551.73 Writings

[1] "Writing," "Original," and "Duplicate" Defined

A "writing" is defined as meaning handwriting, typewriting, printing, photostating, photographing, and every other means of recording on any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or any combination of these [*Evid. Code § 250*]. Hence, properly authenticated tape recordings are admissible in evidence as "writings" [*Darley v. Ward (1980) 28 Cal. 3d 257, 261, 168 Cal. Rptr. 481, 617 P.2d 1113* ; *Jones v. City of Los Angeles (1993) 20 Cal. App. 4th 436, 441-442, 24 Cal. Rptr. 2d 528* (videotape of plaintiff's daily activities in personal injury action); *People v. Archer (1989) 215 Cal. App. 3d 197, 207-209, 263 Cal. Rptr. 486* (videotapes)] provided they do not violate the hearsay rule, discussed *above* [*People v. Sundlee (1977) 70 Cal. App. 3d 477, 483, 138 Cal. Rptr. 834]* . *Evid. Code § 250* does not, however, apply to the recording and reporting of depositions. The procedural aspects of recording and reporting depositions are governed by the Code of Civil Procedure [*see Code Civ. Proc. §§ 17, 2004,* and *2025(l)* (*Code Civ. Proc. § 2025.340* effective July 1, 2005); *Bailey v. Superior Court (1977) 19 Cal. 3d 970, 974, 976, 140 Cal. Rptr. 669, 568 P.2d 394]* .

"Original" means the writing itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print made from it. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original" [*Evid. Code § 255*]. Additionally, if a writing of any sort has been damaged or destroyed by "explosion, conflagration, earthquake, disaster or other public calamity," an interested person may petition a court for an order "establishing, reciting, or declaring the existence, substance, genuineness or authenticity" of the writing [*Code Civ. Proc. § 1953.10*; for discussion, *see* Ch. 356, *Lost Papers* ; *see also § 551.74[6]*]. The order will be deemed in lieu of the original and have the same effect as if the original had not been damaged, destroyed or otherwise rendered wholly or partly illegible [*Code Civ. Proc. § 1953.13*].

A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements, miniatures, or by mechanical or electronic recording, or by chemical reproduction, or by other equivalent technique that accurately reproduces the original [*Evid. Code § 260*].

[2] Authentication of Writings

A writing must be authenticated before it is received in evidence or before secondary evidence of its content may be received in evidence [*Evid. Code § 1401*]. Any alteration or apparent alteration in the writing must be accounted for [*Evid. Code § 1402*]. A writing is authenticated when (1) evidence has been introduced sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is, or (2) such facts are established by any other means provided by law [*Evid. Code § 1400*; *see Osswald v. Anderson (1996) 49 Cal. App. 4th 812, 819-820, 57 Cal. Rptr. 2d 23* (trial court erred in finding sufficient evidence of authenticity); *McAllister v. George (1977) 73 Cal. App. 3d 258, 262, 140 Cal. Rptr. 702]* .

The manner of authenticating writings is set forth in *Evid. Code §§ 1410-1421* (authentication) and *Evid. Code § 645.1* (newspaper or periodical presumption), although nothing in these sections is to be construed to limit the means by which a writing may be authenticated or proved [*Evid. Code § 1410*]. The means of authentication set forth in *Evid. Code § 1410 et seq.* are not exclusive. Circumstantial evidence, content and location are all valid means of authentication [*People v. Gibson (2001) 90 Cal. App. 4th 371, 383, 108 Cal. Rptr. 2d 809]* . The parties may also stipulate to the authenticity of any particular writing, or admit it in the pleadings, in which event evidence authenticating the writing normally may be dispensed with [*see* Cal. Law Revision Commission Comment to *Evid. Code § 1400*]. Otherwise, the proponent of the evidence has the burden of complying with the authentication requirements of *Evid. Code § 1410* [*Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co. (1987) 189 Cal. App. 3d 1072, 1094, 234 Cal. Rptr. 835]* .

[3] Presumptions Affecting Writings

Presumptions affecting acknowledged writings, seals, and signatures of public employees, notaries public, and foreign officials are set forth in *Evid. Code §§ 1450-1454*. Presumptions relating to copies of writings in the custody of a public entity and to official records of writings are set forth in *Evid. Code §§ 1530* and *1532*, respectively. Presumptions relating to photographic copies and printed representations of business records, lost or destroyed records, computer information or programs, and video or digital images are set forth in *Evid. Code §§ 1550-1553*. A presumption that a regularly issued newspaper or periodical is that newspaper or periodical is set forth in *Evid. Code § 645.1*.

These presumptions affect the burden of producing evidence [*Evid. Code §§ 630, 1450, 1532(b)*]. For the effect of such presumptions, see discussion in *§ 551.102[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceAuthenticationGeneral OverviewEvidenceDocumentary EvidenceWritingsGeneral OverviewEvidenceInferences & PresumptionsPresumptions

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48-551 California Forms of Pleading and Practice--Annotated § 551.74

§ 551.74 Proof of Contents of Writings

[1] Repeal of Best Evidence Rule and Enactment of Secondary Evidence Rule

Provisions of the Evidence Code pertaining to proof of the contents of writings were repealed and replaced with new sections in 1998, effective January 1, 1999. The "Best Evidence" Rule [former *Evid. Code § 1500*] and its exceptions [former *Evid. Code §§ 1500.5-1511*] were repealed and replaced by a new "Secondary Evidence Rule" [*Evid. Code § 1521*] and related sections [*Evid. Code §§ 1520-1523, 1552-1553*, effective January 1, 1999].

[2] Proof of Content by Original Writing

The content of a writing may be proved by an otherwise admissible original [*Evid. Code § 1520*].

[3] General Rules for Proof of Content Under Secondary Evidence Rule

The content of a writing may be proved by otherwise admissible secondary evidence [*Evid. Code § 1521(a)*]. This rule is known as the "Secondary Evidence Rule" [*Evid. Code § 1521(d)*]. A corollary of the rule that the contents of lost documents may be proved by secondary evidence is that the law does not require that the contents be proved verbatim [*Dart Industries, Inc. v. Commercial Union Ins. Co. (2002) 28 Cal. 4th 1059, 1069, 124 Cal. Rptr. 2d 142, 52 P.3d 79]* . Courts have admitted many types of secondary evidence to prove the contents of a missing instrument, including:

- Oral testimony [*see* *Dart Industries, Inc. v. Commercial Union Ins. Co. (2002) 28 Cal. 4th 1059, 1068-1071, 124 Cal. Rptr. 2d 142, 52 P.3d 79* (oral testimony to establish contents of lost insurance policy); *Kenniff v. Caulfield (1903) 140 Cal. 34, 43, 73 P. 803* (only evidence of contents of lost and unrecorded deed to parcel of real property was testimony of conveyancer who drafted it); *Posten v. Rassette (1855) 5 Cal. 467, 469-470* (testimony sufficient to establish existence, loss, and contents of power of attorney); *Rogers v. Prudential Ins. Co. (1990) 218 Cal. App. 3d 1132, 267 Cal. Rptr. 499* (proof of contents of lost insurance policy through testimony of insurer's employees or copies of other policies sold at same time utilizing similar provisions); *Robinson v. Thornton (1969) 271 Cal. App. 2d 605, 611-612, 76 Cal. Rptr. 835* (testimony of contracting party to lost contract to repurchase gas lease);

Guardianship of Levy (1955) 137 Cal. App. 2d 237, 249, 290 P.2d 320 (testimony of recipient of lost letters); *Clendenin v. Benson (1931) 117 Cal. App. 674, 4 P.2d 616* (testimony of insurer's employees and insurer's records to lost insurance policy); *Seaboard National Bank v. Ackerman (1911) 16 Cal.App. 55, 57, 116 P. 91* (testimony establishing record of judgment destroyed by fire); *Hedstrom v. Union Trust Co. (1908) 7 Cal. App. 278, 286, 94 P. 386* (testimony of drafter of lost lease). *See* [4], *below*].

- Standard form of the lost document [*see* *Kenniff v. Caulfield (1903) 140 Cal. 34, 43, 73 P. 803* (blank form used in drafting lost deed)].

- Evidence of a routine practice of a party [*see* *Amoco Production Co. v. United States (10th Cir. 1980) 619 F.2d 1383, 1389-1390* (lost deed; grantor's routine practice of reserving mineral interest in all property deeded); *see also* *Rogers v. Prudential Ins. Co. (1990) 218 Cal. App. 3d 1132, 267 Cal. Rptr. 499* (proof of contents of lost insurance policy through testimony of insurer's employees or copies of other policies sold at same time utilizing similar provisions)].

Secondary evidence of the content of a writing is inadmissible if the court determines either [*Evid. Code § 1521(a)*]:

- A genuine dispute exists concerning material terms of the writing and justice requires its exclusion; or

- Admission of the secondary evidence would be unfair.

In criminal actions, additional grounds for exclusion of secondary evidence apply [*Evid. Code § 1522*].

Secondary evidence includes both writings and oral testimony [*see* former *Evid. Code § 1509* ("Secondary evidence, whether *written or oral*, of the content of a writing" (emphasis added)); *People v. Crosby (1962) 58 Cal. 2d 713, 726-727, 25 Cal. Rptr. 847, 375 P.2d 839* (testimony as to contents of writing was "secondary evidence"); *Stenseth v. Wells Fargo Bank (1995) 41 Cal. App. 4th 457, 463, 48 Cal. Rptr. 2d 192* (former *Evid. Code § 1505* permitted oral testimony as secondary evidence of contents of writing, but only if witness had personal knowledge of original)].

The proponent of the evidence still must comply with the authentication requirements [*Evid. Code § 1521(c)*]. *Evid. Code § 1401(b)* provides: "Authentication of a writing is required before secondary evidence of its content may be received in evidence" [*see* discussion in *§ 551.73[2]*].

If oral testimony to prove the content of a writing is inadmissible under *Evid. Code § 1523* (oral testimony of content of writing; see discussion in [4], *below*), nothing in the "Secondary Evidence Rule" makes such testimony admissible [*Evid. Code § 1521(b)*].

Particular provisions govern the proof of the contents of writings through oral testimony, official records, and photographic copies and printed representations of business records, lost or destroyed records, computer information and programs, and video or digital images, as discussed in [4]-[6], *below*.

[4] Proof of Content by Oral Testimony

Oral testimony is not admissible to prove the content of a writing except as otherwise provided by statute [*Evid. Code § 1523(a)*].

Oral testimony of the content of a writing is not made inadmissible by this rule if:

- The proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence [*Evid. Code § 1523(b)*].

- The proponent does not have possession or control of the original or a copy of the writing and either of the following conditions is satisfied [*Evid. Code § 1523(c)*]:

  - Neither the writing nor a copy of the writing was reasonably procurable by the proponent by use of the court's process or by other available means;

  - The writing is not closely related to the controlling issues and it would be inexpedient to require its production.

- The writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole [*Evid. Code § 1523(d)*].

Evid. Code § 1523 follows the approach of former *Evid. Code §§ 1505* and *1508*, not allowing the proponent to elect to offer either a copy or oral testimony of a writing, but rather requiring proof by a copy whenever the proponent has possession or control of a copy.

When oral testimony as to the contents of a writing is admissible, the witness must have personal knowledge of the original [*see, e.g., Stenseth v. Wells Fargo Bank (1995) 41 Cal. App. 4th 457, 463, 48 Cal. Rptr. 2d 192* (decided under former *Evid. Code § 1505*)].

[5] Proof of Content by Official Records

A purported copy of a writing in the custody of a public entity, or of an entry in such a writing, is prima facie evidence of the existence and content of such writing or entry if [*Evid. Code § 1530(a)*]:

- The copy purports to be published by the authority of the nation or state, or public entity therein, in which the writing is kept;

- The office in which the writing is kept is within the United States or specified territories, and the copy is attested or certified as a correct copy of the writing or entry by a public employee, or a deputy thereof, having the legal custody of the writing; or

- The office in which the writing is kept is not within the United States or any of the specified territories and the copy is attested as a correct copy of the writing or entry by a person having authority to make attestation. The attestation must be made according to the requirements specified in *Evid. Code § 1530(a)(3)*.

For purposes of admissibility, whenever a copy of a writing is attested or certified, the attestation or certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be [*Evid. Code § 1531*].

The official record of a writing is prima facie evidence of the existence and content of the original recorded writing if [*Evid. Code § 1532(a)*]:

- The record is in fact a record of an office of a public entity; and

- A statute authorized such a writing to be recorded in that office.

The presumption established by *Evid. Code § 1532(a)* is a presumption affecting the burden of producing evidence [*Evid. Code § 1532(b)*].

The admissibility of certain abstracts of title or certified instruments affecting title to prove the contents of the official record of any writing lost or destroyed by conflagration or other public calamity is governed by *Evid. Code § 1601*.

[6] Proof of Content by Photographic Copies and Printed Representations

[a] Business Records

Certain copies or reproductions of a writing are as admissible as the writing itself if the copy or reproduction was made and preserved as a part of the records of a business (as defined by *Evid. Code § 1270*) in the regular course of that business [*Evid. Code § 1550*]. The permitted copies or reproductions are:

- A nonerasable optical image reproduction, provided that additions, deletions, or changes to the original document are not permitted by the technology;

- A photostatic, microfilm, microcard, miniature photographic, or other photographic copy or reproduction, or an enlargement thereof.

The introduction of the copy, reproduction, or enlargement does not preclude admission of the original writing if it is still in existence. A court may require the introduction of a hard-copy printout of the document [*Evid. Code § 1550*].

The production and transmission of business records pursuant to a subpoena duces tecum and their admissibility are governed by *Evid. Code §§ 1560-1566*.

[a.1] Criminal Justice Documents

Reproductions of files, records, writings, photographs, fingerprints, or other instruments in the official custody of a criminal justice agency that were microphotographed or otherwise reproduced in a manner that conforms with the provisions of *Pen. Code §§ 11106.1*, *11106.2* or *11106.3* are admissible to the same extent and under the same circumstances as the original file, record, writing, or other instrument would be admissible [*Evid. Code § 1550.1*].

Pen. Code § 11106.1 provides that any system of microphotography, optical disk, or reproduction by other techniques that do not permit additions, deletions, or changes to the original document, may be used by the Department of Justice as a photographic reproduction process to record some or all instruments, papers, photographs, and notices that are required or permitted by law to be recorded or filed. All storage media must comply with minimum standards of quality approved by the National Institute of Standards and Technology. *Pen. Code § 11106.2* permits any criminal justice agency to cause any or all files or records in its official custody to be microphotographed or otherwise reproduced pursuant to *Pen. Code § 11106.1*, as in the case of original filings or recordings, or both. Every reproduction is deemed and considered an original, and as a transcript, exemplification or certified copy, as the case may be, of the original. *Pen. Code § 11106.3* allows fingerprints to be stored or created in an electronic format that does not permit additions, deletions, or changes to the original fingerprints so long as the storage medium complies with the minimum standards of quality approved by the National Institute of Standards and Technology.

[b] Lost or Destroyed Records

Certain reproductions of destroyed or lost writings are admissible as the original writing itself. Those reproductions are

[*Evid. Code § 1551*]:

- A print from a photographic film of an original writing, made after the film was taken, whether or not the print was enlarged; photographic film includes a photographic plate, microphotographic film, photostatic negative, or similar reproduction;

- A reproduction from an electronic recording of video images on magnetic surfaces.

Such a reproduction is admissible as the original writing itself if, at the time of its taking, the person under whose direction and control it was taken attached thereto, or to the sealed container in which it was placed and has been kept, or incorporated in the film or electronic recording, a certification complying with the provisions of *Evid. Code § 1531* and stating the date on which, and the fact that, it was so taken under his or her direction and control.

Alternatively, if a writing has been damaged or destroyed by an explosion, fire, or other public calamity, a court may be requested to issue an order establishing the existence and contents of the writing [*Code Civ. Proc. § 1953.10*; for discussion, *see* Ch. 356, *Lost Papers*]. The order has the same effect as the original document [*Code Civ. Proc. § 1953.13*]. In such cases, the secondary evidence rule is not implicated; the court's order is the best evidence of the writing [*Daddario v. Snow Valley (1995) 36 Cal. App. 4th 1325, 1337-1338* (decided under former *Evid. Code § 1500*)].

[c] Computer Information or Programs

A printed representation of computer information or a computer program is presumed to be an accurate representation of the computer information or computer program that it purports to represent [*Evid. Code § 1552(a)*]. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of computer information or computer program is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the computer information or computer program that it purports to represent.

These provisions do not apply to computer-generated official records certified in accordance with *Evid. Code §§ 452.5* or *1530* [*Evid. Code § 1552(b)*].

Although admissible, computer printouts must qualify under some hearsay exception, such as the business records exception [*see Evid. Code § 1271*; *but see, People v. Hawkins (2002) 98 Cal. App. 4th 1428, 1448-1450, 121 Cal. Rptr. 2d 627* (true test for admissibility of printout reflecting computer's internal operations is not whether printout was made in regular course of business, but whether computer was operating properly at time of printout, and trial court did not err in rejecting hearsay objection and admitting printouts into evidence); for discussion of photographic copies and printed representations of business records, *see § 551.74[6][a]*], if the printouts are offered to prove their contents [*Aguimatang v. California State Lottery (1991) 234 Cal. App. 3d 769, 797, 286 Cal. Rptr. 57]* .

[d] Video or Digital Images

A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent [*Evid. Code § 1553*]. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of images stored on a video or digital medium is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the images that it purports to represent.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDocumentary EvidenceBest Evidence RuleEvidenceDocumentary EvidenceWritingsGeneral Overview

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48-551 California Forms of Pleading and Practice--Annotated § 551.75

§ 551.75 Parol Evidence Rule

The parol evidence rule prohibits the introduction of extrinsic evidence to vary the terms of an integrated written instrument [*Code Civ. Proc. § 1856*; *Com. Code § 2202* (contracts for sale of goods)]. For a discussion of this rule, see Ch. 140, *Contracts* , Introduction, Subpt. B, and Ch. 500, *Sales and Secured Transactions* , Pt. I, Subpt. B.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract InterpretationParol EvidenceGeneral OverviewEvidenceDocumentary EvidenceParol EvidenceEvidenceRelevanceParol Evidence

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48-551 California Forms of Pleading and Practice--Annotated § 551.76

§ 551.76 Determination of Preliminary Fact

[1] When Required

The admissibility or inadmissibility of proffered evidence may depend on the existence or nonexistence of a preliminary fact [*see Evid. Code § 401*]. A "preliminary fact" is a fact that must exist in order for evidence to be admissible [*Evid. Code § 400*]. Preliminary facts include the relevancy of proffered evidence, a witness's knowledge, the authenticity of a writing, and the existence of a privilege [*see Evid. Code §§ 400, 403(a)*; *Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park (1975) 45 Cal. App. 3d 519, 530,119 Cal. Rptr. 559]* . For privileges, see discussion in *§ 551.118*. When the existence of a preliminary fact is disputed, its existence or nonexistence must be determined as provided in *Evid. Code §§ 400-406* [*Evid. Code §§ 310, 402(a)*]. *Evid. Code §§ 400-406* do not, however, limit the right of a party to introduce evidence relevant to weight or credibility [*Evid. Code § 406*].

[2] Hearing and Ruling

The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury [*Evid. Code § 402(b)*]. *Evid. Code § 402(b)* has, however, been construed to give the court discretion to decide the admissibility of evidence within the presence of the jury [*People v. Mattison (1971) 4 Cal. 3d 177, 187, 93 Cal. Rptr. 185, 481 P.2d 193* (admissibility of dying declaration); *Mize v. Atchison, T. & S.F. Ry. Co. (1975) 46 Cal. App. 3d 436, 448, 120 Cal. Rptr. 787* (preliminary facts in support of claim of lawyer-client and work-product privilege)]. Nevertheless, when there is a danger that hearing evidence of the preliminary fact will have a prejudicial effect on the jury, the court should conduct the hearing outside its presence [*see People ex rel. Dept. of Public Works v. Glen Arms Estate, Inc. (1964) 230 Cal. App. 2d 841, 863-864, 41 Cal. Rptr. 303* (determination of whether statement constituted offer of compromise or was admission against interest)].

A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite to it, and a separate or formal finding is unnecessary unless required by statute [*Evid. Code § 402(c)*].

[3] Procedure

[a] Generally

The procedure for determining preliminary facts is set forth in *Evid. Code §§ 403*, *404*, and *405*, discussed *below*. Each of these sections applies to different kinds of preliminary facts. *Evid. Code § 403* applies to preliminary facts going to relevancy, personal knowledge, authenticity, or the statement or conduct of another person. *Evid. Code § 404* applies to the privilege against self-incrimination, and *Evid. Code § 405* applies to all other preliminary facts.

[b] Relevancy, Personal Knowledge, Authenticity, or Statement or Conduct of Person

The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds there is evidence sufficient to sustain a finding of the existence of the preliminary fact when [*Evid. Code § 403(a)*]:

- The relevance of the proffered evidence depends on the existence of the preliminary fact;

- The preliminary fact is the personal knowledge of a witness concerning the subject matter of his or her testimony;

- The preliminary fact is the authenticity of a writing; or

- The proffered evidence is of a statement or other conduct of a particular person and the preliminary fact is whether that person made the statement or so conducted himself or herself.

Subject to *Evid. Code § 702*, which requires a witness to have personal knowledge of the matter to which he or she testifies (discussed in *§ 551.121[2]*), the court may conditionally admit the proffered evidence, subject to evidence of the preliminary fact being supplied later in the course of the trial [*Evid. Code § 403(b)*].

If the court admits the proffered evidence, the court (1) may, and on request must, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds the preliminary fact does exist, and (2) must instruct the jury to disregard the proffered evidence if the court subsequently determines that a jury could not reasonably find that the preliminary fact exists [*Evid. Code § 403(c)*]. Thus, under *Evid. Code § 403*, the court decides merely whether there has been a prima facie showing of the existence of the preliminary fact; the final decision as to its existence or nonexistence is made by the jury.

[c] Privilege Against Self-Incrimination

Whenever the proffered evidence is claimed to be privileged under *Evid. Code § 940* (privilege against self-incrimination; for discussion of privileges, see Ch. 191, *Discovery: Privileges and Other Discovery Limitaitons*), the person claiming the privilege has the burden of showing that the proffered evidence might tend to incriminate him or her. The proffered evidence is inadmissible unless it clearly appears to the court that the proffered evidence cannot possibly have a tendency to incriminate the person claiming the privilege [*Evid. Code § 404*].

[d] Determinations in Other Cases

With respect to preliminary fact determinations not governed by *Evid. Code § 403* or *404*, if the existence of a preliminary fact is disputed, the court must indicate which party has the burden of producing evidence [*Evid. Code § 110*] and the burden of proof [*Evid. Code § 115*, also discussed in Subpart F] on the issue as implied by the rule of law under which the question arises. The court must determine the existence or nonexistence of the preliminary fact and admit or exclude the proffered evidence as required by the rule of law under which the question arises [*Evid. Code § 405(a)*].

If the preliminary fact is also a fact in issue, the jury must not be informed of the court's determination as to the existence or nonexistence of the preliminary fact and, if the proffered evidence is admitted, the jury must not be instructed to disregard the evidence if its determination of the fact differs from the court's determination of the preliminary fact [*Evid. Code § 405(b)*].

Thus, under *Evid. Code § 405*, as distinguished from the determination of a preliminary fact under *Evid. Code § 403*, discussed in *§ 551.76[3][b]*, the court alone decides the foundational question.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceProcedural ConsiderationsBurdens of ProofAllocationEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceGeneral OverviewEvidenceProcedural ConsiderationsPreliminary QuestionsAdmissibility of EvidenceExistence of PrivilegesEvidenceProcedural ConsiderationsPreliminary QuestionsHearings Out of Jury's PresenceEvidenceProcedural ConsiderationsPreliminary QuestionsWeight & Credibility of Evidence

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48-551 California Forms of Pleading and Practice--Annotated § 551.77

§ 551.77 Objections to Evidence

[1] Manner of Objecting

Objections to evidence should be addressed to the court and not to opposing counsel [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 8.14]. An objection to proffered evidence need not be in any particular form but it must be timely made and clearly state the specific ground on which it is made [*see Evid. Code § 353(a)*; *see also Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 660, 151 Cal. Rptr. 399* ; *People v. Gibson (1976) 56 Cal. App. 3d 119, 137, 128 Cal. Rptr. 302]* . The failure to object at all waives any claim of error [*Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co. (1993) 14 Cal. App. 4th 1595, 1611, 18 Cal. Rptr. 2d 692]* . Arguments should be brief and few and, whether at the side bench or in chambers, should be reported [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 8.41].

Although counsel may properly phrase the objection and ground in the form of a complete sentence, e.g., "Your Honor, I object on the ground the question calls for hearsay," frequently, the objection need be no more complicated than stating the word "objection" followed by the ground, e.g., "Objection--hearsay." Merely stating "I object," without specifying the ground, however, is insufficient and does not preserve the point for review on appeal [*see Evid. Code § 353(a)*]. Unlike argument on the objection, which normally should be heard out of the jury's hearing (see discussion under [2][a], *below*), an evidentiary objection and a statement of the legal grounds ordinarily may be made within the hearing of the jury. But the court will not normally allow counsel to argue the case or make gratuitous remarks under the guise of stating an objection [*see Continental Dairy Equip. Co. v. Lawrence (1971) 17 Cal. App. 3d 378, 384, 94 Cal. Rptr. 887]* .

Whether counsel objects to an otherwise objectionable question is frequently a matter of trial tactics and a weighing of the effect of the objection on the jury. However, an objection is mandatory if the point is to be considered on appeal [*see Evid. Code § 353(a)*; *Jackson v. Department of Motor Vehicles (1994) 22 Cal. App. 4th 730, 738, 27 Cal. Rptr. 2d 712* ; *Haskell v. Carli (1987) 195 Cal. App. 3d 124, 129, 240 Cal. Rptr. 439* (party seeking to preserve issue for appeal must not only object but secure ruling on objection)]. Moreover, certain otherwise inadmissible evidence will support a judgment if it comes in without objection. The most notable examples are opinion evidence, hearsay evidence, and secondary evidence. Consequently, proper objections should be made to any inadmissible evidence that would be

adverse to the party's claim or defense. In addition, counsel should object if the evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose (*see Evid. Code § 355*) and this is not made clear by the party proffering it. The objecting counsel should request the court to restrict the evidence to its proper scope and, in a jury trial, to instruct the jury accordingly [*see Evid. Code § 355*].

For a listing of common objections and their grounds, see *§ 551.222*.

[2] Argument on Objection

[a] When Allowed

Unless the court instructs otherwise, counsel may argue on an objection before the court rules but not afterwards [*see Bennett v. Superior Court (1946) 73 Cal. App. 2d 203, 216, 166 P.2d 318]* . Hence, to avoid an admonishment from the court or a possible mistrial, counsel should request the court's permission before arguing an objection. This is expressly required by some courts [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 8.41].

[b] Out of Jury's Hearing

In a jury trial, any argument on an objection normally should be made out of the jury's hearing at the side bench or in the judge's chamber, and this is expressly required by some courts [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 8.41].

[3] Offer of Proof

In response to an objection that a question, for example, is irrelevant, counsel may wish to make an offer of proof before the court rules [*see Evid. Code § 354(a)*]. However, counsel first should request permission to make an offer of proof, and offers of proof normally should be made out of the jury's hearing [*see* Los Angeles Co. Super. Ct. Rules, Rule 8.42]. The purpose of an offer of proof is not only to persuade the trial court that the evidence is admissible but to preserve a record on appeal in the event the court sustains the objection [*see Evid. Code § 354*].

An offer of proof must make known to the court the substance, purpose, and relevance of the evidence offered [*see Evid. Code § 354(a)*]. For example, an offer is inadequate if it shows only the substance of facts sought to be proved instead of the substance of the evidence offered [*see McCleery v. City of Bakersfield (1985) 170 Cal. App. 3d 1059, 1072-1075, 216 Cal. Rptr. 852]* .

An offer of proof is not required when:

- When the question itself makes known to the court the substance, purpose, and relevance of the excluded evidence [*Evid. Code § 354(a)*].

- The rulings of the court make an offer of proof futile [*Evid. Code § 354(b)*; *see Castaneda v. Bornstein (1995) 36 Cal. App. 4th 1818, 1827* (no offer of proof required after court bars introduction of entire class of evidence or of all evidence on particular issue); *Reely v. Chapman (1960) 177 Cal. App. 2d 260, 263, 2 Cal. Rptr. 188* (generally necessary to make formal offer of proof except when the rulings are such as would exclude the testimony altogether)].

- The question was asked during cross or recross-examination [*Evid. Code § 354(c)*].

[4] Ruling on Objection

On occasion, courts will conditionally admit evidence to which an objection has been made by either reserving its ruling

on the objection or by admitting the evidence subject to a subsequent motion to strike [*see Evid. Code § 403(b)* (conditional admission of evidence subject to evidence of preliminary fact being supplied later in course of trial); *Gribaldo, Jacobs, Jones & Associates v. Agrippina Versicherunges A.G. (1970) 3 Cal. 3d 434, 443 n. 6, 91 Cal. Rptr. 6, 476 P.2d 406]* . Thus, a court could allow potentially inadmissible evidence to be introduced subject to the opponent's motion to strike if the proponent of the evidence subsequently failed to lay a foundation for it [*Douglass v. Board of Medical Quality Assurance (1983) 141 Cal. App. 3d 645, 658, 190 Cal. Rptr. 506]* . If the court subsequently fails to rule, counsel must be sure to remind it that it reserved ruling. If the evidence was conditionally admitted subject to a subsequent motion to strike, counsel must make the subsequent motion if the testimony is to be stricken [*see Ault v. International Harvester Co. (1974) 13 Cal. 3d 113, 123, 117 Cal. Rptr. 812, 528 P.2d 1148* (objection to conditionally admitted evidence waived by failure to move to strike); *see also Mosesian v. Pennwalt Corp. (1987) 191 Cal. App. 3d 851, 856-865, 236 Cal. Rptr. 778* (objection to conditionally admitted evidence and other evidence waived by failure to move to strike and failure to state correct ground)].

[5] Exception to Court's Ruling or Order

An exception is an objection on a matter of law to a decision made and normally must be taken at the time the decision is made [*Code Civ. Proc. § 646*]. However, a ruling sustaining or overruling an objection and an order granting or denying a motion to strike evidence or testimony are both deemed excepted to, and no express exception is required [*Code Civ. Proc. § 647*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsReviewabilityPreservation for ReviewEvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsEvidenceProcedural ConsiderationsObjections & Offers of ProofOffers of ProofEvidenceProcedural ConsiderationsObjections & Offers of ProofTimelinessEvidenceProcedural ConsiderationsRulings on Evidence

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[Reserved]

§§ 551.78[Reserved]

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§ 551.90 Burden of Proof

[1] Defined

"Proof" is defined in *Evid. Code § 190* [*see* discussion in *§ 551.60[2]*]. "Burden of proof" means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court [*Evid. Code § 115*; for related jury instruction on burden of proof, see *Judicial Council of California Civil Jury Instructions, CACI No. 200* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions].

The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact, or require the party to establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt [*Evid. Code § 115*]. For further discussion of these standards of proof, see *§ 551.92*.

[2] General Rule: Burden of Proving Each Essential Element of Claim or Defense

Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he or she is asserting [*Evid. Code § 500*].

As to a plaintiff, this means the definitional elements of the plaintiff's cause of action describe the minimum showing the plaintiff must make to support a favorable judgment. Accordingly, in order for a plaintiff to prevail, the record must contain sufficient evidence to support a finding in its favor on each and every element that the law requires to support recovery [*Beck Dev. Co. v. Southern Pac. Transp. Co. (1996) 44 Cal. App. 4th 1160, 1205, 52 Cal. Rptr. 2d 518]* .

As to a defendant, this "traditional allocation of burden of proof" applies to facts that are essential to an affirmative defense [*see* *Samuels v. Mix (1999) 22 Cal. 4th 1, 7-9, 91 Cal. Rptr. 2d 273, 989 P.2d 701* (facts indicating time when plaintiff reasonably should have discovered wrongdoing so as to commence running of one-year statutory period of limitation)].

The general rule of *Evid. Code § 500* applies "[e]xcept as otherwise provided by law." The exception includes a recognition of the fact that the allocation of the burden of proof is sometimes at variance with the general rule. In determining whether the normal allocation of the burden of proof should be altered, courts consider a number of factors [*Samuels v. Mix (1999) 22 Cal. 4th 1, 19, 91 Cal. Rptr. 2d 273, 989 P.2d 701]* :

- The knowledge of the parties concerning a particular fact.
- The availability of evidence to the parties.
- The most desirable result in terms of public policy in the absence of proof of the particular fact.
- The probability of the existence or nonexistence of the fact.

The courts have not, however, routinely found exceptions to the general rule on the basis of the parties' relative access to evidence. For example, the allegations required of a plaintiff in a tort or contract action relate to the defendant's acts or omissions, and so might be thought, almost by definition, to describe matters peculiarly within the defendant's knowledge or control. That circumstance has nevertheless not occasioned a wholesale departure from the ordinary allocation of proof burdens in such actions [*Samuels v. Mix (1999) 22 Cal. 4th 1, 19, 91 Cal. Rptr. 2d 273, 989 P.2d 701]* . In a false advertising claim, the burden under state law, unlike federal law, does not shift to the defendant to prove that the advertising claims are true once the plaintiff proffers evidence of the claims [*National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc. (2003) 107 Cal. App. 4th 1336, 1347-1351, 133 Cal. Rptr. 2d 207]* .

The normal allocation of the burden of proof has also been shifted in spoliation of evidence cases [*see McGee v. Cessna Aircraft Co. (1983) 139 Cal. App. 3d 179, 187, 188 Cal. Rptr. 542]* , negligence per se actions [*see McGee v. Cessna Aircraft Co. (1983) 139 Cal. App. 3d 179, 190, 188 Cal. Rptr. 542]* , and product liability cases based on design defect [*Barker v. Lull Engineering Co. (1978) 20 Cal.3d 413, 431, 143 Cal. Rptr. 225, 573 P.2d 443]* .

Even in cases in which the normal allocation of the burden of proof shifts, however, the plaintiff has the burden of producing some evidence before the burden of proof is shifted to the defendant [*National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals (2003) 107 Cal. App. 4th 1336, 1346, 133 Cal. Rptr. 2d 207]* . In spoliation of evidence cases, for example, the plaintiff must produce evidence that the defendant failed to preserve the evidence and establish a substantial probability of causation before the burden of proof shifts to the defendant to prove the failure to preserve the evidence did not cause damage to the plaintiff [*Galanek v. Wismar (1999) 68 Cal. App. 4th 1417, 1426, 81 Cal. Rptr. 2d 236]* . In negligence per se actions, the plaintiff must produce evidence of a violation of a statute and a substantial probability that the plaintiff's injury was caused by the violation of the statute before the burden of proof shifts to the defendant to prove the violation of the statute did not cause the plaintiff's injury [*Haft v. Lone Palm Hotel (1970) 3 Cal. 3d 756, 772 , 478 P.2d 465]* . In design defect cases, the plaintiff must produce evidence that his or her injury was caused by the design of the product, before the burden of proof shifts to the defendant to prove the design of the product was not defective [*Barker v. Lull Engineering Co. (1978) 20 Cal.3d 413, 431, 143 Cal. Rptr. 225, 573 P.2d 443]* . In no case does the burden of proof shift to the defendant on the filing of the complaint [*National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals (2003) 107 Cal. App. 4th 1336, 1347, 133 Cal. Rptr. 2d 207* ; *see Jones v. Ortho Pharmaceutical Corp. (1985) 163 Cal. App. 3d 396, 406, 209 Cal. Rptr. 456]* .

The burden of proving a fact is satisfied when the requisite evidence has been introduced or the persuasion accomplished, and it is of no consequence whether the evidence was introduced by one party rather than the other or whether the persuasion was due to the evidence or to the argument of either counsel [*People v. Belton (1979) 23 Cal. 3d 516, 524, 153 Cal. Rptr. 195, 591 P.2d 485]* .

For discussion of presumptions that affect the burden of proof, see *§ 551.102[3]*.

[3] Specific Issues

[a] Accusation of Crime or Wrongdoing

The party claiming a person is guilty of crime or wrongdoing has the burden of proof on that issue [*Evid. Code § 520*]. The quantum of proof required is a preponderance of the evidence unless otherwise required by law, a preponderance of the evidence [*see Evid. Code § 115*, discussed in [1], *above*; *see also, e.g.,* *Liodas v. Sahadi (1977) 19 Cal. 3d 278, 287-291, 137 Cal. Rptr. 635, 562 P.2d 316* (involving fraud); *Rosener v. Sears Roebuck & Co. (1980) 110 Cal. App. 3d 740, 756, 168 Cal. Rptr. 237 , appeal dismissed,* *450 U.S. 1051, 101 S. Ct. 1772, 68 L. Ed. 2d 247 (1981)* (same); *Sierra Nat'l Bank v. Brown (1971) 18 Cal. App. 3d 98, 105-106, 95 Cal. Rptr. 742* (same)].

Evid. Code § 520 does not apply when a specific statute places the burden of proof on another [*see Evid. Code § 300* (Evidence Code inapplicable when "otherwise provided by statute"); *see also* *Fillmore v. Irvine (1983) 146 Cal. App. 3d 649, 661-662, 194 Cal. Rptr. 319* (construing former version of *Bus. & Prof. Code § 7031*)].

[b] Degree of Care

The party claiming a person did not exercise a requisite degree of care has the burden of proof on that issue [*Evid. Code § 521*; *see* *Mize v. Atchison, T. & S.F. Ry. Co. (1975) 46 Cal. App. 3d 436, 454, 120 Cal. Rptr. 787* ; *see also Evid. Code §§ 669, 669.1*, discussed in *§ 551.102[3]*].

[c] Insanity

The party claiming any person, including himself or herself, is or was insane has the burden of proof on that issue [*Evid. Code § 522*; *see* *Albertson v. Schmidt (1932) 128 Cal. App. 344, 346, 17 P.2d 158]* .

[d] Estoppel

The existence of an estoppel is a question of fact and the burden of proof is on the party asserting it [*Pacific Gas & Elec. Co. v. Hacienda Mobile Home Park (1975) 45 Cal. App. 3d 519, 531, 119 Cal. Rptr. 559]* .

[e] Insurance Coverage

A party seeking coverage under an insurance policy has the burden of proving a loss covered within the agreement [*Collin v. American Empire Ins. Co. (1994) 21 Cal. App. 4th 787, 803, 808, 26 Cal. Rptr. 2d 391]* .

Legal Topics:

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§ 551.91 Burden of Producing Evidence

[1] Defined

"Burden of producing evidence" means the obligation of a party to introduce evidence sufficient to avoid a ruling against that party on the issue [*Evid. Code § 110*].

[2] With Respect to Particular Fact

The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence [*Evid. Code § 550(a)*; *see, e.g.*, *People v. Belton (1979) 23 Cal. 3d 516, 523, 153 Cal. Rptr. 195, 591 P.2d 485]* .

The burden of producing evidence as to a particular fact is initially on the party with the burden of proof as to that fact [*Evid. Code § 550(b)*]. If that party fails to produce sufficient evidence to make a prima facie case, it risks nonsuit or other unfavorable determination. But once that party produces evidence sufficient to make its prima facie case, the burden of producing evidence shifts to the other party to refute the prima facie case [*Sargent Fletcher, Inc. v. Able Corp. (2003) 110 Cal. App. 4th 1658, 1667-1668, 3 Cal. Rptr. 3d 279]* .

Evid. Code § 550 deals with the allocation of the burden of producing evidence. At the outset of the case, the burden coincides with the burden of proof. However, during the course of the trial, the burden may shift from one party to another, irrespective of the incidence of the burden of proof [*see* *Sargent Fletcher, Inc. v. Able Corp. (2003) 110 Cal. App. 4th 1658, 1667, 3 Cal. Rptr. 3d 279* (unlike burden of proof, burden of producing evidence may shift between plaintiff and defendant throughout trial)]. For example, if the party with the initial burden of producing evidence establishes a fact giving rise to a presumption, the burden of producing evidence will shift to the other party, whether or not the presumption is one that affects the burden of proof. In addition, a party may introduce evidence of such overwhelming probative force that no person could reasonably disbelieve it in the absence of countervailing evidence, in which case the burden of producing evidence would shift to the opposing party to produce some evidence [*see* Cal. Law Revision Commission's Comment to *Evid. Code § 550* in annotated codes].

Even though the burden of producing evidence shifts to the other party, that party need not offer evidence in reply. However, failure to do so risks an adverse verdict. Once the party having the burden of producing evidence makes a prima facie showing, the trier of fact determines whether the crucial and necessary facts have been established [*Sargent Fletcher, Inc. v. Able Corp. (2003) 110 Cal. App. 4th 1658, 1668, 3 Cal. Rptr. 3d 279]* .

For discussion of presumptions that affect the burden of producing evidence, see *§ 551.102[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 551.92 Standard of Proof in Civil Proceedings

[1] One of Three Standards of Proof May Apply

In meeting the burden of proof as to the existence or nonexistence of a particular fact, one of three standards of proof will apply. These three standards are enumerated in the Evidence Code as follows [*Evid. Code § 115*; *see also Evid. Code § 502*; *Lillian F. v. Superior Court (1984) 160 Cal. App. 3d 314, 320, 206 Cal. Rptr. 603]* :

- Proof beyond a reasonable doubt.
- Clear and convincing proof.
- Proof by a preponderance of the evidence.

The application by law of these standards of proof reflects the degree to which society seeks to balance public and private interests and allocate the risk of an error by the trier of fact. The function of a standard of proof is to instruct the fact finder concerning the degree of confidence our society deems necessary in the correctness of factual conclusions for a particular type of adjudication, to allocate the risk of error between the litigants, and to indicate the relative importance attached to the ultimate decision [*Conservatorship of Wendland (2001) 26 Cal. 4th 519, 546, 110 Cal. Rptr. 2d 412, 28 P.3d 151]* . Thus, in civil proceedings, one of the two less stringent standards will normally apply. The least stringent standard, proof by a preponderance of the evidence, applies generally in civil actions involving civil disputes over monetary damages, where it is deemed fair that the disputants bear the risk of error in roughly equal fashion. In contrast, the more exacting standard of clear and convincing proof applies in civil proceedings in which the risk of error by the fact finder has a more serious impact on fundamental rights [*see Cynthia D. v. Superior Court (1993) 5 Cal. 4th 242, 251, 19 Cal. Rptr. 2d 698, 851 P.2d 1307* ; *Conservatorship of Wendland (2001) 26 Cal. 4th 519, 546-548, 110 Cal. Rptr. 2d 412, 28 P.3d 151* (clear and convincing standard applied to determination of conservator's petition to remove nutrition and hydration from conscious but severely disabled conservatee)].

[2] Standard Requiring Proof by Preponderance of the Evidence Applies as General Rule

The "preponderance of the evidence" standard is the one that applies as a general rule. In other words, "[e]xcept as otherwise provided by law," the burden of proof required in any given situation is proof by a preponderance of the evidence [*Evid. Code § 115*]. Proof by a preponderance of the evidence simply requires the trier to believe that the existence of a fact is more probable than its nonexistence [*Lillian F. v. Superior Court (1984) 160 Cal. App. 3d 314, 320, 206 Cal. Rptr. 603* (citing *In re Winship (1970) 397 U.S. 358, 371, 90 S. Ct. 1068, 25 L. Ed. 2d 368*)].

[3] Standard Requiring Proof by Clear and Convincing Evidence

"Clear and convincing" evidence requires a finding of high probability; the evidence must be so clear as to leave no substantial doubt [*In re Brian P. (2002) 99 Cal. App. 4th 616, 624, 121 Cal. Rptr. 2d 326* ; *In re Jerome D. (2000) 84 Cal. App. 4th 1200, 1205, 101 Cal. Rptr. 2d 449* ; for related jury instruction on clear and convincing proof, see *Judicial Council of California Civil Jury Instructions, CACI No. 201* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions].

The "clear and convincing proof" standard applies in a number of situations as an express statutory exception to the general rule. For example, under the provisions for recovery of punitive damages, the clear and convincing proof standard applies when seeking to prove that a defendant has been guilty of oppression, fraud, or malice [*Civ. Code § 3294(a)*; *see Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc. (2000) 78 Cal. App. 4th 847, 890-893, 93 Cal. Rptr. 2d 364* (evidence that was sufficient to find insurer bad faith under preponderance of the evidence standard was not sufficient to find insurer guilty of oppression or malice under clear and convincing proof standard)]. Other statutory exceptions require clear and convincing proof to support the findings necessary to terminate parental rights [*Fam. Code § 7821*], to appoint a conservator [*Prob. Code § 1801*], or to rebut a presumption that legal title to property encompasses full beneficial title [*Evid. Code § 662*].

In other situations, constitutional or decisional law, rather than express statute, is the law that provides an exception to the general rule [*see Evid. Code § 160*; *Conservatorship of Wendland (2001) 26 Cal. 4th 519, 546-548, 110 Cal. Rptr. 2d 412, 28 P.3d 151* ; *Lillian F. v. Superior Court (1984)160 Cal. App. 3d 314, 320, 206 Cal. Rptr. 603]* . For example, constitutional privacy rights require a conservator to show by clear and convincing proof that a conservatee lacks the capacity to consent to or refuse an intrusive medical treatment (electroconvulsive therapy), when that finding is necessary for an order sought by the conservator authorizing such treatment [*Lillian F. v. Superior Court (1984) 160 Cal. App. 3d 314, 322-324, 206 Cal. Rptr. 603]* . Similarly, the clear and convincing standard applies to a determination under *Prob. Code § 2355* of a petition by a conservator to withdraw nutrition and hydration from a conservatee, since the decision to withdraw nutrition and hydration is not reversible, and the high evidentiary standard in that case plays the role of adjusting the risk of error to favor the less perilous result [*Conservatorship of Wendland (2001) 26 Cal. 4th 519, 546-548, 110 Cal. Rptr. 2d 412, 28 P.3d 151]* . *First Amendment* rights require that a plaintiff in an action for libel show a defendant's actual malice by clear and convincing proof [*see Tague v. Citizens for Law & Order, Inc. (1977) 75 Cal. App. 3d Supp. 16, 26 , 142 Cal. Rptr. 689]* .

When the clear and convincing proof standard applies, a greater quantum of proof is needed to satisfy the burden of proof than under the preponderance of the evidence standard. Clear and convincing proof requires a finding of high probability; the evidence must be sufficiently clear to leave no substantial doubt and sufficiently strong to command the unhesitating assent of every reasonable mind [*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc. (2000) 78 Cal. App. 4th 847, 890, 93 Cal. Rptr. 2d 364* (citing *In re Angelia P. (1981) 28 Cal. 3d 908, 919, 171 Cal. Rptr. 637*)].

[4] Standard Requiring Proof Beyond a Reasonable Doubt

The most stringent standard of proof, proof beyond a reasonable doubt, generally applies only in criminal proceedings [*see Evid. Code § 501* (assignment of burden of proof in criminal actions subject to *Penal Code § 1096*); *Penal Code § 1096* (state's burden of proof in prosecuting criminal action is to prove criminal defendant's guilt of crime beyond

reasonable doubt; reasonable doubt defined)]. In at least one situation however, the California Supreme Court has required the application of this standard in noncriminal proceedings, that is, when involuntary commitment to a mental hospital is involved. In such a situation the standard of proof beyond a reasonable doubt is implicated because the result, although in a civil proceeding, is functionally equivalent to the loss of freedom and reputation suffered by an incarcerated criminal defendant [*Conservatorship of Roulet (1979) 23 Cal. 3d 219, 223-230, 152 Cal. Rptr. 425, 590 P.2d 1* (also requiring unanimous jury verdict)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 551.93 Weight of Evidence

[1] Sufficiency of Evidence of One Witness

Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact [*Evid. Code § 411*]. This applies even though the witness is a party to the action [*DeMiglio v. Mashore (1992) 4 Cal. App. 4th 1260, 1270, 6 Cal. Rptr. 2d 267* ; *Bank of Costa Mesa v. Losack (1977) 74 Cal. App. 3d 287, 291, 141 Cal. Rptr. 550* ; *see Clark Equipment Co. v. Wheat (1979) 92 Cal. App. 3d 503, 518, 154 Cal. Rptr. 874* ("Substantial evidence may consist of the testimony of a single witness or even the testimony of a party")]. For the meaning of "direct evidence," see discussion in *§ 551.62*.

[2] Weak Evidence Offered When Stronger Evidence Available

If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust [*Evid. Code § 412*; for related jury instruction, see *Judicial Council of California Civil Jury Instructions, CACI No. 203* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions]. Thus, when a party fails to produce evidence that he or she might reasonably be expected to produce, an inference is permitted that such evidence would be unfavorable to that party [*Lumpkin v. Friedman (1982) 131 Cal. App. 3d 450, 456, 182 Cal. Rptr. 378]* . However, to justify a jury instruction to this effect, it must be shown that a party was in fact in possession of or had access to better and stronger evidence than was presented [*see People v. Taylor (1977) 67 Cal. App. 3d 403, 411-412, 136 Cal. Rptr. 640* ; *Neumann v. Bishop (1976) 59 Cal. App. 3d 451, 480, 130 Cal. Rptr. 786]* .

[3] Inferences Drawn From Party's Failure to Explain or Deny Adverse Evidence or From Suppression of Evidence

In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or deny any adverse evidence or facts in the case or any willful suppression by the party of evidence relating to them [*Evid. Code § 413*; *see Neumann v. Bishop (1976) 59 Cal. App. 3d 451, 480, 130 Cal. Rptr. 786* ; for related jury instructions, see *Judicial Council of California Civil Jury*

Instructions, CACI No. 204, 205 (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions]. Thus, when the evidence tends to prove a material fact that imposes a liability on a party, and the party has it in his or her power to produce evidence which from its very nature must overthrow the case made against him or her if it is not founded on fact, and the party refuses to produce such evidence, the presumption arises that the evidence, if produced, would operate to the party's prejudice and support the case of the party's adversary [*Neumann v. Bishop (1976) 59 Cal. App. 3d 451, 482, 130 Cal. Rptr. 786]* .

However, in general, there is no duty on either party to call any particular witness in the absence of a showing of some special circumstances [*Neumann v. Bishop (1976) 59 Cal. App. 3d 451, 481, 130 Cal. Rptr. 786]* . Hence, a party is not guilty of willful suppression of evidence by merely failing to call a potential witness to the stand. Counsel for a party to a civil action has not only the right but the duty to exercise discrimination in selecting witnesses for whom his or her client vouches. Assuming the attorney's honesty and good faith, the attorney, in declining to call a potential witness, may not, for example, believe the potential witness's account of the matter, or may think the potential witness is inaccurate or prejudiced, or that the potential witness is otherwise disqualified to testify [*Neumann v. Bishop (1976) 59 Cal. App. 3d 451, 481-482, 130 Cal. Rptr. 786]* . Similarly, no inference may be drawn from the failure of a party to produce evidence that is privileged [*see, e.g., Evid. Code § 913(a)*; *Maggio, Inc. v. Neal (1987) 196 Cal. App. 3d 745, 750-751, 241 Cal. Rptr. 883* (referee's comment on failure to introduce tax returns was harmless error); for related jury instructions on the exercise of privilege, see *Judicial Council of California Civil Jury Instructions, CACI No. 215, 216* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewEvidenceInferences & PresumptionsInferencesEvidenceInferences & PresumptionsPresumptionsEvidenceProcedural ConsiderationsWeight & Sufficiency

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[Reserved]

§§ 551.94[Reserved]

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48-551 California Forms of Pleading and Practice--Annotated § 551.100

§ 551.100 "Presumption" and "Inference" Defined

A presumption is an assumption of fact the law requires to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence [*Evid. Code § 600(a)*]. A presumption is either conclusive or rebuttable [*Evid. Code § 601*].

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action [*Evid. Code § 600(b)*; *see Nazir v. United Airlines (2009) 178 Cal. App. 4th 243, 273, 100 Cal. Rptr. 3d 296* (distinguishing between inference and presumption)]. An inference that an essential fact to be proven by a party cannot be drawn when there is no evidence as to the fact; to do so would be mere conjecture. The absence of critical evidence does not give rise to an inference that the missing evidence exists; rather, it indicates a failure of proof [*Collin v. American Empire Ins. Co. (1994) 21 Cal. App. 4th 787, 808, 26 Cal. Rptr. 2d 391* (inference that conversion of personal property from rental house was "accident" within meaning of insurance policy was error in absence of any evidence as to how property disappeared)].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceInferences & PresumptionsInferencesEvidenceInferences & PresumptionsPresumptions

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48-551 California Forms of Pleading and Practice--Annotated § 551.101

§ 551.101 Conclusive Presumptions

The presumptions established by *Evid. Code §§ 622-624, below*, and all other presumptions declared by law to be conclusive, are conclusive presumptions [*Evid. Code § 620*]. The following are the presumptions established by *Evid. Code §§ 622-624*:

- The facts recited in a written instrument are conclusively presumed to be true as between the parties or their successors in interest [*Evid. Code § 622*; *see Sanders Construction Co. v. San Joaquin First Fed. Sav. & Loan Assn. (1982) 136 Cal. App. 3d 387, 395, 186 Cal. Rptr. 218* (acknowledgment by tenant in Notice and Acknowledgment of Lease Assignment that lease was in full force and effect)]. But the rule does not apply to the recital of a consideration [*Evid. Code § 622*].

- Whenever a party has, by his or her own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act on that belief, the party is not, in any litigation arising out of the statement or conduct, permitted to contradict it [*Evid. Code § 623*]. For the meaning of the terms "statement" and "conduct," see discussion in *§ 551.60[2]*. For example, once a party has gained an advantage through specific representations to the trial court, he or she may not disavow them [*Alling v. Universal Mfg. Corp. (1992) 5 Cal. App. 4th 1412, 1442-1443, 7 Cal. Rptr. 2d 718* (party in contract dispute who represented to trial court that certain claims applied only to purchase agreement was estopped from asserting those claims with respect to licensing agreement)]. In this respect, it may be noted that an estoppel may be invoked against a governmental agency when justice and right require it [*Hartway v. State Board of Control (1976) 69 Cal. App. 3d 502, 504-505, 137 Cal. Rptr. 199* ; *see Middleton v. Imperial Ins. Co. (1983) 34 Cal. 3d 134, 139, 193 Cal. Rptr. 144, 666 P.2d 1]* . For the elements of estoppel, see *Rankin v. Frebank Co. (1975) 47 Cal. App. 3d 75, 85-86, 121 Cal. Rptr. 348* , and *Varela v. Wells Fargo Bank (1971) 15 Cal. App. 3d 741, 748, 93 Cal. Rptr. 428* .

- A tenant is not permitted to deny the title of his or her landlord at the time of the commencement of the relation [*Evid. Code § 624*].

Additionally, the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage, except as provided in *Fam. Code § 7541* (if blood tests show husband is not father) [*Fam. Code § 7540*; *see Estate of Cornelious (1984) 35 Cal. 3d 461, 464-467, 198 Cal. Rptr. 543, 674 P.2d 245* , (decided under former *Evid. Code § 621(a)*)]. For discussion of this presumption and exceptions to it, see Ch. 412, *Paternity* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceInferences & PresumptionsCreation of PresumptionsEvidenceInferences & PresumptionsPresumptionsEvidenceInferences & PresumptionsRebuttal of Presumptions

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48-551 California Forms of Pleading and Practice--Annotated § 551.102

§ 551.102 Rebuttable Presumptions

[1] Defined and Classified

A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption [*Evid. Code § 602*; *see, e.g., Evid. Code § 1451*, relating to presumptions with respect to acknowledged writings]. Presumptions which the Legislature does not specify as con clusive are rebuttable [*People v. Dubon (2001) 90 Cal. App. 4th 944, 952, 108 Cal. Rptr. 2d 914]* .

Every rebuttable presumption is either a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof [*Evid. Code § 601*; *see Fillmore v. Irvine (1983) 146 Cal. App. 3d 649, 660, 194 Cal. Rptr. 319]* .

[2] Presumptions Affecting Burden of Producing Evidence

A presumption affecting the burden of producing evidence is a presumption established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied [*Evid. Code § 603*]. The effect of the presumption is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced that would support a finding of its nonexistence. In this latter event, the trier of fact must determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. But this does not prevent the drawing of any inference that may be appropriate [*Evid. Code § 604*].

The presumptions established by *Evid. Code §§ 631-647* (set out below) and all other rebuttable presumptions established by law that fall within the criteria of *Evid. Code § 603* are presumptions affecting the burden of producing evidence [*Evid. Code § 630*]. The following are the presumptions established by *Evid. Code §§ 631-645* and *647*:

- Money delivered by one to another is presumed to have been due to the latter [*Evid. Code § 631*].
- A thing delivered by one to another is presumed to have belonged to the latter [*Evid. Code § 632*].

- An obligation delivered up to the debtor is presumed to have been paid [*Evid. Code § 633*].

- A person in possession of an order on himself or herself for the payment of money, or delivery of a thing, is presumed to have paid the money or delivered the thing accordingly [*Evid. Code § 634*].

- An obligation possessed by the creditor is presumed not to have been paid [*Evid. Code § 635*].

- The payment of earlier rent or installments is presumed from a receipt for later rent or installments [*Evid. Code § 636*].

- The things that a person possesses are presumed to be owned by the person [*Evid. Code § 637*].

- A person who exercises acts of ownership over property is presumed to be the owner [*Evid. Code § 638*].

- A judgment, when not conclusive, is presumed to correctly determine or set forth the rights of the parties, but there is no presumption that the facts essential to the judgment have been correctly determined [*Evid. Code § 639*].

- A writing is presumed to have been truly dated [*Evid. Code § 640*].

- A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of the mail [*Evid. Code § 641*].

- A trustee or other person, whose duty it was to convey real property to a particular person, is presumed to have actually conveyed to the person when the presumption is necessary to perfect title of the person or the person's successor in interest [*Evid. Code § 642*].

- A deed or will or other writing purporting to create, terminate, or affect an interest in real or personal property is presumed to be authentic if it (a) is at least 30 years old; (b) is in such condition as to create no suspicion concerning its authenticity; (c) was kept, or if found was found, in a place where the writing, if authentic, would be likely to be kept or found; and (d) has been generally acted on as authentic by persons having an interest in the matter [*Evid. Code § 643*].

- A book, purporting to be printed or published by public authority, is presumed to have been so printed or published [*Evid. Code § 644*].

- A book, purporting to contain reports of cases adjudged in the tribunals of the state or nation where the book is published, is presumed to contain correct reports of the cases [*Evid. Code § 645*].

- Printed materials, purporting to be a particular newspaper or periodical, are presumed to be that newspaper or periodical if regularly issued at average intervals not exceeding three months [*Evid. Code § 645.1*].

- The return of a registered process server on process or notice establishes a presumption, affecting the burden of producing evidence, of the facts stated in the return [*Evid. Code § 647*].

Evid. Code § 646 provides that the judicial doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence and that the word "defendant," as used in the section, includes any party against whom the presumption operates [*Evid. Code § 646(a), (b)*]. *Evid. Code § 646(c)* sets forth the instructions the court may, and on

request shall, give the jury if the evidence, or facts otherwise established, would support a res ipsa loquitur presumption and the defendant has introduced evidence that would support a finding that he or she was not negligent or that any negligence on his or her part was not a proximate cause of the occurrence.

Other statutory presumptions affecting the burden of producing evidence are found in *Evid. Code §§ 1451-1454* (relating to presumptions affecting acknowledged writings and official writings [*see Evid. Code § 1450*]); *Evid. Code § 1552* (presumption that printed representations of computer information and computer programs are accurate representations); *Evid. Code § 1530* (presumption that purported copy of writing in custody of public entity or an entry in such a writing is authentic and accurate); *Evid. Code § 1532* (presumption that official record of writing accurately reflects existence and content or original recorded writing); *Evid. Code § 1600* (record of recorded instrument or document affecting an interest in property as prima facie evidence); and *Evid. Code § 1603* (presumption from deed executed pursuant to legal process that property has been conveyed). *Evid. Code § 1604* provides that a certificate of purchase, or of location, of any lands in California issued or made pursuant to law is prima facie evidence that the holder of the certificate is the owner of the land and sets forth how the evidence may be overcome.

[3] Presumptions Affecting Burden of Proof

A presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of establishment of a parent and child relationship, the validity of marriage, the stability of titles to property, or the security of those who entrust them selves or their property to the administration of others [*Evid. Code § 605*]. The effect of the presumption is to impose on the party against whom it operates the burden of proof as to the nonexistence of the presumed fact [*Evid. Code § 606*].

The presumptions established by *Evid. Code §§ 662-669.5* (set out below) and all other rebuttable presumptions established by law that fall within the criteria of *Evid. Code § 605* are presumptions affecting the burden of proof [*Evid. Code § 660*; *see also Haycock v. Hughes Aircraft Co. (1994) 22 Cal. App. 4th 1473, 1488-1489, 28 Cal. Rptr. 2d 248* (*Lab. Code § 2922* presumption of at-will employment is based on public policy and affects burden of proof)]. The following are the presumptions established by *Evid. Code §§ 662-668*:

- The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof [*Evid. Code § 662*; *see* discussion in *§ 551.92[3]*].

- A ceremonial marriage is presumed to be valid [*Evid. Code § 663*].

- Official duty is presumed to have been regularly performed. But this presumption does not apply to an issue on the lawfulness of an arrest if it is found or otherwise established that the arrest was made without a warrant [*Evid. Code § 664*].

- A person is presumed to intend the ordinary consequences of his or her voluntary act [*Evid. Code § 665* (also stating when presumption is inapplicable in criminal action to establish specific intent)].

- Any California or United States court, or any court of general jurisdiction in any other state or nation, or any judge of such a court, acting as such, is presumed to have acted in the lawful exercise of its jurisdiction. This presumption applies only when the act of the court or judge is under collateral attack [*Evid. Code § 666*].

- A person not heard from in five years is presumed to be dead [*Evid. Code § 667*].

- An unlawful intent is presumed from the doing of an unlawful act [*Evid. Code § 668* (also stating when presumption is inapplicable in criminal action to establish specific intent)].

Evid. Code § 669 sets out when the failure of a person to exercise due care is presumed from the person's violation of a statute, ordinance, or regulation of a public entity. For causes of action arising out of facts occurring on or after January 1, 1988, *Evid. Code § 669.1* excludes from the presumption a rule, policy, manual, or guideline of state or local government setting forth standards of conduct or guidelines for its employees in the conduct of their public employment, unless it has been formally adopted as a statute, ordinance, or agency regulation. For further discussion of these provisions, see Ch. 380, *Negligence* .

Evid. Code § 669.5 relates to the burden of proof in an action challenging the validity of a city or county ordinance limiting the number of building permits that may be issued for residential construction or buildable lots that may be developed for residential purposes.

Legal Topics:

For related research and practice materials, see the following legal topics:
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48-551 California Forms of Pleading and Practice--Annotated §§ 551.103-551.109

[Reserved]

§§ 551.103[Reserved]

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48-551 California Forms of Pleading and Practice--Annotated § 551.110

§ 551.110 "Witness" Defined and Credibility

A witness is a person whose declaration under oath is received as evidence for any purpose [*Code Civ. Proc. § 1878*]. The declaration may be made on oral examination, by deposition, by affidavit, or by declaration under penalty of perjury [*see Code Civ. Proc. §§ 1878, 2002, 2015.5*].

When referring to a witness in the context of a trial, a witness is a person whose declaration under oath is made in person before the trier of fact [*see Code Civ. Proc. §§ 1878, 2002, 2005, 2094*; *Evid. Code § 710*]. The "oath" is given in one of the forms of oath, affirmation, or declaration set out in *Code Civ. Proc. § 2094* [*Code Civ. Proc. § 2094(a)*], or, in the alternative, in some other form administered by the court in a manner calculated to awaken the witness's conscience and impress that person's mind with the duty to tell the truth [*Code Civ. Proc. § 2094(b)*; *see also Evid. Code § 710* (witness who is child under age of 10 or dependent person with substantial cognitive impairment may be required in the court's discretion only to promise to tell the truth)].

The credibility of witnesses is determined by the trier of fact [*McAllister v. George (1977) 73 Cal. App. 3d 258, 265, 140 Cal. Rptr. 702]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceCompetencyAffirmations & OathsEvidenceTestimonyGeneral OverviewEvidenceTestimonyCredibilityGeneral Overview

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§ 551.111 Qualifications

Except as otherwise provided by statute, every person, irrespective of age, is qualified to be a witness and no person is disqualified to testify to any matter [*Evid. Code § 700*]. The California Constitution expressly provides that a person is not incompetent to be a witness because of his or her opinions on religious beliefs [*Cal. Const., art. I, § 4*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 551.112 Witness Fees

Ordinary witness fees are covered by *Gov. Code § 68093* and advance payment for travel and one day's attendance by *Code Civ. Proc. § 1987(a)*. The compensation of expert witnesses is covered by *Evid. Code §§ 730-731, 733* and *Gov. Code § 68092.5*. The witness fees of specified law enforcement officers, fire fighters, and other specified government employees and the payment of one day's fee in advance are covered by *Gov. Code § 68097 et seq.*. For further discussion of witness fees, see Ch. 535, *Subpoena* . For the statutes governing the fees of interpreters and translators, see discussion in *§ 551.117[1]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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48-551 California Forms of Pleading and Practice--Annotated § 551.113

§ 551.113 Particular Persons

[1] Person Unable to Express Self or Understand Duty to Tell Truth as Disqualified

A person is disqualified to be a witness if the person is incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through an interpreter, or incapable of understanding the duty of a witness to tell the truth [*Evid. Code § 701(a)*]. These matters are determined by the court [*see* Cal. Law Revision Commission Comment to *Evid. Code § 701* in annotated codes]. The trial court has the discretion to exclude a witness on this basis if, because of health problems, the witness has memory difficulties, hallucinations, confusion, and the tendency to make up a story when memory is missing [*Stanchfield v. Hamer Toyota, Inc. (1995) 37 Cal. App. 4th 1495, 1506-1507]* . However, physical limitations on a witness's ability to communicate do not necessarily render the witness incompetent to testify [*People v. Tran (1996) 47 Cal. App. 4th 759, 770, 54 Cal. Rptr. 2d 905* (where witness unable to speak, but could answer yes-or-no questions by tapping once for yes and twice for no, defense not deprived of meaningful opportunity to cross-examine)].

The party challenging the witness's competency has the burden of proving the witness's incompetency to testify [*People v. Augustin (2003) 112 Cal. App. 4th 444, 447, 5 Cal. Rptr. 3d 171]* .

In any proceeding held outside the presence of a jury, the court may reserve challenges to the competency of a witness until the conclusion of the direct examination (discussed in *§ 551.121[5]*) of that witness [*Evid. Code § 702(b)*].

A witness's competence to testify must be challenged at the trial level [*People v. Lewis (2001) 26 Cal. 4th 334, 360, 110 Cal. Rptr. 2d 272* ; *People v. Cudjo (1993) 6 Cal. 4th 585, 622, 25 Cal. Rptr. 2d 390, 863 P.2d 635]* . Failure to object at trial waives the issue on appeal [*People v. Augustin (2003) 112 Cal. App. 4th 444, 447, 5 Cal. Rptr. 3d 171* (defense counsel's belated motion to strike victim's testimony on ground prosecutor should not be permitted to ask leading questions to clarify her testimony did not constitute objection to her competency)].

[2] Attorneys

Attorneys are not disqualified to be witnesses and are, therefore, competent under *Evid. Code § 700* (discussed in *§*

551.111) to testify in the trial of a case as a witness for any party. This is also true when the lawyer is counsel of record for a party in the case, even though to testify may be unethical. Thus, a lawyer who has relevant information may be compelled to testify even if it is detrimental to his or her client unless the information is privileged [*Romeo v. Jumbo Market (1967) 247 Cal. App. 2d 817, 820-821, 56 Cal. Rptr. 26* ; *see also People v. Stokley (1968) 266 Cal. App. 2d 930, 936, 72 Cal. Rptr. 513* , *cert. denied, 395 U.S. 914 (1969)* (claim of violation of Canon of Ethics as raising no objection to inadmissability of attorney's testimony)].

Under *Cal. Rules Prof. Conduct, Rule 5-210*, a State Bar member has an ethical obligation to refrain from acting as an advocate before a jury that will hear testimony from him or her unless the testimony relates to an uncontested matter, the testimony relates to the nature and value of legal services rendered in the case, or the member has the informed, written consent of the client [*Cal. Rules Prof. Conduct, Rule 5-210*]. The member is required to withdraw if he or she knows or should know that continued employment will result in violation of this rule [*see Cal. Rules Prof. Conduct, Rule 3-700(B)(2)*]. Apparently, the trial court can disqualify testifying counsel against the client's wishes only if it is confronted with manifest interest that it must protect from palpable injustice [*see Lyle v. Superior Court (1981) 122 Cal. App. 3d 470, 482, 175 Cal. Rptr. 918* (decided under prior version of Rules of Professional Conduct)].

A party seeking to disqualify opposing counsel on the ground that opposing counsel ought to be called as a witness in the case must proceed at the first reasonable opportunity by proper motion to achieve that end and, on failing to do so, it is an abuse of discretion for the trial court to grant the motion [*White v. Superior Court (1979) 98 Cal. App. 3d 51, 55-56, 159 Cal. Rptr. 278]* . For forms that may be adapted for use in moving for an order of disqualification, see *Ch. 72, Attorney Practice and Ethics, § 72.30 et seq.*

[3] Judges, Arbitrators, and Mediators

Like attorneys, trial judges are not disqualified to be witnesses and are, therefore, competent under *Evid. Code § 700* (discussed in *§ 551.111*) to testify in the trial of a case as a witness for any party. However, a judge is disqualified to decide a proceeding if he or she has personal knowledge of disputed evidentiary facts concerning the proceeding, and the judge is deemed to have personal knowledge if to his or her knowledge he or she is likely to be a material witness in the proceeding [*Code Civ. Proc. § 170.1(a)(1)*]. The procedure for disqualifying a judge on this ground is set forth in *Code Civ. Proc. § 170.3*. For discussion and forms, see Ch. 317, *Judges* .

On the other hand, the Evidence Code permits the trial judge to testify if none of the parties objects [*Evid. Code § 703(d)*]. Before the judge may be called to testify, however, the judge shall, in proceedings held out of the presence and hearing of the jury, inform the parties of the information he or she has concerning any fact or matter about which he or she will be called to testify [*Evid. Code § 703(a)*]. If a party objects, the judge may not testify in the trial as a witness, and on the objection, the judge is required to declare a mistrial and order the action assigned for trial before another judge [*Evid. Code § 703(b)*]. Calling the judge to testify is deemed a consent to the granting of a motion for mistrial, and an objection to the calling of the judge is deemed a motion for mistrial [*Evid. Code § 703(c)*].

No person presiding at any judicial or quasi-judicial proceeding, and no arbitrator or mediator, is competent to testify in any subsequent civil proceeding as to any statement, conduct, decision, or ruling occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (1) give rise to civil or criminal contempt, (2) constitute a crime, (3) be the subject of investigation by the State Bar of California or the Commission on Judicial Performance, or (4) give rise to disqualification proceedings under *Code Civ. Proc. § 170.1(a)(1)* or *(6)* [*Evid. Code § 703.5*; *see Merritt v. Reserve Ins. Co. (1973) 34 Cal. App. 3d 858, 883, 110 Cal. Rptr. 511* (decided prior to enactment of *Evid. Code § 703.5*; a trial judge committed prejudicial error in allowing another judge to testify as an expert witness on behalf of one party with respect to matters that took place before the testifying judge in his judicial capacity in a prior trial of the action)]. Section 703.5 does not apply, however, to a mediator with regard to any mediation of visitation or custody issues under *Fam. Code § 3160 et seq.* [*Evid. Code § 703.5*].

[4] Jurors

Jurors are not disqualified to be witnesses and are, therefore, competent under *Evid. Code § 700* (discussed in *§ 551.111*) to testify in the trial of a case as a witness for any party. But it would be unusual for a juror sworn and impaneled to try a case to have personal knowledge of facts involved in that case to which he or she could testify as a witness. One of the questions asked prospective jurors on voir dire is whether the juror has heard of, or has any knowledge of, the facts or events, or is familiar with the places or property mentioned, in the case [*see* Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.25(c)(7)]. If the prospective juror were to answer in the affirmative, it would seem further voir dire would disclose the juror's knowledge of the facts and that he or she would be challenged for cause under *Code Civ. Proc. § 602(7)* or *(8)*.

Nevertheless, as in the case of the trial judge, a juror sworn and impaneled in the trial of an action may be compelled to testify in that trial as a witness in the absence of objection by a party [*Evid. Code § 704(d)*]. But before the juror may be called to testify, the juror must, in proceedings conducted by the court out of the presence and hearing of the remaining jurors, inform the parties of the information he or she has concerning any fact or matter about which he or she will be called to testify [*Evid. Code § 704(a)*]. Against the objection of a party, the juror may not testify, and on that objection, the court must declare a mistrial and order the action assigned for trial before another jury [*Evid. Code § 704(b)*]. The calling of a juror to testify is deemed a consent to the granting of a motion for mistrial, and an objection to the calling of the juror is deemed a motion for mistrial [*Evid. Code § 704(c)*].

[5] Experts

If the matter in issue is one within the knowledge of experts only and not within the common knowledge of laypersons, it is necessary for the plaintiff to introduce expert opinion evidence in order to establish a prima facie case [*Miller v. Los Angeles County Flood Control Dist. (1973) 8 Cal. 3d 689, 702, 106 Cal. Rptr. 1, 505 P.2d 193* ; *see also* discussion in *§ 551.70[2][a]*]. A person is qualified to testify as an expert if he or she has special knowledge, skill, experience, training, or education sufficient to qualify him or her as an expert on the subject to which his or her testimony relates. Against the objection of a party, the special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert [*Evid. Code § 720(a)*]. For the procedure for determining a preliminary fact, see discussion in *§ 551.76* . The test applied in making the determination is simply whether the witness possesses the special knowledge, skill, experience, training, or education sufficient to qualify him or her as an expert on the subject to which his or her testimony relates [*Chadock v. Cohn (1979) 96 Cal. App. 3d 205, 208, 157 Cal. Rptr. 640* ; *see McCleery v. City of Bakersfield (1985) 170 Cal. App. 3d 1059, 1066, 216 Cal. Rptr. 852* (trial court's disqualification of expert witness erroneous to extent it was based on witness's lack of prior experience in testifying and on irrelevance of his proposed testimony, rather than on determination of his special expertise)]. The showing may be made by any otherwise admissible evidence, including the witness's own testimony [*Evid. Code § 720(b)*]. The witness's degree of knowledge goes to the weight and not to the admissibility of his or her testimony [*Mann v. Cracchiolo (1985) 38 Cal. 3d 18, 38, 210 Cal. Rptr. 762, 694 P.2d 1134]* . If the witness's testimony is based upon scientific techniques, those techniques must be generally accepted by a typical cross-section of the relevant scientific community [*People v. Leahy (1994) 8 Cal. 4th 587, 612, 34 Cal. Rptr. 2d 663, 882 P.2d 321* (citing *People v. Kelly (1976) 17 Cal. 3d 24, 37, 130 Cal. Rptr. 144, 549 P.2d 1240*); *see* discussion in *§ 551.70[2][a]*]. It is for the trial court, in the exercise of sound discretion, to determine the competency and qualification of an expert witness to give his or her opinion in evidence, and its ruling will not be disturbed on appeal unless a manifest abuse of that discretion is shown [*Miller v. Los Angeles County Flood Control Dist. (1973) 8 Cal. 3d 689, 701, 106 Cal. Rptr. 1, 505 P.2d 193* ; *Douglas v. Ostermeier (1991) 1 Cal. App. 4th 729, 738, 2 Cal. Rptr. 2d 594]* . However, the refusal to qualify a witness as an expert is an abuse of discretion if the witness disclosed sufficient knowledge of the subject to entitle his or her opinion to go to the jury [*Mann v. Cracchiolo (1985) 38 Cal. 3d 18, 39, 210 Cal. Rptr. 762, 694 P.2d 1134]* .

For a discussion of the evolving status of a consultant-expert who possibly may be called as a witness at trial, see *Kennemur v. State of California (1982) 133 Cal. App. 3d 907, 916, 184 Cal. Rptr. 393* . For a discussion of the effect on

the "work product rule" of the knowledge, opinions, and report of a consultant-expert when the expert becomes a witness in the action, see *Brokopp v. Ford Motor Co. (1977) 71 Cal. App. 3d 841, 857-858, 139 Cal. Rptr. 888* .

The court may, at any time before or during the trial, limit the number of expert witnesses to be called by any party [*Evid. Code § 723*]. The court may also on its own motion or the motion of a party appoint one or more expert witnesses to investigate a fact or matter, render a report to the court, and testify at the trial. The court may also fix the compensation to be paid [*Evid. Code § 730*; for manner of payment of experts appointed by court, see *Evid. Code § 731(b), (c)*]. This does not prevent any party to the action from producing other expert evidence on the same fact or matter, but if other expert witnesses are called by a party, their fees are paid by the party calling them and only ordinary witness fees are taxed as costs [*Evid. Code § 733*].

For related jury instructions on expert witness testimony, see Judicial Council of California Civil Jury Instructions, CACI No. 219-221 (Matthew Bender), also available in *LexisNexis(R) Automated Judicial Council of California Civil Jury Instructions*.

Legal Topics:

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

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48-551 California Forms of Pleading and Practice--Annotated § 551.114

§ 551.114 Compelling Attendance

[1] Power of Court

The court has inherent power to compel the attendance of persons to testify in an action or proceeding, including a party whose physical presence is required as a witness [*Code Civ. Proc. § 128(a)(6)*; *Taylor v. Bell (1971) 21 Cal. App. 3d 1002, 1008, 98 Cal. Rptr. 855 , cert. denied, 408 U.S. 923, 92 S. Ct. 2493, 33 L. Ed. 2d 334 (1972)* (court as lacking power to order party to appear other than as witness)]. However, the court does not have the power to compel attendance of any witness who is not a California resident at the time of service [*Code Civ. Proc. § 1989*; *Amoco Chemical Co. v. Certain Underwriters at Lloyd's of London (1995) 34 Cal. App. 4th 554, 555* (limitation applies to nonresident parties)].

[2] Procedure

The process for compelling the attendance of a nonparty to testify as a witness or to produce books, documents, or other things is a subpoena or subpoena duces tecum [*see Code Civ. Proc. § 1985*]. A person present in court may be required to testify in the same manner as if he or she were in attendance on a subpoena issued by the court [*Code Civ. Proc. § 1990*].

A party to the action or proceeding may also be served with a subpoena or subpoena duces tecum. But the more common procedure for securing the presence of a party or a person for whose immediate benefit an action is prosecuted or defended, or an officer, director, or managing agent of the party or person, is through service of a notice to appear. The giving of the notice has the same effect as service of a subpoena [*see Code Civ. Proc. § 1987(b), (c)*].

For a detailed discussion, a procedural checklist, and forms of subpoenas and notices to appear, see Ch. 535, *Subpoena* .

[3] Exemption of Out-of-State Witness From Arrest or Process While Obeying Criminal Subpoena

The exemption from arrest or service of process, civil or criminal, of a witness coming into California, or passing through California on his or her way to another state, in response to a subpoena or order to attend and testify in a

criminal action or grand jury investigation pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases is provided for in *Penal Code §§ 1334.4* and *1334.5*. For a discussion of persons who are immune to civil process, and for forms for use in moving to quash service of a summons, which, with appropriate modifications, may also be used to move to quash service of a subpoena, see Ch. 323, *Jurisdiction: Personal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewCivil ProcedurePretrial MattersSubpoenas

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48-551 California Forms of Pleading and Practice--Annotated § 551.115

§ 551.115 Interpreters

[1] When Required; Applicability of Laws Relating to Witnesses

Judicial proceedings must be conducted in the English language [*Code Civ. Proc. § 185*]. Consequently, an interpreter is required when a witness is incapable of hearing or understanding the English language or is incapable of expressing himself or herself in the English language so as to be understood directly by counsel, the court, and the jury. In such event, an interpreter must be sworn to interpret for the witness [*Evid. Code § 752(a)*; *see also* Cal. Rules of Ct., Stds. Jud. Admin., Std. 2.10(a)(1) (interpreter also to be appointed if court finds that party is unable to understand and speak English sufficiently to comprehend proceedings and to assist counsel in conduct of case)].

Separate interpreters may be needed for each non-English speaking party. An additional interpreter may be needed to interpret witness testimony for the court [Cal. Rules of Ct., Stds. Jud. Admin., Std. 2.10(a)(2)].

Whether an interpreter should be called rests in the discretion of the trial court [*People v. Augustin (2003) 112 Cal. App. 4th 444, 451, 5 Cal. Rptr. 3d 171]* . But if there is uncontradicted evidence that the witness does not speak or understand English, it would be an abuse of discretion to fail to appoint an interpreter [*Gardiana v. Small Claims Court (1976) 59 Cal. App. 3d 412, 418-419, 130 Cal. Rptr. 675]* .

Evid. Code § 754 covers the appointment of an interpreter in any civil or criminal action for an "individual who is deaf or hearing impaired" to the point that hearing loss is so great that the individual cannot understand language spoken in a normal tone and thus is unable to fully participate in the proceedings, and the use of an assistive listening system or other appropriate equipment, if provided, would not aid in the individual's participation. The provision for appropriate equipment for an "individual who is hearing impaired" but able to fully participate in the proceedings with sufficient assistive listening or computer-aided transcription equipment is covered in *Civ. Code § 54.8*.

A person who serves as an interpreter is subject to all the rules of law relating to witnesses [*Evid. Code § 750*].

An interpreter must be present in certain family law proceedings involving domestic violence when a party who does

not proficiently speak or understand the English language is present. The interpreter must both interpret the proceedings so that the party understands and assist communication between the party and his or her attorney [*Evid. Code § 755(a)*]. If an interpreter is required under this section, the court must generally not commence proceedings until the appointed interpreter is present and situated near the party and his or her attorney [*Evid. Code § 755(a), (c)*].

[2] Procedure

There are no formal requirements as to the manner of requesting an interpreter, and hence the request may be made orally or in writing. However, if made orally, the request should be made in the presence of a reporter so that a record is made of the request. The Judicial Council has recommended that on request by a party or counsel, or whenever it appears that a party's or witness's primary language is not English or that a party or witness may not speak and understand English sufficiently to participate fully in the proceedings, the court should conduct an examination on the record to determine whether a court interpreter is needed [Cal. Rules of Ct., Stds. Jud. Admin., Std. 2.10(b)]. Matters to be included in the examination are set forth in Cal. Rules of Ct., Stds. Jud. Admin., Std. 2.10(c). After the examination, the court should state its conclusion on the record, and the file in the case should be clearly marked to ensure that an interpreter will be present when needed in any subsequent proceeding [Cal. Rules of Ct., Stds. Jud. Admin., Std. 2.10(d)].

For a form of motion for an order appointing an interpreter, along with related declaration and order, see *Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 8, Interpreters, 8.33 -8.35*.

[3] Qualifications and Standards of Professional Conduct of Interpreters

The competence of the interpreter is ordinarily for the trial court to determine and the manner of selection of an interpreter is within the discretion of the trial court [*Hsu v. Mt. Zion Hospital (1968) 259 Cal. App. 2d 562, 582, 66 Cal. Rptr. 659*].

Any person who interprets in a court proceeding using one of the designated languages [*see Gov. Code § 68562(a)* (designation made by Judicial Council)] must be a certified court interpreter for the language used [*Gov. Code § 68561(a)*; *see Gov. Code §§ 68560.5(a)* ("court proceeding" defined), *68566* ("certified court interpreter" defined)]. However, a court may for good cause, and following the good cause and qualification procedures and guidelines adopted by the Judicial Council, appoint an interpreter for a designated language who is not certified [*Gov. Code § 68561(a), (c)*]. Interpreters named and maintained on the list of recommended court interpreters previously established by the State Personnel Board, or established by an entity provisionally approved under *Gov. Code § 68562(b)*, are deemed certified until January 1, 1996. After that date, those interpreters are not deemed certified and must comply with the new procedures for certification as adopted by the Judicial Council. Interpreters approved by the State Personnel Board or any other agency or entity for use in administrative hearings or nonjudicial settings may not be deemed certified as court interpreters. These interpreters also may not be used in court proceedings unless they are qualified by the court under *Gov. Code § 68562(c)* or *(d)* [*Gov. Code § 68561(b)*; *see Gov. Code § 68562(c), (d)*].

Any person who interprets in a court proceeding using a nondesignated language must be qualified by the court under the qualification procedures and guidelines adopted by the Judicial Council. If this qualified interpreter also passes an English fluency examination offered by a testing entity approved by the Judicial Council, this person will be designated a "registered interpreter" [*Gov. Code § 68561(d)*].

Interpreters must establish to the court that they meet the qualification requirements and the record must show that the interpreter is certified or was qualified by the court [*see Gov. Code § 68561(e)*].

There are mandatory Judicial Council forms to present the qualifications of an noncertified or nonregistered interpeter [Judicial Council Form INT-110] and to certify the unavailability of a certified or registered interpreter [Judicial

Council Form INT-120]. For copies of these forms, see *Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 8, Interpreters, 8.36, 8.37*.

[4] Oath of Interpreter; Instructions

The interpreter must take an oath that he or she will make a true interpretation to the witness in a language that the witness understands and that he or she will make a true interpretation of the witness's answers to questions to counsel, court, or jury, in the English language, with his or her best skill and judgment [*Evid. Code § 751(a)*]. When a deaf or hard-of-hearing person is testifying under oath [*see* [1], *above*], an interpreter certified pursuant to *Evid. Code § 754(f)* must advise the court whenever he or she is unable to comply with his or her oath taken pursuant to *Evid. Code § 751(a)* [*Evid. Code § 751(b)*]. An interpreter regularly employed by the court and certified or registered in accordance with *Gov. Code § 68560 et seq.*, relating to court interpreter services, may file an oath as prescribed by *Evid. Code § 751(a)* with the clerk of the court, and the filed oath serves for all subsequent court proceedings until the appointment is revoked [*Evid. Code § 751(d)*].

The instructions to be given to interpreters and to counsel are set forth in Cal. Rules of Ct., Stds. Jud. Admin., Std. 2.11(a) and (b), respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureTrialsExamination of WitnessesGeneral OverviewEvidenceCompetencyInterpretersEvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyExpertsCourt-Appointed ExpertsAppointments

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48-551 California Forms of Pleading and Practice--Annotated § 551.116

§ 551.116 Translators

[1] When Required; Applicability of Laws Relating to Witnesses

A translator is required when the written characters in a writing offered in evidence are incapable of being deciphered or understood directly. In such event, a translator must be sworn to decipher or translate the writing [*Evid. Code § 753(a)*].

A person who serves as a translator is subject to all the rules of law relating to witnesses [*Evid. Code § 750*].

[2] Oath of Translator

The translator must take an oath that he or she will make a true translation in the English language of any writing he or she is to decipher or translate [*Evid. Code § 751(c)*]. A translator regularly employed by the court may file an oath as prescribed by *Evid. Code § 751(c)* with the clerk of the court, and the filed oath serves for all subsequent court proceedings until the appointment is revoked [*Evid. Code § 751(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDocumentary EvidenceWritingsTranscripts &
TranslationsTranslationsEvidenceTestimonyExpertsCourt-Appointed ExpertsAppointments

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48-551 California Forms of Pleading and Practice--Annotated § 551.117

§ 551.117 Compensation of Interpreters and Translators

[1] Fees and Payment

Interpreter and translator fees are covered by *Evid. Code §§ 730-733, 752(b),* and *753(b),* and *Gov. Code §§ 26806(c)* and *(d)* (interpreters employed by county clerk for trial courts in counties of 900,000 or more), and *68092(b)*. The interpreter or translator may be compensated as provided in *Evid. Code §§ 730-733*, relating to compensation of expert witnesses [*Evid. Code §§ 752(b), 753(b)*].

Evid. Code § 730 authorizes the court to appoint experts and to fix their compensation, and *Evid. Code § 731(c)* provides that in all civil actions, the compensation fixed under *Evid. Code § 730* must, in the first instance, be apportioned and charged to the several parties in such proportion as the court may determine and may thereafter be taxed and allowed in like manner as other costs [*see* also *Gov. Code § 68092(b)*].

[2] Indigent Litigants

Although *Evid. Code § 752* [*see § 551.115[1]*] provides for court appointment of an interpreter for a witness, no statutory basis exists for appointing of an interpreter at public expense to assist non-English-speaking litigants in civil cases, and, because language assistance to indigent but represented litigants appears available, there is no need for courts to require appointment of interpreters to assist litigants at public expense [*Jara v. Municipal Court (1978) 21 Cal. 3d 181, 183, 185, 145 Cal. Rptr. 847, 578 P.2d 94 , cert. denied, 439 U.S. 1067 (1979)]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsProceedings in Forma PauperisGeneral OverviewEvidenceCompetencyInterpretersEvidenceDocumentary EvidenceWritingsTranscripts & TranslationsTranslationsEvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyExpertsCourt-Appointed ExpertsCompensation

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48-551 California Forms of Pleading and Practice--Annotated § 551.118

§ 551.118 Privileges

For a discussion of privileges, including a newsperson's immunity from a contempt citation and his or her qualified privilege not to divulge unpublished information, see Ch. 191, *Discovery: Privileges and Other Discovery Limitaitons* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryPrivileged MattersGeneral OverviewEvidencePrivilegesGeneral OverviewEvidencePrivilegesJournalist's PrivilegeGeneral Overview

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48-551 California Forms of Pleading and Practice--Annotated § 551.119

§ 551.119 Confrontation

At the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action if they choose to attend and examine [*Evid. Code § 711*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyExaminationGeneral OverviewEvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationDirect Examination

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48-551 California Forms of Pleading and Practice--Annotated § 551.120

§ 551.120 Exclusion of Witnesses From Courtroom

The court may exclude from the courtroom any witness not at the time under examination so that the witness cannot hear the testimony of other witnesses [*Evid. Code § 777(a)*]. However, the court may not exclude a party to the action, and, if the party is a person other than a natural person, an officer or employee designated by its attorney is entitled to be present [*Evid. Code § 777(b), (c)*].

Legal Topics:

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

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48-551 California Forms of Pleading and Practice--Annotated § 551.121

§ 551.121 Examination of Witnesses

[1] Oath or Affirmation

Before testifying every witness is required to take an oath or make an affirmation or declaration in the form provided by law, except that a court in its discretion may require that a child less than 10 years old or a dependent person with a substantial cognitive impairment only promise to tell the truth [*Evid. Code § 710*; for definition of "dependent person," *see Evid. Code § 177*]. For further discussion and forms for oath and affirmation, see Ch. 392, *Oath and Affirmation* .

[2] Personal Knowledge

Subject to *Evid. Code § 801* (relating to opinion testimony of expert witnesses and discussed in *§ 551.70*), the testimony of a witness is inadmissible unless the witness has personal knowledge of the matter [*Evid. Code § 702(a)*]. This includes the requirement that the witness have the capacity to perceive the facts through his or her own senses and to recollect those facts [*see* Cal. Law Revision Commission Comment to *Evid. Code § 701* in annotated codes; see also *Evid. Code § 170*, defining "perceive" as meaning to acquire knowledge through one's senses].

If a party objects to a witness's testimony on the ground the witness lacks personal knowledge, personal knowledge must be shown before the witness may testify concerning the matter [*Evid. Code § 702(a)*]. The procedure for determining this preliminary fact is set forth in *Evid. Code § 403* (see discussion in *§ 551.76[3][b]*). A witness's personal knowledge of a matter may be shown by any otherwise admissible evidence, including his or her own testimony [*Evid. Code § 702(b)*; *Cassel v. Kolb (1999) 72 Cal. App. 4th 568, 580, 84 Cal. Rptr. 2d 878]* .

[3] Court's Control Over Mode of Interrogation of Witnesses

The court is required to exercise reasonable control over the mode of interrogation of a witness so as (1) to make the interrogation as rapid, as distinct, and as effective for the ascertainment of the truth as may be, and (2) to protect the witness from undue harassment or embarrassment [*Evid. Code § 765(a)*]. The court must take special care to protect a witness under the age of 14 or a dependent person with a substantial cognitive impairment from undue harassment or embarrassment and to restrict any unnecessary repetition of questions [*Evid. Code § 765(b)*; for definition of "dependent

person," *see Evid. Code § 177*]. The court also must take special care to ensure that questions are stated in a form that is appropriate to the age or cognitive level of the witness. The court may, in the interests of justice, on objection by a party, forbid the asking of a question in a form that is not reasonably likely to be understood by a person of the age or cognitive level of the witness [*Evid. Code § 765(b)*].

[4] Calling and Examination by Court

The court, on its own motion or the motion of any party, may call witnesses and interrogate them the same as if they had been produced by a party to the action. The parties may object to the questions and the evidence the same as if the witnesses had been called and examined by an adverse party. The witnesses may be cross-examined by all parties to the action in such order as the court directs [*Evid. Code § 775*].

The trial judge may examine a witness called by a party, but in so doing should not become an advocate for either party or cast aspersions or ridicule on the witness [*see, e.g., McCartney v. Commission on Judicial Qualifications (1974) 12 Cal. 3d 512, 533, 116 Cal. Rptr. 260, 526 P.2d 268* ; see also *Gonzalez v. Commission on Judicial Performance (1983) 33 Cal. 3d 359, 371 n.6, 188 Cal. Rptr. 880, 657 P.2d 372]* .

With respect to questioning by the judge, the Los Angeles County Superior Court has adopted the following policy: The trial judge ordinarily should not examine a witness until the parties have completed their questioning of the witness. If a witness is referring to graphic evidence (e.g., pointing to "here" and "there" on a map), the trial judge should make such inquiries and give such direction that the record is complete and intelligible as to the points of reference. When the judge completes such questions, all parties should have the opportunity to examine on the matters touched on by the judge [Los Angeles Co. Super. Ct. Rules, Rule 8.88].

[5] Direct, Cross, Redirect, and Recross-Examination

[a] Defined

There are four kinds of examination of witnesses, each of which is referred to as a "phase" [*see Evid. Code § 772(a)*]. They are (1) direct examination, (2) cross-examination, (3) redirect examination, and (4) recross-examination [*Evid. Code § 772(a)*; see *Evid. Code §§ 760-763*].

Direct examination is the first examination of a witness on a matter that is not within the scope of a previous examination of a witness [*Evid. Code § 760*].

Cross-examination is the examination of a witness by a party other than the direct examiner on a matter that is within the scope of the direct examination of the witness [*Evid. Code § 761*].

Redirect examination is an examination of a witness by the direct examiner subsequent to the cross-examination of the witness [*Evid. Code § 762*].

Recross-examination is an examination of a witness by a cross-examiner subsequent to a redirect examination of the witness [*Evid. Code § 763*].

[b] Order of Examination

The examination of a witness proceeds as follows: direct examination, cross-examination, redirect examination, recross-examination, and continuing thereafter by redirect and recross-examination [*Evid. Code § 772(a)*].

Each phase of the examination of a witness must be concluded before the succeeding phase begins unless for good cause the court otherwise directs [*Evid. Code § 772(b)*]. But in a civil case a party may in the court's discretion interrupt

his or her cross-examination, redirect examination, or recross-examination in order to examine the witness on a matter not within the scope of a previous examination of the witness [*Evid. Code § 772(c)*].

[c] Order and Scope of Cross-Examination

A witness examined by one party may be cross-examined by each other party to the action in such order as the court directs [*Evid. Code § 773(a)*]. The order of cross-examination by the parties in multiple-party cases sometimes is resolved by the judge at the chambers conference before trial [*see* discussion in Subpart C].

The witness may be cross-examined on any matter within the scope of the direct examination [*Evid. Code § 773(a)*]. However, the cross- examination need not be confined to a mere categorical review of matters, dates, or times mentioned in the direct examination. Rather, the scope of proper cross-examination may extend to the whole transaction of which the witness has testified, or it may be employed to elicit any matter that may tend to overcome, qualify, or explain the testimony given by a witness on his or her direct examination. Moreover, the witness can be cross examined with respect to facts or denials that are necessarily implied from his or her testimony in chief, as well as with respect to facts that the witness expressly states or that are connected with them [*Gallaher v. Superior Court (1980) 103 Cal. App. 3d 666, 671, 162 Cal. Rptr. 389]* . And the cross-examiner, unlike the direct examiner, may ask leading questions [*see Evid. Code § 767(a)(2)* and discussion under [6], *below*].

Notwithstanding the above, the cross-examination of a witness by any party whose interest is not adverse to the party calling the witness is subject to the same rules that apply to the direct examination [*Evid. Code § 773(b)*]; that is, leading questions may not be asked except under special circumstances where the interests of justice otherwise require [*see Evid. Code § 767(a)*].

[d] Reexamination

A witness once examined cannot be reexamined as to the same matter without leave of court, but the witness may be reexamined as to any new matter on which he or she has been examined by another party to the action. Leave may be granted or withheld in the court's discretion [*Evid. Code § 774*].

[e] Recall of Witness

After a witness has been excused from giving further testimony, he or she cannot be recalled without leave of the court. Leave may be granted or withheld in the court's discretion [*Evid. Code § 778*].

[6] Leading Questions

A leading question is one that suggests to the witness the answer the examining party desires [*Evid. Code § 764*]. Except under special circumstances when the interests of justice otherwise require, a leading question may not be asked of a witness on direct or redirect examination, but a leading question may be asked of a witness on cross-examination or recross-examination [*Evid. Code § 767*].

Under the "special circumstances" exception, a leading question may be asked on direct examination of a witness when there is little danger of improper suggestion or when the question is necessary to obtain relevant evidence. This would permit leading questions on direct examination to establish preliminary matters or to refresh recollection, and in examining handicapped witnesses, expert witnesses, and hostile witnesses [*see* Assembly Committee on Judiciary's Comment to *Evid. Code § 767* in annotated codes; *see also People v. Augustin (2003) 112 Cal. App. 4th 444, 449-450, 5 Cal. Rptr. 3d 171* (use of leading questions provided more efficient and less biased way for victim who suffered from cerebral palsy to communicate her testimony); *Gore v. Board of Medical Quality Assurance (1980) 110 Cal. App. 3d 184, 191, 167 Cal. Rptr. 881* (damaging testimony by expert medical witness against petitioner at administrative hearing, some of which was elicited by leading questions); *People v. Campbell (1965) 233 Cal. App. 2d 38, 44, 43*

Cal. Rptr. 237] . Leading questions also may be asked (1) in examining an adverse party or a witness identified with an adverse party [*see Evid. Code § 776(a)*, and discussion in [11][a], *below*]; and (2) to identify exhibits [*see People v. Campbell (1965) 233 Cal. App. 2d 38, 44, 43 Cal. Rptr. 237]* . By the same token, the court may forbid the asking of leading questions on cross-examination when the witness is biased in favor of the cross-examiner and would be unduly susceptible to the influence of questions that suggested the desired answer [*see* Assembly Committee on Judiciary's Comment to *Evid. Code § 767* in annotated codes].

[7] Responsive Answers

A witness must give responsive answers to questions. Answers that are not responsive must be stricken on the motion of a party [*Evid. Code § 766*].

[8] Writings

In examining a witness concerning a writing, it is not necessary to show, read, or disclose to the witness any part of the writing [*Evid. Code § 768(a)*]. If a writing is shown to the witness, all parties to the action must be given an opportunity to inspect it before any question concerning it may be asked of the witness [*Evid. Code § 768(b)*].

[9] Prior Inconsistent Statements or Conduct

A witness may be impeached by prior statements that are inconsistent with the witness's express or implied testimony [*see Evid. Code § 780(h)* (discussed in *§ 551.122*)]. However, certain prior statements may be inadmissible, even for impeachment. For example, a witness's testimony from a judicial arbitration is not admissible to impeach his or her testimony at a subsequent trial [*Jimena v. Alesso (1995) 36 Cal. App. 4th 1028, 1031, 43 Cal. Rptr. 2d 18* ; *see* Ch. 36, *Judicial Arbitration*]. In examining a witness about a statement or other conduct of the witness that is inconsistent with any part of his or her testimony, it is not necessary to disclose any information concerning the statement or other conduct [*Evid. Code § 769*].

However, if evidence of a prior inconsistent statement is subsequently sought to be introduced, a foundational showing under the provisions of *Evid. Code § 770* is required. *Evid. Code § 770* provides that unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his or her testimony must be excluded unless (1) the witness was so examined while testifying as to give the witness an opportunity to explain or deny the statement, or (2) the witness has not been excused from giving further testimony in the action [*see Bossi v. State of California (1981) 119 Cal. App. 3d 313, 324, 174 Cal. Rptr. 93]* . To meet the requirements of the first alternative, the witness should be asked whether or not he or she made the specific inconsistent statement. It is insufficient opportunity for a witness to explain or deny a prior inconsistent statement, for example, by handing the witness a copy of a 60-page transcript of a deposition, which was taken some 18 months before, and asking the witness if at that time and place all of these questions were asked and all of these answers given [*Bossi v. State of California (1981) 119 Cal. App. 3d 313, 325, 174 Cal. Rptr. 93* (holding that witness, who answered "yes" was not provided with any "realistic opportunity to explain or deny any specific statement contained" in transcript)].

[10] Refreshing Memory

If a witness, either before or while testifying, uses a writing to refresh his or her memory with respect to any matter about which he or she testifies, the writing must be produced at the request of an adverse party [*Evid. Code § 771(a)*].

If the writing is produced, the adverse party may inspect it, cross-examine the witness concerning it, and introduce in evidence such portion of it as may be pertinent to the witness's testimony [*Evid. Code § 771(b)*]. However, the rights granted by this provision are not unlimited. For example, a traffic accident report used to refresh the recollection of the officer who made it is not admissible in evidence under *Evid. Code § 771(b)* in an action arising out of the accident [*see Veh. Code § 20013*; *Box v. California Date Growers Assn. (1976) 57 Cal. App. 3d 266, 270, 129 Cal. Rptr. 146* ; cf.

Sherrell v. Kelso (1981) 116 Cal. App. 3d Supp. 22, 27-35, 172 Cal. Rptr. 667 (contents of traffic accident report may, however, be read into evidence as a past recollection recorded under *Evid. Code § 1237* when proper foundation is laid)].

[11] Calling Adverse Party or Person Identified With Adverse Party

[a] Examination

A party or a person identified with a party (*see Evid. Code § 776(d)*, discussed in [b], *below*) may be called and examined as if under cross-examination by any adverse party at any time during the presentation of evidence by the party calling the witness [*Evid. Code § 776(a)*; see Cal. Law Revision Commission Comment to *Evid. Code § 776* in annotated codes]; that is, leading questions may be asked except under special circumstances where the interests of justice otherwise require [*see Evid. Code § 767(a)(2)* and discussion under [6], *above*]. For the purposes of this rule, parties represented by the same counsel are deemed to be a single party [*Evid. Code § 776(c)*].

The purpose of the foregoing provisions is to enable a party to call his or her adversary and elicit testimony without making that party his or her own witness. The examination often is exploratory and requires no offer of proof [*Murry v. Manley (1959) 170 Cal. App. 2d 364, 366, 338 P.2d 976* (involving former *Code Civ. Proc. § 2055*, the predecessor to *Evid. Code § 776*)]. But the examination may prevent counsel's cross-examining the same party on the same matter when called by another party [*see Evid. Code § 774*, discussed in [5][d], *above*].

[b] "Person Identified With Party" Defined

A person is identified with a party if he or she is (1) a person for whose immediate benefit the action is prosecuted or defended by the party; or (2) a director, officer, superintendent, member, agent, employee, or managing agent of the party or person, or an employee of a public entity that is the party, or (3) a person who was in any of the relationships specified in (2) either at the time of the act or omission giving rise to the cause of action or at the time he or she obtained knowledge of the matter concerning which he or she is to be examined under *Evid. Code § 776* [*Evid. Code § 776(d)*].

[c] Cross-Examination

A witness so examined by an adverse party may be cross-examined by all other parties in such order as the court directs [*Evid. Code § 776(b)*]. However, subject to *Evid. Code § 776(e)*, the cross-examination is to be conducted as if the witness were under redirect examination (that is, under *Evid. Code § 767(a)* leading questions may not be asked except under special circumstances where the interests of justice otherwise require) when the examination is by: (1) if the witness is a party, his or her own counsel or counsel for a party who is not adverse to the witness; and (2) if the witness is not a party, by counsel for the party with whom the witness is identified or counsel for a party who is not adverse to the party with whom the witness is identified [*Evid. Code § 773(b)*]. But in the latter case (witness who is not a party), counsel for the party with whom the witness is identified and counsel for a party who is not adverse to the party with whom the witness is identified are not required to examine the witness as if under redirect examination if the party who called the witness is either (1) also a person identified with the same party with whom the witness is identified or (2) the personal representative, heir, successor, or assignee of a person identified with the same party with whom the witness is identified [*Evid. Code § 776(e)*].

The introductory portion of *Evid. Code § 776(b)* states the general rule that a witness examined under the section may be cross-examined by all other parties to the action in such order as the court directs. For example, a party whose interest in the action is identical with that of the party who called the witness for examination under the section has a right to cross-examine the witness fully because he or she, too, has the right to call the witness for examination under the section. Similarly, a party whose interest in the action is adverse to the party who called the witness for examination under the section has the right to cross-examine the witness fully unless he or she is identified with the witness as

described in *Evid. Code § 776(b)(1)* and *(2)*. *Evid. Code § 776(b)(1)* and *(2)* restrict the nature of the cross examination permitted of a witness by a party with whom the witness is identified and by parties whose interest in the action is not adverse to the party with whom the witness is identified. These parties are limited to examination of the witness as if under redirect examination. In essence, this means that leading questions cannot be asked of the witness by these parties [*see Evid. Code § 767(a)*]. Although the examination must proceed as if it were a redirect examination, under *Evid. Code § 761* it is in fact a cross-examination and limited to the scope of the direct examination [*see* Cal. Law Revision Commission Comment to *Evid. Code § 776* in annotated codes].

Evid. Code § 776 permits a party calling as a witness an employee of an adverse party (or someone similarly identified in interest with an adverse party) to examine the witness as if under cross-examination, that is, to use leading questions in the examination. The section requires the party whose employee was thus called and examined to examine the witness as if under redirect examination, that is, to refrain from the use of leading questions. If a party is able to persuade the court that the usual rule prescribed by *Evid. Code § 776* is not in the interest of justice in the particular case, the court may enlarge or restrict the right to use leading questions as provided in *Evid. Code § 767*. These rules are based on the premise that ordinarily the witness will have a feeling of identification in the lawsuit with his or her employer rather than with the other party to the action. But the premise on which *Evid. Code § 776* is based does not necessarily apply when the party calling the witness is also closely identified with the adverse party. In such a case, *Evid. Code § 776(e)* entitles the adverse party to the usual rights of a cross-examiner when examining the witness. For example, when an employee sues his or her employer and calls a coemployee as a witness, there is no reason to assume the coemployee-witness will be adverse to the employee-party and in sympathy with the employer-party. The reverse may be the case. *Evid. Code § 776(e)* permits the employer in such a case, as a general rule, to use leading questions in its cross-examination of the coemployee-witness called to testify by the employee party under *Evid. Code § 776*. However, if the party calling the witness can satisfy the court that the coemployee witness is in fa identified in interest with the employer or for some other reason is amenable to suggestive questioning by the employer, the court may limit the employer's use of leading questions during its examination of the witness pursuant to *Evid. Code § 767* [*see* Cal. Law Revision Commission Comment to 1967 Amendment of *Evid. Code § 776* in annotated codes].

[12] Expert Witnesses

A witness testifying as an expert may be cross-examined to the same extent as any other witness. The witness also may be fully cross-examined as to (1) his or her qualifications, (2) the subject to which his or her expert testimony relates, and (3) the matter on which his or his opinion is based and the reasons for the opinion [*Evid. Code § 721(a)*]. However, a witness who testifies in the form of an opinion may not be cross-examined in regard to the content or tenor of any scientific, technical, or professional text, treatise, journal, or similar publication unless (1) the witness referred to, considered, or relied on the publication in arriving at or forming the opinion, or (2) the publication has been admitted in evidence, or (3) the publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, relevant portions of the publication may be read into evidence but may not be received as exhibits [*Evid. Code § 721(b)*]. The purpose of *Evid. Code § 721(b)* is to prevent the cross-examiner from putting the views of an absent expert (inadmissible hearsay) before the jury. The term "similar publication" is, therefore, broadly construed. For example, a written report that was not published for mass consumption may be excluded as a "similar publication" [*McGarity v. Department of Transportation (1992) 8 Cal. App. 4th 677, 682-684, 10 Cal. Rptr. 2d 344]* .

A treating physician is a percipient expert, but his or her testimony is not limited to personal observations. Like any other expert, the treating physician may provide both fact and opinion testimony. Further, for a treating physician, no expert witness declaration is required, and the physician may testify as to any opinions formed on the basis of facts independently acquired and informed by training, skill, and experience, which could include opinions regarding causation and standard of care, because those issues are inherent in a physician's work [*Schreiber v. Estate of Kiser (1999) 22 Cal. 4th 31, 35, 49, 91 Cal. Rptr. 2d 293, 989 P.2d 720]* .

Any expert appointed by the court under *Evid. Code § 730* (discussed in *§ 551.113[5]*) may be called and examined by the court or by any party to the action. When the witness is called and examined by the court, the parties have the same right to cross-examine the witness and to object to the questions asked and the evidence adduced as expressed in *Evid. Code § 775* (discussed in [4], *above*) [*Evid. Code § 732*].

For the manner of impeaching the testimony of an expert, see discussion in *§ 551.123[3]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyExaminationCross-ExaminationGeneral OverviewEvidenceTestimonyExaminationDirect ExaminationEvidenceTestimonyExaminationJudicial InterrogationEvidenceTestimonyExaminationLeading QuestionsEvidenceTestimonyPresentation of Evidence

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48-551 California Forms of Pleading and Practice--Annotated § 551.122

§ 551.122 Factors Considered in Determining Witness's Credibility

Except as otherwise provided by statute, the court or jury, in determining a witness's credibility, may consider any matter that has any tendency in reason to prove or disprove the truthfulness of the witness's testimony, including but not limited to the following [*Evid. Code § 780*]:

- The witness's demeanor while testifying and the manner in which he or she testifies [*Evid. Code § 780(a)*; *see Meiner v. Ford Motor Co. (1971) 17 Cal. App. 3d 127, 140, 94 Cal. Rptr. 702* (trier of fact is sole and exclusive judge of credibility of witnesses as determined by their demeanor); *see also Linsk v. Linsk (1969) 70 Cal. 2d 272, 278-279, 74 Cal. Rptr. 544, 449 P.2d 760* (right of party to have trier of fact observe his or her demeanor and that of adversary and other witnesses during examination and cross-examination is incontrovertible)].

- The character of the testimony [*Evid. Code § 780(b)*; *see Estate of Baker (1982) 131 Cal. App. 3d 471, 483, 182 Cal. Rptr. 550* (trier of fact's determination will be interfered with on appeal only when it appears witness's testimony is inherently so improbable as to be unworthy of belief); *Wilson v. State Personnel Bd. (1976) 58 Cal. App. 3d 865, 877, 130 Cal. Rptr. 292* (same)].

- The extent of the witness's capacity to perceive, to recollect, or to communicate any matter about which he or she testifies [*Evid. Code § 780(c)*].

- The extent of the witness's opportunity to perceive any matter about which he or she testifies [*Evid. Code § 780(d)*].

- The witness's character for honesty or veracity, or their opposites [*Evid. Code § 780(e)*].

- The existence or nonexistence of a bias, interest, or other motive [*Evid. Code § 780(f)*; *see Grudt v. City of Los Angeles (1970) 2 Cal. 3d 575, 591-592, 86 Cal. Rptr. 465, 468 P.2d 825* (manner of showing bias)].

- A statement previously made by the witness that is consistent with his or her testimony [*Evid. Code § 780(g)*].

- A statement previously made by the witness that is inconsistent with any part of his or her testimony [*Evid. Code § 780(h)*; *see Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 647, 151 Cal. Rptr. 399* (prior statements inconsistent with express or im plied testimony of witness are admissible for impeachment); *see also Marocco v. Ford Motor Co. (1970) 7 Cal. App. 3d 84, 94, 86 Cal. Rptr. 526* (party may not secure admission of otherwise inadmissible evidence for purpose of subsequently impeaching it); and *discussion under § 551.121[9]*].

- The existence or nonexistence of any fact testified to by the witness [*Evid. Code § 780(i)*; *see Kennemur v. State of California (1982) 133 Cal. App. 3d 907, 923-924, 184 Cal. Rptr. 393]* .

- The witness's attitude toward the action or the giving of testimony [*Evid. Code § 780(j)*].

- The witness's admission of untruthfulness [*Evid. Code § 780(k)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceTestimonyCredibilityImpeachmentGeneral OverviewEvidenceTestimonyCredibilityImpeachmentBad Character for TruthfulnessGeneral OverviewEvidenceTestimonyCredibilityImpeachmentBias, Motive & PrejudiceEvidenceTestimonyCredibilityImpeachmentContradictionEvidenceTestimonyCredibilityImpeachmentPrior Inconsistent Statements

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48-551 California Forms of Pleading and Practice--Annotated § 551.123

§ 551.123 Supporting or Attacking Witness's Credibility

[1] By Whom

The credibility of a witness may be attacked or supported by any party, including the party calling the witness [*Evid. Code § 785*].

[2] Methods

Evid. Code § 780 (discussed in *§ 551.122*) recites most of the commonly used methods of impeaching the credibility of a witness [*Kennemur v. State of California (1982) 133 Cal. App. 3d 907, 921, 184 Cal. Rptr. 393]* .

[3] Impeachment of Expert Witnesses

An expert witness, like a lay witness, may be impeached on any of the grounds set forth in *Evid. Code § 780* (discussed in *§ 551.122*). Thus, a party may impeach an expert witness by evidence showing the nonexistence of any fact testified to by the expert [*see Evid. Code § 780(i)*]. This can be done either by cross-examination of the expert or by calling other witnesses to offer evidence showing the nonexistence or error in the data on which the first expert based his or her opinion. The rationale of the rule is that by showing the falsity of a fact asserted by the expert, the expert's entire testimony is brought into question [*Kennemur v. State of California (1982) 133 Cal. App. 3d 907, 922-923, 184 Cal. Rptr. 393]* .

To impeach an expert witness by showing the nonexistence of any fact testified to by the expert [*Evid. Code § 780(i)*], a distinction must be made between the expert's opinion and the foundational facts on which the opinion is based. When the facts underlying the expert's opinion are proved to be false or nonexistent, not only is the expert's opinion destroyed but the falsity permeates his or her entire testimony; it tends to prove the expert's untruthfulness as a witness [*Kennemur v. State of California (1982) 133 Cal. App. 3d 907, 923-924, 184 Cal. Rptr. 393]* . On the other hand, an expert witness is not impeached merely by producing another expert who testifies to a different opinion. That is simply rebuttal and suggests only that the first expert may have reasoned incorrectly, not that the first expert is untruthful [*Kennemur v. State of California (1982) 133 Cal. App. 3d 907, 923, 184 Cal. Rptr. 393* ; *Fish v. Guevara (1993) 12*

Cal. App. 4th 142, 146, 15 Cal. Rptr. 2d 329] .

An expert cannot be cross-examined as to the content or tenor of any scientific, technical, or professional publication that he or she did not consider in forming an opinion unless the publication has been admitted into evidence or the publication has been established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice [*Evid. Code § 721(b)*; *McGarity v. Department of Transportation (1992) 8 Cal. App. 4th 677, 681, 10 Cal. Rptr. 2d 344]* . An expert may be cross-examined about his or her compensation or expenses [*Evid. Code § 722(b)*].

[4] Appointment and Payment of Expert Witnesses

When an expert witness is appointed by the court, that fact may be revealed to the jury [*Evid. Code § 722(a)*].

The compensation and expenses paid or to be paid to an expert witness by the party calling the witness are a proper subject of inquiry by any adverse party as relevant to the credibility of the witness and the weight of the witness's testimony [*Evid. Code § 722(b)*].

[5] Inadmissible Evidence

The following evidence is inadmissible to support or attack a witness's credibility:

- Evidence of the witness's character traits other than honesty or veracity, or their opposites [*Evid. Code § 786*; *see People v. Jones (1984) 155 Cal. App. 3d 153, 184, 202 Cal. Rptr. 162]* . However, evidence that a witness has been convicted of a felony is admissible to show bias under *Evid. Code § 786* without regard to the nature of the underlying crime, since it relates to the character traits of honesty and truthfulness [*Piscitelli v. Salesian Society (2008) 166 Cal. App. 4th 1, 6-10, 82 Cal. Rptr. 3d 139*].

- Evidence of specific instances of conduct tending to prove only a character trait of the witness, unless it is evidence of an unexpunged felony conviction [*Evid. Code §§ 787, 788*; *see Grudt v. City of Los Angeles (1970) 2 Cal. 3d 575, 591-592, 86 Cal. Rptr. 465, 468 P.2d 825* (*Evid. Code §§ 787* and *788* cannot be circumvented under the guise of showing the bias of the witness under *Evid. Code § 780(f)*, discussed in *§ 551.122*; evidence of prior arrests inadmissible to show bias in wrongful death action against city and police officers); for related jury instruction on use of a prior conviction of a felony, see *Judicial Council of California Civil Jury Instructions, CACI No. 211* (Matthew Bender), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions]. However, the admission of felony convictions for impeachment is not automatic. On proper objection to the admission of a felony conviction for impeachment in a civil case, the trial judge is required to weigh the probative value of the conviction against its prejudicial effect under *Evid. Code § 352* [*Robbins v. Wong (1994) 27 Cal. App. 4th 261, 274* (criminal decisions may be used to guide weighing process)]. However, the enactment of *Cal. Const., art. I, § 28(d)* supersedes all California restrictions on the admission of relevant evidence except those preserved or permitted by the express words of section 28(d) itself [*People v. Wheeler (1992) 4 Cal.4th 284, 291, 14 Cal. Rptr. 2d 418, 841 P.2d 938]* . Among those provisions superseded is *Evid. Code § 787* [*In re Freeman (2006) 38 Cal. 4th 630, 640 n.5, 42 Cal. Rptr. 3d 850, 133 P.3d 1013]* .

- Evidence of the witness's religious beliefs or lack of them [*Evid. Code § 789*; *see also Drake v. Dean (1993) 15 Cal. App. 4th 915, 933, 19 Cal. Rptr. 2d 325* (relevant inquiry whether witness's membership in religious sect or tenet of faith might tend to bias witness as not prohibited)].

- Evidence of the witness's good character unless evidence of the witness's bad character has been

admitted for the purpose of attacking his or her credibility [*Evid. Code § 790*].

Evidence of a previous consistent statement made by a witness also is inadmissible to support the witness's credibility unless it is offered after (1) evidence of an inconsistent statement has been admitted for the purpose of attacking the witness's credibility and the consistent statement was made before the alleged inconsistent statement, or (2) an express or implied charge has been made that the witness's testimony was recently fabricated or influenced by bias or other improper motive and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen [*Evid. Code § 791*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceRelevanceCharacter EvidenceEvidenceTestimonyCredibilityImpeachmentGeneral OverviewEvidenceTestimonyCredibilityImpeachmentConvictionsInadmissibilityEvidenceTestimonyCredibilityOne's Own WitnessesGeneral OverviewEvidenceTestimonyCredibilityRehabilitation

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[Reserved]

§§ 551.124[Reserved]

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48-551 California Forms of Pleading and Practice--Annotated § 551.140

§ 551.140 Right of Counsel to Argue Case

When the evidence is concluded, unless the case is submitted without argument, the parties may present their argument or summation [*Code Civ. Proc. §§ 607(7), 631.7*; *see § 551.50* et seq.]. The right to argue the case is absolute in a jury trial, but in a case tried without a jury, the right to argue is a privilege accorded the parties by the court in its discretion [*Gillette v. Gillette (1960) 180 Cal. App. 2d 777, 781, 4 Cal. Rptr. 700]* . If the right to argue is granted in a nonjury trial, the court may limit the length of the summation [*Guardianship of Baby Boy M. (1977) 66 Cal. App. 3d 254, 278, 135 Cal. Rptr. 866]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsBench TrialsCivil ProcedureTrialsClosing ArgumentsGeneral Overview

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48-551 California Forms of Pleading and Practice--Annotated § 551.141

§ 551.141 Content of Argument

[1] Proper Argument

In summing up, counsel may indulge in all fair arguments in favor of his or her client's case but may not assume facts not in evidence or, in a jury trial, invite the jury to speculate as to unsupported inferences [*Neumann v. Bishop (1976) 59 Cal. App. 3d 451, 479, 130 Cal. Rptr. 786]* . However, counsel may argue all reasonable inferences from the evidence and may with propriety comment on the demeanor of a witness indicating recalcitrance [*Brokopp v. Ford Motor Co. (1977) 71 Cal. App. 3d 841, 860-861, 139 Cal. Rptr. 888]* . While the trial judge may properly insist that counsel not undertake to tell the jury what the judge will say, counsel is not precluded from discussing the pertinent law and its application to the facts. The right of discussing the merits of the cause, both as to the law and facts, is unabridged. The range of discussion is wide and counsel may be heard in argument on every question of law, provided his or her statement of the law is correct [*Neumann v. Bishop (1976) 59 Cal. App. 3d 451, 479-480, 130 Cal. Rptr. 786]* .

[2] Improper Argument

On the other hand, the following have been held to be improper argument [*Garden Grove School Dist. v. Hendler (1965) 63 Cal. 2d 141, 143, 45 Cal. Rptr. 313, 403 P.2d 721* (reversing judgment in eminent domain proceeding because of prejudicial misconduct of plaintiff's counsel in remarks during trial and in summation to jury)]:

- Counsel's alluding to his or her personal knowledge in summation to the jury.
- Resorting to insulting and derogatory characterizations of the adverse party.
- Appealing to the jurors' economic self-interest and provinciality.
- By innuendo impugning the adverse party's motives and purpose.

Other matters held to be improper include [*Brokopp v. Ford Motor Co. (1977) 71 Cal. App. 3d 841, 859-862, 139 Cal.*

Rptr. 888 (action for damages arising out of one-vehicle accident caused by failure of defective part of vehicle)]:

- Making a "golden rule" argument (that is, asking jurors in calculating damages to place themselves in plaintiff's shoes and award amount they would charge to undergo equivalent disability, pain, and suffering) or a variant of the rule.

- Making an appeal to the sympathy of the jury based on defendant's size and corporate status.

- Making an appeal to the self-interest of the jurors as taxpayers.

- Arguing a matter not in evidence and contrary to all of the pertinent expert testimony.

In addition, it has been held prejudicial error to overrule a party's objection to the comments and arguments of the adverse party's counsel on the failure of the objecting party to call certain witnesses when the witnesses were equally available to subpoena by either party [*Smith v. Covell (1980) 100 Cal. App. 3d 947, 956-957, 161 Cal. Rptr. 377]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsClosing ArgumentsImproper RemarksCivil ProcedureTrialsClosing ArgumentsObjections

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[Reserved]

§§ 551.142[Reserved]

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§ 551.150 Governing Law

Motions for mistrial, although recognized by statute (see, for example, *Evid. Code §§ 703(c), 704(c)*) and inferentially authorized by *Code Civ. Proc. § 616*, are nonstatutory and governed primarily by case law [*see, e.g., Reimer v. Firpo (1949) 94 Cal. App. 2d 798, 801, 212 P.2d 23 ; see also* California Judges Benchbook--Civil Trials, Ch. 10, *Mistrials*, § 10.2 (CJER 1981); *California Trial Guide, § 3.32* (Matthew Bender)].

Motions for mistrial on the ground that the presiding judge or a juror is called as a witness are governed by *Evid. Code §§ 703* (judge) and 704 (juror). The declaration of a mistrial for failure to complete the trial of a short cause on time is governed by *Cal. Rule of Ct., Rule 3.735(c)*. The retrial of an action after declaration of a mistrial is governed by *Code Civ. Proc. § 616*. Dismissal for failure to prosecute after declaration of a mistrial is governed by *Code Civ. Proc. §§ 583.320(a)(1), 583.420(a)(3)(A)* and is discussed in Ch. 212, *Dismissal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureTrialsMotions for Mistrial

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48-551 California Forms of Pleading and Practice--Annotated § 551.151

§ 551.151 Mistrial and New Trial Distinguished

A mistrial and a new trial differ in both name and effect. A mistrial is the termination of a trial before its conclusion and is the equivalent of no trial [*see Estate of Bartholomae (1968) 261 Cal. App. 2d 839, 842, 68 Cal. Rptr. 332]* . When a trial is incomplete, the trial court's power is limited to declaring a mistrial and resetting the cause for trial. For example, the successor of a trial judge has no authority to decide or to make a statement of decision in a case not tried by him or her. Thus, when material issues are not passed on and disposed of in the trial, it is deemed a mistrial and another trial must be held. A motion for new trial under these circumstances would be premature [*see Reimer v. Firpo (1949) 94 Cal. App. 2d 798, 801, 212 P.2d 23]* .

In contrast, a new trial recognizes a completed trial that for sufficient reasons has been set aside [*Estate of Bartholomae (1968) 261 Cal. App. 2d 839, 842, 68 Cal. Rptr. 332]* . Under *Code Civ. Proc. § 656*, a new trial is a reexamination of an issue of fact in the same court after a trial and decision by a jury, court, or referee [*Code Civ. Proc. § 656*; *see Stoumen v. Munro (1963) 219 Cal. App. 2d 302, 319, 33 Cal. Rptr. 305* (when findings, now statement of decision under *Code Civ. Proc. § 632*, required, case was not complete but still in process of determination until findings signed and filed)].

It is not presumed that the trial court intended to grant a motion for new trial when no power to grant the motion existed. Thus, a premature motion for a new trial will be interpreted as a motion for a declaration of a mistrial [*Estate of Bartholomae (1968) 261 Cal. App. 2d 839, 842, 68 Cal. Rptr. 332* ; *see Reimer v. Firpo (1949) 94 Cal. App. 2d 798, 801-802, 212 P.2d 23* ; *see also Barendregt v. Downing (1959) 175 Cal. App. 2d 733, 736, 346 P.2d 870* (order purporting to grant new trial when there is no completed trial will be interpreted as order for mistrial)]. For additional discussion of motions for new trial, see Ch. 371, *Motions After Trial* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsMotions for MistrialCivil ProcedureJudgmentsRelief From JudgmentMotions for New Trials

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48-551 California Forms of Pleading and Practice--Annotated § 551.152

§ 551.152 Grounds for Declaring Mistrial

[1] Overlap With Grounds for New Trial

Some of the grounds for granting a mistrial and ordering a new trial are the same. For example, the court may grant either motion based on the misconduct of counsel or the judge [*see Code Civ. Proc. § 657(1)*; *Pacific Gas & Electric Co. v. Spencer (1960) 181 Cal. App. 2d 171, 172, 5 Cal. Rptr. 75* ; *see also* [2], [4], *below*]. In addition, a mistrial may be declared or a new trial may be ordered because of misconduct of the jury [*see Code Civ. Proc. § 657(2)*; *see also* [3], *below*].

This overlap, however, is not complete. A new trial may be granted because of insufficiency of the evidence to justify the verdict or other decision, but a mistrial may not be declared on this ground [*see Code Civ. Proc. § 657(6)*; *Heavy Duty Truck Leasing, Inc. v. Superior Court (1970) 11 Cal. App. 3d 116, 119, 89 Cal. Rptr. 598]* . For additional discussion of the grounds for granting a new trial, see § 72.73.

[2] Misconduct of Counsel

[a] In General

A mistrial may be granted when counsel deliberately engages in misconduct [*see Hartman v. Gordon H. Ball, Inc. (1969) 269 Cal. App. 2d 779, 783, 75 Cal. Rptr. 618]* . Although aggressive advocacy is not only proper but desirable, there is a limit. Thus, when the misconduct is intentional, blatant, and continuous from opening statement throughout the trial to closing argument, and is committed by a seasoned and experienced trial lawyer, reversal of the judgment is proper [*see Love v. Wolf (1964) 226 Cal. App. 2d 378, 393-394, 38 Cal. Rptr. 183]* .

Counsel commits misconduct when he or she makes improper references to the financial ability of defendant to respond in damages in a personal injury case [*see Hoffman v. Brandt (1966) 65 Cal. 2d 549, 553-555, 55 Cal. Rptr. 417, 421 P.2d 425]* . Thus, in an action for damages against a public employee, disclosure of the possibility that a public entity may pay the punitive damage portion of the judgment when it is alleged that the public employee is liable for punitive or exemplary damages is grounds for a mistrial [*Gov. Code § 825(b)*]. In addition, personal attacks on the character or

motives of the adverse party, the party's counsel or witnesses are misconduct. Likewise, attempts to appeal to the prejudice, passions, or sympathy of the jury are misconduct [*Stone v. Foster (1980) 106 Cal. App. 3d 334, 355, 164 Cal. Rptr. 901]* .

[b] Inquiry Regarding Insurance

Counsel may commit misconduct by raising the issue of insurance coverage. Generally, on voir dire counsel may inquire about insurance companies by asking questions that are reasonably necessary to ascertain whether prospective jurors are free from a bias or interest that may affect their verdict. The questions, however, must be propounded in good faith. The test of good faith is whether the questions are asked in such a manner as to necessarily convey the impression that a defendant is in fact insured [*Elford v. Hiltabrand (1944) 63 Cal. App. 2d 65, 70, 146 P.2d 510* ; *see Evid. Code § 1155* (evidence that person was insured against loss arising from liability inadmissible to prove negligence or other wrongdoing)].

Thus, in a personal injury action, counsel may, in good faith, ask prospective jurors whether they are interested in a particular insurance company so long as the question does not unnecessarily convey the impression that defendant is in fact insured [*Hart v. Wielt (1970) 4 Cal. App. 3d 224, 230, 84 Cal. Rptr. 220* ; *but see Scally v. Pacific Gas & ElectricCo. (1972) 23 Cal. App. 3d 806, 814, 100 Cal. Rptr. 501* (when insurance company not party, improper to ask prospective jurors questions about ownership of stock or other financial interest in insurance companies)].

[c] Determining Whether Misconduct Is Prejudicial

After finding that counsel committed misconduct, the court must determine whether it was prejudicial. Generally, the trial court's judgment has been affirmed, despite the misconduct, when the question of liability was not a close one and when the damages awarded were not disproportionate to the injuries received. A close question of liability, however, indicates that any misconduct might well have played a definite part in improperly influencing the jury, and the conduct must be treated as prejudicial. For example, counsel's line of examination that suggests to the jury that the defendant is indemnified against any judgment for damages is highly prejudicial to the defendant's rights, especially in a closely balanced case in which the evidence otherwise would be easily sufficient on appeal to support a verdict either for the plaintiff or for the defendant [*see Robinson v. Wada (1935) 10 Cal. App. 2d 5, 9, 10, 51 P.2d 171]* .

In a closely balanced case, whether counsel's improper action constitutes prejudicial misconduct that cannot be cured by the court's admonition is determined by the court's view of the overall record, taking into account the nature and seriousness of the remarks, the good faith of counsel, whether the misconduct consisted of a single utterance or repeated, persistent reiteration, the judge's control of the trial, and the likelihood of prejudicing the jury [*Scally v. Pacific Gas & Electric (1972) 23 Cal. App. 3d 806, 814, 100 Cal. Rptr. 501* ; see *Sabella v. Southern Pacific Co. (1969) 70 Cal. 2d 311, 318, 320-321, 74 Cal. Rptr. 534, 449 P.2d 750* , *cert. denied, 395 U.S. 960* (dicta)].

[3] Misconduct of Juror

A motion for mistrial may be made for improper conduct of a juror. For example, counsel may make the motion when opposing counsel communicates with a juror during a recess in the proceedings [*see Garden Grove School Dist. v. Hendler (1965) 63 Cal. 2d 141, 144, 45 Cal. Rptr. 313, 403 P.2d 721* (motion for mistrial denied, but error could have been corrected by replacing juror with alternate under former *Code Civ. Proc. § 605* (*now Code Civ. Proc. §§ 233-234*))]. For additional discussion of juror misconduct as grounds for a new trial, see Ch. 371, *Motions After Trial* .

The failure of counsel to move for a mistrial immediately after learning about juror misconduct, however, may constitute a waiver of the right to complain later [*see Schouten v. Crawford (1953) 118 Cal. App. 2d 59, 65, 257 P.2d 88* (failure to object to juror's examination of matters outside evidence when counsel knew about incident before jury returned verdict); *see also § 551.153*].

[4] Misconduct of Judge

Misconduct by a judge may also be grounds for a mistrial. For example, a trial judge cannot justify being discourteous to counsel, witnesses, parties, or jurors. A judge presiding at a trial should conduct it in a fair and impartial manner and refrain from making unnecessary comments during the course of the trial that may tend toward a prejudicial result to a litigant. Thus, a judge commits misconduct when his or her remarks indicate to the jury that a party was not telling the truth or that counsel was trying to keep the facts from being presented to the jury [*Etzel v. Rosenbloom (1948) 83 Cal. App. 2d 758, 762, 189 P.2d 848* (grounds for new trial)].

It is also misconduct for a judge to make comments that indicate more than a slight leaning to one side [*Newman v. First California Co. (1975) 47 Cal. App. 3d 60, 68, 120 Cal. Rptr. 494 , cert. denied, 423 U.S. 928* (misconduct not prejudicial)]. In addition, the judge should avoid, in the presence of the jury, any utterance that may be construed as an intimation of his or her opinion on the issues of fact that are to be determined by the jury [*Berguin v. Pacific Elec. Ry. Co. (1928) 203 Cal. 116, 121, 263 P. 220* (judge remarked on plaintiff's ability to walk unassisted)].

Any misconduct on the part of the trial judge from which it may be rightfully deduced that the jury was influenced in rendering its verdict constitutes prejudicial error. Counsel must object to the misconduct, but apparently need not request an admonition in order to preserve the error for appeal [*see Delzell v. Day (1950) 36 Cal. 2d 349, 351, 223 P.2d 625* ; *Berguin v. Pacific Elec. Ry. Co. (1924) 203 Cal. 116, 121-122, 263 P. 220* ; *but see Miller v. Western P. R. Co. (1962) 207 Cal. App. 2d 581, 607, 24 Cal. Rptr. 785* (counsel must both object and request admonishment unless futile); *Etzel v. Rosenbloom (1948) 83 Cal. App. 2d 758, 761-762, 189 P.2d 848]* . For additional discussion of objecting to judicial misconduct, see *§ 551.153[3]*.

[5] Testimony by Presiding Judge or by Juror

The judge presiding at the trial of an action may not testify in that trial as a witness, against the objection of a party. On the party's objection, the judge must declare a mistrial and order the action assigned for trial before another judge [*Evid. Code § 703(b)*]. Calling the judge presiding at a trial to testify in that trial as a witness is deemed a consent to the granting of a motion for mistrial, and an objection to the calling of a judge is deemed a motion for mistrial [*Evid. Code § 703(c)*]. In the absence of objection by a party, however, the presiding judge may testify in the trial as a witness [*Evid. Code § 703(d*); *see Evid. Code § 703.5* (presiding judge or arbitrator prohibited from testifying in subsequent civil proceeding)]. When the presiding judge is called as a witness, the parties must be informed of the proposed testimony [*see Evid. Code § 703(a)*].

Similarly, a juror sworn and impaneled in the trial of an action may not testify before the jury in that trial as a witness, against the objection of a party. On the party's objection, the court must declare a mistrial and order the action assigned for trial before another jury [*Evid. Code § 704(b)*]. Calling a juror to testify before the jury as a witness is deemed a consent to the granting of a motion for mistrial, and an objection to calling a juror is deemed a motion for mistrial [*Evid. Code § 704(c)*]. In the absence of objection by a party, however, a juror sworn and impaneled in the trial of an action may be compelled to testify in that trial as a witness [*Evid. Code § 704(d)*]. When a juror is called as a witness, the parties must be informed of the proposed testimony [*see Evid. Code § 704(a)*].

[6] Failure to Complete Trial of Short Cause on Time

If a short cause is not completely tried within five hours of trial time, including time necessary for reading transcripts, depositions, and other documentary evidence, the judge may complete the trial or in the interest of justice may declare a mistrial. A short cause is a case in which the time estimated for trial by all parties is five hours or less [*Cal. Rules of Ct., Rule 3.735(a)*]. For discussion of the effect of failure to complete trial of a short cause within the required time, *see § 551.156[1]*. For discussion of trial setting procedures, see Ch 425, *Pretrial Proceedings* .

[7] Mandatory vs. Discretionary Mistrial

In certain instances a mistrial must be granted; otherwise it is discretionary. The situations in which a mistrial must be declared are as follows:

- The trial judge is called to testify as a witness and a party objects [*Evid. Code § 703(b), (c)*; *see also Evid. Code § 703.5*; *Merritt v. Reserve Ins. Co. (1973) 34 Cal. App. 3d 858, 882-883, 110 Cal. Rptr. 511*) (impropriety of the trial judge's permitting an arbitrator, mediator, or another judge to testify as an expert witness as to events that occurred at or in conjunction with an earlier proceeding over which the witness judge, mediator, or arbitrator presided)].

- A juror sworn and impaneled to try the case is called to testify as a witness, and a party objects [*Evid. Code § 704(b), (c)*].

- The jury is discharged without having rendered a verdict or is prevented from giving a verdict by accident or other cause and judgment is not entered as provided in *Code Civ. Proc. § 630(f)* (judgment for party entitled to directed verdict) [*Code Civ. Proc. § 616*]. A partial mistrial may be declared when a jury returns special verdicts on some, but not all, causes of action. The trial court may accept those verdicts, enter them in the minutes as the conclusive adjudication of those causes of action, render judgment on the verdicts where appropriate or reserve judgment on those causes of action pending entry of final judgment upon termination of the case, declare a partial mistrial as to the remaining causes of action, and order a limited retrial [*Valentine v. Baxter Healthcare Corp. (1999) 68 Cal. App. 4th 1467, 1475, 81 Cal. Rptr. 2d 252* (case of first impression)].

A mistrial is also mandatory in a nonjury trial when the judge is unable to complete the trial, for example when the judge dies or becomes otherwise disabled [*see, e.g.*, *Linsk v. Linsk (1969) 70 Cal. 2d 272, 275, 74 Cal. Rptr. 544, 449 P.2d 760* (disability of judge); *Reimer v. Firpo (1949) 94 Cal. App. 2d 798, 800-801, 212 P.2d 23* (termination of trial judge's term by appointment to appellate court)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureTrialsMotions for MistrialCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewLegal EthicsJudicial Conduct

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§ 551.153 Timely Objection to Misconduct Required

[1] Requirement and Purpose

Counsel must timely and properly object to alleged misconduct and, in a jury trial, request that the jury be admonished. The rule requiring making timely objections is remedial in nature, and seeks to give the court the opportunity to admonish the jury, instruct counsel, and forestall the accumulation of prejudice through repeated improprieties, thus avoiding the necessity of a retrial. It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot by instructing the jury to disregard the matters, correct the impropriety of counsel's act, and remove any effect that his or her conduct or remarks would otherwise have [*see Horn v. Atchison, Topeka, and Santa Fe Ry. Co. (1964) 61 Cal. 2d 602, 610, 39 Cal. Rptr. 721, 394 P.2d 561 , cert. denied, 380 U.S. 909 (1965)* ; *Atkins v. Bisigier (1971) 16 Cal. App. 3d 414, 427, 94 Cal. Rptr. 49]* .

Thus, a motion for mistrial at the conclusion of plaintiff's closing argument, based on numerous statements in the argument, was not a timely objection, especially when defendant's counsel did not request that the jury be admonished to disregard the allegedly improper statements made by plaintiff's counsel. At that point, the claimed damage could not be forestalled. In the absence of a timely objection, the offended party is deemed to have waived the claim of error on appeal [*see Horn v. Atchison, Topeka, and Santa Fe Ry. Co. (1964) 61 Cal. 2d 602, 610, 39 Cal. Rptr. 721, 394 P.2d 561 , cert. denied, 380 U.S. 909 (1965)* ; *Nelson v. Gaunt (1981) 125 Cal. App. 3d 623, 644, 178 Cal. Rptr. 167* ; *Brokopp v. Ford Motor Co. (1977) 71 Cal. App. 3d 841, 860, 139 Cal. Rptr. 888* ; *see also Whitfield v. Roth (1974) 10 Cal. 3d 874, 891-893, 112 Cal. Rptr. 540, 519 P.2d 588* (misconduct waived because of counsel's failure to object when any effect on jury could have been entirely removed by admonishing instruction); *see also § 551.157[2]*].

[2] Multiple Objections Not Necessarily Required

Multiple objections to alleged misconduct are not necessarily required. Moreover, multiple objections may have a tendency to alienate a jury's good will, especially when the judge fails to rule on objections. In addition, while it may be possible to cure error by admonishing a jury when the error is isolated and unemphasized, an attempt to rectify repeated and resounding misconduct by admonition is futile [*see Love v. Wolf (1964) 226 Cal. App. 2d 378, 392, 38 Cal. Rptr. 183* ; *see also Simmons v. Southern Pacific Transportation Co. (1976) 62 Cal. App. 3d 341, 355-359, 133 Cal. Rptr. 42*

(misconduct was grounds for new trial)].

[3] Objection to Judicial Misconduct

Although a request for an instruction, in addition to an assignment of error, is generally necessary as the basis for an appeal on the ground of misconduct of counsel, there is no such requirement when appellant alleges that rights were prejudiced by improper action of the trial judge. It appears that counsel must merely object to alleged judicial misconduct [*see Delzell v. Day (1950) 36 Cal. 2d 349, 351, 223 P.2d 625* ; *see Berguin v. Pacific Elec. Ry. Co. (1924) 203 Cal. 116, 121-122, 263 P. 220* ; *see also Etzel v. Rosenbloom (1948) 83 Cal. App. 2d 758, 761-762, 189 P.2d 848* (when judge's admonition to jury to disregard judge's misconduct would not remove prejudicial effect of misconduct, not prerequisite to urging error on appeal for appellant to have objected and requested that jury be instructed); *Estate of Golden (1935) 4 Cal. 2d 300, 311, 48 P.2d 962]* .

Some courts have stated that counsel must both object and request an instruction with respect to alleged misconduct of a trial judge, unless it is apparent that an admonition would not remove the prejudicial effect of the judge's conduct [*see Miller v. Western P. R. Co. (1962) 207 Cal. App. 2d 581, 607, 24 Cal. Rptr. 785* ; *Etzel v. Rosenbloom (1948) 83 Cal. App. 2d 758, 761-762, 189 P.2d 848]* .

Legal Topics:

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Civil ProcedureTrialsClosing ArgumentsObjectionsCivil ProcedureTrialsJury TrialsJurorsMisconductCivil ProcedureTrialsMotions for MistrialCivil ProcedureSanctionsMisconduct & Unethical BehaviorGeneral OverviewCivil ProcedureAppealsReviewabilityPreservation for Review

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§ 551.154 Procedure for Requesting Mistrial

[1] Oral Motion During Trial

Generally, counsel requests a mistrial by making an oral motion during trial and outside the presence of the jury [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 8.47 (motion for mistrial should be made and argued outside hearing of jurors)]. The motion may be made, for example, during voir dire for counsel's improper questioning of prospective jurors [*see, e.g., Stevenson v. Link (1954) 128 Cal. App. 2d 564, 568, 275 P.2d 782]* . Counsel may also move for mistrial at any other stage of the action up until the court or jury renders a decision [*see Estate of Bartholomae (1968) 261 Cal. App. 2d 839, 842, 68 Cal. Rptr. 332* ; *Schouten v. Crawford (1953) 118 Cal. App. 2d 59, 65, 257 P.2d 88* (counsel should have moved for mistrial before jury sent back for further deliberation); *see also Code Civ. Proc. § 656* (new trial is reexamination of issue of fact after trial and decision by jury, court, or referee); *§ 551.151*].

[2] Timing of Motion

The motion must be made at the proper time or the claimed error will be considered waived. The mistrial motion, and, when required, a request for admonishment of the jury, should be made when the claimed damage could be forestalled by appropriate court action [*see Horn v. Atchison, Topeka, & Santa Fe Ry. Co. (1964) 61 Cal. 2d 602, 610, 39 Cal. Rptr. 721, 394 P.2d 561 , cert. denied, 380 U.S. 909* (motion untimely when counsel did not interrupt opening or closing arguments to object to claimed misconduct); *Gimbel v. Laramie (1960) 181 Cal. App. 2d 77, 83, 5 Cal. Rptr. 88* (claim of surprise or prejudice waived when counsel failed to move for mistrial after alleged surprise testimony); *see also § 551.153*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeContent & FormCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureTrialsClosing ArgumentsObjectionsCivil ProcedureTrialsMotions for Mistrial

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§ 551.155 Order Denying or Declaring Mistrial

An order determining a motion for mistrial may be made orally by the court and entered in the minutes [*see Vitimin Milling Corp. v. Superior Court (1934) 1 Cal. 2d 116, 118, 33 P.2d 1016]* . Alternatively, a written order denying or declaring a mistrial may be signed and entered [*see Barendregt v. Downing (1959) 175 Cal. App. 2d 733, 735, 346 P.2d 870]* .

When a motion is granted or denied, unless the court otherwise orders, notice of the court's decision or order must be given by the prevailing party to all other parties or their attorneys, in the manner provided in *Code Civ. Proc. §§ 1010-1020*, unless notice is waived by all parties in open court and is entered in the minutes [*Code Civ. Proc. § 1019.5(a)*].

A trial court may declare a partial mistrial and reserve judgment on some, but not all, causes of action pending a second trial [*Valentine v. Baxter Healthcare Corp. (1999) 68 Cal. App. 4th 1467, 1475-1478, 81 Cal. Rptr. 2d 252]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsMotions for Mistrial

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§ 551.156 Procedure Following Order Declaring Mistrial

[1] Short Causes

A "short cause" case is a civil case in which the time estimated for trial by all parties or the court is five hours or less. All other civil cases are "long cause" cases [*Cal. Rules of Ct., Rule 3.735(a)*]. On the stipulation of all parties or the court's own motion, the court may order that a case is a short cause case exempted from the requirements of case management review and set the case for trial [*Cal. Rules of Ct., Rule 3.735(b)*].

If a short cause case is not completely tried within five hours, the judge may declare a mistrial or, in the judge's discretion, may complete the trial. In the event of a mistrial, the case will be treated as a long cause case and must promptly be set either for a new trial or for a case management conference [*Cal. Rules of Ct., Rule 3.735(c)*].

[2] Retrial After Mistrial

When the jury is discharged without having rendered a verdict, or is prevented from giving a verdict by reason of accident or other cause during the progress of the trial or after the cause is submitted to them, the action may be tried again immediately or at a future time as the court may direct. This does not apply when the court directs a verdict under *Code Civ. Proc. § 630* [*see Code Civ. Proc. § 616*].

[3] Dismissal for Failure to Prosecute

When in any action a trial has commenced but no judgment has been entered because of a mistrial or because a jury is unable to reach a decision, the action is subject to mandatory or discretionary dismissal unless it is brought to trial within three or two years, respectively, after entry of the order declaring the mistrial or disagreement by the jury [*Code Civ. Proc. §§ 583.320(a)(1), 583.360, 583.410, 583.420(a)(3)(A)*; *see also Code Civ. Proc. §§ 583.140, 583.330-583.350, 583.420(b)* (pertaining to extensions or excuses)]. For further discussion and forms, see Ch. 212, *Dismissal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedureTrialsMotions for Mistrial

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§ 551.157 Appellate Review

[1] Order Declaring or Denying Mistrial Nonappealable

An order granting a mistrial is nonappealable and may only be reviewed on appeal from the judgment [*Reimer v. Firpo (1949) 94 Cal. App. 2d 798, 802, 212 P.2d 23* ; see *Heavy Duty Truck Leasing, Inc. v. Superior Court (1970) 11 Cal. App. 3d 116, 119, 89 Cal. Rptr. 598* ; *Estate of Bartholomae (1968) 261 Cal. App. 2d 839, 842, 68 Cal. Rptr. 332]* . An order denying a motion for mistrial is also nonappealable, but may also be reviewed on appeal from the judgment [*Warner v. O'Connor (1962) 199 Cal. App. 2d 770, 774, 18 Cal. Rptr. 902]* .

[2] Effect of Failure to Object

Generally, a claim of counsel's misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished [*Horn v. Atchison, Topeka, and Santa Fe Ry. Co. (1964) 61 Cal. 2d 602, 610, 39 Cal. Rptr. 721, 394 P.2d 561 , cert. denied, 380 U.S. 909 (1965)* ; *see Whitfield v. Roth (1974) 10 Cal. 3d 874, 891-893, 112 Cal. Rptr. 540, 519 P.2d 588* ; *Stevens v. Parke, Davis & Co. (1973) 9 Cal. 3d 51, 70, 107 Cal. Rptr. 45, 507 P.2d 653* (applying general rule to motion for new trial); *Sabella v. Southern Pacific Co. (1969) 70 Cal. 2d 311, 318, 74 Cal. Rptr. 534, 449 P.2d 750 , cert. denied, 395 U.S. 960* ; *see also § 551.153*].

Although a request for an instruction, in addition to an assignment of error, is generally necessary as the basis for an appeal on the ground of misconduct of counsel, there is no such requirement when appellant alleges that rights were prejudiced by the improper action of the trial judge [*Delzell v. Day (1950) 36 Cal. 2d 349, 351, 223 P.2d 625* ; *see also § 551.153[3]*].

[3] Standard of Review

The discretion of a trial judge in granting or refusing motions for mistrial is very broad, and the court's decision will be left undisturbed on appeal unless manifest and unmistakable abuse of discretion clearly appears [*Warner v. O'Connor (1962) 199 Cal. App. 2d 770, 776, 18 Cal. Rptr. 902]* . For detailed discussion of the abuse of discretion standard of review, see Ch. 41, *Appeal: Review Standards and Appellate Rules of Law* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsMotions for MistrialCivil ProcedureAppealsAppellate JurisdictionState Court ReviewCivil ProcedureAppealsReviewabilityPreservation for ReviewCivil ProcedureAppealsStandards of ReviewAbuse of Discretion

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[Reserved]

§§ 551.158[Reserved]

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§ 551.170 Civil Proceedings Generally Open to Public

The sitting of every court shall be public, except as otherwise provided under *Fam. Code § 214* or any other provision of law [*Code Civ. Proc. § 124*; for discussion of *Fam. Code § 214* and other exceptions, *see § 551.171*].

Pursuant to the "open court" policy codified in *Code Civ. Proc. § 124*, as well as constitutional protections under the *First Amendment*, substantive courtroom proceedings in ordinary civil cases are "presumptively open" to the public [*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 Cal. 4th 1178, 1212, 1217-1218, 86 Cal. Rptr. 2d 778, 980 P.2d 337]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of FreedomGovernmentsCourtsCreation & Organization

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48-551 California Forms of Pleading and Practice--Annotated § 551.171

§ 551.171 Civil Proceedings Closed by Law

Although proceedings in ordinary civil cases are "presumptively open," some civil proceedings are closed on the basis of an express provision of law. These exceptions occur chiefly with respect to proceedings under the Family Code. For example, proceedings under the Family Code to terminate parental rights or to adopt a minor child are required to be closed [*see Fam. Code §§ 7884, 8611*; *see also Fam. Code § 1818(a)* (family conciliation court proceedings)]. The judge in a proceeding under the Family Code also has general discretion to direct that the trial of any issue of fact joined in the proceeding be closed, if it considers this necessary in the interests of justice and the persons involved [*Fam. Code § 214*]. In this event the court may exclude all persons from the proceeding except the officers of the court, the parties, their witnesses, and counsel [*Fam. Code § 214*; *see Code Civ. Proc. § 124* (general "open court" statute expressly excepting proceedings directed to be private under *Fam. Code § 214*)].

For examples of when court records, as distinguished from proceedings, that are sealed by express provision of law, see *§ 551.173[1]*.

For discussion of procedures to be followed when a court holds *in camera* proceedings from which a party is excluded, see *§ 551.174*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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48-551 California Forms of Pleading and Practice--Annotated § 551.172

§ 551.172 Criteria for Closing Proceedings Otherwise Open to Public

As articulated by the California Supreme Court, a trial court must do all of the following before closing a proceeding that is not otherwise closed by an express statutory exception to the general rule requiring open proceedings [*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 Cal. 4th 1178, 1212, 1217-1218, 86 Cal. Rptr. 2d 778, 980 P.2d 337]* :

- The court must provide notice to the public of the contemplated closure. When an oral motion seeking closure is made, adequate notice is provided if the court announces in open court that it plans to hold or consider holding a particular proceeding in closed session. When a written motion seeking closure is filed, public docketing of that motion reasonably in advance of the court's determination provides adequate notice.

- Before proceedings are closed or transcripts are ordered sealed, the court must hold a hearing and expressly find that there exist an overriding interest supporting the closure or sealing, there is a substantial probability that this interest will be prejudiced absent closure or sealing, the proposed closure or sealing is narrowly tailored to the interest, and there is no less restrictive means of achieving the overriding interest.

Quite apart from its power to restrict public access in order to protect an "overriding interest," a court may properly deny or regulate public access by reasonable restrictions relating to time, place, or manner, in order to maintain dignity and decorum, or when courtroom capacity precludes entry by every person who wishes to attend [*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 Cal. 4th 1178, 1222 n.46, 86 Cal. Rptr. 2d 778, 980 P.2d 337]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of FreedomConstitutional LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsTime,

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48-551 California Forms of Pleading and Practice--Annotated § 551.173

§ 551.173 Procedure for Sealing Otherwise Public Records

[1] Purpose and Applicability

Cal. Rules of Ct., Rules 2.550-2.551 set out the procedure for courts to follow when a request is made to seal records that are otherwise public [*see Cal. Rules of Ct., Rule 2.550(a)(1)*]. This procedure recognizes the *First Amendment* right of access to documents used at trial or as a basis of adjudication, and is based on the standards articulated by the California Supreme Court in *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court(1999) 20 Cal. 4th 1178, 86 Cal. Rptr. 2d 778, 980 P.2d 337* [Advisory Committee Comment to former *Cal. Rules of Ct., Rule 2.550*; *see* discussion of *NBC Subsidiary* under *§ 551.172*].

The procedure for sealing records under *Cal. Rules of Ct., Rule 2.550 et seq.* applies only to records that are otherwise deemed public, that is, they do not apply to records that are to be sealed or kept confidential pursuant to statute or rule [*Cal. Rules of Ct., Rule 2.550(a)(2)*]. Examples of records that are sealed by law are records of the family conciliation court [*see Fam. Code § 1818(b)*] and applications to proceed *in forma pauperis* [*see Cal. Rules of Ct. Rule 3.50 et seq.*]. Similarly, records and the fact of filing may be made temporarily unavailable to the public by a plaintiff preparing for prejudgment attachment proceedings [*see Code Civ. Proc. § 482.050*; *Cal. Rules of Ct., Rule 2.580*; for discussion and a form of declaration under *Cal. Rules of Ct., Rule 2.580* to be used by a plaintiff in this situation, *see* Ch. 62, *Attachment*].

This procedure does not apply to discovery motions and records filed or lodged in connection with discovery motions or proceedings. However, it does apply to discovery materials when they are used at trial or submitted as a basis for adjudication of matters other than discovery motions or proceedings [*Cal. Rules of Ct., Rule 2.550(a)(2)*; *see also* Advisory Committee Comment to former Cal. Rules of Ct., Rule 243.1, citing *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 Cal. 4th 1178, 1208-1209 n.25, 86 Cal. Rptr. 2d 778, 980 P.2d 337]* .

[2] "Record," "Sealed Record," and "Lodged Record" Defined

With respect to the procedures for sealing otherwise public records under *Cal. Rules of Ct., Rule 2.550 et seq.*, the following definitions apply [*Cal. Rules of Ct., Rule 2.550(b)*]:

- A "record" means all or a portion of any document, paper, exhibit, transcript, or other thing filed or lodged with the court, unless the context indicates otherwise.

- A "sealed" record is a record that by court order is not open to inspection by the public.

- A "lodged" record is a record that is temporarily placed or deposited with the court but not filed.

[3] Court Order Required to Seal Records

A record must not be filed under seal without a court order. The court must not permit a record to be filed under seal based solely the agreement or stipulation of the parties [*Cal. Rules of Ct., Rule 2.551(a)*].

[4] Grounds for Order Sealing Records

Unless confidentiality is required by law, court records are presumed to be open [*Cal. Rules of Ct., Rule 2.550(c)*; *see Cal. Rules of Ct., Rule 2.550(b)(1)* ("record" is all or a portion of any document, paper, exhibit, transcript, or other thing filed or lodged with the court)].

A trial court may order that a record be filed under seal only if it expressly finds all of the following [*Cal. Rules of Ct., Rule 2.550(d)*; *see also Cal. Rules of Ct., Rule 2.550(b)(2)* ("sealed records" is one that by court order is not open to inspection by the public)]:

- There exists an overriding interest that overcomes the right of public access to the record.

- The overriding interest supports sealing the record.

- A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed.

- The proposed sealing is narrowly tailored.

- No less restrictive means exist to achieve the overriding interest.

The findings required under *Cal. Rules of Ct., Rule 2.550(d)* reflect the test articulated by the *Supreme Court in NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 Cal. 4th 1178, 86 Cal. Rptr. 2d 778, 980 P.2d 337* , which applies to the sealing of records [Advisory Committee Comment to *Cal. Rules of Ct., Rule 2.550*, citing *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 Cal. 4th 1178, 1217-1218, 86 Cal. Rptr. 2d 778, 980 P.2d 337* ; *see* discussion of this test under *§ 551.172*].

The Supreme Court in *NBC Subsidiary* provides various examples of "overriding interests" recognized by case law. Specifically, courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute "overriding interests" [*see NBC Subsidiary (KNBC-TV), Inc. v. Superior Court (1999) 20 Cal. 4th 1178, 1222 n.46, 86 Cal. Rptr. 2d 778, 980 P.2d 337* (also assuming that civil litigant's right to fair trial would constitute overriding interest, and noting additional overriding interests such as binding contractual obligation not to disclose and protection of witnesses from extreme embarrassment or intimidation)]. *Cal. Rules of Ct., Rule 2.550(d)* does not attempt to define this term, but leaves such definition to developing case law [Advisory Committee Comment to *Cal. Rules of Ct., Rule 2.550*].

Although protection of trade secrets may be a valid reason for restricting access, the mere presence of claimed trade

secrets does not mandate confidentiality. The court is required to keep those records confidential only in actions initiated pursuant to the Uniform Trade Secrets Act for misappropriation of trade secrets [*In re Providian Credit Card Cases (2002) 96 Cal. App. 4th 292, 298-300* ; *see Civ. Code § 3426.5*; for discussion of trade secrets, *see* Ch. 565, *Unfair Competition*].

[5] Noticed Motion Procedure for Order Sealing Records

As discussed in [3], *above*, the parties may not stipulate to sealing records but must seek a court order [*Cal. Rules of Ct., Rule 2.551(a)*].

A party requesting that a record be filed under seal must file a noticed motion for an order sealing the record. This motion must be accompanied by a memorandum and a declaration containing facts sufficient to justify the sealing [*Cal. Rules of Ct., Rule 2.551(b)(1)*]. For a form of noticed motion to seal records, see *§ 551.261*. For discussion of the findings necessary to justify sealing, see [4], *above*. For discussion of the procedural requirements governing noticed motions generally, see Ch. 372, *Motions and Orders* .

A party moving for order directing that a record be filed under seal must lodge that record with the court pursuant *Cal. Rules of Ct., Rule 2.551(d)* at the time of making the motion, unless good cause exists for not lodging it [*Cal. Rules of Ct., Rule 2.551(b)(2)*; *see also Cal. Rules of Ct., Rule 2.550(b)(3)* (a "lodged" record is one temporarily placed or deposited with the court but not filed); for discussion of the procedure for lodging records under *Cal. Rules of Ct., Rule 2.551(d)*, see [8], *below*]. Pending the determination of the motion, a record so lodged will be conditionally under seal [*Cal. Rules of Ct., Rule 2.551(b)(4)*]. If the court denies the motion to seal, the clerk is required to return the lodged record to the submitting party and may not place that record in the case file unless that party notifies the clerk in writing within 10 days after the order denying the motion or application that the record is to be filed [*Cal. Rules of Ct., Rule 2.551(b)(6)*].

[6] Redacted and Complete Versions of Moving and Opposing Papers

If necessary to prevent disclosure, the motion, any opposition, and any supporting documents must be filed in a public redacted version and lodged in a complete version conditionally under seal [*Cal. Rules of Ct., Rule 2.551(b)(5)*; for discussion of procedure for lodging documents conditionally under seal, *see* [8], *below*].

[7] Referee to Examine Voluminous Records

If the records that a party is requesting be placed under seal are voluminous, the court may appoint a referee and fix and allocate the referee's fees among the parties, consistent with *Code Civ. Proc. §§ 639* and *645.1* [*Cal. Rules of Ct., Rule 2.550(e)(2)*]. For discussion of the provisions of *Code Civ. Proc. §§ 639* and *645.1* (relating respectively to order directing reference and payment of referee fees), see Ch. 38, *Reference* .

[8] Lodging Records to Be Sealed and Not to Be Sealed

A party requesting that a record be filed under seal must put it in a envelope or other appropriate container, seal the envelope or container, and lodge it with the court [*Cal. Rules of Ct., Rule 2.551(d)(1)*; *see Cal. Rules of Ct., Rule 2.550(b)(3)* ("lodged" record is one temporarily placed or deposited with the court but not filed)].

The envelope or container must be labeled as follows [*Cal. Rules of Ct., Rule 2.551(d)(2)*]:

"CONDITIONALLY UNDER SEAL."

When lodging a record, the submitting party must, in addition, affix to the envelope or container a cover sheet that includes the following [*Cal. Rules of Ct., Rule 2.551(d)(3)*]:

- All the information required on a caption page under *Cal. Rules of Ct., Rule 2.111* [for general discussion of caption-page requirements under *Cal. Rules of Ct., Rule 2.111, see* Ch. 372, *Motions and Orders*].

- A statement that the enclosed record is subject to a motion to file the record under seal.

For a form of cover sheet to affix to an envelope or container of records that are to be lodged under *Cal. Rules of Ct., Rule 2.551(d)*, see *§ 551.262*.

On receipt of a record lodged under *Cal. Rules of Ct., Rule 2.551(d)*, the clerk must endorse the affixed cover sheet with the date of its receipt and retain the lodged record but not file it unless the court orders it filed [*Cal. Rules of Ct., Rule 2.551(d)(4)*].

If the court denies the motion to seal a record lodged with the court, the clerk must return the lodged record to the submitting party and must not place it in the case file [*Cal. Rules of Ct., Rule 2.551(b)(6)*].

Alternately, if the court grants the motion to seal a record lodged with the court, the clerk must substitute for the label required under *Cal. Rules of Ct., Rule 2.551* (set out *above*), a replacement label on the envelope or container that prominently states the following [*Cal. Rules of Ct., Rule 2.551(e)(1)*]:

"SEALED BY ORDER OF THE COURT ON (DATE)."

In addition, the clerk must replace the cover sheet that was affixed to the envelope or container pursuant to *Cal. Rules of Ct., Rule 2.551(d)(3)* (described *above*) with a file-endorsed copy of the court's order [*Cal. Rules of Ct., Rule 2.551(e)(1)*].

A party that files or intends to file with the court records produced in discovery, for the purposes of adjudication or to use at trial, that are subject to a confidentiality agreement or protective order, and that does not intend to request to have the records sealed, must do each of the following [*Cal. Rules of Ct., Rule 2.551(b)(3)(A)*]:

- Lodge the unredacted records and any pleadings, memorandums, declarations, and other documents that disclose the contents of the records, in the manner stated in *Cal. Rules of Ct., Rule 2.551(d)*.

- File copies of the documents that are redacted so that they do not disclose the contents of the records subject to the confidentiality agreement or protective order.

- Give written notice to the party that produced the records that the records and the other documents will be placed in the public court file unless that party files a timely motion or application to seal the records under *Cal. Rules of Ct., Rule 2.551*.

If the party that produced the documents and was served with notice fails to file a motion or an application to seal the records within 10 days or to obtain a court order extending the time to file a motion or an application, the clerk must promptly remove all the documents from the envelope or container where they are located and place them in the public file. If the party files a motion or an application to seal within 10 days, or a later time the court orders, the documents are to remain conditionally under seal until the court rules on the motion or application and thereafter are to be filed as ordered by the court [*Cal. Rules of Ct., Rule 2.551(b)(3)(B)*].

[9] Order Sealing Records

An order sealing records must specifically set forth the factual findings that support the order [*Cal. Rules of Ct., Rule 2.550(e)(1)(A)*; *see* discussion of these findings in [4], *above*].

The order must also direct the sealing of only those documents and pages, or, if reasonably practicable, only those portions of documents and pages, that contain the material that needs to be placed under seal. All other documents and pages, or portions of each documents or page, must be included in the public file [*Cal. Rules of Ct., Rule 2.550(e)(1)(B)*]. This accords with the requirement articulated by the Supreme Court in *NBC Subsidiary*, that any order directing closure of proceedings or sealing of records be narrowly tailored to the interest to be protected, and be the least restrictive means possible of protecting that interest [*see NBC Subsidiary(KNBC-TV), Inc. v. Superior Court (1999) 20 Cal. 4th 1178, 1212, 1217-1218, 86 Cal. Rptr. 2d 778, 980 P.2d 337* and discussion in [4], *above*].

When an order sealing records relates to a record that has been lodged but not filed under *Cal. Rules of Ct., Rule 2.551(d)* [discussed in [8], *above*], the order must direct that not only that the record be sealed but that it be filed [*see Cal. Rules of Ct., Rule 2.550(d)(4)* (lodged record not filed unless court orders it filed); *see also Cal. Rules of Ct., Rule 2.551(b)(6)* (lodged record not filed but returned if court denies motion to seal lodged record)]. The order must also state whether, in addition to the lodged record, the order itself, the register of actions, any other court records, or any other records relating to the case are also to be sealed [Cal. Rules of Ct., Rule 2.552(e)(2)].

An order sealing records must state whether any person other than the court is authorized to inspect the sealed record [Cal. Rules of Ct., Rule 2.552(e)(3)].

In reviewing an order to seal records, the appellate court proceeds in two stages [*In re Providian Credit Card Cases (2002) 96 Cal. App. 4th 292, 301-302, 116 Cal. Rptr. 2d 833]* :

- The court examines the express findings of fact required by *Cal. Rules Ct., Rule 2.550(d)* to determine if they are supported by substantial evidence on the basis of the entire record.

- The court then decides whether, in light of and on the basis of the findings, the trial court abused its discretion in ordering a record sealed.

For a form of order sealing records, see *§ 551.263*.

[10] Disclosure of Sealed or Conditionally Sealed Records Prohibited

A record filed publicly in the court must not disclose material contained in a record that is sealed, conditionally under seal, or subject to a pending motion to seal [*Cal. Rules of Ct., Rule 2.551(c)*].

[11] Custody of Sealed Records

Sealed records must be securely filed and kept separately from the public file in the case [*Cal. Rules of Ct., Rule 2.551(f)*].

If records to be placed under seal are voluminous and are in the possession of a public agency, the court may by written order direct the agency instead of the clerk to maintain custody of the original records in a secure fashion. If the records are requested by a reviewing court, the trial court must order the public agency to deliver the records to the clerk for transmission to the reviewing court under these rules [*Cal. Rules of Ct., Rule 2.551(g)*; for general discussion of the rules relating to the transmission of records to a reviewing court, *see* Ch. 44, *Appeal: Preparing and Filing the Record* (appeal of unlimited civil case to court of appeal)].

[12] Motion to Unseal Records

A sealed record may not be unsealed except by court order [*Cal. Rules of Ct., Rule 2.551(h)(1)*]. A party or member of the public, or the court on its own motion, may move to unseal a record. Notice of a motion to unseal must be filed and served on the parties [*Cal. Rules of Ct., Rule 2.551(h)(2)*]. The motion, opposition, reply, and supporting documents must be filed in a public redacted version and a sealed complete version, if necessary to comply with *Cal. Rules of Ct., Rule 2.551(c)* [*Cal. Rules of Ct., Rule 2.551(h)(2)*; for discussion of *Cal. Rules of Ct., Rule 2.551(c), see* [10], *above*; *see also* discussion in [6], *above*].

It is recommended that any motion to unseal records be accompanied not only by a supporting memorandum but also a declaration containing facts sufficient to justify the new order [*cf. Cal. Rules of Ct., Rule 2.551(b)(1)*]. A motion to unseal records will necessarily be made on the ground that justification no longer exists for the original order sealing the records. The party making the original motion to seal records was required to establish this justification by means of sufficient facts set out in a supporting declaration [*Cal. Rules of Ct., Rule 2.551(b)(1)*, discussed in [5], *above*], and this justification was embodied in the express findings required to support the original order [*Cal. Rules of Ct., Rule 2.550(e)(1)(A)*, discussed in [4], *above*]. So, too, a motion to unseal records will need a supporting declaration that establishes the new or different facts, circumstances, or law that render nonexistent the justification for the original order [*cf. Code Civ. Proc. § 1008(a), (b)* (motion to reconsider or renewed motion based on "new or different facts, circumstances, or law"), discussed in Ch. 374, *Motions to Reconsider and Renewed Motions*].

Motions to unseal records are governed by *Cal. Rules Ct., Rule 2.551(h)*, which does not impose a requirement of express findings [*In re Providian Credit Card Cases (2002) 96 Cal. App. 4th 292, 302, 116 Cal. Rptr. 2d 833]* . Lacking express written findings by the trial court, the scope of appellate review of an order to unseal begins by determining whether appropriate findings the reviewing court may infer in support of the order that exhibits be unsealed have the support of substantial evidence, which is made on the basis of the entire record, including exhibits the trial court refused to unseal [*In re Providian Credit Card Cases (2002) 96 Cal. App. 4th 292, 302-303, 116 Cal. Rptr. 2d 833]* .

For a form of motion to seal records that may be modified for use as a subsequent motion to unseal records, see *§ 551.261*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechScope of FreedomGovernmentsCourtsCourt Records

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§ 551.174 Confidential Proceedings *In Camera*

If a confidential *in camera* proceeding is held, in which a party is excluded from being represented, the clerk must include in the minutes the nature of the hearing and only such references to writings or witnesses as will not disclose privileged information [*Cal. Rules of Ct., Rule 2.585(a)*].

Records examined by the court in confidence under *Cal. Rules of Ct., Rule 2.585(a)*, or copies of them, must be filed with the clerk under seal and may not be disclosed without court order [*Cal. Rules of Ct., Rule 2.585(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationFreedom of InformationEnforcementIn Camera InspectionsGovernmentsCourtsCourt Records

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§§ 551.175[Reserved]

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Decof, Art of Advocacy, *Opening Statement* (Matthew Bender)

Baldwin, Art of Advocacy, *Direct Examination* (Matthew Bender)

Habush, Art of Advocacy, *Cross Examination of Nonmedical Experts* (Matthew Bender)

Houts, Art of Advocacy, *Cross Examination of Medical Experts* (Matthew Bender)

Smith, Art of Advocacy, *Summation* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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48-551 California Forms of Pleading and Practice--Annotated § 551.201

§ 551.201 California Constitution

Newsperson's immunity from contempt citation. *Cal. Const., art. I, § 2(b)*

Due process, equal protection, privileges and immunities. *Cal. Const., art. I, § 7*

Prohibition against unreasonably detaining witnesses and imprisonment for debt or tort in civil action. *Cal. Const., art. I, § 10*

Right to trial by jury. *Cal. Const., art. I, § 16*

Legal Topics:

For related research and practice materials, see the following legal topics:
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48-551 California Forms of Pleading and Practice--Annotated § 551.202

§ 551.202 State Statutes

[1] Affidavits and Declarations

Affidavit as one of three modes of taking testimony of witnesses. *Code Civ. Proc. § 2002(1)*

"Affidavit" defined. *Code Civ. Proc. § 2003*

Use of affidavits on a motion. *Code Civ. Proc. § 2009*

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[2] Burden of Proof and Producing Evidence

"Burden of producing evidence" defined. *Evid. Code § 110*

"Burden of proof" defined. *Evid. Code § 115*

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Who has burden of producing evidence. *Evid. Code § 550*

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Retention or destruction of exhibits, depositions, and administrative records. *Code Civ. Proc. §§ 1952, 1952.3*

Return of exhibits, depositions, and administrative records to attorneys by court order after judgment has become final. *Code Civ. Proc. § 1952.2*

[4] Experts

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[5] Evidence

View of property, place, object, demonstration, or experiment outside courtroom. *Code Civ. Proc. § 651*

Record of conveyance of real property. *Code Civ. Proc. § 1950*

Miscellaneous provisions relating to evidence in particular cases. *Code Civ. Proc. §§ 2074-2077*

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Admissibility, exclusion, and weight of evidence. *Evid. Code §§ 350-413*

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Hearsay evidence. *Evid. Code § 1200 et seq.*

[6] Interference With Court Proceedings

Unlawful interference with court proceedings as contempt of court. *Code Civ. Proc. § 1209(a)(8)*

[7] Judicial Notice

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Mandatory judicial notice. *Evid. Code 451*

Permissive judicial notice. *Evid. Code §§ 452, 453*

Determination of propriety of judicial notice. *Evid. Code § 454*

Presentation of information to court. *Evid. Code § 455*

Procedure on denial of request for judicial notice. *Evid. Code § 456*

Instruction to jury re judicially noticed matter. *Evid. Code § 457*

Judicial notice in subsequent proceedings. *Evid. Code §§ 458, 459*

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Proposed instructions. *Code Civ. Proc. § 607a*

Court's instructions. *Code Civ. Proc. § 608*

Duty of court with respect to requested instructions. *Code Civ. Proc. § 609*

Verdicts. *Code Civ. Proc. §§ 624-628*

[9] Motion Practice

Application for order as a motion. *Code Civ. Proc. § 1003*

When notice must be given, extensions of time when service is by mail, and serving of supporting papers. *Code Civ. Proc. § 1005(b)*

Motion as deemed made on serving and filing notice of motion. *Code Civ. Proc. § 1005.5*

Contents of notice of motion. *Code Civ. Proc. § 1010*

Service of papers. *Code Civ. Proc. §§ 1011-1020*

[10] Motions During Trial

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Motion for judgment when jury discharged without verdict. *Code Civ. Proc. § 630(f)*

Motion for judgment in nonjury trial. *Code Civ. Proc. § 631.8*

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Motion to produce writing used by witness to refresh recollection. *Evid. Code § 771(a)*

Motion to reexamine witness as to same matter. *Evid. Code § 774*

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Special defense not going to merits of action but constituting bar or ground of abatement to prosecution. *Code Civ. Proc. §§ 597, 597.5*

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[17] Stipulations

Power of attorney to bind client by stipulation. *Code Civ. Proc. § 283*

[18] Trial

Order of trial. *Code Civ. Proc. §§ 607, 631.7*

Province of court and jury. *Evid. Code §§ 310-312*

Regulation of order of proof. *Evid. Code § 320*

[19] Trial by Jury

Formation of jury. *Code Civ. Proc. § 190 et seq.*

Conduct of trial and verdict. *Code Civ. Proc. §§ 607-630*

[20] Trial by Court

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[21] Trier of Fact

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[22] Witnesses

"Witness" defined. *Code Civ. Proc. § 1878*

Power of court to compel attendance of witnesses. *Code Civ. Proc. § 1989*

Modes in which testimony of witnesses may be taken. *Code Civ. Proc. § 2002*

"Oral examination" defined. *Code Civ. Proc. § 2005*

Pretrial exchange of expert witness information. *Code Civ. Proc. § 2034* (*Code Civ. Proc. § 2034.210 et seq.* effective July 1, 2005)

"Unavailable as a witness" defined. *Evid. Code § 240*

Qualifications and disqualifications of persons to be witnesses. *Evid. Code §§ 700-704*

Requirement that witness have personal knowledge of matter to which he or she is testifying unless witness is testifying as expert witness. *Evid. Code § 702*

Oath and confrontation. *Evid. Code §§ 710-712*

Expert witnesses. *Evid. Code §§ 720-733*

Interpreters and translators. *Evid. Code § 750 et seq.*

Method and scope of examination. *Evid. Code §§ 760-778*

Credibility of witnesses. *Evid. Code §§ 780-791*

Expert and other opinion testimony. *Evid. Code §§ 800-870*

[23] Writings

"Parol Evidence Rule." *Code Civ. Proc. § 1856*; *Com. Code § 2202*

Distinction between sealed and unsealed writings as abolished. *Code Civ. Proc. § 1932*

"Writing," "original," and "duplicate" as used in Evidence Code defined. *Evid. Code §§ 250-260*

Ancient documents. *Evid. Code § 643*

Books by public authority. *Evid. Code § 644*

Books containing reports of cases. *Evid. Code § 645*

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Proof of content of writing. *Evid. Code §§ 1520-1523*

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Proof of contents of writing by secondary evidence. *Evid. Code § 1521*

Proof of contents of official record by copy. *Evid. Code §§ 1530-1532, 1601*

Proof of contents of business records by photographic copies and printed representations. *Evid. Code §§ 1550, 1560-1566*

Proof of contents of lost or destroyed records by photographic copies and printed representations. *Evid. Code § 1551*

Proof of contents of computer information or programs by printed representations. *Evid. Code § 1552*

Proof of images stored on video or digital medium by printed representations. *Evid. Code § 1553*

Production of business records. *Evid. Code §§ 1560-1566*

Official writings affecting property. *Evid. Code §§ 1600-1605*

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§ 551.203 California Rules of Court

[1] Complex Litigation

Handling of complex litigation. *Cal. Rules of Ct., Rules 3.400 et seq.* (complex cases); 3.501 et seq. (coordination of complex actions)

[2] Continuances

Motions and grounds for continuance. *Cal. Rules of Ct., Rule 3.1332*

[3] Counsel

Counsel pro hac vice. *Cal. Rules of Ct., Rule 9.40*

Availability of court reporting services in civil cases; when party may procure reporter. *Cal. Rules of Ct., Rules 2.956*

Assessing fee for reporting services. *Cal. Rules of Ct., Rule 2.958*

[4] Destruction, Preservation, or Transfer of Trial Court Records

Preservation and archiving of all superior court records filed before 1911; preservation and archiving of all superior court records filed from 1911 through 1949, if practicable; preservation and archiving of selected sample of superior court records filed after December 31, 1910. *Cal. Rules of Ct., Rule 10.855*

Destruction of superior court records not designated for preservation; transfer of possession of records to requesting entity in lieu of destruction; notice requirements and forms of notice. *Cal. Rules of Ct., Rule 10.856*

[5] Interpreters

Periodic review of court interpreter skills. *Cal. Rules of Ct., Rule 2.891*

Guidelines for approval of certification programs for interpreters for deaf and hard-of-hearing persons. *Cal. Rules of Ct., Rule 2.892*

Standards of professional conduct for court interpreters. *Cal. Rules of Ct., Rule 2.890*

Standards for determining need for court interpreter; instructing participants. Cal. Rules of Ct., Stds. Jud. Admin., Stds. 2.10, 2.11

[6] Judges

Duties of presiding judges. *Cal. Rules of Ct., Rules 10.603*

Duties of all trial court judges. *Cal. Rules of Ct., Rule 10.608*

Assignment of case to one judge for all or limited purposes. *Cal. Rules of Ct., Rule 3.734*

[7] Jurors

Examination of prospective jurors. *Cal. Rules of Ct., Rule 3.1540*; Cal. Rules of Ct., Stds. Jud. Admin., Std. 3.25

Excuses from jury service. *Cal. Rules of Ct., Rule 2.1008*

[8] Jury Instructions and Verdicts

Proposed jury instructions. *Cal. Rules of Ct., Rule 2.1055*

Request for special findings by jury. *Cal. Rules of Ct., Rule 3.1580*

Judicial Council jury instructions (CACI). *Cal. Rules of Ct., Rule 2.1050*

Judicial comment on verdict or mistrial. Cal. Rules of Ct., Cal. Rules of Ct., Stds. Jud. Admin., Std. 2.30

[9] Photographing, Recording, and Broadcasting

"Media coverage" defined. *Cal. Rules of Ct., Rule 1.150(b)(1)*

"Media" and "media agency" defined. *Cal. Rules of Ct., Rule 1.150(b)(2)*

Proceedings for order permitting media coverage; power of court to refuse, limit, or terminate media coverage; prohibited media coverage; media equipment and personnel; media pooling arrangements. *Cal. Rules of Ct., Rule 1.150(e)*

Use of personal recording devices. *Cal. Rules of Ct., Rule 1.150(d)*

Photographing, recording, or broadcasting of court proceedings prohibited except as provided under *Cal. Rules of Ct., Rule 1.150*. *Cal. Rules of Ct., Rule 1.150(c)*

Violation of *Cal. Rules of Ct., Rule 1.150* or of court order made under that rule is unlawful interference with court and may be basis for order terminating media coverage, contempt sanction, monetary or other sanction. *Cal. Rules of Ct., Rule 1.150(f)*

[10] Statement of Decision and Judgment

Procedure. *Cal. Rules of Ct., Rules 3.1590*

Bifurcated trial. *Cal. Rules of Ct., Rule 3.1591*

[11] Submitted Matters

Notice of determination. *Cal. Rules of Ct., Rule 3.1109*

[12] Trial

Assigned case to be tried or dismissed. *Cal. Rules of Ct., Rule 10.910*

Motion to advance, specially set, or reset case for trial. *Cal. Rules of Ct., Rule 3.1335*

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§ 551.204 Local Court Rules

[1] Contra Costa County

Motions affecting master calendar. Contra Costa Co. Local Ct. Rules, Rule 4(d)

Number of counsel participating in examination of witness. Contra Costa Co. Local Ct. Rules, Rule 19

Jurors. Contra Costa Co. Local Ct. Rules, Rule 21

[2] Los Angeles County

Procedure governing civil trials. Los Angeles Co. Super. Ct. Rules, Rule 8.0 et seq.

Selection of Jurors. Los Angeles Co. Super. Ct. Rules, Rule 5.0

Session hours and opening of session. Los Angeles Co. Super. Ct. Rules, Rule 4.0

[3] Orange County

Jury instructions. Orange Co. Coordinated Trial Ct. Rules, Rule 362

[4] San Diego County

Request for daily transcripts. San Diego Co. Coordinated Ct. Rules, Div. II, Rule 11.7

[5] Santa Clara County

Civil Case Management. Santa Clara Co. Super. Ct. Rules, Rule 1.1

[6] Ventura County

Court interpreters. Ventura Co. Super. Ct. Rules, Rule 20.00

Removal of papers and return of exhibits. Ventura Co. Super. Ct. Rules, Rule 5.02

Removal of exhibits. Ventura Co. Super. Ct. Rules, Rule 5.04

Jury fees and expenses. Ventura Co. Super. Ct. Rules, Rule 19.08

Jury instructions. Ventura Co. Super. Ct. Rules, Rule 19.09

Legal Topics:

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§ 551.205 Rules of Professional Conduct

Threatening to present criminal, administrative, or disciplinary charges to obtain advantage in civil dispute. *Cal. Rules Prof. Conduct, Rule 5-100*

Trial conduct. *Cal. Rules Prof. Conduct, Rule 5-200*

Attorney as witness. *Cal. Rules Prof. Conduct, Rule 5-210*

Suppression of evidence. *Cal. Rules Prof. Conduct, Rule 5-220*

Contact with witnesses. *Cal. Rules Prof. Conduct, Rule 5-310*

Contact with jurors. *Cal. Rules Prof. Conduct, Rule 5-320*

Legal Topics:

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§ 551.206 Decisions

[1] Argument

Misconduct of counsel is ground for new trial and often takes form of improper argument to jury, such as urging facts not justified by record, suggesting jury may resort to speculation, informing jury that injured party has been compensated by codefendant, and by informing jury of offer of settlement and compromise. *City of Los Angeles v. Decker (1977) 18 Cal. 3d 860, 870, 135 Cal. Rptr. 647, 558 P.2d 545*

Party on whom burden of proof rests has right to open and close argument subject to reasonable discretion on part of court to regulate time and manner of presenting arguments. *Orient Handel v. United States Fid. & Guar. Co. (1987) 192 Cal. App. 3d 684, 700, 237 Cal. Rptr. 667*

Results of polygraph test properly excluded from jury argument when neither procedural foundation for test nor results mentioned in course of trial, and only reference thereto was testimony that defendant did not request test until shortly before trial. *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co. (1987) 189 Cal. App. 3d 1072, 1094, 234 Cal. Rptr. 835 , cert. denied, 486 U.S. 1036*

Request for appropriate admonition to jury regarding improper argument is required by law in order to obtain relief on appeal. *Troensegaard v. Silvercrest Industries, Inc. (1985) 175 Cal. App. 3d 218, 229, 220 Cal. Rptr. 712*

Defense counsel's statement during argument that peace had been made between plaintiffs and dismissed defendant, objected to on ground it implied settlement, did not constitute prejudicial misconduct requiring reversal of defense verdict. *Tobler v. Chapman (1973) 31 Cal. App. 3d 568, 573-579, 107 Cal. Rptr. 614*

[2] Burden of Proof

In action by insurer under *Ins. Code § 1871.7* against doctors for fraud based on false claims submitted in violation of *Pen. Code § 550*, trial court properly instructed jury under *Evid. Code § 115* that burden of proof was by preponderance

of the evidence; defendants' analogy to punitive damages was flawed, because *Ins. Code § 1871.7(c)* explicitly provides that penalties set forth in *Ins. Code § 1871.7(b)* are intended to be remedial rather than punitive. *People ex rel. Allstate Ins. Co. v. Muhyeldin (2003) 112 Cal. App. 4th 604, 609-610, 5 Cal. Rptr. 3d 492*

In action for misappropriation under Uniform Trade Secrets Act, although burden of producing evidence may have shifted to defendant if plaintiff established prima facie case, burden of proof to demonstrate use of trade secret through improper means remained with plaintiff; thus, trial court properly refused to give burden-shifting jury instruction. *Sargent Fletcher, Inc. v. Able Corp. (2003) 110 Cal. App. 4th 1658, 1668-1673, 3 Cal. Rptr. 3d 279*

In false advertising claim, burden under state law, unlike federal law, does not shift to defendant to prove that claims are true once plaintiff proffers evidence of claim. *National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals (2003) 107 Cal. App. 4th 1336, 1347-1351, 133 Cal. Rptr. 2d 207*

[3] Closed Proceedings and Sealed Records

In class action alleging that defendants had improperly assessed fees and charges to holders of credit cards, trial court did not abuse its discretion in deciding to unseal records over objection that materials constituted proprietary trade secrets, when court found that telemarketing scripts were not trade secrets because they had been disclosed to public; memoranda of marketing strategies and proposals that included blunt criticisms of personnel and management decision-making procedures did not constitute trade secrets because defendants' failure to give them heightened security treatment that was given to other confidential documents reasonably could be deemed by trial court as circumstantial evidence that defendants had not previously treated them as trade secrets. *In re Providian Credit Card Cases (2002) 96 Cal. App. 4th 292, 303-310, 116 Cal. Rptr. 2d 833*

[4] Evidence

[a] Agreement of Parties to Exclude

Written agreement between property owners and waterworks district that no materials or discussions from their settlement negotiations could be used in subsequent litigation was enforceable and trial court erred in admitting evidence of settlement negotiations on plaintiffs' request, when there was no evidence agreement was obtained by fraud, misrepresentation, mistake of fact, or excusable neglect, there was substantial change in circumstances that would make enforcing agreement unfair to plaintiffs, particularly as plaintiffs could have unilaterally terminated agreement at any time, and public policy does not militate against enforcing agreement, since California's public policy is to encourage settlement and settlement is encouraged by allowing parties to communicate freely, without fear their communications may be used against them if settlement negotiations are not successful. *Tower Acton v. Los Angeles County Waterworks Dist. No. 37 (2002) 105 Cal. App. 4th 590, 600-602, 129 Cal. Rptr. 2d 640*

[b] Character and Habit

Evidence of person's character or trait of character is relevant in three situations: (1) when offered on issue of his or her credibility as witness; (2) when offered as circumstantial evidence of his or her conduct in conformity with such character or trait of character; and (3) when his or her character or trait of character is ultimate fact in dispute in action. *People v. Ramos (1997) 15 Cal. 4th 1133, 1179, 64 Cal. Rptr. 2d 892, 938 P.2d 950* (citing *Carr v. Pacific Tel. Co. (1972) 26 Cal. App. 3d 537, 544, 103 Cal. Rptr. 120*)

In action by child against dentist alleging assault, battery, and professional negligence, trial court erroneously concluded that testimony of other patients about unrelated treatment by dentist was admissible under *Evid. Code § 1101*

, where evidence did not establish common design, because neither context of other incidents nor acts complained of shared requisite common features with incident plaintiff alleged to have happened, and in context of defendant's testimony that he treated as many as 45,000 patients in his career, testimony about nine incidents was highly selective and could not be considered representative; and where evidence also was not admissible to demonstrate intent, because intent was not at issue. Uncharged acts were not admissible under *Evid. Code § 1105* to demonstrate that defendant acted in accordance with his usual custom or habit, where defendant's conduct, occurring in different circumstances, toward nine of 45,000 patients, did not qualify as custom or habit. Finally, even if proffered evidence was proper under *Evid. Code § 1101*, trial court abused its discretion under *Evid. Code § 352* in permitting testimony of former patients, where probative value was slight, but it had great potential for prejudice, confusion, and consumption of time. *Bowen v. Ryan (2008) 163 Cal. App. 4th 916, 923-927, 78 Cal. Rptr. 3d 128*

Evid. Code § 1101(a) prohibits evidence of person's character, in form of specific instances of conduct, to prove person's conduct on specific occasion; thus, in sexual harassment case, evidence that other women had been sexually harassed by defendants, to extent offered to show defendants committed conduct at issue because they did same thing before, went to propensity and was correctly excluded. *Beyda v. City of Los Angeles (1998) 65 Cal. App. 4th 511, 518-519, 76 Cal. Rptr. 2d 547*

[c] Criminal Convictions

Guilty plea in prior criminal action is admissible in subsequent civil action as admission. *State Farm Fire & Casualty Co. v. Bomke (9th Cir. 1988) 849 F.2d 1218, 1220*

Trial court erred in excluding evidence of defendant's nolo contendere plea to felony grand theft of automobile which was subject of action for fraud, conversion and negligent misrepresentation, when defendant's plea of nolo contendere to offense punishable as felony, regardless of whether it is ultimately so punished, is admissible as party admission in civil action based on or growing out of act on which criminal prosecution is based. *Rusheen v. Drews (2002) 99 Cal. App. 4th 279, 283-288, 120 Cal. Rptr. 2d 769*

[d] Discretion of Court Under Evid. Code § 352

In capital murder and torture prosecution, trial court did not abuse its discretion under *Evid. Code § 352* in admitting several photographs of victim's body, taken at site where body was found and during subsequent autopsy, where photographs were highly relevant to proof of how, when, and where victim was tortured and murdered and his personal property burned, and simply showed what had been done to victim; revulsion photographs induced was attributable to acts done, not to photographs themselves. *People v. Brasure (2008) 42 Cal. 4th 1037, 1053-1055, 71 Cal. Rptr. 3d 675, 175 P.3d 632*

In capital murder prosecution involving sodomizing and rape of young child, trial court did not abuse its discretion in admitting photographs of genitals of child after she sustained her injuries but before she died, when central factual dispute was how child received fatal injuries, and with exception of radiologist, each medical professional who testified regarding her treatment was asked to describe what her genitals looked like, so jury was entitled to see for itself condition of her body to determine whether testimonial evidence did or did not support prosecution's theory that she was sexually abused, and when, although photographs were disturbing, they were not particularly gruesome, and their probative value far outweighed any prejudicial effect. *People v. Benavides (2005) 35 Cal. 4th 69, 96, 24 Cal. Rptr. 3d 507, 105 P.3d 1099*

In capital murder prosecution in which defendant burned victim, trial court did not abuse its discretion in admitting photographs of victim before and after fire, when photograph before fire was relevant to torture-murder and murder by torture special circumstances, and photographs after fire were relevant to show condition of victim's body as it related to

intent to inflict extreme pain, as well as to prove commission of kind of act calculated to cause such pain; although photographs were unquestionably unpleasant, they were not unduly gruesome or inflammatory and they were sufficiently different as not to be cumulative. *People v. Cole (2004) 33 Cal. 4th 1158, 1197-1199, 17 Cal. Rptr. 3d 532, 95 P.3d 811*

In capital murder prosecution, trial court did not abuse its discretion in admitting relatively small color photographs of crime scene and autopsy photographs objected to on ground they were gruesome, inflammatory, cumulative of each other or of testimony, and that defendant should have been allowed to stipulate to facts to avoid presentation of photographs. Although many were unpleasant, most were, given subject matter, quite unexceptional and had probative value in proving contested issues such as defendant's use of gun, state of mind, premeditation, and motive. *People v. Stewart (2004) 33 Cal. 4th 425, 479-481, 15 Cal. Rptr. 3d 656, 93 P.3d 271*

In prosecution for first degree murder, witness's testimony that murder victim had told witness that if witness did not hear from victim in two weeks to send police was relevant [*Evid. Code § 210*] because it was evidence of victim's state of mind to explain her conduct concerning going with defendant, and was not unduly prejudicial [*Evid. Code § 352*] because testimony was probative on whether victim's disappearance was of her own volition; its evidentiary value was not substantially outweighed by danger of undue prejudice because statement followed witness's nonresponsive answer that victim said she feared defendant and evidence of victim's fear of defendant was introduced independent of statement by witness. *People v. Crew (2003) 31 Cal. 4th 822, 840, 3 Cal. Rptr. 3d 733, 74 P.3d 820*

In prosecution for attempted first-degree murder, trial court did not abuse its discretion under *Evid. Code § 352* in admitting reality television show videotape showing police successfully rescuing defendant's estranged girlfriend from defendant during course of his attempt to strangle her, when videotape corroborated prosecution testimony and its probative value far outweighed any potential that its dramatic nature would mislead, distract or inflame the jury. *People v. Ibarra (2007) 151 Cal. App. 4th 1145, 1150-1151, 61 Cal. Rptr. 3d 22*

In action based on alleged exposure to mycotoxins through mold in home and workplace, trial court properly granted defendants' motion in limine to exclude environmental sampling data pursuant to *Evid. Code § 352*, when probative value of data was minimal because at most it showed that mold spores, not mycotoxins, were present at residence and workplace, and trial court could have reasonably concluded that minimal probative value of data was substantially outweighed by probability that its admission would create substantial danger of undue prejudice, of confusing issues, or of misleading jury. *Geffcken v. D'Andrea (2006) 137 Cal. App. 4th 1298, 1307-1309, 41 Cal. Rptr. 3d 80*

In personal injury case in which defendants conceded liability and contested only damages, trial court abused its discretion in granting defendants' motion to exclude evidence that plaintiff had paid his own medical bills, after which jury ultimately awarded plaintiff less in economic damages than he had already paid out of pocket for medical expenses, when evidence that plaintiff had paid his medical expenses was manifestly relevant to his claim for damages, collateral source rule was inapposite because exclusion of evidence of plaintiff paying his own bills did not further any policy judgment that people should buy insurance, trial court's finding that evidence would be unduly prejudicial to defendants was untenable because evidence did not run risk of emotionally inflaming jury against defendants on immaterial point, reasonable person was unlikely to run up thousands of dollars in medical bills and pay them out of pocket on mere gamble he might someday obtain reimbursement from tortfeasor, and evidence did not raise substantial danger of confusing issues or misleading jury. *Smalley v. Baty (2005) 128 Cal. App. 4th 977, 984-987, 27 Cal. Rptr. 3d 575*

Trial court may not exclude in-court testimony of witness simply because it does not believe witness, except in rare instances of demonstrable falsity, notwithstanding that testimony is damaging to other party; "prejudice" referred to in *Evid. Code § 352* is not synonymous with "damaging." *Vorse v. Sarasy (1997) 53 Cal. App. 4th 998, 1008, 1012-1013, 62 Cal. Rptr. 2d 164*

Trial court did not properly exercising discretion by excluding evidence under *Evid. Code § 352* (undue consumption

of time) without inquiring of plaintiff's attorney regarding how many incidents are to be offered and nature of proof for each incident. *Andrews v. City and County of San Francisco (1988) 205 Cal. App. 3d 938, 947-948, 252 Cal. Rptr. 716*

Trial court has broad discretion in deciding relevance of proffered evidence and in ruling on admissibility of evidence; weighing process under *Evid. Code § 352* depends on trial court's consideration of unique facts and issues of each case rather than on mechanically automatic rules. *Smith v. Brown-Forman Distillers Corp. (1987) 196 Cal. App. 3d 503, 519-520, 241 Cal. Rptr. 916*

Evidence must be relevant to be admissible in discretion of trial court under *Evid. Code § 352*. *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co. (1987) 189 Cal. App. 3d 1072, 1093, 234 Cal. Rptr. 835*

Evid. Code § 352 (exclusion of time-consuming, prejudicial, confusing, or misleading evidence) does not impose any requirement on trial judge to make sua sponte affirmative finding on record to effect that probative value of proffered evidence outweighs its prejudicial effect. *People v. Holt (1972) 28 Cal. App. 3d 343, 353, 104 Cal. Rptr. 572 , cert. denied, 413 U.S. 921 (1973)* (overruled on another point in *Evans v. Superior Court (1974) 11 Cal. 3d 617, 625, 114 Cal. Rptr. 121, 522 P.2d 681*)

[e] Expert Opinion

In capital murder prosecution, after defendant's common-law wife testified that she did not attempt to prevent murder and did not abandon defendant after murder and report crime to police because he physically and mentally abused her and threatened to harm her and members of her family, trial court properly allowed prosecution to call expert witness to testify concerning Battered Woman Syndrome in response to hypothetical question paralleling wife's testimony that her actions were consistent with "battered woman accommodation syndrome," where there was no requirement defendant explicitly challenge witness's credibility on basis that might be explained by BWS evidence before evidence could be introduced; and where expert BWS testimony was relevant to explain that it is common for people who have been physically and mentally abused to act in ways that may be difficult for layperson to understand as authorized by *Evid. Code § 1107*, and there was adequate foundation and BWS evidence was highly relevant. *People v. Riggs (2008) 44 Cal. 4th 248, 292-294, 79 Cal. Rptr. 3d 648, 187 P.3d 363*

In capital murder prosecution resulting from two murders in course of robbery, testimony of board-certified forensic pathologist and deputy medical examiner employed by county coroner's office concerning probable respective positions of shooter and two victims at time of shootings asserting that although each of three described posture scenarios was possible, first two, in which shooter was standing next to victim, were less likely than third theory, that victim was kneeling next to shooter, who would have been standing and holding gun in somewhat natural position at waist level, was properly admitted under *Evid. Code § 801(a)* as subject of expert opinion evidence. *People v. Robinson (2005) 37 Cal. 4th 592, 629-633, 36 Cal. Rptr. 3d 760, 124 P.3d 363*

In capital murder prosecution resulting from sodomizing and strangulation of child, trial court properly admitted expert testimony regarding experiences of child sexual assault victims, when only fraction of general population, and presumably none of jurors, had been personally victimized, and while juror could try to imagine what it would be like for child to experience assault, this kind of imagining did not substitute for expert testimony. *People v. Smith (2005) 35 Cal. 4th 334, 363, 25 Cal. Rptr. 3d 554, 107 P.3d 229*

In prosecution relating to domestic violence, trial court properly admitted testimony offered by prosecution from expert witness to explain that domestic violence victims often later deny or minimize assailant's conduct even though only one incident of abuse occurred; evidence was admissible under *Evid. Code § 801* to assist trier of fact in evaluating credibility of victim's trial testimony and earlier statements to police. *People v. Brown (2004) 33 Cal. 4th 892,*

898-908, 16 Cal. Rptr. 3d 447, 94 P.3d 574

Qualification of expert witnesses, including foundational requirements, rests in sound discretion of trial court; absent manifest abuse, court's determination will not be disturbed on appeal. *People v. Ramos (1997) 15 Cal. 4th 1133, 1175, 64 Cal. Rptr. 2d 892, 938 P.2d 950*

Trial court has considerable discretion to control form in which expert is questioned to prevent jury from learning incompetent hearsay and also has discretion to weigh probative value of inadmissible evidence relied on by expert witness. *People v. Gardeley (1996) 14 Cal. 4th 605, 612, 619, 59 Cal. Rptr. 2d 356, 927 P.2d 713* (upholding admission of hearsay evidence to show basis for expert's opinion about street gang activity)

Expert testimony may be based on material that is not admitted into evidence so long as material is of type that is reasonably relied on by experts in particular field in forming their opinions. *People v. Gardeley (1996) 14 Cal. 4th 605, 618, 59 Cal. Rptr. 2d 356, 927 P.2d 713*

Trial court properly set aside information charging defendant with being ex-felon in possession of body armor, when crime charged consisted of elements incapable of determination by trier of fact without assistance of expert because proscribed body armor was required to be certified based on its ballistic resistance to penetration of test ammunition, and whether vest seized met such certification standards involved concepts beyond common experience and thus was proper subject for expert testimony, but not for lay opinion; and when knowledge and experience of police officer who testified at preliminary hearing regarding body armor were insufficient to qualify him as expert. *People v. Chapple (2006) 138 Cal. App. 4th 540, 545-549, 41 Cal. Rptr. 3d 680*

In action based on alleged exposure to mycotoxins through mold in home and workplace, trial court properly granted defendants' motion in limine to exclude testimony of plaintiffs' expert witness, when irrespective of whether he had requisite qualifications, trial court did not abuse its discretion in impliedly finding there was no reasonable basis for his opinion that exposure to mycotoxins had caused plaintiffs' ailments in view of absence of any reliable evidence plaintiffs had been exposed to mycotoxins at properties in question, so that witness's opinions were speculative and conjectural. *Geffcken v. D'Andrea (2006) 137 Cal. App. 4th 1298, 1310-1312, 41 Cal. Rptr. 3d 80*

In products liability action against automobile and tire manufacturers, based on personal injuries suffered by driver resulting from accident in which right rear tire tread separated from tire, alleging automobile and tire were defectively designed, trial court properly precluded testimony by plaintiff's tire expert and substantially limited testimony by plaintiff's directional stability expert, resulting in granting of defendants' motions for nonsuit, when plaintiff's theory about tire failure was based on tire's chemical characteristics and supposedly defective recipe used in manufacturing process, which was plainly beyond common experience of both judges and jurors; tire was not examined by tire expert or anyone else, and no forensic photographs were taken, so that tire expert relied on supposedly similar tire failures and amateur photographs taken by insurance adjuster and plaintiff's boyfriend, and plaintiff failed to show there was substantial similarity between tire failures relied on by tire expert and plaintiff's tire failure, and failed to establish that amateur photographs were sufficient to support expert's conclusions, so that expert's opinions and conclusions were mere speculation; although trial court did not exclude all references to directional stability expert's testimony regarding "hopping," "tramping," or "skating" of automobile as result of detreading, trial court properly ruled that expert could not give opinion that tramping or hopping or skating could result from tread separation because there was no foundation for opinion about causation. *Stephen v. Ford Motor Co. (2005) 134 Cal. App. 4th 1363, 1367-1376, 37 Cal. Rptr. 3d 9*

California Highway Patrol Officer was qualified and testifying as expert witness in determining accuracy of preliminary alcohol screening (PAS) devices, including one used on defendant, even though officer was never expressly declared by court to be expert witness on accuracy of PAS device, when record amply supported conclusion he was so testifying and parties and court so understood. *People v. Hallquist (2005) 133 Cal. App. 4th 291, 295-297, 34 Cal. Rptr. 3d 621*

In personal injury action by passenger sleeping in sleeping berth in big rig truck when it was struck by defendant's vehicle, expert testimony was not necessary to support jury's finding that plaintiff was 50 percent liable for failure to wear sleeping restraint. *Lara v. Nevitt (2004) 123 Cal. App. 4th 454, 457-460, 19 Cal. Rptr. 3d 865*

Under *Civ. Code § 43.92*, psychotherapist may be held liable for failure to warn third party of serious risk of infliction of grave bodily injury by therapist's client only if jury is persuaded therapist actually believed or predicted his or her client posed serious risk of inflicting grave bodily injury on identifiable victim; thus, because there was no need for expert guidance on standard of care for psychotherapists' statutory duty to warn, trial court erred when it found, as matter of law, that parents of murder victim could not establish their claim against hospital based on therapist's alleged failure to warn them or their son of threat against son by client without presenting expert testimony. *Ewing v. Northridge Hospital Medical Center (2004) 120 Cal. App. 4th 1289, 1297-1304, 16 Cal. Rptr. 3d 591*

In prosecution for crimes related to sex offenses against minors, after prosecution was allowed to present expert testimony on child sexual abuse and child sexual abuse accommodation syndrome, trial court did not abuse its discretion in precluding expert testimony offered by defense that one victim did not exhibit emotional reaction one would expect from petite girl who had been raped by large man, and, based on her experience working with trauma victims, expert believed victim's demeanor was inconsistent with having suffered trauma. *People v. Wells (2004) 118 Cal. App. 4th 179, 186-191, 12 Cal. Rptr. 3d 762*

In murder prosecution based on defendant's driving while intoxicated and killing person, trial court properly excluded one expert's testimony about conclusion of another expert, who had died prior to trial, as to defendant's speed, when court could exclude from expert's testimony any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value. *People v. Vanegas (2004) 115 Cal. App. 4th 592, 597-598, 9 Cal. Rptr. 3d 398*

Exclusion of expert's testimony on ground that study provided no reasonable basis for opinion that plaintiffs' alleged exposure to chemicals supplied by defendants resulted in increased risk of cancer was not abuse of discretion, when evidence that expert reasonably relied on epidemiological studies in forming opinions on causation was of no assistance to plaintiffs when study on which expert relied provided no reasonable basis for his opinion and trial court could determine whether there was reasonable basis for expert opinion by examining opinion and matters on which expert relied and not requiring evidence from second level of experts in making determination. *Lockheed Litigation Cases (2004) 115 Cal. App. 4th 558, 563-566, 115 Cal. App. 4th 621, 10 Cal. Rptr. 3d 34*

In employment discrimination action, trial court committed prejudicial error under *Evid. Code § 801* by allowing human resources management expert to opine that certain facts in evidence were "indicators" that employer discharged plaintiff for retaliatory reasons; testimony improperly invaded province of jury to draw conclusions from evidence and testimony lacked any reliable foundation in expert's professional experience and expertise. *Kotla v. Regents of University of California (2004) 115 Cal. App. 4th 283, 290-295, 8 Cal. Rptr. 3d 898*

Trial court erroneously admitted opinions of police officer testifying at trial of gang member as prosecution's expert witness going to subjective knowledge and intent of occupants of cars that when one gang member in car possesses a gun, every other gang member in car knows of gun and will constructively possess gun, when trial court failed to apply law to facts and opinions offered by witness and instead concluded under *Gardeley* without analysis that all officer opinions on gangs are admissible, and when testimony was not type of culture and habit testimony found in reported cases, none of which permitted testimony that specific individual had specific knowledge or possessed specific intent; trial court abused its discretion by allowing expert to testify at great length about whether also individuals were members of specific gangs based on hearsay material and based on material that inflamed jury's passions and had little or no probative value. *People v. Killebrew (2002) 103 Cal. App. 4th 644, 651-660, 126 Cal. Rptr. 2d 876*

Trial court properly sustained objection to receipt in evidence of declaration of expert regarding broker-dealer's breach of duty to supervise registered representative of broker-dealer, when question of duty is one of law, not fact, which is within province of court to decide. *Asplund v. Selected Investments in Financial Equities, Inc. (2000) 86 Cal. App. 4th 26, 49-50, 103 Cal. Rptr. 2d 34*

Expert opinion may be based on hearsay as long as it is reasonably reliable. *In re Marriage of LaBass & Munsee (1997) 56 Cal. App. 4th 1331, 1339, 66 Cal. Rptr. 2d 393*

Rule as well settled that conjectural and speculative matters may not be relied on by expert in forming opinion on subject to which his or her testimony relates. *Tilem v. City of Los Angeles (1983) 142 Cal. App. 3d 694, 707, 191 Cal. Rptr. 229*

Opinion of qualified expert witness as itself evidence. *Andersen v. Howland (1970) 3 Cal. App. 3d 380, 384, 83 Cal. Rptr. 308*

[f] Failure to Object

Failure of counsel to secure ruling on objection waives objection; objection on ground different than that urged on appeal is insufficient. *Haskell v. Carli (1987) 195 Cal. App. 3d 124, 129, 240 Cal. Rptr. 439*

Failure to object to testimony waives objections. *Orient Handel v. United States Fid. & Guar. Co. (1987) 192 Cal. App. 3d 684, 700, 237 Cal. Rptr. 667*

[g] Hearsay and Exceptions

[i] General Rules

In first-degree murder prosecution, trial court did not err in denying defendant's pretrial motion to admit evidence of statement purportedly made by deceased former police officer to officer investigating murder, in which deceased former officer told investigating officer that she had met a man other than defendant in bar and during their conversation, the man admitted that he committed the robbery and homicide, and in not holding evidentiary hearing to determine if circumstances under which statement was made provided some level of assurance of its reliability; even assuming error, it would have been harmless beyond reasonable doubt. *People v. Garcia (2005) 134 Cal. App. 4th 521, 534-540, 36 Cal. Rptr. 3d 181*

Evidence of preliminary alcohol screening (PAS) test administered by California Highway Patrol, involving use of test solution with label on container that content was.10 percent alcohol was hearsay, because officer was relying on truth of assertion in making determination whether PAS device was functioning accurately, but however, trial court properly admitted evidence, since officer was testifying as expert and could base his opinion on any matter known to him, including hearsay not otherwise admissible, on which officer could reasonably rely for that purpose. *People v. Hallquist (2005) 133 Cal. App. 4th 291, 295-296, 34 Cal. Rptr. 3d 621*

Proper authentication of documents does not overcome hearsay rule; in action by community college student for personal injury based on negligence in planning and supervising assignment to map route for class trip, trial court did not err in excluding transcripts of telephone conversations between plaintiff's investigator and witnesses, during which witnesses verbally declared their statements were true under penalty of perjury and which plaintiff's investigator authenticated via her own declaration attesting transcripts were true reproductions of her conversations, since transcripts were hearsay and plaintiff made no argument on appeal as to what possible exception to hearsay rule would apply. *Stockinger v. Feather River Community College (2003) 111 Cal. App. 4th 1014, 1025-1027, 4 Cal. Rptr. 3d 385*

[ii] Admissions and Confessions

On retrial of defendant, trial court did not err in admitting statements defendant made in closing argument in his first trial, in which defendant represented himself, as party admissions under *Evid. Code § 1220*. *People v. Kiney (2007) 151 Cal. App. 4th 807, 812-816, 60 Cal. Rptr. 3d 168*

Trial court properly found that defendant made adoptive admission of truth of prior sentencing court's description of injuries of victim who had been struck by defendant to enable trial court to use prior conviction as "strike" for sentencing purposes, when a reasonable person in defendant's situation would have disputed court's description of victim's injuries, which impliedly, if not expressly, accused defendant of inflicting great bodily injury on victim, if description had been false, and since defendant was required to make restitution for injuries, he had interest in assuring that court did not exaggerate them. Representation by counsel did not preclude application of adoptive admission exception to hearsay rule, because description of injuries was given in defendant's presence, and he had opportunity to respond either personally or through counsel if description was inaccurate. *People v. Thoma (2005) 128 Cal. App. 4th 676, 682-685, 27 Cal. Rptr. 3d 309*

In murder prosecution, pretrial statements by defendants during joint interview were properly admitted against each defendant under hearsay exception for party admissions and against co-defendants under hearsay exception for adoptive admissions. *People v. Castille (2003) 108 Cal. App. 4th 469, 478-486, 133 Cal. Rptr. 2d 489*

[iii] Declarations Against Interest

Trial court properly excluded videotaped statement of victim's wife that she, rather than defendant, had killed victim, because it failed to meet threshold requirement of trustworthiness, when statement was inconsistent with another statement in which she told police she knew nothing of her husband's death and with subsequent statement blaming defendant and another man for her husband's murder; trial would have devolved into inquiry into conflicting statements, so that questionable value of evidence would have been substantially outweighed by probability its admission would have necessitated undue consumption of time or confused issues and misled jury. *People v. Geier (2007) 41 Cal. 4th 555, 584-585, 61 Cal. Rptr. 3d 580*

In capital murder prosecution resulting from defendant's hiring of daughter's boyfriend to kill her husband and then arranging boyfriend's murder, trial court properly admitted boyfriend's statement to acquaintance that he and another man had killed defendant's husband, defendant had paid him, boyfriend had skimmed money off top for himself and then paid balance to other man, and that he paid other man in cocaine in lieu of money as declaration against penal interest, since facially incriminating comments were in no way exculpatory, self-serving, or collateral, and admission that defendant paid him, volunteered to acquaintance, was specifically disserving to boyfriend's interests in that it intimated he had participated in contract killing, which was particularly heinous type of murder, and in conspiracy to commit murder. *People v. Samuels (2005) 36 Cal. 4th 96, 120-121, 30 Cal. Rptr. 3d 105, 113 P.3d 1125*

Statement by man that he entered murder victim's truck on passenger side was admissible as statement against penal interest, when, although he did not admit to firing fatal shot, he knew he was being charged with murder, admitted to hearing gunshot, and admitted to participating in stealing victim's truck; denial of having been shooter did not absolve him of crimes to which he admitted. *People v. Brown (2003) 31 Cal. 4th 518, 535-537, 3 Cal. Rptr. 3d 145, 73 P.3d 1137*

Co-defendant's statements to his girlfriend describing circumstances of murder was not admissible as declaration against interest, since statements laid blame for killing squarely on other defendant, and, to extent statement implied that other defendant went to victim's room to rob her, it was not specifically disserving of co-defendant. *People v. Smith*

(2005) 135 Cal. App. 4th 914, 922, 38 Cal. Rptr. 3d 1

Wife's statement to her husband shortly before he committed murder that she committed adultery with man he killed not long afterward was properly admitted under social interest exception to hearsay rule under *Evid. Code § 1230* and was sufficiently trustworthy to satisfy *confrontation clause*. *People v. Wheeler (2003) 105 Cal. App. 4th 1423, 1426-1431, 129 Cal. Rptr. 2d 916*

[iv] Former Testimony

In prosecution for possession of check with intent to defraud and second degree burglary, after jury deadlocked at first trial, during second trial court properly allowed prosecution to read defendant's testimony from first trial, including defendant's admission of prior convictions, to jury after defendant elected not to testify and invoked *Fifth Amendment*; once defendant made himself unavailable by invoking his *Fifth Amendment* privilege, admission of his former testimony in second trial under *Evid. Code § 1291(a)* was proper. *People v. Malone (2003) 112 Cal. App. 4th 1241, 1244-1245, 5 Cal. Rptr. 3d 741*

Trial court properly denied admission of deposition testimony of expert witness in earlier case, when, although underlying claims in earlier case were substantially identical to instant case, defendant in earlier case did not have similar motive to cross-examine witness as did defendant in this case, because expert in earlier case was defendants' expert witness and his testimony was given in deposition so that defendant in that case had no incentive or motive to cross-examine him or bring out facts favorable to its defense as defendant in this action would have had if plaintiff proffered expert as expert witness. *Byars v. SCME Mortgage Bankers, Inc. (2003) 109 Cal. App. 4th 1134, 1150, 135 Cal. Rptr. 2d 796*

[v] Infliction or Threat of Infliction of Injury

In murder and spousal abuse prosecution, trial court erred in admitting evidence of victim's statements to her doctor and police officer that defendant had caused her neck injury seven weeks earlier, pursuant to physical injury exception to hearsay rule for statements made at or near time of injury [*Evid. Code § 1370(a)(3)*], when statements were not made at or near time of injury and statements to officer were not made under circumstances indicating their trustworthiness. *People v. Quitiquit (2007) 155 Cal. App. 4th 1, 8-12, 65 Cal. Rptr. 3d 674*

In murder prosecution, trial court erred in admitting application for restraining order filed by victim days before she was killed under *Evid. Code § 1370*, when, although statement purported to narrate, describe, or explain infliction or threat of physical injury on victim by defendant, declarant was unavailable as witness at trial, and statement was made in writing, was electronically recorded, or made to physician, nurse, paramedic, or to law enforcement official. *People v. Pantoja (2004) 122 Cal. App. 4th 1, 8-15, 18 Cal. Rptr. 3d 492*

[vi] Prior Statement

In prosecution for assault and infliction of corporal injury on spouse, trial court did not violate defendant's *Sixth Amendment* confrontation right by admitting hearsay statement by defendant's victim-spouse to police officer as sufficiently trustworthy, when, under *Evid. Code § 1370*, statement narrated infliction of physical injury on spouse, spouse was unavailable at trial as witness because she refused to testify about events, statement was made at or near time of infliction of injury, it was made to police officer, and it was made under circumstances indicating its trustworthiness because defendant had opportunity to cross-examine spouse at preliminary hearing about statement she gave to police officer and he vigorously exercised opportunity and later presented preliminary hearing testimony to jury in support of his defense. *People v. Price (2004) 120 Cal. App. 4th 224, 237-239, 15 Cal. Rptr. 3d 229*

In murder prosecution, trial court erred in admitting statement by nontestifying accomplice to police as statement of identification under *Evid. Code § 1235*, when witness neither testified nor was given opportunity to explain or to deny statement or was not excused from giving further testimony. Statement also was not admissible under *Evid. Code § 1294* as prior inconsistent statement, when recording of statement was not first introduced into evidence at preliminary hearing, but instead accomplice was asked to review specific excerpts of transcript of his interview with police to see if it refreshed his recollection and prosecutor read from portions of transcript to impeach accomplice; while transcript of preliminary hearing testimony was properly admitted at trial due to accomplice's unavailability [*Evid. Code § 1291*], court erred in allowing jury to hear actual recording of his statement. However, portions of statement implicating defendant were covered by accomplice's and another witness's preliminary hearing testimony, error in admitting statement was harmless beyond reasonable doubt. *People v. Martinez (2003) 113 Cal. App. 4th 400, 407-409, 410-411, 7 Cal. Rptr. 3d 49*

Evidence of previous statement by witness is admissible under prior consistent statement exception to hearsay rule if there has been express or implied charge that witness's testimony is recently fabricated and prior consistent statement was made before motive for fabrication is alleged to have arisen [*Evid. Code §§ 1236, 791*]; in evaluating admissibility of prior consistent statements, focus is on specific agreement or other inducement suggested by cross-examination as supporting witness's improper motive. *People v. Crew (2003) 31 Cal. 4th 822, 840, 3 Cal. Rptr. 3d 733, 74 P.3d 820*

[vii] Spontaneous Declarations

In capital murder and attempted murder prosecution, trial court properly allowed police officer to testify to attempted murder victim's identification of defendant just after crimes occurred in response to officer's question as to who did it as spontaneous declaration, when victim's spontaneous statement of names as to "who did it" described event she perceived, and she made identifying remarks while under stress of excitement caused by experiencing crime. *People v. Morrison (2004) 34 Cal. 4th 698, 718-720, 21 Cal. Rptr. 3d 682, 101 P.3d 568*

In capital murder prosecution, trial court properly allowed testimony that witness heard her brother-in-law implicate defendant in murder under spontaneous utterance exception to hearsay rule, since declarant was crying, shaking, and visibly upset when he made statement, explaining that he was still reacting to events himself, and when, although statement was made about 2.5 hours after crime, facts available to trial court justified its conclusion declarant continued to labor mightily under emotional influence of disturbing events he perceived, and there was substantial evidence to support trial court's decision that declarant purported to be describing events he had personally seen. *People v. Brown (2003) 31 Cal. 4th 518, 540-542, 3 Cal. Rptr. 3d 145, 73 P.3d 1137*

Spontaneous declaration exception applies only if statement is both spontaneous and made in state of excitement; California does not recognize "present sense" exception to hearsay rule for statement describing or explaining event or condition made while declarant was perceiving event or condition or immediately thereafter. *People v. Hines (1997) 15 Cal. 4th 997, 1034, 64 Cal. Rptr. 2d 594, 938 P.2d 388*

In spousal abuse prosecution, police officer's testimony that wife told officer she had been assaulted by defendant 30 minutes earlier, that she and defendant got into argument at home and during argument, defendant choked her from behind, pushed her, hit her and threatened her, and that she had come to police station because she was frightened by his death threat was admissible as spontaneous utterance; mere passage of time was insufficient to deprive statement of spontaneity, evidence showed that wife was distraught when making statement, and there was no evidence that statement lacked spontaneity. *People v. Saracoglu (2007) 152 Cal. App. 4th 1584, 1588-1590, 62 Cal. Rptr. 3d 418*

In murder prosecution based on husband's burning of his wife, statements of wife to police officers in response to their questions were admissible under *Evid. Code § 1240* hearsay exception for spontaneous declarations, when two officers

encountered victim and asked only what happened and then followed up by asking how she was burned, officer estimated he spoke to victim for approximately 10 to 15 seconds and other officer said he was with her for few seconds, and victim's response, given minutes after she had sustained severe burns and while she was still suffering from resulting intense pain suggested her statements were product of stress of moment, not deliberation; and although third officer spoke to victim for about five minutes and asked more questions than other officers, evidence supported trial court's finding victim's answers were nonetheless spontaneous. *People v. Pedroza (2007) 147 Cal. App. 4th 784, 791-792, 54 Cal. Rptr. 3d 636*

Statements made by stabbing victim to 911 operator and first police officer on scene were admissible as spontaneous statements. *People v. Brenn (2007) 152 Cal. App. 4th 166, 171-173, 60 Cal. Rptr. 3d 830*

Co-defendant's statement to his girlfriend describing circumstances of murder was admissible as spontaneous declaration; girlfriend's testimony about co-defendant's demeanor provided substantial evidence of preliminary facts showing his statements were spontaneous. *People v. Smith (2005) 135 Cal. App. 4th 914, 922-923, 38 Cal. Rptr. 3d 1*

In murder and attempted murder prosecution, out-of-court statements by attempted murder victim to prosecution witness were admissible as spontaneous statements under *Evid. Code § 1240,* when statements described event victim personally perceived, *i.e.,* being shot in ankle during gunfight immediately before traveling to witness' home, and when there was sufficient evidence to show victim spoke to witness while under stress of excitement caused by shooting. *People v. Rincon (2005) 129 Cal. App. 4th 738, 751-754, 28 Cal. Rptr. 3d 844*

In prosecution for corporal injury to spouse, trial court properly admitted, under spontaneous statements exception to hearsay rule, statements by victim-spouse made immediately after incident to 911 operator that her husband had hit her, which she repeated to police officer and medical personnel who responded to 911 call, because statements described her perception of recent events while stress dominated her reflective powers. *People v. Corella (2004) 122 Cal. App. 4th 461, 465-469, 18 Cal. Rptr. 3d 770*

In prosecution for crimes related to defendant's discharging firearm at occupied vehicle but hitting pedestrian, trial court properly admitted hearsay statement of driver of vehicle at which defendant shot that defendant was trying to shoot vehicle's occupants but they ducked as spontaneous declaration because requirements for excitement and spontaneity were met; when witness to shooting who was with pedestrian testified driver acted "real excited" and spoke quickly and in high-pitched tone which she demonstrated for court, and that car arrived approximately one minute after shooting, which was well within time frame for spontaneous declaration. *People v. Riva (2003) 112 Cal. App. 4th 981, 994-996, 5 Cal. Rptr. 3d 649*

In prosecution based on defendant's alleged theft of money from resident of residential intermediate care facility for physically dependent adults at which defendant worked, trial court erred in admitting statement by resident to social worker about her dealings with defendant as spontaneous declaration, when although at time she first telephoned social worker, resident was tearful and evidently quite shaken by news she was about to be evicted from care facility for non-payment of rent, two days elapsed before substantive discussion between the two women and circumstances surrounding statement showed ample opportunity for deliberation and reflection. *People v. Pirwani (2004) 119 Cal. App. 4th 770, 787-791, 14 Cal. Rptr. 3d 673*

[viii] State of Mind

Statements of murder victim accusing defendant of sexually molesting her were properly admitted to explain defendant's state of mind, motive, and conduct, where defendant's wife and victim's mother testified that after victim, who was defendant's daughter, told her about defendant's abuse, she had numerous conversations with defendant during which she confronted him with details of victim's accusations, so there was no dispute defendant was aware of

accusations before he went to murder site, and where prosecutor contended defendant's anger about allegations and their effect on his family led him to murder victim and other children, so that veracity of accusations was immaterial to their relevance in explaining defendant's motive and prosecutor made clear statements were only being offered to explain defendant's conduct. *People v Mendoza (2006) 42 Cal. 4th 686, 695-698*

Under state of mind exception, trial court properly permitted testimony regarding murder victim's statement that she preferred African-American men, because there was evidence defendant had sexual relations with her on night she was killed, and testimony was relevant to issue of consent, i.e., given her preferences, she would not have consented to sexual relations with defendant, who was white. *People v. Geier (2007) 41 Cal. 4th 555, 585-587, 61 Cal. Rptr. 3d 580*

In capital murder prosecution, trial court did not err by admitting under state of mind exception in prosecution case in aggravation at penalty phase retrial, victim's statement that defendant had been fondling her for some time and she intended to confront him if he continued to do so; statement reflected her mental state, that is, her intent to confront defendant, even though occurrence of confrontation itself depended on defendant's continued fondling; fact that statement may have been inadmissible to prove defendant's past fondling did not render it inadmissible; since it was admissible to prove victim's state of mind and defendant did not request limiting instruction. *People v. Griffin (2004) 33 Cal. 4th 536, 578-579, 15 Cal. Rptr. 3d 743, 93 P.3d 344*

In prosecution for first degree murder, witness's testimony that murder victim had told her that if witness did not hear from victim in two weeks to send police was not inadmissible hearsay; since even if viewed as hearsay, statement was within state-of-mind exception to hearsay rule [*Evid. Code § 1250(a)(2)*] to explain victim's conduct, since defense presented theory that victim disappeared of her own accord because she was a troubled person suffering from stress and depression. *People v. Crew (2003) 31 Cal. 4th 822, 840, 3 Cal. Rptr. 3d 733, 74 P.3d 820*

In murder prosecution of man accused of fatally stabbing his lover, trial court did not err in permitting friend to testify, under hearsay exception in *Evid. Code § 1250* for statement of declarant's then-existing state of mind, emotion, or physical sensation, that victim had told him that defendant would kill him if he found him with another man or knew that he had been with another man; in light of defendant's reliance on self-defense, victim's statements about threats defendant made were clearly admissible under *Evid. Code § 1250*, and statements appeared to have been entirely spontaneous and in company of someone victim was comfortable with and trusted, so there did not appear to be anything in record that undermined trustworthiness of statement. *People v. Romero (2007) 149 Cal. App. 4th 29, 39, 56 Cal. Rptr. 3d 678*

In action for wrongful termination in violation of public policy, trial court should have considered statement by plaintiff's supervisor's supervisor about her alleged desire to seek revenge on those who participated in investigation of her allegedly sexually inappropriate behavior in ruling on employer's summary judgment motion; when statement was admissible for nonhearsay purposes, since apart from truth, i.e., that she would get revenge, statement showed her mental state that she felt she had been wronged and harbored ill will toward those she held responsible; and when, although supervisor's supervisor was not named defendant, she was involved each step of way in process leading to plaintiff's termination, rendering her remark admissible as statement of party. Statement also was admissible as prior inconsistent statement since she denied making it in her deposition. *Colarossi v. Coty US Inc. (2002) 97 Cal. App. 4th 1142, 1149-1151, 119 Cal. Rptr. 2d 131*

When the reasonableness of a person's conduct is at issue, statements of others on which the person acted are admissible. *Silva v. Lucky Stores, Inc. (1998) 65 Cal. App. 4th 256, 265, 76 Cal. Rptr. 2d 382* (in wrongful discharge case, recorded interviews of other employees, made as part of employer's investigation of misconduct before termination decision, were admissible to establish that termination decision was reasonable based on materials generated during employer's investigation)

[ix] Statements and Writings That Are Not Hearsay

Hearsay rule does not apply to evidence of oral or written statements offered to prove existence of contract. *In re Marriage of LaBass & Munsee (1997) 56 Cal. App. 4th 1331, 1338, 66 Cal. Rptr. 2d 393* (want ads admissible for nonhearsay purpose of showing that offers to bargain existed)

Promissory note was admissible not as business record but rather as operative contractual document, admissible merely on adequate evidence of authenticity. *Remington Investments, Inc. v. Hamedani (1997) 55 Cal. App. 4th 1033, 1042-1043, 64 Cal. Rptr. 2d 376*

Out-of-court statements offered as "operative facts" or "verbal acts," not to prove truth of matter asserted in statements, are not hearsay; in proving existence of oral contract, words uttered by offerer in making offer are admissible as nonhearsay to prove essential element of contract. *People v. Dell (1991) 232 Cal. App. 3d 248, 260-262, 283 Cal. Rptr. 361*

[x] Evidence Not Qualifying for Admission Over Hearsay Objection

Trial court erred in granting summary judgment to plaintiff based on declaration of plaintiff's general manager averring that defendant's accounts were delinquent as reflected in bills sent to defendant as detailed statements of what he owed, when declaration explicitly recapitulated contents of second writing consisting of table summarizing plaintiff's claimed damages, which was not incorporated in declaration or even vouched for, but was merely described as "attached," therefore was not given under oath and did not fall within implicit hearsay exception for affidavits and declarations, and when declaration explicitly described amount owed as being derived from third level of documentary hearsay; while original bills might have been admissible over hearsay objection as business records or official records, there was no showing of time and circumstances of documents' creation. Secondary evidence rule [*Evid. Code § 1521*] would permit introduction of otherwise admissible secondary evidence to prove contents of writing, but did not excuse complying with hearsay rule. *Pajaro Valley Water Management Agency v. McGrath (2005) 128 Cal. App. 4th 1093, 1106-1108, 27 Cal. Rptr. 3d 741*

Forensic alcohol analysis submitted by Department of Motor Vehicles in support of suspension of driving privilege was not sufficiently competent evidence to support suspension because it would not have been admissible over hearsay objection in civil action under *Evid. Code § 1280* exception to hearsay rule in conjunction with *Evid. Code § 664* presumption that official duty had been regularly performed, when DMV, as proponent of document, failed to establish it had been prepared by person with official duty. *Furman v. Dept. of Motor Vehicles (2002) 100 Cal. App. 4th 416, 420-423, 122 Cal. Rptr. 2d 520*

[xi] Unavailable Witness

In criminal prosecution, trial court did not err in determining that victim was unavailable to testify at trial because of mental illness or infirmity and because he was unable to testify without suffering substantial trauma [*Evid. Code § 240(a)(3), (c)*] and in admitting his preliminary hearing testimony, when substantial evidence supported trial court's factual findings that requiring victim, who was teenager who suffered from cerebral palsy and learning deficiencies, and who had been abducted by defendant, to testify at trial would substantially be likely to result in an increased level of harm to him and would further aggravate already serious psychological problem that he was suffering *People v. Winslow (2004) 123 Cal. App. 4th 464, 469-473, 19 Cal. Rptr. 3d 872*

[xii] Business Records

In sex discrimination action by female former police officer, trial court did not err in refusing to admit exit questionnaires prepared by departing female officers, as well as summaries of exit interviews prepared by city personnel who conducted them, where questionnaires were not business records within hearsay exception, since, although it may have been city's practice to require departing employees to complete exit questionnaire and to keep questionnaires with exit interview summaries prepared by city personnel, departing officers were neither employees acting on behalf of police department nor acting in ordinary course of their own business when they completed exit questionnaires, and because two officers were leaving to join other police departments, their exit questionnaires were not inherently trustworthy; and where exit interview summaries prepared by city employees, although prepared in ordinary course of business, did not qualify as business records because the employees who prepared them did not have firsthand knowledge of events recorded and officers, who did have firsthand knowledge, were not under business duty to accurately report facts pertaining to their departure. *Zanone v. City of Whittier (2008) 162 Cal. App. 4th 174, 190-192, 75 Cal. Rptr. 3d 439*

Trial court did not err in accepting on summary judgment motion copies of correspondence and contract, with affidavit of claims analyst, in action between insured and insurer regarding settlement of earthquake claim, because analyst was qualified witness under *Evid. Code § 1271* to identify documents, and there was no business records hearsay issue because copies of settlement agreement and release and correspondence documents were themselves direct evidence of their undisputed contents and contents, and their undisputed delivery to insured, were relevant. *Rosenblum v. Safeco Ins. Co. (2005) 126 Cal. App. 4th 847, 863, 24 Cal. Rptr. 3d 427*

In prosecution for spousal abuse, trial court erred in admitting portion of crisis intervention log and client intake data form maintained by organization that assists abused women under business records exception to hearsay rule, when forms contained multiple layers of hearsay because they contained statements by allegedly abused women to organization employees as first layer, and employee's recordation of statements as second layer; although testimony sufficiently established that employees who recorded information were obligated to do so in accurate manner, testimony did not establish trustworthiness of abused woman's statements to employees. Forms were only admissible to establish that woman had telephoned hotline on specified date and that she had visited shelter on another date; forms were inadmissible multiple hearsay to when offered prove circumstances of alleged abuse incident. *People v. Ayers (2005) 125 Cal. App. 4th 988, 994-996, 23 Cal. Rptr. 3d 242*

[xiii] Dying Declarations

Statements by murder victim that he had been robbed and shot and that shooter was short Mexican male who had arrived in car were properly admitted at trial as dying declaration, even though victim survived for several more days before dying, when prosecution established objective severity of victim's fatal wounds as well as his subjective awareness of those wounds based on victim's statements, demeanor, and conduct, as well as his evident injuries. *People v. Monterroso (2004) 34 Cal. 4th 743, 762-763, 22 Cal. Rptr. 3d 1, 101 P.3d 956*

[xiv] Implied Assertions

In prosecution for possession of methamphetamine for sale, statements by telephone caller asking to buy drugs to officer executing search warrant for evidence of possession of controlled substance for sale, and some statements in response to questions by officer were hearsay; however, case law, recognized and accepted when Evidence Code was adopted and continuing thereafter, created exception to hearsay rule for this reliable type of evidence. *People v. Morgan (2005) 125 Cal. App. 4th 935, 940-947, 23 Cal. Rptr. 3d 224*

[xv] Official Records

In proceeding to require DMV to aside suspension of driver's license, trial court did not abuse its discretion by finding results of driver's blood alcohol test were not timely recorded as required by *Evid. Code § 1280(b)*, forensic report was prepared one week later and, although it was only five working days after arrest, memory was subject to erosion with every day that passed, whether working or nonworking; record was silent as to DMV's recordation policies and procedures, any automatic recording capability of testing equipment used, and average number of tests performed by analyst each day; and *Evid. Code § 664* did not create presumption analysts timely recorded test results, because regulations requiring laboratories to maintain records specified no deadlines or time periods or timeliness requirements governing recordation. *Glatman v. Valverde (2006) 146 Cal. App. 4th 700, 703-706, 53 Cal. Rptr. 3d 319*

On petition for writ of mandate challenging DMV administrative suspension of driving privileges on grounds that driver was intoxicated while driving, observations of fire captain who assisted driver from his car contained in police officer's sworn statement and in his unsworn arrest report were admissible as public records to prove driver was driving, since in reporting his personal observations to police officer, fire captain was acting pursuant to his duty to observe facts and report them correctly. *Hildebrand v. Dept. of Motor Vehicles (2007) 152 Cal. App. 4th 1562, 1569-1572, 62 Cal. Rptr. 3d 234*

In mandamus proceeding reviewing findings of audit of dentist, who was Denti-Cal provider, by fiscal intermediary for Department of Health Services' Denti-Cal/Medi-Cal program, Medi-Cal dental patients' claim detail reports (CDRs), showing services rendered to patient and amount paid for each service by Denti-Cal, which information was taken from claim forms submitted by provider to Denti-Cal, were admissible in administrative hearings challenging audit findings under *Evid. Code § 1280* exception to hearsay rule for official documents. *Bhatt v. State Dept. of Health Services (2005) 133 Cal. App. 4th 923, 928-931*

[h] Lay Opinion

In eminent domain action, trial court properly held that property owner's proposed testimony as to value of goodwill lacked foundation, when it was based on nothing more than informal discussions with brokers whose names she could not recall and few store owners, and there was no showing she had any expertise in various methods of valuing goodwill. *Redevelopment Agency of San Diego v. Attisha (2005) 128 Cal. App. 4th 357, 378, 27 Cal. Rptr. 3d 126*

In prosecution for attempted murder, trial court properly allowed police officer who took photographs of shoeprints at crime scene and compared tread with shoes seized from defendant's bedroom to testify that he found similarities between shoeprints and shoes, leading him to believe defendant's shoes possibly left prints as lay opinion under *Evid. Code § 800*, when comparison of shoes and footprints was rationally based on witness's perception and officer's opinion was helpful to clear understanding of his testimony, since jury would otherwise have to make its own tedious comparison of shoes and prints. *People v. Maglaya (2003) 112 Cal. App. 4th 1604, 1608-1609, 6 Cal. Rptr. 3d 155*

In action against real estate broker for intentional and negligent misrepresentation to buyers for whom broker acted as agent, trial court did not err in refusing to allow plaintiffs to reopen their case-in-chief to present one owner's testimony as to value of property, when, although *Evid. Code § 813(a)* allows owner's opinion testimony with regard to value of property, offer of proof failed to provide basis for opinion on market value of house as affected by code violations and structural defects, which was point to be proven, only that, at some time after plaintiffs purchased house and before trial, owner obtained information on value of comparable houses in neighborhood. *Fragale v. Faulkner (2003) 110 Cal. App. 4th 229, 240-241, 1 Cal. Rptr. 3d 616*

[i] Liability Insurance

Because permitting joint trial of causes of action against insured and insurer would contravene legislative intent

underlying *Evid. Code § 1155*, causes of action against insurer should be bifurcated. *Ahmed v. Peterson (1986) 186 Cal. App. 3d 374, 377, 230 Cal. Rptr. 636*

Suing of insured for negligence and insurer for bad faith in same lawsuit violated both letter and spirit of *Evid. Code § 1155*, which precludes use of evidence that tortfeasor has insurance for alleged injury; severance of action against tortfeasor from action against tortfeasor's insurer is within discretion of trial court. *Omaha Indemnity Co. v. Superior Court (1989) 209 Cal. App. 3d 1266, 1271, 258 Cal. Rptr. 66*

Evidence of defendant's insurance coverage is properly excluded under *Evid. Code § 352* when limited probative value of evidence is exceeded by prejudice inherent in its admission. *Staples v. Hoefke (1987) 189 Cal. App. 3d 1397, 1411, 235 Cal. Rptr. 165*

Evidence of defendant's insurance coverage, unless coupled and admitted along with other relevant evidence, is irrelevant and prejudicial to defendant, and thus not admissible to prove defendant's negligence or other wrongdoing. *Blake v. E. Thompson Petroleum Repair Co. (1985) 170 Cal. App. 3d 823, 830, 831, 832, 216 Cal. Rptr. 568*

Under "collateral source rule," evidence of payments to plaintiff by defendant's insurer, unless coupled and admitted along with other relevant evidence, is not admissible to mitigate damages plaintiff otherwise would recover from defendant when evidence of payments, absent showing of their source, would cause jury to speculate, to plaintiff's prejudice, on source of payments. *Blake v. E. Thompson Petroleum Repair Co. (1985) 170 Cal. App. 3d 823, 830, 831, 832, 216 Cal. Rptr. 568*

In negligence action for, among other things, property damage and lost business profits, evidence of payments to plaintiff by defendant's insurer was relevant to show that plaintiff (1) received partial compensation for alleged damages; (2) had financial ability to defray cost of repairing equipment and relocating business; and (3) may have intentionally delayed regeneration of business. *Blake v. E. Thompson Petroleum Repair Co. (1985) 170 Cal. App. 3d 823, 832, 216 Cal. Rptr. 568*

[j] Objections to Evidence

[i] Manner of Objecting

While no particular form of objection is required, objection must be made in such a way as to alert trial court to nature of anticipated evidence and basis on which exclusion is sought, and to afford proponent opportunity to establish its admissibility. *People v. Holt (1997) 15 Cal. 4th 619, 666-667, 63 Cal. Rptr. 2d 782, 937 P.2d 213*

Plaintiff did not preserve error in admission of release as evidence, when although counsel objected, neither reporter's transcript nor clerk's transcript revealed grounds for objection or confirmed he objected on grounds of relevancy, and plaintiff was required to show error by adequate record affirmatively. However, even if appellate court assumed plaintiff preserved his evidentiary objection for consideration on appeal, release was relevant to issue of whether defendant was grossly negligent, when, among other things, it described inherent risks of skiing and using ski lifts, so that trial court did not abuse its discretion in admitting release into evidence. *Platz v. Mammoth Mountain Ski Area (2002) 104 Cal. App. 4th 1253, 1260-1261, 128 Cal. Rptr. 2d 885*

[ii] Offer of Proof

Counsel's failure to describe substance of anticipated testimony, cite hearsay exception, or argue any nonhearsay purpose waived issue of wrongful exclusion of testimony. *People v. Ramos (1997) 15 Cal. 4th 1133, 1178, 64 Cal. Rptr. 2d 892, 938 P.2d 950*

[k] Preliminary Fact Determination

Evid. Code § 405 is designed to allow trial judge to withhold evidence from jury when rule mandating its exclusion is based on public policy considerations. *Jutzi v. County of Los Angeles (1987) 196 Cal. App. 3d 637, 647, 242 Cal. Rptr. 74*

[l] Prior Conduct

In wrongful death and survival action brought against former spouse by heirs of spouse whom former spouse allegedly murdered, trial court properly admitted evidence of former spouse's prior abuse of spouse as relevant to motive, intent and identity; fact that prior instances occurred several years before killing did not preclude admission. *Rufo v. Simpson (2001) 86 Cal. App. 4th 573, 585-587, 103 Cal. Rptr. 2d 492*

In suit for sexual harassment against former landlord in which trial court admitted evidence of uncharged misconduct (landlord's sexual advances toward others), court did not properly weigh probative value of evidence against extreme prejudice of "bad acts" evidence, since it failed to consider extent to which evidence had independent source and fact that there were no other tort judgments or criminal convictions arising out of landlord's conduct. *Brown v. Smith (1997) 55 Cal. App. 4th 767, 792, 795, 64 Cal. Rptr. 2d 301*

Prior episodes of abusive misconduct by police officer tended to show plaintiff's injuries suffered during booking were product of officer's intent and malice, and therefore were admissible under *Evid. Code § 1101(b)* (evidence relevant to prove fact other than disposition). *Andrews v. City and County of San Francisco (1988) 205 Cal. App. 3d 938, 945, 252 Cal. Rptr. 716*

[m] Privileges

[i] Attorney-Client Privilege

Common-law attorney-client privilege does not cease with death of client. *Swidler & Berlin v. United States (1998) 524 U.S. 399, 408-411, 118 S. Ct. 2081, 141 L. Ed. 2d 379*

In prosecution for making false workers' compensation claim, admission of photographs of defendant taken by investigator for defendant's former attorney in previous personal injury claim was error; photographs were privileged because they were taken to convey confidential information from defendant to his attorney, and they would have been privileged had defendant filed lawsuit based on previous personal injury claim, since personal injury claim that waives physician-patient privilege does not waive attorney-client privilege with respect to discussions or communications about that injury. *People v. Gillard (1997) 57 Cal. App. 4th 136, 162-163, 66 Cal. Rptr. 2d 790*

Attorney-client privilege only protects disclosure of communications, not disclosure of underlying facts that are referenced within qualifying communication; accordingly, knowledge of practices and procedures or existence of documents normally used in business operations is not privileged, nor is it violation of privilege to divulge that such documents exist but were not produced in response to discovery request. *State Farm Fire & Cas. Co. v. Superior Court (1997) 54 Cal. App. 4th 625, 643-644, 62 Cal. Rptr. 2d 834* (declarations from former employee of insurer, who had worked in unit that handled suits against insurer, and who collected information from attorneys to convey to insurer's executives and from insurer's employees to convey to its attorneys)

Insurer could not assert attorney-client privilege when services of counsel were sought or obtained with intent to commit fraud on plaintiffs and court; wrongful discovery tactics by insurer in defending litigation fell within

crime/fraud exception because they continued original fraud that formed basis for underlying suit and also constituted fraud on court. *State Farm Fire & Cas. Co. v. Superior Court (1997) 54 Cal. App. 4th 625, 639-641, 62 Cal. Rptr. 2d 834* (withholding of documents and information sought in discovery requests)

[ii] Private Investigator-Client Privilege

Although licensed private investigator has privilege not to disclose information acquired during investigation, except for divulging certain information to law enforcement officer or district attorney [*Bus. & Prof. Code § 7539(a)*], identity of private investigator's employer does not fall within scope of statute. *Flynn v. Superior Court (1997) 57 Cal. App. 4th 990, 994, 67 Cal. Rptr. 2d 491*

[iii] Psychotherapist-Patient Privilege

Confidentiality of communications between patients and psychotherapists does not depend solely on statutory psychotherapist-patient privilege; communications also are protected by constitutional right of privacy. *People v. Hammon (1997) 15 Cal. 4th 1117, 1127, 65 Cal. Rptr. 2d 1, 938 P.2d 986*

Psychotherapist-patient privilege concerns confidential communications during their professional relationship; privilege continues after termination of relationship, but communication between former patient and psychotherapist would not constitute privileged communication under statute. *Poliak v. Board of Psychology (1997) 55 Cal. App. 4th 342, 362, 63 Cal. Rptr. 2d 866*

[iv] Privilege Against Self-Incrimination

In light of *Evid. Code § 913*, to put witness on stand for purpose of having witness invoke privilege against self-incrimination would only invite jury to make improper inference; California law makes no distinction between civil and criminal litigation concerning adverse inferences from witness's invocation of privilege. *People v. Holloway (2004) 33 Cal. 4th 96, 129-131, 14 Cal. Rptr. 3d 212, 91 P.3d 164*

[n] Quality

No degrees of quality of evidence exist apart from its relevancy; hence, when "preponderance" of evidence is required to support a finding, there is no further requirement that it be "clear and convincing." *Barrett v. Bank of America (1986) 183 Cal. App. 3d 1362, 1371, 229 Cal. Rptr. 16*

[o] Relevance

In capital murder prosecution, trial court properly admitted evidence of defendant's gang membership, when evidence was more than merely tangentially relevant to premeditation, which was at issue as to both murder and attempted murder charges, because gang's name itself, 211 187 Hard Way Gangster Crips, was evidence of premeditation, since 211 and 187 were put in name with reference to *Pen. Code §§ 211* (robbery) and 187 (murder). *People v. Jones (2003) 30 Cal. 4th 1084, 1114-1115, 70 P.3d 359*

Testimony of employer regarding reasons for terminating employee was relevant in action for insurance bad faith alleging insurer's failure to indemnify employer's defense in third party's action arising out of employee's dishonesty, because evidence related to insurer's inadequate investigation of reasons for employee's termination. *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co. (1987) 189 Cal. App. 3d 1072, 1091, 234 Cal. Rptr. 835*

Evidence is required to be relevant to be admissible in discretion of trial court under *Evid. Code § 352*. *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co. (1987) 189 Cal. App. 3d 1072, 1093, 234 Cal. Rptr. 835*

[p] Rule of Limited Admissibility

Procedure for invoking rule of limited admissibility (*Evid. Code § 355*); rule applies properly only when evidence is admissible for one purpose but inadmissible for another purpose and not when evidence is admissible for all purposes. *Foreman & Clark Corp. v. Fallon (1971) 3 Cal. 3d 875, 887-888, 92 Cal. Rptr. 162, 479 P.2d 362*

[q] Scientific Evidence

In capital murder prosecution, trial court did not err in admitting results of electrophoretic testing of stains on tennis shoes found in defendant's garage under *Kelly/Frye* test; electrophoretic testing of dried bloodstains is generally accepted; mere variations in technique or procedure went to weight of evidence, not its admissibility; defendant made no showing that variations amounted to material scientific distinction or material failure to use correct, scientifically accepted procedures; and criminologist was fully qualified to perform electrophoretic testing and relate results. *People v. Cook (2007) 40 Cal. 4th 1334, 1344-1348, 58 Cal. Rptr. 3d 340, 157 P.3d 950*

Kelly-Frye test has three prongs: (1) "reliability" of new scientific technique must be established by showing it has gained general acceptance in particular field to which it belongs; (2) any witness testifying on general acceptance must be properly qualified as expert on subject; (3) proponent of evidence must demonstrate that correct scientific procedures were used in particular case. *People v. Venegas (1998) 18 Cal. 4th 47, 78, 74 Cal. Rptr. 2d 262, 954 P.2d 525*

Although *Frye* rule no longer is followed in federal courts when superseded by federal rules [*see* *Daubert v. Merrell Dow Pharms., Inc. (1993) 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469]* , *Kelly* rule remains law in California. *People v. Leahy (1994) 8 Cal. 4th 587, 591, 34 Cal. Rptr. 2d 663, 882 P.2d 321*

In action based on alleged exposure to mycotoxins through mold in home and workplace, trial court properly granted defendants' motion in limine to exclude results of mycotoxin antibody test and blood serology test; plaintiffs failed to show mycotoxin antibody test had gained general acceptance in relevant scientific community because laboratory that did test was only laboratory in United States conducting test, and other doctors testified that test was unreliable and not generally accepted in scientific community as valid technique to determine human exposure to mycotoxins; plaintiffs failed to show blood serology test had gained general acceptance in relevant scientific community as valid diagnostic technique for assessing human exposure to toxigenic mold, because laboratory conducting test was only laboratory in United States performing test, had not been evaluated or approved by FDA, and publication from California Department of Health Services concluded that test could not be used to imply presence of specific mold within home or workplace environment or be used to prove patient exposure to specific mold or its toxins. *Geffcken v. D'Andrea (2006) 137 Cal. App. 4th 1298, 1309-1310, 41 Cal. Rptr. 3d 80*

In murder prosecution, trial court erred in admitting evidence of dog scent identification of defendant because dog scent evidence did not meet *Kelly* requirements, when scent transfer unit was novel device used in furtherance of a new technique and subject to *Kelly* analysis, it was not obvious that vacuum device could properly transfer scent to gauze pad from object, that scent would not degrade or become contaminated, or that scent would not remain in unit after it was cleaned with alcohol; when dog handler who testified for prosecution was not scientist or engineer and was not qualified to testify about characteristics of unit or unit's acceptance in scientific community, and when there was no proof dog handler used correct scientific procedures while employing unit. Further, there was foundational weakness in dog identification evidence because dog was not tracking suspect but rather was given scent from gauze pad some length of time after incident and watched to see if dog showed interest in various locales frequented by defendant, and

there was no proof defendant ever touched matchbook from which scent was collected. Prosecution was required to lay foundation from academic or scientific sources regarding how long scent remains on object or at location; whether every person has scent so unique it provides accurate basis for scent identification, such that it can be analogized to human DNA; whether particular breed of dog is characterized by acute powers of scent and discrimination; and adequacy of certification procedures for scent identifications. However, there was no prejudice in admission of evidence because there was abundant evidence pointing to defendant's guilt. *People v. Willis (2004) 115 Cal. App. 4th 379, 385-388, 9 Cal. Rptr. 3d 235*

In action by minor alleging that his autism was caused by application of pesticide, trial court erred in granting motion in limine by applying admissibility test of *People v. Kelly* to exclude plaintiff's expert opinion testimony that pesticide caused autism because California distinguishes between expert medical opinion and scientific evidence, and medical opinion is not subject to special admissibility rule of *Kelly*; nor did defendant demonstrate that methodology used in studies relied on by plaintiff's experts, including use of animal studies to extrapolate to effects of substance on humans, was in any way novel or unaccepted in scientific community, requiring application of *Kelly* test. *Roberti v. Andy's Termite & Pest Control, Inc. (2003) 113 Cal. App. 4th 893, 899-903, 6 Cal. Rptr. 3d 827*

In prosecution for murder, forcible lewd or lascivious act on a child under age 14, and forcible rape, DNA evidence was not admissible to prove defendant's identity as perpetrator because it was unreliable and untrustworthy, when prosecution failed to carry its burden of demonstrating that FBI used proper scientific procedure to determine perpetrator's D2 genotype, reference to defendant's genotype to prove perpetrator's genotype was improper, and use of band-intensity analysis to prove perpetrator's genotype required first-prong scrutiny of that method under *People v. Kelly (1976) 17 Cal. 3d 24, 130 Cal. Rptr.144, 549 P.2d 1240* , so that FBI's method of discerning perpetrator's D2 genotype constituted improper procedure under *Kelly's* third prong; and when use of improperly discerned genotype to declare defendant match at D2 locus and calculate profile frequency was also improper procedure under *Kelly's* third prong, because D2 genotype, offered to prove match with defendant, in essence had two-out-of-three chance of exonerating defendant, and inclusion of D2 genotype in statistical calculation made perpetrator's profile rarer and defendant's possession of it more incriminating. Further, match and profile frequency evidence relied on perpetrator's genotype as preliminary fact and thus was admitted without adequate foundation under *Evid. Code § 403*. *People v. Pizarro (2003) 110 Cal. App. 4th 530, 554-622, 3 Cal. Rptr. 3d 21*

Trial court properly admitted expert testimony indicating that use of methamphetamine affected criminal defendant's ability to operate vehicle safely, when testimony concerning effects of methamphetamine on human behavior and opinion that person with concentration of methamphetamine in his blood that defendant had and who demonstrated symptoms like defendant's would not have ability to drive safety were based on method of research generally accepted in scientific community. *People v. Bui (2001) 86 Cal. App. 4th 1187, 103 Cal. Rptr. 2d 908*

Ratios used by county assessor's office to determine value of oil-producing property were neither "new" nor "scientific techniques;" not new because expert witnesses testified methods they used were commonly used in oil and gas industry for valuation purposes; not scientific because they did not purport to provide some "definitive truth." *Texaco Producing, Inc. v. County of Kern (1998) 66 Cal. App. 4th 1029, 1048-1049, 78 Cal. Rptr. 2d 433*

Testimony based on alleged memories brought forth through use of sodium amytal ("truth serum") is unreliable and inadmissible under *Kelly-Frye*. *Ramona v. Superior Court (1997) 57 Cal. App. 4th 107, 116-123, 66 Cal. Rptr. 2d 766* (rejecting attempt to distinguish prior cases on ground that sodium amytal was used on witness for therapeutic purposes and two-year interval existed between administering drug and some of witness's allegedly recovered memories)

Psychological "syndrome" or "profile" evidence does not per se require screening procedures applicable to new scientific evidence not previously accepted in court; evidence is admissible when traditional standards for competent expert opinion are met. *People v. Harlan (1990) 222 Cal. App. 3d 439, 448-449, 271 Cal. Rptr. 653* (reactions of sexually abused children)

Admissibility of expert testimony based on new scientific technique involves (1) establishment of reliability of method, usually by expert testimony, and (2) qualification of testifying witness as expert who can give opinion on subject; expert testimony in child dependency action is inadmissible when lacking foundational proof that "child molest syndrome" is generally accepted in scientific psychological community. *In re Sara M. (1987) 194 Cal. App. 3d 585, 592-594, 239 Cal. Rptr. 605*

Evidence based on new scientific method of proof is admissible only on showing that method has been generally accepted as reliable in scientific community in which it was developed. *In re Amber B. (1987) 191 Cal. App. 3d 682, 687-692, 236 Cal. Rptr. 623* ; *In re Christine C. (1987) 191 Cal. App. 3d 676, 679-680, 236 Cal. Rptr. 630*

[r] Settlement Negotiations

In personal injury action resulting from multi-vehicle accident, trial court erred in excluding from evidence as settlement negotiations two letters written by plaintiff to insurance company concerning different motor vehicle accident in which he was later involved, where, although letters were part of settlement negotiations, they were not proffered for purpose of proving either liability or invalidity of claim with respect to later accident. However, it was not reasonably probable defendants would have achieved more favorable result in absence of error, so error was harmless. *Zhou v. Unisource Worldwide (2007) 157 Cal. App. 4th 1471, 1476-1481, 69 Cal. Rptr. 3d 273*

Trial court did not err in excluding evidence of e-mail sent by one party regarding ownership of some shares of stock pursuant to *Evid. Code § 1152*, when e-mail was one of numerous e-mails sent among parties while they were attempting to resolve several interrelated disputes and issue of ownership of all shares of company, which was closely held family company, would be critical information in evaluating one party's buyout offer and resolving parties' many interrelated disputes. *Caira v. Offner (2005) 126 Cal. App. 4th 12, 30-36, 24 Cal. Rptr. 3d 233*

[s] Sufficiency

Testimony of single witness, even a party, is sufficient to establish a fact. *Green v. City of Oceanside (1987) 194 Cal. App. 3d 212, 227, 239 Cal. Rptr. 470*

[t] View of Scene

Law is clear that when view of scene of accident is made by trier of facts, conditions observed and properly bearing on case as independent evidence that may be considered by trier of facts in arriving at its decision. *Gates v. McKinnon (1941) 18 Cal. 2d 179, 182-183, 114 P.2d 576*

[u] Writings

In action involving insurance policy lost or destroyed without fraudulent intent on insured's part, claimant has burden of proving fact that he or she was insured under lost policy during period in issue and the substance of each policy provision essential to particular coverage insured claims; insurer has burden of proving the substance of any policy provision that functions to defeat insured's claim; there is no evidentiary requirement to prove material provisions by introducing evidence of specific language used in those provisions. *Dart Industries, Inc. v. Commercial Union Ins. Co. (2002) 28 Cal. 4th 1059, 1068-1074, 124 Cal. Rptr. 2d 142, 52 P.3d 79*

Deposition testimony of witness alleged to be unavailable under *Evid. Code § 240(a)(3)* requires proper foundation of

unavailability; physician's letter dated two months before hearing concerning medical inadvisability of appearance was not reliable and timely foundation and admission based on that foundation was improper. *Ritter v. State Bar (1985) 40 Cal. 3d 595, 601, 221 Cal. Rptr. 134, 709 P.2d 1303*

[5] Judicial Misconduct

Judicial misconduct deprived plaintiffs of fair trial, when judge made improper ex parte contact by viewing videotape offered by defendants with defense counsel present but not did not inform plaintiff's counsel, and when exchanges between court and counsel were antithesis of required judicial decorum and courtesy; because average person could entertain doubt whether judge was impartial, appellate court could reverse without speculating whether bias was actual or apparent, or whether result would have been same had evidence been impartially considered and matter dispassionately decided. *Haluck v. Ricoh Electronics, Inc. (2007) 151 Cal. App. 4th 994, 1002-1009, 60 Cal. Rptr. 3d 542*

[6] Mistrial

Insufficiency of evidence to justify verdict is ground for motion for new trial, not for mistrial. *Heavy Duty Truck Leasing, Inc. v. Superior Court (1970) 11 Cal. App. 3d 116, 119, 89 Cal. Rptr. 598*

[7] Order of Proceedings

When several defendants, each having separate defenses, appear by separate counsel, court is required to determine their relative order of presentation (*see Code Civ. Proc. § 607(8)*; *Evid. Code § 320*). *Diamond Springs Lime Co. v. American River Constructors (1971) 16 Cal. App. 3d 581, 602, 94 Cal. Rptr. 200*

[8] Order of Proof

Power of trial court to control order of proof is elemental and court's rulings as not disturbed on appeal unless there is abuse of discretion. *Gherman v. Colburn (1977) 72 Cal. App. 3d 544, 584, 140 Cal. Rptr. 330*

[9] Presumptions Affecting Burden of Proof

Report of independent commission on conduct of police department is presumed trustworthy, shifting burden to party opposing its introduction to prove otherwise. *Montiel v. City of Los Angeles (9th Cir. 1993) 2 F. 3d 335, 341-342*

Effect of rebuttable presumption created by *Evid. Code § 664* that official duty is presumed to have been regularly performed is merely to impose on party against whom it operates burden of proof as to nonexistence of presumed fact. *California Advocates for Nursing Home Reform v. Bonta' (2003) 106 Cal. App. 4th 498, 505, 130 Cal. Rptr. 2d 823*

Penal Code Section 1016.5, providing that absent record that court advised criminal defendant of immigration consequences of plea of guilty or nolo contendere, establishes rebuttable presumption affecting burden of proof rather than burden of producing evidence, since section clearly states that its purpose is to promote fairness by requiring appropriate warnings to defendants and Legislature intended to implement public policy of mandating administration of advisements; People rebutted presumption by preponderance of evidence by minute order indicating defendant was advised of possible effects of plea on "alien/citizenship/probation/parole status," coupled with testimony by judge as to his practice to advise criminal defendants of immigration consequences personally. *People v. Dubon (2001) 90 Cal. App. 4th 944, 953-956, 108 Cal. Rptr. 2d 914*

[10] Rebuttal

Rebuttal and impeachment of expert witness distinguished. *Kennemur v. State of California (1982) 133 Cal. App. 3d 907, 921-922, 184 Cal. Rptr. 393*

[11] Refreshing Memory

Rule that writing used by witness before or while testifying to refresh memory of any matter about which he or she testifies must be produced at request of adverse party (*Evid. Code § 771(a)*) is inapplicable to writing consisting of transcript of tape-recorded conference between attorney and client regarding events surrounding basis of client's cause of action, recorded with client's permission, and protected by attorney client privilege (*see Evid. Code § 954*). *Sullivan v. Superior Court (1972) 29 Cal. App. 3d 64, 67-74, 105 Cal. Rptr. 241*

[12] Witnesses

[a] Generally

In capital murder prosecution, after granting defendant's motion under *Evid. Code § 777* to exclude from courtroom any witness not then testifying to prevent witness from hearing testimony of others, trial court did not abuse its discretion in granting prosecution motion to permit presence of victim's mother, who was defendant's wife, and victim's sister pursuant to former *Pen. Code § 1102.6*, which allowed victim and victim's family to be present and seated at trial unless trial court found that their presence would pose substantial risk of influencing or affecting content of any testimony. Nothing before trial court suggested that victim's mother's or sister's presence posed substantial risk that either woman would craft or shape her own testimony, or cause any other witness to do so, as result of her presence. *People v. Griffin (2004) 33 Cal. 4th 536, 570-574, 15 Cal. Rptr. 3d 743, 93 P.3d 344*

Remedy for litigant who believes witness is trying to improve testimony is to question witness and, if necessary, impeach witness with prior testimony; thus, criminal defendant who had full opportunity to cross-examine prosecution witnesses at retrial suppression hearing was not denied due process by any changes in their testimony. *People v. Holloway (2004) 33 Cal. 4th 96, 122, 14 Cal. Rptr. 3d 212, 91 P.3d 164*

Objection to adequacy of witness's oath must be raised in proceeding in which witness is testifying at time when defect can be easily remedied or objection is waived. *People v. Haeberlin (1969) 272 Cal. App. 2d 711, 716, 77 Cal. Rptr. 553*

[b] Children

Child who is incompetent to be witness at given time by virtue of young age resulting in inability to understand duty to tell truth is reasonably presumed to have been incompetent also at earlier time; thus, child's hearsay statements in earlier social study report are inadmissible unless presumption is rebutted. *In re Daniel Z. (1992) 10 Cal. App. 4th 1009, 1018-1020, 13 Cal. Rptr. 2d 139*

Competency of very young witness depends only on witness's ability to perceive, recollect, and communicate, or to understand duty to tell truth; inconsistent or exaggerated statements by child do not indicate incompetence to testify but are questions of credibility for trier of fact. *Adamson v. Department of Social Services (1988) 207 Cal. App. 3d 14, 20, 254 Cal. Rptr. 667* (five-year-old witness)

[c] Credibility

On writ of habeas corpus after conviction resulting in imposition of death penalty, there was more than substantial evidence to support referee's finding that character and reputation for honesty and integrity of district attorney who had prosecuted case and later executed affidavit and testified that judge had improperly colluded with him during jury selection was poor, relying in part on testimony concerning specific instances of prosecutor's dishonesty in violation of *Evid. Code §§ 787, 1101(a)*; when enactment of *Cal. Const., art. I, § 28(d)* superseded all California restrictions on admission of relevant evidence except those expressly preserved or permitted under that section, and among superseded provisions was *Evid. Code § 787*; referee did not err under *Evid. Code § 1101* inasmuch as *Evid. Code § 1101(c)* stated explicitly that nothing in *Evid. Code § 1101* affected admissibility of evidence offered to support or attack credibility of witness. *In re Freeman (2006) 38 Cal. 4th 630, 640, 42 Cal. Rptr. 3d 850, 133 P.3d 1013* ,

In capital murder prosecution, trial court did not abuse its discretion in admitting detective's testimony of out-of-court statement of man who participated in crime to impeach eyewitness testimony as relevant, when eyewitness had testified he saw one man, slightly built Hispanic, go to driver's side of victim's truck while other man stated that he went to passenger side door of same truck, and eyewitness's ability accurately to perceive and recall was called into question if, from distance of at most two car lengths he did not see second man. *People v. Brown (2003) 31 Cal. 4th 518, 533-535, 3 Cal. Rptr. 3d 145, 73 P.3d 1137*

In capital murder prosecution, trial court properly admitted consistent statements of accomplice/witnesses because they were made before plea bargains were struck and thus before existence of one ground alleged in defendant's charge that their trial testimony was biased, even though statements were made after another ground for challenging them arose. *People v. Jones (2003) 30 Cal. 4th 1084, 1106-1107, 70 P.3d 359*

Evidence that witness has been convicted of felony is admissible to show bias under *Evid. Code § 786* without regard to nature of underlying crime, since it relates to character traits of honesty and truthfulness. *Piscitelli v. Salesian Society (2008) 166 Cal. App. 4th 1, 6-10, 82 Cal. Rptr. 3d 139*

Competency of very young witness depends only on witness's ability to perceive, recollect, and communicate, or to understand duty to tell truth; inconsistent or exaggerated statements by child do not indicate incompetence to testify but are questions of credibility for trier of fact. *Adamson v. Department of Social Services (1988) 207 Cal. App. 3d 14, 20, 254 Cal. Rptr. 667* (five-year-old witness)

Except for proof of felony conviction, specific instances of wrongdoing are not proper basis for attacking witness's credibility, pursuant to *Evid. Code §§ 787, 788*. *Downey Savings & Loan Assn. v. Ohio Casualty Ins. Co. (1987) 189 Cal. App. 3d 1072, 1092-1093, 234 Cal. Rptr. 835*

[d] Experts

[i] Appointments

Appointment of expert witnesses is within discretion of court. *People v. Gorg (1955) 45 Cal. 2d 776, 780, 291 P.2d 469* ; *People v. McCracken (1952) 39 Cal. 2d 336, 350, 246 P.2d 913* ; *Pink v. Slater (1955) 131 Cal. App. 2d 816, 817-818, 281 P.2d 272* ; *Laguna Salada, etc. Dist. v. Pac. Dev. Co. (1953) 119 Cal. App. 2d 470, 474, 259 P.2d 498*

Constitutionality of former *Code Civ. Proc. § 1871* (predecessor to *Evid. Code § 730*), authorizing appointment by court of expert witnesses. *Estate of Hastings (1929) 206 Cal. 524, 525-526, 274 P. 973*

Power of court under former *Code Civ. Proc. § 1871* (predecessor to *Evid. Code § 730*) to appoint independent and disinterested expert on its own motion to provide court with impartial report. *Durst v. Superior Court (1963) 222 Cal.*

App. 2d 447, 451, 35 Cal. Rptr. 143

[ii] As Subject to Contempt

Nonparty expert witness in personal injury action is subject to contempt for failure to appear at deposition proceeding to which he had been validly subpoenaed. *In re Morelli (1970) 11 Cal. App. 3d 819, 826, 91 Cal. Rptr. 72*

[iii] Basis of Opinion

In personal injury case arising from automobile accident, trial court's order granting defendant's motion in limine to prohibit plaintiffs' treating physician from testifying at trial as expert and limiting him to testifying as percipient witness because at his deposition, physician conceded he had not reviewed any of plaintiffs' records regarding prior medical treatment, was wrong as matter of law and court had reasonable alternatives to gutting plaintiffs' case; for example, to extent order reflected trial court's belief physician "sandbagged" defense counsel by not being fully prepared for his deposition, court could have ordered physician to submit to further deposition on appropriate terms and conditions. *Fatica v. Superior Court (2002) 99 Cal. App. 4th 350, 120 Cal. Rptr. 2d 904*

Evid. Code § 801(b) permits expert to rely on inadmissible evidence if it is of type that reasonably may be relied on by expert in forming opinion on subject to which testimony is related, but witness is not allowed to testify regarding details of such matters if they are otherwise inadmissible. *Genrich v. State of California (1988) 202 Cal. App. 3d 221, 229, 248 Cal. Rptr. 303*

Experts may properly rely on hearsay in forming opinions, but may not properly relate out-of-court opinion by another expert as independent proof of fact. *Mosesian v. Pennwalt Corp. (1987) 191 Cal. App. 3d 851, 860, 236 Cal. Rptr. 778*

Trial court's refusal to allow plaintiffs' accident reconstruction expert to rely on training records of pilot and observer pilot involved in plane crash in explaining conclusion that they became confused following decision to switch runways for landing was reversible error when paucity of direct evidence entitled expert to reasonably rely on training records in forming opinion and to explain that reliance to jury, as training records indicated similar confusion on part of defendants during previous landing approaches. *Buckwalter v. Airline Training Center (1982) 134 Cal. App. 3d 547, 551-554, 184 Cal. Rptr. 659*

[iv] Fees

Fee of expert accountant appointed by and acting under court's direction is a chargeable cost. *ABC Egg Ranch v. Abdelnour (1963) 223 Cal. App. 2d 12, 19, 35 Cal. Rptr. 487* (involving action for dissolution of partnership)

[v] Impeachment and Rebuttal

Impeachment of expert witness and rebuttal distinguished. *Fish v. Guevara (1993) 12 Cal. App. 4th 142, 146, 15 Cal. Rptr. 2d 329* ; *Kennemur v. State of California (1982) 133 Cal. App. 3d 907, 921-925, 184 Cal. Rptr. 393*

[vi] Qualifications

Trial court's determination that witness is qualified to testify as expert witness is required to be upheld on appeal absent abuse of discretion, which will be found only if evidence shows that witness clearly lacks qualification as expert. *Jutzi*

v. County of Los Angeles (1987) 196 Cal. App. 3d 637, 653, 242 Cal. Rptr. 74

Court did not abuse its discretion in allowing plaintiff's expert witness to testify on direct examination as to his prior employment with defendant and circumstances of his termination by defendant, because such testimony established expert's background and qualifications and went to issue of defendant's malice for purposes of punitive damages claim. *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 786, 174 Cal. Rptr. 348*

Determination of person's qualification as expert is matter for trial court, and trial court's determination to accept witness's expertise is not subject to being overturned on appeal if founded on reasonable basis. *Dean W. Knight & Sons, Inc. v. First Western Bank & Trust Co. (1978) 84 Cal. App. 3d 560, 567, 148 Cal. Rptr. 767*

Exercise of trial court's discretion as to whether one qualifies as expert witness is reversible on appeal only for clear abuse. *Putensen v. Clay Adams, Inc. (1970) 12 Cal. App. 3d 1062, 1081, 91 Cal. Rptr. 319*

Traffic officers whose duties include investigations of automobile accidents are qualified experts who may properly testify concerning their opinions as to various factors involved in such accidents, based on their own observations. *Hart v. Wielt (1970) 4 Cal. App. 3d 224, 229, 84 Cal. Rptr. 220*

[vii] Testimony

In capital murder prosecution, trial court properly excluded defense's offer of expert witness testimony on eyewitness identification, when witness's identification of defendant was corroborated by testimony of five other witnesses, including accomplices, even though all five witnesses could be impeached by proof of bias or prior inconsistent statements, because cumulative corroborative effect of testimony of defendant's admissions was sufficient to give independent reliability to eyewitness identification. *People v. Jones (2003) 30 Cal. 4th 1084, 1111-1112, 70 P.3d 359*

General rule declaring that if trier of fact does not act arbitrarily, he or she may reject in toto testimony of a witness, even though witness is uncontradicted, applies equally to expert witnesses. *Foreman & Clark Corp. v. Fallon (1971) 3 Cal. 3d 875, 890, 92 Cal. Rptr. 162, 479 P.2d 362*

Opinion of expert witness cannot be based on facts that have no support in evidence or on irrelevant or speculative matters; expert's testimony was not speculative when record clearly shows opinion was based on expert's experience and was in line with his expertise, qualifications, and foundation that was laid for testimony. *Williams v. Volkswagenwerk Aktiengesellschaft (1986) 180 Cal. App. 3d 1244, 1262-1263, 226 Cal. Rptr. 306*

Reactions of rape victims and varying motivations and personality characteristics of rapists are not subjects within common knowledge of jurors, and are proper subject of expert testimony in civil action for battery to provide background against which jury may assess plaintiff's reaction to alleged rape, and to demonstrate that prestige or community standing did not eliminate individual from motivation and profile of rapist. *Delia S. v. Torres (1982) 134 Cal. App. 3d 471, 478-480, 184 Cal. Rptr. 787 , overruled on other grounds in Christensen v. Superior Court (1991) 54 Cal. 3d 868, 905 fn. 28, 2 Cal. Rptr. 2d 79, 820 P. 2d 181*

Expert testimony is not required to be necessary to be admissible, but only to be helpful. *People v. Cramblit (1978) 84 Cal. App. 3d 437, 446 n. 3, 148 Cal. Rptr. 440*

Testimony of expert witness (attorney) is admissible in legal malpractice case to establish negligence. *Starr v. Mooslin (1971) 14 Cal. App. 3d 988, 996-999, 92 Cal. Rptr. 583*

Although no California statute disqualifies lawyer from testifying in trial to which lawyer's client is a party, prospective

characteristic of trial created appropriate occasion for exercise of trial court's inherent power over proceedings to give criminal defendant and defendant's attorney pretrial choice between latter's withdrawing as counsel and his withdrawal as witness. *People v. Smith (1970) 13 Cal. App. 3d 897, 904, 907-909, 91 Cal. Rptr. 786*

Testimony of experts is admissible to show recognized and accepted safety standards and practices in profession, trade, or business. *People v. Glass (1968) 266 Cal. App. 2d 222, 226-227, 71 Cal. Rptr. 858 , overruled on other grounds in People v. Superior Court (1972) 6 Cal. 3d 757, 765 n. 7, 100 Cal. Rptr. 281, 493 P. 2d 1145*

Use of hearsay as part of expert's testimony. *Board of Trustees v. Porini (1968) 263 Cal. App. 2d 784, 792-795, 70 Cal. Rptr. 73*

[viii] Witness List

In medical malpractice action against podiatrist, trial court prejudicially erred in denying plaintiff's motion to strike defendant's "second designation" of expert witnesses under former *Code Civ. Proc. § 2034*; defendant had no right to simply delay his designation of retained experts until after he had opportunity to view expert designation timely served by plaintiff, and trial court should have granted motion and left defendant to rely exclusively on treating professionals listed in his initial designation. *Fairfax v. Lords (2006) 138 Cal. App. 4th 1019, 1025-1028, 41 Cal. Rptr. 3d 850*

Under former *Code Civ. Proc. § 2037* (*now see Code Civ. Proc. § 2034.310* effective July 1, 2005), expert witness not included on proposed expert witness list is permitted to testify only for impeachment purposes; expression of opinion contrary to that expressed by opponent's expert did not constitute impeachment under statute. *Ellenberger v. Karr (1982) 127 Cal. App. 3d 423, 427, 179 Cal. Rptr. 583*

Court did not abuse its discretion in allowing testimony of plaintiff's expert witness when, although defendant may not have known of witness before testimony and did not have opportunity to depose him, plaintiff acquired witness after defendant's last request for list of experts and defendant had ample opportunity through pretrial discovery to learn of his identity. *Grimshaw v. Ford Motor Co. (1981) 119 Cal. App. 3d 757, 782, 174 Cal. Rptr. 348*

[e] Lay Witnesses

Evid. Code § 800, limiting admissibility of opinion testimony by lay witness, merely requires that witnesses express themselves at lowest possible level of abstraction; however, witness is permitted to state his or her general impression when details observed, even though recalled, are too complex or subtle for concrete description by witness. *Bartlett v. State of California (1988) 199 Cal. App. 3d 392, 400, 245 Cal. Rptr. 32*

[f] Person Unable to Express Self

In prosecution based on defendant's assaults against her roommate, who suffered from cerebral palsy, defendant failed to show victim was incompetent as witness because victim was incapable of expressing herself, when, although she may have been more difficult to understand than typical witness, record reflected that she was quite intelligent and at trial was both alert and able to express herself concerning assaults, even though, read directly from reporter's transcript, some of her testimony was indecipherable, and when bulk of victim's recorded testimony was comprehensible even without prosecutor's use of leading questions. Trial court did not abuse its discretion by refusing to appoint interpreter for victim, when victim's recorded testimony as whole demonstrated adequate ability to communicate her perceptions in English language so as to be understood by court, counsel, and jury without interpretation; victim spoke English, notwithstanding defense counsel's attempt to compare her to Spanish-speaking witness; victim had completed high school and some college courses; victim's mental capacity was evident in her recorded testimony; defense counsel

understood victim well enough to interject several evidentiary objections to her testimony; and all of her testimony was recorded in reporter's transcript. *People v. Augustin (2003) 112 Cal. App. 4th 444, 448, 451, 5 Cal. Rptr. 3d 171*

Physical limitations on witness's ability to communicate do not necessarily render witness incompetent to testify. *People v. Tran (1996) 47 Cal. App. 4th 759, 770, 54 Cal. Rptr. 2d 905* (when witness was unable to speak, but could answer yes-or-no questions by tapping once for yes and twice for no, defense not deprived of meaningful opportunity to cross-examine)

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48-551 California Forms of Pleading and Practice--Annotated §§ 511.210-511.219

[Reserved]

§§ 511.210[Reserved]

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California Forms of Pleading and Practice--Annotated

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 551 TRIAL
PART IV. PROCEDURAL CHECKLISTS

48-551 California Forms of Pleading and Practice--Annotated § 551.220

§ 551.220 Proceedings Before Trial

NOTE:

For discussion and forms for use in securing appointment of a guardian ad litem for a minor or incompetent party, see Ch. 291, *Guardians ad Litem* . For procedure and forms for use in pretrial, trial setting, and settlement conferences, for having a case set for trial, or for bifurcation, and for discussion and forms for establishing a precedence or preference in trial setting, or to move to specially set a case for trial, see Ch. 425, ***Pretrial Proceedings*** . For discussion and forms for use in securing the appointment of a temporary judge to try the case, or for disqualification for cause of the judge designated to try the case, see Ch. 317, ***Judges*** . For discussion and forms for use in moving for a postponement or continuance of a trial, see Ch. 136, ***Continuances*** . For discussion and forms for use in contempt proceedings arising out of a trial, see Ch. 135, ***Contempt*** . For discussion and forms for use in making a pretrial exchange of lists of expert witnesses and their reports and writings pursuant to *Code Civ. Proc. § 2034.210 et seq.*, see Ch. 198, ***Discovery: Exchange of Expert Witness Information*** . For a discussion of special verdicts and special findings, see Ch. 326A, ***Jury Verdicts*** .

[1] Notice of Trial

☐ Prepare a notice of trial and serve a copy of it on the adverse party [*Code Civ. Proc. § 594*; *see § 551.250*].

NOTE:

The notice of trial may be served by either party on the adverse party. However, it is only when the clerk fails to serve the notice that it must be served by a party [*see* *Code Civ. Proc. § 594(b)*; *see also* *§ 551.22 et seq*.]. For a discussion of service by mail and when service is to be made on a party's attorney in lieu of a party, as well as a form for proof of service by mail, see Ch. 518, ***Service of Summons and Papers*** .

☐ Execute a proof of service and file the original and proof of service with the court.

NOTE:

There appears to be no statutory requirement that the notice of trial and proof of service be filed. It is, nevertheless, good practice to do so. But if the notice and proof of service are filed and the adverse party fails to appear at the trial, the appearing party must be sure to point out to the court that the proof of service is in the file and ask that it be introduced into evidence [*see* *Code Civ. Proc. § 594(b)* (requirement that proof of service be introduced into evidence); ***see also*** *§ 551.25*].

[1A] Motion to Advance, Specially Set or Reset Case for Trial

☐ Prepare a motion to advance, specially set or reset the case for trial and serve a copy of it on the adverse party [*Cal. Rules of Ct., Rule 3.1335*; *see § 551.250A*].

[2] Preparation for Trial

☐ Court rules, policies, and facilities.

☐ Secure a copy of the court's written rules and policies and of any written policies of the judge in whose department the case will be tried (in a court utilizing a master calendar, the trial judge's identity will not normally be known until the time the case is assigned for trial).

NOTE:

The court's written rules and policies may normally be purchased from the court clerk or the court's designated official publisher [***see*** *Cal. Rules of Ct., Rule 10.613(b), (c)*]. Current local rules from all jurisdictions in the state are also available for public examination in the office of each superior court clerk or in the county law library [***see*** *Cal. Rules of Ct., Rule 10.613(b), (e)*]. Trial court rules for most counties are available at the Internet site for the California Judiciary, http://www.courtinfo.ca.gov. Any written policies of the judge in whose department the case will be tried may normally be obtained from the judge's courtroom clerk. Counsel should also ascertain any unwritten policies or preferences of the trial judge. This information might be obtained from the judge's courtroom clerk or bailiff. Matters that counsel may wish to discuss with the courtroom clerk or bailiff, if not covered by the court's written rules and policies, would include, for example, (1) the manner in which the judge conducts the before trial conference (***see*** [3], ***below***); (2) how exhibits are to be marked (***see*** checklist, ***below***); and (3) the availability of courtroom facilities that might be needed during the trial (***e.g.,*** electrical outlets for any electrical equipment such as a slide projector or a tape or video recorder) and whether the court provides projectors, stands for exhibits, a blackboard, storage files for exhibits, or other equipment for counsels' use, or whether these should be provided by counsel, and if the latter the procedure for bringing them to or installing them in the courtroom).

☐ Issues and evidence.

☐ Prepare an outline of the case.

NOTE:

Although not required by law, as a matter of good practice counsel will normally find it helpful substantially in advance of trial to prepare an outline of the issues and evidence, including the exhibits to be introduced at trial. This outline will aid counsel not only at trial, but at various stages of the proceedings as well, for example, in

preparing for the before trial, or chambers, conference with the judge (*see* [3], ***below***) or in a jury trial in drafting the proposed jury instructions (***see*** checklist, ***below***).

The list should include every element necessary on plaintiff's part to establish each cause of action or necessary on defendant's part to establish each defense. The main issues of fact (ultimate facts) are framed by the pleadings [*see* *Code Civ. Proc. § 590*]. Legal issues may also arise from the pleadings, for example, the meaning of an unambiguous contract pleaded in haec verba.

The outline should list each ultimate fact and each evidentiary fact that will establish the ultimate fact and the manner in which the evidentiary fact will be proved, for example, the testimony of a percipient witness or documentary evidence. If the evidentiary fact is to be established by the testimony of a percipient witness, counsel should include the witness's name (for who may be a witness, *see* *Evid. Code §§ 700-704*; *§§ 551.111* and *551.113*); if it will be established by documentary evidence, the outline should identify the document and the name of any witness, if different from the percipient witness, whose testimony may be required to authenticate it (foundational witness; see *Evid. Code §§ 1400-1421*). The outline should include citations to appropriate legal authority that may be helpful to counsel or to the court, for example, authorities setting forth the elements of the cause of action or defense, the manner in which the elements may be proved, and the admissibility of the evidence. For a suggested form of outline, see California Trial Guide (Matthew Bender), Trial Book Vol., Trial Plan Tab, ***Trial Planning Checklist*** and ***Case Analysis Sheet***.

For the weight to be given evidence generally, see discussion in *§ 551.93*.

☐ Consider and determine whether any evidence is protected against disclosure by a privilege.

NOTE:

Privileges are enumerated in *Evid. Code §§ 940-1060*. For a discussion of privileges, including a newsperson's immunity from a contempt citation (*see Cal. Const., art. I, § 2*; *Evid. Code § 1070*) and his or her qualified privilege not to divulge unpublished information, see Ch. 191, *Discovery: Privileges and Other Discovery Limitaitons* .

☐ Secure attendance of witnesses.

NOTE:

For a discussion, procedural checklist, and forms for use in securing the attendance of witnesses or production of evidence at trial, see Ch. 535, *Subpoena* . For a discussion, procedural guide, and forms for use on a noticed motion, see Ch. 372, ***Motions and Orders*** . For discussion of service of papers and proof of service, see Ch. 518, ***Service of Summons and Papers*** .

☐ Judicial notice.

NOTE:

For a discussion of when the court must or may take judicial notice of a matter, the matter that may be judicially noticed, and the procedure, see Ch. 321, *Judicial Notice* **.**

☐ Determine whether any matter may be judicially noticed.

☐ Counsel should ascertain any matter of which he or she will request the court to take judicial notice [*see Evid. Code § 453*].

NOTE:
Matter of which the court must or may take judicial notice is listed in *Evid. Code §§ 451* and *452*, respectively.

☐ Give notice of request for judicial notice.

☐ Give each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable the adverse party to prepare to meet the request [*Evid. Code § 453(a)*].

☐ Provide information for court.

☐ Obtain the information necessary to be furnished to the court to enable the court to take judicial notice of the matter [*Evid. Code § 453(b)*].

☐ Make a motion for appointment of learned person.

☐ If the advice of persons learned in the subject matter is required to enable the court to take judicial notice of a matter, prepare, serve, and file a notice of motion for an order appointing such a person, together with a supporting affidavit or declaration under *Code Civ. Proc. § 2015.5* and a memorandum [*see Cal. Rules of Ct., Rule 3.1113(a)*; for discussion and a procedural guide relating to noticed motions generally, including time requirements, see Ch. 372, *Motions and Orders*].

NOTE:
Appointment of one or more persons learned in the subject matter to provide the court with advice necessary to enable the court to take judicial notice of a matter may be made on the court's own motion or on the motion of a party [*Evid. Code § 460*]. Although *Evid. Code § 460* does not expressly require that the motion by a party be made on notice, it would appear that if the motion is made before trial (as opposed to a motion made at trial in the presence of the adverse counsel), the better, if not required, practice is to make it on notice.

☐ Exhibits.

☐ Prepare a list of the exhibits counsel intends to offer in evidence.

☐ Although not required by statute, it is a matter of good practice for counsel to prepare a list of the exhibits he or she intends to offer in evidence, particularly if there are numerous exhibits. Counsel must do so if local court rule or policy requires it or requires

a pretrial exchange of lists of exhibits. The list should briefly describe each exhibit. If an exchange of exhibit lists is required, counsel should make a copy of the list for opposing counsel. Counsel may exclude from the list any exhibit he or she anticipates in good faith will be used for impeachment or tactical surprise and which has not been disclosed to adversaries.

☐ Make copies of all documents listed on the exhibit list.

☐ Although not required by statute, the better practice is for counsel to have copies made of all documents on the list of exhibits and make them available prior to the commencement of the trial for examination and copying by any other party requesting them. This may be expressly required by local court rule or policy. Local rule or policy may also require each proponent of critical documents or extracts of critical documents to furnish sufficient copies so that a copy may be presented to each counsel, as well as to the court.

NOTE:
Although it is not necessary to show, read, or disclose any part of a writing to a witness being examined at trial concerning the writing, if the writing is shown to the witness, all parties to the action must be given an opportunity to inspect it before the witness may be asked any question concerning it [*Evid. Code § 768*]. To avoid any negative reaction from the court or jury resulting from the time-consuming process of having the parties inspect the writing, the furnishing of copies to the other parties should be done in advance of the examination of the witness out of open court.

☐ Exchange of lists and evidence.

☐ In advance of trial, exchange with opposing counsel exhibit lists, copies of documentary evidence to be introduced, and witness lists, if required by local court rule or policy (*see* checklist, *above*).

☐ Organizing and premarking exhibits.

☐ Counsel should organize his or her exhibits before trial, and follow any local court rules, policies, or department rules for premarking them and having them marked for identification. In Los Angeles County, for example, each party will be assigned a block of arabic numbers to be used sequentially in marking exhibits [*see* Los Angeles Co. Super. Ct. Rules, Rule 8.62]. The manner of marking exhibits varies widely among the courts, and counsel should, if unaware of the local practice, check with the court clerk or the judge's courtroom clerk.

☐ Dangerous or bulky exhibits.

☐ Prepare substitutes, such as photographs, technical reports, or dummies, if possible, for use in lieu of any dangerous or bulky exhibits.

NOTE:
Local court rule or policy may expressly prohibit bringing any dangerous or bulky

exhibit into the courtroom without first, out of the jury's hearing, securing the court's permission to do so [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 8.59].

Even in the absence of a court rule, this is a wise policy to follow. Dangerous or bulky exhibits may not only disrupt the trial but might subject persons in attendance to a risk of serious harm as well. Dangerous exhibits would include explosives, such as T.N.T.; corrosives, such as sulfuric acid; and flammables, such as gasoline. Bulky exhibits would include any large and cumbersome exhibit, such as a ladder, a part of an automobile chassis, a table, and so forth.

☐ If a substitute would not do, out of the hearing of the jury, request the court's permission to bring the exhibit in.

☐ Move the court for an order for the court and jury to view the exhibit outside the courtroom at a place and under conditions that will secure the safety of those present if permission to bring the exhibit in is denied [*see Code Civ. Proc. § 651(a)(3)*; and *§ 551.64*].

☐ Maps, plans, and diagrams.

☐ Indicate on any map, plan, or diagram to be offered in evidence whether it was drawn to scale and, if so, the scale used. If it was not drawn to scale, that fact should be pointed out to the trier of fact [*see, e.g.*, Los Angeles Co. Super. Ct. Rules, Rule 8.75].

☐ Graphic devices used in argument.

☐ It is good practice before commencement of the argument to show opposing counsel any graphic device, such as a chart, summary, or model, that is not in evidence and is to be used for illustration only in argument. This may be expressly required by local court rule or policy [*see, e.g*, Los Angeles Co. Super. Ct. Rules, Rule 8.74].

☐ Trial brief.

☐ Prepare a trial brief, if desired.

☐ Many lawyers find it a good practice in any significant case to prepare a trial brief to present to the judge (with a copy to the adverse party). The purpose of the brief is to familiarize the trial judge with the client's factual and legal claims. The brief should normally (1) contain a summary of the case, (2) outline the facts counsel expects to prove (and a statement and rebuttal of the adverse party's factual contentions), and (3) set forth the legal arguments with proper citations to appropriate authorities. Since the effect of the brief on the judge may depend on when it is submitted, counsel should deliver the brief to him or her as early as possible. The chambers conference with judge and counsel present, which is held immediately before trial in many courts (*see* [3], *below*), provides a good opportunity for personally delivering the brief to the judge. In other courts, counsel might

ascertain from the judge's courtroom clerk the best time and manner for delivering the trial brief.

☐ Proposed jury instructions.

☐ In a jury trial, draft proposed jury instructions covering the law as disclosed by the pleadings. Deliver the original to the court and serve a copy on counsel for the adverse party before the first witness is sworn [*see Code Civ. Proc. § 607a*; *see also* Cal. Rules of Ct., *Cal. Rules of Ct., Rule 2.1050* (Judicial Council jury instructions)]. For discussion and a general form of jury instruction, see Ch. 326, *Jury Instructions* . For when additional proposed instructions on questions of law developed by the evidence and not disclosed by the pleadings may subsequently be delivered to the judge and served, *see § 551.224[5]*.

[3] Day of Trial

☐ Appear for trial.

☐ Appearance.

☐ Appear in the court's master calendar department or the department of the judge supervising the master calendar at the time and place set for the assignment of the case to a department, or, if the court does not have a master calendar (which would include one-judge and two-judge courts, appear in the courtroom of the trial judge at the time and place set for trial.

NOTE:
In a court employing a master calendar, each case transferred to a trial department must be tried, ordered off the calendar, or dismissed unless, for good cause arising after the commencement of the trial, the judge of the trial department continues the case for further hearing or, with the consent of the judge supervising the master calendar, reassigns the case to the judge supervising the master calendar for further disposition [*Cal. Rules of Ct., Rule 10.910*]. For further discussion of courts having master calendars, see Ch. 425, *Pretrial Proceedings* .

☐ Trailing of cases.

☐ To minimize the expense and inconvenience to counsel, parties, and the witnesses, counsel should ascertain in advance of the trial date the practices of the local court with respect to trailing cases and any local court rules that may apply.

☐ Motions in master calendar department or at trial.

☐ Be prepared to make any motion that may appropriately be made in the master calendar department or at trial if the court does not have a master calendar department. Such motions may include the following:

☐ Motion for continuance or postponement of trial.

NOTE:
The court may condition the granting of the motion on the moving party's paying the adverse party the costs occasioned by the postponement [*Code Civ. Proc. § 1024*]. Costs are not limited to taxable costs but may include certain expenses incurred in preparing for the trial [*De Cesare v. Lembert (1983) 144 Cal. App. 3d 20, 25, 192 Cal. Rptr. 354* ; *see* *Inman v. Fremont Medical Center (1975) 49 Cal. App. 3d 169, 172, 122 Cal. Rptr. 372* (fees of jury panel); *Wilkin v. Tadlock (1952) 110 Cal. App. 2d 156, 157-158, 241 P.2d 1066* (transportation costs of out of state adverse parties and taxable costs)]. However, the term does not include attorney fees or lost income [*see* *De Cesare v. Lembert (1983) 144 Cal. App. 3d 20, 23-26, 192 Cal. Rptr. 354* (discussing earlier contrary authorities on the issue of attorney fees, including *McFaddin v. H. S. Crocker Co. (1963) 219 Cal. App. 2d 585, 594, 33 Cal. Rptr. 389* , and holding them repudiated by subsequent case law)]. For further discussion, a procedural checklist, and forms for use in moving for a continuance, see Ch. 136, ***Continuances* .

☐ Motion to disqualify judge.

☐ A motion to disqualify a judge for cause under *Code Civ. Proc. § 170.1* or peremptorily under *Code Civ. Proc. § 170.6* may be made if timely [for discussion, a procedural guide, and forms for use in moving to disqualify, see Ch. 317, *Judges*].

NOTE:
Obtain as much information as possible in advance of trial about the judge who will or may try the case. Local attorneys and bar associations are often the best source of this information. In addition, there are some published sources that counsel should check. The most comprehensive of these is Arnold, California Courts and Judges Handbook (4th ed, 1985), published by Law Book Service Co., 369 Harvard St., San Francisco, CA 94134. This book contains biographical data on all judges of the California courts, as well as federal court judges in California. If the case is pending in a southern California court, counsel may also wish to check the Judicial Profile series of the *Los Angeles Daily Journal* to see if the particular judge has been profiled in that series.

☐ Before trial conference, motions in limine, and stipulations.

☐ Accept the judge's invitation, if any, to join him or her and counsel for the adverse party in a before trial chambers conference.

NOTE:
At the conference, counsel should be prepared to familiarize the judge with the case (and personally deliver to the judge the trial brief, if one has been prepared (*see* [2], *above*)), to make any motions in limine that should be ruled on before the first witness is examined, to make any stipulations that may narrow the issues to be tried, and so forth. For the purposes of the conference and the matters that may be covered, see discussion in Part II, Subpart C.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJury TrialsGeneral OverviewEvidenceProcedural ConsiderationsGeneral OverviewEvidenceTestimonyPresentation of Evidence

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§ 551.221 General Matters Concerning Trial

[1] Behavior and Dress

☐ Ascertain prior to the trial date any local court rule, policy, or practice, as well as any requirements of the judge who will be presiding at trial that relate to behavior and dress.

NOTE:
In the Los Angeles County Superior Court, for example, policy provides that persons in the courtroom shall not converse, read newspapers, smoke, chew gum, or eat food while court is in session, that they should not dress in a bizarre manner such as to be distracting to others of usual sensibilities, that counsel shall so instruct the parties they represent, the witnesses they call, and persons accompanying them, and that attorneys should ordinarily be dressed in accordance with current customs as to their business attire [Los Angeles Co. Super. Ct. Rules, Rules 8.1, 8.2].

[2] Courtroom Arrangements

☐ Seating of counsel.

☐ Ascertain any local court rule, policy, or practice relating to the seating of counsel [*see* Los Angeles Co. Super. Ct. Rules, Rule 8.4 (plaintiff's counsel to be seated adjacent to jury box)].

☐ Addressing court.

☐ In addressing the trial judge in court, counsel should use the term "Your Honor." In referring to the trial judge in court, counsel should use the term "His Honor" or "Her Honor," as the case may be. Contrary to the practice in an appellate court, it is not proper

to address or refer to the trial judge in court as "Judge" or "Judge" followed by the judge's name. In making a motion or request, counsel may use the term "If it please the Court," or "If the Court pleases," followed by the motion or request [*see* Los Angeles Co. Super. Ct. Rules, Rule 8.5].

☐ Restricted areas.

☐ Ascertain any restrictions with respect to moving about the courtroom [*see* Los Angeles Co. Super. Ct. Rules, Rule 8.3 (area between bench and counsel table not to be traversed except with court's approval)].

☐ Examination of witnesses.

☐ Counsel should be familiar with any local court rule, policy, or practice concerning the examination of witnesses [*see* Los Angeles Co. Super. Ct. Rules, Rule 8.9 (remain at or behind counsel table when examining a witness)].

NOTE:

Local court rule, policy, or practice may also prohibit counsel from approaching a witness on the witness stand without the prior permission of the court [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 8.10 (unless court otherwise directs, counsel need not request permission to approach witness for the purpose of showing witness a document or other object, but before approaching witness for any other purpose, a party must request court's permission)].

☐ Unseemly conduct or mugging.

☐ Counsel should normally avoid any unseemly conduct or mugging in response to a witness's testimony [*see* Los Angeles Co. Super. Ct. Rules, Rule 8.91 (persons in courtroom, including the parties and counsel, shall not indicate by facial expression, shaking of head, gesturing, shouts, or other conduct disagreement with or approval of testimony or other evidence being given; counsel is required to so instruct parties they represent, witnesses they call, and any accompanying persons)].

[3] Selection of Jury

☐ If trial is to be by jury, participate in the selection of the jurors from the jury panel.

NOTE:

The qualifications a person must have to be eligible for jury service are set forth in *Code Civ. Proc. § 203*. The California Constitution expressly provides that a person is not incompetent to be a juror because of his or her opinions on religious beliefs [*Cal. Const., art. I, § 4*]. The amount of jurors' fees is governed by *Code Civ. Proc. § 215*.

In a jury trial, the court selects jurors from a jury panel in the voir dire process. Eligible jurors may be excused from jury service only for undue hardship [*Code Civ. Proc. § 204(b)*]. Prospective jurors may be challenged by a party peremptorily or for cause [*see* *Code Civ. Proc. §§ 225(b),*

226-231]. For a discussion of the procedure for selecting a jury, including voir dire and challenges, ***see*** Ch. 322, ***Juries and Jury Selection*** . When the jury selection is completed, the court obtains an acknowledgment and agreement that the jurors will well and truly try the matter in issue and render a verdict according to the evidence and the court's instructions [*Code Civ. Proc. § 232(b)*].

[4] Province of Court and Jury in Jury Trial

☐ Questions of law.

☐ Questions of law are decided by the court [*Evid. Code § 310(a)*].

NOTE:
Questions of law include the construction of statutes and other writings, the admissibility of evidence, and the rules of evidence [*Evid. Code § 310(a)*; *see* *Evid. Code § 160* ("law" includes constitutional, statutory, and decisional law); *Evid. Code § 250* ("writings" defined)].

☐ Foreign law.

☐ The law of an organization of nations, a foreign nation, or a public entity in a foreign nation is a question of law determined as provided in *Evid. Code §§ 450-460* (relating to judicial notice) [*Evid. Code § 310(b)*; *see § 551.220[2]*].

NOTE:
If the law of an organization of nations, a foreign nation, or a state other than California, applies and cannot be determined, the court may either apply the law of California if it can do so consistently with the United States and California Constitutions, or dismiss the action without prejudice [*Evid. Code § 311*].

☐ Determination of preliminary facts.

☐ Determination of fact issues preliminary to the admission of evidence are decided by the court as provided in *Evid. Code §§ 400-406* [*Evid. Code § 310(a)*; *see* discussion in *§ 551.76*].

☐ Questions of fact.

☐ Except as otherwise provided by law, all questions of fact are decided by the jury [*Evid. Code § 312(a)*].

☐ Credibility of witnesses.

☐ Except as otherwise provided by law, the jury, subject to the court's control, determines the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants [*Evid. Code § 312(b)*].

[5] Admissibility of Evidence

☐ Relevant evidence.

☐ All relevant evidence is normally admissible [*Evid. Code § 351*].

NOTE:
Only relevant evidence is admissible, and all relevant evidence is admissible in a civil case unless its probative value is substantially outweighed by the probability that its admission will either (a) necessitate undue consumption of time or (b) create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury [*Evid. Code §§ 350, 351, 352*]. *See* discussion in *§§ 551.66* and *551.68*.

☐ Opinion evidence.

☐ Opinion evidence is normally inadmissible [*see Evid. Code § 800*].

NOTE:
Opinion evidence is inadmissible unless (a) the witness is testifying as an expert and the opinion is within the area of the witness's expertise [*see* *Evid. Code § 801*]; or (b) the witness is a layperson and the opinion is rationally based on the witness's perception and helpful to a clear understanding of the witness's testimony [***see*** *Evid. Code § 800*]; or (c) the opinion is otherwise permitted by law [*Evid. Code § 800*]. Opinions otherwise permitted by law include an owner's opinion as to the value of his or her property [***see*** *Evid. Code § 813(a)(2)*] and a witness's opinion as to the sanity of a person when certain prerequisites are met [***see*** *Evid. Code § 870*]. ***See*** discussion in *§ 551.70*.

☐ Hearsay evidence.

☐ Hearsay evidence is inadmissible unless it falls within one of the numerous exceptions to the hearsay rule [*Evid. Code § 1200(b)*].

NOTE:
Exceptions to the hearsay rule are set forth in *Evid. Code § 1220 et seq.* See discussion in *§ 551.71*.

☐ Authentication of writings.

☐ Before a writing may be introduced in evidence, it must be authenticated [*see Evid. Code § 1401(a)*].

NOTE:
"Writing" as used in the Evidence Code is defined in *Evid. Code § 250* [*see* discussion in *§ 551.73*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsJurorsSelectionGeneral OverviewCivil ProcedureTrialsJury TrialsProvince of Court & JuryEvidenceAuthenticationGeneral OverviewEvidenceHearsayGeneral OverviewEvidenceRelevanceGeneral OverviewEvidenceTestimonyGeneral Overview

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§ 551.222 Objections and Motions to Exclude Evidence or to Strike Testimony

[1] Common Grounds for Objecting to Evidence

NOTE:

The following are common objections that may be made in the course of the trial. For statutory grounds on which specific evidence may be objected to as inadmissible, see discussion in *§ 551.68*. For a discussion of the manner of objecting to evidence, argument on the objection, and offers of proof, *see* discussion in *§ 551.77*. For further discusion of the grounds for the objections, ***see*** Jefferson, California Evidence Benchbook (2d ed) (CJA-CEB 1982) and California Trial Objections (2d ed) (Cal. CEB 1984).

The general objection that evidence is "incompetent, irrelevant, and immaterial" is insufficient unless the evidence is objectionable from every standpoint and on its face there appears no purpose whatsoever for which the evidence asked could be admissible [*Short v. Frink (1907) 151 Cal. 83, 86, 90 P. 200]* .

☐ Objection to the introduction of any evidence by a party.

☐ This is a device for attacking the sufficiency of a pleading and may be directed against the plaintiff or cross complainant or against the defendant or cross defendant. The ground of objection is that the complaint or cross complaint fails to state facts sufficient to constitute a cause of action or that the answer fails to state facts sufficient to constitute a defense, as the case may be [*see McFaddin v. H. S. Crocker Co. (1963) 219 Cal. App. 2d 585, 588 n. 1, 33 Cal. Rptr. 389]* .

☐ The question is irrelevant [*see Evid. Code § 350*].

☐ Other factors outweigh the relevance of the question.

☐ Probative value substantially outweighed by probability that admission will necessitate undue consumption of time [*Evid. Code § 352*].

☐ Probative value substantially outweighed by probability that admission will create substantial danger of undue prejudice [*Evid. Code § 352*].

☐ Probative value substantially outweighed by probability that admission will create substantial danger of confusing the issues [*Evid. Code § 352*; *see Kinney v. County of Contra Costa (1970) 8 Cal. App. 3d 761, 771, 87 Cal. Rptr. 638]* .

☐ Probative value substantially outweighed by probability that admission will create substantial danger of misleading the jury [*Evid. Code § 352*; *see Kinney v. County of Contra Costa (1970) 8 Cal. App. 3d 761, 771, 87 Cal. Rptr. 638]* .

☐ The witness is incompetent to testify to the matter.

☐ Witness does not possess the qualifications required to be a witness in the case [*see Evid. Code §§ 700-704*].

☐ Witness has no personal knowledge of the matter [*see Evid. Code § 702(a)*].

☐ No foundation has been laid showing that the witness has personal knowledge of the facts [*see Evid. Code § 403(a)(2)*].

☐ The question calls for an opinion or conclusion of the witness (and the witness is not competent to give an opinion or conclusion) [*see Evid. Code §§ 800, 1416* (lay witness), *Evid. Code §§ 720, 801, 1418* (expert witness).

☐ No foundation has been laid for the witness to testify to an expert opinion [*see Evid. Code §§ 720, 801, 1418*].

☐ The question calls for speculation by the witness [*see People v. Glancy (1956) 142 Cal. App. 2d 669, 680, 299 P.2d 18]* .

☐ The question is leading [*see Evid. Code § 767(a)(1)* (question asked on direct or redirect examination)].

☐ The question calls for privileged information [*see Evid. Code §§ 950-1060*].

☐ The answer would tend to incriminate the witness [*Evid. Code § 940*].

☐ The question calls for hearsay [*see Evid. Code § 1200(b)*].

☐ The question calls for inadmissible secondary evidence to prove the content of a writing [see *Evid. Code §§ 1521-1523*].

☐ The question calls for evidence that violates the parol evidence rule [*see Code Civ. Proc. § 1856, Com. Code § 2202*].

☐ No foundation has been laid with respect to a writing or other exhibit sought to be introduced [*see Evid. Code § 1401*].

☐ No foundation has been laid with respect to introduction in evidence of witness's prior inconsistent statement [*see Evid. Code § 770*].

☐ No foundation has been laid to assure trustworthiness of "past recollection recorded" sought to be introduced in evidence as an exception to hearsay rule [*see Evid. Code § 1237*; *Sherrell v. Kelso (1981) 172 Cal. Rptr. 667]* .

☐ The question assumes facts not in evidence [*see Evid. Code § 765*; and, e.g., *Brokopp v. Ford Motor Co. (1977) 71 Cal. App. 3d 841, 859, 139 Cal. Rptr. 888]* .

☐ The question has been asked and answered [*see Evid. Code § 765*].

☐ The question is uncertain, ambiguous, or unintelligible [*see Evid. Code § 765*].

☐ The question is complex (i.e., long and involved) [*see Evid. Code § 765*; *Bennett v. Superior Court (1946) 73 Cal. App. 2d 203, 217, 166 P.2d 318]* .

☐ The question is compound (that is, it joins two or more questions, either disjunctively or conjunctively) [*see Evid. Code § 765*].

☐ Objection that the question is too general [*see Evid. Code § 765*; see also Johnson, *California Trial Guide, Unit 20, Procedural Rules for Presentation of Evidence, § 20.15[3]* (Matthew Bender); Jefferson, California Evidence Benchbook; (2d ed) (CJA-CEB 1982), Vol. 1, § 27.6; and California Trial Objections (2d ed) (Cal CEB 1984), Ch. 9, *Question Is Too General*].

☐ The question calls for a narrative answer [*see Evid. Code § 765*].

☐ The question misstates the evidence or misquotes a witness [*see Evid. Code § 765*].

☐ The question is argumentative [*see Evid. Code § 765*].

☐ The evidence is cumulative, that is, the evidence is repetitive of evidence already introduced and its probative value is substantially outweighed by the probability that its admission will necessitate an undue consumption of time or create a substantial danger of undue prejudice [*see Evid. Code § 352*].

☐ The question (on cross-examination for a purpose other than impeachment) exceeds the scope of the direct examination [*see Evid. Code § 761*].

[2] Common Motions to Exclude Evidence or to Strike Testimony

NOTE:

A motion to exclude or to strike evidence must be timely made and so stated as to make clear the specific ground of the motion [*see* *Evid. Code § 353(a)*]. Failure to make a timely motion to strike inadmissible evidence waives the right to complain of the erroneous admission of evidence [*Rodriguez v. McDonnell Douglas Corp. (1978) 87 Cal. App. 3d 626, 659-660, 151 Cal. Rptr. 399]* . Motions to exclude evidence (motions in limine) are normally made before trial at the before-trial conference, if any, but may be made during trial [for further discussion, ***see*** Ch. 373, ***Motions in Limine***]. It is essential that the motion to exclude be made as early as possible if counsel wishes to avoid opposing counsel's reference to the evidence in the voir dire examination of the jurors or in opposing counsel's opening statement. Some judges may require that the motion be presented in writing with a proposed order [***see*** discussion in *§ 551.41[5]*]. A copy of the motion and order should then be delivered to the adverse party. This will circumvent any possibility of a misunderstanding on the part of counsel as to what evidence has been ordered excluded.

☐ Motion to exclude evidence on ground that other factors outweigh its probative value [*see Evid. Code § 352*; [1], *above*].

☐ Motion to exclude reference to specified inadmissible evidence [*see*, as examples of inadmissible evidence, *Evid. Code §§ 1151-1157.7*, discussed in Part II, Subpart E].

☐ Motion to exclude privileged information [*Evid. Code 916*].

☐ Motion to strike nonresponsive answer [*Evid. Code § 766*].

☐ Motion to strike witness's answer to objectionable question made before counsel has time to object.

NOTE:

Like all motions to exclude or to strike, this motion should be timely, clearly state the ground on which it is made, and specify the matter to be stricken [*see* *Evid. Code § 353(a)*; *Lucy v. Davis (1912) 163 Cal. 611, 615, 126 P. 490* (motion to strike denied as too vague and general)]. If the motion is granted, counsel should request the court to admonish the jury to ignore the stricken testimony if the court does not do so when it grants the motion.

☐ Motion to strike testimony of witness on failure to produce writing that witness used to refresh

recollection with respect to matter about which he or she testified [*see Evid. Code § 771(a)*].

☐ Motion to strike testimony on any other ground.

NOTE:
In such event, the motion to strike must be directed with precision to the particular testimony sought to be stricken, especially when only part of it is objectionable [*see* *Orange County Flood Control Dist. v. Sunny Crest Dairy, Inc. (1978) 77 Cal. App. 3d 742, 752, 143 Cal. Rptr. 803*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedurePretrial Motions & ProceduresMotions in LimineEvidenceProcedural ConsiderationsObjections & Offers of ProofGeneral OverviewEvidenceProcedural ConsiderationsObjections & Offers of ProofObjectionsEvidenceProcedural ConsiderationsObjections & Offers of ProofOffers of ProofEvidenceProcedural ConsiderationsObjections & Offers of ProofTimeliness

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48-551 California Forms of Pleading and Practice--Annotated § 551.223

§ 551.223 Common Motions During Trial

NOTE:

Motions to exclude evidence or to strike testimony are listed in *§ 551.222[2]*. Motions at trial are made orally. For common after trial motions, see Ch. 371, *Motions After Trial* .

Except motions to strike testimony [discussed in *§ 551.222[2]*], motions in jury trials should normally be made out of the hearing of the jury but in the presence of adverse counsel. Before trial, counsel should check any local court rules with respect to the making of motions during trial and check further with the trial judge's courtroom clerk to ascertain any requirements of the judge with respect to specific motions not covered by local court rules.

[1] Motions Relating to Trial

☐ Motion for continuance [*see Code Civ. Proc. §§ 594a-595.4*; *see* Ch. 136, *Continuances*].

☐ Motion for judgment on the pleadings [*see* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*].

NOTE:

If made at trial, the motion can be oral and without prior notice [*MacBeth v. West Coast Packing Corp. (1947) 83 Cal. App. 2d 96, 99, 187 P.2d 815]* . The motion is normally made in open court, although any argument on the motion should be out of the jury's hearing. Nevertheless, some courts require that both the motion and the argument be made out of the jury's hearing [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rule 8.47].

☐ Motion for nonsuit [*Code Civ. Proc. § 581c(a)*].

NOTE:
Normally, the motion and any argument on it should be made out of the hearing of the jury to avoid a mistrial if the motion or the argument would prejudice the jury. This may be required, if not by local court rule, by the trial judge.

☐ Motion for judgment [*Code Civ. Proc. § 631.8*; for discussion, *see* Ch. 389, *Nonsuit and Motions for Judgment*].

☐ Motion for mistrial [*see* discussion in Part II, Subpart J, *§ 551.150 et seq.*].

NOTE:
Unless otherwise required by local court rule or by the trial judge, a motion for mistrial may be made orally in open court at the time the misconduct or irregularity occurs, but any argument on the motion should be out of the jury's hearing [*see* California Judges Benchbook--Civil Trials (CJER 1981), Ch. 10, ***Mistrials***, §§ 10.19, 10.20]. Some courts, however, require that both the motion and the argument be out of the jury's hearing [***see, e.g.,*** Los Angeles Co. Super. Ct. Rules, Rule 8.47; ***see also, e.g.,*** *Tobler v. Chapman (1973) 31 Cal. App. 3d 568, 573, 107 Cal. Rptr. 614* (action in Mendocino County Superior Court)].

☐ Motion to amend pleading to conform to proof [*see Code Civ. Proc. §§ 469, 473* (first paragraph), 576; and Ch. 21, *Amended and Supplemental Pleadings*].

☐ Motion for directed verdict [*see Frisk v. Merrihew (1974) 42 Cal. App. 3d 319, 325, 116 Cal. Rptr. 781* ; and Ch. 326A, *Jury Verdicts*].

NOTE:
The motion may be oral, but both the motion and any argument on the motion should normally be out of the jury's hearing; this is expressly required by some courts [*see, e.g.*, Los Angeles Co. Super. Ct. Rules, Rules 8.47].

[2] Motions Relating to Witnesses

NOTE:
Motions to strike testimony or to exclude evidence are listed in *§ 551.222[2]* .

☐ Motion to exclude witnesses from courtroom [*see Evid. Code § 777(a)*].

NOTE:
The motion may be made by either party and would normally be made at the before-trial chambers conference with the judge [*see* discussion in *§ 551.41[3]*].

☐ Motion to appoint expert to investigate, report, and testify [*see Evid. Code § 730*].

NOTE:
An order appointing an expert may be made on the court's own motion or the motion of any party [*Evid. Code § 730*; for further discussion, *see* *§ 551.113[5]*].

☐ Motion that court call witness [*see Evid. Code § 775*].

NOTE:
The court may call witnesses and interrogate them on its own motion or the motion of any party [*Evid. Code § 775*; *see* discussion in *§ 551.121[4]*].

☐ Motion or request to produce writing used by witness to refresh recollection [*see Evid. Code § 771(a)*; *see also* discussion in *§ 551.121[10]*].

☐ Motion to reexamine once examined witness on same matter [*see Evid. Code § 774*].

NOTE:
Leave may be granted or withheld in the court's discretion [*Evid. Code § 774*].

☐ Motion to recall excused witness [*see Evid. Code § 778*].

NOTE:
Leave may be granted or withheld in the court's discretion [*Evid. Code § 778*].

[3] Miscellaneous Motions

☐ Motion to view property, place, or other thing [*see Code Civ. Proc. § 651(a)*; *see also* discussion in *§ 551.64*].

NOTE:
The motion is normally made at the before-trial chambers conference with the judge or thereafter as soon as the motion is contemplated [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rules 8.93; ***see also*** *§ 551.41[3]*].

☐ Motion to exclude privileged information [*see Evid. Code § 916(a)*].

NOTE:
The presiding officer is required to exclude the information on his or her own motion or the motion of a party [*Evid. Code § 916(a)*; *see* *Evid. Code § 905* ("presiding officer" is that person authorized to rule on claim of privilege in proceeding in which claim is made)]. However, the information must not be excluded if the presiding officer is otherwise instructed by a person authorized to permit disclosure or the proponent of the evidence establishes that there is no person in existence authorized to claim the privilege [*Evid. Code § 916(b)*]. For a discussion of privileges, ***see*** Ch. 191, ***Discovery: Privileges and Other Discovery Limitations*** .

☐ Motion in paternity case for blood test [*see Fam. Code § 7551*]. For a form of notice of motion, supporting declaration, and order granting the motion, *see* Ch. 412, *Paternity* .

☐ Noticed motion for judgment when jury discharged without verdict [*see Code Civ. Proc. § 630*]. For discussion, a procedural guide, and requirements of noticed motions generally, *see* Ch. 372, *Motions*

and Orders .

NOTE:

The order may be made by the court on its own motion or on the motion of a party when notice is given within 10 days after discharge of the jury. The failure of the court to order judgment within 30 days, subject to *Code Civ. Proc. § 12a* (relating to holidays), after the jury was discharged constitutes a denial of the motion [*Code Civ. Proc. § 630*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedurePretrial MattersContinuancesCivil ProcedureTrialsGeneral OverviewCivil ProcedureTrialsJudgment as Matter of LawGeneral OverviewCivil ProcedureTrialsMotions for Mistrial

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48-551 California Forms of Pleading and Practice--Annotated § 551.224

§ 551.224 Order of Trial Proceedings

NOTE:

This checklist discusses the general order of the trial. The trial proceeds in the order set forth in *Code Civ. Proc. § 607* unless the court for special reasons otherwise directs [*Code Civ. Proc. §§ 607, 631.7*]. The order of trial in an eminent domain proceeding, however, is varied by statute [*see* *Code Civ. Proc. § 1260.210(a)* (defendant presents his or her evidence on the issue of compensation first, then commences and concludes the argument)].

Photographing, recording, and broadcasting in the courtroom are governed by *Cal. Rules of Ct., Rules 1.150, 2.952, 2.954*.

[1] Opening Statements

NOTE:

Opening statements are expressly authorized by statute [*Code Civ. Proc. § 607(1), (2)* (jury trials), *631.7* (nonjury trials)]. But these statements are not evidence, and in a jury trial the court will so instruct the jury.

The purpose of the opening statement is to outline the facts of the case and the legal theories of the parties. Counsel should, in advance of trial, ascertain any local court rule or policy, department policy, or policy of the trial judge relating to the manner of delivering the opening statement. For example, whether counsel is expected to remain seated at the counsel table or stand, and whether counsel may move about. Practice among the courts and judges of the same court varies widely.

☐ Plaintiff's statement [*see Code Civ. Proc. §§ 607(1), 631.7*].

☐ The facts stated must be sufficiently complete to establish a cause of action. If they are not, defendant may, in either a jury or nonjury trial, on completion of the statement

move for a judgment of nonsuit [*see Code Civ. Proc. § 581c(a)*; *Addison v. Susanville Lumber, Inc. (1975) 47 Cal. App. 3d 394, 398, 120 Cal. Rptr. 737* ; discussion in *§ 551.223[1]*]. For an outline of matters to be covered in plaintiff's opening statement, see California Civil Procedure During Trial (Cal CEB), Vol. 1 (1982), Ch. 8, *Opening Statement*, §§ 8.19-8.31.

☐ Defendant's statement.

☐ After the plaintiff has completed his or her opening statement, make opening statement outlining the defense if desired, or wait until plaintiff has presented his or her evidence [*Code Civ. Proc. §§ 607(2), 631.7*]. For an outline of matters to be covered in defendant's opening statement, see California Civil Procedure During Trial (Cal CEB), Vol. 1 (1982), Ch. 8, *Opening Statement*, §§ 8.20-8.31.

[2] Proposed Jury Instructions Based on Pleadings

☐ Before the first witness is sworn in a jury trial, deliver to the judge presiding at the trial and serve on opposing counsel all proposed instructions to the jury covering the law as disclosed by the pleadings [*see Code Civ. Proc. § 607a*; *§ 551.220[2]*].

[3] Production of Evidence

NOTE:
For a discussion of the admissibility of evidence, see Part II, Subpart E, *§ 551.60 et seq.* For a discussion of the qualification of witnesses, the appointment of interpreters, and the order of examination, see *§ 551.110* et seq. [*see also* California Civil Procedure During Trial (Cal CEB 1982), Vol. 1, Ch. 9, ***Examining Witnesses***].

☐ Plaintiff's case.

☐ After the opening statement or statements, if any, produce evidence to establish plaintiff's case [*Code Civ. Proc. §§ 607(3), 631.7*].

NOTE:
In a jury trial, if plaintiff's evidence fails to establish plaintiff's right to recover, defendant may move for a judgment of nonsuit [*see* *Code Civ. Proc. § 581c(a)*; *§ 551.223[1]*]. In a nonjury trial, defendant may, after plaintiff has completed his or her evidence, move for judgment [***see*** *Code Civ. Proc. § 631.8(a)*; *§ 551.223[1]*].

☐ Defendant's case.

☐ After plaintiff has produced his or her evidence, defendant may make an opening statement if he or she did not do so after plaintiff's opening statement [*see Code Civ. Proc. §§ 607(5), 631.7*].

☐ If several defendants having separate defenses appear by different counsel, the court must

determine their relative order in presenting evidence [*Code Civ. Proc. §§ 607(8), 631.7*]. This is normally determined at the before chambers conference, if any [*see* discussion in *§ 551.41[3]*].

NOTE:

In a nonjury trial, after defendant has completed his or her evidence, plaintiff may move for judgment [*see* *Code Civ. Proc. § 631.8(a)*; and *§ 551.223[1]*].

[4] Rebutting Evidence [*see* Code Civ. Proc. §§ 607(6), 631.7]

☐ After the parties have produced their evidence, they may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permits them to offer evidence on their original case [*Code Civ. Proc. §§ 607(6), 631.7*].

[5] Proposed Jury Instructions Based on Evidence [*see* Code Civ. Proc. § 607a]

☐ Before the commencement of the argument in a jury trial, counsel may deliver to the judge and serve on opposing counsel proposed jury instructions on questions of law developed by the evidence and not disclosed by the pleadings [*see Code Civ. Proc. § 607a*; see also *Finn v. G. D. Searle & Co. (1984) 35 Cal. 3d 691, 701, 200 Cal. Rptr. 870, 677 P.2d 1147]* . These instructions are in addition to those previously delivered to the judge and served on opposing counsel before the first witness was sworn [*Code Civ. Proc. § 607a*; *see* [2], *above*].

☐ After submission of all proposed jury instructions (and verdict and findings forms), the trial judge may hold a chambers conference with counsel outside the presence of the jurors to discuss the instructions. This may be expressly required by local court rule or policy [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rules 8.24].

[6] Argument

☐ Time for and content of argument.

☐ Be prepared to argue the case on conclusion of the presentation of evidence or at such time thereafter as the court may specify [*see Code Civ. Proc. §§ 607(7), 631.7*; *§ 551.140 et seq.*].

☐ Use of graphic devices.

☐ Ascertain before argument any rule, policy, or practice of the court in which the case is tried relating to the use of diagrams or graphic devices in argument, such as any requirement that the device be shown to adversaries in advance [*see, e.g.,* Los Angeles Co. Super. Ct. Rules, Rules 8.74].

☐ Plaintiff's argument.

☐ The plaintiff must commence and may conclude the argument [*Code Civ. Proc. §§ 607(7), 631.7*].

☐ Defendant's argument.

☐ After plaintiff has completed his or her opening argument, defendant may present his or her argument [*see Code Civ. Proc. §§ 607(7), 631.7*]. If several defendants having separate defenses appear by different counsel, the court must determine their relative order in presenting their arguments [*Code Civ. Proc. §§ 607(8), 631.7*].

[7] Instructing Jury

☐ In a jury trial, the court may, after the completion of argument, charge the jury [*Code Civ. Proc. § 607(9)*; *see also, e.g.*, Los Angeles Co. Super. Ct., Rules, Rule 8.51 (when instructions to be read to jury)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsClosing ArgumentsGeneral OverviewCivil ProcedureTrialsJury TrialsJury InstructionsGeneral OverviewCivil ProcedureTrialsOpening StatementsGeneral OverviewEvidenceProcedural ConsiderationsGeneral OverviewEvidenceTestimonyPresentation of Evidence

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[Reserved]

§§ 551.225[Reserved]

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Chapter 551 TRIAL
PART V. FORMS

48-551 California Forms of Pleading and Practice--Annotated § 551.250

§ 551.250 Notice of Time Set for Trial [Code Civ. Proc. § 594(b)]

[1] FORM Notice of Time Set for Trial [Code Civ. Proc. § 594(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF TIME SET FOR TRIAL
[and DOES I through _____,]	)	
Defendant(s).	)	
	)	
	)	

_____

To _____ [*party, e.g.,* plaintiff] and to _____ [*name*], his/her attorney of record:

NOTICE IS HEREBY GIVEN that this action has been set for trial on _____ [*date*], at _____[*time*] in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form in [1], *above*, is for use by a party to an action to give the other party notice of the trial date [*see Code Civ. Proc. § 594*; and discussion in *§ 551.21*]. Many courts provide their own form of notice of trial, and if provided, it should be used.

[3] Cross References

For points and authorities in support of motion for new trial when defendant's nonappearance resulted from failure to receive notice of trial, see California Points and Authorities, Ch. 70, *Defaults and Default Judgments* (Matthew Bender)

For discussion of pretrial proceedings, including the setting of a case for trial, see Ch. 425, *Pretrial Proceedings*

For forms relating to bifurcation of trial, see Ch. 425, *Pretrial Proceedings*

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48-551 California Forms of Pleading and Practice--Annotated § 551.250A

§ 551.250A Motion to Advance, Specially Set or Reset Case for Trial

[1] FORM Motion to Advance, Specially Set or Reset Case for Trial

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION TO
vs.	)	_____ [ADVANCE
_____ [*name*],	)	*or* SPECIALLY SET
Defendant(s).	)	*or* RESET] TRIAL
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Trial Date: _____
	)	

_____

To _____ [*identify party, e.g.*, plaintiff _____ (*name*)] and to _____[*name*] his/her/its attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], _____ [*identify party, e.g.*, defendant] _____[*name*] will, and hereby does, move for an order _____ [advancing *or* specially setting *or* resetting] the trial of this cause to _____[*specify date*]. The motion will be made on the ground(s) that _____[*specify*

grounds showing good cause for advancing, specially setting or resetting the trial].

The motion will be based on this notice of motion, on the declaration(s) of _____[*name(s)*] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

[2] Use of Form

The form of notice of motion in [1], *above*, is for use by a party prior to trial to move the court for an order advancing, specially setting or resetting the trial. The motion may be made by noticed motion or ex parte [*Cal. Rules of Ct., Rule 3.1335(a)*]. The motion must show good cause for the request [*Cal. Rules of Ct., Rule 3.1335(b)*].

[3] Accompanying Papers

A memorandum must be served and filed with this notice of motion [*see Code Civ. Proc. § 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For general discussion and forms, see Ch. 417, *Points and Authorities* .

A declaration must be filed with the motion showing good cause. The court may only grant the request on an affirmative showing by the moving party of good cause based on a declaration served and filed with the motion or application [*Cal. Rules of Ct., Rule 3.1335(b)*].

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48-551 California Forms of Pleading and Practice--Annotated § 551.251

§ 551.251 Proceedings for Appointment of Expert Witness [Evid. Code § 730]--Notice of Motion [Code Civ. Proc. § 1010]

[1] FORM Proceedings for Appointment of Expert Witness--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION FOR ORDER APPOINTING
Plaintiff, vs. _____ [*name*],	)	EXPERT WITNESS
[and DOES I through _____,]	)	Date: _____
Defendant(s).	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff _____ (*name*)] and to _____[*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], _____ [*identify party, e.g.,* defendant] _____[*name*] will, and hereby does, move for an order appointing an expert witness, to wit, an impartial _____ [*specify, e.g.,* medical and psychiatric] expert, _____ [*specify matters for which expert is required, e.g.,* (1) to examine the plaintiff herein for the

purpose of determining whether plaintiff has a psychosis, and, if so, whether (a) the psychosis is the result of a sickness or of the injuries sustained by plaintiff in the automobile accident that occurred on _____ [*date*], (b) the psychosis has totally disabled the plaintiff; and (c) the disability is permanent; (2) to render a written report to the court; and (3) if necessary, to testify at the trial of this action on the issue(s) of _____ (*specify, e.g.,* the cause, effect, and prognosis of plaintiff's disability, if any)]. The motion will be made on the ground(s) that _____ [*specify, e.g.,* the impartial examination of an independent expert witness appointed by the court is required to help resolve the hopeless conflict in the conclusions of the medical and psychiatric experts employed by the parties to this action, and that the examination and report may help to bring about a pretrial settlement of this case, thereby saving both the court and the parties unnecessary expenditure of time and money in the trial of this action and, further, sparing the parties the additional expense that would be incurred in employing yet additional experts whose opinions may be equally conflicting after examining the plaintiff].

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name*(*s*)] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

[2] Use of Form

The form of notice of motion in [1], *above*, is for use by a party prior to trial to move the court for an order appointing an expert witness to investigate, render a report, and testify at the trial. The motion may, however, be made at any time before or during the trial [*see* [4], *below*]; however, a motion during trial is normally made orally. The motion may also be made at the before-trial conference [*see* discussion in Part II, Subpart C].

[3] Accompanying Papers

A memorandum must be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005, 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For general discussion and forms, see Ch. 417, *Points and Authorities* .

[4] Statutory Authority

When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required [*Evid. Code § 730*].

A court-appointed expert must hold the appropriate license in order to perform any act for which a license is required [*see Evid. Code § 730*].

[5] Cross References

For discussion and format requirements of notice of motion, see Ch. 372, *Motions and Orders*

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48-551 California Forms of Pleading and Practice--Annotated § 551.252

§ 551.252 Proceedings for Appointment of Expert Witness [Evid. Code § 730]--Declaration [Code Civ. Proc. § 2015.5] in Support of Motion

[1] FORM Proceedings for Appointment of Expert Witness--Declaration in Support of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff, vs.	)	DECLARATION OF _____
_____ [*name*],	)	[*name*] IN SUPPORT
[and DOES I through _____,]	)	OF MOTION FOR ORDER
Defendant(s).	)	APPOINTING EXPERT WITNESS
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
	)	

_____

I, _____[*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

[*SET FORTH, in successively numbered paragraphs, facts within declarant's personal knowledge establishing the ground(s) of the motion, e.g.:*]

2. As shown by the complaint herein, this is an action by an insured to recover disability benefits under the personal disability provisions of policies issued by the defendant insurer.

3. Under the terms of the policy, plaintiff is entitled to monthly benefits for a maximum of five years if the disability results from a sickness, but if it results from an accident then the benefits may be payable for the remainder of plaintiff's life.

4. The basis of plaintiff's claim is that plaintiff has been totally disabled by a psychosis developed as the result of injuries sustained in an automobile accident which occurred on _____ [*date*].

5. Defendant's position is that plaintiff has not been permanently disabled, or, in the alternative, if the plaintiff did develop a disabling psychosis it is not the result of the accident, but rather of sickness, thereby limiting the benefits payable to five years.

6. To date, plaintiff has been examined by a total of 13 doctors, including psychiatrists, each of whom has rendered a report. Eight of these made their examinations at plaintiff's request and five were selected by defendant.

7. The examining doctors did not agree. Some concluded that the plaintiff is malingering; others reported that plaintiff has a disabling psychosis which may or may not have resulted from the accident.

8. An independent examination and report by an impartial medical and psychiatric expert appointed by the court may assist the parties in reaching a pretrial settlement of this case and, if it does not, the expert's testimony will at least assist the trier of facts in reaching a just decision.

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form of declaration in [1], *above*, is for use to support a motion for an order appointing an expert witness to investigate, report to the court, and, if necessary, testify as an expert in the trial of an action [*see Evid. Code § 730*; for a form of notice of motion, *see § 551.251*]. The fact situation illustrated in the form is adapted from *Durst v. Superior Court (1963) 222 Cal. App. 2d 447, 35 Cal. Rptr. 143* , which involved a predecessor statute and in which the court appointed an independent medical expert on its own motion.

[3] Cross References

For further discussion of a motion to appoint an expert witness in general, see *§ 551.251*

For discussion and general format of affidavits and declarations, see Ch. 15, *Affidavits, Certificates, and Declarations*

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48-551 California Forms of Pleading and Practice--Annotated § 551.253

§ 551.253 Proceedings for Appointment of Expert Witness [Evid. Code § 730]--Order [Code Civ. Proc. § 1003] Granting Motion

[1] FORM Proceedings for Appointment of Expert Witness--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

	)	
	)	NO. _____
_____ [*name*],	)	ORDER GRANTING MOTION TO APPOINT EX-
Plaintiff, vs.	)	PERT WITNESS
_____ [*name*],	)	Date: _____
Defendant(s).	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

The motion of _____ [*identify party, e.g.,* defendant _____ (*name*)] for an order appointing _____ [*specify, e.g.,* an independent medical and psychiatric] expert to _____ [*specify, e.g.,* examine the plaintiff, render a written report to the court, and, if necessary, testify in this action] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____[*name*]; defendant appeared by counsel _____[*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and _____ [*name and title*], whose

business address is _____ [*specify*], is appointed as a _____ [*specify field, e.g.,* medical and psychiatric] expert.

IT IS FURTHER ORDERED that the _____ [*specify field, e.g.,* medical and psychiatric] expert:

[*SPECIFY, in successively numbered subparagraphs, all actions expert is to take, e.g.:*]

1. Examine the plaintiff herein, that the examination be of such medical and psychiatric scope as shall be determined by the medical and psychiatric expert, including such tests, if any, as he/she shall deem advisable, that no one be present or within hearing distance during the examination, except the plaintiff and the medical and psychiatric expert and his/her assistants, if any, and that neither plaintiff nor defendant nor their agents shall record the examination;

2. Complete the examination on or before _____ [*date*];

3. Forthwith give the court written notification of the completion of the examination;

4. Make a written report to the court on or before _____ [*date*], and set forth in the report the expert's opinion respecting the following: the nature, extent, duration, and causes of the disabilities, if any, from which the plaintiff is suffering, including the opinion as to whether the plaintiff is suffering from a psychosis or other psychiatric disturbance, and, if so, the nature, duration, extent, and cause thereof, and the prognosis with respect thereto; the relationship, if any, between any such psychiatric disturbance and the accident of _____ [*date*]; whether the plaintiff is totally disabled from engaging in his/her occupation of _____ (*specify, e.g.,* attorney) and, if so, the duration and cause of such disability, and the prognosis as to the continuation of any such disability; and

5. If necessary, testify as an expert at the trial of this action [on the issues of the cause, effect, and prognosis of plaintiff's disability, if any].

[*CONTINUE*]

[IT IS FURTHER ORDERED that plaintiff appear at such times and places as specified by the expert for the examination, and that plaintiff submit to the examination.]

IT IS FURTHER ORDERED THAT_____ [*name of expert witness*] be allowed the sum of $_____ as compensation for his/her services in _____ [*specify, e.g.,* examining the plaintiff] and preparing his/her [notification and] report to the court and the further sum of $_____ for his/her services as a witness at the trial, if required, which sums shall be paid _____ [*specify, e.g.,* by defendant] and taxed as costs.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, is for use when the motion under *Evid. Code § 730* for appointment of an expert witness is granted. The fact situation illustrated in the order is adapted from *Durst v. Superior Court (1963) 222 Cal. App. 2d 447, 35 Cal. Rptr. 143* , which involved a predecessor statute and in which the court appointed an independent

medical expert to examine plaintiff on its own motion.

[3] Cross References

For further discussion of a motion to appoint an expert witness in general, see *§ 551.251*

For a discussion and forms of orders, see Ch. 372, *Motions and Orders*

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48-551 California Forms of Pleading and Practice--Annotated § 551.254

§ 551.254 Documentary Evidence--Stipulation [Code Civ. Proc. § 283] for Use of Photocopies

[1] FORM Documentary Evidence--Stipulation for Use of Photocopies

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	STIPULATION FOR USE OF PHOTOCOPIES IN
[and DOES I through _____,]	)	LIEU OF ORIGINALS
Defendant(s).	)	
	)	
	)	

_____

IT IS STIPULATED between the parties, by and through their respective counsel, that photocopies of the following described writing(s) may be introduced in evidence at the trial herein, in lieu of the original(s): _____ [*describe writings*].

All other objections to the introduction of the writing(s), including those going to the competency and relevancy thereof, are reserved.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Defendant

[2] Use of Form

The form in [1], *above*, is for use by the parties to a lawsuit to stipulate to the introduction in evidence of photocopies of writings in lieu of the originals. The purpose of the stipulation is to avoid an objection to the use of photocopies under the "Secondary Evidence Rule" [*see Evid. Code § 1521*; *see also § 551.74[3]*].

With appropriate modifications, the form may be used for any written stipulation entered into by the parties.

[3] Cross References

For discussion and alternative forms of stipulations, see Ch. 533, *Stipulations*

For discussion of the secondary evidence rule, see California Trial Guide, Unit 31, *Secondary Evidence of Writings: Best Evidence Rule* (Matthew Bender); Cotchett, California Courtroom Evidence, Ch. 23, *Secondary Evidence* (Matthew Bender)

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48-551 California Forms of Pleading and Practice--Annotated § 551.255

§ 551.255 Proceedings for Order Setting Aside Submission and Reopening Case for Additional Evidence--Notice of Motion [Code Civ. Proc. § 1010]

[1] FORM Proceedings for Order Setting Aside Submission and Reopening Case for Additional Evidence--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION FOR ORDER SETTING
vs.	)	ASIDE SUBMISSION AND REOPENING CASE
_____ [*name*],	)	FOR ADDITIONAL EVIDENCE
[and DOES I through _____,]	)	Date: _____
Defendant(s).	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.*, plaintiff _____ (*name*)] and to _____[*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], _____ [*identify party, e.g.*, defendant] _____[*name*] will, and hereby does, move for an order setting aside the

submission and reopening the case for the reception of additional evidence. The motion will be made on the ground(s) that _____ [*set forth ground(s), such as inadvertent omission of evidence, surprise, availability of previously unavailable evidence, or newly discovered evidence*].

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name*(*s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

[2] Use of Form

The form of notice of motion in [1], *above*, is for use to move for an order setting aside the submission of a case and reopening it for the reception of additional evidence. A motion to reopen a case prior to its submission would normally be made orally in open court.

A motion to reopen a case may inferentially be authorized by *Code Civ. Proc. § 607(6)* providing that after the parties have presented their evidence, they may offer rebutting evidence only unless the court, for good cause and in furtherance of justice, permits them to offer evidence on their original case, and by *Evid. Code § 320*, providing that except as otherwise provided by law, the court in its discretion shall regulate the order of proof.

For a discussion of the order of proof and the order of the proceedings, see Part II, Subpart D.

[3] Accompanying Papers

Cal. Rules of Ct., Rule 3.1113(a) generally requires a notice of motion to be accompanied by a supporting memorandum. It is not clear, however, whether this motion is a law and motion matter as defined in *Cal. Rules of Ct., Rules 3.1100, 3.1103* to which *Cal. Rules of Ct., Rule 3.1113(a)* would apply. Nevertheless, good practice would dictate that whenever a court has discretion to deny a motion, points and authorities be served and filed with the notice of motion. For discussion and forms, see Ch. 417, *Points and Authorities* .

[4] Setting Aside Submission and Reopening

When a matter is tried to a court, the trial judge has broad discretion to reopen the matter after an oral ruling but before final judgment is entered, even over the objection of litigants, if adequate notice is given to parties [*Coit Drapery Cleaners, Inc. v. Sequoia Ins. Co. (1993) 14 Cal. App. 4th 1595, 1610-1612, 18 Cal. Rptr. 2d 692* ; *see also Hughes Tool Co. v. Max Hinrichs Seed Co. (1980) 112 Cal. App. 3d 194, 201, 169 Cal. Rptr. 160* (decision to allow party to reopen trial after case has been submitted for decision is within discretion of trial court); *Baker v. City of Palo Alto (1961) 190 Cal. App. 2d 744, 755, 12 Cal. Rptr. 425* (reopening case by court on its own motion on theory conceived by court is not an abuse of discretion); *Johnston v. Johnson (1954) 127 Cal. App. 2d 464, 471, 274 P.2d 1* (reopening of case for further evidence is entirely within discretion of trial court; reopening at any time before final decision is favored if reopening will tend to promote justice by bringing all facts before court); *Foster v. Keating (1953) 120 Cal. App. 2d 435, 448-452, 261 P.2d 529* (denial of motion to reopen case when introduction of relevant evidence was prevented by ruling of trial court was reversible error)].

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48-551 California Forms of Pleading and Practice--Annotated § 551.256

§ 551.256 Proceedings for Order Setting Aside Submission and Reopening Case for Additional Evidence--Declaration [Code Civ. Proc. § 2015.5] in Support of Motion

[1] FORM Proceedings for Order Setting Aside Submission and Reopening Case for Additional Evidence--Declaration in Support of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	IN SUPPORT OF MOTION FOR ORDER SETTING
_____ [*name*],	)	ASIDE SUBMISSION AND REOPENING CASE
[and DOES I through _____,]	)	FOR ADDITIONAL EVIDENCE
Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____[*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

[*SET FORTH, in successively numbered paragraphs, facts within declarant's personal knowledge establishing the grounds of the motion, e.g.:*]

2. There is material oral and documentary evidence relevant to the issues in this case which _____ [*moving party*] was prevented from presenting at the trial because _____ [*specify reasons such as newly discovered evidence, inadvertence, rulings of the trial court, or other as appropriate, with particulars*].

3. The oral evidence pertains to, and tends to _____ [prove *or* disprove] the issue of _____ [*specify*]. It consists of the testimony of _____ [*name*], who will testify in substance as follows: _____ [*specify*].

4. The documentary evidence pertains to, and tends to _____ [prove *or* disprove] the issue of _____ [*specify*]. It consists of the following: _____ [*describe*].

5. The foregoing evidence is available for immediate introduction with the permission of the court.

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form of declaration in [1], *above*, is for use to support a motion for an order setting aside the submission and reopening the case for the reception of further evidence [*see Code Civ. Proc. § 2015.5*; for a form of notice of motion, *see § 551.255*].

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48-551 California Forms of Pleading and Practice--Annotated § 551.257

§ 551.257 Proceedings for Order Setting Aside Submission and Reopening Case for Additional Evidence--Declaration [Code Civ. Proc. § 2015.5] Opposing Motion

[1] FORM Proceedings for Order Setting Aside Submission and Reopening Case for Additional Evidence--Declaration Opposing Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____ [*name*]
vs.	)	OPPOSING MOTION FOR ORDER SETTING
_____ [*name*],	)	ASIDE SUBMISSION AND REOPENING CASE
[and DOES I through _____,]	)	FOR ADDITIONAL EVIDENCE
Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

I, _____[*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*opposing party*) *or other statement as appropriate*].

2. I oppose the motion of _____ [*moving party*] for an order setting aside the submission of this case and reopening the trial on the ground(s) that _____ [*set forth facts within declarant's personal knowledge negating the grounds of the motion, e.g.*, all the evidence mentioned in the declaration of _____ (*name*) was available to the _____ (*moving party*) at the trial of this action, in that _____ (*set forth evidentiary facts showing that moving party knew and could have produced the evidence at trial*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form of declaration in [1], *above*, is for use to oppose a motion to set aside the submission and reopen the case for reception of further evidence [*see Code Civ. Proc. § 2015.5*]. For discussion of the motion in general, *see § 551.255*.

The illustrative fact situation assumes that the motion to reopen was made on the grounds of newly discovered evidence that could not, in the exercise of due diligence, have been discovered before. The ground of opposition is that the evidence was not newly discovered, but was known and available to the moving party at the time of trial.

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48-551 California Forms of Pleading and Practice--Annotated § 551.258

§ 551.258 Proceedings for Order Setting Aside Submission and Reopening Case for Additional Evidence--Order [Code Civ. Proc. § 1003] Granting Motion

[1] FORM Proceedings for Order Setting Aside Submission and Reopening Case for Additional Evidence--Order Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER SETTING ASIDE SUBMISSION AND
vs.	)	REOPENING CASE FOR ADDITIONAL EVID-
_____ [*name*],	)	ENCE
Defendant(s).	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

The motion of _____ [*identify party, e.g.*, plaintiff] for an order setting aside the submission of this case and reopening the trial for the reception of further evidence came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____[*name*]; defendant appeared by counsel _____[*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that the submission of this case is set aside, and that the trial is reopened for the reception of additional evidence.
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, is for use when the motion for an order setting aside the submission of a case and reopening it for further evidence is granted. For discussion of the motion in general, *see § 551.255*.

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48-551 California Forms of Pleading and Practice--Annotated § 551.259

§ 551.259 Request for Return of Exhibits, Depositions, and Administrative Records, Order Granting Request, and Receipt [Code Civ. Proc. §§ 1003, 1952.2, 2015.5]

[1] FORM Request for Return of Exhibits, Depositions, and Administrative Records, Order Granting Request, and Receipt

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	REQUEST FOR RETURN OF EXHIBITS AND
[and DOES I through _____,]	)	DEPOSITIONS [AND ADMINISTRATIVE RE-
Defendant(s).	)	CORDS], ORDER GRANTING REQUEST, AND
	)	RECEIPT
	)	

_____

I, _____ [*name*], request return of the exhibits and depositions hereinafter described and in support of this request declare:

1. I am the attorney of record for the _____ [*identify party, e.g.*, plaintiff], herein, who is [the owner and] lawfully entitled to the possession [and administrative record(s)] of the following described exhibits and depositions which were introduced into evidence or filed at the trial of this action: _____ [*describe, giving exhibit identification number or letter*].

2. The exhibits and depositions [and administrative record(s)] were introduced or filed in the trial of this action by _____ [*identify party whose attorney is seeking their return*].

3. The judgment herein became final on _____ [*date*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

ORDER

IT IS ORDERED that the clerk return the exhibits and depositions [and administrative record(s)] herein described to _____ [*name*], the attorney of record for _____ [*party*].
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

RECEIPT

Receipt of the exhibits and depositions [and administrative record(s)] herein described is acknowledged.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form in [1], *above*, is for use by the attorney for a party after the judgment has become final to request the court to order the return of exhibits, depositions, and administrative records introduced or filed by the party in the trial of a civil action when the trial judge fails on his or her own motion to order their return. The form also includes an order granting the request, and the attorney's signed receipt for their return [*see Code Civ. Proc. § 1952.2*].

[3] When Judge May Order Exhibits Returned

When a judgment becomes final and no appeal is pending, the court in its discretion and on its own motion by a written order signed and filed in the action or proceeding, and an entry of it made in the register of actions, may order the clerk to return all of the exhibits, depositions, and administrative records introduced or filed in the trial to the attorneys for the parties who introduced or filed them [*Code Civ. Proc. § 1952.2*].

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48-551 California Forms of Pleading and Practice--Annotated § 551.260

§ 551.260 Media Request to Photograph, Record, or Broadcast and Proposed Order [Cal. Rules of Ct., Rule 1.150(e); Cal. Judicial Council Forms MC-500, MC-510]

[1] FORM Media Request to Photograph, Record, or Broadcast and Proposed Order

Click here to view image.

[2] Use of Form

The forms in [1], *above*, are illustrative reproductions of Judicial Council Form MC-500 and Judicial Council Form MC-510, adopted by the Judicial Council for mandatory use [*see Cal. Rules of Ct., Rule 1.31(2)*; Cal. Rules of Ct., This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Judicial Council Form MC-500 is for use by a media agency to request an order permitting photographing, recording, or broadcasting of court proceeding by media using television, radio, photographic, or recording equipment [*see Cal. Rules of Ct., Rule 1.150(e)*; *see also Cal. Rules of Ct., Rule 1.150(b)* (defining "media coverage," "media," and "media agency")]. This includes media coverage in the courtroom in issue but also in the courthouse and its entrances and exits [*see Cal. Rules of Ct., Rule 1.150(b)(3)*]. The request must be signed by a person in a supervisory position in the media agency.

Judicial Council Form MC-510 is for use as a proposed order granting the request. It must be completed by the media agency and attached to the request [*Cal. Rules of Ct., Rule 1.150(e)(1)*].

The request may be made in either a civil or criminal trial, and must be filed at least five court days before the portion of the proceeding to be covered unless good cause is shown. It is submitted to the judge assigned to the case, or, if a judge has not yet been assigned, to the judge supervising the calendar department. The court clerk is required promptly to inform the parties of the request [*Cal. Rules of Ct., Rule 1.150(e)(1)*].

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48-551 California Forms of Pleading and Practice--Annotated § 551.261

§ 551.261 Proceedings to Seal Records--Notice of Motion and Supporting Declaration [Cal. Rules of Ct., Rule 2.551(b)]

[1] FORM Proceedings to Seal Records--Notice of Motion and Supporting Declaration [Cal. Rules of Ct., Rule 2.551(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR ORDER SEALING RECORDS, SUPPORTING DECLARATION OF _____ [*name*], AND MEMORANDUM
vs.	)	
_____ [*name*],	)	
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

[*EITHER*]

To _____ [*identify party, e.g.*, plaintiff _____ (*name*)] and to _____[*name*] his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], _____ [*identify party, e.g.*, defendant] _____[*name*] will, and hereby does, move for an order directing that the following records be sealed pursuant to *California Rules of Court, Rule 2.550 et seq.*: _____[*specify*]. The motion will be made on the grounds that the facts, as established in the accompanying declaration of _____[*specify*], are sufficient to justify sealing the specified records pursuant to *California Rules of Court, Rule 2.550 et seq.*

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name*(*s*)] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for plaintiff in the above-described action].

2. This motion to seal records pertains to the following records[, which have been lodged with court in connection with this motion on _____ (*date*)]: _____[*specify documents, papers, exhibits, transcripts, or other things, or portions of these, filed or lodged with the court*].

3. The sealing of these records is necessary to an overriding interest that overcomes the right of public access to these records. This overriding interest is _____[*specifiy overriding interest, which may consist of but is not necessarily limited to statutory privileges, trade secrets, privacy rights, contractual obligation of nondisclosure, and right of civil litigant to fair trial*].

4. There is a substantial probability that this overriding interest will be prejudiced if these records are not sealed, in that _____[*explain probably prejudice to overriding interest in the event that the records are not sealed*].

5. The following measures have been taken to ensure that the proposed sealing is narrowly tailored and no less restrictive means exist to protect the overriding interest: _____[*specify measures taken, e.g., documents proposed for sealing were specified only after selective analysis leaving other documents subject to public access*].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

MEMORANDUM

[*Add memorandum supporting motion.*]

Respectfully submitted,
_____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

[2] Use of Form

This form of notice of motion and motion is for use by a party seeking an order sealing records under *Cal. Rules of Ct., Rules 2.550* and *2.551*. Court records that are not confidential by law are deemed open to the public and may not be sealed from public access by stipulation of the parties, but only by a court order [*Cal. Rules of Ct., Rules 2.550(a), (c), 2.551(a)*]. A party seeking an order sealing records must do so by noticed motion [*Cal. Rules of Ct., Rule 2.551(b)(1)*].

The motion must be accompanied by a supporting memorandum and by a declaration containing facts sufficient to justify the sealing [*Cal. Rules of Ct., Rules 2.551(b)(1)*]. If the records sought to sealed are not already filed with the court, they must be lodged with the court pursuant to *Cal. Rules of Ct., Rules 2.551(d)*, absent a showing of good cause for not lodging the records [*Cal. Rules of Ct., Rules 2.551(b)(2)*]. If necessary to prevent disclosure, the motion and accompanying papers are to be filed in a redacted version, with the complete version lodged conditionally under seal [*Cal. Rules of Ct., Rules 2.551(b)(2)* (requirement also applicable to opposing papers)].

For further discussion of the procedures for sealing records, including the records to which the procedures apply, the procedures for lodging materials conditionally under seal, and the facts that must be established to support the issuance of an order sealing records, see *§ 551.173*.

[3] Cross References

For discussion and forms relating generally to declarations under penalty of perjury or affidavits, see Ch. 15, *Affidavits, Certificates, and Declarations*

For detailed discussion of format requirements and procedures governing noticed motions generally, see Ch. 372, *Motions and Orders*

For discussion and forms relating to memoranda of points and authorities, see Ch. 417, *Points and Authorities*

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Chapter 551 TRIAL
PART V. FORMS

48-551 California Forms of Pleading and Practice--Annotated § 551.262

§ 551.262 Proceedings to Seal Records--Cover Sheet for Lodged Records Conditionally Under Seal [Cal. Rules of Ct., Rule 2.551(d)(3)]

[1] FORM Proceedings to Seal Records--Cover Sheet for Lodged Records Conditionally Under Seal

_____[*Name of attorney*]
_____[*Street address*]
_____[*city, state, and zip*]
_____[*telephone phone number*]
_____[*fax number, if provided*]
_____[*e-mail address, if provided*]
_____[*State Bar membership number of attorney*]

Attorney for _____ [*moving party, e.g.*, Defendant] _____[*name*]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*]	)	
Plaintiff,	)	NO. _____
vs.	)	COVER SHEET FOR RECORDS LODGED CON-
_____ [*name*]	)	DITIONALLY UNDER SEAL
Defendant.	)	[REFEREE _____ (*name*)]
	)	
	)	

_____

THE ENCLOSED RECORD[S] IS/ARE LODGED WITH THE COURT CONDITIONALLY UNDER SEAL AND IS/ARE SUBJECT TO A MOTION FOR AN ORDER DIRECTING THAT THE ENCLOSED RECORD[S] BE FILED UNDER SEAL

[2] Use of Form

This form of cover sheet is for use by a party when lodging records with the court in connection with a motion that the records be filed under seal. Such records are to be enclosed in an envelope or other container that is labeled "CONDITIONALLY UNDER SEAL" [*Cal. Rules of Ct., Rule 2.551(d)(2)*]. This cover sheet, in turn, is to be affixed to the envelope or container [*Cal. Rules of Ct., Rule 2.551(d)(3)*].

The cover sheet must contain all the information required on a caption page under *Cal. Rules of Ct., Rule 2.111* [*Cal. Rules of Ct., Rule 2.551(d)(3)(A)*]. Thus, this form set outs, in the required format, the information required to be placed on the first page of all papers that are not pleadings, that is, attorney information, title of the court and the case, case number, nature of the paper, and, if applicable, the name of the referee before whom the case is pending when one has been appointed under *Code Civ. Proc. § 638* or *639* [*Cal. Rules of Ct., Rule 2.111(1)-(8)*].

This form also states, as required under *Cal. Rules of Ct., Rule 2.551(d)(3)(B)*, that the records enclosed in the envelope or container are subject to a motion to file the records under seal.

For further discussion of the procedures for lodging records under *Cal. Rules of Ct., Rule 2.551(d)*, see *§ 551.173[8]*.

[3] Cross References

For further discussion of the general format requirements of *Cal. Rules of Ct., Rule 2.111*, see Ch. 372, *Motions and Orders*

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48-551 California Forms of Pleading and Practice--Annotated § 551.263

§ 551.263 Proceedings to Seal Records--Order Sealing Records [Cal. Rules of Ct., Rules 2.550(d), (e), 2.551(a), (e)]

[1] FORM Proceedings to Seal Records--Order Sealing Records

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER _____ [*specify subject of order*]
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

The motion of _____ [*identify party, e.g.,* defendant] _____[*name*] for an order sealing records under *California Rules of Court, Rule 2.550 et seq.,* came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____[*name*]; defendant appeared by counsel _____[*name*].

The Court, having considered the declaration of _____[*name*] and other documents in support of and in opposition to the motion, having heard the arguments of counsel, and being fully advised in the matter, finds as follows:

1. There exists an overriding interest that overcomes the right of public access to the records specified below, in that _____[*specify overriding interest*].

2. This overriding interest support sealing the records specified below.

3. A substantial probability exists that this overriding interest will be prejudiced if the records specified below are not sealed, in that _____[*specify overriding interest*].

4. The records specified below have been tailored to limit narrowly the overall records to be sealed.

5. No less restrictive means exist to achieve the overriding interest than to seal the records specified below.

IT IS, THEREFORE, ORDERED that the motion be, and hereby is, granted and that the following records be _____ [sealed *or* filed underseal]: _____[*specify records and/or portions of records to be sealed; if the specified records are lodged with the court, specify also whether, in addition to the lodged, the order itself, the register of actions, any other court records, or any other records relating to the case are also to be sealed*].

[IT IS FURTHER ORDERED that, other than the court, only the following person[s] is/are authorized to inspect the records sealed by this order: _____ (*names of person(s) other than court authorized to inspect sealed records*)].
Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

This form of order is for use in granting a motion to seal records under *Cal. Rules of Ct., Rules 2.550* and *2.551*.

The form of order specifically sets out the findings necessary to support the order, as required under *Cal. Rules of Ct., Rule 2.550(e)(1)(A)* [*see Cal. Rules of Ct., Rules 2.550(d)* (findings required to seal records)]. By specifying the sealing of particular records only, it also directs the sealing of only those records, or portions or records, that contain material that needs to be placed under seal, as required under *Cal. Rules of Ct., Rule 2.550(e)(1)(B)*. The order also includes optional language which must be included when any person or persons other than the court are to be authorized to inspect the records sealed by the order [*Cal. Rules of Ct., Rule 2.551(e)(3)*].

When an order seals records lodged with the court, it should include directions that the lodged records be filed under seal [*see Cal. Rules of Ct., Rule 2.551(d)(4)* (lodged records not filed unless court orders them filed)], and whether materials other than the lodged records are also to be sealed, such as the order itself, the register of actions, or any other court records or records relating to the case [*Cal. Rules of Ct., Rules 2.551(e)(2)*].

This form may be modified to include the appointment of a referee and directions allocating the referee's fees, when this is necessary to handle voluminous records to be placed under seal [*see Cal. Rules of Ct., Rules 2.550(e)(2)*; for further discussion and forms relating to the appointment of referees and the allocation of fees under *Code Civ. Proc. §§ 639* and *645.1, see* Ch. 38, *Reference*].

For further discussion of orders in motion proceedings to seal otherwise public trial court records, see *§ 551.173[9]*.

[3] Cross References

For detailed discussion of orders in noticed motion proceedings generally, see Ch. 372, *Motions and Orders*

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Chapter 552 TRIAL COURT DELAY REDUCTION

48-552 California Forms of Pleading and Practice--Annotated 552.syn

§ 552.syn Synopsis to Chapter 552: TRIAL COURT DELAY REDUCTION

§ 552.01 Scope of Chapter

§ 552.02 Cross References

§ 552.03 Governing Law

§§ 552.04-552.09 [Reserved]

§ 552.10 Matters Excluded From Trial Court Delay Reduction Programs

§ 552.11 Local Trial Court Delay Reduction Rules

§ 552.12 Differential Case Management Rules

§ 552.13 Common Time Limits Under Trial Court Delay Reduction Rules

[1] Service of Pleadings

[a] Complaint

[b] Service of Responsive Pleadings

[2] Service of Notices and Other Papers

[3] Stipulated Continuance

[4] First Status Conference

[5] Discovery

[6] Referral to Arbitration or Mediation

[7] Dismissal of Fictitious Defendants

[8] Peremptory Disqualification of Judge

[9] Time to Enter Default

[10] Additional Forms

§ 552.14 Effect of Statutory Trial Preferences

§ 552.15 Trial Court's Discretionary Power to Manage Cases

[1] Exercise of Discretion

[a] Exercise of Discretion in General

[b] Dismissal Without Prejudice of Case Subject to Bankruptcy Stay

[2] Sanctions

§§ 552.16-552.29 [Reserved]

§ 552.30 State Statutes

§ 552.31 Decisions

[1] Constitutionality

[2] Due Process

[3] Rules of Court

[4] Discretion of Trial Court

[5] Standard of Appellate Review

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Chapter 552 TRIAL COURT DELAY REDUCTION
PART I. SCOPE

48-552 California Forms of Pleading and Practice--Annotated § 552.01

§ 552.01 Scope of Chapter

This chapter summarizes the Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*) and local rules adopted under it. Trial Court Delay Reduction Act considerations are also addressed throughout this publication in connection with procedures to which they commonly relate.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersContinuancesCivil ProcedureTrialsGeneral Overview

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48-552 California Forms of Pleading and Practice--Annotated § 552.02

§ 552.02 Cross References

For discussion of arbitration and mediation, see Ch. 36, *Judicial Arbitration* , and Ch. 37, *Judicially Mandated Civil Action Mediation* .

For discussion of discovery, see Ch. 190-200: *Discovery* .

For discussion relating to the time for service of notices or other papers under *Code Civ. Proc. §§ 1005* and *1013*, see Ch. 372, *Motions and Orders* , and Ch. 518, *Service of Summons and Papers* .

For discussion of the statutory trial preferences, see Ch. 425, *Pretrial Proceedings* .

For discussion of references, see Ch. 38, *Reference* .

For discussion of sanctions generally, and impositions of sanctions during pretrial proceedings, specifically, see Ch. 510, *Sanctions* , and Ch. 425, *Pretrial Proceedings* , respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeMotion PracticeGeneral OverviewCivil ProcedureJudicial OfficersReferencesCivil ProcedureDiscoveryGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedureSanctionsGeneral Overview

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§ 552.03 Governing Law

The Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*) requires all superior and municipal courts in California to eliminate delay in the progress and ultimate resolution of litigation [*Gov. Code §§ 68605.5, 68607, 68620(a)*].

Exemplary delay reduction programs adopted by local courts are often referred to as "fast track," and cases assigned to the program are referred to as "fast-track cases" [*see Moyal v. Lanphear (1989) 208 Cal. App. 3d 491, 498, 256 Cal. Rptr. 296]* .

Also, the Judicial Council has adopted standards of timely disposition of actions, guided by the principle that from commencement to resolution, litigation should require only that time reasonably necessary for pleadings, discovery, preparation, and court events; any additional time is delay and should be eliminated [Cal. Rules of Ct., Stds. of Jud. Admin., Stds. 2.1, 2.2].

Legal Topics:

For related research and practice materials, see the following legal topics:
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48-552 California Forms of Pleading and Practice--Annotated §§ 552.04-552.09

[Reserved]

§§ 552.04[Reserved]

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48-552 California Forms of Pleading and Practice--Annotated § 552.10

§ 552.10 Matters Excluded From Trial Court Delay Reduction Programs

Trial court delay reduction programs do not apply to the following:

- Small claims [*Gov. Code § 68620(b)*].
- Unlawful detainer [*Gov. Code § 68620(b)*].
- Juvenile cases [*Gov. Code § 68608(a)*].
- Probate cases [*Gov. Code § 68608(a)*].
- Domestic relations cases [*Gov. Code § 68608(a)*].

A court's local rules may exclude from the court's delay reduction program cases that are assigned, based on subject matter, to a judge or judges for all purposes [*Gov. Code § 68608(a)*].

Local rules may identify additional cases or stages of cases that are not covered by that court's Trial Court Delay Reduction program. For example, Los Angeles excepts, among other things, small claims matters, name change petitions, eminent domain pretrial proceedings, pretrial proceedings in asbestos exposure cases, cases stayed by a bankruptcy, writs of mandate, uninsured motorist cases, and other cases as may be designated by the Presiding Judge or Supervising Judge of a district [*see* Los Angeles Co. Super. Ct. Rules, Rule 7.2(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesCase Management

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48-552 California Forms of Pleading and Practice--Annotated § 552.11

§ 552.11 Local Trial Court Delay Reduction Rules

Local court rules implementing the Trial Court Delay Reduction Act govern much of the procedure, particularly impacting on time requirements [*see Gov. Code §§ 68607, 68612, 68616*].

The local rules are restricted by *Gov. Code § 68616*, which provides some minimum time standards. Local rules cannot impose shorter time limits than authorized by *Section 68616*. These limits are discussed under *§ 552.13*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementGovernmentsCourtsRule Application & Interpretation

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48-552 California Forms of Pleading and Practice--Annotated § 552.12

§ 552.12 Differential Case Management Rules

Each court is required to adopt differential case management rules [*Cal. Rules of Ct., Rule 3.710*]. These rules apply to general civil cases, as defined [*see Cal. Rules of Ct., Rule 3.712* (exceptions include probate, family law, and civil petitions)].

Civil cases assigned the case management rules in Ch. 3, Div 7, Tit. 3 of the Cal. Rules of Ct. for review under should be managed so as to achieve the following goals [*Cal. Rules of Ct., Rule 3.714(b)*]:

- Unlimited civil cases. The goal of each trial court should be to manage unlimited civil cases from filing so that: 75% are disposed of within 12 months; 85% percent are disposed of within 18 months; and 100% are disposed of within 24 months.

- Limited civil cases. The goal of each trial court should be to manage limited civil cases from filing so that: 90% are disposed of within 12 months; 98% are disposed of within 18 months; and 100% percent are disposed of within 24 months.

- Individualized case management. The goals above are guidelines for the court's disposition of all unlimited and limited civil cases filed in that court. In managing individual civil cases, the court must consider each case on its merits. To enable the fair and efficient resolution of civil cases, each case should be set for trial as soon as appropriate for that individual case consistent with Rule 3.729.

The court must evaluate each case on its own merits as provided in *Cal. Rules of Ct., Rule 3.715*, under procedures adopted by local court rules. After evaluation, the court must: (1) assign the case to the case management program for review under *Cal. Rules of Ct., Rule 3.720 et seq.* for disposition under the case disposition time goals in Rule 3.714(b); (2) or exempt the case as an exceptional case under Rule 3.714(c) from the case disposition time goals and monitor it with the goal of disposing of it within three years; or (3) assign the case under Rule 3.714(d) to the a local case management plan for disposition within six to nine months after filing [*Cal. Rules of Ct., Rule 3.714(a)*; *see Cal. Rules of Ct., Rule 3.715* (case evaluation factors)].

In Los Angeles Superior Court, this evaluation is done at the first status conference or at an earlier time deemed appropriate by the court [Los Angeles Co. Super. Ct. Rules, Rule 7.6(c)(1)].

In San Francisco Superior Court, all cases are assigned to Plan 1 on filing and remain in Plan 1 unless a showing of good cause for reassignment is timely made [San Francisco Uniform Trial Ct. Rules, Rule 3.1]. In Sacramento Superior Court, cases are also deemed Class I cases unless otherwise requested in a Designation Statement, which if the parties are not in agreement, or if the court does not agree, may result in a hearing on the question of designation [Sacramento Co. Super. Ct. Rules, Rule 11.06].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPretrial MattersGeneral OverviewCivil ProceduresPretrial MattersConferencesCase ManagementGovernmentsCourtsRule Application & Interpretation

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§ 552.13 Common Time Limits Under Trial Court Delay Reduction Rules

[1] Service of Pleadings

[a] Complaint

Local trial court delay reduction rules cannot require service of a complaint to be made within less than 60 days after filing. Rules may, however, provide for granting exceptions for longer periods of time as authorized by local rule [*Gov. Code § 68616(a)*]. Local court rules most commonly track this provision, for example:

- San Diego Co. Super. Ct. Rules, Div. II, Rule 2.1.5 (also requiring filing of Certificate of Progress if service has not been made and providing an exception for service by publication).

- San Francisco Uniform Trial Ct. Rules, Rule 3.3.

[b] Service of Responsive Pleadings

Local trial court delay reduction rules cannot require service of responsive pleadings to be made within less than 30 days after filing. Rules may, however, provide for granting exceptions for longer periods of time as authorized by local rule [*Gov. Code § 68616(b)*]. Consistent with this limitation, local rules cannot shorten the time to plead after service of summons under *Code Civ. Proc. § 412.20* (30 days) [*Gov. Code § 68616(c)*].

Local court rules most commonly track this provision. See, for example, the following:

- San Diego Co. Super. Ct. Rules, Div. II, Rule 2.1.6 (also requiring filing of Certificate of Inability to Respond if not able to respond).

- Sacramento Co. Super. Ct. Rules, Rule 11.04(A) (within time required by law or stipulation, but in no event more than 75 days after filing of action).

[2] Service of Notices and Other Papers

Local trial court delay reduction rules cannot shorten the time for service of notices or other papers under *Code Civ. Proc. §§ 1005* and *1013* [*Gov. Code § 68616(c)*; for discussion of these provisions, *see* Ch. 372, *Motions and Orders* , and Ch. 518, *Service of Summons and Papers* , respectively].

[3] Stipulated Continuance

Local trial court delay reduction rules must allow the parties, within 30 days of service of the responsive pleadings, to stipulate to a single continuance not to exceed 30 days [*Gov. Code § 68616(d)*].

Beyond this continuance, continuances are strongly disfavored in trial court delay reduction [*see Gov. Code § 68607(g)*].

Los Angeles encourages counsel to grant first requests for extensions of time to respond to litigation deadlines as a matter of courtesy unless time is of the essence. Additional requests, however, should be dealt with by balancing the need for expedition against deference one should ordinarily give to an opponent's schedule, the reasonableness of the length of the requested continuance, the opponent's willingness to grant reciprocal extensions, the time actually needed for the task, and the likelihood of the court granting the extension if asked to do so [Los Angeles Super. Ct. Rules, Rule 7.12(a)].

[4] First Status Conference

Local trial court delay reduction rules cannot require a status conference, or similar event other than a challenge to the court's jurisdiction, to be conducted within less than 30 days after service of the first responsive pleadings or if there is a 30-day stipulated continuance under *Gov. Code § 68616(d)*, within less than 30 days of the expiration of the continuance [*Gov. Code § 68616(e)*].

Local rules differ a great deal on when the first status conference is to be held. See, for example, the following:

- Los Angeles Super. Ct. Rules, Rule 7.9(a) (not more that 180 days after the complaint is filed, subject to *Gov. Code § 68616(d), (e)* and *(g)* (*see* [3], *above*; [6], *below*)).

- San Diego Co. Super. Ct. Rules, Div. II, Rule 2.1.9(A) (to be set approximately 150 days after filing of complaint).

- San Francisco Uniform Trial Ct. Rules, Rule 3.4(A) (clerk designates time on face of complaint when complaint is filed; plaintiff is responsible for notifying all defendants of the date).

[5] Discovery

The Civil Discovery Act [*Code Civ. Proc. § 2016.010 et seq.*] governs discovery in cases subject to trial court delay programs, except in arbitration proceedings. Local rules are not allowed to shorten time periods set forth in the Discovery Act [*Gov. Code § 68616(f)*]. Nonetheless, the local court rules may provide that the court will regulate all discovery, consistent with these laws, and at status conferences may inquire of the parties as to the nature and extent of discovery remaining [Los Angeles Super. Ct. Rules, Rule 7.6(d)].

For discussion of discovery, see Ch. 190-200: *Discovery* .

[6] Referral to Arbitration or Mediation

No case may be referred to arbitration prior to 210 days after the filing of the complaint, exclusive of the stipulated

period provided for in *Gov. Code § 68616(d)* [*Gov. Code § 68616(g)*; *see* [3], *above*]. For discussion of arbitration, see Ch. 36, *Judicial Arbitration* .

No trial court delay reduction rule may contravene *Code Civ. Proc. §§ 638* and *639*, relating to reference by stipulation and grounds for ordering reference of a case, respectively [*Gov. Code § 68616(g)*; for discussion of references, *see* Ch. 487, *Reference*].

[7] Dismissal of Fictitious Defendants

Local trial court delay reduction rules cannot provide for dismissal or severance of fictitious (Doe) defendants prior to the conclusion of the introduction of evidence at trial, except on the stipulation or motion of the parties [*Gov. Code § 68616(h)*]. In Los Angeles County Superior Court, the court, at the final status conference before trial, will consider severing for trial any unserved or recently served fictitiously named parties [Los Angeles Super. Ct. Rules, Rule 7.9(h)].

[8] Peremptory Disqualification of Judge

Notwithstanding *Code Civ. Proc. § 170.6*, in direct calendar courts, challenges pursuant to that section must be exercised within 15 days of the party's first appearance. Master calendar courts must be governed solely by Section 170.6 [*Gov. Code § 68616(i)*].

A case is not to be removed from a delay reduction program because a Section 170.6 challenge has been filed [*Gov. Code § 68607.5*].

Local rule may discourage "judge shopping" by providing that if a case is dismissed and subsequently the same or essentially the same claims are alleged in another action, the later-filed actions will be, absent good cause, assigned to the same judge to whom the first-filed case had been assigned [Los Angeles Co. Super. Ct. Rules, Rule 7.3(d)].

[9] Time to Enter Default

Trial court delay reduction rules commonly require plaintiffs to request the clerk to enter default promptly after the defendant fails to timely respond. For example, see the following:

- San Diego Co. Super. Ct. Rules, Div. II, Rules 2.1.7, 2.1.8 (45 days after Certificate of Service required by rule is filed unless Certificate of Inability to Default is filed; and requiring default judgment to be taken within 60 days of entry of default, with exceptions).

[10] Additional Forms

Trial Court Delay Reduction rules commonly require local forms to be used in the course of the proceeding. For example, see the following:

- In Sacramento County Superior Court, the clerk of the court will provide a Program Case Notice, which the plaintiff must serve with the summons and complaint [Sacramento Co. Super. Ct. Rules, Rule 11.01(C)].

- In San Diego Superior Court, the clerk will attach a Notice of Case Assignment to the complaint when it is filed, which the plaintiff must serve with the complaint [San Diego Co. Super. Ct. Rules, Div. II, Rule 2.1.3]. Thereafter, a number of forms are required, including a Certificate of Service, or alternatively a Certificate of Progress, and a Certificate of Inability to Respond [San Diego Co. Super. Ct. Rules, Div. II, Rules 2.1.5, 2.1.6, 2.1.7].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureDiscoveryGeneral OverviewCivil ProcedurePretrial MattersConferencesGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersContinuances

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48-552 California Forms of Pleading and Practice--Annotated § 552.14

§ 552.14 Effect of Statutory Trial Preferences

The statutory trial preference in *Code Civ. Proc. § 36(a)*, entitling a civil case to preference on the motion of any interested party to the action who has reached the age of 70 years and meets certain other requirements (*see generally* Ch. 425, *Pretrial Proceedings*), is fully applicable in jurisdictions with a fast-track program [*see Miller v. Superior Court (1990) 221 Cal. App. 3d 1200, 1211-1212, 270 Cal. Rptr. 766]* . If a case not assigned to a fast-track program is entitled to trial preference under *Code Civ. Proc. § 36(a)*, a trial court may not subordinate the time of trial of the case to that of nonpreference civil cases assigned to the delay reduction program [*Miller v. Superior Court (1990) 221 Cal. App. 3d 1200, 1208, 270 Cal. Rptr. 766]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesCase Management

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48-552 California Forms of Pleading and Practice--Annotated § 552.15

§ 552.15 Trial Court's Discretionary Power to Manage Cases

[1] Exercise of Discretion

[a] Exercise of Discretion in General

In administering a fast-track program, a trial court must exercise its discretion at each stage of a lawsuit in the process of bringing a case to trial, or alternatively, imposing sanctions such as dismissal. Since trial management is a discretionary area, the proper standard of review for a challenge to trial management orders is abuse of discretion [*Moyal v. Lanphear (1989) 208 Cal. App. 3d 491, 498, 256 Cal. Rptr. 296]* . In exercising its discretion, the trial court does not have absolute and unlimited power; it must act with an impartial discretion guided and controlled in its exercise by fixed principles. A reviewing court will not disturb this exercise of discretion unless it appears that the trial court's order was a clear abuse or a miscarriage of justice. Discretion is abused whenever the trial court exceeds the bounds of reason, all of the circumstances before it being considered [*Moyal v. Lanphear (1989) 208 Cal. App. 3d 491, 498, 256 Cal. Rptr. 296]* .

[b] Dismissal Without Prejudice of Case Subject to Bankruptcy Stay

Dismissal of a case without prejudice when some of the defendants are subject to a bankruptcy stay is not an appropriate method to dispense with the need for periodic court monitoring of the case under trial court delay reduction rules. This is true even if the court expressly states that the dismissal will be set aside if the bankruptcy stay is lifted or if the plaintiff elects to proceed against nonbankrupt defendants. The nonbankruptcy trial court must stay the action, not dismiss it [*Traweek v. Finley, Kumble, etc., Myerson & Casey (1991) 235 Cal. App. 3d 1128, 1134-1136, 1 Cal. Rptr. 2d 185]* .

[2] Sanctions

A trial court may enforce fast-track program requirements on the basis of the following statutory or other authority:

- *Code Civ. Proc. § 575.1* (authority of court to enact rules for pretrial case management);

- *Code Civ. Proc. § 575.2* (authority to impose sanctions on failure of counsel or client to comply with local rules regulating supervision and management of actions); *see Cooks v. Superior Court (1990) 224 Cal. App. 3d 723, 727, 274 Cal. Rptr. 113* (restricting use of denial of jury trial in fast-track case is sanction under *Code Civ. Proc. § 575.2(b)*);

- *Code Civ. Proc. § 177.5* (authority to impose reasonable monetary sanctions, payable to the county, for any violation of lawful order);

- *Cal. Rules of Ct., Rule 2.30* (authority to impose sanctions for failure to comply with the California Rules of Court, local rules, and court orders); and

- *Gov. Code § 68608(b)* (providing that trial courts in enforcing fast-track requirements have all the powers to impose sanctions authorized by law, including dismissal) [*see Intel Corp. v. USAIR, Inc. (1991) 228 Cal. App. 3d 1559, 1566, 279 Cal. Rptr. 569* (dismissal of fast-track case under former *Gov. Code § 68609(d)* (*now see Gov. Code § 68608(b)*) upheld in light of previous lack of compliance in case and ineffectiveness of previous sanctions)].

These provisions provide a comprehensive statewide scheme for regulating fast-track matters. Local court rules providing for imposition of sanctions in specific situations, for example, for failure to file a Joint At-Issue Memorandum, supplement the above statewide scheme [*Moyal v. Lanphear (1989) 208 Cal. App. 3d 491, 499-500, 256 Cal. Rptr. 296* ; *see also Laborers' Internat. Union of North America v. El Dorado Landscape Co. (1989) 208 Cal. App. 3d 993, 999, 1004, 1008-1009, 256 Cal. Rptr. 632]* . In addition, the discovery statutes in the Code of Civil Procedure authorizing sanctions for discovery misconduct apply with full force in fast-track matters [*see Laguna Auto Body v. Farmers Ins. Exchange (1991) 231 Cal. App. 3d 481, 490, 282 Cal. Rptr. 530* (upholding dismissal in fast-track case based on party's failure to obey court's discovery order); *see also Code Civ. Proc. § 2023* (*Code Civ. Proc. § 2023.010 et seq.* operative July 1, 2005) (sanctions for misuse of discovery process)].

For discussion of sanctions, see Ch. 510, *Sanctions* . For further discussion of the imposition of sanctions during pretrial proceedings, see Ch. 425, *Pretrial Proceedings* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesSanctions

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[Reserved]

§§ 552.16[Reserved]

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48-552 California Forms of Pleading and Practice--Annotated § 552.30

§ 552.30 State Statutes

Responsibilities of judges. *Gov. Code § 68607*

Policy against continuances. *Gov. Code § 68607(g)*

No removal from delay reduction program due to peremptory challenge of judge. *Gov. Code § 68607.5*

Authority to impose sanctions. *Gov. Code § 68608(b)*

Shortest time periods permissible for service of pleadings, for status conference or similar event, for exercise of peremptory challenge, or for reference to arbitration. *Gov. Code § 68616*

Single continuance by stipulation permitted within 30 days of service of responsive pleadings. *Gov. Code § 68616(d)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsTime LimitationsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersGeneral OverviewCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedurePretrial MattersConferencesSanctionsCivil ProcedurePretrial MattersContinuances

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48-552 California Forms of Pleading and Practice--Annotated § 552.31

§ 552.31 Decisions

CAUTION:
The cases listed below that were decided before 1992 construed the Trial Court Delay Reduction of 1986 (former *Gov. Code §§ 68600-68619*), before it was superseded on January 1, 1991, by the Trial Court Delay Reduction Act (*Gov. Code § 68600 et seq.*). The legal points for which the cases listed below are cited appear to remain valid under the new Act, which contains many of the provisions of the 1986 Act. Caution should be exercised in using those cases, however, in that certain provisions in the 1986 Act have been either renumbered or deleted.

[1] Constitutionality

As Legislature has clearly laid down its broad policy and plan in statutes governing delay reduction and authorized Judicial Council and trial courts to experiment and work out procedures to carry out that plan and set limits on their authority, this delegation by Legislature to courts and Judicial Council as proper and as not violating constitutional separation of powers. *Laborers' Internat. Union of North America v. El Dorado Landscape Co. (1989) 208 Cal. App. 3d 993, 999, 1001-1002, 256 Cal. Rptr. 632*

[2] Due Process

Although judicially declared standards for trial court's exercise of discretion in enforcing fast-track time limits adopted under Trial Court Delay Reduction Act as necessarily evolving along with changes in statutory law in trial court delay reduction field, important objectives of fast-track system as able and required to be achieved in manner consistent with traditional dueprocess standards. *Moyal v. Lanphear (1989) 208 Cal. App. 3d 491, 494, 256 Cal. Rptr. 296*

Assignment of cases into pilot project under Trial Court Delay Reduction Act and adoption of rules to govern that project as acts that are more legislative than adjudicatory in nature and as exempt from procedural due process requirements (reasonable notice and opportunity to be heard). *Lawrence v. Superior Court (1988) 206 Cal. App. 3d 611, 615, 618-619, 253 Cal. Rptr 748*

[3] Rules of Court

Counsel as bearing professional responsibility to be aware of local fast track rules. *Moyal v. Lanphear (1989) 208 Cal. App. 3d 491, 499, 256 Cal. Rptr. 296* ; *Beverly Union Co. v. Superior Court (1988) 206 Cal. App. 3d 40, 43, 253 Cal. Rptr. 359*

[4] Discretion of Trial Court

Gov. Code § 68608(b) merely gives the trial court the power to sanction, including the power of dismissal, for failure to abide by the Delay Reduction Act rules. It does not mandate such dismissals. Where the sole responsibility for failure to comply with the rules is upon counsel, rather than upon the party, the trial court may not dismiss the action as a sanction, either as a matter of law or based upon public policy. *Drum v. Superior Court (2006) 139 Cal. App. 4th 845, 853, 43 Cal. Rptr. 3d 279* , citing *Garcia v. McCutchen (1997) 16 Cal. 4th 469, 471, 475-476, 478-480, 66 Cal. Rptr. 2d 319, 940 P.2d 906*

In administering fast-track system, trial court as required to exercise its discretion at each stage of lawsuit in process of bringing case to trial, or, alternatively, to impose sanctions such as dismissal; in exercising its discretion, court as not having absolute and unlimited power, but as required to act with an impartial discretion guided and controlled in its exercise by fixed legal principles. *Moyal v. Lanphear (1989) 208 Cal. App. 3d 491, 498, 256 Cal. Rptr. 296*

[5] Standard of Appellate Review

Appellate standards for review of trial court discretion in area of trial court delay reduction rules as necessarily gradually evolving to adapt to reality of statewide pilot projects and innovations, and trial courts as required to be accorded maximum flexibility in calendar management to extent consistent with due process requirements. *Moyal v. Lanphear (1989) 208 Cal. App. 3d 491, 499, 256 Cal. Rptr. 296*

Because trial management is discretionary area, proper standard of review for challenge to trial management orders as being abuse of discretion; discretion as abused whenever trial court exceeds bounds of reason, all circumstances before it being considered. *Moyal v. Lanphear (1989) 208 Cal. App. 3d 491, 498, 256 Cal. Rptr. 296*

Reviewing court as not disturbing trial court's exercise of discretion unless it appears its order was clear abuse or miscarriage of justice. *Moyal v. Lanphear (1989) 208 Cal. App. 3d 491, 498, 256 Cal. Rptr. 296*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedurePretrial MattersConferencesCase ManagementCivil ProcedureAppealsStandards of ReviewAbuse of DiscretionConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionGovernmentsCourtsRule Application & Interpretation

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Chapter 553 TRUCKS

48-553 California Forms of Pleading and Practice--Annotated 553.syn

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§ 553.01 Scope of Chapter

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§§ 553.04- 553.09 [Reserved]

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[3] Trailer and Semitrailer

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§ 553.11 Accidents on the Road

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[b] Statutory Cause of Action Against Owner of Motor Vehicle

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[i] "Jack-Knifing" Defined

[ii] Driver Liability

[iii] Owner Liability

[iv] Comparative Negligence and Last Clear Chance

[f] Whipping or Swerving of Trailer

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[a] Effect of Negligence of Plaintiff Riders

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[a] To Driver

[b] To Third Parties

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§ 553.12 Loading and Unloading Trucks

[1] Duty to Participants and Others

[a] General Rule

[b] Person Purchasing Truck's Cargo

[c] Employees of Party Contracting for Truck Services

[d] Truck Owner and Employees

[e] Volunteers

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[2] Assumption of Risk of Obvious Danger

§ 553.13 Towing of Vehicles

[1] Towing Not Negligence Per Se

[2] Coupling Requirements

[a] Safety Chain

[b] Strength of Hitch and Other Coupling Devices

[3] Duty of Driver of Towed Vehicle

[4] Towing of Vehicle Parked on Private Property

[a] When Towing Allowed

[i] General Rule

[ii] Notice

[iii] Authorization

[b] Liability for Injurious or Wrongful Towing

[i] Recovery for Damage

[ii] Liability of Towing Company

[c] Liability for Charging Vehicle Owner Excessive Rate

[d] Limitations Regarding Certain Private Property

[e] Liability for Towing Vehicle off Private Property

§§ 553.14-553.29 [Reserved]

§ 553.30 Related Matthew Bender Publications

§ 553.31 State Statutes

[1] Definitions

[2] Owner's Statutory Liability

[3] Regulation

[a] Length, Width, and Height

[b] Safe Loading and Transportation of Particular Cargos

[c] Safety

[4] Speed Limits

[5] Towing Equipment

[6] Towing of Parked Vehicle by Law Enforcement Officers

[7] Towing of Parked Vehicle by Private Property Owner

[8] Towing of Parked Vehicle Off Another's Private Property

[9] Towing Trailer

[10] Transportation Services

§ 553.32 Federal Regulations

§ 553.33 Administrative Regulations

§ 553.34 Decisions

[1] Crossing Opposing Traffic

[2] Excessive Speed

[3] Expert Testimony

[4] Injuries Suffered by Riders

[5] "Jack-Knifing" of Trailer

[6] Liability Policies

[7] Loading and Unloading

[8] Negligence

[9] Standard of Care in General

[10] Trailer Owner's Liability

[11] Towing

[12] Whipping or Swerving of Trailer

§ 553.35 Attorney General Opinions

§ 553.36 Law Reviews

§§ 553.37-553.49 [Reserved]

§ 553.50 Complaint for Damages [Civ. Code § 3333] for Personal Injury and Property Damage [Civ. Code §§ 1714(a), 2100]--Against Owner and Driver of Truck or Towing Vehicle

[1] FORM

[2] Use of Form

[3] Allegations

[4] Specifying Amount of Damages

[5] Verification

[6] Cross References

§ 553.51 Complaint for Damages [Civ. Code § 3333] for Personal Injury and Property Damage [Civ. Code §§ 1714(a), 2100]--By Driver of Towing Vehicle Against Owner or Driver of Towed Vehicle--Accident Resulting From Negligence of Owner or Driver of Towed Vehicle

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§§ 553.52-553.59 [Reserved]

§ 553.60 Complaint for Damages [Civ. Code § 3333] for Personal Injury and Property Damage [Civ. Code §§ 1714(a), 2100]--Against Owner of Truck and/or Loading Facilities--Accident While Loading or Unloading Truck

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 553.61 Allegation--Accident While Loading or Unloading Truck--Defendant Moved Truck Without Look-Out or Warning

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

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Chapter 553 TRUCKS
PART I. SCOPE

48-553 California Forms of Pleading and Practice--Annotated § 553.01

§ 553.01 Scope of Chapter

This chapter provides discussion and forms relating to negligence actions involving trucks, trailers, and the towing of vehicles. Topics covered include the negligence and liability of both drivers and owners of such vehicles for accidents on the road [*see § 553.11*], the loading and unloading of trucks [*see § 553.12*], and the towing of vehicles and liability associated with it [*see § 553.13*].

This chapter also provides a Research Guide and the following forms:

- General complaint for damages for personal injury and property damages [*see § 553.50*].

- Complaint for damages by driver of a towing vehicle for an accident resulting from the negligence of the owner or driver of a towed vehicle [*see § 553.51*].

- Complaint for damages against owner of truck or loading facilities for an accident while loading or unloading a truck [*see §§ 553.60* and *553.61*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsTransportation TortsMotor VehiclesGeneral OverviewTortsTransportation TortsMotor VehiclesMotor CarriersTortsTransportation TortsMotor VehiclesPersonal VehiclesTransportation LawCommercial VehiclesMaintenance & SafetyTransportation LawPrivate VehiclesSafety StandardsGeneral Overview

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48-553 California Forms of Pleading and Practice--Annotated § 553.02

§ 553.02 Cross References

Additional information regarding trucks and similar vehicles and negligence involving these may be found in the following chapters:

- For discussion and forms relating to personal injury and damages actions involving motor vehicles generally, see Ch. 80, *Automobiles: Overview* , through Ch. 87A, *Automobiles: Post Trial*.

- For discussion of and forms relating to damage to personal property during storage, see Ch. 93, *Bailments*

- For discussion and forms relating to common carriers of persons and freight generally, and relating to consignor or consignee liability to motor carriers for railroad and steamship storage and equipment rental charges caused by delay of consignor or consignee, see Ch. 109, *Carriers* .

- For discussion and forms relating to bills of lading, see Ch. 213, *Documents of Title* .

- For discussion of and forms relating to actions based on respondeat superior, see Ch. 248, *Employer's Liability for Employee's Torts* .

- For discussion of and forms relating to actions based on work done on vehicles in garages, see Ch. 274, *Garages and Gas Stations* .

- For discussion and forms relating to automobile insurance, see Ch. 308, *Insurance* .

- For discussion and forms relating to causes of action in negligence generally, see Ch. 380, *Negligence* .

- For discussion of and forms relating to premises liability, see Ch. 421, *Premises Liability* .

- For discussion of and forms relating to streets and highways, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

- For discussion of and forms relating to trespass to personal property, see Ch. 550, *Trespass* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBailmentsInsurance LawMotor Vehicle InsuranceGeneral OverviewTortsTransportation TortsMotor VehiclesGeneral OverviewTortsVicarious LiabilityEmployersGeneral OverviewTransportation LawCarrier Duties & LiabilitiesGeneral Overview

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Chapter 553 TRUCKS
PART I. SCOPE

48-553 California Forms of Pleading and Practice--Annotated § 553.03

§ 553.03 Governing Law

Civ. Code § 1714(a) sets forth the general standard of care required of every person.

Evid. Code § 669 creates a rebuttable presumption of negligence for the violation of a statute, ordinance, or regulation under certain conditions. Trucks and trailers are subject to the statutory regulations governing all vehicles [*see Fortier Transp. Co. v. Union Packing Co. (1950) 96 Cal. App. 2d 748, 753-754, 216 P.2d 470]* . Civil liability of owners and operators of motor vehicles is governed by *Veh. Code §§ 17000-17463*.

The rules of the road governing motor vehicles generally are set out in *Veh. Code § 21000 et seq.* Right of way in cross traffic is governed by *Veh. Code §§ 21800-21807* and the permissible speed of motor vehicles is governed by *Veh. Code §§ 22348-22413*.

Regulations governing the maximum size of vehicles are set out in *Veh. Code §§ 35250, 35251* (height), 35100-35112 (width), 35400-35414 (length), and 35550-35655 (weight).

Regulations governing towing equipment are set out in *Veh. Code § 29000-29008*.

Federal regulations for motor carriers generally are governed by *49 C.F.R. §§ 301-325*. Federal safety regulations for motor carriers are governed by 49 C.F.R. §§ 350-399.

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsTransportation TortsMotor VehiclesGeneral OverviewTransportation LawCommercial VehiclesMaintenance & SafetyTransportation LawCommercial VehiclesTraffic RegulationTransportation LawPrivate VehiclesSafety StandardsGeneral OverviewTransportation LawPrivate VehiclesTraffic RegulationGeneral Overview

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48-553 California Forms of Pleading and Practice--Annotated §§ 553.04- 553.09

[Reserved]

§§ 553.04[Reserved]

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48-553 California Forms of Pleading and Practice--Annotated § 553.10

§ 553.10 Definitions

[1] Motor Truck

A "motor truck" or "motortruck" is a motor vehicle designed, used, or maintained primarily for the transportation of property [*Veh. Code § 410*; *see Veh. Code §§ 415* (defining "motor vehicle") and 670 (defining "vehicle")].

[2] Truck Tractor

A "truck tractor" is a motor vehicle designed and used primarily for drawing other vehicles, and not so constructed as to carry a load other than a part of the weight of the vehicle and load so drawn [*Veh. Code § 655(a)*]. However, a truck tractor may be equipped with a cargo container to transport exclusively explosives or munitions-related security material if the owner is licensed by the California Highway Patrol to transport explosives [*Veh. Code § 655(b)*].

[3] Trailer and Semitrailer

A "trailer" is a vehicle for carrying persons or property on its own structure and for being drawn by a motor vehicle, and so constructed that no part of its weight rests on any other vehicle [*Veh. Code § 630*]. A "semitrailer" is a vehicle designed for carrying persons or property, used in conjunction with a motor vehicle, and so constructed that some part of its weight and that of its load rests on, or is carried by, another vehicle [*Veh. Code § 550*]. As used in *Veh. Code §§ 35000-35795* (regulating size, weight, and load for vehicles on highways), "trailer" includes a semitrailer when used in conjunction with an auxiliary dolly, if the auxiliary dolly is of a type constructed to replace the function of the drawbar and the front axle or axles of a trailer [*Veh. Code § 630*].

[4] Tractor-Trailer

Throughout this chapter, a truck tractor pulling a semitrailer or a trailer will be referred to as a tractor-trailer [*see* discussion under *§ 553.10[2], [3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCommercial VehiclesGeneral OverviewTransportation LawPrivate VehiclesGeneral Overview

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48-553 California Forms of Pleading and Practice--Annotated § 553.11

§ 553.11 Accidents on the Road

[1] Negligence in Operating Vehicle

[a] Parties

Actions for negligence in the operation of trucks, trailers, and the towing of vehicles may be brought against the owners or operators of thosevehicles by an injured party to whom a duty is owed; for example, a pedestrian, highway worker, train company, the driver and passenger of another vehicle, or the administrator of the estate of a decedent who drove another vehicle [*see Palma v. U.S. Industrial Fasteners, Inc. (1984) 36 Cal. 3d 171, 203 Cal. Rptr. 626, 681 P.2d 893* ; *Horn v. Oh (1983) 147 Cal. App. 3d 1094, 195 Cal. Rptr. 720* ; *Atchison, Topeka & Santa Fe R.R. Co. v. Flintkote Co. (1967) 256 Cal. App. 2d 764, 64 Cal. Rptr. 675* ; *Arroyo v. Arden Farms Co. (1966) 239 Cal. App. 2d 332, 48 Cal. Rptr. 740* ; *Foss v. Anthony Indus. (1983) 139 Cal. App. 3d 794, 189 Cal. Rptr. 31* , respectively].

Actions by the owner or operator of a truck, trailer, or towed vehicle may be brought against the parties whose negligence and breach of duty caused injury or damage [*see Harris v. Irish Truck Lines, Inc. (1974) 11 Cal. 3d 373, 113 Cal. Rptr. 489, 521 P.2d 481* (action by driver of half-ton pickup truck against driver and owner of five-ton truck), and *Strait v. Hale Constr. Co. (1972) 26 Cal. App. 3d 941, 103 Cal. Rptr. 487* (action by truck driver and owner against owner and operator of earthmover and road builder)].

For discussion of actions regarding automobiles brought by owners, operators, and passengers; pedestrians; and property owners, see Ch. 80, *Automobiles: Overview* , to Ch. 87A, *Automobiles: Post Tria l.*

[b] Statutory Cause of Action Against Owner of Motor Vehicle

A statutory cause of action against vehicle owners is created by *Veh. Code § 17150*, which states that every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner [*Soils v. Oilfields Trucking Co. (1979) 90 Cal. App. 3d 349, 352-353, 153 Cal. Rptr. 371]* . Bringing a cause of action under *Veh. Code § 17150*, however, without proving agency and common laws grounds for imputation of negligence, limits the recoverable damages [*Soils v.*

Oilfields Trucking Co. (1979) 90 Cal. App. 3d 349, 353, 153 Cal. Rptr. 371] ; *see Veh. Code § 17151* (limitations on liability)]. *Veh. Code § 17150* governs commercial and private vehicles; its application is not limited to automobiles, and extends, for example, to trucks [*Soils v. Oilfields Trucking Co. (1979) 90 Cal. App. 3d 349, 353, 153 Cal. Rptr. 371]* . *Veh. Code § 17150* is directed primarily at motivating vehicle owners who allow others to use their vehicles within California to exercise care in the selection and supervision of such permissive users, and at protecting persons using California roadways [*Castro v. Budget Rent-A-Car System, Inc. (2007) 154 Cal. App. 4th 1162, 1182, 65 Cal.Rptr. 3d 430]* . For further discussion of a vehicle owner's statutory liability, see *Ch. 82, Automobiles: Causes of Action, § 82.31*.

[c] Standard of Care in General

Everyone is responsible for any injury occasioned to another by his or her want of ordinary skill or in the management of his property or person [*Civ. Code § 1714(a)*]. In addition, the failure of a person to exercise due care is presumed if he or she violated a statute, ordinance, or regulation of a public entity [*Evid. Code § 669(a)(1)*]. The presumption may be rebutted by proof that the person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law [*Evid. Code § 669(b)(1)*]. For discussion and forms relating to the general duty of due care, and also to presumptive negligence based on violation of a statute, ordinance, or regulation, see Ch. 180, *Negligence* , and California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender).

The rules and standards governing the driving of trucks are primarily the same as those governing motor vehicles generally [*see Veh. Code § 410* (defining truck as type of motor vehicle); *Fortier Transp. Co. v. Union Packing Co. (1950) 96 Cal. App. 2d 748, 753-754, 216 P.2d 470]* . However, the courts have recognized that the size, weight, and special operating requirements of trucks create hazards that are unique to trucks. Thus, a driver's duty to operate his or her vehicle safely under existing conditions may create special responsibilities under the special conditions created by the operation of a truck [*see, e.g.,* *Gigliotti v. Nunes (1955) 45 Cal. 2d 85, 92, 286 P.2d 809* (turning into oncoming traffic); *Fortier Transp. Co. v. Union Packing Co. (1950) 96 Cal. App. 2d 748, 753-754, 216 P.2d 470* (determining excessive speed in trucks)]. Some common circumstances under which a truck driver may be required to exercise special caution to avert dangers unique to trucking are discussed below. For a discussion of the rules and standard of care governing motor vehicles generally, see Ch. 80, *Automobiles: Overview* , through Ch. 82, *Automobiles: Causes of Action* .

Although state law will usually provide the standard of care applicable to a motor vehicle driver, federal law may provide a higher standard of care for commercial vehicles. The federal Commercial Motor Vehicle Safety Act [*see 49 U.S.C.S. § 31101 et seq.*] does not specifically preempt state law standards, but regulations issued under the Act may impose a higher standard to which commercial motor vehicles must adhere [*see 49 C.F.R. § 392.2*]. For example, one federal regulation issued under the Act requires a commercial motor vehicle driver to use extreme caution and to reduce speed if hazardous conditions, such as rain or snow, exist [*49 C.F.R. § 392.14*]. The California court of appeal has held that this is a higher standard of care than the reasonable care standard imposed by state law, and that this higher federal standard may be used to determine the negligence of a commercial vehicle driver during hazardous driving conditions [*Weaver v. Chavez (2005) 133 Cal. App. 4th 1350, 1354-1355, 35 Cal. Rptr. 3d 514]* . For purposes of determining the applicability of the Commercial Motor Vehicle Safety Act, a "commercial motor vehicle" is a self-propelled or towed vehicle used on the highways in commerce principally to transport passengers or cargo, if the vehicle also: (1) has a gross vehicle weight rating or gross vehicle weight of at least 10,001 pounds, whichever is greater; (2) is designed to transport more than 10 passengers, including the driver; or (3) is used in transporting material found by the Secretary of Transportation to be hazardous under *49 U.S.C.S. § 5103* and transported in a quantity requiring placards under that statute [*49 U.S.C.S. § 31101(1)*].

[d] Excessive Speed

[i] General Rule

No person may drive any of the following vehicles on a highway at a speed in excess of 55 miles per hour [*Veh. Code § 22406*]:

- A motor truck or truck tractor having three or more axles or a motortruck or truck tractor drawing any other vehicle.
- A passenger vehicle or bus drawing any other vehicle.
- A school bus transporting any school pupil.
- A farm labor vehicle transporting passengers.
- A vehicle transporting explosives.
- A trailer bus, as defined in *Veh. Code § 636*.

Any person who operates a commercial motor vehicle, as defined in *Veh. Code § 15210*, on a highway at a speed exceeding a maximum speed limit by 15 miles per hour or more, is guilty of a misdemeanor [*Veh. Code § 22406.1(a)*]. Such a violation will also be considered a serious traffic violation under *Veh. Code § 15210* and subject to sanctions under *Veh. Code § 15306* or *Veh. Code § 15308* [*Veh. Code § 22406.1(c)*]. Violation of the speed limit set out in *Veh. Code § 22406* is negligence per se [*Fortier Transp. Co. v. Union Packing Co. (1950) 96 Cal. App. 2d 748, 752, 216 P.2d 470* ; *Wood v. Moore (1944) 64 Cal. App. 2d 144, 149, 148 P.2d 91]* .

[ii] Trucks

Trucks, like all motor vehicles, are also required to obey prima facie speed limits, which are statutory limits set at less than the maximum speed set out in the Vehicle Code [*see Veh. Code § 22351(b)*; *see, e.g., Veh. Code § 22352* (reduced speed limits at intersections and railway crossing with obscured view, in alleys, business and residential districts, senior citizens' and school zones); *Fortier Transp. Co. v. Union Packing Co. (1950) 96 Cal. App. 2d 748, 752, 216 P.2d 470]* . However, driving in excess of the prima facie limits is not negligence per se, as long as the maximum limit set out in *Veh. Code § 22406* is not violated [*Wood v. Moore (1944) 64 Cal. App. 2d 144, 149, 148 P.2d 91]* .

Trucks are also subject to the basic speed law, which provides that no person may drive a motor vehicle on a highway at a speed greater than is reasonable or prudent having due regard for the surface and width of the highway and the traffic on it, and in no event at a speed which endangers the safety of persons or property [*Fortier Transp. Co. v. Union Packing Co. (1950) 96 Cal. App. 2d 748, 753, 216 P.2d 470* (interpreting former *Veh. Code § 510, now see Veh. Code § 22350*); *see Veh. Code § 22350* (basic speed law)].

As noted elsewhere [*see § 553.11[1][c]*] , the driver of a truck that meets the definition of a "commercial motor vehicle" under the federal Commercial Motor Vehicle Safety Act [*see 49 U.S.C.S. § 31101(1)*] may also be held to an arguably higher standard of care under safety regulations promulgated under that Act, including the duty to use extreme caution and to reduce speed if hazardous conditions, such as rain or snow, exist [*49 C.F.R. § 392.14*; *see Weaver v. Chavez (2005) 133 Cal. App. 4th 1350, 1354-1355, 35 Cal. Rptr. 3d 514]* .

[iii] Truck and Trailer Combination

The fact that slowing down a truck and trailer combination creates the danger of jack-knifing (*see* [e], *below*) is a consideration for the jury in determining whether or not a truck driver was negligently traveling at a speed that

endangered life or property [*see Fortier Transp. Co. v. Union Packing Co. (1950) 96 Cal. App. 2d 748, 753-754, 216 P.2d 470]* .

[e] Causing Truck to Jack-Knife

[i] "Jack-Knifing" Defined

"Jack-knifing" is a condition in which a trailer or semitrailer coupled to a tractor-trailer combination swings out from its position behind the tractor and hurtles down the road sideways, out of control.

"Jack-knifing" may occur when the driver of the tractor-trailer slows the tractor portion of the vehicle too soon or too roughly or when the tractor-trailer is turned too abruptly to either side [*see Sims v. Phillips (1958) 164 Cal. App. 2d 793, 797, 331 P.2d 174* ; *Fortier Transp. Co. v. Union Packing Co. (1950) 96 Cal. App. 2d 748, 753-754, 216 P.2d 470]* .

[ii] Driver Liability

The driver may be liable for negligence in the jack-knifing of a tractor-trailer resulting from the excessive speed at which the tractor-trailer was traveling when the driver was forced to brake [*Fortier Transp. Co. v. Union Packing Co. (1950) 96 Cal. App. 2d 748, 754, 216 P.2d 470]* .

[iii] Owner Liability

Jack-knifing is not always a result of the driver's negligence, however. For example, jack-knifing may also be caused by inadequate brakes on the trailer so that the negligence of the owner of the trailer is the proximate cause of the accident [*see Hupp v. Griffith Co. (1932) 127 Cal. App. 63, 67, 15 P.2d 211]* . Also, a jury may find that jack-knifing was not caused by the driver's negligence, but was due to the driver abruptly turning to avoid hitting another vehicle driving in the wrong lane [*see Sims v. Phillips (1958) 164 Cal. App. 2d 793, 797, 331 P.2d 174* (reversing judgment on unrelated grounds); for further discussion and a form relating to the defense of avoiding an imminent peril or emergency, *see Ch. 84, Automobiles: Responding to the Action, §§ 84.30(4)(e),* 84.68].

[iv] Comparative Negligence and Last Clear Chance

A driver who failed to stop or swerve his tractor trailer to avoid hitting another vehicle a few seconds before colliding with it was held not to have had the last clear chance to prevent the collision, because stopping or swerving in so short a time would have incurred the danger of jack-knifing or overturning [*Hickambottom v. Cooper Transp. Co. (1958) 163 Cal. App. 2d 489, 492, 329 P.2d 609* (decided before the adoption of comparative negligence in *Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226*)].

For discussion of comparative negligence and its effect on contributory negligence and the last clear chance rule, see Ch. 380, *Negligence* .

[f] Whipping or Swerving of Trailer

No person may operate a train of vehicles when any vehicle being towed whips or swerves from side to side or fails to follow substantially in the path of the towing vehicle [*Veh. Code § 21711*]. A "train" of vehicles apparently means a combination of towing and towed vehicles, for example, a truck towing another truck, or a truck towing a trailer [*see Rayner v. Ramirez (1958) 159 Cal. App. 2d 372, 379, 324 P.2d 83* , and *Risley v. Lenwell (1954) 129 Cal. App. 2d 608, 639, 277 P.2d 897* respectively (both involving former Veh. Code § 701; *now see Veh. Code § 21711*)]. Violation of *Veh. Code § 21711* may be the basis of liability for resulting damages [*see Risley v. Lenwell (1954) 129 Cal. App. 2d 608, 637-638, 277 P.2d 897* (citing former Veh. Code § 701)]. A tractor-trailer driver may be liable fordamage caused

by a swerving trailer when the swerving was caused by excessive speed under the circumstances [*Wells Truckways v. Cebrian (1954) 122 Cal. App. 2d 666, 670, 680, 265 P.2d 557* (excessive speed in rainy weather while moving downhill on unbanked curve)]. The driver may not be liable, however, if the swerving was caused by a sudden turn to avoid collision with another object [*Patterson v. Delta Lines, Inc. (1956) 147 Cal. App. 2d 160, 161-162, 304 P.2d 842* ; for further discussion and a form relating to the defense of avoiding an imminent peril or emergency, see *Ch. 84, Automobiles: Responding to the Action, §§ 84.30(4)(e),* 84.68].

[g] Crossing Opposing Traffic

All motor vehicles making a left turn or a U-turn on a highway or crossing an intersection with a stop sign are required to yield to any vehicle that is approaching so closely from the opposing direction as to constitute a hazard [*see Veh. Code §§ 21801* (left turn) and *21802* (stop sign)]. In applying *Veh. Code § 21801* to tractor-trailers, the courts have noted that a left turn by a slowly moving vehicle in the face of oncoming traffic is one of the most hazardous of all traffic maneuvers [*Gigliotti v. Nunes (1955) 45 Cal. 2d 85, 92, 286 P.2d 809* ; *Colla v. Beaver Lumber Co. (1959) 170 Cal. App. 2d 271, 276-277, 338 P.2d 553]* . The slow acceleration of a tractor-trailer is a major factor that the jury may consider in determining whether oncoming vehicles were so close as to constitute a hazard [*see Gigliotti v. Nunes (1955) 45 Cal. 2d 85, 92, 286 P.2d 809* ; *Hutchison v. Elliot (1960) 183 Cal. App. 2d 263, 270, 7 Cal. Rptr. 77]* . Distances of approach of 100 feet to as much as 500 and 1,000 feet have been held to be sufficently close to permit a jury to find that opposing traffic was so close as to constitute a hazard, depending on the speed of the approaching vehicles and the conditions existing at the time [*see Colla v. Beaver Lumber Co. (1959) 170 Cal. App. 2d 271, 273, 338 P.2d 553* (distance of 100 feet when making left turn); *Hutchison v. Elliott (1960) 183 Cal. App. 2d 263, 270, 7 Cal. Rptr. 77* (distance of 500 to 1,000 feet when crossing major road from side road at night)].

[2] Injury to Riders

[a] Effect of Negligence of Plaintiff Riders

For a discussion of comparative negligence and the effect of contributory negligence generally, see Ch. 380, *Negligence* . For discussion of the contributory negligence of passengers and riders in motor vehicles generally, see *Ch. 84, Automobiles: Responding to the Action, §§ 84.30(4)(c), 84.65*.

[b] Riding in Part of Vehicle not Intended for Passengers or Load

The Vehicle Code prohibits persons from riding on any vehicle or on any portion thereof not designed or intended for use of passengers [*Veh. Code§ 21712(b)*]. In addition, the Vehicle Code provides that no person driving a motor vehicle shall knowingly permit any person to ride on any vehicle or on any portion thereof not designed or intended for the use of passengers [*Veh. Code § 21712(a)*]. However, *Veh. Code § 21712(a)* and *(b)* do not apply to any employee engaged in the necessary discharge of his or her duty, or in the case of persons riding completely within or on vehicle bodies in space intended for any load on the vehicle [*Veh. Code § 21712(f)*]. In addition, a person cannot legally ride in the trunk of a motor vehicle, and a driver cannot legally permit a person to do so [*Veh. Code § 21712(c), (d)*].

The Vehicle Code prohibits persons from riding in or on the back of a pickup truck or a flatbed motortruck on a highway [*Veh. Code § 23116(b)*]. In addition, the Vehicle Code prohibits any person driving a pickup truck or a flatbed motortruck on a highway from transporting another person in or on the back of the truck [*Veh. Code § 23116(a)*].

These provisions do not apply if the person riding in the back of the truck is secured by a restraint system that meets or exceeds federal motor vehicle safety standards [*Veh. Code § 23116(c)*]. These provisions also do not apply to any person transporting one or more persons in the back of a truck or flatbed motor truck owned by a farmer or rancher, if that vehicle is used exclusively within the boundaries of lands owned or managed by that farmer or rancher, including the incidental use of that vehicle on not more than one mile of highway between one part of the farm or ranch to another part of that farm or ranch [*Veh. Code § 23116(d)*]. A person may ride in or on the back of a truck if that person is being

transported in a parade that is supervised by a law enforcement agency and the speed of the truck while in the parade does not exceed eight miles per hour [*Veh. Code § 23116(f)*]. Neither the general prohibition nor the restraint requirements apply if a person is being transported in an emergency response situation by a public agency or pursuant to the direction or authority of a public agency. In this context, "emergency response situation" means instances in which measures are needed to prevent injury or death to person or to prevent, confine, or mitigate property damage or destruction [*Veh. Code § 23116(e)*].

Whether or not an employee was engaged in his or her duty when riding on a truck is a question of fact. For example, an employee standing on the hitch of a trailer in order to warn the driver of overtaking traffic and to help the driver learn to drive better has been found to be engaged in the necessary discharge of a duty [*Espinoza v. Rossini (1966) 247 Cal. App. 2d 40, 48, 55 Cal. Rptr. 205]* .

[3] Liability of Trailer Owner

[a] To Driver

The owner of a trailer may be liable to the driver for the driver's personal injuries if negligence on the owner's part, such as maintaining inadequate brakes on the trailer, caused the truck to jack-knife [*see Hupp v. Griffith Co. (1932) 127 Cal. App. 63, 67, 15 P.2d 211]* . Whether the jack-knifing of a truck was proximately caused by inadequate brakes or by the driver's negligence in operating the truck or in unreasonably choosing an unsafe route is a question of fact [*Hupp v. Griffith Co. (1932) 127 Cal. App. 63, 68-72, 15 P.2d 211]* .

[b] To Third Parties

If the trailer in a tractor-trailer combination is owned separately from the tractor, the negligence of the tractor owner cannot be imputed to the trailer owner if the tractor owner was acting gratuitously or as an independent contractor of the trailer owner. Negligence can be imputed only if the tractor owner was acting as an agent or employee of the trailer owner. The determinative issue in deciding the status of the tractor owner is whether or not the trailer owner controlled or had the right to control the activities of the tractor owner [*Flores v. Brown (1952) 39 Cal. 2d 622, 628, 248 P.2d 922]* .

For purposes of determining the trailer owner's right of control, the position of the trailer owner is analagous to that of a passenger in a motor vehicle. Thus, it may not be inferred that the trailer owner had control of or the right to control the tractor merely because the trip was undertaken for the trailer owner's benefit or because the trailer owner selected the destination [*see Flores v. Brown (1952) 39 Cal. 2d 622, 629, 248 P.2d 922]* . A contract providing for control by the tractor owner of all matters except designation of the load and its destination is proof that the tractor owner is an independent contractor and not an employee or agent [*Gaskill v. Calaveras Cement Co. (1951) 102 Cal. App. 2d 120, 122-123, 226 P.2d 633]* .

[c] Nonapplicability of Statutory Cause of Action Against Owner

As discussed in *§ 553.11[1][b]*, a statutory cause of action exists against the owner of a motor vehicle for negligence in its use and operation [*Veh. Code § 17150*]. An unconnected trailer, however, is a "vehicle" and not a "motor vehicle" under the Vehicle Code [*see Veh. Code §§ 415* ("motor vehicle"), *550* ("semitrailer"), *630* ("trailer"); *see also Miller v. Berman (1942) 55 Cal. App. 2d 569, 571, 572, 131 P.2d 18* ; *but see Ins. Code § 383.6* (defining trailer as a motor vehicle for purposes of *Ins. Code § 383.5*, which governs insurance contracts)]. A semitrailer joined to a truck tractor forms one motor vehicle. However, the owner of a semitrailer is not considered to be a joint owner of a motor vehicle for purposes of statutory liability imposed on an owner [*Miller v. Berman (1942) 55 Cal. App. 2d 569, 571, 572, 131 P.2d 18* ; *but see Mission Ins. Co. v. Hartford Ins. Co. (1984) 155 Cal. App. 3d 1199, 1209, 202 Cal. Rptr. 635* (construing joint ownership of a truck/tractor and semitrailer according to *Ins. Code §§ 11580.8, 11580.9*, which govern the application of multiple liability insurance policies covering the same loss)]. For discussion and forms relating to the

responsibility of a principal for an agent's torts generally, see Ch. 427, *Principal and Agent* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceStandards of CareSpecial CareGeneral OverviewTortsTransportation TortsMotor VehiclesGeneral OverviewTransportation LawCommercial VehiclesTraffic RegulationTransportation LawPrivate VehiclesTraffic RegulationGeneral Overview

California Forms of Pleading and Practice--Annotated

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Chapter 553 TRUCKS
PART II. LEGAL BACKGROUND

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§ 553.12 Loading and Unloading Trucks

[1] Duty to Participants and Others

[a] General Rule

Particular duties owed by persons involved in truck loading and unloading operations to other participants or persons in the vicinity are discussedbelow. For discussion of vicarious liability in the operation of automobiles, see *Ch. 82, Automobiles, §§ 82.16, 82.31(5)* For discussion of an employer's vicarious liability for acts of its employees generally, see Ch. 248, *Employer's Liability for Employee's Torts* . For discussion of comparative negligence, including its effect on the doctrines of contributory negligence and assumption of the risk, see Ch. 380, *Negligence* . For discussion of premises liability generally, see Ch. 421, *Premises Liability* .

[b] Person Purchasing Truck's Cargo

The owner of a truck, as an owner of "premises," may be liable for a dangerous condition existing on the truck, according to the rules of premises liability [*see Squillante v. Barr (1955) 131 Cal. App. 2d 175, 177-179, 280 P.2d 216]* . For example, a truck owner owes a duty to a potential buyer of goods who is invited onto the truck to keep the truck free from known dangerous conditions [*see Squillante v. Barr (1955) 131 Cal. App. 2d 175, 178-179, 280 P.2d 216* (truck owner not liable under facts)].

[c] Employees of Party Contracting for Truck Services

An employee of a party contracting for truck services who assists in loading or unloading has been held to be an invitee on the truck, to whom the truck owner owes the highest category of duty [*Lamar v. John & Wade, Inc. (1945) 70 Cal. App. 2d 806, 809, 161 P.2d 970]* .

A truck owner may be vicariously liable if an employee's negligent unloading causes injury to an employee of the contracting party [*see Scott v. Gallot (1943) 59 Cal. App. 2d 421, 425-426, 138 P.2d 685* (plaintiff's evidence concerning custom and habit on premises of warning workers of approaching truck is admissible under res gestae doctrine)]. For example, a truck owner may be liable if an employee injures a worker while negligently driving a cement

truck down a ramp in order to pour concrete for the worker's employer [*Huber v. Henry J. Kaiser Co. (1945) 71 Cal. App. 2d 278, 287, 162 P.2d 693]* .

A truck owner may be held liable for negligent loading instructions given by its employee to the contracting company's employee if the latter is injured while following unsafe directions [*see Williams v. Field Transp. Co. (1946) 28 Cal. 2d 696, 171 P.2d 722]* . Moreover, a truck owner owes a duty to maintain safe equipment that may otherwise cause injury to workers in the unloading area [*see Manhattan Fire & Marine Ins. Co. v. Travelers Ins. Co. (1977) 66 Cal. App. 3d 794, 800, 136 Cal. Rptr. 400* (finding that use of concrete pump with the truck constituted continuing operation of concrete unloading for purposes of insurance coverage)].

[d] Truck Owner and Employees

A premises owner owes a duty to provide safe conditions for loading and unloading to the owner and employees of a truck company with which itcontracts. For example, an oil company owes a duty to provide safe means for the employees of a truck company contracting to haul crude oil to load the oil; and the truck owner's contributory negligence in failing to prevent an imminent fire is a question of fact for the jury [*Lunsford v. Standard Oil Co. (1948) 84 Cal. App. 2d 459, 464-465, 191 P.2d 82]* .

A company that contracts for a truck's services owes a duty to the truck company's employees to use due care while assisting or directing the unloading of cargo [*see Foster v. Pestana (1947) 77 Cal. App. 2d 885, 889, 177 P.2d 54]* . A construction company, for example, owes a duty to the employees of a truck company and its subcontractors to exercise care in carrying out loading operations [*see Argonaut Ins. Co. v. Colonial Ins. Co. (1977) 70 Cal. App. 3d 608, 614, 138 Cal. Rptr. 855* (defendant employee's loading was "use" of vehicle for purposes of insurance policy coverage)].

[e] Volunteers

A nonemployee who voluntarily helps unload a truck on the premises of the receiver of the cargo at the informal request of the truck driver, who was not an employee of the receiver, has been held to be at least a licensee as to the receiver, so that the receiver is liable for active negligence in unloading that injures the nonemployee [*Church v. Headrick & Brown (1951) 101 Cal. App. 2d 396, 398-402, 405, 408, 225 P.2d 558]* . For discussion of the extent to which the plaintiff's status is relevant since *Rowland v. Christian (1968) 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561* , see Ch. 421, *Premises Liability* .

[f] Passersby

A truck's owner and driver owe a duty to passersby who might foreseeably be harmed, to use reasonable care in loading and unloading cargo [*see American Auto. Ins. Co. v. Transport Indem. Co. (1962) 200 Cal. App. 2d 543, 551, 19 Cal. Rptr. 558* (construction company employee's helping to unload concrete blocks off transportation company's truck constituted "use" of truck for purposes of insurance coverage)]. The duty extends to the party contracting for truck services and its employees if that party or its employees undertake to supervise the operation. For example, if a contracting company's foreman assumes supervision of unloading operations, and knows or should know that persons using a public street adjacent to the loading site might be injured by the activity, the foreman has a duty to post a guard and warn passersby of the danger. Moreover, employees of the contracting company who actively participate in the unloading owe a duty to passersby to use reasonable care [*American Auto. Ins. Co. v. Transport Indem. Co. (1962) 200 Cal. App. 2d 543, 551, 19 Cal. Rptr. 558]* .

[2] Assumption of Risk of Obvious Danger

A property owner is not required to warn one who comes onto the property of a dangerous condition on the property when the condition was obvious to the person coming onto the property. This rule applies to the owner of a truck that is being unloaded as well as to the owner of the premises on which the truck is being unloaded [*see Squillante v. Barr*

(1955) 131 Cal. App. 2d 175, 177-179, 280 P.2d 216 ; for more detailed discussion of the general rules relating to obvious dangers, see Ch. 421, *Premises Liability*]. However, a person loading a truck may be held not to have assumed the risk of resulting damages even though he or she knew of the general condition which caused the damages, when the danger represented by the condition was not known to the person doing the loading, and the negligent acts with which the defendants were charged occured after any assumption of the risk regarding known conditions by the plaintiff [*Lunsford v. Standard Oil Co. (1948) 84 Cal. App. 2d 459, 467-468, 191 P.2d 82* (employees of defendant premises owner failed to take action when fumes from oil that plaintiff was loading came close to nearby boiler without plaintiff's knowledge)]. The jury may consider the lack of expertise and experience of the person unloading, as compared to the experience and knowledge of the person responsible for creating the dangerous condition in determining whether the person unloading assumed the risk. Moreover, a subordinate employee has the right to place some reliance in the judgment of a supervisor in doing his or her work [*Lamar v. John & Wade Inc. (1945) 70 Cal. App. 2d 806, 810, 161 P.2d 970]* .

The application of assumption of the risk as either a defense to liability, or a factor in apportioning fault, must presently be evaluated in light of the comparative negligence doctrine, as set forth in *Li v. Yellow Cab* [*Li v. Yellow Cab (1975) 13 Cal. 3d 804, 119 Cal. Rptr. 858, 532 P.2d 1226]* . For further discussion see Ch. 380, *Negligence* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesComparative NegligenceCommon Law ConceptsAssumption of RiskTortsPremises Liability & PropertyGeneral Premises LiabilityDuties of CareDuty on PremisesInviteesGeneral OverviewTortsTransportation TortsMotor VehiclesMotor CarriersTortsVicarious LiabilityEmployersGeneral OverviewTransportation LawCarrier Duties & LiabilitiesState & Local Regulation

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§ 553.13 Towing of Vehicles

[1] Towing Not Negligence Per Se

Towing one vehicle by means of another is not negligence per se, but the towing must be done with due consideration for the safety of others [*Weddle v. Loges (1971) 52 Cal. App. 2d 115, 124, 125 P.2d 914]* .

[2] Coupling Requirements

[a] Safety Chain

There are detailed statutory requirements governing the manner in which towed vehicles are to be connected to towing vehicles, including ageneral requirement that every towed vehicle be coupled to the towing vehicle by means of a safety chain, cable, or equivalent device in addition to the regular drawbar, tongue or other connection [*Veh. Code §§ 29003(c), 29004(a)*; *see Veh. Code § 29004(c)* (amount of slack, connection to drawbar)].

Failure to use a safety chain in violation of *Veh. Code § 29004* may be the basis of liability if the towed vehicle breaks loose and goes out of control [*Lehmuth v. Long Beach Unified Sch. Dist. (1960) 53 Cal. 2d 544, 552-553, 2 Cal. Rptr. 279, 348 P.2d 887* (relying on former Veh. Code § 701, *now see Veh. Code § 29004*]. There are exceptions to the safety chain requirement of *Veh. Code § 29004* [*Veh. Code §§ 29004(c), 29007* (towed vehicle being steered by licensed driver; fifth-wheel-type connections); *see Veh. Code §§ 29001, 29002* (requirements for fifth-wheel devices); *see also Veh. Code § 29009* (dolly used with construction equipment)].

[b] Strength of Hitch and Other Coupling Devices

Every hitch or coupling device used as a means of attaching the towed and towing vehicles is required to be mounted properly and securely and to be structurally adequate for the weight drawn, including sufficient reinforcement or bracing of the frame to provide sufficient strength and rigidity to prevent undue distortion of the frame [*Veh. Code § 29003(a)*]. The drawbar, tongue, or other connection between the towing and towed vehicles must also be securely attached and structurally adequate for the weight drawn [*Veh. Code § 29003(b)*]. Violation of the standards of former *Veh. Code § 29003(a)* in mounting a trailer hitch may be the basis of liability for negligence [*see Douglass v. Webb*

(1962) 209 Cal. App. 2d 290, 294-295, 304-305, 26 Cal. Rptr. 60 (construing former Veh. Code § 701(d))].

Additional requirements apply when towing is to be done on a freeway, except when a disabled motor vehicle is being towed from the point of disablement to the nearest and most accessible exit from the freeway [*Veh. Code § 29006*].

[3] Duty of Driver of Towed Vehicle

Despite the limited ability of the person at the wheel of a towed vehicle to control its travel, he or she has the duty to exercise ordinary care in watching for traffic and railroad trains, in controlling the car to a reasonable extent, in sounding the horn to warn the driver of the towing vehicle if that appeared necessary, and under slow speed conditions, in leaving the towed car if reasonably necessary [*Conner v. Southern Pac. Co. (1952) 38 Cal. 2d 633, 638, 241 P.2d 535* (plaintiff's decedent in towed vehicle found contributorily negligent); *but cf. Fairman v. Mors (1942) 55 Cal. App. 2d 216, 219-220, 130 P.2d 448* (person behind the wheel of a towed vehicle considered utterly helpless in directing the course or conductof the car; holding that driver of towing vehicle was also driver of towed vehicle for purposes of guest statute)].

The driver of a towed vehicle may be liable for damages resulting from an accident caused by his or her own conduct in arranging and during the towing [*Barnett v. Garrison (1949) 93 Cal. App. 2d 553, 556, 209 P.2d 426* (defendant caused his heavier car to be towed by a lighter one over a winding, hilly road, chose the manner in which he tied the cars together, let his car coast in neutral, and continued that manner of towing even though his car rested against the towing car on every downgrade, and at the fatal moment turned wheels to separate the cars)].

[4] Towing of Vehicle Parked on Private Property

[a] When Towing Allowed

[i] General Rule

The owner or person in lawful possession of private property, including an association of a common interest development as defined in *Civ. Code § 1351*, may cause the removal of a vehicle parked on the property to a storage facility meeting the requirements of *Veh. Code § 22658(n)* under any of the following circumstances [*Veh. Code § 22658(a)*; *see Veh. Code § 22658(n)*; *see also Veh. Code § 22658(f)* (requiring person causing removal to contact local traffic law enforcement within one hour)]:

- There is displayed, in plain view at all entrances to the property, a sign not less than 17 by 22 inches in size, with lettering not less than 1 inch in height, prohibiting public parking and indicating that vehicles will be removed at the owner's expense, and containing the telephone number of the local traffic law enforcement agency and the name and telephone number of each towing company that is a party to a written general towing authorization agreement with the owner or possessor of the property (the sign may also indicate that a citation may also be issued for the violation).

- The vehicle has been issued a notice of parking violation, and 96 hours have elapsed since the issuance of that notice.

- The vehicle is on private property and lacks an engine, transmission, wheels, tires, doors, windshield, or any other major part or equipment necessary to operate safely on the highways, the owner or person in lawful possession of the private property has notified the local traffic law enforcement agency, as appropriate, and 24 hours have elapsed since that notification.

- The lot or parcel on which the vehicle is parked is improved with a single-family dwelling.

Veh. Code § 22658 does not limit or affect any rights or remedies that the owner or person in lawful possession of private property may have by virtue of other provisions of law authorizing the removal of a vehicle parked on private property [*Veh. Code § 22658(c)*].

On the request of the owner of the vehicle, or that owner's agent, the towing company or its driver is required to immediately and unconditionally release any vehicle that is not yet removed from the private property and in transit [*Veh. Code § 22658(g)(1)(B)*; *see also Veh. Code § 22658(g)(1)(C)* (failure to comply with request is misdemeanor)]. If a vehicle is released to a person in compliance with this provision, the vehicle owner or authorized agent is required to move the vehicle to a lawful location immediately [*Veh. Code § 22658(g)(2)*].

[ii] Notice

If the tow truck operator removing the vehicle knows, or is able to ascertain from the property owner, the person in lawful possession of the property, or the registration records of the Department of Motor Vehicles, the name and address of the registered and legal owner of the removed vehicle, the tow truck operator must immediately give, or cause to be given, written notice to the registered and legal owner of the fact and grounds of the removal, the place to which the vehicle has been removed, the mileage on the vehicle at the time of removal, and the time of removal. If the vehicle is stored in a storage facility, a copy of the notice must be given to the proprietor of the facility. If the tow truck operator does not know and is unable to ascertain the name of the owner of the vehicle, or for any other reason is unable to give the prescribed notice to the owner, that person must comply with the requirements of *Veh. Code § 22853(c)* relating to notice in the same manner as applicable to an officer removing a vehicle from private property [*Veh. Code § 22658(b)*].

[iii] Authorization

A towing company is not permitted to remove or commence the removal of a vehicle from private property, without first obtaining written authorization from the property owner or lessee, or an employee or agent of the property owner or lessee. In addition, the property owner, lessee, employee, or agent must generally be present on the property at the time of removal and verify the alleged violation, although the person does not have to be physically present at the exact specified location on the property where the vehicle to be towed is located [*Veh. Code § 22658(l)(1)(A)*]. In addition, presence and verification is not required if the person authorizing the tow is the property owner, or the owner's agent who is not a tow operator, of a residential rental property of 15 or fewer units that does not have an onsite owner, owner's agent, or employee, and if a tenant has verified the violation, requested the tow from that tenant's assigned parking space, and provided a signed request or electronic mail, or has called and provides a signed request or electronic mail within 24 hours, to the property owner or owner's agent, which the owner or agent must provide to the towing company within 48 hours after authorizing the tow [*Veh. Code § 22658(l)(1)(A)*; *see also Veh. Code § 22658(l)(1)(B)* (contents of written authorization specified)].

General authorization to remove or commence the removal of a vehicle at the towing company's discretion cannot be delegated to a towing company or its affiliates except in the case of a vehicle unlawfully parked within 15 feet of a fire hydrant or in a fire lane, or in a manner that interferes with any entrance to, or exit from, the private property [*Veh. Code § 22658(l)(1)(E)(i)*; *see also Veh. Code § 22658(l)(2)* (requiring towing company to photograph vehicle removed under these circumstances and keep copy for presentation to vehicle owner)]. In those cases in which general authorization is granted to a towing company or its affiliate to undertake or commence the removal of a vehicle that is unlawfully parked within 15 feet of a fire hydrant or in a fire lane, or that interferes with an entrance to, or exit from, private property, the towing company and the property owner, the owner's agent, or the person in lawful possession of the private property must have a written agreement granting that general authorization [*Veh. Code § 22658(l)(1)(E)(ii)*].

[b] Liability for Injurious or Wrongful Towing

[i] Recovery for Damage

The owner of a vehicle removed from private property pursuant to *Veh. Code § 22658(a)* may recover for any damage to the vehicle resulting from any intentional or negligent act of person causing the removal of, or removing, the vehicle [*Veh. Code § 22658(d)*]. In addition, an owner or person in lawful possession of any private property, or an association of a common interest development causing the removal of a vehicle parked on that property is liable for double the storage or towing charges whenever there has been a failure to comply with *Veh. Code § 22658(a)(1), (2)* or *(3)* (*see* [a], *above*) or a failure to state the grounds for the removal of the vehicle if requested by the legal or registered owner of the vehicle as required by *Veh. Code § 22658(f)* [*Veh. Code § 22658(e)*].

[ii] Liability of Towing Company

Any towing company that removes a vehicle pursuant to *Veh. Code § 22658(a)* is responsible for [*Veh. Code § 22658(f)*]:

- Any damage to the vehicle in the transit and subsequent storage of the vehicle.

- The removal of a vehicle other than the vehicle specified by the owner or other person in lawful possession of the private property.

A person who removes a vehicle without the proper authorizations and without following the proper procedures as provided in *Veh. Code § 22658(l)* [*see § 553.13[4][a][iii]*], is liable to the owner of the vehicle for four times the amount of the towing and storage charges, in addition to any applicable criminal penalty [*Veh. Code § 22658(l)*].

However, towing company that removes a vehicle from private property with the proper authorization of the property owner or the property owner's agent will *not* be held responsible in any situation relating to the validity of the removal [*Veh. Code § 22658(f)*; *see § 553.13[4][a][iii*]

For discussion and forms relating to damage incurred during the storage of personal property, see Ch. 93, *Bailments* . For discussion and forms relating to the tort of conversion, see Ch. 150, *Conversion* . For discussion and forms relating to trespass to personal property, see Ch. 550, *Trespass* .

[c] Liability for Charging Vehicle Owner Excessive Rate

Any person who charges a vehicle owner a towing, service, or storage charge at an excessive rate is liable to the vehicle owner for four times the amount charged [*Veh. Code § 22658(j)(1)*; *see also Veh. Code § 22658(j)(2)* (criminal penalties for knowingly charging excessive fees)]. A charge for towing or storage, or both, is excessive if the charge exceeds the greater of the following amounts [*Veh. Code § 22658(i)(1)(A)*]:

- The amount that would have been charged for that towing or storage, or both, made at the request of a law enforcement agency under an agreement between a towing company and the law enforcement agency that exercises primary jurisdiction in the city in which is located the private property from which the vehicle was, or was attempted to be, removed, or if the private property is not located within a city, then the law enforcement agency that exercises primary jurisdiction in the county in which the private property is located.

- The amount that would have been charged for that towing or storage, or both, under the rate approved for that towing operator by the California Highway Patrol for the jurisdiction in which the private property is located and from which the vehicle was, or was attempted to be, removed.

If a request to release a vehicle is made within 24 hours from the time the vehicle is brought into the storage facility,

regardless of the calendar date, the storage charge must be for only one day. Not more than one day's storage charge may be required for vehicle released the same day it was stored [*Veh. Code § 22658(i)(2)*].

[d] Limitations Regarding Certain Private Property

An owner or person in lawful possession of private property that is held open to the public, or a discernible portion thereof, for parking of vehicles at no fee, or an employee or agent of the owner or possessor, cannot tow or remove, or cause the towing or removal of, any vehicle within one hour of the vehicle being parked [*Veh. Code § 22953(a)*]. *Veh. Code § 22953(a)* does not apply to a vehicle illegally parked within 15 feet of a fire hydrant, in a fire lane, in a manner that interferes with an entrance to or exit from the private property, or in a parking space or stall legally designated for disabled persons [*Veh. Code § 22953(b)*]. The statute also does not apply to parking spaces at residential property or at a hotel or motel where the parking stalls or spaces are clearly marked for a specific room [*Veh. Code § 22953(c)*].

A person who violates *Veh. Code § 22953(a)* is civilly liable to the vehicle owner, or to the vehicle owner's agent, for two times the amount of the towing and storage charges [*Veh. Code § 22953(e)*].

[e] Liability for Towing Vehicle off Private Property

Any towing company that, in removing a vehicle, cuts, removes, otherwise damages, or leaves open a fence without the prior approval of the property owner or the person in charge of the property must at that time either locate and notify the owner or person in charge of the property of the damage or condition; the name and address of the towing company; and the license, registration, or identification number of the removed vehicle; or the towing company must leave that information in a conspicuous place and notify the appropriate law enforcement agency [*Veh. Code § 22658.1(a)*]. Failure to comply with the provisions of *Veh. Code § 22658.1* constitutes an infraction [*Veh. Code § 22658.1(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceStandards of CareReasonable CareGeneral OverviewTortsTransportation TortsMotor VehiclesGeneral OverviewTransportation LawCommercial VehiclesMaintenance & SafetyTransportation LawCommercial VehiclesRates & TariffsTransportation LawPrivate VehiclesSafety StandardsGeneral Overview

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[Reserved]

§§ 553.14[Reserved]

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PART III. RESEARCH GUIDE

48-553 California Forms of Pleading and Practice--Annotated § 553.30

§ 553.30 Related Matthew Bender Publications

For memoranda of points and authorities for use in actions involving carriers, see California Points and Authorities, Ch. 33, *Carriers*

For memoranda of points and authorities for use in actions involving negligence generally, see California Points and Authorities, Ch. 165, *Negligence*

For forms of transactional documents relating to this chapter, see California Legal Forms, Ch. 54, *Shipment of Property*

Legal Topics:

For related research and practice materials, see the following legal topics:
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48-553 California Forms of Pleading and Practice--Annotated § 553.31

§ 553.31 State Statutes

[1] Definitions

Motor truck. *Veh. Code § 410*

Motor vehicle. *Veh. Code § 415*

Semitrailer. *Veh. Code § 550*

Tow truck. *Veh. Code § 615(a)*

Tow dolly. *Veh. Code § 617*

Trailer. *Veh. Code § 630*

Trailer coach. *Veh. Code § 635*

Truck tractor. *Veh. Code § 655*

Vehicle. *Veh. Code § 670*

[2] Owner's Statutory Liability

Liability for negligence by driver using vehicle with permission. *Veh. Code § 17150*

Limitation of liability for statutory cause of action. *Veh. Code § 17151*

[3] Regulation

[a] Length, Width, and Height

Width regulations for all vehicles on highways. *Veh. Code § 35100 et seq.*

Height regulations for all vehicles on highways. *Veh. Code §§ 35250, 35251*

Length regulations for all vehicles on highways. *Veh. Code §§ 35400 et seq., 35401.3*

Length regulations for combinations of vehicles. *Veh. Code §§ 35401, 35401.5, 35411*

Length regulations for semitrailers or dollies. *Veh. Code § 35414*

[b] Safe Loading and Transportation of Particular Cargos

Hazardous materials. *Veh. Code §§ 31301-31308, 31600 et seq.*

Transportation of workers, including farm labor vehicles. *Veh. Code §§ 31400-31404*

Removable or collapsible freight van or tank containers. *Veh. Code § 31540*

[c] Safety

Highway Patrol regulation of safe operation of vehicles and tour buses. *Veh. Code §§ 34500-34513*

Requirement by motor carrier that driver exceed applicable maximum hours of service as punishable by fine. *Veh. Code § 34501.3(a)(2),(c)*

Commission as required, on Department's recommendation, to suspend registration of private carrier that has failed to maintain its vehicles in safe condition, if failure is either consistent or presents imminent danger to public safety, or if carrier has failed to enroll its drivers in pull notice system. *Veh. Code § 34505.7*

[4] Speed Limits

Driving at unsafe speed prohibited. *Veh. Code § 22350*

Prima facie speed limits for all vehicles. *Veh. Code § 22352*

Speed limits for trucks and towing vehicles. *Veh. Code § 22406*

[5] Towing Equipment

Towing Equipment. *Veh. Code §§ 29000-29008*

Coupling Requirements. *Veh. Code §§ 29003-29006*

Requirement that towing arrangement be secure and structurally adequate. *Veh. Code § 29003*

Safety chain requirement. *Veh. Code § 29004*

Requirements for coupling when towing motor vehicle. *Veh. Code § 29006*

[6] Towing of Parked Vehicle by Law Enforcement Officers

Vehicle illegally parked in disabled persons' space. *Veh. Code §§ 22511.8, 22652*

Vehicle illegally or hazardously parked. *Veh. Code §§ 22651, 22654*

Vehicle in which alarm device activated. *Veh. Code § 22651.5*

Vehicle on private property and that was stolen, embezzled, or involved in accident. *Veh. Code § 22653*

Vehicle involved in hit-and-run accident. *Veh. Code § 22655*

Vehicle located in railroad right-of-way. *Veh. Code § 22656*

Vehicle wrongfully parked on state property. *Veh. Code § 22659*

Abandoned vehicle. *Veh. Code § 22669*

[7] Towing of Parked Vehicle by Private Property Owner

Vehicle wrongfully parked in disabled persons' space. *Veh. Code §§ 22511.8, 22652.5*

Vehicle wrongfully parked on private property. *Veh. Code §§ 22658, 22953*

[8] Towing of Parked Vehicle Off Another's Private Property

Notification requirements; criminal penalties for noncompliance. *Veh. Code § 22658.1*

[9] Towing Trailer

Towing trailer that swerves out of normal path as prohibited. *Veh. Code § 21711*

[10] Transportation Services

Discrimination prohibited in transportation services contract. Pub. Util. Code § 3542

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 553.32 Federal Regulations

General federal motor carrier regulations. *49 C.F.R. §§ 301-325*

Safety regulations for federal motor carriers. 49 C.F.R. §§ 350-399

Legal Topics:

For related research and practice materials, see the following legal topics:
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48-553 California Forms of Pleading and Practice--Annotated § 553.33

§ 553.33 Administrative Regulations

Loading regulations. *13 Cal. Code Reg. §§ 1300-1425*

Legal Topics:

For related research and practice materials, see the following legal topics:
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48-553 California Forms of Pleading and Practice--Annotated § 553.34

§ 553.34 Decisions

[1] Crossing Opposing Traffic

Left turn by slow moving vehicle in face of oncoming traffic is one of most hazardous of all traffic maneuvers; slow acceleration of tractor-trailer is major factor in determining if oncoming vehicles were so close as to constitute hazard. *Gigliotti v. Nunes (1955) 45 Cal. 2d 85, 92, 286 P.2d 809*

[2] Excessive Speed

Exceptional difficulty in braking truck is factor for trier of fact to consider in determining whether truck driver was traveling at speed which endangered life or property. *Fortier Transp. Co. v. Union Packing Co. (1950) 96 Cal. App. 2d 748, 753-754, 216 P.2d 470*

Trucks are subject to law that no person may drive motor vehicle on highway at speed greater than is reasonable or prudent having due regard for relevantconditions, and in no event at speed which endangers safety of persons or property. *Fortier Transp. Co. v. Union Packing Co. (1950) 96 Cal. App. 2d 748, 753, 216 P.2d 470*

Violation of speed limit for trucks set out in *Veh. Code § 22406* is negligence per se. *Fortier Transp. Co. v. Union Packing Co. (1950) 96 Cal. App. 2d 748, 752, 216 P.2d 470* ; *Wood v. Moore (1944) 64 Cal. App. 2d 144, 149, 148 P.2d 91*

Driving in excess of specific prima facie speed limits set out in *Veh. Code § 22352* is not negligence per se. *Wood v. Moore (1944) 64 Cal. App. 2d 144, 149, 148 P.2d 91*

[3] Expert Testimony

Expert witnesses is properly used to aid jury in determining from circumstantial evidence how defendant's trailer was

positioned at time of accident. *Wells Truckways v. Cebrian (1954) 122 Cal. App. 2d 666, 676, 265 P.2d 557*

[4] Injuries Suffered by Riders

Whether or not truck driver was negligent in relation to death of small boy who was riding in open truck, when driver knew of habit of boys to play and climb on sides of truck and drove through area creating hazard for one who did such climbing and playing, is question for jury. *Christiana v. Rattaro (1947) 81 Cal. App. 2d 597, 599, 184 P.2d 682*

[5] "Jack-Knifing" of Trailer

Jury properly exonerates tractor-trailer driver liability for jack-knifing if it finds that jack-knifing was not caused by driver's negligence, but by driver turning abruptly to avoid hitting another improperly located vehicle. *Sims v. Phillips (1958) 164 Cal. App. 2d 793, 797, 331 P.2d 174* (reversing judgment for defendant on unrelated grounds)

Driver who failed to stop or swerve tractor trailer to avoid hitting another vehicle few seconds before colliding with it did not having last clear chance to prevent collision, because of danger of jack-knifing or overturning from sudden stop or swerve. *Hickambottom v. Cooper Transp. Co. (1958) 163 Cal. App. 2d 489, 492, 329 P.2d 609*

Truck driver was liable for jack-knifing of tractor trailer resulting from excessive speed when driver was forced to brake. *Fortier Transp. Co. v. Union Packing Co. (1950) 96 Cal. App. 2d 748, 754, 216 P.2d 470*

[6] Liability Policies

Pub. Util. Code § 3651, requiring regulated highway carriers to provide liability protection for personal injuries and property damage, was enacted to protect public against reckless operation of vehicles by financially irresponsible owners and to provide means of recovery for those injured in their person or property by such operation, and does not require vehicle liability policies to cover work-related injuries sustained by vehicle owner's employees. *Chong v. Fremont Indem. Co. (1988) 202 Cal. App. 3d 1097, 1101-1102, 249 Cal. Rptr. 264*

[7] Loading and Unloading

Method of loading selected, materials used, and directions given to plaintiff who was helping load truck by defendant who planned and supervised loading of truck are factors to be considered in determining negligence. *Williams v. Field Transp. Co. (1946) 28 Cal. 2d 696, 699, 171 P.2d 722*

When plaintiff, who was familiar with unloading procedures, climbed on truck at invitation of defendant employee of packing plant that was receiving shipment and without knowledge of defendant truck driver or defendant truck owner, and was injured when truck driver loosened ropes to begin unloading, jury verdict in favor of defendants was upheld. *Squillante v. Barr (1955) 131 Cal. App. 2d 175, 177-179, 280 P.2d 216*

Lumber company that hired independent contractor to haul lumber was liable for damages caused by accident on highway resulting from negligent loading of cargo on contractor's truck by contractor's employees, when lumber company employees knew or should have known of faulty loading equipment and techniques. *Risley v. Lenwell (1954) 129 Cal. App. 2d 608, 625, 277 P.2d 897*

When defendant employee of defendant buyers of large steel girder was experienced rigger and directed unloading of girder with crane and sling in negligent manner, defendants were liable to volunteer who was riding with truck driver

and lacked knowledge of dangers involved in unloading girder, when volunteer was injured while helping to unload girder. *Church v. Headrick & Brown (1951) 101 Cal. App. 2d 396, 401, 408, 410, 225 P.2d 558*

Owner of loading premises was liable for negligence of its employees in failing to remedy nonobvious dangerous condition caused by loading truck that employees observed to develop during loading. *Lunsford v. Standard Oil Co. (1948) 84 Cal. App. 2d 459, 467-468, 191 P.2d 82* (fumes from gas being loaded on truck together with preexisting fumes on premises reached furnace and exploded)

Negligence of fellow unloading employee in dropping heavy object over side of truck without proper look-out established liability for injuries caused by dropped object. *Foster v. Pestana (1947) 77 Cal. App. 2d 885, 888-889, 177 P.2d 54*

Plaintiff employee of company receiving cargo who enters truck to unload it is invitee; truck owner was liable for plaintiff's injuries caused by falling cargo when truck driver was experienced as compared to plaintiff, was in charge of unloading, and parked truck at angle so as to create dangerous condition. *Lamar v. John & Wade, Inc. (1945) 70 Cal. App. 2d 806, 809, 161 P.2d 970*

Evidence of custom at loading place to warn persons around truck before moving it is admissible to counter charges that plaintiff was contributorily negligent in assuming position which could become dangerous if parked truck moved. *Scott v. Gallot (1943) 59 Cal. App. 2d 421, 425-426, 138 P.2d 685*

Person moving vehicle in loading place without giving sufficient warning or maintaining proper look-out for persons in vicinity of vehicle is liable for injuries caused by truck's movement. *Burke v. John E. Marshall, Inc. (1940) 42 Cal. App. 2d 195, 200-201, 108 P.2d 738*

[8] Negligence

Negligence may be properly alleged in general terms; allegation that act was negligently done without stating particular omission which rendered it negligent is sufficient. *Brooks v. E.J. Willig Truck Transp. Co. (1953) 40 Cal. 2d 669, 680, 255 P.2d 802*

[9] Standard of Care in General

Driver's general duty to operate vehicle safely under existing conditions creates special responsibilities under special conditions created by operation of heavy truck with cumbersome and dangerous braking mechanism. *Fortier Transp. Co. v. Union Packing Co. (1950) 96 Cal. App. 2d 748, 753-754, 216 P.2d 470*

[10] Trailer Owner's Liability

Negligence of tractor owner or driver is imputable to trailer owner only if tractor owner was acting as agent or employee of trailer owner, with control or right to control over activities of tractor owner; control is not inferable from mere fact that trip was undertaken for trailer owner's benefit or that trailer owner selected destination. *Flores v. Brown (1952) 39 Cal. 2d 622, 628-629, 248 P.2d 922*

[11] Towing

Improper coupling without safety chain, in violation of former Veh. Code § 701 (*now see Veh. Code § 29004*)

(coupling requirements for towed vehicles), is basis of liability if towed vehicle breaks loose. *Lehmuth v. Long Beach Unified Sch. District (1960) 53 Cal. 2d 544, 552-553, 2 Cal. Rptr. 279, 348 P.2d 887*

To extent *Veh. Code § 22658* governs charges for nonconsensual vehicle towing and subsequent storage fees, enforcement of statute is not preempted by Federal Aviation Administration Authorization Act of 1994, *49 U.S.C.S. § 14501(c)*. *CPF Agency Corp. v. Sevel's 24 Hour Towing Serv. (2005) 132 Cal. App. 4th 1034, 1052-1053, 34 Cal. Rptr. 3d 120* ; *CPF Agency Corp. v. R&S Towing (2005) 132 Cal. App. 4th 1014, 1030-1032, 34 Cal. Rptr. 3d 106*

Enforcement of *Veh. Code § 22658*, regulating removal of vehicles from private property by towing services, is not preempted by Federal Aviation Administration Authorization Act of 1994. *People ex rel. Renne v. Servantes (2001) 86 Cal. App. 4th 1081, 1088-1092, 103 Cal. Rptr. 2d 870* ; *see 49 U.S.C.S. § 14501(c)*

Enforcement of *Veh. Code § 22658*, regulating removal of vehicles from private property by towing services, is not preempted by Federal Aviation Administration Authorization Act of 1994. *People ex rel. Renne v. Servantes (2001) 86 Cal. App. 4th 1081, 1088-1092, 103 Cal. Rptr. 2d 870* ; *see 49 U.S.C.S. § 14501(c)*

Highway Patrol has no duty, absent existence of special relationship, to remove stranded automobile from highway; driver of truck on highway is unable to cross-complain against state in tort action resulting from truck's collision with motorhome parked to aid stranded automobile. *Bonds v. State of California ex rel. Cal. Highway Patrol (1982) 138 Cal. App. 3d 314, 187 Cal. Rptr. 792*

Towing one vehicle by means of another is not negligence per se, but towing must be done with due consideration for safety of others. *Weddle v. Loges (1971) 52 Cal. App. 2d 115, 124, 125 P.2d 914*

Person, including one in business of renting trailers, who mounts or attaches trailer to insufficiently reinforced or braced frame contrary to standards of former Veh. Code § 701(d) (*now see Veh. Code § 29003(a)*) is negligent. *Douglass v. Webb (1962) 209 Cal. App. 2d 290, 294-295, 304-305, 26 Cal. Rptr. 60*

Evidence establishing that defendant caused his heavier car to be towed by a lighter one over a winding, hilly road, choose the manner in which he tied the cars together, let his car coast in neutral, and continued that manner of towing even though his car rested against the towing car on every downgrade, and at fatal moment turned wheels to separate the cars was sufficient to support finding of negligence. *Barnett v. Garrison (1949) 93 Cal. App. 2d 553, 556, 209 P.2d 426*

Owner of trailer was negligent with respect to driver of truck that was towing it when nonoriginal brakes on trailer were inadequate to control it. *Hupp v. Griffith Co. (1932) 127 Cal. App. 63, 66, 67, 15 P.2d 211*

[12] Whipping or Swerving of Trailer

Tractor trailer driver was properly exonerated from liability when swerving of trailer was caused by sudden turn to avoid collision with another object. *Patterson v. Delta Lines, Inc. (1956) 147 Cal. App. 2d 160, 161-162, 304 P.2d 842*

Violation of former Veh. Code § 701(e) (*now see Veh. Code § 21711*), prohibiting towing of trailer that swerves out of normal path, as basis of liability for resulting damages. *Risley v. Lenwell (1954) 129 Cal. App. 2d 608, 637-638, 277 P.2d 897*

Tractor trailer driver may be liable for damage caused by swerving of trailer due to excessive speed under circumstances. *Wells Truckways v. Cebrian (1954) 122 Cal. App. 2d 666, 670, 680, 265 P.2d 557* (rainy weather

while moving down hill on unbanked curve)

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsTransportation TortsMotor VehiclesGeneral OverviewTransportation LawCommercial VehiclesMaintenance & SafetyTransportation LawCommercial VehiclesTraffic RegulationTransportation LawPrivate VehiclesSafety StandardsGeneral OverviewTransportation LawPrivate VehiclesTraffic RegulationGeneral Overview

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48-553 California Forms of Pleading and Practice--Annotated § 553.35

§ 553.35 Attorney General Opinions

Trailer coach coming within statutory definition of semitrailer may have same length as that prescribed for semitrailers under former Veh. Code § 697(b) (*now see Veh. Code § 35400*). *26 Ops. Cal. Atty. Gen. 134 (1955)*

Implements of husbandry being incidentally towed over highway by pick-up truck are exempt from overall height and weight limits for combination vehicles. *26 Ops. Cal. Atty. Gen. 224 (1955)*

Tractor-trailers and other specified special equipment are not exempt form maximum width regulations set out in *Veh. Code § 35100* when suchvehicles are transported as loads on other vehicles. *28 Ops. Cal. Atty. Gen. 272 (1956)*

County speed ordinance that is not in direct conflict with state maximum speed law applies to all vehicles without exception. *29 Ops. Cal. Atty. Gen. 20 (1957)*

County has authority to set speed limits applicable to all vehicles on roads under its jurisdiction; but not authority to set reduced speed limits for trucks only. *35 Ops. Cal. Atty. Gen. 29 (1960)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCarrier Duties & LiabilitiesState & Local RegulationTransportation LawCommercial VehiclesMaintenance & SafetyTransportation LawCommercial VehiclesTraffic Regulation

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48-553 California Forms of Pleading and Practice--Annotated § 553.36

§ 553.36 Law Reviews

Review of Selected 1983 California Legislation, *Transportation and Motor Vehicles; search and removal of vehicles, 15 Pac. L.J. 704 (1984)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Transportation LawCommercial VehiclesGeneral Overview

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48-553 California Forms of Pleading and Practice--Annotated §§ 553.37-553.49

[Reserved]

§§ 553.37[Reserved]

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48-553 California Forms of Pleading and Practice--Annotated § 553.50

§ 553.50 Complaint for Damages [Civ. Code § 3333] for Personal Injury and Property Damage [Civ. Code §§ 1714(a), 2100]--Against Owner and Driver of Truck or Towing Vehicle

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injury and Property Damage [Civ. Code §§ 1714(a), 2100]--Against Owner and Driver of Truck or Towing Vehicle

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
_____ [*name*], Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES 1	)	(Negligence)
through _____,] Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. Defendant _____ [*name of driver*] is, and at all times herein mentioned was, a resident of _____ [*city and/or county*], California.

[*ADD, if defendant driver is not also the owner*]

2. Defendant _____ [*name of owner*] is, and at all times herein mentioned was, a _____ [corporation *or* partnership *or* unincorporated association][, doing business as _____ (*fictitious name*)], with its _____ [principal place of *or* partners doing] business in _____ [*city and/or county*], California.

[3. Defendants _____ (*names of partners*) are, and at all times herein mentioned were, members of defendant _____ (partnership *or* unincorporated association) and are and at all times herein mentioned were, residents of _____ (*city and/or county*), California.]

4. Defendant _____ [*name of driver*] was at all times herein mentioned an agent and employee of defendant(s) _____ [*name of owner and any individual partners*] and was acting within the scope of his/her authority as defendant _____'s [*name of owner and any individual partners*] agent and employee and with the permission and consent of his/her codefendant(s).

[*CONTINUE*]

[5. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____ (*numeral, e.g.,* 15), inclusive, and thereforesues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when these are ascertained. Plaintiff is informed and believes and based thereon alleges that each of the above mentioned fictitiously names defendants is responsible in some manner, whether by direct negligence or by imputation, for the occurence and resulting injuries herein alleged.]

[6. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned defendants DOE 1 through DOE _____ (*number, e.g.,* 10) were the agents and employees of each of their codefendants, and in doing the things herein alleged, were acting within the course and scope of their authority as the codefendants' agents and employees and with the permission and consent of their codefendants.]

7. Defendant _____ [*name of owner*] is, and at all times herein mentioned was, the owner of a certain _____ [*year, make, and model of vehicle*] _____ [*describe vehicle, e.g.,* tractor unit], referred to herein as _____ [*describe vehicle briefly, e.g.,* tractor unit].

8. [Plaintiff is informed and believes and thereon alleges that] [a]t the time of the accident described below, defendant _____ [*name of driver*] was driving and operating the _____ [*describe defendant's vehicle, e.g.,* tractor unit] [in combination with a _____ (*describe towed vehicle, e.g.,* trailer) which was being pulled by the _____ (*describe defendant's vehicle, e.g.,* tractor unit)] [*add, if the driver and owner are not the same,* with the knowledge, permission, and consent of defendant _____ (*name of owner)*].

9. On _____ [*date*], at or about _____ [*time of accident*], plaintiff was _____ [*specify situation and conduct of plaintiff, e.g.,* operating his/her motor vehicle in a generally southerly direction along the right lane of _____ Street (at or near its intersection with _____ Street) in _____ (*city, if any, and county*)]. At the same time, defendant _____ [*name of driver*] was driving the _____ [defendant's vehicle *or* vehicle combination described above] in a generally _____ [*specify, e.g.,* northerly] direction along _____ [*describe location, e.g.,* _____ Street (at or near its intersection with _____ Street)].

10. At that time and place defendant[s, and each of them,] so negligently entrusted, [loaded,] managed, maintained, drove, and operated the _____ [defendant's vehicle *or* vehicle combination described above], as to proximately cause _____ [*describe accident, e.g.,* the trailer of the vehicle combination described above to swerve to the left out of its normal path as it was passing plaintiff's vehicle and enter the lane in which plaintiff was properly driving, striking plaintiff's vehicle] and causing plaintiff the damages and injuries as described below.

11. As a proximate result of the negligence of the defendant[s, and each of them], plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervous system and person. All of these injuries have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plaintiff is informed and believed and thereon alleges that these injuries will result in some permanent disability to him/her.] As a result of these injuries, plaintiff has suffered general damages.

12. As a further proximate result of the negligence the defendant[s, and each of them], plaintiff has been compelled to incur and has incurred [and will continue to be compelled to incur] expenses for physicians and surgeons, hospital care, and other medical services and supplies.

[13. As a further proximate result of the negligence of the defendant(s, and each of them), _____ (*allege any additional special damages, e.g.,* plaintiff was prevented from attending to his/her usual occupation as a _____ (*state occupation*) for _____ (*specify amount of time away from work*)) and thereby lost earnings.]

[14. As a further proximate result of the negligence of the defendant[s, and each of them], plaintiff's _____ (*describe personal property, e.g.,* automobile) was destroyed. (On _____ (*date of accident*), this _____ (*describe personal property, e.g.,* automobile) had a fair and reasonable market value of $_____; plaintiff was therefore damaged in the sum of $_____.)]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For general damages according to proof;

2. For medical and related expenses according to proof;

[3. For _____ (*specify any additional special damages, e.g.,* loss of earnings) according to proof;]

[4. For damage to personal property (in the sum of $_____);]

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of complaint is for use to bring an action for personal injuries and property damage against the driver and owner of a truck for damages sustained by the plaintiff in an accident caused by the driver or owner of the truck or both.

[3] Allegations

This complaint alleges:

- The residence and capacity of the defendant driver (Paragraph 1).
- The identity of the owner of the truck involved in the accident (Paragraph 7).
- Facts establishing that defendant driver owed a duty of exercising reasonable care towards plaintiff at the time of the accident (Paragraphs 8, 9).
- Defendants' breach of duty toward plaintiff, including an optional allegation that defendants' negligent loading of cargo caused an accident on the highway (Paragraph 10) [*see Risley v. Lenwell (1954) 129 Cal. App. 2d 608, 616-620, 277 P.2d 897* (liability of lumber company that hired independent contractor, independant contractor who owned truck, truck owner's employee who hired driver, and driver, for accident caused by negligent loading of cargo)].
- A description of personal injury suffered by plaintiff as a proximate result of defendant's negligence (Paragraph 11).
- Grounds for compensatory damages for medical expenses incurred by plaintiff (Paragraph 12).
- Grounds for compensatory damages for loss of wages incurred by plaintiff (Paragraph 13).
- An optional allegation for use if plaintiff also suffered property damages (Paragraph 14).

The form also includes the following options:

- Optional allegations for use when the defendant driver is not the owner of the truck that was involved in the accident to allege the capacity of the truck owners and relationship of the defendants (Paragraphs 2-4).
- Optional paragraphs alleging fictitious defendants sued pursuant to *Code Civ. Proc. § 474* (Paragraph 5) and that the fictitious defendants are employees and agents of the other defendants (Paragraph 6).

[4] Specifying Amount of Damages

In an action to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual

or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages for anything other than personal injury or wrongful death (for example, property damage) must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint [*Code Civ. Proc. §§ 425.11, 425.115*], *see* Ch. 177, *Damages* , and Ch. 205, *Defaults and Default Judgments* .

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion *see* Ch. 26, *Answers* .

[6] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For discussion and forms relating to motor vehicle collisions generally, see Ch. 80, *Automobiles: Overview* to Ch. 87A, *Automobiles: Post Trial*

For discussion and forms relating to insurance, see Ch. 88, *Automobiles: Automobile Insurance* , Ch. 88A, *Automobiles: Uninsured Motorist Claims* , and Ch. 308, *Insurance*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For discussion of and forms relating to actions based on respondeat superior, see Ch. 248, *Employer's Liability for Employee's Torts*

For discussion and forms relating to negligence actions generally, see Ch. 380, *Negligence*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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48-553 California Forms of Pleading and Practice--Annotated § 553.51

§ 553.51 Complaint for Damages [Civ. Code § 3333] for Personal Injury and Property Damage [Civ. Code §§ 1714(a), 2100]--By Driver of Towing Vehicle Against Owner or Driver of Towed Vehicle--Accident Resulting From Negligence of Owner or Driver of Towed Vehicle

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injury and Property Damage [Civ. Code §§ 1714(a), 2100]--By Driver of Towing Vehicle Against Owner or Driver of Towed Vehicle--Accident Resulting From Negligence of Owner or Driver of Towed Vehicle

[*Caption. See § 553.50[1].*]

Plaintiff alleges:

1. Defendant _____ [*name of owner of towed vehicle*] is, and at all times herein mentioned was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a resident of _____ County, California *or* a corporation organized and existing under the laws of the State of California with its principal place of business located at _____ (*street address and if any, city*), _____ County, California].

[2. Defendant(s) _____ (*names of any employee defendants*) is/are, and at all times herein mentioned was/were, residents of _____ County, California, and was/were at all times herein mentioned employees and agents of _____ (*name of defendant owner*), and was/were acting within the scope of his/her/their authority as defendant _____'s (*name of defendant owner*) agent(s) and employee(s) and with the permission and consent of _____ (*name of defendant owner*).]

[3. *Fictitious defendant allegation. See § 553.50, Paragraph 5.*]

[4. *Agency allegation relating to fictitious defendants. See § 553.50, Paragraph 6.*]

5. Defendant _____ [*name of defendant owner*] is the owner of a certain _____

[trailer *or* semitrailer *or specify other vehicle*], hereinafter referred to as the "towed vehicle," [and is engaged in the business of renting such vehicles to the general public, to be towed by a motor vehicle provided and driven by the renter].

6. On _____ [*date*], plaintiff _____ (*name*) was the _____ [owner and driver of a certain _____ (*identify towing vehicle*) *or* driver of a certain _____ (*identify towing vehicle*) owned by plaintiff _____ (*name*)].

[*EITHER*]

7. On _____ [*date*], plaintiff rented and hired from defendant _____ [*name of owner*], acting by and through his/her/its agents and employees, defendant(s) _____ [*name(s)*], a certain _____ [*make or model, e.g.,* four-wheel] trailer bearing California trailer license number _____ and paid defendants the specified rental fee for the trailer of $_____. As part of the rental arrangement, defendant _____ [*name of defendant who coupled the vehicles*], attached the rented trailer to plaintiff's above-described vehicle.

[*OR*]

7. On _____ [*date*], _____ [*describe circumstances resulting in plaintiff towing defendant's vehicle, e.g.,* plaintiff, at defendant's request, drove his/her above-described vehicle to _____ (*specify location*), where defendant's car was disabled, to render assistance to defendant. After defendant tied the vehicles together with a rope, plaintiff proceeded to tow defendant's car to _____ (*specify destination*)].

[*CONTINUE*]

8. On _____ [*date*], at or about _____ [*time of accident*], plaintiff was operating _____ [*identify plaintiff's vehicle*], attached to the defendant's _____ [trailer *or* semitrailer *or identify other vehicle*], with the consent and permission of defendant, in a generally _____ [*specify direction*] along _____ [*describe location, e.g.,* Street at or near its intersection with _____ Street], in _____ County, California.

9. At that time and place defendant[s, and each of them], so negligently managed, maintained, [drove,] and attached the _____ [*describe towed vehicle, e.g.,* trailer] to plaintiff's vehicle, as to proximately cause _____ [*describe accident, e.g.,* the trailer to jack-knife and slide out of control], with resulting damages and injuries to plaintiff, as described below].

10. [*General damages. See § 553.50[1], Paragraph 11.*]

11. [*Special damages for medical expenses. See § 553.50[1], Paragraph 12.*]

[12. *Additional special damages. See § 553.50[1], Paragraph 13.*]

[13. *Property damage. See § 553.50[1], Paragraph 14.*]

[*Prayer. See § 553.50[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 553.50[1].*]

[2] Use of Form

This form of complaint is for use by the driver of a vehicle that was towing another vehicle against the owner or driver of the towed vehicle for damages caused by the negligence of the owner or driver of the towed vehicle when the accident was proximately caused by the defendant's negligent maintenance of the towed vehicle or negligence in attaching the towed and towing vehicles to one another.

[3] Allegations

This complaint alleges:

- The capacity and residence of defendants (Paragraphs 1 and 2).
- Either rental of the towed vehicle by defendant to plaintiff or defendant's arrangement to have plaintiff tow defendant's vehicle (Paragraph 7).
- Defendant's ownership of towed vehicle (Paragraph 5).
- Plaintiff's driving of towing vehicle at time of accident (Paragraph 8).
- The occurrence of the accident as the proximate result of defendants' negligence (Paragraph 9) [*see Hupp v. Griffith Co. (1932) 127 Cal. App. 63, 67, 15 P.2d 211]* .

The form also includes an optional paragraph for use to allege plaintiff's ownership of the towing vehicle if the plaintiff is suing for damages to it (Paragraph 6).

[4] Cross References

For discussion and cross references relating to complaints generally, see *§ 553.50[2] et seq.*

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[Reserved]

§§ 553.52[Reserved]

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48-553 California Forms of Pleading and Practice--Annotated § 553.60

§ 553.60 Complaint for Damages [Civ. Code § 3333] for Personal Injury and Property Damage [Civ. Code §§ 1714(a), 2100]--Against Owner of Truck and/or Loading Facilities--Accident While Loading or Unloading Truck

[1] FORM Complaint for Damages [Civ. Code § 3333] for Personal Injury and Property Damage [Civ. Code §§ 1714(a), 2100]--Against Owner of Truck and/or Loading Facilities--Accident While Loading or Unloading Truck

[*Caption. See § 553.50[1].*]

Plaintiff alleges:

[*EITHER*]

1. Defendant _____ [*name of truck driver or other individual involved in loading or unloading operation*] is, and at all times herein mentioned was, a resident of _____ County, California.

[*AND/OR*]

[2. *Capacity and location of person or entity owning truck and residence and capacity of partners or members, if any, of entity owning truck. See § 553.50[1], Paragraphs 2-3.*]

[3. *Ownership of truck by defendant truck owner. See § 553.50[1], Paragraph 7.*]

[4. *Status of truck driver as employee of truck owner. See § 553.50[1], Paragraph 4.*]

[*AND/OR*]

[5. Defendant _____ (*name of owner of loading premises*) is, and at all times herein mentioned was, a _____ (corporation *or* partnership *or* unincorporated association)(, doing business as _____ (*fictitious name*)), with its _____ (principal place of *or* partners doing) business in _____ (*city*), _____ County, California.]

[6. Defendants _____ (*names*) are, and at all times herein mentioned were, members of defendant _____ (partnership *or* unincorporated association) and are and at all times herein mentioned were, residents of _____ County, California.]

7. Defendant _____ [*name*] is, and at all times herein mentioned was, the owner of _____ [*describe premises on which truck was being loaded or unloaded*] located in _____ [*city, if any, and county*], California.

[8. Defendant _____ (*name of individual involved in loading or unloading operation*) was at all times herein mentioned an agent and employee of defendant(s) _____ (*name of owner loading premises and any individual partners*) and was acting within the scope of his/her authority as defendant _____'s [*name of owner and any individual partners*] agent and employee and with the permission and consent of his/her codefendant(s).]

[*CONTINUE*]

[9. *Fictitious defendant allegations. See § 553.50[1], Paragraph 5.*]

[10. *Agency allegation relating to fictitious defendants. See § 553.50[1], Paragraph 6.*]

11. On _____ [*date*], _____ [the above-mentioned *or* a certain _____ (*year, make, and model*)] truck was parked on _____ [the above-described premises belonging to defendant _____ (*name of loading premises owner*) *or describe location at which truck was parked*] for purposes of _____ [loading *or* unloading] a cargo that consisted of _____ [*specify cargo, e.g.,* lengths of pipe]. At about _____ [*specify time*] plaintiff was _____ [on *or* near] the above-described truck and was _____ [*specify plaintiff's activity, e.g.,* helping to unload it], [in the course and scope of his/her employment by _____ (*specify plaintiff's employer*) and] was acting with the knowledge and permission of defendant[s, and each of them].

[*EITHER*]

12. The _____ [loading *or* unloading] operation described above was directed by defendant _____ [*name*], who was at all times herein mentioned an employee of _____ [*specify truck owner or owner of loading premises*].

[*AND/OR*]

13. Defendant(s) _____ [*name(s) of individual(s) participating in loading or unloading*] participated in the _____ [loading *or* unloading] operation described above, and were at all times herein mentioned employees of _____ [*specify truck owner or owner of loading premises*].

[*CONTINUE*]

14. The loading operation was so negligently entrusted, planned, managed, and carried out by defendant[s, and each of them] as to proximately cause _____ [*describe accident, e.g.*, one length of pipe to roll from the truck and strike plaintiff], causing plaintiff damages and injuries as described below.

[15. *Damages suffered by plaintiff as a result of the accident. See § 553.50[1], Paragraphs 12-15.*]

[*Prayer. See § 553.50[1].*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 553.50[1].*]

[2] Use of Form

This form of complaint is for use by a person injured while a truck is being loaded or unloaded to bring an action for damages against the owner of the truck, the owner of the premises on which the loading or unloading was taking place, or both [*see Williams v. Field Transp. Co. (1946) 28 Cal. 2d 696, 697, 699, 171 P.2d 722]* .

[3] Allegations

This complaint alleges:

- Location of the truck for purposes of being loaded or unloaded (Paragraph 11).

- Plaintiff's activities, engaged in with the knowledge and permission of all relevant defendants, in the vicinity of the truck (Paragraph 11) [*see Squillante v. Barr (1955) 131 Cal. App. 2d 175, 178-179, 280 P.2d 216]* .

- Responsibility of individuals and their employers for planning and carrying out the loading operation (Paragraphs 12, 13).

- The improper carrying out of the loading operation by defendants (Paragraph 14) [*see Williams v. Field Transp. Co. (1946) 28 Cal. 2d 696, 699, 171 P.2d 722]* .

[4] Cross References

For discussion and cross references relating to complaints generally, see *§ 553.50[2] et seq.*

For discussion of and forms relating to actions based on work done on vehicles in garages, see Ch. 274, *Garages and Gas Stations*

For discussion of and forms relating to premises liability, see Ch. 421, *Premises Liability*

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48-553 California Forms of Pleading and Practice--Annotated § 553.61

§ 553.61 Allegation--Accident While Loading or Unloading Truck--Defendant Moved Truck Without Look-Out or Warning

[1] FORM Allegation--Accident While Loading or Unloading Truck--Defendant Moved Truck Without Look-Out or Warning

12. On _____ [*date*], _____ [the above-mentioned *or* a certain _____ (*year, make, and model*)] truck was parked in _____ [the above-described premises belonging to defendant _____ (*name of loading premises owner*) *or describe location at which truck was parked*] for purposes of _____ [loading *or* unloading] cargo. At or about _____ [*time*], plaintiff was _____ [*describe plaintiff's situation of hazard in relation to truck, e.g.,* working next to defendant's truck with his/her leg protruding into the path of the truck's tire].

13. At that time and place defendant[s, and each of them], so negligently entrusted, managed, maintained, drove, and operated the _____ [defendant's vehicle *or* vehicle combination described above], as to proximately cause _____ [*describe accident, e.g.,* to hit and run over plaintiff, causing plaintiff damages and injuries as described below.

[2] Use of Form

This form of allegations is for use in a complaint for damages for personal injuries sustained while a truck is being loaded or unloaded. The allegations should be inserted in place of Paragraphs 12-14 in the form in *§ 553.60[1],* to state a cause of action for negligently moving the vehicle without warning of the impending movement when others are known to be in the vicinity of the vehicle [*see Scott v. Gallot (1943) 59 Cal. App. 2d 421, 422-423, 427-428, 138 P.2d 685]* . The remaining Paragraphs of that form should be renumbered accordingly.

[3] Allegations

The allegations set forth:

- The plaintiff's situation of hazard in relation to the truck.

- The negligent entrusting, managing, maintaining, driving, and operating of the defendant's vehicle as to proximately cause the accident.

[4] Cross References

For discussion and cross references relating to complaints generally, see *§ 553.50[2]* et seq.

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES

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[1] FORM

[2] Use of Form

§ 555.167 Order Appointing Probate Referee [Prob. Code § 8920 et seq.] in Proceedings for Deficiency Judgment [Code Civ. Proc. § 726(b)]

[1] FORM

[2] Use of Form

[3] Notice of Order

§ 555.168 Judgment for Deficiency [Code Civ. Proc. § 726(b)]

[1] FORM

[2] Use of Form

§ 555.169 Stipulation and Deficiency Judgment

[1] FORM

[2] Use of Form

§ 555.170 Complaint on Promissory Note Secured by Junior Trust Deed--Security Rendered Valueless by Foreclosure of Senior Lien

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction and Venue

[6] Cross References

§§ 555.171-555.179 [Reserved]

§ 555.180 Complaint for Specific Performance of Trust Deed [Civ. Code § 3384 et seq.]--Beneficiary to Take Possession After Default and Collect Rents, Issues, and Profits [Civ. Code § 2927]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Appointment of Receiver

[5] Verification

[6] Jurisdiction and Venue

[7] Cross References

§ 555.181 Notice of Motion for Receiver Pendente Lite Pursuant to Trust Deed [Code Civ. Proc. § 564(b)(10)]

[1] FORM

[2] Use of Form

[3] Ex Parte Application for Appointment of Receiver

§ 555.182 Declaration in Support of Motion for Receiver Pendente Lite Pursuant to Trust Deed [Code Civ. Proc. § 564(b)(11)]

[1] FORM

[2] Use of Form

§ 555.183 Order Appointing Receiver Pendente Lite Pursuant to Trust Deed [Code Civ. Proc. § 564(b)(11)]

[1] FORM

[2] Use of Form

[3] Notice of Order

§ 555.184 Order to Show Cause and Temporary Restraining Order--Rents, Issues, and Profits [Cal. Rules of Ct., Rule 3.1175 et seq.; Cal. Judicial Council Form RC-300]

[1] FORM

[2] Use of Form

[3] Notice of Hearing

[4] Nomination of Receiver

[5] Service and Briefing Schedule

§ 555.185 Order Appointing Receiver After Hearing and Preliminary Injunction--Rents, Issues, and Profits [Cal. Rules of Ct., Rule 3.1175 et seq.; Cal. Judicial Council Form RC-310]

[1] FORM

[2] Use of Form

[3] Order Appointing Receiver

[a] Who May Be Receiver

[b] Prohibited Arrangements

[c] Inventory

[d] Monthly Reports

[e] Interim Fees

[f] Employment of Attorney

[g] Final Account and Report on Noticed Motion or Stipulation

§ 555.186 Ex Parte Order Appointing Receiver and Order to Show Cause--Rents, Issues, and Profits [Cal. Rules of Ct., Rule 3.1175 et seq.; Cal. Judicial Council Form RC-200]

[1] FORM

[2] Use of Form

[3] Contents of Application

[4] Notice of Hearing

[5] Order Appointing Receiver

[a] Who May Be Receiver

[b] Receiver's Bond and Oath

[c] Prohibited Arrangements

[d] Applicant's Bond

[e] Inventory

[f] Monthly Reports

[g] Interim Fees

[h] Employment of Attorney

[i] Final Account and Report on Noticed Motion or Stipulation

[6] Service and Briefing Schedule

§ 555.187 Order Confirming Appointment of Receiver and Preliminary Injunction--Rents, Issues, and Profits [Cal. Rules of Ct., Rule 3.1175 et seq.; Cal. Judicial Council Form RC-210]

[1] FORM

[2] Use of Form

§ 555.188 Additional Orders

[1] FORM

[2] Use of Form

§ 555.189 Demand for Turnover of Rents, Issues, or Profits [Civ. Code § 2938(j)]

[1] FORM

[2] Use of Form

[3] Delivery and Effectiveness

§ 555.190 Complaint for Damages [Civ. Code § 3333] for Waste Impairing Security [Civ. Code § 2929]--By Beneficiary

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction and Venue

[6] Cross References

§ 555.191 Complaint for Preliminary and Permanent Injunctions [Code Civ. Proc. § 525 et seq.; Civ. Code § 3420 et seq.] Based on Waste Impairing Security [Civ. Code § 2929]--By Beneficiary

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Jurisdiction and Venue

[6] Cross References

§ 555.192 Complaint for Damages for Rent Skimming [Civ. Code § 891]--By Lienholder

[1] FORM

[2] Use of Form

[3] Allegations

[4] Other Relief

[5] Verification

[6] Jurisdiction and Venue

§ 555.193 Affirmative Defense Allegation--Rental Revenue Used for Emergency Medical Treatment or Necessary Repairs [Civ. Code § 893]

[1] FORM

[2] Use of Form

[3] Burden of Proof

§ 555.194 Notice of Motion for Order Declaring That Interest Reacquired by Vendor Is Not Encumbered by Another Lien [Civ. Code § 891(b)]

[1] FORM

[2] Use of Form

[3] Notice to Interested Parties

[4] Order Granting Motion

[5] Jurisdiction and Venue

William M. Hensley
Editorial Consultant n*

FOOTNOTES:
(n101)Footnote *.
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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART I. SCOPE

48-555 California Forms of Pleading and Practice--Annotated § 555.01

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§ 555.01 Scope of Chapter

This chapter discusses actions related to secured transactions involving trust deeds or real property mortgages.

The legal background begins by covering the general characteristics of mortgages and trust deeds, their purpose as security for the performance of an underlying obligation, and the effect that some common provisions may have on that performance [*see § 555.10 et seq.*]. It also covers deeds as mortgages [*see § 555.22*] and equitable mortgages [*see § 555.23*].

Other subparts of the legal background cover foreclosure [*see § 555.30 et seq.*], including both nonjudicial [*see § 555.50 et seq.*] and judicial [*see § 555.70 et seq.*] foreclosures, the collection of rents and profits [*see § 555.80 et seq.*], and injury to the security [*see § 555.90 et seq.*].

The chapter includes the following forms:

- A complaint to quiet title for failure to reconvey title after satisfaction of the secured obligation [*see § 555.120*].

- Complaints and judgments for use in actions concerning the establishment of a deed as a mortgage and equitable mortgages [*see* §§ 555.125-555.129].

- A declaration of a trustee's nonmonetary status [*see § 555.135*], as well as alternative forms to substitute the trustee of a trust deed [*see §§ 555.136, 555.137*].

- Forms for use in connection with conducting a nonjudicial foreclosure sale [*see § 555.140 et seq.*], including a complaint to prevent the sale [*see § 555.147*].

- Complaints and other forms for use in foreclosure actions and proceedings for deficiency judgments [*see § 555.160 et seq.*].

- A complaint and related forms for use in actions to enforce an assignment-of-rents clause in a trust deed [*see § 555.180 et seq.*].

- Complaints, an affirmative defense, and a notice of motion for use in actions for impairment of the value of the security by waste or injury to the property or to recover damages for rent skimming [*see § 555.190 et seq.*].

The chapter also includes a Research Guide [*see § 555.100 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsEquitable MortgagesReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale Foreclosure

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PART I. SCOPE

48-555 California Forms of Pleading and Practice--Annotated § 555.02

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§ 555.02 Cross References

- For discussion and forms relating to grant deeds, including discussion and forms relating to breach of the implied covenant against encumbrances, see Ch. 184, *Deeds* .

- For discussion and forms relating to the sale of judicially foreclosed real property by writ of sale, see *Ch. 254, Executions and Enforcement of Judgments.*

- For discussion and forms relating to redemption of foreclosed real property, see *Ch. 254, Executions and Enforcement of Judgments.*

- For discussion and forms relating to rights and remedies of tenants generally, see Ch. 332, *Landlord and Tenant: The Tenancy* .

- For discussion and forms relating to unlawful detainer proceedings by a purchaser at a foreclosure sale against a trustor or mortgagor who remains in possession, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

- For discussion and forms relating to impressing and foreclosing equitable liens on real property, see *Ch. 342, Liens and Wage Preferences.*

- For discussion and forms relating to quiet title actions generally, see Ch. 482, *Quieting Title* .

- For discussion and forms relating to receivership generally, see Ch. 486, *Receivers* .

- For discussion and forms relating to secured transactions involving personal property, see Ch. 503,

Sales: Secured Transactions .

- For discussion and forms relating to installment land sale contracts, see Ch. 569, *Vendor and Purchaser* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsGeneral OverviewReal Property LawDeedsGeneral OverviewReal Property LawNonmortgage LiensEquitable LiensReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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PART I. SCOPE

48-555 California Forms of Pleading and Practice--Annotated §§ 555.03-555.09

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[Reserved]

§§ 555.03[Reserved]

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A. Characteristics of Trust Deeds and Mortgages

48-555 California Forms of Pleading and Practice--Annotated § 555.10

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§ 555.10 Governing Law

[1] In General

Trust deeds and mortgages are governed generally by (1) *Civ. Code § 2920 et seq.*, which contain detailed requirements relating to trust deeds and mortgages, including provisions for nonjudicial foreclosure sales, and (2) *Civ. Code § 2872 et seq.*, which are generally applicable to all liens.

Civ. Code §§ 2924(a), 2925, and *2950* govern actions to establish a deed, absolute on its face, as a mortgage.

Actions to establish an equitable mortgage are governed by nonstatutory equitable principles [*see Coast Bank v. Minderhout (1964) 61 Cal. 2d 311, 313-314, 38 Cal. Rptr. 505, 392 P.2d 265* (overruled on other grounds in *Wellenkamp v. Bank of America (1978) 21 Cal. 3d 943, 953, 148 Cal. Rptr. 379, 582 P.2d 970*); *Holder v. Williams (1959) 167 Cal. App. 2d 313, 316, 334 P.2d 291]* .

Other provisions generally affecting trust deeds and mortgages include *Civ. Code § 882.020 et seq.*, providing for the expiration of ancient trust deeds and mortgages, and *Civ. Code § 1169 et seq.*, setting forth the general recording provisions affecting the priority of multiple trust deeds, mortgages, or other liens on the same property.

[2] Foreclosure

Nonjudicial foreclosure sales are governed generally by *Civ. Code § 2920 et seq.*

Foreclosure actions are governed generally by *Code Civ. Proc. §§ 580c* and *725a et seq.*

Provisions governing deficiency judgments following foreclosure are set forth in *Code Civ. Proc. §§ 580a, 580b, 580d,*

and *726*.

[3] Collection of Rents and Profits

Civ. Code § 2938 governs written assignments of interests in leases, rents, issues, or profits of real property made in connection with obligations secured by real property.

Code Civ. Proc. § 564 sets forth the grounds for the appointment of a receiver to take possession of encumbered property on behalf of a trust-deed beneficiary, either to protect the property or to collect rents and profits. *Cal. Rules of Ct., Rule 3.1175 et seq.*, specifically govern appointmentof a receiver (in any circumstances, not limited to receivership for rents, issues, and profits).

12 U.S.C. § 1701j-3, known as the Garn Act, applies when a party seeks to enforce a due-on-sale clause. Federal regulations supplementing this statute are set forth chiefly in 12 C.F.R. Pt. 591, with others appearing in 12 C.F.R. Pts. 30 and 701.

[4] Injury to Security

Civ. Code § 2929 and *Code Civ. Proc. § 745* govern actions for waste to property subject to a trust deed or mortgage.

Code Civ. Proc. § 564(b)(1) and *(2)* govern the appointment of a receiver when property is in substantial danger of being destroyed.

Civ. Code § 2929.5 governs a secured lender's right of entry and inspection based on the borrower's environmental impairment of real property security.

Code Civ. Proc. § 726.5 governs a secured lender's election of remedies when the real property is environmentally impaired and the borrower is in default, and *Code Civ. Proc. § 736* governs a secured lender's right of action regarding the borrower's breach of an environmental provision relating to the real property.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawNonmortgage LiensEquitable LiensReal Property LawPriorities & RecordingGeneral Overview

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A. Characteristics of Trust Deeds and Mortgages

48-555 California Forms of Pleading and Practice--Annotated § 555.11

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§ 555.11 Terminology Used in This Chapter

Because of the prevailing use of trust deeds in California and their functional similarity to mortgages [*see § 555.12[4][c]*], this chapter generally uses, for convenience, terminology applicable to trust deeds in reference to both trust deeds and mortgages, except when a distinction is necessary. "Borrower" or "debtor" (instead of "trustor") and "lender" or "creditor" (instead of "beneficiary") may sometimes be used in discussions of authorities that use those terms [*see, e.g., 12 U.S.C. § 1701j-3(a)(2), (d)(5)*-(8)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview

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48-555 California Forms of Pleading and Practice--Annotated § 555.12

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§ 555.12 Mortgage and Trust Deed Compared

[1] Mortgage

[a] Lien of Mortgage

A real property mortgage is a contract by which specified real property (including an estate for years in real property) is hypothecated for the performance of an act, without necessitating a change in possession [*Civ. Code § 2920(a)*; *see Civ. Code § 2920(b)* (for purposes of applying *Civ. Code §§ 2924-2924h* [governing nonjudicial foreclosures], "mortgage" includesany instrument other than trust deed, including real property sale contract, that has power of sale affecting real property)]. It imposes a lien on the property independent of possession, which, in the absence of any contrary agreement, is a special lien that may be enforced only as security for the performance of the particular act or obligation specified in the contract [*Civ. Code § 2923*; *see Civ. Code §§ 2874, 2875*]. The lien of a mortgage involves no passage of title or other incidents of ownership [*Civ. Code §§ 2877, 2888*]. On default by the mortgagor, the mortgagee must first attempt to enforce the lien by a foreclosure action [*see Code Civ. Proc. § 725a et seq.*] or by a private sale (that is, nonjudicial foreclosure) if the mortgage includes a power of sale [*see Civ. Code § 2920 et seq.*].

[b] Equitable Mortgage Distinguished

Some instruments fail to qualify as a legal mortgage or trust deed, such as a promise to give a mortgage or trust deed as security, or a defectively executed trust deed or mortgage. This type of instrument may be declared to be an equitable mortgage in an action brought for that purpose, if the parties intended to create a security interest [*Coast Bank v. Minderhout (1964) 61 Cal. 2d 311, 314, 38 Cal. Rptr. 505, 392 P.2d 265* (overruled on other grounds in *Wellenkamp v. Bank of America (1978) 21 Cal. 3d 943, 953, 148 Cal. Rptr. 379, 582 P.2d 970*)]. For discussion, see *§ 555.23*.

A grant deed absolute on its face, if given solely as security for the performance of a continuing obligation, may

sometimes be referred to as an equitable mortgage [*see, e.g., Aguilar v. Bocci (1974) 39 Cal. App. 3d 475, 477, 114 Cal. Rptr. 91]* , although this type of transfer is actually deemed to be a mortgage by statute [*see Civ. Code §§ 2924(a), 2925*]. For discussion, see *§ 555.22*.

[c] Parties and Form

The mortgage contract involves two parties: the mortgagor, who as owner hypothecates the property, and the mortgagee, who as creditor or obligee receives the lien and is entitled to performance of the secured obligation. The mortgagor is usually the debtor or obligor but occasionally may act as a surety, giving the mortgage to secure the performance of another [*see Bechtel v. Wier (1907) 152 Cal. 443, 444, 93 P. 75]* . The effect of a merger of the interests of the mortgagor and the mortgagee in one person is discussed in *§ 555.18[3]*.

The form of the mortgage contract must generally conform to the formalities required of a grant of real property [*Civ. Code § 2922*]. It may be executed in substantially the form set forth in *Civ. Code § 2948*. For further discussion of the formalities required for effectiveness of a mortgage, see *§ 555.12[2][d][i]*.

[2] Trust Deed

[a] Conveyance of Title to Secure Debt

A trust deed (or deed of trust) is a conveyance of real property to secure payment of a debt [*Hohn v. Riverside County Flood Control etc. Dist. (1964) 228 Cal. App. 2d 605, 611, 39 Cal. Rptr. 647]* , which is usually evidenced by a separate promissory note. Like a mortgage, a trust deed is a contract and is to be interpreted together with the note and any other document that is part of the transaction, such as an agreement of sale [*Huckell v. Matranga (1979) 99 Cal. App. 3d 471, 481, 160 Cal. Rptr. 177]* . Pursuant to this contract, the trustor, usually the debtor, conveys title to a trustee, usually a neutral third party, solely for the purpose of securing the debt owed to the beneficiary, who is the creditor or obligee [*see Huckell v. Matranga (1979) 99 Cal. App. 3d 471, 481, 160 Cal. Rptr. 177* ; *Wasco Creamery etc. Co. v. Coffee (1931) 117 Cal. App. 298, 300-301, 3 P.2d 588]* . The effect of a merger of the interests of the trustor and the beneficiary in one person is discussed in *§ 555.18[3]*.

[b] Distinction From Mortgage Lien

The transfer of title to the trustee, commonly referred to as the title theory of trust deeds, in legal effect distinguishes a trust deed from the lien of a mortgage. This legal distinction is now given little emphasis but does result in a few differences in the treatment given to trust deeds and mortgages [*see Bank of Italy etc. Assn. v. Bentley (1933) 217 Cal. 644, 655, 20 P.2d 940]* . The most significant difference in treatment is that the lapse of the statute of limitations on the principal debt will extinguish a mortgage, including one with a power of sale, while the power of sale in a trust deed is not affected [*Faxon v. All Persons (1913) 166 Cal. 707, 715-717, 137 P. 919* (mortgage); *Carson Redevelopment Agency v. Adam (1982) 136 Cal. App. 3d 608, 610-612, 186 Cal. Rptr. 615* (trust deed)]. This distinction is further discussed in *§ 555.18[4][a]*.

[c] Functional Similarity to Mortgage Lien

Although the title theory of trust deeds is sometimes emphasized [*see* [b], *above*], a trust deed is generally considered to be practically and substantially the same as a mortgage with a power of sale, because the conveyance of legal title to the trustee carries neither possession nor any other incident of ownership except the power to sell the property on default. The trustor is regarded as the legal owner except as to the trustee, and the trustee holds only the title needed to convey the property to a purchaser on the trustor's default [*Bank of Italy etc. Assn. v. Bentley (1933) 217 Cal. 644, 655-656, 20 P.2d 940* ; *Wasco Creamery etc. Co. v. Coffee (1931) 117 Cal. App. 298, 300-301, 3 P.2d 588]* . Because of this functional similarity,a trust deed is often treated like a mortgage lien in spite of the title theory. The same rules that are applied to mortgages are generally applied to trust deeds [*Domarad v. Fisher & Burke, Inc. (1969) 270 Cal. App. 2d*

543, 553, 76 Cal. Rptr. 529] . As a result, mention is often made of the "lien of a trust deed" [*see, e.g., Civ. Code § 882.020(a)*], although technically neither a lien nor a mortgage includes a transfer in trust [*see Civ. Code §§ 2872,* 2924(a)]. This similarity of treatment is illustrated by the following cases:

- The beneficiary of a trust deed secretly executed by a joint tenant contended that when the joint tenant died, the surviving joint tenant took the property subject to the trust deed. The beneficiary argued that, under the title theory of trust deeds, the transfer of title destroyed the joint tenancy's unity of title, converting the interest secured by the trust deed into that of a tenant in common, which survived the tenant's death. However, the court held that the trust deed was analogous to a mortgage lien and did not affect the unity of title, so that the secured interest remained a joint tenancy interest and was extinguished by the trustor's death, leaving no interest to which the trust deed could attach [*Hamel v. Gootkin (1962) 202 Cal. App. 2d 27, 28-30, 20 Cal. Rptr. 372* ; *see People v. Nogarr (1958) 164 Cal. App. 2d 591, 594, 330 P.2d 858* (same rule applied to mortgage)].

- The Supreme Court held that on the default of a trustor, the beneficiary of a trust deed, like the mortgagee of a mortgage, was required first to exhaust the property given as security. At the time, *Code Civ. Proc. § 726* (security-first rule) on its face referred only to mortgages, but the court reasoned that the functional similarity of trust deeds to mortgages justified applying the rule to trust deeds as well, notwithstanding the formal distinction between a trust deed's "title" and a mortgage's "lien" [*Bank of Italy etc. Assn. v. Bentley (1933) 217 Cal. 644, 648-649, 653-658, 20 P.2d 940]* .

[d] Elements

[i] Formalities

The formal elements of a trust deed correspond to those of a mortgage. Although there is no statutory form of trust deed, as there is for a mortgage, the same general requirements as to formalities apply [*see Domarad v. Fisher & Burke, Inc. (1969) 270 Cal. App. 2d 543, 553, 76 Cal. Rptr. 529]* . Both a trust deed and a mortgage must conform to the formalities required of a grant of real property, that is, generally they must be in writing, include a description of the property, and be signed by the trustor or mortgagor [*Civ. Code § 2922*; *see Civ. Code § 1091 et seq.*]. The property description must be sufficient to identify the property [*Sepulveda v. Apablasa (1938) 25 Cal. App. 2d 381, 387, 77 P.2d 526* ; *Scott v. Woodworth (1917) 34 Cal.App. 400, 408-410, 167 P. 543]* . Additionally, there must be sufficient information concerning the obligation secured so as to indicate the extent of the encumbrance [*D'Oyly v. Capp (1893) 99 Cal. 153, 157, 33 P. 736]* . These elements are all present in the statutory form for a mortgage [*Civ. Code § 2948*].

After execution of the trust deed or mortgage, there must be a valid delivery to the beneficiary or mortgagee, before the instrument can be effective [*see Stirton v. Pastor (1960) 177 Cal. App. 2d 232, 234, 2 Cal. Rptr. 135* ; *Hahn v. Hahn (1954) 123 Cal. App. 2d 97, 101, 266 P.2d 519* ; *see also Burns v. Peters (1936) 5 Cal. 2d 619, 623, 55 P.2d 1182* (delivery of trust deed to trustee is not required)].

Acknowledgment and recording are not strictly necessary in order for the trust deed or mortgage to be effective as to the parties and persons with actual notice [*Civ. Code § 1217*]. However, acknowledgment is a prerequisite to recording [*Gov. Code § 27287*], and a trust deed or mortgage that is not recorded will be void as against any subsequent purchaser or lienholder lacking actual notice, whose interest is first recorded [*Civ. Code § 1214*]. For further discussion, see *§ 555.16*.

PRACTICE TIP:

Acknowledgment/Recordation Beats Unrecorded Interests. Acknowledgment and recordation are essentials to preservation of priorities under California's "race notice" scheme. Without them, the parties to an unrecorded trust deed or mortgage will lose to a bona fide purchaser or encumbrancer recording

after the secret lien was created. Observation of these formalities are prerequisites to winning priority contests in "first in time" schemes, such as that adopted in California. *By William M. Hensley*

Acknowledgment and recording may be accomplished in the same manner as a grant of real property [*Civ. Code § 2952*]. Certain additional requirements may apply before a trust deed or mortgage may be recorded. In particular, a trust deed or mortgage with a power of sale must specify the address of the trustor or mortgagor and contain a request by that person for receipt of a copy of any notice of default and a copy of any notice of sale, although failure to include this information does not make the instrument invalid [*Gov. Code § 27321.5(b)*].

[ii] Standard Provisions

Aside from formal requirements, the provisions of trust deeds have generally become standardized by common practice [*see* California Legal Forms, Ch. 25A, *Security Instruments for Real Estate Financing* (Matthew Bender)]. Provisions concerning acceleration of the maturity of the obligation and subordination of priority are discussed in *§ 555.15[3]* and *[4]* and*§ 555.16[4]*. A provision for the right to collect rents and profits is discussed in *§ 555.80* et seq.

The trust deed is commonly a filled-out printed form provided by institutional lenders or title companies, and so it may be construed as a contract of adhesion [*Lomanto v. Bank of America (1972) 22 Cal. App. 3d 663, 668, 99 Cal. Rptr. 442]* . The standardized forms commonly do not contain all of the provisions governing the parties' agreement but instead incorporate many of the standardized provisions by reference to a pro forma trust deed, which contains those provisions and is recorded in each county solely for the purpose of providing constructive notice of the contents [*see Civ. Code § 2952*].

PRACTICE TIP:

Use of Trust Deed Forms in California. Care must be taken to use trust deeds that are catered to peculiarities of California real estate law. Many out-of-state lenders use mortgage forms that do not contain, for example, surety and *Gradsky* waivers. This lack of attention (if not downright sloppiness) can lead to catastrophic results for the unsuspecting lender that does not draft clauses that properly surmount California pro-borrower protections. *By William M. Hensley*

[iii] Status of Trustee

One element of a trust deed different from a mortgage is the addition to the transaction of a third party, the trustee. The status of the trustee is not that of a trustee in the strict sense but is that of a common agent of the trustor and beneficiary [*Lupertino v. Carbahal (1973) 35 Cal. App. 3d 742, 747, 111 Cal. Rptr. 112]* . The trustee's obligations and liabilities are determined by ordinary principles of agency [*Kerivan v. Title Ins. & Trust Co. (1983) 147 Cal. App. 3d 225, 229, 195 Cal. Rptr. 53]* . For further discussion of agency principles generally, see Ch. 427, *Principal and Agent* .

The trustee may be the same person as the beneficiary [*Bank of America Nat'l Trust & Sav. Asso. v. Century Land & Water Co., (1937) 19 Cal. App. 2d 194, 196, 65 P.2d 109]* , but if this arrangement is made in the initial transaction, the instrument may be construed as a mortgage with a power of sale, under the rule that any doubt as to whether an instrument is a trust deed or mortgage should be resolved in favor of a mortgage with a power of sale [*Banta v. Wise (1901) 135 Cal. 277, 280, 67 P. 129* ; *Godfrey v. Monroe (1894) 101 Cal. 224, 226, 227-228, 35 P. 761* ; *see Civ. Code § 2924(a)* (every transfer made as security, other than in trust, is to be deemed mortgage)].

The trustee is not the trustee of an express trust [*Monterey S.P. Partnership v. W.L. Bangham, Inc. (1989) 49 Cal. 3d 454, 462, 261 Cal. Rptr. 587, 777 P.2d 623* ; *see Code Civ. Proc. § 369(a)*], and service of process on thetrustee does not constitute service on the beneficiary or obligate the trustee to notify the beneficiary [*Monterey S.P. Partnership v. W.L. Bangham, Inc. (1989) 49 Cal. 3d 454, 462, 261 Cal. Rptr. 587, 777 P.2d 623* ; *see Civ. Code § 2937.7*]. The trustee is not acting as a fiduciary in conducting a foreclosure sale [*Hatch v. Collins (1990) 225 Cal. App. 3d 1104,*

1112-1113, 275 Cal. Rptr. 476] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsEquitable MortgagesReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's Interests

California Forms of Pleading and Practice--Annotated

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. LEGAL BACKGROUND
A. Characteristics of Trust Deeds and Mortgages

48-555 California Forms of Pleading and Practice--Annotated § 555.13

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§ 555.13 Property Interest Encumbered

[1] Nature of Interest

Any interest in real property that is capable of being transferred may be mortgaged [*Civ. Code § 2947*; *see, e.g., Tripler v. MacDonald Lumber Co. (1916) 173 Cal. 144, 147, 159 P. 591* (interest of purchaser under installment land sale contract)]. The parties may even create, by express agreement, a mortgage lien on real property not yet acquired by the person giving the lien, in which case the lien attaches if and when the person giving the lien subsequently acquires an interest in the property, to the extent of that interest [*Civ. Code § 2883(a)*; *see Hosford v. Henry (1951) 107 Cal. App. 2d 765, 774, 238 P.2d 91* ; *but see Civ. Code § 2883(b)* (beneficiary of estate subject to administration may agree to create lien on undistributed property in estate but cannot thus create actual lien until property is distributed to that beneficiary)]. As a practical matter, however, the property interest provided as security will be some form of present legal ownership, because a trust deed, which by nature requires a transfer of title, is the more commonly used real property security device in California [*see, e.g., Caito v. United California Bank (1978) 20 Cal. 3d 694, 701, 144 Cal. Rptr. 751, 576 P.2d 466* (cotenant's ownership interest was security under trust deed)].

[2] After-Acquired or Reacquired Title

Title acquired by the trustor after execution of the trust deed inures to the beneficiary as security in the same manner as if it had been acquired before the execution [*Civ. Code § 2930*; *Barberi v. Rothchild (1936) 7 Cal. 2d 537, 538-540, 61 P.2d 760]* . If a trustor does not have title at the time he or she purports to transfer it under a trust deed but later acquires it during the life of the trust deed, the trust deed is deemed valid and enforceable on the theory that the trustor is estopped from denying title [*Perego v. Seltzer (1968) 260 Cal. App. 2d 825, 828-829, 67 Cal. Rptr. 636* ; *cf. Hawkins v. Harlan (1885) 68 Cal. 236, 237-238, 9 P. 108* (holding that this rule would not be given effect when it would result in manifest injustice)].

The rule of *Civ. Code § 2930* also applies when title lost through foreclosure is subsequently reacquired by the trustor, either directly as the purchaser at the foreclosure sale or indirectly as a grantee of the purchaser. The effect of the rule in these cases is to revive any junior trust deeds or mortgages that would ordinarily have been extinguished by the foreclosure of the senior lien [*Barberi v. Rothchild (1936) 7 Cal. 2d 537, 538-540, 61 P.2d 760* (junior trust deed revived); *DMC, Inc. v. Downey Savings & Loan Assn. (2002) 99 Cal. App. 4th 190, 198-199, 120 Cal. Rptr. 2d 761* (junior trust deed revived but remains second to new purchase-money deed of trust); *Jensen v. Duke (1925) 71 Cal. App. 210, 211-212, 234 P. 876* (junior mortgage revived); *see § 555.18[5]*].

[3] Fixtures and Personal Property

Personal property placed on encumbered real property so as to constitute a fixture or permanent improvement becomes a part of the encumbered real property, even if it became affixed after the creation of the trust deed [*see Harper v. Buckles (1937) 19 Cal. App. 2d 481, 484-485, 65 P.2d 947* ; *see also Civ. Code §§ 658-660* (fixture is part of real property)]. The lien thus imposed on fixtures as part of the encumbered real property may be subordinate to or otherwise affected by other liens on the fixtures perfected under the Commercial Code [*see Com. Code § 9301 et seq.*]. The trust deed itself may, however, expressly create and perfect a lien on fixtures under these same provisions [*see Com. Code § 9502(c)*]. For further discussion of the operation and effect of these provisions, see Ch. 503, *Sales: Secured Transactions* .

If a fixture is severed, it becomes personal property and is no longer included as part of the encumbered real property. In this event, the beneficiary may bring an action either to enjoin the severance or, after severance, to recover damages for impairment of the security [*Stowell v. Waddingham (1893) 100 Cal. 7, 9-10, 34 P. 436* ; *Lavenson v. Standard Soap Co. (1889) 80 Cal. 245, 246-248, 22 P. 184]* .

Personal property not affixed to the encumbered real property may be included as part of the security under the provisions of the trust deed, and this provision is valid as between the parties [*McLeod v. Barnum (1901) 131 Cal. 605, 606-607, 63 P. 924* ; *Hosford v. Henry (1951) 107 Cal. App. 2d 765, 773-774, 238 P.2d 91]* . The better practice, however, is to draft a separate security agreement for any personal property, in compliance with the requirements applicable to personal property security interests [*see Com. Code § 9101 et seq.*; *Freedland v. Greco (1955) 45 Cal. 2d 462, 466, 289 P.2d 463]* . For further discussion of the operation and effect of these requirements, see Ch. 503, *Sales: Secured Transactions* .

PRACTICE TIP:

Follow Unified Sale Dictates. For commercial properties such as hotels, it is possible to conduct a unified sale of real and personal property without adverse repercussions if the dictates of 9601 et seq. are followed properly. *By William M. Hensley*

[4] Transfer of Encumbered Property

[a] In General

A trustor or successor is free to convey or otherwise transfer property previously provided as security under a trust deed [*Moss v. Minor Properties, Inc. (1968) 262 Cal. App. 2d 847, 855, 69 Cal. Rptr. 341* ; *see § 555.15[4]* for discussion of the effect of due-on-sale clauses]. The transfer is subject to the prior trust deed, so that the property continues to be security for the performance of the trustor's obligation, but the transferee has no personal liability for that obligation in the absence of an assumption agreement [*Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 596-597, 125 Cal. Rptr. 557, 542 P.2d 981]* .

The trustor's personal liability, if any, to satisfy any possible deficiency is unaffected by the transfer. If the transferee does not assume the obligation but merely takes the property subject to the trust deed, the trustor remains liable as a surety for the property itself, thus becoming the principal debtor [*Braun v. Crew (1920) 183 Cal. 728, 731, 192 P.*

531] . If the transferee assumes the obligation, the trustor remains as a surety for the transferee, who assumes the role of principal debtor [*Birkhofer v. Krumm (1935) 4 Cal. App. 2d 43, 50, 40 P.2d 553]* .

[b] Manner and Effect of Assumption

A transferee assumes the secured obligation by agreeing in writing to assume it [*Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 596-597, 125 Cal. Rptr. 557, 542 P.2d 981* ; *Everts v. Matteson (1942) 21 Cal. 2d 437, 448, 132 P.2d 476* ; *see Civ. Code § 1624(a)(7)*]. A mere recitation that the transferee takes the property subject to the trust deed is not an effective assumption [*Snidow v. Hill (1948) 87 Cal. App. 2d 803, 807, 197 P.2d 801]* . Moreover, an assumption agreement is collateral to the transfer itself, and a transferee may not be bound by an assumption provision inserted in a deed without the transferee's knowledge or consent [*Fishback v. J.C. Forkner Fig Gardens (1934) 137 Cal. App. 211, 215-219, 30 P.2d 586]* .

An assuming transferee is estopped to deny the validity of the trust deed [*Harris v. Whittier Bldg. & Loan Asso. (1936) 18 Cal. App. 2d 260, 267, 63 P.2d 840]* and becomes personally liable for any deficiency [*Braun v. Crew (1920) 183 Cal. 728, 731, 192 P. 531]* . However, when the assumption agreement is made with the trustor or a successor, it is not enforceable by the beneficiary and does not give rise to personal liability on the part of the transferee when the trustor has no personal liability [*Ward v. De Oca (1898) 120 Cal. 102, 104-105, 52 P. 130* ; *Dail v. Campbell (1961) 191 Cal. App. 2d 416, 421, 12 Cal. Rptr. 739]* .

On assumption, a relation of principal and surety arises between the transferee and trustor, so that the transferee becomes personally liable as the principal debtor while the trustor becomes personally liable as surety for the transferee [*Braun v. Crew (1920) 183 Cal. 728, 731, 192 P. 531* ; *Birkhofer v. Krumm (1935) 4 Cal. App. 2d 43, 50, 40 P.2d 553]* . From the beneficiary's standpoint, both the trustor and the transferee are sureties for any deficiency [*Birkhofer v. Krumm (1935) 4 Cal. App. 2d 43, 50, 40 P.2d 553]* . Nonetheless, after learning of an assumption, the beneficiary must recognize the suretyship arising between the trustor and the transferee and respect the rights arising under the law of suretyship [*Everts v. Matteson (1942) 21 Cal. 2d 437, 447-448, 132 P.2d 476]* .

PRACTICE TIP:

Difficulties of Proving Assumption Defenses. Many borrowers misperceive the scope of an assumption agreement, frequently believing it "exonerates" them from further exposure under the loan documents. This is not necessarily so, unless the lender expressly releases the assignor from liability. These novation theories, in the absence of a release, are difficult to prove, because novation must be established through an elevated "clear and convincing" evidentiary standard [*see Alexander v. Angel (1951) 37 Cal. 2d 856, 860-861, 236 P. 2d 561]* . Furthermore, should the Resolution Trust Corporation or its assignees be involved, the novation theories would be barred under the *D'Oench, Duhme* doctrine [*see RTC Mortgage Trust v. Shlens (1998) 62 Cal. App. 4th 304, 326, 72 Cal. Rptr. 2d 581]* . Assumption theories must be predicated on ponderable evidence of significance and, further, only work against certain private lenders not purchasing from the RTC or FDIC. *By William M. Hensley*

Under suretyship law [*see Civ. Code § 2787 et seq.*], for example, a trustor as surety, may, in the event of a deficiency, require the beneficiary (creditor) first to proceed against the assuming transferee (debtor) [*Civ. Code § 2845*; *see Hamburger v. Ellingson (1934) 139 Cal. App. 311, 313-315, 33 P.2d 850]* . Also, if the beneficiary grants a partial release of the security without the consent of the trustor, the trustor's personal liability is proportionally reduced under suretyship principles [*Civ. Code §§ 2822, 2849*; *Woodward v. Brown (1897) 119 Cal. 283, 292-295, 51 P. 542* ; *cf. Thompson v. Thomas (1919) 43 Cal. App. 588, 590, 185 P. 427* (surety's liability was not reduced when security instrument expressly provided for partial release)]. For further discussion of suretyship principles generally, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[5] Insurance of Encumbered Property

Trust deeds commonly include provisions requiring that the trustor maintain adequate insurance coverage of the property interest [*see § 555.15[2][a]*].

If the beneficiary or trustee is entitled to receive and control the disbursement of insurance proceeds, that right is enforceable regardless of whether the security interest is actually impaired as a result of the event that caused the proceeds of the policy to become payable [*Civ. Code § 2924.7(b)*; *see* Stats. 1988, ch. 179, § 3 (legislative intent that this provision abrogates contrary decisions)]. A beneficiary may not, however, prohibit the use of insurance proceeds for restoring the property in the absence of evidence that the security interest has been impaired [*Schoolcraft v. Ross (1978) 81 Cal. App. 3d 75, 80-81, 146 Cal. Rptr. 57* ; *see* Stats. 1988, ch. 179, § 3]. On the other hand, if a trustor is in long-standing default when an event occurs that causes the policy proceeds to become payable, the trustor may not insist that the proceeds be used to restore the property. That would impair the beneficiary's security by delaying the beneficiary's right to foreclose because of the default [*see Ford v. Manufacturers Hanover Mortgage Corporation (9th Cir. 1987) 831 F.2d 1520, 1524]* .

PRACTICE TIP:

Earthquake Insurance Proceeds. Deposition of proceeds can be important for lenders of properties involved in earthquakes when borrowers also carry earthquake insurance. Whether the trust deed beneficiary can lay claim to the earthquake insurance proceeds depends on the wording of the germane deed of trust. Specifically, the trust deed must require earthquake insurance and direct the application of insurance proceeds towards repair of the property. Merely designating the lender as a loss payee under the insurance policy does not substitute for precise entitlement language in the trust deed [*see Ziello v. Superior Court (1995) 36 Cal. App. 4th 321, 329-331, 42 Cal. Rptr. 2d 251]* . However, a deed of trust that does not require the homeowner to obtain earthquake insurance but provides that if such insurance is obtained the lender must be named loss payee and has the right to control or direct the proceeds is fully enforceable [*Martin v. World Savings and Loan Assn. (2001) 92 Cal. App. 4th 803, 809, 112 Cal. Rptr. 2d 225]* . Careful drafting of the trust deed on insurance proceed disposition issues is imperative for the lender desiring to protect its security from natural calamities. *By William M. Hensley*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsAfter-Acquired PropertyReal Property LawFinancingMortgages & Other Security InstrumentsTransfersAssignments by MortgagorsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersAssumptionsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersTransfers by MortgageesReal Property LawFixtures & ImprovementsSecurity Interests

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. LEGAL BACKGROUND
A. Characteristics of Trust Deeds and Mortgages

48-555 California Forms of Pleading and Practice--Annotated § 555.14

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§ 555.14 Obligation Secured

[1] Necessity for and Nature of Obligation

Because a trust deed is merely incidental to the obligation secured [*see Civ. Code § 2909*; *Prob. Code § 15407(a)(2)*], it is valid and enforceable only to the extent that the underlying obligation exists [*Turner v. Gosden (1932) 121 Cal. App. 20, 22, 8 P.2d 505]* . An obligation is essential even though no one need be personally obligated to perform it [*Shelley v. Byers (1925) 73 Cal. App. 44, 58-59, 238 P. 177* ; *see Civ. Code §§ 2890, 2928*]. A trust deed is extinguished by discharge of the underlying obligation [*see § 555.18[1]*].

If there is any inconsistency in the terms of the obligation evidenced by a note and the terms of a trust deed securing the obligation, the terms of the note are controlling [*Pacific Fruit Exchange v. Duke (1930) 103 Cal. App. 340, 345, 284 P. 729]* . Similarly, consideration must support the obligation before the trust deed may be enforced [*Coon v. Shry (1930) 209 Cal. 612, 614-615, 289 P. 815]* , but no further consideration need be given for the trust deed itself [*see Carson v. Reid (1902) 137 Cal. 253, 253-257, 70 P. 89]* .

There are no limitations on the form or character of a secured obligation, as long as it exists. For example, it need not be evidenced by a separate writing [*Todd v. Todd (1912) 164 Cal. 255, 258, 128 P. 413]* , as long as the trust deed refers to it sufficiently to ascertain its extent [*D'Oyly v. Capp (1893) 99 Cal. 153, 157, 33 P. 736]* . In addition, several different obligations may be secured by a single trust deed [*see Hocker v. Reas (1861) 18 Cal. 650, 653]* , or one obligation may be secured by more than one trust deed [*see Security Loan etc. Co. v. Mattern (1901) 131 Cal. 326, 330-331, 63 P. 482]* . The character of the obligation is not limited and may be the performance of any act [*Civ. Code §§ 2872, 2920(a)*; *see, e.g., Stub v. Belmont (1942) 20 Cal. 2d 208, 213, 124 P.2d 826* (obligation was service contract)]. However, most secured obligations are money debts evidenced by a promissory note, and as a practical matter there is little point in securing an obligation if it cannot readily be liquidated for the purpose of applying the

proceeds from a sale of the security.

[2] Usurious Loan

If the secured obligation is a debt, and the terms of the loan are in violation of the usury law, usurious interest cannot be collected, but the debt remains valid and enforceable under the trust deed [*Winnett v. Roberts (1986) 179 Cal. App. 3d 909, 921, 225 Cal. Rptr. 82* ; *Harris v. Gallant (1960) 183 Cal. App. 2d 94, 99-100, 6 Cal. Rptr. 630]* . For discussion of what constitutes usury by a lender, see Ch. 568, *Usury* .

[3] Loan Secured by Dragnet or Future Advance Clause

[a] In General

A trust deed does not secure any prior or subsequent debts owed by the trustor to the beneficiary, in the absence of some express provision to the contrary in the trust deed [*see Civ. Code §§ 2874, 2875, 2891, 2923*]. The standardized trust deeds of most lending institutions include so-called dragnet clauses and future-advance clauses, for the purpose of securing unspecified debts in addition to the specified debt. A dragnet clause, in broad language, secures all other debts owed by the trustor to the beneficiary, regardless of when they arise. A future-advance clause, usually included in a dragnet clause, secures other debts owed by the trustor to the beneficiary arising after the execution of the trust deed [*see Wong v. Beneficial Sav. & Loan Asso. (1976) 56 Cal. App. 3d 286, 292, 128 Cal. Rptr. 338]* .

Future-advance and dragnet clauses are valid in California [*Union Bank v. Wendland (1976) 54 Cal. App. 3d 393, 398, 126 Cal. Rptr. 549]* . However, it is a question of fact in each case, whether a dragnet clause or future-advance clause will be construed to secure a particular unspecified debt [*see Lomanto v. Bank of America (1972) 22 Cal. App. 3d 663, 670, 99 Cal. Rptr. 442]* . The courts will construe the clause in accordance with the parties' actual intent rather than its literal wording, and the proponent has the burden of showing that both parties intended the unspecified debt to be secured under the clause [*Wong v. Beneficial Sav. & Loan Asso. (1976) 56 Cal. App. 3d 286, 293-294, 128 Cal. Rptr. 338]* .

In the absence of expressed intent, two recognized tests or considerations will help determine the reasonable intent of the parties: (1) whether the unspecified debt bears a relationship to the specified debt; and (2) whether the unspecified debt was made in reliance on the security [*Wong v. Beneficial Sav. & Loan Asso. (1976) 56 Cal. App. 3d 286, 295-296, 128 Cal. Rptr. 338]* . Under the first test, if the unspecified and specified debts are similar in nature or have some close connection, such as two debts for home improvement, the requisite intent may be inferred, whereas the absence of similarity or a connection, such as with a home improvement loan and a business loan, indicates a lack of requisite intent [*Wong v. Beneficial Sav. & Loan Asso. (1976) 56 Cal. App. 3d 286, 295-296, 128 Cal. Rptr. 338* ; *Union Bank v. Wendland (1976) 54 Cal. App. 3d 393, 404, 126 Cal. Rptr. 549]* . Under the second test, if the unspecified debt is expressly secured by a different security, there is an inference that the parties did not intend that it also be secured by the security provided for the specified debt [*Wong v. Beneficial Sav. & Loan Asso. (1976) 56 Cal. App. 3d 286, 296, 128 Cal. Rptr. 338* ; *Union Bank v. Wendland (1976) 54 Cal. App. 3d 393, 404-405, 126 Cal. Rptr. 549]* .

[b] Pre-existing or Concurrent Debts

In view of the relationship test and reliance test for ascertaining the parties' unexpressed intent [*see* [a], *above*], a pre-existing debt is arguably not secured under a trust deed expressly securing another debt, when the pre-existing debt is not itself specified in the trust deed. Even if there is a close relation between the unspecified debt and the specified debt, there can be no reliance on the security, because the loan was made before the security. Moreover, failure to specify the pre-existing debt together with the specified debt, in spite of the ease of doing so, is strong evidence of an intent that the unspecified debt not be covered [*see Wong v. Beneficial Sav. & Loan Asso. (1976) 56 Cal. App. 3d 286, 293-294, 128 Cal. Rptr. 338]* .

For example, in one case a trust deed including a dragnet clause was given by three trustors who owned the property as tenants in common. At the time the trust deed was executed, one of the trustors was in default on a pre-existing unsecured personal debt, of which the other trustors were unaware. The court held that the pre-existing debt was not secured by the property interests of the trustors who were unaware of its existence [*Gates v. Crocker-Anglo Nat. Bk. (1968) 257 Cal. App. 2d 857, 858, 860-861, 65 Cal. Rptr. 536]* . Among the determining factors was the failure to discuss the pre-existing debt or specify it in the trust deed [*Gates v. Crocker-Anglo Nat. Bk. (1968) 257 Cal. App. 2d 857, 859-860, 861, 65 Cal. Rptr. 536]* .

Another case involved the effect of a dragnet clause on unspecified debts incurred concurrently with the specified debt. The trustor borrowed money to build an apartment complex. For financing reasons the trustor subdivided the property into eight parcels, executed eight separate notes, and then secured each note with a trust deed containing a dragnet clause. The literal effect of the clauses was to make each trust deed security for all eight notes and to secure each debt with all eight trust deeds [*Wong v. Beneficial Sav. & Loan Asso. (1976) 56 Cal. App. 3d 286, 288-289, 292, 128 Cal. Rptr. 338]* . The court held that the clauses did create that result because of the close relation of each debt to the others, all of which were incurred separately only for financing purposes and in fact constituted a single debt for a single purpose. The relation was so strong that it showed true reliance, even though each note technically stated that it was made in reliance on the security of only one of the eight parcels [*Wong v. Beneficial Sav. & Loan Asso. (1976) 56 Cal. App. 3d 286, 296-297, 128 Cal. Rptr. 338]* .

[c] Subsequent Loan or Future Advance

Future-advance clauses have been held to secure unspecified subsequent debts, even if there was no specified covered debt at the time the trust deed was executed [*Moss v. Odell (1901) 134 Cal. 464, 466, 66 P. 581* ; *see Civ. Code § 2884*], or if the future advances are to be made only at the discretion of the beneficiary [*Langerman v. Puritan Dining Room Co. (1913) 21 Cal. App. 637, 647, 132 P. 617]* . No limit to the number or amount of future advances need be specified, as long as the trust deed provides that it is for future advances [*Imhoff v. Title Ins. & Trust Co. (1952) 113 Cal. App. 2d 139, 144, 247 P.2d 851]* . If, however, some limitation is specified, a future advance that does not come within the express limitation is not secured [*see* *Keese v. Beardsley (1923) 190 Cal. 465, 470, 213 P. 500* (mortgage secured future advances only if made before certain date)].

An unspecified subsequent debt will not be secured by a future-advance clause unless that was the intent of the parties, as determined by the relationship test and reliance test [*see* [a], *above*]. For example, promissory notes subsequently executed by the trustor in favor of a third person and later bought up by the beneficiary were not covered by the security because they lacked a relation to the specified debt sufficient to infer an intent that they would be secured [*Moran v. Gardemeyer (1889) 82 Cal. 96, 100-101, 23 P. 6* ; *see* *Union Bank v. Wendland (1976) 54 Cal. App. 3d 393, 404, 126 Cal. Rptr. 549]* . Similarly, a subsequent loan that was expressly made in reliance on different security was not covered because it was evident that the loan was not made in reliance on the security provided for the specified debt [*Moran v. Gardemeyer (1889) 82 Cal. 102, 103-104, 23 P. 8* ; *see* *Union Bank v. Wendland (1976) 54 Cal. App. 3d 393, 404-405, 126 Cal. Rptr. 549* ; *but see* *Wong v. Beneficial Sav. & Loan Asso. (1976) 56 Cal. App. 3d 286, 296-297, 128 Cal. Rptr. 338* ; [b], *above*]. On the other hand, a subsequent loan was held to be secured by a future-advance clause when it was used in part to pay off the specified debt, showing a sufficient relation to that loan, and when it was actually, if not technically, made in reliance on the same security [*Union Bank v. Wendland (1976) 54 Cal. App. 3d 393, 405, 126 Cal. Rptr. 549]* .

A subsequent loan covered by a future-advance clause has the same priority as the trust deed itself if the subsequent loan was obligatory rather than optional on the part of the beneficiary. However, if the subsequent loan was not obligatory, it is subordinate to any intervening lien, if at the time of making the subsequent loan, the beneficiary had been given actual notice of the existence of the junior lien [*Pike v. Tuttle (1971) 18 Cal. App. 3d 746, 751, 96 Cal. Rptr. 403* ; *see, e.g.,* *Garcia v. Atmajian (1980) 113 Cal. App. 3d 516, 520-521, 169 Cal. Rptr. 845* (subsequent loan

was subordinate to intervening lien of purchaser under land sale contract actually known to beneficiary)]. For further discussion of priorities, see *§ 555.16*.

[4] Statutory Regulation of Loans

The terms for financing a loan secured by a trust deed, whether contained in the trust deed or in the note evidencing the debt, are regulated by state and federal laws. For example, statutes regulate the terms of variable-interest loans and adjustable-rate or renegotiable-rate loans [*Civ. Code §§ 1916.5-1916.12*]. These typically provide for certain limitations on the terms set by the lender and also require certain disclosures to the borrower, to be included in the trust deed and note [*see, e.g., Civ. Code § 1916.5(a)*]. A violation of the requirements of *Civ. Code §§ 1916.5-1916.9* does not itself invalidate the lien of a mortgage or trust deed [*Civ. Code § 1916.11*]. However, violation of those provisions could have some effect on any other remedies or defenses available to the borrower [*see Civ. Code § 1916.11*].

Another statutory regulation is *Civ. Code § 2948.5*, which provides that a borrower may not be required to pay interest on a note secured by a mortgage or trust deed on real property improved with one to four residential dwelling units for a period in excess of one day before recording of the mortgage or trust deed if the loan proceeds are paid into escrow, or if there is no escrow, the date on which the loan proceeds have been made available for withdrawal as a matter of right [*Civ. Code § 2948.5(a)*; *see Ins. Code § 12413.1(d)* (withdrawal as matter of right)]. Interest may commence to accrue on the business day immediately preceding the day of recording if both of the following occur [*Civ. Code § 2948.5(b)*]:

- The borrower affirmatively requests, and the lender agrees, that the recording will occur on Monday, or on a day immediately following a bank holiday; and

- The borrower receives disclosure information concerning the amount of additional per diem interest charged to facilitate recording on Monday or the day following a holiday, as the case may be, and stating that it may be possible to avoid the additional per diem interest charge by recording the deed of trust on a day immediately following a business day, and the borrower acknowledges receipt of this information by signing a copy of the disclosure document before placing funds in escrow.

In any case, these provisions do not apply to loans made or negotiated by real estate brokers that are subject to *Bus. & Prof. Code § 10242(c)*, which prohibits charging interest until the date the proceeds of the loan are made available to the lender or are deposited in escrow [*Civ. Code § 2948.5(c)*].

The California Residential Mortgage Lending Act [*Fin. Code § 50000 et seq.*] governs specified persons engaged in the business of making or servicing residential mortgage loans in California. For discussion, see *§ 555.21*. In addition, various requirements are imposed on certain loans with an original balance not exceeding $250,000 [*Fin. Code § 4970 et seq.*]. For discussion of these loans and the requirements applicable to them, see *§ 555.21A*.

Some other pertinent statutes regulating certain terms of secured real property loans and possibly affecting a borrower's remedies or defenses include provisions applicable to:

- Shared-appreciation loans entered into before 1990 [*Civ. Code § 1917.010 et seq.*].

- Changeable-rate mortgage instruments [*Civ. Code §§ 1920, 1921*].

- Balloon-payment loans [*Civ. Code § 2924i*; *see Civ. Code § 2966*].

- Loans made or negotiated by real estate brokers [*Bus. & Prof. Code § 10240 et seq.*].

- Due-on-sale or due-on-encumbrance clauses [*12 U.S.C. § 1701j-3*; *Civ. Code §§ 2924.5, 2924.6,*

2949, 2954.10; for further discussion, see *§ 555.15[4]*].

- Impound account clauses [*Civ. Code § 2954(a)*; *see Civ. Code §§ 2954.1, 2954.8, 2955*].

- Late-payme nt charge clauses [*Civ. Code §§ 2954.4, 2954.5*].

- Prepayment charge clauses [*Civ. Code §§ 2954.9, 2954.10*].

- Disclosure statements [*Civ. Code § 2956 et seq.*; *see 12 U.S.C. § 2601* (Real Estate Settlement Procedures Act); *15 U.S.C. § 1604* (Truth in Lending Act); *Bus. & Prof. Code §§ 10232.4, 10232.5, 10240* (real estate brokers); *Civ. Code §§ 2970, 2971* (home equity loans); *Corp. Code § 25110* (sale of securities)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionReal Estate Settlement ProceduresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsAdjustable Rate MortgagesReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawFinancingUsury

California Forms of Pleading and Practice--Annotated

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. LEGAL BACKGROUND
A. Characteristics of Trust Deeds and Mortgages

48-555 California Forms of Pleading and Practice--Annotated § 555.15

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§ 555.15 Modification of Agreement

[1] Assignment of Debt

[a] In General

Because a trust deed is incidental to the debt that it secures, assignment of the debt carries with it the security [*Civ. Code § 2936*; *Domarad v. Fisher & Burke, Inc. (1969) 270 Cal. App. 2d 543, 553, 76 Cal. Rptr. 529]* . Assignment of a secured debt operates also as an assignment of the benefit of the trust deed without further assignment [*Lewis v. Booth (1935) 3 Cal. 2d 345, 349, 44 P.2d 560]* . Conversely, the trust deed cannot be assigned without also transferring the debt secured, and any attempt to do so is ineffective [*Domarad v. Fisher & Burke, Inc. (1969) 270 Cal. App. 2d 543, 553-554, 76 Cal. Rptr. 529]* .

An assignment of a debt secured by a trust deed constitutes a valid transfer of the beneficial interest in the security even when, at the time of the assignment, an action on the debt is barred by the statute of limitations [*Hohn v. Riverside County Flood Control etc. Dist. (1964) 228 Cal. App. 2d 605, 615, 39 Cal. Rptr. 647]* . When a trust deed secures two or more debts, an assignment of the debts, in the absence of any special agreement, transfers to each assignee a pro rata portion of the beneficial interest in the security [*Redman v. Purrington (1884) 65 Cal. 271, 272, 3 P. 883]* . The assignor of several debts secured by a single trust deed is entitled to fix by agreement the extent or priority of each assignee's interest in the security [*Grattan v. Wiggins (1863) 23 Cal. 16, 30]* .

By assignment of a debt secured by a trust deed, the assignor transfers to the assignee all rights to demand and enforce payment of the debt [*McCown v. Spencer (1970) 8 Cal. App. 3d 216, 225, 87 Cal. Rptr. 213]* . Only the assignee (not the assignor) may effectively foreclose under the trust deed [*Santens v. Los Angeles Finance Co. (1949) 91 Cal. App. 2d 197, 202, 204 P.2d 619]* .

For further discussion of assignments generally, see Ch. 60, *Assignments* .

[b] Position of Assignee

The position of the assignee of a promissory note depends on the negotiability of the note. An assignee that is a good faith purchaser of a negotiable note (a holder in due course), takes the note and the security free and clear of almost all claims and defenses that might have been asserted against the original holder of the note, including lack of consideration [*Gribble v. Mauerhan (1961) 188 Cal. App. 2d 221, 225, 10 Cal. Rptr. 296* ; *Hayward Lbr. & Inv. Co. v. Naslund (1932) 125 Cal. App. 34, 38-41, 13 P.2d 775* ; *see Com. Code § 3305*]. On the other hand, a good faith assignee of a nonnegotiable note takes the note and security subject to all claims and defenses that might otherwise be asserted [*San Jose Ranch Co. v. San Jose L. & W. Co. (1901) 132 Cal. 582, 584, 64 P. 1097]* . For discussion of negotiability, see Ch. 385, *Negotiable Instruments* .

[c] Recordation of Assignment

An assignment of a note and trust deed may be recorded. The record provides constructive notice of its contents to all persons [*Civ. Code § 2934*]. However, recordation does not itself provide notice to the trustor or other obligor under the note, so as to invalidate any payment made to the holder of the note [*Civ. Code § 2935*]. If, after recordation of the assignment, the trustor has no actual notice and makes payment to the assigning beneficiary still in possession of the note, the payment is binding on the assignee [*Rodgers v. Parker (1902) 136 Cal. 313, 316, 68 P. 975* ; *Title Ins. etc. Co. v. Kuchenbeiser (1912) 20 Cal. App. 11, 12-13, 127 P. 1039]* . On the other hand, if the assigning beneficiary no longer has possession of the note (and is not acting as the assignee's agent) after the assignment has been recorded, payment to the assignor is made at the risk of the trustor and is not binding on the assignee [*Rodgers v. Peckham (1898) 120 Cal. 238, 242, 52 P. 483]* .

When a secured note is fraudulently assigned to two innocent assignees, the assignee first in time generally, all things being equal, has priority over the second assignee. But if the first assignee has neglected to record the assignment before the fraudulent second assignment, causing the second assignee to take the note and security as a good faith purchaser without actual or constructive notice of the first assignment, the interest of the second assignee will be deemed prior to that of the first assignee, by whose negligence the fraud occurred [*Security Mortgage Co. v. Delfs (1920) 47 Cal. App. 599, 602-604, 191 P. 53* ; *see Domarad v. Fisher & Burke, Inc. (1969) 270 Cal. App. 2d 543, 554-558, 76 Cal. Rptr. 529]* .

[2] Extension or Renewal

[a] In General

The parties may agree to an extension of the maturity date of the obligation for an additional period or agree to a renewal of a secured obligation, substituting a new obligation by the execution of a new instrument [*Morello v. Metzenbaum (1944) 25 Cal. 2d 494, 499-500, 154 P.2d 670]* . An extension or renewal agreement must be evidenced by a writing executed with the same formalities required in a grant of real property [*Civ. Code § 2922*; *see Code Civ. Proc. § 360*]. Generally, the formal requirements are met if there is an acknowledgment of the debt signed by the trustor or mortgagor as the party to be charged [*Easton v. Ash (1941) 18 Cal. 2d 530, 536-537, 116 P.2d 433* ; *General v. Anthony (1940) 38 Cal. App. 2d 321, 323-324, 100 P.2d 1087* ; *but see Schwartz v. Edmunds (1937) 20 Cal. App. 2d 530, 532, 67 P.2d 351* (extension valid when signed only by mortgagee)]. A valid agreement may also be signed by the transferee of the trustor or mortgagor even though the transferee has not assumed personal liability for the obligation [*Curtis v. Holee (1921) 184 Cal. 726, 729-730, 195 P. 395* ; *Miller v. Roach (1936) 15 Cal. App. 2d 427, 431, 59 P.2d 418]* . When this is done without the consent of the trustor or mortgagor, however, any continuing personal liability of the latter is discharged [*Miller v. Roach (1936) 15 Cal. App. 2d 427, 432, 59 P.2d 418]* . For further discussion of principles relating to assumption or nonassumption, see *§ 555.13[4][b]*.

In addition to the formalities, new consideration is required [*Braun v. Crew (1920) 183 Cal. 728, 734, 192 P. 531]* . However, this requirement is easily met by a promise to pay the pre-existing obligation after it is barred by the statute of limitations, or by the mutual promises of the parties before it is barred [*see, e.g.,* *Easton v. Ash (1941) 18 Cal. 2d 530, 534-535, 116 P.2d 433* ; *Miller v. Roach (1936) 15 Cal. App. 2d 427, 431, 59 P.2d 418]* .

A valid agreement stops the running of the statute of limitations against the obligation for the period of the extension [*Code Civ. Proc. § 360*]. Without the extension, the statute begins to run anew each time a partial payment is made before the expiration of the limitation period [*Code Civ. Proc. § 360*; *see Code Civ. Proc. § 360.5* (permitting written waivers of defense that statute of limitations has run, effective for four-year periods)].

[b] Effect on Third Party Interests

A valid extension or renewal will always be effective against the parties. However, its effectiveness as to junior liens or interests depends on when the junior liens or interests were created. Those created before the extension or renewal may not be subject to the agreement. For example, if the senior security instrument is a mortgage, and a junior lien was created before the extension agreement, then, if the senior mortgagee commences judicial foreclosure proceedings after the expiration of the original limitation period, the junior lienholder may raise the defense that the senior mortgage is extinguished by the lapse of the statute of limitations, and may foreclose the junior lien free and clear of the senior mortgage [*Ekmann v. Plumas County Bank (1932) 215 Cal. 671, 672-674, 12 P.2d 433]* . For further discussion of the effect of the statute of limitations on judicial and nonjudicial foreclosure, see *§ 555.18[4][a]*. On the other hand, junior interests created before the extension or renewal agreement may be subject to the agreement if the trust deed expressly provided for the possibility of an extension by mutual consent [*Western F.G. v. Security Title etc. Co. (1937) 20 Cal. App. 2d 150, 153-154, 66 P.2d 742]* .

PRACTICE TIP:

Junior Interests Subject to Extensions. Generally, trust deeds routinely provide that they secure the original note as well as any modifications. Because this language provides constructive notice of any extension arrangements, junior interests subject to these trust deeds likely are subject to any extensions reached by the senior lienholder and borrower. *By William M. Hensley*

Junior interests created after the extension or renewal agreement have been held to be subject to the agreement in any event, because junior lienholders have a duty to go beyond the record and inquire as to possible extensions when their interests are created [*see, e.g.,* *Newhall v. Hatch (1901) 134 Cal. 269, 273, 66 P. 266* ; *Craig v. Dinwiddie (1926) 77 Cal. App. 681, 687-689, 247 P. 516]* .

[3] Acceleration on Default

[a] In General

A standard provision in real property security transactions is an acceleration-on-default clause, which gives the beneficiary, as holder of the note, an election to declare the entire outstanding debt immediately due after a default by the trustor. The type of default covered by this clause is usually a breach of the principal obligation to pay installments on the principal and interest when due [*see* *Wienke v. Smith (1918) 179 Cal. 220, 222, 176 P. 42]* . However, the clause may cover a default in any or all of the trustor's collateral obligations as well [*see, e.g.,* *Coyne v. Mason (1936) 13 Cal. App. 2d 176, 177-178, 56 P.2d 541* (duty to pay premiums on insurance covering subject property); *Hudson v. Becker (1936) 12 Cal. App. 2d 743, 746-747, 56 P.2d 249* (duty to pay off senior liens)]. The provisions of a trust deed that authorize acceleration and exercise of the power of sale for failure to pay taxes, rents, assessments, or insurance premiums, or any advances, are enforceable whether or not the security has been impaired by the failure [*Civ. Code § 2924.7(a)*].

Usually the clause is included in the note secured by the trust deed [*see* *Wienke v. Smith (1918) 179 Cal. 220, 222, 176*

P. 42 ; *Coyne v. Mason (1936) 13 Cal. App. 2d 176, 177-178, 56 P.2d 541]* . The note and trust deed are to be read together as parts of a single contract, however, and the clause is enforceable whether it appears only in the note or appears only in the trust deed [*First-Trust Joint S.L. Bk. v. Meredith (1936) 5 Cal. 2d 214, 218, 53 P.2d 958* (clause in mortgage only); *San Gabriel Val. Bk. v. Lake View etc. Co. (1906) 4 Cal. App. 630, 632, 89 P. 360* (clause in note only); *cf. Civ. Code § 2924.5* (when trust deed is on residential property containing up to four units, clause for acceleration on sale, further encumbrance, or other transfer by trustor must be included in both note and trust deed)].

[b] Manner and Effect of Election to Accelerate

Because an acceleration-on-default clause gives the beneficiary an election to accelerate, acceleration is not automatic and occurs only after an affirmative election by the beneficiary [*see* *Stalder v. Riverside Groves etc. Water Co. (1914) 167 Cal. 560, 562, 140 P. 252]* . An affirmative election to accelerate may be made by giving the trustor notice to that effect [*see, e.g.,* *Stalder v. Riverside Groves etc. Water Co. (1914) 167 Cal. 560, 562,140 P. 252]* . It may also be made by any other positive act indicating an intention to accelerate [*Stalder v. Riverside Groves etc. Water Co. (1914) 167 Cal. 560, 562, 140 P. 252]* . For example, commencement of judicial foreclosure proceedings is sufficient indication of an intention to accelerate [*Title G. & T. Co. v. Fraternal Finance Co. (1934) 220 Cal. 362, 364, 30 P.2d 515]* . A notice of default preparatory to nonjudicial foreclosure under a power of sale is also sufficient indication of an intention to accelerate, if the notice includes an expression of that intention [*Engelbertson v. Loan & Bldg. Asso. (1936) 6 Cal. 2d 477, 479, 58 P.2d 647]* .

If the trustor tenders payment sufficient to cure the default before the beneficiary has carried out an intention to accelerate, the beneficiary's right to accelerate is terminated [*Stalder v. Riverside Groves etc. Water Co. (1914) 167 Cal. 560, 562-563, 140 P. 252]* . On the other hand, if the trustor tenders payment that only partially cures the default, the beneficiary may accept the payment and still exercise the right to accelerate [*R.G. Hamilton Corp., Ltd. v. Corum (1933) 218 Cal. 92, 96-97, 21 P.2d 413]* .

Acceleration entitles the beneficiary to foreclose on the security, to recover the entire outstanding debt. In the absence of acceleration, the beneficiary may still foreclose to recover the amount in default but may not recover the remainder of the debt not yet due [*see* *Yoakam v. White (1893) 97 Cal. 286, 289, 32 P. 238]* . In any event, however, the beneficiary's right to foreclose after electing to accelerate is limited by the trustor's statutory right to reinstate the obligation, as if no default had occurred, by curing the default after an acceleration but before the lapse of a specified period [*Civ. Code § 2924c(a)(1)*]. For further discussion concerning the right of reinstatement, see *§ 555.54[1]*.

[c] Waiver of Right to Accelerate

Because acceleration on default is elective, it is subject to defenses of waiver and estoppel. For example, the beneficiary may be deemed to have waived the right to accelerate after delaying an unreasonable time before electing to accelerate [*Holland v. Paddock (1956) 142 Cal. App. 2d 534, 538, 298 P.2d 587* (delay of more than 11 months constituted waiver)].

Waiver of the right to accelerate as to one particular default does not waive the right to accelerate as to subsequent defaults [*R.G. Hamilton Corp., Ltd. v. Corum (1933) 218 Cal. 92, 96-97, 21 P.2d 413* ; *Sellman v. Crosby (1937) 20 Cal. App. 2d 562, 564, 67 P.2d 706]* . Also, a beneficiary who has accepted late payments without accelerating does not relinquish the right to accelerate when subsequent payments are late [*Young v. Burchill (1929) 96 Cal. App. 341, 343-345, 274 P. 379]* . However, the beneficiary must first give notice that late payments will no longer be accepted and must give the trustor a reasonable opportunity to comply before accelerating [*Bledsoe v. Pacific Ready Cut Homes, Inc. (1928) 92 Cal. App.641, 645, 268 P. 697* ; *see* *Altman v. McCollum (1951) 236 P.2d 914]* .

If, after acceleration, the trustor pays only part of the amount in default, the beneficiary's acceptance of the payment does not waive the default as to the amount unpaid and does not affect the acceleration election [*Sellman v. Crosby*

(1937) 20 Cal. App. 2d 562, 564-565, 67 P.2d 706] .

[4] Acceleration on Sale or Encumbrance

[a] In General

A trustor is entitled to sell, further encumber, or otherwise transfer the title to the encumbered property, without the consent of the beneficiary [*Moss v. Minor Properties, Inc. (1968) 262 Cal. App. 2d 847, 855, 69 Cal. Rptr. 341* ; *see Civ. Code § 1044*; *Prob. Code § 15410(c)*]. However, promissory notes and trust deeds commonly include so-called due-on-sale clauses, which give the beneficiary the election, on any sale, further encumbrance, or other transfer of the property without the beneficiary's consent, to declare the entire unpaid balance of the note immediately due and payable [*see 12 U.S.C. § 1701j-3(a)(1)*; *Tucker v. Lassen Sav. & Loan Assn. (1974) 12 Cal. 3d 629, 631 n.1, 116 Cal. Rptr. 633, 526 P.2d 1169]* . By this means a beneficiary may discourage unapproved transfers, avoid greater risk of waste or default, or even obtain an advantage by compelling a transferee to refinance the obligation during periods when the market rate exceeds the existing rate of interest on the obligation [*see La Sala v. American Sav. & Loan Assn. (1971) 5 Cal. 3d 864, 879-880, 880 n.17, 97 Cal. Rptr. 849, 489 P.2d 1113]* .

An unauthorized transfer does not itself constitute a default but gives the beneficiary an occasion to declare an acceleration of the unpaid balance of the debt. A default occurs only after the beneficiary has elected acceleration, and the trustor subsequently fails to pay the accelerated debt [*Miller v. Cote (1982) 127 Cal. App. 3d 888, 895, 179 Cal. Rptr. 753]* .

[b] Enforcement Under Federal Law

[i] Garn Act

The Garn Act [*12 U.S.C. § 1701j-3* (Garn-St. Germain Depository Institutions Act of 1982)] expressly preempts all inconsistent state law regarding the enforcement of due-on-sale clauses [*see* [c], *below*], possibly also regarding due-on-encumbrance clauses [*see* [ii], *below*], and provides generally that a lender may enter into or enforce a contract containing a due-on-sale clause with respect to a real property loan [*12 U.S.C. § 1701j-3(b)(1)*]. "Lender" includes any person or government agency, or the assignee or transferee of a person or agency, that makes a loan, mortgage, advance, or credit sale secured by a lien on real property [*12 U.S.C. § 1701j-3(a)(2),(3)*].

In exercising the election under a due-on-sale clause, a lender is encouraged to permit assumption of the loan at the existing contract rate or at a rate that does not exceed the average between the existing contract rate and current market rate [*12 U.S.C. § 1701j-3(b)(3)*]. However, except as specified in *12 U.S.C. § 1701j-3(d)*, a lender's exercise of the election, and all rights and remedies of the lender and borrower, are governed solely by the contract provisions [*12 U.S.C. § 1701j-3(b)(2)*].

In the case of loans secured by a lien on residential real property containing fewer than five dwelling units, a lender may not elect to accelerate under a due-on-sale clause upon any of the following [*12 U.S.C. § 1701j-3(d)*]:

- The creation of a lien or other encumbrance subordinate to the lender's lien and not related to a transfer of rights of occupancy in the property [*12 U.S.C. § 1701j-3(d)(1)*; *see 12 C.F.R. § 591.5(b)(1)(i)* (exception applies only to liens not created pursuant to contract for deed)].

- The creation of a purchase-money security interest for household appliances [*12 U.S.C. § 1701j-3(d)(2)*].

- A transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety [*12 U.S.C. § 1701j-3(d)(3)*].

- The granting of a leasehold interest of three years' duration or less and not containing an option to purchase [*12 U.S.C. § 1701j-3(d)(4)*; *see 12 C.F.R. § 591.5(b)(1)(iv)*].

- A transfer to a relative resulting from the borrower's death [*12 U.S.C. § 1701j-3(d)(5)*; *see 12 C.F.R. § 591.5(b)(1)(v)* (exception applies only if transferee occupies or will occupy subject property)].

- A transfer of ownership to the borrower's spouse or children [*12 U.S.C. § 1701j-3(d)(6)*; *see 12 C.F.R. § 591.5(b)(1)(v)* (exception applies only if transferee occupies or will occupy subject property)].

- A transfer resulting from a decree of a dissolution of marriage or legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property [*12 U.S.C. § 1701j-3(d)(7)*; *see 12 C.F.R. § 591.5(b)(1)(v)* (exception applies only if transferee occupies or will occupy subject property)].

- A transfer into an inter vivos trust of which the borrower is and remains a beneficiary, if the transfer does not relate to a transfer of rights of occupancy in the property [*12 U.S.C. § 1701j-3(d)(8)*; *see 12 C.F.R. § 591.5(b)(1)(vi)* (exception applies only if borrower remains occupant of subject property)].

- Any other transfer or disposition described in regulations prescribed by the Office of Thrift Supervision (OTS), which has express authority, in consultation with the Comptroller of the Currency and the National Credit Union Administration, to issue rules, regulations, and interpretations governing the implementation of the Garn Act [*12 U.S.C. § 1701j-3(d)(9),(e)(1)*; *see* 12 C.F.R. Pt. 591].

OTS regulations limit the foregoing statutory exceptions in several respects in addition to imposing the occupancy limitations noted above [*see 12 C.F.R. § 591.5(b)*]. For example, if an event later occurs that disqualifies a transfer for a previously applicable exception, the lender is no longer precluded from enforcing the due-on-sale clause [*12 C.F.R. § 591.5(b)(5)*].

State decisions that limit enforcement of due-on-sale clauses to cases of reasonable necessity, with the burden of proof placed on the lender, appear to be preempted, because they are inconsistent with the federal rule of general enforceability [*see 12 U.S.C. § 1701j-3(b)(1)*; *12 C.F.R. §§ 591.1(b), 591.5(a)*]. Whether state statutes otherwise affecting due-on clauses are also preempted is less certain. *Civ. Code § 2924.5*, requiring a due-on clause to be inserted in both the trust deed and the underlying note when the subject property consists of one-to-four residential units, is arguably consistent with federal law because it is merely designed to provide notice [*see Wellenkamp v. Bank of America (1978) 21 Cal. 3d 943, 953 n.12, 148 Cal. Rptr. 379, 582 P.2d 970]* . In fact, when adequate notice is actually given, technical noncompliance with the notice requirements will not preclude enforcement of a due-on-sale clause inserted only in the note [*Fernandez v. American Sav. & Loan Ass'n. (1984) 159 Cal. App. 3d 667, 671-672, 205 Cal. Rptr. 707* (noting, however, that creditor might be estopped from enforcing clause against debtor's successors if they were actually misled by lack of record notice)]. It is also arguable that the limitations on enforcement of due-on-sale clauses under *Civ. Code § 2924.6* may be construed consistently with corresponding limitations under federal law [*Civ. Code § 2924.6(a)(1)-(4)*; *cf. 12 U.S.C. § 1701j-3(d)(5)-(8)*]. For further discussion of these state statutes, see [c], *below.*

[ii] Application to Due-on-Encumbrance Clauses

The Garn Act defines a due-on-sale clause as covering any unapproved sale or transfer of all or any part of the property, or any interest in it [*12 U.S.C. § 1701j-3(a)(1)*]. Implementing regulations define sale or transfer as including a conveyance of real property or any right, title, or interest in real property, whether legal or equitable, by outright sale, deed, contract, lease-option contract, lease for more than three years, or any other method of conveyance [*12 C.F.R. § 591.2(b)*]. These definitions appear to encompass encumbrances generally. If the Garn Act thus applies to

due-on-encumbrance clauses, it further appears that state decisions generally limiting the enforcement of these clauses to cases of reasonable necessity, with the burden of proof placed on the lender, are also preempted as inconsistent with federal law [*see 12 U.S.C. § 1701j-3(b)(1)*; *12 C.F.R. §§ 591.1(b), 591.5(a)*]. However, state statutory limitations on the enforcement of these clauses may arguably be construed consistently with corresponding limitations under federal law [*Civ. Code §§ 2924.6(a)(5), 2949*; *cf. 12 U.S.C. § 1701j-3(d)(1)*; *12 C.F.R. § 591.5(b)(1)(i)*]. For further discussion of these state statutes, see [c], *below*.

In the case of loans secured by a lien on residential real property containing fewer than five dwelling units, the Garn Act provides that a lender may not elect to accelerate under a due-on-sale clause because of the creation of a lien or other encumbrance subordinate to the lender's lien and not related to a transfer of rights of occupancy in the property [*12 U.S.C. § 1701j-3(d)(1)*; *see 12 C.F.R. § 591.5(b)(1)(I)* (exception applies only to liens not created pursuant to contract for deed)].

[iii] Effect of Waiver or Estoppel

Because the rights and remedies of the parties with respect to a due-on-sale clause are generally to be governed by reference to their agreement [*12 U.S.C. § 1701j-3(b)(2)*], it appears that normal contract defenses under state law remain applicable. Thus ordinary principles of waiver or estoppel may apply to prevent enforcement of a due-on-sale clause [*see Rubin v. Los Angeles Fed. Sav. & Loan Ass'n. (1984) 159 Cal. App. 3d 292, 296-300, 205 Cal. Rptr. 455* ; *Guild Wineries & Distilleries v. Land Dynamics (1980) 103 Cal. App. 3d 966, 977-978, 163 Cal. Rptr. 348]* .

Additionally, a lender waives the election under a due-on-sale clause as to a specific transfer if, before the transfer, the lender and the borrower's prospective successor agree in writing that the successor will be obligated under the terms of the loan and that interest on sums secured by the lender's security interest will be payable at a rate requested by the lender. On this agreement and resultant waiver, the lender must release the existing borrower from all obligations under the loan, and the lender is deemed to have made a new loan to the successor [*12 C.F.R. § 591.5(b)(4)* (applicable to all loans made by federal association after July 1976 and to all other loans made after May 13, 1983)].

PRACTICE TIP:

Acceptance Can Constitute Garn Act Waiver. Waiver of due-on-sale protections also has been frequently found when a lender accepts payments from a borrower's transferee for a sufficient period of time, notwithstanding the absence of a pre-transfer agreement. This practitioner believes a strong contention can be advanced that "conduct" waiver principles under state law are not preempted by the federal statutory scheme, even though these principles are arguably inconsistent with the federal regulations relating to the Garn Act. *By William M. Hensley*

[iv] Window Period Limitation

The application of the Garn Act is expressly limited by an exemption, under which otherwise preempted state law continues to apply to certain transfers involving window-period loans [*see 12 U.S.C. § 1701j-3(c)(1)*]. "Window-period loans" are generally those loans, not originated by a federal association, that were made or assumed on or after August 25, 1978, and before October 15, 1982, the respective effective dates of *Wellenkamp v. Bank of America (1978) 21 Cal. 3d 943, 148 Cal. Rptr. 379, 582 P.2d 970* and the Garn Act [*see Lucas v. Jones (1983) 148 Cal. App. 3d 1008, 1010-1012, 196 Cal. Rptr. 437* ; *Miranda v. Macias (1983) 141 Cal. App. 3d 188, 192, 191 Cal. Rptr. 177* ; *see 12 C.F.R. § 591.2(p)*]. This exemption applies only if the transfer with respect to which the due-on clause is invoked occurred before October 15, 1985; or, in some cases depending on the character of the lender, only if the triggering transfer occurred even earlier [*12 U.S.C. § 1701j-3(c)(1)*; *see 12 C.F.R. §§ 30.1, 591.2(p), 591.4(c)(1), 701.21(g)(6)(ii)*].

[c] State Law

[i] Statutes

California statutes proscribe or affect the enforcement of due-on-sale/encumbrance clauses in the following situations:

- In the case of notes, trust deeds, and mortgages executed after June 1972, when the collateral is real property with no more than four residential units, a due-on-sale/encumbrance clause is not valid unless it is included in the trust deed or mortgage as well as in the note evidencing the obligation [*Civ. Code § 2924.5*].

- In the case of notes made after 1972, no due-on-encumbrance clause can be enforced solely on the basis of the owner's creation of a junior lien on a single-family, owner-occupied dwelling [*Civ. Code § 2949(a)*; Stats. 1972, ch. 698, § 2].

- In the case of notes made or refinanced after 1975, when the collateral is real property with no more than four residential units, no due-on-sale/encumbrance clause can be enforced solely on the basis of the following transfers [*Civ. Code § 2924.6(a), (c), (d)*]:

  - A transfer, resulting from the death of an obligor, to the obligor's spouse who is also an obligor.

  - A transfer by an obligor through which the obligor's spouse becomes a co-owner.

  - A transfer resulting from a decree of dissolution of the marriage or legal separation or from a property settlement agreement incidental to such a decree, that requires the obligor to continue to make the loan payments by which the obligor's spouse--who is also an obligor--becomes the sole owner of the property.

  - A transfer by an obligor into an inter vivos trust of which the obligor is a beneficiary.

  - A transfer by which the real property or any portion of it is made subject to a junior encumbrance or lien.

[ii] Decisions

The California Supreme Court has held that a due-on-sale/encumbrance clause is unenforceable, as an unreasonable restraint on alienation, unless the lender can demonstrate that enforcement is reasonably necessary to protect the security from impairment or risk of default [*Wellenkamp v. Bank of America (1978) 21 Cal. 3d 943, 953, 148 Cal. Rptr. 379, 582 P.2d 970* (rule applied to preclude enforcement on outright sale); *Tucker v. Lassen Sav. & Loan Assn. (1974) 12 Cal. 3d 629, 632, 638-639, 116 Cal. Rptr. 633, 526 P.2d 1169* (rule applied to preclude enforcement on sale by installment contract); *La Sala v. American Sav. & Loan Assn. (1971) 5 Cal. 3d 864, 869, 877-882, 97 Cal. Rptr. 849, 489 P.2d 1113* (rule applied to preclude enforcement on further encumbrance)]. In other cases the Supreme Court expanded the application of this rule to various situations [*see, e.g.,* *Dawn Investment Co. v. Superior Court (1982) 30 Cal. 3d 695, 700-704, 180 Cal. Rptr. 332, 639 P.2d 974* (rule applied to private, rather than just institutional, lenders, and to investment, rather than just residential, property); *West v. Buffo (1983) 139 Cal. App. 3d 93, 96, 188 Cal. Rptr. 535* (rule applied to individual owner-vendor who took back promissory note and trust deed)].

[5] Substitution of Trustee

At some point a party to a trust deed may wish to replace the original or current trustee, such as when the trustee is unable or unwilling to carry out the beneficiary's request to hold a trustee sale. A substitution of trustees by the parties may be accomplished by a statutory method [*Civ. Code § 2934a*; *see §§ 555.136, 555.137*], by provision, if any, in the

terms of the trust deed [*see, e.g., Bennett v. Ukiah Fair Asso. (1936) 7 Cal. 2d 43, 44-45, 59 P.2d 805]* , or by mutual agreement of the beneficiary and trustor [*see, e.g., Pacific S. & L. Co. v. N. American etc. Co. (1940) 37 Cal. App. 2d 307, 308-311, 99 P.2d 355]* . For further discussion of the substitution of trustees, and related forms, see California Legal Forms, Ch. 25C, *Release and Reconveyance* (Matthew Bender).

A substitution of trustees pursuant to a standard clause included in the trust deed is valid even though it may not conform to the requirements of the statutory method [*U.S. Hertz, Inc. v. Niobrara Farms (1974) 41 Cal. App. 3d 68, 83-85, 116 Cal. Rptr. 44]* . The other nonstatutory method of substitution is the joint execution, acknowledgment, and recordation of an instrument of substitution by the trustor and beneficiary, sometimes used when the trust deed does not include the usual substitution clause. This method is also valid without regard to the requirements of the statutory method [*Pacific S. & L. Co. v. N. American etc. Co. (1940) 37 Cal. App. 2d 307, 311, 99 P.2d 355]* .

Application for substitution of trustees may be made to the superior court under the statutes governing private trusts, when the trustee position is vacant or the trustee refuses to act [*Prob. Code § 15660*; *see Mutual Bldg. & Loan Asso. v. Wiborg, (1943) 59 Cal. App. 2d 325, 330, 139 P.2d 73* ; *Baumann v. Harrison (1941) 46 Cal. App. 2d 84, 93, 115 P.2d 530]* . For further discussion and forms relating to the appointment of trustees to a private trust, see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsFormalitiesReal Property LawFinancingMortgages & Other Security InstrumentsTransfersAssignments by MortgagorsReal Property LawFinancingMortgages & Other Security InstrumentsTransfersDue-on-Sale Clauses

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. LEGAL BACKGROUND
A. Characteristics of Trust Deeds and Mortgages

48-555 California Forms of Pleading and Practice--Annotated § 555.16

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§ 555.16 Priorities of Liens

[1] General Rules

[a] Priority Determined By Time of Creation

When a single property interest is encumbered with more than one lien, the rights of the lienholders depend on the priorities of their liens. Other things being equal, different liens on the same real property have priority according to the time of their creation [*Civ. Code § 2897*; *see Fickling v. Jackman (1928) 203 Cal. 657, 661, 265 P. 810* (trust deed is lien for purpose of determining priority)]. In other words, as between two liens on the same property, the first in time of creation has priority in the absence of any contrary statutory or equitable consideration [*see First Nat. Bank v. Silva (1927) 200 Cal. 494, 497-498, 254 P. 262* (junior lien may be given preference by statute); *Smitton v. McCullough (1920) 182 Cal. 530, 534, 189 P. 686* (junior lien may be given preference in equity)].

Time of creation refers generally to the time the trust deed was executed and delivered [*see Walker v. Buffandeau (1883) 63 Cal. 312, 315-317]* . However, a lien is not necessarily created on delivery of an executed trust deed. Execution and delivery of a trust deed has no effect until a binding underlying obligation is created--for example, by the delivery of an executed promissory note [*Western Loan & Bldg. Co. v. Scheib (1933) 218 Cal. 386, 389-390, 23 P.2d 745]* . In accordance with this principle, when the underlying obligation is for future advances that the beneficiary may make, but is not required to make, no lien arises until an advance is actually made [*Fickling v. Jackman (1928) 203 Cal. 657, 662, 265 P. 810]* . For further discussion of priority rules concerning future advances, *see § 555.14[3][c]*. Similarly, a trust deed has no effect if there is no property to encumber, so that when it has been given to cover property not yet acquired, the lien arises only at the time the property is subsequently acquired [*Civ. Code § 2883*].

[b] Legal Lien Has Priority Over Equitable Lien

When a vendor's lien and a lien under a recorded purchase-money trust deed were created simultaneously because the vendor did not receive the full purchase price in cash (that is, the vendor had a vendor's lien for part of the price), the lien under the purchase-money trust deed had priority because it was a legal lien whereas the vendor's lien was an equitable lien. The Civil Code provisions for priority of the lien under a purchase-money trust deed cannot be reconciled with the provisions for priority of a vendor's lien [*compare Civ. Code § 2898(a) with Civ. Code § 3048*]; however, at common law, a legal lien has priority over an equitable lien. Lien priority under a purchase-money trust deed does not depend on lack of notice of the vendor's lien [*Brock v. First South Savings Ass'n (1992) 8 Cal. App. 4th 661, 672-676, 10 Cal. Rptr. 2d 700]* .

[2] Effect of Recording Laws

The time of recording does not necessarily establish priority. Recordation is intended simply to give constructive notice of the contents of the recorded document to subsequent purchasers or lienholders. Recordation does not create any presumption as to the time a lien was created [*Civ. Code §§ 1213, 1215*; *see Walker v. Buffandeau (1883) 63 Cal. 312, 315-317]* . An unrecorded lien remains effective as to the parties and those who have actual or constructive notice [*Civ. Code § 1217*; *see Powell v. Goldsmith (1984) 152 Cal. App. 3d 746, 749, 751-752, 199 Cal. Rptr. 554* (unrecorded lien retained priority over subsequent lien of holder who had actual notice)].

Recording affects priority against claims of subsequent good faith purchasers [*Wells Fargo Bank v. PAL Investments, Inc. (1979) 96 Cal. App. 3d 431, 438, 157 Cal. Rptr. 818]* . A lien or other interest is void against the claim of any subsequent purchaser or lienholder for value who has no actual or constructive notice of the previously created lien and whose interest is first recorded [*Civ. Code § 1214*; *see Gribble v. Mauerhan (1961) 188 Cal. App. 2d 221, 227-228, 10 Cal. Rptr. 296]* . The interest of a good faith purchaser or lienholder retains priority even if it is transferred to one who has notice of the previous unrecorded interest [*Jones v. IndependentTitle Co. (1944) 23 Cal. 2d 859, 861-862, 147 P.2d 542]* . For the purpose of *Civ. Code § 1214*, the holder of a judgment lien is not considered to be a good faith purchaser [*Bank of Ukiah v. Petaluma S. Bank (1893) 100 Cal. 590, 591, 35 P. 170* ; *Wells Fargo Bank v. PAL Investments, Inc. (1979) 96 Cal. App. 3d 431, 438, 157 Cal. Rptr. 818]* .

[3] Statutory Exceptions

The primary statutory exception to the general rule of priority is that a mortgage or trust deed given to secure the price of real property at the time of conveyance has priority over all other liens created against the purchaser, subject to the operation of the recording laws [*Civ. Code § 2898(a)*; *see Powell v. Goldsmith (1984) 152 Cal. App. 3d 746, 752, 199 Cal. Rptr. 554]* . The priority of the lien of a mortgage or trust deed on an estate for years in real property is determined in the same manner as the priority of a lien of a mortgage or trust deed on real property [*Civ. Code § 2898(b)*]. The effect of *Civ. Code § 2898(a)* is to give a purchase-money trust deed, executed and delivered at the time of conveyance, priority over previously recorded liens against the purchaser. Ordinarily, previously recorded liens against property not yet acquired would attach as soon as the purchaser acquired the property [*see § 555.13[2]*]. However, *Civ. Code § 2898(a)* codifies an equitable principle that is designed to protect the security of a vendor advancing part of the purchase price to the purchaser, namely, that the purchase-money lien attaches at the instant the purchaser acquires title from the vendor. Therefore, no prior voluntary lien can attach [*Van Loben Sels v. Bunnell (1898) 120 Cal. 680, 683, 53 P. 266* ; *see Tolman v. Smith (1890) 85 Cal. 280, 285-286, 24 P. 743* ; *Walley v. P.M.C. Inv. Co. (1968) 262 Cal. App. 2d 218, 219-220, 68 Cal. Rptr. 711]* . Although *Civ. Code § 2898* was originally intended to benefit vendors, it will also apply to trust deeds securing loans made to the purchaser by a third party, as long as the loan is made and used for the express purpose of paying for the property [*Van Loben Sels v. Bunnell (1898) 120 Cal. 680, 683-684, 53 P. 266* ; *Mercantile Collection Bureau v. Roach (1961) 195 Cal. App. 2d 355, 358, 15 Cal. Rptr. 710]* .

Because priority under *Civ. Code § 2898* is subject to the operation of the recording laws, the priority of a purchase-money trust deed may be lost against the claim of a subsequent good faith lienholder who first records the lien [*Civ. Code § 1214*; *see Powell v. Goldsmith (1984) 152 Cal. App. 3d 746, 751-752, 199 Cal. Rptr. 554* (subsequent

lien was not entitled to priority when lienholder had actual notice of unrecorded purchase-money trust deed)]. For further discussion, see [2], *above.*

Other types of liens may have statutory priority regardless of their time of creation [*see, e.g., Rev. & Tax. Code § 2192.1* (tax liens on real property have priority regardless of time of creation)]. These include mechanics' liens and liens on fixtures perfected under the Commercial Code, the priorities of which are discussed in Ch. 361, *Mechanics' Liens* , and Ch. 503, *Sales: Secured Transactions* .

PRACTICE TIP:

Mechanics' Lien Interests Versus Senior Encumbrancers. Mechanics' liens do not necessarily defeat predecessor voluntary encumbrances. These statutory liens only "relate back" and have priority from the date improvements began on the property subject to the lien. However, if the consensual trust deed was recorded before improvement work commenced, the trust deed has priority, and the lienholder under the trust deed would wipe out any mechanics' lien claimants upon completion of a successful nonjudicial foreclosure [*Civ. Code § 3134*]. *By William M. Hensley*

[4] Subordination Agreements

[a] In General

The priorities of liens may, to some extent, be determined by private agreement, as when one lienholder agrees to subordinate or waive the priority of a senior lien [*see Civ. Code § 2953.1(b),(c)*; *see also Civ. Code § 2934* (permitting recordation of subordination agreement)]. Typically, the statutory lien of the beneficiary of a purchase-money trust deed [*see* [3], *above*] is subordinated to the lien of an institutional lender's construction loan [*see, e.g., Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1026, 1030, 96 Cal. Rptr. 338]* . For extended discussion of subordination agreements and clauses, see California Legal Forms, Ch. 25B, *Subordination, Assumption, and Assignment* (Matthew Bender), and California Real Estate Law and Practice, Ch. 114, *Subordination* (Matthew Bender).

[b] Enforceability

An enforceable subordination clause or agreement must contain terms that define and minimize the risk that the superior lien will impair the subordinating lienholder's security. The terms may include limits on the use to which the proceeds of the superior loan may be put (to ensure that the value of the property will be enhanced); maximum amounts, so that the superior loan will not exceed the value of improvements being financed; requirements that the loans not exceed a specified percentage of the construction cost or value of the property as improved; specified amounts per square foot of construction; or other limits designed to protect the subordinating lienholder's security [*Handy v. Gordon (1967) 65 Cal. 2d 578, 581, 55 Cal. Rptr. 769, 422 P.2d 329]* . When these terms are not included, a court may refuse to enforce the clause or agreement on the ground that it is not just and reasonable as to the subordinating lienholder [*see Handy v. Gordon (1967) 65 Cal. 2d 578, 579, 581-582, 55 Cal. Rptr. 769, 422 P.2d 329]* .

Even when a subordination clause may be enforced according to its terms, it may nonetheless be challenged by the subordinating lienholder on the ground that the limiting terms have not been met [*see, e.g., Miller v. Citizens Sav. & Loan Asso. (1967) 248 Cal. App. 2d 655, 663-665, 56 Cal. Rptr. 844* (loan proceeds used with knowledge of subordinating lienholder for purpose not within terms were not covered by subordination clause)]. The subordinating lienholder may even challenge an automatic subordination on the same ground. In a case of automatic subordination, there is no express subordination agreement or clause but simply an escrow instruction providing for prior recordation of the superior lien [*Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1030, 96 Cal. Rptr. 338]* . However, a subordination agreement can and should be inferred in these circumstances, so that the subordinating lienholder may regain the original priority if the terms reasonably implied by the agreement are not met [*Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1030-1038, 96 Cal. Rptr.*

338] .

When the purchaser breaches the subordination agreement by not using the proceeds to improve the property, the lender cannot enforce the vendor's agreement to subordinate. The lender is a third-party beneficiary of the agreement between the purchaser and vendor and cannot assert greater rights than those of the purchaser under the subordination agreement [*Protective Equity Trust #83, Ltd. v. Bybee (1991) 2 Cal. App. 4th 139, 149-151, 2 Cal. Rptr. 2d 864* ; *Middlebrook-Anderson Co. v. Southwest Sav. & Loan Assn. (1971) 18 Cal. App. 3d 1023, 1031-1033, 96 Cal. Rptr. 338]* . The lender's failure to undertake supervision of the disbursement of the funds does not preclude liability for the loss of priority from the purchaser's breach, because the lender is in a better position to control the purchaser's use of the funds [*Protective Equity Trust #83, Ltd. v. Bybee (1991) 2 Cal. App. 4th 139, 149-151, 2 Cal. Rptr. 2d 864]* .

A lender's lien priority may be lost if the terms of the senior loan are materially changed without the consent of a subordinating vendor. When a purchaser-developer and lender modify the terms of the senior loan so as to materially increase the risk that it will become a subject of default, the priority of the senior lien may be lost if the modification materially affects the subordinating vendor's rights [*Gluskin v. Atlantic Savings & Loan Assn. (1973) 32 Cal. App. 3d 307, 314-315, 108 Cal. Rptr. 318]* . However, a material modification of a senior lien may result in loss of priority only for the modification, when the liens are held by hard money lenders [*Lennar Northeast Partners v. Buice (1996) 49 Cal. App. 4th 1576, 1588, 57 Cal. Rptr. 2d 435]* .

PRACTICE TIP:

Scope of *Lennar* Decision. *Lennar* should not apply when the recorded loan documents, especially the trust deed, and a subordination agreement make note modifications superior to the subordinated lien. In effect, a contractual agreement to modifications overrides the *Lennar* result [*cf. Swiss Properties Mgt. Co., Inc. v. The Southern California IBEW-NECA Pension Plan (1997) 60 Cal. App. 4th 839, 845-846, 70 Cal. Rptr. 2d 587]* .

Furthermore, *Lennar* recently has been narrowly circumscribed and held to grant equitable relief to junior lienholders only "according to the facts of the particular case" [*see Friery v. Sutter Buttes Savings Bank (1998) 61 Cal. App. 4th 869, 876, 72 Cal. Rptr. 2d 32]* . Thus far, no post-*Lennar* case has invalidated priority for any senior encumbrance over and above the amount of the modification not consented to by the subordinating junior lienholder. *Lennar* is a factually-intensive decision, which should not be relied on beyond a very narrow set of circumstances. *By William M. Hensley*

[c] Statutory Regulation

The provisions of *Civ. Code §§ 2953.1-2953.5* require that certain disclosures be made in a subordination agreement or in a security instrument that includes a subordination clause, if the subordinating loan does not exceed $25,000 [*Civ. Code §§ 2953.2, 2953.3, 2953.5*]. If these requirements apply but are not met, the subordination clause or agreement may be voidable at the election of the person whose security interest is subordinated, if that person lacks actual knowledge of the existence and terms of the subordination clause or agreement and if the election is made within two years after the clause or agreement was executed [*Civ. Code § 2953.4(a)*]. An election to avoid a subordination clause or agreement must be exercised by recording a notice including certain information [*see Civ. Code § 2953.4(b)*]. The holder of the subordinated security interest may, alternatively, record a notice waiving the right to avoid subordination under *Civ. Code § 2953.4(a)* [*Civ. Code § 2953.4(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawNonmortgage LiensEquitable LiensReal Property

LawNonmortgage LiensMechanics' LiensReal Property LawPriorities & RecordingRecording Acts

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Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
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A. Characteristics of Trust Deeds and Mortgages

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§ 555.17 Notice of Transfer of Servicing of Secured Debt

Any person transferring to a different service agency, or assuming from another, the debt servicing of a note, bond, or other instrument secured by a trust deed on real property in California containing one-to-four residential units must give written notice to the borrower or subsequent obligor before the borrower or subsequent obligor becomes obligated to make payments to the new service agent [*Civ. Code § 2937(b), (e)*]. Any person transferring the servicing of indebtedness to a different servicing agent must also provide to the new servicing agent all existing insurance policy information that the person is responsible for maintaining, including, but not limited to, flood and hazard insurance policy information [*Civ. Code § 2937(d)*]. Any person assuming from another the responsibility for debt service on the instrument must include in the notice a statement of the due date of the next payment [*Civ. Code § 2937(f)*]. For further discussion and a form of notice, see California Legal Forms, Ch. 25B, *Subordination, Assumption, and Assignment* (Matthew Bender).

If a notice of default has been recorded or a judicial foreclosure proceeding has been commenced, the person transferring the debt service and the person assuming it must give written notice of the transfer to the trustee or attorney named in the notice of default or judicial foreclosure proceeding. A notice of default, notice of sale, or judicial foreclosure will not be invalidated solely because the service agent is changed during the foreclosure process [*Civ. Code § 2937(c)*]. A service agent does not include not a trustee exercising a power of sale pursuant to a trust deed [*Civ. Code § 2937(h)*].

The borrower or subsequent obligor is not liable to the holder of the note, bond, or other instrument, or to any service agent, for payments made to the previous service agent or for late charges, if the payments were made before the borrower or subsequent obligor received written notice of the transfer, and the payments were otherwise on time [*Civ. Code § 2937(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsTransfersGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsTransfersTransfers by Mortgagees

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A. Characteristics of Trust Deeds and Mortgages

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§ 555.18 Extinction or Expiration of Security

[1] Performance or Discharge of Obligation

A mortgage is incidental to the obligation for which it is security, and a mortgage may be extinguished like any other accessory obligation [*Civ. Code § 2909*]. A mortgage is extinguished when the underlying obligation is extinguished, whether by full performance or otherwise [*Coon v. Shry (1930) 209 Cal. 612, 615, 289 P. 815* ; *see Burge v. Michael (1963) 213 Cal. App. 2d 780, 786, 29 Cal. Rptr. 290* (dictum); *Trowbridge v. Love (1943) 58 Cal. App. 2d 746, 751, 137 P.2d 890* (trust deed); *see Civ. Code §§ 1473 et seq., 2910* (extinction of obligations generally; sale of property in discharge of secured obligation extinguishes lien)]. If foreclosure proceedings are pending, a tender of the full amount properly due, made at any time before foreclosure, extinguishes the lien and halts the foreclosure proceedings [*Winnett v. Roberts (1986) 179 Cal. App. 3d 909, 922, 225 Cal. Rptr. 82]* . However, if a mortgage is created for future advances, it remains valid even though at times there may be no actual underlying obligation [*Frank H. Buck Co. v. Buck (1912) 162 Cal. 300, 303-304, 122 P. 466* ; *see Moss v. Odell (1901) 134 Cal. 464, 466, 66 P. 581]* . For further discussion of future advances, see *§ 555.14[3][c]*.

When an obligation is secured by a trust deed, discharge of the obligation accomplishes the purpose for which the trust was created, and the trust terminates [*see Prob. Code § 15407(a)(2)*]. Title automatically revests in the trustor, and if the trustee retains bare legal title of record, the trustee can be compelled to reconvey so as to clear the record title [*Bank of Italy Nat'l Trust & Sav. Asso. v. Bentley (1933) 217 Cal. 644, 657, 20 P.2d 940* ; *Winnett v. Roberts (1986) 179 Cal. App. 3d 909, 922, 225 Cal. Rptr. 82* ; *Snider v. Basinger (1976) 61 Cal. App. 3d 819, 823, 132 Cal. Rptr. 637]* .

For further discussion concerning the rights and duties of parties to a mortgage or trust deed on discharge of the secured obligation, see *§§ 555.19* and *555.20*.

[2] Illegality

Certain types of obligations may not be secured by a trust deed. For example, a lien on real property may not be given to secure a loan to finance the purchase of a motor vehicle, with one exception [*Civ. Code § 2982.5(d)(1), (2)*]. A trust deed given in violation of this type of provision is void and unenforceable [*see Civ. Code § 2982.5(d)(1)*; *see also People v. Custom Craft Carpets, Inc. (1984) 159 Cal. App. 3d 676, 685, 206 Cal. Rptr. 12* (trust deed was void when it violated prohibition under *Civ. Code § 1804.3* against use of real property security interest in contract for goods that are not attached to real property)].

[3] Merger of Interests

As a general rule, when two interests in real property are joined in one person, the lesser interest becomes merged into the greater and is annihilated [*Union Bank v. Wendland (1976) 54 Cal. App. 3d 393, 406, 126 Cal. Rptr. 549]* . A trust deed may be extinguished by merger when the beneficiary acquires the ownership interest of the trustor [*Ralph C. Sutro Co. v. Paramount Plastering, Inc. (1963) 216 Cal. App. 2d 433, 438, 31 Cal. Rptr. 174]* or the prior security interest of a senior trust deed [*Union Bank v. Wendland (1976) 54 Cal. App. 3d 393, 406, 126 Cal. Rptr. 549]* .

A merger does not invariably occur on the joinder of two interests, however. Whether that is the result is a factual question and depends on the intent of the person in whom the interests are united [*Strike v. Trans-West Discount Corp. (1979) 92 Cal. App. 3d 735, 742-743, 155 Cal. Rptr. 132]* . A merger is usually held not to occur if a junior lien intervenes between ownership and senior security interests that are united, because it is in the best interest of the person in whom these interests are joined to retain priority over the junior lien [*Anglo-Californian Bank v. Field (1905) 146 Cal. 644, 653, 80 P. 1080]* . Intent to avoid a merger is ordinarily implied, in the absence of express intent, when all of the circumstances show that the interest of the person in whom the two estates have united would be best served by keeping them separate [*Strike v. Trans-West Discount Corp. (1979) 92 Cal. App. 3d 735, 743, 155 Cal. Rptr. 132]* .

[4] Lapse of Time

[a] Effect of Statute of Limitations

A lien is extinguished by the lapse of the statutory period within which an action could be brought on the secured obligation [*Civ. Code § 2911*]. The effect of this provision on a mortgage with a power of sale, as distinguished from a trust deed, demonstrates a major difference between the two [*see Bank of Italy etc. Assn. v. Bentley (1933) 217 Cal. 644, 655, 20 P.2d 940]* . After the limitation period has run on an obligation secured by a mortgage, the mortgage is extinguished even if it contains a power of sale [*Faxon v. All Persons (1913) 166 Cal. 707, 715-717, 137 P. 919]* . A trust deed is not extinguished in the same circumstances; courts have held that a trust deed's power of sale may be exercised in spite of the running of the limitation period on the secured obligation [*Carson Redevelopment Agency v. Adam (1982) 136 Cal. App. 3d 608, 610-612, 186 Cal. Rptr. 615* ; *see Sipe v. McKenna (1948) 88 Cal. App. 2d 1001, 1006, 200 P.2d 61* (assignment by beneficiary after lapse of statute of limitations was effective and enabled assignee to exercise power of sale); *but see* [b], *below*]. However, because the trust deed is merely an incident of the secured obligation, the lapse of the statute of limitations on the obligation does constitute a defense to a judicial action for foreclosure [*see Flack v. Boland (1938) 11 Cal. 2d 103, 106-107, 77 P.2d 1090]* .

PRACTICE TIP:

Limitations for Judicial Foreclosure Actions. Judicial foreclosure actions are governed by a four-year written contractual limitations period running from the obligation maturity date or pertinent installment due date [*Flack v. Boland (1938) 11 Cal. 2d 103, 106, 77 P.2d 1090]* . Even if this contractual limitations period runs on the note obligation, a lender can still nonjudicially foreclose a trust deed under the longer 10-year or 60-year periods set forth in Code Civ. Proc. § 882.020 [*see* [b], *below*]. *By William M. Hensley*

[b] Expiration of Ancient Trust Deeds

Civ. Code § 882.020 et seq. provide that a trust deed will be extinguished in the same manner as a mortgage after the lapse of a specified expiration period. Specifically, if a mortgage or trust deed has not already expired under *Civ. Code § 2911* [*see* [a], *above*], it expires on the later of the following dates [*Civ. Code § 882.020(a)*]:

- Ten years after the final due date of the secured obligation if it is ascertainable from the recorded evidence of indebtedness, or 60 years after the recordation date of the instrument creating the security interest if the final due date is not ascertainable from the recorded evidence of indebtedness; or

- If a notice of intent to preserve the security interest is recorded before the expiration of that period, then 10 years after the date of recordation.

For further discussion and a form of notice of intent to preserve a trust deed or mortgage, see California Legal Forms, Ch. 27, *Deeds and Recording* (Matthew Bender).

After the lapse of the expiration period, the mortgage or deed or trust cannot be enforced by the commencement of an action for foreclosure, the exercise of a power of sale, or the assertion of any other means [*Civ. Code § 882.020(a)*]. A power of sale is exercised, within the meaning of *Civ. Code § 882.020(a)*, on the recordation of the deed executed pursuant to the power of sale [*Civ. Code § 882.020(b)*]. The applicable expiration period may be extended by means of a waiver in compliance with *Code Civ. Proc. § 360.5*, as long as each waiver is recorded before the lapse of the applicable expiration period [*Civ. Code § 882.020(c)*]. For further discussion of the waiver under *Code Civ. Proc. § 360.5*, see Ch. 345, *Limitation of Actions* .

The expiration of the lien of a mortgage, deed of trust, or other security interest pursuant to *Civ. Code § 882.020 et seq.* or any other statute renders the lien unenforceable by any means commenced or asserted thereafter and is equivalent for all purposes to a certificate of satisfaction, reconveyance, release, or other discharge of the security interest. Execution and recording of a certificate of satisfaction, reconveyance, release, or other discharge, while permitted, is not necessary to terminate or evidence the termination of the security interest [*Civ. Code § 882.030*]. *Civ. Code § 882.030* makes unenforceable the right to judicial foreclosure under *Code Civ. Proc. § 725a*, which is subject to the four-year statute of limitations in *Civ. Code § 2911*, but does not apply to the remedy of nonjudicial foreclosure. By use of the term "lien," § 882.030 precludes enforcement of the security interest that has been statutorily extinguished, but not the entire instrument creating the security interest [*Ung v. Koehler (2005) 135 Cal. App. 4th 186, 196, 37 Cal. Rptr. 3d 311]* .

Civ. Code § 882.020 et seq. applies to all mortgages, trust deeds, and other instruments that create a security interest in real property to secure a debt or other obligation, whether executed or recorded before, on, or after January 1, 1983 (the operative date of those statutory provisions) [*Civ. Code § 882.040(a)*; *but see Civ. Code §§ 880.370, 882.040(b)* (extending until January 1, 1988, any earlier filing deadline or expiration date established by those statutes)].

[5] Foreclosure of Senior Lien

Foreclosure under a trust deed extinguishes junior liens or any other subordinate interests in the property [*see, e.g., Carpenter v. Smallpage (1934) 220 Cal. 129, 133, 29 P.2d 841* ; *Jensen v. Duke (1925) 71 Cal. App. 210, 212, 234 P. 876]* . The purchaser at either a judicial sale or a nonjudicial trustee's sale takes title free and clear of those interests [*see Dickey v. Gibson (1898) 121 Cal. 276, 278, 53 P. 704* (judicial sale); *Dugand v. Magnus (1930) 107 Cal. App. 243, 247, 290 P. 309* (nonjudicial trustee's sale)]. The security is lost or becomes valueless, there being nothing for the junior lien to attach to [*see Davis v. Myre (1964) 228 Cal. App. 2d 616, 618-619, 39 Cal. Rptr. 682]* . However, when the original owner's repurchase of property after a trustee's sale revives a junior deed of trust, that junior lien remains second to the new purchase-money deed of trust, which essentially replaces the original senior lien and makes possible the revival of the junior lien [*DMC, Inc. v. Downey Savings & Loan Assn. (2002) 99 Cal. App. 4th 190, 198-199, 120 Cal. Rptr. 2d 761]* .

For discussion of rules determining priority, see *§ 555.16*. For a form of complaint to recover on a note secured by a junior trust deed rendered valueless by foreclosure of a senior trust deed, see *§ 555.170*. For discussion concerning the revival of a junior trust deed extinguished by foreclosure, see *§ 555.13[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationMergerReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationStatutes of LimitationsReal Property LawPriorities & RecordingRecording Acts

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Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. LEGAL BACKGROUND
A. Characteristics of Trust Deeds and Mortgages

48-555 California Forms of Pleading and Practice--Annotated § 555.19

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§ 555.19 Discharge of Obligation

[1] Clearing Title of Record

The legal effect of a certificate of discharge prescribed by *Civ. Code § 2939*, to which a mortgagor becomes entitled under *Civ. Code § 2941* on discharge of an obligation secured by the mortgage [*see* [2]-[6], *below*], is simply to clear the title of record, as the mortgage is extinguished by the discharge [*see Burge v. Michael (1963) 213 Cal. App. 2d 780, 786, 29 Cal. Rptr. 290]* . *Civ. Code § 2941* essentially entitles a trustor or mortgagor to obtain satisfaction of record when the secured obligation is discharged [*see Windt v. Covert (1907) 152 Cal. 350, 354, 93 P. 67]* . A trust deed terminates and title automatically revests in the trustor when the secured obligation is discharged, so that the legal effect of a subsequent reconveyance, to which the trustor becomes entitled under *Civ. Code § 2941* [*see* [2]-[6], *below*], is merely to clear the title of record [*Snider v. Basinger (1976) 61 Cal. App. 3d 819, 823, 132 Cal. Rptr. 637]* .

[2] Reconveyance of Title

[a] Trustee's Duty

Within 30 calendar days after the obligation secured by a trust deed is discharged, the beneficiary or the beneficiary's assignee must execute arequest for full reconveyance and deliver it to the trustee together with the original note, trust deed, and any other documents that are necessary to reconvey the trust deed or to cause it to be reconveyed [*Civ. Code § 2941(b)(1)*; *see Huckell v. Matranga (1979) 99 Cal. App. 3d 471, 478-481, 160 Cal. Rptr. 177* (trustee was entitled to demand delivery of original note before reconveying, and when note was not produced, trustee could require beneficiary to provide corporate surety bond to protect trustee from potential liability to holder of note); *see also Civ. Code § 2941(f)* ("original" may include optically imaged reproduction in circumstances discussed *below*)]. The trustee must then execute a full reconveyance and record it or cause it to be recorded (as defined *below*), in the office of the county recorder in which the trust deed is recorded, within 21 calendar days after receipt by the trustee of the following: the

original note and trust deed, the request for a full reconveyance, the fee that may be charged pursuant to *Civ. Code § 2941(e)* [*see* [4], *below*], the recorder's fees, and any other documents that are necessary to reconvey the trust deed or to cause it to be reconveyed [*Civ. Code § 2941(b)(1)(A)*]. The trustee must deliver a copy of the reconveyance to the beneficiary, successor in interest, or debt-service agent, if known. The reconveyance instrument must specify one of the following options for delivering the instrument, the addresses of which the recorder has no duty to validate [*Civ. Code § 2941(b)(1)(B)*]:

- That the recorder must deliver the recorded instrument pursuant to *Gov. Code § 27321* to the trustor or successor in interest at that person's last known address; or

- That the recorder must deliver the recorded instrument to the trustee's address. If the trustee's address is specified for delivery, the trustee must mail the recorded instrument to the trustor or the successor in interest to the last known address for that party.

Following execution and recordation of the full reconveyance, the trustee is also required, on receipt of a written request by the trustor or the trustor's heirs, successors, or assignees, to deliver, or cause to be delivered, the original note and trust deed to the person making the request [*Civ. Code § 2941(b)(1)(C)*].

In lieu of delivery of the original note and deed of trust to the trustee within 30 days of loan satisfaction, as required by *Civ. Code § 2941(b)(1)*, a beneficiary who executes and delivers to the trustee a request for a full reconveyance within 30 days of loan satisfaction may, within 120 days of loan satisfaction, deliver the original note and deed of trust to either the trustee or trustor. If the note and deed of trust are delivered in this manner, on satisfaction of the note and deed of trust, the note and deed of trust must be altered to indicate that the obligation is paid in full [*Civ. Code § 2941(b)(8)*]. In any case, this provision does not alter the obligations and requirements set forth in *Civ. Code § 2941(b)(2)* and *(3)* [*see § 555.19[2][b], [c]*].

For these purposes, "original" may include an optically imaged reproduction when the following conditions are satisfied [*Civ. Code § 2941(f)*]:

- The trustee is an affiliate or subsidiary of the beneficiary or the beneficiary's assignee.

- The optical image storage media used to store the document is nonerasable write once, read many (WORM) optical image media that does not allow changes to the stored document.

- The optical image reproduction is made consistent with the minimum standards of quality approved by the National Institute of Standards and Technology or the Association for Information and Image Management.

- Written authentication identifying the reproduction as an unaltered copy of the note or trust deed is stamped or printed on the reproduction.

As used in *Civ. Code § 2941*, the phrases "cause to be recorded" and "cause it to be recorded" include, but are not limited to, sending the full reconveyance or certificate of discharge in recordable form, together with payment for all required fees, in an envelope addressed to the county recorder's office of the county in which the deed of trust or mortgage is recorded. These items may be sent by certified mail with the United States Postal Service, or by an independent courier service using its tracking service that provides documentation of receipt and delivery, including the signature of the recipient. If the items are received in recordable form together with all the required fees, within two business days from the day of receipt the county recorder must stamp and record the full reconveyance or certificate of discharge. Compliance with these procedures entitles the trustee to the benefit of the presumption under *Evid. Code § 641* that a letter correctly addressed and properly mailed has been received in the ordinary course of mail [*Civ. Code §*

2941(c); *see Civ. Code § 2941(h)* (provision applicable to mortgage or obligation secured by deed of trust satisfied on or after January 1, 2001)].

[b] Beneficiary's Duty

If the trustee fails to execute and record the full reconveyance, or cause it to be recorded, within 60 calendar days after discharge of the obligation, the beneficiary, on receipt of a written request by the trustor or the trustor's heirs, successor in interest, agent, or assignee, must (1) execute and acknowledge a document pursuant to *Civ. Code § 2934a* substituting itself or another as trustee, and (2) issue a full reconveyance [*Civ. Code § 2941(b)(2)*; *see Civ. Code § 2941(b)(5)* (this backup provision does not excuse beneficiary or trustee from compliance with primary duty, discussed in *§ 555.19[2][a]*].

A beneficiary may, at its discretion, in accordance with the requirements and procedures of *Civ. Code § 2934a*, substitute the title company conducting the escrow through which the obligation is satisfied for the trustee of record. In that case, the title company assumes the obligation of a trustee under these provisions, and may collect the fee authorized by *Civ. Code § 2941(c)*.

[c] Release by Title Insurance Company

If a full reconveyance is not executed and recorded pursuant to *Civ. Code § 2941(b)(l)* or *(2)* [*see § 555.19[2][a], [b]*] within 75 calendar days after discharge of the obligation, then a title insurance company may prepare and record a release [*see Civ. Code § 2941(b)(3)(A)* (required contents of release)]. At least 10 days before the issuance and recording of the release, the title insurance company must send, by first-class, postage-prepaid mail, the intention to release the obligation to the trustee, trustor, and beneficiary of record, or any successor in interest of record, at the last known address [*Civ. Code § 2941(b)(3)*]. When recorded, the release will be deemed to be the equivalent of a reconveyance of the trust deed [*Civ. Code § 2941(b)(3)(B)*; *see Civ. Code § 2941(b)(5)* (this backup provision does not excuse beneficiary or trustee from compliance with primary duties, discussed in *§ 555.19[2][a], [b]*)].

Civ. Code § 2941 creates a hierarchical system for issuing reconveyances. Thus, title insurers may record a release of obligation only if both the beneficiary and trustee, after proper request, have failed or refused to comply with their statutory duties within the specified time periods [*Trustors Security Service v. Title Recon Tracking Service (1996) 49 Cal. App. 4th 592, 607, 56 Cal. Rptr. 2d 793]* .

A title insurance company preparing or recording such a release will be liable to any party for damages, including attorney's fees, that any person may sustain by reason of the issuance and recording of the release [*Civ. Code § 2941(b)(6)*].

[3] Mortgagee's Duty to Record Certificate of Discharge

Within 30 days after a mortgage is extinguished, the mortgagee or assignee must execute a certificate discharging the mortgage in accordance with *Civ. Code § 2939* and record it or cause it to be recorded in the office of the county recorder in which the mortgage is recorded. In addition, the mortgagee must deliver the original note and mortgage to the mortgagor or any heir, successor, or assignee at the written request of the latter [*Civ. Code § 2941(a)*; *see Civ. Code § 2941(f)*].

[4] Fee for Performing Duty

The trustee, beneficiary, or mortgagee may collect official fees and also may charge a reasonable fee to the trustor or mortgagor, or the owner of the land, as the case may be, for all services involved in the preparation, execution, and recordation of the full reconveyance, including document preparation and forwarding services rendered to effect the full reconveyance. This fee may be made payable no earlier than the opening of a good faith escrow or no more than 60

days before the full discharge of the secured obligation [*Civ. Code § 2941(e)(1)*]. The fee will be conclusively presumed to be reasonable if it does not exceed $45 [*Civ. Code § 2941(e)(2)*].

This fee may not be charged unless demand for the fee was included in the payoff demand statement described in *Civ. Code § 2943* [*Civ. Code § 2941(e)(3)*; *see § 555.53* (payoff demand statements)]. In any case, no fee or charge may be imposed on the trustor in connection with, or relating to, any act described in the provisions of *Civ. Code § 2941* except as expressly authorized by that code section [*Civ. Code § 2941(g)*]. However, notwithstanding any other provision of law, if no payoff demand statement is issued in accordance with *Civ. Code § 2943*, nothing in *Civ. Code § 2941* may be construed to prohibit the charging of a reconveyance fee [*Civ. Code § 2941.1*].

[5] Breach of Duty

[a] Damages and Penalty

If any provision of *Civ. Code § 2941* is violated, the violator will be liable to the person affected by the violation for all damages that the latter may sustain by reason of the violation, and must forfeit $500 to that person [*Civ. Code § 2941(d)*]. The $500 payment is a statutory penalty for the wrongful withholding of a reconveyance and may be recovered without proof of any actual damages [*Dixon v. Grossman (1972) 22 Cal. App. 3d 941, 944, 99 Cal. Rptr. 659]* . A direct action based on violation of the statutory duty sounds in tort, and damages may be recovered for emotional distress [*Pintor v. Ong (1989) 211 Cal. App. 3d 837, 841-842, 259 Cal. Rptr. 577]* . For a form of complaint for recovery of the statutory penalty, in addition to other damages and quiet title relief [*see § 555.19[5][b]*], see *§ 555.120*.

Any person who violates *Civ. Code § 2941* is also guilty of a misdemeanor [*Civ. Code § 2941.5*].

[b] Other Relief

A beneficiary or mortgagee that persists in refusing to carry out the duty to clear title of record under *Civ. Code § 2941* may be compelled to do so [*see MacLeod v. Moran (1908) 153 Cal. 97, 100, 94 P. 604]* . This is usually accomplished through the trustor's or mortgagor's action to have title quieted, which may include a cause of action for damages and a statutory penalty under *Civ. Code § 2941(d)* [*Dixon v. Grossman (1972) 22 Cal. App. 3d 941, 943, 99 Cal. Rptr. 659* ; *see § 555.120*]. Alternatively, the trustor or mortgagor may have the title of record cleared by recording a bond and declaration under *Civ. Code § 2941.7* [*see § 555.20*].

If the trustee wrongfully conducts a private foreclosure sale after the trustor has discharged the secured obligation and become entitled to a reconveyance under *Civ. Code § 2941(b)*, the trustor is not limited to damages under *Civ. Code § 2941(d)* but is also entitled to have the private sale set aside and to have the property reconveyed [*Winnett v. Roberts (1986) 179 Cal. App. 3d 909, 922, 225 Cal. Rptr. 82]* .

[6] Special Rules Concerning Application of Provisions

[a] Costs and Actual Damages

If an action that was filed before January 1, 2002, was dismissed as a result of the 2001 amendments to *Civ. Code § 2941* [*see* 2001 Stats., ch. 560, § 1], the plaintiff was not required to pay the defendant's costs [*Civ. Code § 2941(i)(1)*]. If a claim was barred or dismissed as a result of those amendments, the claimant could, within six months thereafter, file or refile a claim for actual damages that occurred before January 1, 2002 [*Civ. Code § 2941(i)(2)*].

[b] Fees and Recording

Notwithstanding any other penalties, if a beneficiary collects a fee for reconveyance and thereafter has knowledge, or

should have knowledge, that no reconveyance has been recorded, the beneficiary must cause the reconveyance to be recorded. Alternatively, if the release of obligation is earlier and timely recorded, the beneficiary must refund to the trustor the fee charged to perform the reconveyance. Evidence of knowledge includes, but is not limited to, notice of a release of obligation pursuant to *Civ. Code § 2941(b)(3)* [*Civ. Code § 2941(j)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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A. Characteristics of Trust Deeds and Mortgages

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§ 555.20 Reconveyance After Posting Bond

[1] In General

If a secured obligation has been discharged, but the beneficiary or mortgagee either cannot be located after diligent search or refuses to perform the duty under *Civ. Code § 2941* [*see § 555.19*], the trustor or mortgagor may obtain a release by recording or causing to be recorded, in the office of the county recorder in which the trust deed or mortgage is recorded, a corporate bond accompanied by a declaration and, in the case of a trust deed, a reconveyance [*Civ. Code § 2941.7*]. This procedure for release may also be used if the obligation has not been discharged but the beneficiary or mortgagee of record cannot be located after diligent search [*Civ. Code § 2941.7*]. This procedure is deemed to be a cumulative remedy rather than an exclusive remedy [*Civ. Code § 2941.7(e)*].

"Diligent search" means all of the following [*Civ. Code § 2941.7(d)*]:

- The mailing of notices as provided under *Civ. Code § 2941.7(b)(5)* [*see § 555.20[2]*] and to any other address used to correspond with or contact the beneficiary or mortgagee.

- A check of the telephone directory in the city of the beneficiary's or mortgagee's last known address or place of business.

- A check of the records of the California secretary of state and the secretary of state in the state of incorporation (if known) if the beneficiary or mortgagee is a corporation.

- An inquiry with the regulatory authority of the bank or association if the beneficiary or mortgagee is a state or national bank or state or federal savings and loan association.

For further discussion and forms, see California Legal Forms, Ch. 25C, *Release and Reconveyance* (Matthew Bender).

[2] Reconveyance or Discharge

In the case of a trust deed, when 30 days have expired following the recordation of a bond and declaration under *Civ. Code § 2941.7*, and when the trustor or a successor has delivered to the trustee a demand for reconveyance under *Civ. Code § 2941.7* together with the usual reconveyance fees plus costs, the trustee must execute and record, or otherwise deliver as provided under *Civ. Code § 2941*, a reconveyance in the same form as if the beneficiary had made a proper request for reconveyance, provided the trustee has not received a written objection to the reconveyance from the beneficiary of record [*Civ. Code § 2941.7(c)*].

The trustee is not liable for this reconveyance, and the sole remedy of any person damaged by it is against the trustor, the affiant, or the surety on the bond [*Civ. Code § 2941.7(c)*].

In the case of a mortgage, when 30 days have expired following the recordation of a bond and declaration under *Civ. Code § 2941.7*, the mortgage is satisfied of record, provided no objection to satisfaction has been recorded by the mortgagee within that period [*Civ. Code § 2941.7(c)*].

When there is an outstanding indebtedness, the interest stops accruing as of the date the reconveyance is recorded or the mortgage is satisfied of record [*Civ. Code § 2941.7(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationRelease Payments

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§ 555.21 California Residential Mortgage Lending Act

[1] License Requirements

The California Residential Mortgage Lending Act [*Fin. Code § 50000 et seq.*] governs persons engaged in the business of making or servicing residential mortgage loans in California. In general, persons engaged in these activities must obtain a license from the commissioner of corporations unless the person or transaction is excepted from a statutory definition or from licensure [*Fin. Code § 50002(a)*; *see Fin. Code § 50120 et seq.* (application and issuance of license for residential mortgage lender; suspension, surrender, or revocation of license for violation; licensing of residential mortgage loan servicer)]. The following are among the exempt persons under the Act [*see Fin. Code § 50002(c)(1)*d-(3)]:

- Any bank, trust company, insurance company, or industrial loan company that is authorized to do business in California and is doing business under the authority of, or in accordance with, a license, certificate, or charter issued by the United States or any state, district, territory, or commonwealth of the United States.

- A federally chartered savings and loan association, federal savings bank, or federal credit union that is authorized to transact business in California.

- A savings and loan association, savings bank, or credit union, organized under the laws of California or any other state, that is authorized to transact business in California.

[2] Licensee's Financial Condition and Loan Transactions

For persons who are subject to the Act, matters covered by the Act include the following:

- Annual audits of a licensee's books by an independent certified public accountant [*see Fin. Code § 50200*].

- A licensee's minimal tangible net worth [*see Fin. Code § 50201*].

- Procedures for handling escrow funds and trust accounts, and related financial matters [*see Fin. Code § 50202*].

- Limits on fees to borrowers and related matters [*see Fin. Code § 50203*].

- Prohibited activities [*see Fin. Code § 50204*].

- A licensee's maintenance of a surety bond [*see Fin. Code § 50205*].

- Adherence to specified subprime and nontraditional lending guidelines [*see Fin. Code § 50333*].

- Brokerage services provided to a borrower by a licensee [*see Fin. Code § 50700 et seq.*].

[3] Additional Statutory Requirements

Detailed provisions govern the administration of the Act and the role of the commissioner of corporations. These provisions cover such matters as the functions, powers, and duties of the commissioner [*see Fin. Code § 50301*], the commissioner's required examination of licensees at least every two years [*see Fin. Code § 50302*], and annual reports that must be filed by licensees [*see Fin. Code § 50307*]. Required fees that must be paid, as well other assessments that the commissioner may levy, are set forth in *Fin. Code § 50400 et seq.*, and the general operation of the act and related matters are covered in *Fin. Code § 50601 et seq.*

[4] Violations of Act

If any amount other than, or in excess of, permitted charges is willfully charged, contracted for, or received by a regulated lender, the commissioner of corporations may order the lender to refund the entire amount of the charge (the otherwise permitted amount plus the excess amount) to all borrowers charged the excess amount, together with 10 percent annual interest on the amount computed from the date the improper charge was imposed. This penalty is in addition to any other penalties or remedies imposed on the lender [*Fin. Code § 50504(a)*]. If interest on the principal amount of a loan in excess of the amount authorized by the Actis willfully charged, contracted for, or received, the Commissioner may order the lender to refund the excess interest amount to all borrowers charged the excess amount, together with 10 percent annual interest on that amount computed from the date the improper charge was imposed [*Fin. Code § 50504(b)*]. The Act also sets forth criminal and civil penalties for violations [*Fin. Code §§ 50500, 50501*; *see Fin. Code § 50510*], which may be applied to persons engaged in specified prohibited practices [*see Fin. Code §§ 50502, 50503, 50505-50509*].

In addition to the specific remedies under the Act, the commissioner has more general enforcement powers. Whenever, in the opinion of the commissioner, a person (other than an exempt person) is engaged, either actually or through subterfuge, in the business of making residential mortgage loans or servicing residential mortgage loans, or engaging in business as a mortgage loan originator [*see Fin. Code § 50003.5(a)* (definition); *California Legal Forms, Ch. 25, Real Estate Loans, § 25.12[6]* (Matthew Bender)], without a license, the commissioner may order that person to desist and refrain. If, within 30 days after an order is served, a request for a hearing is filed in writing and the hearing is not held within 60 days after the filing, the order is rescinded [*Fin. Code § 50320*; *see Fin. Code § 50002(c)* (exempt persons)]. Additionally, whenever the commissioner deems it to be necessary for the public interest, the commissioner has

continuous authority to exercise the powers set forth in the act, whether or not an application for a license has been filed with the commissioner, any license has been issued, or a license has been surrendered, suspended, or revoked [*Fin. Code § 50328*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewGovernmentsState & Territorial GovernmentsEmployees & OfficialsGovernmentsState & Territorial GovernmentsLicensesReal Property LawFinancingState Regulation

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§ 555.21A Regulation of Certain Secured Consumer Loans

[1] Loans and Real Property Covered

A consumer loan that is secured by real property may be subject to additional regulation [*see Fin. Code § 4970 et seq.*]. For the loan to be covered by the governing provisions, the real property securing the loan must be (1) used or intended to be used as the principal dwelling by the consumer, (2) located in California, and (3) improved by a one- to four-unit residential building [*Fin. Code § 4970(d)*]. In addition, one of the following conditions must be met [*Fin. Code § 4970(b)*]:

- The annual percentage rate at consummation of the transaction will exceed by more than 8 percentage points the yield on Treasury securities having comparable periods of maturity on the 15th day of the month immediately preceding the month in which the application for the extension of credit is received by the creditor.

- The total points and fees payable by the consumer at or before closing will exceed 6 percent of the total loan amount [*see Fin. Code § 4970(c)* (what items are included in "points and fees"); *Wolski v. Fremont Investment & Loan (2005) 127 Cal. App. 4th 347, 350, 25 Cal. Rptr. 3d 500* (transaction was not covered loan when total points and fees exceeded 6 percent only if yield-spread premium was included)].

For these purposes, a consumer loan does not include any of the following [*Fin. Code § 4970(d)*]:

- A reverse mortgage.

- An open line of credit as defined by Regulation Z [*see 12 C.F.R. § 226.2(a)(20)*].

- A consumer credit transaction that is secured by rental property or second homes.

- A bridge loan, that is, any temporary loan, having a maturity of one year or less, for the purpose of acquisition or construction of a dwelling intended to become the consumer's principal dwelling.

[2] Prohibited Acts and Limitations for Covered Loans

[a] Prepayment Fee or Penalty

A covered loan may not include a prepayment fee or penalty after the first 36 months following the date of consummation of the loan [*Fin. Code § 4973(a)(1)*]. For the first 36 months, a covered loan may include a prepayment fee or penalty if the person who originates the covered loan has done all of the following [*Fin. Code § 4973(a)(2)*]:

- Offered the consumer a choice of another product without a prepayment fee or penalty;

- Disclosed in writing to the consumer at least three business days before loan consummation the terms of the prepayment fee or penalty for accepting a covered loan with the prepayment penalty, and the rates, points, and fees that would be available to the consumer for accepting a covered loan without a prepayment penalty; and

- Limited the amount of the prepayment fee or penalty to an amount not to exceed the payment of six months' advance interest, at the contract rate of interest then in effect, on the amount prepaid in any 12-month period in excess of 20 percent of the original principal amount.

In addition, a covered loan may not impose the prepayment fee or penalty if the loan is accelerated as a result of default, and the person who originates the covered loan may not finance a prepayment penalty through a new loan that is originated by the same person [*Fin. Code § 4973(a)(2)(D), (E)*].

[b] Permissible Payment Schedules

A covered loan with a term of five years or less may not provide at origination for a payment schedule with regular periodic payments that when aggregated do not fully amortize the principal balance as of the loan's maturity date. If a payment schedule is adjusted for the consumer's seasonal or irregular income, the total installments in a year may not exceed the amount of one year's worth of payments on the loan [*Fin. Code § 4973(b)*; *see Fin. Code § 4973(b)(2)* (not applicable to specified bridge loans)].

[c] Prohibited Terms and Provisions

A covered loan may not contain any of the following terms or provisions:

- A provision for negative amortization such that the payment schedule for regular monthly payments causes the principal balance to increase, unless the loan is a first mortgage and the licensed person discloses to the consumer that the loan contains a negative amortization provision that may add principal to the loan balance [*Fin. Code § 4973(c)*].

- Terms under which periodic payments required under the loan are consolidated and paid in advance from the loan proceeds [*Fin. Code § 4973(d)*].

- A provision that increases the interest rate as a result of a default, unless the change is a result of a

variable rate loan that is consistent with the provisions of the loan documents, and the change in interest rate is not triggered by default or the acceleration of indebtedness [*Fin. Code § 4973(e)*].

- A provision that permits the lender, in its sole discretion, to accelerate the indebtedness, other than an acceleration in accordance with the terms of the loan documents as a result of the consumer's default, pursuant to a due-on-sale provision, or due to fraud or material misrepresentation by a consumer in connection with the loan or the value of security for the loan [*Fin. Code § 4973(i)*].

[3] Lender's Reasonable Belief in Recipient's Ability to Repay Loan

A person who originates a covered loan may not make or arrange the loan unless, at the time the loan is consummated, the person reasonably believes the consumer or consumers will be able to make the scheduled payments to repay the obligation. The lender's belief must be based on a consideration of the consumer's current and expected income, current obligations, employment status, and other financial resources, other than the consumer's equity in the dwelling that secures repayment of the loan. In the case of a covered loan that is structured to increase to a specific designated rate, stated as a number or formula, at a specific predetermined date not exceeding 37 months from the date of application, this evaluation must be based on the fully indexed rate of the loan calculated at the time of application [*Fin. Code § 4973(f)(1)*].

In addition, a licensed person may not refinance or arrange for the refinancing of a consumer loan such that the new loan is a covered loan that is made for the purpose of refinancing, debt consolidation, or cash out that does not result in an identifiable benefit to the consumer,considering the consumer's stated purpose for seeking the loan, as well as fees, interest rates, finance charges, and points [*Fin. Code § 4973(i)*].

A consumer is presumed to be able to make the scheduled payments if, at the time the loan is consummated, the consumer's total monthly debts, including amounts owed under the loan, do not exceed 55 percent of the consumer's monthly gross income, as verified by the credit application, the consumer's financial statement, a credit report, financial information provided to the person originating the loan on behalf of the consumer, or any other reasonable means [*Fin. Code § 4973(f)(1)*; *see Fin. Code § 4973(f)(3)* (loans based on stated income must not be to evade these provisions)]. In any case, no presumption of inability to make the scheduled payments to repay the loan may arise solely from the fact that the consumer's total monthly debts, including the loan amounts owed, exceed 55 percent of the consumer's monthly gross income [*Fin. Code § 4973(f)(1)*].

[4] Other Limitations on Lender and Loans

In general, a person who originates a covered loan may not act in any manner that constitutes fraud, whether specifically prohibited by these provisions or of a different character [*Fin. Code § 4973(o)*]. Specific prohibitions applicable to covered loans include the following:

- A person who originates a covered loan may not pay a contractor under a home-improvement contract from the proceeds of a covered loan other than by an instrument payable to the consumer or jointly to the consumer and the contractor or, at the election of the consumer, to a third-party escrow agent for the benefit of the contractor in accordance with the terms and conditions in a written escrow agreement signed by the consumer, lender, and contractor [*see Fin. Code § 4973(g)*].

- A person who originates a covered loan may not recommend or encourage a consumer to default on an existing consumer loan or other debt in connection with the solicitation or making of a covered loan that refinances all or any portion of the existing consumer loan or debt [*Fin. Code § 4973(h)*].

- A person who originates a covered loan may not steer, counsel, or direct any prospective consumer

to accept a loan product with a risk grade less favorable than the risk grade that the consumer would qualify for based on the lender's current underwriting guidelines [*see Fin. Code § 4973(m)(1)*].

- If a broker originates a covered loan, the broker may not steer, counsel, or direct any prospective consumer to accept a loan product at a higher cost than that for which the consumer could qualify based on loan products offered by persons with whom the broker regularly does business [*Fin. Code § 4973(m)(2)*].

- A person who originates a covered loan may not avoid or attempt to avoid the applications of these provisions by structuring the loan transaction as an open-end credit plan for purposes of evading these provisions if the loan would have been a covered loan if structured as a closed-end loan, or by dividing any loan transaction into separate parts for the purpose of evading these provisions [*Fin. Code § 4973(n), (o)*].

[5] Required Disclosure Statement

A covered loan may not be made unless a statutory disclosure statement has been provided to the consumer no later than three business days before the loan documents are signed. The statement, entitled "CONSUMER CAUTION AND HOME OWNERSHIP COUNSELING NOTICE," must be written in 12-point or larger font [*see Fin. Code § 4973(j)(1)* (text of statutory notice)]. It is a rebuttable presumption that a licensed person has met its obligation to provide this disclosure if the consumer provides the licensed person with a signed acknowledgment of receipt of a copy of the notice [*Fin. Code § 4973(j)(2)*].

[6] Enforcement and Penalties for Violations of Law

An extensive number of provisions govern the enforcement of this law [*see Fin. Code § 4974 et seq.*]. However, any failure to comply with the law that was not willful or intentional and resulted from a bona fide error (which does not include an error in legal judgment), that occurred notwithstanding the maintenance of procedures reasonably adopted to avoid those errors must be corrected within 45 days after receipt of a complaint or discovery of the error. If corrected in this manner, a person who originates a covered loan will not be administratively, civilly, or criminally liable for the error [*Fin. Code § 4974(a)*]. In addition, any licensed person who violated provisions of the law are deemed to have violated the person's licensing law and are subject to suspension or loss of their license as well as administrative and civil penalties [*Fin. Code § 4975*; *see Fin. Code § 4977*].

[7] Preemption of Local Regulation

Fin. Code § 4970 et seq. fully occupies the field of regulation of predatory lending tactics in home mortgages and therefore preempted a city ordinance regulating such lending practices, including the ordinance's regulation of loans not covered by the state statutes [*American Fin. Servs. Ass'n v. City of Oakland (2005) 34 Cal. 4th 1239, 1258, 23 Cal. Rptr. 3d 453, 104 P.3d 813]* . Although the statutes contain no express preemption language, the scope of the legislative scheme, as well as the legislative history, provide clear indications of the Legislature's implicit intent to fully occupy the field [*American Fin. Servs. Ass'n v. City of Oakland (2005) 34 Cal. 4th 1239, 1255-1256, 23 Cal. Rptr. 3d 453, 104 P.3d 813]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingConstruction LoansReal Property LawFinancingState Regulation

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§ 552.21B Temporary Payment Relief for Service Members in Iraq and Afghanistan

[1] Eligibility for Deferment of Payments

Temporary relief from mortgage payments is available under *Mil. & Vet. Code § 800 et seq.* to a member of the U.S. military reserve or California national guard called to active duty as a result of the Iraq conflict pursuant to the Authorization for Use of Military Force Against Iraq Resolution of 2002 [Pub. L. No. 107-243] or the Afghanistan conflict pursuant to Presidential Order No. 13239. Such a service member is called a "reservist" in the statutes [*Mil. & Vet. Code § 803*].

Mil. & Vet. Code § 800 et seq. will not apply to any active duty voluntarily served after the close of the Iraq or Afghanistan conflicts or to any reservist on active duty as part of the Iraq or Afghanistan conflicts before January 1, 2006 [*Mil. & Vet. Code § 809*].

In addition to any other benefits provided by law and to the extent permitted by federal law, any member of the U.S. military reserve or the California national guard who is called to active duty after February 9, 2005, as a part of the Iraq and Afghanistan conflicts may defer payments on an obligation secured by a mortgage or deed of trust, while serving on active duty [*Mil. & Vet. Code § 800(a)*]. "Mortgage" means an obligation secured by a mortgage or deed of trust, and is limited to an obligation secured by a mortgage or deed of trust for residential property owned by the reservist and used as that reservist's primary place of residence on the date the reservist was ordered into active duty [*Mil. & Vet. Code § 801*].

Mil. & Vet. Code § 800 et seq. will apply only to an obligation that was incurred before the date a member of the U.S. military reserve or California national guard was called to active duty as part of the Iraq and Afghanistan conflicts [*Mil. & Vet. Code § 811*].

[2] Procedure to Obtain Deferment

For a mortgage debt of a reservist to be subject to the provisions of *Mil. & Vet. Code § 800 et seq.*, the reservist or the reservist's designee must deliver to the lender both of the following [*Mil. & Vet. Code § 800(b)*]:

- A letter signed by the reservist, under penalty of perjury, requesting a deferment of financial obligations; and

- If required by a financial institution, proof that the reservist's employer does not provide continuing income to the reservist while the reservist is on active military duty, including the reservist's military pay, of more than 90 percent of the reservist's monthly salary and wage income earned before the call to active duty.

On request of the reservist or the reservist's dependent or designee and within five working days of that request, if applicable, the employer of a reservist must furnish the letter or other comparable evidence showing that the employer's compensation policy does not provide continuing income to the reservist, including the reservist's military pay, of more than 90 percent of the reservist's monthly salary and wage income earned before the call to active duty [*Mil. & Vet. Code § 800(c)*].

[3] Relief During Deferment Period

The deferment period will be the lesser of 180 days or the period of active duty plus 60 calendar days and will apply only to those payments due after the notice provided to a lender by the reservist or reservist's designee [*Mil. & Vet. Code § 800(d)*].

The lender must extend the term of the obligation by the number of months the obligation was deferred [*Mil. & Vet. Code § 800(e)*].

During the deferment period, the reservist may defer the payment of principal and interest on the specified obligations. No penalties may be imposed on the nonpayment of principal or interest during this period. No interest may be charged or accumulated on the principal or interest on which the payment was delayed. No foreclosure or repossession of property on which payment has been deferred may take place during the period [*Mil. & Vet. Code § 804*].

[4] Limitations on Relief

Any mortgage payments deferred are due and payable on the earlier of the following [*Mil. & Vet. Code § 802(a)*]:

- The sale of the property or other event specified in the documents creating the obligation permitting the lender to accelerate the loan, other than a deferment of payments authorized by *Mil. & Vet. Code § 800*;

- Further encumbrance of the property; or

- The maturity of the obligation as defined under the terms of the documents creating the obligation or, if applicable, as extended pursuant to *Mil. & Vet. Code § 800(e)* [*see* § 555.21B[3]].

A reservist is not precluded from making payments toward the mortgage payments deferred before the occurrence of any of the events described above [*Mil. & Vet. Code § 802(c)*].

A reservist with a mortgage subject to an impound account for the payment of property taxes, special assessments,

mortgage insurance, and hazard insurance is not relieved from making monthly payments of an amount that is at least sufficient to pay these amounts, unless the borrower and lender agree to a lesser amount [*Mil. & Vet. Code § 802(b)*].

[5] Effect on Holder in Due Course

In those instances when a financial obligation covered by *Mil. & Vet. Code § 800 et seq.* is sold, any requirement to defer payments as specifiedin those code sections is transferred to the purchaser of the obligation [*Mil. & Vet. Code § 810*].

[6] No Adverse Effect on Creditworthiness

A stay, postponement, or suspension under *Mil. & Vet. Code § 800 et seq.* of the payment of any liability of a person in military service may not provide the basis for (1) affecting credit ratings, (2) the denial or revocation of credit, or (3) a change by the lender in the terms of an existing credit arrangement [*Mil. & Vet. Code § 805*].

[7] Continuation of Credit Disability Insurance

The holder of a loan with regard to which the debtor has purchased prepaid credit disability insurance [*see* Ch. 127, *Consumer Contracts and Loans*] must give notice to the debtor, not less than 30 days before the expiration date of the insurance, that the debtor will not be protected during the period between that expiration date and the deferred maturity date of the loan unless the insurance is extended. The debtor may, at his or her option, direct the holder to add the amount of the additional premium to the unpaid balance of the loan [*Mil. & Vet. Code § 807(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Negotiable Instruments (Article 3)EnforcementHolders in Due CourseGeneral OverviewInsurance LawLife InsuranceCredit LifeReal Property LawFinancingState Regulation

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§ 555.21C Restrictions on Higher-Priced Mortgage Loans

[1] Overview

State-licensed lenders can be subject to certain restrictions on higher-priced mortgage loans imposed by *Fin. Code § 4995 et seq.* A "higher-priced mortgage loan" is a consumer credit transaction, secured by the consumer's principal dwelling, with an annual percentage rate that exceeds the average prime offer rate for a comparable transaction, as of the date the interest rate is set, by (1) at least 1.5 percentage points, for a loan secured by a first lien on the dwelling, or (2) at least 3.5 percentage points, for a loan secured by a subordinate lien on the dwelling [*Fin. Code § 4995(a)* (incorporating definition in *12 C.F.R. § 226.35(a)*)].

The provisions of *Fin. Code § 4995 et seq.* apply only with respect to a higher-priced mortgage loan that originates on or after July 1, 2010 [*Fin. Code § 4995.4*].

The state-licensed lenders that can be subject to the restrictions of *Fin. Code § 4995 et seq.* are real estate brokers, finance lenders and brokers licensed under the Finance Lenders Law, residential mortgage lenders, commercial banks, industrial banks, savings associations, and credit unions [*Fin. Code § 4995(b)*].

There is no private right of action against a lender for a violation of *Fin. Code § 4995 et seq.*, which can be enforced only by the attorney general or by the culpable lender's licensing agency [*Fin. Code § 4995.3(e)*]. However, in the event of a violation of *Fin. Code § 4995 et seq.*, a provision for a prepayment penalty or yield spread premium, with respect to the tainted higher-priced mortgage loan, is unenforceable [*Fin. Code § 4995.3(f)*].

[2] Lenders Making Higher-Priced Loans

Notwithstanding any other provision of law, in making higher-priced mortgage loans, state-licensed lenders are subject

to certain restrictions. The maximum amount of a prepayment penalty that may be imposed by the lender in connection with the higher-priced mortgage loan must not exceed 2 percent of the principal balance prepaid, for prepayment of the loan during the first 12 months following loan consummation, or 1 percent of the principal balance prepaid, for prepayment of the loan during the second 12 months following loan consummation [*Fin. Code § 4995.1*].

The lender must not *but see Fin. Code § 4995.2(h)* (safe-harbor protection for good faith noncompliance)]:

- Make, or cause to be made, any false, deceptive, or misleading statement or representation in connection with the higher-priced mortgage loan [*Fin. Code § 4995.2(b)*] ;

- Recommend or encourage default on an existing loan or other debt prior to and in connection with the closing or planned closing of the higher-priced mortgage loan, it if refinances all or any portion of the existing loan or debt [*Fin. Code § 4995.2(f)*]; or

- Make the higher-priced mortgage loan with a provision for negative amortization [*Fin. Code § 4995.2(g)*].

After the higher-priced mortgage loan is made, the lender may enter into a subsequent agreement with the borrower to capitalize payments as a means of permitting the borrower to cure or prevent a delinquency; and that would not violate the proscription against negative amortization [*Fin. Code § 4995.2(g)*].

[3] Lenders Acting as Mortgage Brokers

A state-licensed lender is a "mortgage broker" for purposes of *Fin. Code § 4995 et seq.* when the lender arranges or attempts to arrange a higher-priced mortgage loan, which originates on or after July 1, 2010, and which is to be made by an unaffiliated third person, if the state-licensed lender acts, in the transaction, as exclusive agent for the borrower or as dual agent for the borrower and the higher-priced lender, for compensation or in expectation of compensation, whether paid directly or indirectly. In that situation, the lender-broker is engaging in "mortgage brokerage services" [*Fin. Code § 4995(c), (d)*].

A mortgage broker that arranges only higher-priced mortgage loans must disclose that fact to a borrower, both orally and in writing, at the time of initially engaging in mortgage brokerage services with that borrower [*Fin. Code § 4995.2(c)*].

A mortgage broker that provides mortgage brokerage services must not steer, counsel, or direct a borrower to accept a loan at a higher cost than that for which the borrower could qualify based on the loans offered by the persons with whom the broker regularly does business [*Fin. Code § 4995.2(d)*].

A mortgage broker that provides mortgage brokerage services for a borrower must not receive compensation, including a yield spread premium, fee, commission, or any other compensation, for arranging a higher-priced mortgage loan with a prepayment penalty that exceeds the compensation that the mortgage broker would otherwise receive for arranging that higher-priced mortgage loan without a prepayment penalty [*Fin. Code § 4995.2(e)(1)*].

When providing mortgage brokerage services for a borrower, a mortgage broker must receive the same compensation for providing those services whether paid by the lender, by the borrower, or by a third party [*Fin. Code § 4995.2(e)(2)*].

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§ 555.21D Mortgage Brokers as Fiduciaries

State-licensed lenders can have specific fiduciary duties under *Civ. Code § 2923.1* when acting as mortgage brokers for residential mortgage loans; however, this will not limit or narrow any other fiduciary duty of a mortgage broker [*Civ. Code § 2923.1(c)*].

A "residential mortgage loan" in this context is a consumer credit transaction that is secured by residential real property that is improved by four or fewer residential units [*Civ. Code § 2923.1(b)(4)*].

The state-licensed lenders that could be subject to *Civ. Code § 2923.1* are real estate brokers, finance lenders and brokers licensed under the Finance Lenders Law, residential mortgage lenders, commercial banks, industrial banks, savings associations, and credit unions [*Civ. Code § 2923.1(b)(1)*].

A state-licensed lender is a "mortgage broker" for purposes of *Civ. Code § 2923.1* when the lender arranges or attempts to arrange a residential mortgage loan which is to be made by an unaffiliated third person, if the state-licensed lender acts, in the transaction, as exclusive agent for the borrower or as dual agent for the borrower and the residential lender, for compensation or in expectation of compensation, whether paid directly or indirectly. In that situation, the lender-broker is engaging in "mortgage brokerage services" [*Civ. Code § 2923.1(b)(2), (3)*].

A mortgage broker providing mortgage brokerage services to a borrower is the fiduciary of the borrower, and any violation of the broker's fiduciary duties is a violation of the mortgage broker's license law. This fiduciary duty includes a requirement that the mortgage broker place the economic interest of the borrower ahead of the mortgage broker's own economic interest. A mortgage broker that provides mortgage brokerage services to the borrower owes this fiduciary duty to the borrower regardless of whether the mortgage broker is acting as an agent for any other party in connection with the residential mortgage loan transaction [*Civ. Code § 2923.1(a)*].

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§ 555.22 Deed Absolute As Mortgage

[1] When Given As Security

Every transfer of an interest in real property, other than in trust, that is made only as security for the performance of another act is to be deemed a mortgage [*Civ. Code § 2924(a)*]. Courts will deem a grant deed to be a mortgage, in spite of the fact that it is absolute on its face, if it is shown to have been given only to secure a debt [*Chapman v. Hicks (1919) 41 Cal. App. 158, 162, 182 P. 336* ; *see Schriber v. Alameda etc. Title Ins. Co. (1958) 156 Cal. App. 2d 700, 707, 320 P.2d 82* (deed absolute on its face was mortgage even when conveyance was to third person to hold for mortgagee)]. In such a case the intention of the parties will govern [*Chapman v. Hicks (1919) 41 Cal. App. 158, 162-163, 182 P. 336* ; *see Rickless v. Temple (1970) 4 Cal. App. 3d 869, 890, 84 Cal. Rptr. 828]* .

[2] Effect of Establishing Deed Absolute As Mortgage

A deed absolute on its face, once established as a mortgage, does not pass legal title but creates a mortgage lien in favor of the grantee [*Civ. Code § 2888*; *Moisant v. McPhee (1891) 92 Cal. 76, 79, 28 P. 46* ; *Chapman v. Hicks (1919) 41 Cal. App. 158, 165, 182 P. 336]* . The parties' rights and duties under the deed are then determined by the statutes governing mortgages generally [*see, e.g., Avery v. Hagenios (1919) 45 Cal. App. 176, 179-180, 187 P. 119* (grantee was required under one-form-of-action-rule, *Code Civ. Proc. § 726*, to foreclose rather than seek personal judgment for debt)].

[3] Action to Establish Deed Absolute As Mortgage

[a] By Grantor

The grantor of a deed absolute on its face may have the deed established as a mortgage through an action for declaratory

relief [*see Orlando v. Berns (1957) 154 Cal. App. 2d 753, 754-757, 316 P.2d 705* (grantor sought declaration that, in transaction involving sale with option to repurchase, deed was given as security for loan)].

The grantor may also bring a quiet title action to compel reconveyance of title if the secured obligation has been discharged [*see, e.g., Louvall v. Gridley (1886) 70 Cal. 507, 508-510, 11 P. 777* ; *Steel v. Hadsell (1937) 23 Cal. App. 2d 354, 355-356, 73 P.2d 262]* . If the obligation has not been discharged, the grantor cannot obtain quiet-title relief without first paying the debt [*Aguilar v. Bocci (1974) 39 Cal. App. 3d 475, 476-477, 114 Cal. Rptr. 91]* . A grantor who brings a quiet title action to compel reconveyance before paying off the debt may obtain relief conditioned on subsequent payment of the remaining debt in an amount and within a reasonable time determined by the court [*see, e.g., Rickless v. Temple (1970) 4 Cal. App. 3d 869, 875, 84 Cal. Rptr. 828* ; *Greene v. Colburn (1958) 160 Cal. App. 2d 355, 356, 325 P.2d 148]* . For a form of complaint by a grantor to quiet title and compel reconveyance by the grantee, see *§ 555.125*.

When the grantee has sold the property to a third party, the grantor may elect to affirm the sale and bring an action against the grantee to recover the net proceeds of the sale, less the outstanding debt [*Wilber v. Sanderson (1872) 43 Cal. 496, 497* ; *General Casualty Co. v. Soda (1960) 184 Cal. App. 2d 390, 391-392, 395, 7 Cal. Rptr. 536]* . Alternatively, the grantor may bring an action to quiet title against the third party transferee, unless that transferee is a good faith purchaser or lienholder [*see, e.g., Steel v. Hadsell (1937) 23 Cal. App. 2d 354, 356-357, 73 P.2d 262* (grantor may compel reconveyance from third-party transferee who acquired title without valuable consideration or had notice that deed was hidden security device); *see also Civ. Code §§ 2925, 2950*; *Duncan v. Ledig (1949) 90 Cal. App. 2d 7, 14, 202 P.2d 107]* .

[b] By Grantee

The grantee of a deed absolute intended as a mortgage may, on default by the grantor, bring an action to have the deed declared to be a mortgage and then foreclosed [*see, e.g., Churchill v. Woodworth (1906) 148 Cal. 669, 670, 84 P. 155* ; *cf. Aguilar v. Bocci (1974) 39 Cal. App. 3d 475, 476, 114 Cal. Rptr. 91* (grantee has no remedy when action on secured obligation is barred by statute of limitations)]. This is the grantee's sole remedy, and the grantee may recover a personal judgment on the debt only as adeficiency judgment [*see Avery v. Hagenios (1919) 45 Cal. App. 176, 179-180, 187 P. 119]* . For a form of complaint by a grantee to foreclose a deed established as a mortgage, see *§ 555.127*.

[c] Proof

Parol or extrinsic evidence is competent to show that a deed absolute on its face was intended as a mortgage, except against a good faith purchaser or lienholder [*Civ. Code §§ 2925, 2950*; *Shusett, Inc. v. Home Sav. & Loan Asso. (1964) 231 Cal. App. 2d 146, 153, 41 Cal. Rptr. 622* ; *Jensen v. Friedman (1947) 79 Cal. App. 2d 494, 498, 179 P.2d 855]* . There is a rebuttable presumption that a deed absolute on its face is what it purports to be [*Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal. App. 3d 143, 147-148, 91 Cal. Rptr. 193* ; *see Civ. Code § 1105*; *Evid. Code § 602*]. Therefore, the person seeking to show that the deed is actually a mortgage has the burden of proof, by clear and convincing evidence [*Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal. App. 3d 143, 148, 91 Cal. Rptr. 193* ; *Jones v. Dickerman (1931) 114 Cal. App. 357, 362, 300 P. 135]* . In other words, there must be no substantial doubt that the real intention of the parties was to give the deed solely as security [*Jensen v. Friedman (1947) 79 Cal. App. 2d 494, 505, 179 P.2d 855]* .

The trial court must consider all facts and circumstances in determining whether a deed absolute was intended to be a mortgage [*Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal. App. 3d 143, 149, 91 Cal. Rptr. 193* ; *Greene v. Colburn (1958) 160 Cal. App. 2d 355, 358, 325 P.2d 148]* . The facts of central importance are (1) the existence of a debt owed by the grantor to the grantee at the time of the transaction, and (2) a continuation of this debtor-creditor relationship after the execution of the deed [*Spataro v. Domenico (1950) 96 Cal. App. 2d 411, 413, 216 P.2d 32* ; *Jensen v. Friedman (1947) 79 Cal. App. 2d 494, 501, 179 P.2d 855]* . If this is shown, it may reasonably

be inferred that the deed was given only as security for the debt [*Jensen v. Friedman (1947) 79 Cal. App. 2d 494, 501, 179 P.2d 855* ; *Chapman v. Hicks (1919) 41 Cal. App. 158, 162, 182 P. 336]* . On the other hand, the lack of any surviving debt tends to show that the deed was not intended as a mortgage but was an outright transfer [*Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal. App. 3d 143, 149, 91 Cal. Rptr. 193* ; *Borton v. Joslin (1928) 88 Cal. App. 515, 521, 263 P. 1033]* .

Another important factor is whether there was any express mention by both parties of intent to treat the deed as a mortgage [*Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal. App. 3d 143, 148, 91 Cal. Rptr. 193]* . Mutual intent that the deed operate as a mortgage may be shown, for example, by an express agreement to reconvey on repaymentof a debt [*Rickless v. Temple (1970) 4 Cal. App. 3d 869, 890, 84 Cal. Rptr. 828]* , or it may be disproved by the express refusal of the grantee to enter into a security transaction [*Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal. App. 3d 143, 148, 91 Cal. Rptr. 193]* . The allocation of ownership rights is also significant. The grantee's assumption of possession after the transaction tends to show that no mortgage was intended [*Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal. App. 3d 143, 148, 91 Cal. Rptr. 193]* , while the grantor's retention of possession tends to show the opposite [*see Rickless v. Temple (1970) 4 Cal. App. 3d 869, 890, 84 Cal. Rptr. 828]* . A marked inequality between the value of the property and the consideration given for it under the deed is also strongly indicative of the deed's status as a security device rather than an outright conveyance [*Beeler v. American Trust Co. (1944) 24 Cal. 2d 1, 17, 147 P.2d 583* ; *but see Develop-Amatic Engineering v. Republic Mortgage Co. (1970) 12 Cal. App. 3d 143, 149, 91 Cal. Rptr. 193* (disparity in value was not controlling, in view of other facts showing absolute status of deed)].

[4] Equitable Mortgage Compared

A deed absolute on its face given only as security for a debt is sometimes said to be an equitable mortgage [*see, e.g., Aguilar v. Bocci (1974) 39 Cal. App. 3d 475, 476, 114 Cal. Rptr. 91* ; *UMET Trust v. Santa Monica Medical Investment Co. (1983) 140 Cal. App. 3d 864, 868, 189 Cal. Rptr. 922]* . Although the two are functionally similar, a deed absolute given as security is not an equitable mortgage established under equitable principles [*see § 555.23[1]*], but is a legal mortgage, one created by *Civ. Code §§ 2924* and *2925* [*see Schriber v. Alameda etc. Title Ins. Co. (1958) 156 Cal. App. 2d 700, 707, 320 P.2d 82]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawNonmortgage LiensEquitable LiensReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. LEGAL BACKGROUND
A. Characteristics of Trust Deeds and Mortgages

48-555 California Forms of Pleading and Practice--Annotated § 555.23

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§ 555.23 Equitable Mortgage

[1] Written Agreement Showing Intent

An executory agreement in writing, in which a debtor sufficiently indicates an intent to make certain real property security for the debt, is in equity deemed to create a mortgage on that property, enforceable as any other mortgage except against good faith purchasers or lienholders [*Coast Bank v. Minderhout (1964) 61 Cal. 2d 311, 313-314, 38 Cal. Rptr. 505, 392 P.2d 265* (overruled on other grounds, *Wellenkamp v. Bank of America (1978) 21 Cal. 3d 943, 953, 148 Cal. Rptr. 379, 582 P.2d 970*); *Higgins v. Manson (1899) 126 Cal. 467, 469-470, 58 P. 907]* . A promise to give a mortgage or trust deed on particular property as security for a debt may be enforceable as an equitable mortgage, as may an agreement that fails to qualify as a legal mortgage because of defective execution or some other reason but nonetheless provides that specified property is to be securityfor a debt [*Coast Bank v. Minderhout (1964) 61 Cal. 2d 311, 314, 38 Cal. Rptr. 505, 392 P.2d 265* (overruled on other grounds, *Wellenkamp v. Bank of America (1978) 21 Cal. 3d 943, 953, 148 Cal. Rptr. 379, 582 P.2d 970*); *Kaiser Industries Corp. v. Taylor (1971) 17 Cal. App. 3d 346, 351, 94 Cal. Rptr. 773]* . A second trust deed with an erroneous description creates an equitable mortgage [*Clayton Development Co. v. Falvey (1988) 206 Cal. App. 3d 438, 444, 253 Cal. Rptr. 609]* . For further examples and discussion of the showing required to establish an equitable mortgage, see *§ 555.23[3]*.

[2] Other Equitable Liens Compared

With respect to equitable mortgages, courts are primarily concerned with whether the parties intended to create a security interest; if so, courts will enforce that intent in equity, as between the parties, in spite of any legal imperfection in creating that interest [*see Title Ins. & Trust Co. v. California Dev. Co. (1915) 171 Cal. 173, 201-202, 152 P. 542]* . On the other hand, courts may impose equitable liens in other situations when there is no intent to create a security interest, such as to prevent unjust enrichment [*see, e.g., Beckman v. Mayhew (1975) 49 Cal. App. 3d 529, 534, 122 Cal. Rptr. 604]* . For further discussion and forms relating to equitable liens generally, see *Ch. 342, Liens and Wage*

Preferences.

[3] Action to Establish Equitable Mortgage

[a] Foreclosure

Typically, the creditor, after the debtor's default, seeks to establish an equitable mortgage in an action to foreclose that mortgage [*see, e.g.,* *Coast Bank v. Minderhout (1964) 61 Cal. 2d 311, 312, 38 Cal. Rptr. 505, 392 P.2d 265* (overruled on other grounds in *Wellenkamp v. Bank of America (1978) 21 Cal. 3d 943, 953, 148 Cal. Rptr. 379, 582 P.2d 970*)]. If an equitable mortgage has been created, this is the creditor's only remedy, because the creditor as mortgagee must follow the foreclosure procedure of the one-form-of-action-rule [*Code Civ. Proc. § 726*] and may not elect instead to bring an action on the debt [*Clayton Development Co. v. Falvey (1988) 206 Cal. App. 3d 438, 444, 253 Cal. Rptr. 609* ; *Kaiser Industries Corp. v. Taylor (1971) 17 Cal. App. 3d 346, 352-353, 94 Cal. Rptr. 773]* . For a form of complaint to establish and foreclose an equitable mortgage, see *§ 555.128*.

[b] Proof of Intent

The controlling factual question is whether the parties intended to make the property security for the debt [*Kaiser Industries Corp. v. Taylor (1971) 17 Cal. App. 3d 346, 351, 94 Cal. Rptr. 773]* . The instrument itself need not show on its face the intent to create a security interest, as long as itis reasonably susceptible to this interpretation, and the requisite intent is shown by extrinsic evidence [*Coast Bank v. Minderhout (1964) 61 Cal. 2d 311, 314-315, 38 Cal. Rptr. 505, 392 P.2d 265* (overruled on other grounds in *Wellenkamp v. Bank of America (1978) 21 Cal. 3d 943, 953, 148 Cal. Rptr. 379, 582 P.2d 970*); *Kaiser Industries Corp. v. Taylor (1971) 17 Cal. App. 3d 346, 351, 94 Cal. Rptr. 773]* . One factor to consider in determining whether an agreement is reasonably susceptible to interpretation as a security device is whether this interpretation would be consistent with principles applicable to adhesion contracts. A creditor should not be permitted to take advantage of ambiguous language in a printed form that the creditor has provided in lieu of a standard trust deed, so as to convert an agreement into a security device whenever it becomes desirable to do so [*Tahoe National Bank v. Phillips (1971) 4 Cal. 3d 11, 19-20, 92 Cal. Rptr. 704, 480 P.2d 320]* .

The Supreme Court has created an apparent conflict with respect to agreements by debtors not to transfer or encumber real property. On one hand, the Court held that an agreement by a debtor not to transfer or encumber certain real property until the debt was discharged was reasonably susceptible to being interpreted as providing the specified property as security for the debt, so that it was enforceable as an equitable mortgage on a sufficient showing that such an interpretation conformed with the parties' intent [*Coast Bank v. Minderhout (1964) 61 Cal. 2d 311, 313 n.2, 315, 38 Cal. Rptr. 505, 392 P.2d 265* , *overruled on other grounds,* *Wellenkamp v. Bank of America (1978) 21 Cal. 3d 943, 953, 148 Cal. Rptr. 379, 582 P.2d 970* ; *see* *Kaiser Industries Corp. v. Taylor (1971) 17 Cal. App. 3d 346, 349-350, 352, 94 Cal. Rptr. 773]* . The court reached the opposite conclusion with respect to an almost identical agreement in another case [*Tahoe National Bank v. Phillips (1971) 4 Cal. 3d 11, 14 n.2, 16-21, 92 Cal. Rptr. 704, 480 P.2d 320]* . The court in *Tahoe National Bank* distinguished the agreement in *Coast Bank* on the ground that the *Coast Bank* agreement included an acceleration clause [*see § 555.15[3], [4]*] and was executed in connection with a loan to improve the property covered by the agreement, noting that both features were characteristic of a mortgage and were absent in the agreement considered in *Tahoe National Bank* [*Tahoe National Bank v. Phillips (1971) 4 Cal. 3d 11, 20, 92 Cal. Rptr. 704, 480 P.2d 320]* .

Reflecting what may have been a more important distinction between the cases, the *Tahoe National Bank* court also noted the different equities of the two cases, emphasizing that the creditor in *Coast Bank* sought to establish and foreclose an equitable mortgage after the debtor breached the covenant not to convey, which was the creditor's only effective remedy in the circumstances. By contrast, the debtor in *Tahoe National Bank* had merely defaulted on the debt and had not breached the agreement not toconvey, so that the property was still available for satisfaction of the creditor's judgment on the note [*Tahoe National Bank v. Phillips (1971) 4 Cal. 3d 11, 20-21, 92 Cal. Rptr. 704, 480 P.2d 320* ;

see Orange County Teachers Credit Union v. Peppard (1971) 21 Cal. App. 3d 448, 451-454, 98 Cal. Rptr. 533] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsEquitable MortgagesReal Property LawPriorities & RecordingBona Fide PurchasersReal Property LawPriorities & RecordingRecording Acts

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[Reserved]

§§ 555.24[Reserved]

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. LEGAL BACKGROUND
B. Foreclosure
1. In General

48-555 California Forms of Pleading and Practice--Annotated § 555.30

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§ 555.30 Foreclosure

[1] Private Sale or Foreclosure Action

Foreclosure refers to the enforcement of a mortgage or trust deed in any manner provided by law. The original judicial method of foreclosure is an equitable proceeding to terminate ("foreclose" in the sense of preclude) a mortgagor's or trustor's right or equity of redemption [*see Civ. Code § 2931*; *Code Civ. Proc. § 725a*; *Bank of Italy etc. Assn. v. Bentley (1933) 217 Cal. 644, 654, 20 P.2d 940* ; *Hibernia Sav. & Loan Soc. v. Lauffer (1940) 41 Cal. App. 2d 725, 732, 107 P.2d 494]* . A private sale, or trustee's sale, conducted under a contractual power of sale, is referred to as a nonjudicial method of foreclosure [*see, e.g., Miller v. Cote (1982) 127 Cal. App. 3d 888, 894, 179 Cal. Rptr. 753* ; *Bisno v. Sax (1959) 175 Cal. App. 2d 714, 722, 346 P.2d 814]* .

Because standard trust deeds and most mortgages include a power of sale, the beneficiary or mortgagee typically has the option of pursuing either the judicial or nonjudicial method of foreclosure [*see Lincoln v. Superior Court (1934) 2 Cal. 2d 127, 128-130, 39 P.2d 405]* . Initially, at least, the beneficiary or mortgagee need not elect one method to the exclusion of the other but may pursue both concurrently [*Flack v. Boland (1938) 11 Cal. 2d 103, 107-108, 77 P.2d 1090* ; *Carpenter v. Title Ins. & Trust Co. (1945) 71 Cal. App. 2d 593, 597, 163 P.2d 73* ; *see Commercial Centre Realty Co. v. Superior Court of San Francisco (1936) 7 Cal. 2d 121, 129, 59 P.2d 978]* . The judicial remedy may be pursued until the completion of the nonjudicial sale [*Code Civ. Proc. § 580d*; *Hibernia Sav. & Loan Soc. v. Lauffer (1940) 41 Cal. App. 2d 725, 728, 107 P.2d 494* ; *see § 555.32[2]*]. Conversely, a private sale may be completed at any time before a decree of foreclosure is entered [*see Flack v. Boland (1938) 11 Cal. 2d 103, 108, 77 P.2d 1090* (whether private sale is available after judgment in foreclosure action is open question)]. For discussion comparing the respective features of the two remedies, see *§ 555.30[2]*.

PRACTICE TIP:

Election Through Judicial Foreclosure Decree Entry. Although the issue was not resolved with certainty in *Flack*, this practitioner finds that many courts have ruled in unpublished proceedings that an election has occurred if a lender has obtained a judicial foreclosure decree (even before a marshall's sale is conducted under the decree). However, this area is still ripe for litigation, because it can be argued that no election occurs until a marshall's sale actually happens and the time begins to accrue for a fair value hearing. *By William M. Hensley*

In the few transactions in which there is no provision for a private sale, such as when a grant deed is established as a mortgage [*see § 555.22*], the only remedy is judicial foreclosure [*see Aguilar v. Bocci (1974) 39 Cal. App. 3d 475, 476-477, 114 Cal. Rptr. 91]* .

[2] Methods Compared

The following points of comparison are among the significant factors to be considered in determining whether judicial foreclosure or private sale is the more appropriate remedy in a given case [*see* [1], *above*].

1. In a foreclosure action, if the security proves to be insufficient, the beneficiary in some cases may recover a money judgment for the deficiency [*Code Civ. Proc. §§ 580a, 726(b)*]. For discussion of when a deficiency judgment may be obtained, see *§ 555.32[3]*. After a private sale, a deficiency judgment is barred in nearly all cases [*Code Civ. Proc. §§ 580b, 580d*; *see § 555.32[2]*].

2. The title conveyed by a private sale is nonredeemable [*Roseleaf Corp. v. Chierighino (1963) 59 Cal. 2d 35, 43-44, 27 Cal. Rptr. 873, 378 P.2d 97* ; *see § 555.62*]. In the case of a sale under a foreclosure decree, the trustor or a successor in interest may, in some cases, redeem the property up to one year after the sale [*Code Civ. Proc. § 729.010 et seq.*; *Roseleaf Corp. v. Chierighino (1963) 59 Cal. 2d 35, 43-44, 27 Cal. Rptr. 873, 378 P.2d 97* ; *see § 555.72*].

3. A private sale can be completed in a relatively short period, possibly 110 days [*see Civ. Code §§ 2924(a)(3), 2924f* (90-day period between notice of default and notice of sale plus 20-day period between notice of sale and sale); *Garfinkle v. Superior Court (1978) 21 Cal. 3d 268, 275, 146 Cal. Rptr. 208, 578 P.2d 925* ; *but see § 555.56[4]*]. Judicial foreclosure is subject to the delays incident to civil actions and the enforcement of a judgment for sale of real property. Additionally, a private sale may be expected to involve less expense than a court action.

4. A foreclosure action is subject to the bar of the statute of limitations on the secured obligation, but a private sale is not a judicial action andmay therefore be conducted at any time before final expiration of the trust deed or mortgage with a power of sale [*Flack v. Boland (1938) 11 Cal. 2d 103, 106-107, 77 P.2d 1090* ; *see § 555.18[4][a]*].

5. Irregularities in the sale are more likely to result in the sale being set aside or invalidated when it is done privately than when it is done pursuant to a foreclosure decree [*cf. Scott v. Security Title Ins., & Guar. Co. (1937) 9 Cal. 2d 606, 613-614, 72 P.2d 143* (private sale was nullity when proper notice of sale was not given); *Hamilton v. Carpenter (1942) 52 Cal. App. 2d 447, 447-448, 126 P.2d 395* (failure to give proper notice of sale was not sufficient reason to invalidate or set aside judicial sale)].

PRACTICE TIP:

The Nod Goes to Private Sales. With rare exceptions, most lenders prefer to pursue private sales rather than judicial foreclosures. Time, expense, lack of a substantial deficiency differential, and marketability concerns tied to redeemability issues are the primary factors that convince most lenders to elect private sales over judicial foreclosure proceedings. Conversely, many secondary loan purchasers opt for judicial foreclosure based upon the "portfolio analysis" of deficiency recoverability and REO collateral values. All things considered, private sales outnumber judicial foreclosures by a large margin. *By William M. Hensley*

[3] Right to Foreclose Is Triggered by Default

Foreclosure, whether judicial or nonjudicial, is generally available on any default under the terms of the obligation and trust deed or mortgage [*see Code Civ. Proc. § 726(a)* (foreclosure is sole action for recovery of secured debt or enforcement of secured right); *Lincoln v. Superior Court (1934) 2 Cal. 2d 127, 129, 39 P.2d 405* (customary provision provided for sale by trustee in event of default); *see also Fin. Code §§ 1227.2, 7461* (default provisions that are enforceable even if beneficiary's security interest is not impaired)]. Typically the triggering event is a failure to pay installments of principal and interest due on the secured debt [*see, e.g., California Livestock Production Credit Assn. v. Sutfin (1985) 165 Cal. App. 3d 136, 139, 142, 211 Cal. Rptr. 152* ; *see also § 555.15[3]*]. However, foreclosure may also be available after a default in the performance of a collateral obligation, such as a duty to pay taxes and assessments on the encumbered property [*see, e.g., Security-First Nat. Bank v. Lamb (1931) 212 Cal. 64, 68, 297 P. 550]* or a duty not to transfer the encumbered property without the beneficiary's consent [*see, e.g., Santa Clara Savings & Loan Assn. v. Pereira (1985) 164 Cal. App. 3d 1089, 1093-1097, 1098, 211 Cal. Rptr. 54* ; *see also § 555.15[4]*].

Not every default will justify foreclosure, however. In some circumstances courts may refuse to permit foreclosure if it would result in a forfeiturebased on a technical but insubstantial default. For example, one court denied any relief in a foreclosure action based on a default consisting of waste, which technically violated a covenant against waste but was, in fact, either ameliorative or harmless in effect [*Bart v. Strueli (1935) 5 Cal. 2d 67, 67-68, 52 P.2d 922]* . Similarly, another court held that a trustor was entitled to relief enjoining a trustee's sale when the sale was based on one day's tardiness in payment [*Bisno v. Sax (1959) 175 Cal. App. 2d 714, 720-730, 346 P.2d 814* ; *see Baypoint Mortgage Corp. v. Crest Premium Real Estate etc. Trust (1985) 168 Cal. App. 3d 818, 825-830, 214 Cal. Rptr. 531* (trustor, in action to enjoin private sale, was held likely to prevail on merits when default was merely payment made several days after due date but before date after which late payment charge was to be imposed)].

PRACTICE TIP:

Baypoint Counsels Against Enforcement of Non-Substantial Defaults. Although lenders frequently get frustrated over chronically late-paying borrowers, *Baypoint* came down hard on a lender attempting to enforce technical defaults against a borrower that nevertheless cured the delinquencies through tardy payments. The *Baypoint* court enjoined foreclosure by just such a frustrated lender and stridently counseled lenders not to pursue forfeiture maneuvers against patience-trying borrowers who nonetheless eventually come through with dilatory payments, because the lenders instead can pursue the enforcement of late charge penalties as a less draconian remedy against chronically tardy borrowers. *Baypoint* is must reading for borrowers and lenders in the default enforcement area with respect to what types of defaults will sustain smooth foreclosure efforts. *By William M. Hensley*

[4] Deed in Lieu of Foreclosure

As an expedient and inexpensive alternative to foreclosure, the trustor may give the beneficiary a deed in lieu of foreclosure [*see, e.g., Hamud v. Hawthorne (1959) 52 Cal. 2d 78, 83, 338 P.2d 387]* . At the time the trust deed is created, any agreement by the trustor to make such a conveyance in the event of default is unenforceable [*Civ. Code § 2889*]. However, a separate agreement to convey is valid, as long as it is made after the default for an adequate consideration (for example, cancellation of the secured obligation) and is otherwise fair and free from undue influence [*Hamud v. Hawthorne (1959) 52 Cal. 2d 78, 83, 338 P.2d 387* ; *Phelan v. De Martin (1890) 85 Cal. 365, 367, 24 P. 725]* . The adequacy of consideration would be a question of fact [*Wright v. Security-First Nat. Bank (1939) 35 Cal. App. 2d 264, 280-283, 95 P.2d 194]* .

For discussion of the effect of a conveyance of the trustor's title to the beneficiary, see *§ 555.18[3]*. For discussion of circumstances in which adeed absolute on its face may be established as a mortgage only, see *§ 555.22*.

[5] Foreclosure on Real Property Sales Contracts

Courts have consistently rejected arguments that real property installment sale contracts should be construed as mortgages within the meaning of *Civ. Code § 2924(a)*, on the ground that such a construction should be made expressly by the legislature [*see, e.g.,* *Petersen v. Hartell (1985) 40 Cal. 3d 102, 106 n.1, 219 Cal. Rptr. 170, 707 P.2d 232* ; *Kosloff v. Castle (1981) 115 Cal. App. 3d 369, 377, 171 Cal. Rptr. 308* (disapproved on other grounds in *Petersen v. Hartell (1985) 40 Cal. 3d 102, 117, 219 Cal. Rptr. 170, 707 P.2d 232*)]. Under these decisions, a purchaser in default under an installment sale contract has not had the benefit of statutory protections afforded to mortgagors and trustors under *Civ. Code § 2920 et seq.*, such as the right of reinstatement under *Civ. Code § 2924c*. When the default was not willful or grossly negligent, the purchaser could cure the default and reinstate the contract under *Civ. Code § 3275* (relief from forfeitures) [*see* *Barkis v. Scott (1949) 34 Cal. 2d 116, 117-118, 122-123, 208 P.2d 367]* . Otherwise, however, the purchaser was limited either to restitution of any payments made less damages [*Honey v. Henry's Franchise Leasing Corp. (1966) 64 Cal. 2d 801, 805, 52 Cal. Rptr. 18, 415 P.2d 833]* , or to redemption of title to the property by paying off the entire outstanding balance plus interest and consequential damages [*Petersen v. Hartell (1985) 40 Cal. 3d 102, 117, 219 Cal. Rptr. 170, 707 P.2d 232]* . For further discussion of these remedies, see *Ch. 569, Vendor and Purchaser of Real Property* .

In response to these cases, the legislature partly extended the statutory foreclosure provisions to certain real property sale contracts. Specifically, for purposes of *Civ. Code §§ 2924-2924h* (governing foreclosure by private sale), "mortgage" now includes any security device or instrument, other than a trust deed, that contains a power of sale affecting real property that may be exercised after a breach of the secured obligation. In particular, "mortgage" includes any real property sale contract as defined by *Civ. Code § 2985*, when the contract contains such a power of sale [*Civ. Code § 2920(b)*; *see Civ. Code § 2985(a)* (real property sale contract defined as agreement by which one party agrees to convey title to real property to another party on satisfaction of terms of contract and that does not require conveyance of title within one year)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesElection of RemediesReal Property LawFinancingInstallment Land Sale ContractsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale Foreclosure

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§ 555.31 Effect of One-Form-of-Action Rule

[1] In General

The one-form-of-action rule of *Code Civ. Proc. § 726* is that foreclosure is the only form of action to recover any debt or enforce any right secured by a trust deed or mortgage [*Code Civ. Proc. § 726(a)*]. This rule has two purposes: to compel a secured creditor to resort first to the security, and to protect the debtor from numerous suits when a creditor holds multiple security interests [*see Savings Bank v. Central Market Co. (1898) 122 Cal. 28, 36, 54 P. 273]* . For discussion of the rule as it applies to guarantors, see *§ 555.32[5]*.

[2] Waiver of Protection

The benefits of the one-form-of-action rule may not be waived in advance by the debtor. Any purported waiver at the time of the transaction is void [*Civ. Code § 2953*].

PRACTICE TIP:

Waiver May Be Ineffective Against Guarantors. Although there is no precise California precedent on this point, a Nevada decision construing California law has held that a guarantor of a real estate loan has the benefit of the one-action rule [*see Component Sys. Corp. v. Eighth Judicial Dist. Court, (1985) 101 Nev. 76, 692 P.2d 1296]* . If *Component Systems* is correct, this is significant for guarantors given than *Civ. Code § 2953* does not allow for advance waivers of the one-action rule. An issue waiting to be resolved is whether *Civ. Code § 2856* enactments, relative to post-1996 guarantor waivers [*see § 555.32[5][b][iii]*], allows one-action protections to be waived in advance (as it provides) or is inconsistent in some way with the antiborrower waiver policy enunciated through *Civ. Code § 2953*. *By William M. Hensley*

A debtor's waiver of the rule is invalid against other secured creditors. The creditor who has a personal judgment against the debtor and a waiver from the debtor cannot enforce nonjudicial foreclosure rights under the trust deed to obtain priority over other secured creditors. Obtaining a personal judgment exhausts all of the creditor's rights under the note and trust deed and relegates the creditor to the status of an ordinary judgment creditor without priority. Allowing a waiver would violate the policy of *Code Civ. Proc. § 726*, which is to minimize the extent to which the debtor's unpledged assets may be seized to satisfy a secured creditor's claims--a policy that protects other creditors. Allowing a waiver would also deprive the other creditors of the right of redemption after a judicial foreclosure [*O'Neil v. General Security Corp. (1992) 4 Cal. App. 4th 587, 598-605, 5 Cal. Rptr. 2d 712]* .

A debtor's waiver is also unenforceable against nonconsenting obligors on the note [*Pacific Valley Bank v. Schwenke (1987) 189 Cal. App. 3d 134, 146, 234 Cal. Rptr. 298]* or against successors in interest of the debtor [*Walker v. Community Bank (1974) 10 Cal. 3d 729, 739, 111 Cal. Rptr. 897, 518 P.2d 329]* .

[3] Action on Debt

[a] Barred Until Security Exhausted

[i] Operation of Rule

Under the one-form-of-action rule, a creditor must first exhaust the security before seeking a money judgment on a debt secured by a trust deed or mortgage [*Hartman v. Smith (1963) 219 Cal. App. 2d 415, 417, 33 Cal. Rptr. 147]* . Thus, if a creditor seeks to recover by an action on the debt instead of a foreclosure action, the debtor may raise the existence of the security as an affirmative defense, the effect of which is to bar the action and force the creditor first to exhaust the security before seeking a personal judgment against the debtor for any deficiency [*Walker v. Community Bank (1974) 10 Cal. 3d 729, 734, 111 Cal. Rptr. 897, 518 P.2d 329* ; *Hartman v. Smith (1963) 219 Cal. App. 2d 415, 416-417, 33 Cal. Rptr. 147]* . Similarly, following a debtor's default on a note secured by a trust deed on California real property, the creditor cannot commence an action against the debtor in another country, obtain a prejudgment attachment against the debtor's real property in the other country, and then commence an action in California for judicial foreclosure and a deficiency, because the commencement of the initial action constitutes an election of remedies triggering forfeiture of the creditor's security interest [*Shin v. Superior Court (1994) 26 Cal. App. 4th 542, 546-549, 31 Cal. Rptr. 2d 587]* .

The debtor may waive the defense by failing to raise it [*Scalese v. Wong (2000) 84 Cal. App. 4th 863, 870, 101 Cal. Rptr. 2d 40* ; *Spector v. National Pictures Corp. (1962) 201 Cal. App. 2d 217, 225-226, 20 Cal. Rptr. 307]* . However, even if the debtor waives the defense in an action on the debt, the debtor is still entitled to invoke *Code Civ. Proc. § 726* if the creditor later seeks judicial or nonjudicial foreclosure of the security. In this case, *Code Civ. Proc. § 726* operates as a sanction on the ground that the creditor, by not foreclosing on the security in the action to enforce the debt, made an election of remedies and waived the security [*Walker v. Community Bank (1974) 10 Cal. 3d 729, 733-734, 111 Cal. Rptr. 897, 518 P.2d 329]* .

[ii] Pursuit of Attachment Not an Action

Subject to the antideficiency provisions of *Code Civ. Proc. §§ 580b* and *580d* [*see § 555.32*], in an action to foreclose, the pursuit of any remedy authorized by law relating to attachment does not constitute an action for the recovery of a debt for purposes of *Code Civ. Proc. § 726(a)* or a failure to comply with other statutory or judicial requirements to proceed first against security [*Code Civ. Proc. § 483.012*].

PRACTICE TIP:

No One-Action Problem for Appointment of Receiver or Turnover of Receivership Funds.

Although the issue was in doubt until recently, *Civ. Code § 2938(c), (e)(2), (f)(1),* as well as *Code Civ. Proc. § 564(d),* now clarify that the appointment of a receiver or the receipt of rents, issues, and profits

under an assignment-of-rents clause in the form of receivership estate proceeds does not run afoul of one-action rule prohibitions. *By William M. Hensley*

[iii] Exception for Fraud Action

The one-form-of-action rule does not bar an action for damages for fraud under *Civ. Code § 1572* if that action is brought by a person authorized by California to make or arrange loans, or by any subsidiary, affiliate, or successor in interest that originated the loan or purchased the loan or any interest in the loan, against a borrower for fraudulent conduct that induced the original lender to make a loan secured by a trust deed. Exemplary damages up to 50 percent of actual damages may be recovered in such an action [*Code Civ. Proc. § 726(f), (h)*; *Fin. Code §§ 551(a), 7460(a), 15102(a)*]. This exception to the one-form-of-action rule does not apply to loans secured by single-family, owner-occupied residential real property if the property is actually occupied by the borrower as represented to the lender in order to obtain the loan and the loan is for less than $150,000, as adjusted annually to the Consumer Price Index [*Code Civ. Proc. § 726(g)*; *Fin. Code §§ 551(b), 7460(b), 15102(b)*].

[b] When Security Is Rendered Worthless

[i] Action on Debt Permitted; Sold-Out Junior Lienholder as Creditor

The security-first requirement of the one-form-of-action rule does not preclude an action on the debt by a creditor whose security has been rendered worthless without any fault on the part of that creditor [*see Savings Bank v. Central Market Co. (1898) 122 Cal. 28, 33-36, 54 P. 273* ; *see also Code Civ. Proc. § 483.010* (attachment is permitted on claim originally secured when security has become valueless without act of plaintiff); *Code Civ. Proc. § 483.012* (pursuit of attachment remedy does not constitute failure to comply with requirement to proceed first against security for recovery of debt secured by mortgage or trust deed)]. The most common example is the sold-out junior lienholder, whose security has been rendered valueless by foreclosure of a senior lien [*Roseleaf Corp. v. Chierighino (1963) 59 Cal. 2d 35, 39, 27 Cal. Rptr. 873, 378 P.2d 97* ; *see § 555.18[5]*]. With certain exceptions, the sold-out junior lienholder may bring an action on the debt, because there is no reason to force recourse first to security that no longer exists [*see Roseleaf Corp. v. Chierighino (1963) 27 Cal. Rptr. 873, 378 P.2d 97* ; *Savings Bank v. Central Market Co. (1898) 122 Cal. 28, 33-36, 54 P. 273]* . For further discussion, see [4], *below.* For a form of complaint to enforce a debt secured by a trust deed rendered valueless by foreclosure of a senior lien, see *§ 555.170*.

One court has held that a junior lienholder was not barred from suing directly on the secured obligation when the security was extinguished by the foreclosure of a senior lien, even though the junior lienholder had commenced foreclosure proceedings before the senior lienholder and had suspended the foreclosure sale to allow the senior lienholder to complete a foreclosure sale first [*Bank of America v. Graves (1996) 51 Cal. App. 4th 607, 614-615, 59 Cal. Rptr. 2d 288]* . The junior lienholder's failure to complete foreclosure proceedings was not an affirmative act leading to the loss of the security, and the mere commencement of the foreclosure proceedings was not an election of remedies that precluded a suit for the deficiency [*Bank of America v. Graves (1996) 51 Cal. App. 4th 607, 614-615, 59 Cal. Rptr. 2d 288]* . Similarly, when senior and junior debts secured by the same property were assigned by a creditor to two independent parties, the one-form-of-action rule did not prohibit the junior lienholder from bringing a separate action to recover its debt following the senior lienholder's judicial foreclosure of the property. The fact that the junior lienholder's predecessor-in-interest had allowed the holder of the senior lien to foreclose did not require a different outcome [*National Enterprises, Inc. v. Woods (2001) 94 Cal. App. 4th 1217, 1234, 115 Cal. Rptr. 2d 37]* .

[ii] Other Types of Creditors

Other types of creditors that come within the worthless-security exception to *Code Civ. Proc. § 726* include creditors whose security has been (1) physically destroyed without any fault on their part [*Cohen v. Marshall (1925) 197 Cal. 117, 122-123, 239 P. 1050]* , or (2) rendered worthless because the trust deed or mortgage is legally unenforceable without any fault on their part [*see Giandeini v. Ramirez (1936) 11 Cal. App. 2d 469, 472-473, 54 P.2d 91]* . Creditors

that do not come within this exception are generally those at fault, such as creditors that unilaterally waive the security to bring an action on the underlying debt [*Barbieri v. Ramelli (1890) 84 Cal. 154, 156-157, 23 P. 1086* ; *see Savings Bank v. Central Market Co. (1898) 122 Cal. 28, 33-36, 54 P. 273]* or creditors that knowingly accept a security interest that is inadequate or worthless at the time it is accepted [*Giandeini v. Ramirez (1936) 11 Cal. App. 2d 469, 471, 473-475, 54 P.2d 91]* .

[4] All Interests to Be Foreclosed in Single Action

Under the one-form-of-action rule, a creditor can bring only a single action of foreclosure to enforce or recover on a secured obligation [*Appel v. Hubbard (1957) 155 Cal. App. 2d 639, 643, 318 P.2d 164]* . Thus, if a creditor with several security interests for a single debt brings a foreclosure action but fails to include all those interests in that action, the creditor may be held to have waived the right to foreclose the remaining security interests, whether by another judicial action or nonjudicially [*see Walker v. Community Bank (1974) 10 Cal. 3d 729, 733, 734-740, 111 Cal. Rptr. 897, 518 P.2d 329]* . In such a case, the debtor may either raise the existence of the excluded security interests as a defense and compel their inclusion in the action or wait and later invoke *Code Civ. Proc. § 726* as a sanction to prevent their foreclosure by either judicial or nonjudicial means [*see Walker v. Community Bank (1974) 10 Cal. 3d 729, 740-741, 111 Cal. Rptr. 897, 518 P.2d 329]* . If the debtor chooses the latter course and does not compel inclusion of all security interests in the creditor's action, the creditor may retain any deficiency recovered after a judicial sale of the included security interests, even though the creditor failed to include some security interests [*United California Bank v. Tijerina (1972) 25 Cal. App. 3d 963, 968-969, 102 Cal. Rptr. 234]* .

This single-action requirement of the one-form-of-action rule does not prevent a creditor from foreclosing on several different security interests by means of separate private sales, or by means of a private sale followed by a foreclosure action. The reason for this distinction is that any private sale preceding a foreclosure action does not constitute a judicial action within the meaning of the single-action requirement of *Code Civ. Proc. § 726* [*see Ramsey v. Furlott (1936) 14 Cal. App. 2d 145, 147, 57 P.2d 1007]* .

[5] Enforceability of Letters of Credit

If an obligation is secured by a mortgage or trust deed on real property (or on an estate for years in real property) and is also supported by a letter of credit, the following acts will not constitute an action within the meaning of *Code Civ. Proc. § 726(a)* or a failure to comply with any other statutory or judicial requirement to proceed first against security [*Code Civ. Proc. § 580.5(b)*]:

- The presentment, receipt of payment, or enforcement of a draft or demand for payment under the letter of credit by the beneficiary of the letter of credit.

- The honoring or payment of, or the demand for reimbursement, receipt of reimbursement, or enforcement of any contractual, statutory, or other reimbursement obligation relating to, the letter of credit by the issuer of the letter of credit.

This exemption from the one-form-of-action rule applies whether the above acts occur before or after the following: the judicial or nonjudicial foreclosure of the mortgage or trust deed; or a conveyance in lieu of foreclosure [*Code Civ. Proc. § 580.5(b)*].

Notwithstanding the exemption, a letter of credit will not be enforceable by any party to the letter of credit in a loan transaction in which all of the following circumstances exist [*Code Civ. Proc. § 580.7(b)*]:

- The loan is secured by a purchase-money trust deed or purchase-money mortgage on real property containing one-to-four residential units, at least one of which is owned and occupied, or was intended at

the time the loan was made to be occupied, by the customer.

- The borrower is a natural person.
- The letter of credit is issued to the beneficiary to avoid a default of the existing loan.
- The letter of credit is issued after January 1, 1995 (the operative date of *Code Civ. Proc. § 580.7*).

Code Civ. Proc. § 580.5 also exempts letter-of-credit transactions from the antideficiency statutes [*see Code Civ. Proc. §§ 580a, 580b, 580d, 726(b)*]. For further discussion of the exemption and the legislative intent behind it, see *§ 555.32[6]*. For coverage of letters of credit, see California Legal Forms, Ch. 56, *Letters of Credit and Electronic Fund Transfers* (Matthew Bender).

[6] Effect of Setoff

[a] Creditor's Improper Setoff

It is a violation of the one-form-of-action rule for a bank to set off a deposit account in satisfaction of the depositor's debt to the bank if the debt is secured by a trust deed on the depositor's real property. The one-form-of-action rule requires that the bank first proceed against the security [*Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 999-1000, 275 Cal. Rptr. 201, 800 P.2d 557]* .

When a bank makes an improper setoff, it waives the right to resort to the security. It is not sufficient for the bank merely to reverse the setoff, because the debtor is subjected to the burden of multiple actions in bringing an action for reversal of the setoff and later defending the foreclosure action. Further, the debtor is deprived of funds with which to pay an attorney and suffers costs in recovering funds that should not have been taken in the first place. Therefore, the appropriate remedy is loss of the security interest [*Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 1001-1002, 275 Cal. Rptr. 201, 800 P.2d 557]* . An improper setoff does not, however, deprive the bank of the right to enforce the debt without resorting to the security. The setoff is not a judicial action and does not result in a judgment for the bank on the debt. It could be unfair to deprive the bank of the unsecured right to enforce the debt [*Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 1004-1006, 275 Cal. Rptr. 201, 800 P.2d 557]* .

If a creditor makes an improper setoff, the debtor can demand that the creditor reverse the setoff and resort to the security. If the creditor refuses to reverse the setoff, the security-first rule precludes the creditor from either foreclosing the security interest or proceeding on the debt without waiving the security interest. If the creditor complies with the demand to reverse the setoff, however, the creditor may resort to the security, and the debtor may not thereafter claim that the security interest was waived [*Security Pacific National Bank v. Wozab (1990) 51 Cal. 3d 991, 1006, 275 Cal. Rptr. 201, 800 P.2d 557]* .

[b] Equitable Setoff

An equitable setoff is a means by which a debtor may satisfy, in whole or in part, a judgment or claim against the debtor out of a judgment or claim that the debtor has subsequently acquired against the creditor. The right exists independently of statute and rests on the inherent power of the court to do justice to the parties before it [*Aplanalp v. Forte (1990) 225 Cal. App. 3d 609, 615, 275 Cal. Rptr. 144]* . However, if the setoff is against a debtor on an obligation secured by a mortgage or trust deed on real property, the setoff constitutes an "action" within the meaning of *Code Civ. Proc. § 726.* Either the nonjudicial exercise of the right of setoff or a lawsuit to enforce a setoff without suing for a judicial foreclosure in the same action will result in a waiver of the right to foreclose on the security or to sell the security under a power of sale [*see Aplanalp v. Forte (1990) 225 Cal. App. 3d 609, 613-617, 275 Cal. Rptr. 144]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsReceiversAppointmentsCommercial Law (UCC)Letters of Credit (Article 5)General OverviewContracts LawRemediesElection of RemediesReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral Overview

California Forms of Pleading and Practice--Annotated

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Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. LEGAL BACKGROUND
B. Foreclosure
1. In General

48-555 California Forms of Pleading and Practice--Annotated § 555.32

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§ 555.32 Effect of Antideficiency Statutes

[1] Bar or Limitation on Personal Judgment

[a] Applicability

California's antideficiency statutes [*Code Civ. Proc. §§ 580a, 580b, 580d, 726(b)*] preclude or limit recovery of a personal judgment against the trustor in most situations in which the sale of the property fails to cover the outstanding debt [*see Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 600-602, 125 Cal. Rptr. 557, 542 P.2d 981* (discussing history and purpose of antideficiency statutes)]. *Code Civ. Proc. § 580b* bars deficiency judgments on purchase-money trust deeds or mortgages, and *Code Civ. Proc. § 580d* prohibits deficiencies after most private sales. In those cases in which a deficiency judgment is allowed, the fair-value limitations of *Code Civ. Proc. §§ 580a* and *726(b)* limit recovery to the excess of the outstanding debt over the property's value at the time of the sale.

The antideficiency statutes apply to loans secured by liens on estates for years [*Code Civ. Proc. §§ 580b, 580d, 726*; *contra Taylor v. Bouissiere (1987) 195 Cal. App. 3d 1197, 1199-1200, 241 Cal. Rptr. 253* (tenant's interest in estate for years was not real property interest); *but see* Stats. 1989, ch. 698, § 15 (abrogation of *Taylor* holding; application of antideficiency legislation to liens on leasehold interests is consistent with statutory history of *Code Civ. Proc. § 726* and Commercial Code)].

[b] Waiver

[i] Advance Waiver

The benefits of *Code Civ. Proc. §§ 580a, 580b, 580d,* and *726* may not be waived in advance by the debtor [

Freedland v. Greco (1955) 45 Cal. 2d 462, 467, 289 P.2d 463 ; *see Civ. Code § 2953*].

[ii] Subsequent Waiver

The rule against advance waiver of the benefits of *Code Civ. Proc. §§ 580a* and *726* [*see* [i], *above*] does not preclude a trustor from subsequently waiving those provisions [*Salter v. Ulrich (1943) 22 Cal. 2d 263, 266-267, 138 P.2d 7* ; *see Morello v. Metzenbaum (1944) 25 Cal. 2d 494, 498-499, 154 P.2d 670]* .

The California Supreme Court has not decided whether the benefits of *Code Civ. Proc. § 580d* may subsequently be waived.

PRACTICE TIP:

Contrast Advance Waivers By Guarantors. If *Civ. Code § 2856* is construed literally [*see* [5][b], *below*], guarantors in post-1996 documents may well be held to contractual waivers of *Code Civ. Proc. § 580a, 580d*, or *726*. *By William M. Hensley*

A purchaser may not make a contractual waiver of the protection of *Code Civ. Proc. § 580b* in exchange for renegotiation of the original obligatio [*DeBerard v. Lim (1999) 20 Cal. 4th 659, 85 Cal. Rptr. 2d 292, 976 P.2d 843]* . In *DeBerard v. Lim*, the Supreme Court resolved a conflict in state law on this question [*DeBerard v. Lim (1999) 20 Cal. 4th 659, 661, 671, 85 Cal. Rptr. 2d 292, 976 P.2d 843* (disapproving language to the contrary in *Russell v. Roberts (1974) 39 Cal. App. 3d 390, 394-395, 114 Cal. Rptr. 305* , *Goodyear v. Mack (1984) 159 Cal. App. 3d 654, 659-660, 205 Cal. Rptr. 702* , and *Shepherd v. Robinson (1981) 128 Cal. App. 3d 615, 626, 180 Cal. Rptr. 342*)]. It agreed with the court of appeal decision in *Palm v. Schilling (1988) 199 Cal. App. 3d 63, 68, 75-76, 244 Cal. Rptr. 600* [*DeBerard Properties, Ltd. v. Lim (1999) 20 Cal. 4th 659, 671, 85 Cal. Rptr. 2d 292, 976 P.2d 843]* , which held that a waiver of the antideficiency protection of *Code Civ. Proc. § 580b*, at a time when the trustor is in default and in connection with a refinancing, is invalid and unenforceable because it is inconsistent with the explicit language of that statute and is contrary to public policy.

The Supreme Court recognized that *Spangler v. Memel (1972) 7 Cal. 3d 603, 102 Cal. Rptr. 807, 498 P.2d 1055* created a narrow exception to the scope of Section 580b, which applies when a vendor subordinates a deed of trust to a major construction loan on the property [*DeBerard v. Lim (1999) 20 Cal. 4th 659, 664, 85 Cal. Rptr. 2d 292, 976 P.2d 843* ; *see Spangler v. Memel (1972) 7 Cal. 3d 603, 611, 102 Cal. Rptr. 807, 498 P.2d 1055]* . The Court emphasized that this exception is limited to situations in which intensification of the property's anticipated post-sale use both requires and eventually results in construction financing that dwarfs the property's value at the time of sale. In addition, the purchaser must be in a much better position than the vendor to assess the property's possible value and to understand the risks involved in capitalizing on the property's potential. Finally, under all the circumstances of the sale, including the property's development and the financing for that development, conferring Section 580b's protection must unfairly place the risk of the failure of the commercial development on the vendor, imposing on it a commercially unreasonable burden because the success of the commercial development depends upon the competence, diligence and good faith of the developing purchaser [*DeBerard v. Lim (1999) 20 Cal. 4th 659, 667-668, 85 Cal. Rptr. 2d 292, 976 P.2d 843* ; *Spangler v. Memel (1972) 7 Cal. 3d 603, 613, 102 Cal. Rptr. 807, 498 P.2d 1055]* .

The *DeBerard* Court found that this case was unlike *Spangler*. The defendants in *DeBerard* financed their purchase of a shopping center from the plaintiff by assuming a large debt secured by a first trust deed to a bank, executing a second trust deed in favor of the plaintiff as security for a smaller debt, and paying the plaintiff a substantial down payment. When they could no longer make payments on the two secured obligations they negotiated a refinancing of the major debt. The plaintiff cooperated in exchange for their agreement to waive their rights under *Code Civ. Proc. § 580b*. Thereafter, the defendants defaulted and the bank's foreclosure under the first trust deed wiped out the plaintiffs' second-lien security. The Court noted that the defendants continued to operate the shopping center and the center continued to secure the note. They did not obtain a construction loan that dwarded the property's value at the time of

sale and then proceed to build a more intensive use. Further, there was no dramatic change in the financial arrangements that might conceivably have brought this case within *Spangler's* ambit. The Court could not justify permitting a waiver in disregard of the statutory language just because the plaintiff eased the terms of the defendants' obligation to it. Only when the transaction is sufficiently similar to that in *Spangler* will the vendor's relatively poor knowledge of the property's value trump the basic rule, stated in *Brown v. Jensen (1953) 41 Cal. 2d 193, 197, 259 P.2d 425* , that the vendor is assumed to know the value of its security interest and act accordingly [*DeBerard Properties, Ltd. v. Lim (1999) 20 Cal. 4th 659, 667-668, 85 Cal. Rptr. 2d 292, 976 P.2d 843]* .

[c] Rent Skimming

The antideficiency provisions of *Code Civ. Proc. §§ 580a, 580b, 580d*, and *726* do not apply to any action for damages for rent skimming [*Civ. Code § 891(g)*]. Rent skimming is the owner's use of revenue received from the rental of a parcel of residential real property, at any time during the first year after acquiring that property, without first applying the revenue or an equivalent amount to the payments due on all mortgages and trust deeds encumbering that property [*Civ. Code § 890(a)*]. When a purchaser of rental property engages in rent skimming, the vendor (or any third party) holding a lien may effectively recover a potential deficiency by bringing an action for damages under *Civ. Code § 891*. For further discussion, see *§ 555.94*.

[2] Private Sale

[a] Deficiency Judgment Generally Barred

[i] Single Security Instrument and Note

No deficiency judgment may be rendered on any note secured by a trust deed or mortgage after the encumbered property has been sold by private sale [*Code Civ. Proc. § 580d*]. With a few exceptions [*see* [b], *below*], the effect of *Code Civ. Proc. § 580d* is to limit recovery in nonjudicial foreclosure proceedings to the value of the security only. By choosing nonjudicial foreclosure, the creditor forgoes the right to a deficiency judgment [*Roseleaf Corp. v. Chierighino (1963) 59 Cal. 2d 35, 43-44, 27 Cal. Rptr. 873, 378 P.2d 97]* . When *Code Civ. Proc. § 580d* bars a deficiency judgment after a private sale under a trust deed, the trustee has a duty to cancel the underlying note [*Kerivan v. Title Ins. & Trust Co. (1983) 147 Cal. App. 3d 225, 230-231, 195 Cal. Rptr. 53* (but trustee does not have duty to cancel note if it is subject to sister state law permitting deficiency)].

[ii] More Than One Security Instrument or Note

When more than one trust deed or mortgage is given to secure a single note, the creditor, after a private sale under one of them, may resort to the additional security but cannot obtain a further deficiency judgment even when it would otherwise be allowed by judicial foreclosure of the additional security [*see Freedland v. Greco (1955) 45 Cal. 2d 462, 465-466, 289 P.2d 463]* . This application of *Code Civ. Proc. § 580d* cannot be circumvented by the device of executing two or more notes secured by different security interests, at least when each note evidences the full amount of the same debt [*Freedland v. Greco (1955) 45 Cal. 2d 462, 467, 289 P.2d 463]* . However, the situation is different when a debtor executes two or more notes, so that each note evidences only a part of a single debt, and gives security for one note only. In that case, the creditor may resort to the security and then obtain a money judgment on the separate, unsecured note [*see Christopherson v. Allen (1961) 190 Cal. App. 2d 848, 851-853, 12 Cal. Rptr. 658* ; *cf. Loretz v. Cal-Coast Dev. Corp. (1967) 249 Cal. App. 2d 176, 178-179, 57 Cal. Rptr. 188* (single note was not divisible into secured and unsecured portions)].

[iii] Related Obligations

Similarly, *Code Civ. Proc. § 580d* bars a deficiency judgment based on a related obligation [*but see Code Civ. Proc. § 580.5* (certain letter of credit transactions are exempt from antideficiency legislation); *§ 555.31[5]*]. For instance, when

a lender required the borrower to obtain mortgage insurance, and the mortgage insurer required the borrower to execute an indemnity agreement, the insurer's attempted enforcement of the indemnity agreement after breach and a nonjudicial sale was barred by *Code Civ. Proc. § 580d*. The indemnity agreement added nothing to the borrower's obligation and was an attempt to circumvent the antideficiency policy of *Code Civ. Proc. § 580d* [*Commonwealth Mortgage Assurance Co. v. Superior Court (1989) 211 Cal. App. 3d 508, 515-517, 259 Cal. Rptr. 425]* .

[iv] Successive Loans By Lender

When a lender makes two successive loans secured by separate trust deeds on the same property, then forecloses on the senior lien, the lender is barred from obtaining a deficiency judgment by enforcing the junior lien. The lender is not a true third-party sold-out junior lienholder. Having elected to foreclose the senior lien by a private sale, the lender is barred by *Code Civ. Proc. § 580d* from obtaining a deficiency judgment by enforcing the junior lien. The policy of protecting the borrower from a deficiency judgment following a nonjudicial foreclosure may not be circumvented by a lender's structuring a loan to be secured by multiple trust deeds on the same property covering successive notes from the debtor [*Simon v. Superior Court (1992) 4 Cal. App. 4th 63, 77-78, 5 Cal. Rptr. 2d 428]* .

[b] Allowable Deficiency Judgments

Although *Code Civ. Proc. § 580d* prohibits recovery of any deficiency judgment on a note secured by a trust deed or mortgage with a power of sale after a private sale of the encumbered property [*see* [a], *above*], it provides two exceptions in which a deficiency judgment may be recovered. Those exceptions allow a deficiency judgment when a trust deed or mortgage (1) is given to secure payment of a bond or other debt authorized or permitted to be issued by the Commissioner of Corporations [*see Corp. Code § 25600*], or (2) is made by a public utility subject to the Public Utilities Act [*Code Civ. Proc. § 580d*].

Another exception is that *Code Civ. Proc. § 580d* does not bar recovery on the debt by a sold-out junior lienholder whose security has been rendered worthless by private foreclosure of a senior lien [*see, e.g,* *Roseleaf Corp. v. Chierighino (1963) 59 Cal. 2d 35, 43, 27 Cal. Rptr. 873, 378 P.2d 97]* . For further discussion, see [4], *below.* In this situation, the fair-value provisions of *Code Civ. Proc. § 580a* [*see* [c], *below*] limit the recovery in the event that the junior lienholder purchases the property at the foreclosure sale [*Walter E. Heller Western, Inc. v. Bloxham (1985) 176 Cal. App. 3d 266, 273-274, 221 Cal. Rptr. 425* ; *see* [4], *below*].

In addition, one court has observed that *Code Civ. Proc. § 580d* prohibits deficiency judgments in the case of a secured *note,* whereas *Code Civ. Proc. § 580a* applies the fair-value limitation more broadly to a secured *obligation* [*Willys of Marin Company v. Pierce (1956) 140 Cal. App. 2d 826, 831, 296 P.2d 25]* . For discussion of *Code Civ. Proc. § 580a*, see [c], *below.* It appears possible, therefore, that *Code Civ. Proc. § 580a* may allow limited deficiency judgments in the case of secured obligations other than promissory notes, such as leases [*see* *Willys of Marin Company v. Pierce (1956) 140 Cal. App. 2d 826, 831, 296 P.2d 25]* .

[c] Fair-Value Limitation

When a deficiency judgment is available after a nonjudicial sale, the action must be brought within three months after the sale, and recovery is limited to the amount by which the outstanding debt exceeds either the fair market value of the property at the time it was sold or, if less, the sale price [*Code Civ. Proc. § 580a*].

When *Code Civ. Proc. § 580a* is applied to a sold-out junior lienholder who seeks to recover on the debt after having purchased the property at the senior lienholder's private foreclosure sale, *Code Civ. Proc. § 580a* limits the junior lienholder's recovery to the excess of the combined debts of the senior lienholder and the junior lienholder over either the fair market value of the property or the selling price at the foreclosure sale, whichever is less [*Walter E. Heller Western, Inc. v. Bloxham (1985) 176 Cal. App. 3d 266, 270-274, 221 Cal. Rptr. 425* ; *Bank of Hemet v. United States*

(9th Cir. 1981) 643 F.2d 661, 668-670 ; *see* [4], *below*].

The fair-value provision of *Code Civ. Proc. § 580a* does not limit subsequent foreclosure of additional security interests, because resorting to additional security does not constitute a deficiency judgment [*Dreyfuss v. Union Bank of California (2000) 24 Cal. 4th 400, 406, 101 Cal. Rptr. 2d 29, 11 P.3d 383* ; *Hatch v. Security-First Nat. Bank (1942) 19 Cal. 2d 254, 260-262, 120 P.2d 869]* .

[3] Foreclosure Action

[a] Fair-Value Limitation

A deficiency judgment may generally be recovered after a judicial foreclosure except when the property was sold under a purchase-money trust deed securing payment of the balance of the purchase price of the property sold [*see Code Civ. Proc. § 580b*; *see also* [b], *below*]. When recovery of a deficiency judgment is otherwise allowed in a judicial foreclosure action, the recovery is limited to the amount by which the outstanding debt exceeds either the fair market value of the property at the time it is sold at the judicial sale or, if less, the sale price [*Code Civ. Proc. § 726(b)*]. For further discussion of the procedure for obtaining a deficiency judgment, including a limitation period of three months after the date of the foreclosure sale, see *§ 555.73*.

[b] Purchase-Money Trust Deed

[i] Deficiency Judgment Generally Barred

No deficiency judgment may be recovered in any even t after any sale of property under a trust deed given to the vendor to secure payment of the balance of the purchase price [*Code Civ. Proc. § 580b*]. When the property is a dwelling for no more than four families, occupied in whole or part by the purchaser, this prohibition against any deficiency judgment applies also to a sale under a trust deed given to a third-party lender to secure repayment of a loan that was in fact used to pay all or part of the purchase price [*Code Civ. Proc. § 580b*; *see Prunty v. Bank of America (1974) 37 Cal. App. 3d 430, 441, 112 Cal. Rptr. 370]* . This rule protects purchasers of designated residential property from personal liability to all lenders and protects other purchasers from personal liability to the vendor [*Prunty v. Bank of America (1974) 37 Cal. App. 3d 430, 439 n.10, 112 Cal. Rptr. 370]* . For discussion of *Code Civ. Proc. § 580b* as it applies to installment land sale contracts, see Ch. 569, *Vendor and Purchaser* .

[ii] When Deficiency Judgment May Be Recovered

Code Civ. Proc. § 580b does not cover a purchase-money loan secured by other property [*Roseleaf Corp. v. Chierighino (1963) 59 Cal. 2d 35, 41-43, 27 Cal. Rptr. 873, 378 P.2d 97* ; *Scott v. Fidelity Dev. Co. (1974) 39 Cal. App. 3d 131, 135, 113 Cal. Rptr. 855* ; *see Goodyear v. Mack (1984) 159 Cal. App. 3d 654, 657-659, 205 Cal. Rptr. 702* (overruled on other grounds in *DeBerard Properties, Ltd. v. Lim (1999) 20 Cal. 4th 659, 671, 85 Cal. Rptr. 2d 292, 976 P.2d 843*) (transaction was no longer subject to *Code Civ. Proc. § 580b* when original purchase-money note and trust deed were exchanged for new note secured by other property)].

The statute applies only to initial purchase-money transactions, and its provisions do not cover a subsequent transaction in which a secured loan is used to pay off an initial purchase-money obligation [*Union Bank v. Wendland (1976) 54 Cal. App. 3d 393, 399-400, 126 Cal. Rptr. 549]* . However, the protection of the statute is passed to a transferee who assumes the original purchaser's personal liability on the debt [*Weaver v. Bay (1963) 216 Cal. App. 2d 559, 561, 31 Cal. Rptr. 211* ; *see Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 605, 125 Cal. Rptr. 557, 542 P.2d 981]* . For discussion concerning assumption of personal liability, see *§ 555.13[4]*.

[iii] Standard Purchase Money Transactions

All standard purchase-money transactions are subject to *Code Civ. Proc. § 580b* [*Spangler v. Memel (1972) 7 Cal. 3d 603, 610, 102 Cal. Rptr. 807* ; *Budget Realty, Inc. v. Hunter (1984) 157 Cal. App. 3d 511, 513-515, 204 Cal. Rptr. 48]* . These are two-party transactions in which the vendor retains a security interest, and three-party transactions in which a lender obtains a security interest by financing a purchaser-occupied dwelling of fewer than five units [*Prunty v. Bank of America (1974) 37 Cal. App. 3d 430, 439-440, 112 Cal. Rptr. 370]* .

[iv] Variations on Standard Transactions

Any variation on the standard purchase-money transactions may be subject to *Code Civ. Proc. § 580b* if, in the circumstances, the transaction is within the purpose of the statute, which justifies placing the risk of inadequate security on the vendor or lender [*see* *Spangler v. Memel (1972) 7 Cal. 3d 603, 610-613, 102 Cal. Rptr. 807, 498 P.2d 1055]* . The purpose is to discourage overvaluation of the property by the vendor or lender and so discourage land promotion schemes that are precarious because the security value does not reflect true market value. If the security value proves to be inadequate, not because of overvaluation but because of declining land values during a depression, the statute tends to prevent aggravation of the downturn that would result if defaulting purchasers were burdened with large personal liability in addition to the loss of their properties [*Spangler v. Memel (1972) 7 Cal. 3d 603, 612, 102 Cal. Rptr. 807, 498 P.2d 1055* ; *Roseleaf Corp. v. Chierighino (1963) 59 Cal. 2d 35, 41-42, 27 Cal. Rptr. 873, 378 P.2d 97]* .

For example, *Code Civ. Proc. § 580b* has been applied to a transaction in which a purchaser obtained a secured loan from a lender for the purpose of constructing an owner-occupied dwelling on the property, because the transaction was within the purposes of the statute in much the same way as a standard third-party-lender transaction [*Prunty v. Bank of America (1974) 37 Cal. App. 3d 430, 440-443, 112 Cal. Rptr. 370]* . Further, numerous cases have held that a lienholder participating in a sale transaction by agreeing to make a loan to a new purchaser in order to protect the security interest is a vendor for purposes of *Code Civ. Proc. § 580b* [*see, e.g.,* *Costanzo v. Ganguly (1993) 12 Cal. App. 4th 1085, 1090-1093, 16 Cal. Rptr. 2d 55* (statute should be applied when doing so will promote purposes underlying it)]. The statute also applies when a subordination agreement allows refinancing that does not change the use of the property [*Thompson v. Allert (1991) 233 Cal. App. 3d 1462, 1466-1467, 285 Cal. Rptr. 367]* . Further, the statute applied when two properties were marketed and sold together, the seller made a loan for the purchase of one of the two properties, and the loan was secured by the other property. The court found that this was a variation of the standard purchase-money mortgage and came within the protection of the statute because the two purchases were actually parts of one transaction [*Conley v. Matthes (1997) 56 Cal. App. 4th 1453, 1464-1467, 66 Cal. Rptr. 2d 518]* .

Section 580b also applied in a case in which personal property (a medical practice) belonging to one seller was sold along with real property (the building where the practice was located) belonging to another seller in a transaction in which both sellers took back from the buyer a single purchase money promissory note secured by a deed of trust on the real property and, by a security agreement, by the personal property. The court held that the deed of trust was a "deed of trust upon real property" for purposes of the antideficiency statutes despite the additional security in personal property, and that the seller of the medical practice was a "vendor" within the meaning of *Code Civ. Proc. § 580b* and was barred from recovering a deficiency judgment. The court noted that the initial note had been amended and made payable solely to the personal property vendor. The real property vendor had liquidated and distributed its interest in the original note to its shareholders, and they had allowed their interest to go into limbo when the note was amended. Those same individuals, as partners of the personal property vendor, brought suit seeking a deficiency judgment that the seller of the real property would have been denied. The court concluded that the shareholders were attempting an impermissible end run around Section 580b [*Sherwood-Trimble Medical Group v. 10001 Venice Boulevard Partnership (1999) 75 Cal. App. 4th 872, 878-879, 89 Cal. Rptr. 2d 533]* .

PRACTICE TIP:

Importance of Purchase Money Protections in Non-Standard Transactions. Increasingly, courts are applying *Code Civ. Proc. § 580b* protections to non-standard transactions, such as a loan workout when the creditor allowed the property to be kept intact by the borrower but overvalued the remaining security

in the process. Aggrieved borrowers should consult *Constanzo*, and pay careful attention to the reasoning in *Shepherd v. Robinson (1981) 128 Cal. App. 3d 615, 180 Cal. Rptr. 342* and *LaForgia v. Kolsky (1987) 196 Cal. App. 3d 1103, 242 Cal. Rptr. 282* . *By William M. Hensley*

On the other hand, *Code Civ. Proc. § 580b* has been held not to bar recovery of a deficiency judgment against a purchaser who purchased the property for purposes of radical commercial improvement, the seller having agreed to subordinate the purchase-money trust deed to the construction-loan trust deed. In this situation, the security value did not indicate the ultimate market value, and there was no risk of overvaluation. The risk of loss was more properly placed on the purchaser, whose efforts in development would determine the ultimate market value [*see Spangler v. Memel (1972) 7 Cal. 3d 603, 611-615, 102 Cal. Rptr. 807, 498 P.2d 1055* ; *Jack Erickson and Associates v. Hesselgesser (1996) 50 Cal. App. 4th 182, 187-188, 57 Cal. Rptr. 2d 591]* . The Supreme Court has emphasized that this exception is limited to situations in which intensification of the property's anticipated post-sale use both requires and eventually results in construction financing that dwarfs the property's value at the time of sale [*DeBerard v. Lim (1999) 20 Cal. 4th 659, 666, 85 Cal. Rptr. 2d 292, 976 P.2d 843]* . Furthermore, the purchaser must be in a much better position than the vendor to assess the property's possible value and to understand the risks involved in capitalizing on the property's potential. Finally, under all the circumstances of the sale, including the property's development and the financing for that development, conferring Section 580b's protection must unfairly thrust "the risk of the failure of the commercial development ... upon the vendor," imposing on it a commercially unreasonable burden because "the success of the commercial development depends upon the competence, diligence and good faith of the developing purchaser" [*DeBerard v. Lim (1999) 20 Cal. 4th 659, 666, 85 Cal. Rptr. 2d 292, 976 P.2d 843* ; *Spangler v. Memel (1972) 7 Cal. 3d 603, 613, 102 Cal. Rptr. 807, 498 P.2d 1055]* .

[4] Junior Lienholders

Code Civ. Proc. § 580d, restricting deficiency judgments after nonjudicial sales, and the fair-value limitations of *Code Civ. Proc. §§ 580a* and *726(b)* apply to deficiency judgments sought by the person who undertakes foreclosure. Notwithstanding *Code Civ. Proc. § 580d*, nonjudicial foreclosure of a senior lien will not bar a sold-out junior lienholder, whose security has been rendered worthless by the sale, from bringing an action on the debt secured by the junior lien [*Roseleaf Corp. v. Chierighino (1963) 59 Cal. 2d 35, 43, 27 Cal. Rptr. 873, 378 P.2d 97* ; *cf.* [2][a], *above*]. Similarly, *Code Civ. Proc. §§ 726(b)* and *580a* do not, in general, limit recovery of the debt by a junior lienholder whose security has been rendered worthless by the foreclosure of a senior lien [*Roseleaf Corp. v. Chierighino (1963) 59 Cal. 2d 35, 39-40, 27 Cal. Rptr. 873, 378 P.2d 97* ; *see §§ 555.31[3][b], 555.170*; *see also* [2][c], [3][a], *above*]. If a sold-out junior lienholder is the purchaser at the senior lienholder's private foreclosure sale, however, *Code Civ. Proc. § 580a* will limit the recovery on the junior lienholder's debt [*Walter E. Heller Western, Inc. v. Bloxham (1985) 176 Cal. App. 3d 266, 270-274, 221 Cal. Rptr. 425* ; *see* [2][c], *above*]. If the junior lienholder purchases at the sale, any action for a deficiency must be brought within the three-month period after the sale [*Citrus State Bank v. McKendrick (1989) 215 Cal. App. 3d 941, 948-949, 263 Cal. Rptr. 781]* .

After a judicial foreclose of a purchase-money trust deed, a sold-out junior lienholder may be barred by *Code Civ. Proc. § 580b* from recovering a deficiency judgment. The statute bars a deficiency judgment under a purchase-money trust deed not only after an actual sale but also when a sale is no longer possible because the security has been rendered worthless by foreclosure of a senior lien. This bar serves the purpose of discouraging overvaluation in standard purchase-money transactions, because the seller, who is in the best position to know the true value of the property, must assume the risk that the security may be inadequate under a junior trust deed [*Brown v. Jensen (1953) 41 Cal. 2d 193, 197, 259 P.2d 425* ; *see* [3][b], *above*].

On the other hand, *Code Civ. Proc. § 580b* does not apply to a junior lienholder in a variation on the standard purchase-money transaction in which the seller subordinates the purchase-money security interest so that the purchaser can obtain financing for commercial development of the property. In this type of transaction, a radically improved change in property use and value being contemplated, the adequacy of the seller's security hinges on the success or

failure of the purchaser's development efforts, rather than on the relation of security value to current market value. In such a case, precarious land promotion schemes are best discouraged by placing the risk of inadequate security not on the seller but on the purchaser, forcing the latter to assume the risk of bad judgment and failure in undertaking commercial development of the property [*Spangler v. Memel (1972) 7 Cal. 3d 603, 613-614, 102 Cal. Rptr. 807, 498 P.2d 1055* ; *see DeBerard v. Lim (1999) 20 Cal. 4th 659, 666, 85 Cal. Rptr. 2d 292, 976 P.2d 843* ; *Budget Realty, Inc. v. Hunter (1984) 157 Cal. App. 3d 511, 516-517, 204 Cal. Rptr. 48* (this exception was not applicable to transaction in which commercial development was contemplated but never actually undertaken)].

A wife who was given a promissory note secured by second deeds of trust on several pieces of real property as part of a marital dissolution, and who held nonjudicial trustee's sales on four of the six properties securing the promissory note, was precluded by section 580d from seeking a deficiency judgment on the note through the family law court even though a senior lienholder had foreclosed on one or two of the other properties securing the debt [*In re Marriage of Oropallo (1998) 68 Cal. App. 4th 997, 1007, 80 Cal. Rptr. 2d 669]* . The rule allowing sold-out junior lienholders to pursue deficiency judgments did not apply in this case, because the wife had elected to proceed against some of the real property securing the debt under the power of sale contained in the deed of trust. Thus, the wife's right to recover was not controlled by the "whim of the senior" [*In re Marriage of Oropallo (1998) 68 Cal. App. 4th 997, 1007, 80 Cal. Rptr. 2d 669]* .

[5] Guarantors

[a] Not Protected From Deficiency Judgment

Guarantors are generally not protected by the antideficiency statutes because those statutes concern only actions on the principal obligation, as distinguished from actions against a guarantor [*see, e.g., Mariners Sav. & Loan Assn. v. Neil (1971) 22 Cal. App. 3d 232, 234, 99 Cal. Rptr. 238* (*Code Civ. Proc. § 580a* was not available to guarantor); *Roberts v. Graves (1969) 269 Cal. App. 2d 410, 415-416, 75 Cal. Rptr. 130* (*Code Civ. Proc. § 580b* was not available to guarantor); *see also Talbott v. Hustwit (2008) 164 Cal. App. 4th 148, 153, 78 Cal. Rptr. 3d 703* (*Code Civ. Proc. § 580a* inapplicable in deficiency action against settlors of trust because structure of trust arrangement removed their debtor status and settlors were true guarantors); *Trust One Mortgage Corp. v. Invest America Mortgage Corp. (2005) 134 Cal. App. 4th 1302, 1313, 37 Cal. Rptr. 3d 83* (indemnification provision in agreement between broker and lender was enforceable under antideficiency laws because broker, who was indemnitor, was not same as or substantially identified with principal loan obligor)]. A guaranty is treated as additional security, which may be exhausted notwithstanding the antideficiency statutes [*Heckes v. Sapp (1964) 229 Cal. App. 2d 549, 553, 40 Cal. Rptr. 485]* .

Creditors sometimes attempt to avoid the effect of the antideficiency statutes by structuring a transaction so that the debtor becomes a purported guarantor. Courts distinguish between a true guaranty and a purported guaranty fashioned only to avoid the antideficiency statutes [*Union Bank v. Brummell (1969) 269 Cal. App. 2d 836, 837-838, 75 Cal. Rptr. 234]* . Whether an agreement constitutes a true guaranty or is a sham is a question of fact to be determined from the circumstances of the case [*Roberts v. Graves (1969) 269 Cal. App. 2d 410, 416, 75 Cal. Rptr. 130]* .

PRACTICE TIP:

Sham Guaranties Examined Closely. Increasingly, courts will closely examine and then invalidate guaranties designed to circumvent *Code Civ. Proc. § 580d* antideficiency protections. Guaranties that try to relegate true obligors to the status of guarantors in order to surmount antideficiency protections are being scrutinized more rigorously from an enforceability standpoint. For an example finding triable issues on the sham guaranty defense, see *River Bank America v. Diller (1995) 38 Cal. App. 4th 1400, 1423, 45 Cal. Rptr. 2d 790* . *By William M. Hensley*

Purported guarantors were held to be protected by *Code Civ. Proc. § 580b* when they were actually the purchasers in a secured transaction but had made themselves guarantors for a note executed by a dummy corporation created for that

purpose [*Valinda Builders, Inc. v. Bissner (1964) 230 Cal. App. 2d 106, 107-112, 40 Cal. Rptr. 735]* . Further, purported guarantors were held to be protected by *Code Civ. Proc. § 580d* when they were also liable on the principal obligation because of their status as general partners of the principal debtor [*Union Bank v. Dorn (1967) 254 Cal. App. 2d 157, 158-159, 61 Cal. Rptr. 893]* .

For further discussion and forms concerning the liability of guarantors generally, see Ch. 538, *Suretyship, Bonds, and Undertakings* .

[b] Estoppel of Creditor After Nonjudicial Sale

[i] Basis for Defense

Code Civ. Proc. § 580d, restricting deficiency judgments after a nonjudicial sale, presents a special situation. That section, like the other antideficiency statutes, does not directly bar a creditor's recovery from a guarantor. However, it may indirectly bar recovery by providing the guarantor with an estoppel defense [*Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 41, 71 Cal. Rptr. 64]* . The estoppel theory arises because the one-form-of-action rule [*Code Civ. Proc. § 726(a)*; *see § 555.31*] does not apply to guarantors [*see Murphy v. Hellman Commercial etc. Bk. (1919) 43 Cal. App. 579, 583-586, 185 P. 485* ; *see also Loeb v. Christie (1936) 6 Cal. 2d 416, 418-419, 57 P.2d 1303]* . A creditor can generally bring an action against a guarantor without exhausting the security given by the primary debtor. Even though by statute a guarantor may require the creditor to proceed first against the principal debtor [*Civ. Code § 2845*], that protection, unlike the one-form-of-action rule, can be waived in advance [*see, e.g., Krueger v. Bank of America (1983) 145 Cal. App. 3d 204, 213, 193 Cal. Rptr. 322* ; *Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 43-44 n.3, 71 Cal. Rptr. 64* ; *see also Civ. Code § 2953* (advance waiver of one-form-of-action rule is void)]. The creditor therefore has three choices [*Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 43, 71 Cal. Rptr. 64]* :

- A foreclosure action in which the guarantor is joined as a defendant.
- An action against the guarantor.
- A private sale of the debtor's property.

When the creditor proceeds first by private sale, *Code Civ. Proc. § 580d* shields the debtor from any deficiency judgment [*see* [2][a], *above*]. By foreclosing through a nonjudicial sale, the creditor forgoes the right to proceed further against the debtor, and consequently the guarantor is denied a claim against the debtor to which the guarantor would have been subrogated if the creditor had chosen instead to proceed first against the guarantor. Therefore, on choosing the remedy that destroys the guarantor's rights of subrogation, the creditor is estopped to pursue the guarantor [*Union Bank v. Brummell (1969) 269 Cal. App. 2d 836, 838-839, 75 Cal. Rptr. 234* ; *Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 45-48, 71 Cal. Rptr. 64* ; *but see Mariners Sav. & Loan Assn. v. Neil (1971) 22 Cal. App. 3d 232, 235-236, 99 Cal. Rptr. 238* (criticizing rule for encouraging creditors to proceed first against guarantors rather than debtor's property, contrary to *Civ. Code §§ 2809* and *2845*)].

[ii] Unavailability of Defense

The estoppel defense arising indirectly from *Code Civ. Proc. § 580d* is generally subject to waiver by the guarantor [*see Union Bank v. Gradsky (1968) 265 Cal. App. 2d 40, 48, 71 Cal. Rptr. 64]* . Statutory provisions of model language for a waiver [*see Civ. Code § 2856(c)*] are discussed in [iii] and [iv], *below*. Those provisions do not apply to a guaranty of a debt secured by residential real property that is occupied by the debtor, however.

The estoppel defense is also unavailable when a deficiency judgment against the principal debtor is barred by *Code Civ. Proc. § 580b* [*see* [3][b], *above*], because in that situation the creditor's choice of remedies has no effect on the

subrogation rights of the guarantor [*Bauman v. Castle (1971) 15 Cal. App. 3d 990, 993-994, 93 Cal. Rptr. 565]* .

Even when the defense would otherwise be available, the creditor can avoid it by proceeding first against the guarantor and then exhausting the security of the principal debtor through a private sale [*Krueger v. Bank of America (1983) 145 Cal. App. 3d 204, 210-214, 193 Cal. Rptr. 322]* .

[iii] Post-1996 Waiver of Defense

A contractual provision that is executed after 1996 and expressly sets forth a waiver of defenses based on the antideficiency laws (see statutory examples *below*) will be effective without regard to whether it includes any particular language or phrases to waive those rights or any references to statutory provisions or judicial decisions [*Civ. Code § 2856(b)*]. This does not apply, however, to a guaranty or other type of suretyship obligation made with respect to a loan secured by a trust deed or mortgage on a dwelling for not more than four families when the dwelling is occupied, entirely or in part, by the borrower and the loan was in fact used to pay all or part of the purchase price of that dwelling [*Civ. Code § 2856(e)*].

Without limiting any rights of the creditor or other guarantor or surety to use any other language to express an intent to waive specified rights and defenses of guarantors or other sureties [*see Civ. Code § 2856(a)* (list of those rights and defenses)], the following provisions in a contract will effectively waive various rights and defenses of guarantors or other sureties, including those arising under *Code Civ. Proc. § 580d* [*Civ. Code § 2856(c)*; *see Civ. Code § 2856(a)(2), (3)*]:

> "The guarantor waives all rights and defenses that the guarantor may have because the debtor's debt is secured by real property. This means, among other things:
>
> "(1) The creditor may collect from the guarantor without first foreclosing on any real or personal property collateral pledged by the debtor.
>
> "(2) If the creditor forecloses on any real property collateral pledged by the debtor:
>
> "(A) The amount of the debt may be reduced only by the price for which that collateral is sold at the foreclosure sale, even if the collateral is worth more than the sale price.
>
> "(B) The creditor may collect from the guarantor even if the creditor, by foreclosing on the real property collateral, has destroyed any right the guarantor may have to collect from the debtor. This is an unconditional and irrevocable waiver of any rights and defenses the guarantor may have because the debtor's debt is secured by real property. These rights and defenses include, but are not limited to, any rights and defenses based on *Code of Civil Procedure Sections 580a, 580b, 580d,* and *726*."

Further, the following provision will be effective to waive all rights and defenses the guarantor or other surety may have with respect to obligations as a surety by reason of an election of remedies by the creditor [*Civ. Code § 2856(d)*]:

> "The guarantor waives all rights and defenses arising out of an election of remedies by the creditor, even though that election of remedies, such as a nonjudicial foreclosure with respect to security for a guaranteed obligation, has destroyed the guarantor's rights of subrogation and reimbursement against the principal by the operation of *Code of Civil Procedure Section 580d* or otherwise."

[iv] Pre-1997 Waiver of Defense

The validity of a waiver executed before 1997 must be determined by application of the law that existed on the date the waiver was executed [*Civ. Code § 2856(f)*]. Under former *Civ. Code § 2856,* a waiver could not be effective with

respect to a guaranty of a loan to an individual primarily for personal, family, or household purposes, secured by a trust deed or mortgage on a dwelling for not more than four families when the dwelling was occupied, entirely or in part, by the borrower [former *Civ. Code § 2856(c)*]. In other cases, any language that expressly set forth a waiver of defenses based on the antideficiency laws would be effective, whether or not it contained references to statutory provisions on judicial decisions. The following language would be an effective waiver of the guarantor's defense to a recovery by the creditor by reason of the creditor's election of remedies [former *Civ. Code § 2856(b)*]: "Guarantor waives all rights and defenses arising out of an election of remedies by the creditor, even though that election of remedies, such as a nonjudicial foreclosure with respect to security for a guaranteed obligation, has destroyed the guarantor's rights of subrogation and reimbursement against the principal by the operation of *Code of Civil Procedure Section 580d* or otherwise."

Former *Civ. Code § 2856* in effect abrogated *Cathay Bank v. Lee (1993) 14 Cal. App. 4th 1533, 18 Cal. Rptr. 2d 420* , which invalidated a fairly standard *Gradsky* waiver clause [*see* [ii], *above*] because it failed to inform the guarantor (1) that the loss of subrogation rights creates a defense to a deficiency judgment, and (2) that the guarantor was waiving that specific defense [*Cathay Bank v. Lee (1993) 14 Cal. App. 4th 1533, 1539, 18 Cal. Rptr. 2d 420]* . In dictum the court also strongly implied that lenders should identify the defenses being waived by including references to the statutory provisions [*Cathay Bank v. Lee (1993) 14 Cal. App. 4th 1533, 1541, 18 Cal. Rptr. 2d 420]* .

[6] Transactions Involving Letters of Credit

[a] Exemption From Antideficiency Statutes

If an obligation is secured by a mortgage or trust deed on real property (including an estate for years in real property) and is also supported by a letter of credit, the following acts will not constitute a deficiency judgment within the meaning of the antideficiency statutes [*Code Civ. Proc. §§ 580a, 580b, 580d, 726(b)*] or a violation of those statutes [*Code Civ. Proc. § 580.5(b)*]:

- The presentment, receipt of payment, or enforcement of a draft or demand for payment under the letter of credit by the beneficiary of the letter of credit; or

- The honoring or payment of, or the demand for reimbursement, receipt of reimbursement, or enforcement of any contractual, statutory, or other reimbursement obligation relating to, the letter of credit by the issuer of the letter of credit.

This exemption from the antideficiency statutes applies whether the specified acts occur before or after the judicial or nonjudicial foreclosure of the mortgage or trust deed or a conveyance in lieu of foreclosure [*Code Civ. Proc. § 580.5(b)*]. However, notwithstanding this exemption, a letter of credit will not be enforceable in a loan transaction when the loan is secured by a purchase-money trust deed or mortgage on owner-occupied, one-to-four unit residential property and certain other circumstances exist [*see Code Civ. Proc. § 580.7(b)*; *see also* [3][b][iii], *above*].

[b] Legislative Intent Behind Exemption

In enacting *Code Civ. Proc. § 580.5*, the legislature intended to confirm the independent nature of the letter of credit engagement and to abrogate the holding in *Western Security Bank v. Superior Court (1993) 21 Cal. App. 4th 156, 25 Cal. Rptr. 2d 908* (depublished), that the post-foreclosure presentment of a draft under a letter of credit issued in connection with a loan secured by real property violated *Code Civ. Proc. § 580d* and constituted a "fraud ... or other defect not apparent on the face of the documents" under former *Com. Code § 5114(2)(b)* [*see Western Security Bank v. Superior Court (1997) 15 Cal. 4th 232, 252-253, 62 Cal. Rptr. 2d 243, 933 P.2d 507* (reaching opposite result)]. Further, the legislature intended to confirm the expectation of the parties to a contract underlying a letter of credit, that the beneficiary will have available the value of the collateral and the benefit of the letter of credit without regard to the

order in which the beneficiary resorts to them [Stats. 1994, ch. 611, § 5].

Code Civ. Proc. § 580.5 was intended by the legislature to be a clarification of existing law and therefore applies to letters of credit issued before its effective date, September 16, 1994 [*Western Security Bank v. Superior Court (1997) 15 Cal. 4th 232, 252, 62 Cal. Rptr. 2d 243, 933 P.2d 507]* . The statute also exempts the above-described letter-of-credit transactions from the one-form-of-action rule [*see Code Civ. Proc. § 726(a)*; *see also § 555.31[5]*].

For discussion of letters of credit, see California Legal Forms, Ch. 56, *Letters of Credit and Electronic Fund Transfers* (Matthew Bender).

[7] Actions Not Seeking Deficiency

[a] In General

Code Civ. Proc. §§ 580b and *580d* do not bar subsequent actions that do not seek to enforce the secured debt to the extent that it exceeds the security value of the property [*see Brown v. Jensen (1953) 41 Cal. 2d 193, 198, 259 P.2d 425* (deficiency is difference between security value of property and debt)], nor do they bar the creditor from resorting to additional security [*Armsey v. Channel Associates, Inc. (1986) 184 Cal. App. 3d 833, 837, 229 Cal. Rptr. 509]* . Examples of allowed actions include the following:

- A fraud action when the borrower fraudulently induced the lender to make the loan, even though the alleged misrepresentations did not directly relate to the value of the property securing the debt [*Guild Mortgage Co. v. Heller (1987) 193 Cal. App. 3d 1505, 1512-1515, 239 Cal. Rptr. 59* ; *see Lassar & Gross International, Inc. v. Dunham (1987) 196 Cal. App. 3d 496, 500-502, 241 Cal. Rptr. 854]* ;

- A post-sale action for waste committed in bad faith [*Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 604, 605, 125 Cal. Rptr. 557, 542 P.2d 981* ; *see § 555.90[5]*].

[b] Statutory Exemption

Notwithstanding the antideficiency statutes, a person who is authorized by California to make or arrange loans secured by real property or a successor in interest may bring an action for damages (including exemplary damages not exceeding 50 percent of the actual damages) if (1) the injured person originated, acquired, or purchased a loan secured by a mortgage or trust deed on real property or on an estate for years, (2) the action is based on fraud under *Civ. Code § 1572*, and *(3)* the borrower's fraudulent conduct induced the original lender to make the loan [*Code Civ. Proc. § 726(f)*; *see Fin. Code §§ 551(c), 7460(c), 15102(c)* (comparable provisions applicable to banks, savings and loan associations, and credit unions)].

However, this statutory exemption does not apply to loans secured by single-family, owner-occupied residential real property when the property is actually occupied by the borrower as represented to the lender in order to obtain the loan and the loan is for less than $150,000 as adjusted annually to the Consumer Price Index [*Code Civ. Proc. § 726(g)*; *see Fin. Code §§ 551(b), 7460(b), 15102(b)*; *see also § 555.31[3][a]*]. Further, the statutory exemption does not apply if the lender purchases the property at the sale by making a full-credit bid [*Commonwealth Mortgage Assurance Co. v. Superior Court (1989) 211 Cal. App. 3d 508, 515-517, 259 Cal. Rptr. 425* ; *Sumitomo Bank v. Taurus Developers, Inc. (1986) 185 Cal. App. 3d 211, 220-221, 229 Cal. Rptr. 719]* .

A lender's acquisition of the property by full-credit bid at a nonjudicial foreclosure sale does not bar the lender from maintaining a fraud action to recover damages from nonborrower third parties (such as a real estate appraiser) that fraudulently induced the lender to make the loan [*Alliance Mortgage Co. v. Rothwell (1995) 10 Cal. 4th 1226, 1245-1246, 44 Cal. Rptr. 2d 352, 900 P.2d 601]* . This exception applies only if the lender (1) was induced to enter into

the loan by the false representation, and (2) was still under the mistaken belief that the representation was true at the time it made the full credit bid. Fraud damages are not recoverable if the lender's reliance at the time of the full credit bid was manifestly unreasonable [*Alliance Mortgage Co. v. Rothwell (1995) 10 Cal. 4th 1226, 1246-1247, 44 Cal. Rptr. 2d 352, 900 P.2d 601* ; *see Michelson v. Camp (1999) 72 Cal. App. 4th 955, 968-969, 85 Cal. Rptr. 2d 539* (reliance on appraisal done two years prior to foreclosure was manifestly unreasonable)]. One court has held that the exception is clearly limited to fraud claims and therefore barred the full-credit-bid rule a lender from maintaining a negligence action against an appraiser when the appraisal caused the loan to be under-secured. The lender could instead acquire the property and preserve the right to seek damages from the appraiser [*Pacific Inland Bank v. Ainsworth (1995) 41 Cal. App. 4th 277, 283, 48 Cal. Rptr. 2d 489* ; *see Bank of America v. Quackenbush (1997) 56 Cal. App. 4th 1167, 1171, 66 Cal. Rptr. 2d 81]* . However, some courts have declined to follow Pacific Inland Bank v. Ainsworth, holding that an action for negligent misrepresentation concerns a species of fraud and thus comes within the rule set forth by *Alliance Mortgage* [*see Kolodge v. Boyd (2001) 88 Cal. App. 4th 349, 371-372, 105 Cal. Rptr. 2d 749* ; *First Commercial Mortgage Co. v. Reece (2001) 89 Cal. App. 4th 731, 744, 108 Cal. Rptr. 2d 23]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsPurchase-Money Mortgages

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48-555 California Forms of Pleading and Practice--Annotated § 555.33

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§ 555.33 Effect of Federal Legislation

[1] Federally Guaranteed or Insured Loans

If the secured obligation is a loan insured or guaranteed by the Department of Veterans Affairs or the Federal Housing Administration, the agency should be contacted before commencing any foreclosure proceeding, because each agency has particular requirements affecting foreclosure and deficiency proceedings [*see 12 U.S.C. § 1707 et seq.* (FHA loan); *38 U.S.C. § 3701 et seq.* (DVA loan); 24 C.F.R. Pt. 200 et seq. (FHA loan); *38 C.F.R. Pt. 36* (DVA loan)]. These requirements control in the event of a conflict with state law [*see United States v. Shimer (1961) 367 U.S. 374, 380-381, 81 S. Ct. 1554, 6 L. Ed. 2d 908 (DVA loan)]* . In particular, this means that state antideficiency statutes [*see § 555.32*] do not apply to federally guaranteed or insured loans [*see United States v. Rossi (9th Cir. 1965) 342 F.2d 505, 506* (DVA loan)].

[2] Trustor in Active Military Service

If a trustor is in military service, the Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*] may preclude any nonjudicial or judicial foreclosure [*see 50 U.S.C. App. § 533(c)*]. The prohibition applies to any obligation on real or personal property owned by a servicemember (1) that originated before the period of the servicemember's military service, (2) for which the servicemember is still obligated, and (3) that is secured by a mortgage, trust deed, or other security in the nature of a mortgage [*50 U.S.C. App. § 533(a)*]. A sale, foreclosure, or seizure of property for a breach of an obligation described above is not valid if made during, or within 90 days after, the period of the servicemember's military service, except if made either (1) on a court order granted before the sale, foreclosure, or seizure, with a return made and approved by the court; or (2) pursuant to an enforceable waiver agreement [*50 U.S.C. App. § 533(c)*; *see 50 U.S.C. App. § 517* (waiver agreement)]. Violation of this prohibition is a misdemeanor [*50 U.S.C. App. § 533(d)(1)*]. A trustee, before conducting a nonjudicial foreclosure sale, will typically require proof that the trustor is not, and was not

during the preceding 90 days, in military service. For a form of declaration of a trustor's nonmilitary status, see *§ 555.140*.

Other protection afforded by the Servicemembers Civil Relief Act includes the following:

- Limitations on the amount of interest that may be charged on the secured obligation during the trustor's period of active service [*see 50 U.S.C. App. § 527*]; and

- Relief from penalties imposed for the trustor's default during that period [*see 50 U.S.C. App. § 523*].

For discussion of the special protections given to active military service members under both the federal Servicemembers Civil Relief Act and equivalent California law [*Mil. & Vet. Code § 400 et seq.*], see *§ 555.70[8]*. Forms for relief, including discussion of the court's authority to provide relief, are set forth in §§ 555.138-555.139A.

[3] Bankruptcy

If the trustor files a bankruptcy petition, the commencement or maintenance of judicial or nonjudicial foreclosure proceedings will be automatically stayed [*11 U.S.C. § 362(a)*]. The stay generally continues in effect until the bankruptcy proceeding is terminated, unless the bankruptcy court grants relief from the stay [*see 11 U.S.C. § 362(d)-(g)*]. The automatic stay would not toll the three-month period for reinstatement of a mortgage after a notice of default [*see Civ. Code § 2924(a)(2)*], although that period is subject to a limited extension pursuant to *11 U.S.C. § 108(b)* [*Napue v. Gor-Mey West, Inc. (1985) 175 Cal. App. 3d 608, 617-619, 220 Cal. Rptr. 799* ; *see § 555.54*]. For further discussion, see *Ch. 94, Bankruptcy, § 94.30 et seq.*

PRACTICE TIP:

Published Postponement Notices Do Not Violate Automatic Stay. Although no foreclosure sale can proceed until the bankruptcy court lifts the automatic stay, a foreclosing creditor's published notice of postponement or other acts of continuing a sale noticed before the bankruptcy filing are acts that do not violate the automatic stay [*see Tully v. World Sav. & Loan Assn. (1997) 56 Cal. App. 4th 654, 663, 65 Cal. Rptr. 2d 545* ; *In re Roach (9th Cir. 1981) 660 F.2d 1316, 1318-1319*]. *By William M. Hensley*

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewBankruptcy LawCase AdministrationAdministrative PowersStaysRelief From StaysGeneral OverviewMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief ActReal Property LawFinancingFederal ProgramsFederal Housing AdministrationReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral Overview

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48-555 California Forms of Pleading and Practice--Annotated § 555.34

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§ 555.34 Notice of Delinquency

[1] Junior Lienholder's Request

The beneficiary of a trust deed covering property containing one-to-four residential units or given to secure an original obligation not exceeding $300,000 may, with the written consent of the trustor, submit a written request by certified mail to the beneficiary of any senior trust deed, for written notice of any or all delinquencies of four months or longer in the payment of principal or interest on any obligation secured by the senior trust deed. The trustor's consent must be obtained either by a signed and dated agreement separate from the loan and security documents or through a disclosure on those documents in at least 10-point type [*Civ. Code § 2924e(a)*].

For further discussion and forms, see California Legal Forms, Ch. 25A, *Security Instruments for Real Estate Financing* (Matthew Bender).

[2] Effect of Proper Request

[a] Period of Effectiveness; Successors in Interest

The request is valid until withdrawn in writing as to all delinquencies covered by *Civ. Code § 2924e* that occur before the specified termination date of the junior beneficiary's interest. It is effective for five years from the date it is mailed or recorded, whichever is later, and may be renewed at five-year intervals [*Civ. Code § 2924e(b)*].

The rights and obligations under *Civ. Code § 2924e* inure to the benefit of, or pass to, any successors in interest of the parties. A successor ininterest of a junior beneficiary entitled to notice must file a request for notice with any senior beneficiary (but a new written consent from the trustor is not required) [*Civ. Code § 2924e(b)*]. In addition, when any

beneficiary has been succeeded by another person, the beneficiary has a duty to transmit promptly to that person any notice received under *Civ. Code § 2924e* [*Civ. Code § 2924e(e)*].

[b] Requirements Governing Notice

Once a proper request is made, the senior beneficiary must give written notice to the requesting junior beneficiary of the fact and amount of any deficiency, unless already cured, that has existed four months or longer and that also existed or occurred on or after 10 days from the mailing or recording or the request, whichever is later. The notice is to be given within 15 days after the lapse of the four-month period, by personal service or first-class mail, postage paid. The beneficiary is not required to give notice of a delinquency under *Civ. Code § 2924e* if a notice of default under *Civ. Code § 2924* [*see § 555.52*] has already been recorded [*Civ. Code § 2924e(c)*].

[c] Discharge of Junior Obligation

On discharge of an obligation secured by a junior lien with respect to which a notice request was made pursuant to *Civ. Code § 2924e*, the beneficiary or mortgagee that made the request must communicate that fact in writing to the senior lienholder to whom the request was made. The communication must specify that providing notice pursuant to the previous request is no longer required [*Civ. Code § 2924e(g)*].

[3] Liability for Failure to Give Notice

If the senior beneficiary fails to give notice of a delinquency as required by *Civ. Code § 2924e* and a judicial or nonjudicial foreclosure sale occurs, the senior beneficiary is liable to the requesting junior beneficiary for $300 as a penalty. The senior beneficiary is also liable for any damages arising from the failure to give timely notice and sustained from the date the notice should have been given to the date it is actually given or the date a notice of default is recorded, whichever is earlier [*Civ. Code § 2924e(d)*].

As a defense to this liability, the senior beneficiary may show by a preponderance of evidence that the failure to give notice was due to a good faith error that occurred despite maintenance of procedures reasonably adapted to avoid the error [*Civ. Code § 2924e(d)*].

Failure to comply with *Civ. Code § 2924e* does not affect the rights of a good faith lienholder or the validity of a sale in favor of a good faith purchaser [*Civ. Code § 2924e(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsFormalitiesReal Property LawFinancingSecondary FinancingLien Priorities

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§ 555.35 Beneficiaries' Agreement to Be Governed by Majority Beneficiary

[1] Agreement and Disclosure

Following a process established by statute, all of the beneficiaries under a trust deed may agree to be governed, for purposes of certain procedures relating to a default or foreclosure, by beneficiaries holding more than 50 percent of the record beneficial interest of a series of notes secured by the same real property, or of undivided interests in a note secured by real property equivalent to a series transaction, exclusive of any notes or interests of a licensed real estate broker that is the issuer or servicer of the notes or interests or any affiliate of that licensed real estate broker [*Civ. Code § 2941.9(a)*; *see Civ. Code § 2941.9(e)* ("affiliate of licensed real estate broker" defined)]. The agreement may cover actions to be taken on behalf of all parties in the event of default or foreclosure for matters that require direction or approval of the parties, including designation of the broker, servicing agent, or other person acting on their behalf, and the sale, encumbrance, or lease of real property owned by the parties after foreclosure or receipt of a deed in lieu of foreclosure [*Civ. Code § 2941.9(b)*].

A description of the agreement must be disclosed pursuant to *Bus. & Prof. Code § 10232.5* in the disclosure statement provided by real estate brokers and must be included in a recorded document such as the trust deed or an assignment of interests [*Civ. Code § 2941.9(c)*].

[2] Majority Action Affidavit

Any action taken pursuant to the agreement is not effective unless all of the parties agreeing to the action execute a separate "Majority Action Affidavit" that contains prescribed statements [*Civ. Code § 2941.9(d)*]. The affidavit must be recorded in the office of the county recorder of each county in which the real property described in the trust deed is located. Once the document is recorded, it constitutes conclusive evidence of compliance with the requirements of *Civ.*

Code § 2941.9(d) in favor of trustees acting pursuant to *Civ. Code § 2941.9*, substituted trustees acting pursuant to *Civ. Code § 2934a*, subsequent assignees of the obligation secured by the trust deed, and subsequent good faith purchasers or lienholders for value of the real property described in the trust deed [*Civ. Code § 2941.9(d)*].

For further discussion and forms, see California Legal Forms, Ch. 25A, *Security Instruments for Real Estate Financing* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsFormalitiesReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's Interests

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§ 555.36 Regulation of Foreclosure Consultants and Home Equity Purchasers

Statutes protect homeowners in foreclosure from sharp practices by foreclosure consultants [*Civ. Code § 2945 et seq.*] and home equity purchasers [*Civ. Code § 1695 et seq.*]. A foreclosure consultant is generally an unlicensed person who offers to assist the trustor with the problems of impending nonjudicial foreclosure of the trustor's residential property [*Civ. Code § 2945.1*]. An equity purchaser is any person that acquires title to a residential property during nonjudicial foreclosure, with certain exceptions, such as a relative of the trustor, a person who intends to use the property as a residence, or a beneficiary that takes a deed in lieu of foreclosure [*Civ. Code § 1695.1(a), (b)*].

The statutory schemes have specific requirements as to the form and content of contracts required to be executed, including certain disclosures and notice of the trustor's special right to cancel the contract within a stated period [*Civ. Code §§ 1695.2-1695.5* (equity sale contracts); *Civ. Code §§ 2945.2, 2945.3* (foreclosure services contract)]. Specified practices are prohibited on the part of equity purchasers [*Civ. Code §§ 1695.6, 1695.13*] and foreclosure consultants [*Civ. Code § 2945.4*; *see Civ. Code § 2945.5*]. Any waiver of the statutory protections is void [*Civ. Code §§ 1695.10, 2945.5*]. In the event of specified violations by an equity purchaser or foreclosure consultant, the trustor has express causes of action for damages or equitable relief [*Civ. Code §§ 1695.7, 2945.6*] and, in the case of a sale of home equity, a right of rescission [*Civ. Code § 1695.14*]. Specified violations are also offenses [*Civ. Code §§ 1695.8, 2945.7*].

A home equity sale agreement with an option to repurchase gives rise, in some circumstances, to a presumption that the purportedly absolute conveyance is in fact a mortgage securing a loan [*Civ. Code § 1695.12*; *see § 555.22*].

The protections of the Home Equity Sales Contract Act and the Mortgage Foreclosure Consultants law only apply when the owner of a "residence in foreclosure" is approached while residing in the home [*In re Phelps (2001) 93 Cal. App. 4th 451, 455, 113 Cal. Rptr. 2d 217* (granting petition for habeas corpus by defendant convicted of violating Home

Equity Sales Contract Act, on ground Act was inapplicable because homeowner no longer resided in home when approached by defendant)].

Legal Topics:

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

§§ 555.37[Reserved]

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48-555 California Forms of Pleading and Practice--Annotated § 555.50

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§ 555.50 Validity and Regulation

Nonjudicial foreclosure refers to the private enforcement of a secured obligation on default, by exercise of a power of sale that is included in trustdeeds and many mortgages. The validity of a nonjudicial foreclosure proceeding depends on compliance with the express terms of the provision conferring the power of sale [*see Fogarty v. Sawyer (1861) 17 Cal. 589, 593]* . However, all aspects of the nonjudicial foreclosure process are also regulated in detail by a comprehensive statutory scheme [*see Civ. Code § 2920 et seq.*] that is designed to protect the trustor against unreasonable forfeiture [*Garfinkle v. Superior Court of Contra Costa County (1978) 21 Cal. 3d 268, 278, 146 Cal. Rptr. 208, 578 P.2d 925]* .

Because a nonjudicial foreclosure proceeding is a private act, it does not constitute a deprivation of property without due process in violation of the state and federal constitutions [*Garfinkle v. Superior Court (1978) 21 Cal. 3d 268, 276-283, 146 Cal. Rptr. 208, 578 P.2d 925* ; *U.S. Hertz, Inc. v. Niobrara Farms (1974) 41 Cal. App. 3d 68, 87-88, 116 Cal. Rptr. 44* ; *see U.S. Const., amend. XIV*; *Cal. Const., art. I, § 7*].

On the other hand, nonjudicial foreclosure is deemed to be a harsh remedy subject to careful scrutiny by the courts [*see System Inv. Corp. v. Union Bank (1971) 21 Cal. App. 3d 137, 153, 98 Cal. Rptr. 735]* , which is why a private sale must strictly comply with the terms of the power-of-sale provision [*Hill v. Gibraltar Sav. & Loan Assn. (1967) 254 Cal. App. 2d 241, 243, 62 Cal. Rptr. 188]* and any applicable statutory requirements [*Whitman v. Transtate Title Co. (1985) 165 Cal. App. 3d 312, 322, 211 Cal. Rptr. 582]* . The trustee also has a duty to conduct the sale fairly and openly, with diligence, discretion, and integrity, so as to protect the rights of all interested persons and obtain a reasonable price [*System Inv. Corp. v. Union Bank (1971) 21 Cal. App. 3d 137, 153, 98 Cal. Rptr. 735* ; *Hill v. Gibraltar Sav. & Loan Assn. (1967) 254 Cal. App. 2d 241, 243, 62 Cal. Rptr. 188]* .

For a comparison of a private sale and a foreclosure action, see *§ 555.30[2]*. For discussion of the one-form-of-action

rule [*Code Civ. Proc. § 726(a)*] and the antideficiency statutes [*Code Civ. Proc. §§ 580a, 580b, 580d, 726*] as they relate to privates sales, see *§§ 555.31* and *555.32[2]*. For discussion of other statutory schemes potentially affecting a private sale, see *§§ 555.33* (federal law) and *555.36* (regulation of foreclosure consultants and home equity purchasers).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingState Regulation

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48-555 California Forms of Pleading and Practice--Annotated § 555.51

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§ 555.51 Preliminary Steps

Nonjudicial foreclosure is based on a default by the trustor entitling the beneficiary to exercise the power of sale in the trust deed [*see § 555.30[3]*]. Standard trust deed forms generally require the beneficiary to deliver to the trustee a written declaration of default and demand for sale, describing the nature of the default, stating an election to accelerate, if appropriate, and demanding a sale. For a form of declaration of default and demand for sale, see California Legal Forms, Ch. 25D, *Foreclosure* (Matthew Bender). In addition, the beneficiary generally is required to furnish theoriginal trust deed, note, and any other evidence of the secured debt, as well as the original notice of default and election to sell [*see § 555.52*].

Other matters may require attention at or before this stage of the proceeding. For example, even though nonjudicial foreclosure is not subject to the bar of the statute of limitations [*see § 555.18[4]*], a trust deed is subject to expiration under *Civ. Code § 882.020 et seq.*, after which a private sale can no longer be conducted. For discussion of the expiration period and procedure for preserving a trust deed from expiration, see *§ 555.18[4][b]*. In addition, if a substitution of trustees becomes necessary, this should be done before recording the notice of default [*see Civ. Code § 2934a(b), (c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale Foreclosure

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§ 555.51A Foreclosure Protection

[1] Foreclosure Crisis

In July 2008, the governor signed into law SB 1137, intended to ameliorate the deleterious effects on the state economy and local economies and the California housing market resulting from the foreclosures of residential properties in unprecedented numbers [Stats. 2008, ch. 69, § 1(d)] resulting from economic factors including subprime lending practices. In SB 1137, the legislature found and declared that residential property foreclosures increased sevenfold from 2006 to 2007; that more than 84,375 properties were lost to foreclosure in California in 2007; and that 254,824 loans went into default, the first step in the foreclosure process [Stats. 2008, ch. 69, § 1(a)]. SB 1137 modified the foreclosure process to require mortgagees, beneficiaries, or authorized agents to provide notice to borrowers and explore options that could avoid foreclosure.

[2] Contacting Borrowers

Effective September 6, 2008 [Stats. 2008, ch. 69, § 10], a mortgagee, trustee, beneficiary, or authorized agent may not file a notice of default pursuant to *Civ. Code § 2924* [*see § 555.52*] until 30 days after the mortgagee, beneficiary, or authorized agent initially contacted the borrower in person or by telephone to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure [*Civ. Code § 2923.5(a)*]. However, a notice of default may be filed pursuant to *Civ. Code § 2924* when a mortgagee, beneficiary, or authorized agent failed to contact the borrower as required, provided that the failure to contact the borrower occurred despite the due diligence of the mortgagee, beneficiary, or authorized agent [*Civ. Code § 2923.5(g)*; *see* Civ. Code § 2329.5(g)(1)-(5) (actions required for "due diligence")].

A notice of default must include a declaration that the mortgagee, beneficiary, or authorized agent has contacted the

borrower, or has tried with due diligence to contact the borrower as required by *Civ. Code § 2923.5(g)*, or that no contact was required pursuant to *Civ. Code § 2923.5(h)* [*Civ. Code § 2923.5(b)*].

These requirements apply to a loan that is secured by a mortgage or deed of trust recorded from January 1, 2003, to December 31, 2007, inclusive, on real property that is the principal residence of the borrower (as indicated to the lender in loan documents) containing no more than four dwelling units [*Civ. Code § 2923.5(i)*]. However, these requirements do not apply in any of the following cases [*Civ. Code § 2923.5(h)*]:

- The borrower has surrendered the property as evidenced by either a letter confirming the surrender or delivery of the keys to the property to the mortgagee, trustee, beneficiary, or authorized agent.

- The borrower has contracted with an organization, person, or entity, whose primary business is advising people who have decided to leave their homes and who need advice on how to extend the foreclosure process and avoid their contractual obligations to mortgagees or beneficiaries.

- The borrower has filed a case under Chapter 7, 11, 12, or 13 of the Bankruptcy Code, and the bankruptcy court has not entered an order closing or dismissing the case or granting relief from a stay of foreclosure.

Civ. Code § 2923.5 is in effect until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date [*Civ. Code § 2923.5(j)*].

[3] Loan Modifications

Under specified circumstances, mortgage lenders and servicers are authorized under their pooling and servicing agreements to modify mortgage loans when the modification is in the best interest of investors. Generally, that modification may be deemed to be in the best interest of investors when the net present value of the income stream of the modified loan is greater than the amount that would be recovered through the disposition of the real property security through a foreclosure sale [Stats. 2008, ch. 69, § 1(c)].

In SB 1137, the legislature found and declared that any duty that servicers may have to maximize net present value under their pooling and servicing agreements is owed to all parties in a loan pool, or to all investors under a pooling and servicing agreement, not to any particular party in the loan pool or investor under a polling and servicing agreement, and that a servicer acts in the best interests of all parties to the loan pool or investors in the pooling and servicing agreement if it agrees to or implements a loan modification or workout plan as to which both of the following apply: (1) The loan is in payment default, or payment default is reasonably foreseeable; and (2) anticipated recovery under the loan modification or workout plan exceeds the anticipated recovery through foreclosure on a net present value basis [*Civ. Code § 2923.6(a)*]. The legislature declared its intent that the mortgagee, beneficiary, or authorized agent offer the borrower a loan modification or workout plan if such a modification or plan is consistent with its contractual or other authority [*Civ. Code § 2923.6(b)*]. Section 2923.6 is in effect until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date [*Civ. Code § 2923.6(c)*].

[4] Notice of Foreclosure to Residents

Effective September 6, 2008 [Stats. 2008 , ch. 69, § 10], on posting a notice of sale pursuant to *Civ. Code § 2924f*, a trustee or authorized agent must also post, in the manner required for posting the notice of sale on the property to be sold, the following notice in English and the languages described in *Civ. Code § 1632* [*Civ. Code § 2924.8(a)*]:

"Foreclosure process has begun on this property, which may affect your right to continue to live in

> this property. Twenty days or more after the date of this notice, this property may be sold at foreclosure. If you are renting this property, the new property owner may either give you a new lease or rental agreement or provide you with a 60-day eviction notice. However, other laws may prohibit an eviction in this circumstance or provide you with a longer notice before eviction. You may wish to contact a lawyer or your local legal aid or housing counseling agency to discuss any rights you may have."

Concurrently with the mailing of the notice of sale pursuant to *Civ. Code § 2924b*, the mortgagee, trustee, beneficiary, or authorized agent must send, by first-class mail, a copy of that posted notice, in an envelope addressed to the "resident of property subject to foreclosure sale" [*Civ. Code § 2924.8(a)*]. It is an infraction to tear down the notice within 72 hours of posting. Violators will be subject to a fine of $100 [*Civ. Code § 2924.8(b)*].

These notice requirements apply only to loans secured by residential real property, and if the billing address for the mortgage note is different from the property address [*Civ. Code § 2924.8(d)*].

Section 2923.8 is in effect until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date [Civ. Code § 2923.8(e)].

[5] Maintenance of Vacated Property

A legal owner is required to maintain vacant residential property [*see Civ. Code § 2929.3(g)*] purchased by that owner at a foreclosure sale, or acquired by that owner through foreclosure under a mortgage or deed of trust [*Civ. Code § 2929.3(a)(1)*]. A governmental entity may impose a civil fine of up to $1,000 per day for a violation [*see Civ. Code § 2929.3(a)(1)* (notice of alleged violation and intent to assess fine)]. The governmental entity must provide a period of not less than 30 days for the legal owner to remedy the violation prior to imposing a civil fine and must allow for a hearing and opportunity to contest any fine imposed. In determining the amount of the fine, the governmental entity shall take into consideration any timely and good faith efforts by the legal owner to remedy the violation. The maximum civil fine is $1,000 for each day that the owner fails to maintain the property, commencing on the day following the expiration of the period to remedy the violation established by the governmental entity [*Civ. Code § 2929.3(a)(2)*; *see Civ. Code § 2929.3(b)* ("failure to maintain" defined)]. A governmental entity may establish different compliance periods for different conditions on the same property in the notice of alleged violation mailed to the legal owner [*Civ. Code § 2929.3(a)(3)*].

A governmental entity may provide less than 30 days' notice to remedy a condition before imposing a civil fine if it determines that a specific condition of the property threatens public health or safety and provided that notice of that determination and time for compliance is given [*Civ. Code § 2929.3(c)*]. Fines may not be imposed under both section 2929.3 and a local ordinance [*Civ. Code § 2929.3(e)*]. These provisions do not preempt any local ordinances [[*Civ. Code § 2929.3(f)*]. The rights and remedies provided in section 2929.3 are cumulative and in addition to any other rights and remedies provided by law [*Civ. Code § 2929.3(h)*]. Section 2929.3 is in effect until January 1, 2013, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2013, deletes or extends that date [*Civ. Code § 2929.3(I)*].

[6] Notice to Quit

Notwithstanding the unlawful detainer provisions of *Code Civ. Proc. § 1161a*, a tenant or subtenant in possession of a rental housing unit at the time the property is sold in foreclosure must be given 60 days' written notice to quit pursuant to *Code Civ. Proc. § 1162* [*see Ch. 333, Landlord and Tenant: Eviction Actions, § 333.11*] before the tenant or subtenant may be removed from the property through unlawful detainer proceedings [*Code Civ. Proc. § 1161b(a)*]. However, this notice requirement does not apply if any party to the note remains in the property as a tenant, subtenant, or occupant [*Code Civ. Proc. § 1161b(b)*]. Section 1161b is in effect until January 1, 2013, and as of that date is repealed, unless a later enacted statute, enacted before January 1, 2013, deletes or extends that date [*Code Civ. Proc. §*

1161b(c)].

In 2009, the United States Congress established a 90-day notice requirement in the Protecting Tenants at Foreclosure Act [Pub. L. No. 111-22, S. 896]. This requirement applies to any foreclosure on a federally related mortgage loan or on any dwelling or residential real property after May 20, 2009 [Pub. L. No. 111-22, § 702, 123 Stats. 1660-1661; *see also* Pub. L. No. 111-22, § 703, 123 Stats. 1661, amending *42 U.S.C. § 1437f(o)(7)* (following foreclosure, successor in interest may terminate Section 8 tenancy on 90 days' notice if owner will occupy property as primary residence)]. The Act provides that any immediate successor in interest in the property pursuant to the foreclosure assumes that interest subject to the rights of any bona fide tenant as of the date of the notice of foreclosure, under any bona fide lease entered into before the notice of foreclosure, to occupy the premises until the end of the remaining term of the lease [Pub. L. No. 111-22, § 702(a)(2), 123 Stats. 1661]. However, a successor in interest may terminate a lease effective on the date of sale of the unit to a purchaser who will occupy the unit as a primary residence, subject to the receipt by the tenant of a 90-day notice to vacate [Pub. L. No. 111-22, § 702(a)(2), 123 Stats. 1661].

A lease or tenancy is considered bona fide if (1) the mortgagor or the child, spouse, or parent of the mortgagor under the contract is not the tenant; (2) the lease or tenancy was the result of an arms-length transaction; and (3) the lease or tenancy requires the receipt of rent that is not substantially less than fair market rent for the property or the unit's rent is reduced or subsidized due to a federal, state, or local subsidy [Pub. L. No. 111-22, § 702(b), 123 Stats. 1661]. These provisions are repealed on December 31, 2012 [P.L. 111-22, § 704, 123 Stats. 1662].

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Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. LEGAL BACKGROUND
B. Foreclosure
2. Nonjudicial Foreclosure

48-555 California Forms of Pleading and Practice--Annotated § 555.52

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§ 555.52 Notice of Default

[1] Filing Notice for Record

[a] Filing Requirement; Exceptions

Generally, no power of sale under a trust deed may be exercised until a notice of default is filed for record in the office of the recorder of each county in which the encumbered property is located [*Civ. Code § 2924(a)(1)*; *see Civ. Code § 2953* (benefit of statutory notice requirements may not be waived in advance)]. Typically, the trustee causes the filing of a notice provided by the beneficiary [*see § 555.51*], but the beneficiary or an agent for the beneficiary or trustee may file instead [*Civ. Code § 2924(a)(1)*; *see Birkhofer v. Krumm (1938) 27 Cal. App. 2d 513, 516-517, 81 P.2d 609]* . For a form of notice of default and discussion of its contents, see *§ 555.142*.

Civ. Code § 2924 does not apply to the following trust deeds [*Civ. Code §§ 2924(a), 2953*; *see §§ 555.32[2][b], 555.54[1]*]:

- Trust deeds made pursuant to a court order or judgment.
- Trust deeds that secure payment of a bond or other indebtedness authorized or permitted to be issued by the Commissioner of Corporations [*see Corp. Code § 25600*].
- Trust deeds made by a utility subject to the Public Utilities Act [*see Pub. Util. Code § 201 et seq.*].

Effective September 6, 2008 [2008 Stats., ch. 69, § 10], with respect to certain residential loans, a mortgagee, trustee, beneficiary, or authorized agent may not file a notice of default pursuant to *Civ. Code § 2924* until 30 days after the

mortgagee, beneficiary, or authorized agent has contacted the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure [*Civ. Code § 2923.5(a)(1), (2)*]. However, a notice of default may be filed pursuant to section 2924 when a mortgagee, beneficiary, or authorized agent failed to contact the borrower as required, provided that the failure to contact the borrower occurred despite the due diligence of the mortgagee, beneficiary, or authorized agent [*Civ. Code § 2923.5(g)*; *see* Civ. Code § 2329.5(g)(1)(5) (actions required for "due diligence")]. For discussion of these provisions, see *§ 555.51A*.

[b] Privileged Communications

The mailing, publication, and delivery of notices as required by *Civ. Code § 2924(a)(1)* [*see § 555.52[1][a]*] and the performance of the procedures set forth in *Civ. Code § 2920 et seq.* (provisions relating to trust deeds and mortgages) constitute privileged communications that fall within the scope of *Civ. Code § 47* (governing privileged publications or broadcasts) [*Civ. Code § 2924(d)*; *see Kachlon v. Markowitz (2008) 168 Cal. App. 4th 316, 341, 85 Cal. Rptr. 3d 532* (qualified, common interest privilege set forth in *Civ. Code § 47(c)(1)* is applicable privilege); for coverage of *Civ. Code § 47*, *see* Ch. 340, *Libel and Slander*]. Moreover, in performing acts required by *Civ. Code § 2920 et seq.*, the trustee will not incur any liability for any good faith error resulting fromreliance on informati on provided in good faith by the beneficiary regarding the nature and the amount of the default under the secured obligation, deed or trust, or mortgage [*Civ. Code § 2924(b)*].

[2] Request for Notice

Any person desiring a copy of any notice of default that is required to be filed for recordation [*see § 555.52[1]*] may, at any time after recordation of the trust deed and before recordation of the notice of default, file a duly acknowledged request for notice in the office of the recorder of any county in which any part of the encumbered property is located [*Civ. Code § 2924b(a)*]. For a form of request for notice and discussion of its contents, see *§ 555.141*. A similar request for notice may be included in the trust deed, on behalf of any person or party to the trust deed [*Civ. Code § 2924b(d)*]. A recorded request for notice entitles the designated person to receive a copy of the notice [*see § 555.52[3]*]; it does not operate as notice of any claim to the encumbered property [*Civ. Code § 2924b(g)*].

[3] Mailing Copies of Notice

[a] To Trustor and Persons Requesting Notice

Within 10 days following recordation of the notice of default, the trustee or other person authorized to record the notice (including an agent for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed substitution of trustee, or an agent of that substituted trustee) must send or cause to be sent to the following persons, by registered or certified mail, with postage prepaid, a copy of the notice of default [*see § 555.142*] showing the date of recordation [*Civ. Code § 2924b(b)(1), (4)*]:

- To each trustor, at the last known address if it is different from the address specified in the trust deed.

- To each person entitled to receive notice by reason of a recorded request under *Civ. Code § 2924b(a)* and *(d)* [*see § 555.52[2]*], at the address designated in the request.

The last known address is the last business or residence physical address actually known by the trustee or other person authorized to record the notice of default. A physical address does not include an e-mail address or any form of electronic address for a trustor or mortgagor. An address is "actually known" if it is contained in the original deed of trust or mortgage, or in any subsequent written notification of a change of physical address from the trustor or mortgagor pursuant to the deed of trust or mortgage. The beneficiary must inform the trustee of the trustor's last address actually known by the beneficiary, but the trustee is not liable for failure to send any notice to this last address unless it is actually known by the trustee [*Civ. Code § 2924b(b)(3)*]. Although the trustee has noobligation to take any steps to

discover the trustor's current address or to determine whether the trustor is living [*see I.E. Associates v. Safeco Title Ins. Co. (1985) 39 Cal. 3d 281, 285-289, 216 Cal. Rptr. 438, 702 P. 2d 596]* , if the trustee has actual knowledge that the trustor died and that the deceased trustor's estate is being administered by the public administrator, the trustee is obligated to send the notice to the public administrator [*Estate of Yates (1994) 25 Cal. App. 4th 511, 521, 32 Cal. Rptr. 2d 53]* .

The person required to send copies of the notice of default as described in the preceding paragraph must also simultaneously send or cause to be sent, by regular first-class mail, with postage prepaid, an additional copy of the notice, addressed to each trustor at the same address to which the notice is sent by registered or certified mail. The sender must execute and retain an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) showing that this requirement was met. In the absence of fraud, the affidavit establishes a conclusive presumption of mailing [*Civ. Code § 2924b(e)*].

Standard trust deed forms typically include the trustor's address and a request that the trustor be sent any notice of default or sale [*see Gov. Code § 27321.5(b)* (trustor's address and request for notice is prerequisite to recordation of trust deed)]. However, failure to include this information does not affect the validity of the trust deed [*Gov. Code § 27321.5*].

For a form of the declaration of mailing and discussion of the contents, see *§ 555.145*. For discussion of proof of mailing of copies of the notice, see *§ 555.145[2]* and *[3]*.

[b] To Other Persons

[i] Potential Recipients

Within one month following recordation of the notice of default, if certain conditions are satisfied [*see § 555.52[3][b][ii]*], the trustee or other person authorized to record the notice (including an agent for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed substitution of trustee, or an agent of that substituted trustee) must send or cause to be sent to the following persons, by registered or certified mail, with postage prepaid, a copy of the notice of default [*see § 555.142*] showing the date of recordation [*Civ. Code § 2924b(c)(1), (2), (4)*]:

- The successor in interest, as of the recording date of the notice of default, of all or part of the estate or interest of the trustor [*see generally Perez v. 222 Sutter St. Partners (1990) 222 Cal. App. 3d 938, 947-949, 272 Cal. Rptr. 119* (easement holder is not successor in interest and does not have to be notified except pursuant to recorded request for notice)].

- The beneficiary of any trust deed recorded after the trust deed being foreclosed, or recorded before or concurrently with that trust deed butsubject to a recorded agreement or statement of subordination to that trust deed [*see § 555.16[4]*].

- The assignee of any junior beneficiary described in the preceding item, as of the recording date of the notice of default [*see § 555.15[1]*].

- The purchaser of any contract of sale (or the lessee of any lease) of the estate or interest being foreclosed, which was recorded after the trust deed being foreclosed or was recorded before or concurrently with that trust deed but is subject to a recorded agreement or statement of subordination to that trust deed [*see generally* Ch. 569, *Vendor and Purchaser of Real Property*].

- The successor in interest of a purchaser or lessee described in the preceding item, as of the recording

date of the notice of default.

- The state controller in Sacramento, when, as of the recording date of the notice of default, a notice of lien against the encumbered property for postponed property taxes has been recorded [*see § 555.56[4]*].

When the mailing address of any person listed above, as provided to the county recorder, is the address of the person's attorney, agent, or employee, the fact that a notice of default is mailed to that address does not impose on the attorney, agent, or employee any duty to communicate the notice to the designated person [*Civ. Code § 2924b(c)(5)*].

For a form of the declaration of mailing and discussion of the contents, see *§ 555.145*. For discussion of proof of mailing of copies of the notice, see *§ 555.145[2]* and *[3]*.

[ii] Conditions Precedent

A copy of the notice need not be sent to a person described in § 555.52[3][b][i] unless the following conditions are satisfied with respect to that person [*Civ. Code § 2924b(c)(1)*]:

- The estate or interest of that person in the encumbered property was acquired by an instrument sufficient to impart constructive notice of the estate or interest.

- The instrument is recorded in the office of the county recorder so as to impart constructive notice before the recording date of the notice of default.

- The instrument as recorded sets forth a mailing address for use by the county recorder to return the instrument after recording, which is the address to be used for the purpose of mailing the notice of default.

[4] Publication or Posting of Notice

The trustee or beneficiary must publish a copy of the notice of default in a newspaper of general circulation in the county in which the propertyis located [*see Gov. Code § 6000* (defining newspaper of general circulation); *see generally* Ch. 386, *Newspapers*] if the following conditions are satisfied [*Civ. Code § 2924b(d)*]:

- The trust deed does not contain a mailing address of the trustor or mortgagor named in it.

- The trustor has not recorded a request for notice [*see § 555.52[2]*] under *Civ. Code § 2924b(a)*.

The publication must commence within 10 business days after filing the notice of default for record and must occur once a week for at least four weeks. In lieu of publication, the trustee or beneficiary may arrange to have a copy of the notice of default personally delivered to the trustor, within 10 business days after the notice is filed for record or at any time before publication is to be completed, or post the notice of default in a conspicuous place on the property and mail the notice to the trustor's last known address [*Civ. Code § 2924b(d)*].

For discussion of proof of publication, see *§ 555.56[2]*.

[5] No Duty to Give Actual Notice

A trustee's statutory duty to provide notice is exclusive, and the trustee is not liable, as common agent of the parties, for any failure to provide actual notice to the trustor after meeting the requirements of *Civ. Code § 2924b* [*I.E. Associates v. Safeco Title Ins. Co. (1985) 39 Cal. 3d 281, 285-289, 216 Cal. Rptr. 438, 702 P.2d 596]* .

[6] Warning to Buyer Under Secured Retail Installment Contract

When a default has not been cured within 30 days after recordation of the notice of default, and the default relates to an obligation under a contract for goods or services subject to the Unruh Act [*Civ. Code § 1801 et seq.*] and secured by a trust deed on a single-family owner-occupied residence, the trustee must mail a warning statement [*see Civ. Code § 2924f(c)(3)*] to the trustor's last known address [*Civ. Code § 2924f(c)(1), (3)*]. The warning must also be included in all notices of sale [*see Civ. Code § 2924f(b)*].

For a form of a notice of sale containing the required warning, see *§ 555.144[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstEvidencePrivilegesGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale Foreclosure

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§ 555.53 Status of Secured Debt

[1] Duty to Provide Statement

[a] Request for Statement

Trustors, junior beneficiaries and mortgagees, and certain other persons may request either a beneficiary statement [*see § 555.53[2]*] or a payoff demand statement [*see § 555.53[3]*] from the beneficiary, to determine the status of the loan [*see Civ. Code § 2943(b)(1), (c)*]. A beneficiary statement or payoff demand statement may be relied on in accordance with its terms [*Civ. Code § 2943(d)(1)*].

The request for a beneficiary statement may be made at any time before, or within two months after, the recording of a notice of default, or may otherwise be made more than 30 days before the entry of decree of foreclosure [*Civ. Code § 2943(b)(2)*]. The request for a payoff demand statement may be made at any time.

The preparation and delivery of a beneficiary statement or a payoff demand statement does not change a date of sale established pursuant to *Civ. Code § 2924g* [*Civ. Code § 2943(f)*; *see* § 555.27].

[b] Delivery; Fee; Failure to Furnish

The beneficiary may deliver the beneficiary statement or payoff demand statement by depositing it in the United States mail, with postage prepaid,or by transmitting it by facsimile machine [*Civ. Code § 2943(a)(3)*]. The beneficiary may charge an amount not to exceed $30 for furnishing each required statement [*Civ. Code § 2943(e)(6)* (not applicable to FHA-insured or DVA-guaranteed trust deeds or mortgages)].

Willful failure to furnish a statement in a timely manner entitles the person making the request to actual damages plus a $300 penalty [*Civ. Code § 2943(e)(4)*]. A willful failure is an intentional failure to comply with the requirements of *Civ. Code § 2943* without just cause or excuse [*Civ. Code § 2943(e)(4)*].

[2] Beneficiary Statement

A beneficiary must, within 21 days after receiving a written demand by an entitled person, prepare and deliver to the person demanding it a copy of the note and a beneficiary statement [*Civ. Code § 2943(b)(1)*]. A beneficiary statement is a written statement showing the following information [*Civ. Code § 2943(a)(2)*]:

- The amount of the unpaid balance of the obligation secured by the mortgage or trust deed and the interest rate together with the total amounts, if any, of all overdue installments of principal or interest or both.

- The amounts of periodic payments, if any.

- The date the obligation is due in whole or in part.

- The date to which real estate taxes and special assessments have been paid, to the extent that information is known by the beneficiary.

- The amount of hazard insurance in effect and the term and premium of that insurance, to the extent that information is known by the beneficiary.

- The amount in an account, if any, maintained for the accumulation of funds with which to pay taxes and insurance premiums.

- The nature and, if known, the amount of any additional charges, costs, or expenses paid or incurred by the beneficiary that have become a lien on the encumbered property.

- Whether the obligation secured by the mortgage or trust deed can or may be transferred to a new borrower.

[3] Payoff Demand Statement

A beneficiary must, on written demand by an entitled person, prepare and deliver a payoff demand statement to the person demanding it within 21 days after receiving the demand. However, if the loan is subject to a recorded notice of default or a filed complaint commencing a judicial foreclosure, the beneficiary has no obligation to prepare and deliver the statement unless the written demand is received before the first publication of a notice of sale or the notice of first date of sale established by a court [*Civ. Code § 2943(c)*].

A payoff demand statement is a written statement setting forth the amounts required as of the date of preparation by the beneficiary to discharge all obligations secured by the trust deed that is the subject of the payoff demand statement. The written statement must include information reasonably necessary to compute the payoff amount on a per diem basis for a period, not to exceed 30 days, during which the per diem amount is not changed by the terms of the note [*Civ. Code § 2943(a)(5)*].

Any sums that were due but, for any reason, were not included in the payoff demand statement or an amended statement will be recoverable by the beneficiary as an unsecured obligation, pursuant to the terms of the note and provisions of law [*Civ. Code § 2943(d)(3)*; *Cathay Bank v. Fidelity Nat. Title Ins. Co. (1996) 46 Cal. App. 4th 266, 270-271, 53 Cal.*

Rptr. 2d 595 ; *see* *Ghirardo v. Antonioli (1996) 14 Cal. 4th 39, 52, 57 Cal. Rptr. 2d 687, 924 P.2d 996* (reaching similar result based on common law in effect before enactment of *Civ. Code § 2943*)].

A letter sent by a bank to the escrow agent handling a sale, stating that it had received "payoff funds" for the secured promissory note that it held, did not meet the statutory requirements for a payoff demand statement. The letter did not advise the borrower of the sums needed to pay off the loan nor did it provide a per diem interest rate. The use of the term "payoff funds" in the letter was not sufficient to transform a letter advising the escrow agent of the status of the transaction into a payoff demand statement binding on the bank [*California Nat. Bank v. Havis (2004) 120 Cal. App. 4th 1122, 1134, 16 Cal. Rptr. 3d 245]* .

[4] Short-Sale Transactions

The provisions of *Civ. Code § 2943* discussed below apply from January 1, 2010, until January 1, 2014 [*Civ. Code § 2943(g)*; *see* Stats. 2009, ch. 43, § 5]. These provisions are intended to allow escrow agents to obtain valid payoff statements in short-sale transactions, which can occur when deeds of trust or mortgages have to be foreclosed in a distressed real estate market.

A "short-pay agreement" is an agreement in writing in which the beneficiary agrees to release its lien on a property in return for payment of an amount less than the secured obligation [*Civ. Code § 2943(a)(6)*].

A "short-pay demand statement" is a written statement, issued subsequent to and conditioned on the existence of a short-pay agreement in the possession of the entitled person, that is prepared in response to a written demand made by an entitled person or authorized agent, setting forth an amount less than the outstanding debt, together with any terms and conditions, under which the beneficiary will execute and deliver a reconveyance of the deed of trust securing the note that is the subject of the short-pay demand statement. The period must not be greater than 30 days from the date of preparation by the beneficiary [*Civ. Code § 2943(a)(7)*].

A "short-pay request" is a written request made by an entitled person or authorized agent requesting the beneficiary to provide a short-pay demand statement that includes a copy of an existing contract to purchase the property for an amount certain, a copy of the short-pay agreement in the possession of the entitled person, and information related to the release of any other liens on the property [*Civ. Code § 2943(a)(8)*].

A beneficiary, or his or her authorized agent, must, on receipt of a short pay request, prepare and deliver a short-pay demand statement to the person requesting it within 21 days of the receipt of the short-pay request. A beneficiary, or his or her authorized agent, that elects not to proceed with the transaction that is the subject of the short-pay request may refuse to provide a short-pay demand statement for that transaction, but in that case, the beneficiary or agent must provide a written statement to the person requesting it, indicating that the beneficiary elects not to proceed with the proposed transaction, within 21 days of receipt of the short-pay request. If the terms and conditions of the short-pay agreement require approval by the beneficiary of a closing statement or similar document prepared by an escrow holder, then approval or disapproval must be provided not more than four days after receipt by the beneficiary of the closing statement, otherwise the closing statement will be deemed approved, provided the statement is not clearly contrary to the terms of the short-pay agreement or the short-pay demand statement provided to the escrow holder [*Civ. Code § 2943(c)(2)*].

A short-pay demand statement may be relied on by the entitled person or his or her authorized agent in accordance with its terms, including for the purpose of establishing the amount necessary to pay the obligation in full. If the beneficiary notifies the entitled person or his or her authorized agent of any amendment to the statement, then the amended statement may likewise be relied on by the entitled person or his or her authorized agent [*Civ. Code § 2943(d)(1)*].

If an entitled person or his or her authorized agent requests a statement pursuant to *Civ. Code § 2943* and does not

specify a short-pay demand statement, the beneficiary must treat the request as a request for a normal payoff demand statement [*Civ. Code § 2943(e)(1)*]. The provisions of *Civ. Code § 2943(e)(2)-(6)* also apply to a short-pay demand statement [*Civ. Code § 2943(e)*].

The preparation and delivery of a short-pay demand statement pursuant to *Civ. Code § 2943* will not change a date of sale established pursuant to *Civ. Code § 2924g* [*Civ. Code § 2943(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale Foreclosure

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. LEGAL BACKGROUND
B. Foreclosure
2. Nonjudicial Foreclosure

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§ 555.54 Reinstatement of Accelerated Obligation

[1] Power to Reinstate: Extent and Exercise

[a] Power to Effect Reinstatement

[i] Persons Entitled to Reinstate

The trustor and other persons are empowered by statute to effect reinstatement of the secured obligation and trust deed, *status quo ante*, after the beneficiary has elected to accelerate the secured obligation as the result of a monetary default, such as a failure to pay interest or installments on the principal or failure to make collateral payments such as taxes or insurance premiums [*Civ. Code § 2924c(a)(1)*; *see § 555.15[3]*]. Persons entitled to reinstate during the reinstatement period [*see § 555.54[1][b]*] are the trustor, a successor in interest as to all or part of the encumbered property, and any junior beneficiary or mortgagee [*Civ. Code § 2924c(a)(1)*].

The protection of *Civ. Code § 2924c* may not be waived in advance [*Civ. Code § 2953*].

[ii] Payment of Amount Due

Persons entitled to reinstate [*see § 555.54[1][a][i]*] may accomplish reinstatement by curing the monetary default, that is, paying or tendering payment of the entire amount due under the terms of the trust deed and the secured obligation, including the following [*Civ. Code § 2924c(a)(1)*]:

- Certain costs and fees [*see § 555.54[2]*].

- All amounts of principal, interest, taxes, assessments, insurance premiums, or advances that are actually known by the beneficiary to be, and are, in default and are shown in the notice of default, under the terms of the trust deed or mortgage and the secured obligation.

- All amounts in default on recurring obligations not shown in the notice of default.

Recurring obligations comprise all amounts of principal and interest on the loan or rents, subject to the trust deed or mortgage in default, due after the notice of default is recorded, all amounts of principal and interest or rents advanced on senior liens or leaseholds that are advanced after recordation of the notice of default, and payments of taxes, assessments, and hazard insurance advanced after recordation of the notice of default [*Civ. Code § 2924c(a)(1)*]. If the beneficiary has made no advances on defaults that would constitute recurring obligations, the beneficiary may require the trustor to provide reliable written evidence that the amounts have been paid [*Civ. Code § 2924c(a)(1)*].

The amount required for reinstatement does not include any portion of the principal that, but for the acceleration on default, would not be due [*Civ. Code § 2924c(a)(1)*; *see Bisno v. Sax (1959) 175 Cal. App. 2d 714, 719-720, 346 P.2d 814* (partial payment after default was insufficient cure, and person attempting to cure is not required to tender any amounts not claimed in notice of default)].

[b] Reinstatement Periods

Except when the extraordinary provisions of *Civ. Code §§ 2923.52-2923.55* require a 90-day extension of the time for reinstatement [*see § 555.54[1][f]*], or after those provisions expire on January 1, 2011 [*see Civ. Code §§ 2923.52(e), 2923.53*(*l*), 2923.54(c), 2923.55(d) (sunset date)], the time for reinstatement is governed by the statutory provisions discussed below.

The initial period during which reinstatement can be effected commences with the date of recordation of the notice of default and continues until five business days before the date of sale set forth in the initial recorded notice of sale [*Civ. Code § 2924c(a)(1), (e)*]. This period, at a minimum, exceeds three months, in view of the time requirements for setting the date of sale [*Civ. Code §§ 2924(a)(3), 2924b, 2924f* ; *see § 555.56*].

If the sale does not take place on the date set by the notice of sale or if a subsequent notice of sale is required to be recorded, the right of reinstatement revives as of the date of subsequent recordation of a notice of sale and continues until five business days before the date of sale set forth in the subsequent notice. If the sale is postponed on the date of sale set by the last-recorded notice of sale, or on the date declared for sale at an immediately preceding postponement of sale, and the postponementperiod exceeds five business days, the right of reinstatement revives as of the date of postponement and continues until five business days before the date of sale declared at the time of the postponement. There is no right of reinstatement during the period of five business days before the date of sale, whether that date is given in a notice of sale or declared at a postponement of sale [*Civ. Code § 2924c(e)*]. The term "business day" has the same meaning under *Civ. Code § 2924c(e)* as under *Civ. Code § 9* [*Civ. Code § 2924c(e)*]. For discussion of the postponement procedure, see *§ 555.57[4]*.

A foreclosure sale was invalid and the trustee's deed upon sale was void when the homeowner cured the default before the sale. The fact that the agreement to cure the default did not take place within the time statutorily granted to a trustor to cure a default as a matter of right [*Civ. Code § 2924c(a)(1), (e)*] was irrelevant, because the homeowner and lender mutually agreed to the cure and reinstatement of the loan [*Bank of America N.A. v. La Jolla Group II (2005) 129 Cal. App. 4th 706, 712, 28 Cal. Rptr. 3d 825]* .

Bankruptcy proceedings may in effect permit the debtor to reinstate even after the reinstatement period has elapsed [*see 11 U.S.C. §§ 1124* cl. (2)(A), 1322(b)(2), *(5)*]. One court has held, however, that the postponement of a foreclosure sale numerous times for five or fewer business days during the time a sale was enjoined or stayed--thereby precluding

revival of an expired reinstatement period--was not improper [*Hicks v. E.T. Legg Associates (2001) 89 Cal. App. 4th 496, 508, 108 Cal. Rptr. 2d 10]* . For further discussion, see Ch. 94, *Bankruptcy* .

[c] Duty to Accept Payment

If a person entitled to effect reinstatement tenders the amount necessary to cure the monetary default, the beneficiary cannot properly refuse the tender [*see Munger v. Moore (1970) 11 Cal. App. 3d 1, 8, 89 Cal. Rptr. 323]* . A proper tender effectively cures the default even if is not accepted [*Magnus v. Morrison (1949) 93 Cal. App. 2d 1, 3, 208 P.2d 407]* , and the beneficiary and trustee may be liable for damages if they proceed with the sale [*Munger v. Moore (1970) 11 Cal. App. 3d 1, 8, 89 Cal. Rptr. 323]* .

A beneficiary cannot, as a condition to reinstatement, demand the cure of any delinquency unless it has been sufficiently specified in the notice of default. For example, if a junior beneficiary records a notice of default and afterward cures a default under a senior lien, the junior beneficiary is entitled to add the paid amount to the debt owed to the junior beneficiary. The junior beneficiary, however, may not require the trustor to reimburse that amount in tendering payment for reinstatement under the junior notice of default, because the junior notice of default could not have included any delinquency under the senior trust deed [*Little v. Harbor Pacific Mortgage Investors (1985) 175 Cal. App. 3d 717, 720-721, 221 Cal. Rptr. 59]* .

[d] Effect of Tendering Payment

Once the monetary default is cured by a proper tender of payment, the secured obligation and the trust deed are automatically reinstated in full force and effect, as if no acceleration had occurred, and all pending foreclosure proceedings must be dismissed or discontinued [*Civ. Code § 2924c(a)(1)*].

PRACTICE TIP:

Tender All of It! If a borrower or subordinated junior lienholder wants to cure so as to stop foreclosure proceedings, it is necessary that all amounts under loan documents (even disputed ones) be paid in accordance with *Civ. Code § 2924c(a)(1)*. These tender rules also apply to pre-maturity delinquencies and do not disrupt common-law tender rules upon maturity. A borrower who properly tenders upon maturity may be able to stop the accrual of interest or extinguish the lien if a creditor wrongfully rejects a proper tender. *By William M. Hensley*

When a junior beneficiary or mortgagee is compelled to cure the default and effect reinstatement for self-protection, the amount so paid may be added to the debt secured by the junior trust deed or mortgage [*Civ. Code § 2876*; *see United Sav. & Loan Assn. v. Hoffman (1973) 30 Cal. App. 3d 306, 313, 106 Cal. Rptr. 275]* .

[e] When Reinstatement Is Not Available

Because *Civ. Code § 2924c* applies only to monetary defaults, it does not appear to limit acceleration based on a nonmonetary default, such as an unauthorized transfer by the trustor [*see § 555.15[4]*]. This distinction appears to be in accord with the original purpose of the statute, that is, to relieve debtors that were distressed by the Great Depression [*see Magnus v. Morrison (1949) 93 Cal. App. 2d 1, 3, 208 P.2d 407]* .

Civ. Code § 2924c does not apply to secured obligations authorized or permitted to be issued by the Commissioner of Corporations [*see Corp. Code § 25600*] or those made by a utility subject to the Public Utilities Act [*Civ. Code § 2924c(a)(1)*; *see §§ 555.32[2][b], 555.52[1]*].

[f] Extraordinary Extension of Time

Normally a notice of sale cannot be given until after the passage of three months from the date of filing of the notice of

default [*Civ. Code § 2924(a)(2), (3)*; *see § 555.54[1][b]*]. However, starting June 15, 2009, until January 1, 2011, in some cases in which the delinquent loan is secured by residential real property, that mandatory delay (the purpose of which is to allow time for the noticed default to be cured) is extended an additional 90 days, to allow the parties to pursue a loan modification so as to prevent the impending foreclosure [*Civ. Code § 2923.52(a)*; *see Civ. Code § 2923.52(d), (e)* (operative date and sunset date); *see also 10 Cal. Code Reg. §§ 4.1 et seq., 2031.1 et seq., 2850.1 et seq.* (implemental regulations, issuance of which on June 1, 2009, made statute operative 14 days later)].

Once a notice of default has been recorded, the 90-day extension is effective in any case in which no exception is applicable (see below) and the following conditions are satisfied [*Civ. Code § 2923.52(a)*]:

- The deed of trust or mortgage was recorded during the period from January 1, 2003, to January 1, 2008, inclusive.

- It is the first deed of trust or mortgage encumbering the property that provides security for the loan.

- That property was residential real property when the deed of trust or mortgage was recorded.

- That property was occupied as the borrower's principal residence at the time the loan became delinquent.

In a case in which those conditions are satisfied, the notice of sale may nevertheless be given after the passage of three months from the date of filing of the notice of default [*Civ. Code § 2924(a)(2), (3)*; *see § 555.54[1][b]*] when one of the following conditions exists, because in that case, the 90-day extension is not triggered:

- The delinquent loan is serviced by a mortgage loan servicer that has obtained a temporary or final order of exemption from the appropriate regulatory agency [*see Civ. Code § 2923.53(k)(1)* (either Commissioner of Corporations, Commissioner of Financial Institutions, or Real Estate Commissioner, depending on loan servicer's regulated status)], and that order is current and valid at the time the notice of sale is given [*Civ. Code § 2923.52(b)*]. To be eligible for an order of exemption, the loan servicer must have implemented a comprehensive loan modification program that meets the requirements of *Civ. Code § 2923.53* [*Civ. Code § 2923.53(a)*; *see Civ. Code § 2923.53*(*l*) (sunset date)].

- The delinquent loan either [*Civ. Code § 2923.52(c)*]:

  - Was made or purchased, or is serviced, by a California state or local public housing agency or authority, including state or local housing finance agencies established under *Health & Safety Code § 50000 et seq.* (Zenovich-Moscone-Chacon Housing and Home Finance Act) and *Mil. & Vet. Code § 980 et seq.* (concerning Cal-Vet loans); or

  - Is collateral for securities purchased by such an agency or authority.

- The borrower has either [*Civ. Code § 2923.55(a)-(c)*; *see Civ. Code § 2923.55(d)* (sunset date)]:

  - Surrendered the property to the mortgagee, trustee, beneficiary, or authorized agent, as evidenced by either a letter confirming the surrender or delivery of the keys to the property;

  - Contracted with an organization, person, or entity, whose primary business is advising people who have decided to leave their homes, regarding how to extend the foreclosure process and avoid their contractual obligations to mortgagees or beneficiaries;

or

- Filed a case under Chapter 7, 11, 12, or 13 of the Bankruptcy Code, in which the bankruptcy court has not entered an order closing or dismissing the bankruptcy case or granting relief from a stay of foreclosure.

A notice of sale filed pursuant to *Civ. Code § 2924f* [*see § 555.144*] must include a declaration from the trustee, mortgagee, or other mortgage loan servicer, stating (1) whether or not a final or temporary order of exemption was obtained pursuant to *Civ. Code § 2923.53* and is current and valid on the date the notice of sale is filed, and (2) whether the 90-day extension for giving notice of sale, specified in *Civ. Code § 2923.52(a)*, applies or does not apply, pursuant to *Civ. Code § 2923.52(b)* and *(c)* and *Civ. Code § 2923.55*. However, failure to comply with *Civ. Code § 2923.52* or *2923.53* will not invalidate any sale that would otherwise be valid under *Civ. Code § 2924f* [*Civ. Code § 2923.54(a), (b)*; *see Civ. Code § 2923.54(c)* (sunset date)].

[2] Costs and Fees

[a] Statutory Limitations on Chargeable Costs

Costs and fees that a beneficiary may charge as a condition for reinstatement are subject to statutory limitations [*Civ. Code § 2924c(a)(1)*]. Chargeable costs and expenses are limited to costs actually incurred for recording, mailing, publishing, and posting any notices required under *Civ. Code §§ 2924-2924i*, plus a fee not exceeding $50 for any postponement of a private sale, plus a fee for a trustee's sale guaranty [*Civ. Code § 2924c(c)*; *see Engelbertson v. Loan & Bldg. Asso. (1936) 6 Cal. 2d 477, 479, 58 P.2d 647* (tender of amount due did not cure default when it did not include costs incurred)]. A trustee or beneficiary may purchase a trustee's sale guaranty at a rate meeting the standards in *Ins. Code §§ 12401.1* and *12401.3* [*Civ. Code § 2924c(c)*].

[b] Trustee's or Attorney's Fees

Any charge for trustee's or attorney's fees that does not exceed the following statutory ceiling is conclusively presumed to be lawful and valid [*Civ. Code §§ 2924c(d), 2924d(a)*]. Up to the time the notice of sale is mailed to the trustor, the trustee's or attorney's fees chargeable as a condition of reinstatement may not exceed the following amount [*Civ. Code § 2924c(a)(1), (d)*]:

- $300 if the unpaid principal sum secured is $150,000 or less, or $250 if the unpaid principal sum secured exceeds $150,000, plus

- 0.5 percent of the unpaid principal sum secured exceeding $50,000, up to and including $150,000, plus

- 0.25 percent of any portion of the unpaid principal sum secured exceeding $150,000, up to and including $500,000, plus

- 0.125 percent of any portion of the unpaid principal sum secured exceeding $500,000.

The unpaid principal sum secured is determined as of the date the notice of default is recorded [*Civ. Code § 2924c(d)*].

In addition, when the trust deed secures an obligation subject to the Unruh Act [*Civ. Code § 1801 et seq.* (retail installment sale contracts)], an additional $50 trustee's fee is authorized [*Civ. Code § 2924f(c)(5)*].

After the notice of sale is mailed to the trustor, the trustee's or attorney's fees chargeable as a condition of reinstatement

(in lieu of, not in addition to, the fees authorized above) may not exceed the following amount [*Civ. Code § 2924d(a)*]:

- $425 if the unpaid principal sum secured is $150,000 or less, or $360 if the unpaid principal sum secured exceeds $150,000, plus
- 1 percent of the unpaid principal sum secured exceeding $50,000, up to and including $150,000, plus
- 0.5 percent of any portion of the unpaid principal sum secured exceeding $150,000, up to and including $500,000, plus
- 0.25 percent of any portion of the unpaid principal sum secured exceeding $500,000.

A beneficiary also may demand, as a condition to reinstatement, reimbursement for any additional attorney's fees for other services related to the trust deed that are recoverable under the terms of the trust deed. However, these fees must be claimed in the notice of default, as part of the total amount required to cure the default [*Buck v. Barb (1983) 147 Cal. App. 3d 920, 924-925, 195 Cal. Rptr. 461* ; *see Bisno v. Sax (1959) 175 Cal. App. 2d 714, 720, 346 P.2d 814]* .

A trustee may pay or offer to pay an agent or subagent for work performed in discharging the trustee's obligations under the terms of the trust deed. The payments are conclusively presumed to be lawful and valid if, when the payments are added to the trustee's other fees, the aggregate sum does not exceed the trustee's authorized fee [*Civ. Code § 2924d(d)*].

[3] Notice of Rescission of Default

Within 21 days following a reinstatement, the beneficiary or an agent must execute and deliver to the trustee a notice of rescission, rescinding the declaration of default and demand for sale and advising the trustee of the date of reinstatement. The trustee must cause the notice of rescission to be recorded within 30 days after receiving it and all allowable fees and costs. No charge except the recording fee may be made to the trustor for the execution and recordation of the notice of rescission [*Civ. Code § 2924c(a)(2)*]. For a form of notice of rescission, see *§ 555.143*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale Foreclosure

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§ 555.55 Equity of Redemption

[1] Right to Redeem

Any person having an interest in the encumbered property has a right to redeem the property from the lien of the mortgage or trust deed, until the property is sold at a foreclosure sale [*Civ. Code § 2903*]. Junior lienholders are specifically entitled to redeem [*Civ. Code § 2904*], as long as the junior interest was acquired in good faith and not as a sham to destroy the rights of other junior lienholders [*Lee v. Joseph (1968) 267 Cal. App. 2d 30, 32-35, 72 Cal. Rptr. 471]* .

This right of redemption is commonly referred to as an equity of redemption, a term dating to the period when a mortgagor retained only an equitable, rather than legal, interest in the encumbered property [*see Bradbury v. Davenport (1896) 114 Cal. 593, 601-602, 46 P. 1062]* . The term "equity of redemption" is used here to distinguish it from the statutory redemption procedure that applies following a judicial foreclosure sale [*see Duff v. Randall (1897) 116 Cal. 226, 229-230, 48 P. 66* ; § 555.72].

The person redeeming the encumbered property becomes subrogated to all of the benefits of the trust deed or mortgage, as against all owners of other interests in the property [*Civ. Code §§ 2903, 2904*].

[2] Waiver

An equity of redemption may not be waived in advance [*Civ. Code § 2889*; *Bradbury v. Davenport (1896) 114 Cal. 593, 599, 46 P. 1062]* . It may, however, be subsequently released or conveyed by an agreement that is sufficiently specific and deliberate and is given for an adequate consideration [*Bradbury v. Davenport (1896) 114 Cal. 593, 599-600, 46 P. 1062* ; *see Graves v. Arizona Central Bank (1928) 205 Cal. 715, 717-718, 272 P. 1063* ; *General*

Casualty Co. v. Soda (1960) 184 Cal. App. 2d 390, 394-395, 7 Cal. Rptr. 536 (no effective release of equity of redemption when agreement was not sufficiently specific)]. The most common instance of such a conveyance occurs when a trustor relinquishes the equity of redemption by giving the beneficiary a grant deed in consideration for cancellation of the secured obligation [*Graves v. Arizona Central Bank (1928) 205 Cal. 715, 717-719, 272 P. 1063* ; *see § 555.30[4]*].

PRACTICE TIP:

Other Consideration for Waiver of Redemption Rights. Various forms of consideration other than lien cancellation can support a waiver of redemption rights. For example, this practitioner has structured a redemption waiver in return for a stipulated-to lower deficiency judgment or for a reduction in a future deficiency judgment in some negotiated proportion to the price at which the property is sold to an outside third party without the cloud of redemption rights. *By William M. Hensley*

[3] Amount Payable for Redemption

Redemption is effected through full payment of the secured debt plus any damages sustained by reason of the default or delay in performance [*Civ. Code § 2905*]. Thus, the effect of redemption is to discharge the security and bar further foreclosure proceedings [*see Lee v. Joseph (1968) 267 Cal. App. 2d 30, 35, 72 Cal. Rptr. 471]* . If a proper tender of the amount necessary for redemption is refused, the obligation remains but the security is nonetheless discharged [*Lichty v. Whitney (1947) 80 Cal. App. 2d 696, 699-701, 182 P.2d 582]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 555.56 Notice of Sale

[1] In General

[a] Basic Notice Requirement

After at least three months from the recordation date of the notice of default, if no reinstatement, redemption, or waiver of the default has occurred, the trustee or other person authorized to make the sale must, before proceeding further, give notice of the sale [*Civ. Code § 2924(a)(3)*; *see § 555.56[2], [3]*]. The statute requires only the lapse of a minimum period between the notice of default and notice of sale, and the trustee may wait a longer period if the delay does not prejudice the trustor [*see Arata v. Downer (1937) 21 Cal. App. 2d 406, 408-409, 69 P.2d 213* ; *see also Hayward Lbr. & Invest. Co. v. Corbett (1934) 138 Cal. App. 644, 651, 33 P.2d 41* (reference to "month" in statute or contract is to calendar month); *but see Bennett v. Ukiah Fair Asso. (1936) 7 Cal. 2d 43, 47, 59 P.2d 805* (lapse of three-month period of *Civ. Code § 2924(a)(3)* was described in dictum as passage of 90 days)].

Starting June 15, 2009, until January 1, 2011, in some cases in which the delinquent loan is secured by residential real property, the normal three-month delay between recording the notice of default and giving notice of the sale is extended an additional 90 days, to allow the parties to pursue a loan modification so as to prevent the impending foreclosure [*Civ. Code § 2923.52(a)*; *see Civ. Code § 2923.52(d), (e)* (operative date and sunset date)]. For discussion, see *§ 555.54[1][f]*.

For a form of notice of sale and discussion of the contents, see *§ 555.144*.

[b] Failure to Give Notice; Privileged Communications

When the trustee fails to give notice of the sale to the trustor, junior lienholder, and judgment creditor, and when the failure to give notice is discovered before a deed is issued to the purchaser at the sale, the sale is void and of no effect. No conclusive presumption of the validity of the sale arises, and the purchaser is only entitled to a refund of its bid with interest [*Little v. CFS Service Corp. (1987) 188 Cal. App. 3d 1354, 1360-1362, 233 Cal. Rptr. 923]* .

The mailing, publication, and delivery of the notice, and the performance of the procedures set forth in *Civ. Code § 2920 et seq.* (all provisions relating to trust deeds and mortgages), constitute privileged communications that fall within the scope of *Civ. Code § 47* (governing privileged publications or broadcasts) [*Civ. Code § 2924(d)*]. For coverage of *Civ. Code § 47*, see Ch. 340, *Libel and Slander* .

[c] No Liability for Good Faith Error

In performing acts required by *Civ. Code § 2920 et seq.*, the trustee will not incur any liability for any good faith error resulting from reliance on information provided in good faith by the beneficiary regarding the nature and the amount of the default under the secured obligation, trust deed, or mortgage [*Civ. Code § 2924(b)*].

[2] Notice Procedure

[a] Posting

At least 20 days before the date set for the sale, a written notice must be posted in one public place in the city in which the property is to be sold. If it is not to be sold in a city, the notice must be posted in one public place in the judicial district in which the property is to be sold [*Civ. Code § 2924f(b)(1)*]. Public places typically used include the courthouse and city hall [*see McCabe v. Willard (1931) 119 Cal. App. 122, 125, 6 P.2d 258]* .

A copy of the notice also must be posted in some conspicuous place on the property to be sold, when posting is possible and not restricted for any reason. If the property is a single-family residence, the notice must be posted on the front door, but if that posting is not possible or restricted, then in some other conspicuous place on the property. If access is denied because a common entrance to the property is restricted by a guard gate or similar impediment, the notice may be posted at that guard gate or impediment [*Civ. Code § 2924f(b)(1)*].

If the property includes more than one parcel, posting separate notices on each parcel is necessary only to the extent that the parcels are not contiguous [*see Peterson v. Corporation of America (1937) 21 Cal. App. 2d 527, 529-530, 69 P.2d 904]* .

For discussion of proof of posting of a notice of sale, see *§ 555.145[2]* and *[3]*.

Effective September 6, 2008 [2008 Stats., ch. 69, § 10], with respect to residential foreclosures, on posting a notice of sale pursuant to *Civ. Code § 2924f*, a trustee or authorized agent must also post, in the manner required for posting the notice of sale on the property to be sold, a specified notice in English and the languages described in *Civ. Code § 1632* [*Civ. Code § 2924.8(a)*]. For discussion of this provision and the text of the notice, see *§ 555.51A*.

[b] Publishing

A copy of the notice must be published once a week for three consecutive calendar weeks, with the first publication occurring at least 20 days preceding the sale, in a newspaper of general circulation [*see Gov. Code § 6000 et seq.*; *see also* Ch. 386, *Newspapers*] published in one of the following areas, to be selected in this order according to the location of the property and the existence of a qualifying newspaper [*Civ. Code § 2924f(b)(1), (c)(4)*]:

- The city in which all or part of the property is located, if any part of the property is located in a city.

- The judicial district in which all or part of the property is located.
- The county in which all or part of the property is located.
- The contiguous county having the highest population.

Publication once weekly during the 20-day period is satisfied by three successive publications in a weekly newspaper, and need not be timed to span the entire period [*Hotchkiss v. Darling (1933) 130 Cal. App. 625, 626-627, 20 P.2d 343* (lapse of 14 days between first and third publication)].

An affidavit (or declaration under *Code Civ. Proc. § 2015.5*) showing publication of a notice of default or sale can be executed by the newspaper that published the notice [*see Code Civ. Proc. § 2010*] and, when filed with the clerk of the county where the newspaper is printed, constitutes prima facie evidence of the facts stated in it [*Code Civ. Proc. § 2011*].

[c] Recording

At least 20 days before the date set for the sale, the notice of sale must be recorded with the county recorder of the county in which all or part of the property is located [*Civ. Code § 2924f(b)(1)*].

[3] Copies of Notice

At least 20 days before the date of sale, the trustee or other person authorized to record the notice of default (including an agent for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed substitution of trustee, or an agent of that substituted trustee) must send, or cause to be sent, a copy of the notice of the time and place of sale, by registered or certified mail, with postage prepaid, addressed to (1) each person entitled to receive notice by reason of a duly recorded request [*see Civ. Code § 2924b(a), (d)*], at the address designated in the request [*see § 555.52[2]*], and (2) each trustor, at the last known address if it is different from the address specified in the trust deed [*Civ. Code § 2924b(b)(2), (4)*]. For discussion of "last known address," see *§ 555.52[3][a]*. For discussion of proof of mailing the copies of the notice, see *§ 555.145[2], [3]*.

The person sending the copies of the notice of sale must also simultaneously send or cause to be sent, by regular first-class mail, with postage prepaid, an additional copy of the required notice, addressed to each trustor at the same address to which the notice is sent by registered or certified mail. The sender must execute and retain an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) showing that this requirement was met. In the absence of fraud, the affidavit establishes a conclusive presumption of mailing [*Civ. Code § 2924b(e)*]. For a form of declaration of mailing and discussion of the contents, see *§ 555.145*.

Additionally, at least 20 days before the date of sale, a copy of the notice of sale must be mailed in the same manner to each person entitled to receive a notice of default under *Civ. Code § 2924b(c)(1), (2)* [*Civ. Code § 2924b(c)(3)*; *see § 555.52[3][b]*].

[4] Special Notice for State and Federal Tax Liens

[a] State Tax Liens

If a state tax lien for postponed property taxes is recorded as of the date of the recordation of the notice of default, a copy of the notice of sale must be mailed to the state controller at least 20 days before the date of sale, in the same manner as to other entitled persons [*Gov. Code §§ 16182, 16187(b)*; *Civ. Code § 2924b(c)(2)(F), (3)*; *see §§ 555.52[3][b], 555.56[3]*]. However, when the tax lien has been recorded after the recordation of the notice of default but more than 30 days before the date of sale, a copy of the notice of sale must be given to the state controller at least 25

days before the date of sale [*Gov. Code § 16187(b)*]. If notice is not given, the sale will not extinguish the tax lien [*Gov. Code § 16187(b)*].

A copy of the notice of sale also must be mailed, at least 20 days before the date of sale and in the same manner as to other entitled persons [*see § 555.56[3]*], to the office of any other state taxing agency in Sacramento that recorded a notice of tax lien before the recordation of notice of default [*Civ. Code § 2924b(c)(3)*].

[b] Federal Tax Liens

The mortgagee, trustee, or other person authorized to record the notice of default must provide a copy of the notice of sale to the Internal Revenue Service in accordance with *I.R.C. § 7425* if a "Notice of Federal Tax Lien under Internal Revenue laws" has been recorded against the real property to which the notice of sale applies [*Civ. Code § 2924b(c)(4)*]. The failure to provide the Internal Revenue Service with a copy of the notice of sale is sufficient cause to rescind the trustee's sale and invalidate the trustee's deed, at the option of either the successful bidder at the trustee's sale or the trustee, and in either case with the consent of the beneficiary. Any option to rescind the trustee's sale must be exercised before any transfer of the property by the successful bidder to a bona fide purchaser for value. A recision of the trustee's sale may be recorded in a notice of recision pursuant to *Civ. Code § 1058.5* [*Civ. Code § 2924b(c)(4)*].

If a federal tax lien on the property has been filed for recordation more than 30 days before the sale, notice of the sale must be given to the Internal Revenue Service at least 25 days before the date of sale [*I.R.C. § 7425(c)*; *see Treas. Reg. § 400.4-1* (regulations governing notice of nonjudicial sale to be given to IRS)]. If notice is not given as required, the sale will not extinguish the lien [*I.R.C. § 7425(b)*; *Puls v. United States (N.D. Cal. 1974) 387 F. Supp. 760, 762-763* ; *see I.R.C. § 7425(d)* (IRS is empowered to redeem property within 120 days from date of sale)].

[c] Impact of Tax Liens on Duration of Process

Because *I.R.C. § 7425(c)* and *Gov. Code § 16187(b)* necessitate a record search for possible tax liens filed 31 days or longer before the sale dateand may require a notice of sale to be given 25 days rather than 20 days in advance, they effectively lengthen the minimum 110-day period within which nonjudicial foreclosure may be completed under *Civ. Code §§ 2924(a)(3)* and *2924b*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesLiens (IRC secs. 6320-6327)Discharges of LiensTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesLiens (IRC secs. 6320-6327)Property & Rights Subject to LienTax LawState & Local TaxesAdministration & ProceedingsTax Liens

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. LEGAL BACKGROUND
B. Foreclosure
2. Nonjudicial Foreclosure

48-555 California Forms of Pleading and Practice--Annotated § 555.57

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§ 555.57 Conduct of Sale

[1] In General

[a] Trustee's Duty

A private sale of property under the power of sale of a trust deed must be made at auction to the highest bidder [*Civ. Code § 2924g(a)*; *see § 555.57[5*]; *see also Civ. Code § 2924f(c)(4)*]. The trustee is empowered to conduct the sale but may delegate this task [*see Civ. Code § 2924a* (trustee's attorney or any duly authorized agent may be auctioneer); *Central Sav. Bank of Oakland v. Lake (1927) 201 Cal. 438, 447, 257 P. 521* (trustee hired auctioneer under trust deed provision)]. The trustee has a duty to conduct the sale fairly and openly, with due diligence and sound discretion to protect the rights of the trustor and others and using all reasonable efforts to obtain the best possible or most reasonable price for the benefit of the trustor [*Baron v. Colonial Mortgage Service Co. (1980) 111 Cal. App. 3d 316, 322-323, 168 Cal. Rptr. 450* ; *Kleckner v. Bank of America (1950) 97 Cal. App. 2d 30, 33, 217 P.2d 28]* .

[b] Time and Place of Sale

The time of the sale must be between 9:00 a.m. and 5:00 p.m. on any business day, Monday through Friday [*Civ. Code § 2924g(a)*].

The sale must take place in the county in which all or part of the property is located [*Civ. Code § 2924g(a)*]. If the property is located in two or more counties, all of the property may be sold in any one of the counties in which it is located [*Civ. Code § 2924g(b)*].

In the case of a sale of a single-family owner-occupied residence that is security for a contract for services or goods

subject to the Unruh Act [*Civ. Code § 1801 et seq.* (retail installment sale contracts)], the sale must be in the county in which the residence is located [*Civ. Code § 2924f(c)(4)*].

[2] Disclosure of Property Defects

A beneficiary with knowledge of a defect in the property has a duty to disclose the defect to potential purchasers, if only the beneficiary knows of the defect, and the beneficiary knows that the purchaser does not know and cannot reasonably discover the defect. Thus, a beneficiary was held liable for failure to disclose soil movement under a house that was known by the beneficiary, when the purchaser had no chance to inspect theproperty before the sale [*Karoutas v. Homefed Bank (1991) 232 Cal. App. 3d 767, 770-774, 283 Cal. Rptr. 809]* .

PRACTICE TIP:

Civ. Code § 2924h(g)* and *Karoutas. In 1992, *Civ. Code § 2924h(g)* was amended to allow "as-is" foreclosure sales. Although the provision likely was passed to abrogate *Karoutas*, there is still the likelihood that this statutory subdivision does not protect foreclosing persons from liability for selling property with known but undisclosed defects. The prudent course is to disclose known defects, because "as-is" clauses or statements generally do not protect against disclosure of known problems. *By William M. Hensley*

[3] Multiple Parcels

When the property comprises several lots or parcels, each one must be sold separately unless the trust deed provides otherwise [*Civ. Code § 2924g(b)*]. The trustor, if present at the sale, is entitled to direct the order in which the trustee separately sells the lots or parcels, unless the trust deed provides otherwise [*Civ. Code § 2924g(b)*]. Typically, standard trust deed forms do provide otherwise, giving the trustee discretion to sell the property either as a whole or in separate parcels in whatever order the trustee determines. After sufficient property is sold to satisfy the indebtedness, no more may be sold [*Civ. Code § 2924g(b)*].

If more than one parcel is scheduled to be sold separately at the same time and place by the same trustee, the postponement of any of the sales must be announced at the time specified in the notice of sale for the commencement of the sale. Any sales not postponed must commence immediately afterward, with each successive sale to take place as soon as possible after the completion of the preceding sale [*Civ. Code § 2924g(a)*].

A portion of the property may be sold separately if it is claimed by a third person who requires it to be sold separately [*Civ. Code § 2924g(b)*]. For example, in a judicial foreclosure proceeding, lessees of a portion of the mortgaged premises were entitled to require that the unleased portions be sold first at the judicial sale [*Mack v. Shafer (1901) 135 Cal. 113, 67 P. 40* ; *see Civ. Code § 2899* (security is to be exhausted, on demand, so that portion of property encumbered exclusively by senior lien is sold before portions that are also subject to junior interest)].

[4] Postponement of Sale

[a] When Authorized

The trustee is authorized to postpone the sale in accordance with any of the following [*Civ. Code § 2924g(c)(1)*]:

- On the order of any court of competent jurisdiction;

- If stayed by operation of law [*see, e.g.,* *California Livestock Production Credit Assn. v. Sutfin (1985) 165 Cal. App. 3d 136, 141, 211 Cal. Rptr. 152* (postponement during pendency of trustor's bankruptcy proceedings is required by operation of law)];

- By mutual agreement, whether oral or in writing, of any trustor and any beneficiary or any mortgagor and any mortgagee; or

- At the trustee's discretion [*see, e.g., Pacific Ready-Cut Homes v. Title G. & T. Co. (1929) 103 Cal. App. 1, 5-6, 283 P. 963* (highest amount bid did not constitute fair price)].

Sale proceedings may be postponed, including a postponement on instruction by the beneficiary to the trustee that the sale proceedings be postponed, at any time before the sale's completion, for any period of time not to exceed a total of 365 days from the date set forth in the notice of sale [*Civ. Code § 2924g(c)(1)*].

As a general rule, the trustee must proceed with the sale with reasonable dispatch, and it is not an abuse of discretion to refuse to hold up the sale at the request of a bidder. However, it has been suggested that the trustee's discretion is abused in refusing briefly to postpone the sale to allow a junior lienholder to obtain funds for a qualified bid, at least when there is no higher bid already qualified [*see Hill v. Gibraltar Sav. & Loan Assn. (1967) 254 Cal. App. 2d 241, 62 Cal. Rptr. 188* ; *Kleckner v. Bank of America (1950) 97 Cal. App. 2d 30, 33-34, 217 P.2d 28]* .

In the case of a sale of a single-family owner-occupied residence that is security for a contract for services or goods subject to the Unruh Credit Sales Act [*Civ. Code § 1801 et seq.*], the trustee may receive offers during the 10-day period immediately before the date of sale, and the sale must be postponed to a specified date if any offer so received is accepted in writing by both the trustor and beneficiary. Before the rescheduled date of sale, the trustor may convey the property according to the terms of the accepted offer, and this effectively terminates any further proceedings [*Civ. Code § 2924f(c)(4)*].

[b] New Notice of Sale and New Fees

In the event that the sale proceedings are postponed for a period or periods totaling more than 365 days, the scheduling of any further sale proceedings must be preceded by giving a new notice of sale in the manner prescribed in *Civ. Code § 2924f* . New fees incurred for the new notice of sale must not exceed the amounts specified in *Civ. Code §§ 2924c* and *2924d* and must not exceed reasonable costs that are necessary to comply with these requirements [*Civ. Code § 2924g(c)(2)*].

[c] Notice By Public Declaration; Seven-Day Holding Period; Sale

The trustee must give notice of each postponement, together with the reason for it, by public declaration at the time and place last appointedfor the sale [*Civ. Code § 2924g(d)*; *see Civ. Code § 2924g(a)*]. The declaration must also set forth the new date, time, and place of sale (which must be the same place as that originally fixed by the trustee). No other notice of the postponement need be given [*Civ. Code § 2924g(d)*; *see United States Cold Storage v. Great Western Savings & Loan Assn. (1985) 165 Cal. App. 3d 1214, 1228-1230, 212 Cal. Rptr. 232]* .

The sale may be conducted no sooner than the seventh day after dismissal of any action or, if earlier, expiration or termination of any injunction, restraining order, or stay that required postponement of the sale (whether by entry of an order by a court of competent jurisdiction, operation of law, or otherwise), unless the injunction, restraining order, or subsequent order expressly directs the conducting of the sale within that seven-day period. The seven-day period does not include the day the action is dismissed or the injunction, restraining order, or stay expires or is terminated. If the sale had been scheduled to occur during that seven-day period but could not be held as scheduled because of this seven-day requirement, a new notice of postponement must be given. The trustee is required to keep a record of the reason for each postponement [*Civ. Code § 2924g(d)*]. Notwithstanding these time periods, if postponement of a sale is based on a stay granted under the bankruptcy provisions of Title 11 of the United States Code, the sale may be conducted no sooner than the expiration of the stay granted under the Bankruptcy Code and the seven-day provision of *Civ. Code § 2924g(d)* does not apply [*Civ. Code § 2924g(e)*].

PRACTICE TIP:

Ask For Waiver of Holding Period in Section 2924g(d). When representing a foreclosing lender or seller in a proceeding to dissolve a foreclosure injunction or to lift the bankruptcy automatic stay, counsel should make sure to expressly request, in the moving papers, that the court waive the seven-day holding period of *Civ. Code § 2924g(d)* so the foreclosure can take place forthwith. It is this practitioner's experience that courts will not truncate this holding period unless the request is made in the moving papers. *By William M. Hensley*

[5] Bidding Requirements

[a] Irrevocable Offer; Cancellation

Each bid made at the sale is deemed to be an irrevocable offer by the bidder to purchase the property for the amount of the bid. A bid is effectively canceled by a subsequent bid by any bidder for a higher amount [*Civ. Code § 2924h(a)*]. A postponement or discontinuance of the sale [*see § 555.57[4]*] cancels the last bid [*Civ. Code § 2924h(e)*]. The completion of the sale is to be announced by the fall of the hammer or in another customary manner [*Civ. Code § 2924h(b)*].

[b] Requirement for Cash or Financial Institution's Check

[i] Acceptable Forms

Standard trust deeds typically provide that the property must be sold for cash in U.S. currency, payable at the time of sale. The trustee may, before recognizing any bid, and as a condition of doing so, require every bidder to show evidence of ability to deposit the full amount of the final bid in one of the following forms [*Civ. Code § 2924h(b)*]:

- Cash.

- A cashier's check drawn on a state or national bank [*see Baron v. Colonial Mortgage Service Co. (1980) 111 Cal. App. 3d 316, 320-321, 323, 324, 168 Cal. Rptr. 450* (trustee was liable for abuse of discretion in refusing to accept cashier's check made out to bidder as cash equivalent)].

- A check drawn by a state or federal credit union.

- A check drawn by a state or federal savings and loan association, savings association, or savings bank specified in *Fin. Code § 5102* and authorized to do business in California.

- A cash equivalent designated in the notice of sale as acceptable [*see California Golf v. Cooper (2008) 163 Cal. App. 4th 1053, 1068-1069, 78 Cal. Rptr. 3d 153* (legislature used words "cash equivalent" as a term of art in section 2924h to refer to something different from "cash," "cashier's check," or "check drawn by a [bank]")].

The trustee is entitled to hold the bidders' cash or cash equivalent during the sale. If the last bidder has not previously deposited the full amount of the bid, the trustee may require this amount to be deposited immediately, before completing the sale [*Civ. Code § 2924h(b)*].

[ii] Special Handling Requirements; Finality of Sale

In the event that the trustee accepts a check drawn by a credit union or a savings and loan association or a cash equivalent designated in the notice of sale, the trustee may withhold the trustee's deed until funds become available to the payee or endorsee as a matter of right [*Civ. Code § 2924h(c)*].

For purposes of *Civ. Code § 2924h(c)*, the trustee's sale will be deemed final on the acceptance of the last and highest bid, and will be deemed perfected as of 8:00 a.m. on the actual date of sale if the trustee's deed is recorded within 15 calendar days of the sale, or the next business day following the fifteenth day if the recorder's office is closed on the fifteenth day. However, the sale will be subject to an automatic rescission for a failure of consideration if the funds are not "available for withdrawal" as defined in *Ins. Code § 12413.1* [*Civ. Code § 2924h(c)*; *see Ins. Code § 12413.1(e)* (when draft has been submitted for collection, "available for withdrawal" means when draft has been submitted for collection and payment has been received); *Ins. Code § 12413.1(g)* (incorporating by reference definition set forth in *12 C.F.R. § 229.2(d)* as that regulation existed on January 1, 1990)]. The trustee must send a notice of rescission for a failure of consideration to the last and highest bidder submitting the check or alternative instrument, if the address of the last and highest bidder is known by the trustee. If a sale results in an automatic right of rescission for a failure of consideration under *Civ. Code § 2924h(c)*, the interest of any lienholder is reinstated in the same priority as if the previous sale had not occurred [*Civ. Code § 2924h(c)*].

[c] Beneficiary's Full-Credit Bid

An exception to the general requirement of cash bids is made for the present beneficiary of the trust deed being foreclosed, who may bid on credit to the extent of the outstanding secured debt, including the trustee's fees and expenses [*Civ. Code § 2924h(b)*; *see Central Sav. Bank of Oakland v. Lake (1927) 201 Cal. 438, 447-448, 257 P. 521* (consideration given by beneficiary is discharge of debt)].

The trustee need not accept a partial-credit bid by a junior beneficiary [*see Nomellini Constr. Co. v. Modesto S. & L. Assn. (1969) 275 Cal. App. 2d 114, 115, 79 Cal. Rptr. 717]* .

[d] High Bidder's Duty to Complete Sale

If the trustee has not, pursuant to *Civ. Code § 2924h(b)*, required the last and highest bidder to deposit the amount of the bid in cash or a cash equivalent, the trustee must complete the sale. If the successful bidder thereafter fails to deliver, on demand, the amount of the bid in cash or a cash equivalent, the bidder is liable to the trustee for all damages sustained as a result, including any court costs and reasonable attorney's fees. If the last and highest bidder willfully fails to deliver the amount of the bid, or delivers a check or other instrument as a cash equivalent but later cancels that instrument, the bidder is also guilty of a misdemeanor punishable by a fine up to $2,500 [*Civ. Code § 2924h(d)*].

In the event that the last and highest bidder cancels an instrument submitted to the trustee as a cash equivalent, the trustee must provide a new notice of sale in the manner set forth in *Civ. Code § 2924f* and is entitled to recover the costs of the new notice of sale as provided in *Civ. Code § 2924c* [*Civ. Code § 2924h(d)*]. For discussion of a notice of sale under *Civ. Code § 2924f*, see *§§ 555.56* and *555.144*. For discussion of the expenses that a trustee may recover under *Civ. Code § 2924c* as a condition to reinstatement, see *§ 555.54*.

The civil remedies provided by *Civ. Code § 2924h* are not exclusive. Thus, section 2924h did not bar an action for breach of warranty and fraud by the foreclosing beneficiary against bidders at a nonjudicial foreclosure sale who stopped payments on cashiers' checks and falsely stated that the checks had been lost and never endorsed [*California Golf v. Cooper (2008) 163 Cal. App. 4th 1053, 1068-1069, 78 Cal. Rptr. 3d 153*]. Furthermore, the criminal remedies in section 2924h are not exclusive. The existence of a potential misdemeanor penalty, as provided for in section 2924h(d), would not foreclose prosecution for felony perjury simply because the defendant's allegedly perjurious conduct happened to also constitute the cancellation of a declined cashier's check in a nonjudicial foreclosure sale. Similarly, it did not prohibit a foreclosing beneficiary from pursuing remedies in tort for the bidders' fraudulent conduct in canceling cashiers' checks, simply because that conduct happened to occur in the course of a nonjudicial foreclosure sale [*California Golf v. Cooper (2008) 163 Cal. App. 4th 1053, 1072-1073, 78 Cal. Rptr. 3d 153*].

If the last and highest bidder cancels an instrument submitted to the trustee as a cash equivalent, the trustee must provide a new notice of sale and is entitled to recover the costs of the new notice of sale [*Civ. Code § 2924h(d)*; *see California Golf v. Cooper (2008) 163 Cal. App. 4th 1053, 1068-1069, 78 Cal. Rptr. 3d 153* (legislature plainly used words "cash equivalent" as a term of art in *Civ. Code § 2924h* to refer to something different from "cash," "cashier's check," or "check drawn by a [bank]"; thus, trial court erred in holding this provision was only remedy available where bidders canceled cashier's checks submitted to trustee as payment)].

[e] Proscription of Collusive Bidding

Collusive bidding at the sale is prohibited. Anyone who, acting alone or with others, offers or accepts consideration of any type to fix or restrain bidding that would in any manner operate as a fraud or deceit on any beneficiary, trustor, or junior lienholder, may be punished by a fine up to $10,000 or imprisonment up to one year or both. However, this does not make it unlawful for any person, including the trustee, to state that a property subject to a recorded notice of default or subject to a sale is being sold in an "as is" condition [*Civ. Code § 2924h(g)*].

Any person other than the trustor whose rights as a bidder are not prejudiced, cannot complain of alleged collusive bidding; thus, a junior beneficiary who made no attempt to bid could not have the sale set aside on that ground [*Bertschman v. Covell (1928) 205 Cal. 707, 709-710, 272 P. 571]* .

Gross inadequacy of price coupled with even slight irregularity is enough to set aside the sale. The trustee's failure to tell a bidder that the bid must be a specific amount more than the prior bid has been held to be a sufficient irregularity to set aside the sale [*Bank of Seoul & Trust Co. v. Marcione (1988) 198 Cal. App. 3d 113, 118-120, 244 Cal. Rptr. 1]* .

[6] Completion of Sale

[a] When Sale is Complete

To complete the sale, the trustee may accept a final bid that is below the value of property. Mere inadequacy of price is not, by itself, a ground for setting aside an otherwise properly conducted sale [*Engelbertson v. Loan & Bldg. Asso. (1936) 6 Cal. 2d 477, 479, 58 P.2d 647* ; *Crofoot v. Tarman (1957) 147 Cal. App. 2d 443, 446-447, 305 P.2d 56* ; *but see Pac. Ready-Cut Homes v. Title G. & T. Co. (1929) 103 Cal. App. 1, 5-6, 283 P. 963* (trustee was able to postpone sale because final bid was too low)]. If the trustee accepts a check drawn by a credit union or a savings and loan association, or a cash equivalent designated in the notice of sale, special requirements determine when the sale will be deemed completed. Further, the sale will be subject to an automatic rescission if the funds are not "available for withdrawal" [*see Civ. Code § 2924h(c)*; *see also § 555.57[5][b]*].

The sale is complete the moment the trustee accepts the high bid, regardless of whether a trustee's deed is subsequently executed and delivered. The subsequent execution and delivery of the deed are merely ministerial acts [*Ballengee v. Sadlier (1986) 179 Cal. App. 3d 1, 4-5, 224 Cal. Rptr. 301* (holding limited to facts in *Little v. CFS Service Corp. (1987) 188 Cal. App. 3d 1354, 1362, 233 Cal. Rptr. 923*)].

[b] Form and Delivery of Deed

The successful bidder is not entitled to receive a deed from the auctioneer at the time of tendering payment of the amount bid. Usually the auctioneer gives the purchaser a receipt for the amount received, and the deed is afterward executed and delivered by the trustee in a day or two [*see Kleckner v. Bank of America (1950) 97 Cal. App. 2d 30, 34, 217 P.2d 28]* . The deed is usually without warrant, as the trustee has no duty to guaranty the title [*Tomczak v. Ortega (1966) 240 Cal. App. 2d 902, 907, 50 Cal. Rptr. 20]* and in fact must sell it, on proper demand, even if defective [*Brown v. Busch (1957) 152 Cal. App. 2d 200, 204, 313 P.2d 19]* . For a form of trustee's deed and discussion of the contents, see *§ 555.146*. For further discussion of the title conveyed by a trustee's deed, see *§ 555.62*.

[7] Notice of Rescission

When a trustee's deed is invalidated by a pending bankruptcy or otherwise, recordation of a notice of rescission of the trustee's deed restores the condition of record title and the priority of all liens to the status before the recordation of the trustee's deed. The notice of rescission must properly identify the trust deed, the identification numbers used by the recorder or the books and pages at which the trustee's deed and the trust deed are recorded, the names of all trustors and beneficiaries, the location of the property subject to the trust deed, and the reason for rescission. Only the trustee or beneficiary who caused the trustee's deed to be recorded, or a successor in interest, may record a notice of rescission [*Civ. Code § 1058.5(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawSales of GoodsAuction SalesCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale Foreclosure

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§ 555.58 Expenses of Sale

On sale of the property, the trustee or an agent or successor in interest may demand and receive from the beneficiary or an agent or successor in interest, or may deduct from the proceeds of the sale, the reasonable costs actually incurred in enforcing the terms of the obligation, to the extent allowed under *Civ. Code § 2924c(c)* [*Civ. Code § 2924d(b)*]. For discussion of costs allowable under *Civ. Code § 2924c(c)*, see *§ 555.54[2]*. The trustee also may recover, in the same manner, trustee's or attorney's fees not exceeding $425 or, if greater, 1 percent of the unpaid principal sum secured, determined as of the date the notice of default was recorded. Any charge for fees within this limit is conclusively presumed to be lawful and valid, but is recoverable only in lieu of, not in addition to, fees chargeable under *Civ. Code § 2924c(d)* or *Civ. Code § 2924d(a)* [*Civ. Code § 2924d(b)*]. For discussion of fees allowable under those code sections, see *§ 555.54[2]*.

A trustee may pay or offer to pay an agent or subagent for work performed in discharging the trustee's obligations under the terms of the trust deed. The payments are deemed to be conclusively lawful and valid if, when added to the trustee's other fees, the aggregate sum does not exceed the trustee's authorized fee [*Civ. Code § 2924d(d)*].

The beneficiary may, in addition, add to the outstanding indebtedness any reasonable attorney's fees incurred in successfully defending an action brought by the trustor to enjoin the sale, pursuant to the standard trust deed provisions for recovery of attorney's fees. The beneficiary may add these fees even after failing to request a court award of attorney's fees under *Civ. Code § 1717* [*De La Cuesta v. Superior Court (1984) 152 Cal. App. 3d 945, 948-950, 200 Cal. Rptr. 1]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale Foreclosure

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48-555 California Forms of Pleading and Practice--Annotated § 555.59

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§ 555.59 Application of Proceeds

The trustee or the clerk of the superior court on order of the court must distribute the proceeds of the trustee's sale in the following order [*Civ. Code § 2924k(a)*]:

- Reimbursement of costs and expenses of exercising the power of sale and conducting the sale, including the payment of the trustee's fees and attorney's fees permitted pursuant to *Civ. Code §§ 2924d(b)* and *2924k(b)*.

- Payment of the obligations secured by the trust deed or mortgage.

- Payment of obligations secured by any junior liens or encumbrances in the order of their priority.

- Disbursement of any balance to the trustor or a successor in interest or, in the event the property was sold or transferred to another, to the vested owner of record at the time of the sale.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale Foreclosure

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2. Nonjudicial Foreclosure

48-555 California Forms of Pleading and Practice--Annotated § 555.60

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§ 555.60 Notice of Sale Proceeds

[1] General Requirements

Unless an interpleader action has been filed [*see § 555.60[2][e]*], within 30 days after the execution of the trustee's deed resulting from a sale in which there are proceeds remaining after payment of the costs of sale and the secured obligation, the trustee must send written notice to all persons with recorded interests in the property as of the date immediately before the trustee's sale and entitled to notice of sale pursuant to *Civ. Code § 2924b(b)* and *(c)* [*see § 555.52[2]*]. The notice must be sent by first-class mail in the manner set forth in *Civ. Code § 2924b(c)(1)* [*see § 555.52[3][a]*]. It must state the following [*Civ. Code § 2924j(a)*]:

- There has been a trustee's sale of the described real property.

- The notified person may have a claim to all or a portion of the sale proceeds remaining after payment of the expenses of sale and the amounts owing on the obligation primarily secured.

- The notified person may contact the trustee at the address provided in the notice to pursue any potential claim.

- Before the trustee can act, the notified person may be required to present proof that the person holds the beneficial interest in the obligation and the security interest for the obligation. In the case of a promissory note secured by a trust deed, proof that the person holds the beneficial interest may include the original promissory note and assignment of beneficial interests related to the note. The notified person must also submit a written claim to the trustee, executed under penalty of perjury, stating the

amount of the claim to the date of the trustee's sale and containing an itemized statement of the principal, interest, and other charges.

- Claims must be received by the trustee at the address stated in the notice no later than 30 days after the date the trustee sends the notice.

Nothing in *Civ. Code § 2924j* precludes a person from pursuing other remedies or claims as to surplus proceeds [*Civ. Code § 2924j(b)*].

[2] Priority of Claims; Conflicting Claims

[a] Duty and Failure to Investigate; Payment in Absence of Dispute; Unclaimed Property Law

The trustee must exercise due diligence to determine the priority of the written claims to the surplus proceeds [*Civ. Code § 2924j(b)*]. For these purposes, "due diligence" means the trustee has researched the written claims submitted or other evidence of conflicts and determined that a conflict of priorities exists between two or more claimants, which the trustee is unable to resolve [*see Civ. Code § 2924j(c), (f)*].

If there is no dispute as to the priority of the written claims submitted to the trustee, the trustee must pay the proceeds within 30 days after the conclusion of the notice period [*Civ. Code § 2924j(b)*; *see § 555.60[1*] (notice period)]. If the trustee fails to determine the priority of written claims within 90 days following the 30-day notice period, then within 10 days thereafter the trustee must deposit the funds with the clerk of the court pursuant to *Civ. Code § 2924j(c)* [*see § 555.60[2][b]*] or file an interpleader action pursuant to *Civ. Code § 2924j(e)* [*Civ.Code § 2924j(b)*; *see § 555.60[2][e]*].

In a case in which a trustee conducted a nonjudicial foreclosure sale that resulted in excess sale proceeds, the trustee did not have a duty to search for, verify, prioritize, and distribute the surplus funds to a junior lien holder who had recorded a judgment lien against the property owner but had not recorded a request to receive notice of default and sale. The comprehensive statutory scheme regarding nonjudicial foreclosures clearly delineates the limited role and duties of a trustee in a nonjudicial foreclosure sale, and those duties do not include the responsibility for searching and finding all possible judgment creditors [*Banc of America Leasing & Capital LLC v. 3 Arch Trustee Services Inc. (2009) 180 Cal. App. 4th 1090, 1104-1105, 103 Cal. Rptr. 3d 397]* .

To the extent required by the Unclaimed Property Law [*see Code Civ. Proc. § 1500 et seq.*], a trustee in possession of surplus proceeds not required to be deposited with the court pursuant to *Civ. Code § 2924j(b)* must comply with the Unclaimed Property Law [*Civ. Code § 2924j(g)*]. For coverage of the Law, see Ch. 252, *Escheat (Unclaimed Property)*.

[b] Deposit With Court for Unresolved Claims

If, after due diligence [*see § 555.60[2][a]*], the trustee is unable to determine the priority of the written claims to the surplus, or the trustee determines that there is a conflict between potential claimants, the trustee may file a declaration of the unresolved claims with the clerk of the superior court of the county where the sale occurred [*Civ. Code § 2924j(c)*]. For the Judicial Coucil form that must be used to accomplish this filing, and related discussion concerning completing and filing the form, see *§ 555.148*. At the same time, the trustee must deposit the portion of the sale proceeds that cannot be distributed. The declaration must set forth the date of the trustee's sale, a description of the property, the names and addresses of all persons to whom notice was sent, a statement that the trustee exercised due diligence and provided written notice as required, and the amount of the sale proceeds deposited. The trustee must also submit a copy of the trustee's sale guaranty and any information relevant to the identity, location, and priority of the potential claimants and file proof of service of the required notice [*Civ. Code § 2924j(c)*].

On deposit of that portion of the sale proceeds that cannot be distributed by due diligence, the trustee is discharged of further responsibility for the distribution of the sale proceeds [*Civ. Code § 2924j(c)*].

[c] Notice of Deposit

Before the trustee deposits the funds discussed in *§ 555.60[2][b]* with the clerk, the trustee must send written notice by first-class mail, postage prepaid, to all persons entitled to notice of conflicting claims [*see § 555.60[1]*]. The notice must state that the trustee intends to deposit the funds with the clerk and that claimants must file claims with the court within 30 days from the date of the notice. The notice must also provide the address of the court where the funds were deposited and a phone number to call for further information [*Civ. Code § 2924j(d)*].

[d] Court Determination

Within 90 days after deposit with the clerk, the court must consider all claims filed. At least 15 days before the scheduled hearing date, the court clerk must serve written notice of the hearing by first-class mail on all claimants identified in the trustee's declaration, at the addresses specified in the declaration. After the hearing, the court must distribute the deposited funds to all entitled claimants in the priority stated in *§ 555.59* [*Civ. Code § 2924j(d)*].

[e] Interpleader Not Restricted

The special requirements relating to conflicting claims do not restrict the trustee's right to file an interpleader action in order to resolve a dispute about the proceeds of a trustee's sale. After an interpleader action has been filed, the notice provisions of *Civ. Code § 2924j* do not apply [*Civ. Code § 2924j(e)*]. For discussion of interpleader actions, see Ch. 314, *Interpleader* .

[3] Costs of Distribution

The trustee may charge costs and expenses incurred in distributing the proceeds, including but not limited to costs incurred in investigating the priority and validity of claims and the distribution of funds. If the fee does not exceed $100, or $125 when there are obligations secured by junior liens or encumbrances [*see Civ. Code § 2924k(a)(3)*], the fee is conclusively presumed to be reasonable [*Civ. Code § 2924k(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesInterpleadersGeneral OverviewCivil ProcedureRemediesDeposits in CourtReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale Foreclosure

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48-555 California Forms of Pleading and Practice--Annotated § 555.61

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§ 555.61 Effect of Sale

On sale of the property, the trust deed ceases to exist [*Streiff v. Darlington (1937) 9 Cal. 2d 42, 45, 68 P.2d 728* ; *see Civ. Code § 2910*; *Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 606, 125 Cal. Rptr. 557, 542 P.2d 981]* . A full-credit bid by a junior lienholder extinguishes any right to obtain insurance proceeds or to pursue any other remedy based on diminution of the value of the property [*Bank of America v. Quackenbush (1997) 56 Cal. App. 4th 1167, 1171, 66 Cal. Rptr. 2d 81* ; *Caruso v. Great Western Savings (1991) 229 Cal. App. 3d 667, 673-674, 280 Cal. Rptr. 322]* .

When the property is sold for less than the outstanding debt, the beneficiary is barred from seeking a deficiency judgment in almost all cases [*Code Civ. Proc. § 580d*]. The beneficiary may, however, recover amounts that do not constitute a deficiency judgment, such as damages for bad faith waste [*see Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 604-605, 125 Cal. Rptr. 557, 542 P.2d 981* ; *see also United Sav. & Loan Assn. v. Hoffman (1973) 30 Cal. App. 3d 306, 312-314, 106 Cal. Rptr. 275* (beneficiary often makes less-than-full-credit bid in order to recover, from other sources, amounts not constituting deficiency judgment, such as recovery of rents and profits)]. For discussion of limitations on the recovery of deficiency judgments after a private sale, see *§ 555.32[2]*. For discussion of recovery of rents and profits or damages for waste, see *§§ 555.80 et seq.* and *555.90*.

In the event that the property is sold for at least the outstanding debt, the beneficiary cannot subsequently recover from any other source, such as insurance proceeds payable for damage to the property, net rents and profits, or damages for waste [*Cornelison v. Kornbluth 24 (1975) 15 Cal. 3d 590, 606-607, 125 Cal. Rptr. 557, 542 P.2d 981]* .

When a lender who is named as a loss payee on the debtor's insurance policy forecloses on the property and thereafter prevails in an action for breach of contract and bad faith against the insurance company, the lender's contract damages

are limited under the full credit bid rule to the difference between the amount secured by the deed of trust and the amount of the lender's credit bid at the foreclosure sale [*Track Mortgage Group, Inc. v. Crusader Ins. Co. (2002) 98 Cal. App. 4th 857, 865, 120 Cal. Rptr. 2d 228]* . The lender's tort damages are also limited by the credit bid rule absent a showing that the insurer's conduct caused the lender to make the credit bid [*Track Mortgage Group, Inc. v. Crusader Ins. Co. (2002) 98 Cal. App. 4th 857, 866, 120 Cal. Rptr. 2d 228* ; *see Alliance Mortgage Co. v. Rothwell (1995) 10 Cal. 4th 1226, 44 Cal. Rptr. 2d 352, 900 P.2d 601* ; *see also § 555.32[b]*]. The lender is entitled, however, to other consequential tort damages such as interest and attorney's fees [*Track Mortgage Group, Inc. v. Crusader Ins. Co. (2002) 98 Cal. App. 4th 857, 861, 120 Cal. Rptr. 2d 228]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawTortsWasteGeneral Overview

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§ 555.62 Purchaser's Title and Rights

[1] Title

The purchaser acquires title on receipt of the trustee's deed [*Central Sav. Bank of Oakland v. Lake (1927) 201 Cal. 438, 448, 257 P. 521]* . The title dates back to the date the trust deed was executed and is free and clear of all subsequent or subordinate encumbrances and interests [*Hohn v. Riverside County Flood Control etc. Dist. (1964) 228 Cal. App. 2d 605, 612-613, 39 Cal. Rptr. 647* ; *Dugand v. Magnus (1930) 107 Cal. App. 243, 247* ; *but see Call v. Thunderbird Mortgage Co. (1962) 58 Cal. 2d 542, 548-549, 25 Cal. Rptr. 265, 375 P.2d 169* (subordinate liens were not extinguished when purchaser was trustor or successor)]. It is also free and clear of the interest of the trustor or a successor, which is foreclosed by the sale [*see Hohn v. Riverside County Flood Control etc. Dist. (1964) 228 Cal. App. 2d 605, 612-613, 39 Cal. Rptr. 647]* . The purchaser's title remains subject to all prior or superior encumbrances and interests [*Streiff v. Darlington (1937) 9 Cal. 2d 42, 45, 68 P.2d 728]* .

[2] No Redemption Rights; Exception for IRS

The purchaser's title is generally not conditional on any rights of redemption, as these are terminated by the sale [*Py v. Pleitner (1945) 70 Cal. App. 2d 576, 578-579, 161 P.2d 393* ; *see § 555.72*]. Redemption rights are cut off when the sale is completed, not the time the trustee's deed is executed and delivered [*Stockwell v. Barnum (1908) 7 Cal. App. 413, 418-419, 94 P. 400]* . However, when a subordinate federal tax lien has been filed against the property more than 30 days before the recordation date of the notice of default, the Internal Revenue Service has a right to redeem the property during a period of 120 days following the sale [*I.R.C. § 7425(d)*]. The method of this redemption is governed by federal law [*see 28 U.S.C. § 2410(d)*; *Treas. Reg. § 400.5-1*; *Bank of Hemet v. United States (9th Cir. 1981) 643 F.2d 661, 666-667]* .

[3] Right of Immediate Possession

The purchaser, on acquisition of title, has the right of immediate possession and all other incidents of legal ownership [*Farris v. Pacific States Aux. Corp. (1935) 4 Cal. 2d 103, 105, 48 P.2d 11* ; *Central Sav. Bank of Oakland v. Lake (1927) 201 Cal. 438, 448, 257 P. 521]* . If the trustor or another person remains in possession, the purchaser may bring an unlawful detainer action to recover possession, and need only prove acquisition of title at the sale [*Abrahamer v. Parks (1956) 141 Cal. App. 2d 82, 84, 296 P.2d 341* ; *see Code Civ. Proc. § 1161a(b)(3)*; *see also Code Civ. Proc. § 564(b)(7)* (receiver may be appointed to take possession in action for unlawful detainer)]. The only feasible defense would be that the sale was not conducted in compliance with the requirements of *Civ. Code § 2920 et seq.* and the terms of the trust deed [*Cheney v. Trauzettel (1937) 9 Cal. 2d 158, 159-160, 69 P.2d 832* ; *MCA, Inc. v. Universal Diversified Enterprises Corp. (1972) 27 Cal. App. 3d 170, 176-177, 103 Cal. Rptr. 522]* . However, even this defense may be precluded by a recital in the trustee's deed of compliance with all statutory requirements [*see Civ. Code § 2924(c)*; *Abrahamer v. Parks (1956) 141 Cal. App. 2d 82, 84, 296 P.2d 341]* . For further discussion of the effect of such a recital, see *§ 555.63[2][d]*.

If the issue of the regularity of the sale is litigated in an unlawful detainer action, the doctrine of res judicata may prevent its relitigation in a subsequent action to set aside the sale [*Vella v. Hudgins (1977) 20 Cal. 3d 251, 255-256, 142 Cal. Rptr. 414, 572 P.2d 28]* . For further discussion and forms relating to unlawful detainer actions by the purchaser at a nonjudicial foreclosure sale, see Ch. 333, *Landlord and Tenant: Eviction Actions* .

[4] Acquisition and Subsequent Sale by Mortgagee or Trust Deed Beneficiary

If the mortgagee or trust deed beneficiary becomes the purchaser at the foreclosure sale and then sells the property, the provisions of *Civ. Code § 1103.20 et seq.* (the Buyer's Choice Act) may apply. Until January 1, 2015 [*Civ. Code § 1103.23*], no mortgagee or trust deed beneficiary (or any trustee, agent, officer, or other employee, of a mortgagee or beneficiary) that acquired title to residential real property improved by four or fewer dwelling units at a foreclosure sale may require, directly or indirectly, as a condition of selling the property, that title insurance covering the property, or escrow service provided in connection with the sale of the property, must be obtained by the purchaser from a particular title insurer or escrow agent [*Civ. Code § 1103.22(a), (b)(2)*; *see Civ. Code § 1103.22(b)(1), (3)* ("escrow service" and "title insurance" defined)]. However, the purchaser may agree to accept the services of a title insurer or an escrow agent recommended by the seller if the seller first gives the purchaser written notice of the right to make an independent selection of those services [*Civ. Code § 1103.22(a)*].

Civ. Code § 1103.22 applies regardless of whether the secondary sale ensues from a solicitation of purchasers or from acceptance of an unsolicited offer to purchase [*see Civ. Code § 1103.21(b)*].

A sale subject to *Civ. Code § 1103.22* cannot be invalidated solely because of the failure of any person to comply with any provision of *Civ. Code § 1103.20 et seq.* [*Civ. Code § 1103.22(d)*]. However, a violation of *Civ. Code § 1103.22* is a cause of action, and the purchaser may recover statutory damages equal to three times all of the charges made for the required title insurance or escrow services. A violation also is a ground for disciplinary action by a licensing agency, if the culpable mortgagee or beneficiary (or a culpable trustee, agent, officer, or other employee, of the mortgagee or beneficiary) is a state-licensed person [*Civ. Code § 1103.22(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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§ 555.63 Challenging Private Sale

[1] Action to Enjoin Pending Sale

Before completion of a private sale, the trustor or any other person who disputes the propriety of the sale may bring an action to enjoin the exercise of the power of sale. For example, a trustor may be able to enjoin a sale after offering to cure the default, when the beneficiary and trustee did not give proper notice of the default until after the lapse of the reinstatement period [*see Lupertino v. Carbahal (1973) 35 Cal. App. 3d 742, 744-750, 111 Cal. Rptr. 112]* . For further discussion of reinstatement, see *§ 555.54*. Similarly, a trustor may obtain declaratory relief and an injunction on the ground that there is no actual default justifying a sale [*see Baypoint Mortgage Corp. v. Crest Premium Real Estate etc. Trust (1985) 168 Cal. App. 3d 818, 825-830, 214 Cal. Rptr. 531* (trustor, in action to enjoin private sale, was held likely to prevail on merits when default was merely payment made several days after due date but before date after which late payment charge was to be imposed); *Bisno v. Sax (1959) 175 Cal. App. 2d 714, 718, 720-730, 346 P.2d 814]* or that the secured transaction is itself invalid [*Daniels v. Williams (1954) 125 Cal. App. 2d 310, 312-313, 270 P.2d 556]* . An action for declaratory relief and an injunction is also appropriate to resolve a dispute as to the amount of the default [*More v. Calkins (1890) 85 Cal. 177, 188-190, 24 P. 729]* . For a form of complaint for declaratory and injunctive relief to block a nonjudicial foreclosure sale, see *§ 555.147*.

If there is no dispute as to the default and the amount due, the trustor must do equity, namely, offer to cure the default, in order to obtain injunctive relief [*Meetz v. Mohr (1904) 141 Cal. 667, 672-673, 75 P. 298]* . However, such an offer is not required when the trustor is seeking preliminary injunctive relief in an action to rescind the secured transaction for fraud [*Stockton v. Newman (1957) 148 Cal. App. 2d 558, 563-564, 307 P.2d 56* ; *see U.S. Hertz v. Niobrara Farms (1974) 41 Cal. App. 3d 68, 75-82, 116 Cal. Rptr. 44* ; *but see Kemple v. Security First Nat. Bank (1967) 249 Cal. App. 2d 719, 720-721, 57 Cal. Rptr. 838* (federal law prohibits injunction of private sale against national bank until final

judgment)].

For further discussion and forms relating to the availability of declaratory and injunctive relief generally, see Ch. 182, *Declaratory Relief* , and Ch. 303, *Injunctions* .

[2] Action to Set Aside Sale

[a] Equitable Action

A completed private sale under a trust deed may, in proper circumstances, be attacked by an action to set aside the sale, in which the court will review the proceedings with care to see that the trustor's rights were not violated [*Stirton v. Pastor (1960) 177 Cal. App. 2d 232, 234, 2 Cal. Rptr. 135* ; *Py v. Pleitner (1945) 70 Cal. App. 2d 576, 579, 161 P.2d 393]* . Because it is an equitable action, there is ordinarily no right to a jury trial [*Raedeke v. Gibraltar Sav. & Loan Asso. (1974) 10 Cal. 3d 665, 671, 111 Cal. Rptr. 693, 517 P.2d 1157]* , and the action may be subject to the defense of laches [*see Hauger v. Gates (1954) 42 Cal. 2d 752, 756, 269 P.2d 609]* .

[b] Grounds

Whether the circumstances constitute grounds for setting aside a private sale is essentially a question of fact [*Py v. Pleitner (1945) 70 Cal. App. 2d 576, 579, 161 P.2d 393]* . Whatever the ground, it must have caused injury to the plaintiff [*see, e.g., California Trust Co. v. Smead Inv. Co. (1935) 6 Cal. App. 2d 432, 435, 44 P.2d 624* (trustor was not injured by beneficiary's failure to comply with terms of trust deed by giving trustee note and trust deed when delivering declaration of default); *see also Copsey v. Sacramento Bank (1901) 133 Cal. 659, 662, 66 P. 7]* . Grounds have included the following:

- The trust deed was invalid [*see, e.g., Stirton v. Pastor (1960) 177 Cal. App. 2d 232, 234, 2 Cal. Rptr. 135* (ineffective delivery of trust deed); *see also Saterstrom v. Glick Bros. Sash etc. Co. (1931) 118 Cal. App. 379, 380-383, 5 P.2d 21* (trust deed was void because of insufficient description of property)].

- There was no actual default [*see, e.g., Hauger v. Gates (1954) 42 Cal. 2d 752, 754-755, 269 P.2d 609* (no default because of setoff under former *Code Civ. Proc. § 440*); *Lopez v. Bell (1962) 207 Cal. App. 2d 394, 398-399, 24 Cal. Rptr. 626* (waiver of right to declare default)].

- There was fraud, unfairness, or failure to comply with the trust deed provisions or statutory requirements [*see, e.g., Garcia v. World Savings, FSB (2010) 183 Cal. App. 4th 1031, 1046, 107 Cal. Rptr. 3d 683* (sufficient evidence of detrimental reliance by borrowers on promise by lender to delay foreclosure to support claim of promissory estoppel); *Whitman v. Transtate Title Co. (1985) 165 Cal. App. 3d 312, 322-323, 211 Cal. Rptr. 582* (failure to comply with mandatory postponement requirement); *Standley v. Knapp (1931) 113 Cal. App. 91, 97-102, 298 P. 109* (failure to properly post notice of sale)].

- A gross disparity between the purchase price and the value of the property was coupled with some (even slight) unfairness or irregularity [*see, e.g., Angell v. Superior Court (1999) 73 Cal. App. 4th 691, 700, 86 Cal. Rptr. 2d 657* (defect in notice of sale, coupled with gross inadequacy of price, was sufficient to set aside sale); *Whitman v. Transtate Title Co. (1985) 165 Cal. App. 3d 312, 322-323, 211 Cal. Rptr. 582* (failure to postpone sale on request of trustor's successor in interest); *see also Sargent v. Shumaker (1924) 193 Cal. 122, 129, 223 P. 464]* .

- An inaccurate description of the property may have dissuaded potential purchasers, and the price was

grossly inadequate [*In re Worcester (9th Cir. 1987) 811 F.2d 1224, 1228-1229]* .

- The auctioneer at the foreclosure sale read from a script for a different foreclosure but erroneously called out the street address for the subject property, and as a result opened the bidding with a credit bid that was only a fraction of what was actually owed on the subject property; in conjunction with the gross inadequacy of price, the auctioneer's mistake, discovered after the close of bidding but before the issuance of the trustee's deed, constituted an "irregularity" sufficient to give the trustee the right to rescind the sale [*Millennium Rock Mortgage Inc. v. T.D. Service Co. (2009) 179 Cal. App. 4th 804, 811, 102 Cal. Rptr. 3d 544]* .

Mere inadequacy of the purchase price, in the absence of some irregularity, fraud, unfairness, or oppression, is not a sufficient ground to set aside the sale [*Engelbertson v. Loan & Bldg. Asso. (1936) 6 Cal. 2d 477, 479, 58 P.2d 647* ; *Brown v. Busch (1957) 152 Cal. App. 2d 200, 205, 313 P.2d 19]* .

PRACTICE TIP:

Irregularity in Sale Must Be Significant to Justify Set Aside Action. The type of accompanying irregularity to justify a "set aside" action must be significant in nature. For example, lack of proper notice in tandem with a low sales price of the property will justify relief. However, slight deviations in the technical requirements for the format of the notice of default or notice of sale apparently do not constitute the type of gross irregularity that will justify disruption of a trustee's sale [*see, e.g., Countrywide Home Loans, Inc. v. Clance (1997) 54 Cal. App. 4th 828, 830, 62 Cal. Rptr. 2d 899]* . *By William M. Hensley*

To prove that a junior lienholder was damaged by irregularities in a foreclosure sale that allegedly prevented a higher bid, the junior lienholder must produce a ready, willing, and able purchaser who would have paid a higher price at the sale [*FPCI RE-HAB 01 v. E & G Investments, Ltd. (1989) 207 Cal. App. 3d 1018, 1022-1024, 255 Cal. Rptr. 157* (not action to set aside sale, but for damages)].

[c] Balancing of Equities

If grounds for setting aside the sale exist, the plaintiff may nonetheless be denied relief unless the plaintiff offers to do equity through redemption [*see § 555.55*]. In other words, a valid and viable tender of the outstandingdebt is a prerequisite to an action to set aside a sale [*Karlsen v. American Sav. & Loan Assn. (1971) 15 Cal. App. 3d 112, 117, 92 Cal. Rptr. 851* (complaint that does not show offer to redeem does not state cause of action); *Py v. Pleitner (1945) 70 Cal. App. 2d 576, 582, 161 P.2d 393]* . This rule applies to junior lienholders as well as to trustors [*Arnolds Management Corp. v. Eischen (1984) 158 Cal. App. 3d 575, 577-580, 205 Cal. Rptr. 15* ; *but see United States Cold Storage v. Great Western Savings & Loan Assn. (1985) 165 Cal. App. 3d 1214, 1221-1226, 212 Cal. Rptr. 232* (holding of *Arnold's Management Corp.* questioned and held to be prospective only)].

An offer to have the property sold by the bankruptcy court and the proceeds disbursed to creditors has been held to be a sufficient offer to do equity, and producing cash to redeem was not required [*In re Worcester (9th Cir. 1987) 811 F.2d 1224, 1230-1231]* . For discussion relating to setting aside a private sale under bankruptcy law, see Ch. 94, *Bankruptcy* .

[d] Effect of Recitals in Trustee's Deed

Standard trust deed forms typically provide that the recital of a fact in the trustee's deed is conclusive proof of that fact. If the trustee's deed includes a recital of compliance with all statutory notice requirements, this recital is conclusive evidence of compliance in favor of a good faith purchaser, and prima facie evidence of compliance in all other cases [*Civ. Code § 2924(c)*]. When a recital constitutes conclusive evidence, it cannot be refuted in the absence of a showing

of actual fraud [*Karrell v. First Thrift of Los Angeles (1951) 104 Cal. App. 2d 536, 539, 232 P.2d 1* ; *see Central Nat. Bank v. Bell (1936) 5 Cal. 2d 324, 327-328, 54 P.2d 1107]* .

For these purposes, a good faith purchaser is a third-party purchaser for value who lacks knowledge of any alleged irregularity or unfairness [*see Pierson v. Fischer (1955) 131 Cal. App. 2d 208, 217, 280 P.2d 491* ; *Karrell v. First Thrift of Los Angeles (1951) 104 Cal. App. 2d 536, 539, 232 P.2d 1]* . A beneficiary who purchases at the sale is not included in this category, so that a recital of compliance constitutes, as to the beneficiary, only prima facie evidence of compliance, controvertible by evidence presented by the trustor [*see Beck v. Reinholtz (1956) 138 Cal. App. 2d 719, 723, 292 P.2d 906* ; *Seccombe v. Roe (1913) 22 Cal. App. 139, 143-144, 133 P. 507]* .

The ultimate validity and effect of the statutory provision concerning recitals in trustees' deeds has been expressly left undecided [*Garfinkle v. Superior Court (1978) 21 Cal. 3d 268, 279 n.16, 146 Cal. Rptr. 208, 578 P.2d 925* ; *see Homestead Savings v. Darmiento (1991) 230 Cal. App. 3d 424, 432-436, 281 Cal. Rptr. 367* (conclusive presumption that proper notice has been given is not violation of due process with regard to junior lienholder who was not given notice); *Pierson v. Fischer (1955) 131 Cal. App. 2d 208, 216-217, 280 P.2d 491* (trust deed provision that recital is conclusive did not violate *Civ. Code § 2953*); *contra, Tomczak v. Ortega (1966) 240 Cal. App. 2d 902, 907, 50 Cal. Rptr. 20]* .

One court has held that the conclusive presumption language in *Civ. Code § 2924(c)* applies only to challenges to statutory compliance with regard to default and sales notices [*Melendrez v. D & I Investment, Inc. (2005) 127 Cal. App. 4th 1238, 1256, 26 Cal. Rptr. 3d 413]* . The court recognized that there is dictum suggesting that the conclusive presumption applies across the board to any claimed irregularities in the trustee's sale [*Melendrez v. D & I Investment, Inc. (2005) 127 Cal. App. 4th 1238, 1256, 26 Cal. Rptr. 3d 413* , citing *Moeller v. Lien (1994) 25 Cal. App. 4th 822, 831, 30 Cal. Rptr. 2d 777* ; *Residential Capital v. Cal-Western Reconveyance Corp. (2003) 108 Cal. App. 4th 807, 817, 134 Cal. Rptr. 2d 162]* . However, the court declined to follow these cases to the extent they could be construed as describing the presumption as precluding any attack on the foreclosure sale as to a bona fide purchaser, irrespective of whether the challenge relates to the trustee's compliance with procedural requirements concerning the default and sale notices [*Melendrez v. D & I Investment, Inc. (2005) 127 Cal. App. 4th 1238, 1256, 26 Cal. Rptr. 3d 413]* .

[3] Action for Damages

The beneficiary and trustee may be liable to the trustor or a successor in an action for damages based on an illegal, fraudulent, or wilfully oppressive private sale. The measure of damages is the value of the property at the time it was sold, less the encumbrances against the property [*Munger v. Moore (1970) 11 Cal. App. 3d 1, 7-8, 11, 89 Cal. Rptr. 323]* . In one case, the court of appeal found a senior lienholder and the debtor could be liable for damages to a junior lienholder when the junior alleged that the senior and debtor agreed that no one but the senior would be permitted to purchase at the foreclosure sale, the first two sales were postponed when other bidders appeared, the senior knowingly allowed the trustee to overstate the amount in default, and the trustee failed to collect the full amount of the senior's bid and distribute the excess to the junior [*South Bay Building Enterprises, Inc. v. Riviera Lend-Lease, Inc. (1999) 72 Cal. App. 4th 1111, 1122, 85 Cal. Rptr. 2d 647]* .

[4] Attorney's Fees

Standard trust deed forms typically provide that the trustor must pay reasonable attorney's fees that may be incurred by the trustee or beneficiary in any action or proceeding concerning the trust deed. When the beneficiary prevails in an action brought by the trustor to attack a private sale, the beneficiary is entitled to add reasonable attorney's fees to the outstanding debt even if the beneficiary failed to request a court award of attorney's fees under *Civ. Code § 1717* [*De La Cuesta v. Superior Court (1984) 152 Cal. App. 3d 945, 948-950, 200 Cal. Rptr. 1]* . If, on the other hand, the trustor prevails, as a party subject to the provision for fees, the trustor may recover reasonable attorney's fees under *Civ. Code § 1717* [*Valley Bible Center v. Western Title Ins. Co. (1983) 138 Cal. App. 3d 931, 932-933, 188 Cal. Rptr. 335]* . For

further discussion of *Civ. Code § 1717*, see *Ch. 174, Costs and Attorney's Fees, § 174.50 et seq.*

Civ. Code § 1717 applies in an action brought by a trustor's nonassuming grantee. Even though not directly subject to the provision for fees, a nonassuming grantee has practical liability to pay any fees, because if the beneficiary prevails, the beneficiary can add the fees to the amount that the nonassuming grantee would have to pay in order to prevent foreclosure of the grantee's own interest [*Saucedo v. Mercury Sav. & Loan Assn. (1980) 111 Cal. App. 3d 309, 315, 168 Cal. Rptr. 552* ; *see Wilhite v. Callihan (1982) 135 Cal. App. 3d 295, 301-302, 185 Cal. Rptr. 215]* .

In an action to set aside a foreclosure sale, the antideficiency provisions of *Code Civ. Proc. § 580d* do not prohibit an award of attorney's fees. Furthermore, *Civ. Code §§ 2924c* and *2924d*, which provide for maximum sums that may be claimed as expenses of foreclosing on the property, do not limit the amount of fees the court may award [*Jones v. Union Bank of California (2005) 127 Cal. App. 4th 542, 547, 25 Cal. Rptr. 3d 783]* . Those maximum amounts do not include other costs, including legal fees, which may be incurred by a creditor in protecting the security [*Jones v. Union Bank of California (2005) 127 Cal. App. 4th 542, 548, 25 Cal. Rptr. 3d 783]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefCivil ProcedureDeclaratory Judgment ActionsGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral Overview

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. LEGAL BACKGROUND
B. Foreclosure
2. Nonjudicial Foreclosure

48-555 California Forms of Pleading and Practice--Annotated § 555.64

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§ 555.64 Trustee's Declaration of Nonmonetary Status

If a trustee reasonably believes that in an action or proceeding concerning the trust deed the trustee is named solely because of being the trustee and not because of any wrongful acts or omissions on the trustee's part, then, at any time, the trustee may file a declaration of nonmonetary status [*see § 555.135*]. The declaration must contain specified information [*see Civ. Code § 2924 l*] and must be served on the parties in the manner of serving papers in civil actions generally [*Civ. Code § 2924 l*(a); *see Code Civ. Proc. § 1010 et seq.*].

Within 15 days after service of the declaration, the parties who have appeared in the action or proceeding may object to it [*Civ. Code § 2924l(c)*; *but see Civ. Code § 2924 l(e)* (providing for later filing and service on all parties and the trustee of motion to require trustee to participate in action if parties determine that trustee should participate because of performance of duties as trustee)]. During this period, the time within which the trustee must file an answer or other responsive pleading is tolled [*Civ. Code § 2924 l(f)*]. If no timely objection is served, the trustee will not be required to participate any further in the action or proceeding and will be bound by any court order relating to the trust deed [*Civ. Code § 2924 l(d)*]. If a timely objection is served, the trustee will be required to participate in the action or proceeding [*Civ. Code § 2924 l(e)*] and will have 30 days from the date of service in which to file an answer or other responsive pleading [*Civ. Code § 2924 l(f)*].

For purposes of *Civ. Code § 2924l*, "trustee" includes any agent or employee of the trustee who performs some or all of the duties of a trustee under *Civ. Code § 2920 et seq.* [*Civ. Code § 2924 l(g)*].

Legal Topics:

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

Estate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview

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Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. LEGAL BACKGROUND
B. Foreclosure
2. Nonjudicial Foreclosure

48-555 California Forms of Pleading and Practice--Annotated §§ 555.65-555.69

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[Reserved]

§§ 555.65[Reserved]

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Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. LEGAL BACKGROUND
B. Foreclosure
3. Foreclosure Actions and Deficiency Judgments

48-555 California Forms of Pleading and Practice--Annotated § 555.70

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§ 555.70 Foreclosure Action

[1] Judicial Foreclosure

Judicial foreclosure is the only action that may be maintained after a default to recover on the debt or enforce the obligation secured by a mortgage or trust deed [*Civ. Code § 2931*; *Code Civ. Proc. §§ 725a, 726(a)*; *see Lincoln v. Superior Court (1934) 2 Cal. 2d 127, 129, 39 P.2d 405]* . For discussion of what constitutes a default, see *§ 555.30[3]*. The action is a proceeding in equity [*Nelson v. Orosco (1981) 117 Cal. App. 3d 73, 76, 172 Cal. Rptr. 457]* . The remedy sought is a court-ordered sale of the property, to be followed by a proceeding, when permitted, to obtain a personal judgment for any deficiency [*Code Civ. Proc. § 726(a), (b)*]. It is the exclusive remedy when there is no power of sale under the mortgage or trust deed [*see Aguilar v. Bocci (1974) 39 Cal. App. 3d 475, 476-477, 114 Cal. Rptr. 91]* . For further discussion, see *§ 555.30*.

For discussion of the merits of a foreclosure action, as compared with nonjudicial foreclosure pursuant to a power of sale, see *§ 555.30[2]*. For discussion of the one-form-of-action rule [*Code Civ. Proc. § 726(a)*] and the antideficiency statutes [*Code Civ. Proc. §§ 580a, 580b, 580d, 726*] as they relate to judicial foreclosure, see *§§ 555.31* and *555.32*. For discussion of other statutes that may affect judicial foreclosure, see *§§ 555.33* and *555.36*. For a form of complaint in a foreclosure action, see *§ 555.160*.

[2] Parties

[a] In General

A foreclosure action may be brought by the beneficiary or trustee of a trust deed, by a mortgagee, or by a successor in interest to any of these [*Code Civ. Proc. §§ 725a, 726*].

In the typical foreclosure action by the beneficiary of a trust deed, the trustee is a proper, but not a necessary, defendant. Because the trustee has no real interest, the trustee cannot properly interfere with the beneficiary's maintenance of the action and, if named as a defendant by the beneficiary, cannot recover attorney's fees from the beneficiary [*Field v. Acres (1937) 9 Cal. 2d 110, 112-113, 69 P.2d 422]* .

The present owner of record of the encumbered property is a necessary defendant, even though the owner may not be either the original trustor or an assuming grantee [*Code Civ. Proc. § 726(c)*; *Johnson v. Home Owners' Loan Corp. (1941) 46 Cal. App. 2d 546, 548-549, 116 P.2d 167]* .

The original trustor or an assuming grantee has no further interest or lien after transferring all interest in the property to others and is, therefore, a proper but not a necessary defendant, unless the beneficiary intends to make a case against that party for any deficiency [*Johnson v. Home Owners' Loan Corp. (1941) 46 Cal. App. 2d 546, 548-549, 116 P.2d 167]* . For discussion of personal liability of grantees, see *§ 555.13[4]*. If a deficiency judgment is being sought, a guarantor having independent liability for the secured obligation is a proper, but not a necessary, defendant [*see Titus v. Woods (1920) 45 Cal. App. 541, 542-547, 188 P. 68]* .

[b] Joinder of Parties With Recorded Interest

[i] Subordinate Interest or Lien

Anyone having a subordinate interest or lien that is recorded as of the commencement of the action must be joined as a defendant, otherwise that interest or lien will not be affected by the judicial sale [*Code Civ. Proc. § 726(c)*; *Castle v. Schulman (1948) 32 Cal. 2d 222, 225, 195 P.2d 781]* . This includes the United States or the State of California when there is a subordinate federal or state tax lien or other claim on the property [*I.R.C. § 7425(a)*; *28 U.S.C. § 2410(a)*; *Civ. Code § 2931a*]. If a subordinate interest is properly included in the action, it will generally be terminated by the sale [*see Code Civ. Proc. § 701.630*].

[ii] Interests Not Subject or Subordinate to Trust Deed

Persons having recorded interests not subject or subordinate to the trust deed being foreclosed are strictly not proper or necessary defendants, because their interests are not involved and will not be affected by the judicial sale [*see Beronio v. Ventura Co. Lumber Co. (1900) 129 Cal. 232, 237, 61 P. 958* ; *San Francisco v. Lawton (1861) 18 Cal. 465, 473-474]* . These persons may be named as defendants, however, if there is any doubt as to whether their interest is actually not subject or subordinate to the plaintiff's interest, and this issue may properly be decided in a foreclosure action when it has been submitted without objection [*Dobbins v. Economic Gas Co. (1920) 182 Cal. 616, 623-626, 189 P. 1073* ; *Barrow v. Santa Monica B. Sup. Co. (1937) 9 Cal. 2d 601, 602-606, 71 P.2d 1108* ; *see Beronio v. Ventura Co. Lumber Co. (1900) 129 Cal. 232, 237, 61 P. 958]* . If a prior lienholder is named as a defendant, that person may file a cross complaint to foreclose a prior lien that is also in default [*Van Loben Sels v. Bunnell (1901) 131 Cal. 489, 494, 63 P. 773]* .

PRACTICE TIP:

Get a Litigation Sales Guaranty. For litigators involved in prosecuting judicial foreclosure actions, it is highly advisable to get a litigation sales guaranty from a reputable title company. Such a guaranty is insurance that all recorded interests have been identified so that all necessary parties can be named in the judicial foreclosure action. If any mistake is made, counsel can look to the title company for recourse. *By William M. Hensley*

[iii] Unrecorded Interests

A person with an interest in the encumbered property that is unrecorded as of the time the foreclosure action is

commenced need not be made a defendant, and the ensuing judgment is conclusive against the person as if made a defendant [*Code Civ. Proc. § 726(c)*]. This rule has been applied even when the plaintiff had actual knowledge of the unrecorded interest [*Hager v. Astorg (1904) 145 Cal. 548, 549-551, 79 P. 68]* . For further discussion of the joinder of persons with interests recorded after the commencement of the foreclosure action, see [3], *below.*

[3] Recordation of Lis Pendens

The plaintiff should record a lis pendens in each county in which all or part of the property is located [*Code Civ. Proc. § 405.20 et seq.*]. For further discussion and a form of lis pendens for use in a foreclosure action, see Ch. 348, *Lis Pendens* . If a lis pendens is recorded, it imparts constructive notice of the foreclosure action, and any person acquiring or recording an interest in the property after the commencement of the foreclosure action need not be named as a defendant, because that person will be bound by the judgment in any event [*Hibernia Sav. and Loan Soc. v. Cochran (1904) 141 Cal. 653, 656-657, 75 P. 315* (grantee); *Bolton v. Logan (1938) 30 Cal. App. 2d 30, 32-33, 85 P.2d 546* (purchaser at execution sale of judgment lien)]. However, when the plaintiff fails to record a lis pendens, any person who subsequently acquires or records an interest in the property, and who is not joined in the action nor has actual knowledge of it, will not be bound by the judgment [*Foster v. Warren (1940) 39 Cal. App. 2d 470, 475, 103 P.2d 591]* .

[4] Appointment of Receiver

The plaintiff may have a receiver appointed to take possession of the encumbered property during the action on a showing that (1) the property is in danger of being lost or materially injured, or the conditions of the trust deed are not being performed, and (2) the property probably has insufficient security value to discharge the secured debt [*Code Civ. Proc. § 564(b)(2)*; *see Title etc. Trust Co. v. California Dev. Co. (1912) 164 Cal. 58, 60-62, 127 P. 502]* . For further discussion and forms relating to the appointment of a receiver pendente lite, see Ch. 486, *Receivers* .

Following the judicial foreclosure sale, a receiver may be appointed to collect and disburse rents during the redemption period [*Code Civ. Proc. § 564(b)(4)*].

PRACTICE TIP:

Move for a Post-Sale Redemption Receiver. After the judicial foreclosure sale, the debtor retains possession of the property during the redemption period and *should* remit any rents, issues, or profits to the foreclosure purchaser. However, because the remittance is within the control of the debtor, a post-sale receiver is a necessity for a purchaser who wants to insure rents, issues, or profits are not dissipated by the debtor in possession. *By William M. Hensley*

[5] Defenses

[a] Overview

Circumstances that may affect the validity or enforceability of a given trust deed and may provide a basis for an affirmative defense are discussed throughout this chapter [*see, e.g., §§ 555.12[2][d][i], 555.33[2]*]. Defenses applicable generally to contracts, notes, and deeds may also apply [*see, e.g., Benson v. Andrews (1955) 138 Cal. App. 2d 123, 132-135, 292 P.2d 39* (failure of consideration as to secured obligation)]. For further discussion and forms relating to these general defenses, see Ch. 107, *Cancellation of Instruments* , Ch. 140, *Contracts* , Ch. 184, *Deeds* , and Ch. 385, *Negotiable Instruments* .

PRACTICE TIP:

Affirmative Defenses in Judicial Foreclosure Action. Because judicial foreclosure actions are equitable in nature, affirmative defenses such as unclean hands and laches are allowable and should not be neglected (if facts exist for their assertion). *By William M. Hensley*

[b] Statute of Limitations

The statute of limitations that may be raised to bar a foreclosure action is the one governing an action on the secured obligation [*Civ. Code § 2911*; *see, e.g., Code Civ. Proc. § 337(1)* (four-year period for enforcement of written obligation); *see also* Ch. 345, *Limitation of Actions*]. For further discussion, see *§ 555.18[4][a]*. For a form of this defense, see *§ 555.161*.

[c] One-Form-of-Action Rule

If the beneficiary previously brought an action on the underlying debt, and the trustor then failed to raise the defense that foreclosure was the only proper action, the beneficiary may thereafter be barred from bringing a subsequent foreclosure action, by operation of the one-form-of-action rule of *Code Civ. Proc. § 726(a)* [*Kaiser Industries Corp. v. Taylor (1971) 17 Cal. App. 3d 346, 353, 94 Cal. Rptr. 773]* . For further discussion of the one-form-of-action rule, see *§ 555.31*.

[d] Antideficiency Statutes

If a deficiency judgment is being sought, the defendant may be protected by the antideficiency statutes, as when the trust deed secures payment of all or part of the purchase price of the encumbered property [*Code Civ. Proc. § 580b*; *see § 555.32[3][b]*].

Nonliability for a deficiency would not be an affirmative defense but could be proved under a denial. A nonassuming grantee, for example, is not personally liable for the secured obligation [*Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 596-597, 125 Cal. Rptr. 557, 542 P.2d 981* ; *see § 555.13[4]*].

PRACTICE TIP:

Allege It As a Defense or Waive It. A borrower must allege *Code Civ. Proc. § 580b* as a defense; otherwise, the borrower will be found to have waived it by failure to place the defense at issue in the action [*see Palm v. Schilling (1988) 199 Cal. App. 3d 63, 67 n.3, 244 Cal. Rptr. 600] . By William M. Hensley*

[e] Lack of Notice

A third party defendant may raise the defense that the trust deed being foreclosed is void as to his or her subsequent encumbrance for lack of constructive or actual notice [*Civ. Code §§ 1214, 1215*; *see § 555.16[2]*]. For a form of this defense, see *§ 555.162*.

[f] Fraud

Fraud in inducing the loan secured by the trust deed may be raised as an affirmative defense to a foreclosure action. If successful, that defense would invalidate the trust deed [*Wittman v. Chrysler Corp. (1988) 199 Cal. App. 3d 586, 590-591, 245 Cal. Rptr. 20]* .

[6] Reinstatement and Equity of Redemption

The right of reinstatement is available as in a nonjudicial foreclosure proceeding, except that a person entitled to exercise the right of reinstatement may do so at any time before the entry of the decree of foreclosure [*Civ. Code § 2924c(a)(1)*]. For further discussion, see *§ 555.54*. If reinstatement is accomplished by curing the default, the foreclosure action must be dismissed [*Civ. Code § 2924c(a)(1)*].

The costs and attorney's fees recoverable by the plaintiff as a condition to reinstatement and dismissal of the action are

limited by statute [*see Civ. Code § 2924c(a)(1)*; *see also § 555.54[2]*]. For example, the amount of recoverable attorney's fees before the entry of a foreclosure decree are limited in the same manner as in a nonjudicial foreclosure proceeding before giving the notice of sale [*Civ. Code § 2924c(d)*; *Bruntz v. Alfaro (1989) 212 Cal. App. 3d 411, 417-423, 260 Cal. Rptr. 488]* .

Any person having an interest in the encumbered property has a right to redeem the property by discharging the secured obligation, and offering to pay any damages caused by delay, before the foreclosure sale [*Civ. Code §§ 2903, 2905*]. For further discussion of this right, see *§ 555.55*. Junior lienholders are specifically entitled to redeem [*Civ. Code § 2904*]. For discussion of the separate right to redeem the property from the purchaser after the judicial foreclosure sale, see *§ 555.72*.

[7] Foreclosure Decree

If the court determines that the plaintiff is entitled to foreclosure, the court must enter judgment accordingly. For a form and discussion of a judgment for use in a foreclosure action, see *§ 555.163*.

After a judgment for judicial foreclosure has been rendered, it is improper for the court to make an order for a nonjudicial sale. Obtaining a judgment constitutes an election of remedies, and it would be unfair to allow the plaintiff to change remedies and deprive the defendant of the right to redeem [*Vlahovich v. Cruz (1989) 213 Cal. App. 3d 317, 321-323, 261 Cal. Rptr. 565* ; *see C.J.A. Corp. v. Trans-Action Financial Corp. (2001) 86 Cal. App. 4th 664, 671, 103 Cal. Rptr. 2d 538* (once junior lienholder pursued judicial foreclosure remedy to judgment it was estopped from seeking different remedy after senior lienholder sold property at trustee's sale; trial court therefore erred in modifying foreclosure judgment to money judgment for full amount of note)].

The court must direct the sale of the entire property and the application of the proceeds to the entire secured debt, if it is shown that the property cannot be sold in portions without injury to the parties. Otherwise, when the entire secured debt is not due, only as much of the property may be sold as is necessary to pay the amount then due [*Code Civ. Proc. § 728*].

[8] Protection from Foreclosure for Active Duty Service Members

[a] State Provisions

In 2002, the state legislature enacted special protections for officers and enlisted members of the National Guard called or ordered into active state or federal service and reservists of the United States Military Reserve who have been called to full-time active service or duty [*see* 2002 Stats., ch. 60, § 1; *Mil. & Vet. Code § 400 et seq.*]. This legislation establishes special protection from foreclosure for active service members and reservists [*Mil. & Vet. Code § 408*]. The legislation includes many provisions that are very similar to those included in the federal Servicemembers Civil Relief Act [*50 U.S.C. App. § 501 et seq.*; *see 50 U.S.C. App. §§ 502, 511*], discussed in [b], *below*. However, the federal legislation has many more provisions than the California law covering a greater variety of topics.

The state protections apply to obligations secured by mortgage, trust deed, or other security in the nature of a mortgage on real or personal property owned by a service member at the commencement of the period of the military service and still owned by the service member [*Mil. & Vet. Code § 408(a)*]. In any proceeding commenced in any court during the period of military service to enforce that obligation, arising out of nonpayment of any sum due or out of any other breach of the terms of the mortgage, trust deed, or other security occurring before or during the period of service, the court may, after hearing and in its discretion on its own motion, and must, on application by the service member or some person on the defendant's behalf (1) stay the proceedings for any period as the court deems just, and (2) make any other disposition of the case as may be equitable to conserve the interests of all parties [*Mil. & Vet. Code § 408(b)*]. The court may deny the stay if it finds that the ability of the defendant to comply with the terms of the obligation is not

materially affected by the military service [*Mil. & Vet. Code § 408(b)*].

No sale, foreclosure, or seizure of property for nonpayment of any sum due under any obligation described above will be valid if made during the period of military service or within three months thereafter, except pursuant to an agreement between the parties or on an order previously granted by the court and a return thereto made and approved by the court [*Mil. & Vet. Code § 408(c)*]. Any person who knowingly makes or causes to be made a sale, foreclosure, or seizure of property in violation of these provisions is guilty of a misdemeanor [*Mil. & Vet. Code § 408(d)*].

These provisions apply to service members on active service or duty since September 11, 2001. However, the protections apply prospectively from June 20, 2002 (date bill was signed into law) [*Mil. & Vet. Code § 409.11*]. Dependents of service members are also entitled to these benefits unless the court finds that the dependents' ability to comply with the terms of the obligation has not been materially impaired by the military service of the person on whom the applicants are dependent [*Mil. & Vet. Code § 409.5*].

Relevant forms for relief under the provisions of both the state and federal Acts include (1) a petition for relief from a mortgage or installment contract for the purchase of real property [*see § 555.138*], (2) an application for stay of proceedings to collect real property taxes or assessments [*see § 555.139*], and (3) an order staying an action on an obligation secured by a mortgage, trust deed, or similar security [*see § 555.139A*].

[b] Federal Provisions

The Servicemembers Civil Relief Act (SCRA) [*50 U.S.C. App. § 501 et seq.*; *see 50 U.S.C. App. §§ 502, 511* (applicable to current military personnel)] suspends the enforcement of certain civil liabilities of active service members so that they can devote their entire energy to national defense [*50 U.S.C. App. § 502*]. Among SCRA's protections are many similar to those afforded by the 2002 California legislation, discussed in [a], *above*.

With regard to mortgages and similar instruments, many provision of the SCRA are substantively the same as provisions in the Military and Veterans Code. These laws give a court authority to allow an eligible service member to postpone making payments on mortgages that were entered before the member began active duty, on property that was owned before that time, and that is still owned by the member, if the member's ability to pay the mortgage is affected by his or her service [*see 50 U.S.C. App. §§ 532, 533, 591*; *Mil. & Vet. Code §§ 407, 408*]. Active service members are allowed to apply to a court for a stay of proceedings to collect real property taxes or assessments [*see 50 U.S.C. App. §§ 561, 591*; *Mil. & Vet. Code § 409.2*], and the court is empowered to cap interest rates at 6 percent on all obligations of active service members (including mortgages) incurred before active duty [*see 50 U.S.C. App. § 527*; *Mil. & Vet. Code § 405*].

The SCRA allows for the stay of many civil legal proceedings if the service member demonstrates that his or her military service has materially affected the member's ability to appear for the court proceedings, including proceedings concerning mortgage foreclosures [*see 50 U.S.C. App. §§ 522, 533*]. The length of the stay is at the court's discretion based on the service member's showing. The SCRA also offers protections against eviction from residential property rented by a service member, as well as lawful termination of leases for members entering active duty [*see 50 U.S.C. App. §§ 531, 535*; *see also* Ch. 333, *Landlord and Tenant: Eviction Actions*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. LEGAL BACKGROUND
B. Foreclosure
3. Foreclosure Actions and Deficiency Judgments

48-555 California Forms of Pleading and Practice--Annotated § 555.71

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§ 555.71 Judicial Sale

[1] Writ of Sale

To enforce a judgment for the sale of real property, the plaintiff applies to the clerk of the court for a writ of sale directed to the sheriff or other levying officer in the county in which the judgment is to be enforced [*Code Civ. Proc. §§ 712.010, 716.010(a)*; *see Code Civ. Proc. § 680.260* (levying officer is sheriff, marshal, or constable)]. That county is the county in which all or part of the property is located [*see Code Civ. Proc. § 701.570(a)*; *see also Code Civ. Proc. § 726(d)* (when property is located in two or more counties, court may direct sale to take place in any of those counties)]. For further discussion and a form of writ of sale, see *Ch. 254, Executions and Enforcement of Judgments, § 254.130* et seq.

[2] Absolute Sale When No Deficiency Allowed

If the decree declares that a deficiency judgment cannot be recovered because of a waiver or bar [*see § 555.163[2]*], the levying officer executes the writ of sale [*Code Civ. Proc. § 726(e)*] by effecting a levy on the property [*Code Civ. Proc. § 716.020(a)*; *see Code Civ. Proc. § 700.010 et seq.* (levy)] then giving notice of the sale and selling the property [*Code Civ. Proc. § 716.020(b)*; *see Code Civ. Proc. § 701.510 et seq.* (sale)]. The proceeds are applied in conformity with the foreclosure decree [*Code Civ. Proc. § 716.020(c)*; *see § 555.163[2]*].

There is no right of redemption following the sale [*see Code Civ. Proc. §§ 726(e), 729.010(a)*]. When the sale has been completed, the levying officer executes and delivers a deed to the purchaser and records a duplicate [*Code Civ. Proc. § 701.660*]. By this deed, the purchaser acquires the interest in the property that was held by the judgment debtor on the effective date of the trust deed, as well as any title acquired by the judgment debtor between that date and the date of sale [*Code Civ. Proc. § 701.640*]. The foreclosed lien and subordinate liens are generally extinguished by the sale [*Code*

Civ. Proc. § 701.630]. However, in the rare situation that the judgment debtor is the purchaser, the foreclosed lien is extinguished but the property remains subject to any subordinate liens [*Call v. Thunderbird Mortgage Co. (1962) 58 Cal. 2d 542, 548, 25 Cal. Rptr. 265, 375 P.2d 169]* .

For discussion and forms relating to the foregoing requirements for the issuance and execution of a writ of sale, see *Ch. 254, Executions and Enforcement of Judgments, § 254.130* et seq.

[3] Redemption When Deficiency Allowed

If a deficiency judgment is not waived or barred, and the decree declares one or more of the defendants to be personally liable [*see § 555.163[2]*], the levying officer must sell the property subject to a right of redemption [*see Code Civ. Proc. §§ 729.010-729.090* (redemption)], unless the property is a leasehold estate with an unexpired term of less than two years at the time of the levy [*Code Civ. Proc. §§ 726(e), 729.010(a)*]. A sale subject to the right of redemption is in most respects conducted in the same manner as an absolute sale [*see* [2], *above*], except for certain notice requirements [*Code Civ. Proc. § 729.010(b)*]. The chief difference is the effect of the sale.

After a sale subject to the right of redemption, the levying officer issues a certificate of sale [*Code Civ. Proc. § 729.040*]. The levying officer subsequently executes and delivers a deed to the purchaser only after the lapse of the redemption period, if there has been no redemption [*Code Civ. Proc. § 729.080(a)*]. During the redemption period, the judgment debtor remains entitled to possession of the property in the absence of an agreement to the contrary [*Petersen v. Jurras (1935) 2 Cal. 2d 253, 257, 40 P.2d 257* ; *House v. Lala (1963) 214 Cal. App. 2d 238, 245, 29 Cal. Rptr. 450]* . The purchaser, however, has a statutory right to rents and profits or the value of use and occupation of the property [*Code Civ. Proc. § 729.090(a)*; *see Code Civ. Proc. § 729.090(c)* (purchaser's right to enter for purpose of repair and right to obtain court order restraining waste)]. A receiver may be appointed to collect and disburse rents during the redemption period [*Code Civ. Proc. § 564(b)(4)*].

For further discussion of a sale of property subject to the right of redemption, see *Ch. 254, Executions and Enforcement of Judgments, § 254.150 et seq.* For discussion of the manner and effect of exercising the right of redemption, see *§ 555.72*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionMortgagor's Right

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§ 555.72 Statutory Redemption

[1] By Judgment Debtor

Statutory redemption refers to a right of redemption after a judicial sale, which exists only if a deficiency judgment is allowed under the foreclosure decree [*see Code Civ. Proc. §§ 726(e), 729.010(a)*; *see also § 555.71[3]*]. The term is used to distinguish this right from the broader equity of redemption existing before foreclosure [*see Duff v. Randall (1897) 116 Cal. 226, 229-230, 48 P. 66* ; *see also § 555.55*]. Only the judgment debtor or a successor in interest may redeem, and for the purpose of this limitation the purchaser at the sale is not a successor in interest [*Code Civ. Proc. § 729.020*]. For further discussion of the procedure for redeeming property and the time limit for exercising the right of redemption under *Code Civ. Proc. § 729.010 et seq.*, together with related forms, see *Ch. 254, Executions and Enforcement of Judgments, § 254.150 et seq.*

On redemption, the judgment debtor is restored to the former estate, and the effect of the judicial sale is terminated [*Code Civ. Proc. § 729.080(d)*]. As a result, the judgment debtor becomes entitled to any rents and profits received by the purchaser before redemption [*Code Civ. Proc. § 729.090(b)*; *see § 555.71[3]*]. There is, however, one important exception to the rule that the effect of the judicial sale is terminated. Liens, such as the judgment lien under which the sale was made and subordinate liens, are extinguished by the judicial sale and do not reattach after redemption, and the redeemed property cannot thereafter be applied to the satisfaction of a claim or judgment underlying an extinguished lien [*Code Civ. Proc. § 729.080(d), (e)*; *see Code Civ. Proc. § 701.630* (foreclosed lien, subordinate liens, and state tax liens defined by *Gov. Code § 7162* are extinguished by sale)]. This appears to be the rule even though the opposite is true if, instead of redeeming the property, the judgment debtor becomes the purchaser at the judicial sale [*Call v. Thunderbird Mortgage Co. (1962) 58 Cal. 2d 542, 548-549, 25 Cal. Rptr. 265, 375 P.2d 169]* .

[2] By United States

When the United States is named as a defendant in the action on the basis of a subordinate claim or encumbrance [*see § 555.70[2][b]*], the government has a right of redemption under federal law. The redemption period is generally one year, unless the subordinate interest is a lien in favor of the Internal Revenue Service, in which case the redemption period is 120 days [*28 U.S.C. § 2410(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsRedemptionStatutory Redemption

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48-555 California Forms of Pleading and Practice--Annotated § 555.73

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§ 555.73 Deficiency Judgment

[1] In General

The recovery of a deficiency judgment in a foreclosure action is a two-stage proceeding. In the first stage, culminating in the foreclosure decree, the court determines whether any of the defendants is personally liable for the debt and may be subject to a deficiency judgment [*Code Civ. Proc. § 726(b)*; *United California Bank v. Tijerina (1972) 25 Cal. App. 3d 963, 967-968, 102 Cal. Rptr. 234* ; *see § 555.163[2]*]. In the second stage, in a subsequent proceeding, the court determines the amount of the deficiency, if any, remaining after the sale of the encumbered property, and renders a money judgment for that amount [*Code Civ. Proc. § 726(b)*; *United California Bank v. Tijerina (1972) 25 Cal. App. 3d 963, 968, 102 Cal. Rptr. 234]* .

PRACTICE TIP:

Make Section 998 Offer Before Foreclosure Decree Trial. If a party desires to make a pre-trial settlement offer under *Code Civ. Proc. § 998*, the proper time to do it is before the trial of the foreclosure decree phase of the action. In an unpublished section of the *San Paolo* decision [*see* [4][b], *below*], which this practitioner believes was correctly reasoned, the Court of Appeal found a Section 998 offer was too late when made at the fair value hearing juncture of the action. Counsel must make the Section 998 offer timely in the first phase if he or she wishes to use this method to attempt a resolution or to recover certain costs. *By William M. Hensley*

[2] Motion for Judgment

The plaintiff commences the second stage by moving for a deficiency judgment at any time within three months after the property has been sold under the foreclosure decree [*Code Civ. Proc. § 726(b)*; *United California Bank v. Tijerina*

(1972) 25 Cal. App. 3d 963, 965-966, 102 Cal. Rptr. 234] . The three-month period is a statute of limitations. Thus, a party entitled to seek a deficiency judgment must file an application within three months of the foreclosure sale or no money judgment for a deficiency can be obtained [*Life Savings Bank v. Wilhelm (2000) 84 Cal. App. 4th 174, 177, 100 Cal. Rptr. 2d 657]* . The motion must be filed within three months from the date the sale is effected, that is, when the highest bid is received at the auction, not when the certificate of sale is recorded [*Paykar Construction, Inc. v. Bedrosian (1999) 71 Cal. App. 4th 803, 808, 84 Cal. Rptr. 2d 135]* . Notice of the motion must be served at least 15 days before the scheduled date for the hearing, on all defendants who appeared in the action and against whom the deficiency judgment is sought [*Code Civ. Proc. § 726(b)*]. For a form of notice of motion for a deficiency judgment and a form of supporting declaration, see *§§ 555.164* and *555.165*.

[3] Appointment of Probate Referee As Appraiser

On the motion of any party made at least 10 days before the date set for the hearing of the motion for a deficiency judgment, the court must appoint a probate referee to appraise the property or interest that was sold, as of the time of the sale [*Code Civ. Proc. § 726(b)*; *see Prob. Code § 8900 et seq.* (probate referees)]. For a form of notice of motion for the appointment of a referee and a form of order of appointment, see *§§ 555.166* and *555.167*.

The court may make such an appointment at any time on its own motion [*Code Civ. Proc. § 726(b)*].

The probate referee must file the appraisal with the clerk, together with a subscribed oath. The court fixes a reasonable compensation for the referee, not to exceed similar fees for similar services in the community, and this amount is taxed and allowed together with other costs [*Code Civ. Proc. § 726(b)*].

[4] Hearing and Judgment

[a] Evidence; Issue to Be Determined

The court must receive evidence, which may be presented by either party, as to the fair value of the property or property interest that was sold, as of the date of sale. If a probate referee was appointed for the purpose of appraising the property [*see* [3], *above*], the filed appraisal is admissible in evidence [*Code Civ. Proc. § 726(b)*]. The only issue to be determined is the amount of the deficiency, and a defendant cannot relitigate any issues decided by the foreclosure decree, such as the defendant's personal liability or the plaintiff's right to recover a deficiency judgment [*United California Bank v. Tijerina (1972) 25 Cal. App. 3d 963, 968-969, 102 Cal. Rptr. 234]* .

[b] Amount of Deficiency Judgment

The court must render a money judgment against the defendant or defendants for the amount by which the outstanding debt, with interest and costs, exceeds the fair value of the property as of the date of sale [*Code Civ. Proc. § 726(b)*]. "Fair value," within the context of the statute, may be simply the fair market value of the property, as of the date of the sale, without any reduction for the adverse impact of the foreclosure and the one-year right of redemption, which would temporarily lower the market value of the property [*San Paolo U.S. Holding Co. v. 816 South Figueroa Co. (1998) 62 Cal. App. 4th 1010, 1026, 73 Cal. Rptr. 2d 272]* . The market value of the property is not necessarily the determining value, however. The history of the statute indicates that market value is to be taken as one of the elements, but not the determinant, of the "fair value." Even property for which the market value happens to be zero as of the sale date can have a "fair value" for the purpose of limiting a deficiency [*see* *Rainer Mortgage v. Silverwood Ltd. (1985) 163 Cal. App. 3d 359, 365-367, 209 Cal. Rptr. 294]* . On the other hand, if there is a market value but it happens to be temporarily depressed as of the sale date (for a reason other than the adverse impact of the foreclosure and the one-year right of redemption which all courts agree must not be considered), that temporary depression cannot be ignored in determining the "fair value" for the purpose of limiting a deficiency [*San Paolo U.S. Holding Co. v. 816 South Figueroa Co. (1998) 62 Cal. App. 4th 1010, 1026, 73 Cal. Rptr. 2d 272* (general market depression); *Nelson v. Orosco (1981) 117 Cal. App. 3d 73, 79, 172 Cal. Rptr. 457* (cloud on title, from existence of lis pendens in unrelated action)].

PRACTICE TIP:

Significance of *San Paolo* Decision. The Second District's *San Paolo* decision is a very important case in the fair value hearing area. Aside from establishing that a bright-line "fair market value" test as of the date of the foreclosure sale governs at the fair value hearing stage, *San Paolo* dismissed a pro-borrower appraisal that essentially tried to disregard recessionary factors that made the fair market value much more depressed in amount. The *San Paolo* approach negates dicta in *Rainer* and will result in larger deficiencies. Although the fair market value test is a certain one, *San Paolo* ignores the 1939 legislative history to *Code Civ. Proc. § 726*, which rejected using "fair market value" language in favor of "fair value" verbiage. *San Paolo* does not address this important point relied on in *Rainer* to find a difference between "fair value" and "fair market value" constructs. Borrowers should continue to rely on broader intrinsic worth valuation language in *Rainer*, while creditors would do best to emphasize *San Paolo's* fair market value test until the Supreme Court definitively resolves the issue. *By William M. Hensley*

If the fair value of the property is less than the purchase price at the sale, the amount of the deficiency judgment is limited to the actual deficiency. In other words, the judgment amount, excluding costs and interest from the date of sale, can in no event exceed the amount by which the entire outstanding secured debt exceeds the price paid for the property [*Code Civ. Proc. § 726(b)*]. For a form of deficiency judgment, see *§ 555.168*.

[c] Enforcement of Deficiency Judgment

The deficiency judgment may be enforced in the same manner as any other money judgment [*see, e.g., Tompkins v. Powers (1930) 106 Cal. App. 464, 465, 289 P. 685]* . For further discussion and forms relating to the enforcement of money judgments generally, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq. However, the deficiency judgment may not be enforced against the property sold at the foreclosure sale when the property has been redeemed by the judgment debtor [*Code Civ. Proc. § 729.080(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency Judgments

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§ 555.74 Attorney's Fees and Costs

Standard trust deed forms typically provide that the trustor must pay all costs and reasonable attorney's fees in a foreclosure action brought by the beneficiary. If the trust deed being foreclosed includes a provision for attorney's fees, the court may fix an award of attorney's fees in any reasonable amount, notwithstanding any contrary stipulation, except that the award cannot exceed the amount, if any, specified in the trust deed [*Civ. Code § 2924d(e)*; *Code Civ. Proc. §§ 580c, 726(a), 730*; *Hotaling v. Montieth (1900) 128 Cal. 556, 557-558, 61 P. 95]* .

In many counties, a local court rule determines the manner in which an award of attorney's fees is computed in a foreclosure action [*see, e.g.,* Los Angeles Co. Super. Ct. Rule 3.2(b)]. Otherwise, the manner of computing the award is within the court's discretion [*see Hotaling v. Montieth (1900) 128 Cal. 556, 558, 61 P. 95]* .

PRACTICE TIP:

Local Rule Schedules May Be Nondeterminative. Although many trial judges rely on local rules establishing fee amounts in judicial foreclosure actions, practitioners are advised to not place total reliance on these schedules and, in the process, imprudently dispense with proof of actual fees/costs incurred. One decision holds that local rules establishing schedules cannot be relied on because governing statutes (such as *Civ. Code § 1717*) require the trial judge to actually determine reasonableness of fees without use of arbitrary local rule ceilings [*see Contractors Labor Pool, Inc. v. Westway Contractors, Inc. (1997) 53 Cal. App. 4th 152, 169, 61 Cal. Rptr. 2d 715* (construing L.A. Super. Ct. Local Rule 3.2)]. Practitioners should prove their actual fees and costs rather than bank on local schedule amounts, which may not be determinative at all. *By William M. Hensley*

Recoverable costs are limited to the actual cost of publishing, recording, mailing, and posting notices, a litigation

guaranty, and litigation costs of suit [*Civ. Code § 2924d(e)*; *Code Civ. Proc. § 580c*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial Foreclosures

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[Reserved]

§§ 555.75[Reserved]

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48-555 California Forms of Pleading and Practice--Annotated § 555.80

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§ 555.80 Right to Possession, Rents, and Profits

In the absence of a contrary agreement, the trustor retains all ownership rights in the property, including the right to possession and any rents and profits of the property, while the property is encumbered by the trust deed [*Civ. Code § 2927*; *Code Civ. Proc. § 744*; *Kinnison v. Guaranty Liquidating Corp. (1941) 18 Cal. 2d 256, 260, 115 P.2d 450* ; *Hamel v. Gootkin (1962) 202 Cal. App. 2d 27, 29-30, 20 Cal. Rptr. 372]* . However, the beneficiary may, and commonly does, acquire possessory rights before foreclosure, either under a provision in the trust deed or under separate contract [*Civ. Code §§ 2927, 2938*; *Kinnison v. Guaranty Liquidating Corp. (1941) 18 Cal. 2d 256, 260, 115 P.2d 450* ; *see § 555.81[1]*].

The beneficiary may obtain appointment of a receiver to protect the security value of the property during a foreclosure action, if that value is in danger of being lost or materially injured to the extent of becoming insufficient to cover the secured obligation [*Code Civ. Proc. § 564(b)(2)*; *see § 555.70[4]*]. However, the trustor would remain entitled to any rents and profits collected by the receiver in the absence of a special agreement to the contrary [*Locke v. Klunker (1898) 123 Cal. 231, 235-238, 55 P. 993]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral Overview

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§ 555.81 Assignment of Rents and Profits

[1] Creation of Security Interest

A written assignment of an interest in leases, rents, issues, or profits of real property made in connection with an obligation secured by the property, irrespective of whether the assignment is denoted as absolute, absolute conditioned on default, additional security for an obligation, or otherwise, is, on execution and delivery by the assignor, effective to create a present security interest in existing and future leases, rents, issues, or profits of the property. For these purposes, the term "leases, rents, issues, and profits of real property" includes the cash proceeds of the foregoing. "Cash proceeds" means cash, checks, deposit accounts, and the like [*Civ. Code § 2938(a)*].

Former *Civ. Code §§ 2938* and *2938.1* as they were in effect before 1997 govern assignments made before 1997 and actions and proceedings based on those assignments [*Civ. Code § 2938(i)*]. For discussion of the prior law, see [8], *below.*

[2] Recordation and Perfection

The assignment may be recorded in the county in which the real property is located in the same manner as a conveyance of an interest in real property [*Civ. Code § 2938(b)*]. When the assignment (or a trust deed or mortgage containing the assignment) is duly recorded, the record will be deemed to give constructive notice of the assignment, and the security interest created by the assignment will be deemed fully perfected as of the time of recordation, notwithstanding any provision of the assignment or any provisions of law that would otherwise preclude or defer enforcement of the rights granted to the assignee until the occurrence of a subsequent event, including, but not limited to, a subsequent default of the assignor, the possession of the property by the assignee, or the appointment of a receiver [*Civ. Code § 2938(b)*].

[3] Enforcement on Assignor's Default

[a] Enforcement Steps

On default by the assignor under the obligation secured by the assignment of leases, rents, issues, and profits, once the assignee takes one or more of the enforcement steps described below, the assignee is entitled to collect and receive all rents, issues, and profits that have accrued but remain unpaid and uncollected by or for the assignor on the enforcement date and all rents, issues, and profits that accrue on or after that date [*Civ. Code § 2938(c), (g)*].

The assignment must be enforced by one or more of the following methods:

- Appointment of a receiver [*Civ. Code § 2938(c)(1), (g)*; *see Code Civ. Proc. § 564(b)(11), (12)*; *see also* [5], *below*].

- Obtaining possession of the rents, issues, or profits [*Civ. Code § 2938(c)(2), (g)*].

- Delivery to any one or more of the tenants of a written demand for turnover of rents, issues, and profits [*see Civ. Code § 2938(j)*; [4], *below*], a copy of which must be delivered to the assignor [*Civ. Code § 2938(c)(3)*].

- Delivery to the assignor of a written demand for the rents, issues, or profits, a copy of which must be mailed to all other assignees of record of the leases, rents, issues, and profits of the real property [*Civ. Code § 2938(c)(4)*].

[b] Application of Money Received by Assignee

Money received by the assignee pursuant to the enforcement action, less amounts paid for certain expenses [*see Civ. Code § 2938(g)*; [6], *below*], must be applied by the assignee to the debt or otherwise in accordance with the assignment or the promissory note, trust deed, or other instrument evidencing the obligation. However, neither the application nor the failure to apply the rents, issues, or profits will result in a loss of any lien or security interest that the assignee may have in the property or any other collateral, render the obligation unenforceable, constitute a violation of the one-form-of-action rule [*Code Civ. Proc. § 726*], or otherwise limit any right available to the assignee with respect to its security [*Civ. Code § 2938(c)*].

Nothing in *Civ. Code § 2938(c)* affects the entitlement to rents, issues, or profits as between assignees, as set forth in *Civ. Code § 2938(h)* [*Civ. Code § 2938(d)*; *see* [7], *below*].

[4] Demand for Turnover of Rents, Issues, and Profits

[a] Execution and Receipt

If an assignee elects to make a demand for turnover of rents, issues, and profits [*see Civ. Code § 2838(c)(3)*; [3], *above*], the demand in the form specified by statute [*see § 555.189*] must be signed under penalty of perjury by the assignee or an authorized agent of the assignee. The demand will be effective against a tenant when it is actually received by the tenant at the address for notices provided under the lease or other contractual agreement under which the tenant occupies the property or, if no address for notices is so provided, at the property [*Civ. Code § 2938(d)*].

[b] Tenant's Obligations

On receipt of this demand, the tenant must pay to the assignee all rents, issues, and profits that are past due and payable on the date of receipt of the demand and all rents, issues, and profits coming due under the lease following the date of receipt of the demand, unless either of the following conditions is satisfied [*Civ. Code § 2938(d)*]:

- The tenant previously received, from another assignee of the leases, issues, rents, and profits, a demand that is valid on its face and was sent by the other assignee in accordance with *Civ. Code § 2938(c)* and *(d)*.

- The tenant, in good faith and in a manner that is not inconsistent with the lease, previously paid, or within 10 days following receipt of the demand pays, the rent to the assignor.

Payment of rent to an assignee following a demand under an assignment of leases, rents, issues, and profits discharges the tenant's obligation to pay the amounts under the lease. If the tenant pays rent to the assignor after receipt of a demand other than in the circumstances described above, the tenant's obligation to pay rent to the assignee will not be discharged unless the tenant occupies the property for residential purposes. The obligation of a tenant to pay rent pursuant to *Civ. Code § 2938(c)* and *(d)* continues until receipt by the tenant of a written notice from a court directing the tenant to pay the rent in a different manner, or until receipt by the tenant of a written notice from the assignee from whom the demand was received canceling the demand, whichever occurs first [*Civ. Code § 2938(d)*].

[5] Appointment of Receiver

A receiver may be appointed in an action by a secured lender for specific performance of an assignment of rents in a trust deed, mortgage, or separate document. That appointment may be continued after entry of a judgment for specific performance, if it is appropriate to protect, operate, or maintain the encumbered property or to collect the rents from the property while a pending nonjudicial foreclosure under power of sale in the trust deed or mortgage is being completed. In this situation, there is no need to show that the security is probably inadequate [*Code Civ. Proc. § 564(b)(11)*; *see Turner v. Superior Court (1977) 72 Cal. App. 3d 804, 811, 140 Cal. Rptr. 475]* . For a form of complaint for specific performance and appointment of a receiver, see *§ 555.180*.

A receiver may be appointed in a case brought by the assignee under an assignment of leases, rents, issues, or profits pursuant to *Civ. Code § 2938(g)* [*Code Civ. Proc. § 564(b)(12)*]. For discussion, see [6][c], *below.*

[6] Effect of Enforcement Action and Limitations

[a] In General

The application of rents, issues, or profits to the secured obligation discharges the secured obligation to the extent of those rents, issues, or profits, and, notwithstanding any provisions of the assignment or other loan documents to the contrary, must be credited against any amounts necessary to cure any monetary default for purposes of reinstatement under *Civ. Code § 2924c* [*Civ. Code § 2938(e)*].

No enforcement action of the type authorized by *Civ. Code § 2938(c)* [*see* [3], *above*], and no collection, distribution, or application of rents, issues, or profits by the assignee following such an enforcement action, may do any of the following [*Civ. Code § 2938(e)*]:

- Make the assignee a mortgagee in possession of the property, except if the assignee obtains actual possession of the real property, or an agent of the assignor.

- Constitute an action, render the obligation unenforceable, violate the one-form-of-action rule [*Code Civ. Proc. § 726*], or, except with respect to marshaling requirements, otherwise limit any rights available to the assignee with respect to security.

- Be deemed to create any bar to a deficiency judgment pursuant to any provision of law governing or relating to deficiency judgments following the enforcement of any encumbrance, lien, or security

interest, notwithstanding that the action, collection, distribution, or application may reduce the debt secured by the assignment or by any trust deed or other security instrument.

[b] Distribution of Cash Proceeds

If cash proceeds of rents, issues, or profits to which the assignee is entitled following enforcement [*see Civ. Code § 2938(c)*; [3], *above*] are received by the assignor or an agent for collection or by any other person who has collected the rents, issues, or profits for the assignor's benefit, or for the benefit of any subsequent assignee [*see Civ. Code § 2938(h)*; [7], *below*], following a turnover demand by the assignee [*see Civ. Code § 2938(c)(3),(4)*; [4], *above*], and the assignee has not authorized the assignor's disposition of the cash proceeds in a writing signed by the assignee, the rights to the cash proceeds and to the recovery of the cash proceeds must be determined as follows [*Civ. Code § 2938(f)*].

- The assignor or other party in possession of the cash proceeds must turn over the full amount of the cash proceeds to the assignee, less any amount representing payment of expenses authorized by the assignee in writing. The assignee will have a right to bring an action for recovery of the cash proceeds, without the necessity of bringing an action to foreclose any security interest in the real property. This action will not violate the one-form-of-action rule [*Code Civ. Proc. § 726*] or otherwise limit any right available to the assignee with respect to its security [*Civ. Code § 2938(f)(1)*].

- Between an assignee with a perfected security interest in cash proceeds [*see Civ. Code § 2938(b)*; [2], *above*] enforced by a turnover demand [*see Civ. Code § 2938(c)(3),(4)*; [3], *above*] and any other person claiming an interest in the cash proceeds, other than the assignor or an agent for collection or one collecting rents, issues, and profits for the benefit of the assignor, the assignee will have a continuously perfected security interest in the cash proceeds, to the extent that the cash proceeds are identifiable; but the assignee's interest is subject to *Civ. Code § 2938(h)* [*see* [7], *below*] and any generally applicable law with respect to payments made in the operation of the assignor's business [*Civ. Code § 2938(f)(2)*].

For these purposes, cash proceeds are identifiable if they are segregated or, if commingled with other funds of the assignor or an agent or one acting on the assignor's behalf, they can be traced using the lowest intermediate balance principle, unless the assignor or other party claiming an interest in proceeds shows that some other method of tracing would better serve the interests of justice and equity in the circumstances of the case [*Civ. Code § 2938(f)(2)*].

[c] Costs of Protecting Property

If the assignee enforces the assignment by any means other than the appointment of a receiver [*see* [5], *above*] and receives rents, issues, or profits pursuant to the enforcement, the assignor or any other assignee may make written demand on the enforcing assignee to pay the reasonable costs of protecting and preserving the property, including the payment of taxes and insurance and compliance with any applicable building and housing codes [*Civ. Code § 2938(g)(1)*].

On and after the date of receipt of the demand, the assignee must pay the reasonable costs of protecting and preserving the real property to the extent of any rents, issues, or profits actually received by the assignee. However, no such acts by the assignee will cause the assignee to become a mortgagee in possession, and the assignee's duties in this situation will not be construed to require the assignee to operate or manage the property. Instead, the assignor will continue to be responsible for that [*Civ. Code § 2938(g)(2)*].

The assignee's obligation continues until the date the assignee obtains the appointment of a receiver or, if earlier, the date the assignee ceases to enforce the assignment [*Civ. Code § 2938(g)(3)*].

The foregoing provisions may not be construed to supersede or diminish the right of the assignee to the appointment of a receiver [*Civ. Code § 2938(g)(4)*].

[7] Rents, Issues, or Profits Collected Before Enforcement

The lien priorities, rights, and interests among creditors concerning rents, issues, or profits collected before the enforcement by the assignee are governed generally by *Civ. Code § 2938(a)* and *(b)* [*see* [1], [2], *above*]. However, if an assignee with priority (according to the record) takes any enforcement action after a subordinate assignee's enforcement action, the prior assignee is entitled only to the rents, issues, and profits that are accrued and unpaid as of the date of that assignee's enforcement action, and to unpaid rents, issues, and profits accruing after that date. The prior assignee has no right to rents, issues, or profits paid before the date of the enforcement action, whether held by the assignor or a subordinate assignee. On receipt of notice that the prior assignee has enforced the prior interest in the rents, issues, and profits, the subordinate assignee must immediately send a notice canceling any turnover demand [*see* [3], *above*] previously sent to any tenant [*Civ. Code § 2938(h)*].

[8] Pre-1997 Law

[a] Applicability; General Rules

Former *Civ. Code §§ 2938* and *2938.1* as in effect before 1997 continue to govern contracts entered into and actions and proceedings commenced before 1997 [*Civ. Code § 2938(i)*]. An assignment of the rents, issues, and profits of real property that was executed after 1992 and stated that it was given as additional security, was perfected by recording an instrument of assignment in the county in which the real property was located. Recordation perfected the assignment without requiring the beneficiary to obtain possession of the property, to have a receiver appointed, or to take any other action [former *Civ. Code § 2938.1(a)*].

The assignment could be contained in a mortgage, trust deed, or other instrument [former *Civ. Code § 2938.1(c)*]. The beneficiary could not exercise any rights under this type of assignment until and unless the trustor was in default [former *Civ. Code § 2938.1(b)*].

These provisions did not invalidate assignments as additional security that were perfected by other means before 1993. Further, they did not apply to absolute assignments of rents, issues, and profits [former *Civ. Code § 2938.1(d)*], discussed in the next paragraph.

[b] Absolute Assignment

An assignment of rents, issues, and profits made in connection with a loan secured by real property that was expressly absolute, was deemed to constitute a present transfer of the assignor's interest in existing and future rents, issues, and profits of that real property, effective when the assignment was executed and delivered by the assignor [former *Civ. Code § 2938(a)*]. Such an assignment could be recorded in the county in which the real property was located, whether the assignment was in a separate document or part of a mortgage or trust deed. The record constituted constructive notice of the contents and effect of the assignment. The interest granted by the assignment was deemed perfected as of the date it was recorded, notwithstanding any contrary provision of the assignment or of any other provision of law that would otherwise preclude or defer enforcement of the rights granted to the assignee under the assignment until the occurrence of a subsequent event, including, but not limited to, a subsequent default of the assignor [former *Civ. Code § 2938(b)*].

Legal Topics:

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

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Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. LEGAL BACKGROUND
C. Collection of Rents and Profits

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§ 555.82 Mortgagee in Possession

The mortgagee-in-possession doctrine holds that a beneficiary who, after default, succeeds peaceably in obtaining possession of the encumbered property may not be ousted by the trustor until the default is cured [*Snyder v. Western Loan & Bldg. Co. (1934) 1 Cal. 2d 697, 700-701, 37 P.2d 86]* . A mortgagee in possession may, notwithstanding the absence of any contractual right, collect rents and profits and apply any net profit to the outstanding debt [*Nelson v. Bowen (1932) 124 Cal. App. 662, 670-671, 12 P.2d 1083]* . The chief disadvantage of being a mortgagee in possession is that this status entails a duty of ordinary prudence in managing the property, and a mortgagee in possession may be liable to others having an interest in the property for negligent failure to collect rents or for other mismanagement [*see, e.g., Johns v. Moore (1959) 168 Cal. App. 2d 709, 713, 336 P.2d 579* ; *Davis v. Stewart (1944) 67 Cal. App. 2d 415, 418, 154 P.2d 447]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsMortgagee's Interests

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[Reserved]

§§ 555.83[Reserved]

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§ 555.90 Waste

[1] Trustor's Duty Not to Impair Security by Waste

Standard trust deeds commonly obligate the trustor to maintain and care for the property [*see Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 593-594, 125 Cal. Rptr. 557, 542 P.2d 981* ; *Krone v. Goff (1975) 53 Cal. App. 3d 191, 193 n.1, 127 Cal. Rptr. 390]* . By statute, no person whose interest is subject to the lien of a mortgage may do any act that will substantially impair the mortgagee's security [*Civ. Code § 2929*]. This statute codifies in part the common law action for waste, which may be defined as injury to property by one in possession that substantially depreciates its value and is actionable by another having a nonpossessory interest in the property [*Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 597-598, 125 Cal. Rptr. 557, 542 P.2d 981* ; *Patel v. Athow (1973) 34 Cal. App. 3d 727, 735, 110 Cal. Rptr. 460]* . The duty not to commit waste applies to a nonassuming transferee, who otherwise has no personal liability under the trust deed [*see § 555.13[4]*], as well as to the trustor or a successor under the trust deed [*Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 596-597, 599, 125 Cal. Rptr. 557, 542 P.2d 981]* .

[2] What Constitutes Waste

Actionable waste is some physical harm to the property caused by injurious acts or a failure to care for the property [*see, e.g., Easton v. Ash (1941) 18 Cal. 2d 530, 538-539, 116 P.2d 433* (removal of timber); *Lavenson v. Standard Soap Co. (1889) 80 Cal. 245, 256, 22 P. 184* (removal of fixtures); *Hickman v. Mulder (1976) 58 Cal. App. 3d 900, 908, 130 Cal. Rptr. 304* (allowing property to deteriorate by failing to preserve and properly cultivate orchard and vineyard)].

Physical harm not caused by the trustor, such as earthquake or fire damage, or failure to make repairs necessitated by this harm, does not constitute actionable waste, even if the failure to repair is in violation of the trust deed [*Krone v. Goff (1975) 53 Cal. App. 3d 191, 194-195, 127 Cal. Rptr. 390* (also holding that breach of contractual duty to repair was

enforceable only by foreclosure)].

One court has expanded the potential of an action for waste by holding that a trustor's failure to pay property taxes as required under the trust deed, if it results in a tax sale of the property that renders the security worthless, constitutes waste within the meaning of *Civ. Code § 2929* [*Osuna v. Albertson (1982) 134 Cal. App. 3d 71, 75-78, 184 Cal. Rptr. 338* ; *but see Krone v. Goff (1975) 53 Cal. App. 3d 191, 195, 127 Cal. Rptr. 390* (noting absence of any authority for proposition that failure to pay taxes comes within traditional and legal meaning of waste)].

[3] Foreclosure Based on Waste

When the trustor commits waste in violation of a trust deed provision but is not otherwise in default, that may be a sufficient basis to commence foreclosure proceedings. However, foreclosure is proper only if the waste has substantially impaired the security; if it has not, the trustor may seek relief from foreclosure based on a mere technical violation [*Bart v. Streuli (1935) 5 Cal. 2d 67, 67-68, 52 P.2d 922* ; *see § 555.30[3]*].

During judicial foreclosure, whether or not based on waste, a beneficiary may have the court appoint a receiver to preserve the property from the risk of harm that would render the security inadequate [*Code Civ. Proc. § 564(b)(2)*]. For further discussion, see *§ 555.70[4]*.

[4] Injunctive Relief Against Waste

Before the commencement of a foreclosure action, the beneficiary may obtain an injunction to prevent acts that would materially impair the security value of the property [*Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 598 n.2, 125 Cal. Rptr. 557, 542 P.2d 981* ; *see, e.g., Robinson v. Russell (1864) 24 Cal. 467, 473* (recognizing right to this relief but denying it when alleged injury did not materially impair value of property); *see also Miller v. Waddingham (1891) 91 Cal. 377, 382, 27 P. 750* (no right to enjoin removal of buildings placed on property by trustor in absence of allegation that removal rendered security inadequate)]. A beneficiary may also obtain an injunction during foreclosure, on a showing of good cause, to restrain the person in possession from doing any harm to the property [*Code Civ. Proc. § 745*].

For a form of complaint for use in an action to enjoin impairment of security by waste, see *§ 555.191*.

[5] Action for Damages for Waste

[a] Amount of Recovery; Timing of Action

In an action for waste, the beneficiary may recover damages to the extent that the security is rendered inadequate [*Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 598, 602-603, 125 Cal. Rptr. 557, 542 P.2d 981]* . For example, if the beneficiary purchases the property at a private foreclosure sale by making a full-credit bid, the purchase establishes that the value of the security is adequate, which in turn shows that there was no impairment of the security and precludes any recovery for waste [*Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 606-608, 125 Cal. Rptr. 557, 542 P.2d 981* ; *cf. Hickman v. Mulder (1976) 58 Cal. App. 3d 900, 902-903, 905 n.5, 908, 910, 130 Cal. Rptr. 304* (damages could be recovered for impairment of security when beneficiary bought property with less-than-full-credit bid)].

It appears that an action for damages must be brought either together with an action for judicial foreclosure or following foreclosure [*see Easton v. Ash (1941) 18 Cal. 2d 530, 534, 538-539, 116 P.2d 433* (action for damages was properly brought together with action for foreclosure); *Lavenson v. Standard Soap Co. (1889) 80 Cal. 245, 246, 22 P. 184* (action for damages was properly brought after action for foreclosure); *Hickman v. Mulder (1976) 58 Cal. App. 3d 900, 903, 130 Cal. Rptr. 304* (action for damages was properly brought after trustee's sale)]. Before foreclosure, there is no way to determine the extent to which the security is inadequate. In addition, under the one-form-of-action-rule [*Code Civ. Proc. § 726*], the beneficiary must first foreclose and exhaust the security before attempting to recover damages

from the trustor for rendering that security inadequate [*see U.S. Financial v. Sullivan (1974) 37 Cal. App. 3d 5, 15, 112 Cal. Rptr. 18]* .

For a form of complaint for use in an action for damages for impairment of security by waste, see *§ 555.190*.

[b] Requirement of Bad Faith Waste

Recovery of damages for waste is similar in effect to a deficiency judgment [*Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 603, 605, 125 Cal. Rptr. 557, 542 P.2d 981]* . Therefore, when the provisions of *Code Civ. Proc. § 580b* or *580d* would bar recovery of a deficiency judgment following foreclosure [*see § 555.32*], they also bar recovery of damages for waste unless the waste was committed in bad faith [*Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 604-605, 125 Cal. Rptr. 557, 542 P.2d 981* ; *see Osuna v. Albertson (1982) 134 Cal. App. 3d 71, 79-80, 184 Cal. Rptr. 338]* . Bad faith waste includes reckless, intentional, or malicious despoiling of the property. It results from more than a simple inability to maintain the property adequately during depressed economic conditions [*Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 603-604, 125 Cal. Rptr. 557, 542 P.2d 981* ; *see Hickman v. Mulder (1976) 58 Cal. App. 3d 900, 903, 908-909, 130 Cal. Rptr. 304* (allegation of willful mismanagement resulting in deterioration of property was sufficient pleading of bad faith waste)]. The reason for this distinction is that allowing recovery for waste resulting only from depressed economic conditions would defeat the primary purpose of the antideficiency statutes [*Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 603-605, 125 Cal. Rptr. 557, 542 P.2d 981]* . Whether a given instance of waste is in bad faith is a question of fact [*Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 604, 125 Cal. Rptr. 557, 542 P.2d 981* ; *Hickman v. Mulder (1976) 58 Cal. App. 3d 900, 907, 909, 130 Cal. Rptr. 304]* .

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§ 555.91 Impairment of Security by Third Party

[1] Tortious Impairment

The beneficiary may bring an action based on tortious impairment of security caused by a third party's injury to the encumbered property [*Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 598 n.3, 125 Cal. Rptr. 557, 542 P.2d 981* ; *American Sav. & Loan Asso. v. Leeds (1968) 68 Cal. 2d 611, 614 n.2, 68 Cal. Rptr. 453, 440 P.2d 933]* . This type of action is sometimes referred to as an action for waste [*see, e.g., Brown v. Critchfield (1980) 100 Cal. App. 3d 858, 868, 161 Cal. Rptr. 342]* , but this is inaccurate unless the third party is in possession of the property [& it;see *Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 598 n.3, 125 Cal. Rptr. 557, 542 P.2d 981* ; *see also § 555.90*]. The action may be premised on negligent as well as intentional conduct [*U.S. Financial v. Sullivan (1974) 37 Cal. App. 3d 5, 12-14, 112 Cal. Rptr. 18]* . For discussion and forms relating to actions to enjoin a third party from injuring real property or to recover damages for the injury, which may be adapted for use by a beneficiary not in possession, see Ch. 11, *Adjoining Landowners* ; Ch. 266, *Fences* ; Ch. 303, *Injunctions* ; Ch. 391, *Nuisance* ; and Ch. 550, *Trespass* .

The beneficiary may join a third-party tortfeasor as a defendant in an action for foreclosure and may recover damages from that defendant for any deficiency caused by the tortious injury [*Los Angeles T. & S. Bk. v. Bortenstein (1920) 47 Cal. App. 421, 423-424, 190 P. 850* ; *see Easton v. Ash (1941) 18 Cal. 2d 530, 534, 538-539, 116 P.2d 433]* . Alternatively, a separate action for damages may be brought after foreclosure [*see Lavenson v. Standard Soap Co. (1889) 80 Cal. 245, 246, 22 P. 184]* . The statutes barring recovery of deficiency judgments following foreclosure [*Code Civ. Proc. §§ 581b, 581d*] do not apply to actions for a third party's tortious impairment of security [*Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 598 n.3, 604 n.9, 125 Cal. Rptr. 557, 542 P.2d 981]* .

Injunctive relief is available, before or during foreclosure, when threatened acts by the third party would injure the property so as to render the security inadequate, if damages would not be an adequate remedy [*Robinson v. Russell*

(1864) 24 Cal. 467, 467-468, 473 ; *U.S. Financial v. Sullivan (1974) 37 Cal. App. 3d 5, 14, 112 Cal. Rptr. 18* ; *see Code Civ. Proc. § 526(a)(2)*].

The beneficiary is not required to foreclose either before or at the time of bringing an action for damages against a third-party tortfeasor, because the one-form-of-action rule [*Code Civ. Proc. § 726*] applies only to actions against trustors [*U.S. Financial v. Sullivan (1974) 37 Cal. App. 3d 5, 14-16, 112 Cal. Rptr. 18]* . Moreover, the fact that a third party tortiously impaired the security does not necessarily mean that the trustor will default so as to permit the beneficiary to commence foreclosure proceedings [*U.S. Financial v. Sullivan (1974) 37 Cal. App. 3d 5, 16, 112 Cal. Rptr. 18]* . When an action is brought before foreclosure, the value of the property before and after injury is compared, and damages may be recovered to the extent that the security has been rendered inadequate [*Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 598 n.3, 125 Cal. Rptr. 557, 542 P.2d 981* ; *U.S. Financial v. Sullivan (1974) 37 Cal. App. 3d 5, 17, 112 Cal. Rptr. 18]* .

[2] Recovery by Trustor As Substitute Security

The trustor also has a cause of action against a third party who injures the property [*U.S. Financial v. Sullivan (1974) 37 Cal. App. 3d 5, 17, 112 Cal. Rptr. 18]* . If the trustor sues first and recovers damages, the judgment becomes in effect a substitute security to the extent that the injured property has been rendered inadequate as security [*Los Angeles T. & S. Bk. v. Bortenstein (1920) 47 Cal. App. 421, 424-425, 190 P. 850* (in subsequent foreclosure action, mortgagor's judgment debtor was ordered to pay specified percentage of judgment to mortgagee in event of deficiency); *see American Sav. & Loan Asso. v. Leeds (1968) 68 Cal. 2d 611, 614 n.2, 68 Cal. Rptr. 453, 440 P.2d 933* (dictum)].

Damages recovered by the trustor to compensate only for the trustor's losses do not become substitute security for the beneficiary [*American Sav. & Loan Asso. v. Leeds (1968) 68 Cal. 2d 611, 615-616, 68 Cal. Rptr. 453, 440 P.2d 933* (award of trustor's personal damages based on third party's fraud was not substitute security)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 555.92 Environmentally Impaired Security

[1] Lender's Remedies Generally

When real property that is hypothecated to a lender becomes environmentally impaired [*see* [b][iii], *below*] without the lender's knowledge or complicity, the lender has statutory remedies [*see Code Civ. Proc. §§ 726.5(g), 736(e)* (dates of application)]. On one hand, the lender may elect to waive the lien or pursue the remedies of an unsecured creditor [*see Code Civ. Proc. § 726.5*; [2], *below*]. On the other hand, the lender may bring a contract action against the borrower based on breach of any environmental provision in the security agreement [*see Code Civ. Proc. § 736*; [3], *below*].

In addition, the lender has express rights of entry and inspection related to the environmental damage [*see Civ. Code § 2929.5*; for discussion, *see § 555.93*]. A receiver may be appointed to enable the lender to enter and inspect [*Code Civ. Proc. § 564(c)-(e)*; *see* Ch. 486, *Receivers*].

For discussion and forms regarding civil actions relating to pollution and other environmental matters generally, see Ch. 418, *Pollution and Environmental Matters* .

[2] Lender's Election to Waive Lien or Rely on Security

[a] When Election Is Available

If the borrower is in default, the secured lender may elect to waive the lien and exercise the rights and remedies of an unsecured creditor. When several parcels compose the encumbered property, the lender may waive the lien as to the affected parcels only [*see* [b][i], *below*]; and when the lien attaches to fixtures, the lender may waive the lien as to the fixtures only. On the other hand, the lender may elect to rely on the security, even though the property is environmentally impaired [*Code Civ. Proc. § 726.5(a)*].

This election applies only to loans, extensions of credit, guaranties, or other obligations secured by real property made, renewed, or modified after 1991 [*Code Civ. Proc. § 726.5(g)*], and notwithstanding the one-form-of-action rule [*Code Civ. Proc. § 726(a)*] or any other provision of law except *Code Civ. Proc. § 726.5(d)* [*Code Civ. Proc. § 726.5(a)*; *see* [5], *below*].

The lender's election is not available if the release, or threat of release, of a hazardous substance, which is the cause the environmental impairment [*see* [b][iii], *below*], was not knowingly or negligently caused or contributed to, or knowingly or willfully permitted or acquiesced in, by the borrower or any related party or by any of their affiliates or agents [*Code Civ. Proc. § 726.5(d)(1)*], and either [*Code Civ. Proc. § 726.5(d)(2)*]:

- Neither the borrower nor any related party, nor any of their affiliates or agents, had actual knowledge or notice of the release, or threat of release, in conjunction with the making, renewal, or modification of the loan, extension of credit, guaranty, or other obligation secured by the property.

- If such a person had knowledge or notice of the release, or threat of release, the borrower made written disclosure of it to the secured lender after the lender's written request for information concerning the environmental condition of the property, or the lender otherwise obtained actual knowledge of it, before the making, renewal, or modification of the obligation.

[b] Definitions

[i] Borrower and Related Party

"Borrower" means the trustor under a trust deed, or the mortgagor under a mortgage, when the trust deed or mortgage secures a loan, extension of credit, guaranty, or other obligation. The term includes any successor in interest to the trustor or mortgagor before foreclosure or extinction of the trust deed or mortgage [*Code Civ. Proc. § 726.5(e)(2)*].

"Related party" means any person who shares an ownership interest with the borrower in the property or is a partner or joint venturer with the borrower in a business that includes the acquisition, development, use, lease, or sale of the property [*Code Civ. Proc. § 726.5(e)(6)*].

[ii] Environmentally Impaired

"Environmentally impaired" means that the estimated costs to clean up and remedy a past or present release or threatened release of any hazardous substance [*see* [iv], *below*] into, onto, beneath, or from the property, which is not disclosed in writing to, or otherwise actually known by, the secured lender before the making of the loan or extension of credit secured by the property, exceeds either 25 percent of the aggregate fair market value of all security for the loan or extension of credit at the time of the making of the loan or extension of credit or, if higher, 25 percent of the aggregate fair market value of all security for the loan or extension of credit at the time of the discovery of the release or threatened release by the secured lender [*Code Civ. Proc. § 726.5(e)(3)*].

If the property is included in the National Priorities List [*see 42 U.S.C. § 9605*] or in any list published by the California Department of Toxic Substances Control [*Health & Safety Code § 25356(b)*], it is deemed to be environmentally impaired, notwithstanding the foregoing definition [*Code Civ. Proc. § 726.5(e)(3)*].

The estimated cost to clean up and remedy the resultant contamination includes only costs that would be incurred reasonably and in good faith. Fair market value is determined without giving consideration to the release or threatened release and is exclusive of the amount of all liens and encumbrances against the property that are senior to the lien of the secured lender [*Code Civ. Proc. § 726.5(e)(3)*].

[iii] Real Property and Affected Parcel

"Real property" (or "real property security" in the statute) means any real property and improvements, other than a separate interest and any related interest in the common area of a residential common interest development [*see Civ. Code § 1351*], or residential real property containing not more than 15 dwelling units, that in either case is used solely for residential purposes or, if reasonably contemplated by the parties to the trust deed or mortgage, is used for residential purposes as well as limited incidental agricultural or commercial purposes, and is the subject of an issued certificate of occupancy unless the dwelling is to be owned and occupied by the borrower [*Code Civ. Proc. § 726.5(e)(5)*].

"Affected parcel" means any portion of a parcel of the property that is (1) contiguous to the environmentally impaired parcel, even if separated by roads, streets, utility easements, or railroad rights-of-way, (2) part of an approved or proposed subdivision [*see Gov. Code § 66424*], of which the environmentally impaired parcel is also a part, or (3) within 2,000 feet of the environmentally impaired parcel [*Code Civ. Proc. § 726.5(e)(1)*].

[iv] Release of Hazardous Substance

"Release of a hazardous substance" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, including continuing migration, of hazardous substances into, onto, or through soil, surface water, or groundwater. The term does not include actions directly relating to the incorporation in a lawful manner of building materials into a permanent improvement to the property [*Code Civ. Proc. § 726.5(e)(7)*].

"Hazardous substance" means any hazardous substance as defined in *Health & Safety Code § 25281(h)*, any waste material as defined in *Water Code § 13050(d)*, or petroleum, including crude oil (or any fraction of crude oil), natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel, or any mixture of those substances [*Code Civ. Proc. § 726.5(e)(4)*].

[c] Notice of Default and Action to Confirm Impaired Status

Before the secured lender may elect to waive the lien on any parcel of property because of environmental impairment, the lender must provide written notice of the default to the borrower, and the value of the property must be established and its environmentally impaired status must be confirmed by an order of a court of competent jurisdiction in an action brought by the secured lender against the borrower. The complaint in a valuation and confirmation action may include causes of action for a money judgment for all or part of the secured obligation, in which case the waiver of the secured lender's lien is effective only if and when a final money judgment is obtained against the borrower [*Code Civ. Proc. § 726.5(b)*].

[d] Foreclosure Against Additional Collateral

If the secured lender elects to waive the lien, and the borrower's obligations are also secured by other real property, fixtures, or personal property, the secured lender must first foreclose against the additional collateral to the extent required by applicable law. In that case, the judgment for the lender must be limited to the extent that *Code Civ. Proc. §§ 580a, 580d*, and *726(b)* (antideficiency statutes) apply to the foreclosure against the additional real-property collateral. The borrower may waive or modify the other-collateral-first foreclosure requirement, provided the waiver or modification is in writing and signed by the borrower after default [*Code Civ. Proc. § 726.5(c)*].

[e] Other Contractual Rights Not Impaired

Code Civ. Proc. § 726.5 does not invalidate or otherwise affect in any manner any rights or obligations arising under contract in connection with a loan or extension of credit, including, without limitation, provisions limiting recourse [

Code Civ. Proc. § 726.5(f)].

[3] Contract Action for Violation of Environmental Provision

[a] In General

[i] When Lender May Bring Action

A secured lender may bring an action for damages against a borrower for breach of any environmental provision relating to the property and for specific enforcement of the environmental provision. That action (or the attendant failure to foreclose first against collateral) does not constitute an action within the meaning of the one-form-of-action rule [*Code Civ. Proc. § 726(a)*] or constitute a money judgment for a deficiency or a deficiency judgment within the meaning of the antideficiency statutes [*Code Civ. Proc. §§ 580a, 580b, 580d, 726(b)*]. No injunction for the enforcement of an environmental provision may be issued after the obligation secured by the property has been discharged or after all of the borrower's rights, title, and interest in and to the property have been transferred in a good faith transaction to an unaffiliated third party for fair value [*Code Civ. Proc. § 736(a)*].

This statutory rule is applicable notwithstanding any other provision of law [*Code Civ. Proc. § 736(a)*]. *Code Civ. Proc. § 736* applies only to environmental provisions contracted in conjunction with loans, extensions of credit, guaranties, or other obligations made, renewed, or modified after 1991. The statute does not validate, invalidate, or otherwise affect in any manner the rights and obligations of the parties to, or the enforcement of, environmental provisions contracted before 1992 [*Code Civ. Proc. § 736(e)*]. The statute is not intended to establish, abrogate, modify, limit, or otherwise affect any cause of action other than that provided by *Code Civ. Proc. § 736(a)* that a secured lender may have against a borrower under an environmental provision [*Code Civ. Proc. § 736(d)*].

[ii] "Environmental Provision" Defined

"Environmental provision" means any written representation, warranty, indemnity, promise, or covenant relating to the existence, location, nature, use, generation, manufacture, storage, disposal, handling, or past, present, or future release or threatened release, of any hazardous substance into, onto, beneath, or from the property, or to past, present, or future compliance with any related law, made by a borrower in conjunction with the making, renewal, or modification of a loan, extension of credit, guaranty, or other obligation involving the borrower. This definition applies whether or not the representation, warranty, indemnity, promise, or covenant is or was contained in or secured by the trust deed or mortgage, and whether or not the trust deed or mortgage has been discharged, reconveyed, or foreclosed on [*Code Civ. Proc. § 736(f)(2)*; *see Code Civ. Proc. § 736(f)(1),(3)-(6)* (other definitions, which are same as in *Code Civ. Proc. § 726.5(e)*); [2][b], *above*].

[b] Limitation on Damages

The lender's damages are limited to reimbursement or indemnification of the following items [*Code Civ. Proc. § 736(b)*]:

- If cleanup or remediation is not pursuant to an order of any federal, state, or local governmental agency relating to the cleanup, remediation, or other response action required by applicable law: the costs relating to a reasonable and good faith cleanup, remediation, or other response action concerning a release or threatened release of hazardous substances that is anticipated by the environmental provision.

- If cleanup or remediation is pursuant to an order of any federal, state, or local governmental agency relating to the cleanup, remediation, or other response action required by applicable law that is anticipated by the environmental provision: all amounts reasonably advanced in good faith by the lender in connection with those activities, provided the lender negotiated, or attempted to negotiate, in good

faith to minimize the amounts the lender was required to advance under the order.

- Indemnification against all liabilities to any third party relating to the breach and not arising from acts, omissions, or other conduct that occur after the borrower is no longer an owner or operator of the property [*see 42 U.S.C. § 9601(20)(A)* (definition of "owner or operator," which is incorporated by reference)], provided the lender is not responsible for the environmentally impaired condition of the property in accordance with the standards under *Code Civ. Proc. § 726.5(d)* [*see* [2][a], *above*].

- Attorney's fees and costs incurred by the lender relating to the breach.

[c] Items Not Recoverable

The lender may not recover damages for (1) any part of the principal amount or accrued interest of the secured obligation, except for amounts advanced by the lender to cure or mitigate the breach of the environmental provision that are added to the principal amount, plus contractual interest, or (2) amounts that relate to a release of a hazardous substance that the lender, or an affiliated person or agent, knowingly permitted, caused, or contributed to [*Code Civ. Proc. § 736(b)*].

The lender may not recover damages for amounts advanced or obligations incurred for the cleanup or other remediation of property, and related attorney's fees and costs, if all of the following conditions are satisfied [*Code Civ. Proc. § 736(c)*]:

- The original principal amount of, or commitment for, the loan or other obligation secured by the property did not exceed $200,000.

- The lender, in conjunction with accepting the environmental provision, agreed in writing to accept the property on the basis of a completed environmental site assessment and other relevant information from the borrower.

- The borrower did not permit, cause, or contribute to the release of a hazardous substance or threatened release.

- The trust deed or mortgage covering the property has not been extinguished.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsReceiversAppointmentsContracts LawBreachCauses of ActionGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesCleanupReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral Overview

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Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART II. LEGAL BACKGROUND
D. Injury to Security

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§ 555.93 Inspection Regarding Hazardous Substance Release

[1] Lender's Right to Enter for Inspection

A secured lender may enter and inspect the property for the purpose of determining the existence, location, nature, and magnitude of any past or present release or threatened release of any hazardous substance into, onto, beneath, or from the property in either of the following situations [*Civ. Code § 2929.5(a)*]:

- On reasonable belief of the existence of a past or present release or threatened release of any hazardous substance into, onto, beneath, or from the property not previously disclosed in writing to the lender in conjunction with the making, renewal, or modification of a loan, extension of credit, guaranty, or other obligation involving the borrower [*see Civ. Code § 2929.5(e)* (definitions); *see also § 555.92[2][b]*].

- After the commencement of nonjudicial or judicial foreclosure proceedings against the property.

The lender must reimburse the borrower for the cost of repair of any physical harm to the property caused by the entry and inspection [*Civ. Code § 2929.5(c)*].

[2] Required Notice of Intent to Enter

The lender is prohibited from abusing the right of entry and inspection or using it to harass the borrower or tenant of the property. Except in an emergency, when the borrower or tenant of the property has abandoned the premises, or if it is impracticable to do so, the lender must give the borrower or tenant of the property reasonable notice of the secured lender's intent to enter. The lender may enter only during the borrower's or tenant's normal business hours. Twenty-four hours' notice is presumed to be reasonable notice in absence of evidence to the contrary [*Civ. Code § 2929.5(b)*; *see*

Code Civ. Proc. § 564(c) (action for appointment of receiver to enforce right)].

[3] Petition for Entry and Inspection

If the lender is refused the right of entry and inspection by the borrower or tenant of the property, or is otherwise unable to enter and inspect the property without a breach of the peace, the lender may, on petition, obtain an order from a court of competent jurisdiction to exercise the lender's inspection rights [*Civ. Code § 2929.5(d)*].

A receiver may be appointed by the superior court to enable the lender to enter and inspect the property for the purpose of determining the existence, location, nature, and magnitude of any past or present release or threatened release of any hazardous substance into, onto, beneath, or from the property [*Code Civ. Proc. § 564(c)*]. For further discussion and forms, see Ch. 486, *Receivers* .

An action to enforce the right of entry and inspection or for appointment of a receiver does not constitute an action within the meaning of the one-form-of-action rule [*Civ. Code § 2929.5(d)*; *Code Civ. Proc. § 564(d)*; *see Code Civ. Proc. § 726(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesReceivershipsReceiversAppointmentsEnvironmental LawHazardous Wastes & Toxic SubstancesCleanupReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's Interests

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Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
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48-555 California Forms of Pleading and Practice--Annotated § 555.94

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§ 555.94 Rent Skimming

[1] Definition; Overview of Action; No Waiver

Rent skimming is the landlord's use of revenue received from the rental of a parcel of residential real property, within the first 12 months after acquiring the property, without first applying the revenue or an equivalent amount to the payments due on all mortgages and trust deeds encumbering the property [*Civ. Code § 890(a)*].

Vendors as lienholders, other lienholders, and tenants may, in certain circumstances, bring an action for damages against a person who has engaged in rent skimming [*see Civ. Code § 891(a), (c), (d)*; *see also Civ. Code § 890(c)* (definition of "person")]. The antideficiency statutes [*Code Civ. Proc. §§ 580a, 580b, 580d, 726*] do not apply to the action [*Civ. Code § 891(g)*]. For a form of complaint for use in an action based on rent skimming, see *§ 555.192*.

There can be no effective waiver of the provisions of *Civ. Code § 891* [*Civ. Code § 891(f)*]. The rights and remedies provided by *Civ. Code § 891* are in addition to any other rights and remedies provided by law [*Civ. Code § 891(e)*]. For discussion of other rights and remedies available to tenants and vendors, see Ch. 332, *Landlord and Tenant: The Tenancy* , and Ch. 569, *Vendor and Purchaser* .

[2] Action for Damages

[a] By Vendor As Lienholder

The vendor of an interest in residential real property who received a promissory note or other evidence of a debt for all or a portion of the purchase price, which is secured by a lien on the property, may bring an action against any person who has engaged in rent skimming with respect to that property. The vendor is entitled to recover all actual damages as well as reasonable attorney's fees and costs. The court may also award exemplary damages and any appropriate

equitable relief [*Civ. Code § 891(a)*].

If the defendant engaged in multiple acts of rent skimming, the court must award exemplary damages not less than three times the actual damages [*Civ. Code § 891(a)*]. "Multiple acts of rent skimming" occur if the landlord knowingly and willfully engages in rent skimming with respect to each of five or more parcels of residential real property acquired within any two-year period [*Civ. Code § 890(b)*].

[b] By Other Lienholder

A mortgagee or beneficiary under a trust deed encumbering residential real property may bring an action against a person who has engaged in rent skimming with respect to that property as one of multiple acts of rent skimming [*see* [a], *above*]. The lienholder may bring such an action whether or not the defendant has become contractually bound by an obligation secured by the mortgage or trust deed. The mortgagee or beneficiary is entitled to recover actual damages, to the extent of the amount of the rent collected on the encumbered property, as well as reasonable attorney's fees and costs. The court may also award exemplary damages and any appropriate equitable relief [*Civ. Code § 891(c)*].

[c] By Tenant

A tenant of residential real property may bring an action against a person who has engaged in rent skimming with respect to that property for the recovery of actual damages, including any security deposit [*see Civ. Code § 1950.5*; Ch. 334, *Landlord and Tenant: Claims for Damages*], and for moving expenses if the property is sold at a foreclosure sale and the tenant is required to move. The tenant is entitled to recover reasonable attorney's fees and costs as well. The court may also award exemplary damages, and the court must award exemplary damages of at least three times the amount of actual damages if the defendant engaged in multiple acts of rent skimming [*see* [a], *above*], or if the payments due under any trust deed or mortgage were two or more months delinquent at the time the tenant rented the premises [*Civ. Code § 891(d)*].

[3] Vendor's Motion to Clear Reacquired Interest of Judgment Liens

If the vendor of an interest in residential real property reacquires that interest from a person who engaged in rent skimming with respect to that property, the vendor may move for an order declaring that the reacquired interest is not encumbered by any lien that is or has the effect of a judgment lien against the person who engaged in rent skimming. This motion must be granted, unless the interests of justice would not be served, when the lien is not related to any improvement of the property and does not represent security for a loan made in good faith by a lender without knowledge of the rent skimming [*Civ. Code § 891(b)*]. For a form of notice of this motion, see *§ 555.194*.

[4] Criminal Penalties for Multiple Acts

A person who engages in multiple acts of rent skimming is subject to a $10,000 fine or one year's imprisonment or both, upon conviction of five acts of rent skimming. Conviction of additional acts will carry the same punishment for each additional act, as does a conviction of an act after a prior conviction [*Civ. Code § 892(a), (b)*; *see Civ. Code § 892(c)* (three-year limitation period for prosecution); *Civ. Code § 892(d)* (penalties are cumulative to other remedies or penalties for same conduct); *see also Civ. Code § 890(c)* (definition of "person")].

"Multiple acts of rent skimming" occur if the landlord knowingly and willfully engages in rent skimming with respect to each of five or more parcels of residential real property acquired within any two-year period [*Civ. Code § 890(b)*].

[5] Defense

The following conditions would constitute an affirmative defense for a natural person who is a defendant in a civil or criminal action for rent skimming [*Civ. Code § 893(a)*]:

- The defendant used the rental revenue, which was due but not paid to holders of mortgages or trust deeds, to make payments to health care providers [*see Bus. & Prof. Code § 6146(c)(2)* (definition)] for unforeseen and necessary medical treatment of the defendant or a spouse, parent, or child or to licensed contractors or material suppliers to correct the violation of any statute, ordinance, or regulation relating to the habitability of the premises.

- The defendant made the payments within 30 days of receiving the rental revenue.

- The defendant had no other source of funds from which to make the payments.

The defendant has the burden of proof of each element of the defense in a civil action and the burden of producing evidence in a criminal action [*Civ. Code § 893(b)*]. For a form of this affirmative defense, see *§ 555.193*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawTitle QualityMarketable TitleRemediesReal Property LawTortsGeneral Overview

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[Reserved]

§§ 555.95[Reserved]

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§ 555.100 Related Matthew Bender Publications

[1] California Points and Authorities

For memoranda of points and authorities related to forms in this chapter, see California Points and Authorities, Ch. 230, *Trust Deeds and Real Property Mortgages* (Matthew Bender)

[2] California Legal Forms

For additional discussion of trust deeds and mortgages and related transactional forms, see California Legal Forms (Matthew Bender):

- Ch. 25A, *Security Instruments for Real Estate Financing*
- Ch. 25B, *Subordination, Assumption, and Assignment*
- Ch. 25C, *Release and Reconveyance*
- Ch. 25D, *Foreclosure*

[3] California Real Estate Law & Practice

For additional discussion of trust deeds and mortgages, see California Real Estate Law and Practice (Matthew Bender):

- Ch. 111, *Deeds of Trust and Mortgages*
- Ch. 114, *Subordination*
- Ch. 115, *Release and Reconveyance*
- Ch. 120, *Representing a Client After Default*
- Ch. 121, *Priorities of Liens*
- Ch. 122, *Antideficiency Legislation*
- Ch. 123, *Nonjudicial Foreclosure*
- Ch. 124, *Judicial Foreclosure*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresJudicial ForeclosuresReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingSecondary FinancingLien Priorities

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§ 555.101 Federal Statutes

Stay of foreclosure proceedings during bankruptcy proceedings. *11 U.S.C. § 362*

Garn-St. Germain Depository Institutions Act of 1982, governing due-on clauses. *12 U.S.C. § 1701j-3*

Restrictions on foreclosure proceedings applicable to secured loan guaranteed or insured by DVA or FHA. *12 U.S.C. § 1707 et seq.* (FHA); *38 U.S.C. § 3701 et seq.* (DVA)

Disclosure statements required for benefit of borrower in certain loan transactions secured by mortgage or trust deed. *12 U.S.C. § 2601*; *15 U.S.C. § 1604*

Notice of nonjudicial sale and redemption provisions applicable when federal tax lien exists on property to be sold. *I.R.C. § 7425(b)-(d)*; *28 U.S.C. § 2410(d)*

When United States is named as defendant in foreclosure action, action may be brought in or removed to federal district court. *28 U.S.C. §§ 1444, 2410(a)*

Limitation under Servicemembers Civil Relief Act (*50 U.S.C. App. § 501 et seq.*) on foreclosure proceedings against trustor in active military service. *50 U.S.C. App. § 533*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionReal Estate Settlement ProceduresGeneral OverviewBanking LawFederal

ActsGarn-St. Germain Depository Institutions ActBankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief ActReal Property LawFinancingFederal ProgramsFederal Housing Administration

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48-555 California Forms of Pleading and Practice--Annotated § 555.102

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§ 555.102 State Statutes

[1] In General

Suretyship. *Civ. Code § 2787 et seq.*

Trustee is authorized to sue to exercise trustee's powers and duties with regard to trust deeds. *Code Civ. Proc. § 369(b)*

Enforceability of letter of credit supporting obligation that is secured by mortgage or trust deed. *Code Civ. Proc. §§ 580.5, 580.7*

Code Civ. Proc. §§ 580a et seq., 725a et seq. are not applicable to any security interest governed by Commercial Code, except as provided under *Com. Code § 9604. Code Civ. Proc. § 730.5*

Treble damages for forged trust deed involving residential property. *Code Civ. Proc. §§ 749, 749.5*

Acceleration of trust deed by bank or savings and loan association on failure to pay taxes, rents, assessments, or insurance proceeds is enforceable whether or not security is impaired. *Fin. Code §§ 1227.2, 7461*

Provision authorizing holder of trust deed to receive insurance proceeds is enforceable whether or not security is impaired. *Fin. Code §§ 1227.3, 7462*

Special notice of sale requirements applicable when state lien for postponed property taxes exists on property to be sold. *Gov. Code § 16187(b)*

Protections from certain civil liabilities, including mortgages and property taxes, for active service members. *Mil. &*

Vet. Code §§ 400-420

Trust terminates when trust purpose is fulfilled. *Prob. Code § 15407(a)(2)*

[2] Civil Actions

[a] In General

Venue in foreclosure action. *Code Civ. Proc. § 392(a)(2)*

Pursuit of attachment remedy does not constitute action for recovery of debt or failure to comply with requirement to proceed first against security. *Code Civ. Proc. § 483.012*

Receivers. *Code Civ. Proc. § 564 et seq.*

Actions for foreclosure of mortgages and trust deeds. *Code Civ. Proc. § 725a et seq.*

Secured lender's right of election of remedies regarding environmental impairment of property on borrower's default. *Code Civ. Proc. § 726.5*

Actions for nuisance, waste, and willful trespass, in certain cases, on real property. *Code Civ. Proc. § 731 et seq.*

Secured lender's right of action regarding borrower's breach of environmental provision in contract. *Code Civ. Proc. § 736*

Actions for the recovery of real property, and other provisions relating to actions concerning real property. *Code Civ. Proc. § 740 et seq.*

Mortgage is not to be deemed conveyance enabling mortgagee to recover possession without foreclosure and sale. *Code Civ. Proc. § 744*

Injunction against waste pending foreclosure. *Code Civ. Proc. § 745*

Quiet title. *Code Civ. Proc. § 760.010 et seq.*

[b] Antideficiency Statutes and One-Form-of-Action Rule

Exception to one-form-of-action rule for action based on environmental impairment of real property. *Code Civ. Proc. §§ 564(d), 726.5, 736*

Procedure for and limitation on recovery of deficiency judgment after foreclosure. *Code Civ. Proc. §§ 580a, 726(b)*

Deficiency judgment is barred after any sale of real property under purchase-money mortgage or trust deed. *Code Civ. Proc. § 580b*

Deficiency judgment is generally barred after nonjudicial foreclosure. *Code Civ. Proc. § 580d*

Foreclosure is only form of action permitted for recovery of debt or enforcement of obligation secured by mortgage or trust deed. *Code Civ. Proc. § 726(a)*

[3] Liens in General

Definition of liens. *Civ. Code § 2872 et seq.*

Creation of liens. *Civ. Code § 2881 et seq.*

Effect of liens. *Civ. Code § 2888 et seq.*

Priority of liens. *Civ. Code § 2897 et seq.*

Redemption from liens. *Civ. Code § 2903 et seq.*

Extinction of liens. *Civ. Code § 2909 et seq.*

[4] Mortgages and Trust Deeds

Ancient mortgages and trust deeds. *Civ. Code § 882.020 et seq.*

Rent skimming. *Civ. Code § 890 et seq.*

Home equity sales contracts. *Civ. Code § 1695 et seq.*

Mortgage loans. *Civ. Code § 1918.5 et seq.*

Reverse mortgages. *Civ. Code § 1923 et seq.*

Mortgages in general. *Civ. Code § 2920 et seq.*

Mortgage foreclosure consultants. *Civ. Code § 2945 et seq.*

Mortgage of real property. *Civ. Code § 2947 et seq.*

Disclosures regarding purchase money liens on residential property. *Civ. Code § 2956 et seq.*

Home Equity Loan Disclosures Act. *Civ. Code § 2970 et seq.*

[5] Recordation of Mortgage or Trust Deed

Record as notice. *Civ. Code § 1213 et seq.*

Mortgage or trust deed, unless fictitious, must be acknowledged before recordation. *Gov. Code § 27287*

Recorded trust deed must include address of trustor and request by trustor for copy of any notice of default or sale. *Gov. Code § 27321.5*

County recorder may use system of microphotography, optical disk, or reproduction by other techniques not permitting additions, deletions, or changes to original document as photographic reproduction process to record instruments, papers, and notices required or permitted by law to be recorded or filed, and every such reproduction is deemed original.

Gov. Code §§ 27322.2, 27322.4

[6] Statutory Regulation of Loans

[a] In General

Advance fee for arranging loan secured by real property is prohibited, with exceptions, and violation is punishable by fine of up to $10,000 for individual or $50,000 for corporation. *Bus. & Prof. Code § 10085.5*

Disclosure statements required for benefit of borrower in certain loan transactions secured by mortgage or trust deed. *Bus. & Prof. Code §§ 10232.4, 10232.5, 10240*; *Civ. Code § 2956 et seq.*; *Corp. Code § 25110*

Loans made or negotiated by real estate brokers. *Bus. & Prof. Code § 10240 et seq.*

Loans of money. *Civ. Code § 1912 et seq.*

Shared appreciation loans. *Civ. Code §§ 1917 et seq., 1917.110 et seq.*

Loans of ERISA pension funds. *Civ. Code §§ 1917.010 et seq., 1917.210 et seq.*

Shared appreciation loans for seniors. *Civ. Code § 1917.320 et seq.*

[b] Residential Mortgage Loans

Licensing of residential mortgage loan originators under Real Estate Law, Finance Lenders Law, and Residential Mortgage Lending Act. *Bus. & Prof. Code § 10166.01 et seq.*; *Fin. Code §§ 22012-22014, 22105.1-22105.4, 22109.1-22109.6, 50002.5, 50003.5, 50003.6, 50140 et seq., 50150 et seq.*

California Residential Mortgage Lending Act. *Fin. Code § 50000 et seq.*

Licensing of residential mortgage lender. *Fin. Code § 50120 et seq.*

Licensing of residential mortgage loan servicer. *Fin. Code § 50130*

Requirements governing financial condition, loan transaction, and bonds of licensees. *Fin. Code § 50200 et seq.*

Assessments levied by Commissioner of Corporations. *Fin. Code § 50400 et seq.*

Prohibited mortgage loan practices; penalties. *Fin. Code § 50500 et seq.*

Requirements governing brokerage services provided to borrowers by licensees. *Fin. Code § 50700 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawFinancingMortgages & Other Security InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawFinancingState Regulation

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Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART III. RESEARCH GUIDE

48-555 California Forms of Pleading and Practice--Annotated § 555.103

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§ 555.103 Federal Administrative Regulations

Regulations of Office of Thrift Supervision (OTS), a bureau of Department of Treasury, relating to enforcement of due-on-sale clauses in general. 12 C.F.R. Pt. 591

Regulations of National Credit Union Administration relating to enforcement of due-on-sale clauses in loans by national credit unions. *12 C.F.R. § 701.21(g)(6)*

Requirements for foreclosure proceedings applicable to secured loan guaranteed or insured by DVA or FHA. 24 C.F.R. Pt. 200 et seq. (FHA); *38 C.F.R. Pt. 36* (DVA)

Requirements for notice of nonjudicial sale to be given to IRS when federal tax lien exists on property to be sold. *Treas. Reg. § 400.4-1*

Regulations governing redemption by IRS following private sale. *Treas. Reg. § 400.5-1*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingFederal ProgramsFederal Housing AdministrationReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsTransfersDue-on-Sale ClausesTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesLiens (IRC secs. 6320-6327)Discharges of Liens

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§ 555.104 Local Court Rules

[1] Contra Costa County

Attorney's fees in foreclosure action. Contra Costa Co. Super. Ct. Rules, Rule 20(g)

[2] Los Angeles County

Attorney's fees in foreclosure action. Los Angeles Co. Super. Ct. Rules, Rule 3.2(b)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral Overview

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§ 555.105 Decisions

[1] Antideficiency Statutes

When debtor fraudulently fabricated assets as security for loan and then further secured loan by real property, antideficiency statutes did not bar creditor's action for fraud. *In re Franklin (9th Cir. 1991) 922 F.2d 536, 543*

Action for money judgment was not election to proceed personally instead of proceeding against security if judgment was not obtained; obtaining personal judgment was election of remedies. *In re Madigan (9th Cir. 1991) 122 Bankr. 103, 106-107*

Purchaser may not make contractual waiver of protections of *Code Civ. Proc. § 580b* in exchange for renegotiation of original obligation. *DeBerard v. Lim (1999) 20 Cal. 4th 659, 661-662, 85 Cal. Rptr. 2d 292, 976 P.2d 843* ; *Palm v. Schilling (1988) 199 Cal. App. 3d 63, 72-76, 244 Cal. Rptr. 600*

Three-month period in which motion for deficiency judgment must be filed [*Code Civ. Proc. § 726(b)*] is statute of limitations; thus, party who fails to file timely motion may not seek relief under *Code Civ. Proc. § 473* from "a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." *Life Savings Bank v. Wilhelm (2000) 84 Cal. App. 4th 174, 178, 100 Cal. Rptr. 2d 657*

Sham guaranty when guarantor was settlor and trustee of inter vivos revocable trust that was the principal obligor on obligation governed by antideficiency laws; guarantor's agreement to modification of loan did not waive protection of *Code Civ. Proc. § 580b*. *Cadle Co. II v. Harvey (2000) 83 Cal. App. 4th 927, 933, 100 Cal. Rptr. 2d 150*

Fraud action could not be based on borrowers' waiver of antideficiency protection of *Code Civ. Proc. § 580b*; because protections of § 580b may not be contractually waived by debtor, lender's fraud action was for nonperformance of

invalid waiver. *Lawler v. Jacobs (2000) 83 Cal. App. 4th 723, 736, 100 Cal. Rptr. 2d 52*

Code Civ. Proc. § 580b did not bar deficiency when trust deed securing payment of purchase price was not recorded against purchased property but against property purchased by defendants three years earlier in completely unrelated transaction. *Kurtz v. Calvo (1999) 75 Cal. App. 4th 191, 195, 89 Cal. Rptr. 2d 99*

9604(a)(2)(A) (limited application of one action rule and antideficiency legislation when obligation secured by interest in personal property or fixtures is also secured by interest in real property) relieves mixed collateral creditor entirely from complying with three-month time limit for applying for deficiency judgment under *Code Civ. Proc. § 726. Florio v. Lau (1998) 68 Cal. App. 4th 637, 653, 80 Cal. Rptr. 2d 409*

Judgment creditor who secured judgment lien by accepting note and trust deed was secured creditor and, thus, was barred by *Code Civ. Proc. § 580d* from recovering deficiency after nonjudicial foreclosure sale. *Rettner v. Shepherd (1991) 231 Cal. App. 3d 943, 949-952, 282 Cal. Rptr. 687*

Purchase of all shares of farming corporation that owned real property and had other assets was purchase of personal property not subject to bar of deficiency judgment. *Union Bank v. Anderson (1991) 232 Cal. App. 3d 941, 945-950, 283 Cal. Rptr. 823*

When loan was made to revocable family trust and was guaranteed by husband and wife, who were trustees, trustors, and beneficiaries of trust, guaranties were not true guaranties, and deficiency was barred. *Torrey Pines Bank v. Hoffman (1991) 231 Cal. App. 3d 308, 318-322, 282 Cal. Rptr. 354*

Fair-value limitation was not applicable to bankruptcy sale free and clear of all liens. *Coppola v. Superior Court (1989) 211 Cal. App. 3d 848, 870-876, 259 Cal. Rptr. 811*

Out-of-state judgment for deficiency on purchase money note in California was not entitled to full faith and credit when there was prior judgment in California denying deficiency. *Stuart v. Lilves (1989) 210 Cal. App. 3d 1215, 1219-1221, 258 Cal. Rptr. 780*

Subordinated loan secured by residential property to be demolished to construct three residential units was not standard transaction even though residential, not commercial, use was involved, and thus deficiency was available. *Boyle v. Sweeney (1989) 207 Cal. App. 3d 998, 1002-1004, 255 Cal. Rptr. 153*

When purchase agreement provided for subordination of vendor's lien to new financing, purpose of *Code Civ. Proc. § 580b* was not served and deficiency judgment was allowed. *Wright v. Johnston (1988) 206 Cal. App. 3d 333, 337-338, 253 Cal. Rptr. 418*

When exchange controlled by vendor purported to pass purchase money through third party not on title controlled by vendor, purchase money antideficiency protection for purchaser was continuing. *Ziegler v. Barnes (1988) 200 Cal. App. 3d 224, 229-230, 246 Cal. Rptr. 69*

When purchase-money note was not subject to antideficiency statutes because of subordination clause, renegotiation of subordination clause increasing amount to be subordinated was not making loan subject to antideficiency protection. *Ziegler v. Barnes (1988) 200 Cal. App. 3d 224, 231-233, 246 Cal. Rptr. 69*

Loan was purchase money even when proceeds were not used to pay purchase price if loan was integral part of purchase transaction. *BMP Property Development v. Melvin (1988) 198 Cal. App. 3d 526, 529-531, 243 Cal. Rptr. 715*

Purchase-money antideficiency law was applicable when nonpurchase-money loan was rewritten to allow other creditor to purchase in attempt to resell property and avoid foreclosure. *LaForgia v. Kolsky (1987) 196 Cal. App. 3d 1103, 1108-1113, 242 Cal. Rptr. 282*

Attorney's fees awarded in opposing action to enjoin sale were recoverable in nonjudicial foreclosure sale, and recovery was not precluded by one-form-of-action rule or antideficiency statutes. *Passanisi v. Merit-McBride Realtors, Inc. (1987) 190 Cal. App. 3d 1496, 1506-1512, 236 Cal. Rptr. 59*

Deficiency against purchaser was not barred when purchaser fraudulently obtained second secured loan with priority over first loan and stopped making payments on both. *Bell v. Roy (1986) 187 Cal. App. 3d 694, 699-700, 232 Cal. Rptr. 83*

Antideficiency statute did not bar action for fraud in purchase-money transaction because action was not for deficiency. *Manson v. Reed (1986) 186 Cal. App. 3d 1493, 1501, 231 Cal. Rptr. 446*

In action to recover on guaranty securing note executed in California with respect to sale of Texas land, California antideficiency statutes applied because law of situs of debt controls when action is brought on debt and not to obtain land. *Consolidated Capital Income Trust v. Khaloghli (1986) 183 Cal. App. 3d 107, 112, 227 Cal. Rptr. 879*

Guarantors were not specifically protected by antideficiency statutes; however, when creditor foreclosed on security and thereby destroyed guarantor's subrogation rights against debtor by application of *Code Civ. Proc. § 580d*, creditor was thereafter estopped to assert right to recover on guaranty. *Consolidated Capital Income Trust v. Khaloghli (1986) 183 Cal. App. 3d 107, 112-113, 227 Cal. Rptr. 879*

Code Civ. Proc. § 580b did not apply to variation on standard purchase money security transaction in which purchaser contemplated commercial development of purchased property and vendor agreed to subordinate purchase-money trust deed to trust deed securing third party's construction loan. *Roffinella v. Sherinian (1986) 179 Cal. App. 3d 230, 236-240, 224 Cal. Rptr. 502*

Code Civ. Proc. § 580d, barring deficiency judgment after nonjudicial foreclosure, did not apply to enforcement of judgment of sister state that allowed deficiency judgments. *United Bank of Denver v. K & Y Trucking Co. (1983) 147 Cal. App. 3d 217, 220-221, 195 Cal. Rptr. 49*

Code Civ. Proc. § 580b, barring deficiency judgment after sale under purchase-money trust deed, did not apply to variation of standard purchase-money transaction in which secured note was given by one ex-spouse to other to equalize division of community property on divorce. *Nickerman v. Ryan (1979) 93 Cal. App. 3d 564, 567, 155 Cal. Rptr. 830*

Code Civ. Proc. § 726, requiring sale of security before seeking deficiency judgment, did not require exhaustion of security before personal judgment on note secured by personal property consisting of other note secured by real property. *Bank of California v. Leone (1974) 37 Cal. App. 3d 444, 448, 112 Cal. Rptr. 394*

Code Civ. Proc. § 580b, barring deficiency judgment after sale under purchase-money trust deed, prevented deficiency judgment even though encumbered property was outside *California. Younker v. Reseda Manor (1967) 255 Cal. App. 2d 431, 434-438, 63 Cal. Rptr. 197* ; *Kish v. Bay Counties Title Guaranty Co. (1967) 254 Cal. App. 2d 725, 733, 62 Cal. Rptr. 494*

[2] Availability of Foreclosure

Foreclosure was permissible for failure to pay prepayment penalty, even though collection agent mistakenly accepted

payoff from trustor's agent without objection or demand for prepayment penalty; neither *Civ. Code § 1501* (waiver of inadequacies of tendered performance if no objection is made at time of tender) nor *Code Civ. Proc. § 2076* (same) barred collection of prepayment penalty because both apply to intentional failures to demand proper tender. *Sanguansak v. Myers (1986) 178 Cal. App. 3d 110, 115-117, 223 Cal. Rptr. 490*

Foreclosure for failure to pay prepayment penalty was not barred on basis of equitable estoppel when collection agent mistakenly accepted payoff from maker's agent without penalty and maker's agent knew of clear penalty language in note. *Sanguansak v. Myers (1986) 178 Cal. App. 3d 110, 117-118, 223 Cal. Rptr. 490*

[3] Collection of Rents and Profits

Rents and profits under assignment of rents clause constituted additional security, not deficiency judgment. *Mortgage Guarantee Co. v. Sampsell (1942) 51 Cal. App. 2d 180, 183-186, 124 P.2d 353*

[4] Creation of Mortgage or Trust Deed

Description of secured obligation sufficient to ascertain extent of encumbrance is required to create valid mortgage. *D'Oyly v. Capp (1893) 99 Cal. 153, 157, 33 P. 736*

When parties each believe that trust deed encumbers different property and beneficiary misled trustor to that belief, trust deed is subject to cancellation. *Balistreri v. Nevada Livestock Production Credit Assn. (1989) 214 Cal. App. 3d 635, 640-644, 262 Cal. Rptr. 862*

[5] Deed or Mortgage

In determining whether deed absolute was intended as mortgage, central inquiry is whether debt existed at time of transaction and relation of debtor and creditor continued thereafter; if so, court may infer that deed was intended as mortgage. *Montgomery v. Spect (1880) 55 Cal. 352, 353*

[6] Emotional Distress

Bank's foreclosure of property pledged to secure loan to corporation, on which individual plaintiff-shareholder lived, was privileged; banker's remark questioning whether plaintiff's daughter had "guts" to act as real estate broker in liquidation sale of her mother's house was heartless, insensitive, and merited condemnation but was not type of outrageous conduct necessary to support action for intentional infliction of emotional distress. *Kruse v. Bank of America (1988) 202 Cal. App. 3d 38, 67-68, 248 Cal. Rptr. 217*

[7] Equitable Mortgage

Defective mortgage or trust deed intended to provide property as security for debt was enforceable as equitable mortgage. *Earle v. Sunnyside Land Co. (1907) 150 Cal. 214, 227-228, 88 P. 920* ; *Bank of Suisun v. Fiske (1924) 65 Cal. App. 771, 777-778, 225 P. 7*

Promise to give trust deed or mortgage providing property as security for debt was enforceable as equitable mortgage. *Higgins v. Manson (1899) 126 Cal. 467, 469-470, 58 P. 907* ; *Schelling v. Thomas (1929) 96 Cal. App. 682, 684, 687-688, 274 P. 755*

[8] Foreclosure Action

Junior lienholder named as defendant in foreclosure action was permitted to file cross complaint for foreclosure of subordinate lien in default. *Hibernia etc. Soc. v. London etc. Ins. Co. (1903) 138 Cal. 257, 260, 71 P. 334*

[9] Fraud

Full credit bid rule did not bar repurchasing lender's causes of action against third party nonborrowers for fraud, negligent misrepresentation, and breach of contract. *First Commercial Mortgage Co. v. Reece (2001) 89 Cal. App. 4th 731, 742-744, 108 Cal. Rptr. 2d 23*

[9A] Home Equity Purchasers

Despite signing general release in settlement of unlawful detainer action brought by equity purchaser, seller was entitled to rescind sale of home when purchaser never provided seller notice of right to rescind as required under *Home Equity Sales Contract Act. Hoffman v. Lloyd (9th Cir. 2009) 572 F.3d 999, 1001*

Four-year limitations period for actions involving fraud [*Pen. Code §§ 803(c)*, 805.1] applied to prosecution for violation of the Home Equity Sales Contract Act [*Civ. Code § 1695 et seq.*] in which the defendant failed to provide home equity seller with written contract that complied with disclosure and other requirements. *People v. Shetty (2009) 174 Cal. App. 4th 1488, 1493-1494, 95 Cal. Rptr. 3d 355*

[9B] Insurance on Encumbered Property

Lender was entitled to proceeds of earthquake insurance obtained by borrower, pursuant to provision of deed of trust assigning to lender "all sums due or payable" to owner or owner's successor "for injury or damage to such property" and provision stating that lender could use insurance proceeds it received pursuant to deed of trust to repair property, apply those funds to secured debt, or release funds to owner. *JEM Enterprises v. Washington Mutual Bank (2002) 99 Cal. App. 4th 638, 646, 121 Cal. Rptr. 2d 458*

Deed of trust that does not require homeowner to obtain earthquake insurance but provides that if such insurance is obtained lender must be named loss payee and has right to control or direct proceeds is fully enforceable. *Martin v. World Savings and Loan Assn. (2001) 92 Cal. App. 4th 803, 809, 112 Cal. Rptr. 2d 225*

If lender does not require earthquake insurance on property that secured loan, and loan documents contain no reference to earthquake insurance proceeds, lender has no right to receive or to control proceeds of earthquake insurance policy. *Ziello v. Superior Court (1995) 36 Cal. App. 4th 321, 329, 42 Cal. Rptr. 2d 251*

[10] Obligation Secured

Limitation on right to prepay secured loan under *Civ. Code § 2954.9(a)(3)* applies only during calendar year of sale. *Donahue v. LeVesque (1985) 169 Cal. App. 3d 620, 626-628, 215 Cal. Rptr. 388*

[11] Priority of Liens

"Partial subordination" principle developed in judicial foreclosure context applied to determine priority of liens in

nonjudicial foreclosure when inconsistency regarding priority was created by successive deeds of trust and intervening subordination agreement between two lenders. *Wells Fargo Bank v. Neilsen (2009) 178 Cal. App. 4th 602, 616-617, 100 Cal. Rptr. 3d 547*

Lender was not bona fide encumbrancer when its escrow holder knew that assignee of prior trust deed who had subordinated was pledgee, and pledgee had no right to impair trust deed's security by allowing its subordination without assignor's agreement. *Triple A Management Co. v. Frisone (1999) 69 Cal. App. 4th 520, 539, 81 Cal. Rptr. 2d 669*

When trust deed was recorded after trustor acquired title but before deed to trustor was recorded, trust deed was not in chain of title and did not impart constructive notice. *Far West Savings & Loan Assn. v. McLaughlin (1988) 201 Cal. App. 3d 67, 73-74, 246 Cal. Rptr. 872*

Junior lienholder did not have standing to challenge prior-recorded trust deed on ground that husband signed wife's name on it. *Clar v. Cacciola (1987) 193 Cal. App. 3d 1032, 1036, 238 Cal. Rptr. 726*

[12] Private Sale

In nonjudicial sale by state to foreclose tax lien, *Fourteenth Amendment* requires state to give notice of sale reasonably calculated to give actual notice to those with legally protected interest in property; mere posting and publication of notice, rather than personal or mailed service, is insufficient. *Mennonite Board of Missions v. Adams (1983) 462 U.S. 791, 798-800, 103 S. Ct. 2706, 77 L. Ed. 2d 180*

Nonjudicial foreclosure procedures do not implicate *due process clause of Fourteenth Amendment* because there is no direct state involvement in enforcement of creditor's remedies. *Apao v. Bank of New York (9th Cir. 2003) 324 F.3d 1091*

When nonjudicial foreclosure sale was void due to trustee's failure to properly execute ministerial acts, amount of interest due buyer on return of sale proceeds was 7 percent [*Cal. Const., art. XV, sec. 1*] rather than 10 percent under *Civ. Code § 3289* (legal rate of interest chargeable after breach of contract that does not stipulate interest rate is 10 percent). *Pro Value Properties Inc. v. Quality Loan Service Corp. (2009) 170 Cal. App. 4th 579, 583, 88 Cal. Rptr. 3d 381*

Nonjudicial foreclosure does not involve constitutional rights or free speech, but rather concerns a commercial transaction that is not protected activity under the anti-SLAPP statute [*Code Civ. Proc. § 425.16*]; trial court therefore properly denied special motion to strike wrongful foreclosure cause of action. *Garretson v. Post (2007) 156 Cal. App. 4th 1508, 1524-1525, 68 Cal. Rptr. 3d 230*

Lender and trustee were indispensable parties in action to set aside trustee's sale, and therefore default judgment in that action against the purchaser of the property was subject to collateral attack in subsequent action. *Washington Mutual Bank v. Blechman (2007) 157 Cal. App. 4th 662, 669, 69 Cal. Rptr. 3d 87*

Trustee who was negligent in believing it was trustee of record and who conveyed title to successful bidder in nonjudicial foreclosure sale owed no duty to subsequent purchasers of the property. *Heritage Oaks Partners v. First American Title Ins. Co. (2007) 155 Cal. App. 4th 339, 346, 66 Cal. Rptr. 3d 510*

Premature service of notice of sale in nonjudicial foreclosure proceedings was not prejudicial to borrowers, who received more than 20-day notice required under *Civ. Code § 2924b(b)(2)*; accordingly, summary judgment was properly granted defendants in borrowers' action seeking to set aside foreclosure. *Knapp v. Doherty (2004) 123 Cal. App. 4th 76, 92-93, 20 Cal. Rptr. 3d 1*

Nonjudicial foreclosure sale is subject to automatic stay pending appeal in lawsuit concerning title to property. *Royal Thrift & Loan Co. v. County Escrow, Inc. (2004) 123 Cal. App. 4th 24, 36, 20 Cal. Rptr. 3d 37*

Foreclosure sale properly set aside when trustor and beneficiary agreed to postpone sale, trustee did not receive notice of postponement, and trustee never delivered deed to high bidder; relief to which bidder was entitled was return of its money, plus interest. *Residential Capital, LLC v. Cal-Western Reconveyance Corp. (2003) 108 Cal. App. 4th 807, 823-824, 134 Cal. Rptr. 2d 162*

When escrow for sale of property closed on same day property was sold at foreclosure sale, fact that title passed to plaintiff on close of escrow did not mean foreclosure sale could be set aside; to protect interest in property from pending foreclosure, plaintiff had to ensure underlying obligation was satisfied, and lender did not receive payoff of debt before foreclosure sale. *Nguyen v. Calhoun (2003) 105 Cal. App. 4th 428, 442-443, 129 Cal. Rptr. 2d 436*

Although nonjudicial foreclosure statutes call for automatic recission when there is a failure of consideration [*Civ. Code § 2924h(c)*], they do not otherwise provide for rescission; thus, mortgagee could not rescind trustee's sale on basis that it mistakenly made full credit bid. *Norwest Mortgage, Inc. v. State Farm Fire and Casualty Co. (2002) 97 Cal. App. 4th 571, 580, 118 Cal. Rptr. 2d 367*

Nonjudicial foreclosure sale properly set aside when bidders agreed not to compete, in violation of *Civ. Code § 2924h(g)*. *Lo v. Jensen (2001) 88 Cal. App. 4th 1093, 1095, 106 Cal. Rptr. 2d 443*

Nothing bars party from rebutting recital in trustee's deed pertaining to amount of unpaid debt at time of trustee's sale by evidence showing that amount was different from that stated in deed. *Kolodge v. Boyd (2001) 88 Cal. App. 4th 349, 359, 105 Cal. Rptr. 2d 749*

Foreclosure sale improperly set aside because clerical error by beneficiary's agent setting opening bid at $10,000 rather than $100,000 was not a "procedural error independent of inadequacy of price." *6 Angels, Inc. v. Stuart-Wright Mortgage, Inc. (2001) 85 Cal. App. 4th 1279, 1285, 102 Cal. Rptr. 2d 711*

Trustee's duty to conduct sale fairly and openly does not extend to duty to bidders to provide detailed explanations concerning recorded encumbrances. *Ostayan v. Serrano Reconveyance Co. (2000) 77 Cal. App. 4th 1411, 1420, 92 Cal. Rptr. 2d 577*

Nonjudicial sale was properly set aside when defects in notice of default and notice of sale were discovered after sale but before issuance of trustee's deed. *Angell v. Superior Court (1999) 73 Cal. App. 4th 691, 700, 86 Cal. Rptr. 2d 657*

Prepayment penalty was includable in amount sought at private sale when right to penalty was set forth in note. *Golden Forest Properties Inc. v. Columbia Sav. & Loan Assn. (1988) 202 Cal. App. 3d 193, 197-199, 248 Cal. Rptr. 316*

Agent of trustee was permitted to bid at private sale. *Stephens, Partain & Cunningham v. Hollis (1987) 196 Cal. App. 3d 948, 952-955, 242 Cal. Rptr. 251*

Statutory provisions governing chargeable costs and fees in nonjudicial foreclosure proceeding were not applicable when trustor initiated equitable proceeding to enjoin sale. *Sweatt v. Foreclosure Co. (1985) 166 Cal. App. 3d 273, 278, 212 Cal. Rptr. 350*

When there were two or more beneficiaries, any one was empowered to give notice of default and election to sell in event of default. *Perkins v. Chad Development Corp. (1979) 95 Cal. App. 3d 645, 651, 157 Cal. Rptr. 201*

Right to exercise power of sale under trust deed was not affected by death or insanity of trustor. *Strutt v. Ontario Sav. & Loan Assn. (1970) 11 Cal. App.3d 547, 553, 90 Cal. Rptr. 69* (insanity); *New York Life Ins. Co. v. Doane (1936) 13 Cal. App. 2d 233, 238, 56 P.2d 989* (death)

Even though *Civ. Code § 2924b* requires copies of notice of default or sale to be sent by registered or certified mail, notice was valid when sent by regular mail and received within statutory time. *Crummer v. Whitehead (1964) 230 Cal. App. 2d 264, 267-268, 40 Cal. Rptr. 826*

[13] Property Encumbered

Severed fixture becomes personal property no longer included as part of encumbered property. *Stowell v. Waddingham (1893) 100 Cal. 7, 9-10, 34 P. 436*

[14] Reconveyance

When signatures on request for reconveyance were forged but reconveyance document was not forged, reconveyance was voidable rather than void and bone fide purchaser for value took property free and clear of plaintiffs' lien. *Schiavon v. Arnaudo Bros. (2000) 84 Cal. App. 4th 374, 381, 100 Cal. Rptr. 2d 801*

When trustee mistakenly reconveyed, trustor who received full proceeds after sale was liable on ground of unjust enrichment if trustor had knowledge of mistaken reconveyance. *First Nationwide Savings v. Perry (1992) 11 Cal. App. 4th 1657, 1666-1667, 15 Cal. Rptr. 2d 173*

[15] Subordination Agreements

Seller could not obtain readjustment of priorities under automatic subordination theory when record showed she had tried her case on fraud and conspiracy theory and not on contract theory. *Brown v. Boren (1999) 74 Cal. App. 4th 1303, 1319-1320, 88 Cal. Rptr. 2d 758*

Agreement that misstates amount of lien to be subordinated is enforceable when intent of parties is clear. *Klingele v. Engelman (1987) 192 Cal. App. 3d 1482, 1485, 238 Cal. Rptr. 199*

[16] Substitution of Trustee

Reformation of substitution of trustee was proper when substitution erroneously failed to indicate it was substitution as to one parcel only and that original trustee was retained for purposes of pending foreclosure proceedings. *Jones v. First American Title Ins. Co. (2003) 107 Cal. App. 4th 381, 389, 131 Cal. Rptr. 2d 859*

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawFinancingMortgages & Other Security InstrumentsEquitable MortgagesReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawFinancingMortgages & Other Security InstrumentsFormalities

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Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART III. RESEARCH GUIDE

48-555 California Forms of Pleading and Practice--Annotated § 555.106

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§ 555.106 Attorney General Opinions

Civ. Code § 2955, requiring impound account funds to be retained and reinvested in California, is constitutional. *62 Ops. Cal. Att'y Gen. 351, 351-356 (1979)*

When trustor enters land conservation agreement with county, consent of beneficiary is not required, but in absence of consent, purchaser at trustee'ssale takes title free of restrictions of agreement. *51 Ops. Cal. Att'y Gen. 80, 83-88 (1968)*

Trust deed securing obligation subject to Unruh Act (*Civ. Code § 1801 et seq.*) must be physically attached to contract evidencing obligation. *45 Ops. Cal. Att'y Gen. 8, 9-11 (1965)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesDeposits in CourtContracts LawSales of GoodsBreach, Repudiation & ExcuseInstallment Contracts

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48-555 California Forms of Pleading and Practice--Annotated § 555.107

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§ 555.107 Law Reviews

Comment, *Subrogation of Mortgages in California: A Comparison with the Restatement and Proposals for Change, 48 UCLA L. Rev. 1633 (2001)*

Freeman and Gurev, *An Overview of Defenses Available to Guarantors of Real Property Secured Transactions Under California Law, 38 Santa Clara L. Rev. 329 (1998)*

Sheppard, *Code of Civil Procedure Section 580b, Anti-Deficiency Protection Regarding Purchase Money Debts: Arguments for the Inclusion of Refinanced Purchase Money Obligations Within the Anti-Deficiency Protection of Section 580b, 6 S. Cal. Interdis. L.J. 245 (1997)*

Comment, *Will Refinancing Your Home Mortgage Risk Your Life Savings?: Refinancing and California Code of Civil Procedure Section 580b , 43 UCLA L. Rev. 2077 (1996)*

Knox, *Procedures to Delay Real Property Foreclosures, 23 W. St. U.L. Rev. 303 (1996)*

Harris, *Code of Civil Procedure Section 580b Revisited: Freedom of Contract in Real Estate Purchase Agreements, 30 San Diego L. Rev. 509 (1993)*

Lurie, *Application of California Code of Civil Procedure Section 580d to a Guaranty Secured by Real Property, 28 Cal. W.L. Rev. 51 (1991-1992)*

Comment, *The Sanction for Violation of California's One-Action Rule, 79 Cal. L. Rev. 1601 (1991)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawCongressional Duties & PowersContracts ClauseGeneral OverviewContracts LawThird PartiesSubrogationReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawFinancingSecondary FinancingGeneral Overview

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48-555 California Forms of Pleading and Practice--Annotated § 555.108

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§ 555.108 Text References

Bernhardt, California Mortgage and Deed of Trust Practice (Cal. CEB 2d ed. 1990)

California Real Property Financing (Cal. CEB 1988)

Witkin, California Procedure, vol. 5, *Pleading*, §§ 634-637 (4th ed. 1997)

Witkin, Summary of California Law, vol. 4, *Security Transactions in Real Property*, § 1 et seq. (10th ed. 2005)

Miller & Starr, Current Law of California Real Estate (2d ed. 1989), vol. 4, ch. 9, *Deeds of Trust and Mortgages*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview

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48-555 California Forms of Pleading and Practice--Annotated §§ 555.109-555.119

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[Reserved]

§§ 555.109[Reserved]

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PART IV. FORMS
A. General Forms
1. Discharge of Obligation

48-555 California Forms of Pleading and Practice--Annotated § 555.120

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§ 555.120 Complaint to Quiet Title [Code Civ. Proc. § 761.020] and for Damages and Penalty [Civ. Code §§ 2941(d), 3281]--Nonperformance of Statutory Duty on Discharge of Secured Obligation [Civ. Code § 2941(b)]

[1] FORM Complaint to Quiet Title [Code Civ. Proc. § 761.020] and for Damages and Penalty [Civ. Code §§ 2941(d), 3281]--Nonperformance of Statutory Duty on Discharge of Secured Obligation [Civ. Code § 2941(b), (c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name(s) of defendant(s)*	)	COMPLAINT TO QUIET TITLE AND FOR DAMAGES AND PENALTY
],	)	
[and DOES I through _____,]	)	
Defendant(s).	)	
	)	

_____

Plaintiff alleges:

1. Plaintiff _____ [*name*] is, and at all times mentioned was, _____ [*allege capacity and residence of plaintiff, e.g.,* a California corporation authorized to engage in, and engaging in, the banking business as a California state bank].

2. Defendant, _____ [*name of trustee*], is, and at all times mentioned was, _____ [*allege capacity and residence, e.g.*, a partnership sued under the name that it has assumed, with its principal place of business in _____ County, California].

3. Defendant, _____ [*name of beneficiary*], is, and at all times mentioned was, _____ [*allege capacity and residence, e.g.*, a resident of _____ County, California].

[4. Defendants DOES I through _____, inclusive, have, or claim to have, an interest in the property, the exact nature of which is unknown to plaintiff. Plaintiff is ignorant of the true names, interests, rights, and capacities of defendants sued as DOES I through _____, inclusive, and therefore sues these defendants by those fictitious names. Plaintiff will amend this complaint to allege their true names, rights, interests, and capacities when they are ascertained.]

5. On _____ [*date*], plaintiff, for a valuable consideration, made and delivered a promissory note ("the note") in the sum of $_____, with interest at the rate of _____ percent, dated _____ [*date*] and recorded in _____ County, California, at book _____, page _____.

6. On the same day, plaintiff executed and delivered to defendant _____ (name of beneficiary), as beneficiary, a certain trust deed ("the trust deed") recorded in _____ County, California, at book _____, page _____, and covering the following described real property situated in that county ("the property"): _____ [*describe property, including both legal description and street address or common designation, if any*]. The trust deed conveyed the property to defendant _____ [*name*] as trustee.

7. On or about _____ [*date*], plaintiff and _____ [*name*] ("the purchaser") entered into a written contract by the terms of which plaintiff agreed to sell and the purchaser agreed to buy the property for the price of $_____, subject to the condition that title of record to the property be cleared and the sale be consummated on or before _____ [*date*]. As required by the purchaser, the contract expressly provided that time was of the essence. To secure this contract, plaintiff was required to deposit $_____ into escrow, which, pursuant to the contract of sale, was to be forfeited to the purchaser in the event plaintiff was unable to clear title on or before _____ [*date*]. A copy of the contract is attached as Exhibit A and incorporated by reference. As required by the contract, an escrow was opened into which the purchaser deposited the full purchase price to be delivered to plaintiff on completion of the sale, and plaintiff deposited $_____, to be delivered to the purchaser should plaintiff fail to provide a clear title of record.

8. Plaintiff, on or about _____ [*date*], paid in full the obligation secured by the trust deed. At that time plaintiff, in writing, [notified defendant _____ (*name of beneficiary*) of the terms and conditions of the pending sale and] requested that defendant _____ (*name of beneficiary*) expedite the execution and recording of a reconveyance and deliver to plaintiff the note and trust deed. A copy of the request is attached as Exhibit B and incorporated by reference.

9. In spite of plaintiff's payment of the secured obligation and repeated requests that defendant _____ (*name of beneficiary*) reconvey the title to plaintiff as required by law [and deliver to plaintiff the note and trust deed], defendant _____ (*name of beneficiary*) failed and refused, and continues to fail and refuse, to do so[, with full knowledge of the pending sale of the property and that completion of the sale would depend on the recording of a reconveyance on or before _____ (*date*), and that time was of the essence].

10. As a proximate result of this failure and refusal of defendant _____ (*name of beneficiary*) to

reconvey, _____ [*specify detriment sustained as result of this breach of statutory duty and damages, e.g.,* plaintiff was unable to clear title to the property on or before _____ (*date*), the sale agreement was terminated by its own terms, and plaintiff's deposit in escrow, together with the purchase price deposited by the purchaser, were delivered to the purchaser, to plaintiff's damage in the sum of $_____. After the date title had to be cleared, the market value of the property plummeted, and the property is now worth no more than $_____. As a further proximate result of this failure and refusal, plaintiff has been damaged in the sum of $_____ (*difference between contract price and present market value*)].

WHEREFORE, plaintiff prays judgment as follows:

1. For judgment quieting plaintiff's title to the property against defendants;

2. For damages in the sum of $_____;

3. For a statutory penalty in the further sum of $300;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is a complaint for use by a trustor to quiet title [*see Code Civ. Proc. § 760.010 et seq.*; [6], *below*] against a trustee and beneficiary, and to recover damages sustained as a proximate result of the beneficiary's breach of the statutory duty to execute and record a full reconveyance on discharge of the obligation secured by the trust deed [*see Civ. Code § 2941(d)*; *§ 555.19*].

Although this complaint assumes that the security instrument is a deed of trust, the form may be easily modified to apply to a mortgage and a certificate of discharge [*see Civ. Code § 2941(a)*; *§ 555.19*]. Further, if appropriate, it may be revised to reflect the fact that the action is being brought (1) by the heirs, successors, or assigns of the trustor, or (2) against the assignee of the beneficiary or trustee [*see Civ. Code § 2941(a), (b)*; *§ 555.19*].

This complaint is adapted from the fact situation in *Dixon v. Grossman (1972) 22 Cal. App. 3d 941, 944, 99 Cal. Rptr. 659* , in which the court of appeal held that the plaintiff was entitled to have the title quieted and to recover the statutory penalty only, after concluding that sufficient evidence supported the trial court's finding that plaintiff had suffered no actual damages from the loss of the pending sale of the property.

[3] Allegations

The required contents of a complaint to quiet title are set forth in *Code Civ. Proc. § 761.020* [*see* [6], *below*]. This complaint alleges the following facts:

- The plaintiff's capacity (Paragraph 1).
- The defendants' capacity and status as the trustee and beneficiary under the trust deed (Paragraphs 2 and 3) [*see Civ. Code § 2941(a), (b)*].
- The execution by the plaintiff of the promissory note (Paragraph 5) [*see Civ. Code § 2941(b)*].
- The execution by the plaintiff of the trust deed, and a description of the property (Paragraph 6) [*see Code Civ. Proc. § 761.020(a)*].
- The facts concerning the plaintiff's contract to sell the property (Paragraph 7).
- Payment of the obligation secured by the trust deed, entitling the plaintiff to a reconveyance (Paragraph 8) [*see Civ. Code § 2941(a), (b)*; *Code Civ. Proc. § 761.020(b)*].
- A request for the return of the original note and trust deed (Paragraph 8) [*see Civ. Code § 2941(b)*].
- The defendant's breach of the statutory duty to reconvey (Paragraph 9) [*see Civ. Code § 2941(b)*; *Code Civ. Proc. § 761.020(c)*].
- The detriment sustained by the plaintiff as a proximate result of the breach (Paragraph 10) [*see Civ. Code § 3282*].
- The plaintiff's damages (Paragraph 10) [*see Civ. Code §§ 2941(d), 3281*].

[4] Verification

A complaint to quiet title must be verified [*Code Civ. Proc. § 761.020*].

PRACTICE TIP:

File and Serve Lis Pendens. Counsel also must file and record a lis pendens as a prerequisite to maintaining a quiet title action [*Code Civ. Proc. § 761.010(h)*]. If the plaintiff does not do so, defendant's counsel should consider bringing a motion to strike the quiet title claim. *By William M. Hensley*

[5] Jurisdiction and Venue

Jurisdiction of actions to quiet title [*see Code Civ. Proc. § 760.010 et seq.*; [6], *below*] is in the superior court [*Code Civ. Proc. § 760.040*]. The county in which the real property is situated is the proper county for trial of a quiet title action [*Code Civ. Proc. § 760.050*].

[6] Quiet Title Actions

Actions to quiet title are governed by *Code Civ. Proc. § 760.010 et seq.* The remedy provided by these provisions is cumulative and not exclusive of any other remedy, form or right of action, or proceeding provided by law for establishing or quieting title to property [*Code Civ. Proc. § 760.030(a)*]. However, in any action in which quieting title is in issue, the court, in its discretion, may, on motion of any party, require that the issue be resolved pursuant to *Code Civ. Proc. § 760.010 et seq.* to the extent practicable [*Code Civ. Proc. § 760.030(b)*].

[7] Cross References

For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions*

For alternative allegations as to agency, capacity, and residence of parties, as well as fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction, Inconvenient Forum, and Appearances*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to quiet title actions, see Ch. 482, *Quieting Title*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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A. General Forms
1. Discharge of Obligation

48-555 California Forms of Pleading and Practice--Annotated §§ 555.121-555.124

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[Reserved]

§§ 555.121[Reserved]

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Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART IV. FORMS
A. General Forms
2. Deed Absolute as Mortgage; Equitable Mortgage

48-555 California Forms of Pleading and Practice--Annotated § 555.125

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§ 555.125 Complaint to Establish Deed As Mortgage [Civ. Code §§ 2924(a), 2925] and to Quiet Title [Code Civ. Proc. §§ 760.020, 761.020]--By Mortgagor

[1] FORM Complaint to Establish Deed As Mortgage [Civ. Code §§ 2924(a), 2925] and to Quiet Title [Code Civ. Proc. §§ 760.020, 761.020]--By Mortgagor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT TO ESTABLISH DEED AS MORT-
Defendant.	)	GAGE AND QUIET TITLE
	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of plaintiff. See § 555.120[1], Paragraph 1.*]

2. Defendant, _____ [*name*], is, and at all times mentioned was, _____ [*allege capacity and residence, e.g.,* a partnership sued under the name that it has assumed, with its principal place of business

in _____ County, California].

3. On or about _____ [*date*], plaintiff was the owner of certain real property located at _____ [*street address or common designation, if any*] in _____ County, California, and described as follows ("the property"): _____ [*legal description*].

4. Plaintiff's title at that time was based on _____ [*specify, e.g.,* a deed from _____ (*name of plaintiff's grantor*) granting the property in fee simple to plaintiff, dated _____ (*date*) and recorded in _____ County, California, at book _____, page _____].

5. On _____ [*date*], plaintiff, for a valuable consideration, made and delivered a promissory note in the sum of $_____, with interest at the rate of _____ percent per annum, payable _____ [*specify terms of payment*] ("the note"). Defendant is presently the holder of the note, a copy of which is attached as Exhibit A and incorporated by reference.

6. On the same day, plaintiff executed and delivered to defendant a deed to the property. On _____ [*date*], that deed was recorded in _____ County, California, at book _____, page _____. A copy of that deed is attached as Exhibit B and incorporated by reference. Thatdeed was in fact a mortgage only and was intended by both parties to be mortgage only, in that it was executed and delivered solely to secure payment of the note.

[7. *If accounting of rents and profits is sought from defendant as grantee in possession, allege:* On or about _____ (*date*), defendant entered into actual possession of the property and since that time has received and retained the rents and profits derived from the property.]

[*EITHER*]

8. Plaintiff has paid all sums due to defendant under the note, as follows: _____ [*specify amounts and manner of payment*]. On or about _____ [*date*], plaintiff demanded that defendant reconvey the title to plaintiff. Defendant failed and refused, and continues to fail and refuse, to reconvey or to recognize the deed (Exhibit B) as a mortgage only.

[*OR*]

8. On or about _____ [*date*], plaintiff offered to pay defendant the _____ [whole sum *or* the unpaid balance] of principal and interest [owing and] unpaid under the terms of the note, in the sum of $_____, and demanded that defendant reconvey the title to plaintiff. Defendant failed and refused, and continues to fail and refuse, to accept this tender or to reconvey or to recognize the deed (Exhibit B) as a mortgage only.

[*OR*]

8. On or about _____ [*date*], plaintiff offered to pay defendant the _____ [whole sum *or* the unpaid balance] of principal and interest [owing and] unpaid under the terms of the note, less the rents and profits received by defendant, and requested defendant to give an accounting of rents and profits received and to deliver possession and reconvey the title on being paid whatever sum was found to be due defendant on the account. Defendant failed and refused, and continues to fail and refuse, to account to plaintiff, to deliver possession or reconvey, or to

recognize the deed (Exhibit B) as a mortgage only.

[*CONTINUE*]

9. Plaintiff seeks a determination quieting title as against the defendant as of _____ [*date*] [because _____ (*if date is other than date complaint was filed, allege why determination as of that date is sought*)].

[10. *If unpaid balance is due, allege:* Plaintiff is ready to pay defendant whatever balance and interest are due on the note and offers to deliver this amount into the court for payment.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. That the deed attached as Exhibit B be adjudged to be a mortgage;

[*EITHER*]

2. That the court [order an accounting of the rents and profits received by defendant and, after deducting this amount,] determine the amount [owing and] unpaid on the note;

3. That plaintiff be allowed to deposit whatever amount is adjudged due with the clerk of the court for defendant's benefit in discharge of the note and, on condition of making the deposit, plaintiff have title to the property quieted in plaintiff;

[*OR*]

2. That the note be adjudged to have been fully paid;

3. That plaintiff have title to the property quieted in plaintiff;

[*CONTINUE*]

4. For costs of suit herein incurred; and

5. For any other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification. See § 555.120[1].*]

[2] Use of Form

This form is a complaint for use by the grantor under a deed absolute on its face, to establish that the deed was intended to be a mortgage only [*Civ. Code §§ 2924(a), 2925*] and to quiet title against the grantee after discharge of the debt secured by the mortgage. For further discussion of this particular type of action, see *§ 555.22*.

This form may be modified to state a cause of action against the mortgagee's successor in interest, other than a good faith purchaser or lienholder [*Civ. Code §§ 2925, 2950*]. It may also be modified for use as a complaint for declaratory relief when the mortgagor merely seeks a declaration that a deed absolute on its face is in fact a mortgage [*see Orlando v. Berns (1957) 154 Cal. App. 2d 753, 754-757, 316 P.2d 705]* .

For a form of judgment, see *§ 555.126*. For a complaint by a mortgagee to establish a deed as a mortgage and to foreclose, see *§ 555.127*.

[3] Allegations

This complaint includes the following allegations, which are essential to state a cause of action to establish a deed absolute on its face as a mortgage and to quiet title in favor of the mortgagor:

- The mortgagor's title to the property in question and a description of the property (Paragraphs 3 and 4) [*Code Civ. Proc. § 761.020(a),(b)*];

- The execution and delivery of the deed solely to secure a debt, and the parties' intent that it be a mortgage only (Paragraphs 5 and 6) [*Civ. Code § 2924(a)*; *Code Civ. Proc. § 761.020(c)*];

- The mortgagor's payment of the debt, or offer to pay the debt, secured by the mortgage (Paragraphs 8) [*see Aguilar v. Bocci (1974) 39 Cal. App. 3d 475, 476-477, 114 Cal. Rptr. 91]* ;

- The date as of which the determination as to title is sought (Paragraph 9) [*Code Civ. Proc. § 761.020(d)*].

For further discussion of allegations necessary to state a cause of action for quiet title generally, see Ch. 482, *Quieting Title* .

[4] Jurisdiction and Venue

An action to quiet title is within the jurisdiction of the superior court [*Code Civ. Proc. § 760.040*]. The proper county for the trial of an action to quiet title to real property is the county in which some or all of the property is located [*Code Civ. Proc. § 760.050(a)*].

[5] Verification

A complaint seeking to quiet title must be verified [*Code Civ. Proc. § 761.020*].

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48-555 California Forms of Pleading and Practice--Annotated § 555.126

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§ 555.126 Judgment Declaring Deed to Be Mortgage [Civ. Code §§ 2888, 2924(a), 2925] and Quieting Title [Code Civ. Proc. § 764.010]

[1] FORM Judgment Declaring Deed to Be Mortgage [Civ. Code §§ 2888, 2924(a), 2925] and Quieting Title [Code Civ. Proc. § 764.010]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	JUDGMENT
Defendant.	)	
	)	
	)	

This action came on regularly for trial on _____ [*date*] in [_____ (Department *or* Division) _____ of] the above entitled court, the Honorable _____ [*name*], Judge, presiding[, sitting without a jury]. Plaintiff appeared by _____ [*name*], counsel, and defendant appeared by _____ [*name*], counsel. Oral and documentary evidence was presented by both parties. The cause was argued and submitted for decision. A statement of decision _____ [has been made and filed *or* was not requested].

IT IS ORDERED, ADJUDGED, AND DECREED that:

1. As of _____ [*date*], _____ [*name of plaintiff*] was the sole owner of the title in fee simple to the following real property: _____ [*legal description*].

2. The instrument executed by _____ [*name of plaintiff*] to _____ [*name of defendant*] in the form of a grant deed dated _____ [*date*], which is recorded in _____ County, California, at book _____, page _____, which purported to convey to defendant the above-described property, is in fact and law a mortgage to secure payment of an obligation evidenced by a promissory note dated _____ [*date*], in the sum of $_____.

[*EITHER*]

3. The above-described note has been fully paid.

4. Title to the above-described property is hereby quieted in _____ [*name of plaintiff*], and _____ [*name of defendant*] owns no right, title, estate, interest, or lien, whatever, in the property.

[*OR*]

3. The above-described note has a balance of principal and interest owing and unpaid on _____ [*date*], in the sum of $_____.

4. On payment to _____ [*name of defendant*] of $_____ on or before _____ [*date*], title to the above-described property shall be quieted in _____ [*name of plaintiff*], whereupon _____ [*name of defendant*] shall own no right, title, estate, interest, or lien whatever in the property. On the motion of any interested party after that date, the court shall enter an order confirming the payment and giving effect to this judgment as described in this paragraph or, if payment be not made, an order dismissing this action.

[*CONTINUE*]

5. Plaintiff shall recover costs from defendant.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is a form of judgment for use by the mortgagor in an action to establish a deed absolute on its face as a mortgage and to quiet the mortgagor's title to the property. If the mortgagor has not previously paid the debt, the judgment quieting title must be conditioned on discharge of the secured obligation. For a related complaint, see *§ 555.125[2]*. For further discussion and forms relating to judgments in quiet title actions, see Ch. 482, *Quieting Title* .

In an action to establish a deed as a mortgage, in which the mortgagor sought to recover clear title to the property on payment of the amount found to be due, the judgment properly provided for dismissal on the defendant's motion if the plaintiff failed to pay the amount determined to be due within a reasonable time set by the court, but the judgment could not provide for foreclosure of the mortgage [*Cline v. Robbins (1896) 112 Cal. 581, 585-586, 44 P. 1023]* .

[3] Cross References

For discussion of obtaining, amending, or attacking judgments in general, see Ch. 40, *Appeal: An Overview, et seq.* and Ch. 318, *Judgments*

For discussion and forms relating to statements of decision, see Ch. 529, *Statement of Decision* .

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2. Deed Absolute as Mortgage; Equitable Mortgage

48-555 California Forms of Pleading and Practice--Annotated § 555.127

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§ 555.127 Complaint to Establish Deed As Mortgage [Civ. Code §§ 2924(a), 2925] and to Foreclose [Code Civ. Proc. § 726(a)]--By Mortgagee

[1] FORM Complaint to Establish Deed As Mortgage [Civ. Code §§ 2924(a), 2925] and to Foreclose [Code Civ. Proc. § 726(a)]--By Mortgagee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT TO FORECLOSE UNDER MORT-
Defendant.	)	GAGE
	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of plaintiff. See § 555.120[1], Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 555.125[1], Paragraph 2.*]

3. On _____ [*date*], defendant, for a valuable consideration, made and delivered a promissory note in the sum of $_____, with interest at the rate of _____ percent per annum, payable _____ [*specify terms of payment*] ("the note"). Plaintiff is presently the holder of the note, a copy of which is attached as Exhibit A and incorporated by reference.

4. On the same day, defendant executed and delivered to plaintiff a deed to the property. On _____ [*date*], that deed was recorded in _____ County, California, at book _____, page _____. A copy of that deed is attached as Exhibit B and incorporated by reference. That deed was in fact a mortgage only and was intended by both parties to be a mortgage only, in that it was executed and delivered solely to secure payment of the note.

5. Defendant has defaulted under the terms of the note, in that _____ [*specify default, e.g.*, he has failed and refused, and continues to fail and refuse, to make payments of $_____, principal and interest, due on _____ (*date*), and subsequent months, to and including _____ (*date*), and amounting to $_____].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. That the deed attached as Exhibit B be adjudged to be a mortgage securing payment of the obligation evidenced by the promissory note attached as Exhibit A;

2. [*Set out remainder of prayer as in foreclosure action. See § 555.160[1]*].

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 555.120[1].*]

[2] Use of Form

This form is a complaint for use by a mortgagee as the grantee of a deed absolute, to establish that the deed is in fact a mortgage [*Civ. Code §§ 2924(a), 2925*] and then to foreclose the mortgage [*Code Civ. Proc. § 726(a)*; *see § 555.22[5][b]*]. This form may be modified by including, as appropriate, additional allegations set forth in a usual complaint for foreclosure, such as allegations necessary for recovery of a deficiency judgment or for naming junior lienholders as defendants [*see § 555.160*; *see also § 555.163* (foreclosure decree)].

For a complaint by a mortgagor to establish a deed as a mortgage and to quiet title, see *§ 555.125*.

[3] Allegations

This complaint includes the following allegations, which are essential to state a cause of action to establish a deed absolute on its face as a mortgage for the purpose of foreclosing the mortgage [*Civ. Code §§ 2924(a), 2925*; *Code Civ. Proc. § 726(a)*]:

- A debt (Paragraph 3);

- Execution of a deed solely for the purpose of securing the debt and serving as a mortgage (Paragraph 4);

- The mortgagor's default under the terms of the secured obligation, entitling the mortgagee to foreclosure (Paragraph 5).

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48-555 California Forms of Pleading and Practice--Annotated § 555.128

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§ 555.128 Complaint to Establish and Foreclose Equitable Mortgage on Real Property [Code Civ. Proc. § 726(a)]

[1] FORM Complaint to Establish and Foreclose Equitable Mortgage on Real Property [Code Civ. Proc. § 726(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT TO FORECLOSE UNDER EQUIT-
Defendant.	)	ABLE MORTGAGE
	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of plaintiff. See § 555.120[1], Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 555.125[1], Paragraph 2.*]

3. [*Making of promissory note. See § 555.126[1], Paragraph 3.*]

4. _____ [*Allege instrument intended to secure debt, e.g.,* On the same day, and as part of the same transaction, defendant executed and delivered to plaintiff an agreement to provide certain real property then owned by defendant as security for payment of the note, by naming plaintiff as beneficiary in a trust deed to be executed and delivered for that purpose. By the terms of this agreement, the real property to be provided as security is located in _____ County, California, and is described as follows: _____ (*legal description and street address or common designation, if any*). A copy of this agreement is attached as Exhibit B and incorporated by reference].

5. Defendant has defaulted under the terms of the note in that _____ [*specify default, e.g.,* she has failed and refused, and continues to fail and refuse, to make payments of $_____, principal and interest, due on _____ (*date*), and subsequent months, to and including _____ (*date*), and amounting to $_____]. _____ [*Allege failure to execute formal security instrument, e.g.,* Further, Defendant has failed to execute and deliver the trust deed mentioned above].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. That the real property described above be decreed to be subject to an equitable mortgage in favor of plaintiff, to the extent of $_____.

2. [*Set out remainder of prayer as in foreclosure action. See § 555.160[1]*].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 555.120[1].*]

[2] Use of Form

This form is a complaint for use by a creditor to establish a written agreement as an equitable mortgage [*see, e.g., Higgins v. Manson (1899) 126 Cal. 467, 469-470, 58 P. 907* ; *Schelling v. Thomas (1929) 96 Cal. App. 682, 684, 687-688, 274 P. 755* (written promise to give mortgage or trust deed held enforceable as equitable mortgage)] and then to foreclose the mortgage [*Code Civ. Proc. § 726(a)*]. For further discussion, see *§ 555.23*. For a related form of judgment, see *§ 555.129*.

This form may be modified by including, as appropriate, additional allegations set forth in a usual complaint for foreclosure, such as allegations necessary for recovery of a deficiency judgment or for naming junior lienholders as defendants [*see § 555.160*; *see also § 555.163* (foreclosure decree)].

An executory agreement in writing, in which a debtor sufficiently indicates the intent to make certain real property security for the debt, is deemed in equity to create an enforceable mortgage on that property except as against good faith purchasers or lienholders [*Kaiser Industries Corp. v. Taylor (1971) 17 Cal. App. 3d 346, 351, 94 Cal. Rptr. 773]* .

[3] Allegations

This complaint includes the following allegations, which are essential to state a cause of action to establish a writing as an equitable mortgage for the purpose of foreclosing the mortgage [*Code Civ. Proc. § 726*; *see Coast Bank v. Minderhout (1964) 61 Cal. 2d 311, 313-314, 38 Cal. Rptr. 505, 392 P.2d 265* (overruled on other grounds in

Wellenkamp v. Bank of America (1978) 21 Cal. 3d 943, 953, 148 Cal. Rptr. 379, 582 P.2d 970); *Civ. Code §§ 2924(a), 2925*]:

- A debt owed to the plaintiff (Paragraph 3).

- The creation of an instrument that evidences the parties' intent that certain real property should be provided as security for the debt (Paragraph 4).

- A default under the terms of the secured obligation, entitling the plaintiff to foreclosure (Paragraph 5).

[4] Cross References

For further discussion and forms relating to impression and foreclosure of equitable liens on real property, see *Ch. 342, Liens and Wage Preferences*

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§ 555.129 Judgment Establishing and Foreclosing Equitable Mortgage [Code Civ. Proc. § 726(a)]

[1] FORM Judgment Establishing and Foreclosing Equitable Mortgage [Code Civ. Proc. § 726(a)]

[*Caption and recitals. See § 555.126[1].*]

IT IS ORDERED, ADJUDGED, AND DECREED that:

1. The real property subject to this decree is located at _____ [*street address or common designation, if any*] in _____ County, California, and is described as follows: _____ [*legal description*].

2. The above-described real property is subject to an equitable mortgage that constitutes a lien in favor of _____ [*name of plaintiff*] to the extent of $_____, together with interest thereon at the rate of _____ percent per annum from and after _____ [*date*] until paid.

3. [*Set out remainder of judgment as in foreclosure action. See § 555.163[1]*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is a form of judgment for use by the plaintiff in an action to establish and foreclose an equitable mortgage. For a related complaint and discussion of such an action, see *§ 555.128*.

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[Reserved]

§§ 555.130[Reserved]

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3. Trustee's Status and Obligations in General

48-555 California Forms of Pleading and Practice--Annotated § 555.135

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§ 555.135 Declaration of Trustee's Nonmonetary Status [Civ. Code § 2924 *l*]

[1] FORM Declaration of Trustee's Nonmonetary Status [Civ. Code § 2924 ***l***]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	DECLARATION OF TRUSTEE'S NONMONET-
Defendant.	)	ARY STATUS
	)	
	)	

_____

I, _____ [*name*], declare:

1. I am the trustee under a trust deed dated _____, executed by _____ [*name*] as _____ [*trustor*] to _____ [me *or name of original trustee*] as trustee for _____ [*name*] as beneficiary, recorded _____ [*date*] in _____ County, California, at book _____, page _____. That trust deed is the subject of this _____ [action *or* proceeding].

2. I _____ [know *or* maintain a reasonable belief] that I have been named as a defendant in this _____ [action *or* proceeding] solely in my capacity as trustee under the trust deed. Further, it is my reasonable belief that I have not been named as a defendant because of any acts or omissions on my part in the performance of my duties as trustee. The following is the basis for this [knowledge and] belief: _____ [*specify, e.g.,* the action is a judicial foreclosure action by the beneficiary, and the beneficiary has acknowledged to me that I have been named simply as a nominal defendant and that the beneficiary is not seeking any monetary or other relief against me].

4. I agree to be bound by whatever order or judgment is issued by the court regarding the trust deed.

5. This declaration is made pursuant to *Civil Code Section 2924l*.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form is a declaration for use by a trustee under a trust deed when the trustee has been named in an action or proceeding in which the trust deed is the subject, and the trustee maintains a reasonable belief that the trustee has been named in the action or proceeding solely in the capacity of trustee and not as a result of any wrongful acts or omissions in the performance of duties as trustee. The trustee may file the declaration at any time [*Civ. Code § 2924 l*(a)].

For purposes of *Civ. Code § 2924l*, "trustee" includes any agent or employee of the trustee who performs some or all of the duties of a trustee under *Civ. Code § 2920 et seq.* [*Civ. Code § 2924 l(g)*].

[3] Contents

The declaration must set forth the following [*Civ. Code § 2924 l*(*b)*]:

- The status of the declarant as trustee under the trust deed that is the subject of the action or proceeding.

- That the declarant knows or maintains a reasonable belief that the declarant has been named as a defendant solely in the capacity of trustee under the trust deed.

- That the declarant maintains a reasonable belief that the declarant has not been named as a defendant because of any acts or omissions in the performance of duties as trustee.

- The basis for that knowledge or reasonable belief.

- That the declarant agrees to be bound by whatever order or judgment is issued by the court regarding the trust deed.

[4] Service; Objections; Subsequent Demand to Participate

The declaration must be served on the parties in the manner of serving papers in civil actions generally [*Civ. Code § 2924 l(a)*; *see Code Civ. Proc. § 1010 et seq.*; *see also* Ch. 518, *Service of Summons and Papers*]. The parties who have appeared in the action or proceeding will have 15 days from the service of the declaration in which to object to the

trustee's nonmonetary judgment status. Any objection must set forth the factual basis for the objection and be served on the trustee [*Civ. Code § 2924 l(c)*].

If a timely objection is made, the trustee will thereafter be required to participate in the action or proceeding [*Civ. Code § 2924 l(e)*]. Otherwise, the trustee will not be required to participate any further in the action or proceeding, will not be subject to any monetary awards for damages, attorneys' fees, or costs, will be allowed to respond to any discovery requests as a nonparty, and will be bound by any court order relating to the trust deed [*Civ. Code § 2924 l(d)*].

If the parties do not duly object to the declaration but later, through discovery or otherwise, determine that the trustee should participate in the action because of the performance of duties as a trustee, the parties may file and serve on all parties and the trustee a motion to require the trustee to participate. The motion must be brought pursuant to *Code Civ. Proc. § 473* (governing certain amendments to pleadings that may be allowed in the court's discretion) and specify the factual basis for the demand to participate [for coverage of *Code Civ. Proc. § 473*, *see* Ch. 21, *Amended and Supplemental Pleadings*]. On the court's granting of the motion, the trustee will thereafter be required to participate in the action or proceeding [*Civ. Code § 2924 l(e)*].

[5] Filing of Answer

On the filing of the declaration, the time within which the trustee must file an answer or other responsive pleading will be tolled for the period within which the other parties may respond to the declaration. On the timely service of an objection to the declaration, the trustee will have 30 days from the date of service within which to file an answer or other responsive pleading to the complaint or cross-complaint [*Civ. Code § 2924 l(f)*].

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§ 555.136 Statutory Substitution of Trustee [Civ. Code § 2934a]--By All Beneficiaries

[1] FORM Statutory Substitution of Trustee [Civ. Code § 2934a]--By All Beneficiaries

	)
Recording requested by	)
_____ [*name*]	)
When recorded mail to	)
_____ [*name*]	)
_____ [*address*]	)
_____ [*city, state, zip*]	)
	)

_____

_____

Space above this line for recorder's use

SUBSTITUTION OF TRUSTEE

The undersigned hereby substitutes _____ [*name*] as trustee in place of _____ [*name*

], the trustee now of record, under that certain trust deed executed by _____ [*name*] as trustor to _____ [*name*] as trustee for _____ [*name*], as beneficiary, recorded _____ [*date*] in _____ County, California at book _____, page _____.

_____ [*signature*]
_____ [*typed name*]
Beneficiary

ACKNOWLEDGMENT

	)	
State of California,	)	ss.
County of _____.	)	

On _____ [*date*] before me, _____ [*name and title of officer*], personally appeared _____ [*name(s)*], who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument, and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity/capacities, and that by his/her/their signature(s) on the instrument the person(s), or the entity on behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: _____ (Seal)
Name of Office: _____

[2] Use of Form

The form in [1], *above*, is for use by the sole beneficiary or all beneficiaries of a trust deed to substitute a new trustee in place of the trustee of record [*see Civ. Code § 2934a(a)(1)(A)*]. This form may be modified to substitute the trustee in multiple trust deeds that are recorded in the same county in which the substitution is being recorded and that all have the same trustee and beneficiary or beneficiaries [*see Civ. Code § 2934a(a)(4)*].

[3] Alternative Statutory Methods

Civ. Code § 2934a provides two alternative methods for substituting a trustee who is acting under a trust deed on real property or an estate for years in real property that (1) was given to secure an obligation to pay money, and (2) confers no duties on the trustee other than those that are incidental to the exercise of the power of sale conferred in the trust deed [*Civ. Code § 2934a(a)(1)*]. Both methods require the recordation of a substitution statement in the county in which the property is located. Under the first method, the substitution (this form) must be executed and acknowledged by all of the beneficiaries of the trust deed, or their successors in interest. The substitution will be effective notwithstanding any contrary provision in the trust deed, provided the trust deed was executed after 1967 [*Civ. Code § 2934a(a)(1)(A)*]. For

a form of substitution under the second method, see *§ 555.137*.

Under either statutory method, the instrument of substitution must include the date of recordation of the trust deed, the name of the trustor, the book and page or instrument number where the trust deed is recorded, and the name of the new trustee [*Civ. Code § 2934a(a)(4)*]. A substitution may be accomplished, with respect to multiple trust deeds that are recorded in the same county in which the substitution is being recorded and that all have the same trustee and beneficiary or beneficiaries, by recording a single document that complies with the requirements and substitutes trustees for all of the trust deeds [*Civ. Code § 2934a(a)(4)*].

From the time the substitution is filed for record, the new trustee succeeds to all of the powers, duties, authority, and title granted and delegated to the trustee named in the trust deed [*Civ. Code § 2934a(a)(4)*].

[4] Notice Requirements

If a substitution document is executed, but not recorded, before or concurrently with the recording of the notice of default, the beneficiary or beneficiaries or their authorized agents must cause notice of the substitution to be mailed, before or concurrently with the recording of the substitution document, to all persons to whom a copy of the notice of default wouldbe required to be mailed [*Civ. Code § 2934a(b)*]. If the substitution is effected after a notice of default has been recorded but before the recording of the notice of sale, the beneficiary or beneficiaries or their authorized agents must cause a copy of the substitution document to be mailed, before or concurrently with the recording of that document, to the trustee then of record and to all persons to whom a copy of the notice of default would be required to be mailed [*Civ. Code § 2934a(c)*]. An affidavit must be attached to the substitution document, stating that notice has been given to the persons and in the manner required [*Civ. Code § 2934a(b), (c)*; *see Civ. Code § 2924b* (requirements for mailing)].

A trustee named in a recorded substitution document must be deemed to be authorized to act as the trustee under the mortgage or deed of trust for all purposes from the date the substitution document is executed by the mortgagee, beneficiaries, or by their authorized agents. Nothing in *Civ. Code § 2934a* requires that a trustee under a recorded substitution document accept the substitution. Once recorded, the substitution document constitutes conclusive evidence of the authority of the substituted trustee or his or her agents to act [*Civ. Code § 2934a(d)*].

Unless a new notice of sale containing the name, street address, and telephone number of the substituted trustee is given in accordance with *Civ. Code § 2924f* after execution of the substitution document, any sale conducted by the substituted trustee will be void [*Civ. Code § 2934a(e)*].

[5] Format Requirements

The document must meet format requirements prescribed for recordable documents (for instance, a half-inch margin on each vertical side and the top 2.5 inches of the first page left blank for recording information) [*see Gov. Code § 27361.6*]. For discussion, see California Legal Forms, Ch. 27, *Deeds and Recording* (Matthew Bender).

[6] Cross References

For discussion and alternative forms of acknowledgments, see Ch. 9, *Acknowledgments*

For additional forms of declarations and affidavits, which may be modified, see Ch. 15, *Affidavits, Certificates, and Declarations* , and Ch. 518, *Service of Summons and Papers*

For a form of declaration of mailing, see California Legal Forms, Ch. 25C, *Release and Reconveyance* (Matthew Bender)

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§ 555.137 Statement by Beneficiaries Holding More Than 50 Percent of Specified Interests [Civ. Code § 2934a(a)(1)(B), (2)]

[1] FORM Statement by Beneficiaries Holding More Than 50 Percent of Specified Interests [Civ. Code § 2934a(a)(1)(B), (2)]

[*Recording information. See § 555.136[1].*]

STATEMENT BY PARTIES SIGNING SUBSTITUTION OF TRUSTEE

The undersigned, the beneficiaries who executed the Substitution of Trustee to which this statement is attached (the "Substitution of Trustee"), hereby assert the following.

(1) The Substitution of Trustee was signed pursuant to *Civil Code Section 2934a(a)(1)(B)*.

(2) None of the undersigned is a licensed real estate broker or an affiliate of the broker that is the issuer or servicer of the obligation secured by the trust deed ("Deed of Trust") described in the Substitution of Trustee.

(3) The undersigned together hold more than 50 percent of _____ [the record beneficial interest of a series of notes secured by the same real property securing the Deed of Trust *or* the undivided interests in a note secured by real property equivalent to a series transaction].

(4) Notice of the substitution was sent by certified mail, postage prepaid, with return receipt requested, to each holder of an interest in the obligation secured by the Deed of Trust identified in the Substitution of Trustee who has not joined in the execution of the Substitution of Trustee or this statement.

We, the undersigned, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*signature*]
_____ [*typed name*]
Beneficiary
_____ [*signature*]
_____ [*typed name*]
Beneficiary

[*Acknowledgment. See § 555.136[1].*]

[2] Use of Form

The form in [1], *above*, is a separate statement that may be used in connection with a form of substitution of the trustee [*see § 555.136[1]*] when the substitution is effected by the holders of more than 50 percent of the record beneficial interest of a series of notes secured by the same real property securing the trust deed or of undivided interests in a note secured by real property equivalent to a series transaction [*Civ. Code § 2934a(a)(1)*].

A substitution executed under this method is not effective unless all of the parties signing the substitution also sign, under penalty of perjury, a separate written document (this form) containing certain specified statements regarding compliance with the applicable statutory requirements [*see Civ. Code § 2934a(a)(2)*]. This separate document must be attached to the substitution and must be recorded in each county in which the real property described in the trust deed is located. Once this separate document is recorded, it constitutes conclusive evidence of compliance with these statutory requirements in favor of substituted trustees acting pursuant to *Civ. Code § 2934a*, subsequent assignees of the obligation secured by the trust deed, and subsequent good faith purchasers or lienholders for value of the described real property [*Civ. Code § 2934a(a)(2)*].

For additional discussion, see *§ 555.136[3]* and *[4]*.

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART IV. FORMS
A. General Forms
4. Protections for Military Service Members

48-555 California Forms of Pleading and Practice--Annotated § 555.138

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§ 555.138 Petition for Stay of Foreclosure Proceedings and Relief From Installment Contract or Mortgage, Trust Deed, or Other Security in Nature of a Mortgage on Real Property for Purchase of Real Property by Active Service Member [Mil. & Vet. Code §§ 407(a), (b), 408; 50 U.S.C. App. §§ 532, 533]

[1] FORM Petition for Stay of Foreclosure Proceedings and Relief From Installment Contract or Mortgage, Trust Deed, or Other Security in Nature of a Mortgage on Real Property for Purchase of Real Property by Active Service Member [Mil. & Vet. Code §§ 407(a), (b), 408; 50 U.S.C. App. §§ 531, 532]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	PETITION BY ACTIVE
_____ [*name*],	)	SERVICE MEMBER FOR
Petitioner,	)	STAY OF FORECLOSURE
vs.	)	PROCEEDINGS AND
_____ [*name(s)*],	)	OTHER APPROPRIATE
Respondent(s)	)	RELIEF WITH REGARD
	)	TO _____
	)	INSTALLMENT *or* MORTGAGE]
	)	PAYMENTS
	)	

_____

1. Petitioner _____ [*name*] is currently an active member of the military service of the United States, being a member of _____ [*describe service, rank, and position*].

2. Respondent _____ [*name*] is a _____ [*describe, e.g.,* lending institution doing business in California].

3. Before entry into activity military service, Petitioner executed _____ [*describe and attach as exhibit to petition, e.g.,* an installment loan agreement, a copy of which is attached as Exhibit _____ (*e.g.,* A) to this Petition] with Respondent for a loan to purchase real property located at _____ [*address of property*], with the loan to be secured by _____ [*specify, e.g.,* a mortgage *or* a deed of trust] on that property and with payments on the loan to be made under the terms of the agreement.

4. Petitioner now finds that, because of active military service, he/she is unable to keep up with the payments required by the agreement with Respondent described in Paragraph 3, above. As a result, Respondent began foreclosure proceedings against the Petitioner on _____ [*date*], by serving the notice attached as Exhibit _____ [*e.g.,* B] to this document. The details of why Petitioner's military service interferes with his/her ability to keep up with the loan are as follows: _____ [*describe*].

5. Petitioner requests the Court to provide relief from the agreement described in Paragraph 3, and set out in full as Exhibit _____ [*e.g.,* A] to this Petition, under the authority granted to the Court by the *California Military & Veterans Code Sections 407, 408*, and by the federal Servicemembers Civil Relief Act at *50 United States Code Appendix Sections 532, 533*. In addition to the stay of foreclosure proceedings, Petitioner seeks the following relief from the Court: _____ [*describe desired action in as great as detail as possible, including suggested time for relief and subsequent resumption of payments.*]

_____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[2] Use of Form

The form in [1], *above*, is a petition for stay of foreclosure proceedings and related relief with regard to an installment contract or mortgage for the purchase of real property. It may be filed with the court by an active member of the United States military who otherwise meets the requirements for this type of relief with regard to an installment contract or mortgage, trust deed, or other security in the nature of a mortgage on real property. The form provides the court with information on the key elements that must be satisfied for the court to have authority to modify the terms of the installment or mortgage loan agreement and to provide relief for the active service member [*Mil. & Vet. Code §§ 407(a), (b), 408*; *50 U.S.C. App. §§ 532, 533*; *see* [3], *below*].

[3] Court's Authority to Provide Relief for Active Military Service Members Under State and Federal Law

A court has extensive latitude in handling claims against a person who has joined military service after the date when he or she has given a deposit or paid an installment of the purchase price under a contract for the purchase of real or personal property, or purchased property secured by a mortgage, deed of trust, or other similar security [*Mil. & Vet. Code §§ 407, 408*; *50 U.S.C. App. §§ 532, 533*].

With regard to proceedings to enforce mortgages and similar obligations of active service members, on application to the court by an active service member (or another person on the service member's behalf) or on the court's own motion, the court must stay the proceedings and take any other action to conserve the interest of all the parties if it finds that the

ability of the defendant to comply with the terms of the obligation is materially affected by reason of the member's military service [*Mil. & Vet. Code § 408(b)*; *see 50 U.S.C. App. § 533(b)*]. This applies to proceedings arising out of nonpayment of any sum due or out of any other breach of the terms of the mortgage commenced in any court during the period of military service to enforce the obligation. It covers obligations secured by a mortgage, trust deed, or other security in the nature of a mortgage on real property owned by a service member at the commencement of the period of the military service, and still owned by the service member whose obligations originated before the person's period of military service [*Mil. & Vet. Code § 408(a), (b)*; *see 50 U.S.C. App. § 533(a), (b)*].

An active service member is otherwise protected from foreclosure and similar actions. To be valid, any sale, foreclosure, or seizure of property for nonpayment of any sum due under any obligation, or for any other breach of the terms made during the member's period of military service or within three months thereafter (or 90 days under the federal law), except pursuant to an agreement between the parties, may only take place on an order previously granted by the court and a return made and approved by the court [*Mil. & Vet. Code § 408(c)*; *see 50 U.S.C. App. § 533(c)*]. This is applicable to actions taken under a power of sale, a judgment entered on warrant of attorney to confess judgment contained in the warrant, or otherwise [*Mil. & Vet. Code § 408(c)*; *see 50 U.S.C. App. § 533(c)*]. Any person who knowingly makes or causes to be made any invalid sale, foreclosure, or seizure of property, or attempts to do so, is guilty of a misdemeanor [*Mil. & Vet. Code § 408(d)*; *see 50 U.S.C. App. § 533(d)(1)*].

Similarly, with regard to installment contracts to purchase real property, the court may use its discretion, and on its own motion make any other disposition of the case as may be equitable to conserve the interests of all parties [*Mil. & Vet. Code § 407(b)*; *see 50 U.S.C. App. § 532(c)*]. If the court finds that terminating the contract and allowing the lender to resume possession of the property is an appropriate form of relief, the court may order the repayment of prior installments or deposits or any part of those as a condition of that relief [*Mil. & Vet. Code § 407(b)*; *see 50 U.S.C. App. § 532(c)(1)*]. A service member who meets the requirements for relief is protected by the law from any other actions from the lender or another party. Only by action of a court of competent jurisdiction may the selling party attempt to exercise any right or option under the contract to rescind or terminate the contract or resume possession of the property for nonpayment of any installment due, or for any other breach of its terms occurring before or during the period of the person's military service [*Mil. & Vet. Code § 407(a)*; *see 50 U.S.C. App. § 532(a)* (installment contract may not be rescinded or terminated without court order)]. A lender or seller who knowingly resumes possession of the subject property, or attempts to do so, is guilty of a misdemeanor [*Mil. & Vet. Code § 407(c)*; *see 50 U.S.C. App. § 532(b)(1)*].

For a general discussion of protection from foreclosure and other similar types of relief for active service members, see *§ 555.70[8]*.

[4] Jurisdiction and Venue

Jurisdiction under California law is in the superior court of the county in which the property is located [Code Civ. Proc. §§ 760.40, 760.50]. Jurisdiction is also granted by the federal Servicemembers Civil Relief Act (SCRA) [*50 U.S.C. App. § 501 et seq.*], which applies to any noncriminal proceedings commenced in any court in the United States, the individual states and territories, the District of Columbia, and all territory subject to the jurisdiction of the United States [*50 U.S.C. App. § 512(a), (b)*]. Under the SCRA, appropriate courts include any court of competent jurisdiction in the United States or any state, whether or not it is a court of record [*50 U.S.C. App. § 511(5)*]. Any application under SCRA that is required to be made to a court in which no proceeding has commenced may be made to any court that would otherwise have jurisdiction over the matter [*50 U.S.C. App. § 512(c)*].

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48-555 California Forms of Pleading and Practice--Annotated § 555.139

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§ 555.139 Application for Stay in Response to Attempt to Collect Real Property Taxes or Assessments on Property Owned by Active Service Member [Mil. & Vet. Code § 409.2; 50 U.S.C. App. § 561]

[1] FORM Application for Stay in Response to Attempt to Collect Real Property Taxes or Assessments on Property Owned by Active Service Member [Mil. & Vet. Code § 411; 50 U.S.C. App. § 560]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Petitioner,	)	APPLICATION FOR STAY
vs.	)	OF PROCEEDINGS TO
_____ [*name(s)*],	)	COLLECT REAL PROPERTY
Respondent(s)	)	TAXES OR ASSESSMENTS
	)	FROM ACTIVE SERVICE MEMBER
	)	

_____

1. Petitioner _____ [*name*] is currently an active member of the military service of the United States, being a member of _____ [*describe service, rank, and position*].

2. Respondent _____ [*name*] is a _____ [*name of taxing entity, e.g.,* the Tax Collector for Contra Costa County California].

3. Before entry into activity military service, Petitioner purchased residential real property at _____ [*specify address of real property*], described in the records of _____ [*name of taxing entity*] as Parcel Number _____.

4. The property taxes now due on the property described in Paragraph 3 are as follows: _____ [*described in detail, including current assessments and passed due taxes*]. All relevant documents received from _____ [*name of taxing entity*] are attached as Exhibit _____. Therefore, a total amount of $_____ is now owed by Petitioner to _____ [*name of taxing entity*].

5. Petitioner now finds that, because of active military service, he/she is unable to pay the amount of taxes owed on the property, as described above. The details of why Petitioner's military service interferes with his/her ability to keep up with the loan is as follows: _____ [*describe in detail*].

6. Petitioner requests the Court to provide relief from the property taxes described above, and as set out in full in the attached Exhibit _____ to this Petition, under the authority granted by the *California Military & Veterans Code Section 407*, and by the federal Servicemembers Civil Relief Act at *50 United States Code Appendix Section 561*. Petitioner seeks the following relief from the Court: _____ [*describe desired action such as suspension of tax payments until end of active military service, and any other type of relief desired*.]

_____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[2] Use of Form

The form in [1], *above*, is an application for a stay of proceedings that may be used in response to an attempt by a taxing entity to collect taxes or assessments on real property of active service members who otherwise meet the requirements for preferential treatment under California or federal law [*see* [3], *below*]. The petition provides the court with information on the key elements that must be satisfied for the court to have authority to provide this relief for an active service member.

[3] Court's Authority to Provide Relief for Active Military Service Members Under State and Federal Law

An active service member may seek protection in response to an attempt by a taxing entity to collect any general or special property taxes or assessments that fall due before or during a service members period of military service and are not paid. This applies to taxes on real property owned and occupied for dwelling, professional, business, or agricultural purposes by a service member or his or her dependents at the commencement of the member's period of military service and still so occupied by the service member's dependents or employees [*Mil. & Vet. Code § 409.2(a)*; *see 50 U.S.C. App. § 561(a)* (also applies to taxes on personal property, money, or credits, but not to taxes on income)]. The property may not be sold to enforce the collection of any tax or assessment, or any proceeding or action commenced for that purpose, except on leave of court granted on application by the collector of taxes or other officer whose duty it is to enforce the collection of taxes or assessments. The court may then stay the proceedings or sale for a period extending not more than six months after the member's termination of military service (180 days under the federal statute), unless the court finds that the ability of the service member to pay the taxes or assessments is not materially affected by reason of his or her military service [*Mil. & Vet. Code § 409.2(b)*; *see 50 U.S.C. App. § 561(b)*]. The unpaid tax or assessment will bear interest until paid at the rate of 6 percent per year. No other penalty or interest may be incurred by reason of the nonpayment. Any lien for any unpaid taxes or assessment must also include 6 percent interest on the lien [*Mil. & Vet. Code § 409.2(d)*; *50 U.S.C. App. § 561(d)*].

If by law the service member's property may be sold or forfeited to enforce the collection of any tax or assessment, the service member has the right to redeem or commence an action to redeem that property, at any time not later than six months (180 days under the federal statute) after the termination of the period of military service [*Mil. & Vet. Code § 409.2(c)*; *50 U.S.C. App. § 561(c)*].

For a general discussion of protection from foreclosure and other similar types of relief for active service members, see *§ 555.70[8]*.

[4] Jurisdiction and Venue

Jurisdiction under California law is in the superior court of the county in which the property is located [Code Civ. Proc. §§ 760.40, 760.50]. Jurisdiction is also granted by the federal Servicemembers Civil Relief Act (SCRA) [*50 U.S.C. App. § 501 et seq.*], which applies to any noncriminal proceedings commenced in any court in the United States, the individual states and territories, the District of Columbia, and all territory subject to the jurisdiction of the United States [*50 U.S.C. App. § 512(a), (b)*]. Under the SCRA, appropriate courts include any court of competent jurisdiction in the United States or any state, whether or not it is a court of record [*50 U.S.C. App. § 511(5)*]. Any application under SCRA that is required to be made to a court in which no proceeding has commenced may be made to any court that would otherwise have jurisdiction over the matter [*50 U.S.C. App. § 512(c)*].

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§ 555.139A Order for Stay of Foreclosure Proceedings and Remedy of Court in Relation to Obligation Secured by Mortgage, Trust Deed, or Other Security in Nature of a Mortgage on Real Property for Active Service Member [Mil. & Vet. Code §§ 407, 408; 50 U.S.C. App. §§ 532, 533]

[1] FORM Order for Stay of Foreclosure Proceedings and Remedy of Court in Relation to Obligation Secured by Mortgage, Trust Deed, or Other Security in Nature of a Mortgage on Real Property for Active Service Member [Mil. & Vet. Code §§ 407, 408; 50 U.S.C. App. §§ 531, 532]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO _____
vs.	)	ORDER STAYING FORECLOSURE
_____ [*name(s)*],	)	PROCEEDINGS AND PROVIDING
Respondent(s).	)	RELATED RELIEF FOR ACTIVE
	)	SERVICE MEMBER
	)	

This action came on regularly for hearing and trial on _____ [*date*] in [_____ (Department *or* Division) _____ of] the above entitled court, the Honorable _____ [*name*], Judge, presiding, sitting without a jury. Petitioner appeared by _____ [(*name*), *counsel or designate other representative or that Petitioner appeared alone before the Court*], and Respondent appeared by

_____ [*specify name and official position with Respondent company*]. The Petition was argued and submitted for decision. A statement of decision _____ [has been made and filed *or* was not requested].

IT IS ORDERED, ADJUDGED, AND DECREED that:

1. Petitioner _____ [*name*] is currently an active member of the military service of the United States, being a member of _____ [*describe service, rank, and position*].

2. Respondent _____ is a _____ [*describe, e.g.,* lending institution doing business in California].

3. Before entry into activity military service, Petitioner entered _____ [*describe and attach as exhibit, e.g.,* an installment loan agreement, a copy of which is attached as Exhibit _____ to the Petition] with Respondent for a loan to purchase real property located at _____ [*address of property*], with the loan to be secured by that property according to the terms of the agreement, and with payments on the loan to be made under the terms of the agreement.

4. By the power granted to it under *Military & Veterans Code Section 408* and *50 United States Code Appendix Section 533*], the court has fashioned this remedy:

[*Describe court's orders and remedies, e.g.,* The Court orders a stay of all foreclosure proceedings and collection activities by the Respondent with regard to the aforementioned remedy, and that both parties now proceed with regard to the _____ [*specify instrument, e.g.,* mortgage *or* deed of trust] under the follow terms and time line: _____ (*specify*)].

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is an order staying an action on an obligation secured by a mortgage, trust deed, or similar security, which may be combined with other related court-ordered remedies. It may be issued by an appropriate court [*see* [4], *below*] providing remedies available to the court to assist active military service members who otherwise meet the requirements for protection under California and federal law [*see* [3], *below*]. For a petition seeking appropriate relief for an active service member from actions based on mortgages or similar arrangements, including a stay of action, see *§ 555.138[1]*.

[3] Protections for Active Military Service Members Under State and Federal Law

A court has extensive latitude in handling claims against a person who has joined military service after the date when he or she has given a deposit or paid an installment of the purchase price under a contract for the purchase of real or personal property, or purchased property secured by a mortgage, deed of trust, or other similar security [*Mil. & Vet. Code §§ 407, 408*; *50 U.S.C. App. §§ 532, 533*]. For discussion of this authority, see *§ 555.138[3]*.

[4] Jurisdiction and Venue

Jurisdiction under California law is in the superior court of the county in which the property is located [Code Civ. Proc. §§ 760.40, 760.50]. Jurisdiction is also granted by the federal Servicemembers Civil Relief Act (SCRA) [*50 U.S.C. App. § 501 et seq.*], which applies to any noncriminal proceedings commenced in any court in the United States, the individual states and territories, the District of Columbia, and all territory subject to the jurisdiction of the United States [*50 U.S.C. App. § 512(a), (b)*]. Under the SCRA, appropriate courts include any court of competent jurisdiction in the

United States or any state, whether or not it is a court of record [*50 U.S.C. App. § 511(5)*]. Any application under SCRA that is required to be made to a court in which no proceeding has commenced may be made to any court that would otherwise have jurisdiction over the matter [*50 U.S.C. App. § 512(c)*].

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§ 555.140 Declaration of Trustor's Nonmilitary Service [50 U.S.C. App. § 533(c)]

[1] FORM Declaration of Trustor's Nonmilitary Service [50 U.S.C. App. § 532(3)]

DECLARATION OF TRUSTOR'S NONMILITARY SERVICE

I, _____ [*name*], declare:

1. I am _____ [*set forth capacity or status of affiant, e.g.,* and at all times mentioned was, the beneficiary under a trust deed executed by _____ (*name*) as _____ trustor to _____ (*name*) as _____ trustee for _____ (*name*) as beneficiary and recorded _____ (*date*), in _____ County, California, at book _____, page _____].

2. _____ [I have personally known _____ (*name of trustor*) since _____ (*date*) *or* I personally do not know _____ (*name of trustor*)]. He/she presently resides at _____ [*address*] and has resided at this address since _____ [*date*]. He/she is employed by _____ [*name*] at _____ [*address*] and has been so employed since _____ [*date*]. He/she _____ [*set forth all other factors, such as age, physical disability, or discharge, tending to show that trustor is not in military service, and has not been in military service within preceding 90 days, e.g.,* is presently 55 years of age]. I know that he/she is not in military service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is a declaration for use by a beneficiary to submit to the trustee of a trust deed as proof that the trustor is not, and has not been within the preceding 90 days, on active military service. A trustee will usually require this proof before proceeding with a trustee's sale, because a trustor's status as a active member of the armed forces may preclude foreclosure in the absence of a court order [*see 50 U.S.C. App. § 533(a), (c)*]. For discussion of the special protections given to active military service members, see *§ 555.70[8]*, and for discussion and forms, see §§ 555.138-555.139A. See also *§ 555.33[2]* for discussion of the effects of federal protections under the Servicemembers Civil Relief Act on judicial and nonjudicial foreclosure.

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§ 555.141 Request for Copy of Notice of Default and Copy of Notice of Sale [Civ. Code § 2924b(a)]

[1] FORM Request for Copy of Notice of Default and Copy of Notice of Sale [Civ. Code § 2924b(a)]

[*Recording information. See § 555.136[1].*]

REQUEST FOR COPIES OF NOTICE OF DEFAULT AND NOTICE OF SALE

In accordance with *Civil Code Section 2924b*, request is hereby made that a copy of any notice of default and a copy of any notice of sale under the _____ [trust deed *or* mortgage] recorded _____ [*date*], _____ [in book _____ at page _____ in the records of *or* filed for record with recorder's serial number _____ in] _____ County, California, executed by _____ [*name*] as _____ [trustor *or* mortgagor] in which _____ [*name*] is named as _____ [beneficiary *or* mortgagee] [and _____ (*name*) is named as trustee], be mailed to _____ [*name*] at _____ [*address*].

NOTICE: A copy of any notice of default and of any notice of sale will be sent only to the address contained in this recorded request. If your address changes, a new request must be recorded.

_____ [*signature*]
_____ [*typed name*]

ACKNOWLEDGMENT

	)	
State of California,	)	ss.
County of _____.	)	

_____

On _____ [*date*] before me, _____ [*name and title of officer*], personally appeared _____ [*name(s)*], who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument, and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity/capacities, and that by his/her/their signature(s) on the instrument the person(s), or the entity on behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature: _____ (Seal)
Name of Office: _____

[2] Use of Form

The form in [1], *above*, may be used by any person to request a copy of any notice of default or notice of sale that is given in a nonjudicial foreclosure proceeding under a specified trust deed or mortgage [*Civ. Code § 2924b(a)*; *see §§ 555.52[2], [3][a], 555.56[3]*]. Printed forms of request for copies of notice of default and notice of sale may be obtained from most title insurance companies.

A title insurance company was liable to a junior lienholder in an action for negligent loss of security based on the company's failure to record a request for notice of default and notice of sale [*Howe v. City Title Ins. Co. (1967) 255 Cal. App. 2d 85, 86-87, 63 Cal. Rptr. 119]* .

[3] Contents, Acknowledgment, and Recordation of Request

A request for copies of a notice of default and notice of sale must be substantially the same as this form. It must (1) specify the name and address of the person to whom the notice is to be mailed, and (2) identify the trust deed or mortgage by stating the names of the parties, the recordation date, and the book and page in which it is recorded or the recorder's number [*Civ. Code § 2924b(a)*].

The request must be signed and acknowledged by the person making the request. It must also include, above the signature, a notice to that person that he or she will receive copies of a notice of default or notice of sale only at the address specified in the request, and he or she must record a new request in the event of a change of address [*Civ. Code § 2924b(a)*].

To be effective, the request must be filed for record in the office of the recorder of any county in which any part of the encumbered property is located, at any time after the recordation of the trust deed or mortgage specified in the request but before the recordation of notice of default [*Civ. Code § 2924b(a)*].

[4] Format Requirements

The document must meet format requirements prescribed for recordable documents (for instance, a half-inch margin on each vertical side and the top two inches of the first page left blank for recording information) [*see Gov. Code § 27361.6*]. For discussion, see California Legal Forms, Ch. 27, *Deeds and Recording* (Matthew Bender).

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§ 555.141A Request by Homeowners' Association to Receive Copy of Trustee's Deed [Civ. Code § 2924b(f)]

[1] FORM Request by Homeowners' Association to Receive Copy of Trustee's Deed [Civ. Code § 2924b(f)]

[*Recording information. See § 555.136[1].*]

_____ [*Name*], which is a homeowners' association, requests that a mortgagee, trustee, or other person authorized to record a notice of default regarding any of the separate interests referred to below, mail to the association a copy of any trustee's deed on a sale concerning a separate interest, as provided in *Section 2924b(f) of the Civil Code*.

The separate interests in question are identified by _____ [*either* Assessor's Parcel Number *or* the following legal description:] _____ [*specify*].

The association's name and address are: _____ [*specify*].
Dated: _____.

_____ [*signature*]

[*typed name and title*]

[*Acknowledgment. See § 555.141[1].*]

[2] Use of Form

The form in [1], *above*, may be used by a homeowners' association [*see Civ. Code § 1351(a)* (definition)] to request a copy of any trustee's deed in the event of a sale concerning any separate interest governed by the association. With respect to separate interests governed by a homeowners' association, the association may cause to be filed in the office of the recorder, in the county in which the separate interests are situated, a request that a mortgagee, trustee, or other person authorized to record a notice of default regarding any of those separate interests, mail to the association a copy of any trustee's deed on a sale concerning a separate interest. Subsequent requests by an association will supersede prior requests [*Civ. Code § 2924b(f)*].

The request must include a legal description or the assessor's parcel number of the separate interests and must include the name and address of the association and a statement that it is a homeowners' association [*Civ. Code § 2924b(f)*].

To be effective, the request must be recorded before the filing of a notice of default. The mortgagee, trustee, or other authorized person must mail the requested information to the association within 15 business days following the date the trustee's deed is recorded. Failure to mail the request, however, will not affect the title to real property [*Civ. Code § 2924b(f)*].

The document must meet format requirements prescribed for recordable documents (for instance, a half-inch margin on each vertical side and the top two inches of the first page left blank for recording information) [*see Gov. Code § 27361.6*]. For discussion, see California Legal Forms, Ch. 27, *Deeds and Recording* (Matthew Bender).

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART IV. FORMS
B. Nonjudicial Foreclosure

48-555 California Forms of Pleading and Practice--Annotated § 555.142

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§ 555.142 Notice of Default [Civ. Code §§ 2924(a)(1), 2924c(b)(1)]--By Beneficiary, Trustee, Mortgagee, or Agent

[1] FORM Notice of Default [Civ. Code §§ 2924(a)(1), 2924c(b)(1)]--By Beneficiary, Trustee, Mortgagee, or Agent

[*Recording information. See § 555.136[1].*]

NOTICE OF DEFAULT

[*If default is curable pursuant to Civ. Code § 2924c, notice of default must begin with statement below, which, except as otherwise specified, must appear in at least 12-point boldface type if printed.*]

[*Heading and introductory clause must be in capital letters if typed or 14-point boldface type if printed.*]

IMPORTANT NOTICE

IF YOUR PROPERTY IS IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR PAYMENTS, IT MAY BE SOLD WITHOUT ANY COURT ACTION, and you may have the legal right to bring your account in good standing by paying all of your past due payments plus permitted costs and expenses within the time permitted by law for reinstatement of your account, which is normally five business days before the date set for the sale of your property. No

sale date may be set until three months from the date this notice of default may be recorded (which date of recordation appears on this notice). This amount is $_____ as of _____ [*date*] and will increase until your account becomes current.

While your property is in foreclosure, you still must pay other obligations (such as insurance and taxes) required by your note and trust deed or mortgage. If you fail to make future payments on the loan, pay taxes on the property, provide insurance on the property, or pay other obligations as required in the note and trust deed or mortgage, the beneficiary or mortgagee may insist that you do so in order to reinstate your account in good standing. In addition, the beneficiary or mortgagee may require as a condition to reinstatement that you provide reliable written evidence that you paid all senior liens, property taxes, and hazard insurance premiums.

On your written request, the beneficiary or mortgagee will give you a written itemization of the entire amount you must pay. You may not have to pay the entire unpaid portion of your account, even though full payment was demanded, but you must pay all amounts in default at the time payment is made. However, you and your _____ [beneficiary *or* mortgagee] may mutually agree in writing before the time the notice of sale is posted (which may not be earlier than the end of the three-month period stated above), among other things, (1) to provide additional time in which to cure the default by transfer of the property or otherwise, (2) to establisha schedule of payments in order to cure your default, or (3) both (1) and (2).

Following the expiration of the time period referred to in the first paragraph of this notice, unless the obligation being foreclosed on or a separate written agreement between you and your creditor permits a longer period, you have only the legal right to stop the sale of your property by paying the entire amount demanded by your creditor.

To find out the amount you must pay, or to arrange for payment to stop the foreclosure, or if your property is in foreclosure for any other reason, contact:

_____ [*name of beneficiary or mortgagee*]
_____ [*mailing address*]
_____ [*telephone*]

If you have any questions, you should contact a lawyer or the government agency that may have insured your loan.

Notwithstanding the fact that your property is in foreclosure, you may offer your property for sale, provided the sale is concluded before the conclusion of the foreclosure.

[*Warning below must be in capital letters if typed or 14-point boldface type if printed.*]

Remember, YOU MAY LOSE LEGAL RIGHTS IF YOU DO NOT TAKE PROMPT ACTION.

[*CONTINUE*]

NOTICE IS HEREBY GIVEN by the undersigned, as [agent for] the _____ [beneficiary *or* trustee *or* mortgagee] under a _____ [trust deed *or* mortgage] executed by _____ [*name*] as _____ [trustor *or* mortgagor] to _____ [*name*] as _____ [trustee *or* mortgagee] [for _____ (*name*) as beneficiary], recorded _____ [date] in _____ County, California, at book _____, page _____, that a breach of the obligation, for which the [trust deed *or* mortgage] provides security, has occurred as follows:

1. _____ [*Describe with particularity all breaches in this and succeeding numbered paragraphs, e.g.,* _____ (*name of trustor or mortgagor*) has failed, and continues to fail, to make timely installment payments of principal and interest due for the months of _____ through _____ (*specify*)].

THEREFORE, the _____ [beneficiary *or* mortgagee] [declares that the entire debt and all sums secured by the above-described _____ (trust deed *or* mortgage) are immediately due and payable and] elects to sell the property, or to cause it to be sold, to satisfy the claim for all amounts now due and unpaid.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form may be used by a beneficiary, trustee, or mortgagee (or an authorized agent) in a nonjudicial foreclosure proceeding to give notice of a default on the obligation secured by the trust deed or mortgage and of the consequent election by the beneficiary or mortgagee to sell the encumbered property [*Civ. Code § 2924(a)(1)*]. Optional language is included for use by the beneficiary or mortgagee to declare the entire outstanding secured debt to be immediately due and payable under an acceleration clause [*see Engelbertson v. Loan & Bldg. Asso. (1936) 6 Cal. 2d 477, 479, 58 P.2d 647* (declaration of acceleration in notice of default was sufficient indication of election to exercise option under acceleration clause)]. For further discussion, see *§ 555.15[3]*].

Printed forms of notice of default may be obtained from most title insurance companies.

[3] Contents

[a] Standard Requirements; Actual and Potential Defaults

The notice of default must identify the trust deed by stating the name of the trustor or mortgagor and giving either the book and page in which it is recorded, as in this form, or a description of the property. It must also include a statement that a breach of the obligation secured by the trust deed or mortgage has occurred, a description of the nature of the breach, and a statement of the beneficiary's or mortgagee's election to sell the property [*Civ. Code § 2924(a)(1)*]. All copies of the notice must include its recordation date [*see Civ. Code §§ 2924b(b)(1), (c)(1), 2924c(b)(1)*].

Reference should be made not only to actual defaults but also to any other default that might arise before reinstatement, such as a delinquency in the payment of property taxes or installments under a senior trust deed. In one case, a junior beneficiary recorded a notice of default and afterward cured another default under a senior trust deed. The junior beneficiary then refused to accept a tender of payment for reinstatement on the ground that it did not cover the amount for the curing the default under the senior trust deed. The court of appeal indicated that such a refusal was wrongful. Although the junior beneficiary was entitled to add the disputed amount to the trustor's total debt, the junior beneficiary was not entitled to add that amount to the total sum necessary for reinstatement because that amount was not mentioned in the previously recorded notice of default[*Little v. Harbor Pacific Mortgage Investors (1985) 175 Cal. App. 3d 717, 720-721, 221 Cal. Rptr. 59]* . The court noted that the notice of default would have been sufficient to require tender of the disputed amount if it had included a reference, not only to actual delinquencies, but also to delinquent payments, if any, under the senior trust deed [*Little v. Harbor Pacific Mortgage Investors (1985) 175 Cal. App. 3d 717, 721 n.6, 221 Cal. Rptr. 59]* .

[b] Reinstatement

If the beneficiary or mortgagee has elected to accelerate the secured debt, the trustor or mortgagor has a limited right to

reinstate the obligation without paying the entire accelerated amount [*Civ. Code § 2924c(a)(1)*; *see § 555.54*], and the notice of default must be prefaced with the statement set out in this form, which provides information concerning reinstatement [*Civ. Code §§ 2924(a)(1)(D), 2924c(b)(1)*]. The statement must be given in Spanish if either of the following conditions is satisfied [*Civ. Code § 2924c(b)(1)*]:

- The trustor or mortgagor requested a Spanish translation of the security agreement in a consumer transaction described in *Civ. Code § 1632(a)(1)* or *(4)*.

- The secured obligation was negotiated principally in Spanish and is a home improvement contract [*see Bus. & Prof. Code §§ 7151.2, 7159*] that is subject to the Unruh Act [*see Civ. Code § 1801 et seq.*].

[C] Failure to Comply

Failure to comply with these requirements does not affect the validity of a subsequent private sale to a good faith purchaser or the rights of a good faith lienholder [*Civ. Code § 2924c(b)(2)*]. There is a rebuttable presumption that the beneficiary actually knew of all unpaid loan payments to the beneficiary and secured by the trust deed or mortgage subject to the notice of default. The failure to include an actually known default does not invalidate the notice of sale, however, and the beneficiary is not precluded from asserting a claim based on the omitted default in a separate notice of default [*Civ. Code § 2924(e)*].

[4] Recording, Mailing, and Publishing Notice

The trustee, beneficiary, or mortgagee, or an authorized agent, must file the original notice of default for record in each county in which some part of the property is located [*Civ. Code § 2924(a)(1)*]. For further discussion, see *§ 555.52*. Acknowledgment is not required before recordation [*U.S. Hertz, Inc. v. Niobrara Farms (1974) 41 Cal. App. 3d 68, 85-86, 116 Cal. Rptr. 44]* .

Copies of the notice of default must be mailed to certain persons after recordation of the original notice [*see Civ. Code § 2924b(b)-(e)*]. The time and manner of mailing these copies, and the persons entitled to receive mailed copies, are discussed in *§ 555.52[3]*. In addition, publication of a copy of the notice is required in certain situations for the benefit of the trustor or mortgagor [*Civ. Code § 2924b(d)*]. For discussion of when this publication is necessary, and the time and manner in which it is accomplished, see *§ 555.52[4]*.

The mailing, publication, and delivery of a notice of default (or other notice) as required in *Civ. Code § 2924*, and the performance of related statutory procedures, constitute privileged communications within *Civ. Code § 47* [*Civ. Code § 2924(d)*].

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§ 555.143 Notice of Rescission of Declaration of Default and Demand for Sale [Civ. Code § 2924c(a)(2)]

[1] FORM Notice of Rescission of Declaration of Default and Demand for Sale [Civ. Code § 2924c(a)(2)]

[*Space for recording information; see § 555.141[4].*]

NOTICE OF RESCISSION OF DEFAULT

_____ [*Name*], as [agent for] the _____ [beneficiary *or* trustee *or* mortgagee] under a _____ [trust deed *or* mortgage] executed by _____ [*name*] as _____ [trustor *or* mortgagor] to _____ [*name*] as _____ [trustee *or* mortgagee] [for _____ (*name*) as beneficiary], recorded _____ [date] in _____ County, California, at book _____, page _____, hereby rescinds the declaration of default and election to sell the property that was recorded _____ [date] in _____ County, California, at book _____, page _____. The date of reinstatement is _____ [*date*].

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form is for use by a beneficiary or mortgagee (or an agent for a beneficiary or mortgagee) in a nonjudicial

foreclosure proceeding, to record a notice of rescission of the declaration of default and election to sell [*see § 555.142*] after reinstatement of the secured obligation. The form must be delivered to the trustee for recordation [*see Civ. Code § 2924c(a)(2)*]. For discussion of reinstatement, see *§ 555.54*.

[3] Notice of Rescission As Mandatory

If the trustor, mortgagor, or other authorized person cures the default, the beneficiary, mortgagee, or an agent must, within 21 days, execute and deliver to the trustee a notice rescinding the declaration of default and demand for sale and stating the date of reinstatement. The trustee must cause the notice of rescission to be recorded within 30 days of receiving it (accompanied by all allowable fees and costs). No charge, except for the recording fee, may be made to the trustor for the execution and recordation of the notice of rescission [*Civ. Code § 2924c(a)(2)*]. It appears that acknowledgment of the notice of rescission is not necessary before recordation, as the notice does not confer any right to or lien on the property [*see U.S. Hertz, Inc. v. Niobrara Farms (1974) 41 Cal. App. 3d 68, 86, 116 Cal. Rptr. 44]* .

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§ 555.144 Notice of Sale [Civ. Code §§ 2924(a)(3), 2924f(b), 2924g(a)]

[1] FORM Notice of Sale [Civ. Code §§ 2924(a)(3), 2924f(b), 2924g(a)]

[*Space for recording information; see § 555.141[4].*]

NOTICE OF SALE OF PROPERTY UNDER POWER OF SALE

YOU ARE IN DEFAULT UNDER A _____ [TRUST DEED *or* MORTGAGE] DATED _____. UNLESS YOU TAKE ACTION TO PROTECT YOUR PROPERTY, IT MAY BE SOLD AT A PUBLIC SALE. IF YOU NEED AN EXPLANATION OF THE NATURE OF THE PROCEEDING AGAINST YOU, YOU SHOULD CONTACT A LAWYER.

NOTICE IS HEREBY GIVEN that, on _____ [*business day, i.e., Monday through Friday*], the _____ day of _____ [*month*], _____ [*year*], at _____ [*time between 9:00 a.m. and 5:00 p.m.*] at _____ [*street address and specific place at that address where sale is to be held*], in _____ [*city*], _____ [*name of county in which all or any part of property to be sold is located*] County, California, _____ [*name of trustee or other person acting as trustee's agent and conducting sale*], whose street address in California is _____ and whose _____ [toll-free telephone number *or* telephone number in California] is _____, will sell at public auction to the highest bidder for cash, in lawful money of the United States, all payable at the time of the sale, the real property described below.

[*EITHER*]

The real property is located in the [City of _____,] County of _____, State of California. It is commonly described as _____ [*street address or other common designation*]. The county assessor's parcel number for the property is _____. [*If desired, add:* The following is the legal description of the property: _____.]

[*OR, if property has no street address or other common designation*]

The real property is located in the [City of _____,] County of _____, State of California. The following is the legal description of the property: _____. Directions to the property may be obtained by submitting a written request to the beneficiary requesting this sale, within 10 days after _____ [*date of first publication of notice*]. The name of the beneficiary is _____ and _____ [his *or* her] address is _____.

[*CONTINUE*]

The sale will be made without covenant or warranty regarding title, possession, or encumbrances, pursuant to the power of sale conferred in a _____ [trust deed *or* mortgage] dated _____, executed by _____ [*name*], _____ [*specify status, e.g.,* a single man], as _____ [trustor *or* mortgagor] to _____ [*name*], _____ [*specify status, e.g.,* a corporation], as _____ [trustee for _____ (*name*) asbeneficiary *or* mortgagee], recorded _____ [*date*], in _____ County, California, at book _____, page _____.

A notice of default was recorded _____ [*date*], in _____ County, California, at book _____, page _____.

This notice is given in compliance with a written request made to the trustee by the beneficiary.

On _____ [*date*], which is the date of the initial publication of this notice, the total unpaid balance of the obligation secured by the property plus reasonably estimated costs, expenses, and advances amounted to $_____.

[*Add if appropriate:* This notice of sale is being republished pursuant to a cancellation of a cash equivalent pursuant to *Civil Code Section 2924h(d).*]

[*Add if appropriate:* On the date this notice of sale is filed, a final or temporary order of exemption obtained pursuant to *Civil Code Section 2923.53* _____(is *or* is not) current and valid. The 90-day extension for giving notice of sale, specified in *Civil Code Section 2923.52(a),* _____(applies or does not apply) .]

[*If present holder of secured note is not original beneficiary or mortgagee, add:* The beneficial interest under the _____ (trust deed *or* mortgage) and the secured obligations were assigned to _____ (*name of assignee*), _____ (*specify status, e.g.,* a corporation), by an assignment dated _____ (*date*), and recorded _____ (*date*) in _____ County, California, at book _____, page _____.]

[*If there has been substitution of original trustee under trust deed, add:* The undersigned was appointed and substituted as trustee under the trust deed by a substitution dated _____ (*date*) and recorded _____ (*date*) in _____ County, California, at book _____, page _____.]

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]
_____ [Trustee *or* Mortgagee]

[2] Use of Form

This form is for use by a trustee, mortgagee, or other person conducting a sale of real property pursuant to a power of sale conferred in a trust deed or mortgage, to give notice of the sale [*see Civ. Code §§ 2924(a)(3), 2924b(b)-(e), 2924f(b), 2924g(a)*]. For discussion of the requirements relating to the time and manner of recording the original notice of sale and posting, publishing, and mailing copies of the notice of sale, see *§ 555.56*.

[3] Typeface and Heading

A notice of sale of real property under a power of sale must conform to the minimum requirements of *Gov. Code § 6043* [*Civ. Code § 2924f(b)(1)*]. Thus, the notice must be set in type that is not smaller than nonpareil. Further, it must be preceded with words (that is, a heading) printed inblackface type, not smaller than nonpareil, describing or expressing in general terms the purport or character of the notice intended to be given [*Gov. Code § 6043*]. (There is no statutory definition of "nonpareil" as a type size. It is about six points, according to some old typesetting manuals.)

[4] Contents of Notice

[a] In General

The notice of sale must include the following contents (as well as information described in § 555.144[4][b]-[d]):

- A statement required by *Civ. Code § 2924f(c)(3)*, which is set out in the first paragraph of the body of this form [*Civ. Code § 2924f(b)(1)*].

- The time of the sale, which must be between 9:00 a.m. and 5:00 p.m. on a business day [*Civ. Code § 2924g(a)*].

- The street address and the specific place at that address where the sale will be held, which must be in the county in which any part of the property to be sold is located [*Civ. Code §§ 2924(a)(3), 2924f(b)(1), 2924g(a)*].

- The name, street address in California (which may reflect an agent of the trustee), and either a toll-free telephone number or telephone number in California of the trustee, and the name of the original trustor [*Civ. Code § 2924f(b)(1)*].

- A statement that the notice is being republished pursuant to a cancellation of a cash equivalent under *Civ. Code § 2924h(d)* [*see § 555.57[5]*], if this is the case [*Civ. Code § 2924f(b)(1)*].

- A statement as to (1) whether a final or temporary order of exemption was obtained pursuant to *Civ. Code § 2923.53* and is current and valid on the date the notice of sale is filed, and (2) whether the 90-day extension for giving notice of sale, specified in *Civ. Code § 2923.52(a)*, applies or does not apply,

pursuant to *Civ. Code § 2923.52(b)* and *(c)* and *Civ. Code § 2923.55* [*Civ. Code § 2923.54(a)*; *see Civ. Code § 2923.54(c)* (sunset date is January 1, 2011); for discussion, *see § 555.54[1][f]*].

In addition, if there has been an assignment of the secured note or a substitution of trustees, the notice of sale should include appropriate recording information [*see Civ. Code §§ 2934, 2934a(a)*]. The name, address, and telephone number of the substituted trustee must be included in the notice of sale, otherwise any sale by that trustee will be void [*Civ. Code § 2934a(e)*].

Other provisions in this form, such as the statement that the sale will be made without warranty of title, that the sale will be for cash, and that the notice is given pursuant to the beneficiary's request, are clauses that are typically included pursuant to the terms of standard trust deed forms.

It appears that acknowledgment of the notice of sale is not necessary before recordation, because the notice does not confer any right to or lien on the property [*see U.S. Hertz, Inc. v. Niobrara Farms (1974) 41 Cal. App. 3d 68, 86, 116 Cal. Rptr. 44]* .

[b] Property Description

The description of the property must include the county assessor's parcel number and the street address, if any, or other common designation, ifany. If the property has no street address or other common designation, the notice must include a legal description of the property, the name and address of the beneficiary at whose request the sale is to be conducted, and a statement that directions may be obtained pursuant to a written request submitted to the beneficiary within 10 days from the first publication of the notice of sale [*Civ. Code § 2924f(b)(1)*].

If the notice of sale indicates that directions to the property may be obtained from the beneficiary, any such directions will be deemed reasonably sufficient to locate the property if they refer to the direction and approximate distance from the nearest crossroads, frontage road, or access road [*Civ. Code § 2924f(b)(1)*].

If the property description includes a legal description or a county assessor's parcel number and either a street address or another common designation of the property, the validity of the notice and the validity of the sale will not be affected by any error or omission in the street address, other common designation, name and address of the beneficiary, or the directions obtained from the beneficiary [*Civ. Code § 2924f(b)(1)*].

[c] Amount Due

The notice must state the total amount of the unpaid balance of the secured obligation and reasonably estimated costs, expenses, and advances as of the date of the initial publication of the notice of sale. The trustee is not liable for any good faith error in stating the proper amount, including any amount provided in good faith by or on behalf of the beneficiary, and an inaccurate statement does not affect the validity of the sale to a good faith purchaser [*Civ. Code § 2924f(b)(1)*]. For discussion of permitted costs and expenses, see *§§ 555.54[2], 555.58*.

[d] Unified Sale Including Personal Property or Fixtures

If the sale of the property is to be a unified sale [*see Com. Code § 9604(a)(1)(B)*], the notice must include a description of the personal property or fixtures to be sold. If it is contemplated that all of the personal property or fixtures are to be sold, the description in the notice of the personal property or fixtures will be sufficient if it is the same as the description of the personal property or fixtures contained in the agreement creating the security interest in or encumbrance on the personal property or fixtures or the filed financing statement relating to the personal property or fixtures. In all other cases, the description in the notice will be sufficient if it would be a sufficient description of the personal property or fixtures under *Com. Code § 9108* [*Civ. Code § 2924f(b)(2)*].

Inclusion of a reference to or a description of personal property or fixtures will not constitute an election by the secured party to conduct a unified sale and in no way will render defective or noncomplying either the notice or a sale pursuant to that notice by reason of the fact that the sale includesnone or less than all of the personal property or fixtures referred to or described in the notice [*Civ. Code § 2924f(b)(2)*].

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§ 555.145 Declaration of Mailing Notices of Default and Sale [Civ. Code § 2924b(e)]

[1] FORM Declaration of Mailing Notices of Default and Sale [Civ. Code § 2924b(e)]

DECLARATION OF MAILING

I, _____ [*name*], declare:

1. I am _____ [*identity of declarant, e.g.,* and at all times mentioned was, trustee under a trust deed executed by _____ (*name*) as _____ trustor to _____ (*name*) as _____ trustee for _____ (*name*) as beneficiary and recorded _____ (*date*), in _____ County, California, at book _____, page _____]. I am over the age of 18 years. My _____ [residence *or* business] address is _____ [*address*].

2. On _____ [*date*], within 10 business days after recordation of the notice of default, a true and correct copy of which is attached to this declaration, I deposited in the United States mail copies of the notice of default in separate, sealed envelopes, with first-class postage fully prepaid, addressed as follows:

_____ [*Name and address of each trustor or mortgagor to whom notice of default was mailed*].

3. On _____ [*date*], more than three months after the recording of the notice of default and at least 20 days before the date of the sale set forth in the notice of sale, a true and correct copy of which is attached to this declaration, I deposited in the United States mail copies of the notice of sale in separate, sealed envelopes, with

first-class postage fully prepaid, addressed to the persons at the addresses stated above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form is a declaration for use by any person who is required to send copies of a notice of default or sale to each trustor or mortgagor by first class mail, in addition to those copies required to be sent by registered or certified mail [under *Civ. Code § 2924b(b), (c)*; *see §§ 555.52[3][a], 555.56[3]*]. Such a person must also execute and retain an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) showing that these additional copies were mailed as required [*Civ. Code § 2924b(e)*].

[3] Contents and Effect of Declaration

The affidavit (or declaration under *Code Civ. Proc. § 2015.5*) must state the following facts [*Civ. Code § 2924b(e)*]:

- The name and residence or business address of the declarant.
- That the declarant is over the age of 18 years.
- A specification of each notice of which a copy was mailed.
- The date each copy of a notice was deposited in the mail.
- The name and address of each trustor or mortgagor to whom a copy of a notice was mailed.
- That each envelope containing a copy of notice was sealed and deposited in the mail with first-class postage fully prepaid.

In the absence of fraud, the affidavit (or declaration) establishes a conclusive presumption of mailing [*Civ. Code § 2924b(e)*].

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48-555 California Forms of Pleading and Practice--Annotated § 555.146

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§ 555.146 Deed by Trustee Pursuant to Exercise of Power of Sale [Civ. Code § 2924(a), (c)]

[1] FORM Deed by Trustee Pursuant to Exercise of Power of Sale [Civ. Code § 2924(a), (c)]

[*Recording information. See § 555.136[1].*]

TRUSTEE'S DEED

_____ [*Name of trustee*], _____ [*capacity, e.g.,* a California corporation], as trustee under the trust deed described below, grants without warranty to _____ [*name*] all that real property situated in [_____ (*city*),] _____ County, California, at _____ [*street address or other common designation*], described as follows: _____ [*full legal description*].

This conveyance is made pursuant to the powers conferred on the grantor by the trust deed executed by _____ [*name*] as trustor to _____ [*name*] as trustee for _____ [*name*] as beneficiary, recorded _____ [*date*] in _____ County, California, at book _____, page _____, and after fulfillment of the conditions specified in the trust deed authorizing this conveyance, as follows:

1. A default occurred in the obligations for which the transfer in trust under the trust deed was given as security, and notice of default was recorded in _____ [the *or* each] county in which the property described in the trust deed is situated. The default consisted of the following: _____ [*specify all breaches, e.g.,* _____ (*name of trustor*) failed to make timely installment payments of principal and interest due for

the months of _____ through _____]. This default still existed at the time of sale.

2. The beneficiary made due demand on the trustee to sell the property pursuant to the terms of the trust deed.

3. Not less than three months elapsed between the recordation of the notice of default and the posting and first publication of the notice of sale of the property.

4. The trustee gave notice of the time and place of sale of the property in accordance with law and the terms of the trust deed.

5. Copies of the notice of default and notice of sale were mailed in accordance with the law to the trustor and to all persons who recorded requests for copies of notice or who were entitled by law to receive notice.

6. The trustee sold the property at public auction on _____ [*date*] in _____ County, California, in accordance with the law and the terms of the trust deed. The above-named grantee was the highest bidder at the sale, became the purchaser, and paid to the trustee the amount bid, being $_____, in lawful money of the United States.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]
Trustee

[*Acknowledgment. See § 555.141[1].*]

[2] Use of Form

This form is a deed for use by a trustee to grant title to the person who purchased the property at the foreclosure sale [*see Civ. Code § 2924(a), (c)*]. For discussion of the effect of the trustee's deed and the rights of the grantee, see *§§ 555.61* and *555.62*.

[3] Contents of Deed

The form includes a conveyance of title without warranty, because the trustee has no duty to guaranty title [*Brown v. Busch (1957) 152 Cal. App. 2d 200, 204, 313 P.2d 19]* .

The form also includes recitals indicating that title was duly conveyed pursuant to the trustee's authority under the terms of the trust deed, after (1) a specified default in the secured obligation, and (2) compliance with all terms of the trust deed and all applicable requirements of law. For discussion of the effect of the recitals of compliance with statutory notice requirements, see *§ 555.63[2][b]*.

[4] Cross References

For discussion of grant deeds generally, see *Ch. 184, Deeds.* et seq.

For discussion and forms relating to unlawful detainer proceedings by a purchaser at a foreclosure sale against a trustor or mortgagor who remains in possession, see Ch. 333, *Landlord and Tenant: Eviction Actions*

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Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART IV. FORMS
B. Nonjudicial Foreclosure

48-555 California Forms of Pleading and Practice--Annotated § 555.147

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§ 555.147 Complaint for Declaratory Relief [Code Civ. Proc. §§ 1060, 1061] and for Preliminary and Permanent Injunctive Relief [Code Civ. Proc. § 525 et seq.; Civ. Code § 3420 et seq.]--To Prevent Private Sale Based on Alleged Breach of Obligation Secured by Trust Deed [Civ. Code § 3367(3)]--By Trustor or Successor

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. §§ 1060, 1061] and for Preliminary and Permanent Injunctive Relief [Code Civ. Proc. § 525 et seq.; Civ. Code § 3420 et seq.]--To Prevent Private Sale Based on Alleged Breach of Obligation Secured by Trust Deed [Civ. Code § 3367(3)]--By Trustor or Successor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DECLARATORY RELIEF
Defendant.	)	AND INJUNCTION
	)	
	)	

_____

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Declaratory Relief)

1. [*Capacity and residence of plaintiff. See § 555.120[1], Paragraph 1.*]

2. [*Capacity and residence of defendants. See § 555.120[1], Paragraphs 2 and 3.*]

3. [*Making of promissory note. See § 555.125[1], Paragraph 5.*]

4. On the same day and as part of the same transaction, plaintiff executed a trust deed conveying certain property to defendant _____ [*name*] as trustee for defendant _____ [*name*], the beneficiary, to secure payment of the note. That property is located in _____ County, California, and is described as follows ("the property"): _____ [*legal description*]. The trust deed was recorded _____ [*date*] in _____ County, California, at book _____, page _____. A copy of the trust deed is attached as Exhibit B and incorporated by reference.

5. On _____ [*date*], defendant _____ [*name*] recorded a notice of default in _____ County, California, at book _____, page _____, alleging that the following breach of the obligation secured by the deed of trust had occurred: _____ [*summarize breach set out in notice of default*]. A copy of the notice of default is attached as Exhibit C and incorporated by reference.

6. _____ [*Allege facts showing that default was improperly declared or that defendant is otherwise not entitled to proceed with sale of property*].

7. An actual controversy has arisen and now exists between plaintiff and defendants concerning their respective rights and duties. Plaintiff contends that _____ [*plaintiff's contentions as to legal consequences resulting from allegations above, e.g.,* defendant _____ (*name of beneficiary*) was not entitled to accelerate the maturity of the secured obligation by reason of the acts of plaintiff described above], whereas defendants dispute this contention and contend that _____ [*defendants' contentions, e.g.,* defendant _____ (*name of beneficiary*) was entitled to accelerate it].

8. A judicial declaration is necessary and appropriate at this time in the circumstances in order that plaintiff may ascertain plaintiff's rights and duties under the note and trust deed.

SECOND CAUSE OF ACTION
(Injunction)

9. Plaintiff refers to and incorporates Paragraphs 1-6 of the First Cause of Action.

10. Defendants threaten to (and unless restrained, will) sell the property, or cause it to be sold, to plaintiff's great and irreparable injury, for which pecuniary compensation would not afford adequate relief, in that _____ [*specify*].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For a declaration of the rights and duties of the parties, including a declaration that _____ [*specify declaration, e.g.,* a breach of the obligation for which the trust deed is security has not occurred];

2. For an order requiring defendant _____ [*name of trustee*] to show cause why defendant should not be enjoined as set forth below, during the pendency of this action;

3. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant _____ [name of *trustee]* and all persons acting under, for, or in concert with that defendant, from selling the trust property or attempting to sell it or causing it to be sold, either under the power of sale in the trust deed or by foreclosure action.

4. For costs of suit herein incurred; and

5. For any other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification. See § 555.120[1].*]

[2] Use of Form

This form is a complaint for use by a trustor or a successor in interest, to bring an action to enjoin a threatened nonjudicial foreclosure sale under a power of sale in a trust deed [*Civ. Code § 3420 et seq.*; *Code Civ. Proc. § 525 et seq.*] and obtain a declaration of the rights of the parties [*Code Civ. Proc. §§ 1060, 1061*], when the plaintiff contends that the beneficiary and trustee are not entitled to exercise the power of sale. For further discussion, see *§ 555.63[1]*.

Although the trustor or a successor in interest is usually the plaintiff in this type of action, it appears that any other person with an interest adversely affected by the sale may also have a cause of action [*see, e.g., Lansdown v. Smith & Sons R. Corp., Ltd. (1934) 1 Cal. App. 2d 618, 619-620, 37 P.2d 127* (assuming, without deciding, that junior lienholder would have standing to sue)].

Foreclosure for failure to pay a prepayment penalty was not enjoinable on the basis of equitable estoppel when the collection agent mistakenly accepted payoff from the debtor's agent without a penalty, even though the debtor's agent knew of the clear penalty language in the note [*Sanguansak v. Myers (1986) 178 Cal. App. 3d 110, 117-118, 223 Cal. Rptr. 490]* . Nor could an injunction be issued on the basis of *Civ. Code § 1501* (waiver of the inadequacies of tendered performance if no objection is made at the time of tender) or *Code Civ. Proc. § 2076* (same) after the collection agent mistakenly accepted payoff without objection or demand for the prepayment penalty, because those statutes apply to intentional failures to demand proper tender [*Sanguansak v. Myers (1986) 178 Cal. App. 3d 110, 115-117, 223 Cal. Rptr. 490]* .

[3] Allegations

This complaint states two causes of action. The first, for declaratory relief, alleges the following facts:

- The existence of the secured obligation and trust deed in issue, indicating a proper subject for declaratory relief (Paragraphs 3 and 4) [*see Code Civ. Proc. § 1060* (declaration of rights under written instrument or in respect to property)].

- The declaration of default and election to sell under the trust deed, together with any other steps that the defendant trustee may have taken to conduct the threatened sale (Paragraphs 5).

- The existence of facts on the basis of which the plaintiff contends that an actual justiciable controversy exists with respect to the defendanttrustee's right to conduct the sale (Paragraphs 6-8) [*Code Civ. Proc. §§ 1060, 1061*].

For further discussion and alternative forms of complaints relating to declaratory relief generally, see Ch. 182, *Declaratory Relief* .

The second cause of action for injunctive relief incorporates the allegations of the first cause of action (Paragraph 9) and alleges grounds for preliminary and permanent injunctive relief to enjoin the threatened sale (Paragraph 10) [*Civ. Code § 3422(1)*; *Code Civ. Proc. § 526(a)(2), (4)*]. For further discussion and forms relating to injunctive relief generally, including forms for use in conjunction with this form of complaint to obtain preliminary injunctive relief, see Ch. 303, *Injunctions* .

[4] Verification

Verification [*see Code Civ. Proc. § 446*] is required if the plaintiff seeks a temporary restraining order or a preliminary injunction on the complaint instead of on an affidavit (or declarations under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*; *see generally* Ch. 303, *Injunctions*]. Otherwise, verification is not required [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified)]. However, if the complaint is verified, the defendant is required to file a verified answer in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446(a)*] and is precluded from making a general denial in an unlimited civil case and even in a limited civil case that is based on a claim assigned to a third party for collection [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

If relying on a verified complaint instead of an affidavit (or declaration), counsel must plead evidentiary facts that would entitle the plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan G. Co. v. San Juan R. etc. Assn. (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* . In addition, counsel must append to this form a declaration relating to notice [*Code Civ. Proc. § 527(a)*; *Cal. Rules of Ct., Rule 3.1204(b)*]. For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

[5] Jurisdiction and Venue

An action for declaratory relief or for a permanent injunction restraining a private sale of real property is within the jurisdiction of the superior court and is not a limited civil action [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. § 1060*; *see Code Civ. Proc. §§ 85, 86(a)(8), (b)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

In an action for the determination of rights with respect to real property, the superior court in the county in which the real property is situated is the proper court for the trial of the action [*Code Civ. Proc. § 392(a)(1)*].

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§ 555.148 Petition and Declaration Regarding Unresolved Claims and Deposit of Undistributed Surplus Proceeds of Trustee's Sale--Judicial Council Form MC-095

[1] FORM Petition and Declaration Regarding Unresolved Claims and Deposit of Undistributed Surplus Proceeds of Trustee's Sale--Judicial Council Form MC-095

Click here to view image.

[2] Use of Form

The form illustrated in [1], *above*, is the mandatory Judicial Council form for a petition and declaration to be used by a trustee when the trustee is unable to determine the priority of written claims to the surplus, or the trustee determines that there is a conflict between potential claimants [*Civ. Code § 2924j(c)*; *see* Cal. Judicial Council Form MC-095]. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

At the time of filing this form, the trustee must deposit the portion of the sale proceeds that cannot be distributed with the court [*Civ. Code § 2924j(c)*] and send appropriate notice to all potential claimants [*Civ. Code § 2924j(d)*; *see* [4], *below*].

At least 15 days before the scheduled hearing date, the court must serve written notice of the hearing by first class mail on all claimants identified in the trustee's declaration, at the specified addresses of the claimants. Within 90 days after the trustee files the petition and declaration and deposits the funds with the clerk, the court must consider all claims filed. After the hearing, the court must distribute the deposited funds to all entitled claimants in the priority specified by statute [*Civ. Code § 2924j(d)*; *see § 555.59* (priority of claims)].

[3] Information, Allegations, and Accompanying Documents

The declaration must set forth (1) the date of the trustee's sale, (2) a description of the property, (3) the names and addresses of all persons to whom notice was sent, (4) a statement that the trustee exercised due diligence and provided written notice as required, and (5) the amount of the sale proceeds deposited. In addition, the trustee must submit a copy of the trustee's sale guaranty and any information relevant to the identity, location, and priority of potential claims. The trustee must also file proof of service of the required notice with the declaration [*Civ. Code § 2924j(c)*; *see* [4], *below*].

[4] Notice of Conflicting Claims Mailed to Entitled Persons

Before the trustee deposits the funds with the court clerk, the trustee must send written notice by first-class mail, postage prepaid, to all persons entitled to notice of conflicting claims. The notice must state that the trustee intends to deposit the funds with the clerk, and that claimants must file claims within 30 days following the date of the notice. The address of the court where the funds were deposited, and a phone number for further information, must be included in the notice [*Civ. Code § 2924j(d)*].

[5] Jurisdiction and Venue

The petition and declaration and related documents [*see* [3], *above*] must be filed, and the sales proceeds that cannot be distributed must be deposited, with the clerk of the superior court of the county in which the sale occurred [*Civ. Code § 2924j(c)*].

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[Reserved]

§§ 555.149[Reserved]

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C. Foreclosure Actions and Deficiency Judgments

48-555 California Forms of Pleading and Practice--Annotated § 555.160

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§ 555.160 Complaint for Foreclosure of Deed of Trust Based on Monetary Default [Code Civ. Proc. §§ 725a, 726(a)]--By Beneficiary

[1] FORM Complaint for Foreclosure of Deed of Trust Based on Monetary Default [Code Civ. Proc. §§ 725a, 726(a)]--By Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR FORECLOSURE OF TRUST
Defendant.	)	DEED
	)	
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of plaintiff. See § 555.120[1], Paragraph 1.*]

2. Defendant, _____ [*name of trustor*], is, and at all times mentioned was, _____ [*allege capacity and residence, e.g.,* a resident of _____ County, California].

3. [*Making of promissory note. See § 555.126[1], Paragraph 3.*]

4. [*Execution and recordation of trust deed. See § 555.147[1], Paragraph 4.*]

5. Defendant is the record owner of the property.

6. [On _____ (*date*) the note and the beneficial interest in the trust deed were assigned to plaintiff. A copy of the assignment is attached as Exhibit C and incorporated by reference.] Plaintiff is now, and at all times _____ [mentioned was *or* since _____ (*date of assignment)* has been], the lawful owner and holder of the note and the beneficiary of the trust deed.

7. The note provides that, should a default occur in the payment of any installment when due, or in the performance of any obligation in the trust deed securing payment of the note, the whole sum of principal and interest shall become immediately due at the election of the holder of the note and shall, at the election of the holder, bear interest during the period of the default at the rate of _____ percent per annum. The trust deed provides that, should a default occur in the payment of any debt secured by the trust deed, or in the performance of any obligation in the note or trust deed, all sums secured by the trust deed shall, at the election of the beneficiary, become immediately due and payable.

8. By the terms of the note, defendant promised to pay monthly installments of $_____ or more, principal and interest, on the _____ day of each month beginning _____ [*date*]. Defendant has failed and refused to make payments of $_____ principal and interest, due on _____ [*date*] and in subsequent months, up to and including _____ [*date*], and amounting to $_____ in installments. By reason of these defaults, plaintiff elected to declare the whole sum of principal and interest immediately due and payable. The whole sum due consists of a principal balance of $_____ plus interest from _____ [*date*] to _____ [*date*] at _____ percent per annum amounting to $_____, a combined total of $_____. Interest on the combined total amounts to $_____ per day for each additional day from _____ [*date*] to the date of entry of judgment.

[9. _____ (*Allege additional obligation in default, e.g.,* By the terms of the trust deed, defendant promised to pay, at least _____ days before delinquency, all general and special city and county taxes affecting the property. Defendant has failed and refused to pay these for the fiscal year _____ in the sum of $_____, and plaintiff has paid these taxes to prevent a sale to the State of California for delinquency).]

[10. _____ (*Allege additional obligation in default, e.g.,* By the terms of the trust deed, defendant promised to provide and maintain in force at all times fire, earthquake, and other insurance, each in an amount satisfactory to, and with loss payable to, plaintiff as beneficiary. Since _____ (*date*), defendant has failed and refused to renew and maintain in force fire, earthquake, and other insurance. By reason of defendant's failure and refusal to pay the premium on the insurance policies at the time of renewal, plaintiff has been required to pay, and has paid, the premiums on the insurance in order to keep the property and improvements insured at all times. The dates and amounts of, and periods covered by, these payments are: _____ (*specify*). By the terms of the trust deed, when plaintiff is required to make payments because of defendant's failure and refusal to pay the premiums on the insurance policies, the amounts paid by plaintiff shall be charged to the principal due on the note secured by the trust deed. The sum of $_____, representing payment by plaintiff on the insurance policies, is not included in, and is in addition to, the above-described principal sum of $_____).]

11. By the terms of the trust deed, defendant promised that if any action were commenced on the note or trust deed, defendant would pay plaintiff's reasonable attorney's fees and that these charges would also become a lien on the

property. By reason of the above-mentioned defaults by defendant it has become necessary for plaintiff to employ _____ [*name*], an attorney at law duly licensed to practice in all the courts of the State of California, to commence and prosecute this foreclosure action.

[12. _____ (*If deficiency judgment is being sought, allege basis for personal liability of defendant other than trustor, e.g.,* On _____ (*date*) _____ (*name*) assumed the obligation evidenced by the note. A copy of the assumption agreement is attached as Exhibit D and incorporated by reference).]

[13. _____ (*If deficiency judgment, otherwise permissible, is not being sought, allege express waiver, if desired, e.g.,* Plaintiff waives judgment for any deficiency between the sale price of the real property and the amount due plaintiff with costs).]

[14. _____ (*Allege existence of all known junior lienholders or other interest holders, if any, e.g.,* Defendant _____ (*name*) is a judgment creditor of defendant _____ (*name of trustor*) and on _____ (*date*) recorded an abstract of judgment for the sum of $_____ in _____ County, California. The lien of this judgment is subsequent to and subject to the lien of the trust deed).]

WHEREFORE, plaintiff prays judgment as follows:

1. Against _____ [*names of trustor and any other defendant personally liable for secured obligation*] for the total sum of $_____, principal and interest, together with interest at the rate of $_____ per day from _____ [*date*] to the date of entry of judgment[, and for the sum of $_____ paid by plaintiff on account of _____ (*specify additional amounts of taxes, premiums, etc., for which plaintiff is entitled to repayment under terms of trust deed*)];

2. Against _____ [*names of trustor and any other defendant personally liable for secured obligation*] for attorney's fees in an amount that the court adjudges reasonable;

3. Adjudging that all rights, claims, ownership, liens, titles, and demands of defendant[s, jointly and severally,] are subsequent to and subject to the lien of the trust deed;

4. Adjudging that the trust deed be foreclosed, that the property be sold according to law by a levying officer to be appointed by the court, that the proceeds of the sale be applied in payment of the amounts due to plaintiff, that [each] defendant and all persons claiming under [each] defendant, after execution of plaintiff's trust deed, whether as lien claimant, judgment creditor, claimant under a junior trust deed, purchaser, lienholder, or otherwise, be barred and foreclosed from all rights, claims, interests, or equity of redemption in the property and every part of the property when time for redemption has elapsed;

[5. Adjudging that _____ (*names of trustor and any other defendant personally liable for secured obligation*) is/are personally liable for payment of the obligation secured by the trust deed, and that a deficiency judgment may be ordered following proceedings prescribed by law;]

6. Permitting plaintiff or any parties to this action to become a purchaser at the foreclosure sale;

7. Directing the levying officer, after the time for redemption has elapsed, to execute a deed to the purchaser of the property at the sale, and directing that the purchaser be let into possession of the property on production of the levying officer's deed;

8. For costs of suit herein incurred; and

9. For any other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 555.120[1].*]

[2] Use of Form

This form is a complaint for use by a beneficiary of a trust deed to bring an action for foreclosure based on a monetary default in the obligation secured by the trust deed [*Code Civ. Proc. §§ 725a, 726(a)*; *see § 555.70*]. It may be modified for use by a mortgagee [*see Code Civ. Proc. §§ 725a, 726(a)*; *§ 555.70[2][a]*].

A lis pendens should be recorded at the time the complaint is filed [*Code Civ. Proc. § 405.20 et seq.*; *see § 555.70[3]*]. For further discussion and a form of lis pendens for use in a foreclosure action, see Ch. 348, *Lis Pendens* .

[3] Allegations

This complaint alleges the following essential facts:

- The secured obligation (Paragraph 3).
- The trust deed securing the obligation (Paragraph 4).
- The plaintiff's status as creditor (Paragraph 6).
- Acceleration clauses enabling the plaintiff to declare the entire unpaid debt immediately due (Paragraph 7) [*see Code Civ. Proc. § 728*; *§ 555.15[3]*].
- The defaults entitling the plaintiff to foreclose (Paragraphs 8-10) [*see Code Civ. Proc. § 726(a)*].
- A provision for the recovery of reasonable attorney's fees (Paragraph 11) [*see Code Civ. Proc. § 730*; *§ 555.74*].
- Optional allegations for use if the plaintiff will seek a deficiency judgment (Paragraph 12) or if the plaintiff desires to waive recovery of a deficiency judgment (Paragraph 13) [*see Code Civ. Proc. § 726(b)*].

[4] Defendants

Necessary defendants are the record owner, whether the trustor or a successor, and all persons with a recorded interest in the property that is subsequent or subordinate to the trust deed [*see Code Civ. Proc. § 726(c)*]. Persons who are liable for the secured obligation must be made defendants if a deficiency judgment is being sought [*see Code Civ. Proc. § 726(b)*]. The trustee need not be a defendant [*see Field v. Acres (1937) 9 Cal. 2d 110, 112-113, 69 P.2d 422]* . For further discussion relating to these parties, see *§ 555.70[2]*.

[5] Appointment of Receiver

In some circumstances a receiver may be appointed during the pendency of the action, to take possession of the property [*Code Civ. Proc. § 564(b)(2)*; *see § 555.70[4]*]. For further discussion and related forms, see Ch. 486, *Receivers* .

A receiver may be appointed in an action by a secured lender for specific performance of an as signment of rents in a trust deed, mortgage, or separate assignment document. Such an appointment may be continued after entry of a judgment for specific performance in the action if appropriate to protect, operate, or maintain the property or to collect rents while a pending nonjudicial foreclosure under power of sale is being completed [*Code Civ. Proc. § 564(b)(11)*].

A receiver may be appointed in a case brought by an assignee under an assignment of leases, rents, issues, or profits pursuant to *Civ. Code § 2938(g)* [*Code Civ. Proc. § 564(b)(12)*; *see Civ. Code § 2938* (governing written assignments of interests in leases, rents, issues, or profits of real property made in connection with obligation secured by real property); *see also § 555.81[1]*].

[6] Deficiency Judgment

If a deficiency judgment is being sought, the court will determine whether one may be recovered in the circumstances and, if so, who among the defendants may be held liable [*Code Civ. Proc. § 726(b)*; *see § 555.163[2]*]. The amount of the deficiency will be determined and adjudged in a subsequent proceeding, which must be commenced within three months after the sale of the property under the foreclosure decree [*Code Civ. Proc. § 726(b)*; *see § 555.73* and §§ 555.164-555.168].

[7] Verification

Verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified)]. However, if the complaint is verified, the defendant is required to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446(a)*] and is precluded from making a general denial in superior court actions that are not limited civil cases and in some limited civil cases [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[8] Jurisdiction and Venue

The superior court has jurisdiction of foreclosure actions involving real property; the action is not a limited civil case [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86*]. The court retains jurisdiction until expiration of the statutory redemption period [*Van Loben Sels v. Bunnell (1901) 131 Cal. 489, 492, 63 P. 773* ; *see § 555.72*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

When the United States is a defendant, the action may be brought in, or removed to, the U.S. district court [*28 U.S.C. §§ 1444, 2410(a)*; *see § 555.70[2][b]*].

The superior court in the county in which all or part of the encumbered property is located is the proper court for the trial of a foreclosure action [*Code Civ. Proc. § 392(a)(2)*].

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Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART IV. FORMS
C. Foreclosure Actions and Deficiency Judgments

48-555 California Forms of Pleading and Practice--Annotated § 555.161

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§ 555.161 Affirmative Defense Allegation--Bar of Statute of Limitations [Civ. Code § 2911(1); Code Civ. Proc. § 337(1)]

[1] FORM Affirmative Defense Allegation--Bar of Statute of Limitations [Civ. Code § 2911(1); Code Civ. Proc. § 337(1)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action is alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that the plaintiff's alleged cause of action herein is barred by the provisions of *Civil Code Section 2911(1)* and *Code of Civil Procedure Section 337(1)* in that the four-year statute of limitations has run on the promissory note secured by the _____ [trust deed *or* mortgage].

[2] Use of Form

The form in [1], *above*, is for use by a defendant in an action for foreclosure to raise the statute of limitations as a bar by way of an affirmative defense [*Code Civ. Proc. § 431.30(b)(2)*; *see Flack v. Boland (1938) 11 Cal. 2d 103, 106-107, 77 P.2d 1090]* . For further discussion, see *§ 555.18[4][a]* and Ch. 345, *Limitation of Actions* . The limitation period is the one that applies to an action on the secured obligation [*Civ. Code § 2911(1)*]. Usually, it is the four-year period applicable to actions on a written contract [*Code Civ. Proc. § 337(1)*]. For further discussion of answers generally, including general forms in which this affirmative defense may be inserted, see Ch. 26, *Answers* .

[3] Alternative Use of Demurrer

If the defense of the statute of limitations is apparent on the face of the complaint or from matter of which the court may take judicial notice [*see Evid. Code §§ 451, 452*], the bar of the statute may be raised by a general demurrer [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*], although the specific ground must be pleaded. This is an exception to the rule that

general demurrers need only state that the complaint fails to state a cause of action. However, the defense of the statute of limitations is not waived for failure to demur, and it may be asserted as an affirmative defense [*California Safe etc. Co. v. Sierra etc. Co. (1910) 158 Cal. 690, 697-698, 112 P. 274]* . For further discussion and forms of demurrers generally, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

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48-555 California Forms of Pleading and Practice--Annotated § 555.162

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§ 555.162 Affirmative Defense Allegation--Senior Lien of Another Trust Deed [Civ. Code §§ 1214, 1215]

[1] FORM Affirmative Defense Allegation--Senior Lien of Another Trust Deed [Civ. Code §§ 1214, 1215]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. On _____ [*date*] _____ [*name of trustor*], for a valuable consideration, made, executed, and delivered to defendant a promissory note for the sum of $_____, plus interest. A copy of the note is attached as Exhibit A and incorporated by reference.

2. On the same day and as part of the same transaction, _____ [*name of trustor*] executed a trust deed conveying the property described in the complaint to _____ [*name*] as trustee for defendant as beneficiary to secure payment of the note. The trust deed, duly acknowledged on _____ [*date*], was recorded _____ [*date*] in _____ County, California, at book _____, page _____. A copy of the trust deed is attached as Exhibit B and incorporated by reference.

3. Defendant took the trust deed attached as Exhibit B in good faith without any knowledge, actual or constructive, that plaintiff had, or claimed to have, a prior trust deed on the property. That prior trust deed was not recorded and is void as against defendant.

[2] Use of Form

The form in [1], *above*, is for use as an affirmative defense [*Code Civ. Proc. § 431.30(b)(2)*] by the beneficiary of a second trust deed, who has been named in an action to foreclose a prior trust deed and whose trust deed is alleged in the

complaint to be subsequent or subordinate to the trust deed being foreclosed. The defense is that the second trust deed is, in fact, superior to the trust deed being foreclosed, because the second beneficiary was a subsequent lienholder in good faith and for a valuable consideration, who had no actual notice of the prior trust deed and whose own trust deed was first recorded [*Civ. Code §§ 1214, 1215, 1217*].

For further discussion of answers generally, including general forms in which this affirmative defense may be inserted, see Ch. 26, *Answers* .

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48-555 California Forms of Pleading and Practice--Annotated § 555.163

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§ 555.163 Judgment of Foreclosure and Order of Sale [Code Civ. Proc. § 726(a), (b)]

[1] FORM Judgment of Foreclosure and Order of Sale [Code Civ. Proc. § 726(a), (b)]

[*Caption and recitals. See § 555.126[1].*]

IT IS ORDERED, ADJUDGED, AND DECREED that:

1. Now due and owing to plaintiff from defendant _____ [*name of trustor or other defendant personally liable*] are the following sums: _____ [*specify, e.g.,* $_____ principal and interest on a promissory note made _____ [*date*]; $_____ expended for general and special city and county taxes; $_____ expended for premiums on fire, earthquake, and other insurance; $_____ in attorney's fees; and plaintiff's costs of suit. These debts are liens on the real property described below, pursuant to a trust deed executed by _____ [*name*] as trustor to _____ [*name*] as trustee for _____ [*name*] as beneficiary, which was recorded _____ [*date*] in _____ County, California, at book _____, page _____.

2. The real property described, or as much of it as may be necessary, shall be sold in the manner prescribed by law by the levying officer of _____ County, California, on proper application for issuance of a writ of sale to the levying officer. Any party to this action may be a purchaser at the sale.

3. From the proceeds of the sale, the levying officer shall deduct the expenses for the levy and sale and shall then pay to plaintiff the sums adjudged due, together with interest at the rate of _____ percent per annum from

the date of this judgment.

4. If any surplus remains after making those payments, it shall be paid by the levying officer as follows: _____ [*specify order of payment and amounts to be paid to other parties determined to be entitled to any surplus proceeds*].

[*EITHER*]

5. Defendant _____ [*name*] is personally liable for payment of the sums secured by the trust deed, and a deficiency judgment may be ordered against him/her/it following proceedings prescribed by law. The Court retains jurisdiction to determine the amount of the deficiency, if any, and to render a money judgment on proper application.

6. A deficiency judgment not being waived or prohibited, the property shall be sold subject to the right of redemption as provided in *Code of Civil Procedure Section 729.010 et seq.*

[*OR*]

5. _____ [No defendant is personally liable *or* Plaintiff has waived judgment] for any deficiency between the sale price and the total amount due plaintiff together with expenses of sale.

6. A deficiency judgment being _____ [prohibited *or* waived], the property shall be sold as provided in *Code of Civil Procedure Section 716.020*.

[*CONTINUE*]

7. From and after delivery of a deed by the levying officer to the purchaser at the sale, _____ [*name(s) of defendant(s)*] and all persons claiming under him/her/them or having liens subsequent to the trust deed on the real property described below, and their personal representatives, and all persons claiming to have acquired any estate or interest in the property subsequent to the filing of notice of the pendency of this action with the county recorder, are forever barred and foreclosed from all equity of redemption in, and claim to, the property and every part of it.

8. The property that is the subject of this judgment and order is located in _____ County, California, and is described as follows: _____ [*legal description*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is a form of judgment for use by the plaintiff in an action for foreclosure and an order of sale under a trust deed [*Code Civ. Proc. § 726(a), (b)*; *see Code Civ. Proc. § 725a*]. For a related complaint and discussion of such an action, see *§ 555.160*.

This form assumes that one or more of the defendants appeared in the action. It may be modified, as appropriate, when judgment is taken by default. For further discussion and forms, see Ch. 205, *Defaults and Default Judgments* .

[3] Contents

The judgment must do the following:

- Declare the amount of the secured debt or otherwise state the secured obligation [*Code Civ. Proc. § 726(b)*].

- Direct the sale of the encumbered property, or as much of it as may be necessary [*Code Civ. Proc. § 726(a)*; *see § 555.71*].

- Direct application of the sale proceeds to pay court costs, levy and sale expenses, and the amount due to the plaintiff, including, if the trust deed provides for payment of attorney's fees [*see § 555.74*], a reasonable sum for attorney's fees set by the court [*Code Civ. Proc. § 726(a)*; *see Code Civ. Proc. § 730*].

- Direct that any surplus proceeds be paid to the defendants or cross complainants who are determined to be entitled to the surplus, according to their determined priorities; or, if the interests of these parties are not properly put in issue, direct that any surplus be paid into the court pending later determination and order [*Code Civ. Proc. § 727*; *see Livingston v. Rice (1955) 131 Cal. App. 2d 1, 4-5, 280 P.2d 52* ; *Withington v. Shay (1941) 47 Cal. App. 2d 68, 73, 117 P.2d 415* ; § 555.59].

- Identify the defendants, if any, who have been determined to have personal liability and against whom a deficiency judgment may be ordered in subsequent proceedings, unless a deficiency judgment has been waived or is barred by *Code Civ. Proc. § 580b* [*see §§ 555.31[4], 555.32[2][a], [3][b]*], in which case the judgment must so declare [*Code Civ. Proc. § 726(b)*].

For discussion and forms relating to a subsequent proceeding for a deficiency judgment, see *§§ 555.73* and 555.164-555.168.

[4] Entry of Judgment and Notice of Entry

In an action tried by the court, the clerk is required to enter judgment immediately after the order granting judgment is filed [*Code Civ. Proc. § 664*]. The prevailing party must then serve notice of entry of judgment on all parties and file the original of the notice with proof of service [*Code Civ. Proc. § 664.5(a)*]. For further discussion and forms of notice and proof of service, see *Ch. 318, Judgments, § 318.40 et seq.*

[5] Enforcement

The sale of the property is initiated by application of the judgment creditor to the clerk of the court for issuance of a writ of sale to the levying officer of the county in which the property is to be sold [*Code Civ. Proc. §§ 701.570(a), 712.010, 716.010(a), 716.020, 726(e), 729.010(b)*; *see § 555.71*]. For further discussion along with forms for use in enforcing the judgment, see *Ch. 254, Executions and Enforcement of Judgments, § 254.130 et seq.*

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48-555 California Forms of Pleading and Practice--Annotated § 555.164

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§ 555.164 Notice of Motion for Deficiency Judgment [Code Civ. Proc. § 726(b)]

[1] FORM Notice of Motion for Deficiency Judgment [Code Civ. Proc. § 726(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR DEFI-
Plaintiff,	)	CIENCY JUDGMENT
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant _____ (*name of trustor or other defendant personally liable*)] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*] at _____ [*time*] or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [

specify party, e.g., plaintiff] will, and hereby does, move for a deficiency judgment. The motion will be and hereby is made on the ground that the proceeds for the foreclosure sale, duly held on _____ [*date*], are insufficient to satisfy the judgment of foreclosure entered _____ [*date*], pursuant to which the sale was held, and that plaintiff is entitled to a money judgment for the deficiency, pursuant to that judgment, which provides that the Court shall retain jurisdiction for the purpose of rendering a deficiency judgment in the event that the proceeds from the foreclosure sale are insufficient.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s*)] and the memorandum of points and authorities served and filed with this notice, on the records and file in this action, and on evidence to be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This form is a notice of motion for use by the plaintiff to move for a deficiency judgment after a foreclosure sale held pursuant to a judgment [*Code Civ. Proc. § 726(b)*; *see § 555.73[2]*]. It must be filed within three months after the date of the foreclosure sale [*Code Civ. Proc. § 726(b)*]. The three-month period is a statute of limitations. Thus, a party entitled to seek a deficiency judgment must file an application within three months of the foreclosure sale or no money judgment for a deficiency can be obtained [*Life Savings Bank v. Wilhelm (2000) 84 Cal. App. 4th 174, 177, 100 Cal. Rptr. 2d 657]* . The three-month period runs from the date the sale is effected, that is, when the highest bid is received at the auction, not when the certificate of sale is recorded [*Paykar Construction, Inc. v. Bedrosian (1999) 71 Cal. App. 4th 803, 808, 84 Cal. Rptr. 2d 135]* . Copies must be served on all appearing defendants against whom a deficiency judgment is sought, or on their attorneys of record, at least 15 days before the date set for the hearing to determine the amount of the deficiency [*Code Civ. Proc. § 726(b)*].

For a declaration supporting such a motion, see *§ 555.165*. For a judgment for deficiency, see *§ 555.168*.

A supporting memorandum must be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005(b), 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[3] Jurisdiction and Venue

For coverage of judisdiction and venue, see *§ 555.160[8]*.

[4] Cross References

For memorandum supporting the relief sought in this form, see California Points and Authorities, Ch. 230, *Trust Deeds and Real Property Mortgages*, §§ 230.40 (Matthew Bender)

For discussion and forms of motions and applications generally, see Ch. 372, *Motions and Orders*

For discussion of service of notices of motions generally, see Ch. 518, *Service of Summons and Papers*

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§ 555.165 Declaration in Support of Motion for Deficiency Judgment [Code Civ. Proc. § 726(b)]

[1] FORM Declaration in Support of Motion for Deficiency Judgment [Code Civ. Proc. § 726(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	DECLARATION OF _____ [*name*]
Plaintiff,	)	IN SUPPORT OF MOTION FOR DEFICIENCY
vs.	)	JUDGMENT
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* the attorney of record for the plaintiff].

2. On _____ [*date*], this Court entered a judgment of foreclosure of the trust deed in this action. By

that judgment the Court determined that defendant _____ [*name of trustor or other defendant, as appropriate*] is personally liable for payment of the sums secured by the trust deed and that a deficiency judgment may be ordered.

3. On _____ [*date within three months preceding filing of notice of motion*], the real property was sold at foreclosure sale. As shown by the levying officer's accounting of amounts collected and costs incurred, filed with the return of the writ of sale on _____ [*date*], the property was sold for $_____, and the expenses of levy and sale amounted to $_____.

4. The entire amount of the debt under the judgment, with interest, fees, costs, and expenses of levy and sale, is $_____, consisting of the following items: _____ [*list items and amounts*].

5. The appraised fair value of the property, as of the time of sale, is $_____.

6. There is a deficiency of $_____.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

The form in [1], *above*, is a declaration [*Code Civ. Proc. § 2015.5*] for use by a plaintiff to support a motion for a deficiency judgment [*Code Civ. Proc. § 726(b)*]. For an illustrative motion and related discussion, see *§ 555.164*.

[3] Contents

The supporting declaration should show the amount of the deficiency [*Code Civ. Proc. § 726(b)*; *see §§ 555.73[1], 555.163[2]*].

The existence of the deficiency and the persons liable for it may be determined by reference to court records showing the amount due to the plaintiff under the judgment and the amount of proceeds and expenses of the sale reported by the levying officer (Paragraphs 2-4) [*see Code Civ. Proc. §§ 699.560, 712.050* (return of writ of sale and report of levying officer)].

The amount of the deficiency is determined by reference to the fair value of the property as of the date of sale [*Code Civ. Proc. § 726(b)*; *see § 555.73[4]*]. If the plaintiff had the property appraised (in lieu of or in addition to the appraisal, if any, by a court-appointed probate referee [*see §§ 555.166, 555.167*]), this fact should be included (Paragraph 5).

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48-555 California Forms of Pleading and Practice--Annotated § 555.166

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§ 555.166 Notice of Motion for Appointment of Probate Referee [Prob. Code § 8920 et seq.] in Proceedings for Deficiency Judgment [Code Civ. Proc. § 726(b)]

[1] FORM Notice of Motion for Appointment of Probate Referee [Prob. Code § 8920 et seq.] in Proceedings for Deficiency Judgment [Code Civ. Proc. § 726(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR AP-
Plaintiff,	)	POINTMENT OF PROBATE REFEREE
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant _____ (*name of trustor or other defendant personally liable*)] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*] at _____ [*time*] or as soon

thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.*, plaintiff] will, and hereby does, move for an order appointing a probate referee to appraise the property sold as of the time of sale, according to law, and to file the appraisal with the clerk of this Court. The motion will be made on the following grounds:

1. On _____ [*date*], this Court entered judgment for plaintiff for the following amounts: principal and interest in the amount of $_____, attorney's fees in the amount of $_____, and costs in the amount of $_____, together with interest. The judgment directed that the real property subject to the trust deed be sold, and this Court retained jurisdiction to enter a deficiency judgment against defendant _____ [*name*].

2. On _____ [*date*], the real property was sold as ordered. The proceeds of $_____, less expenses of levy and sale in the sum of $_____, yielded a net amount of $_____, as shown by the levying officer's accounting of amounts collected and costs incurred, filed with the return of the writ of sale on _____ [*date*].

3. On _____ [*date*], plaintiff moved for a deficiency judgment against defendant _____ [*name*], which motion is set for hearing on _____ [*date*].

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s*)] and the memorandum of points and authorities served and filed with this notice, on the records and file in this action, and on evidence to be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

The form in [1], *above*, is a notice of motion for use by any party to a proceeding for a deficiency judgment, to obtain appointment of a probate referee to appraise the property sold at the foreclosure sale, as of the time of the sale [*Code Civ. Proc. § 726(b)*; *see Code Civ. Proc. § 1003* (application for order not contained in judgment is made by motion); *Prob. Code § 8920 et seq.* (designation by court of probate referee); *see also § 555.73[3]*].

The notice of motion must be filed at least 10 days before the date set for the hearing on the motion for a deficiency judgment [*Code Civ. Proc. § 726(b)*]. Service of copies of the notice of motion on other parties to the proceeding does not appear to be necessary [*see Code Civ. Proc. § 1005* (motions requiring written notice)], but counsel may provide copies as a courtesy.

For a form of order of appointment, see *§ 555.167*.

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§ 555.167 Order Appointing Probate Referee [Prob. Code § 8920 et seq.] in Proceedings for Deficiency Judgment [Code Civ. Proc. § 726(b)]

[1] FORM Order Appointing Probate Referee [Prob. Code § 8920 et seq.] in Proceedings for Deficiency Judgment [Code Civ. Proc. § 726(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [*identify party, e.g.*, plaintiff], _____ [*name*], for an order appointing a probate referee to appraise the real property described below came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted, and _____ [*name*], a probate referee, is appointed to appraise the following described real property as of _____ [*date*]: _____ [*legal description*]. The referee shall be paid $_____, plus expenses, and is directed to file the appraisal, together with an oath that the referee has truly, honestly, and impartially appraised the property to the best of the referee's knowledge and ability, with the clerk of this Court on or before _____ [*date*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is an order for use by the moving party for appointment of a probate referee [*see § 555.166* (related notice of motion)] to appraise the property sold at a foreclosure sale, for the purpose of determining the amount of the deficiency that may be recovered [*Code Civ. Proc. § 726(b)*].

For further discussion of the probate referee's appointment, compensation, and appraisal, see *§ 555.73[3]*.

[3] Notice of Order

The moving party is generally required to serve notice of the order on all parties and to file the original of the notice with proof of service [*see Code Civ. Proc. § 1019.5(a)*].

For further discussion and forms of notice and proof of service, see Ch. 372, *Motions and Orders* , and Ch. 518, *Service of Summons and Papers* .

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48-555 California Forms of Pleading and Practice--Annotated § 555.168

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§ 555.168 Judgment for Deficiency [Code Civ. Proc. § 726(b)]

[1] FORM Judgment for Deficiency [Code Civ. Proc. § 726(b)]

[*Caption and recitals. See § 555.126[1].*]

IT IS ORDERED, ADJUDGED, AND DECREED that plaintiff recover from defendant _____ [*name of trustor or other defendant personally liable*] the sum of $_____, with interest at the rate of _____ percent per annum from _____ [*date*] together with $_____ as costs.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, is a form of judgment for use by the plaintiff who has moved for a deficiency judgment after the judicial foreclosure and sale of real property under a trust deed [*Code Civ. Proc. § 726(b)*; *see § 555.164* (related notice of motion)].

For further discussion of the hearing on the motion for a deficiency judgment and the entry of the deficiency judgment, see *§ 555.73[4]*.

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART IV. FORMS
C. Foreclosure Actions and Deficiency Judgments

48-555 California Forms of Pleading and Practice--Annotated § 555.169

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§ 555.169 Stipulation and Deficiency Judgment

[1] FORM Stipulation and Deficiency Judgment

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	STIPULATION AND JUDGMENT
Defendant.	)	
	)	
	)	

STIPULATION FOR DEFICIENCY JUDGMENT

_____ [*Identify stipulating parties, e.g.*, Plaintiff _____ (*name*) and defendants _____ (*names*)] stipulate as follows.

1. On _____ [*date*], pursuant to the judgment of foreclosure entered in this action on _____ [*date*] ("the foreclosure judgment"), the real property described in the foreclosure judgment ("the property") was sold.

2. The parties have exchanged information relating to the value of the property as of the date of sale. There was a deficiency of $_____ for which, pursuant to the foreclosure judgment, defendants _____ [*names*] are personally liable, jointly and severally.

3. _____ [*Financial terms of stipulation and judgment, e.g.,* Defendant _____ (*name*) has paid the deficiency amount to plaintiff _____ (*name*). Judgment may be rendered that defendant _____ (*name*) recover from defendants _____ (*names*), jointly and severally, the sum of $_____ with interest at the rate of _____ percent per annum from _____ (*date*), and that plaintiff _____ (*name*) has received satisfaction of all claims arising from or based on the foreclosure judgment ("the stipulated judgment"). Each party shall bear the party's own costs. Plaintiff _____ (*name*) shall, on entry of the stipulated judgment, file an acknowledgment of full satisfaction of the foreclosure judgment.]

4. Each of the parties waives any and all rights to appeal or otherwise attack the stipulated judgment. Each of the parties waives the right to have findings of fact or a statement of decision with respect to the stipulated judgment.

5. Each of the parties acknowledges, represents, and warrants that in all negotiations for this stipulation, each party had an adequate opportunity to be, and each party was, represented by the party's attorney of choice, and that each attorney signing this stipulation is duly and fully authorized to make this stipulation on behalf of the party represented.

6. Each attorney signing this stipulation acknowledges, represents, and warrants that he/she is duly and fully authorized to make this stipulation on behalf of the party represented.

7. This stipulation shall be governed by the laws of the State of California.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

JUDGMENT

The parties having so stipulated, and the Court having determined that the stipulation is regular and proper,

IT IS ORDERED, ADJUDGED, AND DECREED that:

1. Defendant _____ [*name*] recover from defendants _____ [*names*], jointly and severally, the sum of $_____ with interest at the rate of _____ percent per annum from _____ [*date*].

2. Plaintiff _____ [*name*] has received satisfaction of all claims arising from or based on the judgment entered in this action on _____ [*date*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

The form in [1], *above*, may be used in lieu of the forms in §§ 555.164-555.168 for rendition of a deficiency judgment following a judicial foreclosure sale, when the parties can come to an agreement about the amount of the deficiency, and they have a reason for wanting and allowing a judgment to be entered (instead of simply paying the amount of the deficiency). For instance, if multiple defendants were jointly and severally liable for the deficiency, they could agree that one of them would pay it and that a judgment would be rendered to establish the payer's claim and the others' liability for contribution. Thus, the paying defendant could take the place of the plaintiff as the judgment creditor to whom the other defendants would be liable--a situation that all of the defendants could have reason to view as preferable in supplanting a potentially hostile creditor with a comparatively friendly one. The plaintiff could be willing to agree on the amount of the deficiency because by stipulating to a judgment, the plaintiff would avoid the litigation expenses of moving for a deficiency judgment and establishing the amount of the deficiency.

The judgment may be separated from the stipulation, as the parties may prefer if the stipulation is lengthy. For further discussion of stipulations and judgments based on stipulations, see *Ch. 318, Judgments, § 318.40 et seq.*, and Ch. 533, *Stipulations* .

This stipulation and judgment is based on a form prepared by William M. Hensley, the Editorial Consultant for this chapter, for an action litigated in the Los Angeles County Superior Court.

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PART IV. FORMS
C. Foreclosure Actions and Deficiency Judgments

48-555 California Forms of Pleading and Practice--Annotated § 555.170

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§ 555.170 Complaint on Promissory Note Secured by Junior Trust Deed--Security Rendered Valueless by Foreclosure of Senior Lien

[1] FORM Complaint on Promissory Note Secured by Junior Trust Deed--Security Rendered Valueless by Foreclosure of Senior Lien
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____
[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR MONEY
_____ [*name*],	)	[LIMITED CIVIL CASE]
Defendant.	)	
	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of plaintiff. See § 555.120[1], Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 555.120[1], Paragraph 2.*]

3. [*Making of promissory note. See § 555.126[1], Paragraph 3.*]

4. [*Execution and recordation of trust deed. See § 555.147[1], Paragraph 4.*]

5. The trust deed was subject to a senior trust deed encumbering the property, dated _____ [*date*] and recorded in _____ County, California, at book _____, page _____, securing payment of an obligation in the original amount of $_____ owed by defendant to _____ [*name*].

6. _____ [*Allege foreclosure of senior lien, e.g.,* After giving notice of default and notice of sale as required by law, _____ [*name*], trustee under the senior trust deed, proceeded at _____ [*time*] on _____ [*date*] under a power of sale to sell the property at _____ [*city*], _____ County, California. The property was sold for $_____; the amount claimed due and delinquent on the obligation secured by the senior trust deed was $_____; and the expenses of the sale were $_____. No portion of the proceeds of the sale remained to be applied on the note after deducting the amount due on the above mentioned obligation and the expenses of the sale.]

7. As a result of the sale of the property, the security for the note has become worthless, without any act on the part of plaintiff.

8. Defendant has defaulted on the note, and the entire unpaid balance, together with interest, is now due.

9. Plaintiff has performed all conditions and promises required to be performed on plaintiff's part by the terms of the note, including all conditions precedent to the right to enforce defendant's duty of performance.

WHEREFORE, plaintiff prays judgment as follows:

1. For the sum of $_____;

2. For interest on that sum at _____ percent per annum from _____ [*date*];

3. For reasonable attorney's fees in the sum of $_____;

4. For costs of suit herein incurred; and

5. For any other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 555.120[1].*]

[2] Use of Form

This form is for use by the payee of a promissory note to sue the maker of the note, after real property securing the note

has been rendered worthless as security by foreclosure of a senior lien. This situation is an exception to the general rule requiring a secured creditor first to exhaust the security [*see Roseleaf Corp. v. Chierighino (1963) 59 Cal. 2d 35, 39-44, 27 Cal. Rptr. 873, 378 P.2d 97]* . For further discussion, see *§ 555.31[3]*. An action on the note is barred, however, if the note was secured by a purchase-money trust deed subject to *Code Civ. Proc. § 580b* [*see Brown v. Jensen (1953) 41 Cal. 2d 193, 197-198, 259 P.2d 425]* . For further discussion of this ban, see *§ 555.32[4]*.

Code Civ. Proc. § 580a limits the amount of recovery on a debt by a junior lienholder whose security has been rendered worthless by private foreclosure of the senior lien and who purchased the property at the foreclosure sale [*Walter E. Heller Western, Inc. v. Bloxham (1985) 176 Cal. App. 3d 266, 270-274, 221 Cal. Rptr. 425]* . For further discussion, see *§ 555.32[4]*.

[3] Allegations

A complaint to recover money due under a promissory note [*Civ. Code § 3302*; *Com. Code § 3122*] must allege the following essential facts:

- The note and security (Paragraphs 3 and 4).
- That the security for the note has become worthless in consequence of the foreclosure of a senior lien (Paragraphs 5-7).
- The defendant's default and the resulting damage to the plaintiff (Paragraph 8).
- The plaintiff's performance of all conditions to be performed on the plaintiff's part (Paragraph 9).

Usually an action cannot be brought directly on a note secured by a trust deed, because foreclosure is the required remedy [*Code Civ. Proc. § 726(a)*]. To forestall this affirmative defense, the complaint also alleges facts showing that the security for the note has become worthless without any fault on the plaintiff's part, in consequence of the foreclosure of a senior lien on the property [*see, e.g., Cohen v. Marshall (1925) 197 Cal. 117, 122-125, 239 P. 1050* ; *see also Code Civ. Proc. § 483.010(b)* (attachment may be issued on claim originally secured when security has become valueless without any act of plaintiff); *cf. Barbieri v. Ramelli (1890) 84 Cal. 154, 156-158, 23 P. 1086* (action on note was barred when security was initially valueless)].

[4] Verification

Verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified)]. However, if the complaint is verified, the defendant is required to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446(a)*] and is precluded from making a general denial in superior court actions that are not limited civil cases and in some limited civil cases [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

Generally, the proper county for the trial is the county in which the obligation was entered into, the county in which the

obligation is to be performed, or the county in which the defendant presently resides. Unless there is an agreement to the contrary, the county in which the obligation was incurred is deemed to be the county in which it is to be performed [*Code Civ. Proc. § 395(a)*]. If the defendant is a corporation or association, the county in which its principal place of business is located is also a proper county for trial [*Code Civ. Proc. §§ 395.2, 395.5*].

[6] Cross References

For further discussion and alternate forms for use in an action to enforce a promissory note, see Ch. 385, *Negotiable Instruments*

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PART IV. FORMS
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48-555 California Forms of Pleading and Practice--Annotated §§ 555.171-555.179

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[Reserved]

§§ 555.171[Reserved]

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48-555 California Forms of Pleading and Practice--Annotated § 555.180

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§ 555.180 Complaint for Specific Performance of Trust Deed [Civ. Code § 3384 et seq.]--Beneficiary to Take Possession After Default and Collect Rents, Issues, and Profits [Civ. Code § 2927]

[1] FORM Complaint for Specific Performance of Trust Deed [Civ. Code § 3384 et seq.]--Beneficiary to Take Possession After Default and Collect Rents, Issues, and Profits [Civ. Code § 2927]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR SPECIFIC PERFORMANCE
Defendant.	)	
	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of plaintiff. See § 555.120[1], Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 555.160[1], Paragraph 2.*]

3. [*Making of promissory note. See § 555.126[1], Paragraph 3.*]

4. [*Execution and recordation of trust deed. See § 555.147[1], Paragraph 4.*]

5. The trust deed provides, "_____ [*recite assignment-of-rents clause, e.g.,* As additional security, Trustor hereby confers on Beneficiary the right, power, and authority, during the continuance of the Trust, to collect the rents, issues, and profits of the property, reserving to Trustor the right, before any default by Trustor in payment of any debt secured by this deed or in performance of any agreement under this deed, to collect and retain the rents, issues, and profits as they become due and payable. Upon any such default, Beneficiary may enforce this assignment in any method authorized by *Civil Code Section 2938*]."

6. The consideration received by defendant for the note was _____ [*specify, e.g.,* the principal amount of the note, received at the time the transaction was entered into], and the agreement is, as to defendant, just and reasonable.

7. Plaintiff has performed all conditions, covenants, and promises required to be performed by plaintiff in accordance with the terms and conditions of the agreement.

8. Defendant defaulted under the terms of the note and trust deed in that _____ [*allege default, e.g.,* defendant failed to pay interest and principal for the months of _____ through _____].

9. Plaintiff has demanded that defendant let, but defendant failed and refused and continues to fail and refuse to let, plaintiff into possession of the property to collect the rents, issues, and profits as provided in the trust deed.

10. There is no adequate remedy at law to enforce the provision of the trust deed set out above.

[11. A notice of default and election to sell under the trust deed, as a result of defendant's default, was recorded on _____ (*date*).]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. That a receiver be appointed to take possession and charge of the property described in this complaint, to conserve and manage it [pending the sale] under the terms of the trust deed, and to collect any and all rents and profits [pending the sale];

2. That defendant and anyone holding under defendant be ordered to deliver possession of the property to the receiver without delay;

3. For reasonable attorney's fees and expenses incurred in the collection of rents, issues, and profits;

4. For costs of suit herein incurred; and

5. For any other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 555.120[1].*]

[2] Use of Form

This form is a complaint for use by a beneficiary of a trust deed, to sue for specific performance of a standard assignment-of-rents clause in the trust deed by requiring the trustor to surrender possession to a receiver, who will collect rents and profits after a default by the trustor. If an action for foreclosure is contemplated, this form should be combined with a complaint for foreclosure [*see § 555.160*]. For further discussion and forms relating to actions for specific performance, see Ch. 528, *Specific Performance* .

This form is based on *Code Civ. Proc. § 564(b)(11)*, which authorizes the appointment of a receiver in the circumstances described and also provides for the appointment of a receiver in a case brought by an assignee under an assignment of leases, rents, issues, or profits pursuant to *Civ. Code § 2938(g)* [*Code Civ. Proc. § 564(b)(12)*; *see § 555.180[4]*].

[3] Allegations

This complaint contains the following allegations essential to state a cause of action for specific performance of a standardized assignment-of-rents clause:

- The execution and delivery of a con tract sufficiently certain in its terms, namely, the promissory note and trust deed (Paragraphs 4 and 5) [*see Civ. Code § 3390(5)*].

- The consideration received by the defendant, showing that the agreement was just and reasonable (Paragraph 6) [*Civ. Code § 3391(1), (2)*].

- The plaintiff's performance of all of his or her contractual obligations (Paragraph 7) [*Civ. Code §§ 3386, 3392*].

- The occurrence of conditions entitling the plaintiff to enforce the assignment-of-rents clause, such as the defendant's default and refusal to give the plaintiff possession (Paragraphs 8 and 9).

- The lack of an adequate legal remedy, which justifies equitable relief (Paragraph 10) [*see Mines v. Superior Court (1932) 216 Cal. 776, 778, 16 P.2d 732]* .

For further discussion of allegations necessary to state a cause of action for specific performance generally, see Ch. 528, *Specific Performance* .

An optional paragraph alleging notice of default and election to sell is included (Paragraph 11) for use when nonjudicial foreclosure proceedings have been commenced. This allegation is not required but should be included if applicable, because the plaintiff's rights under the assignment-of-rents clause will be affected by any sale of the property [*see § 555.18[1]*].

[4] Appointment of Receiver

A receiver may be appointed in an action by a secured lender for specified performance of an assignment-of-rents clause in a trust deed, mortgage, or separate assignment document. The appointment may be continued after entry of a judgment for specific performance in that action, if appropriate to protect, operate, or maintain the property encumbered by the trust deed or mortgage, or to collect the rents from the property while a pending nonjudicial foreclosure under

power of sale in the trust deed or mortgage is being completed [*Code Civ. Proc. § 564(b)(11)*].

A receiver may be appointed in a case brought by an assignee under an assignment of leases, rents, issues, or profits pursuant to *Civ. Code § 2938(g)* [*Code Civ. Proc. § 564(b)(12)*; *see § 555.81[6]*]. That section governs a written assignment of an interest in leases, rents, issues, or profits of real property made in connection with an obligation secured by the property. It specifies alternative methods for the enforcement of the assignment, including the appointment of a receiver and obtaining possession of the rents, issues, or profits [*see Civ. Code § 2938(c)*].

For discussion of these statutory appointments, see *§ 555.81[1]*. For a form of demand for turnover of rents, which may be used in connection with the appointment of a receiver, see *§ 555.189*. If the plaintiff will apply for ex parte appointment of a receiver, see *§ 555.186[3]* for required contents of the application, which may be inserted into a verified complaint (such as the form in [1], *above*) or stated in an accompanying affidavit or declaration under penalty of perjury [*see § 555.182*].

[5] Verification

Verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified)]. However, if the complaint is verified, the defendant is required to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446(a)*] and is precluded from making a general denial in superior court actions that are not limited civil cases and in some limited civil cases [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[6] Jurisdiction and Venue

An action for specific performance to enforce an assignment-of-rents clause of a trust deed must be brought in the superior court and is not a limited civil action [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(b)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

In an action to determine a right or interest in real property, the superior court in the county in which the real property is located is the proper court for trial [*Code Civ. Proc. § 392(a)(1)*].

[7] Cross References

For discussion and forms relating to the appointment of receivers generally, see Ch. 486, *Receivers*

For discussion and forms relating to specific performance generally, see Ch. 528, *Specific Performance*

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§ 555.181 Notice of Motion for Receiver Pendente Lite Pursuant to Trust Deed [Code Civ. Proc. § 564(b)(10)]

[1] FORM Notice of Motion for Receiver Pendente Lite Pursuant to Trust Deed [Code Civ. Proc. § 564(b)(11)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR AP-
Plaintiff,	)	POINTMENT OF RECEIVER
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, for example,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*] at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [

specify party, for example, plaintiff] will, and hereby does, move for an order appointing a receiver to take possession of, preserve, manage, and collect all rents and profits accruing from the real property located at _____ [*street address or common designation, if any*] in _____ County, California, and described as _____ [*legal description in trust deed*]. The motion will be made on the ground that *Code of Civil Procedure Section 564(b)(11)* gives the court authority to appoint a receiver in an action by a secured lender for specific performance of an assignment-of-rents clause in a trust deed.

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s)*] and the memorandum of points and authorities served and filed with this notice, on the records and file in this action, and on evidence to be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This form is a notice of motion for use by a beneficiary who has brought an action for specific performance of a standard assignment-of-rents clause [*see § 555.180*], to obtain appointment of a receiver to take possession of the property pendente lite and to collect rents and profits. A superior court may appoint a receiver in an action by a secured lender for specific performance of an assignment-of-rents clause in a trust deed, mortgage, or separate assignment document. The court also has authority to continue that appointment after entry of a judgment for specific performance in the action, if appropriate to protect, operate, or maintain the property encumbered by the trust deed or mortgage or to collect the rents while a pending nonjudicial foreclosure under power of sale in the trust deed or mortgage is being completed [*Code Civ. Proc. § 564(b)(11)*].

A receiver also may be appointed in a case brought by an assignee under an assignment of leases, rents, issues, or profits pursuant to *Civ. Code § 2938(g)* [*Code Civ. Proc. § 564(b)(12)*]. For coverage of that statute, see *§ 555.81[1]*.

A supporting memorandum must be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005(b), 1010; Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

For a related declaration and order, see *§§ 555.182* and *555.183*, respectively.

[3] Ex Parte Application for Appointment of Receiver

An order appointing a receiver pendente lite is generally obtained by a noticed motion but may instead be sought ex parte by an application for an order to show cause why a receiver should not be appointed or by an application for an order of appointment ex parte with a subsequent hearing by way of an order to show cause why the receiver should not be confirmed [*see Cal. Rules of Ct., Rule 3.1175 et seq.*]. For discussion and forms of orders for the ex parte appointment of a receiver for rents, issues, and profits, see *§§ 555.186* and *555.187*. For further discussion of substantive and procedural requirements for ex parte appointments, see Ch. 486, *Receivers* .

PRACTICE TIP:

Consult "Local, Local" Rules of Receivership Judges. More and more, certain departments or divisions of courts are designated as "writs and receivers" departments or divisions. The practitioner seeking receiverships in these specialized departments or divisions should consult with department guidelines, or "local, local rules" in common parlance. For example, some Los Angeles County Superior Court judges do not allow for ex parte receiverships (in the absence of waste or an impending calamity)

unless theborrower is at least three monthsdelinquent. Knowing these local, local rules will save receivership attorneys precious time and expense when practicing in this area. *By William M. Hensley*

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48-555 California Forms of Pleading and Practice--Annotated § 555.182

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§ 555.182 Declaration in Support of Motion for Receiver Pendente Lite Pursuant to Trust Deed [Code Civ. Proc. § 564(b)(11)]

[1] FORM Declaration in Support of Motion for Receiver Pendente Lite Pursuant to Trust Deed [Code Civ. Proc. § 564(b)(10)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	DECLARATION OF _____ [*name*]
Plaintiff,	)	IN SUPPORT OF MOTION FOR APPOINTMENT
vs.	)	OF RECEIVER
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, for example,* the plaintiff] in this action to specifically enforce the

provisions of a trust deed executed by defendant _____ [*name*].

2. Defendant is in actual possession of the real property that is the subject of the trust deed, which consists of _____ [*specify income-producing aspect of property, e.g.,* a five-unit apartment building]. The property produces an income of approximately $_____ per month, which defendant is receiving and retaining.

3. _____ [*Name of receiver proposed by moving party*], whose address is _____, California, is a disinterested and proper person to be appointed receiver pending trial of this action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form is a declaration for use in supporting a motion by a beneficiary to appoint a receiver pursuant to an assignment-of-rents clause in the trust deed, pending trial of an action for specific performanceof the clause [*see Code Civ. Proc. §§ 564(b)(11), 2015.5*; §§ 555.180 (complaint for specific performance), 555.181 (notice of motion for receiver pendente lite)]. Supporting evidence may instead be presented by stating the necessary facts in a verified complaint [*see Cal. Rules of Ct., Rule 3.1175*; *§ 555.180*].

The declaration should provide evidence as to the income-producing aspect of the property and identify the moving party's nominee [*see Cal. Rules of Ct., Rule 3.1177*].

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART IV. FORMS
D. Collection of Rents and Profits

48-555 California Forms of Pleading and Practice--Annotated § 555.183

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§ 555.183 Order Appointing Receiver Pendente Lite Pursuant to Trust Deed [Code Civ. Proc. § 564(b)(11)]

[1] FORM Order Appointing Receiver Pendente Lite Pursuant to Trust Deed [Code Civ. Proc. § 564(b)(10)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER
Defendant.	)	
	)	
	)	

The motion of _____ [*identify party, for example,* plaintiff] for an order appointing a receiver in the above entitled action came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted, and:

1. _____ [*Name*], whose address is _____ [*specify*], is appointed receiver.

2. Before commencing the duties described below, the receiver shall take an oath to perform these duties faithfully and, further, shall execute an undertaking to the State of California for the faithful performance of these duties and subject to the orders of this Court in the amount of $_____.

3. After qualifying, the receiver shall take possession of the following described property: _____ [*legal description and address or other designation, description of any personal property or fixtures and furnishings, description of any business, etc.*].

4. The receiver shall care for, preserve, and maintain the property and may incur expenses necessary for that care, preservation, and maintenance.

5. The receiver shall demand and collect all rents now due and coming due from tenants of any portion of the property, and tenants occupying or using any portion of the property shall pay rents to the receiver.

6. The receiver shall bring and prosecute all proper actions for the collection of rents due, or for the removal of tenants in default or other persons, or for the protection or to recover possession of the property, and for this purpose may employ an attorney to be approved by this Court.

7. The receiver may employ an agent to collect the rents and/or manage, maintain, or repair the property.

IT IS FURTHER ORDERED that the receiver and _____ [*moving party, e.g.*, plaintiff] may apply to this Court from time to time for further instructions or powers necessary to enable the receiver to perform the receiver's duties properly.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is an order for use by a beneficiary moving for appointment of a receiver pendente lite [*see § 555.181* (notice of motion)]. Submission of a carefully drafted order is essential because of the importance of specifying the property that the receiver is to take into possession and the receiver's powers and duties. Additional powers and duties that might be specified in the order include the duty to file an inventory of all property on taking possession and to make periodic accountings; the duty to make specified payments in a specified order for the secured obligation, taxes, insurance, maintenance expenses, senior liens, compensation for the receiver or agents, and other payments; the duty to hold or otherwise dispose of amounts remaining after the specified payments are made; and particular duties or instructions as to the operation of a business [*see Code Civ. Proc. § 568*]. For an illustration of a Judicial Council form of order that may be used as a model for drafting this order, see *§ 555.185[1]* or *§ 555.186[1]*. Under local rules or court practice, one of those Judicial Council forms might be approved for use, with appropriate modifications, in lieu of a custom-drafted order (or an alternative form of order might be prescribed).

[3] Notice of Order

The moving party must serve notice of the order on all other parties, unless the court orders otherwise or notice is waived by all parties in open court and is entered in the minutes [*Code Civ. Proc. § 1019.5(a)*; *see Cal. Rules of Ct., Rule 3.1109* (notice to be given by clerk)].

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D. Collection of Rents and Profits

48-555 California Forms of Pleading and Practice--Annotated § 555.184

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§ 555.184 Order to Show Cause and Temporary Restraining Order--Rents, Issues, and Profits [Cal. Rules of Ct., Rule 3.1175 et seq.; Cal. Judicial Council Form RC-300]

[1] FORM Order to Show Cause and Temporary Restraining Order--Rents, Issues, and Profits [Cal. Rules of Ct., Rule 3.1175 et seq.; Cal. Judicial Council Form RC-300]

Click here to view image.

[2] Use of Form

This form is California Judicial Council Form RC-300, which may be used to obtain appointment of a receiver for rents, issues, and profits, along with a temporary restraining order designed to preserve the status quo respecting the receivership property [*see Cal. Rules of Ct., Rule 3.1175 et seq.*]. This form would be appropriate when exigent circumstances, not allowing for a normal noticed motion [*see § 555.181[1]*], evidently require issuance of the temporary restraining order. If even more urgent circumstances require the ex parte appointment of a receiver, the form in *§ 555.186[1]* may be used. After the hearing on this order to show cause, the form in *§ 555.185[1]* may be used for the order appointing a receiver.

There is no Judicial Council form specifically for use in applying for this order. The application would be made by verified complaint [*see, e.g., § 555.180[1]*] or by affidavit or declaration under penalty of perjury [*see, e.g., § 555.182[1]*]. The contents of the application would be essentially the same as for an application for ex parte appointment of a receiver [*see § 555.186[3]*]. For further discussion of temporary restraining orders and additional forms, see Ch. 303, *Injunctions* .

Use of this form is optional. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge.

A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Notice of Hearing

When a temporary restraining order is issued without notice, the matter must be made returnable on an order requiring cause to be shown why a preliminary injunction should not be granted, on the earliest day that the business of the court will allow, but not later than 15 days or, if good cause appears to the court, 22 days from the date the temporary restraining order is issued [*Code Civ. Proc. § 527(d)(1)*].

The hearing date will control the service and briefing schedule (*see* Paragraphs 7-9 of form) [*see* [5], *below*].

[4] Nomination of Receiver

No receiver is named in this order to show cause. At the hearing of an application for appointment of a receiver on notice, each party appearing may, at the time of the hearing, suggest in writing one or more persons for appointment as receiver, stating the reasons. For discussion of who may be appointed as a receiver, see *§ 555.185[3][a]*. A party's suggestion is without prejudice to the party's objections to the appointment of a receiver [*Cal. Rules of Ct., Rule 3.1177*]. The court is not bound by a party's nomination, but the party's choice is usually given considerable weight. The statement of nomination should demonstrate that the nominee is not disqualified for any statutory reason [*see Code Civ. Proc. § 566(a)*; *§ 555.185[3][a]*].

[5] Service and Briefing Schedule

The party who obtained the temporary restraining order must, within five days from the date the temporary restraining order is issued or two days before the hearing, whichever is earlier, serve on the opposing party:

- A copy of the complaint if not previously served;
- The order to show cause stating the date, time, and place of the hearing;
- Any affidavits to be used in the application; and
- A copy of the points and authorities in support of the application.

The court may for good cause, on motion of the applicant or on its own motion, shorten the time required for service on the opposing party [*Code Civ. Proc. § 527(d)(2)*].

The service and briefing schedule in this order will necessarily be controlled by the hearing date. For example, if the hearing date were set 10 days after issuance of the order to show cause [*see Code Civ. Proc. § 527(d)(1)*; *see also* [3], *above*], the schedule might mandate service by the applicant (*see* Paragraph 7 of form) eight days before the hearing, and service of opposition papers (*see* Paragraph 8) four days before the hearing, and service of any reply papers (*see* Paragraph 9) two days before the hearing. This is a matter that could be governed by a local rule or practice.

When the matter first comes up for hearing, if the party who obtained the temporary restraining order has failed to effect service as required, the court must dissolve the temporary restraining order [*Code Civ. Proc. § 527(d)(3)*; *but see Code Civ. Proc. § 527(d)(5)* (order may be reissued if applicant shows inability to effect service as required)]. The opposing party is entitled to one continuance for a reasonable period of not less than 15 days or any shorter period requested by the opposing party, to enable the opposing party to meet the application for a preliminary injunction. If the opposing party obtains a continuance, the temporary restraining order will remain in effect until the date of the continued hearing [*Code Civ. Proc. § 527(d)(4)*].

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48-555 California Forms of Pleading and Practice--Annotated § 555.185

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§ 555.185 Order Appointing Receiver After Hearing and Preliminary Injunction--Rents, Issues, and Profits [Cal. Rules of Ct., Rule 3.1175 et seq.; Cal. Judicial Council Form RC-310]

[1] FORM Order Appointing Receiver After Hearing and Preliminary Injunction--Rents, Issues, and Profits [Cal. Rules of Ct., Rule 3.1175 et seq.; Cal. Judicial Council Form RC-310]

Click here to view image.

[2] Use of Form

This form is California Judicial Council Form RC-310, which may be used to appoint a receiver for rents, issues, and profits after a hearing on an order to show cause [*see § 555.184*] and to issue a preliminary injunction in aid of the receivership [*see Cal. Rules of Ct., Rule 3.1175 et seq.*].

For examples of additional orders that could be stated in (or attached to) Paragraph 27 of this form, see *§ 555.188[1]*.

Use of this form is optional. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

[3] Order Appointing Receiver

[a] Who May Be Receiver

The receiver is the agent of the court and not of any party, and as such (1) is neutral, (2) acts for the benefit of all who may have an interest in the receivership property, and (3) holds assets for the court and not for the plaintiff or the

defendant [*Cal. Rules of Ct., Rule 3.1179(a)*]. The person appointed as receiver (*see* Paragraph 2 of form) must be eligible under this standard of neutrality and impartiality. The receiver should not be a party, or an attorney of a party, or a person otherwise interested in the action, or a relative of any judge of the court by consanguinity or affinity within the third degree [*see Code Civ. Proc. § 566(a)*].

The receiver must provide a bond and take an oath (*see* Paragraph 3 of form) [*see Code Civ. Proc. § 567*]. The court should fix the amount of the receiver's bond so as to cover the value of transferable personal property and cash that the receiver may possess at any point during the expected period of the receivership. If the bond were set too high or too low, the appropriate remedy would be a noticed motion for a modification. Counsel should be prepared to discuss the amount of the bond at the hearing.

[b] Prohibited Arrangements

The party seeking the appointment of the receiver may not, directly or indirectly, require any contract, agreement, arrangement, or understanding with any receiver whom the party intends to nominate or recommend to the court, and the receiver may not enter any such contract, arrangement, agreement, or understanding concerning any of the following [*Cal. Rules of Ct., Rule 3.1179(b)*]:

- How much the receiver will charge for services (*see* Paragraph 4 of form) [*Cal. Rules of Ct., Rule 3.1179(b)(2)*];

- Whom the receiver will hire, or seek approval to hire, to perform necessary services (*see, e.g.,* Paragraphs 5 and 14b of form) [*Cal. Rules of Ct., Rule 3.1179(b)(3)*];

- How much the receiver will pay for services to appropriate or approved third parties hired to provide services (*see, e.g.,* Paragraphs 5 and 14 of form) [*Cal. Rules of Ct., Rule 3.1179(b)(2)*];

- How the receiver will administer the receivership (*see* Paragraph 7 et seq. of form) [*Cal. Rules of Ct., Rule 3.1179(b)(2)*];

- The role of the receiver with regard to the property following a trustee's sale or termination of the receivership, without specific court permission (*see* Paragraph 8 of form) [*Cal. Rules of Ct., Rule 3.1179(b)(1)*]--for example, the party could not promise or agree that the receiver will get the listing for the property after the receivership or a particular management company will get the right to manage the property; or

- What capital expenditures will be made on the property (*see* Paragraph 14c of form) [*Cal. Rules of Ct., Rule 3.1179(b)(4)*].

[c] Inventory

A receiver must, within 30 days after appointment, or within any other time as the court may order, file an inventory containing a complete and detailed list of all property of which the receiver has taken possession by virtue of the appointment (*see* Paragraph 9 of form). The receiver must promptly file a supplementary inventory of all subsequently obtained property [*Cal. Rules of Ct., Rule 3.1181*].

[d] Monthly Reports

The receiver must provide monthly reports to the parties and, if requested, to nonparty client lienholders [*Cal. Rules of Ct., Rule 3.1182(a)*]. The monthly reports are not to be filed with the court unless the court so orders [*Cal. Rules of Ct.,*

Rule 3.1182(b)]. These reports must include all of the following:

- A narrative report of events [*Cal. Rules of Ct., Rule 3.1182(a)(1)*];
- A financial report (*see* Paragraph 13a of form) [*Cal. Rules of Ct., Rule 3.1182(a)(2)*]; and
- A statement of all fees paid to the receiver [*see* [e], *below*], employees, and professionals showing all of the following [*Cal. Rules of Ct., Rule 3.1182(a)(3)*]:
  - Itemized services;
  - A breakdown of the services by six-minute increments;
  - If the fees are hourly, the hourly fees; and
  - If the fees are on another basis, that basis.

Unless good cause is shown, objections to a receiver's interim report and accounting (1) must be made within 10 days of notice of the report andaccounting, (2) must be specific, and (3) must be delivered to the receiver and all parties entitled to service of the interim report and accounting [*Cal. Rules of Ct., Rule 3.1183(b)*].

[e] Interim Fees

Interim fees (*see* Paragraph 13b of form) are subject to final review and approval by the court. The court retains jurisdiction to award a greater or lesser amount as the full, fair, and final value of the services received [*Cal. Rules of Ct., Rule 3.1183(a)*].

[f] Employment of Attorney

A receiver must not employ an attorney without the court's approval. The application for approval to employ an attorney must be in writing and must state the necessity for the employment, the name of the attorney whom the receiver proposes to employ, and that the attorney is not the attorney for any party, nor associated with any party, nor employed by an attorney for any party (*see* Paragraph 18 of form) [*Cal. Rules of Ct., Rule 3.1180*].

[g] Final Account and Report on Noticed Motion or Stipulation

A receiver must present all of the following by noticed motion or stipulation of all parties [*Cal. Rules of Ct., Rule 3.1184(a)*]:

- A final account and report (*see* Paragraph 22 of form);
- A request for the discharge; and
- A request for exoneration of the receiver's surety.

No memorandum needs to be submitted in support of the motion or stipulation unless the court issues an order requiring a memorandum [*Cal. Rules of Ct., Rule 3.1184(b)*]. Notice of the motion or the stipulation must be given to every person or entity known to the receiver to have a substantial unsatisfied claim that will be affected by the order or stipulation, whether or not the person or entity is a party to the action and has appeared in the action [*Cal. Rules of Ct., Rule 3.1184(c)*]. If any allowance of compensation for the receiver or for an attorney employed by the receiver is

claimed in an account, it must state in detail what services have been performed by the receiver or the attorney, and whether previous allowances have been made to the receiver or attorney, and the amounts [*Cal. Rules of Ct., Rule 3.1184(d)*].

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48-555 California Forms of Pleading and Practice--Annotated § 555.186

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§ 555.186 Ex Parte Order Appointing Receiver and Order to Show Cause--Rents, Issues, and Profits [Cal. Rules of Ct., Rule 3.1175 et seq.; Cal. Judicial Council Form RC-200]

[1] FORM Ex Parte Order Appointing Receiver and Order to Show Cause--Rents, Issues, and Profits [Cal. Rules of Ct., Rule 3.1175 et seq.; Cal. Judicial Council Form RC-200]

Click here to view image.

[2] Use of Form

This form is California Judicial Council Form RC-200, which may be used to order the ex parte appointment of a receiver for rents, issues, and profits [*see Cal. Rules of Ct., Rule 3.1175 et seq.*], along with a temporary restraining order, if necessary, to preserve the status quo regarding the receivership property. This form may be appropriate for use only in the most urgent circumstances, not allowing for a normal noticed motion [*see § 555.181[1]*] and not amenable to issuance of a show-cause order with a temporary restraining order [*see § 555.184[1]*], but evidently requiring the immediate appointment of a receiver. It would be considered a drastic remedy [*see Cal. Rules of Ct., Rule 3.1175(a)(1)*; *see also* [3], *below*].

For examples of additional orders that could be stated in (or attached to) Paragraph 29 of this form, see *§ 555.188[1]*.

Use of this form is optional. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

Before going into court to request the ex parte appointment of a receiver, the applicant should verify his or her nominee's availability and obtain the information necessary to ensure that the receiver's bond and oath [*see* [5][b], *below*

] and the applicant's bond [*see* [5][d], *below*] can be immediately submitted to the court if the application is granted.

[3] Contents of Application

There is no Judicial Council form specifically for use in applying for this ex parte order. The application would be made by verified complaint [*see, e.g., § 555.180[1]*] or by affidavit or declaration under penalty of perjury [*see, e.g., § 555.182[1]*]. It must show in detail (in addition to any other matters supporting an application for the ex parte appointment of a receiver) all of the following:

- The nature of the emergency and the reasons irreparable injury would be suffered by the applicant during the time necessary for a hearing on notice [*Cal. Rules of Ct., Rule 3.1175(a)(1)*];

- The names, addresses, and telephone numbers of the persons in actual possession of the property for which a receiver is requested, or of the president, manager, or principal agent of any corporation in possession of the property [*Cal. Rules of Ct., Rule 3.1175(a)(2)*];

- The use being made of the property by the persons in possession [*Cal. Rules of Ct., Rule 3.1175(a)(3)*]; and

- If the property is a part of the plant, equipment, or stock in trade of any business, the nature and approximate size or extent of thebusiness, and facts sufficient to show whether the taking of the property by a receiver would stop or seriously interfere with the operation of the business [*Cal. Rules of Ct., Rule 3.1175(a)(4)*].

[4] Notice of Hearing

Whenever a receiver is appointed without notice, the matter must be made returnable on an order to show cause why the appointment should not be confirmed. The order to show cause must be made returnable on the earliest date the business of the court will allow, but not later than 15 days or, if good cause appears to the court, 22 days from the date the order is issued [*Cal. Rules of Ct., Rule 3.1176(a)*; *see § 555.184[3]*].

The hearing date will control the service and briefing schedule in the form (*see* Paragraphs 34-36 of form) [*see* [6], *below*].

[5] Order Appointing Receiver

[a] Who May Be Receiver

The receiver is the agent of the court and not of any party, and as such (1) is neutral, (2) acts for the benefit of all who may have an interest in the receivership property, and (3) holds assets for the court and not for the plaintiff or the defendant [*Cal. Rules of Ct., Rule 3.1179(a)*]. The person appointed as receiver (*see* Paragraph 3 of form) must be eligible under this standard of neutrality and impartiality. The receiver should not be a party, or an attorney of a party, or a person otherwise interested in the action, or a relative of any judge of the court by consanguinity or affinity within the third degree [*see Code Civ. Proc. § 566(a)*].

[b] Receiver's Bond and Oath

The receiver must provide a bond and take an oath (*see* Paragraph 4 of form) [*see Code Civ. Proc. § 567*]. The court should fix the amount of the receiver's bond so as to cover the value of transferable personal property and cash that the receiver may possess at any point during the expected period of the receivership. If the bond were set too high or too low, the appropriate remedy would be a noticed motion for a modification. Counsel should be prepared to discuss the

amount of the bond at the ex parte hearing (and at the confirmation hearing; *see § 555.187*).

[c] Prohibited Arrangements

The party seeking the appointment of the receiver may not, directly or indirectly, require any contract, agreement, arrangement, or understanding with any receiver whom the party intends to nominate or recommend to the court, and the receiver may not enter any such contract, arrangement, agreement, or understanding concerning any of the following [*Cal. Rules of Ct., Rule 3.1179(b)*]:

- How much the receiver will charge for services (*see* Paragraph 5 of form) [*Cal. Rules of Ct., Rule 3.1179(b)(2)*];

- Whom the receiver will hire, or seek approval to hire, to perform necessary services (*see, e.g.,* Paragraphs 6 and 16b of form) [*Cal. Rules of Ct., Rule 3.1179(b)(3)*];

- How much the receiver will pay for services to appropriate or approved third parties hired to provide services (*see, e.g.,* Paragraph 6 of form) [*Cal. Rules of Ct., Rule 3.1179(b)(2)*];

- How the receiver will administer the receivership (*see* Paragraph 9 et seq. of form) [*Cal. Rules of Ct., Rule 3.1179(b)(2)*];

- The role of the receiver with regard to the property following a trustee's sale or termination of the receivership, without specific court permission (*see* Paragraph 10 of form) [*Cal. Rules of Ct., Rule 3.1179(b)(1)*]--for example, the party could not promise or agree that the receiver will get the listing for the property after the receivership or a particular management company will get the right to manage the property; or

- What capital expenditures will be made on the property (*see* Paragraph 16c of form) [*Cal. Rules of Ct., Rule 3.1179(b)(4)*].

[d] Applicant's Bond

Because the receiver is appointed ex parte, the applicant is required to provide a bond (*see* Paragraph 8 of form) [*Code Civ. Proc. § 566(b)*]. Counsel should be prepared to discuss the amount of the bond at the ex parte hearing. If the bond were set too high or too low, the appropriate remedy would be a noticed motion for a modification.

[e] Inventory

A receiver must, within 30 days after appointment, or within such other time as the court may order, file an inventory containing a complete and detailed list of all property of which the receiver has taken possession by virtue of the appointment (*see* Paragraph 11 of form). The receiver must promptly file a supplementary inventory of all subsequently obtained property [*Cal. Rules of Ct., Rule 3.1181*].

[f] Monthly Reports

The receiver must provide monthly reports to the parties and, if requested, to nonparty client lienholders [*Cal. Rules of Ct., Rule 3.1182(a)*]. The monthly reports are not to be filed with the court unless the court so orders [*Cal. Rules of Ct., Rule 3.1182(b)*]. These reports must include all of the following:

- A narrative report of events [*Cal. Rules of Ct., Rule 3.1182(a)(1)*];

- A financial report (*see* Paragraph 15a of form) [*Cal. Rules of Ct., Rule 3.1182(a)(2)*]; and

- A statement of all fees paid to the receiver [*see* [g], *below*], employees, and professionals showing [*Cal. Rules of Ct., Rule 3.1182(a)(3)*]:

    - Itemized services;

    - A breakdown of the services by six-minute increments;

    - If the fees are hourly, the hourly fees; and

    - If the fees are on another basis, that basis.

Unless good cause is shown, objections to a receiver's interim report and accounting (1) must be made within 10 days of notice of the report and accounting, (2) must be specific, and (3) must be delivered to the receiver and all parties entitled to service of the interim report and accounting [*Cal. Rules of Ct., Rule 3.1183(b)*].

[g] Interim Fees

Interim fees (*see* Paragraph 15b of form) are subject to final review and approval by the court. The court retains jurisdiction to award a greater or lesser amount as the full, fair, and final value of the services received [*Cal. Rules of Ct., Rule 3.1183(a)*].

[h] Employment of Attorney

A receiver must not employ an attorney without the court's approval. The application for approval to employ an attorney must be in writing and must state the necessity for the employment, the name of the attorney whom the receiver proposes to employ, and that the attorney is not the attorney for any party, nor associated with any party, nor employed by an attorney for any party (*see* Paragraph 20 of form) [*Cal. Rules of Ct., Rule 3.1180*].

[i] Final Account and Report on Noticed Motion or Stipulation

A receiver must present all of the following by noticed motion or stipulation of all parties [*Cal. Rules of Ct., Rule 3.1184(a)*]:

- A final account and report (*see* Paragraph 24 of form);

- A request for the discharge; and

- A request for exoneration of the receiver's surety.

No memorandum needs to be submitted in support of the motion or stipulation unless the court issues an order requiring a memorandum [*Cal. Rules of Ct., Rule 3.1184(b)*]. Notice of the motion or the stipulation must be given to every person or entity known to the receiver to have a substantial unsatisfied claim that will be affected by the order or stipulation, whether or not the person or entity is a party to the action and has appeared in the action [*Cal. Rules of Ct., Rule 3.1184(c)*]. If any allowance of compensation for the receiver or for an attorney employed by the receiver is claimed in an account, it must state in detail what services have been performed by the receiver or the attorney, and whether previous allowanceshave been made to the receiver or attorney, and the amounts [*Cal. Rules of Ct., Rule 3.1184(d)*].

[6] Service and Briefing Schedule

The applicant must serve, by personal service (*see* Paragraph 34 of form) on each of the adverse parties all of the following:

- A copy of the complaint if not previously served;
- The order to show cause stating the date, time, and place of the hearing;
- Any affidavits supporting the application; and
- A memorandum of points and authorities supporting the application.

Service must be made as soon as reasonably practical, but no later than five days after the date the order to show cause is issued, unless the court orders another time for service [*Cal. Rules of Ct., Rule 3.1176(b)*].

The service and briefing schedule will necessarily be controlled by the hearing date. For example, if the hearing date were set 10 days after issuance of the order to show cause [*see Cal. Rules of Ct., Rule 3.1176(a)*; [4], *above*], the schedule might mandate service by the applicant (*see* Paragraph 34 of form) eight days before the hearing, and service of opposition papers (*see* Paragraph 35) four days before the hearing, and service of any reply papers (*see* Paragraph 36) two days before the hearing. This is a matter that could be governed by a local rule or practice.

If the party that obtained the ex parte appointment fails to exercise diligence to effect service on the adverse parties, the court may discharge the receiver [*Cal. Rules of Ct., Rule 3.1176(c)*].

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Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART IV. FORMS
D. Collection of Rents and Profits

48-555 California Forms of Pleading and Practice--Annotated § 555.187

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§ 555.187 Order Confirming Appointment of Receiver and Preliminary Injunction--Rents, Issues, and Profits [Cal. Rules of Ct., Rule 3.1175 et seq.; Cal. Judicial Council Form RC-210]

[1] FORM Order Confirming Appointment of Receiver and Preliminary Injunction--Rents, Issues, and Profits [Cal. Rules of Ct., Rule 3.1175 et seq.; Cal. Judicial Council Form RC-210]

Click here to view image.

[2] Use of Form

This form is California Judicial Council Form RC-210, which may be used to confirm the ex parte appointment of a receiver for rents, issues, and profits [*see § 555.186*] and to issue a preliminary injunction in aid of the receivership [*see Cal. Rules of Ct., Rule 3.1175 et seq.*].

Use of this form is optional. This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

At the hearing for confirmation of an ex parte appointment, each party appearing may, at the time of the hearing, suggest in writing one or more persons for substitution as receiver, stating the reasons. A party's suggestion is without prejudice to the party's objections to the confirmation of the receiver [*Cal. Rules of Ct., Rule 3.1177*].

If the party that obtained the ex parte appointment is not ready to proceed at the confirmation hearing, the court may discharge the receiver [*Cal. Rules of Ct., Rule 3.1176(c)*]. The adverse parties are entitled to one continuance to enable them to oppose the confirmation. If a continuance is granted, the order to show cause remains in effect until the date of the continued hearing [*Cal. Rules of Ct., Rule 3.1176(d)*].

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§ 555.188 Additional Orders

[1] FORM

[*Following are examples of additional orders that could be stated in (or attached to) Paragraph 27 of form in § 555.185[1] or Paragraph 29 of form in § 555.186[1].*]

A. Preservation of Property. The receiver is authorized to care for, preserve, and maintain property in the receivership estate and, for that purpose, to make decisions or take action not specifically authorized by this order, provided that with regard to such authority:

(1) The receiver shall first attempt to obtain a stipulated agreement from the adversarial parties relating to a contemplated action. If the stipulation is obtained, it shall then be submitted to the court, ex parte, with an order for signature.

(2) If unable to obtain a stipulation, the receiver shall circulate a notice, with details of the recommended course of action, and give the parties an opportunity to object and request an ex parte hearing. The notice shall expressly state the necessity for the contemplated action and shall advise the parties that any objection must be written, must be specific, and must be served on the receiver and other parties, and filed with the court within seven days from being mailed or five days from being faxed.

(3) If the contemplated action is not an emergency, the receiver or the objecting party shall move for an order on a regularly noticed motion.

B. Contracts. If, in the receiver's judgment, a contract is necessary to administer the receivership estate, and if the

contract has a *de minimis* effect on the estate, no prior notice need be given, but the circumstances of entering into the contract shall be included in the receiver's next monthly report.

C. Notification of Tenants. The receiver shall inform all tenants of the telephone number and address of the receiver and notify tenants of the requirement that rents be paid to the receiver.

D. New Leases (or Renewals) in Excess of One Year. The receiver shall negotiate leases in excess of one year so as to obtain the best possible lease for the estate. Before execution of a lease, the receiver shall submit the lease to the plaintiff and the defendant (owner), for review, and give each party an opportunity to object by a date certain. If there is objection, the lease shall be submitted to the court for approval.

[2] Use of Form

This form sets forth examples of additional orders that, depending on the circumstances, could be stated in (or attached to) the JudicialCouncil forms in *§ 555.185[1]* (*see* Paragraph 27 of that form) and *§ 555.186[1]* (*see* Paragraph 29 of that form). These orders are adapted from orders sanctioned in local rules of the Los Angeles County Superior Court [*see* Los Angeles Co. Super. Ct. Rule 9.51 et seq.], now largely superseded by *Cal. Rules of Ct., Rule 3.1175 et seq.*

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48-555 California Forms of Pleading and Practice--Annotated § 555.189

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§ 555.189 Demand for Turnover of Rents, Issues, or Profits [Civ. Code § 2938(j)]

[1] FORM Demand for Turnover of Rents, Issues, or Profits [Civ. Code § 2938(j)]

DEMAND TO PAY RENT TO PARTY OTHER THAN LANDLORD
(*CIVIL CODE SECTION 2938*)

Tenant: _____ [*name*]
Property Occupied by Tenant: _____ [*address*]
Landlord: _____ [*name*]
Secured Party: _____ [*name*]
Address: _____ [*address for payment of rent to secured party and for further information*]

The secured party named above is the assignee of leases, rents, issues, and profits under _____ [*name of document*] dated _____ [*date*] and recorded at _____ [*recording information*] in the official records of _____ County, California. You may request a copy of such assignment from the secured party at _____ [*address*].

THIS NOTICE AFFECTS YOUR LEASE OR RENTAL AGREEMENT RIGHTS AND OBLIGATIONS. YOU ARE THEREFORE ADVISED TO CONSULT AN ATTORNEY CONCERNING THOSE RIGHTS AND OBLIGATIONS IF YOU HAVE ANY QUESTIONS REGARDING YOUR RIGHTS AND OBLIGATIONS UNDER THIS NOTICE.

IN ACCORDANCE WITH SECTION 2938 OF THE CIVIL CODE, SUBDIVISION (c), YOU ARE HEREBY DIRECTED TO PAY TO THE SECURED PARTY, _____ [*name*], AT _____ [

address], ALL RENTS UNDER YOUR LEASE OR OTHER RENTAL AGREEMENT WITH THE LANDLORD OR PREDECESSOR IN INTEREST OF LANDLORD, FOR THE OCCUPANCY OF THE PROPERTY AT _____ [*address of rental premises*] WHICH ARE PAST DUE AND PAYABLE ON THE DATE YOU RECEIVE THIS DEMAND, AND ALL RENTS COMING DUE UNDER THE LEASE OR OTHER RENTAL AGREEMENT FOLLOWING THE DATE YOU RECEIVE THIS DEMAND UNLESS YOU HAVE ALREADY PAID THIS RENT TO THE LANDLORD IN GOOD FAITH AND IN A MANNER NOT INCONSISTENT WITH THE AGREEMENT BETWEEN YOU AND THE LANDLORD. IN THIS CASE, THIS DEMAND NOTICE SHALL REQUIRE YOU TO PAY TO THE SECURED PARTY, _____ [*name*], ALL RENTS THAT COME DUE FOLLOWING THE DATE OF THE PAYMENT TO THE LANDLORD.

IF YOU PAY THE RENT TO THE UNDERSIGNED SECURED PARTY, _____ [*name*], IN ACCORDANCE WITH THIS NOTICE, YOU DO NOT HAVE TO PAY THE RENT TO THE LANDLORD. YOU WILL NOT BE SUBJECT TO DAMAGES OR OBLIGATED TO PAY RENT TO THE SECURED PARTY IF YOU HAVE PREVIOUSLY RECEIVED A DEMAND OF THIS TYPE FROM A DIFFERENT SECURED PARTY.

[*For other than residential tenants, add:*]

IF YOU PAY ANY RENT TO THE LANDLORD THAT BY THE TERMS OF THIS DEMAND YOU ARE REQUIRED TO PAY TO THE SECURED PARTY, YOU MAY BE SUBJECT TO DAMAGES INCURRED BY THE SECURED PARTY BY REASON OF YOUR FAILURE TO COMPLY WITH THIS DEMAND, AND YOU MAY NOT BE DISCHARGED FROM YOUR OBLIGATION TO PAY SUCH RENT TO THE SECURED PARTY. YOU WILL NOT BE SUBJECT TO SUCH DAMAGES OR OBLIGATED TO PAY SUCH RENT TO THE SECURED PARTY IF YOU HAVE PREVIOUSLY RECEIVED A DEMAND OF THIS TYPE FROM A DIFFERENT ASSIGNEE.

Your obligation to pay rent under this demand shall continue until you receive either (1) a written notice from a court directing you to pay the rent in a manner provided therein, or (2) a written notice from the secured party named above canceling this demand.

The undersigned hereby certifies, under penalty of perjury, that the undersigned is an authorized officer or agent of the secured party and that the secured party is the assignee, or the current successor to the assignee, under an assignment of leases, rents, issues, or profits executed by the landlord, or a predecessor in interest, that is being enforced pursuant to and in accordance with *Civil Code Section 2938*.

Executed at _____, California, this _____ day of _____, _____.

(Secured Party)
Name: _____ [*signature*]
Title: _____

[2] Use of Form

This form is a statutory demand for a turnover of rents, issues, and profits. It may be used to enforce an assignment of an interest in leases, rents, issues, or profits of real property made in connection with an obligation secured by the property. *Civ. Code § 2938* governs these assignments and sets forth alternative methods of enforcing them. One method permits enforcement by delivering to any one or more of the tenants a written demand (this form) for turnover of rents, issues, and profits [*see Civ. Code § 2938(c)*; *see also* [3], *below*].

The demand must be in the form specified in *Civ. Code § 2938(j)* and must be signed under penalty of perjury by the assignee or the assignee's authorized agent [*Civ. Code § 2938(d)*].

For additional discussion of *Civ. Code § 2938*, see *§ 555.81[1]*.

[3] Delivery and Effectiveness

In addition to being delivered to any one or more of the tenants, a copy of this demand must be delivered to the assignor. A copy must be mailedto each other assignee of record of the leases, rents, issues, and profits of the real property at the address for notices provided in the assignment or, if there is none, the address to which the recorded assignment was to be mailed after recording [*Civ. Code § 2938(c)*].

The demand will be effective against the tenant when it is actually received by the tenant at the address for notices provided in the lease or other contractual agreement under which the tenant occupies the property or, if no address for notices is provided, at the property [*Civ. Code § 2938(d)*].

For discussion of the tenant's obligations on receipt of this demand, see *§ 555.81[4]*.

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PART IV. FORMS
E. Injury to Security

48-555 California Forms of Pleading and Practice--Annotated § 555.190

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§ 555.190 Complaint for Damages [Civ. Code § 3333] for Waste Impairing Security [Civ. Code § 2929]--By Beneficiary

[1] FORM Complaint for Damages [Civ. Code § 3333] for Waste Impairing Security [Civ. Code § 2929]--By Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	[LIMITED CIVIL CASE]
Defendant.	)	
	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of plaintiff. See § 555.120[1], Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 555.160[1], Paragraph 2.*]

3. [*Making of promissory note. See § 555.126[1], Paragraph 3.*]

4. [*Execution and recordation of trust deed. See § 555.147[1], Paragraph 4.*]

5. On or about _____ [*date*], defendant was in possession of the property.

6. When defendant took possession, the property consisted in part of _____ [*aspect of property wasted by defendant, e.g.*, 90 acres of vineyards].

7. After taking possession of the property, defendant committed waste by _____ [*specify defendant's acts and omissions, e.g.*, willfully mismanaging the property and allowing it to deteriorate from a failure to cultivate, irrigate, fertilize, fumigate, prune, and do all other acts necessary to preserve the vineyards].

8. Defendant defaulted on the note by _____ [*specify default, e.g.*, failing to make payments due on and after _____ (*date*)]. After this default, plaintiff caused the property to be sold by the trustee under the power of sale in the trust deed on _____ [*date*].

9. At the time of the trustee's sale, defendant's default amounted to $_____. _____ [*Specify purchaser, e.g.*, Plaintiff] bought the property at the trustee's sale for $_____ and received the customary trustee's deed.

10. As a proximate result of defendant's willful mismanagement of the property, plaintiff's security was impaired and rendered inadequate in theamount of $_____ [*difference between amount of outstanding debt and amount realized by sale of property*].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages in the amount of $_____;

2. For costs of suit herein incurred; and

3. For any other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 555.120[1].*]

[2] Use of Form

This form is a complaint for use by a beneficiary under a trust deed to sue for damages for waste that impaired the security and was committed by the trustor in possession [*Civ. Code §§ 2929, 3333*]. The form may be modified to state a cause of action against any other person in possession, because the duty not to commit waste applies not only to the trustor and successors but also to any other person whose interest is subject to the trust deed [*Civ. Code § 2929*]. For further discussion, see *§ 555.90[1]*.

[3] Allegations

This complaint alleges the following essential facts [*see § 555.90[5][a]*]:

- The defendant's status as a person in possession of property subject to the trust deed of which the plaintiff is the beneficiary (Paragraphs 4 and 5).

- The defendant's wasteful acts and omissions (Paragraphs 6 and 7).

- The proximate result that the plaintiff's security was rendered inadequate (Paragraphs 8-10) [*see Hickman v. Mulder (1976) 58 Cal. App. 3d 900, 902-903, 130 Cal. Rptr. 304]* .

An additional allegation of bad faith waste is required (Paragraph 7, alleging willful mismanagement) to recover damages when a deficiency judgment would otherwise be barred, such as after foreclosure by a private sale (Paragraph 8) [*Code Civ. Proc. § 581d*; *see Cornelison v. Kornbluth (1975) 15 Cal. 3d 590, 603, 605, 125 Cal. Rptr. 557, 542 P.2d 981* ; *Hickman v. Mulder (1976) 58 Cal. App. 3d 900, 903, 908-909, 130 Cal. Rptr. 304]* . For further discussion, see *§ 555.90[5][b]*.

[4] Verification

Verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified)]. However, if the complaint is verified, the defendant is required to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446(a)*] and is precluded from making a general denial in superior court actions that are not limited civil cases and in some limited civil cases [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[5] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

In an action for injuries to real property, the superior court in the county in which the real property is located is the proper court for trial [*Code Civ. Proc. § 392(a)(1)*].

[6] Cross References

For discussion and forms relating to tort damages in general, see Ch. 177, *Damages*

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PART IV. FORMS
E. Injury to Security

48-555 California Forms of Pleading and Practice--Annotated § 555.191

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§ 555.191 Complaint for Preliminary and Permanent Injunctions [Code Civ. Proc. § 525 et seq.; Civ. Code § 3420 et seq.] Based on Waste Impairing Security [Civ. Code § 2929]--By Beneficiary

[1] FORM Complaint for Preliminary and Permanent Injunctions [Code Civ. Proc. § 525 et seq.; Civ. Code § 3420 et seq.] Based on Waste Impairing Security [Civ. Code § 2929]--By Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR TEMPORARY RESTRAINING
Defendant.	)	ORDER AND PRELIMINARY AND PERMANENT
	)	INJUNCTIONS
	)	

_____

Plaintiff alleges:

1. [*Capacity and residence of plaintiff. See § 555.120[1], Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 555.160[1], Paragraph 2.*]

3. [*Making of promissory note. See § 555.126[1], Paragraph 3.*]

4. [*Execution and recordation of trust deed. See § 555.147[1], Paragraph 4.*]

5. [*Defendant's possession of property. See § 555.190[1], Paragraph 6.*]

6. When defendant took possession, _____ [*allege prior condition or nature of property, e.g.,* the first floor of the building on the property consisted of a coin operated laundromat with 46 washers and 20 dryers. The fair market value of the property at that time was $_____].

7. Beginning on or about _____ [*date*], and continuously since then, defendant has committed, and defendant threatens to continue to commit, waste by _____ [*specify, e.g.,* removing the washers and dryers from the property].

8. On or about _____ [*date*], plaintiff demanded that defendant _____ [*specify, e.g.,* not remove or otherwise dispose of the washers and dryers], but defendant has failed to do so, and threatens to continue unless restrained.

9. Defendant's outstanding debt under the note is $_____.

10. Unless defendant's conduct is restrained, it will cause irreparable injury to plaintiff and render plaintiff's security inadequate in that it will reduce the fair market value of the property to approximately $_____.

11. Plaintiff has no adequate remedy at law for this injury, in that _____[*specify, e.g.,* plaintiff is informed and believes and thereon alleges that defendant is insolvent].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an order requiring defendant to show cause why defendant should not be enjoined as set forth below, during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant and all persons acting under, for, or in concert with defendant from _____ [*specify, e.g.,* removing or otherwise disposing of any washers, dryers, or other equipment used in operating the laundromat located on the property];

3. For costs of suit herein incurred; and

4. For any other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification. See § 555.120[1].*]

[2] Use of Form

This form is a complaint for use by the beneficiary under a trust deed to sue for temporary and permanent injunctions restraining the trustor in possession from committing actual or threatened waste to impair the beneficiary's security interest [*Civ. Code §§ 2929, 3422*; *Code Civ. Proc. §§ 526, 527*]. The form may be modified to state a cause of action against any other person in possession, because the duty not to commit waste applies not only to the trustor and successors but also to any other person whose interest is subject to the trust deed [*Civ. Code § 2929*]. For further discussion, see *§ 555.90[1]*. The form may also be modified to include or state a cause of action restraining a third party's injury to the property that impairs the security [*see § 555.91*].

The beneficiary is entitled to obtain injunctive relief before foreclosure in cases in which the waste threatens to render the security inadequate [*see Civ. Code § 2929*; *Miller v. Waddingham (1891) 91 Cal. 377, 382, 27 P. 750]* . If foreclosure proceedings are pending, this form may be modified to enjoin any person in possession of the property from performing any act that injures the property, regardless of whether the acts would render the security inadequate [*Code Civ. Proc. § 745(a)*; *see § 555.90[4]*]. Appointment of a receiver may also be sought in a foreclosure action when acts of waste endanger the security [*Code Civ. Proc. § 564(b)(2)*]. For further discussion and forms, see Ch. 486, *Receivers* .

[3] Allegations

This complaint alleges the following essential facts:

- The defendant's status as a person in possession of property subject to the trust deed of which the plaintiff is the beneficiary (Paragraph 5).

- The defendant's wasteful conduct or threatened conduct (Paragraphs 6-8).

- The likelihood that the plaintiff will suffer irreparable injury unless this conduct is enjoined (Paragraphs 9-11) [*see Miller v. Waddingham (1891) 91 Cal. 377, 382, 27 P. 750* ; *Robinson v. Russell (1864) 24 Cal. 467, 473]* .

For further discussion, see *§ 555.90[4]*.

[4] Verification

Verification [*see Code Civ. Proc. § 446*] is required if the plaintiff seeks a temporary restraining order or a preliminary injunction on the complaint instead of on an affidavit (or declarations under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*; *see generally* Ch. 303, *Injunctions*]. Otherwise, verification is not required [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified)]. However, if the complaint is verified, the defendant is required to file a verified answer [*Code Civ. Proc. § 446(a)*] and is precluded from making a general denial [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

If relying on a verified complaint instead of an affidavit (or declaration), counsel must plead evidentiary facts that would entitle the plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan G. Co. v. San Juan R. etc. Assn. (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* . In addition, counsel must append to this form a declaration relating to notice [*Code Civ. Proc. § 527(a)*; *Cal. Rules of Ct., Rule 3.1204(b)*]. For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

[5] Jurisdiction and Venue

An action seeking permanent injunctive relief is in the jursdiction of the superior court and is not a limited civil action [

Cal. Const., art. VI, § 10; *Code Civ. Proc. §§ 85, 86*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

In an action for injuries to real property, the superior court in the county in which the real property is located is the proper court for trial [*Code Civ. Proc. § 392(a)(1)*].

[6] Cross References

For discussion and forms relating to injunctive relief in general, see Ch. 303, *Injunctions*

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48-555 California Forms of Pleading and Practice--Annotated § 555.192

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§ 555.192 Complaint for Damages for Rent Skimming [Civ. Code § 891]--By Lienholder

[1] FORM Complaint for Damages for Rent Skimming [Civ. Code § 891]--By Lienholder

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	[LIMITED CIVIL CASE]
Defendant.	)	
	)	
	)	

Plaintiff alleges:

1. [*Capacity and residence of plaintiff. See § 555.120[1], Paragraph 1.*]

2. [*Capacity and residence of defendant. See § 555.125[1], Paragraph 2.*]

3. [*Making of promissory note. See § 555.126[1], Paragraph 3.*]

4. [*Execution and recordation of trust deed. See § 555.147[1], Paragraph 4.*]

5. Defendant acquired the property on _____ [*date*]. The property is improved with _____ [*describe residential nature of property, e.g.,* a 15-unit apartment building].

6. [Plaintiff is informed and believes and thereon alleges that during *or* During] the period commencing on _____ [*date within first year of defendant's ownership*] and continuing until _____ [*specify, e.g.,* the present time], defendant engaged in rent skimming, that is, defendant collected rents of at least $_____ per month in the aggregate from the property and [knowingly and willfully] expended that revenue [for personal purposes] without first applying it, or an equivalent amount, to payments then due on the note.

7. As a proximate result of defendant's rent skimming, plaintiff sustained damages in that _____ [*specify, e.g.,* defendant defaulted in the payment on the note. After giving notice of default and notice of sale as required by law, _____ (*name*), trustee under the trust deed, foreclosed the trust deed under the power of sale and sold the property at a public auction for $_____. The amount then due and delinquent on the note was $_____, and the expenses of the sale were $_____. The deficiency, after application of the proceeds of the sale and deduction of the expenses of the sale, is $_____].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For actual damages in the sum of $_____;

[2. For exemplary damages;]

3. For reasonable attorney's fees;

4. For costs of suit herein incurred; and

5. For such other and further relief as the Court may deem proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 555.120[1].*]

[2] Use of Form

This form is a complaint for use by a mortgagee or trust deed beneficiary [*see Civ. Code § 891(b)* (authorizing action by mortgagee or beneficiary)] who has been injured by rent-skimming [*see Civ. Code § 890(a)* (definition)]. Although this complaint has named as defendant only the owner who collected the rents, the complaint may be modified to sue any person, including officers and directors of a business organization, that authorized rent-skimming or, being in a position of control, failed to prevent another from rent skimming [*see Civ. Code § 890(c)*]. The complaint also may be modified for use by a vendor as lienholder or by a tenant, either of whom could be injured by rent skimming. For further discussion, see *§ 555.94*.

For a related affirmative defense allegation, see *§ 555.193*.

[3] Allegations

This complaint alleges the following essential facts:

- The rent skimming, that is, the failure to apply rents from residential real property, or an equivalent amount, at any time during the first year after acquiring the property, to payments due on all mortgages and trust deeds encumbering the property (Paragraphs 5 and 6) [*see Civ. Code § 890(a)* (defining rent skimming)].

- The plaintiff's damages (Paragraph 7) [*see Civ. Code § 891(b)* (mortgagee or beneficiary is entitled to actual damages to extent of rents collected on property, attorney's fees, and costs)].

[4] Other Relief

The rights and remedies provided by *Civ. Code § 891* are in addition to any other rights and remedies provided by law [*Civ. Code § 891(e)*]. In the case of a vendor or another mortgagee or beneficiary, an order for any appropriate equitable relief is specifically authorized [*see Civ. Code § 891(a), (c)*]. For instance, if the mortgage or trust deed contains an assignment of rents as additional security, the beneficiary or mortgagee may seek to have the assignment specifically performed, often by appointment of a receiver, and sometimes in addition to an accounting.

[5] Verification

Verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (unless otherwise required by law, pleadings not required to be verified)]. However, if the complaint is verified, the defendant is required to file a verified answer in a superior court action other than a limited civil case [*Code Civ. Proc. §§ 92(b), 446(a)*] and is precluded from making a general denial in superior court actions that are not limited civil cases and in some limited civil cases [*see Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[6] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

Generally, the proper county for trial is the county in which a defendant resides [*Code Civ. Proc. § 395(a)*]. In an action by the vendor or other lienholder, in which the actual damages are essentially the deficiency or the outstanding debt following foreclosure or loss of the security, the proper county for trial is the county in which the obligation was entered into or is to be performed [*Code Civ. Proc. § 395(a)*]. In an action by a tenant, in which the actual damages are essentially out-of-pocket losses, the proper county for trial is the county in which injury occurs [*Code Civ. Proc. § 395(a)*]. If the defendant is a corporation or association, the county in which its principal place of business is located is a proper county for trial [*Code Civ. Proc. §§ 395.2, 395.5*].

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Volume 48: Theaters, Shows, and Amusement Place thru Trust Deeds and Real Property Mortgages-Chs. 547-559
Chapter 555 TRUST DEEDS AND REAL PROPERTY MORTGAGES
PART IV. FORMS
E. Injury to Security

48-555 California Forms of Pleading and Practice--Annotated § 555.193

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§ 555.193 Affirmative Defense Allegation--Rental Revenue Used for Emergency Medical Treatment or Necessary Repairs [Civ. Code § 893]

[1] FORM Affirmative Defense Allegation--Rental Revenue Used for Emergency Medical Treatment or Necessary Repairs [Civ. Code § 893]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges:

1. Within 30 days of receipt of each and every rent payment that is the subject of the complaint, defendant used the [unapplied portion of the] revenue to pay _____ [health care providers, as defined in *Business and Professions Code Section 6146(c)(2),* for unforeseen and necessary medical treatment for _____ (defendant *or* defendant's spouse *or* defendant's parent *or* defendant's child) *or* _____ (licensed contractors *or* material suppliers) for _____ (*specify expenditure to correct violation of statute, ordinance, or regulation relating to habitability of premises, e.g.,* repairs to the heating and plumbing systems at the property, without which the property could not have complied with the city housing code)].

2. At the time of each and every expenditure described in Paragraph 1, defendant had no other source of funds from which to make the expenditure.

[2] Use of Form

The form in [1], *above,* is a form of affirmative defense for use by a defendant in an action for damages for rent skimming, when the revenue not applied to debts secured by liens on the property were used for unforeseen medical expenses [*Civ. Code § 893(a)(1)(A)*] or to correct violations relating to the habitability of the premises [*Civ. Code §*

893(a)(1)(B)]. In either case, the payment must have been made within 30 days of the defendant's receipt of the rents that were diverted [*Civ. Code § 893(a)(2)*], and the defendant must not have had any other source of funds from which to make the payments [*Civ. Code § 893(a)(2)*].

For a complaint for damages for rent skimming, see *§ 555.192*.

[3] Burden of Proof

The defendant has the burden of proof of each element of the defense [*Civ. Code § 893(b)*].

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§ 555.194 Notice of Motion for Order Declaring That Interest Reacquired by Vendor Is Not Encumbered by Another Lien [Civ. Code § 891(b)]

[1] FORM Notice of Motion for Order Declaring That Interest Reacquired by Vendor Is Not Encumbered by Another Lien [Civ. Code § 891(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	NOTICE OF MOTION AND MOTION FOR OR-
Plaintiff,	)	DER THAT PROPERTY IS NOT SUBJECT TO LI-
vs.	)	EN
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Dept: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

To _____ [*identify party, e.g.*, defendant] _____ [*name*] and to his/her attorney of record and to _____ [*names of persons having liens on property*]:

NOTICE IS HEREBY GIVEN that on _____ [*date*] at _____ [*time*] or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* plaintiff] will, and hereby does, move for an order that his/her/its interest in the property that is the subject of this action and that was reacquired by _____ [*specify party, e.g.,* plaintiff] on _____ [*date*] is not subject to the lien of _____ [*specify, e.g.,* the State of California represented by that certain judgment establishing defendant's unpaid income tax liability for the year 1985. An abstract of that judgment was recorded _____ (*date*) in _____ County, California, at book _____, page _____]. The motion will be made on the grounds that the lien sought to be avoided (1) was incurred by defendant _____ [*name*], a person who engaged in rent skimming as defined in *Civil Code Section 890(a), (2)* _____ [is *or* has the effect of] a judgment lien against that defendant's property, and (3) is not related to any improvement of the property nor does it represent security for any loan made by a good faith lender without knowledge of facts constituting a violation of *Civil Code Section 890 et seq.*

The motion will be based on this notice of motion, on the declaration(s)of _____ [*name(s*)] and the supporting memorandum served and filed with this notice, on the records and file in this action, and on evidence to be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*party's status and name*]

[2] Use of Form

This form is a notice of motion for use by a vendor of an interest in residential real property who has reacquired the interest in the property from a person who engaged in rent skimming with respect to that property, or by a law enforcement agency, to request an order declaring that the reacquired interest is not encumbered by a lien that is or has the effect of a judgment lien against the property of the person who engaged in the rent skimming. This relief cannot be granted if the lien is related to any improvement of the property or if it represents security for a loan made by a good faith lender without knowledge of facts constituting a violation of *Civ. Code § 890 et seq.* [*Civ. Code § 891(b)*]. The requirement that the lien be incurred by a person engaged in rent skimming implies that only liens incurred during the period in which rent was being skimmed can be avoided [*see Civ. Code § 891(b)*].

A supporting memorandum must be served and filed with this notice of motion [*see Code Civ. Proc. §§ 1005(b), 1010*; *Cal. Rules of Ct., Rule 3.1113(a)*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[3] Notice to Interested Parties

The motion pursuant to *Civ. Code § 891(b)* must be made on at least 30 days' written notice to all persons who may be affected by the order, including lienholders [*Civ. Code § 891(b)*].

[4] Order Granting Motion

If the requirements for relief are met, the court must issue an order granting the requested relief unless the court determines that the interests of justice would not be served by the order [*Civ. Code § 891(b)*].

[5] Jurisdiction and Venue

For coverage of jurisdiction and venue, see *§ 555.192[6]*.

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
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[6] List of Beneficiaries

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[a] Generally

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[1] FORM

[2] Use of Form

[3] Allegations

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[5] List of Beneficiaries

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[2] Use of Form

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§ 560.543 Response to Petition [Prob. Code § 17201] to Remove Trustee [Prob. Code § 17200(b)(10)] for Breach of Trust [Prob. Code §§ 16400, 16420(a)(5), 17200(b)(10)], Compel Accounting [Prob. Code § 17200(b)(7)], and Appoint Successor Trustee [Prob. Code § 17200(b)(10)]--By Trustee

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[1] FORM

[2] Use of Form

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[6] Liability for Acts of Agent Prior to July 1, 1987

[7] Cross References

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[2] Use of Form

[3] Allegations

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[5] List of Beneficiaries

[6] Cross References

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[1] FORM

[2] Use of Form

[3] Allegations

[4] Statement of Grounds and Persons Entitled to Notice

[5] List of Beneficiaries

[6] Effect of Filing of Petition on Increased Trustee's Fee

[7] Cross References

§ 560.550 Petition [Prob. Code § 17201] to Determine Right of Beneficiary [Prob. Code § 17200(b)(2)] and to Enforce Oral Trust in Real Property [Prob. Code §§ 850(a)(3)(A), 15206, 17200(a), (b)(2), (12)]--By Beneficiary

[1] FORM

[2] Use of Form

[3] Allegations

[4] Statement of Grounds and Persons Entitled to Notice

[5] List of Beneficiaries

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[7] Jurisdiction and Venue

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[9] Cross References

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[12] Decisions

[13] Text References

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§ 560.551 Petition [Prob. Code § 17201] to Compel Trustee [Prob. Code § 17200(b)(6)] to Invade Principal of Discretionary Trust [Prob. Code § 15303]--By Beneficiary

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[2] Use of Form

[3] Allegations

[4] Statement of Grounds and Persons Entitled to Notice

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[7] State Statutes

[8] Decisions

[9] Cross References

§ 560.552 Order [Prob. Code § 17206] Granting Beneficiary Relief as Prayed [Prob. Code § 17200(b)]

[1] FORM

[2] Use of Form

[3] Bond Requirement

[4] State Statutes

[5] Local Rules of Court

[6] Cross References

§ 560.553 Petition [Prob. Code § 17201] to Appoint Successor Trustee to Fill Vacancy [Prob. Code §§ 15660, 17200(b)(10)]--By Cotrustee

[1] FORM

[2] Use of Form

[3] Allegations

[4] Statement of Grounds and Persons Entitled to Notice

[5] List of Beneficiaries

[6] Appointment of Successor Trustee

[7] Cross References

§ 560.554 Petition [Prob. Code § 17201] to Grant Trustee Powers [Prob. Code § 17200(b)(8)]--By Trustee

[1] FORM

[2] Use of Form

[3] Allegations

[4] Statement of Grounds and Persons Entitled to Notice

[5] List of Beneficiaries

[6] Limitation on Exercise of Power

[7] State Statutes

[8] Decisions

§ 560.555 Petition [Prob. Code § 17201] for Instructions to Trustee [Prob. Code § 17200(b)(6)]--By Trustee

[1] FORM

[2] Use of Form

[3] Statement of Grounds and Persons Entitled to Notice

[4] List of Beneficiaries

[5] Allegations

[6] Decisions

[7] Cross References

§ 560.556 Petition [Prob. Code § 17201] for Injunction to Discontinue and Prevent Breach of Trust of Cotrustee [Prob. Code §§ 16420(a)(2), 17200(b)(12)]--By Trustee

[1] FORM

[2] Use of Form

[3] Allegations

[4] Statement of Grounds and Persons Entitled to Notice

[5] List of Beneficiaries

[6] Cross References

[7] California Points and Authorities

[8] State Statutes

[9] Decisions

[10] Text References

§ 560.557 Petition [Prob. Code § 17201] for Resignation of Trustee [Prob. Code §§ 15640(d), 17200(b)(11)]--By Trustee

[1] FORM

[2] Use of Form

[3] Allegations

[4] Statement of Grounds and Persons Entitled to Notice

[5] List of Beneficiaries

[6] Resignation of Trustee

[7] Appointment of Successor Trustee

[8] Cross References

§ 560.558 Petition [Prob. Code § 17201] to Fix Compensation or Allow Greater Compensation [Prob. Code §§ 15680(b), 17200(b)(9)]--By Trustee

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[2] Use of Form

[3] Allegations

[4] Statement of Grounds and Persons Entitled to Notice

[5] List of Beneficiaries

[6] Compensation of Trustee

[7] State Statutes

[8] California Rules of Court

[9] Cross References

§ 560.559 Account and Report [Prob. Code §§ 1060-1064, 16063] and Petition [Prob. Code § 17200(b)(5)] for Settlement--By Trustee

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[2] Use of Form

[3] When Account Required to be Filed With Court

[4] Contents of Petition

[5] Contents of Account

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[b] Statutory Format

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[d] Market Value of Assets

[e] Purchases or Other Changes in Form of Assets

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[g] Specifically Devised Property

[h] Interest on Pecuniary Devises and Annuities

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[l] No Requirement for Other Information

[m] Verification

[6] State Statutes

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[8] Local Rules of Court

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[b] Los Angeles County

[c] Orange County

[d] Riverside County

[e] San Francisco

[9] Cross References

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[1] FORM

[2] Use of Form

[3] Cross References

§§ 560.561-560.579 [Reserved]

§ 560.580 Petition [Prob. Code § 17201] to Modify Trust [Prob. Code § 17200(b)(13)] to Distribute Accumulated Trust Income for Support or Education of Destitute Beneficiary [Civ. Code § 726]--By Beneficiary

[1] FORM

[2] Use of Form

[3] Allegations

[4] Statement of Grounds and Persons Entitled to Notice

[5] List of Beneficiaries

[6] Text References

[7] Cross References

§ 560.581 Petition [Prob. Code § 17201] to Combine Trusts [Prob. Code §§ 15411, 17200(b)(14)]--By Trustee

[1] FORM

[2] Use of Form

[3] Statement of Grounds and Persons Entitled to Notice

[4] List of Beneficiaries

[5] Allegations

[6] Cross References

§ 560.582 Petition [Prob. Code § 17201] to Ascertain Beneficiaries and Determine Distribution of Property on Final or Partial Termination of Trust [Prob. Code § 17200(b)(4)]--By Trustee

[1] FORM

[2] Use of Form

[3] Statement of Grounds and Persons Entitled to Notice

[4] List of Beneficiaries

[5] Allegations

[6] Decisions

[7] Cross References

§ 560.583 Response to Petition [Prob. Code § 17201] for Ascertainment of Beneficiaries and Determination of Distribution of Property on Final or Partial Termination of Trust [Prob. Code § 17200(b)(4)]--By Beneficiary

[1] FORM

[2] Use of Form

[3] Cross References

§ 560.584 Petition [Prob. Code § 17201] to Modify or Terminate Irrevocable Trust [Prob. Code §§ 15403, 15404, 15408, 15409]

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[2] Use of Form

[3] Statement of Grounds and Persons Entitled to Notice

[4] List of Beneficiaries

[5] State Statutes

[6] Cross References

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§ 560.600 Notice [Prob. Code §§ 1211, 17203] of Hearing on Petition [Prob. Code § 17200]

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[2] Use of Form

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[4] Form of Notice

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[3] State Statutes

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[4] Statement of Grounds and Persons Entitled to Notice

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[1] FORM

[2] Use of Form

[3] Statement of Grounds and Persons Entitled to Notice

[4] List of Beneficiaries

[5] State Statutes

[6] Cross References

§ 560.604 Petition [Prob. Code § 17201] for Construction of Trust Instrument [Prob. Code § 17200(b)(1)]--By Guardian Ad Litem of Beneficiary

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[2] Use of Form

[3] Allegations

[4] Statement of Grounds and Persons Entitled to Notice

[5] List of Beneficiaries

[6] Decisions

[7] Cross References

§ 560.605 Petition [Prob. Code § 17201] to Transfer Administration of Trust or Trust Property to Court of Jurisdiction Outside California [Prob. Code §§ 17200(b)(16), 17402]--By Trustee

[1] FORM

[2] Use of Form

[3] Allegations

[4] Statement of Grounds and Persons Entitled to Notice

[5] List of Beneficiaries

[6] State Statutes

[7] Cross References

§ 560.606 Order [Prob. Code § 17404] Transferring Administration of Trust or Trust Property to Jurisdiction Outside California [Prob. Code § 17401]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 560.607 Petition [Prob. Code § 17201] to Transfer Administration of Trust or Trust Property From Another Jurisdiction to California [Prob. Code §§ 17200(b)(16), 17453]--By Trustee

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[5] List of Beneficiaries

[6] State Statutes

[7] Cross References

§ 560.608 Petition [Prob. Code § 17201] to Transfer Jurisdiction Over Trust Subject to Continuing Jurisdiction to Another County [Prob. Code §§ 17200(b)(17), 17304]--By Trustee

[1] FORM

[2] Use of Form

[3] Allegations

[4] Statement of Grounds and Persons Entitled to Notice

[5] List of Beneficiaries

[6] Granting of Order

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§ 560.609 Petition [Prob. Code § 17201] to Remove Testamentary Trust From Continuing Jurisdiction of Court When No Trustee Is Trust Company [Prob. Code §§ 17200(b)(18), 17352]--By Trustee

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[3] Allegations

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[8] State Statutes

[9] Cross References

§ 560.610 Notice of Removal of Trust From Continuing Jurisdiction of Court [Prob. Code § 17352(d)]

[1] FORM

[2] Use of Form

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[6] Cross References

§§ 560.611-560.629 [Reserved]

§ 560.630 Petition to Enforce Money Judgment by Collecting Trust Income or Principal Due Judgment Debtor as Trust Beneficiary [Code Civ. Proc. § 709.010]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] List of Beneficiaries

[6] Filing of Petition

[7] Trust Property Subject to Enforcement of Money Judgment Generally

[8] Cross References

[9] State Constitution

[10] State Statutes

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§ 560.631 Order For Enforcement of Money Judgment Against Judgment Debtor's Interest as Trust Beneficiary [Code Civ. Proc. § 709.010]

[1] FORM

[2] Use of Form

[3] Cross References

§§ 560.632-560.649 [Reserved]

§ 560.650 Notice to Creditors of Deceased Settlor of Revocable Trust [Prob. Code § 19003]--Notice by Publication

[Prob. Code § 19040]

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[2] Use of Form

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§ 560.651 Notice to Creditors of Deceased Settlor of Revocable Trust [Probate Code Section 19003]--Actual Notice [Prob. Code § 19052]

[1] FORM

[2] Use of Form

[3] Service of Notice

[4] State Statutes

[5] Cross References

§ 560.652 Petition for Approval of Allowance, Compromise, or Settlement of Claims [Prob. Code § 19020]--By Trustee or Beneficiary

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] List of Beneficiaries

[5] Verification

[6] Venue

[7] Notice and Hearing

[8] State Statutes

§ 560.653 Order for Approval of Allowance, Compromise, or Settlement of Claims [Prob. Code § 19020]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 560.654 Notice of Pendency of Action Against Revocable Trust on Rejected Claim [Prob. Code § 19255]

[1] FORM

[2] Use of Form

[3] Filing and Service

[4] State Statutes

§ 560.655 Complaint for Damages in Action Against Revocable Trust on Rejected Claim [Prob. Code § 19255]--By Creditor Against Revocable Trust

[1] FORM

[2] Use of Form

[3] Allegations

[4] Notice of Pendency of Action

[5] Verification

[6] Venue

[7] Cross References

[8] State Statutes

§ 560.656 Petition to Allocate Responsibility for Debts Payable by Decedent's Revocable Trust and Surviving Spouse [Prob. Code § 19320]--By Trustee, Surviving Spouse, Personal Representative, Settlor's Estate, or Beneficiary

[1] FORM

[2] Use of Form

[3] Contents

[4] Verification

[5] Venue

[6] Notice of Hearing

[7] List of Beneficiaries

[8] State Statutes

§ 560.657 Order to Show Cause Why Information Concerning Property of Surviving Spouse Should Not Be Furnished to Petitioner [Prob. Code § 19322]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§ 560.658 Order Allocating Debts Between Trust and Surviving Spouse [Prob. Code § 19325]

[1] FORM

[2] Use of Form

[3] State Statutes

[4] Cross References

§§ 560.659-560.669 [Reserved]

§ 560.670 Complaint for Preliminary [Code Civ. Proc. § 526] and Permanent Injunction [Civ. Code § 3422] Against Nonprofit Public or Mutual Benefit Corporation for Breach of Charitable Trust [Corp. Code §§ 5142, 7142]--Member's Derivative Action [Corp. Code §§ 5710, 7710]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Rescission or Injunction Against Performance of Contract

[5] Necessity for Alleging Capacity

[6] Jurisdiction

[7] Notice to Attorney General

[8] Cross References

[9] State Statutes

[10] Text References

§ 560.671 Complaint for Actual and Punitive Damages or Accounting [Corp. Code §§ 5233(h), 7238] Based on Self-Dealing Transaction by Director [Corp. Code §§ 5233(c), 7238]--By Other Director or Officer on Behalf of Nonprofit Corporation

[1] FORM

[2] Use of Form

[3] Allegations

[4] Verification

[5] Remedies

[6] Venue

[7] Attorney General as Indispensible Party

[8] Statute of Limitations

[9] State Statutes

[10] Text References

[11] Cross References

§ 560.672 Affirmative Defense Allegations to Action for Damages Based on Defendant Director's Alleged Self-Dealing Transaction [Corp. Code § 5233]--Prior Approval of Transaction [Corp. Code § 5233(d)(2), (3)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

[5] State Statutes

§ 560.673 Voluntary Winding Up--Petition for Court Supervision and Approval of Distribution of Assets to Proposed Corporation--By Nonprofit Public Benefit Corporation [Corp. Code § 6614] or Mutual Benefit Corporation Holding Charitable Assets in Trust [Corp. Code § 8614]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Basis for Jurisdiction

[5] Standing

[6] Venue

[7] Notice of Proceedings

[8] Application of Provisions Governing Involuntary Dissolution

[9] Cross References

[10] California Points and Authorities

[11] State Statutes

[12] Decisions

[13] Text References

§§ 560.674-560.689 [Reserved]

§ 560.690 Complaint to Establish Totten Trust [Prob. Code §§ 80, 5301-5307]--By Beneficiary

[1] FORM

[2] Use of Form

[3] Allegations

California Forms of Pleading and Practice--Annotated

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 560 TRUSTS: EXPRESS, PUBLIC, CHARITABLE, AND TOTTEN TRUSTS
PART I. SCOPE

49-560 California Forms of Pleading and Practice--Annotated § 560.01

§ 560.01 Scope of Chapter

This chapter discusses and contains forms relating to actions concerning trusts. It covers the following topics:

- The scope of the Trust Law [*Prob. Code § 15000 et seq.*; see *§ 560.10* et seq.].

- The creation and validity of express trusts, including application of the statute of frauds and the rule against perpetuities, the permissible accumulation of income, and acceleration of distribution of accumulated trust income [see *§ 560.40* et seq.].

- The rights, duties, and liabilities of trustees, and remedies of the beneficiaries, including the trustee's resignation and removal, and vacancies in the office of trustee [see *§ 560.70* et seq.].

- Revocation, modification, and termination of trusts, and disposition of property on termination of a trust [see *§ 560.110* et seq.].

- The procedure for administering trusts under the Trust Law, including judicial administration of trusts, petition, notice, and appeal procedures, subject matter jurisdiction, personal jurisdiction, venue, the transfer of trusts between jurisdictions, removal of testamentary trusts f rom continuing court jurisdiction, and procedures to appoint a guardian ad litem in trust administration proceedings [see *§ 560.130* et seq.].

- Actions between third persons and the trust [see *§ 560.160* et seq.], including a trustee's liability to third persons, a trustee's standing to prosecute or defend an action involving a third person [see *§ 560.180* et seq.], the protection of third persons engaging in transactions with the trustee [see *§ 560.200* et seq.], and a third party creditor's rights to enforce judgments against trust property [see *§ 560.220* et seq.].

- Procedures for making, allowing, or rejecting creditors' claims against a revocable trust of a deceased settlor [see *§ 560.240* et seq.].

- The establishment and enforcement of charitable trusts generally, including the definition and creation of a charitable trust, the duties of a trustee, standing to enforce a charitable trust, standing to bring a petition regarding the internal affairs and existence of the trust, and parts of the Nonprofit Corporation Law [*Corp. Code § 5000 et seq.*] that may apply if a particular charitable trust is administered by a nonprofit corporation [see *§ 560.270* et seq.].

- Creation and enforcement of Totten trusts [see *§ 560.340* et seq.].

The chapter includes the following forms:

- A complaint for use by a settlor of an irrevocable trust to seek declaratory relief regarding the existence of a trust [see *§ 560.520*].

- A petition for use by a beneficiary to determine the validity of a trust provision [see *§ 560.521*].

- Petitions and related forms by a beneficiary to remove a trustee and obtain redress for breach of trust [see *§§ 560.540*- 560-542].

- A trustee's response to a beneficiary's petition [see *§§ 560.543* - 560-546].

- A petition to recover trust property after breach of duty by the trustee's agent [see *§ 560.547*].

- A petition to compel the trustee to account after written request [see *§ 560.548*].

- A petition to seek review of the reasonableness of the trustee's compensation [see *§ 560.549*].

- A petition to enforce an oral trust in real property [see *§ 560.550*].

- A petition to invade the corpus of a trust [see *§ 560.551*].

- A petition by a trustee to fill a vacancy in the office of cotrustee [see *§ 560.553*].

- A petition to grant the trustee powers [see *§ 560.554*].

- A petition to obtain instructions [see *§ 560.555*].

- A petition by a trustee to obtain an injunction against a cotrustee for breach of trust [see *§ 560.556*].

- A petition by a trustee to resign [see *§ 560.557*].

- A petition by a trustee to obtain compensation [see *§ 560.558*].

- A petition to render an account [see *§ 560.559*].

- Orders granting the beneficiary [see *§ 560.552*] and trustee [see *§ 560.560*] relief as prayed.

- A petition for use by a beneficiary to modify the trust to allow distribution of accumulated trust income [see *§ 560.580*].

- A petition for use by a trustee to seek approval of the combination of trusts [see *§ 560.581*].

- A petition to determine distribution of trust property on termination of the trust [see *§ 560.582*].

- A response to a trustee's petition for use by a beneficiary regarding distribution of property in which the beneficiary is interested [see *§ 560.583*].

- A petition to modify or terminate an irrevocable trust [see *§ 560.584*].

- A notice of hearing for use by the petitioner [see *§ 560.600*].

- A request for use by a trustee or beneficiary to obtain a copy of the petition [see *§ 560.601*].

- A petition by an interested party to appoint a guardian ad litem [see *§ 560.602*].

- A form for use by a minor party to the trust to discharge a guardian ad litem and appoint an attorney of record [see *§ 560.603*].

- A form for use by a guardian ad litem to determine the construction of a trust [see *§ 560.604*].

- Forms for use by a trustee to transfer a trust to a jurisdiction outside California [see *§§ 560.605, 560.606*].

- A petition for use to transfer a trust from a foreign jurisdiction to California [see *§ 560.607*].

- A petition for use to transfer a testamentary trust subject to continuing court jurisdiction to another county [see *§ 560.608*].

- A petition [see *§ 560.609*] and notice [see *§ 560.610*] to remove a testamentary trust from the continuing jurisdiction of the court.

- Forms for use by a judgment creditor to enforce a money judgment against a beneficiary of a trust [see *§§ 560.630*, 631].

- Forms for notice by publication [see *§ 560.650*] and actual notice [see *§ 560.651*] to the creditors of a deceased settlor.

- Forms for a petition [see *§ 560.652*] and an order [see *§ 560.653*] for approval of allowance, compromise, or settlement of claims.

- A notice of pendency of [see *§ 560.654*], and a complaint for [see *§ 560.655*], an action against a revocable trust on a rejected claim.

- A petition [see *§ 560.656*] and an order [see *§ 560.657*] relating to allocation of the responsibility for debts payable by the decedent's revocable trust and the surviving spouse.

- An order to show cause why information concerning property of the surviving spouse should not be furnished to the petitioner [see *§ 560.658*].

- A complaint to bring a member's derivative action against a nonprofit corporation for breach of

charitable trust [see *§ 560.670*].

- A complaint [see *§ 560.671*] and affirmative defense [see *§ 560.672*] for an action seeking damages or an accounting against a director for a self-dealing transaction.

- A petition for court supervision of voluntary winding up of a nonprofit corporation [see *§ 560.673*].

- A complaint to establish a Totten Trust [see *§ 560.690*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsTrust AccountsTypesEstate, Gift & Trust LawNonprobate TransfersJointly Held PropertyBank AccountsEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsModification & TerminationEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview

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§ 560.02 Cross References

For discussion and forms relating to appointment of guardians ad litem generally, see Ch. 291, *Guardians ad Litem*

For forms and discussion regarding in personam jurisdiction, see Ch. 323, *Jurisdiction: Personal*

For discussion of contracts generally, see Ch. 140, *Contracts*

For discussion and forms relating to enforcement of money judgments generally, see Ch. 254, *Executions and Enforcement of Judgments*

For discussion and forms regarding negligence actions generally, including discussion of the doctrine of respondeat superior, see Ch. 380, *Negligence*

For discussion and forms relating to premises liability generally, see Ch. 421, *Premises Liability*

For discussion and forms regarding a principal's liability for the acts of an agent generally, see Ch. 427, *Principal and Agent*

For discussion and forms relating to general venue requirements, see Ch. 571, *Venue*

For discussion and forms relating to actions and proceedings under the Nonprofit Religious Corporation Law, see Ch. 110, *Churches and Religious Organizations*

For discussion and forms relating to actions and proceedings under the General Corporation Law, see Ch. 160, *Corporations: Capacity*

For general discussion of the provisions of the Nonprofit Corporations Law that may be applicable to some aspects of charitable trusts, see Ch. 388, *Nonprofit Corporations*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsDuties & LiabilitiesGeneral OverviewBusiness & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewContracts LawGeneral OverviewFamily LawFamily Protection & WelfareChildrenProceedingsTortsNegligenceGeneral OverviewTortsPremises Liability & PropertyGeneral Overview

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49-560 California Forms of Pleading and Practice--Annotated §§ 560.03-560.09

[Reserved]

§§ 560.03[Reserved]

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49-560 California Forms of Pleading and Practice--Annotated § 560.10

§ 560.10 Governing Statutes

The administration of trusts is governed generally by the Trust Law [*Prob. Code § 15000 et seq.*]. Rules for the construction of trusts and other instruments are set forth in *Prob. Code §§ 21101-21700*]. Compliance with the Internal Revenue Code is governed by *Prob. Code §§ 21500-21541*.

Although charitable trusts subject to the jurisdiction of the California Attorney General are subject to the Trust Law, the provisions of the Trust Law apply to those trusts only to the extent that they are not in conflict with the Uniform Supervision of Trustees for Charitable Purposes Act [*Gov. Code § 12580 et seq.*]. Administration of the assets of a charitable trust by a nonprofit corporation is governed by *Corp. Code § 5002 et seq.* Constructive and resulting trusts are subject to case law and *Civ. Code §§ 2223-2225*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust LawTrustsConstructive TrustsEstate, Gift & Trust LawTrustsInterpretationEstate, Gift & Trust LawTrustsResulting Trusts

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49-560 California Forms of Pleading and Practice--Annotated § 560.11

§ 560.11 Definition of Express Trust

A trust is a legal device by which one person, the trustee, holds title to property for the benefit of another, the beneficiary. The creation of a trust divides title to the trust property, placing legal title in the trustee and equitable title in the beneficiary [*Raczynski v. Judge (1986) 186 Cal. App. 3d 504, 511, 230 Cal. Rptr. 741* ; *Askew v. Resources Funding, Ltd. (1979) 94 Cal. App. 3d 402, 407, 156 Cal. Rptr. 208]* . Consequently, a trust establishes a fiduciary relationship between the trustee and the beneficiary, as opposed to an arms-length transaction between parties to a contract [*see* *Gonsalves v. Hodgson (1951) 38 Cal. 2d 91, 98, 99, 237 P.2d 656* (finding a contract instead of a trust); *California-Nevada Annual Conf. of the United Methodist Church v. St. Luke's United Methodist Church (2004) 121 Cal. App. 4th 754, 767, 17 Cal. Rptr. 3d 442* (trust is fiduciary relationship with respect to property, subjecting person by whom title to property is held to equitable duties to deal with property for benefit of another person), *overruled in part by* *Episcopal Church Cases (2009) 45 Cal. 4th 467, 491, 87 Cal. Rptr. 3d 275, 198 P.3d 66* (*Corp. Code § 9142(c)(2)* does give general church the authority to impress trust on local church when local church agrees and is member of governing instruments of general church, which provide any property held by local church is held in trust for general church; local church did not have the right to take church property with it when it disaffiliated from general church even though deeds to property had long been in name of local church)].

A trust is created by the settlor's manifestation of intention to create a trust, trust property, a lawful trust purpose, and an identifiable beneficiary [*California-Nevada Annual Conf. of the United Methodist Church v. St. Luke's United Methodist Church (2004) 121 Cal. App. 4th 754, 767, 17 Cal. Rptr. 3d 442] , overruled in part by* *Episcopal Church Cases (2009) 45 Cal. 4th 467, 491, 87 Cal. Rptr. 3d 275, 198 P.3d 66* . An express trust is generally created in one of two ways: (1) by a declaration of trust in which the owner of property declares that he or she holds it as trustee for some beneficiary; or (2) by a transfer in trust, by which the owner transfers to another as trustee for some beneficiary, either by deed or other inter vivos transfer, or by will [*California-Nevada Annual Conf. of the United Methodist Church v. St. Luke's United Methodist Church (2004) 121 Cal. App. 4th 754, 767, 17 Cal. Rptr. 3d 442]* .

A "living" (or "inter vivos") trust is a trust that is created during the lifetime of the settlor. A "testamentary" trust, in contrast, is created by a will and comes into being only on the death of the settlor (also called the "testator") [*see Prob. Code § 7000* (title to person's property transferred when person dies); *see also* *Estate of Lefranc (1952) 38 Cal. 2d 289,*

297, 239 P.2d 617 and *Estate of Wellings (1923) 192 Cal. 506, 510, 221 P. 628* (judgment of distribution merely confirms title in trustee)]. Both living and testamentary trusts are subject to the Trust Law [*Prob. Code § 15000 et seq.*], and are generally administered according to the same rules. Some testamentary trusts are "subject to continuing court jurisdiction" and thus governed by additional Probate Code rules [*see Prob. Code § 17300 et seq.*]. However, the only trusts subject to these additional rules are trusts created by wills executed before July 1, 1977 (and not incorporated by reference in a will executed on or after that date), and trusts created by wills that explicitly provide that they are subject to the continuing jurisdiction of the superior court [*Prob. Code § 17300*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawNonprobate TransfersLiving TrustsEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview

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§ 560.12 Private and Charitable Trusts Distinguished

A charitable trust is actually a donation that is held in trust to promote the welfare of mankind at large, of a community, or of some class within a community. The beneficiaries of a charitable trust are indefinite in number and identity [*Estate of Schloss (1961) 56 Cal. 2d 248, 256, 14 Cal. Rptr. 643, 363 P.2d 875]* . Since the beneficiaries of a private trust must be either ascertained or ascertainable in accordance with the time limits set forth in the Rule Against Perpetuities, private and charitable trusts are subject to different standards for determination of validity [§ 560.13[3]]. Moreover, charitable trusts are primarily supervised and enforced by the Attorney General pursuant to *Corp. Code §§ 5250, 7240,* and *10200,* which govern nonprofit corporations. For further discussion of the establishment and enforcement of public charitable trusts, see *§ 560.270* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstates Created by Trusts & WillsInvalid Restraints & Rule Against PerpetuitiesEstate, Gift & Trust LawTrustsCharitable Trusts

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§ 560.13 Parties to Express Trust

[1] Settlor

A settlor is the person who creates a trust, whether by a will or living trust [*see* Restatement (Second) of Trusts § 3; *California-Nevada Annual Conf. of the United Methodist Church v. St. Luke's United Methodist Church (2004) 121 Cal. App. 4th 754, 768, 17 Cal. Rptr. 3d 442* ; *see also Prob. Code § 15201* (trust created only if settlor manifests intention to do so)]. The term "trustor," previously used to denote a person who creates a living trust, was abolished with the enactment of the Trust Law (*Prob. Code § 15000 et seq.*) in 1986 [*see* LegislativeCounsel's Digest comments to Stats. 1986, ch. 820, paragraph (2)].

A settlor must have the capacity to make an ordinary transfer of property, and must possess the mental competence to comprehend the subject matter and to understand his or her rights. A person may lack the capacity to declare a trust if a temporary condition, such as intoxication, deprives that person of his or her reason and understanding [*Walton v. Bank of California (1963) 218 Cal. App. 2d 527, 541, 32 Cal. Rptr. 856* (decided under former *Civ. Code § 39*, repealed eff. Jan. 1, 1994)].

[2] Trustee

The person holding property in trust is the trustee [*see* Restatement (Second) of Trusts § 3]. A trustee includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court [*Prob. Code § 84*]. Any person, including a beneficiary, may serve as trustee [*Crocker-Citizens National Bank v. Younger (1971) 4 Cal. 3d 202, 212, 93 Cal. Rptr. 214, 481 P.2d 222]* . However, a sole beneficiary usually may not be the sole trustee, because the legal and equitable titles of the trust property would be merged in one person [*Hill v. Conover (1961) 191 Cal. App. 2d 171, 179, 180, 12 Cal. Rptr. 522* ; *see §§ 560.11, § 560.48*]. Generally, the trustee named by the settlor will be an existing person or legal entity of full capacity who has agreed to accept the trust [*see* Bogert, The Law of Trusts and Trustees, Ch. 8, *The Trustee--Selection: Capacity,* § 121 (2d ed.)]. For discussion of a trustee's acceptance of the trust, see *§ 560.71*. For discussion of a trustee's duties and liabilities with regard to the beneficiary, see *§ 560.76* et seq.. For discussion of a trustee's liabilities to a third party to the trust, see *§ 560.360* et seq.

[3] Beneficiary

A "beneficiary" is a person to whom a donative transfer of property is made, or that person's successor in interest [*Prob. Code § 24*]. As it relates to a trust, "beneficiary" means a person who has any present or future interest, vested or contingent [*Prob. Code § 24(c)*]. As it relates to a charitable trust, it includes any person entitled to enforce the trust [*Prob. Code § 24(d)*]. A beneficiary in a trust other than a charitable trust must be ascertained or ascertainable [*Reagh v. Kelley (1970) 10 Cal. App. 3d 1082, 1092, 1098, 89 Cal. Rptr. 425]* . For discussion of beneficiaries of a charitable trust, see *§ 560.270* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawNonprobate TransfersLiving TrustsEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesGeneral Overview

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49-560 California Forms of Pleading and Practice--Annotated § 560.14

§ 560.14 Attorney as Beneficiary

[1] Statutory Limitations

When an attorney who drafts a trust instrument is named as a beneficiary in the agreement, there is an obvious potential for fraud, undue influence, and similar concerns. The same potential may exist when certain relatives, partners, or employees of such an attorney are beneficiaries [*see Prob. Code § 21350*]. To reduce the potential for these problems, *Prob. Code §§ 21350-21356* establish limitations on donative transfers to drafters and other parties. These provisions determine whether an attorney or a relative, partner, or employee of an attorney is entitled to benefits from a trust when the attorney has drafted the instrument. The term "disqualified person" is used in the statutes to refer to a person to whom a valid transfer cannot be made under these statutes [*Prob. Code § 21350.5*].

These provisions apply to all instruments that become irrevocable on or after September 1, 1993 [*Prob. Code § 21355*]. If an instrument was revocable or amendable on that date, but the transferor by reason of incapacity was unable to change the disposition of his or her property and did not regain capacity before the date of his or her death, the instrument is deemed to be irrevocable for this purpose [*Prob. Code § 21355*].

[2] General Rule Invalidating Transfers to Specified Persons

Prob. Code § 21350 generally invalidates transfers made to any of the following [*Prob. Code § 21350*]:

- The person who drafted the instrument;

- A person who is related by blood or marriage to, or is a cohabitant with or employee of, the person who drafted the instrument;

- Any partner or shareholder of any law partnership or law corporation in which the person who drafted the instrument has an ownership interest, and any employee of any such law partnership or law corporation;

- Any person who has a fiduciary relationship with the transferor, including, but not limited to, a conservator or trustee, and who transcribes the instrument or causes it to be transcribed;

- A person who is related by blood or marriage to, or is a cohabitant with or employee of, a person described in the immediately preceding category; and

- A care custodian of a dependent adult.

For purposes of *Prob. Code § 21350*, "a person who is related by blood or marriage" to a person means all of the following [*Prob. Code § 21350(b)*]:

- The person's spouse or predeceased spouse;

- Relatives within the third degree of the person and of the person's spouse; and

- The spouse of any relative within the third degree of the person or of the person's spouse.

In determining relationships for this purpose, *Prob. Code § 6406*, which governs the inheritance rights of relatives of the half blood, *Prob. Code § 6407*, which governs the inheritance rights of afterborn heirs, and *Prob. Code §§ 6450-6455*, which govern the relationship of parent and child for purposes of intestate succession, are applicable [*Prob. Code § 21350(b)*].

For purposes of *Prob. Code § 21350*, the term "care custodian" means an administrator or employee of a public or private care facility or agency (including a member of the support or maintenance staff), or any other person providing care or services for elders or dependent adults, except persons who do not work directly with elders or dependent adults as part of their official duties [*Prob. Code § 21350(c)*; *see Welf. & Inst. Code § 15610.17* (list of covered care facilities and agencies)].

"Dependent adult" means any of the following [*Prob. Code § 21350(c)*; *see Welf. & Inst. Code § 15610.23(a)*]:

- Any person residing in California, between the ages of 18 and 64 years, who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age [*Prob. Code § 21350(c)*].

- Any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility as defined in *Health & Safety Code §§ 1250, 1250.2*, and *1250.3*.

- Any person older than age 64 who would be a "dependent adult" under the above definitions if he or she were between the ages of 18 and 64.

A trust instrument executed by an elderly woman who resided in a skilled nursing facility in which the woman made a donative transfer of property to the long-term care ombudsman for the facility was held invalid under *Prob. Code § 21350(a)(6)*, because the ombudsman was a "care custodian" within the meaning of the statute and therefore disqualified from benefiting from the trust [*Estate of Shinkle (2002) 97 Cal. App. 4th 990, 992-993, 1005-1007, 119 Cal. Rptr. 2d 42* ; *disapproved in part on other grounds in Bernard v. Foley (2006) 39 Cal. 4th 794, 816, 47 Cal. Rptr. 3d 248, 139 P.3d 1196]* . A long-term care ombudsman is a "care custodian" for purposes of the statute during the time he or she serves as ombudsman for a particular "dependent adult" [*Estate of Shinkle (2002) 97 Cal. App. 4th 990, 1007, 119 Cal. Rptr. 2d 42* . An ombudsman remains a "care custodian" within the meaning of the statute even after his or her formal ombudsman relationship with a particular resident has ended, due either to a change in the ombudsman's

facility assignment or the fact that the resident has left the facility, when the ombudsman, as a result of his or her fiduciary relationship with the resident, develops a personal relationship with the resident and thereby acquires personal and financial information about the resident [*Estate of Shinkle (2002) 97 Cal. App. 4th 990, 993, 1007, 119 Cal. Rptr. 2d 42* ; *disapproved in part on other grounds in Bernard v. Foley (2006) 39 Cal. 4th 794, 816, 47 Cal. Rptr. 3d 248, 139 P.3d 1196]* .

Prob. Code § 21350(a)(4), which includes in the category of presumptively disqualified persons any fiduciary who transcribes the trust instrument or causes it to be transcribed, does not apply to a person who provides information needed in the preparation of the trust instrument (*e.g.*, a list of the trustor's assets) and who encourages the trustor to execute it, but who does not direct or otherwise participate in the transcription of the instrument to final written form [*Rice v. Clark (2002) 28 Cal. 4th 89, 101-105, 120 Cal. Rptr. 2d 522, 47 P.3d 300]* .

Prob. Code § 21350 implicitly requires a person whose interest in a trust is threatened by a transfer to a disqualified person to invoke the protection of the statute affirmatively by seeking a court order establishing the invalidity of the transfer [*Estate of Shinkle (2002) 97 Cal. App. 4th 990, 1004, 119 Cal. Rptr. 2d 42* ; *disapproved in part on other grounds in Bernard v. Foley (2006) 39 Cal. 4th 794, 816, 47 Cal. Rptr. 3d 248, 139 P.3d 1196]* . The burden then shifts to the transferee to justify the transfer under *Prob. Code § 21351* [*Estate of Shinkle (2002) 97 Cal. App. 4th 990, 1004, 119 Cal. Rptr. 2d 42* ; *disapproved in part on other grounds in Bernard v. Foley (2006) 39 Cal. 4th 794, 816, 47 Cal. Rptr. 3d 248, 139 P.3d 1196]* .

[3] Exceptions to General Rule Invalidating Transfers

Under *Prob. Code § 21351*, a transfer is not invalidated under *Prob. Code § 21350* if any of the following conditions are met [*Prob. Code § 21351(a), (b), (c), (f)*]:

- The transferor is related by blood or marriage to, is a cohabitant with, or is the registered domestic partner of, the transferee or the person who drafted the instrument. "Related by blood or marriage" includes persons within the fifth degree or heirs of the transferor [*Prob. Code § 21351(g)*]. A "cohabitant" means two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship [*Prob. Code § 21351(a)*; see *Pen. Code § 13700(b)*]. This provision applies retroactively to an instrument that becomes irrevocable on or after July 1, 1993 [*Prob. Code § 21351(a)*]. This exception applies to a spouse who was care custodian of the transferee prior to marriage [*Estate of Pryor (2009) 177 Cal. App. 4th 1466, 1468, 1476, 99 Cal. Rptr. 3d 895* (decedent's spouse could invoke the spousal exception to the presumption in *Prob. Code § 21351(a)* despite her prior status as a care custodian before her marriage to decedent)].

- The instrument is reviewed by an independent attorney who counsels the transferor about the nature and consequences of the intended transfer, attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and signs and delivers a "Certificate of Independent Review" in substantially the form set forth in *Prob. Code § 21351(b)*.

- After full disclosure of the relationships of the persons involved, the court approves the instrument by order under *Prob. Code § 2580 et seq.* (substituted judgment).

- The transferee is a federal, state, or local public entity, an entity thatqualifies for a charitable exemption from taxation under *I.R.C. § 501(c)(3)* or *I.R.C. § 501(c)(19)*, or a trust holding an interest for this entity, but only to the extent of the interest of the entity, or the trustee of this trust.

A transfer also is not invalidated under *Prob. Code § 21350* if the court determines, on clear and convincing evidence (but not based solely on the testimony of any person described in Prob. Code § 23150(a)), that the transfer was not the

product of fraud, menace, duress, or undue influence [*Prob. Code § 21351(d)*]. If the court finds that the transfer *was* the product of fraud, menace, duress, or undue influence, the disqualified person must bear all costs of the proceeding, including reasonable attorney's fees [*Prob. Code § 21351(d)*]. This provision only applies to the following instruments:

- Any instrument other than one making a transfer to a person who drafted the instrument [*Prob. Code §§ 21350(a)(1), 21351(e)(1)*].

- Any instrument executed on or before July 1, 1993, by a person who was a California resident at the time the instrument was executed [Prob. Code § 23151(e)(2)].

- Any instrument executed by a California resident who was not a resident at the time the instrument was executed [*Prob. Code § 21351(e)(3)*].

For example, an attorney who drafts a client's trust so as to benefit himself or herself is conclusively disqualified under *Prob. Code § 21351(e)(1)*; an attorney who drafts a client's trust so as to benefit one of the attorney's relatives or law partners is presumed to be disqualified, but this presumption is rebuttable under *Prob. Code § 21351(d)* by clear and convincing evidence other than the attorney's testimony that the client freely chose this disposition [*Rice v. Clark (2002) 28 Cal. 4th 89, 98, 120 Cal. Rptr. 2d 522, 47 P.3d 300]* .

Finally, a transfer is not invalidated under *Prob. Code § 21350* if

- The transfer does not exceed $3,000 [*Prob. Code § 21351(h)*]. This provision is inapplicable if the total value of the property in the transferor's estate does not exceed the amount prescribed by *Prob. Code § 13100, i.e.,* $100,000 [*Prob. Code § 21351(h)*].

- The transfer is made by an instrument executed by a nonresident of California who was not a resident at the time the instrument was executed, and that was not signed in California [*Prob. Code § 21351(i)*; *see also Estate of Clementi (2008) 166 Cal. App. 4th 375, 383, 82 Cal. Rptr. 3d 685* (*Prob. Code § 21351(i)* exempted testator's will from prohibition in *Prob. Code § 21350* against donative transfers to the drafter of the will, since testator was nonresident of California when he signed will, even though he was a resident of California at time of his death)].

[4] Time for Commencement of Action to Establish Invalidity of Transfer

An action to establish the invalidity of a transfer under *Prob. Code § 21350* can only be commenced within statutory time limits. If the transfer was by will, the action must be commenced after letters are first issued to a general representative and before an order for final distribution is made [*Prob. Code § 21356(a)*]. If the transfer is made by some instrument other than a will, it must be commenced within the later of three years after the transfer becomes irrevocable or three years from the date the person bringing the action discovers, or reasonably should have discovered, the facts material to the transfer [*Prob. Code § 21356(b)*].

[5] Professional Discipline

Any violation of *Prob. Code §§ 21350-21356* by an attorney is grounds for professional discipline if the violation occurred on or after January 1, 1994, and the attorney knew or should have known of the facts leading to the violation [*Bus. & Prof. Code § 6103.6*].

For further discussion of the rule prohibiting attorneys from being beneficiaries under trusts that they have drafted or transcribed, see *California Wills and Trusts, Ch. 4, Ethical Considerations and Professional Responsibility, § 4.05[3]* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsModification & TerminationLegal EthicsClient RelationsConflicts of InterestLegal EthicsSanctionsGeneral Overview

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§ 560.15 Action to Contest Trust

[1] Contrasted with Will Contest

The comparative ease with which a will contest may be mounted traditionally has been cited as one of the advantages of choosing the inter vivos (or "living" trust) rather than a will as the primary vehicle of an estate plan. The Probate Code requires that when a petition is filed to probate a will, the testator's heirs be formally notified that if they object to the granting of the petition they should make their objections known to the court by either filing them in writing or personally appearing at the hearing to state them [*Prob. Code § 8100*]. An heir may initiate a will contest before or after probate, and the Probate Code contains special rules governing the pleadings, trial, evidence, and judgment in the contest proceeding [*see Prob. Code §§ 8250-8272*].

While a trust also may be contested, the specific procedures for doing so are not defined by statute. The mechanism for contesting a trust is an independent civil action, which is subject to the same rules as any other civil action. However, the procedural requirements have largely blunted the former differences between wills and inter vivos trusts in this regard, and made it somewhat easier to mount a contest of a trust. More importantly, perhaps, these requirements have made it more likely that an inter vivos trust will be contested after the settlor's death.

Before January 1, 1998, there was no requirement that after a settlor died, the settlor's heirs be notified of the existence or terms of the trust or of their right to bring an action to contest the trust. With the adoption of Prob. Code §§ 16051.5 and 16061.7, effective on that date, the trustee must provide a copy of the terms of the trust to any heir who requests it and serve a special notice, called "notification by trustee," on all of the heirs [for discussion of this requirements, *see § 560.81*].

If the notification by the trustee is served because a revocable trust or any portion of it has become irrevocable because of the death of one or more settlors of the trust, or because, by the express terms of the trust, the trust becomes irrevocable within oneyear of the death of a settlor because of a contingency related to the death of one or more of the settlors of the trust, the notification must include, among other things, a warning specifically referring to the heirs' right to bring an action to contest the trust [*see Prob. Code § 16061.7(h)*].

[2] Time Limits for Commencement

No person upon whom a notification by the trustee [*see § 560.81*] is served may bring an action to contest the trust more than 120 days from the date the notification by the trustee is served on him or her, or 60 days from the day on which a copy of the terms of the trust is mailed or personally delivered to him or her during that 120-day period, whichever is later [*Prob. Code § 16061.8*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawNonprobate TransfersLiving TrustsEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsModification & TerminationEstate, Gift & Trust LawWill ContestsGeneral Overview

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49-560 California Forms of Pleading and Practice--Annotated § 560.16

§ 560.16 No-Contest Clauses in Trust Instruments

[1] Nature and Validity

Trust instruments, like wills, frequently contain "no contest clauses" [*see Colburn v. Northern Trust Co. (2007) 151 Cal. App. 4th 439, 59 Cal. Rptr. 3d 828* ; *McIndoe v. Olivos (2005) 132 Cal. App. 4th 483, 485, 487-490, 33 Cal. Rptr. 3d 689* ; *Nairne v. Jessop-Humblet (2002) 101 Cal. App. 4th 1124, 124 Cal. Rptr. 2d 726*]. A no contest clause in an instrument creates a condition on the gifts and dispositions provided for in the instrument [*Burch v. George (1994) 7 Cal. 4th 246, 254, 27 Cal. Rptr. 2d 165, 866 P.2d 92* ; *Estate of Lindstrom (1987) 191 Cal. App. 3d 375, 381, 236 Cal. Rptr. 376*]. In essence, a no contest clause conditions the rights of the devisees named in the instrument to take the devises provided for in the instrument on their acquiescence in its terms. To the extent that a particular devisee acquiesces in those terms, the devisee is entitled to take the devise; to the extent that the devisee does not acquiesce, the devisee cannot take [*see Burch v. George (1994) 7 Cal. 4th 246, 254, 27 Cal. Rptr. 2d 165, 866 P.2d 92*].

The purpose of a no contest clause is to discourage will (or trust) contests by imposing a penalty of forfeiture against any beneficiary who challenges the will (or trust) [Estate of Gonzalez (2002) *102 Cal. App. 4th, 1296, 1302, 126 Cal. Rptr. 2d 332*]. A no contest clause also is known as an "in terrorem" clause. Although the rules governing no contest clauses originally were developed in connection with wills, they have been held applicable to no contest clauses in inter vivos trusts as well [*see Scharlin v. Superior Court (1992) 9 Cal. App. 4th 162, 168-169, 11 Cal. Rptr. 2d 448*].

No contest clauses are valid and enforceable in California [*Burch v. George (1994) 7 Cal. 4th 246, 254, 27 Cal. Rptr. 2d 165, 866 P.2d 92*] to the extent permitted under the governing law [*see* [2], [3], *below*]. Rules relating to the enforcement of no contest clauses are codified in the Probate Code [*see Prob. Code § 21310-21315*]. For additional detailed discussion of the enforceability of no contest clauses, see *Ch. 444, Probate: Will Contests, § 444.14*.

[2] Enforcement of No Contest Clause Under Probate Code

[a] Applicable Law and Enforceability

The rules governing no contest clauses were significantly revised effective January 1, 2010 [*Prob. Code § 21315*; *see*

Prob. Code §§ 21310-21315]. The revised statute governs the enforcement of no contest clauses in "protected instruments" [*see* [c], *below*] that are filed on or after January 1, 2010, whenever executed, provided that the protected instrument became irrevocable on or after January 1, 2001 [*Prob. Code § 21315*]. Common law continues to govern no contest clauses in all other instruments [*Prob. Code § 21315*; *see* [3], *below*].

Under the revised rules, a no contest clause is enforceable only in three specific circumstances [*Prob. Code § 21311(a)*]:

- A direct contest brought without probable cause.
- A challenge to the transfer of property (provided the no contest clause provides).
- The filing of a creditor's claim (provided the no contest clause provides).

There is no opt-out provision in this statute. The provisions of *Prob. Code §§ 21310-21315* apply notwithstanding any contrary provisions in an instrument [*Prob. Code § 21314*].

[b] No Contest Clause Defined

Under the Probate Code revision, a no contest clause is a provision in a valid instrument which, if enforced, would penalize a beneficiary for filing a pleading in any court [*Prob. Code § 21310(c)*]. A pleading is a petition, complaint, cross-complaint, objection, answer, response, or claim [*Prob. Code § 21310(d)*].

[c] Protected Instrument

The Probate Code allows the enforcement of a no contest clause only with respect to a "protected instrument" [*see Prob. Code §§ 21310, 21311*]. "Protected instrument" means the following [*Prob. Code § 21310(e)*]:

- The instrument containing the no contest clause; or
- An instrument that is in existence on the date the instrument containing the no contest clause is executed and is expressly identified in the no contest clause, either individually or as part of an identifiable class of instruments, as being governed by the no contest clause.

Since a no contest clause cannot apply to future instruments [*see Prob. Code § 21310(e)(2)*], each amendment of existing instruments should contain its own no contest clause if one is desired. A commonly used statement in amendments that the settlor confirms and ratifies the original trust agreement is inadequate to incorporate the no contest clause into the amendment [*see Prob. Code § 21310(e), see also Perrin v. Lee (2008) 164 Cal. App. 4th 1239, 79 Cal. Rptr. 3d 885* (no contest clause did not apply to amendment when amendment stated that grantor and trustee confirmed and ratified original trust agreement because former *Prob. Code § 21305(a)* required that no contest clause must explicitly state that challenging validity of amendment is a violation of the clause)].

It is also important to clarify whether or not a testamentary trust created under a will that contains a no contest clause is subject to a no contest provision. Any no contest clause applicable to the trust should be separately contained in the trust terms as recited in the order for distribution entered in the probate proceeding [*Meyer v. Meyer (2008) 162 Cal. App. 4th 983, 76 Cal. Rptr. 3d 546* (no contest clause had not been incorporated by reference into the testamentary trust because the decrees of distribution specifying the terms of the testamentary trust did not include the will's no contest clause as one of those terms)].

[d] Direct Contest

A no contest clause is enforceable in a direct contest that is brought without probable cause [*Prob. Code § 21311(a)(1)*]. A direct contest is one that alleges the invalidity of a protected instrument or one or more of its terms based on any of the following [*Prob. Code §21310(b)*]:

- Forgery.
- Lack of due execution.
- Lack of capacity.
- Menace, duress, fraud, or undue influence.
- Revocation of a will pursuant to *Prob. Code § 6120*, revocation of a trust pursuant to *Prob. Code § 15401*, or revocation of an instrument other than a will or trust pursuant to the procedure for revocation that is provided by statute or by the instrument.
- Disqualification of a beneficiary under *Prob. Code §§ 6112, 21350*.

Probable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable opportunity for further investigation or discovery [*Prob. Code § 21311(b)*].

[e] Challenge to Transfer of Property

A no contest clause also is enforceable against a pleading challenging the transfer of property on the grounds that it was not the transferor's property at the time of the transfer (a "forced election"), as long as the no contest clause expressly so provides [*Prob. Code § 21311(a)(2)*]. In this type of contest, probable cause is irrelevant, and the forced election may be applicable to anyone [*see Prob. Code § 21311(a)(2)*].

[f] Creditor's Claim

A no contest clause also is enforceable against the filing of a creditor's claim or prosecution of an action based on it, as long as the no contest clause expressly provides for such an application of the clause [*Prob. Code § 21311(a)(3)*]. In this type of contest, probable cause is also irrelevant [*see Prob. Code § 21311(a)(3)*].

[g] Declaratory Relief Unavailable

Under former law, declaratory relief was available to determine whether a proposed challenge to an instrument violated a no contest clause [*see* former *Prob. Code §21320*]. Such relief is no longer available under the revised statutes effective January 1, 2010 [*see Prob. Code §§ 21310-21315*].

[3] Enforcement of No Contest Clauses Under Common Law

[a] In General

For contests of a will or trust that contain a no contest clause, but are not governed by the revisions of *Prob. Code § 21310 et seq.* [*see* [2][a], *above*], common law continues to apply. Whether there has been a "contest" within the meaning of the language of a no contest clause is to be determined according to the circumstances of each case and the language used [*Estate of Strader (2003) 107 Cal. App. 4th 996, 1003, 132 Cal. Rptr. 2d 649* ; *Nairne v. Jessop-Humblet (2002) 101 Cal. App. 4th 1124, 1128, 124 Cal. Rptr. 2d 726*].

Factors relevant to determining whether a claim involving the characterization, inclusion, or distribution of a certain

item of property in a testamentary instrument is a contest include [*Nairne v. Jessop-Humblet (2002) 101 Cal. App. 4th 1124, 1129, 124 Cal. Rptr. 2d 726*]:

- The particular language of the no contest clause.
- Whether the instrument specifies the property and its distribution.
- Whether the instrument specifically characterizes the property, e.g., as separate versus community property.
- Whether the challenge, if successful, would thwart the testator's intent.

[b] Indirect Attack

Under common law, an indirect attack in a separate proceeding that nullifies or thwarts the express wishes of the creator of the instrument may constitute a "contest" for purposes of a no contest clause; for example:

- A proposed federal complaint by a surviving spouse against pension plan administrators to assert community property rights to plan benefits that had been transferred to a trust [*see* Burch v. George (1994) *7 Cal. 4th, 246, 27 Cal. Rptr. 2d 165, 866 P.2d 92*].
- A no contest clause in a trust instrument that applied to any attempt to "impair" the trust extended to a trust beneficiary's adjustment petition under the California Uniform Principal and Income Act to reallocate principal and income, when reallocation would have resulted in more income to beneficiary than allowed by trust and invasion of trust principal reserved to other beneficiaries [*Mc Kenzie v. Vanderpoel (2007) 151 Cal. App. 4th 1442, 1454, 61 Cal. Rptr. 3d 129*].
- A beneficiary's petition to recharacterize property that had been specifically characterized by settlors [Estate of Pittman (1997) *63 Cal. App. 4th, 290, 298-305, 73 Cal Rptr. 2d 622*].
- A proposed challenge by a surviving spouse to a corporate stock redemption agreement that was a "cornerstone" of the decedent's integrated estate plan [*Genger v. Delsol (1997) 56 Cal. App. 4th 1410, 1428-1429, 66 Cal. Rptr. 2d 527* ; *but see Jacobs-Zorne v. Superior Court (1966) 46 Cal. App. 4th 1064, 1075, 54 Cal. Rptr. 2d 385* (thwarting of testator's intent not appropriate test in determining whether no contest clause has been triggered)].

[c] Oral Contract

Although some older cases suggest that actions seeking to enforce an oral contract independent of a testamentary instrument do not constitute "contests" [*see Estate of Watson (1986) 177 Cal. App. 3d 569, 573-574, 223 Cal. Rptr. 14* ; *Estate of Black (1984) 160 Cal. App. 3d 582, 591, 206 Cal. Rptr. 663*], the California Supreme Court has clearly indicated that there is no "categorical proposition that any proceeding based upon a claim of right independent of a will or trust instrument is never a contest for purposes of the no contest law" [Burch v. George (1994) *7 Cal. 4th, 246, 261, 27 Cal. Rptr. 2d 165, 866 P.2d 92]* . As a result, more recent cases have held that a complaint seeking to establish and enforce an oral contract based on a right independent of a testamentary instrument may constitute a contest within the meaning of a no contest provision in that instrument [*Nairne v. Jessop-Humblet (2002) 101 Cal. App. 4th 1124, 1129-1131, 124 Cal. Rptr. 2d 726* (complaint alleging that settlors had orally agreed to give specified property to plaintiff and therefore that property should not have been included in trust violated no contest clause in trust because it directly attacked provision of trust that identified and disposed of this property)].

[d] Interpretation

A judicial action seeking an interpretation of a will or other dispositive instrument is not an attack on the instrument and does not constitute a contest of the instrument. It is merely an effort to ascertain the true intentions of the author of the instrument [Graham v. Lenzi (1995) *37 Cal. App. 4th, 248, 258, 43 Cal. Rptr. 2d 407*]. A petition seeking to interpret a will generally does not violate a no contest clause because, rather than thwarting the testator's dispositive intent, the proceeding serves to ascertain and enforce that intent [*Estate of Strader (2003) 107 Cal. App. 4th 996, 1004, 132 Cal. Rptr. 2d 649*].

[e] Challenge on Grounds of Duress or Undue Influence Is Not Contest

A proposed challenge to the validity of a trust amendment on the ground of duress or undue influence does not constitute a contest within the meaning of a no contest clause because it is an attack on the circumstances under which the trust amendment was created, not on the settlor's power to amend the instrument [*Scharlin v. Superior Court (1992) 9 Cal. App. 4th 162, 169-170, 11 Cal. Rptr. 2d 448*].

[f] Contest of One Subtrust May Not Invalidate Other Subtrusts

In a typical multi-trust estate plan, the contest of one of the trusts or subtrusts does not automatically trigger a no contest clause as to other subtrusts. In one case involving a typical living trust arrangement under which the trusts was divided into two trusts on the death of the first settlor, the court held that a petition contesting an amendment that the surviving settlor made to Trust A (the survivor's trust) after the first settlor's death did not constitute a contest of Trust B for purposes of the no contest clause in the trust instrument [*Scharlin v. Superior Court (1992) 9 Cal. App. 4th 162, 170, 11 Cal. Rptr. 2d 448*].

[4] Strict Construction

The strict statutory rules regarding no contest clauses reflect the general doctrine that no contest clauses are disfavored by the public policy against forfeiture [*McIndoe v. Olivos (2005) 132 Cal. App. 4th 483, 487, 33 Cal. Rptr. 3d 689* ; *Estate of Richter (1993) 12 Cal. App. 4th 1361, 1367, 16 Cal. Rptr. 2d 108* ; *Scharlin v. Superior Court (1992) 9 Cal. App. 4th 162, 168-169, 11 Cal. Rptr. 2d 448*]. Accordingly, under both the Probate Code and common law, no contest clauses must be strictly construed and cannot be extended beyond what the settler or testator (as the case may be) clearly intended by the wording of the governing document [*see Prob. Code 21312*; *see also Meyer v. Meyer (2008) 162 Cal. App. 4th 983, 998, 76 Cal. Rptr. 3d 546* ; *Zwirn v. Schweizer (2005) 134 Cal. App. 4th 1153, 1159, 36 Cal. Rptr. 3d 527* ; *Nairne v. Jessop-Humblet (2002) 101 Cal. App. 4th 1124, 1128, 124 Cal. Rptr. 2d 726* ; *see also Scharlin v. Superior Court (1992) 9 Cal. App. 4th 162, 168-69, 11 Cal. Rptr. 2d 448* (rule of strict construction applies to no contest clauses in inter vivos trusts as well as in wills)]. Under the common law, a beneficiary will be found to have violated a no contest clause only if the beneficiary's action clearly falls within the terms of the clause, and the penalty will be imposed only if it is found that the beneficiary's act clearly was intended by the settlor or testator to require the imposition of the penalty [*Estate of Rossi (2006) 138 Cal. App. 1325, 1338, 42 Cal. Rptr. 3d 244* ; *McIndoe v. Olivos (2005) 132 Cal. App. 4th 483, 487, 489, 33 Cal. Rptr. 3d 689* ; *Estate of Richter (1993) 12 Cal. App. 4th 1361, 1367, 16 Cal. Rptr. 2d 108* ; *Scharlin v. Superior Court (1992) 9 Cal. App. 4th 162, 168-169, 11 Cal. Rptr. 2d 448]* . Although these basic rules were developed in connection with no contest clauses in wills, they have been held applicable to no contest clauses in inter vivos trusts as well [*see Scharlin v. Superior Court (1992) 9 Cal. App. 4th 162, 168-169, 11 Cal. Rptr. 2d 448*].

Thus, for example, a testator could permissively provide that three of his five children would *all* lose their testamentary gifts under a trust if any one of them contested it [Tunstall v. Wells (2006) *144 Cal. App. 4th, 554, 557-558, 50 Cal. Rptr. 3d 468*]. The court concluded that the no contest clause did not violate public policy, and reasoned that the decedent's intentions to impose conditions on the gifts of the three children were within his rights as a testator [Tunstall

v. Wells (2006) *144 Cal. App. 4th, 554, 557-558, 50 Cal. Rptr. 3d 468*]. Similarly, a no contest clause in a testamentary trust was upheld although it forced the settlor's former wife and their children to choose between enforcing their rights under an existing martial dissolution judgment by filing creditor's claims, or relinquishing those rights and taking the gifts provided for them in the settlor's trust [*Colburn v. Northern Trust Co. (2007) 151 Cal. App. 4th 439, 447, 59 Cal. Rptr. 3d 828*]. Also upheld was a clause in a trust instrument that applied to any attempt to "impair" the trust, which was held applicable to the trust beneficiary's adjustment petition under the California Uniform Principal and Income Act to reallocate principal and income, when the reallocation would have resulted in more income to the beneficiary than was allowed by the trust and the invasion of trust principal reserved to other beneficiaries [*McKenzie v. Vanderpoel (2007) 151 Cal. App. 4th 1442, 1454, 61 Cal. Rptr. 3d 129*].

Extrinsic evidence on the testator's intended meaning of the no contest clause is admissible if it is relevant to show a meaning to which the language is reasonably susceptible [*Estate of Kaila (2001) 94 Cal. App. 4th 1122, 1132, 114 Cal. Rptr. 2d 865*]. However, consideration of extrinsic evidence does not necessarily require a determination of an action on the merits that would preclude relief [*Estate of Kaila (2001) 94 Cal. App. 4th 1122, 1136, 114 Cal. Rptr. 2d 865*].

[5] Review of Determination

A court order determining whether a particular motion, petition, or other act by the beneficiary would constitute a contest within the terms of the no contest clause is appealable [*Prob. Code § 1303(j), see Estate of Hoffman (2002) 97 Cal. App. 4th 1436, 1438 n.1, 119 Cal. Rptr. 2d 248*].

Cases have held that, given the short filing times in many probate matters and the need for timely and orderly administration of estates, appeal may constitute an inadequate legal remedy. Under these circumstances, a writ of mandate would be the appropriate remedy for reviewing the court's order [*see Varney v. Superior Court (1992) 10 Cal. App. 4th 1092, 1098, 12 Cal. Rptr. 2d 865* ; *Scharlin v. Superior Court (1992) 9 Cal. App. 4th 162, 167, 11 Cal. Rptr. 2d 448*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsInterpretationEstate, Gift & Trust LawTrustsModification & Termination

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49-560 California Forms of Pleading and Practice--Annotated § 560.17

§ 560.17 Applicability of Trust Law

A comprehensive body of statutes governing trusts was adopted in California in 1987 on the recommendation of the California Law Revision Commission. These statutes, collectively referred to as the Trust Law, prescribe detailed rules for the creation, validity, modification, and termination of trusts. Unless otherwise provided by statute, the Trust Law applies to the following:

- All trusts, regardless of when they were created [*Prob. Code § 15001(a)*].

- All proceedings concerning trusts commenced on or after July 1, 1987 [*Prob. Code § 15001(b)*].

- All proceedings concerning trusts commenced before July 1, 1987, unless in the opinion of the court application of a particular provision of the Trust Law would substantially interfere with the effective conduct of the proceedings or the rights of the parties and other interested persons, in which case the particular provision of the Trust Law does not apply and law applicable before July 1, 1987, applies [*Prob. Code § 15001(c)*].

- Charitable trusts subject to the jurisdiction of the Attorney General, to the extent that the application of the provision is not in conflict with the Uniform Supervision of Trustees for Charitable Purposes Act [Prob. Code§ 15004; *see Gov. Code § 12580 et seq.* (Uniform Supervision of Trustees for Charitable Purposes Act)].

Except to the extent that the common law rules governing trusts are modified by statute, the common law regarding trusts is the law of California [*Prob. Code § 15002*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust

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49-560 California Forms of Pleading and Practice--Annotated § 560.18

§ 560.18 Nonapplicability of Trust Law

The Trust Law does not apply to the following:

- Constructive trusts, other than those described in *Prob. Code § 82(a)(2)*, and resulting trusts [*Prob. Code §§ 82(b)(1), 15003(a)*; *see* Ch. 561, *Trusts: Constructive Trusts* and Ch. 502, *Trusts: Resulting Trusts* , respectively].

- Guardianships, conservatorships, or personal representatives [*Prob. Code § 82(b)(2), (3)*; *see* Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , through Ch. 290H, *Guardianship and Conservatorship: Termination of Guardianships and Coonservatorships* , and Ch. 440, *Probate: Is Probate Necessary* through 458E, *Probate: Discharge*].

- Totten trust accounts [*see Prob. Code § 82(b)(4)*; *see § 560.340* et seq.].

- Custodial arrangements pursuant to the Uniform Gifts to Minors Act or the Uniform Transfers to Minors Act of any state [*Prob. Code § 82(b)(5)*; *see, e.g., Prob. Code §§ 3900-3925* (California Uniform Transfers to Minors Act, incorporating former California Uniform Gifts to Minors Act)].

- Business trusts that are taxed as partnerships or corporations [*Prob. Code § 82(b)(6)*].

- Investment trusts subject to regulation under the laws of California or any other jurisdiction [*Prob. Code § 82(b)(7)*].

- Common trust funds [*Prob. Code § 82(b)(8)*].

- Voting trusts or security arrangements [*Prob. Code § 82(b)(9), (10)*; *see Corp. Code § 703*; *see also* Ch. 166, *Corporations* : *Shareholders' Meetings and Voting*].

- Transfers in trust for the purpose of suit or enforcement of a claim or right [*Prob. Code § 82(b)(11)*].

- Liquidation trusts [*Prob. Code § 82(b)(12)*].

- Trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind [*Prob. Code § 82(b)(13)*].

- Any arrangement under which a person is nominee or escrowee for another [*Prob. Code § 82(b)(14)*].

In addition, nothing in the Trust Law affects the substantive law relating to constructive or resulting trusts [*Prob. Code § 15003(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesCommon Trust FundsBusiness & Corporate LawCorporationsShareholdersMeetings & VotingVoting SharesVoting TrustsEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawNonprobate TransfersJointly Held PropertyBank AccountsEstate, Gift & Trust LawPersonal GiftsGifts to MinorsUniform ActsEstate, Gift & Trust LawTrustsConstructive TrustsEstate, Gift & Trust LawTrustsResulting TrustsReal Property LawPurchase & SaleEscrow

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§ 560.19 Effect of Trust Law on Other Relationships and Entities

The 1986 repeal of *Civ. Code §§ 2215-2290.12* was not intended to alter the rules applied by the courts to fiduciary and confidential relationships, except as to express trusts governed by the Trust Law [*Prob. Code § 15003(b)*].

Nothing in the Trust Law or in *Prob. Code § 82* is intended to prevent the application of all or part of the principles or procedures of the Trust Law to an entity or relationship that is excluded from the definition of trust provided by *Prob. Code § 82* if these principles or procedures are applied pursuant to statutory or common law principles, by court order or rule, or by contract [*Prob. Code § 15003(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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49-560 California Forms of Pleading and Practice--Annotated § 560.20

§ 560.20 Nonretroactive Provisions of Trust Law

[1] Revocation

The manner of revocation of a trust revocable by the settlor that was created by an instrument executed before July 1, 1987, is governed by prior law and not by *Prob. Code § 15401* [*Prob. Code § 15401(e)*; *see § 560.111[3]*].

[2] Trustee's Duty to Account Annually

A trustee of a living trust created by an instrument executed before July 1, 1987, or of a trust created by a will executed before July 1, 1987, is not subject to the duty to account provided in *Prob. Code § 16061*, but the requirement of an account pursuant to former Prob. Code § 1120.1a (regarding trusts created by wills executed prior to July 1, 1977) may be satisfied by furnishing an account that satisfies the requirement of *Prob. Code § 16063* [*Prob. Code § 16062(b)*; *see § 560.80*].

[3] Trustee's Liability

The liability of a trustee for acts or omissions of agents that occurred before July 1, 1987, is governed by prior law and not by *Prob. Code § 16401* [*Prob. Code § 16401(c)*]. Moreover, the personal liability of a trustee on a contract entered into before July 1, 1987, is governed by prior law and not by *Prob. Code § 18000* [*Prob. Code § 18000(b)*]. For discussion regarding a trustee's liability to a beneficiary, see *§ 560.94* et seq. For discussion and forms regarding a trustee'sliability to a third party to the trust, see *§ 560.160* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsModification & TerminationEstate, Gift & Trust LawTrustsRevocable Living TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersAccountingEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstGovernmentsLegislationEffect & OperationProspective Operation

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[Reserved]

§§ 560.21[Reserved]

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49-560 California Forms of Pleading and Practice--Annotated § 560.40

§ 560.40 Governing Statutes

The creation and validity of express trusts are governed by *Prob. Code §§ 15200-15212*. Future interests are governed by *Civ. Code § 711* and *Prob. Code §§ 15211, 15212, 15413, 15414, 21200 et seq.* Accumulation of trust income is governed by *Civ. Code §§ 722-726*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstates Created by Trusts & WillsFuture InterestsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsCreation

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49-560 California Forms of Pleading and Practice--Annotated § 560.41

§ 560.41 Methods of Creating Trust

A trust may be created by any of the following methods, subject to other provisions of *Prob. Code §§ 15200-15212* [*Prob. Code § 15200*]:

- A declaration by the owner of property that the owner holds the property as trustee [*see Prob. Code §§ 15206* (Statute of Frauds), 15207 (oral trust of personal property)].

- A transfer of property by the owner during the owner's lifetime to another person as trustee.

- A transfer of property by the owner, by will or by other instrument taking effect on the death of the owner, to another person as trustee.

- An exercise of a power of appointment to another person as trustee.

- An enforceable promise to create a trust [*see Prob. Code §§ 15206* (Statute of Frauds), 15207 (oral trust of personal property)].

A trust created under *Prob. Code §§ 15200-15210* that relates to real property may be recorded in the county where all or part of the real property is located [*Prob. Code § 15210*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsCreation

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49-560 California Forms of Pleading and Practice--Annotated § 560.42

§ 560.42 Requirements for Valid Trust

[1] Intention to Create Trust

A trust is created only if the settlor properly manifests an intention to create a trust [*Prob. Code § 15201*; *see Prob. Code §§ 15206* (Statute of Frauds), 15207 (oral trust of personal property)].

[2] Trust Property

A trust is created only if there is trust property [*Prob. Code § 15202*].

A declaration by the settlors that they hold property in trust for another is sufficient to transfer real property to a trust. It is not necessary to record a deed from real property owners to a trust or to the trustees, or to record the trust [*Estate of Powell (2000) 83 Cal. App. 4th 1434, 1443, 100 Cal. Rptr. 2d 501]* .

The following are examples of interests that can be held in trust:

- Any property that can be voluntarily transferred by the owner [*see* Restatement (Second) of Trusts § 78].

- Property that is not transferable for a reason applicable only to the transfer of the legal title to the property [*see* Restatement (Second) of Trusts § 80].

- An interest that is of the character that a person holding it for his or her own benefit could not transfer it, if it is created in trust, or it accrues to a trustee of a trust already created [*see* Restatement (Second) of Trusts § 81].

- Interests in intangible things, if transferable [*see* Restatement (Second) of Trusts § 82].

- An equitable interest, if transferable [*see* Restatement (Second) of Trusts § 83].

- An interest that is subject to divestment, if transferable [*see* Restatement (Second) of Trusts § 84].

- A contingent interest, if transferable [*see* Restatement (Second) of Trusts § 85].

- An interest in a thing, although the interest is not the complete property in the thing [*see* Restatement (Second) of Trusts § 77].

The following are examples of interests that cannot be held in trust:

- An interest that has not come into existence or that has ceased to exist [*see* Restatement (Second) of Trusts § 75].

- Subject matter that is not definite or definitely ascertainable [*see Reagh v. Kelley (1970) 10 Cal. App. 3d 1082, 1089, 89 Cal. Rptr. 425* (property must be described with certainty)].

- Property that the owner cannot transfer, except as enumerated under items (2) and (3) of the preceding paragraph [*see Strauss v. Summerhays (1984) 157 Cal. App. 3d 806, 816, 204 Cal. Rptr. 227* (property generally mustbe transferable); Restatement (Second) of Trusts § 79].

- An expectation or hope of receiving property in the future [*see* Restatement (Second) of Trusts § 86].

For discussion of contingent interests, see *§ 560.49*.

[3] Ascertainable Beneficiary

A trust, other than a charitable trust, is created only if there is a beneficiary. The instrument therefore must provide either (1) a beneficiary or class of beneficiaries that is ascertainable with reasonable certainty or that is sufficiently described so it can be determined that some person meets the description or is within the class; or (2) a grant of a power to the trustee or some other person to select the beneficiaries based on a standard or in the discretion of the trustee or other person [*Prob. Code § 15205*]. For a definition of a beneficiary, see *§ 560.13[3]*.

[4] Resulting Trust Created on Failure of Express Trust

An attempt to create an express trust that fails to satisfy all the requirements may nevertheless establish an enforceable resulting trust [*see Sears v. Rule (1941) 45 Cal. App. 2d 374, 379, 114 P.2d 57]* . For further discussion, see Ch. 562, *Trusts: Resulting Trusts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsResulting Trusts

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49-560 California Forms of Pleading and Practice--Annotated § 560.43

§ 560.43 Action by Settlor

A settlor who seeks court determination regarding the internal affairs or existence of the trust may bring a petition pursuant to *Prob. Code § 17200* if the trust is revocable and the settlor holds the present power to revoke [*see Prob. Code §§ 15800* (person holding power to revoke has rights of beneficiary), 17200(a) (standing afforded to beneficiary and trustee generally)]. However, if the trust is not revocable, or it is revocable but the settlor does not hold the present power to revoke, a settlor must bring a plenary action under the Civil Code and Code of Civil Procedure [*see, e.g., Code Civ. Proc. § 425.10* (civil complaint) and *see § 560.520*].

A settlor unable to bring a petition in the probate court can bring a plenary action in the superior court, because the superior court traditionally has jurisdiction over matters regarding a trust [*see Cal. Const., art. VI, § 10* (superior court jurisdiction over all causes not given to other courts); *see also St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 358, 287 P.2d 387* (superior court jurisdiction to hear equitable actions); *but see Prob. Code § 17000* (exclusive jurisdiction of probate court regarding *Prob. Code § 17000 et seq.*). Inasmuch as suits in equity do not afford a right to jury trial, actions to determine the nature of the trust, or the interpretation or effect of its terms, are within the sole province of the court sitting without a jury [*Hillman v. Stults (1968) 263 Cal. App. 2d 848, 877, 70 Cal. Rptr. 295]* . For discussion of venue provisions generally, see *Ch. 571, Venue, §§ 571.10* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsIrrevocable Living TrustsEstate, Gift & Trust LawTrustsRevocable Living Trusts

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49-560 California Forms of Pleading and Practice--Annotated § 560.44

§ 560.44 Requirements for Promise to Create Trust

Consideration is not required to create a trust, but a promise to create a trust in the future is enforceable only if the requirements for an enforceable contract are satisfied [*Prob. Code § 15208*; *see* Restatement (Second) of Trusts § 30].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationGeneral OverviewEstate, Gift & Trust LawTrustsCreation

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49-560 California Forms of Pleading and Practice--Annotated § 560.45

§ 560.45 Purpose of Trust

A trust may be created for any purpose that is not illegal or against public policy [*Prob. Code § 15203*].

A trust created for an indefinite or general purpose is not invalid for that reason if it can be determined with reasonable certainty that a particular use of the trust property comes within that purpose [*Prob. Code § 15204*]. The intent of the legislature in enacting *Prob. Code § 15204* was to harmonize the law of trusts and powers in order to effectuate the settlor's intent, because failures at attempts to establish trusts under previous law were often nevertheless upheld as valid powers of appointment [*see Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 527 (1986); *see, e.g., Estate of Davis (1936) 13 Cal. App. 2d 64, 69, 56 P.2d 584* (testamentary trust for distribution to certain issue at discretion of son as trustee upheld as power of appointment)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsInterpretation

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§ 560.46 Statute of Frauds

A trust in relation to real property is not valid unless evidenced by one of the following methods [*Prob. Code § 15206*]:

- A written instrument signed by the trustee, or by the trustee's agent if authorized in writing to do so.
- A written instrument conveying the trust property signed by the settlor, or by the settlor's agent if authorized in writing to do so.
- Operation of law.

All of the conditions and terms of a trust in real property need not be expressed in a single document [*Reagh v. Kelley (1970) 10 Cal. App. 3d 1082, 1090, 89 Cal. Rptr. 425]* . A trust in real property that violates the Statute of Frauds may subsequently become valid and binding if possession is taken or the transfer of property has been fully executed. A person who complies with its provisions cannot later attack its validity on the ground that it was an orally executed trust proved by parol evidence [*Casa Colina Convalescent Home v. Wiest (1963) 214 Cal. App. 2d 161, 165, 166, 29 Cal. Rptr. 407]* . For a form for a petition for useby a beneficiary to enforce an oral trust in real property, *see § 560.550*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawStatutes of FraudsExceptionsGeneral OverviewContracts LawStatutes of FraudsRequirementsGeneral OverviewContracts LawStatutes of FraudsRequirementsSignaturesContracts LawStatutes of FraudsRequirementsWritingsEstate, Gift & Trust LawTrustsCreation

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49-560 California Forms of Pleading and Practice--Annotated § 560.47

§ 560.47 Oral Trust of Personal Property

The existence and terms of an oral trust of personal property may be established only by clear and convincing evidence. The oral declaration of the settlor, standing alone, is not sufficient evidence of the creation of a trust of personal property. In the case of an oral trust, a reference in *Prob. Code § 15000 et seq.* or elsewhere to a trust instrument of declaration means the terms of the trust as established pursuant to *Prob. Code § 15207(a)* [*Prob. Code § 15207*]. Required proof of the existence of an oral trust may be indirect, consisting of acts, conduct, and circumstances, and no particular terminology is needed [*Fahrney v. Wilson (1960) 180 Cal. App. 2d 694, 697, 4 Cal. Rptr. 670]* . However, the clear and convincing evidence rule applies only at the trial level. On review, it is assumed that the trial court applied the proper standard, and the judgment will not be upset if there is substantial evidence to support it [*California Pac. Title Co. v. Moore (1964) 229 Cal. App. 2d 114, 117, 40 Cal. Rptr. 61]* .

Nothing under *Prob. Code § 15207* (or in the entire Trust Law) affects the substantive law concerning constructive trusts [*see Prob. Code § 15003(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsCreationEvidenceProcedural ConsiderationsBurdens of ProofClear & Convincing Proof

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49-560 California Forms of Pleading and Practice--Annotated § 560.48

§ 560.48 Merger Doctrine

[1] In General

When the legal and equitable title to trust property are vested in the same person, the doctrine of merger operates to terminate the trust [*Estate of Washburn (1909) 11 Cal. App. 735, 746, 106 P. 415* ; *see* General Introduction under § 560.11].

[2] Exception

If a trust provides for one or more successor beneficiaries after the death of the settlor, the trust is not invalid, merged, or terminated in either of the following circumstances [*Prob. Code § 15209*]:

- When there is one settlor who is the sole trustee and the sole beneficiary during the settlor's lifetime.

- When there are two or more settlors, one or more of whom are trustees, and the beneficial interest in the trust is in one or more of the settlors during the lifetime of the settlors.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsBeneficiariesSuccessive BeneficiariesEstate, Gift & Trust LawTrustsModification & Termination

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49-560 California Forms of Pleading and Practice--Annotated § 560.49

§ 560.49 Rule Against Perpetuities

[1] General Application to Trusts

A contingent interest or an expectancy based on an existing contract may be the subject of a trust [*Bank of California v. Connolly (1973) 36 Cal. App. 3d 350, 373, 111 Cal. Rptr. 468]* . If a trust involves a contingent interest or an expectancy based on an existing contract, the interest must vest within the time limits set forth in the rule against perpetuities [*see Civ. Code § 711* (when restraint of alienation is void); *Prob. Code §§ 15211, 15212, 15413, 15414, 21200 et seq.* (Rule Against Perpetuities and related provisions governing trusts)].

In 1991, the Legislature adopted the Uniform Statutory Rule Against Perpetuities [*see Prob. Code § 21200 et seq.*]. *Prob. Code § 21200 et seq.* apply to nonvested property interests and unexercised powers of appointment regardless of when they were created, and supersede former *Civ. Code § 715.2*, the common law rule against perpetuities [*Prob. Code §§ 21201, 21202(a)*]. *Prob. Code § 21200 et seq.* do not apply however, to any property interest or power of appointment the validity of which has been determined in a judicial proceeding or by a settlement among interested persons [*Prob. Code § 21202(b)*]. It must be emphasized that the rule against perpetuities applies only to the vesting of future estates, and not to vested estates. If the rule does apply to a trust, that is, if a trust involves the vesting of a *future* estate, both the legal title in the trustee and the equitable title in the beneficiary must vest within the time limits of the rule [*Reagh v. Kelley (1970) 10 Cal. App. 3d 1082, 1097, 89 Cal. Rptr. 425]* .

[2] Period Within Which Interest Must Vest

The rule against perpetuities states that a nonvested property interest is invalid unless one of the following conditions is satisfied [*Prob. Code § 21205*]:

- When the interst is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or

- The interest either vests or terminates within 90 years after its creation.

In determining whether a nonvested property interest is valid under the rule against perpetuities, the possibility that a child will be born to an individual after the individual's death is disregarded [*Prob. Code § 21208*]. In addition, an individual described as the spouse of an individual alive at the commencement of the perpetuities period will be deemed to be an individual alive when the interest is created, whether or not the individual so described was then alive [*Prob. Code § 21231*]. The lives of individuals selected to govern the time of vesting may not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain [*Prob. Code § 21230*].

With respect to governing instruments executed on or after January 1, 1992, in measuring a period from the creation of a trust, if language in a governing instrument seeks to disallow the vesting or termination of any interest or trust beyond, to postpone the vesting or termination of any interest or trust until, or to operate in effect in any similar fashion on the later of (1) the expiration of a periodof time not exceeding 21 years after the death of the survivor of specified lives in being at the creation of the trust or (2) the expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the trust, that language is inoperative to the extent it produces a period that exceeds 21 years after the death of the survivor of the specified lives [*Prob. Code § 21209*].

[3] Time of Creation of Interest

In general, the time of creation of a nonvested property interest is determined by other applicable statutes or, if none, under general principles of property law [*Prob. Code § 21210*].

If there is a person who alone can exercise a power created by a governing instrument to become the unqualified beneficial owner of a nonvested property interest or a property interest subject to a power of appointment, the nonvested property interest or power of appointment is created when the power to become the unqualified beneficial owner terminates [*Prob. Code § 21211(a)*]. A joint power with respect to community property held by individuals married to each other is a power exercisable by one person alone [*Prob. Code § 21211(b)*].

A nonvested property interest or power of appointment arising from a transfer of property to a previously funded trust is created when the nonvested property interest or power of appointment in the original contribution was created [*Prob. Code § 21212*].

[4] Honorary Trusts

A trust for a noncharitable corporation or unincorporated society or for a lawful noncharitable purpose may be performed by the trustee for only 21 years, whether or not there is a beneficiary who can seek enforcement or termination of the trust and whether or not the terms of the trust contemplate a longer duration [*Prob. Code § 15211*].

[5] Trust for Care of Designated Animal

A trust for the care of a designated domestic or pet animal may be performed by the trustee for the life of the animal, whether or not there is a beneficiary who can seek enforcement or termination of the trust and whether or not the terms of the trust contemplate a longer duration [*Prob. Code § 15212*].

[6] Accumulation of Trust Income

A direction for the accumulation of the income of property is subject to the rule against perpetuities [*see Prob. Code § 12200 et seq.* (Rule Against Perpetuities); *see also Civ. Code § 723* (accumulations otherwise void)]. An accumulation of income of property directed by any will, trust, or transfer in writing sufficient to pass the property or create the trust out of which the fund is to arise, for the benefit of one or more persons, is valid if it does not extend beyond the time permitted for the vesting of future interests [*Civ. Code § 724(a)*]. Nevertheless, the income arising from real or personal property held in a trust forming part of a profit-sharing plan of an employer for the exclusive benefit of its employees or

their beneficiaries or forming part of a retirement plan formed primarily for the purpose of providing benefits for employees on or after retirement may be permitted to accumulate until the fund is sufficient, in the opinion of the trustee or trustees, to accomplish the purposes of the trust [*Civ. Code § 724(b)*].

When one or more persons for whose benefit an accumulation of income has been directed is or are destitute of other sufficient means of support or education, the proper court, on application, may direct a suitable sum to be applied thereto out of the fund directed to be accumulated for the benefit of that person or persons [*Civ. Code § 726*]. For a form for a petition to modify the trust to allow distribution of accumulated trust income from trust property, *see § 560.580*.

[7] Interests Excluded From Rule

Some interests are specifically excluded from the scope of the rule against perpetuities [*see Prob. Code § 21225*]. Among the interests excluded are nonvested property interests in certain trusts forming part of pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other benefit plans [*see Prob. Code § 21225(f)*]. Also excluded are trusts created for the purpose of providing for the beneficiaries under hospital service contracts, group life insurance, group disability insurance, group annuities, or any combination of such insurance [*Prob. Code § 21225(h)*].

[8] Termination of Trust After Expiration of Perpetuity Period

Notwithstanding the general rules of trust termination [*see Prob. Code § 15400 et seq.*; *see also* discussion in *§ 560.110* et seq.], if a trust continues in existence after expiration of the longer of the periods provided by the rule against perpetuities, the trust may be terminated on petition by a majority of the beneficiaries, or on petition by the Attorney General or any person who would be affected by the termination, if the court finds that the termination would be in the public interest or in the best interest of a majority of the persons who would be affected by the termination [*Prob. Code § 15414*; *see also Prob. Code § 21200 et seq.* (rule against perpetuities; discussed in *§ 560.49[2]*)]. A trust provision, express or implied, that the trust may not be terminated is ineffective insofar as it purports to be applicable after the expiration of the longer of the periods provided by the rule against perpetuities [*Prob. Code § 15413*].

[9] Reformation

On petition of an interested person, a court will reform a disposition in themanner that most closely approximates the transferor's manifested plan of distribution and is within the 90 years allowed by the rule against perpetuities, if any of the following conditions is satisfied [*Prob. Code § 21220*; *see also Prob. Code § 21200 et seq.*, discussed in *§ 560.49[2]*)]:

- A nonvested property interest or a power of appointment becomes invalid under the rule against perpetuities;

- A class gift is not, but might become, invalid under the rule against perpetuities and the time has arrived when the share of any class member is to take effect in possession or enjoyment; or

- A nonvested property interest that is not validated by *Prob. Code § 21205(a)* (no later than 21 years after death of individual alive at creation of interest; for discussion, *see § 560.49[2]*) can vest, but not within 90 years after its creation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstates Created by Trusts & WillsInvalid Restraints & Rule Against PerpetuitiesEstate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsModification & Termination

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49-560 California Forms of Pleading and Practice--Annotated §§ 560.50-560.69

[Reserved]

§§ 560.50[Reserved]

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49-560 California Forms of Pleading and Practice--Annotated § 560.70

§ 560.70 Governing Statutes

Acceptance and rejection of the trust, bond requirements, and issuance of a trustee certificate are governed by *Prob. Code §§ 15600-15603*. Resignation and appointment of a trustee, and vacancy of the office are governed by *Prob. Code §§ 15640-15660*. Compensation and indemnification of trustees are governed by *Prob. Code §§ 15680-15685*. Duties of trustees are governed by *Prob. Code §§ 16000-16105*. Requirements for the satisfaction of a pecuniary gift by distribution of nonmonetary property are governed by *Prob. Code § 21118*. A trustee's duties, powers, and discretionary authority regarding trusts that relate to various Internal Revenue Code provisions for marital deductions and charitable gifts are governed by *Prob. Code §§ 21500-21541*. Accounting and reporting requirements are governed by *Prob. Code §§ 16060-16064*. Powers of trustees are governed by *Prob. Code §§ 16200-16249*. Liabilities of trustees are governed by *Prob. Code §§ 16400-16465*. Notice requirements for proposed actions by the trustee are governed by *Prob. Code §§ 16500-16504*. Cotrustees are governed by *Prob. Code §§ 15620-15622*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsTrusteesAppointmentEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersCompensationEstate, Gift & Trust LawTrustsTrusteesMultiple TrusteesEstate, Gift & Trust LawTrustsTrusteesRemoval & Resignation

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49-560 California Forms of Pleading and Practice--Annotated § 560.71

§ 560.71 Acceptance of Trust by Trustee

The person named as trustee may accept the trust, or a modification of the trust, by one of the following methods [*Prob. Code § 15600(a)*]:

- Signing the trust instrument or the trust instrument as modified, or signing a separate written acceptance.

- Knowingly exercising powers or performing duties under the trust instrument or the trust instrument as modified, except as provided in *Prob. Code § 15600(b)*.

When there is an immediate risk of damage to the trust property, the person named as trustee may act to preserve the trust property without accepting the trust or a modification of the trust, if within a reasonable time after acting, the person delivers a written rejection of the trust or the modification of the trust to the settlor or, if the settlor is dead or incompetent, to a beneficiary. *Prob. Code § 15600(b)* does not impose a duty on the person named as trustee to act [*Prob. Code § 15600(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsModification & TerminationEstate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesAppointment

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49-560 California Forms of Pleading and Practice--Annotated § 560.72

§ 560.72 Rejection of Trust by the Trustee

A person named as trustee may reject in writing the trust or a modification of the trust [*Prob. Code § 15601(a)*]. If the person named as trustee does not accept the trust or a modification of the trust by a method provided in *Prob. Code § 15600(a)* within a reasonable time after learning of being named as trustee or of the modification, the person has rejected the trust or the modification [*Prob. Code § 15601(b)*]. A person named as trustee who rejects the trust or a modification of the trust is not liable with respect to the rejected trust or modification [*Prob. Code § 15601(c)*]. Moreover, a trustee who rejects new duties arising from a modification need not resign as trustee [*see Recommendation Proposing the Trust Law*, 18 Cal. Law Revision Comm'n Reports 646 (1986)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsModification & TerminationEstate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesAppointmentEstate, Gift & Trust LawTrustsTrusteesRemoval & Resignation

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§ 560.73 Trustee's Bond and Certificate

A trustee is not required to give a bond to secure performance of the trustee's duties, unless any of the following circumstances occurs [*Prob. Code § 15602(a)*]:

- A bond is required by the trust instrument.

- Notwithstanding a waiver of a bond in the trust instrument, the court finds a bond to be necessary to protect the interests of beneficiaries or other persons having an interest in the trust.

- An individual who is not named as a trustee in the trust instrument is appointed as a trustee by the court.

Notwithstanding *Prob. Code § 15602(a)(1)* and *(3)*, the court may excuse a bond requirement, reduce or increase the amount of a bond, release a surety, or permit the substitution of another bond with the same or different sureties [*Prob. Code § 15602(b)*]. However, the court may not excuse the requirement of a bondfor an individual who is not named as a trustee in the trust instrument that the court appoints as trustee, except under compelling circumstances. A request by all of the adult beneficiaries of a trust that the bond be waived for this individual constitutes a compelling circumstance [*Prob. Code § 15602(b)*].

If a bond is required, it must be filed or served and must be in the amount and with sureties and liabilities ordered by the court [*Prob. Code § 15602(c)*]. Except as otherwise provided in the trust instrument or ordered by the court, the cost of the bond will be charged against the trust [*Prob. Code § 15602(d)*]. A trust company may not be required to give a bond, even if the trust instrument requires one [*Prob. Code § 15602(e)*].

On application by the trustee, the court clerk must issue a certificate that the trustee is a duly appointed and acting trustee under the trust if the court file shows the incumbency of the trustee [*Prob. Code § 15603*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesBondsExecutionsEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTrusteesAppointment

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§ 560.74 Professional Fiduciaries Act

[1] Professional Fiduciary

Trustees who are professional fiduciaries are required to comply with the Professional Fiduciaries Act [*Bus. & Prof. Code § 6500 et seq.*; *see Bus. & Prof. Code § 6530(a), Prob. Code § 60.1*]. In the context of trustees, a "professional fiduciary" is anyone who acts as a trustee, agent under a durable power of attorney for health care, or agent under a durable power of attorney for finances, for more than three people or more than three families or a combination of people and families that totals more than three, at the same time, who are not related to the professional fiduciary by blood, adoption, marriage, or registered domestic partnership [*Bus. & Prof. Code § 6501(f)*; for discussion of the definition of "professional fiduciary" in the context of guardians and conservators, *see Ch. 281, Guardianship and Conservatorship: Appointment of Conservators, § 281.66*].

The following are specifically exempted from the licensing requirements [*Bus. & Prof. Code § 6501(f)(4), 6530(b)-(d)*]:

- Trust companies [*see Prob. Code § 83* (definition)].

- FDIC-insured institutions, or their holding companies, subsidiaries or affiliates.

- Any public agency, including the public guardian, public conservator, or other agency of the State of California or of a county of California or any regional center for persons with developmental disability as defined in *Welf. & Inst. Code § 4620*.

- Any person who is employed by a trust company, an FDIC-insured institution or its holding companies, subsidiaries, or affiliates, or a public agency, who is acting in the course and scope of that employment, and in the instance of a public officer of a public agency, acting in the course and scope of official duties.

- Any person whose sole activity as a professional fiduciary is as a broker-dealer, broker-dealer agent, investment adviser representative registered and regulated under the Corporate Securities Law of 1968 [*Corp. Code § 25000 et seq.*], the Investment Advisers Act of 1940 [*15 U.S.C. 80b-1 et seq.*], or the Securities Exchange Act of 1934 [*15 U.S.C. 78a et seq.*], or involves serving as a trustee to a company regulated by the Securities and Exchange Commission under the Investment Company Act of 1940 [*15 U.S.C. 80a-1 et seq.*].

- Any licensed attorney.

- Any licensed certified public accountant;

- Any Internal Revenue Service agent acting within the scope of practice.

[2] Licensing Requirements

No person may act or hold himself or herself out to the public as a professional fiduciary unless he or she is licensed as a professional fiduciary under the Act [*Prob. Code § 60.1(b)*]. Persons previously required to register with the statewide registry under *Prob. Code § 2850 et seq.* (inoperative 7/1/2008, repealed eff. 1/1/2009), and persons required to file information with the clerk of the court under the former version of *Prob. Code § 2340 et seq.* (inoperative 7/1/2008; repealed eff. 1/1/2009) are required to obtain a professional fiduciary license [*Bus & Prof. Code § 6502*].

The Professional Fiduciaries Bureau is responsible for administering the licensing and regulatory program established under the Act, approving classes for prelicense and continuing education, and preparing and administering licensing exams [*Bus. & Prof. Code § 6518*; *see Bus. & Prof. Code §§ 6510, 6511* (creation of Bureau)]. Applications for a professional fiduciary license can be obtained online, through the California Department of Consumer Affairs, at http://www.fiduciary.ca.gov/. The Bureau may investigate an applicant's qualifications, and must approve applicants who meet the required qualifications [*Bus. & Prof. Code § 6536*].

[3] Qualifications for Licensure

Applicants must meet the following qualifications in order to obtain a professional fiduciary license [*Bus. & Prof. Code § 6533(a)-(k)*]:

- Be at least 21 years old.

- Be a United States citizen or legally admitted to the United States.

- Have not committed any acts that are grounds for denial of a license under *Bus. & Prof. Code §§ 480, 6536* [*see below*].

- Submit fingerprints for the purpose of obtaining criminal offender record information [*see Bus. & Prof. Code § 6533.5*].

- Have completed 30 hours of prelicensing education [*see Bus. & Prof. Code § 6538*].

- Have passed the licensing exam [*see Bus. & Prof. Code § 6539*].

- Have a least one of the following:

  - A B.A. or B.S. degree from a college or university;

- An A.A./A.S. degree from a college or university and at least five years experience with substantive fiduciary responsibilities working as a professional fiduciary, public agency, or financial institution acting as a conservator, guardian, trustee, personal representative, or agent under a power of attorney; or

- Experience of not less than three years, prior to July 1, 2008, with substantive fiduciary institution acting as a conservator, guardian, trustee, personal representative, or agent under a power of attorney.

- Agree to adhere to the Professional Fiduciaries Code of Ethics [*see Bus. & Prof. Code § 6520*] and to all statutes and regulations.

- Consent to the bureau conducting a credit check.

- File a completed application.

- Pay the nonrefundable application fee.

The Bureau must deny a license if the applicant [*see Bus. & Prof. Code § 6536(a)-(e)*]:

- Does not meet the qualifications for licensure [*see Bus. & Prof. Code § 6533(a)-(k), above*];

- Has been convicted of a crime substantially related to the qualifications, functions, or duties of a fiduciary;

- Has engaged in fraud or deceit in applying for a license;

- Has engaged in dishonesty, fraud, or gross negligence in performing the functions or duties of a fiduciary; or

- Has been removed as a fiduciary by a court for breach of trust committed intentionally, with gross negligence, in bad faith, or with reckless indifference, or has demonstrated a pattern of negligent conduct (including a removal prior to January 1, 2009), and all appeals have been taken or the time to file an appeal has expired.

[4] License Renewal

A professional fiduciary license is valid for one year [*Bus. & Prof. Code § 6541(a)*]. To renew the license, a professional fiduciary must file a renewal application, continuing education compliance, and the renewal fee [*see Bus. & Prof. Code §§ 6561, 6538(b), 6541(b)*]. Conduct that would result in a refusal of a license renewal is similar to the conduct that would result in a license denial, and includes the following [*Bus. & Prof. Code § 6541(b)*]:

- Conviction of a crime substantially related to the qualifications, functions, or duties of a fiduciary.

- Fraud or deceit in obtaining a license.

- Dishonesty, fraud, or gross negligence in performing the functions or duties of a professional fiduciary.

- Removal as a fiduciary by a court for breach of a fiduciary duty.

[5] Initial and Annual Statement

A professional fiduciary must keep complete and accurate records of client accounts, and must make them available for audit by the Bureau [*Bus. & Prof. Code § 6560*]. A professional fiduciary also must submit a statement, initially and annually thereafter [*Bus. & Prof. Code § 6561(a)*]. The annual statement must be filed with the Bureau 60 days prior to expiration of the fiduciary's license [*Bus. & Prof. Code § 6562*], and must include the following information [*Bus. & Prof. Code § 6561(a)*]:

- The fiduciary's business address, phone, and fax number.

- Whether or not the fiduciary has been removed as conservator, guardian, trustee or personal representative for cause.

- The case names, court locations, and case numbers for all matters in which the fiduciary has been appointed by the court.

- Whether the fiduciary has been found by a court to have breached a fiduciary duty.

- Whether the fiduciary has reassigned or settled a matter in which a complaint has been filed, along with the case number and a statement of the issues and facts pertaining to the allegations.

- Any licenses or professional certificates held.

- Any ownership or beneficial interests in any businesses or other enterprises held by the fiduciary or by a family member who receives or has received payment from a client of the fiduciary.

- Whether the fiduciary has ever filed for bankruptcy or held a controlling financial interest in a business that filed for bankruptcy.

- The name of any persons or entities that have an interest in the fiduciary's professional fiduciary business.

- Whether the fiduciary has been convicted of a crime.

[6] Suspension, Revocation, Denial, and Disciplinary Action

The Bureau has the authority to investigate the actions of any professional fiduciary [*Bus. & Prof. Code § 6580(a)*]. Sanctions may include administrative citations and fines, license suspension or probation, or license revocation [*Bus. & Prof. Code § 6580(b)*]. A license may be suspended, revoked, or denied, or other disciplinary action may be imposed for one or more of the following [*Bus. & Prof. Code § 6584*]:

- Conviction of any felony or misdemeanor, if the misdemeanor is substantially related to the functions and duties of a professional fiduciary.

- Failure to notify the bureau of a conviction [*see Bus. & Prof. Code § 6561(a)(10)*].

- Fraud or misrepresentation in obtaining a license.

- Fraud, dishonesty, corruption, willful violation of duty, gross negligence or incompetence in practice, or unprofessional conduct in, or related to, the practice of a professional fiduciary.

- Failure to comply with, or to pay a monetary sanction imposed by a court for failure to provide timely reports.

- Failure to pay a civil penalty relating to the licensee's professional fiduciary duties.

- The revocation of, suspension of, or other disciplinary action against, any other professional license by the State of California or by another state; Violation of this *Bus. Prof. Code § 6500 et seq.*, *Probate Code § 4000 et seq.*, *Probate Code § 4600 et seq.*, *Probate Code § 5000 et seq.*, or any of the statutes, rules, or regulations pertaining to the duties or functions of a professional fiduciary.

The Bureau has adopted a Professional Fiduciaries Code of Ethics that is available on the bureau's Internet website and is provided to all applicants [*see Bus. & Prof. Code § 6520*; www.fiduciary.ca.gov].

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§ 560.75 Cotrustees

[1] Unanimous Action Required

Unless otherwise provided in the trust instrument, a power vested in two or more trustees may only be exercised by their unanimous action [*Prob. Code § 15620*].

[2] Vacancy or Unavailability

Unless otherwise provided in the trust instrument, if a vacancy occurs in the office of a cotrustee, the remaining cotrustee or cotrustees may act for the trust as if they are the only trustees [*Prob. Code § 15621*].

Unless otherwise provided in the trust instrument, if a cotrustee is unavailable to perform the duties of the cotrustee because of absence, illness, or other temporary incapacity, the remaining cotrustee or cotrustees may act for the trust as if they were the only trustees, when necessary to accomplish the purposes of the trust or to avoid irreparable injury to the trust property [*Prob. Code § 15622*].

[3] Duties of Cotrustees

If a trust has more than one trustee, each trustee has a duty to participate in the administration of the trust [*Prob. Code § 16013(a)*]. Each trustee must also take reasonable steps to prevent a cotrustee from committing a breach of trust or to compel a cotrustee to redress a breach of trust [*Prob. Code § 16013(b)*]. However, if a cotrustee is also a settlor under a revocable trust, a nonsettlor-cotrustee must follow the directions of the settlor-cotrustee [*see Prob. Code § 16001*].

For discussion of a trustee's liability to a beneficiary for acts of a cotrustee, see *Prob. Code § 16402* and § 560.84[3].

Legal Topics:

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

Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersLimitationsEstate, Gift & Trust LawTrustsTrusteesMultiple Trustees

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§ 560.76 Duties of Trustee

[1] Generally

On acceptance of the trust, the trustee has a duty to administer the trust according to the trust instrument and, except to the extent the trust instrument provides otherwise, according to the Trust Law [*Prob. Code § 16000*]. For discussion of the methods of accepting a trust, see *§ 560.71*. For discussion of the procedure when petitioning the court with respect to administration of a trust under the Trust Law, see *§ 560.130* et seq.

[2] In Revocable Trust

Except as provided in *Prob. Code § 16001(b)*, the trustee of a revocable trust must follow any written direction acceptable to the trustee given from time to time by (1) the person then having the power to revoke the trust or the part of the trust withrespect to which the direction is given, or (2) the person to whom the settlor delegates the right to direct the trustee [*Prob. Code § 16001(a)*]. If a written direction given under *Prob. Code § 16001(a)* would have the effect of modifying the trust, the trustee has no duty to follow the direction unless it complies with the requirements for modifying the trust [*Prob. Code § 16001(b)*]. For discussion of modification and termination of trusts, see *§ 560.110* et seq.

[3] Loyalty

The trustee has a duty to administer the trust solely in the interest of the beneficiaries [*Prob. Code § 16002(a)*]. It is not a violation of the duty under *Prob. Code § 16002(a)* for a trustee who administers two trusts to sell, exchange, or participate in the sale or exchange of trust property between the trusts, if both of the following requirements are met [*Prob. Code § 16002(b)*]:

- The sale or exchange is fair and reasonable with respect to the beneficiaries of both trusts.
- The trustee gives to the beneficiaries of both trusts notice of all material facts related to the sale or

exchange that the trustee knows or should know.

If a trust has two or more beneficiaries, the trustee has a duty to deal impartially with them and must act impartially in investing and managing the trust property, taking into account any differing interests of the beneficiaries [*Prob. Code § 16003*].

[4] Conflict of Interest and Adverse Interests

The trustee has a duty not to use or deal with trust property for the trustee's own profit or for any other purpose unconnected with the trust, nor to take part in any transaction in which the trustee has an interest adverse to the beneficiary [*Prob. Code § 16004(a)*; *but see Prob. Code § 16463* (beneficiary's consent relieving trustee from liability)]. The trustee may not enforce any claim against the trust property that the trustee purchased after or in contemplation of appointment as trustee, but the court may allow the trustee to be reimbursed from trust property the amount that the trustee paid in good faith for the claim [*Prob. Code § 16004(b)*].

A transaction between the trustee and a beneficiary that occurs during the existence of the trust or while the trustee's influence with the beneficiary remains and by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee's fiduciary duties. This presumption affects the burden of proof [*Prob. Code § 16004(c)*; *see Evid. Code §§ 605, 606* (definition of presumption affecting burden of proof)].

Prob. Code § 16004(c) does not apply to the provisions of an agreement between a trustee and a beneficiary relating to the hiring or compensation of the trustee [*Prob. Code § 16004(c)*].

The provision of services for compensation by a regulated financial institution or its affiliates in the ordinary course of business either to a trust of which it acts as trustee or to a person dealing with the trust is not a violation of the duty provided in *Prob. Code § 16002* or *16004*. For the purposes of *Prob. Code § 16015*, "affiliate" means a corporation that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with another domestic or foreign corporation [*Prob. Code § 16015*].

Similarly, the duty of loyalty is not violated if the trustee deposits trust funds in a financial institution operated by or affiliated with the trustee [*Prob. Code § 16225(b)*]. However, depositing funds in such an institution is permissible only because it is specifically authorized by statute; without the statute, it would be a clear violation of the duty of loyalty for the trustee to deposit trust funds with itself [*Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 835, 251 Cal. Rptr. 530]* .

The trustee of one trust has a duty not to knowingly become a trustee of another trust adverse in its nature to the interest of the beneficiary of the first trust, and a duty to eliminate the conflict or resign as trustee when the conflict is discovered [*Prob. Code § 16005*; *but see Prob. Code § 16463* (beneficiary's consent relieving trustee from liability)].

[5] Preservation, Use, and Disposal of Trust Property

The trustee has a duty to take reasonable steps, under the circumstances, to take and keep control of and to preserve the trust property [*Prob. Code § 16006*]. Moreover, the trustee has a duty to make the trust property productive under the circumstances and in furtherance of the purposes of the trust [*Prob. Code § 16007*; *see Prob. Code § 16000* (trust instrument controls)].

[6] Commingling Trust Property

The trustee has a duty to keep the trust property separate from other property not subject to the trust [*Prob. Code § 16009(a)*]. There are, however, exceptions, to the general duty to avoid commingling [*see, e.g., Fin. Code §§ 1563*

(registration of trust securities in name of nominee), 1564 (common trust funds)]. The trustee must also see that the trust property is designated as property of the trust [*Prob. Code 16009(b)*].

For discussion of a beneficiary's consent to a trustee's acts that relieve the trustee from liability for breach of trust, see *Prob. Code § 16463* and § 560.87. For discussion of a trustee's standard of care, see *§ 560.78*.

[7] Delegation of Performance and Transfer of Office

The duties of the trustee with respect to the delegation of investment andmanagement responsibilities are subject to special rules set forth in the Uniform Prudent Investor Act [*Prob. Code §§ 16045-16054*] [*see Prob. Code § 16012(c)*]. With respect to all other responsibilities, the authority of the trustee to delegate duties or functions is governed by the general rule stated in *Prob. Code § 16012*. Under that rule, the trustee has a duty not to delegate to others the performance of acts that the trustee can reasonably be required personally to perform, and may not transfer the office of trustee to another person nor delegate the entire administration of the trust to a cotrustee or other person [*Prob. Code § 16012(a)*]. In a case in which a trustee has properly delegated a matter to an agent, cotrustee, or other person, the trustee has a duty to exercise general supervision over the person performing the delegated matter [*Prob. Code § 16012(b)*; *see Prob. Code § 16247* (power to hire agent)]. For discussion of cotrustees, see *Prob. Code §§ 15620-15622* and § 560.75. For discussion of a trustee's liability for acts of an agent, see *§ 560.84* and Ch. 427, *Principal and Agent* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsRevocable Living TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersLimitationsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of Care

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§ 560.77 Trustee's Compliance With Internal Revenue Code Provisions

[1] Marital Deduction Gifts

The federal estate and gift tax laws provide for "marital deductions," under which property passing from one spouse to another is deductible from the gross estate [*see I.R.C. §§ 2056, 2523*]. California law provides that if an instrument contains a marital deduction gift, the provisions of the instrument, including any power, duty, or discretionary authority given to a fiduciary, must be construed to comply with these marital deduction provisions [*Prob. Code § 21522(a)*; *see Prob. Code §§ 39* ("fiduciary" defined), 45 ("instrument" defined); *see also Prob. Code §§ 21500* (reference is to Internal Revenue Code of 1986 as amended), 21501 (applies to distribution made on or after January 1, 1988; prior distributions governed by prior law), 21520(a) ("marital deduction" means deduction under *I.R.C. § 2056* or *2523*), 21520(b) ("marital deduction gift" means a transfer intended to qualify for the marital deduction)].

The trustee may not take any action or have any power that impairs the deduction as applied to the marital deduction gift [*Prob. Code § 21522(b)*]. The marital deduction gift may be satisfied only with property that qualifies for the marital deduction [*Prob. Code § 21522(c)*].

If a marital deduction gift is made in trust, the transferor's spouse has the right to require that the trustee make unproductive marital deduction property productive, or to convert it into productive property within a reasonable time [*Prob. Code § 21524(c)*].

However, the provisions of *Prob. Code §§ 21500-21541* do not apply to an instrument whose terms expressly or by necessary implication make them inapplicable [*Prob. Code § 21502(a)*]. Moreover, *Prob. Code §§ 21520-21526* do not apply to a trust that qualifies for the marital deduction under Treas. Reg. § 20.2056(e)-2(b), commonly referred to as the "estate trust" [*Prob. Code § 21521*]. An "estate trust" is a trust that ultimately pays the entire trust estate, including an accumulated income, to the surviving spouse, or to the surviving spouse's estate or executors.

For discussion of marital deduction trusts and their use in estate planning, *see* California Wills & Trusts, Ch. 112, *The*

Marital Deduction and Marital Deduction Trusts (Matthew Bender); California Legal Forms, Ch. 71, *Marital Deduction Trust Provisions* (Matthew Bender).

[2] Charitable Remainder Unitrusts and Charitable Remainder Annuity Trusts

If an instrument indicates the transferor's intention to comply with the Internal Revenue Code requirements for a charitable remainder unitrust or for a charitable remainder annuity trust as each is defined in *I.R.C. § 664*, the provisions of the instrument, including any power, duty, or discretionary authority given to a fiduciary, is construed to comply with the charitable deduction provisions of *I.R.C. § 2055* or *2522*, and with the charitable remainder trust provisions of *I.R.C. § 664* in order to conform to that intent. In no event may the fiduciary take an action or have a power that impairs the charitable deduction [*Prob. Code § 21540*; *see Prob. Code §§ 39* ("fiduciary" includes trustee), 21500 (Internal Revenue Code references include subsequent amendments)]. Whether an instrument contains a gift under *Prob. Code § 21540* depends on the intention of the transferor at the time the instrument is executed [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 21540*, *20* Cal. L. Rev. Com. Reports 1988 (1990)].

The provisions of the instrument may be augmented in any manner consistent with *I.R.C. § 2055(e)* or *2522(c)* on a petition provided for in *Prob. Code § 17200* [*Prob. Code § 21540*]. For discussion of petition proceedings under *Prob. Code § 17200*, see *§ 560.270* et seq.

The provisions of *Prob. Code §§ 21500-21541* apply to a distribution made on or after January 1, 1988; prior distributions are governed by prior law [*Prob. Code § 21501*]. However, they do not apply to an instrument whose terms expressly or by necessary implication make them inapplicable [*Prob. Code § 21502(a)*].

For discussion and forms relating to charitable remainder annuity trusts and unitrusts with regard to estate planning, see California Wills & Trusts, vol. 3, Ch. 116, *Charitable Remainder Trusts* (Mathhew Bender); California Wills & Trusts Forms, Civ. I, *Complete Inter Vivos Trusts*, Trusts 50, 51 (Matthew Bender); California Legal Forms, Ch. 74, *Split-Interest Charitable Trusts* (Matthew Bender).

[3] Charitable Lead Trusts

If an instrument indicates the transferor's intention to comply with the requirements for a charitable lead trust as described in *I.R.C. §§ 170(f)(2)(B)* and *2055(e)(2)* or *2522(c)(2)*, the provisions of the instrument, including any power, duty, or discretionary authority given to a fiduciary, is construed to comply with the provisions of the relevant federal statute in order to conform to that intent. In no event may the fiduciary take any action or have any power that impairs the charitable deduction. The provisions of the instrument may be augmented in any manner consistent with that intent on a petition under *Prob. Code § 17200* [*Prob. Code § 21541*; *see Prob. Code §§ 39* ("fiduciary" includes trustee), 21500 (Internal Revenue Code references include subsequent amendments); *but see Prob. Code §§ 21501* (applicable only to distribution made on or after January 1, 1988; prior distribution governed by prior law), 21502(a) (inapplicable to trust that provides or implies otherwise)]. For discussion of petition proceedings under *Prob. Code § 17200*, see *§ 560.270* et seq. For discussion and forms relating to charitable lead trusts with regard to estate planning, see California Wills & Trusts, Ch. 117, *Charitable Lead Trusts* (Matthew Bender); California Wills & Trust Forms, Div. I, *Complete Inter Vivos Trusts*, Trusts 55, 56 (Matthew Bender); California Legal Forms, Ch. 74, *Split-Interest Charitable Trusts* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersLimitations

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§ 560.78 Standard of Care

[1] Generally

The trustee has a duty to apply the full extent of the trustee's skills [*Prob. Code § 16014(a)*]. If the settlor, in selecting the trustee, has relied on the trustee's representation of having special skills, the trustee is held to the standard of the skills represented [*Prob. Code § 16014(b)*].

The standard of care that must be exercised by the trustee in investing and managing trust assets is specified in the Uniform Prudent Investor Act [*Prob. Code §§ 16045-16054*] [*see Prob. Code § 16040(c)*]. In exercising its other responsibilities, the trustee is subject to the general rule stated in *Prob. Code § 16040*, which requires the trustee to administer the trust with reasonable care, skill, and caution under the circumstances then prevailing that a prudent person acting in a like capacity would use in the conduct of an enterprise of like character and with like aims to accomplish the purposes of the trust as determined from the trust instrument [*Prob. Code § 16040(a)*]. However, *Prob. Code § 16040* authorizes the settlor to expand or restrict the standard set forth in the section by express provisions in the trust instrument [*Prob. Code § 16040(b)*]. When the settlor does this, the trustee is entitled to rely on those express provisions and is not liable to a beneficiary for doing so [*Prob. Code § 16040(b)*].

A trustee's standard of care and performance in administering the trust is not affected by whether or not the trustee receives any compensation [*Prob. Code § 16041*].

[2] Investment

The trustee's duties with respect to investment are specified in the Uniform Prudent Investor Act [*see Prob. Code §§ 16054-16054*], which applies to all trusts existing on and created after its effective date of January 1, 1996 [*Prob. Code § 16054*]. Under this Act, a trustee who invests and manages trusts assets owes a duty to the beneficiaries to comply with the "prudent investor rule," except to the extent that the settlor has expanded or restricted the rule by express provisions in the trust instrument [*Prob. Code § 16046*]. If the settlor has expanded or restricted the rule by express provisions in the trust instrument, the trustee is entitled to rely in good faith on those provisions and cannot be held

liable to a beneficiary for doing so [*Prob. Code § 16046(b)*].

The "prudent investor rule" requires the trustee to invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust [Prob. Code § 16407(a)]. In satisfying this standard, the trustee must exercise reasonable care, skill, and caution [Prob. Code § 16407(a)].

The prudent investor rule also provides that a trustee's investment and management decisions respecting individual assets and courses of action must be evaluated not in isolation, but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust [*Prob. Code § 16047(b)*; for circumstances that are appropriate to consider, *see Prob. Code § 16047(c)*]. Under the rule, a trustee may invest in any kind of property or type of investment, or engage in any course of action or investment strategy, that is consistent with the Uniform Prudent Investor Act [Prob. Code § 16407(d)]. However, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so [Prob. Code § 16408].

Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee must review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and with the requirements of the Uniform Prudent Investor Act [*Prob. Code § 16049*]. In investing and managing trust assets, a trustee may only incur costs that are appropriate and reasonable in relation to the assets, overall investment strategy, purposes, and other circumstances of the trust [*Prob. Code § 16050*].

[3] Delegation of Investment and Management Functions

A trustee may delegate investment and management functions as prudent under the circumstances. However, the trustee must exercise prudence in selecting an agent, establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust, and periodically reviewing the agent's overall performance and compliance with the terms of the delegation [*Prob. Code § 16052*; *see Prob. Code § 16401* (liability of trustee for acts or omissions of agent)]. See *§ 560.547* for discussion of the extent of a trustee's liability for acts of an agent.

[4] Exercise of Discretionary Powers

[a] General Standard

Except as provided in *Prob. Code § 16081* [*see* discussion *below*], a trustee must exercise any discretionary powers reasonably, and not arbitrarily [*Prob. Code § 16080*].

[b] "Absolute," "Sole," or "Uncontrolled" Discretion

Subject to the additional requirements of *Prob. Code § 16081(b), (c),* and *(d)* discussed below, if a trust instrument confers "absolute," "sole," or "uncontrolled" discretion on a trustee, the trustee must act in accordance with fiduciary principles and may not act in bad faith or in disregard of the purposes of the trust [*Prob. Code § 16081(a)*]. Notwithstanding the use of terms like "absolute," "sole," or "uncontrolled" by a settlor or testator, a person who is a beneficiary of a trust that permits the person, either individually or as trustee or cotrustee, to make discretionary distributions of income or principal to or for the benefit of himself or herself pursuant to a standard, must exercise that power reasonably and in accordance with the standard [*Prob. Code § 16081(b)*].

[c] Discretionary Distributions for Benefit of Trustee

Unless a settlor or a testator clearly indicates that a broader power is intended by express reference to *Prob. Code § 16081(c),* a person who is a beneficiary of a trust that permits the person, as trustee or cotrustee, to make discretionary

distributions of income or principal to or for the benefit of himself or herself may exercise that power in his or her favor only for his or her health, education, support, or maintenance within the meaning of *I.R.C. §§ 2041* and *2514*. Notwithstanding the foregoing and the provisions of *Prob. Code § 15620* (which requires unanimous action when a power is vested in two or more trustees unless the trust instrument provides otherwise), however, if a power to make discretionary distributions of income or principal is conferred on two or more trustees, the power may be exercised by any trustee who is not a current permissible beneficiary of the power.

If there is no trustee who is not a current permissible beneficiary of the power, any party in interest may apply to the court to appoint a trustee who is not a current permissible beneficiary of the power, and the power may be exercised by the trustee appointed by the court [*Prob. Code § 16081(c)*].

Prob. Code § 16081(c) does not apply to any of the following:

- Any power held by the settlor of a revocable or amendable trust.

- Any power held by a settlor's or testator's spouse who is the trustee of a trust for which a marital deduction as defined in *Prob. Code § 21520* has been allowed.

Prob. Code § 16081(c) does apply to any of the following:

- Any trust executed on or after January 1, 1997.

- Any testamentary trust created under a will executed on or after January 1, 1997.

- Any irrevocable trust created under a document executed before January 1, 1997, or any revocable trust executed before that date if the settlor was incapacitated as of that date, unless all parties in interest elect affirmatively not to be subject to *Prob. Code § 16081(c)* through a written instrument delivered to the trustee. That election must be made on or before the latest of January 1, 1998, three years after the date on which the trust became irrevocable, or, in the case of a revocable trust in which the settlor was incapacitated, three years after the date on which the settlor became incapacitated.

Prob. Code § 16081(c) neither creates a new cause of action nor impairs an existing cause of action that, in either case, relates to any power limited by *Prob. Code § 16081(c)* that was exercised before January 1, 1997.

[d] Definition of "Party In Interest"

For purposes of *Prob. Code § 16081*, the term "party in interest" means any of the following persons [*Prob. Code § 16081(g)*]:

- If the trust is revocable and the settlor is incapacitated, the settlor's legal representative under applicable law, or the settlor's attorney-in-fact under a durable power of attorney that is sufficient to grant the authority required under *Prob. Code § 16081(c)* or *(e)*, as applicable.

- If the trust is irrevocable, each trustee, each beneficiary then entitled or authorized to receive income distributions from the trust, or each remainder beneficiary who would be entitled to receive notice of a trust proceeding under Prob. Code § 15084. Any beneficiary who lacks legalcapacity may be represented by the beneficiary's legal representative, attorney-in-fact under a durable power of attorney that is sufficient to grant the authority required under *Prob. Code § 16081(c)* or *(e)*, as applicable, or in the absence of a legal representative or attorney-in-fact, a guardian ad litem appointed for that purpose.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsTrusteesDuties & PowersLimitationsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of Care

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49-560 California Forms of Pleading and Practice--Annotated § 560.79

§ 560.79 Holder of Power May Not Discharge Own Legal Obligations

A person who holds a power to appoint or distribute income or principal to or for the benefit of others, either as an individual or as trustee, may not use the power to discharge the legal obligations of the person holding the power, except as otherwise specifically provided in the trust instrument [*Prob. Code § 16082*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPowers of AppointmentEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersLimitations

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49-560 California Forms of Pleading and Practice--Annotated § 560.80

§ 560.80 Duty to Report or Account

[1] Generally

The trustee has a duty to keep the beneficiaries of the trust reasonably informed of the trust and its administration [*Prob. Code § 16060*]. Ordinarily, the trustee is not under a duty to the beneficiary to furnish information in the absence of a request for it. However, if the trustee enters into a transaction with the beneficiary on the trustee's own account, the trustee has a duty to communicate material facts in connection with the transaction that the trustee knows or should know. The trustee also has a duty to communicate material facts affecting the beneficiary's interest that the trustee knows the beneficiary does not know but needs to know for protection against a third person [*see* Restatement (Second) of Trusts § 173]. Moreover, during the time that the trust is revocable, the trustee owes the duty under *Prob. Code § 16060* to the settlor or other person who has the power to revoke the trust, and not to the beneficiary [*see Prob. Code § 15800*]. Thus, when the settlor of a revocable trust was under the care and custody of a court-appointed conservator, the beneficiaries had no right to an accounting because the trust remained revocable despite the conservatorship [*Johnson v. Kotyck (1999) 76 Cal. App. 4th 83, 88, 90 Cal. Rptr. 2d 99]* .

[2] On Request by Beneficiary

Except as provided in *Prob. Code § 16064*, on reasonable request by a beneficiary, the trustee must provide the beneficiary with a report of information about the assets, liabilities, receipts, and disbursements of the trust, the acts of the trustee, and the particulars relating to the administration of the trust relevant to the beneficiary's interest, including the terms of the trust as defined under *Prob. Code § 16061* [§ 560.80[3]]. This duty to report does not, however, require disclosure of communications protected by the attorney-client privilege [*Wells Fargo Bank v. Superior Court (2000) 22 Cal. 4th 201, 207, 91 Cal. Rptr. 2d 716, 990 P.2d 591]* .

If the trustee does not comply with a reasonable request under *Prob. Code § 16061*, the beneficiary may petition for a report or account [*see Prob. Code § 17200(b)(7)* and *see § 560.548*]. Moreover, the availability of information on request under *Prob. Code § 16061* does not negate the affirmative duty of the trustee to provide information under *Prob. Code § 16060* [*see § 560.80*]].

During the time that the trust is revocable, the trustee owes the duty under *Prob. Code § 16061* to the settlor or other person who has the power to revoke the trust, and not to the beneficiary [*see Prob. Code § 15800*].

[3] Copy of Terms of Trust

If a trust is wholly or partially revocable during the settlor's lifetime, the settlor's death may trigger a duty on the part of the trustee to provide copies of the trust instrument to the beneficiaries or the settlor's heirs. Under *Prob. Code § 16061.5*, the trustee of a revocable trust is required to provide a true and complete copy of the "terms of the trust" to any beneficiary or heir of the settlor who requests if the trust becomes irrevocable because of the death of one or more of the settlors, or because, by the express terms of the trust, the trust becomes irrevocable within one year of the settlor's death because of a contingency related to the death of one or more of the settlors of the trust [*Prob. Code § 16061.5(a)*]. If only a portion of the trust has become irrevocable, the trustee is required only to provide a copy of the terms of the "irrevocable portion of the trust" [*Prob. Code § 16061.5*]. The trustee must rely on any final judicial determination of heirship. However, the trustee has discretion to make a good faith determination by any reasonable means of the heirs of a deceased settlor in the absence of a final judicial determination of heirship known to the trustee [*Prob. Code § 16061.5(b)*].

For purposes of this rule, "terms of the trust" has a specific meaning. It means the written trust instrument of an irrevocable trust or those provisions of a written trust instrument in effect at the settlor's death that describe or affect that portion of a trust that has become irrevocable at the death of the settlor [*Prob. Code § 16060.5*]. The phrase "terms of the trust" also includes, but is not limited to, signatures, amendments, disclaimers, and any directions or instructions to the trustee that affect the disposition of the trust. However, the phrase does not include documents that were intended to affect disposition only while the trust was revocable [*Prob. Code § 16060.5*]. If a trust has been completely restated, "terms of the trust" does not include trust instruments or amendments that are superseded by the last restatement before the settlor's death, but it does include amendments executed after the restatement. "Terms of the trust" also includes any document irrevocably exercising a power of appointment over the trust or over any portion of the trust which has become irrevocable [*Prob. Code § 16060.5*].

The Probate Code does not specify a time limit within which the trustee must comply with the requirements applicable to providing a copy of the terms of the trust. However, it does set time limits for bringing an action to contest the trust,and those time limits are at least partially determined by reference to the time that the trustee mails or delivered a copy of the "terms of the trust." Under *Prob. Code § 16061.8*, no person upon whom a "notification by trustee" [*see Prob. Code § 16061.7*] is served may bring an action to contest the trust more than 120 days from the date the notification by trustee is served on him or her, or 60 days from the date on which a copy of the terms of the trust is mailed or personally delivered to him or her, whichever is later [*Prob. Code § 16061.8*].

[4] Annual Account

The trustee must account at least annually, at the termination of the trust, and on a change of trustees, to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed, except as otherwise provided in *Prob. Code §§ 16062* and *16064* [*Prob. Code § 16062(a)*; for a form of account, *see § 560.559*]. The general duty to provide information is not necessarily satisfied by compliance with *Prob. Code § 16062* [*see Prob. Code § 16060*].

A trustee of a living trust created by an instrument executed before July 1, 1987, is not subject to the duty to account provided by *Prob. Code § 16062(a)* [*Prob. Code § 16062(b)*]. A trustee of a trust created by a will executed before July 1, 1987, is not subject to the duty to account provided by *Prob. Code § 16062(a)*, except that if the trust is removed from continuing court jurisdiction pursuant to *Prob. Code §§ 17350-17354*, the duty to account provided by *Prob. Code § 16062(a)* applies to the trustee [*Prob. Code § 16062(c)*]. The duty of a trustee to account pursuant to former Prob.

Code § 1120.1a (repealed in 1986), under a trust created by a will executed before July 1, 1977, which has been removed from continuing court jurisdiction pursuant to former Prob. Code § 1120.1a, continues to apply after July 1, 1987, except as provided in *Prob. Code § 16064*. The duty to account under former Prob. Code § 1120.1a may be satisfied by furnishing an account that satisfies the requirement of *Prob. Code § 16063* [*Prob. Code § 16062(d)*; for a form of account, *see § 560.559*]. Moreover, *Prob. Code § 16062* does not affect any requirement for an account that may exist under prior law, whether pursuant to statute or court order [*see, e.g.*, former Prob. Code § 1121.1a(b) (requirement to furnish statement of income and principal report to income beneficiaries)]. For discussion of removal of a testamentary trust from continuing court jurisdiction, see *§ 560.146*.

[5] Exceptions to Accounting Requirements

The trustee is not required to report information or account to a beneficiary in any of the following circumstances [*Prob. Code § 16064(b)-(d)*]:

- In the case of a beneficiary of a revocable trust, as provided in *Prob. Code § 15800* for the period during which the trust may be revoked.

- As to a beneficiary who has waived in writing the right to a report or account. A waiver of rights under *Prob. Code § 16064(c)* may be withdrawn in writing at any time as to the most recent account and future accounts. A waiver has no effect on the beneficiary's right to petition for a report or account pursuant to *Prob. Code § 17200*.

- If the beneficiary and the trustee are the same person.

The trustee generally will be relieved of the duty to account if the trust instrument waives accounts [*Prob. Code § 16064(a)*]. However, a waiver of the duty to account in a trust instrument is void and unenforceable if there is only one trustee and that trustee is a "disqualified person" as defined in *Prob. Code § 21350.5* [*Prob. Code §§ 16062(e), 16064(a)*; *see Prob. Code §§ 21350, 21351*]. A "disqualified person" is a person to whom a valid transfer cannot be made under *Prob. Code §§ 21350* or *21351* [*Prob. Code § 21350.5*]. A typical example of a "disqualified person" is an attorney who drafted a trust instrument in which the attorney was named as beneficiary [*see Prob. Code § 21350(a)(1)*]. For more detailed discussion of transfers that are invalidated under these statutes, and circumstances under which a person will be deemed a "disqualified person," see *§ 560.14*.

A waiver of accounts is also unenforceable if it is reasonably likely that a material breach of the trust has occurred. If that is the case, the court may always compel the trustee to account [*Prob. Code § 16064(a)*].

Notwithstanding the absence of duty to account under *Prob. Code § 16064*, the trustee may wish to provide information in order to start the running of the statute of limitations under *Prob. Code § 16460* [*see § 560.86*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsTrusteesDuties & PowersAccountingEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstEstate, Gift & Trust LawTrustsTrusteesDuties & PowersLimitations

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49-560 California Forms of Pleading and Practice--Annotated § 560.81

§ 560.81 Duty to Give Notice When Trust Becomes Irrevocable or On Change of Trustees of Irrevocable Trust

[1] Statutory Notice Requirement

The trustee of a revocable inter vivos (or "living") trust must serve a statutory notice on the beneficiaries and the settlor's heirs whenever the trust becomes irrevocable by reason of the death of the settlor (or one of the settlors), or because, by the express terms of the trust, the trust becomes irrevocable within one year of the death of a settlor because of a contingency related to the death of one or more of the settlors of the trust [*Prob. Code § 16061.7(a)(1)*]. This statutory notice is referred to in the statute as a "notification by trustee" [*see Prob. Code § 16061.7(a)*]. This form must also be served on the beneficiaries and heirs when there is a change of trustees of an irrevocable trust. In that case, the duty to serve the notification is the duty of the continuing or successor trustee, and any one cotrustee may serve the notification [*Prob. Code § 16061.7(a)(2)*].

The trustee is not required to serve a notification by the trustee if the event thatotherwise requires service of the notification by trustee occurred before January 1, 1998 [*Prob. Code § 16061.7(j)*].

[2] Limiting Effect on Actions to Contest Trust

When the notification by trustee has been served as required, the time within which a served person may bring an action to contest the trust is limited to 120 days from the date of service, or 60 days from the day on which a copy of the "terms of the trust" is mailed or personally delivered to the person during the 120-day period, whichever is later [*Prob. Code § 16061.8*; for definition of "terms of trust," see *Prob. Code § 16060.5*; for discussion, *see § 560.80[3]*].

[3] Persons Who Must Be Notified

The notification by trustee must be served on each of the following [*Prob. Code § 16061.7(b)*]:

- Each beneficiary with a present interest in the irrevocable trust, or irrevocable portion of the trust. If there are beneficiaries who only have future interests in the trust, they are entitled to receive the

notification only as specified in *Prob. Code § 15804* [for discussion of *Prob. Code § 15804*, see *§ 560.137[4]*].

- Each heir of the deceased settlor, if the event that requires trustee notification is the death of the settlor or irrevocability within one year of the death of the trust's settlor by the express terms of the trust because of a contingency related to the death of a settlor.

- The Attorney General of California, if the trust is a charitable trust subject to the supervision of the Attorney General.

There is no duty to serve a notification by trustee on any beneficiary or heir who is unknown to the trustee [*Prob. Code § 16061.7(d)(2)*]. Similarly, if the trustee knows of a beneficiary or heir but cannot locate him or her after reasonable diligence, the notification need not be served on that beneficiary or heir [*Prob. Code § 16061.7(d)(1)*]. However, the trustee may serve the notification by trustee on any person or persons in addition to those on whom the notification is required to be served [*Prob. Code § 16061.7(j)*].

In providing notification by the trustee, a trustee must rely on any final judicial determination of heirship known to the trustee. However, the trustee has discretion to make a good faith determination by any reasonable means of the heirs of a deceased settlor in the absence of a final judicial determination of heirship known to the trustee [*Prob. Code § 16061.7(c)*].

[4] Method of Service

The notification by trustee must be served by personal delivery or by mailing it to the last known address of the beneficiary or heir as prescribed in *Prob. Code § 1215* [*Prob. Code § 16061.7(e)*]. It must be served not later than 60 days after the occurrence of the event requiring service, or 60 days after the trustee becomes aware of the existence of a person entitled to receive the notification, if that person was not known to the trustee on the occurrence of the event requiring service [*Prob. Code § 16061.7(f)*]. If the office of trustee is vacant on the date of the occurrence of the event requiring service of the notification by trustee, or if that event causes a vacancy, the 60-day period for service of the notification commences on the date the new trustee commenced to serve as trustee [*Prob. Code § 16061.7(f)*].

[5] Contents of Notification

The notification by trustee must contain the following information [*Prob. Code § 16061.7(g)*]:

- The identity of the settlor or settlors of the trust.

- The date of execution of the trust instrument.

- The name, mailing address, and telephone number of each trustee of the trust.

- The address of the physical location where the principal place of administration of the trust is located as determined under *Prob. Code § 17002* [*see § 560.520*].

- Any additional information that may be expressly required by the terms of the trust instrument.

- A notification that the recipient is entitled, on reasonable request to the trustee, to receive from the trustee a true and complete copy of the "terms of the trust" [*see Prob. Code §§ 16060.5* and *16061.5* and discussion in *§ 560.80[3]*].

The statute does not specify any particular terms or a particular format that must be used for giving this information [*Germino v. Hillyer (2003) 107 Cal. App. 4th 951, 956, 132 Cal. Rptr. 2d 478]* . Thus, the trustee's failure to strictly comply with the notice requirements of *Prob. Code § 16061.7(g)* does not render the notice a nullity, and does not make the 120-day statute inapplicable [*Germino v. Hillyer (2003) 107 Cal. App. 4th 951, 955-957, 132 Cal. Rptr. 2d 478]* . For example, the notice is not rendered a nullity by the fact that the notice failed to specify that the beneficiary on whom notice was served was entitled to a copy of the trust terms, when before service of the notice, but after the settlor's death, thetrustee provided a copy of the trust instrument to the beneficiary [*Germino v. Hillyer (2003) 107 Cal. App. 4th 951, 956-957, 132 Cal. Rptr. 2d 478]* .

If the notification by the trustee is served because a revocable trust or any portion of it has become irrevocable because of the death of one or more settlors of the trust, or because, by the trust's express terms, the trust becomes irrevocable within one year of the death of a settlor because of a contingency related to the death of one or more of the trust's settlors, the notification by the trustee must also include a warning, set out in a separate paragraph in not less than 10-point boldface type, or a reasonable equivalent, that states as follows: "You may not bring an action to contest the trust more than 120 days from the date this notification by the trustee is served upon you or 60 days from the date on which a copy of the terms of the trust is mailed or personally delivered to you during that 120-day period, whichever is later" [*Prob. Code § 16061.7(h)*]. When the notification required in *Prob. Code § 16061.7(h)* (former *Prob. Code § 16061.7(g)*) was not boldfaced, but was in 12-point type like the rest of the document, the notice was not a reasonable equivalent of 10-point boldface type as required by the statute. As a result, the appellants' petition contesting the trust was not untimely [*Harustak v. Wilkins (2000) 84 Cal. App. 4th 208, 216-218, 100 Cal. Rptr. 2d 718]* .

[6] Trustee's Liability for Failure to Serve Notification

A trustee who fails to serve the notification by trustee as required by *Prob. Code § 16061.7* on a beneficiary will be responsible for all damages, including attorney's fees and costs, caused by the failure unless the trustee makes a reasonably diligent effort to comply with the requirements of *Prob. Code § 16061.7* [*Prob. Code § 16061.9(a)*]. A trustee who fails to serve the notification by trustee as required by *Prob. Code § 16061.7* on an heir who is not a beneficiary and whose identity is known to the trustee will be responsible for all damages caused to the heir by the failure, unless the trustee shows that the trustee made a reasonably diligent effort to comply with the requirements of *Prob. Code § 16061.7*. For this purpose, "reasonably diligent effort" means that the trustee has sent notice by first-class mail to the heir at the heir's last mailing address actually known to the trustee [*Prob. Code § 16061.9(b)*]. A trustee, in exercising discretion with regard to the timing and nature of distributions of trust assets, may consider the fact that the period in which a beneficiary or heir could bring an action to contest the trust has not expired [*Prob. Code § 16061.9(c)*].

A trustee is not liable to any person for serving or not serving the notification by trustee on any person in addition to those on whom the notification is required to be served [*Prob. Code § 16061.7(j)*; *see Prob. Code § 16061.7(a)*].

There is no liability for failure to serve the notification by trustee if the event that otherwise requires service of the notification occurred before January 1, 1998 [*see Prob. Code § 16061.7(j)*].

[7] Waiver Against Public Policy

Any waiver by a settlor of the requirement of serving the notification by trustee required by *Prob. Code § 16061.7(h)* is against public policy and will be void [*Prob. Code § 16061.7(i)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsIrrevocable Living TrustsEstate, Gift &

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§ 560.82 Powers

[1] In General

A trustee has the following powers without the need to obtain court authorization [*Prob. Code § 16200*]:

- The powers conferred by the trust instrument.
- Except as limited in the trust instrument, the powers conferred by statute.
- Except as limited in the trust instrument, the power to perform any act that a trustee would perform for the purposes of the trust under the standard of care provided in *Prob. Code §§ 16040* or *16047*.

However, a trustee may wish to obtain court instructions regarding an anticipated exercise of power, or approval of a completed act [*see Prob. Code § 17200(b)(6)* (petition for instructions) and *see § 560.555*].

The grant of a power to a trustee, whether by the trust instrument, by statute, or by the court, does not in itself require or permit the exercise of the power. The exercise of a power by a trustee is subject to the trustee's fiduciary duties [*Prob. Code § 16202*; *see Prob. Code §§ 16000* (duty to administer trust according to instrument), 16001 (revocable trust)]. A trustee's exercise of power is also subject to other limiting provisions [*see, e.g., Prob. Code § 21524(c)* (spouse's right to require that trustee make unproductive marital deduction property productive)].

A court may relieve a trustee from restrictions on the exercise of powers under the trust instrument, notwithstanding the provisions of *Prob. Code §§ 16200-16249* [*Prob. Code § 16201*; *see, e.g., Prob. Code § 15409* (modification of trust after material change of circumstances)]. For a form to petition for a grant of powers, *see § 560.554*.

An instrument that incorporates the powers provided in former Prob. Code § 1120.2 (repealed by 1986 Stats., ch. 820) is deemed to refer to the powers provided in *Prob. Code §§ 16220-16249*. For this purpose, the trustee's powers under

former Prob. Code § 1120.2 are not diminished and the trustee is not required to obtain court approval for exercise of a power for which court approval was not required by former law [*Prob. Code § 16203*].

For discussion of the powers of a trustee with regard to a trust that relates to Internal Revenue Code provisions governing marital deductions and charitable gifts, see *§ 560.77*.

[2] Management of Trust Property

The trustee has the power to do any of the following:

- Collect, hold, and retain trust property received from a settlor or any other person until, in the trustee's judgment, the property should be disposed of. The property may be retained even though it includes property in which the trustee is personally interested [*Prob. Code § 16220*; *see Prob. Code § 62* (definition of property)].

- Continue or participate in the operation of any business or other enterprise that is part of the trust property and may effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise, subject to *Prob. Code § 16222(b)* [*Prob. Code § 16222(a)*].

- Continue the operation of a business or other enterprise only as authorized by the trust instrument or by the court, except as provided in *Prob. Code § 16222(c)* [*Prob. Code § 16222(b)*]. For the purpose of *Prob. Code § 16222(b)*, the lease of four or fewer residential units is not considered to be the operation of a business or other enterprise [*Prob. Code § 16222(b)*; *see Prob. Code § 16222(d)* (inapplicability to trust created by instrument executed before July 1, 1987)].

- Continue the operation of a business or other enterprise for a reasonable time pending a court hearing on the matter or pending a sale of the business or other enterprise [*Prob. Code § 16222(c)*].

- Manage, control, divide, develop, improve, exchange, partition, change the character of, or abandon trust property or any interest therein [*Prob. Code § 16227*].

- Encumber, mortgage, or pledge trust property for a term within or extending beyond the term of the trust in connection with the exercise of any power vested in the trustee [*Prob. Code § 16228*].

- Make ordinary or extraordinary repairs, alterations, improvements in buildings or other trust property [*Prob. Code § 16229(a)*].

- Demolish any improvements [*Prob. Code § 16229(b)*].

- Raze existing or erect new party walls or buildings [*Prob. Code § 16229(c)*].

- Insure the property of the trust against damage or loss and insure the trustee against liability with respect to third persons [*Prob. Code § 16240*].

- Borrow money for any trust purpose to be repaid from trust property; the lender may include, but is not limited to, a bank holding company, affiliate, or subsidiary of the trustee [*Prob. Code § 16241*].

- Accept additions to the property of the trust from a settlor or any other person [*Prob. Code § 16221*; *see Prob. Code §§ 62* (definition of property), 16202 (powers subject to fiduciary duties)].

- Acquire or dispose of property, for cash or on credit, at public or private sale, or by exchange [*Prob. Code § 16226*].

- Grant an option involving disposition of trust property or take an option for the acquisition of any property. An option may be granted or taken that is exercisable beyond the term of the trust [*Prob. Code § 16233*].

- Subdivide or develop land [*Prob. Code § 16230(a)*].

- Dedicate land to public use [*Prob. Code § 16230(b)*].

- Make or obtain the vacation of plats and adjust boundaries [*Prob. Code § 16230(c)*].

- Adjust differences in valuation on exchange or partition by giving or receiving consideration [*Prob. Code § 16230(d)*].

- Dedicate easements to public use without consideration [*Prob. Code § 16230(e)*].

- Enter into a lease for any purpose as lessor or lessee with or without the option to purchase or renew and for a term within or extending beyond the term of the trust [*Prob. Code § 16231*].

- Enter into a lease or arrangement for exploration and removal of gas, oil, or other minerals or geothermal energy, and enter into a community oil lease or a pooling or unitization agreement, and for a term within or extending beyond the term of the trust [*Prob. Code § 16232*].

- Pay taxes, assessments, reasonable compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the collection, care, administration, and protection of the trust [*Prob. Code § 16243*; *see Prob. Code §§ 15680-15688* (compensation of trustees)].

- Hire persons, including accountants, attorneys, auditors, investment advisers, or other agents, even if they are associated or affiliated with the trustee, to advise or assist the trustee in the performance of administrative duties [*Prob. Code § 16247*; *but see Prob. Code § 16063(a)(1)* (duty to account regarding agents)].

- Execute and deliver all instruments that are needed to accomplish orfacilitate the exercise of the powers vested in the trustee [*Prob. Code § 16248*].

For requirements regarding allocation of income and principal, see the Uniform Principal and Income Act, *Prob. Code § 16320 et seq.* (generally), and *Prob. Code § 21524* (regarding marital deduction gift in trust [*Prob. Code § 21501*], but not applicable to "estate trust" [*Prob. Code § 21521*], or to a trust that provides or implies otherwise [*Prob. Code § 21502(a)*]).

[3] Corporate Transactions

With respect to any shares of stock of a domestic or foreign corporation, any membership in a nonprofit corporation, or any other property, a trustee has the power to do any of the following [*Prob. Code § 16234*]:

- Vote in person, and give proxies to exercise, any voting rights with respect to the shares, memberships, or property.

- Waive notice of a meeting or give consent to the holding of a meeting.

- Authorize, ratify, approve, or confirm any action that could be taken by shareholders, members, or property owners.

The trustee also has the power to do any of the following:

- Pay calls, assessments, and any other sums chargeable or accruing against or on account of securities [*Prob. Code § 16235*].

- Sell or exercise stock subscription or conversion rights [*Prob. Code § 16236*].

- Consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise, and to participate in voting trusts, pooling arrangements, and foreclosures, and in connection therewith, to deposit securities with and transfer title and delegate discretions to any protective or other committee as the trustee may deem advisable [*Prob. Code § 16237*].

- Hold a security in the name of a nominee or in other form without disclosure of the trust so that title to the security may pass by delivery [*Prob. Code § 16238*].

- Deposit securities in a securities depository, as defined in *Fin. Code § 30004*, which is licensed under *Fin. Code § 30200* or is exempt from licensing by *Fin. Code § 30005* or *30006*. The securities may be held by the securities depository in the manner authorized by *Fin. Code § 1592* [*Prob. Code § 16239*].

For discussion of voting trusts and shares held by a trustee, see *Corp. Code § 703* and Ch. 166, *Corporations: Shareholders' Meetings and Voting*.

[4] Deposits

The trustee also has the power to deposit trust funds at reasonable interest in an insured account in a financial institution or, to the extent the account is collateralized, in an account in a bank, insured savings and loan association, or insured credit union [*Prob. Code § 16225(a)*; *see Prob. Code §§ 16225(b)* (institution affiliated with trustee), 16225(c) (conditions regarding withdrawals); *see also Fin. Code §§ 1592, 1593* (banks), 7000-7002 (savings accounts)].

The court may authorize the deposit of trust funds in an account under *Prob. Code § 16225(a)* in an amount greater than the maximum insured or collateralized amount [*Prob. Code § 16225(d)*; *see Prob. Code § 17200(b)(2), (5), (6)* (petition proceedings)]. *Prob. Code § 16225* does not prevent the trustee from holding an amount of trust property reasonably necessary for the orderly administration of the trust in the form of cash or in a checking account without interest [*Prob. Code § 16225(e)*].

[5] Deposits in Financial Institution Controlled by Trustee

Under *Prob. Code § 16225(b)*, a financial institution that is a trustee has the right to deposit trust funds in itself or an affiliate ("self-depositing"). This right to self-deposit is contrary to the general law of trusts, specifically the duty of loyalty, because it creates a conflict of interest. It is also contrary to the trustee's duty under *Prob. Code § 16002* not to use the trust property for its own benefit [*Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 836, 251 Cal. Rptr. 530]* . A balance must be struck between the trustee's duty of loyalty and right to self-deposit trust funds. The right to self-deposit does not overcome the duty to maximize returns on investment of trust funds [*Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 837, 251 Cal. Rptr. 530* ; *see Prob. Code § 16007* (trustee's duty to

invest trust funds)]. Although noting that the case did not hinge on burden of proof issues for its resolution, one court of appeal has stated that the self-deposit statutes bar the imposition of the usual burden of proof on a defendant-trustee [*Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 853-854, 251 Cal. Rptr. 530* (usual burden of justifying its actions as shifting to trustee once beneficiary has established existence of fiduciary duty and trustee's failure to perform it)].

The duties of loyalty and maximizing returns have been held not to prevent a bank-trustee from pooling small trust cash balances and investing them for its own benefit. "Small trust cash balances" are funds necessary for the administration of the trust and those awaiting investment or distribution. The court reasoned that because *Prob. Code § 16225(e)* allows self-depositing, without payment of interest, of funds necessary for the administration of the trust, and Fin. Code§ 1562 allows self-deposit of funds awaiting investment or distribution, the trustee is not required to pay interest on those funds; nor is the trustee's right to profit from the use or investment of those funds limited. The trustee is not required to account to the trust beneficiaries for the profit made on the use of self-deposited funds [*Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 839-840, 251 Cal. Rptr. 530]* . That holding may be limited, however, because it was based on a finding that during the period at issue, there was no higher yielding short term investment for small amounts of cash [*Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 842-848, 251 Cal. Rptr. 530]* .

Applying this reasoning, a bank-trustee's use of various types of "float" created by processing trust transactions through suspense accounts of which the bank has use, is proper when the float and suspense accounts (1) pertained to balances needed for administration or awaiting investment or disbursement, (2) were created pursuant to standardized or computerized operating procedures that were reasonable in terms of their cost compared to the cost of manual posting on the actual transaction dates involved and thus were reasonably necessary to the orderly administration of the trust accounts, (3) were consistent with generally accepted accounting principles, and (4) did not produce any hidden profit for the bank [*Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 851-853, 251 Cal. Rptr. 530]* . Moreover, the bank gave the beneficiaries the option to avoid the creation of one type of float by authorizing direct deposit of disbursements [*Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 853, 251 Cal. Rptr. 530]* .

The practices described also did not constitute fraud or unfair competition within the meaning of *Bus. & Prof. Code § 17200*, nor did they result in any unjust enrichment on the part of the bank-trustee [*Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 854-855, 251 Cal. Rptr. 530]* .

A bank-trustee does not have to disclose the use and investment of small cash balances to the trust beneficiaries when the practice is proper and the bank's use of trust account funds is apparent from the account statements it does send [*Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 848-849, 251 Cal. Rptr. 530]* . A bank-trustee is not required to disclose the profit earned through self-depositing [*Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 849, 251 Cal. Rptr. 530]* . Nor is a bank-trustee required to disclose the alternative uses for the trust funds if those alternatives are unworkable or imprudent [*Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 850, 251 Cal. Rptr. 530]* .

[6] Actions and Claims

The trustee has the power to do the following:

- Pay or contest any claim [*Prob. Code § 16242(a)*; *see also Prob. Code §§ 16010* (duty to enforce claims), 16011 (duty to defend actions)].

- Settle a claim by or against the trust by compromise, arbitration, or otherwise [*Prob. Code § 16242(b)*].

- Release, in whole or in part, any claim belonging to the trust [*Prob. Code § 16242(c)*].

- Prosecute or defend actions, claims, or proceedings for the protection of trust property and of the trustee in the performance of the trustee's duties [*Prob. Code § 16249*].

- Take reasonable steps to enforce claims that are part of the trust property [*Prob. Code § 16010*].

- Take reasonable steps to defend actions that may result in a loss to the trust [*Prob. Code § 16011*].

- In an action for the benefit of the trust, recover from the responsible person twice the value of any trust property that is wrongfully taken, concealed, or disposed of [*Prob. Code § 859*].

Actions not relevant to the internal affairs or existence of the trust are not within the scope of the Trust Law, and therefore may not be the subject of petition proceedings under *Prob. Code §§ 17200-17210* [*see Prob. Code § 17200(a)* (subject matter jurisdiction) and § 560.130 et seq.]. Consequently, a trustee must bring an action seeking protection of trust property and of the trustee, pursuant to *Prob. Code § 16249*, under the appropriate provision of the relevant code [*see, e.g., Code Civ. Proc. § 425.10* (civil complaint)]. For discussion of actions involving third persons, see *§ 560.160* et seq.

[7] Loans to Beneficiary

The trustee has the power to make loans out of trust property to the beneficiary on terms and conditions that the trustee determines are fair and reasonable under the circumstances [*Prob. Code § 16244(a)*]. If the trustee makes an advance or loan of trust money to a beneficiary, the beneficiary's interest is subject to a charge for the repayment of the amount advanced or lent [*see* Restatement (Second) of Trusts § 255]. A trustee also has the power to guarantee loans to the beneficiary by encumbrances on trust property [*Prob. Code § 16244(b)*]. However, a beneficiary's interest subject to a spendthrift restraint may not be used to secure a loan [*see Prob. Code §§ 15300-15309* (restraints on transfer of trust property)].

[8] Distribution to Beneficiaries

The trustee has the power to pay any sum of principal or income distributable to a beneficiary, without regard to whether the beneficiary is under a legal disability, by paying the sum to the beneficiary or by paying the sum to another person for the use or benefit of the beneficiary [*Prob. Code § 16245*; *but see* Prob.Code § 21524 (providing limitations for marital deduction gifts made in trust with distribution on or after January 1, 1988 [*Prob. Code § 21501*], but not applicable to "estate trusts" [*Prob. Code § 21521*], or to any trust that provides or implies otherwise [*Prob. Code § 21502(a)*)].

A sum distributable to a minor may be distributed to a custodian for the minor under the California Uniform Transfers to Minors Act [*Prob. Code §§ 3900 et seq.*]. The custodian may be an adult or a trust company [*Prob. Code § 3906(a)*]. However, the trustee may distribute a sum to such a custodian only if the trustee considers the transfer to be in the minor's best interests and the transfer it not prohibited by or inconsistent with the governing instrument. The transfer must be authorized by the court if it exceeds $10,000 in value [*Prob. Code § 3906(c)*; *see Prob. Code § 16245*].

The trustee has the power to effect distribution of property and money in divided or undivided interests and to adjust resulting differences in valuation [*Prob. Code § 16246*]. The trustee also has the power to sell the property in order to make the distribution [*see Recommendation Proposing the Trust Law,* 18 Cal. Law Revision Comm'n Reports 692 (1986)]. A distribution in kind may be made pro rata or non-pro rata [*Prob. Code § 16246*; *see Recommendation Proposing the Trust Law,* 18 Cal. Law Revision Comm'n Reports 692 (1986) (tax considerations regarding distributions)].

If an instrument authorizes a fiduciary to satisfy a pecuniary gift wholly or in part by distribution of property other than money, property selected for that purpose must be valued at its fair market value on the date of distribution, unless the instrument expressly provides otherwise. If the instrument permits the fiduciary to value property selected for distribution as of a date other than the date of distribution, then, unless the instrument expressly provides otherwise, the property selected by the fiduciary for that purpose must fairly reflect net appreciation and depreciation (occurring between the valuation date and the date of distribution) in all assets from which the distribution could have been made [*Prob. Code § 21118(a)*; *see Prob. Code § 39* ("fiduciary" includes trustee); *but see Prob. Code § 21102(b)* (rule applicable only when intention of transferor not indicated by instrument)]. For this purpose, a "pecuniary gift" is a transfer of property that is expressly stated as a fixed dollar amount or is a dollar amount determinable by the provisions of the instrument [*Prob. Code § 21118(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstEstate, Gift & Trust LawTrustsTrusteesDuties & PowersLimitationsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersSales

California Forms of Pleading and Practice--Annotated

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 560 TRUSTS: EXPRESS, PUBLIC, CHARITABLE, AND TOTTEN TRUSTS
PART II. LEGAL BACKGROUND
B. Administration Of Express Trusts
2. Rights, Liabilities, And Duties Of Trustees

49-560 California Forms of Pleading and Practice--Annotated § 560.83

§ 560.83 Notice of Proposed Action by Trustee

[1] In General

A trustee may give notice of proposed action regarding a matter governed by *Prob. Code §§ 16200-16249*. For purpose of the notice provisions, a proposed action includes a course of action or a decision not to take action [*Prob. Code § 16500*]. A trustee is not required, however, to use the notice procedures set forth in *Prob. Code §§ 16500-16504* before taking any action [*Prob. Code § 16504*]. Moreover, these notice provisions do not preclude the application or assertion of any other rights or remedies available to an interested party regarding an action to be taken or not to be taken by the trustee [*Prob. Code § 16500*].

[2] Persons to Whom Notice Must Be Given

A trustee who elects to provide notice of a proposed action must mail notice to each of the following [*Prob. Code § 16501(a)*]:

- A beneficiary who is receiving, or is entitled to receive, income under the trust, including a beneficiary who is entitled to receive income at the trustee's discretion.

- A beneficiary who would receive a distribution of principal if the trust were terminated at the time the notice is given.

If the beneficiary is a minor or an incompetent adult, the notice must be served on the guardian or conservator of the beneficiary's estate [*see Prob. Code § 16503(b)*].

The trustee is not required to give notice to:

- A person who consents in writing to the proposed action; the consent may be executed at any time before or after the proposed action is taken [*Prob. Code § 16501(b)*].

- A beneficiary who is known to the trustee but who cannot be located after reasonable diligence, or who is unknown to the trustee [*Prob. Code § 16501(c)*].

[3] When Notice May Not Be Given

The trustee may not use a notice of proposed action with respect to any of the following actions [*Prob. Code § 16501(d)*]:

- Allowance of the trustee's compensation.
- Allowance of compensation for the trustee's attorney.
- Settlement of accounts.
- Preliminary and final distributions and discharge.
- Sale of trust property to the trustee or the trustee's attorney.
- Exchange of trust property for property of the trustee or the trustee's attorney.
- Grant to the trustee or the trustee's attorney of an option to purchase trustproperty.
- Allowance, payment, or compromise of a claim of the trustee or the trustee's attorney against the trust.
- Compromise or settlement of a claim, action, or proceeding by the trust against the trustee or the attorney for the trust.
- Extension, renewal, or modification of the terms of a debt or other obligation of the trustee or the trustee's attorney, owing to or in favor of the trust.

[4] Contents of Notice

The notice of proposed action must state that it is given under *Prob. Code § 16502*, and must include all of the following [*Prob. Code § 16502*]:

- The trustee's name and mailing address.
- The name and telephone number of a person who may be contacted for additional information.
- A description of the proposed action and an explanation of the reasons for the action.
- The time within which objections to the proposed action can be made, which must be at least 45 days from the ate the notice is mailed.
- The date on or after which the proposed action may be taken or is effective.

[5] Objections to Proposed Action

A beneficiary may object to a proposed action by mailing a written objection to the trustee at the address, and within the time, specified in the notice [*Prob. Code § 16503(a)*]. A trustee is not liable to a beneficiary for a proposed action if the trustee does not receive a timely, written objection from the beneficiary. If no beneficiary entitled to notice objects, the trustee is not liable to any current or future beneficiary with respect to the proposed action [*Prob. Code § 16503(b)*].

If the trustee receives a timely, written objection, the trustee or a beneficiary may petition the court to have the proposed action taken as proposed, taken with modifications, or denied. In the proceeding, a beneficiary who objects to the proposed action has the burden of proving that the action should not be taken. A beneficiary who has not objected to the proposed action is not estopped from opposing the action in the proceeding [*Prob. Code § 16503(c)*].

[6] Decision Not to Take Action

If the trustee decides not to implement the proposed action, the trustee must give the beneficiaries notice of this decision and the reasons for it. The trustee's decision not to implement a proposed action does not itself give rise to liability to any current or future beneficiary. A beneficiary may petition the court to have the action taken, and has the burden of proving that the trustee should take the action [*Prob. Code § 16503(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview

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49-560 California Forms of Pleading and Practice--Annotated § 560.84

§ 560.84 Liability to Beneficiaries

[1] Breach of Trust

A violation by the trustee of any duty that the trustee owes the beneficiary is a breach of trust [*Prob. Code § 16400*]. However, if a trust is revocable, the trustee owes the duty to the person holding the power to revoke, and not to the beneficiaries [*see Prob. Code § 15800*]. Moreover, the holder of a presently exercisable general power of appointment has the rights of a person holding the power to revoke the trust that are provided by *Prob. Code §§ 15800-15802*, to the extent of the holder's power over the trust property [*Prob. Code § 15803*].

[2] Acts of Agent

Except as provided in *Prob. Code § 16401(b)*, the trustee is not liable to the beneficiary for the acts or omissions of an agent [*Prob. Code § 16401(a)*].

The trustee is liable to the beneficiary for an act or omission of an agent employed by the trustee in the administration of the trust that would be a breach of the trust if committed by the trustee under any of the following circumstances [*Prob. Code § 16401(b)*]:

- The trustee directs the act of the agent.

- The trustee delegates to the agent the authority to perform an act that the trustee is under a duty not to delegate.

- The trustee does not use reasonable prudence in the selection of the agent or the retention of the agent selected by the trustee [*see § 560.78[1], [3]*].

- The trustee does not periodically review the agent's overall performance and compliance with the terms of the delegation [*see Prob. Code § 16012(b)* (duty to exercise general supervision over agent

performing delegated matter)].

- The trustee conceals the act of the agent.

- The trustee neglects to take reasonable steps to compel the agent to redress the wrong when the trustee knows of the agent's acts or omissions [§ 560.78[3]].

For limitations on a trustee's liability to a beneficiary, see *Prob. Code §§ 15800* (rights regarding revocable trust inure to settlor, not beneficiary), 15803 (rights inure to holder of presently exercisable general power of appointment or power to withdraw property), 16000 (trust instrument controls), 16462 (acts performed or omitted pursuant to written directions of revocable trust), and § 560.87.

The liability of a trustee for acts or omissions of agents that occurred before July 1, 1987, is governed by prior law and not by *Prob. Code § 16401* [*Prob. Code § 16401(c)*]. Under prior law, a trustee who employs third persons as agents must select the third persons, and supervise their acts, with reasonable care [*Gaver v. Early (1923) 58 Cal. App. 736, 737, 209 P. 394]* . Moreover, the trustee is not liable to the beneficiary for the acts of agents employed in the administration of the trust unless the trustee does one of the following acts [*see* Restatement (Second) of Trusts § 225]:

- Directs or permits the act of the agent.

- Delegates to the agent the performance of acts that he was under a duty not to delegate.

- Does not use reasonable care in the selection or retention of the agent.

- Does not exercise proper supervision over the conduct of the agent.

- Approves or acquiesces in or conceals the act of the agent.

- Neglects to take proper steps to compel the agent to redress the wrong.

For discussion of a principal's liability for acts of an agent generally, see Ch. 427, *Principal and Agent* .

[3] Acts of Cotrustee

[a] Acts Committed on or After July 1, 1987

The liability of a trustee for a breach of trust committed by a cotrustee on or after July 1, 1987, is governed by *Prob. Code § 16402(b)*. Except as provided in *Prob. Code § 16402(b)*, a trustee is not liable for a breach of duty committed by a cotrustee. *Prob Code § 16402(b)* provides that a trustee is liable for a breach of trust committed by a cotrustee if the trustee commits any of the following acts:

- Participates in a breach of trust committed by the cotrustee.

- Improperly delegates the administration of the trust to the cotrustee.

- Approves, knowingly acquiesces in, or conceals a breach of trust committed by the cotrustee.

- Negligently enables the cotrustee to commit a breach of trust [*see Prob. Code § 16012(b)* (duty to exercise general supervision over cotrustee performing delegated matter)].

- Neglects to take reasonable steps to compel the cotrustee to redress a breach of trust when the trustee knows or has information from which the trustee reasonably should have known of the breach.

For discussion of a dissenting cotrustee's liability to a third person under *Prob. Code § 18003*, see *§ 560.160* et seq.

[b] Acts Committed Before July 1, 1987

The liability of a trustee for acts or omissions of a cotrustee that occurred before July 1, 1987, is governed by prior law [*Prob. Code § 16402(c)*]. Under that law, a trustee is responsible only for the wrongful acts of a cotrustee to which the trustee consented, or that the trustee negligently enabled the cotrustee to commit [*see* former *Civ. Code § 2239*]. Consequently, a trustee was not strictly liable for the wrongful acts of a cotrustee, but nevertheless had to exercise reasonable supervision over the conduct of the cotrustee in relation to the trust [*see Blackmon v. Hale (1970) 1 Cal. 3d 548, 559, 83 Cal. Rptr. 194, 463 P.2d 418]* .

[c] Joint and Several Liability

When a breach of trust results in liability to more than one trustee, the liability of the affected trustees is joint and several [*Gbur v. Cohen (1979) 93 Cal. App. 3d 296, 300, 155 Cal. Rptr. 507* (interpreting former *Civ. Code § 2239, now see Prob. Code § 16402*; *see Cagnolatti v. Guinn (1983) 140 Cal. App. 3d 42, 49, 189 Cal. Rptr. 151* (applying former *Civ. Code § 2239* (*now see Prob. Code § 16402*) to partners)].

When more than one trustee is liable to a beneficiary for a breach of trust, each trustee ordinarily is entitled to contribution from the other trustees except when their respective degrees of fault substantially differ [*Gbur v. Cohen (1979) 93 Cal. App. 3d 296, 301, 155 Cal. Rptr. 507* ; *see § 560.544*].

If a trustee is liable to beneficiaries under a trust for damages resulting from the acts and omissions of the trustee and the trust's attorney, the trustee and attorney may be held liable as joint tortfeasors [*see Gackstetter v. Frawley (2006) 135 Cal. App. 4th 1257, 1275, 38 Cal. Rptr. 3d 333]* .

For a discussion of duties, *see § 560.75[3]*.

[4] Acts of Predecessor

Except as provided in *Prob. Code § 16403(b)*, a successor trustee is not liable to the beneficiary for a breach of trust that the predecessor trustee committed on or after July 1, 1987 [*Prob. Code § 16403(a)*; *see Prob. Code § 16403(c)* (breach committed before July 1, 1987)].

Prob. Code § 16503(b) provides that a successor trustee is liable to the beneficiary for breach of trust involving acts or omissions of a predecessor trustee in any of the following circumstances:

- If the successor trustee knows or has information from which the successor trustee reasonably should have known of a situation constituting a breach of trust committed by the predecessor trustee and thesuccessor trustee improperly permits it to continue.

- If the successor trustee neglects to take reasonable steps to compel the predecessor trustee to deliver the trust property to the successor trustee.

- If the successor trustee neglects to take reasonable steps to redress a breach of trust committed by the predecessor trustee when the successor trustee knows or has information from which the successor trustee reasonably should have known of the predecessor trustee's breach.

The liability of a trustee for acts or omissions of a predecessor trustee that occurred before July 1, 1987, is governed by prior law [*Prob. Code § 16403(c)*]. There does not appear to be any statutory or decisional California precedent governing a trustee's liability for acts committed by a predecessor prior to July 1, 1987. Under Rest. 2d Trusts § 223, a trustee is not liable to the beneficiary for a breach of trust committed by a predecessor trustee. However, there is authority that a trustee is liable for the predecessor's acts if the trustee is also guilty of a violation of duty to the beneficiary, which is essentially the same as the liability under *Prob. Code § 16403(c)* [*see, e.g.,* City of Fairview, Oklahoma v. Norris (10th Cir. [Okla.] 1956) *234 F.2d 199, 203* (successor trustee not liable for breach by predecessor)].

[5] Remedies for Breach of Trust

If a trustee commits a breach of trust, or threatens to commit a breach of trust, a beneficiary or cotrustee may commence a proceeding to obtain the following relief [*Prob. Code § 16420(a)*]:

- Compel the trustee to perform the trustee's duties [*see § 560.547*].

- Enjoin the trustee from committing a breach of trust [*see St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 359-362, 287 P.2d 387* (action seeking to enjoin trustee from committing breach of trust)].

- Compel the trustee to redress a breach of trust by payment of money or otherwise [*see Prob. Code §§ 16440-16442* (measure of liability)].

- Appoint a receiver or temporary trustee to take possession of the trust property and administer the trust [*see Code Civ. Proc. § 564(b)(1)* (appointment of receiver when property in danger); *Prob. Code §§ 15660* (appointment of trustee to fill vacancy), 17206 (appointment of temporary trustee); *see also Bowles v. Superior Court (1955) 44 Cal. 2d 574, 583-584, 283 P.2d 704* (appointment of receiver to act as temporary trustee on vacancy of office of trustee)].

- Remove the trustee [*see Prob. Code § 15642* (grounds for removal)].

- Set aside acts of the trustee, subject to *Prob. Code § 18100* (rights of bona fide purchaser); see *§ 560.200* et seq.

- Reduce or deny compensation of the trustee [*see § 560.548*.5].

- Impose an equitable lien or a constructive trust on trust property, subject to *Prob. Code § 18100* (rights of bona fide purchaser) [*see § 560.547* and *§ 560.200* et seq.].

- Trace trust property that has been wrongfully disposed of and recover the property or its proceeds, subject to *Prob. Code § 18100* (rights of bona fide purchaser) [*see § 560.200* et seq.].

The remedies of a beneficiary against the trustee are exclusively in equity [*Prob. Code § 16421*].

The provision of remedies for breach of trust in *Prob. Code § 16420(a)* does not prevent resort to any other appropriate remedy provided by statute or the common law [*Prob. Code § 16420(b)*]. For example, the beneficiary may seek criminal charges against the trustee [*see Penal Code §§ 487* (grand theft), 506 (embezzlement); *see also People v. Stanford (1940) 16 Cal. 2d 247, 105 P.2d 969* (prosecution of trustee for grand theft)]. A court may also use less extreme remedies to remedy a breach of trust [*see Schwartz v. Labow (2008) 164 Cal. App. 4th 417, 428, 78 Cal. Rptr.*

3d 838 (court had jurisdiction to suspend some of trustee's powers for perceived breaches of trust since court had express statutory authority to remove trustee)].

[6] Measure of Liability for Breach of Trust

If the trustee commits a breach of trust, the trustee is chargeable with any of the following that is appropriate under the circumstances [*Prob. Code § 16440(a)*]:

- Any loss or depreciation in value of the trust estate resulting from the breach of trust, with interest.
- Any profit made by the trustee through the breach of trust, with interest.
- Any profit that would have accrued to the trust estate if the loss of profit is the result of the breach of trust.

If the trustee is liable for interest pursuant to *Prob. Code § 16440*, the trustee is liable for the greater of either the amount of interest that accrues at the legal rate on judgments in effect during the period when the interest accrued, or the amount of interest actually received [*Prob. Code § 16441*; *see Code Civ. Proc. § 685.010* (rate of interest on judgments)].

If the trustee has acted reasonably and in good faith under the circumstances as known to the trustee, the court, in its discretion, may excuse the trustee in whole or in part from liability under *Prob. Code §§ 16440(a)* and *16441(a)* if it would be equitable to do so [*Prob. Code §§ 16440(b), 16441(b)*; *see § 560.78*].

The provisions of *Prob. Code §§ 16440-16442* for liability of a trustee for breach of trust do not prevent resort to any other remedy available under the statutory or common law [*Prob. Code § 16442*]. For example, exemplarydamages may be awarded against a trustee who breaches a fiduciary duty if there is evidence of oppression, fraud, or malice [*Vale v. Union Bank (1979) 88 Cal. App. 3d 330, 339, 151 Cal. Rptr. 784]* . Interest under the Trust Law is not compounded as it was under former *Civ. Code § 2262*, notwithstanding *Prob. Code § 16442* [*see* Communication From the Cal. Law Revision Comm'n Concerning AB 362 (1987) (p. 3)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of CareEstate, Gift & Trust LawTrustsTrusteesMultiple TrusteesTortsIntentional TortsBreach of Fiduciary DutyGeneral Overview

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§ 560.85 Release From Liability

A trustee may not require a beneficiary to relieve the trustee of liability as a condition for making a distribution or payment to, or for the benefit of, the beneficiary, if the trust instrument requires the distribution or payment [*Prob. Code § 16004.5(a)*]. This provision, however, does not affect the trustee's right to maintain a reserve for reasonably anticipated expenses, to seek a voluntary release or discharge of the trustee's liability from the beneficiary, to require indemnification against a claim by a person or entity (other than a beneficiary) that may reasonably arise as a result of the distribution, to withhold any portion of an otherwise required distribution that is reasonably in dispute, or to seek court or beneficiary approval of an accounting of trust activities [*Prob. Code § 16004.5(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSettlementsReleases From LiabilityGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstEstate, Gift & Trust LawTrustsTrusteesDuties & PowersLimitations

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49-560 California Forms of Pleading and Practice--Annotated § 560.86

§ 560.86 Limitations on Proceedings Against Trustee

Unless a claim is previously barred by adjudication, consent, limitation, or otherwise, if a beneficiary has received an interim or final account in writing, or other written report, that adequately discloses the existence of a claim against the trustee for breach of trust, the claim is barred as to that beneficiary unless a proceeding to assert the claim is commenced within three years after receipt of the account or report. An account or report adequately discloses existence of a claim if it provides sufficient information so that the beneficiary knows of the claim or reasonably should have inquired into the existence of the claim [*Prob. Code § 16460(a)(1)*; *Di Grazia v. Anderlini (1994) 22 Cal. App. 4th 1337, 1346, 28 Cal. Rptr. 2d 37]* .

If an interim or final account in writing or other written report does not adequately disclose the existence of a claim against the trustee for breach of trust, or if a beneficiary does not receive any written account or report, the claim is barred as to that beneficiary unless a proceeding to assert the claim is commenced within three years after the beneficiary discovered, or reasonably should have discovered, the subject of the claim [*Prob. Code § 16460(a)(2)*; *Di Grazia v. Anderlini (1994) 22 Cal. App. 4th 1337, 1346, 28 Cal. Rptr. 2d 37]* .

For the purpose of *Prob. Code § 16460(a)*, a beneficiary is deemed to have received an account or report as follows [*Prob. Code § 16460(b)*]:

- In the case of an adult who is reasonably capable of understanding the account or report, if it is received by the adult personally.

- In the case of an adult who is not reasonably capable of understanding the account or report, if it is received by the person's legal representative, including a guardian ad litem or other person appointed for this purpose.

- In the case of a minor, if it is received by the minor's guardian or, if the minor does not have a guardian, if it is received by the minor's parent so long as the parent does not have a conflict of interest.

The trustee's written account or report may meet the requirements for formal accounts and reports set forth in *Prob. Code § 16061* or *16063*. However, it is not required to meet those requirements [*Prob. Code § 16460(c)*].

During the time that a trust is revocable, the person holding the power to revoke is the one who must receive the account or report in order to commence the running of the limitations period [*see Prob Code §§ 15800* (rights regarding revocable trust inure to settlor, not beneficiary), 15803 (rights inuring to holder of presently exercisable general power of appointment or power to withdraw property)]. Thus, when the settlor of a revocable trust was under the care and custody of a court-appointed conservator, the beneficiaries had no right to an accounting because the trust remained revocable despite the conservatorship [*Johnson v. Kotyck (1999) 76 Cal. App. 4th 83, 88, 90 Cal. Rptr. 2d 99]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTrusteesDuties & PowersAccountingEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstGovernmentsLegislationStatutes of LimitationsTime Limitations

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§ 560.87 Limitations on Liability

[1] Provision in Trust Instrument

Except as provided in *Prob. Code § 16461(b)-(d)*, the trustee can be relieved of liability for breach of trust by provisions in the trust instrument [*Prob. Code § 16461(a)*]. A provision in the trust instrument is not effective to relieve the trustee of liability for either of the following [*Prob. Code § 16461(b)*]:

- Breach of trust committed intentionally, with gross negligence, in bad faith, or with reckless indifference to the interest of the beneficiary.

- Any profit that the trustee derives from a breach of trust.

[2] Beneficiary's Failure to Object to Account or Report

A provision in a trust instrument that releases the trustee from liability if a beneficiary fails to object to an item in an interim or final account or other written report within a specified time period is effective only if all of the following conditions are met [*Prob. Code § 16461(c)*]:

- The account or report sets forth the item.

- The period specified in the trust instrument for the beneficiary to object isnot less than 180 days.

- Written notice in 12-point boldface type is provided to the beneficiary with the account or report in the following form:

NOTICE TO BENEFICIARIES

YOU HAVE (180 days *or the period specified in the trust instrument, whichever is longer*) FROM

THE RECEIPT OF THIS ACCOUNT OR REPORT TO MAKE AN OBJECTION TO ANY ITEM SET FORTH IN THIS ACCOUNT OR REPORT. ANY OBJECTION YOU MAKE MUST BE IN WRITING, IT MUST BE DELIVERED TO THE TRUSTEE WITHIN THE PERIOD STATED ABOVE, AND IT MUST STATE YOUR OBJECTION. YOUR FAILURE TO DELIVER A WRITTEN OBJECTION TO THE TRUSTEE WITHIN THE PERIOD STATED ABOVE WILL PERMANENTLY PREVENT YOU FROM LATER ASSERTING THIS OBJECTION AGAINST THE TRUSTEE. IF YOU DO MAKE AN OBJECTION TO THE TRUSTEE, THE THREE-YEAR PERIOD PROVIDED IN SECTION 16460 OF THE PROBATE CODE FOR COMMENCEMENT OF LITIGATION WILL APPLY TO CLAIMS BASED ON YOUR OBJECTION AND WILL BEGIN TO RUN ON THE DATE THAT YOU RECEIVE THIS ACCOUNT OR REPORT.

A provision in a trust instrument that provides for a period of less than 180 days to object to an item in an account or report is ineffective to release the trustee from liability. However, a trustee of a trust created by an instrument with an ineffective period may elect to be governed by *Prob. Code § 16461(c)*, except that "180 days" must be substituted in the notice form for the ineffective period [*Prob. Code § 16461(d)*].

A beneficiary who fails to object in writing to an account or report that complies with the requirements of *Prob. Code § 16461(c)* within the specified, valid period, is barred from asserting any claim against the trustee regarding an item that is adequately disclosed in the account or report. An item is adequately disclosed if the disclosure meets the requirements of *Prob. Code § 16460(a)(1)* [*Prob. Code § 16461(e)*; *see § 560.86*].

The trustee is not released from liability as to any claim based on a written objection made by a beneficiary, if the objection is delivered to the trustee within the specified effective period. If a beneficiary files a written objection to an account or report that complies with the requirements of *Prob. Code § 16461(c)* within the specified, valid period that concerns an item that affects any other beneficiary of the trust, any affected beneficiary may join in the objection anytime within the specified, valid period or while resolution of the objection is pending, whichever is later [*Prob. Code § 16461(f)*]. This provision is not intended to establish a class of beneficiaries for actions on an account and report, or to provide that the action of one beneficiary is for the benefit of all beneficiaries. It does not create a duty for any trustee to notify beneficiaries of objections or resolution of objections [*Prob. Code § 16461(f)*].

When a beneficiary has filed a written objection to an account or report that complies with the requirements of *Prob. Code § 16461(c)* within the specified, valid period, a supplemental written objection may be delivered in the same manner as the objection not later than 180 days after receipt of the account or report, or no later than the period specified in the trust instrument, whichever is longer [*Prob. Code § 16461(g)*].

If proper notice has been given and a beneficiary has not made a timely objection, the trustee is not liable for any other claims adequately disclosed by any item in the account or report [*Prob. Code § 16461(i)*].

[3] Revocable Trust

Notwithstanding *Prob. Code § 16461*, a trustee of a revocable trust is not liable to a beneficiary for any act performed or omitted pursuant to written directions from the person holding the power to revoke, including a person to whom the power to direct the trustee is delegated [*Prob. Code § 16462(a) see Prob. Code § 16001* (trustee's duty to follow written directions regarding revocable trust)]. *Prob. Code § 16462(a)* applies to a trust that is revocable in part with respect to the interest of the beneficiary in that part of the trust property [*Prob. Code § 16462(b)*].

[4] Consent of Beneficiary

Except as provided in *Prob. Code § 16463(b)* and *(c)*, a beneficiary may not hold the trustee liable for an act or omission of the trustee as a breach of trust if the beneficiary consented to the act or omission before or at the time of the

act or omission [*Prob. Code § 16463(a)*]. The consent of the beneficiary does not preclude the beneficiary from holding the trustee liable for a breach of trust in any of the following circumstances [*Prob. Code § 16463(b)*]:

- If the beneficiary was under an incapacity at the time of the consent or of the act or omission.

- If the beneficiary at the time consent was given did not know of his or her rights and of the material facts (1) that the trustee knew or should have known, and (2) that the trustee did not reasonably believe that the beneficiary knew.

- The consent of the beneficiary was induced by improper conduct of the trustee.

If the trustee has an interest in the transaction adverse to the interest of the beneficiary, the consent of the beneficiary does not preclude the beneficiary from holding the trustee liable for a breach of trust under any of the circumstances described in *Prob. Code § 16463(b)* or if the transaction to which the beneficiary consented was not fair and reasonable to the beneficiary [*Prob. Code § 16463(c)*].

[5] Release or Contract

Except as provided in *Prob. Code § 16464(b)*, a beneficiary may be precluded from holding the trustee liable for a breach of trust by the beneficiary's release or contract effective to discharge the trustee's liability to the beneficiary for that breach [*Prob. Code § 16464(a)*].

A release or contract is not effective to discharge the trustee's liability for a breach of trust in any of the following circumstances [*Prob. Code § 16464(b)*]:

- The beneficiary was under an incapacity at the time of making the release or contract.

- The beneficiary did not know of his or her rights and of the material facts that the trustee knew or reasonably should have known, and that the trustee did not reasonably believe that the beneficiary knew.

- The release or contract of the beneficiary was induced by improper conduct of the trustee.

- The transaction involved a bargain with the trustee that was not fair and reasonable.

[6] Affirmance of Transaction by Beneficiary

Except as provided in *Prob. Code § 16465(b)*, if the trustee, in breach of trust, enters into a transaction that the beneficiary may reject or affirm, and the beneficiary affirms the transaction, the beneficiary is not able subsequently to reject it and hold the trustee liable for any loss occurring after the trustee entered into the transaction [*Prob. Code § 16465(a)*].

The affirmance of a transaction by the beneficiary does not preclude the beneficiary from holding a trustee liable for a breach of trust if, at the time of the affirmance, circumstances existed comparable to those enumerated under *Prob. Code § 16464(b)*, discussed in *§ 560.87[5]* [*see Prob. Code § 16465(b)*].

[7] Marital Deduction QTIP Trusts

A fiduciary is not liable for a good faith decision to make any election, or not to make any election, referred to in *I.R.C. §§ 2056(b)(7)* or *2523(f)*, which govern qualified terminable interest property (QTIP) trusts regarding federal estate and gift tax deductions, respectively [*Prob. Code § 21526*; *see Prob. Code §§ 39* ("fiduciary" includes trustee), 21500

(Internal Revenue Code references include subsequent amendments)]. This limitation provides protection for both partial and full elections [*see* Cal. Law Revision Comm'n Comment to *Prob. Code § 21526*]. The provisions of *Prob. Code §§ 21500-21541* apply to a distribution made on or after January 1, 1988; prior distributions are governed by prior law [*Prob. Code § 21501*]. Nevertheless, they do not apply to a trust whose terms expressly or by necessary implication make them inapplicable [*Prob. Code § 21502(a)*]. Moreover, *Prob. Code § 21526* does not apply to a trust that qualifies for the marital deduction under Treas. Reg. § 20.2056(e)-2(b) ("estate trust") [*Prob. Code § 21521*; *see* discussion in *§ 560.77[1]*].

A QTIP trust is a particular type of marital deduction trust [*see* California Legal Forms, Ch. 71, *Marital Deduction Trust Provisions* (Matthew Bender); California Wills & Trusts, Ch. 112, *Marital Deduction Trusts* (Matthew Bender)]. Under *I.R.C. § 2056(b)(7)(B)(i)*, qualified terminable interest property is property that passes from the decedent in which the surviving spouse has a qualifying income interest for life, and to which an election under that paragraph applies. Under *I.R.C. § 2523(f)(2)*, it is property that is transferred by the donor spouse in which the donee spouse has a qualifying income interest for life, and to which an election under that subsection applies. For forms for QTIP trusts, see California Legal Forms, Ch. 70, *Complete Revocable Trust Forms*; Ch. 71, *Marital Deduction Trust Provisions*; California Wills & Trusts-- Forms, Trust 30 (Matthew Bender). For discussion of the use of QTIP trusts in estate planning, see California Legal Forms, Ch. 71, *Marital Deduction Trust Provisions* (Matthew Bender); California Wills & Trusts, Ch. 112, *Marital Deduction Trusts* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersAccountingEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstGovernmentsLegislationStatutes of LimitationsTime Limitations

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49-560 California Forms of Pleading and Practice--Annotated § 560.88

§ 560.88 Elder Abuse Action Against Trustee

A trustee may be liable under the Elder Abuse and Dependent Adult Civil Protection Act [*Welf. & Inst. Code § 15600 et seq.*] if the court finds that the trustee abused and neglected a decedent who was entitled to the protection of the Act [*Estate of Lowrie (2004) 118 Cal. App. 4th 220, 224, 226-231, 12 Cal. Rptr. 3d 828* (trustee allegedly exploited his relationship with decedent and through manipulation, fraud, and undue influence enticed decedent to give property to him and to change her estate plan so he would receive substantially all of her assets; trustee also allegedly abused decedent physically and financially, and intentionally isolated decedent from her family]. After the decedent's death, the right to bring an action under the Act is conferred on the decedent's personal representative or, if none, on the person or persons entitled to succeed to the decedent's estate [*Welf. & Inst. Code § 15657.3(d)*]. A broad definition of standing applies in elder abuse cases [*Estate of Lowrie (2004) 118 Cal. App. 4th 220, 227, 12 Cal. Rptr. 3d 828]* .

A decision as to whether a person has standing in an elder abuse case may be intertwined with other issues [*Estate of Lowrie (2004) 118 Cal. App. 4th 220, 230, 12 Cal. Rptr. 3d 828]* . For example, a decedent's granddaughter had standing to bring an elder abuse action against the trustee of the decedent's estate based on the granddaughter's contingent interest in the estate; that is, the fact that she would become the successor trustee and the successor beneficiary to the remainder if the trustee predeceased the decedent [*Estate of Lowrie (2004) 118 Cal. App. 4th 220, 229-231, 12 Cal. Rptr. 3d 828]* . By virtue of *Prob. Code § 259,* if the trustee isshown to have abused or neglected the decedent, the trustee is deemed to have predeceased the decedent and, therefore, is not entitled to inherit the remainder of the decedent's estate [*Estate of Lowrie (2004) 118 Cal. App. 4th 220, 228-231, 12 Cal. Rptr. 3d 828]* .

The Act permits recovery of damages for pain and suffering even after the abused elder has died, as well as recovery of punitive damages and attorney's fees if the plaintiff shows by clear and convincing evidence that the defendant is liable for elder abuse and is guilty of recklessness, oppression, fraud, or malice in the commission of the abuse [*Welf. & Inst. Code § 15657*; *Estate of Lowrie (2004) 118 Cal. App. 4th 220, 226-227, 12 Cal. Rptr. 3d 828]* .

For additional coverage of actions for elder abuse, see Ch. 5, *Abuse of Minors and Elderly* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstFamily LawFamily Protection & WelfareElderly PersonsAbuse, Endangerment & Neglect

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§ 560.89 Compensation of Trustee

[1] Under Trust Instrument

Subject to *Prob. Code § 15680(b)*, and except as provided in *Prob. Code § 15688* (public guardian compensation), if the trust instrument provides for the trustee's compensation, the trustee is entitled to be compensated in accordance with the trust instrument [*Prob. Code § 15680(a)*].

On proper showing, the court may fix or allow greater or lesser compensation than could be allowed under the terms of the trust in any of the following circumstances [*Prob. Code § 15680(b)*; *see § 560.558*]:

- If the duties of the trustee are substantially different from those contemplated when the trust was created.

- If the compensation in accordance with the terms of the trust would be inequitable or unreasonably low or high.

- In extraordinary circumstances calling for equitable relief.

An order fixing or allowing greater or lesser compensation under *Prob. Code § 15680(b)* applies only prospectively to actions taken in administration of the trust after the order is made [*Prob. Code § 15680(c)*].

[2] Reasonable Compensation

If the trust instrument does not specify the trustee's compensation, the trustee is entitled to reasonable compensation under the circumstances [*Prob. Code § 15681*; *see Prob. Code § 16243* (power to pay reasonable compensation)]. Moreover, the court may fix an amount of periodic compensation under *Prob. Code §§ 15680* and *15681*. This compensation may continue for as long as the court determines is proper [*Prob. Code § 15682*].

In determining or approving a trustee's compensation, the court may consider, among other factors, the following [*Cal. Rules of Ct., Rule 7.776*]:

- The gross income of the trust estate.
- The success or failure of the trustee's administration.
- Any unusual skill, expertise, or experience brought to the trustee's work.
- The fidelity or disloyalty shown by the trustee.
- The amount of risk and responsibility the trustee assumed.
- The time spent in the performance of the trustee's duties.
- The custom in the community where the court is located as to compensation authorized by settlers, as to compensation allowed by the court, or as to charges of corporate trustees for trusts of similar size and complexity.
- Whether the work the trustee performed was routine or required more than ordinary skill or judgment.

[3] Apportionment Among Trustees

Unless the trust instrument otherwise provides or the trustees otherwise agree, if the trust has two or more trustees, the compensation must be apportioned among the cotrustees according to the services rendered by them [*Prob. Code § 15683*].

[4] When Attorney Is Trustee

A trustee who is an attorney generally may not receive compensation both for serving as trustee and for performing legal services for the trustee. This rule applies to any services rendered after January 1, 1994, regardless of any contrary provision in the trust instrument [*Prob. Code § 15687(a), (f)*]. The rules limiting the right to dual compensation also apply when the attorney is a parent, child, sibling, or spouse of the trustee, or when a partner, shareholder, or employee of the attorney's law firm is serving as a trustee. If any of these persons is a trustee, the attorney cannot receive any compensation for legal services performed for the trustee unless the trustee waives his or her compensation or follows the procedures discussed below to obtain approval of dual compensation [*Prob. Code § 15687(b)*]. This rule is inapplicable if the trustee is related by blood or marriage to, or is cohabiting with, the settlor [*Prob. Code § 15687(c)*]. Note that there is no exception based solely on the relationship between the attorney and the settlor. Thus, if the attorney is related to the settlor, but the trustee is not, there are circumstances under which the restrictions on dual compensation would still apply. For example, if the settlor's child serves as attorney for the trust and another member of the same law firm serves as trustee, the exception for related persons is inapplicable and the restrictions on dual compensation apply. Conversely, however, if the settlor's child is a member or employee of a law firm and serves as trustee, another member or employee of the law firm may serve as attorney for the trust and the dual compensation rules are inapplicable [*see Prob. Code § 15687(b), (c)*].

Violation of the dual compensation rules may subject the offending attorney to professional discipline if the attorney knew or should have known of the facts leading to the violation [*Bus. & Prof. Code § 6103.6*]. The rules thus constitute a real danger to attorneys and law firms, even when they agree not to charge for work performed in the capacity of trustee. If some of the work for which legal fees are charged, such as fiduciary accountings or the preparation of income

tax returns, can arguably be characterized as fees for trustee work, not legal work, the statute is violated and professional discipline can result.

An attorney-trustee may receive dual compensation if, after the nature of the compensation and the relationship of the trustee to all persons receiving compensation from the attorney-trustee is fully disclosed to the court, the court makes an order determining that dual compensation would be reasonable [*Prob. Code §§ 15687(d)(1), 17200(b)(20)*]. An attorney-trustee may also receive dual compensation after giving 30 days' advance notice to all the beneficiaries (and to the attorney general, if the trust is a charitable trust subject to the attorney general's jurisdiction) if no objection to the dual compensation is received within the 30 days [*Prob. Code § 15687(d)(2)*; for trusts subject to attorney general's jurisdiction, *see Gov. Code §§ 12580-12599.5* (Uniform Supervision of Trustees for Charitable Purposes Act)]. Any of the persons entitled to notice may object within the 30-day period. If an objection is made, the attorney-trustee must obtain court approval of the dual compensation [*Prob. Code § 15687(d)(2)*]. The rule governing dual compensation for an attorney-trustee is based on public policy, and any attempt to waive it is void [*Prob. Code § 15687(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsTrusteesDuties & PowersCompensationEstate, Gift & Trust LawTrustsTrusteesMultiple Trustees

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§ 560.90 Increased Trustee's Fee

A trustee may not charge an increased trustee's fee for administration of a particular trust unless the trustee first gives at least 60 days' written notice of that increased fee to all of the following persons [*Prob. Code § 15686(b)*]:

- Each beneficiary entitled to an account under *Prob. Code § 16062*.
- Each beneficiary who was given the last preceding account.
- Each beneficiary who has made a written request to the trustee for notice of an increased trustee's fee and has given an address for receiving notice by mail.

"Trustee's fee" includes, but is not limited to, the trustee's periodic base fee, rate of percentage compensation, minimum fee, hourly rate, and transaction charge, but does not include fees for extraordinary services [*Prob. Code § 15686(a)*].

If a beneficiary files a petition under *Prob. Code § 17200* for review of the increased trustee's fee or for removal of the trustee and serves a copy of the petition on the trustee before the expiration of the 60-day period, the increased trustee's fee does not take effect as to that trust until otherwise ordered by the court or the petition is dismissed [*Prob. Code § 15686(c)*; *see § 560.540* (petition to remove trustee), § 560.549 (petition to review reasonableness of compensation, including review of increased fee)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersCompensationEstate, Gift & Trust LawTrustsTrusteesRemoval & Resignation

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§ 560.91 Indemnification of Trustee

A trustee is entitled to the repayment out of the trust property for the following [*Prob. Code § 15684*]:

- Expenditures that were properly incurred in the administration of the trust.

- Expenditures that were not properly incurred in the administration of the trust, to the extent that they benefitted the trust.

Consequently, a trustee is not entitled to attorney's fees and expenses in a proceeding in which the trustee is found to have breached the trust, unless otherwise ordered by the court pursuant to *Prob. Code § 15684(b)* [*see, e.g., Estate of Gilmaker (1964) 226 Cal. App. 2d 658, 665, 38 Cal. Rptr. 270]* .

If litigation is necessary to preserve the trust, the trustee is entitled to reimbursement for his or her expenditures from the trust. However, if the litigation is specifically for the trustee's benefit, the trustee must bear his or her own costs, and is not entitled to reimbursement [*Terry v. Conlan (2005) 131 Cal. App. 4th 1445, 1461, 1464, 33 Cal. Rptr. 3d 603* (trustee who did not participate in litigation as neutral trustee to defend trust and protect its assets, but rather to pursue her own interests and those of her siblings to detriment of other beneficiary, was required to bear her own costs)]. If the litigation does not involve a challenge to the existence of the trust, but is a dispute over who will control and benefit from it, the trustee is not entitled to reimbursement because no matter who prevails in the litigation, the trust will remain intact, and the trustee's only participation in the litigation should be that of a neutral party [*Terry v. Conlan (2005) 131 Cal. App. 4th 1445, 1461, 33 Cal. Rptr. 3d 603]* .

The trustee has an equitable lien on the trust property as against the beneficiary in the amount of advances, with any interest, made for the protection of the trust, and for expenses, losses, and liabilities sustained in the administration of the trust or because of ownership or control of any trust property [*Prob. Code § 15685*; *see Prob. Code § 18001* (personal liability of trustee); *Kasperbauer v. Fairfield (2009) 170 Cal. App. 4th 785, 795* (trustee had right to indemnification for expenses reasonably incurred in defending accounting when court ordered beneficiaries to pay

attorney fees incurred by the trustee in completing and defending an accounting)]. However, a trustee does not have an equitable lien against a transferee of the property who gives fair consideration without knowledge of the lien [*see Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 656 (1986)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstEstate, Gift & Trust LawTrustsTrusteesDuties & PowersCompensation

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§ 560.92 Resignation of Trustee

[1] Methods

A trustee who has accepted the trust may resign only by one of the following methods [*Prob. Code § 15640*]:

- As provided in the trust instrument.
- In the case of a revocable trust, with the consent of the person holding the power to revoke the trust.
- In the case of an irrevocable trust, with the consent of all adult beneficiaries who are receiving or are entitled to receive income under the trust or to receive a distribution of principal if the trust were terminated at the time consent is sought [*see Prob. Code § 15403*].
- Pursuant to a court order accepting the trustee's resignation [*see Prob. Code § 17200(b)(11)*].

If a beneficiary of an irrevocable trust has a conservator, the conservator may consent to the trustee's resignation on behalf of the conservatee without obtaining court approval [*Prob. Code § 15640(c)*]. Without limiting the power of the beneficiary to consent to the trustee's resignation, if the beneficiary has designated an attorney infact who has the power under the power of attorney to consent to the trustee's resignation, the attorney in fact may consent to the resignation [*Prob. Code § 15640(c)*].

When a petition is filed for a court order accepting the trustee's resignation [*see Prob. Code § 17200(b)(11)*], the court must accept the trustee's resignation and may make any orders necessary for the preservation of the trust property, including the appointment of a receiver or a temporary trustee [*see §§ 560.557* (petition for resignation), 560.560 (order)].

For discussion of acceptance of the trust, see *§ 560.71*.

[2] Liability of Resigning Trustee

The liability for acts or omissions of a resigning trustee or of the sureties on the trustee's bond, if any, is not released or affected in any manner by the trustee's resignation [*Prob. Code § 15641*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstEstate, Gift & Trust LawTrustsTrusteesRemoval & Resignation

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§ 560.93 Removal of Trustee

[1] General Grounds for Removal

A trustee may be removed in accordance with the trust instrument, by the court on its own motion, or on petition of a settlor, cotrustee, or beneficiary under *Prob. Code § 17200* [*Prob. Code § 15642(a)*; *see § 560.540*].

The grounds for removal of a trustee by the court include the following [*Prob. Code § 15642(b)*]:

- The trustee has committed a breach of the trust.
- The trustee is insolvent or otherwise unfit to administer the trust.
- Hostility or lack of cooperation among cotrustees impairs the administration of the trust.
- The trustee fails or declines to act.
- The trustee's compensation is excessive under the circumstances.
- The trustee is substantially unable to manage the trust's financial resources.
- The trustee is substantially unable to resist fraud or undue influence.
- For other good cause.

[2] Special Rule When Trustee Is Attorney Who Drafted Instrument or Attorney's Relative, Associate, or Employee

[a] Persons Covered by Rule

A special rule governs the removal of the trustee when there is only one trustee, the trust became irrevocable after January 1, 1994, and the trustee is any of the following [*Prob. Code § 15642(b)(6)*; *see Prob. Code § 21350(a)*]:

- The person who drafted the instrument.

- A person who is related by blood or marriage to, or is a cohabitant with or employee of, the person who drafted the instrument.

- Any partner or shareholder of any law partnership or law corporation in which the person who drafted the instrument has an ownership interest, and any employee of any such law partnership or law corporation.

- Any person who has a fiduciary relationship with the transferor, including, but not limited to, a conservator or trustee, and who transcribes the instrument or causes it to be transcribed.

- A person who is related by blood or marriage to, or is a cohabitant with or employee of, a person described in the category immediately above.

- A care custodian of a dependent adult.

For purposes of *Prob. Code § 21350*, "a person who is related by blood or marriage" to a person means all of the following [*Prob. Code § 21350(b)*]:

- The person's spouse or predeceased spouse;

- Relatives within the third degree of the person and of the person's spouse;

- The spouse of any relative within the third degree of the person or of the person's spouse.

In determining relationships for purposes of this rule, *Prob. Code § 6406*, which governs the inheritance rights of relatives of the half blood, *Prob. Code § 6407*, which covers the inheritance rights of afterborn heirs, and *Prob. Code §§ 6450-6455*, which prescribe rules for determining the relationship of parent and child for purposes of intestate succession, are all applicable [*Prob. Code § 21350(b)*].

For purposes of *Prob. Code § 21350*, the term "care" custodian means an administrator or employee of a public or private care facility or agency (including a member of the support or maintenance staff), or any other person providing care or services for elders or dependent adults, except persons who do not work directly with elders or dependent adults as part of their official duties [*Prob. Code § 21350(c)*; *see Welf. & Inst. Code § 15610.17* for list of covered care facilities and agencies)]. A long-term care ombudsman for a skilled nursing facility remains a care custodian even after his or her formal ombudsman relationship with a resident has ended, due either to a change in the ombudsman's facility assignment or the fact that the resident has left the facility when the ombudsman, as a result of his or her fiduciary relationship with the resident, develops a personal relationship with the resident and thereby acquires personal and financial information regarding the resident [*Estate of Shinkle (2002) 97 Cal. App. 4th 990, 993, 119 Cal. Rptr. 2d 42* ; *disapproved in part on other grounds in Bernard v. Foley (2006) 39 Cal. 4th 794, 816, 47 Cal. Rptr. 3d 248, 139 P.3d 1196]* .

"Dependent adult" means any of the following [*Prob. Code § 21350(c)*; *see Welf. & Inst. Code § 15610.23(a)*]:

- Any person residing in California, between the ages of 18 and 64 years, who has physical or mental

limitations that restrict his or her ability to carry out normal activities or to protect his or her rights including, but not limited to, persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age [*Prob. Code § 21350(c)*].

- Any person between the ages of 18 and 64 who is admitted as an inpatient to a 24-hour health facility as defined in *Health & Safety Code §§ 1250, 1250.2,* and *1250.3*.

- Any person older than age 64 who would be a "dependent adult" under the above definitions if he or she were between the ages of 18 and 64.

[b] Removal of Trustee

A trustee who is any one of the persons described above may be removed by the court, on its own motion, or on petition of a settlor or beneficiary under *Prob. Code § 17200*, regardless of whether the trustee has received or is entitled to receive a donative transfer under the trust [*Prob. Code § 15642(a), (b)(6)*]. However, a trustee may not be removed under this rule if any of the following conditions are met [*Prob. Code § 15642(b)(6)*]:

- The settlor is related by blood or marriage to, or is a cohabitant with, any one or more of the trustees, the person who drafted or transcribed the instrument, or the person who caused the instrument to be transcribed.

- The instrument is reviewed by an independent attorney who counsels the settlor about the nature of his or her intended trustee designation and signs and delivers to the settlor and the designated trustee a "Certificate of Independent Review" in substantially the form prescribed by *Prob. Code § 15642(b)(6),* or if, after full disclosure of the relationships of the persons involved, the court approves the instrument by an order under *Prob. Code §§ 2580 et seq.* [*Prob. Code § 15642(b)(6)*]. This rule is based on public policy, and any attempt to waive it is void [*Prob. Code § 15642(b)(6)*].

The court may refuse to remove the trustee under this rule if, after considering all of the facts and circumstances, including any evidence of the settlor's intent, it determines that it is consistent with the settlor's intent for the trustee to continue to serve and that this intent was not the product of fraud, menace, duress, or undue influence [*Prob. Code § 15642(b)(6)*]. However, if the court finds that the designation of the trustee was not consistent with the settlor's intent or was the product of fraud, menace, duress, or undue influence, the person removed as trustee must bear all costs of the proceeding, including reasonable attorney's fees [*Prob. Code § 15642(c)*].

[3] Surrender of Trust Property Pending Disposition of Petition Seeking Renewal

If it appears to the court that trust property or the interest of a beneficiary may suffer loss or injury pending a decision on a petition for removal of a trustee and any appellate review, the court, on its own motion or on petition of a cotrustee or beneficiary, may compel the trustee whose removal is sought to surrender trust property to a cotrustee or a receiver or temporary trustee. The court may suspend the trustee's powers to the extent that it deems this necessary [*Prob. Code § 15642(e)*].

[4] Award of Costs and Fees

If the trustee of a trust that is not revocable has refused to transfer administration of the trust to a successor trust company on request of the beneficiaries described in *Prob. Code § 15640(c)* [*see § 560.92[1]*] and the court in subsequent proceedings under *Prob. Code § 17200* makes an order removing the existingtrustee and appointing a trust company as successor trustee, the court may, in its discretion, award costs and reasonable attorney's fees incurred by the petitioner in the proceeding to be paid by the trustee or from the trust as ordered by the court [*Prob. Code § 15645*].

If the court finds that a petition for the removal of a trustee was filed in bad faith and that removal would be contrary to the settlor's intent, it may order that the person or persons seeking the trustee's removal bear all or part of the costs of the proceeding, including reasonable attorney's fees [*Prob. Code § 15642(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstEstate, Gift & Trust LawTrustsTrusteesRemoval & Resignation

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49-560 California Forms of Pleading and Practice--Annotated § 560.94

§ 560.94 Vacancy in Office of Trustee

[1] Manners in Which Vacancy Arises

There is a vacancy in the office of trustee in any of the following circumstances [*Prob. Code § 15643*]:

- The person named as trustee rejects the trust [*see Prob. Code § 15601*].
- The person named as trustee cannot be identified or does not exist.
- The trustee resigns or is removed [*see Prob. Code §§ 15640* (resignation), 15642 (removal)].
- The trustee dies.
- A conservator or guardian of the person or estate of an individual trustee is appointed.
- The trustee is the subject of an order for relief in bankruptcy.
- A trust company's charter is revoked or powers are suspended, if the revocation or suspension is to be in effect for a period of 30 days or more [*see Prob. Code § 83* (definition of trust company)].
- A receiver is appointed for a trust company if the appointment is not vacated within a period of 30 days.

[2] Delivery of Property by Former Trustee

When a vacancy has occurred in the office of trustee, the former trustee who holds property of the trust must deliver the trust property to the successor trustee or a person appointed by the court to receive the property and remains responsible for the trust property until it is delivered. A trustee who has resigned or is removed has the powers reasonably necessary

under the circumstances to preserve the trust property until it is delivered to the successor trustee and to perform actions necessary to complete the resigning or removed trustee's administration of the trust [*Prob. Code § 15644*; *see Prob. Code § 16420(a)(4)* (appointment of receiver and protection of property after breach of trust)].

[3] Appointment of Trustee to Fill Vacancy

[a] In General

If the trust has no trustee or if the trust instrument requires a vacancy in the office of a cotrustee to be filled, the vacancy must be filled as provided in *Prob. Code § 15660* [*Prob. Code § 15660(a)*; *see Prob. Code § 15621* (remaining cotrustees may act for trust in absence of provision to contrary)]. If the trust instrument provides a practical method of appointing a trustee or names the person to fill the vacancy, the vacancy must be filled as provided in the trust instrument [*Prob. Code § 15660(b)*].

If the vacancy in the office of trustee is not filled as provided in *Prob. Code § 15660(b)*, the vacancy may be filled by a trust company that has agreed to accept the trust on agreement of all adult beneficiaries who are receiving or are entitled to receive income under the trust or to receive a distribution of principal if the trust were terminated at the time the agreement is made. If a beneficiary has a conservator, the conservator may agree to the successor trustee on behalf of the conservatee without obtaining court approval. Without limiting the power of the beneficiary to agree to the successor trustee, if the beneficiary has designated an attorney in fact who has the power under the power of attorney to agree to the successor trustee, the attorney in fact may agree to the successor trustee [*Prob. Code § 15660(c)*].

If the vacancy in the office of trustee is not filled as provided in *Prob. Code § 15660(b)* or *(c)*, on petition of any interested person or any person named as trustee in the trust instrument, the court may, in its discretion, appoint a trustee to fill the vacancy. If the trust provides for more than one trustee, the court may, in its discretion, appoint the original number or any lesser number of trustees. In selecting a trustee, the court shall give consideration to any nomination by the beneficiaries who are 14 years of age or older [*Prob. Code § 15660(d)*; *but see Prob. Code §§ 15800* (rights regarding revocable trust inure to settlor, not beneficiary), 15803 (rights inuring to holder of presently exercisable general power of appointment or power to withdraw property)].

[b] Appointment of Trustee Ad Litem

Just as the probate court may entirely remove a trustee and appoint a replacement, the court may also suspend a trustee's powers relative to specified trust litigation and appoint a trustee ad litem with limited powers to conduct that litigation [*see Getty v. Getty (1988) 205 Cal. App. 3d 134, 142, 252 Cal. Rptr. 342]* . For example, if the interests of the trustee in the conduct of third-partylitigation involving the trust assets are similar to those of the third-party litigants and inimical to those of the trust beneficiaries, suspension of the trustee's powers relative to that litigation and appointment of a trustee ad litem to conduct the litigation is appropriate. In deciding whether to partially suspend the trustee's powers and appoint a trustee ad litem, the court will consider whether doing so will lead to confusion and dispute between the trustee and the trustee ad litem relative to their respective powers and duties. The fact that the division of powers between the two is clear and that the trustee ad litem's powers are appropriately defined will militate in favor of the partial suspension and appointment [*see Getty v. Getty (1988) 205 Cal. App. 3d 134, 141, 252 Cal. Rptr. 342]* .

The appointment of a trustee ad litem is a proper exercise of the probate court's general equity jurisdiction, and is intrinsically included in the court's greater power to remove and replace the trustee. Because the court, in the exercise of its general equity jurisdiction, has the power to remove a trustee entirely, the removal of the existing trustee's power to conduct certain lawsuits and the appointment of a trustee ad litem, when there is a conflict of interest, are also an exercise of that general equity jurisdiction [*Getty v. Getty (1988) 205 Cal. App. 3d 134, 141-142, 252 Cal. Rptr. 342]* . Indeed, the appointment of a trustee ad litem is viewed as a modification of a trust necessary to preserve the trust's assets, and California courts have long had the equity power to modify a trust's terms when necessary to preserve the

trust's assets [*Getty v. Getty (1988) 205 Cal. App. 3d 134, 142, 252 Cal. Rptr. 342* ; *see* *Stewart v. Towse (1988) 203 Cal. App. 3d 425, 428-429, 249 Cal. Rptr 622]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsTrusteesAppointment

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[Reserved]

§§ 560.95[Reserved]

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§ 560.110 Governing Statutes

Revocability of trusts is governed by *Prob. Code §§ 15400-15402*. Modification and termination of trusts is governed by *Prob. Code §§ 15403, 15404, 15407-15409*. The consent of a guardian ad litem regarding modification or termination is governed by *Prob. Code § 15405*. The presumption of fertility with regard to a class of beneficiaries for the purpose of modifying or terminating a trust is governed by *Prob. Code § 15406*. Disposition of property on termination of a trust is governed by *Prob. Code § 15410*. Combination and division of trusts are governed by *Prob. Code §§ 15411* and *15412*, respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsModification & TerminationEstate, Gift & Trust LawTrustsRevocable Living Trusts

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§ 560.111 Revocation

[1] Generally

Unless a trust is expressly made irrevocable by the trust instrument, the trust is revocable by the settlor under any one of the following circumstances [*Prob. Code § 15400*]:

- The settlor is domiciled in California when the trust is created.
- The trust instrument is executed in California.
- The trust instrument provides that the law of California governs the trust.

The California rule that a trust is presumed to be revocable differs from the rule in many other states in which trusts are presumed to be irrevocable unless the settlor reserves the right to revoke [*California-Nevada Annual Conf. of the United Methodist Church v. St. Luke's United Methodist Church (2004) 121 Cal. App. 4th 754, 768, 17 Cal. Rptr. 3d 442* (presumption of revocability has been rule in California since 1931 and applies to trusts created since then); *see* Scott, The Law of Trusts (3th ed.), Vol. VA, Ch. 14, *Trusts and the Conflict of Laws,* § 581].

[2] Method if Trust Created on or After July 1, 1987

A trust that is revocable by the settlor may be revoked in whole or in part by either of the following methods [*Prob. Code § 15401(a)*; *Huscher v. Wells Fargo Bank (2004) 121 Cal. App. 4th 956, 960, 18 Cal. Rptr. 3d 27]* :

- By compliance with any method of revocation provided in the trust instrument.
- By a writing (other than a will) signed by the settlor and delivered to the trustee during the settlor's lifetime, unless the trust instrument explicitly makes the method of revocation provided in the trust instrument the exclusive method of revocation. A settlor may, however, revoke a trust by a will if the

trust provides, pursuant to *Prob. Code § 15401(a)(1)* [*see* Rest. 2d Trusts § 330, Comment (j)].

When a trust expressly permits revocation during the settlor's lifetime by written notice signed by the settlor and delivered to the trustee, and the settlor does not limit or qualify the term "written notice," the settlor is deemed to have authorized revocation by *any* writing that unambiguously manifests the settlor's intention to revoke the trust, including a will [*Gardenhire v. Superior Court (2005) 127 Cal. App. 4th 882, 888, 26 Cal. Rptr. 3d 143]* . The power to revoke a trust by will need not be specifically and expressly stated in the trust [*Gardenhire v. Superior Court (2005) 127 Cal. App. 4th 882, 893-895, 26 Cal. Rptr. 3d 143]* . If a settlor reserves a power to revoke the trust only in a particular manner or under specified circumstances, then the trust can be revoked only in that manner orunder those circumstances [*Gardenhire v. Superior Court (2005) 127 Cal. App. 4th 882, 890, 26 Cal. Rptr. 3d 143]* . Additionally, if a revocation provision is not explicitly exclusive, a trust may be revoked by compliance with the revocation statute [*Prob. Code § 15401(a)(2)*; *see* *Masry v. Masry (2008) 166 Cal. App. 4th 738, 740, 82 Cal. Rptr. 3d 915* (family trust specified settlor's power to revoke by writing delivered to other settlor; however, since revocation provision was not explicitly exclusive, revocation by delivering notice of revocation to oneself as trustee was held valid and in compliance with *Prob. Code § 15401(a)(2)*)].

Unless otherwise provided in the instrument, if a trust is created by more than one settlor, each settlor may revoke the trust as to the portion of the trust contributed by that settlor, except as provided in *Fam. Code § 761* (community property in certain revocable trusts) [*Prob. Code § 15401(b)*]. This means that one spouse may revoke a joint trust as to all community property in the trust [*see Fam. Code § 761(b)*], but as to other property in the trust, one spouse may only revoke the trust as to his or her share [*Prob. Code § 15401(b)*]. In the case of a trust that was revocable at any time during the life of either spouse and that contained community property, revocation by the surviving spouse after his spouse's death resulted in one-half of the trust assets being returned to him and the other half being disposed of according to his wife's will. Under *Prob. Code § 100*, the community property in the trust was transmuted at the wife's death to separate property. Therefore, the husband's revocation was effective only as to his half of the trust corpus [*Estate of Powell (2000) 83 Cal. App. 4th 1434, 1441, 100 Cal. Rptr. 2d 501]* .

A trust created on or after July 1, 1987, may not be revoked by an attorney in fact under a power of attorney unless the power to do so is expressly granted by the trust instrument [*Prob. Code § 15401(c)*]. Although the Uniform Statutory Form Power of Attorney grants the attorney in fact broad authority to act for the principal with respect to trusts [*see Prob. Code §§ 4401* (statutory form), 4458 (powers granted in statutory form with respect to estate, trust, and other beneficiary transactions)], the statutory form will not be effective to empower an attorney in fact to revoke a trust created by the principal unless that power is expressly granted by the power of attorney [*Prob. Code § 4465*]. Even when the power to revoke is granted by the power of attorney, it may not be exercised by the attorney in fact unless the trust instrument grants the attorney in fact the same power [*Prob. Code § 4465*].

Nothing in *Prob. Code § 15401* limits the authority of the settlor to modify a revocable trust pursuant to *Prob. Code § 15403* or of the beneficiaries to modify or terminate an irrevocable trust pursuant to *Prob. Code § 15404* in an appropriate case [*Prob. Code § 15401(d)*].

[3] Method if Trust Created Prior to July 1, 1987

The manner of revocation of a trust revocable by the settlor that was created by an instrument executed before July 1, 1987, is governed by prior law and not by *Prob. Code § 15401* [*Prob. Code § 15401(e)*; *Huscher v. Wells Fargo Bank (2004) 121 Cal. App. 4th 956, 961, 18 Cal. Rptr. 3d 27]* . Under prior law, every voluntary trust is revocable by the settlor by a writing filed with the trustee, unless expressly made irrevocable by the instrument creating the trust. When a voluntary trust is revoked by the settlor, the trustee must transfer to the settlor its full title to the trust estate [*see* former *Civ. Code § 2280*]. Under prior law, a voluntary trust is defined as an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another [*see* former *Civ. Code § 2216*].

The cases discussed below interpreted the law in effect before the 1986 enactment of the Trust Law.

Under former *Civ. Code § 2280*, a trust's modification procedures must be followed if they are explicitly exclusive or if the provisions are so specific and detailed that they implicitly preclude resort to any other method. If not, the trust may be modified in the manner provided by former *Civ. Code § 2280, i.e.,* by delivering a signed modification to the trustee even if the trustee does not sign the amendment [*Huscher v. Wells Fargo Bank (2004) 121 Cal. App. 4th 956, 961, 967-970, 18 Cal. Rptr. 3d 27* (purpose behind former *Civ. Code § 2280* was to protect revocability of trusts that were silent on subject and was not intended to create exclusive method of revocation when trust instrument contains one that is quite specific)]. If the trust's revocation or amendment procedure is not explicitly exclusive and is not sufficiently detailed or specific to be considered implicitly exclusive, either method of modification may be used [*Huscher v. Wells Fargo Bank (2004) 121 Cal. App. 4th 956, 961, 970-971, 18 Cal. Rptr. 3d 27* (modification provision stating that trustor may at any time amend any of the trust terms by an instrument in writing signed by the trustor and the trustee is not explicitly or implicitly exclusive and thus trust can be modified under former *Civ. Code § 2280*)]. Moreover, a trust, though expressly declared irrevocable, can be terminated by the process of eliminating beneficiaries through amendments until those left are able to terminate the trust of their own right, and join in a notice of revocation and demand for delivery of the property [*Heifetz v. Bank of America (1957) 147 Cal. App. 2d 776, 777, 305 P.2d 979* ; *now see Prob. Code § 15403* (modification or termination of irrevocable trust by all beneficiaries)].

Beneficiaries of a trust are not necessary parties to an action by a settlor to rescind a trust under former *Civ. Code § 2280*, particularly when they have no present interest in the trust property and would not have any interest in it until the death of the trustor [*Title Ins. & Trust Co. v. McGraw (1945) 72 Cal. App. 2d 390, 400, 164 P.2d 846* ; *now see Prob. Code § 15800(a)* (person holding power to revoke has rights afforded beneficiaries under the Trust Law)].

[4] Validity of Revocable Trust

The reservation of power to revoke does not destroy the trust or change its character, and the trust remains operative and absolute until the settlor exercises that right [Kinney's Estate v. Commissioner of Internal Revenue (9th Cir. [Cal.] 1935) *80 F.2d 568, 571* ; *Nichols v. Emery (1895) 109 Cal. 323, 331, 41 P. 1089* (decided prior to enactment of the Trust Law)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsCreationEstate, Gift & Trust LawTrustsInterpretationEstate, Gift & Trust LawTrustsIrrevocable Living TrustsEstate, Gift & Trust LawTrustsModification & TerminationEstate, Gift & Trust LawTrustsRevocable Living Trusts

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49-560 California Forms of Pleading and Practice--Annotated § 560.112

§ 560.112 Modification

A trust may be modified under the following circumstances [*see Prob. Code §§ 15403, 15404, 15408, 15409,* respectively; *see § 560.584*]:

- By all the beneficiaries of an irrevocable trust, unless continuation is neededto effectuate a material purpose;
- By the settlor and all beneficiaries;
- Pursuant to a petition by the trustee or beneficiary, on the ground of uneconomically low principal; or
- Pursuant to a petition by the trustee or beneficiary, on the ground of changed circumstances.

Unless the trust instrument provides otherwise, if a trust is revocable by the settlor, the settlor may modify the trust by the procedure for revocation [*Prob. Code § 15402*]. Moreover, an unrestricted power to modify may also include the power to revoke a trust [*see Heifetz v. Bank of America (1957) 147 Cal. App. 2d 776, 781-782, 305 P.2d 979]* . However, if a joint inter vivos trust becomes irrevocable at the death of the first spouse, the trust becomes irrevocable in its entirety and the surviving settlor does not have the right to modify the trust instrument or withdraw trust property without consent from the other beneficiaries of the joint trust [*see Aguilar v. Aguilar (2008) 168 Cal. App. 4th 35, 40, 85 Cal. Rptr. 3d 193*].

The settlor may bind himself or herself to a specific method of modifying or amending a trust. If the trust instrument prescribes the method for amendment or modification, the instrument controls and the settlor must follow that method. *Conservatorship of Irvine (1995) 40 Cal. App. 4th 1334, 1344-1345, 47 Cal. Rptr. 2d 587]* .

A trust created on or after July 1, 1987, may not be modified by an attorney in fact under a power of attorney unless the

power to modify is expressly granted to the attorney in fact in the trust instrument [*Prob. Code § 15401(c)*]. Although the Uniform Statutory Form Power of Attorney grants the attorney in fact broad authority to act for the principal with respect to trusts [*see Prob. Code §§ 4401* (statutory form), 4458 (powers granted in statutory form with respect to estate, trust, and other beneficiary transactions)], the statutory form will not be effective to empower an attorney in fact to modify a trust created by the principal unless that power is expressly granted by the power of attorney [*Prob. Code § 4465*]. Even when the power to modify is granted by the power of attorney, it may be exercised by the attorney in fact only if the trust instrument grants the attorney in fact the same power [*Prob. Code § 4465*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsModification & TerminationEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview

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49-560 California Forms of Pleading and Practice--Annotated § 560.113

§ 560.113 Grounds for Modification or Termination

[1] Uneconomically Low Trust Principal

On petition by a trustee or beneficiary, if the court determines that the fair market value of the principal of a trust has become so low in relation to the cost of administration that continuation of the trust under its existing terms will defeat or substantially impair the accomplishment of its purposes, the court may, in its discretion and in a manner that conforms as nearly as possible to the intention of the settlor, order termination of the trust, modification of the trust, or appointment of a new trustee [*Prob. Code § 15408(a)*].

If the trust principal does not exceed $20,000 in value, the trustee has the power to terminate the trust, notwithstanding *Prob. Code § 15408(a)* [*Prob. Code § 15408(b)*]. Although not required to do so under *Prob. Code § 15408(b)*, the trustee may wish to obtain court approval pursuant to petition proceedings [*see, e.g., Prob. Code § 17200(b)(6)* (instructions), 17200(b)(5) (accounts), 17200(b)(13) (termination)].

The existence of a trust provision restraining transfer of the beneficiary's interest does not prevent application of *Prob. Code § 15408* [*Prob. Code § 15408(c)*].

[2] Changed Circumstances

On petition by a trustee or beneficiary, the court may modify the administrative or dispositive provisions of the trust or terminate the trust if, owing to circumstances not known to the settlor and not anticipated by the settlor, the continuation of the trust under its terms would defeat or substantially impair the accomplishment of the purposes of the trust. In this case, if necessary to carry out the purposes of the trust, the court may order the trustee to do acts that are not authorized or are forbidden by the trust instrument [*Prob. Code § 15409(a)*; *see Bilafer v. Bilafer (2008) 161 Cal. App. 4th 363, 370, 73 Cal. Rptr. 3d 880* ; *see also § 560.584*].

The court must consider a trust provision restraining transfer of the beneficiary's interest as a factor in making its decision whether to modify or terminate the trust, but the court is not precluded from exercising its discretion to modify

or terminate the trust solely because of a restraint on transfer [*Prob. Code § 15409(b)*]. For example, when one or more persons for whose benefit an accumulation of income has been directed is or are destitute of other sufficient means of support or education, the proper court, on application, may direct a suitable sum to be applied for those purposes out of the accumulated income [*Civ. Code § 726*; *see § 560.580*].

[3] Combination of Similar Trusts

If the terms of two or more trusts are substantially similar, on petition by a trustee or beneficiary, the court, for good cause shown, may combine the trusts if the court determines that administration as a single trust will not defeat or substantially impair the accomplishment of the trust purposes or the interests of the beneficiaries [*Prob. Code § 15411*; *see Prob. Code § 17200(b)(14)* (petition); *see also § 560.581*].

[4] Division of Trusts

On petition by a trustee or beneficiary, the court, for good cause shown, may divide a trust into two or more separate trusts, if the court determines that dividing the trust will not defeat or substantially impair the accomplishment of the trust purposes or the interests of the beneficiaries [*Prob. Code § 15412*; *see Prob. Code § 17200(b)(14)* (petition)]. For example, division of a trust may be appropriate when different members of a family desire their own separate trusts because of a disagreement, or when a beneficiary has moved to a different part of the country [*see Recommendation Proposing the Trust Law*, 18 Cal. Law Revision Comm'n Reports 644 (1986)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsModification & TerminationEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview

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49-560 California Forms of Pleading and Practice--Annotated § 560.114

§ 560.114 Compelling Modification or Termination

[1] By All Beneficiaries

If all beneficiaries of an irrevocable trust consent, they may compel modification or termination of the trust on petition to the court, except as provided in *Prob. Code § 15403(b)* [*Prob. Code § 15403(a)*; for a petition to modify or terminate an irrevocable trust, *see § 560.584*]. *Prob. Code § 15403(a)* permits termination of an irrevocable trust with the consent of all beneficiaries when the trust provides for successive beneficiaries or postpones enjoyment of a beneficiary's interest. It is intended to provide some flexibility in the application of the Material Purposes Doctrine when transfer of the beneficiary's interest is not restricted [*see Recommendation Proposing the Trust Law*, 18 Cal. Law Revision Comm'n Reports 637 (1986)]. For example, if a trust gives discretion to the trustees to add charitable organizations, and the beneficiaries enter into a settlement agreement that defines the additional beneficiaries and provide for trust modifications, the court has authority to order modification of the trust [*Boys and Girls Club of Petaluma v. Walsh (2009) 169 Cal. App. 4th 1049, 1060, 1062, 87 Cal. Rptr. 3d 413*].

If the continuance of the trust is necessary to carry out a material purpose of the trust, the trust cannot be modified or terminated unless the court, in its discretion, determines that the reason for doing so under the circumstances outweighs the interest in accomplishing a material purpose of the trust [*see Boys and Girls Club of Petaluma v. Walsh (2009) 169 Cal. App. 4th 1049, 1060, 1062, 87 Cal. Rptr. 3d 413* (reasons for modification outweighed interest in preserving trustees' discretion)]. The court does not have discretion under *Prob. Code § 15403* to permit termination of a trust that is subject to a valid restraint on transfer of the beneficiary's interest as provided in *Prob. Code §§ 15300-15309* [*Prob. Code § 15403(b)*].

[2] By Settlor and All Beneficiaries

If the settlor and all beneficiaries of a trust consent, they may compel the modification or termination of the trust [*Prob. Code § 15404(a)*; *see § 560.584*]. Although modification or termination does not require court approval, the beneficiaries may bring a petition for that relief [*see Prob. Code § 17200(b)(13)*]. For example, a revocable trust may be modified or terminated pursuant to *Prob. Code § 15404* if the trust instrument specifies an overly restrictive method of

modification or revocation [*see Recommendation Proposing the Trust Law,* 18 Cal. Law Revision Comm'n Reports 638 (1986)].

If any beneficiary does not consent to the modification or termination of the trust, on petition to the court, the other beneficiaries, with the consent of the settlor, may compel a modification or a partial termination of the trust if the interests of the beneficiaries who do not consent are not substantially impaired [*Prob. Code § 15404(b)*].

If the trust provides for the disposition of principal to a class of persons described only as "heirs" or "next of kin" of the settlor, or using other words that describe the class of all persons who would take under the rules of intestacy, the court may limit the class of beneficiaries whose consent is needed to compel the modification or termination of the trust to the beneficiaries who are reasonably likely to take under the circumstances [*Prob. Code § 15404(c)*]. *Prob. Code § 15404(c)* reinstates a form of the doctrine of worthier title by providing that the need for consent of persons constituting the settlor's heirs or next of kin may be excused as to beneficiaries (typically unborn or remote beneficiaries) who are not reasonably likely to take principal under the trust. The limitation protects the interests of beneficiaries who are likely to take while permitting modification or termination of an otherwise irrevocable trust in line with the probable intent of the settlor [*see Recommendation Proposing the Trust Law,* 18 Cal. Law Revision Comm'n Reports 639 (1986); *see also Prob. Code § 21108* (common-law doctrine of worthier title abolished in California); *see also* Witkin, *Summary of California Law* (8th ed.), vol. 3, *Real Property,* § 181].

Nothing under *Prob. Code § 15404* affects the settlor's power to revoke or modify a revocable trust [*see Prob. Code § 15401*]. Moreover, a trust may be modified or terminated under *Prob. Code § 15401* regardless of a trust provision restraining transfer of the beneficiary's interest and regardless of whether the trust purposes have been achieved [*see* Restatement (Second) of Trusts § 338, Comments (b)-(d)].

[3] No Conclusive Presumption of Fertility

In determining the class of beneficiaries whose consent is necessary to modify or terminate a trust pursuant to *Prob. Code § 15403* or *15404,* the presumption of fertility is rebuttable [*Prob. Code § 15406*; *see* Scott, The Law of Trusts (3rd ed.), vol. IV, ch. 10, *The Termination and Modification of the Trust,* § 340.1 (rejection of "fertile octogenarian" doctrine)].

[4] Appointment of Guardian Ad Litem

For the purposes of *Prob. Code §§ 15403* and *15404,* the consent of a beneficiary who lacks legal capacity, including a minor, or who is an unascertained or unborn person may be given in proceedings before the court by a guardian ad litem, if it would be appropriate to do so. In determining whether to give consent, the guardian ad litem may rely on general family benefit accruing to living members of the beneficiary's family as a basis for approving a modification or termination of the trust [*Prob. Code § 15405*; *see Recommenda tion Proposing the Trust Law,* 18 Cal. Law Revision Comm'n Reports 639 (1986) (provision is a nonpecuniary *quid pro quo* rule on assumption that benefit to parents will benefit future child)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsModification & TerminationEvidenceInferences & PresumptionsRebuttal of Presumptions

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49-560 California Forms of Pleading and Practice--Annotated § 560.115

§ 560.115 Termination

[1] Methods

A trust terminates when any of the following occurs [*Prob. Code § 15407(a)*]:

- The term of the trust expires.
- The trust purpose is fulfilled.
- The trust purpose becomes unlawful.
- The trust purpose becomes impossible to fulfill.
- The trust is revoked.

Moreover, there can be no trust if the legal and equitable title to the property is merged in the trustees [*Commissioner of Internal Revenue v. Goodan (9th Cir. 1952) 195 F.2d 498, 505]* . When the legal and equitable title to trust property are vested in the same person, the doctrine of merger operates to terminate the trust. To effect a merger, however, the estates must unite in one and the same person, having a coextensive interest in each, with no intervening interest in another. A legal estate in fee in one who has only a partial equitable interest, or vice versa, would not merge [*Estate of Washburn (1909) 11 Cal. App. 735, 746, 106 P. 415]* .

However, if a trust provides for one or more successor beneficiaries after the death of the settlor, the trust is not invalid, merged, or terminated in either of the following circumstances [*Prob. Code § 15209*]:

- When there is one settlor who is the sole trustee and the sole beneficiary during the settlor's lifetime.

- When there are two or more settlors, one or more of whom are trustees, and the beneficial interest in the trust is in one or more of the settlors during the lifetime of the settlors.

[2] Trustee's Powers

On termination of the trust, the trustee continues to have the powers reasonably necessary under the circumstances to wind up the affairs of the trust [*Prob. Code § 15407(b)*].

[3] Disposition of Property

At the termination of a trust, the trust property must be disposed of as follows [*Prob. Code § 15410*]:

- In the case of a trust that is revoked by the settlor, as directed by the settlor.

- In the case of a trust that is terminated by the consent of the settlor and all beneficiaries, as agreed by the settlor and all beneficiaries.

- In any other case, as provided in the trust instrument or in a manner directed by the court that conforms as nearly as possible to the intention of the settlor as expressed in the trust instrument.

- If a trust is terminated by the trustee pursuant to *Prob. Code § 15408(b)* (uneconomically low principal), the trust property may be distributed as determined by the trustee pursuant to the standard provided in *Prob. Code § 15410(c)* without the need for a court order. When the trust instrument does not provide a manner of distribution at termination and the settlor's intent is not adequately expressed in the trust instrument, the trustee may distribute the trust property to the living beneficiaries on an actuarial basis.

When appropriate, distribution on termination of a trust may be made to a custodian for a minor under the Uniform Transfers to Minors Act (*Prob. Code §§ 3900-3925*) [*see Prob. Code §§ 3905* (transfer authorized in trust), 3906 (unauthorized transfer)]. For discussion of the Uniform Transfers to Minors Act, see Ch. 278, *Gifts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsModification & TerminationEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview

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[Reserved]

§§ 560.116[Reserved]

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49-560 California Forms of Pleading and Practice--Annotated § 560.130

§ 560.130 Governing Statutes

Grounds for petition are governed by *Prob. Code § 17200*. The commencement of proceedings is governed by *Prob. Code § 17201*. Dismissal of a petition is governed by *Prob. Code § 17202*. Notice is governed by *Prob. Code §§ 1200-1265, 15804, 17100-17105, 17203-17205*. Guardian ad litem procedures are governed by *Prob. Code § 1003*.

Jurisdiction and venue are governed by *Prob. Code §§ 17000-17005*. Standing of the Attorney General is governed by *Prob. Code § 17210*. Lack of right to a jury trial is governed by *Prob. Code § 17006*. Orders are governed by *Prob. Code § 17206*. Appeals are governed by *Prob. Code §§ 1300-1312*.

Testamentary trusts subject to continuing court jurisdiction are governed by *Prob. Code §§ 17300-17354*. Removal of trusts from continuing court jurisdic tion is governed by *Prob. Code §§ 17350-17354*.

Transfer of trusts to another jurisdiction is governed by *Prob. Code §§ 17400-17405*, and transfer of trusts from another jurisdiction is governed by *Prob. Code §§ 17450-17457*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary Trusts

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49-560 California Forms of Pleading and Practice--Annotated § 560.131

§ 560.131 Procedure to Administer Trusts Generally

All trusts subject to the Trust Law are administered pursuant to the procedures set forth in *Prob. Code §§ 17200-17210*, if the person seeking relief has standing to do so [*see § 560.13*]. *Prob. Code §§ 17200-17210* provide petition, notice, and appeal proceedings for matters concerning the internal affairs of the trust and to determine the existence of the trust. The types of trusts subject to the Trust Law are determined by *Prob. Code §§ 82(a)* (definition of trust) and 15001 (application of trust law to trusts) [*see §§ 560.17, § 560.18*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministration

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49-560 California Forms of Pleading and Practice--Annotated § 560.132

§ 560.132 No Right to Jury Trial

There is no right to a jury trial in proceedings under *Prob. Code § 15000 et seq.* concerning the internal affairs of trusts [*Prob. Code § 17006*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureTrialsJury TrialsRight to Jury TrialEstate, Gift & Trust LawTrustsAdministration

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49-560 California Forms of Pleading and Practice--Annotated § 560.133

§ 560.133 Standing

Any trustee or beneficiary of a trust may petition the court concerning the internal affairs of the trust or to determine the existence of the trust [*Prob. Code § 17200(a)*]. Under appropriate circumstances, the following persons have the same right to petition the court as beneficiaries:

- The person holding the power to revoke [*see Prob. Code § 15800(a)*; *Johnson v. Tate (1989) 215 Cal. App. 3d 1282, 1286, 264 Cal. Rptr. 68* (person having, at most, rights of contingent beneficiary lacks standing)].

- The holder of a presently exercisable general power of appointment, to the extent of the holder's power over the trust property [*see Prob. Code § 15803*].

- The holder of a presently exercisable power to withdraw property from the trust, to the extent of the holder's power over the trust property [*see Prob. Code § 15803*].

The Attorney General may petition in a case involving a charitable trust subject to the jurisdiction of the Attorney General [*see Prob. Code § 17210*]. However, notwithstanding any other provisions of law, the Attorney General is subject to the limitations on the rights of beneficiaries of revocable trusts provided by *Prob. Code §§ 15800-15802* [*Prob. Code § 15805*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & Against

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49-560 California Forms of Pleading and Practice--Annotated § 560.134

§ 560.134 Grounds for Petition

Proceedings concerning the internal affairs of a trust include, but are not limited to, proceedings for any of the following purposes [*Prob. Code § 17200(b)*]:

- Determining questions of construction of a trust instrument [*see § 560.604*].

- Determining the existence or nonexistence of any immunity, power, privilege, duty, or right [*see § 560.550*].

- Determining the validity of a trust provision [*see § 560.521*].

- Ascertaining beneficiaries and determining to whom property shall pass or be delivered upon final or partial termination of the trust, to the extent the determination is not made by the trust instrument [*see §§ 560.582, 560.583*].

- Settling the accounts and passing upon the acts of the trustee, including the exercise of discretionary powers [*see §§ 560.540, 560.546,* 27].

- Instructing the trustee [*see §§ 560.551, 560.555*].

- Compelling the trustee to report information about the trust or account to the beneficiary, if the trustee has failed to submit a requested report or account within 60 days after written request of the beneficiary and no report or account has been made within six months preceding the request [*see § 560.548*].

- Granting powers to the trustee [*see § 560.554*].

- Fixing or allowing payment of the trustee's compensation [*see § 560.558*]; or reviewing the reasonableness of the trustee's compensation [*see § 560.548*.5].

- Appointing or removing a trustee [*see §§ 560.540, 560.541*].

- Accepting the resignation of a trustee [*see § 560.557*].

- Compelling redress of a breach of the trust by any available remedy [*see § 560.550*].

- Approving or directing the modification or termination of the trust [*see § 560.580*].

- Approving or directing the combination or division of trusts [*see § 560.581*].

- Amending or conforming the trust instrument in the manner required to qualify a decedent's estate for the charitable estate tax deduction under federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust as required by final regulations and rulings of the United States Internal Revenue Service inany case in which all parties interested in the trust have either agreed in writing to the proposed changes or submitted written disclaimers of interest [*see Prob. Code § 21540* (authority to augment trust to effect intended compliance with *I.R.C. §§ 664* (charitable remainder trust), 2055, 2522 (charitable deductions)); *see also Prob. Code § 21541* (authority to augment trust to effect intended compliance with *I.R.C. §§ 170(f)(2)(B), 2055(e)(2), 2522(c)(2)* (charitable lead trust)); for discussion of those federal statutes, *see § 560.77*].

- Authorizing or directing transfer of a trust or trust property to or from another jurisdiction [*see §§ 560.605 -560.607*].

- Directing transfer of a testamentary trust subject to continuing court jurisdiction from one county to another [*see § 560.608*].

- Approving removal of a testamentary trust from continuing court jurisdiction [*see §§ 560.609, 560.610*].

- Reforming or excusing compliance with the governing instrument of an organization pursuant to *Prob. Code § 16105* [*see* Pub. L. No. 91-172, § 101(l)(3) (private foundations)].

- Determining petitions filed pursuant to *Prob. Code § 15687* and reviewing the reasonableness of compensation for legal services authorized under that section.

- Appointing a practice administrator if a member of the State Bar of California has transferred the economic interest of his or her practice to a trustee and the member is a deceased member under *Prob. Code § 9764* or a disabled member under *Prob. Code § 2468*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsInterpretationEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesRemoval & Resignation

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Chapter 560 TRUSTS: EXPRESS, PUBLIC, CHARITABLE, AND TOTTEN TRUSTS
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49-560 California Forms of Pleading and Practice--Annotated § 560.135

§ 560.135 Commencement of Proceeding

A proceeding under *Prob. Code § 17200 et seq.* is commenced by filing a petition stating facts showing that the petition is authorized under *Prob. Code § 17200 et seq.* and the grounds of the petition [*Prob. Code § 17201*]. The petition must also state the grounds of the petition and the names and addresses of each person entitled to notice of the petition [*Prob. Code § 17201*]. The petition must be in writing, signed by all of the petitioners, and filed with the court clerk, except as provided in *Prob. Code § 1023* [*Prob. Code § 1020*]. If a petitioner, objector, or respondent is absent from the county or for some other cause is unable to sign or verify the petition, the person's attorney may sign or verify the petition unless the person is a fiduciary appointed in the proceeding [*Prob. Code § 1023*]. A petition filed pursuant to the Probate Code must be verified [*Prob. Code § 1021(a)(1)*]. Verification of a document constitutes signature of that document, unless expressly provided to the contrary [*Prob. Code § 1020*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsRequirementsEstate, Gift & Trust LawTrustsAdministration

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49-560 California Forms of Pleading and Practice--Annotated § 560.136

§ 560.136 Dismissal of Petition

The court may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of the trustee or beneficiary [*Prob. Code § 17202*; *see § 560.543*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewEstate, Gift & Trust LawTrustsAdministration

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Chapter 560 TRUSTS: EXPRESS, PUBLIC, CHARITABLE, AND TOTTEN TRUSTS
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49-560 California Forms of Pleading and Practice--Annotated § 560.137

§ 560.137 Notice

[1] In General

Notice in proceedings commenced pursuant to the Trust Law (*Prob. Code § 15000 et seq.*), or notice otherwise required by the Trust Law is governed by *Prob. Code §§ 1200-1265*, except as otherwise provided in the Trust Law [*Prob. Code § 17100*]. However, *Prob. Code §§ 1200-1265* (as enacted by Stats. 1990, ch. 79, § 14) does not apply to the giving of a particular notice when the notice was delivered, mailed, posted, or first published before July 1, 1991, in which case the applicable law in effect before July 1, 1991, continues to apply to the giving of that notice, notwithstanding repeal [*Prob. Code § 1200(c)*].

[2] Notice to Trustees, Beneficiaries, and Attorney General

At least 30 days before the time set for the hearing on the petition, the petitioner must cause notice of the time and place of hearing to be mailed to all of the following persons [*Prob. Code § 17203(a)*]:

- All trustees.

- All beneficiaries, except that if the trust is revocable and the person holding the power to revoke it is competent notice must be given to the person holding the power to revoke and not to the beneficiary [*Prob. Code § 15802*].

- The Attorney General of California, if the petition relates to a charitable trust subject to the jurisdiction of the Attorney General.

The amendment of the provisions of a charitable trust regarding appointment of successor trustees was improper under the *Fourteenth Amendment to the U.S. Constitution* because potential successor trustees under the trust as written were not notified of the proceeding to amend the trust [*Estate of Sigourney v. American Psychoanalytic Ass'n (2001) 93 Cal. App. 4th 593, 604-605, 113 Cal. Rptr. 2d 274]* .

At least 30 days before the time set for hearing on the petition, the petitioner must cause notice of the hearing and a copy of the petition to be served on any person (other than a trustee or beneficiary) whose right, title, or interest would be affected by the petition and who does not receive mailed notice as provided above [*Prob. Code § 17203(b)*]. Service must be effected in the manner required forservice of summons in civil actions [*Prob. Code § 17203(b)*; *see Code Civ. Proc. § 413.10 et seq.* (service of summons in civil actions)]. The court may not shorten the time for service [*Prob. Code § 17203(b)*].

If a person to whom notice otherwise would be given has been deceased for at least 40 days, and no personal representative has been appointed for that person's estate, and if the deceased person's right, title, or interest has not passed to any other person pursuant to the Probate Code rules for disposition of estates without administration [*see Prob. Code § 13000 et seq.*], notice may instead be given to the following persons [*Prob. Code § 17203(c)*]:

- Each heir and devisee of the decedent, and all persons named as executors of the will of the decedent, so far as known to the petitioner.

- Each person serving as guardian or conservator of the decedent at the time of the decedent's death, so far as known to the petitioner.

[3] Special Notice on Written Request of Beneficiary or Creditor

If proceedings involving a trust are pending, a beneficiary of the trust may, in person or by attorney, file with the court clerk where the proceedings are pending a written request stating that the beneficiary desires special notice of the filing of petitions in the proceeding relating to any or all of the purposes described in *Prob. Code § 17200* and giving an address for receiving notice by mail. A copy of the request must be personally delivered or mailed to the trustee or the trustee's attorney. If personally delivered, the request is effective when it is delivered. If mailed, the request is effective when it is received. When the original of the request is filed with the court clerk, it must be accompanied by a written admission or proof of service. A request for special notice may be modified or withdrawn in the same manner as provided for the making of the initial request [*Prob. Code § 17204(a)*].

A creditor of the trust, or a creditor of the trustor if the trust has become irrevocable on the trustor's death, may request special notice in the same manner as a trust beneficiary of any proceeding fixing or allowing payment of the trustee's compensation or reviewing the reasonableness of that compensation [*Prob. Code § 17204(b)(1), (3)*; *see Prob. Code § 17200(b)(9)*]. The request must be accompanied by a verified statement of the creditor's interest [*Prob. Code § 17204(b)(1)*]. A creditor may also petition the court for an order for special notice of certain other specified proceedings involving the trust. The petition may be made by ex parte application, and must include a verified statement of the creditor's interest. It may be served on the trustee or the trustee's attorney by personal delivery or by mail under *Prob. Code § 1215* [*Prob. Code § 17204(b)(2)*].

After serving and filing a request and proof of service pursuant to *Prob. Code § 17204(a)* or *(b)(1)*, the beneficiary or Creditor is entitled to notice pursuant to *Prob. Code § 17203*, except as provided in *Prob. Code § 17204(d)* [*Prob. Code § 17204(c)*]. A creditor whose petition for special notice is granted is also entitled to notice pursuant to *Prob. Code § 17203* [*Prob. Code § 17204(c)*].

A request for special notice made by a beneficiary whose right to notice is restricted by *Prob. Code § 15802* is not effective [*Prob. Code § 17204(d)*].

[4] Special Notice Regarding Future Interests

Notice must be given to a beneficiary, or to a person interested in the trust, with regard to future interests, as follows [

Prob. Code § 15804(a)]:

- When an interest has been limited on any future contingency to persons who will compose a certain class on the happening of a certain event without further limitation, notice must be given to the persons in being who would constitute the class if the event had happened immediately before the commencement of the proceeding or, if there is no proceeding, if the event had happened immediately before notice is given.

- When an interest has been limited to a living person and the same interest, or a share therein, has been further limited on the happening of a future event to the surviving spouse or to persons who are or may be the distributees, heirs, issue, or other kindred of the living person, notice must be given to the living person.

- When an interest has been limited on the happening of any future event to a person, or a class of persons, or both, and the interest, or a share of the interest, has been further limited on the happening of an additional future event to another person, or a class of persons, or both, notice must be given to the person or persons in being who would take the interest on the happening of the first of these events.

If a conflict of interest involving the subject matter of the trust proceeding exists between a person to whom notice is required to be given and a person to whom notice is not otherwise required to be given under *Prob. Code § 15804(a)*, notice must also be given to persons not otherwise entitled to notice under *Prob. Code § 15804(a)* with respect to whom the conflict of interest exists [*Prob. Code § 15804(b)*].

Nothing in *Prob. Code § 15804* affects any of the following [*Prob. Code § 15804(c)*]:

- Requirements for notice to a person who has requested special notice, a person who has filed notice of appearance, or a particular person or entity required by statute to be given notice.

- Availability of a guardian ad litem pursuant to *Prob. Code § 1003*.

As used in *Prob. Code § 15804*, "notice" includes other papers [*Prob. Code § 15804(d)*].

[5] Copy of Petition on Notice of Appearance or Written Request

If a trustee or beneficiary has served and filed either a notice of appearance, in person or by counsel, directed to the petitioner or the petitioner's counsel in connection with a particular petition and proceeding or a written request for a copy of the petition, and has given an address to which notice or a copy of the petition may be mailed or delivered, the petitioner must cause a copy of the petition to be mailed to that person within five days after service of the notice of appearance or receipt of the request [*Prob. Code § 17205*].

[6] Notice to Other Interested Persons

A petitioner or other person required to give notice may cause notice to be given to any person interested in the trust without the need for a court order [*Prob. Code § 17105*].

[7] Additional Notice

If the court determines that the notice otherwise required is insufficient in the particular circumstances, the court may require that further or additional notice, including a longer period of notice, be given [*Prob. Code § 1202*].

[8] Lis Pendens

If a proceeding under the Probate Code affects the title to or the right to possession of real property, notice of the pendency of the proceeding may be filed in the office of the county recorder in the county in which the property is located, in accordance with *Code Civ. Proc. §§ 405-405.61* [*see Prob. Code § 1004*]. A notice of the pendency of the proceeding will protect the interest of the petitioner in the property by giving notice to prospective purchasers and encumbrancers that the petition claims some interest in the property. For further discussion, see Ch. 348, *Lis Pendens* .

[9] Mailing Procedure

Unless otherwise expressly provided, notices or other papers must be mailed according to the following procedures [*Prob. Code § 1215*]:

- If a notice or other paper is required or permitted to be mailed to a person, the notice or other paper must be mailed as provided in *Prob. Code § 1215* or personally delivered as provided in *Prob. Code § 1216* [§ 560.137[10]].

- The notice or other paper must be sent by one of following methods:

  - First-class mail if the person's address is within the United States. First-class mail includes certified, registered, and express mail;

  - Airmail if the person's address is not within the United States.

- The notice or other paper must be deposited for collection in the United States mail, in a sealed envelope, with postage paid, addressed to the person to whom it is mailed.

- The notice or other paper must be addressed to the person at the person's place of business or place of residence, subject to *Prob. Code § 1212* (procedure when address is unknown) [*see* discussion *below*].

- When the notice or other paper is deposited in the mail, mailing is complete and the period of notice is not extended.

Unless the court dispenses with the notice, if the address of the person to whom a notice or other paper is required to be mailed or delivered is not known, notice must be given as the court may require in the manner provided in *Code Civ. Proc. § 413.30* [*Prob. Code § 1212*]. Pursuant to *Code Civ. Proc. § 413.30*, when no provision is made for service, the court in which the action is pending may direct that service be made in a manner that is reasonably calculated to give actual notice to the party to be served and that proof of service be made as prescribed by the court.

When notice is required to be given to the Attorney General, the notice must be mailed to the Attorney General at the office of the Attorney General at Sacramento, California [*Prob. Code § 1209(b)*].

[10] Personal Delivery

If a notice or other paper is required or permitted to be mailed to a person, it may be delivered personally to that person. Personal delivery as provided in *Prob. Code § 1216* satisfies a provision that requires or permits a notice or other paper to be mailed [*Prob. Code § 1216(a)*]. Personal delivery pursuant to *Prob. Code § 1216* is complete when the notice or other paper is delivered personally to the person who is to receive it [*Prob. Code § 1216(b)*].

[11] Proof of Notice

Proof of mailing may be made in the manner prescribed in *Code Civ. Proc. § 1013a* [*Prob. Code § 1261*]. Pursuant to *Code Civ. Proc. § 1013a*, proof of service by mail may be made by one of the following methods [*Code Civ. Proc. § 1013a*]:

- An affidavit setting forth the exact title of the document served and filed in the cause, showing the name and residence or business address of the person making the service, showing that he or she is a resident of or employed in the county where the mailing occurs, that he or she is overthe age of 18 years and not a party to the cause, and showing the date and place of deposit in the mail, the name and address of the person served as shown on the envelope, and also showing that the envelope was sealed and deposited in the mail with the postage on it fully prepaid.

- A certificate setting forth the exact title of the document served and filed in the cause, showing the name and business address of the person making the service, showing that he or she is an active member of the State Bar of California and is not a party to the cause, and showing the date and place of deposit in the mail, the name and address of the person served as shown on the envelope, and also showing that the envelope was sealed and deposited in the mail with the postage on it fully prepaid.

- An affidavit setting forth the exact title of the document served and filed in the cause, showing the name and residence or business address of the person making the service, that he or she is a resident of, or employed in, the county where the mailing occurs, that he or she is over the age of 18 years and not a party to the cause, that he or she is readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service, that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business, the name and address of the person served as shown on the envelope, and the date and place of business where the correspondence was placed for deposit in the United States Postal Service, and that the envelope was sealed and placed for collection and mailing on that date following ordinary business practices. Service made pursuant to *Code Civ. Proc. § 1013a(3)*, on motion of a party served, is presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in the affidavit.

- In case of service by the clerk of a court of record, a certificate by that clerk setting forth the exact title of the document served and filed in the cause, showing the name of the clerk and the name of the court of which he or she is the clerk, and that he or she is not a party to the cause, and showing the date and place of deposit in the mail, the name and address of the person served as shown on the envelope, and also showing that the envelope was sealed and deposited in the mail with the postage on it fully prepaid. This form of proof is sufficient for service of process when the clerk or deputy clerk signing the certificate places the document for collection and mailing on the date shown on the document so as to cause it to be mailed following standard court practices in an envelope sealed and addressed on that date. If the date of postage cancellation or postage meter imprint shown on the envelope is more than one day after the date of deposit for mailing contained in the certificate, any party served may move the court for an order that the service is deemed to have been made on the date following the date of postage cancellation or postage meter imprint [*Code Civ. Proc. § 1013a(4)*].

For discussion and forms regarding *Code Civ. Proc. § 1013a*, see Ch. 518, *Service of Summons and Papers* .

Proof of notice by personal delivery may be made by the affidavit of the person making the delivery showing the time and place of delivery and the name of the person to whom delivery was made [*Prob. Code § 1264*].

Proof of notice, however given, may be made by evidence presented at the hearing [*Prob. Code § 1265*]. If notice of a hearing is required, proof of giving notice of the hearing must be made to the satisfaction of the court at or before the

hearing [*Prob. Code § 1260(a)*]. If it appears to the satisfaction of the court that notice has been regularly given or that the party entitled to notice has waived it, the court shall so find in its order [*Prob. Code § 1260(b)*]. That finding, when the order becomes final, is conclusive on all persons [*Prob. Code § 1260(c)*].

[12] Shortening Time

Unless the particular provision governing the notice of hearing provides that the time for giving notice may not be shortened, the court may, for good cause, shorten the time for giving notice of hearing [*Prob. Code § 1203(a)*]. Unless the particular provision governing the publication of notice of hearing otherwise provides, the court may not shorten the time for publication of notice [*Prob. Code § 1203(b)*].

[13] Continued or Postponed Hearings

If a hearing is continued or postponed, no further notice of the continued or postponed hearing is required unless ordered by the court [*Prob. Code § 1205*].

[14] Waiver of Notice

A person, including a guardian ad litem, guardian, conservator, trustee, or other fiduciary, may waive notice by a writing signed by the person or the person's attorney and filed in the proceeding [*Prob. Code § 1204*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsBeneficiariesSuccessive BeneficiariesEstate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust LawTrustsTrusteesGeneral Overview

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§ 560.138 Orders

The court in its discretion may make any orders and take any other action necessary or proper to dispose of the matters presented by the petition, including appointment of a temporary trustee to administer the trust in whole or in part [*Prob. Code § 17206*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTrusteesAppointment

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49-560 California Forms of Pleading and Practice--Annotated § 560.139

§ 560.139 Appeals

An appeal may be taken from the grant or denial of any final order made under *Prob. Code §§ 17200-17211*, except the following [*Prob. Code § 1304(a)*]:

- Compelling the trustee to submit an account or report acts as trustee to a beneficiary pursuant to *Prob. Code § 17200(b)(7)*.

- Accepting the resignation of a trustee pursuant to *Prob. Code § 17200(b)(11)*.

- Approving removal of a testamentary trust from continuing court jurisdiction pursuant to *Prob. Code § 17200(b)(18)*.

For discussion and forms relating to appeals generally, see Ch. 40, *Appeal: An Overview* , through Ch. 54, *Appeal: California Supreme Court Review* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTrusteesDuties & PowersAccountingEstate, Gift & Trust LawTrustsTrusteesRemoval & Resignation

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49-560 California Forms of Pleading and Practice--Annotated § 560.140

§ 560.140 Appointment of Guardian Ad Litem

The court may, on its own motion or on request of a trustee or other person interested in the trust, appoint a guardian ad litem at any stage of a proceeding to represent the interest of any of the following persons, if the court determines that representation of the interest otherwise would be inadequate [*Prob. Code § 1003(a)*; *see §§ 560.602*]:

- A minor [*see Fam. Code § 6500 et seq.* (minors)];
- An incapacitated person;
- An unborn person;
- An unascertained person;
- A person whose identity or address is unknown;
- A designated class of persons who are not ascertained or are not in being.

If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests [*Prob. Code § 1003(b)*]. The reasonable expenses of the guardian ad litem, including compensation and attorney's fees, shall be determined by the court and paid as the court orders, either out of property of the estate involved or by the petitioner or from any other source that the court orders [*Prob. Code § 1003(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewEstate, Gift & Trust LawConservators & GuardiansGuardians for MinorsEstate, Gift & Trust LawConservators & GuardiansGuardians for Missing &

Undetermined HeirsEstate, Gift & Trust LawTrustsAdministration

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49-560 California Forms of Pleading and Practice--Annotated § 560.141

§ 560.141 Judicial Intervention in Trust Administration

The administration of trusts is intended to proceed expeditiously and free of judicial intervention, subject to the jurisdiction of the court [*Prob. Code § 17209*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministration

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49-560 California Forms of Pleading and Practice--Annotated § 560.142

§ 560.142 Subject Matter Jurisdiction

The superior court that has jurisdiction over the trust pursuant to *Prob. Code §§ 17000-17006* has exclusive jurisdiction of proceedings concerning the internal affairs of trusts [*Prob. Code § 17000(a)*; *David v. Hermann (2005) 129 Cal. App. 4th 672, 680-683, 28 Cal. Rptr. 3d 622* (superior court of county in which trustee resides had exclusive jurisdiction over proceedings challenging validity of trust)]. The department of the superior court that customarily deals with probate matters is intended to exercise the exclusive jurisdiction relating to internal trust affairs provided by *Prob. Code § 17000(a)* [*see Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 717 (1986)]. However, in a superior court that has a probate department, a nonprobate department does not lack subject matter jurisdiction over a probate matter. A probate department has "primary" jurisdiction, and a nonprobate department has "secondary" jurisdiction of probate-related proceedings [*Harnedy v. Whitty (2003) 110 Cal. App. 4th 1333, 1344-1346, 2 Cal. Rptr. 3d 798* (rejecting challenge to subject matter jurisdiction of nonprobate department to determine claim against trustee)].

The superior court that has jurisdiction over the trust pursuant to *Prob. Code §§ 17000-17457* has concurrent jurisdiction of the following [*Prob. Code § 17000(b)*]:

- Actions and proceedings to determine the existence of trusts [*see § 560.547*].
- Actions and proceedings by or against creditors or debtors of trusts [*see § 560.160 et seq. and §§ 560.630, 560.631*].
- Other actions and proceedings involving trustees and third persons [*see § 560.160* et seq.].

In proceedings commenced under the Trust Law, the court is a court of general jurisdiction and has all the powers of the superior court [*Prob. Code § 17001*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent JurisdictionCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsExclusive JurisdictionEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & Against

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49-560 California Forms of Pleading and Practice--Annotated § 560.143

§ 560.143 In Personam Jurisdiction

[1] Trustee

By accepting the trusteeship of a trust having its principal place of administration in California the trustee submits personally to the jurisdiction of the court under the Trust Law [*Prob. Code § 17003(a)*].

[2] Beneficiaries

To the extent of their interests in the trust, all beneficiaries of a trust having its principal place of administration in California are subject to the jurisdiction of the court under the Trust Law [*Prob. Code § 17003(b)*].

[3] Basis Not Inconsistent With Constitutions

The court may exercise jurisdiction in proceedings under the Trust Law on anybasis permitted by *Code Civ. Proc. § 410.10* [*Prob. Code § 17004*]. *Code Civ. Proc. § 410.10* states that a court may exercise jurisdiction on any basis not inconsistent with the California or United States Constitution [*see 1969 Judicial Council Report to the Governor and the Legislature* (1969), Comment to *Code Civ. Proc. § 410.10* (pp 33-34), *Appendix II, Bases of Judicial Jurisdiction* (pp 68-96), reprinted in West's Annotated California Codes, Judicial Council comments to *Code Civ. Proc. § 410.10*]. For further discussion, see Ch. 323, *Jurisdiction: Personal* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsConstitutional LimitsCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Personam ActionsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & Against

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49-560 California Forms of Pleading and Practice--Annotated § 560.144

§ 560.144 Venue

[1] Generally

The proper county for commencement of a proceeding pursuant to the Trust Law is either [*Prob. Code § 17005(a)*]:

- In the case of a living trust, the county where the principal place of administration of the trust is located.

- In the case of a testamentary trust not subject to the continuing jurisdiction of the court, either the county where the decedent's estate is administered or where the principal place of administration of the trust is located.

The principal place of administration of the trust is the usual place where the day-to-day activity of the trust is carried on by the trustee or its representative who is primarily responsible for the administration of the trust [*Prob. Code § 17002(a)*]. If the principal place of administration of the trust cannot be determined under *Prob. Code § 17002(a)*, it is determined as follows [*Prob. Code § 17002(b)*]:

- If the trust has a single trustee, the principal place of administration of the trust is the trustee's residence or usual place of business.

- If the trust has more than one trustee, the principal place of administration of the trust is the residence or usual place of business of any of the cotrustees as agreed on by them or, if not, the residence or usual place of business of any of the cotrustees.

[2] Appointment of Trustee of Living Trust

If a living trust has no trustee, the proper county for commencement of a proceeding for appointing a trustee is the county where the trust property, or some portion of the trust property, is located [*Prob. Code § 17005(b)*].

[3] Application of Code of Civil Procedure

Except as otherwise provided in *Prob. Code § 17005(a)* and *(b)*, the proper county for commencement of a proceeding pursuant to *Prob. Code § 15000 et seq.* is determined by the rules applicable to civil actions generally [*Prob. Code § 17005(c)*]. For example, rules generally governing civil actions would apply if the principal place of administration of a trust is a foreign state, but jurisdiction is proper in California [*see Recommendation Proposing the Trust Law*, 18 Cal. Law Revision Comm'n Reports 721 (1986)].

In civil actions, the venue for a claim against a trustee in the trustee's official capacity, for the payment of money or for the recovery of personal property, is the county that has jurisdiction of the estate that the defendant represents [*see Code Civ. Proc. § 395.1*; *see also Code Civ. Proc. §§ 392* (real property generally), 395 (defendant's residence generally), and § 560.160 et seq.].

[4] Testamentary Trust Subject to Continuing Jurisdiction of Court

If a trust described in *Prob. Code § 17300* continues after distribution of the decedent's estate, the court in which the decedent's estate was administered retains jurisdiction over the trust for any of the purposes specified in *Prob. Code § 17200* [*Prob. Code § 17301*; for discussion of *Prob. Code § 17300, see § 560.145[1]*]. Consequently, venue for testamentary trusts subject to the continuing jurisdiction of the court is only in the county in which the decedent's estate was administered, whereas venue for other testamentary trusts may be established in the county of either the principal place of administration or the estate administration [*compare Prob. Code § 17005*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueSpecial VenueEstate, Gift & Trust LawNonprobate TransfersLiving TrustsEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTestamentary TrustsEstate, Gift & Trust LawTrustsTrusteesAppointment

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49-560 California Forms of Pleading and Practice--Annotated § 560.145

§ 560.145 Trusts Subject to Continuing Court Jurisdiction

[1] Definition

If a trust created by a will continues after distribution of the decedent's estate, the court in which the decedent's estate was administered retains jurisdiction over the trust for the purposes specified in *Prob. Code § 17200* in the following circumstances [*Prob. Code § 17300*]:

- When the will was executed before July 1, 1977, and not incorporated by reference in a will on or after July 1, 1977.

- When the will provides that the trust is subject to the continuing jurisdiction of the superior court. This includes a trust created by will executed before July 1, 1977, that is incorporated by reference in a will thereafter, but that contains a provision making it subject to the continuing jurisdiction of the court [*see Recommendation Proposing the Trust Law*, 18 Cal. Law Revision Comm'n Reports 732 (1986)].

[2] Transfer Between Counties

At any time after final distribution of the decedent's estate, a trust described in *Prob. Code § 17300* may be transferred to a different county in California if the transfer will be in the best interests of the estate, or if economical and convenient administration of the trust will be facilitated by the transfer [*see Prob. Code § 17304(a), (c)*; for discussion of the procedure and a form for a petition for transfer, *see § 560.608*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsIn Rem ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewCivil ProcedureVenueMotions to TransferInterests of JusticeEstate, Gift & Trust LawTrustsAdministration

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49-560 California Forms of Pleading and Practice--Annotated § 560.146

§ 560.146 Removal From Continuing Court Jurisdiction

Trusts created by will executed before July 1, 1977, and not incorporated by reference in a will on or after July 1, 1987, may be removed from continuing jurisdiction of the court [*Prob. Code § 17350*].

If the trustee is a trust company, the trust company is required to remove the trust from continuing court jurisdiction within six months after the trust is initially funded by giving notice to the beneficiaries. Proof of giving the notice is filed with the court that had jurisdiction over the administration of the decedent's estate, but court approval is not required [*see Prob. Code §§ 17351(a), (c)* (removal when trustee is trust company), 17353 (removal when trust company is successor trustee); *see also Prob. Code §§ 83* (trust company defined), 15804 (notice regarding future interests) and § 560.137[4]].

If the trustee is not a trust company, the trust may be removed from continuing court jurisdiction only with approval of the court on the trustee's petition. The court may receive testimony from any interested person at the hearing. If the petition is granted, the trustee must give notice to each beneficiary and file proof of service pursuant to *Prob. Code § 17351*. If it is denied, the trust continues to be administered under *Prob. Code §§ 17300-17304* [*see Prob. Code § 17352* and §§ 560.609, 560.610].

After a trust is removed from continuing court jurisdiction pursuant to *Prob. Code §§ 17350-17354*, neither a change in trustees nor any other event causes the trust to be subject to continuing court jurisdiction under *Prob. Code §§ 17300-17304* [*Prob. Code § 17354*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral OverviewEstate, Gift & Trust LawTrustsAdministration

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49-560 California Forms of Pleading and Practice--Annotated § 560.147

§ 560.147 Transfer of Trust to Another Jurisdiction

[1] Applicable Law

The court may make an order for the transfer of the place of administration of a trust or the transfer of some or all of the trust property to a jurisdiction outside California as provided in *Prob. Code §§ 17400-17405* [*Prob. Code § 17401(a)*]. Except as otherwise provided in *Prob. Code §§ 17400-17405*, proceedings under *Prob. Code §§ 17400-17405* are governed by *Prob. Code §§ 17000-17457* (judicial proceedings concerning trusts) [*Prob. Code § 17401(b)*].

[2] Trusts Subject to Transfer

The procedure to transfer a trust to another jurisdiction under *Prob. Code §§ 17400-17405* applies to all of the following [*Prob. Code § 17400(a)*]:

- A trust that is subject to the Trust Law [see *Prob. Code § 82* (definition of trust)].
- A trust subject to *Prob. Code §§ 6320-6330* (insurance or employee benefit trusts).
- Any other trust to which the provisions of *Prob. Code §§ 17400-17405* apply.

Prob. Code §§ 17400-17405 does not prevent the transfer of the place of administration of a trust or of trust property to another jurisdiction by any other available means [*Prob. Code § 17400(b)*].

[3] Procedure

The court may order the trustee to transfer the trust property, or to transfer the place of administration of the trust to the other jurisdiction if, after hearing on petition [*see Prob. Code § 17404*]:

- The transfer will promote the best interests of the trust and those interested in it;

- The transfer will not violate the trust instrument;

- Any new trustee is qualified, willing, and able to administer the trust or trust property under the trust instrument.

For forms for use to transfer a trust to a jurisdiction outside California, *see §§ 560.605 -560.606*.

[4] Discharge of Trustee

If a transfer is ordered under *Prob. Code §§ 17400-17405*, the court may direct the manner of transfer and impose terms and conditions as may be just, including, but not limited to, a requirement for the substitution of a successor trustee in any pending litigation in California. The delivery of property in accordance with the order of the court is a full discharge of the trustee in relation to all property embraced in the order [*Prob. Code § 17405*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferInterests of JusticeEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTrusteesRemoval & Resignation

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49-560 California Forms of Pleading and Practice--Annotated § 560.148

§ 560.148 Transfer of Trust From Foreign Jurisdiction

[1] In General

The place of administration of a trust that is, or a portion of which is, administered in a jurisdiction outside California, may be transferred to Californiaas provided in *Prob. Code §§ 17450-17457*. The same procedure may be used to transfer some or all of the trust property in another jurisdiction to a trustee in California [*see Prob. Code §§ 17450(a), 17451(a)*; *see also Prob. Code § 82* (definition of trust)]. *Prob. Code §§ 17450-17457* does not prevent the transfer of the place of administration of a trust or of trust property to California by any other available means [*see Prob. Code § 17450(b)*]. Consequently, the procedure for transfer under *Prob. Code §§ 17450-17457* applies to trusts administered in foreign countries as well as those administered in other states [*see Recommendation Proposing the Trust Law*, 18 Cal. Law Revision Comm'n Reports 741 (1986)]. For a petition to transfer administration or property of a trust from a foreign jurisdiction to California, *see § 560.607*.

[2] Grounds for Transfer

The court may, in its discretion, grant the petition and issue an order accepting transfer of trust property or the place of administration of the trust to California and appoint a trustee to administer the trust in California, if, after hearing, all of the following appear to the court [*Prob. Code § 17455(a)*]:

- The transfer of the trust property to a trustee in California, or the transfer of the place of administration of the trust to California, will promote the best interests of the trust and those interested in it, taking into account the interest in the economical and convenient administration of the trust.

- The transfer will not violate the trust instrument.

- The trustee appointed by the court to administer the trust in California, and to whom the trust property is to be transferred, is qualified, willing, and able to administer the trust or trust property under the trust instrument.

- The proper court in the other jurisdiction has approved the transfer if approval is necessary under the law of the other jurisdiction.

[3] Venue to Transfer Trust

If the petition requests that a resident of California be appointed trustee, the petition must be filed in the court of the county where the proposed principal place of administration of the trust pursuant to *Prob. Code § 17002* is located [*Prob. Code § 17452(a)*; *see § 560.144*].

If the petition requests that only a nonresident of California be appointed trustee, the petition must be filed in the court of the county where either (1) any beneficiary resides or (2) a substantial portion of the trust property to be transferred is located or will be located [*Prob. Code § 17452(b)*].

[4] Notice and Hearing of Transfer

At least 30 days before the time set for the hearing on the petition, the petitioner must cause notice of the time and place of the hearing to be mailed to each of the persons named in the petition at their respective addresses as stated in the petition [*Prob. Code § 17454(a)*]. Any person interested in the trust, as trustee, beneficiary, or otherwise, may appear and file written grounds in opposition to the petition [*Prob. Code § 17454(b)*; *see, e.g., Prob. Code §§ 15802* (notice to beneficiary of revocable trust), 1215 (manner of mailing), 1216 (personal delivery instead of mailing), 17203(c) (notice to Attorney General)].

[5] Orders Regarding Transfer

The court may make an order accepting the transfer of the place of administration of a trust from another jurisdiction to California or the transfer of some or all of the trust property in another jurisdiction to a trustee in California as provided in *Prob. Code §§ 17450-17457* [*Prob. Code § 17451(a)*].

Except as otherwise provided in *Prob. Code §§ 17450-17457*, proceedings under *Prob. Code §§ 17450-17457* are governed by *Prob. Code §§ 17000-17457* (judicial proceedings concerning trusts) [*Prob. Code § 17451(b)*].

If the court grants the petition under *Prob. Code § 17455(a)*, the court must require the trustee to give a bond, if necessary under the law of the other jurisdiction or of California, and may require bond as provided in *Prob. Code § 15602* [*Prob. Code § 17455(b)*; *see § 560.73*].

[6] Conditional Order Accepting Transfer

If appropriate to facilitate transfer of the trust property or the place of administration of a trust to California, the court may issue a conditional order appointing a trustee to administer the trust in California and indicating that transfer to California will be accepted if transfer is approved by the proper court of the other jurisdiction [*Prob. Code § 17456*]. Therefore, a California court can indicate its willingness to accept jurisdiction over a trust administered in another jurisdiction if the law of the other jurisdiction requires appointment of a trustee in the proposed new place of administration before approving transfer [*see Recommendation Proposing the Trust Law*, 18 Cal. Law Revision Comm'n Reports 745 (1986)].

[7] Administration of Transferred Trust

A trust transferred to California pursuant to *Prob. Code §§ 17450-17457* must be administered in the same manner as a trust of that type created in California. This provision, however, does not affect the validity of a trust or the construction of the beneficial provisions of a trust transferred to California [*Prob. Code § 17457*; *see, e.g.,* Gov. Code § 12580 et

seq., Prob. Code § 15004 (charitable trusts)]. It should be noted that *Prob. Code § 17457* is not intended to provide choice of law rules. A trust that was subject to judicial supervision in another statewill not be subject to continuing court jurisdiction under *Prob. Code §§ 17300-17304* unless the trust instrument so provides and the court so determines in the order accepting transfer to California [*see Recommendation Proposing the Trust Law*, 18 Cal. Law Revision Comm'n Reports 745 (1986)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferInterests of JusticeEstate, Gift & Trust LawTrustsAdministration

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49-560 California Forms of Pleading and Practice--Annotated §§ 560.149-560.159

[Reserved]

§§ 560.149[Reserved]

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49-560 California Forms of Pleading and Practice--Annotated § 560.160

§ 560.160 Governing Statutes

Liability of a trustee to third persons generally is governed by *Prob. Code §§ 18000-18005*. The personal liability of a trustee signing a negotiable instrument is governed by *Com. Code §§ 1201(b)(33)* and *3402(b)(2)*. Protection of a third person who transacts with a trustee is governed by *Prob. Code §§ 18100-18104*. Recordation of an affidavit of change of trustee when title to an interest in real property is affected by the change is governed by *Prob. Code §§ 18105-18108*. A trustee's standing to bring an action against a third person is governed by *Code Civ. Proc. § 369*. Recovery of costs by a trustee in a plenary action is governed by *Code Civ. Proc. § 1026*.

The rights of a settlor's creditor against the property of a revocable trust are governed by *Prob. Code § 18200*. The settlor whose trust property is subject to the claims of creditors is entitled to all exemptions provided under *Code Civ. Proc. § 703.010 et seq.* (exemptions under the Enforcement of Judgments Law) [*Prob. Code § 18201*]. *Prob. Code § 15304* governs the subjection of trust property to claims by transferees and creditors when the settlor is the beneficiary. Enforcement of money judgments against a trust beneficiary's interest is governed by *Code Civ. Proc. §§ 695.030*, *699.720*, and *709.010*. Restrictions on voluntary and involuntary transfers of a benficiary's interest in a trust (spendthrift trusts) and exceptions to the restrictions are governed by *Prob. Code §§ 15300-15309*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & Against

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49-560 California Forms of Pleading and Practice--Annotated §§ 560.161-560.179

[Reserved]

§§ 560.161[Reserved]

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49-560 California Forms of Pleading and Practice--Annotated § 560.180

§ 560.180 Personal Liability of Trustee to Third Persons

[1] Contract

A trustee is not personally liable on a contract properly entered into on or after July 1, 1987, in the trustee's fiduciary capacity in the course of administration of the trust, unless the trustee fails to reveal the trustee's representative capacity or identify the trust in the contract, except as otherwise provided in the contract or in *Prob. Code §§ 18000-18005* [*Prob. Code § 18000*].

The personal liability of a trustee on a contract entered into before July 1, 1987, is governed by prior law and not by *Prob. Code § 18000* [*Prob. Code § 18000(b)*]. Former law is the reverse of the law under *Prob. Code § 18000* [*see Recommendation Proposing the Trust Law*, 18 Cal. Law Revision Comm'n Reports 746 (1986)]. Under former law, a trustee is personally liable on a contract unless the contract expressly states that the trustee is not liable [*Goldwater v. Oltman (1930) 210 Cal. 408, 426, 292 P. 624]* . This is the rule even if the terms of the trust exempt the trustee from personal liability [*see Zimmer Constr. Co. v. White (1935) 8 Cal. App. 2d 672, 674, 47 P.2d 1087*].

[2] Obligations Arising From Ownership or Control of Property

A trustee is personally liable for obligations arising from ownership or control of trust property only if the trustee is personally at fault [*Prob. Code § 18001*]. A trustee incurs personal liability by either intentionally or negligently acting or failing to act [*Haskett v. The Villas at Desert Falls (2001) 90 Cal. App. 4th 864, 877-878, 108 Cal. Rptr. 2d 888* ; *see Recommendation Proposing the Trust Law*, 18 Cal. Law Revision Comm'n Reports 747 (1986)].

[3] Torts

A trustee is personally liable for torts committed in the course of administration of the trust only if the trustee is personally at fault [*Prob. Code § 18002*]. A trustee incurs personal liability by committing a tort either intentionally or negligently [*Haskett v. The Villas at Desert Falls (2001) 90 Cal. App. 4th 864, 877-878, 108 Cal. Rptr. 2d 888* ; *see*

Recommendation Proposing the Trust Law, 18 Cal. Law Revision Comm'n Reports 747 (1986)]. For discussion of general principles of negligence, see the Ch. 380, *Negligence*.

[4] Negotiable Instruments

A trustee who signs his or her own name to a negotiable instrument may incur personal liability on the instrument [*Com. Code § 1201(b)(33)* (representative includes trustee); *Com. Code § 3402(b)(2)* (liability of representative)]. If the form of the signature does not show unambiguously that the signature is made in a representative capacity, or if the trust (or other represented person) is not identified in the instrument, the trustee is liable on the instrument to a holder in due course that took the instrument without notice that the trustee was not intended to be liable on the instrument [*Com. Code § 3402(b)(2)*]. With respect to any other person, the trustee is liable on the instrument unless the trustee proves that the original parties did not intend the trustee to be liable on the instrument[*Com. Code § 3402(b)(2)*]. The trustee is not liable, however, for signing his or her name as drawer of a check that is payable from a trust account if the account is identified as a trust account on the check and if the trustee's signature is an authorized signature on the account [*Com. Code § 3402(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Negotiable Instruments (Article 3)Party LiabilitiesSignaturesContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstTortsIntentional TortsGeneral OverviewTortsNegligenceDutyGeneral Overview

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49-560 California Forms of Pleading and Practice--Annotated § 560.181

§ 560.181 Personal Liability of Dissenting Cotrustee

A cotrustee who does not join in exercising a power held by three or more cotrustees is not liable to third persons for the consequences of the exercise of the power [*Prob. Code § 18003(a)*].

A dissenting cotrustee who joins in an action at the direction of the majority cotrustees is not liable to third persons for the action if the dissenting cotrustee expresses the dissent in writing to any other cotrustee at or before the time the action is taken [*Prob. Code § 18003(b)*].

Prob. Code § 18003 does not excuse a cotrustee from liability for failure to discharge the cotrustee's duties as a trustee [*Prob. Code § 18003(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstEstate, Gift & Trust LawTrustsTrusteesMultiple Trustees

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49-560 California Forms of Pleading and Practice--Annotated § 560.182

§ 560.182 Liability of Trust; Naming Trustee as Defendant in Representative Capacity

The trust is liable for authorized actions of the trustee [*see Prob. Code § 18004*]. A claim based on a contract entered into by a trustee in the trustee's representative capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administration of the trust may be asserted against the trust by proceeding against the trustee in the trustee's representative capacity, whether or not the trustee is personally liable on the claim [*Prob. Code § 18004*]. However, third parties may proceed against the trustee's personal assets only if the trustee is personally liable on the claim [*Haskett v. The Villas at Desert Falls (2001) 90 Cal. App. 4th 864, 880, 108 Cal. Rptr. 2d 888]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesCapacity of PartiesTrusteesEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & Against

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49-560 California Forms of Pleading and Practice--Annotated § 560.183

§ 560.183 Determining Liability of Trustee Versus Liability of Estate

The question of liability between the trust estate and the trustee personally may be determined in a proceeding under *Prob. Code § 17200* [*Prob. Code § 18005*]. Under *Prob. Code § 18005*, ultimate assessment of liability between a trustee and the estate need not be determined before the third person's claim can be satisfied. It is permissible, and possibly preferable, for judgment to be entered against the trust without determining the trustee's ultimate liability until later. If judgment is entered against the trustee individually, the trustee's right to reimbursement may be settled informally with the beneficiaries or in a separate proceeding in the probate court [*see Prob. Code § 15684* (indemnity)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & Against

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49-560 California Forms of Pleading and Practice--Annotated § 560.184

§ 560.184 Actions Involving Third Persons

[1] Concurrent Jurisdiction of Probate Court

The superior court that has jurisdiction over the trust pursuant to *Prob. Code §§ 17000-17457* has concurrent jurisdiction of actions and proceedings by or against creditors or debtors of trusts, and other actions and proceedings involving trustees and third persons [*Prob. Code § 17000(b)*]. Moreover, in proceedings commenced pursuant to the Trust Law, the court is a court of general jurisdiction and has all the powers of the superior court [*Prob. Code § 17001*]. *Prob. Code § 17001* rejects and supersedes the holding in *Copley v. Copley (1978) 80 Cal. App. 3d 97, 104-109, 145 Cal. Rptr. 437* , which confined probate court power to *in rem* jurisdiction over the trust, thereby precluding jurisdiction over third parties, regardless whether the issues concerned the affairs of the trust [*see Recommendation Proposing the Trust Law*, 18 Cal. Law Revision Comm'n Reports 718 (1986); for discussion of jurisdiction and other procedural matters, see *§ 560.130* et seq.].

However, a third party does not have standing to file a petition under the Trust Law, and therefore, the manner in which third-party matters might be brought before a court that has jurisdiction over petition proceedings under *Prob. Code § 17200* is unclear [*see Prob. Code §§ 15800* (standing of person having power to revoke), 17200 (standing generally of trustee and beneficiary); *see also Estate of Bowles (2008) 169 Cal. App. 4th 684, 695, 87 Cal. Rptr. 3d 122* (court had concurrent jurisdiction over civil complaint as it was related to beneficiary's petition under *Prob. Code § 17000*)]. It is possible that a petitioner, for example, a trustee or beneficiary, may file papers in the nature of a civil interpleader on the theory that adjudication of third-party issues would avoid multiplicity of litigation [*see, e.g., Code Civ. Proc. § 386(a)* and Ch. 314, *Interpleader*]. It is further feasible that a third party having an interest regarding the internal affairs of the trust or a claim against the trustee, may file papers in a pending petition proceeding, requesting the court to determine the appropriate matters. In any case, counsel should contact the local court for preferred procedure and guidance in this area.

[2] Third Person's Plenary Action Regarding Trust or Trustee

One method by which a third person may obtain adjudication of an action involving a trust or a trustee is by filing a plenary action under the relevant provisions of the Code of Civil Procedure [*see, e.g., Code Civ. Proc. § 425.10* (complaint)]. The action must name the trustee as defendant. An action naming the trust itself as the defendant is demurrable, because an ordinary express trust is not an entity separate from its trustees [*Lazar v. Estate of Lazar (1962) 208 Cal. App. 2d 554, 557 25 Cal. Rptr. 354* (allowing amendment of the complaint naming decedent's estate as defendant); *see Prob. Code § 18004* (claims against trust asserted by suing trustee in trustee's representative capacity)].

A third person who obtains a money judgment against a beneficiary may petition the probate court for enforcement against the trust property [*see* Code Civ.Proc. § 709.010; *see also § 560.220[3]*].

When the trustee is sued in the trustee's representative capacity on a claim for the payment of money or for the recovery of personal property, the county that has jurisdiction of the trust estate is the proper county for the trial of the action [*Code Civ. Proc. § 395.1*]. For discussion of general venue provisions that apply under other circumstances, see Ch. 571, *Venue* .

For discussion of subject matter jurisdiction generally, see Ch. 324, *Jurisdiction: Subject Matter* . For complaint forms that may be adapted for use against a trust and/or its trustee, see the articles relating to the underlying cause of action, such as Ch. 140, *Contracts*, Ch. 380, *Negligence*, or Ch. 421, *Premises Liability*.

[3] Trustee's Plenary Action Against Third Person

The trustee is the real party in interest for purposes of bringing a claim on the trust's behalf [*O'Flaherty v. Belgum (2004) 115 Cal. App. 4th 1044, 1062, 9 Cal. Rptr. 3d 286]* . The trustee may bring suit on these claims without joining as parties the beneficiaries of the trust [*see Code Civ. Proc. § 369(a)(2)*]. This general rule of standing, however, is subject to exceptions.

For example, the beneficiaries of a trust have standing to bring a claim of misfeasance by the trustee and third parties who participated in or benefited from the trustee's breach of trust. The action may be filed against the trustee alone, the third parties alone, or both the trustee and the third parties [*Harnedy v. Whitty (2003) 110 Cal. App. 4th 1333, 1339, 2 Cal. Rptr. 3d 798]* . A beneficiary lacks standing to sue only if the beneficiary is not asserting misfeasance or breach of trust by the trustee, but is, in effect, attempting to step into the trustee's shoes and enforce the trust agreement directly [*Harnedy v. Whitty (2003) 110 Cal. App. 4th 1333, 1342, 2 Cal. Rptr. 3d 798]* .

Individuals who are both trustees and beneficiaries of a trust may sue in their own names without mentioning the trust [*Hassoldt v. Patrick Media Group, Inc. (2000) 84 Cal. App. 4th 153, 170-171, 100 Cal. Rptr. 2d 662]* .

Although a trustee generally is the proper party to bring an action to protect the trust, the trustee cannot appear in pro per in that action, but may only appear through counsel [*Hansen v. Hansen (2003) 114 Cal. App. 4th 618, 621-622, 7 Cal. Rptr. 3d 688]* .

A successor trustee has standing to assert a professional negligence claim against attorneys retained by a prior trustee to provide tax assistance for the benefit of the trust [*Borissoff v. Taylor & Faust (2004) 33 Cal. 4th 523, 529-535, 15 Cal. Rptr. 3d 735, 93 P.3d 337]* .

[4] Beneficiary's Remedies for Acts of Third Person

Because beneficiaries have no legal title to the trust assets, they are not the real parties in interest, and in the usual case they may not sue third parties in the name of the trust [*Saks v. Daimon Raike & Co. (1992) 7 Cal. App. 4th 419, 427, 8 Cal. Rptr. 2d 869]* . This is not the case, however, if the trustee wrongfully refuses to bring an action against a third person. Under those circumstances, the beneficiary may have a right of action, but only if the beneficiary proves that the

trustee should have brought suit against the third party but unreasonably or negligently failed to do so [*Pillsbury v. Karmgard (1994) 22 Cal. App. 4th 743, 756-758, 27 Cal. Rptr. 2d 491]* . When a beneficiary sues a third party under these circumstances, both the third party and the trustee must be named as defendants [*Pillsbury v. Karmgard (1994) 22 Cal. App. 4th 743, 756-758* ; *Saks v. Daimon Raike & Co. (1992) 7 Cal. App. 4th 419, 427-428, 8 Cal. Rptr. 2d 869* ; *Triplett v. Williams (1969) 269 Cal. App. 2d 135, 137-138, 74 Cal. Rptr. 594]* .

The beneficiary also may bring an action against a third party when the action is for breach of trust and the third party participated with the trustee in the breach. In these circumstances, both the trustee and the third party should be named as defendants in the action [*Pierce v. Lyman (1991) 1 Cal. App. 4th 1093, 1098-1106, 3 Cal. Rptr. 2d 236* ; *Saks v. Daimon Raike & Co. (1992) 7 Cal. App. 4th 419, 428, 8 Cal. Rptr. 2d 869* ; *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1998) 68 Cal. App. 4th 445, 80 Cal. Rptr. 2d 329]* . However, a trust beneficiary was held to have standing to bring an action against attorneys who actively participated in the trustee's breach of trust even though the then-deceased trustee's estate was not also named as a defendant in the action. It was enough to allege that the successor cotrustee had controlled and directed the trustee to make improper investments on behalf of the trust, and that the attorneys had actively participated in the breaches of trust [*Wolf v. Mitchell, Silverberg & Knupp (1999) 76 Cal. App. 4th 1030, 1038-1040, 90 Cal. Rptr. 2d 792]* . In addition, a third party must be shown to have knowledge of the unauthorized nature of the trustee's actions to be liable for breach of trust [*Vournas v. Fidelity Nat'l Title Ins. Co. (1999) 73 Cal. App. 4th 668, 86 Cal. Rptr. 2d 490* ; *see Prob. Code §§ 18100, 18101*].

A trust beneficiary has standing to sue a fellow beneficiary, under either a third-party participant theory or a constructive trustee theory, despite appointment of a successor trustee, if the fellow beneficiary aided the trustee in transferring property out of the trust in breach of the trustee's duties [*King v. Johnston (2009) 178 Cal. App. 4th 1488, 1502, 101 Cal. Rptr. 3d 269]* .

Before commencing any suit against a third party, the beneficiary should carefully consider the effect that the Probate Code rules defining the rights, duties, and powers of beneficiaries and trustees could have on the suit [*Saks v. Daimon Raike & Co. (1992) 7 Cal. App. 4th 419, 428, 8 Cal. Rptr. 2d 869]* . *Prob. Code § 16401*, for example, provides that the trustee generally is not liable to beneficiaries for the acts or omissions of agents [*Prob. Code § 16401(a)*]. However, the trustee may be liable for an agent's acts or omissions in specified circumstances. For example, the trustee may be liable if the trustee directs the agent's acts, if the trustee delegates to the agent authority that the trustee is under a duty not to delegate, if the trustee does not use reasonable prudence in the selection or retention of the agent, if the trustee does not periodically review the agent's overall performance and compliance with the terms of the delegation, ifthe trustee conceals the agent's acts, or if the trustee knows of a wrongful act or omission by the agent and does not take reasonable steps to compel the agent to redress the wrong [*Prob. Code § 16401(b)*]. Further, the Probate Code provides remedies for a trustee's breach of trust [*see Prob. Code §§ 16420, 16421*]. To the extent that the Probate Code provides remedies for the actions of a trustee or an agent of the trustee, the Probate Code remedies must be followed, and civil suits are not appropriate [*see Saks v. Damon Raike & Co. (1992) 7 Cal. App. 4th 419, 428-430, 8 Cal. Rptr. 2d 869]* . For discussion of the liability of trustees for acts of agents, see *§ 560.78*.

[5] Double Damages for Wrongfully Taking, Concealing, or Disposing of Trust Property

A person who, in bad faith, has wrongfully taken, concealed, or disposed of property in or belonging to the trust is liable for twice the value of the property. Damages may be recovered in an action by the trustee for the benefit of the trust [*Prob. Code § 16249(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsGeneral JurisdictionCivil ProcedurePartiesCapacity of PartiesTrusteesEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust

LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & Against

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49-560 California Forms of Pleading and Practice--Annotated § 560.185

§ 560.185 Recovery of Costs

In any action prosecuted or defended by a trustee of an express trust, or by a person expressly authorized by statute, costs may be recovered as in an action by or against a person prosecuting or defending in the person's own right. However, such costs must, by the judgment, be made chargeable only on the estate, fund, or party represented, unless the court directs the costs to be paid by the fiduciary personally for mismanagement or bad faith in the action or defense [*Code Civ. Proc. § 1026*; *see Rudnick v. Rudnick (2009) 179 Cal. App. 4th 1328, 1335, 102 Cal. Rptr. 3d 493* (court had equitable power to charge reasonable and necessary fees incurred by trustee in opposing unfounded proceeding brought by trust beneficiary against that beneficiary's share of trust estate); for discussion of costs, *see* Ch. 174, *Costs and Attorney's Fees*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & Against

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49-560 California Forms of Pleading and Practice--Annotated §§ 560.186-560.199

[Reserved]

§§ 560.186[Reserved]

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49-560 California Forms of Pleading and Practice--Annotated § 560.200

§ 560.200 Third Person Transacting With Trustee in Good Faith

With respect to a third person dealing with a trustee or assisting a trustee in the conduct of a transaction, if the third person acts in good faith and for a valuable consideration and without actual knowledge that the trustee is exceeding the trustee's powers or improperly exercising them [*Prob. Code § 18100*]:

- The third person is not bound to inquire whether the trustee has power to act or is properly exercising a power and may assume without inquiry the existence of a trust power and its proper exercise; and

- The third person is fully protected in dealing with or assisting the trustee, just as if the trustee has and is properly exercising the power the trustee purports to exercise.

The protection afforded by *Prob. Code § 18100* is limited by *Com. Code § 3307* in the case of persons taking negotiable instruments from fiduciaries, which includes trustees. *Com. Code § 3307*, which is discussed in Ch. 385, *Negotiable Instruments* , and is the basis for a complaint form in Ch. 95, *Banks, Deposits, and Checks* [*see* Ch. 95, *Banks, Deposits, and Checks* , *see § 560.650*], specifies certain actions, such as taking an instrument in payment of a debt the taker knows to be the personal debt of the fiduciary, that impart notice of breach of fiduciary duty [*see Com. Code § 3307(b)(2)(A)*].

A third person who acts in good faith is not bound to ensure the proper application of trust property paid or delivered to the trustee [*Prob. Code § 18101*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBona Fide PurchasersEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersSalesReal Property LawPriorities & RecordingBona

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49-560 California Forms of Pleading and Practice--Annotated § 560.201

§ 560.201 Certification of Trust

A trustee may satisfy third persons who wish to deal with the trustee that the trustee has power to act in behalf of the trust by executing a certification of trust pursuant to *Prob. Code § 18100.5*. Such a certification may be used to establish the existence and terms of the trust without the necessity of providing a copy of the trust instrument. A certification of trust may be issued on the trustees own initiative, or on request of any person with whom the trustee is dealing [*Prob. Code § 18100.5(a)*].

A certification issued pursuant to *Prob. Code § 18100.5* must be in the form of an acknowledged declaration signed by the trustee or, if there are co-trustees, by all of the acting co-trustees [*Prob. Code § 18100.5(c)*]. It may contain the following information [*Prob. Code § 18100.5(b)*]:

- The existence of the trust and date of execution of the trust instrument.
- The identity of the settlor or settlors and the currently acting trustee or trustees of the trust.
- The powers of the trustee.
- The revocability or irrevocability of the trust and the identity of any person holding any power to revoke the trust.
- When there are multiple trustees, the signature authority of the trustees, indicating whether all or less than all of the currently acting trustees are required to sign in order to exercise various powers of the trustee.
- The trust identification number, whether a social security number or an employer identification number.

- The manner in which title to trust assets should be taken.
- The legal description of any real property interest held in the trust.

The certification must contain a statement that the trust has not been revoked,modified, or amended in any way that would cause the representations contained in it to be incorrect. It may be recorded in the office of the county recorder in the county where all or a portion of the real property held in the trust is located [*Prob. Code § 18100.5(c)*].

A person whose interest is, or may be, affected by the certification of trust may require the trustee offering or recording the certification of trust to provide copies of excerpts from the original trust documents, any amendments to these documents, and any other documents that designate, evidence, or pertain to the succession of the trustee or confer on the trustee the power to act in the pending transaction, or both. The trustee need not, however, provide the dispositive provisions of the trust or the entire trust and amendments to the trust [*Prob. Code § 18100.5(e)*]. The certification of trust may, but is not required to, include excerpts from the original trust documents, any amendments to these documents, and any other documents that evidence or pertain to the succession of successor trustees. The certification of trust is not required to contain the dispositive provisions of the trust that set forth the distribution of the trust estate [*Prob. Code § 18100.5(d)*].

A certification of trust provides some protection to persons who deal with trustees. For example, a person who acts in reliance upon a certification of trust without actual knowledge that it contains incorrect representations cannot be held liable to any other person for doing so. Further, a person dealing with a trust is entitled to rely on the information contained in a certification of trust without the necessity of inquiring as to its truth or accuracy. Finally, any transaction (and any lien created by a transaction) entered into by a trustee and a person acting in reliance on a certification of trust will be enforceable against the trust assets [*Prob. Code § 18100.5(f)*].

Failure to demand a certification of trust under *Prob. Code § 18100.5* will not affect the protection provided by *Prob. Code § 18100* [*see* discussion in *§ 560.202*], and no inference as to whether a person has acted in good faith may be drawn from the failure to demand such a certification [*Prob. Code § 18100.5(g)*].

A certification of trust will provide no protection from liability if the person dealing with the trustee has actual knowledge that information contained in the certification is not correct. However, actual knowledge will not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying on the trust certification [*Prob. Code § 18100.5(f)*].

Except when requested by a beneficiary or in the context of litigation concerning the trust, any person who makes a demand for the trust documents, in addition to a certification of trust, to prove facts set forth in the certification acceptable to the third party is liable for damages including attorney's fees incurred as a result of the refusal to accept the certification of trust in place of the requested documents, if the court determines that the person acted in bad faith in requesting the documents [*Prob. Code § 18100.5(h)*].

Any person may record a certification of trust that relates to an interest in real property in the office of the county recorder in the county where all or a portion of the property is located. The recorded certification is a public record of the real property. A certification of trust need not be recorded in conjunction with the recordation of a transfer of title of real property involving a trust [*Prob. Code § 18100.5(i)*].

For a certification of trust that meets the requirements of *Prob. Code § 18100.5*, see California Wills and Trusts Forms, Div. VIII, MISC 17 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBona Fide PurchasersEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersSalesReal Property LawPriorities & RecordingBona Fide Purchasers

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49-560 California Forms of Pleading and Practice--Annotated § 560.202

§ 560.202 Third Person Transacting With Former Trustee

If a third person acting in good faith and for a valuable consideration enters into a transaction with a former trustee without knowledge that the person is no longer a trustee, the third person is fully protected just as if the former trustee were still a trustee [*Prob. Code § 18102*]. *Prob. Code § 18102* is intended to restate former *Civ. Code § 2281* ("bona fide transaction" with former trustee binding on all parties) without substantive change, and was written to conform with the language of *Prob. Code § 18100* [*see Recommendation Proposing the Trust Law*, 18 Cal. L. Revision Comm'n Reports 749 (1986)].

A bona fide transaction is one in which the parties operate in good faith, honesty, openness, and sincerity, without deceit or fraud. Therefore, the statute makes binding any transaction entered into without fraud, bad faith, or collusion, between a discharged trustee and a purchaser without actual knowledge of the fact of discharge. Consequently, "bona fide transaction" within the meaning of the statute is not synonymous with "bona fide purchaser," and the parties to a bona fide transaction are not held to both actual and constructive notice, as is a bona fide purchaser [*Leach v. Home Savings & Loan Assn. (1986) 185 Cal. App. 3d 1295, 1301-1302* , 230 Cal. Rtpr. 553 (interpreting former *Civ. Code § 2281*; *now see Prob. Code § 18102*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersSalesEstate, Gift & Trust LawTrustsTrusteesMultiple Trustees

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49-560 California Forms of Pleading and Practice--Annotated § 560.203

§ 560.203 Reliance on Record Title to Real Property

If an express trust relating to real property is not contained or declared in the grant to the trustee, or in an instrument signed by the trustee and recorded in the same office with the grant to the trustee, the grant is deemed absolute in favor of a person dealing with the trustee in good faith and for a valuable consideration [*Prob. Code § 18103*; *see also Civ. Code § 1214* (priority recording of subsequent conveyance)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersSalesReal Property LawPriorities & RecordingBona Fide Purchasers

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49-560 California Forms of Pleading and Practice--Annotated § 560.204

§ 560.204 Presumption Regarding Undisclosed Beneficiary

If an interest, lien, or encumbrance on real property is conveyed, created, or affected by an instrument in favor of a person in trust, but no beneficiary is indicated in the instrument, it is presumed that the person holds the interest, lien, or encumbrance absolutely and free of the trust. This is a presumption affecting the burden of proof. In an action or proceeding involving the interest, lien, or encumbrance instituted against the person, the person is deemed the only necessary representative of the undisclosed beneficiary, the original grantor or settlor, and anyone claiming under them. A judgment is binding on and conclusive against these persons as to all matters finally adjudicated in the judgment [*Prob. Code § 18104(a)*].

An instrument executed by the person holding an interest, lien, or encumbrance described in *Prob. Code § 18104(a)*, whether purporting to be the act of that person in his or her own right or in the capacity of a trustee, is presumed to affect the interest, lien, or encumbrance according to the tenor of the instrument. This is a presumption affecting the burden of proof. After the instrument is recorded in the county where the land affected by the instrument is located, the presumption is conclusive in favor of a person acting in good faith and for valuable consideration [*Prob. Code § 18104(b)*].

The presumption of holding the title free from the trust is rebuttable, not conclusive [*Hansen v. G & G Trucking Co. (1965) 236 Cal. App. 2d 481, 491-494, 46 Cal. Rptr. 186]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsCreationEvidenceInferences & PresumptionsPresumptionsEvidenceInferences & PresumptionsRebuttal of Presumptions

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49-560 California Forms of Pleading and Practice--Annotated § 560.205

§ 560.205 Recordation of Affidavit of Change of Trustee

When title to an interest in real property is affected by a change of trustee, the successor trustee may execute and record in the county where the property is located an affidavit of change of trustee. The affidavit must include the legal description of the property, the name of the former trustee(s), and the name of the successor trustee(s). It may also include excerpts from the original trust documents, any amendments to these documents, and any other documents that evidence or pertain to the succession of the successor trustee(s) [*Prob. Code § 18105*]. The affidavit is subject to all statutory requirements for recorded documents [*Prob. Code § 18106(a)*].

The recorded affidavit must be indexed in the index of grantors and grantees. For purposes of the index entry, the person who has been succeeded as trustee is deemed the grantor [*Prob. Code § 18106(b)*]. The recorded affidavit is prima facie evidence of the change of trustee insofar as it identifies an interest in real property located in the county, title to which is affected by the change. This presumption is a presumption affecting the burden of producing evidence [*Prob. Code § 18107*].

Any person whose interest is, or may be, affected by the recordation of an affidavit of change of trustee may require the successor trustee to provide copies of excerpts from the original trust documents, any amendments to these documents, and any other documents that evidence or pertain to the succession of the successor trustee(s). The entire trust, any amendments to the trust, or the dispositive provisions of the trust need not be provided [*Prob. Code § 18108*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTrusteesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesRemoval & ResignationEvidenceInferences & PresumptionsRebuttal of PresumptionsReal Property LawPriorities & RecordingTitle Registration

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49-560 California Forms of Pleading and Practice--Annotated §§ 560.206-560.219

[Reserved]

§§ 560.206[Reserved]

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IV. Rights of Third Party Creditors

49-560 California Forms of Pleading and Practice--Annotated § 560.220

§ 560.220 Enforcement of Judgment Against Judgment Debtor's Interest in Trust

[1] Writ of Execution Not Available

The interest of a trust beneficiary is not subject to levy under a writ of execution [*Code Civ. Proc. § 699.720(a)(8)*]. For discussion of executions generally, see Ch. 254, *Executions and Enforcement of Judgments* .

[2] Extent of Liability

An interest in a trust is subject to enforcement of a money judgment to the extent provided by law [*Code Civ. Proc. § 695.030(b)(1)*; *see, e.g., Code Civ. Proc. § 709.010*; §§ 560.220[3]]. A trust that does not restrain transfer of a beneficiary's interest is subject in its entirety to satisfaction of a money judgment under *Code Civ. Proc. § 709.010* [*see Recommendation Proposing the Trust Law*, 18 Cal. Law Revision Comm'n Reports 633-634 (1986)]. However, property of a judgment debtor that is not assignable or transferable is not subject to enforcement, except as otherwise provided by statute [*Code Civ. Proc. § 695.030(a)*; *see Prob. Code §§ 15300-15309* (restrictions on transfers)].

[3] Petition Proceedings

The judgment debtor's interest as a beneficiary of a trust is subject to enforcement of a money judgment only on petition under *Code Civ. Proc. § 709.010* by a judgment creditor to a court having jurisdiction over administration of the trust under *Prob. Code §§ 17000-17457* [*Code Civ. Proc. § 709.010(b)*; for discussion of jurisdiction, *see § 560.130* et seq.]. The judgment debtor's interest in the trust may be applied to the satisfaction of the money judgment by such means that the court, in its discretion, determines are proper, including but not limited to imposition of a lien on or sale of the judgment debtor's interest, collection of the judgment debtor's interest, collection of trust income, and liquidation and transfer of trust property by the trustee [*Code Civ. Proc. § 709.010(b)*].

The definition of a trust for the purposes of *Code Civ. Proc. § 709.010* is that of *Prob. Code § 82* [*Code Civ. Proc. § 709.010(a)*; *see § 560.17*].

Nothing in *Code Civ. Proc. § 709.010* affects the limitations on the enforcement of a money judgment against the judgment debtor's interest in a trust under *Prob. Code §§ 15300-15309* (restrictions on transfers), and the provisions of *Code Civ. Proc. § 709.010* are subject to the limitations of *Prob. Code §§ 15300-15309* [*Code Civ. Proc. § 709.010(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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49-560 California Forms of Pleading and Practice--Annotated § 560.221

§ 560.221 Restrictions on Voluntary and Involuntary Transfer of Interest in Trust

[1] Spendthrift Trust

A spendthrift trust is one in which the settlor declares that the trust property is inalienable, and may not be reached by the creditors of the beneficiary [*DiMaria v. Bank of California (1965) 237 Cal. App. 2d 254, 258, 46 Cal. Rptr. 924]* . The validity of spendthrift trusts are recognized by the Trust Law [*see Prob. Code §§ 15300* (restrictions on transfer of income) and 15301 (restrictions on transfer of principal); *De Mille v. Ramsey (1989) 207 Cal. App. 3d 116, 126, 254 Cal. Rptr. 573* . If the trust instrument provides that a beneficiary's interest in income or principal is not subject to voluntary or involuntary transfer, it may not be transferred and is not subject to enforcement of a money judgment until paid to the beneficiary, except as provided in *Prob. Code §§ 15304* (settlor is beneficiary), 15305 (child or spousal support), 15305.5 (restitution judgments), 15306 (public support), 15306.5 (general creditors), and 15307 (excess of amount for education or support) [*Prob. Code §§ 15300, 15301*]. In addition to these exceptions, a creditor may also reach principal that has become due and payable to the beneficiary under the trust instrument by petitioning the court under *Code Civ. Proc. § 709.010* for an order that the trustee satisfy all or part of the money judgment out of that principal amount [*Prob. Code § 15301(b)*].

Once a beneficiary has received the trust property, the creditors may reach it and the beneficiary may dispose of it at will [*Kelly v. Kelly (1938) 11 Cal. 2d 356, 362, 79 P.2d 1059* ; *Estate of Schneider (1956) 140 Cal. App. 2d 710, 717, 296 P.2d 45 , appeal dismissed sub nom. Seibert v. Brownell 352 U.S. 938, 77 S. Ct. 263, 1 L. Ed. 2d 235]* .

A disclaimer or renunciation by a beneficiary of all or part of the beneficiary's interest under a trust is not considered a transfer under *Prob. Code § 15300* or *15301* [*Prob. Code § 15309*].

For discussion of spendthrift trusts of which the settlor is beneficiary, *see § 560.225[2]*.

[2] Trust for Education or Support of Beneficiary

If the trust instrument provides that the trustee must pay income or principal or both for the education or support of a beneficiary, the beneficiary's interest in income or principal or both under the trust, to the extent that either one or both is necessary for the education or support of the beneficiary, may not be transferred and is not subject to the enforcement of a money judgment until paid to the beneficiary, except as provided in *Prob. Code §§ 15304* (settlor is beneficiary), 15305 (child or spousal support), 15305.5 (restitution judgments), 15306 (public support), 15306.5 (general creditors), and 15307 (excess of amount for education or support) [*Prob. Code § 15302*].

Any amount to which the beneficiary is entitled under the trust instrument or that the trustee, in the exercise of discretion, has determined to pay to the beneficiary in excess of the amount that is or will be necessary for the education and support of the beneficiary may be applied to the satisfaction of a money judgment against the beneficiary. On the judgment creditor's petition under *Code Civ. Proc. § 709.010*, the court may make an order directing the trustee to satisfy all or part of the judgment out of the beneficiary's interest in the trust. The order is proper notwithstanding a restraint on transfer of a beneficiary's interest in the trust under *Prob. Code § 15300* or *15301* [*Prob. Code § 15307*; § 560.220[3]]. Any order entered by a court under *Prob. Code § 15307* is subject to modification on petition of an interested person filed in the court where the order was made [*Prob. Code § 15308*].

Under the "station-in-life" rule, a creditor can reach surplus of income not required for the judgment debtor, taking into account the beneficiary's condition in life, health, and other circumstances, and the condition of a beneficiary's family, if any [*Canfield v. Security-First Nat. Bank (1939) 13 Cal. 2d 1, 23, 87 P.2d 830]* . Relevant factors include the cost of housing, medical care, the manner in which the beneficiary has been reared, the beneficiary's health, and the health of any dependents [*Canfield v. Security-First Nat. Bank (1939) 13 Cal. 2d 1, 24, 87 P.2d 830]* . However, a beneficiary's standard of living is not properly determined by the beneficiary's extravagance [*Howard v. Adams (1940) 16 Cal. 2d 253, 259, 105 P.2d 971]* .

For discussion of trusts for education or support of which the settlor is beneficiary, *see § 560.225[2]*.

[3] Trust Property Payable to Beneficiary at Trustee's Discretion

If the trust instrument provides that the trustee must pay to or for the benefit of a beneficiary so much of the income or principal or both as the trustee in the trustee's discretion sees fit to pay, a transferee or creditor of the beneficiary may not compel the trustee to pay any amount that may be paid only in the exercise of the trustee's discretion [*Prob. Code § 15303(a)*].

If the trustee has knowledge of the transfer of the beneficiary's interest or has been served with process in a proceeding under *Code Civ. Proc. § 709.010* by a judgment creditor seeking to reach the beneficiary's interest, and the trustee pays to or for the benefit of the beneficiary any part of the income or principal that may be paid only in the exercise of the trustee's discretion, the trustee is liable to the transferee or creditor to the extent that the payment to or for the benefit of the beneficiary impairs the right of the transferee or creditor [*Prob. Code § 15303(b)*]. *Prob. Code § 15303(b)* does not apply if the beneficiary's interest in the trust is subject to a restraint on transfer that is valid under *Prob. Code § 15300* or *15301* (spendthrift trusts) [*Prob. Code § 15303(b)*].

Prob. Code § 15303 applies regardless whether or not the trust instrument provides a standard for the exercise of the trustee's discretion [*Prob. Code § 15303(c)*]. Nothing in *Prob. Code § 15303* limits any right the beneficiary may have to compel the trustee to pay to or for the benefit of the beneficiary all or part of the income or principal [*Prob. Code § 15303(d)*]. Consequently, the beneficiary, but not the transferee or creditor, can compel the trustee to make a payment pursuant to a standard set out in the trust instrument [*see Recommendation Proposing the Trust Law*, 18 Cal. Law Revision Comm'n Reports 628 (1986)]. For a form for use by a beneficiary to compel a trustee to invade the corpus of a discretionary trust, see *§ 560.551*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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49-560 California Forms of Pleading and Practice--Annotated § 560.222

§ 560.222 Rights of General Creditors Regarding Transfer Restrictions

[1] Property Generally Subject to Enforcement

On a judgment creditor's petition under *Code Civ. Proc. § 709.010*, the court may make an order directing the trustee to satisfy all or part of the judgment out of the payments to which the beneficiary is entitled under the trust instrument or that the trustee, in the exercise of the trustee's discretion, has determined or determines in the future to pay to the beneficiary. The order is proper notwithstanding a restraint on transfer of the beneficiary's interest in the trust under *Prob. Code § 15300* or *15301* (spendthrift trust) but is subject to the limitations of *Prob. Code § 15306.5* [*Prob. Code § 15306.5(a)*; § 560.220[3]].

[2] Percentage Limitations

An order under *Prob. Code § 15306.5* may not require that the trustee pay in satisfaction of the judgment either of the following:

- An amount exceeding 25 percent of the payment that otherwise would be made to, or for the benefit of, the beneficiary [*Prob. Code § 15306.5(b)*].

- Any amount that the court determines is necessary for the support of the beneficiary and all the persons the beneficiary is required to support [*Prob. Code § 15306.5(c)*].

Further, the aggregate of all orders for satisfaction of money judgments against the beneficiary's interest in the trust may not exceed 25 percent of the payment that otherwise would be made to or for the benefit of the beneficiary, subject to the provisions of *Prob. Code § 15306.5(d)* (child or spousal support) [*Prob. Code § 15306.5(f)*; *see § 560.223[1]*].

[3] Subordination to Child or Spousal Support Claims

An order for satisfaction of a support judgment under *Prob. Code § 15305* (child or spousal support) has priority over an order to satisfy a judgment of a general creditor under *Prob. Code § 15306.5*. Any amount ordered to be applied to the satisfaction of a judgment under *Prob. Code § 15306.5* must be reduced by the amount of an order for satisfaction of a support judgment under *Prob. Code § 15305*, regardless of whether the order for satisfaction of the support judgment was made before or after the order under *Prob. Code § 15306.5* [*Prob. Code § 15306.5(d)*; *see § 560.223*].

[4] No Right to Affect Trustee Discretion

If the trust gives the trustee discretion over the payment of either principal or income of a trust, or both, nothing in *Prob. Code § 15306.5* affects or limits that discretion in any manner [*Prob. Code § 15306.5(e)*].

[5] Limitations on Liability and Duty of Trustee Regarding Creditor

The trustee has no duty to oppose a petition to satisfy a judgment under *Prob. Code § 15306.5* or to make any claim for exemption on behalf of the beneficiary. The trustee is not liable for any action taken, or omitted to be taken, in compliance with any court order made under *Prob. Code § 15306.5* [*Prob. Code § 15306.5(e)*].

[6] Modifiability of Order

Any order entered by a court under *Prob. Code § 15306.5* is subject to modification on petition of an interested person filed in the court where the order was made [*Prob. Code § 15308*].

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49-560 California Forms of Pleading and Practice--Annotated § 560.223

§ 560.223 Rights of Support Creditors Regarding Transfer Restrictions

[1] Child or Spousal Support

Under *Prob. Code § 15305*, a claimant for delinquent child or spousal support may reach a beneficiary's interest in a trust [*Ventura County Dep't of Child Support Servs. v. Brown (2004) 117 Cal. App. 4th 144, 151, 11 Cal. Rptr. 3d 489* (support claimants are preferred creditors and have rights unavailable to general creditors)].

If the beneficiary has the right under the trust to compel the trustee to payincome or principal or both to or for the benefit of the beneficiary, the court, to the extent that the court determines it is equitable and reasonable under the circumstances, may order the trustee to satisfy all or part of a support judgment out of all or part of those payments as they become due and payable, presently or in the future [*Prob. Code § 15305(b)*]. A support judgment is a money judgment for support of beneficiary's spouse, former spouse, or minor child [*Prob. Code § 15305(a)*].

Whether or not the beneficiary has the right under the trust to compel the trustee to pay income or principal or both to or for the benefit of the beneficiary, the court, to the extent that the court determines it is equitable and reasonable under the circumstances, may order the trustee to satisfy all or part of the support judgment out of all or part of future payments that the trustee, pursuant to the exercise of the trustee's discretion, determines to make to or for the benefit of the beneficiary [*Prob. Code § 15305(c)*].

Prob. Code § 15305 applies to a support judgment notwithstanding any provision in the trust instrument [*Prob. Code § 15305(d)*]. Thus, a minor's right to support is not defeated by a spendthrift provision in a trust instrument [*Ventura County Dep't of Child Support Servs. v. Brown (2004) 117 Cal. App. 4th 144, 152, 11 Cal. Rptr. 3d 489* (legislative history behind *Prob. Code § 15305* establishes that support creditor may reach beneficiary's interest in spendthrift trust)].

A court may order a trustee to satisfy a beneficiary's past due and ongoing child support obligations directly from the

trust [*Ventura County Dep't of Child Support Servs. v. Brown (2004) 117 Cal. App. 4th 144, 155, 11 Cal. Rptr. 3d 489]* .

To obtain relief under *Prob. Code § 15305*, a judgment creditor must file a petition with the court under *Code Civ. Proc. § 709.010* [*see Recommendation Proposing the Trust Law*, 18 Cal. Law Revision Comm'n Reports 630 (1986); *see also § 560.220[3]*].

Any order entered by a court under *Prob. Code § 15305* is subject to modification on petition of an interested person filed in the court where the order was made [*Prob. Code § 15308*].

[2] Public Support

If the beneficiary is liable under a California statute for reimbursement to California or a local public entity for public support furnished to the beneficiary or the beneficiary's spouse or minor child, on petition to the court under *Code Civ. Proc. § 709.010* by the appropriate entity or official, the court may subject the trust property to satisfaction of that claim under certain circumstances, notwithstanding any provision in the trust instrument [*see Prob. Code § 15306*]. If the beneficiary is also the settlor (or the settlor's spouse or minor child), the court may order reimbursement without regard to whether the trustee has then exercised or may thereafter exercise its discretion in the beneficiary's favor [*Prob. Code § 15306(a)(3)*].

Any order entered by a court under *Prob. Code § 15306* is subject to modification on petition of an interested person filed in the court where the order was made [*see Prob. Code § 15308*].

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§ 560.224 Rights of Restitution Judgment Creditors Regarding Transfer Restrictions

If the beneficiary has the right under the trust to compel the trustee to pay income or principal or both to or for the benefit of the beneficiary, the court to the extent that the court determines it is equitable and reasonable under the circumstances, may order the trustee to satisfy all or part of a restitution judgment out of all or part of those payments as they become due and payable, presently or in the future [*Prob. Code § 15305.5(b)*]. The term "restitution judgment" means a judgment awarding restitution for the commission of a felony or a money judgment for damages incurred as a result of conduct for which the defendant was convicted of a felony [*Prob. Code § 15305.5(a)*].

Whether or not the beneficiary has the right under the trust to compel the trustee to pay income or principal or both to or for the benefit of the beneficiary, the court, to the extent that it determines it is equitable and reasonable under the circumstances, may order the trustee to satisfy all or part of the restitution judgment out of all or part of future payments that the trustee, pursuant to the exercise of the trustee's discretion, determines to make to or for the benefit of the beneficiary [*Prob. Code § 15305.5(c)*; *see Chatard v. Oveross (2009) 179 Cal. App. 4th 1098, 1114, 101 Cal. Rptr. 3d 883* (surcharge order upheld notwithstanding existence of spendthrift provision, when trust beneficiary was also trustee and committed a breach causing fiduciary harm to trust); *see also Young v. McCoy (2007) 147 Cal. App. 4th 1078, 1087* ; *54 Cal. Rptr. 3d 847* (trustee reasonably exercised discretion in refusing payment of trust assets to judgment creditor when there is no abuse of trustee's discretion)].

Prob. Code § 15303.5 applies to a restitution judgment notwithstanding any provision in the trust instrument [Prob. Code § 15303.3(d)].

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49-560 California Forms of Pleading and Practice--Annotated § 560.225

§ 560.225 Claims Against Settlor

[1] Revocable Trust

If the settlor retains the power to revoke the trust in whole or in part, the trust property is subject to the claims of creditors of the settlor to the extent of the power of revocation during the lifetime of the settlor [*Prob. Code § 18200*].

Under former law, on the death of a settlor who had retained the power to revoke the trust in whole or in part, the property that was subject to the power of revocation at the time of the settlor's death was subject to the claims of creditors of the decedent settlor's estate and to the expenses of administration of the estate to the extent that the decedent settlor's estate was inadequate to satisfy those claims and expenses [*see* former *Prob. Code § 18201*].

The former law has been replaced with provisions governing the payment of claims, debts, and expenses from the revocable trust of a deceased settlor [*see Prob. Code § 19000 et seq.*]. For discussion and forms relating to these provisions, see *§ 560.240* et seq.

[2] Settlor as Beneficiary

If the settlor is a beneficiary of a trust created by the settlor and the settlor's interest is subject to a provision restraining the voluntary or involuntary transfer of the settlor's interest, the restraint is invalid against transferees or creditors of the settlor. The invalidity of the restraint on transfer does not affect the validity of the trust [*Prob. Code § 15304(a)*]. Consequently, a person cannot create a spendthrift trust for his or her own benefit as a device to shield property from creditors [*Ventura County Dep't of Child Support Servs. v. Brown (2004) 117 Cal. App. 4th 144, 156, 11 Cal. Rptr. 3d 489]* . However, *Code Prob. Code § 15304* does not affect the protection of certain pension trusts under *Civ. Proc. § 704.115* [*see Prob. Code § 82(c)* (definition of trust excludes pensions)].

If the settlor is the beneficiary of a trust created by the settlor and the trust instrument provides that the trustee must pay income or principal or both for the education or support of the beneficiary, or gives the trustee discretion to determine

the amount of income or principal or both to be paid to or for the benefit of the settlor, a transferee or creditor of the settlor may reach the maximum amount that the trustee could pay to or for the benefit of the settlor under the trust instrument, not exceeding the amount of the settlor's proportionate contribution to the trust [*Prob. Code § 15304(b)*].

A settlor who is a beneficiary of a revocable trust has the power, under the doctrine of equitable conversion, to convey property to which the trust holds title and over which the beneficiary has complete control [*Walgren v. Dolan (1990) 226 Cal. App. 3d 572, 576-579, 276 Cal. Rptr. 554]* .

Legal Topics:

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[Reserved]

§§ 560.226[Reserved]

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§ 560.240 Governing Statutes

Prob. Code § 19000 et seq. governs the payment of claims, debts, and expenses from the revocable trust of a deceased settlor who dies on or after January 1, 1992. For settlors who died prior to that date, the applicable law in effect before January 1, 1992, applies [*Prob. Code 19012*; *see* former *Prob. Code § 18201* (predecessor to *Prob. Code § 19000 et seq.*)].

Legal Topics:

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49-560 California Forms of Pleading and Practice--Annotated § 560.241

§ 560.241 Payment of Claims From Trust Authorized

[1] In General

On the death of a settlor of a trust, property of the settlor that was subject to the power of revocation at the time of his or her death is subject both to claims of creditors of the estate and to expenses of administration of the estate, to the extent that the estate is inadequate to satisfy those claims and expenses [*Prob. Code § 19001(a)*; former *Prob. Code § 18201*; *see also Prob. Code §§ 18200, 19000(d)* ("trust" defined)].

Judgment creditors of a decedent's estate are not required to file suit against trustees of the decedent's revocable inter vivos trust in order for the judgment to be satisfied from trust assets [*Dobler v. Arluk Med. Ctr. Indus. Group (2001) 89 Cal. App. 4th 530, 539-540, 107 Cal. Rptr. 2d 478]* . Instead, any judgment creditor that seeks to satisfy its money judgment with property of the decedent must file a timely claim [*see § 560.246[1][a]*]. The judgment then is paid to the judgment creditor in the ordinary course of administration of the estate or trust [*Embree v. Embree (2004) 125 Cal. App. 4th 487, 493-494, 22 Cal. Rptr. 3d 782]* . If the estate and trust are insufficient to satisfy the judgment, a judgment creditor that has preserved its claim by filing a timely claim may pursue trust property distributed to the beneficiaries of the decedent's revocable living trust to the same extent that the property would have been available to satisfy the judgment during the settlor's lifetime [*Embree v. Embree (2004) 125 Cal. App. 4th 487, 494, 22 Cal. Rptr. 3d 782]* . A failure to file a timely claim bars the creditor from recovering against the property of the decedent whether or not the property is distributed [*Prob. Code § 19004*; *Embree v. Embree (2004) 125 Cal. App. 4th 487, 494, 22 Cal. Rptr. 3d 782]* .

A trustee does not have a duty to withhold otherwise authorized distributions to beneficiaries to preserve trust assets for the benefit of creditors who have pending against the estate [*Arluk Med. Ctr. Indus. Group v. Dobler (2004) 116 Cal. App. 4th 1324, 1328, 1335, 11 Cal. Rptr. 3d 194]* . The only duty the trustee owes to creditors is to refrain from affirmative misconduct that defeats the creditors' reasonable expectation for a recovery from trust assets [*Arluk Med. Ctr. Indus. Group v. Dobler (2004) 116 Cal. App. 4th 1324, 1328, 1335, 1341, 11 Cal. Rptr. 3d 194]* . For example, a creditor may seek to hold a trustee personally liable for improperly distributing assets to a trust beneficiary knowing that

an order in the creditor's favor has been entered and judgment is imminent, and the assets will be expended or otherwise unavailable to the creditor once distributed [*Arluk Med. Ctr. Indus. Group v. Dobler (2004) 116 Cal. App. 4th 1324, 1340, 11 Cal. Rptr. 3d 194]* .

By appropriate direction in the trust instrument, the settlor may direct the priority of sources of payment of debts among subtrusts or other gifts establishedby the trust at the deceased settlor's death. No direction by the settlor, however, may alter the priority of payment of the debts of the decedent and decedent's estate as set forth in *Prob. Code § 11420*, which is applied to a trust as it is applied to a probate estate [*Prob. Code § 19001(b)*; *see also Prob. Code § 19000(f)* ("debts" defined)]. For further discussion of the priority for payment of claims against a decedent's estate, see Ch. 454, *Probate: Claims Against the Estate* .

Prob. Code § 19000 et seq. does not permit or require disclosure of the existence of the trust or the contents of any of its provisions to any creditor or beneficiary except as that creditor or beneficiary may otherwise be entitled to that information [*Prob. Code § 19009*].

[2] "Claim" Defined

The term "claim" means a demand for payment, whether due, not due, accrued or not accrued, or contingent, and whether liquidated or unliquidated, for any of the following [*Prob. Code § 19000(a)*]:

- Liability of the deceased settlor, whether arising in contract, tort, or otherwise.

- Liability for taxes incurred before the deceased settlor's death, whether assessed before or after death, other than property taxes and assessments secured by real property liens.

- Liability for the deceased settlor's funeral expenses.

The term "claim" does not include a dispute regarding title to specific property alleged to be included in the trust estate [*Prob. Code § 19000(b)*].

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§ 560.242 Liability of Deceased Settlor's Surviving Spouse

If proceedings are commenced under *Prob. Code § 19000 et seq.* for the settlement of claims against the trust and the time for filing claims has commenced, any action on the liability of the surviving spouse under *Prob. Code § 13550 et seq.* is barred to the same extent as provided for other claims against the trust, except as to the following [*Prob. Code § 19330*]:

- Any creditor who commences judicial proceedings to enforce a claim and serves the surviving spouse with the complaint prior to the expiration of the time for filing claims.

- Any creditor who has or who secures the surviving spouse's acknowledgment in writing of the liability of the surviving spouse for the claim.

- Any creditor who files a timely claim in the proceedings for the administration of the estate of the deceased spouse.

For discussion of allocation of debts between the trust and the deceased settlor's surviving spouse, see *§ 560.256*. For discussion of the personal liability of the surviving spouse for debts of the deceased, see Ch. 441, *Probate: Disposition Without Administration* .

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§ 560.243 Liability of Distributees

[1] When Trustee Does Not Give Notice to Creditors

Subject to the statute of limitations on actions that survive the defendant's death [*Code Civ. Proc. § 366.2*], if there is no proceeding to administer the estate of the deceased settlor and if the trustee does not file a proposed notice to creditors and publish notice to creditors, a beneficiary of the trust to whom payment, delivery, or transfer of the deceased settlor's property is made pursuant to the terms of the trust is personally liable for the unsecured claims of the creditors of the deceased settlor's estate [*Prob. Code § 19400*]. This liability does not arise if trust assets are sufficient to cover the claim [*see Prob. Code § 19402(b)*].

If the creditor fails to bring a claim against the beneficiaries of the trust within one year of the decedent's death, as required by *Code Civ. Proc. § 366.2*, property distributed to the beneficiaries under the terms of the trust is protected and cannot be used to satisfy the creditor's claim [*Embree v. Embree (2004) 125 Cal. App. 4th 487, 494-497, 22 Cal. Rptr. 3d 782* (property distributed to trust beneficiaries could not be used to satisfy judgment against decedent when judgment creditor did not file claim until 19 months after decedent's death)].

[2] When Trustee Gives Notice to Creditors

If the trustee filed a proposed notice to creditors and published notice to creditors, and if the identity of the creditor was known to, or was reasonably ascertainable by, the trustee within four months of the first publication of notice, a person to whom property is distributed is personally liable for the claim of the creditor, without a claim first having been filed, if all of the following conditions are satisfied [*Prob. Code § 19401*]:

- The creditor's claim was not merely conjectural;

- Notice to the creditor was not given to the creditor under *Prob. Code § 19050 et seq.* [*see § 560.245[7]*] and neither the creditor nor the attorney representing the creditor in the matter had actual knowledge of the administration of the trust estate sooner than one year after the date of first publication

of notice; and

- The statute of limitations applicable to the claim under *Code Civ. Proc. § 366.2* has not expired at the time of commencement of the action. That section requires any action on the claim to be commenced within one year of the decedent's death.

Any property distributed by the trustee under the terms of the trust after 120 days from the later of the time a notice of rejection is given or the claim is due, and before a notice of pendency of action or referral or arbitration is filed and given (excluding any time during which there is a vacancy in the office of trustee), is not subject to claims. The distributee is not liable on account of the distribution [*Prob. Code § 19255(d)*].

In any event, liability does not arise if trust assets are sufficient to cover the claim [*see Prob. Code § 19402(b)*].

[3] Defenses

In any action under *Prob. Code § 19400 et seq.*, subject to the statute of limitations on causes of action by and against persons who have died [*Code Civ. Proc. § 366.2*], the distributee may assert any defenses, cross complaints, or setoffs that would have been available to the deceased settlor if the settlor had not died [*Prob. Code § 19402(a)*].

[4] Extent of Liability

A distributee is personally liable only to the extent the claim of the creditor cannot be satisfied out of the trust estate of the deceased settlor. Further, a distributee's personal liability is limited to a pro rata portion of the claim of the creditor, based on the proportion that the value of the property distributed to the person out of the trust estate bears to the total value of all property distributed to all persons out of the trust estate. The distributee's personal liability for all claims of all creditors may not exceed the value of the property distributed to the person out of the trust estate. The term "the value of the property" means the fair market value of the property on the date of its distribution, less the amount of any liens and encumbrances on the property at that time [*Prob. Code § 19402(b)*].

The provisions governing liability of distributees do not affect the rights of a purchaser or encumbrancer of property in good faith and for value from a distributee who is personally liable [*Prob. Code § 19403*].

[5] No Constructive Trust

A distributee cannot be held liable to the creditors on a constructive trust theory merely because he or she received a distribution from the trust [*Valentine v. Read (1996) 50 Cal. App. 4th 787, 795, 57 Cal. Rptr. 2d 836]* . Under the constructive trust theory, one who wrongfully acquires the property of another holds it as an involuntary trustee for the benefit of the person to whom it rightfully belongs [*see Civ. Code §§ 2223* (one who wrongfully detains thing is involuntary trustee for benefit of owner), 2224 (one who gains thing by fraud, accident, mistake, undue influence, violation of trust, or other wrongful act is involuntary trustee for person who would otherwise have had it)]. However, a person who receives a distribution from a trust does not do so wrongfully, even if the distribution is made during litigation and to make it more difficult to collect a potential judgment. The Probate Code clearly contemplates that distributions will be made from trusts, and it provides the exclusive remedy of the creditors when distributions are made [*Valentine v. Read (1996) 50 Cal. App. 4th 787, 795, 57 Cal. Rptr. 2d 836]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesNotice to CreditorsEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsConstructive TrustsEstate, Gift & Trust LawTrustsTrusteesDuties &

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49-560 California Forms of Pleading and Practice--Annotated § 560.244

§ 560.244 Liability Between Trusts Established by Deceased Settlor

Prob. Code § 19000 et seq. does not determine the liability of any trust established by the deceased settlor as against any other trust established by that settlor, except to the extent that the trustee of the other trust must file, publish, and serve notice as specified in *Prob. Code § 19003* [*see § 560.245*] and thereafter seeks a determination of relative liability [*Prob. Code § 19007*; *see also Prob. Code § 19020 et seq.* (determination of liability)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawTrustsAdministration

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49-560 California Forms of Pleading and Practice--Annotated § 560.245

§ 560.245 Notice to Creditors

[1] Trustee Under No Duty to Initiate Notice Proceedings

Prob. Code § 19000 et seq. does not impose any duty on the trustee to initiate the notice proceeding set forth in *Prob. Code § 19003* [§ 560.245[5]], and the trustee is not liable for failure to initiate the proceeding [*Prob. Code § 19010*]. Further, the trustee may not be held personally liable to the creditors merely for making a distribution from the trust. If creditors of the deceased settlor are successful in prosecuting a claim against trust assets, a judgment may properly be rendered against the trustee *as trustee*; but there is no basis for rendering a judgment against the trustee personally [*Valentine v. Read (1996) 50 Cal. App. 4th 787, 793, 794, 796, 57 Cal. Rptr. 2d 836]* .

[2] Effect of Filing Notice

If the trustee elects to file, publish, and serve notice pursuant to *Prob. Code § 19003*, all claims against the trust must be filed in the manner and within the time provided in *Prob. Code § 19000 et seq.* Claims that are not filed in accordance with those provisions are barred from collection from trust assets [*Prob. Code § 19004(a), (b)*; *see Prob. Code § 19010*]. Further, the holder of a claim may not maintain an action on the claim against the trust unless the claim is first filed as provided by *Prob. Code § 19000 et seq.* [*Prob. Code § 19004(c)*]. For discussion of claim procedure, see *§ 560.246*.

If there is no proceeding to administer the estate of the deceased settlor (§ 560.245[4]) and if the trustee does not file a proposed notice to creditors and publish notice to creditors, the liability of the trust to any creditor of the deceased settlor is as otherwise provided by law [*Prob. Code § 19008*].

[3] Multiple Trusts

If the trustee files, publishes, and serves notice as provided in *Prob. Code § 19003*, the protection from creditors afforded that trustee and trust will also be afforded to any other trusts established by the deceased settlor and the trustees and beneficiaries of those trusts [*Prob. Code § 19006(a)*].

[4] Relationship to Decedent's Estate and Other Probate Proceedings

If the personal representative of the deceased settlor's estate has published notice under *Prob. Code § 8120* (notice of petition to administer decedent's estate) and has given notice of administration of the estate of the deceased settlor under *Prob. Code § 9050 et seq.* (notice to known creditor's of decedent), the protection from creditors afforded the personal representative of the deceased settlor's estate will be afforded to the trustee and to the beneficiaries of the trust [*Prob. Code § 19006(b)*]. For discussion of the notice and publication requirements of *Prob. Code §§ 8120, 9050*, see Ch. 442, *Probate: Initiating Probate Administration* .

If, following the filing and publication of the notice set forth in *Prob. Code § 19003*, a proceeding requiring publication of a notice pursuant to *Prob. Code § 8120* is commenced [*see Prob. Code § 8003* (administration of decedent's estate requires notice under *Prob. Code § 8120*)], the trustee has a right of collection against the estate to recover the amount of any debts paid from trust assets that would otherwise have been satisfied by law or by direction in the deceased settlor's will or trust by the property subject to probate proceedings [*Prob. Code § 19006(c)*].

[5] Proposed Notice

[a] Time for Filing

At any time following the settlor's death, and during the time that there has been no filing of a petition to administer the estate of the deceased settlor in California of which the trustee has actual knowledge, the trustee may file with the court a proposed notice to creditors. After the court assigns a proceeding number to the proposed notice, the trustee must publish and serve the notice to creditors of the deceased settlor [*Prob. Code § 19003(a)*; *see Prob. Code § 19003(c)* (requirements of *Prob. Code § 19003(a)* do not affect notice or request to a public entity pursuant to *Prob. Code § 19200 et seq.*, discussed in *§ 560.250*); *Prob. Code §§ 19040 et seq., § 19050 et seq.* (publication and notice requirements, discussed in *§ 560.245[6]*)].

[b] Place of Filing

If the trustee elects to file a proposed notice [*see Prob. Code § 19010*; § 560.245[5]], the filing must be made with the superior court for the county where the deceased settlor resided at the time of death or, if none, in any county in which trust property was located at the time of the settlor's death or, if none, in the county that was the principal place of administration of the trust at the time of the settlor's death [*Prob. Code § 19003(b)*].

[6] Notice by Publication

[a] Requirements

If the trustee has elected to initiate notice proceedings [*see Prob. Code § 19010*], publication of notice must be for at least 15 days. Three publications in a newspaper published at least once a week, with at least five days intervening between the first and last publication dates, not including the first and last publication dates, are sufficient. Notice must be published in a newspaper of general circulation in the California city, county, or city and county where the deceased settlor resided at the time of death or, if none, in the California city, county, or city and county where trust property was located at the time of the settlor's death or, if none, in the California city, county, or city and county where the principal place of administration of the trust was located at the time of the settlor's death [*Prob. Code § 19040(a)*].

If there is no newspaper of general circulation published in the applicable city, county, or city and county, notice must be published in a newspaper of general circulation published in California nearest to the applicable city, county, or city and county seat, and that is circulated within the applicable city, county, or city and county. If there is no such newspaper, notice must be given in written or printed form, posted at three of the most public places within the community. The term "city" means a charter city as defined in *Gov. Code § 34101* or a general law city as defined in

Gov. Code § 34102 [*Prob. Code § 19040(a)*].

For a form of notice, *see § 560.650*.

[b] Good Faith Substantial Compliance Sufficient

To prevent a minor error in publication from invalidating what would otherwise be a proper proceeding, the Legislature has found and declared that notice published in a good faith attempt to comply with *Prob. Code § 19040* is sufficient to provide notice to creditors and establish jurisdiction if the court expressly finds that the notice was published in a newspaper of general circulation published within the city, county, or city and county and widely circulated within a true cross section of the community in which the deceased settlor resided or wherein the principal place of administration of the trust was located or the property was located, in substantial compliance with section 19040 [*Prob. Code § 19041*].

[c] Affidavit of Publication

An affidavit or declaration under penalty of perjury [*see* Code Civ. Proc.§ 2015.5] showing due publication of the notice must be filed with the clerk on completion of publication. The affidavit or declaration must contain copy of the notice and state the date of its first publication [*Prob. Code § 19040(c)*].

[7] Actual Notice

[a] Required for Known Creditors

If the trustee has elected to initiate notice proceedings [*see Prob. Code § 19010*] and has knowledge of a creditor of the deceased settlor, the trustee must give the creditor actual notice. A trustee has knowledge of a creditor of the deceased settlor when the trustee is aware that the creditor has demanded payment from the deceased settlor or the trust estate [*Prob. Code 19050*]. The trustee has no duty, however, to make a search for creditors of the deceased settlor [*see Prob. Code § 19053(d)*]. The actual notice requirement is in addition to the requirement of publication of notice under *Prob. Code § 19040* [*Prob. Code § 19050(b)*; for discussion of the publication requirement, *see § 560.245[6]*].

For a form for use in providing actual notice to creditors of the deceased settlor of a revocable trust, *see § 560.651*.

[b] Not Required for Creditor Who Filed Claim

The trustee need not give notice to a creditor, even though the trustee has knowledge of the creditor, if the creditor has filed a claim pursuant to *Prob. Code § 19000 et seq.* or the creditor has demanded payment and the trustee elects to treat the demand as a claim under *Prob. Code § 19154* [*Prob. Code § 19054*; for discussion of treating a demand as a claim, *see § 560.248*].

[c] Methods of Notice

Notice must be given as provided in *Prob. Code § 1215* for mailing of notices [*Prob. Code 19050*]. Alternatively, notice may be given by personal delivery because, under *Prob. Code § 1216*, personal delivery of a notice or other paper required or permitted to be mailed satisfies any statutory provision under the Probate Code, requiring or permitting the mailing of the notice or paper [*see Prob. Code 1216*]. For discussion of *Prob. Code § 1215* and other general provisions relating to notice under the Probate Code, see Ch. 447, *Probate: Statutory Notice Requirements* .

[d] Time for Giving Notice

Notice must be given before the expiration of the later of (1) four months after the first publication of notice under

Prob. Code § 19040, or *(2)* 30 days after the trustee first had knowledge of the creditor [*Prob. Code § 19051*].

[e] Extent of Trustee's Immunity for Providing or Failing to Provide Notice

If the trustee believes that notice to a particular creditor is or may be required and gives notice based on that belief, the trustee is not liable to any person for giving the notice, whether or not the notice was required [*Prob. Code § 19053(a)*].

If the trustee fails to give notice, the trustee is not liable to any person for that failure, unless a creditor establishes all of the following [*Prob. Code 19053(b)*; *see also Prob. Code § 19010* (no duty to initiate notice proceeding, discussed under)]:

- The failure was in bad faith [*Prob. Code § 19053(b)(1)*];

- The creditors had actual knowledge of the proceedings under *Prob. Code § 19000 et seq.* sooner than one year after publication of notice to creditors and payment would have been made on the creditor's claim if the claim had been properly filed [*Prob. Code § 19053(b)(2)*];

- Within 16 months after the first publication of notice, the creditor filed a petition requesting that the court in which the proceedings under *Prob. Code § 19000 et seq.* were initiated make an order determining the liability of the trustee under this subdivision [*Prob. Code § 19053(b)(3)(A)*]; and

- Within 16 months after the first publication of notice, and at least 30 days before the hearing on the petition, the creditor caused notice of the hearing and a copy of the petition to be served on the trustee in the manner provided in *Code Civ. Proc. § 413.10 et seq.* [*Prob. Code § 19053(b)(3)(B)*].

Probate Code § 19053 does not affect the liability of the trust estate, if any, for the claim of a creditor, and the trustee is not liable to the extent the claim is paid out of the trust estate [*Prob. Code § 19053(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationClaims Against EstatesNotice to CreditorsEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesTime LimitationsEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview

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49-560 California Forms of Pleading and Practice--Annotated § 560.246

§ 560.246 Filing Claims

[1] Time Limitations

[a] Basic Time for Filing Claim

A creditor must file a claim before expiration of the later of four months after the first publication of notice to creditors under *Prob. Code § 19040* [§ 560.245[6]] or 60 days after the date actual notice is mailed or personally delivered to the creditor, if notice is given within the time provided in *Prob. Code § 19051(a)* or *(b)* [*Prob. Code § 19100(a)*]. A reference in another statute to the time for filing a claim means the four-month period after the first publication of notice to creditors, unless the provision or context requires otherwise [*Prob. Code § 19100(b)*].

[b] Effect of Vacancy in Office of Trustee

A vacancy in the office of the trustee that occurs before expiration of the time for filing a claim does not extend the time [*Prob. Code § 19101*]. Nevertheless, a claim that is filed before expiration of the time for filing the claim is timely even if acted on by the trustee or the court after expiration of the time for filing claims [*Prob. Code § 19102*].

[c] Statute of Limitations

A claim barred by the statute of limitations may not be allowed by the trustee. Nevertheless, the filing of a claim tolls the statute of limitations otherwise applicable to the claim until the trustee gives notice of allowance or rejection. Allowance or rejection of the claim further tolls the statute of limitations as to the part of the claim allowed until that portion of the claim is paid [*Prob. Code § 19253*; for discussion of allowance and rejection of claims by the trustee, *see § 560.253*].

[2] Filing of Late Claims

[a] When Late Claim Allowed

Except as provided in *Prob. Code § 19103(b)* [*see below*], on a creditor's petition and after giving notice of hearing as set forth in *Prob. Code § 19024* (*see* discussion in *§ 560.252[2]*), the court may allow a claim to be filed after expiration of the time limitation if either [*Prob. Code § 19103(a)*]:

- The trustee failed to send proper and timely notice to the creditor and the petition is filed within 60 days after the creditor has actual knowledge of the administration of the trust; or

- The creditor did not have knowledge of the facts giving rise to the existence of the claim more than 30 days prior to the time for filing a claim, and the petition is filed within 60 days after the creditor has actual knowledge of both the existence of facts reasonably giving rise to the existence of a claim, and the administration of the trust.

The court, however, will not allow a late claim to be filed more than one year after the date of first publication of notice to creditors under *Prob. Code § 19040*, and *Prob. Code § 19103* does not authorize the allowance or approval of a claim barred by, or extend the time provided in, *Code Civ. Proc. § 366.2* (statute of limitations on cause of action against a person who dies) [*Prob. Code § 19103(b)*].

The court may condition a late claim on terms that are just and equitable, and may deny the claimant's petition if a distribution to trust beneficiaries or payment to general creditors has been made and it appears that filing or establishment of the claim would cause or tend to cause unequal treatment among beneficiaries or creditors [*Prob. Code § 19103(c)*].

[b] Property and Payments Not Subject to Late Claim

Regardless of whether a late claim is later established in whole or in part, property distributed under the terms of the trust subsequent to an order settling claims [*see Prob. Code § 19020*] and payments otherwise properly made before a late claim is filed are not subject to the late claim. Except as provided in *Prob. Code § 19400 et seq.* [*see § 560.243*], and subject to *Prob. Code § 19053* (trustee's immunity; § 560.245[7][e]], the trustee, distributee, or payee is not liable on account of the prior distribution or payment [*Prob. Code § 19103(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationClaims Against EstatesTime LimitationsEstate, Gift & Trust LawTrustsAdministrationGovernmentsLegislationStatutes of LimitationsTime Limitations

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49-560 California Forms of Pleading and Practice--Annotated § 560.247

§ 560.247 Procedure for Filing Claims

[1] In General

A claim may be filed by the creditor or a person acting on behalf of the creditor [*Prob. Code § 19150(a)*]. The claim must be filed with the court and a copy mailed to the trustee. Failure to mail a copy to the trustee does not invalidate a properly filed claim, but any loss that results from the failure must be borne by the claimant [*Prob. Code § 19150(b)*; *see Prob. Code § 19153* (Judicial Council authorized to adopt official claim form)]. For an illustration of the Judicial Council form of creditor's claim against the decedent's estate, see Ch. 454, *Probate: Claims Against the Estate* .

The claim must be supported by the affidavit or declaration under penalty of perjury of the creditor or the person on behalf of the creditor stating all of the following [*Prob. Code § 19151*; *see Code Civ. Proc. § 2015.5* (use of declaration in lieu of affidavit)]:

- The claim is a just claim;
- If the claim is due, the facts supporting the claim, the amount of the claim, and that all payments on and offsets to the claim have been credited;
- If the claim is not due or contingent or the amount is not yet ascertainable, the facts supporting the claim; and
- If the affidavit is made by a person other than the creditor, the reason it is not made by the creditor.

The trustee may require satisfactory vouchers or proof to be produced to support the claim. An original voucher may be withdrawn after a copy is provided. If a copy is provided, the copy shall be attached to the claim [*Prob. Code § 19151(b)*].

[2] Claim Based on Written Instrument

If a claim is based on a written instrument, either the original or a copy of the original with all endorsements must be attached to the claim. If a copy is attached, the original instrument must be exhibited to the trustee on demand unless it is lost or destroyed, in which case the fact that it is lost or destroyed must be stated in the claim [*Prob. Code § 19152(a)*].

If the claim or a part of the claim is secured by a mortgage, deed of trust, or other lien that is recorded in the office of the recorder of the county in which the property subject to the lien is located, it is sufficient to describe the mortgage, deed of trust, or lien and the recording reference for the instrument that created the mortgage, deed of trust, or other lien [*Prob. Code § 19152(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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49-560 California Forms of Pleading and Practice--Annotated § 560.248

§ 560.248 Trustee's Power to Waive Formal Defects in Claim

If a creditor makes a timely written demand for payment, the trustee may waive formal defects and elect to treat the demand as a claim that is properly filed and established by paying the amount demanded [*Prob. Code § 19154(a)*]. This power does not, however, limit application of the doctrines of waiver, estoppel, laches, or detrimental reliance or any other equitable principle [*Prob. Code § 19154(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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49-560 California Forms of Pleading and Practice--Annotated § 560.249

§ 560.249 Amendment and Revision of Claims

If a claim is timely filed, the creditor may later amend or revise the claim. The amendment or revision must be filed in the same manner as the claim [*Prob. Code § 19104(a)*].

An amendment or revision may not be made to increase the amount of a claim after the time for filing a claim has expired. An amendment or revision to specify the amount of a claim that, at the time of filing, was not due, was contingent, or was not yet ascertainable is not an "increase in the amount of the claim" [*Prob. Code § 19104(b)*].

A claim may not be amended or revised for any purpose after the earlier of the date the court makes an order approving settlement of the claim against the deceased settlor or one year after the date of the first publication of notice to creditors [*Prob. Code § 19104(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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49-560 California Forms of Pleading and Practice--Annotated § 560.250

§ 560.250 Claims by Public Entities

[1] In General

A claim by a public entity must generally be filed within the same time as any other claims against the trust [*see Prob. Code § 19200(a)*]. A claim not so filed is barred, including any lien imposed for the claim [*Prob. Code § 19200(a)*].

As used in the provisions governing claims against the decedent's trust by public entities, the term "public entity" has the meaning provided in *Gov. Code § 811.2*, and includes an officer authorized to act on behalf of the public entity. *Gov. Code § 811.2* defines "public entity" to include the state, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state [*see Gov. Code § 811.2*].

The provisions governing claims against the decedent's trust by public entities do not affect the order of priority of debts provided for under other provisions of law, and do not apply to liability for the restitution of amounts illegally acquired through the means of a fraudulent, false, or incorrect representation or a forged or unauthorized endorsement [*Prob. Code §§ 19204, 19205*].

[2] Claims Governed by Special Statutes

Notwithstanding any other statute, a claim of a public entity that arises under the statutes listed in *Prob. Code § 19201(b)* is barred only after written notice or request to the public entity and expiration of the period provided in the applicable section. If no written notice or request is made, the claim is enforceable by the remedies, and is barred at the time, otherwise provided in the law, act, or code [*Prob. Code § 19201(a)(2)*]. A comparable list of statutes is given in *Prob. Code § 9201(b)* (claims by public entities against decedent's estate) and is set out in Ch. 454, *Probate: Claims Against the Estate* .

The public entity may provide a form to be used for the written notice or request to the public entity. When appropriate, the form may require the decedent's social security number, if known [*Prob. Code § 19201(a)(1)*].

If the trustee knows or has reason to believe that the deceased settlor received health care under the Medi-Cal Act (*Welf. & Inst. Code § 14000 et seq.*) or the Waxman-Duffy Prepaid Health Plan Act (*Welf. & Inst. Code § 14200 et seq.*), or was the surviving spouse of a person who received health care, the trustee must give the Director of Health Services notice of the settlor's death in the manner provided in *Prob. Code § 215* [*Prob. Code § 19202(a)*; for discussion of notice under *Prob. Code § 215*, *see* Ch. 454, *Probate: Claims Against the Estate*]. Notice must also be given if the deceased settlor was the surviving spouse of a person who received health care under either of those acts [*Prob. Code § 9202*]. If a person who received that health care dies leaving a surviving spouse, no claim for reimbursement can be made against the person's estate [*Welf. & Inst. Code § 14009.5(b)(2)(A)*]. When the surviving spouse dies, however, the State Department of Health Services is required to make a claim against the estate of the surviving spouse (or against any person who has obtained property from the surviving spouse by distribution or survival) for the amount paid for the medical assistance given to the deceased spouse, or the value of any of the deceased spouse's property received by the surviving spouse through distribution or survival, whichever is less [*Welf. & Inst. Code § 14009.5(b)(2)(A)*]. The Probate Code gives the State Director of Health Services four months after the trustee has given the Director notice of the recipient's death to file a claim [*Prob. Code § 19202(b)*]. Notwithstanding the Probate Code provision, however, the Welfare & Institutions Code provides that any statute of limitations that purports to limit the ability to recover for medical assistance granted under these circumstances "shall not apply to any claim for reimbursement" [*Welf. & Inst. Code § 14009.5(b)(2)(A)*].

[3] Liability of Distributees

If property in the trust is distributed before expiration of the time allowed a public entity to file a claim, the public entity has a claim against the distributees to the full extent of the public entity's claim or each distributee's share of the distributed property, as set forth in *Prob. Code § 19402* [*see § 560.250[3]*], whichever is less. The public entity's claim against distributees includes interest at a rate equal to that specified in *Rev. & Tax. Code § 19521*, from the date of distribution or the date of filing the claim by the public entity, whichever is later, plus other accruing costs as in the case of enforcement of a money judgment [*Prob. Code § 19203*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsState & Territorial GovernmentsClaims By & Against

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49-560 California Forms of Pleading and Practice--Annotated § 560.251

§ 560.251 Payment, Rejection, or Settlement of Claims

At any time, the trustee may pay, reject, or contest any claim against the deceased settlor or settle any claim by compromise, arbitration, or otherwise [*see § 560.253*]. The trustee may also file a petition to settle any claim in the manner set forth in *Prob. Code § 19020 et seq.* [*Prob. Code § 19005*; *see § 560.252*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview

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49-560 California Forms of Pleading and Practice--Annotated § 560.252

§ 560.252 Petition for Approval of Allowance, Compromise, or Settlement of Claims Against Deceased Settlor

[1] In General

At any time after the filing and first publication of notice pursuant to *Prob. Code § 19040 et seq.*, and after expiration of the time to file claims, a trustee or beneficiary may petition the court to approve either of the following [*Prob. Code § 19020*]:

- An allowance, compromise, or settlement of any claims that have not been rejected by the trustee under *Prob. Code § 19000 et seq.* for which trust property may be liable; or

- An allocation to two or more trusts that may be liable for the claims of any amounts due by reason of allowance, compromise, or settlement of any claims.

A proceeding to approve and settle a claim is commenced by the filing of a verified petition stating facts showing that the petition is authorized under *Prob. Code § 19020 et seq.* and the grounds of the petition [*Prob. Code 19022(a)*].

In cases involving charitable trusts subject to the jurisdiction of the Attorney General, the Attorney General may petition under *Prob. Code § 19000 et seq.* [*Prob. Code § 19030*].

For a form of petition for approval of allowance, compromise, or settlement of claims, *see § 560.652*.

[2] Notice of Hearing on Petition for Approval

The clerk will set a hearing date for the petition, and, at least 30 days before the time set for the hearing, the petitioner must cause notice of the time and place of the hearing and a copy of the petition to be served on each of the creditors whose interests in the estate may be affected by the petition. Service must be effected in the manner provided in *Code of Civ. Proc. § 413.10 et seq.* [*Prob. Code §§ 19022(c), 19023*].

In addition, at least 30 days before the time set for the hearing on the petition, the petitioner must cause notice of the time and place of the hearing, together with a copy of the petition, to be mailed to each of the following persons who is not a petitioner [*Prob. Code § 19024*]:

- All trustees of the trust and of any other trusts to which an allocation of liability may be approved by the court pursuant to the petition;

- All affected beneficiaries;

- The personal representative of the deceased settlor's estate if any is known to the trustee; and

- The Attorney General if the petition relates to a charitable trust subject to the jurisdiction of the Attorney General, unless the Attorney General waives notice.

Except as otherwise provided, notice in proceedings under the Trust Law, which includes *Prob. Code § 19000 et seq.*, is governed by *Prob. Code § 1200 et seq.* [*see Prob. Code § 17100*]. For further discussion of the general notice provisions under the Probate Code, see Ch. 447, *Probate: Statutory Notice Requirements* .

[3] Response or Objection

Any interested person may appear to respond or object to the petition [*see Prob. Code §§ 1040, 1043*]. For discussion of the procedure for responding or objecting with regard to claims against an estate, see Ch. 454, *Probate: Claims Against the Estate* .

If any creditor beneficiary, or trustee fails to file a timely written pleading after notice, the case is at issue, notwithstanding the failure. The case may proceed on the petition and written statements filed by the time of the hearing, and no further pleadings by other persons are necessary. The creditor, beneficiary, or trustee who failed to file a timely written pleading may not participate further in the proceeding and will be bound by the decision in the proceeding [*Prob. Code § 19025(a)*].

[4] Discretion of Court

[a] Appointment of Guardian Ad Litem

The court may, on its own motion or on the request of a trustee or other person interested in the trust, appoint a guardian ad litem in accordance with *Prob. Code § 1003* [*Prob. Code § 19029*; for discussion, *see § 560.140*].

[b] Ruling on Petition

The court in its discretion may make any orders and take any other action necessary or proper to dispose of the matters presented by the petition [*Prob. Code § 19027(a)*]. The court may dismiss the petition if the proceeding does not appear to be reasonably necessary for the protection of the interests of the trustee or any beneficiary of the trust [*Prob. Code § 19026*].

If the court determines that the assets of the trust estate are insufficient to pay all debts, the court shall order payment in the manner set forth in *Prob. Code § 11420* (priority of payment) [*Prob. Code § 19027(b)*; for discussion, *see* Ch. 454, *Probate: Claims Against the Estate*].

For a form for an order granting petition for approval of allowance, compromise, or settlement of claims, *see § 560.653*.

[5] Conclusiveness of Order

The court's order, when final, is conclusive as to the liability of the trust property with respect to the claims at issue in the petition. In the event of a subsequent administration of the estate of the deceased settlor, the order is binding on the personal representative of the estate of the deceased settlor as well as on all creditors and beneficiaries who had notice of the petition [*Prob. Code § 19025(b)*].

[6] Appeal

An final order approving (or refusing to approve) an allowance, compromise, or settlement of a claim against the revocable trust of a deceased settlor is appealable [*Prob. Code § 1304(b)*; *see Prob. Code §§ 19020-19030* (petition for approval and settlement of claims against deceased settlor)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview

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49-560 California Forms of Pleading and Practice--Annotated § 560.253

§ 560.253 Allowance and Rejection of Claims

[1] In General

When a claim is filed, the trustee may allow or reject the claim in whole or in part [*Prob. Code § 19250*]. The allowance or rejection must be in writing, and must be filed by the trustee with the court clerk. The trustee must also mail notice to the claimant, together with a copy of the allowance or rejection [*Prob. Code § 19251(a)*; *see Prob. Code § 1215* (manner of mailing notice)]. For discussion of mailing notice, see Ch. 447, *Probate: Statutory Notice Requirements* .

[2] Contents of Allowance or Rejection

The allowance or rejection must contain the following information [*Prob. Code § 19251(b)*; *see also Prob. Code § 19251(c)* (Judicial Council to promulgate official form of allowance or rejection)]:

- The name of the creditor;
- The date of the settlor's death;
- The total amount of the claim;
- The amount allowed or rejected by the trustee; and
- A statement that the creditor has 90 days from the time the notice of rejection is given or 90 days after the claim becomes due, whichever is later, in which to bring an action on a claim rejected in whole or in part.

Prob. Code § 19251 does not apply to demands a trustee elects to treat as claims pursuant to *Prob. Code § 19154* [*Prob. Code § 19251(d)*; for discussion of *Prob. Code § 19154, see § 560.248*].

[3] Allowance of Claim

The trustee has the power to pay any claim or portion of a claim, and payment constitutes allowance of the claim to the extent of the payment. The trustee also has the power to compromise any claim or portion of a claim. If the trustee or the attorney for the trustee is a creditor of the deceased settlor, the trustee has the same powers regarding allowance, rejection, payment, or compromise as he or she would if he or she were not a creditor [*see Prob. Code § 19252*].

Claims barred by the statute of limitations may not be allowed by the trustee [*Prob. Code § 19253(a)*; for discussion of time limitations applicable to claims, *see § 560.246[1]*].

The trustee may petition the court to approve any claims allowed [*see Prob. Code § 19020 et seq.*]. For discussion of petitioning for approval of claims, see *§ 560.252*.

[4] Rejection of Claim

If within 30 days after a claim is filed the trustee has refused or neglected to act on the claim, the refusal or neglect may, at the option of the claimant, be deemed equivalent to the giving of a notice of rejection on the 30th day [*Prob. Code § 19254*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesRejected ClaimsEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview

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49-560 California Forms of Pleading and Practice--Annotated § 560.254

§ 560.254 Creditor's Action on Rejected Claim

[1] In General

A rejected claim is barred as to the part rejected unless the creditor brings an action on the claim or the matter is referred to a referee or to arbitration within 90 days after notice is given if the claim is due at the time of giving notice of rejection or, if the claim is not due at the time of giving notice of rejection, 90 days after the claim becomes due. Neither 90-day period includes time during which there is a vacancy in the office of the trustee [*Prob. Code § 19255(a)*]. Notwithstanding the statute of limitations otherwise applicable to a claim, if an action on a rejected claim is not timely commenced or the matter is not timely referred to a referee or arbitration, it is forever barred [*Prob. Code § 19253(d)*].

For a form for a complaint in an action on a rejected claim, *see § 560.654*.1.

[2] Notice of Pendency of Action

The creditor must file a notice of the pendency of the action or the referral to a referee or to arbitration with the court clerk in the trust proceeding, together with proof of giving a copy of the notice to the trustee as provided in *Prob. Code § 1215*. Personal service of a copy of the summons and complaint on the trustee is equivalent to the filing and giving of the notice [*Prob. Code § 19255(c)*; for discussion of *Prob. Code § 1215*, *see* Ch. 447, *Probate: Statutory Notice Requirements*]. For a form for this notice, *see § 560.654*.

Any property distributed by the trustee under the terms of the trust after 120 days from the later of the time the notice of rejection is given or the claim is due and before the notice of pendency of action or referral or arbitration is filed and given (excluding any time during which there is a vacancy in the office of trustee) is not subject to the claim. Neither the trustee nor the distributee is liable on account of the distribution [*Prob. Code § 19255(d)*].

[3] Costs and Attorney's Fees

The prevailing party in the action is entitled to court costs, and, if the court determines that the prosecution or defense of

the action against the prevailing party was unreasonable, the prevailing party is to be awarded reasonable litigation expenses, including attorney's fees. In this context, the creditor is the prevailing party if the creditor recovers an amount greater than the amount of the claim allowed by the trustee. The trustee is the prevailing party if the creditor recovers an amount equal to or less than the amount of the claim allowed by the trustee [*Prob. Code § 19255(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesBad Faith AwardsCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesRejected ClaimsEstate, Gift & Trust LawTrustsAdministration

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49-560 California Forms of Pleading and Practice--Annotated § 560.255

§ 560.255 Claims Established by Judgment

[1] Money Judgments

After the death of the settlor, a creditor cannot enforce either a money judgment against the deceased settlor on a claim against the deceased settlor or a money judgment against the trustee on a claim against the decedent or the trust estate against property in the trust estate under the Enforcement of Judgments Law (*Code Civ. Proc. § 680.010 et seq.*), except property that was subject to an execution lien at the time of the settlor's death [*Prob. Code §§ 19300(a), 19303*; *see also Code Civ. Proc. § 686.020*].

All money judgments against the deceased settlor or trustee are payable in the course of administration and must be filed in the same manner as other claims [*Prob. Code § 19300*; *see also Prob. Code § 19301*]. For discussion of claim filing requirements and procedures, see *§ 560.246*.

When a money judgment against a trustee in a representative capacity becomes final, it conclusively establishes the validity of the claim for the amount of the judgment. The judgment must provide that it is payable out of property in the deceased settlor's trust estate in the course of administration. In addition, an abstract of the judgment must be filed in the trust administration proceedings [*Prob. Code § 19301*].

[2] Nonmoney Judgments

Notwithstanding the death of the settlor, a judgment for possession of trust property or a judgment for sale of trust property may be enforced under the Enforcement of Judgments Law (*Code Civ. Proc. § 680.010 et seq.*). This does not, however, authorize enforcement under the Enforcement of Judgments Law against any property in the trust estate of the deceased settlor other than the property described in the judgment for possession or sale [*Prob. Code § 19302(a)*]. For discussion and forms relating to enforcement of nonmoney judgments, see Ch. 254, *Executions and Enforcement of Judgments* .

After the settlor's death, a demand for money that is not satisfied from the trust property described in a judgment for sale

of property must be filed as a claim in the same manner as other claims and is payable in the course of administration [*Prob. Code § 19302(b)*].

[3] Property Subject to Execution Lien

If trust property of the deceased settlor is subject to an execution lien at the timeof the settlor's death, enforcement against the property may proceed under the Enforcement of Judgments Law (*Code Civ. Proc. § 680.010 et seq.*) to satisfy the judgment. The levying officer must account to the trustee for any surplus. If the judgment is not satisfied, the balance of the judgment remaining unsatisfied is payable in the course of administration [*Prob. Code § 19303*; *see also Code Civ. Proc. § 680.260* (definition of "levying officer")].

[4] Conversion of Attachment Lien to Judgment Lien

[a] Converting Lien

An attachment lien may be converted into a judgment lien on property in the trust estate subject to the attachment lien, with the same priority as the attachment lien, if the judgment debtor dies after entry of judgment in an action in which the property was attached or if a judgment is entered after the death of the defendant in an action in which the property was attached [*Prob. Code § 19304(a)*].

To convert the attachment lien into a judgment lien, the levying officer must, after entry of judgment in the action in which the property was attached and before the expiration of the attachment lien, do one of the following [*Prob. Code § 19304(b)*]:

- Serve an abstract of the judgment, and a notice that the attachment lien has become a judgment lien, on the trustee or other person holding property subject to the attachment lien.

- Record or file in any office where the writ of attachment and notice of attachment are recorded or filed an abstract of the judgment and a notice that the attachment lien has become a judgment lien. If the attached property is real property, the plaintiff or the plaintiff's attorney may record the required abstract and notice with the same effect as if recorded by the levying officer.

[b] Exemptions From Lien

After the death of the settlor, any members of the deceased settlor's family who were supported in whole or in part by the deceased settlor may claim an exemption provided in *Code Civ. Proc. § 487.020* for property levied on under the writ of attachment if the right to the exemption exists at the time the exemption is claimed [*Prob. Code § 19304(c)*]. The exemptions allowed under that provision are the following:

- All property exempt from enforcement of a money judgment [*see Code Civ. Proc. § 703.010 et seq.*];

- Property necessary for support;

- "Earnings" as defined in *Code Civ. Proc. § 706.011* (Wage Garnishment Law); and

- Property not subject to attachment under *Code Civ. Proc. § 487.010*.

The trustee may claim the exemption on behalf of members of the deceased settlor's family. The claim of exemption may be made at any time before the time the abstract and notice are served, recorded, or filed with respect to the property claimed to be exempt. The claim of exemption must be made in the same manner as an exemption is claimed under *Code Civ. Proc. § 485.610* [*Prob. Code § 19304(c)*]. For further discussion and forms relating to claims of

exemption, Ch. 62, *Attachment*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionExemptionsCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesJudgment LiensEnforcementEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawTrustsAdministration

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49-560 California Forms of Pleading and Practice--Annotated § 560.256

§ 560.256 Allocation of Debts Between Trust and Surviving Spouse

[1] Allocation of Debt Authorized

If a debt of the deceased settlor appears to have been paid or to be payable in whole or in part from property in the deceased settlor's trust, the trustee, the surviving spouse, the personal representative, if any, or a deceased settlor's probate estate, or a beneficiary may petition for an order to allocate the debt [*Prob. Code § 19320*]. For a form of petition for allocation of debt, *see § 560.654*.2.

Absent an agreement, each debt of the deceased settlor must be characterized as separate or community. Then the debts will be allocated as follows [*Prob. Code § 11444(b)*]:

- Separate debts of either spouse are allocated to that spouse's separate property assets, and community debts are allocated to the spouses' community property assets.

- If a separate property asset of either spouse is subject to a secured debt that is characterized as that spouse's separate debt, and the net equity in that asset available to satisfy the secured debt is less than the secured debt, the unsatisfied portion of the secured debt is treated as an unsecured separate debt of that spouse and allocated to the net value of that spouse's other separate property assets.

- If the net value of either spouse's separate property assets is less than that spouse's unsecured separate debt or debts, the unsatisfied portion of the debt or debts is allocated to the net value of that spouse's one-half share of the community property assets. If the net value of that spouse's one-half share of the community property assets is less than that spouse's unsatisfied unsecured separate debt or debts, the remaining unsatisfied portion of the debt or debts is allocated to the net value of the other spouse's one-half share of the community property assets.

- If a community property asset is subject to a secured debt that ischaracterized as a community debt,

and the net equity in that asset available to satisfy the secured debt is less than the secured debt, the unsatisfied portion of the secured debt is treated as an unsecured community debt and allocated to the net value of the other community property assets.

- If the net value of the community property assets is less than the unsecured community debt or debts, the unsatisfied portion of the debt or debts is allocated equally between the separate property assets of the decedent and the surviving spouse. If the net value of either spouse's separate property assets is less than that spouse's share of the unsatisfied portion of the unsecured community debt or debts, the remaining unsatisfied portion of the debt or debts is allocated to the net value of the other spouse's separate property assets.

The net value of separate property is its fair market value as of the date of the decedent's death, minus the date-of-death balance of any liens and encumbrances that are characterized as debts of the owner spouse [*Prob. Code § 11444(c)(1)*]. The net value of community property is its fair market value as of the date of the decedent's death, minus the date-of-death balance of any liens and encumbrances that are characterized as community debts [*Prob. Code § 11444(c)(2)*]. For allocation purposes, a nonrecourse debt is defined as a debt for which the debtor's obligation to repay is limited to the collateral securing the debt and for which a deficiency judgment against the debtor is not permitted, and would limit the amount of a nonrecourse debt to the net equity in the collateral [*Prob. Code § 11444(c)(3)*]. A court may order a different allocation of debts if it finds that allocation to be equitable under the circumstances [*Prob. Code § 11444(d)*].

If a trustee, personal representative or the surviving spouse incurs any damages or expense, including attorney's fees, on account of the nonpayment of a debt that was allocated to the other party, or as the result of a debt being misallocated due to fraud or intentional misrepresentation by the other party, the party incurring damages may recover from the other party for reasonable damages or expense [*Prob. Code § 11444(e)*].

[2] Funeral Expenses and Expenses of Last Illness

Notwithstanding any other statute, funeral expenses and expenses of last illness, in the absence of specific provisions in a will or trust to the contrary, must be charged against the deceased settlor's probate estate and, thereafter, against the deceased settlor's share of the trust, and may not be allocated to or charged against the community share of the surviving spouse, whether or not the surviving spouse is financially able to pay the expenses and whether or not the surviving spouse or any other person is also liable for the expenses [*Prob. Code § 19326*].

[3] Allocation Affected by Value of Surviving Spouse's Property

If it appears from the petition that allocation would be affected by the value of the separate property of the surviving spouse and any community property and quasi-community property not administered in the trust and if an inventory and appraisal of the property has not been provided by the surviving spouse, the court will make an order to show cause why the information should not be provided [*Prob. Code § 19322*.] For a form of order to show cause, *see § 560.654*.3.

[4] Allocation by Agreement

The trustee, the personal representative, if any, of a deceased settlor's probate estate, and the surviving spouse may provide for allocation of debts by agreement if the agreement substantially protects the rights of other interested persons. The trustee, the personal representative, or the spouse may request and obtain court approval of the allocation provided in the agreement [*Prob. Code § 19324(a)*].

[5] Notice of Hearing on Petition for Allocation of Debts

At least 30 days before the time set for the hearing on the petition, the petitioner must cause notice of the time and place

of the hearing and a copy of the petition to be served on the surviving spouse in the manner provided in *Code Civ. Proc. § 413.10 et seq.* for service of a summons [*Prob. Code § 19323(a)*].

At least 30 days before the time set for the hearing on the petition, the petitioner must also cause notice of the time and place of hearing, together with a copy of the petition, to be mailed to each of the following persons who is not a petitioner [*Prob. Code § 19323(b)*]:

- All trustees of the trust and of any trusts to which an allocation of liability may be approved by the court pursuant to the petition [*Prob. Code § 19323(b)*];

- All beneficiaries affected;

- The personal representative of the deceased settlor's estate if any is known to the trustee; and

- The Attorney General if the petition relates to a charitable trust subject to the jurisdiction of the Attorney General, unless the Attorney General waives notice.

Mailing notice is governed by *Prob. Code § 1200 et seq.* [*see Prob. Code § 17100*]. For discussion and general forms, see Ch. 447, *Probate: Statutory Notice Requirements* .

[6] Order Allocating Debts

On making a determination allocating debts, the court is required to make anorder that does the following [*Prob. Code § 19325*]:

- Directs the trustee to make payment of the amounts allocated to the trust by payment to the surviving spouse or creditors.

- Directs the trustee to charge amounts allocated to the surviving spouse against any property or interests of the surviving spouse that are in the possession or control of the trustee. To the extent that property or interests of the surviving spouse in the possession or control of the trustee are insufficient to satisfy the allocation, the court order must summarily direct the surviving spouse to pay the allocation to the trustee.

For a form of order allocating debts, see *§ 560.654*.4.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationFamily LawMarital Duties & RightsDebt Liability

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[Reserved]

§§ 560.257[Reserved]

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1. In General

49-560 California Forms of Pleading and Practice--Annotated § 560.270

§ 560.270 Governing Statutes

Administration of charitable trusts (as well as certain express private trusts) is governed generally by the Trust Law (*Prob. Code §§ 15000 et seq.*) to the extent that application is not in conflict with the Uniform Supervision of Trustees for Charitable Purposes Act (*Gov. Code § 12580 et seq.*), which otherwise governs. Duties of trustees of private foundations, charitable trusts, and split-interest trusts are governed by *Prob. Code § 16100 et seq.* However, when the assets of a charitable trust are administered by a nonprofit corporation, the Nonprofit Corporation Law (*Corp. Code § 5000 et seq.*) applies as follows:

- General provisions and definitions [*see Corp. Code §§ 5002-5080*].

- The Nonprofit Public Benefit Corporation Law (*Corp. Code § 5110 et seq.*), which relates to nonprofit corporations formed for any public or charitable purposes [*see Corp. Code § 5111*].

- The Nonprofit Mutual Benefit Corporation Law (*Corp. Code § 7110 et seq.*), which relates to nonprofit corporations formed for any lawful purpose, except corporations all of whose assets are irrevocably dedicated to charitable, religious, or public purposes if, on dissolution, the assets will be distributed to a person or persons carrying on a charitable, religious, or public purpose [*see Corp. Code § 7111*].

- The Nonprofit Religious Corporation Law (*Corp. Code § 9110 et seq.*), which relates to nonprofit corporations formed primarily or exclusively for religious purposes [*see Corp. Code § 9111*; *see also* Ch. 110, *Churches and Religious Organizations*].

- Transitional provisions (*Corp. Code §§ 9910-9927*), which govern the application of the Nonprofit Corporation Law to corporations organized or existing under prior nonprofit corporation law (see former Corp. Code §§ 9000-9802) [*see Corp. Code §§ 9910(a), 10200* (references to prior law)].

A nonprofit health care service plan holding assets in charitable trust is not subject to the Uniform Supervision of Trustees for Charitable Purposes Act (*Gov. Code § 12580 et seq.*), and thus does not have to register with the Attorney General or meet the other requirements of the Uniform Act [*Gov. Code § 12583*; *Van de Kamp v. Gumbiner (1990) 221 Cal. App. 3d 1260, 1270, 270 Cal. Rptr. 907]* . Instead, nonprofit health care service plans are governed by the Knox-Keene Health Care Service Plan Act of 1975 (*Health & Safety Code § 1340 et seq.*) and the Nonprofit Corporations Law [*see Corp. Code §§ 5142, 5233, 5250, 6510, 6511, 10820, 10821*].

Bus. & Prof. Code §§ 17510.9 and *17510.85* govern fiduciary obligations of, and disclosures by, persons soliciting charitable contributions for compensation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsCharitable Trusts

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49-560 California Forms of Pleading and Practice--Annotated § 560.271

§ 560.271 Commercial Fundraisers for Charitable Purposes

[1] Defined

The Attorney General has responsibility for supervising "commercial fundraisers for charitable purposes," who must register with the Attorney General, account annually to the Attorney General for all funds collected pursuant to any solicitation for charitable purposes during the preceding calendar year, and who are constructive trustees of all funds so collected [*Gov. Code § 12599*]. A "commercial fundraiser for charitable purposes" is any individual, corporation, or other legal entity who for compensation either (1) solicits funds, assets, or property in California for charitable purposes, (2) as a result of a solicitation of funds, assets, or property in California for charitable purposes, receives or controls the funds, assets, or property solicited for charitable purposes, or (3) employs, procures, or engages any compensated person to solicit, receive or control funds, assets or property for charitable purposes. Charitable fundraisers also include any person or entity that obtains a majority of its inventory for resale from an organization qualified to solicit donations pursuant to *Welf. & Inst. Code § 148.3* [*Gov. Code § 12599(a)*]. Any commercial fundraiser that obtains a majority of its inventory for resale from an organization qualified to solicit donations pursuant to *Welf. & Inst. Code § 148.3* must file special reports with the Attorney General, which differ from the reports other commercial fundraisers file [*Gov. Code § 12599(e), (k)*].

"Commercial fundraisers for charitable purposes" do not include trustees as defined in *Gov. Code § 12582* or *12583*, charitable corporations as defined in *Gov. Code § 12582.1*, or any employee of either, or employees of any person registered with the Attorney General as a commercial fundraiser for charitable purposes. Also excluded are federally insured financial institutions that hold funds received as a result of a solicitation for charitable purposes [*Gov. Code § 12599(a)*].

[2] Disclosures Required

Persons who solicit charitable donations for compensation must disclose that fact at the time of each solicitation, stating the name by which they or their employer is registered with the Attorney General as a commercial fundraiser [*Bus. & Prof. Code § 17510.85*]. Similarly, it is unlawful for a commercial fundraiser to fail to disclose on request (written or

oral) its percentage of total fundraising expenses. "Percentage of total fundraising expenses" means the ratio of total expenses of the fundraiser to the total revenues received by the fundraiser for the charitable purpose for which the funds are being solicited as reported on the most recent report filed with the Attorney General. If the request and response are oral, a written follow-up disclosure must still be made within five working days. Failure to make this disclosure is grounds for an injunction prohibiting further solicitation [*Gov. Code § 12599(j)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsManagement Duties & LiabilitiesEstate, Gift & Trust LawTrustsCharitable TrustsGovernmentsState & Territorial GovernmentsEmployees & Officials

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49-560 California Forms of Pleading and Practice--Annotated § 560.272

§ 560.272 Fiduciary Duties of Persons Soliciting Charitable Contributions

There is a fiduciary relationship between a charity or any person soliciting on the charity's behalf and a person from whom a charitable contribution is being solicited. The acceptance of a charitable contribution by a charity or any person soliciting on behalf of a charity establishes a charitable trust and a duty on the part of the person soliciting on behalf of the charity to use the contributions for the declared charitable purpose for which they are sought [*Bus. & Prof. Code § 17510.9*]. *Bus. & Prof. Code § 17510.9* is declarative of existing law.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsManagement Duties & LiabilitiesEstate, Gift & Trust LawTrustsCharitable Trusts

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49-560 California Forms of Pleading and Practice--Annotated §§ 560.273-560.289

[Reserved]

§§ 560.273[Reserved]

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49-560 California Forms of Pleading and Practice--Annotated § 560.290

§ 560.290 Charitable Trust Defined

A charitable trust or a charity is a donation in trust to promote the welfare of the public at large, or a particular class of persons, indefinite with regard to numbers and individuals [*Estate of Schloss (1961) 56 Cal. 2d 248, 256, 14 Cal. Rptr. 643, 363 P.2d 875* ; *Estate of Breeden (1989) 208 Cal. App. 3d 981, 985-986, 256 Cal. Rptr. 813* ; *People v. Cogswell (1896) 113 Cal. 129, 138, 45 P. 270]* . For the purposes of *Prob. Code §§ 16100-16105* (duties of trustees of charitable trusts, private foundations and split-interest trusts), charitable trusts are defined as those described in *I.R.C. § 4947(a)(1)*, private foundations as those defined in *I.R.C. § 509*, and split interest trusts as those defined in *I.R.C. § 4947(a)(2)* [*Prob. Code § 16100*].

To create a charitable trust, the following must exist [*L.B. Research & Educ. Found. v. UCLA Found. (2005) 130 Cal. App. 4th 171, 177, 29 Cal. Rptr. 3d 710]* :

- A proper manifestation by the settlor of an intention to create a trust;
- A charitable purpose; and
- Trust property.

When a charitable gift is made for a specified purpose, a question may arise as to whether the gift creates a trust or a gift subject to a condition subsequent For example, the owner of property, instead of expressly creating a trust, may transfer property to another on the condition that if the transferee fails to perform a specified act, the transferee's interest will be forfeited either to the transferor or to a designated third party. In such a case, the transferee's interest is subject to a condition subsequent and is not held in trust [*L.B. Research & Educ. Found. v. UCLA Found. (2005) 130 Cal. App. 4th 171, 177, 29 Cal. Rptr. 3d 710]* . Whether a trust or a condition is created depends on the transferor's manifested intention. The fact that the word "condition" is used does not necessarily indicate that a condition and not a trust is intended, because trusts can be created by words of condition. Property given on condition that it will be applied to specified charitable purposes is particularly likely to be construed as having been given in a charitable trust [*L.B.*

Research & Educ. Found. v. UCLA Found. (2005) 130 Cal. App. 4th 171, 177-178, 29 Cal. Rptr. 3d 710] . The question to be decided in such cases is whether the donor intended to provide that if the property were not used for the designated charitable purpose it should revert either to the donor's estate or to a contingent donee, or the donor intended to impose an enforceable obligation on the donees to devote it to those purposes [*L.B. Research & Educ. Found. v. UCLA Found. (2005) 130 Cal. App. 4th 171, 178-180, 29 Cal. Rptr. 3d 710* (conditional contract, not charitable trust, was created by instrument giving contribution of $1 million to university but also providing that if this money is not used as directed, fund must be transferred to another institution)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust LawTrustsCreation

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49-560 California Forms of Pleading and Practice--Annotated § 560.291

§ 560.291 Exemption From Rule Against Perpetuities

A charitable trust is exempt from the Rule Against Perpetuities [*Civ. Code § 715* (perpetuities not allowed except for eleemosynary purpose); *People v. Cogswell (1896) 113 Cal. 129, 138, 45 P. 270* (term "eleemosynary" interchangeable with "charitable")]. For discussion of the Rule Against Perpetuities, see *§ 560.49*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstates Created by Trusts & WillsInvalid Restraints & Rule Against PerpetuitiesEstate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust LawTrustsCreation

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49-560 California Forms of Pleading and Practice--Annotated § 560.292

§ 560.292 Beneficiaries

The beneficiaries of a charitable trust are indefinite in number and identity [*Estate of Schloss (1961) 56 Cal. 2d 248, 256, 14 Cal. Rptr. 643, 363 P.2d 875]* . A charitable trust differs significantly from an express private trust in this respect, because the beneficiaries of an express private trust must be ascertained or ascertainable [*see Reagh v. Kelley (1970) 10 Cal. App. 3d 1082, 1092, 1098, 89 Cal. Rptr. 425]* . For further discussion, see *§ 560.40* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsCharitable Trusts

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49-560 California Forms of Pleading and Practice--Annotated § 560.293

§ 560.293 Application of Cy Pres Doctrine

The law favors gifts for charitable purposes, and instruments providing for such gifts will be liberally construed to accomplish the donor's intent [*Estate of Tarrant (1951) 38 Cal. 2d 42, 46, 237 P.2d 505]* . If a donor has expressed a general charitable purpose that for some reason cannot be accomplished in the manner specified, the court may apply the equitable doctrine of cy pres to substitute another charitable object that approximates the original purposes as closely as possible [*see Estate of Tarrant (1951) 38 Cal. 2d 42, 49, 237 P.2d 505* ; *In re Veterans' Industries, Inc. (1970) 8 Cal. App. 3d 902, 918, 88 Cal. Rptr. 303]* . The doctrine has been applied in various situations, including the following:

- To determine the disposition of assets on dissolution of a charitable corporation [*see In re Veterans' Industries, Inc. (1970) 8 Cal. App. 3d 902, 917-918, 88 Cal. Rptr. 303]* .

- To uphold gifts when the testator has failed to specify the precise charitable purpose or to name a trustee to administer the gift [*see Estate of Quinn, (1958) 156 Cal. App. 2d 684, 687, 320 P.2d 219]* .

- To uphold gifts made to charitable institutions that do not accept them [*see Estate of Faulkner (1954) 128 Cal. App. 2d 575, 275 P.2d 818]* .

- To uphold gifts made to charitable institutions that cannot be identified with certainty [*see Estate of Gatlin (1971) 16 Cal. App. 3d 644, 650, 94 Cal. Rptr. 295]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust LawTrustsInterpretation

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49-560 California Forms of Pleading and Practice--Annotated § 560.294

§ 560.294 No Charitable Immunity for Torts

Charitable immunity does not exist under California law, and charitable corporations are liable for their torts [*see Malloy v. Fong (1951) 37 Cal. 2d 356, 364-367, 232 P.2d 241* ; *see also Civ. Code § 1714(a)* (everyone liable for injuries arising from willful or negligent acts)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsManagement Duties & LiabilitiesEstate, Gift & Trust LawTrustsCharitable TrustsTortsNegligenceDefensesPrivate ImmunitiesCharitable Immunity

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§ 560.295 Duties of Trustee

[1] Prohibited Acts

During any period when a trust is deemed to be a charitable trust, a private foundation, or a split-interest trust, the trustee shall not do any of the following [*Prob. Code § 16102*; *see Prob. Code § 16000* (definition of trusts)]:

- Engage in any act of self-dealing as defined in *I.R.C. § 4941(d)*.
- Retain any excess business holdings as defined in *I.R.C. § 4943(c)*.
- Make any investments in a manner that subjects the property of the trust to tax under *I.R.C. § 4944*.
- Make any taxable expenditure as defined in *I.R.C. § 4945(d)*.

Exceptions to *Prob. Code § 16102* with regard to split-interest trusts are set forth in *Prob. Code § 16103*.

[2] Distribution of Income

During any period when a trust is deemed to be a charitable trust or a private foundation, the trustee must distribute its income for each taxable year (and principal if necessary) at a time and in a manner that will not subject the property of the trust to tax under *I.R.C. § 4942* [*Prob. Code § 16101*].

[3] Incorporation of Provisions in Trust Instrument

The provisions of *Prob. Code §§ 16101*, *16102*, and *16103* are deemed to be contained in the instrument creating every trust to which *Prob. Code §§ 16100-16105* applies. Any provision of the instrument inconsistent with or contrary to *Prob. Code §§ 16100-16105* is without effect [*Prob. Code § 16104*].

[4] Applicability of Petition Procedure

A proceeding contemplated by the federal Tax Reform Act of 1969 (Pub. L. No. 91-172 § 101(l)(3)) may be commenced pursuant to *Prob. Code § 17200* (petition in probate court) by the organization involved. All specifically named beneficiaries of the organization and the Attorney General must be parties to the proceedings. Probate court jurisdiction is not exclusive and does not limit any jurisdiction that otherwise exists, notwithstanding *Prob. Code § 17200* [*Prob. Code § 16105(a)*; for recording requirements, see *Prob. Code § 16105(b)*]. For discussion regarding petition procedure under *Prob. Code § 17200* and related provisions, see *§ 560.130* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersLimitations

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49-560 California Forms of Pleading and Practice--Annotated § 560.296

§ 560.296 Enforcement of Charitable Trusts

[1] By Attorney General

The Attorney General is responsible for the supervision of charitable trusts, and is empowered to institute proceedings to ensure compliance pursuant to the Uniform Supervision of Trustees for Charitable Purposes Act (*Gov. Code § 12580 et seq.*) and other statutory provisions listed in *Gov. Code § 12598*, theNonprofit Public Benefit Corporation Law (*Corp. Code § 5110 et seq.*), and the Nonprofit Mutual Benefit Corporation Law (*Corp. Code §§ 7110-8910*) [*see Gov. Code §§ 12591, 12598* and *Corp. Code §§ 5250, 7240*, respectively]. *Gov. Code § 12580 et seq.* primarily set forth registering and reporting requirements regarding certain charitable trusts [*see Gov. Code §§ 12582* (trustee includes any individual, or corporation, or other entity holding property for any charitable trust), 12582 (exclusions, e.g., religious corporations)]. Forms for complying with the reporting requirements may be obtained from the Office of the Attorney General. For further discussion of corporate trusts, see *§ 560.310* et seq.

The Attorney General is empowered to oversee charities as the representative of the public, and of beneficiaries who, unlike beneficiaries of a private trust, are ordinarily indefinite and therefore unable to enforce the trust in their own behalf [*see Holt v. College of Osteopathic Physicians & Surgeons (1964) 61 Cal. 2d 750, 754, 40 Cal. Rptr. 244, 394 P.2d 932* ; *People v. Cogswell (1896) 113 Cal. 129, 136-137, 45 P. 270]* .

[2] By Parties Other Than Attorney General

Although the Attorney General has the primary responsibility for the enforcement of charitable trusts, the courts have recognized that others with sufficient interest in the trust as donor, trustee, *cestui*, or holder of a reversionary right have the right to bring actions for enforcement [*see Holt v. College of Osteopathic Physicians & Surgeons (1964) 61 Cal. 2d 750, 753-754, 40 Cal. Rptr. 244, 394 P.2d 932* (minority trustees of charitable trust have capacity to sue to enforce trust); *L.B. Research & Educ. Found. v. UCLA Found. (2005) 130 Cal. App. 4th 171, 180-181, 29 Cal. Rptr. 3d 710* (donor has standing to enforce terms of trust it created)]. However, other than the Attorney General, only parties who have a special and definite interest in a charitable trust have standing to institute legal action to enforce or protect the assets of the trust [*Hardman v. Feinstein (1987) 195 Cal. App. 3d 157, 161-162, 240 Cal. Rptr. 483* (taxpayers lack

standing even when trust is administered by city officials pursuant to city charter; *Code Civ. Proc. § 526a*, authorizing taxpayer's actions to restrain illegal expenditure of public funds or property does not apply to officials' dealings in their capacity as trustees)].

In addition, a statutory exception is provided in the case of nonprofit health care service plans holding assets in charitable trust. Those plans are not subject to the filing, registration, or reporting provisions of the Uniform Supervision of Trustees for Charitable Purposes Act (*Gov. Code § 12580 et seq.*) [*see Gov. Code § 12583*], but are subject to the Knox-Keene Health Care Service Plan Act of 1975 (*Health & Safety Code § 1340 et seq.*) and the Nonprofit Corporations Law. Responsibility for their regulation and authority to oversee their compliance with the enforcement of charitable trusts pursuant to *Corp. Code §§ 5142* and *5250* is vested in the Department of Corporations [*see Van de Kamp v. Gumbiner (1990) 221 Cal. App. 3d 1260, 1281-1282, 270 Cal. Rptr. 907]* .

For discussion of standing with regard to charitable corporations, see *§§ 560.314, § 560.315*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsManagement Duties & LiabilitiesEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsCharitable TrustsGovernmentsState & Territorial GovernmentsEmployees & Officials

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49-560 California Forms of Pleading and Practice--Annotated § 560.297

§ 560.297 Proceedings Regarding Internal Affairs or Existence of Trust

The Trust Law (*Prob. Code § 15000 et seq.*) applies to charitable trusts subject to the jurisdiction of the Attorney General to the extent that application is not in conflict with the Uniform Supervision of Trustees for Charitable Purposes Act (*Gov. Code § 12580 et seq.*) [*Prob. Code § 15004*; *see also Prob. Code § 82* (definition of trust includes express charitable trust)]. Consequently, a trustee or beneficiary may initiate petition proceedings regarding the internal affairs or existence of the trust, if to do so would not conflict with *Gov. Code § 12580 et seq.* [*Prob. Code § 17200(a)*; *see Prob. Code §§ 24* (definition of beneficiary), 15801-15803 (limitations on rights of beneficiaries of revocable trust)]. The Attorney General may also petition under *Prob. Code § 17200* [*Prob. Code § 17210*]. The Attorney General is subject to the limitations on the rights of beneficiaries of revocable trusts provided by *Prob. Code §§ 15800-15802* (rights of beneficiary of revocable trust inure to person holding power to revoke), notwithstanding any other provision of law [*Prob. Code § 15805*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsCharitable TrustsGovernmentsState & Territorial GovernmentsEmployees & Officials

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49-560 California Forms of Pleading and Practice--Annotated §§ 560.298-560.309

[Reserved]

§§ 560.298[Reserved]

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49-560 California Forms of Pleading and Practice--Annotated § 560.310

§ 560.310 Nonprofit Public Benefit Corporations

Nonprofit public benefit corporations, by definition, have a public or charitable purpose [*Corp. Code § 5111*]. The assets are deemed to be impressed with a charitable trust, by virtue of the charitable purposes set forth in the articles of incorporation [*American Center for Education, Inc. v. Cavnar (1978) 80 Cal. App. 3d 476, 486, 145 Cal. Rptr. 736]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewEstate, Gift & Trust LawTrustsCharitable Trusts

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49-560 California Forms of Pleading and Practice--Annotated § 560.311

§ 560.311 Nonprofit Mutual Benefit Corporations Holding Assets in Charitable Trust

A nonprofit mutual benefit corporation may or may not have a charitable purpose, and at any rate may not have all of its assets irrevocably dedicated to a public or charitable purpose [*see Corp. Code § 7111*]. However, a nonprofit mutual benefit corporation may hold charitable assets in trust. The Nonprofit Mutual Benefit Corporation Law includes several special provisions applicable only to those mutual benefit corporations [*see Corp. Code §§ 7135* (power of court to impress charitable trust on assets of mutual benefit corporation), 7238(director holding assets in charitable trust subject to same standards applied to director of public benefit corporation), 7240 (corporation holding assets in charitable trust subject to examination by Attorney General), and 7913 (notice to Attorney General of disposition of assets held in trust)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewEstate, Gift & Trust LawTrustsCharitable Trusts

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49-560 California Forms of Pleading and Practice--Annotated § 560.312

§ 560.312 Directors' Standard of Conduct

[1] General Standard

The standards of conduct imposed on directors of public benefit corporations as set forth in *Corp. Code §§ 5230-5238*, are made applicable to directors of mutual benefit corporations that hold assets in charitable trust by *Corp. Code § 7238*.

The general standard of conduct to which the directors are held is the same as that which is applicable to directors of commercial corporations. They must perform their duties in good faith, in a manner the director believes to be in the best interests of the corporation and its shareholders, and are subject to the same standard of care that an ordinarily prudent person in a like position would use under similar circumstances, including the requirement of reasonable inquiry [*Corp. Code §§ 309(a)* (commercial corporations), 5231 (public benefit corporation), 7231 (mutual benefit corporation); *see also Corp. Code §§ 5239, 7231.5, 9247* (liability of volunteer directors and volunteer executive officers)].

[2] Standards for Investment of Corporate Assets

Standards of investment applicable to directors of public benefit corporations are set forth in *Corp. Code § 5240*, and essentially require the directors to avoid speculation, and to act in accordance with the general good faith standard embodied in *Corp. Code § 5231* [*Corp. Code § 5240(b)(1), (d)*]. The directors must also comply with investment standards imposed by the articles, bylaws, or express terms of an instrument or agreement pursuant to which the assets were contributed to the corporation [*Corp. Code § 5240(b)(2)*]. The directors are insulated from liability for making investments authorized or required in an instrument or agreement pursuant to which the assets were contributed to the corporation [*Corp. Code § 5240(c)*]. In proper cases a court may direct or permit the corporation to deviate from the terms of a trust or agreement regarding the making or retention of investments. Notice of such an action or proceeding must be given to the Attorney General, who has the right to intervene [*Corp. Code § 5241*].

Nothing in *Corp. Code § 5240* is to be construed to preclude application of the Uniform Prudent Management of Institutional Funds Act [*Prob. Code § 18501 et seq.*], if it would otherwise be applicable, but nothing in the Uniform

Management of Institutional Funds Act alters the status of governing boards, or the duties and liabilities of directors under the Nonprofit Public Benefit Corporation Law (*Corp. Code § 5110 et seq.*) [*Corp. Code § 5240(e)*].

Directors of mutual benefit corporations are not under any specific statutory standard for the investment of assets beyond the general standard of care set forth in *Corp. Code §§ 7230-7238*.

[3] Duties and Obligations of Private Trustees Not Applicable

The provisions in *Prob. Code §§ 16000-16082*, which govern the duties and obligations of a trustee of a private trust, are not applicable to the directors of nonprofit public benefit and mutual benefit corporations [*Corp. Code §§ 5230, 7230*]. Some of the concepts embodied in these provisions are, however, reflected in the Nonprofit Corporation Law applicable to public benefit corporations and to mutual benefit corporations holding charitable assets in trust. For example, the proscriptions against self-dealing by directors reflect the proscriptions against the trustee of a private trust from profiting from his or her position [*compare Corp. Code §§ 5233, 7238 with Prob. Code §§ 16002, 16004*].

In the case of a mutual benefit corporation that not only owns the assets of a charitable trust but is named as the trustee, the provisions governing trustees of private trusts may be applicable to the corporation, although not to its directors [*see generally* Ballantine & Sterling, California Corporation Laws, Ch. 19, *Nonprofit Corporations and Organizations* (Matthew Bender)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsManagement Duties & LiabilitiesEstate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersStandards of Care

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49-560 California Forms of Pleading and Practice--Annotated § 560.313

§ 560.313 Joint and Several Liability for Wrongful Approval

Directors who approve of any of the following corporate actions are jointly and severally liable to the corporation [*Corp. Code § 5237(a)*]:

- Any distribution.

- Wrongful distribution of assets after institution of dissolution proceedings [*see Corp. Code § 5237(a)(2)*].

- Any distributions, loan, or guaranty contrary to *Corp. Code § 5236* (loan or guaranty regarding obligation of director or officer).

Liability under *Corp. Code § 5237(a)* is subject to *Corp. Code § 5231* (director's standard of care in performing duties) [*Corp. Code § 5237*; *see § 560.312[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsManagement Duties & LiabilitiesEstate, Gift & Trust LawTrustsCharitable TrustsTortsProcedureMultiple DefendantsJoint & Several Liability

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49-560 California Forms of Pleading and Practice--Annotated § 560.314

§ 560.314 Actions to Remedy Breach of Trust

An action to enjoin, correct, obtain damages for, or otherwise remedy a breach of charitable trust held by a public benefit or mutual benefit corporation may be brought by any of the following [*see Corp. Code §§ 5142(a), 7142(a)*]:

- The corporation, or a member in the name of the corporation pursuant to *Corp. Code § 5710* (derivative actions by members of public benefit corporations) or 7710 (derivative actions by members of mutual benefitcorporations).

- An officer of the corporation.

- A director of the corporation.

- A person with a reversionary, contractual, or property interest in the assets subject to the charitable trust.

- The Attorney General, or any person granted relator status by the Attorney General.

If the action seeks to have the court rescind or enjoin the performance of a contract entered into in breach of the charitable trust, all of the parties to the contract must be parties to the action [*Corp. Code §§ 5142(b)(1), 7142(b)(1)*]. The contract will not be rescinded or its performance enjoined if a party to the contract has, in good faith and without actual notice of the trust restriction, parted with value under the contract or in reliance on it [*Corp. Code §§ 5142(b)(2), 7142(b)(2)*].

For a complaint to seek remedies for breach of charitable trust, *see § 560.670*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsManagement Duties & LiabilitiesContracts LawRemediesEquitable ReliefInjunctive ReliefEstate, Gift & Trust LawTrustsCharitable Trusts

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49-560 California Forms of Pleading and Practice--Annotated § 560.315

§ 560.315 Actions Challenging Self-Dealing Transactions

[1] In General

If a director of a nonprofit public benefit corporation has a material financial interest in a transaction to which the corporation is a party and that does not meet the requirements of *Corp. Code § 5233(d)*, an action may be brought for the remedies provided in *Corp. Code § 5233(h)*, except for transactions excepted by *Corp. Code § 5233(b)* [*Corp. Code § 5233(a), (c)*; for discussion of remedies, see Comments to *see § 560.671*]. *Corp. Code § 5233* also applies to directors of nonprofit mutual benefit corporations holding assets in trust [*see Corp. Code § 7238*].

The Attorney General or, if the Attorney General is joined as an indispensible party, any of the following may bring the action [*Corp. Code § 5233(c)*]:

- The corporation or a member asserting the right in the name of the corporation in a derivative action under *Corp. Code § 5710*.
- A director of the corporation.
- An officer of the corporation.
- Any person granted relator status by the Attorney General.

[2] Excepted Transactions

Corp. Code § 5233 does not apply to any of the following [*Corp. Code § 5233(b)*]:

- An action of the board fixing the compensation of a director or officer of the corporation.
- A transaction that is part of a public or charitable program of the corporation, if it has been

authorized by the corporation in good faith and without unjustified favoritism, and results in a benefit to one or more directors or their families because they are in the class of persons intended to be benefited by the public or charitable program.

- A transaction of which the interested director has no knowledge, and that does not exceed the lesser of 1 percent of the corporation's gross receipts for the preceding fiscal year or $100,000.

[3] Effect of Prior Approval of Transaction

In an action under *Corp. Code § 5233(c)*, the remedies specified in *Corp. Code § 5233(h)* shall not be granted if prior approval has been granted by a majority of the directors of the board pursuant to the standards set forth in *Corp. Code § 5233(d)(2)*, or by a committee or person authorized by the board under the circumstances set forth in *Corp. Code § 5233(d)(3)*. In addition, relief will not be granted if the Attorney General, or the court in an action in which the Attorney General is an indispensable party, has approved the transaction before or after it was consummated [*Corp. Code § 5233(d)(1)*]. For a form raising prior approval by the board or a committee of the board as an affirmative defense, *see § 560.543*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsManagement Duties & LiabilitiesEstate, Gift & Trust LawTrustsCharitable Trusts

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§ 560.316 Derivative Actions

If a member of a nonprofit public benefit or mutual benefit corporation maintains an action on behalf of the corporation, the requirements of *Corp. Code §§ 5710* and *7710* apply. Generally, a derivative action is only appropriate if the corporation unjustifiably fails to enforce a cause of action it has against a third party [*see Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 106, 107, 81 Cal. Rptr. 592, 460 P.2d 464]* . For a complaint for breach of trust brought as a derivative action, *see § 560.670*.

The derivative action provisions of the Nonprofit Public Benefit and Mutual Benefit Corporation Laws are similar to those set forth in the General Corporation Law (see *Corp. Code § 800*]. For a discussion and forms for derivative actions under the General Corporation Law, see Ch. 168, *Corporations: Derivative Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsShareholdersActions Against CorporationsDerivative ActionsGeneral OverviewBusiness & Corporate LawNonprofit Corporations & OrganizationsManagement Duties & LiabilitiesEstate, Gift & Trust LawTrustsCharitable Trusts

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49-560 California Forms of Pleading and Practice--Annotated § 560.317

§ 560.317 Indemnification of Corporate Agents

A nonprofit public benefit or mutual benefit corporation may indemnify corporate agents, including directors, officers, and employees, for expenses and damages arising from being a defendant in litigation, under statutorily definedcircumstances [*see Corp. Code §§ 5238, 7237*]. Provisions for indemnification of directors and officers are not valid unless consistent with *Corp. Code § 5238* or *7237* [*Corp. Code §§ 5238(g), 7237(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesIndemnificationBusiness & Corporate LawNonprofit Corporations & OrganizationsManagement Duties & LiabilitiesEstate, Gift & Trust LawTrustsCharitable Trusts

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49-560 California Forms of Pleading and Practice--Annotated § 560.318

§ 560.318 Limited Immunity of Volunteer Director or Officer of Nonprofit Corporations

If the charitable trust is organized as a nonprofit corporation, a volunteer office or director may be protected from liability for any act or omission done within the scope of his or her duties as a board member or officer based on one of several statutes [*see Code Civ. Proc. § 425.15*; *Corp. Code §§ 5047.5, 5239, 7231.5, 9247*], as discussed below.

If (1) the charitable trust is administered by a nonprofit corporation, whether organized under *Corp. Code § 5110 et seq.* (nonprofit public benefit corporations), 7110 et seq. (nonprofit mutual benefit corporations), or 9110 et seq. (nonprofit religious corporations)), (2) the corporation bases its federal income tax exemption on *I.R.C. § 501(c)(3)* or *501(c)(6), (3)* the claim against the director or officer may also be made directly against the corporation, and (4) the corporation maintains a general liability insurance policy in the requisite amounts, *Corp. Code § 5047.5* governs [*see* Ch. 388, *Nonprofit Corporations*].

Regardless of the basis of the corporation's federal income tax exemption, no monetary damages may be obtained from a volunteer officer or director of a public benefit corporation if the corporation has insurance to cover the claim or made a good faith attempt to obtain insurance [*see Corp. Code § 5239*, discussed in Ch. 388, *Nonprofit Corporations*]. A similar provision, *Corp. Code § 9247*, applies if the charitable trust is organized as a nonprofit religious corporation. This provision is discussed in Ch. 110, *Churches and Religious Organizations* .

If the charitable trust is organized as a trade, professional, or labor organization incorporated pursuant to the nonprofit mutual benefit corporation law (*Corp. Code § 7110 et seq.*) exclusively for fraternal, educational, or other nonprofit purposes, and bases its federal income tax exemption on *I.R.C. § 501(c)*, immunity is granted to volunteer officers and directors by *Corp. Code § 7231.5*, regardless of insurance coverage. For discussion of *Corp. Code § 7231.5*, see Ch. 388, *Nonprofit Corporations* .

Finally, if the charitable trust is administered by a nonprofit corporation, whether organized under *Corp. Code § 5110 et seq.* (nonprofit public benefit corporations), 7110 et seq. (nonprofit mutual benefit corporations), or 9110 et seq. (nonprofit religious corporations), and the corporation bases its federal income tax exemption on *I.R.C. § 501(c)(1)*

(except a credit union), 501(c)(4) (civic league), 501(c)(7) (club, recreational association), or 501(c)(19) (veterans organization), *Code Civ. Proc. § 425.15* provides immunity to the volunteer officer or director and requires the person intending to sue the volunteer officer or director to first obtain leave from the court to do so. For discussion and a related form, see Ch. 388, *Nonprofit Corporations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsManagement Duties & LiabilitiesEstate, Gift & Trust LawTrustsCharitable Trusts

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49-560 California Forms of Pleading and Practice--Annotated § 560.319

§ 560.319 Dissolution and Winding Up

[1] Involuntary Proceedings

The law governing involuntary dissolution and winding up of nonprofit public benefit and mutual benefit corporations is set forth in *Corp. Code §§ 6510-6519* and *8510-8519*, respectively.

Interested parties [defined in *Corp. Code §§ 6510(a)* and *8510(a)*] may bring an action for involuntary dissolution on several grounds, including inactivity, factionalization of the board or membership, fraud or mismanagement, mandatory termination under the provisions of the articles of incorporation, and, in the case of a public benefit corporation, failure to carry out the corporation's public or charitable purposes [*see Corp. Code §§ 6510(b), 8510(b)*]. In addition, the Attorney General, on his or her own information or on the complaint of a private party, may bring an action for dissolution for violations of laws governing charitable organizations or corporations generally, for failure to pay taxes, or for other fraudulent or unlawful activities [*see Corp. Code §§ 6511(a), 8511(a)*].

In an action under *Corp. Code § 6510(a)*, the Attorney General is an indispensible party, and creditors and the authorized number of members may intervene [*Corp. Code § 6510(c), (d)*; *see Corp. Code § 5036* (authorized number defined)]. In an action under *Corp. Code § 8510(a)*, any member or creditor may intervene, and when the mutual benefit trust holds assets in charitable trust, a copy of the complaint must be served on the Attorney General, who may intervene [*Corp. Code § 8510(c), (e)*].

For further discussion of involuntary dissolution, see Ballantine & Sterling, California Corporation Law, Ch. 19, *Nonprofit Corporations and Organizations*, § 415.03 (Matthew Bender).

[2] Voluntary Proceedings

The law governing voluntary dissolution and winding up of nonprofit public benefit and mutual benefit corporations is set forth in *Corp. Code §§ 6610-6617* and *8610-8617*, respectively.

A corporation may elect voluntarily to wind up and dissolve by approval of a majority of all members (defined in *Corp. Code § 5033*); or by approval of the board and membership (defined in *Corp. Code § 5034*) [*see Corp. Code §§ 6610(a), 8610(a)*].

Board approval alone is sufficient to elect voluntary dissolution, if thecorporation has been adjudicated a bankrupt, has disposed of all assets and been inactive for five years, has no members, or is required to dissolve pursuant to a provision in its articles of incorporation calling for a subordinate corporation to dissolve when its charter is surrendered to, taken away, or revoked by the head organization granting it [*Corp. Code §§ 6610(b), 8610(b)*; *see Corp. Code §§ 5132(a)(2)(A), 7132(a)(4)(A)*]. For discussion of the procedure for voluntary dissolution, see Ballantine & Sterling, California Corporation Law, Ch. 19, *Nonprofit Corporations and Organizations*, § 415.02 (Matthew Bender).

When a corporation is in the process of voluntarily winding up, the corporation, the authorized number of members defined in *Corp. Code § 5036*, the Attorney General, or three or more creditors may petition the superior court to take jurisdiction over the proceeding [*Corp. Code §§ 6614, 8614*; *see § 560.673*]. The court will take jurisdiction if it appears necessary to protect any parties in interest, or in the case of a public benefit corporation, to protect the purposes served by the corporation, or in the case of a mutual benefit corporation holding charitable assets in trust, to protect the assets. Once the court assumes jurisdiction over voluntary dissolution proceedings, *Corp. Code §§ 6512-6519* or *8512-8519*, governing court procedures in proceedings for involuntary dissolution, are applicable [*Corp. Code §§ 6614, 8614*].

Court supervision over the winding up process of a public benefit corporation, or a mutual benefit corporation holding assets in charitable trust, is particularly appropriate when the assets of a charitable trust must be transferred to another organization [*see, e.g., In re Veterans' Industries, Inc. (1970) 8 Cal. App. 3d 902, 88 Cal. Rptr. 303* (application of *cy pres* doctrine in disposing of assets of charitable corporation under petition for court supervision over voluntary winding up proceedings)].

[3] Distribution of Assets

After determining that all known debts and liabilities of the corporation have been paid or adequately provided for, all the assets of a public benefit corporation, and all the assets held in charitable trust by a mutual benefit corporation, must be distributed in conformity with the corporation's articles or bylaws, subject to compliance with the provisions of any trust under which the assets are held [*Corp. Code §§ 6716(a), 8716(a)*].

The disposition must be made by decree of the superior court in proceedings to which the Attorney General is a party. The decree must be made on the petition of the Attorney General or, on 30 days notice to the Attorney General, by any person concerned in the dissolution [*Corp. Code §§ 6716(b), 8716(b)*]. The disposition may be made without the decree, subject to the rights of persons concerned in the dissolution, if the Attorney General makes a written waiver of objections to the disposition [*Corp. Code §§ 6716(c), 8716(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsDissolution & Winding UpEstate, Gift & Trust LawTrustsCharitable Trusts

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49-560 California Forms of Pleading and Practice--Annotated §§ 560.320-560.339

[Reserved]

§§ 560.320[Reserved]

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49-560 California Forms of Pleading and Practice--Annotated § 560.340

§ 560.340 Governing Statutes

The definition of a Totten trust, also known as a tentative trust, is governed by *Prob. Code § 80*. The creation and implementation of Totten trust accounts is governed by the Multiple-Party Accounts Law (*Prob. Code §§ 5100-5407*) and other provisions applicable generally to deposit accounts, such as *Fin. Code §§ 6850-6855* and *Fin. Code §§ 952, 953* [*see* Ch. 95, *Banks, Deposits, and Checks*].

The Multiple-Party Accounts Law applies to accounts in existence on July 1, 1990, and accounts established thereafter [Stats. 1989, ch. 397, § 41]. "Account" within the meaning of that law means a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account, and other like arrangement [*Prob. Code § 5122(a)*]. Joint accounts, "P.O.D. accounts," and Totten trust accounts are "multiple-party accounts" within the meaning of the California Multiple-Party Accounts Law [*Prob. Code § 5132*]. Most business and true fiduciary accounts, for example, regular fiduciary or trust accounts maintained in connection with relationships established other than by the deposit agreement and accounts for the estate of a ward, conservatee, or decedent, are excluded from the coverage of the Multiple-Party Accounts Law [*see Prob. Code § 5122(b)* (also excluding accounts of unincorporated associations or charitable or civic organizations)].

The provisions of the Multiple-Party Accounts Law that apply to the payment of a Totten trust apply to an account in the name of one or more parties as trustee for one or more other persons if the financial institution has no other or further notice in writing that the account is not a Totten trust account as defined in *Prob. Code § 80* [*Prob. Code § 5406*].

Accounts that are governed by the Multiple-Party Accounts Law may be used with a special power of attorney authorized by *Prob. Code § 5204* [*see* Ch. 95, *Banks, Deposits, and Checks*].

Prob. Code §§ 5301-5307, concerning beneficial ownership as between parties, or as between parties and P.O.D. payees or beneficiaries of multiple-party accounts, govern controversies between those persons and their creditors and other successors, but have no bearing on the power of withdrawal of those persons as determined by the terms of account contracts [*Prob. Code § 5201(a)*].

Prob. Code §§ 5401-5407 govern the liability of financial institutions who make payments pursuant to those provisions and are discussed in more detail in Ch. 95, *Banks, Deposits, and Checks* [*Prob. Code § 5201(b)*].

A financial institution has no duty to inform (1) a depositor holding an account on July 1, 1990, (2) a beneficiary named in a Totten trust account on July 1, 1990, (3) a P.O.D. payee designated on a P.O.D. account on July 1, 1990, or (4) an agent designated on an agency account on July 1, 1990 of the enactment of the revised Multiple Party Accounts as effective July 1, 1990; and no liability may be imposed on a financial institution for failing to do so [Stats. 1989, ch. 397, § 40 as amended by Stats. 1990, ch. 324, § 3].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsTrust AccountsRequirementsBanking LawBank ActivitiesBank AccountsTrust AccountsTypesEstate, Gift & Trust LawNonprobate TransfersJointly Held PropertyBank Accounts

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49-560 California Forms of Pleading and Practice--Annotated § 560.341

§ 560.341 Definitions

[1] "Totten Trust Account"

A "Totten trust account" is an account in the name of one or more parties as trustee for one or more beneficiaries when the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account. It is not essential that payment to the beneficiary be mentioned in the deposit agreement [*Prob. Code § 80*]. A Totten trust account does not include (1) a regular trust account under a testamentary trust or a trust agreement that has significance apart from the account, or (2) a fiduciary account arising from a fiduciary relation such as attorney-client [*Prob. Code § 80*].

A person may create a tentative trust, or Totten trust account, by depositing money as trustee for another [*Brucks v. Home Fed. Sav. & Loan Ass'n. (1951) 36 Cal. 2d 845, 850, 228 P.2d 545* . A Totten trust account is not in fact a trust, but is rather a recognized exception to the law of testamentary disposition in that it obviates the need to comply with statutory elements of executing a will [*see Prob. Code § 5304*; *Estate of Collins (1978) 84 Cal. App. 3d 928, 932, 149 Cal. Rptr. 65]* . The trust is tentative in that it remains revocable until the depositor dies or unequivocally creates an irrevocable trust, for example, by delivering the pass book to the beneficiary [*Brucks v. Home Fed. Sav. & Loan Ass'n. (1951) 36 Cal. 2d 845, 850, 228 P.2d 545* ; *Kuck v. Raftery (1931) 117 Cal. App. 755, 758-760, 4 P.2d 552]* . Giving a power of attorney to a third person with instructions to with draw the sums on deposit evidences sufficient intent to revoke a tentative or Totten trust, even if the named beneficiary was able to frustrate the withdrawal [*Roberts v. Goetz (1970) 5 Cal. App. 3d 364, 368-369, 85 Cal. Rptr. 84]* .

The statutory provisions and the term Totten trust derive from the case of *In re Totten (1904) 179 N.Y. 112, 71 N.E. 748* , which defined a Totten trust as an account opened by a depositor in his or her own name as trustee for another person, but reserving the power to withdraw the funds during his or her lifetime. If the depositor has not revoked the trust by then, on his or her death any balance left in the account is payable to the beneficiary [*Estate of Fisher (1988) 198 Cal. App. 3d 418, 424, 244 Cal. Rptr. 5]* . Like any other trust, a Totten trust requires a trustor, a trustee (in a Totten trust they are usually the same person), a trust res, a trust beneficiary, and a trust intent [*Estate of Fisher (1988) 198 Cal. App. 3d 418, 424-425, 244 Cal. Rptr. 5* (decided under prior law, holding that person who claims to be cotrustee,

but who did not sign signature card, cannot use account title as evidence of his or her intent to create trust)].

For a form to establish and enforce a Totten trust account after the death of the trustee, *see § 560.690*.

[2] "Beneficiary" and "Party"

A "beneficiary" means a person named in a Totten trust account as one for whom a party to the account is named as trustee [*Prob. Code § 5126*].

"Party" means a person who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account other than as an agent [*Prob. Code § 5136(a)*] A beneficiary of a Totten trust account is a party to an account, by reason of being a beneficiary, only after the account becomes payable to that beneficiary by reason of surviving all persons named as trustees [*Prob. Code § 5136(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsTrust AccountsCreation & TerminationBanking LawBank ActivitiesBank AccountsTrust AccountsTypesEstate, Gift & Trust LawNonprobate TransfersJointly Held PropertyBank Accounts

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49-560 California Forms of Pleading and Practice--Annotated § 560.342

§ 560.342 Ownership While All Parties Are Living

During the lifetime of all parties, a Totten trust account belongs to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent [*Prob. Code § 5301(a)*; *see Prob. Code § 5150* (sums on deposit defined)]. The net contribution of a party to an account as of any given time is the sum of all of the following [*Prob. Code § 5134(a)*]:

- All deposits to the account made by or for the party, less all withdrawals made by or for the party that have not been paid to or applied to the use of any other party;

- A pro rata share of any interest or dividends earned, whether or not included in the current balance; and

- Any proceeds of deposit life insurance added to the account by reason of the death of the party whose net contribution is in question.

In the absence of proof otherwise, only parties who have a present right of withdrawal are considered as having a net contribution [*Prob. Code § 5134(b)(1)*], and the net contribution of each of the parties having a present right of withdrawal is deemed to be an equal amount [*Prob. Code § 5134(b)(2)*]. This definition is for use in determining ownership interests in an account as between the parties to an account and not as between the parties and the financial institution [*Prob. Code § 5134(c)(2)*].

Notwithstanding *Fam. Code §§ 2581* and *2640*, if parties to an account are married to each other, whether or not they are so described in the deposit agreement, their net contribution to the account is presumed to be and remain their community property [*Prob. Code § 5305(a)*; *see also* Ch. 95, *Banks, Deposits, and Checks*].

Legal Topics:

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

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49-560 California Forms of Pleading and Practice--Annotated § 560.343

§ 560.343 Changes in Account Terms

During the lifetime of a party, the terms of the account may be changed as provided in *Prob. Code § 5303(b)* to eliminate or add rights of survivorship. Withdrawal of funds from the account by a party with a present right of withdrawal during the lifetime of a party also eliminates rights of survivorship on the death of that party with respect to the funds withdrawn [*Prob. Code § 5303(c)*].

Once established, the terms of a multiple party account may be changed only by any of the following methods [*Prob. Code § 5303(b)*]:

- Closing the account and reopening it under different terms;

- Presenting to the financial institution a modification agreement that is signed by all parties with a present right of withdrawal (if the financial institution has a form for this purpose, it may require use of the form);

- If the provisions of the terms of the account or deposit agreement provide a method of modification of the terms of the account, complying with those provisions; or

- As provided in *Prob. Code § 5405(c)*, discussed in *§ 560.345[6]*.

Unless the Totten trust account is described as a community property account, a beneficiary designation in a Totten trust account may not be changed by will [*Prob. Code § 5305(c)*; *see Prob. Code § 5307* (community property account)].

If the Totten Trust account has joint trustees who have rights of survivorship with respect to each others interests, a party who has a unilateral right of withdrawal can eliminate survivorship rights by closing out the account having survivorship rights and opening a new account without survivorship rights [*see* Law Rev. Comm. Comment to *Prob. Code § 5303*]. *Prob. Code § 5303* permits a decedent unilaterally to sever joint tenancy accounts if the decedent had the unilateral right of withdrawal from those accounts. Withdrawal of the funds from the accounts will not, however,

change the other rights of the parties to the moneys withdrawn, for instance the rights accruing pursuant to *Prob. Code §§ 5301* and *5305* [*see* Law Rev. Comm. Comment to *Prob. Code § 5303*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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49-560 California Forms of Pleading and Practice--Annotated § 560.344

§ 560.344 Ownership After Death of Party

The provisions of *Prob. Code § 5302* regarding rights of survivorship are determined by the form of the account at the death of a party [*Prob. Code § 5303(a)*]. A beneficiary designation in a Totten trust account cannot be changed by will [*Prob. Code § 5302(e)*]. *Prob. Code § 5302(e)* was intended to strengthen the position of Totten trust beneficiaries as against heirs of the depositor [*Estate of Fisher (1988) 198 Cal. App. 3d 418, 429, 244 Cal. Rptr. 5]* .

A separate property Totten trust account is not part of the decedent/trustee's estate. Thus, the amount of such an account is not included for purposes of calculating an omitted spouse's share of the estate [*Estate of Allen (1993) 12 Cal. App. 4th 1762, 1767-1771, 16 Cal. Rptr. 2d 352* (decided under former *Prob. Code § 6560(c)*; *now see Prob. Code § 21610(c)*; *compare Prob. Code §§ 5305(b), 5307* (surviving spouse may recover his or her interest in community funds in preference to beneficiary)].

On the death of one of two or more trustees to a Totten trust account, sums remaining on deposit belong to the surviving party or parties, not the estate of the decedent, unless there is clear and convincing evidence of a different intent. If there are two or more surviving parties, their respective ownerships during lifetime are in proportion to their previous ownership interests un der *Prob. Code § 5301*, augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before the decedent's death. The right of survivorship continues between the surviving parties [*Prob. Code § 5302(a), (c)(1)*; *see Prob. Code § 5130* ("joint account" as one which is payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship)].

On the death of the sole or surviving trustee of a Totten trust account, any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear and convincing evidence of a different intent [*Prob. Code § 5302(c)(2)(A)*]. If two or more beneficiaries survive, any sums remaining on deposit belong to them in equal and undivided shares unless the terms of the account or deposit agreement expressly provide for different shares [*Prob. Code § 5302(c)(2)(B)*]. If two or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them [*Prob. Code § 5302(c)(2)(C)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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49-560 California Forms of Pleading and Practice--Annotated § 560.345

§ 560.345 Withdrawals

[1] In General

Financial institutions rights and duties are discussed in more detail in Ch. 95, *Banks, Deposits, and Checks* . In general, the financial institution at which the account is maintained must honor withdrawal requests that are made in accor dance with the terms of the account agreement and may do so without regard to whether any other party is incapacitated or deceased at the time the payment is demanded; but payment may not be made to the personal representative or heirs of a deceased party unless proof of death is presented to the financial institution showing that the decedent was the last surviving party or unless there is no right of survivorship under *Prob. Code § 5302* [*Prob. Code §§ 5401(b), 5402*]. Proof of death includes an original, attested, or certified copy of a death certificate, a record or report that is prima facie evidence of death under *Health & Safety Code § 103550, Evid. Code §§ 1530-1532*, or another California statute [*Prob. Code § 5144*].

The financial institution has no obligation to inquire regarding the source of funds received for deposit to a multiple-party account or the proposed application of funds withdrawn [*Prob. Code § 5401(c)(1)*]. A financial institution is not required to determine any party's net contribution or to limit withdrawals based on a party's net contribution [*Prob. Code § 5401(c)(2), (3)*]. Unless the financial institution has received a court order restraining payment, payment made pursuant to *Prob. Code § 5401* discharges the financial institution from all claims for amounts so paid whether or not the payment is consistent with the beneficial ownership of the account as between parties, P.O.D. payees, or beneficiaries, or their successors [*Prob. Code § 5405(a), (b)*].

[2] Payments to Trustee

The financial institution may pay any sums in a Totten trust account, on request and according to its terms, to any trustee [*Prob. Code § 5404*].

[3] Payment to Heirs or Personal Representative of Deceased Trustee

Unless the financial institution has received written notice that the beneficiary has a vested interest not dependent on

surviving the trustee, payment may be made to the personal representative or heirs of a deceased trustee if proof of death is presented to the financial institution showing that the deceased trustee was the survivor of all other persons named on the account either as trustee or beneficiary [*Prob. Code § 5404*; *see Prob. Code § 5144* (defining proof of death)].

[4] Payments to Beneficiary

A Totten trust account may be paid to a beneficiary or beneficiaries or the personal representative or heirs of a beneficiary or beneficiaries if proof of death is presented to the financial institution showing that the beneficiary or beneficiaries survived all persons named as trustees [*Prob. Code § 5404*; *see Prob. Code § 5144* (defining proof of death)].

[5] Levies and Setoffs

All funds in an account, unless otherwise agreed in writing by the financial institution and the parties to the account, remain subject to liens, security interests, rights of setoff, and charges, notwithstanding the determination or allocation of net contributions with respect to the parties [*Prob. Code § 5401(d)*].

[6] Notice From Party Restraining Payment of Account

A party to an account may give written notice to the financial institution, at the branch or office at which the account is carried, not to permit withdrawals in accordance with the terms of the account, other than a checking account, share draft account, or other similar third-party payment instrument, except with the signatures of more than one of the parties during their lifetimes or of more than one of the survivors after the death of any one of the parties. Unless the notice is withdrawn by a subsequent writing, after receipt of such a notice, the financial institution may only pay the sums on deposit in accordance with the written instructions pending determination of the rights of the parties or their successors [*Prob. Code § 5405(c)*; *see Prob. Code § 5146* (absent account terms to contrary, receipt of notice as receipt at branch or office where account is carried)]. No liability attaches to the financial institution for complying with the terms of any written notice provided pursuant to *Prob. Code § 5405(c)* [*Prob. Code § 5405(c)*; *see also Prob. Code § 5405(b)* (court order restraining payments by financial institution, discussed in Ch. 95, *Banks, Deposits, and Checks*)].

Legal Topics:

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

§§ 560.346[Reserved]

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49-560 California Forms of Pleading and Practice--Annotated § 560.360

§ 560.360 State Statutes

Venue provisions generally. *Code Civ. Proc. §§ 392-395.5*

Methods of creating trust. *Prob. Code § 15200*

Intention to create trust. *Prob. Code § 15201*

Requirement of trust property. *Prob. Code § 15202*

Trust purpose. *Prob. Code §§ 15203, 15204*

Designation of beneficiary. *Prob. Code § 15205*

Statute of frauds. *Prob. Code § 15206*

Oral trust in personal property. *Prob. Code § 15207*

Consideration and promise to create trust. *Prob. Code § 15208*

Exception to doctrine of merger. *Prob. Code § 15209*

Recording of trust. *Prob. Code § 15210*

Rule against perpetuities and related trust provisions. *Prob. Code §§ 15211, 15212, 15413, 15414, 21200 et seq.*

Legal Topics:

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

[1] Trusts

[a] In General

When two individuals entered into a real estate partnership acting in their capacity as trustee of their family trust, the partners were the individuals and not the trust; the trust was not a separate entity from its trustee. *Presta v. Tepper (2009) 179 Cal. App. 4th 909, 918-919, 102 Cal. Rptr. 3d 12*

Trust for illegal purpose unenforceable in *California. In re Marriage of Dick (1993) 15 Cal. App. 4th 144, 161-162, 18 Cal. Rptr. 2d 743*

Trust created by husband for purpose of concealing marital assets from wife illegal and thus unenforceable. *In re Marriage of Dick (1993) 15 Cal. App. 4th 144, 161-162, 18 Cal. Rptr. 2d 743*

Interpretation of declaration of trust presents question of law unless interpretation turns on competence or credibility of extrinsic evidence; accordingly, reviewing court not bound by lower court's interpretation, but required to construe declaration independently. *Poag v. Winston (1987) 195 Cal. App. 3d 1161, 1173, 241 Cal. Rptr. 330*

Attempted residuary provision in will leaving property to named person for distribution according to settlor's wishes, absent explanatory provision, is invalid for uncertainty. *Estate of Feldman (1947) 78 Cal. App. 2d 778, 780, 787-790, 178 P.2d 498*

Express trust may be properly created for any purpose for which persons may lawfully contract; trust to convey property to another as trustee for benefit of settlor is valid. *Reiss v. Reiss (1941) 45 Cal. App. 2d 740, 746, 114 P.2d 718*

Trust as device to sell real property and dispose of the proceeds of the sale. *Craven v. Dominguez Estate Co (1925) 72 Cal. App. 713, 717, 237 P. 821*

[b] Beneficiaries

Contingent beneficiaries described as lawful issue of other beneficiaries include children adopted when they were minors. *Wells Fargo Bank v. Huse (1976) 57 Cal. App. 3d 927, 933-934, 129 Cal. Rptr. 522*

Members of definite class of persons are able to be beneficiaries of trust, but identity of all individuals comprising membership of class must be ascertainable in order to satisfy requirement of definiteness. *Reagh v. Kelley (1970) 10 Cal. App. 3d 1082, 1092, 1097-1098, 89 Cal. Rptr. 425*

Beneficiary of testamentary trust providing stipend until remarriage was unable to be reinstated as beneficiary after annulment of subsequent marriage. *Stoner v. Nethercutt (1970) 8 Cal. App. 3d 667, 669-672, 87 Cal. Rptr. 659*

[c] Creation

Whether trust has been established is determined by law of state that is situs of trust fund. *In re California Trade Technical Schools, Inc. (9th Cir. 1991) 923 F.2d 641, 646* (express trust of student loan funds paid by government to bankrupt, as trustee for student beneficiaries)

Testamentary trust comes into existence and legal title to property vests in trustee at death of testator. *Title Ins. & Trust Co. v. Duffill (1923) 191 Cal. 629, 647, 218 P. 14*

Declaration by settlors that they hold property in trust for another is sufficient to transfer real property to a trust; it is not necessary to record deed from real property owners to trust or trustees, or to record trust. *Estate of Powell (2000) 83 Cal. App. 4th 1434, 1443, 100 Cal. Rptr. 2d 501*

Intention to create trust in real property is subject to proof by parol evidence. *Jose v. Pacific Tile & Porcelain Co. (1967) 251 Cal. App. 2d 141, 144, 58 Cal. Rptr. 880*

Requirement that trust property be delivered is satisfied by actual or symbolic delivery; for example, delivery of written instrument such as stock certificate may possibly constitute delivery of underlying property. *Lawson v. Lowengart (1967) 251 Cal. App. 2d 98, 109-110, 59 Cal. Rptr. 186*

[d] Vesting

Period within which interest appointed under special power of appointment must vest is measured from time power created; perpetuities issue under *Civ. Code § 715.2* properly raised for first time on appeal. *United California Bank v. Bottler (1971) 16 Cal. App. 3d 610, 616-617, 94 Cal. Rptr. 227*

[2] No Contest Clauses

CAUTION:

Effective Jan. 1, 2010, revisions to *Prob. Code § 21310-21315* significantly changed the law governing enforcement of no contest clauses [*Prob. Code § 21315*]. Cases decided under pre-2010 law should be reviewed carefully to determine their applicability under the current law. For discussion of the enforcement of no contest clauses under both the current Probate Code provisions and the common law,

see *§ 560.16*.

Prob. Code § 15409 modification petition to delete a special needs provision because the settler misunderstood the circumstances did not violate a no contest clause as a matter of public policy, and the safe harbor petition was properly granted. Balian v. Balian (2009) *179 Cal. App. 4th, 1505, 1513, 102 Cal. Rptr. 3d 470*

Challenge to surviving spouse's mental capacity to transfer assets and appoint a successor trustee did not violate a no-contest clause in family trust since trustee did not propose to void, nullify, or set aside trust or any of its provisions, or to change provisions that were clearly and unambiguously expressed. *Johnson v. Greenelsh (2009) 47 Cal. 4th 598, 599 Cal. Rptr. 3d 622, 217 P.3d 1194*

When testators instructed that beneficiary's debt to them be offset against beneficiary's distribution, beneficiary's assertion that his debt was not enforceable was indirect contest that violated no contest provision. *Cook v. Cook (2009) 177 Cal. App. 4th 1436, 99 Cal. Rptr. 3d 913*

Petition by contingent remainder beneficiaries, seeking information with regard to how trustee was spending trust funds, which was necessary to enable beneficiaries to enforce their rights under the trust pursuant to *Prob. Code § 16060*, was not a contest within the meaning of trust's no contest clause. *Salter v. Lerner (2009) 176 Cal. App. 4th 1184, 1189, 99 Cal. Rptr. 3d 1*

Beneficiary's challenge to validity of handwritten notations made by settlor on trust after it was executed, which qualified as an instrument other than the instrument containing the no contest clause, was determined not to be a contest under *Prob. Code § 21305(a)(3)*. Cory v. Toscano (2009) 174, Cal. App. 4th 1039, 1046, *94 Cal. Rptr. 3d 841*

Proposed petition challenging exercise of a fiduciary power by trustee did not constitute a contest as a matter of public policy. *Bradley v. Gilbert (2009) 172 Cal. App. 4th 1058, 1071, 91 Cal. Rptr. 3d 680*

Language in trust documents establishing three methods of exercising a limited power of appointment was ambiguous, allowing reformation in accordance with grantors' intent not to violate trust's no contest clause. *Giammarrusco v. Simon (2009) 171 Cal. App. 4th 1586, 91 Cal. Rptr. 3d 50*

Proposed challenge to trust amendment did no violate trust's no contest clause, because no contest clause in trust did not specifically provide that it applied to trust amendments. *Townsend v. Townsend (2009) 171 Cal. App. 4th 389, 402-403, 89 Cal. Rptr. 3d 760*

Beneficiary who filed petition outside of safe harbor provisions of *Prob. Code § 21320*, and whose clear purpose was to defeat surviving settlor's testamentary and donative intent, violated no contest clause. Schwartz v. Schwartz (2008) Cal. App. 4th 733, 745, *84 Cal. Rptr. 3d 387*

Proposed challenge to two trust amendments did not trigger no-contest clause because no-contest clause in trust did not specifically state that it applied to trust amendments and the amendments did not contain a no contest clause as required by *Prob. Code § 21305(a)(3)*. *Perrin v. Lee (2008) 164 Cal. App. 4th 1239, 1244, 79 Cal. Rptr. 3d 885*

Minor's claims, brought under *Prob. Code § 21320* safe harbor provision through a guardian ad litem, did not violate a trust's no contest clause since minor's written consent to appointment of mother as guardian ad litem does not constitute voluntary participation in trust contest. *Safai v. Safai (2008) 164 Cal. App. 4th 233, 244, 78 Cal. Rptr. 3d 759*

After appellate decision that settlor's daughter had triggered no contest clause in irrevocable trust, trial court acted within its authority when it reconsidered on its own motion its earlier grant of *Prob. Code § 21320* relief and held that

daughter lacked standing because she was no longer a beneficiary; and since a related revocable trust contained same no contest language as the irrevocable trust, trial court did not err in ruling that daughter lacked standing as to both trusts. *Montegani v. Johnson (2008) 162 Cal. App. 4th 1231, 1239, 76 Cal. Rptr. 3d 621*

No contest clause in will was not incorporated by reference into testamentary trust when decrees of distribution contained some language that referred to the will, but clear statement in distributing clause of trust, stating that trust was completely set forth in the decree, established that no trust provisions were omitted and there was no room to supplement trust provisions by incorporating provisions contained in will. *Meyer v. Meyer (2008) 162 Cal. App. 4th 983, 998, 76 Cal. Rptr. 3d 546*

Beneficiary's filing of second proposed petition did not violate trust's no contest clause because it sought to impose liability on trustees for alleged breach of fiduciary duty for improper disbursements and did not seek an accounting or seek to void, nullify, or set aside portion of trust limiting liability of successor trustees; doctrine of conclusiveness did not apply as it applies to filed pleadings but has no application to pleadings proposed to be filed under *Prob. Code § 21320*. *Betts v. City Nat'l Bank (2007) 156 Cal App 4th 222, 67 Cal Rptr 3d 152, 162*

No contest clause in trust instrument which applied to any attempt to "impair" the trust extended to trust beneficiary's adjustment petition under California Uniform Principal and Income Act to reallocate principal and income, when reallocation would have resulted in more income to beneficiary than allowed by trust and invasion of trust principal reserved to other beneficiaries. *McKenzie v. Vanderpoel (2007) 151 Cal. App. 4th 1442, 1454, 61 Cal. Rptr. 3d 129*

No contest clause in testamentary trust upheld as valid although it forced settlor's former wife and their children to choose between enforcing their rights under an existing martial dissolution judgment by filing creditor's claims, or relinquishing those rights and taking gifts provided for them in settlor's trust. *Colburn v. Northern Trust Co. (2007) 151 Cal. App. 4th 439, 447, 59 Cal. Rptr. 3d 828*

No contest clause in testamentary trust providing that contest by one beneficiary would avoid devises to other noncontesting beneficiaries' bequests along with the contestant's does not, in itself, violate public policy. *Tunstall v. Wells (2006) 144 Cal. App. 4th 554, 558* ; *50 Cal. Rptr. 3d 468*

When trust amendment was separate from instrument containing no contest clause, within meaning of *Prob. Code § 21305(a)(3)*, because it did not contain a no contest clause, it could be challenged without violating no contest clause of instrument that did contain such a clause, because such an action was not expressly identified as a violation. *Estate of Rossi (2006) 138 Cal. App. 4th 1325, 1338, 42 Cal. Rptr. 3d 244*

Petition proposed by trust beneficiaries to remove trustees for malfeasance violated trust's no contest clause, despite the exception afforded by *Prob. Code § 21305(b)* for challenges to the exercise of fiduciary power or seeking the removal of a fiduciary, when the trust became irrevocable in December 2000; statutory exceptions only apply to trust instruments that become irrevocable before January 1, 2001. *Hermanson v. Hermanson (2003) 108 Cal. App. 4th 441, 444-446, 133 Cal. Rptr. 2d 486*

No contest clauses in inter vivos trusts must be strictly construed; they are not to be extended beyond what was plainly testator's intent. *Scharlin v. Superior Court (1992) 9 Cal. App. 4th 162, 168-169, 11 Cal. Rptr. 2d 448*

Proposed challenge to validity of amendment to inter vivos trust on ground that amendment was result of duress or undue influence constituted attack on *how amendment occurred*, not on settlor's *power to amend*, and therefore did not amount to a "contest" for purposes of no contest clause in trust. *Scharlin v. Superior Court (1992) 9 Cal. App. 4th 162, 169-170, 11 Cal. Rptr. 2d 448*

When settlors created typical living trust arrangement under which trust was divided into two trusts on death of first

settlor, petition contesting an amendment that surviving settlor made to Trust A (the survivor's trust) after first settlor's death did not constitute contest of Trust B for purpose of no-contest clause in trust instrument. *Scharlin v. Superior Court (1992) 9 Cal. App. 4th 162, 170, 11 Cal. Rptr. 2d 448*

No contest clause in trust must be strictly construed because clause may work forfeiture. *Poag v. Winston (1987) 195 Cal. App. 3d 1161, 1173, 1181, 241 Cal. Rptr. 330*

No contest clause not violated by actions that assert no claim to assets of, and pose no threat to, trust; clause not applicable to beneficiary's action to impose personal liability on trustee, among other things. *Poag v. Winston (1987) 195 Cal. App. 3d 1161, 1175-1181, 241 Cal. Rptr. 330*

Generally, no contest clause in declaration of trust is valid and must be given effect according to settlor's intent as intent appears from terms of trust and surrounding circumstances. *Poag v. Winston (1987) 195 Cal. App. 3d 1161, 1173, 241 Cal. Rptr. 330*

[3] Restorative Payments to Trust

"Restorative" payments made by trustee of express trust to replace improperly diverted trust funds become part of trust without need for tracing that would arise in constructive trust. *In re California Trade Technical Schools, Inc. (9th Cir. 1991) 923 F.2d 641, 646* (applying California law; except that restorative payments made within 90 days of filing bankruptcy did not become part of express trust)

[4] Taking Property Out of Trust

Provision in living trust, stating that title to trust property could be held in any way, necessarily meant that selling trust asset and taking title in name other than that of trust would not, by itself, take property out of trust; ostensible purpose of provision--to make it easy and convenient for trust to hold property--by providing that title could be taken in name of trustors, as distinct from trust itself, and property would still be in trust, necessarily required that there be some affirmative action by trustors beyond merely change in form of title to take property out of trust. *Heaps v. Heaps (2004) 124 Cal. App. 4th 286, 291-292, 21 Cal. Rptr. 3d 239*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 560.362 Law Reviews

Engelhardt, *In Terrorem Inter Vivos: Terra Incognita, 26 Real Prop., Prob & Tr. J. 535 (1991)*

Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo, 34 UCLA L. Rev. 1023 (1987)*

Dukeminier, *A Modern Guide to Perpetuities, 74 Cal. L. Rev. 1867 (1986)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 560.363 Text References

For a practical guide to planning, drafting, interpreting, and executing wills and trusts, see California Wills and Trusts (Matthew Bender)

For forms for testamentary and inter vivos trusts, see California Wills and Trusts--Forms (Matthew Bender)

Hartog & Dirkes, California Trust Practice (Matthew Bender)

Current Legal Forms With Tax Analysis, Ch. 9, *Irrevocable Trusts* (Matthew Bender)

Modern Estate Planning, Ch. 5, *Grantor Trusts* ; Ch. 8, *Revocable Trusts* (Matthew Bender)

Nossaman and Wyatt, Trust Adminstration and Taxation, pt. I, *Existence, Validity and Interpretation*: Ch. 1, *Nature, Uses, and Purposes of Trusts*; Ch. 2, *Validity--Certainty* (2d ed. rev. Matthew Bender)

Witkin, California Procedure, vol. 3, *Actions*, §§ 122, 125, 616-618, 720 (4th ed. 1997)

Witkin, Summary of California Law, vol. 13, *Trusts*, §§ 1-7, 12-16, 31-38 (10th ed. 2005)

Bogert, The Law of Trusts and Trustees, Ch. 3, *The Creation of Express Private Trusts--The Settlor and His Intention*; Ch. 4, *The Creation of Express Private Trusts--The Statute of Frauds*; Ch. 5, *The Statute of Frauds--Satisfaction of the Statute*; Ch. 7, *The Trust Subject Matter*; Ch. 8, *The Trustee--Selection: Capacity*; Ch. 12, *The Creation of Trusts--Consideration--Active and Passive Trusts*; Ch. 13, *Restrictions--Illegality--Perpetuities--Accumulations--Suspension of Power of Alienation--Spendthrift Trusts*, §§ 211-220; Ch. 14, *Various Trust Functions* (2d ed.)

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Legal Topics:

For related research and practice materials, see the following legal topics:
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§§ 560.364[Reserved]

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Professional Fiduciaries Act. *Bus & Prof. Code § 6500 et seq.*

Acceptance and rejection of trust. *Prob. Code §§ 15600-15603*

Cotrustees. *Prob. Code §§ 15620-15622*

Resignation of trustee. *Prob. Code §§ 15640, 15641*

Removal of trustee. *Prob. Code § 15642*

Vacancy in office of trustee. *Prob. Code §§ 15643, 15644*

Appointment of trustee to fill vacancy. *Prob. Code § 15660*

Compensation and indemnification. *Prob. Code §§ 15680-15685*

Duties of trustees. *Prob. Code §§ 16000-16105*

Accounting and reporting. *Prob. Code §§ 16060-16064*

Powers of trustees. *Prob. Code §§ 16200-16249*

Liabilities of trustees. *Prob. Code §§ 16400-16465*

Notice of proposed action by trustee. *Prob. Code §§ 16500-16504*

Requirements for distribution of nonmonetary pecuniary gift. *Prob. Code § 21118*

Duties, powers, and discretionary authority of trustee, and other provisions regarding marital deductions and charitable gifts in trusts; conformance with Internal Revenue Code. *Prob. Code §§ 21500-21541*

Trustee's liability to State of California for distribution of assets prior to payment of taxes. *Rev. & Tax. Code § 19516*

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49-560 California Forms of Pleading and Practice--Annotated § 560.381

§ 560.381 Decisions

[1] Accounting

When there has been negligent failure to keep true accounts, or refusal to account, all presumptions are against trustee on settlement. *Blackmon v. Hale (1970) 1 Cal. 3d 548, 560, 83 Cal. Rptr. 194, 463 P.2d 418*

Trustee under duty to support every item of account; unsupported items properly disallowed. *Neel v. Barnard (1944) 24 Cal. 2d 406, 420, 150 P.2d 177*

Court has authority to order beneficiaries to pay attorney fees incurred by trustee in completing and defending accounting; trustee's right to indemnification for expenses reasonably incurred in defending accounting is conferred by *Prob. Code § 15685*. *Kasperbauer v. Fairfield (2009) 170 Cal. App. 4th 785, 795*

When settlor of revocable trust was under care and custody of court-appointed conservator, beneficiaries had no right to accounting because trust remained revocable despite settlor's conservatorship. *Johnson v. Kotyck (1999) 76 Cal. App. 4th 83, 88, 90 Cal. Rptr. 2d 99*

Amendment of *Prob. Code § 16460* in 1996 was intended to reject holding in *Di Grazia v. Anderlini (1994) 22 Cal. App. 4th 1337, 28 Cal. Rptr. 2d 37* (discussed *below*) with regard to the content of account required to put a beneficiary on notice; amendment was not intended to change existing law but rather to clarify it by correcting *Di Grazia's* misinterpretation of the statute; thus 1996 amendment was applicable to claims accruing prior to 1990, and if beneficiaries had the required information at that time, their claims based on breaches that occurred more than three years before they filed their petitions were barred by statute of limitations. *Noggle v. Bank of America (1999) 70 Cal. App. 4th 853, 858, 82 Cal. Rptr. 2d 829*

In case involving 20 separate trusts created by husband wife--two trusts each for each of their 10 siblings--statute of limitations applied separately to each remainder beneficiary's claims vis-a-vis the two trusts in which he or she had a per

capita interest, not to all 20 trusts as a whole; each remainder beneficiary's cause of action accrued when he or she had the required knowledge concerning the trusts in which he or she had an interest, and his or her knowledge about the other trusts' assets was legally irrelevant; contention that each reminder beneficiary had to examine the accountings for *all* of the trusts before it was possible to determine that trustee had failed to invest trust corpus for benefit of remainder beneficiaries rejected. *Noggle v. Bank of America (1999) 70 Cal. App. 4th 853, 860, 82 Cal. Rptr. 2d 829*

Accountings and letters bank provided to the remainder beneficiaries provided more than enough factual information as a matter of law to trigger *Prob. Code § 16460* prior to1990. *Noggle v. Bank of America (1999) 70 Cal. App. 4th 853, 860, 82 Cal. Rptr. 2d 829*

Doctrine of res judicata barred claims of remainder beneficiaries based on breaches of duty by trustee that occurred during years 1969 to 1980 in which probate court had approved the annual reports. *Noggle v. Bank of America (1999) 70 Cal. App. 4th 853, 862, 82 Cal. Rptr. 2d 829*

Court may order trustee's accounting to include transactions related to accounts held in joint tenancy by trustee and settlor. *Evangelho v. Presoto (1998) 67 Cal. App. 4th 615, 79 Cal. Rptr. 2d 146*

Mere schedule of sales and expenses, which does not provide other information regarding administration of trust, is not sufficient accounting to start running of three-year statute of limitations for actions against trustee for breach of trust under *Prob. Code § 16460*. *Di Grazia v. Anderlini (1994) 22 Cal. App. 4th 1337, 1346, 28 Cal. Rptr. 2d 37* ; *but see Noggle v. Bank of America (1999) 70 Cal. App. 4th 853, 858-859, 82 Cal. Rptr. 2d 829 , above*, in which the court held that the 1996 amendment of *Prob. Code § 16460* was intended to reject the *Di Grazia* holding with regard to the content of the account required to put a beneficiary on notice

When beneficiary filed frivolous objections to one of trustee's accounts, court properly ordered beneficiary under *Code Civ. Proc. § 128.5* to pay sanctions in form of reasonable attorney's fees and expenses incurred by trustee in responding to objections. *Wells Fargo Bank v. DiLeonardo (1994) 22 Cal. App. 4th 873, 878-879, 28 Cal. Rptr. 2d 16*

Consent to delay of accounting does not waive right to ultimate account. *Welsh v. Griffin (1960) 179 Cal. App. 2d 207, 214, 3 Cal. Rptr. 729*

[2] Actions and Claims

Surcharge order upheld notwithstanding existence of spendthrift provision, when trust beneficiary was also trustee and committed a breach causing fiduciary harm to the trust. Chatard v. Oveross (2009) *179 Cal. App. 4th, 1098, 1114, 101 Cal. Rptr. 3d 883*

Successor trustee acted reasonably and did not have to be represented by counsel when appearing in court to petition to modify and terminate trust, as she was simply fulfilling her duties as trustee, and not engaged in unauthorized practice of law. *Finkbeiner v. Gavid (2006) 136 Cal. App. 4th 1417, 1421, 39 Cal. Rptr. 3d 871*

Nonattorney trustee may not represent trust in propria persona in action to protect trust property because in that capacity trustee would be representing interests of beneficiaries and would therefore be engaged in unauthorized practice of law. *Ziegler v. Nickel (1998) 64 Cal. App. 4th 545, 548-549, 75 Cal. Rptr. 2d 312*

[3] Attorney's Fees

Provisions of *Cal. Rules of Court, Rule 3.1702*, providing that in civil cases a notice of motion for attorney's fees must be filed and served within 60 days of entry of judgment, do not apply to probate court proceedings. *Hollaway v.*

Edwards (1998) 68 Cal. App. 4th 94, 80 Cal. Rptr. 2d 166

Trustee not entitled to attorney's fees in justified removal action. *Estate of Miller (1968) 259 Cal. App. 2d 536, 546-549, 66 Cal. Rptr. 756*

Beneficiaries not entitled to recover attorney's fees under theory that fees are damages proximately resulting from trustee's negligence. *Estate of Gump (1982) 128 Cal. App. 3d 111, 118, 180 Cal. Rptr. 219*

Beneficiaries not entitled to recover attorney's fees on common fund theory when increase in assets resulting from action did not substantially benefit any other parties. *Estate of Gump (1982) 128 Cal. App. 3d 111, 118, 180 Cal. Rptr. 219*

[4] Compensation

If litigation is necessary to preserve trust, trustee is entitled to reimbursement for his or her expenditures from trust; however, if litigation is specifically for trustee's benefit, trustee must bear his or her own costs, and is not entitled to reimbursement. *Terry v. Conlan (2005) 131 Cal. App. 4th 1445, 1461, 1464, 33 Cal. Rptr. 3d 603*

Appellate court affirmed denial of compensation for services and costs arising from negligent and intentional misconduct in administration of lease property, but remanding denial of ordinary fees for services unconnected with administration of lease property that were reasonable and compensable. *Estate of Gump (1992) 1 Cal. App. 4th 582, 610-611, 2 Cal. Rptr. 2d 269*

Trial court's refusal to award trustee compensation and attorney's fees in proceeding brought by beneficiary for alleged malfeasance was abuse of discretion when trustee successfully defended against majority of charges. *Estate of Cassity (1980) 106 Cal. App. 3d 569, 574* , 165 Cal. Rtpr. 88

Proper standard regarding reasonableness of compensation of trustee managing corporation is not corporate standard prescribed by *Corp. Code § 310*, which requires reasonableness only at time transaction authorized; reasonableness of testamentary trustee's compensation is continuing responsibility of trustee throughout entire tenure. *Estate of Feraud (1979) 92 Cal. App. 3d 717, 722-723, 154 Cal. Rptr. 889*

When beneficial owners of corporation's stock were also beneficiaries of trusts and trustee was president and chief operating officer of corporation, trustee's compensation was required to be fair and reasonable as to beneficiaries and not as to corporation. *Estate of Feraud (1979) 92 Cal. App. 3d 717, 723, 154 Cal. Rptr. 889*

Trustee's compensation was unfair and unreasonable when it was based on gross sales of corporation that trustee managed and stock value rather than on corporation's net profits. *Estate of Feraud (1979) 92 Cal. App. 3d 717, 723, 154 Cal. Rptr. 889*

In determining reasonable compensation of testamentary trustee and attorney, trial court properly reduced amounts requested. *Estate of Nazro (1971) 15 Cal. App. 3d 218, 221-223, 93 Cal. Rptr. 116* (interpreting former Prob. Code § 1122, *now see Prob. Code § 15681*)

Court permitted to increase compensation of testamentary trustee when compensation provided by will would be so unreasonably low that competent trustee would not undertake to administer trust. *Estate of Taylor (1970) 6 Cal. App. 3d 16, 20-22, 85 Cal. Rptr. 474* (interpreting former Prob. Code § 1122, *now see Prob. Code § 15681*)

[5] Duties

Trustee's duty to report to beneficiaries in *Prob. Code § 16061* does not require disclosure of communications protected by attorney-client privilege. *Wells Fargo Bank v. Superior Court (2000) 22 Cal. 4th 201, 207, 91 Cal. Rptr. 2d 716, 990 P.2d 591*

Duties of testamentary trustee commence on death of testator. *Estate of Wellings (1923) 192 Cal. 506, 510, 221 P. 628*

If a trustee is liable to beneficiaries for damages resulting from acts and omissions of trustee and attorney, trustee and attorney may be held liable as joint tortfeasors. *Gackstetter v. Frawley (2006) 135 Cal. App. 4th 1257, 1275, 38 Cal. Rptr. 3d 333*

Trustee's failure to strictly comply with notice requirements of *Prob. Code § 16061.7(g)* does not render notice a nullity, and does not make inapplicable the 120-day statute of limitations for bringing an action to contest the trust. *Germino v. Hillyer (2003) 107 Cal. App. 4th 951, 955-957, 132 Cal. Rptr. 2d 478*

Interest on general pecuniary gift distributable under trust is not payable when trust was created before effective date of prior version of *Prob. Code § 16340(b)*. *Remsen v. Lavacot (2001) 87 Cal. App. 4th 421, 429, 104 Cal. Rptr. 2d 612*

Use of 12-point type is not reasonable equivalent of 10-point boldface type as required in notice of trust becoming irrevocable [*Prob. Code § 16061.7(h)* (former *Prob. Code § 16061.7(g)*)]; appellants' petition contesting trust was not untimely. *Harustak v. Wilkins (2000) 84 Cal. App. 4th 208, 216-218, 100 Cal. Rptr. 2d 718*

Trust beneficiaries stated cause of action against attorneys for former trustees for active participation in breaches of fiduciary duty by former trustees. *Pierce v. Lyman (1991) 1 Cal. App. 4th 1093, 1106, 3 Cal. Rptr. 2d 236*

Trustee breached duty to beneficiaries by realizing profit from lending purchase price to purchaser of trust property. *Estate of Pitzer (1984) 155 Cal. App. 3d 979, 991-992, 202 Cal. Rptr. 855*

Bank-trustee that places trust funds on deposit with itself at rate of interest less than that possible in a higher-yielding account bears burden of proving that circumstances reasonably known to it at time of investment justified lower interest account. *Conservatorship of Pelton (1982) 132 Cal. App. 3d 496, 502, 183 Cal. Rptr. 188* (interpreting former *Civ. Code § 2261, now see Prob. Code § 16225*)

Cotrustee who was public accountant has duty to know that incentive compensation of corporate manager of business and trustee of trust that was totally unrelated to net income of corporation was unfair and unreasonable to beneficial owners of corporation's stock. *Estate of Feraud (1979) 92 Cal. App. 3d 717, 724, 154 Cal. Rptr. 889*

Trustee's execution of quitclaim deed to son was not inconsistent with terms of trust, and was permissible delegation of duties rather than repudiation of trust. *Welsh v. Griffin (1960) 179 Cal. App. 2d 207, 215, 3 Cal. Rptr. 729*

Provision in trust empowering trustees to appoint someone in their place if necessary to carry out terms of trust was construed as method for appointment of successor trustee rather than authorization to delegate discretion to agents. *Estate of Kessler (1953) 120 Cal. App. 2d 383, 388, 261 P.2d 27*

[6] Liability

Transaction that would otherwise constitute wrongful use of trust property held proper when consistent with instructions in main trust instrument. *Estate of Thompson (1958) 50 Cal. 2d 613, 616-617, 328 P.2d 1* ; *Copley v.*

Copley (1981) 126 Cal. App. 3d 248, 279, 178 Cal. Rptr. 842

Managing officer-director of corporate trustee found individually liable to beneficiary for conversion of trust property for corporation's use when he knew or should have known of conversion. *Middlesex Ins. Co. v. Mann (1981) 124 Cal. App. 3d 558, 572, 177 Cal. Rptr. 495*

[7] Measure of Liability

If trustee wrongfully sells trust property, interest is awarded from date of sale, on proceeds of profits from sale; interest is awarded only on money judgment. *Redke v. Silvertrust (1971) 6 Cal. 3d 94, 106-107, 98 Cal. Rptr. 293, 490 P.2d 805 , cert. denied, 405 U.S. 1041, 92 S. Ct. 1316, 31 L. Ed. 2d 583 (1972)*

In cases involving breach of fiduciary relationship, proof of actual damages is not an important factor in award of exemplary damages. *Werschkull v. United California Bank (1978) 85 Cal. App. 3d 981, 1004, 149 Cal. Rptr. 829* (large exemplary damages award against trustee)

[8] Removal

Removal of trustee is proper whenever ill-feeling, growing out of trustee's behavior, exists between trustees, or between trustee and beneficiaries, and continuance in office would prevent harmonious administration of trust, even in absence of misconduct. *May v. May (1896) 167 U.S. 310, 320-321, 17 S. Ct. 824* ; *Brown v. Memorial Nat. Home Foundation (1958) 162 Cal. App. 2d 513, 534, 329 P.2d 118 , cert. denied, 358 U.S. 943, 79 S. Ct. 353, 3 L. Ed. 2d 352 (1959)*

When trustee's duties are solely ministerial, and cotrustee exists who has equal power and must concur in all trust matters, removal was not justified on ground of hostility between trustee and beneficiary. *McPherson v. Cox (1877) 96 U.S. 404, 419, 24 L. Ed. 746*

Trustee held subject to removal for appropriating trust property for personal use, even if trustee mistakenly claimed entitlement to property and subsequently returned it, because purpose of removal is not to penalize past behavior, but to preserve trust property. *Moore v. Bowes (1937) 8 Cal. 2d 162, 165*

Trustee is unable to purchase or deal with subject of trust, purchase debts due and repay them out of trust estate, or be in position antagonistic to trust. *Page v. Naglee (1856) 6 Cal. 241, 245*

Probate court has jurisdiction under *Prob. Code § 17206* to suspend trustee's powers for perceived breaches of trust; since court has express statutory authority to remove a trustee, court has inherent equitable power to use the less extreme remedy of suspending most of trustee's powers, appoint a separate interim trustee, and order trustee to turn over all trust documents and books to interim trustee. *Schwartz v. Labow (2008) 164 Cal. App. 4th 417, 428, 78 Cal. Rptr. 3d 838*

Long-term care ombudsman for skilled nursing facility remains care custodian even after formal ombudsman relationship with resident has ended, due either to change in ombudsman's facility assignment or fact that resident has left facility when ombudsman, as result of fiduciary relationship with resident, develops personal relationship with resident and thereby acquires personal and financial information regarding resident. *Estate of Shinkle (2002) 97 Cal. App. 4th 990, 993, 119 Cal. Rptr. 2d 42* ; *disapproved in part on other grounds in Bernard v. Foley (2006) 39 Cal. 4th 794, 816, 47 Cal. Rptr. 3d 248, 139 P.3d 1196*

Removal of trustee for conflict of interest is unwarranted when trustee is appointed by settlor who is aware of conflicts of interest inherent in appointment and there is no actual breach of trust. *Claypool v. Wilson (1992) 4 Cal. App. 4th*

646, 676-677 (applied to Legislature's appointment of actuary for PERS trust)

Assuming existence of legally proper ground for removal, evidence of actual past wrongdoing by trustee is not required to justify removal, because purpose of removing trustee is not to inflict penalty for past action, but to preserve trust assets; question in each case is whether circumstances are such that continuance of trustee in office would be detrimental to trust. *Getty v. Getty (1988) 205 Cal. App. 3d 134, 139-140, 252 Cal. Rptr. 342*

Trustee's hostility in response to beneficiary's demand for resignation is not ground for removal absent additional showing that administration of trust consequentially suffered. *IFS Industries, Inc. v. Stephens (1984) 159 Cal. App. 3d 740, 754, 205 Cal. Rptr. 915*

If settlor has named trustee while fully aware of potential conflict of interest, trustee is not subject to removal on that ground absent demonstrated abuse of power detrimental to trust. *Estate of Gilliland (1977) 73 Cal. App. 3d 515, 528, 140 Cal. Rptr. 795*

Charitable trustee may be removed on same grounds as trustee of private trust. *Brown v. Memorial Nat. Home Foundation (1958) 162 Cal. App. 2d 513, 533, 329 P.2d 118 , cert. denied, 358 U.S. 943 (1959)*

Concealment, threat, or adverse pressure of any kind is unlawful as long as confidential relation exists, and constitutes grounds for removal. *Estate of Vokal (1953) 121 Cal. App. 2d 252, 257, 263 P.2d 64*

Trustee who controls company in which trustee holds shares both individually and in trust for beneficiary may be properly removed, because dual relationships conflict. *Overell v. Overell (1926) 78 Cal. App. 251, 259, 248 P. 310*

[9] Rights

Cotrustee had right under trust instrument to exercise power vested in two co-trustees when other cotrustee was unable to serve and trust instrument provided that on death, resignation, or inability of one cotrustee, remaining cotrustee serves as successor, notwithstanding *Prob. Code § 15620* (power vested in two or more trustees may only be exercised by their unanimous action). *La Jolla Mesa Vista Improvement Assn. v. La Jolla Mesa Vista Homeowners Assn. (1990) 220 Cal. App. 3d 1187, 1197-1198, 269 Cal. Rptr. 825*

[10] Successor Trustees

Trustee who requested predecessor to prepare audit is not liable for payment of audit because request was made prior to his succession as trustee and audit was done for benefit of predecessor trustee and not for benefit of trust. *Boyle v. Superior Court (1934) 137 Cal. App. 672, 674, 31 P.2d 828*

[11] Temporary Trustee or Receiver

Appointment of receiver is proper when it does not adversely affect any interest of beneficiaries in trust property, but rather is necessary to protect property that would have been otherwise lost. *Bowles v. Superior Court (1955) 44 Cal. 2d 574, 583, 283 P.2d 704* (now see *Prob. Code § 15640(b)* (appointment of receiver or temporary trustee))

[12] Trustee Ad Litem

When trustee's interests in conduct of third-party litigation involving trust assets are similar to those of third-party

litigants and inimical to those of trust beneficiaries, suspension of trustee's powers relative to that litigation and appointment of trustee ad litem to conduct litigation is proper exercise of probate court's general equity jurisdiction, and as intrinsically included in court's greater power to remove and replace trustee. *Getty v. Getty (1988) 205 Cal. App. 3d 134, 141-142, 252 Cal. Rptr. 342*

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Nossaman & Wyatt, Trust Administration and Taxation (2d ed rev) Vol. 1, Part III, *Rights of Settlor and Beneficiaries Generally,* Ch. 23, *Nature of Beneficiaries Rights Under Trust, and in Trust Property,* Vol. 1A, Part VI, *Accountings and Actions,* Ch. 33, *Effect of Orders Settling Accounts,* § 33.03, Part V, *Rights, Powers, Duties, and Liabilities of the Trustee,* Ch. 26, *Who May Be a Trustee --Capacity-- Tenure--Succession* (Matthew Bender)

Witkin, Summary of California Law, Vol. 13, *Trusts,* § 119 (10th ed. 2005)

Bogert, The Law of Trusts and Trustees (2d ed.), Ch. 26, *Trustee's Duties in General,* Ch. 27, *Trustee's Powers in General,* Ch. 28, *Power to Continue Business of Decedent,* Ch. 29, *Collection and Preservation of the Trust Fund,* Ch. 41, *Remedies of the Beneficiary and Trustee,* Ch. 46, *Accounting and Compensation,* Ch. 47, *Modification and Termination of Trusts*

Restatement (Second) of Trusts §§ 173, 255

Scott, The Law of Trusts, vol. III, Ch. 7, *The Administration of the Trust,* §§ 223-225 (3d ed.)

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§ 560.400 State Statutes

Presumption of revocability. *Prob. Code § 15400*

Revocation by settlor. *Prob. Code §§ 15401, 15402*

Methods of modification or termination. *Prob. Code §§ 15403, 15404*

Guardian ad litem. *Prob. Code § 15405*

Presumption regarding fertility. *Prob. Code § 15406*

When trust terminates. *Prob. Code § 15407*

Grounds for modification or termination. *Prob. Code §§ 15408-15409*

Disposition of property on termination. *Prob. Code § 15410*

Combination of trusts. *Prob. Code § 15411*

Division of trusts. *Prob. Code § 15412*

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§ 560.401 Decisions

In action to compel distribution of portion of corpus, to which beneficiary had exclusive rights, court has power to order distribution on ground of change in circumstances. *Whittingham v. California Trust Co. (1931) 214 Cal. 128, 129-130, 134, 4 P.2d 142*

Trust beneficiaries could modify irrevocable trust when trust gave discretion to add organizations as beneficiaries, beneficiaries entered into a settlement agreement, transferor's intent was clear, and ascertaining beneficiaries was not necessary under *Prob. Code § 17202*. *Boys and Girls Club of Petaluma v. Walsh (2009) 169 Cal. App. 4th 1049, 1060, 1062, 87 Cal. Rptr. 3d 413* .

Wife breached terms of joint inter vivos trust by executing deed purporting to withdraw property from trust after husband's death; even though property was her share of community property, trust had become irrevocable in its entirety on husband's death. *Aguilar v. Aguilar (2008) 168 Cal. App. 4th 35, 40, 85 Cal. Rptr. 3d 193*

Revocation of trust by trustor delivering notice of revocation to himself as trustee was held valid and in compliance with *Prob. Code § 15401(a)(2)* when trust's revocation provision was not explicitly exclusive. *Masry v. Masry (2008) 166 Cal. App. 4th 738, 740, 82 Cal. Rptr. 3d 915*

Settlor of two irrevocable trusts had standing to petition for reformation, even though he was not a beneficiary and did not have a pecuniary interest, under the trial court's common law equitable power on grounds that drafting errors defeated settlor's dispositive intent. *Bilafer v. Bilafer (2008) 161 Cal. App. 4th 363, 370, 73 Cal. Rptr. 3d 880* .

Revocation by surviving spouse of trust funded with community property results in one-half of trust assets being returned to him and other half being disposed of according to wife's will because property was transmuted to separate property at wife's death under *Prob. Code § 100*; surviving spouse's revocation was effective as to his half of corpus. *Estate of Powell (2000) 83 Cal. App. 4th 1434, 1441, 100 Cal. Rptr. 2d 501*

Court has equitable power to modify trust to remedy drafting error. *Ike v. Doolittle (1998) 61 Cal. App. 4th 51, 80-85, 70 Cal. Rptr. 2d 887*

Trust instrument controls method of modification or amendment of trust when itspecifies method; settlor required to comply with method of modification or amendment specified in trust instrument. *Conservatorship of Irvine (1995) 40 Cal. App. 4th 1334, 1344-1345, 47 Cal. Rptr. 2d 587*

Prob. Code § 15409, relating to modification of trust in changed circumstances, and *Prob. Code § 17200*, stating grounds for petition concerning internal affairs of trust, codify long-held equity powers of California courts to modify trust's terms when modification is necessary to preserve trust or serve settlor's original intentions. *Stewart v. Towse (1988) 203 Cal. App. 3d 425, 428, 249 Cal. Rptr. 622* ; *see* *Getty v. Getty (1988) 205 Cal. App. 3d 134, 142, 252 Cal. Rptr. 342*

Prob. Code § 15409, relating to modification of trust in changed circumstances, and *Prob. Code § 17200*, stating grounds for petition concerning internal affairs of trust, is basis for probate court jurisdiction over petition to modify terms of trusts or authorize petition to make modifications otherwise forbidden by trust instrument, including change in designated successor trustee. *Stewart v. Towse (1988) 203 Cal. App. 3d 425, 429, 249 Cal. Rptr. 622*

Prob. Code §§ 17001 and *17004* refute notion that declaratory relief is beyond jurisdiction of superior court sitting in probate; when statute confers jurisdiction on probate department, that department is empowered to apply legal and equitable principles in aid of its functions, including modifying trust terms. *Stewart v. Towse (1988) 203 Cal. App. 3d 425, 430, 249 Cal. Rptr. 622*

Petition to modify terms of trust, including modification changing designated successor trustee, is ripe for resolution when trust assets consist largely of interests in same real property and lend themselves to administration by single trustee, and when current state of trust instruments make it likely that settlor's death or incapacity will trigger undesirable division of trustee duties. *Stewart v. Towse (1988) 203 Cal. App. 3d 425, 430-431, 249 Cal. Rptr. 622*

When settlor reserves power to revoke trust only in particular manner or under particular circumstances, settlor is capable of revoking trust only in that manner or under those circumstances; inability of settlor who reserves power to revoke trust by inter vivos transaction to revoke trust by will. *Estate of Lindstrom (1987) 191 Cal. App. 3d 375, 386, 236 Cal. Rptr. 376*

Right to revoke trust does not affect legal title to real property held by trust, since title passes to trustee and remains vested for purposes of trust; if trust is never revoked, validity of trust is unaffected. *Estate of Lindstrom (1987) 191 Cal. App. 3d 375, 388, 236 Cal. Rptr. 376*

Court properly instructed trustee that church named as beneficiary had ceased to exist for purposes of distribution of trust property following termination of trust, when church, although still existing as legal entity, had ceased to exist as canonical entity. *Estate of Klinkner (1978) 85 Cal. App. 3d 942, 947-951, 151 Cal. Rptr. 20*

When purpose of trust ceases, estate of trustee also ceases, and legal and equitable title vests in beneficial owner unless settlor clearly intended otherwise. *Estate of Downing (1982) 134 Cal. App. 3d 256, 271, 184 Cal. Rptr. 511* , citing *Ball v. Mann (1948) 88 Cal. App. 2d 695, 699, 199 P.2d 706*

Trust established for use and benefit of beneficiary terminates on beneficiary's death. *Cutrera v. McClallen (1963) 215 Cal. App. 2d 604, 608, 30 Cal. Rptr. 444*

Trust for support of minor terminates when beneficiary attains age of majority. *Ball v. Mann (1948) 88 Cal. App. 2d*

695, 699, 199 P.2d 706

Trust as properly terminated for impossibility when money of trust that was established to invest in high-interest loans was invested in mortgages, and trustee purchased foreclosed property, so the trust property consisted of realty instead of funds that could be invested, and investment opportunities did not appear to exist *Ellis v. Ellis (1937) 20 Cal. App. 2d 293, 294-295, 66 P.2d 738*

When all beneficiaries are competent and join in request that trust be terminated, and no factual or equitable consideration interposed by trustees weighs against beneficiaries' rights, court is under duty to terminate trust despite general rule that termination is discretionary with trial court. *Moor v. Vawter (1927) 84 Cal. App. 678, 684-685, 258 P. 622*

When trustees' only duty was to hold stock for heirs of settlor, stock as becoming property of heirs on trustor's death. *Yoakum v. Grimes (1925) 73 Cal. App. 204, 207, 238 P. 727*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsModification & TerminationEstate, Gift & Trust LawTrustsRevocable Living TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview

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49-560 California Forms of Pleading and Practice--Annotated § 560.402

§ 560.402 Law Reviews

Comment, *Trust Revocation: Do Trust Terms Prevail Over California Civil Code Section 2280? 17 Pac. L. J. 941 (1986)*

Bird, *Commentary: Trust Termination: Unborn, Living, and Dead Hands--Too Many Fingers in the Trust Pie, 36 Hastings L.J. 563 (1985)*

Verrall, *The Doctrine of Worthier Title: A Questionable Rule of Construction, 6 UCLA L. Rev. 371 (1958-1959)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstates Created by Trusts & WillsLife EstatesDoctrine of Worthier TitleEstate, Gift & Trust LawTrustsInterpretationEstate, Gift & Trust LawTrustsModification & TerminationEstate, Gift & Trust LawTrustsRevocable Living Trusts

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49-560 California Forms of Pleading and Practice--Annotated § 560.403

§ 560.403 Text References

Nossaman & Wyatt, Trust Adminstration and Taxation (2d ed rev) Vol. 1, Part II, *Rights of Settlor and Beneficiaries--Principal and Income,* Ch. 21, *Right of Settlor or Beneficiaries to Revoke or Otherwise Terminate Trust--Power of Amendment* (Matthew Bender)

Witkin, Summary of California Law, vol. 13, *Trusts*, § 195 (10th ed. 2005)

Bogert, The Law of Trusts and Trustees (2d ed.), Ch. 47, *Modification and Termination of Trusts*

Scott, The Law of Trusts (3th ed.), Vol. IV, Ch. 10, *The Termination and Modification of the Trust*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§§ 560.404[Reserved]

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49-560 California Forms of Pleading and Practice--Annotated § 560.420

§ 560.420 California Points and Authorities

For memoranda relating to in personam jurisdiction, see California Points and Authorities, Ch. 132, *Jurisdiction: Personal Jurisdiction and Inconvenient Forum*

Legal Topics:

For related research and practice materials, see the following legal topics:
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49-560 California Forms of Pleading and Practice--Annotated § 560.421

§ 560.421 Other California Matthew Bender Publications

[1] California Legal Forms

For complete revocable trust forms and discussion, see California Legal Forms, Ch. 70, *Complete Revocable Trust Forms*

For additional and alternative marital deduction trust provisions, see California Legal Forms, Ch. 71, *Marital Deduction Trust Provisions*

For complete irrevocable trust forms and discussion, see California Legal Forms, Ch. 72, *Irrevocable Trusts*

For complete split-interest charitable trust forms, see California Legal Forms, Ch. 74, *Split-Interest Charitable Trusts*

[2] California Wills & Trusts

For detailed guidance on planning and drafting all kinds of inter vivos and testamentary trusts, see California Wills & Trusts, text volumes (Matthew Bender)

For complete inter vivos and testamentary trust forms, and alternative provisions, see California Wills & Trusts, forms volumes (Matthew Bender)

[3] California Trust Practice

For detailed guidance on the actions and procedures for postmortem trust administration, and the necessary forms, see Hartog & Dirkes, California Trust Practice (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust LawTrustsIrrevocable Living TrustsEstate, Gift & Trust LawTrustsMarital Deduction TrustsEstate, Gift & Trust LawTrustsRevocable Living TrustsEstate, Gift & Trust LawTrustsTestamentary Trusts

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§ 560.422 Federal Statutes

Definition of charitable remainder annuity trust. *I.R.C. § 664(d)(1)*

Definition of charitable remainder unitrust. *I.R.C. § 664(d)(2)*

Estate tax charitable deduction. *I.R.C. § 2055*

Estate tax marital deduction. *I.R.C. § 2056*

Legal Topics:

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§ 560.423 State Statutes

Personal jurisdiction. *Code Civ. Proc. § 410.10*; *Prob. Code §§ 17003-17004*

Age of majority. *Fam. Code §§ 6500-6502*

Mailing procedure and notice requirements. *Code Civ. Proc. § 1013(a)*; *Prob. Code §§ 1202 et seq.* 17100, 17105

Definition of beneficiary. *Prob. Code § 24*

Additional grounds for petition. *Prob. Code § 850(a)(3)*

Court may not grant petition if it thinks matter should be determined by civil action. *Prob. Code § 853*

Appointment of guardian ad litem. *Prob. Code § 1003*

Appeal. *Prob. Code §§ 1300-1312*

Subject matter jurisdiction. *Prob. Code §§ 17000-17001*

Place of administration of trust. *Prob. Code § 17002*

Venue. *Prob. Code § 17005*

No right to jury trial. *Prob. Code § 17006*

Grounds for petition. *Prob. Code § 17200*

Commencement of proceeding. *Prob. Code § 17201*

Dismissal of petition. *Prob. Code § 17202*

General notice provision. *Prob. Code § 17203*

Orders. *Prob. Code § 17206*

Judicial intervention policy. *Prob. Code § 17209*

Standing of Attorney General. *Prob. Code § 17210*

Testamentary trusts subject to continuing jurisdiction. *Prob. Code §§ 17300-17304*

Removal from continuing jurisdiction. *Prob. Code §§ 17350-17354*

Transfer to another jurisdiction. *Prob. Code §§ 17400-17405*

Transfer from another jurisdiction. *Prob. Code §§ 17450-17457*

Legal Topics:

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49-560 California Forms of Pleading and Practice--Annotated § 560.424

§ 560.424 Decisions

It was error to dismiss complaint for lack of standing because a trust beneficiary can pursue a cause of action against a third party who actively participates in or knowingly benefits from a trustee's breach of trust; even though the civil complaint was not a probate matter under *Prob. Code § 17200*, it was related to the beneficiary's petition and the probate court had concurrent jurisdiction of the civil complaint under *Prob. Code § 17000*. *Estate of Bowles (2008) 169 Cal. App. 4th 684, 695, 87 Cal. Rptr. 3d 122*

Amendment of charitable trust regarding appointment of successor trustees was improper under *Fourteenth Amendment* to U.S. Constitution because potential successor trustees under trust as written were not notified of proceeding to amend trust. *Estate of Sigourney v. American Psychoanalytic Ass'n (2001) 93 Cal. App. 4th 593, 604-605, 113 Cal. Rptr. 2d 274*

Prob. Code § 17200, which empowers court to make orders concerning internal affairs of trust, or to determine existence of trust, is applicable to inter vivos as well as testamentary trusts; fact that settlor is still alive does not prevent court from making such an order. *Conservatorship of Irvine (1995) 40 Cal. App. 4th 1334, 1341, 47 Cal. Rptr. 2d 587*

Prob. Code § 369 provides that trustee is real party in interest in suit on behalf of trust; beneficiary is without standing to sue third parties on behalf of trust and is limited to action against trustee or trustee and third parties. *Saks v. Damon Raike & Co. (1992) 7 Cal. App. 4th 419, 8 Cal. Rptr. 2d 869*

Period for winding up trust subject to continuing court jurisdiction is period after time for termination has arrived and before trust is terminated by distribution of trust property; trustee of trust that continues under court jurisdiction for purpose of winding up has powers and duties that are appropriate for winding up of trust. *Estate of Nicholas (1986) 177 Cal. App. 3d 1071, 1082, 1082* , 223 Cal. Rtpr 410 (interpreting former Prob. Code § 1120)

Petition and written objections (verified by declarations under Civ. Code § 2015.5) are properly considered evidence

absent objection to contrary. *Estate of Nicholas (1986) 177 Cal. App. 3d 1071, 1088, 223 Cal. Rptr. 410* (proceedings under former Prob. Code § 1120)

Provision in will permitting trustee to receive reasonable compensation to be fixed by courts is insufficient to require continuing mandatory court supervision of testamentary trust. *Estate of Goddard (1984) 157 Cal. App. 3d 340, 343-344, 203 Cal. Rptr. 623* (interpreting former Prob. Code § 1120(a), *now see Prob. Code § 17300(b)*

Appointment of income beneficiary of trust as guardian ad litem of her children who were minor remainder beneficiaries was improper because, however well-intentioned, income beneficiary is in position adverse to remainder beneficiaries. *Estate of Lacy (1975) 54 Cal. App. 3d 172, 185, 126 Cal. Rptr. 432*

Appointment of guardian ad litem is advisable and proper when minor enjoys beneficial interest in trust and litigation involves potential destruction of trust. *Estate of High (1967) 250 Cal. App. 2d 561, 567, 58 Cal. Rptr. 694*

Guardian has no power to consent to act hostile to the interests of its ward, absent some showing that invasion of wards' rights might be beneficial to them. *Leonardini v. Wells Fargo Bank (1955) 131 Cal. App. 2d 9, 17, 280 P.2d 81*

When there is conflict of interest between beneficiaries, all beneficiaries are entitled to individual representation, and guardian ad litem of minor beneficiary is necessary and not duplication of work of cotrustee or executor. *Estate of Corotto (1954) 125 Cal. App. 2d 314, 324, 325, 270 P.2d 498*

Trial court's decree depriving unborn and unascertained heirs from ultimately obtaining trust corpus requires reversal on showing from record that, although guardian ad litem was appointed, there was no true representation of those persons. *Wogman v. Wells Fargo Bank (1954) 123 Cal. App. 2d 657, 667, 267 P.2d 423*

Appointment of guardian ad litem for minor beneficiary of a trust is necessary when trust provides for minor's support and education, purpose of action is to dissolve trust, and minor's general guardian, in his or her individual capacity, seeks to revoke trust. *Loock v. Pioneer Title Ins. etc. Co. (1935) 4 Cal. App. 2d 245, 249, 40 P.2d 526*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 560.425 Law Reviews

Review of Selected 1982 California Legislation, "Taxation; wills--marital deductions, charitable remainder trusts, and beneficiaries," *14 Pacific L.J. 732 (1983)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 560.426 Text References

Rabkin and Johnson, Current Legal Forms With Tax Analysis, Ch. 11, *Contributions to Charities,* §§ 11.06A, *11.07* (Matthew Bender)

Rabkin and Johnson, Federal Income, Gift and Estate Taxation, Ch. 53, *Estate Tax Pattern: Deductions and Credits,* § 53.06 (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawFederal Estate & Gift TaxesDeductionsCharitable Deductions (IRC secs. 2055, 2522, 2524)General OverviewTax LawFederal Estate & Gift TaxesDeductionsMarital Deduction (IRC secs. 2056, 2523)General OverviewTax LawFederal Income Tax ComputationDeductions for Nonbusiness ExpensesCharitable Contributions (IRC sec. 170)General OverviewTax LawFederal Taxpayer GroupsIncome Taxation of Estates, Trusts & BeneficiariesGeneral Overview

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§§ 560.427[Reserved]

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49-560 California Forms of Pleading and Practice--Annotated § 560.440

§ 560.440 California Points and Authorities

For memoranda relating to negligence generally, see California Points and Authorities, Ch. 165, *Negligence* (Matthew Bender)

For memoranda relating to third-party actions against an agent or principal, see California Points and Authorities, Ch. 182, *Principal and Agent* (Matthew Bender)

For a memorandum supporting a motion to change venue to a court having jurisdiction of estate represented by a trustee sued in his or her official capacity, see California Points and Authorities, Ch. 238, *Venue* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsCauses of Action & RemediesGeneral OverviewCivil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedurePartiesCapacity of PartiesTrusteesEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstTortsNegligenceGeneral Overview

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§ 560.441 California Torts

For discussion of negligence generally, see California Torts, Div. I, *General Principles of Liability*, Subdiv. A, *Negligence* (Matthew Bender)

For discussion of torts relating to real property, see California Torts, Div. II, *Torts Relating to Real Property* (Matthew Bender)

For discussion of business torts, see California Torts, Div. V, *Intentional Torts and Other Theories of Recovery*, Ch. 40, *Fraud and Deceit and Other Business Torts* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 560.442 State Statutes

[1] Bona Fide Transactions

Protection of third party in good faith transactions with trustee. *Prob. Code § 18100*

[2] Enforcement of Money Judgment

Enforcement of money judgment against beneficiary's interest in trust. Code Civ. Proc.§§ 695.030, 709.010

Exemption of beneficiary's interest from writ of execution. *Code Civ. Proc. § 699.720(a)(8)*

[3] Express Trusts Relating to Real Estate

Recording and disclosure requirements. *Prob. Code § 18103*

Recording affidavit of change of trustee when title to real property is affected by change. *Prob. Code §§ 18105-18108*

[4] Liability of Trustee

Personal liability of trustee who signs negotiable instrument. *Com. Code § 3402(b)*

Contracts. *Prob. Code § 18000*

Personal liability regarding ownership of property. *Prob. Code § 18001*

Personal liability for torts. *Prob. Code § 18002*

Dissenting cotrustee. *Prob. Code § 18003*

Claim against trustee in representative capacity. *Prob. Code § 18004*

Liability against trustee or estate. *Prob. Code § 18005*

[5] Restrictions on Transfer of Trust Property

Restraint on transfer of income. *Prob. Code § 15300*

Restraint on transfer of principal. *Prob. Code § 15301*

Trust for support of beneficiary. *Prob. Code § 15302*

Discretion of trustee to pay beneficiary. *Prob. Code § 15303*

Settlor as beneficiary. *Prob. Code § 15304*

Spousal and child support claims. *Prob. Code § 15305*

Restitution judgments. *Prob. Code § 15305.5*

Liability for public support. *Prob. Code § 15306*

Rights of creditors regarding trusts subject to transfer restrictions. *Prob. Code §§ 15306.5, 15307*

Modification of order allowing creditor to reach trust property subject to transfer restrictions. *Prob. Code § 15308*

Disclaimer of interest under trust. *Prob. Code § 15309*

[6] Procedure in Plenary Actions

Real party in interest. *Code Civ. Proc. § 367*

Authority of trustee of express trust to sue without joining beneficiaries. *Code Civ. Proc. § 369*

Recovery of costs in action prosecuted or defended by trustee. *Code Civ. Proc. § 1026*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 560.443 Federal Rules of Court

Trustee of express trust as real party in interest. *Fed. R. Civ. P., Rule 17(a)*

Legal Topics:

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

[1] Action by Beneficiary Regarding Internal Affairs of Trust

Court had equitable power to charge reasonable and necessary fees incurred by trustee in opposing unfounded proceeding brought by trust beneficiary against that beneficiary's share of trust estate. *Rudnick v. Rudnick (2009) 179 Cal. App. 4th 1328, 1335, 102 Cal. Rptr. 3d 493*

Trust beneficiary had standing to sue a fellow beneficiary, under either a third-party participant theory or a constructive trustee theory, despite a successor trustee being appointed, when the fellow beneficiary aided the trustee in transferring property out of the trust in breach of trustee's duties. *King v. Johnston (2009) 178 Cal. App. 4th 1488, 1502, 101 Cal. Rptr. 3d 269*

Beneficiary required to bring action regarding internal affairs of trust against trustee or trustee and third persons; action must be brought in probate department or, if there is no separate probate department, in superior court that has jurisdiction over trust; *Civ. Code § 1559*, which allows third party beneficiaries to enforce contract, does not apply to trust beneficiaries. *Saks v. Damon Raike & Co. (1992) 7 Cal. App. 4th 419, 8 Cal. Rptr. 2d 869*

[2] Alter Ego

Guarantors of construction loan to revocable family living trust who were also trustors, trustees, and beneficiaries of trust were alter ego of primary obligor trustees; guarantees therefore unenforceable under antideficiency laws after nonjudicial foreclosure. *Torrey Pines Bank v. Hoffman (1991) 231 Cal. App. 3d 308, 320-323, 282 Cal. Rptr. 354*

[3] Attorney's Fees

Attorney who represented trustee in litigation over validity of trust amendment changing primary beneficiary was not entitled to attorney's fees because litigation was not for benefit of trust; moreover, attorney's defense of trust was unsuccessful. *Whittlesey v. Aiello (2002) 104 Cal. App. 4th 1221, 1227-1231, 128 Cal. Rptr. 2d 742*

[4] Bona Fide Transaction

Prob. Code § 18100 protects corporation in bona fide purchase of easement from trustee acting outside its authority without knowledge of corporation; recording requirements of *Prob. Code § 18103* do not alter protection provided by *Prob. Code § 18100*. *Adler v. Manor Healthcare Corp. (1992) 7 Cal. App. 4th 1110, 9 Cal. Rptr. 2d 732*

Former trustee's encumbrance of trust property constitutes bona fide transaction, which is valid under former *Civ. Code § 2267* (*now see Prob. Code § 18102*), when lenders, having knowledge that trustee was not named in trust instrument, satisfied reasonable inquiry into trustee's authority to encumber trust assets at time of loan. *Leach v. Home Savings & Loan Ass'n. (1986) 185 Cal. App. 3d 1295, 1304* , 230 Cal. Rtpr 553

[5] Liability of Trust Estate

Trust estate liable for trustee's tortious acts to extent that estate benefitted from those acts. *Alphonzo E. Bell Corp. v. Bell View Oil Syndicate (1941) 46 Cal. App. 2d 684, 689 , 116 P.2d 786*

[6] Liability of Trustee

Trustee liable under theory of respondeat superior for agent's tortious acts committed in administration of trust. *Longway v. Newbery (1939) 13 Cal. 2d 603, 616-619, 91 P.2d 110*

Trustee that insured trust property premises, and was answerable for premises defects, was potentially liable to third parties for tort liability under doctrine of respondeat superior, and was unable to avoid responsibility therefor on ground that trustee merely held legal title. *Bianchi v. Western Title Ins. & Guar. Co. (1970) 14 Cal. App. 3d 235, 239-240, 92 Cal. Rptr. 745*

In action for rescission of contracts to purchase real property on grounds of fraud, trustee corporation held personally liable because contracts represented it to be owner of properties. *Curtis v. Title Guarantee etc. Co (1935) 3 Cal. App. 2d 612, 619-620, 40 P.2d 562*

In action for failure to prosecute, trustee was not personally liable for judgment against him in his representative capacity because it was not demonstrated that he acted intentionally or negligently. *Haskett v. The Villas at Desert Falls (2001) 90 Cal. App. 4th 864, 877-878, 108 Cal. Rptr. 2d 888*

[7] Restrictions on Transfer of Trust Property

Bankruptcy estate possessed unprotected 25 percent of bankrupt's interest in spendthrift trust and only the interest above bankrupt's support requirements; determination of income necessary for support to be adjusted to bankrupt's fluctuating needs. *In re Neuton (9th Cir. 1990) 922 F.2d 1379, 1384*

Bankrupt beneficiary's interest in assets of California spendthrift trust was immune from judicial process and did not pass to trustee of bankrupt estate. *In re Ahlswede (9th Cir. 1975) 516 F.2d 784, 786*

Voluntary assignment executed before payment to beneficiary conferred on assignee no right to demand payment or delivery from trustee as it becomes due to beneficiary. *Schalk Chemical Company v. C.I.R. (9th Cir. 1962) 304 F.2d 48, 50-51* ; *Kelly v. Kelly (1938) 11 Cal. 2d 356, 362-363, 79 P.2d 1059*

Spendthrift trusts as effective means to prevent indigent beneficiaries from becoming financially dependent on state. *Canfield v. Security-First Nat. Bank (1939) 13 Cal. 2d 1, 13, 87 P.2d 830*

Sisters' written agreement to share equally any inheritance received from their mother, despite any unequal disposition that mother's will might provide, was enforceable against ostensible testamentary spendthrift trust in which bulk of estate was left to one sister, when court determined that trust was not truly spendthrift despite boilerplate spendthrift trust provisions in will. *De Mille v. Ramsey (1989) 207 Cal. App. 3d 116, 125, 254 Cal. Rptr. 573* (*distinguishing Kelly v. Kelly (1938) 11 Cal. 2d 356, 362-363, 79 P.2d 1059* on ground that trust in *De Mille* was not truly spendthrift)

Despite boilerplate provisions characterizing trust as spendthrift, trust was not spendthrift when trustor's intent, as expressed in language creating trust, was not to keep money out of beneficiary's hands, but to keep trust assets away from creditors of beneficiary's husband. *De Mille v. Ramsey (1989) 207 Cal. App. 3d 116, 125, 254 Cal. Rptr. 573*

Enforcement of agreement, executed prior to creation of ostensible spendthrift trust, requiring beneficiary to pay to her sister half of any trust funds distributed to beneficiary did not violate *Prob. Code §§ 15300* (restrictions on transfer of income) and 15301 (restrictions on transfer of principal) when spendthrift provisions of trust were not aimed at beneficiary and when beneficiary never technically transferred to her sister any present interest in trust by executing pre-trust agreement. *De Mille v. Ramsey (1989) 207 Cal. App. 3d 116, 126, 254 Cal. Rptr. 573*

Employee's mandatory contributions to welfare fund with spendthrift provision, pursuant to collective bargaining agreement, was subject to execution for child support. *Parscal v. Parscal (1983) 148 Cal. App. 3d 1098, 1100-1104, 196 Cal. Rptr. 462*

[8] Standing

Compliance officer of restitutionary fund set up by California state court judgment to remedy statutory violations by corporation was trustee of express trust with right to intervene in class action arising out of corporate activity, citing *Fed. R. Civ. P., Rule 17(a)* (trustee of express trust as real party in interest). *Piambino v. Bailey (5th Cir. 1980) 610 F.2d 1306, 1322-1323*

Trustee's delay in bringing action against third-party wrongdoer, when trustee is not in collusion with wrongdoer, bars beneficiaries from subsequently maintaining action. *DeTarr v. Texaco Inc. (1968) 267 Cal. App. 2d 872, 875, 73 Cal. Rptr. 511*

[9] Venue

Venue provision of *Code Civ. Proc. § 395.1* is applicable to all actions brought against trustee to recover money or personal property, and not merely to suits brought on rejected creditors' claims. *Metzger v. Silverman (1976) 62 Cal. App. 3d Supp. 30, 36-37 , 133 Cal. Rptr. 355*

Venue provisions of *Code Civ. Proc. § 395* based on residence of trustee are applicable to transitory actions against trustee that are not covered by *Code Civ. Proc. § 395.1*. *Haines v. Lamb (1962) 206 Cal. App. 2d 322, 326, 24 Cal. Rptr. 146*

Venue provision of *Code Civ. Proc. § 395.1* is applicable only to actions brought against trustee to recover money or

personal property, and not to actions for declaratory relief. *Ramos v. Cypher (1955) 137 Cal. App. 2d 648, 290 P.2d 585*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueSpecial VenueEstate, Gift & Trust LawTrustsAdministrationEstate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsSpendthrift TrustsGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & Against

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§ 560.445 Law Reviews

Van Alstyne, "Venue of Mixed Actions in California," *44 Cal. L. Rev. 685 (1956)*

Recent Decisions, "Jurisdiction and Venue: Suits Where Actions Involving the Title and Possession of Real Property Are Joined with Transitory Actions," *27 Cal. L.Rev. 468 (1939)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 560.446 Text References

California Forms of Jury Instructions (1985), Ch. 4, *Parties*, § 4.65 (Matthew Bender)

Nossaman & Wyatt, Trust Adminstration and Taxation (2d ed rev), Part I, *Existence, Validity and Interpretation*, Ch. 6, *Validity--Perpetuities, Restraints in Alienation and Other Time Limits*, Ch. 7, *Accumulations and Income Undisposed Of*, Part IV, *Rights and Liabilities of Third Persons*, Ch. 24, *Rights of Creditors of Settlor and Beneficiary*, Ch. 25, *Rights and Liabilities of Persons Dealing with Trustees--Liabilities of Trustees, Trust Estate and Beneficiaries on Trust Obligations* (Matthew Bender)

Witkin, California Procedure (3d ed.), Vol. 2, *Jurisdiction*, Part I, *Jurisdiction of The Subject Matter*, Part II, *Jurisdiction Over Persons*, Part III, *Jurisdiction in Rem and Quasi in Rem*

Bogert, The Law of Trusts and Trustees (2d ed.), Ch 13, *Restrictions --Illegality--Perpetuities--Accumulations--Suspension of Power of Alienation--Spendthrift Trusts*, §§ 221-227

Restatement Trusts 2d, §§ 156, 280-329

Scott, The Law of Trusts (3d ed.), Vol. III, Ch. 8, *Liabilities to Third Persons*, § 272, Vol. IV, Ch. 9, *Liabilities of Third Persons*

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§§ 560.447[Reserved]

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§ 560.460 State Statutes

General provisions relating to payment of claims from revocable trust. *Prob. Code §§ 19000-19012*

Petition for approval and settlement of claims against deceased settlor. *Prob. Code §§ 19020-19030*

Publication of notice to creditors. *Prob. Code §§ 19040, 19041*

Actual notice to creditors. *Prob. Code §§ 19050-19054*

Time for filing claims. *Prob. Code §§ 19100-19104*

Filing of claims. *Prob. Code §§ 19150-19154*

Claims by public entities. *Prob. Code §§ 19200-19205*

Allowance and rejection of claims. *Prob. Code §§ 19250-19255*

Claims established by judgment. *Prob. Code §§ 19300-19304*

Allocation of debts between trust and surviving spouse. *Prob. Code §§ 19320-19326*

Liability of settlor's surviving spouse. *Prob. Code § 19330*

Distributee liability. *Prob. Code §§ 19400-19403*

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§ 560.480 California Legal Forms

For forms relating to the formation and taxation of nonprofit corporations, trusts, and associations, see California Legal Forms, Ch. 13, *Nonprofit Corporations*, Ch. 13A, *Nonprofit Unincorporated Associations*, and Ch. 13B, *Tax-Exempt Status for Nonprofit Entities*

Legal Topics:

For related research and practice materials, see the following legal topics:
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Disclosure requirements for solicitations for charitable purposes. *Bus. & Prof. Code §§ 17510-17510.7*

Definition, registration, and regulation of commercial fund raisers for charitable purposes. *Bus. & Prof. Code § 17510.85*; *Gov. Code §§ 12599, 12599.5*

Exemption from Rule Against Perpetuities for charitable gifts. *Civ. Code § 715*

Nonprofit Corporation Law. *Corp. Code §§ 5000-10831*

Nonprofit Public Benefit Corporation Law. *Corp. Code §§ 5110-6910*

Nonprofit Mutual Benefit Corporation Law. *Corp. Code §§ 7110-8910*

Educational institutions. *Corp. Code § 10251*

Uniform Supervision of Trustees for Charitable Purposes Act. *Gov. Code §§ 12580-12599*

False representations of fact by person soliciting funds for charitable purpose; misdemeanor. *Penal Code § 532d*

Notice to Attorney General of probate of will creating charitable trust. *Prob. Code § 8111*

Duties of trustees of private foundations, charitable trusts, and split-interest trusts. *Prob. Code §§ 16100-16105*

Petition to conform trust instrument in manner required to qualify estate for federal charitable estate tax deduction. *Prob. Code § 17200(b)(15)*

Uniform Prudent Management of Institutional Funds Act. *Prob. Code § 18501 et seq.*

Exemption of charitable trusts and corporations from taxation. *Rev. & Tax Code § 23701d*

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§ 560.482 Administrative Regulations

Attorney General's general provisions and definitions relating to regulation of nonprofit corporations. *11 Cal. Code Reg. § 999.1*

Attorney General's regulations of public benefit corporations. *11 Cal. Code Reg. § 999.2*

Attorney General's regulations of mutual benefit corporations. *11 Cal. Code Reg. § 999.3*

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§ 560.483 Decisions

[1] Characteristics of Charitable Trust or Organization

Charitable trust defined. *Estate of Schloss (1961) 56 Cal. 2d 248, 256, 14 Cal. Rptr. 643, 363 P.2d 875*

Prob. Code § 24 (d) permits settlor of charitable trust to object to an accounting when settlor has reserved that power in the trust instrument. *Patton v. Sherwood (2007) 152 Cal. App. 4th 339, 347, 61 Cal. Rptr. 3d 289*

To establish charitable trust, bequest must limit use of funds to charitable purposes; if noncharitable purposes are also permitted, bequest will not be deemed charitable trust, but rules of construction should be applied to accomplish trustor's intent. *Estate of Breeden (1989) 208 Cal. App. 3d 981, 985, 256 Cal. Rptr. 813*

Trust designed to peacefully promote political purposes and change is charitable; promotion of socialistic principles through education and support of those whose activities advance those principles is proper charitable purpose. *Estate of Breeden (1989) 208 Cal. App. 3d 981, 986, 987-990, 256 Cal. Rptr. 813*

Charitable nature of trust is not determined by tax status of organizations that may benefit from trust; as long as purpose of gift remains charitable, valid charitable trust does not lose its character because it is not tax-exempt; *Prob. Code § 16100(a)* defines charitable trust in context of duties placed on trustees of tax exempt trusts to maintain that status. *Estate of Breeden (1989) 208 Cal. App. 3d 981, 989-992, 991, 256 Cal. Rptr. 813*

Charitable trust is fiduciary relationship with respect to property arising from manifestation of intention to create it and subjecting person by whom property is held to equitable duties to deal with property for charitable purpose. *Hardman v. Feinstein (1987) 195 Cal. App. 3d 157, 161, 240 Cal. Rptr. 483*

Nonprofit educational society is charitable corporation within meaning of *Gov. Code § 12582.1* and therefore subject to statutory reporting and other regulations applicable to charitable corporation; particular section under which corporation formed is not conclusive on issue of whether corporation is charitable or not. *Younger v. Wisdom Society (1981) 121*

Cal. App. 3d 683, 690, 175 Cal. Rptr. 542

Gifts to charitable corporations deemed to be impressed with charitable trust. *American Center for Education, Inc. v. Cavnar (1978) 80 Cal. App. 3d 476, 486, 145 Cal. Rptr. 736*

Organization can be charitable in nature even if some activities are noncharitable, as long as main purposes are charitable. *Lynch v. Surprise Valley Lodge No. 235(1972) 26 Cal. App. 3d 265, 270-271, 103 Cal. Rptr. 1*

[2] Charitable Immunity

Charitable corporations are liable for their torts. *Malloy v. Fong (1951) 37 Cal. 2d 356, 364-367, 232 P.2d 241*

[3] Cy Pres Doctrine

Trial court's refusal to apply *cy pres* doctrine based on unsubstantiated conclusion that racial qualification in bequest to "all-white" school was *sine qua non* of testator's intent was reversible error. *Estate of Vanderhoofven (1971) 18 Cal. App. 3d 940, 943-946, 96 Cal. Rptr. 260*

Application of *cy pres* doctrine was appropriate to preserve gifts bequeathed in trust to establish music and rest homes by directing that they be located at suitable sites rather than using sites designated by testator which were not suitable under applicable zoning ordinance. *Estate of Zahn (1971) 16 Cal. App. 3d 106, 113-116, 93 Cal. Rptr. 810 , cert. denied, 404 U.S. 938*

Doctrine of *cy pres* was applicable to prevent lapse of testamentary gifts to insufficiently identified "homes" for blind and crippled children, when testator's underlying motivation was to aid that class of children rather than particular institutions. *Estate of Gatlin (1971) 16 Cal. App. 3d 644, 649-650, 94 Cal. Rptr. 295*

Doctrine of *cy pres* applicable in determining disposition of assets of charitable corporation being dissolved. *In re Veterans' Industries, Inc. (1970) 8 Cal. App. 3d 902, 917-918, 88 Cal. Rptr. 303*

[4] Enforcement Powers of Attorney General

Attorney general has no veto power over compromise reached by individual life beneficiary and charitable beneficiaries of testamentary trust regarding disposition of assets and is not a necessary party to compromise contract. *Estate of Horton (1970) 11 Cal. App. 3d 680, 685-686, 90 Cal. Rptr. 66*

Participation in will contest to protect gift for charitable purposes is right and duty of Attorney General. *Estate of Ventura (1963) 217 Cal. App. 2d 50, 394 P.2d 832*

[5] Enforcement Powers of Parties Other Than Attorney General

Others besides Attorney General have right to enforce charitable trusts. *Holt v. College of Osteopathic Physicians & Surgeons (1964) 61 Cal. 2d 750, 755-756, 40 Cal. Rptr. 244, 394 P.2d 932* ; *Hardman v. Feinstein (1987) 195 Cal. App. 3d 157, 161-162, 240 Cal. Rptr. 483*

Code Civ. Proc. § 526a (taxpayer's action to restrain illegal expenditure of public funds) does not create right of action, based on alleged breach of charitable trust, by resident taxpayer against city officials acting in capacity as trustees of

charitable trust. *Hardman v. Feinstein (1987) 195 Cal. App. 3d 157, 163, 240 Cal. Rptr. 483*

Public trust doctrine unavailable to confer standing on member of general public to enforce charitable trust to protect art museum assets, because doctrine applies onlyto abstract trusts, such as tidelands and waterways protected by public trust, and not to formal trusts created by transfer by trustor to trustee of specific trust res. *Hardman v. Feinstein (1987) 195 Cal. App. 3d 157, 162-163 n.3, 240 Cal. Rptr. 483*

Resident and taxpayer of city who has no special interest in charitable trust lacks standing to bring action seeking to enjoin mismanagement of trust, even though trust is administered pursuant to city charter and trustees are city officials. *Hardman v. Feinstein (1987) 195 Cal. App. 3d 157, 159-160, 240 Cal. Rptr. 483*

Donors not entitled to compel hospital district to use funds for purpose for which they were donated or to recover donations. *Marin Hospital Dist. v. State Department of Health (1979) 92 Cal. App. 3d 442, 448, 154 Cal. Rptr. 838* ; *but see Prob. Code § 24(d)*; *Patton v. Sherwood (2007) 152 Cal. App. 4th 339, 346-347, 61 Cal. Rptr. 3d 289*

Boy scout council has standing to sue to enforce charitable trust in favor of all boy scouts and girl scouts of region. *San Diego etc. Boy Scouts of America v. City of Escondido (1971) 14 Cal. App. 3d 189, 195, 92 Cal. Rptr. 186*

[6] Nonprofit Corporation Law

Corp. Code § 9142(c)(2) provides a general church with authority to impress a trust on a local church when the local church agrees and subscribes to governing instruments of general church, and governing instruments provide that any property held by local church is held in trust for general church; local church did not have right to take church property with it when it disaffiliated from general church even though deeds to the property had long been in the name of the local church. *Episcopal Church Cases (2009) 45 Cal. 4th 467, 491, 87 Cal. Rptr. 3d 275, 198 P.3d 66*

Corporation's right to prior inspection of materials to be mailed by member to other members on membership list is improper condition for providing membership list to dissident members pursuant to *Corp. Code §§ 6330-6338*. *KQED, Inc. v. Hall (1982) 135 Cal. App. 3d 951, 956-957, 185 Cal. Rptr. 630*

Court is able to limit use of proxies but not preclude all use of them in framing remedy for unfairness in election procedures for directors of nonprofit corporation. *Braude v. Automobile Club of Southern Cal. (1978) 78 Cal. App. 3d 178, 186, 144 Cal. Rptr. 169*

[7] Standard of Conduct Regarding Management of Charitable Assets

Good faith is no defense when directors of charitable trust negligently managed trust funds by placing them in noninterest-bearing account trust. *Lynch v. John M. Redfield Foundation (1970) 9 Cal. App. 3d 293, 302, 88 Cal. Rptr. 86*

[8] Nonprofit Health Care Service Plans

Nonprofit health care service plans holding assets in charitable trust are not subject to Uniform Supervision of Trustees for Charitable Purposes Act (*Gov. Code § 12580 et seq.*), but to Knox-Keene Health Care Service Plan Act of 1975 (*Health & Safety Code § 1340 et seq.*) and Nonprofit Corporations Law; responsibility for their regulation and authority to oversee their compliance with enforcement of charitable trusts pursuant to *Corp. Code §§ 5142, 5250* is vested in *Department of Corporations. Van de Kamp v. Gumbiner (1990) 221 Cal. App. 3d 1260, 1281-1282, 270 Cal. Rptr. 907*

Attorney General is without authority, either common law, statutory, as *parens patriae*, or pursuant to specific grant in 1977 settlement agreement, to contest conversion of nonprofit health care service plan to for-profit status because intervening legislation abrogated that authority in favor of Department of Corporations as single oversight authority. *Van de Kamp v. Gumbiner (1990) 221 Cal. App. 3d 1260, 1282-1290, 270 Cal. Rptr. 907*

Nonprofit health care service plan is subject to self-dealing provisions of *Corp. Code § 5233*, dissolution provisions of *Corp. Code §§ 6510, 6511*, and *Corp. Code §§ 5813.5, 10821*; *Health & Safety Code § 1352(b)*, relating to requirement of approval for conversions from nonprofit to for-profit status. *Van de Kamp v. Gumbiner (1990) 221 Cal. App. 3d 1260, 1281-1282, 270 Cal. Rptr. 907*

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§ 560.484 Law Reviews

Comment, *It Pays to Give It Away--Sometimes: Inter Vivos Charitable Remainder Unitrusts in Estate Planning, 15 Pepperdine L. Rev. 367 (1988)*

Note, *Phantom Selves: The Search for a General Charitable Intent in the Application of the Cy Pres Doctrine, 40 Stan. L. Rev. 973 (1988)*

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Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawNonprofit Corporations & OrganizationsGeneral OverviewEstate, Gift & Trust LawTrustsCharitable TrustsEstate, Gift & Trust LawTrustsInterpretation

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B. Actions To Establish And Enforce Public, Charitable Trusts

49-560 California Forms of Pleading and Practice--Annotated § 560.485

§ 560.485 Text References

Ballantine and Sterling, California Corporation Laws, Ch. 19, *Nonprofit Corporations and Organizations* (Matthew Bender)

Nossaman & Wyatt, Trust Adminstration and Taxation (2d ed rev), Part I, *Existence, Validity and Interpretation*, Ch. 3, *Validity--Charitable Trusts* (Matthew Bender)

Scott, The Law of Trusts (3d ed.), Vol. IV, Ch. 11, *Charitable Trusts*

Legal Topics:

For related research and practice materials, see the following legal topics:
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49-560 California Forms of Pleading and Practice--Annotated §§ 560.486-560.499

[Reserved]

§§ 560.486[Reserved]

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C. Totten Trusts

49-560 California Forms of Pleading and Practice--Annotated § 560.500

§ 560.500 State Statutes

Totten trusts defined. *Prob. Code § 80*

"Beneficiary" means person named in Totten trust account as one for whom party to the account is named as trustee. *Prob. Code § 5126*

Totten trust accounts governed by Multiple-Party Accounts Law (*Prob. Code §§ 5100-5407*). *Prob. Code § 5132*

Net contribution defined. *Prob. Code § 5134*

"Party" means person who, according to account terms, has present right of withdrawal; beneficiary of Totten trust account is not party to account until he or she survives all persons named as trustees. *Prob. Code § 5136*

Rights of account parties while all are living. *Prob. Code § 5301*

Payments authorized on death of party to Totten trust account. *Prob. Code §§ 5302(c), (e), 5404*

Changes in account terms. *Prob. Code § 5303*

Testamentary formalities are not applicable to Totten trust accounts. *Prob. Code § 5304*

When parties to account are married to each other, their contributions to account are presumed to be and remain their community property. *Prob. Code § 5305(a)*

Unless Totten trust account is described as community property account, beneficiary designation may not be changed by will. *Prob. Code § 5305(c)*; *see Prob. Code § 5307* (community property account)

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsTrust AccountsTypesEstate, Gift & Trust LawNonprobate TransfersJointly Held PropertyBank Accounts

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49-560 California Forms of Pleading and Practice--Annotated § 560.501

§ 560.501 Decisions

[1] Totten Trust Established

Deposit of money in depositor's own name as trustee for another establishes trust revocable at will until trustee dies or completes gift during lifetime by some unequivocal act or declaration. *Evinger v. MacDougall (1938) 28 Cal. App. 2d 175, 179, 82 P.2d 194*

[2] Totten Trust Not Established

Formation of valid Totten trust requires trustor, trustee, trust res, beneficiary, and trust intent; person named in account title as joint trustee of Totten trust who did not sign account card containing declaration of trust and did not deposit any funds in account is not entitled to funds, except possibly as trustee for named beneficiaries, on death of other trustee, because existence of trust res was not established. *Estate of Fisher (1988) 198 Cal. App. 3d 418, 424-426, 244 Cal. Rptr. 5* (decided under former *Fin. Code §§ 6850, 6852*, which required express statement of survivorship to create presumption of intent to establish joint account)

Irrevocable trust, not Totten trust, is created by deposit of beneficiary's funds. *Miller v. Miller (1963) 217 Cal. App. 2d 538, 544, 31 Cal. Rptr. 618*

Totten trust account theory inapplicable when evidence showed that parents used money belonging to child to open account for child and that subsequently more of child's property and gifts of community property were deposited in the account and there were unequivocal acts recognizing irrevocable nature of trust. *Miller v. Miller (1963) 217 Cal. App. 2d 538, 544, 31 Cal. Rptr. 618*

Legal Topics:

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

Banking LawBank ActivitiesBank AccountsTrust AccountsTypesEstate, Gift & Trust LawNonprobate TransfersJointly Held PropertyBank Accounts

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49-560 California Forms of Pleading and Practice--Annotated § 560.502

§ 560.502 Text References

Nossaman & Wyatt, *Trust Administration and Taxation, Ch. 14, Special Types of Trusts, § 14.03* (2d ed. rev.) (Matthew Bender)

Witkin, Summary of California Law, vol. 13, *Trusts*, §§ 8-11 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawBank ActivitiesBank AccountsTrust AccountsTypesEstate, Gift & Trust LawNonprobate TransfersJointly Held PropertyBank AccountsEstate, Gift & Trust LawTrustsGeneral Overview

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49-560 California Forms of Pleading and Practice--Annotated §§ 560.503-560.519

[Reserved]

§§ 560.503[Reserved]

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A. Administration Of Express Trusts
1. Creation And Validity Of Express Trust

49-560 California Forms of Pleading and Practice--Annotated § 560.520

§ 560.520 Petition to Determine Existence of Trust [Prob. Code § 17200]--By Beneficiary

[1] FORM Petition to Determine Existence of Trust [Prob. Code § 17200]--By Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of _____ [*name of trust*, e.g., The Sally Smith 1994 Trust]	)))))	NO. _____ PETITION TO DETERMINE EXISTENCE OF TRUST

_____

Petitioner alleges:

1. On or about _____ [*date*], _____ [*name of settlor or purported settlor*] executed a written instrument titled _____ [*title of instrument, e.g.,* The Sally Smith 1994 Trust], a true and correct copy of which is attached hereto, marked Exhibit "A," and made a part hereof.

2. At all times herein mentioned, petitioner has been and now is _____ [one of the beneficiaries *or* the sole beneficiary] _____ [named in *or* under] Exhibit "A."

3. _____ [*Name of trustee or alleged trustee*] _____ [was named as trustee in or is acting as trustee under] Exhibit "A." [*If trustee or alleged trustee is a corporation, add appropriate allegation, e.g.,* At all times herein mentioned, _____ (*name of trustee or alleged trustee*) has been and now is a national banking association incorporated under the laws of the United States and doing business as a trust company in the State of California].

4. [Petitioner is informed and believes and thereon alleges that(,)] [A]t all times herein mentioned, the principal place of administration of the trust has been and now is _____ [*e.g.*, 1224 High Road, Suite 112, in the City of Baytown, Pacific County, California].

5. [Petitioner is informed and believes and thereon alleges that(,)] [A]t all times herein mentioned, certain property (the "trust property") has been and now is being held by _____ [*name of trustee or alleged trustee*] as trustee under the terms and provisions of Exhibit "A."

6. [Petitioner is informed and believes and thereon alleges that(,)] [A]t all times herein mentioned, the "trust property" has included, and now includes, _____ [*describe trust property, e.g.*, certain real property located in the City of Baytown, Pacific County, California, consisting of a residential dwelling house and the lot on which it stands, particularly described as Lot 3, Block 14, Map of Eldorado Heights, No. 4, and commonly known as 123 Taylor Street].

7. An actual controversy has arisen and now exists between petitioner and _____ [*name of trustee or alleged trustee*] concerning their respects rights and duties, in that _____ [*allege facts showing actual controversy as to existence or terms of trust, e.g.*, petitioner contents that _____ (he *or* she) is a beneficiary under Exhibit "A" and is entitled to receive payments of trust principal and income pursuant to its terms, while _____ (*name of trustee or alleged trustee*) has denied, and now denies, that _____ (he *or* she *or* it) is acting as trustee under Exhibit "A," or that _____ (he *or* she *or* it) is holding the "trust property" described in Paragraph 4, or any property whatsoever, for the benefit of petitioner under the terms of Exhibit "A." Further, _____ (*name of trustee or alleged trustee*) _____ has refused, and now refuses, to make any payments of principal or income to petitioner as beneficiary of the "trust property" as required by the terms of Exhibit "A," despite demands from petitioner.]

8. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

9. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE, petitioner prays for an order:

1. Declaring that _____ [*name of trustee or alleged trustee*] is now and at all times mentioned herein has been holding the "trust property" describedin this petition for the benefit of petitioner under the terms of Exhibit "A";

2. Compelling _____ [*name of trustee or alleged trustee*] to account to fully for all trust property;

3. Compelling _____ [*name of trustee or alleged trustee*] to make all payments of principal and income required by the terms of Exhibit "A" to be made to petitioner as beneficiary;

4. For all costs herein;

5. For such other orders as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled action. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to matters which are therein alleged on my information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is a petition for use by a person who claims to be the beneficiary of an irrevocable inter vivos trust and who seeks a court order determining the existence of the trust and defining the duties of the trustee to make payments of principal and income under terms of the trust instrument [*see Prob. Code § 17200*].

A petition to determine the existence of a trust may be filed by a trustee or beneficiary [*Prob. Code § 17200(a)*]. A person who claims to be the settlor of a trust cannot file such a petition as settlor. However, if a person is both a settlor and a beneficiary or trustee, the petition may be brought in the person's capacity as beneficiary or trustee [*Prob. Code § 17200(a)*].

It was formerly possible for a person who was interested under a will or trust to seek a judicial declaration of his or her rights or duties under the trust. If an actual controversy existed as to the existence of the trust, or as to the rights of two or more persons under terms of the trust, the court could resolve the controversy by granting declaratory relief under *Code Civ. Proc. § 1060*. Operative January 1, 1995, however, an action for declaratory relief may no longer be maintained by a person who seeks a declaration of his or her rights or duties under a will or a trust [*see* Stats. 1994, ch. 806, § 2, amending *Code Civ. Proc. § 1060*]. The only remedy available is a petition under *Prob. Code § 17200*, and that remedy may be pursued only by a trustee or beneficiary [*Prob. Code § 17200(a)*].

If a trust is revocable, the person holding the right to revoke the trust (generally the settlor) has all of the rights that

would otherwise devolve on the beneficiaries under the Trust Law. Unless the trust instrument provides otherwise, or unless the joint action of the settlor and all of the beneficiaries is required, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the person holding the power to revoke, and not the beneficiary, has the rights afforded beneficiaries under the Trust Law, and the trustee's duties are owed to the person holding the power to revoke [*Prob. Code § 15800*].

[3] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code § 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 8) [*Prob. Code § 17201*]. Notice of a petition regarding a trust must be given to the following persons [*Prob. Code § 17203(a)*]:

- All trustees.

- All beneficiaries, except that if the trust is revocable and the person holding the power to revoke it is competent, notice must be given to the person holding the power to revoke and not to the beneficiary [*Prob. Code § 15802*].

- The Attorney General of California, if the petition relates to a charitable trust subject to the jurisdiction of the Attorney General.

Personal service may be required if there are persons (other than a trustee or beneficiary) whose right, title, or interest would be affected by the petition and if they do not receive notice by mail [*Prob. Code § 17203(b)*]. If the person to whom notice would otherwise be given as been deceased for at least 40 days, notice may be given to the person's executor, heirs, or devisees in specific circumstances [*Prob. Code § 17203(c)*]. For detailed discussion of notice, see *§ 560.137[2]*. For a notice form, see *§ 560.600*.

[4] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[5] Allegations

This form assumes that the petitioner claims to be a beneficiary under the terms of an irrevocable, express trust, and that the alleged trustee denies the existence of the trust, or denies that there property is being held in the trust. It includes allegations as to the principal place of business of the trust (Paragraph 4) and the location of the alleged trust property (Paragraph 6), which will be useful to establish the correct venue for the petition [*see Prob. Code § 17005(a)*; *see also § 560.520[7]*].

[6] Verification

This petition must be verified [*Prob. Code § 1021(a)(1)*]. If the proceeding is uncontested, the verified petition must be received as evidence by the court [*Prob. Code § 1022*].

[7] Venue

The proper county for commencement of a judicial proceeding concerning an inter vivos (living) trust is the county in which the principal place of the administration of the trust is located [*Prob. Code § 17005(a)*]. The principal place of administration of the trust is the usual place where the day-to-day activity of the trust is carried on by the trustee, or any representative of the trustee who is primarily responsible for the administration of the trust [*Prob. Code § 17002(a)*].

If the principal place of administration of the trust cannot be determined on the basis of the trust's activity, and if the trust has only one trustee, the principal place of administration will be the trustee's residence or usual place of business [*Prob. Code § 17002(b)(1)*]. If the trust has more than one trustee and the principal place of administration cannot be determined on the basis of the trust's activity, the principal place of administration may be the residence or usual place of business of one of the trustees, as determined by agreement of the trustees; or, if they have not agreed on the question, the residence or usual place of business of any of the them [*Prob. Code § 17002(b)(2)*].

If the trust is a testamentary trust not subject to the continuing jurisdiction of the court [*see Prob. Code §§ 17300-17354* (testamentary trusts subject to continuing court jurisdiction)], the proper county for commencement of the proceeding is the county in which the deceased settlor's estate is being administered or in which the principal place of administration of the trust is located [*Prob. Code § 17005*].

[8] State Statutes

[a] Jurisdiction and Venue

Subject matter jurisdiction. *Prob. Code §§ 17000-17001*

Principal place of administration of trust. *Prob. Code § 17002*

Jurisdiction over trustees and beneficiaries. *Prob. Code § 17003*

Venue. *Prob. Code § 17005*

No right to jury trial. *Prob. Code § 17006*

[b] Notice

General notice provisions. *Prob. Code § 1200 et seq.*

Mailing. *Prob. Code §§ 1215-1217*

Mailing notice. *Prob. Code §§ 1220, 1221*

Notice in proceedings concerning trusts as provided in Prob. Code *§ 1200 et seq.Prob. Code* § 17100

[c] Petitions

Verification of petition required. *Prob. Code § 1021(a)(1)*

Petition to determine existence of trust. *Prob. Code § 17200(a)*

Commencement of proceeding by petition. *Prob. Code § 17201*

[d] California Rules of Court

Beneficiaries to be listed in petitions and accounts. [*Cal. Rules of Ct., Rule 7.902*]

[e] Decisions

Invalidity of trust was confined to separable provisions regarding future interests, and another provision regarding property transaction made by trustee was not defeated by invalid provisions; trustee was estopped from defeating validity of acts done with trustee's consent. *Burns v. Grable (1956) 138 Cal. App. 2d 280, 287-288, 291 P.2d 969*

See also Comments and References to *see § 560.630*.

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1. Creation And Validity Of Express Trust

49-560 California Forms of Pleading and Practice--Annotated § 560.521

§ 560.521 Petition [Prob. Code § 17201] to Determine Validity of Trust Provision [Prob. Code § 17200(b)(3)]--By Beneficiary

[1] FORM Petition [Prob. Code § 17201] to Determine Validity of Trust Provision [Prob. Code § 17200(b)(3)]--By Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*name of trust*]	)	PETITION TO DETERMINE VALIDITY OF
	)	TRUST PROVISION

_____

Petitioner alleges:

1. Petitioner is a/the beneficiary of the trust described herein.

2. The trust described herein is not revocable.

3. _____ [*Name of trustee*] is [_____ (*specify type of financial institution if trustee is not an individual, e.g.,* a national banking association incorporated under the laws of the United States, engaged in doing business as a trust company in the State of California), and is] the duly appointed and acting trustee of the trust hereinafter described.

[*EITHER, if living trust*]

4. The principal place of business of the trust herein described is located in _____ County, California.

[*OR, if testamentary trust not subject to continuing jurisdiction*]

4. The _____ [decedent's estate is administered *or* principal place of administration of the trust is located] in _____County, California.

[*OR, if testamentary trust subject to continuing jurisdiction*]

4. The decedent's estate is administered in _____ County, California.

[*CONTINUE*]

5. The trust that is the subject of this petition was created pursuant to _____ [a written declaration of trust of _____ (*name of settlor*) *or* the will of _____ (*name of settlor and testator*), deceased *or other as appropriate*] [, a copy of which is attached hereto, marked Exhibit "A," and made a part hereof].

[6. The provision of Paragraph _____ of the above-described trust is invalid in that it _____ (*set forth grounds for invalidity, e.g.,* violates the Rule Against Perpetuities).]

7. As set forth in Paragraph _____ of the _____ [trust instrument *or* will *or other as appropriate*] herein described, the trustee, _____ [*name*], was directed to _____ [*describe allegedly valid provision, e.g.,* buy and sell real property for the purpose of building up the trust and to distribute the income therefrom to the named beneficiaries according to the terms of the trust].

8. The provision described in Paragraph _____ [*number of paragraph of complaint, e.g.,* 7], above, is valid [notwithstanding the invalid provision described in Paragraph _____ (*number of paragraph of complaint, e.g.,* 6, above)] in that _____ [*set forth ground(s) for validity, e.g.,* it is severable from the invalid provision, and the trustee is estopped from asserting their invalidity in that he/she/it has carried out its terms and retained the proceeds therefrom instead of distributing them to the beneficiaries].

9. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

10. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE, petitioner prays for an order:

1. Declaring the trust valid and enforceable to the extent that _____ [*describe disputed provision(s), e.g.,* the trustee is directed to buy and sell real property for the purpose of building up the trust and to distribute the income therefrom to the named beneficiaries according to the terms of the trust];

2. Compelling _____ [*name of trustee*] to account fully for all trust property;

[3. _____ (*Set forth any further relief, e.g.,* Compelling _____ (*name of trustee*) to transfer to the named beneficiaries the proceeds from real property transactions that he/she/it has already completed, as evidenced by the account as approved by the court, and in accordance with the relevant terms of the trust);]

4. For costs herein; and

5. For such other orders as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is a petition for use by a beneficiary who is seeking a determination of the validity of a trust provision [*see Prob. Code § 17200(b)(3)*].

[3] Allegations

This petition alleges:

- The capacity and standing of the petitioner (Paragraphs 1, 2) [see *Prob. Code §§ 17200(a)* (standing

of beneficiary generally), 15800 (person holding right to revoke has rights otherwise afforded to beneficiary)];

- The identity of trustee (Paragraph 3);

- The basis for venue (Paragraph 4) [*see Prob. Code §§ 17002* (principal place of administration), 17005 (venue for living trust or testamentary trust generally), 17301 (venue for testamentary trust subject to continuing jurisdiction of court); *see also Prob. Code § 17004* (basis for venue based on *Code Civ. Proc. § 410.10*)];

- Creation of the trust (Paragraph 5) [*see Prob. Code §§ 15200* (creation of trust), 15206 (Statute of Frauds), 15207 (oral trust in personal property)]; (5) a description of the disputed provision of the trust (Paragraph 7) [*see Burns v. Grable (1956) 138 Cal. App. 2d 280, 288, 291 P.2d 969]* ; and

- A statement of grounds supporting the validity of the disputed provision (Paragraph 8) [*see Burns v. Grable (1956) 138 Cal. App. 2d 280, 288-290, 291 P.2d 969]* .

Optional Paragraph 6 is for use if the trust contains a provision that is indisputably invalid, but that does not render the entire trust invalid [*see Burns v. Grable (1956) 138 Cal. App. 2d 280, 287-288, 291 P.2d 969]*

[4] Contents of Petition

A proceeding under *Prob. Code §§ 17200-17210* is commenced by filing a verified petition stating facts showing that the petition is authorized under *Prob. Code §§ 17200-17210*, and the grounds of the petition [*Prob. Code § 17201(a)*].

[5] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code §§ 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 9) [*Prob. Code § 17201*]. For a more detailed discussion of notice requirements, see *§ 560.137[2]*. For a notice form, see *§ 560.600*.

[6] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[7] Standing

[a] Irrevocable Trust

Except as provided in *Prob. Code § 15800* (revocable trust), a trustee or beneficiary of a trust may petition the court under *Prob. Code §§ 17200-17210* concerning the internal affairs of the trust or to determine the existence of the trust [*Prob. Code § 17200(a)*]. A "beneficiary" of a trust includes a person who has any present or future interest, vested or contingent [*Prob. Code § 24(c)*]. As it relates to a charitable trust, it includes any person entitled to enforce the trust [*Prob. Code § 24(d)*].

[b] Revocable Trust

Under *Prob. Code § 15800*, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the person holding the power to revoke, and not the beneficiary, has the rights afforded beneficiaries under *Prob. Code § 15000 et seq.*, and the duties of the trustee are owed to the person holding the power to revoke. However, these provisions do not apply to the extent that the trust instrument otherwise provides, or if the joint action of the settlor and all beneficiaries is required [*Prob. Code § 15800*]. This form therefore may be adapted for use by the person holding the power to revoke a revocable trust.

[8] Jurisdiction

The superior court that has jurisdiction over the trust pursuant to *Prob. Code §§ 17000-17006* has exclusive jurisdiction of proceedings concerning the internal affairs of trusts [*Prob. Code § 17000(a)*]. In proceedings commenced under the Trust Law, the court is a court of general jurisdiction and has all the powers of the superior court [*Prob. Code § 17001*]. For discussion of in personam jurisdiction, see *§ 560.143*.

[9] Venue

[a] Generally

The proper county for commencement of a proceeding pursuant to *Prob. Code §§ 15000-18201* is either [*Prob. Code § 17005(a)*]:

- In the case of a living trust, the county where the principal place of administration of the trust is located [*see Prob. Code § 17002* (principal place of administration); *but see Prob. Code § 17005(b)* (proceeding to appoint trustee if living trust has no trustee)].

- In the case of a testamentary trust not subject to the continuing jurisdiction of the court, either the county where the decedent's estate is administered or where the principal place of administration of the trust is located [*but see Prob. Code § 17301*; *see also § 560.521[9][b]*].

[b] Testamentary Trust Subject to Continuing Jurisdiction of Court

If a trust described in *Prob. Code § 17300* continues after distribution of the decedent's estate, the court in which the decedent's estate was administered retains jurisdiction over the trust for any of the purposes specified in *Prob. Code § 17200* [*Prob. Code § 17301*]. Trusts described in *Prob. Code § 17300* are a trust created by a will executed before July 1, 1977, and not incorporated by reference in a will on or after July 1, 1977; and a trust created by a will that provides that the trust is subject to the continuing jurisdiction of the superior court. Consequently, venue for testamentary trusts subject to the continuing jurisdiction of the court may not be established in the county in which the principal place of administration of the trust is located (unless, of course, it is the same county). Venue for other testamentary trusts may be established in the county of either the principal place of administration or the estate administration [*cf. Prob. Code §§ 17005, 17301*].

[c] Applicability of Civil Code Provisions

Except as otherwise provided in *Prob. Code § 17005(a)* and *(b)*, the proper county for commencement of a proceeding pursuant to *Prob. Code § 15000 et seq.* is determined by the rules applicable to civil actions generally [*Prob. Code § 17005(c)*; *see Code Civ. Proc. §§ 392* (real property), 395 (defendant's residence)]. For example, rules generally governing civil actions would apply if the principal place of administration of a trust is a foreign state, but jurisdiction is proper in California [*see Recommendation Proposing the Trust Law*, 18 Cal. Law Revision Comm'n Reports 721 (1986)].

[10] No Right to Jury Trial

There is no right to a jury trial in proceedings under *Prob. Code § 15000 et seq.* concerning the internal affairs of trusts [*Prob. Code § 17006*].

[11] State Statutes

[a] Jurisdiction and venue

Subject matter jurisdiction. *Prob. Code §§ 17000-17001*

Place of administration of trust. *Prob. Code § 17002*

Personal jurisdiction. *Prob. Code § 17003*

Personal and in rem jurisdiction. *Prob. Code §§ 17003-17004*

Venue. *Prob. Code § 17005*

No right to jury trial. *Prob. Code § 17006*

[b] Notice

Proof of mailing. *Code Civ. Proc. § 1013a*; *Prob. Code § 1261*

Notice need not be given to oneself. *Prob. Code § 1201*

Power of court to order additional notice. *Prob. Code § 1202*

Order shortening time. *Prob. Code § 1203*

Waiver of notice. *Prob. Code § 1204*

Continued or postponed hearing. *Prob. Code § 1205*

Form of notice. *Prob. Code § 1211*

Notice when address unknown. *Prob. Code § 1212*

Mailing. *Prob. Code § 1215*

Personal delivery in lieu of mailing. *Prob. Code § 1216*

Proof of notice of hearing. *Prob. Code § 1260*

Proof of publication. *Prob. Code § 1262*

Proof of posting. *Prob. Code § 1263*

Proof of notice by personal delivery. *Prob. Code § 1264*

Mode of proof of notice. *Prob. Code § 1265*

[c] Petitions

Verification. *Prob. Code § 1021(a)(1)*

Petition to determine validity of trust provision. *Prob. Code § 17200(b)(3)*

[d] Standing

Definition of beneficiary. *Prob. Code § 24*

Rights of person holding power to revoke. *Prob. Code § 15800*

Rights of person holding power of appointment or power to withdraw property from trust. *Prob. Code § 15803*

Standing generally. *Prob. Code § 17200(a)*

[e] Decisions

Invalidity of trust is confined to separable provisions regarding future interests, and other provision regarding property transaction made by trustee is not defeated by invalid provisions; trustee as estopped from defeating validity of acts done with trustee's consent. *Burns v. Grable (1956) 138 Cal. App. 2d 280, 287-288, 291 P.2d 969*

[12] California Rules of Court

Beneficiaries to be listed in petitions and accounts. [*Cal. Rules of Ct., Rule 7.902*]

[13] Local Rules of Court

[a] Orange County

Form of papers presented for filing. Orange Co. Super. Ct. Rules, Div. VI, Rule 601.02

Trusts. Orange Co. Super. Ct. Rules, Div. VI, Rule 612.01 et seq.

[b] Riverside County

Pleadings and papers. Riverside Co. Consol. Ct. Rules, Rule 6.0101

[c] San Francisco

Pleadings. San Francisco City & County Uniform Local Rules of Court, Rule 14.25

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49-560 California Forms of Pleading and Practice--Annotated §§ 560.522-560.539

[Reserved]

§§ 560.522[Reserved]

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2. Rights, Liabilities, And Duties Of Trustees

49-560 California Forms of Pleading and Practice--Annotated § 560.540

§ 560.540 Petition [Prob. Code § 17201] to Remove Trustee for Breach of Trust [Prob. Code §§ 16400, 16420(a)(5), 17200(b)(10)], Compel Accounting [Prob. Code § 17200(b)(7)], and Appoint Successor Trustee [Prob. Code §§ 15660, 17200(b)(10)]--By Beneficiary

[1] FORM Petition [Prob. Code § 17201] to Remove Trustee for Breach of Trust [Prob. Code §§ 16400, 16420(a)(5), 17200(b)(10)], Compel Accounting [Prob. Code § 17200(b)(7)], and Appoint Successor Trustee [Prob. Code §§ 15660, 17200(b)(10)]--By Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*name of trust*]	)	PETITION FOR REMOVAL OF TRUSTEE, AC-
	)	COUNT, AND APPOINTMENT OF SUCCESSOR

_____

Petitioner alleges:

1. [*Petitioner's identity. See § 560.521, Paragraph 1.*]

2. [*Irrevocability of trust. See § 560.521, Paragraph 2.*]

3. [*Identity of trustee. See § 560.521, Paragraph 3.*]

4. [*Basis for venue. See § 560.521, Paragraph 4.*]

5. [*Creation of trust. See § 560.521, Paragraph 5.*]

[6. As set forth in the _____ (trust instrument *or* will *or other as appropriate*) herein described, the trustee, _____ (*name*), was directed to _____ (*describe duties that trustee breached, e.g.,* lease the real property situated at _____ (*street address and if any, city*), _____ County, California, and more particularly described as follows: _____ (*set forth legal description*) for reasonable value, collect the proceeds therefrom, and distribute rents and profits to the beneficiaries as specified therein).]

7. The trustee, _____ [*name*], has violated the duty owed to petitioner as beneficiary in that _____ [*set forth facts showing breach of trust, e.g.,* he/she/it fails and refuses to administer the trust property according to the trust instrument, and in particular, fails and refuses to lease the trust property, to collect the proceeds from the lease, and to distribute the rents and profits to the beneficiaries as directed in the trust described herein].

[8. In addition, the trustee, _____ (*name*), _____ (*set forth any additional facts showing breach of trust, e.g.,* on or about _____ (*date*), entered and took possession of the property herein described, and has used and is now using the property for her/his/its own personal advantage and profit, and has failed to pay rent or reimburse the trust therefor in any manner whatsoever).]

[9. On the removal of _____ (*name*) as trustee, there will be _____ (no trustee of the trust *or* a vacancy in the office of cotrustee, which the trust instrument requires to be filled). The trust instrument neither provides a practical method of appointing a trustee nor names the person to fill the vacancy.]

[10. There has been no agreement between all adult beneficiaries entitled to enter into such an agreement to provide a successor trustee pursuant to *Probate Code Section 15660(c).*]

[11. Petitioner is over 14 years of age, and nominates _____ (*name*) as successor trustee of the trust. He/She/It is fit and proper to fill the vacancy in the office of trustee of the trust, and is willing to act as trustee.]

12. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

13. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE, petitioner prays for an order:

1. Removing _____ [*name of trustee*] as trustee;

2. Appointing _____ [a *or* _____ (*name*) or some other] suitable person as trustee of the trust, and vesting him/her/it with all the powers previously vested in _____ [*name of removed trustee*], as trustee [under the trust instrument];

3. Compelling _____ [*name of trustee*] to account fully for all trust property;

4. Compelling _____ [*name of removed trustee*] to redress the breachof trust by _____ [*describe appropriate redress of breach, e.g.*, paying petitioner $_____, the reasonable rental value of the property wrongfully occupied by him/her/it];

5. For costs herein; and

6. For such other orders as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification. See § 560.521.*]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This petition is for use by a beneficiary to seek removal of a trustee, an accounting, appointment of a new trustee, and redress for the breach, after the trustee has violated a duty owed to the beneficiary [*see Prob. Code §§ 15660* (appointment of successor), 16400 (breach of trust), 16420 (remedies for breach of trust), 17200(b)(5) (petition to settle account), 17200(b)(7) (petition to compel trustee to account), 17200(b)(10) (petition to remove and appoint trustee)]. The examples set forth in this form were based on the breach of a trustee's duties to administer the trust according to its terms and to make the trust property productive, and a duty not to use the trust property for the trustee's own benefit [*see Prob. Code §§ 16000, 16007, 16004*, respectively; *see also Prob. Code §§ 16000-16015*]. For an allegation that the trustee breached a duty not to take part in a transaction in which the trustee has an interest adverse to the beneficiary, pursuant to *Prob. Code § 16004(a), see § 560.541*]. For a form to compel the trustee to report information or to account after making a written request [*Prob. Code § 17200(b)(7)*], *see § 560.548*. For a form containing a separate nomination by a beneficiary of a successor trustee, see *§ 560.553*.

If all the adult beneficiaries of an irrevocable trust with certain rights under the trust have requested the trustee to transfer administration of the trust to a successor trust company, and the trustee has refused to do so, in subsequent petition proceedings for removal and appointment of a successor, the petitioner may recover costs and reasonable attorney's fees from the removed trustee or the trust property [*see Prob. Code § 15645*]. In such a case, this form may be adapted to seek removal based on the trustee's refusal to comply with the beneficiaries' agreement, and to recover costs and attorneys' fees. In that case, Paragraphs 7 and 8 should be used to set forth the agreement between the beneficiaries and the trustee's refusal to comply with it. Paragraph 9 should be included, and Paragraphs 10-11 deleted. The prayer should include a request for attorney's fees as well as costs.

[3] Allegations

This petition alleges a statement of facts describing the breach of trust (Paragraphs 6-8) [*see Prob. Code § 16000* (duty

to administer trust according to its terms), 16004 (duty not to use trust property for own profit), 16007 (duty to make trust property productive), 16400 (violation of duty is breach of trust)]. Optional Paragraph 6 is for use to describe a particular provision of the trust that was violated [*see Prob. Code § 16000*]. Optional Paragraphs 9-11 are for use by the petitioner, as beneficiary, to nominate a successor trustee. Paragraph 9 states that on removal of the trustee named in the petition, there will be either no trustee of the trust, or a vacancy in the office of cotrustee, which the trust instrument requires to be filled [*see Prob. Code § 15660(a)*]; and that the trust instrument neither provides a practical method of appointing a trustee nor names the person to fill the vacancy [*Prob. Code § 15660(b)*]. Paragraph 10 states that there has been no agreement between all adult beneficiaries entitled to enter into such an agreement, to provide a successor trustee pursuant to *Prob. Code § 15660(c)* (vacancy filled by trust company under agreement by all adult beneficiaries with certain rights under trust or by specified persons of their behalf). Paragraph 11 states that the beneficiary is over the age of 14 [*see Prob. Code § 15660(d)*].

[4] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code § 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 12) [*Prob. Code § 17201*]. Notice of a petition regarding a trust must be given to the following persons [*Prob. Code § 17203(a)*]:

- All trustees.

- All beneficiaries, except that if the trust is revocable and the person holding the power to revoke it is competent notice must be given to the person holding the power to revoke and not to the beneficiary [*Prob. Code § 15802*].

- The Attorney General of California, if the petition relates to a charitable trust subject to the jurisdiction of the Attorney General.

- Personal service may be required if there are persons (other than a trustee or beneficiary) whose right, title, or interest would be affected by the petition and if they do not receive notice by mail [*Prob. Code § 17203(b)*].

For detailed discussion, see *§ 560.137[2]*. For a notice form, see *§ 560.600*.

[5] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[6] State Statutes

Method to fill vacancy of office of trustee. *Prob. Code § 15660*

Effect of filing of petition for removal on increased trustee's fee. *Prob. Code § 15686*

Duty to administer trust according to trust instrument. *Prob. Code § 16000*

Duties of trustee. *Prob. Code §§ 16000-16015*

Duty not to deal with trust property for own profit. *Prob. Code § 16004*

Duty to make trust property productive. *Prob. Code § 16007*

Liabilities of trustee. *Prob. Code §§ 16400-16403*

Breach of trust. *Prob. Code § 16400*

Remedies. *Prob. Code § 16420*

Petition to settle account. *Prob. Code § 17200(b)(5)*

Petition to appoint or remove trustee. *Prob. Code § 17200(b)(10)*

[7] Decisions

Beneficiary seeking to prove breach of trust has initial burden of proving existence of fiduciary duty and trustee's failure to perform it; burden then shifts to trustee to justify its actions. *Van de Kamp v. Bank of America (1988) 204 Cal. App. 3d 819, 853, 251 Cal. Rptr. 530*

[8] California Rules of Court

Beneficiaries to be listed in petitions and accounts. [*Cal. Rules of Ct., Rule 7.902*].

[9] Cross References

For a related form, *see § 560.521*.

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49-560 California Forms of Pleading and Practice--Annotated § 560.541

§ 560.541 Allegations for Petition by Beneficiary Against Trustee--Trustee Took Part in Transaction in Which Trustee Had Interest Adverse to the Beneficiary [Prob. Code § 16004(a)]

[1] FORM Allegations for Petition by Beneficiary Against Trustee--Trustee Took Part in Transaction in Which Trustee Had Interest Adverse to the Beneficiary [Prob. Code § 16004(a)]

1. The defendant trustee, _____ [*name*], has breached his/her/its duty not to take part in a transaction in which he/she/it has an interest adverse to the plaintiff, as beneficiary, in that on or about _____ [*date*], he/she/it _____ [*describe action of trustee, e.g.,* purchased trust property consisting of diamond jewelry without informing plaintiff, and without plaintiff's consent. Further, defendant trustee defrauded plaintiff and concealed his/her/its true actions by supplying the purchase funds to one _____ (*name of third party*), who purported to purchase the property in his/her name alone, and for his/her sole benefit and enjoyment, but who in fact purchased the property as an agent for defendant. Moreover, the appraised price of $250,000 greatly exceeded the purchase price of $60,000, which sum plaintiff was induced to accept by defendant].

2. The defendant trustee, _____ [*name*], has failed to return the trust property to the trust, and to account for profits acquired therefrom.

[2] Use of Form

These allegations are for use in a petition by a beneficiary to seek remedies against a trustee for breach of trust, on the ground that the trustee breached the trust by taking part in a transaction in which the trustee had an interest adverse to the beneficiary [*see Prob. Code § 16004(a)*]. These allegations may be inserted in addition to or in place of Paragraphs 6-8 in § 560.540 if the beneficiary seeks removal of a trustee, an accounting, appointment of a new trustee, and redress for the breach [*see Prob. Code §§ 16400* (breach of trust), 16420 (remedies for breach of trust), 17200(b)(5) (petition to settle account), 17200(b)(10) (petition to remove and appoint trustee)].

[3] Trustee's Limitation of Liability

With limited exceptions relating to gross negligence, bad faith, and wrongful profits, a trustee can be relieved of liability for breach of trust provisions in the trust instrument [*Prob. Code § 16461(a)*; *see Prob. Code § 16461(b)* (exceptions that do not allow limitation of liability)]. A provision in a trust instrument that releases the trustee from liability if a beneficiary fails to object to an item in an interim or final account or other written report within a specified time period is effective only if specified conditions are met, and if a statutory notice to beneficiaries is included with an accounting or report [*Prob. Code § 16461(c)*]. For detailed discussion, see *§ 560.87*.

[4] Allegations

This form alleges that the trustee breached the duty not to take part in a transaction in which the trustee had an interest adverse to the beneficiary, and describes that transaction [*see Prob. Code § 16004(a)*; *see also Estate of Howard (1955) 133 Cal. App. 2d 535, 284 P.2d 966* (trustee's sham sale of jewelry to another party as agent for himself deemed grounds for removal)].

[5] Cross References

For a related form, *see § 560.540*.

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49-560 California Forms of Pleading and Practice--Annotated § 560.542

§ 560.542 Prayer for Partial and Temporary Removal and Suspension of Powers of Trustee and Appointment of Trustee Ad Litem [Prob. Code §§ 15642, 16420, 17000, 17200(b)(8), (10), 17206]

[1] FORM Prayer [Code Civ. Proc. § 425.10(b)] for Partial and Temporary Removal and Suspension of Powers of Trustee and Appointment of Trustee Ad Litem [Prob. Code §§ 15642, 16420, 17000, 17200(b)(8), (10), 17206]

WHEREFORE, petitioner prays for an order:

1. Suspending the powers of _____ [*name of trustee*], as trustee, to _____ [*state powers sought to be suspended, e.g.,* make compromises or settlements, and prosecute or defend actions or proceedings involving the trust assets] in the above-described litigation.

2. Removing _____ [*name of trustee*] as trustee with respect to the above-described litigation.

3. Appointing _____ [*name of proposed trustee ad litem*] as trustee ad litem to represent the trust and the beneficiaries in the above-described litigation, and vesting him/her with the powers to _____ [*state powers to be vested in trustee ad litem, e.g.,* make compromises or settlements, and prosecute or defend actions or proceedings involving the trust assets] in that litigation, until such time as the litigation is completed.

4. Awarding petitioner costs herein; and

5. For such other orders as the court may deem proper.

[2] Use of Form

This prayer is for use in a petition to partially and temporarily remove and suspend specified powers of a trustee and appoint a trustee ad litem to exercise those powers. Typically, these powers relate to litigation involving the trust, such as the power to make compromises or settlements [*see Getty v. Getty (1988) 205 Cal. App. 3d 134, 138-139, 252 Cal. Rptr. 342]* . A trustee ad litem may be appointed to conduct certain litigation relating to a trust when, for example, the

trustee has a conflict of interest such that his or her interests and those of third-party litigants are similar and inimical to those of the beneficiaries [*see Getty v. Getty (1988) 205 Cal. App. 3d 134, 141, 252 Cal. Rptr. 342]* .

To avoid confusion and disputes between the trustee and the trustee ad litem relative to their respective powers and duties, the prayer should specifically and carefully list those powers of the trustee that are to be suspended, and those powers that are to be vested in the trustee ad litem [*see Getty v. Getty (1988) 205 Cal. App. 3d 134, 141, 252 Cal. Rptr. 342]* .

For a petition adaptable for use in seeking the appointment of a trustee ad litem, *see § 560.540*. For a form of order adaptable for use in ordering the appointment of a trustee ad litem, see *§ 560.552*. For further discussion of this type of appointment, see *§ 560.94[3][b]*.

[3] Cross References

For a related form, *see §§ 560.520, 560.521*.

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49-560 California Forms of Pleading and Practice--Annotated § 560.543

§ 560.543 Response to Petition [Prob. Code § 17201] to Remove Trustee [Prob. Code § 17200(b)(10)] for Breach of Trust [Prob. Code §§ 16400, 16420(a)(5), 17200(b)(10)], Compel Accounting [Prob. Code § 17200(b)(7)], and Appoint Successor Trustee [Prob. Code § 17200(b)(10)]--By Trustee

[1] FORM Response to Petition [Prob. Code § 17201] to Remove Trustee [Prob. Code § 17200(b)(10)] for Breach of Trust [Prob. Code §§ 16400, 16420(a)(5), 17200(b)(10)], Compel Accounting [Prob. Code § 17200(b)(7)], and Appoint Successor Trustee [Prob. Code § 17200(b)(10)]--By Trustee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*name of trust*]	)	RESPONSE OF TRUSTEE TO PETITION FOR
	)	REMOVAL OF TRUSTEE, ACCOUNT, AND AP-POINTMENT OF SUCCESSOR

_____

For return and response to the petition filed for his/her/its removal, to compel accounting, and to appoint a successor trustee, and to the notice issued thereon, _____ [*name*], as trustee under the _____ [written declaration of trust of _____, (*name of settlor*) *or* the will of _____ (*name of settlor and testator*), deceased *or other as appropriate*], admits, denies, and alleges:

1. Admits the allegations of Paragraphs _____ [*specify, e.g.,* 1-6] of the petition.

2. _____ [*Set forth here and in subsequent paragraphs, other general and specific admissions, denials, contravening allegations, and affirmative defenses as appropriate, e.g.,* Responding to Paragraphs 7-8, denies that there is any merit or validity to the contentions of petitioners, and alleges that the trust property therein described is unable to

be leased in its present condition in that in several instances its structure is in violation of the building codes, regulations, and ordinances applicable thereto. Respondent did not move into that structure, but rather has allowed access thereto to several contractors and subcontractors who are performing the necessary work thereon. As soon as the work is completed and the building is inhabitable, respondent will seek to lease it].

3. Respondent will promptly render an accounting of all the acts performed as trustee since _____ [*date*], which is the date of the last account.

WHEREFORE respondent prays for an order:

1. Denying and dismissing the petition;

2. For costs herein; and

3. For such other orders as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

VERIFICATION

I, _____ [*name*], am the respondent in the above-entitled proceeding. I have read the foregoing response and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

CAUTION:

The Trust Law is silent with respect to the filing of papers in response to a petition to administer a trust. Moreover, there do not appear to be any California Rules of Court or local court rules to provide guidance in this area, nor any uniformity with regard to the procedures presently used throughout California that would warrant the recommendation of one procedure for all jurisdictions. Counsel should therefore contact the appropriate court to ascertain whether any particular form of responsive pleading is preferred by the local commissioner or judge; for example, a response, an answer, or objections, with or without points and authorities [*see Prob. Code § 1000* (applicability of rules of civil practice in probate proceedings)]. An objection or response filed pursuant to the Probate Code must be verified [*Prob. Code § 1021(a)(2)*].

[2] Use of Form

This form is for use by a trustee to respond to a petition by a beneficiary seeking removal of the trustee, an accounting, appointment of a new trustee, and redress of a breach of trust [*see Prob. Code § 17200(b)(5)* (petition to settle account),

17200(b)(10) (petition to remove and appoint trustee)].

If the disputed issues are legal in nature, counsel should consider filing a memorandum of points and authorities with the responsive pleading, and, if factual, relevant declarations. In questionable matters, counsel should contact the local court for guidance as to whether points and authorities and declarations are appropriate.

For a form of account for submission to the court, see *§ 560.559*.

[3] Service

The Trust Law does not include any provisions specifying on whom responsive pleadings to petitions to administer a trust should be served. However, counsel may obtain guidance from *Prob. Code § 17203*, governing notice of the time and hearing for the petition, and may wish to serve the response on the persons named in that section as well as on the petitioner. *Prob. Code § 17203(a)* provides that a petitioner must cause notice to be mailed to all of the following persons:

- All trustees.

- All beneficiaries, except that if the trust is revocable and the person holding the power to revoke it is competent notice must be given to the person holding the power to revoke and not to the beneficiary [*Prob. Code § 15802*].

- The Attorney General of California, if the petition relates to a charitable trust subject to the jurisdiction of the Attorney General.

- *Prob. Code § 17203(b)* provides that a petitioner must cause notice to be served (in the manner provided for service of summons in civil cases) on any person, other than a trustee or beneficiary, whose right, title, or interest would be affected by the petition and who does not receive notice pursuant to *Prob. Code § 17203(a)* [*see Code Civ. Proc. §§ 413.10 et seq.* (summons in civil cases)].

For detailed discussion, see *§ 560.137[2]*. For a notice form, see *§ 560.600*.

[4] Dismissal of Petition

The court may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of the trustee or beneficiary [*Prob. Code § 17202*].

[5] Cross References

For a related form, *see §§ 560.521, 560.540*.

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49-560 California Forms of Pleading and Practice--Annotated § 560.544

§ 560.544 Allegation for Response by Trustee--Trustee Entitled to Contribution From Cotrustee [Prob. Code § 16402]

[1] FORM Allegation for Response by Trustee--Trustee Entitled to Contribution From Cotrustee [Prob. Code § 16402]

If the acts of respondent as described in the petition are found to be a breach of trust, _____ [*name of cotrustee*], as cotrustee, is equally responsible therefor, because he/she/it _____ [*describe basis for liability, e.g.,* approved and knowingly acquiesced in the acts]. Therefore, if respondent is liable, he/she/it is liable also, with damages to be apportioned between respondent and the cotrustee.

[2] Use of Form

This allegation is for use in a response by a trustee to a petition brought by a beneficiary alleging breach of trust, to seek contribution from a cotrustee who is jointly responsible with the respondent for the breach [*see Prob. Code § 16402*]. The allegation may be inserted in *see § 560.543* if the trustee denies liability but affirmatively asserts that if the trustee is found liable, the cotrustee is equally liable [*see Gbur v. Cohen (1979) 93 Cal. App. 3d 296, 300-303, 155 Cal. Rptr. 507* (cross-complaint for contribution regarding charitable trust)].

The ground for contribution used as an example in this form is that the cotrustee approved and knowingly acquiesced in the breach of trust. Additional grounds for contribution, which may be used in lieu of or in addition to that ground, are the other situations in which a trustee is liable to the beneficiary for a breach committed by a cotrustee. Those situations are when the cotrustee [*see Prob. Code § 10402(b)*]:

- Participated in the breach;
- Improperly delegated the administration of the trust to the respondent;
- Concealed a breach of trust committed by the respondent;

- Negligently enabled the respondent to commit a breach of trust; or

- Neglected to take reasonable steps to compel the respondent to redress a breach of trust in a case in which the cotrustee knew or had information from which he or she reasonably should have known of the breach.

[3] State Statutes

Trustee's liability to beneficiary for acts of cotrustee. *Prob. Code § 16402*

[4] Decisions

When breach of trust results in liability to more than one trustee, liability of affected trustees is joint and several, and suit for contribution may be brought between trustees. *Gbur v. Cohen (1979) 93 Cal. App. 3d 296, 300, 155 Cal. Rptr. 507* (interpreting *Civ. Code § 2239* (principal's liability for authorized or ratified acts of agent) in plenary action for declaratory relief and indemnity regarding charitable trust)

Duties of trustee of charitable trust resemble those of trustee of private trust. *Gbur v. Cohen (1979) 93 Cal. App. 3d 296, 301, 155 Cal. Rptr. 507* (interpreting *Civ. Code § 2239* (principal's liability for authorized or ratified acts of agent) in plenary action for declaratory relief and indemnity regarding charitable trust)

[5] Cross References

For related forms, *see §§ 560.540, 560.543*.

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2. Rights, Liabilities, And Duties Of Trustees

49-560 California Forms of Pleading and Practice--Annotated § 560.545

§ 560.545 Allegation for Response by Trustee--Improper Venue [Prob. Code §§ 15803, 17000]

[1] FORM Allegation for Response by Trustee--Improper Venue [Prob. Code §§ 15803, 17000]

The court designated in the petition is not the proper court in which to bring the proceeding described therein because _____ [*if a living trust*, the principal place of administration of the trust is *or, if a testamentary trust not subject to the continuing jurisdiction of the court, either* the county where the decedent's estate is administered is *or* the principal place of administration of the trust is *or, if a trust subject to the continuing jurisdiction of the court*, the court in which the decedent's estate was administered is] in _____ County, California.

[2] Use of Form

This allegation is for use by a trustee to respond to a petition brought by a beneficiary alleging breach of trust, to raise the issue that the petition was filed in the wrong county [*see Prob. Code §§ 17005* (venue for living trust and trust not subject to continuing jurisdiction of court), 17301 (trust subject to continuing jurisdiction of court)]. For further discussion of venue, see Comments to *§ 560.521*; *see also § 560.144*.

The Trust Law, California Rules of Court, and local court rules are silent with respect to the filing of papers in response to a petition to administer a trust. For discussion of the appropriate form of responsive papers in which to raise this allegation, see *§ 560.543*.

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49-560 California Forms of Pleading and Practice--Annotated § 560.546

§ 560.546 Allegation for Response by Trustee--Petitioner's Lack of Standing [Prob. Code §§ 15800, 15803]

[1] FORM Allegation for Response by Trustee--Petitioner's Lack of Standing [Prob. Code §§ 15800, 15803]

The petitioner does not have standing to bring the petition because _____ [*specify, e.g.*, the petitioner is the beneficiary of a revocable trust, and the power to revoke is in the settlor of the trust].

[2] Use of Form

This form may be used by a trustee to allege that a beneficiary who has filed a petition against the trustee lacks standing to bring the petition [*see Prob. Code §§ 15800* (rights regarding revocable trust inure to settlor and not beneficiaries), 17200(a) (rights of beneficiaries generally)]. The allegation may be inserted in *§ 560.543* if the trustee wishes to assert the beneficiary's lack of standing as an affirmative defense.

The Trust Law, the California Rules of Court, and local court rules are silent with respect to the filing of papers in response to a petition to administer a trust. However, the rules of practice applicable to civil actions constitute the rules of practice in proceedings under the Probate Code, except to the extent that the Probate Code provides applicable rules [*Prob. Code § 1000*]. In a civil action, lack of standing is normally raised by demurrer to a complaint [*see Code Civ. Proc. §§ 430.10(e)* (failure to state cause of action) and 430.30(a) (demurrer proper when ground for objection appears on face of complaint); *but see In re Fred J. (1979) 89 Cal. App. 3d 168, 176, 152 Cal. Rptr. 327* (use of demurrer inconsistent with legislative purpose under Welfare & Institutions Code provisions otherwise incorporating *Code Civ. Proc. §§ 307-1062.10*)]. Counsel should therefore contact the appropriate court to ascertain whether the issue of lack of standing should be raised in any particular form of responsive pleading, for example, a demurrer, and whether the filing of supporting memorandum and other documents is required or preferred [*see Code Civ. Proc. § 1005*; *Cal Rules of Ct, Rules 3.1113(a), 3.1320* (points and authorities and notice of hearing regarding demurrers)]. For discussion of demurrers, see Ch. 206, *Demurrers and Motions for Judgment of the Pleadings* .

[3] Standing of Beneficiary

A beneficiary has standing to bring a petition under *Prob. Code § 17000*, except as provided in *Prob. Code § 15800* [*Prob. Code § 17200(a)*]. Under *Prob. Code § 15800*, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the person holding the power to revoke, and not the beneficiary, has the rights afforded beneficiaries under the Trust Law. The trustee then owes its duties to the person holding the power to revoke. These rules apply unless the trust instrument provides otherwise, or if the joint action ofthe settlor and all beneficiaries is required [*Prob. Code § 15800*].

Moreover, the holder of a presently exercisable general power of appointment, or power to withdraw property from the trust, has the rights of a person holding the power to revoke the trust that are provided by *Prob. Code § 15800* to the extent of the holder's power over the trust property [*Prob. Code § 15803*]. For discussion of standing under the Trust Law generally, see *§ 560.130* et seq.

For forms and discussion of memoranda of points and authorities, see Ch. 417, *Points and Authorities* .

[4] Cross References

For related forms, *see §§ 560.521, 560.543*.

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49-560 California Forms of Pleading and Practice--Annotated § 560.547

§ 560.547 Petition by Trust Beneficiary for Accounting and to Compel Trustee to Redress Breach of Trust by Payment of Money or Otherwise [Prob. Code §§ 16420(a)(3), (9), 17200(b)(5), (12)]--Trustee Liable for Acts and/or Omissions of Agent Employed by Trustee [Prob. Code §§ 16062(a), 16401(b)]

[1] FORM Petition by Trust Beneficiary for Accounting and to Compel Trustee to Redress Breach of Trust by Payment of Money or Otherwise [Prob. Code §§ 16420(a)(3), (9), 17200(b)(5), (12)]--Trustee Liable for Acts and/or Omissions of Agent Employed by Trustee [Prob. Code §§ 16062(a), 16401(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*name of trust*]	)	PETITION FOR RECOVERY OF TRUST PROP-
	)	ERTY AND ACCOUNT

_____

Petitioner alleges:

1. [*Petitioner's identity. See § 560.521, Paragraph 1.*]

2. [*Irrevocability of trust. See § 560.521, Paragraph 2.*]

3. [*Identity of trustee. See § 560.521, Paragraph 3.*]

4. [*Basis for venue. See § 560.521, Paragraph 4.*]

5. [*Creation of trust. See § 560.521, Paragraph 5.*]

6. On or about _____ [*date*], _____ [*name of trustee*] delegated to _____ [*name of agent*], as agent of _____ [*name of trustee*] and of the trust, the authority to _____ [*specify nature of authority that was delegated to agent, e.g.,* manage the securities and mutual fund investments of the trust]; and, in conjunction with that delegation of authority, allowed _____ [*name of agent*] access to the trust funds].

7. On or about _____ [*date*], _____ [*describe wrongful acts and/or omissions of agent, e.g.,* _____ (*name of agent*) expended $50,000 of the trust funds to purchase 1,000 shares of Universal Retractors, Inc., and thereafter titled those shares in _____ (*name of agent*)'s own name. _____ (*name of agent*) has failed to reimburse the trust for the funds taken or to account for any profits from the use of those funds].

[*INCLUDE one or more of the following paragraphs alleging the basis for the trustee's personal liability*]

8. In performing the wrongful acts described in Paragraph 7, _____ [*name of agent*] was acting at and under the direction of _____ [*name of trustee*].

[*OR*]

8. _____ [By law *or* Under the terms of the _____ (will *or* trust instrument) under which the trust was created)], _____ [*name of trustee*] was under a duty not to delegate the authority referred to in Paragraph 6 of this complaint.

[*OR*]

8. _____ [*Name of trustee*] did not use reasonable prudence in the _____ [selection *and/or* retention] of _____ [*name of agent*] as agent for the trust, in that _____ [*specify factual basis for allegation, e.g.,* _____ (*name of trustee*) failed to conduct a reasonable background check of _____ (*name of agent*) and such a check would have revealed that _____ (*name of agent*) has seventeen previous felony convictions for embezzlement and misappropriation of trust funds *or* _____ (*name of trustee*), after being informed that _____ (*name of agent*) had seventeen previous felony convictions for embezzlement and misappropriation of trust fund, continued to employ _____ (*name of agent*) as an agent of the trust].

[*OR*]

8. _____ [*Name of trustee*] did not periodically review _____ [the overall performance of _____ (*name of agent*) as agent for the trust *and/or* the compliance of _____ (*name of agent*) with the terms of the delegation of authority specified in Paragraph 6].

[*OR*]

8. _____ [*Name of trustee*] learned of the wrongful acts of _____ [*name of agent*] specified in Paragraph 7, but concealed those acts from plaintiff [and the other _____ (co-trustees

and/or beneficiaries) of the trust)].

[*OR*]

8. _____ [*Name of trustee*] was aware of the wrongful acts of _____ [*name of agent*] specified in Paragraph 7, but neglected to take reasonable steps to compel _____ [*name of agent*] to redress those wrongs, in that _____ [*specify nature of failure, e.g.,* _____ (*name of trustee*) failed to initiate legal action against _____ (*name of agent*) or any of his/her/its co-conspirators to recover the sums that were wrongfully misappropriated from the trust].

[*OR, if action relates to the investment and management functions of the trust*]

8. In making the delegation of authority referred to in Paragraph 6, _____ [*name of trustee*] did not act consistently with the purposes and terms of the trust, in that _____ [*explain why delegation was not in accordance with trust's terms and purposes, e.g.,* although the trust instrument required the trustee to comply with the "prudent person" rule in investing and managing trust assets, the delegation of authority referred to in Paragraph 6 did not require that _____ (*name of agent*) diversify trust investments or dispose of unproductive trust property within a reasonable time].

[*CONTINUE*]

9. _____ [*Name of trustee*], as trustee, has failed to _____ [*describe failure of trustee to redress the breach, e.g.,* reimburse the trust for the funds taken or to account for any profits made thereon].

10. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

11. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE, petitioner prays for an order:

1. Compelling _____ [*name of trustee*] to account fully for all trust property;

2. Ordering _____ [*name of trustee*] to redress the breach of trust described in Paragraphs 6 through 9, above, by _____ [*state nature of relief requested, e.g.,* returning to the trust all trust property

wrongfully misappropriated from the trust as a result of the actions of _____ (*name of agent*), reimbursing the trust for all losses occasioned by the wrongful actions of _____ (*name of agent*) described in Paragraph 7, and paying to the trust or distributing to petitioner all profits acquired as a result of those wrongful actions, without deduction for any losses];

[3. Imposing a constructive trust in favor of petitioner on property purchasedwith trust funds and standing in the name of _____ (*name of agent*) or another;]

4. For costs herein; and

5. For such other orders as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner

[*Verification. See § 560.521.*]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is a petition for use by a beneficiary who is seeking the hold the trustee liable for wrongful acts committed by an agent of the trustee. The petition seeks orders compelling the trustee to account fully for all trust property [*see Prob. Code § 17200(b)(7)*] and to redress a breach of trust by returning to the trust all property wrongfully misappropriated from it as a result of the agent's actions [*see Prob. Code § 17200(b)(12)*]. It includes optional language requesting the imposition of a constructive trust on property wrongfully purchased with trust funds [*see Prob. Code § 16420(a)(9)*].

[3] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code §§ 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 10) [*Prob. Code § 17201*]. Notice of a petition regarding a trust is governed by *Prob. Code § 17203(a)*. For detailed discussion, see *§ 560.137[2]*. For a notice form, *see § 560.600*.

[4] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[5] Trustee's Liability For Acts of Agent

[a] General Rule of Nonliability

It is a relatively common practice for trustees to delegate specific trust functions to agents. Preparation of accountings and tax returns, and management of investment portfolios and real property, are typical examples of acts that may be delegated to some extent to agents.

In general, the trustee is not liable to the trust beneficiaries for the acts or omissions of agents [*Prob. Code § 16401(a)*; *see Prob. Code § 16052(c)* (investment and management functions of trust)]. Under this rule, the only recourse of the beneficiary is against the agent directly. An agent has a duty to perform the delegated function with reasonable care to comply with the terms of the delegation [*Prob. Code § 16052(b)*] and, by accepting a delegation from the trustee of a trust that is subject to California law, submits to the jurisdiction of California courts [*Prob. Code § 16052(d)*].

[b] When Trustee May Be Personally Liable for Agent's Acts

There are several important exceptions to the general rule of a trustee's nonliability for acts of agents [*see Prob. Code §§ 16052(a), (c), 16401(b)*]. Under these exceptions, with respects to acts of omissions of agents occurring on or after July 1, 1987, the trustee is liable to the beneficiary for an act or omission of an agent employed by the trustee in the administration of the trust that would be a breach of the trust if the committed by the trustee, if any of the following circumstances exist [*Prob. Code § 16401(b)*]:

- The trustee directs the acts of the agent.

- The trustee delegates to the agent the authority to perform an act that the trustee is under a duty not to delegate. In general, the trustee has a duty not to delegate to others the performance of acts that the trustee can reasonably be required personally to perform, and may not transfer the office of trustee or delegate the entire administration of the trust to a cotrustee or other person [*Prob. Code § 16012(a)*]. The provisions of the governing trust instrument or will may also affect the extent to which the trustee may delegate trust functions to agents [*see Prob. Code § 16000* (duty to administer trust according to provisions of trust instrument)].

- The trustee does not use reasonable prudence in the selection or retention of the agent [*see also Prob. Code § 16052(a)(1)* (delegation of investment and management functions)].

- The trustee does not periodically review the agent's overall performanceand compliance with the terms of the delegation [*see also Prob. Code § 16052(a)(2)* (delegation of investment and management functions)].

- The trustee conceals the act of the agent.

- The trustee neglects to take reasonable steps to compel the agent to redress the wrong in a case in which the trustee knows of the agent's acts and omissions.

In addition to these exceptions, when delegating investment or management functions of the trust the trustee has a duty to exercise prudence in establishing the scope and terms of the delegation, consistent with the purposes and terms of the trust [*Prob. Code § 16052(a)(2)*].

This form contains optional allegations for each of the seven exceptions discussed above. The drafter should select one or more of these options as appropriate to the facts of the case. The appropriate allegation(s) should be inserted into the form as Paragraph 8.

[6] Liability for Acts of Agent Prior to July 1, 1987

The rules discussed above apply to liability of a trustee for acts or omissions of agents that occur on or after July 1, 1987. Liability for acts occurring prior to that time are governed by pre-1987 law.

A trustee is not liable for the acts of an agent occurring on or after July 1, 1987, except as provided in *Prob. Code § 16401(b)* [*Prob. Code § 16401(a)*]. With regard to acts of an agent occurring before July 1, 1987, former law controls [*Prob. Code § 16401(c)*; *see, e.g., Gaver v. Early (1923) 58 Cal. App. 736, 737, 209 P. 394* , and Restatement (Second) of Trusts § 225]. For further discussion, see *§ 560.84[2]*.

[7] Cross References

For discussion and forms relating to the agency relationship, see Ch. 427, *Principal and Agent* . For memoranda of points and authorities relating to the agency relationship, see California Points and Authorities, Ch. 182, *Principal and Agent* (Matthew Bender)

For detailed discussion of the powers of trustees and the delegation of those powers to agents, see California Wills & Trusts, Ch. 96, *Powers and Duties of Trustees* (Matthew Bender)

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49-560 California Forms of Pleading and Practice--Annotated § 560.548

§ 560.548 Petition Compelling Trustee to Account After Written Request [Prob. Code § 17200(b)(7)]--By Beneficiary

[1] FORM Petition Compelling Trustee to Account After Written Request [Prob. Code § 17200(b)(7)]--By Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*name of trust*]	)	PETITION FOR ACCOUNT
	)	

_____

Petitioner alleges:

1. [*Petitioner's identity. See § 560.521, Paragraph 1.*]

2. [*Irrevocability of trust. See § 560.521, Paragraph 2.*]

3. [*Identity of trustee. See § 560.521, Paragraph 3.*]

4. [*Basis for venue. See § 560.521, Paragraph 4.*]

5. [*Creation of trust. See § 560.521, Paragraph 5.*]

6. _____ [*Name*], as trustee, made his/her/its last _____ [report of information about

the trust *or* account of the above-described trust *whichever was made more recently*] on _____ [*date more than six months prior to date of petition*].

7. On or about _____ [*date more than 60 days prior to date of petition*], petitioner delivered to the trustee a written request for _____ [a report of information regarding _____ (*specify, e.g.,* the leasing of the real property situated at _____ (*street address*), _____ County, California) *or* an accounting of his/her/its acts as trustee since the period covered by the last _____ [account *or* report]. A copy of the request is attached hereto, marked Exhibit "A," and made a part hereof.

8. The trustee fails and refuses to make the requested _____ [account *or* report].

9. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

10. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE, petitioner prays for an order:

1. Compelling _____ [*name*], as trustee, to submit his/her/its _____ [report of information regarding _____ (*specify, e.g.,* the leasing of the real property at _____ (*street address*), _____ County, California) *or* an accounting of his/her/its acts as trustee since the period covered by the last _____ [account *or* report];

2. For costs herein; and

3. For all other orders the court deems proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification. See § 560.521.*]

CAUTION:

The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is for use by a beneficiary to compel the trustee to report information about the trust or account to the beneficiary, if the trustee has failed to submit a required report or account within 60 days after written request of the beneficiary and no report or account has been made within six months preceding the request [*see Prob. Code § 17200(b)(7)*]. For a form to compel accounting in conjunction with removal of a trustee and appointment of a successor trustee, see *§ 560.540*. For a form of account by a trustee, see *§ 560.559*.

[3] Allegations

This petition alleges [*see Prob. Code § 17200(b)(7)*]:

- That the trustee has not made a report of information or an account to the beneficiary within six months of the date of the petition (Paragraph 6);

- That the beneficiary submitted a written request for certain information or for an account more than 60 days prior to the date of the petition (Paragraph 7); and

- That the trustee has failed to submit the requested report or account as of the date of the petition (Paragraph 8).

[4] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code §§ 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 9) [*Prob. Code § 17201*]. Notice of a petition regarding a trust is governed by *Prob. Code § 17203(a)*. For detailed discussion, see *§ 560.137[2]*. For a notice form, see *§ 560.600*.

[5] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[6] Cross References

For related forms, *see §§ 560.521, 560.559*.

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49-560 California Forms of Pleading and Practice--Annotated § 560.549

§ 560.549 Petition [Prob. Code § 17201] to Review Reasonableness of Trustee's Compensation [Prob. Code §§ 15680, 15686, 17200(b)(9)]--By Beneficiary

[1] FORM Petition [Prob. Code § 17201] to Review Reasonableness of Trustee's Compensation [Prob. Code §§ 15680, 15686, 17200(b)(9)]--By Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*name of trust*]	)	PETITION TO REVIEW REASONABLENESS OF
	)	TRUSTEE'S COMPENSATION

_____

Petitioner alleges:

1. [*Petitioner's identity. See § 560.521, Paragraph 1.*]

2. [*Irrevocability of trust. See § 560.521, Paragraph 2.*]

3. [*Identity of trustee. See § 560.521, Paragraph 3.*]

4. [*Basis for venue. See § 560.521, Paragraph 4.*]

5. [*Creation of trust. See § 560.521, Paragraph 5.*]

[*EITHER*]

6. Pursuant to the above-described trust, _____ [*name of trustee*], as trustee, is entitled to [*specify, e.g.,* $_____ per year], as compensation for performing the duties that are described in the trust.

[*OR*]

6. The trust does not specify the trustee's compensation. The trustee's compensation was fixed at _____ [*specify, e.g.,* $_____ per year] pursuant to _____ [*specify, e.g.,* court order attached as Exhibit "B" and made a part hereof] effective _____ [*date*].

[*CONTINUE*]

[7. On or about _____ (*date*), _____ (*name of trustee*), as trustee, served on petitioner a written notice pursuant to *Probate Code Section 15686*, of an increase in his/her/its _____ (*describe type of fee, e.g.,* periodic base fee), from _____ (*describe fee increase, e.g.,* $_____ per year to $_____ per year), effective _____ (*date*).]

8. _____ [*Set forth basis for requested review, e.g.,* The trustee's duties as described in the trust have diminished in that six parcels of real property in Mendocino County, as described in the trust, were sold on or about _____ (*date*), the proceeds of which were distributed to the beneficiaries. There have been no additions to the trust, and the trustee's duties have not been increased by reason of any changes in the remaining trust property.]

9. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

10. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE, petitioner prays for an order:

1. Reviewing the reasonableness of the trustee's compensation;

[2. Reducing the trustee's compensation to _____ (*specify, e.g.,* $_____ per year);]

[3. Not allowing the trustee's increased fee;]

4. For costs herein; and

5. For such other orders as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification. See § 560.521.*]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is for use by a beneficiary to seek a review of the reasonableness ofthe trustee's compensation [*see Prob. Code §§ 15680* (court may allow lesser compensation), 17200(b)(9) (petition to review reasonableness of compensation)]. For a form of petition for use by a trustee to fix compensation or allow greater compensation, *see § 560.558*.

[3] Allegations

This petition alleges:

- A statement describing the trustee's compensation (Paragraph 6) [*see Prob. Code §§ 15681* (trustee entitled to reasonable compensation), 15682 (court may fix compensation)]; and

- The basis for the requested review (Paragraph 8) [*see Prob. Code §§ 15680(b)* (circumstances under which court may allow greater or lesser compensation), 17200(b)(9) (petition to seek review of reasonableness of trustee's compensation)].

Optional Paragraph 7 is for use to seek review of a trustee's increased fee [*see Prob. Code § 15686*].

[4] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code §§ 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 9) [*Prob. Code § 17201*]. Notice of a petition regarding a trust is governed by *Prob. Code § 17203(a)*. For detailed discussion, see *§ 560.137[2]*. For a notice form, see *§ 560.600*.

[5] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[6] Effect of Filing of Petition on Increased Trustee's Fee

If a beneficiary files a petition under *Prob. Code § 17200* for review of the increased trustee's fee (or for removal of the trustee), and serves a copy of the petition on the trustee before the expiration of required 60-day notice period, the increased trustee's fee does not take effect as to that trust until otherwise ordered by the court or the petition is dismissed [*Prob. Code § 15686(c)*]. For further discussion, see *§ 560.90*.

[7] Cross References

For related forms, see *§§ 560.521, 560.558*.

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 560 TRUSTS: EXPRESS, PUBLIC, CHARITABLE, AND TOTTEN TRUSTS
PART IV. FORMS
A. Administration Of Express Trusts
2. Rights, Liabilities, And Duties Of Trustees

49-560 California Forms of Pleading and Practice--Annotated § 560.550

§ 560.550 Petition [Prob. Code § 17201] to Determine Right of Beneficiary [Prob. Code § 17200(b)(2)] and to Enforce Oral Trust in Real Property [Prob. Code §§ 850(a)(3)(A), 15206, 17200(a), (b)(2), (12)]--By Beneficiary

[1] FORM Petition [Prob. Code § 17201] to Determine Right of Beneficiary [Prob. Code § 17200(b)(2)] and to Enforce Oral Trust in Real Property [Prob. Code §§ 850(a)(3)(A), 15206, 17200(a), (b)(2), (12)]--By Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the _____ [*name of trust, e.g.,* Trust Created by Oral Declaration of _____ (*name of settlor*) for the Benefit of _____ (*name of beneficiary*)]	)))))	NO. _____ PETITION TO ENFORCE ORAL TRUST IN REAL PROPERTY

_____

Petitioner alleges:

1. [*Petitioner's identity. See § 560.521, Paragraph 1.*]

2. [*Irrevocability of trust. See § 560.521, Paragraph 2.*]

3. On or about _____ [*date*], at _____ [*city, if any, and county*], California, _____ [*name of settlor*], owned certain real property, situated at _____ [*street address and, if any, city*] _____ County, California, and more particularly described as follows: _____ [*set forth legal description*].

4. On or about that same date, _____ [*name of settlor*] orally declared that he/she held _____ [that property *or* a _____ (*specify portion, e.g.,* a one-half) interest in that property] in trust on behalf of plaintiff, as beneficiary. Under the terms of the trust declared by _____ [*name of settlor*], _____ [*set forth terms of oral agreement, e.g.,* petitioner may live on the premises so long as he/she desires and is required to satisfy the outstanding indebtedness on the property in the sum of $90,000, and _____ (*name of settlor*) is required to convey to petitioner an undivided one-half interest in the property on petitioner's demand, or, should the property be sold prior to actual conveyance of title of undivided one-half interest to petitioner, to pay to petitioner one half of the proceeds from the sale].

5. _____ [*Specify acts showing reliance on oral declaration of trust, e.g.,* Petitioner, in reliance on the trust declared by _____ (*name of settlor*), and with his/her consent to all activities herein described, took possession of the real property on _____ (*date*), and has remained in possession since that time, paid the total outstanding indebtedness on the property, in the sum of $90,000, and in addition, paid taxes in the sum of $35,000, and expended the sums of $18,000 for improvements to and $12,000 for maintenance, respectively, of the above-described property, thereby irrevocably changing his/her position in reliance on the trust].

[6. _____ (*Describe satisfaction of any conditions petitioner was required to meet by the terms of the trust, e.g.,* On or about _____ (*date*), petitioner executed and delivered to _____ (*name of settlor*), a written demand for the conveyance of the real property described herein. A copy of the demand is attached hereto, marked Exhibit "A," and made a part hereof).]

7. _____ [*Name of settlor*] has failed and refused, and continues to fail and refuse, to perform the conditions of the trust on his/her part in that he/she _____ [*state facts showing breach of trust, e.g.,* has not conveyed to petitioner an undivided one-half interest in the above-described real property].

8. _____ [*Name of settlor*] is estopped from relying on the Statute of Frauds because petitioner, with his/her consent at all times, irrevocably changed his/her position in reliance on the trust by _____ [*specify facts that avoid the Statute of Frauds, e.g.,* taking possession of the premises and making valuable improvements thereon as described above].

9. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

10. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE, petitioner prays for an order:

1. Compelling _____ [*name of settlor*] to _____ [*specify, e.g.,* execute and deliver to petitioner forthwith an undivided one-half interest in the real property described above];

2. For costs herein; and

3. For such other orders as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification. See § 560.521.*]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is for use by a beneficiary to determine the beneficiary's rights with respect to an oral trust in real property [*see Prob. Code §§ 15206* (statute of frauds), 17200(a) (petition to determine existence of trust), 17200(b) (petition to determine existence or nonexistence of any right), 17200(b)(12) (petition to compel redress of breach of trust)]. Any interested person may petition the court for an appropriate order when it appears that the trustee is in possession of, or holds title to, real or personal property, and the property, or some interest in the property, is claimed to belong to another [*Prob. Code § 850(a)(3)(A)*]. The petition prays for an order compelling the trustee to transfer the property to the beneficiary [*see Mulli v. Mulli (1951) 105 Cal. App. 2d 68, 73, 232 P.2d 556]* .

In lieu of this petition, the beneficiary may initiate a civil action to enforce a trust. Although the superior court having jurisdiction over the trust pursuant to *Prob. Code § 17000 et seq.* has exclusive jurisdiction of proceedings concerning the internal affairs of the trust [*Prob. Code § 17000(a)*], it has concurrent jurisdiction of actions and proceedings to determine the existence of trusts [*Prob. Code § 17000(b)(1)*]. The probate court must not grant a petition under *Prob. Code § 17200 et seq.* if it determines that the matter should be determined by a civil action [*Prob. Code § 853*].

[3] Allegations

This petition alleges:

- The creation of an oral trust in real property and the basis for venue (Paragraphs 3, 4) [*see Prob. Code § 15206(c)* (trust in real property by operation of law); *see also Mulli v. Mulli (1951) 105 Cal. App. 2d 68, 73, 232 P.2d 556* (oral trust in real property); *see also Prob. Code § 17005(c)* (venue determined by rules applicable to civil actions generally, except as otherwise provided in *Prob. Code § 17005(a), (b)*) and *Code Civ. Proc. § 392* (venue regarding real property)];

- Petitioner's performance of acts in reliance on trust (Paragraph 5) [*see Mulli v. Mulli (1951) 105 Cal. App. 2d 68, 73, 232 P.2d 556]* ;

- Breach of the terms of the trust by the trustee (Paragraph 7); and

- Facts establishing that the defendant is estopped from pleading the Statute of Frauds as a defense (Paragraph 8) [*see Prob. Code § 15206(c)* (trust in real property by operation of law); *see also*

Porporato v. Devincenzi (1968) 261 Cal. App. 2d 670, 678-679, 68 Cal. Rptr. 210] .

Optional Paragraph 6 is for use to allege that the beneficiary complied with any conditions necessary to establish the trust.

[4] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code § 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 9) [*Prob. Code § 17201*]. Notice of a petition regarding a trust is governed by *Prob. Code § 17203(a)*. For detailed discussion, see *§ 560.137[2]*. For a notice form, *see § 560.600*.

[5] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[6] Statute of Frauds

A trust in relation to real property is not valid unless evidenced by certain methods, including by operation of law [*see Prob. Code § 15206(c)*]. A trust in real property that violates the Statute of Frauds may subsequently become valid and binding if possession is taken or the transfer of property has been fully executed [*Casa Colina Convalescent Home v. Wiest (1963) 214 Cal. App. 2d 161, 165, 166, 29 Cal. Rptr. 407]* .

[7] Jurisdiction and Venue

Jurisdiction and venue regarding petition proceedings under the Trust Law are discussed in *§ 560.142* et seq. If in lieu of filing this petition, the beneficiary brings a plenary action to enforce an oral trust pursuant to the Code of Civil Procedure the superior court will have jurisdiction over the action [*see* Prob. Code§ 17000(b)(1) (probate court's jurisdiction to determine existence of trust is concurrent); *Hillman v. Stults (1968) 263 Cal. App. 2d 848, 877, 70 Cal. Rptr. 295* (action to establish and enforce trusts are equitable); *St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 358, 287 P.2d 387* (superior court jurisdiction over actions that are substantially equitable in nature)]. An action is substantially equitable in nature if it primarily seeks equitable relief, even if it also requests a money judgment [*Hillman v. Stults (1968) 263 Cal. App. 2d 848, 877, 70 Cal. Rptr. 295]* . Because suits in equity do not afford a right to jury trial, actions to determine the nature of the trust, the meaning or interpretation of its terms, or the effect of its terms are within the sole province of the court sitting without a jury [*Hillman v. Stults (1968) 263 Cal. App. 2d 848, 877, 70 Cal. Rptr. 295]* .

With respect to a plenary action to enforce a trust, if the subject of the trust is real property, and the cause of action is "local" (that is, concerns rights to real property), the county in which the real property, or part of it, is located determines the venue of the action [*Code Civ. Proc. § 392*; *see Massae v. Superior Court (1981) 118 Cal. App. 3d 527, 530-531, 173 Cal. Rptr. 527]* . If the subject of the trust is personal property, the general venue provisions for actions not specifically set forth apply, and the trustee's residence determines the venue [*Code Civ. Proc. §§ 395, 395.5*; *see Massae v. Superior Court (1981) 118 Cal. App. 3d 527, 530-531, 173 Cal. Rptr. 527]* .

[8] Lis Pendens

If a proceeding under the Probate Code affects the title to or the right to possession of real property, notice of the pendency of the proceeding may be filed in the office of the county recorder in the county in which the property is located, in accordance with *Code Civ. Proc. §§ 405-405.61* [*see Prob. Code § 1004*]. A notice of the pendency of the proceeding will protect the interest of the petitioner in the property by giving notice to prospective purchasers and encumbrancers that the petition claims some interest in the property. For further discussion, see Ch. 348, *Lis Pendens* .

[9] Cross References

For discussion and forms relating to the Statute of Frauds, see Ch. 530, *Statute of Frauds*

[10] California Points and Authorities

For memoranda of points and authorities relating to the Statute of Frauds, see California Points and Authorities, Ch. 216, *Statute of Frauds*

[11] State Statutes

Petition requesting that court make order when trustee holds property claimed to belong to another. *Prob. Code § 850(a)(3)(A)*

Lis pendens. *Prob. Code § 1004*

Statute of frauds for trust in relation to real property. *Prob. Code § 15206*

Concurrent jurisdiction of superior court over actions and proceedings to determine existence of trusts. *Prob. Code § 17000(b)(1)*

Probate court petition to determine existence of trust. *Prob. Code § 17200(a)*

Petition to determine existence of right. *Prob. Code § 17200(b)(2)*

Petition to compel redress of breach of trust. *Prob. Code § 17200(b)(12)*

[12] Decisions

Action to convey real property does not require allegation that legal remedy is inadequate, because land is presumed to be unique. *Porporato v. Devincenzi (1968) 261 Cal. App. 2d 670, 677, 68 Cal. Rptr. 210*

Oral trust in real property is enforceable if, with consent of trustee, beneficiary enters into possession of land or makes valuable improvements thereon or irrevocably changes position in reliance on trust; declaration by owner of property to hold it for benefit of another constitutes creation of trust. *Mulli v. Mulli (1951) 105 Cal. App. 2d 68, 73, 232 P.2d 556*

[13] Text References

Bogert, The Law of Trusts and Trustees (2d ed.), Ch. 5, *The Statute of Frauds--Satisfaction of the Statute*, §§ 81-100

[14] Cross References

For a related form, see *§§ 560.521*, *560.540*.

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A. Administration Of Express Trusts
2. Rights, Liabilities, And Duties Of Trustees

49-560 California Forms of Pleading and Practice--Annotated § 560.551

§ 560.551 Petition [Prob. Code § 17201] to Compel Trustee [Prob. Code § 17200(b)(6)] to Invade Principal of Discretionary Trust [Prob. Code § 15303]--By Beneficiary

[1] FORM Petition [Prob. Code § 17201] to Compel Trustee [Prob. Code § 17200(b)(6)] to Invade Principal of Discretionary Trust [Prob. Code § 15303]--By Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*name of trust*]	)	PETITION TO INVADE PRINCIPAL OF TRUST
	)	

_____

Petitioner alleges:

1. [*Petitioner's identity. See § 560.521, Paragraph 1.*]

2. [*Irrevocability of trust. See § 560.521, Paragraph 2.*]

3. [*Identity of trustee. See § 560.521, Paragraph 3.*]

4. [*Basis for venue. See § 560.521, Paragraph 4.*]

5. [*Creation of trust. See § 560.521, Paragraph 5.*]

6. Pursuant to the above-described trust, _____ [*set forth provision regarding distribution of*

accumulated income, e.g., the trustee is directed to pay all income from the trust that is available for distribution to petitioner, as beneficiary, for his/her use and benefit, after payment of any expenses of management of the trust estate and administration of the trust, including the compensation for the services of the trustee. In addition, if at any time the income from the corpus of the trust is insufficient to meet the needs of petitioner, then in the sole discretion of the trustee, the trustee may pay to petitioner, as beneficiary, an amount from the principal or corpus of the trust sufficient to meet his/her needs, care, and comfort].

7. _____ [*Describe need to invade principal, e.g.,* Petitioner is physically incapacitated and was institutionalized on or about _____ [*date*]. When the trust instrument was executed, petitioner was confined to her home, and the monthly amount required to meet her needs was $_____. However, due to petitioner's recent institutionalization, she now requires $_____ per month for her reasonable expenses. Consequently, it is necessary that the trustee invade the principal of the trust as necessary in order to maintain monthly payments to petitioner in the amount of $_____ to effectuate the intent of the settlor to provide for petitioner's maintenance and support].

8. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

9. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE, petitioner prays for an order:

1. Instructing the trustee to invade the principal of the trust in the amount of $_____ per month, and to make monthly payments to petitioner in that amount;

2. For costs herein; and

3. For such other orders as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification. See § 560.521.*]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is for use by a beneficiary to petition the court for instructions to the trustee to invade the principal of a trust under which the trustee determines payments from income or principal according to the trustee's discretion [*see Prob. Code §§ 15303(d)* (beneficiary may compel trustee to pay income or principal of discretionary trust), 17200(b)(6) (petition for instructions to trustee)].

[3] Allegations

This petition alleges:

- The relevant trust provisions regarding distribution of income andprincipal for support of the beneficiary (Paragraph 6) [*see Prob. Code § 15303*]; and

- Facts describing the petitioner's need for invasion of the trust principal (Paragraph 7) [*see Prob. Code § 15303*; *see also Estate of Ferrall (1953) 41 Cal. 2d 166, 168-169, 173-174, 258 P.2d 1009* (denying invasion of corpus)].

[4] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code § 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 8) [*Prob. Code § 17201*]. Notice of a petition regarding a trust is governed by *Prob. Code § 17203(a)*. For detailed discussion, see *§ 560.137[2]*. For a notice form, see *§ 560.600*.

[5] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[6] Beneficiary's Rights Regarding Discretionary Trust

If the trust instrument provides that the trustee must pay to or for the benefit of a beneficiary so much of the income or principal or both as the trustee in its discretion sees fit to pay, a transferee or creditor of the beneficiary may not compel the trustee to pay any amount that may be paid only in the exercise of the trustee's discretion [*Prob. Code § 15303(a)*]. However, a beneficiary has the right to compel the trustee to pay to or for the benefit of the beneficiary all or part of the income or principal [*Prob. Code § 15303(d)*].

[7] State Statutes

Discretionary trust. *Prob. Code § 15303*

Petition to instruct trustee. *Prob. Code § 17200(b)(6)*

[8] Decisions

Court does not have control over exercise of absolute discretion absent showing of fraud, bad faith, or abuse of discretion. *Estate of Charters (1956) 46 Cal. 2d 227, 239, 293 P.2d 778*

Sole discretion of trustee to invade corpus of trust for support of beneficiary is properly subject to court review if exercised in bad faith or by abuse of discretion. *Estate of Ferrall (1953) 41 Cal. 2d 166, 168-169, 258 P.2d 1009* (denying invasion of corpus)

Settlor's intent to support beneficiaries within general boundaries of their accustomed standard of living supports invasion of corpus to satisfy debts incurred for purchase of equipment needed in beneficiary's professional practice; discretion of trustee as never unlimited or arbitrary. *Estate of Miller (1964) 230 Cal. App. 2d 888, 907, 909, 41 Cal. Rptr. 410*

[9] Cross References

For a related form, *see § 560.521*.

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49-560 California Forms of Pleading and Practice--Annotated § 560.552

§ 560.552 Order [Prob. Code § 17206] Granting Beneficiary Relief as Prayed [Prob. Code § 17200(b)]

[1] FORM Order [Prob. Code § 17206] Granting Beneficiary Relief as Prayed [Prob. Code § 17200(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the _____ [*name of trust*]	))))	NO. _____ ORDER _____ [*specify, e.g.,* FOR REMOVAL OF TRUSTEE, ACCOUNT, AND APPOINTMENT OF SUCCESSOR

_____

This proceeding for _____ [*specify relief prayed for, e.g,* the removal of _____ (*name of trustee*) as trustee, and appointing a successor trustee] of the _____ (*name of trust*) on the verified petition of _____ [*name of petitioner*], a/the beneficiary of the trust [, and the return and _____ (*specify papers filed in opposition, e.g.,* response) of the trustee], came on regularly for hearing on _____ [*date*], before this court, sitting without a jury. Petitioner appeared by counsel _____ [*name*] [; the trustee appeared by counsel _____ (*name of removed trustee's counsel*)]. [Evidence was introduced on behalf of both parties and the matter was argued and submitted for decision.]

On proof made to the satisfaction of the court that the petition ought to be granted,

IT IS THEREFORE ORDERED as follows:

1. That _____ [*specify order granted, e.g.,* _____ (*name of removed trustee*), having violated the trust, is removed herewith as the trustee of the _____ (*name of trust*)].

[2. That _____ (*specify any further order, e.g.,* _____ (*name of removed trustee*) file a full and final account of his/her/its administration of the trust within _____ number of days, and on settlement of the account surrender the assets of the trust to his/her/its duly appointed successor; an order surcharging _____ (*name of removed trustee*) for any sums owing from him/her/it to the trust will be withheld pending filing and settlement of the account).]

[3. That _____ (*specify any further order, e.g.,* _____ (*name of successor*) is appointed trustee, succeeding _____ (*name of removed trustee*)).]

[4. That _____ (*specify any further order, e.g.,* _____ (*name of successor*) is vested with all the powers that were vested in _____ (*name of removed trustee*), as trustee under the _____ (written declaration of trust of _____ (*name of settlor*) *or* will of _____ (*name of settlor and testator*), deceased *or other as appropriate*) and must execute the trust according to the terms of _____ (that instrument *or other as appropriate*)).]

[5. That _____ (*specify any further order, e.g.,* _____ (*name of successor*) give a bond in the sum of $_____, to be approved by the court, conditioned on the faithful performance of his/her/its trust).]

[6. That petitioner have and recover his/her costs (from _____ (*name of removed trustee*) taxed at $_____).]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This order may be used to grant relief after hearing on a beneficiary's petition seeking the removal of the trustee, compelling an account by the trustee, and appointing a successor trustee [*see Prob. Code § 17200(b)(7), (10)*]. The order may be submitted to the court for signature either with the petition or after hearing on the petition. In some courts, a proposed order must be submitted before the hearing date. Counsel should consult local court practice to determine the appropriate procedure.

[3] Bond Requirement

A trustee is not required to give a bond to secure performance of duties, unless any of the following circumstances occurs [*see Prob. Code § 15602(a)*]:

- A bond is required by the instrument [*but see Prob. Code §§ 15602(b)* (court may excuse requirement), 15602(e) (exception for trust company)].

- The court finds that a bond is necessary to protect the interests of beneficiaries or other persons having an interest in the trust, notwithstanding a waiver of a bond in the trust instrument.

- An individual who is not named as a trustee in the trust instrument is appointed as a trustee by the court.

[4] State Statutes

Court authority to make necessary orders. *Prob. Code § 17206*

[5] Local Rules of Court

Probate orders.

Alameda Co. Super. Ct. Rules, Rules 12.1.10 et seq.

Los Angeles Co. Super. Ct. Rules, Rule 10.36 et seq.

Marin Co. Uniform Local Rules, Rule 5 et seq.

Orange Co. Super. Ct. Rules, Div. VI, Rule 601.14

San Diego Co. Super. Ct. Rules, Div. IV, Rule 1.30 et seq.

Santa Clara Co. Super. Ct. Rules, Rule 5.2(G)

San Francisco City & County Unified Local Rules of Court, Rule 14.27

[6] Cross References

For discussion and forms relating to orders generally, see Ch. 372, *Motions and Orders*

For a related form, see *§ 560.540*.

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49-560 California Forms of Pleading and Practice--Annotated § 560.553

§ 560.553 Petition [Prob. Code § 17201] to Appoint Successor Trustee to Fill Vacancy [Prob. Code §§ 15660, 17200(b)(10)]--By Cotrustee

[1] FORM Petition [Prob. Code § 17201] to Appoint Successor Trustee to Fill Vacancy [Prob. Code §§ 15660, 17200(b)(10)]--By Cotrustee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the _____ [*name of trust*]	))))	NO _____ PETITION TO APPOINT SUCCESSOR, SUPPORTING DECLARATION OF _____ [*name*], AND NOMINATION

_____

Petitioner alleges:

1. At all times mentioned herein, petitioner was and now is the duly appointed and acting cotrustee of the trust created _____ [by a written declaration of trust of _____ (*name of settlor*) *or* under the will of _____ (*name of settlor and testator*), deceased *or other as appropriate*] [, a copy of which is attached hereto, marked Exhibit "A," and made a part hereof]. [Petitioner is _____ (*specify type of financial institution if trustee is not an individual, e.g.,* a national banking association incorporated under the laws of the United States, engaged in doing business as a trust company in the State of California)].

2. [*Basis for venue. See § 560.521, Paragraph 4.*]

3. On _____ [*date*], a vacancy occurred in the office of trustee of the above-described trust in that _____ [*describe reason for vacancy, e.g.,* _____ (*name of former trustee*), a trustee _____ (named in the trust instrument *or* formerly appointed *or other as appropriate*) died].

4. The trust instrument requires that a vacancy in the office of a cotrustee be filled, and the instrument neither provides a practical method of appointing a trustee, nor names the person to fill the vacancy.

5. There has been no agreement between all adult beneficiaries entitled to enter into such an agreement to provide a successor trustee pursuant to *Probate Code Section 15660(c)*.

[6. By an instrument in writing dated _____ (*date*), _____ (*name of beneficiary*), a/the beneficiary of the trust, has nominated _____ (*name*) as successor trustee to fill the vacancy (, a copy of which is attached hereto, marked Exhibit "B," and made a part hereof).]

[7. _____ (A bond is required by the trust instrument *or* Petitioner believes that a bond is required to protect the interests of the beneficiaries). Petitioner believes that a bond in the sum of $_____ is appropriate (and that the cost of the bond should be charged against the trust).]

8. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

9. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE, petitioner prays for an order:

1. Appointing _____ [a *or* _____ (*name*) or some other] suitable person as trustee of the trust, and vesting _____ [him/her *or* that person] with all the powers vested in the office of the trustee under the trust instrument;

[2. Requiring the successor trustee to give a bond (in the sum of $_____) (, and that the cost of the bond be charged against the trust);]

3. For costs herein; and

4. For such other orders as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification. See § 560.521.*]
EXHIBIT B

BENEFICIARY'S DECLARATION AND NOMINATION OF SUCCESSOR TRUSTEE

I, _____ say:

I am a/the beneficiary of the _____ [*name of trust*].

I am over 14 years of age.

A vacancy exists in the office of trustee of the trust because the former trustee, _____ [*name of former trustee*], _____ [*state reason for vacancy, e.g.,* died on _____ (*date*)].

I nominate and request that the Court appoint _____ [*name of successor trustee*] as successor trustee of the trust. He/She is a fit and proper person to fill the vacancy in the office of trustee of the trust, and is willing to act as trustee.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is for use by a cotrustee to request the appointment of a successor after a vacancy has occurred in the office of trustee, when the trust instrument requires that a vacancy be filled [*see Prob. Code §§ 15660* (appointment of successor), 17200(b)(10) (petition for appointment of successor)]. The nomination of a beneficiary over 14 years of age may be attached to the petition as an exhibit [*see Prob. Code § 15660(d)*]. For a petition brought by a beneficiary to seek, among other things, the appointment of a successor trustee, *see § 560.540*, which incorporates the beneficiary's nomination within the body of the form.

[3] Allegations

This petition alleges:

- The capacity of the petitioner and the creation of the trust (Paragraph 1) [*see Prob. Code §§ 15200* (creation of trust), 15206 (Statute of Frauds), 15207 (oral trust in personal property), 17200(a) (standing to bring petition)];

- The reason for the vacancy (Paragraph 3) [*see Prob. Code § 15643*];

- A statement that the trust instrument requires that the vacancy be filled (Paragraph 4) [*see Prob. Code § 15660(a)*]; and

- A statement that there has been no agreement between all adult benefi ciaries entitled to enter into such an agreement to provide a successor trustee pursuant to *Prob. Code § 15660(c)* (Paragraph 5) [*see Prob. Code § 15660(c)* (vacancy filled by trust company under agreement by all adult beneficiaries with certain rights under trust or by specified persons of their behalf)].

Optional Paragraph 6 is for use to state that a beneficiary has nominated a successor [*see Prob. Code § 15660(d)*]. Optional Paragraph 7 is for use to require that the successor trustee give a bond [*see Prob. Code § 15603*].

[4] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code § 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 8) [*Prob. Code § 17201*]. Notice of a petition regarding a trust is governed by *Prob. Code § 17203(a)*. For detailed discussion, see *§ 560.137[2]*. For a notice form, see *§ 560.600*.

[5] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[6] Appointment of Successor Trustee

If the trust has no trustee or if the trust instrument requires a vacancy in the office of a cotrustee to be filled, the vacancy must be filled as provided in *Prob. Code § 15660* [*Prob. Code § 15660(a)*; *see Prob. Code § 15621* (remaining cotrustees may act for trust in absence of provision to contrary)]. If the trust instrument provides a practical method of appointing a trustee or names the person to fill the vacancy, the vacancy must be filled as provided in the trust instrument [*Prob. Code § 15660(b)*]. If the vacancy in the office of trustee is not filled as provided in *Prob. Code § 15660(b)*, the vacancy may be filled by a trust company that has agreed to accept the trust on agreement of all adult beneficiaries (or conservator or attorney-in-fact on their behalf) who are receiving or are entitled to receive income under the trust or to receive a distribution of principal if the trust were terminated at the time the agreement is made [*Prob. Code § 15660(c)*]. If the vacancy in the office of trustee is not filled as provided in *Prob. Code § 15660(b)* or *(c)*, on petition of any interested person or any person named as trustee in the trust instrument, the court may, in its discretion, appoint a trustee to fill the vacancy [*Prob. Code § 15660(d)*].

If the trust provides for more than one trustee, the court may, in its discretion, appoint the original number or any lesser number of trustees. In selecting a trustee, the court shall give consideration any nomination by a beneficiary who is 14 years of age or older [*Prob. Code § 15660(d)*; *see Prob. Code §§ 15800* (rights regarding revocable trust inure to settlor, not beneficiary), 15803 (rights inuring to holder of presently exercisable general power or power to withdraw property)]. For further discussion, see *§ 560.94[3]*.

[7] Cross References

For a related form, *see §§ 560.521, 560.540*.

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 560 TRUSTS: EXPRESS, PUBLIC, CHARITABLE, AND TOTTEN TRUSTS
PART IV. FORMS
A. Administration Of Express Trusts
2. Rights, Liabilities, And Duties Of Trustees

49-560 California Forms of Pleading and Practice--Annotated § 560.554

§ 560.554 Petition [Prob. Code § 17201] to Grant Trustee Powers [Prob. Code § 17200(b)(8)]--By Trustee

[1] FORM Petition [Prob. Code § 17201] to Grant Trustee Powers [Prob. Code § 17200(b)(8)]--By Trustee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*name of trust*]	)	PETITION TO GRANT TRUSTEE POWERS
	)	

_____

Petitioner alleges:

1. At all times mentioned herein, petitioner was and now is the duly appointed and acting trustee of the trust created _____ [by a written declaration of trust of _____ (*name of settlor*) *or* under the will of _____ (*name of settlor and testator*), deceased *or other as appropriate*] [, a copy of which is attached, marked Exhibit "A," and made a part hereof]. [Petitioner is _____ (*specify type of financial institution if trustee is not an individual, e.g.,* a national banking association incorporated under the laws of the United States, engaged in doing business as a trust company in the State of California)].

2. [*Basis for venue. See § 560.521, Paragraph 4.*]

3. The above-described trust provides that the trustee has the power and is directed to _____ [*specify provisions that require construction or expansion of powers, e.g.,* maintain in trust for _____ (*name of beneficiary*), as beneficiary, and not to sell, certain shares of common stock in the XYZ Company, and pay to beneficiary the net income derived therefrom during his/her natural lifetime, and all dividends accruing on the stock

from the effective date of this instrument].

4. _____ [*Describe the powers sought, e.g.,* The trust property presently consists solely of 6,000 shares of common stock in XYZ Company. After careful consideration, petitioner has concluded that in order to bring about a more extensive diversification in the trust assets, it is in the best interests of the beneficiary named herein to sell approximately one-half, or 3,000 shares, of that stock at the current market price on the date of sale, and at a price not less than $28.00 per share].

[5. _____ (*Describe any further powers sought, e.g.,* Petitioner further desires authorization to invest the proceeds of the sale of the above-described common stock in national government, state or municipal bonds or in such other securities as the court deems proper).]

6. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

7. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE, petitioner prays for an order:

1. Authorizing the trustee to exercise the powers described herein;

2. For costs herein; and

3. For such other orders as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification. See § 560.521.*]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This petition is for use by a trustee to seek additional powers [*see Prob. Code § 17200(b)(8)*]. The trustee may use this

form to seek relief from restrictions on the exercise of powers under the trust instrument [*see Prob. Code § 16201*]. Note that a trustee may also seek determination of the existence or nonexistence of any immunity, power, privilege, duty, or right [*see Prob. Code § 17200(b)(2)*].

[3] Allegations

This petition alleges:

- The capacity of the petitioner and the creation of the trust (Paragraph 1) [*see Prob. Code §§ 15200* (creation of trust), 17200(a) (standing to bring petition)];

- A description of the powers authorized by the trust (Paragraph 3) [*see Estate of Keet (1940) 15 Cal. 2d 328, 330-331, 100 P.2d 1045* (interpreting former Prob. Code § 1120, *now see Prob. Code § 17200(b)(6)*)]; and

- Facts requiring a grant of powers (Paragraphs 4-5) [*see Prob. Code § 17200(b)(8)*].

[4] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code § 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 8) [*Prob. Code § 17201*]. Notice of a petition regarding a trust is governed by *Prob. Code § 17203(a)*. For detailed discussion, see *§ 560.137[2]*. For a notice form, *see § 560.600*.

[5] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[6] Limitation on Exercise of Power

The grant of a power to a trustee, whether by the trust instrument, by statute, or by the court, does not in itself require or permit the exer cise of the power. The exercise of a power by a trustee is subject to the trustee's fiduciary duties [*Prob. Code § 16202*; *see Prob. Code §§ 16000-16015* (fiduciary duties)]. Consequently, counsel may wish to obtain instructions prior to the exercise of a power that may possibly constitute a breach of a fiduciary duty [*see Prob. Code § 17200(b)(6)* (petition for instructions)].

[7] State Statutes

Fiduciary duties owed to beneficiaries. *Prob. Code §§ 16000-16015*

Relief by court of restrictions on power. *Prob. Code § 16201*

Exercise of powers subject to duties. *Prob. Code § 16202*

[8] Decisions

Petition by testamentary trustee for authorization to sell trust property as request to grant trustee powers not conferred in trust instrument. *Estate of Keet (1940) 15 Cal. 2d 328, 100 P.2d 1045* (interpreting former Prob. Code § 1120, *now see Prob. Code § 17200(b)(6)*)

See also Comments and References to § 560.521.

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 560 TRUSTS: EXPRESS, PUBLIC, CHARITABLE, AND TOTTEN TRUSTS
PART IV. FORMS
A. Administration Of Express Trusts
2. Rights, Liabilities, And Duties Of Trustees

49-560 California Forms of Pleading and Practice--Annotated § 560.555

§ 560.555 Petition [Prob. Code § 17201] for Instructions to Trustee [Prob. Code § 17200(b)(6)]--By Trustee

[1] FORM Petition [Prob. Code § 17201] for Instructions to Trustee [Prob. Code § 17200(b)(6)]--By Trustee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*name of trust*]	)	PETITION FOR INSTRUCTIONS
	)	

_____

Petitioner alleges:

1. [*Petitioner's identity and creation of trust. See § 560.554, Paragraph 1.*]

2. [*Basis for venue. See § 560.521, Paragraph 4.*]

[3. As set forth in the above-described trust instrument, _____ (*set forth trust provision that contains an ambiguity or conflict, e.g.,* the trustee is directed to reserve monthly from the rents and income of the property a certain sum that will be sufficient in the trustee's judgment to pay taxes, insurance, repairs, and expenses of the property and trust, when the amounts due thereon shall become payable; and to pay the remainder of the income monthly as follows: a one-third portion to the settlor's child, John Smith).]

[4. The trust further provides that _____ (*set forth any additional relevant provisions of trust, e.g.,* the trustees are to pay the income of the property as set out in the instrument, for and during the term of the natural lives of the settlor's children; on the death of any one of the settlor's children, the amount that would have been paid to that

deceased child as his or her share therein shall be paid by the trustee to the legal heirs of the settlor's deceased child if there shall be any living after such time, and if not, then the share of that deceased child shall be divided between the settlor's remaining living children).]

5. _____ [*Set forth circumstances requiring instructions, e.g.,* On _____ (*date*), beneficiary John Smith died, leaving as his sole surviving heirs, his wife, Lucy Smith, and a daughter, Ann Smith. The monthly income formerly paid to the deceased beneficiary was, from and after his death, paid to his widow and daughter. Thereafter, on _____ (*date*), his widow, Lucy Smith, died, leaving as her only surviving heirs a sister, Jane Brown, and the daughter, Ann Smith. Thereafter, on _____ (*date*), Ann Smith died and all further payments of income that would have been paid to her have been withheld by petitioner as trustee. The surviving heir of widow Lucy Smith, to-wit: her sister Jane Brown, now contends that the monthly payments of income formerly paid to the daughter, Ann Smith, should be paid to her].

6. Petitioner requests instructions directing that _____ [*set forth instructions requested, e.g.,* the trustee distribute the monthly income payments, formerly paid to beneficiary Lucy Smith in equal portions to the remaining named beneficiaries of the trust, to-wit: Fred Smith, Irving Smith, and Elizabeth Smith Green].

7. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

8. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE, petitioner prays for an order:

1. Instructing the trustee with regard to the proper administration of the trust with respect to the matters alleged herein;

2. For costs herein; and

3. For such other orders as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification. See § 560.521.*]

CAUTION:

The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This petition is for use by a trustee to obtain instructions relating to the administration of the trust [see *Prob. Code § 17200(b)(6)*]. It appears that thebeneficiary, as well as the trustee, may petition for instructions to the trustee, and the form may be adapted for use by a beneficiary [*see Estate of Van Deusen (1947) 30 Cal. 2d 285, 289, 182 P.2d 565* (decided under former Prob. Code § 1120, *now see Prob. Code § 15000 et seq.* (administration of trusts generally), 17300-17304 (testamentary trusts subject to continuing jurisdiction))].

[3] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code § 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 6) [*Prob. Code § 17201*]. Notice of a petition regarding a trust is governed by *Prob. Code § 17203(a)*. For detailed discussion, see *§ 560.137[2]*. For a notice form, see *§ 560.600*.

[4] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[5] Allegations

This petition alleges:

- Facts explaining the need for instructions (Paragraph 5) [*see Prob. Code § 17200(b)(6)*]; and
- A statement of the requested instructions (Paragraph 6) [*see Prob. Code § 17200(b)(6)*].

Optional Paragraphs 3 and 4 are for use if particular trust provisions require interpretation.

[6] Decisions

Trustee petitioning for instructions regarding exercise of discretionary power has burden to prove exercise will be reasonable. *Estate of Nicholas (1986) 177 Cal. App. 3d 1071, 1087, 223 Cal. Rptr. 410* (interpreting former Prob. Code § 1120, *now see Prob. Code § 17200(b)(6)*)

Petition for instructions regarding apportionment of inheritance, estate, or death taxes according to terms of will and living trust. *Hoover v. Hartman (1982) 136 Cal. App. 3d 1019, 1029-1030, 186 Cal. Rptr. 669* (interpreting former Prob. Code § 1138.1(a)(4), *now see Prob. Code § 17200(b)(6)*)

Petition for instructions requesting construction of ambiguous terms of trust with respect to distribution after death of certain beneficiaries. *Estate of Hartson (1962) 200 Cal. App. 2d 757, 19 Cal. Rptr. 694* (interpreting former Prob. Code § 1120, *now see Prob. Code § 17200(b)(6)*)

[7] Cross References

For a related form, see *§ 560.521*.

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Chapter 560 TRUSTS: EXPRESS, PUBLIC, CHARITABLE, AND TOTTEN TRUSTS
PART IV. FORMS
A. Administration Of Express Trusts
2. Rights, Liabilities, And Duties Of Trustees

49-560 California Forms of Pleading and Practice--Annotated § 560.556

§ 560.556 Petition [Prob. Code § 17201] for Injunction to Discontinue and Prevent Breach of Trust of Cotrustee [Prob. Code §§ 16420(a)(2), 17200(b)(12)]--By Trustee

[1] FORM Petition [Prob. Code § 17201] for Injunction to Discontinue and Prevent Breach of Trust of Cotrustee [Prob. Code §§ 16420(a)(2), 17200(b)(12)]--By Trustee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*name of trust*]	)	PETITION FOR INJUNCTION
	)	

_____

Petitioner alleges:

1. [*Petitioner's identity and creation of trust. See § 560.553, Paragraph 1.*]

2. [*Basis for venue. See § 560.521, Paragraph 4.*]

3. At all times mentioned herein, _____ [*name of cotrustee against whom injunction is sought*] was and now is a duly appointed cotrustee of the above-described trust] [and is _____ (*specify type of financial institution if trustee is not an individual, e.g.,* a national banking association incorporated under the laws of the United States, engaged in doing business as a trust company in the State of California)].

4. On or about _____ [*date*], _____ [*name of cotrustee*], _____ [*describe past conduct, e.g.,* acting as individual trustee and without prior consultation, knowledge or consent of the

remaining trustees, and without a resolution or meeting of the board of trustees, executed a purported one-year lease of the real property at _____ (*street address and, if any, city*), which is the subject of the trust, to third parties at a rental of $_____ per month. Since executing the purported lease, he has collected and received $_____ from the third parties as rent for the trust property. He now holds and has the possession of the $_____ and refuses to pay it over or make it available to the petitioner or the remaining trustees].

5. _____ [*Name of cotrustee*] has threatened and now threatens to _____ [*describe threatened conduct, e.g.,* continue to collect the monthly rental, and to use the money he has collected to purchase further rental property, against the will of petitioner and without any right to do so].

[6. On or about _____ (*date*), petitioner demanded that _____ (*name of cotrustee*) _____ [stop his wrongful conduct *and/or* not commit his threatened conduct]. He has refused and continues to refuse to refrain from his above-described (threatened) conduct.]

7. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

8. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE, petitioner prays for an order:

1. For a temporary restraining order and a preliminary injunction enjoining _____ [*name of cotrustee*] from in any way using or transferring the money he has collected as rent from the above-described property, from further collecting or attempting to collect future rentals on the property, and from interfering with the collections of those rentals by the authorized trustees].

2. For an injunction permanently enjoining _____ [*name of cotrustee*] from _____ [*describe conduct to be prohibited, e.g.,* collecting or attempting to collect future rentals on the above-described property, and from interfering with the collections of those rentals by the authorized trustees].

3. For an order compelling _____ [*name of cotrustee*] to _____ [*describe redress of breach, e.g.,* pay over to petitioner the sum of $_____].

4. For costs herein; and

5. For such other orders as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification. See § 560.521.*]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This petition is for use by a trustee to seek a temporary restraining order,preliminary injunction, and permanent injunction and any appropriate additional redress against a cotrustee for the cotrustee's breach of the trust [*see Prob. Code § 16420(b)(6)*; *see also St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 356-360, 287 P.2d 387* (interpreting *Civ. Code § 3422(4)* and *Code Civ. Proc. § 526* (grounds for issuance of injunction))].

[3] Allegations

This petition alleges:

- The identity of the cotrustee (Paragraph 3) [*see Prob. Code § 16420(a)*]; and

- A statement describing the cotrustee's past or present conduct warranting injunctive relief (Paragraphs 4, 5) [*see Prob. Code § 16420(a)(2)*; *see also St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 356-357, 287 P.2d 387]* .

Optional Paragraph 6 is for use if petitioner has unsuccessfully demanded that the cotrustee cease present conduct or not commit threatened conduct [*see St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 357, 287 P.2d 387]* .

[4] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code § 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 7) [*Prob. Code § 17201*]. Notice of a petition regarding a trust is governed by *Prob. Code § 17203(a)*. For detailed discussion, see *§ 560.137[2]*. For a notice form, see *§ 560.600*.

[5] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[6] Cross References

For a related form, *see §§ 560.521* and *560.544*.

For discussion and forms relating to injunctions generally, see Ch. 303, *Injunctions*

[7] California Points and Authorities

For memoranda of points and authorities relating to injunctions generally, and specifically relating to an injunction based on an obligation arising from trust, see California Points and Authorities, Ch. 116, *Injunctions*

[8] State Statutes

Injunctive relief for breach of trust. *Prob. Code § 16420(b)(2)*

Petition to redress breach of trust by any available remedy. *Prob. Code § 17200(b)(12)*

[9] Decisions

Minority trustees of charitable corporation can properly maintain action against majority trustees for commission of acts that repudiated charitable purpose of trust. *Holt v. College of Osteopathic Physicians & Surgeons (1964) 61 Cal. 2d 750, 759, 40 Cal. Rptr. 244, 394 P.2d 932*

If there are several trustees, each trustee is under duty to beneficiary to use reasonable care to prevent cotrustee from committing breach of trust or to compel cotrustee to redress breach of trust. *Estate of Hensel (1956) 144 Cal. App. 2d 429, 438, 301 P.2d 105* (petition proceeding to settle accounts under former Prob. Code § 1120 brought by one trustee to surcharge another trustee)

Action by trustee is properly brought against cotrustee to compel performance of duties under trust, enjoin commission of breach of trust, or compel redress of breach of trust. *St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 360, 287 P.2d 387* (interpreting *Civ. Code § 3422(4)* and *Code Civ. Proc. § 526* (grounds for issuance of injunction))

[10] Text References

Restatement (Second) of Trusts §§ 199(b), 200 comment (e)

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Chapter 560 TRUSTS: EXPRESS, PUBLIC, CHARITABLE, AND TOTTEN TRUSTS
PART IV. FORMS
A. Administration Of Express Trusts
2. Rights, Liabilities, And Duties Of Trustees

49-560 California Forms of Pleading and Practice--Annotated § 560.557

§ 560.557 Petition [Prob. Code § 17201] for Resignation of Trustee [Prob. Code §§ 15640(d), 17200(b)(11)]--By Trustee

[1] FORM Petition [Prob. Code § 17201] for Resignation of Trustee [Prob. Code §§ 15640(d), 17200(b)(11)]--By Trustee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*name of trust*]	)	PETITION FOR RESIGNATION OF TRUSTEE
	)	

_____

Petitioner alleges:

1. [*Petitioner's identity and creation of trust. See § 560.554, Paragraph 1.*]

2. [*Basis for venue. See § 560.521, Paragraph 4.*]

3. Due to _____ [*specify reasons for resignation, e.g.,* urgent and compelling personal business reasons that have arisen], it is necessary that petitioner resign as trustee at the earliest convenience of the court.

[*EITHER*]

[4. Petitioner recognizes that his/her resignation will create a vacancy in the office of trustee. The trust instrument does

not provide a practical method of appointing a trustee and does not name a successor trustee. There has been no agreement between all adult beneficiaries entitled to enter into such an agreement to provide a successor trustee in accordance with *Probate Code Section 15660(c)*. Consequently, in accordance with *Probate Code Section 15660(d)*, petitioner, as a person named as trustee in the trust instrument, seeks to nominate _____ (*name*) as successor trustee.]

[*OR*]

[4. Petitioner understands that, contemporaneously with this petition for resignation, an application for appointment of a successor trustee is being made by _____ (*name*), a _____ (person interested in the trust *or* trustee named in the trust instrument)].

[*CONTINUE*]

5. In order to apprise the court of the current status of the trust, petitioner is filing contemporaneously herewith a current account and report of his/her/its acts as trustee and, on acceptance of the tendered resignation, petitioner will render forthwith a final account and report of his/her/its acts as trustee and will pay over, transfer, and deliver the assets of the trust in his/her/its possession to the person directed by the court.

6. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

7. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE, petitioner prays:

1. For an order accepting his/her/its resignation as trustee of the above-described trust; [and]

[*EITHER*]

[2. For appointment of a successor trustee in accordance with petitioner's nomination; and]

[*OR*]

[2. For appointment of a temporary trustee; and]

[*CONTINUE*]

3. For such other orders as the court deems proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification. See § 560.521*.]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This petition is for use by a trustee to tender the trustee's resignation from office[*see Prob. Code §§ 15640(d)* (resignation by court order), 17200(b)(11) (petition for resignation)]. It also contains optional allegations for the nomination of a successor trustee for use if (1) the resigning trustee seeks to nominate a successor or (2) an interested person or a person named as trustee in the trust instrument is petitioning to appoint a successor [*see Prob. Code § 15660* (appointment of trustee to fill vacancy)]. In the prayer, the alternatives set forth in optional Paragraphs 2 are for use if the resigning trustee seeks to nominate a successor [*see Prob. Code § 15660(d)*] or there is no proceeding pending to appoint a successor trustee, and the resigning trustee wishes the court to appoint a temporary trustee [*see Prob. Code § 15640(d)*]. For a form for appointment of a successor trustee by a beneficiary or a cotrustee, *see §§ 560.540* and *560.553*, respectively.

[3] Allegations

This petition alleges the reason for the trustee's resignation (Paragraph 3) [*see Prob. Code §§ 15640* (resignation of trustee), 17200(b)(11) (petition for resignation)]. The alternatives set forth in optional Paragraphs 4 are for use if the resigning trustee seeks to appoint a successor or the trustee is aware that an interested person or a person named as trustee in the trust instrument has initiated proceedings for the appointment of a successor [*see Prob. Code § 15660* (appointment of successor)].

[4] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code § 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 6) [*Prob. Code § 17201*]. Notice of a petition regarding a trust is governed by *Prob. Code § 17203(a)*. For detailed discussion, see *§ 560.137[2]*. For a notice form, see *§ 560.600*.

[5] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and

last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[6] Resignation of Trustee

A trustee who has accepted the trust may resign without a court order only as provided in the trust instrument or with consent of the person holding the power to revoke the trust, or if the trust is not revocable, the consent of all adult beneficiaries with certain rights under the trust or the consent of specified persons of their behalf [*see Prob. Code § 15640(c)*; for discussion, see *§ 560.92*]. Otherwise, the trustee must obtain a court order under *Prob. Code § 15640(d)*, which provides that on the trustee's petition, the court must accept the trustee's resignation [*Prob. Code § 15640(d)*; *cf.* former Prob. Code § 1138.8, which required that the trust be silent with respect to resignation]. The court may also make any orders necessary for the preservation of the trust property, including the appointment of a receiver or a temporary trustee [*Prob. Code § 15640(d)*].

[7] Appointment of Successor Trustee

If certain conditions are satisfied, including the failure of the trust instrument to name a successor trustee, any person named as trustee in the trust instrument may petition for appointing a successor [*see Prob. Code § 15660(d)*]. In addition, *Prob. Code § 17200(a)* states generally that a trustee or beneficiary of a trust may petition the court concerning the internal affairs of the trust; the appointment of a trustee is an enumerated purpose for a petition [*see Prob. Code § 17200(b)(10)*]. Consequently, this form includes an optional provision in which the resigning trustee either wishes to nominate a successor or makes known to the court that he or she is aware of a pending proceeding to appoint a successor trustee [*see Prob. Code § 15660*]. Whether a resigning trustee seeks to nominate a successor will depend largely on the circumstances surrounding the resignation. For example, a trustee who resigns for reasons that are not antagonistic to the trust may have specific reasons for seeking the appointment of a successor.

If the resigning trustee fails to nominate a successor and there is no proceeding pending to nominate a successor, the court in the petition for resignation may make any order necessary for the preservation of the trust property, including appointing a temporary trustee [*Prob. Code § 15640(d)*]. For further discussion of appointment procedures generally, see *§ 560.94[3]*.

[8] Cross References

For a related form, *see §§ 560.521* and *560.553*.

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 560 TRUSTS: EXPRESS, PUBLIC, CHARITABLE, AND TOTTEN TRUSTS
PART IV. FORMS
A. Administration Of Express Trusts
2. Rights, Liabilities, And Duties Of Trustees

49-560 California Forms of Pleading and Practice--Annotated § 560.558

§ 560.558 Petition [Prob. Code § 17201] to Fix Compensation or Allow Greater Compensation [Prob. Code §§ 15680(b), 17200(b)(9)]--By Trustee

[1] FORM Petition [Prob. Code § 17201] to Fix Compensation or Allow Greater Compensation [Prob. Code §§ 15680(b), 17200(b)(9)]--By Trustee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the _____ [*name of trust*]	))))	NO. _____ PETITION TO _____ [FIX *or* ALLOW GREATER] COMPENSATION OF TRUSTEE

_____

Petitioner alleges:

1. [*Petitioner's identity and creation of trust. See § 560.554, Paragraph 1.*]

2. [*Basis for venue. See § 560.521, Paragraph 4.*]

[*EITHER*]

3. Pursuant to the above-described trust, petitioner, as trustee, is entitled to _____ [*specify, e.g.,* $_____ per year], as compensation for performing the duties that are described in the trust.

[*OR*]

3. The above-described trust is silent with regard to compensation to the trustee.

[*CONTINUE*]

4. _____ [*Set forth basis for requested compensation, e.g.*, Pursuant to the order of this court dated _____ (*date*), petitioner, as trustee, has incurred additional duties to those originally set forth in the above-described trust, to-wit: administering two distinct trusts instead of the original trust. Moreover, pursuant to the will of Montford P. Wells, effective _____ (*date*), a copy of which is attached, marked Exhibit "A," and made a part hereof, petitioner, as trustee, accepted additions to the trust in the nature of six parcels of real property as described therein].

5. To effectively administer the above-described duties, petitioner requires _____ [*compensation requested, e.g.*, $_____ per year payable at the end of each fiscal year beginning _____ (*date*)].

6. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

7. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE, petitioner prays for an order:

1. _____ [Fixing *or* Allowing] compensation to petitioner, as trustee, _____ [*specify compensation being sought, e.g.*, in the amount of $_____ per year];

2. For costs herein; and

3. For such other orders as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification. See § 560.521.*]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This petition is for use by a trustee to obtain a court order fixing compensation if the trust is silent in that regard, or allowing compensation greater than that provided for in the trust instrument [*see Prob. Code § 15680(b)*, (court allowance of greater compensation), 17200(b)(9) (petition to fix, allow, or review compensation)].

[3] Allegations

This petition alleges:

- The existence or nonexistence of trust provisions regarding compensation(Paragraph 3) [*see Prob. Code § 15680* (trust provision for compensation), 15681 (no trust provision for compensation)];

- Facts explaining the need for the court to fix compensation or allow compensation greater than that provided for in the instrument (Paragraph 4) [*see Prob. Code §§ 15680(b)(1)* (change in compensation based on change in duties), 17200(b)(9) (petition to fix or allow compensation)]; and

- The amount of compensation requested (Paragraph 5) [*see Prob. Code §§ 15680(b)(1)* (change in compensation based on change in duties), 15682 (periodic prospective payments)].

[4] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code § 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 6) [*Prob. Code § 17201*]. Notice of a petition regarding a trust is governed by *Prob. Code § 17203(a)*. For detailed discussion, see *§ 560.137[2]*. For a notice form, see *§ 560.600*.

[5] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[6] Compensation of Trustee

If the trust instrument provides for the trustee's compensation, the trustee is entitled to be compensated in accordance with the trust instrument, subject to *Prob. Code § 15680(b)* and except as provided in *Prob. Code § 15688* (public guardian compensation) [*Prob. Code § 15680(a)*]. On proper showing, the court may fix or allow greater or lesser compensation than could be allowed under the terms of the trust in any of the following circumstances [*Prob. Code § 15680(b)*]:

- If the duties of the trustee are substantially different from those contemplated when the trust was created.

- If the compensation in accordance with the terms of the trust would be inequitable or unreasonably

low or high.

- In extraordinary circumstances calling for equitable relief.

An order fixing or allowing greater or lesser compensation under *Prob. Code § 15680(b)* applies only prospectively to actions taken in administration of the trust after the order is made [*Prob. Code § 15680(c)*].

In determining or approving a trustee's compensation, the court may consider, among other factors, the following:

- The gross income of the trust estate;
- The success or failure of the trustee's administration;
- Any unusual skill, expertise, or experience brought to the trustee's work;
- The fidelity or disloyalty shown by the trustee;
- The amount of risk and responsibility the trustee assumed;
- The time spent in the performance of the trustee's duties;
- The custom in the community where the court is located as to compensation authorized by settlers, as to compensation allowed by the court, or as to charges of corporate trustees for trusts of similar size and complexity; and
- Whether the work the trustee performed was routine or required more than ordinary skill or judgment [*Cal. Rules of Ct., Rule 7.776*].

For further discussion, see *§ 560.89*.

[7] State Statutes

Compensation of trustee when there is trust provision therefor. *Prob. Code § 15680*

Compensation if trust silent. *Prob. Code § 15681*

Periodic compensation. *Prob. Code § 15682*

Petition for fixing or allowing compensation. *Prob. Code § 17200(b)(9)*

[8] California Rules of Court

Factors to consider in determining trustee's compensation. *Cal. Rules of Ct., Rule 7.776*

[9] Cross References

For a related form, see *§ 560.521*

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A. Administration Of Express Trusts
2. Rights, Liabilities, And Duties Of Trustees

49-560 California Forms of Pleading and Practice--Annotated § 560.559

§ 560.559 Account and Report [Prob. Code §§ 1060-1064, 16063] and Petition [Prob. Code § 17200(b)(5)] for Settlement--By Trustee

[1] FORM Account and Report [Prob. Code §§ 1060-1064, 16063] and Petition [Prob. Code § 17200(b)(5)] for Settlement--By Trustee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*name of trust*]	)	ACCOUNT AND PETITION TO SETTLE AC-
	)	COUNT

_____

Petitioner alleges:

1. [*Petitioner's identity and creation of trust. See § 560.554, Paragraph 1.*]

2. [*Basis for venue. See § 560.521, Paragraph 4.*]

3. [Pursuant to the order of this court dated _____ (*date*)] [P]etitioner submits his/her [final] account and report of administration of the trust for settlement and allowance. A complete, true, and correct account of the receipts and disbursements of principal and income that have occurred _____ [during the last complete fiscal year of the trust *or* since the last account] and a statement of the assets and liabilities of the trust as of the end of the _____ [last complete fiscal year of the trust *or* the period covered by the account] is attached as Exhibit "B" and made a part hereof.

4. During the period covered by this account and report, petitioner has managed and administered the trust estate, making collections of income or principal, investing the sums as were available for investment, retaining or disposing of properties and investments, allocating gains, profits, dividends, or income to income or principal account, making distribution of the net income or corpus of the trust estate to the beneficiaries, and exercising his/her powers and discretions as trustee, all in accordance with law and the terms of the trust as set forth and declared in the _____ [*describe trust instrument, e.g.,* declaration of trust].

5. When disbursements of income or principal, if any, to beneficiaries or in connection with administration of the trust are shown by the schedules and are not mandatory under the terms of the declaration of trust, they have been duly made pursuant to the proper exercise of discretionary power conferred on petitioner as trustee by law or in the declaration of trust, and in accordance with the conditions and limitations, if any, therein prescribed.

6. All investments made on property purchased for and assets retained in the trust during the current accounting period were in conformity with law or were authorized by the terms of the trust and have been carefully, prudently, and in good faith made, purchased, or retained for the purpose of serving the best interests of the trust and all persons interested therein.

7. The names and last known addresses of the beneficiaries of the trust, so far as known to petitioner, are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

[*EITHER*]

8. During the account period, petitioner has not hired any person who has a family or affiliate relationship with the petitioner.

[*OR*]

8. During the account period, petitioner hired _____ [*name of agent*], who is _____ [*describe family or affiliate relationship to petitioner, e.g.,* the son of the petitioner *or* the Apex Accounting Corporation, a California corporation of which petitioner is currently the president and chief executive officer,] to _____ [*describe capacity in which agent was hired or duties agent performed, e.g.,* act as a bookkeeper for the trust *or* act as a real estate broker for the purpose of selling real estate belonging to the trust]. During the account period, petitioner has paid _____ [*name of agent*] the sum of $_____ from the assets subject to the account as compensation for his/her/its services on behalf of the trust.

[*CONTINUE with one of the following alternatives*]

[*EITHER, if no other compensation has been paid to petitioner:*]

9. Petitioner is entitled to compensation for services rendered as trustee during the account period in the total amount of $_____. This is reasonable compensation and is computed as follows: _____ [*specify*]. Petitioner has not received any other compensation from the assets subject to the account during the account period.

[*OR, if other compensation has been paid:*]

9. Petitioner is entitled to compensation for services rendered as trustee during the account period in the total amount of $_____. This is reasonable compensation and is computed as follows: _____ [*specify*]. As set out in Schedule _____ to the _____ [*specify, e.g.*, first annual] account, filed herewith, petitioner has received a payment [of *or* on account of his/her]compensation in the sum of $_____ from the assets subject to the account, without prior court order, leaving a balance due of $_____.

[*CONTINUE with one of the following alternatives*]

[*EITHER, if no other compensation has been paid to attorney:*]

10. Petitioner's attorney, _____ [*name*], is entitled to compensation for services rendered as attorney for petitioner during the account period in the total amount of $_____. This is reasonable compensation and is computed as follows: _____ [*specify*]. Petitioner's attorney has not received any other compensation from the assets subject to the account during the account period.

[*OR, if other compensation has been paid:*]

10. Petitioner's attorney, _____ [*name*], is entitled to compensation for services rendered as attorney for petitioner during the account period in the total amount of $_____. This is reasonable compensation and is computed as follows: _____ [*specify*]. As set out in Schedule _____ to the _____ [*specify, e.g.*, first annual] account, filed herewith, petitioner's attorney has received a payment [of *or* on account of his/her] compensation in the sum of $_____ from the assets subject to the account, without prior court order, leaving a balance due of $_____.

[*CONTINUE*]

11. The trustee's and attorney's fees allowed should be charged to _____ [trust income *and/or* principal] as follows: _____ [*specify*].

12. During the accounting period, all of the cash belonging to the trust estate has been invested and maintained in interest bearing accounts or in investments authorized by law or by the governing instrument, except for an amount of cash that is reasonably necessary for the orderly administration of the trust estate.

13. Any recipient of the account accompanying this petition has a right to petition the court pursuant to *Probate Code Section 17200* to obtain court review of the account and of the acts of petitioner. Claims against petitioner for breach of trust may not be made after the expiration of three years from the date the beneficiary receives an account or report disclosing facts giving rise to the claim.

WHEREFORE petitioner prays for an order and judgment as follows:

1. Settling and allowing the account as filed;

2. Ratifying, confirming, and approving all of the acts and transactions of petitioner as trustee;

3. Allowing reasonable compensation to petitioner for ordinary services rendered as trustee;

[4. Instructing petitioner with regard to _____ (*describe action for which instruction is desired, e.g.,* the distribution of the trust property);]

5. Allowing and directing petitioner to pay to _____ [*name of attorney*] reasonable fees for ordinary legal services rendered as attorney for the trustee; and

6. For such other orders as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification. See § 560.521.*]

EXHIBIT B--ACCOUNT
Summary of Account
(From _____ [*date*] to _____ [*date*])

CHARGES

Property on hand at beginning of account period	$_____
Additional property received (or supplemental inventories)	$_____
Income receipts during account period (Schedule A)	$_____
Principal receipts during account period (Schedule B)	$_____
Net income from trade or business (Schedule E)	$_____
Gains on sales or other dispositions (Schedule F)	$_____

TOTAL CHARGES	$_____

CREDITS

Income disbursements during account period (Schedule C)	$_____
Principal disbursements during account period (Schedule D)	$_____
Net loss from trade or business (Schedule E)	$_____
Losses on sales or other dispositions (Schedule G)	$_____
Distributions to beneficiaries (Schedule H)	$_____
Property on hand at end of account period (carry value) (Schedule I)	$_____
TOTAL CREDITS	$_____

SCHEDULE A. INCOME RECEIPTS DURING ACCOUNT PERIOD

[*Record each receipt in chronological order, e.g.:*]

05/22/98	Payment of interest on note from John Q. Smith dated 10/15/96	$_____
09/01/98	Dividend paid on 2,000 shares, Class B stock of Microtechnics Corporation	$_____

[*Add additional items as needed*]

TOTAL	$_____

SCHEDULE B. PRINCIPAL RECEIPTS DURING ACCOUNT PERIOD

[*Record each receipt in chronological order, e.g.:*]

05/22/98	Payment of face value, note, from John Q. Smith dated 15/25/95	$_____

[*Add additional items as needed*]

TOTAL $_____

SCHEDULE C. INCOME DISBURSEMENTS DURING ACCOUNT PERIOD

[*Record each disbursement in chronological order, e.g.:*]

05/22/98 Payment of interest on note to Alan Jones dated 06/16/96 $_____

09/01/98 Repairs to house at 200 Vizcaino Lane, San Cristobal, California $_____

[*Add additional items as needed*]

TOTAL $_____

SCHEDULE D: PRINCIPAL DISBURSEMENTS DURING ACCOUNT PERIOD

[*Record each disbursement in chronological order, e.g.:*]

02/25/98 Sally Meadows, M.D.
expenses of last illness of settlor $_____

09/01/98 Green and Green Funeral Home
expenses of funeral of settlor $_____

[*Add additional items as needed*]

TOTAL $_____

SCHEDULE E: NET INCOME OR LOSS FROM TRADE OR BUSINESS

Income Received During Account Period from _____ [*name of business*]

_____ [*describe item*] $_____

_____ [*describe item*] $_____

_____ [*describe item*] $_____

_____ [*describe item*] $_____

Expenses During Account Period from _____ [*name of business*]

_____ [*describe item*] $_____

_____ [*describe item*] $_____

_____ [*describe item*] $_____

_____ [*describe item*] $_____

NET INCOME (OR LOSS) $_____

SCHEDULE F: GAINS ON SALES OR OTHER DISPOSITIONS

[List all property on hand at end of account period, setting forth value at which property is carried on books:]

1. Inventory Item No. _____, [describe] $_____

2. Appraised at $_____

3. Sold for $_____

4. Gain $_____

[*Describe other items as necessary*]

TOTAL $_____

SCHEDULE G: LOSSES ON SALES OR OTHER DISPOSITIONS

[List all property on hand at end of account period, setting forth value at which property is carried

on books:]

1.	Inventory Item No. _____, [describe]	$_____
2.	Appraised at	$_____
3.	Sold for	$_____
4.	Loss	$_____

[*Describe other items as necessary*]

TOTAL		$_____

SCHEDULE H: DISTRIBUTIONS TO BENEFICIARIES

04/20/98	To Mary Ann Brown tuition costs	$_____
08/15/98	To Joseph Brown, living expenses	$_____
11/15/98	To San Cristobal General Hospital, medical expenses for Rosemary Brown	$_____
12/01/98	To Joseph Brown, 1997 Dodge Ram truck, distributed in accordance with terms of trust instrument	$_____
TOTAL		$_____

SCHEDULE I: PROPERTY ON HAND AT END OF ACCOUNT PERIOD (CARRY VALUE)

[List all property on hand at end of account period, setting forth value at which property is carried on books:]

1.	Cash on hand	$_____
2.	Inventory Item No. _____, 40 acres of unimproved real property situated in San Cristobal, California	$_____
3.	Inventory Item No. _____, U.S. stamp collection	$_____

_

[*List additional items as necessary:*]

TOTAL $_____
_____
_

SCHEDULE J: PROPERTY ON HAND AT END OF ACCOUNT PERIOD (ESTIMATED MARKET VALUE)

[List all property on hand at end of account period, setting forth estimated market value of each item.]

1.	Cash on hand	$_____ _____ _
2.	Inventory Item No. _____, 40 acres of unimproved real property situated in San Cristobal, California	$_____ _____ _
2.	Inventory Item No. _____, U.S. stamp collection	$_____ _____ _

[*List additional items as necessary:*]

TOTAL $_____
_____
_

SCHEDULE K: PROPERTY ON HAND AT BEGINNING OF ACCOUNT PERIOD (ESTIMATED MARKET VALUE)

[In this account, which is required only if the account is not an initial account, list all property on hand at beginning of account period, setting forth estimated market value of each item.]

1.	Cash on hand	$_____ _____ _
2.	Inventory Item No. _____, House and lot at 4111 Navidad Lane, San Cristobal, California	$_____ _____ _
3.	Inventory Item No. _____, Original oil painting by Jasper Johns	$_____ _____ _

[*List additional items as necessary:*]

TOTAL $_____
_____
_

SCHEDULE L: PURCHASES OR OTHER CHANGES IN FORM OF ASSETS DURING ACCOUNT PERIOD

[Set forth any purchases or other changes in forms of assets, such as by sale, exchange, or otherwise, during account period.]

To _____ [*name*]

1.	Inventory Item No. _____, Steinway Grand Piano, Model D, sold on July 1, 1998, for cash in the amount of	$_____
2.	Inventory Item No. _____, real property improved by warehouse building located at 6630 Cabrillo Boulevard, San Cristobal, California, exchanged on August 31, 1998, for 40 acres of unimproved real property at 2000 Vizcaino Road, San Cristobal, California, with a fair market value of	$_____

[*List additional items as necessary:*]

TOTAL $_____

SCHEDULE M: PROPOSED DISTRIBUTION, INCLUDING DISTRIBUTION OF NET INCOME

Petitioner proposes to distribute assets of the estate as follows:

To _____ [*name*]

1.	Inventory Item No. _____, original oil painting by Winslow Homer	$_____
2.	Inventory Item No. _____, 40 acres of unimproved real property at 2000 Vizcaino Road, San Cristobal California,	$_____
3.	Net income received during account period from Item No. 2 above	$_____
	Total distributions to _____ [*name*]	$_____

To _____ [*name*]

1.	Inventory Item No. _____, 1997 Buick Le Sabre,	$_____
2.	Inventory Item No. _____, 2,000 shares of the Class B stock, Microtechnics Corporation,	$_____
3.	Inventory Item No. _____, Net income received during account period from Item No. 2 above	$_____
4.	Inventory Item No. _____ House and lot located at 2000 Shady Lane, San Cristobal, California,	$_____
5.	Inventory Item No. _____, Household furniture and furnishings located at 2000 Portola Lane, San	$_____

	Cristobal, California,	_
	Total distributions to _____ [*name*]	$_____
		_____
		_

[*Set forth additional items of distribution as needed*]

TOTAL DISTRIBUTIONS		$_____
		_____
		_

SCHEDULE N: ALLOCATION OF RECEIPTS AND DISBURSEMENTS BETWEEN PRINCIPAL AND INCOME

	RECEIPTS ALLOCATED TO PRINCIPAL	
1.	World Concepts, Inc., 100 shares, common stock, dividend for period 1/1/98-12/31/99	$_____
		_____
		_
2.	Travelwide Company, 500 shares, common stock, dividend for period 1/1/98-12/31/99	$_____
		_____
		_

[*Add additional items as necessary*]

TOTAL RECEIPTS ALLOCATED TO PRINCIPAL		$_____
		_____
		_
	RECEIPTS ALLOCATED TO INCOME	
1.	City Savings, money market account, dividend for period 1/1/98-12/31/98	$_____
		_____
		_
2.	$50,000 face value, U. S. Treasury notes, interest paid June 1, 1998	$_____
		_____
		_
TOTAL RECEIPTS ALLOCATED TO PRINCIPAL		$_____
		_____
		_

SCHEDULE O: INCOME, DISBURSEMENTS, AND PROCEEDS OF SALE ATTRIBUTABLE TO SPECIFICALLY DEVISED PROPERTY

	INCOME ATTRIBUTABLE TO SPECIFICALLY DEVISED PROPERTY	
1.	Inventory Item No. _____, real property improved with warehouse building located at 6630 Cabrillo Boulevard, San Cristobal, California,net rents received during account period from same	$_____
		_____
		_
2.	Inventory Item No. _____, 2,000 shares of the Class B stock, Micro Force Corporation, dividends received during account period from same	$_____
		_____
		_

[*Add additional items as necessary*]

SCHEDULE P: CALCULATION OF INTEREST TO BE PAID TO _____ [GENERAL PECUNIARY DEVISES *or* ANNUITIES *or DEVISES FOR MAINTENANCE*]

INTEREST TO BE PAID TO GENERAL DEVISE OF $2,000 TO _____

Interest at the rate of _____ percent per annum computed from _____ [*date*] to _____ [*date*]	$_____

[*Add additional items as necessary*]

SCHEDULE Q: LIABILITIES OF TRUST ESTATE

[*List all liabilities of trust estate, including liabilities which are a lien on assets, taxes due but unpaid as shown on filed returns or assessments received after filing returns, all notes payable, any judgments for which trust estate is liable, and any other material liability*]

Unsecured liability owing to All-Nite Loan Company, for money lent to settlor on or about _____ [*date*], principal plus interest accrued to _____ [*date*]	$_____
Judgment in favor of Bulldog Creditors, Inc., entered on _____ [*date*] in the Superior Court of the State of California for the County of Imperial, principal plus interest accrued to _____ [*date*]	$_____

[*Add additional items as needed*]

CAUTION:

The petition, report, and account must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This petition is for use by a trustee to submit an account to the court [*see Prob. Code § 17200(b)(5)*].

The exhibits in this form may be adapted for use as an account and report submitted directly to the person entitled to it under *Prob. Code §§ 16060, 16062*, or former Prob. Code § 1120.1a (regarding trust removed from continuing jurisdiction under former law).

[3] When Account Required to be Filed With Court

The trustee is generally required to submit an account only to the person entitled to an accounting, rather than to file it with the court [*see Prob. Code §§ 16060* (general duty to keep beneficiaries informed), 16061 (request by beneficiary), 16062 (duty to account annually, at termination of trust, and on change of trustees), 16064 (exceptions); *see also Prob. Code § 15800* (person holding power to revoke trust entitled to rights otherwise afforded beneficiary); for further discussion, see *§ 560.80*]. One circumstance under which a trustee would file an account with the court is pursuant to a court order compelling an account [*see, e.g., Prob. Code § 17200(b)(7)*; *see also §§ 560.540, 560.547*, 17]. Moreover, a trustee may file an account with the court on the trustee's own petition, in order to obtain court supervision and approval of the account [*see Prob. Code § 17200(b)(5)*]. The trustee therefore might combine a petition rendering an account with request for other relief [*see, e.g., Prob. Code § 17200(b)(4)* (determination of distribution on termination of trust), 17200(b)(6) (instructions), 17200(b)(11) (resignation); *see §§ 560.582, 560.554*, and 24, respectively].

[4] Contents of Petition

The petition for approval of the account must include all of the following [*Prob. Code § 1064(a)*; *see Prob. Code § 39* ("fiduciary" means trustee)]:

- A description of all sales, purchases, changes in the form of assets, or other transactions occurring during the period of the account that are not otherwise readily understandable from the schedules;

- An explanation of any unusual items appearing in the account;

- A statement of all compensation paid from the assets subject to the account to the trustee or to the attorneys for the trustee other than pursuant to a prior court order (Paragraphs 9 and 10);

- A statement disclosing any family or affiliate relationship between the trustee and any agent hired by the trustee during the accounting period (Paragraph 8). For this purpose, "family" means a relationship created by blood or marriage, and "affiliate" means an entity that directly or indirectly through one or more intermediaries controls, is controlled by, or is under common control with, the trustee [*Prob. Code § 1064(c)*]; and

- An allegation disclosing whether all of the cash has been invested and maintained in interest bearing accounts or in investments authorized by law or the governing instrument, except for an amount of cash that is reasonably necessary for the orderly administration of the estate (Paragraph 12).

The trustee's account must include the following information [*Prob. Code § 16063(a)*]:

- A statement of receipts and disbursements of principal and income that have occurred during the last complete fiscal year of the trust or since the last account.

- A statement of the assets and liabilities of the trust as of the end of the last complete fiscal year of the trust or as of the end of the period covered by the account.

- The trustee's compensation for the last complete fiscal year of the trust or since the law account.

- The agents hired by the trustee, their relationship to the trustee, if any, and their compensation, for the last complete fiscal year of the trust or since the last account.

- A statement that the recipient of the account may petition the court pursuant to *Prob. Code § 17200* to obtain a court review of the account and of the acts of the trustee.

- A statement that claims against the trustee for breach of trust may not be made after the expiration of three years from the date the beneficiary receives an account or report disclosing facts giving rise to the claim.

[5] Contents of Account

[a] In General

All accounts filed under the Probate Code are subject to the requirements of *Prob. Code §§ 1060-1064*, which became operative on July 1, 1997 [*Prob. Code § 1060.5*]. Accounts rendered by trustees must be presented in the manner provided in these sections [*Prob. Code § 16062(a)*]. In addition, *Cal. Rules of Ct., Rule 7.901* prescribes rules for

trustee's accounts.

Every account filed under the Probate Code must include a financial statement and a report of administration as provided in *Prob. Code §§ 1060-1064* [*Prob. Code § 10900(a)*]. Every account must also state the period that it covers, and contain a summary showing all of the following, to the extent applicable [*Prob. Code § 1061(a)*; *Cal. Rules of Ct., Rule 7.901(a)*]:

- The property on hand at the beginning of the account period. If the account is the first account, this will be the value of the property initially received by the trustee [*see Prob. Code § 39* ("fiduciary" includes trustee)]. If it is a subsequent account, it will be the property on hand at the end of the prior account [*Prob. Code § 1061(a)(1)*].

- The value of any assets received during the account period that are not assets on hand as of the commencement of the administration of an estate.

- The amount of any receipts of income or principal, excluding items listed under the first two categories immediately above (Schedules A and B) or receipts from a trade or business.

- Net income from a trade or business (Schedule D).

- Gains on sales (Schedule F).

- The amount of disbursements, excluding disbursements for a trade or business or distributions (Schedules C and D).

- Loss on sales (Schedule G).

- Net loss from trade or business (Schedule E).

- Distributions to beneficiaries (Schedule H).

- Property on hand at the end of the account period, stated at its carry value (Schedule I).

[b] Statutory Format

Prob. Code § 1061(b) establishes a statutory format for the account summary. The format prescribes specific categories of items that must be included, unless they are inapplicable [*Prob. Code § 1061(b)*]. These categories are as follows [*Prob. Code § 1061(b)*]:

```
CHARGES:
Property on hand at beginning of account (or Invent-
ories)
Additional property received (or supplemental in-
ventories)
Receipts (Schedule _____)
Gains on Sale or Other Disposition (Schedule
_____)
Net income from trade or business (Schedule
_____)
Total Charges:
CREDITS:
```

```
Disbursements (Schedule _____)
Losses on Sale or Other Disposition (Schedule
_____)
Net loss from trade or business (Schedule
_____)
Distributions (Schedule _____)
Property on hand at close of account (Schedule
_____)
Total Credits:
```

Amounts must be shown for each of the categories in dollars [*Prob. Code § 1061(b)*]. "Net income" and "net loss" must be determined in accordance with general accounting principles and need not be the same as the "net income" and "net loss" reported on the tax returns for the account period [*Prob. Code § 1061(d)*]. The total charges must equal the total credits [*Prob. Code § 1061(c)*].

[c] Schedules of Receipts, Disbursements, Income or Loss, etc.

The summary of account [*see Prob. Code § 1061*] must be supported by detailed schedules showing the following [*Prob. Code § 1062*]:

- Receipts, showing the nature or purpose of each item, the source of the receipt, and the date (Schedules A and B).
- Disbursements, including the nature or purpose of each item, the name of the payee, and the date (Schedules C and D).
- Net income or loss from a trade or business. It will be sufficient if the summary provides the information disclosed on Schedule C or Schedule F of the federal income tax return (Schedule E).
- Calculation of gains or losses on sales or other dispositions (Schedules F and G).
- Distributions of cash or property to beneficiaries, showing the date and amount of each, with the distribution of property shown at its carry value (Schedule H).
- An itemized list of property on hand, describing each item at its carry value (Schedule I).

[d] Market Value of Assets

All accounts must also include an additional schedule showing the estimated market value of the assets on hand as of the end of the account period (Schedule J) [*Prob. Code § 1063(a)*]. If the account is not the first account, there must also be a schedule of the estimated market value of the assets on hand as of the beginning of the accounting period (Schedule K) [*Prob. Code § 1063(a)*]. The requirement of an estimated value of real estate, a closely held business, or other assets without a ready market may be satisfied by a good faith estimate by the trustee [*Prob. Code § 1063(a)*].

Additionally, if the guardian or conservator has knowledge of any real property of the conservatee or ward located in a foreign jurisdiction, the guardian or conservator must include an additional schedule that identifies the real property, provides a good faith estimate of the fair market value of the real property, and states what action, if any, will or has been taken to preserve and protect the real property, including a recommendation whether an ancillary proceeding is necessary to preserve and protect the real property [*Prob. Code § 1063(h)*].

[e] Purchases or Other Changes in Form of Assets

If there were purchases or other changes in the form of assets occurring during the account period, there must be a schedule showing these transactions [*Prob. Code § 1063(b)*]. However, no reporting is required for transfers between cash or accounts in a financial institution or money market mutual funds [*Prob. Code § 1063(b)*; *see Prob. Code § 8901(d)* (appraisal of cash deposits and money market mutual funds)].

[f] Allocation of Receipts Between Principal and Income

If a trust will be distributed to an income beneficiary, there must be a schedule showing an allocation of receipts and disbursements between principal and income [*Prob. Code § 1063(c)*; *Cal. Rules of Ct., Rule 7.901(c)*].

[g] Specifically Devised Property

If there is specifically devised property, there must be an additional schedule accounting for income, disbursements, and proceeds of sale pursuant to *Prob. Code §§ 12002* and *16340(a)* [*Prob. Code § 1063(d)*]. *Prob. Code § 12002* prescribes rules for allocating income and expense to specific devises, and *Prob. Code § 16340* prescribes rules for paying income and interest after death or end of income interest, including specific gifts, general pecuniary gifts, annuities, and gifts for maintenance.

[h] Interest on Pecuniary Devises and Annuities

If any interest has been paid or is to be paid to general pecuniary devises, annuities, or devises for maintenance, there must be a schedule showing the calculation of the interest [*Prob. Code § 1063(e)*; *see Prob. Code §§ 12003* (interest on general pecuniary devise), 12004 (interest on annuity), 12005 (interest on devise for maintenance), 16340(b) (interest after death or end of income interest)]. Interest on a general pecuniary gift distributable under a trust is not payable when the trust was created before the effective date of a prior version of *Prob. Code § 16340(b)* [*Remsen v. Lavacot (2001) 87 Cal. App. 4th 421, 429, 104 Cal. Rptr. 2d 612* .

[i] Proposed Distributions

If the accounting contemplates a proposed distribution, there must be a schedule setting forth the proposed distribution, including the allocation of income required under *Prob. Code § 12006* (Schedule M) [*Prob. Code § 1063(f)*]. *Prob. Code § 12006* prescribes rules for distribution of net income received during administration and not otherwise devised. If the distributionrequires an allocation between trusts, the allocation must be set forth on the schedule, unless the allocation is to be made by a trustee after receipt of the assets. If the distribution requires valuation of assets as of the date of distribution, the schedule must set forth the fair market value of those assets [*Prob. Code § 1063(f)*].

[j] Liabilities

If at the end of the accounting period there are liabilities of the trust, except current or future periodic payments, including rent, salaries, utilities, or other recurring expenses, there must be a schedule showing the following (Schedule Q) [*Prob. Code § 1063(g)*]:

- All liabilities that are a lien on assets.
- Taxes due but unpaid as shown on filed returns or assessments received after the filing of returns.
- All notes payable.
- Any judgments for which the trust is liable.

- Any other material liability.

Monthly payments, including rent, utilities, salaries, or other recurring expenses need not be separately scheduled [*Prob. Code § 1063(g)*].

[k] Trustee Entitled to Rely on Account of Conservator or Guardian

When a trustee receives assets from the conservator of a deceased conservatee or the guardian of a deceased ward, the trustee may incorporate by reference any accounting provided by the conservator or guardian for the decedent for the period subsequent to the date of death [*Prob. Code § 10902*]. The trustee is entitled to rely on such an accounting and has no duty to independently investigate or verify the transactions report in it [*Prob. Code § 10902*].

[l] No Requirement for Other Information

Before the operative date of *Prob. Code §§ 1060-1064* (January 1, 1997), some information in addition to that required by statute was required by local court rules. However, *Prob. Code § 1060* explicitly states that *Prob. Code §§ 1060-1064* govern all accounts to be filed with the court and that, except as specifically provided elsewhere in the code, or unless good cause is shown therefore, no information in addition to that required in *Prob. Code §§ 1060-1064* need be in an account.

[m] Verification

All accounts must be verified [*Prob. Code § 1021(a)(1)*]. An account must be verified by the person who has the duty to make it or, if there are two or more parties with that duty, by any of them [*Prob. Code § 1021(b)(2)*].

[6] State Statutes

Accounts filed under Probate Code. *Prob. Code §§ 1060-1064*

Statutes govern all accounts under Probate Code. *Prob. Code § 1060*

July 1, 1997, operative date. *Prob. Code § 1060.5*

Summary of account. *Prob. Code § 1061*

Detailed schedules supporting summary. *Prob. Code § 1062*

Additional schedules. *Prob. Code § 1063*

Petition for approval or accompanying report. *Prob. Code § 1064*

Trustee's duty to report information and account to beneficiaries. *Prob. Code §§ 16060-16064*

Duty to report information to beneficiaries. *Prob. Code § 16060*

Duty to account to beneficiaries. *Prob. Code § 16062*

Contents of account. *Prob. Code § 16063*

Exceptions to duty to report information or account. *Prob. Code § 16064*

[7] California Rules of Court

Identification of all relief sought in title of account. *Cal. Rules of Ct., Rule 7.102*

Statement in account of period covered by account. *Cal. Rules of Ct., Rule 7.901(a)*

Allocation of receipts and disbursements between principal and income if trust distributes income. *Cal. Rules of Ct., Rule 7.901(c)*

[8] Local Rules of Court

[a] Alameda County

Trustee's Accounts. Alameda Co. Super. Ct. Rules, Rule 12.16.1

[b] Los Angeles County

Trustee's Accounts. Los Angeles Co. Super. Ct. Rules, Rule 10.181

[c] Orange County

Accounts, compensation, and distributions. Orange Co. Super. Ct. Rules, Div. VI, Rule 608.01 et seq.

[d] Riverside County

Accounts, fees, and distributions. Riverside Co. Consol. Ct. Rules, Rule 6.1001 et seq.

[e] San Francisco

Accounts. San Francisco City & County Uniform Local Rules of Court, Rules 14.74, 14.76

[9] Cross References

For a related form, see *§ 560.521*.

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 560 TRUSTS: EXPRESS, PUBLIC, CHARITABLE, AND TOTTEN TRUSTS
PART IV. FORMS
A. Administration Of Express Trusts
2. Rights, Liabilities, And Duties Of Trustees

49-560 California Forms of Pleading and Practice--Annotated § 560.560

§ 560.560 Order [Prob. Code § 17206] Granting Trustee Relief as Prayed [Prob. Code § 17200(b)]

[1] FORM Order [Prob. Code § 17206] Granting Trustee Relief as Prayed [Prob. Code § 17200(b)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the _____	)	NO. _____
[*name of trust*]	)	ORDER _____ [*specify, e.g.,* AC-
	)	CEPTING RESIGNATION OF TRUSTEE]

_____

This proceeding for _____ [*specify relief prayed for, e.g,* accepting the resignation of the trustee] of the _____ [*name of trust*] on the verified petition of _____ [*name of petitioner*], trustee [, and the return and _____ (*specify papers filed in opposition, e.g.,* response) of the beneficiary _____ (*name*)], came on regularly for hearing on _____ [*date*], before this court, sitting without a jury. Petitioner appeared by counsel _____ [*name of petitioner's counsel*]. [_____ (*Name*), as beneficiary, appeared by counsel _____ (*name of beneficiary's counsel*).] [Evidence was introduced on behalf of both parties and the matter was argued and submitted for decision.]

On proof made to the satisfaction of the court that the petition ought to be granted,

IT IS THEREFORE ORDERED as follows:

1. That _____ [*specify order granted, e.g.,* the tendered resignation of _____ (*name of petitioner*) as trustee of the _____ (*name of trust*), is accepted, effective on settlement of his/her/its accounts and delivery of all the trust assets to the person whom the court shall appoint to receive them].

[2. That _____ (*specify any further order, e.g.,* _____ (*name of petitioner*) render a final account and report of his/her/its acts as trustee within a period of _____ (*number*) days, and on settlement and allowance of the account, pay over, transfer, and deliver the assets of the trust in his/her/its possession as directed by the court).]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This order is for use to grant relief sought by a trustee after a hearing on thetrustee's petition. The example shown is for an order granting the relief as prayed in a petition to accept the resignation of the trustee [*see Prob. Code §§ 15640* (resignation by court order), 17200(b)(11) (petition for resignation) and *see § 560.557*].

[3] Cross References

For related forms, *see §§ 560.552, 560.557*.

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Chapter 560 TRUSTS: EXPRESS, PUBLIC, CHARITABLE, AND TOTTEN TRUSTS
PART IV. FORMS
A. Administration Of Express Trusts
2. Rights, Liabilities, And Duties Of Trustees

49-560 California Forms of Pleading and Practice--Annotated §§ 560.561-560.579

[Reserved]

§§ 560.561[Reserved]

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Chapter 560 TRUSTS: EXPRESS, PUBLIC, CHARITABLE, AND TOTTEN TRUSTS
PART IV. FORMS
A. Administration Of Express Trusts
3. Modification And Termination Of Trusts

49-560 California Forms of Pleading and Practice--Annotated § 560.580

§ 560.580 Petition [Prob. Code § 17201] to Modify Trust [Prob. Code § 17200(b)(13)] to Distribute Accumulated Trust Income for Support or Education of Destitute Beneficiary [Civ. Code § 726]--By Beneficiary

[1] FORM Petition [Prob. Code § 17201] to Modify Trust [Prob. Code § 17200(b)(13)] to Distribute Accumulated Trust Income for Support or Education of Destitute Beneficiary [Civ. Code § 726]--By Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*name of trust*]	)	PETITION TO DISTRIBUTE ACCUMULATED
	)	TRUST INCOME

_____

Petitioner alleges:

1. [*Petitioner's identity. See § 560.521, Paragraph 1.*]

2. [*Irrevocability of trust. See § 560.521, Paragraph 2.*]

3. [*Identity of trustee. See § 560.521, Paragraph 3.*]

4. [*Basis for venue. See § 560.521, Paragraph 4.*]

5. [*Creation of trust. See § 560.521, Paragraph 5.*]

6. Pursuant to the above-described trust, _____ [*set forth provision regarding distribution of*

accumulated income, e.g., income from the principal of the trust is to be accumulated until the beneficiary attains the age of 35, at which time the trustee is directed to pay out that accumulation of income to the beneficiary in monthly installments].

7. Petitioner is destitute of other sufficient means of support or education, and reasonably requires that the sum of $_____ [per month] be distributed to petitioner for petitioner's support or education out of the fund directed to be accumulated for his/her benefit under the trust.

8. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

9. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE, petitioner prays for an order:

1. Instructing the trustee to distribute the sum of $_____ [per month] to petitioner out of the fund directed to be accumulated for the benifit of the petitioner;

2. For costs herein; and

3. For such other orders as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification. See § 560.521.*]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is for use by a beneficiary to petition for modification of a trust to allow the trustee to accelerate distribution of the accumulated income prior to the time specified for distribution under the terms of the trust, on the ground that thebeneficiary requires the income for support or education [*see Civ. Code § 726* (application of beneficiary to accelerate accumulated income for support or education), *Prob. Code § 17200(b)(13)* (petition for modification)].

Prior to the 1986 enactment of the Trust Law, relief under *Civ. Code § 726* was probably initiated most commonly as an ordinary civil action by complaint. However, *Prob. Code § 17200(a)* now provides that a beneficiary or trustee may petition the court concerning the internal affairs of the trust. Although relief under *Civ. Code § 726* is not specifically enumerated under *Prob. Code § 17200*, the list provided therein is not exclusive [*see Prob. Code § 17200(b)*].

[3] Allegations

This petition alleges (1) the trust terms regarding accumulated income (Paragraph 6) [*see Civ. Code § 726*] and (2) facts describing the beneficiary's need to accelerate distribution of the accumulated income (Paragraph 7) [*see Civ. Code § 726* (acceleration of accumulated income); *Prob. Code § 17200(b)(13)* (petition for modification)].

[4] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code §§ 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 8) [*Prob. Code § 17201*]. Notice of a petition regarding a trust is governed by *Prob. Code § 17203(a)*. For detailed discussion, see *§ 560.137[2]*. For a notice form, see *§ 560.600*.

[5] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[6] Text References

Nossaman & Wyatt, Trust Adminstration and Taxation (2d ed rev) Ch. 7, *Accumulation and Income Undisposed Of*, §§ 7.01-7.06 (Matthew Bender)

Witkin, Summary of California Law, vol. 13, *Trusts*, §§ 37 (10th ed. 2005)

Bogert, The Law of Trusts and Trustees (2d ed.), Ch 13, *Restrictions --Illegality--Perpetuities--Accumulations--Suspension of Power of Alienation--Spendthrift Trusts*

[7] Cross References

For a related form, see *§ 560.521*.

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Chapter 560 TRUSTS: EXPRESS, PUBLIC, CHARITABLE, AND TOTTEN TRUSTS
PART IV. FORMS
A. Administration Of Express Trusts
3. Modification And Termination Of Trusts

49-560 California Forms of Pleading and Practice--Annotated § 560.581

§ 560.581 Petition [Prob. Code § 17201] to Combine Trusts [Prob. Code §§ 15411, 17200(b)(14)]--By Trustee

[1] FORM Petition [Prob. Code § 17201] to Combine Trusts [Prob. Code §§ 15411, 17200(b)(14)]--By Trustee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*names of trusts*]	)	PETITION TO COMBINE TRUSTS
	)	

_____

Petitioner alleges:

1. At all times mentioned herein, petitioner was and now is the duly appointed and acting trustee of the trust _____ [*describe first trust, e.g.,* described as the _____ (*name of trust*), created on or about _____ (*date*), by a written declaration of trust of _____, (*name of settlor*), a copy of which is attached hereto, marked Exhibit "A," and made a part hereof].

2. At all times mentioned herein, petitioner was and now is the duly appointed and acting trustee of the trust _____ [*describe second trust, e.g.,* described as the _____ (*name of trust*) under the will of _____ (*name of settlor and testator*), deceased, a copy of which is attached hereto, marked Exhibit "B," and made a part hereof].

[*EITHER, if one or more of trusts is a living trust*]

3. The principal place of business of the _____ [*name(s) of living trust(s) to be combined*] herein described is located in _____ County, California.

[*AND/OR, if one or more of trusts is testamentary*]

3. The _____ [decedent's estate is administered *or* principal place of administration of the _____ (*name(s) of testamentary trust(s) to be combined*) herein described is located] in _____ County, California.

[*CONTINUE*]

4. _____ [*Set forth facts describing similarity of trusts, e.g.,* Pursuant to the provisions of the _____ (*name of first trust*), described in Paragraph 1, above, petitioner, as trustee, is directed to manage certain real property situated in _____ County, California, for the use and benefit of the children of John Doe. Pursuant to the provisions of the _____ (*name of second trust*), described in Paragraph 2, above, petitioner, as trustee, is directed to manage certain other real property, also situated in _____ County, California, which is also for the use and benefit of the children of John Doe].

5. _____ [*Set forth further reasons, if any, for combination of trusts, e.g.,* Since the death of John Doe, petitioner, as trustee, has been directed to administer the trust described in Paragraph 2, above, in addition to the trust described in Paragraph 1, above, which petitioner has continually administered since _____ (*date*). Petitioner is presently administering the above-described trusts separately, and is subject to accounting requirements for different fiscal years for each trust. Petitioner's administrative duties would be simplified, and therefore less costly to the respective trusts, if petitioner were allowed to combine the trusts and administer them as one].

6. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

7. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE, petitioner prays for an order:

1. Combining the trusts described above as the _____ [*name of first trust*] under the declaration of trust dated _____ [*date*], and the _____ [*name of second trust*] under the will of _____ [*name*], deceased;

2. _____ [*Set forth further order, e.g.,* Establishing the fiscal year for the combined trust for accounting and reporting purposes from June 1 through May 31, and requiring the first annual account due on _____ (*date*)];

3. For costs herein; and

4. For such other orders as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification. See § 560.521.*]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This petition is for use by a trustee to seek combination of two or more trusts [*see Prob. Code §§ 15411* (grounds), 17200(b)(14) (petition)].

If the terms of two or more trusts are substantially similar, on petition by a trustee or beneficiary, the court, for good cause shown, may combine the trusts if the court determines that administration as a single trust will not defeat or substantially impair the accomplishment of the trust purposes or the interests of the beneficiaries [*Prob. Code § 15411*]. A living trust and testamentary trust may be combined [*see Recommendation Proposing the Trust Law*, 18 Cal. Law Revision Comm'n Reports 643 (1986)].

[3] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code §§ 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 6) [*Prob. Code § 17201*]. Notice of a petition regarding a trust is governed by *Prob. Code § 17203(a)*. For detailed discussion, see *§ 560.137[2]*. For a notice form, see *§ 560.600*.

[4] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[5] Allegations

This petition alleges:

- The creation of the respective trusts, and the identity of the petitioner (Paragraphs 1-2) [*see Prob.*

Code § 17200(a) (standing), 17200(b)(14) (petition to combine trusts)];

- The basis for venue (Paragraph 3) [*see Prob. Code §§ 17002* (principal place of administration), 17005 (venue for living trust or testamentary trust generally), 17301 (venue for testamentary trust subject to continuing jurisdiction of court); *see also Prob. Code § 17004* (basis for venue based on *Code Civ. Proc. § 410.10*) and Comments to *see § 560.521*]; and

- Facts explaining the need for combination of the trusts (Paragraphs 4-5) [*see Prob. Code § 15411*].

[6] Cross References

For a related form, see *§ 560.521*.

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PART IV. FORMS
A. Administration Of Express Trusts
3. Modification And Termination Of Trusts

49-560 California Forms of Pleading and Practice--Annotated § 560.582

§ 560.582 Petition [Prob. Code § 17201] to Ascertain Beneficiaries and Determine Distribution of Property on Final or Partial Termination of Trust [Prob. Code § 17200(b)(4)]--By Trustee

[1] FORM Petition [Prob. Code § 17201] to Ascertain Beneficiaries and Determine Distribution of Property on Final or Partial Termination of Trust [Prob. Code § 17200(b)(4)]--By Trustee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*name of trust*]	)	PETITION TO DETERMINE DISTRIBUTION OF
	)	PROPERTY

_____

Petitioner alleges:

1. [*Petitioner's identity and creation of trust. See § 560.553, Paragraph 1.*]

2. [*Basis for venue. See § 560.521, Paragraph 4.*]

3. In relevant part, the above-described trust provides as follows: _____ [*set forth any ambiguous or conflicting terms of the trust with respect to the ascertainment of beneficiaries or distribution of property, e.g.,* all of the trust income was to be paid after the settlor's death to his daughter Nancy Smith Jones and her husband Lee Jones, share and share alike during their natural lives, and to the survivor of them during the natural life of the survivor. On their deaths, the income was to be paid equally to the children of Nancy Smith Jones and Lee Jones and the issue of any deceased child born in lawful wedlock, per stirpes, during the lives of those children, as were living at the time of the death of the settlor. On the death of any of the children leaving issue born in lawful wedlock surviving them, the share

of the child in the income was to be paid to the issue, but if the child left no lawful issue, the share of the child would go to the other of the children and issue of any deceased child per stirpes and not per capita. The trust further provided that on the death of Nancy Smith Jones and Lee Jones and all of their children living at the time of the settlor's death, the corpus, with certain exceptions, would pass to, vest in, and be conveyed to the descendants born in lawful wedlock of Nancy Smith Jones and Lee Jones, per stirpes and not per capita, absolutely and free of all trusts].

4. _____ [*Set forth any further necessary facts, e.g.,* Settlor's daughter, Nancy Smith Jones, and her husband, Lee Jones, died on _____ (*date*), and on _____ (*date*), respectively, and on their death were survived by their three children, Gregory Jones, Lee Jones, Jr., and Betsy Jones Roe, who were their only children living at the time of the death of the settlor. Of the three children, Lee Jones died on _____ (*date*), leaving no issue; Gregory Jones died on _____ (*date*), leaving Sarah Jones Doe, Grant Jones and Mary Jones, his children, and Nora Jones and John Jones, his grandchildren, issue of James Jones, a deceased child of Gregory Jones; and Betsy Jones Roe died on _____ (*date*), leaving Howard Roe, Amy Roe Green, and Steven Roe, her children].

5. Petitioner requests a determination that _____ [*set forth requested ascertainment of beneficiaries and distribution of property, e.g.,* the trustee distribute the above-described trust property as follows: a one-half share to the issue of Gregory Jones, and a one-half share to the issue of Betsy Jones Roe, to-wit: a one-eighth share to each of the following: Sarah Jones Doe, Grant Jones, Mary Jones, and the issue of James Jones, to-wit: Nora Jones and John Jones; and a one-half share divided equally between Howard Roe, Amy Roe Green, and Steven Roe].

6. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

7. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE, petitioner prays for an order:

1. Ascertaining the beneficiaries and determining distribution of the proceeds with respect to the sale of the above-described real property as follows: _____ [*Set forth requested direction, e.g.,* a one-half share to the issue of Gregory Jones, and a one-half share to the issue of Betsy Jones Roe, to-wit: a one-eighth share to each of the following: Sarah Jones Doe, Grant Jones, Mary Jones, and the issue of James Jones, to-wit: Nora Jones and John Jones; and a one-half share divided equally between Howard Roe, Amy Roe Green, and Steven Roe];

2. For costs herein; and

3. For such other orders as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification. See § 560.521.*]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form of petition is for use by a trustee to obtain an ascertainment of beneficiaries and determination of the persons to whom property should pass or be delivered on final or partial termination of the trust, to the extent that the determination is not made by the trust instrument [*see Prob. Code § 17200(b)(4)*; *see also Lombardi v. Blois (1964) 230 Cal. App. 2d 191, 198, 40 Cal. Rptr. 899]* .

[3] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code § 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 6) [*Prob. Code § 17201*]. Notice of a petition regarding a trust is governed by *Prob. Code § 17203(a)*. For detailed discussion, see *§ 560.137[2]*. For a notice form, *see § 560.600*.

[4] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[5] Allegations

This petition alleges:

- A description of the trust provision that requires interpretation (Paragraph 3) [*see Lombardi v. Blois (1964) 230 Cal. App. 2d 191, 198, 40 Cal. Rptr. 899]* ;

- A description of the termination of the trust (Paragraph 4); and

- A statement of the determination requested by the trustee (Paragraph 5) [*see Prob. Code § 17200(b)(4)*].

[6] Decisions

Distribution of trust property by right of representation (per stirpes) is antithesis of distribution to individual (per capita); per stirpes as meaning by or according to stock or root. *Lombardi v. Blois (1964) 230 Cal. App. 2d 191, 198, 40 Cal. Rptr. 899*

[7] Cross References

For a related form, see *§ 560.521*.

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49-560 California Forms of Pleading and Practice--Annotated § 560.583

§ 560.583 Response to Petition [Prob. Code § 17201] for Ascertainment of Beneficiaries and Determination of Distribution of Property on Final or Partial Termination of Trust [Prob. Code § 17200(b)(4)]--By Beneficiary

[1] FORM Response to Petition [Prob. Code § 17201] for Ascertainment of Beneficiaries and Determination of Distribution of Property on Final or Partial Termination of Trust [Prob. Code § 17200(b)(4)]--By Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the _____ [*name of trust*]	))))	NO. _____ RESPONSE OF TRUSTEE TO PETITION FOR ASCERTAINMENT OF BENEFICIARIES AND DISTRIBUTION OF PROPERTY

_____

For return and response to the petition filed by the trustee for ascertainment of beneficiaries and distribution of property, _____ [*name*], as beneficiary under the _____ [written declaration of trust of _____ (*name of settlor*) *or* the will of _____ (*name of settlor and testator*), deceased *or other as appropriate*], admits, denies, and alleges:

1. Admits the allegations of Paragraphs _____ [*specify, e.g.,* 1-7] of the petition.

2. _____ [*Set forth here and in subsequent paragraphs, other general and specific admissions, denials, contravening allegations, and affirmative defenses as appropriate, e.g.,* Responding to Paragraph 8, denies that there is any merit or validity to the trustee's requested direction that trustee distribute a one-half share to the issue of Gregory Jones, and a one-half share to the issue of Betsy Jones Roe, to-wit: a one-eighth share to each of the following: Sarah Jones Doe, Grant Jones, Mary Jones, and the issue of James Jones, to-wit: Nora Jones and John Jones; and a one-half

share divided equally between Howard Roe, Amy Roe Green, and Steven Roe].

[3. Alleges that the great-grandchildren of the settlor, to wit: Sarah Jones Doe, Grant Jones, Mary Jones, Howard Roe, Amy Roe Green, and Steven Roe are entitled to share in a per capita distribution of the described trust property and are each therefore entitled to a one-seventh share of the trust property, and that the issue of James Jones, to-wit: Nora Jones and John Jones, are each entitled to a one-half share in the portion to which James Jones would have been entitled, to-wit: a one-fourteenth share of the trust property.]

4. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE respondent prays for an order:

1. Ascertaining the beneficiaries and determining distribution of the proceeds with respect to the sale of the above-described real property as follows: _____ [*set forth requested direction, e.g.,* a one-seventh portion each to Sarah Jones Doe, Grant Jones, Mary Jones, Howard Roe, Amy Roe Green, and Steven Roe; and a one-fourteenth share each to Nora Jones and John Jones];

2. For costs herein; and

3. For such other orders as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Respondent _____ [*name*]

[*Verification. See § 560.543.*]

CAUTION:

The Trust Law is silent with respect to the filing of papers in response to a petition to administer a trust. Moreover, there do not appear to be any California Rules of Court or local court rules to provide guidance in this area, nor any uniformity with regard to the procedures presently used throughout California that would warrant the recommendation of one procedure for all jurisdictions. Counsel should therefore contact the appropriate court to ascertain whether any particular form of responsive papers is preferred by the local commissioner or judge, for example, a response, answer, or objection, with or without a memorandum of points and authorities [*see Prob. Code § 1000* (applicability of rules of civil practice in probate proceedings)]. An objection or response filed pursuant to the Probate Code must be verified [*Prob. Code § 1021(a)(2)*].

[2] Use of Form

This response is for use by a beneficiary of a trust in response to a petition by a trustee seeking ascertainment of beneficiaries and distribution of property on final or partial termination of the trust [*see Prob. Code § 17200(b)(4)*; *see*

also Lombardi v. Blois (1964) 230 Cal. App. 2d 191, 198, 40 Cal. Rptr. 899] .

[3] Cross References

For related forms, see *§§ 560.543, 560.583*.

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49-560 California Forms of Pleading and Practice--Annotated § 560.584

§ 560.584 Petition [Prob. Code § 17201] to Modify or Terminate Irrevocable Trust [Prob. Code §§ 15403, 15404, 15408, 15409]

[1] FORM Petition [Prob. Code § 17201] to Modify or Terminate Irrevocable Trust [Prob. Code §§ 15403, 15404, 15408, 15409]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the _____ [*name of trust*]	))))	NO. _____ PETITION TO _____ [MODIFY *or* TERMINATE] TRUST

_____

Petitioner(s) allege(s):

1. [*Petitioner's identity. See § 560.521, Paragraph 1.*]

2. [*Irrevocability of trust. See § 560.521, Paragraph 2.*]

3. [*Identity of trustee. See § 560.521, Paragraph 3.*]

4. [*Basis for venue. See § 560.521, Paragraph 4.*]

5. [*Creation of trust. See § 560.521, Paragraph 5.*]

[*EITHER*]

6. Petitioner(s) seek(s) to modify the trust to _____ [*specify modification sought, e.g.,* allow the sale of real property located at 55 Blue Sky Way, Arlingtonville, California].

[*OR*]

6. Petitioner(s) seek(s) to terminate the trust.

[*ADD, if seeking to modify or terminate pursuant to Prob. Code § 15403*]

7. Every beneficiary of the trust consents to the proposed _____ [modification *or* termination] and these consents are attached as Exhibit A and made a part hereof.

8. Continuance of the trust is not necessary to carry out any material purpose of the trust.

[*If seeking to modify or terminate pursuant to Prob. Code § 15404, ADD EITHER*]

7. The settlor and every beneficiary of the trust consent to the proposed _____ [modification *or* termination], and these consents are attached as Exhibit A and made a part hereof.

[*OR*]

7. The settlor and every beneficiary of the trust except _____ [*name of beneficiaries not consenting to proposed modification or partial termination*] consent to the proposed _____ [modification *or* partial termination], and these consents are attached as Exhibit A and made a part hereof.

[*AND*]

8. The proposed _____ [modification *or* partial termination] will not [substantially] impair the interest(s) of _____ [*name of beneficiaries not consenting to proposed modification or partial termination*], because _____ [*set forth facts demonstrating lack of substantial impairment to interests of nonconsenting beneficiaries*].

[*ADD, if seeking to modify or terminate pursuant to Prob. Code § 15408*]

7. The proposed _____ [modification *or* termination] is necessary because the fair market value of the principal of the trust is so low in relation to the cost of administration that continuation of the trust under its existing terms will _____ [defeat *or* substantially impair] accomplishment of its purposes. A statement setting forth the fair market value of the trust principal and the costs of administration of the estate is attached as Exhibit A and made a part hereof.

[*ADD, if seeking to modify or terminate pursuant to Prob. Code § 15409*]

7. The proposed _____ [modification *or* termination] is necessary because continuation of the trust under its existing terms will _____ [defeat *or* substantially impair] accomplishment of its purposes because of _____ [*set forth circumstances not known or anticipated by settlor of trust*], which circumstances were not known to or anticipated by the settlor of the trust.

8. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

9. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

[*CONTINUE*]

WHEREFORE, petitioner(s) pray(s) for an order:

[1. Modifying the trust to _____ (*specify modification sought*).]

[2. _____ [Terminating *or* Partially terminating] the trust.]

3. For costs herein; and

4. For such other as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner(s) _____ [*name(s)*]

[*Verification. See § 560.521.*]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This form is for use to petition the court to modify or terminate an irrevocable trust [*see Prob. Code §§ 15403, 15404, 15408, 15409*]. An irrevocable trust may be modified or terminated on consent of all the beneficiaries of the trust [*see*

Prob. Code § 15403] or of the settlor and all beneficiaries [*see Prob. Code § 15404(a)*]. An irrevocable trust may also be modified or partially terminated on consent of the settlor and some beneficiaries if the proposed modification or partial termination does not substantially impair the interests of the nonconsenting beneficiaries [*see Prob. Code § 15404(b)*]. Further, a trust may be modified or terminated on petition of a trustee or beneficiary, based on circumstances not known to or anticipated by the settlor, if continuation of the trust under its terms would defeat or substantially impair accomplishment of the purposes of the trust [*Prob. Code § 15409*] or if the court determines that the fair market value of the principal of the trust has become so low in relation to the cost of administration that continuation of the trust under its existing terms will defeat or substantially impair the accomplishment of its purposes [*Prob. Code § 15408*].

[3] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code §§ 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 8) [*Prob. Code § 17201*]. Notice of a petition regarding a trust is governed by *Prob. Code § 17203(a)*. For detailed discussion, see *§ 560.137[2]*.

[4] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[5] State Statutes

Modification and termination of trusts. *Prob. Code § 15400 et seq.*

[6] Cross References

For a related form, see *§ 560.521*.

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49-560 California Forms of Pleading and Practice--Annotated §§ 560.585-560.599

[Reserved]

§§ 560.585[Reserved]

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49-560 California Forms of Pleading and Practice--Annotated § 560.600

§ 560.600 Notice [Prob. Code §§ 1211, 17203] of Hearing on Petition [Prob. Code § 17200]

[1] FORM Notice [Prob. Code §§ 1211, 17203] of Hearing on Petition [Prob. Code § 17200]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*name of trust*]	)	NOTICE OF HEARING ON PETITION
	)	

_____

Notice is hereby given that _____ [*name of petitioner*], as _____ [trustee *or* beneficiary *or other as appropriate*] of the above-captioned trust, has filed herein a petition _____ [*describe, e.g.,* to modify the trust], reference to which is made for further particulars. The time and place of hearing the petition has been set for _____ [*date*] at _____ [*time*], in the courtroom [of Department No. _____] of the Superior Court at _____ [*street address*] in _____ [*city*], California.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Use of Form

This notice is for use by a trustee, beneficiary, or a person having standing otherwise afforded the beneficiary, to give

notice of the time and place of hearing on a petition filed under *Prob. Code § 17200* [*see Prob. Code §§ 1211* (form of notice), 17203 (notice requirement); *see also Prob. Code §§ 15800* (rights regarding revocable trust inure to settlor, not beneficiary), 15803 (rights inure to holder of presently exercisable power of appointment or power to withdraw property)].

[3] Notice Requirements

At least 30 days before the time set for the hearing on the petition, the petitioner must cause notice of the time and place of hearing to be mailed to all of the following persons [*Prob. Code § 17203(a)*]:

- All trustees.

- All beneficiaries, except that if the trust is revocable and the person holding the power to revoke it is competent notice must be given to the person holding the power to revoke and not to the beneficiary [*Prob. Code § 15802*].

- The Attorney General of California, if the petition relates to a charitable trust subject to the jurisdiction of the Attorney General.

At least 30 days before the time set for hearing on the petition, the petitioner must cause notice of the hearing and a copy of the petition to be served on any person (other than a trustee or beneficiary) whose right, title, or interest would be affected by the petition and who does not receive mailed notice as provided above [*Prob. Code § 17203(b)*]. Service must be effected in the manner required for service of summons in civil actions [*Prob. Code § 17203(b)*; *see Code Civ. Proc. § 413.10 et seq.* (service of summons in civil actions)]. The court may not shorten the time for service [*Prob. Code § 17203(b)*].

If a person to whom notice otherwise would be given has been deceased for at least 40 days, and no personal representative has been appointed for that person's estate, and if the deceased person's right, title, or interest has not passed to any other person pursuant to the Probate Code rules for disposition of estates without administration [*see Prob. Code § 13000 et seq.*], notice may instead be given to the following persons [*Prob. Code § 17203(c)*]:

- Each heir and devisee of the decedent, and all persons named as executors of the will of the decedent, so far as known to the petitioner.

- Each person serving as guardian or conservator of the decedent at the time of the decedent's death, so far as known to the petitioner.

[4] Form of Notice

Except as otherwise provided in the Probate Code, *Prob. Code § 1200 et seq.* govern the notice to be given under the code [*Prob. Code § 1200(a)*]. If notice is required and no other type of notice is prescribed by law, the Judicial Council, or the court or judge, the notice must be substantially in the form set forth in *Prob. Code § 1211* [*see Prob. Code § 1211*].

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49-560 California Forms of Pleading and Practice--Annotated § 560.601

§ 560.601 Request [Prob. Code § 17205] for Copy of Petition [Prob. Code § 17200]--By Trustee or Beneficiary

[1] FORM Request [Prob. Code § 17205] for Copy of Petition [Prob. Code § 17200]--By Trustee or Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the _____ [*name of trust*]	))))	NO. _____ REQUEST FOR COPY OF PETITION [TO _____ (*specify, e.g.,* MODIFY TRUST)]

_____

To _____ [*name of petitioner*], as petitioner of the above-entitled proceeding[, and to _____ [*name*], his/her/its attorney of record]:

YOU ARE HEREBY REQUESTED TO MAIL OR DELIVER A COPY OF THE PETITION AS FOLLOWS:

Within five days after receipt of the request, cause a copy of the petition to be mailed or delivered to the undersigned at this address: _____.

The undersigned, _____ [*name*], is a _____ [trustee *or* beneficiary] of the above-captioned trust and is therefore entitled to a copy of the petition pursuant to *section 17205 of the Probate Code*.

_____ [*date and place*]

_____ [*signature*]

_____ [Trustee *or* Beneficiary]

[2] Use of Form

This request is for use by a trustee or beneficiary to request that the petitioner in a proceeding under *Prob. Code § 17200* deliver or mail a copy of the petition. The petitioner is also required to deliver or mail a copy of the petition if a trustee or beneficiary has served and filed a notice of appearance, in person or by counsel, directed to the petitioner or the petitioner's counsel in connection with a particular petition and proceeding [*see Prob. Code § 17205*].

[3] State Statutes

Request for copy of petition by trustee or beneficiary. *Prob. Code § 17205*

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49-560 California Forms of Pleading and Practice--Annotated § 560.602

§ 560.602 Petition and Order for Appointment of Guardian Ad Litem Under the Probate Code--Cal. Judicial Council Form DE-350, GC-100 [Prob. Code § 1003]

[1] FORM Petition and Order for Appointment of Guardian Ad Litem Under the Probate Code--Cal. Judicial Council Form DE-350, GC-100 [Prob. Code § 1003]

Click here to view image.

[2] Use of Form

This is a filled-in reproduction of the approved Judicial Council Form of Petition and Order for Appointment of Guardian Ad Litem [Cal. Judicial Council Form DE-350, GC-100; *see Prob. Code § 1003*]. Use of the form is mandatory *Cal. Rules of Court, Rules 1.31, 7.101*]. The form is for use by a trustee or other person interested in the trust to seek appointment of a guardian ad litem to represent the interest of, for example, a minor, an incapacitated person, or an unborn person [*see Prob. Code § 1003(a)*]. This form may be obtained from any superior court county clerk. This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

The Judicial Council form includes not only the petition seeking the appointment of a guardian ad litem, but also a consent to act as a guardian ad litem (to be signed by the proposed guardian), an optional consent of the minor 12 years of age or older (to be signed by the minor), and the court's order.

[3] Appointment of Guardian ad Litem at Request of Trustee

At any stage of a proceeding under the Probate Code, the court may appoint a guardian ad litem to represent the interest of any of the following persons, if it determines that representation of the interest would otherwise be inadequate [*Prob. Code § 1003(a)*]:

- A minor.
- An incapacitated person.
- An unborn person.
- An unascertained person.
- A person whose identity or address is unknown.
- A designated class of persons who are not ascertained or are not in being.

The appointment may be made by the court on its own motion or on request of a personal representative, guardian, conservator, trustee, or other interested person [*Prob. Code § 1003(a)*]. If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several persons or interests [*Prob. Code § 1003(b)*].

The reasonable expenses of the guardian ad litem, including compensation and attorneys' fees, must be determined by the court and paid as the court orders, either out of the property of the estate involved or by the petitioner or from such other source as the court orders [*Prob. Code § 1003(c)*].

[4] Statement of Grounds and Persons Entitled to Notice

Proceedings concerning trusts are governed by *Prob. Code §§ 17200-17211*. The petition must state facts showing that it is authorized under these sections [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (*see* Paragraph 9) [*Prob. Code § 17201*]. The various grounds for the petition are set out in *Prob. Code § 17200(b)*.

Notice of a petition regarding a trust is governed by *Prob. Code § 17203(a)*. The court's order portion of the Judicial Council Form requires that the court find (1) that all notices required by law have been given, or (2) that notice has been dispensed with. For detailed discussion, see *§ 560.137[2]*.

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Chapter 560 TRUSTS: EXPRESS, PUBLIC, CHARITABLE, AND TOTTEN TRUSTS
PART IV. FORMS
A. Administration Of Express Trusts
4. Petition Proceedings, Jurisdiction, Venue, And Appointment Of Guardian Ad Litem Relating To Express Trusts

49-560 California Forms of Pleading and Practice--Annotated § 560.603

§ 560.603 Petition [Prob. Code § 17201] to Discharge Guardian Ad Litem and Designate Attorney of Record [Prob. Code § 1003]--Beneficiary's Attaining of Majority--By Beneficiary

[1] FORM Petition [Prob. Code § 17201] to Discharge Guardian Ad Litem and Designate Attorney of Record [Prob. Code § 1003]--Beneficiary's Attaining of Majority--By Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*name of trust*]	)	PETITION TO DISCHARGE GUARDIAN AD
	)	LITEM

_____

Petitioner alleges:

1. [*Petitioner's identity. See § 560.521, Paragraph 1.*]

2. Petitioner was born on _____ [*date*], and since the commencement of this action has attained the age of _____ [18 *or greater number*].

3. Petitioner discharges _____ [*name of guardian ad litem*] and designates _____ [*name*], a duly licensed attorney at law in California with his/her office at _____ [*street address*] in the City of _____, County of _____, California, as his/her attorney of record herein.

4. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address

_____	_____
_____	_____
_____	_____

5. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification. See § 560.521.*]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This petition is for use by a beneficiary of a trust who was a minor at the time a proceeding to administer a trust under the Trust Law was commenced, and who has subsequently attained the age of 18 years, to discharge the guardian ad litem, and to designate an attorney of record [*see Prob. Code § 17200(a)* (standing of beneficiary to petition court concerning internal affairs of trust)]. Although discharge of a guardian ad litem is not an express ground for a petition, the enumerated grounds are not exclusive [*see Prob. Code § 17200(b)*].

[3] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code § 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 8) [*Prob. Code § 17201*]. Notice of a petition regarding a trust is governed by *Prob. Code § 17203(a)*. For detailed discussion, see *§ 560.137[2]*.

[4] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[5] State Statutes

Age of majority. *Fam. Code §§ 6500-6502*

[6] Cross References

For related forms, *see §§ 560.521, 560.602*.

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A. Administration Of Express Trusts
4. Petition Proceedings, Jurisdiction, Venue, And Appointment Of Guardian Ad Litem Relating To Express Trusts

49-560 California Forms of Pleading and Practice--Annotated § 560.604

§ 560.604 Petition [Prob. Code § 17201] for Construction of Trust Instrument [Prob. Code § 17200(b)(1)]--By Guardian Ad Litem of Beneficiary

[1] FORM Petition [Prob. Code § 17201] for Construction of Trust Instrument [Prob. Code § 17200(b)(1)]--By Guardian Ad Litem of Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*name of trust*]	)	PETITION FOR CONSTRUCTION OF TRUST IN-
	)	STRUMENT

_____

Petitioner alleges:

1. At all times mentioned herein, petitioner was, and now is the duly appointed and acting guardian ad litem of _____ (*name of beneficiary*) for the purpose of these proceedings.

2. [*Irrevocability of trust. See § 560.521, Paragraph 2.*]

3. [*Identity of trustee. See § 560.521, Paragraph 3.*]

4. Pursuant to the terms of the above-described trust, _____ [*describe provision requiring construction, e.g.,* _____ (*name of trustee*), as trustee, is directed to manage certain real property for the support and maintenance of _____ (*name of minor beneficiary*) until he/she attains the age of majority. The trust instrument is unclear with respect to _____ [*describe ambiguity, e.g.,* whether the

trust terminates on _____'s (*name of minor beneficiary*) attaining majority, with his/her entitlement at that time to the proceeds of the balance of the trust, or whether his/her interest in the trust terminates on his/her attaining majority, with the holders of remainder interests acquiring his/her interest at that time].

5. Petitioner requests a construction of the trust instrument directing that the above-described trust continues until the beneficiary attains the age of majority, at which time the trust will terminate, and that, at that time, _____ [*name of trustee*], as trustee, must distribute to the beneficiary the balance of any property remaining.

6. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

7. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE, petitioner prays for an order:

1. _____ [*Specify, e.g.,* Determining that the above-described trust continues until the beneficiary attains the age of majority, at which time the trust will terminate, and that, at that time, _____ (*name of trustee*), as trustee, must distribute to the beneficiary the balance of any property remaining];

2. For costs herein; and

3. For such other orders as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification. See § 560.521.*]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This petition is for use by the guardian ad litem of a minor beneficiary of a trust, to obtain construction of a trust instrument with respect to the beneficiary's interest in the trust [*see Prob. Code § 1003* (appointment of guardian ad litem); *see also Ball v. Mann (1948) 88 Cal. App. 2d 695, 199 P.2d 706* (regarding trust for support and maintenance of minor child)].

[3] Allegations

This form alleges:

- The capacity and standing of the petitioner (Paragraphs 1 and 2) [*see Prob. Code §§ 17200(a)* (standing of beneficiary), 17208 (appointment of guardian ad litem)];

- A description of the terms of the trust requiring construction (Paragraph 4) [*see Ball v. Mann (1948) 88 Cal. App. 2d 695, 199 P.2d 706]* ; and

- A statement of the requested construction (Paragraph 5) [*see Ball v. Mann (1948) 88 Cal. App. 2d 695, 199 P.2d 706]* .

[4] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code § 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 8) [*Prob. Code § 17201*]. Notice of a petition regarding a trust is governed by *Prob. Code § 17203(a)*]. For detailed discussion, see *§ 560.137[2]*.

[5] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[6] Decisions

Trust for support and maintenance of minor child is passive and subject to termination when child attains majority age. *Ball v. Mann (1948) 88 Cal. App. 2d 695, 699, 199 P.2d 706*

[7] Cross References

For a related form, see *§ 560.521*.

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49-560 California Forms of Pleading and Practice--Annotated § 560.605

§ 560.605 Petition [Prob. Code § 17201] to Transfer Administration of Trust or Trust Property to Court of Jurisdiction Outside California [Prob. Code §§ 17200(b)(16), 17402]--By Trustee

[1] FORM Petition [Prob. Code § 17201] to Transfer Administration of Trust or Trust Property to Court of Jurisdiction Outside California [Prob. Code §§ 17200(b)(16), 17402]--By Trustee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*name of trust*]	)	PETITION FOR TRANSFER OF TRUST
	)	[PROPERTY]

_____

Petitioner alleges:

1. [*Petitioner's identity and creation of trust. See § 560.554, Paragraph 1.*]

2. [*Basis for venue. See § 560.521, Paragraph 4.*]

3. This petition is made to obtain an order transferring _____ [the place of administration of the above-described trust *or* (part of) the property of the above-described trust] to _____ [*court*] in _____ County in _____ [*specify state*].

4. The trustee administering the above-described trust in California is _____ [*name*]. [The trustee is _____ (*specify type of financial institution if trustee is not an individual, e.g.,* a national banking association incorporated under the laws of the United States, engaged in doing business as a trust company in the State

of California)]. _____. [He/She resides at *or* Its place of residence is] _____ [*street address*], _____ County, California.

5. The proposed trustee, _____ [who *or* which] will administer the above-described trust in _____ [*specify state*], is _____ [*name*] [,an individual whose age is _____]. [The trustee is _____ (*specify type of financial institution if trustee is not an individual, e.g.,* a national banking association incorporated under the laws of the United States, engaged in doing business as a trust company in the State of _____ [*specify state*)]. _____ [He/She resides at *or* Its place of residence is] _____ [*street address*], _____ County in _____ [*specify state*].

6. The proposed trustee is qualified to act as trustee of the trust in that _____ [*set forth a general statement of qualifications*].

7. The proposed trustee has [not] agreed to accept the trust. [A copy of the agreement is _____ (attached hereto, marked Exhibit "B," and made a part hereof *or* filed with the court.]

[8. The proposed trustee has a bond in the amount of $_____.]

[9. The proposed trustee is now administering [a] trust[s] of the settlor containing the following assets: _____ (*set forth a general statement of the nature and value of property*). _____ (He/She/It is under the jurisdiction of _____ (*specify court*) *or* His/Her/Its accounts are under the jurisdiction of _____ (*specify court*) *or* Proceedings with respect to the administration of the trust property sought to be transferred may be had in _____ (*specify court*)).]

10. The names, ages, and places of residence of all living beneficiaries of the above-described trust, as far as known to petitioner, are as follows:

Name	Age	Residence
_____	_____	_____
_____	_____	_____
_____	_____	_____

11. The character, condition, value, and location of the property included in the trust estate are as follows: _____ [*set forth description*].

12. There is _____ [no *or* a] civil action now pending in California against the proposed trustee. [The action concerns _____ (*set forth brief description of action, if any*).]

13. The reasons for transferring further proceedings relating to administration of the trust to _____ [*specify court*], _____ County, _____ [*specify state*], are as follows: _____ [*set forth ways in which transfer will promote the best interests of the trust and those interested in it, including factors concerning the economical and convenient administration of the trust*].

14. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____

_____ _____
_____ _____

WHEREFORE, petitioner prays for an order transferring _____ [the place of administration of the trust *or* _____ (some *or* all) of the trust property] to _____ [*specify court*], _____ County, _____ [*specify state*].

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification. See § 560.521.*]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This petition is for use by a trustee to seek a transfer of the administration of the trust, or some or all of the trust property, to a jurisdiction outside California [*see Prob. Code §§ 17401* (court may make order transferring trust administration or property), 17402 (petition for transfer)].

[3] Allegations

This petition alleges:

- The purpose for the petition (Paragraph 3) [*see Prob. Code § 17401*];
- The identity and residence of the trustee in California (Paragraph 4) [*see Prob. Code § 17402(a)(1)*];
- The identity, residence, and age (if an individual) of the proposed trustee (Paragraph 5) [*see Prob. Code § 17402(a)(2), (d)*];
- The qualifications of the proposed trustee (Paragraph 6) [*see Prob. Code § 17402(d)*];
- A statement of whether the proposed trustee has agreed to accept the trust (Paragraph 7) [*see Prob. Code § 17402(c)*];
- The names, ages, and residences of all living beneficiaries known to the petitioner (Paragraph 10) [*see Prob. Code § 17402(b)*];
- A statement of the character, condition, and value of the trust property subject to transfer (Paragraph 11) [*see Prob. Code § 17402(g)*];

- A statement of whether any civil action against the proposed trustee is pending in California (Paragraph 12) [*see Prob. Code § 17402(h)*]; and

- A statement of the reasons for the transfer (Paragraph 13) [*see Prob. Code §§ 17402(i)* (requirement for statement), 17404(a) (grounds for transfer)].

Optional Paragraph 8 is for use to set forth the amount of any fiduciary bond required of the proposed trustee [*see Prob. Code § 17402(d)*]. Optional Paragraph 9 is for use to describe the nature and value of any property of a trust of the settlor that the proposed trustee is administering in the other jurisdiction [*see Prob. Code § 17402(e)*].

[4] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code § 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 8) [*Prob. Code § 17201*]. Notice of a petition regarding a trust is governed by *Prob. Code § 17203(a)*. For detailed discussion, see *§ 560.137[2]*.

[5] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[6] State Statutes

Petition to transfer trust to or from another jurisdiction. *Prob. Code § 17200(b)(16)*

[7] Cross References

For a related form, see *§ 560.521*.

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49-560 California Forms of Pleading and Practice--Annotated § 560.606

§ 560.606 Order [Prob. Code § 17404] Transferring Administration of Trust or Trust Property to Jurisdiction Outside California [Prob. Code § 17401]

[1] FORM Order [Prob. Code § 17404] Transferring Administration of Trust or Trust Property to Jurisdiction Outside California [Prob. Code § 17401]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of the _____ [*name of trust*]	))))	NO. _____ ORDER TRANSFERRING TRUST [PROPERTY]

This proceeding to transfer the _____ [administration of the trust *or* (part of) the trust property] of the _____ (*name of trust*) on the verified petition of _____ (*name of petitioner*), trustee [, and the return and _____ (*specify papers filed in opposition, e.g.,* response) of the beneficiary _____ (*name*)], came on regularly for hearing on _____ [*date*], before this court, sitting without a jury. Petitioner appeared by counsel _____ [*name of petitioner's counsel*]. [_____ (*Name*), as beneficiary, appeared by counsel _____ (*name of beneficiary's counsel*).] [Evidence was introduced on behalf of both parties and the matter was argued and submitted for decision.]

On proof made to the satisfaction of the court that the petition ought to be granted,

IT IS ORDERED as follows:

1. That further proceedings relating to administration of the _____ [*name of trust*] are transferred to

the _____ [*specify court*], _____ County, _____ [*specify state*].

2. _____ [*Specify manner of transfer directed by court, and any terms and conditions imposed*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is an order for use to transfer the administration or property of a trust to a jurisdiction outside California [*see Prob. Code § 17404*].

[3] State Statutes

Court order to transfer administration or property. *Prob. Code § 17401*

Grounds for granting order. *Prob. Code § 17404*

[4] Cross References

For related forms, see *§§ 560.552, 560.605*.

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49-560 California Forms of Pleading and Practice--Annotated § 560.607

§ 560.607 Petition [Prob. Code § 17201] to Transfer Administration of Trust or Trust Property From Another Jurisdiction to California [Prob. Code §§ 17200(b)(16), 17453]--By Trustee

[1] FORM Petition [Prob. Code § 17201] to Transfer Administration of Trust or Trust Property From Another Jurisdiction to California [Prob. Code §§ 17200(b)(16), 17453]--By Trustee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*name of trust*]	)	PETITION FOR TRANSFER OF TRUST
	)	[PROPERTY]

_____

Petitioner alleges:

1. At all times mentioned herein, petitioner was, and now is, the duly appointed and acting trustee of the trust created _____ [by a written declaration of trust of _____ (*name of settlor*) *or* under the will of _____ (*name of settlor and testator*), deceased *or other as appropriate*]. _____ [A copy of the instrument is attached hereto, marked Exhibit "A," and made a part hereof *or set forth terms of trust instrument in effect at time petition is filed, including all amendments thereto*].

2. Petitioner is _____ [an individual who resides *or* _____ (*specify type of financial institution if trustee is not an individual, e.g.,* a national banking association incorporated under the laws of the United States, engaged in doing business as a trust company), whose principal place of business is located] at _____ [*street address*] in the State of _____.

[*EITHER, if a proposed trustee is resident of California*]

3. The proposed principal place of administration of the trust pursuant to *section 17002 of the Probate Code* is located in _____ County, California.

[*OR, if no proposed trustee is resident of California*]

3. _____ [The residence of _____ (*name*), a/the beneficiary of the trust *or* a substantial portion of the trust property to be transferred _____ (is *or* will be)] located in _____ County, California.

[*CONTINUE*]

4. This petition is made to obtain an order transferring _____ [the place of administration *or* (part of) the property] of the above-described trust from _____ County, _____ [*specify state*], to _____ County, California.

5. The proposed trustee to whom the _____ [administration of the trust *or* trust property] will be transferred is _____ [*name*] [,an individual whose age is _____]. [The proposed trustee is _____ (*specify type of financial institution if trustee is not an individual, e.g.,* a national banking association incorporated under the laws of the United States, engaged in doing business as a trust company in the State of _____ (California *or specify other state*).] _____ [He/She resides *or* Its principal place of business is] at _____ [*street address*], _____ County, _____ [California *or specify other state*].

6. [*Qualifications of proposed trustee. See § 560.605, Paragraph 6.*]

7. [*Statement regarding whether proposed trustee has accepted trust. See § 560.605, Paragraph 7.*]

[8. Petitioner requests that the proposed trustee post a bond in the amount of $_____.]

9. [*Names, ages, and places of residence of all living beneficiaries. See § 560.605, Paragraph 10.*]

10. [*Character, condition, location, and value of trust property. See § 560.605, Paragraph 11.*]

11. Administration of the trust has [not] been subject to supervision outside California.

[12. A _____ (petition *or other appropriate request*) for transfer of place of administration of the trust (property) _____ (has not been filed in _____ [*name of state*] *or* has been filed with _____ [*name of court*] in _____ County, _____ [*name of state*], and _____ [*describe status of proceedings in other state, e.g.,* was granted on _____ (*date*)]).]

13. The reasons for transferring _____ [the place of administration *or* (part of) the property] of the above-described trust from _____ County, _____ [*specify state*], to _____ County, California, are that _____ [*set forth ways in which transfer will promote the best interests of the trust and those interested in it, including factors concerning the economical and*

convenient administration of the trust].

14. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

15. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE, petitioner prays for an order transferring _____ [the place of administration of the trust *or* _____ (some *or* all) of the trust property] to _____ County, California.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification. See § 560.521.*]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This petition is for use by a trustee to seek a transfer of the administration of the trust, or some or all of the trust property, to California from a foreign jurisdiction [*see Prob. Code §§ 17200(b)(16)* (ground for petition), 17451 (court may make order transferring trust administration or property)]. The procedure for transfer under *Prob. Code §§ 17450-17457* applies to trusts administered in foreign countries as well as those administered in other states [*see Recommendation Proposing the Trust Law*, 18 Cal. Law Revision Comm'n Reports 741 (1986)].

[3] Contents of Petition

The petition for transfer must set forth all of the following [*Prob. Code § 17453*]:

- The names and places of residence of (a) the trustee administering the trust in the other jurisdiction, and (b) the proposed trustee to whom administration of the trust or trust property will be transferred (Paragraphs 2 and 5, respectively).

- The names, ages, and places of residence of all living beneficiaries, as far as known to the petitioner (Paragraph 9).

- Whether administration of the trust has been subject to supervision in a jurisdiction outside this state. If so, the petition must state whether a petition or appropriate request for transfer of place of administration of the trust or trust property to California has been filed, if necessary, with the court in the other jurisdiction, and the status of the petition or request (Paragraphs 11, 12).

- Whether the trustee proposed to administer the trust in California has agreed to accept the trust in this state. If the trustee has agreed, the acceptance must be attached as an exhibit to the petition or otherwise filed with the court (Paragraph 7).

- A general statement of the qualifications of the trustee proposed to administer the trust in California and the amount of any bond to be requested. If the trustee is an individual, the statement must include the trustee's age (Paragraphs 6, 8, and 5, respectively).

- A copy of the trust instrument or a statement of the terms of the trust instrument in effect at the time the petition is filed, including all amendments thereto (Paragraph 1).

- A statement of the character, condition, location, and value of the trust property sought to be transferred (Paragraph 10).

- A statement of the reasons for the transfer (Paragraph 13).

In addition it alleges: (1) the identity of petitioner (Paragraph 1) [*see Prob. Code §§ 17200(a)* (standing), (2) the basis for venue (Paragraph 3) [see *Prob. Code §§ 17002, 17452*; for discussion of *Prob. Code § 17002* (defining principal place of administration), see *§ 560.521[9][a]*]; (3) the purpose for the petition (Paragraph 4) [*see Prob. Code § 17451*]; and (4) optionally, the amount of any bond requested (Paragraph 8) [*see Prob. Code § 17453(e)*].

[4] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code § 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 8) [*Prob. Code § 17201*]. Notice of a petition regarding a trust is governed by *Prob. Code § 17203(a)*]. For detailed discussion, see *§ 560.137[2]*.

[5] List of Beneficiaries

The petition must state the names and last known addresses of all vested orcontingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[6] State Statutes

Petition to transfer trust to or from another jurisdiction. *Prob. Code §§ 17200(b)(16), 17453*

[7] Cross References

For a related form, see *§ 560.521*.

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49-560 California Forms of Pleading and Practice--Annotated § 560.608

§ 560.608 Petition [Prob. Code § 17201] to Transfer Jurisdiction Over Trust Subject to Continuing Jurisdiction to Another County [Prob. Code §§ 17200(b)(17), 17304]--By Trustee

[1] FORM Petition [Prob. Code § 17201] to Transfer Jurisdiction Over Trust Subject to Continuing Jurisdiction to Another County [Prob. Code §§ 17200(b)(17), 17304]--By Trustee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*name of trust*]	)	PETITION FOR TRANSFER OF TRUST
	)	[PROPERTY]

_____

Petitioner alleges:

1. At all times mentioned herein, petitioner was and now is the duly appointed and acting trustee of the trust created under the will of _____ (*name of settlor and testator*), deceased, a copy of which is attached hereto, marked Exhibit "A," and made a part hereof]. [Petitioner is _____ (*specify type of financial institution if trustee is not an individual, e.g.,* a national banking association incorporated under the laws of the United States, engaged in doing business as a trust company in the State of California)].

2. The decedent's estate was administered in _____County, California.

3. The above-described trust was created by a will _____ [executed before July 1, 1977, and not incorporated by reference in a will on or after July 1, 1977 *or* that provides that the trust is subject to the continuing jurisdiction of the superior court].

4. Final distribution of the decedent's estate occurred on or about _____ [*date*].

5. This petition is made to obtain an order transferring the jurisdiction over the above-described trust to _____ [*court*] in _____ County, California.

6. The names, ages, and places of residence of all living trustees of the above-described trust are as follows:

Name	Age	Residence
_____	_____	_____
_____	_____	_____
_____	_____	_____

7. The names, ages, and places of residence of all living beneficiaries of the above-described trust, as far as known to petitioner, are as follows:

Name	Age	Residence
_____	_____	_____
_____	_____	_____
_____	_____	_____

8. The character, condition, value, and location of the property included in the trust estate are as follows: _____ [*set forth description*].

9. The reasons for transferring the jurisdiction over the above-described trust to _____ [*specify court*], _____ County, California, are as follows: _____ [*set forth ways in which the transfer will promote the best interests of the estate, or will facilitate the economical and convenient administration of the trust*].

10. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE, petitioner prays for an order transferring the jurisdiction over the above-described trust to _____ [*specify court*], _____ County, California.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification. See § 560.521.*]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This petition is for use by a trustee to seek to transfer the jurisdiction over a testamentary trust that is subject to continuing jurisdiction of the court to another county in California [*see Prob. Code §§ 17200(b)(17), 17304*; *see also Prob. Code § 17300* (description of trusts subject to continuing jurisdiction)].

[3] Allegations

This petition alleges:

- The identity of the petitioner and the creation of the trust (Paragraph 1) [*see Prob. Code §§ 15200* (creation of trust), 17200(a) (standing to bring petition)];
- The basis for venue (Paragraph 2) [*see Prob. Code § 17301*];
- The basis for continuing court jurisdiction (Paragraph 3) [*see Prob. Code § 17300*];
- A statement that final distribution of the estate has occurred (Paragraph 4) [*see Prob. Code § 17304(a)*];
- The county to which jurisdiction is sought to be transferred (Paragraph 5) [*see Prob. Code § 17304(b)(1)*];
- The names, ages, and residences of all trustees and all beneficiaries known to the petitioner (Paragraphs 6, 7) [*see Prob. Code § 17304(b)(2)*];
- A statement of the character, condition, and value of the trust property subject to transfer (Paragraph 8) [*see Prob. Code § 17304(b)(3)*]; and
- A statement of the reasons for the transfer (Paragraph 9) [*see Prob. Code § 17304(b)(4)* (requirement of statement), 17304(c) (grounds for transfer)].

[4] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code § 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 8) [*Prob. Code § 17201*]. Notice of a petition regarding a trust is governed by *Prob. Code § 17203(a)*. For detailed discussion, see *§ 560.137[2]*.

[5] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and

last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[6] Granting of Order

If, after hearing, it appears to the court that the transfer of jurisdiction to the county designated in the petition or to any other county in California will be in the best interests of the estate, or that economical and convenient administration of the trust will be facilitated by the transfer, the court will make an order transferring jurisdiction over the trust [*Prob. Code § 17304(c)*].

[7] Transfer of Documents

After the order transferring jurisdiction is made, the court clerk will certify a copy of the order of transfer to the clerk of the court to which jurisdiction is transferred, together with copies of the instrument creating the trust, the decree of distribution, and any other documents or matters of record the court determines by order to be necessary to define the powers and duties of the trustee, or otherwise to be necessary in connection with further administration of the trust [*Prob. Code § 17304(c)*].

The court to which jurisdiction is transferred may from time to time require by order the filing of certified copies of additional papers or matters of record from the court in which the decedent's estate was administered as are required [*Prob. Code § 17304(d)*].

[8] Jurisdiction of Court To Which Trust Is Transferred

On the filing of a certified copy of the order of transfer, together with supporting documents, the court to which jurisdiction is transferred has the same jurisdiction over the trust as the court in which the decedent's estate was administered but for the transfer [*Prob. Code § 17304(e)*].

[9] Venue

If a trust described in *Prob. Code § 17300* continues after distribution of the decedent's estate, the court in which the decedent's estate was administered retains jurisdiction over the trust and is the court in which to file the petition to transfer jurisdiction [*see Prob. Code §§ 17200(b)(17), 17301*].

[10] State Statutes

Petition to transfer jurisdiction of trust subject to continuing court jurisdiction. *Prob. Code § 17201(b)(17)*

Trusts subject to continuing court jurisdiction. *Prob. Code § 17300*

Venue regarding trusts subject to continuing jurisdiction. *Prob. Code § 17301*

Contents of petition to transfer jurisdiction over trust subject to continuing jurisdiction. *Prob. Code § 17304*

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Chapter 560 TRUSTS: EXPRESS, PUBLIC, CHARITABLE, AND TOTTEN TRUSTS
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A. Administration Of Express Trusts
4. Petition Proceedings, Jurisdiction, Venue, And Appointment Of Guardian Ad Litem Relating To Express Trusts

49-560 California Forms of Pleading and Practice--Annotated § 560.609

§ 560.609 Petition [Prob. Code § 17201] to Remove Testamentary Trust From Continuing Jurisdiction of Court When No Trustee Is Trust Company [Prob. Code §§ 17200(b)(18), 17352]--By Trustee

[1] FORM Petition [Prob. Code § 17201] to Remove Testamentary Trust From Continuing Jurisdiction of Court When No Trustee Is Trust Company [Prob. Code §§ 17200(b)(18), 17352]--By Trustee

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*name of trust*]	)	PETITION FOR TRANSFER OF TRUST
	)	[PROPERTY]

_____

Petitioner alleges:

1. At all times mentioned herein, petitioner was and now is the duly appointed and acting trustee of the trust created under the will of _____ (*name of settlor and testator*), deceased, a copy of which is attached hereto, marked Exhibit "A," and made a part hereof.

2. Petitioner [is the sole trustee of the trust and] is not a trust company. [None of the remaining trustees is a trust company.]

3. [*Basis for venue. See § 560.608, Paragraph 2.*]

4. The trust was created by a will executed before July 1, 1977, and not incorporated by reference in a will on or after July 1, 1977.

5. This petition is made to obtain an order removing the trust from the continuing jurisdiction of the court.

6. [*Account and report of trustee's acts. See § 560.559, Paragraphs 4-8.*]

7. [*Condition of estate. See § 560.608, Paragraph 8.*]

8. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

9. The names and addresses of the persons entitled to notice of this petition are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE, petitioner prays for an order removing the trust from the continuing jurisdiction of this court.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*EXHIBIT B--ACCOUNT. See § 560.559.*]

[*Verification. See § 560.521.*]

CAUTION:
The petition must be verified [*Prob. Code § 1021(a)(1)*].

[2] Use of Form

This petition is for use by a trustee to seek removal of a testamentary trust from the continuing jurisdiction of the court [*see Prob. Code §§ 17200(b)(18), 17352*]. It is for use only if no trustee of a trust described in *Prob. Code § 17350* is a trust company, in which case approval of the court is required [*Prob. Code § 17352(a)*; *see Prob. Code § 17351* (notice procedure if trustee is trust company)]. Trusts described in *Prob. Code § 17350* are those created by will executed before July 1, 1977, and not incorporated by reference in a will on or after July 1, 1977. The trustee may petition for court approval at any time, and from time to time, in the trustee's discretion [*Prob. Code § 17352(a)*].

A copy of the trust instrument must be attached to the petition [*Prob. Code § 17352(b)*].

[3] Allegations

This petition alleges:

- The identity of the petitioner and the creation of the trust (Paragraph 1) [*see Prob. Code §§ 15200* (creation of trust), 17200(a) (standing to bring petition)];
- A statement that no trustee is a trust company (Paragraph 2) [*see Prob. Code § 17352(a)*]; and
- The basis for continuing court jurisdiction (Paragraph 4) [*see Prob. Code § 17350*].

[4] Contents of Petition

The petition for removal must set forth the trust accounts in detail (Paragraph 6), report the trustee's acts (Paragraph 6), and show the condition of the trust estate (Paragraph 7). A copy of the trust instrument must be attached to the petition [*Prob. Code § 17352(b)*].

[5] Statement of Grounds and Persons Entitled to Notice

The petition must state facts showing that it is authorized under *Prob. Code § 17200 et seq.* [*Prob. Code § 17201*]. It must also state the name and address of each person entitled to notice of the petition (Paragraph 8) [*Prob. Code § 17201*]. Notice of a petition regarding a trust is governed by *Prob. Code § 17203(a)*]. For detailed discussion, see *§ 560.137[2]*.

[6] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[7] Granting or Denying of Order

At the hearing the court may receive testimony from any interested person and may grant or deny the petition, or may grant the petition on such conditions as the court in its discretion deems proper [*Prob. Code § 17352(c)*].

If the petition is granted, the trustee must send the notice of removal of the trust provided in *Prob. Code § 17351(b)* and file proof of service as required by *Prob. Code § 17351(c)* within six months and seven months, respectively, from the date the petition is granted. A copy of the court order granting the petition must be attached to the notice [*Prob. Code § 17352(d)*]. For a notice, *see § 560.610*.

If the petition is not granted, the trust continues to be administered under *Prob. Code §§ 17300-17304* as if the settlor had provided in the will that the court does not lose jurisdiction of the estate by final distribution [*Prob. Code § 17352(e)*].

[8] State Statutes

Petition to remove testamentary trust from continuing court jurisdiction. *Prob. Code § 17200(b)(18)*

Trusts subject to removal from continuing court jurisdiction. *Prob. Code § 17350*

Contents of petition to remove trust from continuing court jurisdiction. *Prob. Code § 17352*

[9] Cross References

For related forms, see *§§ 560.521, 560.608*.

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49-560 California Forms of Pleading and Practice--Annotated § 560.610

§ 560.610 Notice of Removal of Trust From Continuing Jurisdiction of Court [Prob. Code § 17352(d)]

[1] FORM Notice of Removal of Trust From Continuing Jurisdiction of Court [Prob. Code § 17352(d)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
In the Matter of the	)	NO. _____
_____ [*name of trust*]	)	NOTICE OF REMOVAL OF TRUST FROM CON-
	)	TINUING JURISDICTION OF COURT]

_____

NOTICE IS HEREBY GIVEN that on _____ [*date*], the above-entitled Court entered an order removing the above-captioned trust from the continuing jurisdiction of the court. A copy of the order is attached hereto, marked Exhibit "A," and made a part hereof.

FURTHER NOTICE IS HEREBY GIVEN that as of January 1, 1983, the law was changed to remove the necessity for continuing jurisdiction over the above-captioned trust.

FURTHER NOTICE IS HEREBY GIVEN that any beneficiary of the trust has the right to petition a court to determine important matters relating to the administration of the trust, pursuant to *section 17200 of the Probate Code*. *Section 17200 of the Probate Code* provides as follows:

(a) Except as provided in *Prob. Code § 15800*, a trustee or beneficiary of a trust may petition the court under this chapter [*Prob. Code §§ 17200-17210*] concerning the internal affairs of the trust or to determine the existence of the trust.

(b) Proceedings concerning the internal affairs of a trust include, but are not limited to, proceedings for any of the following purposes:

- Determining questions of construction of a trust instrument.
- Determining the existence or nonexistence of any immunity, power, privilege, duty, or right.
- Determining the validity of a trust provision.
- Ascertaining beneficiaries and determining to whom property shall pass or be delivered upon final or partial termination of the trust, to the extent the determination is not made by the trust instrument.
- Settling the accounts and passing upon the acts of the trustee, including the exercise of discretionary powers.
- Instructing the trustee.
- Compelling the trustee to report information about the trust or account to the beneficiary, if (A) the trustee has failed to submit a requested report or account within 60 days after written request of the beneficiary and (B) no report or account has been made within six months preceding the request.
- Granting powers to the trustee.
- Fixing or allowing payment of the trustee's compensation.
- Appointing or removing a trustee.
- Accepting the resignation of a trustee.
- Compelling redress of a breach of the trust by any available remedy.
- Approving or directing the modification or termination of the trust.
- Approving or directing the combination or division of trusts.
- Amending or conforming the trust instrument in the manner required to qualify a decedent's estate for the charitable estate tax deduction under federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust as required by final regulations and rulings of the United States Internal Revenue Service.
- Authorizing or directing transfer of a trust or trust property to or from another jurisdiction.
- Directing transfer of a testamentary trust subject to continuing court jurisdiction from one county to another.
- Approving removal of a testamentary trust from continuing court jurisdiction.
- Reforming or excusing compliance with the governing instrument of an organization pursuant to *Probate Code Section 16105*.

- Determining petitions filed pursuant to *Probate Code Section 15687* and reviewing the reasonableness of compensation for legal services authorized under that section. In determining the reasonableness of compensation under this paragraph, the court may consider, together with all other relevant circumstances, whether prior approval was obtained pursuant to *Probate Code Section 15687*.

Section 17201 of the Probate Code provides as follows:

A proceeding under this chapter is commenced by filing a petition stating facts showing that the petition is authorized under this chapter. The petition shall also state the grounds of the petition and the names and addresses of each person entitled to notice of the petition.

FURTHER NOTICE IS HEREBY GIVEN that each income beneficiary, as defined in *Probate Code Section 16325*, is entitled to an annual statement of the principal and income receipts and disbursements of the trust, and that any other beneficiary is entitled to that information on written request to the trustee.

FURTHER NOTICE IS HEREBY GIVEN that the appropriate court in which to file a petition pursuant to *Section 17200 of the Probate Code* is [either of the following:] the Superior Court of the County of _____ [*name of county having venue under Prob. Code § 17005*], at _____ (*address*) [*if a different court administered decedent's estate, add*, or the Superior Court of the County of _____ (*name of county having venue over decedent's estate*), at _____ (*address*), which is the court that had jurisdiction over the administration of _____'s (*name of decedent*) estate].
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[2] Use of Form

This notice is for use by a trustee to give notice that a testamentary trust was removed from continuing jurisdiction of the court. This form may be used whether or not the trustee is a trust company. A trustee that is a trust company does not file a petition for removal, but rather gives notice of removal within six months of the initial funding of the trust, and may use the foregoing form to comply with those notice requirements [*see Prob. Code § 17351*]. A trustee that is not a trust company must file a petition for removal, and must give notice in compliance with *Prob. Code § 17351(b)* after the court grants the petition [*Prob. Code § 17352(d)*]. For a form of petition for removal, *see § 560.609*.

[3] Contents of Notice

The notice must contain the following [*see Prob. Code §§ 17351(b)* (contents), 17352(d) (requirement for notice)]:

- A statement that as of January 1, 1983, the law was changed to remove the necessity for continuing court jurisdiction over the trust.

- A statement that *Prob. Code § 17200* gives any beneficiary the right to petition a court to determine important matters relating to the administration of the trust.

- A copy of the text of *Prob. Code §§ 17200* and *17201*.

- A statement that each income beneficiary, as defined in *Prob. Code § 16325*, is entitled to an annual

statement of the principal and income receipts and disbursements of the trust and that any other beneficiary is entitled to such information on written request to the trustee.

- The name and location of the court in the county in which it is appropriate to file a petition pursuant *Prob. Code § 17200*, the name and location of the court that had jurisdiction over the administration of the decedent's estate, and a statement that it is appropriate to file a petition pursuant to *Prob. Code § 17200* with either court.

[4] Service

The trustee that is not a trust company must send the notice of removal of the trust to each beneficiary within six months from the date the petition is granted. The trustee must file proof of service with the court that had jurisdiction over the administration of the decedent's estate within seven months from the date the petition is granted [*Prob. Code §§ 17352(d)* (requirement for notice), 17351(c) (proper court for filing)].

[5] State Statutes

Contents of notice of removal. *Prob. Code § 17351(b)*

Proof of service; proper court for filing. *Prob. Code § 17351(c)*

Notice of removal of trust from continuing court jurisdiction after hearing on petition. *Prob. Code § 17352(d)*

[6] Cross References

For a related form, see *§ 560.609*.

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[Reserved]

§§ 560.611[Reserved]

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PART IV. FORMS
A. Administration Of Express Trusts
5. Actions Involving Third Persons

49-560 California Forms of Pleading and Practice--Annotated § 560.630

§ 560.630 Petition to Enforce Money Judgment by Collecting Trust Income or Principal Due Judgment Debtor as Trust Beneficiary [Code Civ. Proc. § 709.010]

[1] FORM Petition to Enforce Money Judgment by Collecting Trust Income or Principal Due Judgment Debtor as Trust Beneficiary [Code Civ. Proc. § 709.010]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION TO ENFORCE MONEY JUDGMENT
Respondent.	)	
	)	
	)	

Petitioner alleges:

1. Petitioner is a judgment creditor of respondent _____ [*name of trust beneficiary*].

2. Respondent _____ [*name of trust beneficiary*] is the named beneficiary under the _____ [*name of trust*].

3. Respondent _____ [*name of trustee*] is the trustee of the trust [and _____ (*specify, e.g.*, a national banking corporation, incorporated under the laws of the United States, engaged in and doing business as a trust company in California with its principal place of business located in _____ County.]

4. [*Basis for venue. See § 560.521, Paragraph 4.*]

5. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

6. On _____ [*date*], petitioner recovered a money judgment against _____ [*name of beneficiary*] for the sum of $_____ [and for costs in the sum of $_____] in Action No. _____ in the _____ [*specify*] Court of _____ County, entitled _____ vs. _____, which was duly entered in the Judgment Book of that Court, Vol. _____, page _____, on _____ [*date*] [,a copy of which is attached as Exhibit "A," and incorporated by reference].

7. No part of the [unsatisfied portion of the] judgment has been paid and there is due, owing, and unpaid to petitioner from respondent beneficiary on the judgment the sum of $_____, together with interest at the legal rate from _____ [*date of judgment*].

[*EITHER, if transfer of trust property is not restricted and beneficiary's interest is in income*]

8. By the terms of the trust agreement, _____ [*describe beneficiary's interest in trust income, e.g.,* respondent trustee was and is to receive the income of the trust property and to pay to respondent beneficiary the sum of $_____ per month].

WHEREFORE, petitioner prays for an order:

1. That respondent trustee withhold from respondent beneficiary and pay to petitioner _____ [*specify, e.g.,* the sum of $_____ per month to which respondent beneficiary would otherwise be entitled, until petitioner's judgment, together with interest thereon at the legal rate from and after _____ (*date of judgment*) is satisfied in full];

[*OR, if transfer of trust property is not restricted and beneficiary's interest is in principal*]

8. By the terms of the trust agreement, _____ [*describe beneficiary's interest in trust principal, e.g.,* on or about _____ (*date*), respondent trustee will liquidate 400 shares of _____ (*name*) common stock that is the subject of the trust and distribute the proceeds to respondent beneficiary].

WHEREFORE, petitioner prays for an order:

1. That respondent trustee withhold from respondent beneficiary and pay to petitioner _____ [*specify, e.g.,* the proceeds from the sale of 400 shares of _____ (*name*) common stock to which respondent beneficiary would otherwise be entitled, to the extent that petitioner's judgment, together with interest thereon at the legal rate from and after _____ (*date of judgment*) is satisfied in full];

[*OR, if transfer of trust property is restricted and beneficiary's interest is in income*]

8. By the terms of the trust agreement, respondent beneficiary's interest in income is not subject to voluntary or involuntary transfer, and _____ [*describe beneficiary's interest in the trust, e.g.,* he/she receives from the trust property income the sum of $_____, and an amount determined by the respondent trustee for the beneficiary's education and support, payable to the beneficiary monthly].

[9. Petitioner is informed and believes and thereon alleges that the amount that is and will be necessary for the beneficiary's education and support (per _____ (*specify period, e.g.,* month) is $_____.]

WHEREFORE, petitioner prays for an order:

1. That respondent trustee withhold and pay to petitioner _____ [*specify, e.g.,* the sum of $_____, which is the monthly amount to which respondent beneficiary is entitled in excess of the amount necessary for the education and support of the beneficiary, payable to petitioner monthly, until petitioner's judgment, together with interest thereon at the legal rate from and after _____ (*date of judgment*) is satisfied in full];

[*OR, if transfer of trust property is restricted and beneficiary's interest is in principal*]

8. By the terms of the trust agreement, respondent beneficiary's interest in the principal of the trust is not subject to voluntary or involuntary transfer, and _____ [*describe beneficiary's interest in the trust, e.g.,* he/she has a vested future interest in full legal title to the trust property described as the real property situated at _____ (*street address and if any, city*), _____ County, California, and more particularly described as follows: _____ (*set forth legal description*).

WHEREFORE, petitioner prays for an order:

1. That respondent trustee _____ [*specify, e.g.,* liquidate respondent beneficiary's vested future interest in the above-described trust property and distribute to petitioner the proceeds therefrom to which the beneficiary would otherwise be entitled, to the extent that petitioner's judgment, together with interest thereon at the legal rate from and after _____ (*date of judgment*) is satisfied in full];

[*CONTINUE*]

2. For costs herein; and

3. For such other orders as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

[*Verification, if desired. See § 560.521.*]

[2] Use of Form

This petition is for use by a judgment creditor to seek an order to enforce a money judgment against the judgment debtor's interest as beneficiary of a trust by ordering the trustee to pay to the petitioner an amount from trust property otherwise payable to the beneficiary, to the extent allowable by the provisions for transfer restrictions under *Prob. Code §§ 15300-15309* [*see Code Civ. Proc. §§ 695.030(b)(1)* (interest in trust subject to enforcement of money judgment to extent provided by law), 709.010 (petition proceeding); *see also Prob. Code §§ 15306.5* (satisfaction of judgment from payments to which beneficiary otherwise entitled), 15307 (excess of amount necessary for education and support subject to enforcement of judgment)]. This form provides examples for use to obtain the beneficiary's interest in income or in principal for distribution to the petitioner instead of the beneficiary. The form may also be adapted to seek imposition of a lien on the trust property [*see Code Civ. Proc. § 709.010(b)*].

[3] Allegations

The petition alleges:

- The petitioner's status as a judgment creditor (Paragraph 1) [*see Code Civ. Proc. § 709.010(b)*].

- The identity of respondents and a description of the trust (Paragraphs 2, 3) [*see Code Civ. Proc. § 709.010*].

- A description of the underlying judgment and the amount due thereon (Paragraphs 5, 6) [*see Code Civ. Proc. § 709.010(b)*].

- The terms of the trust agreement controlling the amount of income to which the beneficiary is entitled (Paragraph 7) [*see Code Civ. Proc. §§ 695.030(b)(1)* (interest in trust subject to enforcement of money judgment to extent provided by law), 709.010(b) (means of satisfying judgment by sale of beneficiary's interest, collection of trust income, and liquidation and transfer of trust, among others), *Prob. Code §§ 15306.5* (beneficiary's interest subject to judgment creditor's petition), 15307 (excess of amount for education and support subject to judgment creditor's petition)].

Optional Paragraph 8 is for use to allege the amount required for the beneficiary's education and support [*see Prob. Code § 15307* (excess of amount required for education and support subject to judgment creditor's petition)].

[4] Verification

Code Civ. Proc. § 709.010 does not require that the petition be verified.

[5] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[6] Filing of Petition

This petition is filed in the court having jurisdiction over administration of the trust, as prescribed in *Prob. Code §§ 17000-17457*; that is, the appropriate probate court. For discussion of jurisdiction and venue under *Prob. Code §§*

17000-17457, see Subpart D, of this chapter.

[7] Trust Property Subject to Enforcement of Money Judgment Generally

Generally, an interest in a trust is subject to enforcement of a money judgment to the extent provided by law [*Code Civ. Proc. § 695.030(b)(1)*]. With the exception of a trust in which transfer of the beneficiary's interest is restrained, the entire interest of a beneficiary may be applied to the satisfaction of a money judgment under *Code Civ. Proc. § 709.010* [*see Code Civ. Proc. § 695.030(a)*; *see also Recommendation Proposing the Trust Law*, 18 Cal. Law Revision Comm'n Reports 633-634 (1986); *see also § 560.255*]].

[8] Cross References

For a related form, see *§ 560.521*.

For discussion and forms relating to an order applying nonvested interest to satisfaction of a judgment under *Code Civ. Proc. § 709.020*, see *Ch. 254, Executions and Enforcement of Judgments, § 254.180* et seq.

[9] State Constitution

Legal rate of interest on judgment. *Cal. Const., art. XV, § 1*

[10] State Statutes

Interest rate on judgment. *Code Civ. Proc. § 685.010*

Enforcement of a money judgment against trust property generally. *Code Civ. Proc. § 695.030(b)(1)*

Exemption of trust beneficiary's interest from execution. *Code Civ. Proc. § 699.720(a)(8)*

Enforcement of money judgment against interest of beneficiary in trust. *Code Civ. Proc. § 709.010*

Creditors' rights against property of trust subject to restraints of transfer. *Prob. Code §§ 15301(b), 15304, 15305, 15305.5, 15306, 15306.5, 15307*

[11] Decisions

Code Civ. Proc. § 709.010 provides procedure for enforcement of money judgment by directing trustee to make payment in satisfaction of judgment; procedure inapplicable to judgment in equitable action against beneficiary requiring beneficiary to pay money received from trust to a third party. *De Mille v. Ramsey (1989) 207 Cal. App. 3d 116, 127, 254 Cal. Rptr. 573*

Judgment creditor bears burden of proving existence of surplus income from trust estate over that necessary for support of judgment debtor. *Alvis v. Bank of America Nat. Trust & Assn (1950) 95 Cal. App. 2d 118, 124, 212 P.2d 608*

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49-560 California Forms of Pleading and Practice--Annotated § 560.631

§ 560.631 Order For Enforcement of Money Judgment Against Judgment Debtor's Interest as Trust Beneficiary [Code Civ. Proc. § 709.010]

[1] FORM Order For Enforcement of Money Judgment Against Judgment Debtor's Interest as Trust Beneficiary [Code Civ. Proc. § 709.010]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	ORDER GRANTING PETITION TO ENFORCE
Respondent.	)	MONEY JUDGMENT
	)	
	)	

This proceeding for enforcement of a money judgment against the interest of respondent _____ [*name of beneficiary*] as a beneficiary of the _____ [*name of trust*] on the petition of _____ [*name of petitioner*] [, and the return and _____ (*specify responsive paper(s), e.g.,* response) of the _____ (*specify, e.g.,* beneficiary)], came on regularly for hearing on _____ [*date*], before this court, sitting without a jury. Petitioner appeared by counsel _____ [*name*] [; respondent beneficiary appeared by counsel _____ (*name*)]. [Evidence was introduced on behalf of both parties and the matter was argued and submitted for decision.]

On proof made to the satisfaction of the court that the petition ought to be granted,

IT IS ORDERED as follows:

1. That _____ [*specify payment or payments to be made by trustee to petitioner, e.g.*, commencing on _____ (*date*), and _____ (*specify period, e.g.*, monthly) thereafter, _____ (*name of trustee*), as trustee, withhold and pay to petitioner the sum of $_____ otherwise due the respondent beneficiary, until petitioner's judgment, together with interest thereon at the legal rate from and after _____ (*date of judgment*), is satisfied in full].

2. Petitioner recover costs herein incurred.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This order is for use to grant relief on a petition by a judgment creditor toenforce a money judgment against a judgment debtor's interest as a beneficiary of a trust [*see Code Civ. Proc. § 709.010*].

[3] Cross References

For related forms, see *§§ 560.551, 560.630*

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49-560 California Forms of Pleading and Practice--Annotated §§ 560.632-560.649

[Reserved]

§§ 560.632[Reserved]

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49-560 California Forms of Pleading and Practice--Annotated § 560.650

§ 560.650 Notice to Creditors of Deceased Settlor of Revocable Trust [Prob. Code § 19003]--Notice by Publication [Prob. Code § 19040]

[1] FORM Notice to Creditors of Deceased Settlor of Revocable Trust [Prob. Code § 19003]--Notice by Publication [Prob. Code § 19040]

NOTICE TO CREDITORS
OF _____ [*name of deceased settlor*]
#_____ [*proceeding number*]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

Notice is hereby given to the creditors and contingent creditors of the above-named decedent that all persons having claims against the decedent are required to file them with the Superior Court at _____ [*address*], and mail a copy to _____ [*name*], as trustee of the trust dated _____, wherein the decedent was the settlor, at _____ [*address*], within the later of four months after _____ [the date of the first publication of notice to creditors], or, if notice is mailed or personally delivered to you, 60 days after the date this notice is mailed or personally delivered to you. A claim form may be obtained from the court clerk. For your protection, you are encouraged to file your claim by certified mail, with return receipt requested.

_____
[*Name and address of trustee or attorney*]

[2] Use of Form

This form is a notice for use by the trustee of a revocable trust to give notice by publication of the settlor's death to the deceased settlor's creditors. The caption of the notice, the deceased settlor's name, and the name of the trustee must be in at least 8-point type, the text of the notice must be in at least 7-point type, and the language must be substantially as set forth in the form [*Prob. Code § 19040(b)*].

For discussion of the requirements for publishing the notice to creditors, see *§ 560.245[6]*.

[3] State Statutes

Notice to creditors of deceased settlor of revocable trust. *Prob. Code § 19003*

Requirements for publication. *Prob. Code §§ 19040, 19041*

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49-560 California Forms of Pleading and Practice--Annotated § 560.651

§ 560.651 Notice to Creditors of Deceased Settlor of Revocable Trust [Probate Code Section 19003]--Actual Notice [Prob. Code § 19052]

[1] FORM Notice to Creditors of Deceased Settlor of Revocable Trust [Probate Code Section 19003]--Actual Notice [Prob. Code § 19052]

[*Caption. See § 560.650.*]

Notice is hereby given to the creditors and contingent creditors of the above-named decedent that all persons having claims against the decedent are required to file them with the Superior Court at _____ [*address*], and mail or deliver a copy to _____ [*name*], as trustee of the trust dated _____, wherein the decedent was the settlor, at _____ [*address*], within the later of four months after _____ [*date of first publication of notice to creditors*], or, if notice is mailed or personally delivered to you, 60 days after the date this notice is mailed or personally delivered to you, or you must petition to file a late claim as provided in *Section 19103 of the Probate Code*. A claim form may be obtained from the court clerk. For your protection, you are encouraged to file your claim by certified mail, with return receipt requested.

_____	_____
[*Date of mailing this notice if applicable*]	[*Name and address of trustee or attorney*]

[2] Use of Form

This form is a notice for use by the trustee of a revocable trust to notify creditors of the settlor of a revocable trust that the settlor has died. The language of the notice must be substantially as set forth, *above* [*Prob. Code § 19052*].

For further discussion of the requirements for actual notice to creditors, see *§ 560.245[7]*.

[3] Service of Notice

Notice must be given as provided in *Prob. Code § 1215* for mailing of notices [*Prob. Code § 19050*]. Alternatively, notice may be given by personal delivery because, under *Prob. Code § 1216*, personal delivery of a notice or other paper required or permitted to be mailed satisfies any statutory provision under the Probate Code requiring or permitting the mailing of the notice or paper [*see Prob. Code 1216*].

[4] State Statutes

Actual notice to creditors. *Prob. Code §§ 19052-19054*

[5] Cross References

For a related form, see *§ 560.560*

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49-560 California Forms of Pleading and Practice--Annotated § 560.652

§ 560.652 Petition for Approval of Allowance, Compromise, or Settlement of Claims [Prob. Code § 19020]--By Trustee or Beneficiary

[1] FORM Petition for Approval of Allowance, Compromise, or Settlement of Claims [Prob. Code § 19020]--By Trustee or Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of _____ [*name of trust*]	))))	NO. _____ PETITION FOR APPROVAL OF _____ [ALLOWANCE *and/or* COMPROMISE *and/or* SETTLEMENT] OF CLAIM(S) AGAINST DECEASED SETTLOR OF REVOCABLE TRUST [AND FOR ALLOCATION BETWEEN TRUSTS OF AMOUNTS DUE ON CLAIMS]

_____

Petitioner, _____ [*name*], respectfully represents:

[*EITHER*]

1. Petitioner, _____ [*name*], is the duly appointed and acting trustee of the _____ [*name of trust*] (hereinafter referred to as "the trust").

[*OR*]

1. Petitioner, _____ [*name*], is the beneficiary of the _____ [*name of trust*] [(hereinafter referred to as "the trust")].

[*CONTINUE*]

2. The trust was created by _____ [*name of deceased settlor*] on _____ [*date*], by _____ [*specify method of creation of trust, e.g.,* a written declaration of trust].

3. The names and last known addresses of all vested or contingent beneficiaries are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

4. The time for filing claims against the settlor of the trust expired on _____ [*date*].

5. The claims filed against the settlor of the trust, including the name of the claimant, the amount of the claim, the date the claim was filed, and the determination requested by the court, are as follows:

[*SET FORTH information in separately lettered paragraphs, e.g.:*]

a. Jackson Miller, M.D., claim for $3427 dated October 2, 2007, for expenses of deceased settlor's last illness, _____ [*set forth requested determination e.g.,* to be allowed and paid] on _____ [*date*].

b. Russell & White Mortuary, claim for $4297 dated October 22, 2007, for funeral services, _____ [*set forth disposition of claim e.g.,* to be allowed and paid] on _____ [*date*].

c. John Jones, claim for $37,500, dated October 15, 2007, for breach of contract _____ [*set forth requested determination e.g.,* to be compromised for $24,750, pursuant to the agreement of compromise and settlement attached hereto as Exhibit _____ and incorporated by reference, to be paid] on _____ [*date*].

[6. _____ (*Name of deceased settlor*) also left assets in _____ (*specify trust(s) as to which allocation of debts is desired, e.g.,* Trust B), which was/were revocable by him/her at the time of his/her death. The trustee(s) of _____ (*name of trust, e.g.,* Trust B) is/are _____ (*names(s)*). (*If more than one trust:* The trustee(s) of _____ (*name of trust, e.g.,* Trust C) is/are _____ (*names(s)*)).]

[7. The _____ (beneficiary *or* beneficiaries) of _____ (*specify trust(s) as to which allocation of debts is desired, e.g.,* Trust B) is/are _____ (*name(s)*).]

[8. _____ (*Name of deceased settlor*) left _____ (no instructions for the allocation of

debts between these trusts *or* instructions that _____ (*specify instructions, e.g.,* Trust A was to bear all funeral expenses and expenses of last illness, as well as 50 per cent of all other debts not satisfied from his/her probate estate and Trust B was to bear 50 per cent of all debts not satisfied from his/her probate estate other than funeral expenses and expenses of last illness)).]

[9. Petitioner requests that _____ (*set forth requested allocation, e.g.,* $_____ be allocated to _____ (*name of trust*) and that $_____ be allocated to _____ (*name of trust*)). This allocation _____ (is in accordance with the instructions of _____ (*name of deceased settlor*) *or specify reasons for requested allocation, e.g.,* reflects the proportion of the decedent's assets held by the respective trusts).]

[*EITHER*]

10. There are no other claimants whose interest in the trust will be affected by this petition.

[*OR*]

10. _____ [*Name(s)*] _____ [has a claim *or* have claims] against the trust, and his/her/its/their interest in the trust may be affected by this petition.

[*CONTINUE*]

WHEREFORE, petitioner prays that the court make an order approving _____ [payment *or* compromise and payment *or* settlement and payment] of claims set forth herein, and for such other relief as the court may deem proper.

_____ [*signature*]
Petitioner
_____ [*signature*]
Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This petition is for use by the trustee or a beneficiary in obtaining approval of an allowance, compromise, or settlement

of claims against the deceased settlor of a revocable trust [*see Prob. Code § 19020*]. It is not necessary to file a copy of the trust with the petition or that the petition disclose the beneficial interests of the trust [*Prob. Code § 19022(b)*].

For further discussion of the requirements for petitioning for approval of an allowance, compromise, or settlement of claims against the deceased settlor, see *§ 560.252*

[3] Contents of Petition

The petition for approval of allowance, compromise, or settlement of claims must set forth the following [*Prob. Code § 19020(b)*]:

- A description of the trust (Paragraphs 1 and 2).
- The names of the claimants with respect to which the action is requested (Paragraph 5)
- A description of each claim (Paragraph 5).
- The requested determination by the court with respect to the claims (Paragraph 5).
- The beneficiaries of the trust (Paragraph 3).
- Those claimants whose interest in the trust may be affected the petition(alternate Paragraphs 10).
- The trustees of any other trust to which an allocation of liability may be approved by the court pursuant to the petition (Optional Paragraphs 6-9).

[4] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. The petition also does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[5] Verification

The petition must be verified [*see Prob. Code § 1021(a)*; *see also Prob. Code § 12* ("shall" is mandatory)]. If a verified petition is not opposed, it will be accepted as evidence [*see Prob. Code § 1022*].

[6] Venue

The petition is to be filed with the superior court for the county where the deceased settlor resided at the time of death or, if none, in any county in which trust property was located at the time of the settlor's death or, if none, in the county that was the principal place of administration of the trust at the time of the settlor's death [*Prob. Code §§ 19003(b), 19021*].

If the petition seeks approval of allocation to two or more trusts for which *Prob. Code § 19003* prescribes superior courts for more than one county, the court located in the county prescribed for the trustee initiating the proceeding has jurisdiction [*Prob. Code § 19021*].

[7] Notice and Hearing

The clerk will set a hearing date for the petition, and, at least 30 days before the time set for the hearing, the petitioner must cause notice of the time and place of the hearing and a copy of the petition to be served on each of the creditors whose interests in the estate may be affected by the petition and to be mailed to certain other persons who are not petitioners [*see Prob. Code §§ 19022(c), 19023*]. Any interested person may appear to respond or object to the petition [*see Prob. Code §§ 1040, 1043*]. For further discussion of notice and hearing procedures relating to the petition for approval and settlement of claims, see *§§ 560.252*[2,] 560.252[3].

[8] State Statutes

Petition for approval and settlement of claims against deceased settlor. *Prob. Code §§ 19020-19030*

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49-560 California Forms of Pleading and Practice--Annotated § 560.653

§ 560.653 Order for Approval of Allowance, Compromise, or Settlement of Claims [Prob. Code § 19020]

[1] FORM Order for Approval of Allowance, Compromise, or Settlement of Claims [Prob. Code § 19020]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In the Matter of _____ [*name of trust*]	))))	NO. _____ ORDER GRANTING PETITION FOR APPROVAL OF _____ [ALLOWANCE *and/or* COMPROMISE *and/or* SETTLEMENT] OF CLAIM(S) AGAINST DECEASED SETTLOR OF REVOCABLE TRUST [AND FOR ALLOCATION BETWEEN TRUSTS OF AMOUNTS DUE ON CLAIMS]

_____

The verified petition of _____ [*name*], as the _____ [trustee *or* beneficiary] of the _____ [*name of trust*] (hereinafter referred to as "the trust"), for an order approving the _____ [allowance *and/or* compromise *and/or* settlement] of claim(s) against _____ [*name of decedent*], as settlor of the trust, in the amount of $_____, came on regularly for hearing by the court on _____ [*date*]. Petitioner appeared by counsel _____ [*name*] [; _____ (*name*), objector, appeared by counsel _____ (*name*)].

The court finds from proof made to its satisfaction:

1. Notice of the time and place of the hearing was given as required by law.

2. _____ [The *or* Each] claim is a claim within the meaning of *Probate Code Section 19000 et seq.*

3. _____ [The *or* Each] claim was timely filed.

4. _____ [The *or* Each] claim is valid.

WHEREFORE, IT IS ORDERED:

1. The following claim(s) against _____ [*name of decedent*], as settlor of the trust, is/are approved:

[*SET FORTH claims to be approved in as many subparagraphs an necessary, e.g.:*]

a. Jackson Miller, M.D., claim for $3427 dated October 2, 2007, for expenses of deceased settlor's last illness, to be paid on _____ [*date*].

b. Russell & White Mortuary, claim for $4297 dated October 22, 2007, for funeral services, to be paid on _____ [*date*].

[*SET OUT any further orders regarding compromise or settlement in as many paragraphs as necessary, e.g.,:*]

2. The compromise of the claim of John Jones for $37,500, dated October 15, 2007,for breach of contract for $24,750 is approved, and the sum of $24,750 is to be paid in full satisfaction of that claim on _____ [*date*].

Dated _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use in obtaining court approval of the allowance, compromise, or settlement of claims against the deceased settlor of a revocable trust [*see Prob. Code § 19202 et seq.*].

For further discussion relating to a court's order on a petitioning for approval of an allowance, compromise, or settlement of claims against the deceased settlor, see *§§ 560.252[4], [5]*.

[3] State Statutes

Court order on petition for approval and settlement of claims against deceased settlor. *Prob. Code §§ 19025-19027*

[4] Cross References

For a related form, see *§ 560.652*

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49-560 California Forms of Pleading and Practice--Annotated § 560.654

§ 560.654 Notice of Pendency of Action Against Revocable Trust on Rejected Claim [Prob. Code § 19255]

[1] FORM Notice of Pendency of Action Against Revocable Trust on Rejected Claim [Prob. Code § 19255].

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	NOTICE OF PENDENCY OF ACTION AGAINST
Trustee of _____	)	REVOCABLE TRUST OF DECEASED SETTLOR
[*name of trust*], Defendant.	)	ON REJECTED CLAIM
	)	
	)	

_____

NOTICE IS HEREBY GIVEN that, on _____ [*date*], an action on a claim against the above-entitled trust was filed and is pending in the _____ [Municipal Court of the _____ (*name*) _____ (Municipal *or* Judicial) District *or* Superior Court] of _____County, California, entitled _____ [*name*], Plaintiff, vs. _____ [*name*], as Trustee of _____ [*name of trust*], No. _____.

_____ [*date*]

_____ [*signature*]
Attorney for Plaintiff

[2] Use of Form

This form is a notice for use by a creditor bringing an action on a rejected claim against a deceased settlor's revocable trust to give notice of the pendency of the action to the trustee [*see Prob. Code § 19255*].

[3] Filing and Service

The creditor must file a notice of the pendency of the action or the referral to a referee or to arbitration with the court clerk in the trust proceeding, together with proof of giving a copy of the notice to the trustee as provided in *Prob. Code § 1215* [*Prob. Code § 19255(c)*; for discussion of *Prob. Code § 1215, see* Ch. 447, *Probate: Statutory Notice Requirements*].

Personal service of a copy of the summons and complaint on the trustee is equivalent to the filing and giving of the notice [*Prob. Code § 19255(c)*].

[4] State Statutes

Notice of pendency of action on rejected claim. *Prob. Code § 19255(c)*

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49-560 California Forms of Pleading and Practice--Annotated § 560.655

§ 560.655 Complaint for Damages in Action Against Revocable Trust on Rejected Claim [Prob. Code § 19255]--By Creditor Against Revocable Trust

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages in Action Against Revocable Trust on Rejected Claim [Prob. Code § 19255]--By Creditor Against Revocable Trust

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT ON REJECTED CLAIM AGAINST
Trustee of _____	)	TRUST FOR _____ [*e.g.,* DAM-
[*name of trust*], Defendant.	)	AGES FOR BREACH OF CONTRACT]
	)	
	)	

Plaintiff alleges:

1. On _____ [*date*], _____ [*name*], decedent, died. Decedent was the settlor of _____ [*name of trust*] (hereinafter referred to as "the trust").

2. The trust was created on _____ [*date*], by _____ [*specify method of creation of trust, e.g.,* a written declaration of trust].

3. Defendant _____ [*name*] is the duly appointed, qualified, and acting trustee of the trust.

4. On _____ [*date*], _____ [plaintiff *or* _____ (*name*), on plaintiff's behalf,] filed a claim in the amount of $_____ against the trust with the clerk of the court. On _____ [*date*], _____ [plaintiff *or* _____ (*name*), on plaintiff's behalf,] also _____ [mailed *or* delivered] a copy of the claim to _____ [defendant *or* _____ (*name*), defendant's attorney]. A copy of the claim as so filed is attached hereto as Exhibit "_____," and incorporated by reference.

[*EITHER, if plaintiff rejected claim*]

5. On _____ [*date*], defendant rejected the claim _____ [in its entirety *or* in the amount of $_____ and allowed it in the amount of $_____], filed the [allowance and] rejection with the clerk of the court in the above-mentioned proceeding under the Trust Law, and served plaintiff with written notice of the [partial] rejection on _____ [*date*].

[*OR, if plaintiff treats inaction on claim as rejection of claim*]

5. Thirty days have passed since _____ [plaintiff *or* _____ (*name*), on plaintiff's behalf,] filed the claim with the clerk of the court in the above-mentioned proceeding under the Trust Law and provided defendant with a copy of the claim. Defendant has refused or neglected to act on the claim. Pursuant to *Probate Code Section 19254*, plaintiff elects to treat this inaction on the claim as equivalent to notice of rejection of the claim.

[*CONTINUE*]

6. During the decedent's lifetime, and on or about _____ [*date*], _____ [*allege here, and in subsequent paragraphs, all allegations necessary to a complete cause of action for damages for breach of contract or for personal injuries or other, as appropriate, as would be done in an action against decedent while alive*].

7. _____ [No part *or* Only $_____ (*set forth amount allowed and paid*)] of the sum of $_____, which is the total amount of plaintiff's claim as filed, has been paid by decedent, by defendant as the trustee of the trust, or otherwise.

WHEREFORE, plaintiff prays judgment against defendant, as trustee of the trust, as follows:

1. For judgment in the sum of $_____;

2. For costs of suit herein incurred;

3. For reasonable litigation expenses, including attorney's fees, expended in this action; and

4. For such other and further relief as the court may deem proper.

Dated _____.

_____ [*signature*]
Attorney for Plaintiff

[*Add verification if desired.*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This complaint is for use by a creditor to bring an action on a claim against the revocable trust of a deceased settlor when the claim has been rejected, in whole or in part, by the trustee [*see Prob. Code § 19255*].

For further discussion relating to actions on a rejected claim, including the prevailing party's right to recover costs and potential for recovery of litigation expenses including attorney's fees under *Prob. Code § 19255(e)*, see *§ 560.254*.

[3] Allegations

This complaint contains the following allegations:

- Description of the trust (Paragraphs 1-3);
- A claim was filed by the claimant (Paragraph 4);
- The claim was rejected by the trustee (Alternate Paragraphs 5); and
- The creditor has suffered damages (Paragraphs 6 and 7).

[4] Notice of Pendency of Action

The creditor must file a notice of pendency of the action with the court together proof of giving notice to the trustee [*see Prob. Code § 19255(c)*]. For a notice, *see § 560.654*.

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification also will preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[6] Venue

In addition to any other county in which an action on a rejected claim may be commenced, the action may be commenced in the county or city and county in which the principal place of administration of the trust is located [*Prob. Code § 19255(b)*].

[7] Cross References

For a related form, *see § 560.654*.

For alternative allegations as to agency, capacity, and residence of parties, andfictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Filing and Service of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms for allegations showing proper venue, see Ch. 571, *Venue*

For alternative verification forms, see Ch. 572, *Verification*

[8] State Statutes

Action on rejected claim against revocable trust. *Prob. Code § 19255(c)*

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 560 TRUSTS: EXPRESS, PUBLIC, CHARITABLE, AND TOTTEN TRUSTS
PART IV. FORMS
A. Administration Of Express Trusts
6. Claims Against Decedent's Revocable Trust

49-560 California Forms of Pleading and Practice--Annotated § 560.656

§ 560.656 Petition to Allocate Responsibility for Debts Payable by Decedent's Revocable Trust and Surviving Spouse [Prob. Code § 19320]--By Trustee, Surviving Spouse, Personal Representative, Settlor's Estate, or Beneficiary

[1] FORM Petition to Allocate Responsibility for Debts Payable by Decedent's Revocable Trust and Surviving Spouse [Prob. Code § 19320]--By Trustee, Surviving Spouse, Personal Representative, Settlor's Estate, or Beneficiary
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
In the Matter of the	)	PETITION TO ALLOCATE RESPONSIBILITY
_____ [*name of trust*]	)	FOR DEBTS PAYABLE BY DECEDENT'S RE-
	)	VOCABLE TRUST AND SURVIVING SPOUSE
		[*Prob. Code § 19320*]

_____

Petitioner, _____ [*name*], respectfully represents:

[*EITHER*]

1. Petitioner is the trustee of _____ [*name of trust*] (hereinafter referred to as "the trust"), a revocable trust that was settled by _____ [*name of decedent*] on _____ [*date*]. _____ [*Name of decedent*] died on _____ [*date*].

[*OR*]

1. Petitioner is the surviving spouse of _____ [*name of decedent*], who died on _____ [*date*].

[*OR*]

1. Petitioner is the personal representative of the estate of _____ [*name of decedent*], who died on _____ [*date*].

[*OR*]

1. Petitioner is a beneficiary of _____ [*name of trust*] (hereinafter referred to as "the trust"), a revocable trust that was settled by _____ [*name of decedent*] on _____ [*date*]. _____ [*Name of decedent*] died on _____ [*date*].

[*CONTINUE*]

2. All the debts of the decedent and [petitioner, as] the surviving spouse[,] known to the petitioner and subject to allocation are _____ [listed onExhibit _____, attached hereto and made a part hereof *or* the following: _____ (*list*)].

3. The above-described debts should be allocated between [petitioner, as] the surviving spouse of decedent[,] and _____ [the trust *or* _____ (*name of trust*) (hereinafter referred to as "the trust"), a revocable trust that was settled by decedent on _____ (*date*)] for the following reason(s): _____ [*set forth reasons(s)*].

4. Petitioner proposes the following allocation in the belief that it is in the best manner in which to allocate responsibility for the debts listed above between the trust and [petitioner, as] the surviving spouse: _____ [*set forth proposed allocation*].

[5. Petitioner and _____ (*name(s)*), the _____ (personal representative of decedent's estate *and/or* decedent's surviving spouse *and/or* the trustee of the trust) have agreed to the allocation set forth in Paragraph 4, above.]

[6. The above-proposed allocation is affected by the value of the separate property of the surviving spouse and community property and quasi-community property not administered in the trust, because _____ (*specify reasons why allocation would be affected*). The surviving spouse has not provided an inventory and appraisal of this property.]

7. The names and last known addresses of all vested or contingent beneficiaries of the trust are as follows:

Name	Address
_____	_____
_____	_____
_____	_____

WHEREFORE, petitioner prays after due notice and hearing for an order as follows:

[1. Approving the allocation agreement between petitioner and _____ (*names*).]

2. Directing _____ [*name or* petitioner], as the trustee of the trust, to charge the amounts to be allocated to _____ [*name or* petitioner], as surviving spouse, against any of his/her property or interests that are in the possession or control of _____ [*name or* petitioner], as trustee of the trust.

3. Directing _____ [*name or* petitioner], as surviving spouse, to make payment of the amount to be allocated to the trust to _____ [*name or* petitioner], the trustee of the trust, to the extent that his/her property or interests that are in the possession or control of _____ [*name or* petitioner], as trustee, are insufficient to satisfy the allocation.

4. Directing _____ [*name or* petitioner], as trustee of the trust, to make payment of the amounts allocated to the trust by payment to the surviving spouse or creditors;

[5. Ordering _____ (*name of surviving spouse*) to show cause why the information concerning the inventory of the separate property and quasi-community property not administered in the trust as well as the value thereof should not be furnished to the petitioner.]

6. For such other and further orders as the court may deem proper.

_____ [*signature*]
Petitioner
_____ [*signature*]
Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of petition is for use in obtaining an order allocating responsibility for debts between a decedent's revocable trust and his or her surviving spouse [*see Prob. Code § 19320*].

[3] Contents

This form includes the following:

- The petitioner's capacity and standing (Alternate Paragraphs 1);

- A statement of all debts of the decedent and surviving spouse known to the petitioner that are alleged to be subject to allocation and whether those debts have been paid in whole, paid in part, or have not been paid(Paragraph 2) [*Prob. Code § 19321(a)*];

- The reason why the debts should be allocated (Paragraph 3) [*Prob. Code § 19321(b)*]; and

- The proposed allocation and the basis for the allocation alleged by the petitioner (Paragraphs 4-6) [*Prob. Code § 19321(c)*], including an optional statement that the trustee, the personal representative, if any, of the decedent's estate, and the surviving spouse have agreed to the proposed allocation [*Prob. Code § 19324*].

The petition also includes an optional allegation to use when the petitioner is seeking an order to show cause why the surviving spouse should not file an inventory and appraisal of his or her own property (Optional Paragraph 7) [*see Prob. Code § 19322*].

[4] Verification

The petition must be verified [*see Prob. Code § 1021*; *see also Prob. Code § 12* ("shall" is mandatory)]. If a verified petition is not opposed, it will be accepted as evidence [*see Prob. Code § 1022*].

[5] Venue

The petition is required to be filed in the superior court in the principal place of administration of the trust [*see Prob. Code § 17000(a), 17002, 17005(a)(1)*], unless there is no trustee, in which case it is filed in the county where the trust property, or some of it, is located [*see Prob. Code § 17000(a), 17002, 17005(a)(2)*].

[6] Notice of Hearing

At least 30 days before the time set for the hearing on the petition, the petitioner must cause notice of the time and place of the hearing and a copy of the petition to be served on the surviving spouse in the manner provided in *Code Civ. Proc. § 413.10 et seq.* for service of a summons, and mailed to specified other persons who are not petitioners [*Prob. Code § 19323*; *see § 560.256[5]*].

[7] List of Beneficiaries

The petition must state the names and last known addresses of all vested or contingent beneficiaries, including all persons in being who may or will receive trust income or corpus. However, during the time that a trust is revocable and the person holding the power to revoke the trust is competent, the names and last known addresses of beneficiaries who do not hold the power to revoke do not need to be stated. Additionally, the petition does not need to state the name and last known address of any beneficiary who, under *Prob. Code § 15804* (beneficiaries with a future interest in the trust), need not be given notice [*Cal. Rules of Ct., Rule 7.902*].

[8] State Statutes

Allocation of debts between trust and surviving spouse. *Prob. Code §§ 19320-19326*

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PART IV. FORMS
A. Administration Of Express Trusts
6. Claims Against Decedent's Revocable Trust

49-560 California Forms of Pleading and Practice--Annotated § 560.657

§ 560.657 Order to Show Cause Why Information Concerning Property of Surviving Spouse Should Not Be Furnished to Petitioner [Prob. Code § 19322]

[1] FORM Order to Show Cause Why Information Concerning Property of Surviving Spouse Should Not Be Furnished to Petitioner [Prob. Code § 19322]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
In the Matter of the	)	ORDER TO SHOW CAUSE
_____ [*name of trust*].	)	[*Prob. Code § 19322*]
	)	

_____

TO _____ [*name of surviving spouse*]:

You are hereby ordered to appear before this court [in Department _____] on _____ [*date*], at _____ [*time*], then and there to show cause why you should not furnish to _____ [*name of petitioner*] an inventory and appraisal of your separate property and of any community property and quasi-community property not administered in _____ [*name of trust*], to effectuate the allocation and payment of debts as set forth in the attached petition of _____ [*name of petitioner*].

Dated _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form is an order to show cause for use when the petition to allocate debt appears to indicate that allocation would be affected by the value of the separate property of the surviving spouse and any community property and quasi-community property not administered in the trust, and when an inventory and appraisal of the property has not been provided by the surviving spouse. In such a case, the court is required to make an order to show cause why the information should not be provided [*Prob. Code § 19322*].

[3] State Statutes

Order to show cause why information relating to property of surviving spouse should not be provided. *Prob. Code § 19322*].

[4] Cross References

For a related form, see *§ 560.654*

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49-560 California Forms of Pleading and Practice--Annotated § 560.658

§ 560.658 Order Allocating Debts Between Trust and Surviving Spouse [Prob. Code § 19325]

[1] FORM Order Allocating Debts Between Trust and Surviving Spouse [Prob. Code § 19325]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
In the Matter of the	)	ORDER ALLOCATING DEBTS
_____ [*name of trust*]	)	[*Prob. Code § 19325*]
	)	

_____

The petition of _____ [*name*] for an order to allocate responsibility for the debts of _____ [*name of decedent*], settlor of _____ [*name of trust*] (hereinafter referred to as "the trust"), between the trust and _____ [*name of surviving spouse*], decedent's surviving spouse, came on regularly for hearing by the court this date. [Petitioner appeared by counsel _____ (*name*). (*Specify other appearances, if any, e.g.,* _____ (*name*) appeared by counsel _____ (*name*), in opposition to the petition.)].

The court finds from proof made to the satisfaction of the court:

1. Notice of the time and place of the hearing was given as required by law.

2. All facts set forth in the petition are true.

[3. _____ (*Set forth additional findings as desired, e.g.,* The agreement for allocation between

_____ (*name*), as trustee of the trust, and _____ (*name*), as the decedent's surviving spouse, substantially protects the rights of all persons who are interested in the trust.)]

IT IS ORDERED that [, pursuant to the agreement for allocation,] the debts payable by the estate and the surviving spouse are to be apportioned as follows: _____ [*set forth apportionment of each debt*].

IT IS FURTHER ORDERED that:

1. The trustee charge against the property or interests of the surviving spouse all debts allocated to the surviving spouse pursuant to this order as follows: _____ [*set forth property or interests of surviving spouse that are in trustee's possession or control and amount of debt to be allocated to each item of property or interest*];

[2. The surviving spouse pay to the trustee the additional sum of $_____ in satisfaction of all remaining debts allocated to him/her pursuant to this order;]

3. The trustee pay to _____ [the surviving spouse *or* the hereafter-named creditors] the following amounts in satisfaction of all debts allocated to the estate pursuant to the order: _____ [*set forth amounts to be paid to surviving spouse for each creditor, or to each creditor*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use in allocating the debts between the property in a revocable trust settled by a decedent and the decedent's surviving spouse [*Prob. Code § 19325*]. For further discussion, see *§ 560.256[6]*

[3] State Statutes

Order directing allocation. *Prob. Code § 19325*

[4] Cross References

For a related form, see *§ 560.654*

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49-560 California Forms of Pleading and Practice--Annotated §§ 560.659-560.669

[Reserved]

§§ 560.659[Reserved]

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PART IV. FORMS
B. Actions To Establish And Enforce Public, Charitable Trusts

49-560 California Forms of Pleading and Practice--Annotated § 560.670

§ 560.670 Complaint for Preliminary [Code Civ. Proc. § 526] and Permanent Injunction [Civ. Code § 3422] Against Nonprofit Public or Mutual Benefit Corporation for Breach of Charitable Trust [Corp. Code §§ 5142, 7142]--Member's Derivative Action [Corp. Code §§ 5710, 7710]

[1] FORM Complaint for Preliminary [Code Civ. Proc. § 526] and Permanent Injunction [Civ. Code § 3422] Against Nonprofit Public or Mutual Benefit Corporation for Breach of Charitable Trust [Corp. Code §§ 5142, 7142]--Member's Derivative Action [Corp. Code §§ 5710, 7710]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR PRELIMINARY AND PER-
_____ [*names*],	)	MANENT INJUNCTION
Defendants.	)	(Breach of Charitable Trust)
	)	
	)	

Plaintiff alleges:

[*EITHER*]

1. At all times herein mentioned, and at the time of the acts complained of herein, plaintiff was a member of defendant corporation.

[*OR*]

1. Plaintiff's membership in _____ [*name of corporation*], defendant corporation, devolved on plaintiff on _____ [*date*], by _____ [*nature of operation of law resulting in devolution of membership, e.g.,* legacy] from _____ [*name of holder*], who was a member of defendant corporation at the time of the disputed acts.

[*CONTINUE*]

2. Defendant, _____ [*name of corporation*], hereinafter referred to as "the corporation" is, and at all times herein mentioned was, a nonprofit _____ [public *or* mutual] benefit corporation duly organized and existing under the laws of the State of California _____ [*either, if corporation is a public benefit corporation,* for charitable purposes *or, if corporation is a municipal benefit corporation holding charitable assets in trust* for lawful purposes, including _____ (*identify charitable purpose*)], and has its principal place of business in _____ County, California.

3. Defendants _____ (*names*) are, and at all times herein mentionedwere, _____ [*identify additional defendants, e.g.,* the duly elected and acting directors of the corporation].

4. _____ [*Allege residence of each additional defendant, e.g.,* Defendant director _____ (*name*) is a resident of _____, County, California].

[5. Defendant(s), _____ (*name*(*s*)), entered into a contract with defendant _____ (*name of corporation*) on or about _____ [*date*], which provides that _____ (*describe relevant provisions of contract to be rescinded or enjoined*)].

6. Defendant _____ (*name of corporation*) holds _____ [real and personal *or* real *or* personal] property subject to charitable trust. This property was received and is held by the corporation for the uses and purposes specified in _____ [its articles of incorporation *or* the trust instrument dated _____ [*date*], pursuant to which the assets were transferred to the corporation], and for no other use or purpose. Plaintiffs are informed and believe, and on that information allege, that the property held subject to trust has a present value in excess of $_____.

[*EITHER, if corporation is a public benefit corporation*]

7. The provisions of the articles of incorporation of the corporation relating to the purposes for which the corporation was formed read: _____ [*set forth relevant provisions*].

[*OR, if corporation is a mutual benefit corporation holding charitable assets in trust*]

7. The provisions of the trust instrument relating to the charitable purposes for which the corporation administers the aforesaid assets read: _____ [*set forth relevant provisions*].

[*CONTINUE*]

8. In accordance with its purposes, and at all times since its incorporation until on or about _____ [

date], the corporation under its board of directors has been _____ [*specify nature of corporation, e.g.,* an osteopathic medical and surgical college in which young men and women are trained in osteopathic medicine].

9. Ever since _____ [its incorporation *or* accepting the assets pursuant to the aforesaid trust instrument] until on or about _____ [*date*], the corporation has actively pursued and fulfilled the charitable purposes set out in the provisions of the _____ [articles of incorporation *or* trust instrument] of _____ [*specify charitable purposes, e.g.,* providing scholarships to young men and women who are studying osteopathic medicine and funding improvements in equipment and other facilities for the study of osteopathic medicine].

10. Defendant directors have repudiated and abandoned the aforesaid charitable purposes and threaten to and, unless enjoined, will divert the funds and other assets of the corporation to purposes other than and contrary to the aforesaid charitable purposes [for which defendant directors and their predecessors in office have solicited and received funds since the incorporation of defendant corporation] in that: _____ [*allege facts of transaction resulting in breach of trust, including, if applicable, entry into a contract sought to be rescinded or enjoined*].

[11. _____ (*State facts showing that none of the parties to the contract has, in good faith and without actual notice of the trust restriction, parted with value under or in reliance on the contract, e.g.,* On or about _____ [*date*], on learning of the proposed contract and before any party to it had parted with value under or in reliance on it, plaintiff informed all parties to the contract that under the express terms of the trust the _____ (*specify trust's restriction that precludes the contract*).]

[*EITHER*]

12. On or about _____ [*date*], plaintiff made the following efforts to secure action by the board of directors of the corporation to correct the wrongful acts complained of herein: _____ [*describe efforts with particularity*].

[*OR*]

12. Plaintiff did not make any effort to secure action by the board of directors of the corporation to correct the wrongful acts complained of herein, because any effort would have been futile in that _____ [*set forth facts demonstrating futility of demand*].

[*CONTINUE*]

13. On _____ [*date*], plaintiff _____ [informed the board of directors of the ultimate facts of each cause of action herein alleged *or* delivered to the board of directors a true copy of the complaint which plaintiff proposed to file].

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For an order requiring defendants to show cause if they have any, why they should not be enjoined as hereinafter set forth, during the pendancy of this action;

2. For a preliminary injunction and a permanent injunction enjoining defendants, and each of them, and their agents, servants, and employees, and all persons acting under, in concert with, or for them from _____ [

specify, e.g., amending the articles of incorporation of defendant corporation or changing or in any way derogating from the charitable purposes set forth in the articles of incorporation];

3. For costs herein; and

4. For such other orders as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 560.520.*]

CAUTION:
A complaint seeking preliminary injunction must either be verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*). The court may not grant a preliminary injunction unless the complaint or affidavits show that there are sufficient grounds for such an injunction [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan G. Co. v. San Juan R. etc. Assn. (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* . For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

[2] Use of Form

This complaint is for use by a member of a nonprofit corporation administering the assets of a charitable trust to seek preliminary and permanent injunctions against breach of the trust [*see Corp. Code §§ 5142(a)(1), 7142(a)(1)*; *see also Civ. Code § 3422* (grounds for final injunction); *Code Civ. Proc. § 526* (injunctive relief when obligation arises from a trust)]. Inasmuch as the action is derivative in nature, because it is brought on behalf of the corporation acting as trustee, the plaintiff must comply with the requirements for bringing a derivative suit [*see Corp. Code §§ 5710, 7710*]. For further discussion and forms for use in derivative actions under the analogous General Corporation Law, see Ch. 168, *Corporations: Derivative Actions* .

This form may be adapted for use by plaintiffs other than a member of the corporation [*see Corp. Code §§ 5142(a), 7142(a)* (standing of corporation, officer or director, person with reversionary, contractual or property interest in assets of trust, Attorney General or person granted relator status)].

[3] Allegations

This complaint alleges:

- The plaintiff's standing (Paragraph 1) [*see Corp. Code §§ 5710(b)(2), 7710(b)(2)*];
- The capacity and principal place of business of defendant corporation (Paragraph 2);
- The identities of additional defendants, such as directors or officers of the corporation, and their residences (Paragraphs 3 and 4);

- The nature and value of property held in trust (Paragraph 6);

- The provisions of the articles of incorporation or trust instrument relating to the corporation's charitable purposes (Paragraph 7);

- The charitable purposes of the corporation (Paragraphs 8 and 9);

- The facts concerning the transaction resulting in breach of the charitable trust (Paragraph 10);

- The efforts made by plaintiff to secure action by the directors, or the reasons why such efforts would be futile (Paragraph 12) [*see Corp. Code §§ 5710(b)(2), 7710(b)(2)*]; and

- Notice to the board of directors by the plaintiff concerning the facts of this cause of action (Paragraph 13) [*see Corp. Code §§ 5710(b)(2), 7710(b)(2)*].

Optional allegations are included for use if the action seeks to rescind or enjoin the performance of a contract (Paragraphs 5 and 11) [*see Corp. Code §§ 5142(b)(1), 7142(b)(1)*; *see* § 560.679.[4]].

[4] Rescission or Injunction Against Performance of Contract

In an action under *Corp. Code § 5142* or *7142* for breach of a charitable trust the court may not rescind or enjoin the performance of a contract unless (1) all of the contracting parties are parties to the action, (2) no party to the contract has, in good faith and without actual notice of the trust restriction, parted with value under or in reliance on the contract, and (3) it is equitable to do so [*see Corp. Code §§ 5142(b), 7142(b)*]. For discussion and forms relating to rescission of contracts in general, see Ch. 490, *Rescission and Restitution* .

[5] Necessity for Alleging Capacity

Nonprofit public benefit corporations and municipal benefit corporations have the capacity to sue and be sued [*see Corp. Code §§ 5004* (applicability of Code of Civil Procedure), 5140 (powers of public benefit corporation), 7140 (powers ofmunicipal benefit corporation)]. Technically, legal capacity need not be specifically alleged in a pleading, because lack of capacity, if apparent on the face of the complaint, should ordinarily be raised by an answer or demurrer [*Los Angeles Railway Co. v. Davis (1905) 146 Cal. 179, 180-181, 79 P. 865]* . However, the general practice appears to be to include allegations of capacity.

Allegations of the principal place of business of the corporate parties to an action are customarily included, although they are not necessary unless venue is based on location of the corporation's principal place of business [*see Code Civ. Proc. § 395.5* (corporate defendant); *Corp. Code § 5068* (defining "proper county" regarding certain actions involving nonprofit corporations)].

[6] Jurisdiction

A derivative suit is an equitable action [*see Gaillard v. Natomas Co. (1985) 173 Cal. App. 3d 410, 419, 219 Cal. Rptr. 74]* . Thus, the action is in the jurisdiction of the superior court and is not a limited civil case [*see Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(b)*].

[7] Notice to Attorney General

In an action brought to enjoin, correct, obtain damages for, or to otherwise remedy a breach of a charitable trust, the Attorney General must be given notice, and may intervene [*Corp. Code §§ 5142(a), 7142(a)*].

[8] Cross References

For a related form, see *§ 560.520*.

For alternative allegations of corporate capacity, see Ch. 160, *Corporations: Capacity* and Ch. 20, *Allegations Commonly Used*

For a discussion of and forms for use in obtaining injunctive relief, see Ch. 303, *Injunctions*

[9] State Statutes

Breach of obligation arising out of trust as ground for permanent injunctive relief. *Civ. Code § 3422*

Breach of obligation arising out of trust as ground for preliminary injunctive relief. *Code Civ. Proc. § 526*

Action for breach of charitable trust by a nonprofit public benefit corporation. *Corp. Code § 5142*

Requirements for bringing members' derivative action against nonprofit public benefit corporation. *Corp. Code § 5710(b)*

Action for breach of charitable trust by a nonprofit mutual benefit corporation. *Corp. Code § 7142*

Requirements for bringing members' derivative action against nonprofit mutual benefit corporation. *Corp. Code § 7710(b)*

[10] Text References

California Corporation Laws, Ch. 19, *Nonprofit Corporations and Organizations*

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B. Actions To Establish And Enforce Public, Charitable Trusts

49-560 California Forms of Pleading and Practice--Annotated § 560.671

§ 560.671 Complaint for Actual and Punitive Damages or Accounting [Corp. Code §§ 5233(h), 7238] Based on Self-Dealing Transaction by Director [Corp. Code §§ 5233(c), 7238]--By Other Director or Officer on Behalf of Nonprofit Corporation

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Actual and Punitive Damages or Accounting [Corp. Code §§ 5233(h), 7238] Based on Self-Dealing Transaction by Director [Corp. Code §§ 5233(c), 7238]--By Other Director or Officer on Behalf of Nonprofit Corporation

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*names*],	)	(Self-dealing Transaction by Director of Nonprofit
Defendants.	)	Organization)
	)	[*Corp. Code §§ 5233, 7238*]
	)	

_____

Plaintiff alleges:

1. Plaintiff, _____ [*name of director or officer*], is and at all times mentioned herein was, a _____ [director *or* officer] of _____ [*name of corporation*].

2. [*Capacity of defendant nonprofit corporation. See § 560.670, Paragraph 2*].

3. Defendant, _____ [*name of director*], was at all times herein mentioned a director of the corporation.

4. Defendant, _____ [*name of Attorney General*], is the duly constituted Attorney General of the State of California and as such is charged with the supervision and enforcement of all charitable trusts.

5. _____ [*Allege facts showing contract or transaction that is basis of action, e.g.,* On or about _____ [*date*], after negotiations conducted on behalf of _____ (*name of defendant nonprofit corporation*) by _____ (*name of defendant director*), _____ (*name of defendant nonprofit corporation*) entered into a contract with _____ (*name of buyer*) for the sale of a parcel of property at _____ (*street address*), _____ County, California. On or about, _____ [*date*], on payment to _____ (*name of defendant nonprofit corporation*) of $_____, _____ (*name of defendant nonprofit corporation*) conveyed the property in accordance with the contract].

6. _____ [*Name of defendant director*] had a material financial interest in the transaction described above in that _____ [*specify, e.g.,* defendant at that time owned 8000 shares of common stock in _____ (*name of buyer*), which represented 80 percent of the outstanding shares in _____ (*name of buyer*)].

[7. _____ (*Allege any additional facts showing lack of good faith or intent to further best interests of corporation, e.g.,* Two days after the sale of the property to _____ (*name of buyer*), _____ (*name of buyer*) sold the property for $_____, a 250 percent profit over the amount paid to _____ (*name of defendant nonprofit corporation*).]

[*EITHER, if alleging measure of damages*]

8. Defendant _____ [*name of nonprofit corporation*] has lost _____ [*specify property lost to corporation as a result of transaction*], valued at $_____on the date of the transaction described above, [together with $_____in _____ (income *and/or* appreciation) that _____ (*name of nonprofit corporation*) would have earned from the property since that date had the transaction not occurred].

[*OR, if alleging necessity for accounting*]

8. The amount of money and other property due from defendant _____ [*name of director*] to _____ [*name of nonprofit corporation*] is unknown to plaintiff and cannot be ascertained without an accounting of the proceeds that defendant _____ [*name of director*] has gained by reason of the transaction. _____ [Plaintiff has demanded an accounting of the transaction from defendant director and payment of any sum found to be due and delivery of any property that defendant should in equity return to the corporation, but defendant has failed and refused and continues to fail and refuse to render such an accounting *or allege facts showing that a demand would have been futile*].

[9. With respect to the acts described above, defendant _____ (*name of director*) acted _____ (maliciously *or* fraudulently) in that _____ (*specify actions related to transaction that show malice or fraud*).]

WHEREFORE, plaintiff prays judgment against defendant director as follows:

[*EITHER*]

1. For general damages in the amount of $_____;

[*OR*]

1. For an accounting for any profits defendant _____ [*name of director*] may have made by reason of the transaction described above;

2. For the amount of defendant's profit to be paid to _____ [*name of nonprofit corporation*];

[*CONTINUE*]

3. For interest [on the sum of $_____] at the legal rate from or after _____, [*month/day*] _____ [*year*];

[4. For exemplary damages in the sum of $_____;]

5. For costs herein; and

6. For such other orders as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 560.520.*]

[2] Use of Form

This form of complaint is for use to bring an action against a director of a nonprofit public or mutual benefit corporation for a self-dealing transaction [*see Corp. Code §§ 5233* (public benefit corporations), 7238 (mutual benefit corporations holding charitable assets in trust)]. The form is for use by a plaintiff who is a director or officer of the corporation, but it may be adapted for use if the plaintiff is the corporation, a member, or any person who has been granted relator status by the Attorney General [see *Corp. Code § 5233(c)*].

[3] Allegations

This form alleges:

- The plaintiff's standing (Paragraph 1) [see *Corp. Code § 5233(c)*];
- The capacity of defendant director (Paragraph 3) [*see Corp. Code § 5233(a)*];
- Joinder of the Attorney General (Paragraph 4) [*see Corp. Code § 5233(c)*]; (
- Facts showing that the defendant director had a material financial interest in the transaction (Paragraphs 5-6)].

Paragraph 8 is for use to allege a measure of damages or to seek an accounting (Alternative Paragraphs 8) [*see Corp. Code § 5233(h)*]. Optional Paragraphs 7 and 9 are for use to establish a basis for exemplary damages [*see Corp. Code § 5233(h)*]. For further discussion, see *§ 560.671[5]*.

[4] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified [*Code Civ. Proc. §§ 92(b), 446*], and will also preclude a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[5] Remedies

If a self-dealing transaction has occurred, the interested director or directors must perform those acts and pay those damages that, in the court's discretion, will provide an equitable and fair remedy to the corporation. Relevant factors are any benefit received by the corporation and whether the interested director or directors acted in good faith and with intent to further the best interest of the corporation [*Corp. Code § 5233(h)*]. Without limiting the generality of the foregoing, the court may order the director to do any or all of the following [*Corp. Code § 5233(h)*]:

- Account for any profits made from the transaction and pay them to the corporation.
- Pay the corporation the value of the use of any of its property used in the transaction.
- Return or replace any property lost to the corporation as a result of the transaction, together with any income or appreciation lost by reason of the transaction, or account for any proceeds of sale of the property, and pay the proceeds to the corporation together with interest at the legal rate. The court may award prejudgment interest to the extent allowed in *Civ. Code § 3287* or *3288*. Moreover, the court has discretion to grant exemplary damages for a fraudulent or malicious violation of *Corp. Code § 5233*.

[6] Venue

An action for damages based on the self-dealing of a director of a nonprofit corporation must be brought in the superior court of the county in which the corporation's principal office in California is located, or, if the corporation has no such office, in Sacramento County [*Corp. Code § 5068, 5233(c)*].

[7] Attorney General as Indispensible Party

The Attorney General is an indispensible party to an action challenging the self-dealing transaction of a director of a nonprofit corporation under *Corp. Code § 5233* [*see Corp. Code § 5233(c)*].

[8] Statute of Limitations

When brought by a party other than the Attorney General, the action must be filed within two years after written notice has been filed with the Attorney General setting forth the material facts of the transaction and the director's interest in it or, if no such notice is filed, within three years after the transaction occurred. The Attorney General may file the action within 10 years after the transaction occurred [*Corp. Code § 5233(e)*].

[9] State Statutes

Corporation's power to contract, borrow, or lend. *Corp. Code § 5140*

Action by board without meeting. *Corp. Code § 5211(b)*

Restrictions on power of committee to approve self-dealing transaction. *Corp. Code § 5212(a)(8)*

Self-dealing transaction of director of public benefit corporation defined; action authorized. *Corp. Code § 5233*

Corp. Code § 5233 made applicable to mutual benefit corporations holding assets in charitable trust. *Corp. Code § 7238*

[10] Text References

Ballantine and Sterling, California Corporation Laws, Ch. 19, *Nonprofit Corporations and Organizations* (Matthew Bender)

[11] Cross References

For a related form, see *§ 560.520*

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B. Actions To Establish And Enforce Public, Charitable Trusts

49-560 California Forms of Pleading and Practice--Annotated § 560.672

§ 560.672 Affirmative Defense Allegations to Action for Damages Based on Defendant Director's Alleged Self-Dealing Transaction [Corp. Code § 5233]--Prior Approval of Transaction [Corp. Code § 5233(d)(2), (3)]

[1] FORM Affirmative Defense Allegations to Action for Damages Based on Defendant Director's Alleged Self-Dealing Transaction [Corp. Code § 5233]--Prior Approval of Transaction [Corp. Code § 5233(d)(2), (3)]

AS A [_____ (*specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. _____ [*Name of corporation*] entered into the transaction for its own benefit, in that _____ [*specify benefit received or to be received by corporation*].

2. The transaction was fair and reasonable as to _____ [*name of corporation*] at the time _____ [*name of corporation*] entered into the transaction.

[*EITHER, if board of directors authorized or approved transaction*]

3. On _____ [*date*], prior to consummating the transaction, or any part thereof, the board of directors of _____ [*name of corporation*] _____ [authorized *or* approved] the transaction in good faith, with full knowledge of the material facts concerning the transaction and the interest of _____ [*name of defendant director*] in the transaction, by a vote of _____ [*specify number*]. At that time, there were a total of _____ [*specify number*] directors of the board, and the aforementioned vote represented a majority of these directors, excluding the _____ [*specify number*] vote(s) of the defendant director(s).

4. _____ [Prior to _____ (authorizing *or* approving) the transaction, the board considered and in good faith determined after reasonable investigation that the corporation could not have obtained a more advantageous arrangement with reasonable effort under the circumstances *or* The corporation could not have obtained a more advantageous arrangement with reasonable effort under the circumstances in that

_____ (*specify facts*)].

[*OR, if committee or person authorized by board approved transaction*]

3. The disputed transaction was approved by _____ [*name of person or committee authorized by board*] on _____ [*date*], in good faith and with knowledge of the material facts concerning the transaction and the directors's interest in the transaction. [The committee consisted of _____ (*number*) members, _____ (*number constituting majority of members*) of whom voted to approve the transaction.]

4. _____ [*Name of authorized person or committee*] was authorizedby the board of directors of _____ [*name of nonprofit corporation*] to approve the transaction complained of by virtue of _____ [*specify basis for authority, e.g.,* a majority vote taken by the board on _____ [*date*], conferring authority on _____ (him *or* her *or* the committee) to _____ (*specify nature of authority*)].

5. It was not reasonably practicable to obtain approval of the board of directors of the corporation prior to entering into the transaction because _____ [*specify reasons*].

6. _____ [Prior to approving the transaction, the _____ (*name of authorized person or committee*) considered and in good faith determined after reasonable investigation that the corporation could not have obtained a more advantageous arrangement with reasonable effort under the circumstances *or* The corporation could not have obtained a more advantageous arrangement with reasonable effort under the circumstances in that _____ (*specify facts*)].

7. The board, after determining that the transaction benefitted the corporation and was fair and reasonable as to the corporation, ratified the transaction at its next meeting on _____ [*date*], by a vote of _____ [*specify number of majority vote*]. At that time, there were a total of _____ [*specify number*] directors of the board, and the aforementioned vote represented a majority of these directors, excluding the _____ [*specify number*] vote(s) of the defendant director(s).

[2] Use of Form

This form of affirmative defense is for use in an answer to an action brought to recover damages, an accounting, or the return of property from a director of a nonprofit corporation who has been sued for a self-dealing transaction under *Corp. Code § 5233*. The affirmative defense set forth is based on prior approval of the transaction by a majority of the directors of the board, or by a person or committee authorized by the board, and subsequent ratification by the board [*see Corp. Code § 5233(d)(2), (3)*].

[3] Allegations

This form alleges: (1) that the corporation received benefit from the transaction (Paragraph 1) [*see Corp. Code § 5233(d)(2)(A)*], and (2) that the transaction was fair and reasonable to the corporation (Paragraph 2) [*see Corp. Code § 5233(d)(2)(B)*]. First alternative Paragraphs 3 and 4 are for use if the board approved the transaction in accordance with the requisite statutory standards [*see Corp. Code § 5233(d)(2)(C), (D)*]. Second alternative Paragraphs 3-7 are for use if a committee approved the transaction in accordance with the requisite statutory standards, and the board thereafter ratified it [*see Corp. Code §§ 5233(d)(3)*].

[4] Cross References

For a related form, see *§ 560.671*.

For discussion and forms relating to answers in general to use with this form, see Ch. 26, *Answers*

[5] State Statutes

Restrictions on power of committee to approve self-dealing transaction. *Corp. Code § 5212(a)(8)*

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B. Actions To Establish And Enforce Public, Charitable Trusts

49-560 California Forms of Pleading and Practice--Annotated § 560.673

§ 560.673 Voluntary Winding Up--Petition for Court Supervision and Approval of Distribution of Assets to Proposed Corporation--By Nonprofit Public Benefit Corporation [Corp. Code § 6614] or Mutual Benefit Corporation Holding Charitable Assets in Trust [Corp. Code § 8614]

[1] FORM Voluntary Winding Up--Petition for Court Supervision and Approval of Distribution of Assets to Proposed Corporation--By Nonprofit Public Benefit Corporation [Corp. Code § 6614] or Mutual Benefit Corporation Holding Charitable Assets in Trust [Corp. Code § 8614]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

In re _____ [*name of corporation*], A Corporation in Process of Winding Up.	)))))	NO. _____ PETITION FOR COURT SUPERVISION OF VOLUNTARY WINDING UP OF _____ [PUBLIC BENEFIT CORPORATION *or* MUTUAL BENEFIT CORPORATION HOLDING ASSETS IN CHARITABLE TRUST] [Corp. Code § _____ (6614 *or* 8614)]

_____

Petitioner alleges:

1. Petitioner, _____ [*name of corporation*], hereinafter referred to as "petitioner corporation" is, and at all times herein mentioned was, a nonprofit _____ [public *or* mutual] benefit corporation duly organized and existing under the laws of the State of California _____ [*either, if corporation is a public benefit corporation,* for charitable purposes *or, if corporation is a municipal benefit corporation holding charitable assets in trust* for lawful purposes, including _____ (*identify charitable purpose*)], and has

its principal place of business in _____ County, California [with chapters throughout the state].

2. The corporation's assets consist of $_____.

3. In accordance with procedures set forth under Section _____ [6610(a) *or* 6610(b) *or* 8610(a) *or* 8610(b)] of the Corporation Code, the following resolution was approved by _____ [a majority of all the members of the corporation *or* the corporation's board of directors *or* the corporation's board of directors and its members]:

_____ [*Set forth language, e.g.,* It is hereby resolved to wind up and dissolve the Corporation, and after paying or providing for all known debts and liabilities, to transfer all remaining assets of the Corporation to _____ (*name of proposed transferee corporation*), or other Corporation or organization as may be approved by the Attorney General or by a Decree of the Superior Court].

[A copy of the Resolution is attached hereto as Exhibit "A" and made a part hereof.]

4. A certificate of election to dissolve was filed in the office of the Secretary of State on _____, 19 _____, and with the Attorney General on _____, 19_____. [A copy of the certificate is attached hereto as Exhibit "B" and made a part hereof.]

5. Supervision of the court over the voluntary winding up proceeding is necessary in that _____ [*specify facts indicating why court supervision is necessary to protect interested persons, the corporation's charitable purpose, or assets held in charitable trust*].

WHEREFORE, petitioner prays for an order:

1. For a winding up and dissolution of the corporation;

2. For distribution of petitioner's assets to _____ [*name of proposed transferee corporation*] or to a suitable successor corporation to be held on the same trusts as held by petitioner;

3. Prescribing what notice shall be given to persons interested in the corporation as members or creditors;

4. Assuming jurisdiction over the winding up of the affairs of the corporation; and

5. For such other orders as the court may deem proper.

_____ [*signature*]
Attorney for Petitioner

[*Verification. See § 560.521.*]

[2] Use of Form

This form is for use by a nonprofit public benefit corporation or a nonprofit mutual benefit corporation holding assets in charitable trust to petition the court to assume jurisdiction over the corporation's voluntary winding up and dissolution proceedings [*Corp. Code §§ 6614* (public benefit corporations), 8614 (mutual benefit corporations)]. It may be used only after the board and/or membership have elected to wind up and dissolve [*see Corp. Code §§ 6610, 6614, 8610, 8614*].

[3] Allegations

This petition alleges:

- The capacity of the corporation as petitioner (Paragraph 1) [see *Corp. Code §§ 6614, 8614*];
- The amount of the corporation's assets (Paragraph 2);
- The substance of the resolution pursuant to which voluntary winding up and dissolution was approved (Paragraph 3) [see *Corp. Code §§ 6610(a), 8610(a)*];
- The filing of a certificate of election to dissolve (Paragraphs 4) [*see Corp. Code §§ 6611(a), 8611(a)*]; and
- The basis for seeking court supervision (Paragraph 5) [*see Corp. Code §§ 6614, 8614*].

The prayer requests a decree of dissolution and an order naming a successor corporation to the assets held in charitable trust by the petitioning corporation [*see Corp. Code §§ 6716(b), 8716(b)*], and, in accordance with *Corp. Code §§ 6614* and *8614*, orders prescribing the form of notice to be given to interested persons, assuming jurisdiction over the winding up of the corporation's affairs, and such other orders as justice and equity may require.

[4] Basis for Jurisdiction

The court may take jurisdiction if it appears necessary to protect any parties in interest or, in the case of a public benefit corporation, to protect the purposes served by the corporation, or, in the case of a mutual benefit corporation holding charitable assets in trust, to protect those assets [*Corp. Code §§ 6614, 8614*].

[5] Standing

The petition may be instituted by the corporation, by the authorized number (percentage of the voting power), by the Attorney General, or by three or more creditors [*Corp. Code §§ 6614, 8614*; *see Corp. Code §§ 5036* (defining "authorized number"), 5078 (defining "voting power")].

[6] Venue

The petition must be brought in the superior court of the county in which the corporation's principal office in California is located, or, if none, in Sacramento County [*Corp. Code §§ 5068, 6614, 8614*].

[7] Notice of Proceedings

Notice of the petition proceedings must be given to the corporation (if the petition is instituted by one other than the corporation), and to other persons interested in the corporation as members or creditors as the court may order [*Corp. Code §§ 6614, 8614*].

[8] Application of Provisions Governing Involuntary Dissolution

Once the court assumes jurisdiction, the procedures for involuntary dissolution set forth in *Corp. Code §§ 6512-6519* (public benefit corporations), and *Corp. Code §§ 8512-8519* (mutual benefit corporations) apply [*Corp. Code §§ 6614, 8614*].

[9] Cross References

For discussion and forms relating to petition proceedings for court supervision of voluntary winding up and dissolution proceedings of commercial corporations, see Ch. 170, *Corporations: Dissolution*

[10] California Points and Authorities

For a memorandum of points and authorities in support of a petition for court supervision of a voluntary winding up and dissolution, see California Points and Authorities, Ch. 52, *Corporations*

[11] State Statutes

Election for voluntary wind up and dissolution of public benefit corporation. *Corp. Code § 6610*

Jurisdiction over voluntary dissolution of public benefit corporation. *Corp. Code § 6614*

General provisions relating to dissolution of public benefit corporation. *Corp. Code §§ 6710-6721*

Election for voluntary wind up and dissolution of municipal benefit corporation. *Corp. Code § 8610*

Jurisdiction over voluntary dissolution of municipal benefit corporation. *Corp. Code § 8614*

General provisions relating to dissolution of mutual benefit corporation. *Corp. Code §§ 8710-8724*

[12] Decisions

Court is not bound by Attorney General's nomination of distributee for assets of charitable corporation in connection with petition for approval of voluntary dissolution and proposed disposition of assets. *In re Veterans' Industries, Inc. (1970) 8 Cal. App. 3d 902, 920, 88 Cal. Rptr. 303*

[13] Text References

Ballantine and Sterling, California Corporation Laws, Ch. 19, *Nonprofit Corporations and Organizations* (Matthew Bender)

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[Reserved]

§§ 560.674[Reserved]

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C. Totten Trusts

49-560 California Forms of Pleading and Practice--Annotated § 560.690

§ 560.690 Complaint to Establish Totten Trust [Prob. Code §§ 80, 5301-5307]--By Beneficiary

[1] FORM Complaint to Establish Totten Trust [Prob. Code §§ 80, 5301-5307]--By Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*names*],	)	COMPLAINT TO ESTABLISH TOTTEN TRUST
Defendants.	)	
	)	
	)	

Plaintiff alleges:

1. On or about _____ [*date of death*], _____ [*name*] died, and his/her estate is now pending administration in a probate proceeding in the Superior Court for the County of _____, California, entitled _____ [*name of case in which decedent's estate is being administered*], Case No. _____.

2. Defendant _____ [*name of executor/executrix of will or administrator/adminstratrix of estate*] is the duly appointed, qualified, and acting _____ [*specify capacity of defendant, e.g.*, executor of the will] of the decedent.

3. Defendant _____ [*name of financial institution in which decedent's account is located*] is a _____ [*specify type of financial institution, e.g.*, a national banking association duly organized and

existing under and by virtue of the laws of the United States], and having its principal place of business in the City of _____, County of _____, California.

4. During his/her lifetime, and on or about _____ [*date account was opened*], the decedent opened a savings account in defendant _____ [*specify type of financial institution, e.g.,* bank] with a deposit of $_____ [*amount of initial deposit*] in the name of decedent for the benefit of and in trust for plaintiff, designated "_____ [*name of decedent*], trustee, for _____ [*name of plaintiff*]." At the same time and pursuant to his/her directions, the decedent received from defendant _____ [*specify type of financial institution, e.g.,* bank] its passbook No. _____, bearing the same designation. [From time to time thereafter until his/her death, the decedent made withdrawals from, and deposits in, the account in varying amounts.]

5. Decedent _____ [*describe any changes decedent made to the title of the account, e.g.,* never changed the designation on the account], and when decedent died, plaintiff was the only beneficiary named on the account.

6. At the time of decedent's death, decedent was the sole [surviving] trustee of the savings account herein described.

7. At the time of decedent's death, there was [and still is] on deposit in the account the sum of $_____ [*amount of balance in account at time of decendant's death*].

8. At no time did decedent otherwise provide for an alternative disposition of the funds constituting the balance of the savings account herein described.

9. Defendant _____ [executor/executrix/administrator/administratrix] has _____ [withdrawn the sums on deposit *or* possession of the _____ (*describe any evidence of account, e.g.,* certificate of deposit)], refuses to deliver it/them to plaintiff or recognize the trust in favor of plaintiff, and contends that the sums on deposit in the account are part of decedent's estate.

10. On or about _____ [*date*], plaintiff delivered _____ [*describe proof of death offered, e.g.,* a certified copy of decedent's death certificate] to defendant's _____ [*address*] branch and demanded payment of all sums remaining on deposit to the credit of account No. _____, but defendant _____ [*name of defendant financial institution*] refuses to pay the balance of the account together with the interest due thereon to plaintiff.

WHEREFORE, plaintiff prays judgment against defendants, and each of them, as follows:

1. For a declaration by the court of a trust in the account herein described, and the right of plaintiff to payment of the funds therein together with the interest due thereon;

2. For issuance of an order requiring defendant _____ [executor/executrix/administrator/administratrix/financial in stitution] to deliver the sums on deposit in the account herein described to plaintiff;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 560.520.*]

[2] Use of Form

This complaint is for use by the beneficiary of a Totten trust account [*see Prob. Code § 80* (definition of Totten trust account)] against the administrator of the trustee's estate and the financial institution in which the account is located, after the depositor has died, to declare a trust in the funds remaining in the account [*Prob. Code § 80*; *see Brucks v. Home Fed. Sav. & Loan Ass'n. (1951) 36 Cal. 2d 845, 849-850, 228 P.2d 545]* . The form may be modified for use against a single defendant. For instance, if the personal representative has not already withdrawn the funds, plaintiff may prefer not to name the financial institution as a defendant, in which case, Paragraphs 3 and 10 of this form need not be used. If the personal representative has not withdrawn the funds, counsel may wish to serve the financial institution with written notice not to allow withdrawals except with the signatures of all claimants [*see Prob. Code § 5405(c)*; *see also Prob. Code § 5405(b)* (court order restraining payments by financial institution, discussed in Ch. 95, *Banks, Deposits, and Checks*)].

For a general complaint against a financial institution for use by any depositor whose withdrawal request has been wrongfully refused, see Ch. 95, *Banks, Deposits, and Checks* .

[3] Allegations

This complaint alleges:

- The basis for venue (Paragraph 1) [*see Code Civ. Proc. § 395.1*].

- The capacities of the defendants (Paragraphs 2, 3) [*see Brucks v. Home Fed. Sav. & Loan Ass'n. (1951) 36 Cal. 2d 845, 228 P.2d 545]* .

- The capacity of the plaintiff, the creation of the trust account, and the intent of the trustee to create a tentative trust (Paragraph 4) [*Prob. Code § 80*; *see Brucks v. Home Fed. Sav. & Loan Ass'n. (1951) 36 Cal. 2d 845, 849-850, 228 P.2d 545]* .

- Plaintiff's status as sole surviving beneficiary (Paragraph 5) [*Prob. Code § 5302(c)*].

- Decedent's status as the sole trustee at the time of his or her death (Paragraph 6) [*see Prob. Code § 5302(c)*].

- The amount on deposit at the date of death (Paragraph 7) [*see Prob. Code § 5150* (defining "sums on deposit" to include account balance payable with interest and dividends earned, whether or not included in current balance, and any life insurance proceeds added to account by reason of death of party to account)].

- That no other agreement existed relating to those funds (Paragraph 8) [*see Prob. Code §§ 80, 5406*; *see also Prob. Code § 5305(c)* (beneficiary designation may not be changed by will, except on account described ascommunity property)].

- The status of the sums on deposit and/or any evidence of account necessary to accompany a

withdrawal request (Paragraph 9) [*see Prob. Code § 5148* (defining "request" as one that complies with financial institution's regulations)], as well as the personal representative's contention that the sums on deposit at decedent's date of death were not subject to a trust in favor of plaintiff (Paragraph 9) [*Code Civ. Proc. § 1060* (declaratory relief)].

- Any withdrawal request made by plaintiff and the financial institution's response to that request (Paragraph 10) [*see Prob. Code §§ 5401, 5404*].

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Chapter 561 TRUSTS: CONSTRUCTIVE TRUSTS

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§ 561.syn Synopsis to Chapter 561: TRUSTS: CONSTRUCTIVE TRUSTS

§ 561.01 Scope of Chapter

§ 561.02 Cross References

§§ 561.03-561.09 [Reserved]

§ 561.10 Governing Law

§ 561.11 Constructive Trust as Equitable Remedy

§ 561.12 Involuntary Trust Created by Operation of Law

§ 561.13 Express and Resulting Trusts Distinguished

§ 561.14 Obligations of Trustee

§ 561.15 Applicable to Real or Personal Property

§ 561.16 Establishing Constructive Trust

[1] Summary of Elements

[2] Existence of Trust Res

[3] Adequacy of Legal Remedy

[4] Defendant's Gain

[a] By Fraud

[b] By Mistake

[c] By Accident

[d] By Undue Influence

[e] By Violation of Trust

[f] By Violation of Secret Trust

[g] By Other Wrongful Acts

§ 561.17 Proceeds of Trust Property

§ 561.18 Rights of Bona Fide Purchasers for Value

§ 561.19 Jurisdiction

[1] Real Property

[2] Personal Property

[3] Probate Proceedings

§ 561.20 Venue

§ 561.21 Lis Pendens

§ 561.22 Burden of Proof

§ 561.23 Statute of Frauds

§ 561.24 Parol Evidence

§ 561.25 Statute of Limitations

§ 561.26 Relief Available

[1] Generally

[2] Election of Remedies

[3] Conveyance of Trust Property

[4] Equitable Lien

[5] Charitable Trust

[6] Money Judgments

[7] Injunctive Relief

[8] Punitive Damages

§ 561.27 Defenses

[1] Laches

[2] Bona Fide Purchaser for Value

[3] Unclean Hands

§ 561.28 Sale of Felon's Item Enhanced by Notoriety of Crime

[1] Profits Subject to Involuntary Trust

[2] Duration of Trust; Escheat of Remaining Funds

[3] Definitions

[a] Convicted Felon

[b] Felony

[c] Materials

[d] Story

[e] Sale

[f] Profits

[g] Representative of Felon

[h] Profiteer of Felony

[i] Beneficiary

[j] Beneficiary's Interest

[4] Procedure

[a] Action by Beneficiary

[b] Jurisdiction and Venue

[c] Statute of Limitations

[d] Order for Payment From Profits

[e] Apportionment of Profits Among Beneficiaries

[f] Priority of Payment of Profits

[5] Action by Attorney General

[6] Preliminary Injunctive Relief

[7] Violation of Court Order as Contempt

[8] Remedies Cumulative

§§ 561.29-561.39 [Reserved]

§ 561.40 State Statutes

[1] Deceit

[2] Fraud

[3] Involuntary Trusts

[4] Menace

[5] Mistake

[6] Profits Derived From Felony

[7] Statute of Frauds

[8] Statutes of Limitation

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[8] Preemption by Federal Law

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[a] Subject Matter of and Parties to Action

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[10] Cross References

[11] State Statutes

[12] Decisions

§ 561.61 Complaint [Code Civ. Proc. § 425.10]--For Damages [Civ. Code § 3336] for Conversion, for Imposition of Constructive Trust on Proceeds of Embezzled Funds, Including Real Property Purchased With Part of Proceeds [Civ. Code § 2224], for Order for Conveyance [Civ. Code §§ 3367, 3375], and for Accounting--Against Embezzler--By

Beneficiary

[1] FORM

[2] Use of Form

[3] Allegations

[a] Conversion

[b] Constructive Trust

[4] Imposition of Constructive Trust on Proceeds of Funds Wrongfully Acquired

[5] Verification

[6] Lis Pendens

[7] Cross References

[8] State Statutes

[9] Decisions

§ 561.62 Complaint [Code Civ. Proc. § 425.10]--For Imposition of Constructive Trust [Civ. Code § 2224] on Interest in Real Property Acquired by Mistake of Fact [Civ. Code § 1577], for Order for Conveyance [Civ. Code §§ 3367, 3375], and Accounting--Against Joint Tenant--By Beneficiary

[1] FORM

[2] Use of Form

[3] Allegations

[a] Mistake of Fact

[b] Constructive Trust

[4] Lis Pendens

[5] State Statutes

[6] Decisions

[7] Cross References

§ 561.63 Complaint [Code Civ. Proc. § 425.10]--For Imposition of Constructive Trust [Civ. Code § 2224] on Real Property Acquired by Undue Influence [Civ. Code § 1575(2), (3)], for Order for Conveyance [Civ. Code §§ 3367, 3375], and for an Accounting--Against Trustee--By Beneficiary

[1] FORM

[2] Use of Form

[3] Allegations

[a] Undue Influence

[b] Constructive Trust

[4] Lis Pendens

[5] Cross References

[6] State Statutes

[7] Decisions

§ 561.64 Complaint [Code Civ. Proc. § 425.10]--For Imposition of Constructive Trust on Funds Acquired Through Violation of Trust [Civ. Code § 2224]--Breach of Confidential Relationship--Against Trustee--By Beneficiary

[1] FORM

[2] Use of Form

[3] Allegations

[a] Breach of Confidential Relationship

[b] Constructive Trust

[4] Lis Pendens

[5] State Statutes

[6] Decisions

[7] Cross References

§ 561.65 Complaint [Code Civ. Proc. § 425.10]--For Imposition of Constructive Trust [Civ. Code § 2224] on Real Property Acquired by Will Under Secret Trust, for Order for Conveyance [Civ. Code §§ 3367, 3375], and for Accounting--Against Trustee--By Beneficiary

[1] FORM

[2] Use of Form

[3] Allegations

[4] Lis Pendens

[5] Cross References

§ 561.66 Complaint Against Convicted Felon, Felon's Representative, or Profiteer of Felony for Recovery of Interest in Profits From Sale of Item With Value Enhanced as Result of Notoriety From Commission of Felony [Civ. Code § 2225(b)(2), (c)] and for Preliminary Injunctive Relief Against Waste of Proceeds [Civ. Code § 2225(f); Code Civ. Proc. § 526]

[1] FORM

[2] Use of Form

[3] Defendants

[4] Alleging Civil Cause of Action Against Felon

[5] Alleging Previous Civil Recovery Against Convicted Felon

[6] Allegations

[7] Jurisdiction and Venue

[8] Preliminary Injunction

[9] Lis Pendens

[10] Cross References

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§ 561.01 Scope of Chapter

This chapter discusses the creation and imposition of constructive trusts [*see § 561.10* et seq]. It includes a discussion of tracing the proceeds of constructive trust property, as well as a discussion of the forms of relief available in actions to impose a constructive trust. It includes forms for use to impose constructive trusts on property acquired through fraud [*see § 561.60*], conversion [*see § 561.61*], mistake [*see § 561.62*], undue influence [*see § 561.63*], violation of a confidential relationship [*see § 561.64*], and through violation of a secret trust [*see § 561.65*], as well as a form of pleading for use in imposing a constructive trust under *Civ. Code § 2225* on profits derived from the sale or transfer of an item with value enhanced by the notoriety gained from commission of a felony [*see § 561.66*].

For discussion and forms relating to the imposition of constructive trusts on property received in breach of an oral agreement to make a will, see Ch. 528, *Specific Performance* .

For dicussion of resulting trusts, which arise from the transfer of property where the transferee was not intended to take beneficial interest in the property, see Ch. 562, *Trusts: Resulting Trusts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract InterpretationFiduciary ResponsibilitiesContracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewEstate, Gift & Trust LawTrustsConstructive Trusts

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§ 561.02 Cross References

For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions*

For a form of complaint by a member of a dissolved association to bring a class action to impose a constructive trust on the association's fund seized by the parent body's officers, see Ch. 61, *Associations and Clubs*

For a discussion of the imposition of constructive trusts on negotiable instruments, see Ch. 385, *Negotiable Instruments*

For a discussion of and forms for use to allege duress, menace, fraud, undue influence, and mistake, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*

For a discussion of the distinction between constructive trusts and gifts, see Ch. 278, *Gifts*

For a discussion of the imposition of constructive trusts on estates held in joint tenancy when one joint tenant intentionally and unlawfully causes the death of a cotenant, see Ch. 316, *Joint Tenancy and Tenancy in Common*

For a form of complaint for declaratory relief by a decedent's personal representative seeking to impose a constructive trust when an instrument was insufficient to establish an intended joint tenancy, see Ch. 316, *Joint Tenancy and Tenancy in Common*

For a discussion of the imposition of constructive trusts in the adjudication of property rights of parties to nonmarital relationships, see Ch. 387, *Nonmarital Cohabitation*

For a discussion of and forms for use in the imposition of constructive trusts in actions for quasi-specific performance, see Ch. 528, *Specific Performance*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewEstate, Gift & Trust LawPersonal GiftsGeneral OverviewReal Property LawEstatesConcurrent OwnershipJoint Tenancies

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[Reserved]

§§ 561.03[Reserved]

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§ 561.10 Governing Law

The creation of constructive trusts is principally governed by *Civ. Code §§ 2223* and *2224* [*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton (2002) 96 Cal. App. 4th 1017, 117 Cal. Rptr. 2d 685* ; *Burlesci v. Petersen (1998) 68 Cal. App. 4th 1062, 1067, 80 Cal. Rptr. 2d 704* ; *Communist Party v. 522 Valencia, Inc. (1995) 35 Cal. App. 4th 980, 990, 41 Cal. Rptr. 2d 618]* . The imposition of constructive trusts is governed by a variety of common and statutory law, including the law of fraud, undue influence, mistake, accident, and breach of trust. Both the creation and imposition of constructive trusts are governed by the equitable principles of restitution and unjust enrichment [*see Burlesci v. Petersen (1998) 68 Cal. App. 4th 1062, 1067, 80 Cal. Rptr. 2d 704* ; *Communist Party v. 522 Valencia, Inc. (1995) 35 Cal. App. 4th 980, 990, 41 Cal. Rptr. 2d 618]* . Statutory law governing express trusts does not affect the substantive law relating to imposition of constructive trusts [*Prob. Code § 15003(a)*; *see Prob. Code § 82(b)(1)* (term "trust" as used in Probate Code generally excludes constructive trusts)].

The imposition of a constructive trust in favor of a crime victim on the profits derived from the sale or transfer of anything that has enhanced value because of the notoriety gained from commission of the felony, is governed by *Civ. Code § 2225*. The Supreme Court of California has held that *Civ. Code § 2225* is facially invalid under both the free speech clause of the *First Amendment to the federal Constitution* as applied to the states through the *Fourteenth Amendment*, and the liberty of speech clause of the California Constitution [*Keenan v. Superior Court (2002) 27 Cal. 4th 413, 415-416, 117 Cal. Rptr. 2d 1, 40 P.3d 718* ; *see Cal. Const. art. I, § 2, subd. (a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawRemediesEquitable ReliefQuantum MeruitContracts LawRemediesRestitutionFamily LawCohabitationAgreementsEnforceabilityConstructive Trusts

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§ 561.11 Constructive Trust as Equitable Remedy

A constructive trust is an involuntary equitable trust created by operation of law as a remedy to compel the transfer of property from a person who is wrongfully holding it to its rightful owner [*Burlesci v. Petersen (1998) 68 Cal. App. 4th 1062, 1067, 80 Cal. Rptr. 2d 704* ; *Communist Party v. 522 Valencia, Inc. (1995) 35 Cal. App. 4th 980, 990, 41 Cal. Rptr. 2d 618]* . The purpose of a constructive trust is to prevent unjust enrichment and to prevent a person from taking advantage of his or her own wrongdoing [*Burlesci v. Petersen (1998) 68 Cal. App. 4th 1062, 1067, 80 Cal. Rptr. 2d 704* ; *Communist Party v. 522 Valencia, Inc. (1995) 35 Cal. App. 4th 980, 990, 41 Cal. Rptr. 2d 618]* .

A plaintiff's claim for a constructive trust is, in effect, an action for possession of property [*Olson v. Toy (1996) 46 Cal. App. 4th 818, 823, 54 Cal. Rptr. 2d 29]* . A constructive trust is not a true trust, but is an equitable remedy available to a plaintiff seeking to recover specific property in a number of different situations [*Olson v. Toy (1996) 46 Cal. App. 4th 818, 823, 54 Cal. Rptr. 2d 29]* . A constructive trust may be imposed in practically any case in which there has been a wrongful acquisition or detention of property to which another is entitled [*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton (2002) 96 Cal. App. 4th 1017, 117 Cal. Rptr. 2d 685* ; *Burlesci v. Petersen (1998) 68 Cal. App. 4th 1062, 1067, 80 Cal. Rptr. 2d 704]* . A plaintiff's cause of action for a constructive trust is not based on the establishment of a trust, but consists of the fraud, breach of fiduciary duty, or other act of the defendant that entitles the plaintiff to some relief. This relief may be to make the defendant a constructive trustee with the duty to transfer the property to the plaintiff [*Olson v. Toy (1996) 46 Cal. App. 4th 818, 823, 54 Cal. Rptr. 2d 29]* .

The equitable principles that one who wrongfully acquires or detains property of another holds the property as an involuntary constructive trustee for the owner are codified in *Civ. Code §§ 2223* and *2224* [*American Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton (2002) 96 Cal. App. 4th 1017, 117 Cal. Rptr. 2d 685* ; *Burlesci v. Petersen (1998) 68 Cal. App. 4th 1062, 1067, 80 Cal. Rptr. 2d 704* ; *Communist Party v. 522 Valencia, Inc. (1995) 35 Cal. App. 4th 980, 990, 41 Cal. Rptr. 2d 618]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefEstate, Gift & Trust LawTrustsConstructive TrustsReal Property LawTrustsConstructive

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§ 561.12 Involuntary Trust Created by Operation of Law

A constructive trust is an involuntary trust created by operation of law [*Communist Party v. 522 Valencia, Inc. (1995) 35 Cal. App. 4th 980, 990, 41 Cal. Rptr. 2d 618]* . Under the principles of constructive trusts, one who gains a thing by fraud, accident, mistake, undue influence, violation of a trust, or other wrongful act is, unless he or she has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it [*Civ. Code § 2224*]. Also, one who wrongfully detains a thing is an involuntary trustee thereof for the benefit of the owner [*Civ. Code § 2223*].

In order to provide the necessary flexibility to apply an equitable doctrine to individual cases, *Civ. Code §§ 2223* and *2224* state general principles for a court's guidance rather than restrictive rules [*Martin v. Kehl (1983) 145 Cal. App. 3d 228, 237, 193 Cal. Rptr. 312]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsConstructive TrustsReal Property LawTrustsConstructive Trusts

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§ 561.13 Express and Resulting Trusts Distinguished

Because the concept of constructive trust is one of equitable remedy, the incidents of a constructive trust differ from those of an express or resulting trust [*Haskel Eng'g & Supply Co. v. Hartford Accident & Indem. Co. (1978) 78 Cal. App. 3d 371, 375, 144 Cal. Rptr. 189* ; *see also* Restatement of Restitution § 1, cmt. e, §§ 3 and 4, and § 160, cmts. a-c)].

Express or resulting trusts create substantive rights enforceable by various remedies [*Haskel Eng'g & Supply Co. v. Hartford Accident & Indem. Co. (1978) 78 Cal. App. 3d 371, 378, 144 Cal. Rptr. 189]* .

Express and resulting trusts arise from the intention of the parties (express or implied) to set aside property under the stewardship of a trustee for the benefit of the beneficiary. An express trust establishes a fiduciary relationship, while a constructive trust does not. A constructive trust is imposed by a court of equity, independent of the intention of the parties, to prevent a party in possession of property from being unjustly enriched [*see* *Del Costello v. State of California (1982) 135 Cal. App. 3d 887, 892, 185 Cal. Rptr. 582]* . For discussion of the nature of express trusts and resulting trusts, see Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts* , and Ch. 562, *Trusts, Resulting Trusts* ,, respectively.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsGeneral OverviewEstate, Gift & Trust LawTrustsConstructive TrustsEstate, Gift & Trust LawTrustsResulting TrustsReal Property LawTrustsGeneral OverviewReal Property LawTrustsConstructive Trusts

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§ 561.14 Obligations of Trustee

A constructive trust is a passive trust, and it has been held that the trustee's only duty is to convey the property to its rightful owner [*Calistoga Civic Club v. City of Calistoga (1983) 143 Cal. App. 3d 111, 117, 191 Cal. Rptr. 571]* . However, it has also been held that a constructive trustee has a duty to preserve the trust property because a constructive trust would lose its efficacy as a remedial device if a trustee were permitted to defeat recovery by wrongfully permitting the property to become valueless [*Elliott v. Elliott (1964) 231 Cal. App. 2d 205, 209, 41 Cal. Rptr. 686]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsConstructive TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewReal Property LawTrustsConstructive Trusts

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§ 561.15 Applicable to Real or Personal Property

A constructive trust may be applied to either personal or real property [*see Weiss v. Marcus (1975) 51 Cal. App. 3d 590, 594, 600, 124 Cal. Rptr. 297* (reasonable value of legal services)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsConstructive TrustsReal Property LawTrustsConstructive Trusts

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§ 561.16 Establishing Constructive Trust

[1] Summary of Elements

Under *Civ. Code §§ 2223* and *2224* and the case law applying them, a constructive trust may only be imposed when the following three conditions are met: (1) the existence of property or some interest in property; (2) the plaintiff's right to that property; and (3) the defendant's wrongful acquisition or detention of the property [*Burlesci v. Petersen (1998) 68 Cal. App. 4th 1062, 1067, 80 Cal. Rptr. 2d 704* ; *Communist Party v. 522 Valencia, Inc. (1995) 35 Cal. App. 4th 980, 990-991, 41 Cal. Rptr. 2d 618]* .

[2] Existence of Trust Res

In establishing the existence of a trust res, a plaintiff must plead specifically identifiable trust property [*In re Marriage of Buford (1984) 155 Cal. App. 3d 74, 79, 202 Cal. Rptr. 20* ; *but see Douglas v. Superior Court (1989) 215 Cal. App. 3d 155, 160, 263 Cal. Rptr. 473* (pleading held sufficient although plaintiff did not identify specific property but only particular automobile and other specific categories of property acquired with funds due to plaintiff); *see § 561.17*]. A note evidencing indebtedness satisfies any technical requirement of *Civ. Code §§ 2223* and *2224* that a thing, or a res, exist as an element of a constructive trust [see *Elliott v. Elliott (1964) 231 Cal. App. 2d 205, 209, 41 Cal. Rptr. 686* (after note was held to be community property in divorce proceedings, husband, who allowed statute of limitations to run on the note, held constructive trustee of half the value of the debt evidenced by the note)].

[3] Adequacy of Legal Remedy

An action to establish a constructive trust does not depend on, and therefore a plaintiff need not plead, the absence of an adequate remedy at law [*Bacon v. Grosse (1913) 165 Cal. 481, 493, 132 P. 1027* (court sitting in equity as acquiring jurisdiction of action not because damages at law would be inadequate, but because action is one to enforce constructive trust); *GHK Assocs. v. Mayer Group, Inc. (1990) 224 Cal. App. 3d 856, 878, 274 Cal. Rptr. 168* (noting that dictum in *Allen v. Powell (1967) 248 Cal. App. 2d 502, 509, 56 Cal. Rptr. 715* , requiring inadequacy of legal remedy was rejected in *Heckmann); Heckmann v. Ahmanson (1985) 168 Cal. App. 3d 119, 134, 214 Cal. Rptr. 177* (action in equity to establish constructive trust as not depending on absence of adequate legal remedy); *see also Juranek v. Juranek (1938) 29 Cal. App. 2d 276, 280, 84 P.2d 195* (plaintiff as not required to plead absence of adequate legal

remedy in equitable actions to establish constructive and resulting trusts)].

[4] Defendant's Gain

[a] By Fraud

In an action to impose a constructive trust on property acquired by another through fraud, a plaintiff must plead and prove a cause of action for fraud [*Lazar v. Hertz Corp. (1983) 143 Cal. App. 3d 128, 139, 191 Cal. Rptr. 849* ; see *Civ. Code § 2224*]. The fraud may be actual or constructive [*Briggs v. Nilson (1964) 226 Cal. App. 2d 342, 345-346, 38 Cal. Rptr. 68* ; see also *Civ. Code § 1571*]. Actual fraud is defined in *Civ. Code § 1572*, and constructive fraud is defined in *Civ. Code § 1573* [*see Civ. Code §§ 1572, 1573*]. Thus, a constructive trust may be imposed on property acquired either through actual fraud in inducing a conveyance of real property, or through constructive fraud arising from a breach of an oral promise to reconvey real property, by a grantee who is in a confidential relationship with a grantor [*Briggs v. Nilson (1964) 226 Cal. App. 2d 342, 345-346, 38 Cal. Rptr. 68]* . A constructive trust may be imposed on aninterest in property acquired by a party's promise to convey without any intention of performing the promise [*see Civ. Code § 1572(4)*; Helfrich v. Kerley (1961) 192 Cal. App. 2d 726, 728-729, *192 Cal. App. 2d 726, 13 Cal. Rptr. 753]* . A constructive trust may also be imposed on funds paid to an automobile rental agency by its customers as a result of allegedly fraudulent overcharging of gasoline prices by the agency [*Lazar v. Hertz Corp. (1983) 143 Cal. App. 3d 128, 139, 191 Cal. Rptr. 849]* .

Equity will relieve an injured party from the effect of a judgment or decree procured by extrinsic fraud, that was not the result of negligence or laches on the part of the complainant [*see Clavey v. Loney (1926) 80 Cal. App. 20, 24, 251 P. 232* (using term "resulting trust", but relying on cases that merely referred to "involutary trust"). For example, when, through extrinsic fraud practiced in probate proceedings, distributees have obtained property to which they are not entitled, equity will do justice, not by overthrowing the decree of distribution, but by declaring that the distributees hold the property in trust for the rightful owners [*Sears v. Rule (1941) 45 Cal. App. 2d 374, 384, 114 P.2d 57]* .

For a form of complaint to impose a constructive trust on real property acquired by fraud, see *§ 561.60*. For a complete discussion and forms for use in pleading a cause of action for fraud, see Ch. 269, *Fraud and Deceit* .

[b] By Mistake

In an action to impose a constructive trust on property acquired by another by mistake, a plaintiff must establish the existence of some interest in the property, the plaintiff's right to the interest in the property, and defendant's gain of the property by mistake [*Kraus v. Willow Park Pub. Golf Course (1977) 73 Cal. App. 3d 354, 373, 140 Cal. Rptr. 744* ; *see Civ. Code § 2224*]. The mistake may be either of fact or of law [see *Civ. Code § 1576*]. Mistake of fact is defined in *Civ. Code §§ 1577* and *1579*, and mistake of law is defined in *Civ. Code § 1578* [*Civ. Code §§ 1577-1579*].

Actions to impose constructive trusts on property acquired through mistake arise in a variety of contexts. For example, when a grantor, through a mistake of fact in drafting a deed, conveys real property to plaintiff and defendant as joint tenants, rather than solely to plaintiff, defendant holds his or her interest in the property as a constructive trustee for the plaintiff's benefit [*Abbott v. Miller (1950) 98 Cal. App. 2d 595, 596, 220 P.2d 570]* . A mistake of law that causes the erroneous computation of sales tax reimbursements and payments gives rise to an involuntary trust under *Civ. Code § 2224*, so that when a seller mistakenly collects from its customers and pays to the State Board of Equalization more sales taxes than it should have, both the seller and the Board become constructive trustees of the overage collected for the benefit of the seller's customers [*Decorative Carpets, Inc. v. State Bd. of Equalization (1962) 58 Cal. 2d 252, 254-255, 23 Cal. Rptr. 589, 373 P.2d 637* ; *Javor v. State Bd. of Equalization (1974) 12 Cal. 3d 790, 798, 117 Cal. Rptr. 305, 527 P.2d 1153]* . In addition, when the proceeds from a sale of property that is collateral for a loan are mistakenly paid to the debtor, the debtor holds the proceeds on a constructive trust for the benefit of the lender, who is the rightful owner of the collateral [*People v. Newman (1975) 49 Cal. App. 3d 426, 430-431, 122 Cal. Rptr. 455]* .

For a form of complaint to impose a constructive trust on property acquired by a mistake of fact, see *§ 561.62*. For a complete discussion of and forms for use in pleading a cause of action for damages based on mistake, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

[c] By Accident

Accident appears to be rarely mentioned in case law as a basis for imposition of a constructive trust. When it is mentioned, it arises in connection with mistake. For example, if through accident, fraud, or mistake, distributees under a will hold property to which they are not entitled, equity will do justice, not by overthrowing the decree of distribution, but by declaring the distributees to be involuntary trustees, under *Civ. Code § 2224*, of the rightful owner of the property [*Estate of Walker (1911) 160 Cal. 547, 549, 117 P. 510]* .

[d] By Undue Influence

Undue influence consists of any of the following [*Civ. Code § 1575*]:

- The use, by a person in whom a confidence is reposed by another, or by a person who holds a real or apparent authority over another, of the confidence or authority for the purpose of obtaining an unfair advantage over the other person;
- Taking an unfair advantage of another person's weakness of mind; or
- Taking a grossly oppressive and unfair advantage of another person's necessities or distress.

Not all constructive trusts in property acquired through the exertion of undue influence require the existence of a confiden tial relationship [*see Clark v. Pullins (1959) 171 Cal. App. 2d 703, 341 P.2d 73]* . However, when undue influence is alleged to be the result of a confidential relationship between parties to a transaction, and the relationship is not presumptively confidential, a plaintiff must plead facts showing the existence of a confidential relationship [*see Johnson v. Clark (1936) 7 Cal. 2d 529, 534, 61 P.2d 767]* .

A constructive trust in favor of the beneficiaries of a decedent's will may also be sought under *Prob. Code § 850 et seq.* (petition by personal representative or interested person, to claim property for estate when another claims title to or possesses the property) against property acquired by undue influence and which another possesses or claims title to [*see Estate of Aiello (1980) 106 Cal. App. 3d 669, 672-673, 676-677, 165 Cal.Rptr. 207* ; *see generally* Ch. 440, *Probate : Is Probate Necessary?* et seq. regarding forms of petition and order].

For a form of complaint to impose a constructive trust on property acquired by undue influence, see *§ 561.63*. For a complete discussion of and forms for use in pleading a cause of action for damages based on undue influence, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

[e] By Violation of Trust

Confidential and fiduciary relations are synonymous in law, and may be said to exist whenever trust and confidence are reposed by one person in the integrity and fidelity of another. Thus, the breach of trust contemplated by *Civ. Code § 2224* need not be a breach of an express or oral trust, but may arise from breach of a confidential relationship [*see South v. Wishard (1956) 146 Cal. App. 2d 276, 284, 303 P.2d 805]* .

For example, a constructive trust will be imposed on property acquired in violation of a confidential relationship between stepfather and daughter by virtue of the stepfather's failure to perform his agreement with his wife to bequeath

certain of her separate property to the daughter [*Redke v. Silvertrust (1971) 6 Cal. 3d 94, 106, 98 Cal. Rptr. 293, 490 P.2d 805]* . A constructive trust will also be imposed on property acquired by a bank loan officer in violation of his fiduciary relationship with the bank when the property acquired consists of gratuities and commissions received from customers in exchange for approving their loans [*Bank of Am. v. Ryan (1962) 207 Cal. App. 2d 698, 706, 24 Cal. Rptr. 739]* .

Similarly, when partners or joint venturers have agreed to buy a specific parcel of real property, and one partner or joint venturer, in breach of a fiduciary duty, wrongfully acquires the property in his or her own name, the other partner or joint venturer may bring an action to impose a constructive trust and requiring the wrongdoing partner or joint venturer to convey the appropriate share of the legal title [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 970, 89 Cal. Rptr. 2d 693]* .

An action to impose a constructive trust may also be based on a breach of fiduciary duty by a trustee of an express trust [*Ehret v. Ichioka (1967) 247 Cal. App. 2d 637, 643, 55 Cal. Rptr. 869* ; see *Prob. Code §§ 16002* (duty of loyalty to beneficiary), 16004 (duty to avoid conflict of interest with beneficiary); *see generally* Ch. 560, *Trusts: Express, Public, Charitable and Totten Trusts* , regarding the duty of a trustee of an express trust]. A beneficiary of an express trust must use petition proceedings under the Trust Law to compel redress of a breach of trust concerning the internal affairs of the trust by any available remedy [*Prob. Code §§ 17000, 17200(a), (b)(12)*; *see Ch. 560, Trusts: Express, Public, Charitable and Totten Trusts, § 560.545*].

For a form of complaint to impose a constructive trust on funds acquired through the violation of a trust, *see § 561.64*. For further discussion of which relationships are confidential and the elements of a confidential relationship, together with forms of allegations for use in establishing theexistence of confidential relationships, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

[f] By Violation of Secret Trust

A constructive trust may be imposed when property is unconditionally willed to a person based on that person's promise to the testator to hold the property in trust for another [*Estate of Everts (1912) 163 Cal. 449, 454, 125 P. 1058* ; *Prior v. Andrews (1927) 83 Cal. App. 782, 790, 257 P. 560]* . Thus, if a testator is induced to make a will, or not change a will after it has been made, by a promise on the part of a legatee that he or she will devote the legacy to an agreed purpose, a secret trust is created, the terms of of which may be enforced by the mechanism of a constructive trust [*Sears v. Rule (1945) 27 Cal. 2d 131, 139, 163 P.2d 443* ; *Prior v. Andrews (1927) 83 Cal. App. 782, 790, 257 P. 560]* . The promise on the part of the legatee that he or she will perform the secret trust may be express or implied and may be proved by extrinsic evidence [*Estate of Sargavak (1953) 41 Cal. 2d 314, 321, 259 P.2d 897* ; *Prior v. Andrews (1927) 83 Cal. App. 782, 790, 257 P. 560]* .

For a form of complaint for imposing a constructive trust on property gained by violation of a secret trust, *see § 561.65*.

[g] By Other Wrongful Acts

A constructive trust may be imposed in practically any case when there is a wrongful acquisition or detention of property to which another is entitled [*Weiss v. Marcus (1975) 51 Cal. App. 3d 590, 600, 124 Cal. Rptr. 297* ; *see, e.g., Douglas v. Superior Court (1989) 215 Cal. App. 3d 155, 160, 263 Cal. Rptr. 473* (cause of action for constructive trust that incorporated allegations of causes of action for fraud, conspiracy, and racketeering was sufficient)]. For example, property obtained through duress or menace, defined in *Civ. Code § 1569* and *Civ. Code § 1570* respectively, may be subject to a constructive trust [*see* *Clark v. Pullins (1959) 171 Cal. App. 2d 703, 708-709, 341 P.2d 73]* . A constructive trust may be imposed on profits held by one who deprived another of contract rights, whether by breach of contract, tortious interference with the contract, or conspiracy inducing breach of the contract [*GHK Assocs. v. Mayer Group, Inc. (1990) 224 Cal. App. 3d 856, 878, 274 Cal. Rptr. 168]* . The wrongful act giving rise to a constructive trust

need not amount to fraud or intentional misrepresentation. All that must be shown is that the acquisition of the property was wrongful and that the keeping of the property by the defendant would constitute unjust enrichment [*Nguyen v. Scott (1988) 206 Cal. App. 3d 725, 737-740, 253 Cal. Rptr. 800* (breach by seller's broker of duty of honesty and fair dealing owed to potential purchasers arising from broker's failure to communicate their offer to seller and eventual purchase of the property for less than amount of that offer as "other wrongful act" within meaning of *Civ. Code § 2224*); *Calistoga Civic Club v. City of Calistoga (1983) 143 Cal. App. 3d 111, 116, 191 Cal. Rptr. 571]* .

Thus, in a case giving rise to a resulting trust, the court also found the imposition of a constructive trust proper against property wrongfully detained by defendant in violation of her promise to convey it (and transfer half of the proceeds to plaintiff) after vacating the premises. The court based its finding on the fact that defendant would be unjustly enriched if she were allowed to retain the property [*Martin v. Kehl (1983) 145 Cal. App. 3d 228, 238, 193 Cal. Rptr. 312]* .

Usually, however, constructive trusts based on property acquired through "other wrongful acts" under *Civ. Code § 2224* are imposed on property acquired through criminal acts. For example, if a defendant embezzles money from his or her employer, the employer may impose a constructive trust on the proceeds acquired with the funds [*Church v. Bailey (1949) 90 Cal. App. 2d 501, 503-504, 203 P.2d 547]* . Additionally, if a beneficiary of a life insurance policy murders the insured, the murderer will be deemed the constructive trustee of the proceeds of the policy either for an alternative beneficiary or for the estate of the insured [*Beck v. West Coast Life Ins. Co. (1952) 38 Cal. 2d 643, 645-646, 241 P.2d 544]* . For a form of complaint to impose a constructive trust on the proceeds of embezzled funds, *see § 561.61*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewEstate, Gift & Trust LawTrustsConstructive TrustsReal Property LawTrustsConstructive Trusts

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§ 561.17 Proceeds of Trust Property

A constructive trust extends to property acquired in exchange for the wrongfully acquired property [*Coppinger v. Superior Court (1982) 134 Cal. App. 3d 883, 891, 185 Cal. Rptr. 24]* .

A constructive trust also extends to the profit on and enhancement in value of the property traced into the trust [*Haskel Eng'g & Supply Co. v. Hartford Accident & Indem. Co. (1978) 78 Cal. App. 3d 371, 375, 144 Cal. Rptr. 189* (citing Restatement Restitution § 160, com. h; § 205)]. The beneficiary of the constructive trust is entitled to the enhancement in the value of the trust property not because he or she has a substantive right to it but rather to prevent unjust enrichment of the wrongdoer/constructive trustee [*Haskel Eng'g & Supply Co. v. Hartford Accident & Indem. Co. (1978) 78 Cal. App. 3d 371, 378, 144 Cal. Rptr. 189]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsConstructive TrustsReal Property LawTrustsConstructive Trusts

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§ 561.18 Rights of Bona Fide Purchasers for Value

Former Civ. Code §§ 856 and 2243, which provided in essence that any trust could not prejudice the rights of transferees of the trust property who purchased their interest for value and without notice of the trust, were repealed in 1986. However, the result remains the same because under the common law, as well as other statutory provisions, bona fide purchasers and mortagees of property subject to a constructive trust take the property free of the trust [*see Murphy v. Clayton (1896) 113 Cal. 153, 158, 45 P. 267* ; *see also Civ. Code § 1214* (real property; priority to good faith purchasers or mortgagees for value who record first); *Com. Code § 2403* (bona fide purchasers of personal property may take good title); *see also Prob. Code § 18100* (bona fide purchaser fully protected in dealing withtrustee under express trust); 18 Cal. Law Rev Comm'n Reports 501, 793 (1986)]. The grant of protection to bona fide purchasers is in accord with the position of the *Restatement* [*see* Restatement (Second) of Trusts § 408].

As against a bona fide purchaser for value, a beneficiary of a constructive trust has no remedy, but instead must seek a personal remedy against the trustee [*see § 561.26[6]*].

A transferee of constructive trust property who is not a bona fide purchaser for value is chargeable as the trustee and may, like the trustee, be either compelled by the beneficiary to reconvey the property or sued by the beneficiary for the value of the property if the transferee conveys it to a bona fide purchaser. A transferee who takes with knowledge of the trust is liable even though he or she acted in good faith or without the intention of perpetrating a wrong [*Lucas v. Associacao Protectora Uniao MadeirenseDo Estado Da Cal. (1943) 61 Cal. App. 2d 344, 351-352, 143 P.2d 53]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsBona Fide PurchasersEstate, Gift & Trust LawTrustsConstructive TrustsReal Property LawPriorities & RecordingBona Fide PurchasersReal Property LawTrustsConstructive Trusts

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§ 561.19 Jurisdiction

[1] Real Property

Actions to impose constructive trusts on real property are within the equity jurisdiction of the superior court and cannot be brought as limited civil cases [*see Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(b), 580(b)(3)*].

[2] Personal Property

Actions to impose constructive trusts on personal property are limited civil cases if the amount, or value of the property, in controversy does not exceed $25,000, exclusive of interest [*Code Civ. Proc. §§ 85, 86(a)(1), 86(b)*; *see Cal. Const. art. VI, § 10*; *see also Code Civ. Proc. § 580(a)* (court may impose liability on legal or equitable principles)].

If the amount of personal property involved exceeds $25,000, the superior court has jurisdiction of an action to impose a constructive trust, and it can not be brought as a limited civil case [*see Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1), 86(b)*].

[3] Probate Proceedings

In addition, the superior court sitting in probate has jurisdiction over an heir's action to impose a constructive trust on property held individually by the executor of the estate while probate proceedings are pending [*Bauer v. Bauer (1927) 201 Cal. 267, 271-272, 256 P. 820* ; *see Estate of Aiello (1980) 106 Cal. App. 3d 669, 165 Cal. Rptr. 207]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionAmount in ControversyCivil ProcedureEquityGeneral OverviewEstate, Gift & Trust LawTrustsConstructive TrustsReal Property LawTrustsConstructive Trusts

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§ 561.20 Venue

Venue in an action to impose a constructive trust turns on whether the action is a local action, a transitory action, or a "mixed" action. If the action is primarily one for the determination of a right and interest in real property, the action is essentially local, and venue is properly laid in the county in which the real property, or part of it, is located [*see Franco Western Oil Co. v. Cameron (1962) 200 Cal. App. 2d 37, 40, 19 Cal. Rptr. 304* ; *see also Code Civ. Proc. 392(a)*]. If the action does not primarily involve the determination of a right and interest in real property, it is essentially transitory, and venue is properly laid in the county of the defendant's residence [*see Neet v. Holmes (1942) 19 Cal. 2d 605, 611, 122 P.2d 557* ; *see Code Civ. Proc. § 395(a)*]. If one cause of action requests two distinct types of relief, one local and one transitory, the principal relief sought will be determinative of the nature of the action and hence its venue [*see Neet v. Holmes (1942) 19 Cal. 2d 605, 611, 122 P.2d 557* (principal relief sought was accounting, and determination of interest in real property was incidental); *Franco W. Oil Co. v. Cameron (1962) 200 Cal. App. 2d 37, 40, 19 Cal. Rptr. 304* (principal relief sought was imposition of constructive trust on interest in real property, even though accounting was sought incidentally thereto)]. For a discussion of the nature of actions as either local or transitory, see Ch. 571, *Venue* .

When a defendant is sued in an official capacity as executor, administrator, guardian, conservator, or trustee on a claim for the payment of money or for the recovery of personal property, the county that has jurisdiction of the estate which the defendant represents is the proper county for trial of the action [*Code Civ. Proc. § 395.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueIndividual DefendantsEstate, Gift & Trust LawTrustsConstructive TrustsReal Property LawTrustsConstructive Trusts

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§ 561.21 Lis Pendens

The purpose of a lis pendens is to give constructive notice of an action affecting real property to persons who subsequently acquire an interest in the property, so that any judgment in the action will be binding on those persons, even if they acquire their interest before judgment is rendered [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 647, 15 Cal. Rptr. 3d 805, 93 P.3d 395]* . A party may not file a notice of lis pendens unless the party pleads a cause of action that affects title to specific real property [*Gale v. Superior Court (2004) 122 Cal. App. 4th 1388, 1395, 19 Cal. Rptr. 3d 554]* , and a party is not entitled to a lis pendens in an action in which the only relief sought is money damages [*Palmer v. Zaklama (2003) 109 Cal. App. 4th 1367, 1381, 1 Cal. Rptr. 3d 116]* . A fraudulent conveyance action seeking avoidance of a transfer of title of specific real property under *Civ. Code § 3439.07(a)(1)* is a real property claim for purposes of the lis pendens statute [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 652, 15 Cal. Rptr. 3d 805, 93 P.3d 395]* .

If a pleading combines theories of liability for monetary damages and for a constructive trust, the plaintiff is not entitled to a lis pendens, because that might provide an unscrupulous plaintiff with a powerful lever to force the settlement of a groundless or malicious suit [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 972, 89 Cal. Rptr. 2d 693]* . A lis pendens is a provisional remedy that must be applied narrowly [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 967, 89 Cal. Rptr. 2d 693]* . For example, a lis pendens is not available in an action by a trustee requesting the imposition of a constructive trust and an equitable lien on the defendant's house for the amount of money that the defendant used to make improvements to the house, which the defendant allegedly obtained by exercising undue influence over the deceased trustor [*Campbell v. Superior Court (2005) 132 Cal. App. 4th 904, 916-922, 34 Cal. Rptr. 3d 68]* .

A motion to expunge a lis pendens may be filed on any of the following grounds: (1) invalid service of the notice of recordation [*see Code Civ. Proc. § 405.22*]; (2) failure to plead a real property claim [*see Code Civ. Proc. § 405.31*]; (3) failure to establish the probable validity of the real property claim [*see Code Civ. Proc. § 405.32*]; or (4) a showing that adequate relief can be secured to the claimant by giving an undertaking [*see Code Civ. Proc. § 405.33*]. If a motion to expunge is filed, the plaintiff has the burden of showing that the complaint sets forth a real property claim [*Code Civ. Proc. §§ 405.30, 405.31*]. The plaintiff's purpose in filing the lis pendens is irrelevant [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 649-650, 15 Cal. Rptr. 3d 805, 93 P.3d 395]* . A showing of good faith and a proper purpose are

insufficient to defeat a motion to expunge if the claim does not allege a real property claim [*Palmer v. Zaklama (2003) 109 Cal. App. 4th 1367, 1378, 1 Cal. Rptr. 3d 116]* . The plaintiff must also establish, by a preponderance of the evidence, the probable validity of the real property claim [*Code Civ. Proc. §§ 405.30, 405.31, 481.190*]. This requires the court to consider the merits of the plaintiff's claim [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 651, 15 Cal. Rptr. 3d 805, 93 P.3d 395]* . Even if the plaintiff shows a probably valid claim, the court may still order expungement of the lis pendens if adequate relief for the plaintiff can be secured by giving an undertaking [*Code Civ. Proc. § 405.33*].

If the court finds that the plaintiff has not met this burden, the court must grant the motion to expunge. It may not refuse to grant the motion pending the outcome of the plaintiff's appeal, unless it finds that this ruling will "probably" be overturned on appeal [*Mix v. Superior Court (2004) 124 Cal. App. 4th 987, 994-996, 21 Cal. Rptr. 3d 826]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensNoticesCivil ProcedureRemediesLis PendensTerminationsEstate, Gift & Trust LawTrustsConstructive TrustsReal Property LawPriorities & RecordingLis PendensReal Property LawTrustsConstructive Trusts

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§ 561.22 Burden of Proof

One who claims the ownership of property the legal title to which is in the name of another, and who asserts that the property is held by that person in trust for the claimant, must establish the claim by clear, satisfactory, and convincing evidence. This burden of proof applies in an action to impose a constructive trust. Whether the claimant meets the burden is primarily a question for the trial court to determine. If there is substantial evidence to support its conclusion, the determination is not open to review on appeal. Similarly, the credibility and weight of the evidence are questions exclusively for determination by the trial court [*Taylor v. Polackwich (1983) 145 Cal. App. 3d 1014, 1022, 194 Cal. Rptr. 8* ; *but see Liodas v. Sahadi (1977) 19 Cal. 3d 278, 287, 292, 137 Cal. Rptr. 635, 562 P.2d 316* (burden of proof in civil actions in which fraud is an issue is a preponderance of the evidence)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsConstructive TrustsEvidenceProcedural ConsiderationsBurdens of ProofClear & Convincing ProofReal Property LawTrustsConstructive Trusts

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§ 561.23 Statute of Frauds

The statute of frauds does not apply to a constructive trust, because the trust is created by operation of law and is therefore exempt from the provisions of the statute. Thus, a constructive trust relating to real property need not be created, granted, assigned, surrendered, or declared in writing in order to be valid [*see Code Civ. Proc. § 1972(b)*; *see also South v. Wishard (1956) 146 Cal. App. 2d 276, 285, 303 P.2d 805* (based on former Civ. Code § 852 (*now see Prob. Code § 15206*))].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 561.24 Parol Evidence

Trusts in personal property may be proved by parol evidence [*In re Kellogg (1940) 41 Cal. App. 2d 833, 841, 107 P.2d 964]* .

Generally, in an action to impose a constructive trust on real property, parol evidence is admissible not for the purpose of contradicting the deed conveying the property, but for the purpose of explaining the transactionsout of which the equity supporting imposition of the constructive trust arises [*Brison v. Brison (1888) 75 Cal. 525, 533, 17 P. 689]* .

Parol evidence is thus admissible to prove that real property is held by a grantee in constructive trust and to prove the terms of the trust, even though the conveyance of the property is in writing, absolute in its terms, and purports, on its face, to convey an estate in fee. However, in order that the property may be impressed with a constructive trust, the trust must be created and its terms agreed on prior to or at the time of execution of the conveyance [*Kingsley v. Carroll (1951) 106 Cal. App. 2d 358, 362-363, 234 P.2d 1039]* .

Parol evidence is also admissible to establish an oral employment contract for the purpose of showing a relationship between parties to a transaction for the sale of real property, the fiduciary duty arising therefrom, and to establish a constructive trust based on violation of that fiduciary duty [*Walter H. Leimert Co. v. Woodson (1954) 125 Cal. App. 2d 186, 190-191, 270 P.2d 95]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract InterpretationParol EvidenceGeneral OverviewEstate, Gift & Trust LawTrustsConstructive TrustsEvidenceDocumentary EvidenceParol EvidenceEvidenceRelevanceParol EvidenceReal Property LawTrustsConstructive Trusts

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§ 561.25 Statute of Limitations

Because a constructive trust is a remedy, rather than a trust, a cause of action seeking the remedy is based on some act other than the imposition of the trust. Therefore, in an action for the imposition of a constructive trust, the statute of limitations to be applied is determined by the nature of the right sued on, not by the form of the action or the relief sought [*Davies v. Krasna (1975) 14 Cal. 3d 502, 515-516, 121 Cal. Rptr. 705, 535 P.2d 1161* ; *Day v. Greene (1963) 59 Cal. 2d 404, 411, 29 Cal. Rptr. 785, 380 P.2d 385]* .

An action to impose a constructive trust on real property has been held to be an action for the recovery of real property within the meaning of *Code Civ. Proc. § 318*, prescribing a five-year period of limitation [*Coppinger v. Superior Court (1982) 134 Cal. App. 3d 883, 891, 185 Cal. Rptr. 24* ; *see Code Civ. Proc. § 318*].

However, when the gist of an action is fraud, regardless of the form, the three-year period of limitation prescribed by *Code Civ. Proc. § 338(d)* applies, and this limitation period applies in an action, based on fraud, to establish a constructive trust in real property [*Security First Nat'l Bank v. Ross (1963) 214 Cal. App. 2d 424, 429-430, 29 Cal. Rptr. 538* ; *see Code Civ. Proc. § 338(d)*]. The period does not commence to run until the aggrieved party knows or should know of the fraud [*Security First Nat'l Bank v. Ross (1963) 214 Cal. App. 2d 424, 429-430, 29 Cal. Rptr. 538* ; *Code Civ. Proc. § 338(d)*]. However, a cause of action to declare a constructive trust in favor of the rightful owner of property acquired by another through fraud arises at the time of acquisition by the latter if, for example,there is no concealment of facts surrounding the fraud and the facts are known or should have been known to the aggrieved party at the time the property was acquired by the constructive trustee [*Bell v. Bayly Bros. (1942) 53 Cal. App. 2d 149, 159, 127 P.2d 662* ; *see Security First Nat'l Bank v. Ross (1963) 214 Cal. App. 2d 424, 430-431, 29 Cal. Rptr. 538]* .

Similarly, an action to impose a constructive trust that is based on mistake is governed by the three-year limitation period in *Code Civ. Proc. § 338(d)*. The action is commenced in time if the complaint is filed within three years after discovery of the facts constituting the mistake [*Nevarez v. Nevarez (1962) 202 Cal. App. 2d 596, 602, 21 Cal. Rptr. 70* ; *Code Civ. Proc. § 338(d)*].

The imposition of a constructive trust in an action in which the limitation period is not otherwise provided for by statute is governed by the four-year limitation period of *Code Civ. Proc. § 343* [*see Code Civ. Proc. § 343*]. This limitation

period applies in all suits in equity not strictly of concurrent cognizance in law and equity [*Nelson v. Nevel (1984) 154 Cal. App. 3d 132, 140, 201 Cal. Rptr. 93]* . Thus, in an action by one partner to a nonmarital relationship to impose a constructive trust on, and thereby obtain her interest in, real property acquired through the mutual efforts of both partners during their cohabitation, but to which legal title was recorded in the other partner's name only, the court applied the four-year limitation period of *Code Civ. Proc. § 343* [*Nelson v. Nevel (1984) 154 Cal. App. 3d 132, 138, 140, 201 Cal. Rptr. 93]* .

No repudiation of the law-imposed constructive trust is necessary to set the appropriate statute of limitations in motion [*Security First Nat'l Bank v. Ross (1963) 214 Cal. App. 2d 424, 431, 29 Cal. Rptr. 538]* .

For a discussion of and forms for use in raising the bar of the statute of limitations, see Ch. 345, *Limitation of Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsConstructive TrustsGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawTrustsConstructive Trusts

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§ 561.26 Relief Available

[1] Generally

The matter of determining the appropriate equitable relief to be granted to a beneficiary of a constructive trust is generally left to the good judgment of the trial court. From the very nature of equity, a wide play is left to the court in formulating its decree, so that justice may be effectually carried out [*Rivero v. Thomas (1948) 86 Cal. App. 2d 225, 238, 194 P.2d 533]* .

[2] Election of Remedies

A plaintiff seeking restitutionary relief through the imposition of a constructive trust generally cannot also obtain a remedy at law for damages. Damages and restitution are alternative remedies, and an election to pursue one is a bar to invoking the other [*Weightman v. Hadley (1952) 113 Cal. App. 2d 598, 607, 248 P.2d 801]* .

[3] Conveyance of Trust Property

The theory of a constructive trust was adopted by equity as a remedy to compel one party to restore property to which he or she is not justlyentitled, to another [*Fowler v. Fowler (1964) 227 Cal. App. 2d 741, 744, 39 Cal. Rptr. 101]* . Thus, one type of relief usually granted in establishing and enforcing a constructive trust is a court order of conveyance of the trust property to the person entitled to it [*Calistoga Civic Club v. City of Calistoga (1983) 143 Cal. App. 3d 111, 117, 191 Cal. Rptr. 571* ; *see Michaelian v. State Comp. Ins. Fund (1996) 50 Cal. App. 4th 1093, 1114, 58 Cal. Rptr. 2d 133* (dicta)].

[4] Equitable Lien

A court may impose a lien on the trust property to secure payment of a judgment, including interest and costs of suit. However, punitive damages, even though properly awarded in an action to impose a constructive trust, may not be secured by a lien without special statutory provision therefor [*Rivero v. Thomas (1948) 86 Cal. App. 2d 225, 239, 194 P.2d 533* ; see also *Calistoga Civic Club v. City of Calistoga (1983) 143 Cal. App. 3d 111, 117, 191 Cal. Rptr. 571]* .

[5] Charitable Trust

A court may also achieve an equitable result by imposing a charitable trust on the trust property [*Calistoga Civic Club v. City of Calistoga (1983) 143 Cal. App. 3d 111, 117, 191 Cal. Rptr. 571* (imposition of constructive charitable trust on title to property of private civic club as justified to prevent club's unjust enrichment in club's action to discontinue city's use of building on property as public library)].

[6] Money Judgments

The constructive trustee is usually personally liable in damages for his or her acts, although the one whose property has been taken is not relegated to a personal claim against the wrongdoer. However, the beneficiary of the constructive trust cannot have both a judgment declaring the defendant to be a constructive trustee and a personal judgment for money invested in the subject property [*Fowler v. Fowler (1964) 227 Cal. App. 2d 741, 744-745, 39 Cal. Rptr. 101]* .

Courts have also recognized the rights of a constructive trust beneficiary to obtain a money judgment in lieu of destroyed trust property, and to recover the value of trust property commingled by a constructive trustee with the trustee's own property, so that the identity of the trust property could no longer be traced [*Elliott v. Elliott (1964) 231 Cal. App. 2d 205, 209-210, 41 Cal. Rptr. 686]* .

When the trust property has been sold to a bona fide purchaser for value, the constructive trust beneficiary may either hold the trustee for the proceeds of the sale or sue for the reasonable value of the trust property [*Johnson v. Clark (1936) 7 Cal. 2d 529, 536, 61 P.2d 767]* . On the other hand, if the purchaser had knowledge of the plaintiff's interest in the property and purchased it anyway, a constructive trust may be imposed on rents and profits derived from the property [*GHK Assocs. v. Mayer Group, Inc. (1990) 224 Cal. App. 3d 856, 878-880, 274 Cal. Rptr. 168* (property transferred in breach of development agreement)].

The beneficiary of the constructive trust is also entitled to the profit on and enhancement in the value of the trust property [*Haskel Eng'g & Supply Co. v. Hartford Accident & Indem. Co. (1978) 78 Cal. App. 3d 371, 375, 144 Cal. Rptr. 189* ; *see also § 561.17*].

[7] Injunctive Relief

Preliminary injunctive relief is available to prevent destruction of a plaintiff's equitable remedy of constructive trust [Heckmann v. Ahmanson (1985) 168 Cal. App. 3d 119, 135-136, *168 Cal. App. 3d 119, 214 Cal. Rptr. 177* (preliminary relief as proper to prevent dissipation of trust res and to preserve res to enable plaintiffs to trace its proceeds); *see Cramer v. Biddison (1968) 257 Cal. App. 2d 720, 727, 65 Cal. Rptr. 624* ; *see also Code Civ. Proc. § 526* (grounds for preliminary injunctive relief)].

For further discussion of and forms for use in obtaining preliminary and permanent injunctive relief, see Ch. 303, *Injunctions* .

[8] Punitive Damages

A court may award punitive damages in an action to impose a constructive trust when under all the circumstances of the case such an award is not unjust and unreasonable. As a general rule, courts of equity will not award exemplary damages, although this rule is not without exception [*Rivero v. Thomas (1948) 86 Cal. App. 2d 225, 239, 194 P.2d 533* ; *see Civ. Code § 3294*].

Legal Topics:

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

Civil ProcedureRemediesDamagesPunitive DamagesContracts LawRemediesElection of RemediesEstate, Gift & Trust LawTrustsConstructive TrustsReal Property LawNonmortgage LiensEquitable LiensReal Property LawTrustsConstructive Trusts

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49-561 California Forms of Pleading and Practice--Annotated § 561.27

§ 561.27 Defenses

[1] Laches

Laches may bar relief in equity whether or not the statute of limitations has run on the action at law [*Martin v. Kehl (1983) 145 Cal. App. 3d 228, 241, 193 Cal. Rptr. 312]* .

The defense of laches requires unreasonable delay in bringing suit, coupled with either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay. The prejudice is never presumed, but rather must be affirmatively demonstrated by the defendant to sustain his or her burdens of proof and production of the evidence on the issue. The beneficiary of a constructive trust will not be barred by laches even though he or she knows of the circumstances giving rise to the trust when he or she has no reason to believe that the constructive trustee is holding the property adversely [*Martin v. Kehl (1983) 145 Cal. App. 3d 228, 241, 193 Cal. Rptr. 312]* .

[2] Bona Fide Purchaser for Value

That one is a bona fide purchaser for value and without notice is a defense in an action by a beneficiary against a transferee of trust property [*see § 561.18*].

[3] Unclean Hands

Given the equitable nature of the constructive trust doctrine, a constructive trust will not be imposed if the claimant has unclean hands [*Taylor v. Fields (1986) 178 Cal. App. 3d 653, 666, 224 Cal. Rptr. 186]* . Any unconscionable conduct may give rise to the unclean hands defense [*Taylor v. Fields (1986) 178 Cal. App. 3d 653, 666, 224 Cal. Rptr. 186* (claimant in adulterous relationship with person through whom she claimed right to property)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityMaximsClean Hands PrincipleContracts LawTypes of ContractsBona Fide PurchasersEstate, Gift & Trust LawTrustsConstructive TrustsReal Property LawTrustsConstructive TrustsTortsBusiness TortsFraud &

MisrepresentationActual FraudDefenses

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49-561 California Forms of Pleading and Practice--Annotated § 561.28

§ 561.28 Sale of Felon's Item Enhanced by Notoriety of Crime

[1] Profits Subject to Involuntary Trust

NOTE:

The Supreme Court of California has held that *Civ. Code § 2225* is facially invalid under both the free speech clause of the *First Amendment to the federal Constitution* as applied to the states through the *Fourteenth Amendment*, and the liberty of speech clause of the California Constitution [*Keenan v. Superior Court (2002) 27 Cal. 4th 413, 415-416, 117 Cal. Rptr. 2d 1, 40 P.3d 718* ; *see Cal. Const. art. I, § 2, subd. (a)*].

All "profits" derived from the sale or transfer of certain items by a convicted felon, as defined in *Civ. Code § 2225(a)(10)* [*see § 561.28[3][f]*], are subject to an involuntary trust for the benefit of the beneficiaries described in *Civ. Code § 2225(a)(4)* [*Civ. Code § 2225(b)(2)*; *see § 561.28[3][i]*]. However, in the case of a sale or a transfer by a profiteer of a felony [*see Civ. Code § 2225(a)(3)(B)* ("profiteer of the felony" defined); for discussion, § 561.28[3][h]], the portion of the profits that represents the inherent value of the memorabilia, property, or thing sold or transferred, exclusive of the enhancement to the value due to the notoriety of the convicted felon, may be excluded from the involuntary trust [*Civ. Code § 2225(b)(3)*].

This statutory scheme also provides that all proceeds from the preparation for the purpose of sale, the sale of rights to, or the sale of materials that include or are based on the depiction, portrayal, or reenactment of a felony for which a felon was convicted, are subject to an involuntary trust for the benefit of such beneficiaries [*Civ. Code § 2225(b)(1)*; *see also Civ. Code § 2225(a)(9)* ("proceeds" defined)]. However, the California Supreme Court in 2002 ruled that this part of the statute is unconstitutional on its face. Because this provision imposes content-based financial penalties on protected speech, it must be narrowly tailored to meet a compelling state interest. The Court held that the provision is overinclusive in attempting to further the compelling state interest in preventing criminals from profiting from their crimes, and in compensating crime victims from those profits, because the provision confiscates all income from all expressive materials, whatever their general themes or subjects, that include significant discussion of their creators' past crimes [*Keenan v. Superior Court (2002) 27 Cal. 4th 413, 417-418, 117 Cal. Rptr. 2d 1, 40 P.3d 718]* .

The Supreme Court's ruling does not prevent the victim of a felon, as a judgment creditor, from reaching a convicted

felon's assets, including those derived from expressive materials that describe the crime, by generally applicable remedies for the enforcement and satisfaction of judgments [*see Keenan v. Superior Court (2002) 27 Cal. 4th 413, 436 n.21, 117 Cal. Rptr. 2d 1, 40 P.3d 718* ; *see, e.g., Code Civ. Proc. § 481.010 et seq.*; *Code Civ. Proc. § 680.010 et seq.*].

For a form of complaint to recover profits from the sale or transfer of items, the value of which was enhanced by the notoriety gained from commission of a crime, see *§ 561.66*.

[2] Duration of Trust; Escheat of Remaining Funds

The involuntary trust imposed by *Civ. Code § 2225* continues until five years after the time of payment of the profits to the felon, or five years after the date of conviction, whichever is later. If an action is filed by a beneficiary to recover his or her interest in a trust within the five-year period, the trust character of the property continues until the conclusion of the action [*Civ. Code § 2225(b)(2)*].

At the end of the five-year trust period, any profits that have not been claimed by a beneficiary are transferred to the Controller, to be allocated to the Restitution Fund for the payment of claims under *Gov. Code § 13969* (state restitution payments to crime victims) [*Civ. Code § 2225(b)(2)*]. For discussion of procedures for restitution claims by crime victims, see Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

[3] Definitions

[a] Convicted Felon

"Convicted felon" means any person convicted of a felony, or found not guilty by reason of insanity of a felony committed in California, either by a court or jury trial, or by entry of a plea in court [*Civ. Code § 2225(a)(1)*].

[b] Felony

"Felony" means a felony defined by any California or United States statute [*Civ. Code § 2225(a)(2)*].

[c] Materials

"Materials" means books, magazine or newspaper articles, movies, films, videotapes, sound recordings, interviews or appearances on television and radio stations, and live presentations of any kind [*Civ. Code § 2225(a)(6)*].

[d] Story

"Story" means a depiction, portrayal, or reenactment of a felony, and does not mean a passsing mention of the felony, as in a footnote or bibliography [*Civ. Code § 2225(a)(7)*].

[e] Sale

"Sale" includes lease, license, or any other transfer or alienation taking place in California or elsewhere [*Civ. Code § 2225(a)(8)*].

[f] Profits

"Profits" means all income from anything sold or transferred, by the felon, a representative of the felon, or a profiteer of the felony, including any right, the value of which is enhanced by the notoriety gained from the commission of a felony for which a convicted felon was convicted [*Civ. Code § 2225(a)(10)*]. The income may have been accrued, earned, or

paid before or after the conviction. However, voluntary donations or contributions to a defendant to assist in the defense of criminal charges are not deemed "profits," provided the donation or contribution is not given in exchange for some material of value [*Civ. Code § 2225(a)(10)*].

[g] Representative of Felon

"Representative of the felon" means any person or entity receiving proceeds by designation, on behalf, or instead of that felon, whether by the felon's designation or by operation of law [*Civ. Code § 2225(a)(3)(A)*].

[h] Profiteer of Felony

"Profiteer of the felony" means any person who sells or transfers for profit any memorabilia or other property or thing of the felon, the value of which is enhanced by the notoriety gained from the commission of the felony for which the felon was convicted [*Civ. Code § 2225(a)(3)(B)*]. However, this definition does not apply to the following:

- Any media entity reporting on the felon's story or on the sale of the materials, memorabilia, or other property or thing of the felon [*Civ. Code § 2225(a)(3)(B)*].

- The sale of books, magazine or newspaper articles, movies, films, videotapes, sound recordings, interviews or television or radio appearances, or live presentations of any kind when the seller is exercising his or her *First Amendment* Rights [*Civ. Code § 2225(a)(3)(B), (6)*].

- The sale or transfer by a profiteer of any other expressive work protected by the *First Amendment* unless the sale or transfer is primarily for a commercial or speculative purpose [*Civ. Code § 2225(a)(3)(B)*].

[i] Beneficiary

"Beneficiary" means a person who, under applicable law, other than the provisions of *Civ. Code § 2225*, has or had a right to recover damages from the convicted felon for physical, mental, or emotional injury, or pecuniary loss proximately caused by the convicted felon as a result of the crime for which the felon was convicted [*Civ. Code § 2225(a)(4)(A)*].

If a beneficiary has died, "beneficiary" also includes a person or estate entitled to recover damages pursuant to *Code Civ. Proc. § 377.10 et seq.* (survival actions) [*Civ. Code § 2225(a)(4)(B)*].

If a person has died and the death was proximately caused by the convicted felon as a result of the crime for which the felon was convicted,"beneficary" also includes a person described in *Code Civ. Proc. § 377.60* (actions for wrongful death) and any beneficiary of a will of the decedent who had a right under that will to receive more than 25 percent of the value of the decedent's estate [*Civ. Code § 2225(a)(4)(C)*].

[j] Beneficiary's Interest

"Beneficiary's interest or profits" means that portion of the proceeds necessary to pay the following:

- In the case of a beneficiary described in *Civ. Code § 2225(a)(4)(A)* or *(B)*, those damages which, under applicable law other than *Civ. Code § 2225*, the beneficiary has or had a right to recover from the convicted felon for injuries proximately caused by the convicted felon as a result of the crime for which the felon was convicted [*Civ. Code § 2225(a)(5)(A)*].

- In the case of a beneficiary described in *Civ. Code § 2225(a)(4)(C)*, those damages which under all

the circumstances of the case may be just [*Civ. Code § 2225(a)(5)(B)*].

A beneficiary's interest is reduced by the following amounts:

- Money paid to the beneficiary from the Restitution Fund because of the crime for which the felon was convicted [*Civ. Code § 2225(a)(5)(C)(i)*].

- Money paid to the beneficiary by the convicted felon because of a requirement of restitution imposed by a court in connection with the crime for which the felon was convicted [*Civ. Code § 2225(a)(5)(C)(ii)*].

- Money paid to the beneficary because of a judgment against the convicted felon based on the crime for which the felon was convicted [*Civ. Code § 2225(a)(5)(C)(iii)*].

In the case of an unsatisfied existing judgment or order of restitution against the convicted felon and in favor of a beneficary, any money paid to the beneficary under *Civ. Code § 2225* must be applied to reduce the amount of the unsatisfied judgment or order [*Civ. Code § 2225(a)(5)(D)*].

[4] Procedure

[a] Action by Beneficiary

Any beneficiary may bring an action against a convicted felon, representative of the felon, or profiteer of the felony to recover his or her interest in the trust established by *Civ. Code § 2225* [*Civ. Code § 2225(c)(1)*].

[b] Jurisdiction and Venue

The beneficiary may bring the action in the superior court of the county in which the beneficiary resides, in which the convicted felon resides, or in which the proceeds or profits are located [*Civ. Code § 2225(c)(2)*].

[c] Statute of Limitations

Although the statutory language is not entirely clear, it appears that an action by a beneficiary to recover his or her interest in an involuntary trust under *Civ. Code § 2225* must be brought within the five-year trust period described in *Civ. Code § 2225(b)* [*see § 561.28[2]*]. The right of recovery under *Civ. Code § 2225* is not limited by any period of limitations except those provided by *Civ. Code § 2225* [*Civ. Code § 2225(h)*].

[d] Order for Payment From Profits

If the court determines that a beneficiary is entitled to profits pursuant to *Civ. Code § 2225*, the court must order the payment from profits that have been received, and, if that is insufficient, from profits that may be received in the future [*Civ. Code § 2225(c)(3)*].

[e] Apportionment of Profits Among Beneficiaries

If there are two or more beneficiaries and if the available profits are insufficient to pay all beneficiaries, the profits must be equitably apportioned among the beneficiaries, taking into account the effect of the crime on them [*Civ. Code § 2225(d)*].

[f] Priority of Payment of Profits

Before any distribution of any profits to a beneficiary, the court must determine whether the convicted felon has failed to pay any portion of a restitution fine or penalty fine imposed by a court, or any restitution imposed as a condition of probation. The court must also determine whether the felon is obligated to reimburse a governmental entity for the costs of his or her defense and whether a portion of the proceeds is needed to cover his or her reasonable attorney's fees incurred in the criminal proceeding related to the felony, in any appeal or other related proceeding, or in the defense of the action brought under *Civ. Code § 2225* [*Civ. Code § 2225(d)*].

The court must order payment of the foregoing obligations prior to any payment to a beneficiary, except that 60 percent of the profits must be reserved for payment to the beneficiaries [*Civ. Code § 2225(d)*].

[5] Action by Attorney General

The Attorney General may bring an action to require profits received by a convicted felon to be held in an express trust in a bank authorized to act as a trustee [*Civ. Code § 2225(e)(1)*]. If the Attorney General prevails in the action, the court will order that all profits be deposited in a bank and held by the bank as trustee of the trust until an order of disposition is made by a court pursuant to *Civ. Code § 2225(d)*, or until the expiration of the period specified in *Civ. Code § 2225(b)* [*see Civ. Code § 2225(e)(3)*]. If the Attorney General prevails, the court must also order the payment of reasonable costs and attorney's fees to the Attorney General from the profits [*Civ. Code § 2225(e)(4)*].

An action by the Attorney General under *Civ. Code § 2225(e)* must be brought within one year after the receipt of the profits by the convicted felon, or one year after the date of conviction, whichever is later [*Civ. Code § 2225(e)(2)*].

[6] Preliminary Injunctive Relief

On motion of any party in an action brought to obtain payment from the involuntary trust, the court must grant a preliminary injunction to prevent any waste of profits if it appears that they are subject to the trust and that they may be subject to waste [*Civ. Code § 2225(f)(1)*; *see Civ. Code § 2225(a)(10)* ("profits" defined); *see also § 561.28[3][f]*]. On motion of the Attorney General or any potential beneficiary, the court must grant a preliminary injunction against a person against whom an indictment or information for a felony has been filed in superior court to prevent any waste of profits if there is probable cause to believe that the profits would be subject to an involuntary trust on conviction of the person and that they may be subject to waste [*Civ. Code § 2225(f)(2)*].

[7] Violation of Court Order as Contempt

Any violation of a court order made under *Civ. Code § 2225* is punishable as contempt [*Civ. Code § 2225(g)*].

[8] Remedies Cumulative

The remedies available under *Civ. Code § 2225* are in addition to other remedies provided by law [*Civ. Code § 2225(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureSanctionsContemptCivil ContemptEstate, Gift & Trust LawIntestacyEscheatEstate, Gift & Trust LawTrustsConstructive TrustsReal Property LawTrustsConstructive Trusts

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[Reserved]

§§ 561.29[Reserved]

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PART III. RESEARCH GUIDE

49-561 California Forms of Pleading and Practice--Annotated § 561.40

§ 561.40 State Statutes

[1] Deceit

Deceit is promise made without intention to perform. *Civ. Code § 1710(4)*

[2] Fraud

Fraud is either actual or constructive. *Civ. Code § 1571*

Actual fraud defined. *Civ. Code § 1572*

Constructive fraud defined. *Civ. Code § 1573*

[3] Involuntary Trusts

One who wrongfully detains a thing is involuntary trustee thereof for benefit of owner. *Civ. Code § 2223*

One who gains a thing by fraud, accident, mistake, undue influence, violation of trust, or other wrongful act is involuntary trustee thereof. *Civ. Code § 2224*

[4] Menace

Menace is threat of unlawful and violent injury to person. *Civ. Code § 1570(2)*

[5] Mistake

Mistake is either of law or fact. *Civ. Code § 1576*

Mistake of fact defined. *Civ. Code § 1577*

Mistake of law defined. *Civ. Code § 1578*

Mistake of foreign law is mistake of fact. *Civ. Code § 1579*

[6] Profits Derived From Felony

Definitions. *Civ. Code § 2225(a)*

Involuntary trust is imposed on profits from sale or transfer of anything with value enhanced by notoriety derived from commission of crime. *Civ. Code § 2225(b)(2)*

Exclusion from involuntary trust of profits representing inherent value of items sold or transferred. *Civ. Code § 2225(b)(3)*

Action by beneficiary to recover interest in trust. *Civ. Code § 2225(c)*

Allocation of profits recovered. *Civ. Code § 2225(d)*

Action by Attorney General to require deposit of profits in bank to be held in express trust. *Civ. Code § 2225(e)*

Injunctive relief in action under *Civ. Code § 2225*. *Civ. Code § 2225(f)*

Violation of court order under *Civ. Code § 2225* punishable as contempt. Civ. Code § 2225(g)

Cumulative nature of remedies; inapplicability of limitations periods in other statutes. *Civ. Code § 2225(h)*

[7] Statute of Frauds

Creation, assignment, grant, surrender, or declaration of estates or interests in land is only accomplished by instrument in writing unless by operation of law. *Code Civ. Proc. § 1971*

Code Civ. Proc. § 1971 does not prevent creation or extinction of trusts by operation of law. *Code Civ. Proc. § 1972(b)*

Trust relating to real property is required to be evidenced by writing or by operation of law. *Prob. Code § 15206*

[8] Statutes of Limitation

Action to recover real property to be commenced within five years of seisin or possession. *Code Civ. Proc. § 318*

Action for relief on ground of fraud or mistake to be commenced within three years after discovery of facts constituting fraud or mistake. *Code Civ. Proc. § 338(d)*

Action for relief not limited by other provision to be commenced within four years after accrual of cause of action. *Code Civ. Proc. § 343*

[9] Undue Influence

Undue influence defined. *Civ. Code § 1575*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesDuress & Undue InfluenceGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewEstate, Gift & Trust LawTrustsConstructive TrustsReal Property LawTrustsConstructive Trusts

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PART III. RESEARCH GUIDE

49-561 California Forms of Pleading and Practice--Annotated § 561.41

§ 561.41 Decisions

[1] Accrual of Cause of Action

Accrual of cause of action to impose constructive trust based on fraud and mistake; knowledge of facts constituting breach of trust. *Bennett v. Hibernia Bank (1956) 47 Cal. 2d 540, 559, 305 P.2d 20* (fraud and mistake); *Marshall v. Marshall (1965) 232 Cal. App. 2d 232, 250-251, 42 Cal. Rptr. 686* (constructive fraud)

[2] Attorney's Fees

Award of attorney's fees from constructive trust property is not unreasonable in action by plaintiff for benefit of himself and defendant investors, rather than for plaintiff's own right or exclusive benefit, and when plaintiff as well as defendant investors benefited as result of action. *Churchill v. Peters (1943) 57 Cal. App. 2d 521, 531-532, 134 P.2d 841*

[3] Burden of Proof

Degree of proof required in action to impose constructive trust is clear and convincing evidence; mere preponderance of evidence is not sufficient. *Cameron v. Crocker-Citizens Nat'l Bank (1971) 19 Cal. App. 3d 940, 943-944, 97 Cal. Rptr. 269*

[4] Jurisdiction

In action to impress constructive trust on sums received by defendants from estate, court as properly retaining jurisdiction to amend judgment to include further damages. *Day v. Sharp (1975) 50 Cal. App. 3d 904, 912, 123 Cal. Rptr. 918*

[5] Limitation of Actions

Three-year period of limitation prescribed by former Code Civ. Proc. § 338(4) (*now see Code Civ. Proc. § 338(d)*) as applicable when constructive fraudis gravamen of action, even though breach of contract is involved. *Day v. Greene (1963) 59 Cal. 2d 404, 411, 29 Cal. Rptr. 785, 380 P.2d 385*

Nature of right sued on, rather than form of action or relief demanded, as determining applicability of particular statute of limitations. *Jefferson v. J.E. French Co. (1960) 54 Cal. 2d 717, 718-719, 7 Cal. Rptr. 899, 355 P.2d 643*

Repudiation as not necessary to start running of statute of limitations against constructive trustee; statute as running from time beneficiaries knew or should have known of trustee's wrongful act. *Bainbridge v. Stoner (1940) 16 Cal. 2d 423, 429, 106 P.2d 423*

Statute of limitations ordinarily commences to run on right to enforce constructive trust from time beneficiary has knowledge of wrongful holding of property. *Martin v. Kehl (1983) 145 Cal. App. 3d 228, 240, 193 Cal. Rptr. 312*

Action to establish constructive trust when husband had unduly influenced wife to transfer her separate funds to joint account, which he then converted to his own use, held barred within three years under *Code Civ. Proc. § 338(d). Triplett v. Williams (1969) 269 Cal. App. 2d 135, 137, 74 Cal. Rptr. 594*

[6] Lis Pendens

Fraudulent conveyance action seeking avoidance of a transfer of title of specific real property under *Civ. Code § 3439.07(a)(1)* is real property claim for purposes of lis pendens statute. *Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 652, 15 Cal. Rptr. 3d 805, 93 P.3d 395*

Lis pendens is not available in trustee's action requesting imposition of constructive trust and equitable lien on defendant's house for amount of money defendant used to make improvements to house, which defendant allegedly obtained by exercising undue influence over deceased trustor. *Campbell v. Superior Court (2005) 132 Cal. App. 4th 904, 916-922, 34 Cal. Rptr. 3d 68*

Plaintiff may not file notice of lis pendens unless plaintiff pleads cause of action that affects title to specific real property. *Gale v. Superior Court (2004) 122 Cal. App. 4th 1388, 1395, 19 Cal. Rptr. 3d 554*

Plaintiff is not entitled to lis pendens in action in which only relief sought is money damages. *Palmer v. Zaklama (2003) 109 Cal. App. 4th 1367, 1381, 1 Cal. Rptr. 3d 116*

Plaintiff's entitlement to constructive trust is not determinative of whether plaintiff may maintain a lis pendends. *BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 970, 89 Cal. Rptr. 2d 693*

When pleading combines theories of liability for money damages and for constructive trust, plaintiff should not be allowed to maintain lis pendens. *BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 972, 89 Cal. Rptr. 2d 693*

Constructive trust claim does not support a lis pendends. *Lewis v. Superior Court (1994) 30 Cal. App. 4th 1850, 1862-1863, 37 Cal. Rptr. 2d 63* (rejecting contention that plaintiff was entitled to lis pendens in action to impose constructive trust on property purchased with stolen funds)

Expungement of lis pendens proper when purpose of constructive trust on real property is only to secure payment of debt. *LaPaglia v. Superior Court (1989) 215 Cal. App. 3d 1322, 1329, 264 Cal. Rptr. 63* ; *Urez v. Superior Court*

(1987) 190 Cal. App. 3d 1141, 1149, 235 Cal. Rptr. 837 ; *Deane v. Superior Court (1985) 164 Cal. App. 3d 292, 297, 210 Cal. Rptr. 406* ; *Burger v. Superior Court (1984) 151 Cal. App. 3d 1013, 1017-1019, 199 Cal. Rptr. 227* (all criticizing *Coppinger v. Superior Court (1982) 134 Cal. App. 3d 883, 891, 185 Cal. Rptr. 24* , which held action to impose constructive trust on real property as action affecting title to or possession of real property in which lis pendens may properly be filed).

[7] Other Wrongful Acts

Triable issues of fact as presented whether property was wrongfully acquired by law firm that previously represented partners and used confidentialinformation regarding partnership's negotiations for purchase of property, which was obtained by firm member who was limited partner. *Tri-Growth Ctr. City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg (1989) 216 Cal. App. 3d 1139, 1154, 265 Cal. Rptr. 330*

[8] Preemption by Federal Law

Mere fact that Federal Employees' Group Life Insurance Act (*5 U.S.C. §§ 8701-8716*) contains no anti-attachment provision is insufficient to support conclusion that constructive trust may be imposed on proceeds of insurance policy issued under act, under California law consistently with act's provisions; imposition of constructive trust under California law on proceeds of policy is preempted by *5 C.F.R. § 870.902*, providing for change of beneficiary at any time and without knowledge or consent of previous beneficary, and prohibiting waiver or restriction of right. *Metropolitan Life Ins. Co. v. McShan (N.D. Cal. 1983) 577 F. Supp. 165, 167, 169*

Imposition of constructive trust under California law (former Civ. Code § 2224) on proceeds of check cashed and wrongfully retained by debtor's lessor is unenforceable in bankruptcy proceeding if imposition of trust conflicts with distribution of funds contemplated by Bankruptcy Act in case at bar. *In re Esgro, Inc. (9th Cir. 1981) 645 F.2d 794, 797-798*

[9] Proceeds or Profits Subject to Involuntary Trust

Supreme Court of California has held that *Civ. Code § 2225* is facially invalid under both free speech clause of *First Amendment* to federal Constitution as applied to states through *Fourteenth Amendment*, and liberty of speech clause of California Constitution [*Keenan v. Superior Court (2002) 27 Cal. 4th 413, 415-416, 117 Cal. Rptr. 2d 1, 40 P.3d 718]* .

[10] Purpose of Remedy

Purpose of imposing constructive trust is preventing unjust enrichment. *Day v. Greene (1963) 59 Cal. 2d 404, 411, 29 Cal. Rptr. 785, 380 P.2d 385*

[11] Resulting Trust Distinguished

Purpose of constructive trust is to prevent unjust enrichment and to prevent a person from taking advantage of his or her own wrongdoing. *Burlesci v. Petersen (1998) 68 Cal. App. 4th 1062, 1067, 80 Cal. Rptr. 2d 704* ; *Communist Party v. 522 Valencia, Inc. (1995) 35 Cal. App. 4th 980, 990, 41 Cal. Rptr. 2d 618*

Constructive trust is not a true trust, but is an equitable remedy available to a plaintiff seeking to recover specific property in a number of different situations. *Olson v. Toy (1996) 46 Cal. App. 4th 818, 823, 54 Cal. Rptr. 2d 29*

[12] When Imposition Improper

When A agrees to sell property to B and B agrees to sell it to C, and both sales are executed through single escrow, property is subject to judgment liens against B, even though B put up no money for property which was paid for entirely by C, and neither resulting trust nor constructive trust arises in favor of *C. Majewsky v. Empire Constr. Co., Ltd. (1970) 2 Cal. 3d 478, 483-486, 85 Cal. Rptr. 819, 467 P.2d 547*

Shareholder does not own any part of specific property of corporation, and thus, did not meet "entitlement to res" criteria for imposition of constructive trust on real property transferred by corporation in allegedly fraudulent merger. *Pacific Lumber Co. v. Superior Court (1990) 226 Cal. App. 3d 371, 377-378, 276 Cal. Rptr. 425*

Imposition of constructive trust on real property transferred by corporation in allegedly fraudulent merger/exchange of shares was improper when subsidiary that got title to property was not wrongdoer; corporate veil would not be pierced to impute parent corporation's alleged wrongdoing to subsidiary; even if merger was rescinded, constructive trust could only be imposed on shares held by parent corporation. *Pacific Lumber Co. v. Superior Court (1990) 226 Cal. App. 3d 371, 377-378, 276 Cal. Rptr. 425*

Imposition of constructive trust against income tax overpayment refund was improper when state and Franchise Tax Board properly applied refund to offset amount owed to state under prior judgment against taxpayer. *Del Costello v. State of California (1982) 135 Cal. App. 3d 887, 895, 185 Cal. Rptr. 582*

No constructive trust in favor of adopted son on proceeds of ranch sold by deceased adoptive father by virtue of his written agreement to devise property to adopted son. *Walters v. Calderon (1972) 25 Cal. App. 3d 863, 873-876, 102 Cal. Rptr. 89*

[13] When Imposition Proper

Constructive trust is appropriate remedy for business partner's breach of fiduciary duty in failing to inform other partner of offer for partnership property considerably greater than value placed on property during dissolution negotiations. *Lund v. Albrecht (9th Cir. 1991) 936 F.2d 459, 464*

When partners or joint venturers have agreed to buy specific parcel of real property, and one partner or joint venturer, in breach of fiduciary duty, wrongfully acquires property in his or her own name, the other partner or joint venturer may bring an action to impose a constructive trust and requiring the wrongdoing partner or joint venturer to convey the appropriate share of legal title. *BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 970, 89 Cal. Rptr. 2d 693*

Under *Civ. Code §§ 2223* and *2224* and case law applying them, a constructive trust may only be imposed when the following three conditions are met: (1) the existence of property or some interest in property; (2) the plaintiff's right to that property; and (3) the defendant's wrongful acquisition or detention of the property. *Burlesci v. Petersen (1998) 68 Cal. App. 4th 1062, 1067, 80 Cal. Rptr. 2d 704* ; *Communist Party v. 522 Valencia, Inc. (1995) 35 Cal. App. 4th 980, 990-991, 41 Cal. Rptr. 2d 618*

Constructive trust properly imposed on assets of estate of husband who committed suicide after court in dissolution of marriage proceeding ordered him to provide life insurance for benefit of spouse. *Tintocalis v. Tintocalis (1993) 20 Cal. App. 4th 1590, 1596, 25 Cal. Rptr. 2d 655*

Allegations that seller's broker failed to communicate plaintiffs' offer to seller and bought property for amount less than plaintiffs offered stated cause of action for imposition of constructive trust; breach by seller's broker of duty of honesty

and fair dealing owed to potential purchasers, while notamounting to misrepresentation nor based on fiduciary obligation, was sufficient. *Nguyen v. Scott (1988) 206 Cal. App. 3d 725, 737-740, 253 Cal. Rptr. 800*

Court may impose constructive trust on gains resulting from attorney's breach of fiduciary duty to client. *David Welch Co. v. Erskine & Tulley (1988) 203 Cal. App. 3d 884, 894, 250 Cal. Rptr. 339*

Constructive trust is appropriate remedy to fulfill reasonable expectations of parties to nonmarital relationship and to prevent unjust enrichment; fiduciary or confidential relationship as unnecessary. *Nelson v. Nevel (1984) 154 Cal. App. 3d 132, 139, 201 Cal. Rptr. 93*

Although judgment affirmed on resulting trust theory, trial court findings supported imposition of constructive trust in plaintiff's favor for one-half interest in real property when each party supplied half of down payment, defendant to take title and make payments in lieu of rent, and plaintiff to receive one-half proceeds when defendant vacated premises. *Martin v. Kehl (1983) 145 Cal. App. 3d 228, 238, 193 Cal. Rptr. 312*

Imposition of constructive trust against income tax overpayment refund was proper under *Civ. Code § 2223-2224* if state and Franchise Tax Board wrongfully detain refund, or gain it by accident, mistake, or other wrongful act absent better right to it than taxpayer. *Del Costello v. State of California (1982) 135 Cal. App. 3d 887, 895, 185 Cal. Rptr. 582*

Constructive trust theory was proper for allowing court to give plaintiff property purchased with funds stolen from him, although plaintiff's only relevant request was for "such other and further relief as the court deems just." *Pena v. Toney (1979) 98 Cal. App. 3d 534, 541, 542, 160 Cal. Rptr. 4*

Imposition of constructive trust on properties of decedent's estate in favor of legal wife against interests of putative spouse is appropriate remedy. *Sousa v. Freitas (1970) 10 Cal. App. 3d 660, 667, 89 Cal. Rptr. 485*

Constructive trust as available to enforce vendor's lien (*Civ. Code § 3046*) against subsequent purchasers of real property with notice. *Edwards-Town, Inc. v. Dimin (1970) 9 Cal. App. 3d 87, 93-94, 87 Cal. Rptr. 726*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesLis PendensGeneral OverviewEstate, Gift & Trust LawTrustsConstructive TrustsEvidenceProcedural ConsiderationsBurdens of ProofClear & Convincing ProofGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawTrustsConstructive Trusts

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49-561 California Forms of Pleading and Practice--Annotated § 561.42

§ 561.42 Law Reviews

Franklin, *Constructive Trust as a Remedy in Commercial Litigation-- An Argument Against It*, 17 Bev. Hills B.J. 110 (1983)

Note, *Constructive Trust and the Political Widow: A Remedy for Unjust Enrichment Arising from Unused Political Campaign Funds, 46 So. Cal. L. Rev. 1168 (1973)*

Note, *The Necessity for Unjust Enrichment in a Constructive Trust in California: Elliott v. Elliott, 19 Hastings L.J. 1268 (1968)*

Evans, *Observations on the State, etc., of the California Laws of Uses and Trusts, 28 So. Cal. L. Rev. 111 (1955)*

Note, *Real Property: Statute of Frauds: Grantor's Remedies for Breach of Invalid Promise to Reconvey: Constructive Trust: Restitution, 40 Cal. L. Rev. 621 (1952)*

Note, *Trusts and Trustees: Creation of Express or Constructive Trusts by Contract for Joint Bank Account, 29 Cal. L. Rev. 90 (1940)*

Comment, *Trusts: Constructive and Resulting: Part Performance: Estoppel, 19 Cal. L. Rev. 70 (1930)*

Comment, *Trusts: Constructive Trusts: Oral Promise to Hold: Fraud: Confidential Relationship, 13 Cal. L. Rev. 174 (1925)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesRestitutionContracts LawStatutes of FraudsGeneral OverviewEstate, Gift & Trust LawTrustsConstructive TrustsEstate, Gift & Trust LawTrustsResulting TrustsReal Property LawTrustsConstructive

Trusts

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§ 561.43 Text References

Witkin, California Procedure, Vol. 3, *Actions*, §§ 372, 620-622, Vol. 5, *Pleading*, §§ 796-800 (4th ed. 1996-1997)

Witkin, Summary of California Law, Vol. 13, *Trusts*, §§ 319-328 (10th ed. 2005)

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsConstructive TrustsReal Property LawTrustsConstructive Trusts

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[Reserved]

§§ 561.44[Reserved]

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49-561 California Forms of Pleading and Practice--Annotated § 561.60

§ 561.60 Complaint--For Imposition of Constructive Trust on Real Property Obtained Through Fraud [Civ. Code § 2224]; Order for Reconveyance [Civ. Code §§ 3367, 3375], Preliminary Injunctive Relief [Code Civ. Proc. § 526], and Accounting--Against Constructive Trustee--By Beneficiary

[1] FORM Complaint--For Imposition of Constructive Trust on Real Property Obtained Through Fraud [Civ. Code § 2224]; Order for Reconveyance [Civ. Code §§ 3367, 3375], Preliminary Injunctive Relief [Code Civ. Proc. § 526], and Accounting--Against Constructive Trustee--By Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR IMPOSITION OF CON-
[and DOES 1 through _____],	)	STRUCTIVE TRUST [AND PRELIMINARY IN-
Defendant(s).	)	JUNCTION]
	)	(Fraud)
	)	

Plaintiff alleges:

1. The real property referred to herein is that real property located at _____ [*street address and, if any, city*], _____ County, California, and more fully described as follows: _____ [*set forth legal description of property*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously

named defendants is responsible in some manner for the occurrences herein alleged.]

[3. (Plaintiff is informed and believes and thereon alleges that) (A)t all times herein mentioned, each of the defendants was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting in the course and scope of such agency and employment.]

4. On or about _____ [*date*], plaintiff and defendant orally agreed _____ [*specify oral agreement, e.g.,* to jointly purchase the above-described real property].

5. Pursuant to the terms of the agreement, _____ [*specify defendant's promises, e.g.,* defendant promised to acquire the property for both plaintiff and defendant by bidding at an auction at which the property wasto be sold. Defendant promised, if successful in acquiring the property, to convey a one-third interest in the property to plaintiff in exchange for plaintiff's payment of one third of the purchase price and of the expenses of the purchase.]

6. In reliance on defendant's promises, plaintiff _____ [*specify plaintiff's acts in reliance on defendant's promises, e.g.,* neither attended nor bid for the property at the above-mentioned auction].

7. On or about _____ [*date*], _____ [*specify defendant's acquisition of the property, e.g.,* at auction in _____ (*city*), _____ County, California, the above-described real property was sold to defendant as the highest bidder, for a price of $_____].

[8. On or about _____ (*date*), plaintiff demanded of defendant that he/she _____ (*specify plaintiff's demand for performance, e.g.,* convey to plaintiff an undivided one-third interest in the property in exchange for plaintiff's payment of one-third of the purchase price and of the expenses of the purchase).]

9. Defendant has failed and refused and continues to fail and refuse to convey plaintiff's share of the property to him/her.

10. [Plaintiff is informed and believes and thereon alleges that] [A]t the time defendant made the promises to plaintiff, as alleged above, defendant had no intention of performing them.

11. [Plaintiff is informed and believes and thereon alleges that] [D]efendant made these promises to plaintiff with the intent to defraud plaintiff and to induce plaintiff to _____ [*specify acts, e.g.,* forbear from bidding for the property at auction so that defendant could bid for the property without competition and thereby acquire and keep the property all for himself/herself].

12. At the time these promises were made and at the time plaintiff acted in reliance on them, plaintiff was ignorant of defendant's secret intention not to perform, and _____ [*allege plaintiff's justifiable reliance on the promises, e.g.,* could not, in the exercise of reasonable diligence, have discovered defendant's secret intention and therefore acted reasonably in relying on defendant's promises]. Had plaintiff known of defendant's secret intention not to perform, plaintiff would not have acted in reliance on defendant's promises.

13. By virtue of his/her fraudulent acts, defendant holds the property described above as a constructive trustee for plaintiff's benefit.

[14. (Plaintiff is informed and believes and thereon alleges that) (S)ince approximately _____ (*date*), defendant has caused and continues to cause injury to the property and to plaintiff's beneficial interest therein by committing waste on the property by _____ (*describe defendant's acts or omissions constituting waste*)].

[15. (Plaintiff is further informed and believes and thereon alleges that) (P)rior to the commencement of defendant's conduct, the above-described property had a reasonable market value of $_____; presently, its reasonable market value is $_____].

[16. (Plaintiff is further informed and believes and thereon alleges that) (P)laintiff's beneficial interest in the property held in trust for him/her by defendant will be further wasted unless defendant's conduct is forthwith enjoined].

[17. On or about _____ (*date*), plaintiff requested, in writing, that defendant provide plaintiff with a statement of all sums of money collected as rent on the property, less expenses, to which plaintiff is entitled as rightful owner of the property. A copy of the request is attached hereto, marked Exhibit _____, and incorporated by reference herein.]

[18. Defendant refused, and continues to refuse, plaintiff's request for information concerning rental income from the property.]

[19. Plaintiff does not know the amount owing as rental income and an accounting is necessary to determine this amount given the complex nature of the account, in that _____ (*state reason account is complex, e.g.,* the property in issue contains 15 rental units and defendant may be entitled to a number of deductions from gross rental income).]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an order declaring that defendant holds _____ [the real property *or* an undivided _____ (*specify proportion, e.g.,* one-third) interest in the real property] described above in trust for plaintiff;

2. For an order compelling defendant to convey to plaintiff _____ [the real property *or* an undivided _____ (*specify proportion, e.g.,* one-third) interest in the real property];

[3. For an order granting possession of the property to the plaintiff;]

[4. For an order preliminarily enjoining defendant and his/her agents, servants, and employees, and all persons acting under, in concert with, or for him/her from _____ (*specify acts or omissions constituting waste*);] and

[5. For an accounting of all monies owing to plaintiff.]

[6. For damages in the amount of all monies found owing to plaintiff.]

7. For such other and further relief as the court deems proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification. See Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, § 560.520.*]

[2] Use of Form

This complaint is for use to bring an action to impose a constructive trust on and to compel reconveyance of real

property acquired through fraud based on a promise made without the intention of performing it [*see Civ. Code §§ 1710(4), 2224*]. The form is adapted from the facts in *Helfrich v. Kerley (1961) 192 Cal. App. 2d 726, 13 Cal. Rptr. 753* .

CAUTION:

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc.§ 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* . For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

[3] Pleading Requirements

The pleading requirements for a constructive trust are [*Michaelian v. State Comp. Ins. Fund (1996) 50 Cal. App. 4th 1093, 1114, 58 Cal. Rptr. 2d 133]* :

- Facts constituting the underlying cause of action, and
- Specific identifiable property to which the defendant has title.

[4] Allegations

[a] Subject Matter of and Parties to Action

This form of complaint identifies the property that is the subject of the action (Paragraph 1), and includes optional paragraphs to allege the existence of fictitiously named defendants (Paragraph 2) [*Code Civ. Proc. § 474*] and an agency relationship between and among defendants (Paragraph 3).

[b] Fraud

The form alleges elements of a cause of action for fraud based on a promise made without any intention of performing it: (1) defendant's promises to plaintiff (Paragraph 5), (2) plaintiff's actions in justifiable reliance on the promises (Paragraphs 6 and 12), (3) defendant's lack of any intent to perform the promises (Paragraph 10), (4) defendant's intent to induce plaintiff to rely on the promises (Paragraph 11), (5) defendant's refusal to perform the promises (Paragraph 9), and (6) damage to plaintiff (Paragraph 7) [*see Fowler v. Fowler (1964) 227 Cal. App. 2d 741, 747-748, 39 Cal. Rptr. 101]* .

[c] Constructive Trust

The form also includes allegations necessary for the imposition of a constructive trust on the property wrongfully acquired by defendant: (1) the existence of property or some interest therein (Paragraphs 1, 4, and 5), (2) the plaintiff's right to it (Paragraphs 4-12), and (3) the defendant's gain of the property by fraud (Paragraphs 5-7 and 10-12) [*Lazar v. Hertz Corp. (1983) 143 Cal. App. 3d 128, 139, 191 Cal. Rptr. 849]* .

[5] Preliminary Injunctive Relief

The complaint includes optional allegations of waste as grounds for preliminary injunctive relief (Paragraphs 14-16) [*Code Civ. Proc. § 526(a)(2), (5)*]. The doctrineof waste applies, by definition, only to real property. Proof of conduct

that has resulted in substantial depreciation of the market value of land establishes waste (Paragraph 15) [*see Smith v. Cap Concrete, Inc. (1982) 133 Cal. App. 3d 769, 775-776, 184 Cal. Rptr. 308]* . For further discussion of and forms for use in alleging waste, see Ch. 316, *Joint Tenancy and Tenancy in Common* , Ch. 332, *Landlord and Tenant: The Tenancy* , and Ch. 344, *Life Estates and Remainders* .

[6] Prayer

Paragraph 2 of the prayer requests an order compelling defendant to convey the real property in issue to the plaintiff [*see Civ. Code § 3375*; *Murphy v. Hopcroft (1904) 142 Cal. 43, 46, 75 P. 567]* . Optional Paragraph 3 of the prayer requests an order granting plaintiff possession of the real property in issue to the plaintiff, which is also a proper form of relief when a plaintiff is entitled to specific real property [*see Civ. Code § 3375*; *Smith v. Smith (1941) 47 Cal. App. 2d 574, 576, 118 P.2d 487]* .

[7] Accounting

Because the form involves real property that may have generated rental income, an optional allegation of plaintiff's demand for and defendant's refusal of an accounting of profits acquired by defendant is included (Paragraphs 17-19). A complaint in an action for an accounting must normally allege either a fiduciary relationship between plaintiff and defendant or an unknown balance due when the accounts are so complicated in nature that an ordinary legal action demanding a fixed sum is impractible and cannot be determined without an accounting (Paragraph 19) [*San Pedro Lumber Co. v. Reynolds (1896) 111 Cal. 588, 596, 44 P. 309* ; *Civic W. Corp. v. Zila Indus., Inc. (1977) 66 Cal. App. 3d 1, 14, 135 Cal. Rptr. 915* ; *see Raymond v. Independent Growers, Inc. (1955) 133 Cal. App. 2d 154, 160, 284 P.2d 57* ; *St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 359, 287 P.2d 387]* . Generally, the complaint must also allege plaintiff's demand for and defendant's refusal to provide an accounting (Paragraphs 17-18) [*see Wooster v. Nevills (1887) 73 Cal. 58, 60, 14 P. 390]* . For a discussion and forms for use in an accounting action, see Ch. 7, *Accounting, Action for*.

[8] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*]) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary to obtain a preliminary injunction, see Ch. 303, *Injunctions* .

Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

[9] Lis Pendens

A plaintiff may not file a notice of lis pendens unless the plaintiff pleads a cause of action that affects title to specific real property [*Gale v. Superior Court (2004) 122 Cal. App. 4th 1388, 1395, 19 Cal. Rptr. 3d 554]* , and a plaintiff is not entitled to a lis pendens in an action in which the only relief sought is money damages [*Palmer v. Zaklama (2003) 109 Cal. App. 4th 1367, 1381, 1 Cal. Rptr. 3d 116]* .

If a pleading combines theories of liability for monetary damages and for a constructive trust, the plaintiff is not entitled to a lis pendens, because that might provide an unscrupulous plaintiff with a powerful lever to force the settlement of a groundless or malicious suit [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 972, 89 Cal. Rptr. 2d 693]* . A lis pendens is a provisional remedy that must be applied narrowly [*BGJ Assocs. v. Superior Court (1999) 75 Cal.*

App. 4th 952, 967, 89 Cal. Rptr. 2d 693] . For example, a lis pendens is not available in an action by a trustee requesting the imposition of a constructive trust and an equitable lien on the defendant's house for the amount of money that the defendant used to make improvements to the house, which the defendant allegedly obtained by exercising undue influence over the deceased trustor [*Campbell v. Superior Court (2005) 132 Cal. App. 4th 904, 916-922, 34 Cal. Rptr. 3d 68]* .

However, a fraudulent conveyance action seeking avoidance of a transfer of title of specific real property under *Civ. Code § 3439.07(a)(1)* is a real property claim for purposes of the lis pendens statute [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 652, 15 Cal. Rptr. 3d 805, 93 P.3d 395]* .

For a complete discussion of the lis pendens procedure and forms, see Ch. 348, *Lis Pendens* .

[10] Cross References

For discussion and forms relating to fraud and deceit, see Ch. 269, *Fraud and Deceit*

[11] State Statutes

Elements of deceit. *Civ. Code § 1710*

Promise made without intention to perform is deceit. *Civ. Code § 1710(4)*

One who wrongfully detains a thing is involuntary trustee thereof for benefit of owner. *Civ. Code § 2223*

One who gains a thing by fraud, unless holding other and better right thereto, is involuntary trustee of thing gained for benefit of person who would otherwise have had it. *Civ. Code § 2224*

Statute of limitations for fraud is three years from date of discovery by aggrieved party of facts constituting fraud. *Code Civ. Proc. § 338(d)*

[12] Decisions

Imposition of constructive trust on property acquired through fraud requires establishment of cause of action for fraud. *Lazar v. Hertz Corp. (1983) 143 Cal. App. 3d 128, 139, 191 Cal. Rptr. 849*

In action for imposition of constructive trust, conveyance of property to its equitable owner as normal remedy. *Calistoga Civic Club v. City of Calistoga (1983) 143 Cal. App. 3d 111, 117, 191 Cal. Rptr. 571*

Constructive trust as arising and enforceable on repudiation of oral promise to convey property. *Fowler v. Fowler (1964) 227 Cal. App. 2d 741, 746, 39 Cal. Rptr. 101*

In constructive trusts based on fraud or wrongdoing, oral promise to convey property as sufficient, and existence or absence of confidential relationship between parties as not controlling. *Fowler v. Fowler (1964) 227 Cal. App. 2d 741, 746, 39 Cal. Rptr. 101*

Imposition of constructive trust on property as proper when defendant induced plaintiffs to refrain from bidding on property by agreeing to bid on property to acquire it jointly for parties without any intent to perform agreement, and subsequently bought property for himself. *Helfrich v. Kerley (1961) 192 Cal. App. 2d 726, 728-729, 13 Cal. Rptr. 753*

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49-561 California Forms of Pleading and Practice--Annotated § 561.61

§ 561.61 Complaint [Code Civ. Proc. § 425.10]--For Damages [Civ. Code § 3336] for Conversion, for Imposition of Constructive Trust on Proceeds of Embezzled Funds, Including Real Property Purchased With Part of Proceeds [Civ. Code § 2224], for Order for Conveyance [Civ. Code §§ 3367, 3375], and for Accounting--Against Embezzler--By Beneficiary

[1] FORM Complaint [Code Civ. Proc. § 425.10]--For Damages [Civ. Code § 3336] for Conversion, for Imposition of Constructive Trust on Proceeds of Embezzled Funds, Including Real Property Purchased With Part of Proceeds [Civ. Code § 2224], for Order for Conveyance [Civ. Code §§ 3367, 3375], and for Accounting--Against Embezzler--By Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES, IMPOSITION OF
_____ [*name*],	)	CONSTRUCTIVE TRUST, AND ORDER OF CON-
Defendant.	)	VEYANCE
	)	(Embezzlement)
	)	[*Civ. Code §§ 2224, 3336*]

_____

Plaintiff alleges:

1. At all times mentioned herein, defendant was, and now is, a resident of the County of _____, California.

2. On or about _____ [*date*], _____ [*describe circumstances that put defendant in position to embezzle from plaintiff, e.g.,* plaintiff employed defendant as a bookkeeper for plaintiff's business, _____ (*specify name of business*). Defendant continued in plaintiff's employ until

_____ [*date*]. During the course of his/her employment, defendant, as bookkeeper, was solely and completely in charge of maintaining the business accounts and business records of plaintiff's business, and plaintiff employed no other person for this purpose].

3. During the period of his/her employment, defendant, _____ [*describe manner in which defendant embezzled from plaintiff, e.g.,* by means of false and fraudulent alteration and writing of checks drawn on plaintiff's business accounts, and by means of false, fraudulent, and deceptive entries in the check register, journal, and other business records, misappropriated and converted to his/her personal use and possession, without plaintiff's knowledge or consent, the sum of $_____ (*specify, e.g.,* $45,000), all of which sum belonged to plaintiff].

4. On or about _____ [*date*], defendant deposited the full amount of that sum in a personal account at the _____ [*name of depositary institution*], account number _____.

5. Subsequently, on or about _____ [*date*], defendant purchased a parcel of real property located at _____ [*street address, including city, if any*], _____ County, California, and more particularly described as _____ [*provide legal description*]. On or about _____ [*date*], title to the property was conveyed to defendant.

6. To date, defendant has paid the sum of $_____ [*specify, e.g.,* $30,000] on the purchase price of the property, the entire amount of which came from the account at _____ [*name of depositary institution*], mentioned above.

7. By virtue of defendant's wrongful acts, he/she holds the converted funds, in the amount of $_____ [*specify, e.g.,* $45,000], and the real property described above as a constructive trustee for the benefit of plaintiff.

[8. *Right to accounting. See § 561.60, Paragraphs 17-19.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the funds converted in the amount of $_____ [*specify, e.g.,* $45,000];

2. For interest at the legal rate on $_____ (*specify, e.g.,* $45,000), pursuant to *Section 3336 of the Civil Code*, from and after _____ [*date*];

3. For an order declaring that defendant holds the real property described above in trust for plaintiff;

4. For an order declaring plaintiff the owner of the real property, subject to any existing encumbrances thereon;

5. For an order compelling defendant to convey the real property to plaintiff;

[6. *Accounting. See § 561.60, Prayer, Paragraphs 5, 6;*]

7. For costs of suit herein incurred; and

8. For such other and further relief as the court deems proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, § 560.520.*]

[2] Use of Form

This form of complaint is for use by a person from whom funds have been embezzled to bring an action for damages for conversion and for imposition of a constructive trust on the funds converted and on real property acquired with the converted funds [*Civ. Code §§ 2224, 3336*]. The form is adapted from the facts in *Church v. Bailey (1949) 90 Cal. App. 2d 501, 203 P.2d 547* .

[3] Allegations

[a] Conversion

This form of complaint alleges the capacity and residence of the defendant (Paragraph 1) [*see Neet v. Holmes (1942) 19 Cal. 2d 605, 611, 122 P.2d 557* (action primarily involving determination of interest in personal property as essentially transitory, and venue as properly laid in county of defendant's residence); *see also § 561.20*].

The conversion cause of action contains the following allegations: (1) plaintiff's interest in and right to possession of the converted funds (Paragraph 2); (2) the value of the funds (Paragraph 3); and (3) defendant's conversion of the funds, including the acquisition of real property as proceeds of the converted funds (Paragraphs 4-6). For a complete discussion of and forms of for use in actions for conversion, see Ch. 150, *Conversion* .

[b] Constructive Trust

The form also includes allegations necessary to impose a constructive trust on the converted funds and on the real property acquired with a portion of those funds: (1) the existence of property or some interest in that property (Paragraphs 4-6), (2) the plaintiff's right to it (Paragraphs 3 and 7), and (3) the defendant's gain of the property by the wrongful act of conversion (Paragraphs 2-6) [*see Lazar v. Hertz Corp. (1983) 143 Cal. App. 3d 128, 139, 191 Cal. Rptr. 849* ; *see also Church v. Bailey (1949) 90 Cal. App. 2d 501, 504, 203 P.2d 547* (one who wrongfully detains funds of another as involuntary trustee thereof for benefit of owner)].

[4] Imposition of Constructive Trust on Proceeds of Funds Wrongfully Acquired

A person who embezzles funds and deposits them in his or her personal bank account becomes a constructive trustee of the funds deposited. Furthermore, a trust will be imposed on property acquired with the funds unless the property is held by a bona fide purchaser for value, without notice, and in good faith [*Church v. Bailey (1949) 90 Cal. App. 2d 501, 504, 203 P.2d 547* ; *see §§ 561.17, 561.18*].

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is an unlimited civil case in the superior court [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Lis Pendens

A plaintiff may not file a notice of lis pendens unless the plaintiff pleads a cause of action that affects title to specific real property [*Gale v. Superior Court (2004) 122 Cal. App. 4th 1388, 1395, 19 Cal. Rptr. 3d 554]* , and a plaintiff is not entitled to a lis pendens in an action in which the only relief sought is money damages [*Palmer v. Zaklama (2003) 109 Cal. App. 4th 1367, 1381, 1 Cal. Rptr. 3d 116]* .

If a pleading combines theories of liability for monetary damages and for a constructive trust, the plaintiff is not entitled to a lis pendens, because that might provide an unscrupulous plaintiff with a powerful lever to force the settlement of a groundless or malicious suit [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 972, 89 Cal. Rptr. 2d 693]* . A lis pendens is a provisional remedy that must be applied narrowly [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 967, 89 Cal. Rptr. 2d 693]* . For example, a lis pendens is not available in an action by a trustee requesting the imposition of a constructive trust and an equitable lien on the defendant's house for the amount of money that the defendant used to make improvements to the house, which the defendant allegedly obtained by exercising undue influence over the deceased trustor [*Campbell v. Superior Court (2005) 132 Cal. App. 4th 904, 916-922, 34 Cal. Rptr. 3d 68]* .

However, a fraudulent conveyance action seeking avoidance of a transfer of title of specific real property under *Civ. Code § 3439.07(a)(1)* is a real property claim for purposes of the lis pendens statute [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 652, 15 Cal. Rptr. 3d 805, 93 P.3d 395]* .

For a complete discussion of the lis pendens procedure and forms, see Ch. 348, *Lis Pendens* .

[7] Cross References

For a discussion and forms for use in conversion actions, see Ch. 150, *Conversion*

For a related form, see *§ 561.60*

[8] State Statutes

Statute of limitations as three years in action for taking, detaining, or injuring goods or chattels. *Code Civ. Proc. § 338(c)*

Statute of limitations as 90 days in action for conversion of personal property left at hotel, hospital, rest home, sanitarium, boarding house, lodging house, furnished apartment, or furnished bungalow court. *Code Civ. Proc. § 341a*

Statute of limitations as 180 days in action for conversion of well-drilled oil, gas, or other liquid or fluid. *Code Civ. Proc. § 3493*/4

[9] Decisions

Constructive trust as properly impressed on property acquired with funds wrongfully acquired from another, unless property is held by bona fide purchaser for value and without notice. *Church v. Bailey (1949) 90 Cal. App. 2d 501, 504, 203 P.2d 547*

One who wrongfully detains funds of another as involuntary trustee thereof for owner's benefit. *Church v. Bailey (1949) 90 Cal. App. 2d 501, 504, 203 P.2d 547*

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 561 TRUSTS: CONSTRUCTIVE TRUSTS
PART IV. FORMS

49-561 California Forms of Pleading and Practice--Annotated § 561.62

§ 561.62 Complaint [Code Civ. Proc. § 425.10]--For Imposition of Constructive Trust [Civ. Code § 2224] on Interest in Real Property Acquired by Mistake of Fact [Civ. Code § 1577], for Order for Conveyance [Civ. Code §§ 3367, 3375], and Accounting--Against Joint Tenant--By Beneficiary

[1] FORM Complaint [Code Civ. Proc. § 425.10]--For Imposition of Constructive Trust [Civ. Code § 2224] on Interest in Real Property Acquired by Mistake of Fact [Civ. Code § 1577], for Order for Conveyance [Civ. Code §§ 3367, 3375], and Accounting--Against Joint Tenant--By Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR IMPOSITION OF CON-
_____ [*name*],	)	STRUCTIVE TRUST [AND PRELIMINARY IN-
Defendant.	)	JUCTION]
	)	(Mistake)
	)	[*Civ. Code §§ 1577, 2224*]

_____

Plaintiff alleges:

[1. *Description of real property. See § 561.60, Paragraph 1.*]

[*SET OUT the facts giving rise to the mistake in successive paragraphs*]

2. On _____ [*date*], plaintiff and defendant were married to each other in _____ [*city and state or country*].

3. The marriage of the parties was dissolved by a judgment of dissolution entered by the Superior Court of _____ County, California, and effective on _____ [*date*].

4. On or about _____ [*date*], prior to the dissolution, the parties, as buyers, entered into a written contract with _____ [*name*], as seller, for the purchase of the real property described above. A copy of the contract is attached as Exhibit "_____," and incorporated herein by reference.

5. On or about _____ [*date*], prior to the dissolution, defendant conveyed to plaintiff in writing all his/her right, title, and interest in and to the property. Plaintiff recorded the conveyance in the Official Records of the County of _____, California, Book _____, page _____. A copy of the conveyance is attached as Exhibit "_____," and incorporated herein by reference.

6. After plaintiff acquired defendant's interest in the contract, plaintiff paid the balance of the purchase price for the property in full.

[*CONTINUE*]

7. On or about _____ [*date*], the seller of the property _____ [*name*] executed a deed to the property, and recorded the deed in the Official Records of the County of _____, California, Book _____, page _____. A copy of the deed is attached as Exhibit "_____," and incorporated herein by reference.

8. The deed contains a mistake of material fact in that _____ [*specify mistake, e.g.,* contrary to plaintiff's intention, it conveyed the property to plaintiff and defendant as grantees, rather than to plaintiff as grantee].

9. As a result of the mistake, plaintiff was injured in that _____ [*describe injury, e.g.,* there exists a cloud on the title to the property because defendant has refused and continues to refuse to convey his/her legal title to plaintiff].

[10. *Defendant's commission of waste on the property. See § 561.60, Paragraph 14.*]

[11. *Decrease in market value of the property due to defendant's waste. See § 561.60, Paragraph 15.*]

[12. *Plaintiff's beneficial interest in the property subject to further waste absent injunctive relief. See § 561.60, Paragraph 16.*]

[13. *Right to accounting. See § 561.60, Paragraphs 17-19.*]

14. By virtue of the mistake of fact described above, defendant holds his/her interest in the property as a constructive trustee for plaintiff's benefit.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an order declaring that defendant holds his/her interest in the real property hereinabove described in trust for plaintiff;

2. For an order compelling defendant to convey to plaintiff defendant's interest in the real property;

[3. *Preliminary injunctive relief. See § 561.60, Prayer Paragraph 3*];

[4. *Accounting. See § 561.60, Prayer Paragraphs 5 and 6*]; and

5. For such other and further relief as the court deems proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, § 560.520.*]

[2] Use of Form

This form of complaint is for use to bring an action to impose a constructive trust on, and to obtain an order conveying to plaintiff, an interest in property that was conveyed by mistake of fact to plaintiff and defendant as joint tenants, rather than to plaintiff alone [*see Civ. Code §§ 1577, 2224*]. The form is adapted from the facts in *Abbott v. Miller (1950) 98 Cal. App. 2d 595, 220 P.2d 570* .

A grantor's mistake in drafting a deed furnishes grounds for relief under *Civ. Code § 2224*, if a person thereby gains an apparent interest in property to which he or she is not entitled. The person thus holds his or her interest as an involuntary trustee for the benefit of the rightful owner [*Abbott v. Miller (1950) 98 Cal. App. 2d 595, 596, 220 P.2d 570]* .

CAUTION:

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitleplaintiff to the relief sought [*see E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

[3] Allegations

[a] Mistake of Fact

This form of complaint alleges a cause of action for mistake of fact: (1) the facts giving rise to the mistake (Paragraphs 2-6); (2) the mistake of fact, not caused by the neglect of a legal duty on the part of the person making the mistake, but consisting of an unconscious ignorance or forgetfulness of a fact material to the contract (Paragraphs 7 and 8) [*Civ. Code § 1577(1)*]; and (3) damage to plaintiff (Paragraph 9).

Because the mistake involves the ownership of real property, the form includes optional allegations for use in seeking preliminary injunctive relief to prevent waste to the property (Paragraphs 10-12).

For a discussion and forms for use in actions involving mistakes of fact and law, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

[b] Constructive Trust

The form also includes allegations necessary for the imposition of a constructive trust on the property: (1) the existence of property or some interest in that property(Paragraph 1), (2) the plaintiff's right to it (Paragraphs 5 and 13), and (3) the defendant's gain of the property by a mistake of fact (Paragraph 8) [*see Abbott v. Miller (1950) 98 Cal. App. 2d 595, 596, 220 P.2d 570]* .

[4] Lis Pendens

A plaintiff may not file a notice of lis pendens unless the plaintiff pleads a cause of action that affects title to specific real property [*Gale v. Superior Court (2004) 122 Cal. App. 4th 1388, 1395, 19 Cal. Rptr. 3d 554]* , and a plaintiff is not entitled to a lis pendens in an action in which the only relief sought is money damages [*Palmer v. Zaklama (2003) 109 Cal. App. 4th 1367, 1381, 1 Cal. Rptr. 3d 116]* .

If a pleading combines theories of liability for monetary damages and for a constructive trust, the plaintiff is not entitled to a lis pendens, because that might provide an unscrupulous plaintiff with a powerful lever to force the settlement of a groundless or malicious suit [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 972, 89 Cal. Rptr. 2d 693]* . A lis pendens is a provisional remedy that must be applied narrowly [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 967, 89 Cal. Rptr. 2d 693]* . For example, a lis pendens is not available in an action by a trustee requesting the imposition of a constructive trust and an equitable lien on the defendant's house for the amount of money that the defendant used to make improvements to the house, which the defendant allegedly obtained by exercising undue influence over the deceased trustor [*Campbell v. Superior Court (2005) 132 Cal. App. 4th 904, 916-922, 34 Cal. Rptr. 3d 68]* .

However, a fraudulent conveyance action seeking avoidance of a transfer of title of specific real property under *Civ. Code § 3439.07(a)(1)* is a real property claim for purposes of the lis pendens statute [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 652, 15 Cal. Rptr. 3d 805, 93 P.3d 395]* .

For a complete discussion of the lis pendens procedure and forms, see Ch. 348, *Lis Pendens* .

[5] State Statutes

Mistake as either one of fact or of law. *Civ. Code § 1576*

Mistake of fact defined. *Civ. Code § 1577*

Mistake of law defined. *Civ. Code § 1578*

Mistake of foreign law as mistake of fact. *Civ. Code § 1579*

[6] Decisions

Cause of action for imposition of constructive trust on property acquired by mistake as stated by complaint alleging grantor's mistake in drafting deed. *Abbott v. Miller (1950) 98 Cal. App. 2d 595, 596, 220 P.2d 570*

[7] Cross References

For a related from, see *§ 561.60*

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 561 TRUSTS: CONSTRUCTIVE TRUSTS
PART IV. FORMS

49-561 California Forms of Pleading and Practice--Annotated § 561.63

§ 561.63 Complaint [Code Civ. Proc. § 425.10]--For Imposition of Constructive Trust [Civ. Code § 2224] on Real Property Acquired by Undue Influence [Civ. Code § 1575(2), (3)], for Order for Conveyance [Civ. Code §§ 3367, 3375], and for an Accounting--Against Trustee--By Beneficiary

[1] FORM Complaint [Code Civ. Proc. § 425.10]--For Imposition of Constructive Trust [Civ. Code § 2224] on Real Property Acquired by Undue Influence [Civ. Code § 1575(2), (3)], for Order for Conveyance [Civ. Code §§ 3367, 3375], and for an Accounting--Against Trustee--By Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR IMPOSITION OF CON-
_____ [*name*],	)	STRUCTIVE TRUST, ORDER OF CONVEYANCE,
[and DOES 1 through _____,]	)	AND ACCOUNTING
Defendant(s).	)	(Undue Influence)
	)	[*Civ. Code §§ 1575(2), (3), 2224*]
	)	

Plaintiff alleges:

1. From _____, until _____ [*dates*], plaintiff was the owner of residential real property located at _____ [*address, including city, if any*], _____ County, California, and more particularly described as follows: _____ [*provide legal description*].

2. From _____, until _____ [*dates*], plaintiff _____ [*allege relationship between plaintiff and defendant, e.g.*, rented a room in the home of defendant, located at _____ (*address, including city, if any*), _____ County, California. Plaintiff's rental

payments were $_____ per month, which he/she paid on a timely basis].

3. Beginning on or about _____ [*date*], during the course of _____ [*specify relationship, e.g.,* plaintiff's tenancy], and continuing until or about _____ [date], _____ [*specify defendant's exercise of undue influence over plaintiff, e.g.,* defendant embarked on a course of violent conduct against plaintiff in that on several occasions defendant struck and beat plaintiff with his/her fists and verbally threatened plaintiff's life].

4. On or about _____ [*date*], during the course of _____ [*specify relationship, e.g.,* plaintiff's tenancy], plaintiff transferred to defendant by deed all his/her right, title, and interest in the real property owned by plaintiff, and described in Pargraph 1.

5. Defendant gained a grossly oppressive and unfair advantage over plaintiff's physical, mental, and emotional distress in that _____ [*specify plaintiff's distress and defendant's advantage, e.g.,* defendant threatened to commit further acts of physical violence against plaintiff, as alleged above, and threatened his/her life if he/she did not transfer the property to defendant without consideration].

6. But for defendant's exercise of undue influence over him/her, plaintiff would not have conveyed the real property to defendant.

7. By virtue of defendant's acquisition and detention of plaintiff's property through undue influence as alleged above, defendant holds title to the property as constructive trustee for plaintiff's benefit.

[8. *Right to accounting. See § 561.60, Paragraphs 17-19.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an order declaring that defendant holds his/her interest in the real property described above in trust for plaintiff;

2. For an order compelling defendant to convey the real property to plaintiff;

3. [*Accounting. See § 561.60, Prayer, Paragraphs 5, 6*]; and

4. For such other and further relief as the court deems proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, § 560.520.*]

[2] Use of Form

This form of complaint is for use to bring an action to impose a constructive trust on real property acquired by the exercise of undue influence by the defendant over the plaintiff, for an order compelling defendant to convey the

property to the plaintiff, and for an accounting of any sums received by the defendant during his or her constructive trusteeship of the property, for the use and benefit of the plaintiff [*Civ. Code §§ 2224, 2237*]. The form is adapted from the facts in *Clark v. Pullins (1959) 171 Cal. App. 2d 703, 341 P.2d 73* .

[3] Allegations

[a] Undue Influence

This form of complaint alleges the location of the real property that is the subject matter of the action (Paragraph 1) [*see Code Civ. Proc. § 392(a)*] and the relationship between plaintiff and defendant (Paragraph 2).

The form then alleges a cause of action for imposition of a constructive trust on property acquired by the defendant through the exertion of undue influence over the plaintiff: (1) the nature of the influence exerted (Paragraph 3) [*see Civ. Code §§ 1570, 1575(2), (3)*], and (2) defendant's wrongful acquisition of property as a result of influence unduly exerted (Paragraphs 4-6) [*see Civ. Code § 2224*; *see Clark v. Pullins (1959) 171 Cal. App. 2d 703, 708-709, 341 P.2d 73]* .

For discussion and additional forms for use in actions involving undue influence, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

[b] Constructive Trust

The form also includes allegations necessary for the imposition of a constructive trust on the property: (1) The existence of property or some interest therein (Paragraph 1); (2) the plaintiff's right thereto (Paragraphs 5 and 8); and (3) the defendant's gain of the property by the exercise of undue influence over the plaintiff (Paragraphs 5 and 6) [*see Civ. Code § 2224*].

[4] Lis Pendens

A plaintiff may not file a notice of lis pendens unless the plaintiff pleads a cause of action that affects title to specific real property [*Gale v. Superior Court (2004) 122 Cal. App. 4th 1388, 1395, 19 Cal. Rptr. 3d 554]* , and a plaintiff is not entitled to a lis pendens in an action in which the only relief sought is money damages [*Palmer v. Zaklama (2003) 109 Cal. App. 4th 1367, 1381, 1 Cal. Rptr. 3d 116]* .

If a pleading combines theories of liability for monetary damages and for a constructive trust, the plaintiff is not entitled to a lis pendens, because that might provide an unscrupulous plaintiff with a powerful lever to force the settlement of a groundless or malicious suit [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 972, 89 Cal. Rptr. 2d 693]* . A lis pendens is a provisional remedy that must be applied narrowly [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 967, 89 Cal. Rptr. 2d 693]* . For example, a lis pendens is not available in an action by a trustee requesting the imposition of a constructive trust and an equitable lien on the defendant's house for the amount of money that the defendant used to make improvements to the house, which the defendant allegedly obtained by exercising undue influence over the deceased trustor [*Campbell v. Superior Court (2005) 132 Cal. App. 4th 904, 916-922, 34 Cal. Rptr. 3d 68]* .

However, a fraudulent conveyance action seeking avoidance of a transfer of title of specific real property under *Civ. Code § 3439.07(a)(1)* is a real property claim for purposes of the lis pendens statute [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 652, 15 Cal. Rptr. 3d 805, 93 P.3d 395]* .

For a complete discussion of the lis pendens procedure and forms, see Ch. 348, *Lis Pendens* .

[5] Cross References

For a discussion and forms for use in alleging elements of undue influence, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*

For a related form, see *§ 561.60*

[6] State Statutes

Menace as threat of unlawful and violent injury to person. *Civ. Code § 1570(2)*

Undue influence as taking unfair advantage of another's weakness of mind or taking grossly oppressive and unfair advantage of another's necessities or distress. *Civ. Code § 1575(2), (3)*

One who gains a thing by undue influence as constructive trustee therefor. *Civ. Code § 2224*

[7] Decisions

Physical violence and threats thereof as constituting undue influence and duress sufficient for imposition of constructive trust under *Civ. Code § 2224*. *Clark v. Pullins (1959) 171 Cal. App. 2d 703, 708-709, 341 P.2d 73*

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Chapter 561 TRUSTS: CONSTRUCTIVE TRUSTS
PART IV. FORMS

49-561 California Forms of Pleading and Practice--Annotated § 561.64

§ 561.64 Complaint [Code Civ. Proc. § 425.10]--For Imposition of Constructive Trust on Funds Acquired Through Violation of Trust [Civ. Code § 2224]--Breach of Confidential Relationship--Against Trustee--By Beneficiary

[1] FORM Complaint [Code Civ. Proc. § 425.10]--For Imposition of Constructive Trust on Funds Acquired Through Violation of Trust [Civ. Code § 2224]--Breach of Confidential Relationship--Against Trustee--By Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR IMPOSITION OF CON-
_____ [*name*],	)	STRUCTIVE TRUST
Defendant.	)	(Violation of Trust)
	)	[*Civ. Code § 2224*]
	)	

Plaintiff alleges:

[1. *Basis for venue. See § 561.61, Paragraph 1.*]

2. At all material times herein, a confidential relationship existed between plaintiff and defendant in that _____ [*allege facts showing existence of confidential relationship, e.g.,* since _____ (*date*), plaintiff and defendant have been associated at the law firm of _____ (*name of firm*), occupying the same suite of offices and advising each other concerning mutual professional and business transactions.]

3. At all material times herein, plaintiff believed implicitly in the integrity and truthfulness of defendant, and reposed absolute trust and confidence in him/her.

4. On or about _____ [*date*], _____ [*allege facts showing agreement entered into pursuant to confidential relationship, e.g.,* plaintiff interviewed a client, _____ (*name*) pursuant to the client's desire that plaintiff provide legal services in the organization of client's proposed corporation. In consideration and payment for plaintiff's legal services, _____ (*name of client*) agreed to assign plaintiff a _____ (*specify percent*) interest in royalties from the production of oil and gas from wells located in _____ County, California. Subsequent to the interview, on or about _____ (*date*), plaintiff informed defendant that plaintiff would be unable to meet with _____ (*name of client*), and requested defendant to meet with _____ (*name of client*) in his/her place. Defendant agreed to do so, and to render any necessary legal services. Defendant further agreed to take the assignment of royalties in the name of and for plaintiff.]

5. On or about _____ [*date*], _____ [*allege facts showing defendant's violation of confidential relationship, e.g.,* defendant met with _____ (*name of client*), pursuant to plaintiff's request and rendered the necessary legal services. Defendant, however, took the assignment of royalties from _____ (*name of client*) in defendant's own name. Defendant took the assignment in the absence of and without the knowledge or consent of plaintiff. On or about _____ (*date*), in response to plaintiff's inquiry of defendant as to the status of _____ (*name of client's*) corporation, defendant falsely informed plaintiff that _____ (*client*) had abandoned his plans and that no assignment was given].

6. On or about _____ [*date*], _____ [*allege facts showing that defendant acquired funds through violation of confidential relationship, e.g.,* plaintiff discovered that _____ (*name of client*) had assigned a _____ (*specify percent*) royalty interest to defendant]. Plaintiff is informed and believes and thereon alleges that, since _____ [*date*], defendant has received approximately $_____ in _____ [*specify, e.g.,* royalty payments] in violation of the confidential relationship between plaintiff and defendant alleged above.

7. By virtue of defendant's violation of the relationship of trust and confidence then existing between plaintiff and defendant, defendant holds _____ [*specify property, e.g.,* all royalty payments from the assignment] as a constructive trustee for plaintiff's benefit.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an order declaring that defendant holds _____ [*specify property, e.g.,* the royalty payments he/she has received from the assignment] in trust for plaintiff;

2. For an accounting of _____ [*specify funds, e.g.,* all royalty payments received by defendant since _____ (*date*)]; and

3. For such other and further relief as the court deems proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, § 560.520.*]

[2] Use of Form

This form of complaint is for use by a plaintiff who is in a confidential relationship with defendant to bring an action to impose a constructive trust on and obtain an accounting of funds acquired by the defendant in violation of the confidential relationship [*see Civ. Code § 2224*]. The complaint is adapted from the facts in *South v. Wishard (1956) 146 Cal. App. 2d 276, 303 P.2d 805* .

[3] Allegations

[a] Breach of Confidential Relationship

The cause of action for breach of a confidential relationship contains the following allegations: (1) the existence of a confidential relationship between plaintiff anddefendant (Paragraphs 2 and 3); (2) an agreement entered into between the parties pursuant to that relationship (Paragraph 4); (3) defendant's violation of the relationship by violating the agreement (Paragraph 5); and (4) defendant's wrongful acquisition of property in violation of the relationship (Paragraph 6) [*see Civ. Code § 2224*; *South v. Wishard (1956) 146 Cal. App. 2d 276, 281, 285, 303 P.2d 805]* .

[b] Constructive Trust

The form also includes allegations necessary for the imposition of a constructive trust on the property: (1) the existence of property or some interest in that property (Paragraphs 4 and 5), (2) the plaintiff's right to it (Paragraph 7), and (3) the defendant's gain of the property by the breach of the confidential relationship between plaintiff and defendant (Paragraph 6) [*see Civ. Code § 2224*].

For discussion and additional forms for use in actions involving misuse of confidential relationships, see Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* .

[4] Lis Pendens

A plaintiff may not file a notice of lis pendens unless the plaintiff pleads a cause of action that affects title to specific real property [*Gale v. Superior Court (2004) 122 Cal. App. 4th 1388, 1395, 19 Cal. Rptr. 3d 554]* , and a plaintiff is not entitled to a lis pendens in an action in which the only relief sought is money damages [*Palmer v. Zaklama (2003) 109 Cal. App. 4th 1367, 1381, 1 Cal. Rptr. 3d 116]* .

If a pleading combines theories of liability for monetary damages and for a constructive trust, the plaintiff is not entitled to a lis pendens, because that might provide an unscrupulous plaintiff with a powerful lever to force the settlement of a groundless or malicious suit [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 972, 89 Cal. Rptr. 2d 693]* . A lis pendens is a provisional remedy that must be applied narrowly [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 967, 89 Cal. Rptr. 2d 693]* . For example, a lis pendens is not available in an action by a trustee requesting the imposition of a constructive trust and an equitable lien on the defendant's house for the amount of money that the defendant used to make improvements to the house, which the defendant allegedly obtained by exercising undue influence over the deceased trustor [*Campbell v. Superior Court (2005) 132 Cal. App. 4th 904, 916-922, 34 Cal. Rptr. 3d 68]* .

However, a fraudulent conveyance action seeking avoidance of a transfer of title of specific real property under *Civ. Code § 3439.07(a)(1)* is a real property claim for purposes of the lis pendens statute [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 652, 15 Cal. Rptr. 3d 805, 93 P.3d 395]* .

For a complete discussion of the lis pendens procedure and forms, see Ch. 348, *Lis Pendens* .

[5] State Statutes

Imposition of constructive trust on property gained by violation of trust. *Civ. Code § 2224*

[6] Decisions

Confidential relationship and fiduciary relationship as synonymous in law. *South v. Wishard (1956) 146 Cal. App. 2d 276, 284, 303 P.2d 805*

Violation of confidential relationship as sufficient to satisfy violation of trust under *Civ. Code § 2224*. *South v. Wishard (1956) 146 Cal. App. 2d 276, 285, 303 P.2d 805*

[7] Cross References

For related forms, see *§§ 561.60* and *561.63*

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 561 TRUSTS: CONSTRUCTIVE TRUSTS
PART IV. FORMS

49-561 California Forms of Pleading and Practice--Annotated § 561.65

§ 561.65 Complaint [Code Civ. Proc. § 425.10]--For Imposition of Constructive Trust [Civ. Code § 2224] on Real Property Acquired by Will Under Secret Trust, for Order for Conveyance [Civ. Code §§ 3367, 3375], and for Accounting--Against Trustee--By Beneficiary

[1] FORM Complaint [Code Civ. Proc. § 425.10]--For Imposition of Constructive Trust [Civ. Code § 2224] on Real Property Acquired by Will Under Secret Trust, for Order for Conveyance [Civ. Code §§ 3367, 3375], and for Accounting--Against Trustee--By Beneficiary

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR IMPOSITION OF CON-
[and DOES 1 through_____,]	)	STRUCTIVE TRUST AND ACCOUNTING
Defendant(s).	)	[*Civ. Code §§ 2224, 3367, 3375*]
	)	
	)	

Plaintiff alleges:

[1. *Description of real property. See § 561.60, Paragraph 1.*]

2. On or about _____ [*date*], _____ [*name of deceased settlor*] agreed to devise to defendant _____ [*name*] the above-described real property on the promise of defendant _____ [*name*] _____ [*describe conditions of trust, e.g.,* that the defendant would hold the property in trust for plaintiff _____ (*name*) until plaintiff's twenty-first birthday and then convey full title to the property to plaintiff].

3. On _____ [*date*], _____ [*name of settlor*] died and his/her last will unconditionally devised to defendant _____ [*name*] the above-described real property.

4. _____ [*Allege facts showing defendant's breach of trust agreement, e.g.,* On _____ [*date*], after reaching the age of twenty-one years, plaintiff requested defendant to convey the above-described property to him/her. Defendant refused to convey the property to plaintiff and continues refuse to do so in breach of his/her agreement with _____ (*name of deceased settlor*).]

[5. *Right to accounting. See § 561.60, Paragraphs 17-19.*]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an order declaring that defendant holds the real property described above in trust for plaintiff;

2. For an order compelling defendant to convey to plaintiff the real property described above;

[3. *Accounting. See § 561.60, Prayer, Paragraphs 5, 6;*] and

4. For such other and further relief as the court deems proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, § 560.520.*]

[2] Use of Form

This form of complaint is for use to bring an action for imposition of a constructive trust on and conveyance of real property when a decedent, without creating a valid testamentary trust, has devised real property to another with the understanding, express or implied, that the person to whom the property was devised will hold the property in trust for the beneficiary [*see Estate of Everts (1912) 163 Cal. 449, 454, 125 P. 1058]* . For a discussion of the law relating to such "secret trusts," see *§ 561.16[4][f]*.

The form may be modified for use to establish a constructive trust in personal property when a party in possession of the property refuses to comply with the terms of secret trust.

Forms for imposing a constructive trust in situations in which a decedent has violated an agreement to devise or bequeath property in an agreed manner can be found in Ch. 528, *Specific Performance* .

[3] Allegations

This form alleges the essential elements of a cause of action to establish a constructive trust based on the violation of a secret trust. It states the elements of a secret trust by alleging decedent's devise of property to defendant on defendant's

promise to hold the property in trust for plaintiff (Paragraphs 2 and 3) [*see Estate of Everts (1912) 163 Cal. 449, 454, 125 P. 1058* ; *Prior v. Andrews (1927) 83 Cal. App. 782, 790, 257 P. 560]* . It states requirements for a constructive trust by alleging defendant's breach of a secret trust agreement and wrongful retention of the property subject to the secret trust (Paragraph 4) [*see Estate of Everts (1912) 163 Cal. 449, 454, 125 P. 1058* ; *Prior v. Andrews (1927) 83 Cal. App. 782, 790, 257 P. 560]* .

[4] Lis Pendens

A plaintiff may not file a notice of lis pendens unless the plaintiff pleads a cause of action that affects title to specific real property [*Gale v. Superior Court (2004) 122 Cal. App. 4th 1388, 1395, 19 Cal. Rptr. 3d 554]* , and a plaintiff is not entitled to a lis pendens in an action in which the only relief sought is money damages [*Palmer v. Zaklama (2003) 109 Cal. App. 4th 1367, 1381, 1 Cal. Rptr. 3d 116]* .

If a pleading combines theories of liability for monetary damages and for a constructive trust, the plaintiff is not entitled to a lis pendens, because that might provide an unscrupulous plaintiff with a powerful lever to force the settlement of a groundless or malicious suit [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 972, 89 Cal. Rptr. 2d 693]* . A lis pendens is a provisional remedy that must be applied narrowly [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 967, 89 Cal. Rptr. 2d 693]* . For example, a lis pendens is not available in an action by a trustee requesting the imposition of a constructive trust and an equitable lien on the defendant's house for the amount of money that the defendant used to make improvements to the house, which the defendant allegedly obtained by exercising undue influence over the deceased trustor [*Campbell v. Superior Court (2005) 132 Cal. App. 4th 904, 916-922, 34 Cal. Rptr. 3d 68]* .

However, a fraudulent conveyance action seeking avoidance of a transfer of title of specific real property under *Civ. Code § 3439.07(a)(1)* is a real property claim for purposes of the lis pendens statute [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 652, 15 Cal. Rptr. 3d 805, 93 P.3d 395]* .

For a complete discussion of the lis pendens procedure and forms, see Ch. 348, *Lis Pendens* .

[5] Cross References

For a related form, see *§ 561.60*

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Chapter 561 TRUSTS: CONSTRUCTIVE TRUSTS
PART IV. FORMS

49-561 California Forms of Pleading and Practice--Annotated § 561.66

§ 561.66 Complaint Against Convicted Felon, Felon's Representative, or Profiteer of Felony for Recovery of Interest in Profits From Sale of Item With Value Enhanced as Result of Notoriety From Commission of Felony [Civ. Code § 2225(b)(2), (c)] and for Preliminary Injunctive Relief Against Waste of Proceeds [Civ. Code § 2225(f); Code Civ. Proc. § 526]

[1] FORM Complaint Against Convicted Felon, Felon's Representative, or Profiteer of Felony for Recovery of Interest in Profits From Sale of Item With Value Enhanced as Result of Notoriety From Commission of Felony [Civ. Code § 2225(b)(2), (c)] and for Preliminary Injunctive Relief Against Waste of Proceeds [Civ. Code § 2225(f); Code Civ. Proc. § 526]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR RECOVERY OF INTEREST IN
[and DOES 1 through_____,]	)	TRUST PROPERTY
Defendant(s).	)	(Profits From _____ (*specify, e.g.,*
	)	Sale of Felon's Memorabilia))
	)	

Plaintiff alleges:

[*EITHER*]

1. At all times herein mentioned plaintiff was and is a resident of _____ County, California.

[*OR*]

1. Plaintiff _____ [*name*], is the _____ [*relationship to decedent, e.g.,* widow of _____ (*name of decedent*), deceased, and is the sole surviving heir at law of _____ (*name of decedent*), hereinafter referred to as the decedent].

[*OR*]

1. On or about _____ [*date*], plaintiff was issued letters _____ [*specify, e.g.,* of administration of the estate *or* testamentary of the will] of _____ [*name of decedent*], deceased, by the Superior Court of California, County of _____. Plaintiff is the duly appointed, qualified, and acting personal representative of the estate of _____ [*name*], deceased (hereinafter referred to as the decedent), and brings this complaint in that capacity.

2. At all times herein mentioned, _____ [defendant was and is a resident of *or* the property that is the subject of this action was and is located in] _____ County, California.

[3. *Fictitious name allegation, if appropriate. See § 561.60, Paragraph 2.*]

[4. *Agency allegation, if appropriate. See § 561.60, Paragraph 3.*]

[*Allege facts giving rise to felony conviction and to plaintiff's damages and establishing plaintiff's right to recover damages from defendant, such as the following*]

5. On or about _____ [*date*], at _____ [*place*], [defendant] _____ [*name of felon*] unlawfully and deliberately took decedent's life by shooting him/her in the back without lawful excuse or justification.

6. Prior to decedent's death, plaintiff lived with decedent as his/her spouse and was dependent on decedent for support and maintenance. At all times prior to his/her death, decedent was a dutiful husband/wife to plaintiff.

7. As a proximate result of the wrongful conduct of [defendant] _____ [*name of felon*], plaintiff has suffered pecuniary loss resulting from the loss of the society, comfort, attention, services, and support of the decedent.

[*CONTINUE*]

8. On or about _____ [*date*], based on the actions and conduct of [defendant] _____ [*name of felon*] as alleged in Paragraph(s) _____, above, [defendant] _____ [*name of felon*] was charged in _____ [*specify court*] with _____ [*specify crime, e.g.,* first-degree murder] in violation of _____ [*specify criminal statute(s), e.g., Penal Code Sections 187* and *189*], which is a felony under the laws of the _____ [State of California *or* United States of America].

9. On _____ [*date*], after _____ [trial to the court *or* trial by jury *or* entry of a plea of guilty *or* entry of a plea of insanity], judgment was entered in the _____ [*specify court*], _____ [convicting (defendant) _____ (*name of felon*) *or* finding (defendant)

_____ (*name of felon*) not guilty by reason of insanity] of the felony offense under the law of the _____ [State of California *or* United States of America] of _____ [*specify felony, e.g.,* murder in the first degree] committed in the State of California. A certified copy of the judgment is attached as Exhibit "_____," and incorporated herein by reference.

10. Judgment in the above-entitled criminal proceeding has become final. It has not been vacated, modified, stayed, or set aside, and _____ [the time for appeal has expired *or* the judgment was affirmed on appeal to _____ (*specify court*)].

[11. On _____ (*date*), plaintiff commenced a civil action in _____ (*specify court*), entitled _____ vs. _____ (*title of previous action for damages resulting from the crime*), Case No. _____, against (defendant) _____ (*name of felon*) for damages for _____ (physicalinjury *and/or* emotional injury *and/or* pecuniary loss) proximately caused by (defendant) _____ (*name of felon*) as a result of the crime for which he/she was convicted, as alleged above.]

[12. On _____ (*date*), judgment in favor of plaintiff and against (defendant) _____ (*name of felon*) was entered and became final in the above-mentioned civil action. It has not been vacated, modified, stayed, or set aside, and _____ (*specify, e.g.,* the time for appeal has expired *or* the judgment was affirmed on appeal to _____ (*specify court*)). A certified copy of the judgment is attached as Exhibit "_____," and incorporated herein by reference.]

[13. Judgment in the above-entitled civil action awarded plaintiff the sum of $_____ with interest from the date thereof at the rate of _____ percent per annum until paid. _____ (*Specify extent of satisfaction of judgment, e.g.,* No part) of the judgment has been paid.]

14. Plaintiff has received _____ [no restitution from the Restitution Fund or from (defendant) _____ (*name of felon*) *or* $_____ in restitution from _____ (the Restitution Fund *and/or name of felon*)] in connection with the crime for which [defendant] _____ [*name of felon*] was convicted.

15. [Plaintiff is informed and believes and thereon alleges that] [O]n or about _____ [*date*], [defendant] _____ [*name of felon*]_____ [sold *or allege other type of transfer*] to [defendant] _____ [*name of transferee*] the following: _____ [*specify thing(s) sold or transferred, e.g.,* the rights to use _____ (*name of felon*)'s name and likeness on "Famous Criminals" trading cards to be produced and marketed by (defendant) _____ (*name*)]. The value of the _____ [*thing sold or transferred, e.g.,* rights] transferred by [defendant] _____ [*name of felon*] was enhanced by the notoriety gained by [defendant] _____ [*name of felon*] from his/her commission of the felony described in Paragraph(s) _____ in that _____ [*specify, e.g.,* his/her name and likeness would have had no commercial value for purposes of marketing trading cards had he/she not committed that crime].

16. [Plaintiff is further informed and believes and thereon alleges that] (D)efendant _____ [*name of felon*] has received income and profits in the amount of approximately $ _____ from the _____ [*type of transfer, e.g.,* sale] of the [*thing sold or transferred, e.g.,* rights] described in Paragraph 1.

[17. (Plaintiff is further informed and believes and thereon alleges that) (D)efendant _____ (*name of felon*) will receive future income and profits in the amount of approximately $_____ from the _____ (*type of transfer, e.g.,* sale) of the _____ (*thing sold or transferred, e.g.,*

rights) described in Paragraph 1.]

18. Defendant _____ [*name of felon*] holds the above-described income and profits as an involuntary trustee for plaintiff's benefit under *Civil Code Section 2225(b)(2)*.

[19. *If profits are real property, defendant's commission of waste on the property. See § 561.60, Paragraph 14*.]

[20. *If profits are real property, decrease in market value of the property due to defendant's waste. See § 561.60, Paragraph 15*.]

[21. *If profits are real property, plaintiff's beneficial interest in the property subject to further waste absent injunctive relief. See § 561.60, Paragraph 16*.]

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an order declaring that defendant holds the present and future profits of _____ [*specify material, e.g.,* the memorabilia] in trust for plaintiff.

2. For an order that _____ [*specify payor(s), e.g.,* defendant, or any party or entity paying defendant for _____ (*specify, e.g.,* sale of the memorabilia)], pay to plaintiff $_____ from the current and future profits of _____ [*specify material, e.g.,* the book] [in satisfaction of the civil judgment in plaintiff's favor alleged above].

[3. *Preliminary injunctive relief. See § 561.60, Prayer, Paragraphs 3, 4*.]

4. For such other and further relief as the court deems proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification. See Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, § 560.520*.]

[2] Use of Form

This form of complaint is for use by a beneficiary against a convicted felon, the felon's representative, or a profiteer of the felony, to bring an action to recover the beneficiary's interest in any profits [*see § 561.28[3][f]*] from the felon's sale or transfer of anything that has enhanced value as a result of the notoriety gained from the felon's commission of the crime for which he or she was convicted [*see Civ. Code § 2225(b)(2), (c), (f)*]. In the case of a sale or transfer by a profiteer of the felony, the court must, on an adequate showing by the profiteer of the felony, exclude from the involuntary trust that portion of the profits that represents the inherent value of the memorabilia, property, or thing sold or transferred and exclusive of the amount of the enhancement of the value due to the notoriety of the convicted felon [*Civ. Code § 2225(b)(3)*].

This statutory scheme also provides that all proceeds from the preparation for the purpose of sale, the sale of rights to,

or the sale of materials that include or are based on the depiction, portrayal, or reenactment of a felony for which a felon was convicted, are subject to an involuntary trust for the benefit of such beneficiaries [*Civ. Code § 2225(b)(1)*]. However, the California Supreme Court in 2002 ruled that this part of the statute is unconstitutional on its face [*Keenan v. Superior Court (2002) 27 Cal. 4th 413, 417-418, 117 Cal. Rptr. 2d 1, 40 P.3d 718* ; *see § 561.28[1]*.

NOTE:

The Supreme Court of California has held that *Civ. Code § 2225* is facially invalid under both the free speech clause of the *First Amendment to the federal Constitution* as applied to the states through the *Fourteenth Amendment*, and the liberty of speech clause of the California Constitution [*Keenan v. Superior Court (2002) 27 Cal. 4th 413, 415-416, 117 Cal. Rptr. 2d 1, 40 P.3d 718* ; *see Cal. Const. art. I, § 2, subd. (a)*].

CAUTION:

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E. H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* . For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or a preliminary injunction, see Ch. 303, *Injunctions* .

[3] Defendants

The action may be brought against a convicted felon who has proximately caused physical, mental, or emotional injury, or pecuniary loss to, or the death of, a person as a result of the felony for which the felon was convicted [*Civ. Code § 2225(a)(1), (4), (c)(1)*]. The action may also be brought against the felon's representative, who is any person or entity receiving proceeds by designation, on behalf, or instead of the felon, whether by the felon's designation or by operation of law. The action may also be brought against a profiteer of a felony [*Civ. Code § 2225(a)(3)(B), (c)(1)*; *see § 561.28[3][h]*].

[4] Alleging Civil Cause of Action Against Felon

Plaintiff should allege facts establishing his or her status as a "beneficiary" within the meaning of *Civ. Code § 2225(a)(4)* [*see § 561.28[3][i]*], thus establishing his or her right to bring an action under *Civ. Code § 2225(c)* to recover his or her interest in the involuntary trust. Therefore, if plaintiff was the direct victim of the crime, it appears that he or she should plead facts showing his or her right to recover damages for physical, mental, or emotional injury or pecuniary loss against the convicted felon under one or more tort causes of action, as part of his or her cause of action under *Civ. Code § 2225* [*see Civ. Code § 2225(a)(4)(A)*]. Alternatively, plaintiff may join his or her tort cause(s) of action with his or her cause of action under *Civ. Code § 2225(c)* to recover his or her interest in the trust [*see Code Civ. Proc. § 427.10(a)*]. If the causes of action are joined, plaintiff could allege the tort causes of action separately, and incorporate by reference the allegations of his or her tort causes of action into the cause of action under *Civ. Code § 2225(c)*. For discussion of joinder of causes of action, see Ch. 123, *Complaints and Cross Complaints* .

If the direct victim of the crime has died, plaintiff should allege facts showing one or more of the following:

- The plaintiff's standing under *Code Civ. Proc. § 377.10 et seq.* as the decedent's personal representative or successor in interest to bring anaction for damages sustained by the decedent before his or her death [*see Civ. Code § 2225(a)(4)(B)*]; or

- If the victim's death was proximately caused by the crime of which the felon was convicted, the

plaintiff's status as (1) a person entitled to bring anaction for wrongful death under *Code Civ. Proc. § 377.60*, or *(2)* a beneficiary of the decedent's will who has a right under the will to receive more than 25 percent of the value of the decedent's estate [*see Civ. Code § 2225(a)(4)(C)*].

This form, for example, alleges plaintiff's right to recover from the felon on a theory of wrongful death (Paragraphs 5-7) [*see Civ. Code § 2225(a)(4)(C)*; *Code Civ. Proc. § 377.60*; *see also* Ch. 181, *Death and Survival Actions*]. For other tort allegations, refer to the appropriate chapters in this publication, such as Ch. 58, *Assault and Battery*, Ch. 150, *Conversion*, Ch. 257, *False Imprisonment*, Ch. 362, Mental Suffering and Emotional Distress, Ch. 380, *Negligence*, and Ch. 429, *Privacy*.

[5] Alleging Previous Civil Recovery Against Convicted Felon

Although plaintiff must establish his or her right to recover damages against the convicted felon under applicable law other than *Civ. Code § 2225*, the statute does not, by its terms, require plaintiff to obtain a civil judgment against the convicted felon establishing that right of recovery as a prerequisite to bringing an action to impose an involuntary trust [*see Civ. Code § 2225(a)(4)* (defining "beneficiary" as person who has or had right to recover)]. If, however, the plaintiff has already obtained such a judgment, it may collaterally estop the defendant from relitigating the issue of his or her responsibility for the plaintiff's damages [*see* Ch. 491, *Res Judicata*]. Thus, plaintiff should allege the facts concerning the prior civil action in the complaint under *Civ. Code § 2225*.

If the plaintiff has recovered a prior judgment against the felon based on the crime for which the felon was convicted, the plaintiff's interest in the trust will be reduced by the amount of the judgment that was previously satisfied by the felon [*see Civ. Code § 2225(a)(5)(C)(iii)*; *see also § 561.28[3][j]*].

This form contains optional paragraphs for use when the plaintiff has recovered a judgment against the felon in a prior civil action for personal injury, pecuniary loss, or wrongful death, based on the crime for which the felon was convicted (Optional Paragraphs 11, 12) [*see Civ. Code § 2225(a)(4)*]. It also includes an allegation regarding the amount of the judgment entered in the prior civil action and the amount, if any, that has been satisfied (Optional Paragraph 13) [*see Civ. Code § 2225(a)(5)(C)(iii), (D)*].

[6] Allegations

This form of complaint alleges all of the following:

- The felon's conviction (Paragraphs 8-10) [*see Civ. Code § 2225(a)(1), (2)*];

- The plaintiff's standing to bring the action (Paragraphs 1, 5-7) [*see Civ. Code § 2225(a)(4)*; *see also § 561.28[3][i]* regarding definitions of beneficiaries and their interests in the trust proceeds];

- The plaintiff's recovery against the felon in a previous civil action (Optional Paragraphs 11-13) [*see § 561.66[5]*];

- The amount of money, if any, plaintiff received from either the restitution fund or the felon pursuant to a court order (Paragraph 14) [*see Civ. Code § 2225(a)(5)(C)(i), (ii)*];

- The convicted felon's sale or transfer of a thing, including a right, that has enhanced value because of the notoriety gained from the commission of the crime for which the felon was convicted (Paragraph 15) [*see Civ. Code § 2225(a)(1)*];

- The existence of current and future profits from the sale or transfer (Paragraph 16 and Optional

Paragraph 17) [*see Civ. Code § 2225(a)(10), (c)(3)*]; and

- The fact that the profits are subject to an involuntary trust for the plaintiff's benefit (Paragraph 18) [*see Civ. Code § 2225(b)(2)*].

[7] Jurisdiction and Venue

An action by a beneficiary to recover his or her interest in a trust created by *Civ. Code § 2225(b)* may be brought in the superior court of the county in which the beneficiary resides (First Alternative Paragraph 1), in which the convicted felon resides, or in which the proceeds are located (*see* Paragraph 2) [*Civ. Code § 2225(c)(2)*].

[8] Preliminary Injunction

On motion of any party in an action brought under *Civ. Code § 2225*, the court must grant a preliminary injunction to prevent any waste of profits if it appears that they are subject to the trust and that they may be subject to waste [*Civ. Code § 2225(f)(1)*; *see Civ. Code § 2225(a)(10)* ("profits" defined); *see also § 561.28[3][f]*].

Inasmuch as this complaint seeks both preliminary injunctive relief and recovery of an interest in the proceeds, it assumes that the defendant has already been convicted of the felony that forms the basis for the plaintiff's claims. However, it is also possible to obtain preliminary injunctive relief prior to the defendant's actual conviction. Upon motion of the Attorney General or any potential beneficiary, the court must grant a preliminary injunction against a person against whom an indictment or information for a felony has been filed in superior court, to prevent any waste of profits if there is probable cause to believe that the profits would be subject to an involuntary trust upon conviction of the person and that they may be subject to waste [*Civ. Code § 2225(f)(2)*]. When such relief is sought, the statute appears to require the plaintiff to allege that:

- Plaintiff is a "beneficiary" within the meaning of *Civ. Code § 2225(a)(4)* [*see § 561.28[3][i]*];

- A felony indictment or information has been filed against the defendant in a superior court;

- There is probable cause to believe that any profits would be subject to an involuntary trust if the defendant is ultimately convicted; and

- There is probable cause to believe that any profits may be subject to waste if preliminary injunctive relief is not granted.

For discussion of the law and procedures relating to preliminary injunctions generally, see Ch. 303, *Injunctions* .

[9] Lis Pendens

A plaintiff may not file a notice of lis pendens unless the plaintiff pleads a cause of action that affects title to specific real property [*Gale v. Superior Court (2004) 122 Cal. App. 4th 1388, 1395, 19 Cal. Rptr. 3d 554]* , and a plaintiff is not entitled to a lis pendens in an action in which the only relief sought is money damages [*Palmer v. Zaklama (2003) 109 Cal. App. 4th 1367, 1381, 1 Cal. Rptr. 3d 116]* .

If a pleading combines theories of liability for monetary damages and for a constructive trust, the plaintiff is not entitled to a lis pendens, because that might provide an unscrupulous plaintiff with a powerful lever to force the settlement of a groundless or malicious suit [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 972, 89 Cal. Rptr. 2d 693]* . A lis pendens is a provisional remedy that must be applied narrowly [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 967, 89 Cal. Rptr. 2d 693]* . For example, a lis pendens is not available in an action by a trustee requesting

the imposition of a constructive trust and an equitable lien on the defendant's house for the amount of money that the defendant used to make improvements to the house, which the defendant allegedly obtained by exercising undue influence over the deceased trustor [*Campbell v. Superior Court (2005) 132 Cal. App. 4th 904, 916-922, 34 Cal. Rptr. 3d 68]* .

However, a fraudulent conveyance action seeking avoidance of a transfer of title of specific real property under *Civ. Code § 3439.07(a)(1)* is a real property claim for purposes of the lis pendens statute [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 652, 15 Cal. Rptr. 3d 805, 93 P.3d 395]* .

For a complete discussion of the lis pendens procedure and forms, see Ch. 348, *Lis Pendens* .

[10] Cross References

For a related form, see *§ 561.60*

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§ 562.syn Synopsis to Chapter 562: TRUSTS: RESULTING TRUSTS

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§§ 562.03-562.09 [Reserved]

§ 562.10 Governing Law

§ 562.11 Nature of Resulting Trust

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§ 562.12 Trustee's Duties

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§ 562.14 Situations Giving Rise to Resulting Trust

[1] When Real Property Seller Does Not Convey to Buyer Who Has Paid

[2] When Express Trust Fails

[3] Express Trust Does Not Exhaust Trust Estate

[4] Purchase-Money Resulting Trust

[a] In General

[b] Full Payment of Purchase Price

[c] Partial Payment of Purchase Price

[d] Nature of Consideration

[e] Time of Payment of Consideration

[f] Transferee Pays Purchase Price as Loan to Person Claiming Beneficial Interest in Property

§ 562.15 Situtations Not Giving Rise to Resulting Trust

[1] Gift to Transferee--Rebuts Presumption of Resulting Trust

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§ 562.16 Rights of Bona Fide Purchasers for Value and Creditors

§ 562.17 Statute of Limitations

§ 562.18 Laches

§ 562.19 Statute of Frauds and Parol Evidence

§ 562.20 Burden of Proof

§ 562.21 Termination of Resulting Trust by Merger

[1] Transfer of Trust Property to Beneficiary

[2] Conveyance or Surrender of Trust Property to Trustee

§ 562.22 Relief Available

§§ 562.23-562.39 [Reserved]

§ 562.40 State Statutes

§ 562.41 Decisions

[1] Constructive Trust Distinguished

[2] Defenses

[3] Intent Requirement

[4] Liability of Beneficiary

[5] Period of Limitation

[6] Pro Tanto Resulting Trust

[7] Resulting Trust Defined

[8] When Imposition of Resulting Trust Improper

[9] When Imposition of Resulting Trust Proper

§ 562.42 Text References

§§ 562.43-563.59 [Reserved]

§ 562.60 Complaint To Establish Purchase-Money Resulting Trust in Full or Partial Interest in Real Property or Sale Proceeds and for Order of Conveyance [Civ. Code §§ 3367, 3375]--Against Title Holder

[1] FORM

[2] Use of Form

[3] Allegations

[4] Part Payment of Purchase Price

[5] Verification

[6] Demand on Trustee

[7] Pleading Lack of an Adequate Remedy at Law

[8] Jurisdiction

[9] Venue

[10] Quiet Title and Ejectment

[11] Recovery of Money Judgment

[12] No Right to Jury Trial

[13] Lis Pendens

[14] State Statutes

[15] Decisions

§ 562.61 Complaint [Code Civ. Proc. § 425.10]--To Establish Purchase-Money Resulting Trust in Real Property and for Order of Conveyance [Civ. Code §§ 3367, 3375]--Against Title Holder--Consideration as Discharge of Preexisting Debt

[1] FORM

[2] Use of Form

[3] Allegations

[4] Lis Pendens

[5] Decisions

[6] Cross References

§ 562.62 Complaint [Code Civ. Proc. § 425.10]--To Establish Purchase-Money Resulting Trust in Real Property Purchased in Part With Borrowed Funds With Title Taken in Name of Now Deceased Lender as Security, for Accounting, and for Order to Convey Title [Civ. Code §§ 3367, 3375] on Payment of Balance of Loan--Against Estate of Title Holder

[1] FORM

[2] Use of Form

[3] Allegations

[4] Accounting Action

[5] Lis Pendens

[6] Decisions

[7] Text References

[8] Cross References

§ 562.63 Allegation--Property Was Not Transferred as Gift

[1] FORM

[2] Use of Form

[3] Decisions

§ 562.64 Affirmative Defense--Consideration or Transfer of Property Was Gift

[1] FORM

[2] Use of Form

[3] Cross References

[4] State Statutes

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§ 562.01 Scope of Chapter

This chapter discusses and provides forms for use in establishing and enforcing resulting trusts [*see § 562.10* et seq.]. It primarily focuses on purchase-money resulting trusts, and the forms are for use in enforcing and establishing purchase-money resulting trusts. The forms include a complaint to establish and enforce a resulting trust in a full or partial interest in real property or the proceeds thereof [*see § 562.60*]; a complaint to establish and enforce a resulting trust in real property when the consideration provided for the transfer was other than money [*see § 562.61*]; a complaint to establish and enforce a resulting trust in real property when the consideration provided took the form of a loan from the trustee to the beneficiary [*see § 562.62*]; an allegation, for use in a complaint to establish and enforce a resulting trust in real or personal property, when the transfer of property was not a gift [*see § 562.63*]; and an affirmative defense when the property was transferred as a gift [*see § 562.64*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsResulting TrustsReal Property LawTrustsResulting Trusts

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§ 562.02 Cross References

For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions*

For a discussion and forms relating to transfers of community property, see Ch. 122, *Community Property*

For a discussion and forms for use in actions involving property held in escrow, see Ch. 253, *Escrows*

For a discussion and forms for use in actions involving gifts, see Ch. 278, *Gifts*

For a discussion and forms for use in actions involving joint interests, see Ch. 316, *Joint Tenancy and Tenancy in Common*

For a discussion and forms for use in partition actions, see Ch. 397, *Partition*

For a discussion and forms relating to actions to quiet title, see Ch. 482, *Quieting Title*

For a discussion and forms for use in actions involving trust deeds, see Ch. 555, *Trust Deeds and Real Property Mortgages* ,

For a discussion and forms relating to the sale of real property, see Ch. 569, *Vendor and Purchaser*

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipPartition ActionsReal Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawTitle QualityAdverse Claim

ActionsQuiet Title Actions

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[Reserved]

§§ 562.03[Reserved]

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§ 562.10 Governing Law

Civ. Code §§ 2223 and *2224* provide generally for the creation of an involuntary trust when a person wrongfully detains property. However, excepting these general provisions, the common law governs the establishment and enforcement of resulting trusts [*see Prob. Code §§ 82, 15002, 15003(b)*; *see, e.g., Bainbridge v. Stoner (1940) 16 Cal. 2d 423, 428, 106 P.2d 423]* . It should be noted that although purchase money resulting trusts involving real property were formerly governed by *Civ. Code § 853*, repealed in 1986, that section was declared to be a statement of the common law and therefore cases decided under that provision are presumably still persuasive [*see Estate of Schechtman (1958) 162 Cal. App. 2d 365, 370, 328 P.2d 478]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsResulting TrustsReal Property LawTrustsResulting Trusts

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§ 562.11 Nature of Resulting Trust

[1] In General

A resulting trust arises from the transer of property under circumstances showing that the transferee was not intended to take the beneficial interest in the property [*Lloyds Bank Cal. v. Wells Fargo Bank (1986) 187 Cal. App. 3d 1038, 1042, 232 Cal. Rptr. 339* ; *see* Restatement (Second) of Trusts § 404; *see also 15 Ops. Cal. Att'y Gen. 250, 254 (1950)]* . A resulting trust thus arises when one person furnishes the money or other thing of value with which property is acquired and title is taken in the name of another, absent the intention to create a gift [*In re Marriage of Becker (1984) 161 Cal. App. 3d 65, 75, 207 Cal. Rptr. 392* (former wife's interest in deceased ex-husband's retirement benefits being received by surviving spouse held by surviving spouse subject to resulting trust in favor of former wife)]. A resulting trust may be established in personal as well as real property [*Norman v. Burks (1949) 93 Cal. App. 2d 687, 691, 209 P.2d 815]* .

A resulting trust is not merely a method of repaying a person for money or value furnished, and thus the beneficiary of a resulting trust is entitled to the whole property that is subject to the trust, including interest it has earned [*see In re Marriage of Becker (1984) 161 Cal. App. 3d 65, 77, 207 Cal. Rptr. 392]* .

[2] Created by Operation of Law

A resulting trust is one created by operation of law [*see Lloyds Bank Cal. v. Wells Fargo Bank (1986) 187 Cal. App. 3d 1038, 1042, 232 Cal. Rptr. 339]* . It is a creature of equity [*Calistoga Civic Club v. City of Calistoga (1983) 143 Cal. App. 3d 111, 117, 191 Cal. Rptr. 571]* .

[3] Involuntary Trust

A resulting trust is an involuntary trust, implied by law, when the intention of the parties to create a trust is not expressed [*Wells Fargo Bank v. Greuner (1964) 226 Cal. App. 2d 454, 460, 38 Cal. Rptr. 132]* . A resulting trust therefore enforces the inferred intent of the parties [*Lloyds Bank Cal. v. Wells Fargo Bank (1986) 187 Cal. App. 3d 1038, 1042, 232 Cal. Rptr. 339]* .

[4] Constructive Trust Distinguished

The terms "constructive trust" and "resulting trust" have often been confused by attorneys, as well as by some courts. Both are involuntary trusts implied by law and exempt from the statute of frauds [*see § 562.19*]. However, a resulting trust arises from a transfer of property under circumstances showing that the transferee was not intended to take the beneficial interest in the property. A resulting trust has been termed an "intention-enforcing" trust, to distinguish it from the other type of implied trust, the constructive or "fraud-rectifying" trust. While the resulting trust carries out the inferred intent ofthe parties, the constructive trust defeats or prevents the wrongful act of one of the parties [*Martin v. Kehl (1983) 145 Cal. App. 3d 228, 238, 193 Cal. Rptr. 312]* . For a complete discussion of and forms for use in establishing and enforcing constructive trusts, see Ch. 561, *Trusts: Constructive Trusts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsConstructive TrustsEstate, Gift & Trust LawTrustsResulting TrustsReal Property LawTrustsResulting Trusts

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§ 562.12 Trustee's Duties

The trustee of a resulting trust has no duties to perform, no trust to administer, and no purpose to carry out except the single one of holding the trust property or conveying it to the beneficiary [*Laing v. Laubach (1965) 233 Cal. App. 2d 511, 515, 43 Cal. Rptr. 537]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsResulting TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral Overview

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§ 562.13 Liability to Third Parties

When the beneficiary controls the operation and maintenance of the trust property, the beneficiary is liable for injury to third parties arising out of the beneficiary's operation and maintenance of the trust property [*Richman v. Green (1956) 143 Cal. App. 2d 470, 473, 299 P.2d 890]* . *Richman* does not hold, however, that a trustee who is only a nominal owner is not liable, but only that any such liability is not primary [*Bianchi v. Western Title Ins. & Guaranty Co. (1970) 14 Cal. App. 3d 235, 238, 92 Cal. Rptr. 745]* .

When the operation and maintenance of trust property is under the control of the trustee of a passive, express trust, the trustee is liable for injuries of third parties when the injuries arise out of the trustee's operation and maintenance of the property [*Bianchi v. Western Title Ins. & Guaranty Co. (1970) 14 Cal. App. 3d 235, 238-242, 92 Cal. Rptr. 745* (defendant held title under an express trust, not a resulting trust, for about 13 owners who could internally exchange shares while defendant held title; elevator permit was in defendant's name, however)]. For a discussion of the liability of a trustee of an express trust to third parties, see *Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, § 560.160* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsBeneficiariesGeneral OverviewEstate, Gift & Trust LawTrustsResulting TrustsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewReal Property LawTrustsResulting Trusts

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49-562 California Forms of Pleading and Practice--Annotated § 562.14

§ 562.14 Situations Giving Rise to Resulting Trust

[1] When Real Property Seller Does Not Convey to Buyer Who Has Paid

Under a contract for the purchase of real property, a seller who does not execute a conveyance to a buyer who has fully paid holds the property as trustee on a resulting trust for the buyer [*Scadden Flat Gold Mining Co. v. Scadden (1898) 121 Cal. 33, 39, 53 P. 440]* . For a form of complaint by a purchaser for specific performance of a contract to convey real property, see Ch. 569, *Vendor and Purchaser* .

[2] When Express Trust Fails

A resulting trust is created when, because of some invalidity such as lack of a definite purpose or legality, an express trust fails [*Bainbridge v. Stoner (1940) 16 Cal. 2d 423, 428, 106 P.2d 423]* .

To the extent that an express trust fails because of an invalid restraint on alienation, the trustee holds legal title to the trust property on a resulting trust for the trustor and the trustor's heirs [*see* *Davenport v. Davenport Found. (1950) 36 Cal. 2d 67, 75, 222 P.2d 11]* .

To the extent that an express trust fails on the death of the settlor, the trustee holds the trust estate on a resulting trust for the estate of the settlor [*see* *Hansen v. Bear Film Co., Inc. (1946) 28 Cal. 2d 154, 173, 168 P.2d 946]* .

To the extent that a testamentary trust fails because it does not adequately designate the subject, purpose, and beneficiary, leaving the residue of an estate undisposed of, the distributee holds the residue on a resulting trust for the benefit of the testator's heirs pursuant to the rules of succession [*Sears v. Rule (1941) 45 Cal. App. 2d 374, 379-384, 114 P.2d 57* ; *see* Restatement of Trusts § 411, cmt. c; Restatement (Second) of Trusts § 411, cmt. c].

[3] Express Trust Does Not Exhaust Trust Estate

A resulting trust is created when, after a trust is fully performed, there is property remaining in the hands of the trustee [*Bainbridge v. Stoner (1940) 16 Cal. 2d 423, 428, 106 P.2d 423]* .

[4] Purchase-Money Resulting Trust

[a] In General

Ordinarily, a purchase-money resulting trust arises in favor of the payor of the purchase price of the property when the purchase price, or a part thereof, is paid by one person and the title is taken in the name of another. The trust arises because it is the natural presumption in such a case that it was the intention of the parties that the ostensible purchaser should acquire and hold the property for the one with whose means it was acquired [*Martin v. Kehl (1983) 145 Cal. App. 3d 228, 238-239, 193 Cal. Rptr. 312]* .

However, a resulting trust is not founded on the simple fact that money or property of one has been used by another to purchase property. It is founded on a relationship between the two, and on the fact that as between them, consciously and intentionally, one has advanced the consideration wherewith to make a purchase in the name of the other [*Majewsky v. Empire Constr. Co. Ltd. (1970) 2 Cal. 3d 478, 485, 85 Cal. Rptr. 819, 467 P.2d 547]* .

This rule applies not only when a person other than the transferee pays the purchase price directly to the vendor, but also when transferee pays the purchase price to the vendor with money or other property belonging to another person with the consent of the other person. Thus, when property is transferred to one person who pays the purchase price with money or other property belonging to another person, with the consent of the latter, a resulting trust arises in that other person's favor. If, on the other hand, the other person did not consent to the use of his or her money or other property in making the purchase, or did not consent that the property purchased should be transferred to the transferee, a constructive trust and not a resulting trust arises [*Majewsky v. Empire Constr. Co. Ltd. (1970) 2 Cal. 3d 478, 485-486, 85 Cal. Rptr. 819, 467 P.2d 547* ; *see* Restatement (Second) of Trusts § 440, cmt. h].

The doctrine of purchase-money resulting trusts applies to personal property as well as to real property [*Keene v. Keene (1962) 57 Cal. 2d 657, 665, 21 Cal. Rptr. 593, 371 P.2d 329* ; Restatement (Second) of Trusts § 440, cmt. b].

[b] Full Payment of Purchase Price

Full payment of the purchase price of the property gives rise to a resulting trust in the whole of the trust property [*see Martin v. Kehl (1983) 145 Cal. App. 3d 228, 238, 193 Cal. Rptr. 312]* .

[c] Partial Payment of Purchase Price

Part payment of the purchase price gives rise to a resulting trust to the extent thereof. When one person pays part of the purchase price and title is taken in another's name, the payor cannot secure a greater interest in the property by way of a resulting trust than the proportion of the amount he or she paid bears to the total purchase price [*Martin v. Kehl (1983) 145 Cal. App. 3d 228, 243, 193 Cal. Rptr. 312* ; Restatement (Second) of Trusts § 454]. However, a party seeking to impose a resulting trust based on partial payment has the burden of establishing with definiteness and specificity the proportional amount contributed [*Lloyds BankCal. v. Wells Fargo Bank (1986) 187 Cal. App. 3d 1038, 1044-1045, 232 Cal. Rptr. 339]* .

[d] Nature of Consideration

Consideration for the transfer of property can be in the form of money, property, the performance of services, or the discharge of preexisting indebtedness [*Laing v. Laubach (1965) 233 Cal. App. 2d 511, 515, 43 Cal. Rptr. 537]* . In addition, a promise to repay a loan used to purchase property is sufficient consideration to support a resulting trust. For example, when the transferee has purchased property for another party under an agreement that the other party will repay the purchase price, a resulting trust is appropriate [*Viner v. Untrecht (1945) 26 Cal. 2d 261, 269, 158 P.2d 3* ; *Novak v. Novak (1967) 249 Cal. App. 2d 438, 442, 57 Cal. Rptr. 564]* .

[e] Time of Payment of Consideration

Normally, a purchase-money resulting trust arises when the claimant has paid the purchase price of the property at the time it was acquired. However, contemporaneous payment is not an essential requirement for establishing a resulting trust. In situations in which the transferee has paid the purchase price with the understanding that the claimant will repay the transferee, a resulting trust may arise [*Viner v. Untrecht (1945) 26 Cal. 2d 261, 270, 158 P.2d 3* ; *Stone v. Lobsien (1952) 112 Cal. App. 2d 750, 755, 247 P.2d 357* ; *see § 562.14[f]*].

When a claimant seeks to impose a resulting trust on a proportional interest in property, proportional payment of consideration at the time of conveyance must be distinguished from subsequent monetary contributions to make improvements on property or for installment payments after the title has been acquired, which do not secure an interest by way of a resulting trust [*Martin v. Kehl (1983) 145 Cal. App. 3d 228, 243, 193 Cal. Rptr. 312]* . It is clear that payments made for improvements on property after it has been purchased will not support imposition of a resulting trust [*Keene v. Keene (1962) 57 Cal. 2d 657, 667, 21 Cal. Rptr. 593, 371 P.2d 329]* . However, when a claimant has made installment payments, after title has been acquired, based on an implied promise to make those payments made prior to the acquisition, it appears that a resulting trust establishing a proportionate interest would be appropriate [*see Stone v. Lobsien (1952) 112 Cal. App. 2d 750, 755, 247 P.2d 357]* .

[f] Transferee Pays Purchase Price as Loan to Person Claiming Beneficial Interest in Property

The payment of the purchase price that gives rise to a beneficial interest in the property may be made in the form of a loan from the transferee to the person claiming the beneficial interest. For example, when defendant (transferee) loans plaintiff (beneficial owner) money to buy residential property and defendant takes title to the property as security for the loan, defendant holds title as a resulting trustee for plaintiff until plaintiff repays the loan [*Viner v. Untrecht (1945) 26 Cal. 2d 261, 269, 158 P.2d 3* ; *see* Restatement of Trusts § 448; Restatement (Second) of Trusts § 448; *see generally* Ch. 555, *Trust Deeds and Real Property Mortgages* , regarding actions to establish a deed absolute as a mortgage].

A resulting trust can also arise through the transferee's assumption of an obligation to the vendor or transferor to pay the purchase price, when the person claiming the beneficial interest in the property is obligated to reimburse the transferee. In this case, there is a loan of credit by the transferee to the claimant [*Viner v. Untrecht (1945) 26 Cal. 2d 261, 269, 158 P.2d 3* ; *see* Restatement (Second) of Trusts § 456, cmt. d].

In the case of either a loan of cash or a loan of credit, it is not necessary that there be an express agreement by the claimant to repay the loan. An agreement to repay may be implied [*Viner v. Untrecht (1945) 26 Cal. 2d 261, 270, 158 P.2d 3]* . However, before a resulting trust in the claimant's favor will arise, there must be evidence of claimant's obligation to repay the loan [*Stone v. Lobsien (1952) 112 Cal. App. 2d 750, 755, 247 P.2d 357* (dicta)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 562.15 Situtations Not Giving Rise to Resulting Trust

[1] Gift to Transferee--Rebuts Presumption of Resulting Trust

A resulting trust will not arise if the intention of the parties was that the person receiving title to the property received it as a gift [*In re Marriage of Becker (1984) 161 Cal. App. 3d 65, 75, 207 Cal. Rptr. 392* ; *Knouse v. Shubert (1941) 48 Cal. App. 2d 685, 689, 121 P.2d 74]* . The presumption in favor of finding a purchase-money resulting trust when the party claiming the property supplied the purchase money for it may be rebutted, and incertain circumstances a presumption of a gift may arise [*see* *Lloyds Bank Cal. v. Wells Fargo Bank (1986) 187 Cal. App. 3d 1038, 1043, 232 Cal. Rptr. 339* ; *Quinn v. Reilly (1926) 198 Cal. 465, 467-468, 245 P. 1091* ; *see § 562.15[2]* ; *see also* Ch. 278, *Gifts*]. For a form raising the defense that the transfer was a gift, *see § 562.64*.

[2] Presumptions in Favor of Gift

Even when it is satisfactorily established that all or part of the purchase price was furnished by one other than the grantee, if it appears in addition that the grantee was the natural object of bounty of the person who made the payment, it will be presumed that a gift was intended [*Lloyds Bank Cal. v. Wells Fargo Bank (1986) 187 Cal. App. 3d 1038, 1043, 232 Cal. Rptr. 339* ; *Gomez v. Cecena (1940) 15 Cal. 2d 363, 367, 101 P.2d 477* ; *see* Restatement of Trusts § 442; Restatement (Second) of Trusts § 442]. Thus, when a parent pays for a conveyance of property to his or her child, or otherwise transfers property to a child, there is a presumption that a gift is intended and no presumption of a resulting trust arises [*Oyama v. State of California (1948) 332 U.S. 633, 68 S. Ct. 269, 92 L. Ed. 249, 256* ; *Lloyds Bank Cal. v. Wells Fargo Bank (1986) 187 Cal. App. 3d 1038, 1043, 232 Cal. Rptr. 339]* . In transactions between spouses, the rule is that a gift is presumed if the wife is the transferee but is not presumed if the husband is the transferee [*compare Altramano v. Swan (1942) 20 Cal. 2d 622, 628, 128 P.2d 353* (presumption of gift arises if wife is transferee and husband is claimant); *with* *Socol v. King (1950) 36 Cal. 2d 342, 348, 223 P.2d 627* (resulting trust presumed if husband takes title and wife furnishes consideration); *see* Restatement of Trusts § 442; Restatement (Second) of Trusts § 442]. This rule appears to raise equal protection issues.

When a presumption of gift arises, the burden shifts to the payor to prove that he or she did not intend to make a gift to the transferee [*Altramano v. Swan (1942) 20 Cal. 2d 622, 628, 128 P.2d 353* ; *see* Restatement of Trusts § 442, cmt. b]. The presumption of a gift may be rebutted by adequate proof that the grantee was not intended to have the beneficial

interest [*Gomez v. Cecena (1940) 15 Cal. 2d 363, 367, 101 P.2d 477* ; *see* Restatement of Trusts § 442; Restatement (Second) of Trusts § 442].

[3] Person Claiming Beneficial Interest in Property Pays Purchase Price as Loan to Transferee

When the transferee, that is, the grantee of a deed, borrows funds with which to purchase property, no resulting trust arises in favor of the lender on account of the loan and the use of its proceeds to pay for the property. For example, when parents lend their son funds with which to purchase property, and the son, in repayment of the loan, subsequently conveys a life interest to his parents in property purchased with proceeds of the loan, the son does not hold the property as resulting trustee for the parents [*Haskell v. Wood (1967) 256 Cal. App. 2d 799, 805, 64 Cal. Rptr. 459* ; see Restatement (Second) of Trusts § 445]. Similarly, when a transfer of property is made to one person and the purchase price is advanced by another as a loan to the transferee, the lender is not entitled to an equitable lien on the property in the absence of an agreement between the lender and the transferee that the lender is to have such a lien [*Reid v. Gillespie (1948) 87 Cal. App. 2d 769, 771-772, 197 P.2d 566* ; *see* Restatement of Trusts § 445; see Restatement (Second) of Trusts § 445, cmt. b; *see generally* Ch. 348, *Liens and Wage Preferences* , regarding equitable liens].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawPersonal GiftsElements of Valid GiftsGeneral OverviewEstate, Gift & Trust LawPersonal GiftsProceduresPresumptionsEstate, Gift & Trust LawTrustsResulting TrustsReal Property LawTrustsResulting Trusts

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49-562 California Forms of Pleading and Practice--Annotated § 562.16

§ 562.16 Rights of Bona Fide Purchasers for Value and Creditors

Although former *Civ. Code §§ 856* and *2243*, which provided in essence that a resulting trust could not prejudice the rights of transferees of the trust property who purchased their interest for value and without notice of the trust, were repealed in 1986, the common law as well as other statutory provisions grant this same protection to bona fide purchasers and mortagees [*Murphy v. Clayton (1896) 113 Cal. 153, 158, 45 P. 267* ; see *Civ. Code § 1214* (real property; priority to good faith purchasers or morgagees for value who record first); *Com. Code § 2403* (bona fide purchasers of personal property may take good title); see also *Prob. Code § 18100* (bona fide purchaser fully protected in dealing with trustee under express trust); 18 Cal. Law Rev Comm'n Reports 501, 793 (1986)]. The grant of protection to bona fide purchasers is in accord with the position of the *Restatement* [*see* Restatement (Second) of Trusts § 408].

An attachment or judgment creditor is not a bona fide purchaser for value. A trustee in bankruptcy has the status of an attachment or judgment creditor and is thus not a purchaser for value without notice [*In re Rogal (S.D. Cal. 1953) 112 F. Supp.712, 717-718* (applying California law); *Owings v. Laugharn (1942) 53 Cal. App. 2d 789, 791]* .

General creditors of the trustee of a resulting trust may not normally subject the trust property to the debts of the trustee even though the trustee gained credit based in part on the fact that the trust property was in his or her name [*Murphy v. Clayton (1896) 113 Cal. 153, 159-162, 45 P. 267]* . The creditors of the trustee of a resulting trust cannot subject the property to the payment of the trustee's debts merely because the title stands in the trustee's name, and a beneficiary's knowledge, after the transfer of property to the trustee, that the trustee is claiming the property to be his or her own in order to obtain credit cannot be implied from mere recordation or representation by the trustee [*In re Rogal (S.D. Cal. 1953) 112 F. Supp. 712, 719]* . However, the trustee's creditors can subject the property to their claims by showing (1) record title in the trustee's name, (2) knowledge on the part of the beneficiary that the trustee is claiming the property as his or her own, and (3) that a creditor relied on the trustee's claim of title and was induced thereby to extend credit [*In re Rogal (S.D. Cal. 1953) 112 F. Supp. 712, 719* ; *see* Restatement (Second) of Trusts § 459]. In addition, the beneficiary may be estopped from asserting the resulting trust over the rights of the creditors of the trustee if the beneficiary had knowledge that the trustee was obtaining credit based on the trust property, or otherwise by an affirmative act other than allowing title to stand in the name of the trustee, induced the creditors to extend credit to the trustee [*Breeze v. Brooks (1886) 71 Cal. 169, 182, 11 P. 885]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesEquitable EstoppelGeneral OverviewContracts LawTypes of ContractsBona Fide PurchasersEstate, Gift & Trust LawTrustsResulting TrustsReal Property LawPriorities & RecordingBona Fide PurchasersReal Property LawTrustsResulting Trusts

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49-562 California Forms of Pleading and Practice--Annotated § 562.17

§ 562.17 Statute of Limitations

The four-year period of limitations provided for in *Code Civ. Proc. § 343* applies to an action to establish a resulting trust and for an accounting incidental thereto [*McCosker v. McCosker (1954) 122 Cal. App. 2d 498, 501, 265 P.2d 21* ; *see also Code Civ. Proc. § 343*].

The statute of limitations does not run on a beneficiary of a resulting trust until he or she has actual knowledge of repudiation or breach of trust [*Martin v. Kehl (1983) 145 Cal. App. 3d 228, 240, 193 Cal. Rptr. 312* ; see *Davenport v. Davenport Found. (1950) 36 Cal. 2d 67, 75, 222 P.2d 11* (statute of limitations as not running in favor of trustee until time of repudiation of trust in case of failure of express trust as well as in case of purchase-money resulting trust)].

When a beneficiary requests conveyance of the legal title and the trustee gives various excuses for delaying, these excuses cannot be deemed to be an unequivocal repudiation of the trust [*Laing v. Laubach (1965) 233 Cal. App. 2d 511, 519, 43 Cal. Rptr. 537]* . For forms for use in raising the bar of the statute of limitations, see Ch. 345, *Limitation of Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesEquitable AccountingsGeneral OverviewEstate, Gift & Trust LawTrustsResulting TrustsGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawTrustsResulting Trusts

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49-562 California Forms of Pleading and Practice--Annotated § 562.18

§ 562.18 Laches

Laches may bar relief in equity irrespective of whether the statute of limitations has run on the action at law. However, the affirmative defense of laches requires both unreasonable delay in bringing suit, and either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay. Moreover, prejudice to the defendant is never presumed; rather it must be affirmatively demonstrated by the defendant in order to sustain his or her burden of proof and production of evidence on the issue. The beneficiary of a resulting trust will not be barred from enforcing the trust merely because of the lapse of time if the trustee has not, to the beneficiary's knowledge, repudiated the trust [*Martin v. Kehl (1983) 145 Cal. App. 3d 228, 241, 193 Cal. Rptr. 312]* . For a form that may be used to raise the defense of laches, see Ch. 345, *Limitation of Actions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsResulting TrustsReal Property LawTrustsResulting TrustsTortsProcedureCommencement & ProsecutionGeneral Overview

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49-562 California Forms of Pleading and Practice--Annotated § 562.19

§ 562.19 Statute of Frauds and Parol Evidence

Aa a general rule, the statute of frauds has no application in an action for a resulting trust [*Jones v. Gore (1956) 141 Cal. App. 2d 667, 673, 297 P.2d 474* ; *see Code Civ. Proc. § 1972(b)*]. A resulting trust is a creature of equity and need not be evidenced by writing or even by an express declaration [*Calistoga Civic Club v. City of Calistoga (1983) 143 Cal. App. 3d 111, 117-118, 191 Cal. Rptr. 571]* .

When the elements of a resulting trust are present, the fact that the transferee and the payor of the purchase price make an oral agreement, which is unenforceable under the statute of frauds, that the former is to hold the property in trust for the latter does not prevent a resulting trust from arising. In fact, such an agreement supports the inference or presumption that the payor does not intend the transferee to have the beneficial interest [*Martin v. Kehl (1983) 145 Cal. App. 3d 228, 239, 193 Cal. Rptr. 312]* .

Parol evidence is admissible to prove the existence of a resulting trust [*Jones v. Gore (1956) 141 Cal. App. 2d 667, 673, 297 P.2d 474]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract InterpretationParol EvidenceGeneral OverviewContracts LawStatutes of FraudsGeneral OverviewEstate, Gift & Trust LawTrustsResulting TrustsReal Property LawTrustsResulting Trusts

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§ 562.20 Burden of Proof

One who claims a resulting trust in property has the burden of proving the facts establishing his or her beneficial interest by clear and convincing evidence [*Gomez v. Cecena (1940) 15 Cal. 2d 363, 366-367, 101 P.2d 477* ; *see* Restatement (Second) of Trusts § 458].

Whether the evidence to prove the existence of a resulting trust is clear, satisfactory, and convincing is primarily a question for the trial court to determine. If there is substantial evidence to support its conclusion, the determination is not open to review on appeal. Likewise, the credibility and weight of the evidence are exclusively for the trial court's determination [*Viner v. Untrecht (1945) 26 Cal. 2d 261, 267, 158 P.2d 3]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsStandards of ReviewSubstantial EvidenceGeneral OverviewEstate, Gift & Trust LawTrustsResulting TrustsEvidenceProcedural ConsiderationsBurdens of ProofClear & Convincing ProofReal Property LawTrustsResulting Trusts

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49-562 California Forms of Pleading and Practice--Annotated § 562.21

§ 562.21 Termination of Resulting Trust by Merger

[1] Transfer of Trust Property to Beneficiary

If a trustee of a resulting trust transfers the trust property to the beneficiary or transfers the trust property at the direction of the beneficiary, the resulting trust terminates. This result is a necessary consequence of the vesting of both legal and equitable titles in the beneficiary, because there is no longer any purpose in keeping the trust relationship alive [*Zakaessian v. Zakaessian (1945) 70 Cal. App. 2d 721, 724, 161 P.2d 677* (purchase money resulting trust); *see* Restatement of Trusts § 410, cmt. b; Restatement (Second) of Trusts, § 410, cmt. b].

[2] Conveyance or Surrender of Trust Property to Trustee

Similarly, the resulting trust that arises in favor of the payor in a purchase-money resulting trust can be extinguished by an oral conveyance or surrender of his or her interest by the beneficiary of the resulting trust to the trustee. The resulting trust in this situation arises from the fact of the payment of the purchase price and without any writing. Just as the inference that a resulting trust arises from the payment of the purchase price can be rebutted without a writing (*see § 562.19*), it can be extinguished without a writing [*Johnson v. Altman (1950) 96 Cal. App. 2d 467, 469, 215 P.2d 768* ; *see* Restatement (Second) of Trusts § 460 and cmt. a].

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsModification & TerminationEstate, Gift & Trust LawTrustsResulting TrustsEvidenceInferences & PresumptionsInferencesReal Property LawTrustsResulting Trusts

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§ 562.22 Relief Available

The usual type of relief contemplated in an action to establish and enforce a resulting trust is a conveyance of the trust property from the trustee to the beneficiary. However, relief is also available in the form of actions to quiet title, and for ejectment [*see Seabury v. Costello (1962) 209 Cal. App. 2d 640, 642, 26 Cal. Rptr. 248]* .

When the trust property has been disposed of, relief is available in the form of a judgment for the proceeds thereof or for its value [*see Martin v. Kehl (1983) 145 Cal. App. 3d 228, 244, 193 Cal. Rptr. 312* (proceeds); *Penziner v. West Am. Fin. Co. (1933) 133 Cal. App. 578, 586, 24 P.2d 501* (value)]. If the trustee has made subsequent monetary contributions for items such as improvements, utility bills, or loan payments on the property, and the beneficiary recovers judgment for the proceeds of the property, the judgment is for the net proceeds after reimbursing the trustee for the subsequent contributions [*see Martin v. Kehl (1983) 145 Cal. App. 3d 228, 243-244, 193 Cal. Rptr. 312]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsResulting TrustsReal Property LawTitle QualityAdverse Claim ActionsEjectmentReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsReal Property LawTrustsResulting Trusts

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[Reserved]

§§ 562.23[Reserved]

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§ 562.40 State Statutes

Statute of frauds. *Civ. Code § 1624*; *Code Civ. Proc. § 1971*

Involuntary trusts. *Civ. Code §§ 2223, 2224*

Statute of limitations. *Code Civ. Proc. § 343*

Statute of frauds regarding real property transfers inapplicable to trusts arising by implication or operation of law. *Code Civ. Proc. § 1972(b)*

Common law as governing establishment and enforcement of resulting trusts. *Prob. Code §§ 15002, 15003(b)*

Legal Topics:

For related research and practice materials, see the following legal topics:
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49-562 California Forms of Pleading and Practice--Annotated § 562.41

§ 562.41 Decisions

[1] Constructive Trust Distinguished

Resulting trust as "intention-enforcing" trust, and as distinguished from constructive trust, which is "fraud-rectifying" trust. *Martin v. Kehl (1983) 145 Cal. App. 3d 228, 238-239, 193 Cal. Rptr. 312* ; *see also Johnson v. Johnson (1987) 192 Cal. App. 3d 551, 556, 237 Cal. Rptr. 644*

[2] Defenses

Defense of illegality to action to establish resulting trust exists for benefit of public and is permitted to be raised even though party raising defense is not inequitably injured by illegality. *In re Torrez (9th Cir. 1987) 827 F.2d 1299, 1301, 1301 n.4*

[3] Intent Requirement

Resulting trust, like express trust, as based on manifestation of intention of person creating it. *Majewsky v. Empire Constr. Co., Ltd. (1970) 2 Cal. 3d 478, 485, 85 Cal. Rptr. 819, 467 P.2d 547*

Resulting trust as often called "intention-enforcing" trust, and as arising by implication of law to enforce inferred intention of parties to transaction. *Calistoga Civic Club v. City of Calistoga (1983) 143 Cal. App. 3d 111, 117, 191 Cal. Rptr. 571*

[4] Liability of Beneficiary

When trustee of resulting trust has no duties to perform or trust to administer, except to hold and convey title according to beneficiary's demand, and beneficiary controls operation and maintenance of trust property, beneficiary liable as master for torts of servants committed in scope and course of servants' employment. *Richman v. Green (1956) 143*

Cal. App. 2d 470, 473, 299 P.2d 890

[5] Period of Limitation

Applicable statute of limitations in action to establish resulting trust and for accounting incidental thereto as *Code Civ. Proc. § 343*, four-year statute. *McCosker v. McCosker (1954) 122 Cal. App. 2d 498, 501, 265 P.2d 21*

Statute of limitations as not commencing to run on beneficiary of resulting trust until he or she has actual knowledge of repudiation or breach of trust. Martin v. Kehl (1983) *145 Cal. App. 3d, 228, 240 , 193 Cal. Rptr. 312*

[6] Pro Tanto Resulting Trust

Imposition of simple, rather than pro tanto, resulting trust as proper when (1) substantial evidence exists to support trial court's finding that defendant-trustee made no contribution to purchase price of property subject to trust, (2) court was not provided with argument or authority to convert defendant-trustee's arrangement of loan for purchasing property into pro tanto resulting trust, and (3) it would be unjust, under facts of case, to allow defendant to retain any share of title to property. *Johnson v. Johnson (1987) 192 Cal. App. 3d 551, 558-559, 237 Cal. Rptr. 644*

[7] Resulting Trust Defined

Resulting trust as not founded on simple fact that money or property of one has been used by another to purchase property, but on relationship betweenparties, that as between them consciously and intentionally, one has advanced consideration to make purchase in other's name; trust as arising because it is natural presumption that it was parties intention that ostensible purchaser should acquire and hold property for one with whose means it was acquired. *Majewsky v. Empire Constr. Co., Ltd. (1970) 2 Cal. 3d 478, 485, 85 Cal. Rptr. 819, 467 P.2d 547*

When resulting trust arises. *Lehmann v. Kamp (1969) 273 Cal. App. 2d 701, 706, 77 Cal. Rptr. 910*

[8] When Imposition of Resulting Trust Improper

Resulting trust in favor of purchasers of land who placed legal title in their children's names to circumvent federal reclamation law was established and not voided by illegal purpose because (1) agreement was completed, rather than executory, and thus invocation of rule against illegality would benefit public only by way of example; (2) purchasers' conduct did not involve serious moral turpitude; and (3) children would be unjustly enriched if trust were voided. *In re Torrez (9th Cir. 1987) 827 F.2d 1299, 1301-1303* (distinguishing *Hainey v. Narigon (1966) 247 Cal. App. 2d 528, 55 Cal. Rptr. 638*)

Use of "middleman" escrow as not giving rise to resulting trust for benefit of second buyers of property absent parties' intent that first buyer hold property in trust for second buyers. *Majewsky v. Empire Constr. Col, Ltd. (1970) 2 Cal. 3d 478, 483-486, 85 Cal. Rptr. 819, 467 P.2d 547*

Illegality of loan agreement used to obtain funds to purchase property subject to resulting trust as not barring enforcement of trust when (1) loan transaction is completed and public is not harmed by it, (2) defendant-trustee, rather than plaintiff-beneficiary, is guilty of great moral fault, and (3) nonenforcement of trust would unjustly enrich defendant. *Johnson v. Johnson (1987) 192 Cal. App. 3d 551, 557, 237 Cal. Rptr. 644*

Settlement paid by insurer to injured party prior to judicial determination that insured's policy did not cover injury as

not establishing resulting trust in favor of insurer and insurer as unable to seek reimbursement from injured party in absence of provision in settlement agreement allowing it to do so. *American Motorists Ins. Co. v. Cowan (1982) 127 Cal. App. 3d 875, 886, 179 Cal. Rptr. 747*

[9] When Imposition of Resulting Trust Proper

Petition to determine ownership of a real property interest pursuant to *Prob. Code § 850*, when there was no dispute between the testator and decent, brought on a resulting trust and therefore was not subject to *Code Civ. Proc. § 366.2*, which specifies one-year limitations period for actions based on the liability of the person. *Estate of Yool (2007) 151 Cal. App. 4th 867, 875, 60 Cal. Rptr. 3d 526*

Resulting trust, as well as constructive trust, in plaintiff's favor for one-half interest in real property as proper when each party supplied half of down payment, defendant to take title and make payments in lieu of rent, and plaintiff to receive one-half proceeds when defendant vacated premises. *Martin v. Kehl (1983) 145 Cal. App. 3d 228, 238-239, 193 Cal. Rptr. 312*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityMaximsClean Hands PrincipleEstate, Gift & Trust LawTrustsResulting TrustsGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawTrustsResulting Trusts

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§ 562.42 Text References

Collier on Bankruptcy (15th Ed.), Ch. 5, *Bankruptcy Code, Creditors, the Debtor, and the Estate*, § 541.11[4] (Matthew Bender)

Witkin, Summary of California Law, Vol. 13, *Trusts*, §§ 311-318 (9th ed. 1990)

Witkin, California Procedure, Vol. 5, *Pleading*, §§ 793-795 (4th ed.)

Restatement (Second) of Trusts §§ 404-460

Bogert, Handbook of the Law of Trusts (3d ed.), Ch. 7

Bogert, The Law of Trusts and Trustees (2d ed. rev.), Ch. 23

Scott, The Law of Trusts (3d ed.), Vol. 5, §§ 404-460

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawTrustsResulting TrustsReal Property LawTrustsResulting Trusts

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[Reserved]

§§ 562.43[Reserved]

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PART IV. FORMS

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§ 562.60 Complaint To Establish Purchase-Money Resulting Trust in Full or Partial Interest in Real Property or Sale Proceeds and for Order of Conveyance [Civ. Code §§ 3367, 3375]--Against Title Holder

[1] FORM Complaint [Code Civ. Proc. § 425.10]--To Establish Purchase-Money Resulting Trust in Full or Partial Interest in Real Property or Sale Proceeds and for Order of Conveyance [Civ. Code §§ 3367, 3375]--Against Title Holder

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT TO ESTABLISH RESULTING
[and DOES 1 through _____,]	)	TRUST
Defendant(s).	)	
	)	
	)	

Plaintiff alleges:

1. The real property referred to herein is that real property located at _____ [*street address and, if any, city*], _____ County, California, and more fully described as follows: _____ [*set forth legal description of property*].

[2. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES 1- _____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants claims or may claim some interest in the above-described real property adverse to plaintiff, which

claim is without any merit.]

[*EITHER*]

3. On or about _____ [*date*], _____ [*allege facts showing payment of consideration by plaintiff, e.g.,* plaintiff, with his/her own money, paid $_____ as down payment on the above-described real property. The balance of the purchase price was secured by a purchase money first deed of trust, the monthly payments on which defendant agreed to pay in lieu of rent so long as he/she occupied the real property. (The deed of trust was recorded on _____ [*date*], in Volume _____ of Deeds at page _____ in the office of the County Recorder of _____ County, California)].

[*OR*]

3. On or about _____ [*date*], _____ [*allege facts showing proportion of consideration paid by plaintiff, e.g.,* plaintiff, with his/her own money, paid $_____ as _____ (*allege proportionate share, e.g.,* one-half) of the down payment on the above-described real property. The remaining _____ (*allege proportionate share, e.g.,* one-half) of the down payment was paid by _____ (*name of co-payer*) in the amount of $_____].

[*CONTINUE*]

4. In consideration of plaintiff's payment, _____ [*allege facts showing transfer of property to trustee, e.g.,* _____ (*name of grantor*), granted the above-described property to defendant by deed dated _____ [*date*], and recorded on _____ [*date*], in Volume _____ of Deeds at page _____ in the office of the County Recorder of _____ County, California].

5. At all times mentioned herein, plaintiff was the equitable owner and defendant was the legal owner of the above-described real property. At all times mentioned herein, it was and is the intention of the parties that _____ [*describe parties' intentions as to the property, e.g.,* defendant hold _____ (the property *or* a _____ per cent interest in the property) in trust for plaintiff until such time as defendant vacated the property, at which time the property would be sold and plaintiff would receive _____ (the net proceeds *or* _____ per cent of the net proceeds) of the sale].

6. On or about _____ [*date*], _____ [*allege facts showing defendant's breach of trust, e.g.,* defendant vacated the above-described real property. On or about _____ [*date*], plaintiff, by letter, demanded that defendant either sell the property or pay plaintiff his/her equity share. Defendant failed and refused, and continues to fail and refuse, to comply with plaintiff's demand].

[7. (Plaintiff is informed and believes and thereon alleges that) (a)n escrow has been opened in the _____ (*name and address of title insurance or escrow company*), Escrow No. _____, wherein defendant has agreed to sell, and _____ (*name*(*s*) *of buyer*(*s*)) has/have agreed to buy, the above-described real property for the sum of $_____. Plaintiff regards this price as fair, and is willing, on declaration by this court of his/her rights inthe property, to ratify the sale and to transfer his/her interest in the property to the buyer(s).]

[8. (Plaintiff is informed and believes and thereon alleges that) (P)art of the purchase price has been paid to defendant by the above-mentioned buyer(s), even though the property has not yet been conveyed to the buyer(s).]

WHEREFORE, plaintiff prays for judgment against defendant[s, and each of them,] as follows:

1. Declaring that _____ [defendant holds title to the above-described real property as trustee of a resulting trust for the benefit of plaintiff, and that defendant has no right, title, or interest in the property *or* plaintiff has equitable title to an undivided _____ (*allege proportionate share, e.g.,* one-half) interest in the above-described real property, and that defendant holds title to the property to that extent in trust for plaintiff];

2. Declaring that, if plaintiff's interest in the above-described real property is disposed of before this judgment becomes final, plaintiff is the owner of _____ [the *or* an undivided _____ (*allege proportionate share, e.g.,* one-half) interest in the] proceeds of the real property [including the note given in payment for the property and the deed of trust securing it];

3. Ordering defendant to convey to plaintiff forthwith _____ [all of the title to *or* an undivided _____ (*allege proportionate share, e.g.,* one-half) interest in] the above-described real property or to pay to plaintiff _____ [the *or* _____ (*allege proportionate share, e.g.,* one-half) of the] proceeds of the sale of the property;

4. Ordering that, if the property and its proceeds are disposed of by defendant before the judgment becomes final, plaintiff have and recover judgment from defendant for $_____ [*allege an amount equivalent to the value of plaintiff's interest in the property*];

5. Awarding to plaintiff costs of suit herein incurred; and

6. Awarding to plaintiff such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, § 560.520.*]

[2] Use of Form

This form of complaint is for use to establish and enforce a purchase-money resulting trust in a full or partial interest in real property. Actions to establish resulting trusts are governed by the common law [*Prob. Code §§ 15002, 15003(b)*; *see § 562.10*].

The form of complaint is adapted from the facts in *Martin v. Kehl (1983) 145 Cal. App. 3d 228, 193 Cal. Rptr. 312* .

[3] Allegations

This form alleges the location and full legal description of the real property that is the subject matter of the action (Paragraph 1). The form then alleges elements of a cause of action for establishment and enforcement of a purchase-money resulting trust under the common law: (1) payment of either full or partial consideration by the plaintiff-beneficiary (Paragraph 3); (2) transfer of the property to the defendant-trustee (Paragraph 4); and (3) the intent of the parties in relation to the property (Paragraph 5); and (4) breach of the resulting trust by the defendant-trustee (Paragraph 6) [*see Martin v. Kehl (1983) 145 Cal. App. 3d 228, 238-239, 193 Cal. Rptr. 312* ; *Juranek v. Juranek (1938) 29 Cal. App. 2d 276, 279-280, 84 P.2d 195]* .

The form includes optional paragraphs for use if a sale of the property is pending, alleging that defendant has opened an escrow for receipt of funds from sale of the property (Paragraph 7) and that the buyers have paid a portion of the purchase price to defendant (Paragraph 8) [*see Livernois v. Brandt (1964) 225 Cal. App. 2d 301, 303, 304, 309, 37 Cal. Rptr. 279* (trust declared in property or its proceeds or equivalent amount should property and proceeds be disposed of prior to finality of judgment)].

The form also includes an optional paragraph alleging the responsibility of fictitiously named defendants sued pursuant to *Code Civ. Proc. § 474* (Paragraph 2).

[4] Part Payment of Purchase Price

When a plaintiff pays only a portion of the purchase price for the trust property, the precise amount or proportion of the consideration furnished must be established clearly, convincingly, and unambiguously [*see Martin v. Kehl (1983) 145 Cal. App. 3d 228, 239, 193 Cal. Rptr. 312]* .

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Demand on Trustee

It is not necessary that the plaintiff-beneficiary tender a demand to the defendant-trustee, before commencing an action to establish and enforce a resulting trust, to convey the property if the facts show that such a demand would not be complied with [*Crozier v. Soquel (1929) 101 Cal. App. 402, 407, 281 P. 698]* .

[7] Pleading Lack of an Adequate Remedy at Law

In an action to establish and enforce a resulting trust, plaintiff-beneficiary need not plead the lack of an adequate remedy at law because the action is one in equity to establish a trust [*Juranek v. Juranek (1938) 29 Cal. App. 2d 276, 280, 84 P.2d 195]* .

[8] Jurisdiction

The superior court, exercising general equity powers, has subject matter jurisdiction over actions to establish and enforce resulting trusts in real property. The action would not be a limited civil case [*Code Civ. Proc. §§ 85, 580(b)(3)*; *see Cal. Const. art. VI, § 10*].

If the action involves personal property in an amount not exceeding $25,000, the matter could be considered as a limited civil case [*see Cal. Const. art. VI, § 10*; *Code Civ. Proc. § 85, 86(b)(1), 580(a)*].

[9] Venue

In an action to establish and enforce a resulting trust in real property, venue is laid in the county in which the property is located [*Code Civ. Proc. § 392(a)(1)*; *Booker v. Aitken (1903) 140 Cal. 471, 476, 74 P. 11]* . In an action to establish and enforce a resulting trust in personal property, venue is laid in the county in which the defendant resides [*Code Civ. Proc. § 395(a)*]. When a defendant is sued in an official capacity as executor, administrator, guardian, conservator, or

trustee on a claim for the payment of money or the recovery of personal property, venue is laid in the county that has jurisdiction of the estate that the defendant represents [*Code Civ. Proc. § 395.1*].

[10] Quiet Title and Ejectment

An action to quiet title and for ejectment may give rise to a finding by an appellate court of a resulting trust, and relief may subsequently be afforded on the resulting trust theory of liability [*see Seabury v. Costello (1962) 209 Cal. App. 2d 640, 646, 26 Cal. Rptr. 248]* . For a discussion of and forms for use in quiet title and ejectment actions, see Ch. 482, *Quieting Title* , and Ch. 241, *Ejectment* .

[11] Recovery of Money Judgment

An action to establish and enforce a resulting trust may be combined with an action to recover a money judgment instead of the trust property [*see Penziner v. West Am. Fin. Co. (1933) 133 Cal. App. 578, 586, 24 P.2d 501]* .

[12] No Right to Jury Trial

When a judgment is sought requiring the declaration of a trust, even though the judgment will be one for money, the action is in equity, without right of jury trial [*Hillman v. Stults (1968) 263 Cal. App. 2d 848, 877, 70 Cal. Rptr. 295]* .

[13] Lis Pendens

If an action to establish a resulting trust on real property is seeking title to or possession of real property, recordation of a lis pendens is proper to put third parties on notice of plaintiff's claim [*Code Civ. Proc. § 405 et seq.*]. A plaintiff may not file a notice of lis pendens unless the plaintiff pleads a cause of action that affects title to specific real property [*Gale v. Superior Court (2004) 122 Cal. App. 4th 1388, 1395, 19 Cal. Rptr. 3d 554]* , and a plaintiff is not entitled to a lis pendens in an action in which the only relief sought is money damages [*Palmer v. Zaklama (2003) 109 Cal. App. 4th 1367, 1381, 1 Cal. Rptr. 3d 116]* .

If a pleading combines theories of liability for monetary damages and for a constructive trust, the plaintiff is not entitled to a lis pendens, because that might provide an unscrupulous plaintiff with a powerful lever to force the settlement of a groundless or malicious suit [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 972, 89 Cal. Rptr. 2d 693]* . A lis pendens is a provisional remedy that must be applied narrowly [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 967, 89 Cal. Rptr. 2d 693]* . For example, a lis pendens is not available in an action by a trustee requesting the imposition of a constructive trust and an equitable lien on the defendant's house for the amount of money that the defendant used to make improvements to the house, which the defendant allegedly obtained by exercising undue influence over the deceased trustor [*Campbell v. Superior Court (2005) 132 Cal. App. 4th 904, 916-922, 34 Cal. Rptr. 3d 68]* .

However, a fraudulent conveyance action seeking avoidance of a transfer of title of specific real property under *Civ. Code § 3439.07(a)(1)* is a real property claim for purposes of the lis pendens statute [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 652, 15 Cal. Rptr. 3d 805, 93 P.3d 395]* .

For a detailed discussion of the lis pendens procedure and forms, see Ch. 348, *Lis Pendens* .

[14] State Statutes

Statute of limitations for breach of resulting trust. *Code Civ. Proc. § 343*

Statute of frauds inapplicable to trusts regarding real property arising by implication of law. *Code Civ. Proc. § 1972(b)*

[15] Decisions

Statutory presumption of purchase-money resulting trust as applicable to both personal and real property. *Keene v. Keene (1962) 57 Cal. 2d 657, 665, 21 Cal. Rptr. 593, 371 P.2d 329*

Party claiming resulting trust as bearing burden of proof by clear and convincing evidence. *Gomez v. Cecena (1940) 15 Cal. 2d 363, 366-367, 101 P.2d 477* ; *Johnson v. Johnson (1987) 192 Cal. App. 3d 551, 556, 237 Cal. Rptr. 644*

Party claiming resulting trust as required to establish clearly, convincingly, and unambiguously precise amount or proportion of consideration furnished. *Laing v. Laubach (1965) 233 Cal. App. 2d 511, 517, 43 Cal. Rptr. 537*

Showing of parties' intention to create trust as necessary in establishing resulting trust. *Baskett v. Crook (1948) 86 Cal. App. 2d 355, 362, 195 P.2d 39*

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 562 TRUSTS: RESULTING TRUSTS
PART IV. FORMS

49-562 California Forms of Pleading and Practice--Annotated § 562.61

§ 562.61 Complaint [Code Civ. Proc. § 425.10]--To Establish Purchase-Money Resulting Trust in Real Property and for Order of Conveyance [Civ. Code §§ 3367, 3375]--Against Title Holder--Consideration as Discharge of Preexisting Debt

[1] FORM Complaint [Code Civ. Proc. § 425.10]--To Establish Purchase-Money Resulting Trust in Real Property and for Order of Conveyance [Civ. Code §§ 3367, 3375]--Against Title Holder--Consideration as Discharge of Preexisting Debt

[*Caption. See § 562.60.*]

Plaintiff alleges:

[1. *Description of real property. See § 562.60, Paragraph 1.*]

[2. *Fictitious defendant allegation. See § 562.60, Paragraph 2.*]

3. On or about _____ [*date*], _____ [*allege facts showing existence of preeexisting debt, e.g.,* plaintiff performed work and labor for defendant, pursuant to an oral contract, on a boat owned by defendant for the agreed compensation of half the proceeds on the sale of the boat. On or about _____ (*date*), the boat was "sold" or traded as a $2,500 down payment on real property located in _____ County, California. On or about _____ (*date*), plaintiff and defendant entered into an oral accord and satisfaction whereby defendant agreed to purchase for plaintiff certain additional real property, described in Paragraph 1, above, and to pay all escrow charges and costs connected therewith. Defendant, with his/her own money, paid all escrow charges and costs connected with the purchase of that real property].

4. In consideration of plaintiff's discharge of defendant's preexisting debt to plaintiff, as alleged above, _____ [*allege facts showing transfer of property to trustee, e.g.,* defendant purchased the property, described in Paragraph 1, above, from _____ (*grantor*) by deed dated _____ (*date*), and recorded on _____ (*date*), in Volume _____ of Deeds, at page

_____, in the office of the County Recorder of _____ County, California. Defendant purchased such real property in his/her own name]. On transfer of the real property, plaintiff took possession thereof, has remained in possession ever since then, and is still in possession thereof.

5. It was and is the intention of the parties that _____ [*describe parties' intentions as to the property, e.g.*, defendant hold the property described in Paragraph 1, above, in trust for plaintiff in consideration for plaintiff's discharge of defendant's preexisting debt to plaintiff].

6. On or about _____ [*date*], _____ [*allege facts showing defendant's breach of trust, e.g.*, defendant, through his/her attorney _____ (*name*), wrote to plaintiff and demanded that he/she vacate the real property and premises. Defendant failed and refused, and continues to fail and refuse, to comply with plaintiff's demand].

WHEREFORE, plaintiff prays for judgment against defendant[s, and each of them,] as follows:

1. Declaring that plaintiff has an equitable title to the above-described real property, and that defendant holds title to the property in trust for plaintiff;

2. Ordering defendant to convey to plaintiff forthwith the above-described real property;

3. Awarding plaintiff costs of suit herein incurred; and

4. Awarding plaintiff such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See Form 1.*]

[2] Use of Form

This form of complaint is for use to establish and enforce a resulting trust in real property when consideration is provided in a form other than money. Actions to establish resulting trusts aregoverned by the common law [*Prob. Code §§ 15002, 15003(b)*; *see § 562.10*].

The form of complaint is adapted from the facts in *Laing v. Laubach (1965) 233 Cal. App. 2d 511, 43 Cal. Rptr. 537* .

[3] Allegations

This form alleges: (1) facts showing payment of full consideration, in the form of discharge of a preexisting debt, by the plaintiff-beneficiary (Paragraph 3) [*see Laing v. Laubach (1965) 233 Cal. App. 2d 511, 518, 43 Cal. Rptr. 537]* ; (2) facts showing transfer of the property to the defendant-trustee (Paragraph 4); (3) the intent of the parties in relation to the property (Paragraph 5); and (4) facts showing breach of the resulting trust by the defendant-trustee (Paragraph 6).

[4] Lis Pendens

A plaintiff may not file a notice of lis pendens unless the plaintiff pleads a cause of action that affects title to specific real property [*Gale v. Superior Court (2004) 122 Cal. App. 4th 1388, 1395, 19 Cal. Rptr. 3d 554]* , and a plaintiff is

not entitled to a lis pendens in an action in which the only relief sought is money damages [*Palmer v. Zaklama (2003) 109 Cal. App. 4th 1367, 1381, 1 Cal. Rptr. 3d 116]* .

If a pleading combines theories of liability for monetary damages and for a constructive trust, the plaintiff is not entitled to a lis pendens, because that might provide an unscrupulous plaintiff with a powerful lever to force the settlement of a groundless or malicious suit [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 972, 89 Cal. Rptr. 2d 693]* . A lis pendens is a provisional remedy that must be applied narrowly [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 967, 89 Cal. Rptr. 2d 693]* . For example, a lis pendens is not available in an action by a trustee requesting the imposition of a constructive trust and an equitable lien on the defendant's house for the amount of money that the defendant used to make improvements to the house, which the defendant allegedly obtained by exercising undue influence over the deceased trustor [*Campbell v. Superior Court (2005) 132 Cal. App. 4th 904, 916-922, 34 Cal. Rptr. 3d 68]* .

However, a fraudulent conveyance action seeking avoidance of a transfer of title of specific real property under *Civ. Code § 3439.07(a)(1)* is a real property claim for purposes of the lis pendens statute [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 652, 15 Cal. Rptr. 3d 805, 93 P.3d 395]* .

[5] Decisions

Money, property, performance of services, or discharge of preexisting debt as permissible consideration for transfer of property subject to resulting trust. *Laing v. Laubach (1965) 233 Cal. App. 2d 511, 515, 43 Cal. Rptr. 537*

[6] Cross References

For a related form, see *§ 562.60*

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Chapter 562 TRUSTS: RESULTING TRUSTS
PART IV. FORMS

49-562 California Forms of Pleading and Practice--Annotated § 562.62

§ 562.62 Complaint [Code Civ. Proc. § 425.10]--To Establish Purchase-Money Resulting Trust in Real Property Purchased in Part With Borrowed Funds With Title Taken in Name of Now Deceased Lender as Security, for Accounting, and for Order to Convey Title [Civ. Code §§ 3367, 3375] on Payment of Balance of Loan--Against Estate of Title Holder

[1] FORM Complaint [Code Civ. Proc. § 425.10]--To Establish Purchase-Money Resulting Trust in Real Property Purchased in Part With Borrowed Funds With Title Taken in Name of Now Deceased Lender as Security, for Accounting, and for Order to Convey Title [Civ. Code §§ 3367, 3375] on Payment of Balance of Loan--Against Estate of Title Holder

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	
_____ [*name*],	)	NO. _____
individually and as _____	)	COMPLAINT TO ESTABLISH RESULTING
[Administrator of the Estate *or* Executor of the Will]	)	TRUST AND FOR ACCOUNTING
of _____ [*name of deceased*],	)	[*Civ. Code §§ 3367, 3375*]
[and DOES 1 through _____,]	)	
Defendant(s).	)	
	)	
	)	

_____

Plaintiff alleges:

1. Defendant _____ [*name*] is the duly appointed, qualified, and acting _____ [*specify, e.g.*, administrator of the estate (with will annexed) *or* executor of the will] of _____ [*name*],

hereinafter referred to as the deceased[, and is the sole heir of the deceased]. [Defendant is sued herein in his/her representative capacity and individually.]

[2. *Fictitious defendant allegation. See § 562.60, Paragraph 2.*]

3. On or about _____ [*date*], plaintiff purchased from _____ [*name of seller*] real property situated at _____ [*street address and if any, city*] _____ County, California, more particularly described as follows: _____ [*set forth legal description*].

4. The purchase price of the property was $_____, and was paid [*specify any consideration paid in addition to loan from defendant, e.g.,* by the assumption of an indebtedness secured by a first deed of trust in the sum of $_____, plaintiff's funds on hand in the sum of $_____, and] by $_____, [borrowed by plaintiff from the deceased on or about _____ (*date*), *or* paid to the seller by the deceased as a loan to plaintiff].

5. Title to the property was taken in the name of the deceased solely as security for repayment by plaintiff of the above-mentioned loan [together with interest thereon at the rate of _____ percent per annum]. At the time of the transaction, plaintiff and the deceased orally agreed that the deceased would hold title to the property until the loan, together with interest thereon, was fully repaid, whereon the deceased would convey title to plaintiff.

6. At the time of the transaction, plaintiff and the deceased further orally agreed that, _____ [*specify terms of repayment, e.g.,* commencing on _____ (*date*), plaintiff would make monthly payments to the deceased in the the sum of $_____, $_____ of which the deceased would apply to the payment due on the indebtedness secured by the first deed of trust and the remainder of which the deceased would apply to the principal and interest due on the loan from the deceased to plaintiff].

7. On conclusion of the transaction, plaintiff took charge of the real property, occupied it, and has continually, ever since, occupied the property.

8. In accordance with the agreement alleged above, from _____, until _____ [*dates*], the date of the deceased's death, plaintiff paid to the deceased the total sum of $_____ for application by him/her pursuant to their agreement.

9. On or about _____ [*date*], plaintiff requested, in writing, that defendant provide plaintiff with a statement of the application by the deceased of the sums paid by plaintiff, and a statement of any balance due on the loan from the deceased. [Coincident with this request, plaintiff offered to pay any balance due and requested defendant to then convey title to the property to plaintiff.] A copy of the request [and offer to pay] is attached hereto, marked Exhibit _____, and incorporated by reference herein.

10. In response to plaintiff's request and offer, defendant refused, and continues to refuse, to recognize the transaction between plaintiff and the deceased as a loan transaction, to provide plaintiff with either a statement of how the deceased applied the sums paid to him/her by plaintiff or a statement of any balance due on the loan from the deceased, to accept any payment on the balance, and to convey title of the property to plaintiff.

11. Plaintiff does not know the amount, if any, owing on the loan from the deceased for the reason that _____ [*specify reason why accounting is necessary, e.g.,* plaintiff does not know the respective amounts that the deceased in fact applied to payments on the indebtedness secured by the first deed of trust and to payments on the loan from the deceased].

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. Declaring that defendant[s, and each of them,] holds title to the above-described real property as trustee of a resulting trust for the benefit ofplaintiff, and that defendant[s, and each of them,] has no right, title, or interest in the property;

2. Ordering defendant _____ [*name*] to account for all sums paid by plaintiff and applied by the deceased, pursuant to the agreement between plaintiff and the deceased;

3. Determining the balance, if any, owing by plaintiff on the loan from the deceased;

4. Ordering defendant, on payment by plaintiff of any balance found to be due, to execute and deliver any deeds or other instruments as shall be necessary to convey title to the property to plaintiff;

5. Awarding to plaintiff costs of suit herein incurred; and

6. Awarding to plaintiff such other and further relief as the court deems necessary.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See Ch. 560, Trusts: Express, Public, Charitable, and Totten Trusts, § 560.520.*]

[2] Use of Form

This form of complaint is for use by a beneficiary to establish and enforce a purchase-money resulting trust in real property against the estate of a deceased person who loaned funds to the beneficiary to enable the beneficiary to buy the property and who took title to the property to secure the loan. The complaint also seeks an accounting for amounts paid to the lender [*see Viner v. Untrecht (1945) 26 Cal. 2d 261, 269, 158 P.2d 3* (citing Restatement of Trusts § 448)].

In this type of transaction, the lender typically takes title to the property as security for repayment of the loan and as resulting trustee for the borrower-beneficiary until the beneficiary repays the loan. On repayment, the lender is under a duty to convey title to the borrower-beneficiary, and if the lender fails to so convey, thereby repudiating the trust, a cause of action arises in favor of the beneficiary for enforcement of the resulting trust [*Viner v. Untrecht (1945) 26 Cal. 2d 261, 269, 158 P.2d 3* (citing Restatement of Trusts § 448); *see* Restatement (Second) of Trusts § 448].

The form of complaint is adapted from that in Markgraf v. Koschmieder, San Francisco Superior Court No. 423370.

[3] Allegations

This form alleges: (1) defendant's capacity (Paragraph 1), and (2) a description of the property that is the subject matter of the action (Paragraph 3) [*Code Civ. Proc. § 455*]. The complaint then alleges elements of a cause of action for enforcement of a purchase-money resulting trust under the common law: (1) plaintiff's purchase of real property (Paragraph 3); (2) payment for the property in whole or in part with consideration borrowed by the plaintiff from the deceased (Paragraph 4) [*see Viner v. Untrecht (1945) 26 Cal. 2d 261, 269, 158 P.2d 3]* ; plaintiff's obligation to repay the loan (Paragraph 6) [*see Viner v. Untrecht (1945)26 Cal. 2d 261, 270, 158 P.2d 3]* ; the intention of the parties that to secure the loan, the deceased take title to the property as trustee until plaintiff's repayment of the loan and that plaintiff remain the beneficial owner of the property (Paragraphs 5-7); and plaintiff's payments on the loan (Paragraph 8).

[4] Accounting Action

A complaint in an action for an accounting must allege the existence of both a relationship between plaintiff and defendant, and an unknown balance due that cannot be determined without an accounting (Paragraphs 3-6, and 11) [*Raymond v. Independent Growers, Inc. (1955) 133 Cal. App. 2d 154, 160, 284 P.2d 57* ; *see St. James Church v. Superior Court (1955) 135 Cal. App. 2d 352, 359, 287 P.2d 387]* . Generally, the complaint must also allege plaintiff's demand for and defendant's refusal to provide an accounting (Paragraphs 9 and 10) [*see Wooster v. Nevills (1887) 73 Cal. 58, 60, 14 P. 390]* .

For a complete discussion of and forms for use in pleading the elements of an accounting action, see Ch. 7, *Accounting, Action for*.

[5] Lis Pendens

A plaintiff may not file a notice of lis pendens unless the plaintiff pleads a cause of action that affects title to specific real property [*Gale v. Superior Court (2004) 122 Cal. App. 4th 1388, 1395, 19 Cal. Rptr. 3d 554]* , and a plaintiff is not entitled to a lis pendens in an action in which the only relief sought is money damages [*Palmer v. Zaklama (2003) 109 Cal. App. 4th 1367, 1381, 1 Cal. Rptr. 3d 116]* .

If a pleading combines theories of liability for monetary damages and for a constructive trust, the plaintiff is not entitled to a lis pendens, because that might provide an unscrupulous plaintiff with a powerful lever to force the settlement of a groundless or malicious suit [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 972, 89 Cal. Rptr. 2d 693]* . A lis pendens is a provisional remedy that must be applied narrowly [*BGJ Assocs. v. Superior Court (1999) 75 Cal. App. 4th 952, 967, 89 Cal. Rptr. 2d 693]* . For example, a lis pendens is not available in an action by a trustee requesting the imposition of a constructive trust and an equitable lien on the defendant's house for the amount of money that the defendant used to make improvements to the house, which the defendant allegedly obtained by exercising undue influence over the deceased trustor [*Campbell v. Superior Court (2005) 132 Cal. App. 4th 904, 916-922, 34 Cal. Rptr. 3d 68]* .

However, a fraudulent conveyance action seeking avoidance of a transfer of title of specific real property under *Civ. Code § 3439.07(a)(1)* is a real property claim for purposes of the lis pendens statute [*Kirkeby v. Superior Court (2004) 33 Cal. 4th 642, 652, 15 Cal. Rptr. 3d 805, 93 P.3d 395]* .

[6] Decisions

Resulting trust as arising on loan from trustee to beneficiary for part payment of purchase price of property. *Viner v. Untrecht (1945) 26 Cal. 2d 261, 269, 158 P.2d 3*

[7] Text References

Restatement (Second) of Trusts § 448

[8] Cross References

For a related form, see *§ 562.60*

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49-562 California Forms of Pleading and Practice--Annotated § 562.63

§ 562.63 Allegation--Property Was Not Transferred as Gift

[1] FORM Allegation--Property Was Not Transferred as Gift

1. At all times mentioned herein, the above-described property was neither conveyed with any intent or purpose that the conveyance be, nor was the conveyance, a gift, advancement, or bounty to _____ [*name of defendant*] from _____ [*name of plaintiff*]. At all times mentioned, _____ defendant has held interest and title in such property in trust and as trustee, as alleged herein, for _____ plaintiff and not otherwise.

[2] Use of Form

This form of allegation is for use in a complaint to establish and enforce a purchase-money resulting trust in real or personal property. It should be used when the defendant is a natural object of the bounty of the plaintiff to allege that the payment for the property was not a gift [*see* *Quinn v. Reilly (1926) 198 Cal. 465, 467-468, 245 P. 1091* (daughter as trustee)].

If it appears that the grantee is a child or other natural object of bounty of the person who makes the payment, it will be presumed that a gift is intended [*Gomez v. Cecena (1940) 15 Cal. 2d 363, 367, 101 P.2d 477* , see Restatement (Second) of Trusts § 442]. The presumption of gift is sufficient to rebut the presumption of the existence of a resulting trust [*Oyama v. State of California (1948) 332 U.S. 633, 68 S. Ct. 269, 92 L. Ed. 249, 256]* . The burden of proof then shifts to the payor to prove that he or she did not intend to make a gift to the transferee [*Altramano v. Swan (1942) 20 Cal. 2d 622, 628, 128 P.2d 353* (citing Restatement of Trusts § 442, comment b)].

To rebut the presumption of gift in cases of property transfers between and among family members, a plaintiff must be allowed to allege facts showing that a gift is not intended. In so doing, plaintiff need only allege ultimate facts and not, for example, acts or agreements tending to prove those ultimate facts [*Quinn v. Reilly (1926) 198 Cal. 465, 468, 245 P. 1091]* .

This allegation is adapted from the facts in *Quinn v. Reilly (1926) 198 Cal. 465, 467, 245 P. 1091* .

[3] Decisions

When parent pays for conveyance of property to child, presumption of gift arises, rather than presumption of resulting trust. *Oyama v. State of California (1948) 332 U.S. 633, 641, 68 S. Ct. 269, 92 L. Ed. 249*

When title to property taken in husband's name and consideration for transfer furnished by wife, presumption of resulting trust arises. *Socol v. King (1950) 36 Cal. 2d 342, 348, 223 P.2d 627* .

When title to property taken in wife's name and consideration for transfer furnished by husband, presumption of gift arises, and burden as shifts to payor to prove that gift not intended. *Altramano v. Swan (1942) 20 Cal. 2d 622, 628, 128 P.2d 353*

Presumption of gift is rebutted by adequate proof that grantee was not intended to have beneficial interest. *Gomez v. Cecena (1940) 15 Cal. 2d 363, 367, 101 P.2d 477*

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Chapter 562 TRUSTS: RESULTING TRUSTS
PART IV. FORMS

49-562 California Forms of Pleading and Practice--Annotated § 562.64

§ 562.64 Affirmative Defense--Consideration or Transfer of Property Was Gift

[1] FORM Affirmative Defense--Consideration or Transfer of Property Was Gift

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of actionalleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that

[*EITHER*]

plaintiff's advance to defendant of consideration for the purchase of property described in plaintiff's complaint was intended by plaintiff to be and was a gift to defendant of money to enable defendant to purchase the above-mentioned property for defendant's own benefit.

[*OR*]

plaintiff's transfer to defendant of the property described in plaintiff's complaint was a gift from plaintiff to defendant. Defendant does not hold, nor has he/she ever held, the above-mentioned property in trust for plaintiff.

[2] Use of Form

This affirmative defense is for use in an answer to a complaint seeking to establish and enforce a resulting trust in real or personal property. It may be used by a defendant to rebut the presumption that when a transfer of property is made to one person and the consideration therefor is paid by or for another, a trust results in favor of the person by or for whom the payment is made [*see Martin v. Kehl (1983) 145 Cal. App. 3d 228, 238-239, 193 Cal. Rptr. 312* ; *see also Estate of Raphael (1953) 115 Cal. App. 2d 525, 531, 252 P.2d 979]* .

A statement of any new matter constituting a defense must be contained in an answer to a complaint [*Code Civ. Proc. § 431.30(b)(2)*]. If more than one affirmative defense is set forth in the answer, each defense must be separately stated [

Code Civ. Proc. § 431.30(g)] and numbered [*Cal. Rule of Ct., Rule 2.112(1)*]. If the complaint sets forth more than one cause of action, the affirmative defense must refer to the cause of action it is intended to answer [*Code Civ. Proc. § 431.30(g)*].

[3] Cross References

For a related form, see *§ 562.63*

For discussion relating to answers generally and general forms for answers into which the foregoing allegation may be inserted, see Ch. 26, *Answers*

For a discussion and forms relating to demurrers, see Ch. 206, *Demurrers and Motion for Judgment on the Pleadings*

[4] State Statutes

Pleading affirmative defenses. *Code Civ. Proc. § 431.30(b)(2)*

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§ 564.16 Obtaining Employment Development Department Forms

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§ 564.33 Appointment and Duties of Administrative Law Judges

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§ 564.37 Representation by Counsel

[1] Claimant's Right

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§ 564.43 Nonfinality of Administrative Law Judge's Decision

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[1] "Employer"

[2] "Employing Unit"

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[5] "Employee"

[6] "Wages"

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§ 564.74 Employer Contributions

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[3] Protest of Charge or Credit

§ 564.76 Collection of Contributions by Director

§ 564.77 Civil Action to Prevent Collection Prohibited

§ 564.78 Administrative Appellate Review

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[4] Effect of Decision and Explanation of Right to Judicial Review

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[2] When Action May Be Filed

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[c] On Denial of Claim of Exemption by Religious Organization

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§ 564.103 Unemployment Compensation Disability Fund

§ 564.104 Nonwaiverability and Nonassignability of Benefits

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[1] Base Period

[2] Alternate Base Period

§ 564.125 "Unemployed" Defined

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§ 564.126 "Week" Defined

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[2] Person Applying to Another Jurisdiction for Benefits

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§ 564.130 Disqualified Persons

[1] Grounds

[2] "Most Recent Work" Defined

[3] What Constitutes Voluntary Leaving

[4] "Good Cause"

[a] Defined

[b] Determination as Question of Law

[c] Examples

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[a] Requirements

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[2] "Disability Benefit Period"

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[3] Incarcerated

[4] Disabled Due to Commission of Crime

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[13] Violations and Penalties

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[5] Withholding Tax on Wages

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[2] Burden of Proof

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[4] Unemployment Compensation Benefits

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[2] Use of Form

[3] Scope and Effect of Court's Determination

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[5] Standing to Sue

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§ 564.280 Complaint to Recover Erroneously or Illegally Collected Employer Contributions [Unemp. Ins. Code § 1241(a)]--By Alleged Employer

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[2] Use of Form

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[4] When Refund Is Not Permitted

[5] Necessity of Filing Claim for Refund or Credit

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[7] Venue of Action

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§ 564.300 Petition for Writ of Mandate [Code Civ. Proc. § 1094.5]--To Review Decision of Unemployment Insurance Appeals Board Allowing Unemployment Compensation Benefits [Unemp. Ins. Code § 410, 1st and 4th paragraphs]--Employee Left Work Without Good Cause or Was Discharged for Misconduct in Connection With Work [Unemp. Ins. Code § 1256]--By Employer

[1] FORM

[2] Use of Form

[3] Administrative Record

[4] Parties

[5] Allegations

[6] Cross References

[7] State Statutes

[8] Decisions

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[1] FORM

[2] Use of Form

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§ 564.01 Scope of Chapter

This chapter discusses the Appeals Division of the Employment Development Department, which consists of the Unemployment Insurance Appeals Board and its employees [*Unemp. Ins. Code §§ 315, 401*]. The chapter includes a form of complaint for declaratory relief to challenge the validity of a precedent decision issued by the board [*see § 564.260*]. For procedure and forms for use in challenging the validity of an authorized regulation (defined in *Unemp. Ins. Code § 127*), see Ch. 472B, *Review of Agency Rulemaking* .

This chapter also discusses contributions to the Unemployment and Disability Funds, employers' reserve accounts, the reports required of employers, assessments, alternative methods of financing authorized for specific kinds of employing units, and administrative review. It includes a form of complaint to recover an overpayment after a claim for refund or credit was denied and administrative remedies were exhausted [*see § 564.280*].

This chapter also discusses unemployment compensation and disability insurance, and administrative and judicial review of claims for each. It includes forms of petitions for a writ of mandate to review a decision of the Unemployment Insurance Appeals Board adverse to an employer [*see § 564.300*] and adverse to a claimant for unemployment insurance compensation [*see § 564.301*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusLabor & Employment LawDisability & Unemployment InsuranceDisability BenefitsCoverage & DefinitionsGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationCoverage & DefinitionsLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationReview

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§ 564.02 Cross References

For discussion and forms for use in seeking a declaration as to the validity of a regulation under *Gov. Code § 11350*, see Ch. 472B, *Review of Agency Rulemaking*

For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewCivil ProcedureGeneral Overview

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[Reserved]

§§ 564.03[Reserved]

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§ 564.10 Governing Law

Unemployment insurance is governed by the federal Unemployment Tax Act (*I.R.C. § 3301* et seq.), the federal Social Security Act (*42 U.S.C. §§ 501-504, 1101*-1109), the California Unemployment Insurance Code, and *22 Cal. Code Reg. § 125.1 et seq.*

Federal disability insurance is governed by *42 U.S.C. § 401 et seq.* [*see, e.g., Brawner v. Secretary of Health and Human Services (9th Cir. 1988) 839 F.2d 432, 433-434]* .

The Unemployment Insurance Code consists of General Provisions (*Unemp. Ins. Code § 1 et seq.*) and seven divisions. Division 1 (*Unemp. Ins. Code § 100 et seq.*) covers unemployment and disability compensation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationCoverage & DefinitionsWorkers' Compensation & SSDISocial Security Disability InsuranceGeneral Overview

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§ 564.11 Federal-State System

The unemployment insurance program was initiated by Congress in the Social Security Act of 1935 [*see City of Sacramento v. State of California (1984) 156 Cal. App. 3d 182, 187, 203 Cal. Rptr. 258]* . The act provides for a federal-state system of unemployment compensation by imposing a federal tax on an affected employer in specified percentages of the total wages paid in a given calendar year [*see I.R.C. § 3301*]. A partial credit against the tax is allowed for contributions paid by the employer pursuant to a state unemployment compensation program which is approved by the United States Secretary of Labor on review in conformity with qualifying criteria established by federal law [*see I.R.C. §§ 3302*-3304]. State programs approved by the Secretary of Labor are subsidized with federal grants paid to the conforming states pursuant to the Social Security Act (*42 U.S.C. §§ 501-503*) [*see City of Sacramento v. State of California (1984) 156 Cal. App. 3d 182, 187, 203 Cal. Rptr. 258* ; *Russ v. Unemployment Ins. Appeals Bd. (1981) 125 Cal. App. 3d 834, 842, 178 Cal. Rptr. 421]* . Thus, the act imposes a tax on employers that each state can mitigate by establishing its own unemployment insurance program meeting federal guidelines [*Campos v. Employment Development Dept. (1982) 132 Cal. App. 3d 961, 966-967, 183 Cal. Rptr. 637]* .

The California law is contained in the Unemployment Insurance Code of 1953 (*discussed under § 564.100*), which consolidated and revised the prior law (originally enacted in 1935) relating to unemployment and disability insurance [*see Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1981) 29 Cal. 3d 101, 114, 172 Cal. Rptr. 194, 624 P.2d 244]* . Provisions governing interstate and federal cooperation are set forth in *Unemp. Ins. Code §§ 451-456*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationCoverage & Definitions

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§ 564.12 Purposes of Law

The purposes of the unemployment insurance law are to provide benefits for persons unemployed through no fault of their own and to reduce involuntary unemployment and the suffering caused by it to a minimum. Unemployed persons claiming unemployment insurance benefits are required to make all reasonable effort to secure employment on their own behalf [*Unemp. Ins. Code § 100*; *see Gilles v. Department of Human Resources Development (1974) 11 Cal. 3d 313, 316, 113 Cal. Rptr. 374, 521 P.2d 110]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationCoverage & DefinitionsLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationEligibilityInvoluntary Unemployment

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§ 564.13 Administration of Law

Under both the federal and state acts, administrative boards are empowered to promulgate rules, regulations, and administrative interpretations [*Manchester Avenue Co. v. Stewart (1958) 50 Cal. 2d 307, 310, 325 P.2d 457* ; *see California Emp. Com. v. Kovacevich (1946) 27 Cal. 2d 546, 554, 165 P.2d 917]* . The administrative board in California charged with the responsibility of carrying out the duties imposed by the Unemployment Insurance Code is the Employment Development Department in the Health and Welfare Agency [*see Unemp. Ins. Code §§ 301-301.7*]. The department is administered by the Director of Employment Development [*Unemp. Ins. Code § 301*], whose duties and powers are set forth in *Unemp. Ins. Code §§ 301, 305-307, 311, 316-318, 320-323, 325-327, 330-334,* and *403*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency RulemakingGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationGeneral Overview

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§ 564.14 Dissemination of Rules and Regulations

On the request of any person or entity, the department is required to provide any or all of its rules, regulations, guidelines, bulletins, manuals, standards of general application, or the departmental responsibilities under any state or federal law, along with any subscription service necessary to assure prompt receipt of amendments to any of the materials. Except for one free copy of the materials that must be provided to each state legislator on request, the department is required to charge a fee to cover the costs of reproducing the materials and the postage associated with a subscription service. Documents properly classified as confidential are exempt from these requirements [*Unemp. Ins. Code § 307*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationGeneral Overview

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§ 564.15 Use of Information Obtained

[1] Confidentiality

Information obtained by the department in the administration of the code is for the exclusive use and information of the director and is not open to the public, except as otherwise specifically provided in the Unemployment Insurance Code [*Unemp. Ins. Code § 1094(a)*]. Any information released to authorized entities pursuant to other provisions of the Unemployment Insurance Code is not admissible in evidence in any action or special proceeding, other than one arising out of the Code [*Unemp. Ins. Code § 1094(b)*; *see Unemp. Ins. Code § 1095*].

The information may, however, be tabulated and published in statistical form, but the name of the employing unit or of any worker must never be divulged in the course of the tabulation or publication [*Unemp. Ins. Code § 1094(c)*].

The confidentiality of medical records obtained under *Unemp. Ins. Code §§ 2601-3272* (relating to disability compensation) and exceptions are covered by *Unemp. Ins. Code § 2714*.

Thus, except as otherwise provided in the Unemployment Insurance Code, and except with respect to information furnished by the department in connection with its participation as a party or as a lien claimant in a judicial or administrative proceeding, information obtained in the course of administration of the unemployment and disability compensation laws is confidential. It is not to be published or open to public inspection in any manner [*Unemp. Ins. Code § 2111*; *see also Unemp. Ins. Code § 2122* (penalty for violation of nondisclosure provisions)]. Disclosure of amounts of wages paid and amounts of California personal income tax withheld from those wages is not permitted, except as provided by *Rev. & Tax. Code § 19542 et seq.*, which govern disclosure of information by the Franchise Tax Board [*Unemp. Ins. Code § 1094(d)*; *see, e.g., Rev. & Tax. Code § 19545* (disclosure in judicial or adminstrative proceeding)].

[2] Exceptions

There are several exceptions to the foregoing provisions. Information regarding a recipient of unemployment compensation that must be made available to a federal agency charged with the administration of public works or

assistance through public employment is covered by *Unemp. Ins. Code § 321*. The exchange of information between the department and other state or federal agencies is covered by *Unemp. Ins. Code § 322*. Disclosures required to be made by the department to law enforcement agencies are covered by *Unemp. Ins. Code § 1095*. Disclosures required to be made by the department regarding entitlement of benefits and regarding employers' obligations and rights are set forth in *Unemp. Ins. Code § 1095(b)* and *(c)* and *Unemp. Ins. Code § 1095(d)* and *(e)*, respectively. Disclosures required to be made by the department regarding public social services and local relief assistance are set forth in *Unemp. Ins. Code § 1095(f)* and *(g)*, respectively.

Additional disclosures required to be made by the department are set forth in *Unemp. Ins. Code § 1095*. For example, information may be disclosed to enable an employer to fully discharge its obligations or safeguard its rights under the Unemployment Insurance Code or the Employment Development Act [*see Unemp. Ins. Code § 1 et seq*, § 9000 et seq.]; to enable federal, state, or local government departments or agencies to verify or determine the eligibility or entitlement of applicant for public social services; and to enable state or local governmental departments or agencies to pursue criminal, civil; or administrative remedies in connection with the unlawful application or receipt of relief under the Welfare and Institutions Code or to enable the collection of expenditures for medical assistance services under the Welfare and Institutions Code) [*Unemp. Ins. Code § 1095(d), (f), (h)*]. Disclosures required to be made by the department to public employee retirement systems are set forth in *Unemp. Ins. Code § 1095(j)*. Disclosures required to be made to the Division of Labor Standards Enforcement in the Department of Industrial Relations to enable it to seek criminal, civil, or administrative remedies in connection with the failure to pay, or the unlawful payment of, wages pursuant to *Lab. Code § 200 et seq.* (payment of wages) and *Lab. Code § 1720 et seq.* (relating to public works) are set forth in *Unemp. Ins. Code § 1095(k)*. Disclosures required to be made to federal, state, or local governmental departments or agencies relating to child support enforcement are set forth in *Unemp. Ins. Code § 1095(l)*. Disclosures required to be made to federal, state, or local governmental departments or agencies to assist in location of crime victims entitled to restitution and collection of restitution, fines, penalties, assessments, and fees owed to the county are set forth in *Unemp. Ins. Code § 1095(m)*. Disclosures required to be made by the department to provide an authorized governmental agency, such as a county district attorney or office of the Attorney General, with relevant information that relates to any specific workers' compensation insurance fraud investigation are set forth in *Unemp. Ins. Code § 1095(o)*. Disclosures required to enablecity and county planning agencies to develop economicforecasts are set forth in *Unemp. Ins. Code § 1095(r)*. Disclosure of wage and employer information to the State Department of Developmental Services to assist that department in the collection of moneys owed by the recipient, parent, or any other legally liable person for services and support provided by the department under specified programs is authorized by *Unemp. Ins. Code § 1095(s)*. Disclosure of information to enable the Contractors' State License Board to verify the employment history of an individual applying for a contractor's license [*see Bus. & Prof. Code § 7068*] is authorized by *Unemp. Ins. Code § 1095(v)*.

However, nothing in *Unemp. Ins. Code § 1095* authorizes or permits the use of information obtained in the administration of the Unemployment Insurance Code by any private collection agency [*Unemp. Ins. Code § 1095(t)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationFreedom of InformationDefenses & ExemptionsStatutory ExemptionsLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationGeneral Overview

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49-564 California Forms of Pleading and Practice--Annotated § 564.16

§ 564.16 Obtaining Employment Development Department Forms

Forms prescribed by the Employment Development Department may be ordered from the Employment Development Department, 800 Capitol Mall, Sacramento, California 95814. Form DE 3274 Rev. 14 (4-82), listing theforms and form numbers, may be used to place an order. Forms may also be ordered via the internet from www.edd.cahwnet.gov.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawGovernmental InformationGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationGeneral Overview

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[Reserved]

§§ 564.17[Reserved]

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49-564 California Forms of Pleading and Practice--Annotated § 564.30

§ 564.30 Governing Law

The organization and function of the Unemployment Insurance Appeals Board and the appointment and general duties of administrative law judges are governed by *Unemp. Ins. Code §§ 401-413*. Proceedings before administrative law judges and the appeals board are governed by *22 Cal. Code Reg. § 5000 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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49-564 California Forms of Pleading and Practice--Annotated § 564.31

§ 564.31 Unemployment Insurance Appeals Board

The Unemployment Insurance Appeals Board consists of seven members, two of whom are required to be attorneys [*Unemp. Ins. Code § 401*].

The appeals board meets as a whole at such times as the chairperson directs, to consider and pass on such matters as the chairperson may bring before it and to consider and decide cases which present issues of first impression or which will enable the board to achieve uniformity of decisions by the respective members [*Unemp. Ins. Code § 409*].

The appeals board as a whole may promulgate, amend, or rescind rules pertaining to hearing appeals and other matters falling within its jurisdiction [*Unemp. Ins. Code § 411*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationReview of Initial DecisionsLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationGeneral Overview

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49-564 California Forms of Pleading and Practice--Annotated § 564.32

§ 564.32 Appointment and Duties of Chief Administrative Law Judge

The chief administrative law judge is appointed by the appeals board and must be a member in good standing of the State Bar of California [*Unemp. Ins. Code § 405*]. This judge (1) serves as the board's chief executive in the administration of the activities of adminstrative law judges and their staffs, and (2) maintains a continuous review of the decisions of the administrative law judges from which no appeal is taken to uncover decisions which appear inconsistent with the law, with established judicial decisions, or with prior decisions of the board or with each other, and recommends such cases to the appeals board for certification to itself for a further hearing [*Unemp. Ins. Code § 406*; *see § 564.44*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 564.33 Appointment and Duties of Administrative Law Judges

The administrative law judges are appointed and their activities are directed by the appeals board or by its executive officer [*Unemp. Ins. Code § 404*]. There is no requirement that these judges be attorneys.

The administrative law judges are required to hear and render a decision in every matter in which a petition is filed or in which an appeal is taken to them as provided in the Unemployment Insurance Code [*Unemp. Ins. Code § 404*; *see* Parts II and III, *below*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationPresiding OfficersAdministrative Law JudgesAdministrative LawAgency AdjudicationPresiding OfficersDuties & PowersLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationGeneral Overview

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§ 564.34 Delegation by Appeals Board of Powers and Authority

The appeals board may delegate its power to any deputy, administrative law judge, or other person properly authorized by it in writing for the purposes of any investigation, hearing, or proceeding under *Unemp. Ins. Code §§ 100-4751* (relating to unemployment and disability compensation) [*Unemp. Ins. Code § 1959*]. It may also delegate to any one of its members or to a special examiner or administrative law judge the taking or hearing of evidence in any case before it [*Unemp. Ins. Code § 407*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 564.35 Rules as Governing Procedure

The manner in which disputed claims, appeals, and petitions are presented, the reports required from the claimant and from any employing unit, and the conduct of the hearings and appeals must be in accordance with the rules prescribed by the appeals board [*Unemp. Ins. Code § 1951*]. These rules are set forth in *22 Cal. Code Reg. § 5000 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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49-564 California Forms of Pleading and Practice--Annotated § 564.36

§ 564.36 Consolidation of Similar Matters

Cases before an administrative judge with respect to which the alleged facts and the points of law are the same must be consolidated for hearing [*see Unemp. Ins. Code § 1951*], provided that no substantial right of any party will be prejudiced [*22 Cal. Code Reg. § 5053*]. Cases before the Appeals Board involving similar facts and circumstances may also be consolidated [*22 Cal. Code Reg. § 5100*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 564.37 Representation by Counsel

[1] Claimant's Right

Any individual claiming benefits in any proceedings before the appeals board or its authorized representative may be represented by counsel or agent [*Unemp. Ins. Code § 1957*]. However, there is no constitutional right to state-appointed counsel [*Staley v. California Unemployment Ins. App. Bd. (1970) 6 Cal. App. 3d 675, 678, 86 Cal. Rptr. 294]* . Nevertheless, legal agencies that furnish free legal advice and representation to indigents may be available to the claimant [*see Staley v. California Unemployment Ins. App. Bd. (1970) 6 Cal. App. 3d 675, 678-679, 86 Cal. Rptr. 294]* .

[2] Counsel Fees

Any counsel or agent representing a claimant must not charge or receive for his or her services more than an amount approved by the appeals board; a violation of this provision is punishable by fine, imprisonment, or both [*Unemp. Ins. Code § 1957*]. If a fee is charged by an agent for representing a claimant before an administrative law judge and an issue as to the amount is raised by the claimant, the agent, or the judge, the agent must receive no more than an amount approved by the judge. The approved fee may be reviewed by the appeals board [*22 Cal. Code Reg. § 5011*]. If a fee is charged in a proceeding before the appeals board and an issue is raised as to the amount, the agent must receive no more than an amount approved by the board [*22 Cal. Code Reg. § 5011*].

[3] Authorization for Representation and Service of Notices

A form is provided by the department without charge for the use of an individual claiming benefits to authorize a counsel or an agent to represent the claimant in any proceedings before the appeals board or its administrative law judges or authorized representatives. If an authorization is filed, the appeals board or its administrative law judges must, on request by the claimant, serve copies of all notices and transcript pertinent to the proceedings on the claimant and his or her counsel or agent [*Unemp. Ins. Code § 1957.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewCivil ProcedureCounselGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationGeneral Overview

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§ 564.38 Administering Oaths, Taking Depositions, Certifying to Official Acts, and Issuing Subpoenas; Telephone Participation at Hearings

In any proceeding, hearing, investigation, or in the discharge of any duties imposed by law, any member of the appeals board, an administrative law judge, and any authorized employee designated by the board may administer oaths, take depositions, certify to official acts, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records [*Unemp. Ins. Code § 1953*; *see 22 Cal. Code Reg. § 5058* (witnesses and subpoenas); *see also Hill v. Brisbane (1944) 66 Cal. App. 2d 15, 17-18, 151 P.2d 578]* .

Obedience to subpoenas may be enforced by application to the superior court as set forth in *Gov. Code §§ 11180-11191* (relating to investigations and hearings by state agencies) [*Unemp. Ins. Code § 1954*]. However, the only duty of the court is to assist the department in the performance of its functions, and the court may not in the proceeding usurp the functions of the department [*Hill v. Brisbane (1944) 66 Cal. App. 2d 15, 20, 151 P.2d 578* (involving predecessor statute)].

A party, or a party's representative, must be allowed to participate in a hearing by telephone on the party's or representative's request and a showing of good cause [*Unemp. Ins. Code § 1951* (telephone participation must be in accordance with regulations by appeals board); *see also 22 Cal. Code Reg. § 5055*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationPresiding OfficersDuties & PowersAdministrative LawAgency InvestigationsScopeSubpoenasLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationGeneral Overview

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§ 564.39 Privilege Against Self-Incrimination

No person shall be excused from attending and testifying or from producing books, papers, correspondence, memoranda, and other records as required by a subpoena on the grounds that the testimony or evidence required may tend to incriminate the person or subject the person to a penalty or forfeiture. However, no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he or she is compelled to testify or produce evidence, documentary or otherwise, after having claimed the privilege against self-incrimination. But this does not exempt any individual from prosecution and punishment for perjury committed while so testifying [*Unemp. Ins. Code § 1955*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceAdmissibilityPrivilegeCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesPerjuryGeneral OverviewEvidencePrivilegesSelf-Incrimination PrivilegeExceptionsLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationGeneral Overview

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49-564 California Forms of Pleading and Practice--Annotated § 564.40

§ 564.40 Fees and Expenses

Neither the appeals board nor its representative may charge any individual claiming benefits fees of any kind [*Unemp. Ins. Code § 1956*].

Subpoenaed witnesses are allowed the fees prescribed in *Gov. Code § 68093*, relating to proceedings in the superior court. These fees and all expenses incurred by the Director of Employment Development or the appeals board, or the representative of either, are part of the expenses of administering the law. But this does not apply to charges for services of counsel or other agent representing the claimant, employer, or other interested person [*Unemp. Ins. Code § 1956*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsWitnessesLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationGeneral Overview

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49-564 California Forms of Pleading and Practice--Annotated § 564.41

§ 564.41 Rules of Evidence and Official or Judicial Notice

The appeals board and its representatives and administrative law judges are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure. Rather, they may conduct the hearings and appeals in such manner as to ascertain the substantial rights of the parties [*Unemp Ins. Code § 1952*]. Thus, any relevant evidence must be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of the evidence over objection in civil actions [*22 Cal. Code Reg. § 5062(e)*]. Under this standard, affidavits by persons as to facts within their personal knowledge would qualify as competent evidence provided the opposing party's right to cross-examine is fully protected [*Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 598, 155 Cal. Rptr. 63]* .

The taking of official or judicial notice by an administrative law judge or the board is authorized by *22 Cal. Code Reg. § 5009*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsEvidenceAdmissibilityGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceOfficial NoticeLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationGeneral Overview

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49-564 California Forms of Pleading and Practice--Annotated § 564.42

§ 564.42 Record of Proceedings

A full and complete record must be kept of all proceedings in connection with disputed claims. All testimony at any hearing held in California on a disputed claim must be recorded, and, when feasible, by a reporter in shorthand or by machine writing. The testimony need not be transcribed unless the disputed claim is further appealed [*Unemp. Ins. Code § 1952*; *see 22 Cal. Code Reg. § 5010* for party's right to transcript on appeal to appeals board].

Legal Topics:

For related research and practice materials, see the following legal topics:
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49-564 California Forms of Pleading and Practice--Annotated § 564.43

§ 564.43 Nonfinality of Administrative Law Judge's Decision

No decision of an administrative law judge is final if the appeals board sets it aside or removes the proceedings to itself for review and decision [*Unemp. Ins. Code § 413(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsRes JudicataAdministrative LawAgency AdjudicationReview of Initial DecisionsLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationReview

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49-564 California Forms of Pleading and Practice--Annotated § 564.44

§ 564.44 Board's Power to Transfer Case

[1] Before Decision of Administrative Law Judge

The appeals board acting as a whole may, on its own motion, by notice mailed to the Director of Employment Development and the parties prior to the mailing of an administrative law judge's decision, either (1) transfer the proceedings to another administrative law judge, or (2) remove the proceedings to itself for review and decision [*Unemp. Ins. Code § 412(a)*]. In this latter event, the board may order the taking of additional evidence and may affirm, reverse, modify, or set aside any findings or actions of the Employment Development Department from which the appeal or petition to the administrative law judge was taken. The board must promptly notify the department and the parties of its order or decision [*Unemp. Ins. Code § 412(b)*].

[2] After Decision of Administrative Law Judge

The appeals board acting as a whole may, on its own motion, by notice mailed to the Director of Employment Development and to the parties not later than 30 days after the mailing of an administrative law judge's decision, either (1) set aside the decision and remand the proceedings to another administrative law judge for review and decision, or (2) remove the proceedings to itself for review and decision [*Unemp. Ins. Code § 413(a)*]. In this latter event, the board may order the taking of additional evidence and may affirm, reverse, modify, or set aside the administrative law judge's decision. The board must promptly notify the department and parties to the proceedings of its order or decision [*Unemp. Ins. Code § 413(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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49-564 California Forms of Pleading and Practice--Annotated § 564.45

§ 564.45 Assignment of Cases to Board Members

The chairperson of the appeals board assigns cases before the board to any two of the board's members for consideration and decision. Their decision is the board's decision unless they fail to concur, in which event the chairperson or another board member designated by the chairperson is assigned to the panel to resolve the impasse. However, a case must be considered and decided by the appeals board acting as a whole at the request of any board member. Decisions of the board acting as a whole are made by a majority vote of its members [*Unemp. Ins. Code § 409*; *see 22 Cal. Code Reg. § 5108(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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49-564 California Forms of Pleading and Practice--Annotated § 564.46

§ 564.46 Board's Decisions

All decisions and orders of the board must be in writing [*Unemp. Ins. Code § 408*]. Each decision must contain a statement of the facts on which it is based and a statement of the decision itself and the reasons for it. Anything incorporated in a decision, other than a precedent decision (discussed *below*), must be physically attached to and made a part of the decision [*Unemp. Ins. Code § 409*]. If a request for review may be taken, the board must attach to its decision an explanation of the party's right to seek such review [*Unemp. Ins. Code § 410*].

Except for action taken by a judicial tribunal as permitted or required by law, a decision of the appeals board is final and binding on the Director of Employment Development with respect to the parties involved in the particular appeal [*Unemp. Ins. Code § 410*]. However, the director has the right to seek judicial review from an appeals board decision regardless of whether or not he or she appeared or participated in the appeal to the administrative law judge or to the appeals board [*Unemp. Ins. Code § 410*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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49-564 California Forms of Pleading and Practice--Annotated § 564.47

§ 564.47 Costs, Penalties, and Interest

Costs are not awarded in hearings on appeal by the appeals board. However, if the claimant or an employer acted in bad faith and without reasonable basis for appeal, a penalty not exceeding 10 percent of the amount finally awarded on the appeal may be taxed against and deducted from the award by the appeals board and placed in the Unemployment Fund. If a penalty is assessed against an employer, his or her account is debited with the amount of the penalty [*Unemp. Ins. Code § 1958*]. A claimant is not entitled to recover interest on unemployment insurance benefits previously denied by the Employment Development Department but ordered by an administrative law judge. Interest may only be awarded by a superior court in a judicial action reviewing the administrative denial of benefits [In re Kalem (1993) Cal. Unemp. Ins. Appeals Bd. Prec. Dec. No. P-B-476; *see also Aguilar v. Unemployment Ins. Appeals Bd. (1990) 223 Cal. App. 3d 239, 245-246, 272 Cal. Rptr. 696* ; *Civ. Code § 3287(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationReview of Initial DecisionsCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationReview

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49-564 California Forms of Pleading and Practice--Annotated § 564.48

§ 564.48 Reconsideration

After a decision of the appeals board has become final, the matter shall not be reopened, reconsidered, or reheard, and the decision shall not be changed except to correct clerical errors. However, the appeals board, acting as a whole, may on its own motion reconsider a previously issued decision solely to determine whether or not such decision shall be designated as a precedent decision (discussed *below*) [*22 Cal. Code Reg. § 5108(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationReview of Initial DecisionsLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationReview

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§ 564.49 Time to Appeal From Board Decision

Notwithstanding any other provision of law, the right of the Employment Development Director, or of any other party except as provided by *Unemp. Ins. Code §§ 1241* (actions to recover contributions), 1243 (decisions denying protest of charges to reserve account), and 5313 (relating to work incentive and employment preparation programs), to seek judicial review from a decision of the Unemployment Insurance Appeals Board must be exercised not later than six months after the date of the decision or the date on which the decision is designated a precedent decision (discussed *below*), whichever is later [*Unemp. Ins. Code § 410*; *see Tarkington v. California Unemployment Ins. Appeals Bd. (2009) 172 Cal. App. 4th 1494, 1502-1508, 92 Cal. Rptr. 3d 131* (six-month period under *Unemp. Ins. Code § 410* is subject to equitable tolling while plaintiff pursues alternative remedy reasonably and in good faith)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationReview

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§ 564.50 Effect of Findings, Judgment, Conclusion, and Order on Separate Actions or Proceedings

Any finding of fact or law, judgment, conclusion, or final order made by a hearing officer, administrative law judge, or any person with authority to make findings of fact or law in any action or proceeding before the appeals board, shall not be conclusive or binding in any separate or subsequent action or proceeding, and shall not be used as evidence in any separate or subsequent action or proceeding, between an individual and his or her present or prior employer brought before an arbitrator, judge, court, or judge of California or the United States, regardless of whether the prior action was between the same or related parties or involved the same facts [*Unemp. Ins. Code § 1960*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsRes JudicataLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationGeneral Overview

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49-564 California Forms of Pleading and Practice--Annotated § 564.51

§ 564.51 Precedent Decision

[1] Designation

The appeals board acting as a whole may designate certain of its decisions as precedents and may on its own motion reconsider a previously issued decision solely to determine whether it shall be designated as a precedent decision [*Unemp. Ins. Code § 409*; *see 22 Cal. Code Reg. § 5108(d)* (*discussed under § 564.163*)]. Any decision so designated must be identified in such a manner as to clearly show that it is a precedent and must be published in a manner to make it available for public use, although a charge to defray the cost of publication and distribution may be made [*Unemp. Ins. Code § 409*; *see 22 Cal. Code Reg. § 5109*].

The director and the administrative law judges are controlled by precedent decisions except as modified by judicial review [*Unemp. Ins. Code § 409*; *see, e.g., Gilles v. Department of Human Resources Development (1974) 11 Cal. 3d 313, 320-321, 113 Cal. Rptr. 374, 521 P.2d 110]* .

The designation of a decision or part of a decision, or failure to designate a decision or part of a decision, as a precedent decision is not subject to judicial review [*Gov. Code § 11425.60*; *Unemp. Ins. Code § 409*].

[2] Declaratory Relief Action to Challenge Validity

Precedent decisions are akin to agency rulemaking because they announce how governing law will be applied in future cases and, for all practical purposes, are regulations [*Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1981) 29 Cal. 3d 101, 109, 172 Cal. Rptr. 194, 624 P.2d 244]* . Thus, any interested person or organization may bring a declaratory relief action in the superior court to obtain a judicial declaration as to the validity of a precedent decision [*Unemp. Ins. Code § 409.2*; *see § 564.260*]. Like *Gov. Code § 11350*, which gives interested persons the right to obtain a judicial declaration as to the validity of any regulation and allows those affected by a regulation to test its legality before risking violation, *Unemp. Ins. Code § 409.2* confers standing on nonparties to seek a declaration as to the validity of a precedent decision [*Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1981) 29 Cal. 3d 101, 108-109, 172 Cal. Rptr. 194, 624 P.2d 244]* .

In a declaratory relief action brought under *Unemp. Ins. Code § 409.2* by a nonparty to the board's precedential decision, the court may determine only whether the board decision accords with the law that would govern if the rule announced in the board decision had been articulated as a regulation. There should be no review of the underlying record or new evidence to discover whether the board correctly resolved factual disputes. The board's version of those facts may not be disturbed unless it lacks substantial support on the face of the decision [*Pacific Legal Found. v. Unemployment Ins. Appeals Bd. (1981) 29 Cal. 3d 101, 111, 172 Cal. Rptr. 194, 624 P.2d 244* ; *Messenger Courier Assn. of Americas v. California Unemployment Ins. Appeals Bd. (2009) 175 Cal. App. 4th 1074, 1086, 96 Cal. Rptr. 3d 797*].

[3] Procedure on Reversal or Declaration of Invalidity

If a final judgment of a court of competent jurisdiction reverses a precedent decision or declares it invalid, the board, acting as a whole, must promptly modify the decision to conform in all respects to the court's judgment. The modified precedent decision supersedes the prior precedent decision for all purposes, and the board must promptly notify the director, the administrative law judges, and all other subscribers to the precedent decisions of the modified precedent decision [*Unemp. Ins. Code § 409.1*].

By referring separately to reversals and declarations of invalidity, *Unemp. Ins. Code § 409.1* reflects the distinction between the review rights accorded the original parties on the one hand and interested third persons on the other. In actions brought by the former, the court may review the administrative record and "reverse" the board decision, altering the outcome between the parties. The board's conforming modifications take account of that effect, and the decision is superseded to the full extent the reversal may require. However, a judicial declaration of invalidity (*see § 564.51[2]*) in an action brought by a third person does not alter the operative impact of the decision between claimants and employers. In such an action, the court may determine only whether the board decision accords with the law that would govern were the rule announced articulated as a regulation [*Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1981) 29 Cal. 3d 101, 110-111, 172 Cal. Rptr. 194, 624 P.2d 244]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsRes JudicataAdministrative LawJudicial ReviewGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationReview

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[Reserved]

§§ 564.52[Reserved]

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§ 564.70 Governing Law

Contributions to the Unemployment and Disability Funds and reports are governed by *Unemp. Ins. Code §§ 901-1243*.

Definitions of terms used in these sections are set forth in *Unemp. Ins. Code §§ 901-906*. "Wages," the basis of the contribution, is defined in *Unemp. Ins. Code §§ 926-940* and 22 Cal. Code Reg. §§ 926-1-937-1.

Contribution rates are covered by *Unemp. Ins. Code §§ 976-994* and 22 Cal. Code Reg. §§ 976.7-1-991(b)-1. Reserve accounts are covered by *Unemp. Ins. Code §§ 1025-1037* and 22 Cal. Code Reg. §§ 1026-1-1036-2. Transfer of reserve accounts are covered by *Unemp. Ins. Code §§ 1051-1060* and 22 Cal. Code Reg. § 1051-1-1060-1. Records, reports, and contribution payments are covered by *Unemp. Ins. Code §§ 1085-1098* and 22 Cal. Code Reg. §§ 1085-1-1097-1. Payment of reported contributions is covered by *Unemp. Ins. Code §§ 1110-1116* and 22 Cal. Code Reg. §§ 1110-1 and 1111-1. Assessments are covered by *Unemp. Ins. Code §§ 1126-1142*. Refunds and overpayments are covered by *Unemp. Ins. Code §§ 1176-1185* and 22 Cal. Code Reg. §§ 1178(c)-1-1181-1.

Acts constituting violations of law and penalties imposed are set forth in *Unemp. Ins. Code §§ 1114* and *2101 et seq.*

The manner in which notices may be served by the Employment Development Director, an administrative law judge, or the Unemployment Insurance Appeals Board is covered by *Unemp. Ins. Code § 1206*. Administrative appellate review is covered by *Unemp. Ins. Code §§ 1221-1224* and 22 Cal. Code Reg. § 5000 *et seq.*. Judicial review is covered by *Unemp. Ins. Code § 1241-1243*.

The election of an employing unit not otherwise subject to *Unemp. Ins. Code §§ 100-4751* (relating to unemployment and disability compensation) to be covered by those provisions and termination of the election are covered by *Unemp. Ins. Code §§ 701-713* and 22 Cal. Code Reg. § 701-1-710-1. Alternative methods of financing the liability for unemployment compensation benefits, extended duration benefits, and federal state extended benefits of nonprofit organizations and public entities which have made the election are authorized by *Unemp. Ins. Code §§ 801-806* and 22 Cal. Code Reg. §§ 803-1-803-4 [*see also Unemp. Ins. Code §§ 702.1(f)* (nonprofit organizations), 710(c) (public entities)]. The financing of unemployment insurance coverage for public school employees is covered by *Unemp. Ins.*

Code §§ 821-832.

Worker contributions to the Disability Fund [*see Unemp. Ins. Code § 3001*] are covered by *Unemp. Ins. Code §§ 984-990* and *2901-2903*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationCoverage & Definitions

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§ 564.71 Definitions

[1] "Employer"

"Employer" means any "employing unit" that employs one or more persons in the current or preceding year and pays "wages" exceeding $100 in any calendar quarter [*Unemp. Ins. Code § 675*; *see also Unemp. Ins. Code § 676 et seq.*, and *Unemp. Ins. Code § 10200 et seq.*].

Whether an individual or entity is the employer of specific employees is determined under common law rules applicable in determining the employer-employee relationship [*Unemp. Ins. Code § 606.5(a)*]. However, specific statutory rules govern this determination for individuals or entities that are considered temporary services employers or leasing employers because they contract with clients or customers to supply workers to perform services for the client or customers [*Unemp. Ins. Code § 606.5(b)-(d)*; *see also Unemp. Ins. Code § 606*; 22 Cal. Code Reg. § 606-1 (who is employer of individual employed to perform work of or assist employee)].

[2] "Employing Unit"

"Employing unit" is any individual or type of organization which has in its employ one or more individuals performing services for it within California [*Unemp. Ins. Code § 135(a)*].

An acquisition or change in the form or organization of an existing business enterprise does not create a new employing unit if there is continuity of control [*Unemp. Ins. Code § 135.1(a)*]. Also, if two or more business enterprises are united by factors of control, operation, and use, the Employment Development Director may determine that the business enterprises are one employing unit [*Unemp. Ins. Code § 135.2(a)*].

[3] "Calendar Quarter"

"Calendar quarter" is the three consecutive calendar months periods ending on March 31st, June 30th, September 30th, or December 31st, or the equivalent thereof as may be prescribed by "authorized regulations" (defined *below*) [*Unemp. Ins. Code § 129*].

[4] "Employment"

"Employment" is defined generally as meaning any service, including service in interstate commerce, performed for "wages" under a written or oral, express or implied contract of hire [*Unemp. Ins. Code § 601*]. Specific kinds of service included in the term employment are set forth in *Unemp. Ins. Code §§ 601.5-611*; *see also* 22 Cal. Code Reg. §§ 606-1 (specifying when employer has constructive knowledge of assistant and substitute employees) and 607-1 (relating to segregation of exempt services and subject employment). Services excluded from the term "employment" are set forth in *Unemp. Ins. Code § 629 et seq.* and 22 Cal. Code Reg. § 629-1 et seq. "Employment" for the purposes of disability insurance is defined in *Unemp. Ins. Code §§ 2606, 2606.4*, and *2606.5*.

[5] "Employee"

The term "employee" includes the following: (1) any corporate officer [*Unemp. Ins. Code § 621(a)*]; (2) any individual who has the status of an employee under the usual common law rules applicable in determining the employer-employee relationship [*Unemp. Ins. Code § 621(b)*; *see* 22 Cal. Code Reg. § 621(b)-1; *see also* Messenger Courier Assn. of Americas v. California Unemployment Ins. Appeals Bd. (2009) 175 Cal. App. 4th 1074, 1089-1092, 96 Cal. Rptr. 3d 797 (common-law rules for this purpose include complementary criteria developed in case law and factors identified in Restatement Second of Agency)]; and (3) certain agent or commission drivers engaged in distributing specified food products or laundry or drycleaning services, specified traveling or city salespersons, and certain home workers [*Unemp. Ins. Code § 621(c)(1)*; *see* 22 Cal. Code Reg. § 621(c)-1(a)]. However, a person is not an "employee" under the provisions of *Unemp. Ins. Code § 621(c)(1)* if he or she has a substantial investment in facilities used in connection with the performance of the services, other than in facilities for transportation, or if the services are in the nature of a single transaction not part of a continuing relationship with the employing unit for which the services are performed [*Unemp. Ins. Code § 621(c)(2)*; *see* 22 Cal. Code Reg. § 621(c)-1(b)].

"Employee" also includes any individual [*Unemp. Ins. Code § 621.5*]:

- who is an employee pursuant to *Unemp. Ins. Code § 601.5* (service in artistic or literary capacity performed pursuant to collective bargaining agreement between employer and labor organization in motion picture, radio, or television industry) or *Unemp. Ins. Code § 686* (contract for creation of specially ordered or commissioned work of authorship) [*Unemp. Ins. Code § 621(d)*];

- whose services are in subject employment pursuant to an election for coverage under any provision of *Unemp. Ins. Code §§ 701-713* (relating to elective coverage) [*Unemp. Ins. Code § 621(e)*]; and

- who is an employee, pursuant to *Lab. Code § 2750.5* (relating to disability insurance and raising rebuttable presumption that worker is employee rather than independent contractor), of a person who holds, or does not hold but is required to obtain, a valid state contractor's license pursuant to *Bus. & Prof. Code § 7000 et seq.* (Contractors License Law) [*see Hunt Bldg. Corp. v. Bernick (2000) 79 Cal. App. 4th 213, 219-220, 93 Cal. Rptr. 2d 883* (unlicensed subcontractors and their employees are deemed statutory employees of general contractor for purposes of Unemployment Insurance Code)].

The term "employee" does not include a director of a corporation or association performing services in his or her capacity as a director, but this does not apply to service included in "employment" (discussed *above*) pursuant to *Unemp. Ins. Code §§ 605, 608, 709*, and *710* [*Unemp. Ins. Code § 622(a)*]. Services included and excluded from the term "services in his or her capacity as a director" are set forth in *Unemp. Ins. Code § 622(b)* and *(c)*.

For the meaning of "employee," as used in *Unemp. Ins. Code §§ 13000-13101*, relating to the withholding of state taxes on wages, see *Unemp. Ins. Code §§ 13004, 13004.1*.

[6] "Wages"

The term "wages" is variously defined throughout the Unemployment Insurance Code and its meaning depends on the context in which it is used. For the purposes of *Unemp. Ins. Code §§ 901-1243* (relating to contributions and reports), and except as otherwise provided by *Unemp. Ins. Code §§ 926-940* (relating to wages as the basis of the contribution), "wages" means all remuneration payable to an employee for personal services, whether by private agreement or consent or by force of statute, including commissions and bonuses and the reasonable cash value of all remuneration payable to an employee in any medium other than cash [*Unemp. Ins. Code § 926*; *see 22 Cal. Code Reg. §§ 926-1-926-7*]. In this context, the term also means all remuneration payable for personal services, as specified in *Unemp. Ins. Code § 926, above*, when the legal obligation for the payment of the wages is assumed by an employer specified in *Unemp. Ins. Code § 678* (relating to motion picture, radio, and television industry), and the first or prior employer for whom the personal services were originally performed is relieved of the legal obligation for the payment of the remuneration [*Unemp. Ins. Code § 926.5*]. The term includes all tips which are received while performing services which constitute employment and included in a written statement furnished to the employer pursuant to *I.R.C. § 6053(a)* [*Unemp. Ins. Code § 927*]. For the purposes of specified code sections, "wages" means taxable wages as well as wages that would be taxable except for the limitations on taxable wages provided under *Unemp. Ins. Code §§ 930* ($7,000 during calendar year) and 985 (relating to employee contributions) [*Unemp. Ins. Code § 940*].

For the meaning of "wages," as used in *Unemp. Ins. Code §§ 13000-13101*, relating to the withholding of state taxes, *see Unemp. Ins. Code § 13009*.

[7] "Authorized Regulations"

"Authorized regulations" are regulations promulgated pursuant to the provisions of *Gov. Code § 11340 et seq.* [*Unemp. Ins. Code § 127*].

[8] Other Terms

Other terms, as used in *Unemp. Ins. Code § 901 et seq.* (relating to employer and employee contributions and reports), defined by statute are:

- "computation date" [*Unemp. Ins. Code § 902*],
- "rating period" [*Unemp. Ins. Code § 903*],
- "net balance of reserve" [*Unemp. Ins. Code § 904*],
- "average base pay roll" [*Unemp. Ins. Code § 905*], and
- "contributions paid on his own behalf" [*Unemp. Ins. Code § 906*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationCoverage & Definitions

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§ 564.72 Registration With Employment Development Department (EDD)

Within 15 days after becoming an employer, an employing unit must register with the Employment Development Department (EDD) on the prescribed form [*Unemp. Ins. Code § 1086*]. Any employing unit that fails to register with the EDD because of intentional disregard or intent to evade *Unemp. Ins. Code § 100 et seq.* or authorized regulations is subject to a penalty of $100 for each nonreported employee [*Unemp. Ins. Code § 1126.1(a)*]. This penalty is in addition to the penalty for failure to make a reconciliation return [*Unemp. Ins. Code § 1126.1(a)*; *see Unemp. Ins. Code § 1126*; *see § 564.73[4]*]. The number of unreported employees is the highest number of employees determined by the EDD to have been engaged by the employer during any single calendar quarter included in the assessment issued under *Unemp. Ins. Code § 1126* [*Unemp. Ins. Code § 1126.1(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationCoverage & Definitions

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§ 564.73 Reports, Returns, and Work Records

[1] Requirements

Each employer must file with the Employment Development Director within the time required for payment of employer contributions a report of contributions and a report of wages paid to its workers [*Unemp. Ins. Code § 1088(a)*; *see* 22 Cal. Code Reg. § 1088-1(a)]. The report of contributions must be filed within the time required by *Unemp. Ins. Code § 1110(b)* for payment of worker contributions and must contain the employer's business name, address, and account number, the total amount of worker contributions due, and such other information as the director prescribes [*Unemp. Ins. Code § 1088(b)*; *see* 22 Cal. Code Reg. § 1088-1(b)]. Special procedures apply if the Director determines that an employer reporting wages is not the correct employer of the employees whose wages are reported [*Unemp. Ins. Code § 1127.5*]. Employers and self-employed individuals who have elected under *Unemp. Ins. Code § 708(a)* to be covered by unemployment and disability insurance must file a separate report of contributions to report wages subject to contributions for disability insurance [*Unemp. Ins. Code § 1088(c)*].

Under the Make it Easy on the Family and Small Business Act, employers who employ individuals to perform domestic service (as described in *Unemp. Ins. Code §§ 682* and *684*) are authorized to file the report required by *Unemp. Ins. Code § 1088* by telephone [*Unemp. Ins. Code § 1118* (operative July 1, 1997; establishing specific procedures and content for reporting by telephone)].

In addition to information in the report of contributions and report of wages under *Unemp. Ins. Code § 1088*, employers are required to file with the EDD specified information on new employees [*see Unemp. Ins. Code § 1088.5(a)*]. An employer generally must submit the report within 20 days of hiring any new employee who works in California and to whom the employer anticipates paying wages [*Unemp. Ins. Code § 1088.5(b), (d)(1)*; *see Unemp. Ins. Code § 1088.5(d)(2)* (semimonthly reporting schedule for employers reporting magnetically or electronically)]. The report must include the employee's name, address, social security number, and starting work date; the employer's name, address, state employer identification number (if one has been issued), and federal taxpayer identification number [*Unemp. Ins. Code § 1088.5(d)(4)*]. The failure to timely report the hiring of an employee, unless the failure is due to good cause, will be subject to the assessment of a penalty by the EDD [*Unemp. Ins. Code § 1088.5(e)*]. The information reported may be

used [*Unemp. Ins. Code § 1088.5(f)*]:

- By the EDD to perform its duties under the Unemployment Insurance Code;

- To locate individuals for purposes of establishing paternity and establishing, modifying, and enforcing child support obligations [*see also* Welf. & Inst. code § 11478.51];

- To administer employment security and workers' compensation programs;

- To provide employer or employee information to the Franchise Tax Board for the purpose of tax enforcement; and

- To verify eligibility of applicants for, or recipients of, public assistance programs.

For purposes of this reporting requirement, an "employer" includes a labor union hiring hall [*Unemp. Ins. Code § 1088.5(g)*]. The federal government and its departments, agencies, and instrumentalities are not subject to the reporting requirement [*Unemp. Ins. Code § 1088.5(c)(1)*]. A state agency employer is not required to report an employee performing intelligence or counterintelligence functions, if the head of the agency has determined that reporting the employee would endanger the safety of the employee or compromise an ongoing investigation or intelligence mission [*Unemp. Ins. Code § 1088.5(c)(2)*].

Every employing unit must keep an accurate work record of all its workers and their status (employed, on layoff, or on leave of absence) and the other matters specified in *Unemp. Ins. Code § 1085*. The employing unit must furnish to the Employment Development Director, administrative law judge, or deputy, on demand, a sworn statement of the matters contained in the work records. If the records are kept pursuant to contract with a financial institution as defined in *Gov. Code § 7465*, the employing unit must also furnish to the director or to the director's authorized representative an authorization for disclosure of the account or accounts. The records must be open to inspection and subject to being copied by the director or his or her authorized representative at any time during the employing unit's business hours. Any claimant or his or her authorized representative at a hearing before a deputy or administrative law judge or the appeals board must be supplied with information from the records to the extent necessary for the proper presentation of the claim [*Unemp. Ins. Code § 1092*].

Employers that have employees who receive tips must furnish each employee with a written statement showing the excess of contributions required for the tips included in the employee's federal income tax tip report over contributions withheld with regard to the employee's wages generally. Employers must also file a copy of this statement with the Employment Development Director [*Unemp. Ins. Code § 1088.6*].

[2] Consequences of Failure to Provide

If an employer fails to provide any records or reports necessary for the proper disposition of a claim for benefits, it is presumed that the claimant is entitled to the maximum total amount of benefits payable, unless the employer establishes by other evidence that a lesser amount is properly due. Special rules apply to any claimant who has earned wages for more than one employer during his or her base period [*Unemp. Ins. Code § 1093*].

In addition, an employer that fails to timely provide the report of contributions and wage report required by *Unemp. Ins. Code § 1088(a)*) [*see § 564.73[1]*] must pay a penalty equal to 10 percent of the amount of worker contributions required by the return [*Unemp. Ins. Code § 1112.5(a)*]. The penalty is in addition to the penalties required by *Unemp. Ins. Code §§ 1112* and *1126* [*Unemp. Ins. Code § 1112.5(a)*].

Employers who fail to provide the statement showing the excess of contributions required for the tips included in an

employee's federal income tax tip report over contributions withheld with regard to the employee's wages generally [*see § 564.73[1]*] are liable for the excess contributions [*Unemp. Ins. Code § 1088.6*].

[3] Use of Agent for Workers Employed by Several Employers

If a number of workers are normally employed during the year by several employers, those employers may, with the approval of the Employment Development Director, appoint an agent to prepare and file the required reports for those workers [*Unemp. Ins. Code § 1096*; *see also Unemp. Ins. Code §§ 1097, 1098*].

[4] Annual Reconciliation Return

In addition to the reports of wages and worker contributions [*see § 564.73*], each employer must file with the director an annual reconciliation return showing the total amount of wages [*see Unemp. Ins. Code §§ 976, 976.6*], employer contributions [*see Unemp. Ins. Code §§ 976, 976.6*], and worker contributions [*see Unemp. Ins. Code § 984*], as well as amounts withheld as California personal income tax [*see Unemp. Ins. Code §§ 13020, 13028*], and any other information required by the director [*Unemp. Ins. Code § 1088(e)*]. This return is due the first day of January following the close of the prior calendar year; it is delinquent if not filed by the last day of January [*Unemp. Ins. Code § 1088(e)*]. The penalty for failure to file this return is set forth in *Unemp. Ins. Code § 1117*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationCoverage & Definitions

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49-564 California Forms of Pleading and Practice--Annotated § 564.74

§ 564.74 Employer Contributions

Employer contributions accrue and become payable to the Employment Development Department for the Unemployment Fund [*see Unemp. Ins. Code § 1521*] by every employer, except an employer defined in *Unemp. Ins. Code § 676* (employer for which services are performed that are included in "employment" solely for purposes of *Unemp. Ins. Code § 2601 et seq.*, relating to disability compensation) for each calendar year with respect to wages paid for employment. The contributions must not be deducted in whole or in part from the employees' wages [*Unemp. Ins. Code § 976*].

The United States Supreme Court has held that, for purposes of employer taxes under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act [*see I.R.C. §§ 3111, 3301 et seq.*], back wages are allocated to the year in which the wages are actually paid, rather than the year in which they should have been paid [*United States v. Cleveland Indians Baseball Co. (2001) 532 U.S. 200, 205-220, 121 S. Ct. 1433, 149 L. Ed. 2d 401, 411-418]* .

For further discussion of employer contributions, see Wilcox, California Employment Law, ch. 80 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationCoverage & DefinitionsTax LawFederal Tax Administration & ProcedureTax Credits & LiabilitiesEstimates & Withholding (IRC secs. 3101-3102, 3301-3310, 3401-3406, 6315, 6654-6655)FUTA Rate of Tax

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49-564 California Forms of Pleading and Practice--Annotated § 564.75

§ 564.75 Reserve Accounts

[1] Charges and Credits

The Employment Development Director is required to keep separate records of the amounts paid into the Unemployment Fund by each employer or chargeable to the employer as benefits and to maintain a separate reserve account for each employer in which contributions paid on the employer's own behalf are credited [*Unemp. Ins. Code §§ 1025, 1026(a)*; *see Altaville Drug Store, Inc. v. Employment Development Department (1988) 44 Cal. 3d 231, 234, 242 Cal. Rptr. 732, 746 P.2d 871]* . The director also credits the interest earned by the Unemployment Fund to each positive reserve employer account in proportion to the amount the account bears to the total of all positive reserve accounts [*Unemp. Ins. Code § 1026(c)*]. Credits and charges are governed by *Unemp. Ins. Code § 1026(d), (e)*.

[2] Annual Statements

At least once each year, every employer is furnished with an itemized statement of the charges to the reserve account, and with a statement of the reserve accounts showing credits and charges, the net balance of the reserve account, and the contribution rate for the applicable rating period [*Unemp. Ins. Code § 1033*].

[3] Protest of Charge or Credit

Except as to corrections made by the director as provided in *Unemp. Ins. Code § 1036*, the contribution rate and other items shown on the statement are final unless a protest is filed [*Unemp. Ins. Code § 1034*; *see* 22 Cal. Code Reg. § 1034-1].

A written protest on any item shown may be filed by the employer within 60 days or any extension thereof after the date the statement of charges or credits and charges was mailed [*Unemp. Ins. Code § 1034*; 22 Cal. Code Reg. § 1034-1(a)]. The protest must include the matter set forth in 22 Cal. Code Reg. § 1034-1(b). The protest must also set forth the specific grounds on which it is made [*Unemp. Ins. Code § 1034*]. However, no protest may be made on the grounds that a claimant was ineligible for a benefit payment if (1) the employer was notified of the filing of the claim or of a determination of the claimant's eligibility and failed to file a timely appeal on the benefit claim, or (2) a final decision of

an administrative law judge or of the appeals board affirmed the payment of benefits [*Unemp. Ins. Code § 1034(a)*]. An employer may file a protest on the grounds that the director did not allow voluntary unemployment insurance contributions to the reserve account in accordance with *Unemp. Ins. Code § 976.5*. The protest must be filed within 30 days after the last working day of March [*Unemp. Ins. Code § 1034(b)*].

The director is required to give the employer notice of his or her action on the protest [*Unemp. Ins. Code § 1035*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationCoverage & Definitions

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49-564 California Forms of Pleading and Practice--Annotated § 564.76

§ 564.76 Collection of Contributions by Director

The collection of employee and employer contributions required to be paid to the department by any employing unit is governed by *Unemp. Ins. Code §§ 1701-1855*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationCoverage & Definitions

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49-564 California Forms of Pleading and Practice--Annotated § 564.77

§ 564.77 Civil Action to Prevent Collection Prohibited

No injunction, writ of mandate, or other legal or equitable process shall issue in any suit, action, or proceeding in any court against the state or any state officer to prevent or enjoin the collection of any contribution sought to be collected under the provisions of the Unemployment Insurance Code [*Unemp. Ins. Code § 1851*; *see Cal. Const., art. XIII, § 32*; *see also Lorco Properties, Inc. v. Department of Benefit Payments (1976) 57 Cal. App. 3d 809, 815, 129 Cal. Rptr. 312]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationCoverage & Definitions

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49-564 California Forms of Pleading and Practice--Annotated § 564.78

§ 564.78 Administrative Appellate Review

[1] Levels of Appellate Review

There are two levels of administrative appellate review of (1) the denial of a protest of charges to an employer's reserve account, (2) the denial or granting of an application for transfer of a reserve account, (3) a notice of assessment, (4) the denial of a claim for refund or credit, and (5) any notice under specified code sections made or given by the Director of Employment Development [*see Unemp. Ins. Code §§ 1034* (denial of protest), 1051-1055, 1243 (denying or granting transfer of reserve accounts), 1221 (notice of jeopardy assessment), 1222 (notice of assessment, denial of claim for refund or credit, or notice under specified code sections)]. The first consists of a review by an administrative law judge and the second consists of a review by the Unemployment Insurance Appeals Board.

[2] Review by Administrative Law Judge

The first of the two levels of appellate review is a review by an administrative law judge on petition for review or reassessment, as the case may be [*see Unemp. Ins. Code §§ 1221, 1222*]. The petition must include the name of the petitioner; the employer account number, if any, of the petitioner; the mailing address of the petitioner; the name and mailing address of any representative filing the petition; and the name and social security number of any claimant who is a party [*22 Cal. Code Reg. § 5008(b)*]. The petition may also include a telephone number for the petitioner; an electronic address of the petitioner; the date or case number of the underlying department action, decision, or order; a concise statement of reasons for the petition; any request for language assistance or special accommodation; and a dated signature of the petitioner [*22 Cal. Code Reg. § 5008(c)*]. The duty of the administrative law judge to review the matter and, if requested by petitioner, to grant a hearing is set forth in *Unemp. Ins. Code § 1223*.

[3] Review by Unemployment Insurance Appeals Board

The second level of appellate review is by appeal from the administrative law judge's decision or order to the Unemployment Insurance Appeals Board [*see Unemp. Ins. Code §§ 1034* (review of decision on denial of protest of charges to employer's reserve account), 1224 (review of decision on assessment, denial of claim for refund or credit, or specified notices), 1243 (review of decision on denial of protest under *Unemp. Ins. Code § 1034* or denial or granting of

application for transfer of reserve account)].

Within 30 days after service of notice of the administrative law judge's decision, or any extension of that period, the petitioner or director may file an appeal with the appeals board. If the administrative law judge fails to serve notice of the decision on a petition for review of the denial of a claim for refund or credit within 60 days after the petition is filed, the petitioner may consider the petition denied and file the appeal [*Unemp. Ins. Code § 1224(a)*].

The appeal must include the name of the appellant; the employer account number, if any, of the appellant; the mailing address of the appellant; the name and mailing address of any representative filing the appeal; and the name and social security number of any claimant who is a party [*22 Cal. Code Reg. § 5008(b)*]. The appeal may also include a telephone number for the appellant; an electronic address of the appellant; the date or case number of the underlying department action, decision, or order; a concise statement of reasons for the appellant; any request for language assistance or special accommodation; and a dated signature of the appellant [*22 Cal. Code Reg. § 5008(c)*].

If an appeal is not filed within the time allowed, the decision of the administrative law judge is final at the expiration of that time. Any assessment involved is also final at the same time except when the administrative law judge's decision requires the adjustment of an assessment by granting a portion of a petition or by increasing an assessment; in this event, the assessment is final 30 days after service on the petitioner by the director of a statement of amounts due setting forth the adjusted liability pursuant to the decision [*Unemp. Ins. Code § 1224(a)*].

If an appeal is taken to the appeals board, the board may decrease or increase the amount of the assessment involved. If the appeals board's order or decision requires an adjustment of an assessment by granting a portion of the petition or by increasing an assessment, the order or decision and assessment become final 30 days after service on the petitioner by the director of a statement of amounts due setting forth the adjusted liability pursuant to the appeals board's decision or order. In all other cases, the appeals board's order or decision and any assessment become final 30 days after service on the petitioner of notice of the order or decision [*Unemp. Ins. Code § 1224(b)*].

[4] Effect of Decision and Explanation of Right to Judicial Review

A decision of the Unemployment Insurance Appeals Board is final, except for such action as may be taken by a judicial tribunal as permitted or required by law [*Unemp. Ins. Code § 410*]. If a request for review may be taken, the appeals board must attach to its decisions an explanation of the party's right to seek such review [*Unemp. Ins. Code § 410*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationReview of Initial DecisionsLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationCoverage & DefinitionsLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationReview

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49-564 California Forms of Pleading and Practice--Annotated § 564.79

§ 564.79 Judicial Review

[1] Claim for Refund or Credit as Prerequisite

No suit or proceeding shall be maintained in any court for the recovery of contributions, interest, or penalties alleged to have been erroneously or illegally assessed or collected unless a claim for refund or credit has been filed [*Unemp. Ins. Code § 1241(a)*].

[2] When Action May Be Filed

[a] Generally

Except as provided by *Unemp. Ins. Code §§ 1241* (*discussed under § 564.79[2][b]*), 1243 (*discussed under § 564.79[2][d]*), and 5313 (relating to work incentive programs), a party's right to seek judicial review from an appeals board decision must be exercised not later than six months after the date of the board's decision or the date on which the decision is designated as a precedent decision, whichever is later [*Unemp. Ins. Code § 410*; *see Tarkington v. California Unemployment Ins. Appeals Bd. (2009) 172 Cal. App. 4th 1494, 1502-1508, 92 Cal. Rptr. 3d 131* (six-month period under *Unemp. Ins. Code § 410* is subject to equitable tolling while plaintiff pursues alternative remedy reasonably and in good faith)]. For discussion of precedent decisions, *see § 564.51*.

[b] On Denial of Claim for Refund or Credit

Within 90 days after service of the Unemployment Insurance Appeals Board's notice of decision on an appeal, the claimant may bring an action against the Employment Development Director on the grounds set forth in the claim for refund or credit in a court of competent jurisdiction in the County of Sacramento (or in any city or city and county in which the Attorney General has an office [*Code Civ. Proc. § 401*]) for the recovery of the whole or any part of the amount with respect to which the claim has been denied [*Unemp. Ins. Code § 1241(a)*; *see § 564.280*].

The director may, in writing, extend the time within which the action may be instituted for a period not exceeding two years if a written request for an extension is filed with the director within the 90-day period. Failure to bring an action

within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments. If the appeals board fails to serve notice of its decision on the appeal within 90 days after an appeal is filed, the claimant may consider the claim denied and bring an action against the director [*Unemp. Ins. Code § 1241(a)*].

If judgment is for the plaintiff, the amount of the judgment is first credited on any contributions, interest, and penalties due from the plaintiff and the balance is refunded to the plaintiff. Interest at the rate of 12 percent per annum on the amount of contributions found to have been illegally collected from the date the contributions were paid to the date of the judgment shall be allowed and paid only to the extent that interest and penalties collected are available [*Unemp. Ins. Code § 1242*].

[c] On Denial of Claim of Exemption by Religious Organization

To the extent permitted by federal law, an entity or organization that has made a bona fide claim that it is a church, a convention or association of churches, or an organization operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches, may bring suit to challenge a decision of the Unemployment Insurance Appeals Board denying an exemption as a church or religious organization. However, it must first pay the amount of the last quarter assessed immediately preceding the initial appeals board decision denying the exemption and then make a claim for refund or credit pursuant to *Unemp. Ins. Code § 1241* [*Unemp. Ins. Code § 1241(b)*].

An entity or organization is deemed to have made a bona fide claim that it is a church or religious entity if (1) it has been recognized as a church or religious organization by any entity of state or federal government, or (2) the appeals board found that the department failed to show by a preponderance of the evidence admitted at the proceedings to determine tax liability that the petitioner had not made a bona fide claim for coverage under *Unemp. Ins. Code § 1241(a)* as a church or religious entity [*Unemp. Ins. Code § 1241(b)*].

A decision denying eligibility under *Unemp. Ins. Code § 1241(b)* may be challenged by a petition for writ of mandate and shall not be deemed an action proscribed by or within the meaning of *Cal. Const., art. XIII, § 32* (prohibiting legal or equitable process to prevent or enjoin collection of tax), or *Unemp. Ins. Code § 1851* (prohibiting actions or proceedings to prevent or enjoin collection of contributions). The time within which to file any claim or action under *Unemp. Ins. Code § 1241(a), discussed under § 564.79[2][b],* is extended during the pendency of the mandate proceeding [*Unemp. Ins. Code § 1241(c)*].

[d] On Denial of Protest or Denial or Grant of Application for Transfer of Reserve Account

A decision of the appeals board on an appeal from a denial of a protest under *Unemp. Ins. Code § 1034* or an appeal from the denial or granting of an application for transfer of reserve account under *Unemp. Ins. Code §§ 1051-1055* is subject to judicial review if an appropriate proceeding is filed by the employer within 90 days of the service of the notice of decision. The director may, in writing, extend for a period not exceeding two years the time within which the proceeding may be instituted if written request for the extension is filed with the director within the 90 day period [*Unemp. Ins. Code § 1243*]._____

Legal Topics:

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

§§ 564.80[Reserved]

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49-564 California Forms of Pleading and Practice--Annotated § 564.100

§ 564.100 Governing Law

Unemployment compensation benefits are governed by *Unemp. Ins. Code §§ 1251-1384* and 22 Cal. Code Reg. §§ 1251-1-1375-1, extended unemployment compensation by *Unemp. Ins. Code §§ 3501-3751*, and federal-state extended compensation by *Unemp. Ins. Code §§ 4001-4751*. Disability compensation is governed by *Unemp. Ins. Code §§ 2601-3272* and 22 Cal. Code Reg. §§ 2601-1-3271-1.

The procedures available to the Employment Development Department for recovering overpayment of unemployment compensation benefits are covered by *Unemp. Ins. Code §§ 1375-1384* and 22 Cal. Code Reg. § 1375-1 [*see Gilles v. Department of Human Resources Development (1974) 11 Cal. 3d 313, 316-329, 113 Cal. Rptr. 374, 521 P.2d 110]* . Refunds of overpayments and penalties assessed against and collected from recipients by the department resulting from the department's failure to withhold from unemployment insurance benefits the amount of all prior work pension benefits received by a claimant from any source are covered by the McAlister-Duffy-Greene Unemployment Benefit Pension Offset Refund Act (Stats. 1985, ch. 1217, §§ 1, 7, 11, 16). Section 1 of the act sets forth legislative findings and declarations relating to collection of overpayments; section 7 amends *Unemp. Ins. Code § 1255.3*, relating to reduction of benefits by retirement pay based on previous work; section 11 requires refund of overpayment assessments and penalties received since March 1, 1984; and section 16 requires the department to prepare and publish a printed summary describing liability for unemployment insurance compensation benefit overpayment, penalty assessments, and the pension offset issue to be included with each refund.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceDisability BenefitsCoverage & DefinitionsGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationBenefit EntitlementsLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationCoverage & Definitions

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§ 564.101 Source of Benefit Payments

Funds for payment of unemployment and disability benefits come from the Unemployment Fund and the Unemployment Compensation Disability Fund, discussed *below*, which are special funds, separate from all other public money and administered by the Director of Employment Development [*see Unemp. Ins. Code §§ 134.5, 1522, 3001(a), 3002*; *but see Unemp. Ins. Code § 3001(b)* (moneys in Unemployment Compensation Disability Fund may be used for interest-bearing loans to General Fund)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationCoverage & Definitions

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§ 564.102 Unemployment Fund

The Unemployment Fund consists of (1) all employer contributions collected under the Unemployment Insurance Code (*see* discussion in *§§ 564.74, 564.75*); (2) interest earned on any money in the fund; (3) any property or securities acquired through the use of money belonging to the fund; (4) all earnings of the property or securities; (5) all money credited to the state's account in the Unemployment Trust Fund pursuant to "Section 903 of the Social Security Act, as amended" (*see 42 U.S.C. § 1103*); and (6) all other money received for the fund from any other source [*Unemp. Ins. Code § 1521*].

Employers' contributions to the Unemployment Fund must not be deducted in whole or in part from the employees' wages [*Unemp. Ins. Code § 976*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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49-564 California Forms of Pleading and Practice--Annotated § 564.103

§ 564.103 Unemployment Compensation Disability Fund

The Unemployment Compensation Disability Fund consists of (1) all contributions required of individuals under *Unemp. Ins. Code § 984* (*see also Unemp. Ins. Code § 2901*) with respect to wages paid by employers for employment; (2) all money received for the purpose of disability benefits from the United States of America or any of its agencies, or from any other source; and (3) any property or securities acquired through the use of money belonging to the fund, and all earnings on the money or securities [*Unemp. Ins. Code § 3004*].

The employer must deduct the employees' contributions to the disability fund from the employees' paychecks, show the deduction on its payroll records, and furnish each worker with a written statement showing the amount that has been deducted [*Unemp. Ins. Code § 986*; 22 Cal. Code Reg. §§ 986-1, *986-2*].

Legal Topics:

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49-564 California Forms of Pleading and Practice--Annotated § 564.104

§ 564.104 Nonwaiverability and Nonassignability of Benefits

Except as provided in *Unemp. Ins. Code §§ 1255.7* (relating to support obligations), 1342.1 (relating to income tax withholding), 1345 (redirection of disability insurance voluntary plan benefits to cover cost of employee-paid benefits), and 2630 (relating to duties of State Department of Social Services with respect to individuals having claims for unemployment disability benefits with department or under approved voluntary plan) [*see also Code Civ. Proc. § 704.120(b)(1), (d)*], any waiver by any person of any benefit or right under the Unemployment Insurance Code is invalid [*Unemp. Ins. Code § 1342*].

Subject to the same exceptions, benefits under the code and payments to an individual under a plan or system established by an employer that makes provisions for his or her employees generally or for a class or group of his or her employees, for the purpose of supplementing unemployment compensation benefits, are not subject to assignment, release, or commutation [*Unemp. Ins. Code § 1342*].

Moreover, any agreement by an individual to pay the employer's contributions to the Unemployment Insurance Fund is void [*Unemp. Ins. Code § 1342*].

Legal Topics:

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

§§ 564.105[Reserved]

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2. Unemployment Compensation Benefits

49-564 California Forms of Pleading and Practice--Annotated § 564.120

§ 564.120 Summary of Procedure for Claiming Unemployment Compensation Benefits and Administrative Appeal

Normally, there are five steps for handling a typical unemployment insurance claim: (1) the claimant files a claim for unemployment insurance; (2) in two weeks, or as directed by the Employment Development Department, the claimant reports in person to the department field office to file a continued claim and is interviewed as to eligibility and benefit rights; if the claimant is found to be eligible, he or she is credited for the one week waiting period and is thereafter paid for one week; (3) in the fifth week, the claimant, to be paid for the third and fourth weeks, files by mail a "continued claim" form certifying that he or she meets the eligibility requirements; (4) periodic eligibility reviews; and (5) determinations of eligibility [22 Cal. Code Reg. § 1326-1; *see § 564.16*].

Thus, the initial determination of a claimant's eligibility for unemployment compensation benefits is rendered by a claims interviewer, who examines documents submitted by the claimant and by the claimant's former employer and discusses the matter with the claimaint in a non-adversarial setting. A party dissatisfied with the determination of the claims interviewer may appeal to an administrative law judge [*Unemp. Ins. Code § 1328*]. (An appeal may also be taken to an administrative law judge from a ruling on a computation or recomputation of benefits made under *Unemp. Ins. Code § 1329* [*see Unemp. Ins. Code §§ 1030(c), 1031, 1032.5, 1330, 1331*].) Following a hearing at which the parties may be represented by counsel and may present testimonial and documentary evidence, the administrative law judge decides the issue of eligibility de novo [*see Unemp. Ins. Code §§ 1957, 1334*; *22 Cal. Code Reg. § 5000 et seq.* ; § 564.37; and *Gilles v. Department of Human Resources Development (1974) 11 Cal. 3d 313, 317, 113 Cal. Rptr. 374, 521 P.2d 110]* . The parties may further appeal the decision of the administrative law judge to the Unemployment Insurance Appeals Board [*see Unemp. Ins. Code § 1336*]. The board may decide the case on the record of the administrative law judge's hearing or take additional evidence [*see Unemp. Ins. Code § 1336*; *22 Cal. Code Reg. § 5102*]. If it requires the taking of additional evidence, the hearing must be commenced within 60 days after the submission of the appeal and the board's decision must be mailed within 60 days after completion of the hearing; if the taking of further evidence is not required, it must render its decision within 60 days after the submission of the appeal [*Unemp. Ins.Code § 1337*; *see Gilles v. Department of Human Resources Development (1974) 11 Cal. 3d 313, 316-317, 113 Cal. Rptr. 374, 521 P.2d 110]* .

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§ 564.121 Kinds of Unemployment Compensation Benefits

Unemployment compensation benefits consist of (1) unemployment compensation benefits [*see Unemp. Ins. Code §§ 1251-1384*], (2) extended duration benefits [*see Unemp. Ins. Code §§ 3501-3751*], and (3) federal-state extended benefits [*see Unemp. Ins. Code §§ 4001-4751*].

Notwithstanding any other provision of *Unemp. Ins. Code §§ 100-4751* (relating to unemployment and disability compensation), unemployment compensation benefits, extended duration benefits, and federal-state extended benefits are payable on the basis of service to which *I.R.C. § 3309(a)(1)* (relating to services performed for nonprofit organizations or governmental entities) applies in the same amount, on the same terms, and subject to the same conditions as benefits payable on the basis of other service subject to *Unemp. Ins. Code §§ 100-4751*, except as provided in *Unemp. Ins. Code § 1253.3* [*Unemp. Ins. Code § 1253.3(a)*; for the exceptions, *see § 564.128*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 564.122 Source and Amount of Benefits and To Whom Payable

Unemployment compensation benefits are payable from the Unemployment Fund to unemployed individuals who are eligible [*Unemp. Ins. Code §§ 1251, 1521*; *see § 564.127*]. Independent contractors, as that term is traditionally used, are not within the coverage of the code [*Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43, 168 P.2d 686 , overruled on another point, People v. Sims (1982) 32 Cal. 3d 468, 479-480 n.8, 186 Cal. Rptr. 77, 651 P.2d 321*); *Southwest Research Inst. v. Unemployment Ins. Appeals Board (2000) 81 Cal. App. 4th 705, 707-710, 96 Cal. Rptr. 2d 769* (when method of performing worker's task is dictated by government regulations, hirer is not exercising control over manner and means of working and thus is not employer); *Aladdin Oil Corp. v. Perluss (1964) 230 Cal. App. 2d 603, 610, 41 Cal. Rptr. 239]* .

The amount payable depends on the amount of wages received by the worker during his or her base period, up to a maximum specified by statute [*Unemp. Ins. Code § 1280*].

The amount of benefits during partial employment is covered by *Unemp. Ins. Code § 1279*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 564.123 Prohibition Against Denial of Benefits and Exceptions

Benefits must not be denied to any individual by reason of cancellation of wage credits or total reduction of his or her benefit rights for any cause other than discharge for misconduct connected with his or her work, fraud in connection with a claim for benefits, or receipt of disqualifying income. However, this is not to be construed to authorize cancellation of wage credits or total reduction of benefit rights for any cause whatsoever, nor shall it limit or affect any other section of the code that provides for cancellation of wage credits or total reduction of benefit rights for any cause permitted under *Unemp. Ins. Code § 1260.1* [*Unemp. Ins. Code § 1260.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 564.124 "Base Period" Defined

[1] Base Period

"Base period" means the following [*Unemp. Ins. Code § 1275(a)*]:

(1) For benefit years beginning in October, November, or December, the four calendar quarters ended in the next preceding month of June;

(2) For benefit years beginning in January, February, or March, the four calendar quarters ended in the next preceding month of September;

(3) For benefit years beginning in April, May, or June, the four calendar quarters ended in the next preceding month of December;

(4) For benefit years beginning in July, August, or September, the four calendar quarters ended with the next preceding month of March.

Wages used in the determination of benefits payable to an individual during any benefit year must not be used in determining the individual's benefits in any subsequent benefit year [*Unemp. Ins. Code § 1275(a)*].

[2] Alternate Base Period

An alternate base period may be available for new claims filed on or after April 3, 2011, or earlier if the Employment Development implements the technical changes necessary to establish claims under the alternate base period [*Unemp. Ins. Code § 1275(b),(c)*; *see Unemp. Ins. Code § 1329.5* (special rules for computation of benefits under alternate base period)]. Under the provisions for an alternate base period, if an individual cannot establish a claim under the regular base period [*see* [1], *above*], that individual may use a base period defined as follows [*Unemp. Ins. Code § 1275(b)*]:

(1) For benefit years beginning in October, November, or December, the four calendar quarters ended in the next preceding month of September;

(2) For benefit years beginning in January, February, or March, the four calendar quarters ended in the next preceding month of December;

(3) For benefit years beginning in April, May, or June, the four calendar quarters ended in the next preceding month of March;

(4) For benefit years beginning in July, August, or September, the four calendar quarters ended in the next preceding month of June.

Under the alternate base period, the quarter with the highest wages must be used to determine the individual's weekly benefit amount [*Unemp. Ins. Code § 1275(b)*]. Wages used in the determination of benefits payable to an individual during any benefit year may not be used in determining that individual's benefits in any subsequent benefit year [*Unemp. Ins. Code § 1275(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 564.125 "Unemployed" Defined

[1] General Conditions

With certain exceptions [*see § 564.125[2]*], an individual is unemployed in any week in which he or she meets any of the following conditions [*Unemp. Ins. Code § 1252(a)*]:

(1) Any week during which the individual performs no services and with respect to which no wages are payable to him or her.

(2) Any week of less than full-time work, if the wages payable to the individual with respect to the week, when reduced by $25 or 25 percent of the wages payable, whichever is greater, do not equal or exceed his or her weekly benefit amount.

(3) Any week for which, except for the requirements of *Unemp. Ins. Code § 1253(d)*, requiring a one-week waiting period, the individual would be eligible for benefits under *Unemp. Ins. Code § 1253.5*, relating to physical or mental illness or injury for one or more days during a week (§ 564.132[1][e]).

(4) Any week during which the individual performs full-time work for five days as a juror, or as a witness under subpoena.

For the purpose of the foregoing provisions only, "wages" includes any and all compensation for personal services whether performed as an employee or as an independent contractor or as a juror or as a witness, but does not include any payment received by a member of the National Guard or reserve component of the armed forces for inactive duty training, annual training, or emergency state active duty [*Unemp. Ins. Code § 1252(c)*].

[2] Commercial Fishing

The general definition of "unemployed" [*see § 564.125*] does not apply to commercial fishermen. For definitions

applicable to both unemployed and partially employed commercial fishermen, see *Unemp. Ins. Code §§ 1252.1, 1252* and 22 Cal. Code Reg. §§ 1252.1-1, 1252.2-1.

[3] Shared Work Arrangements

The general definition of "unemployed" [*see § 564.125*] does not apply to individuals working under a shared work arrangement. For a definition of "unemployed" applicable to those individuals, see *Unemp. Ins. Code § 1279.5(a)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 564.126 "Week" Defined

The term "week" for benefit purposes means the seven consecutive days commencing at 12:01 a.m. Sunday, and ending 12 midnight the following Saturday [22 Cal. Code Reg. § 1253-1; *see Unemp. Ins. Code § 143*]. For the various meanings of the term "week of unemployment," see *22 Cal. Code Reg. §§ 1253-2-1253-11*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 564.127 Eligible Individuals

[1] Conditions of Eligibility

An employee qualified for unemployment compensation benefits is eligible for benefits with respect to any week [*see* "Week" Defined, *above*] if the director finds as follows [*Unemp. Ins. Code § 1253*]:

- A claim for benefits with respect to that week was made in accordance with authorized regulations [*Unemp. Ins. Code § 1253(a)*; *see* 22 Cal. Code Reg. § 1253(a)-1; *see also* 22 Cal. Code Reg. § 1326-1 for general description of claims filing procedures for unemployment compensation benefits; and *discussion under § 564.132[1]*].

- The individual has registered for work, and thereafter has continued to report, at a public employment office or such other place as the director may approve. Either or both of these requirements may be waived or altered by authorized regulation as to partially employed individuals attached to regular jobs [*Unemp. Ins. Code § 1253(b)*; *see* 22 Cal. Code Reg. § 1253(b)-1].

- The individual was able to work and was available for work for that week [*Unemp. Ins. Code § 1253(c)*; *see* 22 Cal. Code Reg. § 1253(c)-2; *see also § 564.127[3]*].

- The individual has been unemployed for a waiting period of one week as defined in *Unemp. Ins. Code § 1254*, unless the Governor has waived the waiting period due to war or a state of emergency pursuant to *Gov. Code § 8571* [*Unemp. Ins. Code § 1253(d)*; *see § 564.127[2]*].

- The individual conducted a search for suitable work in accordance with specific and reasonable instructions of a public employment office [*Unemp. Ins. Code § 1253(e)*; *see* 22 Cal. Code Reg. §§ 1253(e)-1, 1253(e)-2; *see also §§ 564.127[4] -[6]*].

- If the individual has been identified by an automated profiling system as likely to exhaust regular unemployment benefits, the individual participated as required in reemployment activities, such as orientation and assessment, unless the individual has shown good cause for failure to participate [*Unemp. Ins. Code § 1253(f)*].

Notwithstanding *Unemp. Ins. Code § 1253(c), above,* if an individual is, in all other respects, eligible for benefits and becomes unable to work due to a physical or mental illness or injury for one or more days during the week, he or she shall be paid unemployment compensation benefits at the rate of one-seventh the weekly benefit amount payable for that week for each day which he or she was available for and able to work, but is not entitled to benefits for any day during the week in which he or she was unable to work due to the physical or mental illness or injury [*Unemp. Ins. Code § 1253.5*].

[2] "Week of Unemployment"

No week is counted as a "week of unemployment" [*see* 22 Cal. Code Reg. § 1253-2, defining phrase] under *Unemp. Ins. Code § 1253(d), discussed under § 564.127[1]* [*Unemp. Ins. Code § 1254*]:

- Unless it occurs within the benefit year which includes the week with respect to which the person claims payment of unemployment compensation benefits, but this requirement does not interrupt the payment of benefits for consecutive weeks of unemployment. Moreover, the week immediately preceding a benefit year, if part of one uninterrupted period of unemployment which continues into that benefit year, is deemed, for the purposes of *Unemp. Ins. Code § 1254* only, to be within the benefit year as well as within the preceding benefit year [*Unemp. Ins. Code § 1254(a)*].

- If unemployment compensation benefits have been paid with respect to that week [*Unemp. Ins. Code § 1254(b)*].

- Unless the individual was eligible for unemployment compensation benefits with respect thereto in all respects, except for the requirements of *Unemp. Ins. Code §§ 1253(d), above* and 1281 (relating to minimum earnings requirement) [*Unemp. Ins. Code § 1254(c)*].

[3] "Available for Work" Requirement

With respect to the requirement that the individual be "available for work" [*Unemp. Ins. Code § 1253(c), discussed under § 564.127[1]*], the term requires no more than that an individual claimant (1) be willing to accept suitable work that he or she has no good cause for refusing and (2) thereby make himself or herself available to a substantial field of employment [*Sanchez v. Unemployment Ins. Appeals Bd. (1977) 20 Cal. 3d 55, 67, 141 Cal. Rptr. 146, 569 P.2d 740* ; *see Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1981) 29 Cal. 3d 101, 113-114, 172 Cal. Rptr. 194, 624 P.2d 244* ; *Glick v. Unemployment Ins. Appeals Bd. (1979) 23 Cal. 3d 493, 499, 153 Cal. Rptr. 1, 591 P.2d 24]* . Thus, a person may for good cause refuse otherwise suitable employment without losing his or her right to unemployment compensation benefits, provided the person remains available to a substantial field of employment. For example, a parent or guardian of a minor has good cause for refusing employment that conflicts with parental activities reasonably necessary for the care or education of the minor if no reasonable alternative means of discharging those responsibilities exist, provided the claimant remains available to a substantial field of employment [*Sanchez v. Unemployment Ins. Appeals Bd. (1977) 20 Cal. 3d 55, 70, 141 Cal. Rptr. 146, 569 P.2d 740* (holding claim for unemployment compensation benefits of mother seeking employment in restaurants or factories, days or nights, Mondays through Friday, was improperly denied because she was unable to accept weekend work that would conflict with her responsibilities to care for her minor child)]. In other words, the requirement of availability does not preclude claimants for unemployment insurance benefits from placing some restrictions on their availability to accept employment, as long as they remain available for employment by a more than a minimal number of employers in the

community [*Rios v. Employment Development Dept. (1986) 187 Cal. App. 3d 489, 493-494, 231 Cal. Rptr. 732]* .

Student status, alone, may not disqualify an individual for unemployment compensation benefits. An unemployed individual may be considered "able and available for work" if school attendance does not eliminate a substantial portion of the individual's full-time labor market availability [*Unemp. Ins. Code § 1253.9*].

Moreover, once the claimant for unemployment compensation benefits has shown that he or she is available for suitable work that he or she has no good cause for refusing, the burden of proof on the issue of whether he or she is available to a substantial field of employment lies with the Employment Development Department; if the department believes a given claimant, despite his or her availability for such suitable work, is nevertheless not attached to a labor market of sufficient dimension, it may be expected to explain its position and support it with appropriate evidence [*Sanchez v. Unemployment Ins. Appeals Bd. (1977) 20 Cal. 3d 55, 71, 141 Cal. Rptr. 146, 569 P.2d 740* ; *see* *Glick v. Unemployment Ins. Appeals Bd. (1979) 23 Cal. 3d 493, 500-505, 153 Cal. Rptr. 1, 591 P.2d 24* (holding claim for unemployment compensation benefits of law student seeking part-time employment that would not conflict with requirements of her full-time schooling was properly granted)].

In addition, to deny an unemployed school teacher, otherwise qualified for and receiving unemployment compensation, benefits for a whole week instead of five sevenths of a week on the ground the teacher was unavailable for work within the meaning of *Unemp. Ins. Code § 1253(c)* for two of the days due to his or her observance of religious holidays in accordance with the dictates of his or her faith violated the teacher's right to free exercise of religion as guaranteed by the *First Amendment to the United States Constitution* and by *Cal. Const., art. I, § 4* and was erroneous when a market for the teacher's services remained [*Jaffe v. Unemployment Ins. Appeals Bd. (1984) 156 Cal. App. 3d 719, 721-724, 202 Cal. Rptr. 812]* .

However, availability for work includes being legally, as well as physically, available to accept employment. Therefore, an alien who has no work authorization from the federal Immigration and Naturalization Service (INS) is not available for work as required by *Unemp. Ins. Code § 1253(c)* and the Employment Development Department may deny benefits on this basis. An alien's eligibility for benefits generally under *Unemp. Ins. Code § 1264*, which restricts benefits to aliens based on their status at the time services were performed, is not relevant to the determination of whether an alien is legally available for work at the time he or she applies for benefits [*Gutierrez v. Employment Development Dept. (1993) 14 Cal. App. 4th 1791, 1799, 18 Cal. Rptr. 2d 705* ; *see also* *Alonso v. State of California (1975) 50 Cal. App. 3d 242, 249-250, 123 Cal. Rptr. 536* ; for discussion of the eligibility of aliens generally, § 564.128[4]].

[4] "Seek Work" Requirement

The "seek-work" statute (now *Unemp. Ins. Code § 1253(e), discussed under § 564.127[1]*), as adopted in 1947, provided that the claimant must comply with seek-work "regulations" (Stats. 1953, ch. 308). In 1961, the statute was amended to charge the Department of Employment (now Employment Development Department) with directing claimants' work-search efforts in detail. The Legislature apparently believed it was unfair to make each claimant guess what seek-work effort was necessary to maintain eligibility in his or her case. It therefore eliminated the open-ended "regulations" requirement and substituted a mandate that the Employment Development Department give each claimant "specific" instructions, that is, the guidance appropriate for his or her particular circumstances. Under the present statute the claimant must adopt a course of action reasonably designed to result in his or her prompt employment in suitable work, considering the customary methods of obtaining work and the current condition of the labor market [*see* 22 Cal. Code Reg. § 1253(c)-2, (e)-1(a)]. But the claimant's duty is circumscribed by the department's responsibility under *Unemp. Ins. Code § 1253(e)* to design a proper "course of action" for each case. When the department is better situated than the claimant to know customary methods of obtaining work and the current condition of the labor market, the claimant may rely on its advice or that of another state agency to which the department has referred the claimant. Thus, an applicant for benefits fulfills his or her duty to seek work if he or she follows with reasonable diligence the specific and reasonable seek-work instructions of a public employment office [*Pacific Legal Foundation v. Unemployment*

Ins. Appeals Bd. (1981) 29 Cal. 3d 101, 111-112, 117, 172 Cal. Rptr. 194, 624 P.2d 244] .

For the history and interrelation of the seek-work requirement of *Unemp. Ins. Code § 1253(e)* and the availability for work requirement of *Unemp. Ins. Code § 1253(c), discussed under § 564.127[3]*, and the provision that "unemployed persons claiming unemployment insurance benefits shall be required to make all reasonable effort to secure employment on their own behalf," set forth in *Unemp. Ins. Code § 100, see Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1981) 29 Cal. 3d 101, 113-117, 172 Cal. Rptr. 194, 624 P.2d 244* .

[5] What Constitutes "Suitable Employment" and Factors Considered

The term "suitable employment" means work in the individual's usual occupation or for which the individual is reasonably fitted [*Unemp. Ins. Code § 1258*].

In determining whether the work is work for which the individual is reasonably fitted, the Director of Employment Development must consider the following:

- The degree of risk involved to the individual's health, safety, and morals;

- The individual's physical fitness and prior training, experience and prior earnings, and length of unemployment and prospects for securing local work in his or her customary occupation;

- The distance of the available work from the individual's residence; and

- Such other factors as would influence a reasonably prudent person in the individual's circumstances [*Unemp. Ins. Code § 1258*; *see Sanchez v. Unemployment Ins. Appeals Bd. (1977) 20 Cal. 3d 55, 63, 141 Cal. Rptr. 146, 569 P.2d 740]* .

[6] Unsuitable Employment and Effect of Refusal to Accept

The term "suitable employment" does not include employment with an employer who does not: (1) possess an appropriate state license to engage in his or her business, trade, or profession; or (2) withhold or hold in trust the employee contributions required by *Unemp. Ins. Code §§ 2601-3272* for unemployment compensation disability benefits and does not transmit all such employee contributions to the department for the Disability Fund as required by *Unemp. Ins. Code § 986*; or *(3)* carry either workers' compensation insurance or possess a certificate of self-insurance as required by *Lab. Code § 3201 et seq.* [*Unemp. Ins. Code § 1258.5*].

No work or employment shall be deemed suitable and benefits must not be denied to any otherwise eligible and qualified person for refusing new work under any of the following conditions [*Unemp. Ins. Code § 1259*]:

- If the position offered is vacant due directly to a strike, lockout, or other labor dispute [*Unemp. Ins. Code § 1259(a)*; *see Campos v. Employment Development Dept. (1982) 132 Cal. App. 3d 961, 967, 183 Cal. Rptr. 637]* .

- If the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality [*Unemp. Ins. Code § 1259(b)*].

- If, as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization [*Unemp. Ins. Code § 1259(c)*].

- If the offer of employment is from an employer who does not possess an appropriate state license to

engage in his or her business, trade, or profession if required by state law [*Unemp. Ins. Code § 1259(d)*].

- If the offer of employment is from an employer who does not carry either workers' compensation insurance or possess a certificate of self-insurance as required by *Lab. Code §§ 3201-6002* [*Unemp. Ins. Code § 1259(e)*].

- If the offer of employment is from an employer who does not withhold or hold in trust the employee contributions required by *Unemp. Ins. Code §§ 2601-3272* for unemployment compensation disability benefits and does not transmit all such employee contributions to the Employment Development Department for the Disability Fund as required by *Unemp. Ins. Code § 986* [*Unemp. Ins. Code § 1259(f)*].

[7] Factors Not Affecting Eligibility

An unemployed person who is otherwise eligible for unemployment compensation benefits is not to be deemed ineligible for any week in which:

- for not exceeding two working days, he or she cannot reasonably be expected to work because (a) he or she is unlawfully detained [*Unemp. Ins. Code § 1253.1(a)*; *see 22 Cal. Code Reg. § 1253.1-1*]; (b) he or she is lawfully detained or arrested, but the charge is subsequently dismissed [*Unemp. Ins. Code § 1253.1(b)*]; or (c) there has been a death in his or her immediate family in the state in which he or she resides [*Unemp. Ins. Code § 1253.12(a)*; *see* 22 Cal. Code Reg. § 1253.12-1];

- for not exceeding four working days, he or she cannot reasonably be expected to work because there has been a death in his or her immediate family outside the state in which he or she resides [*Unemp. Ins. Code § 1253.12(b)*; *see* 22 Cal. Code Reg. § 1253.12-1]; or

- pursuant to the provisions of a collective bargaining agreement, he or she is allowed not more than one uncompensated day off in that week or is allowed not more than one uncompensated holiday in that week if (a) he or she is employed in longshoring operations; (b) his or her employer regularly offers employment to individuals employed in such operations seven days a week; and (c) he or she is able to work and available for work for six days of the week except as provided in *Unemp. Ins. Code § 1253.1* or 1253.12, *above* [*Unemp. Ins. Code § 1253.2*].

An unemployed person who has been discharged from any branch of the United States armed services and who is otherwise eligible for unemployment compensation benefits is not to be deemed ineligible in any week for which the person has unexpired leave time for which he or she was compensated on discharge [*Unemp. Ins. Code § 1253.15*].

An unemployed person otherwise eligible for unemployment compensation benefits is not to be deemed not able to work or unavailable for work for any week in which he or she is unable to work or unavailable for work solely because he or she is serving on a grand or petit jury or is responding to a subpoena [*Unemp. Ins. Code § 1253.6*].

An unemployed individual is disqualified for eligibility for unemployment compensation benefits solely on the basis that he or she is available for part-time work, only. If an individual restricts his or her availability to part-time work, he or she may be considered to be able to work and available for work [*see Unemp. Ins. Code § 1253(c)*] if it is determined that all of following conditions exist [*Unemp. Ins. Code § 1253.8*]:

(1) The claim is based on the part-time employment.

(2) The claimant is actively seeking and is willing to accept work under essentially the same conditions

that existed while the wage credits were accrued.

(3) The claimant imposes no other restrictions and is in a labor market in which a reasonable demand exists for the part-time services he or she offers.

An unemployed individual who meets the foregoing criteria will be considered "able and available" for work, despite having restricted availability for part-time work, only, due to school attendance [*Unemp. Ins. Code § 1253.9*].

Finally, a person is not disqualified for any week solely because he or she is (1) before any court of the United States or any state pursuant to a lawfully issued summons to appear for jury duty, or (2) hospitalized for treatment of an emergency or life-threatening condition [*Unemp. Ins. Code § 1253.7*].

Legal Topics:

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§ 564.128 Ineligible Persons

[1] School and Seasonal Employees

Unemployment compensation benefits are generally not payable to school employees in the service of a nonprofit organization, a public entity as defined by *Unemp. Ins. Code § 605*, for holiday recesses, between term breaks, vacations, and paid sabbaticals when there is a contract or reasonable assurance that the employee will perform services for the educational institution after the break or vacation [*see Unemp. Ins. Code § 1253.3(b)-(i)*; *Russ v. Unemployment Ins. Appeals Bd. (1981) 125 Cal. App. 3d 834, 840-848, 178 Cal. Rptr. 421* ; *Winters v. Unemployment Ins. Appeals Bd. (1976) 63 Cal. App. 3d 41, 45, 133 Cal. Rptr. 567* ; for exceptions applicable to nonprofessional employees of specified state special schools, *see Unemp. Ins. Code §§ 1451-1454*]. The exclusion of benefits under *Unemp. Ins. Code § 1253.3* applies to instructional educational employees regardless of whether their employment status is vested or nonvested or the employee is tenured or nontenured. Thus, if there is a contract or a reasonable assurance that a teacher, who has taught during the prerecess period, will perform teaching services for the employer in the academic year or term during the postrecess period, the teacher must be denied unemployment benefits during the summer recess [*Board of Education v. Unemployment Ins. Appeals Bd. (1984) 160 Cal. App. 3d 674, 682-683, 206 Cal. Rptr. 788]* . On the other hand, assignments given to part-time, hourly instructors of a community college district that depended on their ability to attract a sufficient number of students to justify offering the classes, and for which the standard faculty assignment forms stated that the employment was contingent on adequate class enrollment, do not constitute reasonable assurances of continued employment within the meaning of *Unemp. Ins. Code § 1253.3* [*Cervisi v. Unemployment Ins. Appeals Bd. (1989) 208 Cal. App. 3d 635, 639, 256 Cal. Rptr. 142* (affirming trial court's judgments granting writs of mandate requiring that instructors be paid unemployment benefits for period between fall and spring semesters)].

The same rules apply to between season periods of unemployment of persons employed in seasonal sports and athletic events [*see Unemp. Ins. Code § 1253.4*].

[2] Person Applying to Another Jurisdiction for Benefits

A person is not eligible for unemployment compensation benefits for any week or part of any week with respect to

which he or she has received or is seeking unemployment benefits under an unemployment compensation law of another state or the United States unless the other state or United States finally determines the person is not entitled to unemployment compensation benefits [*Unemp. Ins. Code § 1255*].

[3] Strikers

A person who left his or her work because of a trade dispute is not eligible for unemployment compensation benefits. The ineligibility continues for the period the person remains out of work because of the continuation of the dispute in the establishment in which he or she is employed [*Unemp. Ins. Code § 1262*; 22 Cal. Code Reg. §§ 1262-1, *1262-2*]. The disqualification imposed by *Unemp. Ins. Code § 1262* is not contingent on the merits of the controversy [*Acuff v. Unemployment Ins. Appeals Bd. (1989) 208 Cal. App. 3d 1038, 1044, 256 Cal. Rptr. 513]* . For a definition of when locked-out employees in the course of a selective strike are ineligible for benefits, see *Interstate Brands v. Unemployment Ins. Appeals Bd. (1980) 26 Cal. 3d 770, 774 n.2, 782, 163 Cal. Rptr. 619, 608 P.2d 707* . On the duty of the Employment Development Department to investigate a trade dispute, see *Unemp. Ins. Code § 1262.5*.

Unemp. Ins. Code § 1262 manifests the state's desire to maintain neutrality in labor disputes and not to require the employer to subsidize, through its contributions to the unemployment compensation fund, the use of the strike as an economic weapon against it [*Acuff v. Unemployment Ins. Appeals Bd. (1989) 208 Cal. App. 3d 1038, 1044, 256 Cal. Rptr. 513* ; *Martinez v. California Unemployment Ins. Appeals Bd. (1988) 206 Cal. App. 3d 1385, 1393, 254 Cal. Rptr. 461* ; *Brotherhood of Teamsters & Auto Truck Drivers v. Unemployment Ins. Appeals Bd. (1987) 190 Cal. App. 3d 1515, 1525, 236 Cal. Rptr. 78* ; *National Broadcasting Co. v. Unemployment Ins. Appeals Bd. (1979) 95 Cal. App. 3d 550, 555, 157 Cal. Rptr. 207]* . However, an employee is ineligible under the statute for unemployment compensation benefits only if he or she left work because of the dispute; an employee is not ineligible if he or she left work in the course of, and not because of, a trade dispute for another reason constituting good cause [*Bunny's Waffle Shop v. Cal. Emp. Com. (1944) 24 Cal. 2d 735, 738-742, 151 P.2d 224]* . In determining ineligibility under *Unemp. Ins. Code § 1262*, the courts have recognized a two-part test: (1) the worker must voluntarily leave or remain away from his or her employment (a volitional test), and (2) the worker must leave or remain away from his or her employment because of a trade dispute (causational test) [*Campos v. Employment Development Dept. (1982) 132 Cal. App. 3d 961, 966, 183 Cal. Rptr. 637* ; *see* *Acuff v. Unemployment Ins. Appeals Bd. (1989) 208 Cal. App. 3d 1038, 1045, 256 Cal. Rptr. 513* (trade dispute resulted because of employer's requirement that employees accept a 7.8 percent wage reduction and a total wage and benefit reduction of 14.8 percent); *Martinez v. California Unemployment Ins. Appeals Bd. (1988) 206 Cal. App. 3d 1385, 1390, 254 Cal. Rptr. 461* (trade dispute resulted because of 27 to 33 percent reduction in earnings for employees and in combination with reduced benefits comprised a 34 to 41 percent earnings reduction); *Brotherhood of Teamsters & Auto Truck Drivers v. Unemployment Ins. Appeals Bd. (1987) 190 Cal. App. 3d 1515, 1525, 236 Cal. Rptr. 78* ; *Pacific Maritime Assn. v. Unemployment Ins. Appeals Bd. (1985) 169 Cal. App. 3d 568, 575-579, 215 Cal. Rptr. 408* (neither test metwhen claimants for benefits worked out of union hall on rotational dispatch system and werenot scheduled to work during period in question and did not walk off job or refuse work, even though they did not actively repudiate their union's selective work stoppage policy or seek employment from struck employers)]. The form of cessation of employment is not controlling; what matters is what precedes it in terms of causation and volitional conduct [*Acuff v. Unemployment Ins. Appeals Bd. (1989) 208 Cal. App. 3d 1038, 1048, 256 Cal. Rptr. 513]* . When an independent, intervening act of another so disrupts the chain of causation as to render the leaving involuntary, the causation and volitional tests tend to overlap [*Acuff v. Unemployment Ins. Appeals Bd. (1989) 208 Cal. App. 3d 1038, 1045, 256 Cal. Rptr. 513]* .

[4] Aliens

Unemployment compensation benefits, extended duration benefits, and federal-state extended benefits are not payable on the basis of services performed by an alien unless the alien was lawfully admitted for permanent residence at the time the services were performed, was lawfully present for purposes of performing them, or was permanently residing in the United States under color of law at the time they were performed, including an alien who was lawfully present in

the United States as a result of the application of the provisions of *Section 212(d)(5) of the Immigration and Nationality Act* (*8 U.S.C. § 1182(d)(5)*) [*Unemp. Ins. Code § 1264(a)*].

In 1988 the Legislature amended *Unemp. Ins. Code § 1264* to prescribe various procedures to be followed by the Employment Development Department respecting aliens who have applied for temporary resident status under the federal Immigration Reform and Control Act of 1986 (Pub. L. No. 99-603) and whose unemployment insurance benefits are at issue. These provisions are set out in *Unemp. Ins. Code § 1264(d)-(f)*, which, however, cease to be operative if the United States Secretary of Labor determines that they do not comply with the federal Unemployment Tax Act [*Unemp. Ins. Code § 1264(g)*] or on September 30, 1990, whichever is earlier, unless the Legislature deletes or extends that date [*Unemp. Ins. Code § 1264(h)*].

However, even an alien who falls into one of the three categories discussed above (lawfully admitted for permanent residence, lawfully present for purposes of performing services, or permanently residing in the United States under color of law) at the time services were performed may not be eligible for benefits. If an alien has no work authorization from the federal Immigration and Naturalization Service (INS) when he or she applies for benefits, he or she is not legally available for work as required by Unemp. *Ins. Code § 1253(c)* and the EDD may deny benefits on this basis [*Gutierrez v. Employment Development Dept. (1993) 14 Cal. App. 4th 1791, 1799, 18 Cal. Rptr. 2d 705* ; *see also Alonso v. State of California (1975) 50 Cal. App. 3d 242, 249-250, 123 Cal. Rptr. 536* ; for discussion of the requirement of availability for work, § 564.127[3]].

Legal Topics:

For related research and practice materials, see the following legal topics:
Immigration LawDuties & Rights of AliensPublic BenefitsLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationEligibilityGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationEligibilityVoluntary Unemployment

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 564 UNEMPLOYMENT AND DISABILITY INSURANCE
PART II. LEGAL BACKGROUND
D. Eligibility And Claims For Benefits
2. Unemployment Compensation Benefits

49-564 California Forms of Pleading and Practice--Annotated § 564.129

§ 564.129 Reductions and Deductions for Other Payments

The weekly amount of any unemployment compensation otherwise due is, subject to specified exceptions, reduced by the amount of any payments received as pension, retirement pay, annuity, or other similar periodic payment based on the person's previous work or for any temporary total disability under any workers' compensation or employer's liability law [*Unemp. Ins. Code §§ 1255.3(a), 1255.5*]. The legislative intent in enacting *Unemp. Ins. Code § 1255.3* was to comply with the letter of *I.R.C. § 3304(a)(15)*, mandating the states to enact such provisions, and nothing more [*Evans v. Unemployment Ins. Appeals Bd. (1985) 39 Cal. 3d 398, 408-410, 216 Cal. Rptr. 782, 703 P.2d 122* ; *see Unemp. Ins. Code § 1255.3(b)*; and Stats. 1985, ch. 1217, §§ 1, 11, 16 (the McAlister-Duffy-Greene Unemployment Benefit Pension Offset Refund Act)].

However, payments to an individual for vacation pay that was earned but not paid for services performed prior to termination of employment are not construed to be wages or compensation for personal services, and benefits payable under *Unemp. Ins. Code § 100 et seq.* may not be denied or reduced because of the receipt of those payments [*Unemp. Ins. Code § 1265.5*; *see Evans v. Unemployment Ins. Appeals Bd. (1985) 39 Cal. 3d 398, 410, 216 Cal. Rptr. 782, 703 P.2d 122* (construing former version of statute)]. This provision applies notwithstanding any other provision of *Unemp. Ins. Code § 100 et seq.* [*Unemp. Ins. Code § 1265.5*].

Similarly, payments for holiday pay that were earned but not paid prior to an indefinite layoff, termination of employment, or commencement of unemployment caused by disability are not to be construed to be wages or compensation for personal services, and benefits payable must not be denied or reduced because of the receipt of these payments [*Unemp. Ins. Code § 1265.6*].

On deductions from benefits payable for support obligations, see *Unemp. Ins. Code § 1255.7*.

Legal Topics:

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

Labor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationBenefit EntitlementsLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationClaim Procedures

California Forms of Pleading and Practice--Annotated

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49-564 California Forms of Pleading and Practice--Annotated § 564.130

§ 564.130 Disqualified Persons

[1] Grounds

A person is disqualified for unemployment compensation benefits if he or she (1) left his or her most recent work voluntarily without good cause or (2) was discharged for misconduct connected with his or her most recent work [*Unemp. Ins. Code § 1256*; *see 22 Cal. Code Reg. §§ 1256-1-1256-43*; *see also Morrison v. Unemployment Ins. Appeals Bd. (1976) 65 Cal. App. 3d 245, 250, 134 Cal. Rptr. 916* ; *Evenson v. Unemployment Ins. Appeals Bd. (1976) 62 Cal. App. 3d 1005, 1015, 133 Cal. Rptr. 488]* .

[2] "Most Recent Work" Defined

The term "most recent work," as used in *Unemp. Ins. Code § 1256, above, Unemp. Ins. Code §§ 1256.1, 1256.2,* or *1256.5, discussed under § 564.130[7],* is that work in which a claimant for unemployment compensation benefits last performed compensated services (1) prior to and nearest the date of filing a valid new, reopened, or additional claim for unemployment compensation benefits, a valid primary, reopened, or additional claim for extended duration benefits, or a valid application or reopened or additional claim for federal-state extended benefits (2) during the calendar week for which a continued claim is filed [*Unemp. Ins. Code § 1256.3*].

[3] What Constitutes Voluntary Leaving

The determination of whether an employee voluntarily quit his or her position, rather than being discharged, hinges on who was the "moving party" in the termination [*Morgan v. Unemployment Ins. Appeals Bd. (1992) 4 Cal. App. 4th 762, 767, 6 Cal. Rptr. 2d 34]* . If an employer refuses to permit an able and willing employee to continue working or is unable to provide continuing work, the employer is the moving party and the employee is deemed to have been involuntarily unemployed because of a discharge or layoff [*see* 22 Cal. Code Reg. § 1256-1(c), (d)]. If the employee left employment while continued work was available, the employee is the moving party [*Morgan v. Unemployment Ins. Appeals Bd. (1992) 4 Cal. App. 4th 762, 767, 6 Cal. Rptr. 2d 34]* . Therefore, a voluntary leaving occurs only when work is available and the employee leaves work of his or her own free will [22 Cal. Code Reg. § 1256-1(d) (also

providing examples of "voluntary" leaving)].

[4] "Good Cause"

[a] Defined

The term "good cause" means an adequate cause that comports with the purposes of the Unemployment Insurance Code and with other laws. The concept of good cause cannot be arbitrarily limited; it must take account of real circumstances, substantial reasons, objective conditions, palpable forces that operate to produce correlative results, adequate excuses that will bear the test of reason, just grounds for action, and always the element of good faith. Accordingly, good cause for leaving work means such a cause as justifies an employee's voluntarily leaving the ranks of the employed and joining the ranks of the unemployed; the quitting must be for such a cause as would reasonably motivate in a similar situation the average able-bodied and qualified worker to give up his or her employment with its certain wage rewards in order to enter the ranks of the compensated unemployed [*Sanchez v. Unemployment Ins. Appeals Bd. (1984) 36 Cal. 3d 575, 584, 205 Cal. Rptr. 501, 685 P.2d 61]* . Hence, good cause may exist for reasons that are personal and not connected to the employment situation, but those reasons must be imperative and compelling in nature [*MacGregor v. Unemployment Ins. Appeals Bd. (1984) 37 Cal. 3d 205, 209, 207 Cal. Rptr. 823, 689 P.2d 453]* .

For example, the Unemployment Insurance Appeals Board found that good cause did not exist in a case in which an employee, whose job was not in jeopardy from his employer's restructuring process, accepted the employer's offer of a bonus to retire 6 months early. The employee chose early retirement for two reasons: his concern that his job might be subject to restructuring sometime in the future, and his desire to prevent the reassignment, downgrading, or potential layoff of an employee with lesser seniority. The first reason was not good cause because it was purely speculative rather than imperative and compelling. The second reason was not good cause because the restructuring process included protection against layoffs, and there was no evidence that the employee would have displaced any other employee had he remained at his job [In re Mitchell (1994) Cal. Unemp. Ins. Appeals Bd. Prec. Dec. No. P-B-479].

[b] Determination as Question of Law

Whether an applicant for unemployment insurance benefits left his or her employment for "good cause," as this term is used in *Unemp. Ins. Code § 1256, discussed under § 564.130[1] above,* is a question of law that must be answered in relation to the particular facts of each case [*MacGregor v. Unemployment Ins. Appeals Bd. (1984) 37 Cal. 3d 205, 209, 207 Cal. Rptr. 823, 689 P.2d 453* ; *see Sanchez v. Unemployment Ins. Appeals Bd. (1984) 36 Cal. 3d 575, 585, 205 Cal. Rptr. 501, 685 P.2d 61* ; *Norman v. Unemployment Ins. Appeals Bd. (1983) 34 Cal. 3d 1, 6, 192 Cal. Rptr. 134, 663 P.2d 904]* .

[c] Examples

[i] Harassment

It has been held that an employee who quit her employment in the face of continuing harassment and threatened dismissal in retaliation for her union activities and "whistle blowing" to public authorities, rather than waiting to be fired, had good cause for leaving her employment [*Sanchez v. Unemployment Ins. Appeals Bd. (1984) 36 Cal. 3d 575, 578, 205 Cal. Rptr. 501, 685 P.2d 61]* .

A person who left work because of sexual harassment is deemed to have left the employment with good cause if the person took reasonable steps to preserve the working relationship, unless such steps would have been futile [*Unemp. Ins. Code § 1256.5*].

[ii] Reduction in Earnings

A substantial reduction in earnings (25-percent wage cut) constitutes good cause for leaving employment [*Bunny's Waffle Shop v. Cal. Emp. Com. (1944) 24 Cal. 2d 735, 743, 151 P.2d 224]* . Conversely, an insubstantial reduction (72/3-percent reduction in salary) does not constitute good cause, particularly if the employee would not have quit but for the belief that he or she was eligible for unemployment compensation benefits [*Maitland v. Employment Development Dept. (1982) 130 Cal. App. 3d 331, 334-335, 181 Cal. Rptr. 587]* . Workers who leave their jobs because of a trade dispute are ineligible for unemployment insurance benefits under *Unemp. Ins. Code § 1262* (*discussed under § 564.128[3]*), notwithstanding the fact that the trade dispute was precipitated by substantial wage cuts [*Martinez v. California Unemployment Ins. Appeals Bd. (1988) 206 Cal. App. 3d 1385, 1390-1394, 254 Cal. Rptr. 461* (wage cuts constituting 27-percent to 33-percent reduction in earnings for employees and in combination with reduced benefits comprised 34-percent to 41-percent earnings reduction); *see also Acuff v. Unemployment Ins. Appeals Bd. (1989) 208 Cal. App. 3d 1038, 1045, 256 Cal. Rptr. 513* (trade dispute resulted because of employer's requirement that employees accept 7.8-percent wage reduction and total wage and benefit reduction of 14.8 percent)]. In such cases, *Unemp. Ins. Code § 1256*, which expressly incorporates a "good cause" standard, does not come into play [*see Acuff v. Unemployment Ins. Appeals Bd. (1989) 208 Cal. App. 3d 1038, 1049-1050, 256 Cal. Rptr. 513]* .

[iii] To Preserve Family Relationship

A person may be deemed to have left his or her most recent work with good cause if he or she left employment to accompany his or her spouse or domestic partner to a place from which it is impractical to commute to the employment [*Unemp. Ins. Code § 1256*]. For the purposes of *Unemp. Ins. Code § 1256*, the word "spouse" includes a person to whom marriage is imminent [*Unemp. Ins. Code § 1256*; *see also Unemp. Ins. Code §§ 1032, 3701, 3702(c), 4701(a), 4702* (relating to employers' reserve accounts); 22 Cal. Code Reg. § 1256-12; *Altaville Drug Store, Inc. v. Employment Development Department (1988) 44 Cal. 3d 231, 236, 242 Cal. Rptr. 732, 746 P.2d 871]* . However, this does not apply to nonmarried persons, even though they may be engaged to be married, if no marriage is imminent and there are no children of their nonformalized relationship [*Norman v. Unemployment Ins. Appeals Bd. (1983) 34 Cal. 3d 1, 9-10, 192 Cal. Rptr. 134, 663 P.2d 904* ; *but see MacGregor v. Unemployment Ins. Appeals Bd. (1984) 37 Cal. 3d 205*]. Conversely, a worker who leaves his or her employment to accompany his or her nonmarital partner to another state in order to maintain the familial relationship they have established with their child constitutes leaving voluntarily with good cause within the meaning of the statute governing eligibility for unemployment insurance benefits [*MacGregor v. Unemployment Ins. Appeals Bd. (1984) 37 Cal. 3d 205, 212, 207 Cal. Rptr. 823, 689 P.2d 453]* . The precise scope of the word "spouse" in this context has become less important with the enactment of legislation, effective January 1, 2002, under which unmarried domestic partners are treated the same as spouses for the purpose of determining whether a claimant left employment to preserve a family relationship [*Unemp. Ins. Code §§ 1030(a), 1032, 1056*; *see Fam. Code § 297* (definition of "domestic partner"); *see also* 2001 Stats., ch. 893].

[iv] Pursuant to Collective Bargaining Agreement

A person whose employment was terminated under the compulsory retirement provisions of a collective bargaining agreement to which the employer is a party is not deemed to have left his or her work without good cause [*Unemp. Ins. Code §§ 1030(e), 1256*]. Also, a person is deemed to have left his or her most recent work with good cause if he or she elected to be laid off in place of an employee with less seniority pursuant to a provision in a collective bargaining agreement permitting an employee with more seniority to elect to be laid off in place of an employee with less seniority if the employer has decided to lay off employees [*Unemp. Ins. Code § 1256*].

[v] Deprivation of Equal Opportunity or Discrimination

Subject to specified exceptions, termination of employment by a person whose employer operated so as to deprive the person of equal employment opportunities on the basis of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation is not deemed to be "having left the most recent work without good cause" [*see Gov. Code § 12940(a)* (prohibited bases of discrimination);

see also Gov. Code §§ 12926, 12926.1 (definitions)]. However, this does not apply to a deprivation based on a bona fide occupational qualification or on applicable security regulations established by the United States or California, nor does it apply if the person fails to make reasonable efforts to provide the employer with an opportunity to remove any unintentional deprivation of the person's equal employment opportunities [*Unemp. Ins. Code § 1256.2*; *see Prescod v. Unemployment Ins. Appeals Bd. (1976) 57 Cal. App. 3d 29, 41, n.19, 127 Cal. Rptr. 540* (*Unemp. Ins. Code § 1256.2* as declaratory of existing law)]. Thus, if one's work is made intolerable over a period of time by the discriminatory acts of the employer, such as a refusal to reinstate, a demotion in grade, and loss of promotional opportunity, there is good cause for leaving employment and seeking unemployment compensation benefits [*Prescod v. Unemployment Ins. Appeals Bd. (1976) 57 Cal. App. 3d 29, 41, 127 Cal. Rptr. 540* (sex discrimination against woman rehired after maternity leave at same pay but in lower grade, resulting in loss of promotional opportunity; *see Sanchez v. Unemployment Ins. Appeals Bd. (1984) 36 Cal. 3d 575, 586-587, 205 Cal. Rptr. 501, 685 P.2d 61* , approving *Prescod* and disapproving *Warringer*)].

The term "employment opportunities," as used in *Unemp. Ins. Code § 1256.2*, includes, but is not limited to, assignments to jobs, work atmosphere, compensation, including fringe benefits, promotions, transfer, upgrading, rights and duties of employees under work rules, and the terms, conditions, or privileges of employment [*22 Cal. Code Reg. § 1256.2-1*].

Employers are prohibited from discriminating on the basis of sex in the payment of wages [*Lab. Code § 1197.5(a)*]. Hence, it has been held that an employee who had been discriminated against as to wages due to sex, who had made appropriate protest and request for equalization of compensation, and who had been refused adjustment after the employer had had an opportunity to do so had good cause for leaving the employment [*Morrison v. Unemployment Ins. Appeals Bd. (1976) 65 Cal. App. 3d 245, 250-253, 134 Cal. Rptr. 916* (pointing out, however, that existence of a claim based on past discrimination which has ceased should not afford good cause to leave employment voluntarily, since methods are available for enforcing the claim by legal process)].

[vi] To Escape Domestic Violence

An individual may be deemed to have left his or her most recent work with good cause if he or she leaves employment to protect his or her children, or himself or herself, from domestic violence abuse [*Unemp. Ins. Code § 1256*].

[vii] Absence From Work

A person whose employment is terminated due to his or her absence from work for a period in excess of 24 hours because of his or her incarceration and who is convicted of the offense for which he or she was incarcerated or of any lesser included offense is deemed to have left his or her work voluntarily without good cause for the purposes of determining eligibility for benefits under *Unemp. Ins. Code § 1256* [*Unemp. Ins. Code § 1256.1(a)*; *see Unemp. Ins. Code § 1030.1(1)*; *see also Jefferson v. Unemployment Ins. Appeals Bd. (1976) 59 Cal. App. 3d 72, 76-79, 130 Cal. Rptr. 405* (upholding constitutionality of *Unemp. Ins. Code § 1256.1(a)* against procedural due process and equal protection challenges)].

[5] What Constitutes Misconduct

The term "misconduct," as used in *Unemp. Ins. Code § 1256* (*discussed under § 564.130[1]*), is limited to conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior that the employer has the right to expect of an employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent, or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not misconduct. The

policy of the law as expressed in *Unemp. Ins. Code § 100* is to provide benefits to persons unemployed through no fault of their own. Accordingly, fault is the basic element to be considered in interpreting and applying the law governing unemployment compensation. The determination of fault is not concluded by a finding that the discharge was justified. The employee's conduct must evince culpability or bad faith. Hence, a claimant may not be denied benefits solely on the basis of a good faith error in judgment [*Amador v. Unemployment Ins. Appeals Bd. (1984) 35 Cal. 3d 671, 678-679, 200 Cal. Rptr. 298, 677 P.2d 224* (worker not disqualified from collecting unemployment insurance benefits if discharged for wilfully refusing to perform work that worker reasonably and in good faith believed would jeopardize health of others); *see Moore v. Unemployment Ins. Appeals Bd. (1985) 169 Cal. App. 3d 235, 242, 215 Cal. Rptr. 316* (if claimant's reasons for refusing work assignment by employer would constitute good cause sufficient to justify resignation, such refusal resulting in employee's discharge as not constituting misconduct); *Rowe v. Hansen (1974) 41 Cal. App. 3d 512, 520, 116 Cal. Rptr. 16]* . The test is essentially volitional: although conduct may be harmful to an employer's interest and justify the employee's discharge, it will not disqualify the employee for unemployment insurance benefits unless it is willful, wanton, or equally culpable [*Jacobs v. California Unemployment Ins. Appeals Bd. (1972) 25 Cal. App. 3d 1035, 1037, 102 Cal. Rptr. 364]* .

Failure to abide by an employer's reasonable and job-related rule or policy amounts to misconduct. For example, an employee who refuses to submit to a drug test while working in a hazardous environment, albeit in a job that would not be considered safety-sensitive in another location, has committed misconduct and is ineligible for unemployment compensation benefits [*American Federation of Labor v. Unemployment Ins. Appeals Bd. (1994) 23 Cal. App. 4th 51, 61-62, 28 Cal. Rptr. 2d 210]* .

The employer has the burden of establishing misconduct to protect its reserve fund [*Cerberonics, Inc. v. Unemployment Ins. Appeals Bd. (1984) 152 Cal. App. 3d 172, 176, 199 Cal. Rptr. 292]* .

[6] Presumption Favoring Employee Absent Contrary Notice From Employer

A person is presumed to have been discharged for reasons other than misconduct and not to have voluntarily left his or her work without good cause unless the employer has given written notice to the contrary to the Employment Development Department, as provided in *Unemp. Ins. Code § 1327*, setting forth facts sufficient to overcome the presumption. The presumption is rebuttable [*Unemp. Ins. Code § 1256*]. The presumption is one that affects the burden of proof and controls the burden of proof at each level of appeal; that is, from the Employment Development Department, to the administrative law judge, to the Unemployment Insurance Appeals Board, through the superior court, regardless of whether it was deemed rebutted at a lower level [*O'Connell v. Unemployment Ins. Appeals Bd. (1983) 149 Cal. App. 3d 54, 56-59, 196 Cal. Rptr. 505]* .

[7] Other Grounds of Disqualification

An individual is also disqualified for unemployment compensation benefits if he or she:

> (1) Was discharged from his or her most recent work for chronic absenteeism due to intoxication, reporting to work while intoxicated, using intoxicants on the job, or gross neglect of duty while intoxicated, if any of these incidents is caused by an irresistible compulsion to use or consume intoxicants, including alcoholic beverages, or otherwise left the employment for reasons caused by an irresistible compulsion to use or consume intoxicants, including alcoholic beverages [*Unemp. Ins. Code § 1256.4(a)*; *see* 22 Cal. Code Reg. § 1256-37];
>
> (2) Willfully, for the purposes of obtaining unemployment compensation benefits, either made a false statement or representation, including using a false name, false social security number or other false identification, with actual knowledge of its falsity or withheld a material fact in order to obtain unemployment compensation benefits [*Unemp. Ins. Code § 1257(a)*]; or

(3) Without good cause refused to accept suitable employment when offered or failed to apply for suitable employment when notified by a public employment office [*Unemp. Ins. Code § 1257(b)*; *see § 564.127[5]*]. "Good cause," as used in this provision, means an adequate cause, a cause that comports with the purposes of the Unemployment Insurance Code and with other laws [*Syrek v. California Unemployment Insurance Appeals Board (1960) 54 Cal. 2d 519, 529, 7 Cal. Rptr. 97, 354 P.2d 625* (holding that "good cause" for refusing suitable employment includes conscientious objection to subscribing to a loyalty oath required by a public agency employer as a condition of the position refused)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationEligibilityGood CauseLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationEligibilityInvoluntary UnemploymentLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationEligibilityVoluntary Unemployment

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§ 564.131 Duration of Disqualification

[1] Person Voluntarily Quit or Was Fired for Misconduct

A person disqualified under *Unemp. Ins. Code § 1256* (quitting without good cause or fired for misconduct connected with work, *discussed under § 564.130[1]*) is ineligible to receive unemployment compensation benefits for the week in which the act that causes the disqualification occurs, and continuing until he or she has, subsequent to the act that caused disqualification and his or her registration for work, performed service in bona fide employment for which remuneration is received equal to or in excess of five times his or her weekly benefit amount [*Unemp. Ins. Code § 1260(a)*; *see* 22 Cal. Code Reg. § 1260(a)-1].

[2] Refusal to Accept Suitable Employment

A person disqualified under *Unemp. Ins. Code § 1257(b)* (refusal without good cause to accept suitable employment, *discussed under § 564.130[7]*) is ineligible to receive unemployment compensation benefits for not less than two or more than 10 consecutive weeks beginning with (1) the week in which the cause of disqualification occurs, if he or she registers for work in that week; or (2) the week subsequent to the occurrence of the cause of disqualification in which he or she first registers for work if he or she does not register for work in the week in which the cause of disqualification occurs [*Unemp. Ins. Code § 1260(b)*].

[3] False Statement

A person disqualified under *Unemp. Ins. Code § 1257(a)* (false statement or representation to obtain unemployment compensation benefits, *discussed under § 564.130[7]*) under a determination transmitted to him or her from the department, and who was not paid any benefit amount as a result of his or her false statement or representation, is ineligible to receive unemployment compensation benefits for two weeks, beginning with the week in which the determination is mailed to or personally served on him or her, or any subsequent week for which he or she is first otherwise in all respects eligible for unemployment compensation benefits, and for not more than 13 subsequent weeks for which he or she is otherwise in all respects eligible for unemployment compensation benefits [*Unemp. Ins. Code §*

1260(c)]. If the individual was paid any benefit amount as a result of his or her false statement or representation, he or she is ineligible to receive unemployment compensation benefits for five weeks beginning with the week in which the determination is mailed to or personally served on him or her, or any subsequent week, for which he or she is first otherwise in all respects eligible for unemployment compensation benefits and for not more than 10 subsequent weeks for which he or she is otherwise in all respect eligible for unemployment compensation benefits [Unemp. Ins. Code § 1260(d)]. However, no disqualification under this provision may be applied to any week if all or any portion of the week is beyond the three-year period next succeeding the date of the mailing or personal service of the determination [*Unemp. Ins. Code § 1260(c), (d)*].

Unemp. Ins. Code § 1260(c), (d) does not apply to a person convicted under *Unemp. Ins. Code § 2101*, relating to willful misrepresentation or concealment of a material fact [*Unemp. Ins. Code § 1260(c), (d)*; on duration of forfeiture of rights on conviction under *Unemp. Ins. Code § 2101, see Unemp. Ins. Code § 1263*].

[4] Serving Multiple Disqualification Periods Concurrently

Notwithstanding the provisions of *Unemp. Ins. Code § 1260(c), discussed under § 564.131[3]*, an individual who is subject to a disqualification imposed under *Unemp. Ins. Code § 1257(b)* (*discussed under § 564.131[2]*) may, if he or she is otherwise eligible for unemployment compensation benefits, concurrently serve a disqualification imposed under *Unemp. Ins. Code § 1257(a)* (*discussed under § 564.131[3]*) [*Unemp. Ins. Code § 1260(d)*].

[5] Extension of Ineligibility Period on Successive Disqualifications

When successive disqualifications under *Unemp. Ins. Code § 1257* occur, the director may extend the period of ineligibility provided for in *Unemp. Ins. Code § 1260* for an additional period not to exceed eight additional weeks [*Unemp. Ins. Code § 1261*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationBenefit EntitlementsLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationEligibilityGood CauseLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationEligibilitySuitable Employment

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§ 564.132 Claims for Benefits

[1] Kinds of Claims

[a] "New Claim"

A "new claim" for unemployment compensation benefits means an application for the establishment of a benefit year and a computation of the maximum benefits payable and the weekly rate [22 Cal. Code Reg. § 1326-2(a)]. The filing and contents of a new claim are covered by 22 Cal. Code Reg. § 1326-2(b).

[b] "Additional Claim"

An "additional claim" for unemployment compensation benefits means an application that certifies to the beginning date of a period of unemployment (1) that falls within a previously established benefit year, extended duration period, or extended benefit period; and (2) when a break of one or more weeks has occurred in the claim series with intervening employment [22 Cal. Code Reg. § 1326-4(a)]. What constitutes a break in the claim series with intervening employment is set forth in 22 Cal. Code Reg. § 1326-4(a)(2)(A)-(C). The filing of an additional claim, when an additional claim may not be filed, and the notice required to be given by the department to the employer of the filing of an additional claim are covered in 22 Cal. Code Reg. § 1326-4(b)-(d), respectively.

[c] "Reopened Claim"

A "reopened claim" for unemployment compensation benefits means an application that certifies to the beginning date of a period of unemployment (1) that falls within a previously established benefit year, extended duration period, or extended benefit period; and (2) that follows either of the following: (a) a period of one or more weeks for which the claimant failed to file a continued claim or partial claim [*see § 564.132[1][e]*] and during which the claimant did not perform services in employment; or (b) a period of one or more weeks for which the claimant was ineligible for benefits for a definite period and for which continued claims or partial claims were filed, unless with respect to any week during such period, the claimant was ineligible for benefits pursuant to *Unemp. Ins. Code § 1252* (*discussed under § 564.125*)

or pursuant to *Unemp. Ins. Code § 1279* (relating to unemployment compenation benefits during partial employment, *discussed under § 564.122*) due to excessive earnings from services performed in employment that week (if the latter condition is met, an additional claim would be filed following the end of the period of ineligibility [*see* 22 Cal. Code Reg. § 1326-4, *discussed under § 564.132[1][b]*]) [22 Cal. Code Reg. § 1326-5(a)]. The filing of a reopened claim is covered in 22 Cal. Code Reg. § 1326-5(b) and (c), and a definition of when a reopened claim may not be filed is covered in 22 Cal. Code Reg. § 1326-5(d).

[d] "Continued Claim"

A "continued claim" for unemployment compensation benefits means an application to serve a waiting period or for the receipt of benefits that certifies to a week of unemployment [22 Cal. Code Reg. § 1326-6(a)]. The procedure for filing the claims, the matters to which the claimant must certify, and extensions of time to file are covered in 22 Cal. Code Reg. § 1326-6(b)-(e). The notice required to be given to the claimant by the department relating to any right of appeal is set forth in 22 Cal. Code Reg. § 1326-6(f).

[e] "Partial Claims"

A "partial claim" for unemployment compensaton benefits is a claim for partial benefits by a partially unemployed individual. "First partial claim" and "subsequent partial claim" for partial unemployment compensation benefits mean an application for a determination of eligibility for partial benefits that certifies to the completion of a week of partial unemployment either to satisfy a week of the waiting period requirement or to claim partial benefits for a compensable week or two compensable weeks [22 Cal. Code Reg. § 1326-8(a)].

A partially unemployed individual is a person who during a week (1) was employed by a regular employer, (2) worked less than his or her normal customary full-time hours for his or her regular employer because of lack of full-time work, and (3) was continuously attached to his or her regular employer in that no severance of the employer-employee relationship occurred [22 Cal. Code Reg. § 1252-1(a); *see* 22 Cal. Code Reg. § 1326-7]. A person receiving benefits under *Unemp. Ins. Code § 1279.5* (relating to shared work) during a benefit year may not receive benefits as a partially unemployed individual with respect to any week in such benefit year while in employment status with the regular employer who initiated the shared work program [22 Cal. Code Reg. § 1252-1(b)(1)]. A person may not claim benefits as a partially unemployed individual if the Department determines that the individual has been laid off for a period in excess of two consecutive weeks [22 Cal. Code Reg. § 1252-1(b)(2)].

The employer of a partially unemployed individual is required, within five days after the termination of any payroll week to give the individual a notice of reduced earnings on a form supplied by the department which must set forth the matters listed in 22 Cal. Code Reg. § 1326-7 [22 Cal. Code Reg. § 1326-7]. The filing and content of a first or subsequent partial claim for partial unemployment compensation benefits are covered by 22 Cal. Code Reg. § 1326-8(b). When a claimant has filed partial claims for two consecutive weeks during which he or she performed no services for the regular employer, he or she may not file a partial claim for a subsequent week of unemployment until he or she again performs services for the regular employer. For any subsequent weeks in which the claimant is ineligible to file partial claims, he or she may, if unemployed, filed continued claims in accordance with *22 Cal. Code Reg. § 1326.6* [*see § 564.132[1][d]*] [*22 Cal. Code Reg. § 1326.8(c)*].

[2] Filing Claim

[a] Requirements

Claims for unemployment compensation benefits must be made in accordance with authorized regulations of the Director of Employment Development [*Unemp. Ins. Code § 1326*; *see 22 Cal. Code Reg. §§ 1326-1-1326-11* (discussed in *§ 564.132[1]*)].

[b] Delayed Filing

Regulations permit delayed filing of a claim for good cause. 22 Cal. Code Reg. § 1253-8 provides that a week of unemployment of an individual who for good cause delays filing his or her new claim is the week in which he or she first becomes unemployed. Thereafter, his or her week consists of seven consecutive day periods, pursuant to 22 Cal. Code Reg. § 1253-1, commencing immediately after the initial week [*Wang v. Unemployment Ins. Appeals Bd. (1990) 225 Cal. App. 3d 412, 417, 275 Cal. Rptr. 237]* . Good cause for late filing includes, but is not limited to, the examples set forth in 22 Cal. Code Reg. § 1326-10(a) (for example, an employer's failure to comply with regulations regarding partial unemployment benefits, under 22 Cal. Code Reg. § 1326-10(a)(1)) [*Wang v. Unemployment Ins. Appeals Bd. (1990) 225 Cal. App. 3d 412, 418, 275 Cal. Rptr. 237]* . Accordingly, good cause for a delayed claim is defined broadly. Although good cause might include the employee's unawareness of the right to seek unemployment benefits if he or she files a claim within a reasonable period of time under the circumstances, unawareness does not constitute good cause when coupled with an unreasonable delay in filing a claim [*Wang v. Unemployment Ins. Appeals Bd. (1990) 225 Cal. App. 3d 412, 420, 275 Cal. Rptr. 237]* .

[3] Payment or Denial of Claim

Except as otherwise provided in *Unemp. Ins. Code §§ 1326-1342* (relating to the filing, determination, and payment of unemployment compensation claims), the Employment Development Department must promptly pay benefits if it finds the claimant is eligible, or must promptly deny benefits if it finds the claimant ineligible [*Unemp. Ins. Code § 1326*; *see 22 Cal. Code Reg. §§ 1326-1-1326-11*]. Benefits are paid through public employment offices or through such other agency as may be prescribed by authorized regulations of the director [*Unemp. Ins. Code § 1339(a)*]. Payment of benefits due a deceased or legally declared incompetent person is covered by *Unemp. Ins. Code § 1341* and 22 Cal. Code Reg. § 1341-1.

[4] Payment of Interest on Wrongful Denial of Claim

Prejudgment interest is properly awarded on unemployment insurance benefits payable under a wrongfully denied claim [*Aguilar v. Unemployment Ins. Appeals Bd. (1990) 223 Cal. App. 3d 239, 245-246, 272 Cal. Rptr. 696]* . This interest is properly awarded by a superior court in an action arising from administrative denial of benefits [*Aguilar v. Unemployment Ins. Appeals Bd. (1990) 223 Cal. App. 3d 239, 241, 246 n.4, 272 Cal. Rptr. 696* (noting EDD's assertion that administrative law judge has no power to award interest, but not necessarily accepting it, and emphasizing that in instant case, interest was awarded by superior court judgment)].

Neither the Board nor an administrative law judge has the authority to award interest on a retroactive lump-sum payment that the Board or judge determines is owed to the claimant. The retroactive amount, covering the period from the first day of eligibility to the date the claimant is administratively determined to be eligible for disability benefits, is not equivalent to "damages" assessed in a civil action, and so *Civ. Code § 3287(a)*, which authorizes a *trial court* to award prejudgment interest, is inapplicable [*see Weber v. Board of Retirement (1998) 62 Cal. App. 4th 1440, 1444-1452, 73 Cal. Rptr. 2d 769]* . On the other hand, if the Board *denies* disability benefits and the claimant brings a mandamus action to recover the benefits, the court may award prejudgment interest under *Civ. Code § 3287(a)* on the amount of benefits wrongfully denied by the Board [*see American Federation of Labor v. Unemployment Ins. Appeals Bd. (1996) 13 Cal. 4th 1017, 1033-1042, 56 Cal. Rptr. 2d 109, 920 P.2d 1314]* . Under *Civ. Code § 3287(a)*, a claimant must satisfy three conditions for the recovery of interest in a mandamus action against the state: (1) there must be an underlying monetary obligation, (2) the recovery must be certain or capable of being made certain by calculation, and (3) the right to recovery must vest on a particular day *Aguilar v. Unemployment Ins. Appeals Bd. (1990) 223 Cal. App. 3d 239, 242-245, 272 Cal. Rptr. 696* (citing *Tripp v. Swoap (1976) 17 Cal. 3d 671, 681-682, 131 Cal. Rptr. 789, 552 P.2d 749*)]. These criteria are satisfied with respect to unemployment insurance benefits because (1) unemployment benefits are a monetary obligation that can be enforced by a claimant in a mandamus proceeding, (2) the amount to which a particular claimant is entitled can be calculated with certainty by reference to fixed schedules, and (3) the right

to payment of benefits vests when the claimant has established the facts that entitle the claimant to the benefits [*Aguilar v. Unemployment Ins. Appeals Bd. (1990) 223 Cal. App. 3d 239, 245, 272 Cal. Rptr. 696]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestPrejudgment InterestLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationClaim Procedures

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§ 564.133 Notice to Employer and Employer's Right to Submit Facts

[1] On Employee's Claim

The Employment Development Department must give notice of the filing of a new or additional claim [*see §§ 564.132[1][a], [b]*] to the employing unit by which the claimant was last employed immediately preceding the filing of the claim unless the additional claim is the result of the filing of a partial claim as defined by the department, there has not been a subsequent employing unit which is designated as the last employer, and there is no separation issue [*Unemp. Ins. Code § 1327*].

Within 10 days after the notice is mailed or within any extension of that period for good cause, the employing unit so notified is required to submit any known facts that may affect the claimant's eligibility for benefits, including but not limited to any facts pertaining to eligibility under *Unemp. Ins. Code § 1256* (*discussed under § 564.130[1]*) [*Unemp. Ins. Code § 1327*; *see* 22 Cal. Code Reg. § 1333-1]. If after the 10-day period the employing unit acquires knowledge of facts that may affect the claimant's eligibility and the facts could not reasonably have been known within the period, the employing unit is required, within 10 days of acquiring the knowledge or any extension of that period for good cause, to submit the facts to the department [*Unemp. Ins. Code § 1327*; *see* 22 Cal. Code Reg. § 1333-1].

Because of the reference in *Unemp. Ins. Code § 1327* to *Unemp. Ins. Code § 1256* (voluntary quitting or discharge for misconduct), the mandatory provisions of *Unemp. Ins. Code § 1327* overlap the permissive provisions of *Unemp. Ins. Code § 1030*, relating to contributions and reports. *Unemp. Ins. Code § 1030* provides that an employer entitled under *Unemp. Ins. Code § 1327* to receive notice of the filing of a new or additional claim may, within 10 days after the mailing of the notice or any extension of that period for good cause, submit to the department any facts disclosing whether the claimant (1) left the employing unit's employ voluntarily and without good cause; (2) was discharged for misconduct connected with his or her work; (3) was discharged from or quit his or her most recent employment as the result of an irresistible compulsion to use or consume intoxicants including alcoholic beverages; (4) was a student employed on a temporary basis, whose employment began with the vacation period and ended with return to school at the close of that period; (5) left the job to accompany his or her spouse or domestic partner to, or join him or her at, a

place (a) from which it is impractical to commute to the employment, and (b) to which a transfer of the claimant by the employer is not available; or (6) left the job to protect his or her children or himself or herself from domestic violence abuse [*Unemp. Ins. Code § 1030(a)*; *see Unemp. Ins. Code § 1032*]. As used in *Unemp. Ins. Code § 1030*, the word "spouse" includes a person to whom marriage is imminent [*Unemp. Ins. Code § 1032*; *see also Unemp. Ins. Code §§ 3701(a), 4701(a)* (relating to extended duration benefits and federal-state extended benefits, respectively)]. The precise scope of the word "spouse" in this context has become less important with the enactment of legislation, effective January 1, 2002, under which unmarried domestic partners are treated the same as spouses for the purpose of determining whether a claimant left employment to preserve a family relationship [*Unemp. Ins. Code §§ 1030(a), 1032, 1056*; *see Fam. Code § 297* (definition of "domestic partner"); *see also* 2001 Stats., ch. 893].

For the purposes of *Unemp. Ins. Code § 1030* only, if the claimant voluntarily left the employment without notification to the employer of the reasons and the employer submits all of the facts within its possession concerning the leaving, the leaving is presumed to be without good cause [*Unemp. Ins. Code § 1030(d)*]. On the other hand, an individual whose employment is terminated under the compulsory retirement provisions of a collective bargaining agreement to which the employer is a party shall not be deemed to have voluntarily left his or her employment without good cause [*Unemp. Ins. Code § 1030(e)*].

[2] On Computation of Claim

An employer who is not entitled to receive notice of the filing of the claim under *Unemp. Ins. Code § 1327* (base period employer who was not the last previous employer) but is entitled to receive notice of computation under *Unemp. Ins. Code § 1329* (all base period employers) may, within 15 days after the mailing of the notice of computation or any extension of that period for good cause, submit to the department facts disclosing the matters set forth in *Unemp. Ins. Code § 1030(a)* (*discussed under § 564.133[1]*) [*Unemp. Ins. Code § 1030(b)*; 22 Cal. Code Reg. § 1030-1(b); *see also Unemp. Ins. Code § 1032.5* (less than full-time work rendered for base period employer)]. A notice of computation or recomputation given to a base period employer under *Unemp. Ins. Code §§ 1329* and *1330* shall not identify wages paid to the claimant by other employers [22 Cal. Code Reg. § 1329-1].

The claimant and any base period employer to whom a notice of computation or recomputation is given may, within 20 days after the mailing or personal service of the notice or any extension of that period for good cause, protest the accuracy of the computation or recomputation [*Unemp. Ins. Code § 1330*; *see* 22 Cal. Code Reg. § 1333-2]. The department must consider any protest and must promptly notify the claimant and the base period employer submitting it of the recomputation or denial of recomputation. An appeal may be taken from a notice of denial in the manner prescribed in *Unemp. Ins. Code § 1328* (*discussed under § 564.134*), and the director shall be an interested party to any appeal [*Unemp. Ins. Code § 1330*].

Any base period employer shall, within 15 days after a notice of computation was mailed or within any extension of that period for good cause, submit to the department any facts then known which he or she was not previously required to submit to the department under *Unemp. Ins. Code § 1327* that could affect the claimant's eligibility for benefits. If after the 15-day period the employer acquires knowlege of facts that may affect the claimant's eligibility and the facts could not reasonably have been known within the period, the employer shall, within 10 days of acquiring the knowledge or within any extension of that period for good cause, submit the facts to the department [*Unemp. Ins. Code § 1331*; *see* 22 Cal. Code Reg. § 1333-1]. The department is required to make a determination or reconsidered determination and promptly notify the claimant and the base period employer of the determination or reconsidered determination and the reasons for it. An appeal may be taken in the manner prescribed in *Unemp. Ins. Code § 1328*, and the director shall be an interested party to any appeal [*Unemp. Ins. Code § 1331*; *see* 22 Cal. Code Reg. § 1328-1].

Legal Topics:

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

Labor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationClaim Procedures

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§ 564.134 Department's Determination or Ruling

The department will consider the facts submitted by an employer pursuant to *Unemp. Ins. Code § 1327* (*discussed under § 564.133[1]*) and, if benefits are claimed subsequent to the filing of the new or additional claim [*see § 564.132[1][a], [b]*], make a determination of the claimant's eligibility for benefits. The department must promptly notify the claimant and any employer who prior to the determination submitted any facts or gave any notice pursuant to *Unemp. Ins. Code § 1327* or *1328* and authorized regulations of the determination or reconsidered determination and the reasons for it. Within 20 days from the mailing or personal service of the notice of the determination or reconsidered determination or within any extension of the period, the claimant and employer may appeal to an administrative law judge, and the director shall be an interested party to any appeal [*Unemp. Ins. Code § 1328*; *see* 22 Cal. Code Reg. § 1328-1(b)].

If the employer is entitled to a ruling under *Unemp. Ins. Code § 1030(b)* (*discussed under § 564.133[2]*), or to a determination under *Unemp. Ins. Code § 1328*, the department shall consider the facts submitted by the employer together with other information it has, and rule as to the cause of termination of the claimant's employment [*see Unemp. Ins. Code §§ 1030(c), 1328*]. Within 20 days after mailing or personal service of the notice of the ruling or reconsidered ruling, or within any extension of that period, the employer may appeal to an administrative law judge. The ruling may be reconsidered for good cause within five days an appeal is filed or, if no appeal is filed, within 20 days after mailing or personal service of the notice of the ruling, except that any ruling or reconsidered ruling relating to a determination which is reconsidered pursuant to *Unemp. Ins. Code § 1332(b)* may be reconsidered by the department for good cause within 15 days after an appeal is filed or, if no appeal is filed, within 20 days after mailing or personal service of the notice of determination [*Unemp. Ins. Code §§ 1030(c), 1332(b)*].

No ruling made under *Unemp. Ins. Code § 1030* may constitute a basis for the disqualification of any claimant, but a determination by the department made under *Unemp. Ins. Code § 1328* (determination of eligibility for unemployment compensation benefits) may constitute a ruling under *Unemp. Ins. Code § 1030* [*Unemp. Ins. Code § 1031*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationClaim ProceduresLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationReview

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[Reserved]

§§ 564.135[Reserved]

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§ 564.150 Generally

Disability compensation is covered by *Unemp. Ins. Code §§ 2601-3272, 3300-3305*, and 22 Cal. Code Reg. §§ 2601-1-3271-1. Workers' contributions to the Disability Fund are covered by *Unemp. Ins. Code §§ 984* and *985* [*see Unemp. Ins. Code § 2901*]. Disability payments are made to eligible individuals from the Disability Fund or from a voluntary plan [*see Unemp. Ins. Code §§ 2625, 2712, 2712.5*; on voluntary plans, *see Unemp. Ins. Code §§ 3251-3272*]. Eligible minors may be paid and may receive disability benefits in their own right and a receipt signed by a minor is valid and binding [*Unemp. Ins. Code § 2702*]. Benefits are payable by the Employment Development Department through public employment offices or other agencies approved by the Director of Employment Development [*Unemp. Ins. Code § 2701*]. Initial payment for disability benefits to a monetarily eligible claimant who is otherwise determined eligible by the department under applicable law and regulation must be issued by the department within 14 days of receipt of the claimant's properly completed first disability claim [*Unemp. Ins. Code § 2701.5*].

The benefit rights of industrially disabled persons are covered by *Unemp. Ins. Code §§ 2775-2778* and 22 Cal. Code Reg. § 2777-1. Nonindustrial disability insurance for state employees is covered by *Unemp. Ins. Code §§ 2781-2783*. The exemption of individuals on religious grounds from making contributions to the Disability Fund and their ineligibility for benefits are covered by *Unemp. Ins. Code § 2902*.

The statutory provisions governing disability compensation (*Unemp. Ins. Code § 2601 et seq.*) thus set out the provisions of three separate disability plans: (1) the state disability insurance program, which adopts to some extent the provisions governing unemployment insurance; (2) the nonindustrial disability insurance program, which incorporates some of the provisions of the state disability insurance program but is largely set forth in *Gov. Code § 8000 et seq.*; and *(3)* voluntary plans, which are adopted by some employers in place of the state disability and nonindustrial disability insurance programs. The state disability insurance program and the nonindustrial disability insurance program for state employees are two entirely separate and quite different systems. They differ in terms of eligibility, benefits, and funding, and there is no overlap between them. Because of the separateness of the two programs and the lack of any mechanism for transferring funds between them, a worker who made no employee contributions to the state disability insurance fund during his or her base period has no cognizable wages from employment for purposes of *Unemp. Ins.*

Code § 2652 [*Simpson v. Unemployment Ins. Comp. Appeals Bd. (1986) 187 Cal. App. 3d 342, 352, 231 Cal. Rptr. 690]* .

The liability of persons who are overpaid any amount as benefits is covered by *Unemp. Ins. Code §§ 2735-2742*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceDisability BenefitsBenefit EntitlementsLabor & Employment LawDisability & Unemployment InsuranceDisability BenefitsCoverage & DefinitionsGeneral Overview

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§ 564.151 Nature of Disability Insurance Law

The Unemployment Compensation Disability Act provides benefits, either through the State Disability Fund or under voluntary plans approved and monitored by the Director of Employment Development, for persons who are unable to work because of nonoccupational illness or injury, and is financed by a tax on wages of employees themselves. The act thus fills the gap between workers' compensation, which provides benefits for disability incurred during employment, and unemployment insurance, which affords benefits for involuntary unemployment suffered by persons who are physically able to work [*Safeway Stores, Inc. v. Superior Court (1987) 190 Cal. App. 3d 713, 716-717, 235 Cal. Rptr. 636]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceDisability BenefitsCoverage & DefinitionsGeneral Overview

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§ 564.152 Family Temporary Disability Insurance

The Legislature has added Family Temporary Disability Insurance (FTDI), also called "Paid Family Leave," to the California Disability Insurance program. Beginning in July, 2004, an eligible worker can receive up to six weeks of FTDI benefits per year for family care leave [*Unemp. Ins. Code § 3302(e)*; *see* 2002 Stats., ch. 901, § 7; *Unemp. Ins. Code § 2613(c)*]. The purpose of the FTDI program is to provide wage-replacement benefits to workers who exercise their rights under the federal Family and Medical Leave Act [*see 29 U.S.C. § 2601 et seq.*] and California's Family Rights Act [*see Gov. Code §§ 12945.1, 12945.2* (Moore-Brown-Roberti Family Rights Act)] to take unpaid, job-protected leave to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a minor child within one year of the birth or placement of the child in connection with foster care or adoption [*see Unemp. Ins. Code §§ 3300, 3301(a)*].

Specifically, an employee will be eligible for FTDI benefits equal to one-seventh of his or her weekly benefit amount on any day in which he or she is unable to perform his or her regular or customary work because he or she is bonding with a minor child during the first year after the birth or placement of the child in connection with foster care or adoption, or caring for a seriously ill child, parent, spouse, or domestic if all of the following conditions are satisfied [*Unemp. Ins. Code § 3303*; *see Unemp. Ins. Code § 3302(e)* (defining "family care leave," although that term is not expressly made part of eligibility criteria)]:

(1) The employee has made a claim for temporary disability benefits as required by authorized regulations.

(2) The employee has been unable to perform his or her regular or customary work for a seven-day waiting period during each disability benefit period, with respect to which waiting period no FTDI benefits are payable.

(3) The employee has filed a certificate documenting the reason for taking leave [*see Unemp. Ins. Code §§ 2708, 2709*; *see also Unemp. Ins. Code § 3306* (employee may be required to submit additional

medical evidence if it can be procured without additional cost to care recipient)].

For FTDI purposes, "child" means an employee's biological, adopted, or foster son or daughter; an employee's stepson, stepdaughter, or legal ward; a son or daughter of an employee's domestic partner; or a person to whom the employee who stands in loco parentis [*Unemp. Ins. Code § 3302(c)*]. "Parent" means a biological, foster, or adoptive parent, a stepparent, a legal guardian, or other person who stood in loco parentis to the employee when the employee was a child [*Unemp. Ins. Code § 3302(g)*]. A "domestic partner" has the same meaning as under the Family Code [*Unemp. Ins. Code § 3302(d)*; *see Fam. Code § 297(b)* (domestic partnership established by filing Declaration of Domestic Partnership with Secretary of State)]. The term "seriously ill" is not defined in the statute, but "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential health care facility, or continuing treatment or continuing supervision by a health care provider [*Unemp. Ins. Code § 3302(h)*; *see Gov. Code § 12945.2* (similar definition under California Family Rights Act)].

The employee's weekly FTDI benefit is computed in the same manner as the weekly benefit under the state disability insurance program [*Unemp. Ins. Code § 3301(b)*; *see Unemp. Ins. Code § 2655*; *see also* "Amount of Benefits," *below*]. An individual is eligible to receive FTDI benefits equal to one-seventh of his or her weekly benefit amount for each full day during which he or she is unable to work due to caring for a seriously ill or injured family member or bonding with a minor child within one year of the birth or placement of the child in connection with foster care or adoption [*Unemp. Ins. Code § 3301(b)*]. The maximum benefit during any disability period is six times the employee's weekly benefit, and no more than six weeks of FDTI benefits may be paid in any 12-month period [*Unemp. Ins. Code § 3301(c), (d)*].

FTDI benefits will not be paid if the employee is already receiving unemployment compensation, benefits from the state disability insurance program, or other temporary disability benefits under federal or state law [*see Unemp. Ins. Code §§ 2629(b), 3303.1(a)(1)-(3)*]. Benefits are also not payable for any day in which another family member is ready, willing, and able and available for the same period of time in a day that the employee is providing the required care [*Unemp. Ins. Code § 3303.1(a)(4)*; *see Unemp. Ins. Code § 3302(f)* ("family member" is child, parent, spouse, or domestic partner of employee)]. An employee who is entitled to leave under the federal Family and Medical Leave Act of 1993 (FMLA) [*29 U.S.C. § 2601 et seq.*] or California's Moore-Brown-Roberti Family Rights Act (CFRA) [*Gov. Code §§ 12945.1, 12945.2*] must take FTDI leave concurrent with leave taken under the FMLA and the CFRA [*Unemp. Ins. Code § 3303.1(b)*]. Finally, an employer may require the employee to take up to two weeks of earned vacation time before receiving FTDI benefits [*Unemp. Ins. Code § 3303.1(c)* (vacation time to be applied against seven-day waiting period for benefits)].

FTDI benefits are funded entirely by employee contributions to the Unemployment Compensation Disability Fund. Employee contributions begin on January 1, 2004 [*Unemp. Ins. Code § 984(a)(2)(B)*], and benefit payments are available beginning on July 1, 2004 [2002 Stats., ch. 901, § 7; *see Unemp. Ins. Code § 2613(c)*].

Except as specifically provided by statute, the FTDI program is administered in accordance with the policies of the state disability insurance program [*see Unemp. Ins. Code § 3300(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceDisability BenefitsBenefit EntitlementsLabor & Employment LawDisability & Unemployment InsuranceDisability BenefitsCoverage & DefinitionsGeneral OverviewLabor & Employment LawLeaves of AbsenceFamily & Medical Leave ActCoverage & DefinitionsGeneral Overview

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§ 564.153 Definitions

[1] "Employment"

"Employment," for the purposes of disability insurance, is defined generally as meaning service included in the term "employment" as defined by *Unemp. Ins. Code §§ 100-2116*, relating to unemployment compensation benefits [*see § 564.71[4]*] [*Unemp. Ins. Code § 2606(a)*]. The term is further specially defined with respect to service for a public entity, service perfomed in the employ of certain nonprofit corporations, community chests, funds, and foundations in connection with the operation of certain health facilities, and domestic service in *Unemp. Ins. Code §§ 2606(a)* and *(b)* and *2606.5*, respectively.

The services performed for a public entity (defined in *Unemp. Ins. Code § 605(b)*), within the definition of "employment," are limited to four types [*Unemp. Ins. Code § 2606(a)*]. The third is service performed by a state employee to the extent provided by *Unemp. Ins. Code § 2781* (relating to nonindustrial disability insurance for state employees) [*Unemp. Ins. Code § 2606(a)(3)*]. *Unemp. Ins. Code § 2781* must, however, be read together with *Gov. Code §§ 19878-19885* (formerly, *Gov. Code §§ 18135-18142*), relating to nonindustrial disability leave. Taken together, *Unemp. Ins. Code § 2781* and *Gov. Code § 19878* provide disability insurance for state employees who are members of the Public Employees' Retirement System (PERS), members of the State Teachers' Retirement System (STRS), or employees of the Legislature. Members of the University of California Retirement System (UCRS) are not included, but are covered by the university's own nonindustrial disability insurance plan, which is not legislatively mandated [*Simpson v. Unemployment Ins. Comp. Appeals Bd. (1986) 187 Cal. App. 3d 342, 348-349, 231 Cal. Rptr. 690]* . Note, however, that in 1988, the Government Code provisions relating to industrial disability leave and nonindustrial disability leave for employees of the California State University were transferred to the Education Code. This was accomplished by repealing former *Educ. Code § 89526* and *Gov. Code §§ 19869.1* and *19878.1*, adding *Educ. Code §§ 89529-89529.11* and *Educ. Code §§ 89529.15-89529.25*, and amending *Gov. Code §§ 19875-19878* and *19885* [Stats. 1988, ch. 670]. These changes do not constitute a change in, but, rather, are declaratory of, the existing law [*see* Stats. 1988, ch. 670, § 11].

[2] "Disability Benefit Period"

"Disability benefit period," with respect to any individual, means the continuous period of unemployment and disability beginning with the first day with respect to which the individual files a valid claim for unemployment compensation disability benefits (for the meaning of "valid claim," *see § 564.153[4]*). Two consecutive periods of disability due to the same or related cause or condition and separated by a period of not more than 14 days is considered as one disability benefit period [*Unemp. Ins. Code § 2608*; *see Bilyeu v. Unemployment Ins. Appeals Bd. (1982) 130 Cal. App. 3d 657, 663, 181 Cal. Rptr. 837]* .

[3] "Disability Base Period"

"Disability base period," with respect to an individual who does not have an unexpired benefit year for unemployment compensation benefits, means the following [*Unemp. Ins. Code § 2610*]:

(1) For disability benefit periods beginning in October, November, or December, the four calendar quarters ended in the next preceding month of June;

(2) For disability benefit periods beginning January, February, or March, the four calendar quarters ended in the next preceding month of September;

(3) For disability benefit periods beginning in April, May, or June, the four calendar quarters ended in the next preceding month of December;

(4) For disability benefit periods beginning in July, August, or September, the four calendar quarters ended with the next preceding month of March.

The "disability base period," with respect to an individual who has an unexpired benefit year for unemployment compensation benefits, is as follows [*Unemp. Ins. Code § 2611*]:

(1) The same as the disability base period in *Unemp. Ins. Code § 2610, above*, if the individual has sufficient qualifying earnings in that disability base period;

(2) The same as the base period used to establish the benefit year for unemployment compensation benefits [*see § 564.124[1]*] if the individual does not have sufficient qualifying earnings in the disability base period in *Unemp. Ins. Code § 2610, above*.

For when quarters during which the worker was unemployed, or unemployed because of his or her involvement in a trade dispute, are excluded from the disability base period and preceding quarters substituted, see *Unemp. Ins. Code §§ 2612* and *2658*, respectively. For exclusions from the disability base period applicable to military trainees and to industrially disabled persons, see *Unemp. Ins. Code §§ 2770* and *2777*, respectively.

[4] "Valid Claim"

"Valid claim" means any claim for disability benefits made in accordance with the provisions of the Unemployment Insurance Code and regulations if the individual is unemployed and disabled and has been paid wages in employment for employers necessary to qualify for benefits under *Unemp. Ins. Code § 2652, below* [*Unemp. Ins. Code § 2609*]. An individual cannot establish a valid claim unless he or she has been paid wages for employment by employers of not less than $300 during his or her disability base period [*Unemp. Ins. Code § 2652*].

The earnings during the base period used for determining eligibility for state disability insurance (*see Unemp. Ins. Code § 2652*) must be subject to the state disability insurance tax in order to qualify as state disability "base period wages" [

Simpson v. Unemployment Ins. Comp. Appeals Bd. (1986) 187 Cal. App. 3d 342, 348, 350-354, 231 Cal. Rptr. 690 (holding that employee working in private sector when disabled was ineligible for state disability insurance when employer during base period was University of California, because base period employment was not subject to state disability insurance tax, and pointing out that worker was also ineligible for benefits under university's plan under which no benefits were payable for any day on and after separation from state service)].

[5] "Disability" and "Disabled"

The terms "disability" and "disabled" include (1) physical or mental illness or injury, including any illness or injury resulting from pregnancy, childbirth, or related medical condition; (2) inability to work because of a written order from a state or local health officer to an individual infected with, or suspected of being infected with, a communicable disease; (3) acute alcoholism being medically treated or, to the extent specified in *Unemp. Ins. Code § 2626.1*, resident status in an alcoholic recovery home; and (4) acute drug-induced illness being medically treated or, to the extent specified in *Unemp. Ins. Code § 2626.2*, resident status in a drug-free residential facility [*Unemp. Ins. Code § 2626*]. An individual who is a resident in an alcohol recovery home, or a drug-free residential facility, outside California pursuant to referral or recommendation by a physician is eligible for disability benefits to the extent provided in *Unemp. Ins. Code § 2626.1(c)* (alcohol recovery home) or *Unemp. Ins. Code § 2626.2(c)* (drug-free residential facility) if an authorized representative of the home or facility certifies that the individual is a resident participating in an alcoholic recovery program or a drug-free residential program, licensed by or satisfying a program review by the state in which the facility is located [*Unemp. Ins. Code §§ 2626.1(c), 2626.2(c)*].

An individual is deemed disabled on any day in which, because of his or her physical or mental condition, he or she is unable to perform his or her regular or customary work [*Unemp. Ins. Code § 2626*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 564.154 Submission of Notices, Protests, and Information

Required notices, protests, and information must be submitted in accordance with authorized regulations [*Unemp. Ins. Code § 2707.6*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 564.155 Eligibility for Benefits

Eligibility for disability benefits is covered in *Unemp. Ins. Code §§ 2625-2629.1*. However, the purpose of the unemployment compensation disability benefit system is to compensate in part for the wage loss sustained by any individual who is unable to work due to his or her own sickness or injury, the sickness or injury of a family member, or the birth, adoption, or foster care placement of a new child, and to reduce to a minimum the suffering caused by unemployment resulting from those circumstances [*Unemp. Ins. Code § 2601*]. Thus, as a minimum, to be eligible for disability insurance benefits one must be a part of the covered labor force, that is, a wage earner, at the time of disability [*see Unemp. Ins. Code §§ 140.5, 2601*]. Persons who are self-employed and who earn "profits" as distinguished from "wages" are not a part of the system and are not covered, unless they elect coverage and make contributions as provided in *Unemp. Ins. Code § 708.5*, and this is so notwithstanding the fact that they were wage earners and made contributions during the disability base period as defined in *Unemp. Ins. Code § 2610* [*Simon v. Unemployment Insurance Appeals Bd. (1987) 193 Cal. App. 3d 1076, 1078, 238 Cal. Rptr. 589]* .

A disabled individual is eligible to receive disability benefits equal to one-seventh of his or her weekly benefit amount for each full day during which he or she is unemployed due to a disability and the Employment Development Director finds as follows [*Unemp. Ins. Code § 2627*]:

> (1) The person has made a claim for disability benefits as required by authorized regulations [*Unemp. Ins. Code § 2627(a)*];
>
> (2) The person has been unemployed and disabled for a waiting period of seven consecutive days during each disability benefit period with respect to which waiting period no disability benefits are payable [*Unemp. Ins. Code § 2627(b)*];
>
> (3) Except as provided in *Unemp. Ins. Code §§ 2626.1* (resident of alcoholic recovery home), 2626.2 (resident of drug-free facility), and 2709 (certificate of disability or serious health condition of family member by authorized religious practitioners), the person has submitted to such reasonable examinations

as the director may require for the purpose of determining his or her disability [*Unemp. Ins. Code § 2627(c)*]; and

(4) Except as provided in *Unemp. Ins. Code § 2708.1* (person receiving temporary workers' compensation), the person has filed a certificate of disability as required by *Unemp. Ins. Code § 2708* (certificate of physician, dentist, podiatrist, or, with respect to normal pregnancy or childbirth, nurse-midwife or nurse-practitioner) or 2709 (certificate of authorized religious practitioner) [*Unemp. Ins. Code § 2627(d)*].

Effective January 1, 2004, eligibility for benefits extends not just to individuals who are unable to work because of their own disabilities, but also to those who are unable to work because of family circumstances. The family temporary disability insurance program, which has been established within the state disability insurance program, provides up to six weeks of wage-replacement benefits to workers who take time off work to care for a seriously ill child, spouse, parent, domestic partner, or to bond with a new child [*Unemp. Ins. Code § 3300 et seq.*]. The weekly benefit under the family temporary disability insurance program is the same as the weekly benefit calculated for the individual's own disability, but it is limited to six weeks during any disability benefit period [*Unemp. Ins. Code § 3301*].

Legal Topics:

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§ 564.156 Ineligibility for Benefits

An individual is not eligible for disability benefits with respect to any period for which the director finds that he or she has received or is entitled to receive unemployment compensation benefits under the laws of this or any other state or the federal government [*Unemp. Ins. Code § 2628*]. Nor is an individual eligible for any day of unemployment and disability for which he or she has received or is entitled to receive "other benefits" in the form of cash payments, except as noted below [*Unemp. Ins. Code § 2629(a)*]. "Other benefits" means temporary disability indemnity under a state or federal workers' compensation law, permanent disability benefits for the same injury or illness under a state or federal workers' compensation law, or temporary disability benefits under a state or federal employer's liability law [*Unemp. Ins. Code § 2629(b)*]. However, if the "other benefits" are less than the amount the person would otherwise receive as disability benefits, the person is entitled to receive the difference [*Unemp. Ins. Code § 2629(c)*; *see 22 Cal. Code Reg. § 2708.1-1*].

Nothing in *Unemp. Ins. Code § 2629* is to be construed to authorize a delay in the payment of disability benefits unless the claimant is currently in receipt of other benefits or the department has received notice that the claimant's employer or insurer has agreed to commence the payment of other benefits [Unemp. Ins. Code § 2929.1(a)].

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§ 564.157 Amount of Benefits

The weekly benefit amount depends on the amount of wages earned in the highest quarter of the individual's disability base period and ranges from a low of $50 to a high of $343 for periods of disability beginning after 1990 [*see Unemp. Ins. Code § 2655*]. Effective January 1, 2000, the maximum weekly benefit is equal to the maximum workers' compensation temporary disability indemnity weekly benefit amount [*Unemp. Ins. Code § 2655(d)*; *see Lab. Code § 4453, 4653*]. Except for individuals who elect coverage under *Unemp. Ins. Code §§ 708* and *708.5*, the maximum amount of benefits payable to an individual during any one disability benefit period is 52 times his or her weekly benefit amount, but in no case more than the total wages paid to the individual during his or her disability base period [*Unemp. Ins. Code § 2653*].

An individual eligible to receive disability benefits who receives wages or regular wages from his or her employer during the period of his or her disability or period of family care leave must be paid disability benefits for any seven-day week or partial week in an amount that does not exceed his or her maximum weekly amount and that, together with the wages or regular wages, does not exceed his or her weekly wage, exclusive of wages paid for overtime work, immediately prior to the commencement of his or her disability or period of family care leave [*Unemp. Ins. Code § 2656(a)*]. To determine the wages or regular wages received by the eligible individual, the amount as stated by the individual is presumed to be accurate, and this presumption affects the burden of producing evidence [Unemp. Ins. Code § 2565(b)]. For purposes of periods of disability beginning after 1991, vacation pay is not considered wages for determining eligibility for disability benefits [*Unemp. Ins. Code § 2656(c)*]. The term "regular wages," as used in *Unemp. Ins. Code § 2656*, includes sick-leave benefits paid entirely by the employer directly to an employee during the period of the employee's disability [*Cooper v. Unemployment Ins. Appeals Bd. (1981) 118 Cal. App. 3d 166, 168-171, 173 Cal. Rptr. 255* (holding inapplicable provisions of *Unemp. Ins. Code § 1265*, prohibiting any denial or reduction of benefits because of supplemental unemployment compensation benefits paid by the employer pursuant to an employer plan, on the grounds that *Unemp. Ins. Code § 1265* is in a part of the code that deals with unemployment compensation benefits and does not apply to part dealing with disability benefits)].

For the determination of weekly wages when wages are paid at irregular intervals or in such a manner as not to extend

regularly over the period of employment, see *Unemp. Ins. Code § 2657* and 22 Cal. Code Reg. § 2657-1.

Legal Topics:

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

[1] Fraud

A person is disqualified from receiving benefits for the period prescribed in *Unemp. Ins. Code § 2675(b)*, if he or she willfully made a false statement or representation with actual knowledge of its falsity or withheld a material fact for the purpose of obtaining benefits [*Unemp. Ins. Code § 2675(a)*]. Persons receiving benefits who are suspected of fraud are entitled to an eligibility review before the department determines whether they are entitled to continue receiving benefits [22 Cal. Code Reg. § 2675-1; *see § 564.162*].

[2] Confined as Dipsomaniac, Drug Addict, or Sex Offender

A person is also disqualified from receiving benefits while confined pursuant to a commitment, court order, or certification in an institution or other place as a dipsomaniac, drug addict, or "sexual psychopath" [*Unemp. Ins. Code § 2678*; the statutory provisions for commitment of sexual psychopaths (later referred to as mentally disordered sex offenders) [former *Welf. & Inst. Code §§ 6300-6330* have been repealed]].

[3] Incarcerated

A person who is incarcerated because of a criminal violation of a state, federal, or municipal law or ordinance is not eligible for disability benefits. Incarceration includes any time spent in the custody of law enforcement authorities upon adjudication or conviction by a court of competent jurisdiction. This rule applies only to periods of incarceration beginning after 1993 [*Unemp. Ins. Code § 2680*].

[4] Disabled Due to Commission of Crime

A person who commits a crime is not eligible for disability benefits if the person's disability was caused by or arose out of the commission of, arrest for, investigation of, or prosecution of any crime that results in a felony conviction. This rule applies only to convictions rendered after 1993, regardless of when the disability commenced [*Unemp. Ins. Code §*

2681(a), (c)].

[5] Disqualified From Receiving Unemployment Compensation

A person disqualified from receiving unemployment compensation benefits under *Unemp. Ins. Code §§ 1256* (quitting work without good cause or fired for misconduct connected with work), 1257 (false statement or representation or failure to report material fact, or who without good cause refused to accept suitable employment), 1260 (duration of disqualification), 1261 (successive disqualifications), and 1263 (conviction for false statement or concealment) is presumed to be ineligible to receive disability benefits for the same period or periods unless he or she establishes that he or she is suffering a bona fide illness or injury or claiming a period of family care leave and the director finds there is good cause for paying disability benefits [*Unemp. Ins. Code § 2676*]. However, a person disqualified from receiving unemployment compensation benefits under *Unemp. Ins. Code § 1262* (person who left work because of trade dispute) is not disqualified from receiving disability benefits if otherwise eligible [*Unemp. Ins. Code § 2677*]. Nor is a person, if otherwise eligible, disqualified for benefits for the day he or she (or a family member for whom the person was providing care) died [*Unemp. Ins. Code § 2679*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 564.159 Filing Claim for Benefits

Claims for disability benefits must be made in accordance with authorized regulations [*Unemp. Ins. Code § 2706*; *see* 22 Cal. Code Reg. §§ 2706-1, 2706-4]. A claim is made by filing a claim on a form furnished by the department not later than the 41st consecutive day following the first compensable day of unemployment and disability. The time may be extended by the department on a showing of good cause [*Unemp. Ins. Code § 2706.1*]. "Good cause" includes, but is not limited to, mistake, inadvertence, surprise, or excusable neglect [*Gruschka v. Unemployment Ins. Appeals Bd. (1985) 169 Cal. App. 3d 789, 791-793, 215 Cal. Rptr. 484]* . For the procedure for filing a claim for benefits by a person legally entitled to them under *Unemp. Ins. Code § 1341* when the person eligible to receive disability benefits dies before making a claim, see *Unemp. Ins. Code § 2705* and 22 Cal. Code Reg. § 2705-1. For the procedure for filing a claim on behalf of an eligible person who is mentally unable to do so and for payment, see *Unemp. Ins. Code § 2705.1* and 22 Cal. Code Reg. § 2705.1-1.

A claim for family temporary disability insurance benefits must be filed not later than the 41st consecutive day following the first compensable day with respect to which the claim is made for benefits, and the time must be extended by the department on a showing of good cause. If a first claim is not complete, the claim form must be returned to the claimant for completion, and it must be completed and returned not later than the tenth consecutive day after the date it was mailed by the department to the claimant; this time must be extended by the department on a showing of good cause [*Unemp. Ins. Code § 3301(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 564.160 Procedure on Claim and Appeal

The department must give notice of the filing of the claim to the claimant's last employer [*Unemp. Ins. Code § 2707*]. Within two working days after receipt of the notice or, if the claimant's service has been terminated, five days after the termination, whichever is later, the last employer must notify the department of any information it knows which may bear on the claimant's eligibility [*Unemp. Ins. Code § 2707.1*]. The department shall consider the facts submitted by the employer, make a determination as to the claimant's eligibility, and promptly notify the claimant of the determination and its reasons. Within 20 days from the mailing or personal service of the notice of determination, or within any extension of that period, the claimant may appeal to an administrative law judge; the Employment Development Director shall be an interested party to any appeal [*Unemp. Ins. Code § 2707.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 564.161 Computation, Notice, and Protest

Except as provided in *Unemp. Ins. Code § 2707.3(b), below,* the Employment Development Department, on the filing of a claim for disability benefits, shall promptly make a computation on the claim which shall set forth the maximum amount of benefits potentially payable during the disability benefit period, and the weekly benefit amount and promptly notify the claimant of the computation [*Unemp. Ins. Code § 2707.3(a)*]. However, no computation is made on a worker's claim for disability benefits under an approved self-insured plan if the uninterrupted period of disability does not exceed the waiting period prescribed for benefits from the Disability Fund under *Unemp. Ins. Code § 2627(b), discussed under § 564.155* [*Unemp. Ins. Code § 2707.3(b)*]. The claimant may file a protest within 20 days, or within any extension thereof, after the mailing or personal service of the notice of computation and appeal from a notice of denial of recomputation in the manner prescribed in *Unemp. Ins. Code § 2707.2* (*discussed under § 564.160*); the Employment Development Director shall be an interested party to any appeal [*Unemp. Ins. Code § 2707.4*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationReview of Initial DecisionsLabor & Employment LawDisability & Unemployment InsuranceDisability BenefitsClaim ProceduresLabor & Employment LawDisability & Unemployment InsuranceDisability BenefitsReview

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49-564 California Forms of Pleading and Practice--Annotated § 564.162

§ 564.162 Eligibility Review for Suspected Fraud

Any person who is receiving benefits but whom the department suspects of having made a fraudulent claim is entitled to an in-office eligibility review before the department decides whether that person is entitled to continue receiving benefits. The purpose of the review is to give the person a fair and equitable opportunity to be heard in person [22 Cal. Code Reg. § 2675-1(a)]. For purposes of this review, fraud includes, but is not limited to, a claim filed by a person other than the individual named on the claim form, a medical certificate that cannot be substantiated, a willful false statement or representation, the withholding of a material fact concerning eligibility for benefits, or an organized scheme to defraud the department [22 Cal. Code Reg. § 2675-1(b)(1)]. For details of the procedures applicable to this review, see 22 Cal. Code Reg. § 2675-1.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesFraudFraud Against the GovernmentFalse ClaimsGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceDisability BenefitsClaim Procedures

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§ 564.163 Reconsideration

The Employment Development Department for good cause may reconsider any determination prior to the filing of an appeal from it, or within 30 days after an appeal to an administrative judge is filed, and the department must promptly notify the claimant of any reconsidered determination. The claimant may appeal from a reconsidered determination in the manner prescribed in *Unemp. Ins. Code § 2707.2* (*discussed under § 564.160*). The Director of Employment Development shall be an interested party to any appeal [*Unemp. Ins. Code § 2707.5(a)*].

The department may also for good cause reconsider any computation or recomputation in the manner and within the times specified in *Unemp. Ins. Code § 2707.5(b)* and must promptly notify the claimant of the recomputation. The claimant may protest the accuracy of the recomputation as prescribed in *Unemp. Ins. Code § 2707.4* [*Unemp. Ins. Code § 2707.5(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationReview of Initial DecisionsLabor & Employment LawDisability & Unemployment InsuranceDisability BenefitsClaim ProceduresLabor & Employment LawDisability & Unemployment InsuranceDisability BenefitsReview

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49-564 California Forms of Pleading and Practice--Annotated § 564.164

§ 564.164 Levels of Administrative Appeal

As in the case of a claim for unemployment compensation benefits (*see § 564.120*), there are two levels of administrative appeal available to an employee aggrieved by an order or decision of the Director of Employment Development relating to disability benefits. The first is by appeal to an administrative law judge [*see Unemp. Ins. Code §§ 2707.2, 2707.4, 2707.5, 2712, 2712.5, 2737*]. The second is by appeal to the Unemployment Insurance Appeals Board [*see Unemp. Ins. Code §§ 2712, 2712.5, 2737*].

Neither the Board nor an administrative law judge has the authority to award interest on a retroactive lump-sum payment that the Board or judge determines is owed to the claimant. The retroactive amount, covering the period from the first day of eligibility to the date the claimant is administratively determined to be eligible for disability benefits, is not equivalent to "damages" assessed in a civil action, and so *Civil Code § 3287(a)*, which authorizes a *trial court* to award prejudgment interest, is inapplicable [*see Weber v. Board of Retirement (1998) 62 Cal. App. 4th 1440, 1444-1452, 73 Cal. Rptr. 2d 769]* . On the other hand, if the Board *denies* disability benefits and the claimant brings a mandamus action to recover the benefits, the court may award prejudgment interest under *Civil Code § 3287(a)* on the amount of benefits wrongfully denied by the Board [*see American Federation of Labor v. Unemployment Ins. Appeals Bd. (1996) 13 Cal. 4th 1017, 1033-1042, 56 Cal. Rptr. 2d 109, 920 P.2d 1314.]* .

For rules governing payment of disability benefits pending a claimant's appeal in situations where the department initially determines a claimant to be eligible for benefits, the department subsequently determines that the claimant is ineligible or disqualified for benefits, and the claimant files an appeal from the subsequent determination, see 22 Cal. Code Reg. § 2706-5.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationReview of Initial DecisionsLabor & Employment LawDisability & Unemployment InsuranceDisability BenefitsClaim ProceduresLabor & Employment LawDisability & Unemployment

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49-564 California Forms of Pleading and Practice--Annotated §§ 564.165-564.179

[Reserved]

§§ 564.165[Reserved]

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49-564 California Forms of Pleading and Practice--Annotated § 564.180

§ 564.180 Time Limit on Judicial Review

Notwithstanding any other provision of law, the right of the Employment Development Director, or of any other party except as provided in *Unemp. Ins. Code §§ 1241* and *1243* [*see § 564.79[2][c], [d]*] and *Unemp. Ins. Code § 5313* (relating to work incentive programs), to seek judicial review from a decision of the Unemployment Insurance Appeals Board must be exercised not later than six months after the date of the decision or the date on which the decision is designated a precedent decision, whichever is later [*Unemp. Ins. Code § 410*, fourth paragraph; *see Tarkington v. California Unemployment Ins. Appeals Bd. (2009) 172 Cal. App. 4th 1494, 1502-1508, 92 Cal. Rptr. 3d 131* (six-month period under *Unemp. Ins. Code § 410* is subject to equitable tolling while plaintiff pursues alternative remedy reasonably and in good faith)]. The board must attach to all of its decisions subject to judicial review an explanation of the party's right to seek review [*Unemp. Ins. Code § 410*, fifth paragraph].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceDisability BenefitsReview

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§ 564.181 Right of Director to Seek Judicial Review

The Employment Development Director has the right to seek judicial review from a decision of the Unemployment Insurance Appeals Board whether or not he or she appeared or participated in the appeal to the administrative law judge or to the appeals board [*Unemp. Ins. Code § 410*, third paragraph].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 564.182 Review by Administrative Mandate

Court review of decisions of the Unemployment Insurance Appeals Board relating to the eligibility of unemployed workers for unemployment compensation or disability benefits may be had by a proceeding in administrative mandate under the provisions of *Code Civ. Proc. § 1094.5* [*see, e.g., Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 591-592, 155 Cal. Rptr. 63* (unemployment compensation benefits); *Bilyeu v. Unemployment Ins. Appeals Bd. (1982) 130 Cal. App. 3d 657, 660, 181 Cal. Rptr. 837* (unemployment disability benefits); *see also Gilles v. Department of Human Resources Development (1974) 11 Cal. 3d 313, 321, 113 Cal. Rptr. 374, 521 P.2d 110* (complaint for declaratory and injunctive relief involving construction of *Unemp. Ins. Code §§ 1375* and *1379*, relating to recovery of overpayment of benefits, treated by trial court as petition for administrative mandate under *Code Civ. Proc. § 1094.5*); *see §§ 564.300, 564.301*].

For full discussion of administrative mandate, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusLabor & Employment LawDisability & Unemployment InsuranceDisability BenefitsReview

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49-564 California Forms of Pleading and Practice--Annotated § 564.183

§ 564.183 Standard and Scope of Review

[1] By Superior Court

In reviewing a decision of the Unemployment Insurance Appeals Board on a petition for writ of mandate, the superior court must exercise its independent judgment on the evidence in the administrative record [*MacGregor v. Unemployment Ins. Appeals Bd. (1984) 37 Cal. 3d 205, 211-212, 207 Cal. Rptr. 823, 689 P.2d 453* (review on employee's petition of decision denying unemployment insurance benefits); *Interstate Brands v. Unemployment Ins. Appeals Bd. (1980) 26 Cal. 3d 770, 774-782, 163 Cal. Rptr. 619, 608 P.2d 707* (review on employer's petition of grant of unemployment insurance benefits); *Bilyeu v. Unemployment Ins. Appeals Bd. (1982) 130 Cal. App. 3d 657, 661, 668, 181 Cal. Rptr. 837* (review on employee's petition of decision denying disability benefits)]. That is, the independent judgment standard, and not the substantial evidence test, applies [*Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 599, 155 Cal. Rptr. 63]* .

[2] By Appellate Court

On review of the trial court's judgment in an administrative mandate proceeding, the substantial evidence test applies. That is, except when the trial court admits relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent (*see Code Civ. Proc. § 1094.5(e)*), the scope of appellate review is limited to a determination of whether the trial court's decision is supported by substantial evidence [*Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 599, 155 Cal. Rptr. 63* ; *see Cervisi v. Unemployment Ins. Appeals Bd. (1989) 208 Cal. App. 3d 635, 638, 256 Cal. Rptr. 142]* . Thus, the appellate court is ordinarily confined to an inquiry as to whether the findings and judgment of the trial court are supported by substantial, credible, and competent evidence [*Sanchez v. Unemployment Ins. Appeals Bd. (1984) 36 Cal. 3d 575, 585, 205 Cal. Rptr. 501, 685 P.2d 61]* . All conflicts in the evidence must be resolved in favor of the respondent and all legitimate and reasonable inferences must be made to uphold the superior court's finding [*Amador v. Unemployment Ins. Appeals Bd. (1984) 35 Cal. 3d 671, 685, 200 Cal. Rptr. 298, 677 P.2d 224* ; *see Cervisi v. Unemployment Ins. Appeals Bd. (1989) 208 Cal. App. 3d 635, 638, 256 Cal. Rptr. 142]* . If there is any credible evidence in support of the superior court's findings, contrary evidence must be disregarded, and the judgment upheld [

Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 599, 155 Cal. Rptr. 63] . Even when the trial court's findings are contrary to those of the board, they cannot be overturned for evidentiary insufficiency if they are substantially supported [*Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1981) 29 Cal. 3d 101, 108, 172 Cal. Rptr. 194, 624 P.2d 244]* .

However, if the facts are undisputed and opposing inferences may not reasonably be drawn from those facts, the question of whether or not an employee had, for example, good cause for refusing to perform certain work or for leaving his or her work is an issue of law [*Amador v. Unemployment Ins. Appeals Bd. (1984) 35 Cal. 3d 671, 685, 200 Cal. Rptr. 298, 677 P.2d 224* ; *Sanchez v. Unemployment Ins. Appeals Bd. (1984) 36 Cal. 3d 575, 585, 205 Cal. Rptr. 501, 685 P.2d 61]* . Thus, if the probative facts are not in dispute, and those facts clearly require a conclusion different from that reached by the trial court, the latter's conclusions may be disregarded by the appellate court [*Sanchez v. Unemployment Ins. Appeals Bd. (1984) 36 Cal. 3d 575, 585, 205 Cal. Rptr. 501, 685 P.2d 61]*
.

Legal Topics:

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

§§ 564.184[Reserved]

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49-564 California Forms of Pleading and Practice--Annotated § 564.200

§ 564.200 State Statutes

Unemployment Insurance Appeals Board. *Unemp. Ins. Code § 401 et seq.*

Hearing procedure. *Unemp. Ins. Code § 1951 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationReview of Initial DecisionsLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationReview

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49-564 California Forms of Pleading and Practice--Annotated § 564.201

§ 564.201 Administrative Regulations

Proceedings before administrative law judges and before Unemployment Insurance Appeals Board. *22 Cal. Code Reg. § 5000 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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49-564 California Forms of Pleading and Practice--Annotated § 564.202

§ 564.202 Decisions

[1] Evidence

Affidavits as competent evidence. *Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 598, 155 Cal. Rptr. 63*

[2] Precedent Decisions

Judicial review of precedent decisions. *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1981) 29 Cal. 3d 101, 108-109, 172 Cal. Rptr. 194, 624 P.2d 244*

Trial court's judgment reversing precedent benefit decision as required to be upheld if there is any substantial evidence in support of court's findings. *Board of Education v. Unemployment Ins. Appeals Bd. (1984) 160 Cal. App. 3d 674, 683, 206 Cal. Rptr. 788*

[3] Privilege Against Self-Incrimination

Effect of privilege against self-incrimination. *Escamilla v. Superior Court (1969) 271 Cal. App. 2d 730, 732-735, 76 Cal. Rptr. 704*

[4] Right to Legal Representation

Department of Employment (now Employment Development Department) as not required to advise claimant of availability of counsel on administrative review or to provide claimant with appointed counsel. *Staley v. California Unemployment Ins. App. Bd. (1970) 6 Cal. App. 3d 675, 677-678, 86 Cal. Rptr. 294*

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsStare DecisisAdministrative LawAgency AdjudicationHearingsEvidenceGeneral OverviewAdministrative LawAgency AdjudicationHearingsEvidenceAdmissibilityPrivilegeCivil ProcedureCounselGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationGeneral Overview

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§ 564.203 Law Reviews

Comment, "Asserting Confidentiality: The Need for a Lay Representative-Claimant Privilege." *15 Pacific L. J. 245 (1984)*

Comment, "Religious Organizations and the Unemployment Insurance Code; Is California Playing Favorites with Churches?" *10 Pacific L. J. 225 (1979)*

Livingston, "Organizations and Administrative Practice--A Balance to the Corporate State?" *26 Hastings L. J. 91 (1974)*

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidencePrivilegesGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationCoverage & Definitions

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[Reserved]

§§ 564.204[Reserved]

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§ 564.220 State Statutes

[1] Administrative Appeal

Administrative appellate review by administrative law judge of assessment, denial of refund or credit, or transfer of reserve account. *Unemp. Ins. Code §§ 1221-1224*

[2] Alternative Methods of Financing Unemployment Insurance Coverage

Nonprofit organization. *Unemp. Ins. Code §§ 801, 801.5*

State of California or instrumentality of state or of state and one or more other states. *Unemp. Ins. Code § 802*

Method of financing coverage. *Unemp. Ins. Code § 803*

Effect of acquisition of or succession to another entity. *Unemp. Ins. Code § 803.1*

Effect of acquistion by nonprofit corporation of favorable reserve account. *Unemp. Ins. Code § 803.2*

Unregistered organization (as defined) may to elect reimbursement financing as method of financing its liability for unemployment compensation benefits when Director of Employment Development finds that organization has good cause for failing to register as employer. *Unemp. Ins. Code § 805*

Notice required to be given by Employment Development Department to public entity which has elected a method of financing under *Unemp. Ins. Code § 803*. *Unemp. Ins. Code § 806*

Financing coverage for public school employees. *Unemp. Ins. Code §§ 821-832*

Financing coverage for local public entity employees. Stats. 1985, ch. 1217, § 13

[3] Collection of Employee and Employer Contributions

Priority and lien of tax. *Unemp. Ins. Code §§ 1701-1703*

Liability of successors, officers, and fiduciaries. *Unemp. Ins. Code §§ 1731-1736*

Notice of levy. *Unemp. Ins. Code §§ 1755-1758*

Warrant for collection. *Unemp. Ins. Code §§ 1785-1787*

Summary judgment. *Unemp. Ins. Code §§ 1815-1818*

Civil action. *Unemp. Ins. Code §§ 1851-1855*

Additional remedies for collecting delinquent contributions, interest, and penalties. *Unemp. Ins. Code § 1860*

Offers in compromise of delinquent contributions, interest, and penalties. *Unemp. Ins. Code § 1860*

[4] Contributions and Reports

Definitions. *Unemp. Ins. Code §§ 901-906*

Wages as basis of contribution. *Unemp. Ins. Code §§ 926-940*

Contribution rates. *Unemp. Ins. Code §§ 976-994*

Reserve accounts. *Unemp. Ins. Code §§ 1025-1037*

Transfer of reserve accounts. *Unemp. Ins. Code §§ 1051-1060*

Records, reports, and contribution payments. *Unemp. Ins. Code §§ 1085-1098*

Payment of reported contributions. *Unemp. Ins. Code §§ 1110-1116*

Assessments. *Unemp. Ins. Code §§ 1126-1142*

Refunds and overpayments. *Unemp. Ins. Code §§ 1176-1185*

Service of notices. *Unemp. Ins. Code § 1206*

Administrative appellate review. *Unemp. Ins. Code §§ 1221-1224*

Judicial review. *Unemp. Ins. Code §§ 1241-1243*

[5] Court Calendar Preference

Courts as required to give calendar preference to any civil action by or against Director of Employment Development over all other civil litigation except equity cases, cases involving extraordinary writs, or summary proceedings. *Unemp. Ins. Code § 1853*

[6] Disability Compensation

General provisions. *Unemp. Ins. Code §§ 2601-2612*

Disability benefits. *Unemp. Ins. Code §§ 2625-2778*

Nonindustrial disability insurance for state employees. *Unemp. Ins. Code §§ 2781-2783*

Worker contributions. *Unemp. Ins. Code §§ 2901-2903*

Financial provisions. *Unemp. Ins. Code §§ 3001-3075*

Voluntary plans. *Unemp. Ins. Code §§ 3251-3272*

[7] Elective Coverage

Election that employing unit not subject to *Unemp. Ins. Code §§ 100-4751* (relating to unemployment and disability compensation) be deemed employer subject to such statutes. *Unemp. Ins. Code §§ 701, 702.1, 702.6, 709, 710.4, 710.5, 710.6, 710.7, 710.8, 710.9*

Election that services not constituting employment be deemed employment. *Unemp. Ins. Code §§ 702-703, 710*

When election must not be approved. *Unemp. Ins. Code § 704*

Termination of elective coverage. *Unemp. Ins. Code §§ 704.1-706, 711*

Notice of election or termination. *Unemp. Ins. Code § 707*

Employers' election to qualify for benefits. *Unemp. Ins. Code § 708*

Election of self-employed persons to qualify for benefits under *Unemp. Ins. Code §§ 2601-3272* (relating to disability benefits). *Unemp. Ins. Code § 708.5*

Contributions and credits. *Unemp. Ins. Code §§ 712, 713*

[8] Employer-Employee Relationship

Rules applicable to determining employer-employee relationship. *Unemp. Ins. Code § 606.5*

[9] Extended Duration Benefits

Reserve accounts. *Unemp. Ins. Code §§ 3701, 3702*

[10] Federal-State Extended Benefits

Reserve accounts. *Unemp. Ins. Code §§ 4701, 4702*

[11] Hearing Procedure

Manner of presenting disputed claims, appeals, and petitions, reports required from claimant and employing unit and conduct of hearings, as required to be in accordance with rules prescribed by Unemployment Insurance Appeals Board. *Unemp. Ins. Code § 1951*

Rules of evidence or procedure and recording of proceedings. *Unemp. Ins. Code § 1952*

Who may administer oaths, take depositions, certify official acts, and issue subpoenas. *Unemp. Ins. Code § 1953*

Enforcement of subpoenas. *Unemp. Ins. Code § 1954*

Duty to attend, testify, and produce required records. *Unemp. Ins. Code § 1955*

Witness fees. *Unemp. Ins. Code § 1956*

Right to representation by counsel before appeals board. *Unemp. Ins. Code § 1957*

Authorization for representation of claimant. *Unemp. Ins. Code § 1957.5*

Costs. *Unemp. Ins. Code § 1958*

Delegation of powers by appeals board. *Unemp. Ins. Code § 1959*

Nonconclusive, nonbinding, and nonevidence effect on separate or subsequent actions or proceedings before California or United States arbitrator, court, or judge of findings, judgment, conclusion, or final order of hearing officer, administrative law judge, or person with authority to make findings of fact or law in any action or proceeding before Unemployment Insurance Appeals Board. *Unemp. Ins. Code § 1960*

[12] Settlement

Settlement of civil employment tax matter disputes. *Unemp. Ins. Code § 1236*

[13] Violations and Penalties

Right of civil action against contractor that successfully bid on public works contract, by second lowest bidder that suffered damage based on denial of bid because of successful bidder's violation of *Lab. Code § 3200 et seq.* or of Unemployment Insurance Code. *Lab. Code § 1750*; *Pub. Contract Code §§ 19102, 20104.70*

Monetary penalty for failure to file employer's reconciliation return described in either *Unemp. Ins. Code § 1088(e)* or *Unemp. Ins. Code § 13021(j)*. *Unemp. Ins. Code § 1117*

Personal liability of officers, major stockholders, and other persons having charge of a corporation, association, registered limited liability partnership or foreign limited liability partnership, or limited liability company employing unit which willfully fails to pay contributions or withholdings *Unemp. Ins. Code § 1735*

Misrepresentations and concealment. *Unemp. Ins. Code §§ 2101, 2101.5*

Overdeductions from workers. *Unemp. Ins. Code § 2103*

Failure to appear, testify, or produce books or things. *Unemp. Ins. Code § 2104*

Failure to make required records available for inspection. *Unemp. Ins. Code § 2105*

Failure to furnish required reports. *Unemp. Ins. Code § 2106*

Withholding information to aid individual to obtain benefits. *Unemp. Ins. Code § 2107*

Nonpayment of contributions. *Unemp. Ins. Code § 2108*

Failure of executive officers of corporation, association, or limited liability company to register corporation, association, or limited liability company as employing unit or to submit contribution reports. *Unemp. Ins. Code § 2109*

Failure to pay deductions withheld from workers. *Unemp. Ins. Code § 2110*

Unauthorized disclosure of confidential information obtained in course of administration of unemployment insurance law. *Unemp. Ins. Code § 2111*

Failure to pay contributions agreed to be paid for workers without deduction from remuneration paid to workers. *Unemp. Ins. Code § 2110.3*

Failure to withhold deductions in trust and exception. *Unemp. Ins. Code § 2110.5*

Failure to hold in trust contributions agreed to be paid for workers without deduction from remuneration. *Unemp. Ins. Code § 2110.7*

Violation of law or authorized regulation. *Unemp. Ins. Code § 2112*

Report or registration of fictitious employee or fictitious wages to Employment Development Department. *Unemp. Ins. Code § 2114*

False report of wages or time period. *Unemp. Ins. Code § 2115*

Penalty for failure, with or without intent to evade statutory or Employment Development Department requirement, to file return or report or supply information required by Unemployment Insurance Code, for making false or fraudulent return or report or for supplying false or fraudulent information. *Unemp. Ins. Code § 2117*

Penalty for willful failure, with intent to evade tax imposed, to file return or report or supply information, or for willfully, with like intent, making false or fraudulent return or report or supplying false or fraudulent information. *Unemp. Ins. Code § 2117.5*

Penalty for failure, without intent to evade, to withhold pursuant to *Unemp. Ins. Code § 13020* (relating to state income taxes) or to pay over tax withheld. *Unemp. Ins. Code § 2118*

Penalty for willful failure to collect, truthfully account for, and pay over any tax or amount required to be withheld.

Unemp. Ins. Code § 2118.5

Willful failure to furnish statement required by *Unemp. Ins. Code § 13050* (annual statement to employee of wages paid, amounts deducted, etc.) in manner, at time, and showing information required by that section or for willfully furnishing false or fraudulent statement. *Unemp. Ins. Code § 2119*

Willful failure to supply employer with information required under *Unemp. Ins. Code §§ 13040, 13041*, or *13042* (relating to withholding taxes on wages) which would require increase in tax to be withheld under *Unemp. Ins. Code § 13020* or who willfully supplies false or fraudulent information. *Unemp. Ins. Code § 2120*

Willfully aiding, assisting in, procuring, counseling, coercing, or advising preparation or presentation of return, report, affidavit, claim or other document fraudulent or false as to any material matter. *Unemp. Ins. Code § 2121*

Except as provided in *Unemp. Ins. Code §§ 2117, 2117.5, 2118*, and *2118.5*, penalty for violation of *Unemp. Ins. Code §§ 2101-2127. Unemp. Ins. Code § 2122*

Payment of fines. *Unemp. Ins. Code § 2122.5*

Certificate of Employment Development Department to the effect that return or report has not been filed or information has not been supplied as required by *Unemp. Ins. Code §§ 13000-13101* (relating to withholding taxes on wages) as prima facie evidence of that fact. *Unemp. Ins. Code § 2123*

Place of trial. *Unemp. Ins. Code § 2124*

Action or prosecution must be instituted within four years after discovery of offense. *Unemp. Ins. Code § 2125*

Court has discretion to charge any person or employing unit convicted of offense with costs of investigation and prosecution. *Unemp. Ins. Code § 2126*

Penalties are cumulative; prosecutor may compromise penalty with consent of Employment Development Department. *Unemp. Ins. Code § 2127*

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For related research and practice materials, see the following legal topics:
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§ 564.221 Administrative Regulations

[1] Contributions and Reports

"Wages" the basis of the contribution. *22 Cal. Code Reg. § 926-1 et seq.*

Contribution rates. 22 Cal. Code Reg. §§ 982-1-991(b)-1

Reserve accounts. *22 Cal. Code Reg. §§ 1026-1-1036-2*

Transfer of reserve accounts. *22 Cal. Code Reg. §§ 1051-1-1060-1*

Records, reports, and contribution payments. *22 Cal. Code Reg. §§ 1085-1-1097-1*

Extensions of time for paying contributions and filing returns. 22 Cal. Code Reg. § 1111-1

[2] Definitions

"Code," terms defined in code, "month," "day," and "social security number." 22 Cal. Code Reg. § 125-1

"Week," for contribution purposes. 22 Cal. Code Reg. § 143-1

[3] Employment

Assistant and substitute employees-constructive knowledge. 22 Cal. Code Reg. § 606-1

Segregation of exempt services and subject employment. 22 Cal. Code Reg. § 607-1

Employer-employee relationship: common law rules. 22 Cal. Code Reg. § 621(b)-1

Special classes of employees. 22 Cal. Code Reg. § 621(c)-1

Excluded services. *22 Cal. Code Reg. §§ 629-1-653-1*

Musicians. 22 Cal. Code Reg. § 680-1

Elective coverage. *22 Cal. Code Reg. §§ 701-1-710-1*

Elections for financing unemployment insurance coverage. *22 Cal. Code Reg. §§ 803-1-803-4*

[4] Refunds and Overpayments

Disposition of erroneous worker contributions. 22 Cal. Code Reg. § 1178(c)-1

Denial of claim for refund or credit. 22 Cal. Code Reg. § 1180-1

"Date of the allowance" of refund or credit. 22 Cal. Code Reg. § 1181-1

[5] Withholding Tax on Wages

General provisions. *22 Cal. Code Reg. §§ 4304-1-4309-3*

Withholding and payment of tax. *22 Cal. Code Reg. §§ 4320-1-4331-1*

Withholding exemptions. 22 Cal. Code Reg. § 4340-1

Reports, returns, and statements. 22 Cal. Code Reg. §§ 4350-1-4355

Collections. 22 Cal. Code Reg. §§ 4370-1, *4371-1*

Legal Topics:

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§ 564.222 Decisions

[1] Actions to Recover Erroneously or Illegally Assessed Contributions

Actions to recover contributions, penalties, and interest. *Manchester Avenue Co. v. Stewart (1958) 50 Cal. 2d 307, 325 P.2d 457* (action by golf course operator to recover unemployment insurance taxes paid under protest on behalf of golf course caddies); *Bell-Brook Dairies, Inc. v. Bryant (1950) 35 Cal. 2d 404, 218 P.2d 1* (action involving erroneous charge of unemployment benefits against reserve account, plaintiff having failed to receive any notice of filing of applications for unemployment benefits); *Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 168 P.2d 686 , overruled on another point, People v. Sims (1982) 32 Cal. 3d 468, 479-480 n.8, 186 Cal. Rptr. 77, 651 P.2d 321* (action to recover unemployment insurance taxes paid under protest arising out of question whether mine operators were employees or independent contractors); *California Emp. Com. v. Kovacevich (1946) 27 C2d 546, 165 P.2d 917* (action to recover unemployment insurance contributions claimed to be due involving agricultural labor); *Andrews v. California Emp. Com. (1946) 27 Cal. 2d 568, 165 P.2d 929* (action to recover unemployment insurance contributions paid under protest and involving agricultural labor); *Zuckerman-Mandeville, Inc. v. Sheffield (1970) 8 Cal. App. 3d 793, 88 Cal. Rptr. 57* (action to recover unemployment insurance taxes paid under protest by farming corporation; judgment for plaintiff reversed); *Aladdin Oil Corp. v. Perluss (1964) 230 Cal. App. 2d 603, 41 Cal. Rptr. 239* (action to recover unemployment insurance contributions, interest, and penalties paid under protest following an assessment; judgment for defendant affirmed); *California Emp. etc. Com. v. Lund (1946) 76 Cal. App. 2d 567, 173 P.2d 379* (consolidated actions to collect unemployment insurance contributions from garage owner and to recover taxes on contributions paid by him under protest; judgment for garage owner affirmed)

Employer who paid under protest Employment Development Department's levy of assessment for unemployment tax contributions on unreported wages of musicians made pursuant to former *Unemp. Ins. Code § 681* (making certain musicians under prescribed conditions statutory employees of person utilizing their services) were not entitled to refund on ground statute was repealed before assessment had become "due and payable" as defined in *Unemp. Ins. Code § 1703(b)*, because *Unemp. Ins. Code § 1703* relates to perfection and enforcement of state tax lien on unpaid contributions, that is, to collection of contributions, and not to employer's liability to pay them, which liability was established prior to repeal, and Legislature, in repealing former *Unemp. Ins. Code § 681*, did not provide for forgiveness

of all earlier tax liability or elimination of department's earlier assessments. *Hotel Del Coronado Corp. v. Employment Development Dept. (1989) 208 Cal. App. 3d 59, 61-62, 255 Cal. Rptr. 804*

When essential facts of unemployment taxation case are not in conflict, nor reasonably susceptible of conflicting inferences, question of legal relationship arising from those facts is one of law. *Avchen v. Kiddoo (1988) 200 Cal. App. 3d 532, 535, 246 Cal. Rptr. 152* (relationship between nurses and nurses' registry was question of law on undisputed facts in action for refund of taxes paid)

[2] Burden of Proof

Burden of proof in action for refund as on taxpayer-plaintiff. *Aladdin Oil Corp. v. Perluss (1964) 230 Cal. App. 2d 603, 610, 41 Cal. Rptr. 239*

[3] Contributions

Under *Unemp. Ins. Code § 977*, rate of employer's contribution to Unemployment Fund (pooled fund contributed to by all employers) is based on ratio between its average base payroll and net balance in its reserve account; decision awarding unemployment insurance benefits to claimant that are chargeable to reserve account of claimant's employer has effect of increasing employer's rate of contributions to *Unemployment Fund. Altaville Drug Store, Inc. v. Employment Development Department (1988) 44 Cal. 3d 231, 234, 242 Cal. Rptr. 732, 746 P.2d 871*

Employer as required to make unemployment insurance contributions in favor of writers of television shows. *Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 946, 88 Cal. Rptr. 175, 471 P.2d 975*

Adjustment of contribution rates for periods elapsing pending appeal in prior action for refund. *Manning's, Inc. v. Burkett (1955) 45 Cal. 2d 43, 44-46, 286 P.2d 13*

[4] Employee vs. Agent

Legislature has enacted numerous statutes in Business & Professions Code explicitly defining nature of relation between nurses and nurses' registries as one of agency [*see, e.g., Bus. & Prof. Code § 2732.05* and former *Bus. & Prof. Code § 9958 et seq.* (repealed by Stats. 1989, ch. 704, § 1; *now see Civ. Code §§ 1812.524-1812.533*)] and, hence, in action by nurses' registry to recover unemployment taxes paid under protest, trial court properly found that registry was not nurses' employer when agreement signed by nurses at time they enrolled with registry was nonexclusive and appointed registry as their agent to assist them in securing employment, registry's role was to alert nurses to openings after which nurses themselves negotiated time, pay rate, assignments, and working conditions directly with their prospective employers, and registry's role was that of commercial matchmaker. *Avchen v. Kiddoo (1988) 200 Cal. App. 3d 532, 535-537, 246 Cal. Rptr. 152* (noting that holding was in accord with *Unemp. Ins. Code § 606.5*, which was effective after trial of case)

[5] Employee vs. Independent Contractor

Determination of whether services are those of employee or independent contractor. *Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43-44, 168 P.2d 686 , overruled on another point, People v. Sims (1982) 32 Cal. 3d 468, 479-480 n.8, 186 Cal. Rptr. 77, 651 P.2d 321* ; *Santa Cruz Transportation, Inc. v. Unemployment Ins. Appeals Bd. (1991) 235 Cal. App. 3d 1363, 1371, 1 Cal. Rptr. 2d 64* ; *Sudduth v. California Emp. Stab. Com. (1955) 130 Cal. App. 2d 304, 313-314, 278 P.2d 946*

[6] Experience Rating Formula

Contributions resulting from improper charges for unemployment claims against employer's account as not to be considered in experience rating formula (cumulated contributions minus cumu lated charges for unemployment claims divided by one-third of wages paid by employer over three-yearperiod). *John Breuner Co. v. Perluss (1963) 220 Cal. App. 2d 163, 167-170, 33 Cal. Rptr. 580*

[7] Jurisdiction

Original jurisdiction of action involving legality of tax as in superior court. *Cal. Emp. etc. Com. v. Citizens etc. Bk. (1946) 73 Cal. App. 2d 915, 916, 167 P.2d 752* ; *Cal. Emp. etc. Com. v. Municipal Ct. (1944) 62 Cal. App. 2d 781, 784-786, 145 P.2d 361* ; *Unemp. etc. Com. v. St. Francis etc. Assn. (1943) 58 Cal. App. 2d 271, 280, 137 P.2d 64*

[8] Limitations on Judicial Actions

Mandate as unavailable to compel department to transfer its former unemployment insurance reserve account to its current account because contributions are in effect taxes, and judicial process to prevent or enjoin collection of taxes is prohibited by *Cal. Const., art. XIII, § 32* and *Unemp. Ins. Code § 1851*. *Lorco Properties, Inc. v. Department of Benefit Payments (1976) 57 Cal. App. 3d 809, 815, 129 Cal. Rptr. 312*

[9] Penalties

Intent to deceive as not required to merit imposition of penalty against employer pursuant to *Unemp. Ins. Code § 1030.5* for misrepresenting that claimant's employment was voluntarily terminated. *Diagnostic Data, Inc. v. Unemployment Ins. Appeals Bd. (1973) 34 Cal. App. 3d 556, 558, 110 Cal. Rptr. 157*

[10] Reserve Accounts

Unemployment insurance benefits paid to claimant and, pursuant to *Unemp. Ins. Code § 1032*, not charged to employer's reserve account are paid out of pooled fund, and charge is allocated to account of every employer. *Altaville Drug Store, Inc. v. Employment Development Department (1988) 44 Cal. 3d 231, 234-235, 242 Cal. Rptr. 732, 746 P.2d 871*

Unemp. Ins. Code § 1032, setting forth circumstances in which unemployment insurance benefits awarded to claimant are not charged to employer's reserve account, is intended by Legislature to operate in connection with *Unemp. Ins. Code § 1256* (eligibility for benefits) so that later expansion of word "spouse" in section 1256 to include imminent spouse (claimant who leaves employment to join imminent spouse at distant location has quit for good cause) (*see* 22 Cal. Code Reg. § 1256-12(b)(1)) mandates use of same expanded definition applying section 1032. *Altaville Drug Store, Inc. v. Employment Development Department (1988) 44 Cal. 3d 231, 233-238, 242 Cal. Rptr. 732, 746 P.2d 871*

[11] Statutory Interpretation

Uncodified provision of 1982 amendment of *Unemp. Ins. Code § 1256* (eligibility for unemployment compensation benefits) states that amendment to section 1256 is intended to endorse Employment Development Department policy, as expressed in its regulations (*see* 22 Cal. Code Reg. § 1256-12(b)(1)). *Altaville Drug Store, Inc. v. Employment Development Department (1988) 44 Cal. 3d 231, 236, 242 Cal. Rptr. 732, 746 P.2d 871*

Legal Topics:

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§ 564.223 Attorney General Opinions

Unemployment Insurance Appeals Board may conduct hearings on petitions for tax reassessment and review of denial of tax refund without first obtaining relief from automatic stay under Bankruptcy Code, where petitioner has filed bankruptcy and taxes accrued prior to commencement of bankruptcy proceedings. *69 Ops. Cal. Att'y Gen. 51 (1986)*

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§ 564.224 Law Reviews

Comment, "Religious Organizations and the Unemployment Insurance Code: Is California Playing Favorites with Churches?" *10 Pacific L.J. 225 (1979)*

Note, "Administrative Law: Unemployment Compensation: Proof Required by Employer Seeking to Remove Charges From His Reserve Account," *9 UCLA L. Rev. 208 (1962)*

Note, "Unemployment Insurance: Definition of Employee and Employing Unit," *33 Cal. L. Rev. 648 (1945)*

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[Reserved]

§§ 564.225[Reserved]

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§ 564.240 State Statutes

[1] Administrative Appeal

Appeal to administrative law judge of determination of eligibility and hearing. *Unemp. Ins. Code §§ 1328, 1331, 1334*

Appeal to Unemployment Insurance Appeals Board. *Unemp. Ins. Code §§ 1334, 1336*

[2] Child and Spousal Support

Withholding of support obligations from unemployment compensation or disability benefits. *Code Civ. Proc. § 704.120*; *Unemp. Ins. Code §§ 1255.7, 1342, 2630*

[3] Disability Benefits

Requirement that employer give notice of disability insurance rights and benefits due to sickness, injury, or pregnancy to each new employee and each employee leaving work due to pregnancy or nonoccupational sickness or injury. *Unemp. Ins. Code § 2613*

To whom disability benefits are payable. *Unemp. Ins. Code §§ 2625, 2627*

"Disability" and "disabled" defined. *Unemp. Ins. Code § 2626*

Eligibility of alcoholic recovery home or drug-free residential facility resident. *Unemp. Ins. Code §§ 2626.1, 2626.2*

Person entitled to unemployment compensation benefits as ineligible for disability insurance benefits. *Unemp. Ins. Code § 2628*

Effect on eligibility for disability if entitled to other benefits in form of cash payments. *Unemp. Ins. Code § 2629*

Unemp. Ins. Code § 2629, relating to effect on eligibility when individual is entitled to other benefits in form of cash payments, is not to be construed to authorize delay of payment of disability benefits, and exceptions; when payments must commence. *Unemp. Ins. Code § 2629.1(a), (b)*

Duty of Employment Development Department when claim for disability benefits is filed. *Unemp. Ins. Code § 2629.1(c)*

Employment Development Department's right to reimbursement if employer or insurer disputes liability for payment of other benefits is subject to jurisdiction of Workers' Compensation Appeals Board in accordance with Lab. Code *§§ 5300 et seq. Unemp. Ins. Code* § 2629.1(d)

Procedure when liability of employer or insurer to reimburse Employment Development Department for disability benefits paid is established. *Unemp. Ins. Code § 2629.1(e), (f)*

Requirement for valid claim. *Unemp. Ins. Code § 2652*

Amount and duration of disability benefits. *Unemp. Ins. Code §§ 2653, 2655-2658*

Wages due and unpaid as deemed wages paid. *Unemp. Ins. Code § 2654*

Disqualifications. *Unemp. Ins. Code §§ 2675-2679*

Filing, determination, and payment of disability benefit claims. *Unemp. Ins. Code §§ 2701-2714*

Overpayments. *Unemp. Ins. Code §§ 2735-2742*

Rights of military trainees. *Unemp. Ins. Code §§ 2765-2772*

Rights of industrially disabled persons. *Unemp. Ins. Code §§ 2775-2778*

Nonindustrial disability insurance for state employees. *Unemp. Ins. Code §§ 2781-2783*

Contributions. *Unemp. Ins. Code §§ 2901-2903*

Disability fund. *Unemp. Ins. Code §§ 3001-3015*

Disability administration account. *Unemp. Ins. Code § 3051*

Disability benefit payment account. *Unemp. Ins. Code § 3075*

Voluntary plans. *Unemp. Ins. Code §§ 3251-3272*

Ineligibility for benefits from Disability Fund of employee covered by approved voluntary plan. *Unemp. Ins. Code § 3253*

Administrative review of denial of employee's claim for disability benefits under approved voluntary plan; mandate as exclusive remedy for judicial review of Appeals Board's decision denying benefits. *Unemp. Ins. Code § 3264*

[4] Disqualification for Unemployment Compensation Benefits

Person who quit most recent work without good cause or was discharged for misconduct. *Unemp. Ins. Code § 1256*

Person discharged for use of intoxicants, including alcoholic beverages. *Unemp. Ins. Code § 1256.4(a)*

Person who made false statement or withheld material fact in order to obtain unemployment compensation benefits. *Unemp. Ins. Code § 1257(a)*

Person who without good cause refused or when properly notified failed to apply for suitable employment. *Unemp. Ins. Code § 1257(b)*

[5] Employment Training

Employment Training Fund. *Unemp. Ins. Code § 1610 et seq.*

Employment Training Panel. *Unemp. Ins. Code § 10200 et seq.*

[6] Extended Duration Benefits

Eligibility and disqualifications. *Unemp. Ins. Code §§ 3551-3553*

Computation (amount and duration). *Unemp. Ins. Code §§ 3601-3603*

Filing, determination of claim, and payment. *Unemp. Ins. Code §§ 3651-3656*

Overpayments. *Unemp. Ins. Code § 3751*

[7] Federal-State Extended Compensation

General provisions. *Unemp. Ins. Code §§ 4001-4004*

Eligibility and disqualification. *Unemp. Ins. Code §§ 4551-4558*

Computation (amount and duration). *Unemp. Ins. Code § 4601*

Filing, determination of claim, and payment. *Unemp. Ins. Code §§ 4651-4656*

Notice to individual and employer who submitted facts pursuant to *Unemp. Ins. Code § 4654* of department's determination of eligibility, and right of individual or employer to appeal to administrative law judge. *Unemp. Ins. Code § 4655*

Ruling as to cause of termination of individual's most recent employment. *Unemp. Ins. Code § 4701*

When federal-state extended benefits may be charged against employer's reserve account. *Unemp. Ins. Code § 4702*

Overpayments. *Unemp. Ins. Code § 4751*

[8] Funds

Unemployment Fund. *Unemp. Ins. Code §§ 1521-1537*

Administration Fund. *Unemp. Ins. Code §§ 1555-1562*

Contingent Fund. *Unemp. Ins. Code §§ 1585-1590*

Benefit Audit Fund. *Unemp. Ins. Code §§ 130.5, 1595-1598*

Employment Training Fund. *Unemp. Ins. Code § 1610 et seq.*

Disability Fund. *Unemp. Ins. Code §§ 3001-3015*

[9] Judicial Review

Time limit on judicial review of decisions of Unemployment Insurance Appeals Board and exceptions. *Unemp. Ins. Code § 410*

[10] Liens

Judgment or settlement of action as provided for in *Lab. Code §§ 3850-3865* (relating to subrogation of employer in action against third-party tortfeasor) is subject, on notice to court, to same lien claims of Employment Development Department as are provided for in *Lab. Code §§ 4900-4909.1* and are to be allowed by court as it determines necessary to avoid duplication of payment as compensation to employee for lost earnings. *Lab. Code § 3865*

Workers' Compensation Appeals Board must allow lien equal to amount of unemployment compensation, unemployment disability benefits, and family temporary disability insurance benefits paid against sums to be paid as workers' compensation. *Lab. Code § 4903(f)-(h)*; *see also Lab. Code §§ 4903.2, 4904*; *Unemp. Ins. Code §§ 2629, 2629.1*

A claim for family temporary disability insurance benefits must be filed not later than the 41st consecutive day following the first compensable day with respect to which the claim is made for benefits, and the time must be extended by the department on a showing of good cause. If a first claim is not complete, the claim form must be returned to the claimant for completion, and it must be completed and returned not later than the tenth consecutive day after the date it was mailed by the department to the claimant; this time must be extended by the department on a showing of good cause [*Unemp. Ins. Code § 3301(e)*].

[11] Presumptions

Rebuttable presumption that person was discharged for reasons other than misconduct and that person did not voluntarily leave work without good cause. *Unemp. Ins. Code § 1256*

[12] Unemployment Insurance Benefits

Eligibility and disqualifications. *Unemp. Ins. Code §§ 1251-1265.9*

Retraining benefits. *Unemp. Ins. Code §§ 1266-1274.10*

Computation of unemployment compensation benefit award (amount and duration). *Unemp. Ins. Code § 1275-1342*

Overpayments. *Unemp. Ins. Code §§ 1375-1384*

Extended duration unemployment compensation. *Unemp. Ins. Code §§ 3501-3751*

Federal-state extended compensation. *Unemp. Ins. Code §§ 4001-4751*

[13] Violations and Penalties

Any individual falsely certifying person's medical condition to obtain disability insurance benefits, with intent to defraud, as subject to penalty of 25 percent of benefits paid as result of false certification. *Unemp. Ins. Code § 1143*

Employer that induces, solicits, or coerces employee to file false claim for benefits is subject to penalty equal to liability established against employee under *Unemp. Ins. Code §§ 1375, 1375.1*. *Unemp. Ins. Code § 1144*

Assessment against person overpaid unemployment compensation benefits because of false representation or concealment of material fact for purpose of obtaining benefits. *Unemp. Ins. Code § 1375.1*

Misrepresentation or concealment to obtain, increase, reduce, or defeat any benefit or payment. *Unemp. Ins. Code § 2101*

Willfully making false statement or knowingly failing to disclose material fact, including, but not limited to, using a false name, false social security number, or other false identification, is a violation of Unemployment Insurance Code. *Unemp. Ins. Code § 2101*

Misrepresentation or concealment to obtain benefits under employment laws of another state. *Unemp. Ins. Code § 2102*

Withholding information to aid individual to obtain benefits. *Unemp. Ins. Code § 2107*

Violation of law or authorized regulation. *Unemp. Ins. Code § 2112*

Restitution for overpayment of benefits. *Unemp. Ins. Code § 2113*

Reporting or registering a fictitious employer or fictitious employee, and fictitious wages to Employment Development Department in order to obtain or increase benefits. *Unemp. Ins. Code § 2114*

False certification of medical condition to obtain disability insurance benefits. *Unemp. Ins. Code § 2116(a)*; *see also Unemp. Ins. Code § 2116(d)* (assisting, abetting, soliciting, or conspiring in act also unlawful)

Knowingly presenting false statement supporting claim for disability insurance benefits. *Unemp. Ins. Code § 2116(b)*; *see also Unemp. Ins. Code § 2116(d)* (assisting, abetting, soliciting, or conspiring in act also unlawful)

Knowingly soliciting, receiving, paying, offering, or accepting consideration for soliciting claimant to apply for disability insurance benefits. *Unemp. Ins. Code § 2116(c)*; *see also Unemp. Ins. Code § 2116(d)* (assisting, abetting, soliciting, or conspiring in act also unlawful)

Penalty for failure, with or without intent to evade statutory or Employment Development Department requirement, to supply information required by Unemployment Insurance Code or for supplying false or fraudulent information. *Unemp. Ins. Code § 2117*

Willfully aiding, assisting in, procuring, counseling, coercing, or advising preparation or presentation of document that is fraudulent or false as to any material matter. *Unemp. Ins. Code § 2121*

Except as provided in *Unemp. Ins. Code §§ 2117* or *2117.5*, penalty for violation of *Unemp. Ins. Code §§ 2101-2127*. *Unemp. Ins. Code § 2122*

Place of trial. *Unemp. Ins. Code § 2124*

Action or prosecution must be instituted within four years after discovery of offense. *Unemp. Ins. Code § 2125*

Court has discretion to charge any person convicted of offense with costs of investigation and prosecution. *Unemp. Ins. Code § 2126*

Penalties are cumulative; prosecutor may compromise penalty with consent of Employment Development Department. *Unemp. Ins. Code § 2127*

Payment of fines. *Unemp. Ins. Code § 2122.5*

[14] Voluntarily Leaving Work with Good Cause

Individual whose employment terminated under compulsory retirement provisions of collective bargaining agreement as not deemed to have left work without good cause. *Unemp. Ins. Code § 1256*

Individual may be deemed to have left most recent work with good cause if he or she left employment to accompany spouse (including person to whom marriage is imminent) or domestic partner to place from which it is impractical to commute to the employment. *Unemp. Ins. Code § 1256*

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceDisability BenefitsClaim ProceduresLabor & Employment LawDisability & Unemployment InsuranceDisability BenefitsCoverage & DefinitionsGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationCoverage & DefinitionsLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationEligibilityVoluntary UnemploymentLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationReview

California Forms of Pleading and Practice--Annotated

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 564 UNEMPLOYMENT AND DISABILITY INSURANCE
PART III. RESEARCH GUIDE
C. Eligibility And Claims For Benefits

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§ 564.241 Administrative Regulations

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Wage Garnishment Law (*Code Civ. Proc. § 706.010 et seq.*). *22 Cal. Code Reg. § 1755-1 et seq.*

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"Week of unemployment." 22 Cal. Code Reg. § 1253-2

"Week of unemployment" with respect to partial unemployment. 22 Cal. Code Reg. § 1253-3

"Week of unemployment," with respect to late or delayed filing of claim. 22 Cal. Code Reg. §§ 1253-4, *1253-5, 1253-8*

"Week of unemployment," with respect to person who resides in area served only by itinerant service of unemployment office. 22 Cal. Code Reg. § 1253-6

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Disability insurance definitions. 22 Cal. Code Reg. §§ 2601-1, *2608-1*

Computation of benefits (amount and duration). 22 Cal. Code Reg. §§ 2657-1, *2658-1*

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Work sharing unemployment insurance benefits. *22 Cal. Code Reg. §§ 1279.5-1-1279.5-10*

Filing, determination, and payment of claims. *22 Cal. Code Reg. §§ 1326-1-1341-1*

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[5] Violations and Penalties

When department will seek criminal prosecution for receipt of benefits to which claimant is not entitled. 22 Cal. Code Reg. § 2113-1

[6] Work Incentive Programs

Employment preparation program. *22 Cal. Code Reg. §§ 4000-1-4000-5*

Pilot payment component. *22 Cal. Code Reg. §§ 4000-11-4000-15*

Legal Topics:

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49-564 California Forms of Pleading and Practice--Annotated § 564.242

§ 564.242 Decisions

[1] Administrative Appeal

Administrative construction of term "good cause" as used in *Unemp. Ins. Code § 1328*, relating to extensions of time within which to appeal decision of department as to eligibility for employment benefits to referee (now administrative law judge), so as to exclude cases in which delay was attributable to applicant or his or her counsel, no matter how reasonable or excusable, as subverting remedial purpose of statute and defeating legislative objective of providing prompt administrative adjudication of claims for unemployment benefits without recourse to technical and formal requirements. *Gibson v. Unemployment Ins. Appeals Bd. (1973) 9 Cal. 3d 494, 496-497, 501, 108 Cal. Rptr. 1, 509 P.2d 945*

Good cause, as used in *Unemp. Ins. Code § 1328*, providing that time to appeal decision of department relating to eligibility for unemployment insurance benefits to administrative law judge may be extended for good cause, as applying whether claimant or employer seeks to attack determination; meaning of good cause. *United States Postal Service v. Unemployment Ins. Appeals Bd. (1976) 63 Cal. App. 3d 506, 514-515, 134 Cal. Rptr. 19*

Good cause for extending period for filing appeal from administrative decision denying unemployment compensation benefits to referee (now administrative law judge) as shown by facts that one day after claimant had been informed of decision denying benefits he placed matter of appeal in hands of legal aid attorney and, due to attorney's large case load and backlog of secretarial work, appeal was received at proper office one business day after 10 days allowed by *Unemp. Ins. Code § 1328*. *Flores v. Unemployment Ins. Appeals Bd. (1973) 30 Cal. App. 3d 681, 683-685, 106 Cal. Rptr. 543*

Applicant for unemployment insurance benefits as not denied due process of law by fact that after his application had been denied he had not been accorded hearing on merits by referee (now administrative law judge) of his eligibility when he failed to file timely appeal to referee and when he had been given opportunity (albeit unsuccessfully), with assistance of counsel, to show good cause for late appeal. *Hicks v. Sheffield (1972) 23 Cal. App. 3d 441, 442-443, 100 Cal. Rptr. 274*

Writ of mandate to review administrative decision that petitioner had been untimely in appealing withholding of unemployment benefits by Director of Employment as properly denied where no good cause for late appeal was shown. *Perez v. Unemployment Ins. App. Bd. (1970) 4 Cal. App. 3d 62, 65-66, 83 Cal. Rptr. 871*

[2] Attorney Fees

In mandate proceeding to compel Employment Development Department and Unemployment Insurance Appeals Board to set aside determination and decision that petitioner was ineligible for unemployment insurance benefits because of her refusal to answer questions with respect to her pregnancy, though she later provided administrative law judge with certificate from her physician stating she was in good health and could work, petitioner as entitled to award of attorney fees both for services rendered at trial and on appeal under private attorney general theory codified in *Code Civ. Proc. § 1021.5*, since significant nonpecuniary benefit was conferred by case on large class of persons, namely, working women who become pregnant and unemployed. *Gunn v. Employment Development Dep't (1979) 94 Cal. App. 3d 658, 665-666, 156 Cal. Rptr. 584*

[3] Availability for Work

Denial of unemployment compensation benefits to nondenominational Christian who refused temporary position offered him by employment agency, which would have required him to work on Sunday, based on his sincerely held religious belief that, as a Christian, he could not work on "the Lord's day," violated *free exercise clause* of *U.S. Const., amend. I*, as applied to states through *U.S. Const., amend. XIV*, when state presents no interest that is sufficiently compelling to override individual's free exercise claim. *Frazee v. Illinois Dep't of Employment Sec. (1989) 489 U.S. 829, 109 S. Ct. 1514, 103 L. Ed. 2d 914, 917-921*

"Availability for work" within meaning of *Unemp. Ins. Code § 1253(c)*, as requiring no more than that claimant (1) be willing to accept suitable work which he or she has no good cause for refusing, and (2) thereby make himself or herself available to substantial field of employment. *Glick v. Unemployment Ins. Appeals Bd. (1979) 23 Cal. 3d 493, 499, 153 Cal. Rptr. 1, 591 P.2d 24* ; *Rios v. Employment Development Dept. (1986) 187 Cal. App. 3d 489, 493-494, 231 Cal. Rptr. 732*

Migrant farm workers, who annually came to California to perform seasonable agricultural work and then returned home to Texas, and who applied for California unemployment insurance benefits when they failed to obtain work in Texas, presented substantial evidence of good cause for restricting their labor market by making themselves unavailable for work in California; evidence of simultaneous loss of work and affordable housing was sufficient to support trial court's finding that farmworkers had good cause to return to homes in *Texas. Rios v. Employment Development Dept. (1986) 187 Cal. App. 3d 489, 494, 231 Cal. Rptr. 732*

Denial of full week's benefits based on claimant's declaration that he was unavailable for work for two days due to his observance of religious holidays as unconstitutional; interpretation of *Unemp. Ins. Code § 1253(c)* permitting apportionment of benefits on daily, rather than weekly, basis as constitutionally compelled. *Jaffe v. Unemployment Ins. Appeals Bd. (1984) 156 Cal. App. 3d 719, 721-725, 202 Cal. Rptr. 812*

Peripheral *First Amendment* or other right applicant for unemployment insurance may have to retain his selected hair styling (hair 13 inches in length tied behind head in pony tail and mustache and full beard which extended 3 or 4 inches below his chin), as yielding to dictate of *Unemp. Ins. Code § 1253(c)*, requiring person seeking unemployment benefits to keep himself available for work. *Chambers v. Unemployment Ins. Appeals Bd. (1973) 33 Cal. App. 3d 923, 926-928, 109 Cal. Rptr. 413* (dictum, court holding that trial court erred in finding applicant ineligible for unemployment insurance benefits after determining there were no jobs available in his job market; person seeking unemployment relief as under no duty to keep himself available for work that did not appear to exist)

Unemployment benefits as improperly denied on ground that applicant voluntarily made himself unavailable for work (*Unemp. Ins. Code § 1253(c)*) by his beard and other slovenly dress when there was no showing pursuant to *Unemp. Ins. Code § 1258* that there was any potential employer to interview applicant. *Spangler v. California Unemp. Ins. App. Bd. (1971) 14 Cal. App. 3d 284, 288, 92 Cal. Rptr. 266*

[4] Base Period

Earnings during base period used for determining eligibility for state disability insurance [*see Unemp. Ins. Code § 2652*] must be subject to state disability insurance tax in order to qualify as state disability "base period wages." *Simpson v. Unemployment Ins. Comp. Appeals Bd. (1986) 187 Cal. App. 3d 342, 348, 350-354, 231 Cal. Rptr. 690*

[5] Benefits Generally

Unemp. Ins. Code § 1335 (prior to its 1971 amendment), permitting automatic termination of unemployment compensation benefits pending employer's appeal, as inconsistent with *42 U.S.C. § 503(a)(1)*, which requires payment of benefits when due. *California Dep't of Human Resources Development v. Java (1971) 402 U.S. 121, 122-124, 91 S. Ct. 1347, 28 L. Ed. 2d 666*

Unemp. Ins. Code § 1255.3, providing for pension offset against unemployment compensation benefits received as enacted to comply with mandate of *I.R.C. § 3304(a)(15)*, requiring states to enact such provisions, and nothing more. *Evans v. Unemployment Ins. Appeals Bd. (1985) 39 Cal. 3d 398, 408-410, 216 Cal. Rptr. 782, 703 P.2d 122*

Statutory requirements for prompt payment of benefits after determination of eligibility by referee as prohibiting withholding of payments pending employer's appeal of the determination. *Los Angeles Unified School Dist. v. Livingston (1981) 125 Cal. App. 3d 942, 946-947, 178 Cal. Rptr. 680*

Claimant's rights to payment of unemployment compensation when due (*42 U.S.C. § 503(a)(1)*) and procedural due process (*Cal. Const., art. I, § 7*) as violated by practice of Employment Development Department in suspending payment of unemployment insurance benefits pending appeal to any continuing claim recipients determined by department clerk to be ineligible for further payments. *American Federation of Labor v. Employment Dev. Dept. (1979) 88 Cal. App. 3d 811, 817-821, 152 Cal. Rptr. 193*

Discharged employee as not entitled to unemployment insurance benefits for period between determination by supervisor of Department of Human Resources Development (now Employment Development Department) on reconsideration under *Unemp. Ins. Code § 1332(a)* [*now see Unemp. Ins. Code § 1332(b)*] of original interviewer's finding of eligibility that employee was not eligible and decision of referee (now administrative law judge) on appeal upholding that determination. *Miranda v. Unemployment Ins. Appeals Bd. (1973) 36 Cal. App. 3d 213, 218-221, 111 Cal. Rptr. 419*

Recovery of both unemployment disability benefits and worker's compensation for same period of unemployment as not permitted. *Martin v. California Dept. of Employment (1972) 28 Cal. App. 3d 804, 806-808, 105 Cal. Rptr. 111*

[6] Burden of Proof and Prima Facie Case

Applicant for unemployment insurance benefits as having burden of establishing eligibility. *Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 599, 155 Cal. Rptr. 63*

When applicant's eligibility for unemployment insurance is at issue before superior court, burden of disqualification as on employer and not on employee. *Prescod v. Unemployment Ins. Appeals Bd. (1976) 57 Cal. App. 3d 29, 37-38, 127 Cal. Rptr. 540*

Employer as having burden of establishing that employee is ineligible for unemployment benefits by reason of misconduct. *Jacobs v. California Unemployment Ins. Appeals Bd. (1972) 25 Cal. App. 3d 1035, 1039 n.7, 102 Cal. Rptr. 364*

Burden of establishing prima facie case that employee left work both voluntarily and without good cause as on employer, and meaning of phrase "without good cause," as used in *Unemp. Ins. Code § 1030*, relating to submission of facts to department by employer showing whether applicant for unemployment compensation benefits left employment voluntarily and without good cause. *Cal. Portland Cement Co. v. Cal. Unemp. Ins. Appeals Board (1960) 178 Cal. App. 2d 263, 271-275, 3 Cal. Rptr. 37*

[7] Collateral Estoppel

Under *Unemp. Ins. Code § 1960*, decision of Unemployment Insurance Appeals Board finding that employee was discharged for misconduct does not collaterally estop employee from relitigating reasons for discharge in civil action for wrongful termination. *Pichon v. Pacific Gas & Electric Co. (1989) 212 Cal. App. 3d 488, 503, 260 Cal. Rptr. 677*

Unemp. Ins. Code § 1960, providing that findings, judgments, and orders in unemployment compensation proceedings are not conclusive or binding in separate or subsequent actions or proceedings, applies retroactively to all litigation pending at time of its enactment. *Mahon v. Safeco Title Ins. Co. (1988) 199 Cal. App. 3d 616, 619-620, 245 Cal. Rptr. 103*

[8] Collective Bargaining Agreements

Eligibility for unemployment compensation benefits of employee who left work as required by provisions of collective bargaining agreement fixing limited tenure of employment under system of job rotation. *Pacific Maritime Asso. v. California Unemployment Ins. Appeals Board (1965) 236 Cal. App. 2d 325, 340-341, 45 Cal. Rptr. 892*

Pregnant employee required by collective bargaining agreement to take leave of absence at end of fourth month of pregnancy as eligible for unemployment compensation benefits when employee was still able to work for two more months. *Douglas Aircraft Co. v. California Unemp. Ins. Appeals Board (1960) 180 Cal. App. 2d 636, 642-648, 4 Cal. Rptr. 723*

[9] Disability Insurance

"Good cause," as used in *Unemp. Ins. Code § 2706.1*, providing for extension for good cause of time within which to file claim for disability insurance benefits as including, without limitation, mistake, inadvertence, surprise, or excusable neglect. *Gruschka v. Unemployment Ins. Appeals Bd. (1985) 169 Cal. App. 3d 789, 791-793, 215 Cal. Rptr. 484*

Construction of *Unemp. Ins. Code § 2608*, defining "disability benefit period," with respect to consecutive periods of disability. *Bilyeu v. Unemployment Ins. Appeals Bd. (1982) 130 Cal. App. 3d 657, 663-668, 181 Cal. Rptr. 837*

[10] Disqualified Persons

Illegal alien as not entitled to collect unemployment benefits. *Alonso v. State of California (1975) 50 Cal. App. 3d 242, 253-254, 123 Cal. Rptr. 536 , cert. denied, 425 U.S. 903, 96 S. Ct. 1492, 47 L. Ed. 2d 752 (1976)*

Exclusion from unemployment insurance program of individual who is employed by son (*see Unemp. Ins. Code § 631*) as rational and reasonable classification in light of legislative objective. *Miller v. Department of Human Resources Dev. (1974) 39 Cal. App. 3d 168, 170, 172-173, 114 Cal. Rptr. 8*

[11] Duration of Disqualification for Benefits

Work performed by worker as condition of receiving general relief under county-operated work relief program does not constitute employment within meaning of *Unemp. Ins. Code § 601* (defining employment) or *Unemp. Ins. Code § 621* (defining employee) [*see Unemp. Ins. Code § 634.5(e)* (relating to public entities)], and hence does not constitute "bona fide employment," within meaning of *Unemp. Ins. Code § 1260(a)* and 22 Cal. Code Reg. § 1260(a)-1, relating to duration of disqualification of worker for unemployment insurance benefits resulting from voluntary unemployment without good cause. *Ghent v. Unemployment Ins. Appeals Bd. (1986) 183 Cal. App. 3d 1167, 1172-1174, 228 Cal. Rptr. 631*

[12] Federal Law

State is not barred by *I.R.C. § 3304(a)(12)* (unemployment compensation not to be denied under state law solely on basis of pregnancy) from denying unemployment benefits to woman who left job due to pregnancy when state disqualifies all persons who leave jobs for reasons not causally connected to their work or to their employer. *Wimberly v. Labor & Industrial Rel. Comm'n (1987) 479 U.S. 511, 107 S. Ct. 821, 93 L. Ed. 2d 909, 912, 915-916, 919*

[13] Fraudulently Obtaining Benefits

Employment Development Department as not required to notify recipients of intent to file criminal complaint for fraudulently obtaining unemployment insurance benefits that restitution may be acceptable alternative to prosecution. *Manning v. Municipal Court (1978) 87 Cal. App. 3d 932, 936-937, 151 Cal. Rptr. 453*

[14] Good Cause for Leaving Employment

State's denial of unemployment compensation benefits to Jehovah's Witness who terminated his job because his religious beliefs forbade participation in production of armaments as violating *First Amendment* right to free exercise of religion. *Thomas v. Review Bd., Ind. Empl. Sec. Div. (1981) 450 U.S. 707, 709-720, 101 S. Ct. 1425, 67 L. Ed. 2d 624*

Worker who leaves employment to accompany nonmarital partner to another state in order to maintain familial relationship established with their child as constituting good cause for leaving work within meaning of *Unemp. Ins. Code § 1256* (governing eligibility for unemployment insurance benefits). *MacGregor v. Unemployment Ins. Appeals Bd. (1984) 37 Cal. 3d 205, 207, 212, 207 Cal. Rptr. 823, 689 P.2d 453*

Employee who quit employment in face of continuing harassment and threatened dismissal in retaliation for union activities and "whistle blowing" to public authorities, rather than waiting to be fired, as leaving employment for good cause. *Sanchez v. Unemployment Ins. Appeals Bd. (1984) 36 Cal. 3d 575, 578, 205 Cal. Rptr. 501, 685 P.2d 61*

Voluntary termination of one's employment to follow nonmarital "loved one" as not constituting good cause for leaving employment when no marriage between them is imminent and there are no children of nonformalized relationship.

Norman v. Unemployment Ins. Appeals Bd. (1983) 34 Cal. 3d 1, 3-10, 192 Cal. Rptr. 134, 663 P.2d 904

Substantial reduction in earnings (25 percent wage cut) as constituting good cause for leaving employment. *Bunny's Waffle Shop v. Cal. Emp. Com. (1944) 24 Cal. 2d 735, 743, 151 P.2d 224*

Employee who reasonably and in good faith feared harm to his health from working in unventilated room filled with tobacco smoke and therefore voluntarily left his job as having good cause within meaning of *Unemp. Ins. Code § 1256*. *McCrocklin v. Employment Development Dep't (1984) 156 Cal. App. 3d 1067, 1074, 205 Cal. Rptr. 156*

Volunteering to leave work during mandatory reduction in work force in order to take place of less senior employee, according to provision in collective bargaining agreement, as constituting "good cause" for employee's leaving work within meaning of *Unemp. Ins. Code § 1256*. *Stanford v. Unemployment Ins. Appeals Bd. (1983) 147 Cal. App. 3d 98, 102, 195 Cal. Rptr. 1*

Insubstantial reduction in salary (7-2/3rds) as not constituting good cause for employee's leaving work, particularly when employee would not have quit but for belief that she was eligible to receive unemployment compensation benefits. *Maitland v. Employment Development Dept. (1982) 130 Cal. App. 3d 331, 334-335, 181 Cal. Rptr. 587*

When record did not establish that coworker communication was expected or required condition of employment, employer's order to claimant to either speak to coworker or discontinue employment was unreasonable and claimant's leaving employment rather than speak to coworker as not a constructive voluntary leaving. *Steinberg v. Unemployment Ins. Appeals Bd. (1978) 87 Cal. App. 3d 582, 584-587, 151 Cal. Rptr. 133*

Female employee discriminated against as to wages due to sex, who had made appropriate protest and request for equalization of compensation and who had been refused adjustment after employer had opportunity to do so, as having good cause for leaving employment. *Morrison v. Unemployment Ins. Appeals Bd. (1976) 65 Cal. App. 3d 245, 247-253, 134 Cal. Rptr. 916*

When employer's policy regarding maternity leave violated Civil Rights Act (*42 U.S.C. § 2000e*), termination by employee after having at first been refused reinstatement after maternity leave and then rehired in lower grade but with same pay as being for good cause within meaning of *Unemp. Ins. Code § 1256* when lower grade operated to deprive her of promotional opportunity. *Prescod v. Unemployment Ins. Appeals Bd. (1976) 57 Cal. App. 3d 29, 38-43, 127 Cal. Rptr. 540*

Trial court's determination of whether undisputed facts established a voluntary leaving without good cause, as defined by *Unemp. Ins. Code § 1256*, as conclusion of law subject to judicial review. *Prescod v. Unemployment Ins. Appeals Bd. (1976) 57 Cal. App. 3d 29, 38, 127 Cal. Rptr. 540*

Unemployment Insurance Appeals Board as having abused its discretion in denying unemployment compensation benefits on grounds that in serving seven days in jail as result of inability to pay fine, worker, pursuant to *Unemp. Ins. Code § 1256.1*, was deemed to have quit voluntarily without good cause. *Kaylor v. Department of Human Resources Dev. (1973) 32 Cal. App. 3d 732, 735-737, 108 Cal. Rptr. 267*

Applicant for unemployment insurance benefits as having left last employment without good cause within meaning of *Unemp. Ins. Code § 1256* when he quit in order to attend English classes while work was available. *Perales v. Department of Human Resources Dev. (1973) 32 Cal. App. 3d 332, 335-337, 108 Cal. Rptr. 167*

[15] Misconduct

State's denial of unemployment compensation benefits to worker discharged for misconduct because of refusal to work on Sabbath, which was contrary to her sincerely-held religious convictions, violated Free Exercise of Religion Clause of *U.S. Const., amend. I.* *Hobbie v. Unemployment Appeals Commission (1987) 480 U.S. 136, 107 S. Ct. 1046, 94 L. Ed. 2d 190*

Employee's willful refusal to perform work which she reasonably and in good faith believed would jeopardize health of others as not constituting misconduct so as to disqualify her under *Unemp. Ins. Code § 1256* from collecting unemployment benefits. *Amador v. Unemployment Ins. Appeals Bd. (1984) 35 Cal. 3d 671, 686, 200 Cal. Rptr. 298, 677 P.2d 224*

Word "misconduct" is limited to conduct evincing such willful or wanton disregard of employer's interests as is found in deliberate violations or disregard of standards of behavior that employer has right to expect of employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show intentional and substantial disregard of employer's interests or of employee's duties and obligations to employer; mere poor performance is not equated with misconduct. *Robinson v. Hewlett-Packard Corp. (1986) 183 Cal. App. 3d 1108, 1123-1124, 228 Cal. Rptr. 591*

Trial court as having erred in finding that refusal of claimants for unemployment compensation benefits to work in radiation areas constituted misconduct justifying discharge (*see Unemp. Ins. Code § 1256*) when evidence demonstrated each claimant's good faith belief that there was substantial health risk in working within assigned areas; reasons for refusing work that would constitute good cause for resignation also justify less drastic step of refusing work assignment. *Moore v. Unemployment Ins. Appeals Bd. (1985) 169 Cal. App. 3d 235, 241-242, 215 Cal. Rptr. 316*

Misconduct under *Unemp. Ins. Code § 1256* as requiring willful or wanton disregard of employer's interests as in deliberate disregard of reasonable standards of behavior, or in carelessness or negligence of such degree or recurrence as to show equal culpability; mere inefficiency, unsatisfactory conduct, inadvertencies, or ordinary negligence as not constituting misconduct. *Cerberonics, Inc. v. Unemployment Ins. Appeals Bd. (1984) 152 Cal. App. 3d 172, 176, 199 Cal. Rptr. 292*

Bus. & Prof. Code § 16600 as proscribing contracts in restraint of one's profession, trade, or business; restraining individual from seeking employment elsewhere as violating this provision and constituting unreasonable burden on employee; hence, employee's refusal to sign agreement not to permit any competitor of employer to use her resume in submitting contract bids, although it resulted in employee's being fired, as not having committed misconduct for purposes of *Unemp. Ins. Code § 1256*. *Cerberonics, Inc. v. Unemployment Ins. Appeals Bd. (1984) 152 Cal. App. 3d 172, 176-177, 199 Cal. Rptr. 292*

Question of reasonableness of employer's order for purpose of determining whether employee's disobedience constituted miscon duct as question of law for appellate court when facts are undisputed. *Cerberonics, Inc. v. Unemployment Ins. Appeals Bd. (1984) 152 Cal. App. 3d 172, 176, 199 Cal. Rptr. 292*

Employer as bearing burden of proving that order disobeyed by employee was given in language understood by employee in order to establish disqualification for benefits due to misconduct. *Lozano v. Unemployment Ins. Appeals Bd. (1982) 130 Cal. App. 3d 749, 757, 182 Cal. Rptr. 6*

Trial court's finding that nurse was discharged for cause as supported by substantial evidence and therefore affirmed though, had trial court found otherwise, decision would also have been supported by substantial evidence and affirmed. *Davis v. Unemployment Ins. Appeals Bd. (1974) 43 Cal. App. 3d 71, 76, 76 n.6, 117 Cal. Rptr. 463*

Trial court's findings that cleaning woman employed by nursing home was discharged for misconduct and thus disqualified for unemployment benefits as supported by substantial evidence showing employee was capable of

performing tasks assigned and that her failure to perform was due to carelessness and negligence of such degree and recurrence as to manifest wrongful intent and to show intentional and substantial disregard of employer's interests and of employee's duties and obligations to employer. *Agnone v. Hansen (1974) 41 Cal. App. 3d 524, 528-529, 116 Cal. Rptr. 122*

Trial court's finding that conduct of restaurant employee established manifestation of persistent and enduring intractability impressing conduct with character of insubordination; that is, willful, deliberate violation of reasonable orders of employer, thus disqualifying her for unemployment benefits, as supported by substantial evidence. *Rowe v. Hansen (1974) 41 Cal. App. 3d 512, 522-523, 116 Cal. Rptr. 16*

Threatening bodily harm to supervisors as misconduct within scope of *Unemp. Ins. Code § 1256*, and indefinite suspension of employee (treated as discharge for misconduct) on this ground disqualified employee from unemployment compensation benefits. *Morris v. Unemployment Ins. Appeals Bd. (1973) 34 Cal. App. 3d 1002, 1005-1006, 110 Cal. Rptr. 630*

When refusal to shave beard may or may not constitute misconduct. *Thornton v. Department of Human Resources Dev. (1973) 32 Cal. App. 3d 180, 183-186, 107 Cal. Rptr. 892* ; *King v. California Unemployment Ins. Appeals Bd. (1972) 25 Cal. App. 3d 199, 204-207, 101 Cal. Rptr. 660*

Vulgar statement by employee as minor peccadillo and not misconduct justifying denial of unemployment insurance benefits. *Silva v. Nelson (1973) 31 Cal. App. 3d 136, 139-142, 106 Cal. Rptr. 908*

Employee's refusal to comply with employer's rule that back hair length shall be trimmed to at least one inch above shoulder level to be measured from colar bone as constituting misconduct under *Unemp. Ins. Code § 1256* justifying denial of unemployment insurance benefits. *McCrae v. California Unemployment Ins. Appeals Bd. (1973) 30 Cal. App. 3d 89, 93-95, 106 Cal. Rptr. 159*

Trial court's conclusion that demoted employee's refusal to train man who was her replacement and new superior was reasonable and absolved her from charge of misconduct, though administrative agency had viewed same evidence and had made a contrary finding, as question of fact under circumstances of case and supported by substantial evidence. *Lacy v. California Unemployment Ins. Appeals Bd. (1971) 17 Cal. App. 3d 1128, 1132-1135, 95 Cal. Rptr. 566*

[16] Overpayment

Matters considered in determining liability of claimant for overpayment of unemployment compensation benefits under *Unemp. Ins. Code § 1375*. *Gilles v. Department of Human Resources Development (1974) 11 Cal. 3d 313, 322-323, 113 Cal. Rptr. 374, 521 P.2d 110* (*see also* McAlister-Duffy-Greene Unemployment Benefit Pension Offset Refund Act (Stats. 1985, ch. 1217, §§ 1, 7, 11, 16)

Unemp. Ins. Code § 1379 (*now Unemp. Ins. Code § 1379(d)*), providing for setoff of overpayments of benefits against benefits to which claimant may become entitled as not in conflict with federal Social Security Act (*42 U.S.C. § 503(a)(1)*). Gilles v. Department of Human Resources Development (1974) 11 Cal. 3d 3l3, 326-327, *113 Cal. Rptr. 374, 521 P.2d 110*

[17] Penalties

Intent to deceive as not required to merit imposition of penalty against employer pursuant to *Unemp. Ins. Code § 1030.5* (repealed, *now see Unemp. Ins. Code § 2101*) for misrepresenting that claimant's employment was voluntarily terminated. *Diagnostic Data, Inc. v. Unemployment Ins. Appeals Bd. (1973) 34 Cal. App. 3d 556, 558, 110 Cal. Rptr.*

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[18] Pregnancy

State statute making pregnant women ineligible for unemployment benefits for specified period before and after childbirth as violative of *Fourteenth Amendment*. *Turner v. Dept. of Employment Security (1975) 423 U.S. 44, 45-46, 96 S. Ct. 249, 46 L. Ed. 2d 181, 184*

Mandatory unpaid maternity leave of public school teacher as violative of due process. *Cleveland Board of Education v. LaFleur (1974) 414 U.S. 632, 643-644, 94 S. Ct. 791, 39 L. Ed. 2d 52*

Because pregnancy may render woman either unable to work or unavailable for work, inquiry by department and board into potential effect of apparent pregnancy on claimant's health as constitutionally permissible provided such inquiry is conducted in least intrusive manner possible. *Gunn v. Employment Development Dep't (1979) 94 Cal. App. 3d 658, 663-664, 156 Cal. Rptr. 584* (at p 664 n.5 pointing out that *I.R.C. § 3304(a)(12)*, relating to discrimination on basis of pregnancy, may preclude such inquiry)

Pregnant woman required to terminate employment after six months of pregnancy as not voluntarily quitting job. *Young v. Unemployment Ins. Appeals Bd. (1974) 37 Cal. App. 3d 606, 610, 112 Cal. Rptr. 460*

[19] Presumptions

Rebuttable presumption in *Unemp. Ins. Code § 1256* that worker is presumed to have been discharged for reasons other than misconduct and not to have voluntarily left work without good cause unless employer gives written notice to the contrary as controlling burden of proof at each stage of proceedings in the appeal process for unemployment insurance benefits. *O'Connell v. Unemployment Ins. Appeals Bd. (1983) 149 Cal. App. 3d 54, 57-59, 196 Cal. Rptr. 505*

Unemp. Ins. Code § 1256, providing that individual is presumed to have been discharged for reasons other than misconduct in connection with his or her work and not to have voluntarily left work without good cause unless employer has given written notice to the contrary to the department, as creating rebuttable rather than conclusive presumption. *Miranda v. Department of Human Resources Dev. (1973) 33 Cal. App. 3d 314, 318-319, 109 Cal. Rptr. 35*

[20] Recall after Layoff

Recall offer after indefinite layoff as offer of "new work" and workers refusing recall offer due to trade dispute (*see Unemp. Ins. Code § 1259* (refusal of unsuitable employment)) as eligible for unemployment benefits. *Campos v. Employment Development Dept. (1982) 132 Cal. App. 3d 961, 974-975, 183 Cal. Rptr. 637*

[21] Representation by Counsel

Department of Employment as not required to advise claimant of availability of agencies providing free legal advice or to provide claimant with appointed counsel. *Staley v. California Unemployment Ins. App. Bd. (1970) 6 Cal. App. 3d 675, 677-679, 86 Cal. Rptr. 294*

[22] Review on Mandate

When reviewing decision of Unemployment Insurance Appeals Board on petition for writ of mandate, superior court as required to exercise its independent judgment on evidence in administrative record. *MacGregor v. Unemployment Ins. Appeals Bd. (1984) 37 Cal. 3d 205, 211-212, 207 Cal. Rptr. 823, 689 P.2d 453* (review on employee's petition of decision denying unemployment insurance benefits); *Sanchez v. Unemployment Ins. Appeals Bd. (1984) 36 Cal. 3d 575, 585, 205 Cal. Rptr. 501, 685 P.2d 61* (same); *Interstate Brands v. Unemployment Ins. Appeals Bd. (1980) 26 Cal. 3d 770, 774-782, 163 Cal. Rptr. 619, 608 P.2d 707* (review on petition of employer of grant of unemployment insurance benefits); *Bilyeu v. Unemployment Ins. Appeals Bd. (1982) 130 Cal. App. 3d 657, 661, 668, 181 Cal. Rptr. 837* (review on petition of employee of decision denying disability benefits); *Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 599, 155 Cal. Rptr. 63* (review on petition of employer of decision granting unemployment insurance benefits)

Dispute about employer's liability for unemployment benefits as affecting both claimant's and employer's fundamental vested rights; hence, when either challenges board decision by administrative mandate (*Code Civ. Proc. § 1094.5*), trial court as required to exercise independent judgment on evidence in administrative record. *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1981) 29 Cal. 3d 101* ; *see Interstate Brands v. Unemployment Ins. Appeals Bd. (1980) 26 Cal. 3d 770, 775-782, 163 Cal. Rptr. 619, 608 P.2d 707*

Exhaustion of administrative remedies provided by Unemployment Insurance Act as jurisdictional prerequisite to court review by mandate. *Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 291-296, 109 P.2d 942*

Union has beneficial interest in outcome of proceeding and, hence, standing as representative of its members to petition for writ of mandate when (1) its members would otherwise have standing to sue in their own right; (2) interests it seeks to protect are germane to organization's purpose; and (3) neither claim asserted nor relief requested requires participation of individual members in lawsuit. *Brotherhood of Teamsters & Auto Truck Drivers v. Unemployment Ins. Appeals Bd. (1987) 190 Cal. App. 3d 1515, 1521-1524, 236 Cal. Rptr. 78*

Standard of review on mandate. *Brotherhood of Teamsters & Auto Truck Drivers v. Unemployment Ins. Appeals Bd. (1987) 190 Cal. App. 3d 1515, 1525, 236 Cal. Rptr. 78*

Proper interpretation and application of statutes as well as regulations are questions of law for review by court; hence, appeals board's interpretation of "bona fide employment" as used in *Unemp. Ins. Code § 1260(a)*, relating to duration of disqualification of worker who voluntarily quits employment or is discharged for misconduct, is subject to review by court of appeal. *Ghent v. Unemployment Ins. Appeals Bd. (1986) 183 Cal. App. 3d 1167, 1171, 228 Cal. Rptr. 631*

Although strong presumption supports correctness of findings of administrative agency, agency's conclusions of law are subject to de novo review by court of appeal, independent of trial court, and, in that review, court looks to complete record before it. *Ghent v. Unemployment Ins. Appeals Bd. (1986) 183 Cal. App. 3d 1167, 1171, 228 Cal. Rptr. 631*

Although court of appeal may properly assume trial court exercised its independent judgment on evidence, appellate court as required to determine whether judgment is supported by substantial, credible, and competent evidence and whether different result was compelled as matter of law; when probative facts are undisputed and require different conclusion, conclusion reached by trial court may be disregarded. *Gruschka v. Unemployment Ins. Appeals Bd. (1985) 169 Cal. App. 3d 789, 793, 215 Cal. Rptr. 484*

When administrative record may be augmented by evidence introduced at court proceeding. *Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 594-599, 155 Cal. Rptr. 63*

Trial court in mandate proceeding under *Code Civ. Proc. § 1094.5* to review decision of Unemployment Insurance Appeals Board as not required to make findings in sustaining demurrer to petition when only issue involved in case is one of law. *Carleson v. Unemployment Ins. Appeals Bd. (1976) 64 Cal. App. 3d 145, 149-150, 134 Cal. Rptr. 278*

Judicial review of benefit decisions of Unemployment Insurance Appeals Board as governed by *Code Civ. Proc. § 1094.5*. *Jacobs v. California Unemployment Ins. Appeals Bd. (1972) 25 Cal. App. 3d 1035, 1040, 102 Cal. Rptr. 364*

Trial court in mandate proceeding under *Code Civ. Proc. § 1094.5* to review decision of Unemployment Insurance Appeals Board as committing reversible error in sustaining demurrer to petition without leave to amend and failing to make findings of fact when proceeding presented factual issues on which court was required to exercise its independent judgment with respect to evidence presented at administrative hearing and to make findings in accordance therewith. *Sears, Roebuck & Co. v. Walls (1960) 178 Cal. App. 2d 284, 288-289, 2 Cal. Rptr. 847*

Right of employer whose reserve account is charged with payment of unemployment insurance benefits to seek judicial review by mandate. *Cal. Portland Cement Co. v. Cal. Unemp. Ins. Appeals Board (1960) 178 Cal. App. 2d 263, 269, 3 Cal. Rptr. 37* ; *Chrysler Corp. v. California Emp. etc. Com. (1953) 116 Cal. App. 2d 8, 14-15, 253 P.2d 68*

[23] School Employees

Under *Unemp. Ins. Code § 1253.3(g)* (providing that teacher assignment that is contingent on enrollment, funding, or program changes is not "reasonable assurance" of employment), assignments given to part-time, hourly community college instructors that depended on their ability to attract sufficient number of students to justify offering classes is contingent employment not constituting reasonable assurances of continued employment within meaning of *Unemp. Ins. Code § 1253.3*, and instructors are entitled to be paid unemployment benefits for period between fall and spring semesters. *Cervisi v. Unemployment Ins. Appeals Bd. (1989) 208 Cal. App. 3d 635, 639, 256 Cal. Rptr. 142*

Substitute secondary school teacher as not entitled to unemployment compensation benefits during summer recess when he had worked as substitute teacher for school district during prior academic year and had been offered and accepted continued employment by district during next academic year, even though he had written on his acceptance that he did not accept district's offer as reasonable assurance of employment, but rather as opportunity for such, and district in its subsequent notice to substitute teachers contained statement that substitute teachers were given no assurance of employment, since by district's offer and his acceptance he had reasonable assurance, within meaning of *Unemp. Ins. Code § 1253.3*, of employment by district for next academic year. *Board of Education v. Unemployment Ins. Appeals Bd. (1984) 160 Cal. App. 3d 674, 680-690, 206 Cal. Rptr. 788*

Denial of unemployment insurance to elementary school teacher's aide as proper when based on finding that aide had been given reasonable assurance within meaning of *Unemp. Ins. Code § 1253.3* that she would be reemployed after school recess. *Russ v. Unemployment Ins. Appeals Bd. (1981) 125 Cal. App. 3d 834, 845, 847, 178 Cal. Rptr. 421*

[24] Seek-Work Requirement

Trial court's finding that unemployed truck driver satisfied his union's seek-work requirements as supported by substantial evidence. *Rubino v. Unemployment Ins. Appeals Bd. (1972) 8 Cal. 3d 405, 408-409, 105 Cal. Rptr. 158, 503 P.2d 614*

[25] Strikes and Lockouts

National Labor Relations Act (*29 U.S.C. §§ 151-187*) as not precluding state (New York) from authorizing unemployment compensation for workers while on strike. *N.Y. Tel. Co. v. N.Y. State DOL (1978) 440 U.S. 519, 540, 99 S. Ct. 1328, 59 L. Ed. 2d 553, 569, 571-572*

Locked out union members' unemployment as regarded as voluntary and bar to unemployment compensation benefits when it was reasonably foreseeable that selective strike by union against certain members of multiemployer bargaining group might result in retailiatory lockout by other members of the group. *Interstate Brands v. Unemployment Ins. Appeals Bd. (1980) 26 Cal. 3d 770, 773, 782, 163 Cal. Rptr. 619, 608 P.2d 707*

Employee who left work in course of, and not because of, trade dispute for another reason constituting good cause as not ineligible for unemployment compensation benefits under *Unemp. Ins. Code § 1262*, making person who left work because of trade dispute ineligible for unemployment compensation benefits. *Bunny's Waffle Shop v. Cal. Emp. Com. (1944) 24 Cal. 2d 735, 738-742, 151 P.2d 224*

Disqualification of striking employees from receiving unemployment benefits imposed by *Unemp. Ins. Code § 1262* is not contingent on merits of controversy; section 1262 expresses two-pronged and balanced purpose of state to maintain its neutrality in trade dispute and not to use payment or withholding of benefits to aid either party to dispute; although dynamics and economic realities of situation leading to unemployment require examination, motive or justification underlying conduct of parties involved is immaterial. *Acuff v. Unemployment Ins. Appeals Bd. (1989) 208 Cal. App. 3d 1038, 1045, 256 Cal. Rptr. 513*

After negotiations for new collective bargaining between employer and labor union had reached impasse, employer's unilateral implementation of its last proposal, effecting wage and benefit reduction that resulted in strike when former collective bargaining agreement expired, was neither drastic economic weapon severing causal connection between existing trade dispute and employees' leaving work, nor constructive lockout rendering unemployment involuntary, when wages and benefits were essence of dispute and union had already voted overwhelmingly to strike rather than accept reduction. *Acuff v. Unemployment Ins. Appeals Bd. (1989) 208 Cal. App. 3d 1038, 1045-1046, 1048, 1052-1053, 256 Cal. Rptr. 513*

Trade dispute disqualification of *Unemp. Ins. Code § 1262* does not unconstitutionally discriminate against strikers because they join together in work stoppage as result of reduction in wages and benefits even though if they had not done so, but individually quit work because of reduction, there may have been good cause for leaving work under *Unemp. Ins. Code § 1256*. *Acuff v. Unemployment Ins. Appeals Bd. (1989) 208 Cal. App. 3d 1038, 1051, 256 Cal. Rptr. 513*

Disqualification for unemployment insurance benefits under *Unemp. Ins. Code § 1262* depends on fact of voluntary action and not on motives that led to it; eligibility for unemployment insurance benefits is determined not by looking at employer's economic problems, but by determining worker's conduct. *Martinez v. California Unemployment Ins. Appeals Bd. (1988) 206 Cal. App. 3d 1385, 1391, 1392, 254 Cal. Rptr. 461*

Picket line or strike is economic weapon directed against employer by union, and recognition of it by employee amounts to participation by employee in trade dispute it represents; decision to participate in union picket line or strike is never deemed involuntary in eyes of law. *Martinez v. California Unemployment Ins. Appeals Bd. (1988) 206 Cal. App. 3d 1385, 1391, 254 Cal. Rptr. 461*

Workers who leave jobs because of trade dispute were ineligible for unemployment insurance benefits under *Unemp. Ins. Code § 1262*, even though dispute was precipitated by wage cuts constituting 27 to 33 percent reduction in earnings for employees and wage cuts in combination with reduced benefits comprised 34 to 41 percent earnings reduction. *Martinez v. California Unemployment Ins. Appeals Bd. (1988) 206 Cal. App. 3d 1385, 1390-1394, 254 Cal. Rptr. 461*

Two-part test applies for determining whether claimant is ineligible to receive unemployment benefits pursuant to *Unemp. Ins. Code § 1262* (denying benefits to persons who left work because of trade dispute): (1) employee must voluntarily leave or remain away from employment (volitional test); and (2) employee must leave or remain away from employment because of trade dispute (causation test); criteria for denial or awarding of benefits being personal

responsibility of claimant for his or her unemployment in former case, or fault of employer in latter case. *Brotherhood of Teamsters & Auto Truck Drivers v. Unemployment Ins. Appeals Bd. (1987) 190 Cal. App. 3d 1515, 1525-1526, 236 Cal. Rptr. 78*

Unemp. Ins. Code § 1262, denying benefits to persons who left work because of trade dispute, as inapplicable to longshoremen who applied for benefits for period when their union was engaged in selective work stoppages, where, under rotational dispatch system, longshoremen were not scheduled to work during period in question, and where none of them walked off job or expressly refused work, even though they failed to actively repudiate their union's work stoppage policy or to seek employment, which became available as result of work stoppages, from struck employers. *Pacific Maritime Assn. v. Unemployment Ins. Appeals Bd. (1985) 169 Cal. App. 3d 568, 574-576, 215 Cal. Rptr. 408*

Courts as having recognized two-part test in determining ineligibility under *Unemp. Ins. Code § 1262*, making person who left work because of trade dispute ineligible for unemployment compensation benefits: (1) leaving work or remaining away must be volun tary (volitional test); and (2) leaving work or remaining away must be because of trade dispute (causational test). *Acuff v. Unemployment Ins. Appeals Bd. (1989) 208 Cal. App. 3d 1038, 1045, 256 Cal. Rptr. 513* ; *Martinez v. California Unemployment Ins. Appeals Bd. (1988) 206 Cal. App. 3d 1385, 1390, 254 Cal. Rptr. 461* ; *Campos v. Employment Development Dept. (1982) 132 Cal. App. 3d 961, 966, 183 Cal. Rptr. 637*

Unemp. Ins. Code § 1262, making person who left work because of trade dispute ineligible for unemployment compensation benefits, as manifesting state's desire to maintain neutrality in labor disputes and not to require employer to subsidize, through its contributions to Unemployment Fund, use of strike as economic weapon against it. *National Broadcasting Co. v. Unemployment Ins. Appeals Bd. (1979) 95 Cal. App. 3d 550, 555, 157 Cal. Rptr. 207*

[26] Unemployment Insurance Act as Remedial and Liberally Construed

Provisions of Unemployment Insurance Code as required to be liberally construed to further legislative objective of reducing hardship of unemployment. *Sanchez v. Unemployment Ins. Appeals Bd. (1984) 36 Cal. 3d 575, 584, 205 Cal. Rptr. 501, 685 P.2d 61* ; *Gilles v. Department of Human Resources Development (1974) 11 Cal. 3d 313, 325, 113 Cal. Rptr. 374, 521 P.2d 110* ; *Prescod v. Unemployment Ins. Appeals Bd. (1976) 57 Cal. App. 3d 29, 40, 127 Cal. Rptr. 540*

Unemployment Insurance Act as remedial statute and provisions as to benefits as required to be liberally construed to accomplish its purposes. *Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43, 168 P.2d 686* , *overruled on another point,* *People v. Sims (1982) 32 Cal. 3d 468, 479-480 n.8, 186 Cal. Rptr. 77, 651 P.2d 321*)

Unemployment Insurance Act as not purely economic but as also remedial. *Prescod v. Unemployment Ins. Appeals Bd. (1976) 57 Cal. App. 3d 29, 40, 127 Cal. Rptr. 540*

Unemployment insurance legislation as remedial in character, subject to a liberal construction, to effectuate its purpose and to coincide with its reflection of public policy. *Zuckerman-Mandeville, Inc. v. Sheffield (1970) 8 Cal. App. 3d 793, 799, 88 Cal. Rptr. 57*

[27] Violations and Penalties

Violation of *Unemp. Ins. Code § 2101* (willfully making false statement or knowingly concealing material fact including, but not limited to, using a false name, false social security number, or other false identification) is punishable under *Unemp. Ins. Code § 2122* as either misdemeanor or felony, not under *Unemp. Ins. Code § 2117* as only misdemeanor. *People v. Booker (1994) 21 Cal. App. 4th 1517, 1523, 26 Cal. Rptr. 2d 715*

Unemp. Ins. Code § 2113, requiring Employment Development Department to give 10 days' notice to individual of overpayment of benefits prior to filing criminal complaint applies only to misdemeanor prosecutions and not to felony prosecutions under *Unemp. Ins. Code § 2114* (relating to report or registration with department, with intent defraud, of fictitious employer or fictitious employee and fictitious wages in order to obtain unemployment insurance benefits). *People v. Belnick (1986) 184 Cal. App. 3d 1449, 1450-1455, 229 Cal. Rptr. 414*

Intent to deceive is not required for imposition of penalty against employer under *Unemp. Ins. Code § 1030.5* (*now see Unemp. Ins. Code § 2101*) for misrepresenting that claimant voluntarily terminated employment. *Diagnostic Data, Inc. v. Unemployment Ins. Appeals Bd. (1973) 34 Cal. App. 3d 556, 558, 110 Cal. Rptr. 157*

[28] Voluntary Disability Insurance Plans

Unemp. Ins. Code § 3264 provides exclusive remedy to disabled worker whose employer or its insurer wholly or partially denies liability on worker's claim for disability benefits under approved voluntary disability insurance plan and bars employee's common law claims against employer for alleged breach of insurance contract, breach of covenant of good faith and fair dealing, fraud, intentional infliction of emotional distress, and sexual discrimination in violation of Title VII of Civil Rights Act of 1964 (*42 U.S.C. §§ 2000e et seq.*). *Safeway Stores, Inc. v. Superior Court (1987) 190 Cal. App. 3d 713, 717-720, 235 Cal. Rptr. 636*

[29] Wages

Amount equal to former employee's back pay paid by former employer in settlement of NLRB claim for unlawful discharge as constituting wages involving work, as those terms are used in *Unemp. Ins. Code § 1277*, for purposes of determining amount of unemployment insurance payable. *Oliver v. Unemployment Ins. Appeals Bd. (1983) 143 Cal. App. 3d 215, 217, 191 Cal. Rptr. 694*

Unemp. Ins. Code § 1265, which excludes payments by employer under plan established for purpose of supplementing unemploy ment compensation benefits from definition of wages, as applicable only when employer's payments supplement benefits payable under unemployment compensation provisions and not when benefits are payable under disability benefits provisions. *Cooper v. Unemployment Ins. Appeals Bd. (1981) 118 Cal. App. 3d 166, 170, 173 Cal. Rptr. 255*

Severance pay paid to employees after company terminated its operations in accordance with plan adopted and implemented by company as not wages but payments within scope of *Unemp. Ins. Code § 1265* (excluding from term "wages" payments under employer plan supplementing unemployment compensation), since payments were made to all employees and payments had not vested in that they were contingent on signing agreement waiving all other possible or actual claims. *Citroen Cars Corp. v. Unemployment Ins. Appeals Bd. (1980) 107 Cal. App. 3d 945, 948-950, 165 Cal. Rptr. 924*

Back pay as wages. *Kerin v. Unemployment Ins. Appeals Bd. (1978) 87 Cal. App. 3d 146, 149-150, 150 Cal. Rptr. 751*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsPreclusion & Effect of JudgmentsEstoppelCollateral EstoppelImmigration LawDuties & Rights of AliensPublic BenefitsLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationEligibilityInvoluntary UnemploymentLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationEligibilitySuitable EmploymentLabor & Employment LawDisability &

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49-564 California Forms of Pleading and Practice--Annotated § 564.243

§ 564.243 Law Reviews

Comment, *Religious Organizations and the Unemployment Insurance Code: Is California Playing Favorites with Churches? 10 Pacific L.J. 225 (1979)*

Comment, *The Concept of 'Availability' in California's Unemployment Insurance Program: Any Reason for Requiring Good Cause? 66 Cal. L. Rev. 1293 (1978)*

Recent Case, *Unemployment Compensation--Discrimination in Compensation Based Upon Sex Is Good Cause to Terminate Employment Voluntarily-- Morrison v. Unemployment Ins. Appeals Bd., 65 Cal. App.3d 245, 134 Cal. Rptr. 916 (1976) , 18 Santa Clara L. Rev. 828 (1978)*

Comment, *The Claimant Complains: Unemployment Insurance in California, 10 U.S.F. L. Rev. 297 (1975)*

Walker, *Sex Discrimination in Government Benefit Programs, 23 Hastings L.J. 277 (1971)*

Riesenfeld, *Workmen's Compensation and Other Social Legislation: The Shadow of Stone Tablets, 53 Cal. L. Rev. 207, 218*-221 (1965)

Note, *Conscientious Objection to Loyalty Oath--Cause for Refusing Unemployment Insurance*, 34 So Cal. L. Rev. 367 (1961)

Note, *Unemployment Insurance: Effect of Collective Bargaining Agreement upon Disqualification for Voluntary Relinquishment of Employment.--Douglas Aircraft Co. v. California Unemployment Ins. Appeals Bd.* (Cal. App. 1960)," *49 Cal. L. Rev. 580 (1961)*

Feldman, *Unemployment Insurance: Its Effect on Trade Disputes in California, 5 UCLA L. Rev. 604 (1958)*

Comment, *Pension Plans and Unemployment Compensation, 4 UCLA L. Rev. 438 (1957)*

Note, *Unemployment Insurance: Effect of Receipt of Dismissal Payments at Time of Discharge from Employment Upon Eligibiliity for State Unemployment Insurance Benefits, 8 Hastings L.J. 233 (1957)*

Netterville, *Judicial Review: The "Independent Judgment" Anomaly, 44 Cal. L. Rev. 262 (1956)*

Feldman, *The Garden of Live Flowers: Terminating the Trade Dispute Disqualification Under the California Unemployment Insurance Act, 27 So. Cal. L. Rev. 3 (1953)*

Comment, *Locked-out Workers Denied Unemployment Benefits, 2 Stan. L. Rev. 427 (1950)*

Note, *Legislative Medicine for the Sick Worker, 2 Stan. L. Rev. 345 (1950)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceDisability BenefitsGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationClaim ProceduresLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationCoverage & DefinitionsLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationEligibilityInvoluntary UnemploymentLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationEligibilityVoluntary Unemployment

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49-564 California Forms of Pleading and Practice--Annotated §§ 564.244-564.259

[Reserved]

§§ 564.244[Reserved]

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 564 UNEMPLOYMENT AND DISABILITY INSURANCE
PART IV. FORMS
A. Appeals Division

49-564 California Forms of Pleading and Practice--Annotated § 564.260

§ 564.260 Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--Against Unemployment Insurance Appeals Board to Determine Validity of Precedent Decision [Unemp. Ins. Code § 409.2]--By Interested Person or Organization

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. § 1060]--Against Unemployment Insurance Appeals Board to Determine Validity of Precedent Decision [Unemp. Ins. Code § 409.2]--By Interested Person or Organization

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
UNEMPLOYMENT INSURANCE APPEALS	)	COMPLAINT FOR DECLARATORY RELIEF
BOARD,	)	
Defendant.	)	
	)	

Plaintiff alleges:

1. Plaintiff is [and at all times herein mentioned was] _____ [*specify capacity, e.g.*, a corporation organized and existing under the laws of the State of California with its principal place of business in _____ County, California].

2. Defendant is the Unemployment Insurance Appeals Board of the State of California.

3. On or about _____, [*date*] defendant issued _____ [*identify precedent decision,*

e.g., Precedent Benefit Decision No. _____], _____ [*specify effect, e.g.,* (a) reversing the ruling of the administrative law judge that denied an applicant unemployment insurance benefits for a _____ week period on the grounds that he/she did not seek work and was not available for work within the meaning of Section 1253(c) and (e) of the Unemployment Insurance Code, and (b) holding the applicant had satisified the "seek work" and "availability" requirements of the code and was qualified for unemployment benefits]. A copy of the decision is attached as Exhibit A and made a part hereof.

4. Plaintiff _____ [is affected by *or* could be subject to] the foregoing decision for the following reasons: _____ [*specify, e.g.,* plaintiff employs _____ (*number*) workers covered by the Unemployment Insurance Code and is required to contribute to the unemployment insurance fund. The precedent decision issued by defendant could result in increasing the amount of plaintiff's contributions which would adversely affect it].

4. Plaintiff contends that the decision is invalid for the following reason(s): _____ [*specify, e.g.,* the decision was issued without express statutory authority and substantially increases the number of eligible claimants for unemployment assistance. This will result in increasing the amount of unemployment assistance paid, thus increasing the employer contributions that will be necessary to support the increased payments].

WHEREFORE, plaintiff prays judgment declaring defendant's _____ [*identify precedent decision, e.g.,* Precedent Benefit Decision No. _____] invalid, for costs of suit herein incurred, and for such other and further relief as the court may deem proper.
Dated: _____.

_____ [*Signature*]

Attorney for Plaintiff

[2] Use of Form

This form of complaint is for use by an interested person or organization to challenge the validity of a precedent decision issued by the California Unemployment Insurance Appeals Board [*see Unemp. Ins. Code § 409.2*; *see also § 564.51*].

[3] Scope and Effect of Court's Determination

In a declaratory-relief action brought under *Unemp. Ins. Code § 409.2* by a nonparty to the board's precedential decision, the court may determine only whether the board decision accords with the law that would govern if the rule announced in the board decision had been articulated as a regulation. There is no review of the underlying record or introduction of new evidence to discover whether the board correctly resolved disputes on adjudicative facts. The board's version of those facts may not be disturbed unless it lacks substantial support on the face of the decision. A judicial declaration of invalidity does not alter or affect the operative impact of the decision as between the original parties; that is, whatever result the court reaches on the merits, the declaratory judgment may not alter the result between the parties who were the subject of the precedent decision [*Pacific Legal Found. v. Unemployment Ins. Appeals Bd. (1981) 29 Cal. 3d 101, 111, 172 Cal. Rptr. 194, 624 P.2d 244* ; *Messenger Courier Assn. of Americas v. California Unemployment Ins. Appeals Bd. (2009) 175 Cal. App. 4th 1074, 1086, 96 Cal. Rptr. 3d 797*].

[4] Allegations

The complaint alleges:

- Plaintiff's capacity (Paragraph 1);

- Defendant's identity (Paragraph 2);

- Defendant's issuance of the subject precedent decision (Paragraph 3) [*see Unemp. Ins. Code §§ 409, 409.1*];

- Plaintiff's standing to challenge the validity of the precedent decision (Paragraph 4) [*see Unemp. Ins. Code § 409.2*]; and

- Plaintiff's contention as to why the precedent decision is invalid (Paragraph 5) [*see* Unemp. Ins. Code *§ 409.2, Code Civ. Proc.* § 1060].

[5] Standing to Sue

To maintain the action, plaintiff must be an interested person or organization [*Unemp. Ins. Code § 409.2*]. That is, plaintiff must be a person or organization who is subject to the precedent decision or affected by it, or who is or could be subject to its effects. A plaintiff who is such a person has standing to sue for declaratory relief [*Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1977) 74 Cal. App. 3d 150, 154, 156, 141 Cal. Rptr. 474* ; *see Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1981) 29 Cal. 3d 101, 109, 172 Cal. Rptr. 194, 624 P.2d 244* (term interested persons includes those who, though not directly involved in a benefit case, may be subject to a precedent decision)].

[6] Actual Controversy Implied

Unemp. Ins. Code § 409.2 authorizes a declaratory relief action "in accordance with the provisions of the Code of Civil Procedure" to challenge the validity of a precedent decision. Normally, a complaint for declaratory relief must allege the existence of an actual controversy relating to the legal rights and duties of the respective parties and their respective contentions [*see Code Civ. Proc. § 1060*; and Ch. 182, *Declaratory Relief*, and Ch. 472B, *Review of Agency Rulemaking*]. However, this rule apparently does not apply to a declaratory relief action to challenge the validity of a precedent decision rendered by the Unemployment Insurance Appeals Board; rather, it appears that the mere possibility that an actual controversy might arise in the future is sufficient if the plaintiff has standing to sue as an interested person or organization [*see Pacific Legal Foundation v. Unemployment Ins. Appeals Bd. (1977) 74 Cal. App. 3d 150, 160, 141 Cal. Rptr. 474* (dissenting opinion)].

[7] State Statutes

Designation by appeals board of certain of its decisions as precedents. *Unemp. Ins. Code § 409*, 3rd paragraph

Modification of precedent decision to conform to court judgment. *Unemp. Ins. Code § 409.1*

Declaratory relief action to obtain judicial declaration of validity of precedent decision. *Unemp. Ins. Code § 409.2*

Time limit on when judicial review of precedent decision may be sought by Employment Development Director or any other party. *Unemp. Ins. Code § 410*, 4th paragraph

[8] Decisions

Trial court properly declared invalid five decisions of Unemployment Insurance Appeals Board concerning precedent

benefit, in each of which appeals board denied unemployment compensation benefits solely on claimant's reduction of his or her labor market (e.g., by moving to another geographical locale), as in conflict with *Glick v. Unemployment Ins. Appeals Bd. (1979) 23 Cal. 3d 493, 499, 153 Cal. Rptr. 1, 591 P.2d 24* , and *Sanchez v. Unemployment Ins. Appeals Bd. (1977) 20 Cal. 3d 55, 67, 141 Cal. Rptr. 146, 569 P.2d 740* (holding that claimants may reduce their labor markets for good cause and remain eligible for benefits, as long as they are available to a substantial field of employment). *Rios v. Employment Development Dept. (1986) 187 Cal. App. 3d 489, 497, 231 Cal. Rptr. 732*

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 564 UNEMPLOYMENT AND DISABILITY INSURANCE
PART IV. FORMS
A. Appeals Division

49-564 California Forms of Pleading and Practice--Annotated §§ 564.261-564.279

[Reserved]

§§ 564.261[Reserved]

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 564 UNEMPLOYMENT AND DISABILITY INSURANCE
PART IV. FORMS
B. Reports, Contributions, and Assessments

49-564 California Forms of Pleading and Practice--Annotated § 564.280

§ 564.280 Complaint to Recover Erroneously or Illegally Collected Employer Contributions [Unemp. Ins. Code § 1241(a)]--By Alleged Employer

[1] FORM Complaint to Recover Erroneously or Illegally Collected Employer Contributions [Unemp. Ins. Code § 1241(a)]--By Alleged Employer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO RECOVER
_____ [*name*], as Director of	)	_____ [ERRONEOUSLY *or* IL-
the California Employment Development Depart-	)	LEGALLY] COLLECTED EMPLOYER CONTRI-
ment,	)	BUTIONS TO UNEMPLOYMENT FUND
Defendant.	)	[LIMITED CIVIL CASE]
		[Amount demanded _____
		(exceeds *or* does not exceed) $10,000]

_____

Plaintiff alleges:

1. The California Employment Development Department (hereinafter, the department) is a department of the State of California. Defendant _____ [*name*] is the Director of Employment Development and is charged by law with the administration of the unemployment compensation program of the State of California, including the computation and assessment of employer contributions payable to the department for deposit in the Unemployment Fund.

2. Plaintiff is, and at all times herein mentioned was, _____ [*allege capacity and occupation, e.g.,*

engaged as a private individual in the manufacture and sale of wood carvings].

[*Allege in following and successively numbered paragraphs, if required, the working relationship existing between plaintiff and his or her alleged employees, e.g.,*]

3. At all times herein mentioned, plaintiff delivered his/her wood carvings to various persons for sale to the general public; in all such transactions, it was orally agreed between plaintiff and each of the persons that wood carvings not sold would be returned to plaintiff, and that for each carving sold the person would pay to plaintiff _____ percent of the sale price, but in no event less than a minimum price established for each carving. Plaintiff neither had nor attempted to exert control of any kind over the persons as to how the carvings were to be sold, where or when they were to be sold, to whom they were to be sold, or in any other way. Plaintiff was in no way obligated to provide the persons, or any of them, with a minimum number of carvings, or any at all, and the persons were in no way required to sell the carvings or to exert any efforts on plaintiff's behalf. The sole power retained by plaintiff was to require return of the unsold carvings, which power was to be exercised by him/her in his/her sole discretion and for any reason].

[*CONTINUE*]

4. On or about _____ [*date*], plaintiff received a written notice that defendant Director had, under the provisions of Section _____ [*e.g.*, 1126] of the Unemployment Insurance Code, assessed plaintiff in the amount of $_____, together with penalty and interest, on _____ [*specify, e.g.*, alleged unreported wages paid by plaintiff for the period from _____ (*date*) to _____ (*date*)].

5. On or about _____ [*date within 30 days, or any extended period, after service of notice of assessment*], plaintiff, pursuant to the provisions of *Section 1222 of the Unemployment Insurance Code*, filed with _____ [*name*], an administrative law judge, a petition for reassessment, a copy of which is attached hereto as Exhibit A and made a part hereof. On or about _____ [*date*], [after a hearing thereon,] the administrative law judge rendered his/her decision _____ [upholding the assessment as made by defendant Director *or* _____ (increasing *or* decreasing) the amount of the assessment to $_____]. [A copy of the decision is attached hereto as Exhibit B and made a part hereof.]

6. On or about _____ [*date within 30 days, or any extended period, after service of notice of administrative law judge's decision*], plaintiff filed an appeal from the administrative law judge's decision with the Unemployment Insurance Appeals Board, which rendered its decision on _____ [*date*], _____ [*either* affirming the decision of the ad ministrative law judge *or* _____ (increasing *or* decreasing) the amount of the assessment to $_____]. [A copy of the decision is attached hereto as Exhibit C and made a part hereof.]

7. On or about _____ [*date*], plaintiff [, under protest,] paid the department the sum so assessed in the amount of $_____.

8. Thereafter, on _____ [*date*], plaintiff filed with defendant Director a written claim for refund of the amount paid as hereinabove set forth. A copy of the claim is attached hereto as Exhibit D and made a part hereof.

[*EITHER*]

9. On or about _____ [*date*], defendant Director notified plaintiff that his/her claim for refund had

been denied.

[*OR*]

9. The Director failed to serve on plaintiff notice of his/her action on the claim for refund, more than 60 days elapsed after plaintiff's claim for refund was filed, and plaintiff, therefore, elected to consider the claim denied.

10. On or about _____ [*date within 30 days after director served notice of denial, or after claim for refund was considered denied because of director's failure to have served notice of denial*], plaintiff filed a petition for review of the Director's decision with _____ [*name*], an administrative law judge.

[*EITHER*]

11. On or about _____ [*date*], the administrative law judge rendered his/her decision upholding defendant Director's denial of the claim for refund. A copy of the decision is attached hereto as Exhibit E and made a part hereof.

[*OR*]

11. The administrative law judge failed to serve on plaintiff notice of his/her decision on the claim for refund. More than 60 days elapsed after the petition for review was filed, and plaintiff, therefore, elected to consider the petition denied.

12. Thereafter, on or about _____ [*date within 30 days, or any extended period, after service of notice of administrative law judge's decision or after petition was considered denied because of failure of administrative law judge to have served notice of his/her decision*], plaintiff filed an appeal with the Unemployment Insurance Appeals Board. By order dated _____, the appeals board affirmed the denial of the refund. A copy of the order is attached hereto as Exhibit F. and made a part hereof.

13. The assessment was illegally collected for the reasons set forth in plaintiff's petition for reassessment (Exhibit A) and in his/her claim for refund (Exhibit D) filed with defendant Director, as hereinabove alleged.

14. As shown by the foregoing allegations, plaintiff has exhausted the administrative remedies prescribed by law.

WHEREFORE, plaintiff prays judgment as follows:

1. That plaintiff recover from defendant the sum of $_____, which is the sum that was assessed against and paid by plaintiff as employer's contribution, penalty, and interest.

2. Interest on the sum at the rate of 12 percent per annum from _____ [*date*], the date plaintiff paid the assessment.

3. For costs of suit herein incurred; and

4. For such other or further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[2] Use of Form

This form of complaint is for use by a person or entity to recover erroneously or illegally assessed employer contributions after its claim for refund or credit was denied or deemed denied [*see Unemp. Ins. Code § 1241(a)*; *see also Patane v. Kiddoo (1985) 167 Cal. App. 3d 1207, 1209-1214, 214 Cal. Rptr. 9]* .

[3] Allegations

The complaint alleges:

- The status of the Employment Development Department as a state department and the defendant as the Director of Employment Development (Paragraph 1) [*see Unemp. Ins. Code § 1241(a)*; *Patane v. Kiddoo (1985) 167 Cal. App. 3d 1207, 1209 n.1, 214 Cal. Rptr. 9]* .

- Plaintiff's capacity (Paragraph 2).

- Facts negating the propriety or legality of the assessment (Paragraph 3).

- The receipt of notice of the assessment (Paragraph 4).

- Plaintiff's filing of a petition for reassessment with an administrative law judge who upheld the director's assessment with or without increasing or decreasing the amount (Paragraph 5) [*see Unemp. Ins. Code § 1223*].

- Plaintiff's filing of an appeal with the Unemployment Insurance Appeals Board, which upheld the administrative law judge's decision, with or without decreasing the amount of the assessment (Paragraph 6) [*see Unemp. Ins. Code § 1224*].

- Plaintiff's payment of the assessment (Paragraph 7).

- Plaintiff's filing of a claim for refund (Paragraph 8) [*see Unemp. Ins. Code §§ 1222, 1241(a)*].

- Defendant director's express or implied denial of the claim for refund (alternative Paragraphs 9) [*see Unemp. Ins. Code §§ 1180, 1222*].

- Plaintiff's filing of a petition for review with an administrative law judge (Paragraph 10) [*see Unemp. Ins. Code §§ 1222, 1223*].

- The administrative law judge's express or implied denial of the claim for refund (alternative Paragraphs 11) [*see Unemp. Ins. Code § 1224(a)*].

- Plaintiff's appeal to the Unemployment Insurance Appeals Board which affirmed the denial (Paragraph 12) [*see Unemp. Ins. Code § 1224*].

- The reason collection of the assessment was illegal (Paragraph 13).

- That, as shown by the complaint, plaintiff has exhausted the administrative remedies prescribed by law (Paragraph 14) [*see Patane v. Kiddoo (1985) 167 Cal. App. 3d 1207, 1214, 214 Cal. Rptr. 9]* .

Payment of the amount of assessment is a precondition to further administrative or judicial review [*Masi v. Nagle (1992) 5 Cal. App. 4th 608, 615, 7 Cal. Rptr. 2d 423]* . Even cases of severe financial hardship do not permit judicial intervention [*see Masi v. Nagle (1992) 5 Cal. App. 4th 608, 615, 7 Cal. Rptr. 2d 423* (citing *Modern Barber Co. v. Cal. Emp. Stab. Com. (1948) 31 Cal. 2d 720, 730, 192 P.2d 916*)].

[4] When Refund Is Not Permitted

Employer contributions paid pursuant to *Unemp. Ins. Code § 976.5* (relating to voluntary contribution for purpose of redetermining contribution rate) may not be refunded except under certain circumstances defined by statute [*Unemp. Ins. Code § 1178(e)*].

[5] Necessity of Filing Claim for Refund or Credit

No suit or proceeding shall be maintained in any court for the recovery of any amount of contributions, interest, or penalties alleged to have been erroneously or illegally assessed or collected until a claim for refund or credit has been filed [*Unemp. Ins. Code § 1241(a)*].

[6] Effect on Claim for Refund of Payment Pending Administrative Appeal of Assessment

The petition for reassessment and review of a denial of the claim for refund or credit, set forth separately in the foregoing form (*see* Paragraphs 5 and 8), may be consolidated when payment of the contributions assessed is made during the administrative appeal. That is, if the employing unit pays the amount of contributions, penalties, and interest assessed before the administrative law judge issues his or her decision on the petition for reassessment, the payment constitutes the filing of a claim for refund, the claim for refund is deemed denied by the director, and the petition for reassessment automatically becomes a petition to review a denial of the claim for refund [*Unemp. Ins. Code § 1179.5(a)*]. Also, if payment is not made before that time but is made before the appeals board issues its decision on an appeal from the administrative law judge's decision on a petition for reassessment, the payment constitutes the filing of a claim for refund, the claim is deemed denied by the director, the denial is deemed affirmed by the administrative law judge, and the appeal automatically becomes an appeal from an administrative law judge's decision upholding the director's denial of the claim for refund [*Unemp. Ins. Code § 1179.5(b)*].

[7] Venue of Action

The action is required to be filed in a court of competent jurisdiction in the County of Sacramento [*Unemp. Ins. Code § 1241(a)*]. However, it may be filed in any city or city and county in which the Attorney General has an office [*Code Civ. Proc. § 401*].

[8] Subject Matter Jurisdiction

An action involving the legality of a tax must be brought in superior court and cannot be classified as a limited civil case [*see Code Civ. Proc. § 85, 86(a)(1)*]. If the legality of a tax is not involved in an action to recover taxes, the case is treated as an ordinary action to recover money due and unpaid and should be filed as a limited civil case or otherwise based on the amount in dispute [*see Cal. Emp. etc. Com. v. Citizens etc. Bk. (1946) 73 Cal. App. 2d 915, 916, 167 P.2d 752]* .

The legality of a tax is involved whenever the taxpayer contends that the tax was illegally assessed or levied [*see Cal. Emp. etc. Com. v. Citizens etc. Bk. (1946) 73 Cal. App. 2d 915, 916, 167 P.2d 752]* . "Contributions," as used in the Unemployment Insurance Code, is a euphemistic expression meaning tax exactions [*Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 47, 168 P.2d 686 , overruled on another point, People v. Sims (1982) 32 Cal. 3d 468, 479-480 n.8, 186 Cal. Rptr. 77, 651 P.2d 321]* . Hence, the foregoing rule applies to employer's contributions under the Unemployment Insurance Code [*see Cal. Emp. etc. Com. v. Citizens etc. Bk. (1946) 73 Cal. App. 2d 915, 916, 167 P.2d 752]* . Thus, when the person against whom contributions have been assessed denies that he or she is an employer, the legality of a tax is involved and jurisdiction of the case is in the superior court as an unlimited civil case [*see Cal. Emp. etc. Com. v. Municipal Ct. (1944) 62 Cal. App. 2d 781, 784-786, 145 P.2d 361* (municipal court lacked jurisdiction of action to collect employer contributions where defendants denied they were employers)].

[9] State Statutes

Prerequisites and time for filing civil action to recover erroneously or illegally assessed or collected contributions. *Unemp. Ins. Code § 1241(a)*

Venue of action. *Code Civ. Proc. § 401*; *Unemp. Ins. Code § 1241(a)*

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[Reserved]

§§ 564.281[Reserved]

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Chapter 564 UNEMPLOYMENT AND DISABILITY INSURANCE
PART IV. FORMS
C. Eligibility And Claims For Benefits

49-564 California Forms of Pleading and Practice--Annotated § 564.300

§ 564.300 Petition for Writ of Mandate [Code Civ. Proc. § 1094.5]--To Review Decision of Unemployment Insurance Appeals Board Allowing Unemployment Compensation Benefits [Unemp. Ins. Code § 410, 1st and 4th paragraphs]--Employee Left Work Without Good Cause or Was Discharged for Misconduct in Connection With Work [Unemp. Ins. Code § 1256]--By Employer

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. § 1094.5]--To Review Decision of Unemployment Insurance Appeals Board Allowing Unemployment Compensation Benefits [Unemp. Ins. Code § 410, 1st and 4th paragraphs]--Employee Left Work Without Good Cause or Was Discharged for Misconduct in Connection With Work [Unemp. Ins. Code § 1256]--By Employer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
UNEMPLOYMENT INSURANCE APPEALS	)	PETITION FOR WRIT OF MANDATE
BOARD, EMPLOYMENT DEVELOPMENT DE-	)	[*Code Civ. Proc. § 1094.5*]
PARTMENT, and _____ [*name*], as	)	
the Director of Employment Development	)	
Respondents;	)	
_____ [*name of claimant*],	)	
Real Party in Interest.		

_____

Petitioner alleges:

1. Petitioner is, and at all times herein mentioned was, _____ [*specify capacity, e.g.,* an individual engaged as a sole proprietor in the business of owning and operating _____ (*e.g.,* an automotive parts

supply retail store) in _____ County, California], in the course of which he/she employs _____ persons.

2. Respondent Unemployment Insurance Appeals Board (hereinafter, the appeals board) and its employees constitute the Appeals Division of the Employment Development Department.

3. Respondent Employment Development Department (hereinafter, the department) is a department in the Health and Welfare Agency of the State of California.

4. Respondent _____ [*name*] (hereinafter, the director) is the Director of Employment Development and is charged by law with the administration of the unemployment compensation program of the State of California.

5. Real party in interest _____ [*name*] (hereinafter the claimant) was employed by petitioner from _____ [*date*] to _____ [*date*], as _____ [*title of job, e.g.,* a shipping clerk]. The last-mentioned date was the last day on which the claimant worked for petitioner. On or about _____ [*date*], petitioner received written notice from the department that a claim for unemployment compensation benefits had been filed by the claimant. Pursuant to the provisions of *Section 1327 of the Unemployment Insurance Code*, petitioner submitted to the Department a written statement setting forth facts showing that the claimant _____ [(is deemed to have) voluntarily left his/her employment without good cause *or* was discharged for misconduct in connection with his/her work]. A copy of the statement is attached hereto as Exhibit A and made a part hereof.

[*ALLEGE each step of administrative proceeding, including any reconsiderations, e.g.*]

6. Thereafter, on _____ [*date*], the department issued a determination and ruling that the claimant _____ [voluntarily left his/her work with good cause *or* was not discharged for misconduct in connection with his/her work], and was eligible for unemployment compensation benefits, and notified petitioner accordingly. A copy of the notice is attached hereto as Exhibit B and made a part hereof.

7. [As authorized by *Section 1328 of the Unemployment Insurance Code*,] [P]etitioner thereafter duly filed an appeal with an administrative law judge who, by written decision dated _____, affirmed the determination and ruling of the department, and notified petitioner accordingly. A copy of the decision with its reasons is attached hereto as Exhibit C and made a part hereof.

8. In affirming the determination and ruling of the director, the administrative law judge _____ [*specify, e.g.,* abused his/her discretion and acted in excess of his/her jurisdiction in concluding that the claimant _____ (voluntarily left his/her work with good cause *or* was not discharged for misconduct in connection with his/her work) in that the conclusion is contrary to the (weight of the) evidence and is against the law].

9. [As authorized by *Section 1336 of the Unemployment Insurance Code*,] [P]etitioner duly filed an appeal with the appeals board, which, on _____ [*date*], affirmed the decision of the administrative law judge, and notified petitioner accordingly. A copy of the decision is attached hereto as Exhibit D and made a part hereof.

10. The appeals board _____ [*specify, e.g.,* abused its discretion and acted in excess of its jurisdiction in the same manner as did the administrative law judge] in that _____ [*specify, e.g.,* the evidence and the law indisputably establish that the claimant _____ ([is deemed to have] voluntarily left his/her employment with petitioner without good cause *or* was discharged for misconduct in connection with his/her work) in that the claimant, as shown by the evidence before the administrative law judge and the appeals board, _____ (*summarize, e.g.,* on the evening of the last day he/she reported for work and worked for

petitioner was arrested for the commission of a criminal offense, to wit, _____ (*specify*), and was subsequently convicted and sentenced to jail for a term of _____ (days *or* months). Subsequent to his/her release from jail, the claimant sought to return to his/her former position, but petitioner was unable to reemploy him/her because the position had been filled)].

[*CONTINUE*]

11. Pursuant to the decision of the appeals board, the department has charged, and will charge, petitioner's reserve account with the amount of benefits paid, and to be paid, to the claimant.

12. Petitioner has exhausted his/her administrative remedies in that, under the provisions of *Section 410 of the Unemployment Insurance Code*, the decision of the appeals board is final, except for such action as may be taken by a judicial tribunal as permitted or required by law.

13. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law to compel the appeals board to reverse its decision or to compel the department and director to credit petitioner's reserve account with the amount charged against it on account of the compensation benefits paid to the claimant, and no remedy at all unless this petition is granted.

WHEREFORE, petitioner prays as follows:

1. That this court issue an alternative writ of mandate ordering respondent Unemployment Insurance Appeals Board

a. to set aside its decision _____ [*specify, e.g.*, affirming the decision of the administrative law judge affirming the determination of the Director of Employment Development] that the claimant _____ [voluntarily left his/her work with good cause *or* was not discharged for misconduct in connection with his/her work], and was eligible for unemployment compensation benefits, and to deny such benefits, or

b. in the alternative, to show cause before this court at a time and place to be fixed by the court why it has not done so and directing it to file with this court the record of all proceedings in this matter before the respondent and the administrative law judge;

2. That, after hearing on the order to show cause, this court issue a peremptory writ of mandate to the same effect as the alternative writ except for the order to show cause;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

CAUTION:

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Proof of service on each respondent and real party in interest of a copy of a petition that seeks an alternative writ must accompany the petition when it is offered for filing except when, in its discretion and for good cause, the court has granted the application for the writ ex parte [*Code Civ. Proc. § 1107*; for a discussion of serving the petition, *see* Ch. 358, *Mandate and Prohibition*]. Points and authorities also customarily accompany a petition filed in a superior court, although they do not appear to be expressly required by statute. When no alternative writ is sought, proof of service of a copy of the petition need not accompany the application, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

[2] Use of Form

This form of petition for writ of mandate is for use by an employer to seek judicial review of the decision of the Unemployment Insurance Appeals Board affirming the decision of an administrative law judge that a claimant was eligible for unemployment compensation [*see Unemp. Ins. Code §§ 1328, 1334, 1336*]. The illustrative grounds set forth for issuance of the writ are (1) prejudicial abuse of discretion in that the decision is not supported by the evidence, and (2) excess of jurisdiction in that the decision is against the law [*see Code Civ. Proc. § 1094.5(b), (d)*]. The bracketed references in Paragraphs 7 and 9 cite the statutory authority for the particular proceeding referred to. These references may be included, but their inclusion is not required since under *Evid. Code § 451(a)* the court is mandatorily required to take judicial notice of the public statutory law of California.

With appropriate modifications, the form may be used by an employer (1) when the writ is sought on the grounds that the respondent proceeded without jurisdiction or that petitioner was denied a fair hearing [*see Code Civ. Proc. § 1094.5(b)*]; and (2) to seek judicial review of a decision of the appeals board (a) reversing the decision of the administrative law judge denying unemployment compensation benefits, or (b) affirming or reversing the decision of an administrative law judge reviewing the director's (i) computation or recomputation of the benefit amount after protest by the employer, or (ii) reconsidered determination [*see Unemp. Ins. Code §§ 1329-1336*].

[3] Administrative Record

All or part of the administrative record of the proceedings may be filed with the petition or with respondent's points and authorities or pursuant to court order. Except when otherwise prescribed by statute, the cost of preparing the record is borne by the petitioner [Code Civ. Prov. § 1094.5(a)]. If the petitioner's court fees have been waived because he or she is proceeding in forma pauperis [*see Gov. Code § 68630 et seq.*], and the transcript is necessary to a proper review of the administrative proceedings, the cost of preparing the transcript is borne by the respondent [Code Civ. Prov. §

1094.5(a)]. For discussion of waiving court fees because of a person's financial condition, see *Ch. 174, Costs and Attorney's Fees, § 174.110* et seq.

If the petitioner has proceeded pursuant to *Code Civ. Proc. § 1088.5* (no alternative writ is sought), the administrative record must be filed as expeditiously as possible, and may be filed with the petition, or by the respondent after payment of the costs by the petitioner, when required, or as otherwise directed by the court [*Code Civ. Proc. § 1094.5(a)*].

[4] Parties

The decision to be reviewed by the court is that of the Unemployment Insurance Appeals Board, which would normally be the only respondent. However, this form seeks to have the Director of Employment Development credit the employer's reserve account with the amounts charged against it for benefits (*see Unemp. Ins. Code § 1338*). Consequently, both the director and the Employment Development Department are named as respondents, although the court, if it grants the writ, need not order that the reserve account be credited with the amounts erroneously charged, since this will follow as a matter of law [*see Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 602-603, 155 Cal. Rptr. 63]* .

[5] Allegations

This petition alleges:

- The capacity of petitioner as an employing unit (Paragraph 1) [*see Unemp. Ins. Code § 135(a)*];
- The names and capacities of the respondents (Paragraphs 2-4).
- The identity of the real party in interest, that is, the claimant for unemployment insurance benefits (Paragraph 5).
- The administrative determinations that the claimant was entitled to unemployment compensation benefits (Paragraphs 6, 7, 9).
- The grounds justifying issuance of a writ of mandate (Paragraphs 8, 10, 13) [*see Code Civ. Proc. §§ 1086, 1094.5(b)*].
- The fact showing that petitioner is a party beneficially interested, that is, the charging of the benefits paid against petitioner's reserve account (Paragraph 11) [*see Code Civ. Proc. § 1086*; *Cal. Portland Cement Co. v. Cal. Unemp. Ins. Appeals Board (1960) 178 Cal. App. 2d 263, 269, 3 Cal. Rptr. 37]* .
- The exhaustion of administrative remedies (Paragraphs 5, 6, 7, 9, 12) [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 291-296, 109 P.2d 942]* .
- Absence of plain, speedy, and adequate remedy in ordinary course of law (Paragraph 13) [*see Code Civ. Proc. § 1086*].

[6] Cross References

For discussion, procedural checklist, and forms for petitions for traditional writ of mandate generally and related forms, see Ch. 358, *Mandate and Prohibition*

For discussion and forms for petition for administrative mandate, alternative writ of mandate, and related forms, see

Ch. 474, *Availability of Judicial Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions*

[7] State Statutes

Finality of appeals board's decision and judicial review. *Unemp. Ins. Code § 410*

Person terminated for absence from work because of incarceration and conviction of offense for period in excess of 24 hours as deemed to have left work without good cause. *Unemp. Ins. Code § 1256.1*

Director as interested party to any appeal to administrative law judge. *Unemp. Ins. Code §§ 1328, 1331*

On reversal or setting aside of decision, employer's account as not to be charged with benefits except as provided in *Unemp. Ins. Code §§ 1026. Unemp. Ins. Code §§ 1335(b), (c), 1338*

[8] Decisions

Termination of employment when employee was sentenced for crime was grounds for denial of benefits. *Sherman Bertram, Inc. v. California Dep't of Employment (1962) 202 Cal. App. 2d 733, 736-739, 21 Cal. Rptr. 130*

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C. Eligibility And Claims For Benefits

49-564 California Forms of Pleading and Practice--Annotated § 564.301

§ 564.301 Petition for Writ of Mandate [Code Civ. Proc. § 1094.5]--To Review Decision of Unemployment Insurance Appeals Board Denying Unemployment Insurance Benefits [Unemp. Ins. Code § 410, 1st and 4th paragraphs]--By Unemployed Worker

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. § 1094.5]--To Review Decision of Unemployment Insurance Appeals Board Denying Unemployment Insurance Benefits [Unemp. Ins. Code § 410, 1st and 4th paragraphs]--By Unemployed Worker

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	
UNEMPLOYMENT INSURANCE APPEALS	)	NO. _____
BOARD,	)	PETITION FOR WRIT OF MANDATE
Respondent.	)	
_____ [*name of*	)	
employer],	)	
Real Party in Interest.	)	
	)	

_____

Petitioner alleges:

1. [*Respondent's name and capacity. See § 564.300, Paragraph 2*].

2. Real Party in Interest, _____ [*name*] (hereinafter the employer) is, and at all times herein mentioned was, _____ [*specify capacity and place of business, e.g.,* a corporation organized and

existing under the laws of California, with its principal place of business located in _____ County, California].

3. From _____ [*date*] to _____ [*date*], petitioner was employed by the employer at its place of business at _____ [*street address and city*], California as a _____ [full *or* part] time _____ [*title of position*] and was paid wages while so employed sufficient to qualify him/her for unemployment compensation benefits.

4. On _____ [*latter date specified above*], petitioner _____ [terminated his/her services *or* was notified by the employer that his/her services were terminated] _____ [*specify reason(s) for termination, e.g.,* to accompany his/her nonmarital partner to _____ (*city and state*) to which he/she had been permanently transferred by her/his employer, in order to maintain the family relationship the partners had established with their children].

5. Thereafter, petitioner duly filed a claim for unemployment compensation benefits at _____ [*specify, e.g.,* a public employment office of the California Employment Development Department] located at _____ [*address*], where he/she registered for employment.

[*ALLEGE each step of administrative proceeding, including any reconsiderations, e.g.*]

6. The claim was denied by an examiner of the California Employment Development Department on _____ [*date*], on the ground petitioner was disqualified from receiving unemployment benefits for the reason(s) that _____ [*specify*], and, on _____ [*date*], petitioner received a written notice of this determination. A copy of the determination is attached hereto as Exhibit A and made a part hereof.

7. [Pursuant to the provisions of *Section 1328 of the Unemployment Insurance Code*], [P]etitioner duly filed an appeal with an administrative law judge who, by a written decision dated _____, affirmed the examiner's determination. A copy of the decision is attached hereto as Exhibit B and made a part hereof.

8. In affirming the examiner's determination and ruling, the administrative law judge _____ [*specify, e.g.,* abused his/her discretion and acted in excess of his/her jurisdiction in concluding that the claimant _____ (voluntarily left his/her work without good cause *or* was discharged for misconduct in connection with his/her work). The conclusion is contrary to the (weight of the) evidence that the claimant _____ (left his/her employment to accompany his/her nonmarital partner to _____ (*city and state*), to which the nonmarital partner had been transferred by her/his employer, and which is a place from which it is impracticable to commute to the employer's place of employment, in order to maintain the familial relationship he/she and his/her nonmarital partner have established with their children, and is against the law].

9. [As authorized by *Section 1336 of the Unemployment Insurance Code*], [P]etitioner thereafter duly filed an appeal with the appeals board, which on _____ [*date*] affirmed the administrative law judge's decision and notified petitioner accordingly. A copy of the decision is attached hereto as Exhibit C and made a part hereof.

10. In affirming the decision of the administrative law judge, the appeals board _____ [*specify, e.g.,* abused its discretion and acted in excess of its jurisdiction in the same manner as did the administrative law judge, as alleged in paragraph 8].

[*CONTINUE*]

11. [*Exhaustion of administrative remedies. See § 564.300, Paragraph 12*].

12. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law to compel the appeals board to reverse its decision and to grant petitioner's claim for unemployment compensation benefits, and no remedy at all unless this petition is granted.

WHEREFORE, petitioner prays as follows:

1. That this court issue an alternative writ of mandate ordering respondent Unemployment Insurance Appeals Board

(a) To set aside its decision _____ [*specify, e.g.,* affirming the decision of the administrative law judge affirming the determination of the Director of Employment Development] that the claimant _____ [voluntarily left his/her work without good cause *or* was discharged for misconduct in connection with his/her work], and is ineligible for unemployment compensation benefits, and to grant such benefits, or

(b) In the alternative, to show cause before this court at a time and place to be fixed by the court why it has not done so and directing it to file with this court the record of all proceedings in this matter before the respondent and the administrative law judge;

2. That, after hearing on the order to show cause, this court issue a peremptory writ of mandate to the same effect as the alternative writ except for the order to show cause;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.
Dated: _____

_____ [*Signature*]

Attorney for Petitioner

[*Verification. See § 564.300.*]

CAUTION:

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Proof of service on each respondent and real party in interest of a copy of a petition that seeks an alternative writ must accompany the petition when it is offered for filing except when, in its discretion and for good cause, the court has granted the application for the writ ex parte [*Code Civ. Proc. § 1107*; for a discussion of serving the petition, *see* Ch. 358, *Mandate and Prohibition*]. Points and authorities also customarily accompany a petition filed in a superior court, although they do not appear to be expressly required by statute. When no alternative writ is sought, proof of service of a copy of the petition need not accompany the application, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

[2] Use of Form

This form of petition for writ of mandate is for use by an unemployed worker to seek judicial review of the decision of the Unemployment Insurance Appeals Board affirming the decision of an administrative law judge that a claimant is ineligible for unemployment compensation [*see* Unemp. *Ins. Code §§ 1328,* 1334, 1336]. The illustrative grounds for

the writ set forth in the form are (1) prejudicial abuse of discretion in that the decision is not supported by the evidence, and (2) excess of jurisdiction in that the decision is against the law [*see Code Civ. Proc. § 1094.5(b), (d)*]. The optional phrases at the beginning of Paragraphs 7 and 9 cite the statutory authority for the particular proceeding referred to. These references may be included, but their inclusion is not required since under *Evid. Code § 451(a)* the court must take judicial notice of the public statutory law of California.

With appropriate modifications, the form may be used by a claimant for unemployment compensation benefits (1) when the writ is sought on the ground that the respondent proceeded without jurisdiction or on the ground that petitioner was denied a fair hearing [*see Code Civ. Proc. § 1094.5(b)*]; and (2) to seek judicial review of a decision of the appeals board (a) reversing the decision of the administrative law judge granting unemployment compensation benefits, or (b) affirming or reversing the decision of an administrative law judge reviewing the director's (i) computation or recomputation of the benefit amount after protest by the claimant, or (ii) reconsidered determination [*see Unemp. Ins. Code §§ 1329-1336*].

With appropriate modifications, the form may also be used by a claimant to seek review of the decision of the Unemployment Insurance Appeals Board denying, or affirming a decision denying, a claim for disability benefits.

[3] Allegations

The form of petition alleges:

(1) Respondent's name and capacity (Paragraph 1);

(2) The name and capacity of the real party in interest as an employing unit (Paragraph 2) [*see Unemp. Ins. Code § 135(a)*];

(3) The facts establishing petitioner's eligibility for unemployment compensation benefits (Paragraphs 3, 4);

(4) Petitioner's filing of a claim for benefits (Paragraph 5); the administrative determinations that the claimant was ineligible for unemployment compensation benefits (Paragraphs 6, 7, 9);

(5) The grounds justifying issuance of a writ of mandate (Paragraphs 8, 10) [*see Code Civ. Proc. §§ 1086, 1094.5(b)*];

(6) The exhaustion of administrative remedies (Paragraphs 6, 7, 9, 11) [*see Abelleira v. District Court of Appeal (1941) 17 Cal. 2d 280, 291-296, 109 P.2d 942]* ; and

(7) The absence of plain, speedy, and adequate remedy in ordinary course of law (Paragraph 12) [*see Code Civ. Proc. § 1086*].

[4] Decisions

Worker who leaves employment to accompany nonmarital partner to another state in order to maintain familial relationship established with their child as leaving work voluntarily for good cause. *MacGregor v. Unemployment Ins. Appeals Bd. (1984) 37 Cal. 3d 205, 207, 212, 207 Cal. Rptr. 823, 689 P.2d 453*

[3] Cross References

For a related form, *see § 564.300*.

California Forms of Pleading and Practice--Annotated

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 565 UNFAIR COMPETITION

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California Forms of Pleading and Practice--Annotated

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 565 UNFAIR COMPETITION
PART I. SCOPE

49-565 California Forms of Pleading and Practice--Annotated § 565.01

§ 565.01 Scope of Chapter

This chapter discusses actions based on statutory unfair competition (*Bus. & Prof. Code § 17200 et seq.*; *see § 565.30* et seq.) and actions under the Unfair Practices Act (*Bus. & Prof. Code § 17000 et seq.* [*see § 565.50* et seq.]. It includes a form of complaint for use by a plaintiff to obtain injunctive relief and damages against a defendant for violation of the Unfair Practices Act [*see § 565.230*].

For discussion and forms concerning related actions (other than those discussed in*§ 565.70* et seq.,§ 565.100 et seq., and§ 565.130 et seq.) that are based on false advertising [*see Bus. & Prof. Code § 17500 et seq.*], common law trade libel, and trademark infringement [*see 15 U.S.C.S. § 1051 et seq.*; *Bus. & Prof. Code § 14200 et seq.*], or common law confusion of source, see Ch. 14, *Advertising* , Ch. 340, *Libel and Slander* , and Ch. 549, *Trademarks and Trade Names* .

Causes of action based on federal law, particularly the Robinson-Patman Act [*15 U.S.C.S. § 13 et seq.*] and the Federal Trade Commission Act [*15 U.S.C.S. § 41 et seq.*], are frequently combined with causes of action discussed in this part. For full discussion of related federal legislative schemes governing unfair business practices, see Von Kalinowski, Antitrust Laws and Trade Regulation(Matthew Bender).

This chapter also discusses contracts not to compete and other restraints of trade, business, and practice of one's profession prohibited under California law [*see § 565.70* et seq.]. It contains a form of complaint by a consumer plaintiff against various defendants for restraint of trade [*see § 565.250*].

Contracts between former partners or between a former partner and a partnership not to compete are discussed in *Ch. 403, Partnerships: Actions by and Against Dissociated Partners, § 403.14*. For in-depth coverage of antitrust law, see Von Kalinowski, Antitrust Laws and Trade Regulation(Matthew Bender).

This chapter also discusses trade secrets generally, including both the common law and the Uniform Trade Secret Act (UTSA), (*Civ. Code § 3426 et seq.*[*see § 565.100* et seq.]). It includes a form of complaint for damages for and injunctive relief against misappropriation of a trade secret [*see § 565.270*]. Also included are forms of allegations for use by a plaintiff when the misappropriation is by a former employee [*see § 565.271*] and when the trade secret is in the

form of a customer list [*see § 565.272*]. This part also includes forms of affirmative defense based on product disclosure of the trade secret [*see § 565.273*] and the statute of limitations [*see § 565.274*].

This chapter also discusses tort actions for intentional and negligent interference with economic relations [*see § 565.130* et seq.]. It includes forms of complaint alleging intentional [*see § 565.290*] or negligent [*see § 565.291*] interference with a contract or other economic relationship. Also included are forms of affirmative defenses to an action for interference [*see §§ 565.292, 565.293*] and a form of judgment granting monetary and injunctive relief in such an action [*see § 565.294*].

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§ 565.02 Cross References

For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions* .

For discussion relating to civil actions for false or misleading advertising under *Bus. & Prof. Code § 17500 et seq.*, see Ch. 14, *Advertising* .

For general discussion and forms relating to tort damages, see Ch. 177, *Damages* .

For discussion and forms relating to jurisdictional allegations in complaints filed in federal court, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

For general discussion and forms relating to injunctive relief, see Ch. 303, *Injunctions* .

For general discussion and forms relating to trade libel, see Ch. 340, *Libel and Slander* .

For general discussion and forms relating to state and federal copyright protection, see Ch. 349, *Literary Property and Copyright* .

For discussion and a form relating to actions by independent retail equipment dealers for violations of *Bus. & Prof. Code § 22900 et seq.*, see Ch. 515, *Securities and Franchise Regulation* .

For discussion and forms relating to trademark and trade name infringement, see Ch. 549, *Trademarks and Trade Names* .

For discussion and forms relating to deceit and constructive fraud, see Ch. 269, *Fraud and Deceit* .

For discussion and forms relating to procedures for seeking injunctive relief, see Ch. 303, *Injunctions* .

For discussion and forms relating to actions involving the rights and duties of the employment relationship, see Ch. 249, *Employment Law: Termination and Discipline* .

For discussion and forms relating to actions involving an agency relationship, see Ch. 427, *Principal and Agent* .

For discussion relating to civil conspiracy generally and forms of complaint alleging conspiracy to interfere with business or contractual relationships, see Ch. 126, *Conspiracy* .

For general discussion and forms relating to breach of contract, see Ch. 140, *Contracts* .

For discussion and forms relating to immunity of public entities for interference with economic relations, see Ch. 269, *Fraud and Deceit* , and Ch. 464, *Public Entities and Officers: California Tort Claims Act* .

For further discussion and a form of complaint for use in an action for intentional interference with a physician's practice, see Ch. 416, *Physicians: Membership on Hospital Staffs or in Professional Organizations* .

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[Reserved]

§§ 565.04[Reserved]

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§ 565.10 Governing Law

Actions for unfair competition are generally governed by *Bus. & Prof. Code § 17200 et seq.* Particular unfair business practices are also actionable under the Unfair Practices Act (*Bus. & Prof. Code § 17000 et seq.*), which prohibits locality discrimination, sales and services below cost, secret rebates, and other specified practices.

Civ. Code § 3345 trebles a discretionary civil penalty in any other statute in an action brought by, on behalf of, or for the benefit of, senior citizens or disabled persons to redress unfair or deceptive acts or practices or unfair methods of competition.

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§§ 565.11[Reserved]

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§ 565.30 Unfair Competition

[1] Statutory Definition

California's unfair competition law, *Bus. & Prof. Code § 17200 et seq.* (sometimes called, although not officially, the Unfair Competition Act), defines unfair competition to mean and include three types of business-related activities [*Bus. & Prof. Code § 17200*]:

- Any unlawful, unfair, or fraudulent business act or practice [*see § 565.31*];
- Unfair, deceptive, untrue, or misleading advertising; and
- Any act prohibited by *Bus. & Prof. Code § 17500 et seq.*, a chapter that governs a broad range of advertising.

For discussion of unfair, deceptive, untrue, or misleading advertising as well as activities governed by *Bus. & Prof. Code § 17500 et seq.*, and related forms, *see* Ch. 14, *Advertising* .

[2] Common Law Concept

Common law unfair competition is limited to fact situations involving confusion of source. Former *Civ. Code § 3369*, which was supplanted by *Bus. & Prof. Code § 17200 et seq.*, encompassed only common law unfair competition [*see Barquis v. Merchants Collection Assn. (1972) 7 Cal. 3d 94, 111, 101 Cal. Rptr. 745, 496 P.2d 817* ; *Motors, Inc. v. Times Mirror Co. (1980) 102 Cal. App. 3d 735, 740 n. 2, 162 Cal. Rptr. 543* ; *Plotkin v. Tanner's Vacuums (1975) 53 Cal. App. 3d 454, 459, 125 Cal. Rptr. 697* ; Note, *Former Civil Code Section 3369: A Study in Judicial Interpretation, 30 Hastings L.J. 705 (1979)*]. The common law concept is partly subsumed in the statutory definition in *Bus. & Prof. Code § 17200* but for the most part is covered by the law of trademarks and trade names [*see* Ch. 549, *Trademarks and Trade Names*] and, to some extent, patent and copyright law [*see* Ch. 349, *Literary Property and Copyright* , and Ch. 411, *Patents and Inventions* ; *see also § 565.37*].

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§ 565.31 Unlawful, Unfair, or Fraudulent Business Act or Practice

[1] In General

Actions for relief under the unfair competition law may be based on any business act or practice that is within the broad definition of unfair competition under *Bus. & Prof. Code § 17200* [*Consumers Union of United States, Inc. v. Fisher Dev., Inc. (1989) 208 Cal. App. 3d 1433, 1438-1439, 257 Cal. Rptr. 151* ; *cf. People ex rel. Mosk v. Nat'l Research Co. of Cal. (1962) 201 Cal. App. 2d 765, 770-771, 20 Cal. Rptr. 516* (decided under former *Civ. Code § 3369*)].

[2] Causal Connection Required

In an action under the unfair competition statute, a plaintiff is required to provide evidence of a causal connection between a defendant's business practices and the alleged harm--that is, evidence that the defendant's conduct caused or was likely to cause substantial injury. It is insufficient for a plaintiff to show merely that the defendant's conduct created a risk of harm [*In re Firearm Cases (2005) 126 Cal. App. 4th 959, 982-982, 24 Cal. Rptr. 3d 659* (no evidence that conduct of gun manufacturers or distributors actually caused harm attributed to gun dealers and users)].

[3] "Act or Practice"

The "act or practice" aspect of the statutory definition of unfair competition covers any single act of misconduct, as well as ongoing misconduct [*see Klein v. Earth Elements, Inc. (1997) 59 Cal. App. 4th 965, 969 n.3, 69 Cal. Rptr. 2d 623* ; *Podolsky v. First Healthcare Corp. (1996) 50 Cal. App. 4th 632, 654-655]* . Until the words "any ... act or" were added in 1992, *Bus. & Prof. Code § 17200* specified unlawful, unfair, or fraudulent "business practice" and was construed as being directed at ongoing wrongful business conduct, something beyond a single transaction [*State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal. 3d 1147, 1169-1170, 252 Cal. Rptr. 221, 762 P.2d 385]* .

[4] "Unlawful" Acts and Practices

[a] In General

An unlawful business act or practice is an act or practice that is both undertaken pursuant to business activity and also forbidden by law [*Farmers Ins. Exch. v. Superior Court (1992) 2 Cal. 4th 377, 383, 6 Cal. Rptr. 2d 487, 826 P.2d 730]* . Any business act or practice that is unlawful, in the sense that it violates a specific statute, may be enjoined under the unfair competition law [*Comm. on Children's Television, Inc. v. Gen. Foods Corp. (1983) 35 Cal. 3d 197, 209-210, 197 Cal. Rptr. 783, 673 P.2d 660 , superseded by statute on other grounds as stated in Gartin v. S&M NuTec LLC, 2007 U.S. Dist. LEXIS 38050 (C.D. Cal.)* ; *Consumers Union of United States, Inc. v. Fisher Dev., Inc. (1989) 208 Cal. App. 3d 1433, 1438-1439, 257 Cal. Rptr. 151]* .

Virtually any law can serve as the predicate for an unfair competition action [*State Farm Fire & Cas. Co. v. Superior Court (1996) 45 Cal. App. 4th 1093, 1102-1103, 53 Cal. Rptr.2d 229]* . The "unlawful" practices prohibited by *Bus. & Prof. Code § 17200* are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made. It is not necessary that the predicate law provide for private civil enforcement [*Saunders v. Superior Court (1994) 27 Cal. App. 4th 832, 838-839, 33 Cal. Rptr. 2d 438* ; *see Californians for Population Stabilization v. Hewlett-Packard Co. (1997) 58 Cal. App. 4th 273, 287, 67 Cal. Rptr. 2d 621* (unfair competition cases have cited anti-discrimination laws, antitrust laws, criminal laws, environmental protection laws, fish and game laws, housing laws, labor laws, and vehicle laws)].

In one case, a court of appeal held that violations of a conditional use permit, as well as violations of a temporary restraining order, could be challenged as unlawful business practices [*Hewlett v. Squaw Valley Ski Corp. (1997) 54 Cal. App. 4th 499, 532, 535, 63 Cal. Rptr. 2d 118]* .

However, the underlying statute might create an exclusive jurisdictional prerequisite that must be met before any subsequent action may be brought, including an action under the unfair competition statute. For example, the Talent Agencies Act vests exclusive original jurisdiction in the Labor Commissioner for all claims arguably coming under its provisions [*see Lab. Code § 1700.44*], and failure to meet this jurisdictional hurdle will bar an action under the unfair competition statute for violation of the Act [*Blanks v. Seyfarth Shaw LLP (2009) 171 Cal. App. 4th 336, 364-365, 89 Cal. Rptr. 3d 710*].

Federal law generally does not preempt use of the unfair competition statute to remedy a violation of federal law. To the extent that the action is based on a violation of federal requirements, the plaintiff is not seeking to impose different or additional requirements beyond those imposed under federal law. Therefore, the action does not run afoul of federal preemption concerns [*see McKell v. Washington Mut., Inc. (2006) 142 Cal. App. 4th 1457, 1485-1486, 49 Cal. Rptr. 3d 227]* .

[b] Unfair Practices Act Violations

A violation of the Unfair Practices Act [*Bus. & Prof. Code § 17000 et seq.*; *see § 565.50* et seq.] can be the basis for relief under the unfair competition law [*see People v. Thomas Shelton Powers, M.D., Inc. (1992) 2 Cal. App. 4th 330, 338-339, 3 Cal. Rptr. 2d 34* (sale of condominium unit, designated as low- and moderate-income housing, at price exceeding established ceiling, in violation of city code, was unfair practice under *Bus. & Prof. Code § 17000 et seq.*, andplaintiff entitled to relief under *Bus. & Prof. Code § 17203*)].

[c] Cartwright Act Violations

Violations of the Cartwright Act [*Bus. & Prof. Code § 16700 et seq.*], which governs activities in restraint of trade [*see § 565.70* et seq.], would constitute unlawful acts or practices under *Bus. & Prof. Code § 17200 et seq.* [*see, e.g., BILJAC Assocs. v. First Interstate Bank (1990) 218 Cal. App.3d 1410, 1422-1423, 267 Cal. Rptr. 819* ; *see Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 43-51, 77 Cal. Rptr. 2d 709, 960 P.2d 513* ; *B.W.I. Custom Kitchen v. Owens-Ill., Inc. (1987) 191 Cal. App. 3d 1341, 1345, 1348, 1348 n. 6, 235 Cal. Rptr. 228]* . This subject is

further discussed in*§ 565.31[5][a]*.

[d] Uniform Trade Secrets Act Violations

Misappropriation of trade secrets in violation of the Uniform Trade Secrets Act [*Civ. Code § 3426 et seq.*; *see § 565.100* et seq.] would constitute unfair competition [*see Courtesy Temporary Serv., Inc. v. Camacho (1990) 222 Cal. App. 3d 1278, 1292, 272 Cal. Rptr. 352* ("cases are legion" holding that former employee's use of confidential information obtained from employer to compete with employer and solicit business from employer's customers is regarded as unfair competition)].

[e] Choice of Remedies

An act or practice that violates a specific statute may be redressed under that statute instead of under the unfair competition law. For example, sales that violated provisions of the Unfair Practices Act governing below-cost sales and loss leaders (namely, sales made with the purpose of injuring competitors and destroying competition) were subject to the greater remedies afforded by the Unfair Practices Act [*Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 174-175, 83 Cal. Rptr. 2d 548, 973 P.2d 527* ; *see Bus. & Prof. Code §§ 17043, 17044*].

[f] Mere Cause of Action Not "Unlawful" Act or Practice

Although any violation of virtually any law, including court-made law, can serve as the predicate for an unfair competition action based on an unlawful business act or practice [*see § 565.31[4]*], such an action is not warranted for a mere cause of action. For instance, mere liability under the doctrines of strict products liability and breach of the implied warranty of fitness was insufficient to support an independent unfair competition action for an unlawful business act or practice [*Klein v. Earth Elements, Inc. (1997) 59 Cal. App. 4th 965, 969, 69 Cal. Rptr. 2d 623* (manufacturer's unintentional distribution of contaminated pet food was beyond scope and policy of unfair competition law's proscription of unlawful business act or practice)]. In another case, the inclusion of unenforceable liquidated-damages provisions in an employment contract did not constitute an unlawful business practice [*Californians for Population Stabilization v. Hewlett-Packard Co. (1997) 58 Cal. App. 4th 273, 287, 67 Cal. Rptr. 2d 621]* .

[5] "Unfair" Acts and Practices

[a] Business Rivals

If a plaintiff claims to have suffered injury from a direct competitor's "unfair" act or practice, as that term is used in *Bus. & Prof. Code § 17200*, conduct is "unfair" if it threatens an incipient violation of an antitrust law, or violates the policy or spirit of such a law because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition [*Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527]* . Thus, below-cost sales were unfair under the provisions of the unfair competition law because they were neither protected under a specific statute [*see Bus. & Prof. Code § 17026.1*; *see also § 565.32[1]*] nor yet in violation of the Unfair Practices Act's provisions on below-cost sales and loss leaders [*Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 188, 83 Cal. Rptr. 2d 548, 973 P.2d 527]* .

This standard is patterned after the test used to determine "unfair methods of competition" under Section 5 of the Federal Trade Commission Act [*see Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 185-186, 83 Cal. Rptr. 2d 548, 973 P.2d 527* ; *see also 15 U.S.C.S. § 45(a)*]. For example, unfair price discrimination between customers may be enjoined under *Bus. & Prof. Code § 17203* [*see Motors, Inc. v. Times Mirror Co. (1980) 102 Cal. App. 3d 735, 739-741, 162 Cal. Rptr. 543]* .

Under this standard, an injury to a competitor is not the same as an injury to competition, and only the latter is actionable. For example, a supplier's refusal to deal on favorable terms with a competitor, although perhaps injurious to the competitor, is not necessarily actionable as an injury to competition [*see People's Choice Wireless, Inc. v. Verizon Wireless (2005) 131 Cal. App. 4th 656, 666-668, 31 Cal. Rptr. 3d 819]* .

Unless there is a law that provides otherwise, a private party generally may choose to refuse to do business with whomever he or she pleases without violating the spirit of antitrust laws [*Drum v. San Fernando Valley Bar Assn. (2010) 182 Cal. App. 4th 247, 254, 106 Cal. Rptr. 3d 46]* .

[b] Other Contexts

The standard discussed in*§ 565.31[5][a]* is limited to claims of unfair acts and practices between business rivals. It does not apply to actions brought by consumers [*see § 565.33*] or actions between competitors alleging other kinds of violations of the unfair competition law, such as actions alleging fraudulent or unlawful business practices or unfair, deceptive, untrue, or misleading advertising [*Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 187 n.12, 83 Cal. Rptr. 2d 548, 973 P.2d 527]* .

The standard for determining what constitutes unfair conduct in these othercontexts is not entirely clear. In one line of cases determining whether a business practice or act is unfair within the meaning of *Bus. & Prof. Code § 17200* entails examination of the effect of the practice or act on thevictim, balanced against the reasons, justifications, and motives of the alleged wrongdoer. The court must weigh the utility of the alleged wrongdoer's conduct against the gravity of the harm to the alleged victim [*Progressive West Ins. Co. v. Superior Court (2005) 135 Cal. App. 4th 263, 285-286, 37 Cal. Rptr. 3d 434* ; *Pastoria v. Nationwide Ins. (2003) 112 Cal. App. 4th 1490, 1498, 6 Cal. Rptr. 3d 148]* . For example, a pet food distributor unintentionally distributed contaminated pet food, but then acted promptly to recall the contaminated products, advertised the recall effort, and afforded restitution to customers. The pet food distributor's conduct was not unfair within the meaning of *Bus. & Prof. Code § 17200*. The court reasoned that: (1) although dogs did get sick, the distributor's act was accidental; (2) after discovering what had happened, the distributor moved quickly to abate the harm; and (3) setting the standard at perfection or zero mistakes was too high a price to pay for eliminating the potential harm to the dogs from the unwitting distribution of contaminated food [*Klein v. Earth Elements, Inc. (1997) 59 Cal. App. 4th 965, 970, 69 Cal. Rptr. 2d 623]* .

However, other court of appeal opinions have questioned whether the earlier formulations for determining what constitutes unfair conduct in an action brought by a party who is not a competitor are now too broad in light of the Supreme Court's more restrictive definition of what constitutes an unfair practice in an action brought by a competitor [*see § 565.31[5][a]*]. Some of these court opinions have suggested that to ensure that a court will not merely apply its own subjective conception of fairness, the conduct alleged to be unfair must be tethered to a specific constitutional, statutory, or regulatory provision, at least if the claim of unfairness is predicated on an alleged violation of public policy [*see, e.g., Scripps Clinic v. Superior Court (2003) 108 Cal. App. 4th 917, 939-940, 134 Cal. Rptr. 2d 101]* .

Other court of appeal opinions have adopted a test in consumer actions that is patterned after the test applicable in similar cases brought under the Federal Trade Commission Act. Under this test, a consumer must show that the injury: (1) is substantial; (2) is not outweighed by any countervailing benefits to consumers or competition, and (3) is not one that consumers themselves could reasonably have avoided [*Davis v. Ford Motor Credit Co. LLC (2009) 179 Cal. App. 4th 581, 597-598, 101 Cal. Rptr. 3d 697* ; *Camacho v. Automobile Club of S. Cal. (2006) 142 Cal. App. 4th 1394, 1403, 48 Cal. Rptr. 3d 770]* . The first court opinion to adopt this test concluded that tethering a finding of unfairness in consumer cases to a violation of specific provisions was too restrictive, given the broad scope of the unfair competition statute and the fact that separate provision is made in the statute for "unlawful" conduct. The court also concluded that although it makes sense to tie unfair, anti-competitive conduct among competitors to antitrust laws, the same cannot be said if the action is brought by a consumer, because the range of potentially unfair, harmful conduct is broader [*Camacho v. Automobile Club of S. Cal. (2006) 142 Cal. App. 4th 1394, 1402-1403, 48 Cal. Rptr. 3d 770]* .

[6] "Fraudulent" Acts and Practices

Although *Bus. & Prof. Code § 17200* specifies any "fraudulent" business act or practice [*see § 565.30[1]*], courts often speak of "deceptive" acts and practices when applying the unfair competition law. Proving a fraudulent or deceptive business practice only requires a showing that members of the public are likely to be deceived, and unlike common law fraud, it does not require allegations of actual deception, reasonable reliance, and damages [*Blakemore v. Superior Court (2005) 129 Cal. App. 4th 36, 49, 27 Cal. Rptr. 3d 877* ; *see, e.g.,* *Morgan v. AT&T Wireless Services, Inc. (2009) 177 Cal. App. 4th 1235, 1255-1257, 99 Cal. Rptr. 3d 768* (plaintiffs sufficiently alleged UCL action based on deceptive conduct by wireless telephone carrier when marketing phone and accompanying network services)].

In one case, a nursing home's proposed third-party guarantee agreement for private-pay residents provided that the guarantor's signature was optional, but if the guarantor did sign, he or she was personally guaranteeing payment to the home for all care, supplies, or services provided to the resident. Because the agreement offered family members little or no additional protection under federal and state law, the absence of any information regarding those protections rendered the guarantee agreement deceptive. The manner in which the original guarantee agreements were presented and explained to potential guarantors may have been deceptive as well. During the admissions process, numerous documents were hurriedly presented to family members, with little or no explanation. The court held that the procedure was likely to deceive consumers, who would not be made aware of the provisions of the proposed guarantee, or who might be misled into believing that signature was required [*Podolsky v. First Healthcare Corp. (1996) 50 Cal. App. 4th 632, 651, 58 Cal. Rptr. 2d 89]* .

On the other hand, the inclusion of unenforceable terms in an employment contract was not considered a deceptive business practice under *Bus. & Prof. Code § 17200*. The court reasoned that the employment contract was legal under the laws of India and that the mere fact that certain provisions were unenforceable in California did not render the use of the documents a deceptive business practice [*Californians for Population Stabilization v. Hewlett-Packard Co. (1997) 58 Cal. App. 4th 273, 293, 67 Cal. Rptr. 2d 621]* .

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§ 565.32 Exempt Acts and Practices

[1] Specifically Permitted Business Activity

An action based on unlawful business practice may be maintained unless the defendant's conduct is privileged or is immunized by another statute, or unless the underlying statute expressly bars its enforcement under the unfair competition law [*Stevens v. Superior Court (1999) 75 Cal. App. 4th 594, 603-604, 89 Cal. Rptr. 2d 370* (plaintiff could base action on violation of Insurance Code requirementthat agents, brokers, and automobile dealers be licensed to transact insurance business)].

In a case brought by cellular telephone retailers alleging injury caused by below-cost sales of cellular telephones by a cellular telephone service provider, the Supreme Court held that cellular telephone sales that were specifically permitted by *Bus. & Prof. Code § 17026.1*, which is part of the Unfair Practices Act, could not be "unfair" under the unfair competition law [*Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 187-188, 83 Cal. Rptr. 2d 548, 973 P.2d 527]* .

The rule that an action under the unfair competition statute cannot be based on conduct that is specifically permitted by law has been applied even though the statute authorizing the conduct was subsequently held to be preempted by federal law [*Olszewski v. Scripps Health (2003) 30 Cal. 4th 798, 829, 135 Cal. Rptr. 2d 1, 69 P.3d 927]* .

[2] No Claim for Conduct Within Litigation Privilege

Conduct that would otherwise amount to unfair competition may be protected by the "litigation privilege" of *Civ. Code § 47(b)*, so that the party against whom the litigation is threatened or maintained cannot state a claim for relief under *Bus. & Prof. Code § 17203* [*Rubin v. Green (1993) 4 Cal. 4th 1187, 1196-1204, 17 Cal. Rptr. 2d 828, 847 P.2d 1044* ; *see, e.g., People ex rel. Gallegos v. The Pacific Lumber Co. (2008) 158 Cal. App. 4th 950, 958-963, 70 Cal. Rptr. 3d 501* (litigation privilege provided complete defense to action brought by State under unfair competition statute against lumber company that allegedly provided false information in administrative proceedings)]. That was the eventual outcome for a retaliatory unfair competition action filed by the owner of a mobile home park after he received a notice

from a tenant stating that she intended to commence an action against him for 23 alleged defects in the operation of the park. The tenant and over 120 other residents of the park eventually did file suit, but not until after the park owner had filed a suit against the tenant who sent the notice and her attorneys for damages and injunctive relief based on meetings that the tenant and her attorneys had with other residents of the park. Those meetings were alleged to have interfered with the park owner's contractual relations with the other tenants and to constitute unfair competition under *Bus. & Prof. Code § 17200* because they violated *Bus. & Prof. Code §§ 6152* and *6153*, which make it unlawful to act as an agent in soliciting business on behalf of attorneys.

The entire Supreme Court agreed that the conduct alleged was sufficiently communicative and sufficiently related to the threatened judicial proceeding that *Civ. Code § 47(b)* and the policy interest it is designed to protect--namely, assuring free access to the courts--barred any action for damages [*Rubin v. Green (1993) 4 Cal. 4th 1187, 1196, 1204, 1212, 17 Cal. Rptr. 2d 828, 847 P.2d 1044]* .

Regarding the availability of injunctive relief, however, the court was closely divided. The majority reasoned that it would undermine the privilege to permit the same communicative acts that would not support a claim for damages to provide the basis for injunctive relief, and that the privilege should not evaporate merely because there is a conveniently different label for pleading what is in substance an identical grievance arising from identical conduct as that protected by *Civ. Code § 47(b)*. Permitting injunctive relief would upset the balance between a plaintiff's freedom to seek redress in the courts and a potential defendant's interest in being free from unjustified litigation [*Rubin v. Green (1993) 4 Cal. 4th 1187, 1203, 17 Cal. Rptr. 2d 828, 847 P.2d 1044]* . The majority emphasized that their result was in part due to the precise circumstances involved, noting that apart from spawning another layer of litigation, allowing injunction relief in the derivative action would promote all the evils that accompany retaliatory suits based on litigation-related communications, such as disruption, intimidation, distractions of requiring counsel to defend the personal countersuit, and the dampening effect on presentation of the underlying claim *[Rubin v. Green (1993) 4 Cal. 4th 1187, 1198, 1203-1204, 17 Cal. Rptr. 2d 828, 847 P.2d 1044]* .

The minority distinguished between adequate access to the judicial system and illegal access, and thought that allowing injunctive relief would not restrict legal access because it was quick and easy and because even if the underlying action had no merit, it would be allowed to proceed despite any injunction against the unlawful solicitation. The minority believed that allowing injunctive relief would not deprive anyone of access to the courts because there are enough competent, ethical attorneys that any person with any even remotely meritorious claim can find an attorney [*Rubin v. Green (1993) 4 Cal. 4th 1187, 1212, 17 Cal. Rptr. 2d 828, 847 P.2d 1044]* . The minority also found it inappropriate that under *Bus. & Prof. Code § 17204*, district attorneys, city attorneys, members of the public, and everyone but the victim will be empowered to bring suit to have the unlawful solicitation enjoined [*Rubin v. Green (1993) 4 Cal. 4th 1187, 1204-1206, 17 Cal. Rptr. 2d 828, 847 P.2d 1044]* . The minority did not agree that there was any apparent conflict between *Civ. Code § 47(b)*, *Bus. & Prof. Code §§ 17203* and *17204*, and *Bus. & Prof. Code §§ 6152* and *6153*, but believed that the legislature, in enacting the Business and Professions Code sections after the privilege was already in place, intended injunctive relief to be available against unlawful solicitation [*Rubin v. Green (1993) 4 Cal. 4th 1187, 1207-1208, 17 Cal. Rptr. 2d 828, 847 P.2d 1044]* .

Relying on a distinction drawn by the Supreme Court [*see* *Rubin v. Green (1993) 4 Cal. 4th 1187, 1202-1204, 17 Cal. Rptr. 2d 828, 847 P.2d 1044]* , however, the court of appeal has subsequently held that the litigation privilege is not a defense in an unfair competition action brought against an attorney if the plaintiff was not a party to the earlier litigation in which the allegedly protected conduct occurred [*American Prods. Co., Inc. v. Law Offices of Geller, Stewart & Foley, LLP (2005) 134 Cal. App. 4th 1332, 1346, 37 Cal. Rptr. 3d 93* ; *Kashian v. Harriman (2002) 98 Cal. App. 4th 892, 120 Cal. Rptr. 2d 576]* . In one case, for example, the manufacturer of after-market automotive accessories, alleged to be illegal for use on California roads, brought suit for unfair competition and related claims against a law firm that had sent demand letters to retailers who sold the goods. The demand letters, and subsequent lawsuits that were brought against these retailers, were allegedly an attempt to force settlements from those retailers and create income for the law firm. When the manufacturer sued the law firm for its litigation-related tactics against the retailers, the court of appeal

held that the litigation privilege did not protect the firm because the manufacturer wasnot a party to the underlying litigation and the Supreme Court's analysis described above was specifically limited to unfair competition actions brought by plaintiffs who were parties to the underlying litigation [*American Prods. Co., Inc. v. Law Offices of Geller, Stewart & Foley, LLP (2005) 134 Cal. App. 4th 1332, 1346, 37 Cal. Rptr. 3d 93]* . The continued vitality of this holding is suspect, however, as the California Supreme Court, while not mentioning the case just described, has subsequently rejected a broad exception to the litigation privilege for parties who did not participate in the underlying litigation [*Action Apartment Assn., Inc. v. City of Santa Monica (2007) 41 Cal. 4th 1232, 1248, 63 Cal. Rptr. 3d 398, 163 P.3d 89* ; *see People ex rel. Gallegos v. The Pacific Lumber Co. (2008) 158 Cal. App. 4th 950, 961* & n.5, *70 Cal. Rptr. 3d 501*].

[3] Political Election Campaigns

The practices of political election campaigns [*see* Ch. 242, *Election Campaigns*] are not subject to *Bus. & Prof. Code § 17200 et seq.* [*O'Connor v. Superior Court (1986) 177 Cal. App. 3d 1013, 1014, 1019-1020, 223 Cal. Rptr. 357]* .

[4] Title Insurance Ratemaking

The practices of title insurers [*see* Ch. 548, *Title Insurance*] are subject to *Bus. & Prof. Code § 17200 et seq.* [*Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 43-46, 77 Cal. Rptr. 2d 709, 960 P.2d 513]* , except with respect to ratemaking [*see Walker v. Allstate Indem. Co. (2000) 77 Cal. App. 4th 750, 754-760, 92 Cal. Rptr. 2d 132* (Insurance Code provides immunity to claims under *Bus. & Prof. Code § 17200 et seq.* challenging rates charged by insurance companies, because rates were approved through appropriate administrative procedures); *cf. Donabedian v. Mercury Ins. Co. (2004) 116 Cal. App. 4th 968, 992-994, 11 Cal. Rptr. 3d 45* (because insurance commissioner approved only general use of "persistency" as rating factor, claim against insurer for improperly applying lack of prior insurance in determining rates for individual policyholders did not involve "ratemaking")].

[5] Securities Transactions

Bus. & Prof. Code § 17200 et seq. is inapplicable to securities transactions [*Bowen v. Ziasun Techs., Inc. (2004) 116 Cal. App. 4th 777, 788-790, 11 Cal. Rptr. 3d 522]* .

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§ 565.33 Customers as Victims or Perpetrators of Unfair Competition

In broadly defining unfair competition without limiting its scope to acts and practices between business competitors, the legislature has extended protection to the customers, as well as the rivals, of individuals and entities that engage in prohibited acts and practices [*see, e.g., Barquis v. Merchants Collection Assn. (1972) 7 Cal. 3d 94, 109-113, 101 Cal. Rptr. 745, 496 P.2d 817* (collection agency's practice of filing actions in inconvenient forums to obtain default judgments); *Consumers Union of United States, Inc. v. Fisher Dev., Inc. (1989) 208 Cal. App. 3d 1433, 1439, 257 Cal. Rptr. 151* ; *Pines v. Tomson (1984) 160 Cal. App. 3d 370, 379-381, 206 Cal. Rptr. 866* (publisher's discrimination against advertisers on basis of religious belief)].

Moreover, customers can be sued for engaging in prohibited acts and practices [*see, e.g., Allied Grape Growers v. Bronco Wine Co. (1988) 203 Cal. App. 3d 432, 449-450, 249 Cal. Rptr. 872* (buyer refused delivery of part of crop and downgraded other part, thus undercutting price in violation of statute)].

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§ 565.34 Remedies and Relief

[1] In General

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction [*Bus. & Prof. Code § 17203*; *see also Madrid v. Perot Sys. Corp. (2005) 130 Cal. App. 4th 440, 465, 30 Cal. Rptr. 3d 210* (injunction only appropriate if threat of misconduct's being repeated in future)]. The court may make such orders or judgments, including the appointment of a receiver [*see* Ch. 486, *Receivers*], as may be necessary to prevent the use or employment by a person of any practice that constitutes unfair competition under *Bus. & Prof. Code § 17200*, or as may be necessary to restore to any person in interest any money or property, real or personal, that may have been acquired by means of such unfair competition [*Bus. & Prof. Code § 17203*].

For a form of complaint to enjoin unfair competition and recover restitution under *Bus. & Prof. Code § 17200 et seq., see § 565.231*. For a form stating a cause of action brought under that statute, based on the deceptive use of a confusingly similar name or mark, *see* Ch. 549, *Trademarks and Trade Names* .

[2] Restitution and Disgorgement

[a] In General

Bus. & Prof. Code § 17203 expressly authorizes a court to take whatever action is necessary to restore to any person in interest any property acquired by means of unfair competition. There is little question that the broad range of remedies provided for in *Bus. & Prof. Code § 17203* includes restitution and disgorgement of profits [*People v. Thomas Shelton Powers, M.D., Inc. (1992) 2 Cal. App. 4th 330, 339-341, 3 Cal. Rptr. 2d 34* (action by district attorney, not private litigant); *see Bronco Wine Co. v. Frank A. Logoluso Farms (1989) 214 Cal. App. 3d 699, 704, 721, 262 Cal. Rptr. 899* (no challenge to private litigant's recovery of so-called restitutionary damages pursuant to *Bus. & Prof. Code § 17203*)]. However, in exercising its discretion to fashion an appropriate equitable remedy, the court may also consider any equitable defenses pleaded by the defendant [*Cortez v. Purolator Air Filtration Prods. Co. (2000) 23 Cal. 4th 163, 179-180, 96 Cal. Rptr. 2d 518, 999 P.2d 706]* .

Restitution may be ordered even without the issuance of an injunction. The Supreme Court has rejected the contention that restitution is available only when ancillary to an injunction [*ABC Int'l Traders, Inc. v. Matsushita Elec. Corp. (1997) 14 Cal. 4th 1247, 1268-1271, 61 Cal. Rptr. 2d 112, 931 P.2d 290]* .

Although restitution and disgorgement of profits are appropriate to prevent a defendant from profiting from unfair competition, disgorgement into a fluid recovery fund is authorized only in a class action suit and may not be used in a representative action that has not been certified as a class action [*Kraus v. Trinity Mgmt. Servs., Inc. (2000) 23 Cal. 4th 116, 137, 96 Cal. Rptr. 2d 485, 999 P.2d 718* ; *see also Corbett v. Superior Court (2002) 101 Cal. App. 4th 649, 654-655, 125 Cal. Rptr. 2d 46* (UCLaction may be prosecuted as class action, and class remedy may include disgorgement into fluid recovery fund)]. Moreover, even in a class action, disgorgement into a fluid recovery fund is limited to disgorgementof restitutionary funds and does not extend to amounts that are nonrestitutionary in nature [*Feitelberg v. Credit Suisse First Boston, LLC (2005) 134 Cal. App. 4th 997, 1016-1020, 36 Cal. Rptr. 3d 592* ; *Madrid v. Perot Sys. Corp. (2005) 130 Cal. App. 4th 440, 460, 30 Cal. Rptr. 3d 210]* .

A defendant cannot be ordered to disgorge profits to an individual plaintiff if those profits were not taken from the plaintiff or if the plaintiff does not otherwise have an ownership interest in those profits, because disgorgement of profits in the absence of an ownership interest by the plaintiff goes beyond the restitution that is authorized by the statute [*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1144-1148, 131 Cal. Rptr. 2d 29, 63 P.3d 937* ; *see also Reid v. Google, Inc. (2007) 155 Cal. App. 4th 1342, 1351, 66 Cal. Rptr. 3d 744* (plaintiff unable to recover stock options that had not vested at time of actionable conduct as restitution)]. However, a plaintiff who purchases a product because of false or misleading advertisements or product packaging statements is entitled to recover from the product manufacturer as restitution the revenue obtained from the sale of the product, even if the plaintiff purchased the product from a retailer rather than directly from the manufacturer. A plaintiff in such cases is effectively seeking the return of money in which plaintiff had an interest prior to the purchase [*Shersher v. Superior Court (2007) 154 Cal. App. 4th 1491, 1494, 65 Cal. Rptr. 3d 634]* .

Under the appropriate circumstances, a defendant may be ordered to pay restitution even if plaintiff did not pay the money directly to that defendant, as for example, when the money was paid to an agent for the defendant or otherwise was paid to an enterprise of which defendant was an integral part and defendant directly benefited financially from the payments [*Troyk v. Farmers Group, Inc. (2009) 171 Cal. App. 4th 1305, 1340-1342, 90 Cal. Rptr. 3d 589]* .

[b] Award to Nonparties in Class Action

An action under the unfair competition statute may be prosecuted as a class action [*Corbett v. Superior Court (2002) 101 Cal. App. 4th 649, 654-655, 125 Cal. Rptr. 2d 46]* . However, in a case that involved a challenge to a $50 termination fee that an investment firm assessed on individual retirement accounts, the court held that it was error to certify the action as a class action without any showing that class treatment was demonstrably superior to an individual, representative action [*Dean Witter Reynolds, Inc. v. Superior Court (1989) 211 Cal. App. 3d 758, 772-773, 259 Cal. Rptr. 789]* . The court in another case reversed a restitution award to 27 nonparty wine-grape growers on several grounds: each grower's damages required complicated proof of such things as sugar content, tonnages delivered, and delivery dates; serious fundamental due process questions were raised; and administrative proceedings available through the Department of Agriculture provided the growers with an inexpensive and effective remedy [*Bronco Wine Co. v. Frank A. Logoluso Farms (1989) 214 Cal. App. 3d 699, 717-721, 262 Cal. Rptr. 899]* . Similarly, a defendant cannot be ordered to disgorge profits to an individual plaintiff if those profits were not taken from the plaintiff or if the plaintiff does not otherwise have an ownership interest in those profits, because disgorgement of profits in the absence of an ownership interest by the plaintiff goes beyond the restitution that is authorized by the statute [*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1144-1148, 131 Cal. Rptr. 2d 29, 63 P.3d 937]* .

[3] Damages

[a] No Private Recovery

A private plaintiff cannot recover damages under *Bus. & Prof. Code § 17203* [*Heller v. Norcal Mut. Ins. Co. (1994) 8 Cal. 4th 30, 45, 32 Cal. Rptr. 2d 200, 876 P.2d 999* ; *Bank of W. v. Superior Court (1992) 2 Cal. 4th 1254, 1266, 1272-1273 & n.7* (disgorgement of wrongfully obtained money does not constitute damages covered by insurance policy), *disapproving United Farm Workers of Am. v. Superior Court (1975) 47 Cal. App. 3d 334, 120 Cal. Rptr. 904* ; *Industrial Indem. Co. v. Superior Court (1989) 209 Cal. App. 3d 1093, 1096-1097, 257 Cal. Rptr. 655* ; *see E.W. French & Sons, Inc. v. General Portland Inc. (9th Cir. 1989) 885 F.2d 1392, 1401-1402* ; *Little Oil Co., Inc. v. Atlantic Richfield Co. (9th Cir. 1988) 852 F.2d 441, 445* (determining pendent state claims)]. The Supreme Court has held that the substantially similar provision of *Bus. & Prof. Code § 17535* [*see* Ch. 14, *Advertising*] does not support the award of compensatory damages to private individuals, but instead limits their relief to equitable remedies--namely, injunction and restitution [*Bank of W. v. Superior Court (1992) 2 Cal. 4th 1254, 1272-1273, 10 Cal. Rptr. 2d 538, 833 P.2d 545* ; *Fletcher v. Security Pac. Nat'l Bank (1979) 23 Cal. 3d 442, 452, 153 Cal. Rptr. 28, 591 P.2d 51* ; *Chern v. Bank of Am. (1976) 15 Cal. 3d 866, 875, 127 Cal. Rptr. 110, 544 P.2d 1310]* .

Because a plaintiff is not entitled to damages under the statute, the proper measure of restitution is the amount received by the defendant as a result of the improper conduct, even if the amount of monetary damage suffered by the plaintiff as a consequence of the conduct is greater [*Inline, Inc. v. Apace Moving Sys., Inc. (2005) 125 Cal. App. 4th 895, 903-904, 23 Cal. Rptr. 3d 216]* .

[b] In-Lieu Recovery

Although damages are not recoverable under *Bus. & Prof. Code § 17203*, a remedy that could constitute "damages" if recovered on a different cause of action may still be available under the unfair competition statute. For example, under *Bus. & Prof. Code § 17203*, a defendant may be compelled to pay back wages that were unlawfully withheld from employees, even though back wages may constitute damages in another action [*Cortez v. Purolator Air Filtration Prods. Co. (2000) 23 Cal. 4th 163, 176-178, 96 Cal. Rptr. 2d 518, 999 P.2d 706]* . Restitution under the unfair competition lawis not limited to the return of money or property that was once in possession of the person entitled to restitution; it may include wages that were earned in exchange for labor given, because the right to the wages had already vested in the plaintiff [*Cortez v. Purolator Air Filtration Prods. Co. (2000) 23 Cal. 4th 163, 178, 96 Cal. Rptr. 2d 518, 999 P.2d 706* ; *see also Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1149, 131 Cal. Rptr. 2d 29, 63 P.3d 937]* .

However, while wages may be recovered from the actual employer, wages may notbe recovered as restitution from the employer's owners, officers, or managers, unless the labor was performed for such persons personally or those persons appropriated funds from the employer that would otherwise have been used to pay the unpaid wages [*Bradstreet v. Wong (2008) 161 Cal. App. 4th 1440, 1460-1461, 75 Cal. Rptr. 3d 253*]. In addition, a penalty imposed on an employer under *Lab. Code § 203* for failure to pay earned wages on time are not wages for labor provided and may not be recovered as restitution under the unfair competition statute [*Pineda v. Bank of America, N.A. (2009) 170 Cal. App. 4th 388, 393-394, 87 Cal. Rptr. 3d 864 , review granted, depublished, Pineda v. Bank of America, N.A. (2009) 93 Cal. Rptr. 3d 536, 207 P.3d 1, 2009 Cal. LEXIS 4599*].

[4] Cumulative Remedies

The remedies of the unfair competition law are cumulative to each other and to the remedies or penalties available under all other state laws [*Bus. & Prof. Code § 17205*]. Thus, counsel might consider seeking damages under some other law and injunctive relief under *Bus. & Prof. Code § 17203*. For instance, a growers cooperative, faced with a buyer's refusal to take delivery of part of the crop and the buyer's downgrading of the portions it did accept, recovered damages under *Com. Code § 2706*, and an injunction under *Bus. & Prof. Code § 17203* was not barred by the award of damages, especially because the buyer had perpetrated the same unfair practice on others [*see Allied Grape Growers v. Bronco*

Wine Co. (1988) 203 Cal. App. 3d 432, 452-453, 249 Cal. Rptr. 872] .

[5] Attorney's Fees

Bus. & Prof. Code § 17203 does not authorize an award of attorney's fees to a successful plaintiff. Attorney's fees may not be recovered under this statute even if the violation of another statute serves as a predicate for the unfair competition action and that underlying statute has a provision for the recovery of attorney's fees, at least when the plaintiff brings the action solely under the unfair competition statute rather than directly under the underlying statute [*Davis v. Ford Motor Credit Co. LLC (2009) 179 Cal. App. 4th 581, 601, 101 Cal. Rptr. 3d 697]* .

However, if a provision in a contract that provides for attorney's fees is challenged in an action that is in fact one to enforce or avoid enforcement of that particular contract, attorney's fees may be awarded to the prevailing party in accordance with *Civ. Code § 1717* [*Shadoan v. World Sav. & Loan Assn. (1990) 219 Cal. App. 3d 97, 107-109, 268 Cal. Rptr. 207* (fees to successful defendant, however, were apportioned because plaintiffs sued in individual capacity for restitution and in representative capacity to enjoin application of challenged provision in other contracts; plaintiffs could not be charged with attorney's fees relating to injunction or to issues pursued in representative capacity)].

[6] Subsequent Administrative Actions

The filing of a civil action under the unfair competition law does not preclude the subsequent commencement, by an administrative agency, of an administrative proceeding based on the same facts. There is no fundamental unfairness because the statutory remedies under the unfair competition law are cumulative, and the relief sought in an administrative proceeding is unavailable in a civil action under the unfair competition law [*Setliff Bros. Serv. v. Bureau of Auto. Repair (1997) 53 Cal App. 4th 1491, 1495-1496, 62 Cal. Rptr. 2d 25]* .

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§ 565.35 Action for Relief

[1] Standing to Sue

A private person may bring an action under *Bus. & Prof. Code § 17200 et seq.* only if the person has suffered injury in fact and has lost money or property as a result of unfair competition [*Bus. & Prof. Code § 17204*]; *R & B Auto Ctr., Inc. v. Farmers Group, Inc. (2006) 140 Cal. App. 4th 327, 360, 44 Cal. Rptr. 3d 426* (plaintiff's payment of insurance premiums for liability coverage not provided, despite contrary representations, and payment on claim against plaintiff due to lack of coverage, constituted loss sufficient to confer standing). A private plaintiff may file a representative action on behalf of others only if the plaintiff meets this actual injury requirement and meets the requirements for class actions under *Code Civ. Proc. § 382* [*Bus. & Prof. Code § 17203*; *Arias v. Superior Court (2009) 46 Cal. 4th 969, 980, 95 Cal. Rptr. 3d 588, 209 P.3d 923*]. However, so long as a class is otherwise properly certified, only the named class representatives must specifically show standing to bring the action and unnamed class members need not do so [*In re Tobacco II Cases (2009) 46 Cal. 4th 298, 321, 93 Cal. Rptr. 3d 559, 207 P.3d 20]* .

Only a person who meets the requirements for standing may bring an action under the unfair competition statute. Thus, an injured party who would have standing cannot assign the right to sue under the unfair competition statute to another party who does not otherwise meet the requirements for standing to sue [*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court (2009) 46 Cal. 4th 993, 1002, 95 Cal. Rptr. 3d 605, 209 P.3d 937*]. Moreover, an association, such as a labor union, does not have standing to sue on behalf of its individual members when the association itself cannot meet the requirements for standing [*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court (2009) 46 Cal. 4th 993, 1003-1004, 95 Cal. Rptr. 3d 605, 209 P.3d 937*]. A private plaintiff must also show a causal connection between the alleged wrongful conduct and the actual injury sustained [*see Bus. & Prof. Code § 17204*; *Hall v. Time Inc. (2008) 158 Cal. App. 4th 847, 855, 70 Cal. Rptr. 3d 466* ; *Daro v. Superior Court (2007) 151 Cal. App. 4th 1079, 1098, 61 Cal. Rptr. 3d 716]* . For example, if the unfair competition claim is based on fraud stemming from alleged false advertising and misrepresentations made to consumers, the plaintiff must plead and prove actual reliance to satisfy the standing requirement [*In re Tobacco II Cases (2009) 46 Cal. 4th 298, 328, 93 Cal. Rptr. 3d 559, 207 P.3d 20* ; *see, e.g.,* *Princess Cruise Lines, Ltd. v. Superior Court (2009) 179 Cal. App. 4th 36, 43-44, 101*

Cal. Rptr. 3d 323 (plaintiff's own discovery responses demonstrated that she did not rely on any representations made by defendant cruise line when electing to purchase shore excursions as part of cruise package)]. However, while a plaintiff in those circumstances must allege that the defendant's misrepresentations were an immediate cause of the injury, the plaintiff need not show that those misrepresentations were the sole or even decisive cause. Moreover, the plaintiff is not required to necessarily plead and prove individualized reliance on specific misrepresentations or false statements when those misrepresentations and false statements were part of an extensive and long-term advertising campaign. Finally, an allegation of reliance is not defeated merely because there was alternative information available to the plaintiff that might have countered the defendant's alleged misrepresentations [*In re Tobacco II Cases (2009) 46 Cal. 4th 298, 328, 93 Cal. Rptr. 3d 559, 207 P.3d 20]* .

If the cause of action is based on an unlawful business practice, plaintiff cannot predicate standing to sue on an injury caused by lawful conduct of the defendant that is somehow connected to defendant's unlawful conduct, if that unlawful conduct does not itself cause actionable injury to plaintiff [*Daro v. Superior Court (2007) 151 Cal. App. 4th 1079, 1099, 61 Cal. Rptr. 3d 716]* .

Prior to the passage of Proposition 64 in 2004, the standing requirements for a private plaintiff were much more liberal, and a private person or entity could sue for that person's or entity's interest, the interest of its members, or the interest of the general public [*see* former *Bus. & Prof. Code § 17204*]. Under that standard, a private person or entity could sue on behalf of the general public without having suffered actual injury [*see* *Stop Youth Addiction, Inc. v. Lucky Stores, Inc. (1998) 17 Cal. 4th 553, 561, 71 Cal. Rptr. 2d 731, 950 P.2d 1086]* .

A plaintiff may not effectively avoid the changes made by Proposition 64 by claiming as "injury in fact" the expenses incurred in pursuing litigation against the defendant. Similarly, an individual consumer cannot create the requisite injury by purchasing a defendant's product if the purchase was made solely to facilitate a subsequent lawsuit [*Buckland v. Threshold Enterprises, Ltd. (2007) 155 Cal. App. 4th 798, 815-816, 66 Cal. Rptr. 3d 543]* . Moreover, a plaintiff who purchases a product merely to facilitate future litigation cannot establish that he or she lost money or property "as a result of the unfair competition" [*Buckland v. Threshold Enterprises, Ltd. (2007) 155 Cal. App. 4th 798, 818, 66 Cal. Rptr. 3d 543]* . In addition, alleged damage to the goodwill of a business, for which no restitution could be recovered under the unfair competition statute, is not a loss of "money or property" sufficient to confer standing to sue [*Citizens of Humanity, LLC v. Costco Wholesale Corp. (2009) 171 Cal. App. 4th 1, 22, 89 Cal. Rptr. 3d 455*]. Similarly, a consumer cannot show standing by arguing that he or she would not have purchased the defendant's product had defendant not advertised the product falsely, at least when the product purchased is worth the purchase price, not defective, and priced comparably to competing products [*see, e.g.,* *Kwikset Corp. v. Superior Court (2009) 171 Cal. App. 4th 645, 654-655, 90 Cal. Rptr. 3d 123* , *review granted, depublished,* *Kwikset Corporation v. Superior Court (2009) 97 Cal. Rptr. 3d 271, 211 P.3d 1060, 2009 Cal. LEXIS 6403* (consumers had no standing to sue padlock manufacturer for falsely representing that locks were made in America, as no restitution would be available for purchases of non-defective locks)].

The California Supreme Court has held that the changes to the requirements for standing enacted by Proposition 64 apply to actions that were pending when Proposition 64 was passed [*Californians for Disability Rights v. Mervyn's, LLC (2006) 39 Cal. 4th 223, 232-233, 46 Cal. Rptr. 3d 57, 138 P.3d 207]* . However, the ordinary rules governing the amendment of complaints and their relation back to the original complaint apply to these pending lawsuits [*Branick v. Downey Savings & Loan Assn. (2006) 39 Cal. 4th 235, 239, 46 Cal. Rptr. 3d 66, 138 P.3d 214]* . Therefore, a complaint brought by a plaintiff who no longer has standing under Proposition 64 may be amended to name a new plaintiff who does meet the standing requirements, so long as the proposed new plaintiff is not stating facts that give rise to a wholly distinct and different cause of action against the defendant [*Branick v. Downey Savings & Loan Assn. (2006) 39 Cal. 4th 235, 243, 46 Cal. Rptr. 3d 66, 138 P.3d 214* ; *see, e.g.,* *Foundation For Taxpayer & Consumer Rights v. Nextel Commc'ns, Inc. (2006) 143 Cal. App. 4th 131, 136, 48 Cal. Rptr. 3d 836* (abuse of discretion for trial court to refuse to allow amendment)]. For purposes of meeting the applicable statute of limitations, any amendment would relate back to the original complaint if the amended complaint rests on the same general set of facts, involves the same injury, and

refers to the same instrumentality as the original complaint [*Branick v. Downey Savings & Loan Assn. (2006) 39 Cal. 4th 235, 244, 46 Cal. Rptr. 3d 66, 138 P.3d 214]* .

A plaintiff who has been given an opportunity to amend but cannot meet the requirements for standing, and who has not identified a substitute plaintiff who does meet the requirements for standing, may not have a right to precertification discovery in an attempt to locate an appropriate representative to continue the original plaintiff's action as a class action [*see, e.g.,* *Cryoport Systems v. CNA Ins. Companies (2007) 149 Cal. App. 4th 627, 633-634, 57 Cal. Rptr. 3d 358]* . However, when a class action is brought, a plaintiff who is not a class member or is otherwise unqualified to serve as a class representative may, in appropriate cases, move for precertification discovery for the purposes of identifying a proper class representative [*Safeco Ins. Co. of America v. Superior Court (2009) 173 Cal. App. 4th 814, 828, 92 Cal. Rptr. 3d 814]* . The absence of a reasonable, good-faith belief that the plaintiff had standing under the law in effect at the time the plaintiff was first named as a plaintiff will ordinarily compel denial of a motion for precertification discovery. In other circumstances, however, a trial court should exercise its sound discretion to determine whether the potential for abuse in allowing precertification discovery outweighs the rights of the parties in the particular circumstances of the case [*Safeco Ins. Co. of America v. Superior Court (2009) 173 Cal. App. 4th 814, 833, 92 Cal. Rptr. 3d 814]* .

If a plaintiff suffered actual injury sufficient to meet the requirements for standing under Proposition 64, but prior to the passage of Proposition 64 entered into a settlement agreement under which plaintiff released all claims for that injury at least partly in exchange for the right to pursue a claim for injunctive relief, the general rule applying the changes made by Proposition 64 to actions pending at the time of its passage in November 2004 does not bar such a plaintiff from prosecuting the action for injunctive relief [*Zermeno v. Precis, Inc. (2009) 180 Cal. App. 4th 773, 780, 103 Cal. Rptr. 3d 360]* .

Collateral estoppel may not bar an unfair competition action seeking class certification under California law just because a court in a previous action alleging the same actionable conduct denied class certification, if the class certification in the previous action was denied because the proposed class included all plaintiffs eligible to bring suit under the more liberal pre-Proposition 64 standing requirements and class certification in the subsequent action is limited to only those plaintiffs who can meet the more stringent standing requirements imposed by Proposition 64 [*Johnson v. GlaxoSmithKline, Inc. (2008) 166 Cal. App. 4th 1497, 1514-1515, 83 Cal. Rptr. 3d 607*].

When certifying a plaintiff class under the current requirements imposed by Proposition 64, even though only the named plaintiff must meet the requirements to establish standing, the class certification process still necessarily includes an inquiry into whether the material questions of law or fact common to the members of the class are substantially similar and predominate over questions affecting the individual class members [*Steroid Hormone Product Cases (2010) 181 Cal. App. 4th 145, 158, 104 Cal. Rptr. 3d 329* ; *see also* *McAdams v. Monier, Inc. (2010) 182 Cal. App. 4th 174, 190-191, 105 Cal. Rptr. 3d 704]* . However, class certification should not be denied on the grounds that factual issues surrounding actual injury and causation are not substantially similar among the unnamed class members if those inquiries are not necessary to establishing a right to the remedy sought. In one case, for example, a plaintiff sought class certification in a lawsuit seeking the disgorgement of money received by a defendant by selling over-the-counter nutritional supplements that contained steroids that were illegal to sell or possess without a prescription. The trial court denied class certification because of individualized factual inquiries for each class member as to whether the illegality of the product was material to the decision to purchase. The court of appeal reversed, holding that class certification was improperly denied because establishing a right to restitution under the facts required only proof that the defendant's conduct in selling the product was unlawful and evidence of how much money the defendant received through the sale of the unlawful product [*Steroid Hormone Product Cases (2010) 181 Cal. App. 4th 145, 154-155, 104 Cal. Rptr. 3d 329]* .

As individualized proof of reliance and injury are not generally required for nonrepresentative class members when a class action seeks restitution for alleged misrepresentations in extensive, long-term advertising campaigns, as noted

above, issues concerning reliance by and injury to unnamed class members will not foreclose a class action in that context [*McAdams v. Monier, Inc. (2010) 182 Cal. App. 4th 174, 192, 105 Cal. Rptr. 3d 704]* . However, in advertising campaigns of shorter duration, for example a campaign lasting only six months, evidence that many or most of the proposed class members were never actually exposed to alleged misrepresentations can defeat an attempt to certify a class by showing that there was no class-wide injury [*Pfizer Inc. v. Superior Court (2010) 182 Cal. App. 4th 622, 631-633, 105 Cal. Rptr. 3d 795]* .

[2] Suit by Public Attorney

An action for any relief under *Bus. & Prof. Code § 17203* may also be prosecuted in the name of the people of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement of the district attorney in actions involving violation of a county ordinance, by a city attorney of a city having a population in excess of 750,000, by a city attorney in any city and county, or by a city prosecutor in any city or county having a full-time city prosecutor who has the consent of the either on his or her own complaint or on that of any board, officer, person, corporation, or association [*Bus. & Prof. Code § 17204*]. As the remedies and penalties provided by the unfair competition statute are cumulative to each other and to remedies and penalties available under all other laws of California, a public prosecutor's authority to pursue a remedy under the unfair competition statute is curtailed only as expressly provided by some other law [*Bus. & Prof. Code § 17205*; *see, e.g.,* *Blue Cross of California, Inc. v. Superior Court (2009) 180 Cal. App. 4th 1237, 1249-1255, -- Cal. Rptr. 3d* -- (city prosecutor was not barred from pursuing unfair competition claims against health care service plan for violations of Knox-Keene Health Care Service Plan Act, *Health & Safety Code § 1340 et seq.*)].

A city attorney or other public official is not limited to seeking injunctive relief and civil penalties, but may obtain restitution and disgorgement of illicit profits [*see* *People v. Thomas Shelton Powers, M.D., Inc. (1992) 2 Cal. App. 4th 330, 339, 3 Cal. Rptr. 2d 34]* .

Because an unfair competition action brought by a prosecutor is a law enforcement action primarily for the benefit of the public, res judicata principles do not prevent a person who has been defrauded from seeking restitution in a separate unfair competition suit brought subsequent to the action brought by the public prosecutor, at least if the private plaintiff did not receive restitution from the earlier action brought by the prosecutor [*Payne v. National Collection Sys., Inc. (2001) 91 Cal. App. 4th 1037, 1047, 111 Cal. Rptr. 2d 260]* .

[3] Defendants

[a] Nonresidents

Nonresident as well as resident businesses can be held to account for wrongful business conduct affecting California employers and employees. Thus, a Maryland corporation's use of covenants not to compete in its employment agreements with employees who were not California residents, to prevent them from obtaining employment in California, violated the unfair competition law [*Application Group, Inc. v. Hunter Group, Inc. (1998) 61 Cal. App. 4th 881, 908, 72 Cal. Rptr. 2d 73]* . However, in that case, an injury was produced in California to California employers. To meet due process concerns, the California unfair competition law may not be applied to defendants whose headquarters and principal places of operation are outside California, if the injuries are suffered by non-California residents and are caused by conduct occurring outside California [*Norwest Mortgage, Inc. v. Superior Court (1999) 72 Cal. App. 4th 214, 222-227, 85 Cal. Rptr. 2d 18* (reversing nationwide class certification)].

[b] Government Entity Immunity

Government entities do not meet the definition of "person" applicable to statutory unfair competition actions and thus are not subject to suit brought under the statutory provisions [*California Med. Assn. v. Regents of Univ. of Cal. (2000) 79 Cal. App. 4th 542, 551, 94 Cal. Rptr. 2d 194* ; *Janis v. California State Lottery Comm'n (1998) 68 Cal. App. 4th*

824, 831, 80 Cal. Rptr. 2d 549 ; *see Bus. & Prof. Code §§ 17201, 17506*]. However, the State Compensation Insurance Fund, although a type of state entity, is statutorily excepted from most protections provided to government entities and may be liable under the unfair competition statute [*Notrica v. State Comp. Ins. Fund (1999) 70 Cal. App. 4th 911, 939-944, 83 Cal. Rptr. 2d 89]* . Similarly, a charter school run by a nongovernmental entity is subject to suit under the unfair competition statute, even if the charter school is subject to some degree of oversight by a public school district [*Wells v. One2One Learning Foundation (2006) 39 Cal. 4th 1164*].

[4] Time for Bringing Action

An action based on unfair competition must be commenced within four years after the cause of action accrued [*Bus. & Prof. Code § 17208*; *see Mangini v. Aerojet-Gen. Corp. (1991) 230 Cal. App. 3d 1125, 1156, 281 Cal. Rptr. 827* (continuing nuisance isdifferent from "continuing misconduct"; unfair competition suit required to be commenced within four years after end of lease term during which defendant failed to remove hazardous waste)]. Court of appeal opinions are in disagreement as to whether a delayed discovery rule, under which the limitations period does not begin to run until a reasonable person would have discovered the factual basis for the claim, may be applied in an unfair competition action [*compare Broberg v. The Guardian Life Ins. Co. of America (2009) 171 Cal. App. 4th 912, 920-921, 90 Cal. Rptr. 3d 225* (discovery rule applied to complaint alleging deceptive insurance marketing and sales practices) *with Snapp & Associates Ins. Services, Inc. v. Robertson (2002) 96 Cal. App. 4th 884, 891, 117 Cal. Rptr. 2d 331* (delayed discovery rule held inapplicable)].

[5] Notification Requirement

If a cause of action under the unfair competition law is alleged or the application or construction of *Bus. & Prof. Code § 17200 et seq.* is in issue in any proceeding in the Supreme Court, a court of appeal, or the appellate department of a superior court, the person who commenced the proceeding must serve notice of it. The notice, plus a copy of the brief or petition and brief, must be served on the Attorney General (directed to the attention of the Consumer Law Section) and on the district attorney of the county in which the lower court action or proceeding was originally filed. The notice, brief, and petition, if any, must be served within three days aftercommencement of the appellate proceeding, provided that the time may be extended by the chief justice or presiding judge or justice for good cause shown. No judgment or relief, temporary or permanent, can be granted until proof of service of this notice is filed with the court [*Bus. & Prof. Code § 17209*]. In addition, at the request of the Attorney General or a district attorney, any person who has filed any other document with the court, including all or a portion of the appellate record, must provide a copy of that document without charge to the Attorney General or district attorney within five days after the request [*Bus. & Prof. Code § 17209*].

The phrase "within three days after commencement of the appellate proceeding" in *Bus. & Prof. Code § 17209* has been held by one court of appeal to mean that the Attorney General and local district attorney must be served with the appellant's opening brief within three days after its being filed, because it is not until this point that the issues on appeal are specifically set forth and a determination may be made whether to file an amicus curiae brief [*Californians for Population Stabilization v. Hewlett-Packard Co. (1997) 58 Cal. App. 4th 273, 284-285, 67 Cal. Rptr. 2d 621* (rejecting contention that statute establishes jurisdictional requirement for all appellate actions involving unfair competition)].

[6] No Right to Jury Trial

There is no right to a jury trial in an action that is brought solely under the unfair competition statute, even if a jury trial would be available in an action to enforce directly a statute the violation of which forms the basis for the unfair competition action [*Hodge v. Superior Court (2006) 145 Cal. App. 4th 278, 284, 51 Cal. Rptr. 3d 519]* . An action brought under the unfair competition statute is a separate cause of action providing equitable, rather than legal, remedies. As such, no right to a jury trial exists [*Hodge v. Superior Court (2006) 145 Cal. App. 4th 278, 284, 51 Cal. Rptr. 3d 519* ; *see § 565.34*]. This does not change merely because the defendant asserts an affirmative defense

requiring resolution of disputed factual issues related to statutory or contractual duties that are otherwise legal in nature [*Hodge v. Superior Court (2006) 145 Cal. App. 4th 278, 285-287, 51 Cal. Rptr. 3d 519]* .

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§ 565.36 Suit for Civil Penalty

[1] In General

Any person who engages, has engaged, or proposes to engage in unfair competition is liable for a civil penalty not to exceed $2,500 for each violation. The penalty is assessed and recovered in a civil action brought in the name of the people of California by the Attorney General, by any district attorney, by any county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance, by a city attorney of a city with a population exceeding 750,000, by a city attorney in any city and county, and, with the consent of the district attorney, by a city prosecutor in any city having a full time city prosecutor [*Bus. & Prof. Code § 17206(a)*; *see Bus. & Prof. Code § 17206(c)-(f)* (distribution of recovered penalty among public treasurers); *People v. Dollar Rent-A-Car Sys., Inc. (1989) 211 Cal. App. 3d 119, 132, 259 Cal. Rptr. 191* ($100,000 penalty justified by evidence of 500,000 misleading and deceptive contracts over four-year period and 1,500 false repair invoices)].

Bus. & Prof. Code § 17206(a) has been interpreted to require imposition of a civil penalty for any act that constitutes unfair competition, although the court has discretion to set the amount imposed after considering mitigating and aggravating factors [*People v. Custom Craft Carpets, Inc. (1984) 159 Cal. App. 3d 676, 686, 206 Cal. Rptr. 12* (false advertising under *Bus. & Prof. Code § 17500 et seq.*); *People v. National Ass'n of Realtors (1984) 155 Cal. App. 3d 578, 584-588, 202 Cal. Rptr. 243* (violation of Cartwright Act, *Bus. & Prof. Code § 16700 et seq.*)].

[2] Determination of Penalty

In assessing a civil penalty, a court is directed to consider any and all of the following factors [*Bus. & Prof. Code § 17206(b)*; *see generally* Stats. 1992, ch. 430, § 6 (1992 amendment not intended to change decisional law regarding methods of determining number of violations on which award of civil penalties is based)]:

- The nature and seriousness of the misconduct;
- The number of violations;

- The persistence of the misconduct;
- The length of time over which the misconduct occurred;
- The willfulness of the defendant's misconduct; and
- The defendant's assets, liabilities, and net worth.

A court is authorized to impose a civil penalty based on any of these factors, or any combination of these factors, but it is up to the parties to present evidence of the factor each party wants to be considered. For example, the prosecuting party is not required to present evidence of a defendant's financial condition, and if neither the prosecuting party nor the defendant present that evidence, a court may impose a civil penalty without it [*People v. First Fed. Credit Corp. (2002) 104 Cal. App. 4th 721, 728-729, 128 Cal. Rptr. 2d 542]* .

A finding that the defendant's conduct was "reprehensible" is not required to impose a civil penalty [*People ex rel. Bill Lockyer v. Fremont Life Ins. Co. (2002) 104 Cal. App. 4th 508, 524-527, 128 Cal. Rptr. 2d 463]* .

[3] Penalty for Violation of Injunction

Any person who intentionally violates any injunction prohibiting unfair competition, which was issued under *Bus. & Prof. Code § 17203*, is liable for a civil penalty not to exceed $6,000 for each violation. If the conduct constituting the violation is of a continuing nature, each day of the conduct is a separate and distinct violation. In determining the amount of the civil penalty, the court must consider all relevant circumstances, including [*Bus. & Prof. Code § 17207(a)*]:

- The extent of the harm caused by the conduct in question;
- The nature and persistence of this conduct;
- The length of time over which the conduct has occurred;
- The assets, liabilities, and net worth of the defendant, whether corporate or individual; and
- Any corrective action taken by the defendant.

This penalty must be assessed and recovered in a civil action brought in the name of the people of California by the Attorney General, by any district attorney, or by any city attorney [*see Bus. & Prof. Code § 17207(b)*; *see also Bus. & Prof. Code § 17207(c),(d)* (distribution of recovered penalty among public treasurers)].

[4] Penalty for Violation Against Senior Citizen or Disabled Person

[a] In General

In addition to any liability for a civil penalty pursuant to *Bus. & Prof. Code § 17206*, any person who violates *Bus. & Prof. Code § 17200 et seq.* by perpetrating an act or acts of unfair competition against one or more senior citizens or disabled persons is liable for a civil penalty not to exceed $2,500 for each violation, which may be assessed and recovered in a civil action as prescribed in *Bus. & Prof. Code § 17206* [*Bus. & Prof. Code § 17206.1*]. *Civ. Code § 3345(b)* provides that this penalty, or any other discretionary civil penalty for unfair or deceptive acts or practices or unfair methods of competition perpetrated against senior citizens or disabled persons, may be trebled if one or more

affirmative findings are made. The factors with respect to which an affirmative finding or findings are required under *Civ. Code § 3345(b)* are the same as those required to be considered by the trier of fact under *Bus. & Prof. Code § 17206.1(c)* [*see Civ. Code § 3345(b)*; *see also § 565.36[4][c]*].

For a form of allegations relating to the factors to be considered under *Bus. & Prof. Code § 17206.1*, *see* Ch. 504, *Sales: Consumers Legal Remedies Act* . For discussion and forms regarding findings and requests for findings generally, *see* Ch. 529, *Statement of Decision* .

[b] Senior Citizen and Disabled Person Defined

As used in *Bus. & Prof. Code § 17206.1*, a senior citizen is a person who is 65 years of age or older [*Bus. & Prof. Code § 17206.1(b)(1)*].

As used in *Bus. & Prof. Code § 17206.1*, a disabled person is any person who has a physical or mental impairment that substantially limits one or more major life activities [*Bus. & Prof. Code § 17206.1(b)(2)*]. Major life activities are functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working [*Bus. & Prof. Code § 17206.1(b)(2)(B)*]. Physical or mental impairment means any of the following [*Bus. & Prof. Code § 17206.1(b)(2)(A)*]:

- Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss substantially affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; or endocrine; and

- Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, vision, speech, or hearing impairment, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, and emotional illness [*Bus. & Prof. Code § 17206.1(b)(2)(A)*].

[c] Factors Considered by Court for Imposition of Penalty

In determining whether to impose a civil penalty pursuant to *Bus. & Prof. Code § 17206.1(a)*, the trier of fact must consider, in addition to other appropriate factors, the extent to which any or all of the following factors are present [*Bus. & Prof. Code § 17206.1(c)*]:

- The defendant knew or should have known that his or her conduct was directed to one or more senior citizens or disabled persons.

- The defendant's conduct caused one or more senior citizens or disabled persons to suffer: loss or encumbrance of a primary residence, principal employment, or source of income; substantial loss of property set aside for retirement, or for personal or family care and maintenance; or substantial loss of payments received under pension or retirement plan or a government benefits program, or assets essential to the health or welfare of the senior citizen or disabled person.

- One or more senior citizens or disabled persons are substantially more vulnerable than other members of the public to the defendant's conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damages resulting from the defendant's conduct.

An affirmative finding on one or more of these issues is required to treble the penalty pursuant to *Civ. Code § 3345(b)* [*Civ. Code § 3345(b)*].

[d] Restitution

Any court of competent jurisdiction hearing an action pursuant to *Bus. & Prof. Code § 17206.1* may make such orders and judgments as may be necessary to restore to any senior citizen or disabled person any money or property, real or personal, that may have been acquired by means of a violation of *Bus. & Prof. Code § 1720 et seq.* [*Bus. & Prof. Code § 17206.1(d)*]. Restitution ordered pursuant to *Bus. & Prof. Code § 17206.1(d)* must be given priority over recovery of any civil penalty designated by the court as imposed pursuant to *Bus. & Prof. Code § 17206(a)*. If the court determines that full restitution cannot be made to the senior citizens or disabled persons, either at the time of judgment or by a future date determined by the court, then restitution under *Bus.& Prof. Code § 17206.1(d)* must be made on a pro rata basis depending on the amount of the loss [*Bus. & Prof. Code § 17206.1(d)*].

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§ 565.37 Patent and Copyright Cases

[1] Federal Preemption Generally

The U.S. Supreme Court has held that if anything is within the purview of federal patent or copyright law, but is not protected by that law, the Supremacy Clause [*see* U.S. Const. art. VI] precludes the states from applying unfair competition law to prohibit copying or to award damages for copying [*see Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 231-233, 84 S. Ct. 784, 11 L. Ed. 2d 661* ; *Compco Corp. v. Day-Brite Lighting, Inc. (1964) 376 U.S. 234, 237-239, 84 S. Ct. 779, 11 L. Ed. 2d 669]* . A state law that substantially interferes with the enjoyment of an unpatented utilitarian or design concept that has been freely disclosed by its author to the public at large impermissibly contravenes the ultimate goal of public disclosure and use that is the centerpiece of federal patent policy [*Bonito Boats v. Thunder Craft Boats (1989) 489 U.S. 141, 156-157, 109 S. Ct. 971, 103 L. Ed. 2d 118]* . Such state statutes threaten the national uniformity promoted by the patent law and raise the specter of state-created monopolies in a host of useful shapes and processes for which patent protection has been denied or is otherwise unobtainable [*Bonito Boats v. Thunder Craft Boats (1989) 489 U.S. 141, 167, 109 S. Ct. 971, 103 L. Ed. 2d 118]* .

A federal decision to forgo regulation in a given area may imply an authoritative federal decision that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate [*Bonito Boats v. Thunder Craft Boats (1989) 489 U.S. 141, 151-152, 109 S. Ct. 971, 103 L. Ed. 2d 118]* . To determine whether federal patent or copyright law preempts a state-law unfair competition claim, the court must analyze whether the state-law claim contains an element not shared by the federal law--that is, an extra element that changes the nature of the action so that it is qualitatively different from a copyright or patent infringement claim. If copying the plaintiff's product in itself infringes the state-created right, then the state-created right is preempted [*Summit Mach. Tool Mfg. v. Victor CNC Sys. (9th Cir. 1993) 7 F.3d 1434, 1439-1440, 1442]* .

[2] Limited State Regulation Allowed

The holdings in *Bonito Boats*, *Sears*, and *Compco* [*see § 565.37[1]*] do not preclude all state restriction of unfair competition and trade secrets. Indeed, Section 43(a) of the Lanham Act [*15 U.S.C.S. § 1125(a)*], discussed in Ch. 549,

Trademarks and Trade Names , is an affirmative indication from Congress that both the law of unfair competition and the law of trade secret protection are consistent with the balance struck by the patent laws [*Bonito Boats v. Thunder Craft Boats (1989) 489 U.S. 141, 166, 109 S. Ct. 971, 103 L. Ed. 2d 118]* .

The states remain free to place limited regulations on the circumstances in which unpatentable designs are used to prevent consumer confusion as to source and to prohibit the tortious appropriation of private information [*Bonito Boats v. Thunder Craft Boats (1989) 489 U.S. 141, 165-166, 109 S. Ct. 971, 103 L. Ed. 2d 118]* . The law of unfair competition has its roots in the common law tort of deceit: its general concern is with protecting consumers from confusion as to source. The common law of unfair competition is limited, however, to protection against copying nonfunctional aspects of consumer products that have acquired secondary meaning so that they operate as a designation of source [*Bonito Boats v. Thunder Craft Boats (1989) 489 U.S. 141, 157, 158, 109 S. Ct. 971, 103 L. Ed. 2d 118]* . Judge Learned Hand phrased the distinction as follows: "[T]he plaintiff has the right not to lose [his or her] customers through false representations that those are [the plaintiff's] wares which in fact are not, but [the plaintiff] may not monopolize any design or pattern, however trifling. The defendant, on the other hand, may copy [the] plaintiff's goods slavishly down to the minutest detail: but [the defendant] may not represent [himself or herself] as the plaintiff in their sale" [*Crescent Tool Co. v. Kilborn & Bishop Co. (2d Cir. 1917) 247 F. 299, 301]* .

State unfair competition law may still require that a person take precautionary steps, such as labeling, to prevent customers from being misled as to the source of goods or services, and the state may enforce that requirement through injunctions and awards of damages [*Tomlin v. Walt Disney Prods. (1971) 18 Cal. App. 3d 226, 234-235, 96 Cal. Rptr. 118* ; *see* *Compco Corp. v. Day-Brite Lighting, Inc. (1964) 376 U.S. 234, 238, 84 S. Ct. 779, 11 L. Ed. 2d 669* ; *Sears, Roebuck & Co. v. Stiffel Co. (1964) 376 U.S. 225, 232, 84 S. Ct. 784, 11 L. Ed. 2d 661]* . Thus, a state court may enjoin a defendant to take adequate precautions to avoid public confusion [*see* *Allied Artists Pictures Corp. v. Friedman (1977) 68 Cal. App. 3d 127, 133-137, 137 Cal. Rptr. 94* ; *see also* *Sammons & Sons v. Ladd-Fab, Inc. (1982) 138 Cal. App. 3d 306, 313, 187 Cal. Rptr. 874* (complaint insufficient because allegations indicated adequate precaution to identify source of goods); *Capitol Records, Inc. v. Erickson (1969) 2 Cal. App. 3d 526, 537, 82 Cal. Rptr. 798* (preliminary injunction upheld because there was question of fact concerning adequacy of precautions taken by defendant)]. Damages may be imposed if a defendant imitates a name or design with the intent to deceive the public by palming off copies of goods as original or otherwise deliberately creating a likelihood of confusion of source [*see* *Gordon v. Warner Bros. Pictures, Inc. (1969) 269 Cal. App. 2d 31, 39-40, 74 Cal. Rptr. 499* ; *see also* *Summit Mach. Tool Mfg. v. Victor CNC Sys. (9th Cir. 1993) 7 F.3d 1434, 1441* (state unfair competition laws that seek to prevent reverse palming off are not preempted by federal law)].

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§ 565.50 Purposes of Act

The Unfair Practices Act (*Bus. & Prof. Code §§ 17000-17101*) prohibits specified practices, which the legislature has determined to be unfair, in order to safeguard against monopolies and to foster and encourage competition [*Bus. & Prof. Code § 17001*; *Uneedus v. California Shoppers, Inc. (1978) 86 Cal. App. 3d 932, 940-941, 150 Cal. Rptr. 596]* . Its provisions must be liberally construed toward that end [*Bus. & Prof. Code § 17002*].

The Act is directed at ongoing wrongful business conduct. The "practice" requirement envisions something more than a single transaction; it contemplates a pattern of conduct. A merger is not ongoing conduct, and hence cannot be enjoined under the Unfair Practices Act [*State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal. 3d 1147, 1169-1170, 252 Cal. Rptr. 221, 762 P.2d 385]* .

The Act is similar to the federal Robinson-Patman Act (*15 U.S.C.S. §§ 13, 13a-13c, 21a*), in that both proscribe three basic types of business practices: (1) price discrimination, (2) sales below cost, and (3) the granting of rebates and discounts not made available to all buyers on like terms or conditions [*Uneedus v. California Shoppers, Inc. (1978) 86 Cal. App. 3d 932, 937, 150 Cal. Rptr. 596]* . For a full discussion of the Robinson-Patman Act, see Von Kalinowski, Antitrust Laws and Trade Regulation, Ch. 4 (Matthew Bender).

The Unfair Practices Act reflects a "horizontal" concept of trade regulation: it protects first-line competition against predatory practices, but does not prohibit price discriminations that only affect second-line or third-line competition at the buyer level or lower. Thus, a seller may discriminate in favor of one purchaser if he or she has no intent to prevent or destroy competition of other sellers at his or her own level [*Plotkin v. Tanner's Vacuums (1975) 53 Cal. App. 3d 454, 458-459, 125 Cal. Rptr. 697]* .

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§ 565.51 Liability for Violation of Act

[1] Civil and Criminal

A civil action for injunctive relief and damages may be brought against a person who violates the act [*Bus. & Prof. Code § 17070*]. For discussion of the elements of a cause of action as to each type of violation, see*§ 565.71[2]*. For further discussion relating to remedies, discovery, and proof in such actions, see*§ 565.54[1]*. For a form of complaint for use in a civil action brought under the act, see*§ 565.230*.

Each violation of the act also constitutes a misdemeanor [*see Bus. & Prof. Code § 17100*].

[2] Liability of Agents

Any person who is a director, officer, or agent of any principal violating the act, and who assists or aids the principal, directly or indirectly, in that violation, is equally responsible with the principal [*Bus. & Prof. Code § 17095*]. Moreover, when an injunction proceeding or criminal action is brought against any person for his or her conduct as director, officer, or agent, it is sufficient to allege and prove the unlawful intent of the principal for which he or she acts [*Bus. & Prof. Code §§ 17096, 17101*].

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§ 565.52 Prohibited Practices

[1] Locality Discrimination

It is unlawful for any person engaged in the production, manufacture, distribution, or sale of any article or product of general use or consumption to create locality discriminations with intent to destroy the competition of any regular established dealer in that article or product or to prevent the competition of any person who in good faith intends and attempts to become such a dealer [*Bus. & Prof. Code §§ 17040*]. This prohibition embraces any scheme of special rebates, collateral contracts, or any device of any nature whereby locality discrimination is in substance or fact effected in violation of the spirit and intent of the Unfair Practices Act [*Bus. & Prof. Code § 17049*]. For discussion of what constitutes an "article or product," see*§ 565.52[2]*].

The essential elements of a cause of action based on locality discrimination are the following [*see Harris v. Capitol Records Distrib. Corp. (1966) 64 Cal. 2d 454, 460-461, 50 Cal. Rptr. 539, 413 P.2d 139]* :

- A person with two or more places of business makes a sale of an article or product at a lower price in one place than in another.

- The person acts with the intent to destroy his or her competition.

For further discussion concerning proof of intent, see*§ 565.54[3][a]*.

A locality discrimination is permissible when it is not intended to destroy or prevent competition, but reflects legitimate differences in costs of manufacture, sale, delivery, or transportation [*Bus. & Prof. Code § 17041*]. This exception is to be a matter of defense; it need not be negatived by the plaintiff in order to state a cause of action for locality discrimination [*see G.H.I.I. v. MTS, Inc. (1983) 147 Cal. App. 3d 256, 273-274, 195 Cal. Rptr. 211* (distinguishing contrary holding in *Green v. Grimes-Stassforth Stationery Co. (1940) 39 Cal. App. 2d 52, 55-56, 102 P.2d 452* , as based on prior law)]. For further discussion of situations in which the prohibition against locality discrimination does

not apply, see*§ 565.53*.

[2] Sales or Service Below Cost

It is unlawful for any person engaged in business within California to sell any article or product at less than its cost to the vendor, or to give awayany article or product, for the purpose of injuring competitors or destroying competition [*Bus. & Prof. Code § 17043*]. "Sell" and "give" include offering to sell or give, or advertising to sell or give, as well as actual selling or giving [*Bus. & Prof. Code §§ 17022, 17023*]. "Article or product" includes services, the output of a service trade, and any thing of value, as well as articles, products, and commodities (with specified exceptions relating to public utility services) [*Bus. & Prof. Code § 17024*; *Paramount Gen. Hosp. Co. v. National Med. Enters., Inc. (1974) 42 Cal. App. 3d 496, 501-502, 117 Cal. Rptr. 42* ; *see also Bus. & Prof. Code § 17048.5* (special prohibition against provision of warranty or repair service below cost)]. The prohibition against sales below cost embraces any scheme of special rebates, collateral contracts, or any device of any nature whereby the sale below cost is in substance or fact effected in violation of the spirit and intent of the Unfair Practices Act [*Bus. & Prof. Code § 17049*; *see, e.g., Paramount Gen. Hosp. Co. v. National Med. Enters., Inc. (1974) 42 Cal. App. 3d 496, 500-504, 117 Cal. Rptr. 42* (cause of action for sales below cost stated when plaintiff alleged that the defendant was offering incidental services below cost in connection with lease of medical offices)].

In order to demonstrate a violation of these provisions, a plaintiff must show that a defendant acted purposely--that is, with a desire to injure a competitor or destroy competition. It is not enough that the defendant may have acted with knowledge that competitors may be injured by its actions in selling below cost [*Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 174-175, 83 Cal. Rptr. 2d 548, 973 P.2d 527* (distinguishing "purpose" from "intent")]. The Supreme Court opinion so holding did not address the statutory, rebuttable presumption of intent or purpose that is created upon proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, along with proof of injurious effect [*see Bus. & Prof. Code § 17071*; *see also § 565.54[3][a]*]. Arguably, the Supreme Court's holding is inconsistent with these evidentiary presumptions, and at very least it appears likely that, despite the Supreme Court's holding, a defendant may still be forced to bear the burden of rebutting a statutory presumption of the requisite purpose by proving the applicability of a statutory exception to the prohibition on selling below cost [*see Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 212-219, 83 Cal. Rptr. 2d 548, 973 P.2d 527* (Baxter, J., concurring and dissenting); *Bus. & Prof. Code §§ 17071, 17050*; *see also Bus. & Prof. Code § 17026.1*].

"Cost" as applied to production includes cost of raw materials, labor, and all overhead expenses of the producer [*Bus. & Prof. Code § 17026*; *see Bus. & Prof. Code § 17029* ("overhead expenses" defined as all costs of doing business incurred in conduct of business)].

As applied to distribution, "cost" means the distributor's invoice or replacement cost, whichever is lower, plus the cost of doing business, which in the absence of proof constitutes a six percent markup of the invoice or replacement cost [*Bus. & Prof. Code § 17026*; *see Bus. & Prof. Code § 17029* ("cost of doing business" defined as all costs of doing business incurred in conduct of business)]. Thus, in alleging a distributor's cost, a plaintiff must normally state the sale price, the defendant's cost in the product, and his or her cost of doing business [*see G.H.I.I. v. MTS, Inc. (1983) 147 Cal. App. 3d 256, 275, 195 Cal. Rptr. 211]* . Furthermore, in establishing a distributor's cost, the invoice cost of an article or product purchased at a forced, bankruptcy, closeout, or other sale outside the ordinary channels of trade may not be used to justify a price lower than one based on the cost of replacement, through ordinary channels of trade as of the date of sale, unless the article or product is kept separate from goods purchased in the ordinary channels of trade and is advertised and sold as merchandise purchased at a forced, bankruptcy, closeout, sale, or by means other than through the ordinary channels of trade [*Bus. & Prof. Code § 17027* (also requiring that advertising must state conditions under which goods were purchased, and quantity to be sold or offered for sale); *see Bus. & Prof. Code § 17028* (definition of "ordinary channels of trade"); *see also § 565.53[2]*].

As applied to warranty service agreements, "cost" includes the cost of parts, transporting the parts, labor, and all overhead expenses of the service agency [*Bus. & Prof. Code § 17026*].

Discounts granted for cash payments may not be used to reduce cost [*Bus. & Prof. Code § 17026*; *but see Bus. & Prof. Code § 17026.5* (exception for nondiscriminatory discounts offered to cigarette distributors), *overruling E & H Wholesale, Inc. v. Glaser Bros. (1984) 158 Cal. App. 3d 728, 733-735, 204 Cal. Rptr. 838]* .

Because *Bus. & Prof. Code §§ 17026* and *17029* define cost to include all variable and fixed costs, the Unfair Practices Act apparently employs a fully allocated cost or fully distributed cost standard to determine whether a sale violates *Bus. & Prof. Code § 17043* [*Turnbull & Turnbull v. ARA Transp., Inc. (1990) 219 Cal. App. 3d 811, 820, 268 Cal. Rptr. 856* (variable costs are costs that vary with changes in output, whereas fixed costs are those that do not vary with changes in output)]. The concept of fully allocated cost has been equated with average total cost [*Turnbull & Turnbull v. ARA Transp., Inc. (1990) 219 Cal. App. 3d 811, 819-820, 268 Cal. Rptr. 856]* . The fully allocated cost method was challenged as arbitrary and irrational and thus in violation of the due process clause of the California and United States Constitutions for favoring small, less efficient, single-product competitors. The fully allocated cost method survived the challenge, however, with the court of appeal holding that, although not perfect, the fully allocated cost method, when viewed in conjunction with the injurious intent requirement of *Bus. & Prof. Code § 17043*, is rationally related to the valid legislative purpose enunciated in *Bus. & Prof. Code § 17001*, which is to guard against the creation or perpetuation of monopolies and of fostering and encouraging competition [*Turnbull & Turnbull v. ARA Transp., Inc. (1990) 219 Cal. App. 3d 811, 823, 826, 268 Cal. Rptr. 856]* . A defendant is free to demonstrate to the trier of fact that its fully allocated cost, using another reasonable allocation method other than that used by plaintiff, is actually lower than plaintiff alleges and lower than defendant's sales or bid price [*Turnbull & Turnbull v. ARA Transp., Inc. (1990) 219 Cal. App. 3d 811, 822-823, 268 Cal. Rptr. 856* ; *see also Pan Asia Venture Capital Corp. v. Hearst Corp. (1999) 74 Cal. App. 4th 424, 439, 88 Cal. Rptr. 2d 118* (error for trial court to refuse to allow defendant to present its cost allocation method to jury)]. To be legally acceptable, the allocation of indirect and fixed overhead costs to a particular product or service must be reasonably related to the burden the product or service imposes on the overall cost of doing business [*Turnbull & Turnbull v. ARA Transp., Inc. (1990) 219 Cal. App. 3d 811, 822, 268 Cal. Rptr. 856]* .

The rationale underlying the challenge proceeds as follows. Under another method, such as the variable cost method, a multi-product competitor could allocate major indirect or fixed costs disproportionately among its products and thus, for one or more products, claim a cost of manufacture far below that of a single-product competitor. After having driven the single-product competitor from the market, the multi-product competitor could reallocate its fixed costs to attack some other product line or market. Thus, the appellant in *Turnbull* contended, application of the fully allocated cost method improperly favors smaller, less efficient, single-product competitors [*Turnbull & Turnbull v. ARA Transp., Inc. (1990) 219 Cal. App. 3d 811, 822-823, 268 Cal. Rptr. 856]* .

The fully allocated cost method was also challenged as preempted by the Sherman Act (*15 U.S.C.S. § 1 et seq.*) on the ground that its application prohibits procompetitive conduct that is not injurious to competition, specifically that it makes rational, profitable, and nonpredatory pricing above long-run incremental cost presumptively unlawful [*Turnbull & Turnbull v. ARA Transp., Inc. (1990) 219 Cal. App. 3d 811, 823-824, 268 Cal. Rptr. 856]* . Application of the fully allocated cost method, however, is not preempted by federal antitrust law [*Turnbull & Turnbull v. ARA Transp., Inc. (1990) 219 Cal. App. 3d 811, 826, 268 Cal. Rptr. 856]* . One reason is that there is no clear federal standard with which the Unfair Practices Act (*Bus. & Prof. Code § 17000 et seq.*) may be said to conflict for determining whether pricing is predatory. The federal circuit courts disagree on the appropriate cost method, and the United States Supreme Court has not made a determination that any particular formula or cost method should be used in determining whether pricing is predatory [*Turnbull & Turnbull v. ARA Transp., Inc. (1990) 219 Cal. App. 3d 811, 825, 268 Cal. Rptr. 856]* . The difference between the approaches taken by California courts and the Ninth Circuit has also been described as only a matter of allocation of evidentiary burdens. Assuming proof of injury to a competitor has been made, California allows plaintiffs to establish a prima facie case with proof of prices below average total cost. The defendant then has the burden of negating the inference of illegal intent or establishing an affirmative defense. Under

federal law, the plaintiff who relies on prices below average total cost, but above average variable cost, has not created a presumption of illegal intent. To establish such a presumption under federal law, the plaintiff must show that no legitimate business reason for the below-cost price exists. Therefore, a price below average total cost but above average variable cost does not always violate California law, nor is such a price a guarantee of immunity under federal law [*William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co. (9th Cir. 1981) 668 F.2d 1014, 1049-1050* ; *Turnbull & Turnbull v. ARA Transp., Inc. (1990) 219 Cal. App. 3d 811, 824-825, 268 Cal. Rptr. 856]* .

Of course, in determining whether defendant's sales of a product were below cost, it is necessary to define the relevant "product." The defendant and the trial court are not necessarily bound by the plaintiff's characterization of the relevant product for purposes of cost allocation [*see Western Union Fin. Servs., Inc. v. First Data Corp. (1993) 20 Cal. App. 4th 1530, 1535-1538, 25 Cal. Rptr. 2d 341* (trial court was not bound to accept plaintiff's characterization of domestic money transfers as a separate "product" from international transfers and allocate only costs and revenues attributable to that "product" in determining whether defendant sold money transfer services below cost); *but see Fisherman's Wharf Bay Cruise Corp. v. Superior Court (2003) 114 Cal. App. 4th 309, 322-330, 7 Cal. Rptr. 3d 628* (bay cruise ship line could not avoid claim of selling wholesale tickets to tourist agencies below cost by arguing that relevant product was all cruise tickets sold, both wholesale and retail to walkup ticket buyers)].

For further discussion concerning proof of cost, see *§ 565.54[3][b]*. For discussion of permissible sales below cost, see*§ 565.53*.

[3] "Loss Leader" Practices

It is unlawful for any person engaged in business within California to sell or use any article or product as a "loss leader" [*Bus. & Prof. Code §§ 17044*]. For the purpose of this prohibition, "loss leader" is defined as any article or product sold at less than cost if: (1) the purpose is to induce, promote, or encourage the purchase of other merchandise; (2) the effect is a tendency or capacity to mislead or deceive purchasers or prospective purchasers; or (3) the effect is to divert trade from or otherwise injure competitors [*Bus. & Prof. Code §§ 17030, 17044*; for definition of "article or product," *see § 565.52[2]*].

Despite statutory language that might suggest otherwise, the California Supreme Court has held that proving a violation of these provisions requires proof that the defendant acted purposely--that is, with a desire to injure a competitor or destroy competition [*Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 178, 83 Cal. Rptr. 2d 548, 973 P.2d 527]* . However, the Supreme Court opinion so holdingdid not address the statutory, rebuttable presumption of intent or purpose that may be used to shift to a defendant the burden of proving that the requisite purpose was absent [*see § 565.52[2]*]. The evidentiary presumptions are discussed further in § 565.54[3][a].

For discussion of situations in which the prohibition against loss leaders does not apply, see*§ 565.53*.

[4] Secret Rebates or Unearned Discounts

It is unlawful to make secret payments to allow rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise; or to secretly extend to certain purchasers special services or privileges not extended to all purchasers on like terms and conditions, when the practice injures a competitor and tends to destroy competition [*Bus. & Prof. Code § 17045*]. It is not necessary to purchase "on like terms and conditions" to state a claim that a competitor received a secret rebate or unearned discount, because that phrase only attaches to "special services or privileges not extended to all purchasers" [*Eddins v. Redstone (2005) 134 Cal. App. 4th 290, 332, 35 Cal. Rptr. 3d 863]* .

The primary function of this prohibition is to prevent distributors from discriminating between purchasers. However, a purchaser who accepts a prohibited rebate or discount, as well as the distributor who offers it, is deemed to violate this prohibition [*Diesel Elec. Sales & Serv., Inc. v. Marco Marine San Diego, Inc. (1993) 16 Cal. App. 4th 202, 214-215,*

20 Cal. Rptr. 2d 62 ; *G.H.I.I. v. MTS, Inc. (1983) 147 Cal. App. 3d 256, 271]* . Unlike the Robinson-Patman Antidiscrimination Act [*see 15 U.S.C.S. § 13(f)*], a buyer can violate *Bus. & Prof. Code § 17045* without "knowingly receiving" the illegal discount [*Diesel Elec. Sales & Serv., Inc. v. Marco Marine San Diego, Inc. (1993) 16 Cal. App. 4th 202, 214 n.4, 20 Cal. Rptr. 2d 62* (dicta; defendant knew it received discounts other distributors did not)]. *Bus. & Prof. Code § 17045* applies to secret payments from a seller to a purchaser, but it does not apply to secret payments from a purchaser to a seller [*Kunert v. Mission Fin. Servs. Corp. (2003) 110 Cal. App. 4th 242, 260-261, 1 Cal. Rptr. 3d 589]* .

However, *Bus. & Prof. Code § 17045* as applied to trailer-on-flatcar service has been preempted by exemptions granted by the Interstate Commerce Commission pursuant to its authority under the Staggers Rail Act of 1980 [*see 49 U.S.C.S. § 10505*], although antitrust remedies for a combination or conspiracy that injures competition, as opposed to a single competitor, survive [*Alliance Shippers v. Southern Pac. Transp. Co. (9th Cir. 1988) 858 F.2d 567, 569-570]* .

The elements of a cause of action based on violation of *Bus. & Prof. Code § 17045* are: (1) a secret payment or rebate, or the a secret allowance of an unearned discount; (2) the injury of a competitor; and (3) the tendency of the payment, allowance, or rebate to destroy competition [*see, e.g.,* *Harris v. Capitol Records Distrib. Corp. (1966) 64 Cal. 2d 454, 463, 50 Cal. Rptr. 539, 413 P.2d 139* (cause of action not established when "advertising allowance" was not secret and was extended to all purchasers); *Diesel Elec. Sales & Serv., Inc. v. Marco Marine San Diego, Inc. (1993) 16 Cal. App.4th 202, 212, 20 Cal. Rptr. 2d 62* (distributor versus distributor; nonsuit reversed); *E & H Wholesale, Inc. v. Glaser Bros. (1984) 158 Cal. App. 3d 728, 738-739, 204 Cal. Rptr. 838* (cause of action not established when rebates were made to meet, rather than to destroy competition)].

The first element, allowance of a "secret unearned discount," is established by the supplier's or competitor's failure to disclose to the plaintiff that a competitor is receiving a discount or allowance that the plaintiff is not receiving [*see Diesel Elec. Sales & Serv., Inc. v. Marco Marine San Diego, Inc. (1993) 16 Cal. App. 4th 202, 212-213, 20 Cal. Rptr. 2d 62* (defendant reached maximum volume discount without buying volume to qualify for that discount)].

Prima facie "injury to a competitor" is established by evidence of a decline in plaintiff's gross revenues over a three-year period during which it competed with defendant and during which defendant's revenues increased and plaintiff eventually stopped serving that market. The fact that all or part of the increase in defendant's revenues during that period could be attributable to factors other than secret unearned discounts was matter of weighing evidence and not relevant to determining whether nonsuit was proper [*Diesel Elec. Sales & Serv., Inc. v. Marco Marine San Diego, Inc. (1993) 16 Cal. App. 4th 202, 213-214, 20 Cal. Rptr. 2d 62]* .

The term "competition" includes competition among retailers, wholesalers, or producers; violation does not require competitive damage to competitors of the person allowing an unearned discount (the "primary" line of commerce), but can be based on competitive damage to competitors of the person receiving it (the "secondary" line of commerce). Thus, an action by a purchaser who had not received the secret discount was permitted to go forward based on its allegation that it had been injured in its competition with those purchasers who had received the discounts, even without alleging any competitive injury among suppliers [*ABC Int'l Traders, Inc. v. Matsushita Elec. Corp. (1997) 14 Cal. 4th 1247, 1254, 61 Cal. Rptr. 2d 112, 931 P.2d 290]* .

The fact that a competitor in a "primary" line of commerce may have taken a business action to remain competitive, such as entering into a revenue-sharing agreement or participating in a secret rebate or discount, is not necessarily a defense to an action under *Bus. & Prof. Code § 17045*. This so-called "meeting competition" defense does not establish as a matter of law that the conduct does not tend to destroy competition in a "secondary" line of commerce, and harm to this type of competition would be sufficient to overcome the defense [*Eddins v. Redstone (2005) 134 Cal. App. 4th 290, 339, 35 Cal. Rptr. 3d 863]* . In one case, for example, movie studios that had entered into revenue-sharingagreements with a large video rental retailer argued that the agreements were necessary to meet the competition posed to them by other studios that had already reached the same agreements, and that this necessity

provided a defense to the claim that their actions tended to destroy competition. However, the court of appeal concluded that the trial court erred by not considering whether the revenue-sharing agreements tended to destroy competition in a secondary line of commerce--in this case, the competition between the large video rental retailer and smaller, independently owned rental outlets who were not doing business with the studios under the same revenue-sharing agreements [*Eddins v. Redstone (2005) 134 Cal. App. 4th 290, 338-339, 35 Cal. Rptr. 3d 863]* .

Liability cannot be imposed under *Bus. & Prof. Code § 17045* for price discrimination if that liability is premised on agreements made between two companies that are part of the same corporate family, because these companies form part of a single economic enterprise with a complete unity of financial interest [*Eddins v. Redstone (2005) 134 Cal. App. 4th 290, 341, 35 Cal. Rptr. 3d 863]* .

[5] Coercion, Solicitation, or Collusion to Effectuate Prohibited Practice

It is unlawful for any person to use any threat, intimidation, or boycott to effectuate any violation of the Unfair Practices Act [*Bus. & Prof. Code § 17046*; *see, e.g., Chicago Title Ins. Co. v. Great W. Fin. Corp. (1968) 69 Cal. 2d 305, 324, 70 Cal. Rptr. 849, 444 P.2d 481* (boycott not established in absence of showing of concerted attempt to coerce third parties not to deal with plaintiff)]. It is also unlawful for any manufacturer, wholesaler, distributor, jobber, contractor, broker, retailer, or other vendor, or any agent of any such person, to solicit any violation of the act or to participate or collude jointly with any other such person in violation of the act [*Bus. & Prof. Code §§ 17047* (solicitation), 17048 (participation or collusion); *see, e.g., Harris v. Capitol Records Distrib. Corp. (1966) 64 Cal. 2d 454, 462, 50 Cal. Rptr. 539, 413 P.2d 139* (collusion or conspiracy not shown when wholesaler merely "had reason to know" that purchaser intended to resell below cost)].

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§ 565.53 Defenses

[1] Applicable in General

Nothing in the Unfair Practices Act precludes a person from selecting the customers with whom he or she will deal [*Bus. & Prof. Code § 17042*; *Chicago Title Ins. Co. v. Great W. Fin. Corp. (1968) 69 Cal. 2d 305, 324, 70 Cal. Rptr. 849, 444 P.2d 481]* . For example, a manufacturer does not violate the act simply by designating one distributor as the only one with whom he or she will deal with directly [*see Plotkin v. Tanner's Vacuums (1975) 53 Cal. App. 3d 454, 458-459, 125 Cal. Rptr. 697]* .

Similarly, nothing in the act precludes a person from establishing a price differential for any article or product as between customers that he or she has classified in different functions, such as broker, jobber, wholesaler, or retailer [*Bus. & Prof. Code § 17042*; *Harris v. Capitol Records Distrib. Corp. (1966) 64 Cal. 2d 454, 463, 50 Cal. Rptr. 539, 413 P.2d 139* ; *see also Motors, Inc. v. Times Mirror Co. (1980) 102 Cal. App. 3d 735, 742-743, 162 Cal. Rptr. 543* (Stevens, J., concurring; suggesting that price discrimination based on classification of customers as wholesaler or retailer is not justified when customers are merely wholesaler or retailer in relation to third parties)].

The practices excepted under *Bus. & Prof. Code § 17042* appear to be matters of defense that need not be negatived or disproved by the plaintiff, by analogy to case law relating to other express exceptions [*see § 565.53[2]*].

The equitable defense of "unclean hands" does not apply to actions under the act [*Page v. Bakersfield Unif. & Towel Supply Co. (1966) 239 Cal. App. 2d 762, 770, 49 Cal. Rptr. 46]* .

[2] Applicable Only to Locality Discrimination, Sales Below Cost, or Loss Leaders

The prohibitions against locality discrimination, sales below cost, and loss leaders do not apply to certain closeout sales: (1) in closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his or her trade in any article or product, or in the case of seasonal or perishable goods, to prevent loss to the vendor by spoilage or depreciation; or (2) when the goods are damaged or deteriorated in quality. In either case, notice to the public is

required [*Bus. & Prof. Code § 17050(a),(b)*]. The required notice is not sufficient unless the subject of the sale is kept separate from the other stocks and is clearly and legibly marked with the reason for the sale. Also, any advertisement of the goods must indicate the same facts and the number of items to be sold [*Bus. & Prof. Code § 17050*].

The prohibitions against locality discrimination, sales below cost, and loss leaders also do not apply to sales made: (1) in an endeavor made in good faith to meet the legal prices of a competitor selling the same article or product in the same locality or trade area and in the ordinary channels of trade; or (2) in an endeavor made in good faith by a manufacturer, selling an article or product of his or her own manufacture, in a transaction and sale to a wholesaler or retailer for resale to meet the legal prices of a competitor selling the same or a similar or comparable article or product in the same locality or trade area and in the ordinary channels of trade [*Bus. & Prof. Code § 17050(d),(e)*]. "Ordinary channels of trade" means those ordinary, regular, and daily transactions in the mercantile tradewhereby title to an article or product, in no way damaged or deteriorated, is transferred from one person or another. This excludes, for example, bankruptcy sales of stocks, closeout goods, fire sales, and sales of goods that, for any reason, are damaged or deteriorated [*Bus. & Prof. Code § 17028*]. Because the exception applies only to meeting the "legal price" of a competitor, it does not apply to one who is attempting to meet competing prices of goods or services that are themselves below cost in violation of *Bus. & Prof. Code § 17043* [*Page v. Bakersfield Unif. & Towel Supply Co. (1966) 239 Cal. App. 2d 762, 770, 49 Cal. Rptr. 46* ; *People v. Gordon (1951) 105 Cal. App. 2d 711, 724, 234 P.2d 287]* .

Finally, the prohibitions against locality discrimination, sales below cost, and loss leaders do not apply to sales made by an officer acting under the orders of any court [*Bus. & Prof. Code § 17050(c)*].

The practices excepted under *Bus. & Prof. Code § 17050* are matters of defense and need not be negatived or disproved by the plaintiff [*see People v. Gordon (1951) 105 Cal. App. 2d 711, 724, 234 P.2d 287* (meeting competition exception of *Bus. & Prof. Code § 17050(d)* as defense); *see also G.H.I.I. v. MTS, Inc. (1983) 147 Cal. App. 3d 256, 273-274, 195 Cal. Rptr. 211* (exception under *Bus. & Prof. Code § 17041* also not required to be negatived in initial pleading)].

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§ 565.54 Contract Violating Act as Illegal

[1] Civil Action

[a] Illegal Contract

Any contract, express or implied, made by any person, firm, or corporation in violation of the Unfair Practices Act is an illegal contract on which there can be no recovery [*Bus. & Prof. Code § 17051*].

[b] Remedies; Injunctive Relief

In an action under the Unfair Practices Act, it is not necessary to allege or prove actual damages or the threat thereof, or actual injury or the threat thereof, to the plaintiff [*Bus. & Prof. Code § 17082*]. In other words, a plaintiff may obtain injunctive relief for a violation of the act without showing damages or injury to himself or herself [*see Uneedus v. California Shoppers, Inc. (1978) 86 Cal. App. 3d 932, 943, 150 Cal. Rptr. 596]* .

If it appears to the court on an application for a temporary restraining order, on hearing of an order to show cause why a preliminary injunction should not be issued, or on hearing of a motion for preliminary injunction, that any defendant is violating, or has violated, the Unfair Practices Act, or if the court so finds in any action under that act, it shall enjoin that defendant from doing all acts prohibited by the section or sections that he or she is violating or has violated [*Bus. & Prof. Code § 17078*; *see People v. Gordon (1951) 105 Cal. App. 2d 711, 725, 234 P.2d 287* (acts prohibited must be restricted to those done with requisite intent to injure competitors or destroy competition)]. The grant of injunctive relief under *Bus. & Prof. Code § 17078* is mandatory, but only on demonstration of a clear violation of the act [*E & H Wholesale, Inc. v. Glaser Bros. (1984) 158 Cal. App. 3d 728, 733, 204 Cal. Rptr. 838]* .

The court may, in its discretion, include in any injunction against a violation of the act such other restraint as it may deem expedient to deter the defendant from, and to insure against, his or her committing a future violation of the act [*Bus. & Prof. Code § 17079*].

Any injunction against a violation of the act, whether interim or final, must cover every article or product and not merely the particular article or product involved in the action [*Bus. & Prof. Code § 17080*].

It is not necessary for the plaintiff, in any action under act, to provide or file any undertaking or bond for the issuance of any interim or final injunction [*Bus. & Prof. Code § 17081*].

For comparative discussion relating to *Civ. Code § 3422* and *Code Civ. Proc. §§ 526* and *527*, governing injunctive relief in general, see Ch. 303, *Injunctions* .

[c] Treble Damages and Attorney's Fees

In any action under the Unfair Practices Act, it is not necessary to allege or prove actual damages or the threat thereof, or actual injury or the threat thereof, to the plaintiff. However, a plaintiff is entitled, in addition to injunctive relief, to recover three times the amount of his or her actual damages, if any, as well as three times the actual damages, if any, suffered by any person who has assigned his or her claim of damages to the plaintiff [*Bus. & Prof. Code § 17082*; *see Page v. Bakersfield Unif. & Towel Supply Co. (1966) 239 Cal. App. 2d 762, 773, 49 Cal. Rptr. 46* (recovery denied when damages were uncertain, speculative, and based in part on net losses attributable to that party's sales below cost in violation of the act)]. The provision for treble damages is mandatory, so that if actual damages are shown, the court must award three times that amount without regard to the defendant's malice or any other judicially imposed qualifying condition [*Uneedus v. California Shoppers, Inc. (1978) 86 Cal. App. 3d 932, 941-944, 150 Cal. Rptr. 596* ; for further discussion relating to damages in general, *see* Ch. 177, *Damages*]. Because *Bus. & Prof. Code § 17082* is mandatory and because punitive damages under *Civ. Code § 3294* and treble damages under *Bus. & Prof. Code § 17082* serve substantially the same purpose, a plaintiff who pursues a single cause of action under the Unfair Practices Act and establishes a malicious or oppressive violation of that Act is not entitled to elect whether to take punitive damages under *Civ. Code § 3294* or treble damages under *Bus. & Prof. Code § 17082*, but is only entitled to treble damages [*Turnbull & Turnbull v. ARA Transp., Inc. (1990) 219 Cal. App. 3d 811, 826-827, 268 Cal. Rptr. 856]* . However, a plaintiff who prevails on a common law tort claim as well as the violation of the Unfair Practices Act and proves malice or oppression under *Civ. Code § 3294* may elect between trebled and punitive damages [*see Turnbull & Turnbull v. ARA Transp., Inc. (1990) 219 Cal. App. 3d 811, 826-827, 268 Cal. Rptr. 856* ; *Marshall v. Brown (1983) 141 Cal. App. 3d 408, 419, 190 Cal. Rptr. 392* (upheld right to election by plaintiff who prevailed on causes of action for slander and one authorized by *Lab. Code §§ 1050, 1054*); *see also Sandler v. Gordon (1949) 94 Cal. App. 2d 254, 259, 210 P.2d 314* (decided prior to 1959 amendment to *Bus. & Prof. Code § 17082* adding trebling provision and allowing punitive damages pursuant to *Civ. Code § 3294*)].

In any action under the act in which judgment is entered against the defendant, the plaintiff is also entitled to an award of reasonable attorney's fees together with the costs of suit [*Bus. & Prof. Code § 17082*; *see Page v. Bakersfield Unif. & Towel Supply Co. (1966) 239 Cal. App. 2d 762, 774-775, 49 Cal. Rptr. 46* (failure to award fees not reversible error when both parties prevailed and had incurred fees and costs of approximately equal value); for further discussion relating to attorney's fees and costs in general, *see Ch. 174, Costs and Attorney's Fees, § 174.10 et seq. and § 174.50* et seq.].

[2] Limitation Period

The limitation period applicable to a cause of action for injunctive relief and actual damages under the Unfair Practices Act is generally the three-year period of *Code Civ. Proc. § 338(a)*, which is the period limiting actions based on statutory liability. However, actual damages may not be trebled under *Bus. & Prof. Code § 17082* unless the action is brought within one year after they accrue, because treble damages are penal in nature and the one-year period of *Code Civ. Proc. § 340(a)* limits statutory actions based on a penalty [*G.H.I.I. v. MTS, Inc. (1983) 147 Cal. App. 3d 256, 276-279, 195 Cal. Rptr. 211]* .

[3] Evidentiary Provisions

[a] Relating to Intent

On proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, together with proof of injurious effect, the requisite intent to injure competitors or to destroy competition must be presumed [*Bus. & Prof. Code § 17071*; *E & H Wholesale, Inc. v. Glaser Bros. (1984) 158 Cal. App. 3d 728, 735, 204 Cal. Rptr. 838* ; *see Dooley's Hardware Mart v. Food Giant Mkts., Inc. (1971) 21 Cal. App. 3d 513, 517, 98 Cal. Rptr. 543* (presumption not applicable absent evidence of injurious effect)]. A similar presumption arises on proof of sale below invoice or replacement cost, whichever is lower, of less than the entire supply of an article or product to any one customer of a retailer engaged primarily in resale [*Bus. & Prof. Code § 17071.5*].

Whether these presumptions affect the burden of persuasion or merely the burden of producing evidence is not clear under California law [*see Evid. Code §§ 604, 606* (effect of presumptions affecting burden of producing evidence and of persuasion)]. One court of appeal, with little discussion, has held that the presumption in *Bus. & Prof. Code § 17071.5* is a presumption affecting the burden of persuasion [*see Dooley's Hardware Mart v. Food Giant Mkts., Inc. (1971) 21 Cal. App. 3d 513, 517-518, 98 Cal. Rptr. 543]* . Without expressly addressing the issue, some later cases appear to have also treated the presumption of *Bus. & Prof. Code § 17071* as a presumption affecting the burden of persuasion [*see William Inglis & Sons, Inc. v. Continental Baking (9th Cir. 1991) 942 F.2d 1332, 1338-1339* ; *E & H Wholesale, Inc. v. Glaser Bros. (1984) 158 Cal. App. 3d 728, 737, 204 Cal. Rptr. 838]* . However, in a more recent case, another court, again without expressly addressing the issue, appeared to treat the presumption under *Bus. & Prof. Code § 17071* as a presumption affecting the burden of producing evidence. The court stated that the only effect of the presumption is "to require ... [the defendant] to go forward with proof to negate the presumption of wrongful intent"; and that once the defendant has done that, the burden of proof regarding intent shifts back to the plaintiff [*Western Union Fin. Servs., Inc. v. First Data Corp. (1993) 20 Cal. App. 4th 1530, 1540, 25 Cal. Rptr. 2d 341* ; *see also People v. Pay Less Drug Store (1944) 25 Cal. 2d 108, 114, 153 P.2d 9* (identically worded predecessor statute interpreted as requiring that defendant "go forward with evidence to rebut a prima facie showing")]. The language in the latter case appears more consistent with a presumption affecting the burden of producing evidence than a burden affecting the burden of persuasion.

In an action in which it is alleged and shown that the person complained against is selling below his or her cost of doing business, and the person is including labor at less than the prevailing wage scale in the trade in which he or she is engaged for the locality or vicinity in which he or she is doing business, evidence of the prevailing wage scale is admissible toprove the intent or purpose of that person to violate the Unfair Practices Act [*Bus. & Prof. Code § 17075*].

For discussion relating to proof of intent with respect to agents who assist or aid their principal in violating the act, see*§ 565.51[2]*.

[b] Relating to Costs

When a person complained against is a member of a particular trade or industry that has an established cost survey for the locality and vicinity in which the offense is committed, that survey may be used to prove the costs of that person [*Bus. & Prof. Code § 17072*].

Proof of average overall cost of doing business for any particular inventory period when added to (1) the cost of production of each article or product, as to a producer, or (2) the invoice or replacement cost, whichever is lower, as to a distributor, is presumptive evidence of the cost of an article or product [*Bus. & Prof. Code § 17073*].

Proof of transportation tariffs fixed and approved by the Public Utilities Commission is presumptive evidence of delivery cost [*Bus. & Prof. Code § 17074*].

When an action is brought against a person for unfair business practices that involve the employment or services of others, and these others are not compensated or are compensated below the wage prevailing for such services at the time and place of the service, their services must be charged as an expense of the business in which rendered and at the prevailing wage [*Bus. & Prof. Code § 17076*].

In an action for sales below cost, if the defendant acquires his or her raw materials for a consideration not wholly or definitely computable in money, the cost of the raw materials must be presumed to be the prevailing market price for similar raw materials in the ordinary channels of trade in the locality or vicinity in which such raw materials were acquired, at the time of the acquisition [*Bus. & Prof. Code § 17077*].

[4] Discovery

Bus. & Prof. Code §§ 17083 and *17084*, relating to discovery under the Unfair Practices Act, have been unchanged since their enactment in 1941, and should be viewed in light of the subsequently enacted Discovery Act [*Code Civ. Proc. § 2016.010 et seq.*]. Provisions of *Bus. & Prof. Code §§ 17083* and *17084*, relating to the production or inspection of books and records, are similar to, but are not entirely consistent with, the general provisions of the Discovery Act that now govern this type of discovery. For further discussion and forms relating to the general provisions of the Discovery Act, see Ch. 190, *Depositions and Discovery* .

[5] Reference Proceeding

If, during the pendency of an action under the Unfair Practices Act, it appears to the court that an extensive examination of books, papers, records, or documents is or may become material or relevant to the issues in the action, the court may, in its discretion, on the application of any party or on its own motion, order a reference to be had under *Code Civ. Proc. § 638 et seq.* [*Bus. & Prof. Code § 17085*]. For further discussion and forms relating to reference proceedings, see Ch. 38, *Reference* .

[6] Immunity From Prosecution

Information obtained under *Bus. & Prof. Code § 17070 et seq.* or the general discovery provisions of *Code Civ. Proc. § 2016.010 et seq.* (*see § 565.54[4]*) may not be used against any party or witness as a basis for misdemeanor or felony prosecution in any California state court [*Bus. & Prof. Code § 17086*; *see also Bus. & Prof. Code § 17087* (privilege against self-incrimination and immunity from prosecution in proceeding brought by the Attorney General or a district attorney)].

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[Reserved]

§§ 565.55[Reserved]

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§ 565.70 Governing Law

Contracts restraining trade, business, or the practice of a profession are governed by *Bus. & Prof. Code §§ 16600-16607*. Combinations in restraint of trade are governed by the Cartwright Act, *Bus. & Prof. Code §§ 16700-16770*. Federal decisions interpreting the Sherman Act and *15 U.S.C.S. § 14* may be applicable to interpret California law [*Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1971) 4 Cal. 3d 842, 852-853, 94 Cal. Rptr. 785, 484 P.2d 953* ; *Reynolds v. California Dental Serv. (1988) 200 Cal. App. 3d 590, 596 n.9, 246 Cal. Rptr. 331* ; *see § 565.71*].

A Cartwright Act violation may also be subject to the unfair competition provisions of *Bus. & Prof. Code §§ 17200-17208* [*see B. W. I. Custom Kitchen v. Owens-Ill., Inc. (1987) 191 Cal. App. 3d 1341, 1345, 1348, 1348 n.6, 235 Cal. Rptr. 228]* . For discussion and forms relating to these provisions, see*§ 565.10* et seq. and§ 565.230 et seq.

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§ 565.71 History and Interpretation of the Cartwright Act

[1] In General

Several decisions have stated that the Cartwright Act is patterned after the Sherman Act, or after a bill that was proposed, but rejected, as an alternative to what became the Sherman Act [*see, e.g., Cianci v. SuperiorCourt (1985) 40 Cal. 3d 903, 919, 221 Cal. Rptr. 575, 710 P.2d 375* ; *Marin County Bd. of Realtors, Inc. v. Palsson (1976) 16 Cal. 3d 920, 925-926, 130 Cal. Rptr. 1, 549 P.2d 833* ; *Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 542, 30 Cal. Rptr. 2d 706]* . Although those statements are adequate for some analyses, and judicial interpretation of the Sherman Act is often helpful, if not directly probative of the intent of the drafters of the Cartwright Act, more precise analysis of the history of the Cartwright Act is necessary in some situations [*State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal. 3d 1147, 1153-1154, 1168-1169, 252 Cal. Rptr. 221, 762 P.2d 385* ; *see § 565.75*]. Enacted in 1907, the Cartwright Act is patterned after the 1889 Texas act governing restraints of trade and after its progeny, most notably the 1899 Michigan act. Those laws used the term "combination" in a narrower sense than did other laws in effect in 1907 [*State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal. 3d 1147, 1160-1163, 1168, 252 Cal. Rptr. 221, 762 P.2d 385]* . Dicta that the Cartwright Act "is broader in range and deeper in reach than the Sherman Act" [*see Cianci v. Superior Court (1985) 40 Cal. 3d 903, 920, 221 Cal. Rptr. 575, 710 P.2d 375]* and that it "reaches beyond the Sherman Act to threats to competition in their incipiency--much like section 7 of the Clayton Act ... and thereby goes beyond clear-cut menaces to competition in order to deal with merely ephemeral possibilities" [*see Cianci v. Superior Court (1985) 40 Cal. 3d 903, 918, 221 Cal. Rptr. 575, 710 P.2d 375]* has been criticized as conclusionary and substantially suspect [*State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal. 3d 1147, 1169, 1169 n.20, 252 Cal. Rptr. 221, 762 P.2d 385]* .

The Cartwright Act is not a codification of the common law of restraint of trade. Although the public policy underlying the Cartwright Act is rooted in common law, the Act is neither confined by, nor as broad as, the common law [*State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal. 3d 1147, 1166, 252 Cal. Rptr. 221, 762 P.2d 385* , noting dicta to the contrary in *Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1971) 4 Cal. 3d 842, 852, 94 Cal. Rptr. 785, 484 P.2d 953]* .

Bus. & Prof. Code § 16727, which was added to the Cartwright Act in 1961, is patterned after Section 3 of the Clayton Act (*15 U.S.C.S. § 14*), which deals with exclusive dealing arrangements [*State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal. 3d 1147, 1163 n.15, 1168, 252 Cal. Rptr. 221, 762 P.2d 385* ; *Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1971) 4 Cal. 3d 842,852-853, 94 Cal. Rptr. 785, 484 P. 2d 953]* . Thus, federal decisions interpreting Section 3 of the Clayton Act are applicable to *Bus. & Prof. Code § 16727* [*Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1971) 4 Cal. 3d 842, 852-853, 94 Cal. Rptr. 785, 484 P. 2d 953]* .

[2] Prohibited Conduct

[a] Contracts Restraining Trade or Practice of Profession; Void as General Rule

Except as expressly provided in *Bus. & Prof. Code §§ 16601-16607*, every contract that restrains anyone from engaging in a lawful profession, trade, or business of any kind is, to that extent, void [*Bus. & Prof. Code § 16600*].

A contract is void under *Bus. & Prof. Code § 16600* only to the extent it constitutes an unlawful restraint [*Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1971) 20 Cal. App. 3d 668, 673, 97 Cal. Rptr. 811* (arbitration provisions enforced)].

[b] Agreement Conferring Exclusive Privilege

An agreement conferring an exclusive privilege on one person or a group of persons, which may thereby exclude others from some aspect of the practice of their trade or profession, is not per se illegal under *Bus. & Prof. Code § 16600*. Among the factors to be considered in determining whether or not the restraint is valid are the appropriateness of the defendant's conduct as a means of advancing its interests and the availability of less harmful means to achieve those interests [*see* *Blank v. Palo Alto-Stanford Hosp. Ctr. (1965) 234 Cal. App. 2d 377, 384-386, 44 Cal. Rptr. 572* (upholding agreement giving certain staff members exclusive right to use hospital's radiology facilities)].

[c] Restraints on Former Employees

Bus. & Prof. Code § 16600 invalidates employment contracts that prohibit an employee from working for a competitor after the employment terminates, except to the extent necessary to protect the employer's trade secrets [*Muggill v. Reuben H. Donnelley Corp. (1965) 62 Cal. 2d 239, 242, 42 Cal. Rptr. 107, 398 P.2d 147* ; *Metro Traffic Control, Inc. v. Shadow Traffic Network (1994) 22 Cal. App. 4th 853, 859, 27 Cal. Rptr. 2d 573]* . The exception for protection of trade secrets means that, even if a blanket covenant not to compete may be void, restrictions may be placed on a former employee's ability to solicit the employer's customers when confidential information is employed to do so [*see* *Smith v. CMTA-IAM Pension Trust (9th Cir. 1981) 654 F.2d 650, 660-661* (applying California law)]. However, only the use of confidential trade secrets may be enjoined under this exception, and an employer may not prohibit former employees from soliciting its customers through use of information obtained independently of the employer's protected customer lists [*The Retirement Group v. Galante (2009) 176 Cal. App. 4th 1226, 1238-1239, 98 Cal. Rptr. 3d 585*]. For discussion and forms pertaining to liability for misappropriation of trade secrets, see *§ 565.100* et seq.

There is a split of authority concerning whether covenants not to compete may restrict future employment to a greater degree than would otherwise be permitted under the law of trade secrets or unfair competition [*compare* *Metro Traffic Control, Inc. v. Shadow Traffic Network (1994) 22 Cal. App. 4th 853, 860-861, 27 Cal. Rptr. 2d 573* (contract may restrict conduct by former employee only to extent permissible under law of unfair competition in absence of contract); *Moss, Adams & Co. v. Shilling (1986) 179 Cal. App. 3d 124, 130, 224 Cal. Rptr. 456* (same); *with* *Loral Corp. v. Moyes (1985) 174 Cal. App. 3d 268, 276-279, 219 Cal. Rptr. 836* (contract may impose greater restraints on former employer than law of unfair competition would otherwise allow)]. For further discussion of this issue and of an employee's liability for unfair competition with his or her former employer, see Wilcox, California Employment Law, ch. 70 (Matthew Bender).

Bus. & Prof. Code § 16600 also prohibits contractual provisions that impose a penalty on an employee for working for a competitor after termination of employment [*Muggill v. Reuben H. Donnelley Corp. (1965) 62 Cal. 2d 239, 242, 42 Cal. Rptr. 107, 398 P.2d 147]* . For example, provisions terminating all pension benefits or all profit-sharing benefits of a former employee who goes to work for a competitor are void [*see* *Muggill v. Reuben H. Donnelley Corp. (1965) 62 Cal. 2d 239, 242-243, 42 Cal. Rptr. 107, 398 P.2d 147* (pension rights); *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1971) 20 Cal. App. 3d 668, 672-674, 97 Cal. Rptr. 811* (profit-sharing)]. In another case, by contrast, the court held that *Bus. & Prof. Code § 16600* did not prohibit a provision of a multi-employer pension plan (negotiated as part of a collective bargaining agreement) under which an otherwise eligible member's benefits are suspended if he or she is employed by another participating employer. The court distinguished *Muggill* and *Frame* because the suspension of benefits in the case before it was not intended to inhibit business competition, was limited in nature, furthered the interests of fairness in allocating retirement benefits, and served other important public policies [*see* *Smith v. CMTA-IAM Pension Trust (9th Cir. 1981) 654 F.2d 650, 660-661]* .

A broad provision in a contract with a customer prohibiting that customer from hiring the employees of the other contracting party for a specified term, and imposing a penalty on the customer if doing so, also violates *Bus. & Prof. Code § 16600* [*VL Systems, Inc. v. Unisen, Inc. (2007) 152 Cal. App. 4th 708, 710-714, 61 Cal. Rptr. 3d 818]* . Such a contract limits the ability of the affected employees to change employment, and even more damaging that non-competition clauses in employment contracts, it does so without extracting a prior agreement from the employees or ensuring that the employees even have advance notice of the restriction being placed on their employment opportunities [*VL Systems, Inc. v. Unisen, Inc. (2007) 152 Cal. App. 4th 708, 717-718, 61 Cal. Rptr. 3d 818]* . It is unclear whether a narrower provision that only prevents a customer from soliciting the employees of the other contracting employer would be enforceable, as such an agreement would leave employees free to pursue other job opportunities on their own initiative [*see* *VL Systems, Inc. v. Unisen, Inc. (2007) 152 Cal. App. 4th 708, 713 n.4, 718, 61 Cal. Rptr. 3d 818]* .

As discussed in *§ 565.73[1], Bus. & Prof. Code § 16600* does not bar certain covenants not to compete within a geographic area that are part of an agreementfor sale of a business [*see Bus. & Prof. Code § 16601*]. In one case, the former employee was also an officer and director of the corporate employer, and had been an officer of the firm that sold its accounts to the corporate employer and a signatory of the buy-sell agreement. The court held that the employee was bound by a noncompetition clause in the buy-sell agreement [*see* *Matull & Assocs. v. Cloutier (1987) 194 Cal. App. 3d 1049, 1054-1056, 240 Cal. Rptr. 211* (clause was valid as means of protecting former employer's confidential information)]. However, an employer may not use a stock purchase agreement with its employees as a sham to avoid the prohibition of *Bus. & Prof. Code § 16600* against noncompetition clauses [*see* *Bosley Med. Group v. Abramson (1984) 161 Cal. App. 3d 284, 290-292, 207 Cal. Rptr. 477* (*Bus. & Prof. Code § 16601* exception permits noncompetition clause only if substantially all of assets of corporate subsidiary or division are sold; did not apply because employee was required to buy stock in corporation and received only small minority interest)].

When a covenant not to compete is void and unenforceable under *Bus. & Prof. Code § 16600*, a trial court may not rewrite the covenant more narrowly to make it enforceable, since giving the court such discretion would create an incentive for business owners to write broad covenants knowing that, if challenged in court, the court could be asked to write a narrower, enforceable covenant [*Kolani v. Gluska (1998) 64 Cal. App. 4th 402, 407-408, 75 Cal. Rptr. 2d 257* (trial court properly declined to rewrite broad covenant not to compete into narrow bar on theft of confidential information)].

Although some federal courts have approved an exception to Section 16600 for restrictions on trade that are narrowly drawn, as, for example, when the restriction does not place a substantial segment of the market off limits to the restricted party [*see, e.g.,* *Latona v. Aetna U.S. Healthcare Inc. (C.D. Cal. 1999) 82 F. Supp. 2d 1089, 1091-1096]* , the California Supreme Court has specifically rejected this "narrow-restraint" exception and reaffirmed that *Bus. & Prof. Code § 16600* is unambiguous in invalidating all restraints of trade that do not fall under a specific statutory exception [*Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 949-950, 81 Cal. Rptr. 3d 282, 189 P.3d 285*]. It is unclear

whether this holding by the Supreme Court effectively eliminates the common-law trade secret exception as well, and the Court specifically stated that it had no occasion in that opinion to decide that issue [*Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 946 n.4, 81 Cal. Rptr. 3d 282, 189 P.3d 285* ; *see Dowell v. Biosense Webster, Inc. (2009) 179 Cal. App. 4th 564, 576-577, 102 Cal. Rptr. 3d 1]* . Even if still valid, however, the trade secret exception would apply only if the noncompete or nonsolicitation clause at issue is narrowly tailored or carefully limited to the protection of trade secrets, and not so broadly worded as to restrain competition [*see Dowell v. Biosense Webster, Inc. (2009) 179 Cal. App. 4th 564, 577, 102 Cal. Rptr. 3d 1* (broadly worded noncompetition and nonsolicitation clauses were void and did not trigger trade secret exception)].

[d] Restraints in Commercial Leases

A commercial tenant with substantial leverage may be able to negotiate for the right to operate a certain type of business exclusively within a certain development, building, or center. Although contractual restraints on trade competition are generally invalid under the provisions of *Bus. & Prof. Code § 16600*, that section does not invalidate express restrictive covenants regarding the use of retained premises, which are frequently incorporated in leases [*Stockton Dry Goods Co. v. Girsh (1951) 36 Cal. 2d 677, 680, 227 P.2d 1* ; *see Keating v. Preston (1940) 42 Cal. App. 2d 110, 123, 108 P.2d 479]* . Express covenants by a landlord to refrain from engaging in a competing business or leasing other portions of the same premises or adjoining premises owned by the landlord for a competing purpose are generally enforceable [*see Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 669, 155 P.2d 24* ; *Medico-Dental Bldg. Co. of L.A. v. Horton & Converse (1942) 21 Cal. 2d 411, 419-420, 132 P.2d 457]* .

If a tenant wants a restrictive covenant for property retained by the landlord, the lease must clearly express this intention [*Stockton Dry Goods Co. v. Girsh (1951) 36 Cal. 2d 677, 680-681, 227 P.2d 1]* , although that covenant may be implied if language indicating the restrictive intent is used [*Keating v. Preston (1940) 42 Cal. App. 2d 110, 122, 108 P.2d 479]* . However, an implied covenant cannot rest solely on an inference from facts surrounding the lease's execution, but must have a basis in the contract itself [*Stockton Dry Goods Co. v. Girsh (1951) 36 Cal. 2d 677, 680-681, 227 P.2d 1]* .

Breach of a restrictive noncompetition covenant by a landlord does not entitle the tenant to escape the obligation to pay rent accrued to the date of the breach [*Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 669, 155 P.2d 24]* . However, if the exclusive right to conduct the tenant's business on the premises is the essence of the consideration for that tenant's payment of rent, breach of the restrictive covenant is so substantive that it goes to the whole of the consideration and supports a rescission of the contract, terminating the obligation to pay rent [*Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 670, 155 P.2d 24* ; *see Medico-Dental Bldg. Co. of L.A. v. Horton & Converse (1942) 21 Cal. 2d 411, 433-434, 132 P.2d 457]* . Coversely, default by the tenant in the payment of rent does not waive the landlord's performance of the restrictive covenant unless the lease provides expressly or by necessary implication that performance depends on the payment of rent [*Kulawitz v. Pacific Woodenware & Paper Co. (1944) 25 Cal. 2d 664, 670, 155 P.2d 24]* .

Covenants by a landlord in a lease to do any act, or not to use or permit to be used any real property owned by the landlord that is contiguous to premises leased to a tenant, run with the land and are binding on successive owners of the land, if statutory requirements are satisfied [*see Civ. Code §§ 1469, 1470*]. For these covenants, the lease must describe the contiguous real property, must expressly state that successive owners and persons having an interest in the lease are bound by the covenant, and must be recorded in the county in which all or part of the contiguous real property is located [*Civ. Code §§ 1469, 1470*]. A covenant that runs with the land not only binds the covenantor and vests in the covenantee, but also binds the assignees of the covenantor and vests in the assignees of the covenantee in the same manner as if they had personally entered into the covenant [*Civ. Code § 1460*]. Even if a restrictive covenant in a lease is unenforceable because it does not comply with these statutory requirements, it may still be enforceable as an equitable servitude if the restriction is in writing in the lease and the person against whom it runs has actual notice of the covenant [*Civ. Code § 1217*; *Hudson Oil Co. v. Shortstop (1980) 111 Cal. App. 3d 488, 493-496, 168 Cal. Rptr. 801]* .

For discussion of the legal issues applicable to protective and restrictive covenants, see California Real Estate Law and Practice, Ch. 153, *Drafting Commercial Leases* , and Ch. 474, *Shopping Centers* (Matthew Bender).

[e] Public Policy Overrides Choice of Foreign Law

Bus. & Prof. Code § 16600 is such a strong statement of California public policy that it voids the parties' choice of another state's law if that law would uphold the anticompetition provision [*Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1971) 20 Cal. App. 3d 668, 672-674, 97 Cal. Rptr. 811* ; *accord, Scott v. Snelling and Snelling, Inc. (N.D. Cal. 1990) 732 F. Supp. 1034, 1039-1041* (applying *Bus. & Prof. Code § 16600* to determine validity of noncompetition clause in franchise agreement despite provision that it be governed by Pennsylvania law)].

[3] Combinations in Restraint of Trade

The Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*) prohibits trusts or combinations of capital, skill, or acts by two or more persons for any of the following purposes [*Bus. & Prof. Code § 16720*]:

- To create or carry out restrictions in trade or commerce;
- To limit or reduce the production, or increase the price of merchandise or of any commodity;
- To prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity;
- To fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in California;
- To make or enter into or execute or carry out any contracts, obligations, or agreements of any kind or description, by which they do all or any combination of any of the following:
    - Bind themselves not to sell, dispose of, or transport any article or commodity or any article of trade, use, merchandise, commerce, or consumption below a common standard figure or fixed value;
    - Agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure;
    - Establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity; or
    - Agree to pool, combine, or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected.

A "combination" under the Cartwright Act means a concert of action by individuals or entities maintaining separate and independent interests. An individual acting alone through his or her agent or a corporation acting alone through its officers is not a combination in restraint of trade proscribed by the statute [*Roth v. Rhodes (1994) 25 Cal. App. 4th*

530, 543, 544, 30 Cal. Rptr. 2d 706 ; *see also Bondi v. Jewels by Edwar, Ltd. (1968) 267 Cal. App. 2d 672, 678, 73 Cal. Rptr. 494* ; *cf. Williams v. I.B. Fischer Nev. (9th Cir. 1993) 999 F.2d 445, 447* (violation of Sherman Act § 1 requires proof of conspiracy to restrain trade; to be capable of conspiring, corporate entities must be sufficiently independent of each other; no conspiracy established when defendant entities comprise "common enterprise")]. Thus, for example, an allegation that joint owners and operators of an office building "conspired" with each other to restrict competition by plaintiff by refusing to rent office space to him did not sufficiently allege a combination in restraint of trade in violation of the Cartwright Act because the owners were jointly engaged in the single enterprise of managing the building and each owner was the agent of the other [*see Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 544, 30 Cal. Rptr. 2d 706]* . In the absence of proof of a conspiracy or agreement among independent parties, there can be no liability for a combination in restraint of trade under the Cartwright Act [*see Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 544-545, 30 Cal. Rptr. 2d 706* (upholding summary adjudication of Cartwright Act cause of action in favor of defendant because of lack of proof of conspiracy or agreement)].

A combination in restraint of trade may be found even though the actions that form the basis of the combination might be legal when performed by one defendant individually and in isolation. For example, recognition that a single insurer in a market might refuse to insure tax deed titles for a legitimate business reason has been held insufficient to demonstrate "a purpose unrelated to elimination or reduction of competition" for an agreement by a combination of insurers to refuse such policies [*Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 49-50, 77 Cal. Rptr. 2d 709, 960 P.2d 513]* .

In an action alleging an unlawful conspiracy between competitors to limit output or increase price, a defendant moving for summary judgment must carry an initial burden of producing evidence that makes a prima facie showing that no conspiracy existed [*see Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 861, 107 Cal. Rptr. 2d 841, 24 P.3d 493]* . To defeat the motion, the plaintiff mustthen present evidence that would allow a reasonable finder of fact to rule in the plaintiff's favor on the unlawful conspiracy issue by a preponderance of the evidence, which means that the plaintiff's evidence must allow the finder of fact to conclude that an unlawful conspiracy was more likely than not [*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 852, 107 Cal. Rptr. 2d 841, 24 P.3d 493]* . However, speculative inferences or ambiguous evidence showing conduct that is as consistent with permissible competition by independent actors as with unlawful collusion is insufficient to carry the plaintiff's burden to defeat a summary judgment motion [*Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 852, 107 Cal. Rptr. 2d 841, 24 P.3d 493]* .

[4] Lease or Agreement for Nonuse of Competitor's Product

No one may condition a lease, sale, or contract of sale for goods, merchandise, machinery, supplies, or commodities for use in California or fix the price thereof, or any discount from or rebate on the price, on the agreement that the lessee or purchaser not use or deal in the goods, merchandise, machinery, supplies, commodities, or services of the seller's or lessor's competitor or competitors if the effect may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in any section of California [*Bus. & Prof. Code § 16727*]. *Bus. & Prof. Code § 16727* is based on Section 3 of the Clayton Act, *15 U.S.C.S. § 14*, so federal cases interpreting Section 3 of the Clayton Act are applicable to cases under *Bus. & Prof. Code § 16727*. *Bus. & Prof. Code § 16727* has been described as going "beyond common law and the Sherman Act to inhibit trade restraints at their inception" [*Chicago Title Ins. Co. v. Great W. Fin. Corp. (1968) 69 Cal. 2d 305, 315, 70 Cal. Rptr. 849, 444 P.2d 481]* . Tie-ins are an example of a practice that is illegal under *Bus. & Prof. Code § 16727* [*Mailand v. Burckle (1978) 20 Cal. 3d 367, 382, 143 Cal. Rptr. 1, 572 P.2d 1142* ; *see § 565.77[4]*].

Consistent with the interpretation given to Section 3 of the Clayton Act, *Bus. & Prof. Code § 16727* does not apply when the tying item is a service [*Morrison v. Viacom, Inc. (1998) 66 Cal. App. 4th 534, 546-548, 78 Cal. Rptr. 2d 133* (cable television was service and providers were not subject to *Bus. & Prof. Code § 16727*)].

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§ 565.72 Professions as Within Cartwright Act

Trade and commerce within the meaning of the Cartwright Act includes professions [*Cianci v. Superior Court (1985) 40 Cal. 3d 903, 916-925, 221 Cal. Rptr. 575, 710 P.2d 375* (overruling *Willis v. Santa Ana Cmty. Hosp. Ass'n (1962) 58 Cal. 2d 806, 809-810, 26 Cal. Rptr. 640, 376 P.2d 568*); *Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 540, 30 Cal. Rptr. 2d 706]* . Prior to *Cianci*, the only redress available to a professional whose practice was restrained was an action under *Bus. & Prof. Code § 16600* or under a common law theory of intentional interference with the right to pursue a lawful calling or profession when the interference was by unlawful means or by means otherwise lawful when there was lack of sufficient justification [*see* *Willis v. Santa Ana Cmty. Hosp. Ass'n (1962) 58 Cal. 2d 806, 809-810, 26 Cal. Rptr. 640, 376 P.2d 568* ; *Blank v. Palo Alto-Stanford Hosp. Ctr. (1965) 234 Cal. App. 2d 377, 384, 44 Cal. Rptr. 572]* . If, however, the basis for the Cartwright Act claim is a quasi-judicial decision, such as the decision of a review committee to deny hospital privileges, the state antitrust action is barred unless and until the quasi-judicial decision has been overturned by the grant of a writ of mandate [*Mir v. Little Co. of Mary Hosp. (9th Cir. 1988) 844 F.2d 646, 651* (considering pendent state claim and relying on *Westlake Cmty. Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 484, 131 Cal. Rptr. 90, 551 P.2d 410*)]. For discussion and forms for use by physicians excluded or expelled from membership on hospital staffs or other professional organizations, see Ch. 416, *Physicians: Membership on Hospital Staffs or in Professional Organizations* .

Interference with contractual and prospective economic relations is discussed in*§ 565.130* et seq.

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§ 565.73 Exceptions

[1] Sale of Business

Bus. & Prof. Code § 16601 provides an exception to the general prohibition against restraints on trade or profession set forth in *Bus. & Prof. Code § 16600*. Under *Bus. & Prof. Code § 16601*, any of the following persons who sell an interest in a business may agree with the buyer to refrain from carrying on a similar business within a specified geographical area in which the business sold has been carried on for so long as the buyer (or any person deriving title to the goodwill or shares from the buyer) carries on a like business in that area:

- Any person who sells the goodwill of a business.

- An owner of a business entity selling or otherwise disposing of all of his or her ownership interest in the business entity.

- Any owner of a business entity that sells: (1) all or substantially all of its operating assets together with the goodwill of the business entity; (2) all or substantially all of the operating assets of a division or a subsidiary of the business entity together with the goodwill of that division or subsidiary; or (3) all of the ownership interest of any subsidiary.

Bus. & Prof. Code § 16601 has been interpreted by some courts to apply only to the sale of all or substantially all the stock of a business [*see Bus. & Prof. Code § 16601(b)*; *Bosley Med. Group v. Abramson (1984) 161 Cal. App. 3d 284, 290-292, 207 Cal. Rptr. 477* (agreement not to compete held unenforceable under any interpretation because forced sale of stock to employee and redemption ontermination of employment was sham for purposes of bringing noncompetition agreement within exception of *Bus. & Prof. Code § 16601*); *Radiant Indus., Inc. v. Skirvin (1973) 33 Cal. App. 3d 401, 109 Cal. Rptr. 96* (*Bus. & Prof. Code § 16601* not applicable when seller retained 18 percent of stock)].

Other courts have held that a covenant not to compete is enforceable if the selling shareholder had a substantial share of the business *or* was a substantial contributor to goodwill so that without his or her shares, the purpose of the sale would

be frustrated [*Vacco Indus., Inc. v. Van Den Berg (1992) 5 Cal. App. 4th 34, 48-49, 6 Cal. Rptr. 2d 602* (seller was 9th largest shareholder, owning 3 percent of shares, and officer of corporation)].

To uphold a covenant not to compete on the basis of the buyback of corporate stock from an employee leaving the company, there must be a clear indication that, in the sales transaction, the parties valued or considered goodwill as a component of the sales price. A sales price that is significantly below market value is evidence that goodwill was not a component [*Hill Med. Corp. v. Wycoff (2001) 86 Cal. App. 4th 895, 906-907, 103 Cal. Rptr. 2d 779* (covenant unenforceable because repurchase price of employee's shares was substantially below fair market value and employee owned only 7 percent of total shares in corporation)]. Retention by the seller of an insubstantial amount of nonoperating or unrelated assets will not defeat the noncompetition covenant [*Fleming v. Ray-Suzuki, Inc. (1990) 225 Cal. App. 3d 574, 583, 275 Cal. Rptr. 150* (sale of mail order business in United States; retained assets were nonoperating assets related to activities outside United States)].

The exception of *Bus. & Prof. Code § 16601* applies when one corporation is acquired and merged with another corporation, if under the terms of the merger all shares in the first corporation are surrendered in return for shares in the second corporation [*Hilb, Rogal & Hamilton Ins. v. Robb (1995) 33 Cal. App. 4th 1812, 1824-1825, 39 Cal. Rptr. 2d 887]* . Thus, a covenant not to compete executed as part of the merger agreement by a party surrendering his or her shares in the acquired business is valid under that statute [*Hilb, Rogal & Hamilton Ins. v. Robb (1995) 33 Cal. App. 4th 1812, 1825, 39 Cal. Rptr. 2d 887]* . Moreover, under those circumstances, the covenant is valid regardless of whether it is found in the merger agreement or a separate employment contract, so long as the evidence demonstrates that the non-competition agreement was executed as part of the sale or disposition of the shareholder's stock in the acquired corporation [*Hilb, Rogal & Hamilton Ins. v. Robb (1995) 33 Cal. App. 4th 1812, 1826, 39 Cal. Rptr. 2d 887]* .

When a covenant not to compete is executed as an adjunct to a sale of a business, there is an inference that the business had a "goodwill" and that it was transferred. An injunction implementing a covenant not to compete and extending to the territory specified in the agreement, is not overbroad because it exceeds the county or physical location of the buildings, plants, warehouses, or the area in which actual sales were made. Appropriate territorial limits are coextensive with the entire area in which the parties conducted all phases of their business including production, promotion, and marketing activities as well as sales [*Alliant Ins. Services, Inc. v. Gaddy (2008) 159 Cal. App. 4th 1292, 1302-1306, 72 Cal. Rptr. 3d 259* (upholding restriction covering all 58 counties of California); *Monogram Indus., Inc. v. Sar Indus., Inc. (1976) 64 Cal. App. 3d 692, 701-703, 134 Cal. Rptr. 714* (nationwide injunction)].

The language in *Bus. & Prof. Code § 16601* limiting the scope of covenants not to compete to "counties and cities" is not limited to California. If the market, goodwill, and area intended by the parties to be encompassed by the covenant not to compete extend outside California, the covenant encompasses areas outside California [*Fleming v. Ray-Suzuki, Inc. (1990) 225 Cal. App. 3d 574, 583, 275 Cal. Rptr. 150* (injunction not to compete in mail-order business of selling tennis products in United States)].

Bus. & Prof. Code § 16601 has been held inapplicable to a noncompetition clause pertaining to termination of a franchise agreement because of the dissimilarity between termination of a franchise and the sale of a business. Therefore, the noncompetition clause was held to be void and unenforceable against former franchisees who began competing businesses [*see Scott v. Snelling & Snelling, Inc. (N.D. Cal. 1990) 732 F. Supp. 1034, 1041* (describing franchise as more like a lease of goodwill)].

Concluding that *Bus. & Prof. Code § 16601* is intended to protect the value of the business that is sold, the court of appeal has held that an agreement prohibiting the seller from soliciting the employees and customers of the buying company is not enforceable under *Bus. & Prof. Code § 16601*. Although an agreement prohibiting the seller from soliciting the former employees and customers of the sold company would be protected, the assets of the buying company that were not part of the acquired company are not so protected [*Strategix, Ltd. v. Infocrossing W., Inc.*

(2006) 142 Cal. App. 4th 1068, 1073-1074, 48 Cal. Rptr. 3d 614] . However, if the seller goes to work for the buyer as an employee after selling the company, a covenant prohibiting that employee from soliciting the buying company's customers in the event of termination of employment may be enforceable if necessary to protect the buyer's trade secrets, which may include confidential client information [*Alliant Ins. Services, Inc. v. Gaddy (2008) 159 Cal. App. 4th 1292, 1306-1307, 72 Cal. Rptr. 3d 259*].

If a noncompetition covenant is valid under *Bus. & Prof. Code § 16601*, any injunction implementing the covenant must be limited to those types of activities with respect to which the parties can and do actually compete. For example, an injunction against a former attorney-employee-director of a labor relations consulting firm was was held to be overbroad to the extent that it prohibited the attorney from providing legal services to clients of the firm because the firm was not licensed to provide those services [*see Matull & Assocs. v. Cloutier (1987) 194 Cal. App. 3d 1049, 1055-1056, 240 Cal. Rptr. 211]* .

[2] Dissolution of Partnership

Another exception to the general prohibition against restraints on trade or profession set forth in *Bus. & Prof. Code § 16600* pertains to the dissolution of a partnership [*see Howard v. Babcock (1993) 6 Cal. 4th 409, 416, 25 Cal. Rptr. 2d 80, 863 P.2d 150]* . *Bus. & Prof. Code § 16602* provides that a partner, on dissolution of a partnership or in anticipation of dissolution, may agree not to carry on a similar business within a specified geographical area where the partnership business has been transacted, so longas any other member of the partnership (or any person deriving title to the business or goodwill of the partnership from another member of the partnership) is carrying on a like business in that area [*Bus. & Prof. Code § 16602*; *see Alliance Payment Systems, Inc. v. Walczer (2007) 152 Cal. App. 4th 620, 637, 61 Cal. Rptr. 3d 789* (provision unenforceable when lacking requirement that former partner remain engaged in like business in order to benefit from terms of provision)]. A ban on soliciting specified clients is sufficient to meet the requirement that the agreement be limited to the specified geographic area in which the former partnership conducted business, so long as the clients had places of business known to the parties to be located in that specified area [*Alliance Payment Systems, Inc. v. Walczer (2007) 152 Cal. App. 4th 620, 642-643, 61 Cal. Rptr. 3d 789]* .

The requirement of a transfer of goodwill found in *Bus. & Prof. Code § 16601* is not read into *Bus. & Prof. Code § 16602*. Thus, a partnership agreement that prevents a departing partner whose interest is bought by the continuing partners from competing with them is valid even though it does not expressly provide for the transfer of a portion of the goodwill of the partnership or take goodwill into account in valuing the departing partner's interest [*South Bay Radiology Med. Assoc. v. Asher (1990) 219 Cal. App. 3d 1092, 220 Cal. App. 3d 1074, 1082-1084, 269 Cal. Rptr. 15]* . For discussion relating to enforcement of a noncompetition clause against a partner who is dissociated from a partnership, see *Ch. 403, Partnerships: Actions by and Against Dissociated Partners, § 403.14*.

Bus. & Prof. Code § 16602, on its face, applies to law partnerships [*Howard v. Babcock (1993) 6 Cal. 4th 409, 417-418, 25 Cal. Rptr. 2d 80, 863 P.2d 150]* . However, special considerations apply to covenants not to compete involving withdrawing law partners because of *Cal. Rules Prof. Conduct, Rule 1-500(A)*, which prohibits a State Bar member from making an agreement that restricts his or her right to practice law on termination of an employment, shareholder, or partnership relationship. Nevertheless, the Supreme Court has held that Rule 1-500 does not prohibit an agreement that does restrict an attorney's practice of law, but merely assesses a reasonable cost against a withdrawing partner who chooses to compete with his or her former partners (e.g., a provision forfeiting a competing partner's withdrawal benefits other than his or her capital interest) [*Howard v. Babcock (1993) 6 Cal. 4th 409, 418-419, 25 Cal. Rptr. 2d 80, 863 P.2d 150* ; *see also Haight, Brown & Bonesteel v. Superior Court (1991) 234 Cal. App. 3d 963, 969-972, 285 Cal. Rptr. 845* (reaching same conclusion)].

[3] Sale of Interest in Limited Liability Company

Another exception to *Bus. & Prof. Code § 16600* applies to members of limited liability companies. Any member may,

on or in anticipation of the dissolution of a limited liability company or a sale of his or her interest in a limited liability company, agree that he or she will not carry on a similar business within a specified geographical area where the limitedliability company's business has been transacted for so long as any other member of the company (or any person deriving title to the company's business or goodwill from another member) carries on a like business in the specified area [*Bus. & Prof. Code § 16602.5*].

[4] Labor and Labor Activities

Bus. & Prof. Code § 16703 specifies that labor is not a "commodity" within the meaning of the Cartwright Act. The "labor" exemption of *Bus. & Prof. Code § 16703* is not limited to agreements to set the price of labor. It extends to combinations of laborers for purposes of furthering their interests by collective bargaining, when not otherwise unlawful. A labor union, acting alone, violates the Cartwright Act only when its primary purpose is to accomplish a restraint of trade, not when its purpose is to obtain a valid labor objective [*Messner v. Journeymen Barbers, Hairdressers & Cosmetologists, Int'l Union of Am. (1960) 53 Cal. 2d 873, 886, 4 Cal. Rptr. 179, 351 P.2d 347]* . Therefore, peaceful picketing, if directed to a proper objective, is not enjoinable under the Cartwright Act even if the employees of the establishment being picketed do not wish to join the union and even if the employer loses business on account of the picketing [*Messner v. Journeymen Barbers, Hairdressers & Cosmetologists, Int'l Union of Am. (1960) 53 Cal. 2d 873, 877-883, 4 Cal. Rptr. 179, 351 P.2d 347]* .

The labor exemption is broad enough to protect more than employees or wage earners. It protects activities by independent contractors whose economic function is the same as that of employees if the activities serve the legitimate labor objective of increasing the amount they are paid or improving their working conditions [*California Dental Assn. v. California Dental Hygienists' Assn. (1990) 222 Cal. App. 3d 49, 64-65, 271 Cal. Rptr. 410* (exchange of fee information, refusal to refer hygienists to dentists for less than minimum rate); *Los Angeles Pie Bakers Asso. v. Bakery Drivers Local No. 276 (1953) 122 Cal. App. 2d 237, 239, 243* (independent drivers paid percentage of resale prices)]. Thus, the workers need not be part of a union or collective bargaining unit for their activities to be exempted [*California Dental Assn. v. California Dental Hygienists' Assn. (1990) 222 Cal. App. 3d 49, 67-70, 271 Cal. Rptr. 410]* . Similarly, the exemption extends to employment agencies working with the labor groups to raise and maintain compensation levels [*California Dental Assn. v. California Dental Hygienists' Assn. (1990) 222 Cal. App. 3d 49, 70-71, 271 Cal. Rptr. 410* ; *see also H.A. Artists & Assocs. v. Actors' Equity Ass'n (1981) 451 U.S. 704, 707-708, 717-721, 101 S. Ct. 2102, 68 L. Ed. 2d 558]* . However, the exemption does not apply if the independent contractors are "entrepreneur service providers" and the challenged activity is designed to advance their interests as entrepreneurs rather than as employees [*Marin County Bd. of Realtors, Inc. v. Palsson (1976) 16 Cal. 3d 920, 927-928, 130 Cal. Rptr. 1, 549 P.2d 833* (real estate broker); *California Dental Ass'nv. California Dental Hygienists' Ass'n (1990) 222 Cal. App. 3d 49, 65-66, 271 Cal. Rptr. 410]* .

The labor exemption of *Bus. & Prof. Code § 16703* will not protect all union activity or all collective bargaining agreements. For example, provisions of an agreement prohibiting the sale of prepackaged meats at all and after 6:00 p.m. have been held void as restraining trade [*Alpha Beta Mkts. v. Amalgamated Meat Cutters (1956) 147 Cal. App. 2d 343, 346-350, 305 P.2d 163* ; *Kold Kist v. Amalgamated Meat Cutters (1950) 99 Cal. App. 2d 191, 197-201, 221 P.2d 724]* .

Apart from the labor exemption set forth in *Bus. & Prof. Code § 16703*, application of the Cartwright Act to activities that are within the jurisdiction of the National Labor Relations Board may potentially be preempted by federal labor law [*see Guss v. Utah Labor Relations Bd. (1957) 353 U.S. 1, 9-11, 77 S. Ct. 598, 1 L. Ed. 2d 601* ; *San Diego Bldg. Trades Council v. Garmon (1957) 353 U.S. 26, 28-29, 77 S. Ct. 607, 1 L. Ed. 2d 618]* . For full discussion of federal labor law preemption, see NLRA Law and Practice, Ch. 22 (Matthew Bender).

[5] Petitioning Government for Redress of Grievance (*Noerr-Pennington* Doctrine)

[a] General Rule

The *Noerr-Pennington* doctrine provides that there is no antitrust liability under the Sherman Act for efforts to influence government that are protected by the *First Amendment* right to petition for redress of grievances, even when the motive behind such actions is anticompetitive [*Professional Real Estate Investors v. Columbia Pictures Indus. Inc. (1993) 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611, 621-622* ; *see Blank v. Kirwan (1985) 39 Cal. 3d 311, 320, 216 Cal. Rptr. 718, 703 P.2d 58* ; *Hi-Top Steel Corp. v. Lehrer (1994) 24 Cal. App. 4th 570, 574, 29 Cal. Rptr. 2d 646]* . The doctrine originated in the U.S. Supreme Court's decision in *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc. (1961) 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464* , in which the Court held that alleged lobbying efforts by the railroad industry to foster legislation that would be adverse to the trucking industry could not form the basis for liability under the Sherman Act, even if the defendants' motive was to injure competition [*see Eastern R. Presidents Conference v. Noerr Motor Freight, Inc. (1961) 365 U.S. 127, 136-140, 81 S. Ct. 523, 5 L. Ed. 2d 464* ; *see also United Mine Workers v. Pennington (1965) 381 U.S. 657, 669-670, 85 S. Ct. 1585, 14 L. Ed. 2d 626* ; *Sessions Tank Liners, Inc. v. Joor Mfg., Inc. (9th Cir. 1994) 17 F.3d 295, 299-300* (defendant shielded from antitrust liability for false statements made to induce influential standard-setting body to set new standard that was unfavorable to plaintiff competitor because direct cause of plaintiff's damages was governmental action, i.e., denial of permits by local officials who enforce those standards)]. In a later decision, the Court made clearthat the *Noerr-Pennington* doctrine applies to judicial and administrative, as well as legislative, proceedings [*California Transp. v. Trucking Unlimited (1972) 404 U.S. 508, 510-511, 92 S. Ct. 609, 30 L. Ed. 2d 642* ; *see Professional Real Estate Investors v. Columbia Pictures Indus. Inc. (1993) 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611, 621-622]* .

Although the *Noerr-Pennington* doctrine originated in the context of federal antitrust litigation, the California Supreme Court has applied the doctrine to actions under the Cartwright Act [*see Blank v. Kirwan (1985) 39 Cal. 3d 311, 320-322, 216 Cal. Rptr. 718, 703 P.2d 58* (defendants' actions aimed at influencing city to license defendants' poker club were protected by *Noerr-Pennington* doctrine from Cartwright Act claim)].

[b] "Sham" Exception

Efforts to influence government that are merely a "sham" are not protected by the *Noerr-Pennington* doctrine and are subject to antitrust liability [*see California Transp. v. Trucking Unlimited (1972) 404 U.S. 508, 512-513, 92 S. Ct. 609, 30 L. Ed. 2d 642* ; *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc. (1961) 365 U.S. 127, 144, 81 S. Ct. 523, 5 L. Ed. 2d 464* ; *Blank v. Kirwan (1985) 39 Cal. 3d 311, 321-322* ; *Hi-Top Steel Corp. v. Lehrer (1994) 24 Cal. App. 4th 570, 575*]. The sham exception encompasses situations in which persons use the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon [*Columbia v. Omni Outdoor Adver. (1991) 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382]* . The sham exception has been applied to California actions for unfair competition [*see Hi-Top Steel Corp. v. Lehrer (1994) 24 Cal. App. 4th 570, 579, 581-583, 29 Cal. Rptr. 2d 646* (defendants' alleged false and baseless statements to city officials about plaintiffs' plans for automobile body shredder made for purpose of causing regulatory delays constituted sufficient facts to support application of sham exception); *see also Blank v. Kirwan (1985) 39 Cal. 3d 311, 321-322, 325-326, 216 Cal. Rptr. 718, 703 P.2d 58* (recognizing doctrine in action under Cartwright Act, but finding it inapplicable under facts of case)].

Litigation will not be deemed a sham unless the lawsuit is so objectively baseless that no reasonable litigant could realistically expect success on the merits [*Professional Professional Real Estate Investors v. Columbia Pictures Indus. Inc. (1993) 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611, 624, 625* ; *see, e.g., Liberty Lake Invs. v. Magnuson (9th Cir. 1993) 12 F.3d 155, 157-158* (environmental litigation instituted by competitor in attempt to prevent plaintiff from developing competing shopping center was not objectively baseless and therefore not a sham under *Real Estate Investors* test)]. The existence of probable cause to institute the legal proceedings thus precludes a finding that the defendant has engaged in sham litigation [*Professional Real Estate Investors v. Columbia PicturesIndus. Inc. (1993) 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611, 625-626]* . If an objective litigant could reasonably conclude that the suit is reasonably calculated to elicit a favorable outcome, then the suit is immunized from antitrust liability under the

Noerr-Pennington doctrine, regardless of the defendant's subjective intent in bringing the suit [*Professional Real Estate Investors v. Columbia Pictures Indus. Inc. (1993) 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611, 621-622, 624* ; *see Liberty Lake Invs. v. Magnuson (9th Cir. 1993) 12 F.3d 155, 157, 159]* .

[6] Interstate League Sports

Because the player-team-league relationships in professional baseball and football involve interstate commerce and require national uniformity, application of state antitrust laws is either preempted or prohibited as an undue burden on interstate commerce [*see Flood v. Kuhn (2d Cir. 1971) 443 F.2d 264, 267-268 , aff'd, 407 U.S. 258, 92 S. Ct. 2099, 32 L. Ed. 2d 728* (baseball); *Partee v. San Diego Chargers Football Co. (1983) 34 Cal. 3d 378, 380, 385, 194 Cal. Rptr. 367, 668 P.2d 674* (football); *Hebert v. Los Angeles Raiders, Ltd. (1991) 23 Cal. App. 4th 414, 422-425, 29 Cal. Rptr. 2d 540* (football; following *Partee*)].

[7] Trade Associations

Agreements and associations whose purpose and effect is to promote competition in any trade or industry or that are in furtherance of trade are not prohibited under the Cartwright Act [*Bus. & Prof. Code § 16725*]. In general, trade association activities tend to promote competition and are lawful. Gathering and compiling industry information and disseminating it among members does not offend antitrust policy, even though it may naturally tend to stabilize that trade or business and to produce uniformity of price and trade practice [*BILJAC Assocs. v. First Interstate Bank (1990) 218 Cal. App. 3d 1410, 1430, 267 Cal. Rptr. 819]* . Disseminating competitive information, even pricing information, through trade associations is condoned by antitrust law. Members may use that information in management and control of their individual businesses. Only if they take concerted action to restrain trade based on that information is the law violated [*BILJAC Assocs. v. First Interstate Bank (1990) 218 Cal. App. 3d 1410, 1430, 1432-1433, 267 Cal. Rptr. 819* (no conspiracy established among bankers associations to set and manipulate variable interest rates on loans to "middle market" commercial borrowers)].

For example, agreements by which a cooperative marketing association that requires its members to sell all their production to it are not prohibited restraints of trade [*Poultry Producers of S. Cal. v. Barlow (1922) 189 Cal. 278, 283-285, 208 P. 93* (decided under *Bus. & Prof. Code § 16723*, which was repealed in 1961)]. Although a federal court stated as dicta that an eligibility rule of bowling proprietors' associations, which limited tournament participation to persons who did all their league bowling inestablishments owned by association members, was protected under *Bus. & Prof. Code § 16725*, the California court of appeal, without mentioning *Bus. & Prof. Code § 16725*, held the rules to be an unreasonable restraint of trade and therefore enjoinable [*Monument Bowl, Inc. v. Northern Cal. Bowling Proprietors' Ass'n (N.D. Cal. 1961) 197 F. Supp. 208, 210* (dismissal for failure to allege interstate impact reversed sub nom. *Breier v. Northern Cal. Bowling Proprietors' Ass'n. (9th Cir. 1963) 316 F.2d 787, 789* , requiring allowance of amendment); *People v. Santa Clara Valley Bowling Proprietors' Ass'n (1965) 238 Cal. App. 2d 225, 236-241, 47 Cal. Rptr. 570* (group boycott as per se restraint)]. Similarly, a trade association that fixes prices and agrees that members will raise their prices to customers who seek to change contractors has gone too far, and such conduct is enjoinable [*People v. Building Maint. Contractors' Ass'n, Inc. (1953) 41 Cal. 2d 719, 726-728, 264 P.2d 31]* .

The practice of limiting membership in a county board of realtors to those who are engaged full time in the real estate business is an unreasonable restraint of trade, as is denying nonmembers access to the board's multiple listing service [*Marin County Bd. of Realtors, Inc. v. Palsson (1976) 16 Cal. 3d 920, 935-940, 130 Cal. Rptr. 1, 549 P.2d 833]* . The court in *Marin* applied the rule of reason standard, rejecting the contention that the practice was a per se unlawful group boycott, and characterizing it as a trade association agreement not directly aimed at coercing third parties and eliminating competitors [*Marin County Bd. of Realtors, Inc. v. Palsson (1976) 16 Cal. 3d 920, 930-934, 130 Cal. Rptr. 1, 549 P.2d 833]* . In later cases, however, a board's exclusion of nonmembers from its residential multiple listing service was found illegal per se as a group boycott, and its exclusion of nonmembers from its investment multiple listing service was found illegal per se as a tying arrangement [*People v. National Ass'n of Realtors (1984) 155 Cal.*

App. 3d 578, 583-584, 589, 202 Cal. Rptr. 243 (investment multiple listing service); *People v. National Ass'n of Realtors (1981) 120 Cal. App. 3d 459, 467-469, 174 Cal. Rptr. 728* (residential multiple listing service); *see § 565.77[4]*].

[8] Insurance

In 1945, Congress passed the McCarran-Ferguson Act (*15 U.S.C.S. §§ 1011-1015*, hereinafter "the McCarran Act"), exempting insurance from federal antitrust laws to the extent that state law regulated insurance. The federal exemption does not extend, and the Sherman Act therefore applies, to agreements to boycott or coerce and acts of boycott and coercion [*15 U.S.C.S. § 1013(b)*]. This exception applies to acts of boycott and coercion among insurance companies and agents and was intended to protect agents from insurance company black lists [*Addrisi v. Equitable Life Assurance Soc'y of U.S. (9th Cir. 1974) 503 F.2d 725, 728-729]* . States were given until June 30, 1948, to pass laws in the field [*15 U.S.C.S. § 1012(b)*]. In 1947, California enacted *Ins. Code §§ 1850-1860.3* (hereinafter "the McBride Act"), which superseded the Cartwright Act with respect to casualty insurance ratemaking [*Karlin v. Zalta (1984) 154 Cal. App. 3d 953, 966-972, 201 Cal. Rptr. 379* ; *but see Ins. Code § 1851* (types of insurance not within McBride Act as including title insurance, reinsurance, life insurance, marine insurance, disability insurance, workers' compensation insurance, mortage insurance, and insurance transaction by county fire marshal insurers or reinsurers)]. Substantial amendments to the McBride Act (*now see Ins. Code §§ 1850.4-1861.14*) were made by Proposition 103, adopted in 1988. The business of insurance is now subject to the laws of California applicable to any other business, including, but not limited to, *Bus. & Prof. Code §§ 16600-17101*, which encompasses both the Cartwright Act and the Unfair Practices Act (*Bus. & Prof. Code § 17000 et seq.*) [*Ins. Code § 1861.03(a)*; *see also Industrial Indem. Co. v. Superior Court (1989) 209 Cal. App. 3d 1093, 1096-1097, 257 Cal. Rptr. 655* (only injunctive relief is available to third party in action under *Bus. & Prof. Code § 17203*]. Proposition 103 left some minor exemptions for concerted action intact, such as *Ins. Code § 1853.5*, relating to commonly owned insurers; *Ins. Code § 1853.8*, governing agreements, which must be approved by the Insurance Commissioner, to apportion risks to provide insurance to applicants who would not otherwise be able to obtain insurance; and *Ins. Code § 1855*, which allows advisory organizations. Proposition 103 provided for other types of permissible concerted action, such as agreements to collect, compile, and disseminate historical data on paid claims and reserves for reported claims and participation in joint arrangements established by statute or by the Insurance Commissioner to ensure the availability of insurance, and exchange of premium, rate, and underwriting information between agents or brokers and the insurers they represent [*Ins. Code § 1861.03(b)*].

The procedure for administrative challenges to rates for lines of insurance governed by *Ins. Code §§ 1850.4-1861.14* and for judicial review of administrative orders relating to those challenges [*see, e.g., Ins. Code §§ 1858-1858.7*] were not displaced by Proposition 103, which added new provisions requiring public hearings for approval of rate changes [*Ins. Code §§ 1861.05-1861.09*]. Any person may initiate or intervene in any proceeding permitted or established by *Ins. Code §§ 1850.4-1861.14*, challenge any action of the Insurance Commissioner under the new procedures (*Ins. Code §§ 1861.01-1861.14*), and enforce any provision of *Ins. Code §§ 1861.01-1861.14* [*Ins. Code § 1861.10(a)*; *but see Karlin v. Zalta (1984) 154 Cal. App. 3d 953, 975, 983-987, 201 Cal. Rptr. 379* (decided before passage of Proposition 103, requiring exhaustion of administrative remedies provided by *Ins. Code §§ 1858-1858.7* prior to initiating action regarding rates)].

The doctrine of primary jurisdiction may be applied to require courts to refrain from proceeding with a case until the Insurance Commissioner has determined the issue even when the applicable statutes do not require it and do not require exhaustion of administrative remedies. Application ofthe doctrine of primary jurisdiction rests on the administrative agency's special competence with respect to a specific statutory scheme or issue and is determined on a case by case basis. Thus, because of the factual complexities of automobile insurance ratemaking, application of the doctrine was appropriate to stay an action under *Bus. & Prof. Code §§ 17204-17206* seeking redress for an insurer's failure to offer good driver discounts mandated by *Ins. Code §§ 1861.02, 1861.05* pending administrative proceedings by the Insurance Commissioner [*Farmers Ins. Exch. v. Superior Court (1992) 2 Cal. 4th 377, 390-401, 6 Cal. Rptr. 2d 487, 826 P.2d 730]* .

In addition, in 1959, California passed *Ins. Code §§ 790 et seq.* (hereinafter "the Unfair Practices Act" or "UPA"), establishing unfair practices in insurance. *Ins. Code § 790.03(c)* mirrors the Cartwright Act by prohibiting any act of boycott, coercion, or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance. Coercion prohibited by this section is coercion in the antitrust sense, conduct that constitutes the improper use of economic power to compel another to submit to the wishes of the one who wields it [*Greenberg v. Equitable Life Assurance Soc'y (1973) 34 Cal. App. 3d 994, 999, 110 Cal. Rptr. 470* (tying); *see Bodenhamer v. Superior Court (1986) 178 Cal. App. 3d 180, 183-185, 223 Cal. Rptr. 486* (*Ins. Code § 790.03(h)*, unfair settlement practices, as applicable to independent insurance adjusters); *but see Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58* (prospectively abrogating private third-party standing under *Ins. Code § 790.03(h)*); *Love v. Fire Ins. Exch. (1990) 221 Cal. App. 3d 1136, 1144 n.4, 271 Cal. Rptr. 246* (*Moradi-Shalal* abrogated first-party right of action under *Ins. Code § 790.03*); *Smith v. State Farm Mut. Auto. Ins. Co. (1992) 5 Cal. App. 4th 1104, 1116, 7 Cal. Rptr. 2d 131* (same); *Maler v. Superior Court (1990) 220 Cal. App. 3d 1592, 1597-1601, 270 Cal. Rptr. 222* (same, and Proposition 103 did not establish or revive any right of action under *Ins. Code § 1861.03*); *Zephyr Park v. Superior Court (1989) 213 Cal. App. 3d 833, 836-838, 262 Cal. Rptr. 106* (same re first-party right of action, but refusing to apply rule retroactively)]. For discussion and forms relating to unfair settlement practices, including rights of both insureds and third parties under the Unfair Practices Act (*Ins. Code § 790 et seq.*), see Ch. 308, *Insurance* .

Thus, when an insurance company doing business both within California and nationwide required borrowers of loans on single family properties to obtain from it a whole life policy and to pledge the policy as additional security for the loan, no federal antitrust cause of action could be stated because state law had regulated insurance, but a cause of action for illegal tie-in could be stated under California law if the insurance company enjoyed a dominant position in the home loan market [*Addrisi v. Equitable Life Assurance Soc'y of U.S. (9th Cir. 1974) 503 F.2d 725, 728-729* ; *Greenberg v. Equitable Life Assurance Soc'y (1973) 34 Cal. App. 3d 994, 998-1000, 110 Cal. Rptr. 470]* .

Although *Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 250 Cal. Rptr. 116, 758 P.2d 58* , which abrogated private third-party standing to recover for unfair settlement practices that violate *Ins. Code § 790.03(h)*, distinguished *Shernoff v. Superior Court (1975) 44 Cal. App. 3d 406, 409-410, 118 Cal. Rptr. 680* (class action alleging conspiracy to fix price of title insurance), and *Greenberg v. Equitable Life Assurance Soc'y (1973) 34 Cal. App. 3d 994, 1001, 110 Cal. Rptr. 470* (class action challenging illegal tying), as not involving either third parties or *Ins. Code § 790.03(h)* [*see Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 295, 250 Cal. Rptr. 116, 758 P.2d 58]* , the language of that decision to the effect that *Ins. Code § 790.09* does not support private civil remedies is so broad that it may also be applied to foreclose private remedies for anticompetitive violations of *Ins. Code § 790.03(c)* [*see Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 304-305, 320, 250 Cal. Rptr. 116, 758 P.2d 58]* .

[9] Bargaining Units for Health Care Coverage

There are several statutory schemes under which price fixing of health care costs are authorized, such as *Health & Safety Code § 1340 et seq.* (health care service plans), *Ins. Code § 10133 et seq.* (fixed-price contracts between doctors, hospitals, other health care providers and insurers), and *Ins. Code § 11512 et seq.* (hospital service plans). The California Legislature recognized that *State of Arizona v. Maricopa Med. Soc'y (1982) 457 U.S. 332, 352-357, 102 S. Ct. 2466, 73 L. Ed. 2d 48* , which held that medical society fee ceilings constitute per se violations of federal antitrust law, served as a disincentive for medical societies and other health care providers to bargain in groups regarding the types of fixed-price contracts mentioned above. Thus, in 1985, the legislature enacted *Bus. & Prof. Code § 16770*, *Health & Safety Code § 1342.6*, and *Ins. Code § 10133.6* to provide an antitrust exemption for groups and combinations of providers and purchasers formed to create efficient-sized bargaining units for those types of health care coverage. Antitrust law still applies to other aspects of the contracts and combinations, including agreements or arrangements to exclude any person who is lawfully qualified to perform the service because he or she does not have the same license or

certification as the members of the group or combination [*Bus. & Prof. Code § 16770(g),(h)*].

For several reasons, alleged anticompetitive effects of health care plans provisions are to be tested by the rule of reason. A plan that is an integrated plan within the definition set forth by the Federal Trade Commission should, as stated by the Commission, generally be judged under the rule of reason standard. Practices that are designed to increase economic efficiency and render markets more, rather than less, competitive should be judged by the rule of reason standard [*Reynolds v. California Dental Serv. (1988) 200 Cal. App. 3d 590, 597, 246 Cal. Rptr. 331]* . The fact that the legislature enacted *Bus. & Prof. Code § 16770(g)* and*(h)* indicates thatit intended to permit provider-controlled medical plans despite their potential for competitive harm. Thus, the legislature may have mandated that the rule of reason be used to test the practices of those plans [*Reynolds v. California Dental Serv. (1988) 200 Cal. App. 3d 590, 596-597, 599-600, 246 Cal. Rptr. 331]* . Also, the per se standard is usually not applied until the courts have considerable experience with the business relationship involved. Neither the California nor the federal courts have much exposure to the antitrust implications of prepaid medical plans [*Reynolds v. California Dental Serv. (1988) 200 Cal. App. 3d 590, 597-598, 246 Cal. Rptr. 331]* . The usual fee requirement of most plans does not fix prices at a specific level, and thus is not plainly anticompetitive [*Reynolds v. California Dental Serv. (1988) 200 Cal. App. 3d 590, 598, 246 Cal. Rptr. 331]* .

The California court of appeal has rejected antitrust and unfair competition claims stemming from an exclusive provider contract between Blue Cross and a physical therapy provider group brought by competing physical therapy providers. Under the contract between Blue Cross and the defendant provider group, the provider group would accept reduced rates from Blue Cross for its services but would be the exclusive preferred provider of physical therapy services for Blue Cross members. The court in that case concluded that such agreement was expressly authorized by these statutes, notwithstanding the fact that it inhibited the ability of competing providers to compete on the basis of price [*Lori Rubinstein Physical Therapy, Inc. v. PTPN, Inc. (2007) 148 Cal. App. 4th 1130, 1139, 56 Cal. Rptr. 3d 351]* . In addition, the fact that the defendant provider group restricted the number of its providers by geographic location did not constitute an antitrust violation, as these restrictions helped the group sustain an efficient-sized contracting unit by guaranteeing a certain volume of patients to its member providers [*Lori Rubinstein Physical Therapy, Inc. v. PTPN, Inc. (2007) 148 Cal. App. 4th 1130, 1141, 56 Cal. Rptr. 3d 351* ; *see Bus. & Prof. Code § 16770(g)*]. The court did recognize, however, that an antitrust violation might be found if one or more providers or provider groups used coercion, threats, or intimidation to convince an insurer to refuse to negotiate with other providers or provider groups [*Lori Rubinstein Physical Therapy, Inc. v. PTPN, Inc. (2007) 148 Cal. App. 4th 1130, 1140, 56 Cal. Rptr. 3d 351]* .

[10] Municipal Activities

Municipal governments, although they can sue as plaintiffs under *Bus. & Prof. Code § 16750(b)*, cannot be sued as defendants under the Cartwright Act. This immunity extends to individual members of a city's governing body. This municipal immunity under Cartwright is broader than state action immunity under federal antitrust law that would apply only if the state compelled the activity in question [*Bus. & Prof. Code § 16702*; *People ex rel. Freitas v. City & County of San Francisco (1979) 92 Cal. App. 3d 913, 917-921, 925-926, 155 Cal. Rptr. 319]* . Not only is the municipal activity protected, but so are private citizens' attempts to influence municipal activity. This is true even though pleaded as a conspiracy between public officials and private citizens and even when there are anticompetitive effects, such as the private citizen's being given a monopoly in a business requiring a city license [*Blank v. Kirwan (1985) 39 Cal. 3d 311, 322-327, 216 Cal. Rptr. 718, 703 P.2d 58]* .

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Chapter 565 UNFAIR COMPETITION
PART II. LEGAL BACKGROUND
B. Restraints Of Trade

49-565 California Forms of Pleading and Practice--Annotated § 565.74

§ 565.74 Determination of Validity and Effect of Conduct or Agreement

[1] Interpretation and Application

A contract that appears by its terms to be in restraint of trade is not necessarily so, for example, when the offending provision has never in fact been enforced. It is not the combination or particular means used but the result to be achieved that antitrust law condemns [*Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1978) 22 Cal. 3d 302, 312-315, 148 Cal. Rptr. 918, 583 P.2d 777]* .

[2] Rule of Reason

Although the Sherman Act and the Cartwright Act by their express terms forbid all restraints on trade, each has been interpreted to permit by implication those restraints found to be reasonable [*Standard Oil Co. v. United States (1911) 221 U.S. 1, 60, 31 S. Ct. 502, 55 L. Ed. 619* ; *People v. Building Maint. Contractors' Ass'n (1953) 41 Cal. 2d 719, 727, 264 P.2d 31]* . Factors to be considered in determining whether or not a particular restraint is unreasonable include the facts peculiar to the business to which the restraint is applied; the condition of the particular business or market before and after the restraint is imposed; the nature of the restraint, and its effect, actual or probable; the history of the restraint; the evil the restraint was implemented to curb and other reasons for adopting it [*Board of Trade v. United States (1918) 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683* ; *Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1971) 4 Cal. 3d 842, 854, 94 Cal. Rptr. 785, 484 P.2d 953* ; *Kolling v. Dow Jones & Co. (1982) 137 Cal. App. 3d 709, 727, 187 Cal. Rptr. 797]* . The court should consider the percentage of business controlled, the strength of the remaining competition, and whether the action springs from requirements of business or from a purpose to monopolize [*United States v. Columbia Steel Co. (1948) 334 U.S. 495, 527, 68 S. Ct. 1107, 92 L. Ed. 1533* ; *Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1971) 4 Cal. 3d 842, 854, 94 Cal. Rptr. 785, 484 P.2d 953]* . Whether a restraint of trade is unreasonable or not is a question of fact to be determined at trial [*Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1971) 4 Cal. 3d 842, 855, 94 Cal. Rptr. 785, 484 P.2d 953]* .

For additional discussion, see*§ 565.73[9]*.

[3] Relevant Market

Federal courts applying the rule of reason to vertical restraints of trade (thoseimposed by persons or firms further up the chain of distribution of a specific product than the enterprise restrained), have required a threshold inquiry into the defendant's market power, which is usually equated with market share. To meet the initial burden in establishing that the practice is an unreasonable restraint of trade, plaintiff must show that the activity is of the type that restrains trade, and that the restraint is likely to be of significant magnitude. Ordinarily, plaintiff must delineate a relevant market, and show that defendant plays enough of a role in that market to impair competition significantly. The relevant market may be a question of fact, although the issue becomes one of law if the undisputed facts leave no room for a reasonable difference of opinion [*Exxon Corp. v. Superior Court (1997) 51 Cal. App. 4th 1672, 1682* (in Cartright Act action by Exxon franchisee gasoline service station dealers, relevant market for assessing anticompetitive behavior was question of law and was all gasoline, not wholesale market for Exxon fuel); *see also Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 542, 30 Cal. Rptr. 2d 706]* .

[4] Per Se

The per se doctrine is applied if a particular practice and the setting in which it occurs are sufficient to compel the conclusion that competitionis unreasonably restrained. Consequently the practice is illegal without any inquiry as to the precise harm caused or the business excuse for its use [*B. W. I. Custom Kitchen v. Owens-Ill., Inc. (1987) 191 Cal. App. 3d 1341, 1348-1350, 235 Cal. Rptr. 228* ; *Marin County Bd. of Realtors, Inc. v. Palsson (1976) 130 Cal. Rptr. 1, 549 P.2d 833]* . When conduct is to be tested by the per se standard, most defenses are irrelevant, and the pleading and proof requirements of the specific harm element are relaxed because these practices are deemed so harmful to competition as to amount to public harms [*Klor's v. Broadway-Hale Stores (1959) 359 U.S. 207, 210-214, 79 S. Ct. 705, 3 L. Ed. 2d 741* ; *B. W. I. Custom Kitchen v. Owens-Ill., Inc. (1987) 191 Cal. App. 3d 1341, 1348-1350, 235 Cal. Rptr. 228* ; *but see ARCO v. USA Petroleum (1990) 495 U.S. 328, 335-340, 110 S. Ct. 1884, 109 L. Ed. 2d 333* (vertical conspiracy to maintain low prices is illegal per se, but, unless pricing is predatory, competitor has no actionable injury, and effects may actually be procompetitive for consumers); *Mozart Co. v. Mercedes-Benz of N. Am., Inc. (9th Cir. 1987) 833 F.2d 1342, 1348-1349* (federal law allows business justification defense in action on per se illegal tying arrangement)]. Among the practices that the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements [*Northern Pac. Ry. Co. v. United States (1958) 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545* ; *Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1971) 4 Cal. 3d 842, 853, 94 Cal. Rptr. 785, 484 P.2d 953* (tying); *B. W. I. Custom Kitchen v. Owens-Ill., Inc. (1987) 191 Cal. App. 3d 1341, 1348, 235 Cal. Rptr. 228* (price fixing); *Kolling v. Dow Jones & Co. (1982) 137 Cal. App. 3d 709, 721, 187 Cal. Rptr. 797* (price fixing); *but see ARCO v. USA Petroleum (1990) 495 U.S. 328, 335-346, 110 S. Ct. 1884, 109 L. Ed. 2d 333* (exception for vertical nonpredatory "maximum price fixing conspiracy," which may have procompetitive effect); *Mozart Co. v. Mercedes-Benz of N. Am., Inc. (9th Cir. 1987) 833 F.2d 1342, 1348-1349* (allowing business justification defense to tying arrangement that is illegal per se)].

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§ 565.75 Mergers

The Cartwright Act does not regulate mergers--that is, the bona fide purchase and sale of one firm by another [*State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal. 3d 1147, 1151, 1164-1166, 252 Cal. Rptr. 221, 762 P.2d 385]* . The Act applies only to situations in which the parties improperly collude *and* continue as separate, independent entities. It does not apply to situations in which, by virtue of purchase and sale, or merger, one or more of the entities ceases to exist [*State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal. 3d 1147, 1151, 1164-1166, 252 Cal. Rptr. 221, 762 P.2d 385]* .

Several decisions have stated that the Cartwright Act is patterned after the Sherman Act, or after a bill that was proposed, but rejected as an alternative to what became the Sherman Act. Although those statements are adequate for some analyses, and judicial interpretation of the Sherman Act is often helpful if not directly probative of the intent of the drafters of the Cartwright Act, more precise analysis of the history of the Cartwright Act is necessary to determine whether it was intended to regulate mergers [*State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal. 3d 1147, 1153-1154, 1168-1169, 252 Cal. Rptr. 221, 762 P.2d 385]* . In 1907, when Cartwright was enacted, many state laws, including the 1903 version of the Texas law, contained antimerger provisions. However, the Cartwright Act uses language identical to the 1889 version of the Texas act, under which the term "combination" had been held not to include a merger, and to the 1899 Michigan act. Neither of those two laws contained antimerger provisions. Also, the Cartwright Act uses the term "combination" without any modification to avoid the then-prevailing narrow construction of that term [*State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal. 3d 1147, 1160-1163, 1168-1169, 252 Cal. Rptr. 221, 762 P.2d 385]* . Additionally, the Cartwright Act has been amended 26 times between 1909 and 1988, including the 1961 addition of *Bus. & Prof. Code § 16727*, which is essentially Section 3 of the Clayton Act (*15 U.S.C.S. § 14*). Thus, the California Legislature was certainly well aware of the Clayton Act, and, if it intended the Cartwright Act to apply to mergers, it could have adopted the language of Section 7 of the Clayton Act (*15 U.S.C.S. § 18*) [*State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal. 3d 1147, 1162-1163, 1163 n.15, 252 Cal. Rptr. 221, 762 P.2d 385]* .

The Cartwright Act is not a codification of the common law of restraint of trade [*State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal. 3d 1147, 1166, 252 Cal. Rptr. 221, 762 P.2d 385]* . The majority view at common

law was that a merger or acquisition was illegal if it involved a clear, actual threat to competition, but not if it only involved an incipient threat to competition. It may be that a common law remedy has survived for a merger that is illegal by common law standards. The common law remedy made the merger agreement void and unenforceable or subject to prosecution by the state by quo warranto [*State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal. 3d 1147, 1167-1168, 252 Cal. Rptr. 221, 762 P.2d 385* (dicta because no challenge on common law grounds was made)].

Under federal law, a merger may be attacked under Section 1 or 2 of the Sherman Act (*15 U.S.C.S. §§ 1, 2*) or under Section 7 of the Clayton Act (*15 U.S.C.S. § 18*). A merger is illegal under Section 1 of the Sherman Act (*15 U.S.C.S. § 1*) if it effects an unreasonable restraint of trade. Section 2 of the Sherman Act (*15 U.S.C.S. § 2*) prohibits monopolies. A merger may be attacked under Section 7 of the Clayton Act (*15 U.S.C.S. § 18*) if it might substantially lessen competition [*State of California v. American Stores (9th Cir. 1989) 872 F.2d 837, 841 , rev'd on other grounds, 495 U.S. 271, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990)* ; *State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal. 3d 1147, 1164-1165, 252 Cal. Rptr. 221, 762 P.2d 385]* . Thus, a merger may be subject to attack under the Clayton Act even if it would be proper under Sherman Act standards [*State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal. 3d 1147, 1164 n.14, 252 Cal. Rptr. 221, 762 P.2d 385]* . A merger may substantially lessen competition by permitting one firm to control an undue share of the relevant market and by significantly increasing the concentration of firms in that market [*State of California v. American Stores (9th Cir. 1989) 872 F.2d 837, 841 , rev'd on other grounds, 495 U.S. 271, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990)]* . Relevant indicia of competitive effects are (1) the market shares of the merging firms, (2) the degree of concentration in the market, and (3) the degree to which that concentration will be increased by the merger. Statistics that indicate excessive postmerger market share and market concentration create a presumption that the merger violates the Clayton Act [*State of California v. American Stores (9th Cir. 1989) 872 F.2d 837, 842 , rev'd on other grounds, 495 U.S. 271 (1990)*]. However, the absence of barriers to entry into a market constrains anticompetitive conduct, regardless of the market's degree of concentration [*United States v. Syufy Enters. (9th Cir. 1990) 903 F.2d 659, 664-667* ; *State of California v. American Stores (9th Cir. 1989) 872 F.2d 837, 842-843 , rev'd on other grounds, 495 U.S. 271, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990)* (factors relevant to analysis of existence of entry barriers)].

When a merger threatens to cause irreparable harm by substantially lessening competition, or when the merger has been completed and has substantially lessened competition, an injunction under *15 U.S.C.S. § 26* restraining the merger or requiring divestiture is available [*State of California v. American Stores Co. (1990) 495 U.S. 271, 279-285, 110 S. Ct. 1853, 109 L. Ed. 2d 240]* . Divestiture is available under *15 U.S.C.S. § 26* in actions initiated by private parties whose own interests are threatened with loss or damage, as well as under *15 U.S.C.S. § 25* in actions initiated by the Federal Trade Commission or the United States [*State of California v. American Stores Co. (1990) 495 U.S. 271, 279-285, 295-296, 110 S. Ct. 1853, 109 L. Ed. 2d 240* (however, laches may protect consummated transactions from belated attacks by private parties if it would not be too late for government to vindicate public interest)]. A preliminary injunction requiring the merged entities to be operated separately is considered a way of maintaining the status quo in the event that a permanent injunction requiring divestiture is granted [*see State of California v. American Stores Co. (1990) 495 U.S. 271, 274, 296, 110 S. Ct. 1853, 109 L. Ed. 2d 240, 262]* .

To the extent that the Cartwright Act could be said to be patterned after the Sherman Act, a merger challenge under the Cartwright Act would require the same showing, namely that the merger effected an unreasonable restraint of trade [*State of California ex rel. Van de Kamp v. Texaco, Inc. (1988) 46 Cal. 3d 1147, 1165, 252 Cal. Rptr. 221, 762 P.2d 385]* .

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 565 UNFAIR COMPETITION
PART II. LEGAL BACKGROUND
B. Restraints Of Trade

49-565 California Forms of Pleading and Practice--Annotated § 565.76

§ 565.76 Monopoly

Under federal law, a single entity may violate antitrust law by creating or being a monopoly [*15 U.S.C.S. § 2*]. There is no similar provision in California law, though *Bus. & Prof. Code § 16727* prohibits specified acts by one entity that may tend to create a monopoly. For discussion of *Bus. & Prof. Code § 16727*, see*§ 565.71[4]*. Still, a least one case has said that monopoly, though not specifically listed, is a prohibited restraint of trade in California and has adopted the federal definition: that the offense of monopoly involves the willful acquisition of the power to control prices or exclude competition from commerce in a particular geographic area with respect to a specific product [*Lowell v. Mother's Cake & Cookie Co. (1978) 79 Cal. App. 3d 13, 23, 144 Cal. Rptr. 664* ; *see United States v. Grinnell Corp. (1966) 384 U.S. 563, 86 S. Ct. 1698, 16 L. Ed. 2d 778* ; *United States v. Aluminum Co. of Am. (2d Cir. 1945) 148 F.2d 416*); *see also* Cowan, *California's Single-Firm Monopoly Loophole, 18 Cal. W. L. Rev. 240 (1982)*].

Even if the "offense" charged is not monopoly, monopoly power is relevant in several contexts in California. An entity with monopoly power may not use its refusal to deal with others to restrain trade [*R.E. Spriggs Co. v. Adolph Coors Co. (1979) 94 Cal. App. 3d 419, 425-426, 156 Cal. Rptr. 738* ; *see § 565.105*]. A monopoly position in the tying product market determines whether other elements are also necessary to establish an illegal tying arrangement [*Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1971) 4 Cal. 3d 842, 858, 94 Cal. Rptr. 785, 484 P.2d 953* ; *People v. National Ass'n of Realtors (1981) 120 Cal. App. 3d 459, 472-473, 174 Cal. Rptr. 728* ; *see § 565.77[4]*].

A federal court applying California law in a diversity action has held that, although combinations to monopolize would appear to fall within the general prohibition of *Bus. & Prof. Code § 16720*, that statute does not address unilateral conduct [*Dimidowich v. Bell & Howell (9th Cir. 1986) 803 F.2d 1473, 1478* ; *G.H.I.I. v. MTS, Inc. (1983) 147 Cal. App. 3d 256, 266, 268, 195 Cal. Rptr. 211* ; *Bondi v. Jewels by Edwar, Ltd. (1968) 267 Cal. App. 2d 672, 678, 73 Cal. Rptr. 494* ; *see also Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 543, 30 Cal. Rptr. 2d 706* ("combination" requires concerted action by parties with independent interests)].

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49-565 California Forms of Pleading and Practice--Annotated § 565.77

§ 565.77 Particular Situations

[1] Single Entity's Refusal to Deal

In general, absent a monopolistic purpose and unless prohibited by other statutes such as the civil rights laws, a person may exercise his or her own discretion as to parties with whom he or she will deal, and may announce in advance the circumstances under which he or she will refuse to sell [*United States v. Colgate & Co. (1919) 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992* ; *A.B.C. Distrib. Co. v. Distillers Distrib. Corp. (1957) 154 Cal. App. 2d 175, 188-190* ; *Rolley, Inc. v. Merle Norman Cosmetics (1954) 129 Cal. App. 2d 844, 846-852, 278 P.2d 63]* . However, a supplier's refusal to deal with a potential customer may constitute a "vertical restraint," the legality of which will be judged by a rule-of-reason analysis [*see § 565.74[2]*], if the supplier has sufficient market power in the relevant market to impair competition [*see Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 542, 30 Cal. Rptr. 2d 706* (relying on *Redwood Theatres, Inc. v. Festival Enters., Inc. (1988) 200 Cal. App. 3d 687, 703-704, 248 Cal. Rptr. 189* ; *Bhan v. NME Hosps., Inc. (9th Cir. 1991) 929 F.2d 1404, 1413)]* . If, however, the defendant lacks market power in the relevant market, his or her unilateral refusal to deal cannot violate the Cartwright Act [*see Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 542-543, 30 Cal. Rptr. 2d 706* (refusal of medical doctors who owned office building to rent office space to podiatrist, allegedly to interfere with competition by podiatrists, was not a violation of Cartwright Act because doctors controlled less than 10 percent share of relevant market for office space and therefore possessed insufficient market power to affect competition)].

If an entity with substantial economic clout, such as a manufacturer with 2000 applicants for 167 distributorships whose existing distributorship agreements are terminable without cause on 30 days' notice, maintains prices through "suggestions that distributors cannot refuse," the manufacturer has gone beyond simple announcement of policy and refusal to deal and "has put together a combination in violation of the Sherman Act" [*R.E. Spriggs Co. v. Adolph Coors Co. (1979) 94 Cal. App. 3d 419, 425-426, 156 Cal. Rptr. 738* (citing *United States v. Parke, Davis & Co. (1960) 362 U.S. 29, 44, 80 S. Ct. 503, 4 L. Ed. 2d 505*)]. Similarly, if a "single trader" pressures customers or dealers into adhering to resale price maintenance, territorial restrictions, exclusive dealing arrangements, or illegal tie-ins, an unlawful combination is established, irrespective of any monopoly or conspiracy, and despite the recognized right of a producer to deal with whom it will [*Kolling v. Dow Jones & Co. (1982) 137 Cal. App. 3d 709, 720, 187 Cal. Rptr. 797*

; *see G.H.I.I. v. MTS, Inc. (1983) 147 Cal. App. 3d 256, 268-269, 195 Cal. Rptr. 211* (description of retail sole trader's activities amounting to combination)].

[2] Price Fixing

Price fixing often involves distributorships through which the manufacturer coerces its dealers to maintain certain price levels [*see § 565.77[1]*]. Price fixing is considered illegal per se under both California and federal law [*Kolling v. Dow Jones & Co. (1982) 137 Cal. App. 3d 709, 721, 187 Cal. Rptr. 797]* . The test to determine whether a particular restraint is illegal is whether the agreement or conduct interferes with the freedom of sellers or traders so as to preclude or restrain their ability to sell in accordance with their own judgment, not what effect the agreement or conduct has on actual prices [*Kolling v. Dow Jones & Co. (1982) 137 Cal. App. 3d 709, 722, 187 Cal. Rptr. 797]* .

Parallel movement of prices by itself is not enough to establish a price-fixing violation under either the Cartwright Act or the Sherman Act. Plaintiff must prove that the parallel pricing is the result of an agreement, conspiracy, or contract [*BILJAC Assocs. v. First Interstate Bank (1990) 218 Cal. App. 3d 1410, 1427-1429, 267 Cal. Rptr. 819* ; *see also Freeman v. San Diego Assn. of Realtors (1999) 77 Cal. App. 4th 171, 200, 91 Cal. Rptr. 2d 534* (unilateral action by monopolist in charging allegedly excessive prices, by itself, does not violate antitrust laws)].

To recover for an alleged price-fixing conspiracy, the plaintiff must prove that the defendants conspired, or at least acted in conscious parallel, to fix and maintain prices and that both the plaintiff and the competition in general were injured by the artificial price established by the conspiracy or parallel conduct. The plaintiff may prove its case by either direct or circumstantial evidence [*City of Long Beach v. Standard Oil Co. of Cal. (9th Cir. 1989) 872 F.2d 1401, 1405-1406* (considering claims under both California and federal law)]. If plaintiffs offer no direct evidence of conspiracy, but only ambiguous evidence, such as evidence that defendants met and exchanged ideas, inferences are required to conclude that any agreement or consensus came out of defendants' discussions [*BILJAC Assocs. v. First Interstate Bank (1990) 218 Cal. App. 3d 1410, 1430-1433, 267 Cal. Rptr. 819* (plaintiffs' evidence was insufficient to raise triable issue of fact that conspiracy existed)]. If only circumstantial evidence is offered, the defendants are entitled to summary judgment if they provide a plausible and justifiable alternative interpretation of their conduct that rebuts the alleged conspiracy [*City of Long Beach v. Standard Oil Co. of Cal. (9th Cir. 1989) 872 F.2d 1401, 1406* (considering claims under both California and federal law)]. Under the doctrine of conscious parallelism, an agreement may be inferred if each participant knew that concerted action was contemplated and invited, gave its adherence to, and participated in the scheme, and understood that cooperation was essential to the plan. Alleged conspirators that dominate the relevant market may be deemed to understand the necessity of cooperation [*City of Long Beach v. Standard Oil Co. of Cal. (9th Cir. 1989) 872 F.2d 1401, 1407* (considering claims under both California and federal law)].

A conspiracy to illegally fix prices is not shown merely because separate entities have combined to provide a unified product or service, if the product or service is one that the entities had not or could not have provided individually in competition with one another. Under these circumstances, the entities' interests in providing the new product or service are interdependent, because they share the common purpose of creating and marketing the new product or service [*Freeman v. San Diego Assn. of Realtors (1999) 77 Cal. App. 4th 171, 192-193, 91 Cal. Rptr. 2d 534]* .

If the price fixing is illegal per se, the following defenses are precluded: (1) the price was reasonable, (2) the conduct complained of had legitimate business purposes other than the stabilization of prices, and (3) the partiesdid not intend to impact prices by their conduct [*People v. National Ass'n of Realtors (1981) 120 Cal. App. 3d 459, 481, 174 Cal. Rptr. 728]* . However, not all conduct by which prices are allegedly fixed is illegal per se. For example, in considering an alleged conspiracy by a consortium of petroleum purchasers to fix prices under a contract that used weighed averages of prices posted or paid to establish the contract price, a type of barter system between the purchasers that removed a substantial portion of their volume from the base used for the contract calculations had to be examined under the rule of reason because those barter exchanges were not only justifiable, but necessary to their operations [*City of Long Beach*

v. Standard Oil Co. of Cal. (9th Cir. 1989) 872 F.2d 1401, 1405-1406 (considering claims under both California and federal law)].

A cause of action for conspiracy to fix prices may be maintained even when price controls are imposed by some regulatory agency. Especially when the regulatory price was set after the alleged conspiracy began, the fact of price controls does not in itself mean that the conspirators' conduct could not have caused the injury. If the prices imposed by the regulatory agency would have been different in the absence of the conspiracy, or were based on artificial price levels that resulted from the conspiracy, the plaintiff may recover [*City of Long Beach v. Standard Oil Co. of Cal. (9th Cir. 1989) 872 F.2d 1401, 1408-1409* (considering claims under both California and federal law)]. A regulatory price control program will not displace antitrust liability unless the relief desired is available from the regulatory agency [*City of Long Beach v. Standard Oil Co. of Cal. (9th Cir. 1989) 872 F.2d 1401, 1409* (considering claims under both California and federal law); *accord Cellular Plus, Inc. v. Superior Court (1993) 14 Cal. App. 4th 1224, 1247-1249, 18 Cal. Rptr. 2d 308* (courts, not PUC, have primary, if not exclusive, jurisdiction over Cartwright action charging price fixing of cellular phone service rates)]. Similarly, no exemption to antitrust liability will be found unless the challenged activity is within the scope of the regulation and the conflict between the regulatory decision and antitrust liability is obvious [*City of Long Beach v. Standard Oil Co. of Cal. (9th Cir. 1989) 872 F.2d 1401, 1409* (considering claims under both California and federal law)].

Price fixing is not only a violation of the Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*), but is also an unlawful business practice under *Bus. & Prof. Code § 17200 et seq.* [*see B. W. I. Custom Kitchen v. Owens-Ill., Inc. (1987) 191 Cal. App. 3d 1341, 1345, 1348, 1348 n.6, 235 Cal. Rptr. 228* ; *BILJAC Assocs. v. First Interstate Bank (1990) 218 Cal. App. 3d 1410, 1422-1423, 267 Cal. Rptr. 819* ; for discussion and forms relating to *Bus. & Prof. Code § 17200 et seq., see § 565.30* et seq.,§ 565.231]. The same conduct that constitutes anticompetitive price fixing may also constitute a breach of the duty of good faith imposed by *Com. Code § 1304*, although a plaintiff would not be permitted double recovery for what are essentially two different claims for the same injury [*State of California v. ChevronCorp. (9th Cir. 1989) 872 F.2d 1410, 1413-1414* (considering both federal antitrust and Cartwright claims and California bad faith claim); for further discussion of breach of the duty of good faith, *see* Ch. 140, *Contracts*]. In addition, other types of price discrimination are prohibited by California's Unfair Practices Act (*Bus. & Prof. Code § 17000 et seq.*) [*see § 565.10* et seq.].

[3] Distributorships and Exclusive Dealing Arrangements

Exclusive dealing arrangements, in which one is prohibited from distributing products other than those of the supplier or in which one entity agrees to deal exclusively with another, are not illegal per se. For instance, the fact that savings and loan and escrow subsidiaries of a holding company use the title insurance services of a company in which the parent has an interest does not amount to an illegal boycott. Such vertical integration is proper so long as there is no intent to coerce third parties to deal with them [*Chicago Title Ins. Co. v. Great W. Fin. Corp. (1968) 69 Cal. 2d 305, 324, 70 Cal. Rptr. 849, 444 P.2d 481]* .

Exclusive dealing arrangements are tested by the "rule of reason" standard and are unlawful only if the arrangement was intended to, or actually did, unreasonably restrain trade [*Kolling v. Dow Jones & Co. (1982) 137 Cal. App. 3d 709, 726-727, 187 Cal. Rptr. 797* ; for discussion of a supplier's right to refuse to deal with a specific entity, *see § 565.77[1]*, and*§ 565.77[2]*]. A determination of illegality under the "rule of reason" requires knowledge and analysis of the line of commerce, the market area, and the affected share of the relevant market [*Fisherman's Wharf Bay Cruise Corp. v. Superior Court (2003) 114 Cal. App. 4th 309, 335, 7 Cal. Rptr. 3d 628]* . To be actionable under this rule, an exclusive dealing arrangement must foreclose competition in a substantial share of the affected market [*Fisherman's Wharf Bay Cruise Corp. v. Superior Court (2003) 114 Cal. App. 4th 309, 335-339, 7 Cal. Rptr. 3d 628* (plaintiff allowed to proceed with claim because 20 percent of relevant market was effectively foreclosed by defendant's exclusive dealership agreements)].

A dealership or distributorship agreement may relate not only to the product itself, but also to replacement parts and service and repairs of the product. The requirement that a dealer or distributor only use authorized replacement parts supplied by the manufacturer has been attacked by independent parts distributors as a boycott, a conspiracy between the manufacturer and its franchised distributors to impose a monopoly, and as an illegal tying arrangement [*see Mozart Co. v. Mercedes-Benz of N. Am., Inc. (9th Cir. 1987) 833 F.2d 1342, 1344, 1348-1351* (restriction as justified for quality control)]. Between the manufacturer and the distributors, this type of restriction is generally considered a vertical nonprice restraint and is evaluated under the rule of reason standard [*Dimidowich v. Bell & Howell (9th Cir. 1986) 803 F.2d 1473, 1480* (diversity case applying Californialaw)]. If there is sufficient business justification, amanufacturer, even one that is also a distributor, may refuse to sell replacement parts and do all repair work itself, or may authorize only some of its other distributors to service its product or to sell replacement parts [*Dimidowich v. Bell & Howell (9th Cir. 1986) 803 F.2d 1473, 1483-1484]* . There may be benefits to competition in the product market, referred to as interbrand competition, that result from this type of intrabrand restriction [*Dimidowich v. Bell & Howell (9th Cir. 1986) 803 F.2d 1473, 1483-1484]* . Still, if it can be established that the manufacturer and one or more of its distributors agreed to exclude other distributors from the service and replacement market in order to eliminate competition in those markets, rather than to compete more effectively in the product market, the restraint will be illegal. The question is whether the anticompetitive effects in the service market outweigh the procompetitive effects in the product market. In most situations, the service market for that manufacturer's product will be much smaller than the product market. If this is the case, a nontrivial procompetitive effect in the product market will outweigh the anticompeti tive effect in the service market, and the restraint will be legal [*Dimidowich v. Bell & Howell (9th Cir. 1986) 803 F.2d 1473, 1484]* .

The termination of a dealership or distributorship arrangement is not prohibited, either as a breach of contract or as an antitrust violation, unless the cancellation is for anticompetitive reasons [*Kolling v. Dow Jones & Co. (1982) 137 Cal. App. 3d 709, 718-719, 187 Cal. Rptr. 797* ; *but see Gianelli Distrib. Co. v. Beck & Co. (1985) 172 Cal. App. 3d 1020, 1026-1042, 219 Cal. Rptr. 203* (summary judgment improper; question of fact whether custom and usage requires implied condition to terminate only for cause); for discussion of contracts, including interpretation to include a requirement of good cause in order to terminate, *see* Ch. 140, *Contracts*]. For discussion of additional considerations relevant to termination of franchises in general, of those for petroleum products or motor vehicle dealerships, and of discriminatory terminations, see Ch. 515, *Securities and Franchise Regulation* .

If the termination of an exclusive distributorship was wrongful and done for purposes of restraining trade, the withholding of approval of sale is part of the antitrust injury [*Kolling v. Dow Jones & Co. (1982) 137 Cal. App. 3d 709, 723-724, 187 Cal. Rptr. 797]* .

An agreement between distributors to divide territories or customers is referred to as a horizontal restraint, because it is between competitors at the same level of distribution, and is a per se antitrust violation [*Guild Wineries & Distilleries v. J. Sosnick & Son (1980) 102 Cal. App. 3d 627, 633, 162 Cal. Rptr. 87* ; *see Dimidowich v. Bell & Howell (9th Cir. 1986) 803 F.2d 1473, 1480* (diversity case applying California law under stipulation that it be interpreted in accordance with Sherman Act)]. A relationship between entities at different levels of the same distribution chain is referred to as vertical and is tested under the rule of reason standard [*Dimidowich v. Bell & Howell (9th Cir. 1986) 803 F.2d 1473, 1480]* . A manufacturer that operates at two distinct levels of the distribution chain in the same market by acting as both a supplier and a distributor of its own products is called a dual distributor [*Dimidowich v. Bell & Howell (9th Cir. 1986) 803 F.2d 1473, 1480]* . Without characterizing the restraint as vertical or horizontal, a California court held that, if a dual distributor's termination of a distributorship is primarily motivated by a desire to sell directly to customers of the terminated distributor, there is a per se violation [*Guild Wineries & Distilleries v. J. Sosnick & Son (1980) 102 Cal. App. 3d 627, 633-636, 162 Cal. Rptr. 87* ; *but see Dimidowich v. Bell & Howell (9th Cir. 1986) 803 F.2d 1473, 1482-1483* (diversity case applying California law and refusing to apply per se standard of *Guild* in situation not involving termination on ground that California Supreme Court would not apply per se approach to arrangement, such as dual distributorship, with which it is unfamiliar)].

It is not clear how far a manufacturer can go in enforcing a termination of a distributor. In sustaining summary

judgment for defendants on a Cartwright cause of action, the court said that the manufacturer did not have to allow its wholesalers to continue to supply the terminated distributors to avoid antitrust liability. However, summary judgment for defendants on a cause of action for interference with prospective economic advantage was reversed, with the same court saying there were questions of fact whether the manufacturer was privileged to have its agents request its wholesalers to stop supplying the terminated distributors and to terminate one of those wholesalers [*Gianelli Distrib. Co. v. Beck & Co. (1985) 172 Cal. App. 3d 1020, 1049, 1052-1058, 219 Cal. Rptr. 203* ; *see § 565.130* et seq.].

In one example of an insufficient pleading for wrongful termination of a distributorship and Cartwright violations, a distributor alleged that the termination was motivated by his sale of products of other suppliers. However, the termination was not wrongful because the distributorship agreement had been allowed to expire by its own terms. Because no damages for the alleged Cartwright violations were claimed to have been suffered during the term of the agreement, none were available on account of the proper termination [*Witt v. Union Oil Co. (1979) 99 Cal. App. 3d 435, 441, 160 Cal. Rptr. 285]* .

[4] Tie-Ins

A tie-in or tying arrangement involves one party's conditioning a sale of one item (the tying product) to the sale of another (the tied product). Tie-ins in California are prohibited under *Bus. & Prof. Code § 16727* (patterned on § 3 of the Clayton Act, *15 U.S.C.S. § 14*) and under *Bus. & Prof. Code §§ 16720* and *16726* (patterned on the Sherman Act). Decisions under those federal antitrust statutes are therefore applicable to interpret California law [*Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1971) 4 Cal. 3d 842, 852-853, 94 Cal. Rptr. 785, 484 P.2d 953]* . The purpose of the prohibition against the use of ties is to prevent a seller from using a dominant, desired product to compel the purchase of a second distinctcommodity. When a seller has the economic power to coerce buyers to forego exercise of their independent judgment as to the merits of the tied product, thus shielding it from competitive market forces, there is a restraint on competition [*People v. National Ass'n of Realtors (1981) 120 Cal. App. 3d 459, 470, 174 Cal. Rptr. 728]* .

Under *Bus. & Prof. Code § 16727* (and the Clayton Act), a tie-in is illegal if either (1) the seller enjoys a monopolistic position in the market for the "tying" product, or (2) if a substantial volume of commerce in the tied product is restrained [*see, e.g.*, *UAS Management, Inc. v. Mater Misericordiae Hospital (2008) 169 Cal. App. 4th 357, 370-371, 87 Cal. Rptr. 3d 81* (monopoly hospital's tying of inpatient hospital services with outpatient services, contractually preventing insurers from contracting with competing outpatient service provider, foreclosed sufficient business to constitute illegal tie-in)]. Under *Bus. & Prof. Code §§ 16720* and *16726* (and the Sherman Act) tyings are not illegal unless both of these conditions exist [*People v. National Ass'n of Realtors (1981) 120 Cal. App. 3d 459, 472, 174 Cal. Rptr. 728]* . A tying arrangement is illegal per se under the Clayton Act and *Bus. & Prof. Code § 16727* when either of the two elements exist and under *Bus. & Prof. Code §§ 16720* and *16726* when both exist [*People v. National Ass'n of Realtors (1984) 155 Cal. App. 3d 578, 583, 202 Cal. Rptr. 243]* . The tying product must in fact be a product, and not a service, to constitute an illegal tying arrangement under *Bus. & Prof. Code § 16727*, although the tied product may be a service [*Fisherman's Wharf Bay Cruise Corp. v. Superior Court (2003) 114 Cal. App. 4th 309, 340-341, 7 Cal. Rptr. 3d 628* (bay cruise was service, even though tangible ticket had to be purchased to facilitate sale of service)].

Proof of requisite economic power is usually inferred from other, more easily proven, facts. Domination of the market in the tying product is sufficient to infer that competition in the tied product has been or probably will be lessened by the agreement. Thus, evidence of market dominance is sufficient to support a finding of the requisite economic power. The "monopolistic" condition is satisfied when the seller has a dominant, as opposed to absolute, monopoly position in the tying product market and even though this power exists only with respect to some of the buyers in the market [*Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1971) 4 Cal. 3d 842, 858, 94 Cal. Rptr. 785, 484 P.2d 953* ; *People v. National Ass'n of Realtors (1981) 120 Cal. App. 3d 459, 472, 174 Cal. Rptr. 728* (multiple listing service as tying product, real estate association memberships as tied product)]. Neither California courts nor the ninth circuit require a finding of actual restraint of competition before a tie-in can be found illegal [*Roberts v. Elaine Powers*

Figure Salons, Inc. (9th Cir. 1983) 708 F.2d 1476, 1478-1479 ; *People v. National Ass'n of Realtors (1984) 155 Cal. App. 3d 578, 583-584, 202 Cal. Rptr. 243]* .

An illegal tying arrangement requires the existence of two products, and sometimes there is a question of fact as to whether there actually is more than a single, unitary service [*see, e.g.,* *Freeman v. San Diego Assn. of Realtors (1999) 77 Cal. App. 4th 171, 184-187, 91 Cal. Rptr. 2d 534]* . There may be a legitimate business reason for selling items in a combined form. Though not exhaustive, the following factors are to be taken into account: (1) whether competitors offer to sell the products or services separately or only as a unit, (2) whether the combined product or service is composed of varying assortments of component parts, (3) whether buyers are or can be charged separately for the allegedly separate products or service, and (4) whether defendant sells or offers to sell the products or services separately [*Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1971) 4 Cal. 3d 842, 858-859, 94 Cal. Rptr. 785, 484 P.2d 953]* .

It is not clear whether a tying arrangement is illegal per se if the seller will sell the tying product without the tied product, but will only do so at a higher price [*see* *Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1971) 4 Cal. 3d 842, 857 n.13, 94 Cal. Rptr. 785, 484 P.2d 953*].

Necessary allegations to state a cause of action for an illegal tying arrangement include a definition of the market by subject matter, total volume, proportion controlled by defendant, availability to plaintiff of the subject matter or a competing subject matter, and availability to the public of the subject matter or competing subject matter. Facts must be set forth from which it can be inferred that the defendant controls the market as geographically and otherwise defined and can substantially exclude plaintiff or others from that market or limit the availability of the product to the public [*Chicago Title Ins. Co. v. Great W. Fin. Corp. (1968) 69 Cal. 2d 305, 325-326, 70 Cal. Rptr. 849, 444 P.2d 481]* .

Failure to show that the defendant has any competitors in the tied product market or that the tie-in has any effect on competition in that market will defeat an action brought under *Bus. & Prof. Code § 16720* [*Morrison v. Viacom, Inc. (1998) 66 Cal. App. 4th 534, 543, 78 Cal. Rptr. 2d 133]* . For example, an action under *Bus. & Prof. Code § 16727* brought against a cable television provider that tied the purchase of satellite and premium channels to the purchase of local broadcast channels failed when the plaintiff consumers were unable to show that the cable company had any competitors in the market for local broadcast television channels. Since the only other source of local broadcast television channels in the area was free reception over the airwaves, the plaintiffs failed to show that the tying practice had any effect on competition for the product [*Morrison v. Viacom, Inc. (1998) 66 Cal. App. 4th 534, 543, 78 Cal. Rptr. 2d 133]* . Similarly, a cable company did not engage in an illegal tying arrangement when requiring customers to purchase basic cable television in order to receive FM or audio-only music channels. As the plaintiffs admitted they had no interest in purchasing basic cable, the tying arrangement did not injure competition in that market [*Belton v. Comcast Cable Holdings, LLC (2007) 151 Cal. App. 4th 1224, 1235-1236, 60 Cal. Rptr. 3d 631]* .

The prohibition on illegal tying arrangements may not be used to support a claim that a defendant is illegally evading price controls on the tying product by charging higher prices on the tied product [*Freeman v. San Diego Assn. of Realtors (1999) 77 Cal. App. 4th 171, 187-188, 91 Cal. Rptr. 2d 534 & n.18*].

[5] Group Boycott

In contrast to the single entity's refusal to deal and the exclusive dealing arrangement between two entities, both of which are permissible if no intent to restrain trade or abuse of monopoly power is involved, is the group boycott in which two or more traders refuse to deal with a third [*see* *Chicago Title Ins. Co. v. Great W. Fin. Corp. (1968) 69 Cal. 2d 305, 324, 70 Cal. Rptr. 849, 444 P.2d 481]* . Group boycott allegations often involve trade or professional associations, exclusive dealing arrangements, or distributorships [*see* *People v. Santa Clara Valley Bowling Proprietors' Ass'n (1965) 238 Cal. App. 2d 225, 236-241, 47 Cal. Rptr. 570* ; *see* *Marin County Bd. of Realtors, Inc. v. Palsson (1976) 16 Cal. 3d 920, 935-940, 130 Cal. Rptr. 1, 549 P.2d 833* ; *see* *Chicago Title Ins. Co. v. Great W. Fin.*

Corp. (1968) 69 Cal. 2d 305, 324, 70 Cal. Rptr. 849, 444 P.2d 481 (exclusive dealing arrangements)]. It is not clear when group boycotts are illegal per se and when they are to be tested under the rule of reason. Generally the distinctions arose between group boycotts involving anticompetitive business motivations and those involving trade or professional associations where services or activities were open only to members. Still, this distinction is not absolute [*see People v. Santa Clara Valley Bowling Proprietors' Ass'n (1965) 238 Cal. App. 2d 225, 236-241, 47 Cal. Rptr. 570* (applying per se standard)]. The landmark federal case enunciating the per se rule involved a retail department store which had exacted promises from all major electrical appliance manufacturers to refuse to sell to a neighboring retail competitor. That conduct was deemed illegal per se. As such, no defenses of reasonableness or mitigation were relevant, and no individual injury had to be shown. Injury to commerce or a tendency to monopoly was presumed to flow from the nature of the combination [*Klor's v. Broadway-Hale Stores (1959) 359 U.S. 207, 210-214, 79 S. Ct. 705, 3 L. Ed. 2d 741]* . In 1976, the California Supreme Court in considering the membership limitations of a local real estate association and the anticompetitive consequences of its allowing only member realtors to use its multiple listing service, distinguished an alleged group boycott by a trade association which is not aimed directly at coercing third parties or eliminating competitors, and tested the restraint by the rule of reason. Application of the rule of reason criteria had precedent in federal trade association cases [*see Associated Press v. United States (1945) 326 U.S. 1, 14-22, 65 S. Ct. 1416, 89 L. Ed. 2013* ; *Marin County Bd. of Realtors, Inc. v. Palsson (1976) 16 Cal. 3d 920, 935-940, 130 Cal. Rptr. 1, 549 P.2d 833]* .

When only competitive business motives are involved, presumably California courts will still consider a group boycott illegal per se [*see Oakland-Alameda County Builders' Exch. v. F. P. Lathrop Constr. Co. (1971) 4 Cal. 3d 354, 368, 93 Cal. Rptr. 602, 482 P.2d 226* (builders' exchange bid rules and exclusion of nonmember subcontractors as price tampering and group boycott considered illegal per se); *Jomicra, Inc. v. California Mobile Home Dealers Assn. (1970) 12 Cal. App. 3d 396, 401-402, 90 Cal. Rptr. 696* (association formed to boycott mobile home park and dealer to whom it gave exclusive sales' rights as boycott; unclean hands as not applicable to conduct which is illegal per se)].

Boycotts, threats, and coercion are also prohibited by California's Unfair Practices Act, *Bus. & Prof. Code §§ 17000-17208* [*see § 565.10* et seq.].

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§ 565.78 Preemption of State Court Jurisdiction

[1] By Interstate Activity or Impact

State court jurisdiction is not preempted in matters that have interstate aspects if there is a significant affect on state interests [*Younger v. Jensen (1980) 26 Cal. 3d 397, 405-406* ; *Union Oil Co. v. Chandler (1970) 4 Cal. App. 3d 716, 726, 84 Cal. Rptr. 756]* . Unless there is actual conflict due to the exercise of concurrent state and federal power, there is no federal preemption. When application of the Cartwright Act on interstate commerce is to facilitate competition and not to place a restraint on it, state courts retain subject matter jurisdiction. For instance, if an exclusive distributor whose territory is entirely within California, sues other California distributors and the manufacturer, a foreign corporation, both interstate and intrastate commerce are involved: the purchases and agreement between plaintiff and the manufacturer are in interstate commerce, and the restraint of the unfair distributorship practices has an impact on intrastate commerce [*R.E. Spriggs Co. v. Adolph Coors Co. (1974) 37 Cal. App. 3d 653, 659-666, 112 Cal. Rptr. 585]* . If the same facts give rise to both state and federal antitrust remedies, the plaintiff is free to ignore the federal question and pursue only the state claim [*Salveson v. Western States Bankcard Ass'n (9th Cir. 1984) 731 F.2d 1423, 1427* ; *see also Moore's Federal Practice, § 107.14[4][b][i]* (3d ed. Matthew Bender)].

However, the Commerce Clause does not necessarily prevent the application of state antitrust and unfair competition laws to out-of-state conduct causing damage in California, but determining whether a particular claim under state law would be preempted by federal law requires a factual analysis of the burden that would be imposed on interstate commerce [*RLH Indus., Inc. v. SBC Communications, Inc. (2005) 133 Cal. App. 4th 1277, 1290-1291, 35 Cal. Rptr. 3d 469]* .

[2] By Exclusive Federal Agency Jurisdiction

There are instances in which a California court's exercise of its jurisdiction is preempted by a federal agency. For example, the National Labor Relations Board (hereinafter NLRB) has exclusive primary jurisdiction over matters that affect interstate commerce and may constitute violations of the Taft-Hartley Act [*Garmon v. San Diego Bldg. Trades Council (1955) 45 Cal. 2d 657, 661-664, 291 P.2d 1* (NLRB declined jurisdiction); *California Kitchens v. United Bhd. of Carpenters & Joiners of Am. (1956) 139 Cal. App. 2d 597, 606, 294 P.2d 468]* . In one case for example, union

workers refused to handle cabinets manufactured out of state in a nonunion shop and caused cancellation of contracts for approximately8,000 cabinets. Although factual findings were made that the union activity was a combination restraining trade, an injunction prohibiting continuation of the activity was set aside because the California court could not assert jurisdiction until the NLRB had determined whether the activity complained of was an illegal boycott, enjoinable under Taft-Hartley, or was protected union activity. State court abstention is required even though injustices might result prior to the NLRB's decision to assume or decline jurisdiction [*California Kitchens v. United Bhd. of Carpenters & Joiners of Am. (1956) 139 Cal. App. 2d 597, 599-607, 294 P.2d 468]* .

[3] By Federal Statute

If a practice amounting to an unlawful restraint of trade is expressly required by federal law, a state antitrust claim based on that practice may be preempted. For example, a cable television company's practice of requiring customers to subscribe to its basic service tier in order to access other tiers of service, a practice that is expressly required by the Cable Television Consumer Protection and Competition Act of 1992, would be preempted if the cable company was regulated under the Act [*see* *Morrison v. Viacom, Inc. (1997) 52 Cal. App. 4th 1514, 1520-1522, 61 Cal. Rptr. 2d 544]* .

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§ 565.79 Jurisdiction and Venue

[1] State Courts

State courts of any county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, without regard to the amount in controversy, have jurisdiction under the Cartwright Act [*Bus. & Prof. Code § 16750(a)*]. In addition, once an action is pending, the court may join other parties if the ends of justice so require, whether or not those other parties reside in the county where the action is pending [*Bus. & Prof. Code § 16751*; *see Union Carbide Corp. v. Superior Court (1984) 36 Cal. 3d 15, 19-22, 201 Cal. Rptr. 580, 679 P.2d 14* (1978 amendment to *Bus. & Prof. Code § 16750* as establishing legislative intent that mandatory joinder procedures of *Code Civ. Proc. § 389* not thwart antitrust relief for indirect purchasers)]. State courts have no jurisdiction to construe or enforce federal antitrust laws [*Blumenstock Bros. Adver. Agency v. Curtis Publ'g Co. (1920) 252 U.S. 436, 440, 40 S. Ct. 385, 64 L. Ed. 649* ; *see Younger v. Jensen (1980) 26 Cal. 3d 397, 405-406* ; Von Kalinowski, Antitrust Laws and Trade Regulation, Ch. 6].

[2] Federal District Courts

Federal district courts in any district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, have jurisdiction to determine federal antitrust claims [*15 U.S.C.S. §§ 15* (treble damages), 26 (injunction); *28 U.S.C.S. § 1337* (civil actions under laws against restraints and monopolies)]. To state a federal claim, interstate commerce must be involved. The interstate commerce requirement can be met under either the "in commerce" theory or the "effect on commerce" theory [*McLain v. Real Estate Bd. of New Orleans, Inc. (1980) 444 U.S. 232, 242, 100 S. Ct. 502, 62 L. Ed. 2d 441]* . Under the "effect on commerce" theory, only the local activity, not the alleged illegal conduct, need have a substantial effect on interstate commerce. There must be a sufficient nexus between the local activity and interstate commerce so that it can be said as a practical matter of economics that there is not an insubstantial effect on the line of commerce involved. For instance a dispute over allocation of racing days at a race track where 50 percent of the owners and trainers, 40 percent of the horses, 40 percent of the patrons, and 66 percent of the jockeys were from out of state was found to have sufficient effect on interstate commerce to give the federal district court jurisdiction [*Turf Paradise, Inc. v. Arizona Downs (9th Cir. 1982) 670 F.2d 813, 818-819]* . For full treatment of federal court jurisdiction over antitrust claims, see Von Kalinowski, Antitrust Laws and Trade Regulation, Ch. 6.

Federal courts, in addition to having jurisdiction over antitrust claims involving interstate commerce, have pendent jurisdiction over state claims arising from the same facts [*Ford Motor Co. v. Superior Court (1973) 35 Cal. App. 3d 676, 679-680, 110 Cal. Rptr. 59* ; *see § 565.79[3]*].

[3] Concurrent Jurisdiction; Res Judicata

Although one could simultaneously bring a suit in state court for the Cartwright violations and a suit in federal district court for the federal violations, that procedure involves the risk of the first judgment barring the second on the basis of res judicata [*Derish v. San Mateo-Burlingame Bd. of Realtors (9th Cir. 1983) 724 F.2d 1347, 1352* (prior state action bars federal action); *Boccardo v. Safeway Stores, Inc. (1982) 134 Cal. App. 3d 1037, 1053-1054, 184 Cal. Rptr. 903* ; *Ford Motor Co. v. Superior Court (1973) 35 Cal. App. 3d 676, 678, 680, 110 Cal. Rptr. 59* (prior federal action bars state action)]. A federal district court cannot abstain from hearing the matter if only federal claims are set forth in the complaint [*Selma-Kingsburg-Fowler County Sanitation Dist. v. United States Dist. Court (9th Cir. 1979) 604 F.2d 643, 644-645* (commenting also that simultaneous state and federal actions are not in the interests of judicial economy)]. If the facts indicate there has been but one violation of a primary right that will support both state and federal claims and the federal claim is substantial, the federal court will have pendent jurisdiction to determine the state claim [*Sun Valley Disposal Co. v. Silver State Disposal Co. (9th Cir. 1969) 420 F.2d 341, 343-344* (local activity's impact on interstate commerce must be more than incidental); *Ford Motor Co. v. Superior Court (1973) 35 Cal. App. 3d 676, 679-680, 110 Cal. Rptr. 59]* .

[4] Removal to Federal Court

A state action can be removed to federal court if the claim arises under federal law. When this is done, the federal court acquires jurisdiction over pendent state claims, whether or not the plaintiff recovers on the federal claim [*see 28 U.S.C.S. § 1441(b)*; *Salveson v. Western States Bankcard Ass'n (9th Cir. 1984) 731 F.2d 1423, 1426, 1430-1431]* . Removal jurisdiction is derivative of the state court's jurisdiction. Thus, if the state court never actually had jurisdiction, as when an alleged state claim was merely an artfully pleaded federal claim, the federal court will have no removaljurisdiction [*Salveson v. Western States Bankcard Ass'n (9th Cir. 1984) 731 F.2d 1423, 1426, 1430-1431]* . The doctrine of artful pleading is also used to allow removal of a state claim filed to avoid the res judicata effect of a federal judgment. The federal court's jurisdiction is considered necessary to protect the earlier federal judgment [*State of California v. Chevron Corp. (9th Cir. 1989) 872 F.2d 1410, 1415* ; *Salveson v. Western States Bankcard Ass'n (9th Cir. 1984) 731 F.2d 1423, 1427-1429]* . However, the doctrine of artful pleading will not be applied in this context to prevent remand when the state claim relates to a later time period than that involved in the earlier federal action [*State of California v. Chevron Corp. (9th Cir. 1989) 872 F.2d 1410, 1414-1416]* . For discussion of removal, see Ch. 265, *Federal Courts: Jurisdiction and Removal* .

[5] Arbitration of Cartwright Act Claims

One court of appeal decision has held that parties cannot agree privately to arbitrate antitrust claims under the Cartwright Act [*see Bos Material Handling, Inc. v. Crown Controls Corp. (1982) 137 Cal. App. 3d 99, 109-111, 186 Cal. Rptr. 740]* . However, in a more recent case, another court of appeal concluded that Cartwright Act claims are subject to private agreements to arbitrate [*Crown Homes, Inc. v. Landes (1994) 22 Cal. App. 4th 1273, 1276-1283, 27 Cal. Rptr. 2d 827]* . The court in *Crown Homes* relied on federal cases, decided after *Bos*, which held that federal antitrust claims are subject to private arbitration agreements [*see, e.g., Mitsubishi Motors v. Soler Chrysler-Plymouth (1985) 473 U.S. 614, 628-640, 105 S. Ct. 3346, 87 L. Ed. 2d 444* (antitrust claims arising out of international transaction); *Nghiem v. NEC Elec., Inc. (9th Cir. 1994) 25 F.3d 1437, 1441-1442* (applying *Mitsubishi* rule to antitrust claims arising out of domestic transaction); *Kowalski v. Chicago Tribune Co. (7th Cir. 1988) 854 F.2d 168, 173* (same)].

For full discussion of contractual arbitration, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* , through Ch. 34, *Contractual Arbitration: Judicial Review* .

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§ 565.80 Standing to Sue

[1] Individual Consumers

Although both the federal statute and the Cartwright Act are phrased in terms of authorizing recovery by persons who have been injured in their "business or property," a consumer plaintiff who has been damaged by the anticompetitive conduct has standing to sue [*Reiter v. Sonotone Corp. (1979) 442 U.S. 330, 337-343, 99 S. Ct. 2326, 60 L. Ed. 2d 931* ; *Chicago Title Ins. Co. v. Great W. Fin. Corp. (1968) 69 Cal. 2d 305, 322, 70 Cal. Rptr. 849, 444 P.2d 481* ; *15 U.S.C.S. § 15*; *Bus. & Prof. Code § 16750(a)*]. The California statute further specifies that a plaintiff may recover whether he or she has dealt directly or indirectly with the defendant [*Bus. & Prof. Code § 16750(a)*; *Union Carbide Corp. v. Superior Court (1984) 36 Cal. 3d 15, 21-22, 201 Cal. Rptr. 580, 679 P.2d 14]* . Although federal antitrust law does not usually allow recovery to those who dealt only indirectly with the defendant, such as indirect purchasers, recovery by indirect purchasers under *Bus. & Prof. Code § 16750(a)* is not preempted by federal law because Congress did not express an intent to occupy the field or to preempt state law, and because there is no actual conflict [*State of California v. ARC Am. Corp. (1989) 490 U.S. 93, 109 S. Ct. 1661, 104 L. Ed. 2d 86* ; *B. W. I. Custom Kitchen v. Owens-Ill., Inc. (1987) 191 Cal. App. 3d 1341, 1346, 235 Cal. Rptr. 228* ; *Crown Oil Corp. v. Superior Court (1986) 177 Cal. App. 3d 604, 610-612, 223 Cal. Rptr. 164* ; *see Kansas v. Utilcorp United, Inc. (1990) 497 U.S. 199, 110 S. Ct. 2807, 111 L. Ed. 2d 169, 179-186* (describing direct purchaser rule and reasons therefor)].

[2] Competitors

Sometimes standing will be a question of the relevant market, that is, whether plaintiff and defendant compete in the same market. Federal cases hold that the boundaries of a product market are determined by the reasonable interchangeability of use or crosselasticity of demand between the product itself and substitutes for it. If an increase in the price of one product leads to an increase in demand for another, both products should be included in the relevant product market [*State of California v. American Stores (9th Cir. 1989) 872 F.2d 837, 841* (affirming finding that supermarkets are separate market from other retailers of grocery products)]. A federal court has ignored California statutes restricting nurse anesthetists' work and found standing for a nurse anesthetist to challenge an alleged conspiracy to eliminate competition by hiring only M.D. anesthesiologists. The court found that doctors and nurses compete in the same market because of interchangeability of use or cross elasticity of demand between the two professions [*Bhan v.*

NME Hospitals, Inc. (9th Cir. 1985) 772 F.2d 1467, 1470-1471 ; *but see Bhan v. NME Hosps., Inc. (9th Cir. 1991) 929 F.2d 1404, 1413-1414* (plaintiff failed to prove town in which hospital was located was relevant market or that firing of one nurse anesthetist injured competition)].

[3] Associations

Whether an association has standing to bring an action under *Bus. & Prof. Code § 16750(a)* on behalf of its members depends in substantial measure on the nature of the relief sought. If the association seeks a declaration, injunction, or some other kind of prospective relief, it is reasonable to suppose that the remedy, if granted, will inure to the benefit of those members of the association actually injured [*California Dental Assn. v. California Dental Hygienists' Assn. (1990) 222 Cal. App. 3d 49, 62, 271 Cal. Rptr. 410]* . Although noting that the federal criteria may differfrom the California criteria, a court of appeal analysed the issue under the general (as opposed to antitrust) federal rule, which states that an association has standing to bring suit on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit [*California Dental Assn. v. California Dental Hygienists' Assn. (1990) 222 Cal. App. 3d 49, 62, 271 Cal. Rptr. 410* ; *see Hunt v. Washington Apple Adver. Comm'n (1977) 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383]* . The court of appeal held a complaint by an incorporated association of dentists, as limited to the claim for injunctive relief, sufficient to withstand a demurrer because the complaint alleged injuries to the association's members and facts showing the association to be an appropriate representative for purposes of injunctive redress [*California Dental Assn. v. California Dental Hygienists' Assn. (1990) 222 Cal. App. 3d 49, 62, 271 Cal. Rptr. 410* ; *see also Residents of Beverly Glen, Inc. v. City of Los Angeles (1973) 34 Cal. App. 3d 117, 128-129, 109 Cal. Rptr. 724* (general California rule regarding standing of association)].

[4] Class Actions

[a] Certification

Class actions are authorized under the Cartwright Act, both with the Attorney General as class representative and with an individual as class representative [*Bus. & Prof. Code § 16750(c)*; *Bruno v. Superior Court (1981) 127 Cal. App. 3d 120, 130-133, 179 Cal. Rptr. 342]* . Although the Act authorizes the Attorney General to bring state antitrust actions on behalf of the state's political subdivisions; it does not prevent a county or other local public entity from bringing an action on its own behalf. [*Pacific Gas & Elec. Co. v. County of Stanislaus (1997) 16 Cal. 4th 1143, 1152, 69 Cal. Rptr. 2d 329, 947 P.2d 291]* . Counties that have been injured by price-fixing are no different from other persons or other businesses that have been injured by such conduct. The Cartwright Act authorizes a county to bring an action in federal court for violations of federal antitrust law even when the alleged illegal acts and their effects occur primarily outside the county's boundaries. A county, which is a political subdivision of the state with the right to sue and be sued, may bring a civil action for a violation of the Cartwright Act under *Bus. & Prof. Code § 16750(a)*, which provides that any person injured by a violation of the Cartwright Act may bring a civil action, and *Bus. & Prof. Code § 16750(b)*, which defines "person" as including the state and "any of its political subdivisions and public agencies" [*Pacific Gas & Elec. Co. v. County of Stanislaus (1997) 16 Cal. 4th 1143, 1150, 69 Cal. Rptr. 2d 329, 947 P.2d 291]* .

Certification requires that both illegal activity and resultant injury, sometimes referred to as "impact," can be proved predominantly with facts applicable to the class as a whole, rather than by a series of facts relevant to only individual or small groups of plaintiffs. A class impact is most easily established when the violations charged are illegal per se, like price-fixing. When a conspiracy to fix prices has been established and plaintiffs have established that they purchased the affected goods or services, impact or injury can be inferred. In addition, it is not necessary that each member of the purported class prove that he or she absorbed at least some part of the overcharges. The fact that certain members of the class may be injured to a lesser extent or not at all does not defeat certification; nor will local variations in marketing practices defeat certification [*B. W. I. Custom Kitchen v. Owens-Ill., Inc. (1987) 191 Cal. App. 3d 1341, 1348-1355,*

235 Cal. Rptr. 228 ; *Rosack v. Volvo of Am. Corp. (1982) 131 Cal. App. 3d 741, 752-760, 182 Cal. Rptr. 800]* .

When the issue involves the construction and coercive effect of standardized provisions in the defendant's contracts, the fact that there were many transactions with different individual plaintiffs, and that each plaintiff may have had a different understanding of the contract provision, does not prohibit certification. Unlike vindication of private rights through individual breach of contract or fraud causes of action, the purpose of unfair trade laws is to thwart unfair practices and to require the wrongdoer to disgorge the profits obtained in violation of the statute [*MacManus v. A.E. Realty Partners (1987) 195 Cal. App. 3d 1106, 1115-1116, 241 Cal. Rptr. 315]* . Requisite community of interest for certification exists if every member of the class would not be required to litigate numerous and substantial questions to determine his or her right to recover subsequent to the rendering of any class judgment that determines in the plaintiffs' favor those issues common to the class [*Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 809, 94 Cal. Rptr. 796, 484 P.2d 964* ; *MacManus v. A.E. Realty Partners (1987) 195 Cal. App. 3d 1106, 1116-1117, 241 Cal. Rptr. 315]* . A variance in purchase prices paid by class members is not an obstacle to certification. The court can divide the class into subclasses [*Occidental Land, Inc. v. Superior Court (1976) 18 Cal. 3d 355, 360 n.3, 134 Cal. Rptr. 388, 556 P.2d 750* ; *MacManus v. A.E. Realty Partners (1987) 195 Cal. App. 3d 1106, 1117, 241 Cal. Rptr. 315]* .

[b] Fluid Class Recovery

If recovery exceeds the claims filed and proved by individual class members, fluid class recovery may be allowed, often by requiring defendants to lower prices for a period of time or by giving the residue of damages to the state to be used to benefit class members [*Bruno v. Superior Court (1981) 127 Cal. App. 3d 120, 123-124, 130-135, 179 Cal. Rptr. 342]* . Fluid class recovery implements the policies of disgorgement and deterrence, and prevents defendants from retaining ill-gotten gains simply because their conduct harmed large numbers of people in small amounts rather than small numbers of people in large amounts [*State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 472, 224 Cal. Rptr. 605, 715 P.2d 564]* .

There are three steps in implementing fluid class recovery. First, the defendant's total damages liability is paid over to the class fund. Second, individual class members claim their shares by proving damages, often according to a lowered standard of proof. Some safeguards against fraud, such as verification of all claims or large claims, is usually required [*State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 472-473, 476-477, 224 Cal. Rptr. 605, 715 P.2d 564]* . Lastly, the remainder of the fund is distributed by one of several methods.

The appropriateness of a particular method depends on its usefulness in fulfilling the purposes of the underlying action. In determining which particular method to employ, the court must consider: (1) the amount of compensation provided to class members, including nonclaiming members; (2) the proportion of class members sharing in recovery; (3) the extent to which the benefits will "spill over" to nonclass members and the degree to which the spillover benefits will effectuate the purposes of the underlying substantive law; and (4) costs of administration [*State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 472-473, 224 Cal. Rptr. 605, 715 P.2d 564]* .

Under the price rollback method, the unclaimed portion of the fund is distributed through the market by lowering prices of the defendant's product for a specified time. This method is appropriate when the product is repeatedly purchased by the same individuals. It is not appropriate in a nonmonopoly market or when defendant is a manufacturer and retailers set the price of defendant's product [*State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 473-474, 224 Cal. Rptr. 605, 715 P.2d 564]* .

Under the "earmarked escheat" method, the unclaimed funds are disbursed to a responsible government organization for use on projects that benefit the noncollecting class members and promote the purposes of the underlying action [*State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 474, 224 Cal. Rptr. 605, 715 P.2d 564* , citing *Market St. Ry. Co. v. Railroad Comm'n (1946) 28 Cal. 2d 363, 171 P.2d 875* (not a class action; unclaimed fare overcharges awarded to city to improve street car services)]. Earmarked escheat indirectly benefits silent class members and has the

advantage of minimizing administrative costs to the extent already extant agencies administer the fund. This method should not be used if the relevant governmental body opposes its use [*State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 474-475, 224 Cal. Rptr. 605, 715 P.2d 564]* .

General escheat (payment of the recovery to the general fund of a governed body) may be used as a last resort when a more precise remedy cannot be found. Its only advantage is ease of administration [*State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 475, 224 Cal. Rptr. 605, 715 P.2d 564]* .

Under the "consumer trust fund" approach, the court appoints a board of directors to administer recovery in the interest of the class for indirect compensation to class members and to further the purposes of substantive law involved. To minimize expenses of administration, the funds can be allocated directly to responsible private organizations. This method has the advantage of ensuring that the recovery will not be submerged in the state's general fund [*State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 475, 224 Cal. Rptr. 605, 715 P.2d 564]* .

Under the "claimant fund sharing" approach, the residue is divided among the individual claimants. The disadvantage of the claimant fund sharing method is that it provides no benefit to silent class members. Further, if there is a windfall, it goes not to further the purposes of substantive law, but to overcompensate legitimate claims or to pay erroneous or fraudulent claims. This method is appropriate only if a large proportion of the class members participate and submit accurate claims [*State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 475-476, 224 Cal. Rptr. 605, 715 P.2d 564]* . This determination is not a function of the absolute number of persons recovering, but of the correlation or overlap between the injured class of persons and the class to be benefitted. Such a correlation cannot be found if there is a high incidence of erroneous or fraudulent claims [*see* *State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460, 479, 224 Cal. Rptr. 605, 715 P.2d 564]* .

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49-565 California Forms of Pleading and Practice--Annotated § 565.81

§ 565.81 Damages, Prejudgment Interest, and Injunctive Relief

Treble damages are recoverable under both the Cartwright Act and federal antitrust law. It has never been determined in California whether, like federal law, the Cartwright Act makes treble damages mandatory once actual damages or injury are shown, but it seems likely that they would be [*see Uneedus v. California Shoppers, Inc. (1978) 86 Cal. App. 3d 932, 936-942, 150 Cal. Rptr. 596* (treble damages under *Bus. & Prof. Code §§ 17043, 17082* of California's Unfair Practices Act, discussed in*§ 565.10* et seq. as mandatory because they would be under *15 U.S.C.S. §§ 13, 15*)]. In addition, a plaintiff may recover interest on his or her actual (before trebling) damages from the date of service of the complaint, reasonable attorney's fees, and costs of suit [*15 U.S.C.S. § 15(a)*; *Bus. & Prof. Code § 16750(a)*; *see also Bus. & Prof. Code § 16761* (10 percent interest)]. A prevailing defendant, by contrast, does not have a right to attorney's fees under these provisions [*Carver v. Chevron U.S.A., Inc. (2002) 97 Cal. App. 4th 132, 147, 118 Cal. Rptr. 2d 569]* . Moreover, a prevailing defendant cannot overcome this prohibition under an alternative contractual attorney fee provision if the legal work that was performed to defend against the claims under the Cartwright Act overlapped with work to defend against other claims that would otherwise be covered by the contractual provision [*Carver v. Chevron U.S.A., Inc. (2004) 119 Cal. App. 4th 498, 505, 14 Cal. Rptr. 3d 467]* .

15 U.S.C.S. § 26 authorizes injunctive relief in federal antitrust actions, and *Bus. & Prof. Code § 16754.5* authorizes injunctive relief in civil Cartwright actions brought by the California Attorney General or a district attorney. In the case of private actions under Cartwright, injunctive relief, both preliminary and permanent, is available when, and under the same conditions and principles as, injunctive relief is granted by courts generally under California law [*Bus. & Prof. Code § 16750(a)*; *see also* Stats. 1987, ch. 865, § 1 (declaring 1987 amendment to *Bus. & Prof. Code § 16750(a)* to be declarative of existing law)]. It is also available under general equitable principles [*Kold Kist v. Amalgamated Meat Cutters (1950) 99 Cal. App. 2d 191, 203-204, 221 P.2d 724* ; *O'Shea v. Tile Layers Union (1957) 155 Cal. App. 2d 373, 375, 318 P.2d 102* ; *see Civ. Code § 3422*; for complete discussion of the requirements for injunctive relief, *see* Ch. 303, *Injunctions*]. If the conduct complained of is illegal per se, a plaintiff seeking injunctive relief will not be denied that relief because he or she has unclean hands. The unclean hands doctrine is not applicable when conduct that is against public policy is involved [*Jomicra, Inc. v. California Mobile Home Dealers Assn. (1970) 12 Cal. App. 3d 396, 401-402, 90 Cal. Rptr. 696]* .

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§ 565.82 Penalties

In addition to the penalties in the Cartwright Act (*Bus. & Prof. Code § 16700 et seq.*), violations of the Cartwright Act subject a defendant to the civil penalties of *Bus. & Prof. Code § 17206*. Those penalties are fixed in the discretion of the court up to $2500 per violation established in any action brought in the name of the people of California by any of the following officials [*Bus. & Prof. Code § 17206*; *see People v. National Ass'n of Realtors (1981) 120 Cal. App. 3d 459, 473-476, 174 Cal. Rptr. 728]* :

- The Attorney General.
- Any district attorney or county counsel authorized by agreement with the district attorney in actions involving violation of a county ordinance.
- Any city attorney of a city with a population in excess of 750,000 with the district attorney's consent.
- A city prosecutor in any city having a full-time city prosecutor.
- A city attorney in any city and county (that, is San Francisco), with the district attorney's consent.

The *Bus. & Prof. Code § 17206* penalty is mandatory, and must be imposed for each violation, not for each category of violation. Factors relevant to the amount of the penalty include the number of persons directly affected by each act of unfair competition, the degree of harm, harassment, and unfair competition caused, whether the acts were malicious and predatory, and the nature and extent of public injury to do so the trial court must make a factual assessment of the number of people injured by the violations [*People v. National Ass'n of Realtors (1984) 155 Cal. App. 3d 578, 585-588, 202 Cal. Rptr. 243]* .

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§ 565.83 Notification Requirements Relating to Writs and Appeals

Anyone other than the attorney general or a district attorney who, by writ or appeal, commences any proceeding under the Cartwright Act in the California Supreme Court or a state court of appeal must notify the attorney general within three days of the commencement of the action. No relief, temporary or permanent, may be granted until proof of service of the required notice is filed with the court. On a showing of good cause, the Chief Justice or presiding justice may extend the time for filing the notice [*Bus. & Prof. Code § 16750.2*].

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[Reserved]

§§ 565.84[Reserved]

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49-565 California Forms of Pleading and Practice--Annotated § 565.100

§ 565.100 Governing Law

The Uniform Trade Secret Act, *Civ. Code §§ 3426-3426.10*, governs trade secret protection and has been effective since January 1, 1985. Special discovery rules pertaining to misappropriation actions under the UTSA are contained in *Code Civ. Proc. § 2019.210*. *Evid. Code §§ 915(b)* and *1060-1063* set forth the evidentiary privilege against disclosure of trade secret information. Common law, which adopted the Restatement of Torts § 757 and comments thereto, controls actions for misappropriations occurring prior to January 1, 1985 [*see Sinclair v. Aquarius Elecs., Inc. (1974) 42 Cal. App. 3d 216, 221, 116 Cal. Rptr. 654* ; *Civ. Code 3426.10*].

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§ 565.101 Relationship to Patent and Copyright Law

Although a trade secret may be a device or process that is patentable, patentability is not a condition precedent to the classification of a trade secret. Novelty and invention are not requisite for a trade secret as they are for patentability [*Rigging Int'l Maint. Co. v. Gwin (1982) 128 Cal. App. 3d 594, 613, 180 Cal. Rptr. 451]* . Whereas patent law is based on a policy of rewarding or otherwise encouraging the development of secret processes or devices, trade secret protection merely guards against breach of faith and reprehensible means of learning another's secret [*Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279, 290, 23 Cal. Rptr. 198]* .

Trade secret law also protects items that would not be proper subjects for consideration for patent protection. Since the patent laws require adequate and full disclosure and require a full and clear description of the invention and of the manner and process of making and using it, a patentcannot be a trade secret [*Kewanee Oil Co. v. Bicron Corp. (1974) 416 U.S. 470, 481-482, 94 S. Ct. 1879, 40 L. Ed. 2d 315* ; *see CytoDyn of New Mexico, Inc. v. Amerimmune Pharmaceuticals, Inc. (2008) 160 Cal. App. 4th 288, 298, 72 Cal. Rptr. 3d 600* (patents and trademarks could not constitute trade secrets)].

Unlike a patent, a trade secret does not give its owner any monopoly and once contracted away is subject to being copied, but the inventor is entirely free to keep the idea secret and not to divulge it to the general public [*Sinclair v. Aquarius Elecs., Inc. (1974) 42 Cal. App. 3d 216, 223, 116 Cal. Rptr. 654]* .

Another distinction between trade secrets and patents is the proof required in an action against misuse. To sustain a charge of infringement all of the elements of an invention must have been present in an accused device. But to sustain a claim of trade secret misappropriation, it is only necessary that some secret information relating to one or more essentials of the method or apparatus have been misappropriated [*Engelhard Indus., Inc. v. Research Instrumental Corp. (9th Cir. 1963) 324 F.2d 347, 353* ; for discussion and forms relating to patent law matters in state court actions, *see* Ch. 411, *Patents and Inventions*].

Similarly, states may regulate trade secrets only to the extent that the regulation does not conflict with federal copyright law [*S. O. S., Inc. v. Payday, Inc. (9th Cir. 1989) 886 F.2d 1081, 1090 n.13* ; *Religious Tech. Ctr. v. Wollersheim (9th*

Cir. 1986) 796 F.2d 1076, 1089] . Federal copyright law, however, does not preempt a state trade-secret cause of action that involves a legal or equitable right that is in addition to, or qualitatively different from, a claim based on copyright infringement [*S.O.S., Inc. v. Payday, Inc. (9th Cir. 1989) 886 F.2d 1081, 1089-1090* ; *Balboa Ins. Co. v. Trans Global Equities (1990) 218 Cal. App. 3d 1327, 1340, 1346-1350, 267 Cal. Rptr. 787* (referred to as "extra element" test)]. This rule leaves areas in which state trade-secret laws may properly apply to copyrighted material. For example, the owner of copyrighted computer software programs could state a cause of action against its licensee for surreptitiously obtaining an "unprotected" copy of the program because the California statute pleaded, *Civ. Code § 3426.1(a),(b),* did not involve a legal or equitable right equivalent to an exclusive right of a copyright owner under the Copyright Act, but only prohibited certain means of obtaining confidential information. Thus, application of the UTSA would not conflict with federal copyright law [*S.O.S., Inc. v. Payday, Inc. (9th Cir. 1989) 886 F.2d 1081, 1089-1090* (reversing summary judgment on pendent state claim and holding triable issue of fact existed regarding whether licensing contract allowed licensee to have copy of program that was not protected by source codes)]. For discussion and forms relating to copyright protection, *see* Ch. 349, *Literary Property and Copyright* .

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§ 565.102 UTSA Construed to Promote Uniformity

California has adopted the Uniform Trade Secrets Act (UTSA), codified at *Civ. Code § 3426 et seq.*. The purpose of the UTSA is to make uniform the law regarding trade secrets among the states enacting similar acts and it is to be applied and construed to further that purpose [*Civ. Code § 3426.8*].

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§ 565.103 Application of UTSA

[1] Date of Misappropriation

The UTSA does not apply to misappropriation occurring prior to January 1, 1985. If a continuing misappropriation otherwise covered by the UTSA began before January 1, 1985, the UTSA does not apply to the part of the misappropriation occurring before that date, but does apply to that part of the misappropriation occurring on or after January 1, 1985, unless the appropriation was not a misappropriation under the law in effect before the operative date of the UTSA [*Civ. Code § 3426.10*]. Thus, pursuant to *Civ. Code § 3426.10*, damages for a misappropriation that began before January 1, 1985, and continued thereafter are limited to those that occurred after that date. Further, recovery under the UTSA for the part of a continuing misappropriation occurring on or after January 1, 1985, can only be had if the appropriation was a misappropriation under the law in effect before January 1, 1985 [*Ralph Andrews Prods., Inc. v. Paramount Pictures Corp. (1990) 222 Cal. App. 3d 676, 685-686, 271 Cal. Rptr. 797* ; *see § 565.104*].

[2] Relationship to Other Statutes

The UTSA does not supersede any statute relating to the misappropriation of a trade secret, or any statute otherwise regulating trade secrets [*Civ. Code § 3426.7(a)*; *see* Research Guide for list of other statutes pertaining to trade secrets]. Thus, unfair and deceptive practices of former employees in stealing customers of their former employer can be enjoined under *Bus. & Prof. Code § 17200 et seq.* (discussed in§ 565.20 et seq.), whether or not the customer list is a trade secret [*Courtesy Temp. Serv., Inc. v. Camacho (1990) 222 Cal. App. 3d 1278, 1291, 272 Cal. Rptr. 352]* .

The UTSA does not affect contractual remedies or criminal remedies, whether or not based on misappropriation of a trade secret, or other civil remedies that are not based on misappropriation of a trade secret [*Civ. Code § 3426.7(b)*].

Nor does the UTSA affect the disclosure of a record by a state or local agency under the California Public Records Act (*Gov. Code § 6250 et seq.*). The determination of whether the disclosure of a record under the California Public Records Act constitutes a misappropriation of a trade secret and the resulting rights and remedies is made pursuant to the common law in effect prior to January 1, 1985 [*Civ. Code § 3426.7(c)*; for discussion of the California Public Records Act, *see* Ch. 470C, *Public Records Act*].

[3] Relationship to Common Law

Knowledge of the common law pertaining to trade secrets is important not only for those misappropriations occurring prior to January 1, 1985, but because it may clarify and provide guidance even for those acts to which the UTSA applies. For example, *Civ. Code § 3426.1(b)* provides descriptions of various acts of misappropriation, two of which revolve around a duty to maintain the secrecy or limit the use of a trade secret. Since the UTSA does not define under what circumstances such a duty would arise, the common law rule applicable to the duty attaching to confidential information should be relevant [*see § 565.104*]. Additionally, the UTSA makes specific reference to the common law, and both *Civ. Code §§ 3426.7(c)* (disclosure of public records) and 3426.10 (application of the UTSA) declare the common law to be determinative in specified instances. Moreover, the UTSA is very similar to the common law in some instances [*compare Civ. Code § 3426.1(b) with* Restatement of Torts § 757 (definitions of misappropriation)].

[4] Action Under UTSA; Definitions

[a] "Trade Secret"

"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that

- Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

- Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [*Civ. Code § 3426.1(d)*].

This California definition differs from the Uniform Trade Secrets Act proposed by the National Conference of Commissioners on Uniform State Laws in that it does not include the phrase "and not being readily ascertainable by proper means," after "generally known to" in *Civ. Code § 3426.1(d)(1)*. The deletion apparently resulted from arguments that conditioning the scope of a trade secret on the extent to which the information was not readily ascertainable would muddy the meaning of the term trade secret and invite the various parties to speculate on the time needed to discover a secret [*ABBA Rubber Co. v. Seaquist (1991) 235 Cal. App. 3d 1, 21, 286 Cal. Rptr. 518* (declining to follow *American Paper & Packaging Prods., Inc. v. Kirgan (1986) 183 Cal. App. 3d 1318, 1326, 228 Cal. Rptr. 713* , to extent it suggests that information is not protectable as trade secret if it is "known or readily ascertainable")]. While the ease of ascertainability is irrelevant to the definition of a trade secret, the assertion that a matter is readily ascertainable by proper means remains available as a defense to a claim of misappropriation if the defendant can establish that its knowledge of the information resulted from its own efforts or some other proper means[*ABBA Rubber Co. v. Seaquist (1991) 235 Cal. App. 3d 1, 21-22 n.9, 286 Cal. Rptr. 518]* .

The failure of the UTSA to include customer lists in its definition of a trade secret does not mean that the legislature intentionally excluded such lists. Rather, the language of *Civ. Code § 3426.1(d)* is inclusive, not exclusive, and customer lists can be protectable trade secrets under the Act [*Morlife, Inc. v. Perry (1997) 56 Cal. App. 4th 1514, 1523, 66 Cal. Rptr. 2d 731* ; *ABBA Rubber Co. v. Seaquist (1991) 235 Cal. App. 3d 1, 18, 286 Cal. Rptr. 518* ; *American Paper & Packaging Prods., Inc. v. Kirgan (1986) 183 Cal. App. 3d 1318, 1324, 228 Cal. Rptr. 713]* .

The word "compilation," as used in *Civ. Code § 3426.1(d)*, is not to be given the dictionary meanings ascribed to the verb "to compile." A compilation of data, as common usage of this term indicates, may come from any source and is as readily storable in one's memory as in some written form [*American Paper & Packaging Prods., Inc. v. Kirgan (1986) 183 Cal. App. 3d 1318, 1324, 228 Cal. Rptr. 713]* .

Information may lose its status as a trade secret through widespread distribution to a large group of potential

competitors or other persons to whom the information would have some economic value [*DVD Copy Control Assn., Inc.. v. Bunner (2004) 116 Cal. App. 4th 241, 251, 10 Cal. Rptr. 3d 185]* . In one case, for example, the court of appeal held that DVD decryption software, while originally the plaintiff's trade secret, lost its status as a trade secret when it was posted on dozens of Internet web sites within a short time and it was widely publicized through the community of computer programmers that the software was available for download by any interested party [*DVD Copy Control Assn., Inc. v. Bunner (2004) 116 Cal. App. 4th 241, 251253, 10 Cal. Rptr. 3d 185* (preliminary injunction improperly granted given loss of secrecy of information at time injunction was sought)].

[b] "Improper Means"

"Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. Reverse engineering or independent derivation alone shall not be considered improper means [*Civ. Code § 3426.1(a)*].

The plaintiff bears the burden of proof at trial on the issue of improper means, including the burden of proving that the defendant's use resulted from independent derivation or reverse engineering [*Sargent Fletcher, Inc. v. Able Corp. (2003) 110 Cal. App. 4th 1658, 1669, 3 Cal. Rptr. 3d 279]* . However, the failure of a defendant to produce evidence to rebut a prima facie showing made by the plaintiff can support a judgment for the plaintiff [*Sargent Fletcher, Inc. v. Able Corp. (2003) 110 Cal. App. 4th 1658, 1669, 3 Cal. Rptr. 3d 279]* .

[c] "Misappropriation"

"Misappropriation" means [*Civ. Code § 3426.1(b)*]:

- Acquisition of another's trade secret by a person who knows or has reason to know that the trade secret was acquired by improper means; or

- Disclosure or use of another's trade secret without express or implied consent by a person who:

  - Used improper means to acquire knowledge of the trade secret; or

  - At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was (i) derived through a person who used improper means to acquire it; (ii) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (iii) derived through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use [*see, e.g.,* *Vacco Indus., Inc. v. Van Den Berg (1992) 5 Cal. App. 4th 34, 51, 6 Cal. Rptr. 2d 602* (emphasizing, with respect to engineering drawings that were taken before effective date of UTSA, that their continued use after effective date to market products derived therefrom was misappropriation under UTSA definition)]; or

  - Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

A person "has reason to know" if he or she is on constructive notice and should make further inquiry regarding the ownership of the secret. Constructive notice is codified in *Civ. Code § 19*: every person who has actual notice of circumstances sufficient to put a prudent person on inquiry as to a particular fact has constructive notice of the fact itself in all cases in which, by prosecuting the inquiry, he or she might have learned the fact [*Ralph Andrews Prods., Inc. v. Paramount Pictures Corp. (1990) 222 Cal. App. 3d 676, 681-682, 271 Cal. Rptr. 797]* . If no duty is imposed by law on a person to make inquiry and the circumstances are such that a prudent person would not be put on inquiry, the fact that

the means of obtaining the true facts are open to a person and he or she does not pursue those means is not sufficient to impose liability. No definite rule can be formulated to specify what, in a particular instance, is sufficient to arouse suspicion. The better rule is that even information regarding collateral facts, which, if pursued, would have led to the discovery of the ultimate facts, is sufficient to charge the person failing to pursue [*Ralph Andrews Prods., Inc. v. Paramount Pictures Corp. (1990) 222 Cal. App. 3d 676, 682, 271 Cal. Rptr. 797]* .

General business practices and one's own actions are considered in determining if there is constructive notice [*Ralph Andrews Prods., Inc. v. Paramount Pictures Corp. (1990) 222 Cal. App. 3d 676, 683, 271 Cal. Rptr. 797]* . In one case, for example, the defendant had acquired a concept for a television show from plaintiff's employee. The employee allegedly misrepresented to defendant that he owned the rights to the concept. Defendant claimed it had a right to rely on the representation, but plaintiff argued that the reliance was not reasonable and that defendant had a duty to investigate. In reversing summary judgment for defendant, the court of appeal noted that the record did not disclose whether defendant ever received the written verification it requested from the employee that the employee owned the concept and that another studio had decided not to exercise its option on it [*Ralph Andrews Prods., Inc. v. Paramount Pictures Corp. (1990) 222 Cal. App. 3d 676, 683-685, 684 n.5, 271 Cal. Rptr. 797]* . Although defendant's usual practice was to have its legal department handle "clearances" for shows, there was no indication whether those normal business practices were followed. Nor did the record contain any evidence regarding the industry standards for obtaining clearances [*Ralph Andrews Prods., Inc. v. Paramount Pictures Corp. (1990) 222 Cal. App. 3d 676, 684-685, 271 Cal. Rptr. 797]* .

A defendant's continuing improper use or disclosure of a trade secret after the defendant's initial misappropriation is considered part of a single claim of continuing misappropriation accruing at the time of the initial misappropriation [*Cadence Design Sys., Inc. v. Avant! Corp. (2002) 29 Cal. 4th 215, 218, 127 Cal. Rptr. 2d 169, 57 P.3d 647]* . Each new use or wrongful disclosure by that defendant augments a single claim for misappropriation, rather than giving rise to a separate claim [*Cadence Design Sys., Inc. v. Avant! Corp. (2002) 29 Cal. 4th 215, 223, 127 Cal. Rptr. 2d 169, 57 P.3d 647]* . This does not preclude the existence of separate claims against different defendants, however. For example, some defendants may be liable for the initial misappropriation of the trade secret, while others are liable only for a later continuing use [*Cadence Design Sys., Inc. v. Avant! Corp. (2002) 29 Cal. 4th 215, 225, 127 Cal. Rptr. 2d 169, 57 P.3d 647]* .

[d] Definitions Not Exhaustive

In addition to not defining every term used in the UTSA, the definitions given may be subject to different meanings, as the statutory definitions are prefaced with the limitation, "unless the context requires otherwise" [*Civ. Code § 3426.1*; *see also § 565.103[2]*].

[5] Statute of Limitations

An action for misappropriation under the UTSA must be brought within three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. A continuing misappropriation constitutes a single claim for the purpose of determining the accrual of the statute of limitations [*Civ. Code § 3426.6*].

The first discovered, or discoverable, misappropriation of a trade secret commences the limitations period [*see Glue-Fold, Inc. v. Slautterback Corp. (2000) 82 Cal. App. 4th 1018, 1026, 98 Cal. Rptr. 2d 661]* . Therefore, even if there are two distinct periods of misappropriation, separated by a period during which the plaintiff erroneously believes that the defendant has ceased the misappropriation, the statute of limitations begins to run on the entire claim when the plaintiff first discovers or should have discovered the initial misappropriation [*Glue-Fold, Inc. v. Slautterback Corp. (2000) 82 Cal. App. 4th 1018, 1023-1028, 98 Cal. Rptr. 2d 661]* .

Despite the rule that a continuing misappropriation constitutes a single claim, a plaintiff may have more than one claim

for misappropriation, each with its own limitations period, when there is more than one defendant and at least one defendant obtained the trade secret at a later date from the original misappropriation [*Cypress Semiconductor Corp. v. Superior Court (2008) 163 Cal. App. 4th 575, 583-584, 77 Cal. Rptr. 3d 685*]. Thus, if a third party subsequently obtains misappropriated trade secrets from the original misappropriating party, a plaintiff's claim against that third party accrues only when the plaintiff discovers that third party's misappropriation. As to that third party, consistent with the single-claim rule, any continuing misappropriation constitutes a single claim [*Cypress Semiconductor Corp. v. Superior Court (2008) 163 Cal. App. 4th 575, 583-585, 77 Cal. Rptr. 3d 685*]. Although knowledge or lack of knowledge of the tainted nature of a trade secret by such a third-party defendant will be relevant to establishing the merits of a misappropriation claim against that third party, it is the *plaintiff's* knowledge of misappropriation by that third party, rather than the third party's knowledge, that triggers the running of the statute of limitations [*Cypress Semiconductor Corp. v. Superior Court (2008) 163 Cal. App. 4th 575, 586-587, 77 Cal. Rptr. 3d 685*].

For a form of affirmative defense based on the statute of limitations, *see § 565.274*.

[6] Injunctive Relief

Actual or threatened misappropriation of a trade secret may be enjoined. On application to the court, an injunction will be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional period of time in order to eliminate commercial advantage that would otherwise be derived from the misappropriation [*Civ. Code § 3426.2(a)*; *see also Morlife, Inc. v. Perry (1997) 56 Cal. App. 4th 1514, 1528, 66 Cal. Rptr. 2d 731* (upholding injunction that did not have specified time span, but which permitted enjoined party to seek termination of injunction pursuant to statute)]. For discussion and forms relating to injunctive relief generally, see Ch. 303, *Injunctions* .

If the court determines that it would be unreasonable to prohibit future use, an injunction may condition future use on payment of a reasonable royalty for no longer than the period of time the use could have been prohibited [*Civ. Code § 3426.2(b)*].

In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order [*Civ. Code § 3426.2(c)*]. The UTSA neither defines appropriate circumstances nor elaborates on the court order.

Even before a UTSA action is decided on its merits, a plaintiff may obtain a preliminary injunction prohibiting the publication of a trade secret, assuming that the trial court determines that the plaintiff is likely to prevail on the merits of the claim and will suffer irreparable harm without the injunction [*see DVD Copy Control Assn., Inc. v. Bunner (2003) 31 Cal. 4th 864, 875, 889, 4 Cal. Rptr. 3d 69, 75 P.3d 1* ; *see, e.g., ReadyLink Healthcare v. Cotton (2005) 126 Cal. App. 4th 1006, 1016-1026, 24 Cal. Rptr. 3d 720* (upholding preliminary injunction)]. A preliminary injunction enjoining the publication of a trade secret does not necessarily violate free speech rights under the federal and California constitutions, so long as the injunction at issue meets the appropriate constitutional standards and is narrowly tailored to enjoin no more speech than is necessary to protect the plaintiff's legitimate property right [*see DVD Copy Control Assn., Inc. v. Bunner (2003) 31 Cal. 4th 864, 876-889, 4 Cal. Rptr. 3d 69* (upholding preliminary injunction prohibiting publication of DVD decryption software code on Internet web site)].

If a preliminary injunction is issued, the plaintiff must furnish an undertaking equal to the damages the defendant may sustain as a result of the injunction. That estimate is an exercise of the trial court's discretion and will not be disturbed on appeal unless there is a clear abuse of discretion or the amount is arbitrary, capricious, or beyond the bounds of reason [*see ABBA Rubber Co. v. Seaquist (1991) 235 Cal. App. 3d 1, 14, 22, 286 Cal. Rptr. 518* (dissolving preliminary injunction because $1,000 was insufficient bond in view of evidence that 87.7 percent of defendant's invoices or $315,000 per year came from customers on plaintiff's customer list)]. Although lost profits will be offset by savings resulting from reduced sales expenses or costs of goods sold, the trial court cannot usually assume that the losses a defendant is likely to suffer will be easily compensated by new customers for its product. The amount of the undertaking must factor in reasonable attorney's fees and expenses that the defendant will have to expend to procure a

final decision dissolving the injunction [*ABBA Rubber Co. v. Seaquist (1991) 235 Cal. App. 3d 1, 14-15, 286 Cal. Rptr. 518]* .

Also, the California court of appeal has rejected the so-called "inevitable disclosure" doctrine that has been accepted in some other jurisdictions. Under this doctrine, an employer, without proof of actual or threatened trade secret misappropriation, may seek to enjoin a former employee from working for a competitor on the theory that the former employee's new employment will inevitably lead him or her to rely on the former employer's trade secrets. Noting that California public policy strongly favors employee mobility, the court of appeal concluded that adoption of this doctrine would effectively impose a covenant not to compete on the employee without the employee's express agreement, possibly through use of a confidentiality agreement signed after the employment contract with the former employer was already in place [*Whyte v. Schlage Lock Co. (2002) 101 Cal. App. 4th 1443, 1462-1463, 125 Cal. Rptr. 2d 277]* .

[7] Monetary Relief

[a] Damages

Damages for the actual loss caused by misappropriation may be recovered and any unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss may also be recovered [*Civ. Code § 3426.3(a)*; *seealso Morlife, Inc. v. Perry (1997) 56 Cal. App. 4th 1514, 1528, 66 Cal. Rptr. 2d 731* (upholding award characterized as "reasonable approximation" of enrichment)]. For a form of complaint for damages for trade secret misappropriation, *see § 565.270*.

[b] Royalties

If neither damages nor unjust enrichment caused by misappropriation are provable, the court may order payment of a reasonable royalty for no longer than the period of time the use could have been prohibited [*Civ. Code § 3426.3(b)*; *see § 565.103[6]*]. A royalty as damages may only be awarded under the conditions specified by statute. Thus, for example, a royalty may not be awarded as damages when damages or unjust enrichment are otherwise proven or provable [*Robert L. Cloud & Assocs., Inc. v. Mikesell (1999) 69 Cal. App. 4th 1141, 1149-1150, 82 Cal. Rptr. 2d 143* (also rejecting authority of trial court to order royalties from future business under general civil authority to fashion injunctive relief)].

[c] Exemplary Damages

If the misappropriation was willful and malicious, the court may award exemplary damages in an amount not exceeding twice any award made under *Civ. Code § 3426.3(a)* (damages) or *Civ. Code § 3426.3(b)* (royalties) [*Civ. Code § 3426.3(c)*]. This cap on exemplary damages of twice the compensatory damages does not relieve a plaintiff from the burden of providing meaningful evidence of the defendant's financial condition in order to support an award of punitive damages [*Robert L. Cloud & Assocs., Inc. v. Mikesell (1999) 69 Cal. App. 4th 1141, 1151-1152, 82 Cal. Rptr. 2d 143]* .

[d] Attorney's Fees and Costs

The court may award reasonable attorney's fees and costs to the prevailing party if a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or the misappropriation was willful and malicious [*Civ. Code § 3426.4*; *see Computer Prepared Accounts, Inc. v. Katz (1991) 235 Cal. App. 3d 428, 431, 439-440, 286 Cal. Rptr. 556* (awarding sanctions and attorney's fees under *Civ. Code § 3426.4* and *Code Civ. Proc. § 128.5* for seeking injunction based on forged documents)].

Costs that may be recovered by the prevailing party include a reasonable sum for the services of expert witnesses actually incurred and reasonably necessary in preparation for or during trial or arbitration. Costs may only be recovered

for expert witnesses who are not regular employees of any party [*Civ. Code § 3426.4*].

Although the statute does not define "bad faith," the court of appeal has held that, for these purposes, bad faith requires not only that the claim be objectively specious (not viable despite some apparent superficial merit), but also that the plaintiff brought or maintained the claim in subjective bad faith--that is, with an improper motive [*FLIR Systems, Inc. v. Parrish (2009) 174 Cal. App. 4th 1270, 1275-1278, 95 Cal. Rptr. 3d 307* ; *Gemini Aluminum Corp. v. California Custom Shapes, Inc. (2002) 95 Cal. App. 4th 1249, 1261-1263, 116 Cal. Rptr. 2d 358]* . Evidence that plaintiffs had an anticompetitive motive in filing the lawsuit will also support a finding that the lawsuit was objectively specious, at least when there is no evidence of actual damages, misappropriation or threatened misappropriation, and no threat of imminent harm [*FLIR Systems, Inc. v. Parrish (2009) 174 Cal. App. 4th 1270, 1276-1277, 95 Cal. Rptr. 3d 307*]. In addition, the fact that the trial court may have denied a defendant's motion for summary judgment will not preclude a later finding that the plaintiff's action was brought or maintained in bad faith [*FLIR Systems, Inc. v. Parrish (2009) 174 Cal. App. 4th 1270, 1283, 95 Cal. Rptr. 3d 307*].

The statute also does not define "willful" or "malicious." One appellate court has held that willfulness and maliciousness are established by a jury's determination, on clear and convincing evidence, to award punitive damages, because such a determination necessitates a finding that defendants' acts of misappropriation were done with malice [*Vacco Indus., Inc. v. Van Den Berg (1992) 5 Cal. App. 4th 34, 54, 6 Cal. Rptr. 2d 602]* .

Because attorney's fees for a prevailing plaintiff when defendant's misappropriation is willful and malicious are authorized by statute, they are awarded pursuant to *Code Civ. Proc. § 1033.5(a)(10)*, and the amount of the award is fixed by the court in a posttrial noticed motion [*Code Civ. Proc. § 1033.5(c)(5)*; *Vacco Indus., Inc. v. Van Den Berg (1992) 5 Cal. App. 4th 34, 55, 6 Cal. Rptr. 2d 602]* . The amount of the award to a successful plaintiff need not reflect the monetary relief awarded when the most significant relief awarded the plaintiff is injunctive [*Vacco Indus., Inc. v. Van Den Berg (1992) 5 Cal. App. 4th 34, 55, 6 Cal. Rptr. 2d 602* (relatively minor monetary award only reflected fact that defendant has not yet been successful in financially injuring plaintiffs)]. If the misappropriation began before the effective date of the UTSA (January 1, 1985) [*Civ. Code § 3426.10*], any attorney's fee award must be apportioned so that it is only attributable to misappropriations occurring after January 1, 1985 [*Vacco Indus., Inc. v. Van Den Berg (1992) 5 Cal. App. 4th 34, 55-56, 6 Cal. Rptr. 2d 602]* . If one defendant steals the trade secrets and joins with others in using them, that does not mean that attorney's fees may be awarded under the third party tortfeasor doctrine [*see Prentice v. North Am. Title Guar. Corp. (1963) 59 Cal. 2d 618, 30 Cal. Rptr. 821, 381 P. 2d 645* (first enunciating doctrine, sometime referred to as "Prentice" award)]. Plaintiff's damages in that situation do not flow from the "first" defendant's initial misappropriation, but from the continuing misconduct of the tortfeasors whose misappropriation was later in time [*Vacco Indus., Inc. v. Van Den Berg (1992) 5 Cal. App. 4th 34, 56-57, 6 Cal. Rptr. 2d 602]* .

An award of attorney's fees is not authorized under the UTSA when the complaint does not actually allege a cause of action for misappropriation of a trade secret, even if the plaintiff mistakenly includes a prayer for relief under the UTSA. In one case, for example, the complaint alleged only misappropriation of patents and trademarks. However, because patents and trademarks, by their very nature, are not trade secrets, defendant was not entitled to attorney's fees under the UTSA, even though the complaint sought double damages under *Civ. Code § 3426.3* [*CytoDyn of New Mexico, Inc. v. Amerimmune Pharmaceuticals, Inc. (2008) 160 Cal. App. 4th 288, 296-300, 72 Cal. Rptr. 3d 600*].

[8] Description of Trade Secret for Discovery Purposes

In any action alleging the misappropriation of a trade secret under the UTSA, before commencing discovery relating to the trade secret, the party alleging the misappropriation must identify the trade secret with reasonable particularity subject to any orders that may be appropriate under *Civ. Code § 3426.5* (protective discovery orders) [*Code Civ. Proc. § 2019.210*; *see § 565.103[9]*].

The statute does not clearly indicate whether the plaintiff must identify the trade secret with reasonable particularity in

the complaint or by some other means. However this identification is made, the "reasonable particularity" mandated by the statute does not require the party alleging misappropriation to define every minute detail of the claimed trade secret at the outset of the litigation. Instead, the plaintiff must make a showing that is reasonable under the circumstances to identify the alleged trade secret in a manner that will allow the trial court to control the scope of discovery, protect the parties' proprietary information, and allow them a fair opportunity to prepare and present their best case or defense [*Advanced Modular Sputtering, Inc. v. Superior Court (2005) 132 Cal. App. 4th 826, 835-836, 33 Cal. Rptr. 3d 901]* . Although not always required, if the nature of the alleged trade secret or the technical field in which it arises makes a detailed description alone inadequate to permit a defendant to learn the limits of the secret and develop defenses or permit the court to understand the secret and fashion discovery, the court may require, as necessary to satisfy those needs, an explanation of how the alleged trade secret differs from matters known to skilled persons in the field [*see Brescia v. Angelin (2009) 172 Cal. App. 4th 133, 150, 90 Cal. Rptr. 3d 842]* .

However, a plaintiff cannot be required at this stage of the proceedings to convince the court that the purported trade secrets are actually secret. While this is an essential element of the plaintiff's case that must be proven at trial, it is not a required showing at the prediscovery stage of the action [*Perlan Therapeutics, Inc. v. Superior Court (2009) 178 Cal. App. 4th 1333, 1351, 101 Cal. Rptr. 3d 211]* .

A trial court has the authority to reject a trade secret statement if the statement does not clearly identify all of the trade secrets at issue, or if it includes broad, catchall language, extensive extraneous material, or voluminous attachments as a tactic to preserve an unrestricted, unilateral right to subsequently amend the statement to include trade secrets that were not envisioned when the initial statement was filed [*Perlan Therapeutics, Inc. v. Superior Court (2009) 178 Cal. App. 4th 1333, 1350-1352, 101 Cal. Rptr. 3d 211]* .

[9] Preservation of Secrecy Ordered by Court

In an action under the UTSA, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval [*Civ. Code § 3426.5*].

During discovery a party responding to a discovery device or any other affectednatural person or organization may make a motion for a protectiveorder after making a reasonable and good faith attempt at informal resolution. The court, for good cause shown, may make any order that justice requires to protect that party and may order that a trade secret or other confidential research not be disclosed or be disclosed only in a certain way [*see Code Civ. Proc. § 2025.420(b)(13)* (depositions), *Code Civ. Proc. § 2030.090(b)(6)* (interrogatories), *Code Civ. Proc. § 2031.060(b)(5)* (inspection of documents), and *Code Civ. Proc. § 2033.080(b)(4)* (requests for admissions)]. For discussion of discovery procedures generally, see Ch. 190, *Discovery: Scope, Regulation, and Timing* .

If a protective order is issued to protect trade secrets that are the subject of litigation, a willful violation of the protective order by an attorney or client may result in the imposition of sanctions under *Code Civ. Proc. § 128.7*, or under former *Code Civ. Proc. § 128.5* if the suit was brought prior to 1995 [*see Wallis v. PHL Associates, Inc. (2008) 168 Cal. App. 4th 882, 900, 86 Cal. Rptr. 3d 297* (sanctions issued under *Code Civ. Proc. § 128.5*)].

[10] Current Ownership of Trade Secret Not Required

A plaintiff is not required to prove current ownership of the relevant trade secret in order to prosecute an action for misappropriation of a trade secret. It is sufficient that the plaintiff had an ownership interest in the secret during the time period for which damages are being sought [*Jasmine Networks, Inc. v. Superior Court (2009) 180 Cal. App. 4th 980, 986, 103 Cal. Rptr. 3d 426]* . Thus, for example, if a plaintiff files suit for trade secret misappropriation, then sells the trade secret but retains the right to sue for the past misappropriation, plaintiff does not lose the right to pursue remedies

for the misappropriation that occurred prior to selling the rights to the trade secret [*Jasmine Networks, Inc. v. Superior Court (2009) 180 Cal. App. 4th 980, 986, 103 Cal. Rptr. 3d 426]* .

If suit brought by a former owner raises concerns about the rights of an absent party, such as the current owner of the trade secret, or there is a danger of multiple or inconsistent liabilities on the part of the parties before the court, the rules governing permissive or compulsory joinder of parties may be used to seek to join the absent party [*Jasmine Networks, Inc. v. Superior Court (2009) 180 Cal. App. 4th 980, 986, 103 Cal. Rptr. 3d 426* ; *see, e.g., Code Civ. Proc. § 389*].

California Forms of Pleading and Practice--Annotated

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 565 UNFAIR COMPETITION
PART II. LEGAL BACKGROUND
C. Trade Secrets

49-565 California Forms of Pleading and Practice--Annotated § 565.104

§ 565.104 Common Law Action for Misappropriation

[1] Elements

The California common law position on liability for misappropriation of trade secrets is based on the Restatement definition of a trade secret. Liability requires proof of the existence of subject matter capable of protection as a trade secret and disclosure of the secret under circumstances giving rise to a contractual or other legally imposed obligation on the part of the disclosee not to use or disclose the secret to the detriment of the discloser [*Cal Francisco Inv. Corp. v. Vrionis (1971) 14 Cal. App. 3d 318, 321-322, 92 Cal. Rptr. 201* ; Restatement of Torts § 757, cmt. b]. A more recent federal appellate opinion, however, states that the elements of cause of action for common law misappropriation are (1) plaintiff's investment of substantial time and money in developing its "property," (2) defendant's appropriation of that property at little or no cost, and (3) plaintiff's injury by defendant's conduct [*Self-Directed Placement Corp. v. Control Data Corp. (9th Cir. 1990) 908 F.2d 462, 467]* .

A complaint alleging trade secret misappropriation must allege all three elements: (1) the existence of a trade secret; (2) disclosure under circumstances imposing an obligation to maintain its secrecy; and (3) use or disclosure to the owner's detriment [*see* *Cal Francisco Inv. Corp. v. Vrionis (1971) 14 Cal. App. 3d 318, 321-322, 92 Cal. Rptr. 201* ; *see § 565.270*]. If the defendant is an employee or former employee of the plaintiff, the facts alleged must also show that the public policy in favor of the protection of the complainant's interest in maintaining the secret outweighs the interest of the employee in using his or her knowledge to support himself or herself in other employment [*Cal Francisco Inv. Corp. v. Vrionis (1971) 14 Cal. App. 3d 318, 321-322, 92 Cal. Rptr. 201* ; *see § 565.105[1]*]. For discussion of privileges specific to trade secrets, see *§ 565.107*.

[2] Protectable Secret

California adopted the Restatement of Torts definition of trade secret, which provides that a trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business, and which gives the owner an opportunity to obtain an advantage over competitors who do not know or use it. Although the nature of a trade secret is somewhat nebulous, a characteristic common to those secrets which have found protection from disclosure and use by the courts is the need for their continued use by the owner in order to maintain a competitive advantage over others [

Rigging Int'l Maint. Co. v. Gwin (1982) 128 Cal. App. 3d 594, 606-607, 180 Cal. Rptr. 451 ; *see* Restatement of Torts § 757, cmt. b]. A trade secret differs from other secret information in a business because it is not simply information as to single or ephemeral events in the conduct of the business; it is a process or device for continuous use in the operation of the business [*Cal Francisco Inv. Corp. v. Vrionis (1971) 14 Cal. App. 3d 318, 322, 92 Cal. Rptr. 201]* .

Some factors to be considered in determining whether given information is one's trade secret are: the extent to which the information is known outside of the business, the extent to which it is known by employees and others involved in the business, the extent of measures taken to guard the secrecy of the information, the value of the information to the owner and competitors, the amount of effort or money expended in developing the information, and the ease or difficulty with which the information could be properly acquired or duplicated by others [*Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279, 289, 23 Cal. Rptr. 198]* .

Although the specific character of the trade secret is not important, its secrecy is, and matters which are completely disclosed by the goods marketed cannot be trade secrets [*Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279, 289, 23 Cal. Rptr. 198* ; for discussion of reverse engineering, *see § 565.104[3]*].

A trade secret protects only during the period when others working in the same field do not, in the ordinary course of their work, make the same discovery [*Sarkes Tarzian, Inc. v. Audio Devices, Inc. (S.D. Cal. 1958) 166 F. Supp. 250, 279]* . An invention may be placed in public use or on sale without losing its secret character, but, by definition, a trade secret is something which has not been placed in the public domain [*Sinclair v. Aquarius Elecs., Inc. (1974) 42 Cal. App. 3d 216, 226, 116 Cal. Rptr. 654* ; for an affirmative defense based on product disclosure of a trade secret, *see § 565.273*]. Even when a product utilizing misappropriated trade secret information is not built until after the information is made public, if the misappropriation occurred while the information was secret, an action for trade secret misappropriation will still exist and damages may be available for profits resulting from the acceleration of the date when production was possible [*Engelhard Indus., Inc. v. Research Instrumental Corp. (9th Cir. 1963) 324 F.2d 347, 353]* .

[3] Improper Disclosure

Trade secrets are protected only when they are disclosed or used through improper means. The significant difference between trade secretinformation and information that is not secret is that knowledge of the latter is available without use of improper means, while trade secret knowledge is usually available only by improper means [*Knudsen Corp. v. Ever-Fresh Foods, Inc. (C.D. Cal. 1971) 336 F. Supp. 241, 244]* . Trade secrets do not enjoy absolute monopoly protection and will lose their character as private property when the owner divulges them or when they are discovered through proper means [*Chicago Lock Co. v. Fanberg (9th Cir. 1982) 676 F.2d 400, 404* (defendants did not use improper means in soliciting lock combinations from locksmiths, using reverse engineering to deduce pattern, and publishing combination codes)]. "Improper means" connotes the existence of a duty to the trade secret owner not to disclose the secret to others [*Chicago Lock Co. v. Fanberg (9th Cir. 1982) 676 F.2d 400, 404-405* ; for discussion of employment and confidential information imposing duty of nondisclosure, *see § 565.105[1],[2]*]. A trade secret does not protect against discovery by fair and honest means such as independent invention, accidental disclosure, or reverse engineering (starting with the known product and working backward to divine the process) [*Sinclair v. Aquarius Elecs., Inc. (1974) 42 Cal. App. 3d 216, 226, 116 Cal. Rptr. 654* ; *see also* Restatement of Torts § 758 (1939); *Ralph Andrews Prods., Inc. v. Paramount Pictures Corp. (1990) 222 Cal. App. 3d 676, 686, 271 Cal. Rptr. 797* (issues to be determined on remand were whether defendant paid value in good faith to acquire concept for television show from plaintiff's employee, and whether defendant changed its position such that to subject it to liability would be inequitable)].

[4] Remedies for Misappropriation

[a] Damages

In an action under the common law, damages are recoverable for the pecuniary loss suffered by the defendant's wrongful use of the trade secret [*Klamath-Orleans Lumber, Inc. v. Miller (1978) 87 Cal. App. 3d 458, 466, 151 Cal. Rptr. 118]* . Loss of profits through a reduction of sales and price are the usual way to prove damages when the trade secret is production oriented [*Sarkes Tarzian, Inc. v. Audio Devices, Inc. (S.D. Cal. 1958) 166 F. Supp. 250, 269]* . When the trade secret misappropriated is a customer list, this may be shown by the loss of profits resulting from sales actually diverted from plaintiff's business [*Klamath-Orleans Lumber, Inc. v. Miller (1978) 87 Cal. App. 3d 458, 466, 151 Cal. Rptr. 118]* . Another method of assessing damages combines the losses sustained by the plaintiff and the benefits enjoyed by the misappropriator [*Tri-Tron Int'l v. Velto (9th Cir. 1975) 525 F.2d 432, 437* (discussing California law)].

[b] Injunctive Relief

Although injunctive relief under the common law has no paramount control over new cases because they are governed by UTSA, the common law principles may serve as important guidelines in deciding when injunctive relief is appropriate [*see § 565.103[1]* and*§ 565.103[3]*]. Moreover, even though UTSA provides for injunctive relief, it does not specify when that relief is warranted [*see Civ. Code § 3426.2*].

While the authority for injunctive relief is not stated in many cases, trade secret misappropriation under the common law could be enjoined under the purview of "unfair competition" and "unlawful" or "unfair business practice" under former *Civ. Code § 3369* (now *Bus. & Prof. Code §§ 17200-17203*) [*Chicago Lock Co. v. Fanberg (9th Cir. 1982) 676 F.2d 400, 404* ; *see Barquis v. Merchants Collection Assn.(1972) 7 Cal. 3d 94, 108-113, 101 Cal. Rptr. 745, 496 P.2d 817* ; *see also § 565.10* et seq.].

The owner of a trade secret is entitled to protection of its trade secret for as long as it remains a secret. If it is determined that information would not remain secret forever, but would be fully disclosed as a result of public announcements, demonstrations, sales of products, or other disclosures, that may be reflected in any injunctive relief ordered by the court [[*Winston Research Corp. v. Minnesota Mining & Mfg. Co. (9th Cir. 1965) 350 F.2d 134, 141]* . Injunctive relief has been granted for the approximate period it would require a legitimate competitor to develop a successful product after public disclosure of the previously secret information [*Winston Research Corp. v. Minnesota Mining & Mfg. Co. (9th Cir. 1965) 350 F.2d 134, 142* ; *Knudsen Corp. v. Ever-Fresh Foods, Inc. (C.D. Cal. 1971) 336 F. Supp. 241, 244]* .

[c] Statute of Limitations

No case definitively states what statute of limitations was applicable to trade secret misappropriation cases. While some cases theorized that trade secret protection was based on a property right [*see, e.g., California Intelligence Bureau v. Cunningham (1948) 83 Cal. App. 2d 197, 203, 188 P.2d 303]* , others reasoned that it arose out of a personal relationship requiring good faith actions [*see, e.g., Monolith Portland Midwest Co. v. Kaiser Aluminum & Chem. Corp. (9th Cir. 1969) 407 F.2d 288, 293* ; *see also § 565.105[1]*]. The period of limitation for an action for breach of good faith confidence is governed by *Code Civ. Proc. § 339(1)*, which imposes a two year limitation on actions on a contract, obligation, or liability not founded on an instrument of writing [*see Davies v. Krasna (1975) 14 Cal. 3d 502, 509-510, 121 Cal. Rptr. 705, 535 P.2d 1161* (case analyzed from fiduciary duty viewpoint rather than misappropriation of trade secret, but implies that two year limitation applies to trade secrets)]. For discussion of the elements and requirements of a confidential relationship, see Ch. 427, *Principal and Agent* .

A cause of action for violation of a trade secret accrues at the first moment of adverse use or disclosure of a trade secret in violation of the confidential relationship. Once the relationship is violated, it is not violatedanew with each added use or disclosure, although the damages suffered may thereby be aggravated. The cause of action arises only once [*Monolith Portland Midwest Co. v. Kaiser Aluminum & Chem. Corp. (9th Cir. 1969) 407 F.2d 288, 292-293]* . For a

form of affirmative defense based on the statute of limitations, *see § 565.274*.

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 565 UNFAIR COMPETITION
PART II. LEGAL BACKGROUND
C. Trade Secrets

49-565 California Forms of Pleading and Practice--Annotated § 565.105

§ 565.105 Particular Situations

[1] Employment Relationships

[a] In General

Although *Lab. Code § 2860*, which provides that everything which an employee acquires by virtue of employment, except compensation due from the employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the terms of employment, has been cited as authority for protection of the employer's secrets [*see Reid v. Mass Co., Inc. (1957) 155 Cal. App. 2d 293, 300, 318 P.2d 54]* , it is not necessary, because the employer's right to protection of trade secrets derives from the fact that the information was secret, not from the fact that it came to the employee in the course of employment [*see King v. Pacific Vitamin Corp. (1967) 256 Cal. App. 2d 841, 849, 64 Cal. Rptr. 486]* . While there is an older line of cases referring to trade secret as an absolute property right of the employer [*see, e.g., California Intelligence Bureau v. Cunningham (1948) 83 Cal. App. 2d 197, 203, 188 P.2d 303]* , more recent cases focus on relationship between the parties at the time the secret is disclosed [*see, e.g., Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279, 288, 23 Cal. Rptr. 198]* . The protected relationship, although not a confidential relationship, is one to which some rudimentary requirements of good faith attach [*see Monolith Portland Midwest Co. v. Kaiser Aluminum & Chem. Corp. (9th Cir. 1969) 407 F.2d 288, 293* (action based on supplier-customer relationship)]. For discussion of the elements and requirements of a confidential relationship, see Ch. 427, *Principal and Agent* .

Regardless of the underlying theory, the employer does not have a monopoly in the use of a trade secret, but merely a proprietary right against usurpation by unfair means. The employer has the burden of showing two things in an action for trade secret misappropriation against an employee or former employee: a legally protectable trade secret and a legal basis, either a covenant or a confidential relationship, on which to predicate relief [*Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279, 283, 23 Cal. Rptr. 198* ; *see § 565.271* for an allegation of trade secret misappropriation by a former employee].

[b] Implied Obligation of Confidentiality

In the employment relationship, the employee's obligation not to disclose trade secrets exists in the absence of any stipulation to the contrary [*By-Buk Co. v. Printed Cellophane Tape Co. (1958) 163 Cal. App. 2d 157, 164, 329 P.2d 147]* . The implied obligation not to make use of or disclose trade secrets is one of trust and encompasses the use of the information to the employers's prejudice [*American Loan Corp. v. California Commercial Corp. (1963) 211 Cal. App. 2d 515, 521, 27 Cal. Rptr. 243]* . As in other circumstances, if the information is not known to be secret or confidential, it will not be protected as such. For example, if an employer does not in any manner inform or indicate to employees that particular information is secret or to be treated in confidence, a warning that nonspecific information is secret after an employee terminates his or her employment is, in effect, ex post facto, and not effective [*see Architectural Models, Inc. v. Neklason (N.D. Cal. 1967) 264 F. Supp. 312, 321 , aff'd, (9th Cir. 1968) 397 F.2d 405]* . The implied obligation not to disclose the employer's trade secrets does not extend to create an obligation not to disclose trade secrets developed by the employee. Unless the employer can demonstrate another reason for the implication of confidence, an employee is privileged to disclose and use trade secrets which he or she developed--they being a part of the technical knowledge and skill acquired by virtue of employment [*Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279, 285-287, 23 Cal. Rptr. 198]* .

An employment agreement may contain various provisions, and in that contract an employee may limit his or her right to compete with the employer or restrict his or her right to use trade secret information [*Cal Francisco Inv. Corp. v. Vrionis (1971) 14 Cal. App. 3d 318, 323, 92 Cal. Rptr. 201]* . An agreement not to use trade secrets is not an unlawful restraint of trade unless it is more extensive than is reasonably required to protect the employer's interests [*By-Buk Co. v. Printed Cellophane Tape Co. (1958) 163 Cal. App. 2d 157, 164, 329 P.2d 147* ; for discussion of contracts not to compete generally, *see § 565.70* et seq.]. However, merely labeling something as confidential or a trade secret in an employment agreement will not make matters generally known in the trade or readily discernible by those in the trade a secret [*see Sarkes Tarzian, Inc. v. Audio Devices, Inc. (S.D. Cal. 1958) 166 F. Supp. 250, 264-265]* .

Whether or not a duty not to divulge trade secret information is expressed in an employment contract is a question of fact [*Ungar Elec. Tools, Inc. v. Sid Ungar Co., Inc. (1961) 192 Cal. App. 2d 398, 403, 13 Cal. Rptr. 268]* . A promise in an employment contract not to use confidential information regarding customers for one year after termination of employment is enforceable [*Gordon v. Landau (1958) 49 Cal. 2d 690, 694, 321 P.2d 456* (damages awarded for period promise was effective, injunctive relief not available past the effective time of promise)].

[c] Information Particular to Employer

The cases reflect the accommodation of competing policies in the law: the right of a business to be protected against unfair competition stemmingfrom the usurpation of its trade secret and the right of an individual to the unhampered pursuit of the livelihood for which he or she is best suited [*Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279, 285-286, 23 Cal. Rptr. 198]* . Trade secret protection is available only when the information has value through affording the employer a competitive advantage over competitors who do not know of it, and when the granting of protection will not unduly hamstring the former employee in the practice of his or her occupation [*Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279, 288, 23 Cal. Rptr. 198*]. Thus, trade secrets must be the particular secrets of the employer as distinguished from the general secrets of the trade. Secrets acquired and developed as a result of long employment in the particular trade may be carried over and put to use by the former employee and the new employer [*Sarkes Tarzian, Inc. v. Audio Devices, Inc. (S.D. Cal. 1958) 166 F. Supp. 250, 264-265]* . An employee's skill and knowledge of a particular business constitute the means by which he or she earns a living, and the courts will not readily label them confidential when that will deprive the employee of employment opportunities. If no confidential information is used, a former employee is free to compete with his or her former employer, to advise the former employer's customers of his or her new activities, and to solicit their business [*Rigging Int'l Maint. Co. v. Gwin (1982) 128 Cal. App. 3d 594, 612, 180 Cal. Rptr. 451]* .

[d] Customer Lists

[i] Statutory Analysis in Determining Trade Secret Status

The failure to include customer lists in its statutory definition of a trade secret [*Civ. Code § 3426.1(d)*] in the Uniform Trade Secrets Act does not mean that the legislature intentionally excluded them. Rather, the language of the statute is inclusive, not exclusive, and customer lists can be protectable trade secrets under the Act [*ABBA Rubber Co. v. Seaquist (1991) 235 Cal. App. 3d 1, 18, 286 Cal. Rptr. 518* ; *American Paper & Packaging Prods., Inc. v. Kirgan (1986) 183 Cal. App. 3d 1318, 1323-1324, 228 Cal. Rptr. 713]* .

Whether or not a particular customer list is a trade secret is determined by an analysis that had five components in the pre-UTSA cases (before January 1, 1985) [*Civ. Code § 3426.10*; *see Aetna Bldg. Maint. Co. v. West (1952) 39 Cal. 2d 198, 204-205, 246 P.2d 11* ; *see also § 565.105[2][c][iii]*]. The analysis now has only three components, although two or three of the five seem to have been subsumed in the "value" component of the most recent articulation of the criteria [*compare Aetna Bldg. Maint. Co. v. West (1952) 39 Cal. 2d 198, 204-205, 246 P.2d 11* ; *with ABBA Rubber Co. v. Seaquist (1991) 235 Cal. App. 3d 1, 18-19, 286 Cal. Rptr. 518]* .

The statutory definition of trade secret analyzed in the context of a customer list requires (1) information (2) that is valuable because it is unknown to others, and (3) which the owner has attempted to keep secret [*Civ. Code § 3426.1(d)*; *ABBA Rubber Co. v. Seaquist (1991) 235 Cal. App. 3d 1, 18, 286 Cal. Rptr. 518* ; *American Credit Indem. Co. v. Sacks (1989) 213 Cal. App. 3d 622, 630, 262 Cal. Rptr. 92* ; *see MAI Sys. Corp. v. Peak Computer, Inc. (9th Cir. 1993) 991 F.2d 511, 521* (computer company's confidential customer database constituted trade secret under California UTSA); *see also Courtesy Temp. Serv., Inc. v. Camacho (1990) 222 Cal. App. 3d 1278, 1287-1291, 272 Cal. Rptr. 352* ; *American Credit Indem. Co. v. Sacks (1989) 213 Cal. App. 3d 622, 630, 262 Cal. Rptr. 92* (describing test as consisting only of second and third elements)]. For example, in one case the court reiterated the above factors, and determined that a customer list fell within the definition of a trade secret under the Uniform Trade Secret Act (*Civ. Code § 3426 et seq.*) because: (1) plaintiff company provided a relatively unusual roofing service, commercial roof repair and maintenance; (2) its customer list was a compilation developed over a period of years, consisting of names, addresses, and contact persons, containing pricing information and knowledge about particular roofs and roofing needs of customers using its services; (3) the identities of those particular commercial buildings using these services were not generally known to the roofing industry; and (4) the company made reasonable efforts to maintain the secrecy of its customers' identities by limiting circulation of its customer lists, and by advising its employees, through an employment agreement and an employee handbook, that the company considered the information valuable and confidential [*Morlife, Inc. v. Perry (1997) 56 Cal. App. 4th 1514, 1520-1521, 66 Cal. Rptr. 2d 731]* .

A customer list, otherwise a trade secret, remains a trade secret belonging to the employer, even if prepared in part by the former employee [*Empire Steam Laundry v. Lozier (1913) 165 Cal. 95, 99, 130 P. 1180* ; *Reid v. Mass Co., Inc. (1957) 155 Cal. App. 2d 293, 302, 318 P.2d 54*]. A customer list may exist in the memory of the employee as well as in writing [*George v. Burdusis (1942) 21 Cal. 2d 153, 160, 130 P.2d 399* ; *Whitted v. Williams (1964) 226 Cal. App. 2d 52, 56, 37 Cal. Rptr. 692]* .

[ii] Misappropriation

Once an employer proves a customer list is entitled to trade secret protection, it must then prove that the former employee misappropriated the information to attain an unfair competitive advantage. Under the Uniform Trade Secret Act (*Civ. Code § 3426 et seq.*), the term "misappropriation" is defined to include the nonconsensual disclosure or use of a trade secret [*Civ. Code § 3426.1(b)(2)*]. Acts of solicitation may constitute use or misappropriation of protected information [*Morlife, Inc. v. Perry (1997) 56 Cal. App. 4th 1514, 1520-1521, 66 Cal. Rptr. 2d 731* (commercial roof repair business's former employees' use of customer list to solicit customers for their new commercial roof repair business constituted misappropriation)]. However, merely announcing a job change, or impending job change, to clients of a former employer is not by itself solicitation of thebusiness of those clients and is not actionable [*Hilb, Rogal & Hamilton Ins. v. Robb (1995) 33 Cal. App. 4th 1812, 1821-1822, 39 Cal. Rptr. 2d 887* (clients initiated transfer of

accounts on learning of employee's job change)].

[iii] Common Law Analysis

Under common law, to assure protection of a customer list, the former employer had to show that [*Aetna Bldg. Maint. Co. v. West (1952) 39 Cal. 2d 198, 204-205, 246 P.2d 11]* :

- The customer information was confidential and not readily accessible to competitors;
- The former employee solicited those customers with intent to injure the former employer;
- The former employee sought out certain preferred customers whose trade is particularly profitable and whose identities are not generally known to the trade;
- The business is such that a customer will ordinarily patronize only one concern; and
- The established business relationship between the customer and the former employer would normally continue unless interfered with.

The fundamental test for judicial protection of employer information was whether the knowledge gained by an employee is secret and confidential, and although all five factors were present in most instances of trade-secret protection, not all five had to be present for a plaintiff to prevail [*Hollingsworth Solderless Terminal Co. v. Turley (9th Cir. 1980) 622 F.2d 1324, 1331* ; *see Greenly v. Cooper (1978) 77 Cal. App. 3d 382, 391 n.2, 143 Cal. Rptr. 514* (possibility that other courts may have inadvertently interpreted five factors conjunctively rather than disjunctively)].

[iv] "Value" Element

The "value" element requires the information to have value to other businesses that are unaware of the information and that could put that information, if known, to valuable use [*see, e.g., GAB Business Servs., Inc. v. Lindsey & Newsom Claim Servs., Inc. (2000) 83 Cal. App. 4th 409, 428, 99 Cal. Rptr. 2d 665* (secrecy of employee salaries did not prove that knowledge of salaries had independent economic value)].

To illustrate, suppose the hypothetical widget industry consists of five sellers and there are 1,000,000 businesses engaged in industries that have been known to use widgets in their operations, but there is no way for the sellers to know for sure which of those 1,000,000 use widgets and which do not. Seller A's customer list of 500 would therefore have value to its competitors because it would allow them to distinguish the proven customers from those that are only potential customers and thus allow them to focus their sales efforts. However, if each of Seller A's competitors already knows that the businesses on A's customer list are proven widget consumers (even though they do not know that those businesses buy their widgets from A), A's customer list has no independent value because the identities of its customers are already known to its competitors. In the first situation, A's customer list would be a protectable trade secret, but in the second it would not [*ABBA Rubber Co. v. Seaquist (1991) 235 Cal. App. 3d 1, 19, 286 Cal. Rptr. 518]* .

A case that fits within the first hypothetical involved a customer list of a company selling credit insurance. Credit insurance would be purchased by an entity selling receivables and would insure against defaults. Of the potential purchasers of credit insurance at the time of the case, when credit insurance was new and there was resistance to it, only 6.5 percent were actually purchasing it. Therefore, knowledge of the customer list would have great value to a competitor [*American Credit Indem. Co. v. Sacks (1989) 213 Cal. App. 3d 622, 630-631, 638, 262 Cal. Rptr. 92]* . Temporary employees is another example of a product market in which a customer list is likely to have value to competitors because without it, a competing seller will have to expend quite a bit of effort to determine which potential purchasers are actual purchasers [*Courtesy Temp. Serv., Inc. v. Camacho (1990) 222 Cal. App. 3d 1278, 1282, 272*

Cal. Rptr. 352] .

[v] "Secrecy" Element

The "secrecy" prong of the test is satisfied if an employer requires employees to sign a confidentiality agreement respecting its client list, expiration dates of customer contracts, lists of business leads, history of customer relationships, and related client information [*American Credit Indem. Co. v. Sacks (1989) 213 Cal. App. 3d 622, 631, 262 Cal. Rptr. 92]* .

The secrecy prong can be satisfied even if the employee is not required to sign an agreement regarding confidentiality, for example, if the information is not divulged to anyone outside the business, is only divulged to employees when necessary for them to effectively carry out their functions, and the employees are told the information is confidential [*Courtesy Temp. Serv., Inc. v. Camacho (1990) 222 Cal. App. 3d 1278, 1288, 272 Cal. Rptr. 352]* .

[vi] Customers' Special Characteristics or Peculiar Requirements

Even when the customer list is not protected as a trade secret, if the former employment is one by which the former employee obtained information regarding the customers that would enable him or her to secure or retain their business, the list may be protected as a trade secret, and the former employee restrained from using or disclosing that information in a competing business [*Whitted v. Williams (1964) 226 Cal. App. 2d 52, 57, 37 Cal. Rptr. 692]* . A finding of confidentiality may be proper, even if thecustomers' names are well known, if their special characteristics are important to the seller and not obvious. For example, a customer list of home loan investors that contained other valuable information such as areas in which a customer would or would not invest, the maximum amount of investment, and loan expiration dates (enabling one to solicit the customer for additional business when the loan expires) warranted protection as a trade secret [*Hollingsworth Solderless Terminal Co. v. Turley (9th Cir. 1980) 622 F.2d 1324, 1333]* .

Salespersons must know the particular requirements of customers; that knowledge is not always protected as confidential [*American Alloy Steel Corp. v. Ross (1957) 149 Cal. App. 2d 215, 218-219, 308 P.2d 494]* . A former employee's subsequent use of knowledge of the "peculiar likes and fancies and other characteristics" of the former employer's customers is not allowed when that knowledge aids in securing and retaining their business [*Courtesy Temp. Serv., Inc. v. Camacho (1990) 222 Cal. App. 3d 1278, 1288-1291, 272 Cal. Rptr. 352]* . This knowledge is critical when friendly contact with customers is important to solicitors, a circumstance typical of the "trade route" cases, and when knowledge of the customer's desires for specialized information, preference for certain products, and buying habits are important to the sale. When superiority of product or service, rather than personal relationships or a secret specialty, is the basis for patronage, knowledge of the customer's requirements is not critical and usually does not warrant protection [*Aetna Bldg. Maint. Co. v. West (1952) 39 Cal. 2d 198, 205-206, 246 P.2d 11* ; *Klamath-Orleans Lumber, Inc. v. Miller (1978) 87 Cal. App. 3d 458, 465, 151 Cal. Rptr. 118]* .

[vii] Announcement of Change of Employment

Before the effective date of the UTSA, the announcement rule permitted a former employee to announce a change of employment to individuals or firms he or she had serviced for the former employer, whether or not those individuals or firms were on a protected trade-secret customer list [*American Credit Indem. Co. v. Sacks (1989) 213 Cal. App. 3d 622, 636, 262 Cal. Rptr. 92* ; *Theodore v. Williams (1919) 44 Cal. App. 34, 39, 185 P. 1014* ; *see Moss, Adams & Co. v. Shilling (1986) 179 Cal. App. 3d 124, 127-130, 224 Cal. Rptr. 456* (applying pre-UTSA announcement rule but holding customers serviced and remembered by former employees without resort to list were not trade secrets)]. Under UTSA, the fact that an employee personally rendered service to a customer of the former employer is not determinative of the trade-secret issue. The announcement rule retains its validity, however, and permits a former employee to announce a change of employment to individuals or firms he or she had serviced for the former employer even if those individuals or firms were on a protected trade-secret customer list because the right to announce a new affiliation is

basic to an individual's right to engage in fair competition [*American Credit Indem. Co. v. Sacks (1989) 213 Cal. App. 3d 622, 636, 262 Cal. Rptr. 92* ; *MAI Sys. Corp. v. Peak Computer, Inc. (9th Cir. 1993) 991 F.2d 511, 521* (applying California law)].

If the customer list is a trade secret, the former employee must stop at announcing his or her change of employment and cannot solicit the customer of the former employer. Providing personal service to a customer whose identity is a trade secret does not thereafter render that customer fair game for solicitation [*American Credit Indem. Co. v. Sacks (1989) 213 Cal. App. 3d 622, 636, 262 Cal. Rptr. 92* ; *see, e.g., MAI Sys. Corp. v. Peak Computer, Inc. (9th Cir. 1993) 991 F.2d 511, 521-522* (applying California law; former employee's use of former employer's customer database to contact former employer's customers and try to induce them to switch over to his new employer constituted improper solicitation)]. An "announcement" of new employment that informs the former employer's customers of the interesting competitive alternatives available from the former employee's new employer and invites inquiries goes beyond announcing new employment and is a solicitation [*American Credit Indem. Co. v. Sacks (1989) 213 Cal. App. 3d 622, 636-637, 262 Cal. Rptr. 92]* .

[viii] Certain Customer Lists Deemed Trade Secrets by Statute

Certain customer lists have been deemed trade secrets by statute. For example, the customer list (including the names, addresses, and identities of customers) of a telephone answering service constitutes a trade secret and confidential information of the owner of the telephone answering service [*Bus. & Prof. Code § 16606*].

Likewise, the customer list of an employment agency (including the names, addresses, and identities of (1) all employer customers who have listed job orders with the agency within 180 days before separation of an employee from the agency, and (2) all job applicant customers) constitutes a trade secret and confidential information of the employment agency [*Bus. & Prof. Code § 16607(a)*]. However, no liability arises from, and no cause of action attaches to, the use of an employment agency's customer list by a former employee who enters into business as an employment agency more than one year immediately following termination of his or her employment [*Bus. & Prof. Code § 16607(b)*].

Bus. & Prof. Code § 16607 has been construed to apply only to employer-employee relationships. A federal district court refused to apply *Bus. & Prof. Code § 16607* in the context of a franchise agreement regarding temporary personnel agencies, in part because former *Bus. & Prof. Code § 9902*, which was applicable to the acts complained of, excluded temporary personnel agencies from its definition of employment agency (*now see Civ. Code § 1812.501(a)*, which has no such exclusion). Thus, the court did not extend trade secret protection to the customer list or the temporary employee lists and would not enforce a noncompetition clause against former franchisees who established competing businesses [*Scott v. Snelling & Snelling, Inc. (N.D. Cal. 1990) 732 F. Supp. 1034, 1043-1044* (evidence showed former franchisees developed customer lists through their own efforts, personal knowledge, and business contacts; temporary employee lists were not so nonexclusive, given fact that employees often listed themselves with several agencies, as to be trade secret under *Civ. Code § 3426.1(d)*)].

[e] Corporate Director

Even in the absence of an express agreement against revelation of trade secrets, a director is under a fiduciary duty not to use or reveal them to the detriment of the corporation of which he or she is a director [*Components for Research, Inc. v. Isolation Prods., Inc. (1966) 241 Cal. App. 2d 726, 729, 50 Cal. Rptr. 829* ; for discussion and forms relating to corporate directors, *see* Ch. 167, *Corporations: Directors and Management*].

While a person is a director of a corporation, he or she may not undertake or participate in activities adverse to the interest of the corporation. A director is free to engage in competition with the corporation after termination of employment, but may plan and develop a competitive enterprise during the course of the directorship only when the particular activity engaged in is not against the best interests of the corporation [*see* *Sequoia Vacuum Sys. v. Stransky*

(1964) 229 Cal. App. 2d 281, 287, 40 Cal. Rptr. 203 (likening director to agent and finding him guilty of unfair competition)]. If a director violates this fiduciary duty, the corporation is entitled to recover all the profits of the transaction [*American Loan Corp. v. California Commercial Corp. (1963) 211 Cal. App. 2d 515, 524, 27 Cal. Rptr. 243]* .

[f] Injunctive Relief Against Employee

Within an employment relationship, injunctive relief should be granted only on convincing proof of a harmful violation of the plaintiff's rights, and the instances in which those rights are violated by an employee's misuse of information given during employment constitute an exceedingly small proportion of the whole [*Mathews Paint Co. v. Seaside Paint Co. (1957) 148 Cal. App. 2d 168, 175, 306 P.2d 113]* . The doctrine under which injunctive relief is granted should not be given application that would overemphasize the employer's right to the detriment of the employee by treating as confidential and secret all knowledge and information gained by the employee that might be of assistance to the employee and a later and competing employer. Whether or not injunctive relief will be granted is determined by whether the knowledge gained by an employee is secret and confidential. Only if the information is secret and confidential will its use by a former employee be enjoined. Some knowledge gained by an employee is of such a general character that equity will not restrict its later use [*American Alloy Steel Corp. v. Ross (1957) 149 Cal. App. 2d 215, 218-219, 308 P.2d 494* ; *see, e.g.,* *Electro Optical Indus., Inc. v. White (1999) 76 Cal. App. 4th 653, 661-662, 90 Cal. Rptr. 2d 680* (plaintiff's customer lists, sales prices, production costs, and marketing plans were not trade secrets because they were common knowledge or readily available)].

One court of appeal opinion has held that if an employer seeks an injunction preventing a former employee from working for a direct competitor, the former employer must demonstrate either that the disclosure of trade secrets is likely to result from the subsequent employment or that it would be impossible for the employee to perform his or her new job without disclosing those trade secrets [*Electro Optical Indus., Inc. v. White (1999) 76 Cal. App. 4th 653, 660, 90 Cal. Rptr. 2d 680* (former employer failed to show that disclosure would likely result from new employment)].

A salesperson necessarily becomes somewhat acquainted with the particular requirements of customers, but that knowledge is not in and of itself confidential information that is the property of the employer. Trade and business secrets and confidential information are the property of the employer and cannot be used by the employee for his or her own benefit [*American Alloy Steel Corp. v. Ross (1957) 149 Cal. App. 2d 215, 218-219, 308 P.2d 494* ; *see Lab. Code § 2860*].

When the trade secrets obtained by a former employee are not used by him or her, or that employee's subsequent employer, no ground for any injunction exists. The receipt or acceptance of further business by the new employer from former customers of the former employer who were not solicited or are not retained through the use of the former employer's trade secret may not be enjoined [*Whitted v. Williams (1964) 226 Cal. App. 2d 52, 59, 37 Cal. Rptr. 692]* .

The fact that the employer that owns the trade secret wrongfully terminated the employment of the person who misappropriated the trade secret does not usually amount to "unclean hands" to bar injunctive relief. Unclean hands is determined by the impact the conduct has on the equitable relations between the parties. The firing of an employee on a pretextual basis does not implicate the equities between the parties arising out of the employee's tortious misconduct or obligation to refrain from a tortious invasion of the employer's proprietary rights [*Vacco Indus., Inc. v. Van Den Berg (1992) 5 Cal. App. 4th 34, 52-54, 6 Cal. Rptr. 2d 602* (wrongful termination occurred after employee had stolen engineering plans, drawings, and parts comprising trade secrets but before employee started using them to solicit plaintiff's customers or manufacture competing products)]. To conclude otherwise would invite every disgruntled terminated employee to defend charges of theft and misappropriation by establishing breach or wrongful termination of employment contract [*Vacco Indus., Inc. v. Van Den Berg (1992) 5 Cal. App. 4th 34, 53, 6 Cal. Rptr. 2d 602]* .

For general considerations involved in granting or denying injunctive relief, see*§ 565.103[6]*.

[g] Employee's Wrongful Termination No Defense

The fact that employment of the employee who misappropriated the trade secret was wrongfully terminated does not provide defense or bar to prevent the employer from recovering compensatory relief [*Vacco Indus., Inc. v. Van Den Berg (1992) 5 Cal. App. 4th 34, 53, 6 Cal. Rptr. 2d 602* (to conclude otherwise would invite every disgruntled terminated employee to defend charges of theft and misappropriation by establishing breach or wrongful termination of employment contract)]. Nor does it bar injunctive relief [*see § 565.105[1][f]*].

[2] Disclosure of Information in Confidence

Trade-secret misappropriation is not based on a trade secret as a physical object of property, but on abuse of confidence or impropriety in learning the secret, and that abuse or impropriety may exist when the information is not a trade secret [*see Ojala v. Bohlin (1960) 178 Cal. App. 2d 292, 301, 2 Cal. Rptr. 919* (action for unfair competition by plaintiff against a manufacturer who made goods of plaintiff's design for plaintiff under a contract including a covenant not to compete, but who used plaintiff's design to manufacture a competing product); *Thompson v. California Brewing Co. (1957) 150 Cal. App. 2d 469, 476, 310 P.2d 436* (disclosure of marketing idea); *but see American Alloy Steel Corp. v. Ross (1957) 149 Cal. App. 2d 215, 218-219, 308 P.2d 494* (information must be secret)]. An obligation not to disclose confidential information may arise from express or implied agreement [*Plant Indus., Inc. v. Coleman (C.D. Cal. 1968) 287 F. Supp. 636, 644* (involving employee)]. Because trade-secret law protects against breach of faith and reprehensible means of learning another's secret, a specific and judicially recognized relationship need not have been established. The circumstances surrounding the acquisition and disclosure of secret information may indicate that an implied relationship of trust and confidence exists with respect to that information. For example, a trial court's finding of a breach of faith and confidence was upheld when the defendant, a manufacturer, solicited a breakdown of the physical properties and characteristics of a part from the part supplier without revealing that the information would be used to allow the defendant to copy the part and transfer the information to other potential suppliers [*Pachmayr Gun Works, Inc. v. Olin Mathieson Chem. Corp., Winchester W. Div. (9th Cir. 1974) 502 F.2d 802, 807-808]* .

Other circumstances in which secret information may be disclosed include in the course of contract negotiations. However, confidence cannot be imposed on a person without that person's consent or if that person has no knowledge of the confidential nature of the information being disclosed [*Thompson v. California Brewing Co. (1957) 150 Cal. App. 2d 469, 475-476, 310 P.2d 436* (disclosure of marketing idea); *see* Restatement of Torts § 757, cmts. b, j].

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49-565 California Forms of Pleading and Practice--Annotated § 565.106

§ 565.106 Agreement for Use of Trade Secret

Parties may elect to make a legally binding agreement for the use, payment, preservation of confidentiality, and return of trade secret information. That agreement is effective only between the contracting parties and does not constitute a bar to free copying by others who independently discover the idea [*Sinclair v. Aquarius Elecs., Inc. (1974) 42 Cal. App. 3d 216, 224, 116 Cal. Rptr. 654]* .

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49-565 California Forms of Pleading and Practice--Annotated § 565.107

§ 565.107 Trade Secret Evidentiary Privilege

The owner of a trade secret has a privilege to refuse to disclose a trade secret and to prevent another from disclosing it, if allowing that privilege will not work an injustice [*Evid. Code § 1060*]. In cases involving a trade secret privilege, the burden of proof is on the party claiming the privilege; that party should be prepared to prove the existence of the trade secret and the business injury caused by disclosure. The claimant may also be required to furnish the court with sufficient information for the court to balance whether the interest involved in the secret's value to its owner outweighs the need of the adverse party for that information, as well as to show why a protective order would not solve the problems caused by the requested disclosure [*Agricultural Labor Relations Bd. v. Richard A. Glass Co. (1985) 175 Cal. App. 3d 703, 715, 221 Cal. Rptr. 63* (disclosure allowed); *see also Hofmann Corp. v. Superior Court (1985) 172 Cal. App. 3d 357, 362, 218 Cal. Rptr. 355* (no disclosure allowed)].

The court may not require disclosure of the trade secret in order to rule on the claim of privilege except as provided in *Evid. Code § 915(b)* [*Evid. Code § 915(a)*]. Under *Evid. Code § 915(b)*, if a claim of privilege under *Evid. Code § 1060* is made and the court is unable to rule without requiring disclosure of the information claimed to be secret, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and any other person that person is willing to have present. If the judge determines that the information is privileged, neither the judge nor any other person may ever disclose the information so disclosed without the consent of a person authorized to permit the disclosure [*Evid. Code § 915(b)*].

In a criminal proceeding, the privilege is asserted by the owner of the trade secret, or by the People on the owner's behalf and with the owner's permission, making a motion for a protective order. The protective order shall be granted if a preponderance of evidence demonstrates that a trade secret might be disclosed during the proceeding unless a protective order is issued and that issuance of a protective order would not conceal a fraud or work an injustice [*Evid. Code § 1061*]. In addition in a criminal case, the court may exclude the public from any portion of the proceeding duringwhich it is likely that the trade secret would otherwise be disclosed to the public if there is a substantial probability that the disclosure would cause serious harm to the owner of the trade secret and there is no overriding public interest in an open proceeding. A hearing on a motion to exclude the public is conducted in camera [*Evid. Code §*

1062; *see also Evid. Code § 1063* (procedure for sealing articles protected by protective order in criminal proceeding)].

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49-565 California Forms of Pleading and Practice--Annotated § 565.108

§ 565.108 Judicial Proceedings Privilege Inapplicable

Notwithstanding *Civ. Code § 47(b)*, referred to as the judicial proceedings privilege, there is no privilege for the voluntary, intentional disclosure of trade secret information, unauthorized by its owner, to a competitor or potential competitor of the owner of the trade secret information or the agent or representative of that competitor or potential competitor in any legislative or judicial proceeding, or in any other official proceeding authorized by law, or in the initiation or course of any other proceeding authorized by law and reviewable by writ of mandate [*Civ. Code § 3426.11*]. Such disclosure is not privileged and is not a privileged communication for purposes of Part 2 of Division 1 of the Civil Code (*Civ. Code § 43 et seq.*) [*Civ. Code § 3426.11*].

Civ. Code § 3426.11 does not in any manner limit, restrict, impair, or otherwise modify either the application of the other subdivisions of *Civ. Code § 47* to the conduct to which *Civ. Code § 3426.11* applies or the court's authority to control, order, or permit access to evidence in any case before it [*Civ. Code § 3426.11*]. Nor may *Civ. Code § 3426.11* be construed to limit, restrict, or otherwise impair, the capacity of persons employed by public entities to report improper government activity, as defined in Gov. Code § 8457.2(b), or the capacity of private persons to report improper activities of a private business [*Civ. Code § 3426.11*].

Civ. Code § 3426.11 was enacted by Stats. 1992, ch. 165, and abrogates the privilege enunciated in *ITT Telecom Prods. Corp. v. Dooley (1989) 214 Cal. App. 3d 307, 314-317, 262 Cal. Rptr. 773* . The court in *ITT Telecom* held that a voluntary disclosure of a trade secret or other information in aid of a judicial proceeding that is also a breach of an express agreement is not privileged [*ITT Telecom Prods. Corp. v. Dooley (1989) 214 Cal. App. 3d 307, 320, 262 Cal. Rptr. 773]* .

For a form of affirmative defense based on the judicial proceeding privilege, see Ch. 340, *Libel and Slander* .

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49-565 California Forms of Pleading and Practice--Annotated § 565.109

§ 565.109 Personal Liability of Corporate Directors for Using Misappropriated Trade Secrets

In applying the statutory definition of "misappropriation" under the Uniform Trade Secret Act (UTSA) [*see Civ. Code § 3426.1(b)*] [*see § 565.103[4][c]*], corporate directors and officers who have joined a corporation after the initial trade secret misappropriation may be held personally liable if they used, through the corporation, the trade secrets and if, at the time of their use, they knew or had reason to know that knowledge of the trade secrets was derived from or through a person who had improperly acquired the knowledge or that the trade secrets were obtained by a person who owed a duty to the plaintiffs to maintain their secrecy [*PMC, Inc. v. Kadisha (2000) 78 Cal. App.4th 1368, 1383, 1385, 93 Cal. Rptr. 2d 663]* .

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[Reserved]

§§ 565.110[Reserved]

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49-565 California Forms of Pleading and Practice--Annotated § 565.130

§ 565.130 Governing Law

An action based on intentional interference with economic relations is governed by case law principles that have their roots in the common law tort of inducing breach of contract [*see Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 387-391, 45 Cal. Rptr. 2d 436, 902 P.2d 740* ; *Buckaloo v. Johnson (1975) 14 Cal. 3d 815, 822-823, 122 Cal. Rptr. 745, 537 P.2d 865 , overruled on other grounds, Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 393 n.5, 45 Cal. Rptr. 2d 436, 902 P.2d 740* ; *see also* Restatement (Second) of Torts §§ 766-766B]. However, the California Supreme Court has emphasized the distinctions between interference with a contract and interference with prospective economic relations. The law grants greater solicitude to relationships that have ripened into agreements, while recognizing that relationships short of that "subsist in a zone where the risks and rewards of competition are dominant" [*Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 392, 45 Cal. Rptr. 2d 436, 902 P.2d 740]* .

An action based on negligent interference with economic relations is governed by case law that begins with the Supreme Court's decision in *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 803-808, 157 Cal. Rptr. 407, 598 P.2d 60* .

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§ 565.131 Terminology Used in This Analysis

"Interference with economic relations" is used by some courts, and is so used in this analysis, to describe all types of actionable interference short of interference with a contractual relationship, that is, wrongful interference with a person's general right to establish a lawful contractual, business, or other advantageous economic relationship [*see Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 381 n.2, 387-392, 45 Cal. Rptr. 2d 436, 902 P.2d 740* (setting forth preferred terminology, based on discussion of conceptual distinctions between interference with contract and interference with prospective economic relationships)]."Interference with contract" refers to the narrower cause of action, which provides for greater protection from interference by a stranger to the agreement [*see Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 55, 77 Cal. Rptr. 2d 709, 960 P.2d 513* ; *Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 381 n.2, 392, 45 Cal. Rptr. 2d 436, 902 P.2d 740]* .

In the past, courts had stated that the two causes of action were conceptually similar, even that interference with contract was one type of the broader tort of interference with prospective economic advantage [*see, e.g., Environmental Planning & Info. Council v. Superior Court (1984) 36 Cal. 3d 188, 193, 203 Cal. Rptr. 127, 680 P.2d 1086]* . The California Supreme Court has clearly repudiated this view of the actions [*see Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 381 n.2, 392, 45 Cal. Rptr. 2d 436, 902 P.2d 740]* .

Several other terms are commonly used to describe specific types of interference (for example, "inducing breach of contract" and "interference with business relations") [*see Manor Inv. Co. v. F.W. Woolworth, Co. (1984) 159 Cal. App. 3d 586, 592-594, 206 Cal. Rptr. 37 , overruled on other grounds, Applied Equip.t Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454]* . Counsel may prefer to use these terms in pleadings or other papers in accordance with local practice or personal preference.

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§ 565.132 Intentional Interference

[1] General Rule

A cause of action will lie for intentional interference with a contractual relationship, or with some other economic relationship containing a probability of future benefits accruing to plaintiff, when the interference is accomplished either by wrongful means or, in the case of interference with contract, by means that are lawful but lack sufficient justification [*Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 381 n.2, 392-393, 45 Cal. Rptr. 2d 436, 902 P.2d 740* (plaintiff alleging interference with economic relations must plead and prove that interference was wrongful by some measure beyond fact of interference itself); *Herron v. State Farm Mutual Ins. Co. (1961) 56 Cal. 2d 202, 205, 14 Cal. Rptr. 294, 363 P.2d 310* (interference with contractual relationship); *A-Mark Coin Co. v. General Mills, Inc. (1983) 195 Cal. Rptr. 859* (same); *A.F. Arnold & Co. v. Pacific Prof'l Ins., Inc. (1972) 27 Cal. App. 3d 710, 716, 104 Cal. Rptr. 96* (interference with noncontractual relationship)].

Interference by unlawful means is actionable because of the defendant's use of improper methods, whereas interference by lawful but unjustified means is actionable because of the defendant's improper purpose or motive [*see Lowell v. Mother's Cake & Cookie Co. (1978) 79 Cal. App. 3d 13, 18,144 Cal. Rptr. 664]* . Accordingly, "justification" for interference by lawful means generally depends on whether the defendant's purpose or motive is proper in the sense that it advances an interest with greater social significance than the interest with which it interferes [*Imperial Ice Co. v. Rossier (1941) 18 Cal. 2d 33, 35, 112 P.2d 631* ; *see Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal. App. 3d 200, 228, 194 Cal. Rptr. 180* , *overruled on other grounds, Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454* (justification based on defendant's confidential relationship with third party is lost when defendant acts from improper motive rather than to protect welfare of third party)]. Although intentional interference with contract by lawful means is not actionable when it is justified, lack of justification is not an element of plaintiff's cause of action; justification must be affirmatively shown by the defendant [*see Savage v. Pacific Gas & Elec. Co. (1993) 21 Cal. App. 4th 434, 449, 26 Cal. Rptr. 2d 305* ; *Rickel v. Schwinn Bicycle Co. (1983) 144 Cal. App. 3d 648, 657-658, 192 Cal. Rptr. 732]* . For further discussion of this defense, see*§ 565.137[4]*. If the means of interference are unlawful, the interference cannot be justified and is beyond the reach of that affirmative defense. Unlawful means include defamation and other forms of tortious conduct [*Savage v. Pacific*

Gas & Elec. Co. (1993) 21 Cal. App. 4th 434, 449, 26 Cal. Rptr. 2d 305] .

For a form of complaint for use in an action for intentional interference with economic relations, see*§ 565.290*.

[2] With Contractual Relationship

[a] Inducing Breach by Third Party

The first type of intentional interference held to be actionable was that involving a contractual relationship, specifically, a defendant's inducement of a third party to breach his or her contract with the plaintiff. Initially, this interference was actionable only if the means used were themselves unlawful. In 1941 the Supreme Court expressly recognized that interference by lawful but unjustified means was also actionable [*Imperial Ice Co. v. Rossier (1941) 18 Cal. 2d 33, 35, 37-39, 112 P.2d 631* (repudiating contrary statements in *Boyson v. Thorn (1893) 98 Cal. 578, 33 P. 492*); *see* Restatement (Second) of Torts § 766; *see also § 565.132[1]*].

[b] Rendering Plaintiff's Performance More Difficult

The original tort of intentional interference by inducing a breach of contract [*see § 565.132[2][a]*] now extends to impose liability, not only when a defendant causes a third party to breach a contract with the plaintiff, but also when a defendant causes the plaintiff to breach a contract with a third party, or otherwise causes the plaintiff's own contract performance to be more difficult or burdensome [*Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1126-1127, 1129-1130, 270 Cal. Rptr. 1, 791 P.2d 587* (but holding defendant's conduct not actionable on public policy grounds, as discussed in*§ 565.137[4][h]*); *Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal. 2d 224, 232, 234, 11 Cal. Rptr. 97, 359 P.2d 465* ; *see* *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 766, 206 Cal. Rptr. 354, 686 P.2d 1158* ; Restatement (Second) of Torts § 766A; *see also § 565.132[1]*].

However, one court of appeal rejected a claim involving interference that made plaintiff's contract obligations to third parties more expensive, when the claim was made by a public entity with respect to payments to employees for additional public services required by defendant's conduct, that is, a county's increased payments to sheriffs for services required to break up defendants' blockade of a nuclear power facility. In that case the court held, without further discussion, that defendant's conduct was not the kind of "disruption" required to state a claim [*County of San Luis Obispo v. Abalone Alliance (1986) 178 Cal. App. 3d 848, 861, 223 Cal. Rptr. 846* (upholding general demurrer)].

[3] With Noncontractual Economic Relationship

Interference with a prospective economic relationship that is short of a contractual relationship can be the basis of liability, even though the law will protect contractual relationships to a greater extent [*see* *Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 392-393, 45 Cal. Rptr. 2d 436, 902 P.2d 740]* .

Interference with noncontractual economic relationships, includes, most commonly, interference with a specific prospective contract [*Buckaloo v. Johnson (1975) 14 Cal. 3d 815, 828-830, 827, 122 Cal. Rptr. 745, 537 P.2d 865* , *overruled on other grounds,* *Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 393 n.5, 45 Cal. Rptr. 2d 436, 902 P.2d 740* (interference with broker's prospective contract for commission fees)], but also includes interference with the operation or pursuit of any lawful business, calling, trade, or occupation [*Willis v. Santa Ana Cmty. Hosp. Ass'n (1962) 58 Cal. 2d 806, 810, 26 Cal. Rptr. 640, 376 P.2d 568* (interference with physician's pursuit of medical practice); for further discussion and a form of complaint for use in an action for interference with a physician's practice, *see* Ch. 416, *Physicians: Membership on Hospital Staffs or in Professional Associations*].

Many cases have discussed in*§ 565.172[1][a]*.

[4] First Amendment Limitations

First Amendment doctrines analogous to those that limit defamation claims apply to interference claims based on the alleged injurious falsehood of a statement [*see Blatty v. New York Times Co. (1986) 42 Cal. 3d 1033, 1045, 232 Cal. Rptr. 542, 728 P.2d 1177* ; *Morningstar, Inc. v. Superior Court (1994) 23 Cal. App. 4th 676, 696, 29 Cal. Rptr. 2d 547]* . Thus, for example, expressions of opinion may not form the basis of an action for interference with contract or with prospective economic advantage unless they contain false and defamatory statements of fact [*see Morningstar, Inc. v. Superior Court (1994) 23 Cal. App. 4th 676, 696, 29 Cal. Rptr. 2d 547* ; *see also Savage v. Pacific Gas & Elec. Co. (1993) 21 Cal. App. 4th 434, 450, 26 Cal. Rptr. 2d 305* (action for interference with economic relations may not be based on alleged unfounded opinion)]. For detailed discussion of what constitutes a defamatory statement as well as *First Amendment* limitations on defamation actions, see Ch. 340, *Libel and Slander* , and Levy, Golden & Sacks, California Torts, Ch. 45 (Matthew Bender).

For discussion of the defense of justification based on constitutional or statutory protection for the defendant's conduct, see*§ 565.137[e]*.

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§ 565.133 Elements of Intentional Interference

[1] In General

The following elements are necessary to state a cause of action for intentional interference with contract [*Blank v. Kirwan (1985) 39 Cal. 3d 311, 330, 216 Cal. Rptr. 718, 703 P.2d 58* ; *Savage v. Pacific Gas & Elec. Co. (1993) 21 Cal. App. 4th 434, 448, 26 Cal. Rptr. 2d 305* ; *Settimo Assocs. v. Environ Sys., Inc. (1993) 14 Cal. App. 4th 842, 845, 17 Cal. Rptr. 2d 757* ; *Wanland v. Los Gatos Lodge, Inc. (1991) 230 Cal. App. 3d 1507, 1522, 281 Cal. Rptr. 890* ; *see Summit Mach. Tool Mfg. v. Victor CNC Sys. (9th Cir. 1993) 7 F.3d 1434, 1442]* :

- The existence of a valid contract or some other economic relationship between the plaintiff and a third party containing a probability of future economic benefits to the plaintiff;
- The defendant's knowledge of the existence of the relationship;
- Intentional acts on the part of the defendant designed to disrupt the relationship;
- Actual disruption of the relationship; and
- Damages to the plaintiff proximately caused by the defendant's acts.

In a case involving interference with prospective economic relationship that is short of contractual, the plaintiff must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself [*Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 393, 45 Cal. Rptr. 2d 436, 902 P.2d 740]* . An act is independently wrongful if it is unlawful, which means that it must be conduct proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard [*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1159, 131 Cal. Rptr. 2d 29, 63 P.3d 937]* . Although the defendant must know of the plaintiff's prospective economic advantage is required, a plaintiff isnot required to allege that the defendant acted with the specific

intent or purpose of disrupting the plaintiff's prospective economic advantage. It is sufficient that the plaintiff plead that the defendant knew that the interference was certain or substantially certain to occur as a result of the defendant's action [*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1153, 131 Cal. Rptr. 2d 29, 63 P.3d 937]* .

A plaintiff seeking to recover for intentional interference with existing as opposed to prospective contractual relations need not plead and prove that the defendant's interference was wrongful by some measure beyond the fact of the interference itself [*Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 55, 77 Cal. Rptr. 2d 709, 960 P.2d 513* ; *LiMandri v. Judkins (1997) 52 Cal. App. 4th 326, 343, 60 Cal. Rptr. 2d 539]* . Pecuniary or economic benefit to the defendant is not an element of the action [*McCalden v. California Library Ass'n (9th Cir. 1990) 955 F.2d 1214, 1220]* .

For a general form of complaint for intentional interference with economic relations, *see § 565.290*. For discussion of elements necessary to plead an additional cause of action for conspiracy to interfere with economic relations, see*§ 565.134[1]*. For discussion of elements necessary to state cause of action for negligent interference with economic relations, see*§ 565.135[3]*.

[2] Existence of Economic Relationship

[a] Contractual

In an action for interference with a contractual relationship, the plaintiff must show an existing contract between the plaintiff and a third party [*Shamblin v. Berge (1985) 166 Cal. App. 3d 118, 122-123, 212 Cal. Rptr. 313]*]. Thus, there is no cause of action if, for example, the plaintiff is not a party to the alleged contract [*see Beckjord v. Slusher (1937) 22 Cal. App. 2d 559, 567-568, 71 P.2d 820* (contract between defendant and third party)], or if the alleged contract was no longer in force at the time of the alleged interference [*see Dryden v. Tri-Valley Growers (1977) 65 Cal. App. 3d 990, 997-998, 135 Cal. Rptr. 720* (third party cancelled contract before defendant's alleged interference)]. Only a "stranger to the contract" may be liable for interference with that contract, and an agent for a contracting principal, including a corporate agent or employee, cannot be liable for interfering with the principal's contract with the plaintiff if the alleged interference was committed when the agent was acting in the scope of the agency [*Mintz v. Blue Cross of California (2009) 172 Cal. App. 4th 1594, 1603-1604, 92 Cal. Rptr. 3d 422]* .

The contract must also be valid [*Shamblin v. Berge (1985) 166 Cal. App. 3d 118, 122-123, 212 Cal. Rptr. 313* ; *Freed v. Manchester Serv., Inc. (1958) 165 Cal. App. 2d 186, 189, 331 P.2d 689]* . For purposes of this requirement, a contract is valid if it is not illegal, opposed to public policy, or otherwise void [*Shamblin v. Berge (1985) 166 Cal. App. 3d 118, 124, 212 Cal. Rptr. 313]* . A contract that is entirely void ab initio is not a basis for an action for interference with contract and, further, it is not a basis for an action for interference with a noncontractual economic relationship because it cannot provide any probable future economic benefit [*see A-Mark Coin Co. v. General Mills, Inc. (1982) 148 Cal. App. 3d 312, 320-322* (contract void as one subject to vacated order of probate court); *see also § 565.133[b]* and*§ 565.137[1]*]. A contract that is illegal or contrary to public policy is not a basis for an action for intentional interference [*Renaissance Realty, Inc. v. Soriano (1981) 120 Cal. App. 3d Supp. 13, 17-18* (fraudulently conceived real estate agreement)].

It is sometimes stated that an existing contract that is voidable, not void, because of the statute of frauds, lack of consideration, uncertainty of terms, or other formal defect, nonetheless satisfies the validity requirement [*Shamblin v. Berge (1985) 166 Cal. App. 3d 118, 124, 212 Cal. Rptr. 313* ; *see Zimmerman v. Bank of Am. (1961) 191 Cal. App. 2d 55, 58, 12 Cal. Rptr. 319]* . Such a contract is said to be valid as to the defendant, because its voidability constitutes an affirmative defense that may only be asserted by a party to the contract [*see Golden v. Anderson (1967) 256 Cal. App. 2d 714, 719, 64 Cal. Rptr. 404]* . However, other courts, including the Supreme Court, have indicated that an action for intentional interference may be based on a voidable contract, not so much because it is valid but because the action may also be based on interference with noncontractual economic relationship [*see Buckaloo v. Johnson (1975) 14 Cal. 3d*

815, 822-823, 827-830, 122 Cal. Rptr. 745, 537 P.2d 865 (overruled on other grounds in *Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 393 n.5, 45 Cal. Rptr. 2d 436, 902 P.2d 740*); *Zimmerman v. Bank of Am. (1961) 191 Cal. App. 2d 55, 57-58, 12 Cal. Rptr. 319]* . Still other courts have held that an unenforceable contract cannot form the basis of a cause of action for intentional interference with contractual relations [*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Vill. Square Venture Partners (1997) 52 Cal. App. 4th 867, 879, 60 Cal. Rptr. 2d 830]* .

If a valid, existing contract is shown, the fact that it is terminable at will does not preclude recovery [*Savage v. Pacific Gas & Elec. Co. (1993) 21 Cal. App. 4th 434, 448, 26 Cal. Rptr. 2d 305* ; *see Speegle v. Board of Fire Underwriters (1946) 29 Cal. 2d 34, 39-41, 172 P.2d 867* ; *see also § 565.137[4][b]*]. However, if a party terminates a contract that the party was free to terminate, there is no breach of contract, and an issue arises as to whether a third party should be held liable for inducing a party to terminate such a contract. The California Supreme Court has noted that interference with an at-will contract is properly viewed as an interference with prospective economic advantage, rather than as interference with an existing contract, because the expectation of an at-will contract is that of a future relationship between the parties to the contract [*Reeves v. Hanlon (2004) 33 Cal. 4th 1140, 1151-1152, 17 Cal. Rptr. 3d 289, 95 P.3d 513]* .

For example, the Supreme Court has held that a plaintiff may recover for interference with an at-will employment relationship, although the plaintiff must plead and prove the elements of a cause of action for interference with prospective economic advantage. In accordance with the elements of that cause of action, the plaintiff must show that the defendant engaged in conduct that is independently wrongful--that is, conduct that is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard [*Reeves v. Hanlon (2004) 33 Cal. 4th 1140, 1152-1153, 17 Cal. Rptr. 3d 289, 95 P.3d 513* ; *see § 565.133[1]*]. Therefore, an employer may pursue an action against a competing employer for interfering with the plaintiff's at-will employment relationships, although the plaintiff must show that the competing employer engaged in wrongful conduct that consisted of something more than just hiring away the plaintiff's employees [*Reeves v. Hanlon (2004) 33 Cal. 4th 1140, 1154-1155, 17 Cal. Rptr. 3d 289, 95 P.3d 513]* .

A plaintiff seeking to recover for intentional interference with existing as opposed to prospective contractual relations need not plead and prove that the defendant's interference was wrongful by some measure beyond the fact of the interference itself [*Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 55, 77 Cal. Rptr. 2d 709, 960 P.2d 513* ; *LiMandri v. Judkins (1997) 52 Cal. App. 4th 326, 343, 60 Cal. Rptr. 2d 539]* .

[b] Noncontractual

In an action for interference with noncontractual economic relations, the plaintiff must show the existence of an economic relationship, between himself or herself and a third party, that contains a probability of future economic benefit to the plaintiff [*see Buckaloo v. Johnson (1975) 14 Cal. 3d 815, 827, 122 Cal. Rptr. 745, 537 P.2d 865* (overruled on other grounds in *Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 393 n.5, 45 Cal. Rptr. 2d 436, 902 P.2d 740*); *Savage v. Pacific Gas & Elec. Co. (1993) 21 Cal. App. 4th 434, 448, 26 Cal. Rptr. 2d 305* ; *see also Roth v. Rhodes (1994) 25 Cal. App. 4th 530, 546, 30 Cal. Rptr. 2d 706* (existence of business relationship is essential element of tort of intentional interference with prospective business advantage; element not satisfied by allegation that defendant's conduct resulted in loss of potential future referrals and patient contacts)]. The "future economic benefit" refers to an expectancy in ordinary commercial dealings, not, for example, an expectancy in obtaining a license to do business [*Blank v. Kirwan (1985) 39 Cal. 3d 311, 330, 216 Cal. Rptr. 718, 703 P.2d 58]* .

This expectancy must be "probable" in the sense that it is more than a mere hope or desire for an economic relationship or future benefit. Thus, an expected economic relationship with potential patrons was held to lack sufficient probability when it was contingent on plaintiff's first obtaining a business license from a government agency vested with broad discretion to grant or deny the license [*Blank v. Kirwan (1985) 39 Cal. 3d 311, 330-331, 216 Cal. Rptr. 718, 703 P.2d 58]* . Similarly, the outcome of a sporting event is normally too uncertain to support an allegation that a plaintiff had a

reasonable expectancy of winning prize money but for the defendant's wrongful interference [*see* *Youst v. Longo (1987) 43 Cal. 3d 64, 74-79, 233 Cal. Rptr. 294, 729 P.2d 728* (public policy prohibited recovery based on interference with opportunity to win prize in sporting event)]. A plaintiff's expectation of winning a judgment for punitive damages or one that will be nondischargeable in bankruptcy also lacks sufficient probability [*see* *Hepe v. Paknad (1988) 199 Cal. App. 3d 412, 420-421, 244 Cal. Rptr. 823* (defendant concealed driver who injured plaintiff while allegedly driving under the influence of alcohol, preventing police or plaintiff from establishing driver's intoxication)].

By contrast, allegations that defendant's conduct caused a newspaper to cease accepting articles written by plaintiff (a freelance reporter) for publication sufficiently alleged interference with an economic relationship offering a probability of future economic benefit because plaintiff could expect payment for articles that might otherwise have been accepted for publication [*Savage v. Pacific Gas & Elec. Co. (1993) 21 Cal. App. 4th 434, 449, 26 Cal. Rptr. 2d 305]* .

Not every business relationship will support an action for intentional interference with economic advantage. For example, the possibility of obtaining a discount on a loan by threatening default is not a protected economic interest for purposes of the tort [*AB Group v. Wertin (1997) 59 Cal. App. 4th 1022, 1034, 69 Cal. Rptr. 2d 652]* . Whether the business relationship between the plaintiff and the third party is sufficient to support the tort of interference with noncontractual economic advantage is a question of fact [*Buckaloo v. Johnson (1975) 14 Cal. 3d 815, 830 n.7, 122 Cal. Rptr. 745, 537 P.2d 865 , overruled on other grounds,* *Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 393 n.5, 45 Cal. Rptr. 2d 436, 902 P.2d 740* ; *Tri-Growth Ctr. City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg (1989) 216 Cal. App. 3d 1139, 1153-1154, 265 Cal. Rptr. 330]* .

[3] Defendant's Knowledge of Relationship

The second essential element to a cause of action for intentional interference with contract or economic relations is that the defendant had knowledge of the existence of the relationship interfered with [*Blank v. Kirwan (1985) 39 Cal. 3d 311, 330, 216 Cal. Rptr. 718, 703 P.2d 58* ; *Freed v. Manchester Serv., Inc. (1958) 165 Cal. App. 2d 186, 189, 331 P.2d 689]* . Showing the defendant's actual knowledge is, in effect, the first step in establishing the fact that he or she acted with the necessary intent. If the defendant had no knowledge, he or she cannot be liable for intentional interference [*Seaman's Direct Buying Serv., Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 765-766, 206 Cal. Rptr. 354, 686 P.2d 1158* ; *see* *Summit Mach. Tool Mfg. v. Victor CNC Sys. (9th Cir. 1993) 7 F.3d 1434, 1442* ; for discussion concerning intent, see*§ 565.133[4]*]. Thus, it is not enough to show that the defendant learned of the economic relationship *after* he or she performed the interfering action [*Dryden v. Tri-Valley Growers (1977) 65 Cal. App. 3d 990, 995, 135 Cal. Rptr. 720* ; *Springer v. Singleton (1967) 256 Cal. App. 2d 184, 189, 63 Cal. Rptr. 770]* .

When the claim involves interference with the economic relations of plaintiff and a third party, it is not necessary that the defendant's knowledge include an awareness of the plaintiff's specific identity or name, so long as plaintiff is identified in some manner. For example, the defendant's knowledge is sufficient when he or she knows that the third party was negotiating a lease with a particular, but unnamed, lessee [*Ramona Manor Convalescent Hosp. v. Care Enters. (1986) 177 Cal. App. 3d 1120, 1130-1132, 225 Cal. Rptr. 120]* .

[4] Intentional Acts by Defendant

The third essential element to a cause of action for intentional interference with contract or economic relations is an intentional act by the defendant designed to disrupt the economic relationship [*Blank v. Kirwan (1985) 39 Cal. 3d 311, 330, 216 Cal. Rptr. 718, 703 P.2d 58* ; *Savage v. Pacific Gas & Elec. Co. (1993) 21 Cal. App. 4th 434, 448, 449, 26 Cal. Rptr. 2d 305* ; *Freed v. Manchester Serv., Inc. (1958) 165 Cal. App. 2d 186, 189, 331 P.2d 689]* . This act may be pleaded as an ultimate fact, such as a defendant's advising, counseling, or persuading a third party to terminate his or her contract with the plaintiff [*see* *Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal. App. 3d 200, 221, 194 Cal. Rptr. 180* ; *but see* *Fisher v. San Pedro Peninsula Hosp. (1989) 214 Cal. App. 3d 590, 619, 262 Cal. Rptr. 842* (conclusionary pleading that defendant "embarked on course of intentional conduct designed to disrupt plaintiff's

relationship with employer" was insufficient)].

In an action for intentional interference with prospective economic advantage that has not ripened into a contract, a plaintiff is not required to allege that the defendant acted with the specific intent or purpose of disrupting the plaintiff's prospective economic advantage. It is sufficient that the plaintiff plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action [*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1153, 131 Cal. Rptr. 2d 29, 63 P.3d 937]* . However, as part of its burden of pleading and proof, the plaintiff must also show that the defendant's conduct was wrongful by some measure other than the fact of the interference. This requires a showing that the conduct was independently unlawful--that is, that it violated some constitutional, statutory, regulatory, common law, or other determinable legal standard [*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1159, 131 Cal. Rptr. 2d 29, 63 P.3d 937]* . Therefore, the defendant's intent may in some cases be relevant to showing that the conduct was unlawful by some independent legal standard [*see Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1161, 131 Cal. Rptr. 2d 29, 63 P.3d 937]* .

A plaintiff seeking to recover for intentional interference with existing as opposed to prospective contractual relations need not plead and prove that the defendant's interference was wrongful by some measure beyond the fact of the interference itself [*Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 55, 77 Cal. Rptr. 2d 709, 960 P.2d 513* ; *LiMandri v. Judkins (1997) 52 Cal. App. 4th 326, 343, 60 Cal. Rptr. 2d 539]* . The defendant's act need not be wrongful in itself, but the plaintiff must nevertheless show facts that take the act out of the realm of legitimate business transactions [*Rickel v. Schwinn Bicycle Co. (1983) 144 Cal. App. 3d 648, 657-658, 192 Cal. Rptr. 732* ; *see Tri-Growth Ctr. City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg (1989) 216 Cal. App. 3d 1139, 1153-1154, 265 Cal. Rptr. 330* (defendant's acts must be somehow wrongful, but showing is met by facts taking defendant's acts out of realm of legitimate business transactions)]. Thus, in proving this element, particularly when the act is itself lawful, it is crucial to show the defendant's intent in acting. General intent to perform the act is not enough; the defendant must have intended specifically to interfere with the plaintiff's economic relationship [*Seaman's Direct Buying Serv., Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 765-766, 206 Cal. Rptr. 354, 686 P.2d 1158* ; *Ramona Manor Convalescent Hosp. v. Care Enters. (1986) 177 Cal. App. 3d 1120, 1130-1131, 225 Cal. Rptr. 120]* . An attorney's payment of fees recovered from a third party to his or her client rather than to the insurance company lienor cannot be construed as an act designed to induce breach or disruption of a contractual relationship [*Farmers Ins. Exch. v. Zerin (1997) 53 Cal. App. 4th 445, 458, 61 Cal. Rptr. 2d 707]* .

In a claim of intentional interference with contractual relations, the actor's primary purpose need not be the disruption of the contract; actionable conduct may include interfering conduct taken not only with the desire to interfere, but for some other purpose as well [*see Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 56, 77 Cal. Rptr. 2d 709, 960 P.2d 513* ; *see also* Restatement (Second) of Torts § 766, cmt. j]. Moreover, intent to interfere may be inferred from a defendant's intentional performance of an act substantially certain to result in interference [*Savage v. Pacific Gas & Elec. Co. (1993) 21 Cal. App. 4th 434, 449, 450, 26 Cal. Rptr. 2d 305]* , assuming, of course, that he or she also had the prerequisite awareness of the existence of the relationship [*see § 565.133[3]*].

[5] Actual Interference

The fourth essential element to a cause of action for intentional interference with contract or economic relations is that defendant's intentional act caused interference resulting in injury to the plaintiff [*Blank v. Kirwan (1985) 39 Cal. 3d 311, 330, 216 Cal. Rptr. 718, 703 P.2d 58* ; *Freed v. Manchester Serv., Inc. (1958) 165 Cal. App. 2d 186, 189, 331 P.2d 689]* . In other words, there must be some showing that injurious interference did, in fact, occur [*see Davis v. Nadrich (2009) 174 Cal. App. 4th 1, 10, 94 Cal. Rptr. 3d 414* ; *Short v. Nevada Joint Union High Sch. Dist. (1985) 163 Cal. App. 3d 1087, 1101, 210 Cal. Rptr. 297* (both cases; no actual interference when conduct by third parties that was allegedly induced by defendants did not actually constitute breach of contract terms); *see also § 565.132[2], [3]*]. An interference is an action designed to induce breach or disruption of a contractual relationship [*Farmers Ins. Exch. v. Zerin (1997) 53 Cal. App. 4th 445, 458, 61 Cal. Rptr. 2d 707* (attorney's payment of fees recovered from third party, to

client rather than to insurance company lienor, insufficient act of interference)]. Also, there must be some showing that the defendant's intentional act was a cause in fact of this interference [*see Dryden v. Tri-Valley Growers (1977) 65 Cal App. 3d 990, 995-996, 997, 135 Cal. Rptr. 720* (no allegation that alleged breach was result of defendant's alleged conduct); *see also Springer v. Singleton (1967) 256 Cal. App. 2d 184, 189, 63 Cal. Rptr. 770* (defendant not liable because evidence supported finding that alleged breach of contract with plaintiff was initiated by third parties and occurred before defendant's alleged acts); for discussion concerning proximate causation, as distinguished from cause in fact, see *§ 565.133[7]*].

In one case, for example, a physician was unable to state a cause of action against another physician at the same hospital who allegedly refused to examine plaintiff's patients in retaliation for plaintiff's having reported instances of a third physician's misconduct to the hospital. Although the complaint alleged that plaintiff's relationship with the hospital was actually disrupted because plaintiff had to seek other physicians and the welfare of plaintiff's patients was actually threatened, there was no allegation that plaintiff lost patients [*Fisher v. San Pedro Peninsula Hosp. (1989) 214 Cal. App. 3d 590, 619-620, 262 Cal. Rptr. 842]* . In addition, having to seek other physicians or threats to patient welfare are not the kind of economic interest that this tort is designed to protect [*Fisher v. San Pedro Peninsula Hosp. (1989) 214 Cal. App. 3d 590, 620, 262 Cal. Rptr. 842]* .

[6] Wrongfulness of Interference With Prospective Economic Relations

A plaintiff seeking to recover for an alleged interference with prospective contractual or economic relations must plead and prove as part of its case-in-chief that the defendant engaged in conduct that was wrongful by some measure other than the fact of interference itself [*Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 393, 45 Cal. Rptr. 2d 436, 902 P.2d 740]* . An act is independently wrongful for these purposes if it is unlawful, which means that it must be conduct proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard [*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1159, 131 Cal. Rptr. 2d 29, 63 P.3d 937]* .

Actions that are contractually permissible are not wrongful for these purposes [*see, e.g., Lange v. TIG Ins. Co. (1998) 68 Cal. App. 4th 1179, 1187-1188, 81 Cal. Rptr. 2d 39* ; *Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co. (1996) 47 Cal. App. 4th 464, 476-480, 54 Cal. Rptr. 2d 888]* .

It is also insufficient to allege that the defendant engaged in tortious conduct distinct from or only tangentially related to the conduct that constituted the alleged interference [*LiMandri v. Judkins (1997) 52 Cal. App. 4th 326, 342, 60 Cal. Rptr. 2d 539]* . One court of appeal opinion held that allegations that the defendant's conduct was unethical, or violated vague industry standards, was insufficient to meet the test of wrongfulness [*Gemini Aluminum Corp. v. California Custom Shapes, Inc. (2002) 95 Cal. App. 4th 1249, 1259, 116 Cal. Rptr. 2d 358]* . However, the result may be different if the industry standards are more defined, such as with written industry standards. In a subsequent case, the court of appeal held that in an action between competitors who are bound by well-defined, established rules or standards of a trade, association, or profession, a violation of those rules or standards may constitute wrongful conduct under the *Korea Supply* standard [*Stevenson Real Estate Servs., Inc. v. CB Richard Ellis Real Estate Servs., Inc. (2006) 138 Cal. App. 4th 1215, 1223, 42 Cal. Rptr. 3d 235]* . The rule or standard allegedly violated must be independently actionable, however, which necessarily requires that the rule or standard provide for, or give rise to, a sanction or means of enforcement for a violation. A right to arbitration between aggrieved members of the trade or association would be sufficient to meet this requirement [*Stevenson Real Estate Servs., Inc. v. CB Richard Ellis Real Estate Servs., Inc. (2006) 138 Cal. App. 4th 1215, 1223-1224, 42 Cal. Rptr. 3d 235]* . If a particular rule or standard unduly restricts free competition, that particular rule may not be an appropriate basis for an interference action [*Stevenson Real Estate Servs., Inc. v. CB Richard Ellis Real Estate Servs., Inc. (2006) 138 Cal. App. 4th 1215, 1223, 42 Cal. Rptr. 3d 235]* .

[7] Proximately Caused Damages

The final element of a cause of action for intentional interference with contract or economic relations is that the defendant's intentional act proximately caused plaintiff's damages [*Blank v. Kirwan (1985) 39 Cal. 3d 311, 330, 216 Cal. Rptr. 718, 703 P.2d 58* ; *Freed v. Manchester Serv., Inc. (1958) 165 Cal. App. 2d 186, 189, 331 P.2d 689]* . To meet this burden, plaintiff must prove that defendant's conduct was a substantial factor in causing the harm alleged [*Bank of New York v. Fremont Gen. Corp. (9th Cir. 2008) 523 F.3d 902, 909-910* ; *CACI No. 2201*]. The plaintiff must also show that the injury to his or her economic interests resulted in actual damages or economic loss [*see Baldwin v. Marina City Props., Inc. (1978) 79 Cal. App. 3d 393, 407, 145 Cal. Rptr. 406* (no cause of action for interference with security agreement stated when there was no allegation of any loss or impairment of value of security); *see also § 565.136[1]*].

In an action for inducing breach of contract, one court of appeal held that the complaint was defective because it included no allegation that the contract would otherwise have been performed but for the alleged interference [*Augustine v. Trucco (1954) 124 Cal. App. 2d 229, 246-247, 268 P.2d 780]* . Other courts of appeal, however, have held that this allegation is sufficiently, if impliedly, stated by the more general allegation of proximately caused damages [*Freed v. Manchester Serv., Inc. (1958) 165 Cal. App. 2d 186, 189 n.2, 331 P.2d 689* ; *see also Allen v. Powell (1967) 248 Cal. App. 2d 502, 508, 56 Cal. Rptr. 715]* .

The necessity of showing damages is particularly important in actions for interference with noncontractual economic relationships, and in such a case this showing is related to the probability of economic benenfit in the relationship interfered with [*see § 565.133[2][b]*]. For example, when a plaintiff brought an action on the basis of adefendant's alleged inducement of third parties not to rent him business space, his complaint was held to be defective because it failed to allege that he would otherwise have consummated a rental agreement, and also because it failed to allege any facts tending to show the nature or amount of any resulting damage [*Campbell v. Rayburn (1954) 129 Cal. App. 2d 232, 234-235, 276 P.2d 671* ; *see also Eichman v. Fotomat Corp. (9th Cir. 1989) 880 F.2d 149, 167-168* (applying California law; no cause of action established when there was no evidence that would support inference that decline in franchisee's sales was caused by franchisor's company stores in same area); *Wilson v. Loew's Inc. (1956) 142 Cal. App. 2d 183, 190-195, 298 P.2d 152* (no cause of action stated for interference with prospective contractual relationship when plaintiffs failed to show actual damages in that they otherwise would have entered into contract)].

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Chapter 565 UNFAIR COMPETITION
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49-565 California Forms of Pleading and Practice--Annotated § 565.134

§ 565.134 Conspiracy to Interfere

[1] Elements

A cause of action for civil conspiracy will lie against third persons who pursuant to a conspiracy have interfered with a contractual or other economic relationship resulting in damages [*Wise v. Southern Pac. Co. (1963) 223 Cal. App. 2d 50, 65, 35 Cal. Rptr. 652* , (disapproved by *Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454* , to extent that it held that party can be liable in tort for conspiracy to interfere with its own contract)].

A conspiracy is not actionable unless a civil wrong has been committed resulting in damage. The general elements of a cause of action for conspiracy are therefore stated to be [*Olivet v. Frischling (1980) 104 Cal. App. 3d 831, 837, 164 Cal. Rptr. 87 , disapproved on other grounds, Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454* ; *Wise v. Southern Pac. Co. (1963) 223 Cal. App. 2d 50, 64, 35 Cal. Rptr. 652]* :

- The formation and operation of the conspiracy,
- The wrongful act done pursuant thereto, and
- The damage resulting from such act.

In other words, there is no actionable conspiracy when acts done pursuant to the conspiracy are not themselves actionable. For example, in a case involving interference with contract, a jury verdict finding defendants liable for conspiracy was inconsistent with another verdict finding in their favor on the underlying cause of action for interference [*Manor Inv. Co. v. F.W. Woolworth, Co. (1984) 159 Cal. App. 3d 586, 594-596, 206 Cal. Rptr. 37* (retrial required)]. For further discussion relating to civil conspiracy in general, including forms of complaint based on conspiracy to interfere with a contract or other economic relation, see Ch. 126, *Conspiracy* .

[2] Contracting Party Not Liable for Conspiracy to Interfere With Own Contract

A contracting party cannot be held liable in tort for conspiracy to interfere with its own contract [*Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 507-508 & n.10* (disapproving prior court of appeal decisions holding to contrary)]. Because a party to a contract owes no tort duty to refrain from interference with its own contract [*see § 565.137[2]*], a contracting party cannot be bootstrapped into tort liability by allegations of conspiracy [*Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 514, 28 Cal. Rptr. 2d 475, 869 P.2d 454]* . To hold otherwise would circumvent limitations on the damages recoverable for breach of contract and obliterate the distinction between tort and contract recovery [*see Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 516-518, 28 Cal. Rptr. 2d 475, 869 P.2d 454]* .

Similarly, because a corporate officer or employee acting within the scope of his or her authority cannot be held liable for inducing a corporation's breach of contract [*see § 565.137[2]*], such a corporate officer or agent cannot be held liable for conspiring to induce the corporation's breach of a contract [*Grosvenor Props., Ltd. v. Southmark Corp. (9th Cir. 1990) 896 F.2d 1149, 1153-1154* (applying California law)].

Prior to the Supreme Court's decision in *Applied Equip. Corp.*, courts of appeal had held that parents, subsidiaries, and other affiliates may be liable for conspiring to induce breach of the affiliate's contract [*see GHK Assocs. v. Mayer Group, Inc. (1990) 224 Cal. App. 3d 856, 881, 274 Cal. Rptr. 168]* . Whether these holdings remain good law after *Applied Equip.* is unclear. To the extent that the parent or subsidiary is considered to be in privity of contract with its affiliate, such holdings would appear to conflict with the reasoning of the *Applied Equip.* decision. In some cases, the parent or subsidiary may be able to successfully assert the manager's or financial interest privileges [*see §§ 565.137[4][c][ii], 565.137[4][d]*].

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§ 565.135 Negligent Interference

[1] No Action Under Prior Law

There is no cause of action for negligent interference with economic relations under the majority rule of common law jurisdictions [*see* Restatement (Second) of Torts, § 766C, cmt. a].

The Supreme Court has cited the majority rule with approval and held that a plaintiff who had contracted to provide lifetime health care to a third party could not recover the increased expenses incurred after the defendant negligently injured the third party [*Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 636-637, 7 Cal. Rptr. 377, 354 P.2d 1073]* . This decision was interpreted by lower courts to bar recovery for negligent interferenceunder any circumstances [*see Rodrigues v. Campbell Indus. (1978) 87 Cal. App. 3d 494, 499, 151 Cal. Rptr. 90* ; *Adams v. Southern Pac. Transp. Co. (1975) 50 Cal. App. 3d 37, 39-41, 123 Cal. Rptr. 216* ; *Costello v. Wells Fargo Bank (1968) 258 Cal. App. 2d 90, 94-96, 65 Cal. Rptr. 612* ; *Stromer v. City of Yuba City (1964) 225 Cal. App. 2d 286, 288-291, 37 Cal. Rptr. 240]* .

[2] Cause of Action Recognized

In *J'Aire Corp. v. Gregory* [*J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60]* , the Supreme Court changed its earlier position and recognized a cause of action for negligent interference with economic relations. The court in *J'Aire* held that the plaintiff, a restaurant operator leasing its business premises, had stated a cause of action against defendant for business losses resulting from the latter's negligent delay in completing a contract with the owner of the premises to construct certain improvements [*J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 804-808, 157 Cal. Rptr. 407, 598 P.2d 60]* .

The key issue considered by the court in *J'Aire* was whether, under the circumstances, the defendant owed a duty of care to the plaintiff. Unlike its earlier decision in *Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 636, 7 Cal. Rptr. 377, 354 P.2d 1073* , the court disregarded the majority common law rule that there is no duty. Instead, the court analysed the issue of duty under general negligence principles under which a person is generally liable for negligent injury of another, and any exception to this rule on the ground that no duty of care exists is determined on a case-by-case basis, primarily by focusing on the foreseeability of the risk of harm [*J'Aire Corp. v. Gregory (1979) 24*

Cal. 3d 799, 803-806, 157 Cal. Rptr. 407, 598 P.2d 60 (also citing *Civ. Code § 1714(a)*)]. The court distinguished the *Fifield* decision, noting that the facts of the latter case did not show enough foreseeability of injury to justify imposing a duty of care [*J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 806-807, 157 Cal. Rptr. 407, 598 P.2d 60* , *disapproving Adams v. Southern Pac. Transp. Co. (1975) 50 Cal. App. 3d 37, 47, 123 Cal. Rptr. 216* (*Fifield* decision did not entirely foreclose recovery for negligent interference)].

To determine whether a specific duty of care existed in an action involving negligent interference with economic relations, the court relied on another line of negligence cases, beginning with *Biakanja v. Irving (1958) 49 Cal. 2d 647, 320 P.2d 16* . Under this line of cases, when a special relationship exists between the parties, a plaintiff may recover for the loss of expected economic advantage occasioned by a defendant's negligent performance of a contract even though the parties were not in contractual privity [*J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 804, 157 Cal. Rptr. 407, 598 P.2d 60* ; *see, e.g.,* *Biakanja v. Irving (1958) 49 Cal. 2d 647, 648-651, 320 P.2d 16* (plaintiff beneficiary allowed to recover value of bequest lost due to defendant's negligent preparation of third party's will); for further discussion of this line of cases, *see* Ch. 380, *Negligence*].

The precise scope of a cause of action for negligent interference with economic relations, as defined by the court in *J'Aire*, is somewhat unclear. At one point the Court indicated that such a cause of action would merely be limited to cases in which the risk of harm is foreseeable and closely connected with the defendant's conduct, and in which damages are not wholly speculative and the injury is not part of the plaintiff's ordinary business risk [*J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 808, 157 Cal. Rptr. 407, 598 P.2d 60]* . However, it also appears, under the criteria that govern such a cause of action, that recovery may be more specifically limited to cases in which the defendant's negligent conduct relates to some specific "transaction," relationship, or activity that, to some extent, is intended or known to have an effect on plaintiff's economic relations [*see* *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 804-805, 157 Cal. Rptr. 407, 598 P.2d 60]* . In fact, those cases that have so far upheld a cause of action for negligent interference have specifically involved a defendant's negligent performance of a contract with a third party, when that performance had a more or less direct affect on plaintiff's economic relations [*see* *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 804, 157 Cal. Rptr. 407, 598 P.2d 60* ; *Chameleon Eng'g Corp. v. Air Dynamics Inc. (1980) 101 Cal. App. 3d 418, 420-423, 161 Cal. Rptr. 463]* . For further discussion, see*§ 565.135[4][b]*.

There is, on the other hand, no apparent reason to limit recovery for negligent interference to the type of interference discussed in *J'Aire*--that is, negligent interference with noncontractual or prospective economic relationships. The court in *J'Aire* itself described the cause of action as one for negligent interference with "prospective economic advantage" [*see* *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 808, 157 Cal. Rptr. 407, 598 P.2d 60]* , and it has used this same term in intentional interference cases to include contractual as well as noncontractual interference [*Buckaloo v. Johnson (1975) 14 Cal. 3d 815, 822-823, 122 Cal. Rptr. 745, 537 P.2d 865* ; *see* discussion under Terminology Used in This Part]. Moreoever, one court of appeal, applying the criteria set forth in *J'Aire*, held that a complaint was sufficient to state a cause of action for negligent interference with economic relations when the facts involved interference with a contract. In that case the plaintiff, a general contractor, alleged that its own performance of a contract was rendered more burdensome, in that it was forced to pay liquidated damages, due to the defendant's negligent delay in performing a separate contract to furnish supplies to one of plaintiff's subcontractors [*Chameleon Eng'g Corp. v. Air Dynamics Inc. (1980) 101 Cal. App. 3d 418, 420-423, 161 Cal. Rptr. 463]* .

Conversely, one court of appeal case in 2009 held that there is no cause of action for negligent interference with an existing contract. In that opinion, the court noted that the California Supreme Court had rejected such a cause of action in the 1960 case of *Fifield Manor v. Finston* [*see* *Fifield Manor v. Finston (1960) 54 Cal. 2d 632, 636, 7 Cal. Rptr. 377, 354 P.2d 1073]* . Because that case has never been overruled, by *J'Aire* or any subsequent Supreme Court case, the court of appeal concluded that it was still bound by its holding [*Davis v. Nadrich (2009) 174 Cal. App. 4th 1, 9-10, 94 Cal. Rptr. 3d 414]* .

For a form of complaint for use in an action for negligent interference with economic relations, *see § 565.291*.

[3] Elements of Action--In General

As discussed in*§ 565.135[2]*, the leading Supreme Court opinion in *J'Aire Corp. v. Gregory* [*J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 157 Cal. Rptr. 407, 598 P.2d 60]* indicates that a cause of action for negligent interference with economic relations is elementally similar to negligence actions in general, and in particular to actions to recover for economic losses resulting from negligence in performing a contract to which the plaintiff was a third party beneficiary [*J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 804-808, 157 Cal. Rptr. 407, 598 P.2d 60* ; *see also Chameleon Eng'g Corp. v. Air Dynamics Inc. (1980) 101 Cal. App. 3d 418, 420-423, 161 Cal. Rptr. 463]* .

The elements of a general cause of action for negligence are: (1) a legal duty to use due care (2) breach of that duty, (3) and the breach as proximate cause of resulting injury and damages [*see United States Liab. Ins. Co. v. Haidinger-Hayes, Inc. (1970) 1 Cal. 3d 586, 594, 83 Cal. Rptr. 418, 463 P.2d 770* (general elements of actionable negligence); *see also Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 513-514, 150 Cal. Rptr. 1, 585 P.2d 851* ; for further discussion relating to the elements of a cause of action for negligence generally, *see* Ch. 380, *Negligence*].

The court of appeal subsequent to the Supreme Court's opinion in the *Della Penna* case [*see Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 45 Cal. Rptr. 2d 436, 902 P.2d 740* ; *see § 565.133*], held that the Supreme Court's requirement that plaintiff prove that defendant's conduct was wrongful by some measure beyond the fact of the interference applies regardless whether the alleged interference was intentional or merely negligent [*National Med. Transp. Network v. Deloitte & Touche (1998) 62 Cal. App. 4th 412, 440, 72 Cal. Rptr. 2d 720]* . However, it seems likely that the breach of a negligence duty of care would satisfy the requirement of independently wrongful conduct. In fact, one court of appeal opinion agreeing that wrongfulness is an element of an action for negligent interference cited with seeming approval language from another court opinion suggesting that wrongful conduct is subsumed within a finding that a legal duty of care was owed [*see Lange v. TIG Ins. Co. (1998) 68 Cal. App. 4th 1179, 1187-1189, 81 Cal. Rptr. 2d 39]* . It is clear, in any event, that when negligent interference is alleged, plaintiff is not required to prove that defendant's conduct was intentional or willful. Negligent conduct is sufficient [*Venhaus v. Schultz (2007) 155 Cal. App. 4th 1072, 1079, 66 Cal. Rptr. 3d 432* ; *see CACI No. 2204*].

[4] Duty of Care

[a] Factors Considered

The Supreme Court in *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799* adopted the following criteria for determining the existence of a duty of care [*J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 804, 157 Cal. Rptr. 407, 598 P.2d 60* ; *see Biakanja v. Irving (1958) 49 Cal. 2d 647, 648-651, 320 P.2d 16* ; *see also § 565.135[2]*]:

- The extent to which the transaction was intended to affect the plaintiff,
- The foreseeability of harm to the plaintiff,
- The degree of certainty that the plaintiff suffered injury,
- The closeness of the connection between the defendant's conduct and the injury suffered,
- The moral blame attached to the defendant's conduct, and
- The policy of preventing future harm.

The court concluded that these criteria should be applied, together with ordinary tort principles such as proximate cause,

to determine recovery for negligent interference [*J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 808, 157 Cal. Rptr. 407, 598 P.2d 60]* .

[b] Extent to Which Transaction Intended to Affect Plaintiff

The first criterion is the extent to which the "transaction" is intended to affect the plaintiff [*J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 804-805, 157 Cal. Rptr. 407, 598 P.2d 60]* . This appears to require some showing that the defendant entered into or engaged in a contract, relationship, activity, or other "transaction" that did not involve the plaintiff as a party but which was nonetheless intended or known to affect an economic relation that contained a probability of future economic benefit to the plaintiff [*see, e.g.*, *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 804, 157 Cal. Rptr. 407, 598 P.2d 60* (defendant contracted with owner to improve business premises leased by plaintiff); *Chameleon Eng'g Corp. v. Air Dynamics Inc. (1980) 101 Cal. App. 3d 418, 420-423, 161 Cal. Rptr. 463* (defendant contracted with one of plaintiff's subcontractors to furnish supplies); *see also* *Blank v. Kirwan (1985) 39 Cal. 3d 311, 330-331, 216 Cal. Rptr. 718, 703 P.2d 58* (intentional injury to economic interest not actionable when that interest contained no probable economic benefit to plaintiff)]. For further discussion of the possible limitations imposed by this "transaction" criterion, see*§ 565.135[2]*.

[c] Foreseeability of Harm to Plaintiff

The second criterion is the foreseeability of harm to the plaintiff [*J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 804, 157 Cal. Rptr. 407, 598 P.2d 60]* . The court in *J'Aire* frequently emphasized this requirement, so it would appear to be essential for the plaintiff to show that there was a foreseeable risk of harm to his or her economic relationship if defendant failed to use ordinary care in performing the alleged transaction [*see* *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 804-805, 808, 157 Cal. Rptr. 407, 598 P.2d 60* (plaintiff repeatedly told defendant that his prolonged construction disruption was adversely affecting operation of plaintiff's business)].

[d] Certainty of Injury and Nexus of Defendant's Conduct to Injury

The third and fourth criteria are the degree of certainty that the plaintiff suffered injury and the closeness of the connection between the defendant's conduct and the plaintiff's injury [*J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 804, 157 Cal. Rptr. 407, 598 P.2d 60]* . The court in *J'Aire* emphasized the latter criterion, the nexus between the negligent conduct and injury, together with foreseeability [*J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 806-808, 157 Cal. Rptr. 407, 598 P.2d 60]* . Thus, it appears to be essential that the plaintiff show a close connection between thedefendant's negligence in performing the transaction and the plaintiff's injury. Moreover, the plaintiff must also show that the injury was not a part of his or her ordinary business risk, and that it resulted in relatively certain, or at least not wholly speculative, damages [*see* *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 805, 808, 157 Cal. Rptr. 407, 598 P.2d 60* (plaintiff could not operate business as direct result of defendant's unreasonable delays in performance); *cf.* *Worldvision Enters., Inc. v. American Broad. Cos., Inc. (1983) 142 Cal. App. 3d 589, 596, 191 Cal. Rptr. 148* (no cause of action when injury was ordinary business risk known to plaintiffs)]. This showing appears to be identical to that necessary to establish the third element of a general cause of action for negligence--that is, proximately caused damages [*cf.* *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc. (1970) 1 Cal. 3d 586, 594, 83 Cal. Rptr. 418, 463 P.2d 770]* .

[e] Moral Blame

The fifth criterion is the moral blame attached to the defendant's conduct [*J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 804, 157 Cal. Rptr. 407, 598 P.2d 60]* . In this sense it is at least helpful if a plaintiff can show some particular blameworthiness in the defendant's conduct [*see* *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 805, 157 Cal. Rptr. 407, 598 P.2d 60* (defendant's delay continued after his attention was drawn to its adverse effect on plaintiff's business)]. However, simple negligence may be enough if the other criteria support a finding of duty [*see* *Chameleon Eng'g Corp.v. Air Dynamics Inc. (1980) 101 Cal. App. 3d 418, 423, 161 Cal. Rptr. 463* (cause of action stated although

blameworthiness of defendant's conduct not significant either way)].

[f] Public Policy to Prevent Future Harm

The last criterion is the public policy of preventing future harm [*J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 805, 157 Cal. Rptr. 407, 598 P.2d 60]* . In this sense it may be helpful if there is some expression of public policy that is specifically directed against the defendant's conduct [*see J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 805, 157 Cal. Rptr. 407, 598 P.2d 60* (defendant's negligent delay also constituted grounds for disciplinary action under *Bus. & Prof. Code § 7119*)]. One court of appeal has indicated that *Civ. Code § 1714(a)*, holding persons liable for negligence generally, is a sufficient expression of public policy when the other criteria support a finding of duty [*Chameleon Eng'g Corp. v. Air Dynamics Inc. (1980) 101 Cal. App. 3d 418, 423, 161 Cal. Rptr. 463]* . On the other hand, in considering this criterion, other, countervailing public policies may also be considered to prevent a finding of duty even though other criteria support such a finding. For example, a defendant was held not liable on this ground for offering an opinion in good faith on a matter of public interest, in view of the countervailing public policy that strongly favors this conduct [*Worldvision Enters., Inc. v. American Broad. Cos., Inc. (1983) 142 Cal. App. 3d 589, 596, 598, 191 Cal. Rptr. 148]* .

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Chapter 565 UNFAIR COMPETITION
PART II. LEGAL BACKGROUND
D. Interference With Economic Relations

49-565 California Forms of Pleading and Practice--Annotated § 565.136

§ 565.136 Remedies

[1] Damages--In General

Damages for intentional interference with economic relations are recoverable by analogy to other intentional torts, and recovery is allowed for all resulting harm, including expenses, mental distress, and damage to business reputation [*Duff v. Engelberg (1965) 237 Cal. App. 2d 505, 508, 47 Cal. Rptr. 114* ; *see Civ. Code § 3333*; *Guillory v. Godfrey (1955) 134 Cal. App. 2d 628, 632-634, 286 P.2d 474* (upholding award of damages for mental distress and medical expenses incurred for aggravation of existing condition)]. The measure of tort damages for economic loss is reflected by loss of profits, expenses incurred, or similar concrete evidences of injury [*Elsbach v. Mulligan (1943) 58 Cal. App. 2d 354, 366-367, 136 P.2d 651* (upholding capitalization of past profits as method of measuring damage to value of business in action for interference); *see also Mayes v. Sturdy N. Sales, Inc. (1979) 91 Cal. App. 3d 69, 84, 154 Cal. Rptr. 43* (upholding recovery of loss of net profits); *Crummer v. Zalk (1967) 248 Cal. App. 2d 794, 797-798, 57 Cal. Rptr. 185* (upholding recovery of difference between contract price and value of what plaintiff parted with); Restatement (Second) of Torts § 774A(1) (recovery allowed for pecuniary loss, proximately caused consequential losses, and for mental suffering or damage to reputation that may reasonably be expected to result from interference)].

Punitive damages may also be recovered for intentional interference if the defendant acted with malice, fraud, or oppression [*Duff v. Engelberg (1965) 237 Cal. App. 2d 505, 509, 47 Cal. Rptr. 114* ; *see Civ. Code § 3294(a)*; *Guillory v. Godfrey (1955) 134 Cal. App. 2d 628, 633, 286 P.2d 474* (upholding award of punitive damages)].

In cases involving negligent interference with economic relations, recovery is limited by ordinary principles of proximate cause governing other negligence actions. In addition, damages may not be wholly speculative nor based on injuries that are merely a part of the plaintiff's ordinary business risks [*see J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 808, 157 Cal. Rptr. 407, 598 P.2d 60]* .

For discussion concerning the effect of alternate contract remedies in a case involving interference with contract relations, see*§ 565.136[2]*. For forms of complaint for intentional or negligent interference with economic relations including causes of action for monetary relief, see*§§ 565.290* and *565.291*. For discussion and forms relating to tort

damages generally, see Ch. 177, *Damages* .

[2] Effect of Available Contract Remedies

A defendant's liability in tort for intentional interference with contract is not affected by the fact that the plaintiff may also have a cause of action in contract against the defaulting party to the contract, even if the plaintiff has reduced the latter claim toan unsatisfied judgment. A plaintiff may even recover from both wrongdoers, as long as there is no double recovery of compensatory damages. For example, he or she may obtain specific performance and contract damages from the defaulting party, but may still recover any additional, noncontractual damages and punitive damages from the defendant tortfeasor [*Duff v. Engelberg (1965) 237 Cal. App. 2d 505, 507-508, 47 Cal. Rptr. 114* ; *see also Owens v. Palos Verdes Monaco (1983) 142 Cal. App. 3d 855, 872, 191 Cal. Rptr. 381* (cause of action for damages for conspiracy to interfere with contractual relations not barred by cause of action for specific performance of contract); Restatement (Second) of Torts § 774A(2)].

[3] Injunctive Relief

Injunctive relief is available to restrain the threat of future interference with economic relations [*Uptown Enters. v. Strand (1961) 195 Cal. App. 2d 45, 51, 15 Cal. Rptr. 486* ; *California Grape Control Bd., Ltd. v. California Produce Corp., Ltd. (1935) 4 Cal. App. 2d 242, 244, 40 P.2d 846]* . For example, it may be available to restrain continued harassment of a business operator and his or her patrons [*see Uptown Enters. v. Strand (1961) 195 Cal. App. 2d 45, 50, 15 Cal. Rptr. 486* (harassment of drive-in theater operator and patrons)], or to restrain a competitor's continuing inducement of suppliers to breach their contracts with plaintiff [*California Grape Control Bd., Ltd. v. California Produce Corp., Ltd. (1935) 4 Cal. App. 2d 242, 243, 40 P.2d 846* (inducement by produce marketer of individual growers to breach their contracts with plaintiff competitor)]. Relief is afforded on the same basis as in other suits for injunctive relief, such as when damages are not sufficiently ascertainable or are otherwise inadequate relief [*see Huong Que, Inc. v. Luu (2007) 150 Cal. App. 4th 400, 418, 58 Cal. Rptr. 3d 527* ; *Uptown Enters. v. Strand (1961) 195 Cal. App. 2d 45, 50, 15 Cal. Rptr. 486* ; *see also Civ. Code § 3422* (grounds for permanent injunction)].

For a form of complaint for intentional interference with economic relations including a cause of action for injunctive relief, see*§ 565.290*. For discussion and forms governing injunctive relief generally, see Ch. 303, *Injunctions* .

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§ 565.137 Defenses

[1] Controverting Matter

A defendant in an action for interference may, in addition to other general defenses, simply rebut one or more of the essential elements that the plaintiff must prove. For example, in an action for interference with contract, a defendant may show that he or she was not the "moving" or proximate cause of the breach in issue [*see Eltolad Music, Inc. v. April Music, Inc. (1975) 139 Cal. App. 3d 697, 703, 706, 708, 188 Cal. Rptr. 858* (breach of contract be tween plaintiff and third party was at instigation of third party)], or that the contract was entirely void or illegal at the time of the alleged interference [*see A-Mark Coin Co. v. General Mills, Inc. (1983) 148 Cal. App. 3d 312, 320-322, 195 Cal. Rptr. 859* (contract was void as one made pursuant to vacated probate order); *cf.* § 565.133[a]]. Similarly, a defendant may rely on his or her lack of any knowledge of the existence of the economic relationship in issue [*see Contemporary Invs., Inc. v. Safeco Title Ins. Co. (1983) 145 Cal. App. 3d 999, 1002-1003, 193 Cal. Rptr. 822]* .

For further discussion relating to each essential element, see*§ 565.135[3]* and*§ 565.135[4]*. For general forms denying allegations of a complaint, see Ch. 26, *Answers* .

[2] Defendant as Party to Contractual Relationship

[a] In General

Relief based on tort liability for intentional interference with contractual relations may be sought only against those who are not themselves parties to the contractual relationship. This is because contract remedies may be pursued against the parties thereto, and allowance of tort recovery against parties to a contract would circumvent limitations applicable to recovery of damages in contract actions, such as those preventing an award of punitive damages or damages for emotional distress [*Shoemaker v. Myers (1990) 52 Cal. 3d 1, 24, 276 Cal. Rptr. 303, 801 P.2d 1054* ; *Dryden v. Tri-Valley Growers (1977) 65 Cal. App. 3d 990, 998-999, 135 Cal. Rptr. 720* ; *see also Deeter v. Angus (1986) 179 Cal. App. 3d 241, 252-253, 224 Cal. Rptr. 801* ; *Kelly v. General Tel. Co. (1982) 136 Cal. App. 3d 278, 288, 186 Cal. Rptr. 184]* . This is the rule even if the theory of recovery is interference with prospective economic advantage and even if the conduct constituting the breach of contract also happens to violate an independent statutory duty [*JRS Prods.,*

Inc. v. Matsushita Elec. Corp. of Am. (2004) 115 Cal. App. 4th 168, 181-183, 8 Cal. Rptr. 3d 840 (defendant's conduct also violated franchise and unfair competition laws)].

It is also well established that corporate agents and employees acting for and on behalf of a corporation cannot be held liable for inducing breach of the corporation's contract [*Shoemaker v. Myers (1990) 52 Cal. 3d 1, 24, 276 Cal. Rptr. 303, 801 P.2d 1054* ; *Gruenberg v. Aetna Ins. Co. (1973) 9 Cal. 3d 566, 576, 108 Cal. Rptr. 480, 510 P.2d 1032]* . Thus, an officer or employee of a corporation has no independent duty to parties with whom the corporation contracts and cannot be liable for inducing breach of the corporation's contract or conspiring to breach it [*Grosvenor Props., Ltd. v. Southmark Corp. (9th Cir. 1990) 896 F.2d 1149, 1153-1154* (analysis under California law; choice-of-law issue was never reached because officer would not have been liable under Canadian law)]. Similarly, neither a party to a contract nor agents of that party may be liable for interference with related subcontracts that would require the performance of the party to the primary contract [*PM Group, Inc. v. Stewart (2007) 154 Cal. App. 4th 55, 65, 64 Cal. Rptr. 3d 227]* .

On the other hand, a claim for interference with contract may be brought against an owner, officer, or director of a company whose contract was the subject of the litigation. Although these defendants may defend on the grounds that their conduct was privileged or justified, that defense must be pleaded and proved [*Woods v. Fox Broad. Sub., Inc. (2005) 129 Cal. App. 4th 344, 356, 28 Cal. Rptr. 3d 463]* . For example, a director of an entity that is a party to a contract may be liable for interfering with that contract if the acts constituting interference are not undertaken in the scope of the director's duties as agent of the corporation [*Mouchette v. Board of Educ. (1990) 217 Cal. App. 3d 303, 312, 266 Cal. Rptr. 1* (director of school board who, motivated by political alliances, influenced board to terminate plaintiff's contract); *see also Plate v. Sun-Diamond Growers (1990) 225 Cal. App. 3d 1115, 1126, 275 Cal. Rptr. 667* (director liable but not entitled to indemnification from corporate party to terminated contract)]. The immunity for officers, directors, and shareholders of corporations appears to be based not on the fact that they are the same entity as the corporation, but on the fact that, when acting in the corporation's interest, that is to say, within the scope of their office, their actions are privileged [*see § 565.137[4][c],[d]*].

[b] Liability Imposed by Alter Ego Doctrine

If the "manager's privilege" defense [*see § 565.137[4][c]*] is not raised or if the alter ego does not prevail on that defense, the alter ego doctrine cannot be used as a shield to prevent imposition of tort liability on the alter ego who caused the corporation to breach its contract [*Shapoff v. Scull (1990) 222 Cal. App. 3d 1457, 1466, 1471-1473, 272 Cal. Rptr. 480* (manager's privilege was not tendered by either argument or requested jury instructions; however, evidence suggested that manager's privilege would not have applied because, in causing corporation to breach contract, alter ego was acting to recoup losses on investments unrelated to corporation or in retaliation for unrelated project)]. The manager's privilege and the alter ego doctrine serve different purposes. Imposition of liability under the alter ego doctrine does not depend on whether the owner or manager was acting in the corporation's interest. The alter ego doctrine imposes liability to avoid inequitable results that would otherwise be suffered by the party who dealt with the corporation [*Shapoff v. Scull (1990) 222 Cal. App. 3d 1457, 1466, 1469-1471, 272 Cal. Rptr. 480]* . In arguing that the alter ego doctrine should be applied to limit the alter ego's liability to the contract claim, the court of appeal said the alter ego was attempting to obtain relief that would be denied to similarly situated defendants under the "manager's privilege" criteria (that is, immunity without regard to motive), and rejected such an application of the alter ego doctrine [*Shapoff v. Scull (1990) 222 Cal. App. 3d 1457, 1472, 272 Cal. Rptr. 480]* .

The original judgment in *Shapoff v. Scull* was against the corporation and its two principals, awarding plaintiff $55,000 for breach of a development agreement with the corporation, $55,000 for intentional interference with contractual relations, and $300,000 in punitive damages. The judgment was based in part on findings that the individual defendants were the alter egos of the corporate defendant and that the breach was caused by the tortious interference of one of them. The individual defendant found to have tortiously interfered with the contractual relations moved for judgment notwithstanding the verdict, asking the court to limit his liability to the contract claim on the ground that it was inconsistent to impose liability on both the contract claim and the tort claim. The trial court agreed that it was

inconsistent, and gave plaintiff the election to enforce one or the other. Not surprisingly, plaintiff chose to proceed on the tort claim. The trial court amended the judgment to delete its determination that the individual was an alter ego of the corporation [*Shapoff v. Scull (1990) 222 Cal. App. 3d 1457, 1462, 272 Cal. Rptr. 480]* . Plaintiff did not contest that election on appeal, so the related issue of whether one person can be held liable both in tort for interference and on the contract as an alter ego was not addressed [*Shapoff v. Scull (1990) 222 Cal. App. 3d 1457, 1473, 272 Cal. Rptr. 480]* .

A similar result occurred in another case in which the court of appeal upheld a jury finding that both an individual defendant and corporatedefendants were liable for conspiring to interfere with the plaintiff's contractual security interest, despite the fact that the individual defendant was arguably the alter ego of both the corporate defendants and the corporation that had the contract with the plaintiff [*Webber v. Inland Empire Invs., Inc., (1999) 74 Cal. App. 4th 884, 898-901, 88 Cal. Rptr 2d 594]* . The court concluded that the case before it was virtually indistinguishable from *Shapoff* [*Webber v. Inland Empire Invs., Inc., (1999) 74 Cal. App. 4th 884, 899-900, 88 Cal. Rptr 2d 594* (Supreme Court's subsequent disapproval of *Shapoff* extended only to *Shapoff* court's holding that party to contract can be liable in tort for conspiring to interfere with own contract)].

[3] Lapse of Limitation Period

No limitation period is specifically provided for an action for interference with economic relations. Thus, as a general rule, the applicable limitation period is the two-year period set forth in *Code Civ. Proc. § 339(1)*, which governs tort actions that involve intangible interests for which no limitation period is specifically provided [*McWilliams v. Holton (1967) 248 Cal. App. 2d 447, 454, 56 Cal. Rptr. 574* (dictum); *see, e.g., Kenworthy v. Brown (1967) 248 Cal. App. 2d 298, 301, 56 Cal. Rptr. 461* (*Code Civ. Proc. § 339(1)* applied to action for conspiracy to interfere with contract); *Kiang v. Strycula (1965) 231 Cal. App. 2d 809, 811-812, 42 Cal. Rptr. 338* (*Code Civ. Proc. § 339(1)* applied to action for intentional interference with contract)].

Other limitation periods may apply to an interference action when the alleged wrongful conduct is tortious in itself. For example, the three-year period set forth in former *Code Civ. Proc. § 338(4)* (*now see Code Civ. Proc. § 338(d)*) was held to apply to an action for intentional interference with contract that was based on allegations of fraud [*Romano v. Wilbur Ellis & Co. (1947) 82 Cal. App. 2d 670, 673-674, 186 P.2d 1012]* .

Similarly, dictum in a court of appeal decision indicated that an action for interference by means of libel, slander, or physical violence would fall within the one-year limitations period of former *Code Civ. Proc. § 340(3)* (*now see Code Civ. Proc. §§ 335.1, 340(c)* (beginning in 2003, two-year limitations period for actions for personal injury or death caused by negligence or wrongful act of another, and one-year limitations period for actions for libel or slander)) [*see Romano v. Wilbur Ellis & Co. (1947) 82 Cal. App. 2d 670, 674, 186 P.2d 1012* ; *see also Ch. 345, Limitation of Actions, § 345.14*].

The applicable statute of limitations may be pleaded affirmatively as a bar to an action not brought within the prescribed period [*see McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 591, 33 Cal. Rptr. 389* ; *see also Union Sugar Co. v. Hollister Estate Co. (1935) 3 Cal. 2d 740, 744, 47 P.2d 273* (bar of statute of limitations as affirmative defense required to be raised in appropriate pleading)]. For a form of affirmative defense allegation raising the bar of *Code Civ. Proc. § 339(1), see § 565.292*. For discussion and forms relating to limitations periods generally, see Ch. 345, *Limitation of Actions* .

[4] Justification or Privilege

[a] General Balancing Test

One defense to actions for interference with economic relations is that of justification or privilege. The terms

"justification" and "privilege" are essentially synonymous, signifying that the defendant's conduct was not improper under the particular circumstances [*see Environmental Planning & Info. Council v. Superior Court (1984) 36 Cal. 3d 188, 193-194, 194 n.3, 203 Cal. Rptr. 127, 680 P.2d 1086]* . This general defense is based on the rule that intentional interference with economic relations is only actionable if the method of interference was itself unlawful, or if the method was lawful but there was a lack of sufficient justification or privilege [*Lowell v. Mother's Cake & Cookie Co. (1978) 79 Cal. App. 3d 13, 17-18, 144 Cal. Rptr. 664]* .

A plaintiff must now plead and prove that a defendant's conduct was wrongful by some measure other than the act of the interference itself in order to recover for intentional interference with prospective economic advantage. Therefore, the burden is now on the plaintiff in those actions to prove the element of "wrongfulness" by pleading and proving that the defendant's interference was unlawful, which means that it must be conduct proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard [*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1159, 131 Cal. Rptr. 2d 29, 63 P.3d 937]* . Therefore, if the plaintiff is required to prove that the defendant's conduct was unlawful as an element of the cause of action for intentional interference with prospective economic advantage that has not yet ripened into a contract, it would seem that the defendant's only real remaining burden in these actions on what was in the past considered the defense of justification is to counter the plaintiff's evidence and argument with the defendant's own showing that the conduct was not unlawful.

For other types of interference claims, however, the defense of justification or privilege is an affirmative defense that is waived if not raised [*GHK Assocs. v. Mayer Group, Inc. (1990) 224 Cal. App. 3d 856, 882, 274 Cal. Rptr. 168* ; *Mayes v. Sturdy N. Sales, Inc. (1979) 91 Cal. App. 3d 69, 80, 154 Cal. Rptr. 43* ; *see also Buckaloo v. Johnson (1975) 14 Cal. 3d 815, 827-828, 122 Cal. Rptr. 745, 537 P.2d 865]* . Moreover, it cannot be considered as a ground for sustaining a general demurrer unless the facts giving rise to the defense appear on the face of the complaint [*Herron v. State Farm Mut. Ins. Co. (1961) 56 Cal. 2d 202, 206-207, 14 Cal. Rptr. 294, 363 P.2d 310* ; *Lowell v. Mother's Cake & Cookie Co. (1978) 79 Cal. App. 3d 13, 18-19, 144 Cal. Rptr. 664]* .

There are a number of general fact situations in which the defense of justification or privilege is typically recognized [*see, e.g., § 565.137[4][b]*]. As a general rule, however, the contours of justification or privilege are not precisely defined, and establishing the defense requires a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with, considering all the circumstances including the nature of the defendant's conduct and the relationship between the parties [*Environmental Planning & Info. Council v. Superior Court (1984) 36 Cal. 3d 188, 193-194, 203 Cal. Rptr. 127, 680 P.2d 1086]* .

In other words, the issue is essentially whether the defendant's conduct was fair and reasonable under all the circumstances. Existence of justification or privilege is therefore a question of fact usually decided by proof of facts rather than by the pleadings [*Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal. App. 3d 200, 228-229, 194 Cal. Rptr. 180* ; *Lowell v. Mother's Cake & Cookie Co. (1978) 79 Cal. App. 3d 13, 17-21, 144 Cal. Rptr. 664]* . One of the most significant considerations is the purpose or motive underlying the defendant's intentional acts [*see Seaman's Direct Buying Serv., Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 766, 206 Cal. Rptr. 354, 686 P.2d 1158* (defendant's motive becomes relevant issue only as defense once intent is shown)]. If the motive is improper, that is, solely to harm the plaintiff, this will defeat any apparent defense of justification or privilege that might otherwise apply due to the existence of a relationship or interest that typically gives rise to the defense [*Bridges v. Cal-Pac. Leasing Co. (1971) 16 Cal. App. 3d 118, 132, 93 Cal. Rptr. 796]* .

Some courts, in determining whether justification or privilege exists, have adopted a balancing test that includes consideration of the following specific factors [*see, e.g., Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal. App. 3d 200, 230, 194 Cal. Rptr. 180* ; *Lowell v. Mother's Cake & Cookie Co. (1978) 79 Cal. App. 3d 13, 21, 144 Cal. Rptr. 664* ; Restatement (Second) of Torts § 767]:

- The nature of the defendant's conduct;

- The defendant's motive;
- The interests of the plaintiff that are interfered with;
- The interests sought to be advanced by the defendant;
- The social interests in protecting the freedom of the action of the defendant and the contractual or other economic interests of the plaintiff;
- The proximity or remoteness of the defendant's conduct to the interference; and
- The relationship between the parties.

For a form of affirmative defense based on justification or privilege, *see § 565.293*.

[b] Fair Competition

The interest in competitive freedom is important enough to justify fair and lawful efforts to obtain the business of a third person by inducing him or her to forsake a competitor, when there is no existing contractual relation between the third person and the competitor [*Imperial Ice Co. v. Rossier (1941) 18 Cal. 2d 33, 36, 112 P.2d 631]* . As a general rule, this defense arises if [*Los Angeles Land Co. v. Brunswick Corp. (9th Cir. 1993) 6 F.3d 1422, 1430-1431* ; *A-Mark Coin Co. v. General Mills, Inc. (1981) 148 Cal. App. 3d 312, 323* ; *Charles C. Chapman Bldg. Co. v. California Mart (1969) 2 Cal. App. 3d 846, 855-856, 82 Cal. Rptr. 830* ; *see* Restatement (Second) of Torts § 768(1)]:

- The relation concerns a matter involved in the competition between the defendant and the plaintiff;
- The defendant does not employ means wrongful in themselves;
- The defendant's action does not create or continue an unlawful restraint of trade; and
- The defendant's purpose is at least in part to advance the defendant's interest in competing with the plaintiff.

However, the interest in contractual stability is deemed to be more important than the interest in competitive freedom. Therefore, the mere fact that one is in competition with another for the business of a third person does not justify inducing the third person to breach an existing contract with the other [*Imperial Ice Co. v. Rossier (1941) 18 Cal. 2d 33, 36-37, 112 P.2d 631]* . This is true even though the contract is terminable at the will of the parties [*Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1127, 1129, 270 Cal. Rptr. 1, 791 P.2d 587* (however, defendant's conduct not actionable on public policy grounds; *see § 565.137[h]*); *Speegle v. Board of Fire Underwriters (1946) 29 Cal. 2d 34, 39-41, 172 P.2d 867* (fact that contract is terminable at will of parties does not mean that it is terminable at will of others); *Freed v. Manchester Serv., Inc. (1958) 165 Cal. App. 2d 186, 188-189, 191, 331 P.2d 689* ; *but see A-Mark Coin Co. v. General Mills, Inc. (1981) 148 Cal. App. 3d 312, 323* (citing with approval Restatement (Second) of Torts § 768(1), under which fair competition justifies interference with existing contract that is terminable at will)]. For example, an insurer may be liable for inducing an attorney's client to breach his or her contingent fee contract with the attorney in order to settle with the client for lesser sum, notwithstanding the fact that a contingent fee contract may be terminated at will by a client with or without cause [*Herron v. State Farm Mut. Ins. Co. (1961) 56 Cal. 2d 202, 205, 207, 14 Cal. Rptr. 294, 363 P.2d 310]* . The reason for making it actionable to induce a party to terminate a contract according to its terms is that, if protection from outside interference is accorded to an economic relationship that is wholly prospective, protection must also be accorded to contractual relationships that are subject to

termination [*Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1127-1128, 270 Cal. Rptr. 1, 791 P.2d 587]* .

Although fair competition does not justify active and affirmative efforts to interfere with or induce a breach of contract, a person is free to compete by lawful means even though an incidental result may be to induce a third party to breach a contract with a competitor. Similarly, if two parties have separate contracts with a third party, each may resort to lawful means to secure performance even though the necessary result is a breach of the other's contract [*Imperial Ice Co. v. Rossier (1941) 18 Cal. 2d 33, 36-37, 112 P.2d 631* (dictum); *see also § 565.137[4][g]*].

[c] Confidential Relationship

[i] Protecting Welfare of Third Party

A defendant who induces a third party to sever an existing contract or not to enter some other economic relation may justify doing so if he or she had a confidential relationship with the third party. The general rule may be stated as follows: a defendant who is charged with the responsibility or welfare of a third party is not liable for intentionally causing that party to breach his or her contract or not to enter into a prospective contractual relation with the plaintiff, when the defendant uses lawful means and acts to protect the welfare of the third party [Restatement (Second) of Torts § 770]. For example, an attorney may not be held liable for advising a client to breach a contract with a third party. Public policy dictates that attorneys must remain free to counsel their clients without fear of subjecting themselves to liability as a result of the proper discharge of their professional obligations. Clients also must feel free to seek out an attorney's advice on any issue at any time. Any rule to the contrary would constitute a serious impairment of the confidential attorney-client relationship and would have a resulting deleterious effect on the administration of justice [*Schick v. Lerner (1987) 193 Cal. App. 3d 1321, 1329, 238 Cal. Rptr. 902]* .

[ii] Manager's Privilege

Under the "manager's privilege," a corporate agent or employee acting for and on behalf of his or her corporation is privileged to induce the corporation to breach a contract, by virtue of his or her confidential relationship with the corporation [*Mayes v. Sturdy N. Sales, Inc. (1979) 91 Cal. App. 3d 69, 77-78, 154 Cal. Rptr. 43* ; *Wise v. Southern Pac. Co. (1963) 223 Cal. App. 2d 50, 72-73, 35 Cal. Rptr. 652* ; *see also Mallard v. Boring (1960) 182 Cal. App. 2d 390, 393, 6 Cal. Rptr. 171* (same privilege applied to employee of partnership)].

The manager's privilege may not be sufficient to insulate an officer or director from liability if imposition of liability is otherwise appropriate under the alter ego doctrine [*see Shapoff v. Scull (1990) 222 Cal. App. 3d 1457, 1469-1473* (manager's privilege defense was not raised, but court noted that alter ego liability does not depend on whether owner or manager was acting in corporation's interest); *see also § 565.137[2][b]*].

The manager's privilege is not limited to cases in which a manager has allegedly induced an entity principal to breach a contract, but may apply to a manager or agent who acts on behalf of a natural person [*Huynh v. Vu (2003) 111 Cal. App. 4th 1183, 1195, 4 Cal. Rptr. 3d 595* (husband could assert privilege as agent for wife)].

California court opinions have not entirely established whether the manager's privilege is an absolute privilege, or whether it is a qualified privilege that may be defeated by a showing that the manager's motive was improper [*see Halvorsen v. Aramark Unif. Servs., Inc. (1998) 65 Cal. App. 4th 1383, 1391-1393, 77 Cal. Rptr. 2d 383]* . For these purposes, an improper motive would be one in which the manager acted in his or her best interests, rather than in the principal's best interests [*see Wanland v. Los Gatos Lodge, Inc. (1991) 230 Cal. App. 3d 1507, 1522-1523, 281 Cal. Rptr. 890*].

However, at least one court of appeal opinion has specifically held that the privilege is absolute regardless of the

manager's motivations, at least in the context of employment decisions made by a managing agent of the employer [*Halvorsen v. Aramark Unif. Servs., Inc. (1998) 65 Cal. App. 4th 1383, 1392-1396, 77 Cal. Rptr. 2d 383* (in interference with contract action based on termination from employment, manager's privilege was absolute when employment was terminable at-will)].

Other opinions have considered the propriety of the manager's motives in determining whether to apply the privilege [*see, e.g., Aalgaard v. Merchants Nat'l Bank, Inc. (1990) 224 Cal. App. 3d 674, 684-686, 274 Cal. Rptr. 81* (privilege protected defendants when evidence established that officers did not act in their own interests)], and the privilege has been denied in instances when the manager acted primarily out of self-interest [*see, e.g., Olivet v. Frischling (1980) 104 Cal. App. 3d 831, 840-841, 164 Cal. Rptr. 87 , disapproved on other grounds, Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454]* .

Even when motive has been considered, however, the privilege has applied when the predominant motive of the manager was proper [*see Halvorsen v. Aramark Unif. Servs., Inc. (1998) 65 Cal. App. 4th 1383, 1392-1393, 77 Cal. Rptr. 2d 383* (discussing earlier cases)]. Under this predominant motive test, if the manager has some personal financial interest in the transaction, so that it is reasonably possible that the manager acted at least in part out of self-interest, a manager's desire to advance his or her personal interests does not vitiate the privilege as long as the manager's predominant motive is advancing the principal's interests [*Huynh v. Vu (2003) 111 Cal. App. 4th 1183, 1198-1200, 4 Cal. Rptr. 3d 595]* .

[d] Financial Interest

A defendant who has a financial interest in the business of a third party, and who intentionally causes that person not to enter into a prospective contractual relation with the plaintiff, is justified in so doing if he or she does not employ wrongful means and acts to protect his or her interest from being prejudiced by the relation [*Chicago Title Ins. Co. v. Great W. Fin. Corp. (1968) 69 Cal. 2d 305, 319, 70 Cal. Rptr. 849, 444 P.2d 481* ; *Culcal Stylco, Inc. v. Vornado, Inc. (1972) 26 Cal. App. 3d 879, 882, 103 Cal. Rptr. 419* ; *see* Restatement (Second) of Torts § 769]. "Financial interest" refers to an investment or ownership interest. For example, a parent corporation has a financial interest in its subsidiary, although the opposite is not true [*Culcal Stylco, Inc. v. Vornado, Inc. (1972) 26 Cal. App. 3d 879, 882-883, 103 Cal. Rptr. 419]* .

The privilege based on financial interest is qualified, in the sense that a defendant must show not only that the existence of the financial interest, but also that he or she acted with the proper purpose, that is, to protect his or her interest or the interest of the entity he or she owns [*Wanland v. Los Gatos Lodge, Inc. (1991) 230 Cal. App. 3d 1507, 1522, 281 Cal. Rptr. 890* ; *see also Culcal Stylco, Inc. v. Vornado, Inc. (1972) 26 Cal. App. 3d 879, 882-883, 103 Cal. Rptr. 419* (existence of privilege normally determined on basis of proof rather than pleadings)].

Financial interest, like fair competition, does not justify intentional interference with an existing contract, as distinguished from a noncontractual relationship. For example, one court held that the defense was not available when defendants, who were controlling shareholders, induced their corporation to breach an existing contract [*Winn v. McCulloch Corp. (1976) 60 Cal. App. 3d 663, 673-674, 131 Cal. Rptr. 597]* .

[e] Conduct Protected by Constitution or Statute

[i] In General

In certain instances, a defendant's interference with economic relations has been held to be justified or privileged because the interfering conduct was protected by public policy expressed in a constitutional or statutory provision, which outweighed any detriment resulting to the economic interest interfered with. Specific applications of this principle are discussed in the subheadings below.

[ii] Petitioning Government for Redress of Grievance (*Noerr-Pennington* Doctrine)

The *Noerr-Pennington* doctrine provides that there is no antitrust liability under the Sherman Act for efforts to influence government that are protected by the *First Amendment* right to petition for redress of grievances, even when the motive behind such actions is anticompetitive [*ProfessionalReal Estate Investors v. Columbia Pictures Indus. Inc. (1993) 508 U.S. 49, 56-58, 113 S. Ct. 1920, 123 L. Ed. 2d 611* ; *see* *Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1133, 270 Cal. Rptr. 1, 791 P.2d 587* ; *Hi-Top Steel Corp. v. Lehrer (1994) 24 Cal. App. 4th 570, 574, 29 Cal. Rptr. 2d 646]* . The doctrine originated in the U.S. Supreme Court's decision in *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc. (1961) 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464* , in which the Court held that alleged lobbying efforts by the railroad industry to foster legislation that would be adverse to the trucking industry could not form the basis for liability under the Sherman Act, even if the defendants' motive was to injure competition [*see* *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc. (1961) 365 U.S. 127, 136-140, 81 S. Ct. 523, 5 L. Ed. 2d 464* ; *see also* *United Mine Workers v. Pennington (1965) 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626]* . In a later decision, the Court made clear that the *Noerr-Pennington* doctrine applies to judicial and administrative, as well as legislative, proceedings [*California Transp. v. Trucking Unlimited (1972) 404 U.S. 508, 510-511, 92 S. Ct. 609, 30 L. Ed. 2d 642* ; *see* *Professional Real Estate Investors v. Columbia Pictures Indus. Inc. (1993) 508 U.S. 49, 56-58, 113 S. Ct. 1920, 123 L. Ed. 2d 611]* .

Although the *Noerr-Pennington* doctrine originated in the context of federal antitrust litigation, courts have also applied the doctrine to actions for intentional interference with economic relations under California law. Thus, the scope of interference claims is limited by the constitutional right to petition for redress of grievances [*see* *Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1133-1137, 270 Cal. Rptr. 1, 791 P.2d 587* ; *Hi-Top Steel Corp. v. Lehrer (1994) 24 Cal. App. 4th 570, 577-578, 29 Cal. Rptr. 2d 646* ; *Matossian v. Fahmie (1980) 101 Cal. App. 3d 128, 138-139, 161 Cal. Rptr. 532* ; *Sierra Club v. Butz (N.D. Cal. 1972) 349 F. Supp. 934, 937-938]* . In one case, for example, a court held that the *Noerr-Pennington* doctrine barred a timber company that had a logging contract with the United States from bringing an action for intentional interference with contract against an environmental group seeking to enjoin the company from logging in an area under consideration for wilderness status [*see* *Sierra Club v. Butz (N.D. Cal. 1972) 349 F. Supp. 934, 938-939]* . In another case, the doctrine was applied to bar an action for interference with business relations brought by alcoholic beverage licenseholders against competitors who had unsuccessfully protested the granting of the plaintiffs' liquor license [*see* *Matossian v. Fahmie (1980) 101 Cal. App. 3d 128, 138-139, 161 Cal. Rptr. 532]* .

Efforts to influence government that are merely a "sham" are not protected by the *Noerr-Pennington* doctrine and are subject to antitrust liability [*see* *California Transp. v. Trucking Unlimited (1972) 404 U.S. 508, 512-513, 92 S. Ct. 609, 30 L. Ed. 2d 642* ; *Eastern R. Presidents Conference v. Noerr Motor Freight, Inc. (1961) 365 U.S. 127, 144, 81 S. Ct. 523, 5 L. Ed. 2d 464* ; *Hi-Top Steel Corp. v. Lehrer (1994) 24 Cal. App. 4th 570, 575, 29 Cal. Rptr. 2d 646]* . The sham exception encompasses situations in which persons use the governmental process, as opposed to the outcome of that process, as an anticompetitive weapon [*Columbia v. Omni Outdoor Adver. (1991) 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382]* . The sham exception has been applied to California tort actions for intentional interference with economic relations [*see* *Hi-Top Steel Corp. v. Lehrer (1994) 24 Cal. App. 4th 570, 579, 581-583, 29 Cal. Rptr. 2d 646* (defendants' alleged false and baseless statements to city officials about plaintiffs' plans for automobile body shredder made for purpose of causing regulatory delays constituted sufficient facts to support application of sham exception)].

Litigation will not be deemed a sham unless the lawsuit is so objectively baseless that no reasonable litigant could realistically expect success on the merits [*Professional Real Estate Investors v. Columbia Pictures Indus. Inc. (1993) 508 U.S. 49, 60-63, 113 S. Ct. 1920, 123 L. Ed. 2d 611]* . The existence of probable cause to institute the legal proceedings thus precludes a finding that the defendant has engaged in sham litigation [*Professional Real Estate Investors v. Columbia Pictures Indus. Inc. (1993) 508 U.S. 49, 61-64, 113 S. Ct. 1920, 123 L. Ed. 2d 611* ; *see also* *Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1137, 270 Cal. Rptr. 1, 791 P.2d 587* (plaintiff

seeking to state claim for intentional interference with economic relations based on defendant's inducing another party to undertake litigation must allege that litigation was brought without probable cause and was concluded in plaintiff's favor)]. If an objective litigant could reasonably conclude that the suit is reasonably calculated to elicit a favorable outcome, then the suit is immunized under the *Noerr-Pennington* doctrine, regardless of the defendant's subjective intent in bringing the suit [*Professional Real Estate Investors v. Columbia Pictures Indus. Inc. (1993) 508 U.S. 49, 56-58, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611]* .

[iii] Privilege for Statements Made in Course of Legislative, Judicial, or Other Official Proceedings

Under *Civ. Code § 47(b)*, a statement is generally privileged if made in the course of a legislative, judicial, or other official proceeding. Although this provision is most often invoked in defamation actions, it has also been applied to actions for intentional interference with economic relations [*see* *Rubin v. Green (1993) 4 Cal. 4th 1187, 1196, 17 Cal. Rptr. 2d 828, 847 P.2d 1044* (acts alleged amounted to unlawful attorney solicitation); *1-800-Contacts, Inc. v. Steinberg (2003) 107 Cal. App. 4th 568, 586-588* (statements in anticipation of legislative activity were shielded from action for interference with contract); *Rosenthal v. Irell & Manella (1982) 135 Cal. App. 3d 121, 125-128, 185 Cal. Rptr. 92* (statements connected with judicial proceeding); *Asia Inv. Co. v. Borowski (1982) 133 Cal. App. 3d 832, 841-842, 184 Cal. Rptr. 317* (filing of petition for writ of mandate)]. However, the privilege has been held inapplicable, despite the fact that the defendant was involved in a judicial proceeding, when the defendant's conduct had no connection with the issues raised in the litigation [*see* *Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal. App. 3d 200, 231-234, 194 Cal. Rptr. 180]* . The privilege is also inapplicable where the conduct is largely noncommunicative and unrelated to any anticipated litigation [*see* *LiMandri v. Judkins (1997) 52 Cal. App. 4th 326, 348, 60 Cal. Rptr. 2d 539* (attorney's conduct in securing trust company's lien rights not privileged under *Civ. Code § 47(b)* because unrelated to subsequent interpleader action)].

For further discussion of the scope of the privilege under *Civ. Code § 47(b)*, see Ch. 340, *Libel and Slander* .

[iv] Other Examples

In one case, an attorney contracted with members of a city council to contest a recall election seeking the removal of these members. Proponents of the election persuaded the city treasurer to refuse to disburse any public funds pursuant to this contract, and the attorney sued the proponents for interference. In this situation, it was held that the interference was privileged, notwithstanding any detriment to the attorney's contract interest, in view of the strong public interest in allowing free challenges to public expenditures, as expressed by *Code Civ. Proc. § 526a* [*Bledsoe v. Watson (1973) 30 Cal. App. 3d 105, 108-111, 106 Cal. Rptr. 197* (also citing *U.S. Const. amends. I, XIV*; *Cal. Const. art. I, § 1*); *see also* *Gold v. Los Angeles Democratic League (1975) 49 Cal. App. 3d 365, 376, 122 Cal. Rptr. 732* (freedom of speech may be raised as defense in action based on defendant's alleged misrepresentations interfering with plaintiff's prospective opportunity to be elected as city treasurer)].

In another case, a plaintiff publishing company brought an action against defendants based on their intentional efforts to dissuade third parties from advertising in plaintiff's newspaper. The California Supreme Court noted that a politically motivated boycott designed to force governmental or economic change was a constitutionally protected activity. The Court held that defendants' conduct was similarly motivated to force a change in plaintiff's editorial policy, and as such it was justified as a matter of public policy expressed in *U.S. Const. amend. I*, as well as common law principles [*Environmental Planning & Info. Council v. Superior Court (1984) 36 Cal. 3d 188, 195-198, 203 Cal. Rptr. 127, 680 P.2d 1086]* .

[v] Motion to Strike Claims Against Constitutionally Privileged Conduct (SLAPP Suits)

The legislature has declared that there is a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances (Strategic Litigation Against

Public Participation or "SLAPP suits"). In orderto protect the public interest to encourage continued participation in matters of public significance, and to prevent this participation from being chilled through abuse of the judicial process, the legislature enacted *Code Civ. Proc. § 425.16* [*see Code Civ. Proc. § 425.16(a)*], which authorizes a special motion to strike in order to determine the validity of such actions.

The motion to strike is based on the ground that the actions complained of arise from acts of the defendant in furtherance of his or her right of petition or free speech under the United States or California Constitution in connection with a public issue. In response to the motion, the plaintiff has the burden to establish that there is a probability that plaintiff will prevail on the claim [*Code Civ. Proc. § 425.16(b)*]. In making its determination, the court considers the pleadings, and supporting and opposing affidavits stating the facts on which the liability or defense is based [*Code Civ. Proc. § 425.16(b)*; *see also Code Civ. Proc. § 425.16(c),(g)* (costs and fees, stay of discovery during pendency of motion)].

These special motion provisions are not applicable to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor [*Code Civ. Proc. § 425.16(d)*].

For detailed discussion and a form of motion and supporting declaration, see Ch. 376, *Motions to Strike: Anti-SLAPP* .

[f] Truthful Information or Honest Advice

A defendant who intentionally causes a third party not to perform a contract or not to enter into a prospective contractual relation with the plaintiff is justified in doing so if he or she has merely given the third party truthful information or honest advice within the scope of a request for the advice [Restatement (Second) of Torts § 772; *see Savage v. Pacific Gas & Elec. Co. (1993) 21 Cal. App. 4th 434, 449-450, 26 Cal. Rptr. 2d 305* (applying privilege for providing truthful information); *Lowell v. Mother's Cake & Cookie Co. (1978) 79 Cal. App. 3d 13, 20 n.1, 144 Cal. Rptr. 664* (privilege based on honest advice does not apply unless advice is requested); *Walsh v. Glendale Fed. Sav. & Loan Assn. (1969) 1 Cal. App. 3d 578, 588-589, 81 Cal. Rptr. 804 , disapproved on other grounds, Garrett v. Coast & Southern Fed. Sav. & Loan Assn. (1973) 9 Cal. 3d 731, 737-738, 108 Cal. Rptr. 845, 511 P.2d 1197* (privilege based on honest advice not apparent on face of complaint when defendant gave advice on request and within scope of request but allegedly gave false and fraudulent information)].

[g] Bona Fide Claim

A defendant who intentionally interferes with a contract or other economic relationship by asserting in good faith a legally protected interest of his or her own or by threatening in good faith to protect that interest by appropriate means is justified in doing so if he or she believes that his or her interest may otherwise be impaired or destroyed by the performance of the contract or other transaction interfered with [Restatement (Second) of Torts § 773]. This privilege refers generally to a defendant's assertion of an honest claim by bringing or threatening to bring a suit in good faith, to protect a present, existing, economic interest, such as an ownership interest in property or a contractual interest. For example, if the defendant has a prior contract with a third party, he or she may prevent that third party from performing another contract with the plaintiff that threatens the prior contract [*Richardson v. La Rancherita (1979) 98 Cal. App. 3d 73, 81, 159 Cal. Rptr. 285* ; *see also Imperial Ice Co. v. Rossier (1941) 18 Cal. 2d 33, 37, 112 P.2d 631* ; *Lawless v. Brotherhood of Painters (1956) 143 Cal. App. 2d 474, 478, 300 P.2d 159* (if two parties have separate contracts with third party, each may resort by lawful means to secure performance of his or her own contract even though the necessary result is a breach of the other's contract)].

As with all recognized situations in which justification or privilege may apply, a showing of proper motive is crucial [*cf.* § 565.137[4][c], [d]]. The defendant must not only show the existence of a legally protected interest, but must act in good faith to preserve that interest. To establish "good faith," the defendant must show some objective basis for his or

her belief, something more than mere reliance on counsel or mere sincerity and honest conviction with regard to the validity of the claim. For example, in one case, a defendant lessor interfered with a lessee's sale of corporate stock on the ground that it constituted a lease assignment requiring the lessor's consent. However, justification on the basis of a bona fide claim was held not to apply, because the evidence supported findings that the lessor's predominant motive was to use its consent to negotiate an increase in the financial return on the leased property, and there was insufficient objective basis for its claim that the sale of stock amounted to a lease assignment in violation of the terms of the lease [*Richardson v. La Rancherita (1979) 98 Cal. App. 3d 73, 82, 159 Cal. Rptr. 285* ; *cf. Bridges v. Cal-Pac. Leasing Co. (1971) 16 Cal. App. 3d 118, 131-132, 93 Cal. Rptr. 796* (evidence supported finding of good faith claim to protect property interest)].

[h] Right to Induce Litigation on Contract

No cause of action for intentional interference with economic relations can be stated based on the defendant's inducing another to undertake litigation relating to the contract unless that litigation was brought without probable cause and was concluded in plaintiff's favor [*Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1137, 270 Cal. Rptr. 1, 791 P.2d 587* (issue raised on demurrer)]. To allow a cause of action to be stated for interference with a contract or a prospective advantage when the only interference alleged is that defendant induced the bringing of potentially meritorious litigation would be an unwarranted expansion of thescope of these torts and a pernicious barrier to free access to the courts [*Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1123, 270 Cal. Rptr. 1, 791 P.2d 587]* .

In one case, the defendant induced a county water agency to seek a declaratory judgment that it could terminate its contract with plaintiff early by retiring related project bonds. That action resulted in a trial court judgment for the agency, which was reversed on appeal and still pending when the action for damages and injunctive relief based on intentional interference with contract and with prospective economic advantage reached the Supreme Court [*Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1124-1125, 270 Cal. Rptr. 1, 791 P.2d 587]* .

In reaching its conclusion, the Court considered the public policy to allow free access to the courts to provide for peaceful, judicial resolution of differences [*Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1131-1133, 270 Cal. Rptr. 1, 791 P.2d 587* ; *see Civ. Code § 47(b*); *see also § 565.137[4][e][iii]*], the constitutional right to petition for redress of grievances [*Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1133-1135, 270 Cal. Rptr. 1, 791 P.2d 587* ; *see § 565.137[4][e][ii]*], and the fact that the interference torts themselves have been criticized as favoring secure enjoyment of contractual and economic relations at the expense of a freely competitive economy, and have been limited accordingly [*Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1136-1137, 270 Cal. Rptr. 1, 791 P.2d 587* ; *see, e.g., Youst v. Longo (1987) 43 Cal. 3d 64, 74-75, 233 Cal. Rptr. 294, 729 P.2d 728* (tort not extended to context of sporting event)]. The Court concluded that the appropriate balance between the right to free access to the courts and the interest in being free from the financial and emotional cost of defending litigation is already struck by the tort of malicious prosecution [*Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1131-1133, 1137, 270 Cal. Rptr. 1, 791 P.2d 587]* . The Court acknowledged that the right to petition for redress of grievances has previously been applied only to protect the litigants, but held that, in order to assure free access to the courts and to prevent a flood of oppressive derivative litigation, third parties should be similarly protected [*Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1135-1136, 270 Cal. Rptr. 1, 791 P.2d 587]* . For discussion of tort actions for malicious prosecution, see Ch. 357, *Malicious Prosecution and Abuse of Process* .

Likewise, an action for intentional interference with contractual relations may not be brought against a defendant whose conduct induces the *plaintiff* to institute litigation to determine its rights under a contract with a third party, at least when the plaintiff's position on the contractual dispute is not indisputably correct. A business relationship with a party to a contract that merely brings to head the contracting parties' good faith dispute about the interpretation of the contract is not tortious [*Golden W.Baseball Co. v. City of Anaheim (1994) 25 Cal. App. 4th 11, 51, 31 Cal. Rptr. 2d 378]* .

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[Reserved]

§§ 565.137[Reserved]

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§ 565.150 California Points and Authorities

For points and authorities supporting an application for a preliminary injunction restraining the use of misleading advertising as unfair competition under *Bus. & Prof. Code § 17200 et seq.*, see California Points and Authorities, Ch. 14, *Advertising* (Matthew Bender)

For points and authorities supporting an application for a temporary restraining order or preliminary injunction restraining trade name infringement, restraint of trade, and unfair trade practices under *Bus. & Prof. Code §§ 17000 et seq.* and *17200 et seq.*, see California Points and Authorities, Ch. 116, *Injunctions* (Matthew Bender)

For points and authorities pertaining to actions under *Bus. & Prof. Code §§ 17000 et seq.* and *17200 et seq.*, see California Points and Authorities, Ch. 235, *Unfair Competition* (Matthew Bender)

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§ 565.151 California Torts

For full discussion of the business related torts generally, see Levy, Golden, and Sacks, California Torts, Ch. 40 (Matthew Bender)

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§ 565.152 Forms of Discovery

For forms of interrogatories for use in actions involving unfair competition, see Bender's Forms of Discovery, Ch. 207, *Unfair Competition* (Matthew Bender)

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§ 565.153 Federal Statutes

Price discrimination prohibited under Robinson-Patman Act (*15 U.S.C.S. §§ 13, 13a-13c, 21a*). *15 U.S.C.S. § 13*

Unfair competition prohibited under Federal Trade Commission Act (*15 U.S.C.S. §§ 41-58*). *15 U.S.C.S. § 45(a)(1)*

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§ 565.154 State Statutes

Resale of drugs acquired at preferentially low prices pursuant to *15 U.S.C.S. § 13c* (federal Nonprofit Institutions Act), with limited exceptions, is unfair competition within meaning of *Bus. & Prof. Code § 17200* et seq. *Bus. & Prof. Code §§ 4450, 4470*

Unfair Practices Act; action for injunctive relief and damages for locality discrimination, sales and service below cost, secret rebates or unearned discounts, and loss leaders. *Bus. & Prof. Code §§ 17000-17101*

Retailer not permitted to refuse to sell cellular phone because customer refuses to use service for which retailer is agent. *Bus. & Prof. Code § 17026.1(c)*

Action for injunctive relief and civil penalties for unfair competition. *Bus. & Prof. Code §§ 17200-17208*

Action for injunctive relief and damages for direct-mold duplication of manufactured item. *Bus. & Prof. Code §§ 17300, 17301*

Action for injunctive relief and civil penalties for false advertising. *Bus. & Prof. Code §§ 17500-17572*

Untruthful, misleading, or deceptive environmental claims, whether explicit or implied, are unlawful. *Bus. & Prof. Code § 17580.5*; *see Bus. & Prof. Code § 17580* (record keeping requirements)

Production, advertising, offering to sell, selling, distributing, or otherwise transferring for use in California simulated check that is not clearly marked "THIS IS NOT A CHECK" is prohibited and may be enjoined; civil penalty. *Bus. & Prof. Code § 22433*

Treble penalty in action brought by, on behalf of, or for benefit of, senior citizens or disabled persons, to redress unfair or deceptive acts or practices or unfair methods of competition. *Civ. Code § 3345*

Failure to comply with *Gov. Code § 11011.20* or *53086* (advertising by private entity regarding sale of government property) is unfair business practice within meaning of *Bus. & Prof. Code § 17200*. *Gov. Code §§ 11011.20, 53086*

Appointment of receiver in action by Attorney General in name of people of state of *California. Gov. Code § 12527*

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§ 565.155 Decisions

[1] Common Law Unfair Competition

Advertisements by producers of turfgrass seed and sod claiming that advertised turfgrass was better than competition in certain key characteristics does not support claim for common law unfair competition; allegations do not amount to "passing off one's goods as those of another." *Southland Sod Farms v. Stover Seed Co. (1997) 108 F.3d 1134, 1147*

Unauthorized use of computer software enhancements and support system, confidential information, and customer lists involves four species of unfair competition: breach of confidence, breach of fiduciary duty, trade secrets, and common law misappropriation, only last of which is preempted by federal copyright law because it does not require extra element of relationship between unauthorized user and owner of information. *Balboa Ins. Co. v. Trans Global Equities (1990) 218 Cal. App. 3d 1327, 1344-1345, 1350-1353, 267 Cal. Rptr. 787*

[2] Federal Preemption

Class action under *Bus. & Prof. Code § 17200 et seq.* against tobacco companies for advertising allegedly targeted at minors preempted by Federal Cigarette Labeling and Advertising Act, *15 U.S.C.S. § 1331 et seq.*, because claim was necessarily and inherently based on concerns about smoking and health. *In re Tobacco Cases II (2007) 41 Cal. 4th 1257, 1272-1276, 63 Cal. Rptr. 3d 418, 163 P.3d 106* (overruling *Mangini v. R.J. Reynolds Tobacco Co. (1994) 7 Cal. 4th 1057, 31 Cal. Rptr. 2d 358, 875 P.2d 73*)

Federal regulations did not preempt causes of action against lenders, including some claims brought under *Bus. & Prof. Code § 17200 et seq.*, alleging that lenders used deceptive and misleading statements to convince consumers that tax refund anticipation loans were merely accelerated tax refunds, rather than loans, and that they failed to clarify to applicants that tax refunds could be seized to pay existing debts from prior, similar loans; actions were brought in part to enforce federal law and had only incidental effect on lender's deposit-taking and non-real-estate-lending powers. *Hood v. Santa Barbara Bank & Trust (2006) 143 Cal. App. 4th 526, 542-548, 49 Cal. Rptr. 3d 369*

Class action brought under *Bus. & Prof. Code § 17200 et seq.* and based on violation of federal Fair Labor Standards Act (FLSA), *29 U.S.C.S. § 207*, not preempted by FLSAmerely because state statute allows traditional opt-out class actions while FLSA requires that class members specifically opt in. *Harris v. Investor's Bus. Daily, Inc. (2006) 138 Cal. App. 4th 28, 32-36, 41 Cal. Rptr. 3d 108*

State court lacked subject matter jurisdiction over claims for unfair competition and violation of Cartwright Act because claims presented questions of invalidity or enforceability of patents, resulting in exclusive federal jurisdiction under federal patent law. *Holiday Matinee, Inc. v. Rambus, Inc. (2004) 118 Cal. App. 4th 1413, 1426-1427, 13 Cal. Rptr. 3d 766*

Statutory unfair competition claims brought against savings association for charging borrowers more for replacement hazard insurance than cost of insurance were not preempted by federal law limiting application of state laws to lending activities, because claims were based on violation of generally applicable contractual duties and only incidentally affected lending activities. *Gibson v. World Sav. & Loan Assn. (2002) 103 Cal. App. 4th 1291, 1301-1302, 128 Cal. Rptr. 2d 19*

Action based on false advertising under *Bus. & Prof. Code § 17200 et seq.*, brought against makers of over-the-counter dietary supplements, was not preempted by either Federal Trade Commission Act, *15 U.S.C.S. § 41 et seq.*, or Federal Food, Drug & Cosmetic Act, *21 U.S.C.S. § 301 et seq.* *Consumer Justice Ctr. v. Olympian Labs, Inc. (2002) 99 Cal. App. 4th 1056, 1059-1066, 121 Cal. Rptr. 2d 749*

Claims brought against federally chartered savings and loan association under *Bus. & Prof. Code § 17200 et seq.*, based on defendant's charging preclosing interest on loan proceeds once proceeds were made available to borrower through escrow by wire or electronic transfer, were preempted by federal Home Owners' Loan Act, *12 U.S.C.S. § 1461 et seq. Washington Mut. Bank v. Superior Court (2002) 95 Cal. App. 4th 606, 621, 115 Cal. Rptr. 2d 765*

Action brought under *Bus. & Prof. Code § 17200 et seq.* against hospital alleging that hospital had included anti-union expenses in annual Medicare cost reports in violation of federal law was preempted by federal law, which thoroughly occupies field with pervasive and complex regulatory scheme governing provider cost reporting and reimbursement. *Congress of Cal. Seniors v. Catholic Healthcare W. (2001) 87 Cal. App. 4th 491, 508-509, 104 Cal. Rptr. 2d 655*

Federal law did not preempt class action for violations of *Bus. & Prof. Code § 17200 et seq.* based on allegations that stock brokerage firm breached duty to customers by not executing their sell orders in fair and timely manner, but instead executing its own sell orders first in violation of federal law. *Roskind v. Morgan Stanley Dean Witter (2000) 80 Cal. App. 4th 345, 352-354, 95 Cal. Rptr. 2d 258*

Action brought under *Bus. & Prof. Code §§ 17200* and *17500* by consumers of pre-paid phone cards against providers of phone services for alleged failure to disclose in advertising and packaging that charges would be rounded up to nearest full minute, were not barred by filed rate doctrine, which would bar suit for damages arising out of claims involving rates filed with FCC, because consumers' action challenged improper advertising practices, not rates; plaintiffs' remedies limited to injunctive relief, however, because disgorgement of profits from use of cards would constitute illegal rebate prohibited by filed rate doctrine. *Day v. AT & T Corp. (1998) 63 Cal. App. 4th 325, 334-339, 74 Cal. Rptr. 2d 55*

Neither *12 U.S.C.S. § 1461 et seq.* (Home Owners Loan Act) nor related regulations (*12 C.F.R. §§ 545.1, 545.2*) preempts cause of action against savings association and its officers for unfair competition based on making loans to unqualified strawmen to maximize income and perpetuate slum conditions; however, allegation with regard to "points" charged in conflict with *12 U.S.C.S. § 1463(g)*, and portion of prayer seeking foreclosure in conflict with 12 C.F.R. § 545.34, requiring that both be stricken. *People v. Highland Fed. Sav. & Loan (1993) 14 Cal. App. 4th 1692,*

1708-1713, 19 Cal. Rptr. 2d 555

Action for injunctive relief to prevent violations of *Bus. & Prof. Code §§ 17200, 17500* and *Civ. Code § 1770* (state unfair trade practices laws) in HMO's marketing of subscriptions and Medicare supplemental plans to Medicare-eligible individuals (elderly and disabled) not preempted by *42 U.S.C.S. § 1395mm* or 42 C.F.R. § 417.223 (federal regulation of HMO activities in that area). *Solorzano v. Superior Court (1992) 10 Cal. App. 4th 1135, 1139-1149, 13 Cal. Rptr. 2d 161*

Fact that one defendant was foreign government did not implicate any issue of federal supremacy, preclusion, or preemption on basis of foreign relations or foreign commerce sufficient to bar California action when anticompetitive conduct in question has direct, substantial, and reasonably foreseeable effect in California; California unfair competition and unfair trade practice laws neutral in their application. *Amarel v. Connell (1988) 202 Cal. App. 3d 137, 144-150, 248 Cal. Rptr. 276*

[3] Unfair Competition (Bus. & Prof. Code §§ 17200-17208)

Under "reasonable consumer" standard, plaintiffs stated cause of action for deceptive advertising under California unfair competition statute, *Bus. & Prof. Code § 17200 et seq.*, when alleging that defendant's packaging implied that "fruit juice snacks" contained juice of those fruits shown on box, in light of box statements that product was made with "fruit juice and other all natural ingredients" and were "nutritious." *Williams v. Gerber Products Co. (9th Cir. 2008) 523 F.3d 934, 939-940*

Likelihood of confusion is applicable test both for California trademark infringement (*Bus. & Prof. Code §§ 14320, 14330, 14335*) and for whether use of similar business name constitutes unfair competition (*Bus. & Prof. Code § 17200 et seq.*). *Century 21 Real Estate Corp. v. Sandlin (9th Cir. 1988) 846 F.2d 1175, 1180* ; *see In re Marriage of Shelton (1981) 118 Cal. App. 3d 811, 814-815, 173 Cal. Rptr. 629* (unfair competition)

General practice of "blind bidding" (bidding for right to exhibit movie without first viewing it) not prohibited in California; "blind bidding" of movie that was in stage of production unsuitable for screening did not constitute unfair trade practice under *Bus. & Prof. Code § 17200*. *Orion Pictures Distribution v. Syufy Enters. (9th Cir. 1987) 829 F.2d 946, 949*

Plaintiff may not recover under *Bus. & Prof. Code § 17200 et seq.*, if some other provision of law specifically legalizes challenged conduct, while court is not precluded from finding that challenged conduct is unfair under *Bus. & Prof. Code § 17200* merely because Legislature has failed to make conduct illegal. *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 184, 83 Cal. Rptr. 2d 548, 973 P.2d 527*

When plaintiff claims to have suffered injury from direct competitor's "unfair" act or practice, as that term is defined for purposes of *Bus. & Prof. Code § 17200*, conduct is "unfair" if threatening incipient violation of antitrust law, or violating policy or spirit of antitrust law because effects are comparable to or same as violation of antitrust law, or otherwise significantly threatening or harming competition. *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 187, 83 Cal. Rptr. 2d 548, 973 P.2d 527*

Medical center did not engage in fraudulent conduct actionable under *Bus. & Prof. Code § 17200* when billing insured patients at full amount for health care not covered by patient's insurance, without notifying patient of discount voluntarily offered by medical provider if bill was paid within 30 to 60 days. *Buller v. Sutter Health (2008)160 Cal. App. 4th 981, 988, 74 Cal. Rptr. 3d 47*

Although de minimus injury might occur to some consumers, mortgage lender's calculation of interest payments based

on average 30.4 day month was not actionable as unfair under *Bus. & Prof. Code § 17200* when consistent with national lender practices designed to foster consumer loan availability. *Puentes v. Wells Fargo Home Mortgage, Inc. (2008) 160 Cal. App. 4th 638, 648-651, 72 Cal. Rptr. 3d 903*

Cell phone purchasers suffered no actual injury and thus had no standing to sue phone vendor under unfair competition law for selling cell phone insurance without license, even when vendor collected commission on sales from insurer; plaintiffs did not allege they paid more for insurance due to commission, or that insurance could have been obtained for lower price from licensed agent. *Peterson v. Cellco Partnership (2008) 164 Cal. App. 4th 1583, 1590-1591, 80 Cal. Rptr. 3d 316*

Although seller of wheel and tire service coverage was unlicensed as insurer in California, plaintiff consumer suffered no injury caused by unlicensed status for purposes of prosecuting unfair competition action when contract was still enforceable by plaintiff, he had not had claim denied, and he did not pay more for contract than it was worth. *Medina v. Safe-Guard Products, Internat., Inc. (2008) 164 Cal. App. 4th 105, 112-115, 78 Cal. Rptr. 3d 672*

Plaintiffs asserting that defendant's failure to provide complete tenant screening reports resulted in denial of residential tenant applications lacked standing to bring action under unfair competition statute when evidence indicated that applications would have been denied even if reports had been complete; as such, plaintiffs had suffered no actual injury. *Trujillo v. First American Registry, Inc. (2007) 157 Cal. App. 4th 628, 639, 68 Cal. Rptr. 3d 732*

Automobile manufacturer's failure to warn consumers about engine defect that did not cause malfunctions until after expiration of three-year express warranty period was not deceptive or unfair practice actionable under unfair competition statute. *Daugherty v. American Honda Motor Co., Inc. (2006) 144 Cal. App. 4th 824, 838-839, 51 Cal. Rptr. 3d 118*

Customer had alleged sufficient facts to support cause of action for unfair competition against truck rental company when alleging that company charged $20 "refueling fee," plus $2 per gallon, when customer returned truck with less gasoline than when rented, even though company did not actually refuel trucks when they were returned, but merely rented them to next customer with whatever amount was left in tank by previous customer, and customer effectively had to return truck with more fuel than when rented to ensure avoidance of fees. *Aron v. U-Haul Co. of California (2006) 143 Cal. App. 4th 796, 804-807, 49 Cal. Rptr. 3d 555*

California Milk Producers Advisory Board is public entity not susceptible to suit under *Bus. & Prof. Code § 17200 et seq.* *People for Ethical Treatmentof Animals, Inc. v. California Milk Producers Advisory Bd. (2005) 125 Cal. App. 4th 871, 878-879, 22 Cal. Rptr. 3d 900*

Representations that satellite television signal would deliver "crystal clear video" and "CD quality sound" were not factual representations that would, if false, support liability under False Advertising Act or unfair competition statute. *Consumer Advocates v. Echostar Satellite Corp. (2003) 113 Cal. App. 4th 1351, 1361, 8 Cal. Rptr. 3d 22*

Unfair competition statute, *Bus. & Prof. Code § 17200 et seq.*, may apply if employer is guilty of age discrimination under Fair Employment and Housing Act, *Gov. Code § 12900 et seq.*, at least if only injunctive relief is sought under unfair competition statute. Herr v. Nestl'e *U.S.A., Inc. (2003) 109 Cal. App. 4th 779, 782, 135 Cal. Rptr. 2d 477*

Failure of law firm to register as corporation with State Bar, even though it holds itself out as "law corporation," does not in and of itself warrant private remedies, such as disgorgement of legal fees under unfair competition statute, in action brought by clients who have not shown reliance on corporate status in seeking legal services or any other injury by virtue of firm's failure to register. *Olson v. Cohen (2003) 106 Cal. App. 4th 1209, 1214-1216, 131 Cal. Rptr. 2d 620*

Hospital adequately pleaded action under unfair competition statute against health care service plan for withholding payment for services rendered to plan members in alleged violation of Knox-Keene Health Care Service Plan Act (*Health & Saf. Code § 1340 et seq.*). *Coast Plaza Doctors Hosp. v. UHP Healthcare (2002) 105 Cal. App. 4th 693, 703-705, 129 Cal. Rptr. 2d 650*

Decision of large supermarket chain to keep former store empty to prevent competitors from leasing space and competing with newer store nearby was not actionable as unfair business conduct under unfair competition statute, even though keeping former site empty may have been contributing to urban blight at shopping mall in which former store was located. *Gregory v. Albertson's, Inc. (2002) 104 Cal. App. 4th 845, 854-857, 128 Cal. Rptr. 2d 389*

Hotel's practice of charging mandatory service charge for room service, but not telling patrons that charge went to servers, was neither unfair nor deceptive under *Bus. & Prof. Code § 17200 et seq.* *Searle v. Wyndham Int'l, Inc. (2002) 102 Cal. App. 4th 1327, 1334-1335, 126 Cal. Rptr. 2d 231*

Mortgage loan servicing company's practice of passing modest cost of performing property inspections to delinquent borrowers was not unlawful, unfair, or deceptive under *Bus. & Prof. Code § 17200 et seq.* *Walker v. Countrywide Home Loans, Inc. (2002) 98 Cal. App. 4th 1158, 1170-1178, 121 Cal. Rptr. 2d 79*

Conduct determined not to be unreasonable restraint of trade under Cartwright Act could not support cause of action under *Bus. & Prof. Code § 17200 et seq.* *Chavez v. Whirlpool Corp. (2001) 93 Cal. App. 4th 363, 374-375, 113 Cal. Rptr. 2d 175*

Appellants stated cause of action under *Bus. & Prof. Code § 17200 et seq.* by alleging that insurance company violated *Civ. Code § 1457* by transferring contractual obligations under insurance policies to another insurance company without obtaining policyholders' consent. *AICCO, Inc. v. Ins. Co. of N. Am. (2001) 90 Cal. App. 4th 579, 588-589, 109 Cal. Rptr. 2d 359*

Statutory action for unfair competition is not barred by pending action brought under False Claims Act (*Gov. Code § 12650 et seq.*); provision of False Claims Act barring "related action based on the facts underlying the pending action" applies only to subsequent qui tam actions brought under *False Claims Act. Rothschild v. Tyco Int'l (US), Inc. (2000) 83 Cal. App. 4th 488, 499-500, 99 Cal. Rptr. 2d 721*

Former *Civ. Code § 1936(m)(2)* (*now see Civ. Code § 1936(n)(2)*), which permits rental car companies to impose charges for optional services if car renter knows that charge may be avoided, provided rental car company with "safe harbor" from claims under unfair competition statute based on imposition of refueling surcharge and amount of surcharge; however, *Civ. Code § 1936* did not protect company from claim under unfair competition statute that company unfairly or fraudulently advised customers of fuel service surcharge. *Schnall v. Hertz Corp. (2000) 78 Cal. App. 4th 1144, 1156, 1162, 1170, 93 Cal. Rptr. 2d 439* ; *see also* *Shvarts v. Budget Group, Inc. (2000) 81 Cal. App. 4th 1153, 1159-1160, 97 Cal. Rptr. 2d 722* (agreeing with *Schnall* analysis, but rejecting fraud claim because amount of refueling surcharge was clearly printed on first page of rental agreement)

Plaintiff car dealership was not entitled to recover against wholesale floor plan lender under Unfair Competition statute for defendant's use of interest calculation method that was based on 360-day year, because evidence of plaintiff's course of dealings with defendant and widespread industry use of practice demonstrated that plaintiff knew of and expected defendant to use that interest calculation method. *South Bay Chevrolet v. General Motors Acceptance Corp. (1999) 72 Cal. App. 4th 861, 878-890, 85 Cal. Rptr. 2d 301*

Practice of clinical medical laboratory in negotiating discounts for physicians' private-pay patients did not constitute unfair competition, because practice was not injurious to consumers, there was no serious risk that physicians would choose laboratory for reasons other than quality of its work, and under state regulations, Medi-Cal controlled amount it

would pay and was not at disadvantage by not being offered similar discounts. *People v. Duz-Mor Diagnostic Lab., Inc. (1998) 68 Cal. App. 4th 654, 662-663, 80 Cal. Rptr. 2d 419*

Trial court injunction ordering bank to lower its service fee for deposited items returned constituted abuse of court's discretion to enjoin unfair competition under *Bus. & Prof. Code § 17200 et seq.*, because regulation of fees charged by federally chartered banks is more appropriately left to *Comptroller of Currency. California Grocers Ass'n v. Bank of Am. (1994) 22 Cal. App. 4th 205, 218-219, 27 Cal. Rptr. 2d 396*

Injunction under *Bus. & Prof. Code § 17200* against enforcement of health maintenance organization (HMO) plan provision requiring member to reimburse HMO for cost of medical services provided to member from judgment or settlement recovered by member against third party not properly based on alleged violations of provisions of *Health & Safety Code § 1340 et seq.* (Knox-Keene Health Care Service Plan Act), because Act's provisions did not define unlawful acts but merely constituted guidelines governing the exercise of Department of Corporation's regulatory power over *HMO's. Samura v. Kaiser Found. Health Plan, Inc. (1993) 17 Cal. App. 4th 1284, 1300-1302, 22 Cal. Rptr. 2d 20*

No cause of action for damages and injunctive relief could be stated under *Civ. Code § 1670.5* based on unconscionability of contract term; but if term was unconscionable, injunctive relief could be awarded under *Bus. & Prof. Code § 17203* on ground that imposition of offending term constituted unfair business practice. *Shadoan v. World Sav. & Loan Assn. (1990) 219 Cal. App. 3d 97, 101, 268 Cal. Rptr. 207*

Demurrer properly sustained to complaint challenging prepayment penalty as unconscionable and unfair business practice when lack of availability of financing without offending term, and thus lack of bargaining power, was pleaded as conclusion and without facts; nor was prepayment penalty oppressive or unreasonably favorable to defendant. *Shadoan v. World Sav. & Loan Assn. (1990) 219 Cal. App. 3d 97, 103-106, 268 Cal. Rptr. 207*

Since *Moradi-Shalal v. Fireman's Fund Ins. Cos. (1988) 46 Cal. 3d 287, 305-313* , abolished third party's private right of action for unfair claims settlement practices under *Ins. Code § 790.03(h)*, third party has no cause of action under *Bus. & Prof. Code § 17200*. *Safeco Ins. Co. v. Superior Court (1990) 216 Cal. App. 3d 1491, 1493-1494, 265 Cal. Rptr. 585*

Eviction service that cloaked itself with aura of expertise and provided more than clerical services by assisting clients in advancing their legal rights, engaged in unauthorized practice of law (*Bus. & Prof. Code §§ 6125, 6126*), and thus was guilty of unfair competition and subject to penalty under *Bus. & Prof. Code § 17206*. *People v. Landlords Prof'l Servs., Inc. (1989) 215 Cal. App. 3d 1599, 1608-1610, 264 Cal. Rptr. 548*

Employer's practice of conditioning acceptance of offers of employment on prospective employee's successful completion of physical examination that includes drug and alcohol testing not violative of *Cal. Const. art. I, § 1*, or *2 Cal. Code Reg. § 7294.0(b)(3)*, and thus not unfair business practice. *Wilkinson v. Times Mirror Corp. (1989) 215 Cal. App. 3d 1034, 1052-1053, 264 Cal. Rptr. 194*

Bus. & Prof. Code § 17200 designed to protect consumers as well as competitors. *People v. Dollar Rent-A-Car Sys., Inc. (1989) 211 Cal. App. 3d 119, 129, 259 Cal. Rptr. 191*

Practice of charging "retail repair rate" to renter when rental company only paid wholesale repair rate, without explanation or substantiation, was deceptive business practice within meaning of *Bus. & Prof. Code § 17200*. *People v. Dollar Rent-A-Car Sys., Inc. (1989) 211 Cal. App. 3d 119, 129-130, 259 Cal. Rptr. 191*

Fact that consumer did not read contract not relevant when ambiguous written contracts and deceptive oral misrepresentations of sales representatives constituted deceptive business practice within meaning of *Bus. & Prof. Code § 17200*. *People v. Dollar Rent-A-Car Sys., Inc. (1989) 211 Cal. App. 3d 119, 131, 259 Cal. Rptr. 191*

Ambiguous written contracts and misleading oral sales presentations that failed to inform renter that collision damage waiver was not insurance and was voided by renter's negligence, was deceptive business practice. *People v. Dollar Rent-A-Car Sys., Inc. (1989) 211 Cal. App. 3d 119, 130-131, 259 Cal. Rptr. 191*

Majority stockholder and chief executive officer who was responsible for ambiguous written contracts and misleading presentations of selling agents was personally liable for violations of *Bus. & Prof. Code §§ 17200, 17500*. *People v. Dollar Rent-A-Car Sys., Inc. (1989) 211 Cal. App. 3d 119, 132, 259 Cal. Rptr. 191*

Hospital's change from "open staff" to exclusive contract with one bypass surgeon not unfair competition within meaning of *Bus. & Prof. Code § 17200*; no fraud or unfair business practice was involved when change was not made for anticompetitive purposes. *Redding v. St. Francis Med. Ctr. (1989) 208 Cal. App. 3d 98, 107, 255 Cal. Rptr. 806*

Because borrower has no duty to disclose known defects at trustee's sale, lender acquiring property at foreclosure does not have cause of action against builder/borrower under *Bus. & Prof. Code § 17200* (unfair and deceptive practices) based on known construction defects. *Sumitomo Bank v. Taurus Developers, Inc. (1986) 185 Cal. App. 3d 211, 222-223, 229 Cal. Rptr. 719*

Bus. & Prof. Code § 17200 et seq. (unfair competition) and *Bus. & Prof. Code § 17500 et seq.* (false advertising) not applicable to political election campaign practices. *O'Connor v. Superior Court (1986) 177 Cal. App. 3d 1013, 1019-1020, 223 Cal. Rptr. 357*

Use of similar alphanumeric telephone number that is likely to confuse potential customers as to source of services was possible basis of unfair competition claim. *Cytanovich Reading Ctr. v. Reading Game (1984) 162 Cal. App. 3d 107, 114, 208 Cal. Rptr. 412*

Laches available defense in action to enjoin unfair competition based on confusion of source of goods or services. *Tustin Cmty. Hosp., Inc. v. Santa Ana Cmty. Hosp. Ass'n (1979) 89 Cal. App. 3d 889, 894, 153 Cal. Rptr. 76* ; *McCord Co. v. Plotnick (1951) 108 Cal. App. 2d 392, 395-396, 239 P.2d 32*

[4] Unfair Practices Act (Bus. & Prof. Code §§ 17000-17101)

Presumption of unlawful purpose created by evidence of sales below average total cost plus proof of injury to competition; presumption allows fact-finder to infer unlawful intent without regard to particular market conditions. *William Inglis & Sons, Inc. v. Continental Baking (9th Cir. 1991) 942 F.2d 1332, 1338*

In order to demonstrate violation of *Bus. & Prof. Code § 17043* (sales below cost) or *Bus. & Prof. Code § 17044* (low cost leader), plaintiff must show that defendant acted *purposely*, that is, with desire to injure competitor or destroy competition; it is insufficient that defendant may have acted with knowledge that competitors may be injured by its actions. *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 174-178, 83 Cal. Rptr. 2d 548, 973 P.2d 527*

Catholic hospital's failure voluntarily to offer information concerning pregnancy prevention, including fact that "morning after pill" would have to be administered within 72 hours after intercourse to be effective, to rape victim treated in its emergency room did not constitute to unfair, dishonest, deceptive, destructive, fraudulent, or discriminatory practice. *Brownfield v. Daniel Freeman Marina Hosp. (1989) 208 Cal. App. 3d 405, 411, 256 Cal. Rptr. 240*

When third party brought action against insured for violations of *Bus. & Prof. Code § 17043* (sales below cost) and

later obtained judgment of treble damages under *Bus. & Prof. Code § 17082*, insured's liability for judgment covered under insurer's business liability policy when insured's conduct was intentional but without malice; award of treble damages under *Bus. & Prof. Code § 17082* covered under policy because it is not exemplary but constitutes additional compensation. *California Shoppers, Inc. v. Royal Globe Ins. Co. (1985) 175 Cal. App. 3d 1, 31-34, 221 Cal. Rptr. 171* ; *but see Turnbull & Turnbull v. ARA Transp., Inc. (1990) 219 Cal. App. 3d 811, 827, 268 Cal. Rptr. 856* (barring plaintiff's election between punitive damages and trebled damages in part because *Bus. & Prof. Code § 17082* and *Civ. Code § 3294* both serve punitive purpose)

Evidentiary presumption under *Bus. & Prof. Code § 17071* on proof of certain facts did not prevent sustaining of general demurrer. *Hladek v. City of Merced (1977) 69 Cal. App. 3d 585, 591 n.3, 138 Cal. Rptr. 194*

Waiver of bond requirement for preliminary injunction under *Bus. & Prof. Code § 17081* proper only in action based on violation of Unfair Practices Act. *Federal Automotive Servs. v. Lane Buick Co. (1962) 204 Cal. App. 2d 689, 693-695*

People are proper party plaintiff in action based on violation of Unfair Practices Act. *People v. Part (1951) 102 Cal. App. 2d 653, 654*

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§ 565.156 Attorney General Opinions

Lender practice of designating those foreclosure trustees who agree to charge trustee fee only in amount that federal government will reimburse lender for foreclosure sale on FHA or VA secured loans, and allowing trustee to charge maximum fee allowed by state law on other loan foreclosures, violates Unfair Business Practices Act (*Bus. & Prof. Code § 17000 et seq.*). *71 Ops. Cal. Att'y Gen. 314 (1988)*

Wine products included within "articles or products" subject to Unfair Practices Act (*Bus. & Prof. Code §§ 17000-17101*); *Bus. & Prof. Code § 17031* includes all commodities except those expressly excluded. *19 Ops. Cal. Att'y Gen. 88 (1952)*

Use of colored lights to alter appearance of food displayed for sale is unfair competition under former *Civ. Code § 3369* (*now see Bus. & Prof. Code § 17200*). *58 Ops. Cal. Att'y Gen. 750 (1975)*

Bus. & Prof. Code § 17048.5 inapplicable to reimbursement agreement between automobile manufacturer and new car dealer for performance of warranty repair service; agreements governed by more specific provisions of *Veh. Code §§ 3050, 3065*. *62 Ops. Cal. Att'y Gen. 726 (1979)*

District attorney may bring action under *Bus. & Prof. Code §§ 17204, 17206* for conduct in violation of *Lab. Code §§ 1420, 1420.1, 1420.35*. *63 Ops. Cal. Att'y Gen. 457 (1980)*

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§ 565.157 Law Reviews

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§ 565.158 Text References

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[Reserved]

§§ 565.159[Reserved]

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§ 565.170 California Legal Forms

For a form of noncompetition covenant that may be used in a business buy-out agreement, see *California Legal Forms, Ch. 17, Buying and Selling a Business or Professional Practice, § 17.213* (Matthew Bender)

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§ 565.171 Federal Statutes

[1] General Jurisdiction

Jurisdiction of district courts over actions under laws regulating commerce or protecting trade and commerce from restraints and monopolies. *28 U.S.C.S. § 1337*

[2] Sherman Act (15 U.S.C.S. §§ 1-7)

Combinations in restraint of trade; price fixing. *15 U.S.C.S. §§ 1, 3*

Monopolies, attempts and conspiracies to monopolize. *15 U.S.C.S. § 2*

Jurisdiction of federal district courts; joinder of additional parties, whether or not they reside within district. *15 U.S.C.S. §§ 4, 5*

Forfeiture of property involved in combination. *15 U.S.C.S. § 6*

[3] Clayton Act (15 U.S.C.S. §§ 12-27, 44)

Discrimination in prices, services, facilities, or selection of customers; discrimination in rebates, discounts, advertising; underselling; exemptions for cooperative and nonprofit associations. *15 U.S.C.S. §§ 13, 13a-13c*

Sales, leases, and contracts conditioned on nonuse of competitor's product. *15 U.S.C.S. § 14*

Standing to sue; treble damages, costs, and attorney's fees; United States as plaintiff. *15 U.S.C.S. §§ 15, 15a*

Four-year limitation period; tolling of limitation period for private actions during pendency of specified actions instituted by United States. *15 U.S.C.S. §§ 15b, 16(i)*

Exemptions for labor organizations, specified agricultural and horticultural organizations. *15 U.S.C.S. § 17*

Mergers and acquisitions which lessen competition or tend to create monopoly prohibited; notification and waiting period requirements. *15 U.S.C.S. §§ 18, 18a*

Interlocking directorates. *15 U.S.C.S. § 19*

Federal agency enforcement provisions. *15 U.S.C.S. § 21*

Venue over corporate defendant in any district wherein it transacts business. *15 U.S.C.S. § 22*

Corporate directors, officers, or agents who authorize corporate violations liable for violation. *15 U.S.C.S. § 24*

Injunctions. *15 U.S.C.S. §§ 25, 26*

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§ 565.172 State Statutes

[1] Cartwright Act

[a] In General

Definition of person. *Bus. & Prof. Code § 16702*

Trusts and combinations in restraint of trade prohibited; contracts in violation of Act and unlawful trusts are void. *Bus. & Prof. Code §§ 16720, 16722, 16726*

Conditioning lease, sale, or contract on nonuse of competitor's product prohibited. *Bus. & Prof. Code § 16727*

[b] Exceptions and Exemptions

Labor. *Bus. & Prof. Code § 16703*

Associations to promote competition. *Bus. & Prof. Code § 16725*

[c] Procedural and Enforcement Provisions

Jurisdiction; venue; standing; injunctive relief; treble damages; prejudgment interest, costs, and attorney's fees; additional parties; attorney general as class representative. *Bus. & Prof. Code §§ 16750, 16751, 16760, 16761*

Four-year limitation period. *Bus. & Prof. Code § 16750.1*

Foreign and domestic corporations and associations are subject to forfeiture of corporate charter, franchises, and privileges on violation. *Bus. & Prof. Code §§ 16752* (domestic), *16753* (foreign)

Actions brought by state. *Bus. & Prof. Code §§ 16754, 16754.5*

Fines and penalties for violations. *Bus. & Prof. Code § 16755*

Specificity of pleading and proof required. *Bus. & Prof. Code §§ 16756, 16757*

Self-incrimination privilege of attorney general's witness suspended; investigative powers of attorney general, district attorneys; damages in actions by attorney general. *Bus. & Prof. Code §§ 16758-16760*

Appointment of receiver in action by Attorney General in name of people of State of *California. Gov. Code § 12527*

[2] Contracts in Restraint of Trade

Contracts restraining trade, business, or practice of one's profession are void to that extent. *Bus. & Prof. Code § 16600*

Noncompetition clause in buy-out agreement is enforceable against former (selling) partner or shareholder. *Bus. & Prof. Code §§ 16601* (corporate shares), *16602* (partnership)

Prohibited transactions relating to sales and consignments of horror comics, books, magazines, and publications. *Bus. & Prof. Code §§ 16603-16605*

Customer list of telephone answering service is trade secret of service owner. *Bus. & Prof. Code § 16606*

Customer list of employment agency is trade secret of agency, but former employee is entitled to use list after one year from termination of employment. *Bus. & Prof. Code § 16607*

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§ 565.173 Decisions

[1] Boycotts

Vertical restraint and boycott are labels for different forms of antitrust analysis, one focusing on practices and other on broader question of market structure. *Redwood Theaters, Inc. v. Festival Enters., Inc. (1988) 200 Cal. App. 3d 687, 703, 248 Cal. Rptr. 189*

In testing alleged exclusive-dealing agreements of competing exhibitor with each of three distributors as boycotts that tended to cut off plaintiff's access to first-run films of those distributors, evidence of predatory intent is necessary for boycott to be illegal per se. *Redwood Theaters, Inc. v. Festival Enters., Inc. (1988) 200 Cal. App. 3d 687, 702-703, 248 Cal. Rptr. 189*

[2] Class Actions

Variance in purchase prices paid by class members is not obstacle to certification; court is empowered to divide class into subclasses. *Occidental Land, Inc. v. Superior Court (1976) 18 Cal. 3d 355, 360 n.3, 134 Cal. Rptr. 388, 556 P.2d 750* ; *MacManus v. A. E. Realty Partners (1987) 195 Cal. App. 3d 1106, 1117, 241 Cal. Rptr. 315*

Requisite community of interest for certification is established if every member of class would not be required to litigate numerous and substantial questions to determine his or her right to recover subsequent to rendering of any class judgment in plaintiffs' favor on common issues. *Vasquez v. Superior Court (1971) 4 Cal. 3d 800, 809, 94 Cal. Rptr. 796, 484 P.2d 964* ; *MacManus v. A. E. Realty Partners (1987) 195 Cal. App. 3d 1106, 1116-1117, 241 Cal. Rptr. 315*

Certification is not to be denied because case involves construction or coercive effect of standardized provisions in defendant's contracts, there were many individual transactions, and each plaintiff may have had different understanding of contract provisions; individual understanding is not as important as vindication of purpose of unfair trade laws. *MacManus v. A. E. Realty Partners (1987) 195 Cal. App. 3d 1106, 1115-1116, 241 Cal. Rptr. 315*

For certification of class of indirect purchasers in action alleging price fixing conspiracy, damages are presumed to flow from per se nature of offense; each class member is not required to have purchased every product fixed in price. *B. W. I. Custom Kitchen v. Owens-Ill., Inc. (1987) 191 Cal. App. 3d 1341, 1348-1355, 235 Cal. Rptr. 228*

[3] Conspiracy

Under Cartwright Act, when conduct is tested by rule of reason, plaintiff must show that either purpose or effect of conspiracy is illegal restraint. *Dimidowich v. Bell & Howell (9th Cir. 1986) 803 F.2d 1473, 1483*

Simultaneous refusals to deal are consistent with independent action even when each refusing party is aware of the other's refusal. *Dimidowich v. Bell & Howell (9th Cir. 1986) 803 F.2d 1473, 1479*

Concerted refusals to deal are tested by rule of reason when economic impact of challenged practice is not obvious. *Dimidowich v. Bell & Howell (9th Cir. 1986) 803 F.2d 1473, 1480-1483*

Conspiracy in violation of Cartwright Act not alleged if manufacturer announced minimum resale prices for its products and that it would refuse to sell to retailers who did not comply, and manufacturer took steps to monitor which retailers were in compliance with pricing policy. *Chavez v. Whirlpool Corp. (2001) 93 Cal. App. 4th 363, 373, 113 Cal. Rptr. 2d 175*

[4] Contractual Restraints on Former Employees

Former employer may restrain by contract only that conduct of former employee which would have been subject to judicial restraint absent contract. *Hollingsworth Solderless Terminal Co. v. Turley (9th Cir. 1980) 622 F.2d 1324, 1338*

Injunction was overbroad in prohibiting former attorney employee of consulting firm from rendering legal services, which firm was not licensed to do, to clients of firm. *Matull & Assocs. v. Cloutier (1987) 194 Cal. App. 3d 1049, 1055-1056, 240 Cal. Rptr. 211*

Former employee who was officer and director of corporate employer, and was officer of firm that sold its accounts to corporate employer and signatory of buy-sell agreement, was bound by broad noncompetition clause in buy-sell agreement. *Matull & Assocs. v. Cloutier (1987) 194 Cal. App. 3d 1049, 1054-1055, 240 Cal. Rptr. 211*

Contract prohibiting solicitation of employer's customers may permissibly prohibit more than law of marketplace otherwise would prohibit. *Loral Corp. v. Moyes (1985) 174 Cal. App. 3d 268, 276-280, 219 Cal. Rptr. 836*

[5] Covenants Not to Compete

Covenant not to compete, even one with temporal and geographic limitations, after termination of franchise term is unenforceable under *Bus. & Prof. Code § 16600*, which applies even though franchise agreement that provides it will be governed by law of another state. *Scott v. Snelling and Snelling, Inc. (N.D. Cal. 1990) 732 F. Supp. 1034, 1045-1046*

Covenant not to compete contained in warehouse management partnership agreement was void under *Bus. & Prof. Code § 16600*; covenant sought to prevent partner from designing or building any other warehouse, but partnership agreement also specified that partnership was limited in scope to listed warehouse, that partners could engage separately in competing real estate activities, and that partners had no obligation to refer any business opportunity to partnership. *Kelton v. Stravinski (2006) 138 Cal. App. 4th 941, 946-947, 41 Cal. Rptr. 3d 877*

Jury instruction requested by plaintiff was not erroneous because it failed to define competition; plaintiff is not required to educate jury regarding defenses. *Fleming v. Ray-Suzuki, Inc. (1990) 225 Cal. App. 3d 574, 583, 275 Cal. Rptr. 150*

[6] Distributorships

Agreement between manufacturer and distributor to establish exclusive distributorship is not, of itself, violation of antitrust laws, and in most circumstances, does not adversely affect competition in market; no antitrust violation occurs unless agreement is intended to or actually does harmcompetition in relevant market. *Rutman Wine Co. v. E. & J. Gallo Winery (9th Cir. 1987) 829 F.2d 729, 735*

Agreement between distributors to divide territories or customers is horizontal restraint and per se violation. *Guild Wineries & Distilleries v. J. Sosnick & Son (1980) 102 Cal. App. 3d 627, 633, 162 Cal. Rptr. 87* ; *but see Dimidowich v. Bell & Howell (9th Cir. 1986) 803 F.2d 1473, 1480-1483* (refusing to follow *Guild Wineries & Distilleries v. J. Sosnick & Son (1980) 102 Cal. App. 3d 627, 162 Cal. Rptr. 87* , on ground that California Supreme court would apply rule of reason standard)

[7] Exclusive Dealing Arrangements

Contract exclusively entitling franchisor of employees' cafeteria operation to provide coffee sold in cafeteria, under which employer foreclosed franchisee operator of cafeteria from providing coffee, had de minimis impact on relevant market and was not unreasonable restraint on trade. *Kim v. Servosnax, Inc. (1992) 10 Cal. App. 4th 1346, 1361, 13 Cal. Rptr. 2d 422*

Vertical restraints on customers and territory are tested by rule of reason and require threshold inquiry into defendants' market power (share); 16 percent market share is below threshold for scrutiny; market shares of separate distributors cannot be aggregated for threshold determination unless there is evidence or allegation of collusion between them. *Redwood Theatres, Inc. v. Festival Enterprises, Inc. (1988) 200 Cal. App. 3d 687, 704-705, 248 Cal. Rptr. 189* (citing Department of Justice's Vertical Restraint Guidelines, as published January 23, 1985)

[8] Exhaustion of Administrative Review

If basis of Cartwright claim is quasi-judicial decision, such as decision of review committee to deny physician hospital privileges, state antitrust action is barred unless and until quasi-judicial decision has been overturned by grant of writ of mandate. *Mir v. Little Co. of Mary Hosp. (9th Cir. 1988) 844 F.2d 646, 651* (considering pendent state claim); *Westlake Community Hosp. v. Superior Court (1976) 17 Cal. 3d 465, 484, 131 Cal. Rptr. 90, 551 P.2d 410*

[9] Governmental Immunity

Cities are not "persons" within meaning of *Bus. & Prof. Code § 16702* and are not subject to suit under *Cartwright Act. Penn v. City of San Diego (1987) 188 Cal. App. 3d 636, 642-643, 233 Cal. Rptr. 514* ; *People ex rel. Freitas v. City and County of San Francisco (1979) 92 Cal. App. 3d 913, 921, 155 Cal. Rptr. 319*

[10] Multiple Listing Services

Multiple listing service is not required to be open to members of public who do not hold real estate licenses. *Derish v. San Mateo-Burlingame Bd. of Realtors (1982) 136 Cal. App. 3d 534, 540-542, 186 Cal. Rptr. 390*

Multiple listing service's refusal to accept exclusive agency listings and open listings is impermissible restraint. *People v. National Ass'n of Realtors (1981) 120 Cal. App. 3d 459, 477-479, 174 Cal. Rptr. 728*

Rule of reason test applied to claim that listing service must be available on reasonable fee basis; injury to plaintiff broker was insufficient, impaired market or monopoly is required. *Feldman v. Sacramento Bd. of Realtors, Inc. (1981) 119 Cal. App. 3d 739, 742-745, 747-748, 174 Cal. Rptr. 231*

[11] Medical and Dental Plans

Question of fact was presented regarding whether plan provision requiring provider to charge same price to plan member as to patient who is not plan member was restraint of trade, but summary judgment in favor of plan was proper because plan members were unable to show any injury. *Reynolds v. California Dental Serv. (1988) 200 Cal. App. 3d 590, 604-605, 246 Cal. Rptr. 331*

Provision in dental plan prohibiting dentist from waiving patient's copayment did not constitute price fixing, nor create any anticompetitive effect. *Reynolds v. California Dental Serv. (1988) 200 Cal. App. 3d 590, 601-603, 246 Cal. Rptr. 331*

Usual fee requirement of most plans is not fixing prices at specific level, and thus, is not plainly anticompetitive. *Reynolds v. California Dental Serv. (1988) 200 Cal. App. 3d 590, 598, 246 Cal. Rptr. 331*

Alleged anticompetitive affects of health care plans provisions are to be tested by the rule of reason. *Reynolds v. California Dental Serv. (1988) 200 Cal. App. 3d 590, 596-600, 246 Cal. Rptr. 331*

[12] Preemption

No conflict exists between *Pub. Util. Code § 21690.8* grant of authority to fix prices and Emergency Petroleum Allocation Act (*15 U.S.C.S. §§ 751-760*) as long as price fixed under authority of *Pub. Util. Code § 21690.8* does not exceed federal guideline. *California Aviation, Inc. v. City of Santa Monica (9th Cir. 1986) 806 F.2d 905, 908-909*

Fact that one defendant-buyer was foreign government did not implicate any issue of federal supremacy, preclusion, or preemption on basis of foreign relations or foreign commerce sufficient to bar California action when anticompetitive conduct in question has direct, substantial, and reasonably foreseeable effect in California; California antitrust and unfair trade laws neutral in their application. *Amarel v. Connell (1988) 202 Cal. App. 3d 137, 144-150, 248 Cal. Rptr. 276*

[13] Price Fixing

Under Cartwright Act, economic reasonableness of prices not determinative; issue is whether prices are artificially maintained at uniform level, whether "reasonable" or not. *Cellular Plus, Inc. v. Superior Court (1993) 14 Cal. App. 4th 1224, 1246, 18 Cal. Rptr. 2d 308*

[14] Prohibited Combinations

Plaintiffs sufficiently pleaded combination in restraint of trade when alleging that title to property conveyed by tax deed had become unmarketable incounty as result of efforts of defendants to convince public that title insurance is

necessity whenever real property is purchased, and conspiracy among only three title insurers in county to refuse to insure title to tax-defaulted property. *Quelimane Co. v. Stewart Title Guaranty Co. (1998) 19 Cal. 4th 26, 48-51, 77 Cal. Rptr. 2d 709, 960 P.2d 513*

Two entities necessary for prohibited combination under *15 U.S.C.S. § 1*; *Bus. & Prof. Code § 16720* are defendant and plaintiff/victim; cause of action stated against real estate developer and escrow subsidiary for developer-seller's allegedly requiring plaintiff-buyers to use escrow services of its subsidiary. *MacManus v. A. E. Realty Partners (1987) 195 Cal. App. 3d 1106, 1110-1112, 241 Cal. Rptr. 315* (distinguishing *Copperweld Corp. v. Independence Tube Corp. (1984) 467 U.S. 752, 759-768, 104 S. Ct. 2731, 81 L. Ed. 2d 628*)

[15] Proof of Injury

No injury shown under either federal or California law by alleged conspiracy to fix electrical construction contract prices when price paid by plaintiff was fixed by arbitrator as fair in contract litigation between parties. *Kaiser Cement Corp. v. Fischbach and Moore, Inc. (9th Cir. 1986) 793 F.2d 1100, 1104-1105*

Poll taken by expert economist sufficient to establish that plaintiff's share of market would be greater but for defendant's activities. *Dolphin Tours, Inc. v. Pacifico Creative Serv., Inc. (9th Cir. 1985) 773 F.2d 1506, 1510*

Antitrust laws designed to provide competitors just and equal opportunity to compete, and to prohibit unreasonable restraints on entrepreneurs' freedom to enter new markets or to expand market share. *Redwood Theatres, Inc. v. Festival Enterprises, Inc. (1988) 200 Cal. App. 3d 687, 708-710, 248 Cal. Rptr. 189*

Question of fact presented regarding whether plan provision requiring provider to charge same price to plan member as to patient who is not plan member was restraint of trade, but summary judgment in favor of plan proper because plan members unable to show any injury. *Reynolds v. California Dental Serv. (1988) 200 Cal. App. 3d 590, 604-605, 246 Cal. Rptr. 331*

[16] Relevant Market

Although interchangeability of products is usually considered in defining market, some products, such as popular first-run movies, are not substitutable. *Redwood Theatres, Inc. v. Festival Enterprises, Inc. (1988) 200 Cal. App. 3d 687, 705-707, 248 Cal. Rptr. 189*

Definition of relevant market is question of law and fact often necessary to resolution of antitrust claim. *Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1971) 4 Cal. 3d 842, 855, 94 Cal. Rptr. 785, 484 P.2d 953*

Test under rule of reason standard is whether anticompetitive effects of challenged restraint outweigh procompetitive ones. *Dimidowich v. Bell & Howell (9th Cir. 1986) 803 F.2d 1473, 1484* (diversity case applying California law, and citing *Gianelli Distributing Co. v. Beck & Co. (1985) 172 Cal. App. 3d 1020, 1048, 219 Cal. Rptr. 203*)

Per se standard usually not applied until courts have considerable experience with business relationship involved. *Reynolds v. California Dental Serv. (1988) 200 Cal. App. 3d 590, 597-598, 246 Cal. Rptr. 331*

Alleged anticompetitive affects of health care plans provisions tested by rule of reason; integrated plan (as defined by Federal Trade Commission) judged under rule of reason standard. *Reynolds v. California Dental Serv. (1988) 200 Cal. App. 3d 590, 597, 246 Cal. Rptr. 331*

Practices that are designed to increase economic efficiency and render markets more, rather than less, competitive are

judged by rule of reason standard. *Reynolds v. California Dental Serv. (1988) 200 Cal. App. 3d 590, 597, 246 Cal. Rptr. 331*

Fact that California Legislature enacted *Bus. & Prof. Code § 16770(g)* and *(h)* indicates intention to permit provider-controlled medical plans despite their potential for competitive harm; thus, rule of reason applicable to test practices of those plans. *Reynolds v. California Dental Serv. (1988) 200 Cal. App. 3d 590, 596-597, 599-600, 246 Cal. Rptr. 331*

[17] Summary Judgment Rarely Proper

Summary judgment for defendant disfavored in antitrust matters, in which motive and intent play leading roles and proof is largely in hands of alleged conspirators and hostile witnesses, credibility and weight of whose testimony can be properly determined only when opportunity to cross-examine is present. *Poller v. Columbia Broadcasting System (1962) 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458* ; *Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1971) 4 Cal. 3d 842, 852, 94 Cal. Rptr. 785, 484 P.2d 953*

Whether or not particular restraint of trade is reasonable is question of fact to be determined at trial. *Corwin v. Los Angeles Newspaper Serv. Bureau, Inc. (1971) 4 Cal. 3d 842, 855, 94 Cal. Rptr. 785, 484 P.2d 953*

Summary judgment disfavored in complex antitrust litigation if extensive factual determinations must be made concerning intent and motive; however, summary judgment is appropriate in absence of any significant probative evidence tending to support complaint. *Three Movies of Tarzana v. Pacific Theatres, Inc. (9th Cir. 1987) 828 F.2d 1395, 1398*

When defendants' explanations for refusal to deal are not entirely convincing and both defendants' admit agreement to refuse to deal with plaintiff was discussed, summary judgment for defendants improper. *Dimidowich v. Bell & Howell (9th Cir. 1986) 803 F.2d 1473, 1479-1480, 1483-1484*

Summary judgment for defendants was error after trial court denied plaintiff's motion to compel discovery of evidence that was necessary to establish existence of alleged exclusive dealing agreements; whether agreements resulted in unreasonable restraint of trade was question of fact. *Redwood Theatres, Inc. v. Festival Enterprises, Inc. (1988) 200 Cal. App. 3d 687, 713-714, 248 Cal. Rptr. 189*

[18] Tying Arrangements

Plaintiff manufactured homes dealer did not state cause of action for illegal tying arrangement between mobilehome park operator and other mobilehome dealers when evidence did not support allegations that potential tenants of park could only rent space in park if they purchased mobilehome from specified dealers. *SC Manufactured Homes, Inc. v. Liebert (2008) 162 Cal. App. 4th 68, 87-89, 76 Cal. Rptr. 3d 73*

Decision of automobile distributor to package custom floor mats with automobiles as standard equipment before sending vehicles to dealerships was notillegal tying arrangement under *Bus. & Prof. Code § 16727*. *Lloyd Design Corp. v. Mercedes-Benz of North America, Inc. (1998) 66 Cal. App. 4th 716, 725, 78 Cal. Rptr. 2d 185*

Allegation that cable television company illegally tied sale of satellite channels to sale of broadcast channels and sale of premium channels to sale of both broadcast and satellite channels not preempted by Cable Television Consumer Protection and Competition Act of 1992 provision prohibiting states from regulating rates. *Morrison v. Viacom, Inc. (1997) 52 Cal. App. 4th 1514, 1527, 61 Cal. Rptr. 2d 544*

Defendant's influence in market sufficient to establish illegal tying arrangement; elements to establish tying arrangement. *MacManus v. A. E. Realty Partners (1983) 146 Cal. App. 3d 275, 285-286, 194 Cal. Rptr. 567*

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§ 565.190 California Points and Authorities

For memoranda of points and authorities relating to motions in proceedings involving tort damages, see California Points and Authorities, Ch. 64, *Damages: Tort* (Matthew Bender)

For memoranda of points and authorities relating to motions in support for and opposition to injunctions, see California Points and Authorities, Ch. 116, *Injunctions* (Matthew Bender)

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§ 565.191 California Torts

For discussion of trade secrets, see N. Levy, M. Golden & L. Sacks, *California Torts, ch. 40, Fraud and Deceit and Other Business Torts, §§ 40.50 -40.56* (Matthew Bender)

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§ 565.192 State Statutes

[1] California Public Records Act

California Public Records Act. *Gov. Code § 6250 et seq.*

"Trade secret" defined. *Gov. Code §§ 6254.2, 6254.7*

[2] Criminal Sanctions

"Trade secret" defined, and unlawful use made crime. *Penal Code § 499c*

Transmission through telecommunication to obtain trade secrets from public utility by fraudulent representations is crime. *Penal Code § 538.5*

[3] Customer lists

Customer list of telephone answering service is trade secret. *Bus. & Prof. Code § 16606*

Customer list of employment agency is trade secret. *Bus. & Prof. Code § 16607*

[4] Employment Related

Everything acquired by employee by virtue of employment belongs to employer. *Lab. Code § 2860*

Disclosure of trade secrets revealed during employment safety inspections is prohibited. *Lab. Code §§ 6322, 6396* (governed by California Public Records Act)

Rule prohibiting retaliation against employee disclosing information to government is not applicable to trade secret information. *Lab. Code § 1102.5*

[5] Evidence and Discovery

Discovery in action under UTSA for misappropriation of trade secret. *Code Civ. Proc. § 2019.210*

Privilege of nondisclosure attaches to trade secret. *Evid. Code §§ 915, 1060-1063*

[6] Protection of Trade Secrets Disclosed to Government Agency

Trade secret protection related to investigation of health effects of pesticides. *Food & Agric. Code § 14022*

Trade secret acquired through compliance with health emergency situation must be kept confidential by health officer. *Health & Safety Code § 473*

Information distributed by officials concerning treatment, recycling, and disposal of hazardous waste is required to protect trade secrets. *Health & Safety Code §§ 25170, 25175*

"Trade secret" defined and protected in Underground Storage of Hazardous Substances Chapter (*Health & Safety Code § 25280 et seq.*). *Health & Safety Code § 25290*

"Trade secret" defined and protected in Carpenter-Presley-Tanner Hazardous Substance Account Act (*Health & Safety Code § 25300 et seq.*). *Health & Safety Code § 25358.2*

Disclosure of trade secret acquired by state agent during inspection under food, drug, and cosmetic law is prohibited. *Health & Safety Code § 110165*

Disclosure of trade secret acquired by state agent under authority of California Hazardous Substances Act (*Health & Safety Code § 108100 et seq.*) is prohibited. *Health & Safety Code § 108290*

Trade secret protection is related to clean air standards and reports. *Health & Safety Code §§ 39660, 43206*

Disclosure of trade secrets revealed during employment safety inspections is prohibited. *Lab. Code §§ 6322, 6396*

Trade secret submitted as required by California Environmental Quality Act (*Pub. Res. Code § 21000 et seq.*) to public agency to apply for lease, permit, or other entitlements for use for proposed project, may not be disclosed by public agency. *Pub. Res. Code § 21160*

Trade secret presented by gas and electric utilities to Public Utilities Commission for forecasting purposes is protected. *Pub. Res. Code § 25321*

Trade secrets are not required to be presented at open meetings of county board of equalization. *Rev. & Tax. Code § 1605.4*

[7] Trade Secret Definitions

"Trade secret" defined. *Civ. Code § 3426.1(d), Gov. Code § 6254.2, Gov. Code § 6254.7, Health & Safety Code §§ 25358.2, 25290, Penal Code § 499c*

[8] Uniform Trade Secret Act

Uniform Trade Secrets Act. *Civ. Code § 3426*

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§ 565.193 Decisions

[1] Customer Lists

In context of particular terminated franchise relationship regarding temporary employment service agency, customer list was not trade secret under *Civ. Code § 3426.1(d)* because it was developed by franchisees through their own efforts, personal knowledge, and business contacts. *Scott v. Snelling & Snelling, Inc. (N.D. Cal. 1990) 732 F. Supp. 1034, 1044-1045*

Triable issue existed as to whether construction project binders generated by defendant while employed by plaintiff constituted protectable trade secrets; binders were more than just subcontractor contact lists and contained correspondences, descriptions, measurements, and detailed cost estimates for upcoming projects. *San Jose Construction, Inc. v. S.B.C.C., Inc. (2007) 155 Cal. App. 4th 1528, 1538-1543, 67 Cal. Rptr. 3d 54*

Civ. Code § 3426.1(d), defining trade secret, is inclusive and not exclusive, and hence does not exclude customer lists by its failure to include them. *American Paper & Packaging Prods., Inc. v. Kirgan (1986) 183 Cal. App. 3d 1318, 1323-1324, 228 Cal. Rptr. 713*

[2] Determining Existence of Trade Secret

[a] Generally

Fact that product might disclose so-called secret is not determinative when there was sufficient evidence to support conclusion implied by verdict that plans and designs taken by employee/defendant were trade secrets under both common law and UTSA because plaintiff treated them as secrets and took reasonable steps to protect them. *Vacco Indus., Inc. v. Van Den Berg (1992) 5 Cal. App. 4th 34, 50, 6 Cal. Rptr. 2d 602*

[b] Effect of Employment Agreement

Agreement between employer and employee defining trade secret is not decisive in determining whether court will so regard it. *American Paper & Packaging Prods., Inc. v. Kirgan (1986) 183 Cal. App. 3d 1318, 1325, 228 Cal. Rptr. 713*

Employer-employee agreement defining "trade secret" was not necessarily binding on court; contractual restrictions on customer solicitation are more likely to be binding on former employee than contractual restrictions on nondisclosure. *Loral Corp. v. Moyes (1985) 174 Cal. App. 3d 268, 275, 219 Cal. Rptr. 836*

[c] No Trade Secret Found

Elements of employment counseling program are obvious to anyone who enrolled in program, generally known to public or other persons who can obtain economic value from them, and thus not trade secret. *Self-Directed Placement Corp. v. Control Data Corp. (9th Cir. 1990) 908 F.2d 462, 465-466* (applying California law)

Scriptural materials of church are not trade secret because church alleged no competitive market advantage from maintaining their secrecy, but only religious harm; materials are spiritual, not commercial, and thus do not have independent economic value necessary under definition of *Civ. Code § 3426.1(d). Religious Tech. Ctr. v. Wollersheim (9th Cir. 1986) 796 F.2d 1076, 1089-1091* (applying California law); *but see Religious Tech. Ctr., Church of Scientology Int'l, Inc. v. Scott (9th Cir. 1989) 869 F.2d 1306, 1309-1310* (same case; second application for temporary restraining order on amended complaint alleging materials had economic value was not res judicata but had to be considered on merits)

Computer software "routines" were not trade secrets when software company failed to prove that these routines had independent economic value by showing how helpful these routines were when crafting competing software or demonstrating how much of defendant's software consisted of these routines. *Yield Dynamics, Inc. v. TEA Systems Corp. (2007) 154 Cal. App. 4th 547, 564-572, 66 Cal. Rptr. 3d 1*

Fact that former employees (traffic reporters) possessed characteristics specified by former employer's customer (a radio station) did not support enforcement of noncompetition clause against former employees because personal characteristics of employees are not "trade secrets" of former employer. *Metro Traffic Control, Inc. v. Shadow Traffic Network (1994) 22 Cal. App. 4th 853, 861-862, 27 Cal. Rptr. 2d 573*

Information regarding radio station's preferences and requirements regarding traffic reporters was not trade secret of traffic reporting service that formerly employed reporters because information was available directly from radio station to anyone contracting with station. *Metro Traffic Control, Inc. v. Shadow Traffic Network (1994) 22 Cal. App. 4th 853, 863, 27 Cal. Rptr. 2d 573*

[3] Federal Preemption

Defense of federal preemption by copyright law is jurisdictional and may be raised for first time on appeal. *Balboa Ins. Co. v. Trans Global Equities (1990) 218 Cal. App. 3d 1327, 1338-1339, 1344-1345, 267 Cal. Rptr. 787* ; *see 28 U.S.C.S. § 1338(a)*

Unauthorized use of computer software enhancements and support system, confidential information, and customer lists involves four species of unfair competition: breach of confidence, breach of fiduciary duty, trade secrets, and common law misappropriation, only last of which is preempted by federal copyright law because it does not require extra element of relationship between unauthorized user and owner of information. *Balboa Ins. Co. v. Trans Global Equities (1990) 218 Cal. App. 3d 1327, 1344-1345, 1350-1353, 267 Cal. Rptr. 787*

[4] Injunctive Relief

Preliminary injunction against former employee is appropriate if former employee has already solicited customers on protected customer list and persuaded largest customer to contract with new employer, former employer is likely to prevail on merits, and likelihood of continuing harm to former employer in interim is strong. *American Credit Indem. Co. v. Sacks (1989) 213 Cal. App. 3d 622, 637-638, 262 Cal. Rptr. 92*

Under *Civ. Code § 3426.2(a)*, injunction lasts only as long as is necessary to eliminate commercial advantage that person would obtain through misappropriation of trade secret and terminates when what once might have been trade secret becomes known to good faith competitors; information generally known in trade and already used by good faith competitors is not protectable trade secret and injunction does not issue to restrain its use. *AmericanPaper & Packaging Prods., Inc. v. Kirgan (1986) 183 Cal. App. 3d 1318, 1326, 228 Cal. Rptr. 713*

[5] Uniform Trade Secrets Act

Legislative intent in enacting Uniform Trade Secrets Act (UTSA), *Civ. Code §§ 3426, 3426.10*, was to codify better-reasoned cases concerning remedies for trade secret misappropriation and thus provide for more uniform application in area of misappropriation through improper means of trade secrets. *American Paper & Packaging Prods., Inc. v. Kirgan (1986) 183 Cal. App. 3d 1318, 1324, 228 Cal. Rptr. 713*

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49-565 California Forms of Pleading and Practice--Annotated § 565.194

§ 565.194 Law Reviews

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49-565 California Forms of Pleading and Practice--Annotated § 565.195

§ 565.195 Text References

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[Reserved]

§§ 565.196[Reserved]

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49-565 California Forms of Pleading and Practice--Annotated § 565.210

§ 565.210 California Points and Authorities

For memoranda of points and authorities supporting and opposing demurrers or motions for summary judgment in an action for interference with business or contractual relationships, see California Points and Authorities, Ch. 122, *Interference*

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§ 565.211 California Torts

For full discussion of the torts of interference with business or contractual relationships, see Levy, Golden & Sacks, *California Torts, Ch. 40, §§ 40.100 -40.135*

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§ 565.212 State Statutes

Publication privileged when made in legislative, judicial, or other official proceeding. *Civ. Code § 47(b)*

Everyone is generally responsible for injury to rights of another occasioned by willful or negligent conduct. *Civ. Code § 1714(a)*

Punitive and compensatory monetary relief in tort action. *Civ. Code §§ 3294(a), 3333*

Injunctive relief. *Civ. Code § 3422*; *Code Civ. Proc. §§ 526, 527*

Action based on liability not founded on written instrument must be brought within two years. *Code Civ. Proc. § 339(1)*

Public entity's immunity for intentional or negligent misrepresentations of entity's employees. *Gov. Code § 818.8*

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§ 565.213 Decisions

[1] Conspiracy to Interfere

Contracting party is not liable in tort for conspiracy to interfere with its own contract. *Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 507-508, 521 & n.10* (disapproving prior court of appeal cases to contrary)

[2] Defenses

Defense of justification, or privilege, depends on balancing of importance, social and private, of objective advanced by interference against importance of interest interfered with, considering all circumstances including nature of actor's conduct and relationship of parties. *Environmental Planning & Inf. Council v. Superior Court (1984) 36 Cal. 3d 188, 193-194, 203 Cal. Rptr. 127, 680 P.2d 1086* ; *Greenberg v. Hollywood Turf Club (1970) 7 Cal. App. 3d 968, 977, 86 Cal. Rptr. 885*

City was not liable for intentional or negligent interference with economic relationships based on misrepresentations of city's employees because immunity under *Gov. Code § 818.8* applied. *Los Angeles Equestrian Ctr., Inc. v. City of Los Angeles (1993) 17 Cal. App. 4th 432, 449-450, 21 Cal. Rptr. 2d 313*

Fact that utility merger required regulatory approval did not entitle competitor to interfere other than by making its objections in context of regulatory process; regulatory approvals are merely condition precedent like any other. *SCEcorp v. Superior Court (1992) 3 Cal. App. 4th 673, 678-683, 681, 4 Cal. Rptr. 2d 372*

Even if credit report causes harm, truth of report is complete defense to causes of action for defamation, interference with prospective economic advantage, injurious falsehood, or intentional infliction of emotional distress. *Francis v. Dun & Bradstreet, Inc. (1992) 3 Cal. App. 4th 535, 539-541, 4 Cal. Rptr. 2d 361*

First Amendment protection is defense to injunction against signs and picketing and claim of intentional interference

with economic advantage where there is no claim of untrue statements *Paradise Hills Assocs. v. Procel (1991) 235 Cal. App. 3d 1528, 1542-1545, 1 Cal. Rptr. 2d 514* (signs, pickets regarding construction defects in home defendant purchased from plaintiff)

Summary judgment for defendant was proper when there was no factual question presented that directors' actions were undertaken in best interest of bank. *Aalgaard v. Merchants Nat'l Bank, Inc. (1990) 224 Cal. App. 3d 674, 683-686, 274 Cal. Rptr. 81*

Defense of confidential relationship extends to attorney in rendering advice to client to breach contract. *Schick v. Bach (1987) 193 Cal. App. 3d 1321, 1329, 238 Cal. Rptr. 902*

Service station operator's claims of violation of covenant of good faith, fraud, and interference with prospective advantage arising from oil company's failure to maintain underlying ground lease was preempted by federal Petroleum Marketing Practices Act (*15 U.S.C.S. § 2806(a)*). *Mobil Oil Corp. v. Superior Court (1987) 189 Cal. App. 3d 485, 488-490, 234 Cal. Rptr. 482*

Existence of privilege is question of fact. *Gianelli Distrib. Co. v. Beck & Co. (1985) 172 Cal. App. 3d 1020, 1054-1057, 219 Cal. Rptr. 203*

Landlord's refusal to consent to tenant's sublease and subsequent negotiation of new lease on terms identical to that of sublease does not constitute cause of action for interference with contract relationship, when tenant's execution of sublease without landlord's written consent broke lease and entitled landlord to unilaterally sever landlord-tenant relationship. *Hamilton v. Dixon (1985) 168 Cal. App. 3d 1004, 1011-1013, 214 Cal. Rptr. 639*

[3] Intentional Interference

[a] With Contractual Relationship

To state cause of action, plaintiff need not allege that some pecuniary or economic benefit accrued to defendant that formerly was plaintiff's. *McCalden v. California Library Ass'n (9th Cir. 1991) 919 F.2d 538, 543* (applying California law)

Airline could validly enforce tariff with holders of frequent flyer coupons and refuse to accept "brokered" coupons, but evidence of damages was insufficient to sustain summary judgment or injunction against broker of frequent flyer coupons. *Transworld Airlines v. American Coupon Exch. (9th Cir. 1991) 913 F.2d 676, 691-693, 698*

Jury instruction that culpable intent is deemed to exist if defendant knew that interference with plaintiff's contract with third party was substantially certain to result from its conduct was erroneous; proper instruction was that jury might infer culpable intent from conduct substantially certain to interfere with contract. *Seaman's Direct Buying Serv., Inc. v. Standard Oil Co. (1984) 36 Cal. 3d 752, 767, 206 Cal. Rptr. 354, 686 P.2d 1158*

Plaintiff is entitled to bring action for inducing breach of contract by third party, or for rendering plaintiff's own performance more difficult, when interference is by unlawful means or by means lawful but without sufficient justification. *Lipman v. Brisbane Elementary Sch. Dist. (1961) 55 Cal. 2d 224, 232, 11 Cal. Rptr. 97, 359 P.2d 465* ; *Imperial Ice Co. v. Rossier (1941) 18 Cal. 2d 33, 35-36, 112 P.2d 631*

Injury to plaintiff's business employee by drunk driver was insufficient basis for cause of action for intentional interference with contractual relations because defendant's conduct was not "calculated to disrupt" employer-employee relationship. *Herrick v. Superior Court (1987) 188 Cal. App. 3d 787, 790-792, 233 Cal. Rptr. 675*

Question whether defendant's conduct caused third party to break contract with plaintiff was one of fact. *Gianelli Distrib. Co. v. Beck & Co. (1985) 172 Cal. App. 3d 1020, 1054 n. 12, 1057, 219 Cal. Rptr. 203*

Failure to instruct jury that proof of valid and existing contract was necessary to establish interference with contractual relations was harmless error due to overwhelming evidence of existence of contract; recovery for interference with contractual relations is not barred because contract is voidable. *Shamblin v. Berge (1985) 166 Cal. App. 3d 118, 123-125, 212 Cal. Rptr. 313*

[b] With Noncontractual Economic Relationship

Plaintiff is entitled to bring action for interference with relationship involving prospective economic advantage, whether or not relationship is contractual. *Buckaloo v. Johnson (1975) 14 Cal. 3d 815, 822-823, 122 Cal. Rptr. 745, 537 P.2d 865* ; *Zimmerman v. Bank of Am. (1961) 191 Cal. App. 2d 55, 57-58, 12 Cal. Rptr. 319*

Public policy dictates against allowing cause of action for interference with prospective economic advantage based on interference with opportunity towin prize in sporting event. *Youst v. Longo (1987) 43 Cal. 3d 64, 77-79, 233 Cal. Rptr. 294, 729 P.2d 728*

In action for intentional interference with prospective economic advantage based on landlord's failure to disclose to tenant that its subtenant had signed a sublease with another tenant, allegedly causing the subtenant to default on and not renew its sublease with the plaintiff tenant, plaintiff failed to establish loss of economic advantage because plaintiff failed to show that it would have been better off had defendant landlord disclosed the other sublease. *Girard v. Delta Towers Joint Venture (1993) 20 Cal. App. 4th 1741, 1750, 26 Cal. Rptr. 2d 102*

Factual contentions that law firm, which had previously represented partners and other of their ventures, used confidential information regarding partnership's negotiations for purchase of property, which was obtained by firm member who was limited partner, to allow firm to make more favorable offer, which was accepted, supported cause of action for intentional interference and presented triable issues of fact. *Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg (1989) 216 Cal. App. 3d 1139, 1153-1154, 265 Cal. Rptr. 330*

References to plaintiff's medical practice, and right of employment with individual patients plaintiff had evaluated and treated and might evaluate and treat in future, was insufficient pleading of economic relationship with third parties to support cause of action for interference with prospective business advantage. *Amid v. Hawthorne Cmty. Med. Group, Inc. (1989) 212 Cal. App. 3d 1383, 1392, 261 Cal. Rptr. 240*

Individual shareholder's claim that bank interfered with relationship between shareholder and corporation by denying corporation's loan request and liquidating corporation to pay other loans was nothing more than indirect attempt to recover damages to corporation, which shareholder lacked standing to do. *Kruse v. Bank of Am. (1988) 202 Cal. App. 3d 38, 65-66, 248 Cal. Rptr. 217*

Tort of interference with prospective economic advantage does not protect against interference with plaintiff's expectation of winning judgment for punitive damages or one that will be nondischargeable in bankruptcy. *Hepe v. Paknad (1988) 199 Cal. App. 3d 412, 420-421, 244 Cal. Rptr. 823*

Existence of legally binding agreement is not required to maintain action for intentional interference with prospective economic advantage. *Rader Co. v. Stone (1986) 178 Cal. App. 3d 10, 28, 223 Cal. Rptr. 806*

Cause of action for interference with prospective economic advantage was stated against defendant, who owned

premises leased to corporate business which plaintiff had contracted to purchase, when complaint alleged that defendant unreasonably and for improper motive refused to consent to assignment of lease, even though lease authorized defendant arbitrarily to withhold consent to assignment. *Sade Shoe Co. v. Oschin & Snyder (1984) 162 Cal. App. 3d 1174, 1179-1181, 209 Cal. Rptr. 124*

[4] Negligent Interference

Cause of action for negligent interference with economic relations is stated when plaintiff suffers damages from injury to economic relationship due to defendant's negligent performance of contract with third party and such injury is foreseeable. *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 808, 157 Cal. Rptr. 407, 598 P.2d 60* ; *Chameleon Eng'g Corp. v. Air Dynamics Inc. (1980) 101 Cal. App. 3d 418, 420-423, 161 Cal. Rptr. 463*

No cause of action for negligent interference with prospective economic advantage stated where doctor and assistant who administered neurological examination to boxer owed no duty to boxer's manager. *Colome v. State Athletic Comm'n (1996) 47 Cal. App. 4th 1444, 1460, 55 Cal. Rptr. 2d 300*

No cause of action for negligent interference with economic relations was stated when plaintiff's injury was part of its ordinary business risk and when defendant merely gave opinion on matter of public interest. *Worldvision Enters., Inc. v. American Broad. Cos., Inc. (1983) 142 Cal. App. 3d 589, 596-598, 191 Cal. Rptr. 148*

[5] No Cause of Action Stated

Employee who cannot identify any "prospective economic advantage" other than continuation of his or her employment relationship in action against employer does not state cause of action because party cannot induce breach of its own contract. *Shoemaker v. Myers (1990) 52 Cal. 3d 1, 24, 276 Cal. Rptr. 303, 801 P.2d 1054*

Motion to strike cause of action for intentional interference with prospective economic advantage brought under anti-SLAPP statute, *Code Civ. Proc. § 425.16*, failed for lack of evidence of economic detriment; plaintiff provided no evidence to support allegations that value of plaintiff's real property was diminished by defendant's conduct. *Salma v. Capon (2008) 161 Cal. App. 4th 1275, 1292-1293, 74 Cal. Rptr. 3d 873*

Bidding without necessary license, although intended to disrupt prospective business relationships of competitors, is essential to free-market system; thus, licensed competitor that was outbid by entity licensed to do only part of work bid was unable to state cause of action for interference with prospective advantage. *Settimo Assocs. v. Environ Sys., Inc. (1993) 14 Cal. App. 4th 842, 845-846, 17 Cal. Rptr. 2d 757*

Subcontractor was not able to state cause of action for interference with contract or with prospective business advantage against department of power and water based on termination of primary contract after one unit of multiple-unit contract because claims were barred by governmental immunity and subcontractor was not intended beneficiary of primary contract. *Lundeen Coatings Corp. v. Department of Water & Power (1991) 232 Cal. App. 3d 816, 834, 283 Cal. Rptr. 551*

[6] Preemption

State claims for interference are preempted by*§ 301(a) of Labor* Management Relations Act (*29 U.S.C.S. § 185(a)*) when their determination requires interpretation of collective bargaining agreement. *Milne Employees Ass'n v. Sun Carriers (9th Cir. 1991) 960 F.2d 1401, 1412*

Fact that one defendant, buyer, was foreign government did not implicate any issue of federal supremacy, preclusion, or preemption on basis of foreign relations or foreign commerce sufficient to bar California action for interference with contract and prospective economic advantage when anticompetitive conduct in question has direct, substantial, and reasonably foreseeableeffect in California; California antitrust and unfair trade laws are neutral in their application.
Amarel v. Connell (1988) 202 Cal. App. 3d 137, 144-150, 248 Cal. Rptr. 276

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§ 565.214 Law Reviews

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§ 565.215 Text References

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Attorney's Guide to the Law of Competitive Business Practices (Cal. C.E.B. 1981), Ch. 9, *Business-Related Torts*, §§ 9.2-9.18

Witkin, California Procedure, vol. 1, *Attorneys*, § 245; vol. 3, *Actions*, §§ 574-576, Vol. 5, *Pleading*, §§ 727-732, Vol. 6, *Provisional Remedies*, § 312 (4th ed. 1997)

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Prosser and Keeton on the Law of Torts (5th ed. 1984), Ch. 24, *Economic Relations*, §§ 129, 130

Restatement (Second) of Torts §§ 766-774B

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§§ 565.216[Reserved]

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PART IV. FORMS
A. Unfair Business Practices

49-565 California Forms of Pleading and Practice--Annotated § 565.230

§ 565.230 Complaint for Temporary and Permanent Injunctive Relief [Bus. & Prof. Code §§ 17070, 17078-17081] and for Treble Damages [Bus. & Prof. Code §§ 17070, 17082] for Prohibited Business Practice [Bus. & Prof. Code §§ 17040, 17043-17049]

[1] FORM Complaint for Temporary and Permanent Injunctive Relief [Bus. & Prof. Code §§ 17070, 17078-17081] and for Treble Damages [Bus. & Prof. Code §§ 17070, 17082] for Prohibited Business Practice [Bus. & Prof. Code §§ 17040, 17043-17049]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR INJUNCTION AND TREBLE DAMAGES
_____ [*name*], [and DOES 1	)	
through_____,]	)	(Unfair Business Practice)
Defendant(s).	)	
	)	

_____

Plaintiff alleges:

[1. _____ (*Allege identity and capacity of plaintiff, e.g.,* Plaintiff_____ (*name*) is, and at all times herein mentioned was, a corporation organized and existing under the laws of the state of California, and doing business in California).]

[2. _____ (*Allege identity and capacity of defendant(s), e.g.,* Defendant_____ (*name*) is, and at all times herein mentioned was, a partnership sued herein under the name_____ (by which it is known *or* which it has assumed), with its principal office located_____ (at_____ (

street address) *or* in_____ (*city*)),_____ County, California.]

[3. Defendants DOES 1 through_____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by such defendants.]

4. _____ [*Allege act(s) of defendant(s) that constitute sales or services below cost, locality discrimination, the use of loss leaders, or the useof secret rebates or unearned discounts, e.g.,* Between_____, and_____ (*dates*), defendant_____ (*name*) offered for sale and sold to purchasers(, for whom plaintiff and defendant compete,) large quantities of Brand-X latex house paint at the price of $_____ per gallon. These offers of sale and sales were made below cost, in that_____ (*specify facts showing the costs of defendant(s), e.g.,* defendant purchased them at a price of $_____ per gallon, and his/her costs of doing business exceeds $_____ (*sale price minus purchase price*) per gallon)].

5. [Plaintiff is informed and believes and thereon alleges that] [D]efendant(s) performed the above-mentioned act(s) for the purpose of_____ [*specify requisite wrongful intent, e.g.,* injuring (plaintiff and other) competitors].

6. Defendant(s) threatens/threaten to [and unless restrained, will]_____ [*specify continuing threat of alleged act(s) violating the Unfair Practices Act, e.g.,* continue to offer to sell and sell to purchasers the above-mentioned_____ (*specify, e.g.,* commodities) below cost].

7. As a proximate result of the above-mentioned act(s) of defendant(s), plaintiff has been deprived of the patronage of a large number of his/her actual and potential customers, all to his/her damage in the sum of $_____, trebled to the sum of $_____.

WHEREFORE, plaintiff prays for judgment against defendant(s) as follows:

1. For an order requiring defendant[s, and each of them,] to show cause, if any they have, why they should not be enjoined as set forth below, during the pendency of this action;

2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant(s) from_____ [*specify, e.g.,* offering to sell or selling any article or product below cost];

3. For trebled damages in the amount of $_____;

4. For reasonable attorney's fees in the amount of $_____;

5. For his/her costs incurred; and

6. For any other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

VERIFICATION

I,_____ [*name*], declare:

I am an officer,_____ [*specify office held*], of_____ [*name of corporation*], a corporation organized and existing under the laws of_____ [*specify state*], which is the plaintiff in the above-entitled action, and I have been authorized to make this verification on its behalf.

I have read the foregoing complaint and know the contents thereof. I am informed and believe that the matters stated therein are true and on that ground I allege that the matters stated therein are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of complaint is for use by a plaintiff to state a cause of action for injunctive relief and trebled damages based on conduct in violation of the Unfair Practices Act (*Bus. & Prof. Code § 17000 et seq.*) [*Bus. & Prof. Code §§ 17070, 17078-17082*].

[3] Allegations

The complaint includes initial, optional paragraphs that allege the capacity of a nonnatural plaintiff (Paragraph 1), the capacity of a nonnatural defendant and a basis for venue (Paragraph 2), and fictitiously named defendants (Paragraph 3). It then alleges the essential elements of a cause of action based on a violation of the Unfair Practices Act: defendant's commission of an act or acts prohibited by the Unfair Practices Act (Paragraph 4), with the requisite wrongful intent (Paragraph 5) [*see Bus. & Prof. Code §§ 17040-17050*; *G.H.I.I. v. MTS, Inc. (1983) 147 Cal. App. 3d 256, 275, 195 Cal. Rptr. 211* (sales below cost); *see also § 565.52*].

As a basis for injunctive relief, it alleges defendant's continuing commission or threat of commission of the alleged prohibited acts (Paragraph 6) [*see Bus. & Prof. Code §§ 17070, 17078-17082*; *see also § 565.54[1][b]*; *see generally* Ch. 303, *Injunctions*].

As a basis for trebled damages, it alleges actual damages proximately caused by defendant's conduct (Paragraph 7) [*see Bus. & Prof. Code §§ 17070, 17082*; *see also § 565.54[1][c]*; *see generally Ch. 177, § 177.70* et seq.].

[4] Injunction Not Necessary for Recovery of Restitution

Restitution pursuant to *Bus. & Prof. Code § 17203* may be recovered even without the issuance of an injunction; the California Supreme Court has rejected the contention that restitution is available as relief only when ancillary to an injunction. Thus, the failure to allege entitlement to injunctive relief does not preclude the recovery of restitution [*ABC Int'l Traders, Inc. v. Matsushita Elec. Corp. (1997) 14 Cal. 4th 1247, 1268-1271, 61 Cal. Rptr. 2d 112, 931 P.2d 290]* .

[5] Punitive Damages

The form contains no allegation for punitive damages because courts have held that a plaintiff who pursues a single cause of action under the Unfair Practices Act and establishes a malicious or oppressive violation of that Act is not entitled to elect whether to take punitive damages under *Civ. Code § 3294* or treble damages under *Bus. & Prof. Code § 17082*, but is only entitled to treble damages [*Turnbull & Turnbull v. ARA Transp., Inc. (1990) 219 Cal. App. 3d 811, 826-827, 268 Cal. Rptr. 856* ; *see § 565.54[1][b]*].

[6] Attorney's Fees and Costs

The form includes a prayer for reasonable attorney's fees, which are expressly authorized under *Bus. & Prof. Code § 17082*. For further discussion, see*§ 565.54[1][b]*.

[7] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*] and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

For alternative forms of verification for use when the plaintiff is an individual or other noncorporate entity, *see § 565.250* and Ch. 572, *Verification* .

[8] Jurisdiction and Venue

An action seeking permanent injunctive relief is in the jurisdiction of the superior court and is not a limited civil case [*see Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*].

If permanent injunctive relief is not sought, the superior court has jurisdiction of the action [*Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*]. In limited civil cases (amount in controversy, exclusive of interest, is $25,000 or less) the caption must state whether the demand exceeds or does not exceed $10,000. The caption must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9),(10)*].

If treble damages are sought, the proper county for trial of the action appears to be the county in which all or part of the cause of action arose [*Code Civ. Proc. § 393(a)* (action for recovery of penalty imposed by statute); *G.H.I.I. v. MTS, Inc. (1983) 147 Cal. App. 3d 256, 276-279, 195 Cal. Rptr. 211* (treble damages under *Bus. & Prof. Code § 17082* as penal in nature)]. Otherwise, the proper county for trial of the action is the county in which at least one defendant resided at the commencement of the action [*Code Civ. Proc. § 395(a)*] or, if a defendant is a corporation, the county in which its principal place of business is located or, if a defendant is a partnership or other unincorporated association, the county in which its principal office is located (Paragraph 2) [*Code Civ. Proc. §§ 395.2, 395.5*].

[9] Cross References

For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions*

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to pleading and procecedural requirements of establishing an award of attorney's fees, see Ch. 174, *Costs and Attorney's Fees*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to pleading and procecedural requirements for temporary restraining orders, preliminary and permanent injuctions, see Ch. 303, *Injunctions*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter Jurisdiction*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

[10] California Points and Authorities

For memoranda of points and authorities supporting an application for a temporary restraining order or preliminary injunction restraining the useof a loss leader in violation of *Bus. & Prof. Code §§ 17030, 17044*, see California Points and Authorities, Ch. 116, *Injunctions* (Matthew Bender)

[11] State Statutes

Action for injunctive relief and trebled damages for violation of Unfair Practices Act (*Bus. & Prof. Code §§ 17000-17101*). *Bus. & Prof. Code §§ 17070, 17078-17082*

[12] Decisions

"Competition" includes competition among retailers, wholesalers, or producers; *Bus. & Prof. Code § 17045* does not require competitive damage to competitors of person allowing unearned discount ("primary" line of commerce); violation can be based on competitive damage to competitors of person receiving it ("secondary" line of commerce). *ABC Int'l Traders, Inc. v. Matsushita Elec. Corp. (1997) 14 Cal. 4th 1247, 1254, 61 Cal. Rptr. 2d 112, 931 P.2d 290*

Allegations that only amount to breach of contract are insufficient; complaint must allege facts supporting statutory elements of violation and identify particular section of statutory scheme that was violated. *Khoury v. Maly's of Cal.,*

Inc. (1993) 14 Cal. App. 4th 612, 619, 17 Cal. Rptr. 2d 708

[13] Text References

Attorney's Guide to the Law of Competitive Business Practices, Ch. 5, *Antitrust*, §§ 5.107-5.126 (Cal. C.E.B. 1981)

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 565 UNFAIR COMPETITION
PART IV. FORMS
A. Unfair Business Practices

49-565 California Forms of Pleading and Practice--Annotated § 565.231

§ 565.231 Complaint for Restitution and Injunction [Bus. & Prof. Code § 17203]--Class Action [Code Civ. Proc. § 382] for Unfair Acts or Practices [Bus. & Prof. Code § 17200]

[1] FORM Complaint for Restitution and Injunction [Bus. & Prof. Code § 17203]--Class Action [Code Civ. Proc. § 382] for Unfair Acts or Practices [Bus. & Prof. Code § 17200]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	CLASS ACTION COMPLAINT FOR INJUNC-
_____ [*names*]	)	TION AND RESTITUTION
Defendants.	)	(Unfair Competition)
	)	
	)	

Plaintiff alleges:

[1. *Identity and capacity of the plaintiff. See§ 565.230, Paragraph 1*.]

[2. *Identity and capacity of the defendant. See§ 565.230, Paragraph 2*.]

[3. *Fictitious name allegation. See§ 565.230, Paragraph 3*.]

4. The plaintiff brings this action on his/her own behalf and on behalf of all persons similarly situated. The class that the plaintiff represents is composed of all persons who, at any time since the date four years before the filing of this complaint, [*specify facts common to class members on which injunction and restitution are based, e.g.,* have had their

vehicle towed by the defendant and been charged an unconscionable fee to retrieve the vehicle]. The persons in the class are so numerous [consisting of approximately_____ individuals,] that the joinder of all such persons is impracticable and that the disposition of their claims in a class action is a benefit to the parties and to the court.

5. There is a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented in that each member of the class is or has been in the same factual circumstances, hereinafter alleged, as the plaintiff. Proof of a common or single state of facts will establish the right of each member of the class to recover. The claims of the plaintiff are typical of those of the class and the plaintiff will fairly and adequately represent the interests of the class.

[6. There is no plain, speedy, or adequate remedy other than by maintenance of this class action because the plaintiff is informed and believes that each class member is entitled to restitution of a relatively small amount of money, amounting at most to $_____ each, making it economically infeasible to pursue remedies other than a class action. Consequently,there would be a failure of justice but for the maintenance of the present class action.]

7._____ [*Set forth factual allegations that the defendant's acts or practices occurred while doing business, e.g.,* The defendant_____ (*name*) is a business incorporated in the state of California and at all times herein mentioned owned and operated a vehicle towing service in_____ (*city*), California].

8._____ [*Set forth factual allegations of the defendant's acts that are the basis of the claim, e.g.,* Beginning on or about July 1, 1998, and continuing to the present time, the defendant_____ (*name*) was awarded a vehicle towing service license in_____ (*city*), California, and has towed and impounded vehicles at both the request of city officials and public persons. On June 1, 2004, the defendant_____ (*name*) towed the vehicle of the plaintiff_____ (*name*), a 1995 Ford Probe, License Plate No. 1234567, from_____ (*street address*),_____ (*city*), California].

9._____ [*Set forth allegations that show that defendant's acts are unfair, e.g,* The defendant_____ (*name*) towed and impounded the vehicle of the plaintiff_____ (*name*) on June 1, 2004, without sufficient warning. The defendant_____ (*name*) charged an unconscionable fee to retrieve the car, would not relinquish the vehicle from the defendant's impound lot unless the plaintiff signed a waiver of damage claims, and informed the plaintiff that the defendant would take title of the vehicle to pay for the towing and impound fees when the plaintiff refused to sign the damage waiver. On information and belief, the defendant_____ (*name*) has charged other members of the plaintiff class unconscionable fees to retrieve cars, forced owners to waive damage claims in order to retrieve vehicles from the defendant's impound lot, and forced owners to relinquish title to the vehicles when damage waivers were not signed and the unconscionable fees not paid].

10._____ [*Set forth causation and injury, e.g.,* As a direct, proximate, and foreseeable result of the defendant's wrongful conduct, as alleged above, the plaintiff_____ (*name*) and other members of the plaintiff class, who are unknown to the plaintiff but can be identified through inspection of the defendant's towing and impound records and by other means, were subjected to unlawful vehicle tows due to insufficient warning, were forced to pay unconscionable towing and storage fees in order to retrieve their vehicles, were not compensated for damage inflicted on their vehicles by improper towing procedures, and lost title to their vehicles if they refused to sign the defendant's damage waiver and pay the unconscionable fees. The plaintiff is entitled to relief, including full restitution and/or disgorgement of all revenues, earnings, profits, compensation, and benefits that may have been obtained by the defendant_____ (*name*) as a result of such unfair business acts or practices].

[11._____ (*Set forth allegations of attempts to notify the defendant of conduct and requests for non judicial remedies, if appropriate, e.g.,* The defendant_____ (*name*) has failed and refused to accede to

the plaintiff's request for a refund of the unconscionable fees obtained by the defendant. The plaintiff is informed and believes and thereon alleges that the defendant has likewise failed and refused, and in the future will fail and refuse, to accede to other drivers' requests for refunds. The defendant_____ (*name*) has also refused to accede to the plaintiff's request for return of the title to the plaintiff's vehicle after the plaintiff refused to sign a damage waiver and pay the unconscionable fees, and the plaintiff is informed and believes and thereon alleges that the defendant has likewise failed and refused, and in the future will fail and refuse, to accede to other drivers' requests for return of title to their vehicles).]

12. The defendant's acts hereinabove alleged are acts of unfair competition within the meaning of *Business and Professions Code Section 17203*. The plaintiff is informed and believes that the defendant will continue to do those acts unless the court orders the defendant to cease and desist.

13. The plaintiff has incurred and, during the pendency of this action, will incur expenses for attorney's fees and costs herein. Such attorney's fees and costs are necessary for the prosecution of this action and will result in a benefit to each of the members of the class. The sum of $_____ is a reasonable amount for attorney's fees herein.

WHEREFORE, the plaintiff prays for judgment as follows:

1. For restitution to the plaintiff and each other member of the class, as his or her interest may appear, of all sums unlawfully collected by the defendant from the plaintiff and other members of the class since_____ [*date*];

2. For interest on these sums at the legal rate from the date of each unlawful collection [*or other prayer for interest*];

3. For a permanent injunction enjoining the defendant, and the defendant's agents, servants, and employees, and all persons acting under or in concert with them, to cease and desist from the following acts:

a._____ [*Specify according to allegations, e.g.,* Towing any vehicles in_____ (*city*) without adequate warning];

b._____ [*Continue as appropriate*];

[4. For_____ (*Specify if return or refund sought, e.g.,* an order requiring the defendant to return title to the plaintiff's 1995 Ford Probe, License Plate No. 1234567).]

5. For_____ [*Specify actions required to provide relief for class, e.g.,* an order requiring the defendant to compile a list identifying, as far as possible, all other persons who have had their vehicle towed by the defendant, and to send each such person a written offer to return any vehicle whose title was improperly transferred and to refund the unconscionable towing fees].

6. For the payment of the plaintiff's attorney's fees out of the moneys recovered for the joint benefit of the members of the class;

7. For costs of suit herein incurred; and

8. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See§ 565.230* .]

[2] Use of Form

This form of complaint is for use by a plaintiff to state a class action cause of action for restitution and injunctive relief based on conduct in violation of the unfair competition statute (*Bus. & Prof. Code § 17200 et seq.*) [*Bus. & Prof. Code § 17203*].

For further discussion of the unfair competition statute, *see § 565.30* et seq. For discussion of, and forms for use in, class actions or actions for injunctions, *see* Chs. 120, *Class Actions* , and 303, *Injunctions* .

[3] Allegations

This complaint alleges:

- The factual predicates necessary to prosecute the action as a class action lawsuit (Paragraphs 4, 5, and 6);
- The defendant's business status (Paragraph 7);
- The factual basis for the claim and the conduct of defendant that constituted unfair competition (Paragraphs 8, 9);
- The injury suffered by the plaintiff and members of the plaintiff class, and that this injury was caused by defendant's unfair competition (Paragraph 10);
- The defendant's refusal to cooperate with attempts to resolve the dispute through nonjudicial means (Paragraph 11);
- That defendant's conduct violates the unfair competition statute and will continue to do so absent judicial relief (Paragraph 12); and
- The attorney's fees incurred by the plaintiff in prosecuting the claim as a class action (Paragraph 13).

[4] Standing

In 2004, the voters approved Proposition 64, which imposed standing requirements on private plaintiffs seeking relief under the unfaircompetition statute. Proposition 64's stated intent was to prohibit private attorneys from filing lawsuits for unfair competition if they do not have clients who have been injured in fact under the standing requirements of the United States Constitution [Proposition 64, § 1(h) (2004)]. As a result, a private person may bring an action under *Bus. & Prof. Code § 17200 et seq.* only if that person has suffered injury in fact and has lost money or property as a result of unfair competition [*Bus. & Prof. Code § 17204*]. A private plaintiff may file a representative action on behalf of others only if the plaintiff meets this actual injury requirement and meets the requirements for class actions under *Code Civ. Proc. § 382* [*Bus. & Prof. Code § 17203*; *Arias v. Superior Court (2009) 46 Cal. 4th 969, 980, 95 Cal. Rptr. 3d 588,*

209 P.3d 923]. However, so long as a class is otherwise properly certified, only the named class representatives must specifically show standing to bring the action and unnamed class members need not do so [*In re Tobacco II Cases (2009) 46 Cal. 4th 298, 321, 93 Cal. Rptr. 3d 559, 207 P.3d 20]* .

Only a person who meets the requirements for standing may bring an action under the unfair competition statute. Thus, an injured party who would have standing cannot assign the right to sue under the unfair competition statute to another party who does not otherwise meet the requirements for standing to sue [*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court (2009) 46 Cal. 4th 993, 1002, 95 Cal. Rptr. 3d 605, 209 P.3d 937*]. Moreover, an association, such as a labor union, does not have standing to sue on behalf of its individual members when the association itself cannot meet the requirements for standing [*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court (2009) 46 Cal. 4th 993, 1003-1004, 95 Cal. Rptr. 3d 605, 209 P.3d 937*].The changes to the requirements for standing enacted by Proposition 64 apply to actions that were pending when Proposition 64 was passed [*Californians for Disability Rights v. Mervyn's, LLC (2006) 39 Cal. 4th 223, 232-233, 46 Cal. Rptr. 3d 57, 138 P.3d 207]* . However, the ordinary rules governing the amendment of complaints and their relation back to the original complaint apply to these pending lawsuits [*Branick v. Downey Savings & Loan Assn. (2006) 39 Cal. 4th 235, 239, 46 Cal. Rptr. 3d 66, 138 P.3d 214* ; *see § 565.35[1]*].

[5] Statute of Limitations

An action brought to enforce any cause of action for unfair competition under *Bus. & Prof. Code § 17200 et seq.* must be brought within four years after the cause of action accrued [*Bus. & Prof. Code § 17208*].

[6] Remedies

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction [*Bus. & Prof. Code § 17203*]. The court may make such orders or judgments, including the appointment of a receiver [*see* Ch. 486, *Receivers*], as may be necessary to prevent the use or employment by a person of any practice that constitutes unfair competition under *Bus. & Prof. Code § 17200*, or as may be necessary to restore to any person in interest any money or property, real or personal, that may have been acquired by means of such unfair competition [*Bus. & Prof. Code § 17203*]. However, a private plaintiff cannot recover damages under *Bus. & Prof. Code § 17203* [*Heller v. Norcal Mut. Ins. Co. (1994) 8 Cal. 4th 30, 45, 32 Cal. Rptr. 2d 200, 876 P.2d 999]* .

For further discussion of the remedies available in an action brought under the unfair competition statute, *see § 565.34*.

[7] Attorneys' Fees

This form includes a prayer for reasonable attorney's fees. Although the unfair competition statute does not contain any provision for the recovery of attorney's fees by a successful plaintiff, a plaintiff may recover those fees in a successful class action suit under the common fund principle. Under that principle, a party who incurs attorney's fees in bringing a cause of action that creates or preserves a fund for the benefit of nonlitigants as well as the prevailing litigants, is entitled to recover attorney's fees from the fund itself [*see* *D'Amico v. Board of Med. Examiners (1974) 11 Cal. 3d 1, 25, 112 Cal. Rptr. 786, 520 P.2d 10]* .

[8] Verification

Verification [*Code Civ. Proc. § 446*] is required if the plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits or declarations, counsel must plead evidentiary facts that would entitle the plaintiff to the relief sought [*see* *E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order or preliminary injunction,

see Ch. 303, *Injunctions* .

Otherwise, verification is not required, but verification of the complaint requires the defendant to file a verified answer [*Code Civ. Proc. §§ 92(b), 446*], and precludes use of a general denial [*Code Civ. Proc. § 431.30(d)*]. For further discussion of the effect that verifying a complaint has on the answer, see Ch. 26, *Answers* .

For alternate forms of verification for use when the plaintiff is an individual or other noncorporate entity, *see § 565.250* and Ch. 572, *Verification* .

[9] Cross References

For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions*

For discussions and forms for use in class action lawsuits, see Ch. 120, *Class Actions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to pleading and procedural requirements for establishing an award of attorney's fees, see Ch. 174, *Costs and Attorney's Fees*

For discussion and forms relating to pleading and procedural requirements for temporary retraining orders, preliminary injunctions, and permanent injunctions, see Ch. 303, *Injunctions*

[10] California Points and Authorities

For memoranda of points and authorities supporting a cause of action brought under the unfair competition statute, see California Points and Authorities, Ch. 235, *Unfair Competition* , (Matthew Bender)

[11] State Statutes

Actions for restitution or injunction restraining acts constituting unfair competition under *Bus. & Prof. Code § 17200*. *Bus. & Prof. Code § 17203*

[12] Cross References

For a related form, *see § 565.230*

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Chapter 565 UNFAIR COMPETITION
PART IV. FORMS
A. Unfair Business Practices

49-565 California Forms of Pleading and Practice--Annotated §§ 565.232-565.249

[Reserved]

§§ 565.232[Reserved]

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 565 UNFAIR COMPETITION
PART IV. FORMS
B. Restraints Of Trade

49-565 California Forms of Pleading and Practice--Annotated § 565.250

§ 565.250 Complaint for Treble Damages for Restraint of Trade [Bus. & Prof. Code §§ 16720, 16727, 17650(a)] and Preliminary [Code Civ. Proc. §§ 526, 527(a)] and Permanent [Civ. Code § 3422] Injunctive Relief--By Consumer

[1] FORM Complaint for Treble Damages for Restraint of Trade [Bus. & Prof. Code §§ 16720, 16727, 17650(a)] and Preliminary [Code Civ. Proc. §§ 526, 527(a)] and Permanent [Civ. Code § 3422] Injunctive Relief--By Consumer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*names*], [individually and on behalf of all others similarly situated,] Plaintiffs, vs. _____ [*names*], [and DOES 1 through _____,] Defendants.	))))))	NO. _____ COMPLAINT FOR TREBLE DAMAGES FOR RESTRAINT OF TRADE [AND (PRELIMINARY AND) PERMANENT INJUNCTIVE RELIEF] [Amount demanded_____ (exceeds *or* does not exceed) $10,000] [LIMITED CIVIL CASE]

_____

1. Plaintiffs_____ [*describe plaintiffs' capacity and residence, including facts showing participation in the relevant market, e.g.,* are or were owners of housing units for occupancy by four families or less in_____ (*describe geographic perimeters of relevant market, e.g.,* _____ County) who listed those properties for sale and/or sold them during the period beginning_____ [*date*] (*specify date within four years of date of filing of complaint*), and ending on the date of the filing of this complaint].

[*SPECIFY, in successive paragraphs, capacity and residence of named defendants, e.g.,*]

2. Defendant_____ [*name*] is a local professional real estate association operating in_____ County.

3. Defendant_____ [*name*] is a state professional real estate association.

4. Defendant_____ [*name*] is a nation-wide incorporated trade association of real estate professionals.

5. Defendants_____ [*names*] are real estate brokers licensed as such under the laws of the State of California and doing business in_____County; all are members and officers of one or more of defendant real estate associations.

[*CONTINUE*]

[6. *Fictitious name allegation. See§ 565.230, Paragraph 3.*]

[7. Plaintiffs bring this action on their own behalf and on behalf of all persons similarly situated. The class which plaintiffs represent is composed of all_____ (*describe class, e.g.,* individuals, firms, partnerships, associations, and corporations who have listed for sale and/or sold residential properties in_____ County within the four years immediately preceding the filing of this complaint). The persons in the class are so numerous, consisting of approximately_____ (*specify number and nature of class members, e.g.,* 55,000 individuals, firms, partnerships, associations, and corporations), that joinder of all such persons is impracticable and that the disposition of their claims in a class action is a benefit to the parties and to the court.]

[8. There is a well-defined community of interest in the questions of law and fact involved affecting the parties to be represented in that_____ (*specify common issues, e.g.,* defendants carried out the combination and conspiracy hereinafter alleged by using standardized agreements and negotiating practices so that individualized negotiations with plaintiffs as to commission rates never occurred and all commission negotiations and agreements were carried out in accordance with defendants' common practices). Proof of a common or single set of facts will establish the right of each member of the class to recover. The claims of plaintiffs are typical of those of the class and plaintiffs will fairly and adequately represent the interests of the class.]

[9. There is no plain, speedy, or adequate remedy other than by maintenance of this class action since plaintiffs are informed and believe that the damage to each plaintiff, approximating between $_____ and $_____, is relatively small compared to the expenses of litigation, making it economically unfeasible to pursue the remedies other than as a class action. In addition, some members of the class no longer reside in_____ County. Consequently, there would be a failure of justice but for the maintenance of the present class action.]

[*DESCRIBE, in as many paragraphs as necessary, the relevant market, in terms of both product/service and geography, and the portion of that market controlled by the defendants. The market description should be broad enough to set forth any frequently substituted product or service or a statement that there is no comparably priced substitute.*]

10. Eleven hundred twenty three of the 1221 real estate brokers handling residential properties in_____ County, constituting 92 percent of such brokers, are members of defendant_____ [*name of local association*], and 534 of the real estate brokers handling residentialproperties in_____ County are members of more than one defendant association. Defendant_____ [*name of local association*] operates the only multiple listing service for residential

properties in_____ County. In each of the four years prior to the filing of this complaint, 98 or 99 percent of the dollar volume of residential properties sold in_____ County had been listed in defendant's multiple listing service. There is no alternative service available in_____ County to disseminate information regarding price, availability, and particularized terms of offers of sale of residential properties. A person seeking to sell residential real property in_____ County must list the property with a broker member of the multiple listing service. There is no alternative which will expose the property to as broad a market or invite comparable cooperation from brokers representing purchasers.

[*DESCRIBE, in as many paragraphs as necessary, the formation of the agreement, combination, or conspiracy and identify specific acts in furtherance thereof.*]

11. Since 1955 and up to the present time, defendants, and each of them, combined, conspired, and agreed together and continue to combine, conspire, and agree to fix and maintain the commission rates, terms, and conditions of residential real estate broker commissions. In 1974, defendants, and each of them, agreed at joint meetings to establish a standard commission rate of 6 percent for all residential listings and sales and to accept only "exclusive right to sell" listings for residential properties. The 6 percent commission rate was formalized in policy statements of defendant associations and in advisory schedules, both of which were, at all times relevant herein, published and dis seminated on a regular basis to all members of defendant associations. Defendant associations drafted, printed, and supplied to their members a standardized form of "exclusive right to sell" listings for residential property.

12. In furtherance of this unlawful combination, conspiracy, and agreement, defendant_____ [*name of local association*] refused to accept for inclusion in its multiple listing service any listing agreement other than those evidenced by the terms contained in its standardized "exclusive right to sell" agreement. Defendant_____ [*name of local association*] required the commission rate to be included in each listing published by the multiple listing service. By means of the regular publication of listings, commission information was continually collected, monitored, and disseminated.

13. In furtherance of this unlawful combination, conspiracy, and agreement, defendants, and each of them, encouraged individual members to refuse to cooperate with or share commissions with real estate brokers who entered into residential listing agreements for less than the agreed 6 percent. Individual defendants adhered to the 6 percent commission rate and refused to cooperate with brokers who entered into listing agreements at less than a 6 percent commission.

[*DESCRIBE, in as many paragraphs as necessary, the harm to, and damages sustained by, the plaintiffs and the public at large*]

14. As a direct consequence of the acts of defendants, and each of them, competition in both prices of real estate broker commissions on the sale and terms of listing agreements for residential real property in_____ County have been restrained, suppressed, and eliminated; the commission rate has been raised, fixed, and maintained at a high and artificial level; plaintiffs and other sellers of residential property in_____ County have been deprived of the benefit of free, competitive negotiations for real property listings and brokers' commission rates and have been forced to enter into "exclusive right to sell" listings and to pay artificially high commission rates.

15. As a direct consequence of the agreement, acts, and course of conduct of defendants, and each of them, plaintiffs were deprived of the benefit of free, competitive negotiations for real property listings and brokers' commission rates._____ [Each plaintiff suffered damages of $_____ per $100,000 of sales or listing price *or* Plaintiffs are unable to state their damages with precision at this time, since that determination will require discovery and accounting analysis of defendants' books and records]. Under *Section 16750(a) of the Business*

and Professions Code, plaintiffs are entitled to interest on the aforementioned sum from the date of service of this complaint until entry of judgment thereon, to their reasonable attorney's fees, and to treble damages.

[*CONTINUE*]

[16. Defendants' continuing wrongful conduct as alleged above, unless and until restrained by order of this court, will cause great and irreparable harm to_____ (*describe injury to all or some of plaintiffs, e.g.,* those plaintiffs who have been forced to enter into listing agreements without benefit of competitive negotiations but who have not yet completed performance under those agreements and to the public at large which is deprived of a free market as set forth in Paragraph 14., above).]

[17. Plaintiffs (and the public at large) have no adequate remedy at law for the injuries currently being suffered or which will result in the future from defendants' continued wrongful conduct in that_____ (*specify grounds for permanent injunctive relief, e.g.,* most individual injuries are too small to warrant the expenditures necessary in litigation. In addition, damages flowing from the artificial restraint of the free market as set forth in Paragraph 14, above, are difficult if not impossible to ascertain. Unless this court restrains defendants, some plaintiffs and other members of the public will be forced to institute a multiplicity of suits to obtain compensation.)]

WHEREFORE, plaintiffs pray judgment against defendants, and each of them, as follows:

[1. For an order requiring defendants to show cause, if any they have, why they should not be enjoined as hereinafter set forth during the pendency of this action;]

[2. For (a temporary restraining order, a preliminary injunction, and) a permanent injunction, all enjoining defendants, and each of them, their agents, servants, and employees, and all persons acting under, in concert with, or for them from directly or indirectly or in any manner_____ (*specify acts to be en joined, e.g.,* adopting, advertising, participating in, adhering to, applying or enforcing any by-law, rule, regulation, agreement, contract, understanding, practice, procedure, or arrangement of any kind or nature whatsoever which has the purpose or effect, directly or indirectly, of requiring as a condition of eligibility for participation in, or listing by, any multiple listing service directly or indirectly controlled or sponsored by defendants, or any of them, that a commission of a specified percentage rate be paid by the seller to the listing broker or that the agency agreement between the broker and the seller be an exclusive right to sell listing);]

3. For damages according to proof, and that said sum be trebled; [that said sum be paid on the basis of individual claims presented, and to the extent that class members do not present such claims, on whatever basis the court deems proper, such as by lowering of the brokerage commission rate on residential real properties sold in_____ County or by depositing said sum with the State of California or a unit thereof for the limited purpose of being applied to eleemosynary purposes benefiting the consuming public in_____ County;]

4. For interest from and after the date of service of this complaint at the legal rate;

5. For payment of plaintiffs' reasonable attorney's fees;

6. For costs of suit herein incurred; and

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

VERIFICATION

I,_____ [*name*], am [one of] the [individual] plaintiff[s] in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

_____ [*typed name*]

[2] Use of Form

This form of complaint is for use by a consumer to bring an action in state court to seek treble damages and injunctive relief under the Cartwright Act when the defendants have conspired to restrain trade [*Civ. Code § 3422*; *Bus. & Prof. Code §§ 16720, 16727, 16750*; *Code Civ. Proc. §§ 526, 527(a)*]. It may be used by the consumer as an individual or as the representative of a class of similarly situated consumers. This form is based in part on the fact situation in *People v. National Ass'n of Realtors (1984) 155 Cal. App. 3d 578, 202 Cal. Rptr. 243* [*see § 565.77[4]*], and in *People v. National Ass'n of Realtors (1981) 120 Cal. App. 3d 459, 477-479, 174 Cal. Rptr. 728* .

[3] Allegations

The form alleges:

- Plaintiffs' capacity, residence, and facts which establish standing by showing the way plaintiff participates in the market claimed to be affected by the restraint (Paragraph 1);

- Defendants' capacity and residence (Paragraphs 2-5)

- A detailed description of the market claimed to be affected by the restraints, including some factual showing of the percentage of the market controlled or affected by defendants (Paragraph 10) [*see Chicago Title Ins. Co. v. Great W. Fin. Corp. (1968) 69 Cal. 2d 305, 325-326, 70 Cal. Rptr. 849, 444 P.2d 481* (allegation of market insufficient); *Bhan v. NME Hospitals, Inc. (9th Cir. 1985) 772 F.2d 1467, 1470-1471]*

- The formation of the specific agreement or combination and specific acts done in furtherance of the conspiracy or agreement (Paragraphs 11-13) [*Bus. & Prof. Code §§ 16756, 16757*; *Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 118-119, 81 Cal. Rptr. 592, 460 P.2d 464* ; *Bartley v. California Ass'n of Realtors (1980) 115 Cal. App. 3d 930, 934-935, 173 Cal. Rptr. 284]*

- The harmful impact on the relevant market caused by defendants' conduct (Paragraph 14) [*Kolling v. Dow Jones & Co. (1982) 137 Cal. App. 3d 709, 721-722, 187 Cal. Rptr. 797* ; *Feldman v. Sacramento Bd. of Realtors, Inc. (1981) 119 Cal. App. 3d 739, 747-748, 174 Cal. Rptr. 231]* ;

- The damages caused to plaintiffs by defendants' conduct (Paragraph 15) [*Saxer v. Philip Morris, Inc. (1975) 54 Cal. App. 3d 7, 20-23, 126 Cal. Rptr. 327]* .

The form includes optional paragraphs to allege the basis for injunctive relief (Paragraphs 16, 17; Paragraphs 1 and 2 of prayer).

The form also includes optional paragraphs for use to bring the suit as a class action:

- The description of the class, including an estimate of its size and the way in which its members participate in the relevant market (Paragraph 7);

- The specific ways in which common questions of law and fact predominate (Paragraph 8);

- A statement why the class action is the most appropriate method of relief (Paragraph 9). Paragraph 3 of the prayer includes an optional provision seeking fluid class recovery [*see* *Bruno v. Superior Court (1981) 127 Cal. App. 3d 120, 123-124, 130-135, 179 Cal. Rptr. 342]* .

[4] Specificity in Pleading Cartwright Cases Required

Antitrust complaints, more than others, require detailed specific factual allegations. Conclusionary pleadings are insufficient. To maintain a cause of action for combination in restraint of trade one must allege:

- The formation and operation of a conspiracy whose purpose is to restrain trade in a particular market, including, in most cases, the intent of all parties to the conspiracy to restrain trade;

- The illegal acts done pursuant thereto;

- The damage caused by the acts.

Specific facts must be alleged indicating all elements of the cause of action--the creation of the conspiracy, its objectives and impact, the specific acts in furtherance of the conspiracy, and specific damage to plaintiff's business or property [*Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 118-119, 81 Cal. Rptr. 592, 460 P.2d 464* ; *Chicago Title Ins. Co. v. Great W. Fin. Corp. (1968) 69 Cal. 2d 305, 325-326, 70 Cal. Rptr. 849, 444 P.2d 481* ; *Truta v. Avis Rent A Car Sys. (1987) 193 Cal. App. 3d 802, 822, 238 Cal. Rptr. 806* ; *G.H.I.I. v. MTS, Inc. (1983) 147 Cal. App. 3d 256, 264-270, 195 Cal. Rptr. 211]* . The market should be described in terms of geography, subject matter, total volume, proportion controlled by defendants, availability to plaintiffs and to the public of the subject matter or competing subject matter (interchangeable products or services) [*Ralph C. Wilson Indus. v. Chronicle Broadcast. (9th Cir. 1986) 794 F.2d 1359, 1363-1364* ; *Chicago Title Ins. Co. v. Great W. Fin. Corp. (1968) 69 Cal. 2d 305, 325-326, 70 Cal. Rptr. 849, 444 P.2d 481* ; *Bhan v. NME Hospitals, Inc. (9th Cir. 1985) 772 F.2d 1467, 1470-1471* ; *see also § 565.80[2]*].

[5] Pleading Conspiracy: When Inferences Are Sufficient

Although this complaint alleges an actual agreement, often a conspiracy will provide the basis for the action. The formation and operation of the conspiracy must be shown by facts which establish the intent or purpose of the

defendants to restrain trade. Although in some cases it may be sufficient to allege solely the effect of a combination from which a purpose to eliminate competition may be inferred, no inference will be made when the alleged conduct is consistent with a lawful purpose. For instance, no inference was made when the allegations showed defendants' primary motive to be personal financial gain but did not show any acts which would be consistent with a separate purpose to eliminate the market for minority shares [*Jones v. H.F. Ahmanson & Co. (1969) 1 Cal. 3d 93, 118-119, 81 Cal. Rptr. 592, 460 P.2d 464]* .

On the other hand, in a court of appeal case, a cause of action was stated against a "passive" parent that merely acquiesced in a conspiracy. For a party's participation in the conspiracy to be inferred, the acts done, the relationship of the alleged conspirators, the interests of the parties, and the individual circumstances must support the inference [*Saxer v. Philip Morris, Inc. (1975) 54 Cal. App. 3d 7, 19, 24-26, 126 Cal. Rptr. 327]* . In this case, the active defendants were all owned by the passive parent corporation, many officers of the parent corporation were also officers of the more active defendants, there were numerous communications between the officers of the parent and those of the more active subsidiaries, and the parent was aware of the subsidiaries' plans and operations and supported them [*Saxer v. Philip Morris, Inc. (1975) 54 Cal. App. 3d 7, 19, 24-26, 126 Cal. Rptr. 327]* .

[6] Pleading Acts in Furtherance of Conspiracy: Coercion or Leverage?

Although general allegations of agreement have been held sufficient and a conspiracy allegation has been held unnecessary, the unlawful acts in furtherance of the conspiracy must be specifically alleged [*Bartley v. California Ass'n of Realtors (1980) 115 Cal. App. 3d 930, 934-935, 173 Cal. Rptr. 284]* . An allegation that two defendant retailers, which were among the largest record retailers, used their economic leverage to convince record distributors to grant them price discounts and other beneficial terms was insufficient. Allegations as to a third retailer defendant that it obtained favorable treatment from distributors by threats, coercion, intimidation, and boycott were sufficient when coupled with specific descriptions of the threats and boycott [*G.H.I.I. v. MTS, Inc. (1983) 147 Cal. App. 3d 256, 268-269, 195 Cal. Rptr. 211* (boycott by single trader that uses coercion, threats or intimidation to exact unwilling cooperation from another as combination in restraint of trade); *see also § 565.77[1]*].

[7] Pleading Damages

The alleged antitrust violation need not be the sole cause of plaintiff's injury, but it must be a substantial factor in bringing about the injury [*Saxer v. Philip Morris, Inc. (1975) 54 Cal. App. 3d 7, 23, 126 Cal. Rptr. 327]* . Moreover, individual injury to plaintiff's business is not enough. A plaintiff must show that there is some public injury to the market inquestion that does public harm, for instance by creating a monopoly, or that plaintiff is a competitor or a consumer in a market in which defendant's conduct has impaired competition [*Feldman v. Sacramento Bd. of Realtors, Inc. (1981) 119 Cal. App. 3d 739, 747-748, 174 Cal. Rptr. 231]* . The individual injury pleading and proof requirements are less stringent if the conduct complained of is illegal per se rather than to be evaluated under the rule of reason [*Klor's v. Broadway-Hale Stores (1959) 359 U.S. 207, 210-214, 79 S. Ct. 705, 3 L. Ed. 2d 741* ; *B. W. I. Custom Kitchen v. Owens-Ill., Inc. (1987) 191 Cal. App. 3d 1341, 1348, 235 Cal. Rptr. 228* ; *see also §§ 565.74[2],[4], 565.77[1]*].

[8] Interest and Attorney's Fees

Prejudgment interest on actual damages in Cartwright actions is allowed from the date of service of the complaint [*Bus. & Prof. Code §§ 16750(a), 16761*]]. Attorney's fees are authorized in Cartwright actions [*Bus. & Prof. Code § 16750(a)*].

[9] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see Code Civ. Proc. §*

527(a)]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

Otherwise, verification is not required, but verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[10] Cross References

For discussion and forms relating to pleading and procedural requirements in class actions, see Ch. 120, *Class Actions*

For discussion and forms relating to injunctive relief, see Ch. 303, *Injunctions*

For discussion and forms relating to termination or nonrenewal of franchises, other than those involving petroleum products or new motor vehicles, under the California Franchise Relations Act, see Ch. 515, *Securities and Franchise Regulation*

For discussion and forms relating to prohibited practices, termination, or nonrenewal of petroleum product franchises, see Ch. 515, *Securities and Franchise Regulation*

For discussion and forms relating to regulation, termination, or nonrenewal of new motor vehicle dealerships, see Ch. 515, *Securities and Franchise Regulation*

For discussion and forms relating to special civil rights afforded all franchisees under California's Fair Dealership Law, see Ch. 515, *Securities and Franchise Regulation*

[11] State Statutes

Jurisdiction; venue; standing; injunctive relief; treble damages; prejudgment interest, costs, and attorney's fees; additional parties; attorney general as class representative. *Bus. & Prof. Code §§ 16750, 16751, 16760, 16761*

Four-year limitation period. *Bus. & Prof. Code § 16750.1*

Pleading is not required to give name or description of combination or date and place of its creation; purpose and effect of trust or combination and fact that defendant acted in furtherance of or aided purpose of trust or combination is sufficient. *Bus. & Prof. Code § 16756*

Character of trust or combination is provable by its general reputation, written instrument is not necessary; proof of nondefendant members is not required. *Bus. & Prof. Code § 16757*

[12] Decisions

Considerations in choosing method for distribution of unallocated damages residue in fluid class recovery; analysis of various methods appropriate in various situations. *State of California v. Levi Strauss & Co. (1986) 41 Cal. 3d 460,*

473-479, 224 Cal. Rptr. 605, 715 P.2d 564

Agreement between wholesale bakers setting retail price of bread and refusing to sell to retailers who would not maintain that price was prohibited restraint. *People v. H. Jevne Co. (1919) 179 Cal. 621, 627-628, 178 P. 517*

Allegations that individual subscribers of cellular phone service paid articifially inflated prices because of defendants' price fixing was sufficient allegation of standing. *Cellular Plus, Inc. v. Superior Court (1993) 14 Cal. App. 4th 1224, 1233-1235, 18 Cal. Rptr. 2d 308*

Although loss of sales is not always sufficient antitrust injury to confer standing, allegations by defendants' corporate sales agents that they lost sales as result of articifially inflated prices maintained by defendants' price fixing was sufficient allegation of standing. *Cellular Plus, Inc. v. Superior Court (1993) 14 Cal. App. 4th 1224, 1233-1235, 18 Cal. Rptr. 2d 308*

Complaint in action for conspiracy under Cartwright Act must allege (1) formation and operation of conspiracy, (2) wrongful act or acts done pursuant to conspiracy, and (3) resulting damage; sustaining of defendant's demurrer by trial court was proper when plaintiff failed to allege specific overt acts in furtherance of conspiracy. *Truta v. Avis Rent A Car Sys. (1987) 193 Cal. App. 3d 802, 822-823, 238 Cal. Rptr. 806*

Allegation that defendant published form of agreement and repeatedly and forcefully urged its members to use it was insufficient to establish defendant's participation in conspiracy. *Bartley v. California Ass'n of Realtors (1980) 115 Cal. App. 3d 930, 934-935, 173 Cal. Rptr. 284*

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 565 UNFAIR COMPETITION
PART IV. FORMS
B. Restraints Of Trade

49-565 California Forms of Pleading and Practice--Annotated § 565.251

§ 565.251 Proceedings to Obtain Prejudgment Interest [Bus. & Prof. Code § 16761]--Notice of Motion

[1] FORM Proceedings to Obtain Prejudgment Interest [Bus. & Prof. Code § 16761]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION AND MOTION FOR PRE-JUDGMENT INTEREST [, SUPPORTING_____ (AFFIDAVIT *or* DECLARATION) OF_____ (*name*), AND MEMORANDUM OF POINTS AND AUTHORITIES]
vs.	)	
_____ [*name*],	)	
Defendant.	)	
	)	[Telephone Appearance]
	)	Date:_____
	)	Time:_____
	)	Location:_____
		Judge:_____
		Date Action Filed:_____
		Trial Date:_____

_____

To_____ [*identify party, e.g.,* defendant]_____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that, on_____ [*date*], at_____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division)_____ of]

this court, located at_____ [*street address*],_____ [*city*], plaintiff will, and hereby does, move for an order awarding prejudgment interest on the actual damages recovered by plaintiff pursuant to *Section 16750 of the Business and Professions Code*, at the rate of 10 percent per annum for the period beginning on_____ [*date complaint served or later*], and ending on_____ [*date of judgment or earlier*]. The total amount of interest sought is $_____ [*amount*]. The motion will be made on the grounds that such an award of interest is authorized by *Section 16761 of the Business and Professions Code* and is just under the circumstances.

The motion will be based on this notice of motion, on the declaration(s) of_____ [*name(s)*] and the memorandum of points and authorities served and filed herewith, on the papers, records, and file herein, and on such oral and documentary evidence as may be presented at the hearing of the motion.
Dated:_____.

_____ [*firm name, if ny*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for_____ [*moving party*]

[2] Use of Form

This notice of motion is for use in obtaining prejudgment interest after a judgment for damages for unfair competition is recovered pursuant to *Bus. & Prof. Code § 16750*. An award of prejudgment interest is authorized by *Bus. & Prof. Code §§ 16750(a)*, and *16761*. For a general form of declaration in support of a motion and a form of an order granting a motion, see Ch. 372, *Motions and Orders* .

A memorandum of points and authorities must be filed and a copy served with this notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[3] Prejudgment Interest

Prejudgment interest may be allowed on a motion by the person recovering damages pursuant to *Bus. & Prof. Code § 16750*. Interest is calculated on the actual damages at the rate of 10 percent per annum for the period beginning on the date of service of the complaint and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of interest for that period is just in the circumstances. In determining whether or not an award of interest for any period is just, the court may consider only the following [*Bus. & Prof. Code § 16761*]:

- Whether the person or opposing party, or the representative of any of these people, made motions or asserted claims or defenses so lacking in merit as to show that the party or representative acted intentionally for delay, or otherwise acted in bad faith;

- Whether, in the course of the action involved, the person or opposing party, or the representative of any of these people, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

- Whether the person or opposing party, or the representative of any of these people, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

[4] State Statutes

Prejudgment interest in unfair competition actions. *Bus. & Prof. Code §§ 16750(a), 16761*

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 565 UNFAIR COMPETITION
PART IV. FORMS
B. Restraints Of Trade

49-565 California Forms of Pleading and Practice--Annotated §§ 565.252-565.269

[Reserved]

§§ 565.252[Reserved]

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Volume 49: Trusts: Express, Public, Charitable, and Totten Trusts thru Unfair Competition-Chs. 560-567
Chapter 565 UNFAIR COMPETITION
PART IV. FORMS
C. Trade Secrets

49-565 California Forms of Pleading and Practice--Annotated § 565.270

§ 565.270 Complaint for Damages [Civ. Code §§ 3294, 3333, 3426.3] for Misappropriation of Trade Secret and for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)], and Permanent Injunction [Civ. Code § 3422]--General Form

[1] FORM Complaint for Damages [Civ. Code §§ 3294, 3333, 3426.3] for Misappropriation of Trade Secret and for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)], and Permanent Injunction [Civ. Code § 3422]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES[, TEMPORARY
_____ [*name*],	)	RESTRAINING ORDER, AND PRELIMINARY
[and DOES 1 through_____,]	)	(AND PERMANENT) INJUNCTION(S)]
Defendant(s).	)	(Misappropriation of Trade Secret)
	)	[Amount demanded_____ (exceeds
	)	*or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

FIRST COUNT
(Misappropriation of Trade Secret--Statutory)

[1. *Identity and capacity of plaintiff. See§ 565.230, Paragraph 1*.]

[2. _____ (*Name of plaintiff corporation*) is, and at all times herein mentioned was, a corporation organized and existing under the_____ (*governing law, e.g.*, General Corporation Law of California)(*if foreign corporation, add* : and subject to *Section 2115 of the Corporations Code*).]

[3. *Identity and capacity of defendant. See§ 565.230, Paragraph 2.*]

[4. At all times herein mentioned defendant(s),_____ (*name(s*))_____ (was a director *or* were directors) of_____ (*name of plaintiff corporation*).]

[5. *Fictitious name allegation. See§ 565.230, Paragraph 3.*]

[6. (Plaintiff is informed and believes and thereon alleges that) (A)t all times herein mentioned, each of the defendants was the agent of each of the remaining defendants, and in doing the things hereinafter alleged, wasacting within the course and scope of such agency and with the permission and consent of his/her codefendants.]

7. Plaintiff was in possession of a trade secret_____ [*identify trade secret with reasonable particularity, e.g.*, which consisted of a secret recipe for plaintiff's gourmet cheesecake].

8. Plaintiff's_____ [*specify trade secret, e.g.*, recipe] had economic value in that_____ [*specify its economic value, either actual or potential, e.g.*, its use resulted in the creation of cheesecakes with a unique taste for considerably less overhead expenses than the usual mass produced cheesecake]. Plaintiff made reasonable efforts to insure that the_____ [*specify trade secret*] remained a secret by_____ [*specify measures used by plaintiff to maintain secrecy, e.g.*, keeping the recipe in a safe and disclosing it only to employees who had acheived the position of assistant chef].

9. On or about_____ [*specify date of January 1, 1985 or thereafter*], [and continuing to the present time], defendant[s, and each of them,] misappropriated the above-described trade secret of plaintiff by_____ [*specify the act of misappropriation meeting the definition of Civ. Code § 3426.1(b), e.g.*, using plaintiff's recipe to make cheesecakes to be sold under defendant's name after paying a large sum of money to one of plaintiff's employees for unauthorized disclosure of the secret recipe].

[*EITHER, if alleging general damages*]

10. As a proximate result of the_____ [*specify the misappropriation of plaintiff's trade secret, e.g.*, use by defendant of plaintiff's cheesecake recipe], plaintiff has suffered actual damages. [As a further proximate result of the misappropriation, defendant was unjustly enriched_____ [*specify any unjust enrichment enjoyed by defendant, e.g.*, by obtaining the dessert catering contract for the county fair.]

[*OR, if alleging royalties*]

10. Because neither plaintiff's actual damages nor defendant's unjust enrichment are subject to proof, plaintiff is entitled to a reasonable royalty_____ [*specify nature and amount of royalty, e.g.*, in the amount of 55 percent of the revenue received by defendant from cheesecake sales].

[11. The (plaintiff is informed and believes and thereon alleges that the) aforementioned acts of the defendant were willful and malicious in that_____ (*allege facts indicating presence of willfulness and malice, e.g.*, defendant misappropriated plaintiff's recipe with the deliberate intent to injure plaintiff's business and improve its own).

Plaintiff is therefore entitled to punitive damages. Plaintiff is also entitled to reasonable attorney's fees.]

[12. Defendant's wrongful conduct_____ (*describe conduct, e.g*, in misappropriating plaintiff's recipe), unless and until enjoined and restrained by order of this court, will_____ (*specify particular facts establishing grounds for preliminary injunctive relief, e.g.*, cause great and irreparable injury to plaintiff's business in that plaintiff has lost several of its most profitable catering accounts and is continuing to lose accounts, plaintiff has been forced to lay off workers and will be forced to lay off more, and is operating at such a loss that it may be forced out of business before this action can be brought to trial).]

[13. Plaintiff has no adequate remedy at law for the injuries_____ (currently being suffered *or* which are threatened) in that_____ (*specify any additional facts tending to show grounds for permanent injunctive relief, e.g.*, defendant will continue to misappropriate the trade secret and plaintiff would be required to maintain a multiplicity of judicial proceedings to protect its interests).]

SECOND COUNT
(Misappropriation of Trade Secret--Common Law)

14. Plaintiff refers to and herein incorporates Paragraphs 1-8 of the First Count.

15. On or about_____ [*specify date prior to January 1, 1985*], [and continuing until January 1, 1985], defendant[s, and each of them,] misappropriated the above-described trade secret of plaintiff by_____ [*specify the act of misappropriation meeting the definition of Restatement of Torts § 757, e.g.*, using plaintiff's recipe to make cheesecakes to be sold under defen dant's name after paying a large sum of money to one of plaintiff's employees for unauthorized disclosure of the secret recipe].

16. As a proximate result of the_____ [*specify the misappropriation of plaintiff's trade secret, e.g.*, use by defendant of plaintiff's cheesecake recipe], plaintiff has suffered actual damages_____ [*specify compensatory damages, e.g.*, in the nature of lost profits resulting from decreased sales].

[17. The (plaintiff is informed and believes and alleges thereon that the) acts of defendant alleged above were_____ (malicious *and/or* oppressive *and/or* fraudulent) in that_____ (*state facts showing malice, oppression, or fraud within meaning of Civ. Code § 3294*). Plaintiff is therefore entitled to an award of punitive damages.]

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

On the FIRST COUNT:

[1. For an order requiring defendants to show cause, if any they have, why they should not be enjoined as hereinafter set forth, during the pendancy of this action;

[2. For a temporary restraining order, a preliminary injunction, and a permanent injunction, all requiring defendant and his/her agents, servants, and employees, and all persons, acting under, in concert with, or for him/her:

a. To refrain from_____ (*specify each of the acts and courses of conduct defendants are to be prohibited from doing, commencing, or continuing, e.g.*, continuing the misappropriation of plaintiff's trade secret by ongoing use of plaintiff's recipe);

b. To_____ (*specify each of the acts and courses of conduct defendants are to be commanded to do or*

undertake, e.g., return all copies of the recipe to plaintiff);]

[*EITHER, if general damages are alleged*]

3. For general damages [and the amount necessary to prevent the unjust enrichment of defendant];

[*OR, if alleging royalties*]

3. For reasonable royalties_____ [*specify nature and amount*];

[4. For punitive damages;]

[5. For reasonable attorney's fees;]

On the SECOND COUNT:

6. For general damages;

[7. For punitive damages;]

On all COUNTS:

8. For all costs of suit herein incurred; and

9. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

[*Verification, if desired. See§ 565.230.*]

[2] Use of Form

This form of complaint is for use by a plaintiff to bring an action based on misappropriation of a trade secret. The First Count is based on the UTSA, which governs misappropriations occurring after January 1, 1985, and seeks both damages and injunctive relief [*see Civ. Code §§ 3426.3* (remedies), *3426.10* (effective date of UTSA)]. The Second Count is based on common law, which governs misappropriations occurring prior to January 1, 1985, and seeks only damages (injunctive relief was available under the common law; however, any injunctive relief is now governed by UTSA) [*see Diodes, Inc. v. Franzen (1968) 260 Cal. App. 2d 244, 250-251, 67 Cal. Rptr. 19* ; Restatement of Torts § 757]. Because a misappropriation may have begun prior to January 1, 1985, and continued after that date, situations may arise in which both counts may be used for the same act of misappropriation [*see Civ. Code § 3426.10*].

[3] Allegations

[a] First Count

The First Count of the complaint alleges:

- The existence and possession by plaintiff of a trade secret (Paragraph 7) [for first count *see Civ. Code § 3426.1(d)*, for second count *see* Restatement of Torts § 757, cmt. b]

- The economic value of the trade secret and the measures taken by plaintiff to insure its secrecy (Paragraph 8) [*see Civ. Code § 3426.1(d)*]

- The nature of defendant's wrongful act (Paragraph 9) [*see Civ. Code § 3426.1(b)*].

It includes alternate allegations for the measure of damages (Paragraphs 10) [*see Civ. Code § 3426.3(a),(b)*].

The form also includes optional paragraphs alleging the breach of a defendant corporate director's fiduciary duty (Paragraphs 2 and 4) [*see* Ch. 167, *Corporations: Directors and Management*], the agency relationship of defendants (Paragraph 6) [*see* Ch. 427, *Principal and Agent*], facts showing that punitive damages are appropriate (Paragraph 11) [*see Civ. Code § 3426.3(c)*], facts to support preliminary injunctive relief (Paragraph 12) [*see Code Civ. Proc. § 526*; *E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1]* , and any additional facts necessary to support permanent injunctive relief (Paragraph 13) [*see Civ. Code § 3422*; *see* Ch. 303, *Injunctions*].

[b] Second Count

The Second Count of the complaint incorporates by reference Paragraphs 1-13 of the First Count (Paragraph 14). It then alleges the nature of defendant's wrongful act (Paragraph 15) [*see* Restatement of Torts § 757], and damages proximately caused by defendant's misappropriation (Paragraph 16) [*see Klamath-Orleans Lumber, Inc. v. Miller (1978) 87 Cal. App. 3d 458, 466, 151 Cal. Rptr. 118]* . It also includes an optional paragraph alleging a factual basis for an award of punitive damages (Paragraph 17) [*see Civ. Code § 3294*].

[4] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*]) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a proceduralchecklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

Otherwise, verification is not required. but verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b)*, 467]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[5] Pleading

In a trade secret action the facts pleaded must show the existence of subject matter which is capable of protection as a trade secret and disclosure of the secret under circumstances giving rise to a contractual or other legally imposed obligation not to use or disclose the secret to the detriment of the discloser [*Cal Francisco Inv. Corp. v. Vrionis (1971)*

14 Cal. App. 3d 318, 321-322, 92 Cal. Rptr. 201] . A complaint which fails to allege that the information claimed to be a trade secret was, in fact a secret and unknown by others, may be dismissed [*American Alloy Steel Corp. v. Ross (1957) 149 Cal. App. 2d 215, 219-220, 308 P.2d 494]* . If the defendant is an employee or former employee of the plaintiff the facts alleged must also show that the public policy in favor of protection of the complainant's interest in maintaining the secret outweighs the interest of the employee in using his or her knowledge to support himself or herself in other employment [*Cal Francisco Inv. Corp. v. Vrionis (1971) 14 Cal. App. 3d 318, 321-322, 92 Cal. Rptr. 201* ; *see § 565.105[1]*].

In order to avoid the destruction of the very thing for which protection is sought, the details of the trade secret need not be spelled out to avoid a demurrer to a complaint. However, the ultimate facts showing the existence of a trade secret or other confidential data must be alleged to state a cause of action. The complaint should describe the subject matter of the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special knowledge of those skilled in the trade, and to permit the defendant to ascertain at least the boundaries within which the secret lies. If the subject matter of the claimed trade secret is a manufacturing process, the plaintiff must identify the end product manufactured, and supply sufficient data concerning the process, without revealing the details of it, to provide reasonable notice of the issues and reasonable guidance in ascertaining the scope of appropriate discovery [*Diodes, Inc. v. Franzen (1968) 260 Cal. App. 2d 244, 252-253, 67 Cal. Rptr. 19]* . For discussion of privileges specific to trade secrets, see*§ 565.107*.

[6] Former Employee as Defendant

When the plaintiff is alleging that a former employee misappropriated trade secrets acquired through employment with the plaintiff and then implemented those secrets for a new employer, the plaintiff may name both the former employee and the new employer as defendants in the same action [*see, e.g.,* *King v. Pacific Vitamin Corp. (1967) 256 Cal. App. 2d 841, 843, 64 Cal. Rptr. 486]* .

[7] Director of Corporate Plaintiff as Defendant

Optional Paragraphs 2 and 4 may be included when the plaintiff is a corporation bringing an action against a director or former director. *Corp. Code § 309* requires that corporate director actions be actions which the director believes in good faith are in the best interests of the corporation. When the plaintiff is a corporation bringing an action for misappropriation of trade secrets against a director or former director, counsel should be cognizant of the time limitations imposed by *Code Civ. Proc. § 359. Code Civ. Proc. § 359* provides that an action must be brought within three years after discovery or the liability was created. Thus, both *Code Civ. Proc. § 359* and *Civ. Code § 3426.6* indicate that a misappropriation action under the UTSA must be brought within three years. However, in a similar action brought under the common law, the two year limitation period of *Code Civ. Proc. § 339(1)* rather than *Code Civ. Proc. § 359* appears to control [*see* *Southern Counties Thrift Co. v. Rairdon (1941) 47 Cal. App. 2d 770, 771-772, 118 P.2d 828* ; for discussion and forms pertaining to corporate directors and additional causes of action against them for breach of duty which may be joined with this action, *see* Ch. 167, *Corporations: Directors and Management* ; for discussion and forms concerning the limitation of actions generally, *see* Ch. 345, *Limitations of Actions*].

[8] Injunction Broadly Written

When the subject matter of the injunction is a matter within the peculiar knowledge of the defendant, and the spelling out of the nature of the trade secret involved would, in and of itself, destroy the existence of that very secret, the injunction restraining misappropriation of a trade secret may be more broadly worded than usual [*Ungar Elec. Tools, Inc. v. Sid Ungar Co., Inc. (1961) 192 Cal. App. 2d 398, 404, 13 Cal. Rptr. 268]* .

[9] Cross References

For a related form, *see § 565.230*

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49-565 California Forms of Pleading and Practice--Annotated § 565.271

§ 565.271 Allegations--Misappropriation of Trade Secret by Former Employee--Manufacturing Process

[1] FORM Allegations--Misappropriation of Trade Secret by Former Employee--Manufacturing Process

1. Plaintiff was in possession of a trade secret that consisted of a unique manufacturing process_____ [*identify trade secret meeting definition of either Civ. Code § 3426.1(d) or Restatement of Torts § 757, cmt. b, or both, e.g.*, for casting metal electrical energy conductors within epoxy resin].

2. Plaintiff's_____ [*specify trade secret*] had economic value in that_____ [*specify its economic value, either actual or potential, e.g.*, its use resulted in the casting of metal electrical energy conductors in a commercially feasible manner]. Plaintiff made reasonable efforts to insure that the secret manufacturing process remained a secret by_____ [*specify measures used by plaintiff to maintain secrecy, e.g.*, disclosing the casting process only to persons directly involved in the casting itself].

3. Defendant was employed by plaintiff as_____ [*specify defendant's position with plaintiff, e.g.*, supervisor of the casting division] and while employed in that capacity was informed of the above-described trade secret_____ [*specify reason for disclosure to defendant, e.g.*, in order that he might perform his job effectively].

4. On or about_____ [*date*], defendant[s, and each of them,] misappropriated the above-described trade secret of plaintiff by_____ [*specify the act of misappropriation, e.g.*, leaving the employment of plaintiff in which he had gained knowledge of the manufacturing process, forming his own corporation, and commencing production of conductors using the manufacturing process which had been developed and maintained by plaintiff as a trade secret].

[2] Use of Form

These allegations are for use by a plaintiff in a complaint for misappropriation of a trade secret against a former employee when the trade secret is in the form of a manufacturing process [*see § 565.105[1]*]. When using these allegations, Paragraphs 1 through 3 should replace Paragraphs 7 and 8 in the First Count, which are incorporated in the

Second Count by Paragraph 14, and Paragraph 4 should replace Paragraph 9 in the First Count and Paragraph 15 in the Second Count of § 565.270.

With appropriate modifications these allegations may be used when the defendant was never an employee of the plaintiff, but obtained the trade secret under different circumstances of confidentiality imposing the duty to not disclose or use the information [*see Civ. Code § 3426.1(b)(2)(B)*; Restatement of Torts § 757(b), (c); for discussion of other circumstances imposing a duty of nondisclosure, *see § 565.105[2]*]. These allegations use a manufacturing process as an example of a trade secret, but may be modified to be used when the trade secret is in another form, such as a formula, pattern, compilation, device, program, method, or technique [*see Civ. Code § 3426.1(d)*; Restatement of Torts § 757, cmt. b].

These allegations are adapted from the fact situation in *Components for Research, Inc. v. Isolation Prods., Inc. (1966) 241 Cal. App. 2d 726, 50 Cal. Rptr. 829* .

[3] Cross References

For a related form, *see § 565.270*

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49-565 California Forms of Pleading and Practice--Annotated § 565.272

§ 565.272 Allegations--Misappropriation of Trade Secret--Customer List

[1] FORM Allegations--Misappropriation of Trade Secret--Customer List

1. Plaintiff was in possession of a customer list_____ [*identify customer list as trade secret, e.g.,* of nationwide purchasers of its load binders. The list was the result of a substantial amount of time, energy, and money on the part of plaintiff and included special financial arrangements made based on the credit status of each customer].

2. Plaintiff's customer list had economic value in that_____ [*specify its economic value through its confidential nature, e.g.,* it contained information not generally known within the trade and represented many years of research and client communications]. Plaintiff made reasonable efforts to insure that the customer list remained a secret by_____ [*specify measures used by plaintiff to maintain secrecy, e.g.,* disclosing the list only to those employees who needed the information to perform their jobs].

3. Plaintiff's customer list was a trade secret which merited legal protection from defendant's misappropriation in that_____ [*set forth as many of the following additional factors as are present* : (1) defendant solicited the customers of plaintiff with intent to injure plaintiff; (2) plaintiff is informed and believes and thereon alleges that defendant sought out certain preferred customers whose trade is particularly profitable and whose identities are not generally known to the trade; (3) in the_____ (*specify nature of business, e.g.,* load binding business) a customer ordinarily patronizes only one concern; (4) established business relationships between customers and the plaintiff normally continue unless interfered with].

4. On or about_____ [*date*], defendant[s, and each of them,] misappropriated the above-described customer list of plaintiff by_____ [*specify the act of misappropriation, e.g.,* copying plaintiff's customer list, leaving the employment of plaintiff, establishing a company engaging in the same type of business, and soliciting business primarily from those customers on the list].

[2] Use of Form

These allegations are for use by a plaintiff in a complaint for misappropriation of a trade secret when the trade secret is

in the form of a customer list. When using these allegations, Paragraphs 1 through 3 should replace Paragraphs 7 and 8 in the First Count, which are incorporated in the Second Count by Paragraph 14, and Paragraph 4 should replace Paragraph 9 in the First Count and Paragraph 15 in the Second Count of § 565.270.

These allegations are adapted from the fact situation in *Klamath-Orleans Lumber, Inc. v. Miller (1978) 87 Cal. App. 3d 458, 151 Cal. Rptr. 118* .

[3] Factors Considered in Determining Whether Customer List Is Trade Secret

The courts consider five factors in awarding relief: the four factors articulated in Paragraph 3 and the confidentiality factor of Paragraph 2 [*Klamath-Orleans Lumber, Inc. v. Miller (1978) 87 Cal. App. 3d 458, 463-464, 151 Cal. Rptr. 118* ; *see § 565.192[3]*]. Although in most cases meriting protection of information as a trade secret, all five factors will be present, a plaintiff is not required to prove all five to prevail, and the confidential nature of the list is seen as the most important [*Hollingsworth Solderless Terminal Co. v. Turley (9th Cir. 1980) 622 F.2d 1324, 1329-1331* ; *American Credit Indem. Co. v. Sacks (1989) 213 Cal. App. 3d 622, 630, 262 Cal. Rptr. 92* (distinguishing cases involving use of lists before January 1, 1985; since that date, only two elements of *Civ. Code § 3426.2(d)* as necessary for customer list to be trade secret); *see* *Greenly v. Cooper (1978) 77 Cal. App. 3d 382, 391 n.2, 143 Cal. Rptr. 514* (noting possibility that five factors may have been inadvertently interpreted conjunctively rather than disjunctively)].

[4] Misappropriation

Once an employer proves a customer list is entitled to trade secret protection, it must then prove that the former employee misappropriated the information to attain an unfair competitive advantage. Under the Uniform Trade Secret Act (*Civ. Code § 3426 et seq.*), the term "misappropriation" is defined to include the nonconsensual disclosure or use of a trade secret [*Civ. Code § 3426.1(b)(2)*]. Acts of solicitation may constitute use or misappropriation of protected information [*Morlife, Inc. v. Perry (1997) 56 Cal. App. 4th 1514, 1520-1521, 66 Cal. Rptr. 2d 731* (commercial roof repair business's former employees' use of customer list to solicit customers for their new commercial roof repair business constituted misappropriation)].

[5] Decisions

[a] Customer List as Trade Secret

Factual considerations helpful in determining whether customer list warrants protection as trade secret as including whether there was competition with other businesses for customer's patronage; whether customer's name appears in extensive listings in public directories along with names of many other businesses which are not even potential customers and whether reasonably diligent salesperson could perceive narrowing classification to reduce costs of identifying potential customers; percentage of businesses serviced by plaintiff which salesperson contacted for new employer; whether customer identities and locations are numerous and scattered and require substantial amount of time, effort, and expense to obtain; whether customer's decision to purchase is influenced primarily by considerations such asprice, quality, reliable delivery, and efficient service, or by considerations such as special needs or susceptibilities; and whether former employer and customer had stable and continuous relationship. *Hollingsworth Solderless Terminal Co. v. Turley (9th Cir. 1980) 622 F.2d 1324, 1333-1334*

To be trade secret, customer list must (1) derive independent economic value, actual or potential, from not being generally known to public or to other persons who can obtain economic value from its disclosure; and (2) be subject of efforts that are reasonable under circumstances to maintain its secrecy. *Courtesy Temp. Serv., Inc. v. Camacho (1990) 222 Cal. App. 3d 1278, 1287-1291, 272 Cal. Rptr. 352* ; *American Credit Indem. Co. v. Sacks (1989) 213 Cal. App. 3d 622, 630, 262 Cal. Rptr. 92* (construing *Civ. Code § 3426.2(d)*)

Second prong of *Civ. Code § 3426.2(d)* test as satisfied if employer requires employees to sign confidentiality agreement respecting its client list and related client information. *American Credit Indem. Co. v. Sacks (1989) 213 Cal. App. 3d 622, 631, 262 Cal. Rptr. 92*

Second prong of *Civ. Code § 3426.2(d)* test as satisfied when product is unique and product resistance has to be overcome before anyone will purchase it. *American Credit Indem. Co. v. Sacks (1989) 213 Cal. App. 3d 622, 630-631, 638, 262 Cal. Rptr. 92* (credit insurance purchased by seller covering defaults of its receivables; resistance indicated by fact that only 6.5 percent of potential market purchases product)

Former employee of consulting firm who was also attorney as entitled to render legal services to firm's clients, which firm was not licensed to do; attorney as entitled to use firm's customer list to inform legal clients of change of employment and whether or not representation would continue. *Matull & Assocs. v. Cloutier (1987) 194 Cal. App. 3d 1049, 1055-1056, 240 Cal. Rptr. 211* (involving noncompetition clause in buy-sell agreement)

Former employee as not allowed to use trade secrets to announce change of employment to former employer's clients; names of clients personally serviced by former employee as not trade secret; antisolicitation covenants as unlawful business restraint except when enforcement is necessary to protect trade secrets. *Moss, Adams & Co. v. Shilling (1986) 179 Cal. App. 3d 124, 130, 224 Cal. Rptr. 456* (applying pre-UTSA announcement rule)

[b] Intent to Injure Plaintiff

Failing to illustrate exclusivity in business relationship between plaintiff and customers or that customers' names were not commonly known in trade, combined with failure to contend that defendant was only competitor or that plaintiff would have made sale had defendant not done so as fatal to plaintiff's case. *Continental Car-Na-Var Corp. v. Moseley (1944) 24 Cal. 2d 104, 108-109, 111-113, 148 P.2d 9*

Threat to quit employment followed by deliberate acts of leaving employment, using information acquired through employment, and working for competitor as example of intent to injure. *Gloria Ice Cream & Milk Co. v. Cowan (1935) 2 Cal. 2d 460, 464-465, 41 P.2d 340*

Intention to take away some business when action is in good faith and without malice as insufficient to show deliberate intent to injure. *King v. Pacific Vitamin Corp. (1967) 256 Cal. App. 2d 841, 850, 64 Cal. Rptr. 486*

Intent to injure as reasonably inferred from defendant's admissions of deliberately soliciting only plaintiff's customers at time most disadvantageous to plaintiff and from evidence concerning defendant's methods of obtaining subscribers. *Reid v. Mass Co., Inc. (1957) 155 Cal. App. 2d 293, 303, 318 P.2d 54*

[c] Damages

Damages for misappropriation of customer list trade secret as able to be shown by loss of profits on sales actually diverted from plaintiff's business. *Klamath-Orleans Lumber, Inc. v. Miller (1978) 87 Cal. App. 3d 458, 466, 151 Cal. Rptr. 118*

[6] Cross References

For a related form, *see § 565.270*

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49-565 California Forms of Pleading and Practice--Annotated § 565.273

§ 565.273 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--No Trade Secret--Information Disclosed by Product

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--No Trade Secret--Information Disclosed by Product

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE_____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that any information concerning_____ (*specify the nature of the alleged trade secret, e.g.,* the design features of the specified valve) was not a trade secret in that the essence of the alleged secret was completely disclosed by_____ (*specify the manufactured product which discloses the alleged secret information, e.g.,* the manufactured valve itself).

[2] Use of Form

This form of affirmative defense is for use by a defendant in an answer to a complaint for trade secret misappropriation when the alleged secret information was completely disclosed by the product marketed. Although a trade secret need not be of a specific character, it must be kept secret by the owner and not disclosed by the product [*Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279, 289, 23 Cal. Rptr. 198* ; Restatement of Tort § 757, cmt. b; for discussion of the concept of reverse engineering, *see § 565.104[3]*]. This affirmative defense is adapted from the fact situation in *Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279, 23 Cal. Rptr. 198* .

If more than one affirmative defense is set forth in the answer, each defense must be separately stated [*Code Civ. Proc. § 431.30(g)*] and numbered [*Cal. Rules of Ct., Rules 2.112(1)*]. If the complaint sets forth more than one cause of action, the affirmative defense must refer to the cause of action it is intended to answer [*Code Civ. Proc. § 431.30(g)*].

[3] Cross References

For discussion and forms showing the format of answers generally, see Ch. 28, *Answers*

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49-565 California Forms of Pleading and Practice--Annotated § 565.274

§ 565.274 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action Barred by Statute of Limitation [Civ. Code § 3426.6; Code Civ. Proc. § 339(1)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)]--Action Barred by Statute of Limitation [Civ. Code § 3426.6; Code Civ. Proc. § 339(1)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE_____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that the cause of action set forth in the complaint is barred by the_____ [two *or* three] year provision of_____ *[Section 339(1) of the Code of Civil Procedure or Section 3426.6 of the Civil Code*].

[2] Use of Form

This form of affirmative defense is for use by a defendant in an answer to a complaint for trade secret misappropriation when the statute of limitation has run on the misappropriation. When it appears on the face of the complaint that the statute has run, the objection may be raised by demurrer [*Code Civ. Proc. § 430.30*]. The form has alternatives which reflect the different statutes depending on the type of action brought. The time for bringing an action for misappropriation of a trade secret in an action under the UTSA is three years [*Civ. Code § 3426.6*; for further discussion, *see § 565.103[5]*]. The time for bringing an action for misappropriation of a trade secret in a common law action appears to be two years [*Code Civ. Proc. § 339(1)*; *see Davies v. Krasna (1975) 14 Cal. 3d 502, 508, 121 Cal. Rptr. 705, 535 P.2d 1161* (apparent breach of confidence case); *see also §§ 565.104[1], 565.104[4][c]*].

[3] Cross References

See generally Ch. 375, *Motions to Strike: Pleadings*

For discussion of statutes of limitations generally, see Ch. 345, *Limitation of Actions*

For a related form, see*§ 565.270*

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49-565 California Forms of Pleading and Practice--Annotated §§ 565.275-565.289

[Reserved]

§§ 565.275[Reserved]

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D. Interference With Economic Relations

49-565 California Forms of Pleading and Practice--Annotated § 565.290

§ 565.290 Interference With Economic Relations--Complaint for Damages [Civ. Code §§ 3294, 3333] and for Temporary [Code Civ. Proc. §§ 525-527] and Permanent [Civ. Code §§ 3420-3422] Injunctive Relief for Intentional Interference With Contract or Other Economic Relationship

[1] FORM Interference With Economic Relations--Complaint for Damages [Civ. Code §§ 3294, 3333] and for Temporary [Code Civ. Proc. §§ 525-527] and Permanent [Civ. Code §§ 3420-3422] Injunctive Relief for Intentional Interference With Contract or Other Economic Relationship

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*],	)	COMPLAINT FOR DAMAGES AND INJUNC-
[and DOES 1 through_____,]	)	TION
Defendant(s).	)	(Intentional Interference With Economic Relation-
	)	ship)
	)	

_____

Plaintiff alleges:

[1. *Identity and capacity of plaintiff. See§ 565.230, Paragraph 1.*]

[2. *Identity and capacity of defendant. See§ 565.230, Paragraph 2.*]

[3. *Fictitious name allegation. See§ 565.230, Paragraph 3.*]

[*EITHER*]

4. On or about_____ [*date*], plaintiff and_____ (*name of third party*)_____ [*allege facts showing existence of valid contract between plaintiff and third party, e.g.,* entered into a written agreement whereby_____ (*name of third party*) agreed to use plaintiff's janitorial service in the operation of_____'s (*name*) business, and plaintiff agreed to provide such service on an exclusive basis, from_____ [*date*], to_____ [*date*], with terms of payment as follows:_____ (*specify*). A copy of this agreement, marked Exhibit "A," is attached and incorporated herein by reference].

[*OR*]

4._____ [*Allege facts showing existence of noncontractual economic relationship between plaintiff and third party that contains probable future economic benefits to plaintiff, e.g.,* Between_____ [*date*] and_____ [*date*], plaintiff customarily provided janitorial service to_____ (*name of third party*) pursuant to contracts that expired annually on_____. On or about_____ [*date*], plaintiff and_____ (*name of third party*) began discussions to renew the contract due to expireon_____ [*date*]. At that time plaintiff and_____ (*name of third party*) agreed informally to renew the contract for one year with terms of payment as follows:_____ (*specify*)].

[*CONTINUE*]

5. Defendant_____ (*name*) knew of the above described_____ (contract *or* relationship) existing between plaintiff and_____ (*name of third party*), in that_____ [*allege facts showing that defendant(s) knew of the existence of the economic relationship described above, e.g.,* defendant was formerly employed by plaintiff, from_____ [*date*] to_____ [*date*], and during his/her employment had supervised_____'s (*name of third party*) account].

6._____ [*Allege facts showing intentional acts by defendant(s) designed to disrupt the above described economic relationship, e.g.,* On or about_____ [*date*], defendant met with_____ (*name of third party*). At this meeting defendant falsely represented that plaintiff was insolvent, unreliable, and no longer capable of providing quality janitorial service, all with the intent to harm plaintiff financially and to induce_____ (*name of third part* y) to_____ (breach his/her contract *or* sever his/her business relationship) with plaintiff].

[*ADD, if complaint is for interference with prospective relations*]

7._____ [*Allege facts showing that interference was wrongful by some legal measure other than the interference itself, e.g.,* Defendant's false representation as alleged in Paragraph 6, above, constituted an unfair trade practice in violation of *Business and Professions Code Section 17200*.]

8._____ [*Allege facts showing disruption of the above described economic relationship, e.g.,* On_____ [*date*],_____ (*name of third party*)_____ (cancelled the described contract *or* broke off the contract negotiations) with plaintiff as a result of defendant's conduct].

9._____ [*Allege facts showing that the acts of defendant(s) were a proximate cause of actual damages*

suffered by plaintiff, e.g., As a proximate result of defendant's conduct and the_____ (breach of contract *or* severance of contract negotiations) by_____ (*name of third party*), plaintiff has suffered damages].

[10. The aforementioned acts of defendant[s, and each of them,] were willful and_____ (*specify, e.g.,* oppressive *or* fraudulent *or* malicious). Plaintiff is therefore entitled to punitive damages.]

11. Defendant(s) threaten(s) to [and unless restrained, will]_____ [*specify continuing threat of interference, e.g.,* disrupt other_____ (contracts *or* business relationships) between plaintiff and_____ (*name*(*s*)), whose accounts defendant also supervised during the period of his/her employment with plaintiff], to plaintiff's great and irreparable injury, for which damages would not afford adequate relief, in that_____ [*specify, e.g*, they would not completely compensate for the injury to plaintiff's business reputation and goodwill].

WHEREFORE, plaintiff prays for judgment against defendant(s) as follows:

1. For damages.

[2. For exemplary and punitive damages.]

3. For an order requiring defendant[s, and each of them,] to show cause, if any they have, why they should not be enjoined as set forth below, during the pendency of this action;

4. For a temprorary restraining order, a preliminary injunction, and a permanent injunction, all enjoining defendant(s) from_____ [*specify, e.g.,* making any false misrepresentations to or otherwise harassing_____ (*name*(*s*)) concerning his/her/their_____ (contract(s) *or* business relationship(s)) with plaintiff].

5. For his/her costs incurred; and

6. For any other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

[*Verification, if desired. See§ 565.230.*]

[2] Use of Form

This form of complaint is for use by a plaintiff to state a cause of action for damages and injunctive relief based on intentional interference with a contract or other advantageous economic relationship. For discussion of damages and injunctive relief in an action for interference, see*§ 565.136*. For a form of judgment awarding damages and injunctive relief in an action for interference, see*§ 565.294*.

For discussion of effect of the availability of a cause of action based on a third party's breach of contract, see*§ 565.136[2]*. For discussion concerning an alternate or separate cause of action for conspiracy to interfere with economic relations, see*§ 565.134*.

[3] Allegations

This complaint consists of a cause of action for damages and injunctive relief [*Civ. Code §§ 3294, 3333, 3422*; *Code Civ. Proc. §§ 526, 527*]. It alleges:

- The existence a valid contract or other economic relationship containing a probability of future economic benefits accruing to the plaintiff (Paragraph 4).

- Defendant's knowledge of the relationship (Paragraph 5).

- Defendant's intentional acts designed to disrupt the relationship (Paragraph 6) [*see Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1153, 131 Cal. Rptr. 2d 29, 63 P.3d 937* (in action for intentional interference with prospective economic advantage, plaintiff need not allege defendant's specific intent to interfere, and knowledge of certainty or substantial certainty of interference will suffice); *but see Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 57, 77 Cal. Rptr. 2d 709, 960 P.2d 513* (in pleading defendant's intent, general allegations of deliberate, willful, and intentional interference with contractual relations were sufficient to withstand demurrer; proof of defendant's intent was matter for trial)].

- The unlawfulness of the conduct by some measure other than the fact of interference itself, for use in an action for interference with prospective contractual or economic relations (Paragraph 7) [*Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 393, 45 Cal. Rptr. 2d 436, 902 P.2d 740]* .

- Actual disruption of the relationship (Paragraph 8); damages proximately caused by defendant's disruption of the relationship (Paragraph 9) [*Blank v. Kirwan (1985) 39 Cal. 3d 311, 330, 216 Cal. Rptr. 718, 703 P.2d 58* ; *see also §§ 565.133, 565.213[3]*].

- A basis for preliminary and permanent injunctive relief to enjoin defendant's continuing interference (Paragraph 11) [*Civ. Code § 3422*; *Code Civ. Proc. § 526(a)(2),(4)*; *see generally* Ch. 303, *Injunctions*].

An optional paragraph alleges a basis for punitive damages (Paragraph 10) [*Civ. Code § 3294(a)*; *see generally* Ch. 174, *Damages*].

[4] Jurisdiction

An action seeking permanent injunctive relief is in the jurisdiction of the superior court and is not a limited civil case [*see Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(2)*]. However, in a limited civil case, the court may issue temporary restraining orders and preliminary injunctions [*see Code Civ. Proc. §§ 85, 86(a)(8)*].

An action for damages is in the jurisdiction of the superior court [*see Cal. Const. art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*]. In limited civil cases (amount in controversy, exclusive of interest, is $25,000 or less) the caption must state whether the demand exceeds or does not exceed $10,000. The caption must also identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613(b)*; *Cal. Rules of Ct., Rule 2.111(9),(10)*].

[5] Venue

An action for interference with economic relations is based on nonphysical injury to intangible interests and is transitory in nature. Thus, theproper county for trial is that in which the defendants or some of them reside at the commencement of the action [*Code Civ. Proc. § 395(a)*; *Johnson v. Superior Court (1965) 232 Cal. App. 2d 212, 218-220, 42 Cal. Rptr. 645* (interference with operation of business)]. If a defendant is a corporation or association, the county in which its principal place of business is located is also a proper county for trial (Paragraph 2) [*Code Civ. Proc. §§ 395.2, 395.5*].

[6] Verification

Verification [*Code Civ. Proc. § 446*] is required if plaintiff seeks a temporary restraining order or a preliminary injunction on a complaint instead of on affidavit (or declaration under *Code Civ. Proc. § 2015.5*]) [*see Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary in order to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

Otherwise, verification is not required, but verification will require any answer to be verified also, if the action is in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial except in a limited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[7] Cross References

For discussion and forms of complaint alleging a civil cause of action for conspiracy to interfere with business or contractual relationships, see Ch. 126, *Conspiracy*

For a related form, *see § 565.230*

[8] California Torts

For full discussion of the torts of interference with business or contractual relationships, see Levy, Golden, and Sacks, *California Torts, Ch. 40, §§ 40.100 -40.135*

[9] State Statutes

Punitive and compensatory monetary relief in tort action. *Civ. Code §§ 3294(a), 3333*

Injunctive relief. *Civ. Code § 3422*; *Code Civ. Proc. §§ 526, 527*

[10] Decisions

Pecuniary or economic benefit to defendant is not element of tort of intereference with contractual relationship. *McCalden v. California Library Ass'n (9th Cir. 1990) 955 F.2d 1214, 1220*

In action for intentional interference with prospective economic advantage, plaintiff need not allege defendant's specific intent to interfere, and knowledge of certainty or substantial certainty of interference will suffice; in pleading conduct

was wrongful, plaintiff must plead that conduct was unlawful by some independent legal standard. *Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1153, 1159, 131 Cal. Rptr. 2d 29, 63 P.3d 937*

Plaintiff in intentional interference with existing contractual relations action is not required to plead "wrongfulness" independent of the inducement to breach the contract; in pleading defendant's intent, general allegations of deliberate, willful, and intentional interference with contractual relations were sufficient to withstand demurrer; proof of defendant's intent was matter for trial. *Quelimane Co. v. Stewart Title Guar. Co. (1998) 19 Cal. 4th 26, 55-57, 77 Cal. Rptr. 2d 709, 960 P.2d 513*

Interference with prospective relations cause of action required to be based on conduct wrongful by some legal measure other than fact of interference itself; distinctions between actions for interference with contract and interference with prospective relations. *Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 387-393, 45 Cal. Rptr. 2d 436, 902 P.2d 740*

General or conclusionary pleading of elements of intentional interference is insufficient; complaint must allege factual basis for assertion that defendant interfered with plaintiff's business relations with improper malicious purpose to destroy plaintiff's business. *Khoury v. Maly's of Cal., Inc. (1993) 14 Cal. App. 4th 612, 618, 17 Cal. Rptr. 2d 708*

Matters that must be pleaded and proved in action for interference with an advantageous contractual relationship or with prospective economic advantage. *Northridge Hospital Foundation v. Pic'N' Save No. 9, Inc. (1986) 187 Cal. App. 3d 1088, 1102-1103, 232 Cal. Rptr. 329*

Elements of cause of action for intentional interference with economic relations. *Blank v. Kirwan (1985) 39 Cal. 3d 311, 330, 216 Cal. Rptr. 718, 703 P.2d 58*

[11] Text References

Attorney's Guide to the Law of Competitive Business Practices (Cal. C.E.B. 1981), Ch. 9, *Business-Related Torts*, §§ 9.2-9.18

Witkin, California Procedure, vol. 1, *Attorneys*, § 245, vol. 3, *Actions*, §§ 574-576, Vol. 5, *Pleading*, §§ 727-732, 778-783, Vol. 6, *Provisional Remedies*, § 312 (4th ed. 1996-1997)

Witkin, Summary of California Law, vol. 2, *Insurance*, §§ 247, 248; vol. 5, *Torts*, §§ 731-754, 756-763, 765-766; vol. 6 *Torts*, § 1709 (10th ed. 2005)

[12] Cross References

For a related form, *see § 565.230*

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PART IV. FORMS
D. Interference With Economic Relations

49-565 California Forms of Pleading and Practice--Annotated § 565.291

§ 565.291 Interference With Economic Relations--Complaint for Damages [Civ. Code § 3333] for Negligent Interference With Contract or Other Economic Relationship

[1] FORM Interference With Economic Relations--Complaint for Damages [Civ. Code § 3333] for Negligent Interference With Contract or Other Economic Relationship

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES 1	)	(Negligent Interference With Economic Relation-
through_____,]	)	ship)
Defendant(s).	)	[Amount demanded_____ (exceeds
	)	*or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Identity and capacity of plaintiff. See§ 565.230, Paragraph 1.*]

[2. *Identity and capacity of defendant. See§ 565.230, Paragraph 2.*]

[3. Defendants DOES 1 through_____, inclusive, are sued herein under ficititious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintiff will amend this complaint by inserting their true names and capacities herein. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is negligently responsible in some manner for the occurrences herein alleged,

and thereby proximately caused injuries and damages to the plaintiff as herein alleged.]

4._____ [*Allege facts showing plaintiff's contractual or advantageous economic relationship, e.g.,* On or about_____ [*date*], plaintiff entered into a written contract with_____ (*name*) whereby plaintiff undertook to construct an office building located in_____ (*city*),_____ County, California. Pursuant to the terms of this contract, plaintiff was obligated to pay liquidated damages in the sum $_____ for any significant delay in completing the building. A copy of this contract, marked Exhibit "A," is attached and incorporated by reference herein].

5._____ [*Allege facts showing contract, relationship, activity, or other transaction under which defendant's performance was intended to affect plaintiff's relationship, e.g.,* On or about_____ [*date*], defendant_____ (*name*) entered into a written contract with_____ (*name*), who was one of plaintiff's subcontractors on the above described building project, whereby defendant agreed to furnish necessary building materials].

6._____ [*Allege facts showing foreseeability of risk of harm to plaintiff's economic relationship if defendant did not perform his/her transaction with ordinary care, e.g.,* Defendant was informed, when he/she entered the above described contract with plaintiff's subcontractor, that his/her failure to furnish supplies in a timely fashion could subject plaintiff to liability under the general building contract].

7._____ [*Allege negligent acts by defendant(s), e.g.,* Defendant nevertheless negligently failed to furnish supplies in a timely fashion, in that_____ (*specify, e.g.,* he/she failed to take ordinary precautions in advance to insure that necessary materials would be shipped and delivered on time].

8._____ [*Allege actual damages proximately caused by the defendant's negligent acts, e.g.,* As a result of defendant's negligence, plaintiff's subcontractor was unable to obtain necessary materials in time to complete his/her part of the building project on time, and, as a proximate result of this delay, plaintiff was compelled to pay liquidated damages under his/her general contract in the sum of $_____].

WHEREFORE, plaintiff prays for judgment against defendant(s) as follows:

1. For damages in the amount of $_____.

2. For his/her costs incurred; and

3. For any other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By:_____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff_____ [*name*]

[*Verification, if desired. See§ 565.230.*]

[2] Use of Form

This form of complaint is for use by a plaintiff to state a cause of action for damages based on negligent interference with a contract or other advantageous economic relationship. This form may be modified to state an additional cause of action for injunctive relief in an appropriate case [*see § 565.290*].

[3] Allegations

This complaint consists of a cause of action for damages [*Civ. Code § 3333*]. It alleges [*see United States Liab. Ins. Co. v. Haidinger-Hayes, Inc. (1970) 1 Cal. 3d 586, 594, 83 Cal. Rptr. 418, 463 P.2d 770* (general elements of actionable negligence); *see also Hoyem v. Manhattan Beach City Sch. Dist. (1978) 22 Cal. 3d 508, 513-514, 150 Cal. Rptr. 1, 585 P.2d 851]* :

- A legal duty to use due care owed by the defendant to the plaintiff (Paragraphs 4-6, 8);
- The defendant's breach of that duty (Paragraph 7); and
- The breach as proximate cause of resulting injury and damages (Paragraph 8).

The allegations showing a duty of care are based on the criteria that are to be considered in determining the existence of such a duty in any action for negligent interference [*see J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 804-805, 157 Cal. Rptr. 407, 598 P.2d 60* ; *Chameleon Eng'g Corp. v. Air Dynamics Inc. (1980) 101 Cal. App. 3d 418, 420-423, 161 Cal. Rptr. 463* ; *see also § 565.135[3]*]:

- The defendant entered into or engaged in a contract, relationship, activity, or other "transaction" that was intended or known to affect an economic relationship of plaintiff (Paragraph 4);
- There was a foreseeable risk of harm to plaintiff's economic relationship if defendant failed to use ordinary care in performing the transaction (Paragraph 5);
- There was a close connection between the defendant's negligence and the plaintiff's injury (Paragraph 8)
- The plaintiff's injury resulted in certain damages (Paragraphs 4, 8); and
- The defendant's conduct was blameworthy (Paragraphs 5-8).

A final criterion, the public policy of preventing future harm, appears to be a matter of judicial notice of the policy applicable to the particular facts [*see J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 804-805, 157 Cal. Rptr. 407, 598 P.2d 60* ; *Chameleon Eng'g Corp. v. Air Dynamics Inc. (1980) 101 Cal. App. 3d 418, 420-423, 161 Cal. Rptr. 463* ; *see also § 565.135[3]*].

[4] State Statutes

Compensatory monetary relief in tort action. *Civ. Code § 3333*

[5] Decisions

Cause of action for negligent interference with economic relations is stated if plaintiff suffers damages from injury to economic relationship due to defendant's negligent performance of contract with third party and such injury is foreseeable. *J'Aire Corp. v. Gregory (1979) 24 Cal. 3d 799, 808, 157 Cal. Rptr. 407, 598 P.2d 60* ; *Chameleon*

Eng'g Corp. v. Air Dynamics Inc. (1980) 101 Cal. App. 3d 418, 420-423, 161 Cal. Rptr. 463

[6] Cross References

For related forms, *see §§ 565.230* and *565.290*

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49-565 California Forms of Pleading and Practice--Annotated § 565.292

§ 565.292 Interference With Economic Relations--Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Bar of Statute of Limitations [Code Civ. Proc. § 339(1)]

[1] FORM Interference With Economic Relations--Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Bar of Statute of Limitations [Code Civ. Proc. § 339(1)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE_____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that the action is barred by the provisions of_____ [*specify applicable section, e.g.,* Section 339, subdivision 1, of the Code of Civil Procedure].

[2] Use of Form

This form is for use by a defendant in an action for interference with economic relations to raise the bar of the statute of limitations by way of an affirmative defense allegation in his or her answer [*Code Civ. Proc. § 431.30(b)(2)*]. The limitation period is usually the two-year period set forth in *Code Civ. Proc. § 339(1)*, although another period may apply when the defendant's conduct constitutes a separate tort [*see Kiang v. Strycula (1965) 231 Cal. App. 2d 809, 811-812, 42 Cal. Rptr. 338* (*Code Civ. Proc. § 339(1)* applied); *Romano v. Wilbur Ellis & Co. (1947) 82 Cal. App. 2d 670, 673-674, 186 P.2d 1012* (three-year period of former *Code Civ. Proc. § 338(4)* (*now see Code Civ. Proc. § 338(d)*) applied when complaint alleged fraudulent conduct); *see also § 565.137[3]*]. For discussion relating to limitations periods generally, see Ch. 345, *Limitation of Actions* . For discussion relating to answers generally, including general forms into which this affirmative defense allegation may be inserted, see Ch. 26, *Answers* .

[3] Alternative Use of Demurrer

If the defense of the statute of limitations is apparent from the face of the complaint or from matter of which the court may take judicial notice, the objection may be raised by general demurrer [*Code Civ. Proc. §§ 430.10(e), 430.30(a)*; *see Evid. Code §§ 451, 452* (judicial notice)]. The specific grounds must be pleaded (an exception to the general rule that general demurrers need only state that the complaint fails to state a cause of action). However, the defense of the statute of limitations is not waived for failure to demur, and may nonetheless be asserted as an affirmative defense in the

answer [*California Safe Deposit & Trust Co. v. Sierra Valleys Ry. Co. (1910) 158 Cal. 690, 697-698, 112 P. 274]* . For further discussion and forms relating to demurrers generally, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[4] State Statutes

Action based on liability not founded on written instrument must be brought within two years. *Code Civ. Proc. § 339(1)*

In pleading statute of limitations, facts showing defense are not required to be stated; pleading is permitted to state generally that action is barred by specified statutory provision that is relied on. *Code Civ. Proc. § 458*

[5] Decisons

Action for interference with business was barred when it was not commenced within two-year period embodied in *Code Civ. Proc. § 339(1)*. *McFaddin v. H.S. Crocker Co. (1963) 219 Cal. App. 2d 585, 591, 33 Cal. Rptr. 389*

[6] Text References

Witkin, California Procedure, Vol. 3, *Actions*, §§ 574-576 (4th ed. 1997)

[7] Cross References

For a related form, *see § 565.290*

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49-565 California Forms of Pleading and Practice--Annotated § 565.293

§ 565.293 Interference With Economic Relations--Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Justification or Privilege

[1] FORM Interference With Economic Relations--Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Justification or Privilege

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE_____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that his/her conduct was_____ [justified *or* privileged] under the circumstances, in that_____ [*allege facts showing justification or privilege, e.g.,* he/she was a corporate officer of_____ (*name of third part* y), acting within that corporate capacity with the sole purpose of protecting the interests of_____ (*name of third party*)].

[2] Use of Form

This form is for use by a defendant as an affirmative defense allegation in his or her answer in an action based on intentional or negligent interference with a contract or other economic relationship [*Code Civ. Proc. § 431.30(b)(2)*]. The affirmative defense alleged is that the defendant's alleged conduct was justified or privileged under the particular circumstances.

In an action for interference with prospective economic relations, an element of the plaintiff's cause of action is that defendant's conduct was wrongful by some legal measure beyond the fact of interference itself [*Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 393, 45 Cal. Rptr. 2d 436, 902 P.2d 740]* . For these purposes, conduct is independently wrongful if it is unlawful, which means that it must be conduct proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard [*Korea Supply Co. v. Lockheed Martin Corp. (2003) 29 Cal. 4th 1134, 1159, 131 Cal. Rptr. 2d 29, 63 P.3d 937]* . Because a plaintiff is required to prove that the defendant's conduct was unlawful as an element of the cause of action for intentional interference with prospective economic advantage that has not yet ripened into a contract, it would seem that the defendant's only real remaining burden in these actions on what was in the past considered the defense of justification is to counter the plaintiff's evidence and argument with the defendant's own showing that the conduct was not unlawful.

For further discussion relating to answers generally, including general forms into which this affirmative defense allegation may be inserted, see Ch. 26, *Answers* .

[3] Justification or Privilege

Whether a defendant's conduct is justified or privileged is a question of fact usually established by proof of facts rather than pleadings, whichturns essentially on whether the defendant's conduct was fair and reasonable under all the circumstances [*Rosenfeld, Meyer & Susman v. Cohen (1983) 146 Cal. App. 3d 200, 228-229, 194 Cal. Rptr. 180* (overruled on other grounds in *Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454*); *Lowell v. Mother's Cake & Cookie Co. (1978) 79 Cal. App. 3d 13, 17-21, 144 Cal. Rptr. 664]* . There are, however, several general fact situations in which the defense is typically recognized. For example, this form alleges illustrative facts showing a "manager's privilege" to induce his or her principal to breach its contract or to otherwise sever its economic relationship with plaintiff, so long as his or her purpose was to protect the principal's interests [*see Mayes v. Sturdy N. Sales, Inc. (1979) 91 Cal. App. 3d 69, 77-78, 154 Cal. Rptr. 43* ; *Olivet v. Frischling (1980) 104 Cal. App. 3d 831, 840-841, 164 Cal. Rptr. 87 , disapproved on other grounds, Applied Equip. Corp. v. Litton Saudi Arabia Ltd. (1994) 7 Cal. 4th 503, 521 n.10, 28 Cal. Rptr. 2d 475, 869 P.2d 454]* . For further discussion, including discussion of other situations in which the defense commonly arises, see*§ 565.137[4]*.

[4] Alternative Use of Demurrer

Justification or privilege is an affirmative defense that usually must be raised by way of allegation in the answer. It may be considered as a ground for demurrer only when it is apparent on the face of the complaint [*see Lowell v. Mother's Cake & Cookie Co. (1978) 79 Cal. App. 3d 13, 18-19, 144 Cal. Rptr. 664* ; *see, e.g., Pacific Gas & Elec. Co. v. Bear Stearns & Co. (1990) 50 Cal. 3d 1118, 1125, 1137, 270 Cal. Rptr. 1, 791 P.2d 587* (right to induce litigation on contract held privileged on demurrer)]. In an action for interference with prospective economic relations, an element of the plaintiff's cause of action is that defendant's conduct was wrongful by some legal measure beyond the fact of interference itself [*Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal. 4th 376, 393, 45 Cal. Rptr. 2d 436, 902 P.2d 740* ; *see § 565.290*]. A demurrer would be used if the complaint did not allege wrongfulness. For further discussion and forms relating to demurrers generally, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* .

[5] California Points and Authorities

For memoranda of points and authorities supporting a motion for summary judgment on the ground that defendant's acts were justified or privileged, see California Points and Authorities, Ch. 122, *Interference* (Matthew Bender)

[6] Decisions

Insurer's and its adjuster's misrepresentations and concealment from plaintiff regarding whereabouts of her artwork during her action against insured, and their instructions to insured to falsely deny knowledge of whereabouts of painting, were absolutely privileged under *Civ. Code § 47(b)(2)*. *Kupiecv. American Int'l Adjustment Co. (1991) 235 Cal. App. 3d 1326, 1331-1332, 1 Cal. Rptr. 2d 371*

Privilege under *Civ. Code § 47(b)(2)* is applicable only to communications, not to tortious courses of conduct; purpose of privilege is to afford litigants freedom of access to courts and open channels of communication by absolutely protecting them from derivative litigation based on communicative acts during judicial proceedings. *Kupiec v. American Int'l Adjustment Co. (1991) 235 Cal. App. 3d 1326, 1331, 1 Cal. Rptr. 2d 371*

Privilege under *Civ. Code § 47(b)(2)* as applicable to communicative acts done in judicial proceeding by litigants, to achieve objects of litigation, and that had logical relation to action. *Kupiec v. American Int'l Adjustment Co. (1991) 235 Cal. App. 3d 1326, 1331-1332, 1 Cal. Rptr. 2d 371* (misrepresentations to delay prior lawsuit and to avoid liability)

[7] Cross References

For a related form, *see § 565.290*

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49-565 California Forms of Pleading and Practice--Annotated § 565.294

§ 565.294 Interference With Economic Relations--Judgment [Code Civ. Proc. § 664]--Awarding Damages [Civ. Code §§ 3294, 3333] and Permanent Injunction [Civ. Code § 3422]

[1] FORM Interference With Economic Relations--Judgment [Code Civ. Proc. § 664]--Awarding Damages [Civ. Code §§ 3294, 3333] and Permanent Injunction [Civ. Code § 3422]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF_____

_____ [*name*],	)	
Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], [and DOES 1	)	JUDGMENT
through_____,]	)	
Defendant(s).	)	
	)	

This action came on regularly for trial on_____ [*date*] in [_____ (Department *or* Division_____ of] the above entitled court, the Honorable_____ (*name*), Judge, presiding, sitting without a jury. Plaintiff appeared by_____ [*name*], counsel; defendant_____ [*name*] appeared by_____ [*name*], counsel[; and_____ (*specify appearances by additional defendants, if any*)]. Oral and documentary evidence was presented by both parties. The cause was argued and submitted for decision. A statement of decision_____ [has been made and filed *or* was not requested].

NOW, THEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED that:

1. Plaintiff recover from defendant(s)_____ [*name(s)*] the sum of $_____, as actual

damages sustained by plaintiff, [the sum of $_____, as exemplary or punitive damages,] and the sum of $_____, for costs herein incurred.

2. Defendant(s),_____ [*name(s)*], his/her/their agents, employees, and all persons in active concert and participation with him/her/them be, and hereby are, permanently enjoined from engaging in or performing, directly or indirectly, any of the following acts:_____ [*specify acts of interference enjoined, e.g.*, harassment or obstruction of plaintiff's patrons as they enter or leave plaintiff's place of business].
Dated:_____.

_____ [*signature*]

Judge of the Superior Court

[2] Use of Form

This form of judgment is for use by a plaintiff who has successfully obtained an award of damages and injunctive relief after trial by the court of an action for interference with economic relations. For discussion relating to the availability of damages and injunctive relief in such an action, see*§ 565.136*. For general forms of judgment that award or deny monetary relief on the basis of a jury verdict, see Ch. 318, *Judgments* .

[3] Entry and Notice of Entry of Judgment

In an action tried by the court, the clerk is required to enter judgment immediately after the order granting judgment is filed [*Code Civ. Proc. § 664*]. The prevailing party must then serve notice of entry of judgment on all parties, and file the original of such notice with proof of service [*Code Civ. Proc. § 664.5*]. For further discussion and forms of notice and proof of service, see Ch. 318, *Judgments* .

[4] State Statutes

Statement of decision. *Code Civ. Proc. § 632*

Entry and notice of entry of judgment. *Code Civ. Proc. §§ 664, 664.5*

[5] Cross References

For discussion and forms relating to execution of money judgments and enforcement of nonmoney judgments, see Ch. 254, *Executions and Enforcement of Judgments*

For general discussion and forms relating to obtaining, amending, and enforcing judgments, see Ch. 318, *Judgments*

For discussion and forms relating to statements of decision, see Ch. 529, *Statement of Decision*

For related forms, *see §§ 565.290* and *565.291*

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Volume 50: Usury thru Verification-Chs. 568-572
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[1] FORM

[2] Use of Form

[3] Allegations

[4] California Statutes

[a] Consumer Finance Lenders

[b] Industrial Loan Companies

[c] Personal Property Brokers

[5] Cross References

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Volume 50: Usury thru Verification-Chs. 568-572
Chapter 568 USURY
PART I. SCOPE

50-568 California Forms of Pleading and Practice--Annotated § 568.01

§ 568.01 Scope of Chapter

This chapter discusses and provides forms relating to actions to recover usurious interest payments that have been made to a lender or other person on a loan or forbearance. The chapter examines the general usury provisions contained in the state constitution, as well as general statutory provisions and considerations for determining whether or not a given transaction is usurious. In addition, it discusses various federal preemptions of state law, and the numerous state statutory exceptions to the state constitutional provision.

The chapter includes forms of complaints for use in the following actions:

- To recover treble damages under the California constitutional and general statutory usury provisions [*see § 568.120*].

- To recover double damages under the federal provisions [*see § 568.123*].

- To recover actual, double, or treble damages under California real estate broker provisions [Forms 5, 6, and 7].

The chapter includes affirmative defense allegations for use in actions for breach of contract to assert the following defenses:

- Violation of the California constitutional usury provisions [Forms 2, 3].

- Violation of state laws regulating loans made by industrial loan companies, personal property brokers, or consumer finance lenders [Forms 8, 9].

Retail installment contracts, strictly speaking, are sales rather than loans [*see Civ. Code § 1801.6* (establishing standards for determining whether transaction is loan or installment sale); *Boerner v. Colwell Co. (1978) 21 Cal. 3d 37, 43-46, 145 Cal. Rptr. 380, 577 P.2d 200]* . A bona fide credit sale is not subject to usury laws because it does not involve a loan, although the contract of sale calls for interest to accrue at a rate that would be usurious [*see Boerner v. Colwell*

Co. (1978) 21 Cal. 3d 37, 43-46, 145 Cal. Rptr. 380, 577 P.2d 200 ; *Verbeck v. Clymer (1927) 202 Cal. 557, 562-563, 261 P. 1017]* . Thus, retail installment contracts and the amounts of interest that may be charged in such a contract [*see Civ. Code §§ 1803.1-1809.1*; *see also Civ. Code § 1810.1 et seq.* (retail installment accounts)], do not involve usury and are discussed in Ch. 501, *Sales: Retail Installment Sales* . For detailed discussion and forms relating to automobile sales contracts, which are governed separately from retail installment contracts in general [*see Civ. Code § 2981 et seq.* (Rees-Levering Motor Vehicle Sales and Finance Act)], see Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawNational BanksInterest & UsuryGeneral OverviewContracts LawDefensesUsuryContracts LawTypes of ContractsInstallment ContractsReal Property LawBrokersGeneral OverviewReal Property LawFinancingUsury

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§ 568.02 Cross References

For discussion and forms relating to an action concerning usurious interest rates on an automobile loan, Ch. 89, *Automobiles: Sales and Financing Under the Rees-Levering Act.*

For discussion and forms relating to banks, see Ch. 95, *Banks, Deposits, and Checks* .

For discussion and forms relating to an action on a promissory note, see Ch. 385, *Negotiable Instruments* .

For discussion and forms relating to real estate brokers, see Ch. 103, *Brokers* .

For discussion and forms relating to credit card transactions, see Ch. 127, *Consumer Contracts and Loans* .

For discussion and forms relating to an action for declaratory relief, see Ch. 182, *Declaratory Relief* .

For discussion and forms relating to an action for reformation of a contract, see Ch. 488, *Reformation of Instruments* .

For discussion and forms relating to an action concerning usurious interest rates on a retail installment contract, see Ch. 501, *Sales: Retail Installment Sales* .

For discussion and forms relating to securities, see Ch. 515, *Securities and Franchise Regulation* .

For discussion and forms relating to trust deeds, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

For a discussion of maximum rates charged by a common interest development association, see Ch. 579, *Zoning and Planning* .

Legal Topics:

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

Banking LawConsumer ProtectionCredit Card AgreementsGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)General OverviewReal Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral Overview

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[Reserved]

§§ 568.03[Reserved]

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PART II. LEGAL BACKGROUND
A. In General

50-568 California Forms of Pleading and Practice--Annotated § 568.10

§ 568.10 Governing Law

[1] In General

The law governing maximum interest rates that may be charged on loans or forbearances is set forth generally in *Cal. Const., art. XV § 1*, the Usury Law, Stats. 1919, p. lxxxiii, as amended by Stats. 1970, ch. 784, § 1 (Deering's Annot. Uncod. Measures 1919-1; West's Annot. *Civ. Code §§ 1916-1*-1916-3; throughout the article, this provision will be cited as Deering's Annot. Uncod. Measures 1919-1; West's Annot. *Civ. Code § 1916-1*-1916-3), and *Civ. Code §§ 1916.1-1916.12*. Federal preemption of state usury laws is governed by *12 U.S.C.A. § 86a*, Note (Pub. L. No. 96-221, § 512), *12 U.S.C. § 1735f-7*, *12 U.S.C.A. § 1735f-7*, Note (Pub. L. No. 96-221, § 501, as amended, and Pub. L. No. 96-221, §§ 528, 529), and *15 U.S.C. § 687(i)(3)*. The interest rates permitted by federal law, and the loans to which they apply, are governed by *12 U.S.C. §§ 86a*, *1785*, and *1831d*, and *15 U.S.C. § 687*. State statutory exemptions from the state constitutional usury laws are set forth generally in *Cal. Const., art. XV, § 1*. Specific exemptions are also set forth with respect to banks, associations, trust companies, and other fiduciaries in *Fin. Code §§ 1504*, *3707*, *6515(c)*, and *7675*. Additional statutes governing various specific types of loans and lenders may be found at *Fin. Code § 14000 et seq.* (credit unions); *Fin. Code § 18000 et seq.* (industrial loan companies); *Fin. Code § 21000 et seq.* (pawnbrokers); *Fin. Code § 22000 et seq.* (personal property brokers); *Fin. Code § 24000 et seq.* (consumer finance lenders); *Fin. Code § 26000 et seq.* (commercial finance lenders); *Civ. Code § 1916.1* and *Bus. & Prof. Code §§ 10131* and *10240-10248.3* (real estate brokers); *Civ. Code §§ 1803.1-1809.1*(retail installment contracts); *Civ. Code §§ 2981 et seq.* (automobile sales contracts); *Civ. Code § 1366(f)* (common interest development associations); *Ins. Code § 1100.1* (insurers); *Corp. Code §§ 25110-25117*, *25211*, and *25211.5* (sales of securities); *Gov. Code § 7509* (state or local public retirement systems); and *Harb. & Nav. Code §§ 450*, *455* (bottomry contracts).

Under the Servicemembers Civil Relief Act [*see 50 U.S.C. App. § 501 et seq.*] and similar California law [*see Mil. & Vet. Code § 400 et seq.*], no obligation or liability bearing interest at a rate in excess of 6 percent per year incurred by a service member [*see 50 U.S.C. App. § 511(1)* (member of uniformed services); *Mil. & Vet. Code § 400(a)* (member of national guard or military reserve called to active duty)] before his or her entry into service can, during any part of the period of military service [*see 50 U.S.C. App. § 511(2), (3)*; *Mil. & Vet. Code § 400(b)* (active service or active duty)], bear interest at a rate in excess of 6 percent per year unless, in the opinion of the court, on application by the obligee, the

ability of the service member to pay interest on that obligation or liability at a rate in excess of 6 percent per year is not materially affected by reason of that service, in which case the court may make whatever order is in its opinion just. "Interest" includes service charges, renewal charges, fees, or any other charges, except bona fide charges for insurance, in respect of any obligation or liability [*50 U.S.C. App. § 527(d)*; *Mil. & Vet. Code § 405*].

Unconscionability is governed by *Civ. Code § 1670.5*, which may be applied to bar enforcement of an interest rate otherwise within an exemption from the usury law [*see Carboni v. Arrospide (1991) 2 Cal. App. 4th 76, 81-85, 2 Cal. Rptr. 2d 845]* . For discussion of unconscionability and a form for an affirmative defense seeking to have an onerous term declared unconscionable, see Ch. 140, *Contracts* .

[2] Historical Background

California's first usury law was passed by initiative in 1918, setting the ceiling on permissible interest rates that may be charged on a loan or forbearance, and providing for civil and criminal remedies if those rates are exceeded [*see* Deering's Annot. Uncod. Measures 1919-1; West's Annot. *Civ. Code § 1916-1*-1916-3]. That law provided in part that the interest rate may not exceed seven percent, except that parties may contract in writing for an interest rate not exceeding twelve percent [Deering's Annot. Uncod. Measures 1919-1 § 1; West's Annot. *Civ. Code § 1916-1*].

In 1934, a state constitutional amendment was passed that lowered the contractual rate from 12 to 10 percent, and provided for various exemptions from the usury law [*see* former *Cal. Const, art. XX, § 22*]. The passage of the constitutional amendment did not supersede all of the provisions of the 1918 initiative, but did supersede the 1918 provisions to the extent that they conflicted with the constitutional amendment. Thus, the courts held that the constitutional amendment was to be read into the initiative provisions [*see, e.g., Heald v. Friis-Hansen (1959) 52 Cal. 2d 834, 838, 345 P.2d 457* (state constitutional usury provisions read into statute)].

The civil and criminal penalties portion of the initiative [Deering's Annot. Uncod. Measures 1919-1, § 1; West's Annot. *Civ. Code § 1916-3*] was amended in 1970 [Stats. 1970, ch. 784, § 1]. Six years later, former *Cal. Const, art. XX, § 22* was repealed and reenacted with changes as *Cal. Const., art. XV, § 1*. Subsequent amendments were made to *Cal. Const., art. XV, § 1* in 1978 and 1979, including the addition of a different ceiling for a contractual interest rate if the loan or forbearance is for use other than primarily for personal, family, or household purposes. Even with the reenactment and various amendments, however, the courts have continued to hold that the constitutional amendment must be read into the initiative provisions [*see, e.g., Arneill Ranch v. Petit (1976) 64 Cal. App. 3d 277, 280 n. 1, 134 Cal. Rptr. 456]* . Both the constitutional and initiative provisions are discussed in detail in *§§ 568.30, 568.31*.

The Legislature has also enacted numerous statutes to exempt or to specially regulate certain types of interest rates, as discussed in *§ 568.30* et seq. However, these statutes, as well as the constitutional and initiative provisions, are subject to preemption by federal regulation, as discussed in *§ 568.50* et seq.

Any changes in the usury laws are retroactively applied to a transaction, unless a cause of action for usury regarding that transaction has been reduced to final judgment [*Chapman v. Farr (1982) 132 Cal. App. 3d 1021, 1023, 183 Cal. Rptr. 606* ; *Orden v. Crawshaw Mortgage & Inv. Co. (1980) 109 Cal. App. 3d 141, 144-146, 167 Cal. Rptr. 62* ; *see Penziner v. West American Finance Co. (1937) 10 Cal. 2d 160, 170-171, 74 P.2d 252* (usury law provides recovery as statutory remedy and penalty, which may be repealed); *Garcia v. Wetzel (1984) 159 Cal. App. 3d 1093, 1097-1098, 206 Cal. Rptr. 251* (1979 amendment to *Civ. Code § 1916.1* applied retroactively)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawNational BanksInterest & UsuryGeneral OverviewContracts LawDefensesUsuryGovernmentsLegislationEffect & OperationRetrospective OperationReal Property

LawFinancingUsury

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§ 568.11 Definitions and General Principles

Usury laws are enacted to limit the amount of interest that may be charged on a loan or forbearance of money [*see, e.g., Cal. Const., art. XV, § 1*]. A "loan of money" means a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which he or she borrowed [*Civ. Code § 1912*]. A "forbearance of money" is the giving of further time for the payment of a debt or an agreement not to enforce a claim at its due date [*Boerner v. Colwell Co. (1978) 21 Cal. 3d 37, 44 n.7, 145 Cal. Rptr. 380, 577 P.2d 200* ; *see Sheehy v. Franchise Tax Board (2000) 84 Cal. App. 4th 280, 283-284, 100 Cal. Rptr. 2d 760* (Franchise Tax Board's six-year delay in informing taxpayers of amount due was not "forbearance" and constitutional prohibition against usurious interest did not apply; true purpose of 10 percent interest rate on delinquent taxes was penalty assessment)]. "Interest" means the compensation allowed by law or fixed by the parties for the use, forbearance, or detention of money [*Civ. Code § 1915*].

A loan of money is presumed to be made on interest, unless otherwise expressly stipulated at the time in writing [*Civ. Code § 1914*; *see Civ. Code § 1912* ("loan of money" defined)].

When a law or contract prescribes an interest rate but does not specify the period of time by which the rate is to be calculated, the rate is deemed to be an annual rate [*Civ. Code § 1916*].

In the case of joint venturers, one of whom holds a note made by the other to effectuate their venture, the usury law does not prevent enforcement of the note even though its terms would violate the usury law if the note had been made to memorialize a loan. Since the note is part of a transaction that is not a "loan or forbearance of any money, goods or things in action" [*see Cal. Const., art. XV, § 1*], the usury law does not apply. Whether a transaction is a joint venture or a loan is a question of fact [*Junkin v. Golden West Foreclosure Serv., Inc. (2010) 180 Cal. App. 4th 1150, 1155-1158, 103 Cal. Rptr. 3d 582* (review of facts supported conclusion that parties to promissory note were joint venturers, not lender and borrower)]. This rule, which comes from case law, is sometimes called the "joint venture exception" to the usury law.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawNational BanksInterest & UsuryGeneral OverviewContracts LawDefensesUsuryReal Property LawFinancingUsury

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§ 568.12 Establishing That Transaction Is Usurious

[1] Credit Sale Versus Loan

Bona fide credit sales are exempt from the usury law on the theory that in a sale there is no loan or forbearance, and therefore no interest is involved at all [*Fox v. Federated Department Stores, Inc. (1979) 94 Cal. App. 3d 867, 876, 156 Cal. Rptr. 893]* . In determining whether a transaction, disguised as a sale, actually constitutes a loan or forbearance, the court will look to the substance rather than the form of the transaction [*Southwest Concrete Products v. Gosh Construction Corp. (1990) 51 Cal. 3d 701, 705, 274 Cal. Rptr. 404, 798 P.2d 1247* ; *Boerner v. Colwell Co. (1978) 21 Cal. 3d 37, 44, 145 Cal. Rptr. 380, 577 P.2d 200* ; *see Ghirardo v. Antonioli (1994) 8 Cal. 4th 791, 802, 883 P.2d 960]* . The issue is whether or not the bargain of the parties, assessed in light of all the circumstances and with a view to substance rather than form, has as its true object the hire of money at an excessive rate of interest [*Southwest Concrete Products v. Gosh Construction Corp. (1990) 51 Cal. 3d 701, 705, 274 Cal. Rptr. 404, 798 P.2d 1247* ; *Boerner v. Colwell Co. (1978) 21 Cal. 3d 37, 44, 145 Cal. Rptr. 380, 577 P.2d 200]* . For example, a lease-back arrangement may be found to be a loan merely disguised as lease-back [*see, e.g., Rochester Capital Leasing Corp. v. K & L Litho Corp. (1970) 13 Cal. App. 3d 697, 701, 91 Cal. Rptr. 827]* . On the other hand, an interest-bearing promissory note may be found to be part of a sale if it is included as part of the purchase price in the legitimate sale of a going business [*see, e.g., La France Enterprises v. Van Der Linden (1977) 70 Cal. App. 3d 375, 381, 138 Cal. Rptr. 690* ; *Lenes v. Dean (1976) 64 Cal. App. 3d 845, 848, 135 Cal. Rptr. 14]* . Similarly, the purchase of a note at a discount may be found to be a sale rather than a loan [*see, e.g., Moe v. Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 289, 300, 98 Cal. Rptr. 547]* .

An agreement imposing a monthly "late charge" on a buyer's past due account is typically characterized as a credit sale rather than a forbearance because the parties did not intend that the buyer could forbear from making full payment ad infinitum or that the creditor could never recover the principal as long as the late charges were being paid [*see Southwest Concrete Products v. Gosh Construction Corp. (1990) 51 Cal. 3d 701, 708, 274 Cal. Rptr. 404, 798 P.2d 1247* ; *O'Connor v. Televideo System, Inc. (1990) 218 Cal. App. 3d 709, 717, 267 Cal. Rptr. 237]* .

Under the "time-price" doctrine, a transaction is exempt from the usury law if the seller finances the purchase of

property by extending payments over time and charging a higher price for carrying the financing [*Southwest Concrete Products v. Gosh Construction Corp. (1990) 51 Cal. 3d 701, 705, 274 Cal. Rptr. 404, 798 P.2d 1247* ; *see Ghirardo v. Antonioli (1994) 8 Cal. 4th 791, 802-803, 883 P.2d 960]* . When a seller offers to sell at a designated price for cash or at a much higher price on credit, the credit sale does not constitute usury, however great the difference between the two prices, unless the "sale" was a mere pretense [*Verbeck v. Clymer (1927) 202 Cal. 557, 563, 261 P. 1017]* . A retailer's "finance charges" have been held valid under the time-price doctrine when they were charged to a consumer holding a revolving charge account in the form of a credit card [*Fox v. Federated Department Stores, Inc. (1979) 94 Cal. App. 3d 867, 874, 880, 156 Cal. Rptr. 893* (upholding otherwise usurious charges authorized by Unruh Act; for discussion of the Unruh Act, *see* Ch. 501, *Sales: Retail Installment Sales*]. Commercial sellers also may legally impose such finance charges in connection with revolving charge accounts [*see Fox v. Federated Department Stores, Inc. (1979) 94 Cal. App. 3d 867, 873, 156 Cal. Rptr. 893]* . "Late charges," which a seller bills to the buyer if full payment is not made within a certain number of days after delivery of goods, have also been held valid under the time-price doctrine [*Southwest Concrete Products v. Gosh Construction Corp. (1990) 51 Cal. 3d 701, 707, 709, 274 Cal. Rptr. 404, 798 P.2d 1247* ; *see Fox v. Federated Department Stores, Inc. (1979) 94 Cal. App. 3d 867, 884-885, 156 Cal. Rptr. 893* (upholding finance charges on credit card account requiring full payment every month)]. It appears, however, that even when "late charges" do not run afoul of the usury laws, they may still be challenged as illegal liquidated damages provisions [*see Beasley v. Wells Fargo Bank (1991) 235 Cal. App. 3d 1383, 1398-1401, 1 Cal. Rptr. 2d 446* (exempt credit card issuer's late-payment and over-limit fees held invalid under *Civ. Code § 1671(d)*), *disapproved on other grounds, Olson v. Automobile Club of So. Cal. (2008) 42 Cal. 4th 1142, 1153 n.6*]. For further discussion of liquidated damages, see Ch. 177, *Damages* .

The legal distinction between a credit sale and a loan has become increasingly blurred, and some courts are now admitting that the decision to label a transaction usurious turns more on policy than on the mechanics of the transaction. For example, in *DCM Partners v. Smith (1991) 228 Cal. App. 3d 729, 278 Cal. Rptr. 778* , the court held that a private seller who financed a buyer's purchase of real estate could legally raise the interest rate on the secured loan to 15 percent as a condition for extending the loan's maturity date. The court reasoned that to invalidate such transactions would chill the willingness of nonexempt lenders to extend credit, thereby harming consumers. In addition, the court argued, the lender could have legally achieved the same practical result by the more convoluted process of obtaining the property through foreclosure and reselling it to the buyer with financing at the higher 15 percent rate, thereby transacting a bona fide credit sale permissible under the "time-price" doctrine [*see DCM Partners v. Smith (1991) 228 Cal. App. 3d 729, 733-736, 734 n.1, 278 Cal. Rptr. 778]* . This rationale was subsequently adopted by the *Ghirardo v. Antonioli (1994) 8 Cal. 4th 791, 883 P.2d 960* , in which the Court held that the restructuring of an arrangement under which one party transferred an interest in real property to another in exchange for a promissory note and deed of trust was exempt from the usury laws. The original transaction was characterized as a sale rather than a loan, and therefore was found to be exempt under the "time-price" doctrine [*Ghirardo v. Antonioli (1994) 8 Cal. 4th 791, 802-803, 883 P.2d 960]* . The contention was that the terms of new notes, executed as a result of the restructuring of the transaction to avoid foreclosure, were usurious. However, the Court concluded that since the original transaction was exempt from the usury laws, a modification of that transaction was similarly exempt [*Ghirardo v. Antonioli (1994) 8 Cal. 4th 791, 804, 883 P.2d 960]* , even though the interest rate on the modification was greater than that on the original transaction [*Ghirardo v. Antonioli (1994) 8 Cal. 4th 791, 806, 883 P.2d 960]* . The court reasoned that it would be impractical and unfair to both buyer and seller if the only alternative to foreclosure for a seller who had suffered a default was the extension of credit to the buyer on new terms favorable only to the buyer [*Ghirardo v. Antonioli (1994) 8 Cal. 4th 791, 804-806, 883 P.2d 960]* . The fact that that the original purchaser had sold the property to another party at the time the restructuring had occurred did not alter this result [*Ghirardo v. Antonioli (1994) 8 Cal. 4th 791, 804-805, 883 P.2d 960]* .

The transfer of structured settlement payments under the Structured Settlement Transfer Act [*Ins. Code § 10136 et seq.*] does not implicate the prohibition against usury in *Cal. Const., art. XV, § 1* because a structured settlement transfer is not a loan or forbearance but is instead a sale, as indicated in *Ins. Code § 10136(b)* [*321 Henderson Receivables Origination LLC v. Sioteco (2009) 173 Cal. App. 4th 1059, 1077, 93 Cal. Rptr. 3d 321]* .

[2] Variable Interest Rate

An agreement may contain a variable interest rate that exceeds the constitutional limit if a specific contingency occurs. This type of interest rate is not deemed usurious if the transaction is consummated in good faith without intent to avoid the usury laws [*see, e.g., McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1978) 21 Cal. 3d 365, 377-378, 146 Cal. Rptr. 371, 578 P.2d 1375* ; *Arneill Ranch v. Petit (1976) 64 Cal. App. 3d 277, 289, 134 Cal. Rptr. 456]* . For further discussion of loans secured by real property that provide for variable interest rates, see California Legal Forms, Ch. 25, *Real Property Security Estate Loans* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawNational BanksInterest & UsuryGeneral OverviewContracts LawDefensesUsuryReal Property LawFinancingUsury

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[Reserved]

§§ 568.13[Reserved]

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50-568 California Forms of Pleading and Practice--Annotated § 568.30

§ 568.30 Maximum Rate of Interest Under State Constitutional Provisions

Cal. Const., art. XV, § 1 provides that the interest rate on a loan or forbearance of any money, goods, or things in action, or on accounts after demand, is seven percent per annum, but it is competent for the parties to any loan or forbearance of any money, goods, or things in action to contract for a higher rate of interest as specified [*Cal. Const., art. XV, § 1*].

Parties to any loan or forbearance of any money, goods, or things in action for use primarily for personal, family, or household purposes may nevertheless contract in writing for an interest rate not exceeding 10 percent per annum. In this context, however, a loan or forbearance is not deemed for use primarily for personal, family, or household purposes if its proceeds are used primarily for the purchase, construction, or improvement of real property [*Cal. Const., art. XV, § 1(1)*].

Parties to any loan or forbearance of any money, goods, or things in action for use other than primarily for personal, family, or household purposes may also contract in writing for an interest rate other than the seven percent rate, if the rate does not exceed the higher of (a) 10 percent per annum or (b) five percent per annum plus the rate established by the Federal Reserve Bank of San Francisco on advances to member banks, or if the rate is not determinable, the closest counterpart of the rate as designated by the California Superintendent of Banks or another person or agency delegated the authority by the California Legislature. For the purposes of determining the maximum rate permitted under (b), the rate used in the computation is that which prevails on the 25th day of the month preceding the earlier of (1) the date of execution of the contract to make the loan or forbearance, or (2) the date of making the loan or forbearance [*Cal. Const., art. XV, § 1(2)*].

In general, no person, association, partnership, or corporation may, by charging a fee, bonus, commission, discount, or other compensation, receive from a borrower more than these authorized interest rates on any loan or forbearance of any money, goods, or things in action [*Cal. Const., art. XV, § 1*]. However, numerous classes of persons are specifically exempted from these rate restrictions, including savings associations, industrial loan companies, credit unions, licensed pawnbrokers, licensed personal property brokers, licensed real estate brokers, banks, certain nonprofit cooperative associations, and any other class of persons authorized by statute, as well as any successor in interest to any loan or

forbearance exempted from the rate restrictions [*see Cal. Const., art. XV, § 1*]. Instead, the Legislature may prescribe the maximum rate per annum of these exempted persons [*Cal. Const., art. XV, § 1*]. For further discussion of exempted classes, see *§ 568.70* et seq.

The California Constitution requires the Legislature to set the interest rate on a court judgment at not more than 10 percent per annum. Otherwise, the rate will be deemed to be seven percent per annum. The rate may be variable and based on interest rates charged by federal agencies or economic indicators, or both [*Cal. Const., art. XV, § 1*]. Currently, the Legislature has set the rate at 10 percent per annum on the principal amount of a money judgment remaining unsatisfied; however, the Legislature has reserved the right to change this rate to one less than 10 percent per annum for future interest that accrues [*Code Civ. Proc. § 685.010*].

The provisions of *Cal. Const., art. XV, § 1* supersede any previously adopted constitutional provision or enacted statute to the contrary [*Cal. Const., art. XV, § 1*; *see* discussion in *§ 568.10[2]*]. However, Cal. Const., *art. XV, § 1*, is preempted by any federal law to the contrary. For example, prejudgment interest at the market rate in an inverse condemnation case is proper even if the rate exceeds the legal rate set by *Cal. Const., art. XV, § 1*, and *Code Civ. Proc. § 685.010*, because the right to prejudgment interest in an inverse condemnation suit derives from *U.S. Const., amend. V*, which has supremacy under U.S. Const., art. VI, *cl. 2*, over any state constitutional provision or statute to the contrary [*see, e.g., Aetna Life & Casualty Co. v. City of Los Angeles (1985) 170 Cal. App. 3d 865, 879, 216 Cal. Rptr. 831]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 568.31 Statutory Restrictions

When computing interest on any bond, note, or other instrument or agreement, interest may not be compounded, nor may the interest be construed to bear interest unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged [Deering's Annot. Uncod. Measures 1919-1 § 2; West's Annot. *Civ. Code § 1916-2*; *see McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1983) 33 Cal. 3d 816, 818-824, 191 Cal. Rptr. 458, 662 P.2d 916* (discussing requirement of writing "clearly expressed")].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawNegotiable InstrumentsTypesPromissory Notes

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§ 568.32 Remedies Available When Transaction Shown to Be Usurious Under General Provisions

[1] Interest Provision Null and Void

Any agreement or contract of any nature that provides for an interest rate greater than the maximum rate allowed under *Cal. Const., art. XV, § 1*, or that provides for compounded interest or interest on interest but is not in a writing that is signed by the party to be charged, is null and void as to any agreement or stipulation to pay interest [Deering's Annot. Uncod. Measures 1919-1 § 2; West's Annot. *Civ. Code § 1916-2*; *see Cal. Const., art. XV, § 1*; *Gibbo v. Berger (2004) 123 Cal. App. 4th 396, 403, 19 Cal. Rptr. 3d 829* ; *Winnett v. Roberts (1986) 179 Cal. App. 3d 909, 921, 225 Cal. Rptr. 82* ; *see also Heald v. Friis-Hansen (1959) 52 Cal. 2d 834, 838, 345 P.2d 457* (state constitutional usury provisions read into statute); *Arneill Ranch v. Petit (1976) 64 Cal. App. 3d 277, 280 n. 1, 134 Cal. Rptr. 456* (same)]. When a loan is usurious the creditor is entitled to repayment of principal only [*Gibbo v. Berger (2004) 123 Cal. App. 4th 396, 403, 19 Cal. Rptr. 3d 829* ; *Winnett v. Roberts (1986) 179 Cal. App. 3d 909, 921, 225 Cal. Rptr. 82]* .

[2] Action at Law

[a] Treble Damages

Any person, company, association, or corporation who has paid any greater sum or value than is allowed may recover treble the violative amount paid, in an action at law against the person, company, association, or corporation to whom the interest was paid [Deering's Annot. Uncod. Measures 1919-1 § 3(a); West's Annot. *Civ. Code § 1916-3(a)*; *Gibbo v. Berger (2004) 123 Cal. App. 4th 396, 404, 19 Cal. Rptr. 3d 829]* . Treble the entire amount of interest may be recovered, not merely treble the excess permissible amount [*Haines v. Commercial Mortgage Co. (1927) 200 Cal. 609, 617, 254 P. 956, 255 P. 805* (overruled on other grounds in *Heald v. Friis-Hansen (1959) 52 Cal. 2d 834, 840, 345 P.2d 457*)].

The action must be brought within one year after any payment in order to recover treble the amount of that payment [Deering's Annot. Uncod. Measures 1919-1 § 3(a); West's Annot. *Civ. Code § 1916-3(a)*]. It is immaterial whether or not any principal remains unpaid at the time the interest is paid [*Arneill Ranch v. Petit (1976) 64 Cal. App. 3d 277, 296, 134 Cal. Rptr. 456]* .

The court has wide discretion in determining whether treble damages should be awarded [*Burr v. Capital Reserve Corp. (1969) 71 Cal. 2d 983, 994, 80 Cal. Rptr. 345, 458 P.2d 185* (usurer's unjustifiable claim on title to property is not conduct so shocking as to require treble damages as matter of law); *Gibbo v. Berger (2004) 123 Cal. App. 4th 396, 404, 19 Cal. Rptr. 3d 829* (treble damages award is at trial court's discretion)]. However, because public policy favors subjecting a usurious lender to a treble damage penalty, a court might exercise its discretion to deny the penalty only if the borrower rather than the lender was the moving force in the usurious loan [*see, e.g.,* *Buck v. Dahlgren (1972) 23 Cal. App. 3d 779, 787-789, 100 Cal. Rptr. 462* (borrower suggested and initiated usurious method of payment and induced method through fraudulent representations)].

[b] Money Had and Received

In addition to or in lieu of a cause of action for treble damages, the party who has paid any greater sum or value than is allowed may bring a cause of action against the person to whom the sum was paid to recover money had and received [*Stock v. Meek (1950) 35 Cal. 2d 809, 816-817, 221 P.2d 15]* . Interest paid within two years of the bringing of the action may be recovered [*Stock v. Meek (1950) 35 Cal. 2d 809, 816-817, 221 P.2d 15* ; *see Code Civ. Proc. § 339(1)* (two-year statute of limitations for money had and received)]. Thus, any amount paid more than one year but less than two years from the date of the bringing of the action, for which treble damage recovery is barred as being untimely, may still be recoverable if the action is brought within the two-year period [*see, e.g.,* *Stock v. Meek (1950) 35 Cal. 2d 809, 817, 221 P.2d 15* (borrowers not barred from counterclaiming to recover usurious interest paid 14 months before complaint was filed); cf. *G.H.I.I. v. MTS, Inc. (1983) 147 Cal. App. 3d 256, 278-279, 195 Cal. Rptr. 211* (plaintiffs entitled to actual damages from antitrust violations that accrued within three years of filing of complaint and to treble damages from antitrust violations that accrued within one year of filing of complaint)]. However, the statute of limitations on recovery of usurious interest does not apply if the lender has initiated foreclosure proceedings based on the usurious note; in that case the borrower may cross-complain for recovery of all interest actually paid [*Gibbo v. Berger (2004) 123 Cal. App. 4th 396, 404, 19 Cal. Rptr. 3d 829* (in foreclosure action, cross-complaint for unjust enrichment not barred by statute of limitations)].

Although in many cases a plaintiff may recover the amount of interest paid even though treble damages are not awarded, a court may refuse to allow any recovery when the circumstances justify a finding that no award is appropriate [*see* *Buck v. Dahlgren (1972) 23 Cal. App. 3d 779, 788, 100 Cal. Rptr. 462* (plaintiff held to be estopped from any recovery)].

[3] Action in Equity

The party who has paid or agreed to pay any greater sum or value than is allowed may bring an action in equity for declaratory relief to declare the interest provisions of the contract void [*see Code Civ. Proc. § 1060*; *see also Code Civ. Proc. §§ 1061* (necessity of declaration), 1062 (declaration not exclusive remedy)]. For discussion and forms relating to declaratory relief actions, see Ch. 182, *Declaratory Relief* . An action for reformation of the contract to eliminate its interest provisions may also be brought under certain circumstances [*see Civ. Code §§ 3399-3402*]. For discussion and forms relating to the reformation of contracts, see Ch. 488, *Reformation of Instruments* .

[4] Rights of Usurer to Recover Debt but Not Interest

The party to whom the interest is to be paid under the terms of the agreement may not maintain an action at law to recover that interest in any sum [Deering's Annot. Uncod. Measures 1919-1 § 2; West's *Civ. Code § 1916-2*; *Gibbo v. Berger (2004) 123 Cal. App. 4th 396, 403, 19 Cal. Rptr. 3d 829* ; *Winnett v. Roberts (1986) 179 Cal. App. 3d 909, 921, 225 Cal. Rptr. 82]* , and cannot declare the debt to be due until the full period of time for which it was contracted has elapsed [Deering's Annot. Uncod. Measures 1919-1 § 2; West's Annot. *Civ. Code § 1916-2*].

When the debt matures, the payee is entitled to payment of the principal sum in full. If the payor fails to make timely payment of the principal at the date of maturity, the payee is entitled to payment of interest on the principal at the legal rate from the date the note matures until the time at which the payee obtains a judgment, as would the payee of any other noninterest-bearing note [*Epstein v. Frank (1981) 125 Cal. App. 3d 111, 123, 177 Cal. Rptr. 831]* .

[5] Defense and Cross Complaint to Complaint by Usurer to Recover Debt

In an action to recover a debt, the payor may assert usury as a defense to the payment of interest. The defendant must affirmatively plead the defense of usury, or it will be deemed waived [*Willcox v. Edwards (1912) 162 Cal. 455, 462, 123 P. 276]* . However, if the contract is usurious on its face, the court may deny interest on its motion, regardless of whether the defense has been affirmatively pleaded [*Curtis v. Thaxter (1928) 204 Cal. 439, 440, 268 P. 630]* .

Insofar as a guaranteed debt for interest is unenforceable on the ground of usury, the guarantor's contract cannot be construed or enforced so as to waive the guarantor's right to raise that defense, since a promise to pay usurious interest is illegal and therefore cannot be enforced on any theory [*WRI Opportunity Loans II, LLC v. Cooper (2007) 154 Cal. App. 4th 525, 542-544, 65 Cal. Rptr. 3d 205*].

The payor may file a cross complaint for treble damages [*Rice v. Dunlap (1928) 205 Cal. 133, 137* ; *Gibbo v. Berger (2004) 123 Cal. App. 4th 396, 404, 19 Cal. Rptr. 3d 829* ; *see Code Civ. Proc. § 428.10*]. The amount to be recovered by the payor may be offset from the principal amount owing on the debt [*Rice v. Dunlap (1928) 205 Cal. 133, 137* ; *see District Bond Co. v. Haley (1935) 2 Cal. 2d 308, 311, 41 P.2d 319]* .

[6] Criminal Liability

A person who willfully makes or negotiates a usurious interest rate and who is neither specially licensed to make or to negotiate loans nor exempted from the licensing or usury laws is guilty of the felony of loan-sharking [Deering's Annot. Uncod. Measures 1919-1 § 3(b); West's Annot. *Civ. Code § 1916-3(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§§ 568.33[Reserved]

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§ 568.50 In General

Congress has enacted legislation that preempts certain state constitutional and statutory usury provisions [*see 12 U.S.C.A. § 86a*, Note (Pub. L. No. 96-221, § 512, as amended (certain business and agricultural loans)); *12 U.S.C. § 1735f-7* (certain insured loans, mortgages, or advances); *12 U.S.C.A. § 1735f-7*, Note (Pub. L. No. 96-221, § 501, as amended (certain loans secured, after March 31, 1980, by first lien on residential real property, cooperative housing stock, or manufactured home), Pub. L. No. 96-221, § 529 (certain loans secured, before March 31, 1980, by first lien on residential real property or cooperative housing stock)); *15 U.S.C. § 687(i)(3)* (certain loans by small business investment companies); *see also 12 U.S.C.A. § 1735f-7*, Note (Pub. L. No. 96-221, § 528 (applicable rate when one or more provisions apply))].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 568.51 Depository Institutions

[1] General Preemption of Laws Restricting Interest Rates

Any state constitutional and statutory provision that expressly limits the rate or amount of interest that may be charged, taken, received, or reserved is preempted by federal law and does not apply to any deposit or account held by, or other obligation of, a depository institution [*12 U.S.C.A. § 1735f-7*, Note (Pub. L. No. 96-221, § 501(a)(2), as amended)].

For purposes of this preemption, a depository institution includes [*12 U.S.C.A. § 1735f-7*, Note (Pub. L. No. 96-221, § 501(a)(2), as amended)]:

- Any insured depository institution, any mutual savings bank, and any savings bank, as defined in the Federal Deposit Insurance Act, § 3 (*12 U.S.C. § 1813*); and

- Any insured credit union as defined in the Federal Credit Union Act, § 101 (*12 U.S.C. § 1752*).

[2] Federal Rate Restrictions for State-Chartered Insured Depository Institutions, Insured Branches of Foreign Banks, and Insured Credit Unions

A state-chartered insured depository institution, including an insured savings bank and insured branch of a foreign bank, and any credit union whose member accounts are insured in accordance with *12 U.S.C. § 1781 et seq.* may take, receive, reserve, and charge on any loan, discount, note, bill of exchange, or other evidence of debt, interest at a rate of not more than 1 percent in excess of the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the Federal Reserve District where the bank is located, or at the rate allowed by the laws of the state, territory, or district where the bank is located, whichever is greater. This maximum rate applies notwithstanding any state constitution or statute to the contrary [*12 U.S.C. §§ 1785(g)(1), 1831d(a)*; *see 12 U.S.C. § 1752(7)* (powers of federal credit union)]. California law currently does not reject the preemption; in fact, California law specifically exempts these institutions from the state constitutional usury provisions [*see Cal. Const., art. XV, § 1* (exemption for credit union); *Fin. Code §§ 1504* (exemption for state bank authorized to engage in trust business, when acting in its fiduciary capacity, or national bank authorized to engage in trust business, when acting in its fiduciary capacity, if it maintains main or branch office in

California, or foreign (other state) state bank authorized to engage in a trust business, when acting in its fiduciary capacity, if it maintains branch office in California), 1716 (exemption for foreign (other nation) bank), 3707 (exemption for bank holding company), 3805 (exemption for foreign (other state) state bank), 6515(c) (exemption for association, federal association, or service corporation, when acting in fiduciary capacity as trustee), 7675 (exemption for association, federal association, qualified foreign savings association, savings and loan holding company, and service corporation); *see also* discussion of these exemptions in § 568.71].

If a state bank or insured branch of a foreign bank knowingly takes, receives, reserves, or charges a greater rate of interest than allowed when state law is preempted pursuant to *12 U.S.C. § 1785(g)(1)* or *1831d(a)*, the entire interest is deemed forfeited. Furthermore, the person who paid any amount of the interest may recover twice that amount in a civil action commenced in a court of appropriate jurisdiction within two years after the date of the payment [*12 U.S.C. §§ 1785(g)(2), 1831d(b)*]. Either federal or state court may be a court of appropriate jurisdiction [*see 28 U.S.C. § 1331*; *Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 86, 116.220*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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50-568 California Forms of Pleading and Practice--Annotated § 568.52

§ 568.52 Federally Related Mortgage Loans

Any state constitutional and statutory provision that expressly limits the rate or amount of interest, discount points, finance charges, or other charges that may be charged, taken, received, or reserved is preempted and does not apply to any federally related mortgage loan made in California on or after April 1, 1980, that is secured by a first lien on residential real property, on a residential manufactured home, or on all stock allocated to a dwelling unit in a residential cooperative housing corporation [*12 U.S.C. §§ 1735f-5(b), 1735f-7*; *12 U.S.C.A. § 1735f-7*, Note (Pub. L. No. 96-221, § 501(a)(1), (b), as amended)]. "Federally related mortgage loan" refers to certain federally insured, sponsored, or otherwise associated loans that are secured by residential real property designed principally for the occupancy of from one to four families [*see 12 U.S.C. § 1735f-5(b)* ("federally related mortgage loan" defined)]. Since neither the California Legislature nor the voters of California adopted a law or provision before April 1, 1983, that stated explicitly and by its terms that California does not want the preemption to apply, the federal provisions will continue to apply and preempt state law on the subject, now and in the future [*see 12 U.S.C.A. § 1735f-7*, Note (Pub. L. No. 96-221, § 501(b))].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 568.53 Credit Card Interest and Late Payment Fees

The National Bank Act of 1864 provides that a national bank may charge its loan customers interest at the rate allowed by the laws of the state where the bank is located [*12 U.S.C. § 85*; *see Beneficial National Bank v. Anderson (2003) 539 U.S. 1, 123 S.Ct. 2058, 2060, 156 L.Ed. 2d 1* (National Bank Act provides exclusive cause of action for usury claims against national banks; thus usury action against national bank filed in state court could be removed to federal court because it actually arose under federal law)]. This provision authorizes a national bank to charge out-of-state credit card customers an interest rate allowed by the bank's home state, even when that rate is higher than what is permitted by the states in which the cardholders reside [*Marquette Nat. Bank of Minneapolisv. First of Omaha Service Corp. (1978) 439 U.S. 299, 318, 99 S. Ct. 540, 58 L. Ed. 2d 534]* . That provision of the Act also authorizes a national bank to charge late payment fees that are lawful in the bank's home state but prohibited in the states where the cardholders reside. In other words, the statutory term "interest" encompasses late payment fees [*Smiley v. Citibank (1996) 517 U.S. 735, 116 S. Ct. 1730, 1736, 135 L. Ed. 2d 25* ; *see 12 C.F.R. § 7.4001(a)* (term "interest" in *12 U.S.C. § 85* includes late payment fees)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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50-568 California Forms of Pleading and Practice--Annotated § 568.54

§ 568.54 Small Business Investment Company

A small business investment company may charge interest on a business loan at a rate that does not exceed the maximum rate prescribed by regulation by the Small Business Administration for loans made by any licensee [*15 U.S.C. § 687(i)(2)*]. That rate is determined without regard to any state rate incorporated by the regulation [*15 U.S.C. § 687(i)(2)*]. A state law or constitutional provision is preempted for these purposes if the loan is made on or after April 1, 1980, and before either the state adopts a law or certifies that the voters of that state have voted to adopt a law or provision that explicitly rejects the preemption [*15 U.S.C. § 687(i)(3)*]. No such law or provision has been adopted in California.

If the maximum rate so authorized exceeds the rate that would be authorized by applicable state law if that state law were not preempted for computation purposes, any charging of an interest rate in excess of the authorized rate is deemed a forfeiture of the greater of (1) all interest carried with the loan, or (2) all interest agreed to be paid on the loan [*15 U.S.C. § 687(i)(4)(A)*]. If the interest is forfeited, the person who paid the interest may recover from the company an amount equal to twice the amount of interest paid on the loan. The interest may be recovered in a civil action commenced in a court of appropriate jurisdiction within two years after the most recent payment of interest [*15 U.S.C. § 687(i)(4)(B)*].

Legal Topics:

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

§§ 568.55[Reserved]

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50-568 California Forms of Pleading and Practice--Annotated § 568.70

§ 568.70 In General

Numerous classes of persons are specifically exempted from the interest rate restrictions of *Cal. Const., art. XV, § 1*. In addition, the Legislature is authorized to enact statutes designating classes of persons to be exempted from these usury provisions [*Cal. Const., art. XV, § 1*].

Nevertheless, even an interest rate exempted from the usury law may be unenforceable on the ground of unconscionability [*see Civ. Code § 1670.5*; *Carboni v. Arrospide (1991) 2 Cal. App. 4th 76, 81-85, 2 Cal. Rptr. 2d 845* (affirming finding of unconscionability of secured note providing 200 percent annual interest rate over one and one-half year term)]. For discussion of unconscionability and a form of affirmative defense seeking to have an onerous term declared unconscionable, see Ch. 140, *Contracts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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50-568 California Forms of Pleading and Practice--Annotated § 568.71

§ 568.71 Banks, Associations, Trust Companies, and Other Fiduciaries

The restrictions on interest rates contained in *Cal. Const., art. XV, § 1* do not apply to any obligations of, loans made or arranged by, or forbearances of any of the following:

- Any California state bank authorized to engage in a trust business, when acting in its fiduciary capacity [*Fin. Code § 1504(a)*].

- Any national bank authorized to engage in a trust business, when acting in its fiduciary capacity, if it maintains its main office or a branch office in California [*Fin. Code § 1504(b)*; *see Jones v. Wells Fargo Bank (2003) 112 Cal. App. 4th 1527, 1534-1535, 5 Cal. Rptr. 3d 835* (because loan and forbearance agreement made by national bank both fell squarely within *Fin. Code § 1504* exemption, they were not illegal under California usury law)].

- Any foreign (other state) state bank authorized to engage in a trust business, when acting in its fiduciary capacity, if it maintains a branch office in California [*Fin. Code § 1504(c)*].

- Any association [Fin. Code § 7565; *see Fin. Code § 5102(a)* (defining "association"); *see also Fin. Code § 6515(c)* (exemption for association acting in fiduciary capacity as trustee)].

- Any federal association [*Fin. Code § 7675(a)*; *see Fin. Code § 6515(c)* (exemption for federal association acting in fiduciary capacity as trustee)].

- A qualified foreign savings association [*Fin. Code § 7675(a)*; *see Fin. Code §§ 10000(c)* (defining foreign savings association), 10002, 10003 (qualification)].

- Any savings and loan holding company [*Fin. Code § 7675(a)*].

- Any subsidiary of a savings and loan holding company that is not an association [*Fin. Code §*

7675(a)],

- Any service corporation that is a subsidiary of an association, federal association, or qualified foreign association [*Fin. Code § 7675(a)*].

- Any service corporation that is authorized to exercise trust powers and is acting in its fiduciary capacity as trustee [*Fin. Code § 6515(c)*].

- A bank holding company or subsidiary of a bank holding company that is not a bank [*Fin. Code § 3707*].

Any foreign bank from another state is exempted from the restrictions on interest rates contained in *Cal. Const., art. XV, § 1* [*Fin. Code § 3805(a)*].

Any foreign bank from another nation is similarly exempted if, at the time it makes a loan or forbearance, or executes a contract for a loan or forbearance, the bank has assets equal to at least $100 million and is licensed to maintain an office in California or in another state or to maintain a federal branch in any state [*Fin. Code § 1716*].

For discussion of federal regulation of the interest rates of depository institutions, preempting any conflicting state law to the contrary, see *§ 568.50* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
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50-568 California Forms of Pleading and Practice--Annotated § 568.72

§ 568.72 Credit Unions

The obligations of, loans made by, or forbearances of any credit union governed by *Fin. Code § 14000 et seq.* are exempted from the restrictions on interest rates contained in *Cal. Const., art. XV, § 1* [*see Cal. Const., art. XV, § 1* (specifying exemption for former act governing credit unions, repealed and now replaced by *Fin. Code § 14000 et seq.*)].

A credit union may assess charges as approved by the board of directors for failure to meet punctually obligations to the credit union. Any late charge may be made only once for each delinquent payment and is subject to *Civ. Code § 2954.5* (requiring notice to the borrower before imposition of the late charge), Division 1.1 of the Financial Code [*see Fin. Code § 4000 et seq.*], and any other applicable law [*Fin. Code § 15001*].

For discussion of federal regulation of the interest rates of federally insured credit unions, preempting any conflicting state law to the contrary, see *§ 568.51*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 568.73 Industrial Loan Companies

The restrictions on interest rates contained in *Cal. Const., art. XV, § 1* do not apply to the obligations of, loans made by, or forbearances of any industrial loan company governed by *Fin. Code §§ 18000-18705* [*see Cal. Const., art. XV, § 1* (specifying exemption for former act governing industrial loan companies, repealed and now replaced by *Fin. Code § 18000 et seq.*)].

State law places certain restrictions on certain charges that may be levied in connection with a loan by an industrial loan company [*see, e.g., Fin. Code §§ 18212, 18212.1, 18300, 18625-18631*]. If any amount in excess of permitted charges, including interest, is charged, contracted for, or received in the making or collection of a contract of such a loan except as a result of accidental or bona fide error in computation, the contract is void and the company may not collect or receive the principal, interest, or charges [*Fin. Code § 18439*]. Furthermore, a director, officer, or employee of an industrial loan company, its holding company, or its affiliate, who concurs in any vote or act by which it is intended to make a loan or purchase such a contract is guilty of a misdemeanor [*Fin. Code § 18450*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 568.74 Deferred Deposit Lenders (Payday Lenders)

Persons licensed under the California Deferred Deposit Transaction Law [*Fin. Code § 23000 et seq.*], operative December 31, 2004 [*Fin. Code § 23104* (effective and operative dates of statute)]--commonly known as payday lenders--are in an exempt class under *Cal. Const., art. XV, § 1* [*Fin. Code § 23106*]. Prior to the operative date of the California Deferred Deposit Transaction Law, payday lenders were regulated under the statutes applicable to check cashers [*see Civ. Code § 1789.30 et seq.*]. For discussion, see Ch. 95, *Banks, Deposits, and Checks* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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50-568 California Forms of Pleading and Practice--Annotated § 568.75

§ 568.75 Pawnbroker

[1] In General

The obligations of, loans made by, or forbearances of any licensed pawnbroker are exempt from the restrictions on interest rates contained in *Cal. Const., art. XV, § 1* [*see Cal. Const., art. XV, § 1*; *Fin. Code § 21000 et seq.*]. This exemption, however, applies only to pawn transactions within the scope of the pawnbroker license [*Agapitov v. Lerner (2003) 108 Cal. App. 4th 830, 832, 133 Cal. Rptr. 2d 837* (pawnbroker could not claim benefit of pawnbroker exemption from usury law with respect to loan that was not pawn transaction, did not comply with statutory requirements, and was not made within scope of pawnbroker's license)]. Except as otherwise provided in *Fin. Code §§ 21200-21209*, no pawnbroker may charge or receive compensation, for a loan of a bona fide principal amount of less than $2,500, at a rate exceeding the sum of the following [*Fin. Code §§ 21051, 21200(a)*] after the first 90 days [*Fin. Code § 21201.4*]:

- Two and one-half percent per month on the unpaid principal balance of the loan that is equal to or less than $225;
- Two percent per month on the unpaid principal balance between $225.01-$900;
- One and one-half percent per month on the unpaid principal balance between $900.01-$1,650;
- One percent per month on any remainder of the unpaid principal balance in excess of $1,650; and
- A charge not exceeding $3 a month on any loan when the monthly permitted charge would otherwise be less than $3.

One month's interest may be charged for any part of the month in which pawned property is redeemed [*Fin. Code § 21200(b)*].

A loan setup fee not to exceed $5 or 2 percent, whichever is greater, may be charged for each loan. However, the maximum loan setup fee may not exceed $10. Loan setup fees are in addition to any other allowed charges [*Fin. Code § 21200.1*].

If the principal amount of the loan is less than $2,500, then for the first 90 days of a loan having a term longer than 90 days [*Fin. Code § 21201.4*], or for the term of a loan having a term of up to 90 days, a licensed pawnbroker may charge for a loan as follows [*Fin. Code § 21200.5*; *see also Fin. Code § 21051(a)*]:

- $1 or less for a 30-day loan of no more than $14.99.
- $3 or less for a 90-day loan of $15-$19.99.
- $4 or less for a 90-day loan of $20-$24.99.
- $5 or less for a 90-day loan of $25-$39.99.
- $6 or less for a 90-day loan of $40-$49.99.
- $7.50 or less for a 90-day loan of $50-$64.99.
- $8.50 or less for a 90-day loan of $65-$74.99.
- $10 or less for a 90-day loan of $75-$99.99.
- $12.50 or less for a 90-day loan of $100-$124.99.
- $13.50 or less for a 90-day loan of $125-$149.99.
- $15 or less for a 90-day loan of $150-$224.99.
- $20 or less for a 90-day loan of $225-$324.99.
- $25 or less for a 90-day loan of $325-$449.99.
- $35 or less for a 90-day loan of $450-$599.99.
- $45 or less for a 90-day loan of $600-$799.99.
- $55 or less for a 90-day loan of $800-$999.99.
- $70 or less for a 90-day loan of $1,000-$1,199.99.
- $85 or less for a 90-day loan of $1,200-$1,499.99.
- $100 or less for a 90-day loan of $1,500-$1,799.99.
- $120 or less for a 90-day loan of $1,800-$2,099.99.
- $140 or less for a 90-day loan of $2,100-$2,499.99.

The charge for any extension or renewal of a loan must be computed in accordance with the provisions of *Fin. Code § 21200* [*Fin. Code § 21200.5(v)*].

In addition to other charges allowed, and irrespective of the duration of the time the article is in pledge, a pawnbroker may collect at the time the property is redeemed handling and storage charges based on the size of each article pawned as follows [*Fin. Code § 21200.6(a)*; *see Fin. Code § 21200.6(c)* (measurements taken at widest, deepest, and highest points)]:

- $5 for any article that cannot be contained within one cubic foot.
- $10 for any article that cannot be contained within three cubic feet.
- $20 for any article that cannot be contained within six cubic feet.
- $1 for each additional cubic foot, in excess of six cubic feet.

Whenever a pledger, or his or her assignee, loses a pawn ticket, a fee not to exceed $10 may be charged for services of verifying the identification of the claimant, fingerprinting the claimant, and having the claimant execute a declaration under penalty of perjury [*Fin. Code § 21201.1*]. If the pledger fails to redeem any pawned item during the loan period, thereby obliging the pawnbroker to mail the notice required under *Fin. Code § 21201*, the pawnbroker may charge a fee of up to $3 for services and costs pertaining to the preparation of the notice, in addition to any other allowed charges [*Fin. Code § 21201.2*].

No additional charge is allowed for any article that can be contained within one cubic foot [*Fin. Code § 21200.6(b)*].

In addition to other charges allowed, a pawnbroker may also collect a $4 processing charge for each firearm pawned [*Fin. Code § 21200.8*].

A pawnbroker who knowingly charges, or should know that he or she is charging, more than the permitted amount is guilty of a misdemeanor [*see Fin. Code § 21209*]. However, the Financial Code does not specify a particular civil remedy against a pawnbroker for charging excessive fees.

[2] Licensure

The chief of police, the sheriff, or when appropriate, the police commissioner, must accept an application for and grant a license permitting the licensee to engage in the business of pawnbroker, at the address indicated on the application, to an applicant who has complied with the statutory requirements and has not been convicted of an attempt to receive stolen property or any other offense involving stolen property [*Fin. Code § 21300(a)*; *see Fin. Code §§ 21000* ("pawnbroker" defined), 21303-21305 (statutory requirements); *see also Fin. Code § 21300(b)* ("convicted" defined)]. No person may be denied a pawnbroker's license solely on the grounds that he or she violated any provision of *Fin. Code §§ 21000-21209* (definitions and pawnbroker regulations) or *Bus. & Prof. Code §§ 21625-21653* (tangible personal property or resale of goods) unless the violation demonstrates a pattern of conduct [*Fin. Code § 21300(c)*].

The statutory requirements require a pawnbroker licensee to file a two-year nonrevocable surety bond in the sum of $20,000 [*Fin. Code § 21303(a)*]. The applicant must also file a financial statement confirming that the applicant has at least $100,000 in liquid assets, not including real property, readily available for use in the business for which the application is made, or in the absence of $100,000, an applicant may post a nonrevocable surety bond for $100,000. In lieu of posting a surety bond, the applicant may deposit money, certificates, accounts, bonds, or notes as provided in *Code Civ. Proc. § 995.710* (the Bond and Undertaking Law) [*Fin. Code § 21304(a)*]. The financial statement must be filed by the applicant under penalty of perjury and signed by a California Certified Public Accountant verifying that he

or she has reviewed the financial statement [*Fin. Code § 21304(a)*]. However, the requirement of filing a financial statement does not apply to any person holding a secondhand dealers license [*see Bus. & Prof. Code §§ 21641, 21642*] and who is actively engaged as a pawnbroker on January 1, 1994 [*Fin. Code § 21304(b)*]. In addition, a pawnbroker licensed under *Fin. Code § 21300* is exempt from the licensing requirements under *Bus. & Prof. Code §§ 21641* and *21642* and may engage in any transaction involving tangible personal property for which a secondhand dealers license is required. Pawnbrokers operating under this license exemption are required to conform to all other requirements of secondhand dealers for which a license is required under *Bus. & Prof. Code §§ 21641* and *21642* [*Fin. Code § 21306*].

The licensure provisions also provide for renewing a license [*see Fin. Code § 21301(a)*], grounds for forfeiting the license [*see Fin. Code § 21301(b)*], and grounds for bringing an injunction for violating *Fin. Code §§ 21000-21209* (definitions and pawnbroker regulations) or *Bus. & Prof. Code §§ 21625-21653* (tangible personal property or resale of goods) [*see Fin. Code § 21302*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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50-568 California Forms of Pleading and Practice--Annotated § 568.76

§ 568.76 Personal Property Brokers and Consumer Finance Lenders

The obligations of, loans made by, or forbearances of any licensed personal property broker are exempt from the restrictions on interest rates contained in *Cal. Const., art. XV, § 1* [*see Cal. Const., art. XV, § 1*; *Fin. Code §§ 22000-22654*]. The exemption also applies to obligations of, loans made by, or forbearances of any licensed consumer finance lender [*see Cal. Const., art. XV, § 1* (permitting Legislature to exempt classes of persons from usury provisions); *Fin. Code §§ 24000-24654*; Stats. 1982, ch. 1082, § 28 (set forth as note in annotation to *Fin. Code § 22000*)]. In addition, a loan made by, or forbearance of, a licensed personal property broker or consumer finance lender is exempted from certain statutory regulations if the bona fide principal amount of the loan exceeds a specified amount and if the broker or lender has not taken advantage of the exemptions for the purpose of evading the statutory usury laws [*see Fin. Code §§ 22053, 22053.1, 24053, 24053.1*; *see, e.g., Draper v. American Funding Ltd. (1991) 234 Cal. App. 3d 345, 350, 285 Cal. Rptr. 640* (*Civ. Code § 2954.9*, governing prepayment penalties, does not apply to loans made by personal property brokers)].

A licensed personal property broker may not charge, contract for, or receive any interest or charge of any nature for a commercial loan of less than $5,000 or a noncommercial loan of any amount, unless the loan is actually made, except that a charge may be imposed for a noncommercial loan of $5,000 or more if the loan is not consummated because of the borrower's failure to disclose essential information [*Fin. Code §§ 22053.1, 22450, 22450.1*]. A licensed consumer finance lender similarly may not charge, contract for, or receive any interest or charge of any nature for a loan of less than $5,000 unless the loan is actually made; however, the charge may be made for a loan of $5,000 or more if the loan is not consummated because of the borrower's failure to disclose essential information [*Fin. Code §§ 24053.1, 24450, 24450.1*].

In general, a loan contract by a licensed personal property broker or consumer finance lender may not be unconscionable [*see Civ. Code § 1670.5*; *Fin. Code §§ 22450.5, 24450.5*]. In addition, when a licensed personal property broker or consumer finance lender lends less than $2,500, the loan contract may only provide for payment of charges if the rate meets the criteria of either of two alternative schedules of charges. In the case of personal property brokers, however, neither of the schedules applies to any commercial loan made to a person engaged in the business of selling goods for the purpose of financing the purchaser of goods for resale as determined in accordance with *Fin. Code*

§ 22054 [*Fin. Code §§ 22451, 22451.1*]. Under the first schedule, the contract may provide for payment of charges if the rate does not exceed the sum of the following [*Fin. Code §§ 22451* (maximum charges by personal property brokers), 24451 (maximum charges by consumer finance lenders); *see also Fin. Code §§ 22452, 24452* (open end credit program)]:

- Two and one-half percent per month on the unpaid principal balance of the loan that is equal to or less than $225; plus
- Two percent per month on the unpaid principal balance between $225.01-$900; plus
- One and one-half percent per month on the unpaid principal balance between $900.01-$1,650; plus
- One percent per month on any remainder of the unpaid principal balance in excess of $1,650.

Under the alternative to *Fin. Code § 22451* or *24451*, a licensed personal property broker or consumer finance lender lending less than $2,500 may contract for payment of charges at the greater of the following [*Fin. Code §§ 22451.1* (alternative charges by personal property brokers), 24451.1 (alternative charges by consumer finance lenders)]:

- A rate not exceeding one and three-fifths percent per month on the unpaid principal balance; or
- A rate, calculated on the unpaid principal balance, not exceeding five-sixths of one percent per month plus a percentage per month equal to one-twelfth of the annual rate prevailing on the 25th day of the second month of the quarter preceding the quarter in which the loan is made as established by the Federal Reserve Bank of San Francisco on advances to members, or if not determinable, the closest counterpart of this rate as determined by the Superintendent of Banks of the State of California.

In addition to the charge, a licensed personal property broker or consumer finance lender may charge an administrative fee for a loan of no more than $2,500, at a rate not in excess of five percent of the principal amount or $50, whichever is less [*Fin. Code §§ 22451.3, 24451.3*].

Other fees charged by a licensed personal property broker in connection with commercial loans of less than $5,000 or noncommercial loans of less than $10,000 are regulated by statute [*see Fin. Code §§ 22053, 22458.3-22458.7, 22472*]. Other fees charged by a consumer finance lender are also regulated by statute [*see Fin. Code §§ 24458.3-24458.7, 24472*].

Precomputation and payment of charges on a loan by a licensed personal property broker are governed by *Fin. Code §§ 22480-22482* [*see Draper v. American Funding Ltd. (1991) 234 Cal. App. 3d 345, 350-354, 285 Cal. Rptr. 640* (*Fin. Code §§ 22480, 22482*, not *Civ. Code § 2954.9*, governs prepayment penalties charged by personal property brokers)], whereas precomputation and payment of charges on a loan by a consumer finance lender are governed by *Fin. Code §§ 24480-24482*.

If any unpermitted amount is charged, contracted for, or received, for any reason other than a willful act of the licensed personal property broker or consumer finance lender, the broker or lender must forfeit all interest and charges on the loan and may collect or receive only the principal amount of the loan [*Fin. Code §§ 22651(a), 24651(a)*; *see also § 568.127* (affirmative defense to action on loan if violation is nonwillful)]. Nevertheless, the broker or lender may collect or receive the interest and charges if the broker or lender shows by a preponderance of the evidence that the violation was unintentional and due to a bona fide error in computation notwithstanding the maintenance of procedures reasonably adapted to avoid such errors, and if, within 60 days of discovering the error, the broker or lender notifies the borrower of the error, and makes all necessary corrections to the account [*Fin. Code §§ 22651(b), 24651(b)*].

If any unpermitted amount is willfully charged, contracted for, or received, the contract of loan is void, and the personal property broker or consumer finance lender has no right to collect or receive any principal, charges, or recompense in connection with the transaction [*Fin. Code §§ 22650(a), 24650(a)*; *see also § 568.128* (affirmative defense to action on loan if violation is willful)]. Additionally, any willful violation is punishable by a fine or imprisonment, or both [*Fin. Code §§ 22653, 24653*].

An open-end credit program by a personal property broker or a consumer finance lender is also regulated by statute [*see Fin. Code §§ 22500-22517* (personal property brokers), 24500-24517 (consumer finance lenders)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionGeneral OverviewContracts LawDefensesUsuryContracts LawTypes of ContractsGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesReal Property LawFinancingUsury

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50-568 California Forms of Pleading and Practice--Annotated § 568.77

§ 568.77 Real Estate Brokers

[1] In General

The usury provisions of *Cal. Const., art. XV, § 1*, do not apply to any loan or forbearance made or arranged by any person licensed as a real estate broker by the State of California if the loan or forbearance is secured, directly or collaterally, in whole or in part, by liens on real property [*Civ. Code § 1916.1*; *Gibbo v. Berger (2004) 123 Cal. App. 4th 396, 404, 19 Cal. Rptr. 3d 829]* . This exemption should be construed broadly to effectuate the Legislature's purpose, which was to increase the availability of money of nonconsumer loans while ensuring protection of the public through existing licensing requirements and regulatory control over real estate brokers [Park Terrace Ltd. v. Teasdale (2002) (*100 Cal. App. 4th 802, 805-806, 122 Cal. Rptr. 2d 797* (finding exemption for loans arranged by licensed real estate broker applicable); *Del Mar v. Caspe (1990) 222 Cal. App. 3d 1316, 1326, 272 Cal. Rptr. 446* ; *but see Gibbo v. Berger (2004) 123 Cal. App. 4th 396, 401-402, 19 Cal. Rptr. 3d 829* (criticizing broad interpretation of "arranged" in *Del Mar v. Caspe*)].

For the purposes of *Civ. Code § 1916.1*, a loan or forbearance is arranged by a person licensed as a real estate broker when the broker does any of the following [*Civ. Code § 1916.1*]:

- Acts for compensation or in expectation of compensation for soliciting, negotiating, or arranging the loan for another;

- Acts for compensation or in expectation of compensation for selling, buying, leasing, exchanging, or negotiating the sale, purchase, lease, or exchange of real property or a business for another and either (1) arranges a loan to pay all or any portion of the purchase price of, or of an improvement to, that property or business, or (2) arranges a forbearance, extension, or refinancing of any loan in connection with that sale, purchase, lease, exchange of, or an improvement to, real property or a business; or

- Arranges or negotiates for another a forbearance, extension, or refinancing of any loan secured by real property in connection with a past transaction in which the broker had acted for compensation or in

expectation of compensation for selling, buying, leasing, exchanging, or negotiating the sale, purchase, lease, or exchange of real property or a business.

"Made or arranged" includes any loan made by a person licensed as a real estate broker as a principal or as an agent for others, and whether or not the person is acting within the course and scope of that license [*Civ. Code § 1916.1*].

A broker has "arranged" a loan for another within the terms of *Civ. Code § 1916.1(1)* if he or she was essential to the preparation, execution, and completion of the loan documents and transaction, unless the broker's services were nominal or pretextual [Park Terrace Ltd. v. Teasdale (2002) (*100 Cal. App. 4th 802, 806-808, 122 Cal. Rptr. 2d 797* (finding that licensed real estate broker "arranged" obligation; notes also provided conclusive presumption of arrangement); *Del Mar v. Caspe (1990) 222 Cal. App. 3d 1316, 1329, 272 Cal. Rptr. 446* ; *but see* *Gibbo v. Berger (2004) 123 Cal. App. 4th 396, 401-402, 19 Cal. Rptr. 3d 829* (criticizing broad interpretation of "arranged" in *Del Mar v. Caspe*)].

Although one court has stated that the term "arranged" should be broadly construed [*Del Mar v. Caspe (1990) 222 Cal. App. 3d 1316, 1328, 272 Cal. Rptr. 446]* , that approach has been criticized as dicta that would lead to absurd results [*Gibbo v. Berger (2004) 123 Cal. App. 4th 396, 401-402, 19 Cal. Rptr. 3d 829* (broad interpretation in *Del Mar* unnecessary because broker acted within meaning of statute, even under narrowest interpretation)]. The real estate broker must do more than photocopy and collate pages of a loan document for a nominal fee, and instead must engage in some conduct as a third-party intermediary that causes the loan to be obtained or procured [*Gibbo v. Berger (2004) 123 Cal. App. 4th 396, 403-404, 19 Cal. Rptr. 3d 829* (real estate broker who merely prepared documentation of loan already agreed upon by lender and borrower did not act within meaning of usury exemption)]. Specific conduct that has been found to fall within the usury exemption for loans "arranged" by real estate brokers includes:

- Structuring the loan as agent for the lender [*Chapman v. Farr (1982) 132 Cal. App. 3d 1021, 1026, 183 Cal. Rptr. 606]* .

- Setting the interest rate, points and terms of a forbearance agreement [*Gibbo v. Berger (2004) 123 Cal. App. 4th 396, 401-402, 19 Cal. Rptr. 3d 829* ; *Jones v. Kallman (1988) 199 Cal. App. 3d 131, 135, 244 Cal. Rptr. 609]* .

- Conducting title searches, drafting terms of the loan, and reviewing loan and forbearance documents [*Gibbo v. Berger (2004) 123 Cal. App. 4th 396, 401-402, 19 Cal. Rptr. 3d 829* ; *Jones v. Kallman (1988) 199 Cal. App. 3d 131, 135, 244 Cal. Rptr. 609]* .

A broker who negotiates a loan on behalf of the lender, and who is an officer and employee of an affiliate of the lender but is not employed by the lender itself, negotiates the loan "for another" within the meaning of *Civ. Code § 1916.1* [*Stoneridge Parkway Partners, LLC v. MW Housing Partners III, L.P. (2007) 153 Cal. App. 4th 1373, 1379-1380, 64 Cal. Rptr. 3d 61]* .

[2] Maximum Charges on Original Loans

The costs and expenses of a loan secured by a dwelling that is made or arranged by a real estate broker pursuant to *Bus. & Prof. Code §§ 10240-10248.3*, other than a loan for $20,000 or more if secured by a first trust deed or $10,000 or more if secured by any lien junior to a trust deed (referred to as a "regulated dwelling loan"), are subject to certain maximum limits [*Bus. & Prof. Code §§ 10240.1* (provisions apply only to loans secured by dwelling), 10242(a) (maximum charges), 10245 (certain provisions do not apply to loan of $30,000 or more secured by first trust deed or to loan of $20,000 or more secured by lien junior to first trust deed)]. Specifically, the maximum amount of all costs and expenses to be paid by a borrower for appraisal fees, escrow fees, notary fees, and credit investigation fees may not exceed the greater of five percent of the principal amount of the loan up to $390, or $700. In no event may the maximum amount exceed actual costs and expenses paid, incurred, or reasonably earned [*Bus. & Prof. Code § 10242(a)*

].

The maximum amount of charges to be paid by the borrower on a regulated dwelling loan to the real estate broker for the brokerage or commissions if the broker arranged the loan, or for the loan origination fees, points, bonuses, and other charges in lieu of interest if the broker acted as a lender rather than agent, may not exceed the following amounts [*Bus. & Prof. Code § 10242(b)*]:

- Five percent of the principal amount of the loan, if the loan was secured directly or collaterally, in whole or in part by a first trust deed, and is for a term of less than three years.

- Ten percent of the principal amount of the loan, if the loan was secured directly or collaterally, in whole or in part by a first trust deed, and is for a term of three years or more.

- Five percent of the principal amount of the loan, if the loan was secured directly or collaterally by a trust deed other than a first trust deed, and is for a term of less than two years.

- Ten percent of the principal amount of the loan, if the loan was secured directly or collaterally by a trust deed other than a first trust deed, and is for a term of at least two years but less than three years.

- Fifteen percent of the principal amount of the loan, if the loan was secured directly or collaterally by a trust deed other than a first trust deed, and is for a term of three years of more.

- With respect to a further advance on a note, the charges may not exceed the charges for an original loan in the same amount as the further advance and made for a term equal to the remaining term of the note on which the further advance is being made, including any extension thereof.

No interest may be charged on a regulated dwelling loan with respect to any period prior to the date that the proceeds of the loan are made available to the borrower or are deposited in escrow [*Bus. & Prof. Code § 10242(c)*].

[3] Maximum Charges on Refinanced Loans

If a regulated dwelling loan has an original maturity period of less than three years and is renewed or refinanced, the total amount of charges to be paid on both the original obligation and the balance of the obligation, as renewed or refinanced, may not in the aggregate exceed the amount of charges as provided in *Bus. & Prof. Code § 10242*. If the loan is renewed or refinanced through the person who negotiated the original loan, the total amount of costs and expenses to be paid on both the original obligation and the renewed or refinanced obligation may not exceed in the aggregate the amount of costs and expenses authorized in *Bus. & Prof. Code § 10242(a)* [*Bus. & Prof. Code § 10244*]. However, neither of these restrictions applies if the loan is secured by a first trust deed on real property and is made in connection with the financing of the usual costs of the development of a residential, commercial, or industrial building or buildings on the property under a written agreement that provides for the disbursement of the loan funds as costs are incurred or in relation to the progress of the work and that provides for certain title insurance or final disbursement [*Bus. & Prof. Code § 10244*].

[4] Maximum Charge for Late Payment

A charge for a late payment of an installment due on a regulated dwelling loan that is secured by a mortgage or deed of trust on real property may not exceed 10 percent of the principal and interest part of the installment due or $5, whichever is greater [*Bus. & Prof. Code § 10242.5(a)*]. The charge may not be imposed more than once for the same late payment, and may not be imposed on any installment that is paid or tendered in full within 10 days of its due date [*Bus. & Prof. Code § 10242.5(b)*].

A late payment charge may be imposed under *Bus. & Prof. Code § 10242.5* for the payment of any balloon payment more than 10 days after the due date. The charge must not exceed an amount equal to the maximum late charge that could have been assessed with respect to the largest single monthly installment previously due, other than the balloon payment, multiplied by the sum of one plus the number of months occurring since the late payment charge began to accrue [*Bus. & Prof. Code § 10242.5(c)*].

[5] Effect of Prepayment by Borrower

With respect to any loan secured by a single-family, owner-occupied dwelling, that is made or arranged by a real estate broker pursuant to *Bus. & Prof. Code §§ 10240-10248.3*, the borrower may prepay, at any time and in whole or in part, the principal and accrued interest on the loan, if the loan is secured by a mortgage or deed of trust on real property containing only a single-family, owner-occupied dwelling. However, a prepayment charge may be levied on any amount prepaid in any 12-month period within seven years of the date of execution of the mortgage or deed of trust, if the prepaid amount exceeds 20 percent of the unpaid balance. The prepayment charge may not exceed an amount equal to the payment of six months' advance interest on the amount prepaid in excess of 20 percent of the unpaid balance [*Bus. & Prof. Code § 10242.6*].

[6] Remedies for Excess Charges

If any amount prohibited by *Bus. & Prof. Code §§ 10242, 10242.5, 10242.6*, or *10248.1* [*see § 568.77[2] -[5]*] is received by any person, the borrower may recover from that person three times the amount of the prohibited amount. However, if the prohibited amount is the result of a bona fide error, the borrower may only recover the prohibited amount [*Bus. & Prof. Code § 10246*]. In addition, the borrower is entitled to costs and reasonable attorney's fees. The borrower must bring the recovery action within two years from the date on which the prohibited amount was received [*Bus. & Prof. Code § 10246*].

If the loan is negotiated in violation of any provision of *Bus. & Prof. Code §§ 10240-10248.3*, the borrower may seek relief in a demand procedure. However, if the demand procedure is pursued, the borrower may not additionally seek relief under *Bus. & Prof. Code § 10246* for the same breach. Under the demand procedure, the borrower may demand that the broker return to the borrower any bonus, brokerage, or commission paid or payable under *Bus. & Prof. Code § 10242* for negotiation of the loan. If the demand is not satisfied within 20 days from the date on which the written demand is personally delivered or mailed to the broker, the borrower may commence an action and recover actual damages or twice the bonus, brokerage or commission, whichever is greater. The borrower may also recover costs and reasonable attorney's fees in the action [*Bus. & Prof. Code § 10248.2(b)*]. The action must be commenced within two years after the maturity of the loan [*Bus. & Prof. Code § 10248.2(d)*]. The broker will not be held liable in the action if the broker shows, by a preponderance of the evidence, that the violation was unintentional and resulted from a bona fide error [*Bus. & Prof. Code § 10248.2(b)*]. (Although *Bus. & Prof. Code § 10248.2(b)* does not explicitly remove mistakes of law from the scope of the "bona fide error" defense--whereas some other statutes allowing the same defense do exclude mistakes of law--the defense probably does not cover a violation that arose from the defendant's mistaken interpretation of statutory requirements [*cf. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA (2010) -- U.S. --, 130 S. Ct. 1605, 176 L. Ed. 2d 519, 2010 U.S. LEXIS 3480, at *15-*59* (such defense allowed by Fair Debt Collection Practices Act, *15 U.S.C. § 1692k(c)*, in same language as *Bus. & Prof. Code § 10248.2(b)*, did not cover debt-collecting attorney's mistake of law as to Act's requirements)].)

For a form for use in drafting a demand letter, see *§ 568.125*. For a form for use in drafting a complaint if the demand is not met, see *§ 568.126*. For a form for use in drafting a complaint if the demand procedure has not been employed, see *§ 568.124*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesUsuryReal Property LawBrokersGeneral OverviewReal Property LawFinancingUsury

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§ 568.78 Nonprofit Cooperatives

Any nonprofit cooperative association governed by *Food & Agric. Code § 54001 et seq.*, and any nonprofit cooperative governed by the Agricultural Credits Act of 1923 [*12 U.S.C. § 1151 et seq.*], is exempt from the interest rate restrictions contained in *Cal. Const., art XV, § 1* [*Cal. Const., art. XV, § 1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCooperativesGeneral OverviewContracts LawDefensesUsuryReal Property LawFinancingUsury

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50-568 California Forms of Pleading and Practice--Annotated § 568.79

§ 568.79 Common Interest Development Association

A common interest development association is exempt from the interest-rate limitations imposed by *Cal. Const., art. XV, § 1* [*Civ. Code § 1366(f)*]. Instead, the association is permitted to levy a late charge on an owner of a separate interest in the development for an assessment of that interest that is delinquent, as long as the late charge does not exceed 10 percent of the delinquent assessment or $10, whichever is greater. However, if the declaration governing the development specifies a late charge in a smaller amount, the late charge actually levied may not exceed that specified amount [*Civ. Code § 1366(e)(2)*]. The association may recover interest on all sums imposed in accordance with *Civ. Code § 1366*, including the delinquent assessments, reasonable fees and costs of collection, and reasonable attorney's fees, at an annual interest rate not to exceed 12 percent, commencing 30 days after the assessment becomes due, unless the declaration specifies the recovery of interest at a rate of a lesser amount, in which case the lesser rate of interest applies [*Civ. Code § 1366(e)(3)*]. For further discussion, see Ch. 579, *Zoning and Planning* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesUsuryReal Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawFinancingUsury

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50-568 California Forms of Pleading and Practice--Annotated § 568.80

§ 568.80 Insurer

Any admitted incorporated insurer possessing a valid certificate of authority issued pursuant to *Ins. Code § 699 et seq.* is exempted from the restrictions on interest rates contained in *Cal. Const., art. XV, § 1* [*Ins. Code § 1100.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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50-568 California Forms of Pleading and Practice--Annotated § 568.81

§ 568.81 Sales of Securities

Five classes of persons created under the state corporate securities laws [*Corp. Code § 25000 et seq.*] in regard to the sale of securities are exempt from the restrictions on interest rates contained in *Cal. Const., art. XV, § 1* [*see Corp. Code §§ 25116-25118, 25211.5*], as follows:

First, an evidence of indebtedness issued pursuant to a qualification of a sale of a security under *Corp. Code § 25110* or *Corp. Code § 25120 et seq.*, and its purchaser, are exempt from the usury provisions of *Cal. Const., art. XV, § 1*. However, the exemption is subject to compliance by the issuer of the security and by the purchaser with the terms and requirements that may be imposed by the Commissioner of Corporations as a condition of the qualification [*Corp. Code § 25116*].

Second, an evidence of indebtedness and its purchasers or holders are exempt from the usury provisions of *Cal. Const., art. XV, § 1* if either of the following criteria are met [*Corp. Code § 25117(a)*]:

- The evidence of indebtedness is rated or provisionally rated by Standard & Poor's Corporation as AAA, AA, A, BBB, or investment grade commercial paper, or by Moody's Investors Service, Inc. as Aaa, Aa, A, Baa, or investment grade commercial paper, including any such ratings with "+" or "-" designation or other variations that occur within these ratings, or has a rating or a provisional rating by another nationally recognized rating agency or system, which rating and agency or system have been certified by rule or order of the Commissioner of Corporations; or

- The issuer of the security either (1) has any security listed or approved for listing on notice of issuance on a national securities exchange, if the exchange has been certified by the Commissioner of Corporations, pursuant to *Corp. Code § 25100(o)*, or *(2)* is a corporation subject to Section 13 of the Securities Exchange Act of 1934, has total shareholders' equity of at least $1 million, and has consolidated net income of at least $500,000. Any evidence of indebtedness issued in compliance with the above criteria will be entitled to the benefits of the usury exemption, regardless of whether, after its issuance, the evidence of indebtedness is determined by a court to be a "security" [*Corp. Code §*

25117(c)].

Third and fourth, the following evidences of indebtedness, and the purchasers or holders, are exempt from the usury provisions of the Constitution (provided the transaction is not disqualified as specified below and meets either of two criteria specified below):

- An evidence of indebtedness issued by an entity or guaranteed by an entity that is an affiliate [*see Corp. Code § 150* (definition)] of the borrower if, on the day the evidence of indebtedness or guaranty is first issued or entered into, the entity has total assets of at least $2 million according to its then most-recent financial statements [*Corp. Code § 25118(a)*].

- Any one or more evidences of indebtedness if either of the following applies [*Corp. Code § 25118(b)*]:

  - The evidences of indebtedness aggregate at the time of issuance at least $300,000 in original face amount, or, if the evidences of indebtedness are purchased with original issue discount, they are purchased for an aggregate purchase price at the time of issuance of at least $300,000.

  - The evidences of indebtedness are issued pursuant to a bona fide written commitment for the lending to the issuer of at least $300,000, or the provision of a line of credit to the issuer in a principal amount of at least $300,000. The exemption provided by this paragraph will not be affected by a subsequent event of default or other event not in the lender's control that has relieved or may relieve the lender from its commitment.

These exemptions are not available, however, if the issuer or guarantor is an individual (whether directly or through a controlled trust or partnership) or the transaction is for personal, family, or household purposes [*Corp. Code § 25118(e)*]. Moreover, these exemptions are available only in a transaction that meets either of the following criteria [*Corp. Code § 25118(f)*]:

- The lender and either the issuer of the indebtedness or the guarantor, as the case may be, or any of their respective officers, directors, or controlling persons, or, if any party is a limited liability company, the managers as appointed or elected by the members, have a preexisting personal or business relationship [*see Corp. Code § 25118(g)* (definition)].

- The lender and the issuer, or the lender and the guarantor, by reason of their own business and financial experience or that of their professional advisers, could reasonably be assumed to have the capacity to protect their own interests in connection with the transaction.

The evidences of indebtedness described above, and the purchasers or holders, are entitled to the benefits of the usury exemption regardless of whether, at any time after the evidence of indebtedness or guaranty is first issued or entered into, the evidence of indebtedness or guaranty is determined by a court of competent jurisdiction not to be a "security" [*Corp. Code § 25118(c)*].

Finally, a broker-dealer of securities, acting pursuant to a certificate that is then in effect and that is issued pursuant to *Corp. Code § 25211*, is exempt from the usury provisions of *Cal. Const., art. XV, § 1* [*Corp. Code § 25211.5*].

Legal Topics:

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

Contracts LawDefensesUsuryReal Property LawFinancingUsury

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§ 568.82 Employee Retirement Income Security Act of 1974 (ERISA)

Civ. Code § 1917.220 provides that the restrictions on interest rates contained in *Cal. Const., art XV, § 1* do not apply to any obligation of, loan made by, or forbearance of, any pension fund or retirement system that is subject to the Employee Retirement Income Security Act of 1974 (ERISA) [*29 U.S.C. § 1001 et seq.*]. However, a California appellate court has held that *Civ. Code § 1917.220* is itself preempted by ERISA [*Varr v. Olimpia (1996) 45 Cal. App. 4th 675, 680-682, 53 Cal. Rptr. 2d 106]* . *Civ. Code § 1917.220* specifically refers to ERISA and singles out ERISA-governed pension plans for special treatment. Furthermore, *Civ. Code § 1917.220* is specifically designed to affect employee pension plans [*Varr v. Olimpia (1996) 45 Cal. App. 4th 675, 682, 53 Cal. Rptr. 2d 106]* .

The court also held that although *Civ. Code § 1917.220* is preempted, ERISA does not preempt California's general usury law itself. The court noted that there was no indication that when Congress enacted ERISA, it intended to displace state usury laws. ERISA does not dictate rates of interest that plans can charge on loans to third parties, and gives plan administrators broad discretion to choose among investments for the benefit of plan participants and beneficiaries [*Varr v. Olimpia (1996) 45 Cal. App. 4th 675, 686-687, 53 Cal. Rptr. 2d 106]* .

Since this case holds that ERISA preempts the statutory exemption for ERISA plans, but not the general California usury laws, the net result under this decision is that ERISA plans are subject to the state usury laws notwithstanding the statutory exemption [*see* *Varr v. Olimpia (1996) 45 Cal. App. 4th 675, 687, 53 Cal. Rptr. 2d 106* (*Civ. Code § 1917.220* could not form basis for lower court's denial of preliminary injunction against foreclosure of allegedly usurious obligations)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesUsuryPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)General OverviewPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)Federal PreemptionGeneral OverviewReal Property LawFinancingUsury

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50-568 California Forms of Pleading and Practice--Annotated § 568.83

§ 568.83 State or Local Public Retirement System

The restrictions on interest rates contained in *Cal. Const., art. XV, § 1* do not apply to any loans made by, or forbearances of, any state or local public retirement system [*Gov. Code § 7509*]. They also do not apply to any loans made by, or forbearances of, a public retirement or pension system created, authorized, and regulated by the laws of a state or of a local agency of a state other than California [*Civ. Code § 1916.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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50-568 California Forms of Pleading and Practice--Annotated § 568.84

§ 568.84 Mortgage Loans for Residential Property

Because most mortgage loans are arranged by parties such as financial institutions and real estate brokers, most mortgage loans for residential property will be exempt from the usury provisions of *Cal. Const., art. XV, § 1* under a specific exemption for those parties [*see Cal. Const., art. XV, § 1*; *see also* Banks, Associations, Trust Companies, and Other Fiduciaries, and Real Estate Brokers, *above*]. However, if a mortgage loan is not made or arranged by an exempt party, the general constitutional and statutory usury provisions [*see § 568.30* et seq.] will apply to the loan.

A mortgage contract, deed of trust, real estate sales contract, or any note or negotiable instrument issued in connection with that contract or trust deed, for residential real property, may contain a provision for a variable interest rate [*see Civ. Code §§ 1916.5-1916.12, 1918-1921*]. For further discussion of loans secured by real property that provide for variable interest rates, see California Legal Forms, Ch. 25, *Real Estate Loans* (Matthew Bender).

For regulation of the interest rates of federally related mortgage loans for residential property, see the discussion in *§ 568.52*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawNational BanksReal Estate LoansReal Property LawFinancingGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingUsury

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§ 568.85 Bottomry Contract

The Harbors and Navigation Code provides that a higher rate of interest than that allowed by law on other contracts may be stipulated by the parties in a contract of bottomry, which is a contract by which a vessel or its freightage is hypothecated as security for a loan to be repaid only if the vessel survives a particular risk, voyage, or period [*see Harb. & Nav. Code §§ 450, 455*]. Under that the provision, the court may reduce any stipulated rate that is unjustifiable and exorbitant [*Harb. & Nav. Code § 455*].

Although it is questionable whether this provision survived the passage of *Cal. Const., art. XV, § 1*, its validity has not yet been challenged in the courts.

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawMaritime LiensPriority & SourcesContractsBottomryContracts LawDefensesUsury

California Forms of Pleading and Practice--Annotated

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Chapter 568 USURY
PART II. LEGAL BACKGROUND
D. Exemptions From State Constitutional Provisions

50-568 California Forms of Pleading and Practice--Annotated § 568.86

§ 568.86 Shared Appreciation Loans

Lenders are exempt from the usury provisions of Cal. Const., art. XV, with respect to shared appreciation loan transactions [*Civ. Code § 1917.005*]. A "shared appreciation loan" is any loan made on the security of an interest in real property and obligating the borrower to pay to the lender contingent deferred interest pursuant to the loan documentation, but not including a loan made on the security of an interest in real property containing one to four residential units at least one of which, at the time the loan is made, is or is to be occupied by the borrower [*Civ. Code § 1917(b)*; *see Civ. Code § 1917.006(a)* (additional definition, applicable when lender is local public entity providing low-income-housing financial assistance)]. "Contingent deferred interest" means the sum that a borrower is obligated to pay to a lender pursuant to the documentation of a shared appreciation loan as a share of the appreciation in the value of the security property and/or a share of rents and profits attributable to the subject property [*Civ. Code § 1917(a)*].

The Legislature's apparent intent in creating the foregoing exemption was to clarify the application of the so-called interest contingency rule in a defined set of circumstances. Under the rule, a lender may obtain payments on a loan that exceed the maximum allowed by the usury law, provided those payments are subject to risk. Accordingly, the statutory definition of a shared appreciation loan must be understood to permit a lender to obtain fixed-sum interest payments up to the maximum amount permitted under the usury law and, additionally, to obtain further payments of contingent deferred interest that are subject to risk. In other words, the legislative intent behind *Civ. Code § 1917.005* was to establish that if (1) a loan permits the lender to obtain payments over and above the maximum permitted by the usury law, and (2) the loan documents disclose on their face that these payments constitute a share of appreciation, rents, or profits in a secured property, then the statutory exemption will apply [*WRI Opportunity Loans II, LLC v. Cooper (2007) 154 Cal. App. 4th 525, 539-540, 65 Cal. Rptr. 3d 205*].

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[Reserved]

§§ 568.87[Reserved]

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50-568 California Forms of Pleading and Practice--Annotated § 568.100

§ 568.100 California Points and Authorities

For discussion and forms relating to retail installment sales, see California Points and Authorities, Ch. 206, *Sales*

For discussion and forms relating to automobile sales, see California Points and Authorities, Ch. 206, *Sales*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesUsuryContracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsInstallment Contracts

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§ 568.101 California Legal Forms

For transactional forms relating to the subject of this chapter, see California Legal Forms, Ch. 25, *Real Property Security Transactions,* Ch. 46, *Credit Card and Other Open-End Transactions,* Ch. 47, *Automotive Financing,* and Ch. 102, *Personal Property Transactions*

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawNational BanksInterest & UsuryGeneral OverviewContracts LawDefensesUsuryReal Property LawFinancingUsury

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50-568 California Forms of Pleading and Practice--Annotated § 568.102

§ 568.102 California Constitution

Maximum interest rates charged on loans or forbearances; lenders exempt from rate restrictions. *Cal. Const., art. XV, § 1*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesUsuryReal Property LawFinancingUsury

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50-568 California Forms of Pleading and Practice--Annotated § 568.103

§ 568.103 Federal Statutes

[1] Business and Agricultural Loans

Maximum interest rates charged on business and agricultural loans. *12 U.S.C. § 86a*

Application of provisions of *12 U.S.C. § 86a* to business and agricultural loans. *12 U.S.C.A. § 86a*, Note (Pub. L. No. 96-221, § 512)

[2] Banks, Savings Associations, and Credit Unions

[a] Applicability of Statutes

Application of provisions of *12 U.S.C. §§ 1785, 1831d* to certain loans. *12 U.S.C.A. § 1730g*, Note (Pub. L. No. 96-221, §§ 525-527, as amended)

[b] Credit Unions

Federal credit union definitions. *12 U.S.C. § 1752*

Requirements governing insured credit unions. *12 U.S.C. § 1785*

Maximum interest rates charged by credit unions. *12 U.S.C. § 1785(g)*

[c] Depository Institutions

Maximum interest rates charged by depository institutions. *12 U.S.C. § 1735f-7*; *12 U.S.C.A. § 1735f-7*, Note (Pub. L. No. 96-221, § 501(a)(2), as amended)

[d] Mortgage Loans

"Federally related mortgage loan" defined. *12 U.S.C. § 1735f-5(b)*

Maximum interest rates charged on certain loans, mortgages, credit sales, and advances. *12 U.S.C. § 1735f-7*; *12 U.S.C.A. § 1735f-7*, Note (Pub. L. No. 96-221, §§ 501, 528, 529, as amended)

[e] Small Business Investment Companies

Maximum interest rates charged by small business investment companies. *15 U.S.C. § 687*

[f] State and Foreign Banks

Bank definitions. *12 U.S.C. § 1813*

Maximum interest rates charged by state and foreign insured banks. *12 U.S.C. § 1831d*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 568.104 California Statutes

[1] Automobile Sales

Automobile sales contracts. *Civ. Code § 2981 et seq.*

Maximum finance charge on automobile sales contracts. *Civ. Code § 2982(j)*

[2] Banking Institutions Exempted From Constitutional Usury Law

Banks. *Fin. Code § 1504*

Foreign banks. *Fin. Code § 1716*

Bank holding companies. *Fin. Code § 3707*

Associations. *Fin. Code § 6515(c)*

Associations and savings and loan associations. *Fin. Code § 7675*

[3] Bottomry Contracts

"Bottomry contract" defined. *Harb. & Nav. Code § 450*

Contract for higher interest rate than allowed by law. *Harb. & Nav. Code § 455*

[4] Common Interest Development Associations

Exemption for and maximum rates by common interest development associations. *Civ. Code § 1366(e), (f)*

[5] Consumer Finance Lenders

[a] In General

Reference to personal property broker is reference also to consumer finance lender. Stats. 1982, ch. 1082, § 28 (set forth as note in annotation to *Fin. Code § 22000*)

Governing law. *Fin. Code § 24000 et seq.*

Types of loans not subject to specified statutory requirements. *Fin. Code §§ 24053, 24053.1*

Effect of contract when loan is not actually consummated. *Fin. Code §§ 24450, 24450.1*

[b] Restrictions on Charges and Fees

Maximum charges. *Fin. Code § 24451*

Alternative maximum charges. *Fin. Code § 24451.1*

Administrative fees. *Fin. Code § 24451.3*

Open-end credit program. *Fin. Code § 24500 et seq.*

Other permissible fees. *Fin. Code §§ 24458.3-24458.7*

Statutory fees. *Fin. Code § 24472*

Precomputation and payment of charges. *Fin. Code §§ 24480-24482*

[c] Violation of Statute

Effect of usurious contract. *Fin. Code §§ 24650, 24651*

Willful violation of statute is misdemeanor. *Fin. Code § 24653*

[6] Credit Unions

Governing law. *Fin. Code § 14000 et seq.*

Late charges. *Fin. Code § 15001*

[7] Industrial Loan Companies

Governing law. *Fin. Code § 18000 et seq.*

Maximum charges. *Fin. Code § 18212*

Alternative maximum charges. *Fin. Code § 18212.1*

Open-end loans. *Fin. Code § 18300*

Effect of usurious charge. *Fin. Code § 18439*

Usury as misdemeanor. *Fin. Code § 18450*

Limitation on finance charges. *Fin. Code §§ 18625-18631*

[8] Insurers

Governing law. *Ins. Code § 699 et seq.*

Exemption from constitutional usury law. *Ins. Code § 1100.1*

[9] Mortgage Loans

Variable interest rates. *Civ. Code §§ 1916.5-1916.12*

Variable interest rates. *Civ. Code §§ 1918-1921*

[10] Pawnbrokers

Governing law. *Fin. Code §§ 21000-21209*

Inapplicability of provisions to certain loans. *Fin. Code § 21051(a)*

Maximum charges. *Fin. Code § 21200*

Alternative maximum charges. *Fin. Code § 21200.5*

Extension or renewal charges. *Fin. Code § 21200.5(v)*

Handling and storage charges. *Fin. Code §§ 21200.1, 21200.6, 21201.1, 21201.2*

Firearm processing charge. *Fin. Code § 21200.8*

Usury as misdemeanor. *Fin. Code § 21209*

[11] Personal Property Brokers

[a] In General

Governing law. *Fin. Code §§ 22000-22654*

Inapplicability of certain provisions to certain loans. *Fin. Code §§ 22053-22053.1*

Effect of contract when loan not actually consummated. *Fin. Code §§ 22450-22450.1*

[b] Restrictions on Charges and Fees

Maximum charges. *Fin. Code § 22451*

Alternative maximum charges. *Fin. Code § 22451.1*

Administrative fees. *Fin. Code § 22451.3*

Open-end credit program. *Fin. Code § 22500 et seq.*

Other permissible fees. *Fin. Code §§ 22458.3-22458.7*

Statutory fees. *Fin. Code § 22472*

Precomputation and payment of charges. *Fin. Code §§ 22480-22482*

[c] Violation of Statute

Effect of usurious contract. *Fin. Code § 22651*

Willful violation of statute is punishable by fine, imprisonment, or both. *Fin. Code § 22653*

[12] Public Retirement Systems

Governing law. *Gov. Code §§ 7500-7511*; *Civ. Code § 1916.2*

Exemption from constitutional usury law. *Gov. Code § 7509*; *Civ. Code § 1916.2*

[13] Real Estate Brokers

[a] In General

"Real estate broker" defined. *Bus. & Prof. Code § 10131*

Loans by real estate brokers. *Bus. & Prof. Code §§ 10240-10248.3*

Application of *Bus. & Prof. Code §§ 10240-10248.3* to loans secured by dwelling. *Bus. & Prof. Code § 10240.1*

Inapplicability of *Bus. & Prof. Code §§ 10240-10248.3* to certain loans. *Bus. & Prof. Code § 10245*

Real estate broker exemption from constitutional usury law. *Civ. Code § 1916.1*

[b] Maximum Charges

Maximum amount of expenses, charges, and interest. *Bus. & Prof. Code § 10242*

Late payment charges. *Bus. & Prof. Code § 10242.5*

Prepayment of principal and interest. *Bus. & Prof. Code § 10242.6*

Renewal or refinance. *Bus. & Prof. Code § 10244*

Restrictions on charges by real estate licensees. *Bus. & Prof. Code § 10248.1*

[c] Recovery of Usurious Interest from Real Estate Broker

Action to recover usurious charge. *Bus. & Prof. Code § 10246*

Demand procedure. *Bus. & Prof. Code § 10248.2*

[14] Retail Installment Contracts

[a] In General

Retail installment sales. *Civ. Code § 1801 et seq.*

Retail installment contracts. *Civ. Code §§ 1803.1-1809.1*

Retail installment accounts. *Civ. Code §§ 1810, 1810.1, 1810.12*

[b] Civil and Criminal Liabilities

Willful violation is misdemeanor. *Civ. Code § 1812.6*

Recovery of usurious charge. *Civ. Code § 1812.7*

Nonwillful violation is correctible. *Civ. Code § 1812.8*

Treble damages for willful violation. *Civ. Code § 1812.9*

[c] Regulation of Charges

Finance charge permissible. *Civ. Code § 1803.3*

Delinquency charge. *Civ. Code § 1803.6*

Maximum amount of finance charge. *Civ. Code §§ 1805.1*

Simple-interest basis as required computation. *Civ. Code § 1805.7*

Combining precomputed and simple-interest bases. *Civ. Code § 1805.9*

Extension and deferral charges. *Civ. Code § 1807.1*

Maximum amount of finance charge on outstanding balance. *Civ. Code § 1810.2*

Delinquency charge on installment account. *Civ. Code § 1810.12*

[15] Sales of Securities

State corporate securities law. *Corp. Code § 25000 et seq.*

Qualification of sale of security. *Corp. Code § 25110 et seq.*

Exemption from constitutional usury law for qualified sale. *Corp. Code § 25116*

Exemption from constitutional usury law for certain issuers. *Corp. Code § 25117*

Exemption from constitutional usury law for certain commercial debt instruments. *Corp. Code § 25118*

Exemption from constitutional usury law for certified broker-dealer. *Corp. Code § 25211.5*

[16] Usury Laws in General

[a] Definitions and Principles

Usury law. Deering's Annot. Uncod. Measures 1919-1 § 1; West's Annot. *Civ. Code § 1916-1*

Usurious provision are null and void. Deering's Annot. Uncod. Measures 1919-1 § 2; West's Annot. *Civ. Code § 1916-2*

Loan-sharking is felony. Deering's Annot. Uncod. Measures 1919-1 § 3(b); West's Annot. *Civ. Code § 1916-3(b)*

"Loan of money" defined. *Civ. Code § 1912*

Loan of money presumed to be with interest. *Civ. Code § 1914*

"Interest" defined. *Civ. Code § 1915*

Interest rate deemed to be annual when unspecified. *Civ. Code § 1916*

Interest rate on court judgment set at 10 percent. *Code Civ. Proc. § 685.010*

[b] Civil Remedies

Treble damages. Deering's Annot. Uncod. Measures 1919-1 § 3(a); West's Annot. *Civ. Code § 1916-3(a)*

Reformation of contract. *Civ. Code § 3399 et seq.*

Statute of limitations for action for money had and received. *Code Civ. Proc. § 339(1)*

Permissive cross complaints. *Code Civ. Proc. § 428.10*

Declaratory relief. *Code Civ. Proc. § 1060 et seq.*

Legal Topics:

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

[1] Agricultural Labor

ALRB order is not subject to constitutional interest rate until ALRB obtains superior court enforcement order under *Lab. Code § 1160.8*. *Sandrini Brothers v. Agricultural Labor Relations Bd. (1984) 156 Cal. App. 3d 878, 888-889, 203 Cal. Rptr. 304*

[2] Assignee of Usurious Note

Assignee of lender exempt from usury laws is able to collect interest on note although assignee is not exempt. *Strike v. Trans-West Discount Corp. (1979)92 Cal. App. 3d 735, 745, 155 Cal. Rptr. 132 , appeal dismissed, 444 U.S. 948, 100 S. Ct. 417, 62 L. Ed. 2d 317*)

[3] Attorney's Fees

Mortgage lender who prevailed in action by borrower is not entitled to attorney's fees as costs when usurious contract did not contain attorney's fees provision. *Orden v. Crawshaw Mortgage & Inv. Co. (1980) 109 Cal. App. 3d 141, 146-147, 167 Cal. Rptr. 62*

[4] Choice of Law Determination

In action for usury, when promissory notes did not contain any choice-of-law clauses but recited that each note was to be repaid in Nevada, *Civ. Code § 1646* required that Nevada law should be applied since Nevada was place of performance of loan contract; Restatement (Second) of Conflicts analysis reaches same result. *Shannon-Vail Five Inc. v. Bunch (9th Cir. 2001) 270 F.3d 1207, 1210*

Parties' incorporation in promissory note of Colorado interest rate, usurious under California law, would be permitted only on factual examination of reasonable relationship of contract to Colorado, substantial contacts of parties with Colorado, and consideration of California's fundamental policy with respect to usury. *Mencor Enterprises, Inc. v. Hets Equities Corp. (1987) 190 Cal. App. 3d 432, 441, 235 Cal. Rptr. 464*

[5] Credit Sales

Usury law has no place in field of bona fide credit sale financing, unless parties intend to effect hire of money at excessive interest rate rather than to finance bona fide sale of property. *Boerner v. Colwell Co. (1978) 21 Cal. 3d 37, 54, 145 Cal. Rptr. 380, 577 P.2d 200*

Participation by nonexempt financing institution in credit sale contract for construction of residence does not convert otherwise bona fide credit sale into "loan" subject to usury laws. *Boerner v. Colwell Co. (1978) 21 Cal. 3d 37, 54, 145 Cal. Rptr. 380, 577 P.2d 200*

"Finance charge" (time-price differential) on credit sales by various department stores and oil companies is not interest for purpose of applying *Usury Law. Fox v. Federated Department Stores, Inc. (1979) 94 Cal. App. 3d 867, 872, 156 Cal. Rptr. 893*

[6] Defense

Pleading usury is unnecessary when contract is usurious on its face; court is entitled to deny interest sua sponte. *Curtis v. Thaxter (1928) 204 Cal. 439, 440, 268 P. 630*

Defense of usury is waived if not affirmatively pleaded. *Willcox v. Edwards (1912) 162 Cal. 455, 462, 123 P. 276*

Usury is defense personal to borrower that may not be asserted by person not party to contract. *Moe v. Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 289, 300, 98 Cal. Rptr. 547*

[7] Effect of Change in Usury Laws

Civ. Code § 1916.1 (real estate brokers' usury exemption) applies retroactively although enacted after decisions of lower courts. In re Lara (9th Cir. [Cal.] 1984) *731 F.2d 1455, 1459*

State constitutional usury provisions are read into existing statutes. *Heald v. Friis-Hansen (1959) 52 Cal. 2d 834, 838, 345 P.2d 457*

Usury law providing recovery is statutory remedy and penalty which may be repealed. *Penziner v. West American Finance Co. (1937) 10 Cal. 2d 160, 170-171, 74 P.2d 252*

1979 amendment to *Civ. Code § 1916.1* applies retroactively. *Garcia v. Wetzel (1984) 159 Cal. App. 3d 1093, 1097-1098, 206 Cal. Rptr. 251*

Statutes that repeal or modify usury laws are given retrospective effect to determine scope of liability with respect to transactions entered into prior to the repeal or modification. *Chapman v. Farr (1982) 132 Cal. App. 3d 1021, 1023, 183 Cal. Rptr. 606*

Change in usury law is applicable retroactively, precluding recovery of penalty for usurious interest charged prior to change in law. *Orden v. Crawshaw Mortgage & Inv. Co. (1980) 109 Cal. App. 3d 141, 144-146, 167 Cal. Rptr. 62*

Maximum interest rate established by former *Cal. Const, art. XX, § 22* (now *Cal. Const., art. XV, § 1*) is required to be read into Deering's Annot. Uncod. Measures 1919-1 §§ 2, 3; West's Annot. *Civ. Code §§ 1916-2, 1916-3*. *Arneill Ranch v. Petit (1976) 64 Cal. App. 3d 277, 280 n. 1, 134 Cal. Rptr. 456*

[8] Effect of Subsequent Events

Contract not usurious in inception does not become usurious by subsequent events (contract assigned by exempt lender to nonexempt party). *Strike v. Trans-West Discount Corp. (1979) 92 Cal. App. 3d 735, 745, 155 Cal. Rptr. 132 , appeal dismissed, 444 U.S. 948, 100 S. Ct. 417, 62 L. Ed. 2d 317*)

Loan not usurious in its inception is not subject to claim of usury because of subsequent events (contract assigned by exempt lender to nonexempt party). *Cambridge Dev. Co. v. U. S. Financial (1970) 11 Cal. App. 3d 1025, 1031, 90 Cal. Rptr. 333*

[9] Effect of Usurious Provision

If a loan is usurious the creditor is entitled to no interest whatsoever, and to repayment of principal only. *Gibbo v. Berger (2004) 123 Cal. App. 4th 396, 403, 19 Cal. Rptr. 3d 829* ; *Winnett v. Roberts (1986) 179 Cal. App. 3d 909, 921, 225 Cal. Rptr. 82*

Unenforceability of usurious agreement does not affect preexisting lawful agreements between same parties. *Strike v. Trans-West Discount Corp. (1979) 92 Cal. App. 3d 735, 744, 155 Cal. Rptr. 132 , appeal dismissed, 444 U.S. 948, 100 S. Ct. 417, 62 L. Ed. 2d 317*)

Usurious provisions do not affect right of payee to recover principal amount of note when due; payee entitled to interest at legal rate from date note matures until date of judgment. *Epstein v. Frank (1981) 125 Cal. App. 3d 111, 123, 177 Cal. Rptr. 831*

[10] ERISA

Civ. Code § 1917.220, which provides that *Cal. Const. art. XV § 1* restrictions on interest rates do not apply to loans made by pension fund or retirement system subject to ERISA [*29 U.S.C. § 1001 et seq.*], was itself preempted by ERISA; ERISA, however, does not preempt California's general usury laws. *Varr v. Olimpia (1996) 45 Cal. App. 4th 675, 680-682, 686, 53 Cal. Rptr. 2d 106*

[11] Estoppel

Conduct of borrower's agent creates estoppel against borrower to claim usury. *Lakeview Meadows Ranch v. Bintliff (1973) 36 Cal. App. 3d 418, 424-425, 111 Cal. Rptr. 414*

Payor is estopped from recovering interest paid as well as treble damages. *Buck v. Dahlgren (1972) 23 Cal. App. 3d 779, 789, 100 Cal. Rptr. 462*

Borrower estopped from asserting usury due to his fraudulent representations and inducements, even though interest rate exceeded that allowable and one month postponement of foreclosure for $500 constituted usurious forbearance. *Buck v. Dahlgren (1972) 23 Cal. App. 3d 779, 784-791, 100 Cal. Rptr. 462*

[12] Evidence and Procedure

Civ. Code § 1916.3 limits treble damages for usury to period commencing one year prior to filing of complaint but does not cut off damages accruing after filing of complaint. *Handi Inv. Co. v. Mobil Oil Corp. (9th Cir.1981) 653 F.2d 391, 393*

Parol evidence is not available to explain meaning of written agreement that does not, on its face, clearly provide for compounding of interest by securities broker on customer debit-balance accounts. *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1983) 33 Cal. 3d 816, 822-823, 191 Cal. Rptr. 458, 662 P.2d 916*

Contract subject to two constructions, one usurious and the other lawful, is required to be construed as lawful in absence of evidence requiring it to be construed as usurious. *Lakeview Meadows Ranch v. Bintliff (1973) 36 Cal. App. 3d 418, 423, 111 Cal. Rptr. 414*

Class action is proper to recover monies wrongfully collected from plaintiff borrowers as late charges; late charge "service fee" is liquidated damages; need for proof of payment by each class member does not bar class action. *Clermont v. Secured Investment Corp. (1972) 25 Cal. App. 3d 766, 768-771, 102 Cal. Rptr. 340*

Whether transaction is usurious is question of fact; nevertheless, court is able to decide as matter of law if interest rate easily determinable. *Domarad v. Fisher & Burke, Inc. (1969) 270 Cal. App. 2d 543, 560, 76 Cal. Rptr. 529*

Evidence tending to prove usury is proper even though such evidence is something other than written loan documents. *Mission Hills Dev. Corp. v. Western Small Business Inv. Co. (1968) 260 Cal. App. 2d 923, 926-928, 67 Cal. Rptr. 505*

Time in which to bring action based on usury. *Baruch Inv. Co. v. Huntoon (1967) 257 Cal. App. 2d 485, 490, 65 Cal. Rptr. 131*

[13] Examples

[a] Usurious Loans

Interest provisions of note are void when interest rate is usurious. *Gibbo v. Berger (2004) 123 Cal. App. 4th 396, 403, 19 Cal. Rptr. 3d 829* ; *Winnett v. Roberts (1986) 179 Cal. App. 3d 909, 921, 225 Cal. Rptr. 82* ; *Epstein v. Frank (1981) 125 Cal. App. 3d 111, 122, 177 Cal. Rptr. 831*

Bad faith delay in paying over loan proceeds to borrower results in borrower paying excessive interest and renders loan usurious, even though loan terms provide for maximum rate. *First American Title Ins. & Trust Co. v. Cook (1970) 12 Cal. App. 3d 592, 597, 90 Cal. Rptr. 645*

Note is usurious when unpaid monthly payment of maximum interest rate is to be added to principal and bear like interest as principal. *First American Title Ins. & Trust Co. v. Cook (1970) 12 Cal. App. 3d 592, 597, 90 Cal. Rptr. 645*

Loan is usurious when borrower is to pay six percent per annum but, to secure to lender a 30 percent per annum return, also takes option to purchase real property of lender for a price which, added to six percent figure, equals 30 percent. *McClung v. Saito (1970) 4 Cal. App. 3d 143, 148-149, 84 Cal. Rptr. 44*

[b] Nonusurious Loans

Promissory note held not usurious because it was not absolutely repayable; when plain language of promissory note limited repayment to promisor's interests in royalty payments, limitations served as hazard or contingency on loan because if there were no royalties, there would be no repayment. *D-Beam Ltd. P'ship v. Roller Derby Skates, Inc. (9th Cir. 2004) 366 F.3d 972, 975*

Loan is not usurious, although it would be usurious if commission charged by trustee for loan were treated as interest, when trust was not aware of commission and did not receive any portion of it. *Hobbs v. Buck (1981) 115 Cal. App. 3d 176, 179-184, 171 Cal. Rptr. 258*

Clauses in residential real estate contracts for penalty amount per day for failure to close transaction on certain date protect seller from having to support two residences and are reasonable in light of anticipated harm, despite excessive legal interest rate. *Angell v. Rowlands (1978) 85 Cal. App. 3d 536, 543, 149 Cal. Rptr. 574*

Late charge provisions of note do not make it usurious. *First American Title Ins. & Trust Co. v. Cook (1970) 12 Cal. App. 3d 592, 597, 90 Cal. Rptr. 645*

Lender charging fee in addition to interest in connection with making loan is not necessarily violating usury laws even if combined charges exceed prescribed limit; usury law does not purport to fix or limit legitimate expense or service charge that may properly be borne by borrower. *Cambridge Dev. Co. v. U. S. Financial (1970) 11 Cal. App. 3d 1025, 1028, 90 Cal. Rptr. 333*

[14] Exemption and Common Law Remedies

Exemption of enumerated classes from restrictions of usury law immunizes them from actions grounded on common law remedies existing prior to usury law. *West Pico Furniture Co. v. Pacific Finance Loans (1970) 2 Cal. 3d 594, 615, 86 Cal. Rptr. 793, 469 P.2d 665*

[15] Extension of Time for Payment

Extension of time for payment of debt due constitutes forbearance on part of creditor within meaning of usury law rather than part of credit sale, since interest becomes due only in event of default on part of purchaser to pay amount due. *Crestwood Lumber Co. v. Citizens Sav. & Loan Assn. (1978) 83 Cal. App. 3d 819, 825, 148 Cal. Rptr. 129*

[16] Intent as Element of Usury

Variable interest rate exceeding constitutional maximum is upheld when contracted for in good faith and without intent to avoid usury laws. *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1978) 21 Cal. 3d 365, 376-378, 146 Cal. Rptr. 371, 578 P.2d 1375*

When bank's note and forbearance agreement fit within legally authorized exception to general usury law (*Fin. Code § 1504*), interest provisions did not exceed statutory maximum and defendant's intent was irrelevant. *Jones v. Wells Fargo Bank (2003) 112 Cal. App. 4th 1527, 1538, 5 Cal. Rptr. 3d 835*

Interest contingently payable at rate that may be less than or in excess of maximum of legal rate is usurious when parties contract in bad faith and with intent to avoid usury statute. *Arneill Ranch v. Petit (1976) 64 Cal. App. 3d 277, 283, 134 Cal. Rptr. 456*

Intent to charge more than legal rate of interest is element of usury; that element is not found when borrower requests attorney to draft agreement modifying original note. *Lakeview Meadows Ranch v. Bintliff (1973) 36 Cal. App. 3d 418, 424-425, 111 Cal. Rptr. 414*

Court correctly admitted evidence of parties' lack of intent to violate usury law in action to reform note by deleting usurious provision. *First American Title Ins. & Trust Co. v. Cook (1970) 12 Cal. App. 3d 592, 597-598, 90 Cal. Rptr. 645*

Conscious and voluntary taking of more than legal rate of interest constitutes usury; taking of amount of interest is only intent necessary by lender. *McClung v. Saito (1970) 4 Cal. App. 3d 143, 153, 84 Cal. Rptr. 44*

[17] Interest Assessed on Unpaid Taxes

Franchise Tax Board's six-year delay in informing taxpayers of amount due was not "forbearance" under *Cal. Const., art. XV, § 1*; true purpose of interest on delinquent taxes was penalty assessment. *Sheehy v. Franchise Tax Board (2000) 84 Cal. App. 4th 280, 283-284, 100 Cal. Rptr. 2d 760*

[18] Judgment Interest

Neither the 1918 Usury Law nor *Cal. Const., art. XV, § 1* prohibit the compounding of interest under the renewal provisions of the *Enforcement of Judgments Law. OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp. (2008) 168 Cal. App. 4th 185, 203, 85 Cal. Rptr. 3d 350*

Defendant payee of usurious note is entitled to interest at legal rate from date of maturity to date of judgment; because note was not judgment and did not specify interest rate, constitutional rate of 7 percent a year applied. *Green v. Future Two (1986) 179 Cal. App. 3d 738, 744, 225 Cal. Rptr. 3*

Prejudgment interest at market rate in inverse condemnation case is proper even though rate exceeded legal rate set by *Cal. Const., art. XV, § 1,* and *Code Civ. Proc. § 685.010,* because right to prejudgment interest in inverse condemnation suit derives from *U.S. Const., amend. V,* which has supremacy under U.S. Const., art. VI, *cl. 2,* over any state constitutional provision or statute to contrary. *Aetna Life & Casualty Co. v. City of Los Angeles (1985) 170 Cal. App. 3d 865, 879, 216 Cal. Rptr. 831*

Civ. Code § 3291 (judgment bears 10 percent interest from date of first rejected settlement offer under *Code Civ. Proc. § 998*) and *Code Civ. Proc. § 685.010(a)* (judgment bears 10 percent interest from date judgment rendered) do not violate *Cal. Const., art. XV, § 1,* because sections are not applied cumulatively to give 20 percent interest but are applied separately or conjunctively to permit recovery of no more than 10 percent interest. *Mendez v. Kurten (1985) 170 Cal. App. 3d 481, 487, 215 Cal. Rptr. 924*

[19] Pawnbrokers

Article XV of California Constitution exempts from usury law only those pawn transactions made within scope of pawnbroker license; pawnbroker could not claim benefit of exemption with respect to loan that was not pawn transaction, did not comply with statutory requirements, and was not made within scope of pawnbroker's license. *Agapitov v. Lerner (2003) 108 Cal. App. 4th 830, 832, 133 Cal. Rptr. 2d 837*

[20] Personal Property Broker or Finance Lender

On precomputed noncommercial loan over $10,000 made by personal property broker in 1981 and secured by borrower's residence and personal property, prepayment penalty is computed by Rule of 78's under *Fin. Code § 22053*. *Draper v. American Funding Ltd. (1991) 234 Cal. App. 3d 345, 350-354, 285 Cal. Rptr. 640*

Finance company, licensed as personal property broker, that lends money to furniture dealer secured by pledge of conditional sale contract is exempted by *Fin. Code § 22053* from maximum rates and is exempted from state constitutional usury provisions. *West Pico Furniture Co. v. Pacific Finance Loans (1970) 2 Cal. 3d 594, 606-615, 86 Cal. Rptr. 793, 469 P.2d 665*

Fin. Code § 22053 and *Cal. Const., art. XV, § 1,* exempt licensed personal property brokers from compliance with laws fixing maximum interest chargeable on loans despite gross disparity between values of realty and personalty taken as security. *Hall v. Beneficial Finance Co. (1981) 118 Cal. App. 3d 652, 653-655, 173 Cal. Rptr. 450*

Personal property broker loan exceeding $10,000, not inflated to make face amount of note appear to be greater than actual unpaid purchase price to avoid usury laws, are exempt from usury laws. *Lenes v. Dean (1976) 64 Cal. App. 3d 845, 849-850, 135 Cal. Rptr. 14*

Bona fide loan by personal property broker of $30,000 at 18 percent yearly interest secured in part by real property and in part by qualified security under *Fin. Code § 22009* is exempt from interest rate restrictions of *Fin. Code § 22053*.

Raysinger v. Peoples Inv. & Loan Assn (1973) 36 Cal. App. 3d 248, 250, 112 Cal. Rptr. 163

[21] Rate Assigned by Court on Implied Loan Agreement

Seven percent is maximum interest rate to be assigned by court on implied loan agreement, even if court hearing case sits as court of equity. *Armstrong v. Picquelle (1984) 157 Cal. App. 3d 122, 128-129, 203 Cal. Rptr. 552*

[22] Real Estate Broker

Trial court did not err in ruling that a secured loan was exempt from the constitutional usury prohibition on the ground that it was negotiated and arranged by a licensed real estate broker where the broker, although an employee of an affiliate of the lender, acted as a third party intermediary and did not negotiate the loan on his own behalf because the lender was a legal entity separate and distinct from the broker and the broker's employer. It was of no moment that the broker indirectly benefitted from the transaction; as long as he was not negotiating solely on his own behalf, he fit squarely within the *Civ. Code § 1916.1* exemption of a licensed broker who negotiated and arranged a loan for another. *Stoneridge Parkway Partners, LLC v. MW Housing Partners III, LP (2007) 153 Cal. App. 4th 1373, 1381, 64 Cal. Rptr. 3d 61*

Usury exemption of *Cal. Const., art XV, § 1* and *Civ. Code § 1916.1* for loans "arranged" by real estate brokers not applicable if lender and borrower had already agreed upon terms of loan and broker's involvement was limited to following parties' instructions in preparing loan documents, ordering title insurance and disbursing funds. *Gibbo v. Berger (2004) 123 Cal. App. 4th 396, 401-403, 19 Cal. Rptr. 3d 829*

Usury exemption was applicable to loan arranged by general partner who was licensed real estate broker; broker "arranged" obligation, and provision in each note also provided conclusive presumption of that arrangement; exemption is not limited to brokers who act in capacity requiring license. *Park Terrace Ltd. v. Teasdale (2002) 100 Cal. App. 4th 802, 806-808, 122 Cal. Rptr. 2d 797*

Fact that nonbroker arranging loan was licensed attorney and thus authorized to perform certain acts for which real estate broker's license would otherwise be required did not constitute substantial compliance with licensing requirement of *Civ. Code § 1916.1*. *Del Mar v. Caspe (1990) 222 Cal. App. 3d 1316, 1330, 1334, 272 Cal. Rptr. 446*

Real estate broker was "arranging" loan for purposes of exemption under *Civ. Code § 1916.1(1)* when services performed for compensation included title searches, document reviews, consultation and advisement, computation of principal and interest, preparation of loan documents, discussion of documents and terms with lender and borrower, and securing execution of documents. *Del Mar v. Caspe (1990) 222 Cal. App. 3d 1316, 1328-1329, 272 Cal. Rptr. 446*

For purposes of exemption for broker-arranged loan, compensation encompasses receipt of almost any form of monetary or tangible benefit that is not self-bestowed. *Jones v. Kallman (1988) 199 Cal. App. 3d 131, 136, 244 Cal. Rptr. 609* ; *Stickel v. Harris (1987) 196 Cal. App. 3d 575, 584, 242 Cal. Rptr. 88*

Broker compensation was essential element of exemption for broker-arranged loan; fact that salesman-partner rather than broker-partner received all of commission was not disqualifying because firm's practice of applying portion of each commission to firm's expenses provided sufficient compensation to broker. *Jones v. Kallman (1988) 199 Cal. App. 3d*

131, 135-136, 244 Cal. Rptr. 609

Even though salesman-partner did most of work, participation of broker-partner in arranging loan, though minimal, was sufficient when broker determined rates and points at lender's request, transmitted those terms to borrower's broker, and reviewed loan documents drafted by salesman. *Jones v. Kallman (1988) 199 Cal. App. 3d 131, 134-135, 244 Cal. Rptr. 609*

When broker arranged loan to joint venture of which broker was member, broker's anticipated share of joint venture's future profits was sufficient compensation to bring loan within exemption of *Civ. Code § 1916.1*. *Stickel v. Harris (1987) 196 Cal. App. 3d 575, 585, 242 Cal. Rptr. 88*

Real estate broker neither makes nor arranges loan when broker acts only as borrower and has not otherwise acted to make or arrange loan for another or others, and has not acted to receive or expect compensation; thus, broker was not exempt from usury provisions of *Cal. Const., art. XV, § 1*, under that section's exemptions or under *Civ. Code § 1916.1*. *Green v. Future Two (1986) 179 Cal. App. 3d 738, 742-743, 225 Cal. Rptr. 3*

Loan is not made or arranged by real estate broker within meaning of *Cal. Const., art. XV, § 1*, when broker acts only as borrower, transaction is only between broker and lender who each act on own behalf, and no third-party licensed broker acts for compensation as intermediary. *Winnett v. Roberts (1986) 179 Cal. App. 3d 909, 921, 225 Cal. Rptr. 82*

Licensed real estate broker is exempt from usury provisions, even if not acting in his or her licensed capacity. *Garcia v. Wetzel (1984) 159 Cal. App. 3d 1093, 1097-1098, 206 Cal. Rptr. 251*

Bus. & Prof. Code § 10242(a) requires some method of cost accounting by real estate broker to protect borrowers. *Pacific Plan v. Fox (1978) 84 Cal. App. 3d 215, 219, 148 Cal. Rptr. 510*

[23] Reformation of Contract

Reformation of usurious contract under *Civ. Code § 3399* was proper when all parties intended not to bear interest that exceeds maximum permissible rate and separate compound interest provision resulted in mutual mistake; compound interest provision was deleted while 10 percent rate provision left intact. *First American Title Ins. & Trust Co. v. Cook (1970) 12 Cal. App. 3d 592, 597-598, 90 Cal. Rptr. 645*

[24] Sale Versus Loan

"Late charges" on buyer's past due account were not subject to usury law because transaction did not involve forbearance; parties did not intend that buyer could forbear from making full payment ad infinitum in exchange for buyer's payment of late charges. *Southwest Concrete Products v. Gosh Construction Corp. (1990) 51 Cal. 3d 701, 708, 274 Cal. Rptr. 404, 798 P.2d 1247* ; *O'Connor v. Televideo System, Inc. (1990) 218 Cal. App. 3d 709, 717, 267 Cal. Rptr. 237*

"Late charges" on buyer's past-due account were exempt from usury law under "time-price" doctrine. *Southwest Concrete Products v. Gosh ConstructionCorp. (1990) 51 Cal. 3d 701, 707, 709, 274 Cal. Rptr. 404, 798 P.2d 1247* ;

Fox v. Federated Department Stores, Inc. (1979) 94 Cal. App. 3d 867, 884-885, 156 Cal. Rptr. 893

The transfer of structured settlement payments under the Structured Settlement Transfer Act (*Ins. Code § 10136 et seq.*) does not implicate the prohibition against usury in *Cal. Const., art. XV, § 1* because a structured settlement transfer is not a loan or forbearance but is instead a sale, as indicated in *Ins. Code § 10136(b)*. *321 Henderson Receivables Origination LLC v. Sioteco (2009) 173 Cal. App. 4th 1059, 1077, 93 Cal. Rptr. 3d 321*

Operating agreement requiring defendant to pay interest at the rate of 18 percent on any amount due but not paid within 30 days of a triggering event does not violate usury provision as no forbearance was involved within the meaning of *Cal. Const., art. XV, § 1* and there was no agreement between the parties to extend payment of a debt. *Roodenburg v. Pavestone Co., L.P. (2009) 171 Cal. App. 4th 185, 194, 89 Cal. Rptr. 3d 558*

"Finance charges" billed to revolving charge account were exempt from usury law under "time-price" doctrine. *Fox v. Federated Department Stores, Inc. (1979) 94 Cal. App. 3d 867, 873-874, 880, 156 Cal. Rptr. 893*

Court looks to substance rather than form of transaction to assess whether usurious arrangement made; issue is whether bargain of parties, in light of all circumstances and with view to substance rather than form, has hire of money at excessive interest rate as true object. *Boerner v. Colwell Co. (1978) 21 Cal. 3d 37, 44, 145 Cal. Rptr. 380, 577 P.2d 200*

Consideration of whether transaction constitutes loan is substance for transaction rather than its form or terminology used by parties. *Burr v. Capital Reserve Corp. (1969) 71 Cal. 2d 983, 989, 80 Cal. Rptr. 345, 458 P.2d 185*

Usury laws do not apply when essence of transaction is sale, since no loan or forbearance of money made, and hence no interest charged. *Fox v. Federated Department Stores, Inc. (1979) 94 Cal. App. 3d 867, 877, 156 Cal. Rptr. 893*

Usury laws apply to loan disguised as sale. *Fox v. Federated Department Stores, Inc. (1979) 94 Cal. App. 3d 867, 877, 156 Cal. Rptr. 893*

Court looks to substance of transaction rather than form to determine whether transaction is sale or loan. *Fox v. Federated Department Stores, Inc. (1979) 94 Cal. App. 3d 867, 877, 156 Cal. Rptr. 893*

Buyer's execution of $3,200 note and assumption of seller's obligation secured by business at 10 percent interest was part of purchase price of business in transaction for sale of business, not subject to usury law. *La France Enterprises v. Van Der Linden (1977) 70 Cal. App. 3d 375, 380-381, 138 Cal. Rptr. 690*

Usury laws are inapplicable to legitimate sale of going business. *Lenes v. Dean (1976) 64 Cal. App. 3d 845, 848-849, 135 Cal. Rptr. 14*

Mere purchase of note at discount is not affected by usury law. *Moe v. Transamerica Title Ins. Co. (1971) 21 Cal. App. 3d 289, 300, 98 Cal. Rptr. 547*

Sale and lease back of equipment is loan transaction subject to usury laws. *Rochester Capital Leasing Corp. v. K & L Litho Corp. (1970) 13 Cal. App. 3d 697, 702-703, 91 Cal. Rptr. 827*

[25] Standing to Challenge Usury

Under California law, right of action against usury and right to assert defense of usury are personal to borrower; junior lienholder who made its loan with knowledge of usurious senior loan had no standing (in adversary proceeding in borrower's bankruptcy) to challenge payment of usurious interest on senior loan. *In re Dominelli (9th Cir. 1987) 820 F.2d 313, 318* , citing *Moe v. Transamerica Title Insurance Co. (1971) 21 Cal. App. 3d 289, 300, 98 Cal. Rptr. 547* ; *Domarad v. Fisher & Burke, Inc. (1969) 270 Cal. App. 2d 543, 560, 76 Cal. Rptr. 529*

Exception to rule that defense of usury is personal to borrower is that defense may be asserted by one who stands in borrower's shoes and is damaged by usury; it is not applicable to junior lienholder who made its loan with knowledge of usurious senior loan. *In re Dominelli (9th Cir. 1987) 820 F.2d 313, 318* , citing *Western States Acceptance Corp. v. Frank D. Tuttle, Inc. (1930) 210 Cal. 51, 54, 290 P. 574* ; *Sosin v. Richardson (1962) 210 Cal. App. 2d 258, 266, 26 Cal. Rptr. 610*

[26] Treble Damages

Court has discretion to award treble damages. *Burr v. Capital Reserve Corp. (1969) 71 Cal. 2d 983, 994, 80 Cal. Rptr. 345, 458 P.2d 185* ; *Gibbo v. Berger (2004) 123 Cal. App. 4th 396, 404, 19 Cal. Rptr. 3d 829*

Treble damages provision does not abrogate common law rights of borrowers, but as adding statutory remedy to aid borrower and penalize lender; borrower is also permitted to bring action for money had and received to recover usurious interest paid within two years of suit. *Stock v. Meek (1950) 35 Cal. 2d 809, 816-817, 221 P.2d 15*

Treble damage recovery is statutory remedy and penalty, which may be repealed. *Penziner v. West American Finance Co. (1937) 10 Cal. 2d 160, 170-171, 74 P.2d 252*

Treble damages are prayed for in cross complaint; amount is properly offset from principal. *Rice v. Dunlap (1928) 205 Cal. 133, 137*

Borrower recovers treble entire amount of interest paid rather than merely three times excess amount. *Haines v. Commercial Mortgage Co. (1927) 200 Cal. 609, 617, 254 P. 956, 255 P. 805* (overruled on other grounds in *Heald v. Friis-Hansen (1959) 52 Cal. 2d 834, 840, 345 P.2d 457*)

Court has wide discretion in determining whether treble damages under Usury Act should be awarded. *Buck v. Dahlgren (1972) 23 Cal. App. 3d 779, 788, 100 Cal. Rptr. 462*

Granting of treble damages on a finding of usury is discretionary with court. *McClung v. Saito (1970) 4 Cal. App. 3d 143, 152, 84 Cal. Rptr. 44*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 568.106 Attorney General Opinions

January 1, 1988, reduction in maximum finance charge that may be applied to outstanding balances on retail installment accounts under former *Civ. Code § 1810.2* was applicable to those portions of outstanding balances attributable to purchases made prior to January 1, 1988. *70 Ops. Cal. Att'y Gen. 256 (1987)*

Inclusion of "surcharge" in interest rate charged by Federal Reserve Bank of San Francisco. 67 Ops. Cal. Att'y Gen. 320 (1984)

Interest rate is not limited when sellers of residential or commercial real property take cash down payment and promissory note for balance of purchase price. *62 Ops. Cal. Att'y Gen. 735 (1979)*

Loans made by commercial banks' trust departments and trust company acting as trustee are not exempt from usury restriction [*but now see 12 U.S.C. § 1735f-7*; *12 U.S.C.A. § 1735f-7*, Note (Pub. L. No. 96-221, § 501(a)(2), as amended); *12 U.S.C. §§ 1785(g)(1), 1831d(a)*]. *59 Ops. Cal. Att'y Gen. 515 (1976)*

"Seller's points" received by lender constitute additional interest for purpose of usury; discount points paid by buyer on conventional home loan produced for sale to FHLMC or to FNMA constitute additional interest for purpose of usury; FHA insured or VA guaranteed mortgages not exempt from state usury laws except as provided in federal Veterans Housing Amendments Act [*but now see 12 U.S.C. §§ 1735f-5(b), 1735f-7*; *12 U.S.C.A. § 1735f-7*, Note (Pub. L. No. 96-221, § 501(a)(1), (b), as amended)]. *59 Ops. Cal. Att'y Gen. 452 (1976)*

Mortgage banker is not exempt from maximum interest rate of 10 percent and is prohibited from assigning right to collect interest in excess of that rate. *58 Ops. Cal. Att'y Gen. 487 (1975)*

Mortgage banker is not exempt from maximum interest rate of 10 percent and is prohibited from assigning right to collect interest in excess of that rate. *58 Ops. Cal. Att'y Gen. 487 (1975)*

"Seller's points" received by lender constitute additional interest for purpose of usury; discount points paid by buyer on conventional home loan produced for sale to FHLMC or to FNMA constitute additional interest for purpose of usury; FHA insured or VA guaranteed mortgages not exempt from state usury laws except as provided in federal Veterans Housing Amendments Act [*but now see 12 U.S.C. §§ 1735f-5(b), 1735f-7*; *12 U.S.C.A. § 1735f-7*, Note (Pub. L. No. 96-221, § 501(a)(1), (b), as amended)]. *59 Ops. Cal. Att'y Gen. 452 (1976)*

Loans made by commercial banks' trust departments and trust company acting as trustee not exempt from usury restriction [*but now see 12 U.S.C. § 1735f-7*; *12 U.S.C.A. § 1735f-7*, Note (Pub. L. No. 96-221, § 501(a)(2), as amended); *12 U.S.C. §§ 1785(g)(1), 1831d(a)*]. *59 Ops. Cal. Att'y Gen. 515 (1976)*

Interest rate not limited when sellers of residential or commercial real property take cash down payment and promissory note for balance of purchase price. *62 Ops. Cal. Att'y Gen. 735 (1979)*

Inclusion of "surcharge" in interest rate charged by Federal Reserve Bank of San Francisco. 67 Ops. Cal. Att'y Gen. 320 (1984)

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For related research and practice materials, see the following legal topics:
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§ 568.107 Law Reviews

[1] California Usury Laws

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Curotto, *Conflict of Laws and Usury in California: The Impact on Flow of Mortgage Funds, 9 USF L. Rev. 441 (1975)*

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Kaplinsky, *Federal Usury Law Developments, 101 Banking L.J. 663 (1984)*

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Note, *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.: New Tests for Variable-Interest Loans, 30 Hastings L.J. 1843 (1979)*

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[7] Sales of Goods

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§ 568.120 Complaint for Recovery of Treble Amount of Interest Paid on Loan Against Payee to Whom Interest Paid [Deering's Annot. Uncod. Measures 1919-1 § 3; West's Annot. Civ. Code § 1916-3], Recovery of Interest Paid on Loan as Money Had and Received (Indebitatus Assumpsit), and Declaratory Relief [Code Civ. Proc. § 1060] Declaring Interest Provisions of Loan Contract Void--Loan Violates State Constitutional Usury Provisions [Cal. Const., art. XV, § 1]--By Borrower Against Person to Whom Interest Paid

[1] FORM Complaint for Recovery of Treble Amount of Interest Paid on Loan Against Payee to Whom Interest Paid [Deering's Annot. Uncod. Measures 1919-1 § 3; West's Annot. Civ. Code § 1916-3], Recovery of Interest Paid on Loan as Money Had and Received (Indebitatus Assumpsit), and Declaratory Relief [Code Civ. Proc. § 1060] Declaring Interest Provisions of Loan Contract Void--Loan Violates State Constitutional Usury Provisions [Cal. Const., art. XV, § 1]--By Borrower Against Person to Whom Interest Paid

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RECOVERY OF USURIOUS
_____ [*name*],	)	INTEREST AND FOR DECLARATORY RELIEF
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. _____ [*Allege plaintiff's residence and capacity, e.g.,* Plaintiff is, and at all times herein mentioned was, a resident of _____ (*city*), California].

2. Defendant _____ [*name*] is, and at all times herein mentioned was, _____ [*state capacity and residence of defendant or other basis of venue, e.g.,* a resident of _____ County, California *or* a corporation organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), California].

[3. (Plaintiff is informed and believes and thereon alleges that) (A)t all times mentioned herein the defendant _____ (*name*) was the agent of the defendant _____ (*name*), and (in doing the things hereafter alleged) was acting within the scope and course of his/her agency and with the permission and consent of his/her codefendant.]

[4. (Plaintiff is informed and believes and thereon alleges that) defendant _____ (*name*) is the assignee of the right to receive interest payment on the subject contract.]

[*EITHER, if loan was not for personal, family, or household purpose*]

5. On or about _____ [*date*], at _____ [*city*], California, plaintiff and [defendant] _____ [*name*] entered into a contract in which [defendant] _____ [*name*] promised to loan plaintiff the sum of $_____, for use by plaintiff primarily _____ [*specify purpose, e.g.,* to purchase a computer for business use] and not for a personal, family, or household purpose.

[*OR, if loan was for personal, family, or household purpose*]

5. On or about _____ [*date*], at _____ [*city*], California, plaintiff and [defendant] _____ [*name*] entered into a contract in which [defendant] _____ [*name*] promised to loan plaintiff the sum of $_____, for use by plaintiff primarily _____ [*specify purpose, e.g.,* to purchase a refrigerator] for a _____ [personal, family, *and/or* household] purpose.

6. Under the terms of the contract, interest payments on the principal were to be made as follows: _____ [*specify, including statement of annual interest rate*].

[*EITHER*]

7. A copy of the contract is attached as Exhibit A, and incorporated by reference.

[*OR*]

7. The contract was executed in the form of a promissory note, dated _____ [*date*], a copy of which is attached as Exhibit A, and incorporated by reference.

[*EITHER*]

8. The interest payment terms of the _____ [contract *or* promissory note] are usurious and violate the

California Constitution, Article XV, Section 1(1), which prescribes that a contract in writing for a loan for use primarily for personal, family, or household purposes may not provide for an interest rate that exceeds 10 percent per annum.

[*OR*]

8. The interest payment terms of the _____ [contract *or* promissory note] are usurious and violate the *California Constitution, Article XV, Section 1(2),* which prescribes that a contract in writing for a loan for any use other than primarily for personal, family, or household purposes may not provide for an interest rate that exceeds _____ [10 percent per annum *or* five percent per annum plus _____ (*specify applicable rate of Federal Reserve Bank*), which was the applicable rate set by the Federal Reserve Bank of San Francisco on _____ (*set out date that is the 25th day of the month preceding the earlier of the date of execution of contract to make loan or the date of making the loan*)].

[*CONTINUE*]

[9. On or about _____ (*date*), _____ (*name of maker of usurious note*) assigned the right to receive interest payments on the subject _____ (contract *or* promissory note) to defendant _____ (*assignee's name*).]

10. On and after _____ [*specify date one year prior to filing complaint*], plaintiff made the following interest payments to defendant(s) _____[*name(s*)] on the _____ [contract *or* promissory note]: _____ [*specify date(s) and amount(s) of payment(s*)]. These payments were in excess of the maximum rate of interest allowed by the *California Constitution, Article XV, Section 1*, and plaintiff is entitled to recover treble the amount paid pursuant to Section 3(a) of the Statutes of 1919, page lxxxiii, as amended by Section 1 of Chapter 784 of the Statutes of 1970.

[11. On and after _____ (*specify date two years prior to filing complaint*), but before _____ (*specify date one year prior to filing complaint*), plaintiff made the following interest payments to defendant(s) _____ (*name*(*s*)) on the _____ (contract *or* promissory note): _____ (*specify*). These payments were in excess of the maximum rate of interest allowed by the *California Constitution, Article XV, Section 1*, and plaintiff is entitled to recover the amount paid as money had and received.]

12. An actual controversy has arisen and now exists between plaintiff and defendant _____ [*name*] concerning their respective rights and duties in that plaintiff contends that he/she/it is only obligated to pay defendant _____ [*name*] the principal amount of the loan without interest, and that the interest rate specified in the _____ [contract *or* promissory note] is usurious and should be declared null and void, whereas defendant _____ [*name*] disputes this contention and contends that plaintiff must continue paying both the principal amount and the specified interest rate.

13. Plaintiff desires a judicial determination of his/her/its rights and duties, and a declaration that the interest rate provisions of the _____ [contract *or* promissory note] are null and void, pursuant to the *California Constitution, Article XV, Section 1* and *Section 2* of the Statutes of 1919, page lxxxiii.

14. A judicial declaration is necessary and appropriate at this time under the circumstances in order that plaintiff may ascertain his/her/its rights and duties under the _____ [contract *or* promissory note].

[15. Plaintiff is entitled to recover attorney's fees against defendant _____ (*name*) in this action

_____ (under paragraph _____ of the _____ (contract *or* promissory note) *or* because defendant _____ (*name*) has been convicted of the felony of loan-sharking).]

WHEREFORE, plaintiff prays judgment against defendant(s) as follows:

1. For the assessment of treble damages against defendant _____ [*name*] in the sum of $_____ [*specify treble the amount of all interest paid to this defendant within the year previous to the filing of the complaint*];

[2. For the assessment of treble damages against defendant _____ (*other defendant's name, to whom payment also made*) in the sum of $_____ (*specify treble the amount of all interest paid to this defendant within the year previous to the filing of the complaint*);]

[3. For the assessment of damages against defendant _____ [*name*] in the sum of $_____ [*specify the amount of all interest paid to this defendant between one and two years of the date of the filing of the complaint*;]

[4. For the assessment of damages against defendant _____ (*other defendant's name, to whom payment also made*) in the sum of $_____ (*specify the amount of all interest paid to this defendant between one and two years of the date of the filing of the complaint*;)]

5. For a declaration that the interest rate provisions of the _____ [contract *or* promissory note] are null and void and of no force or effect;

[6. For reasonable attorney's fees against defendant _____ (*name*) _____ (in the amount of $_____ *or* according to proof);]

7. For costs of suit herein incurred; and

8. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This complaint is for use by a borrower to recover treble the amount of interest paid within the one-year period preceding the filing of the complaint, and to obtain a judgment declaring the interest provisions null and void, on the ground that the amount of interest paid under the contract was usurious [Stats. 1919, p. lxxxiii, § 3, as amended by Stats. 1970, Ch 784, § 1 (Deering's Annot. Uncod. Measures 1919-1 § 3; West's Annot. *Civ. Code § 1916-3*); *see Cal. Const., art. XV § 1* (maximum permissible interest rate); *Code Civ. Proc. § 1060* (declaratory relief)]. If interest was also paid between one and two years of the filing of the complaint, this form may also be used to recover that interest as money had and received [*see Stock v. Meek (1950) 35 Cal. 2d 809, 816-817, 221 P.2d 15* ; *see also Code Civ. Proc. § 339(1)* (two-year statute of limitations)]. For alternative forms for complaints for use in actions seeking a declaratory judgment, see Ch. 182, *Declaratory Relief* .

This form may be adapted for use as an action for reformation of the contract under *Civ. Code § 3399* based on unilateral or mutual mistake, to delete all or part of the usurious provisions. However, this type of request is more likely to be used by the lender, who might request the court to reform the contract to reduce the usurious interest rate to a legal rate of interest, rather than declare the debt to be interest-free [*see, e.g., First American Title Ins. & Trust Co. v. Cook (1970) 12 Cal. App. 3d 592, 597-598, 90 Cal. Rptr. 645* (reformation of usurious contract proper when all parties intended to include interest rate that did not exceed maximum permissible rate and inclusion of separate compound interest provision resulted in mutual mistake; compound interest provision deleted while 10 percent rate provision left intact)]. For forms and further discussion, see Ch. 488, *Reformation of Instruments* .

[3] Allegations

The complaint alleges:

- The residence and capacity of the parties (Paragraphs 1 and 2) [*see Code Civ. Proc. §§ 395(a), (b)* (venue based on residence of defendant), 395.2 (venue for unincorporated association), 395.5 (venue for corporation or association)].

- The existence of an agency relationship among the parties (Paragraph 3).

- Information regarding the assignment of the right to receive payment under the promissory note, if any (Paragraphs 4 and 9).

- The terms and execution of the loan, including the date and place of the signing of the contract, the amount loaned under the contract, whether the loan was to be used by the borrower primarily for personal, family, or household purposes, and the terms of the interest provisions of the contract (Paragraphs 5 and 6) [*see Code Civ. Proc. § 395(a)* (venue when loan not primarily for personal, family, or household purposes), *Code Civ. Proc. § 395(b)* (venue when loan primarily for personal, family, or household purposes); *see also Cal. Const., art. XV, § 1(1)* (maximum rate when loan is primarily for personal, family, or household purposes), *Cal. Const., art. XV, § 1(2)* (maximum rate when loan is not primarily for personal, family, or household purposes)].

- That a copy of the contract or promissory note is attached to the complaint as an exhibit (Paragraphs 7).

- That the interest provisions are usurious (first alternative Paragraph 8 if loan was to be primarily used for personal, family, or household purposes [*see Cal. Const., art. XV, § 1(1)*], or second alternative Paragraph 8 if loan was not to be used primarily for personal, family, or household purposes [*see Cal. Const., art. XV, § 1(2)*].

- The details of all interest payments made during the one-year period prior to the date of the filing of the complaint, including the amount paid, the date on which the payment was made, and the name of the person to whom the payment was made (Paragraph 10) [*see* Deering's Annot. Uncod. Measures 1919-1 § 3(a); West's Annot. *Civ. Code § 1916-3(a)*].

- The details of any additional interest payments made between one and two years of the date of the filing of the complaint, including the amount of each payment, date of that payment, and payee (Paragraph 11) [*see Stock v. Meek (1950) 35 Cal. 2d 809, 816-817, 221 P.2d 15* ; *see also Code Civ. Proc. § 339(1)* (two-year statute of limitations)].

- Optional allegations that will support a judgment declaring the interest rate provisions as null and void (Paragraphs 12 through 14) [*see Code Civ. Proc. § 1060*].

- That plaintiff is entitled to attorney's fees, if applicable (Paragraph 15) [*see § 568.120[4]*].

[4] Costs and Attorney's Fees

If the plaintiff prevails in the action, he or she is entitled to costs [*Code Civ. Proc. § 1032(b)*].

A prevailing plaintiff ordinarily may not recover attorney's fees unless the contract expressly or impliedly provides for attorney's fees [*see Code Civ. Proc. § 1021*]. However, if the defendant has been convicted of the felony of loan sharking, the plaintiff may recover reasonable attorney's fees regardless of the terms of the contract [*see Code Civ. Proc. § 1021.4*; *see also* Deering's Annot. Uncod. Measures 1919-1 § 3(b); West's Annot. *Civ. Code § 1916-3(b)* (loan sharking is felony)]. The attorney's fees are fixed by the court, on notice and motion by a party, and are an element of the costs of suit [*see Civ. Code § 1717*]. For further discussion of attorney's fees, see Ch. 174, *Costs and Attorney's Fees* .

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case in the superior court [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

[6] Jurisdiction

If the language in the form seeking declaratory relief is used, the superior court has jurisdiction of the action, and it cannot be a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(7), 589(b)(5), 1060*]. Otherwise, the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Code Civ. Proc. §§ 85, 86(a)(1)*].

In limited civil cases, the caption must identify the case as a limited civil case [*Code Civ. Proc. § 422.30(b)*; *Cal. Rules of Ct., Rule 2.111(10)*], and the first page of the paper must state whether or not the demand exceeds $10,000 [*Gov. Code § 72055*; *see Cal. Rules of Ct., Rule 2.111(9)* (statement regarding amount of demand must appear "below the character of the action or proceeding")].

[7] Venue

If the loan was to be used primarily for personal, family, or household purposes, proper county for the trial of the action

can be, at the plaintiff's option, either the county in which the borrower in fact signed the contract, or the county in which the borrower resided at the time the contract was entered into, or the county in which the borrower resides at the commencement of the action [*Code Civ. Proc. § 395(b)*; *see Fontaine v. Superior Court (CashCall, Inc.) (2009) 175 Cal. App. 4th 830, 838-840, 96 Cal. Rptr. 3d 607* (statute applies to action by or against consumer, and if any defendant in consumer's action is individual, that is irrelevant to application of statute)]. In any other case--or additionally, in the case of a consumer loan, if the borrower is a plaintiff--the proper county for trial is the county where the defendants or some of them reside at the commencement of the action [*Code Civ. Proc. § 395(a)*]; and furthermore, a corporation, association, or unincorporated association may be sued in the county in which the contract is made or is to be performed, the obligation arises, the breach occurs, or its principal place of business is situated [*Code Civ. Proc. §§ 395.2, 395.5*]. For further discussion, see Ch. 571, *Venue* .

[8] California Constitution

Maximum interest rates charged on loans or forbearances. *Cal. Const., art. XV, § 1*

[9] California Statutes

Civil and criminal remedies. Deering's Annot. Uncod. Measures 1919-1 § 3; West's Annot. *Civ. Code § 1916-3*

Award of attorney's fees. *Civ. Code § 1717*

Entitlement to costs and attorney's fees in general. *Code Civ. Proc. § 1021*

Entitlement to attorney's fees when losing party convicted of felony. *Code Civ. Proc. § 1021.4*

Costs. *Code Civ. Proc. § 1032 et seq.*

[10] Cross References

For alternative allegations of agency, capacity, residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms for captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to fax service and filing of papers, see Ch. 264, *Fax Service and Filing of Papers*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms for prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms for verification, see Ch. 572, *Verification*

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Volume 50: Usury thru Verification-Chs. 568-572
Chapter 568 USURY
PART IV. FORMS

50-568 California Forms of Pleading and Practice--Annotated § 568.121

§ 568.121 Affirmative Defense to Action Based on Usurious Contract--By Borrower--Loan Violates State Constitutional Usury Provisions [Cal. Const., art. XV, § 1]--Interest Provision Null and Void [Deering's Annot. Uncod. Measures 1919-1 § 2; West's Annot. Civ. Code § 1916-2]

[1] FORM Affirmative Defense to Action Based on Usurious Contract--By Borrower--Loan Violates State Constitutional Usury Provisions [Cal. Const., art. XV, § 1]--Interest Provision Null and Void [Deering's Annot. Uncod. Measures 1919-1 § 2; West's Annot. Civ. Code § 1916-2]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

[*EITHER, if loan was not for personal, family, or household purpose*]

1. Defendant entered into the subject _____ [contract *or* promissory note] with plaintiff to obtain a loan in the sum of $_____, to be used by defendant primarily _____ [*specify purpose, e.g.,* to purchase a computer for business use] and not for a personal, family, or household purpose.

[*OR, if loan was for personal, family, or household purpose*]

1. Defendant entered into the subject _____ [contract *or* promissory note] with plaintiff to obtain a loan in the sum of $_____, to be used by defendant primarily _____ [*specify purpose, e.g.,* to purchase a refrigerator] for a _____ [personal, family, *and/or* household] purpose.

2. The interest rate provisions for the debt in the subject _____ [contract *or* promissory note] provide for an annual interest rate of _____ percent to be paid on the principal[, calculated as follows: _____ (*specify*)].

[*EITHER*]

3. This annual interest rate exceeds the 10 percent maximum rate allowed under the *California Constitution, Article XV, Section 1(1)* for a contractual loan used primarily for personal, family, or household purposes.

[*OR*]

3. This annual interest rate exceeds the maximum rate allowed under *California Constitution, Article XV, Section 1(2)* for a loan for any use other than primarily for personal, family, or household purposes, which permits a maximum interest rate of _____ [*specify interest rate obtained by calculation, e.g.,* 16.5 percent], which represents the sum of five percent per annum plus the Federal Reserve rate of _____ percent that prevailed on _____ [*set out date that is the 25th day of the month preceding the earlier of the date of execution of contract to make loan or the date of making the loan*], for a loan _____ [made *or* contracted for] on _____ [*date*].

[*CONTINUE*]

4. The interest rate provisions for the debt in the subject _____ [contract *or* promissory note] are usurious and, by violating the *California Constitution, Article XV, Section 1*, are null and void under Section 2 of the Statutes of 1919, page lxxxiii. Plaintiff is barred under Section 2 of the Statutes of 1919, page lxxxiii from maintaining this action to recover that interest in any sum.

[2] Use of Form

This affirmative defense may be used in an answer to a breach of contract or specific performance action initiated by a lender of a usurious loan [see *Code Civ. Proc. § 430.30(b)*]. The form may also be adapted for use as a demurrer to the action [*see Code Civ. Proc. § 430.30(a)*; *see also* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*].

[3] Allegations

This affirmative defense alleges the amount of the usurious loan, the interest rate on the loan, the purpose for which it was to be used, and whether that purpose was a personal, family, or household purpose (Paragraphs 1 and 2) [*see Cal. Const., art. XV, § 1(1)* (maximum rate when loan is primarily for personal, family, or household purposes), (2) (maximum rate when loan is not primarily for personal, family, or household purposes)]. Alternative paragraphs are provided to state that the interest rate on a loan primarily for a personal, family, or household purpose, or on a loan not primarily for such a purpose, is usurious (Paragraphs 3, respectively) [*see Cal. Const., art. XV, § 1(1)* (maximum rate when loan primarily for personal, family, or household purposes), (2) (maximum rate when loan not primarily for personal, family, or household purposes)]. Finally, the form provides a statement that the interest provisions are null and void, and that the plaintiff may not maintain the action to recover the interest (Paragraph 4) [*see* Stats. 1919, p. lxxxiii, § 2 (Deering's Annot. Uncod. Measures 1919-1 § 2; West's Annot. *Civ. Code § 1916-2*)].

For an affirmative defense based on an allegation that the debt does not become due until the full contractual period elapses [*see* Deering's Annot. Uncod. Measures 1919-1 § 2; West's Annot. *Civ. Code § 1916-2*], see *§ 568.122*. In an appropriate case, this form and the *form in § 568.122* may be combined.

[4] California Statutes

Borrower obligated to pay principal of loan, even though lender may not maintain action to recover interest. Deering's Annot. Uncod. Measures 1919-1 § 2; West's Annot. *Civ. Code § 1916-2*

[5] Cross References

For discussion and forms relating to the format of answers, see Ch. 26, *Answers*

For discussion and forms relating to the format of demurrers, see Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

See also Comments and References to § 568.120

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Chapter 568 USURY
PART IV. FORMS

50-568 California Forms of Pleading and Practice--Annotated § 568.122

§ 568.122 Affirmative Defense to Action Based on Usurious Contract--By Borrower--Loan Violates State Constitutional Usury Provisions [Cal. Const., art. XV, § 1]--Debt Not Due Until Full Contractual Period Elapses [Deering's Annot. Uncod. Measures 1919-1 § 2; West's Annot. Civ. Code § 1916-2]

[1] FORM Affirmative Defense to Action Based on Usurious Contract--By Borrower--Loan Violates State Constitutional Usury Provisions [Cal. Const., art. XV, § 1]--Debt Not Due Until Full Contractual Period Elapses [Deering's Annot. Uncod. Measures 1919-1 § 2; West's Annot. Civ. Code § 1916-2]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES:

1. [*Allege amount and purpose of loan. See § 568.121, Paragraph 1.*]

2. [*Allege interest rate under loan. See § 568.121, Paragraph 2.*]

3. [*Allege constitutional maximum rate. See § 568.121, Paragraphs 3.*]

4. The full period of time for which the loan was contracted does not elapse until _____ [*date*].

5. Section 2 of the Statutes of 1919, page lxxxiii bars plaintiff from declaring the debt under the loan due until that full period of time for which it was contracted has elapsed.

[2] Use of Form

This affirmative defense may be used in an answer to a breach of contract or specific performance action initiated by a lender of a usurious loan [*see Code Civ. Proc. § 430.30(b)*]. The form may also be adapted for use in a demurrer to the action [*see Code Civ. Proc. § 430.30(a)*]. In an appropriate case, this form may be combined with the allegations in § 568.121.

[3] Allegations

This affirmative defense alleges that the plaintiff is barred from declaring the debt due (Paragraphs 4 and 5) [*see* Stats. 1919, p. lxxxiii, § 2 (Deering's Annot. Uncod. Measures 1919-1 § 2; West's Annot. *Civ. Code 1916-2*)].

[4] Decisions

Payee entitled to payment of principal sum once debt matures; payee entitled to payment of interest on principal at legal rate from date note matures until payee obtains judgment. *Epstein v. Frank (1981) 125 Cal. App. 3d 111, 123, 177 Cal. Rptr. 831*

[5] Cross References

See also Comments and References to §§ 568.120 and 568.121

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Chapter 568 USURY
PART IV. FORMS

50-568 California Forms of Pleading and Practice--Annotated § 568.123

§ 568.123 Complaint for Recovery of Double Amount of Interest Paid on Loan Against Payee to Whom Interest Paid [12 U.S.C. §§ 1785(g)(2), 1831d(b)] and for Declaratory Relief [Code Civ. Proc. § 1060] to Declare Interest Provisions of Loan Contract Forfeited--Loan Violates Federal Usury Limits on Loans by State Depository Institutions, Foreign Banks, or Credit Unions [12 U.S.C. §§ 1785(g), 1831d]

[1] FORM Complaint for Recovery of Double Amount of Interest Paid on Loan Against Payee to Whom Interest Paid [12 U.S.C. §§ 1785(g)(2), 1831d(b)] and for Declaratory Relief [Code Civ. Proc. § 1060] to Declare Interest Provisions of Loan Contract Forfeited--Loan Violates Federal Usury Limits on Loans by State Depository Institutions, Foreign Banks, or Credit Unions [12 U.S.C. §§ 1785(g), 1831d]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RECOVERY OF USURIOUS
_____ [*name*],	)	INTEREST AND FOR DECLARATORY RELIEF
Defendant.	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. [*Allege plaintiff's residence and capacity. See § 568.120, Paragraph 1.*]

2. Defendant _____ [*name*] is, and at all times herein mentioned was, a federally insured _____ [state-chartered depository institution *or* branch of a foreign bank *or* credit union] governed by Title 12 of the United States Code, Section _____[1785(g) *or* 1831d], whose _____ [principal place of business *or* branch office] is located at _____ [*specify address*].

3. On or about _____ [*date*], at _____ [*city*], California, plaintiff and defendant entered into a contract in which defendant promised to loan plaintiff the sum of $_____.

4. [*Allege interest terms of contract. See § 568.120, Paragraph 6.*]

5. [*State that copy of contract is attached as exhibit. See § 568.120, alternative Paragraphs 7.*]

6. The interest payment terms of the _____ [contract *or* promissory note] equal an annual rate of _____ percent. These terms are usurious because they violate Title 12 of the United States Code, Section _____ [1785(g)(1) *or* 1831d(a)], because they provide for an interest rate that is more than 1 percent in excess of _____ [*specify amount of rate*], which is the discount rate _____ [on 90-day commercial paper in effect at the Federal Reserve Bank of _____ (*specify district in which lender is located*) *or, if greater,* provided under _____ (*specify state law allowing rate greater than allowed by Federal Reserve Bank district)*].

7. On and after _____ [*specify date two years prior to filing complaint*], plaintiff made the following interest payments to defendant on the _____ [contract *or* promissory note]: _____ [*specify*]. Plaintiff is entitled to recover double the amount of these payments, pursuant to Title 12 of the United States Code, Section _____ [1785(g)(2) *or* 1831d(b)].

8. An actual controversy has arisen and now exists between plaintiff and defendant concerning their respective rights and duties in that plaintiff contends that he/she/it is only obligated to pay defendant the principal amount of the loan without interest, and that the interest rate specified in the _____ [contract *or* promissory note] is usurious and should be declared forfeited, whereas defendant disputes this contention and contends that plaintiff must continue paying both the principal amount and the specified interest rate.

9. Plaintiff desires a judicial determination of his/her/its rights and duties, and a declaration that the interest rate provisions of the _____ [contract *or* promissory note] are forfeited, pursuant to Title 12 of the United States Code, Section _____ [1785(g)(2) *or* 1831d(b)].

10. A judicial declaration is necessary and appropriate at this time under the circumstances in order that plaintiff may ascertain his/her/its rights and duties under the _____ [contract *or* promissory note].

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For damages equal to double the amount of interest paid, in the sum of $_____ [*specify double the amount of all interest paid to this defendant within the two-year period prior to the filing of the complaint*];

2. For a declaration that the interest rate provisions of the _____ [contract *or* promissory note] are forfeited and no longer of any force or effect;

[3. For reasonable attorney's fees _____ (of $_____ *or* according to proof);]

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 568.120.*]

[2] Use of Form

This complaint is for use to recover double the amount of interest that has been paid to a federally insured state-chartered depository institution (including a savings bank), a foreign bank branch, or a credit union pursuant to a contract or promissory note for a loan containing interest rate provisions that violate *12 U.S.C. §§ 1785(g)* or *1831d*, and for a judgment declaring the interest rate provisions to be forfeited [*see 12 U.S.C. §§ 1785(g)(2), 1831d(b)*; *Code Civ. Proc. § 1060*].

[3] Allegations

This complaint alleges:

- The status of the defendant as a financial institution covered by the federal law limits on interest rates (Paragraph 2) [*see 12 U.S.C. §§ 1785(g), 1831d* (usury provisions for certain federal institutions); *Code Civ. Proc. § 395.5* (venue for corporations or associations)].

- The date and place of execution of the contract, and the amount of the loan (Paragraph 3) [*Code Civ. Proc. § 395.5* (venue for corporations or associations)].

- The usurious nature of the contract (Paragraph 6) [*see 12 U.S.C. §§ 1785(g), 1831d*].

- An accounting of all interest payments made within the two-year period prior to the filing of the complaint (Paragraph 7) [*see 12 U.S.C. §§ 1785(g)(2), 1831d(b)* (double recovery of payments)].

- The necessary statements for obtaining a declaratory judgment that the interest rate provisions are forfeited (Paragraphs 8 through 10) [*see 12 U.S.C. §§ 1785(g)(2), 1831d(b)* (forfeiture of usurious provisions); *see also Code Civ. Proc. § 1060* (declaratory relief); *see also* Ch. 182, *Declaratory Relief*].

[4] Jurisdiction

The civil action must be brought in a court of appropriate jurisdiction, within two years after the date of the payment [*12 U.S.C. §§ 1785(g)(2), 1831d(b)*]. Either federal or state court may be a court of appropriate jurisdiction [*see 28 U.S.C. § 1331*; *Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86, 116.220*]. This complaint must be adapted for use if the plaintiff wishes to proceed in federal court.

Declaratory relief actions must be brought in superior court, and may not be filed as limited civil cases [*Code Civ. Proc §§ 86(a)(7), 580(b)(5), 1060*]. Thus this form, when used in its entirety, may not be filed as a limited civil case, regardless of the amount of damages requested. In order to use this form in a limited civil case (amount in controversy less than $25,000), the declaratory relief allegations in this form must be deleted [*see Code Civ. Proc §§ 85, 86(a)(1),*

580(b)(5), 1060]. However, a declaratory relief action may be filed as a limited civil case when filed by way of cross complaint as to a right of indemnity with respect to the relief demanded in the complaint or a cross complaint in an action or proceeding that is otherwise a limited civil case [*Code Civ. Proc § 86(a)(7)(B)*].

[5] Federal Statutes

Maximum interest rates charged by credit unions. *12 U.S.C. § 1785(g)*

Maximum interest rates charged by federally insured state depository institutions and foreign bank branches. *12 U.S.C. § 1831d*

Federal question jurisdiction. *28 U.S.C. § 1331*

[6] California Constitution

Superior court jurisdiction. *Cal. Const., art. VI, § 10*

[7] California Statutes

Limited civil cases. *Code Civ. Proc. § 85, 86*

[8] Cross References

See also Comments and References to § 568.120

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Volume 50: Usury thru Verification-Chs. 568-572
Chapter 568 USURY
PART IV. FORMS

50-568 California Forms of Pleading and Practice--Annotated § 568.124

§ 568.124 Complaint for Recovery of Treble Amount of Interest Paid on Loan Secured by Dwelling [Bus. & Prof. Code § 10246]--By Borrower Against Payee to Whom Interest or Charge Paid--Loan Violates State Real Estate Broker Usury Laws [Bus. & Prof. Code §§ 10240-10248.3]

[1] FORM Complaint for Recovery of Treble Amount of Interest Paid on Loan Secured by Dwelling [Bus. & Prof. Code § 10246]--By Borrower Against Payee to Whom Interest or Charge Paid--Loan Violates State Real Estate Broker Usury Laws [Bus. & Prof. Code §§ 10240-10248.3]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RECOVERY OF USURIOUS
_____ [*name*],	)	[INTEREST *and/or* CHARGES]
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Allege plaintiff's residence and capacity. See § 568.120, Paragraph 1.*]

2. [*Allege defendant's residence and capacity. See § 568.120, Paragraph 2.*]

[3. *Allege agency, if appropriate. See § 568.120, Paragraph 3.*]

[4. *Allege assignment, if appropriate. See § 568.120, Paragraph 4.*]

5. [Defendant] _____ [*real estate broker's name*] is, and at all times herein mentioned was, a real estate broker duly licensed by the state of California.

6. On or about _____ [*date*], at _____ [*city*], California, [defendant] _____ [*real estate broker's name*] _____ [made *or* arranged] a loan secured by a dwelling for plaintiff, under the following circumstances: _____ [*specify*].

[7. On or about _____ [*date*], plaintiff and defendant _____ (*real estate broker's name*), as compensation for said defendant's services as described above, entered into a contract under which plaintiff promised to pay said defendant the following _____ (brokerage *or* commissions *or* loan origination fees, points, bonuses, and other charges in lieu of interest): _____ (*specify*). A copy of this contract is attached as Exhibit A, and incorporated by reference.]

8. As a result of the actions of [defendant] _____ [*real estate broker's name*], plaintiff and [defendant] _____ [*lender's name*] entered into a contract in which [defendant] _____ [*lender's name*] promised to loan plaintiff the sum of $_____, secured by a dwelling, under the following terms: _____ [*specify all terms, including interest provisions, any trust deeds or liens junior to trust deed, any usurious prepayment charges, and any usurious costs and expenses for appraisal fees, escrow fees, notary fees, and credit investigation fees*].

9. [*State that copy of loan contract is attached as exhibit. See § 568.120, alternative Paragraphs 7.*]

10. The charges imposed for _____ [*specify, e.g.,* appraisal and escrow fees, and for the commission for defendant _____ (*real estate broker's name*)], exceed the maximum limit allowed by Business and Professions Code Section(s) _____ [*specify section or sections, e.g.,* 10242].

[11. On or about _____ (*date*), _____ (*assignor's name*) assigned the right to receive payment of the _____ (*specify*) charges to defendant _____ (*assignee's name*).]

12. On and after _____ [*specify date two years prior to filing complaint*], plaintiff made the following payments to defendant(s) _____ [*name*(*s*)]: _____ [*specify, listing each charge paid, person to whom paid, and date paid*].

13. Plaintiff is entitled to recover treble the amount of these charges paid and is entitled to costs and reasonable attorney's fees, pursuant to *Section 10246 of the Business and Professions Code*.

14. Plaintiff has not sought relief pursuant to *Section 10248.2 of the Business and Professions Code*.

WHEREFORE, plaintiff prays judgment against defendant(s) _____ [*name(s*)] as follows:

1. For the assessment of treble damages against defendant _____ [*name*] in the sum of $_____ [*specify treble the amount of all charges paid to this defendant within the two years prior to the filing of the complaint*];

[2. For the assessment of treble damages against defendant _____ (*other defendant's name, to whom payment also made*) in the sum of $_____ (*specify treble the amount of all charges paid to this defendant within the two years prior to the filing of the complaint*);]

3. For reasonable attorney's fees _____ [of $_____ *or* according to proof];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 568.120.*]

CAUTION:

This form may not be used if the alternative demand procedure prescribed by *Bus. & Prof. Code § 10248.2* has been or will be employed. Use § 568.125 to initiate the demand procedure, and § 568.126 to institute an action at law if the demand is unsatisfied within 20 days of service [see *Bus. & Prof. Code § 10248.2*].

[2] Use of Form

This complaint is for use to recover treble the amount of usurious charges paid with respect to a loan secured by a dwelling that is made or arranged by a real estate broker pursuant to *Bus. & Prof. Code § 10240 et seq.*, other than a loan for $30,000 or more if secured by a first trust deed or $10,000 or more if secured by any lien junior to a trust deed [see *Bus. & Prof. Code §§ 10240.1, 10245, 10246*].

If the usurious charges were levied as the result of a bona fide error, only the amount actually paid may be recovered [*Bus. & Prof. Code § 10246*].

[3] Allegations

This complaint alleges:

- The nature of the relationship between the plaintiff and the real estate broker, including the terms of any usurious contract between them (Paragraphs 6 and 7) [*see Bus. & Prof. Code § 10242(c)*].

- The terms of the loan contract (Paragraph 8) [*see Bus. & Prof. Code §§ 10242-10242.6*].

- The usurious nature of the loan charges (Paragraph 10) [*see Bus. & Prof. Code §§ 10242-10242.6, 10246*].

- The assignment of the loan, if any (Paragraph 11).

- A listing of all usurious charges that were paid within the two-year period preceding the filing of the complaint (Paragraph 12).

- That the plaintiff is entitled to receive treble the amount of the charges paid as damages, as well as costs and reasonable attorney's fees (Paragraph 13) [*see Bus. & Prof. Code § 10246*].

- That relief has not been sought under the alternative demand procedure [*see Bus. & Prof. Code § 10248.2*].

[4] Costs and Attorney's Fees

The prevailing plaintiff is entitled to recover both costs and reasonable attorney's fees [*see Bus. & Prof. Code § 10246*].

[5] California Statutes

Real estate broker usury laws. *Bus. & Prof. Code §§ 10240-10248.3*

[6] Cross References

See also Comments and References to Forms 1, 6, and 7

California Forms of Pleading and Practice--Annotated

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Volume 50: Usury thru Verification-Chs. 568-572
Chapter 568 USURY
PART IV. FORMS

50-568 California Forms of Pleading and Practice--Annotated § 568.125

§ 568.125 Demand Letter for Recovery of Real Estate Broker's Bonus, Brokerage, or Commission Within 20 Days [Bus. & Prof. Code § 10248.2(b)]--Alternative Procedure to Complaint for Recovery of Treble Amount of Interest Paid on Loan Secured by Dwelling--By Borrower Against Payee to Whom Interest or Charge Paid--Loan Violates State Real Estate Broker Usury Laws [Bus. & Prof. Code § 10240 et seq.]

[1] FORM Demand Letter for Recovery of Real Estate Broker's Bonus, Brokerage, or Commission Within 20 Days [Bus. & Prof. Code § 10248.2(b)]--Alternative Procedure to Complaint for Recovery of Treble Amount of Interest Paid on Loan Secured by Dwelling--By Borrower Against Payee to Whom Interest or Charge Paid--Loan Violates State Real Estate Broker Usury Laws [Bus. & Prof. Code § 10240 et seq.]

_____ [*Name and address of borrower's attorney*]

_____ [*Name and address of lender*]

Re: _____ [*Give short identification of contract with lender*]

Dear _____ [*Lender's name*]:

On _____ [*date*], you and my client, _____ [*borrower's name*], entered into a contract under which my client became obligated to pay you $_____ as a _____ [bonus *or* brokerage *or* commission] for negotiating a loan in the amount of $_____ and secured _____ [directly *or* collaterally] _____ [in whole or in part by a first trust deed *or* by a trust deed other than a first trust deed] and for a term of _____ [*specify, e.g.,* less than three years].

The _____ [bonus *or* brokerage *or* commission] exceeds [five *or* 10 *or* 15] percent of the principal amount of the loan, and as such exceeds the maximum amount that may be charged for such a fee as prescribed by *Section 10242(b) of the Business and Professions Code*.

To date, my client has paid you the sum of $_____, as payment for your _____ [bonus *or* brokerage *or* commission] pursuant to the contract. [As a result of this payment, my client has suffered actual

damages in the amount of $_____.]

My client hereby demands that you return this $_____. If this amount is not returned to my client within 20 days of the _____ [personal delivery *or* date of the mailing] of this letter, my client will be forced to commence an action at law pursuant to *Bus. & Prof. Code § 10248.2(b)* to recover either the amount of actual damages or twice the excessive fees, whichever is greater.

Sincerely,

_____ [*signature*]

Attorney for _____ [*borrower's name*]

CAUTION:

This procedure may not be employed if the borrower has already commenced an action for treble damages under *Bus. & Prof. Code § 10246* [*Bus. & Prof. Code § 10248.2(b)*]. If such an action is preferred, use § 568.124 rather than this form; see also *§ 568.126*.

[2] Use of Form

This demand letter is for use by a borrower to demand the return of a real estate broker's bonus, brokerage, or commission for negotiation of a loan secured by a dwelling [*see Bus. & Prof. Code § 10248.2(b)*]. The form may only be used if the loan was other than a loan for $30,000 or more if secured by a first trust deed or $10,000 or more if secured by any lien junior to a trust deed [*see Bus. & Prof. Code § 10245*].

If the demanded amount is not returned to the borrower within 20 days of service of the letter, the borrower may commence an action at law to recover actual damages or twice the amount paid, whichever is greater [*Bus. & Prof. Code § 10248.2(b)*]. In this case, use the *form in § 568.126* to draft an appropriate complaint.

[3] Contents

This demand letter describes the bonus, brokerage, or commission contract, the loan contract, whether the loan was se cured directly or collaterally, in whole or in part by a first trust deed or by a trust deed other than a first trust deed, and the length of the term of the loan [*see Bus. & Prof. Code § 10242(b)*]. The demand letter then alleges that the bonus, brokerage, or commission exceeds the maximum amount that may be charged by the real estate broker [*see Bus. & Prof. Code § 10242(b)*]. Finally, the letter sets forth the amount paid by the borrower, the amount of actual damages suffered by the borrower if greater, and a demand for the return of the bonus, brokerage, or commission within 20 days of service of the letter [*see Bus. & Prof. Code § 10248.2(b)*].

The bonus, brokerage, or commission may not exceed five percent of the principal amount of the loan if the loan is secured by a first trust deed and its term is less than three years [*Bus. & Prof. Code § 10242(b)(1)*], or if the loan is secured by a trust deed other than a first trust deed and its term is less than two years [*Bus. & Prof. Code § 10242(b)(2)*]. The bonus, brokerage, or commission may not exceed 10 percent of the principal amount of the loan if the loan is secured by a first trust deed and its term is three years or more [*Bus. & Prof. Code § 10242(b)(1)*], or if the loan is secured by a trust deed other than a first trust deed and its term is between two and three years [*Bus. & Prof. Code § 10242(b)(2)*]. The bonus, brokerage, or commission may not exceed 15 percent of the principal amount of the loan if the loan is secured by a trust deed other than a first trust deed and its term is three years or more [*Bus. & Prof. Code § 10242(b)(2)*].

[4] Cross References

See also Comments and References to §§ 568.124 and 568.126

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50-568 California Forms of Pleading and Practice--Annotated § 568.126

§ 568.126 Complaint for Recovery of Actual Damages or Double Amount of Usurious Charges When Real Estate Broker Fails to Return Bonus, Brokerage, or Commission Within 20 Days of Service of Demand Letter [Bus. & Prof. Code § 10248.2(b)]--Alternative to Complaint for Recovery of Treble Amount of Interest Paid on Loan Secured by Dwelling--By Borrower Against Payee to Whom Interest or Charge Paid--Loan Violates State Real Estate Broker Usury Laws [Bus. & Prof. Code §§ 10240-10248.3]

[1] FORM Complaint for Recovery of Actual Damages or Double Amount of Usurious Charges When Real Estate Broker Fails to Return Bonus, Brokerage, or Commission Within 20 Days of Service of Demand Letter [Bus. & Prof. Code § 10248.2(b)]--Alternative to Complaint for Recovery of Treble Amount of Interest Paid on Loan Secured by Dwelling--By Borrower Against Payee to Whom Interest or Charge Paid--Loan Violates State Real Estate Broker Usury Laws [Bus. & Prof. Code §§ 10240-10248.3]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR RECOVERY OF USURIOUS
_____ [*name*],	)	_____[BONUS *or* BROKERAGE
Defendant.	)	*or* COMMISSION]
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

1. [*Allege plaintiff's residence and capacity. See § 568.120, Paragraph 1.*]

2. Defendant _____ [*name, and if venue so based, residence*] is, and at all times herein mentioned

was, a real estate broker duly licensed by the state of California.

3. On or about _____ [*date*], at _____ [*city*], California, defendant negotiated a loan secured by a dwelling for plaintiff, under the following circumstances: _____ [*specify*].

4. On or about _____ [*date*], plaintiff and defendant, as compensation for said defendant's services as described above, entered into a contract under which plaintiff promised to pay said defendant the following _____ [bonus *or* brokerage *or* commission]: _____ [*specify*]. A copy of this contract is attached as Exhibit A, and incorporated by reference.

5. As a result of the actions of defendant, plaintiff and _____ [*lender's name*] entered into a contract in which _____ [*lender's name*] promised to loan plaintiff the sum of $_____, secured _____ [directly *or* collaterally] _____ [in whole or in part by a first trust deed *or* by a trust deed other than a first trust deed] on a dwelling and for a term of _____ [*specify, e.g.,* less than three years].

6. [*State that copy of loan contract is attached as exhibit. See § 568.120, alternative Paragraphs 7.*]

7. The _____ [bonus *or* brokerage *or* commission] exceeds _____ [five *or* 10 *or* 15] percent of the principal amount of the loan, and as such exceeds the maximum amount that may be charged for such a fee as prescribed by *Section 10242(b) of the Business and Professions Code*.

8. On _____ [*date*], plaintiff paid the sum of $_____ to defendant, for the _____ [bonus *or* brokerage *or* commission].

[9. As a result of the payment of the $_____ to defendant for the _____ (bonus *or* brokerage *or* commission), plaintiff has suffered actual damages in the amount of $_____, as follows: _____ (*specify*).]

10. On _____ [*date*], plaintiff _____ [personally delivered *or* mailed] to defendant a letter demanding the return of the $_____ that had been paid to defendant for the _____ [bonus *or* brokerage *or* commission]. The demand letter stated that the $_____ must be returned within 20 days of the _____ [personal delivery *or* date of the mailing] of the letter, or the plaintiff would be forced to commence an action at law pursuant to *Bus. & Prof. Code § 10248.2(b)* to recover either the amount of actual damages or twice the excessive fees paid, whichever is greater.

11. Defendant failed to return the $_____ within the aforementioned 20-day period. Plaintiff is entitled to recover either the amount of actual damages or twice the excessive fees paid, whichever is greater and is entitled to costs and reasonable attorney's fees, pursuant to *Section 10248.2(b) of the Business and Professions Code*.

12. Plaintiff has not sought relief pursuant to *Section 10246 of the Business and Professions Code*.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For the assessment of [actual damages or] double the amount of the fees paid against defendant, _____ [in the amount of $_____ *or* whichever is greater];

2. For reasonable attorney's fees _____ [of $_____ *or* according to proof];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

[*Verification, if desired. See § 568.120.*]

CAUTION:
This procedure may not be employed if the borrower has already commenced an action for treble damages under *Bus. & Prof. Code § 10246* [*Bus. & Prof. Code § 10248.2(b)*]. If such an action is preferred, use § 568.124 to draft the appropriate complaint.

[2] Use of Form

This form is a complaint for use by a borrower to recover the greater of actual damages or double the amount of a bonus, brokerage, or commission paid to a real estate broker for negotiation of a loan secured by a dwelling, after the broker has failed to return the fee within 20 days of the service of a demand letter [*see Bus. & Prof. Code § 10248.2(b)*]. The form may only be used if the loan was other than a loan for $30,000 or more if secured by a first trust deed or $20,000 or more if secured by any lien junior to a trust deed [*see Bus. & Prof. Code § 10245*]. For a form for a demand letter, see *§ 568.125*.

The action must be commenced within two years after the loan has matured [*Bus. & Prof. Code § 10248.2(d)*].

The real estate broker will not be held liable if he or she shows by a preponderance of evidence that the usurious charge was unintentional and the result of a bona fide error [*Bus. & Prof. Code § 10248.2(b)*].

[3] Allegations

This complaint alleges:

- The identity and capacity of the real estate broker, and his or her residence if venue is so based (Paragraph 2) [*see Code Civ. Proc. §§ 395(a), (b)* (venue based on residence of defendant)].

- The nature of the relationship between the plaintiff and the real estate broker, and the terms of the usurious contract between them (Paragraphs 3 and 4) [*see Bus. & Prof. Code § 10242(c)*].

- A description of the loan contract (Paragraph 5) [*see Bus. & Prof. Code § 10242(c)*].

- The usurious nature of the bonus, brokerage, or commission (Paragraph 7) [*see Bus. & Prof. Code § 10242(c)*].

- The amount paid for the usurious charge, and the amount of actual damages if appropriate (Paragraphs 8 and 9) [*see Bus. & Prof. Code § 10248.2(b)*].

- The delivery or mailing of a demand letter to defendant, and the failure of the defendant to comply with the demand (Paragraphs 10 and 11) [*see Bus. & Prof. Code § 10248.2(b)*].

- A statement that plaintiff has not sought relief pursuant to Section 10246 (Paragraph 12) [*see Bus. & Prof. Code § 10248.2(b)*].

[4] Costs and Attorney's Fees

The prevailing plaintiff is entitled to recover both costs and reasonable attorney's fees [*see Bus. & Prof. Code § 10248.2(b)*].

[5] Cross References

See also Comments and References to Forms 1, 5, and 6

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50-568 California Forms of Pleading and Practice--Annotated § 568.127

§ 568.127 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action Based on Usurious Contract--By Borrower Sued by Personal Property Broker [Fin. Code § 22651(a)] or Consumer Finance Lender [Fin. Code § 24651(a)]--Lender Unable to Collect or Receive Interest or Charges for Nonwillful Violation [Fin. Code §§ 22651(a), 24651(a)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action Based on Usurious Contract--By Borrower Sued by Personal Property Broker [Fin. Code § 22651(a)] or Consumer Finance Lender [Fin. Code § 24651(a)]--Lender Unable to Collect or Receive Interest or Charges for Nonwillful Violation [Fin. Code §§ 22651(a), 24651(a)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], defendant alleges that:

1. Defendant entered into the subject _____ [contract *or* promissory note] with plaintiff to obtain a loan in the sum of $_____.

2. Plaintiff is a _____ [personal property broker *or* consumer finance lender] governed by Sections _____ [22000-22654 *if personal property broker or* 24000-24654 *for consumer finance lender*] of the Financial Code.

[*EITHER*]

3. The terms of the loan to defendant violate the provisions of Section(s) _____ [*specify*] of the Financial Code, as evidenced by the following: _____ [*specify*].

[*OR*]

3. The _____ [interest rate *and/or* fees] charged under the terms of the loan to defendant is/are _____ [*specify rate or manner in which rates or fees are calculated*]. This/these _____ [interest rate *or* fees] is/are in excess of the rate allowed by Section(s) _____ [*specify*] of the Financial Code.

[*CONTINUE*]

4. Since the terms of the loan violate Section(s) _____[*specify*] of the Financial Code, pursuant to Section [22651(a) *if personal property broker or* 24651(a) *for consumer finance lender*] of the Financial Code plaintiff must forfeit all interest and charges on the loan.

[2] Use of Form

This form is an affirmative defense that may be used in an answer to a breach of contract or specific performance action initiated by a usurious lender who is a personal property broker or consumer finance lender if the lender seeks to recover interest and/or charges on the loan, and the violation is not willful [*see Code Civ. Proc. § 431.30(b)(2)*; *Fin. Code §§ 22651(a)* (personal property brokers), 24651(a) (consumer finance lenders)].

The defense is not available if the broker or lender shows by a preponderance of the evidence that the violation was unintentional and due to a bona fide error in computation, notwithstanding the maintenance of procedures reasonably adapted to avoid such error, and if, within 60 days of discovering the error, the lender notified the borrower of the error, and made all necessary corrections to the account [*Fin. Code §§ 22651(b), 24651(b)*].

For an affirmative defense to an action based on a willful violation, see *§ 568.128* (lender unable to collect or receive principal, interest, or charges).

[3] Allegations

This form alleges:

- The amount of the loan (Paragraph 1).
- The fact that the plaintiff is a personal property broker or consumer finance lender governed by *Fin. Code §§ 22000-22654* or *24000-24654* (Paragraph 2).
- The usurious nature of the loan (alternative Paragraphs 3) [*see Fin. Code §§ 22053, 22053.1, 22450-22482, 24053, 24053.1, 24450-24482*].
- The requirement that the plaintiff forfeit all interest and charges on the loan (Paragraph 4) [*see Fin. Code §§ 22651(a), 24651(a)*].

[4] California Statutes

[a] Consumer Finance Lenders

Governing law. *Fin. Code §§ 24000-24654*

Effect of usurious contract if violation is not willful. *Fin. Code § 24651*

[b] Personal Property Brokers

Governing law. *Fin. Code §§ 22000-22654*

Effect of usurious contract if violation is not willful. *Fin. Code § 22651*

[5] Cross References

See also Comments and References to §§ 568.121 and 568.128

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50-568 California Forms of Pleading and Practice--Annotated § 568.128

§ 568.128 Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action Based on Usurious Contract--By Borrower Sued by Industrial Loan Company [Fin. Code § 18439], Personal Property Broker [Fin. Code § 22650(a)], or Consumer Finance Lender [Fin. Code § 24650(a)]--Contract Void and Lender Unable to Collect or Receive Principal, Interest, or Charges [Fin. Code §§ 18439, 22650(a), 24650(a)]

[1] FORM Affirmative Defense [Code Civ. Proc. § 431.30(b)(2)] to Action Based on Usurious Contract--By Borrower Sued by Industrial Loan Company [Fin. Code § 18439], Personal Property Broker [Fin. Code § 22650(a)], or Consumer Finance Lender [Fin. Code § 24650(a)]--Contract Void and Lender Unable to Collect or Receive Principal, Interest, or Charges [Fin. Code §§ 18439, 22650(a), 24650(a)]

AS A SEPARATE AND AFFIRMATIVE DEFENSE, defendant alleges:

1. Defendant entered into the subject _____ [contract *or* promissory note] with plaintiff to obtain a loan in the sum of $_____.

2. Plaintiff is a[n] _____ [industrial loan company *or* personal property broker *or* consumer finance lender] governed by Sections _____ [18000-18643 *if industrial loan company*, 22000-22654 *if personal property broker, or* 24000-24654 *if consumer finance lender*] of the Financial Code.

[*EITHER*]

3. The terms of the loan to defendant violate the provisions of Section(s) _____ [*specify*] of the Financial Code, as evidenced by the following: _____ [*specify*].

[*OR*]

3. The _____ [interest rate *and/or* fees] charged under the terms of the loan to defendant is/are _____ [*specify rate or manner in which rates or fees are calculated*]. This/these

_____ [interest rate *or* fees] is/are in excess of the rate allowed by Section(s) _____ [*specify*] of the Financial Code.

[*CONTINUE*]

[4. *If plaintiff is personal property broker or consumer finance lender, allege:* In violating Section(s) _____ (*specify*) of the Financial Code, plaintiff did so willfully.]

[*EITHER, if plaintiff is industrial loan company*]

5. Since the terms of the loan violate Section(s) _____[*specify*] of the Financial Code, pursuant to *Section 18439 of the Financial Code* the entire contract of loan is void, and plaintiff has no right to collect or receive any principal, interest, or charges in connection with the transaction.

[*OR, if plaintiff is personal property broker or consumer finance lender*]

5. Since plaintiff has willfully violated Section(s) _____[*specify*] of the Financial Code pursuant to Section _____ [22650(a) *if personal property broker or* 24650(a) *if consumer finance lender*] of the Financial Code, the entire contract is void, and plaintiff has no right to collect or receive any principal, charges, or recompense in connection with the transaction.

[2] Use of Form

This form is an affirmative defense that may be used in an answer to a breach of contract or specific performance action initiated by a usurious lender who is an industrial loan company, personal property broker, or consumer finance lender [*see Code Civ. Proc. § 431.30(b)(2)*; *Fin. Code §§ 18439* (industrial loan companies), 22650(a) (personal property brokers), 24650(a) (consumer finance lenders)]. The form may also be adapted for use as a demurrer to the action [*see Code Civ. Proc. § 430.30(a)*].

If the plaintiff is a personal property broker or consumer finance lender, the defense is available only when the violation is willful [*see Fin. Code §§ 22650(a)* (personal property brokers), 24650(a) (consumer finance lenders)]. If the violation is not willful, the lender must forfeit all interest and charges, but may collect or receive the principal amount of the loan [*see Fin. Code §§ 22651(a)* (personal property brokers), 24651(a) (consumer finance lenders)]. For an affirmative defense to an action based on a usurious contract when the violation is not willful, see *§ 568.127*.

[3] Allegations

This form alleges:

- The amount of the loan (Paragraph 1).

- The fact that the plaintiff is an industrial loan company, personal property broker, or consumer finance lender governed by *Fin. Code §§ 18000-18643*, *22000-22654*, or *24000-24654* (Paragraph 2).

- The usurious nature of the loan (alternative Paragraphs 3) [*see Fin. Code §§ 18212*, *18212.1*, *18300*, *18625-18631*, *18702*, *22053*, *22053.1*, *22450-22482*, *24053*, *24053.1*, *24450-24482*].

- The fact that the violation by the plaintiff was willful, as required if the plaintiff is a personal property broker or consumer finance lender (Paragraph 4).

- The void nature of the contract, and the bar to plaintiff to collect or receive any principal, interest, charges, or recompense in connection with the transaction (Paragraph 5) [*see Fin. Code §§ 18439, 22650(a), 24650(a)*].

[4] California Statutes

[a] Consumer Finance Lenders

Governing law. *Fin. Code §§ 24000-24654*

Effect of usurious contract if violation is willful. *Fin. Code § 24650(a)*

[b] Industrial Loan Companies

Governing law. *Fin. Code §§ 18000-18643*

Effect of usurious charge. *Fin. Code § 18439*

[c] Personal Property Brokers

Governing law. *Fin. Code §§ 22000-22654*

Effect of usurious contract if violation is willful. *Fin. Code § 22650(a)*

[5] Cross References

See also Comments and References to §§ 568.121 and 568.127

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§§ 569.03-569.09 [Reserved]

§ 569.10 Governing Law and Definitions

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[1] When Required; Legislative Intent

[2] Exempt Transactions

[3] Disclosure Form

[a] Statutory "Real Estate Transfer Disclosure Statement"

[b] City or County Requirements

[c] Approximate Disclosures

[4] Delivery of Disclosure Statement

[5] Amendment After Delivery

[6] Noncompliance

[a] Seller's Liability Generally

[b] Validity of Transfer

[c] Errors and Omissions

[d] Professional Reports and Opinions in Lieu of Disclosure

[e] Public Agency's or Other Person's Information in Lieu of Disclosure

[f] Subsequent Inaccuracy of Information

[g] Waiver by Purchaser

§ 569.12 Natural Hazard Disclosures

[1] Natural Hazard Disclosure Statement

[2] Exempted Transactions

[3] Delivery and Confirmation of Disclosure Statement

[4] Delivery of Information By Public Agency, Other Person, or Expert

[5] Transferee's Right to Rescind Transaction

[6] Amendment to Disclosure Statement; Subsequent Changes in Information

[7] Liability of Transferor and Real Estate Agents; Third Party Reliance on Statement

[8] Effect of Noncompliance; Good Faith Requirement

[9] Relationship to Other Disclosure Requirements

[10] Special Instructions for Completing Form

[11] Special Flood Hazard Area

[12] Area of Potential Flooding

[13] Very High Fire Hazard Severity Zone

[14] Delineated Earthquake Fault Zone

[15] Seismic Hazard Zone

[16] Wildland Fire Zone

§ 569.13 Residential Vendor's Special Duties of Disclosure

[1] Mello-Roos Community Facilities Act and Assessment Installments Under Improvement Bond Act of 1915

[2] Supplemental Property Tax Bills

[3] Former Ordnance Location

[4] Industrial Use Zoning

[5] Registered Sex Offenders Data Base

[6] Arranged Credit

[7] Noncompliant Plumbing Fixtures (Pre-1994 Residential Property)

§ 569.14 Liability for Failure to Disclose Presence of Hazardous Substance

§ 569.15 Disclosures Regarding Environmental and Earthquake Hazards

[1] Environmental Hazards

[a] Consumer Information Booklet

[b] Toxic Mold Protection Act

[c] Local Health Officer's Order Prohibiting Use or Occupancy

[2] Earthquake Hazards Generally

[3] Earthquake Hazards of Certain Residential Property

[a] Disclosure Requirement

[b] Contents of Disclosure

[c] Exempt Transfers

[d] Retrofit Standards

§ 569.16 Private Transfer-Fee Requirement

§ 569.16A Sale Cannot Be Conditioned on Purchase of Title Insurance

§ 569.17 Expiration of Rights Under Unperformed Recorded Contract of Sale

§ 569.18 Duty to Execute Release

§ 569.19 Expiration of Record of Expired Option

§ 569.20 Risk of Loss

§ 569.21 Formation and Breach of Contract

[1] In General

[2] Performance or Excuse of Conditions

§ 569.22 Purchaser's Remedies

[1] In General

[2] Purchaser's Remedies to Gain Possession

[3] Purchaser's Damages for Breach of Contract

[4] Purchaser's Right to Specific Performance

[5] Purchaser's Enforcement of Liquidated Damage Clause

[6] Purchaser's Damages for Fraud

[7] Purchaser's Right to Rescission

§ 569.23 Protection From Foreclosure for Active Duty Service Members Under California and Federal Law

[1] Purpose and Application of Protections

[2] Actions for Foreclose on Mortgage or Deed of Trust

[3] Actions to Rescind or Terminate Contract for Purchase

§ 569.24 Vendor's Remedies

[1] Consideration; Election of Remedies

[2] To Remove Clouds on Title Created by Purchaser's Claims

[3] To Regain Possession

[4] Vendor's Damages for Breach of Contract

[5] Vendor's Right to Specific Performance

[6] Vendor's Retention of Deposit

[a] Under Liquidated Damages Clause

[i] Residential Property

[ii] Nonresidential Property

[b] Absent Liquidated Damages Clause

[7] Vendor's Right to Rescission

[a] Grounds

[b] Procedure

[c] Cancellation and Rescission Distinguished

[8] Vendor's Damages for Fraud

[9] Action for Unlawful "Rent Skimming"

§ 569.25 Declaratory Relief

§ 569.26 Reformation

§ 569.27 Options and Preemptive Rights

§§ 569.28-569.59 [Reserved]

§ 569.60 Governing Law

§ 569.61 Installment Sales Contract--Definition

§ 569.62 Disclosure Requirements

§ 569.63 Transfer of Contract and Fee Must Coincide

§ 569.64 Tax and Term Statement

§ 569.65 Encumbrances Prohibited

§ 569.66 Misuse of Payments Prohibited

§ 569.67 California Veteran Loans

§§ 569.68-569.79 [Reserved]

§ 569.80 Reinstatement Under Power of Sale in Contract

§§ 569.81-569.99 [Reserved]

§ 569.100 Installment Purchaser's Remedies

[1] In General

[2] Restitution

[3] Redemption or Specific Performance

[a] Judicial Recognition of Right

[b] Procedure for Asserting Right

[c] Time for Asserting Right

[4] Reinstatement

§ 569.101 Money Judgment Prohibited as Deficiency

§ 569.102 Unlawful Detainer Unavailable

§ 569.103 Judicial Sale

§ 569.104 Installment Vendor's Remedies

[1] In General

[2] Quiet Title

[3] Limitations on Installment Vendor's Damages

[a] Election of Measure

[b] Rental Value Measure

[c] Contract Measure

[d] Incidental Damages

§§ 569.105-569.119 [Reserved]

§ 569.120 California Real Estate

§ 569.121 Federal Statutes

§ 569.122 State Statutes

[1] In General

[2] Agents

[3] Damages and Remedies

[4] Disclosures and Informational Requirements

[5] Options

§ 569.123 Decisions

[1] In General

[2] Arbitration

[3] Conditions Precedent

[4] Damages

[a] Measure

[b] Recoverable by Defaulting Purchaser

[c] Damages Recoverable by Vendor for Breach of Contract

[5] Duty of Disclosure

[6] Fraud

[7] Implied Covenants

[8] Liquidated Damage Clause

[9] Options

[10] Preemptive Rights

[11] Right of First Refusal

[12] Subdivision Map Act

[13] Subordination of Seller's Purchase Money Lien

[14] Risk of Loss

[15] Time Essence; Delays Not Amounting to Breach

[16] Vendor's Election of Remedies

[17] Warranties

§ 569.124 Law Reviews

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§ 569.140 State Statutes

§ 569.141 Decisions

§§ 569.142-569.159 [Reserved]

§ 569.160 Complaint by Vendor--To Establish and Foreclose Vendor's Lien [Civ. Code § 3046]

[1] FORM

[2] Use of Form

[3] Establishing Lien Without Foreclosing

[4] Allegations

[5] Verification

[6] Jurisdiction

[7] Venue

[8] Statute of Limitations

[9] Waiver of Lien

[10] Statutes

[11] Decisions

[a] In General

[b] Priorities

[12] Cross References

§ 569.161 Complaint by Vendor--For Damages for Breach of Contract to Purchase Real Property [Civ. Code § 3307]

[1] FORM

[2] Use of Form

[3] Allegations.

[4] Jurisdiction and Venue

[5] State Statutes

[6] Decisions

[a] Vendor's Performance or Excuse

[b] Consequential Damages

[i] In General

[ii] Broker's Fees

[iii] Loss of Income

[iv] Purchase of Other Residence

[c] Difference in Value Damages

[7] Cross References

§ 569.162 Complaint by Vendor--For Damages for Fraud in the Purchase or Exchange of Real Property [Civ. Code § 3343]--Or in the Alternative, for Rescission [Civ. Code § 1692] and Cancellation [Civ. Code § 3412]

[1] FORM

[2] Use of Form

[3] Parties

[4] Allegations

[5] Jurisdiction and Venue

[6] State Statutes

[7] Decisions

[a] Attorney's Fees

[b] Cancellation

[c] Misrepresentations as to Value of Consideration Given by Purchaser

[d] Subordination of Purchase Money Deed of Trust

[e] Right to Rescission

[8] Cross References

§ 569.163 Complaint by Purchaser--To Establish and Foreclose Purchaser's Lien For Amount Paid Toward Purchase Price [Civ. Code § 3050]

[1] FORM

[2] Use of Form

[3] Priority of Lien

[4] Allegations

[5] State Statutes

[6] Decisions

[7] Cross References

§ 569.164 Complaint by Purchaser--For Damages for Breach of Contract to Sell Real Property [Civ. Code § 3306]

[1] FORM

[2] Use of Form

[3] Breach of Collateral Promise

[4] Allegations

[5] Allegations Regarding Vendor Financing

[6] State Statutes

[7] Decisions

[a] Damages for Breach of Collateral Promise

[b] Damages for Failure to Convey

[c] When Performance or Tender Necessary

[d] Who May Waive Particular Conditions

[8] Cross References

§ 569.165 Complaint by Purchaser--For Specific Performance of Contract to Convey Real Property [Civ. Code §§ 3384, 3387]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction and Venue

[5] Laches and Limitations

[6] Lis Pendens

[7] State Statutes

[8] Decisions

[a] In General

[b] Decree and Incidental Adjustments

[c] Options

[d] Specific Performance Properly Denied

[e] Description

[9] Cross References

§ 569.166 Complaint for Damages for Failure to Make Required Disclosures [Civ. Code § 1102]--By Purchaser Against Vendor

[1] FORM

[2] Use of Form

[3] Allegations

[4] Statute of Limitations

[5] Verification

[6] Cross References

§ 569.167 Complaint by Purchaser--For Damages for Failure to Provide Written Notice of Hazardous Substance on Property--Against Vendor or Landlord of Nonresidential Real Property [Health & Safety Code § 25359.7(a)]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Cross References

§ 569.168 Complaint by Purchaser--For Rescission of Contract [Civ. Code § 1692] for Purchase and Sale of Real Property, for Cancellation of Instrument [Civ. Code § 3412], and for Exemplary Damages [Civ. Code § 3294(a), (c)] and Attorney's Fees [Civ. Code § 1717]

[1] FORM

[2] Use of Form

[3] Parties

[4] Allegations

[5] Jurisdiction

[6] Venue

[7] State Statutes

[8] Decisions

[a] Grounds for Fraud or Rescission

[b] Particular Relief

[9] Cross References

§ 569.169 Complaint by Purchaser or Optionee--For Declaratory Relief [Code Civ. Proc. § 1060] Seeking Declaration That Contract or Option to Purchase Real Property Is in Full Force and Effect

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction

[5] Decisions

[6] Text References

[7] Cross References

§§ 569.170-569.189 [Reserved]

§ 569.190 Complaint to Quiet Title [Code Civ. Proc. §§ 760.020, 761.020] Against Purchaser's Interest Under Installment Sales Contract and to Recover Possession and Damages

[1] FORM

[2] Use of Form

[3] Purchaser's Rights of Redemption, Reinstatement; Notice of Election

[4] Allegations

[5] Additional Defendants

[6] Verification

[7] Jurisdiction and Venue

[8] Lis Pendens

[9] Decisions

[10] Cross References

§ 569.191 Interlocutory Judgment in Vendor's Action to Quiet Title [Code Civ. Proc. §§ 760.020, 761.020] Against

Purchaser's Interest Under Installment Sales Contract and to Recover Possession and Damages--Granting Purchaser Reinstatement [Civ. Code § 3275] or Redemption, or in the Alternative, Quieting Vendor's Title on Restitution [Civ. Code § 3369]

[1] FORM

[2] Use of Form

[3] Contents of Judgment

[4] Notice of Judgment

[5] Effect of Judgment

[6] Procedure for Obtaining Final Judgment

[7] State Statutes

[8] Decisions

[9] Cross References

§ 569.192 Conditional Judgment in Vendor's Action to Quiet Title [Code Civ. Proc. §§ 760.020, 761.020] Against Purchaser's Interest Under Installment Sales Contract and to Recover Possession and Damages--Granting Purchaser Restitution [Civ. Code § 3369]

[1] FORM

[2] Use of Form

[3] Cross References

§ 569.193 Complaint for Declaratory Relief [Code Civ. Proc. § 1060] Under Installment Sales Contract--For Relief From Forfeiture [Civ. Code § 3275] by Allowing Reinstatement of Contract--By Purchaser

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction and Venue

[5] Decisions

[6] Cross References

§ 569.194 Complaint for Declaratory Relief [Code Civ. Proc. § 1060] Under Installment Sales Contract--For Redemption of Purchaser's Interest Under the Contract

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction and Venue

[5] State Statutes

[6] Decisions

[7] Cross References

§ 569.195 Complaint Under Installment Sales Contract--For Restitution [Civ. Code § 3369] by Purchaser

[1] FORM

[2] Use of Form

[3] Allegations

[4] Jurisdiction

[5] Venue

[6] Decisions

[7] Cross References

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Chapter 569 VENDOR AND PURCHASER OF REAL PROPERTY
PART I. SCOPE

50-569 California Forms of Pleading and Practice--Annotated § 569.01

§ 569.01 Scope of Chapter

This chapter discusses provisions relating to transfers of real property, including vendor's and purchaser's liens, options, installment sales contracts, and the expiration of rights under unperformed recorded contracts for the transfer of real property. It includes coverage of disclosure requirements and damage provisions unique to real property transactions, provides forms of complaints by which buyers and sellers of real property may enforce their rights, and discusses the most common alternative remedies available to vendors and purchasers. It contains the following forms:

- Complaints by a vendor to enforce a statutory lien to obtain unpaid purchase money, for damages for breach of contract or fraud, or for rescission and cancellation [*see §§ 569.160 -569.162*].

- Complaints by a purchaser to obtain unrefunded amounts paid under a contract, for damages for breach of contract or failure to comply with statutory disclosure or notice requirements, for specific performance, for rescission and cancellation, or for declaratory relief to establish that a contract or option remains in force [*see §§ 569.163 -569.169*].

This chapter also discusses special remedies, rights, and duties of vendors and purchasers peculiar to real property installment sales contracts. The remedies, rights, and duties, with few exceptions such as *Civ. Code §§ 1675-1681* relating to liquidated damages, are of a general nature and also apply to vendors and purchasers using installment sales contracts. The chapter also contains forms for use by vendors and purchasers under installment contracts [*see §§ 569.190 -569.195*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsInstallment ContractsReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleOption ContractsGeneral OverviewReal Property LawPurchase & SaleRemediesRescission & RestitutionReal Property LawPurchase & SaleRemediesSpecific Performance

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§ 569.02 Cross References

Other chapters that discuss and contain forms relating to specific aspects of real property transfers include the following:

- Ch. 103, *Brokers*.
- Ch. 104, *Building Contracts*.
- Ch. 184, *Deeds*.
- Ch. 247, *Eminent Domain and Inverse Condemnation*.
- Ch. 253, *Escrows*.
- Chs. 330-335, *Landlord and Tenant*.
- Ch. 369, *Mobilehomes and Mobilehome Parks*.
- Ch. 530, *Statute of Frauds*.
- Ch. 579, *Zoning and Planning*.

General contract requirements are discussed in Ch. 140, *Contracts* .

Fraud and mistake as defenses negating formation of a contract and fraud as a ground of affirmative relief, are discussed in Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* , and Ch. 269, *Fraud and Deceit* .

Lis pendens are covered in Ch. 348, *Lis Pendens* .

The more general aspects of specific performance are discussed in Ch. 528, *Specific Performance* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersGeneral OverviewReal Property LawConstruction LawContractsReal Property LawDeedsGeneral OverviewReal Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawInverse CondemnationGeneral Overview

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[Reserved]

§§ 569.03[Reserved]

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A. Actions Between Vendors and Purchasers Generally

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§ 569.10 Governing Law and Definitions

Various statutes govern the rights and obligations of vendors and purchasers, that is, sellers and buyers of real property. For a list of the principal statutes, see *§ 569.122*.

This chapter uses the terms "vendor" and "seller" synonymously. The person who transfers property by sale, particularly real estate, has traditionally been termed a "vendor," and "seller" has been the more commonly used term for one who sells personal property. However, a "seller" may, with entire propriety, be termed a "vendor" [Black Law's Dictionary, p. 1395 (Fifth Ed.)]. Similarly, this chapter uses the terms "purchaser" and "buyer" synonymously as well.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleGeneral Overview

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§ 569.11 Residential Seller's Duty of Disclosure

[1] When Required; Legislative Intent

A seller of residential property is required, except in certain cases (*see § 569.11[2]*), to make specified disclosures about the property to the buyer [*see Civ. Code § 1102 et seq.*]. The requirement applies generally to any transfer by sale, exchange, installment land sale contract (as defined by *Civ. Code § 2985(a)*), lease with an option to purchase, any other option to purchase, or ground lease coupled with improvements, of real property, or a residential stock cooperative, improved with or consisting of not less than one nor more than four dwelling units [*Civ. Code § 1102(a)*; *see Civ. Code § 1102(b)* (requirements also apply to resale of manufactured home or mobilehome that is classified as personal property and intended for use as residence)].

The required disclosures must be made, and each required act relating to the disclosure statement must be performed, in good faith, that is, with honesty in fact in the conduct of the transaction [*Civ. Code § 1102.7*].

The required disclosure is not a warranty of any kind by the seller and is not a substitute for any inspections or warranties that the buyer may wish to obtain [*Civ. Code § 1102.6* (first paragraph of prescribed disclosure statement)]; however, the purchaser may rely on the information in the disclosure statement when deciding whether to purchase the property and on what terms to purchase it [*Civ. Code § 1102.6* (Part II of prescribed statement)].

Other disclosure requirements may be applicable as well; for example, depending on the facts of the transaction, disclosures may be required concerning the property's inclusion in a special study zone or concerning purchase-money liens on the property [*see Civ. Code § 1102.6* (Part I of prescribed disclosure form)]; *see also* discussion of other disclosure requirements in §§ 569.12-569.16. Any other applicable disclosure requirements are not limited or abridged by the requirements being discussed here [*Civ. Code § 1102.8*].

In enacting the disclosures requirements in *Civ. Code § 1102 et seq.*, the California Legislature intended to clarify and facilitate the use of the real estate transfer disclosure statement specified in *Civ. Code § 1102.6* [*see § 569.11[3]*]. The Legislature intended the statement to be used by (1) transferors making disclosures required under *Civ. Code § 1102 et*

seq., and *(2)* agents making disclosures required by *Civ. Code § 2079* on the agent's portion (Paragraphs III and IV) of the real estate transfer disclosure statement. In transfers not subject to *Civ. Code § 1102 et seq.*, agents may make required disclosures in a separate writing. The Legislature did not intend to affect the existing obligations of the parties to a real estate contract, or their agents, to disclose any fact materially affecting the value and desirability of the property. In transfers not subject to these provisions, agents may make required disclosures in a separate writing [*Civ. Code § 1102.1(a)*]. Further, nothing in *Civ. Code § 1102 et seq.* is to be construed to change the duty of a real estate broker or salesperson pursuant to *Civ. Code § 2079*. It was also the intent of the Legislature that the delivery of a real estate transfer disclosure statement may not be waived in an "as is" sale, as held in *Loughrin v. Superior Court* [*Civ. Code § 1102.1(a)*; *see Loughrin v. Superior Court (1993) 15 Cal. App. 4th 1188, 19 Cal. Rptr. 2d 161* ; *see also § 569.11[6][g]*].

[2] Exempt Transactions

The seller's duty of disclosure does not arise in any of the following transactions:

- A transfer that is required to be preceded by the furnishing to the transferee of a copy of a public report pursuant to *Bus. & Prof. Code § 11018.1* (concerning subdivided lands) [*Civ. Code § 1102.2(a)*].

- A transfer that can be made without a public report pursuant to *Bus. & Prof. Code § 11010.4* (concerning subdivided lands) [*Civ. Code § 1102.2(a)*].

- A transfer pursuant to a court order [*Civ. Code § 1102.2(b)*].

- A transfer to a secured creditor that effects a foreclosure of the debtor's interest [*see Civ. Code § 1102.2(c)*].

- A transfer in the course of administering an estate or trust or guardianship or conservatorship, unless (1) the transfer involves a sole trustee of a revocable trust, (2) this trustee is a natural person, and (3) he or she is aformer owner of the property or was an occupant in possession of the property within the preceding year [*Civ. Code § 1102.2(d)*].

- A transfer between co-owners [*Civ. Code § 1102.2(e)*] or between spouses or ancestor and descendant [*Civ. Code § 1102.2(f)*].

- A transfer between the parties to a marriage dissolution or legal separation proceeding or parties to a property settlement agreement incidental to such a proceeding [*Civ. Code § 1102.2(g)*].

- A transfer by the Controller of the State of California in the course of administering the Unclaimed Property Law [*Civ. Code § 1102.2(h)*; *see Code Civ. Proc. § 1500 et seq.*].

- A transfer of tax-deeded property [*Civ. Code § 1102.2(i)*; *see Rev. & Tax. Code §§ 3691 et seq., 3771 et seq.*].

- A transfer to or from any governmental entity [*Civ. Code § 1102.2(j)*].

[3] Disclosure Form

[a] Statutory "Real Estate Transfer Disclosure Statement"

The required disclosures must be made on a prescribed form called a "Real Estate Transfer Disclosure Statement." The

seller must make specified disclosures, regarding (1) appliances, fixtures, and features, including whether there are significant defects or malfunctions, and (2) environmental hazards, noncompliance with building codes and permit requirements, and structure and site problems [*Civ. Code § 1102.6*]. The prescribed form includes disclosure statements to be signed by the vendor's listing and selling brokers, if any. For discussion of brokers' disclosure duties and liabilities, see Ch. 103, *Brokers* .

If other disclosure forms have been completed in connection with the transaction, the prescribed form referred to here need not be completed with respect to matters that are covered in the other forms, if those other forms are identified on the prescribed form [*Civ. Code § 1102.6* (Part I of prescribed form)].

[b] City or County Requirements

Cities and counties may elect to require additional disclosures [*Civ. Code § 1102.6a(a)*]. These must be made on an additional prescribed form called a "Local Option Real Estate Transfer Disclosure Statement" [*Civ. Code § 1102.6a(b)*], which may be supplemented with addenda to facilitate making the required disclosures. The city or county may use the local-option disclosure form for other purposes [*Civ. Code § 1102.6a(c)*].

After 2004, if a city or county adopts a different or additional disclosure form pursuant to *Civ. Code § 1102.6a* regarding the proximity or effects of an airport, the statement in that form must contain, at a minimum, the information in the "Notice of Airport in Vicinity" found in the following statutes [*Civ. Code § 1102.6a(d)(1)*]:

- *Bus. & Prof. Code § 11010(b)(13)(A)*, relating to the contents of a filed notice of intention to offer subdivided land [*see* California Legal Forms, Ch. 30, *Subdivision Regulation* (Matthew Bender)];

- *Civ. Code § 1103.4(c)*, relating to natural hazards disclosures in an expert's report provided at the transferee's request [*see § 569.12[4]*]; or

- *Civ. Code § 1353(a)(1)*, relating to the contents of the declaration that is recorded with regard to the creation of a common-interest development [for sample declarations of different common interest developments, see *California Legal Forms, Ch. 33C, Stock Cooperatives, § 33C.201*; *Ch. 33D, Planned Developments, § 33D.200*; and Ch. 34, *Condominiums*, § 34.202 (Matthew Bender)].

After 2005, if a city or county does not adopt a different or additional disclosure form pursuant to *Civ. Code § 1102.6a*, then the provision of an "airport influence area" disclosure under one of the statutes listed above [*see Bus. & Prof. Code § 11010(b)(13)*; *Civ. Code §§ 1103.4(c), 1353(a)*] or, if there is not a current airport influence map, a written disclosure of an airport within two statute miles, will be deemed to satisfy any city or county requirements for the disclosure of airports in connection with transfers of real property [*Civ. Code § 1102.6a(d)(2)*].

A local-option disclosure is not a warranty of any kind by the vendor and is not a substitute for any inspections or warranties that the purchaser may wish to obtain [*Civ. Code § 1102.6a(b)* (first paragraph of prescribed form)]; however, the purchaser may rely on the information in the disclosure statement when deciding whether to purchase the property and on what terms to purchase it [*Civ. Code § 1102.6a(b)* (Part I of prescribed form)].

Certain natural hazard disclosures required by *Civ. Code § 1103* and related statutes may be made in the local option real estate disclosure statement if that statement includes substantially the same information and substantially the same warnings that are in the statutory natural hazard disclosure statement [*Civ. Code § 1103.2(e)*; *see Civ. Code § 1103 et seq.*]. For further discussion of natural hazard disclosures, see *§ 569.12*.

[c] Approximate Disclosures

If the seller does not know or does not have access to particular information that is required to be disclosed, and the seller has made a reasonable effort to obtain the information, the seller may "use an approximation of the information," provided the approximation (1) is clearly identified as such, (2) is reasonable, (3)is based on the best information available to the seller or the seller's agent, and (4) is not used for the purpose of circumventing or evading the disclosure requirement [*Civ. Code § 1102.5*].

[4] Delivery of Disclosure Statement

The disclosure statement must be delivered personally or by mail to the buyer. It may be delivered instead to the purchaser's spouse, with the same effect as delivery to the purchaser, unless the contract provides otherwise [*Civ. Code § 1102.10*].

In the case of an ordinary sale or exchange, the statement must be delivered as soon as practicable before the transfer of title [*Civ. Code § 1102.3(a)*]. In the case of transfer by a real property sales contract, as defined in *Civ. Code § 2985(a)*, or by a lease together with an option to purchase, or a ground lease coupled with improvements, the statement must be delivered as soon as practicable before execution of the contract. For these purposes, "execution" means the making or acceptance of an offer [*Civ. Code § 1102.3(b)*]. The seller must indicate compliance with *Civ. Code § 1102 et seq.* on the receipt for deposit, the real property sales contract, the lease, or any addendum attached to these documents, or on a separate document [*Civ. Code § 1102.3*].

If any disclosure, or any material amendment of any disclosure required by *Civ. Code § 1102 et seq.*, is delivered after the execution of an offer to purchase, the buyer may, within three days following personal delivery or five days following delivery by mail, revoke the offer. Revocation must be made by delivery of a written notice of termination to the seller or the seller's agent [*Civ. Code § 1102.3*].

The transferor of any manufactured home or mobilehome subject to the disclosure requirements [*see § 569.11[1]*] must deliver the required written disclosure statement to prospective transferees, at the times and in the manner specified by statute [*see Civ. Code § 1102.3a*]. In addition, the management of a mobilehome park must provided a prospective homeowner with a completed written disclosure form at least three days before execution of a rental agreement [*Civ. Code § 798.75*.5]. For complete coverage of these and related requirements, see Ch. 369, *Mobilehomes and Mobilehome Parks* .

[5] Amendment After Delivery

The disclosure statement may be amended in writing, provided the amendment is delivered in compliance with delivery requirements for the original statement [*Civ. Code § 1102.9*]. See the discussion in *§ 569.11[4]*.

[6] Noncompliance

[a] Seller's Liability Generally

A seller who willfully or negligently fails to perform any duty with regard to the disclosure requirements is liable in damages for any actual harm resulting to the buyer [*Civ. Code § 1102.13*]. For a form of complaint by the buyer, see *§ 569.166*. However, this provision is applicable only when the buyer has gone through with the transaction despite the seller's failure to comply with the statutory disclosure requirements. If no transfer has taken place, *Civ. Code § 1102.13* does not apply. Prior to transfer, the failure to provide a disclosure statement gives rise to a right to rescission in the buyer [*Realmuto v. Gagnard (2003) 110 Cal. App. 4th 193, 202, 204, 1 Cal. Rptr. 3d 569* ; for a form of complaint for use by a purchaser seeking rescission, *see § 569.168*].

[b] Validity of Transfer

The sale, exchange, or other transfer that is subject to the disclosure requirements is not invalidated by any failure of any person to comply with those requirements [*Civ. Code § 1102.13*]. However, this provision is applicable only when the buyer has gone through with the transaction despite the seller's failure to comply with the statutory disclosure requirements. If no transfer has taken place, *Civ. Code § 1102.13* does not apply. Prior to transfer, the failure to provide a disclosure statement gives rise to a right to rescission in the buyer [*Realmuto v. Gagnard (2003) 110 Cal. App. 4th 193, 202, 204, 1 Cal. Rptr. 3d 569* ; for a form of complaint for use by a buyer seeking rescission, *see § 569.168*].

[c] Errors and Omissions

The seller is not liable on account of any error, inaccuracy, or omission in the disclosure statement if (1) the seller had no personal knowledge of the matter in question, (2) the defect resulted from information timely provided by a public agency or any of specified contractors (*see § 569.11[6][d]*), and (3) the seller exercised ordinary care in obtaining and transmitting that information [*Civ. Code § 1102.4(a)*].

[d] Professional Reports and Opinions in Lieu of Disclosure

The seller may avoid liability on account of an error, inaccuracy, or omission in the disclosure statement by properly relying on a professional report or opinion in meeting the disclosure requirement (*see § 569.11[6][c]*). The report or opinion must be prepared by a licensed engineer, land surveyor, geologist, structural pest control operator, or contractor, or some other expert, and must deal with matters within the scope of the author's license or expertise. The report or opinion must be delivered to the purchaser pursuant to a written or oral request for it. If the author of the report or opinion indicates in writing that the information in it willbe used to meet the general disclosure requirements of *Civ. Code § 1102 et seq.*, the report or opinion must indicate also the parts of the required disclosure form to which the information pertains [*Civ. Code § 1102.4(c)*].

[e] Public Agency's or Other Person's Information in Lieu of Disclosure

If a public agency or any other person delivers to the purchaser any informationthat is required to be disclosed to the purchaser, that delivery of information is deemed to be compliance by the seller with the disclosure requirement as to that information, and the seller is relieved of any further duty of disclosure with respect to that information [*Civ. Code § 1102.4(b)*].

[f] Subsequent Inaccuracy of Information

Information disclosed in accordance with the disclosure requirement may be rendered inaccurate as a result of an act, occurrence, or agreement after the disclosure. In that event, however, no violation of the disclosure requirement arises [*Civ. Code § 1102.5*].

[g] Waiver by Purchaser

Any waiver of the disclosure requirements of *Civ. Code § 1102 et seq.* is void as against public policy [*Civ. Code § 1102(c)*]. This provision, enacted in 1994 [*see* 1994 Stats., ch. 817, § 1], appears to controvert in part the decision in *Loughrin v. Superior Court (1993) 15 Cal. App. 4th 1188, 19 Cal. Rptr. 2d 161* . That decision held that the benefits of the statutory disclosure requirements may be waived by a knowing waiver because the disclosure requirements are imposed to facilitate private transactions, not for the general public benefit [*Loughrin v. Superior Court (1993) 15 Cal. App. 4th 1188, 1194-1194, 19 Cal. Rptr. 2d 161]* .

Loughrin also held that an "as is" clause does not waive the benefits of the disclosure requirements if disclosure is made. The "as is" clause alerts the buyer to the deteriorated nature of the property, gives notice that the seller is not making an inspection, and advises that the buyer is taking the property with its obvious and patent defects. It does not preclude the possibility of a claim for misrepresentation for failure to reveal concealed defects not apparent from an

inspection of the property, including intentional and negligent misrepresentations [*Loughrin v. Superior Court (1993) 15 Cal. App. 4th 1188, 1193-1196, 19 Cal. Rptr. 2d 161]* . The ongoing validity of this portion of the *Loughrin* decision was affirmed by the Legislature in 1994 when it expressly provided that "the delivery of a real estate transfer disclosure statement may not be waived in an 'as is' sale, as was held in Loughrin v. Superior Court" [1994 Stats., ch. 817, § 3].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral Overview

California Forms of Pleading and Practice--Annotated

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Chapter 569 VENDOR AND PURCHASER OF REAL PROPERTY
PART II. LEGAL BACKGROUND
A. Actions Between Vendors and Purchasers Generally

50-569 California Forms of Pleading and Practice--Annotated § 569.12

§ 569.12 Natural Hazard Disclosures

[1] Natural Hazard Disclosure Statement

When property is located in a specified natural hazard area, the seller or other transferor and his or her agent must make certain disclosures in a statutory natural hazard disclosure statement form [*see Civ. Code § 1103.2(b)*] or in the local option real estate disclosure statement [*see § 569.11[3][b]*] if that statement includes substantially the same information and substantially the same warnings that are in the statutory natural hazard disclosure statement [*Civ. Code § 1103.2(e)*; *see Civ. Code § 1103 et seq.*]. These disclosures must be made with regard to the same types of transfers subject to *Civ. Code § 1102 et seq.* [s *ee Civ. Code § 1103(a)*].

This requirement applies only if the transferor or his or her agent is required to make one of the following disclosures [*Civ. Code § 1103(b), (c)*]:

- A person who is acting as an agent for a transferor of real property that is located within a special flood hazard area (any type Zone "A" or "V") designated by the Federal Emergency Management Agency, or the transferor if he or she is acting without an agent, must disclose to any prospective transferee the fact that the property is located within a special flood hazard area, if either (1) the transferor, or the transferor's agent, has actual knowledge that the property is within a special flood hazard area; or (2) the local jurisdiction has compiled a list, by parcel, of properties that are within the special flood hazard area and a notice has been posted at the offices of the county recorder, county assessor, and county planning agency that identifies the location of the parcel list [*Gov. Code § 8589.3*; *see § 569.12[11]*].

- A person who is acting as an agent for a transferor of real property that is located within an area of potential flooding shown on a dam failure inundation map pursuant to *Gov. Code § 8589.5*, or the transferor if he or she is acting without an agent, must disclose to any prospective transferee the fact that the property is located within an area of potential flooding, if either (1) the transferor, or the transferor's agent, has actual knowledge that the property is within an inundation area; or (2) the local jurisdiction

has compiled a list, by parcel, of properties that are within the inundation area and a notice has been posted at the offices of the county recorder, county assessor, and county planning agency that identifies the location of the parcel list [*see § 569.12[12]*].

- A transferor of real property that is located within a very high fire hazard severity zone [*see Gov. Code § 51178*] must disclose to any prospective transferee the fact that the property is located within a very high fire hazard severity zone and is subject to the maintenance requirements of *Gov. Code § 51182*, if either (1) the transferor, or the transferor's agent, has actual knowledge that the property is within a very high fire hazard severity zone; or (2) a map that includes the property has been provided to the local agency as provided in *Gov. Code § 51178* and a notice has been posted at the offices of the county recorder, county assessor, and county planning agency that identifies the location of the map and any information regarding changes to the map received by the local agency [*Gov. Code § 51183.5*; *see § 569.12[13]*].

- A person who is acting as an agent for a transferor of real property that islocated within an earthquake fault zone [*see Pub. Res. Code § 2622*], or the transferor if he or she is acting without an agent, must disclose to any prospective transferee the fact that the property is located within a delineated earthquake fault zone, if either (1) the transferor, or the transferor's agent, has actual knowledge that the property is within a delineated earthquake fault zone; or (2) a map that includes the property has been provided to the city or county as provided in *Pub. Res. Code § 2622* and a notice has been posted at the offices of the county recorder, county assessor, and county planning agency that identifies the location of the map and any information regarding changes to the map received by the county [*Pub. Res. Code § 2621.9*; *see § 569.12[14]*].

- A person who is acting as an agent for a transferor of real property that is located within a seismic hazard zone [*see Pub. Res. Code § 2696*], or the transferor if he or she is acting without an agent, must disclose to any prospective transferee the fact that the property is located within a seismic hazard zone, if either (1) the transferor, or the transferor's agent, has actual knowledge that the property is within a seismic hazard zone; or (2) a map that includes the property has been provided to the city or county as provided in *Pub. Res. Code § 2696* and a notice has been posted at the offices of the county recorder, county assessor, and county planning agency that identifies the location of the map and any information regarding changes to the map received by the county [*Pub. Res. Code § 2694*; *see § 569.12[15]*].

- A transferor of real property that is located within a state responsibility area [*see Pub. Res. Code § 4125*] must disclose to any prospective transferee the fact that the property is located within a wildland area that may contain substantial forest fire risks and hazards and is subject to the maintenance requirements of *Pub. Res. Code § 4291*, if either (1) the transferor, or the transferor's agent, has actual knowledge that the property is within a wildland fire zone; or (2) a map that includes the property has been provided to the city or county as provided in *Pub. Res. Code § 4125* and a notice has been posted at the offices of the county recorder, county assessor, and county planning agency that identifies the location of the map and any information regarding changes to the map received by the county [*Pub. Res. Code § 4136*]. The transferor must also disclose to any prospective transferee that it is not the state's responsibility to provide fire protection services to any building or structure located within the wildlands unless the Department of Forestry and Fire Protection has entered into a cooperative agreement with a local agency for those purposes in accordance with *Pub. Res. Code § 4142* [*Pub. Res. Code § 4136(b)*; *see § 569.12[16]*].

A person or entity acting as an escrow agent for the transfer of the property is not deemed the agent of the transferor or transferee for purposes of the natural hazard disclosure requirements, unless the person or entity is empowered to so act by an express written agreement to that effect. In that case, the extent of that agency is governed by the written

agreement [*Civ. Code § 1103.11*].

In any transaction in which a transferor accepted, before June 1, 1998, an offer to purchase, the transferor, or his or her agent, is deemed to have complied with the natural hazard disclosure requirement if the transferor or agent delivered to the prospective transferee a statement that included substantially the same information and warning as the Natural Hazard Disclosure Statement [*Civ. Code § 1103.2(h)*].

Any waiver of the disclosure requirement is void as against public policy [*Civ. Code § 1103(d)*].

[2] Exempted Transactions

The following transactions are exempt from the natural hazard disclosure requirement [*Civ. Code § 1103.1(a)*]:

- Transfers ordered by the court, including, but not limited to, transfers ordered by a probate court in administration of an estate, transfers under a writ of execution, transfers by any foreclosure sale, transfers by a trustee in bankruptcy, transfers by eminent domain, and transfers resulting from a decree for specific performance.

- Transfers to a mortgagee by a mortgagor or successor in interest who is in default, transfers to a beneficiary of a deed of trust by a trustor or successor in interest who is in default, transfers by any foreclosure sale after default, transfers by any foreclosure sale after default in an obligation secured by a mortgage, transfers by a sale under a power of sale or any foreclosure sale under a decree of foreclosure after default in an obligation secured by a deed of trust or secured by any other instrument containing a power of sale, or transfers by a mortgagee or a beneficiary under a deed of trust who has acquired the real property at a sale conducted under a power of sale in a mortgage or deed of trust or a sale under a decree of foreclosure or has acquired the real property by a deed in lieu of foreclosure.

- Transfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust.

- Transfers from one co-owner to one or more other co-owners.

- Transfers made to a spouse, or to a person or persons in the lineal line of consanguinity of one or more of the transferors.

- Transfers between spouses resulting from a judgment of dissolution of marriage or of legal separation of the parties or from a property settlement agreement incidental to that judgment.

- Transfers by the Controller under the Unclaimed Property Law [*see Code Civ. Proc. § 1500 et seq.*].

- Transfers under the statutory provisions providing for the sale of tax-defaulted property [*see Rev. & Tax. Code §§ 3691 et seq., 3771 et seq.*].

- Transfers or exchanges to or from any governmental entity.

However, these exempted transactions may be subject to other disclosure requirements, including those under *Gov. Code §§ 8589.3, 8589.4* (special flood hazard areas), 51183.5 (fire hazard severity zones), and *Pub. Res. Code §§ 2621.9* (earthquake fault zones), 2694 (seismic hazard zones), and 4136 (state responsibility areas for substantial forest fire risks) [*Civ. Code § 1103.1(b)*].

[3] Delivery and Confirmation of Disclosure Statement

The transferor must deliver to the prospective transferee the Natural Hazard Disclosure Statement, as follows [*Civ. Code § 1103.3(a)*]:

- In the case of a sale, as soon as practicable before transfer of title; or

- In the case of transfer by a real property sales contract [*see Civ. Code § 2985*], or by a lease together with an option to purchase, or a ground lease coupled with improvements, as soon as practicable before execution of the contract.

Delivery of natural hazard disclosures must be made by personal delivery or mail to the prospective transferee. Delivery to the spouse of a transferee is deemed delivery to the transferee, unless provided otherwise by contract [*Civ. Code § 1103.10*].

If more than one licensed real estate broker is acting as an agent in a transaction, the broker who has obtained the offer made by the transferee must, except as otherwise provided *below*, deliver the required disclosure to the transferee, unless the transferor has given other written instructions for delivery [*Civ. Code § 1103.12(a)*].

The transferor must indicate compliance with the natural hazard disclosure requirements either on the receipt for deposit, the real property sales contract, the lease, any addendum attached to the lease, or on a separate document [*Civ. Code § 1103.3(b)*].

If a licensed real estate broker responsible for delivering the disclosures (*see* discussion *above*) cannot obtain the disclosure document required and does not have written assurance from the transferee that the disclosure has been received, the broker must advise the transferee in writing of his or her rights to the disclosure. A licensed real estate broker responsible for delivering the disclosures must maintain a record of the action taken to effect compliance [*Civ. Code § 1103.12(b)*; *see Bus. & Prof. Code § 10148*].

[4] Delivery of Information By Public Agency, Other Person, or Expert

The delivery of any information required to be disclosed under *Civ. Code § 1103 et seq.* to a prospective transferee by a public agency or other person providing the information is deemed to comply with the disclosure requirements and will relieve the transferor or any listing or selling agent of any further duty with regard to that item of information [*Civ. Code § 1103.4(b)*].

The delivery of a report or opinion prepared by a licensed engineer, land surveyor, geologist, or expert in natural hazard discovery dealing with matters within the scope of the professional's license or expertise, is sufficient compliance for application of the exemption discussed in the preceding paragraph if the information is provided to the prospective transferee under a written or oral request. In responding to that request, an expert may indicate, in writing, an understanding that the information provided will be used in fulfilling the requirements of *Civ. Code § 1103.2* and, if so, must indicate the required disclosures, or parts of disclosures, to which the information being furnished is applicable. When that statement is furnished, the expert is not responsible for any items of information, or parts of information, other than those expressly set forth in the statement [*Civ. Code § 1103.4(c)*].

Further, in responding to the transferee's request, the expert is required to make the following determinations and include the following statements, as appropriate, in the report [*Civ. Code § 1103.4(c)*]:

- If the property is determined to be within an "airport influence area" [*see Bus. & Prof. Code § 11010(b)(13)(B)* (definition)], the report must include this statement [*Civ. Code § 1103.4(c)(1)*]:

"NOTICE OF AIRPORT IN VICINITY. This property is presently located in the vicinity of an airport, within what is known as an airport influence area. For that reason, the property may be subject to some of the annoyances or inconveniences associated with proximity to airport operations (for example: noise, vibration, or odors). Individual sensitivities to those annoyances can vary from person to person. You may wish to consider what airport annoyances, if any, are associated with the property before you complete your purchase and determine whether they are acceptable to you."

- If the property is determined to be within the jurisdiction of the San Francisco Bay Conservation and Development Commission [*see Gov. Code § 66620 et seq.*], the report must include this statement [*Civ. Code § 1103.4(c)(2)*]: "NOTICE OF SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION JURISDICTION. This property is located within the jurisdiction of the San Francisco Bay Conservation and Development Commission. Use and development of property within the commission's jurisdiction may be subject to special regulations, restrictions, and permit requirements. You may wish to investigate and determine whether they are acceptable to you and your intended use of the property before you complete your transaction."

- If the property is determined to be within one mile of a parcel of real property designated as "Prime Farmland," "Farmland of Statewide Importance," "Unique Farmland," "Farmland of Local Importance," or "Grazing Land" onthe most current "Important Farmland Map" issued by the California Department of Conservation, Division of Land Resource Protection, using solely the county-level GIS map data, if any, available on the Farmland Mapping and Monitoring Program web site, the report must include this statement [*Civ. Code § 1103.4(c)(3)*]: "NOTICE OF RIGHT TO FARM. This property is located within one mile of a farm or ranch land designated on the current county-level GIS 'Important Farmland Map,' issued by the California Department of Conservation, Division of Land Resource Protection. Accordingly, the property may be subject to inconveniences or discomforts resulting from agricultural operations that are a normal and necessary aspect of living in a community with a strong rural character and a healthy agricultural sector. Customary agricultural practices in farm operations may include, but are not limited to, noise, odors, dust, light, insects, the operation of pumps and machinery, the storage and disposal of manure, bee pollination, and the ground or aerial application of fertilizers, pesticides, and herbicides. These agricultural practices may occur at any time during the 24-hour day. Individual sensitivities to those practices can vary from person to person. You may wish to consider the impacts of such agricultural practices before you complete your purchase. Please be advised that you may be barred from obtaining legal remedies against agricultural practices conducted in a manner consistent with proper and accepted customs and standards pursuant to *Section 3482.5 of the Civil Code* or any pertinent local ordinance."

The legal effect of a consultant's report delivered to satisfy the exemption provided by *Civ. Code § 1103.4* is not changed when it is accompanied by a natural hazard disclosure statement [*Civ. Code § 1103.2(f)(1)*]. A consultant's report must always be accompanied by a completed and signed natural hazard disclosure statement [*Civ. Code § 1103.2(f)(2)*].

[5] Transferee's Right to Rescind Transaction

If any disclosure, or any material amendment of any disclosure, required to be made under *Civ. Code § 1103 et seq.*, is delivered after the execution of an offer to purchase, the transferee has three days after delivery in person or five days after delivery by deposit in the mail to terminate his or her offer by delivery of a written notice of termination to the transferor or the transferor's agent [*Civ. Code § 1103.3(c)*].

[6] Amendment to Disclosure Statement; Subsequent Changes in Information

Any natural hazard disclosure statement may be amended in writing by the transferor or his or her agent, subject to the requirements of *Civ. Code § 1103.3* [*Civ. Code § 1103.9*; *see § 569.12[3], [5]*].

If information disclosed is subsequently rendered inaccurate as a result of any governmental action, map revision, changed information, or other act or occurrence after the delivery of the required disclosures, the resulting inaccuracy does not constitute a violation of the natural hazard disclosure requirements [*Civ. Code § 1103.5(b)*; *see § 569.12[7]*].

[7] Liability of Transferor and Real Estate Agents; Third Party Reliance on Statement

Neither the transferor nor any listing or selling agent will be liable for any error, inaccuracy, or omission of any information delivered by public agencies or other persons if (1) the error, inaccuracy, or omission was not within the personal knowledge of the transferor or the listing or selling agent, and was based on information timely provided by public agencies or by other persons providing information as specified in § 569.12[4], and (2) ordinary care was exercised in obtaining and transmitting the information [*Civ. Code § 1103.4(a)*].

After a transferor and his or her agent comply with the disclosure requirements of *Civ. Code § 1103.2*, they are relieved of further duty with regard to those items of information. The transferor and his or her agent are not required to provide notice to the transferee if the information provided subsequently becomes inaccurate as a result of any governmental action, map revision, changed information, or other act or occurrence, unless the transferor or agent has actual knowledge that the information has become inaccurate [*Civ. Code § 1103.5(a)*; *see § 569.12[6]*].

The natural hazard disclosures required under *Civ. Code § 1103 et seq.* are disclosures only between the transferor, the transferor's agents, and the transferee, and may not be used by any other party, including, but not limited to, insurance companies, lenders, or governmental agencies, for any purpose [*Civ. Code § 1103.2(g)*].

[8] Effect of Noncompliance; Good Faith Requirement

A transfer will not be invalidated solely because of the failure of any person to comply with the natural hazard disclosure requirements. However, any person who willfully or negligently violates or fails to perform any duty prescribed by the provisions of *Civ. Code § 1103 et seq.* is liable in the amount of actual damages suffered by a transferee [*Civ. Code § 1103.13*].

Each disclosure and each act that may be performed in making the disclosure must be made in good faith. "Good faith" means honesty in fact in the conduct of the transaction [*Civ. Code § 1103.7*].

[9] Relationship to Other Disclosure Requirements

The specification of items for disclosure in the statutory form does not limit or abridge any obligation for disclosure created by any other provision of law or that may exist to avoid fraud, misrepresentation, or deceit in the transfer transaction. In enacting this disclosure legislation, the Legislature did not intend to affect the existing obligations of the parties to a real estate contract, or their agents, to disclose any fact materially affecting the value and desirability of the property, including, but not limited to, the physical condition of the property and previously received reports of physical inspection noted on the disclosure form provided under *Civ. Code § 1102.6* or *1102.6a* [*Civ. Code § 1103.8(a)*]. Likewise, the natural hazard disclosure requirements do not change the inspection and disclosure duties of a real estate broker or salesperson under *Civ. Code § 2079* [*Civ. Code § 1103.8(b)*].

[10] Special Instructions for Completing Form

If an earthquake fault zone, seismic hazard zone, very high fire hazard severityzone, or wildland fire area map or accompanying information is not of sufficient accuracy or scale that a reasonable person can determine if the property is included in a natural hazard area, the transferor or transferor's agent must mark "Yes" on the Natural Hazard Disclosure

Statement. The transferor or transferor's agent may mark "No" on the Natural Hazard Disclosure Statement if he or she attaches a report prepared by an expert [*see § 569.12[4]*] that verifies the property is not in the hazard zone. Nothing in this paragraph is intended to limit or abridge any existing duty of the transferor or the transferor's agents to exercise reasonable care in making a determination of the existence of the natural hazard areas [*Civ. Code § 1103.2(b)*].

If the Federal Emergency Management Agency (FEMA) has issued a Letter of Map Revision confirming that a property is no longer within a special flood hazard area, then the transferor or transferor's agent may mark "No" on the Natural Hazard Disclosure Statement, even if the map has not yet been updated. In that case, the transferor or transferor's agent must attach a copy of the Letter of Map Revision to the disclosure statement [*Civ. Code § 1103.2(c)*].

If FEMA has issued a Letter of Map Revision confirming that a property is within a special flood hazard area and the location of the letter has been posted in accordance with *Gov. Code § 8589.3(g)*, then the transferor or transferor's agent must mark "Yes" on the Natural Hazard Disclosure Statement, even if the map has not yet been updated. In that case, the transferor or transferor's agent must attach a copy of the Letter of Map Revision to the disclosure statement [*Civ. Code § 1103.2(d)*].

[11] Special Flood Hazard Area

An agent for a seller or real property that is located within a special flood hazard area (any type Zone "A" or "V") designated by the FEMA or the seller if he or she is acting without any agent, must disclose to any prospective buyer the fact that the property is located within a special flood hazard area [*Gov. Code § 8589.3(a)*]. This disclosure is required only when one of the following conditions is met [*Civ. Code § 1103(c)(1)*; *Gov. Code § 8589.3(b)*]:

- The transferor, or the transferor's agent, has actual knowledge that the property is within a special flood hazard area.

- The local jurisdiction has compiled a list, by parcel, of properties that are within the special flood hazard area and a notice has been posted at the offices of the county recorder, county assessor, and county planning agency that identifies the location of the parcel list.

For these purposes, the following persons will not be deemed agents of the transferor: (1) persons specified in *Civ. Code § 1103.11* (i.e., escrow agents); and (2) persons acting under a power of sale regulated by *Civ. Code § 2924* [*Gov. Code § 8589.3(d)*].

In all transactions that are subject to *Civ. Code § 1103* [*see § 569.12[1]*], the special flood hazard area disclosure must be provided by either of the following means [*Gov. Code § 8589.3(b)*]:

- The local option real estate transfer disclosure statement [*see Civ. Code § 1102.6a*; § 569.11[3][b]].

- The natural hazard disclosure statement [*see Civ. Code § 1103.2*; § 569.12[1]].

The specification of items for disclosure in § 8589.3 does not limit or abridge any obligation for disclosure created by any other provision or law or that may exist to avoid fraud, misrepresentation, or deceit in the transfer transaction [*Gov. Code § 8589.3(f)*].

A notice must be posted at the offices of the county recorder, county assessor, and county planning agency that identifies the location of the special flood hazard area map, any relevant Letters of Map Revision from FEMA, and of any parcel list compiled by the local jurisdiction [*Gov. Code § 8589.3(g)*].

No transfer subject to *Civ. Code § 1103 et seq.* will be invalidated solely because of the failure of any person to comply

with the provisions, including § 8589.3. However, any person who willfully or negligently violates or fails to perform any duty prescribed by these provisions will be liable in the amount of actual damages suffered by a transferee [*see Gov. Code § 8589.3(e)*; *see also Civ. Code § 1103.13*].

[12] Area of Potential Flooding

An agent for a seller of real property that is located within an area of potential flooding shown on an inundation map, or the seller if he or she is acting without an agent, must disclose to any prospective buyer the fact that the property is located within an area of potential flooding [*Gov. Code § 8589.4(a)*]. This disclosure is required only when one of the following conditions is met [*Gov. Code § 8589.4(b)*]:

- The transferor, or the transferor's agent, has actual knowledge that the property is within an inundation area.

- The local jurisdiction has compiled a list, by parcel, of properties that are within the inundation area and a notice has been posted at the offices of the county recorder, county assessor, and county planning agency that identifies the location of the parcel list.

For these purposes, the following persons will not be deemed agents of the transferor: (1) persons specified in *Civ. Code § 1103.11* (i.e., escrow agents); and (2) persons acting under a power of sale regulated by *Civ. Code § 2924* [*Gov. Code § 8589.4(d)*].

In all transactions that are subject to *Civ. Code § 1103* [*see § 569.12[1]*], this disclosure must be provided by either of the following means [*Gov. Code § 8589.4(c)*]:

- The local option real estate transfer disclosure statement [*see Civ. Code § 1102.6a*; § 569.11[3][b]].

- The natural hazard disclosure statement [*Civ. Code § 1103.2*; *see § 569.12[1]*].

The specification of items for disclosure in § 8589.4 does not limit or abridge any obligation for disclosure created by any other provision or law or that may exist to avoid fraud, misrepresentation, or deceit in the transfer transaction [*Gov. Code § 8589.4(f)*].

No transfer subject to *Civ. Code § 1103 et seq.* will be invalidated solely because of the failure of any person to comply with those provisions or with *Gov. Code § 8589.4*. However, any person who willfully or negligently violates or fails to perform any duty prescribed by these provisions will be liable in the amount of actual damages suffered by a transferee [*see Gov. Code § 8589.4(e)*; *see also Civ. Code § 1103.13*].

[13] Very High Fire Hazard Severity Zone

A seller of real property that is located within a very high fire hazard severity zone designated pursuant to *Gov. Code § 51175 et seq.* must disclose to any prospective buyer the fact that the property is located within a very high fire hazard severity zone, and is subject to the requirements of *Gov. Code § 51182* [*Gov. Code § 51183.5(a)*; *see Gov. Code § 51182* (imposing maintenance obligations on any person who owns, leases, controls, operates, or maintains occupied dwelling or occupied structure in, on, or adjoining any area or land that is covered with flammable materials and is within very high fire hazard severity zone designated by a local agency pursuant to *Gov. Code § 51179*)]. This disclosure is required only when one of the following conditions is met [*Gov. Code § 51183.5(b)*]:

- The transferor, or the transferor's agent, has actual knowledge that the property is within a very high fire hazard severity zone.

- A map that includes the property has been provided to the local agency pursuant to *Gov. Code § 51178*, and a notice is posted at the offices of the county recorder, county assessor, and county planning agency that identifies the location of the map and any information regarding changes to the map received by the local agency.

In all transactions that are subject to *Civ. Code § 1103* [*see § 569.12[1]*], the very high fire hazard severity zone disclosure must be provided by either of the following means [*Gov. Code § 51183.5(c)*]:

- The local option real estate transfer disclosure statement [*see Civ. Code § 1102.6a*; § 569.11[3][b]].

- The natural hazard disclosure statement [*see Civ. Code § 1103.2*; § 569.12[1]].

If the map or accompanying information is not of sufficient accuracy or scale that a reasonable person can determine if the subject real property is included in a very high fire hazard zone, the transferor normally must mark "Yes" on the natural hazard disclosure statement. The transferor may mark "No" on the natural hazard disclosure statement, however, if he or she attaches a report prepared pursuant to *Civ. Code § 1103.4(c)* [*see § 569.12[4]* that verifies the property is not in the hazard zone. These provisions are not intended to limit or abridge any existing duty of the transferor or the transferor's agents to exercise reasonable care in making the above determination [*Gov. Code § 51183.5(d)*].

The specification of items for disclosure in § 51183.5 does not limit or abridge any obligation for disclosure created by any other provision or law or that may exist to avoid fraud, misrepresentation, or deceit in the transfer transaction [*Gov. Code § 51183.5(f)*].

No transfer subject to *Civ. Code § 1103 et seq.* will be invalidated solely because of the failure of any person to comply with those provisions or with *Gov. Code § 51183.5*. However, any person who willfully or negligently violates or fails to perform any duty prescribed by these provisions will be liable in the amount of actual damages suffered by a transferee [*see Gov. Code § 51183.5(e)*; *see also Civ. Code § 1103.13*].

[14] Delineated Earthquake Fault Zone

An agent for a transferor of real property that is located within a delineated earthquake fault zone, or the transferor if he or she is acting without any agent, must disclose to any prospective transferee the fact that the property is located within a delineated earthquake fault zone [*Pub. Res. Code § 2621.9(a)*]. This disclosure is required only when one of the following conditions is met [*Pub. Res. Code § 2621.9(b)*]:

- The transferor, or the transferor's agent, has actual knowledge that the property is within a delineated earthquake fault zone.

- A map that includes the property has been provided to the city or county pursuant to *Pub. Res. Code § 2622*, and a notice has been posted at the offices of the county recorder, county assessor, and county planning agency that identifies the location of the map and any information regarding changes to the map received by the county.

For these purposes, the following persons will not be deemed agents of the transferor: (1) persons specified in *Civ. Code § 1103.11* (i.e., escrow agents); and (2) persons acting under a power of sale regulated by *Civ. Code § 2924* [*Pub. Res. Code § 2621.9(e)*].

In all transactions that are subject to *Civ. Code § 1103* [*see* § 569.2[1]], the delineated earthquake fault zone disclosure must be provided by either of the following means [*Pub. Res. Code § 2621.9(c)*]:

- The local option real estate transfer disclosure statement [*see Civ. Code § 1102.6a*; § 569.11[3][b]].

- The natural hazard disclosure statement [*see Civ. Code § 1103.2*; § 569.12[1]].

If the map or accompanying information is not of sufficient accuracy or scale that a reasonable person can determine if the subject real property is included in a delineated earthquake fault hazard zone, the agent normally must mark "Yes" on the natural hazard disclosure statement. The agent may mark "No" on the natural hazard disclosure statement, however, if he or she attaches a report prepared pursuant to *Civ. Code § 1103.4(c)* [*see § 569.12[4]*] that verifies the property is not in the hazard zone. These provisions are not intended to limit or abridge any existing duty of the transferor or the transferor's agents to exercise reasonable care in making the above determination [*Pub. Res. Code § 2621.9(d)*].

The specification of items for disclosure in § 2621.9 does not limit or abridge any obligation for disclosure created by any other provision or law or that may exist to avoid fraud, misrepresentation, or deceit in the transfer transaction [*Pub. Res. Code § 2621.9(g)*].

No transfer subject to *Civ. Code § 1103 et seq.* will be invalidated solely because of the failure of any person to comply with those provisions or with *Pub. Res. Code § 2621.9*. However, any person who willfully or negligently violates or fails to perform any duty prescribed by these provisions will be liable in the amount of actual damages suffered by a transferee [*see Pub. Res. Code § 2621.9(f)*; *see also Civ. Code § 1103.13*].

For additional earthquake-related disclosure obligations, see *§§ 569.12[15]* and *569.15*.

[15] Seismic Hazard Zone

An agent for a transferor of real property that is located within a seismic hazard zone as designated under *Pub. Res. Code § 2690 et seq.*, or the transferor if he or she is acting without any agent, must disclose to any prospective purchaser the fact that the property is located within a seismic hazard zone [*Pub. Res. Code § 2694(a)*]. This disclosure is required only when one of the following conditions is met [*Pub. Res. Code § 2694(b)*]:

- The transferor, or the transferor's agent, has actual knowledge that the property is within a seismic hazard zone.

- A map that includes the property has been provided to the city or county pursuant to *Pub. Res. Code § 2622*, and a notice has been posted at the offices of the county recorder, county assessor, and county planning agency that identifies the location of the map and any information regarding changes to the map received by the county.

For these purposes, the following persons will not be deemed agents of the transferor: (1) persons specified in *Civ. Code § 1103.11* (i.e., escrow agents); and (2) persons acting under a power of sale regulated by *Civ. Code § 2924* [*Pub. Res. Code § 2694(e)*].

In all transactions that are subject to *Civ. Code § 1103* [*see § 569.12[1]*], the delineated earthquake fault zone disclosure must be provided by either of the following means [*Pub. Res. Code § 2694(c)*]:

- The local option real estate transfer disclosure statement [*see Civ. Code § 1102.6a*; § 569.11[3][b]].

- The natural hazard disclosure statement [*see Civ. Code § 1103.2*; § 569.12[1]].

If the map or accompanying information is not of sufficient accuracy or scale that a reasonable person can determine if the subject real property is included in a seismic hazard zone, the agent normally must mark "Yes" on the natural hazard disclosure statement. The agent may mark "No" on the natural hazard disclosure statement, however, if he or she attaches a report prepared pursuant to *Civ. Code § 1103.4(c)* [*see § 569.12[4]*] that verifies the property is not in the hazard zone. These provisions are not intended to limit or abridge any existing duty of the transferor or the transferor's agents to exercise reasonable care in making the above determination [*Pub. Res. Code § 2694(d)*].

The specification of items for disclosure in § 2694 does not limit or abridge any obligation for disclosure created by any other provision or law or that may exist to avoid fraud, misrepresentation, or deceit in the transfer transaction [*Pub. Res. Code § 2694(g)*].

No transfer subject to *Civ. Code § 1103 et seq.* will be invalidated solely because of the failure of any person to comply with those provisions or with *Pub. Res. Code § 2694*. However, any person who willfully or negligently violates or fails to perform any duty prescribed by these provisions will be liable in the amount of actual damages suffered by a transferee [*see Pub. Res. Code § 2694(f)*; *see also Civ. Code § 1103.13*].

For additional earthquake-related disclosure obligations, see *§§ 569.12[14]* and *569.15*.

[16] Wildland Fire Zone

A transferor of real property that is located within a state responsibility area determined by the State Board of Forestry (Board) pursuant to *Pub. Res. Code § 4125* must disclose to any prospective purchaser the fact that the property is located within a wildland area that may contain substantial forest fire risks and hazards and is subject to the requirements of *Pub. Res. Code § 4291* [*Pub. Res. Code § 4136(a)*; *see Pub. Res. Code § 4291* (requiring any person that owns, leases, controls, operates, or maintains any building or structure in, on, or adjoining any mountainous area or forest-covered lands, brush-covered lands, or grass-covered lands, or any land that is covered with flammable material, to maintain a firebreak and take other specified fire prevention steps)]. Except for property located within a county that has assumed responsibility for prevention and suppression of all fires pursuant to *Pub. Res. Code § 4129*, the transferor must also disclose to any prospective buyer that it is not the state's responsibility to provide fire protection services to any building or structure located within the wildlands unless the Department of Forestry and Fire Protection has entered into a cooperative agreement with a local agency for those purposes pursuant to *Pub. Res. Code § 4142* [*Pub. Res. Code § 4136(b)*].

This disclosure is required only when one of the following conditions is met [*Pub. Res. Code § 4136(c)*]:

- The transferor, or the transferor's agent, has actual knowledge that the property is within a wildland fire zone.

- A map that includes the property has been provided to the city or county pursuant to *Pub. Res. Code § 4125*, and a notice has been posted at the offices of the county recorder, county assessor, and county planning agency that identifies the location of the map and any information regarding changes to the map received by the county.

In all transactions that are subject to *Civ. Code § 1103* [*see § 569.12[1]*], the state responsibility area disclosure must be provided by either of the following means [*Pub. Res. Code § 4136(d)*]:

- The local option real estate transfer disclosure statement [*see Civ. Code § 1102.6a*; § 569.11[3][b]].

- The natural hazard disclosure statement [*see Civ. Code § 1103.2*; § 569.12[1]].

If the map or accompanying information is not of sufficient accuracy or scale that a reasonable person can determine if the subject real property is included in a wildland fire zone, the transferor normally must mark "Yes" on the natural hazard disclosure statement. The transferor may mark "No" on the natural hazard disclosure statement, however, if he or she attaches a report prepared pursuant to *Civ. Code § 1103.4(c)* [*see § 569.12[4]*] that verifies the property is not in the hazard zone. These provisions are not intended to limit or abridge any existing duty of the transferor or the transferor's agents to exercise reasonable care in making the above determination [*Pub. Res. Code § 4136(e)*].

The specification of items for disclosure in § 4136 does not limit or abridge any obligation for disclosure created by any other provision or law or that may exist in order to avoid fraud, misrepresentation, or deceit in the transfer transaction [*Pub. Res. Code § 4136(g)*].

No transfer subject to *Civ. Code § 1103 et seq.* will be invalidated solely because of the failure of any person to comply with those provisions or with *Pub. Res. Code § 4136*. However, any person who willfully or negligently violates or fails to perform any duty prescribed by these provisions will be liable in the amount of actual damages suffered by a transferee [*see Pub. Res. Code § 4136(f)*; *see also Civ. Code § 1103.13*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawAssessment & Information AccessGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose

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Chapter 569 VENDOR AND PURCHASER OF REAL PROPERTY
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A. Actions Between Vendors and Purchasers Generally

50-569 California Forms of Pleading and Practice--Annotated § 569.13

§ 569.13 Residential Vendor's Special Duties of Disclosure

[1] Mello-Roos Community Facilities Act and Assessment Installments Under Improvement Bond Act of 1915

The seller of any real property subject to the disclosure requirements of *Civ. Code § 1102 et seq.* [*see § 569.11*] must make disclosures if the property being transferred is subject to a continuing lien securing the levy of special taxes under the Mello-Roos Community Facilities Act [*Gov. Code 53111 et seq.*] or to a fixed lien assessment collected in installments to secure bonds issued in accordance with the Improvement Bond Act of 1915 [*Sts. & Hy. Code § 8500 et seq.*] which are generally used for street improvements [*Civ. Code § 1102.6b(a)*]. The seller must make a good faith effort to obtain and deliver to the transferee a disclosure notice concerning the special Mello-Roos tax provided in *Gov. Code § 53340.2*, and an assessment installment provided in *Gov. Code § 53754* from each local agency that levies the special tax or that collects the assessment installments [*Civ. Code § 1102.6b(b)*]. Special provisions require the legislative body collecting assessment installments under the Improvement Bond Act of 1915 to designate an office, department, or bureau in the local agency to handle annual assessment installment obligation information, reports, and dissemination, among other related activities [*Gov. Code § 53754(a)*]. For purposes of enabling sellers of real property to satisfy notice requirements concerning these assessment, the agency must furnish a Notice of Assessment on request within five working days, at a charge not to exceed $10 [*Gov. Code § 53754(b)*; *see Gov. Code § 53754(c)* (prescribed form of Notice of Assessment)].

A seller may satisfy the disclosure notice requirements by delivering a disclosure notice obtained from a non-governmental source that satisfies thespecified requirements [*Civ. Code § 1102.6b(d)(1)*; *see Civ. Code § 1102.6b(d)(3)* (provision does not change ability to make disclosures under *Civ. Code § 1102.4*)]. With regard to each type of required disclosure, a notice provided by a private entity other than a designated office, department, or bureau of the levying entity may be modified as needed to clearly and accurately describe either of the following [*Civ. Code § 1102.6b(d)(2)*]:

- A special tax pursuant to the Mello-Roos Community Facilities Act levied against the property, or to clearly and accurately consolidate information about two or more districts that levy or are authorized to

levy a special tax pursuant to the Mello-Roos Community Facilities Act against the property. This notice must include the name of the Mello-Roos levying taxes against the property, the annual tax due for the Mello-Roos for the current tax year, the maximum tax that may be levied against the property in any year, the percentage by which the maximum tax for the Mello-Roos may increase per year, and the date until the tax may be levied against the property for the Mello-Roos and a contact telephone number, if available, for further information about the Mello-Roos.

- Special assessments and bonds pursuant to the Improvement Bond Act of 1915 levied against the property, or to clearly and accurately consolidate information about two or more districts that levy or are authorized to levy special assessments and bonds pursuant to the Improvement Bond Act of 1915 against the property. This notice must include the name of the special assessments and bonds issued pursuant to the Improvement Bond Act of 1915, the current annual tax on the property for the special assessments and bonds issued pursuant to the Improvement Bond Act of 1915, and a contact telephone number, if available, for further information about the special assessments and bonds issued pursuant to the Improvement Bond Act of 1915.

If these required disclosures have been delivered to the transferee, the seller or the seller's agent is not required to provide additional information concerning the special tax or assessment installments, and the disclosure information is deemed to satisfy the responsibility of the seller or the seller's agent to provide this information to the transferee. In any case, these disclosure requirements do not impose a duty agent to discover a special tax or assessment installments or the existence of any levying district not actually known to the agents [*Civ. Code § 1102.6b(e)*]. For additional discussion of the requirements of this type of disclosure, see Ch. 103, *Brokers* . For discussion of disclosure requirements in general, see *§ 569.11[1]*.

[2] Supplemental Property Tax Bills

It is the sole responsibility of the seller of any residential real property in a transfer that is subject to *Civ. Code § 1102 et seq.*, or the seller's agent, to deliver to the prospective purchaser a prescribed disclosure notice concerning supplemental property tax bills, in addition to any other disclosure required by *Civ. Code § 1102 et seq.* [*Civ. Code § 1102.6c(a)*].

[3] Former Ordnance Location

The seller of any residential property who has actual knowledge of any former federal or state ordnance locations within one mile (that is, in the "neighborhood area") of the property must give written notice of that knowledge to the buyer as soon as practicable before the transfer of title, if the transfer is subject to the general disclosure requirements imposed on residential sellers [*Civ. Code § 1102.15*; *see Civ. Code § 1102 et seq.* (general disclosure requirements)]. A former federal or state ordnance location is an area identified by an agency or instrumentality of the federal government or state government as an area that was used for military training purposes and so may contain potentially explosive munitions [*Civ. Code § 1102.15*].

[4] Industrial Use Zoning

The seller of residential real property who has actual knowledge that the property is adjacent to, or zoned to allow, an industrial use described in *Code Civ. Proc. § 731a*, or affected by a nuisance created by such a use, must give written notice of that knowledge to the purchaser as soon as practicable before transfer of title [*Civ. Code § 1102.17*]. For coverage of § 731a, which places limits on nuisance actions with respect to manufacturing, commercial, or airport uses in certain designated zones or districts, see Ch. 391, *Nuisance* .

[5] Registered Sex Offenders Data Base

In response to the passage of "Megan's Law" requiring law enforcement authorities to maintain a data base of the

locations of registered sex offenders and to provide that information to the public [*see Penal Code §§ 290, 290.4, 290.46*], certain written real estate contracts must contain a notice related to that data base [*see Civ. Code § 2079.10a*]. The notice requirement applies to every contract of sale for residential real property comprising one to four dwelling units, including installment land sales contracts [*Civ. Code § 2079.10a(a)*; *see Civ. Code § 2985(a)* (definition of real property sales contract)].

The contract must contain the following notice, printed in not less than eight-point type [*Civ. Code § 2079.10a(a)(3)* (applicable on and after April 1, 2006); *see Civ. Code § 2079.10a(a)(1), (2)* (this notice may be used in contracts before April 1, 2006, in lieu of notice that formerly was required; contract forms containing notice that formerly was required may be used until April 1, 2006)]:

> **Notice:**
> Pursuant to *Section 290.46 of the Penal Code*, information about specified registered sex offenders is made available to the public via an Internet Web site maintained by the Department of Justice at www.meganslaw.ca.gov. Depending on an offender's criminal history, this information will include either the address at which the offender resides or the community of residence and ZIP Code in which he or she resides.

The information in the notice is deemed adequate to inform the buyer about the existence of the statewide data base and information from the data base regarding the locations of registered sex offenders [*Civ. Code § 2079.10a(b)*]. On delivery of this notice, the seller is not required to provide any further information in addition to that contained in the notice regarding the proximity of registered sex offenders, and making those disclosures cannot give rise to any cause of action against the seller by a registered sex offender [*Civ. Code § 2079.10a(b)*]. However, providing the statutory notice does not alter any other existing duty that a seller has to make disclosures [*Civ. Code § 2079.10a(c)*].

[6] Arranged Credit

Every person who is an arranger of credit must make specific disclosures to the vendor and the purchaser. The vendor must join in the disclosures to the purchaser and the purchaser in the disclosures to the vendor to the extent the purchaser and vendor have knowledge of the information. The conditions in which the disclosures must be made are as follows:

- The purchase is of a dwelling for not more than four families and the vendor extends credit [*Civ. Code § 2956*].

- There is an arranger of credit involved [*Civ. Code § 2956*].

- The credit involved is subject to a finance charge or payable by written agreement in more than four installments, whether providing for payment of principal and interest or interest only, not including a down payment [*Civ. Code § 2957(d)*].

- The vendor or purchaser is not entitled to disclosure of similar facts under other specified statutes [*Civ. Code § 2958*].

"Arranger of credit" includes [*Civ. Code § 2957(a)(1), (2)*]:

- A person, other than a party to the credit transaction and other than an attorney representing one of the parties to the credit transaction, who is involved in developing or negotiating credit terms, participates in the completion of the credit documents, and directly or indirectly receives compensation for arrangement of the credit or from any transaction or transfer of the real property that is facilitated by

that extension of credit; and

- A party to the transaction who is either a real estate licensee or a licensed attorney, if neither party to the transaction is represented by an agent who is a real estate licensee (but in this case, the obligations apply only to the licensee or attorney who is a party to the transaction, and not to any other party).

"Arranger of credit" does not include a person acting as an escrow agent in the transaction, except that a person described in the second bulleted item, above, who acts as escrow agent will be deemed an arranger of credit if he or she acts on behalf of a party to the transaction, or an agent of the party, in negotiating or developing the credit terms. Neither completing credit documents in accordance with instructions of a party or his or her agent nor furnishing information regarding credit terms to a party or his or her agent is considered developing or negotiating credit terms [*Civ. Code § 2957(a)(3), (4)*].

The facts required to be disclosed about the credit transaction are set forth by statute [*see Civ. Code § 2963*]. The disclosures must be made as soon as practicable and before execution of any note or security documents [*Civ. Code § 2959*].

Any credit document or any security document subject to *Civ. Code § 2956 et seq.* is not invalidated solely because of the failure of any person to comply with *Civ. Code § 2956 et seq.* However, any person who willfully violates any provision of *Civ. Code § 2956 et seq.* will be liable in the amount of actual damages suffered by the vendor or purchaser as the proximate result of the violation. No person may be held liable in any action under this article if it is shown by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error, notwithstanding the maintenance of procedures reasonably adopted to avoid any such error [*Civ. Code § 2965*].

If a balloon payment is involved, there are special provisions requiring notice to the payor not less than 90 or more than 150 days before the payment is due [*Civ. Code § 2966(a)*].

[7] Noncompliant Plumbing Fixtures (Pre-1994 Residential Property)

On and after January 1, 2017 [*Civ. Code § 1102.155(b)*], the seller of residential real property subject to *Civ. Code § 1102 et seq.* [*see § 569.11[1]*] must disclose, in writing, that *Civ. Code § 1101.4* requires that California singe-lfamily residences, if built and available for use before January 1, 1994 [*Civ. Code § 1101.2*], must be equipped with water-conserving plumbing fixtures on or before January 1, 2017, and the seller must further disclose whether the property includes any noncompliant plumbing fixtures [*Civ. Code § 1102.155(a)(1)*; *see Civ. Code § 1101.3(c), (e)* (noncompliant and water-conserving plumbing fixtures listed)]. The seller must affirm that the representation is by the seller and not a representation of an agent, and that the disclosure is not intended to be part of any contract between the buyer and the seller. The seller must further affirm that the disclosure is not a warranty of any kind by the seller or an agent representing a principal in the transaction and is not a substitute for an inspection that or warranties a principal may want to obtain [*Civ. Code § 1102.155(a)(2)*]. For a disclosure form that can be used to meet this requirement, see *California Legal Forms, Ch. 23, Real Property Sales Agreements, § 23.315* (Matthew Bender).

Civ. Code § 1101.4(b) provides that on or before January 1, 2017, noncompliant plumbing fixtures in a single-family residential property must be replaced by the property owner with water-conserving plumbing fixtures. On and after January 1, 2017, a seller or transferor of a single-family residential property must disclose in writing to the prospective purchaser or transferee the requirements of *Civ. Code § 1101.4(b)* and whether the property includes any noncompliant plumbing fixtures [*Civ. Code § 1101.4(c)*]. These requirements apply only to residential and commercial real property built and available for use on or before January 1, 1994 [*Civ. Code § 1101.2*]. For discussion of these requirements and definitions of terms, see California Legal Forms, Ch. 23, *Real Property Sales Agreements*, § 23.20B (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedurePostconviction ProceedingsSex OffendersGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to DiscloseReal Property LawZoning & Land UseGeneral OverviewTax LawState & Local TaxesReal Property TaxGeneral Overview

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50-569 California Forms of Pleading and Practice--Annotated § 569.14

§ 569.14 Liability for Failure to Disclose Presence of Hazardous Substance

Owners of nonresidential real property who know or have reasonable cause to believe that a release of hazardous substance has come to be located on or beneath that property must give written notice of that condition to each buyer, lessee, or renter prior to the sale or lease. Failure of the owner to provide this notice subjects the owner to actual damages and to any other remedies provided by law. Additionally, if the owner has actual knowledge of the presence of a hazardous substance and knowingly fails to provide written notice to the buyer, lessee, or renter, the owner is liable for a civil penalty, not to exceed $5,000, for each separate violation [*Health & Safety Code § 25359.7*]. For a form of complaint fordamages for failure to comply with statutory notice requirements, see *§ 569.167*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawAssessment & Information AccessGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose

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50-569 California Forms of Pleading and Practice--Annotated § 569.15

§ 569.15 Disclosures Regarding Environmental and Earthquake Hazards

[1] Environmental Hazards

[a] Consumer Information Booklet

If a consumer information book described in *Bus. & Prof. Code § 10084.1* is delivered to a transferee in connection with a transfer of real property, the seller or broker is not required to provide additional information concerning, and the information provided is deemed to be adequate to inform the transferee regarding, common environmental hazards that can affect the real property [*Civ. Code § 2079.7(a)*]. This does not increase the duties of sellers or brokers or alter the duty of a seller or broker to disclose the existence of known hazards on or affecting the real property [*Civ. Code § 2079.7(b)*].

[b] Toxic Mold Protection Act

The Toxic Mold Protection Act of 2001 [*Health & Safety Code § 26100 et seq.*] requires the Department of Health Services to convene a task force of various experts and interested parties to advise the Department on the development of permissible exposure limits to molds, standards for assessment of molds in indoor environments, standards for identification of molds, and remediation of mold. The Act will eventually require any person who sells, transfers, or rents specified types of residential, commercial, or industrial real property to provide written disclosures to potential buyers, prospective tenants, renters, and landlords concerning mold problems in the real property [*see Health & Safety Code § 26140 et seq.*]. However, these disclosure duties and requirements would not apply until the January 1 or July 1 that occurs at least six months after the Department adopts the requisite standards and guidelines [*see Health & Safety Code § 26154*]. Adding additional uncertainty concerning these requirements, the Act will be implemented only to the extent the Department determines that funds are available for its implementation [*Health & Safety Code § 26156*].

[c] Local Health Officer's Order Prohibiting Use or Occupancy

A local health officer has power to issue and serve an order prohibiting the use or occupancy of particular property after determining that the property is polluted by a hazardous chemical related to methamphetamine-laboratory activities [

Health & Safety Code § 25400.22(a)]. The property owner and any other person occupying the property must immediately vacate, and the owner must promptly engage a contractor to clean up the property [*Health & Safety Code § 25400.25*]. Thereafter, until the owner has received a notice from the local health officer that the property requires no further action, the owner must notify a prospective buyer in writing of the pending order, and provide the prospective buyer with a copy of the pending order, except as otherwise required in *Civ. Code § 1102.3* [*see § 569.11[4]*]. The prospective buyer must acknowledge, in writing, the receipt of a copy of the pending order [*Health & Safety Code § 25400.28(a)*]. The owner is subject to a civil penalty for failing to provide the required notice to a prospective buyer [*Health & Safety Code § 25400.45(a)*].

[2] Earthquake Hazards Generally

If a Homeowner's Guide to Earthquake Safety described in *Bus. & Prof. Code § 10149* or a Commercial Property Owner's Guide described in *Bus. & Prof. Code § 10147* is delivered to a transferee in connection with a transfer of real property, the seller or broker is not required to provide additional information concerning, and the information provided is deemed to be adequate to inform the transferee regarding, geologic and seismic hazards that can affect the real property [*Civ. Code §§ 2079.8(a), 2079.9(a)*; *but see Gov. Code § 8897.1* (discussed in *§ 569.15[3]*)]. This does not increase the duties of sellers or brokers or alter the duty of a seller or broker to disclose the existence of known hazards on or affecting the real property [*Civ. Code §§ 2079.8(b), 2079.9(b)*; *but see Gov. Code § 8897.1*].

[3] Earthquake Hazards of Certain Residential Property

[a] Disclosure Requirement

The seller of real property containing any residential dwelling built before January 1, 1960, with one to four living units of conventional light-frame construction must, as soon as practicable before the transfer, deliver to the buyer a copy of the Homeowner's Guide to Earthquake Safety published pursuant to *Bus. & Prof. Code § 10149* and complete the earthquake hazards disclosure regarding the property, clearly indicating whether the seller has actual knowledge that the dwelling has any of the deficiencies listed in *Gov. Code § 8897.2* [*Gov. Code § 8897.1(a)*].

The transferor of property described in *Gov. Code § 8897.1(a)* must make the earthquake hazards disclosure as soon as practicable before the transfer of title in the case of a sale or exchange or prior to execution of the contract when the transfer is by a real property sales contract, and the disclosure must be made in person or by mail to the transferee, to any person authorized to act for the transferee in the transaction, or to additional transferees who have requested delivery from the transferor in writing [*Gov. Code § 8897.1(b)*].

The duty of a real estate licensee under *Gov. Code § 8897.1 et seq.* is limited to providing the seller with a copy of the Homeowner's Guide to Earthquake Preparedness for delivery to the transferee pursuant to *Civ. Code § 2079.8* [*Gov. Code § 8897.5*].

No transfer of title may be invalidated on the basis of a failure to comply with*Gov. Code § 8897.1 et seq.* [*Gov. Code § 8897.4*].

[b] Contents of Disclosure

The seller must disclose any of the following deficiencies that are within the seller's actual knowledge and material to the transaction and that may increase a dwelling's vulnerability to earthquake damage [*Gov. Code § 8897.2(a)*]:

- The absence of anchor bolts securing the sill plate to the foundation;

- The existence of perimeter cripple walls that are not braced with plywood, blocking, or diagonal metal or wood braces;

- The existence of a first-story wall or walls that are not braced with plywood, blocking, or diagonal metal or wood braces;

- The existence of a perimeter foundation composed of unreinforced masonry;

- The existence of unreinforced masonry dwelling walls;

- The existence of a habitable room or rooms above a garage; and

- The existence of a water heater that is not anchored, strapped, or braced.

[c] Exempt Transfers

The disclosure required by *Gov. Code § 8897.1(a)* does not apply to any of the following transfers [*Gov. Code § 8897.1(c)*]:

- Transfers that are required to be preceded by the furnishing to a prospective transferee of a copy of a public report pursuant to *Bus. & Prof. Code § 11018.1*;

- Transfers pursuant to court order, including, but not limited to, transfers ordered by a probate court in the administration of an estate, transfers pursuant to a writ of execution, transfers by a trustee in bankruptcy, transfers by eminent domain, or transfers resulting from a decree for specific performance;

- Transfers to a mortgagee by a mortgagor in default, transfers to a beneficiary of a deed of trust by a trustor in default, transfers by any foreclosure sale after default, transfers by any foreclosure sale after default in any obligation secured by a mortgage, or transfers by a sale under a power of sale after a default in an obligation secured by a deed of trust or secured by any other instrument containing a power of sale, and any subsequent transfer by a mortgagor or beneficiary of a deed of trust who accepts a deed in lieu of foreclosure or purchases the property at a foreclosure sale;

- Transfers by a fiduciary in the course of the administration of a decedent's estate, guardianship, conservatorship, or trust;

- Transfers from one co-owner to one or more co-owners;

- Transfers made to a spouse or to a person or persons in the lineal line of consanguinity of one or more of the transferors;

- Transfers between spouses resulting from a decree of dissolution of a marriage, from a decree of legal separation, or from a property settlement agreement incidental to either of those decrees;

- Transfers by the Controller in the course of administering the Unclaimed Property Law provided for in *Code Civ. Proc. § 1500 et seq.*;

- Transfers under the provisions of *Rev. & Tax. Code § 3771 et seq.*; and

- Transfers for which the transferee has agreed in writing that the dwelling will be demolished within one year of the date of transfer.

[d] Retrofit Standards

Gov. Code § 8897.3 provides the standards to be used if it is determined that retrofit work is appropriate to address potential deficiencies listed in *Gov. Code § 8897.2* [*Gov. Code § 8897.3(a)*] and provides that any qualified historical building or structure, as defined pursuant to *Health & Safety Code § 18955*, may use retrofit alternatives [*Gov. Code § 8897.3(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionEnvironmental LawHazardous Wastes & Toxic SubstancesToxic MoldFamily LawMarital Termination & Spousal SupportDissolution & DivorceProperty DistributionGeneral OverviewReal Property LawEstatesConcurrent OwnershipGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose

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§ 569.16 Private Transfer-Fee Requirement

If property being transferred after 2007 is subject to a private transfer fee, the transferor must provide, at the time the transfer disclosure statement required pursuant to *Civ. Code § 1102.6* is provided, an additional disclosure statement containing all of the following [*Civ. Code § 1102.6e*]:

- Notice that payment of a transfer fee is required on transfer of the property;
- The amount of the fee required for the asking price of the real property, and a description of how the fee is calculated;
- Notice that the final amount of the fee may be different if the fee is based on a percentage of the final sale price;
- The entity to which funds from the fee will be paid;
- The purposes for which funds from the fee will be used; and
- The date or circumstances under which the obligation to pay the transfer fee expires, if it could expire.

A "private transfer fee", for this purpose, is any fee-payment requirement imposed in a covenant, restriction, or condition contained in any deed, contract, security instrument, or other document affecting the transfer or sale of, or any interest in, real property, which requires a fee be paid on transfer of the real property [*Civ. Code § 1098*; *but see Civ. Code § 1098(a)-(i)* (exceptions)].

In addition, the recipient of any such fee imposed before 2008, or the person or entity imposing any such fee after 2007, must record a document, entitled "Payment of Transfer Fee Required," in which pertinent facts about the fee-payment requirement are disclosed [*Civ. Code § 1098.5*].

For forms of these disclosure statements, see *California Legal Forms, Ch. 23, Real Property Sales Agreements, § 23.314* (Matthew Bender).

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§ 569.16A Sale Cannot Be Conditioned on Purchase of Title Insurance

Under the Buyer's Choice Act [*Civ. Code § 1103.20*] from October 11, 2009, through January 1, 2015 [*Civ. Code § 1103.23*], a seller of residential real property with four or fewer dwelling units may not require directly or indirectly, as a condition of selling the property, that title insurance covering the property or escrow service provided in connection with the sale be purchased by the buyer from a particular title insurer or escrow agent. However, this does not prohibit a buyer from agreeing to accept the services of a title insurer or an escrow agent recommended by the seller if written notice of the right to make an independent selection of those services is first provided by the seller [*Civ. Code § 1103.22(a)*].

"Escrow service" means service provided by a person licensed pursuant to Division 6 (commencing with Section 17000) of the Financial Code, or exempt from licensing pursuant to *Section 17006 of the Financial Code*. "Seller" means a mortgagee or beneficiary under a deed of trust who acquired title to residential real property improved by four or fewer dwelling units at a foreclosure sale, including a trustee, agent, officer, or other employee of any such mortgagee or beneficiary. "Title insurance" means insurance offered by an insurer admitted in this state to transact title insurance pursuant to Chapter 1 (commencing with Section 12340) of Part 6 of the Insurance Code [*Civ. Code § 1103.22(b)*].

A seller who violates *Civ. Code § 1103.22* is liable to the buyer for three times all charges made for the title insurance or escrow service. In addition, a person who violates *Civ. Code § 1103.22* will be deemed to have violated his or her license law and subject to discipline by his or her licensing entity [*Civ. Code § 1103.22(c)*]. A transaction subject to this provision will not be invalidated solely because of the failure of any person to comply with any provision of it [*Civ. Code § 1103.22(c)*].

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§ 569.17 Expiration of Rights Under Unperformed Recorded Contract of Sale

As used in *Civ. Code § 886.010 et seq.*, a "contract for sale of real property" means an agreement wherein one party agrees to convey title to real property to another party on the satisfaction of specified conditions set forth in the contract and that requires conveyance of title within one year from the date of formation of the contract, whether the agreement is designated as a contract for sale of real property, land sale contract, deposit receipt, agreement for sale, agreement to convey, or otherwise [*Civ. Code § 886.010(a)*].

A recorded contract for sale of real property expires of record at the later of the following times [*Civ. Code § 886.030(a)*]:

(1) Five years after the date for conveyance of title provided in the contract or, if no date for conveyance of title is provided in the contract, five years after thelast date provided in the contract for satisfaction of the specified conditions set forth in the contract; or

(2) If there is a recorded extension of the contract within the time prescribed in (1), *above*, five years after the date for conveyance of title provided in the extension or, if no date for conveyance of title is provided in the extension, five years after the last date provided in the extension for satisfaction of the specified conditions set forth in the contract.

The statutory expiration period can be extended or waived only by an instrument recorded before the expiration of the otherwise applicable five-year period [*Civ. Code § 886.030(b)*].

When the unperformed contract has expired of record, the recorded contract has no effect and does not constitute a cloud or encumbrance on the property except as against a party to the contract [*Civ. Code § 886.040*].

Civ. Code §§ 886.010-886.050 apply to all contracts for sale of real property, whether recorded before or after the effective date, which is January 1, 1983. However, no contract for sale of real property will expire until December 31, 1985 [*Civ. Code § 886.050*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral Overview

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§ 569.18 Duty to Execute Release

If the party to whom title to real property is to be conveyed pursuant to a recorded contract for the sale of real property (*defined in § 569.17*) fails to satisfy the specified conditions set forth in the contract and does not seek performance of the contract or restitution of amounts paid under the contract, the party must, on demand therefor, execute a release of the contract, duly acknowledged for record, to the party who agreed to convey title. Willful violation of the above duty by the party to whom title is to be conveyed without good cause makes the party liable for the damages the party who agreed to convey title sustains by reason of the violation, including, but not limited to, court costs and reasonable attorney's fees in an action to clear title to real property. This does not make a release or a demand therefor a condition precedent to an action to clear title [*Civ. Code § 886.020*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesDamagesCompensatory DamagesContracts LawTypes of ContractsReleasesReal Property LawPriorities & RecordingGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Act

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§ 569.19 Expiration of Record of Expired Option

If a recorded instrument creates or gives constructive notice of an option to purchase real property, the option expires of record if no conveyance, contract, or other instrument that gives notice of exercise or extends the option is recorded within the following times [*Civ. Code § 884.010*]:

(1) Six months after the option expires by its terms; or

(2) If the option provides no expiration date, six months after the date the instrument that creates or gives constructive notice of the option is recorded.

When the option has expired of record due to the expiration of the applicable six-month period, the recorded option or instrument giving notice of option does not give notice to anyone or put anyone on inquiry as to the exercise or extension of the option [*Civ. Code § 884.020*].

Civ. Code §§ 884.010-884.030 apply on their operative date (January 1, 1983) to all options executed or recorded before, on, or after the operative date. However, an option that expires according to its terms before January 1, 1984, will not expire until that date, and an option that has no expiration date and was recorded before January 1, 1983, will not expire of record until December 31, 1987 [*Civ. Code § 884.030*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsOption ContractsReal Property LawPriorities & RecordingGeneral OverviewReal Property LawPurchase & SaleOption ContractsGeneral Overview

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§ 569.20 Risk of Loss

Under the Uniform Vendor and Purchaser Risk Act (*Civ. Code § 1662*), risk follows title and possession. Unless the contract provides otherwise, if all or a material part of the property is destroyed, without fault of the purchaser, or taken by eminent domain, before transfer of either title or possession, the vendor cannot enforce the contract and is excused from performance, and the purchaser is entitled to recover any payments made [*Civ. Code § 1662(a)*; *Dixon v. Salvation Army (1983) 142 Cal. App. 3d 463, 467, 191 Cal. Rptr. 111]* . Conversely, unless the contract provides otherwise, if all or a material part of the property is destoyed, without fault of the vendor, or taken by eminent domain, after either title or possession has been transferred, the purchaser is not relieved of the duty to pay the purchase price, nor is he or she entitled to recover any portion of payments made [*Civ. Code § 1662(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingRisk of Loss

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§ 569.21 Formation and Breach of Contract

[1] In General

Both buyers and sellers considering suit for damages for breach of contract must first determine (1) that a contract has indeed been formed, rather than just a series of offers and counteroffers; (2) that there has been a breach of contract as opposed to a "no fault" failure of condition; and (3) that all conditions precedent to the other party's obligation have been satisfied or waived [*see, e.g.,* *Krasley v. Superior Court (1980) 101 Cal. App. 3d 425, 430, 161 Cal. Rptr. 629* (only counteroffers); *Doryon v. Salant (1977) 75 Cal. App. 3d 706, 711, 142 Cal. Rptr. 378* (contract found); *Spangler v. Castello (1956) 147 Cal. App. 2d 49, 53, 304 P.2d 752* (requirement for FHA, VA approval is not waivable by purchaser alone)]. In regard to the second consideration, if a buyer's qualification for certain financing is a condition, the law implies a promise by the purchaser to diligently seek that financing. The burden of proving lack of diligence is on the seller asserting breach of contract [*Abrams v. Motter (1970) 3 Cal. App. 3d 828, 837-839, 83 Cal. Rptr. 855]* . When a seller invites bids as counteroffers and abuyer's bid is in terms of a specified amount more than the highest bid, that incremental bid is fraudulent unless the seller solicited relative bids or such bids are customary in the trade or industry [*Carver v. Teitsworth (1991) 1 Cal. App. 4th 845, 854-855, 2 Cal. Rptr. 2d 446]* .

[2] Performance or Excuse of Conditions

Because the seller's conveyance and the buyer's payment are considered concurrent conditions, a seller is not in default until the buyer has paid or tendered the full purchase price and demanded conveyance; although a seller's repudiation or inability to perform or failure to fulfill a condition precedent will excuse a buyer's tender [*Rubin v. Fuchs (1969) 1 Cal. 3d 50, 54-55, 81 Cal. Rptr. 373, 459 P.2d 925* ; *Kossler v. Palm Springs Developments, Ltd. (1980) 101 Cal. App. 3d 88, 99-101, 161 Cal. Rptr. 423]* . A purchaser may make a conditional tender, that is, conditioned on a vendor's conveyance [*Groobman v. Kirk (1958) 159 Cal. App. 2d 117, 118-126, 323 P.2d 867]* . Similarly, unless the purchaser's breach takes the form of repudiation, the vendor will have to tender his or her own performance and, if a time provision is involved, demand strict performance in order to put the purchaser in default [*Baird v. Barton (1958) 163 Cal. App. 2d 502, 505, 329 P.2d 492]* .

When conditions are concurrent and time is of the essence in the contract, both parties' failure to perform by the closing

date discharges the contract, and one party cannot tender after the closing date and make the contract enforceable [*Pittman v. Canham (1992) 2 Cal. App. 4th 556, 559-560, 3 Cal. Rptr. 2d 340]* . However, an agreement for the purchase and sale of property was not automatically discharged when neither party performed concurrent obligations by the date specified in the escrow instructions, even though the sales agreement provided that time was of the essence. The seller waived the time provisions by continuing to deal with the buyer after the date specified in the contract, and the buyer was prevented from tendering the loan funds by the seller's failure to provide a termite report as required by the agreement [*Galdjie v. Darwish (2003) 113 Cal. App. 4th 1331, 1342-1343, 7 Cal. Rptr. 3d 178]* . Similarly, a buyer was entitled to specific performance of two purchase and sales contracts when it was ready, willing, and able to perform the transactions and the seller prevented the buyer from performing by failing to comply with its escrow obligations, even though the escrow instructions contained "time is of the essence" clauses [*Ninety Nine Investments, Ltd. v. Overseas Courier Service (2003) 113 Cal. App. 4th 1118, 1134, 6 Cal. Rptr. 3d 891]* .

A party whose performance is subject to a condition precedent to be performed by the other party which has not been fulfilled or waived, need not perform. This excuse for performance or tender is somewhat vitiated by the rule of construction that conditions are to be construed as concurrent rather than precedent unless a contrary intent is plain from the contract language or the condition must in reality be fulfilled before the other performances can be accomplished. For instance, a seller's recording of a final subdivision map was a condition precedent to the buyer's duty to pay because neither the deed nor the deed of trust to secure purchase money financing could be executed until the final map was recorded to provide the official recording data [*Rubin v. Fuchs (1969) 1 Cal. 3d 50, 53-55, 81 Cal. Rptr. 373, 459 P.2d 925]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachAnticipatory RepudiationGeneral OverviewContracts LawContract Conditions & ProvisionsConditions PrecedentContracts LawFormationGeneral OverviewContracts LawPerformanceTender & DeliveryReal Property LawPurchase & SaleContracts of SaleGeneral Overview

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§ 569.22 Purchaser's Remedies

[1] In General

A purchaser's choice of remedy will be affected by market conditions and the magnitude of the purchaser's desire to own the property, possibly with defects of which the purchaser was not aware at the time of contracting, and very probably after long and expensive litigation. The buyer's remedies include (1) damages for breach of the contract, (2) specific performance, even if there is some defect in title or if the seller does not own the entire estate promised, in which case the buyer is entitled to compensation for the defect, (3) damages for fraud, (4) rescission, and (5) cancellation [*Civ. Code §§ 1689, 1690-1693* (rescission), 3306 (damages for breach of contract to convey), 3343 (damages for fraud), 3384-3395 (specific performance), 3412-3415 (cancellation); *see Miller v. Dyer (1942) 20 Cal. 2d 526, 529, 127 P.2d 901* (buyer is entitled to compel conveyance of defective title with compensation for defect)]. Declaratory relief and reformation are available to purchasers on the same basis as they are to vendors, as discussed in *§§ 569.25* and *569.26*. Also, a reformed contract may be specifically enforced [*Civ. Code § 3402*]. Purchasers may also enforce liquidated damage provisions for their benefit, though such provisions are rare [*Civ. Code §§ 1671, 1679*].

A defaulting buyer is entitled to restitution of the excess of sums paid under the contract over the amount of actual damages sustained by the seller, if there is no valid liquidated damages provision in the seller's favor [*Freedman v. St. Matthias Parish (1951) 37 Cal. 2d 16, 20-23, 230 P.2d 629* ; *see §§ 569.24[4]* (seller's damages for breach), 569.100[2] (restitution for installment purchaser), 569.104[3] (limitations on installment seller's damages); *see also § 569.195* (complaint for restitution under installment sales contract), which can be modified for use under a non-installment contract].

A purchaser may plead inconsistent remedies and does not have to elect between them until after trial [*Williams v. Marshall (1951) 37 Cal. 2d 445, 457, 235 P.2d 372* ; *Walters v. Marler (1978) 83 Cal. App. 3d 1, 16, 147 Cal. Rptr. 655* ; *see § 569.24[7][b]*].

[2] Purchaser's Remedies to Gain Possession

It would seem that a provision for delivery of possession would be proper asincidental relief in a specific performance

action [*see Michaelian v. Elba Land Co. (1926) 76 Cal. App. 541, 557]* . If the seller does not deliver possession after conveyance of title as provided in the contract, the buyer's remedy is an unlawful detainer action pursuant to *Code Civ. Proc. § 1161a(b)(4)*, which applies also to anyone claiming through the seller [*Code Civ. Proc. § 1161a(b)(4)*; *Moss v. Williams (1948) 84 Cal. App. 2d 830, 839, 191 P.2d 804* ; *Kessler v. Bridge (1958) 161 Cal. App. 2d Supp. 837, 838, 841* , *327 P.2d 241* ; for discussion and forms of notice and complaint for eviction of a seller holding over, see Ch. 333, *Landlord and Tenant: Eviction Actions*].

[3] Purchaser's Damages for Breach of Contract

A purchaser intending to sue for damages for breach of contract should take note of the considerations discussed in *§ 569.21* (formation and breach of contract). In determining the measure of damages to be applied, the distinction must be made whether the promise to convey is the promise breached, in which case *Civ. Code § 3306* governs the measure of damages, or whether some collateral promise has been breached, in which case *Civ. Code § 3300* governs the measure of damages [*see Coughlin v. Blair (1953) 41 Cal. 2d 587, 600, 262 P.2d 305* (collateral promise to connect road, water, electricity); *Christensen v. Slawter (1959) 173 Cal. App. 2d 325, 330-334, 343 P.2d 341* (delay)]. In some cases both measures will produce the same result [*see Crocker v. Grandi (1961) 189 Cal. App. 2d 431, 437-438, 11 Cal. Rptr. 330* (specific performance under option with damages for lots to which seller did not have clear title)].

The measure of damages under *Civ. Code § 3306* for a seller's breach of the promise to convey is (1) the amount paid and expenses properly incurred in examining title and preparing the necessary papers, (2) the difference between the contract price and the value of the estate agreed to be conveyed at the time of the breach, (3) the expenses properly incurred in preparing to enter on the land, (4) consequential damages, and (5) interest [*Civ. Code § 3306*]. Before 1984, *Civ. Code § 3306* did not provide for consequential damages or interest, though interest was allowed under case law, and any difference between the contract price and the value on the date of breach was recoverable only if the seller's bad faith was proved [*see Caplan v. Schroeder (1961) 56 Cal. 2d 515, 521-522, 15 Cal. Rptr. 145, 364 P.2d 321* (allowing interest on bad faith damages from date difference could be determined); for a form of complaint by a purchaser seeking damages for breach of contract to convey, *see § 569.164*]. The seller may not recover consequential damages because of loss of rental income if the evidence of capitalized income value of the property included rental income [*Stevens Group Fund IV v. Sobrato Development Co. (1991) 1 Cal. App. 4th 886, 890-892, 2 Cal. Rptr. 2d 460]* . Because there is little case law on a buyer's consequential damages, some guidance may be found in the cases establishing the seller's consequential damages, discussed in *§ 569.24[4]*.

The measure of damages under *Civ. Code § 3300* for a vendor's breach of a collateral promise is the amount that will compensate the purchaser for all the detriment caused, or which in the ordinary course of things would be likely to result from the breach [*Civ. Code § 3300*]. For particular applications of the *Civ. Code § 3300* measure, see the decisions in § 569.164[7].

[4] Purchaser's Right to Specific Performance

To obtain specific performance, a purchaser must establish (1) the formation of a contract the terms of which are sufficiently definite to be enforced, (2) the adequacy of the consideration to be received by the vendor, (3) that the contract is just and reasonable as to the vendor, (4) that the purchaser's legal remedy is inadequate, and (5) that the purchaser remains willing and able to perform [*Civ. Code § 3391(1), (2)*; *Henderson v. Fisher (1965) 236 Cal. App. 2d 468, 473, 46 Cal. Rptr. 173* ; *see Doryon v. Salant (1977) 75 Cal. App. 3d 706, 714-715, 142 Cal. Rptr. 378* (failure to allege willingness and ability to perform is not fatal if defendant fails to object to sufficiency of complaint and evidence shows willingness and ability)]. The legal remedy is presumed to be inadequate. If the property with regard to which specific performance is being sought is a single-family residence to be occupied by the purchaser, the presumption is conclusive. In other cases the presumption shifts the burden of proof, so that the vendor is required to show that money damages would be adequate [*Civ. Code § 3387*; *see Evid. Code §§ 601, 606*]. The just and reasonable requirement and the adequacy of consideration requirement are closely linked, as are the certainty requirement and the just and

reasonable requirement [*see* *Handy v. Gordon (1967) 65 Cal. 2d 578, 581, 55 Cal. Rptr. 769, 422 P.2d 329* (uncertain as unjust and unreasonable); *Henderson v. Fisher (1965) 236 Cal. App. 2d 468, 474, 46 Cal. Rptr. 173* (just, reasonable, and adequate)]. A purchaser may waive an indefinite provision solely for his or her benefit and thereby obtain specific performance of an agreement that would otherwise be too uncertain to be enforced specifically [*Reeder v. Longo (1982) 131 Cal. App. 3d 291, 296-297, 182 Cal. Rptr. 287]* . Adequacy of consideration is tested at the time of formation of the contract or, in the case of an option, at the time it was made, not at the time it was exercised [*O'Connell v. Lampe (1929) 206 Cal. 282, 285, 274 P. 336* (option); *see* *Schwartz v. Shapiro (1964) 229 Cal. App. 2d 238, 255, 40 Cal. Rptr. 189* (error to admit evidence of increased value at time of trial)]. Adequacy of consideration does not require that the vendor receive the highest possible price for the property, but only that considering all the circumstances as they existed at the time of the contract, the price was fair and reasonable. Circumstances to be considered include the relation of the parties; their friendship, love, and affection; the object to be obtained by the contact; and the vendor's desire for a quick sale [*Meyer v. Benko (1976) 55 Cal. App. 3d 937, 945, 127 Cal. Rptr. 846* ; *Henderson v. Fisher (1965) 236 Cal. App. 2d 468, 474-475, 46 Cal. Rptr. 173]* .

Specific performance is proper if a party did not have the ability to perform when the contract was executed but has the ability when the trial is held. For example, when a property could not be conveyed free and clear when the contract was made because a secured note on the property could not be prepaid, but the note is due when the trial is held, the seller is able to convey title free and clear at the time of trial, and, thus, specific performance is available [*Stevens Group Fund IV v. Sobrato Development Co. (1991) 1 Cal. App. 4th 886, 893-897, 2 Cal. Rptr. 2d 460]* .

A defense of impossibility with regard to specific performance was rejected by the court in a case in which a foreclosure sale resulted in the property being conveyed to bona fide third-party purchasers after the plaintiffs had entered into an oral contract for the purchase of the property. The court reasoned that a decree of specific performance need not be absolute in form, and the performance that it requires need not be identical with that promised in the contract; it may be so drawn as to best effectuate the purposes for which the contract was made, and it may be granted on such terms and conditions as justice requires [*Rogers v. Davis (1994) 28 Cal. App. 4th 1215, 1221-1222, 34 Cal. Rptr. 2d 716* , citing Restatement of Contracts § 359(2)]. The court held that, as the equitable owners of the property at the time of the foreclosure sale, the plaintiffs were entitled in equity to the proceeds of the sale under the doctrine of equitable conversion [*Rogers v. Davis (1994) 28 Cal. App. 4th 1215, 1223, 34 Cal. Rptr. 2d 716]* .

A purchaser who is successful in an action for specific performance is entitled to recover incidentals to compensate for the delay. These include the rents and profits from or rental value of the property from the date the purchaser was entitled to possession. These amounts will be reduced by the amount of interest on so much of the purchase price as has not been set aside by the purchaser, with notice to the vendor, so the purchaser does not derive any benefit from it [*Ellis v. Mihelis (1963) 60 Cal. 2d 206, 220-222, 32 Cal. Rptr. 415, 384 P.2d 7]* . Increased financing costs are another example of incidentals [*Stratton v. Tejani (1982) 139 Cal. App. 3d 204, 208-209, 214-215, 187 Cal. Rptr. 231]* . The court may enter an interlocutory judgment, order an accounting to determine the amount of the incidentals involved, and retain jurisdiction for further supervision of the closing [*Wesley N. Taylor Co. v. Russell (1961) 194 Cal. App. 2d 816, 817-819, 15 Cal. Rptr. 357* .

For a form of complaint by a purchaser seeking specific performance of a contract to convey real property, see *§ 569.165*.

[5] Purchaser's Enforcement of Liquidated Damage Clause

A clause providing for liquidated damages payable to the buyer in the event of breach by the seller would be tested under *Civ. Code § 1671* and would be valid unless it was proved to be unreasonable under the circumstances existing at the time the contract was made [*Civ. Code §§ 1671(a), (b), 1679*].

If a clause providing for liquidated damages payable to the buyer in the event of breach by the buyer is being used

defensively by the buyer to limit his or her liability to the seller, the validity of the provision will be tested under *Civ. Code § 1671* if commercial property is involved and under *Civ. Code §§ 1675-1681* if residential property is involved. Both are discussed in *§ 569.24[6][a]*. A provision liquidating a seller's damages in the event of the buyer's default may be enforced by the purchaser even if it does not strictly comply with the provisions of *Civ. Code §§ 1675-1677*, for example, when sellers had not initialed the clause as required by *Civ. Code § 1677(a)*. In such a case, the election to void the clause rests solely with the purchaser because purchasers, not vendors, are the class to be protected [*Guthman v. Moss (1984) 150 Cal. App. 3d 501, 506-512, 198 Cal. Rptr. 54]* .

[6] Purchaser's Damages for Fraud

A buyer's damages for fraud can be based on either affirmative misrepresentations or nondisclosure of material facts. In an action for damages for fraud based on affirmative misrepresentations, a buyer is required to prove that (1) the seller made a false representation respecting a material fact; (2) the seller knew the representation was false or made it without any reasonable ground for believing it to be true; (3) the seller intended to induce the buyer's reliance; (4) the buyer did rely on the representation; and (5) the buyer was damaged as a result of his or her reliance [*Reed v. King (1983) 145 Cal. App. 3d 261, 264, 193 Cal. Rptr. 130* ; *Roland v. Hubenka (1970) 12 Cal. App. 3d 215, 220, 90 Cal. Rptr. 490]* .

A subsequent purchaser may bring an action for damages against the original seller based on fraudulent misrepresentations made to the original buyer if the seller (1) had reason to expect that the misrepresentations would be repeated and (2) the misrepresentations were repeated to the subsequent buyer [*Geernaert v. Mitchell (1995) 31 Cal. App. 4th 601, 607-608, 37 Cal. Rptr. 2d 483]* . Whether a seller of real property had "reason to expect" transmission to the plaintiff depends on (1) the extent of the seller's knowledge of resale to a particular person or class of persons and (2) the likelihood that the particular misrepresentation (or concealment) would be passed on to them [*Geernaert v. Mitchell (1995) 31 Cal. App. 4th. 601, 608, 37 Cal. Rptr. 2d 483]* .

In a case involving a relocation intermediary, the Court of Appeal held that the sellers were subject to common law liability to the eventual purchaser for intentional and/or negligent misrepresentation as well as statutory liability under *Civ. Code § 1102 et seq.* The sellers had sold their home to a relocation intermediary, executed a grant deed with the name of the grantee left blank, and indicated on the statutory transfer disclosure statement that they were not awareof any neighborhood noise problems. This representation was not true as they had had an ongoing dispute with a neighbor over noise. The court found that the sellers had a common law and statutory obligation to make a full disclosure as to the noise disturbances. The sellers had to know and realize that the intermediary intended to sell the property. Further, because the intermediary had no knowledge of the property or its problems, other than as disclosed by the sellers, the sellers had every reason to expect that their disclosure statement would be delivered to the eventual purchaser. These circumstances were sufficient to satisfy the principles of the indirect deception doctrine [*Shapiro v. Sutherland (1998) 64 Cal. App. 4th 1534, 1546, 1550, 76 Cal. Rptr. 2d 101]* .

If damages are based on nondisclosure and no confidential relationship is involved (that is, the fraud is not perpetrated by the purchaser's own agent) in addition to the last three elements set forth above, the purchaser must prove (1) the nondisclosure by the vendor of facts materially affecting value or desirability of property and (2) that the undisclosed facts are known or accessible only to the vendor and not known or within reach of the diligent attention and observation of the purchaser [*Reed v. King (1983) 145 Cal. App. 3d 261, 265, 193 Cal. Rptr. 130* ; *Driver v. Melone (1970) 11 Cal. App. 3d 746, 753, 90 Cal. Rptr. 98]* . When these elements exist, a purchaser has an election between rescission and damages for fraud [*Snelson v. Ondulando Highlands Corp. (1970) 5 Cal. App. 3d 243, 251, 84 Cal. Rptr. 800]* . The materiality of the undisclosed fact is determined from consideration of (1) the gravity of the harm inflicted by nondisclosure; (2) the fairness of imposing a duty of discovery on the purchaser as an alternative to compelling disclosure by the vendor; and (3) the impact on the stability of the contract if rescission is allowed [*Reed v. King (1983) 145 Cal. App. 3d 261, 265-267, 193 Cal. Rptr. 130]* . Some defects or conditions, such as the fact that a lot is all or part fill, are considered by case law to be so material that their nondisclosure is considered an inducement [*see, e.g., Snelson v. Ondulando Highlands Corp. (1970) 5 Cal. App. 3d 243, 251, 84 Cal. Rptr. 800* ; *Buist v. C. Dudley De*

Velbiss Corp. (1960) 182 Cal. App. 2d 325, 331, 6 Cal. Rptr. 259] . In addition, if a vendor has knowledge of the existence of a past or present progressive destruction or substantial impairment, he or she is under a duty to disclose even if he or she believes the progression has been halted [*Barnhouse v. City of Pinole (1982) 133 Cal. App. 3d 171, 190, 183 Cal. Rptr. 881]* . If a buyer cannot establish all of these elements, damages may still be recoverable for omissions in the various statutory disclosures [*see, e.g., § 569.11*].

For a form of complaint for damages for a seller's failure to comply with statutory disclosure requirements, see *§ 569.166*. For a form of complaint for rescission based on a seller's fraud, see *§ 569.168*. For more detailed discussion of fraud and for forms specifically for use by defrauded buyer's of real property, see Ch. 269, *Fraud and Deceit* . For discussion of the purchaser's rights if his or her own agent perpetrated the fraud, see Ch. 103, *Brokers* .

If the seller's agent's misrepresentations were made within the actual or apparent scope of his or her authority, both the agent and the seller are jointly liable for damages for fraud, even though the seller may be innocent of personally participating in the fraud, on the theory that he or she has accepted and retained the benefits of the transaction [*Ach v. Finkelstein (1968) 264 Cal. App. 2d 667, 677, 70 Cal. Rptr. 472]* . On the other hand, if there is an "as is" provision in the contract, or one stating that no representations or understandings are to be relied on except those written in the contract, an innocent seller will be liable for rescission and restoration, but not for damages for fraud [*Herzog v. Capital Co. (1945) 27 Cal. 2d 349, 353, 164 P.2d 8* ; *London v. Guberman (1963) 214 Cal. App. 2d 215, 218, 29 Cal. Rptr. 279]* .

The measure of damages for fraud in the sale of real property is the difference between the actual value of what the purchaser parted with and the actual value of what he or she received, referred to as "out-of-pocket" damages [*Civ. Code § 3343(a)*]. The purchaser may not recover based on the former "benefit-of-the-bargain" rule which allowed recovery of the difference between the actual value of the property and the value as represented [*Civ. Code § 3343(b)(1)*]. Even when no out-of-pocket damages have been sustained, additional damages can be recovered under *Civ. Code § 3343 (a)(1), (4)*, which allow recovery of amounts actually and reasonably expended in reliance on the fraud and to compensate for any loss of profits or other gains that were reasonably anticipated and would have been earned by the purchaser from the use or sale of the property had it possessed the characteristics fraudulently attributed to it. Because damages for lost profits from the use or sale of the property are only allowed if (1) the property was acquired for use or resale at a profit; (2) the purchaser reasonably relied on the fraud in entering the transaction and anticipating profits; and (3) the damages were actually caused by the fraud and the purchaser's reliance thereon, they are not usually available to a purchaser of a residence [*Civ. Code § 3343(a)(1), (4)*; *Stout v. Turney (1978) 22 Cal. 3d 718, 723-730, 150 Cal. Rptr. 637, 586 P.2d 1228* (mobilehome park); *see also Hartman v. Shell Oil Co. (1977) 68 Cal. App. 3d 240, 247-250, 137 Cal. Rptr. 244* (purchase of gas station, upholding punitive damages)]. A buyer's damages will not be reduced by the amount of any collateral source which might have mitigated his or her damages. The seller may not recover consequential damages because of loss of rental income if the evidence of capitalized income value of the property included rental income [*Stevens Group Fund IV v. Sobrato Development Co. (1991) 1 Cal. App. 4th 886, 890-892, 2 Cal. Rptr. 2d 460]* . For instance, in an action for damages based on the seller's failure to disclose roof leakage, the fact that FHA regulations would allow the buyer of a low-income apartment complex to increase rents to cover the cost of roof repairs was inadmissible [*Philip Chang & Sons Associates v. La Casa Novato (1986) 177 Cal. App. 3d 159, 165-173, 222 Cal. Rptr. 800]* .

[7] Purchaser's Right to Rescission

The requisite grounds and procedures for rescission of the contract and restitution of any consideration paid, including the requirement that anything of value received by the plaintiff be returned to the defendant, and their comparison to cancellation are discussed in *§ 569.24[7]*. If the grounds for rescission are fraud, a purchaser can elect fraud damages or rescission [*Kent v. Clark (1942) 20 Cal. 2d 779, 783, 128 P.2d 868]* . The election can occur unintentionally. For instance, purchasers who demolished a house after learning that the foundation was so defective that the house could not be occupied and believing that there was no other way to correct the defect, were foreclosed from restitution [

Prichard v. Reitz (1986) 178 Cal. App. 3d 465, 467-469, 223 Cal. Rptr. 734] . A purchaser who is in default is still entitled to rescission and restitution of the excess of the payments made under the contract, plus the value of any improvements made to the property, over the fair rental value of the property during the time he or she was in possession [*Kent v. Clark (1942) 20 Cal. 2d 779, 784-785, 128 P.2d 868* ; *but see Lesny Development Co. v. Kendall (1985) 164 Cal. App. 3d 1010, 1020-1024, 210 Cal. Rptr. 890* (defaulting purchaser denied specific performance is only entitled to restitution of lesser of enhanced value of property due to, or reasonable cost of obtaining, subdivision map); *Utemark v. Samuel (1953) 118 Cal. App. 2d 313, 316, 257 P.2d 656* (restitution of costs, which exceeded increased value, to purchaser granted rescission on vendor's refusal to convey)]. If the fraud occurred in the sale of income property or a business, however, the seller's offset is the lesser of the profits made by the buyer before rescission or the reasonable rental value [*McCoy v. West (1977) 70 Cal. App. 3d 295, 302-303, 138 Cal. Rptr. 660]* . The rental value offset is comprised only of the reasonable rental value of the property sold and does not include the rental value of any improvements made on it by the purchaser. Interest is allowed to the purchaser on the amounts paid towards the purchase price [*Utemark v. Samuel (1953) 118 Cal. App. 2d 313, 317-318, 257 P.2d 656]* . For a form of complaint for use by a buyer seeking rescission, see *§ 569.168*.

For mutual mistake to provide the basis for rescission there must be some fact that is believed by both parties. Mutual ignorance of a fact, or a failure to contemplate the fact that later became known, for instance, that the holder of the existing deed of trust would require financial information from the purchaser to allow him or her to assume the loan, is not sufficient [*Civ. Code § 1577*; *Spurgeon v. Drumheller (1985) 174 Cal. App. 3d 659, 663-664, 220 Cal. Rptr. 195]* . When mutual mistake does provide the grounds for rescission, the buyer has an election whether to rescind or to enforce the contract and have damages caused by the mistake [*see Levy v. Wolff (1956) 46 Cal. 2d 367, 368-369, 294 P.2d 945* (belief that property was subject to valid lease)]. For more detailed discussion of the general requirements applicable to rescission and for additional forms, including a form of judgment for restitution based on rescission, see Ch. 490, *Rescission and Restitution* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral OverviewContracts LawRemediesSpecific PerformanceReal Property LawPurchase & SaleContracts of SaleEnforceabilityFraud & MisrepresentationReal Property LawPurchase & SaleContracts of SaleEnforceabilityMistake

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Chapter 569 VENDOR AND PURCHASER OF REAL PROPERTY
PART II. LEGAL BACKGROUND
A. Actions Between Vendors and Purchasers Generally

50-569 California Forms of Pleading and Practice--Annotated § 569.23

§ 569.23 Protection From Foreclosure for Active Duty Service Members Under California and Federal Law

[1] Purpose and Application of Protections

In 2002, the State Legislature enacted special protections for officers and enlisted members of the National Guard called or ordered into active state or federal service and reservists of the United States Military Reserve who have been called to full-time active service or duty [*see* 2002 Stats., ch. 60, § 1; *Mil. & Vet. Code § 400 et seq.*]. This legislation establishes special protection from foreclosure and other civil liabilities for active service members and reservists who are found by a court to need assistance because of the demands of their military service [*Mil. & Vet. Code § 408*]. The legislation includes many provisions that are similar to those included in the federal Servicemembers Civil Relief Act (SCRA) [*50 U.S.C. App. § 501 et seq.*], which is also discussed below. However, the SCRA has many more provisions than the California law, covering a greater variety of topics.

The California provisions apply to service members on active service or duty since September 11, 2001. However, the protections apply prospectively from June 20, 2002 (date bill was signed into law) [*Mil. & Vet. Code § 409.11*]. Dependents of service members are also entitled to these benefits unless the court finds that the dependents' ability to comply with the terms of the obligation has not been materially impaired by the military service of the person on whom the applicants are dependent [*Mil. & Vet. Code § 409.5*].

[2] Actions for Foreclose on Mortgage or Deed of Trust

These protections apply to obligations secured by a mortgage, trust deed, or other security in the nature of a mortgage on real or personal property owned by a service member at the commencement of the period of the military service and still owned by the service member [*Mil. & Vet. Code § 408(a)*]. In any proceeding commenced in any court during the period of military service to enforce that obligation, arising out of nonpayment of any sum due or out of any other breach of the terms of the mortgage, trust deed, or other security occurring before or during the period of service, the court may, after hearing and in its discretion on its own motion, and must, on application by the service member or some person on the defendant's behalf (1) stay the proceedings for any period as the court deems just, and (2) make any other disposition of the case as may be equitable to conserve the interests of all parties [*Mil. & Vet. Code § 408(b)*]. The court may deny the stay if it finds that the ability of the defendant to comply withthe terms of the obligation is not

materially affected by the military service [*Mil. & Vet. Code § 408(b)*].

No sale, foreclosure, or seizure of property for nonpayment of any sum due under any obligation described above will be valid if made during the period of military service or within three months thereafter, except pursuant to an agreement between the parties or on an order previously granted by the court and a return thereto made and approved by the court [*Mil. & Vet. Code § 408(c)*]. Any person who knowingly makes or causes to be made a sale, foreclosure, or seizure of property in violation of these provisions is guilty of a misdemeanor [*Mil. & Vet. Code § 408(d)*].

[3] Actions to Rescind or Terminate Contract for Purchase

A person may not exercise any right or option to rescind or terminate a contract for the purchase of real or personal property, if the person or the person's assignor has received a deposit or purchase price installment from a person who has entered military service after the date of payment of the deposit or installment. Additionally, the person who holds the contract may not exercise any right or option under that contract to resume possession of the property for nonpayment of any installment due. This prohibition is applicable to any breach of the contract's terms occurring before or during the period of that military service. The only exercise may be action in a court of competent jurisdiction [*Mil. & Vet. Code § 407(a)*]. Violation of these provisions subjects the violator to a fine and potential imprisonment [*Mil. & Vet. Code § 407(c)*].

A court, on the hearing of the action, may order the repayment of prior installments or deposits or any part of these, as a condition of terminating the contract and resuming possession of the property. The court must take this action on application to it by the service member or some person on the service member's behalf. Otherwise, the court may take this action on its own motion and discretion [*Mil. & Vet. Code § 407(b)*]. Alernatively, the court may order a stay of proceedings as the court deems just, unless in the court's opinion, the ability of the defendant to comply with the terms of the contract is not materially affected by reason of the service; or it may make any other disposition of the case as may be equitable to conserve the interests of all parties [*Mil. & Vet. Code § 407(b)*].

The Servicemembers Civil Relief Act (SCRA) [*50 U.S.C. App. § 501 et seq.*] suspends the enforcement of certain civil liabilities of active service members so that they can devote their entire energy to national defense [*50 U.S.C. App. § 502*]. Among the SCRA's protections are many similar to those afforded by the 2002 California legislation, discussed above.

With regard to mortgages and similar instruments, many provisions of the SCRA are substantively the same as provisions in the Military and Veterans Code. These laws give a court authority to allow an eligible service member to postpone making payments on mortgages that were entered before the member began active duty, on property that was owned before that time, and that is still owned by the member, if the member's ability to pay the mortgage is affected by his or her service [*see 50 U.S.C. App. §§ 532, 533, 591*; *Mil. & Vet. Code §§ 407, 408*]. Active service members are allowed to apply to a court for a stay of proceedings to collect real property taxes or assessments [*see 50 U.S.C. App. §§ 561, 591*; *Mil. & Vet. Code § 409.2*], and the court is empowered to cap interest rates at 6 percent on all obligations of active service members (including mortgages) incurred before active duty [*see 50 U.S.C. App. § 527*; *Mil. & Vet. Code § 405*].

The SCRA allows for the stay of many civil legal proceedings if the service member demonstrates that his or her military service has materially affected the member's ability to appear for the court proceedings, including proceedings concerning mortgage foreclosures [*see 50 U.S.C. App. §§ 522, 533*]. The length of the stay is at the court's discretion based on the service member's showing. The SCRA also offers protections against eviction from residential property rented by a service member, as well as lawful termination of leases for members entering active duty [*see 50 U.S.C. App. §§ 531, 535*; *see also* Ch. 333, *Landlord and Tenant: Eviction Actions*].

Forms for relief under the provisions of these Acts are set forth in Chapter 555, *Trust Deeds and Real Property*

Mortgages . These forms include a petition for relief from a mortgage or installment contract for the purchase of real property [*see § 555.138*], an application for a stay of proceedings to collect real property taxes or assessments [*see § 555.139*], and an order staying an action on an obligation secured by a mortgage, trust deed, or similar security [*see § 555.139A*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral OverviewMilitary & Veterans LawServicemembersSoldiers & Sailors Civil Relief ActReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewTax LawState & Local TaxesReal Property TaxCollectionGeneral Overview

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§ 569.24 Vendor's Remedies

[1] Consideration; Election of Remedies

In selecting among available remedies, the seller will consider market conditions, the stance of the parties, and other unique aspects of the transaction, such as special conditions or covenants that are uncertain or otherwise difficult to establish in monetary terms or unenforceable in equity. Generally the choices include damages for breach of contract, declaratory relief, damages for fraud, rescission, or cancellation [*Abrams v. Motter (1970) 3 Cal. App. 3d 828, 847, 83 Cal. Rptr. 855* ; *see* *Evans v. Rancho Royale Hotel Co. (1952) 114 Cal. App. 2d 503, 507, 250 P.2d 283]* . Specific performance may be available to a seller in a unique situation [*see § 569.24[5]*.

Although inconsistent remedies may be pleaded, the seller should beware of actions that amount to an election [*see Williams v. Marshall (1951) 37 Cal. 2d 445, 457, 235 P.2d 372* (rescission and breach of contract)]. For instance, resaleof the property to a third party who has no knowledge of the first contract and pays value, forecloses the possibility of specific performance; and a mutual rescission agreement forecloses an action for damages for fraud [*see Civ. Code § 3395*; *Abrams v. Motter (1970) 3 Cal. App. 3d 828, 836, 847-848, 83 Cal. Rptr. 855* ; *Evans v. Rancho Royale Hotel Co. (1952) 114 Cal. App. 2d 503, 507, 250 P.2d 283]* .

[2] To Remove Clouds on Title Created by Purchaser's Claims

If the contract has been recorded and the buyer refuses to execute a release in recordable form, the seller will probably have to sue for declaratory relief, cancellation, or quiet title to be able to convey clear title to anyone else [*see Civ. Code §§ 886.020* (duty to execute release), 886.030(a) (expiration of rights under recorded contract) discussed in *§ 569.18* and *§ 569.17*, respectively; *see also § 569.24[7][c]*]. Each of those three remedies has disadvantages and is discussed in more detail in Ch. 107, *Cancellation of Instruments* , Ch. 182, *Declaratory Relief* , and Ch. 482, *Quieting Title* , respectively. Cancellation operates only on a void or voidable instrument, and is thus inconsistent with damages for breach of contract [*Millar v. James (1967) 254 Cal. App. 2d 530, 532-534, 62 Cal. Rptr. 335]* . While quiet title may be used to establish plaintiff's superior title as against only one adverse claim, to be successful a plaintiff cannot establish merely the weakness in defendant's title, but must prove his or her own title, even if the defendant's default has been taken [*Code Civ. Proc. §§ 761.020(c), 762.010, 762.060(c), 764.010*; *see* *Winter v. Rice (1986) 176 Cal. App. 3d*

679, 683, 222 Cal. Rptr. 340 (complaint disclosing defect in plaintiff's title stated cause of action for cancellation, but not for quiet title)]. In addition, quiet title is not technically available to a plaintiff who does not have legal title but only equitable title; nevertheless, the technicalities are occasionally overlooked to provide rescission, cancellation and quiet title to an injured seller in the same action [*see Nevarez v. Nevarez (1962) 202 Cal. App. 2d 596, 600, 21 Cal. Rptr. 70* (quiet title is not available to plaintiff who does not have legal title; proper remedy is declaration that defendant holds title as constructive trustee for plaintiff); *Millar v. James (1967) 254 Cal. App. 2d 530, 531-532, 62 Cal. Rptr. 335* (transaction rescinded, deed cancelled, and title quieted against holders of deed of trust)]. Declaratory relief could be sought along with damages for breach of contract to establish that the purchaser no longer has any rights under the contract, but reliance on such a judgment to make plaintiff's title marketable seems prudent only if one knows title insurance will be available on that basis.

Thus, if the contract has been recorded and the purchaser refuses to execute a release, a vendor seeking damages for breach of contract will also seek to quiet title, whereas if the underlying transaction is rescinded, the vendor will seek cancellation. Similarly, if rescission of the contract is sought after the deed has been recorded, cancellation or a judgment requiring reconveyance will be necessary.

[3] To Regain Possession

If a buyer has taken possession and refuses to vacate after default or rescission, the seller can regain possession in a quiet title action or by an action for ejectment [*Civ. Code § 3375* (ejectment); *Code Civ. Proc. §§ 760.020, 761.020* (quiet title); *South Shore Land Co. v. Petersen (1964) 226 Cal. App. 2d 725, 741, 38 Cal. Rptr. 392* (quiet title); *see Paap v. Von Helmholt (1960) 185 Cal. App. 2d 823, 828-829, 8 Cal. Rptr. 568* (both)]. The primary difference between the two is that ejectment is based on the right to possession, while quiet title requires plaintiff to have and prove his or her legal title [*Code Civ. Proc. § 764.010*]. Nevertheless, title may become relevant in an ejectment action if necessary to determine the right to possession [*Whittaker v. Otto (1961) 188 Cal. App. 2d 619, 626, 10 Cal. Rptr. 689* (ejectment); *see § 569.24[2]*]. For more detailed discussion and forms for seeking these remedies, see Ch. 241, *Ejectment* , and Ch. 482, *Quieting Title* , respectively.

[4] Vendor's Damages for Breach of Contract

A seller considering suit for damages for breach of contract should first take note of the considerations discussed in *§ 569.21*. Because the statutory measure of damages for breach of a contract to purchase real property is the difference, if any, between the contract price and the value of the property to the seller, which is generally the market value, on the date of breach, plus consequential damages and interest, the seller won't have any actual damages for breach of contract in a stable or rising market [*Civ. Code § 3307*; *Royer v. Carter (1951) 37 Cal. 2d 544, 550, 233 P.2d 539]* . In addition, to obtain consequential damages incurred after breach, resale must be made with reasonable diligence [*Spurgeon v. Drumheller (1985) 174 Cal. App. 3d 659, 665-666, 220 Cal. Rptr. 195* (seller took property off market because personal reasons no longer necessitated sale); *Sutter v. Madrin (1969) 269 Cal. App. 2d 161, 169, 74 Cal. Rptr. 627]* . If the contract called for the seller to take back a note and deed of trust, the contract price will have to be discounted to reflect its cash equivalent. That discounting will erode, and may eliminate, any difference between the contract price and market value at the time of breach [*Abrams v. Motter (1970) 3 Cal. App. 3d 828, 841, 83 Cal. Rptr. 855]* . Furthermore, a seller who has actual damages based on market value at the time of breach but resells at a profit before trial, cannot recover damages for breach of contract [*Freedman v. St. Matthias Parish (1951) 37 Cal. 2d 16, 19-20, 23, 230 P.2d 629* ; *Smith v. Mady (1983) 146 Cal. App. 3d 129, 133, 194 Cal. Rptr. 42*)]. Thus, absent significant consequential damages, a seller can recover damages for breach of contract only in a falling market. Even then, the purchaser's liability is fixed as of the date of breach, and losses after that time due to continuing market erosion are not recoverable [*Royer v. Carter (1951) 37 Cal. 2d 544, 548-550, 233 P.2d 539*]. For a form of complaint for use by a seller seeking damages for breach of contract, see *§ 569.161*.

[5] Vendor's Right to Specific Performance

There is a presumption that the breach of an agreement to transfer real property cannot be adequately relieved by monetary damages. In the case of a single-family dwelling that the buyer intends to occupy, the presumption is conclusive. In all other cases, the presumption affects the burden of proof [*Civ. Code § 3387*]. Thus, if a single-family dwelling is not involved, the buyer will have the burden of proving that monetary damages provide adequate relief [*see Civ. Code § 3387*; *Evid. Code §§ 601, 606*; *see also Henderson v. Fisher (1965) 236 Cal. App. 2d 468, 473, 46 Cal. Rptr. 173* (seller's burden of proof)].

Civ. Code § 3307, which specifies the detriment caused by breach of a real property contract and allows a seller to recover consequential damages and interest, does not eliminate the seller's ability to seek specific performance. The seller has a choice of remedies, and may pursue damages or specific performance [*BD Inns v. Pooley (1990) 218 Cal. App. 3d 289, 295-296, 266 Cal. Rptr. 815]* .

Adequacy of consideration and the justness and reasonableness of the contract price, elements not required to be proven in an action for damages, must be shown in a specific performance action [*Civ. Code § 3391(1), (2)*]. Adequacy of consideration is determined as of the inception of the contract, or, in the case of an option, at the time the option was given [*O'Connell v. Lampe (1929) 206 Cal. 282, 285, 274 P. 336* (option; purchaser plaintiff); *Schwartz v. Shapiro (1964) 229 Cal. App. 2d 238, 255, 40 Cal. Rptr. 189* ; *but see Pasteur Realty Corp. v. La Fleur (1957) 154 Cal. App. 2d 5, 7, 315 P.2d 374* (dicta, trial court denied specific performance because of lapse of time and decreased value at time of trial)]. A vendor seeking specific performance must have performed all conditions precedent to be performed on his or her part and will have to hold the property off the market during the pendency of the action to be ready to perform [*Civ. Code §§ 3392, 3394*; *Abrams v. Motter (1970) 3 Cal. App. 3d 828, 847, 83 Cal. Rptr. 855]* . Any defect in title will prevent a vendor from obtaining specific performance [*Schmidt v. Callero (1950) 97 Cal. App. 2d 582, 589, 218 P.2d 80]* . Specific performance also requires more certainty of contract than does an action for damages [*Store Properties, Inc. v. Neal (1945) 72 Cal. App. 2d 112, 116, 164 P.2d 38 , disapproved on other grounds, Sterling v. Taylor (2007) 40 Cal. 4th 757, 770* ; *but see Schomaker v. Osborne (1967) 250 Cal. App. 2d 887, 893, 58 Cal. Rptr. 827* (court fixed remaining terms since principal terms were defined)].

A vendor's right to specific performance is not foreclosed by a liquidated damage provision [*Civ. Code § 1680*].

[6] Vendor's Retention of Deposit

[a] Under Liquidated Damages Clause

[i] Residential Property

A valid liquidated damage clause will prevent a seller from seeking damages for breach of contract but will not prevent a specific performance action [*Civ. Code § 1680*]. The rules governing the validity of a liquidated damages clause depend on the nature of the property that is the subject of the contract. If the contract involves a dwelling containing one to four residential units, that (or a unit in which) the buyer intends to occupy as his or her residence, a liquidated damages clause that provides that all or any part of a payment made by the buyer shall constitute liquidated damages if the buyer does not complete the purchase of the property, may be valid to the extent that payment is actually made in the form of cash or check, including a postdated check [*Civ. Code § 1675(a), (b)*]. The buyer's intent to reside on the premises is determined as of the time the contract was made [*Civ. Code § 1675(a)(2)*].

To be valid, the liquidated damages provision must be separately signed or initialed by each party to the contract. If it is included in a printed contract, it must also be set out either in at least 10-point bold type or in contrasting red print in at least 8-point bold type [*Civ. Code §§ 1675(b), 1677*]. If the amount actually paid pursuant to the liquidated damages provision does not exceed 3 percent of the purchase price, the provision is valid to the extent that payment is actually made unless the buyer establishes that the amount is unreasonable as liquidated damages [*Civ. Code § 1675(b), (c)*].

Conversely, if the amount actually paid pursuant to the liquidated damages provision exceeds 3 percent of the purchase price, the provision is invalid unless the party seeking to uphold the provision establishes that the amount actually paid is reasonable as liquidated damages [*Civ. Code § 1675(b), (d)*]. For these purposes, reasonableness of the amount paid is determined by taking into account (1) the circumstances existing at the time the contract was made, and (2) the price and other terms and circumstances of any subsequent sale or contract to sell the same property if the sale or contract is made within six months of the buyer's default [*Civ. Code § 1675(e)*].

Special provisions apply to the initial sale of newly constructed attached residential condominium units [*see Civ. Code § 783*] located within a structure of 10 or more residential condominium units [*Civ. Code § 1675(f)(1)*; *see Civ. Code § 1675(f)(6)* ("structure" defined)]. If the amount actually paid to the seller in accordance with the liquidated damages provision exceeds 3 percent of the purchase price of the residential condominium unit, and the buyer then defaults, the seller must perform an accounting of its costs and revenues related to and fairly allocable to the construction and sale of the unit within 60 calendar days after the final close of escrow of the sale of the unit [*Civ. Code § 1675(f)(1)(A)*].The accounting must include any and all costs and revenues related to the construction and sale of the residential property and any delay caused by buyer's default. The seller must make reasonable efforts to mitigate any damages arising from the default, and the seller must refund to the buyer any amounts previously retained as liquidated damages in excess of the greater of either 3 percent of the originally agreed-on purchase price or the amount of the seller's losses resulting from the buyer's default, as calculated by the accounting [*Civ. Code § 1675(f)(1)(B)*]. The refund must be sent to the buyer's last known address within 90 days after the final close of escrow of the sale or lease of all the residential condominium units within the structure [*Civ. Code § 1675(f)(2)*]. If the amount retained by the seller after the accounting does not exceed 3 percent of the purchase price, the amount is valid unless the buyer establishes that the amount is unreasonable as liquidated damages pursuant to *Civ. Code § 1675(e)* [*Civ. Code § 1675(f)(3)*; *see Civ. Code § 1675(f)(4)* (*Civ. Code § 1675(d)* does not apply regarding reasonableness)]. If a "new qualified buyer" has entered into a contract to purchase the residential property, the seller must perform the accounting within 60 calendar days after the new buyer entered the contract to purchase the unit [*Civ. Code § 1675(f)(5)*; *see Civ. Code § 1675(f)(7)* ("new qualified buyer" defined)].

Until July 1, 2014, special provision is made for enhanced liquidated damages to be allowed to sellers in cases involving pre-completion sales of units in a structure of 20 or more residential condominium units, standing over eight stories high, that is high-density infill development as defined in *Pub. Res. Code § 21159.24(a)(10)* and is located in a city, county, or city and county with a population density of 1,900 residents per square mile or greater as evidenced by the 2000 federal census. When the sale price of a unit exceeds $1 million and the buyer defaults, liquidated damages of 6 percent of the purchase price will be presumed valid [*Civ. Code § 1675(g), (h)*]. Except regarding the amount of liquidated damages and the conditions prescribed for this case, the rules in this case are essentially the same as in a case subject to *Civ. Code § 1675(f)*, described above.

If more than one payment made by the buyer is to constitute liquidated damages, the amount of any payment after the first is valid as liquidated damages only if (1) the total of all payments is valid under the requirements of *Civ. Code § 1675*, and *(2)* a separate liquidated damages provision satisfying the requirements of *Civ. Code § 1677* is separately signed or initialed by each party for each subsequent payment [*Civ. Code §§ 1675(b), 1678*].

These requirements do not apply to installment contracts as defined in *Civ. Code § 2985(a)* (contracts that do not require conveyance within one year from date contract was formed), which are discussed in *§ 569.60* et seq. [*Civ. Code § 1681*].

[ii] Nonresidential Property

If a contract for the sale of real property does not involve owner-occupied residential property as defined by *Civ. Code § 1675(a)*, discussed in *§ 569.24[6][a][i]*, a provision liquidating the damages to the seller if the buyer fails to complete the purchase of the property is valid, subject to the following two conditions [*Civ. Code § 1676*]:

- The liquidated damages provision is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made [*Civ. Code § 1671(b)*; for further discussion of *Civ. Code § 1671(b)*, see *Ch. 177, Damages, § 177.190* et seq.].

- The liquidated damages provision is invalid unless it is separately signed or initialed by each party to the contract and, if it is included in a printed contract, unless it is set out in at least 10-point bold type or in contrasting red print in at least 8-point bold type [*Civ. Code § 1677*].

[b] Absent Liquidated Damages Clause

Although most standard form deposit receipts contain liquidated damage provisions, in some cases a deposit will be made pursuant to some other provision or pursuant to a provision that fails as a liquidated damage provision. If the deposit is actually consideration for part of the agreement, such as an option, the seller may, of course, retain it. However, mere recitation in the agreement that the deposit is consideration for the execution of the agreement is insufficient to establish that the deposit is actually meaningful separate consideration [*Caplan v. Schroeder (1961) 56 Cal. 2d 515, 519, 15 Cal. Rptr. 145, 364 P.2d 321* ; *Rodriguez v. Barnett (1959) 52 Cal. 2d 154, 160, 338 P.2d 907* ; *see Eddy v. Gallaway (1970) 11 Cal. App. 3d 185, 190-191, 89 Cal. Rptr. 491* (deposit treated as separate consideration for execution of agreement because parties treated it as option)]. Even if the deposit is not separate consideration for execution of the agreement, the seller is entitled to retain it on the buyer's breach to apply to his or her actual damages [*Royer v. Carter (1951) 37 Cal. 2d 544, 547, 233 P.2d 539]* .

If the contract fails or is rescinded due to a failure of condition, such as the buyer's good faith dissatisfaction with a subdivision map, the seller is not entitled to keep any portion of the deposit [*Rodriguez v. Barnett (1959) 52 Cal. 2d 154, 160-161, 338 P.2d 907]* . The seller is liable to return to the defaulting purchaser any excess of the deposit over actual damages, even if the purchaser's breach is willful [*Freedman v. St. Matthias Parish (1951) 37 Cal. 2d 16, 20-23, 230 P.2d 629]* .

[7] Vendor's Right to Rescission

[a] Grounds

The major grounds for rescission are [*Civ. Code § 1689(b)(1)-(5)*]:

- That consent to the contract was given by mistake or obtained through fraud, duress, or undue influence [*see Civ. Code §§ 1569* (defining "duress"), 1571-1574 (defining "fraud"), 1575 (defining "undue influence"), 1576, 1577 (defining "mistake"); *Conlan v. Sullivan (1895) 110 Cal. 624, 626-627, 42 P. 1081* (vendor's mistake, purchaser's fraud)];

- That the consideration for the obligation of the rescinding party failed, in whole or in part, through the fault of the other party;

- That the consideration for the obligation of the rescinding party became entirely void from any cause, or failed in a material respect from anycause before it was rendered; or

- That the contract is unlawful for causes which do not appear in its terms or conditions, and the parties are not equally at fault.

For further discussion of these and other grounds for rescission, see Ch. 215, *Duress, Menace, Fraud, Undue Influence,*

and Mistake , and Ch. 490, *Rescission and Restitution* .

Failure of a condition precedent to be performed by the buyer is a failure of consideration providing the seller with grounds for rescission. If the condition is to be performed by a specified date, strict performance is not required, but a seller's notice of rescission given after a reasonable time will be upheld [*Fowler v. Ross (1983) 142 Cal. App. 3d 472, 478-480, 191 Cal. Rptr. 183* (no time essence clause; notice of rescission given 52 days after date verification of financing was required); *see Williams Plumbing Co. v. Sinsley (1975) 53 Cal. App. 3d 1027, 1031-1035, 126 Cal. Rptr. 345* (time essence clause; purchaser who tendered portion of deposit three days late still entitled to specific performance)].

A seller may have a right to rescind if he or she has been misled as to the value of his or her property by the buyer. This right will arise if (1) the purchaser makes a positive statement about the value of the property with intent to deceive, (2) circumstances indicate that the vendor relies on the purchaser's statement and superior knowledge, and (3) the vendor is either pursuaded not to make an independent investigation or is not reasonably situated so as to be able to do so [*Palm v. Smither (1942) 52 Cal. App. 2d 500, 505, 126 P.2d 428]* . A vendor has grounds for rescission if a managing partner or co-owner misrepresents to the vendor of a commercial property that there are operating losses, or if a purchaser misrepresents the value of the collateral, other than the property sold, taken as consideration by the vendor or fails to provide the promised collateral [*see Zeller v. Milligan (1925) 71 Cal. App. 617, 623-625, 236 P. 349* (sale of one-half interest in hotel after co-owner misrepresented operating losses; misrepresentation as to value of note and deed of trust given is consideration); *Frankish v. Federal Mortg. Co. (1939) 30 Cal. App. 2d 700, 713-714, 87 P.2d 90* (promised security never given)]. Other examples of grounds for rescission are discussed in *§ 569.24[8]*.

In addition, a vendor can rescind a sale to the broker who was employed to find a buyer for the property and who purchased the property without disclosing to the vendor that he or she was the purchaser. Because the broker is a fiduciary, such a sale is presumed to be without sufficient consideration, and the burden is on the broker to show otherwise [*Smith v. Zak (1971) 20 Cal. App. 3d 785, 792-793, 98 Cal. Rptr. 242* ; *Slusher v. Buckley (1959) 174 Cal. App. 2d 324, 331, 344 P.2d 905* (rule applied when agent's spouse was purchaser)]. If the broker, or a person or entity related to or affiliated with the broker, purchases the property, as an alternative to rescission, the vendor can recover any secret profits made by the broker [*Adams v. Herman (1951) 106 Cal. App. 2d 92, 99-102, 234 P.2d 695]* . For more detailed discussion of broker liability and forms of complaint for accounting and to compel reconveyance, see Ch. 103, *Brokers* . Other examples of broker fraud are discussed in *§ 569.24[8]*.

Under *Civ. Code § 1692*, consequential damages may be awarded in incident to rescission. In the context of real estate contracts, this will commonly include the value of the use of the property during the time it was in defendant's possession [*Millar v. James (1967) 254 Cal. App. 2d 530, 532-533, 62 Cal. Rptr. 335]* . Punitive damages may be awarded incident to rescission based on tortious conduct [*Mahon v. Berg (1968) 267 Cal. App. 2d 588, 589-590, 73 Cal. Rptr. 356* ; *Millar v. James (1967) 254 Cal. App. 2d 530, 533, 62 Cal. Rptr. 335]* .

[b] Procedure

Rescission requires the return to the other party of any consideration he or she has paid [*Civ. Code § 1691*]. A seller of real property has to return payments and the value of any improvements made by the purchaser, less credit for the fair rental value for any time the purchaser was in possession [*Kent v. Clark (1942) 20 Cal. 2d 779, 784-786, 128 P.2d 868]* . Rescission should be instituted as soon as grounds are discovered because it is subject to laches and cannot be granted if the delay has prejudiced the other party [*Civ. Code §§ 1691, 1693*; *Leeper v. Beltrami (1959) 53 Cal. 2d 195, 214-215, 1 Cal. Rptr. 12, 347 P.2d 12* (complaint demurrable for failure to allege prompt rescission)]. If rescission is sought after the deed has been given, it should be coupled with an action to cancel the deed [*see Civ. Code § 3412* (cancellation of void or voidable instrument) and Ch. 107, *Cancellation of Instruments*; *see also § 569.162*]. In addition, if a business or rental property is involved, or for some other reason counsel anticipates difficulty in determining the exact amount of restitution required, a cause of action for an accounting should be added to determine the amount of

profits due from the purchaser to the vendor [*see Zeller v. Milligan (1925) 71 Cal. App. 617, 623-625, 236 P. 349* (rescission of sale of half interest in hotel); for discussion of the procedural aspects of accounting and for forms relating to accounting, *see* Ch. 7, *Accounting, Action for*].

Rescission is inconsistent with an action for damages for fraud or for breach of contract, both of which rest on the continuance of the contract. Thus, a completed or effective rescission bars an action for damages for fraud or for breach of contract [*Civ. Code § 1688*; *Sharabianlou v. Karp (2010) 181 Cal. App. 4th 1133, 1146, 105 Cal. Rptr. 3d 300* (award of damages in action for rescission improperly compensated sellers for benefit of bargain that full performance would have brought); *Paularena v. Superior Court (1965) 231 Cal. App. 2d 906, 915, 42 Cal. Rptr. 366* ; *Evans v. Rancho Royale Hotel Co. (1952) 114 Cal. App. 2d 503, 507, 250 P.2d 283]* . A party seeking damages based on rescission may alternatively seek damages based on breach of contract in the event rescission has not been effected. When such inconsistent remedies are pleaded, the plaintiff cannot be forced to an election until after trial [*Williams v. Marshall(1951) 37 Cal. 2d 445, 457, 235 P.2d 372]* . Nevertheless, because a complaint for rescission is a continuing offer of rescission, the other party may accept the offer at any time [*see Paularena v. Superior Court (1965) 231 Cal. App. 2d 906, 910, 915, 42 Cal. Rptr. 366]* . If the court in a rescission action finds the contract has not been rescinded, other relief may be granted [*Civ. Code § 1692*]. A vendor's quiet title action does not indicate an election to rescind the contract [*Honey v. Henry's Franchise Leasing Corp. (1966) 64 Cal. 2d 801, 803, 52 Cal. Rptr. 18, 415 P.2d 833]* . However, quiet title and rescission are not inconsistent remedies and may be sought in the same action [*see Seeger v. Odell (1941) 18 Cal. 2d 409, 412-414, 115 P.2d 977]* .

Because a rescission action seeking to recover something other than the consideration paid was an equitable action before the 1961 amendments to the statutes governing rescission, it is an equitable action today. Thus, a vendor was not entitled to a jury trial on a cause of action for rescission against the buyer where the recovery sought by the vendor (money judgment) consisted entirely of something other than the consideration originally paid by vendor (the parcel of land). The 1961 changes to the law of rescission did not give a rescinding plaintiff the right to a jury trial whenever that plaintiff seeks only a monetary recovery [*NMSBPCSLDHB v. County of Fresno (2007) 152 Cal. App. 4th 954, 962-963, 61 Cal. Rptr. 3d 425]* .

[c] Cancellation and Rescission Distinguished

Rescission terminates the contract or obligation while cancellation operates on the instrument. Rescission assumes the existence of a valid contract, while cancellation is only available as to an instrument that is void or voidable [*Civ. Code §§ 1688* (rescission), 3412 (cancellation); *Chas. Brown & Sons v. White Lunch Co. (1928) 92 Cal. App. 457, 461-462, 268 P. 490]* . Cancellation is subject to the additional requirement that there be a reasonable basis for apprehension that if the instrument is left outstanding, it may cause serious injury to a person against whom it is void or voidable. Thus, an instrument that is void on its face, or on the face of another instrument which is necessary to its use in evidence, cannot be the subject of an action for cancellation [*Civ. Code § 3413*]. A deed or a recorded contract for the transfer of property can first be rescinded and then cancelled [*Millar v. James (1967) 254 Cal. App. 2d 530, 532-534, 62 Cal. Rptr. 335* (deed); *Kejr v. Construction Engineers, Inc. (1952) 111 Cal. App. 2d 817, 819, 245 P.2d 21* (recorded timber sale contract)]. Cancellation terminates so much of the contract as remains unperformed and operates as of the time of cancellation; rescission operates to restore the parties to the status quo as of the time the contract was formed [*Mamula v. McCulloch (1969) 275 Cal. App. 2d 184, 197, 79 Cal. Rptr. 571]* . Still, damages may be awarded incident to both cancellation and rescission [*Oswald v. City of El Centro (1930) 211 Cal. 45, 52, 292 P. 1073* (cancellation of lease); *Millar v. James (1967) 254 Cal. App. 2d 530, 532-533, 62 Cal. Rptr. 335* (both)].

Both rescission of contracts and cancellation of voidable instruments require restoration by plaintiff of anything of value he or she has received from the defendant; cancellation of a void instrument, such as a deed of trust one was tricked into signing, does not [*Fleming v. Kagan (1961) 189 Cal. App. 2d 791, 796-799, 11 Cal. Rptr. 737]* . Partial cancellation is available, but, absent a showing that certain provisions are severable, partial rescission is not [*Civ. Code § 3414*; *IMO Development Corp. v. Dow Corning Corp. (1982) 135 Cal. App. 3d 451, 457-458, 185 Cal. Rptr. 341* ; *Pitts v.*

Highland Construction Co. (1953) 115 Cal. App. 2d 206, 212-213, 252 P.2d 14 (amount of note reduced in action to cancel note and deed of trust)]. Both rescission and cancellation are subject to laches [*Leeper v. Beltrami (1959) 53 Cal. 2d 195, 214-215, 1 Cal. Rptr. 12, 347 P.2d 12]* .

[8] Vendor's Damages for Fraud

If a vendor has sufficient grounds to recover damages for fraud, he or she will also have grounds for rescission, so counsel will want to carefully evaluate whether rescission or damages for fraud will be more advantageous under the facts of the case [*Civ. Code § 1689(b)(1)*]. For discussion of the relief available in a rescission action as well as examples of fraud allowing rescission, see *§ 569.24[7]*. Vendor's damages for fraud generally arise out of four types of misrepresentations:

- Misrepresentations as to the value of the vendor's property or the extent of the vendor's interest in the property [*see Palm v. Smither (1942) 52 Cal. App. 2d 500, 505, 126 P.2d 428* , discussed in *§ 569.24[7][a]* (value of property); *Seeger v. Odell (1941) 18 Cal. 2d 409, 414-417, 115 P.2d 977* (extent of interest)];

- Misrepresentations as to the value of the consideration given in exchange by the purchaser [*see Schoenberg v. Romike Properties (1967) 251 Cal. App. 2d 154, 156-157, 59 Cal. Rptr. 359* ; *Salvati v. Cusolito (1950) 98 Cal. App. 2d 582, 584-585, 220 P.2d 800]* ;

- Trickery in obtaining the vendor's signature on the deed [*see Channell v. Anthony (1976) 58 Cal. App. 3d 290, 298-299, 129 Cal. Rptr. 704]* ; and

- Misrepresentations in connection with the vendor's agreement to subordinate a deed of trust taken back as partial payment. This often involves the contention that the purchaser promised to use the proceeds of the senior loan solely for improvement of the property without any intention of performing that promise. Such a contention is very difficult to prove [*see Tenzer v. Superscope, Inc. (1985) 39 Cal. 3d 18, 30-31, 216Cal. Rptr. 130, 702 P.2d 212* (something more than nonperformance is required to prove defendant's intent not to perform the promise); *Rambo v. Blain (1968) 263 Cal. App. 2d 158, 163-165, 69 Cal. Rptr. 132* (senior lender joined as conspirator)].

A purchaser has a duty to disclose material facts only under certain limited circumstances, including (1) situations in which a fiduciary or confidential relationship exists, (2) situations in which a partial or misleading disclosure is made, and (3) situations in which the purchaser knows that the vendor would reasonably expect a disclosure to be made [*Nussbaum v. Weeks (1989) 214 Cal. App. 3d 1589, 1600-1601, 263 Cal. Rptr. 360]* .

The primary measure of a defrauded seller's damages is the difference between actual value of what he or she parted with and actual value of what he or she received, referred to as "out-of-pocket" damages [*Civ. Code § 3343(a)*]. The seller may not base his or her damages on the former "benefit-of-the-bargain"rule, which allowed recovery of the difference between the actual value of the property and the value as represented [*Civ. Code § 3343(b)(1)*].

Even if no out-of-pocket damages have been sustained, a seller may recover damages (1) for amounts actually and reasonably expended in reliance on the fraud, (2) to compensate the seller for loss of use and enjoyment of the property proximately caused by the fraud, and (3) to compensate the seller for profits or other gains that might reasonably have been earned by use of the property had it been retained [*Civ. Code § 3343(a)(1)-(3)*; *Stout v. Turney (1978) 22 Cal. 3d 718, 723-725, 727-730, 150 Cal. Rptr. 637, 586 P.2d 1228* (purchaser plaintiff)]. Damages of the types numbered (2) and (3) are only available if, under the terms of the particular transaction, the seller retained some right to use the property or participate in profits from the property after conveyance to the defendant. Otherwise, once the seller has parted with title and waived the right to rescission, he or she no longer has any right to use the property or to claim

profits from it [*Channell v. Anthony (1976) 58 Cal. App. 3d 290, 315-318, 129 Cal. Rptr. 704]* . If the transaction was not structured so as to entitle the vendor to damages for lost use and profits under *Civ. Code § 3343(a)(2), (3),* rescission may provide a better remedy for the particular vendor. The *Civ. Code § 3343* measure of damages is discussed in more detail in Ch. 269, *Fraud and Deceit* .

A seller of real property may also be the victim of fraud practiced by his or her broker, as well as the purchaser, for instance if the broker failed to disclose a higher offer, and after a sale based on a lower offer, acted as broker for the purchaser to resell to the offeror of the undisclosed higher offer. In such a case, because of the broker's fiduciary duty, the seller's damages are not governed by *Civ. Code § 3343*, but by the broader measures of *Civ. Code §§ 1709* and *3333* [*Lewis v. Upton (1984) 151 Cal. App. 3d 232, 234-237, 198 Cal. Rptr. 494* (punitive damages also recoverable); *Simone v. McKee (1956) 142 Cal. App. 2d 307, 315, 298 P.2d 667* (damages awarded equal to difference between the first and second sale prices)]. For a form of complaint against the broker and the purchaser for damages for fraud by taking secret profits on resale, see Ch. 269, *Fraud and Deceit* . Broker fraud might take the form of misrepresentations concerning the type or value of consideration or negligent misrepresentations by passing on the purchaser's misrepresentations without adequate investigation [*see, e.g.,* *Hartzell v. Myall (1953) 115 Cal. App. 2d 670, 676-677, 252 P.2d 676* (transaction netted seller less consideration for equity than promised; note not worth face value; punitive damages awarded); *Schoenberg v. Romike Properties (1967) 251 Cal. App. 2d 154, 162, 59 Cal. Rptr. 359* (in addition to purchasers' liability, broker who failed to investigate purchasers' misrepresentation as to value of security is liable for constructive fraud); *Banville v. Schmidt (1974) 37 Cal. App. 3d 92, 95, 98-99, 112 Cal. Rptr. 126* (in addition to liability of purchaser for fraud, broker is liable for negligent misrepresentations to vendor that property securing note and deed of trust taken by vendors was worth much more than amount due on note and that maker of note was financially stable)].

For more detailed discussion of broker liability and forms of complaint for accounting and to compel reconveyance, see Ch. 103, *Brokers* .

[9] Action for Unlawful "Rent Skimming"

Civ. Code § 890 et seq. establishes civil and criminal liability for rent skimming, which is essentially a purchasing landlord's use of rent revenue from residential property during the first year after acquiring that property without first applying the revenue or an equivalent amount to payments due on all encumbrances on that property [*see Civ. Code § 890(a)*].

The seller of residential real property who holds a lien on the property securing all or part of the purchase price may bring an action against any person who has engaged in rent skimming with respect to that property, in which he or she is entitled to recover actual damages, any appropriate equitable relief, attorney's fees, and costs. The court may also award exemplary damages in an amount not less than three times the actual damages under specified circumstances [*Civ. Code § 891(a)*]. If the seller reacquires the property, he or she may request the court for an order declaring that the property is not encumbered by any lien that is or has the effect of being a judgment lien against the person who engaged in rent skimming, as long as the lien in question is not related to improvement of the property and does not represent security for a loan in good faith without knowledge of facts constituting a violation of *Civ. Code § 890 et seq.* [*Civ. Code § 891(b)*]. For further discussion and forms relating to this type of action, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesElection of RemediesContracts LawRemediesLiquidated DamagesContracts LawRemediesRescission & RedhibitionGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsEjectment

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§ 569.25 Declaratory Relief

Declaratory relief is available to both vendors and purchasers to determine their respective rights under a contract [*Code Civ. Proc. § 1060*]. Questions relating to the formation of a contract, its validity, its construction and effect, excuses for nonperformance, and termination are proper subjects for declaratory relief [*Fowler v. Ross (1983) 142 Cal. App. 3d 472, 478, 191 Cal. Rptr. 183* (vendor seeking declaration that contract has been rescinded); *see Holiday Inns of America v. Knight (1969) 70 Cal. 2d 327, 328, 74 Cal. Rptr. 722, 450 P.2d 42* (purchaser/optionee seeking declaration that contract is still in force despite late tender); *Roberts v. Parker (1958) 165 Cal. App. 2d 140, 141, 331 P.2d 447* (determining proration of taxes and assessments, date for performance); *see § 569.169*]. A declaratory relief action has the advantage of being entitled to priority in trial setting; however priority is not available, absent a showing that a speedy trial is necessary, if other relief is sought in addition to declaratory relief [*Code Civ. Proc. § 1062.3*]. For detailed discussion and forms of declaratory relief, see Ch. 182, *Declaratory Relief* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral Overview

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§ 569.26 Reformation

Both vendors and purchasers can have a contract or other instrument reformed, on grounds of fraud, mutual or unilateral mistake, to conform to the true intention of the parties. In the case of unilateral mistake, reformation is available only if the defendant knew of or suspected the plaintiff's mistake at the time it was made. In all cases relief is limited in that it can only be granted without prejudice to rights acquired by third parties in good faith and for value [*Civ. Code §§ 3399-3401*]. A contract may first be reformed and then specifically enforced [*Civ. Code § 3402*]. Because the purpose of reformation is to conform the contract or instrument to the intention of the parties, it is only available when there is in fact a common intention shared by both parties [*Lemoge Electric v. County of San Mateo (1956) 46 Cal. 2d 659, 663-664, 297 P.2d 638]* . Thus, reformation may be based on misrepresentations that a writing conforms to the intention of the parties, but may not be based on misrepresentations that induced the contract, because in the latter case the parties would not have had a common intention [*Lane v. Davis (1959) 172 Cal. App. 2d 302, 307-308, 342 P.2d 267* ; *California Pac. Title Co. v. Moore (1964) 229 Cal. App. 2d 114, 116, 40 Cal. Rptr. 61* (error in drafting deed)]. For discussion and forms relating to reformation, see Ch. 488, *Reformation of Instruments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesReformationReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityFraud & MisrepresentationReal Property LawPurchase & SaleContracts of SaleEnforceabilityIllegalityReal Property LawPurchase & SaleContracts of SaleEnforceabilityMistake

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50-569 California Forms of Pleading and Practice--Annotated § 569.27

§ 569.27 Options and Preemptive Rights

An option, when supported by consideration, is a contract by which an owner gives another the exclusive right to accept or reject a present offer for the sale of his or her property for a stipulated price within a specified time. An option contract is irrevocable by the optionor (owner), and unless the agreement provides to the contrary, it is generally assignable by the optionee [*County of San Diego v. Miller (1975) 13 Cal. 3d 684, 688, 119 Cal. Rptr. 491, 532 P.2d 139]* . The option becomes a contract of sale binding on both parties only on acceptance, or exercise, of the option by the optionee [*Rollins v. Stokes (1981) 123 Cal. App. 3d 701, 709, 176 Cal. Rptr. 835]* . For cases involving disputes over whether an option has been effectively exercised, see *§ 569.165[8][c]*.

Once the option is exercised, it relates back to the time the option was given, and cuts off intervening interests if the holders of those interests had notice of the existence of the option. Notice can be provided either by recording of the option or from the optionee's possession of the premises [*Claremont Terrace Homeowners' Assn. v. United States (1983) 146 Cal. App. 3d 398, 407-409, 194 Cal. Rptr. 216* (intervening federal tax lien defeated)]. However, evidence that an optionee has obtained title to property that is the subject of the option is not sufficient to extinguish an intervening lien when there is no evidence that the optionee's title was obtained pursuant to the option. For an optionee to have the benefit of the relation back rule, the optionee must have been able to compel specific performance of the option. If an optionee did not have the right to specific performance of the option, but nevertheless obtains title to the property outside the purview of the option, the optionee has no greater priority among competing claims to the property than any other purchaser of the property [*Wachovia Bank v. Lifetime Industries, Inc. (2006) 145 Cal. App. 4th 1039, 1042, 52 Cal. Rptr. 3d 168]* .

The California Supreme Court concluded that, although an agreement was titled "Real Estate Purchase Contract," the label was not dispositive. Rather, the Court looked through the agreement's form to its substance, and determined that the agreement contained the classic features of an option. First, the agreement obliged the property owner to hold open an offer to sell the parcel at a fixed price for three years. Second, the optionee had the power to accept the offer by satisfying or waiving the contingencies and paying the balance of the purchase price; however, because of an escape clause, the optionee was not obligated to do anything. The relevant term provided, "It is expressly understood that [optionee] may, at [his] absolute and sole discretion during this period, elect not to continue in this transaction and this

purchase contract will become null and void" [*Steiner v. Thexton (2010) 48 Cal. 4th 411, 418, 106 Cal. Rptr. 3d 252, 226 P.3d 359]* . Further, it appeared that the term's broad and express language permitted the optionee to terminate the agreement even if all contingencies had been satisfied. For that reason, the Court rejected the contention that the agreement should instead have been construed as a bilateral contract subject to a contingency [*Steiner v. Thexton (2010) 48 Cal. 4th 411, 418-419, 106 Cal. Rptr. 3d 252, 226 P.3d 359]* .

A preemptive right requires the owner, if and when he or she decides to sell the property, to offer it first to the preemptioner, at the stipulated price. If the preemptioner decides not to buy at that price, the owner is free to sell the property to someone else. Thus, unlike an option, a premeptive right does not give the preemptioner the power to compel an unwilling owner to sell the property subject to the right [*Nelson v. Reisner (1958) 51 Cal. 2d 161, 166, 331 P.2d 17]* . In a sense, however, a preemptive right becomes an option when the property owner decides to sell [*Mercer v. Lemmens (1964) 230 Cal. App. 2d 167, 171, 40 Cal. Rptr. 803]* . Similarly, the granting of an option to a third party is considered a decision to sell so as to trigger a preemptive right, even if the option provides that it cannot be exercised until expiration of the preemptive right [*Rollins v. Stokes (1981) 123 Cal. App. 3d 701, 705-706, 710-712, 176 Cal. Rptr. 835]* .

Options and preemptive rights given to tenants are discussed in Ch. 331, *Landlord and Tenant: Creating the Tenancy* , Ch. 334, *Landlord and Tenant: Claims for Damages* , and Ch. 335, *Landlord and Tenant: Rent Control* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsOption ContractsReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleOption ContractsGeneral OverviewReal Property LawPurchase & SaleOption ContractsRights of First RefusalReal Property LawPurchase & SaleOption ContractsRights of Preemption

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[Reserved]

§§ 569.28[Reserved]

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§ 569.60 Governing Law

Installment sales contracts are subject to the requirements of *Civ. Code § 2985 et seq.* *Civ. Code §§ 3275* (relief from forfeiture) and 3369 (nonenforcement of penalty or forfeiture in equity) have provided the basis for certain of the equitable and security-type remedies available to a purchaser under an installment sales contracts. The vendor's remedy of strict foreclosure of the purchaser's interest is governed by the quiet title statutes, *Code Civ. Proc. § 760.010 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefContracts LawTypes of ContractsInstallment ContractsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresStrict ForeclosureReal Property LawTitle QualityAdverse Claim ActionsQuiet Title Actions

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§ 569.61 Installment Sales Contract--Definition

In this chapter, "installment sales contract" is used to refer to the type of contract defined in *Civ. Code § 2985* as a real property sales contract: an agreement in which one party agrees to convey title to real property to another party on the satisfaction of specified conditions set forth in the contract and whichdoes not require conveyance of title within one year from the date of formation of the contract [*Civ. Code § 2985(a)*; *see Petersen v. Hartell (1985) 40 Cal. 3d 102, 106, 219 Cal. Rptr. 170, 707 P.2d 232* (right of redemption is applicable to contracts that on their face do not require conveyance within one year); *In re Marriage of Tucker (1983) 141 Cal. App. 3d 128, 133-134, 190 Cal. Rptr. 127* (deposit receipt stating "Buyers will purchase house on contract of sale," providing for transfer of title in six to 12 months with no requirement of specific time, and evidencing intent that title be conveyed when FHA financing became available one year after completion of construction is contract of sale)].

Because developers could have difficulty financing large-scale residential condominium developments that comprise attached units, if the Civil Code provisions governing installment land sale contracts [*Civ. Code § 2985 et seq.*] were applied to a pre-sale agreement for a unit in such a project, those provisions do not apply to such an agreement that was made in consequence of a conditional public report for the condominium project issued by the Department of Real Estate pursuant to *Bus. & Prof. Code § 11018.12* [*Civ. Code § 2985(b)*; *see generally* Assem. Comm. on Judiciary, Analysis of Sen. Bill No. 504 (2005-2006 Reg. Sess.) as amended Jan. 19, 2006; *see also* California Real Estate Law and Pracitce, Ch. 424, *Regulation of Subdivided Land Sales*, § 424.80 (Matthew Bender) (issuance of conditional public report)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsInstallment ContractsReal Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawPurchase & SaleContracts of SaleGeneral Overview

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§ 569.62 Disclosure Requirements

The seller under an installment sales contract is bound by the disclosure requirements applicable to sellers of real property generally [*see Civ. Code § 1102(a)* (statutory provisions governing disclosures on transfer of residential real property apply to installment land sale contracts)]. For discussion of these various disclosure requirements, including a residential seller's duty of disclosure and disclosures required of arrangers of credit, see *§§ 569.11 -569.16*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsInstallment ContractsReal Property LawPurchase & SaleRemediesDuty to Disclose

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§ 569.63 Transfer of Contract and Fee Must Coincide

The fee owner of real property subject to an installment sales contract may not transfer the installment sales contract unless the sale is accompanied by a transfer of the real property that is the subject of the contract. Similarly, the fee owner may not transfer the real property unless the transfer is accompanied by an assignment of the contract. Nevertheless, the following are not prohibited: (1) the assignment or pledge of an installment sales contract, as security or for collection, to the holder of the first lien on the real property which is the subject of the contract without transfer of the real property; or (2) the transfer of a fee title in trust without the concurrent assignment of the sales contract [*Civ. Code § 2985.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsInstallment ContractsAssignmentsContracts LawTypes of ContractsInstallment ContractsEstate, Gift & Trust LawTrustsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawOwnership & TransferGeneral Overview

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§ 569.64 Tax and Term Statement

Every installment sales contract entered into after January 1, 1966, must contain a statement of (1) the number of years required to complete payment in accordance with the terms of the contract, and (2) the basis on which the tax estimate is made [*Civ. Code § 2985.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsInstallment ContractsReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to DiscloseTax LawState & Local TaxesReal Property TaxGeneral Overview

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§ 569.65 Encumbrances Prohibited

It is a public offense for any person, or the assignee of such person, who sells a parcel of land under an installment sales contract which is not recorded to thereafter cause an encumbrance or encumbrances not consented to in writing by the parties on the property in an amount which, together with existing encumbrances thereon, exceeds the amount then due under the contract, or under which the aggregate amount of any periodic payments exceeds the periodic payments due on the contract, excluding any pro rata amount for insurance and taxes. No civil remedy is set forth, but the offense is punishable by a fine not exceeding $10,000 or by imprisonment in a state prison or county jail not exceeding one year, or by both the fine and imprisonment [*Civ. Code § 2985.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsInstallment ContractsCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral Overview

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§ 569.66 Misuse of Payments Prohibited

It is a public offense for a seller of improved or unimproved real property under an installment sales contract, or any seller's assignee, to knowingly receive an installment payment from the buyer at a time when any payment by the seller or seller's assignee is then due on an obligation secured by an encumbrance on the property subject to the contract and to use that payment, or so much of it as equals the seller's or assignee's obligation, other than for payment of the amount then due on the seller's or assignee's obligation. No civil remedy is set forth, but the offense is punishable by a fine not exceeding $10,000 or by imprisonment in a state prison or county jail not exceeding one year, or by both the fine and imprisonment [*Civ. Code § 2985.3*]. Similarly, a seller who receives pro rata payments for insurance and taxes holds them in trust for the purpose designated and cannot disburse them for any other purpose without the consent of the payor and any entity holding an encumbrance on the property [*Civ. Code § 2985.4*]. *Civ. Code § 2985.4* does not apply to a state- or federal-supervised assignee of a seller who collects and disburses the payments as agent of the seller [*Civ. Code § 2985.4*; *see Penal Code § 506b* (violation of *Civ. Code § 2985.3* or *2985.4*); *People v. Thygesen (1979) 93 Cal. App. 3d 895, 904-905, 907, 156 Cal. Rptr. 212* (specific intent is not required for conviction; under neither provision does jury determine punishment)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSecured TransactionsInstallment ContractsAssignmentsContracts LawTypes of ContractsInstallment ContractsCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral Overview

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§ 569.67 California Veteran Loans

Cal Vet loans are not actually loans; the Department of Veterans Affairs purchases the farm or home and sells it to the veteran on an installment contract [*Mil. & Vet. Code §§ 986.9, 987.69*]. To the extent that the Legislature has not created any specific provision governing Cal Vet loans, they are subject to the same law and equities as regular installment sales contracts [*see, e.g., Brown v. Dep't of Veterans Affairs (1986) 178 Cal. App. 3d 392, 400-403, 224 Cal. Rptr. 149* (no statutory requirement that department provide insurance)]. If the Legislature has created a specific provision governing Cal Vet loans, the specific provision overrides general rules of law and equity. For instance, under *Mil. & Vet. Code § 987.77*, when a Cal Vet contract is cancelled on account of the veteran's default, the veteran is not entitled to restitution of excess of payments made to the department over the fair rental value during the time he or she was in possession. *Mil. & Vet. Code § 987.77* provides for a forfeiture which is not allowed under regular installment sales contracts [*Department of Veterans Affairs v. Duerksen (1982) 138 Cal. App. 3d 149, 156-158, 187 Cal. Rptr. 832* ; *but see Mil. & Vet. Code § 987.78* (department may pay veteran gain on resale)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureEquityReliefContracts LawTypes of ContractsInstallment ContractsMilitary & Veterans LawVeteransBenefitsGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral Overview

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[Reserved]

§§ 569.68[Reserved]

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50-569 California Forms of Pleading and Practice--Annotated § 569.80

§ 569.80 Reinstatement Under Power of Sale in Contract

If the installment sales contract involved gives the vendor a power of sale to be exercised after breach of the obligation, the purchaser has the same rights of notice of default, reinstatement, notice of sale, and all other rights mortgagors have under *Civ. Code §§ 2924-2924h* [*Civ. Code § 2920*]. Similarly, when the installment sales contract involved gives the vendor a power of sale, the vendor's remedy for default is limited to nonjudicial foreclosure of the purchaser's interest. These rights and duties are discussed in *Ch. 555, Trust Deeds and Real Property Mortgages, §§ 555.50 -555.64*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsInstallment ContractsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's Interests

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§§ 569.81[Reserved]

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3. Contract Without Power of Sale

50-569 California Forms of Pleading and Practice--Annotated § 569.100

§ 569.100 Installment Purchaser's Remedies

[1] In General

A purchaser under an installment sales contract that does not grant the vendor a power of sale has all the remedies available to a purchaser using any other type of option or contractual arrangement. These are discussed in *§ 569.22* and include a statutory lien on the property pursuant to *Civ. Code § 3050* for payments made, declaratory relief, damages for breach of contract, fraud, rescission, reformation, restitution of any excess of payments made over the vendor's actual damages, and specific performance [*see §§ 569.163 -569.169* (sample complaints)]. As a preventative measure, a purchaser should record the installment sales contract [*see McLane v. Van Eaton (1943) 60 Cal. App. 2d 612, 615, 141 P.2d 783* (recording of contract gives constructive notice to vendor's grantees so they are not bona fide purchasers); *Resh v. Pillsbury (1936) 12 Cal. App. 2d 226, 230, 55 P.2d 264* (dicta that provision prohibiting recordation is void as against public policy); *see also Code Civ. Proc. § 1062.10* (suit to enforce terms of installment sales contract entered into after January 1, 1986, cannot be maintained without prior recordation of contract or filing of change in ownership statement as required by *Rev. & Tax. Code § 480*)].

[2] Restitution

Even a willfully defaulting purchaser under an installment contract without a power of sale is entitled to restitution of any excess of payments made to the vendor over the vendor's actual damages, though the purchaser has the burden of proving that payments exceed the vendor's actual damages [*Petersen v. Hartell (1985) 40 Cal. 3d 102, 113, 219 Cal. Rptr. 170, 707 P.2d 232* ; *Honey v. Henry's Franchise Leasing Corp. (1966) 64 Cal. 2d 801, 805, 52 Cal. Rptr. 18, 415 P.2d 833* ; *see § 569.104[3]*]. Restitution is also available to a defaulting purchaser under any other arrangement, so the discussion in *§ 569.24[4]*, and the cases in the Research Guide (§ 569.120 et seq.), would also apply under an installment sales contract. A provision in an installment sales contract that provides that in the event of purchaser's default, the vendor may retain all sums paid as rent is unenforceable as an attempt to specify potentially excessive damages unless it otherwise qualifies as a liquidated damages provision, although a vendor who elects rescission may recover the reasonable rental value [*Honey v. Henry's Franchise Leasing Corp. (1966) 64 Cal. 2d 801, 804, 52 Cal. Rptr. 18, 415 P.2d 833* (election is vendor's, not purchaser's); *Behrendt v. Abraham (1966) 64 Cal. 2d 182, 186-188,*

49 Cal. Rptr. 292, 410 P.2d 828 ; *Greene v. Municipal Court (1975) 51 Cal. App. 3d 446, 450-451, 124 Cal. Rptr. 139]* .

[3] Redemption or Specific Performance

[a] Judicial Recognition of Right

A purchaser under an installment contract without a power of sale, even a willfully defaulting purchaser whose defaults consist solely of failure to pay amounts due, who has made substantial payments on the contract or substantial improvements to the property, has an unconditional right to redeem the property by paying the entire remaining balance, plus interest and damages, before judgment or within a reasonable time thereafter set by the court. The right of redemption is exercisable as soon as the vendor gives notice of election to terminate the contract on account of default [*Petersen v. Hartell (1985) 40 Cal. 3d 102, 106, 111-114, 116-117, 219 Cal. Rptr. 170, 707 P.2d 232* (payments of $2,900 of $9,162 purchase price is substantial)].

Before *Petersen*, which was in fact a purchaser's suit for specific performance, this right of redemption was referred to as specific performance [*see, e.g.,* *MacFadden v. Walker (1971) 5 Cal. 3d 809, 812-814, 97 Cal. Rptr. 537, 488 P.2d 1353]* . The court in *Petersen* said that a complaint by a purchaser seeking to enforce the right might more properly be called one to redeem the purchaser's equity, implying that the purchaser would not be required to prove that the contract was fair and reasonable and the consideration adequate [*Petersen v. Hartell (1985) 40 Cal. 3d 102, 110-111, 116-117, 219 Cal. Rptr. 170, 707 P.2d 232* (noting at pp. 110-111 that adequacy of consideration is tested at time contract is made and considers not only value of property but also relationship of parties and object to be obtained by contract); *but see* *Archer v. Miller (1925) 73 Cal. App. 678, 684, 239 P. 92* (purchaser defending against vendor's quiet title action on basis of lease and option to purchase is required to allege value of land, that contract was just and reasonable)].

[b] Procedure for Asserting Right

The right of redemption can be asserted either affirmatively in an action for redemption by the purchaser or in response to the vendor's action. No vendor is entitled to a judgment quieting title until the purchaser has been given a chance to redeem the property, either before judgment or within a reasonable time set by the court [*Petersen v. Hartell (1985) 40 Cal. 3d 102, 106, 111-114, 116-117, 219 Cal. Rptr. 170, 707 P.2d 232* ; *see § 569.194* (complaint for declaratory relief, redemption)]. If the right of redemption is raised in response to the vendor's quiet title action, it is not clear whether it constitutes such affirmative relief as to require a cross complaint [*see Code Civ. Proc. § 761.040(a)* (affirmative relief available by cross complaint in quiet title action); *Furnivall v. Groves (1957) 154 Cal. App. 2d 846, 847-848, 317 P.2d 117* (quiet title unique in allowing affirmative relief on basis of defendant's title without need of cross complaint)]. At any rate, it will have to be set forth in the answer because answers in quiet title actions must give the basis of any claim the defendant has and a statement of any new matter constituting a defense [*Code Civ. Proc. § 761.030(a)(1), (3)*].

[c] Time for Asserting Right

There does not seem to be any statute of limitations on the purchaser's right of redemption. The plaintiff in *Petersen* did not commence the action until after a four-year hiatus in payments under the contract. Additionally, the court said that because of *Civ. Code § 2985.1* (discussed in *§ 569.63*), a vendor cannot sell the property subject to the contract to anyone else until the purchaser's interest has been terminated by foreclosure sale (discussed in *§ 569.103*) or by quieting title against the purchaser's equity of redemption [*Petersen v. Hartell (1985) 40 Cal. 3d 102, 116, 219 Cal. Rptr. 170, 707 P.2d 232]* . Still, a purchaser who had led the vendor to believe that he or she intended to abandon the contract or was willing to agree to mutual rescission of the contract might be barred by laches.

[4] Reinstatement

By virtue of *Civ. Code § 3275*, providing relief from forfeitures, a purchaser who has made substantial payments on the contract or substantial improvements to the property and whose default is not willful or grossly negligent has an absolute right to reinstate the contract by payment of arrearages [*Barkis v. Scott (1949) 34 Cal. 2d 116, 117-118, 122-123, 208 P.2d 367* ($3,114 of improvements, $700 downpayment, and 57 timely monthly payments compared to purchaser price of $6,150; innocent mistake regarding checks drawn on insufficient funds for two installments)]. Lack of funds alone is not sufficient to meet the burden of *Civ. Code § 3275*. There must be some additional showing that the lack is not itself attributable to willful or grossly negligent conduct, for example, that the earning capacity of the purchaser has been unexpectedly impaired by illness or accident [*Bartley v. Karas (1983) 150 Cal. App. 3d 336, 342-343, 197 Cal. Rptr. 749* , *disapproved on other grounds*, *Petersen v. Hartell (1985) 40 Cal. 3d 102, 117, 219 Cal. Rptr. 170, 707 P.2d 232* , citing *Scarbery v. Bill Patch Land & Water Co. (1960) 184 Cal. App. 2d 87, 94, 104-105, 7 Cal. Rptr. 408* (fire on adjacent property and illness of purchaser delayed subdivision work and sales necessary to raise cash); *Major-Blakeney Corp. v. Jenkins (1953) 263 P.2d655* (not an installment sale case, unexpected withdrawal of financial commitment)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesSpecific PerformanceContracts LawTypes of ContractsInstallment ContractsReal Property LawFinancingMortgages & Other Security InstrumentsRedemptionGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityFraud & Misrepresentation

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50-569 California Forms of Pleading and Practice--Annotated § 569.101

§ 569.101 Money Judgment Prohibited as Deficiency

Code Civ. Proc. § 580b prevents a vendor under an installment sales contract of a 1-to-4-family dwelling, who retains title, from obtaining a personal judgment of any type against the purchaser. A vendor cannot recover a money judgment against the purchaser for past due installments, for the unpaid balance, or for damages for breach of the contract [*Venable v. Harmon (1965) 233 Cal. App. 2d 297, 301-302, 43 Cal. Rptr. 490]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsInstallment ContractsReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawPurchase & SaleRemediesDamagesGeneral Overview

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§ 569.102 Unlawful Detainer Unavailable

Language in an installment sales contract to the effect that on default the purchaser's interest is, or at the vendor's election may be, forfeited and the purchaser becomes only a tenant is not enforceable, and a defaulting purchaser in possession under an installment sales contract cannot be removed by the summary method of unlawful detainer [*Greene v. Municipal Court (1975) 51 Cal. App. 3d 446, 449-451, 124 Cal. Rptr. 139]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsInstallment ContractsReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & DetainerReal Property LawPurchase & SaleContracts of SaleEnforceabilityGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsUnlawful Detainer

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§ 569.103 Judicial Sale

A judicial sale, sometimes called foreclosure by sale, may be ordered if an installment sales vendor sues for specific performance and the purchaser does not wish to complete the purchase or cannot pay the balance due. Then any sale proceeds exceeding the balance due under the contract are turned over to the purchaser [*Longmaid v. Coulter (1898) 123 Cal. 208, 213-218, 55 P. 791* ; *Sparks v. Hess (1860) 15 Cal. 186, 193-195* ; *see Laske v. Lampasona (1948) 89 Cal. App. 2d 284, 288, 200 P.2d 871* ; *Petersen v. Hartell (1985) 40 Cal. 3d 102, 115 n.5, 219 Cal. Rptr. 170, 707 P.2d 232]* . It has been suggested that an installment sale purchaser should also be able to initiate judicial sale, thus keeping any proceeds representing any increase in value [*MacFadden v. Walker (1971) 5 Cal. 3d 809, 816, 97 Cal. Rptr. 537, 488 P.2d 1353* ; *see 1 Ward v. Union Bond & Trust Company (9th Cir. 1957) 243 F.2d 476, 480-481* ; *Petersen v. Hartell (1985) 40 Cal. 3d 102, 115, 116-117, 219 Cal. Rptr. 170, 707 P.2d 232, n.5]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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50-569 California Forms of Pleading and Practice--Annotated § 569.104

§ 569.104 Installment Vendor's Remedies

[1] In General

A seller's remedies are subject to the purchaser's rights of reinstatement, redemption, and restitution [*Petersen v. Hartell (1985) 40 Cal. 3d 102, 111-114, 116-117, 219 Cal. Rptr. 170, 707 P.2d 232* (redemption); *Honey v. Henry's Franchise Leasing Corp. (1966) 64 Cal. 2d 801, 805, 52 Cal. Rptr. 18, 415 P.2d 833* (restitution); *Barkis v. Scott (1949) 34 Cal. 2d 116, 117-118, 122-123, 208 P.2d 367* (reinstatement); *see §§ 569.100[4], 569.100[3],* and *569.100[2],* respectively].

[2] Quiet Title

For a vendor who wishes to retain the benefits of any increase in the value of the property since the execution of the installment sales contract, the only remedy is an action to quiet title pursuant to *Code Civ. Proc. §§ 760.010-764.070*. Further, in establishing the purchaser's right of redemption, the court said that because of *Civ. Code § 2985.1* (discussed in *§ 569.63*) a vendor cannot sell the property subject to the contract to anyone else until the purchaser's interest has been terminated by foreclosure sale (discussed in *§ 569.103*) or quieting title against the purchaser's equity of redemption [*Petersen v. Hartell (1985) 40 Cal. 3d 102, 116, 219 Cal. Rptr. 170, 707 P.2d 232]* . Recovery of possession, damages for withholding, and a declaration of the forfeiture of the purchaser's rights under the installment sales contract are all incidental relief that may be granted in the vendor's quiet title action [*Keele v. Clouser (1928) 92 Cal. App. 526, 529-530, 268 P. 682]* .

[3] Limitations on Installment Vendor's Damages

[a] Election of Measure

The deficiency prohibition of *Code Civ. Proc. § 580b* prevents a vendor from being awarded a personal judgment against the purchaser under an installment sales contract covering a 1-to-4-unit dwelling. Therefore, a vendor can only recoup damages to the extent of purchaser's payments under the contract [*Venable v. Harmon (1965) 233 Cal. App. 2d*

297, 301-302, 43 Cal. Rptr. 490] . In addition, the purchaser is entitled to restitution of the excess of payments made to the vendor over the vendor's actual damages. The purchaser has the burden of proving that excess [*Honey v. Henry's Franchise Leasing Corp. (1966) 64 Cal. 2d 801, 805, 52 Cal. Rptr. 18, 415 P.2d 833]* . Earlier cases held the measure of vendor's damages to be the rental value of the property during the time the purchaser was in possession [*Behrendt v. Abraham (1966) 64 Cal. 2d 182, 186-188, 49 Cal. Rptr. 292, 410 P.2d 828]* . More recently, however, the vendor has been said to have an election to proceed (1) on a rescission theory, terminating the contract and recovering damages for the purpose of putting the parties in the position they were in before the contract, which essentially would give the vendor the rental value measure of damages, or (2) on a contract theory to recover damages under *Civ. Code § 3307* of the difference, if any, between the contract price and the market value of the property at the time of the breach. The latter measure will only be beneficial to the vendor if the value of the property at the time of breach is less than the contract price. Seeking to quiet title does not amount to an election to rescind the contract [*Honey v. Henry's Franchise Leasing Corp. (1966) 64 Cal. 2d 801, 803-805, 52 Cal. Rptr. 18, 415 P.2d 833]* .

[b] Rental Value Measure

Under the rental value measure, the purchaser is entitled to offset against the rental value of the property during the time he or she was in possession the amount of both principal and interest payments made to the vendor and/or to third parties on the theory that those are not the obligations of a renter, but of an owner. Similarly, whether the purchaser is entitled to credit for taxes paid when applying the rental value measure of damages depends on whether the rental rate used to establish the vendor's credits was the rental rate payable by a tenant who assumed the obligation of taxes or the rental rate payable by a tenant under an arrangement in which the owner paid the taxes [*Behrendt v. Abraham (1966) 64 Cal. 2d 182, 186, 188, 49 Cal. Rptr. 292, 410 P.2d 828* (purchaser also credited for value of improvements)].

A vendor desiring the rental value measure of damages will have to give notice of rescission fairly soon after default, or have the complaint serve as notice of rescission and restore, or offer to restore, excess payments to the purchaser [*Civ. Code § 1691*; *Kudokas v. Balkus (1972) 26 Cal. App. 3d 744, 753-754, 103 Cal. Rptr. 318* ; *see § 569.24[7][a], [b]*].

[c] Contract Measure

In addition to the difference between the contract price and the value of the property at the time of purchaser's breach, other elements of damage available to the vendor under the contract measure include (1) expenses of resale over and above the expenses assumed by the vendor in connection with the breached contract, (2) real estate taxes and assessments assumed by the purchaser under the contract, but not paid by the purchaser, (3) fees and penalties paid to rescue trust deeds from foreclosure on account of the purchaser's failure to keep payments current, and (4) in the case of income producing property, expenses of a receivership necessary to maintain the property's productivity [*Kudokas v. Balkus (1972) 26 Cal. App. 3d 744, 755, 103 Cal. Rptr. 318]* . Under the contract measure of damages, the purchaser is entitled to credit for principal payments made to the vendor or to third parties, but not to credit for interest payments. Loss of interest payments imposes no forfeiture on the purchaser, nor does it enrich the vendor. Interest paid to the vendor is consideration for the purchaser's use of deferredprincipal, and interest paid to a third party is part of the burden of the purchaser's equitable ownership and consideration for the purchaser's use of the third party's money [*Kudokas v. Balkus (1972) 26 Cal. App. 3d 744, 756-757, 103 Cal. Rptr. 318]* .

[d] Incidental Damages

If the purchaser refuses to vacate the property or asserts an interest in the property, the vendor's damages include amounts necessary to regain possession and expunge the purchaser's claim whether the vendor proceeds under the rental value or contract measure of damages. In addition, if the purchaser has remained in possession, the vendor may recover the rental value of the premises for the period after the breach or effective date of rescission [*Honey v. Henry's Franchise Leasing Corp. (1966) 64 Cal. 2d 801, 805, 52 Cal. Rptr. 18, 415 P.2d 833* (contract measure); *Kudokas v. Balkus (1972) 26 Cal. App. 3d 744, 754-755, 103 Cal. Rptr. 318* (contract measure); *Millar v. James (1967) 254 Cal.*

App. 2d 530, 532-534, 62 Cal. Rptr. 335 (rescission, but not an installment sales contract case); *see Civ. Code § 1692* (damages incident to rescission)]. The vendor can also recover costs expended to restore the property to the condition it was in before the transaction, less normal wear and tear [*Bensinger v. Davidson (SD Cal, 1956) 147 F. Supp. 240, 248]* .

Legal Topics:

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

§§ 569.105[Reserved]

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§ 569.120 California Real Estate

For discussion of options, see California Real Estate Law and Practice, Ch. 70, *Options* (Matthew Bender)

For discussion of the basic elements of deposit receipts and other agreements for the sale of real property, see California Real Estate Law and Practice, Ch. 71, *Deposit Receipts and Other Agreements of Sale* (Matthew Bender)

For discussion of the defenses available to both sellers and buyers in an action based on an agreement for the sale of real property, see California Real Estate Law and Practice, Ch. 73, *Defenses in Actions Involving Agreements of Sale* (Matthew Bender)

For discussion of purchasers' remedies, see California Real Estate Law and Practice, Ch. 74, *Buyer's Remedies in Actions Involving Agreements of Sale* (Matthew Bender)

For discussion of vendors' remedies, see California Real Estate Law and Practice, Ch. 75, *Seller's Remedies in Actions Involving Agreements of Sale* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 569.121 Federal Statutes

Purchaser's and lessee's right of rescission under Interstate Land Sales Full Disclosure Act (*15 U.S.C. §§ 1701-1720*, governing sales of unimproved parcels of less than five acres advertised through mails or sold in interstate commerce). *15 U.S.C. §§ 1703, 1709*

Transferee's duty to withhold 10 percent of consideration payable to foreign person on transfer of United States real property interest as defined in *I.R.C. § 897(c)* (which includes shares in corporation owing United States real property). *I.R.C. § 1445*

Legal Topics:

For related research and practice materials, see the following legal topics:
Immigration LawDuties & Rights of AliensProperty OwnershipReal Property LawOwnership & TransferNatural PersonsReal Property LawPurchase & SaleInterstate Land Sales Full Disclosure Act

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§ 569.122 State Statutes

[1] In General

Subdivided Lands Act. *Bus. & Prof. Code § 11000 et seq.*

Grants, security instruments, and ordinances prohibiting for sale signs are void. *Civ. Code §§ 712, 713*

Written agreement required for transfer of or agreement to sell real property; specific performance of oral agreement for transfer of real property is permissible if partially performed. *Civ. Code §§ 1091, 1624(c)*; *Code Civ. Proc. §§ 1971, 1972*

Disclosure of industrial use zoning by vendor of residential real property. *Civ. Code § 1102.17*

Disclosure of natural hazards on transfer of any real property or residential stock cooperative improved with or consisting of one to four dwelling units. *Civ. Code § 1103 et seq.*

Grant of land bordering highway conveys to center unless different intent appears. *Civ. Code § 1112*

Covenants running with land. *Civ. Code §§ 1460-1471*

Written agreement required for appointment of broker to sell real property. *Civ. Code § 1624(a)(4)*

Written agreement required for assumption of indebtedness secured by real property. *Civ. Code § 1624(a)(6)*

Disclosure regarding law enforcement data base of registered sex offenders. *Civ. Code § 2079.10a*

Interest may not accrue on note secured by mortgage or trust deed on residential real property with one to four residential dwelling units for period in excess of one day before recording if loan proceeds are paid into escrow, or if no

escrow, date on which loan proceeds are made available for withdrawal as matter of right under *Ins. Code § 12413.1(d). Civ. Code § 2948.5*

Purchaser, encumbrancer, or other transferee of real property described in recorded notice of pendency of action is deemed to have notice from date of recordation. *Code Civ. Proc. § 405.24*

Ex parte protective order restraining transfer or encumbrance of community property during dissolution or nullity proceedings. *Fam. Code § 2035(a)*

Recording instrument affecting title to or possession of real property. *Gov. Code §§ 27279, 27280*

Recording judgment affecting title to or possession of real property is proper without acknowledgement, but requires certification of clerk. *Gov. Code § 27282(a)(1)*

Subdivision Map Act. *Gov. Code § 66410 et seq.*

[2] Agents

Regulation of real estate brokers. *Bus. & Prof. Code § 10000 et seq.*

Requirement that agreement employing broker to purchase or sell real estate be in writing. *Civ. Code § 1624(d)*

Authority of agent to sell real property includes authority to give usual covenants of warranty. *Civ. Code § 2323*

Real estate developer was prohibited from requiring escrow for sale of single-family dwelling to be entity of which developer owned or controlled five percent or more; liability for violation was three times amount charged for escrow services, but at least $250, plus attorney's fees and costs; waiver was void. *Civ. Code § 2995*

[3] Damages and Remedies

Action for damages by seller-lienholder and other affected persons against purchaser-landlord for unlawful use of rental revenue during first year after acquisition of residential rental property without first applying revenue or equivalent amount to pay off encumbrances. *Civ. Code § 890 et seq.*

Uniform Vendor and Purchaser Risk Act. *Civ. Code § 1662*

Liquidated damages generally. *Civ. Code § 1671*

Liquidated damages for buyer's breach of contract (other than installment sale contract) to purchase sale property. *Civ. Code § 1675 et seq.*

Grounds for rescission. *Civ. Code § 1689*

Cancellation of instruments by consent of parties. *Civ. Code § 1699*

Establishment of involuntary trust. *Civ. Code §§ 2223, 2224*

Vendor's lien on land. *Civ. Code §§ 3046-3048*

Purchaser's lien on land. *Civ. Code §§ 3048, 3050*

Relief from forfeiture incurred under terms of obligation on making full compensation to other party, except in case of grossly negligent, willful, or fraudulent breach of duty. *Civ. Code § 3275*

Measure of damages for breach of agreement to convey realty. *Civ. Code § 3306*

Measure of damages for breach of agreement to purchase real property. *Civ. Code § 3307*

Damages for fraud in sale, exchange, or purchase of real property. *Civ. Code § 3343*

Specific performance, generally. *Civ. Code §§ 3369, 3384 et seq.*; *Prob. Code § 9860 et seq.* (by purchaser against decedent's estate)

Revision or reformation of contract; specific performance of revised or reformed contract. *Civ. Code § 3399 et seq.*

Action for cancellation of void instruments. *Civ. Code § 3412 et seq.*

Notice of pendency of action in actions concerning real property (lis pendens). *Code Civ. Proc. § 405 et seq.*

Action to quiet title to realty. *Code Civ. Proc. § 760.010 et seq.*; *Rev. & Tax. Code §§ 3727-3729, 3950 et seq., 4113* (by purchaser, redemptioner of tax-defaulted property)

Action for partition of real property. *Code Civ. Proc. § 872.010 et seq.*

Action for declaratory relief. *Code Civ. Proc. § 1060 et seq.*

Recordation of agreement or filing of change-in-ownership statement required by *Rev. & Tax. Code § 480* is prerequisite to maintaining action to enforce contract, for transfer of real property or mobilehome subject to local property tax. *Code Civ. Proc. § 1062.10*

Buyer's right to rescind contract or deed to property divided in violation of Subdivision Map Act (*Gov. Code § 66410 et seq.*) within one year of discovery of violation. *Gov. Code § 66499.32*

[4] Disclosures and Informational Requirements

Disclosures and fee ceilings on real property secured loans negotiated by real estate licensees. *Bus. & Prof. Code § 10240 et seq.*

Disclosures required in connection with sale of condominium or other common interest development; damages for willful violation. *Bus. & Prof. Code § 11018.6*; *Civ. Code § 1368*

Delivery to purchaser of pest control report and notice of work completed thereunder is required if condition of contract or financing. *Civ. Code § 1099*

Disclosures required by vendor of one-to-four-unit residential property and broker; actual damages, as provided for negligent or willful failure to disclose. *Civ. Code § 1102 et seq.*

Notice by subdivider to buyer of existence of blanket encumbrance prior to sale of parcel or unit in subdivision. *Civ.*

Code § 1133

Notice or disclaimer (after inspection) of defects and malfunctions in newly converted condominium, community apartment, or stock cooperative and common areas. *Civ. Code § 1134*

Neither owner, owner's agent, nor transferee's agent must disclose to transferee, purchaser, lessee, or renter that prior occupant died, if death occurred more than three years prior to offer to buy or lease, or that prior occupant had died of AIDS. *Civ. Code § 1710.2*

Seller's broker and cooperating broker have duty to purchaser of one-to-four-unit dwelling to make visual inspection and to disclose material facts affecting property's desirability; action for breach of this duty must be commenced within two years after whichever is earliest: recordation, close of escrow, or date of occupancy. *Civ. Code §§ 2079-2079.5*

Disclosures required when vendor extends credit on sale of one-to-four-unit dwelling and arranger of credit is involved; definition of arranger of credit; actual damages. *Civ. Code §§ 2956-2967, 2957(a), 2965*

Transferors of certain residential property must disclose known deficiencies that constitute earthquake hazards, unless transaction is exempted. *Gov. Code § 8897.1 et seq.*

Sellers of property in area where state has fire responsibility must disclose fact that property is in wildland area that may contain substantial forest fire risks. *Pub. Res. Code § 4136*

[5] Options

Option given by debtor to creditor secured by lien on option property is deemed not to impair debtor's lien redemption rights if right to exercise option is not dependent on default under security agreement and option and lien are on other than one-to-four-unit residential property. *Civ. Code § 2906*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to DiscloseReal Property LawPurchase & SaleRemediesRescission & RestitutionReal Property LawPurchase & SaleRemediesSpecific Performance

California Forms of Pleading and Practice--Annotated

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Volume 50: Usury thru Verification-Chs. 568-572
Chapter 569 VENDOR AND PURCHASER OF REAL PROPERTY
PART III. RESEARCH GUIDE
A. Actions Between Vendors and Purchasers Generally

50-569 California Forms of Pleading and Practice--Annotated § 569.123

§ 569.123 Decisions

[1] In General

Purchasers under "back-up" contract for sale of land, which was subject to condition precedent of failure, termination, cancellation, or novation of existing contract between seller and another party, had heavy burden in attempting to set aside contract relationship between seller and other party; trial court's finding that sale was consummated under modification of original contract and that no condition precedent had occurred was supported by substantial evidence. *Meadows v. Lee (1985) 175 Cal. App. 3d 475, 483-484, 221 Cal. Rptr. 22*

If offer is accepted after it expired by its terms, person making offer is able to waive expiration of offer and create contract by proceeding with purchase. *Sabo v. Fasano (1984) 154 Cal. App. 3d 502, 506-509, 201 Cal. Rptr. 270*

Whether purchaser contracting on behalf of himself or herself and nominee is entitled to maintain action on contract of sale is matter of intention of parties as to whether buyer assigned his or her rights to nominee. *McCown v. Spencer (1970) 8 Cal. App. 3d 216, 225-226, 87 Cal. Rptr. 213*

Agreement to extend time of closing of escrow is independent agreement; consideration paid to vendor for extension is not recoverable by purchaser. *Morrison v. Frazier (1968) 262 Cal. App. 2d 386, 389-390, 68 Cal. Rptr. 690*

Equitable relief was available to buyers under oral real property sales agreement after foreclosure on the property by bona fide third party lenders; relief properly took form of award of part of proceeds of foreclosure sale. *Rogers v. Davis (1994) 28 Cal. App. 4th 1215, 1221-1222, 34 Cal. Rptr. 2d 716*

[2] Arbitration

Purchaser's claims for rescission and damages based on seller's failure to disclose flooding problems on Transfer Disclosure Statement were subject to arbitration pursuant to broad arbitration clause in purchase agreement. *Johnson*

v. Siegel (2000) 84 Cal. App. 4th 1087, 1094, 101 Cal. Rptr. 2d 412

[3] Conditions Precedent

Phrase "subject to" in contract is generally construed to impose condition precedent. *Rubin v. Fuchs (1969) 1 Cal. 3d 50, 54, 81 Cal. Rptr. 373, 459 P.2d 925*

Seller's delivery of real estate transfer disclosure statement is nonwaivable condition precedent to buyer's duty of performance under contract for sale and purchase of real property. *Realmuto v. Gagnard (2003) 110 Cal. App. 4th 193, 201-202, 1 Cal. Rptr. 3d 569*

When buyer failed to request opening of escrow and escrow did not close by date required in contract, buyer was not entitled to recover for breach of contract because buyer could not prove that condition precedent was performed. *Consolidated World Investments, Inc. v. Lido Preferred Ltd. (1992) 9 Cal. App. 4th 373, 380-382, 11 Cal. Rptr. 2d 524*

When buyer expressly disapproved condition, contract was terminated and buyer wasnot later able to enforce it by offering to waive condition. *Beverly Way Associates v. Barham (1990) 226 Cal. App. 3d 49, 55-56, 276 Cal. Rptr. 240*

When condition does not occur because of party's failure to cooperate, burden of proof is on that party to establish that condition would not have been met even if party had cooperated. *Jacobs v. Tenneco West Inc. (1986) 186 Cal. App. 3d 1413, 1417-1418, 231 Cal. Rptr. 351*

Discovery, after real estate sale contract had been performed, of breach of condition precedent was proper basis for cause of action for breach of contract. *Louison v. Yohanan (1981) 117 Cal. App. 3d 258, 266, 172 Cal. Rptr. 602*

[4] Damages

[a] Measure

Language of *Civ. Code § 3306* makes clear that proper measure of damages for breach of contract to convey real property is difference between contract price and fair market value at time of breach, not difference between contract price and value of property at time of trial. Further, "consequential damages" recoverable under *Civ. Code § 3306* for breach of contract to convey real property does not include appreciation in value of property from time of breach to time of trial. *Reese v. Wong (2001) 93 Cal. App. 4th 51, 59-61, 112 Cal. Rptr. 2d 669*

[b] Recoverable by Defaulting Purchaser

Willfully defaulting vendee was entitled to recover excess of payments made under contract over vendor's damages caused by breach. *Freedman v. St. Matthias Parish (1951) 37 Cal. 2d 16, 20-23, 230 P.2d 629* ; *Q.S.W. Corp. v. Malick (1967) 257 Cal. App. 2d 277, 281, 64 Cal. Rptr. 722*

Defaulting purchaser who was denied specific performance of contract for sale of real property was entitled to restitution of reasonable value of services rendered by it that benefitted landowner, but not to enhanced value of property attributable to those services because that would have amounted to windfall. *Lesny Development Co. v. Kendall (1985) 164 Cal. App. 3d 1010, 1020-1024, 210 Cal. Rptr. 890*

Defaulting vendee was not, because of default alone, to be denied right to recover damages for fraud. *Holder v. Home Sav. & Loan Asso. (1968) 267 Cal. App. 2d 91, 108-109, 72 Cal. Rptr. 704*

[c] Damages Recoverable by Vendor for Breach of Contract

In action arising from buyer's default (after failure to procure financing, and refusal to cancel escrow), vendor was not entitled to recover amount of taxes paid because property was not sold until following year (reflecting change in law increasing tax liability), because buyer's failure to close in August of previous year did not actually cause adverse tax consequences effective in *January. Nielsen v. Farrington (1990) 223 Cal. App. 3d 1582, 1588-1589, 273 Cal. Rptr. 312*

In action by vendor for contract breach against defaulting buyer, buyer is not entitled to offset for "savings" resulting from absence of broker's commission in resale when there is no evidence of value of property at time of breach; court in those circumstances is not required to determine whether benefit-of-bargain damages should be based simply on difference between contract price and value of property, or whether broker's commission should be deducted from contract price before measuring difference. *Nielsen v. Farrington (1990) 223 Cal. App. 3d 1582, 1586-1588, 273 Cal. Rptr. 312*

[5] Duty of Disclosure

Triable issue whether seller of property had common-law duty to disclose existence of prior litigation concerning water intrusion as a material fact affecting the desirability and value of property. *Calemine v. Samuelson (2009) 171 Cal. App. 4th 153, 166, 89 Cal. Rptr. 3d 495*

Real estate vendor's failure to comply with statutory disclosure requirements gives right to rescission in buyer if transfer has not taken place. *Realmuto v. Gagnard (2003) 110 Cal. App. 4th 193, 202, 1 Cal. Rptr. 3d 569*

[6] Fraud

Sellers who used relocation intermediary and failed to disclose neighborhood noise problems to intermediary were subject to eventual purchaser for intentional and/or negligent misrepresentation as well as statutory liability under *Civ. Code § 1102 et seq.* *Shapiro v. Sutherland (1998) 64 Cal. App. 4th 1534, 1546, 1550, 76 Cal. Rptr. 2d 101*

Subsequent purchaser may bring action for damages against original seller based on fraudulent misrepresentations made to original buyer if seller had reason to expect that misrepresentations would be repeated and they actually were repeated to subsequent purchaser. *Geernaert v. Mitchell (1995) 31 Cal. App. 4th 601, 608, 37 Cal. Rptr. 2d 483*

Damages for lost profits do not encompass profits expected from resale of property that never was acquired because of fraud. *Kenly v. Ukegawa (1993) 16 Cal. App. 4th 49, 54-56, 19 Cal. Rptr. 2d 771*

Subdivider was liable in fraud for failure to disclose that units sold were not in maintenance district and thus at risk of losing water and sewer services. *County of Mariposa v. Yosemite West Associates (1988) 202 Cal. App. 3d 791, 812-813, 248 Cal. Rptr. 778*

Vendor's attorney who is not acting as broker does not have same duty of disclosure to purchaser as broker; attorney would be liable for fraud only if (1) fiduciary relationship existed, (2) attorney had exclusive knowledge of materials facts not known to purchaser, (3) attorney actively concealed material facts, or (4) attorney made partial representation while suppressing some material facts. *Heliotis v. Schuman (1986) 181 Cal. App. 3d 646, 650-651, 226 Cal. Rptr. 509*

Vendor's assertion to purchaser of amount of acreage constituted actionable misrepresentation to seller who did not survey property until one year after purchase; because purchaser acquired property to subdivide and develop it, fact that

actual value of land was more than price paid did not deprive purchaser of right to damages for loss of anticipated profits pursuant to *Civ. Code § 3343(a)(4)*. *Cory v. Villa Properties (1986) 180 Cal. App. 3d 592, 597-598, 601-603, 225 Cal. Rptr. 628*

Real estate agent is liable for damages resulting from false representation in sale of real property; foreclosure of property is circumstance that may be considered in determining out-of-pocket loss of defrauded purchaser. *Burkhouse v. Phillips (1971) 18 Cal. App. 3d 661, 665-666, 96 Cal. Rptr. 197*

Buyer learning one representation by seller is false is not entitled to assume that other representations by seller were true. *Roland v. Hubenka (1970) 12 Cal. App. 3d 215, 225, 90 Cal. Rptr. 490*

[7] Implied Covenants

Contract conditioned on approval of inspections is binding because purchaser has implied duty of good faith with regard to approving inspections; contract is subject to specific performance because strict mutuality of remedy is not required. *Converse v. Fong (1984) 159 Cal. App. 3d 86, 90, 205 Cal. Rptr. 242*

Contract is not necessarily illusory when conditioned on approval of board of directors of one party because party and party's agent are bound by implied covenant of good faith to submit contract and recommend sale to board for its good-faith consideration. *Moreland Development Co. v. Gladstone Holmes, Inc. (1982) 135 Cal. App. 3d 973, 977-978, 186 Cal. Rptr. 6* ; *Jacobs v. Freeman (1980) 104 Cal. App. 3d 177, 180-187, 163 Cal. Rptr. 680*

[8] Liquidated Damage Clause

In $1.3 million commercial transaction, $26,000 or 2 percent was reasonable in event of purchaser's breach; purchaser had burden under *Civ. Code § 1671* to prove unreasonableness. *Hong v. Somerset Associates (1984) 161 Cal. App. 3d 111, 115-116, 207 Cal. Rptr. 597*

[9] Options

Option lying outside safe harbor of *Civ. Code § 2906* because it is dependent on borrower's default will not necessarily be declared void or lose priority; option may be treated as disguised mortgage or facts and circumstances might indicate that option should be enforced according to its terms. *Wachovia Bank v. Lifetime Industries, Inc. (2006) 145 Cal. App. 4th 1039, 1058-1059, 52 Cal. Rptr. 3d 168*

Covenant not to compete given in option takes effect on execution of option contract, not on exercise of option. *Hoover Community Hotel Development Corp. v. Thomson (1985) 167 Cal. App. 3d 1130, 1135-1140, 213 Cal. Rptr. 750*

Agreement failing as bilateral contract because it gave purchaser unilateral and unconditional right to rescind within 45 days after close of escrow, was revived as option contract by purchaser's delivery and vendors' acceptance of automobile; this part performance was sufficient for 45-day option making promise to sell irrevocable. *Kowal v. Day (1971) 20 Cal. App. 3d 720, 724-728, 98 Cal. Rptr. 118*

[10] Preemptive Rights

Contract susceptible to different interpretations must be given construction that will make it lawful, operative, definite,

reasonable, capable of being carried into effect, and equitable; thus, contract for option and preemptive right confers rights only on parties, not their successors, so as to avoid violating rule against perpetuities. *Strong v. Theis (1986) 187 Cal. App. 3d 913, 919-921, 232 Cal. Rptr. 272*

[11] Right of First Refusal

Right of first refusal to purchase property in commercial lease was not triggered when family partnership transferred interest in the property to grandchildren in the family, because transfer was not made pursuant to a "bona fide offer from any third party for the purchase" of the property as required by the parties' agreement. *Hartzheim v. Valley Land and Cattle Co. (2007) 153 Cal. App. 4th 383, 394, 62 Cal. Rptr. 3d 815*

When exercise of right of first refusal offered different security than original offer, seller had reasonable time to determine whether security was adequate based on reasonableness standard. *McCulloch v. M & C Beauty Colleges (1987) 194 Cal. App. 3d 1338, 1346-1347, 240 Cal. Rptr. 189*

[12] Subdivision Map Act

Buyers who purchased lots from developer who had not yet obtained subdivision approval from Department of Real Estate were entitled to specific performance of purchase agreements; extrinsic evidence is admissible to render description of lots conveyed by purchase agreements sufficiently definite for enforcement. *Blackburn v. Charnley (2004) 117 Cal. App. 4th 758, 766-767, 11 Cal. Rptr. 3d 885*

Gov. Code § 66499.32(b), which denies buyer the option of voiding the contract when there is a certificate of compliance filed pursuant to *Gov. Code § 66499.35*, parcel map, or final map, does not preclude buyer from voiding sale when seller has violated Act and, by doing so, has also violated certificate of compliance, parcel map, or final map. *Le Gault v. Erickson (1999) 70 Cal. App. 4th 369, 374, 82 Cal. Rptr. 2d 692*

[13] Subordination of Seller's Purchase Money Lien

If vendor's security interest in development property under subordinated purchase money deed of trust is lost by foreclosure of senior lien, *Code Civ. Proc. § 580b* is not applicable to bar recovery by vendor of unpaid balance of purchase price. *Spangler v. Memel (1972) 7 Cal. 3d 603, 608-615, 102 Cal. Rptr. 807, 498 P.2d 1055* ; *Roffinella v. Sherinian (1986) 179 Cal. App. 3d 230, 236-241, 224 Cal. Rptr. 502*

Subordination agreement that does not specify principal amount of lien but requires reasonable amount is not specific enough to be found to be fair to seller. *Roskamp Manley Associates, Inc. v. Davis Development & Investment Corp. (1987) 184 Cal. App. 3d 513, 517-520, 229 Cal. Rptr. 186*

Agreement of vendor to subordinate purchase money deed of trust to institutional purchase money first deed of trust is enforceable even though no interest rate or maximum rate on senior note was specified; vendor is adequately protected because agreement provided senior note would not exceed 60 percent of purchase price and no construction was contemplated. *Thomas v. Fox (1982) 128 Cal. App. 3d 361, 365-368, 180 Cal. Rptr. 253*

[14] Risk of Loss

Absent agreement so providing, purchaser has no rights in proceeds of insurance policy held by seller on premises destroyed prior to transfer of title. *Long v. Keller (1980) 104 Cal. App. 3d 312, 318-320, 163 Cal. Rptr. 532*

[15] Time Essence; Delays Not Amounting to Breach

Vendor was estopped pursuant to former *Code Civ. Proc. § 1962(3)*, now *Evid. Code § 623*, from asserting purchaser's delayed performance if purchaser was misled by vendor's representation. *McCown v. Spencer (1970) 8 Cal. App. 3d 216, 222-225, 87 Cal. Rptr. 213*

[16] Vendor's Election of Remedies

Vendor, but not purchaser, has election to rescind or enforce contract of sale when purchaser has materially breached it. *Sweet v. Relis (1969) 275 Cal. App. 2d 257, 263, 79 Cal. Rptr. 829*

[17] Warranties

Implied warranty of merchantability is not applicable to individual seller of property who had it constructed by independent contractor. *Siders v. Schloo (1987) 188 Cal. App. 3d 1217, 1220-1221, 233 Cal. Rptr. 906*

Implied warranties were not made in sale of commercial real property that was not new; sale "as is" precluded liability for undisclosed defects in absence of fraud. *Shapiro v. Hu (1986) 188 Cal. App. 3d 324, 332-334, 233 Cal. Rptr. 470*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityFraud & MisrepresentationReal Property LawPurchase & SaleOption ContractsGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to DiscloseReal Property LawPurchase & SaleRemediesRescission & Restitution

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§ 569.124 Law Reviews

Note, *Builder's Liability to New and Subsequent Purchasers, 20 Sw. U.L. Rev. 219 (1991)*

Levin, *Consumerism and Land Sales, 15 Pepperdine L. Rev. 131 (1988)*

Comment, *Easton: The Birth of Negligence in Real Estate Broker-Purchaser Relationships, 14 Pepperdine L. Rev. 667 (1987)*

D. A. Larson, *The "as is" Disclaimer and The Sale of New Houses*, 13 Real Est. L. J. 238 (1985)

J. M. Pedowitz, *The Effect of Bankruptcy or Insolvency on Real Estate Transactions--An Overview, 20 Real Prop., Prob., & Tr. J. 25 (1985)*

H. B. Lambe, *Enforceability of Subordination Agreements, 19 Real Prop., Prob., & Tr. J. 631 (1984)*

McNamara, *Subordination Agreements as Viewed by Sellers, Purchasers, Construction Lenders, and Title Companies*, 12 Real. Est. L.J. 347 (1984)

Note, *Reed v. King: Fraudulent Nondisclosure of a Multiple Murder in a Real Estate Transaction, 45 U. Pitt. L. Rev. 877 (1984)*

Note, *Contracts --Mutual Mistake-- Rescission of a Land Contract for the Purchase of a Residence, 29 Wayne L. Rev. 1433 (1983)*

K. B. Holtzchue, *Contract of Sale for Office, Commercial, and Multi-Family Residential Premises--A Commentary, 17 Real Prop., Prob., & Tr. J. 382 (1982)*

Note, *The Home Buyers' Protection Act: An Alternative to Building Codes For Single Family Homes, 54 So. Cal. L. Rev. 529 (1981)*

Watson, *Impairment of Purchase-Money Security by Disaster and the Antideficiency Legislation: The Sounds of Silence*, 47 Lab. Arb. Rep. (BNA) 146 (1972)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawBrokersFiduciary ResponsibilitiesReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresDeficiency JudgmentsReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityMistakeReal Property LawPurchase & SaleRemediesDuty to Disclose

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[Reserved]

§§ 569.125[Reserved]

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B. Installment Sales Contracts

50-569 California Forms of Pleading and Practice--Annotated § 569.140

§ 569.140 State Statutes

Requirements if interest rate changes in contract relating to residential property or property on which residence will be constructed. *Civ. Code § 1916.5*

For purposes of *Civ. Code §§ 2924-2924h* (nonjudicial foreclosure) mortgage includes installment sales contract that gives vendor power of sale to be exercised after breach of obligation. *Civ. Code § 2920*

Limitations on tax, insurance, or other impound accounts. *Civ. Code §§ 2954, 2954.1, 2954(a)*

Purchaser of one-to-four-unit residence under installment sales contract is entitled to annual statement detailing payments applied to interest, principal, taxes, assessment, insurance, and other credits. *Civ. Code § 2954.2*

Vendor is trustee of payments for taxes and insurance, and is required to invest impound funds in California and to disburse them only for stated purpose, unless payor and encumbrancers agree. *Civ. Code §§ 2955, 2985.4*

Purchaser is entitled to prepay all or part of balance due on installment sales contract with respect to land that has been subdivided into lot or lots containing one-to-four-unit residence; provided, however that seller may, by written agreement, prohibit prepayment for one year after sale; waivers are void. *Civ. Code § 2985.6*

Veterans' Farm and Home Purchase Acts of 1943 and 1974. *Mil. & Vet. Code §§ 985-987.31*; *Mil. & Vet. Code §§ 987.50-987.95*

NOTE: See other applicable statutes listed in § 569.122.

Legal Topics:

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

Contracts LawTypes of ContractsInstallment ContractsEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresPrivate Power-of-Sale ForeclosureReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose

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§ 569.141 Decisions

Both vendor and purchaser under installment sales contract have insurable interests; absent statutory or contractual provision, neither party has obligation to other to insure property. *Brown v. Department of Veterans Affairs (1986) 178 Cal. App. 3d 392, 400, 403, 224 Cal. Rptr. 149*

Instrument entitled "Option for Sale and Purchase of Real Property" constitutes installment sales contract because monthly payments were substantial and were described as payments on purchase price and continued payments were required. *Smith v. Morton (1972) 29 Cal. App. 3d 616, 619-620, 106 Cal. Rptr. 52*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsInstallment ContractsInsurance LawProperty InsuranceInsurable InterestsReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleOption ContractsGeneral Overview

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[Reserved]

§§ 569.142[Reserved]

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§ 569.160 Complaint by Vendor--To Establish and Foreclose Vendor's Lien [Civ. Code § 3046]

[1] FORM Complaint by Vendor--To Establish and Foreclose Vendor's Lien [Civ. Code § 3046]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	NO. _____
vs.	)	COMPLAINT TO ESTABLISH AND FORECLOSE
_____ [*name*(*s*)], [and DOES I	)	VENDOR'S LIEN
through _____],	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff(s) allege(s):

[1. At all times mentioned herein, defendant(s) _____ (*name(s)*), sometimes hereinafter referred to as "Buyers," was/were, and now is/are, _____ (husband and wife *or other allegation of capacity or residence as necessary*).]

[2. The true names and capacities, whether individual, corporate, associate, or otherwise, of defendants sued herein as Doe I to Doe _____, inclusive, are unknown to plaintiff(s), who therefore sue said defendants by such fictitious names; plaintiff(s) will amend this complaint to show such true names and capacities when the same are ascertained. Plaintiff(s) is/are informed and believe and thereon allege that said defendants, and each of them, claim some right, title, estate, lien, or interest superior to plaintiff's(s') in the real property which is the subject of this action.]

[3. (Plaintiff(s) is/are informed and believe and thereon allege that) at all times herein mentioned, each of the defendants

was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of such agency.]

4. On _____ [*date*], at _____ [*city*], _____ County, California, plaintiff(s) and defendant(s) entered into a written agreement, a copy of which is attached hereto, marked Exhibit "A" and made a part hereof by reference, whereby plaintiff(s) agreed to sell to defendant(s) and defendant(s) agreed to purchase from plaintiff(s) for the sum of $_____ that certain real property situated in the County of _____, State of California, [commonly known as _____ (*common designation or street address*),] and more particularly described as follows: _____ [*set forth legal description*].

5. On _____ [*date*], in accordance with the terms of the agreement, plaintiff(s) conveyed the premises described above to defendant(s) by execution and delivery of a grant deed to defendant(s). Defendant(s) paid plaintiff(s) a down payment of $_____ and agreed to pay the balance of $_____ as follows: _____ [*specify*].

6. Defendant(s) failed to make the payments provided for in that he/she/it/they _____ [*set forth details of default*]. Defendant(s) is/are indebted to the plaintiff(s) in the sum of $_____, no part of which has been paid and no part of which is secured other than by the personal obligation of defendant(s).

7. As vendor(s), plaintiff(s) has/have a lien on the property described above for the payment of the unpaid portion of the purchase price. Plaintiff(s) claim(s) that lien in this action.

WHEREFORE, the plaintiff(s) pray(s) for judgment against the defendant(s) as follows:

1. For the sum of $_____ [, which includes reasonable attorney's fees as provided in the _____ (contract *or* note),] with interest at the rate of _____ percent from _____ [*date*];

2. For a declaration that plaintiff(s) has/have a vendor's lien on the aforesaid property to secure repayment of that sum;

3. For the sale of the premises in accordance with law and that the proceeds therefrom be used to satisfy the indebtedness of $_____ with interest;

4. For costs of suit incurred herein; and

5. For such other and further relief as this court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am [one of] the plaintiff(s) in the above-entitledaction. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of complaint is for use by a vendor of real property to establish and foreclose the vendor's lien provided by *Civ. Code § 3046* for the amount of the unpaid portion of the purchase price that is unsecured and payment of which is in default [*Civ. Code § 3046*]. The lien is not an absolute charge on the property, only an equitable right that must be established by action before it can be asserted [*Brown v. Johnson (1979) 98 Cal. App. 3d 844, 850-851, 159 Cal. Rptr. 675]* . The lien arises only after title has been transferred to the purchaser. Before then the vendor is said to have an express lien in the form of the contract and retention of title [*Avery v. Clark (1891) 87 Cal. 619, 625, 25 P. 919* ; *Barron-Gray Packing Co. v. Tapley (1947) 78 Cal. App. 2d 432, 437-439, 177 P.2d 776]* . A vendor's lien must be based on an obligation to pay money. A promise to perform personal services will not give rise to a vendor's lien [*Womble v. Womble (1910) 14 Cal. App. 739, 745, 113 P. 353]* .

If the real property is in another state and the purchasers are subject to personal jurisdiction in California, this form can be modified to state a cause of action for declaratory relief to establish the lien and that purchasers hold the property as constructive trustees of the vendor [*Mills v. Mills (1956) 147 Cal. App. 2d 107, 116-118, 305 P.2d 61]* .

[3] Establishing Lien Without Foreclosing

A vendor may bring an action for declaratory relief to establish, but not foreclose, the lien before default in order to preserve the lien as against subsequent purchasers [*LaHue v. Dougherty (1949) 34 Cal. 2d 1, 4, 206 P.2d 640]* .

[4] Allegations

This complaint sets forth the allegations necessary to establish a vendor's lien: the formation of a contract for the sale of real property (Paragraph 4); the vendor's performance of the contract by transfer of title (Paragraph 5); and default by the purchaser in unsecured cash payments for the purchase price (Paragraphs 5, 6) [*LaHue v. Dougherty (1949) 34 Cal. 2d 1, 5, 206 P.2d 640]* . Because venue rests on the location of the real property [*see § 569.160[7]*], the residence of the parties is not a necessary allegation, although allegations regarding capacity and/or residence of the parties may be included (Paragraph 1). Other optional allegations include those for fictitious defendants (Paragraph 2) and agency (Paragraph 3).

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude the defendant from using a general denial in an unlimited civil case, and will preclude a general denial in a limited civil case if the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

In limited civil cases, the first page of the first paper filed must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[7] Venue

In an action for the foreclosure of a lien on real property, the proper court for the trial of the action is the superior court in the county in which the real property (or some part of it) is situated [*Code Civ. Proc. § 392(a)(2)*].

[8] Statute of Limitations

The limitation period for an action to establish a vendor's lien is the limitation period applicable to an action to recover the purchase money. If, as in most cases, a note was given for the balance of the purchase price, the limitation would be four years from the date of default [*Finnell v. Finnell (1909) 156 Cal. 589, 599, 105 P. 740* ; *Code Civ. Proc. § 337(1)*].

[9] Waiver of Lien

A vendor's lien can be waived by any action of the vendor evidencing an intent not to rely on the lien, including in some cases the characteristics of the transaction itself. For instance, when the property was first to be conveyed free of all encumbrances to an agent who would hold title until a corporation was formedand then convey to the corporation free of all encumbrances, the vendor was found to have waived any right to a lien [*Royal Con. Min. Co. v. Royal Con. Mines (1910) 157 Cal. 737, 746-749, 110 P. 123]* . Neither consideration nor a writing is necessary to waive the lien [*Royal Con. Min. Co. v. Royal Con. Mines (1910) 157 Cal. 737, 746, 110 P. 123* ; *Claiborne v. Castle (1893) 98 Cal. 30, 33-34, 32 P. 807]* . The burden of proof of waiver rests on the party resisting the lien [*Selna v. Selna (1899) 125 Cal. 357, 362, 58 P. 16* ; *Edwards-Town, Inc v. Dimin (1970) 9 Cal. App. 3d 87, 92, 87 Cal. Rptr. 726]* . The vendor waives the lien by taking a mortgage for the balance of the purchase price [*Wells v. Harter (1880) 56 Cal. 342, 344]* , or by taking a note from a third party as security [*Jones v. Allert (1911) 161 Cal. 234, 237, 118 P. 794]* . The vendor's lien is not necessarily waived by his or her obtaining a money judgment for the balance of the purchase price, even if he or she has levied execution against the property. For the vendor's lien to be extinguished by execution on the money judgment, without satisfaction or sale of the property, the purchaser must show that there is property to which the judgment lien of the money judgment can attach, and which can thus serve as security for the debt [*Brown v. Kahn (1917) 176 Cal. 159, 160-164, 167 P. 869]* . Similarly, approval of a creditor's claim against the purchaser's estate for the balance of the purchase price does not extinguish the lien [*Selna v. Selna (1899) 125 Cal. 357, 362-364, 58 P. 16]* .

[10] Statutes

Absolute transfer (as opposed to transfer in trust to pay debts) of contract for all or part of payment of purchase price is waiver of lien to extent of sum payable under contract. *Civ. Code § 3047*

Vendor's lien is valid against everyone claiming under debtor except purchaser or encumbrancer in good faith and for value. *Civ. Code § 3048*

Recording lis pendens in connection with action concerning real property. *Code Civ. Proc. § 405 et seq.*

Judgment for sale of real property; contents and execution of writ of sale of real property. *Code Civ. Proc. §§ 712.010-712.070, 716.010-716.030*

[11] Decisions

[a] In General

Types of estate sold that give rise to vendor's lien. *Rogers Etc. Co. v. S. California Etc. Co. (1911) 159 Cal. 735, 740-741, 115 P. 934* (equitable interest under purchase contract); *Grossman v. Lippson (1978) 81 Cal. App. 3d 554, 562, 146 Cal. Rptr. 741* (sublease at premium exceeding rent payable under lease); *McGreevy v. Constitution Life Ins. Co. (1965) 238 Cal. App. 2d 364, 368-369* (oil and gas lease)

Transfer of note for collection does not waive vendor's lien. *Nolan v. Nolan (1909) 155 Cal. 476, 479, 482, 101 P. 520*

Vendor's lien passes to and may be established by personal representative or heirs of deceased vendor and is enforceable against estate or heirs of deceased purchaser. *Selna v. Selna (1899) 125 Cal. 357, 361, 58 P. 16* ; *Mills v. Mills (1956) 147 Cal. App. 2d 107, 118-120, 305 P.2d 61*

Vendor's lien is not assignable. *Williams v. Young (1862) 21 Cal. 227, 228*

Vendor's lien is not extinguished by extension of time for payment of purchase money. *Mills v. Mills (1956) 147 Cal. App. 2d 107, 118, 305 P.2d 61*

One-action provisions of *Code Civ. Proc. § 726* are not applicable to vendors' liens. *Schwartz v. Mead (1931) 116 Cal. App. 606, 611-614, 3 P.2d 48*

Deficiency provisions of *Code Civ. Proc. § 726* do not apply to vendors' liens. *Ocean Shore Dev. Co., Inc. v. Hammond (1918) 38 Cal. App. 102, 108, 175 P. 706*

[b] Priorities

When purchaser had given mortgage on property subject to vendor's lien and on adjoining parcel and had declared homestead on adjoining parcel, mortgage has priority over vendor's lien, but foreclosing vendor is entitled to require homestead parcel to be sold first. *Nolan v. Nolan (1909) 155 Cal. 476, 487-488, 101 P. 520*

Vendor's lien is superior to homestead. *Williams v. Young (1861) 17 Cal. 403, 406*

Subsequent purchaser who has no notice of unpaid balance of purchase price takes free of vendor's lien even though notice of vendor's lien had been recorded; recordation of lien before lien has been established by action does not impart constructive notice. *Brown v. Johnson (1979) 98 Cal. App. 3d 844, 849-851, 159 Cal. Rptr. 675*

Vendor's lien continues after sale of property to subsequent purchaser who had notice of unpaid balance of purchase price. *Edwards-Town, Inc. v. Dimin (1970) 9 Cal. App. 3d 87, 93-94, 87 Cal. Rptr. 726*

Judgment lien does not have priority over vendor's lien unless judgment creditor extended credit believing purchaser owned property free and clear or parted with value so as to become good faith encumbrancer. *Schut v. Doyle (1959) 168 Cal. App. 2d 698, 702-704, 336 P.2d 567*

[12] Cross References

For a related form, see *§ 569.163*.

For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions*

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see *Ch. 177, Damages, § 177.40* et seq.

For discussion and forms for enforcement of a judgment of foreclosure, see *Ch. 254, Executions and Enforcement of Judgments, § 254.130* et seq.

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal Jurisdiction, Inconvenient Forum, and Appearances* , and Ch. 324, *Jurisdiction: Subject Matter Jurisdiction*

For discussion of when recording of lis pendens is appropriate in connection with an action regarding real property and form of lis pendens, see Ch. 348, *Lis Pendens*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

Legal Topics:

For related research and practice materials, see the following legal topics:
Admiralty LawMaritime LiensNatureAssignabilityAdmiralty LawMaritime LiensPriority & SourcesGeneral OverviewAdmiralty LawMaritime LiensPriority & SourcesContractsAuthorityAdmiralty LawMaritime LiensPriority & SourcesTortCivil ProcedureJurisdictionGeneral OverviewCivil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedureVenueIndividual DefendantsCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesFictitious NamesCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawDebtor & Creditor RelationsContracts LawNegotiable InstrumentsEnforcementDefensesStatutes of LimitationsContracts LawNegotiable InstrumentsTransfersContracts LawThird PartiesGeneral OverviewContracts LawTypes of ContractsBona Fide PurchasersContracts LawTypes of ContractsLease AgreementsGeneral OverviewEnergy & Utilities LawFinancingGeneral OverviewEnergy & Utilities LawLeases & LicensesAssignment, Release & Surrender ClausesSubleasesEnergy & Utilities LawPurchase ContractsGeneral OverviewEstate, Gift & Trust LawEstate AdministrationClaims Against EstatesGeneral OverviewEstate, Gift & Trust LawProbateGeneral OverviewEstate, Gift & Trust LawTrustsConstructive TrustsGovernmentsLegislationStatutes of LimitationsGeneral OverviewReal Property

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Volume 50: Usury thru Verification-Chs. 568-572
Chapter 569 VENDOR AND PURCHASER OF REAL PROPERTY
PART IV. FORMS
A. Actions Between Vendors And Purchasers Generally

50-569 California Forms of Pleading and Practice--Annotated § 569.161

§ 569.161 Complaint by Vendor--For Damages for Breach of Contract to Purchase Real Property [Civ. Code § 3307]

[1] FORM Complaint by Vendor--For Damages for Breach of Contract to Purchase Real Property [Civ. Code § 3307]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name(s)*,	)	
Plaintiff(s),	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR BREACH OF
_____ [*name(s)*,	)	CONTRACT TO PURCHASE REAL PROPERTY
[and DOES I through _____],	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff(s) allege(s):

1. Plaintiff(s) _____ [*name(s)*] is/are, and at all times herein mentioned, was/were, _____ [*state capacity of plaintiff(s) as necessary, e.g.*, husband and wife and fee owners of the real property described below].

2. Defendant(s) _____ [*name(s)*], sometimes hereinafter referred to as "Buyer(s)," is/are, and at all times herein mentioned, was/were, _____ [*state capacity and if used as basis of venue, residence of defendant(s), e.g.*, husband and wife, residing at _____ (*street address and city*), _____ County, California].

[3. The true names and capacities, whether individual, corporate, associate, or otherwise, of defendants sued herein as Doe I to Doe _____, inclusive, are unknown to plaintiff(s), who therefore sue(s) said defendants by such fictitious names; plaintiff(s) will amend this complaint to show such true names and capacities when the same are ascertained. Plaintiff(s) is/are informed and believe and thereon allege that said defendants, and each of them, is responsible in some manner for plaintiff's(s') damages herein alleged.]

[4. *Agency allegation, if appropriate. See § 569.160[1], Paragraph 3.*]

5. On _____ [*date*], at _____ [*city*], _____ County, California, plaintiff(s) and defendant(s) entered into a written contract, a copy of which is attached hereto, marked Exhibit "A" and made a part hereof by reference, whereby plaintiff(s) agreed to sell to defendant(s) and defendant(s) agreed to purchase from plaintiff(s) for the sum of $_____ that certainreal property situated in the County of _____, State of California, [commonly known as _____ (*common designation or street address*),] and more particularly described as follows: _____ [*set forth legal description*].

6. The contract price of $_____ was to be paid _____ [*specify terms, e.g.,* $_____ as a cash downpayment prior to close of escrow, $_____ from the proceeds of a note and first deed of trust in favor of an institutional lender, and $_____ in the form of a note to plaintiff(s) secured by a second deed of trust on the property. Discounting the value of the note to be taken by plaintiff(s) the contract price was equivalent to an all-cash-to-seller price of $_____.]

7. Plaintiff(s) has/have fully performed all conditions, covenants, and promises he/she/they is/are required to perform under the terms of the contract referred to in Paragraph 5, above, [and the escrow instructions executed by the parties on _____ (*date*),] [_____ (*if performance has not been completed by plaintiff(s), so state, giving the excuse for nonperformance, e.g.,* except that plaintiffs did not place their deed in escrow because tender was excused by defendants' conduct described in Paragraph 9, below)].

[8. On or about _____ (*date*), _____ (*describe the satisfaction or waiver of any condition precedent to defendant's(s') performance, e.g.,* defendant's received from _____ (*name of lender*) a written commitment for a loan for _____ ($_____ or _____ per cent of the purchase price) to be secured by the subject property).]

9. _____ [*Describe defendant's(s') breach, e.g.,* The defendants have failed and refused to pay the remainder of the downpayment required by the contract or to execute the note and deed of trust in connection with the loan described above _____ (for 50 days after the time called for by the contract *or* and on _____ (*date*), stated that they are not going to comply with the provisions of the agreement and escrow instructions)].

[10. On _____ (*date*), plaintiff(s) demanded that defendant(s) perform his/her/its/their obligations under the contract.]

11. On the date defendant(s) breached the contract, the _____ [fair market value of the property *or* value of the property to plaintiff(s)] was $_____. As a result of the breach, plaintiff(s) has/have suffered damages of $_____, reflecting the difference between the contract price and the _____ [market value of the property *or* value of the property to plaintiff(s)] at the time of the breach.

[12. Plaintiffs purchased a replacement home after learning that defendant(s) had qualified for financing. As a further proximate cause of defendant's(s') breach of the contract, plaintiff(s) has/have incurred liability for and paid _____ (*specify any special damage incurred by plaintiff(s), e.g.,* sewer assessments, taxes, utility and

maintenance costs required to keep the contract property free from vandalism and ready for resale in the sum of $_____.]

WHEREFORE, plaintiff(s) pray(s) judgment against defendant(s) as follows:

1. For compensatory damages in the sum of $_____, together with interest thereon from the date of defendant's(s') breach;

2. For special damages in the sum of $_____, together with interest thereon from the date of defendant's(s') breach;

3. For costs of suit herein incurred[, including attorney's fees as provided by the contract here at issue];

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 569.160.*]

[2] Use of Form

This form of complaint is for use by a vendor under a contract for the sale and purchase of real property to recover damages resulting from purchaser's breach of the contract [*Civ. Code § 3307*]. For discussions of circumstances to be considered in electing a remedy, see *§§ 569.21, 569.24[1], [4]*. For an illustration of the Judicial Council breach of contract pleading form, see Ch. 140, *Contracts* .

[3] Allegations.

This complaint sets forth:

- The formation of a written contract for the sale of real property (Paragraph 5) [*Civ. Code § 1624(c)*; *Code Civ. Proc. § 430.10(g)*].

- The vendor's performance of the contract or excuses for nonperformance of any obligations under the contract plaintiff did not perform (Paragraph 7).

- The satisfaction or waiver of any conditions precedent to defendant's performance (Paragraph 8); defendant's breach of the contract (Paragraph 9).

- The value of the property to plaintiffs on the date of breach, which isgenerally the fair market value of the property, and a calculation of general damages (Paragraph 11) [*see Jensen v. Dalton (1970) 9 Cal. App. 3d 654, 657-658, 88 Cal. Rptr. 426* (value of property to vendor on date of breach is decreased by amount of taxes, utilities, and assessments coming due between date of contract and date of breach)].

- Any special damages suffered by plaintiffs (Paragraph 12) [*Lortz v. Connell (1969) 273 Cal. App. 2d 286, 290-291, 78 Cal. Rptr. 6* (breach of contract elements); *Caspar Lumber Co. v. Stowell (1940) 37 Cal. App. 2d 58, 61, 98 P.2d 744* (market value date of breach); *Employees' Participating Asso. v.*

Pine (1949) 91 Cal. App. 2d 299, 301, 204 P.2d 965 (market value date of breach)].

Unless the breach was repudiation, plaintiff's tender and demand must be alleged (Paragraphs 7 and 10). The allegation of demand is especially important if plaintiff/vendor had allowed the time specified for performance to pass without objection [*McKinley v. Lagae (1962) 207 Cal. App. 2d 284, 291, 293-294, 24 Cal. Rptr. 454* (repudiation); *Baird v. Barton (1958) 163 Cal. App. 2d 502, 505-506, 329 P.2d 492* (demand to reinstate time provision)].

While no case has held that the cash equivalent of the contract price must be pleaded, in a transaction that calls for the vendor to take back a note and deed of trust, damages are measured as if the contract provided for all cash to the seller [*Abrams v. Motter (1970) 3 Cal. App. 3d 828, 841, 83 Cal. Rptr. 855]* . Because contract price is an element of damage, and damages are required to be pleaded, it would seem prudent to add Paragraph 6 if the contract called for vendor financing.

[4] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

In limited civil cases, the first page of the first paper filed must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

An action for damages for breach of contract may be brought in the county in which the contract was formed or is to be performed or in which any defendant resides [*Code Civ. Proc. § 395(a)* (county in which contract formed as county of performance unless contract provides otherwise)]. Venue will be the same if this form is used in a complaint that also seeks declaratory relief based on the contract [*Mission Imports, Inc. v. Superior Court (1982) 31 Cal. 3d 921, 930-931, 184 Cal. Rptr. 296, 647 P.2d 1075]* . If this form is used in a complaint that also seeks to quiet title, only the superior court has jurisdiction, regardless of the amount of any incidental damages sought, and venue is in the county in which the real property is located, although that court may transfer it [*Code Civ. Proc. §§ 760.040(a), 760.050(a)*].

[5] State Statutes

Contract for sale of real property must be in writing. *Civ. Code § 1624(c)*

Nonapplicability of Unruh Act (*Civ. Code § 1810 et seq.*) to contract for sale of entire residence or lot. *Civ. Code § 1801.4(a), (b)*

Resale by personal representative of deceased vendor if purchaser defaults after sale is confirmed. *Prob. Code § 10350*

[6] Decisions

[a] Vendor's Performance or Excuse

Purchaser's unconditional repudiation excuses vendor's performance if vendor has acted in reliance on repudiation prior to attempted retraction. *Freedman v. St. Matthias Parish (1951) 37 Cal. 2d 16, 19, 230 P.2d 629*

Purchaser's offer to perform if granted demands to which he or she is not entitled does not amount to retraction of

repudiation. *Freedman v. St. Matthias Parish (1951) 37 Cal. 2d 16, 19, 230 P.2d 629*

Purchasers' failure to make timely deposit of funds in escrow was not breach because seller/builder had not completed home according to specifications and tender by each party was concurrent condition. *Kossler v. Palm Springs Developments, Ltd. (1980) 101 Cal. App. 3d 88, 99-101, 161 Cal. Rptr. 423*

[b] Consequential Damages

[i] In General

Vendor is entitled to recover costs of clearing title or regaining possession. *Honey v. Henry's Franchise Leasing Corp. (1966) 64 Cal. 2d 801, 805, 52 Cal. Rptr. 18, 415 P.2d 833* ; *Yackey v. Pacific Development Co. (1979) 99 Cal. App. 3d 776, 786-787, 160 Cal. Rptr. 430* (costs of removing lis pendens of third party that purchaser had agreed to assume)

Vendor is not entitled to recover expenses would have been incurred if sale was completed, but is entitled to recover expenses of actual or hypothetical resale that exceed expenses assumed under breached contract. *Royer v. Carter (1951) 37 Cal. 2d 544, 550-551, 233 P.2d 539* (actual resale); *Jensen v. Dalton (1970) 9 Cal. App. 3d 654, 657-658, 88 Cal. Rptr. 426* (hypothetical resale)

To sustain award to vendor of mortgage interest and taxes paid between breach andtrial, trial court must find that these expenses were reasonably foreseeable, thatvendor diligently attempted resale or that defaulting purchaser's lis pendens made property unmarketable, and that awarded expenses exceeded value of vendor's use of property during period. *Askari v. R. & R. Land Co. (1986) 179 Cal. App. 3d 1101, 1108, 225 Cal. Rptr. 285*

If vendor diligently attempted resale or defaulting purchaser's lis pendens made property unmarketable, vendor was entitled to consequential damages equal to interest that would have been earned on down payment between date of breach and time of trial and interest that would have been earned on vendor-assisted financing during that period. *Askari v. R. & R. Land Co. (1986) 179 Cal. App. 3d 1101, 1108-1110, 225 Cal. Rptr. 285*

Vendor who could not resell property because of defaulting purchaser's lis pendens was entitled to consequential damages for decrease in value of property attributable to lis pendens; increase or decrease in value was to be calculated as of date lis pendens is lifted. *Askari v. R. & R. Land Co. (1986) 179 Cal. App. 3d 1101, 1110-1112, 225 Cal. Rptr. 285*

Defaulting purchaser was entitled to offset for difference between contract price and higher market value at time of trial; if defaulting purchaser's lis pendens hindered vendor's resale efforts, offset was to be calculated as of date of breach; in both cases, burden of proof of greater value was on defaulting purchaser. *Askari v. R. & R. Land Co. (1986) 179 Cal. App. 3d 1101, 1112, 225 Cal. Rptr. 285*

Vendor is entitled to recover taxes, utilities, and assessments that came due between date of contract and date of breach on theory they decreased net value of property to vendor on date of breach. *Jensen v. Dalton (1970) 9 Cal. App. 3d 654, 657-658, 88 Cal. Rptr. 426*

Vendor whose purchase of replacement home is reasonably foreseeable at time of contracting and who, as a consequence of purchaser's breach, is required to maintain two residences until resale of contract property is entitled to recover commuting expenses related to contract property. *Jensen v. Dalton (1970) 9 Cal. App. 3d 654, 658, 88 Cal. Rptr. 426*

Vendor is not entitled to recover expenses of normal occupation, only those necessary for resale. *Abrams v. Motter (1970) 3 Cal. App. 3d 828, 850, 83 Cal. Rptr. 855*

Although *Civ. Code § 3353* relates only to resale of personal property and not to resale of real property, vendor must show that resale was made with reasonable diligence to recover any consequential damages. *Sutter v. Madrin (1969) 269 Cal. App. 2d 161, 169-170, 74 Cal. Rptr. 627* (hotel operating expenses)

If resale is made in shortest possible time, vendor's out-of-pocket expenses for fire insurance, mortgage interest, and real property taxes are consequential damages. *Allen v. Enomoto (1964) 228 Cal. App. 2d 798, 803-804, 39 Cal. Rptr. 815*

When property that is vendor's residence remains unoccupied between date of breach and resale, vendor is not entitled to recover rental value. *Allen v. Enomoto (1964) 228 Cal. App. 2d 798, 804, 39 Cal. Rptr. 815*

When other property is taken as partial payment on resale, vendor is entitled to recover expenses incurred in refinancing other property, but neither loss nor expenses on resale of other property is recoverable. *Allen v. Enomoto (1964) 228 Cal. App. 2d 798, 804, 39 Cal. Rptr. 815*

[ii] Broker's Fees

Amount of broker's commission on resale recoverable by vendor must be required to be decreased by amount of commission saved (i.e., difference between commission agreed to be paid and actually paid or enforceable by broker) on breached sale. *Royer v. Carter (1951) 37 Cal. 2d 544, 551, 233 P.2d 539*

Vendor is entitled to recover broker's commission necessary to resell even though breached sale did not involve broker. *Jensen v. Dalton (1970) 9 Cal. App. 3d 654, 657-658, 88 Cal. Rptr. 426*

Vendor's recovery of damages for breach of contract is not in itself sufficient to establish vendor's liability for brokerage commission. *Barton v. White Oak Realty, Inc. (1969) 271 Cal. App. 2d 579, 585-587, 76 Cal. Rptr. 587*

Vendor is entitled to recover amount of broker's judgment against him or her for fee on breached sale plus interest on that judgment from date thereof. *McKinley v. Lagae (1962) 207 Cal. App. 2d 284, 295, 24 Cal. Rptr. 454*

[iii] Loss of Income

Vendor of agricultural property who has refrained from planting crops in reliance on contract is entitled to recover net income crops would have produced. *Wade v. Lake County Title Co. (1970) 6 Cal. App. 3d 824, 831, 86 Cal. Rptr. 182* ; *Yocum v. Taylor (1920) 50 Cal. App. 294, 295, 195 P. 62*

Vendor who evicts tenant in reliance on contract is entitled to recover lost rentals from time of eviction until date of resale. *McKinley v. Lagae (1962) 207 Cal. App. 2d 284, 295, 24 Cal. Rptr. 454*

[iv] Purchase of Other Residence

If vendor's purchase of another residence is foreseeable and expenses connected with purchase are caused by purchaser's breach, those expenses are recoverable by vendor. *Angell v. Rowlands (1978) 85 Cal. App. 3d 536, 542-543, 149 Cal. Rptr. 574* (penalty paid for delay in closing purchase of replacement home); *Jensen v Dalton (1970) 9 Cal. App. 3d 654, 658, 88 Cal. Rptr. 426* (refinance because of lower downpayment, commuting between two

residences)

Whether purchase of replacement residence was foreseeable and reasonable is question of fact; vendor's purchase of replacement home before purchaser qualified for financing may not be reasonable; expenses of two residences are recoverable by vendor only if purchase was both foreseeable and reasonable and resale was in shortest possible time. *Abrams v. Motter (1970) 3 Cal. App. 3d 828, 850-851, 83 Cal. Rptr. 855*

[c] Difference in Value Damages

Traditional measure of damages assumes vendor is able to resell property; when purchaser had agreed to remove lis pendens filed by third party, vendor was properly awarded costs to remove lis pendens plus interest on contract price fromdate escrow should have closed until lis pendens was removed. *Yackey v. Pacific Development Co. (1979) 99 Cal. App. 3d 776, 786-787, 160 Cal. Rptr. 430*

[7] Cross References

For a related form, see *§ 569.160*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueCorporationsCivil ProcedureVenueIndividual DefendantsCivil ProcedurePartiesFictitious NamesCivil ProcedureRemediesDamagesGeneral OverviewCivil ProcedureRemediesLis PendensGeneral OverviewContracts LawGeneral OverviewContracts LawBreachGeneral OverviewContracts LawBreachCauses of ActionElements of ClaimsContracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawContract Conditions & ProvisionsConditions PrecedentContracts LawPerformanceGeneral OverviewContracts LawPerformanceTender & DeliveryContracts LawRemediesGeneral OverviewContracts LawRemediesCompensatory DamagesConsequential DamagesContracts LawRemediesCompensatory DamagesInterestContracts LawRemediesElection of RemediesContracts LawThird PartiesGeneral OverviewEnergy & Utilities LawPurchase ContractsPrice TermsEnergy & Utilities LawPurchase ContractsRemedies for BreachEstate, Gift & Trust LawProbateGeneral OverviewGovernmentsLocal GovernmentsGeneral OverviewGovernmentsLocal GovernmentsFinanceGovernmentsPublic ImprovementsFinancingInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesBrokersInsurance LawProperty InsuranceCoverageReal PropertyGeneral OverviewLabor & Employment LawWrongful TerminationBreach of ContractExpress ContractsPublic Contracts LawBids & FormationOffer & AcceptanceAcceptances & AwardsReal Property LawBrokersGeneral OverviewReal Property LawBrokersDiscipline, Licensing & RegulationReal Property LawDeedsRemediesDamagesReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingSecondary FinancingGeneral OverviewReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsDamagesConsequential DamagesReal Property LawPriorities & RecordingLis PendensReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleRemediesGeneral OverviewReal Property LawPurchase & SaleRemediesDamagesGeneral OverviewReal Property LawPurchase & SaleRemediesDamagesConsequential DamagesReal Property LawPurchase & SaleRemediesDamagesIncidental DamagesReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsTax LawState & Local TaxesPublic Utilities TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationGeneral OverviewTax LawState & Local TaxesReal Property TaxAssessment & ValuationValuationTortsNegligenceCausationProximate CauseForeseeability

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California Forms of Pleading and Practice--Annotated

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Volume 50: Usury thru Verification-Chs. 568-572
Chapter 569 VENDOR AND PURCHASER OF REAL PROPERTY
PART IV. FORMS
A. Actions Between Vendors And Purchasers Generally

50-569 California Forms of Pleading and Practice--Annotated § 569.162

§ 569.162 Complaint by Vendor--For Damages for Fraud in the Purchase or Exchange of Real Property [Civ. Code § 3343]--Or in the Alternative, for Rescission [Civ. Code § 1692] and Cancellation [Civ. Code § 3412]

[1] FORM Complaint by Vendor--For Damages for Fraud in the Purchase or Exchange of Real Property [Civ. Code § 3343]--Or in the Alternative, for Rescission [Civ. Code § 1692] and Cancellation [Civ. Code § 3412]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR FRAUD[,
_____ [*name*(*s*)],	)	RESCISSION, AND CANCELLATION]
[and DOES I through _____],	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff(s) allege(s):

FIRST CAUSE OF ACTION
(Damages for Fraud in _____ [Purchase *or* Exchange] of Real Property)

1. [*Capacity and residence of defendant(s). See § 569.161, Paragraph 2.*]

[2. *Fictitious name allegation, if appropriate. See § 569.161, Paragraph 3.*]

[3. *Agency allegation, if appropriate. See § 569.160, Paragraph 3.*]

4. At all times herein mentioned prior to _____ [*date*], plaintiff(s) was/were [husband and wife and] fee owner(s) of that certain real property situated in the County of _____, State of California, [commonly known as _____ (*common designation or street address*),] and more particularly described as follows: _____ [*set forth legal description*].

[*EITHER, if purchase contract*]

5. On or about _____ [*date*], plaintiff(s) and defendant(s) entered into a written contract, a copy of which is attached hereto as Exhibit "A" and made a part hereof, whereby plaintiff(s) agreed to sell to defendant(s) and defendant(s) agreed to purchase from plaintiff(s) for the sum of $_____ the real property described in Paragraph 4. On or about _____ [*date*], pursuant to that agreement, plaintiff(s) conveyed the property described in Paragraph 4 to defendant(s).

[*OR, if exchange of property*]

5. At all times herein mentioned prior to _____[*date*], defendant(s) was/were fee owners of that certain real property situated in the County of _____, State of California, [commonly known as _____ (*common designation or street address*),] and more particularly described as follows: _____ [*set forth legal description*].

6. On or about _____ [*date*], plaintiff(s) and defendant(s) entered into a written contract, a copy of which is attached hereto as Exhibit "A" and made a part hereof, whereby plaintiff(s) agreed to convey to defendant(s) the real property described in Paragraph 4, above, and defendant(s) agreed to convey to plaintiff(s) the real property described in Paragraph 5, above. On or about _____[*date*], pursuant to that contract, plaintiff(s) conveyed the property described in Paragraph 4, above, to defendant(s), and defendant(s) conveyed the property described in Paragraph 5, above, to plaintiff(s).

[*CONTINUE*]

[7. The deed from plaintiff(s) to defendant(s) was recorded on _____ (*date*), in _____(Book *or* Reel) _____, at _____ (Page *or* Image) _____ of the Official Records in the Office of the County Recorder of _____ County, California. A copy of that deed is attached hereto, marked Exhibit "B" and made a part hereof.]

[8. The deed from defendant(s) to plaintiff(s) was recorded on _____ (*date*), in _____(Book *or* Reel) _____, at _____ (Page *or* Image) _____ of the Official Records in the Office of the County Recorder of _____ County, California. A copy of that deed is attached hereto, marked Exhibit "C" and made a part hereof.]

[9. _____ (*Describe any provisions of the agreement which are relevant to the relief sought, such as notes or deed of trust taken by plaintiff and performance of those provisions, e.g.,* The purchase price was to be paid $_____ as a cash down payment prior to close of escrow and $_____ in the form of a note payable to plaintiff(s) secured by a deed of trust on the subject property. Plaintiff(s) agreed to subordinate this deed of trust to a development loan of not more than $_____ which defendant(s) represented to plaintiff(s) that he/she/it/they intended to obtain. Defendant(s) agreed that the proceeds of the development loan would

be used exclusively to install roads, water, sewage, and electrical systems on the subject property and to subdivide it into parcels of no less than four acres each. The down payment, note, and deed of trust were received by plaintiff(s) on or about _____(*date*), at which time plaintiff(s) executed the subordination agreement (*if cancellation of the subordination agreement will be sought, add recording data:*, which was recorded on _____ (*date*), in _____ (Book or Reel) _____, at _____ (Page or Image) _____ of the Official Records in the Office of the County Recorder of _____County, California, a copy of which is attached hereto as Exhibit "D" and made a hereof)].

10. On or about _____ [*date*], and during the negotiations for the above-described contract for the _____ [sale and purchase *or* exchange] of property defendant(s) falsely represented to plaintiff(s) _____ [*state the substance of the misrepresentation, e.g.,* that plaintiff's(s') property described in Paragraph 4, above, had a fair market value of $_____ (*the contract price*) and that it's highest and best use was as vacation parcels].

11. In fact, _____ [*state the true facts, e.g.,* plaintiff's(s') property described in Paragraph 4, above, was within an area which the State of California intended to take by eminent domain for use as in the state water project's canal system].

12. These representations were made by defendant(s) with the intent to deceive and defraud plaintiff(s) and to induce him/her/them to enter into the above-described contract of _____ [sale and purchase *or* exchange].

13. The representations made by defendant(s) were in fact false, and defendant(s) knew them to be false at the time he/she/they made them [and at all times herein mentioned].

14. Plaintiff(s) relied on the representations by defendant(s) in entering into the above-described contract of _____ [sale and purchase *or* exchange]. Plaintiff's(s') reliance on these representations was justified because _____ [*set forth facts showing justifiable reliance, e.g.,* plaintiffs live in _____ County, California, some _____ miles from their property described in Paragraph 4. Plaintiffs are 87 and 89 years old respectively and have never visited that property, which they acquired in satisfaction of a debt in 1972. Until defendant(s) approached them, plaintiffs had no intention of selling that property, and had not investigated the real estate market in that area].

15. The representations defendant(s) made to plaintiff(s) were a material inducement to plaintiff(s) to enter into the contract. Plaintiff(s) would not have entered into the contract but for those representations.

16. On or about _____ [*date*], plaintiff(s) _____ [*allege discovery of true facts, e.g.,* were informed by their grandson that the state of California intended to acquire land in _____ County for expansion of its water project's canal system and asked plaintiffs if their land was within the area targeted for acquisition. Plaintiffs immediately contacted the Department of Water Resources and were informed that the property described in Paragraph 4, above, was targeted for acquisition at an offering price of $_____].

17. As a proximate result of defendant's(s') fraud and deceit plaintiff(s)has/have sustained damages of $_____, which is the difference between the actual value of the property described in Paragraph 4, above, and the actual value of the consideration received by plaintiff(s) in exchange for that property.

[18. As a (further) proximate result of the defendant's(s') fraud and deceit, plaintiff(s) has/have _____ (*describe other items of allowable damages, such as income from property after sale, if plaintiff(s) would have been entitled to it or if rescission is pleaded as an alternative, e.g.,* been deprived of the use and value of the use of the property described in Paragraph 4, which is worth $_____ per month, since the time defendant(s) have taken possession thereof).]

[19. At all times herein mentioned, _____ (*allege facts showing that defendant(s) acted with oppression, fraud, and malice, e.g.,* and even before he/she/they approached plaintiff(s), defendant(s) knew that plaintiff's(s') property was targeted for acquisition by emiment domain. Each and every act of defendant(s) and statement of defendant(s) to plaintiff(s) was part of a scheme to intentionally and maliciously deceive plaintiff(s) and take unfair advantage of his/her/their advanced years, lack of familiarity with the property, and lack of ability to travel).]

SECOND CAUSE OF ACTION
(Rescission)

20. Plaintiff(s) reallege(s) and incorporate(s) herein Paragraphs 1-19 of the First Cause of Action.

[21. At all times herein mentioned, defendant _____ (*name*), hereinafter referred to as "Title Company," was, and now is, a corporation organized and existing under and by virtue of the law of the State of California, with its principal office for the transaction of business in _____ County, California, and trustee of the deed of trust described in Paragraph 9, above, given by defendant(s) to plaintiff(s) to secure the note for $_____ of the purchase.]

22. Plaintiff(s) intend(s) that service of summons of this action and of this complaint serve as notice of rescission of the aforementioned contract of _____ [sale and purchase *or* exchange] [including the loan transaction evidenced by the note, deed of trust, and subordination agreement referred to in Paragraph 9] and hereby offer(s) to restore all consideration furnished by defendant(s) under the contract [, note, and deed of trust], on condition that defendant(s) restore to plaintiff(s) the consideration furnished by plaintiff(s).

THIRD CAUSE OF ACTION
(Cancellation)

23. Plaintiff(s) reallege(s) and incorporate(s) herein Paragraphs 1-19 of the First Cause of Action [and Paragraph 21 of the Second Cause of Action].

24. Plaintiff(s) intend(s) that service of summons of this action and of this complaint serve as notice of cancellation of the _____ [deed referred to in Paragraphs 5 and 7 *or* deeds referred to in Paragraphs 5, 6, 7, and 8] [and of the note, and deed of trust referred to in Paragraph 9] and hereby offer(s) to restore all consideration furnished by defendant(s), on condition that defendant(s) restore to plaintiff(s) the consideration furnished by plaintiff(s).

WHEREFORE, plaintiff(s) pray(s) judgment against defendant(s) as follows:

On the FIRST CAUSE OF ACTION:

1. For general damages _____ [in the sum of $_____ *or* according to proof];

[2. For special damages _____ (in the sum of $_____ *or* according to proof);]

On the SECOND CAUSE OF ACTION:

3. For a determination by the Court that the contract has been rescinded and ordering defendant(s) to convey the real property described in Paragraph 4, above, to plaintiff(s) [as husband and wife] on condition that plaintiff(s) _____ [(surrender the note and deed of trust executed by defendant(s) to the Court for cancellation

and) pay to defendant(s) such sums as ordered by the judgment of this Court *and/or* convey to defendant(s) the real property described in Paragraph 5, above];

[4. That there be deducted from any sum found owing by plaintiff(s) to defendant(s) on rescission of the contract, the sum of $_____, together with interest thereon at the legal rate from _____ (*date*);]

On the THIRD CAUSE OF ACTION:

5. That the deed _____ [*describe with specificity, e.g.,* given by plaintiff(s) conveying the property described in Paragraph 4 to defendant(s), which was recorded on _____ (*date*), in _____ (Book *or* Reel) _____, at _____ (Page *or* Image) _____ of the Official Records in the Office of the County Recorder of _____ County, California] [and the note and deed of trust described in Paragraph 9, above,] be declared void;

On all CAUSES OF ACTION:

[6. For exemplary damages;]

7. For costs of suit herein incurred [*if rescission is sought and the contract provided for attorney's fees*, including attorney's fees as provided by the contract here at issue];

8. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 569.160.*]

[2] Use of Form

This form of complaint is for use by a vendor who has been defrauded in the sale or exchange of real property to recover damages resulting from the purchaser's fraud [*Civ. Code § 3343*]. The form also includes causes of action for rescission of the contract and any subsidiary agreements [*Civ. Code § 1692*] and cancellation of the deed and any other instruments involved, such as notes, deeds of trust, or subordination agreements [*see Civ. Code § 3412*]. The form may be modified to seek only damages or only rescission and cancellation. For discussion of these remedies and the circumstances in which each is appropriate, see *§ 569.24[2], [7], [8]*. An illustration of the Judicial Council pleading form for damages for fraud can be found in Ch. 269, *Fraud and Deceit* .

[3] Parties

All parties to any instrument sought to be cancelled or rescinded must be made parties to the action [*Code Civ. Proc. § 389*; *see Cooke v. Darnell (1929) 100 Cal. App. 482, 490, 280 P. 383* (holder of encumbrance not bound by judgment, though named as defendant, because not served)].

[4] Allegations

The essential allegations to establish fraud in a real estate transaction are (1) that defendants made a false representation respecting a material fact (Paragraphs 10 and 11 (false representation) and 15 (materiality)); (2) knowing the

representation to be false or without having any reasonable basis for believing it to be true (Paragraph 13); (3) with the intent that plaintiffs rely thereon (Paragraph 12); (4) that plaintiffs relied on the representation (Paragraph 14) [*see also Palm v. Smither (1942) 52 Cal. App. 2d 500, 505, 126 P.2d 428* (special elements to establish fraud on vendor relating to value of his or her own land), discussed in *§ 569.24[7][a]*]; and (5) to their damage (Paragraphs 17 (general fraud damages under *Civ. Code § 3343*) and 18 (special fraud damages under *Civ. Code § 3343(a)(1)-(3)* or damages incident to rescission) [*Roland v. Hubenka (1970) 12 Cal. App. 3d 215, 220, 90 Cal. Rptr. 490* ; *Simone v. McKee (1956) 142 Cal. App. 2d 307, 312, 298 P.2d 667]* . Paragraph 16 provides the basis to establish that the cause of action was brought within the applicable three-year limitation period, commencing on discovery of the fraud, or, in the case of rescission or cancellation that laches do not apply [*Code Civ. Proc. § 338(d)*; *see Leeper v. Beltrami (1959) 53 Cal. 2d 195, 214-215, 1 Cal. Rptr. 12, 347 P.2d 12* (complaint for rescission, cancellation as subject to demurrer for failure to show prompt action to rescind or excuse)]. Optional Paragraph 19 seeks punitive damages.

If rescission is sought, Paragraphs 1-19 establish the grounds; Paragraph 21 sets forth the capacity of another party to a subsidiary contract sought to be rescinded; and Paragraph 22 alleges notice of rescission and offer to restore consideration. Consecutively numbered additional paragraphs should be added after Paragraph 21 to allege the capacity of each other party to all of the contracts sought to be rescinded. If notice of rescission was given prior to commencement of the action, Paragraph 19 will not be appropriate. Instead use the allegation in § 569.168, second alternative Paragraph 21.

If cancellation is sought, Paragraphs 1-19 establish the grounds; Paragraph 21 and as many other paragraphs as are necessary set forth the capacity of each other party to all of the instruments sought to be cancelled; and Paragraph 24 alleges notice of cancellation and offer to restore consideration. If notice of intent to cancel was given prior to commencement of the action, Paragraph 19 will not be appropriate. Instead use the allegation in § 569.168, second alternative Paragraph 21.

[5] Jurisdiction and Venue

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless the amount in controversy, exclusive of interest, is $25,000 or less, in which case it will be classified as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(8)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

In limited civil cases, the first page of the first paper filed must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

Venue for an action to recover damages for fraud is the county of defendant's residence, so if only damages for fraud are sought (Paragraphs 1-19), it is clear that the proper venue is the county or judicial district where defendant resides [*Code Civ. Proc. § 395(a)*]. If only rescission and cancellation are sought, venue is in the county in which the real property is located [*Eckstrand v. Wilshusen (1933) 217 Cal. 380, 382-383, 18 P.2d 931* ; *see Etter v. Vollmer (1956) 139 Cal. App. 2d 718, 720, 294 P.2d 55* (vendor's action for declaration that deed is void and for reconveyance; restoration of benefits considered incidental)]. If both damages and rescission are pleaded as alternative remedies, it is not clear whether venue will lie in the county of defendant's residence on the basis of the rule that in mixed actions, defendant is entitled to have the action tried in the county of hisor her residence [*see Massae v. Superior Court (1981) 118 Cal. App. 3d 527* , 530-531, *173 Cal. Rptr. 527* (discussing rules); *see also* Ch. 571, *Venue*].

[6] State Statutes

Redelivery of deed to grantor or cancellation of deed does not retransfer title. *Civ. Code § 1058*

Relief based on rescission of contract. *Civ. Code § 1692*

Measure of damages for fraud in sale, purchase, or exchange of property. *Civ. Code § 3343*

Cancellation of instruments. *Civ. Code §§ 3412-3415*

Exemplary damages. *Civ. Code § 3294*

When prevailing party in action on contract entitled to attorneys' fees. *Civ. Code § 1717*

Limitation period for fraud action is three years from discovery of fraud. *Code Civ. Proc. § 338(d)*

[7] Decisions

[a] Attorney's Fees

Action for rescission is one "on contract" so as to allow recovery of attorney's fees to successful party if contract contains attorney's fee clause that does not limit recovery to particular form of action on contract. *Hastings v. Matlock (1985) 171 Cal. App. 3d 826, 840-841, 217 Cal. Rptr. 856*

[b] Cancellation

Instead of pleading in general terms that defendant claims adverse interest, to state cause of action under *Civ. Code § 3412* plaintiff is required to allege facts showing invalidity of apparently valid instrument. *Wolfe v. Lipsy (1985) 163 Cal. App. 3d 633, 638, 209 Cal. Rptr. 801* (disapproved on another point in *Droeger v. Friedman, Sloan & Ross (1991) 54 Cal. 3d 26, 36-39, 283 Cal. Rptr. 584, 812 P.2d 931*)

[c] Misrepresentations as to Value of Consideration Given by Purchaser

Vendor who took 24 overvalued or worthless second deeds of trust in exchange for real property is entitled to recover under former *Bus. & Prof. Code § 10239.4* (renumbered *Bus. & Prof. Code § 10238.7*) providing for interest and attorney's fees. *Harvey v. Davis (1968) 69 Cal. 2d 362, 367-369, 71 Cal. Rptr. 129, 444 P.2d 705*

Purchasers were liable for damages for fraud equal to difference between unpaid balance of note secured by chattel mortgage on restaurant equipment given in partial payment for purchase of home and amount realized by vendor on foreclosure of note and resale of equipment. *Metz v. Malley (1957) 155 Cal. App. 2d 848, 849-852, 318 P.2d 843*

[d] Subordination of Purchase Money Deed of Trust

Purchaser has breached subordination agreement, and if promise to use proceeds of loan secured by senior deed of trust for improvements to property that was security for note payable to vendor was made without intent to perform, purchaser has committed fraud by using senior loan proceeds for other purposes. *Joanaco Projects, Inc. v. Nixon & Tierney Constr. Co. (1967) 248 Cal. App. 2d 821, 830-831, 57 Cal. Rptr. 48* (senior foreclosed)

[e] Right to Rescission

Vendor is entitled to rescind when offer is subject to conditions as to appraisal and termite reports and is accompanied by post-dated deposit check and vendor is not informed of either postdating or conditions by broker who is agent for both parties. *Wilson v. Lewis (1980) 106 Cal. App. 3d 802, 806-809, 165 Cal. Rptr. 396*

Vendor whose mistake is based on purchaser's agent's fraud is entitled to rescission. *Wright v. Lowe (1956) 140 Cal. App. 2d 891, 897-898, 296 P.2d 34*

[8] Cross References

For a related form, see *§ 569.160*.

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For general discussion of and forms of judgment for cancellation, see Ch. 107, *Cancellation of Instruments*

For discussion and forms relating to pleading and proof of damages in tort actions, including punitive damages, see *Ch. 177, Damages, § 177.40* et seq.

For discussion and forms relating to fraud generally, see Ch. 269, *Fraud and Deceit*

For discussion of when recording of lis pendens is appropriate in connection with an action regarding real property and form of lis pendens, see Ch. 348, *Lis Pendens*

For general discussion of and forms of judgment for rescission, see Ch. 490, *Rescission and Restitution*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueIndividual DefendantsCivil ProcedurePartiesGeneral OverviewCivil ProcedurePartiesFictitious NamesCivil ProcedureRemediesDamagesPunitive DamagesCivil ProcedureRemediesLis PendensGeneral OverviewContracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawFormationOffersGeneral OverviewContracts LawNegotiable InstrumentsDischarge & PaymentGeneral OverviewContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesGeneral OverviewContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesForgery, Fraud & MistakeContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesImposters & Fictitious PayeesContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesGeneral OverviewContracts LawRemediesGeneral OverviewContracts LawSecured TransactionsPerfection & PriorityPriorityGeneral OverviewEnvironmental LawLitigation & Administrative ProceedingsToxic TortsGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLocal GovernmentsGeneral OverviewGovernmentsLocal GovernmentsClaims By & AgainstReal Property LawDeedsGeneral OverviewReal Property LawDeedsRemediesCancellation & RescissionReal Property LawDeedsRemediesDamagesReal Property LawEminent Domain ProceedingsConstitutional Limits & RightsGeneral OverviewReal Property LawEminent Domain ProceedingsValuationReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsPurchase-Money MortgagesReal Property LawFinancingSecondary FinancingGeneral OverviewReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawPriorities & RecordingLis PendensReal Property LawPurchase & SaleGeneral

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50-569 California Forms of Pleading and Practice--Annotated § 569.163

§ 569.163 Complaint by Purchaser--To Establish and Foreclose Purchaser's Lien For Amount Paid Toward Purchase Price [Civ. Code § 3050]

[1] FORM Complaint by Purchaser--To Establish and Foreclose Purchaser's Lien For Amount Paid Toward Purchase Price [Civ. Code § 3050]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	NO. _____
vs.	)	COMPLAINT TO ESTABLISH AND FORECLOSE
_____ [*name*(*s*)],	)	PURCHASER'S LIEN
[and DOES I through _____],	)	[Civ. Code §(§ 3048,) 3050]
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff(s) allege(s):

[1. At all times mentioned herein, defendant(s) _____ (*name(s)*), sometimes hereinafter referred to as "Sellers," was/were, and now is/are, _____ (husband and wife *or other allegation of capacity or residence*).]

[2. *Fictitious name allegation, if appropriate. See § 569.160, Paragraph 2.*]

[3. *Agency allegation, if appropriate. See § 569.160, Paragraph 3.*]

4. On _____ [*date*], at _____ [city], _____ County, California, plaintiff(s) and defendant(s) entered into a written contract, a copy of which is attached hereto, marked Exhibit "A," and made a part hereof by reference, whereby defendant(s) agreed to sell to plaintiff(s) and plaintiff(s) agreed to purchase from defendant(s) for the sum of $_____ that certain real property situated in the County of _____, State of California, [commonly known as _____ (*common designation or street address*),] and more particularly described as follows: _____ [*set forth legal description*].

5. The contract Exhibit "A," provided that the purchase price was payable by plaintiff(s) as follows: _____ [*specify, e.g.,* $20,000 on acceptance of plaintiff's(s') offer, $30,000 within 10 days of notice of completion of the repairs by defendant(s) as required by the structural pest control report dated _____, by Term-X Co., and the remainder in cash on the close of escrow which was to be within 30 days from plaintiff's(s') obtaining of a loan commitment at the rate and for the terms specified in the agreement]. On completion of payments, defendant(s) was/were to deliver a grant deed of the property to the plaintiff(s).

[6. *Conditions precedent to performance of either party. See § 569.164, Paragraph 6.*]

7. In accordance with the terms of the contract, plaintiff(s) paid _____ [*specify payment or payments made in compliance with contract, e.g.,* $_____ on or before _____ (*date*), an additional $_____, on or before _____ (*date*), and the balance of $_____, for a total of $_____, on or before _____ (*date*).

[8. Immediately on execution of the contract plaintiff(s) entered into and assumed possession of the property and constructed thereon the following improvements of the aggregate value of $_____, to wit: _____ (*describe improvements*). Between _____ (*date*), and _____ (*date*), plaintiff(s) expended the sum of $_____ for taxes and insurance on the property and the sum of $_____ to _____ (*describe any repairs made, e.g.,* replace broken windows on the premises).]

[9. *Satisfaction or waiver of conditions precedent to performance of either party. See § 569.164, Paragraph 8.*]

[*EITHER, if plaintiff's performance was excused*]

10. Plaintiff(s) duly performed all the conditions, terms, and promises required to be performed on his/her/its/their part by the contract [and the escrow instructions executed by the parties on _____ (*date*),] except that plaintiffs did not _____ [*specify portion of plaintiff's performance which was not completed, e.g.,* place the final payment in escrow] because his/her/its/their _____ [performance *or* tender] was excused by defendants' conduct [and inability to perform] described in Paragraph 11).

11. Defendant(s) has/have failed and refused to execute and deliver a grant deed or any other conveyance to plaintiff(s) and on _____ [*date*], _____ [*specify conduct or inability of defendant(s) which excused plaintiff's performance, e.g.,* stated that he/she/it/they had conveyed the property to a third party and would not comply with the provisions of the contract with plaintiff(s) or the escrow instructions of the parties].

[*OR, if plaintiff performed or tendered performance*]

10. Plaintiff(s) duly performed all the conditions, terms, and promises required to be performed on his/her/its/their part by the contract [and the escrow instructions executed by the parties on _____, (*date*),] and on _____ [*date*], plaintiff(s) demanded that defendant(s) execute and deliverto him/her/it/them a grant

deed to the property which is the subject of the written contract of the parties.

11. Defendant(s) has/have failed [and refused] to execute and deliver a grant deed or any other conveyance to plaintiff(s).

[*CONTINUE*]

[12. On _____ (*date*), plaintiff(s) vacated the premises and surrendered possession thereof to defendant(s). Plaintiff(s) was/were in possession and occupancy of the property for a period of _____ months and _____ days. The reasonable rental value of the property during the period of plaintiff's(s') possession and occupancy thereof was and is the sum of $_____.]

13. On _____ [*date*], plaintiff(s) demanded a return of the $_____ paid to defendant(s) [and reimbursement for the _____ (*specify as appropriate*) $_____ paid for taxes, insurance, repairs, and the value of the improvements to the property set forth in Paragraph 8, *above*], but the defendant(s) has/have not repaid those sum(s) or any part thereof.

14. Plaintiff(s) has/have a lien on the property as (a) purchaser(s) for the amount of $_____ which plaintiff(s) is/are entitled to recover back from defendant(s).

WHEREFORE, plaintiff(s) pray(s) judgment against defendant(s) as follows:

1. For the sum of $_____ with interest at the rate of _____ percent from _____ [*date*];

2. For a declaration that plaintiff(s) has/have a purchaser's lien against the property herein described to secure repayment of the said sum;

3. For an order for the sale of the premises in accordance with law and that the proceeds from the sale be used to satisfy the indebtedness of $_____ with interest;

4. For costs of suit incurred herein; and

5. For such other and further relief as this court may deem just and proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 569.160.*]

[2] Use of Form

This form of complaint is for use by a purchaser of real property who is not in default under the contract to establish and foreclose the purchaser's lien provided by *Civ. Code § 3050* for so much of the purchase price as has been paid, together with expenditures made on the property including taxes, insurance, and the value of improvements, less the reasonable rental value for any period during which the purchaser had possession of the property [*Civ. Code § 3050*; *see Kent v.*

Clark (1942) 20 Cal. 2d 779, 784-786, 128 P.2d 868 (value of improvements less reasonable rental value during purchaser's occupancy); *Montgomery v. Meyerstein (1921) 186 Cal. 459, 462, 464, 199 P. 800* (taxes, insurance, improvements); *Benson v. Shotwell (1890) 87 Cal. 49, 54-55, 60, 25 P. 249* (purchaser who is in default first is not entitled to lien)]. The purchaser's lien arises on the vendor's failure, refusal, or inability to convey, or if the purchaser is entitled to avoid the contract because of the vendor's misrepresentations or for another reason. It is not necessary for the purchaser to give notice of rescission or to ground the action on the theory of rescission [*Moresco v. Foppiano (1936) 7 Cal. 2d 242, 247, 60 P.2d 430* ; *Montgomery v. Meyerstein (1921) 186 Cal. 459, 464-465, 199 P. 800]* .

[3] Priority of Lien

The priority of the purchaser's lien over preexisting encumbrances on the property is determined as of the date of the contract of sale. Thus, the purchaser can have a declaration of the actual amounts owing under the prior encumbrances as of the date of the contract, and will be entitled to priority over optional additional advances made after the contract date by the holder of an encumbrance who knew of contract of sale [*Civ. Code § 3048*; *Garcia v. Atmajian (1980) 113 Cal. App. 3d 516, 520-521, 169 Cal. Rptr. 845]* .

[4] Allegations

This form of complaint alleges:

- The formation and terms of a contract for the sale and purchase of real property (Paragraphs 4 and 5).

- The extent of purchaser's payments under the contract (Paragraph 7).

- If purchaser's performance was excused, the performance of all unexcused obligations required to be performed by purchaser and the excuse for nonperformance of the remainder (first alternative Paragraphs 10 and 11), or, if purchaser's performance or tender was not excused, purchaser's performance or tender and demand, and vendor's failure or refusal to perform (second alternative Paragraphs 10 and 11).

- Plaintiff's demand for return of moneys paid and sums expended, including the value of any improvements made to the property (Paragraph 13), and the assertion that plaintiff has a lien on the property for those sums (Paragraph 14).

Optional allegations allege the capacity or residence of the defendants (Paragraph 1) [*see Code Civ. Proc. § 392(a)(2)* (venue for lien foreclosure is superior court in county in which property is located)]; fictitious defendants (Paragraph 2); and agency (Paragraph 3). In addition, if plaintiff has taken possession, that must be alleged (Paragraph 8), as well as surrender of possession and value of occupancy to determine the amount of the offset to which defendant/vendor is entitled (Paragraph 12) [*Montgomery v. Meyerstein (1921) 186 Cal. 459, 465, 199 P. 800]* . If plaintiff has made improvements or expenditures, a description of the improvements and their value and/or the description and amount of the expenditures should be alleged (Paragraph 8) [*Montgomery v. Meyerstein (1921) 186 Cal. 459, 464-465, 199 P. 800]* .

If either party's performance was subject to a condition precedent, additional paragraphs should be added setting forth the condition or conditions (Paragraph 6) and alleging the satisfaction of the condition, or, its waiver by the party for whose benefit the condition existed (Paragraph 9) [*see Doryon v. Salant (1977) 75 Cal. App. 3d 706, 712-713, 142 Cal. Rptr. 378* (party may waive condition solely for his or her benefit)].

[5] State Statutes

Person entitled to recover damages certain or capable of being made certain by calculation, if right to recover is vested on particular day, is entitled to recover interest thereon from that day. *Civ. Code § 3287*

[6] Decisions

Lien is applicable on vendor's abandonment of executory contract without need of rescission. *Lockie v. Cooperative Land Co. (1929) 207 Cal. 624, 629-630, 279 P. 428*

Purchaser's lien is enforceable against subsequent purchaser with notice. *S. San Bernardino Co. v. S. B. Nat. Bk. (1899) 127 Cal. 245, 247, 59 P. 699*

Purchaser is entitled to recover interest on his or her deposit in event of vendor's breach of agreement. *Rasmussen v. Moe (1956) 138 Cal. App. 2d 499, 504, 292 P.2d 226*

Lien is applicable in case of fraud and rescission. *Newcomb v. Title Guar. & Trust Co. (1933) 131 Cal. App. 329, 333, 21 P.2d 456*

[7] Cross References

For a related form, see *§ 569.160*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueIndividual DefendantsCivil ProcedureVenuePublic OfficialsContracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawContract Conditions & ProvisionsConditions PrecedentContracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawPerformanceGeneral OverviewContracts LawPerformanceTender & DeliveryContracts LawTypes of ContractsExecutory ContractsInsurance LawClaims & ContractsEstoppel & WaiverGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsFormalitiesReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingTender of PerformanceReal Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleRemediesDamagesGeneral Overview

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Volume 50: Usury thru Verification-Chs. 568-572
Chapter 569 VENDOR AND PURCHASER OF REAL PROPERTY
PART IV. FORMS
A. Actions Between Vendors And Purchasers Generally

50-569 California Forms of Pleading and Practice--Annotated § 569.164

§ 569.164 Complaint by Purchaser--For Damages for Breach of Contract to Sell Real Property [Civ. Code § 3306]

[1] FORM Complaint by Purchaser--For Damages for Breach of Contract to Sell Real Property [Civ. Code § 3306]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR BREACH OF
_____ [*name*(*s*)],	)	CONTRACT TO SELL REAL PROPERTY
[and DOES I through _____],	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff(s) allege(s):

[1. Plaintiff(s) _____ (*name(s*)) is/are and at all times herein mentioned, was/were, _____ (*State capacity of plaintiff(s) as necessary, e.g.,* husband and wife).]

2. Defendant(s) _____ [*name(s*)], sometimes hereinafter referred to as "Seller(s)," is/are, and at all times herein mentioned, was/were, _____ [*state capacity and if used as basis of venue, residence of defendant(s), e.g.,* husband and wife, residing at _____ (*street address and city*), _____ County, California and (at all times prior to _____ [*date*], was/were the) fee simple owner(s) of the real property described in Paragraph 5, below].

[3. *Fictitious name allegation, if appropriate. See § 569.161, Paragraph 3.*]

[4. *Agency allegation, if appropriate. See § 569.160, Paragraph 3.*]

5. [*Formation of contract. See § 569.163, Paragraph 4.*]

[6. The contract _____ (*specify any relevant terms of the contract, including any conditions precedent to the performance of either party, e.g.,* was subject to the following conditions: (1) that plaintiffs qualify within 45 days from the date of the contract for a 30-year loan for 90 percent of the purchase price at an interest rate not exceeding 10.5 percent per annum and (2) that defendants qualify within the same period for a 30-year loan of at least $_____ at an interest rate not exceeding 10.5 percent per annum to finance the purchase of their replacement home).]

[7. The contract price was payable as follows: $_____ as a cashdownpayment prior to close of escrow, $_____ from the proceeds of a note and first deed of trust in favor of an institutional lender, and $_____ in the form of a note to defendant(s) secured by a second deed of trust on the property. Discounting the value of the note to be taken by defendant(s) the contract price was equivalent to an all-cash-to-seller price of $_____.]

[8. _____ (*Set forth the satisfaction of any conditions precedent or their waiver by the party for whose benefit the particular condition was inserted, e.g.,* On _____ (*date*), plaintiffs notified defendants that plaintiffs had waived the condition regarding their loan qualification and intended to fund their performance pursuant to a loan committed on _____ (*date*), by _____ (*name of lender*) at an interest rate of 10.25 percent per annum with a 15-year amortization period. On _____ (*date*), _____ (*name of lender*) issued to defendants a written commitment for a $_____ 30-year loan at an interest rate of 10.25 percent per annum to finance the purchase of defendants' replacement home).]

[*EITHER, if plaintiff's performance was excused*]

9. Plaintiff(s) duly performed all the conditions, terms, and promises required to be performed on his/her/its/their part by the contract [and the escrow instructions executed by the parties on _____ (*date*),] except that plaintiff(s) did not _____ [*specify portion of plaintiff's performance which was not completed, e.g.,* place the final payment in escrow] because his/her/its/their _____ [performance *or* tender] was excused by defendants' conduct [and inability to perform] described in Paragraph 10.

[*OR, if plaintiff has fully performed or tendered performance*]

9. Plaintiff(s) has/have fully performed all conditions, covenants, and promises he/she/it/they is/are required to perform under the terms of the contract referred to in Paragraph 5 [and the escrow instructions executed by the parties on _____ (*date*),] and on _____ [*date*], _____ [*set forth tender or performance by plaintiffs, e.g.,* offered to pay the balance of the purchase price on condition that defendant(s) execute and deliver to him/her/it/them a grant deed to the property which is the subject of the written agreement of the parties] and demanded that defendant(s) execute and deliver said deed.

[*CONTINUE*]

10. The defendant(s) has/have failed and refused _____ [*describe defendant's(s') breach, and if failure to perform is not accompanied by a specific repudiation or a certain inability, indicate that nonperformance has continued for more than a reasonable time, e.g.,* to execute and deliver a deed to plaintiff(s) _____ (for 50 days after the time called for by the contract *or* and on _____ (*date*), stated that they are not going to comply with the provisions of the contract and escrow instructions.)]

11. Pursuant to the contract, plaintiff(s) have paid to defendant(s) the total amount of $_____, consisting of the following payments made on the following dates: _____.

[12. In reliance on the contract, plaintiff(s) _____(*set forth compensable expenses incurred by plaintiffs, e.g.,* has/have paid $_____ on account of a contract entered into by the defendants with a third party for termite repairs on the property to be sold, all to the benefit of the defendants).]

13. Subsequent to the agreement entered into by and between the plaintiff(s) and defendant(s) on _____ [*date*], the property has appreciated in value, and as of _____ [*date of breach*], had a reasonable value of $_____. By reason thereof, the plaintiff(s) has/have sustained damage in the amount of $_____.

WHEREFORE, the plaintiff(s) pray(s) judgment against defendant(s) as follows:

1. For general damages in the sum of $_____, together with interest at the rate of _____ percent per annum from _____ [*the date of breach or any later date on which market value as of the date of breach was determined*];

2. For the sum of $_____ special damages, together with interest at the rate of _____ percent per annum from the date of each payment;

3. For the sum of $_____ [*payments made to seller*], together with interest at the rate of _____ percent per annum, from the date payments thereon were made to defendants;

4. For their costs of suit incurred herein[, including reasonable attorney's fees as provided by the contract]; and

5. For such other and further relief as this court may deem just and proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 569.160.*]

[2] Use of Form

This form of complaint is for use by a purchaser of real property who is not in default under the contract to recover damages for the vendor's failure or refusal to convey [*Civ. Code § 3306*].

[3] Breach of Collateral Promise

The form may be modified to set forth a cause of action for damages for delay in conveyance or for breach of some collateral promise in the agreement of the parties, such as a promise by the vendor to construct improvements on the

property or to build a road on other property belonging to the vendor to connect the parcel conveyed with the public road. Damages for breach of some collateral promises are governed by *Civ. Code § 3300*, not *Civ. Code § 3306* [*Coughlin v. Blair (1953) 41 Cal. 2d 587, 600, 262 P.2d 305* (connecting road, water, electricity); *Christensen v. Slawter (1959) 173 Cal. App. 2d 325, 330-334, 343 P.2d 341* (delay)].

[4] Allegations

This complaint alleges:

- The capacity of the parties, and, if suit is brought in the county of defendant's residence rather than in the county in which the contract was formed or was to be performed, the residence of defendant(s) (Paragraphs 1-4) [*see Code Civ. Proc. § 395(a)* (venue of contract action as county in which contract was formed or is to be performed or in which any defendant resides)].

- The formation of a written contract for the sale of real property (Paragraph 5) [*Civ. Code § 1624(c)*; *Code Civ. Proc. § 430.10(g)*] and any conditions precedent to the performance of either party or terms of the contract relevant to the breach at issue (Paragraph 6).

- Satisfaction or waiver of any conditions precedent to the performance of either party (Paragraph 8).

- Plaintiff's partial performance and the excuse for further performance (first alternative Paragraph 9) or plaintiff's performance or tender and demand for defendant's performance (second alternative Paragraph 9) [*see Fogarty v. Saathoff (1982) 128 Cal. App. 3d 780, 785, 180 Cal. Rptr. 484* (generally offer, tender, or ability to perform as required to place other party in default)].

- Defendant's nonperformance (Paragraph 10).

- The total of payments made by plaintiff to defendant under the contract (Paragraph 11).

- Special damages incurred by plaintiff (Paragraph 12) [*see Moore v. Fredericks (1914) 24 Cal. App. 536, 538-539, 141 P. 1049* (special damages, which are those not necessarily following from breach, as must be specially pleaded)]; and the difference in value damages (Paragraph 13) [*see Employees' Participating Asso. v. Pine (1949) 91 Cal. App. 2d 299, 301, 204 P.2d 965* (market value on date of breach as required to be pleaded)].

[5] Allegations Regarding Vendor Financing

While no case has held that the cash equivalent of the contract price must be pleaded, in a transaction that calls for the vendor to take back a note and deed of trust, damages are measured as if the contract provided for all cash to seller [*Abrams v. Motter (1970) 3 Cal. App. 3d 828, 841, 83 Cal. Rptr. 855]* . Because contract price is an element of damage, and damages are required to be pleaded, it would seem prudent to include the discounted value allegations in optional Paragraph 7 if the contract called for vendor financing [*see Lortz v. Connell (1969) 273 Cal. App. 2d 286, 290-291, 78 Cal. Rptr. 6* (elements are formation of contract, plaintiff's performance or excuse, defendant's breach, and damages)].

[6] State Statutes

Recovery of attorney's fees when provided by contract. *Civ. Code § 1717*

Legal rate of interest specified in contract remains chargeable after breach until superseded by verdict or other obligation; 10 percent per annum is rate if contract does not specify legal rate chargeable after breach. *Civ. Code § 3289*

[7] Decisions

[a] Damages for Breach of Collateral Promise

Measure of damages for breach of promise to build improvement on plaintiff's land is reasonable cost to complete work; measure of damages if improvements were to be constructed on property not owned by plaintiff is difference in value of plaintiff's land; plaintiff's easement is not considered to be plaintiff's land for application of these rules. *Coughlin v. Blair (1953) 41 Cal. 2d 587, 600, 262 P.2d 305* ; *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co. (1977) 66 Cal. App. 3d 101, 123-124, 135 Cal. Rptr. 802*

[b] Damages for Failure to Convey

Purchaser is entitled to interest from date damages could be calculated, which would be date of breach if value of land was then known. *Caplan v. Schroeder (1961) 56 Cal. 2d 515, 521-522, 15 Cal. Rptr. 145, 364 P.2d 321* (finding value was not certain until date of stipulation by parties)

[c] When Performance or Tender Necessary

Vendor who had placed deed in escrow was not in default for failure to provide termite clearance or title insurance because purchaser's nonperformance made both impossible. *Fogarty v. Saathoff (1982) 128 Cal. App. 3d 780, 784-787, 180 Cal. Rptr. 484*

When vendor had leased property to another and purchaser was able to perform,purchaser's offer to deposit balance of purchase price conditioned on conveyance was sufficient tender of performance to put vendor in breach. *Groobman v. Kirk (1958) 159 Cal. App. 2d 117, 118-126, 323 P.2d 867*

Statements by purchaser's banker that purchaser was ready, willing, and able to perform and bank would forward funds to escrow when called for was sufficient tender when vendor had not completed construction and did not have marketable title; purchaser's tender was excused by vendor's inability to perform or notification that vendor won't perform. *Hunt v. Mahoney (1947) 82 Cal. App. 2d 540, 546-549, 187 P.2d 43*

[d] Who May Waive Particular Conditions

Contract provision that vendor subordinate purchase money deed of trust was solely for purchaser's benefit and was subject to waiver by purchaser so long as waiver was not conditional or ambiguous. *Reeder v. Longo (1982) 131 Cal. App. 3d 291, 296-297, 182 Cal. Rptr. 287* (absolute waiver); *Spellman v. Dixon (1967) 256 Cal. App. 2d 1, 4-5, 63 Cal. Rptr. 668* (ambiguous waiver); *Magna Development Co. v. Reed (1964) 228 Cal. App. 2d 230, 236-243, 39 Cal. Rptr. 284* (conditional waiver)

Conditions regarding availability of construction loan and number of houses that could be built per lot was solely for benefit of, and waivable by, purchaser. *Pease v. Brown (1960) 186 Cal. App. 2d 425, 429, 8 Cal. Rptr. 917*

Condition that planning commission approve subdivision of property to be sold under contract was solely for purchaser's benefit and therefore waivable by purchaser. *Johnson v. Lehtonen (1957) 151 Cal. App. 2d 579, 582, 312 P.2d 35*

When vendor was providing financing, FHA, VA approval was for benefit of both parties and was not waivable by

purchaser alone. *Spangler v. Castello (1956) 147 Cal. App. 2d 49, 53, 304 P.2d 752*

[8] Cross References

For related forms, see *§§ 569.161* and *569.163*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueIndividual DefendantsCivil ProcedureParties General OverviewCivil ProceduresPretrial JudgmentsDefaultDefault JudgmentsCivil Rights LawContractual Relations & HousingFair Housing RightsFair Housing ActContracts LawGeneral OverviewContracts LawBreachGeneral OverviewContracts LawContract Conditions & ProvisionsConditions PrecedentContracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawFormationAmbiguity & MistakeGeneral OverviewContracts LawFormationCapacity of PartiesGeneral OverviewContracts LawPerformanceGeneral OverviewContracts LawPerformancePartial PerformanceGeneral OverviewContracts LawPerformanceTender & DeliveryContracts LawRemediesCompensatory DamagesGeneral OverviewEnergy & Utilities LawFinancingGeneral OverviewEnergy & Utilities LawTransportation & PipelinesEasements & Rights of WayGovernmentsPublic ImprovementsBridges & RoadsReal Property LawDeedsRemediesDamagesReal Property LawEstatesPresent EstatesFee Simple EstatesReal Property LawFinancingGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsPurchase-Money MortgagesReal Property LawFinancingSecondary FinancingGeneral OverviewReal Property LawFinancingSecondary FinancingLien PrioritiesReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsPerformanceGeneral OverviewReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingImpossibility of PerformanceReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingTender of PerformanceReal Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleRemediesGeneral OverviewReal Property LawPurchase & SaleRemediesDamagesGeneral OverviewReal Property LawPurchase & SaleRemediesDamagesMeasures of DamagesTransportation LawBridges & RoadsGeneral Overview

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Chapter 569 VENDOR AND PURCHASER OF REAL PROPERTY
PART IV. FORMS
A. Actions Between Vendors And Purchasers Generally

50-569 California Forms of Pleading and Practice--Annotated § 569.165

§ 569.165 Complaint by Purchaser--For Specific Performance of Contract to Convey Real Property [Civ. Code §§ 3384, 3387]

[1] FORM Complaint by Purchaser--For Specific Performance of Contract to Convey Real Property [Civ. Code §§ 3384, 3387]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name*(*s*)],	)	COMPLAINT FOR SPECIFIC PERFORMANCE
[and DOES I through _____],	)	(Contract to Convey Real Property)
Defendant(s).	)	
	)	
	)	

Plaintiff(s) allege(s):

[1. *Capacity of plaintiff(s), if appropriate. See § 569.164, Paragraph 1.*]

2. Defendant(s) _____ [*name(s*)], sometimes hereinafter referred to as "Seller(s)," is/are, and at all times herein mentioned, was/were, [husband and wife and] fee simple owner(s) of the real property described in Paragraph 5.

[3. *Fictitious name allegation, if appropriate. See § 569.161, Paragraph 3.*]

[4. *Agency allegation, if appropriate. See § 569.160, Paragraph 3.*]

5. [*Formation of contract. See § 569.163, Paragraph 4.*]

[6. *Relevant terms, including conditions precedent to the performance of either party. See § 569.164, Paragraph 6.*]

[7. *Vendor financing, if applicable. See § 569.164, Paragraph 7.*]

[8. *Satisfaction of any conditions precedent or waiver of condition precedent by the party for whose benefit the particular condition was inserted. See § 569.164, Paragraph 8.*]

9. [*Plaintiff's part performance and excuse for remainder of performance, or plaintiff's performance or tender or and demand. See § 569.164, alternate Paragraphs 9.*]

10. [*Defendant's failure, refusal, or inability to perform. See § 569.164, Paragraph 10.*]

11. The consideration named in the contract to be received by defendant(s) is adequate when compared to the value of the real property [and considering allcircumstances including the relationship of the parties and the objects to be accomplished by the contract].

12. The agreement is fair, just, and reasonable in all respects as to defendant(s).

13. Plaintiff(s) is/are still ready, willing, and able to consummate the purchase of the real property and to pay to defendant(s) the purchase price as set forth in the written contract.

14. Plaintiff(s) is/are informed and believe(s) and thereon allege(s) that from and after _____ [*date when plaintiff(s) would have been entitled to possession under the contract*], the reasonable rental value and the reasonable value of the use and occupancy of the real property is the sum of $_____ per month.

[15. Plaintiff(s) has/have been further damaged by the increase in financing costs since the time required by the contract for defendant's(s') conveyance. If defendant(s) had conveyed the property at the time required by the agreement, plaintiff(s) would have financed the purchase with _____ [the loan described in Paragraph 7 which required *or* a _____-year loan of $_____ bearing interest at _____ percent per annum requiring] monthly payments of interest and principal of $_____; whereas interest rates have now risen to _____ percent per annum and a similar loan would now require monthly payments of $_____. Plaintiff(s) is/are informed and believe(s) and thereon allege(s) that interest rates will increase even more by the time defendant(s) are required by decree of this Court to convey the property to plaintiff(s).]

16. Plaintiff(s) has/have no adequate remedy at law because _____ [the real property which is the subject of the contract is a single-family dwelling which plaintiff(s) intend(s) to occupy *or specify other reason for inadequacy of remedy at law, e.g.,* plaintiff's contract remedy will not provide compensation to plaintiff for the increase in value of the property since defendant's refusal to perform].

WHEREFORE, plaintiff(s) pray(s) judgment against defendant(s) as follows:

1. For a decree that on the payment to him/her/it/them by plaintiff(s) of the sum of $_____ and the performance by plaintiff(s) of all conditions of the written contract to be performed by him/her/it/them, defendant(s) be ordered and directed to convey the real [and personal] property described in Paragraph 5 to plaintiff(s) and to perform all other conditions of the written contract to be performed by him/her/it/them;

2. That plaintiff(s) have and recover from defendant(s) or that there be deducted from the purchase price required to be paid by plaintiff(s) to defendant(s) the sum equal to plaintiff's(s') damages for the wrongful withholding of the real property from plaintiff computed at the rate of $_____ per month commencing as of _____ [*date*];

3. That plaintiff(s) have and recover from defendant(s) or that there be deducted from the purchase price required to be paid by plaintiff(s) to defendant(s) the sum equal to plaintiff's(s') increased financing costs on account of the failure of defendant(s) to convey the property on _____ [*date*];

4. For costs of suit herein[, including reasonable attorney's fees as provided by the contract]; and

5. For such other relief as the Court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 569.160.*]

[2] Use of Form

This form of complaint is for use by a purchaser under a written contract for the purchase and sale of real property to bring an action to compel specific performance [*Civ. Code § 3384*]. To use the form, the purchaser must not be materially in default under the contract [*see Civ. Code § 3392* (specific performance may be granted in favor of party whose failure to perform is partial and either immaterial or fully compensable)].

This form of complaint may be modified for use when the vendor does not have all the interest promised to be conveyed. Unless the defect relates to the community property interest of a spouse, the purchaser can compel conveyance of whatever interest the vendor has with an abatement in the purchase price to compensate for the defect [*see Fam. Code § 1102* (both spouses must join in conveyance of community property); *Andrade Development Co. v. Martin (1982) 138 Cal. App. 3d 330, 333-339, 187 Cal. Rptr. 863* (purchaser knew it was community property and was not even entitled to breach of contract damages from signatory spouse); *Johnson v. Lehtonen (1957) 151 Cal. App. 2d 579, 581-582, 312 P.2d 35* (specific performance affirmed as to one spouse's interest; property held in joint tenancy and purchased with community funds was not shown to be community property)].

Paragraphs 2 and 11-16 of this form may be added as a second count to § 569.164 to seek specific performance or, as an alternative if specific performance is not available, damages for breach of contract. If that is done, the first paragraph of the specific performance cause of action must reallege by incorporation all paragraphs of § 569.164.

This form may be modified to seek specific performance of a contract based on exercise of an option by substituting Paragraphs 1-4 of § 569.169 for Paragraphs 1-2 and 5-6 of this form and adding a Paragraph alleging exercise of the option.

[3] Allegations

In addition to the contract allegations set forth and discussed in *§ 569.164*, this form of complaint alleges:

- That the consideration is adequate (Paragraph 11).

- That the contract is fair and reasonable as to defendant (Paragraph 12) [*Civ. Code § 3391(1), (2)*; *see Meyer v. Benko (1976) 55 Cal. App. 3d 937, 945, 127 Cal. Rptr. 846* (adequacy as tested was of formation of contract in light of all circumstances then existing; $23,500 sale price to vendor who had duty to build new roof on property worth $29,000-$30,000 was adequate when vendor had dropped asking price to get quick sale); *Weneda Corp. v. Dispalatro (1964) 225 Cal. App. 2d 187, 190-191, 37 Cal. Rptr. 267* (both allegations were necessary)].

- That plaintiff is still ready, willing, and able to purchase (Paragraph 13) [*but see Hunt v. Mahoney (1947) 82 Cal. App. 2d 540, 547-549, 187 P.2d 43* (purchaser need not keep good tender or deposit money in vendor's name when vendor does not have marketable title or has notified purchaser he/she does not intend to perform)].

- The reasonable rental value of the property from the time purchaser was entitled to conveyance under the contract (Paragraph 14) [*see Ellis v. Mihelis (1963) 60 Cal. 2d 206, 219-220, 32 Cal. Rptr. 415, 384 P.2d 7* (rents and profits from time property should have been conveyed as not really damages but incidental compensation for delay); *Meyer v. Benko (1976) 55 Cal. App. 3d 937, 946, 127 Cal. Rptr. 846* (entitlement to rents and profits was not conditioned on property's being income-producing)].

- That the plaintiff has no adequate remedy at law [*see Civ. Code § 3387* (conclusive presumption that pecuniary compensation is inadequate in case of single-family dwelling that plaintiff intends to occupy; presumption affects burden of proof in case of other real property); *see also Evid. Code §§ 601, 606*].

The form includes an optional allegation that plaintiff has been damaged by the delay because financing costs have increased (Paragraph 15) [*see Stratton v. Tejani (1982) 139 Cal. App. 3d 204, 208-209, 214-215, 187 Cal. Rptr. 231* (present value of difference in loan payments at different rates only over length of time purchasers were likely to possess property or until they were likely to refinance if evidence showed rates likely to decrease after close of escrow); *Hutton v. Gliksberg (1982) 128 Cal. App. 3d 240, 247-252, 180 Cal. Rptr. 141* (present value of difference of 30 years' payments at different loan rates)]. The fact that the property is unimproved, zoned commercial, and being purchased for development and resale, or lease, does not mean that it is not unique. The size of the parcel and its proximity to such things as thoroughfares and a post office may contribute to its uniqueness [*Stewart Development Co. v. Superior Court (1980) 108 Cal. App. 3d 266, 272-275, 166 Cal. Rptr. 450]* .

[4] Jurisdiction and Venue

The superior court has jurisdiction of an action for specific performance [*see Cal. Const., art. VI, § 10*]. An action for specific performance of a contract to convey real property is not a limited civil case [*see Code Civ. Proc. § 86(b)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

Venue lies in the superior court in the county in which the property, or any part of it, is located, even if the cause of action for specific performance is pleaded as an alternative to damages for breach of contract [*Code Civ. Proc. § 392(a)(1)*; Santa Barbara Lodge No. 605 v. *Penzner (1951) 104 Cal. App. 2d 494, 231 P.2d 595]* .

[5] Laches and Limitations

An action for specific performance of a written contract to convey real property is subject to the four-year limitation of *Code Civ. Proc. § 337(1)* [*Reiner v. Hermann (1947) 79 Cal. App. 2d 543, 545, 548, 180 P.2d 385]* . However, if the purchaser has fully performed, the vendor is trustee of the legal title for the benefit of purchaser, and the limitation period will not begin to run until the vendor has made a specific repudiation of the trust. Similarly, if the purchaser is in possession, the vendor's repudiation will not commence the running of the period unless it includes an actual taking of

possession [*Kidd v. Kidd (1964) 61 Cal. 2d 479, 481, 39 Cal. Rptr. 203, 393 P.2d 403]* .

Laches, which requires not only the passage of time, but also prejudice to the adverse party, applies to actions for specific performance [*see Stafford v. Ballinger (1962) 199 Cal. App. 2d 289, 296, 18 Cal. Rptr. 568* (17 years and intervening transfers; specific performance pleaded as alternative to quiet title)].

[6] Lis Pendens

Plaintiff will probably wish to record a notice of pendency of the specific performance action [*Code Civ. Proc. § 405 et seq.*; *see Stewart Development Co. v. Superior Court (1980) 108 Cal. App. 3d 266, 276-277, 166 Cal. Rptr. 450* ; *see also* Ch. 348, *Lis Pendens*].

[7] State Statutes

Specific performance is available against any successor of vendor except purchaser in good faith. *Civ. Code § 3395*

[8] Decisions

[a] In General

Fact that contract precluded seller's remedy of specific performance did not preclude buyer's right to specific performance; buyer's promise to use best efforts to obtain development permits was sufficient mutuality of obligation to make binding contract. *Bleecher v. Conte (1981) 29 Cal. 3d 345, 350-355, 173 Cal. Rptr. 278, 626 P.2d 1051*

Law favors carrying out parties' intentions through enforcement of contracts and disfavors holding them unenforceable for uncertainty; in real property transaction, material terms are price, time and manner of performance, property to be transferred, and description sufficient to identify that property. *Hennefer v. Butcher (1986) 182 Cal. App. 3d 492, 500, 501, 227 Cal. Rptr. 318*

By litigating entitlement to premium, vendor waived contract provision for arbitration by panel of three appraisers to determine premium payment, if any, payable to vendor for increased value on rezoning; submission of evidence of value went beyond that necessary to establish fairness and reasonableness of contract price. *Hennefer v. Butcher (1986) 182 Cal. App. 3d 492, 503-505, 227 Cal. Rptr. 318*

"Fair market value" is certain enough price term to allow specific performance. *Goodwest Rubber Corp. v. Munoz (1985) 170 Cal. App. 3d 919, 921, 216 Cal. Rptr. 604* (option)

Purchaser's failure to allege willingness and ability to perform is not fatal if defendant fails to object to sufficiency of complaint and evidence shows willingness and ability. *Doryon v. Salant (1977) 75 Cal. App. 3d 706, 714-715, 142 Cal. Rptr. 378*

Purchaser who is willing to accept defective title with adjustment is required to indicate that willingness within reasonable time. *Weneda Corp. v. Dispalatro (1964) 225 Cal. App. 2d 187, 192, 37 Cal. Rptr. 267*

Vendor who has accepted payment is unable to complain that payment was late or that consideration was inadequate. *Crocker v. Grandi (1961) 189 Cal. App. 2d 431, 436-437, 11 Cal. Rptr. 330*

[b] Decree and Incidental Adjustments

Vendee entitled to specific performance and the rents and profits of the land from the time the conveyance should have been made. *Ellis v. Mihelis (1963) 60 Cal. 2d 206, 219, 32 Cal. Rptr. 415, 384 P.2d 7*

Vendor is entitled to offset against rents and profits allowed to purchaser interest on purchase price during period of delay, except interest is not to be allowed on sums purchaser has set aside, with notice to vendor, so as not to derive benefit therefrom; funds placed in escrow by purchaser are not subject to interest credit in favor of vendor. *Ellis v. Mihelis (1963) 60 Cal. 2d 206, 220-222, 32 Cal. Rptr. 415, 384 P.2d 7*

Purchaser was entitled to compensation for carrying costs during period of delay and for costs of having to reobtain governmental approvals that expired during delay wrongfully caused by vendor; vendor who did not raise issue in trial court was not entitled to offset for lost interest on purchase price; question of entitlement to offset was not pure question of law but required equitable accounting, which involved factual and legal issues. *Hennefer v. Butcher (1986) 182 Cal. App. 3d 492, 499, 505-506, 227 Cal. Rptr. 318*

Appellate court may correct judgment containing obvious clerical error by modifying judgment; in specific performance action, when findings of fact set forth in statement of decision clearly show amount of purchase price payable and amount of and reasons for several offsets, mathematical error in judgment is clerical error. *Hennefer v. Butcher (1986) 182 Cal. App. 3d 492, 506-508, 227 Cal. Rptr. 318*

Party awarded specific performance is also entitled to compensation for increased costs resulting from breaching party's delay; such compensation is not limited by foreseeability but is required to be reasonable and based on equitable principles. *Bravo v. Buelow (1985) 168 Cal. App. 3d 208, 213-215, 214 Cal. Rptr. 65* (increased construction costs); *Housing Authority v. Monterey Senior Citizen Park (1985) 164 Cal. App. 3d 348, 356-357, 210 Cal. Rptr. 497* (increased financing costs)

Attorney's fee award was not proper incident of decree of specific performance against defendant who was third party to whom vendor had sold property after making contract with plaintiff because third party wasn't party to contract with plaintiff providing for attorney's fees as between them; plaintiff had cause of action against vendor for attorney's fees incurred in action against third party. *Glynn v. Marquette (1984) 152 Cal. App. 3d 277, 280-282, 199 Cal. Rptr. 306*

Preliminary injunction was proper to keep second purchaser from moving into new house pending outcome of first purchaser's action for specific performance. *Grey v. Webb (1979) 97 Cal. App. 3d 232, 236-238, 158 Cal. Rptr. 595*

Court properly retains jurisdiction in interlocutory decree to determine amounts owed. *Wesley N. Taylor Co. v. Russell (1961) 194 Cal. App. 2d 816, 817-819, 15 Cal. Rptr. 357*

Specific performance decree conditioned conveyance on payment. *Greenstone v. Claretian Theo. Seminary (1959) 173 Cal. App. 2d 21, 37, 343 P.2d 161* (overruled on other grounds in *Ellis v. Mihelis (1963) 60 Cal. 2d 206, 221, 32 Cal. Rptr. 415, 384 P.2d 7*)

[c] Options

Option that was required to be exercised "within 30 days prior to the expiration date" could be exercised at any time in 30-day period preceding expiration date; language did not require exercise at least 30 days before expiration date. *Wilson v. Gentile (1992) 8 Cal. App. 4th 759, 762-768, 10 Cal. Rptr. 2d 713*

Exercise of option by ordinary mail is adequate; such exercise is not required to include tender of purchase price in absence of clause in option regarding time andmode of payment of pur chase price. *Erich v. Granoff (1980) 109 Cal.*

App. 3d 920, 927-929, 167 Cal. Rptr. 538

Acceptance of exercise of option waives any objection to form of exercise (oral exercise accepted when written acceptance specified in contract). *Collins v. Marvel Land Co. (1970) 13 Cal. App. 3d 34, 40, 91 Cal. Rptr. 291*

Rejection by buyer-optionee of nonconforming escrow instructions does not affect validity of land sales contract that becomes *in esse* on exercise of option. *Collins v. Marvel Land Co. (1970) 13 Cal. App. 3d 34, 41, 91 Cal. Rptr. 291*

Exercise of option or tender of performance is ineffective if it includes conditions that optionee is not entitled to demand; nevertheless, defects are waived unless optionor/vendor specifically points out alleged defects at time of exercise/tender. *Layton v. West (1969) 271 Cal. App. 2d 508, 511-512, 76 Cal. Rptr. 507*

[d] Specific Performance Properly Denied

Document signed only by husband was not contract, but only counteroffer, and because never accepted, was not specifically enforceable; even though no contract existed, vendors were entitled to attorney's fees under provision in document claimed to by contract. *Manier v. Anaheim Business Center Co. (1984) 161 Cal. App. 3d 503, 505-508, 207 Cal. Rptr. 508*

Specific performance of alleged contract for purchase and sale of portion of real property was abuse of discretion; specific performance is required to be refused when written contract of parties is ambiguous and parol evidence of transaction between parties fails to remove ambiguity as to material term. *White Point Co. v. Herrington (1968) 268 Cal. App. 2d 458, 461, 467-468, 73 Cal. Rptr. 885*

[e] Description

Description of property without street address or legal description is inadequate for specific performance. *Gorges v. Johnson (1959) 167 Cal. App. 2d 349, 352, 334 P.2d 621* .

[9] Cross References

For a related form, see *§ 569.164*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesLis PendensNoticesCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral OverviewContracts LawGeneral OverviewContracts LawBreachGeneral OverviewContracts LawConsiderationGeneral OverviewContracts LawConsiderationAdequate ConsiderationContracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawContract InterpretationParol EvidenceGeneral OverviewContracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawFormationAmbiguity & MistakeGeneral OverviewContracts LawPerformanceGeneral OverviewContracts LawPerformanceTender & DeliveryContracts LawRemediesGeneral OverviewContracts LawRemediesCompensatory DamagesInterestContracts LawRemediesSpecific PerformanceContracts LawSales of GoodsBreach, Repudiation & ExcuseRightful RejectionContracts LawThird PartiesGeneral OverviewContracts LawTypes of ContractsBona Fide PurchasersEstate, Gift & Trust LawCommunity PropertyGeneral OverviewEvidenceDocumentary EvidenceParol EvidenceEvidenceInferences & PresumptionsRebuttal of PresumptionsFamily LawMarital Duties & RightsProperty

RightsGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationGeneral OverviewFamily LawMarital Duties & RightsProperty RightsCharacterizationCommunity PropertyGovernmentsCourtsCourt RecordsGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLocal GovernmentsClaims By & AgainstReal Property LawDeedsGeneral OverviewReal Property LawDeedsRemediesSpecific PerformanceReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesPresent EstatesFee Simple EstatesReal Property LawFinancingGeneral OverviewReal Property LawFinancingConstruction LoansReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingTender of PerformanceReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingTime of PerformanceReal Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleRemediesDamagesCompensatory DamagesReal Property LawPurchase & SaleRemediesDamagesIncidental DamagesReal Property LawPurchase & SaleRemediesSpecific PerformanceReal Property LawTitle QualityGeneral Overview

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Volume 50: Usury thru Verification-Chs. 568-572
Chapter 569 VENDOR AND PURCHASER OF REAL PROPERTY
PART IV. FORMS
A. Actions Between Vendors And Purchasers Generally

50-569 California Forms of Pleading and Practice--Annotated § 569.166

§ 569.166 Complaint for Damages for Failure to Make Required Disclosures [Civ. Code § 1102]--By Purchaser Against Vendor

[1] FORM Complaint for Damages for Failure to Make Required Disclosures [Civ. Code § 1102]--By Purchaser Against Vendor

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES FOR FAILURE TO
_____ [*name*],	)	MAKE REQUIRED DISCLOSURES
[and DOES I through _____,]	)	[Amount demanded _____
Defendant(s).	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]
	)	

_____

Plaintiff alleges:

[1. *Capacity of plaintiff as necessary. See § 569.164, Paragraph 1.*]

2. [*Capacity and residence of named defendant. See § 569.164, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 569.160, Paragraph 2.*]

4. On _____ [*date*], at _____ [*city*], _____ [*county*], California, plaintiff and defendant entered into a written contract, a copy of which is attached to this complaint as Exhibit A and

made a part of this complaint by reference. Under this contract, defendant agreed to sell to plaintiff and plaintiff agreed to purchase from defendant for the sum of $_____ that certain real property situated in the County of _____, State of California, [commonly known as _____(*common designation or street address*),] and more particularly described as follows: _____ [*set forth legal description*]. The escrow closed on this sales transaction on _____ [*date*].

5. At all times mentioned in this complaint the property was improved with a _____ [single-family residence *or* multi-residential building consisting of _____ (*number of units*) units].

FIRST CAUSE OF ACTION
(Violation of *Civil Code Section 1102 et seq.*)

[*EITHER*]

6. _____ [Prior to the close of escrow *or* At some time prior to the execution of the sales agreement and continuing through the escrow period],defendant became aware that _____ [*specify nondisclosed items, e.g.,* certain additions or alterations were completed by defendant's predecessor in interest without the required permits].

[*OR*]

6. Prior to the close of escrow, defendant failed to use reasonable care to observe that _____ [*specify nondisclosed items, e.g.,* certain additions or alterations were completed by defendant's predecessor in interest without the required permits].

[*CONTINUE*]

7. Prior to the close of escrow, defendant _____ [willfully *or* negligently] failed to _____ [provide plaintiff with a Transfer Disclosure Statement required by *Civil Code Section 1102 et seq. or* indicate on the Transfer Disclosure Statement provided to plaintiff pursuant to *Civil Code Section 1102 et seq.* that _____ (*specify omitted items, e.g.,* certain additions or alterations were completed by defendant or defendant's predecessor in interest without the required permits)].

8. As a result of defendant's breach of his/her duty to _____ [provide plaintiff with a Transfer Disclosure Statement required by *Civil Code Section 1102 et seq. or* indicate on the Transfer Disclosure Statement provided to plaintiff pursuant to *Civil Code Section 1102 et seq.* that _____ (*specify omitted items, e.g.,* certain additions or alterations were completed by defendant or defendant's predecessor in interest without the required permits)], plaintiff completed the purchase of the property and has been damaged in the sum equal to the amount required to _____ [*specify requirements to cure problem, e.g.,* bring the property into compliance with local regulations].

SECOND CAUSE OF ACTION
(Failure to Disclose Material Facts)

9. _____ [Prior to the close of escrow *or* At some time prior to the execution of the sales agreement

and continuing through the escrow period], defendant became aware that _____ [*specify nondisclosed items, e.g.,* certain additions or alterations were completed by defendant's predecessor in interest without the required permits]. Defendant knew that these facts were unknown to plaintiff or were not within the diligent attention and observation of plaintiff, and failed to disclose these facts to plaintiff.

10. These facts materially affect the value and the desirability of the property.

11. As a result of defendant's breach of his/her duty to disclose these facts to plaintiff, plaintiff completed the purchase of the property and has been damaged in the sum equal to the amount required to _____ [*specify requirements to cure problem, e.g.,* bring the property into compliance with local regulations].

THIRD CAUSE OF ACTION
(Fraud)

12. Plaintiff incorporates in this cause of action by reference Paragraphs 9 and 10 of the Second Cause of Action.

13. Defendant failed to disclose these facts to plaintiff with the intent to induce plaintiff to purchase the property.

14. As a result of defendant's fraudulent nondisclosure of these facts, plaintiff completed the purchase of the property and has been damaged in the sum equal to the amount required to _____ [*specify requirements to cure problem, e.g.,* bring the property into compliance with local regulations].

WHEREFORE, plaintiff prays judgment against defendant[s, and each of them,] as follows:

1. For damages _____ [in the sum of $_____ *or* equal to the amount required to _____ (*specify requirement to cure problem*), according to proof];

2. For interest on this sum at the prevailing legal rate from _____ [*date*];

[3. For reasonable attorney's fees _____ (of $_____ *or* according to proof);]

4. For costs of suit herein by plaintiff; and

5. For such other and further relief as the court deems proper.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*].
_____ [*signature*]
_____ [*typed name*]

[2] Use of Form

This form is a complaint for use by a purchaser of a one-to-four unit residential property to recover damages sustained as the result of the vendor's willful or negligent failure to comply with the disclosure requirements imposed generally on residential vendors. The broker(s) for the vendor and the purchaser may also be potential defendants.

For discussion and forms relating to a cause of action against a broker for the failure to disclose, see Ch. 103, *Brokers* . For a form seeking rescission and cancellation based on fraudulent misrepresentations, see *§ 569.168*.

[3] Allegations

The complaint includes allegations regarding the formation of the sales contract and the close of escrow (Paragraph 4), and the type of residential property involved (Paragraph 5).

The first cause of action is based on the vendor's failure to comply with the disclosure requirements of *Civ. Code § 1102 et seq.* Any person who willfully or negligently violates or fails to perform any duty prescribed by any provision of this statutory scheme will be liable in the amount of actual damages suffered by a transferee [*Civ. Code § 1102.13*]. For a discussion of the statutory disclosure requirements, see *§ 569.11*.

Paragraph 6 alleges either that the defendant was aware or should have been aware of certain facts required to be disclosed. Paragraph 7 alleges that the defendant either willfully or negligently failed to provide the statutory Transfer Disclosure Statement to the plaintiff or failed to include certain facts on the statement provided to the plaintiff. Paragraph 8 alleges the damages suffered by the plaintiff as a result of the defendant's violation of the statutory duty to disclose.

The second cause of action is based on the vendor's common law duty to disclose material facts. When the seller knows of facts materially affecting the value or desirability of the property that are known or accessible only to him or her, and also knows that these facts are not known to, or within the reach of the diligent attention and observation of, the buyer, the seller is under a duty to disclose the facts to the buyer. Whether information is of sufficient materiality to affect the value or desirability of the property depends on the facts of the particular case [*Reed v. King (1983) 145 Cal. App. 3d 261, 265, 193 Cal. Rptr. 130* (buyer stated cause of action for seller's failure to disclose material fact based on nondisclosure of 10-year-old multiple murders in the residence)]. For further discussion of this common law duty, see Ch. 103, *Brokers* .

Paragraph 9 alleges the defendant's knowledge of and failure to disclose certain facts that were unknown to the plaintiff or not within the diligent attention and observation of the plaintiff. Paragraph 10 alleges that the facts materially affect the value and the desirability of the property. Paragraph 11 alleges the damages suffered by the plaintiff as the result of the defendant's failure to disclose material facts.

The third cause of action is based on the vendor's fraudulent nondisclosure of material facts. In addition to the allegations included in the second cause of action, Paragraph 13 alleges the vendor's intent to induce the plaintiff to purchase the property. For coverage of fraud in this context, see Ch. 103, *Brokers* .

[4] Statute of Limitations

It appears that an action under *Civ. Code § 1102.13* is subject to the three-year limitation period for actions based on a liability created by statute [*see Code Civ. Proc. § 338(a)*]. Unlike the three-year limitation period applicable to common law fraud actions, the limitation period specified in *Code Civ. Proc. § 338(a)* commences on accrual of the cause of action [*see Code Civ. Proc. § 312*], even though the plaintiff may not have discovered the facts constituting the cause of action. In contrast, the cause of action for fraud is not deemed to have accrued until the plaintiff's discovery of the facts constituting the fraud [*Code Civ. Proc. § 338(d)*].

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)*], verification will require any answer to be verified in an unlimited civil case in the superior court [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion, see Ch. 26, *Answers* .

[6] Cross References

For a related form, see *§ 569.161*.

For discussion and forms relating to fraud generally, see Ch. 269, *Fraud and Deceit* .

For discussion and forms relating to a broker's duty to disclose facts, see Ch. 103, *Brokers* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesFictitious NamesContracts LawDefensesFraud & MisrepresentationGeneral OverviewContracts LawRemediesCompensatory DamagesGeneral OverviewGovernmentsLegislationStatutes of LimitationsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLocal GovernmentsClaims By & AgainstReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleRemediesDuty to DiscloseTortsBusiness TortsFraud & MisrepresentationNondisclosureRemediesTortsDamagesGeneral OverviewTortsDamagesCompensatory DamagesGeneral OverviewTortsDamagesCompensatory DamagesProperty DamageGeneral OverviewTortsProcedureStatutes of LimitationsAccrual of ActionsDiscovery Rule

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50-569 California Forms of Pleading and Practice--Annotated § 569.167

§ 569.167 Complaint by Purchaser--For Damages for Failure to Provide Written Notice of Hazardous Substance on Property--Against Vendor or Landlord of Nonresidential Real Property [Health & Safety Code § 25359.7(a)]

[1] FORM Complaint by Purchaser--For Damages for Failure to Provide Written Notice of Hazardous Substance on Property--Against Vendor or Lessor of Nonresidential Real Property [Health & Safety Code § 25359.7(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*],	)	(Failure to Disclose Presence of Hazardous Sub-
[and DOES I through _____,]	)	stance)
Defendant(s).	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
	)	[LIMITED CIVIL CASE]

_____

Plaintiff alleges:

[1. *Capacity of plaintiff as necessary. See § 569.164, Paragraph 1.*]

2. [*Capacity and residence of named defendant. See § 569.164, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 569.160, Paragraph 2.*]

4. [*Formation of contract. See § 569.163, Paragraph 4.*]

5. At all times herein mentioned the property that is the subject of the contract was used for nonresidential purposes only.

6. On _____ [*date*], defendant knew or had reasonable cause to believe that a release of hazardous substance had come to be located on or beneath the property.

7. The _____ [transfer of title to *or* lease of] the property occurred on _____ [*date*]. Defendant failed to give plaintiff written notice before that date regarding the presence of a hazardous substance on or beneath the property.

8. As a result of defendant's failure to give the notice as required by law, _____ [*describe harm to plaintiff, e.g.,* because of the extreme danger to human life posed by the presence of toxic and hazardous waste on the property, plaintiff was forced to sell the property at a loss].

[9. In performing the acts herein alleged, defendant had actual knowledge of the presence of a hazardous substance on or beneath the property and knowingly and willfully failed to give plaintiff the notice required by law.]

WHEREFORE, plaintiff prays judgment against defendant(s) as follows:

1. For actual damages;

[2. For the civil penalty provided by law;]

3. For costs of suit incurred herein; and

4. For such other and further relief as the court deems proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 569.160.*]

[2] Use of Form

This form of complaint is for use by a purchaser or tenant of nonresidential real property who has suffered harm because of the vendor's or landlord's failure to give written notice of the presence of a hazardous substance. The vendor or landlord is required to give this notice when he or she knows or has reasonable cause to believe that a release of hazardous substance has come to be located on or beneath the property. The vendor or lessor is liable for actual damages resulting from a failure to give the required notice before the transfer of title or making of the lease. In addition, the vendor or lessor is liable for a civil penalty if he or she had actual knowledge of the situation and knowingly and willfully failed to give notice as required by law [*Health & Safety Code § 25359.7(a)*].

[3] Allegations

This complaint alleges:

- The nonresidential nature of the real property (Paragraph 5).

- The vendor's or lessor's knowledge or reasonable cause to believe that a hazardous substance was located on or beneath the property (Paragraph 6).

- The transfer of title to, or lease of, the property without the notice required by law (Paragraph 7).

- The harm that the purchaser or lessee suffered as a result of the vendor's or lessor's failure to give the notice (Paragraph 8). The complaint contains an optional allegation of actual knowledge and willful failure to give thenotice, as a basis for claiming a civil penalty (Paragraph 9) [*Health & Safety Code § 25359.7(a)*].

[4] Cross References

For a related form, see *§ 569.160*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesFictitious NamesContracts LawTypes of ContractsLease AgreementsGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundRecordkeeping & ReportingReal Property LawLandlord & TenantGeneral OverviewReal Property LawPurchase & SaleGeneral OverviewTortsPremises Liability & PropertyLessees & LessorsGeneral OverviewTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsGeneral OverviewTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligenceGeneral OverviewTortsPremises Liability & PropertyLessees & LessorsLiabilities of LessorsNegligenceSafety Requirements

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A. Actions Between Vendors And Purchasers Generally

50-569 California Forms of Pleading and Practice--Annotated § 569.168

§ 569.168 Complaint by Purchaser--For Rescission of Contract [Civ. Code § 1692] for Purchase and Sale of Real Property, for Cancellation of Instrument [Civ. Code § 3412], and for Exemplary Damages [Civ. Code § 3294(a),(c)] and Attorney's Fees [Civ. Code § 1717]

[1] FORM Complaint by Purchaser--For Rescission of Contract [Civ. Code § 1692] for Purchase and Sale of Real Property, for Cancellation of Instrument [Civ. Code § 3412], and for Exemplary Damages [Civ. Code § 3294(a),(c)] and Attorney's Fees [Civ. Code § 1717]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	NO. _____
vs.	)	COMPLAINT FOR RESCISSION, CANCELLA-
_____ [*name*(*s*)],	)	TION OF DEED, NOTES, AND DEEDS OF
[and DOES I through _____],	)	TRUST, EXEMPLARY DAMAGES, AND ATTOR-
Defendant(s).	)	NEY'S FEES
	)	[Amount demanded _____
	)	(exceeds *or* does not exceed) $10,000]
		[LIMITED CIVIL CASE]

_____

Plaintiff(s) allege(s):

[1. *Capacity of plaintiff(s) as necessary. See § 569.164, Paragraph 1.*]

2. [*Capacity and residence of defendant seller(s). See § 569.164, Paragraph 2*].

[*ALLEGE, in successively numbered paragraphs, the capacity of each party to all of the contracts and instruments*

sought to be rescinded or cancelled, for example:]

3. At all times herein mentioned, defendant _____, hereinafter referred to as "Bank" was, and now is, a National Banking Association, duly authorized to transact business in the State of California.

4. At all times herein mentioned, defendant _____, hereinafter referred to as "Title Company," was, and now is, a corporation organized and existing under and by virtue of the law of the State of _____, [and authorized to transact and transacting business in California,] with its principal office for the transaction of business in [California in] _____ County, California.

5. At all times herein mentioned, defendant _____, hereinafter referred to as "Securities Company," was, and now is, a corporation organized andexisting under and by virtue of the laws of the State of _____, [and authorized to transact and transacting business in California,] with its principal office for the transaction of business in [California in] _____County, California.

[*CONTINUE*]

[6. *Fictitious name allegation, if appropriate. See § 569.161, Paragraph 3.*]

7. [*Agency allegation. See § 569.160, Paragraph 3.*]

8. [*Formation of contract. See § 569.163, Paragraph 4.*]

9. Pursuant to the contract mentioned above, Seller(s), on or about _____ [*date*], executed a deed, a copy of which is attached hereto, marked Exhibit "B", and made a part hereof, conveying the real property to plaintiffs. That deed was recorded on _____ [*date*], in _____ (Book *or* Reel) _____, at _____ (Page *or* Image) _____ of the Official Records in the Office of the County Recorder of _____ County, California.

10. Pursuant to the contract, plaintiff(s) made a cash down payment in the sum of $_____, _____ [*give particulars of subsidiary agreements, notes, and/or deeds of trust sought to be rescinded or cancelled, e.g.,* assumed an existing note payable to Bank in the unpaid amount of $_____, secured by a first deed of trust, and executed an additional note in the sum of $_____, payable to defendant Seller(s) secured by a second deed of trust on the real property. The note payable by plaintiff(s) to Seller(s), a copy which is attached hereto marked Exhibit "C" and made a part hereof, is dated _____.

[*DESCRIBE, in successively numbered paragraphs, each additional contract and instrument sought to be rescinded or cancelled, or affected by the rescission or cancellation of some other contract or instrument, for example:*]

11. The trustee of the second deed of trust is defendant Title Company and the holders thereof are defendant Seller(s). The second deed of trust, a copy of which is attached hereto marked Exhibit "D" and made a part hereof, is dated _____ [*date*] and was recorded on _____ [*date*], in _____ [Book *or* Reel] No. _____, at _____ [Page *or* Image] _____ of the Official Records in the Office of the County Recorder of _____ County, California.

12. The assumption agreement between plaintiff(s), Seller(s), and Bank, a copy of which is attached hereto marked Exhibit "E" and made a part hereof, is dated _____.

13. The first deed of trust [referred to in the assumption agreement] is dated _____, and was recorded on _____ [*date*], in _____ [Book *or* Reel] No. _____, at _____[Page *or* Image] _____ of the Official Records in the Office of the County Recorder of _____ County, California. The trustee of the first deed of trust is defendant Securities Company and the holder thereof is defendant Bank.

[*CONTINUE*]

[14. Plaintiff(s) thereafter made the following improvements on the real property: _____ [*itemize*]. The reasonable value of the improvements is _____ (the sum of $_____ *or itemize value of each improvement*), and the real property is increased in its fair market value by that amount.]

[*ALLEGE, in successively numbered paragraphs, the ground, such as fraud, on which rescission, cancellation, and restitution are sought, for example*]

15. Thereafter, on or about _____ [*date*], plaintiff(s) discovered _____ [*state grounds for rescission, e.g.*: that a moderate rain causes the real property to become flooded. As a result of this discovery, plaintiff(s) made inquiry and discovered that heavy rain causes the interior of the residence situated on the real property to become flooded to a depth of several inches or more, to be totally uninhabitable, that the water flows onto the property from three sides, that it is not practical to attempt to solve the problem of flooding, and that the value of the property by reason of the propensity to flood is not more than the sum of $_____, which sum _____ (does *or* does not) inlcude the value of improvements made by plaintiffs as alleged above)].

16. Defendant Seller[s, and each of them], at the time he/she/it/they agreed to sell the property to plaintiff(s), knew of the _____ [*set forth material fact required to be disclosed or which was subject of fraudulent misrepresentation, e.g.,* propensity of the property to flood], _____ [concealed that fact from plaintiff(s) *or* falsely represented to the plaintiff(s) that the property _____ (*set forth substance of misrepresentation, e.g.,* did not flood)], all [with the intent to deceive and defraud plaintiff(s) and] as an inducement to plaintiff(s) to purchase the property. Plaintiff(s) had no knowledge of the _____ [*true facts, e.g.,* propensity of the property to flood] until he/she/it/they discovered that fact as herein alleged, and would not have purchased the property had he/she/it/they known of the true facts.

17. An examination of the premises at the time plaintiff(s) agreed to purchase the property would not have revealed the _____ [*true condition, e.g.,* propensity of the property to flood], and the Seller[s, and each of them,] knew that a prospective purchaser would not be able to discern the _____[*true condition, e.g.,* propensity] by looking at the property, that plaintiff(s) had no knowledge thereof, and that plaintiff(s) would not have agreed to purchase the property had he/she/it/they known thereof.

18. By reason of the above _____ [failure to disclose *or* falserepresentation], Seller[s, and each of them,] has/have been guilty of fraud.

[*CONTINUE*]

19. As a result of purchasing the real property, plaintiff(s) have incurred expenses in addition to those alleged above. These expenses include, without limitation, closing costs, title insurance, casualty and liability insurance, principal and interest on obligations outstanding, taxes, fees for engineers, and moving expenses. Plaintiff(s) has/have paid a total of

$_____ for these expenses as of the date of this complaint and will continue to incur them in an amount unknown to him/her/it/them at this time. Plaintiff(s) pray(s) leave of court to amend this complaint to insert herein the true amount of those expenses when they are ascertained.

[20. *Punitive damage allegation. See § 569.166, Paragraph 12.*]

[*EITHER*]

21. Plaintiff(s) intend(s) that service of summons in this action and of the complaint serve as notice of rescission of the contract [and _____ (*specify subsidiary agreement(s), e.g.,* assumption agreement)] and cancellation of the deed [_____ (*specify other instruments to be cancelled, e.g.,* note(s) and deed(s) of trust in favor of _____)] described above, and hereby offer(s) to restore all consideration furnished by Seller(s) under the contract, on condition that Seller(s) restore to plaintiff(s) the consideration furnished by plaintiff(s), and the value of his/her/its/their improvements.

[*OR*]

21. On or about _____ [*date*], plaintiff(s) notified defendants, and each of them, in writing that he/she/it/they had rescinded the contract [and _____ (*specify subsidiary agreement(s), e.g.,* assumption agreement)] and intended to seek cancellation of the deed [, _____ (*specify other instruments to be cancelled, e.g.,* note(s) and deed(s) of trust in favor of _____)] described above on the ground of _____ [*specify, e.g.,* fraud] and offered to restore to Seller(s) all consideration given by him/her/it/them on condition that Seller(s) restore to plaintiff(s) the consideration advanced by him/her/it/them and the value of plaintiffs' (plaintiff's(s') improvements. Defendants, and each of them, refused, and continue to refuse, to return the consideration or to pay the value of the improvements, or to recognize that the contract [and assumption agreement] has/have been rescinded and that the deed, note(s), and deed(s) of trust have been cancelled.

WHEREFORE, plaintiff(s) pray(s) judgment as follows:

1. That defendant Seller[s, and each of them,] be ordered to pay to plaintiff(s) the following sums:

[(a) The down payment made by plaintiff(s) to Seller(s) in the sum of $_____;]

[(b) The reasonable value of the improvements made by plaintiffs to said real property in the sum of $_____;]

[(c) The sums paid, or which will be paid, by plaintiff(s), for closing costs, title insurance, moving expenses, casualty and liability insurance, principal and interest on outstanding obligations, taxes, fees for engineers, and miscellaneous costs, in an amount which will be set forth by amendment to this complaint when it has been ascertained;]

[(d) Exemplary damages; and]

(e) The costs of suit herein incurred[, including reasonable attorney's fees as authorized by *Civil Code Section 1717*].

2. That the _____ [*specify, e.g.,* contract of the parties and the assumption agreement] has/have been rescinded [; that plaintiff(s) be relieved of any liability on the _____ (*specify, e.g.,* note and deed(s) of trust _____ (given *and/or* assumed) by them)] [; that Seller(s) be required to assume the obligations of plaintiff(s) to _____(*specify third party lenders*)] [; and that plaintiff(s) be indemnified and held

harmless by defendant Sellers from any actions or claims thereunder by _____ (*specify, e.g.,* Bank or Security Company)].

[3. That the note and second deed of trust executed by plaintiff(s) be ordered surrendered up by their holders and cancelled by this Court.]

4. That plaintiff(s) be ordered to convey the real property to Seller(s) by quitclaim deed on condition that Seller(s) pay to plaintiff(s) the sums as ordered by the judgment of this Court.

5. That any sums which this Court finds to be due to plaintiff(s) from defendant Seller(s) be declared a lien on the real property.

6. For such other relief as the Court deems just.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification, if desired. See § 569.160.*]

[2] Use of Form

This form of complaint is for use by a purchaser of real property to bring anaction for rescission of the contract and any collateral agreements, such as agreements assuming preexisting encumbrances. To provide complete relief, the complaint also seeks cancellation of the deed and any notes and deeds of trust in favor of the vendor, restitution, and that vendor's indemnify, and hold purchasers harmless from any claims on the preexisting encumbrances or assume purchase money obligations to third party lenders.

The ground for rescission used in the form is either nondisclosure of a material fact required to be disclosed or affirmative misrepresentation. The form may be modified for use if material mistake or some other ground is the basis for rescission [*see Civ. Code § 1689* and discussion in *§ 569.22[7]*].

This form may be used to seek alternative relief to damages for fraud or for failure to make statutory disclosures [*Civ. Code §§ 1102-1102.14, 1134.5, 3343*; *see § 569.166*].

If any of the lenders has commenced foreclosure proceedings, plaintiff may wish to seek an injunction to restrain the sale to preclude a purchaser at the foreclosure sale from establishing rights superior to plaintiff's rights. For a form of complaint that includes allegations to enjoin a sale that may be combined with this form, see Ch. 555, *Trust Deeds and Real Property Mortgages* .

[3] Parties

All parties to a contract or instrument sought to be rescinded or cancelled must be named in an action for relief based on rescission or cancellation [*Holder v. Home Sav. & Loan Asso. (1968) 267 Cal. App. 2d 91, 107, 72 Cal. Rptr. 704]* . In this complaint, Paragraphs 3 through 5 set forth the capacity of the lenders and trustees on loans which are original obligations of plaintiffs and those assumed by plaintiffs. While the court cannot require full payoff of a loan made by a third party, it can compel vendors to assume those obligations [*see Snelson v. Ondulando Highlands Corp. (1970) 5 Cal. App. 3d 243, 254-258, 84 Cal. Rptr. 800* (party extending financing is not indispensible to rescission so long as decree can be made that does not infringe lender's rights)]. The trustee of the assumed loan has been named in this

complaint in order that it will be bound by any judgment rescinding the assumption agreement (Paragraph 5) [*see Cooke v. Darnell (1920) 100 Cal. App. 482, 490, 280 P. 383* (holder of encumbrance not bound by judgment, though named as defendant, because not served)].

[4] Allegations

In addition to the capacities of all the parties, this form of complaint sets forth the formation and performance of the contract (Paragraphs 8 and 9) and describes each subsidiary agreement and instrument to be affected (Paragraphs 10 through 13). Additional paragraphs should be added as necessary to describe other terms of the transaction and agreements and instruments affected.

Other allegations set forth in this form are:

- Plaintiff's discovery of the defect and its impact on the property's market value (Paragraph 15) [*see Hefferan v. Freebairn (1950) 34 Cal. 2d 715, 721-722, 214 P.2d 386* ; *Reed v. King (1983) 145 Cal. App. 3d 261, 267-268, 193 Cal. Rptr. 130* (purchaser not required to prove pecuniary loss, property need not be worth less than purchaser paid to entitle purchaser to rescission)].

- Defendant's knowledge of the defect not disclosed or falsity of the affirmative misrepresentation and intent to induce reliance, plaintiff's lack of knowledge of the defect or falsity, the materiality or the defect or misrepresentation, and purchaser's reliance on the nonexistence of the defect or misrepresentation (Paragraph 16) [*see Snelson v. Ondulando Highlands Corp. (1970) 5 Cal. App. 3d 243, 251, 84 Cal. Rptr. 800* ; *Buist v. C. Dudley DeVelbiss Corp (1960) 182 Cal. App. 2d 325, 331, 6 Cal. Rptr. 259* (misrepresentation or concealment of known fact of fill in lot is material inducement and fraud if purchaser does not know)].

- That the defect would not have been apparent to purchasers from a reasonably diligent inspection of the property (Paragraph 17) [*see Snelson v. Ondulando Highlands Corp. (1970) 5 Cal. App. 3d 243, 252, 84 Cal. Rptr. 800* (independent investigation does not preclude reliance if falsity would not be apparent from inspection, if defendant had superior knowledge, or if plaintiff is not competent to judge facts within expert assistance)].

- Consequential expenditures (Paragraph 19).

- Notice of rescission and cancellation and offer to restore consideration or that service of summons and complaint should constitute notice and offer to restore (alternative Paragraph 21).

Optional allegations regarding improvements made by plaintiffs (Paragraph 14) and punitive damages (Paragraph 20) are also included [*Civ. Code §§ 1692, 3294(a)*; *see Kent v. Clark (1942) 20 Cal. 2d 779, 784-786, 128 P.2d 868* (value of improvements)].

[5] Jurisdiction

The superior court has jurisdiction of the action, which will be classified as an unlimited civil case unless it qualifies as a limited civil case [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(1)*]. An action to cancel or rescind a contract is a limited civil case when the relief is sought in connection with an action to recover money not exceeding $25,000 or property of a value not exceeding $25,000, paid or delivered under, or in consideration of, the contract [Code Civ.Proc. § 86(a)(3)]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

In limited civil cases, the first page of the first paper filed must identify the case as a limited civil case and must state whether the demand exceeds or does not exceed $10,000 [*Code Civ. Proc. § 422.30(b)*; *Gov. Code § 70613*; *Cal. Rules of Ct., Rule 2.111(9), (10)*].

[6] Venue

A purchaser's action for rescission of a contract for purchase and sale of real property is considered transitory if the gravamen of the action is fraud despite the fact that transfer of title to real property will be required if plaintiff is successful; therefore, venue is in the county of defendant's residence [*Code Civ. Proc. § 395(a)*; *Coe v. Kessler (1956) 139 Cal. App. 2d 536, 540-542, 294 P.2d 83* ; *Postin v. Griggs (1944) 66 Cal. App. 2d 147, 149-150, 151 P.2d 887]* . When individual and corporate defendants are named, the residence of the individual defendant is entitled to have the action removed to the county of his or her residence [*Rosen v. Kessler (1956) 145 Cal. App. 2d 676, 681-683, 303 P.2d 110]* .

[7] State Statutes

When prevailing party in action on contract is entitled to attorneys' fees. *Civ. Code § 1717*

Exemplary damages. *Civ. Code § 3294*

Cancellation of instruments. *Civ. Code §§ 3412-3415*

[8] Decisions

[a] Grounds for Fraud or Rescission

Purchaser is not prevented by "as is" provision from rescission and restitution from honest vendor on account of vendor's agent's misrepresentations; honest vendor is not liable for other damages. *Herzog v. Capital Co. (1945) 27 Cal. 2d 349, 353, 164 P.2d 8*

Misrepresentations as to acreage, susceptibility of property to flooding, and suitability of property for cultivation; purchaser's replacement and repair of culverts does not preclude reliance; numerous visits to property by purchaser as not precluding reliance when purchaser was not knowledgable as to soil or land conditions as they related to cultivation. *Shearer v. Cooper (1943) 21 Cal. 2d 695, 697-702, 134 P.2d 764*

Cause of action was stated for fraud when purchasers bought house without knowing or being told that foundation was so defective that house could not be occupied because broker who was also vendor had duty to disclose defects; purchasers' demolition of house, even in belief that was only way to correct defect, precluded restitution. *Prichard v. Reitz (1986) 178 Cal. App. 3d 465, 467-469, 223 Cal. Rptr. 734*

Purchaser was entitled to rescission if fact that murders occurred in home 10 years earlier was material; market value assumes purchaser has knowledge of all issues and purposes to which property is adapted. *Reed v. King (1983) 145 Cal. App. 3d 261, 267-268, 193 Cal. Rptr. 130* (murders in home)

Every contract is subject to rescission for material misrepresentation whether innocent or fraudulent within reasonable time after discovery of falsity; rescission was proper within 60 days after date of contract when property was represented to net $19,000 but in fact it was operating at substantial loss and even though contract provided purchaser seven days to verify income and expenses. *Osborne v. Cal-Am Financial Corp. (1978) 80 Cal. App. 3d 259, 266-268, 145 Cal. Rptr. 584*

Purchaser was not entitled to unilateral rescission for mutual mistake or innocent misrepresentation regarding gas leak when leak was discovered after representation was made, and was repaired, tested, and passed city inspection, before close of escrow; gas leaks were too common and repaired leak was too immaterial to allow rescission because purchaser's unusual susceptibility to concern over gas leaks was not communicated. *Wood v. Kalbaugh (1974) 39 Cal. App. 3d 926, 929-932, 114 Cal. Rptr. 673*

Purchaser was entitled to rescission for broker's misrepresentation that dwellings had been constructed in compliance with local building codes and ordinances and pursuant to valid permit. *Thompson v. Guyer-Hays (1962) 207 Cal. App. 2d 366, 369-371, 374, 24 Cal. Rptr. 461*

[b] Particular Relief

Quitclaim deed is generally preferable to grant deed in rescission judgment. *Snelson v. Ondulando Highlands Corp. (1970) 5 Cal. App. 3d 243, 256, 84 Cal. Rptr. 800*

Court was not permitted to require immediate full payoff of purchase money loan made by third party lender; court as properly required vendors to assume obligation of third party purchase money note and deed of trust and to hold purchasers harmless from demands, and claims of lender. *Snelson v. Ondulando Highlands Corp. (1970) 5 Cal. App. 3d 243, 257-258, 84 Cal. Rptr. 800*

Brokers were properly held liable with vendors for restitution of downpayment, closing costs, incidental consequential damages, and payments made by purchasers on note. *Snelson v. Ondulando Highlands Corp. (1970) 5 Cal. App. 3d 243, 258, 84 Cal. Rptr. 800* .

[9] Cross References

For related forms, see *§§ 569.163* and *569.166*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawNational BanksAffiliates & SubsidiariesBusiness & Corporate LawCorporate NamesFictitious NamesGeneral OverviewBusiness & Corporate LawCorporate NamesFictitious NamesConducting Business Under Fictitious NamesBusiness & Corporate LawCorporationsDissolution & ReceivershipGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedureVenueCorporationsCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePartiesGeneral OverviewCivil ProcedureRemediesDamagesPunitive DamagesContracts LawDefensesGeneral OverviewContracts LawDefensesAmbiguity & MistakeGeneral OverviewContracts LawDefensesAmbiguity & MistakeMutual MistakeContracts LawDefensesFraud & MisrepresentationMaterial MisrepresentationContracts LawFormationAmbiguity & MistakeMutual MistakeContracts LawFormationOffersGeneral OverviewContracts LawNegotiable InstrumentsEnforcementDefensesFailure of ConsiderationContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesGeneral OverviewContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesForgery, Fraud & MistakeContracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesGeneral OverviewContracts LawRemediesEquitable ReliefInjunctive ReliefContracts LawThird PartiesGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsGeneral OverviewEnergy & Utilities LawAdministrative ProceedingsCosts & Attorney FeesEnergy & Utilities LawFinancingGeneral OverviewEnergy & Utilities LawGrants & ReservationsGeneral OverviewEnergy & Utilities LawPurchase ContractsGeneral OverviewEnergy & Utilities LawPurchase ContractsPrice

TermsEnergy & Utilities LawUtility CompaniesService TerminationsEnvironmental LawLitigation & Administrative ProceedingsToxic TortsEnvironmental LawWater QualityClean Water ActDischarge PermitsDredged or Fill MaterialAlternatives AnalysisEstate, Gift & Trust LawTrustsTrusteesDuties & PowersGeneral OverviewGovernmentsLocal GovernmentsGeneral OverviewGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsLocal GovernmentsFinanceInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesGeneral OverviewInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesBrokersInsurance LawProperty InsuranceTitle InsuranceReal Property LawBrokersGeneral OverviewReal Property LawBrokersFiduciary ResponsibilitiesReal Property LawDeedsGeneral OverviewReal Property LawDeedsTypesQuit Claim DeedsReal Property LawDeedsRemediesCancellation & RescissionReal Property LawDeedsRemediesDamagesReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsPurchase-Money MortgagesReal Property LawFinancingMortgages & Other Security InstrumentsTransfersGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsTransfersAssumptionsReal Property LawFinancingSecondary FinancingGeneral OverviewReal Property LawOwnership & TransferDeath & IncapacityTestamentary DispositionsReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityFraud & MisrepresentationReal Property LawPurchase & SaleFraudulent TransfersReal Property LawPurchase & SaleRemediesDamagesGeneral OverviewReal Property LawPurchase & SaleRemediesDamagesPunitive DamagesReal Property LawPurchase & SaleRemediesRescission & RestitutionReal Property LawZoning & Land UseBuilding & Housing CodesTortsBusiness TortsGeneral OverviewTortsDamagesPunitive DamagesAward CalculationsGeneral Overview

California Forms of Pleading and Practice--Annotated

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Volume 50: Usury thru Verification-Chs. 568-572
Chapter 569 VENDOR AND PURCHASER OF REAL PROPERTY
PART IV. FORMS
A. Actions Between Vendors And Purchasers Generally

50-569 California Forms of Pleading and Practice--Annotated § 569.169

§ 569.169 Complaint by Purchaser or Optionee--For Declaratory Relief [Code Civ. Proc. § 1060] Seeking Declaration That Contract or Option to Purchase Real Property Is in Full Force and Effect

[1] FORM Complaint by Purchaser or Optionee--For Declaratory Relief [Code Civ. Proc. § 1060] Seeking Declaration That Contract or Option to Purchase Real Property Is in Full Force and Effect

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name*(*s*)],	)	COMPLAINT FOR DECLARATORY RELIEF
[and DOES I through _____],	)	
Defendant(s).	)	
	)	
	)	

Plaintiff(s) alleges(s):

1. At all times herein mentioned plaintiff(s), sometimes hereinafter referred to as _____ ["Buyer(s)" *or* "Optionee(s)"], was/were, and is/are, _____ [*plaintiff's capacity, e.g.*, a corporation organized and existing under the laws of California].

2. At all times herein mentioned defendant(s), sometimes hereinafter referred to as _____ ["Seller(s)" *or* "Optionor(s)"], was, and is, _____ [*state capacity and if used as basis of venue, residence of defendant(s), e.g.*, husband and wife, residents of _____ County, California, and the fee owner(s) of the following described real property(, hereinafter referred to as the option property), situated in the County of

_____, State of California, (commonly known as _____ (*common designation or street address*),) and more particularly described as follows: _____ [*set forth legal description*].

3. On or about _____ [*date*], plaintiff(s) and defendant(s) entered into a written agreement, [hereinafter referred to as the option agreement,] a copy of which is attached hereto, marked Exhibit "A," and made a part hereof, whereby plaintiff(s) was/were _____ [granted the exclusive option to purchase the option property on or before _____ (*date*), *or* to purchase from defendant(s) and defendant(s) was/were to sell to plaintiff(s) for the sum of $_____ the real property described above]. The [option] agreement provided for an initial payment of $_____, which was paid on or about _____ [*date*], and for _____ [*specify number, or* an] additional [_____ (*regular interval, if applicable, e.g.,* quarterly)] payment(s) of $_____ [each] to be paid to _____ [Seller(s) *or* Optionor(s) *or name of escrow or other agent*] on _____ [*specify date(s) or other, e.g.,* the last business day of March, June, September, and December of each year, commencing on _____ (*date*),], [unless the option was exercised or canceled before the next payment became due]. The payment(s) was/were [not] to be applied to the purchase price [but was/were to be made as consideration for the _____ (execution of the agreement *or* option)]. _____ [*Specify other relevant conditions, e.g.,* Plaintiff's obligation to purchase the property was conditioned on its obtaining, on or before _____ (*date*), tentative subdivision map approval from the City and/or County of _____]. The agreement further provided that time was of the essence and that failure to make a payment on or before the prescribed date would automatically _____ [cancel *or* terminate] the _____ [option *or* contract] without further notice.

[4. From and after _____ (*date*), plaintiff(s) has/have expended in excess of $_____ on _____ (*specify expenditures on subject property or adjacent property, and if applicable, any increase in value of the subject property on account of the expenditures, e.g.,* planning, building, and developing a major residential and commercial center consisting of shopping centers, office buildings, apartments, and parking garages on approximately _____ acres of land in _____ County, California, located adjacent to the option property. A portion of the adjacent property was purchased by plaintiff(s) from defendant(s). The planning, building, and developing of adjacent property has caused the option property to increase substantially in value since _____ (*date*), the date of the option agreement).]

[5. Pursuant to the terms and conditions of the (option) agreement, plaintiff(s) paid defendant(s) the sum of $_____ on or about _____ (*date*), and, in addition, plaintiff(s) paid _____ (defendant(s) *or name of escrow or other agent*) the _____ (*date*), and _____ (*date*), installment payments of $_____ each.]

6. Plaintiff(s) made the _____ [*specify payment that was not timely made, e.g.,* 2005 fourth quarter payment] installment of $_____ by depositing, on or about _____, a check dated _____ [*date*], in the sum of $_____ in the regular mail addressed to defendant(s). A copy of the check is attached hereto, marked Exhibit "B," and made a part hereof.

7. On or about _____ [*date*], defendant(s) advised plaintiff(s) in writing that he/she/it/they considered the [option] agreement _____ [cancelled *or* terminated] on the ground that the _____ [*specify payment that was not timely made, e.g.,* 2005 fourth quarter payment] installment payment was not received by him/her/it/them until _____ [*date*]. On or about _____ [*date*], defendant(s) returned the check to plaintiff(s).

8. On _____ [*date*], plaintiff(s) again tendered the $_____ due as the _____ [*date*], installment and notified defendant(s) that he/she/it/they considered the _____ [option *or* contract] to be and remain in full force and effect, but defendant(s) refused, and still refuses, to accept the same.

9. An actual controversy has arisen and now exists between plaintiff(s) and defendant(s) concerning their respective rights and duties under the [option] agreement in that plaintiff(s) contend(s), and defendant(s) denies/deny, that plaintiff(s) has/have performed and that the [option] agreement is now in full force and effect and that defendant's(s') purported _____ [termination *or* cancellation] thereof is of no legal force or effect.

10. Plaintiff(s) desire(s) a judicial determination of his/her/its/their rights and duties, and a declaration as to which party's interpretation of the [option] contract is correct.

11. [*Necessity and appropriateness of judicial declaration. See § 569.193[1], Paragraph 17.*]

WHEREFORE, plaintiff(s) pray(s) judgment as follows:

1. For a declaration that the [option] contract described above is now in full force and effect and that the purported _____ [termination *or* cancellation] of it is of no legal force or effect;

2. For costs of suit herein incurred[, including reasonable attorney's fees as provided by the agreement]; and

3. For such other and further relief as the Court deems just.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff(s)

[*Verification, if desired. See § 569.160[1].*]

[2] Use of Form

This form of complaint is for use by a purchaser or optionee of real property to seek a declaration that the late payment of an installment has not terminated the entire agreement or option. This complaint is adapted in part from the facts in *Holiday Inns of America v. Knight (1969) 70 Cal. 2d 327, 74 Cal. Rptr. 722, 450 P.2d 42* , involving an option contract. Relief is based on *Civ. Code § 3275*, prohibiting forfeitures for nonwillful defaults when the payee can be made whole. This basis for relief also applies to installment sales contracts [*see § 569.193*]. If the option has been exercised or the final payment under the contract is at issue, plaintiff's relief would be specific performance [*see § 569.165*] instead of declaratory relief.

If payments were to be made to an escrow rather than to the vendor directly, the allegations should be modified accordingly.

[3] Allegations

This form of complaint alleges the following:

- The capacity of the parties, and residence of defendant if used as the basis of venue (Paragraphs 1-2) [*see also Mission Imports, Inc. v. Superior Court (1982) 31 Cal. 3d 921, 930-931, 184 Cal. Rptr. 296, 647 P.2d 1075* (venue for declaratory relief regarding contract is same as for contract); *see also §§ 569.164* and *569.193*].

- The formation of the contract or option and the particular terms relevant to the dispute (Paragraph 3).

- Expenditures made by plaintiff in reliance on the contract or option, and any benefit therefrom that accrues to defendant (Paragraph 4).

- The extent of plaintiff's performance under the contract or option (Paragraph 5).

- Plaintiff's late tender (Paragraph 6).

- Defendant's refusal to accept the late tender and insistence that the contract or option is terminated (Paragraph 7).

- Plaintiff's retender and demand that the contract or option be honored as still in force (Paragraph 8).

- A description of the actual controversy that exists (Paragraph 9), and statements that plaintiff desires a judicial determination (Paragraph 10), and that a judicial determination is necessary and appropriate (Paragraph 11).

[4] Jurisdiction

Actions for declaratory relief are in the jurisdiction of the superior court as cases of unlimited jurisdiction. An action for declaratory relief is in the jurisdiction of the superior court as a limited civil case only when brought as a cross complaint for indemnity in an action or proceeding that is otherwise a limited civil case or in cases following nonbinding arbitration between an attorney and client when the amount in controversy is $25,000 or less [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(7)(A)*, 580(b)(4), *1060*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case willbe classified as an unlimited civil case [*see Code Civ. Proc. § 88*].

[5] Decisions

Purchaser/optionee who makes payment within reasonable time after it is due is entitled to relief from forfeiture under *Civ. Code § 3275* and declaration that option/agreement remains in force. *Holiday Inns of America v. Knight (1969) 70 Cal. 2d 327, 329, 74 Cal. Rptr. 722, 450 P.2d 42*

Purchaser entitled to specific performance of contract despite three day late tender of second installment. *Williams Plumbing Co. v. Sinsley (1975) 53 Cal. App. 3d 1027, 1031-1035, 126 Cal. Rptr. 345*

[6] Text References

California Real Estate Law & Practice, Ch. 70, *Options* (Matthew Bender)

[7] Cross References

For related forms, see *§§ 569.165* and *569.193*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityCase or Controversy RequirementsActual DisputesCivil ProcedureVenueGeneral OverviewCivil ProcedureVenueCorporationsCivil ProcedureVenueIndividual DefendantsCivil ProcedureDeclaratory

Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureCounselGeneral OverviewContracts LawFormationCapacity of PartiesGeneral OverviewContracts LawNegotiable InstrumentsDischarge & PaymentPaymentGeneral OverviewContracts LawPerformanceDischarges & TerminationsContracts LawPerformanceTender & DeliveryContracts LawRemediesGeneral OverviewContracts LawRemediesSpecific PerformanceContracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsInstallment ContractsContracts LawTypes of ContractsOption ContractsReal Property LawAdjoining LandownersGeneral OverviewReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingTender of PerformanceReal Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleOption ContractsGeneral OverviewReal Property LawPurchase & SaleRemediesSpecific Performance

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Volume 50: Usury thru Verification-Chs. 568-572
Chapter 569 VENDOR AND PURCHASER OF REAL PROPERTY
PART IV. FORMS
A. Actions Between Vendors And Purchasers Generally

50-569 California Forms of Pleading and Practice--Annotated §§ 569.170-569.189

[Reserved]

§§ 569.170[Reserved]

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Volume 50: Usury thru Verification-Chs. 568-572
Chapter 569 VENDOR AND PURCHASER OF REAL PROPERTY
PART IV. FORMS
B. Installment Sales Contracts

50-569 California Forms of Pleading and Practice--Annotated § 569.190

§ 569.190 Complaint to Quiet Title [Code Civ. Proc. §§ 760.020, 761.020] Against Purchaser's Interest Under Installment Sales Contract and to Recover Possession and Damages

[1] FORM Complaint to Quiet Title [Code Civ. Proc. §§ 760.020, 761.020] Against Purchaser's Interest under Installment Sales Contract and to Recover Possession and Damages

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name*(*s*)],	)	COMPLAINT TO QUIET TITLE
Defendant(s).	)	
	)	
	)	

Plaintiff(s) allege(s):

1. _____ [Plaintiff is the sole owner *or* Plaintiffs are the owners concurrently, as _____ (joint tenants *or* tenants in common *or* partners *or* husband and wife *or* husband and wife as joint tenants),] of the fee simple title to certain real (and personal) property, namely _____ [*give both street address or common designation and legal description of real property; the description of any personal property must include its usual location*].

2. Defendant(s) _____ [*name(s)*], sometimes hereinafter referred to as "Purchaser(s)," is/are, and at all times herein mentioned, was/were, [husband and wife and] Purchaser(s) of the real [and personal] property described above pursuant to a written contract of sale executed by him/her/it/them and by plaintiff(s) on _____

[*date*], a copy of which is attached hereto marked Exhibit "A" and incorporated herein by reference. By the terms of that contract plaintiff(s) agreed to sell to defendant(s) and defendant(s) agreed to purchase from plaintiff(s) the above-described real property for a total purchase price of $_____, payable as follows: _____ [*set forth payment terms, e.g.,* the sum of $_____ on execution of the contract, receipt of which is therein acknowledged, and the balance in equal monthly installments of $_____ or more, including interest at the rate of _____ percent per annum, on the _____ day of each and every month, commencing _____ [*date*].

[3. On execution of the contract, Purchaser(s) entered into and assumed possession of the property. Since _____ (*date of forfeiture or by which demand set forth in Paragraph 7 was to have been performed*), Purchaser(s)has/have been, and is/are now, unlawfully withholding possession thereof from plaintiff(s).]

4. The basis of plaintiff's (plaintiffs') title is _____ [*specify, e.g.,* a deed from _____ (*name of grantor*) granting the above-described property in fee simple to plaintiff(s) dated _____ and recorded in the Official Records of the County of _____ at _____(Book *or* Reel) No. _____ at _____ (Page *or* Image) _____ (*number*)].

5. _____ [Plaintiff(s) *or* Plaintiff's(s') _____ (ancestor *or* predecessor *or* grantor)] was _____ [seized *or* possessed] of the above-described property within five years of the commencement of this action.

6. Plaintiff(s) admit(s) the following claims against the property described above:

[*LIST, in consecutively lettered subparagraphs, all admitted claims, for example:*]

a. The lien of [defendant] _____ County, California for taxes for the fiscal year(s) _____ [through _____];

b. The utility easement of [defendant] Pacific Gas and Electric Company as shown on the map of the _____ [*name of subdivision or survey*] filed in Book _____, Page _____ of Parcel Maps in the Office of the County Recorder of _____ County, California; and

c. The deed of trust dated _____, to [defendant] _____ [name of trustee] as trustee, in favor of [defendant] _____ [name of beneficiary] as beneficiary, securing the original principal sum of $_____ recorded _____ [*date*], in _____ [Book *or* Reel] _____, at _____[Page *or* Image] _____ in the Official records of County Recorder of _____ County, California.

[*CONTINUE*]

7. Plaintiff(s) seek(s) to quiet title against the claim of defendant Purchaser(s) under the written contract which is Exhibit "A." The claim of defendant Purchaser(s) is without any right whatever and defendant Purchaser(s) has/have no right, title, estate, lien, or interest whatever in the property described above for the reasons described below.

8. _____ [*Set forth any terms of contract relating to breach, but not described in Paragraph 2, and contract terms providing for forfeiture, e.g.,* Paragraph _____ of the contract provides that Purchasers will pay all taxes on the property as they come due. Paragraph _____ of the contract provides that in the event of the failure of the purchasers to comply with any of the terms and conditions of said contract, or any part thereof, on their part to be

performed, plaintiff(s) may elect to (*if proceeding on rescission theory* rescind the contract and) terminate Purchasers' interest thereunder; on such election, Purchasers shall forfeit all rights under the contract, and plaintiff(s) shall be entitled to immediate possession of the premises; Paragraph _____ of the contract provides that "time is of the essence of this agreement"].

9. Purchasers have defaulted in _____ [*set forth facts constituting breach, e.g.,* payments of $_____ per month due to plaintiff according to the terms of said contract _____ (*set forth default in detail, e.g.,* for each month from June, 1998, to the present and have failed to pay county property tax installments of $_____ due December 10, 1998, and April 10, 1999, and installments of $_____ due December 10, 2000, and April 10, 1986, together with delinquent interest now due therefor).]

10. On _____ [*date*], plaintiff served written notice on defendants notifying them of the defaults and of plaintiff's(s') election to (*if proceeding on rescission theory* rescind the contract and) declare all right of Purchaser(s) under the contract forfeited and to seek immediate possession of the property unless payment in full of the amount then due under the contract, the sum of $_____, was made to plaintiff(s) and a receipt for payment of the delinquent county tax installments, and interest accrued thereon, was delivered to plaintiff on or before _____ [*date*]. The notice specified that the total remaining unpaid balance under the contract was $_____, which sum would accrue interest at the rate of $_____ per day after _____ (*date of notice*)). A copy of the notice (*if proceeding on rescission theory*, which also offered to restore to Purchaser(s) the excess of his/her/its/their payments under the contract over the reasonable rental value of the property since the execution of the contract on receipt of his/her/its/their quitclaim deed, in recordable form, reconveying the property to plaintiff(s),) is attached hereto marked Exhibit "B," and made a part hereof.

11. Purchaser(s) has/have failed and refused to pay the taxes or the sum specified in the notice, or any part thereof, the time specified in the notice has expired, and plaintiff has declared [the contract rescinded and] all rights of Purchaser(s) under the contract forfeited.

[*EITHER, if proceeding on breach of contract theory*]

12. As a proximate result of the failure of Purchaser(s) to perform under the contract, plaintiff(s) has/have suffered damages of $_____, _____ [*specify element(s) of damage, e.g.,* the excess of the contract price over the fair market value of the property on the date of Purchaser's(s') default, plus $_____ which will be necessary expenses on resale]. [This amount is in excess of the $_____ received in payments from Purchaser(s).]

[*OR, if proceeding on rescission theory*]

12. As a result of the failure of Purchaser(s) to perform under the contract, plaintiff(s) has/have sustained damages equal to the excess of the value of the use of the property since the date of execution of the contract of $_____ per month, over the $_____ received in payments from Purchaser(s).

[*CONTINUE*]

13. As a proximate result of the failure of Purchaser(s) to perform under the contract, plaintiff(s) has/have sustained damages of $_____, reflecting _____ [*specify any consequential damages, e,g.,* taxes and delinquent interest thereon which were assumed by Purchasers under the contract but were not paid by them.

Plaintiff(s) has/have incurred expenses, including attorney's fees, in addition to those alleged above, which expenses were, and are, necessary to (regain possession and) remove the cloud of Purchaser's(s') claim from his/her/its/their title. Plaintiff(s) will continue to incur these expenses in an amount unknown to him/her/it/them at this time. Plaintiff(s) pray(s) leave of court to amend this complaint to insert herein the true amount of said expenses when they are ascertained. In addition, the reasonable value of the property to Plaintiff(s) since _____, (*date of rescission or forfeiture*) has been and still is, the sum of $_____ per day, and by reason of defendant's (defendants') unlawful detention of the premises plaintiff(s) is/are deprived of the reasonable value of the use and occupancy thereof, and will continue to be so deprived until possession is restored to Plaintiff(s)].

14. Plaintiff(s) seek(s) to quiet title as of _____ [the date of the filing of this complaint *or specify other date and reason why determination is sought as of the other date*].

WHEREFORE, plaintiff(s) pray(s) judgment against said defendant(s) as follows:

1. For a decree declaring that certain Contract for Sale of Real Property between plaintiff(s) and defendant(s) dated _____ is _____ [terminated *or* rescinded] and all rights of defendant(s) thereunder forfeited;

2. For a decree declaring that all moneys heretofore paid by defendant(s) to plaintiff(s) under and by virtue of the contract shall be retained by plaintiff(s) as payment of _____ [the fair value for the use and occupancy of the property since the execution of the contract *and/or* plaintiff's(s') damages];

3. For restitution of the premises;

4. For damages at the rate of $_____ per day for the wrongful detention of the premises by defendant from _____ [*date*], until such time as possession of the premises is restored to plaintiff;

5. For a judgment that plaintiff(s) is/are the fee simple owners of the property and that defendant(s) has/have no interest in the property adverse to plaintiff(s);

6. For costs of court herein, including reasonable attorney's fees;

7. For such other and further relief as the Court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification. See § 569.160.*]

[2] Use of Form

This form of complaint is for use by a vendor under an installment sales contract to terminate the purchaser's interest and to quiet title [*see Code Civ. Proc. §§ 760.020, 761.020*]. For more detailed discussion of quiet title procedures, see Ch. 482, *Quieting Title* .

[3] Purchaser's Rights of Redemption, Reinstatement; Notice of Election

Before a vendor is allowed to quiet title, a purchaser, even a willfully defaulting purchaser, who has made substantial

payments on the contract or substantial improvements on the property has an unconditional right to redeem the property by paying the entire remaining balance, plus interest and damages, within a reasonable time. This right of redemption is exercisable as soon as the vendor gives notice of election to terminate the contract on account of default [*Petersen v. Hartell (1985) 40 Cal. 3d 102, 111-114, 219 Cal. Rptr. 170, 707 P.2d 232* (payment of $2,900 of $9,162 purchase price was substantial)]. For this reason, Paragraph 10 contains the optional allegation that the notice of election to terminate the contract set forth the payoff balance.

Also, a purchaser who has made substantial payments on the contract or substantial improvements on the property and whose default is not willful or grossly negligent has an absolute right to reinstate the contract on payment of arrearages, hence the allegations in Paragraph 10 that the notice contained a statement of arrearages [*Barkis v. Scott (1949) 34 Cal. 2d 116, 117-118, 122-123, 208 P.2d 367* ($3,114 of improvements, $700 downpayment, and 57 timely monthly payments compared to purchaser price of $6,150; innocent mistake regarding checks drawn on insufficient funds for two installments)].

[4] Allegations

This form alleges:

- Plaintiff's capacity and interest and the description of the property with the specificity required by *Code Civ. Proc. § 761.020(a)* (Paragraph 1) [*Code Civ. Proc. § 761.010(a), (b)*].

- The identity of defendant purchasers and the basis of their claim (Paragraph 2) [*Code Civ. Proc. §§ 761.020(c), 762.010*].

- The basis of plaintiff's title (Paragraph 4) [*Code Civ. Proc. §§ 761.010(b), 764.010*; *see Winter v. Rice (1986) 176 Cal. App. 3d 679, 683, 222 Cal. Rptr. 340* (plaintiff in quiet title action is required to prove his or her title, even if defendant defaults)].

- That plaintiff or plaintiff's predecessor was seized or possessed of the property within five years before commencement of the action (Paragraph 5) [*see Code Civ. Proc. § 318*; *Safwenberg v. Marquez (1975) 50 Cal. App. 3d 301, 311, 123 Cal. Rptr. 405* (seizing or possession within five years before commencement of action is necessary to recover possessory interest in real property)].

- The claims against the property which are admitted by plaintiff (Paragraph 6) [*Code Civ. Proc. § 762.060(c)*; *see Code Civ. Proc. § 764.045* (holders of known or recorded claims who are not parties to action are not bound by judgment)].

- That the purchasers have no interest in the property (Paragraph 7).

- The contract terms, in addition to those set forth in Paragraph 2, that are the basis for the default and the election to require forfeiture of the purchaser's interest (Paragraph 8).

- The facts constituting purchaser's default (Paragraph 9).

- Plaintiff's notice of election to rescind or to terminate the contract, which gave defendant an opportunity to reinstate the contract and/or redeem the property (Paragraph 10) [*see Petersen v. Hartell (1985) 40 Cal. 3d 102, 111-114, 219 Cal. Rptr. 170, 707 P.2d 232* ; *Barkis v. Scott (1949) 34 Cal. 2d 116, 117-118, 122-123, 208 P.2d 367* , discussed in *§ 569.190[3]*].

- That no reinstatement or redemption has been made at the time the complaint is filed (Paragraph 11).

- Damages under a breach of contract measure or under the rescission/rental measure (alternative Paragraphs 12) [*see Honey v. Henry's Franchise Leasing Corp. (1966) 64 Cal. 2d 801, 803-805, 52 Cal. Rptr. 18, 415 P.2d 833* (*Civ. Code § 3307* measure, not rental value, is appropriate when rescission is not sought); *Behrendt v. Abraham (1966) 64 Cal. 2d 182, 186-188, 49 Cal. Rptr. 292, 410 P.2d 828* (allowing rental measure without rescission but after purchasers' abandonment so long as purchasers given credit for interest payments); for more detailed treatment of vendor's damages, *see § 569.104[3]*].

- Consequential damages likely to be applicable under either measure of damages (Paragraph 13) [*see South Shore Land Co. v. Petersen (1964) 226 Cal. App. 2d 725, 741, 38 Cal. Rptr. 392* (return of possession and damages for withholding is proper relief incident to quiet title)].

- The statement required by *Code Civ. Proc. § 761.020(d)* regarding the date as of which the determination is sought (Paragraph 14).

Optional Paragraph 3, alleging defendant's possession of the premises, is included for use when a judgment restoring plaintiff to possession is sought [*South Shore Land Co. v. Petersen (1964) 226 Cal. App. 2d 725, 741, 38 Cal. Rptr. 392* (return of possession and damages for withholding is proper relief incident to quiet title)].

It is not clear whether this action is one to enforce the terms of a contract within the meaning of *Code Civ. Proc. § 1062.10*, which provides that no action can be maintained to enforce the terms of a real property installment sales contract providing for a change in ownership until the agreement has been recorded or the change of ownership statement required by *Rev. & Tax. Code § 480* has been filed [*Code Civ. Proc. § 1062.10*]. Because a redemption action by the purchaser would require compliance with *Code Civ. Proc. § 1062.10*, and because redemption may be part of a conditional judgment in the vendor's quiet title action, it would seem that *Code Civ. Proc. § 1062.10* should be complied with. Compliance would require an additional allegation either that the contract was recorded or that the change of ownership statement has been filed.

[5] Additional Defendants

There are four classes of potential defendants not named as defendants in this form:

- Additional known defendants claiming adverse interests that plaintiff contests, such as an assignee of defendant's interest under the contract.

- Holders of known or recorded adverse claims that plaintiff admits, such as utility easements or deeds of trust [*see Code Civ. Proc. § 762.060(b), (c)*].

- Unknown adverse claimants [*see Code Civ. Proc. §§ 762.010, 762.020, 762.060(a)*].

- Unknown successors of a deceased person required to be named as a defendant [*see Code Civ. Proc. § 762.030*].

If there are other known entities whose claims are contested, the capacity ofeach claimant and basis of his/her/its claim should be set forth in separate consecutively numbered paragraphs after Paragraph 2. Each of those claims must also be mentioned in Paragraph 7 as a claim against which determination is sought and that is without merit [*Code Civ. Proc. § 760.020(c)*].

If unknown defendants are named under *Code Civ. Proc. § 762.060(a)*, holders of known or recorded claims must be made defendants [*see Code Civ. Proc. § 762.060(b)*]. Holders of known or recorded claims who are not made parties to

the action will not be bound by the judgment, but because, with the exception of an assignee of defendant's interest, those claims will be admitted in most situations, they have been omitted from this form for clarity [*Code Civ. Proc. § 764.045*; *see Code Civ. Proc. § 762.010* (only holders of claims against which determination is sought must be named defendants)].

For allegations, more detailed discussion of their use, and special requirements for the caption and service when unknown defendants are named, see Ch. 482, *Quieting Title* .

[6] Verification

A complaint to quiet title must be verified [*Code Civ. Proc. § 760.020*].

[7] Jurisdiction and Venue

The superior court has jurisdiction of a quiet title action, including jurisdiction to grant whatever equitable relief is proper under the circumstances [*Code Civ. Proc. § 760.040*]. The action is not a limited civil case [*see Code Civ. Proc. §§ 85, 86(b), 580(b)(3)*]. When title or right to possession is to be tried, or permanent injunctive relief is sought, the case will be classified as an unlimited civil case [*see Code Civ. Proc. § 88*]. The court has complete jurisdiction over the parties to the action and the property described in the complaint and is deemed to have obtained possession and control of the property for the purposes of the action with complete jurisdiction to render the quiet title judgment [*Code Civ. Proc. § 760.040(b)*].

Subject to the power of the court to transfer actions, the proper county for a quiet title action of real, or real and personal, property is the county in which the real property, or some part of it, is located [*Code Civ. Proc. § 760.050(a)*].

[8] Lis Pendens

Immediately on commencement of a quiet title action by filing of the complaint, the plaintiff must file a lis pendens in the office of the county recorder of each county in which any real property described in the complaint is located [*Code Civ. Proc. § 761.010*]. For a form of lis pendens, see Ch. 348, *Lis Pendens* .

[9] Decisions

Vendor who has waived time provisions by accepting late payment may revive requirement of strict compliance with time provision by giving proper notice to that effect. *Gonzalez v. Hirose (1948) 33 Cal. 2d 213, 216-217, 200 P.2d 793* ; *Bishop v. Barndt (1919) 43 Cal. App. 149, 154-157, 184 P. 901*

When final installment has come due, vendor is required to tender deed in order to put purchaser in default. *Boone v. Templeman (1910) 158 Cal. 290, 297, 110 P. 947*

Recovery of possession, damages for withholding, and declaration of forfeiture of purchaser's rights under installment sales contract are proper incidental relief in vendor's quiet title action. *Keele v. Clouser (1928) 92 Cal. App. 526, 529-530, 268 P. 682*

[10] Cross References

For related forms, see *§§ 569.193 -569.195*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsLeave of CourtCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesForfeituresGeneral OverviewCivil ProcedureRemediesLis PendensGeneral OverviewCivil ProcedureRemediesLis PendensNoticesContracts LawGeneral OverviewContracts LawBreachGeneral OverviewContracts LawContract Conditions & ProvisionsWaiversAcceptance of Late PaymentContracts LawPerformanceTender & DeliveryContracts LawRemediesGeneral OverviewContracts LawSecured TransactionsInstallment ContractsLegal TitleContracts LawTypes of ContractsInstallment ContractsCriminal Law & ProcedureSentencingForfeituresGeneral OverviewEnergy & Utilities LawPurchase ContractsPrice TermsEnergy & Utilities LawPurchase ContractsRemedies for BreachEstate, Gift & Trust LawWill ContestsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsGovernmentsLocal GovernmentsGeneral OverviewGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsLocal GovernmentsElectionsLabor & Employment LawWrongful TerminationRemediesReinstatementReal Property LawDeedsGeneral OverviewReal Property LawDeedsTypesQuit Claim DeedsReal Property LawDeedsRemediesDamagesReal Property LawEstatesGeneral OverviewReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawEstatesPresent EstatesFee Simple EstatesReal Property LawLandlord & TenantLease AgreementsDamagesGeneral OverviewReal Property LawOwnership & TransferPublic EntitiesReal Property LawPriorities & RecordingLis PendensReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesDamagesMeasures of DamagesReal Property LawPurchase & SaleRemediesRescission & RestitutionReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsTax LawState & Local TaxesAdministration & ProceedingsFailure to Pay TaxTax LawState & Local TaxesAdministration & ProceedingsTax LiensTax LawState & Local TaxesPublic Utilities TaxGeneral OverviewTortsDamagesGeneral OverviewTortsDamagesCompensatory DamagesProperty DamageGeneral OverviewTortsDamagesCompensatory DamagesProperty DamageAward Calculations

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50-569 California Forms of Pleading and Practice--Annotated § 569.191

§ 569.191 Interlocutory Judgment in Vendor's Action to Quiet Title [Code Civ. Proc. §§ 760.020, 761.020] Against Purchaser's Interest Under Installment Sales Contract and to Recover Possession and Damages--Granting Purchaser Reinstatement [Civ. Code § 3275] or Redemption, or in the Alternative, Quieting Vendor's Title on Restitution [Civ. Code § 3369]

[1] FORM Interlocutory Judgment in Vendor's Action to Quiet Title [Code Civ. Proc. §§ 760.020, 761.020] Against Purchaser's Interest Under Installment Sales Contract and to Recover Possession and Damages--Granting Purchaser Reinstatement [Civ. Code § 3275] or Redemption, or in the Alternative, Quieting Vendor's Title on Restitution [Civ. Code § 3369]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name*(*s*)],	)	INTERLOCUTORY JUDGMENT
Defendant(s).	)	
	)	
	)	

This cause came on regularly for trial on _____ [*date*], in Department _____ of the above-entitled Court, the Honorable _____, Judge, presiding, sitting without a jury. Plaintiff(s) appeared by his/her/its/their attorney _____ and defendant(s) appeared by his/her/its/their attorney _____ and evidence both oral and documentary having been presented by both parties, the cause having been argued and submitted for decision, [and the Court having made and caused to be filed herein its written Statement of Decision,]

IT IS ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. As of _____ [*date*], plaintiff(s) herein _____ [was the sole owners *or* were the owners concurrently, as _____ (joint tenants *or* tenants in common *or* partners *or* husband and wife *or* husband and wife as joint tenants),] of the fee simple title to certain real [and personal] property, namely _____ (*give legal description of real property as in deed for real property and bill of sale for personal property*)].

2. Plaintiff's(s') title to that real property is subject to the right of defendant(s) arising from the contract for the purchase and sale of that property executed by the parties and dated _____ to _____ [reinstate *or* redeem his/her/its/their interest under] the contract by payment to _____ [plaintiff(s) *or* the clerk of this Court for the benefit of plaintiff(s) *or* (*name of third party escrow*) for the benefit of plaintiff(s)] _____ [on or before _____ [*date*], *or* within _____ days from the _____ (entry of this judgment *or* from service on him/her/it/them of written notice of the entry of this judgment)] of the sum of $_____ together with interest thereon at the rate of _____ percent per annum which is $_____ per day, from and after _____ [*date*].

3. If it is made to appear to this Court that the payment set forth in Paragraph 2, above, has not been made by the appointed date, this Court shall make and enter a final judgment cancelling the contract for the purchase and sale of the real property herein described; providing that plaintiff(s) shall have and recover possession of the real [and personal] property and that a writ of execution shall be issued to the sheriff of _____ County, California, directing the sheriff to remove defendant(s) and all those claiming by, through, or under defendant(s), and to place plaintiff(s) in possession of the premises; and terminating all rights of defendant(s) under the contract, except the right to receive from plaintiff(s) the excess of defendant's(s') payments under the contract [plus the value of improvements made to the property by defendant(s)] over plaintiff's(s') actual damages on account of defendant's(s') failure to fully perform the contract, including the reasonable rental value of the premises for the period after breach of the contract during which defendant(s) retained possession of the premises. Said excess amounts to $_____, with interest thereon at the rate of _____ percent per annum [which is $_____ per day] from and after _____ [*date*]. For each day after _____ [*date*], that defendant(s) retain(s) possession of the premises, there shall be deducted from the amount owed by plaintiff(s) to defendant(s) the sum of $_____. If it is made to appear to this Court that the payment from plaintiff(s) to defendant(s) has been made, judgment shall further provide that plaintiff's(s') title to the real [and personal] property be quieted against any and all claims of defendant(s) and any person or persons claiming by, through, or under defendant(s).

[*EITHER, if reinstatement*]

4. On payment being made as provided in Paragraph 2, above, this Court shall make and enter a final judgment declaring the contract in full force and effect and all rights of defendant(s) thereunder reinstated, and ordering plaintiff(s), so long as defendant(s) shall thereafter not default on the contract, to perform all conditions thereof on his/her/its/their part to be performed.

[*OR, if redemption*]

4. On payment being made by defendant(s) as provided in Paragraph 2, above, plaintiff(s) shall execute and deliver to _____ [defendant(s) *or* the clerk of this Court for the benefit of defendant(s) *or* (*name of third party escrow*) for the benefit of defendant(s)] a good and sufficient _____ [grant *or* warranty] deed conveying to defendant(s) good and marketable title to the property as described in Paragraph 1, above, and evidenced by a standard policy of title insurance in the full amount of the purchase price [procured and paid for by plaintiff];

[*CONTINUE*]

5. Each party to bear his/her/its/their own costs [and attorney's fees], except that plaintiff(s) shall recover from defendant(s) any costs and reasonable attorney's fees expended after the date of this judgment to recover possession of the premises.

[6. That this Court reserves and continues its jurisdiction over the parties and the subject matter of this action to supervise, compel compliance with, and enforcement of this judgment and decree until it has been fully discharged and satisfied.]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of judgment is for use in a vendor's quiet title action in which the purchaser has established a right to reinstatement or redemption, and if reinstatement or redemption cannot be made within the time allowed, a right to restitution. If purchaser has established only the right to restitution, the *form in § 569.192* should be used rather than this form.

This form has been framed as an interlocutory judgment on the assumption that each party will want a final judgment for his or her protection. It could be modified to be a conditional judgment by deleting references to the final judgment.

[3] Contents of Judgment

Judgment in a vendor's action foreclosing a purchaser's rights under a contract of sale must be qualified or conditional; it must set forth (1) the amount due, (2) that it be paid on or before a certain date, (3) that on failure of payment, the purchaser's equity is foreclosed, or (4) that if payment is made, vendor must give a deed [*Gonzalez v. Hirose (1948) 33 Cal. 2d 213, 216-217, 200 P.2d 793* ; *Petersen v. Ridenour (1955) 135 Cal. App. 2d 720, 728-730, 287 P.2d 848]* . The judgment should also provide for the amount of restitution to be made from the vendor to the purchaser in order to quiet the vendor's title [*see Bartley v. Karas (1983) 150 Cal. App. 3d 336, 345 n.5, 197 Cal. Rptr. 749 , disapproved on other grounds, Petersen v. Hartell (1985) 40 Cal. 3d 102, 117, 219 Cal. Rptr. 170, 707 P.2d 232* ; *Crofoot v. Weger (1952) 109 Cal. App. 2d 839, 843, 241 P.2d 1017]* .

[4] Notice of Judgment

In a contested action or special proceeding, the party submitting a judgment for entry must prepare and mail a copy of the notice of entry of judgment to all appearing parties and file with the court the original notice of entry of judgment together with the proof of service by mail, unless the court orders the clerk to mail notice [*Code Civ. Proc. § 664.5*].

[5] Effect of Judgment

The judgment, whether framed as interlocutory or conditional, is final when it establishes all the rights and liabilities of the parties, even though the question of whether redemption has been effected is necessarily left open for future determination [*Newhouse v. Upchurch (1971) 22 Cal. App. 3d 204, 211, 99 Cal. Rptr. 436* ; *Perry v. West Coast Bond etc. Co. (1934) 136 Cal. App. 557, 559, 29 P.2d 279* ; *see also Code Civ. Proc. § 904.1(a)(8)* (appealability of interlocutory judgment regarding redemption)]. The vendor's payment of the sums required as restitution is merely a condition of quieting his or her title. Failure to make the payment will not divest the vendor of title [*Stein v. Simpson*

(1953) 116 Cal. App. 2d 559, 563-564, 253 P.2d 1026] .

[6] Procedure for Obtaining Final Judgment

The usual procedure is for the party who has satisfied his or her part of the judgment, that is, a purchaser who has paid the reinstatement or redemption amount or a vendor who has paid the restitution amount, to move for final judgment or to compel compliance by the other party on the basis of a satisfaction of judgment given by the other party or on the basis of declarations and documentary evidence [*see Newhouse v. Upchurch (1971) 22 Cal. App. 3d 204, 206-210, 99 Cal. Rptr. 436* ; *Scarbery v. Bill Patch Land & Water Co. (1960) 184 Cal. App. 2d 87, 96-98, 7 Cal. Rptr. 408* ; *see also Code Civ. Proc. § 904.1* (appealability of orders after judgment)]. Acceptance of amounts owing as restitution and giving of a satisfaction of judgment therefor will not foreclose the purchaser's right to appeal based on a claim that a greater amount is owed as restitution [*Stein v. Simpson (1951) 37 Cal. 2d 79, 87, 230 P.2d 816]* .

[7] State Statutes

Contents and manner of execution of writ of possession of real property. *Code Civ. Proc. §§ 715.010-715.040*

Judgment not otherwise enforceable may be enforced by service of certified copy of judgment on party required to perform under it and invocation of court's contempt power. *Code Civ. Proc. § 717.010*

[8] Decisions

Vendor's quiet title judgment is required to be qualified so as to provide for delivery of deed conveying title to purchaser on payment of amounts due vendor within such time as court deems reasonable. *Gonzalez v. Hirose (1948) 33 Cal. 2d 213, 217, 200 P.2d 793*

Judgment requiring conveyance is authorized to appoint clerk of court as receiver, though sometimes called commissioner, pursuant to former *Code Civ. Proc. § 564(3), (4)* (*now see Code Civ. Proc. § 564(b)(3), (4)*) to execute deed if difficulty is anticipated in compelling party to make conveyance; receiver's powersand duties to be fixed by decree. *Scadden Flat G. M. Co. v. Scadden (1898) 121 Cal. 33, 41, 53 P. 440*

Willful refusal of party to comply with judgment requiring him or her to execute conveyance is punishable by contempt of court.' *76 L. & W. Co. v. Superior Court (1892) 93 Cal. 139, 143, 28 P. 813* ; see *Addiego v. Hill (1971) 17 Cal. App. 3d 453, 460, 95 Cal. Rptr. 151* (dicta)

When vendor seeks to foreclose purchaser's equity in quiet title action, decree should fix time within which purchaser may pay balance due on contract or be foreclosed. *Keller v. Lewis (1878) 53 Cal. 113, 118*

On stipulated judgment for reinstatement, when one of two checks tendered one week late was not covered by sufficient funds through innocent mistake, but was made good within four days, equities were with purchaser and reinstatement was affected, especially because stipulated judgment should not have included two payments coming due between date of oral stipulation and date for performance under stipulated judgment and should have given credit to purchaser for rents collected by vendor during interim. *Newhouse v. Upchurch (1971) 22 Cal. App. 3d 204, 208-212, 99 Cal. Rptr. 436*

Quiet title action brought to terminate contract of sale of realty is strict foreclosure; court is required to find amount due and decree that it be paid on or before certain date and that on failure of payment, purchaser's equity is foreclosed. *Petersen v. Ridenour (1955) 135 Cal. App. 2d 720, 728, 287 P.2d 848*

Equities require qualified judgment providing for delivery of deed to purchaser on payment of sums owed to vendor within reasonable time. *Petersen v. Ridenour (1955) 135 Cal. App. 2d 720, 730, 287 P.2d 848*

[9] Cross References

For related forms, see *§§ 569.190, 569.192, 569.193 -569.195*.

For discussion and forms for enforcement of judgments for possession of property, see *Ch. 254, Executions and Enforcement of Judgments, § 254.130* et seq.

For discussion of interlocutory and conditional judgments, see Ch. 318, *Judgments* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureRemediesWritsAncillary WritsGeneral OverviewCivil ProcedureRemediesWritsAncillary WritsWrits of ExecutionContracts LawPerformanceTender & DeliveryContracts LawRemediesGeneral OverviewContracts LawSecured TransactionsInstallment ContractsLegal TitleContracts LawThird PartiesGeneral OverviewContracts LawTypes of ContractsInstallment ContractsContracts LawTypes of ContractsPersonal PropertyGovernmentsCourtsClerks of CourtInsurance LawClaims & ContractsDisclosure ObligationsWarrantiesReal Property LawDeedsGeneral OverviewReal Property LawDeedsTypesGeneral OverviewReal Property LawDeedsTypesWarrantyReal Property LawDeedsProperty DescriptionsReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawEstatesPresent EstatesFee Simple EstatesReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresStrict ForeclosureReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleEnforceabilityMistakeReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleEscrowReal Property LawTitle QualityGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsReal Property LawTitle QualityMarketable TitleGeneral OverviewReal Property LawTitle QualityMarketable TitleRemediesReal Property LawTitle QualityMarketable TitleTests

California Forms of Pleading and Practice--Annotated

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Volume 50: Usury thru Verification-Chs. 568-572
Chapter 569 VENDOR AND PURCHASER OF REAL PROPERTY
PART IV. FORMS
B. Installment Sales Contracts

50-569 California Forms of Pleading and Practice--Annotated § 569.192

§ 569.192 Conditional Judgment in Vendor's Action to Quiet Title [Code Civ. Proc. §§ 760.020, 761.020] Against Purchaser's Interest Under Installment Sales Contract and to Recover Possession and Damages--Granting Purchaser Restitution [Civ. Code § 3369]

[1] FORM Conditional Judgment in Vendor's Action to Quiet Title [Code Civ. Proc. §§ 760.020, 761.020] Against Purchaser's Interest Under Installment Sales Contract and to Recover Possession and Damages--Granting Purchaser Restitution [Civ. Code § 3369]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name*(*s*)],	)	CONDITIONAL JUDGMENT
Defendant(s).	)	
	)	
	)	

This cause came on regularly for trial on _____ [*date*], in Department _____ of the above-entitled Court, the Honorable _____, Judge, presiding, sitting without a jury. Plaintiff(s) appeared by his/her/its/their attorney _____ and defendant(s) appeared by his/her/its/their attorney _____ and evidence both oral and documentary having been presented by both parties, the cause having been argued and submitted for decision, [and the Court having made and caused to be filed herein its written Statement of Decision,]

IT IS ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. [*Order regarding ownership and description of property. See § 569.191, Order 1.*]

2. That plaintiff(s) restore to defendant(s) the excess of defendant's(s') payments under the contract for the purchase and sale of the above-described real property executed by the parties and dated _____, [plus the value of improvements made to the property by defendant(s)] over plaintiff's(s') actual damages on account of defendant's(s') failure to fully perform the contract, including the reasonable rental value of the premises for the period after breach of the contract during which defendant(s) retained possession of the premises, which is the sum of $_____, plus interest at _____ percent per annum from _____ [*date*], less the sum of $_____ per day for each day from and after _____ [*date*], that defendant(s) retains(s) possession of the premises;

3. [Plaintiff's(s') title is subject to the lien of defendant(s) for restitution of the excess set forth in Item 2, above.] Quieting of plaintiff's(s') title to the real [and personal] property against any and all claims of defendant(s) and any person orpersons claiming under said defendant(s) is conditioned on payment from plaintiff(s) to defendant(s) of the sum set forth in Item 2.

4. Other than the claim set forth in Item 2, defendant(s) has/have no right, title, estate, or interest in the property.

5. A writ of execution shall be issued to the sheriff of _____ County, California, directing the sheriff to remove defendant(s) and all those claiming by, through, or under defendant(s), and to place plaintiff(s) in possession of the premises.

6. [*Award of costs and attorney's fees. See § 569.191, Order 5.*]

7. [*Retention of jurisdiction. See § 569.191, Order 6.*]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of conditional judgment is for use in a quiet title action by a vendor under an installment sales contract who has been awarded judgment conditioned on restitution to the purchaser of the excess of payments under the contract over vendor's actual damages. It may be modified for use as an interlocutory judgment by changing Order 2 to state that a final judgment quieting vendor's title must be entered when it is made to appear to the court that the amounts specified as restitution have been paid.

[3] Cross References

For a related form, see *§ 569.190*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionContracts LawBreachNonperformanceContracts LawSecured TransactionsInstallment ContractsLegal TitleContracts LawTypes of ContractsInstallment ContractsCriminal Law & ProcedureTrialsBench TrialsReal Property LawPurchase & SaleRemediesDamagesGeneral OverviewReal Property LawPurchase & SaleRemediesDamagesCompensatory Damages

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50-569 California Forms of Pleading and Practice--Annotated § 569.193

§ 569.193 Complaint for Declaratory Relief [Code Civ. Proc. § 1060] Under Installment Sales Contract--For Relief From Forfeiture [Civ. Code § 3275] by Allowing Reinstatement of Contract--By Purchaser

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. § 1060] Under Installment Sales Contract--For Relief from Forfeiture [Civ. Code § 3275] by Allowing Reinstatement of Contract--By Purchaser

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name*(*s*)],	)	COMPLAINT FOR DECLARATORY RELIEF
[and DOES I through _____],	)	(Reinstatement of Installment Sales Contract)
Defendant(s).	)	
	)	
	)	

_____

Plaintiff(s) allege(s):

[1. _____ (*State capacity of plaintiff(s) as necessary, e.g.,* Plaintiff(s) _____ [and _____] is/are, and at all times herein mentioned, was/were, _____ husband and wife.]

2. Defendant(s) _____ [*name(s*)], sometimes hereinafter referred to as "Seller(s)," is/are, and at all times herein mentioned, was/were, _____ [*state capacity, and if used as basis of venue, residence of defendant(s), e.g.,* husband and wife and residents of _____ County, California, residing at _____ (*street address and city*)].

[3. *Fictitious name allegation, if appropriate. See § 569.161, Paragraph 3.*]

[4. *Agency allegation, if appropriate. See § 569.160, Paragraph 3.*]

5. On _____ [*date*], at _____ [*city*], _____ County, California, plaintiff(s) and defendant(s) entered into a written contract, a copy of which is attached hereto, marked Exhibit "A," and made a part hereof. The contract was recorded in the office of the County Recorder of _____ County on _____ [*date*]. By the terms of the contract, defendant(s) agreed to sell to plaintiff(s) and plaintiff(s) agreed to purchase from defendant(s) the real property situated in the County of _____, State of California, described as follows: _____ [*legal description and/or street name or common designation; if modified for use as cross complaint to vendor's quiet title action, legal description is required*].

6. The contract provides that the total purchase price of $_____ ispayable as follows: _____ [*set forth terms of contract, e.g.,* the sum of $_____ on execution of the contract, receipt of which is therein acknowledged, and the balance in equal monthly installments of $_____ or more on the _____ day of each and every month, commencing _____ [*date*], and continuing until the entire amount of the purchase price together with interest thereon at the rate of _____ percent per annum has been paid].

7. Paragraph _____ of the contract provides that _____ [*set forth provision of contract that vendor claims allows acceleration and/or forfeiture for default, e.g.,* "if default be made in the payment of any of the said sums of principal or interest when due, all moneys theretofore paid on the premises by the Purchaser shall, at the option of the Seller, become absolutely forfeited to and be retained by the Seller as and for liquidated and agreed damages for breach of this agreement; and this agreement shall then become and be absolutely void and of no effect. It being expressly agreed that time is of the essence of this contract."]

[8. Immediately on execution of the contract plaintiff(s) entered into and assumed possession of the property and constructed on it _____ [*describe improvements, e.g.,* a house, two-car garage, and driveway, together with landscaping,] of the aggregate value of $_____.]

9. Plaintiff(s) fully and duly performed all terms, conditions, and covenants of the contract on his/her/its/their part required to be performed prior to _____ [*date*], and paid to _____ [defendant(s) or _____ (*name*), as agent for defendant(s)] all sums of money becoming due under the contract to and including the installment becoming due under the contract on _____ [*date*].

10. The total amount of money paid by plaintiff(s), pursuant to the contract, on the purchase price of the property is the sum of $_____.

11. Plaintiff(s) is/are currently in default in payment of installments due on the contract in that _____ [*allege default, e.g.,* the check delivered by plaintiff(s) to _____ (defendant(s) or _____ (*name*), as agent for defendant(s)) as and for the payment becoming due under the contract on _____ (*date*), was not honored by the bank on which it was drawn but was marked by the bank "Refer to Maker" and returned, unpaid to defendant(s)].

12. _____ [*Allege facts showing default was not grossly negligent, willful or fraudulent, e.g.,* Plaintiffs had miscalculated the balance on deposit in their checking account and had no knowledge of the default until _____ (*date*), when defendant served written notice of default on them, notifying them of the default, of defendant's election, pursuant to Paragraph _____ of the contract, to declare all interests (and payments) of plaintiffs under the contract forfeited (and demanding immediate possession of the property *and/or* immediate payment, in full, of the remainder of the purchase price).]

13. _____ [On _____ (*date*), *or specify very short period, e.g.,* Within two days of receiving notice of the default], plaintiff(s) _____ [*specify act curing default, e.g.,* tendered the full amount then due under the contract to defendant(s)] but defendant(s) refused, and still refuse(s), to accept the same.

14. Plaintiff(s) is/are ready, willing, and able to pay to defendant(s) or to deposit with this Court all sums now due, owing, and unpaid on the contract and all sums necessary to fully compensate the defendant(s) for any damages suffered by him/her/it/them by reason of the default.

15. An actual controversy has arisen between plaintiff(s) and defendant(s) concerning their respective rights and duties under the contract in that plaintiff(s) contend(s) he/she/it/they is/are entitled as a matter of law to reinstate the contract by paying arrearages [and/or to a reasonable amount of time within which to redeem his/her/its/their interest by paying the full remaining balance of the purchase price, with interest,] and any other damages suffered by defendant(s) on account of the _____ [*specify, e.g.,* late payments], whereas defendant(s) claim(s) that he/she/it/they can enforce Paragraph _____ of the contract as written and cause forfeiture of all plaintiff's(s') rights under the contract and all sums heretofor paid by plaintiff(s) under the contract [and expended for improvements to the property].

16. Plaintiff(s) desire(s) a judicial determination of his/her/its/their rights and duties, and a declaration as to which party's interpretation of the contract is correct.

17. A judicial declaration is necessary and appropriate at this time under the circumstances in order that plaintiff may ascertain his/her/its/their rights and duties under the contract. _____ [*Allege any other burden being caused by the unsettled state of affairs, e.g.,* Plaintiffs would ordinarily have begun construction of an addition on the residence. Postponement for the resolution of this issue may cause expiration of plaintiffs' building permit, and due to a moratorium on new construction in the City of _____, plaintiff's could not obtain another permit.]

WHEREFORE, plaintiff(s) pray(s) judgment against defendant(s) as follows:

1. For a declaration by the Court that Paragraph _____ of the contract is void and not enforceable, that plaintiff(s) is/are relieved from forfeiture of the contract, and that [on payment by plaintiff(s) to defendant(s) within such reasonable time as the Court may fix, of all sums the Court finds are now due under the contract, together with such further sums as the Court may find are necessary tocompensate defendant(s) fully for any damages which the Court may find to have been caused by the default, (less a reasonable sum fixed by the Court as plaintiff's(s') costs and attorney's fees),] the contract _____ [is *or* be] fully reinstated and remain(s) in full force and effect;

[2. In the alternative, for a declaration by the Court that Paragraph _____ of the contract is void and not enforceable, that plaintiff(s) may be relieved from forfeiture of the contract, and that on payment by plaintiff(s) to _____ [defendant(s) *or* the clerk of the Court *or* specify third party escrow] within such reasonable time as the Court may fix, of all sums the Court finds due as the full remaining balance of the purchase price, with interest, together with such further sums as the Court may find are necessary to compensate defendant(s) fully for any damages which the Court may find to have been caused by the default, [less a reasonable sum fixed by the Court as plaintiff's (plaintiffs' costs and attorney's fees,] the defendant(s) be required to convey the plaintiff(s) the property which is the subject of the contract;]

3. For costs of suit herein incurred [, including attorney's fees as provided by the contract here at issue]; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 569.160.*]

[2] Use of Form

This form of complaint is for use by a purchaser under an installment sales contract to seek relief from forfeiture by way of reinstatement on the ground that the default was not willful [*Civ. Code § 3275*; *Barkis v. Scott (1949) 34 Cal. 2d 116, 117-118, 122-123, 208 P.2d 367* ; *see § 569.100[4]*]. This form is set forth as a complaint for declaratory relief in order to gain the trial setting priority accorded declaratory relief actions, but it may be modified by deleting Paragraphs 15-17 to be merely a complaint for relief from forfeiture by allowing reinstatment [*see Code Civ. Proc. § 1062.3* (trial setting priority for declaratory relief actions)]. If it is so modified, the word "declaration" should be replaced in the prayer with the word "decree" and the title of the paper in the caption should be changed to: " Complaint for Relief From Forfeiture (Installment Sales Contract)."

This form may also be modified for use as a cross complaint in response to a vendor's action foreclosing the purchaser's interest by changing the word "plaintiff(s)" to "cross-complainant(s)" wherever it appears and by adding "cross" before the word "defendant(s)" each time it appears. If modified for use as a cross complaint in a quiet title action, see Ch. 482, *Quieting Title* , for particular requirements and procedures applicable to quiet title actions.

If counsel is not sure of prevailing on the issue that the default is nonwillful and therefore qualifies the purchaser for reinstatement, or if for some other reason the purchaser would like to pay off the entire balance instead of just reinstating delinquencies, a second cause of action for redemption may be joined seeking redemption as alternative relief [*see § 569.194*]. Item 2 of the prayer should be used only when redemption is sought as alternative relief.

[3] Allegations

This form alleges:

- Defendant's residence (Paragraph 2).

- The formation and terms of the contract, and that the contract was recorded (Paragraphs 5-7) [*see Code Civ. Proc. § 1062.10* (suit to enforce terms of installment sales contract entered into after January 1, 1986, cannot be maintained without prior recordation of contract or filing of change in ownership statement as required by *Rev. & Tax. Code § 480*)].

- The extent of plaintiff's performance under the contract (Paragraphs 8-10).

- Plaintiff's default (Paragraph 11).

- The facts from which the court can determine that the default was not willful, grossly negligent, or fraudulent (Paragraph 12).

- Defendant's notice of election to terminate the contract (Paragraph 12).

- Plaintiff's tender of all sums or doing of all acts necessary to cure the default or defaults (Paragraph 13) [*see Civ. Code § 1504* (offer of performance stops interest accruing)].

- Defendant's refusal to accept reinstatement (Paragraph 13).
- Plaintiff's continuing willingness and ability to reinstate (Paragraph 14).

To be entitled to reinstatement one must establish substantial performance under the contract (Paragraphs 9 and 10 compared with purchase price and terms set forth in Paragraph 6) or substantial improvements to the property (Paragraph 8), and that the default was not willful, grossly negligent, or fraudulent [*Civ. Code § 3275*; *Barkis v. Scott (1949) 34 Cal. 2d 116, 117-118, 122-123, 208 P.2d 367* ; *see § 569.100[4]*].

To establish the basis for declaratory relief, the form alleges an actual andimmediate controversy (Paragraph 15), plaintiff's desire for a judicial declaration (Paragraph 16), and that this is an appropriate and necessary situation for declaratory relief (Paragraph 17) [*Code Civ. Proc. §§ 1060, 1061*; *see City of Alturas v. Gloster (1940) 16 Cal. 2d 46, 48, 104 P.2d 810* (mere statement that controversy exists is insufficient, facts must show controversy)]. For discussion of the procedural and other requirements applicable to declaratory relief, see Ch. 182, *Declaratory Relief* .

[4] Jurisdiction and Venue

Actions for declaratory relief are generally in the jurisdiction of the superior court as cases of unlimited jurisdiction [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(7)(A)*, 580(b)(4), *1060*]. In addition, because an action for reinstatement is not one of the enumerated cases in equity that are limited civil cases [*see Code Civ. Proc. § 86(b)*], jurisdiction is in the superior court [*Cal. Const., art. VI, § 10*].

If the action is considered one on the contract, venue lies in the county in which the contract was formed or is to be performed or in which any defendant resides [*Code Civ. Proc. § 395(a)* (county in which contract formed is county of performance unless contract provides otherwise); *see Mission Imports, Inc. v. Superior Court (1982) 31 Cal. 3d 921, 930-931, 184 Cal. Rptr. 296, 647 P.2d 1075* (venue in declaratory relief action based on contract as contract venue)]. If the action is considered one to establish rights in land, venue lies in the superior court in the county in which the land is located [*Code Civ. Proc. § 392(a)(1)* (recovery of real property or determination of interest or right therein)].

[5] Decisions

When purchaser's breach in giving vendor check for which there was insufficient funds on deposit was not willful or grossly negligent, relief from forfeiture by reinstatement was proper. *Barkis v. Scott (1949) 34 Cal. 2d 116, 117-118, 122-123, 208 P.2d 367* ($3,114 of improvements, $700 downpayment, and 57 timely monthly payments compared to purchaser price of $6,150)

Lack of funds alone is not sufficient to meet burden of *Civ. Code § 3275*; additional showing that lack is not itself attributable to willful or grossly negligent conduct is required, such as, earning capacity of purchaser having been unexpectedly impaired by illness or accident. *Bartley v. Karas (1983) 150 Cal. App. 3d 336, 342-343, 197 Cal. Rptr. 749* (purchaser tendered full payoff during trial), *disapproved on other grounds, Petersen v. Hartell (1985) 40 Cal. 3d 102, 117, 219 Cal. Rptr. 170, 707 P.2d 232*

Even willfully defaulting purchaser is entitled to restitution of excess of payments under contract over vendor's damages. *Bartley v. Karas (1983) 150 Cal. App. 3d 336, 345 n. 5, 197 Cal. Rptr. 749 , disapproved on other grounds, Petersen v. Hartell (1985) 40 Cal. 3d 102, 117, 219 Cal. Rptr. 170, 707 P.2d 232*

Even if willfully defaulting purchaser does not pray for restitution of excess of payments over vendor's damages, court has duty to determine if unjust enrichment would result from forfeiture of purchaser's rights under contract. *Crofoot v. Weger (1952) 109 Cal. App. 2d 839, 843, 241 P.2d 1017*

[6] Cross References

For related forms, see *§§ 569.190*, *569.194*, and *569.195*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawCriminal OffensesCheck FraudElementsBusiness & Corporate LawAgency RelationshipsCauses of Action & RemediesBreach of ContractCivil ProcedureJurisdictionJurisdictional SourcesConstitutional SourcesCivil ProcedureEquityGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedureVenueIndividual DefendantsCivil ProcedureVenuePublic OfficialsCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureJudgmentsRelief From JudgmentGeneral OverviewContracts LawGeneral OverviewContracts LawContract InterpretationGeneral OverviewContracts LawPerformanceSubstantial PerformanceContracts LawPerformanceTender & DeliveryContracts LawRemediesGeneral OverviewContracts LawRemediesForeseeable DamagesGeneral OverviewContracts LawSecured TransactionsInstallment ContractsLegal TitleContracts LawSecured TransactionsInstallment ContractsPriorityContracts LawSecured TransactionsInstallment ContractsRecordingContracts LawTypes of ContractsInstallment ContractsGovernmentsCourtsClerks of CourtGovernmentsLocal GovernmentsGeneral OverviewGovernmentsLocal GovernmentsClaims By & AgainstGovernmentsLocal GovernmentsFinanceLegal EthicsClient RelationsAttorney FeesFee AgreementsReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsQuiet Title ActionsTortsDamagesGeneral Overview

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Volume 50: Usury thru Verification-Chs. 568-572
Chapter 569 VENDOR AND PURCHASER OF REAL PROPERTY
PART IV. FORMS
B. Installment Sales Contracts

50-569 California Forms of Pleading and Practice--Annotated § 569.194

§ 569.194 Complaint for Declaratory Relief [Code Civ. Proc. § 1060] Under Installment Sales Contract--For Redemption of Purchaser's Interest Under the Contract

[1] FORM Complaint for Declaratory Relief [Code Civ. Proc. § 1060] Under Installment Sales Contract--For Redemption of Purchaser's Interest Under the Contract

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	
vs.	)	NO. _____
_____ [*name*(*s*)],	)	COMPLAINT FOR DECLARATORY RELIEF
[and DOES I through _____],	)	(Purchaser's Right of Redemption Under Installment
Defendant(s).	)	Sales Contract)
	)	
	)	

_____

Plaintiff(s) allege(s):

[1. *Capacity of plaintiff(s), if necessary. See § 569.193[1], Paragraph 1.*]

[2. *Fictitious name allegation, if appropriate. See § 569.161[1], Paragraph 3.*]

[3. *Agency allegation, if appropriate. See § 569.160[1], Paragraph 3.*]

4. [*Formation and recording of contract and legal description of property. See § 569.193[1], Paragraph 5.*]

5. [*Provisions of contract which relate to breaches at issue. See § 569.193[1], Paragraph 6.*]

6. [*Provision of contract which defendant claims as basis for declaring forfeiture. See § 569.193[1], Paragraph 7.*]

[7. *Change of possession and/or construction of improvements, if applicable. See § 569.193[1], Paragraph 8.*]

8. [*Plaintiff's performance. See § 569.193[1], Paragraph 9.*]

9. [*Total paid by plaintiff under contract. See § 569.193[1], Paragraph 10.*]

10. Plaintiff's(s') default(s) consist(s) entirely and only of the failure to pay money, specifically, he/she/it/they has/have failed to pay the _____ [*number*] installments _____ [*if desired, specify composition of payments, e.g.,* of principal and interest due _____ (*specify, e.g.,* from June 10, 2004 to August 10, 2005, inclusive)].

11. On _____ [*date*], defendant(s) served written notice of default on plaintiff(s), notifying him/her/it/them of defendant's(s') election, pursuant to Paragraph _____ of the contract, to declare all interests [and payments] of plaintiff(s) under the contract forfeited [and demanding immediate possession of the property *and/or* immediate payment, in full, of the remainder of the purchase price].

12. On or about _____ [*date*], plaintiff(s) told defendant(s) that he/she/it/they intended to exercise his/her/its/their right of redemption and that he/she/it/they was/were ready, willing, and able to pay to defendant(s), within a reasonable amount of time, the full remaining balance of the purchase price, with interest, and any other damages suffered by defendant(s) on account of the late payments in exchange for defendant's(s') conveyance of the property [and requested from defendant(s) a statement of the full remaining balance due under the contract].

13. _____ [*Set forth details and extent of disagreement as to amount of remaining balance, e.g.,* Defendant(s) has/have failed and refused, and still fail and refuse to inform plaintiff(s) of the total remaining unpaid balance of the purchase price plus the amounts, if any, claimed by defendant(s) as interest and damages.]

[14. On _____ [*date*], plaintiff(s) tendered to defendant(s) the sum of $_____ which he/she/it/they believe to be the full remaining balance of the purchase price, with interest at the rate of _____ (*contract rate*) percent per annum from _____ [*date*] (*if interest paid in arrears, date payment before last payment*), but defendant(s) refused, and still refuse(s), to accept the same.]

15. Defendant(s) has/have failed and refused, and still fail and refuse to agree _____ [on a reasonable period of time within which plaintiff(s) is/are entitled to tender the sums owing in order to receive a deed to the property *or* that plaintiff(s) have a reasonable time within which to pay the unpaid balance of the purchase price plus the amounts, if any, claimed by defendant(s) as interest and damages].

16. Plaintiff(s) remain(s) ready, willing, and able, within such reasonable period of time as may be fixed by this Court, to pay to defendant(s), or to deposit with this Court [or with the escrow holder specified in the contract], the full remaining unpaid balance of the purchase price, plus interest, and all sums necessary to fully compensate the defendant(s) for any damages suffered by him/her/it/them by reason of the default in return for defendant(s) conveyance to plaintiff(s) of the real [and personal] property which is the subject of the contract.

17. An actual controversy has arisen between plaintiff(s) and defendant(s) concerning their respective rights and duties under the contract in that plaintiff(s) contend(s) that he/she/it/they are entitled as a matter of law to redeem his/her/its/their interest under the contract by paying the full remaining balance of the purchase price, with interest, and any other damages suffered by defendant(s) on account of the late payments, whereas defendant(s) claim(s) that he/she/it/they can enforce Paragraph _____ of the contract as written and cause forfeiture of all plaintiff's(s') rights

under the contract and all sums heretofore paid by plaintiff(s) under the contract [and expended for improvements to the property].

18. [*Plaintiff's desire for judicial declaration. See § 569.193[1], Paragraph 16.*]

19. [*Necessity and appropriateness of declaratory relief. See § 569.193[1], Paragraph 17.*]

WHEREFORE, plaintiff(s) pray(s) judgment against defendant(s) as follows:

1. For declarations by the Court that Paragraph _____ of the contract is void and not enforceable; that plaintiff(s) may be relieved from forfeiture of the contract; that plaintiff(s) is/are entitled to redeem his/her/its/their interest under the contract by payment to _____ [*choose as many as plaintiff would be willing to perform:* defendant(s) *or* the clerk of the Court *or* specify third party escrow] within such reasonable time as the Court may fix, of all sums the Court finds due as [*if deposit has been made pursuant to Civ. Code § 1500,* any additional sums still owing for] the full remaining balance of the purchase price, with interest, together with such further sums as the Court may find are necessary to compensate defendant(s) fully for any damages which the Court may find to have been caused by the default, [less a reasonable sum fixed by the Court as plaintiff's(s') costs and attorney's fees]; and that on such redemption and payment by plaintiff(s), the defendant(s) be required to convey to the plaintiff(s) the property which is the subject of the contract;

2. For costs of suit herein incurred [, including attorney's fees as provided by the contract here at issue];

3. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 569.160[1].*]

[2] Use of Form

This form of complaint is for use by a purchaser who is in default under an installment sales contract but who has substantially performed under the contract or has made substantial improvements to the property to seek a declaratory judgment that he or she has a right to redeem the property, that is, a reasonable opportunity to tender the full remaining balance under the contract, plus interest, and any incidental damages, in return for the deed. The plaintiff may seek redemption even if the default was willful so long as the default consists solely of the failure to pay money [*Petersen v. Hartell (1985) 40 Cal. 3d 102, 106, 111-114, 116-117, 219 Cal. Rptr. 170, 707 P.2d 232* ; *see § 569.100[3]*]. The foregoing form of complaint is set forth as one for declaratory relief in order to gain the trial setting priority accorded declaratory relief actions, but it could be modified by deletion of Paragraphs 17-19 to be merely a complaint for redemption of purchasers' interest [*see Code Civ. Proc. § 1062.3* (trial setting priority for declaratory relief actions)]. If it is so modified, the word "declaration" should be replaced in the prayer with the word "decree", and the title of the paper in the caption should be changed to: "COMPLAINT FOR EQUITABLE RELIEF (Purchaser's Right of Redemption Under Installment Sales Contract)."

This form may also be modified for use as a cross complaint in response to a vendor's action foreclosing the purchaser's interest by changing the word "plaintiff" to "cross complainant" wherever it appears and by adding "cross" before the word "defendant" each time it appears.

If this form is used as a second cause of action to seek redemption as alternative relief along with reinstatement [*see § 569.193*], Paragraphs 1-13 and 15-17 of the *form in § 569.193* may be incorporated by reference into the cause of action for redemption. If those Paragraphs are incorporated, Paragraphs 12-16 of the form may be the only additional Paragraphs necessary in the second cause of action. Paragraph 10 of the form will be unnecessary if it is clear from the facts set forth in Paragraph 11 of § 569.193 that the default consists only of the payment of money. Paragraph 11 of the form is alleged as part of Paragraph 12 in § 569.193. Paragraph 17 of the form will be unnecessary if the first bracketed phrase of Paragraph 15 of § 569.193 was included in the cause of action for reinstatement.

[3] Allegations

In addition to basic allegations relating to formation of the contract, its terms, performance, and breach, which are incorporated from the *form in § 569.193*, this form alleges:

- That plaintiff's default consists solely of the failure to pay money (Paragraph 10).

- Plaintiff's demand for a statement of the full remaining balance, interest, and any other sums claimed by defendant and an expression of the willingness, ability, and desire to redeem plaintiff's interest within a reasonable amount of time (Paragraph 12).

- That defendants have either refused to give a statement of the balancedemanded or have demanded sums to which they are not entitled (Paragraph 13).

- That defendants have either claimed plaintiff has no right of redemption or have demanded that it be exercised in an unreasonably short period of time (Paragraph 15).

- That plaintiff remains willing and able to pay the proper amount owing within a reasonable amount of time (Paragraph 16); and that the controversy is in regard to the right of redemption (Paragraph 17).

Optional Paragraph 14 alleges the tender of the full remaining balance, plus interest and any other applicable damages, and defendants' refusal to accept that tender [*see Civ. Code § 1504* (tender of performance stops further accrual of interest)].

To establish one's right of redemption, one must show substantial payments under the contract or substantial improvement to the property and that the default consists solely of the obligation to pay money [*Petersen v. Hartell (1985) 40 Cal. 3d 102, 114, 219 Cal. Rptr. 170, 707 P.2d 232]* .

[4] Jurisdiction and Venue

Actions for declaratory relief are generally in the jurisdiction of the superior court as cases of unlimited jurisdiction [*Cal. Const., art. VI, § 10*; *Code Civ. Proc. §§ 85, 86(a)(7)(A)*, 580(b)(4), *1060*]. In addition, because an action for redemption is not one of the enumerated cases in equity that are limited civil cases [*see Code Civ. Proc. § 86(b)*], jurisdiction is in the superior court [*Cal. Const., art. VI, § 10*].

Because redemption, if successfully completed, would require the defendant to convey the property to the plaintiff, the action is one to determine an interest in real property. Venue is in the superior court in the county in which the property, or some portion of it, is located [*Code Civ. Proc. § 392(a)(1)*].

[5] State Statutes

Neither specific nor preventative relief is available to enforce penalty or forfeiture. *Civ. Code § 3369*

Contract as defined in *Civ. Code § 2985(a)* providing for change in ownership of real property is required to be recorded or change-in-ownership statement required by *Rev. & Tax. Code § 480* is required to be filed before action to enforce contract can be maintained if contract was entered into after January 1, 1986. *Code Civ. Proc. § 1062.10*

[6] Decisions

Purchaser guilty of willful breach granted specific performance of installment sales contract of real property. *Ward v. Union Bond & Trust Company (9th Cir. 1957) 243 F.2d 476, 479-481*

[7] Cross References

For related forms, see *§§ 569.190*, *569.193*, and *569.195*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionJurisdictional SourcesConstitutional SourcesCivil ProcedureEquityGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewCivil ProcedureRemediesDeposits in CourtContracts LawGeneral OverviewContracts LawBreachGeneral OverviewContracts LawPerformanceSubstantial PerformanceContracts LawPerformanceTender & DeliveryContracts LawRemediesSpecific PerformanceContracts LawSecured TransactionsInstallment ContractsPriorityContracts LawTypes of ContractsInstallment ContractsCriminal Law & ProcedureSentencingForfeituresGeneral OverviewCriminal Law & ProcedureSentencingForfeituresProceedingsGovernmentsCourtsClerks of CourtReal Property LawDeedsRemediesDamagesReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleRemediesGeneral OverviewReal Property LawPurchase & SaleRemediesSpecific PerformanceTax LawFederal Income Tax ComputationTax AccountingAccounting Records (IRC secs. 446, 6001)

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50-569 California Forms of Pleading and Practice--Annotated § 569.195

§ 569.195 Complaint Under Installment Sales Contract--For Restitution [Civ. Code § 3369] by Purchaser

[1] FORM Complaint Under Installment Sales Contract--For Restitution [Civ. Code § 3369] by Purchaser

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

_____ [*name*(*s*)],	)	
Plaintiff(s),	)	NO. _____
vs.	)	COMPLAINT FOR RESTITUTION
_____ [*name*(*s*)], [and DOES I	)	(Installment Sales Contract)
through _____],	)	
Defendant(s).	)	
	)	

Plaintiff(s) allege(s):

[1. *Capacity of plaintiff(s), if necessary. See § 569.193, Paragraph 1.*]

[2. *Capacity and residence of defendant(s), if necessary. See § 569.193, Paragraph 2.*]

[3. *Fictitious name allegation, if appropriate. See § 569.161, Paragraph 3.*]

[4. *Agency allegation, if appropriate. See § 569.160, Paragraph 3.*]

5. [*Formation and recording of contract and legal description of property. See § 569.193, Paragraph 5.*]

6. [*Provisions of contract which relate to breaches at issue. See § 569.193, Paragraph 6.*]

7. [*Provision of contract which defendant claims as basis for declaring forfeiture. See § 569.193, Paragraph 7.*]

[8. *Change of possession and/or construction of improvements, if applicable. See § 569.193, Paragraph 8.*]

9. [*Plaintiff's performance. See § 569.193, Paragraph 9.*]

10. The total amount of _____ [*if rental value measure of vendor's damages applies, mention those actually paid* principal and interest *or, if contract measure vendor's of damages applies,* principal] paid by plaintiff(s), pursuant to the contract is the sum of $_____.

11. On _____ [*date*], defendant(s) served on plaintiff(s) a written notice of default, notifying plaintiff(s) of defendant's(s') election pursuant to Paragraph _____ of the contract to declare all interests and payments of plaintiff(s) under the contract forfeited for default _____ [*specify, e.g.,* in making payments due under the contract for the months of June 2004, through March 2005, inclusive,] _____ [*add as applicable:* and demanding immediate possession of the property *and/or* immediate payment, in full, of the remainder of the purchase price].

[12. On _____ (*date*), plaintiff(s), pursuant to _____ (*specify, e.g.,* a mutual release executed by the parties, a copy of which is attached hereto marked Exhibit "B" and made a part hereof by reference, which reserved for future determination the amount defendant(s) is/are liable to return to plaintiff(s) as the excess of payments made by plaintiff(s) under the contract over actual damages suffered by defendant(s)). Plaintiff(s) was/were in possession and occupancy of the property for a period of _____ months and _____ days.]

[*EITHER, if rental value measure of vendor's damages is in issue*]

13. The reasonable rental value of the property during the period of plaintiff's(s') possession and occupancy thereof was and is the sum of $_____ [*add if plaintiffs continue in possession* from _____ (*date*), to _____ (*date*), and continues from and after _____ (*date*), at the rate of $_____ per _____ (month *or* day)].

[*OR, if contract measure of vendor's damages applies*]

13. The fair market value of the property which is the subject of the contract between the parties on _____ [*date of breach*] was $_____. _____ [*Continue with vendor's incidental damages as applicable, e.g.,* Defendant's(s') reasonable expenses of resale are not likely to exceed the expenses assumed under the contract with plaintiff(s). As plaintiff(s) surrendered possession and delivered a quitclaim deed to defendant(s) within two weeks of receipt of the notice of defendant's(s') election to terminate the contract, defendant(s) was/were not required to expend any sums for costs or attorney's fees to recover possession of the property or to expunge plaintiff's(s') claim as a cloud on his/her/its/their title. The rental value of the property from the _____ (*date of breach*), until plaintiff(s) surrendered possession was the sum of $_____].

[*CONTINUE*]

14. The payments [*if breach of contract measure applies, add* of principal] made by plaintiff(s) to defendant(s) [and to

_____ (*state name and capacity of any third parties to whom plaintiff(s) made payments, e.g.,* XYZ Bank, holder of the first deed of trust on the property)] under the contract [*add, if applicable,* plus the value of the improvements made to the property by plaintiff(s)] exceed _____ [*if rental value measure of vendor's damagesapplies,* the reasonable rental value of said property for the period plaintiff(s) was/were in possession thereof (through the date of the filing of the complaint) *or, if contract measure vendor's of damages applies,* the actual damages suffered by defendant(s) on account of the failure of plaintiff(s) to complete contract] by the sum of $_____.

[*EITHER, if restitution is the only relief sought*]

15. On _____ [*date*], plaintiff(s) demanded in writing that defendant(s) return to plaintiff(s) the amount by which the [principal] payments under the contract [plus the value of the improvements made to the property by plaintiff(s)] exceed _____ [*if rental value measure of vendor's damages applies,* the reasonable rental value of the property during the period plaintiff(s) was/were in possession thereof *or, if contract measure vendor's of damages applies,* the actual damages suffered by defendant(s) on account of the failure of plaintiff(s) to complete the contract], but defendant(s) has/have refused to so do and no part of said excess has been paid.

[*OR, if restitution is being sought as alternative relief in the event reinstatement is denied and/or redemption cannot be made*]

15. If plaintiff(s) is/are _____ [not entitled _____ (*or* able) to reinstate the contract *and/or* not able the redeem his/her/its/their interest under the contract within the reasonable time set by this Court] and therefore forfeit(s) his/her/its/their interest under the contract, he/she/it/they will be entitled to recover from defendant(s) the amount by which [principal] payments made by plaintiff(s) under the contract [plus the value of the improvements plaintiff(s) made to the property] exceed _____ [*if rental value measure of vendor's damages applies,* the reasonable rental value of the property during the period plaintiff(s) was/were in possession thereof *or, if contract measure vendor's of damages applies,* the actual damages suffered by defendant(s) on account of the failure of plaintiff(s) to complete the contract]. [Defendant(s) is/are not entitled to a decree quieting his/her/its/their title to the property which is the subject of the contract unless and until such sums are paid to plaintiff(s), but defendant(s) deny any obligation to pay such sums to plaintiff(s).]

[*CONTINUE*]

WHEREFORE, plaintiff(s) pray(s) judgment against defendant(s) as follows:

1. For damages in the sum of $_____, with interest thereon at the rate of _____ percent from _____ [*date*];

2. For costs of suit herein incurred[, including attorney's fees as provided by the contract here at issue];

[3. For a decree providing that defendant's(s') title to the property which is the subject of the contract not be quieted unless and until defendant(s) pay(s) to plaintiff(s) all sums found by this Court to be owing from defendant(s) to plaintiff(s).]

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff

[*Verification, if desired. See § 569.160.*]

[2] Use of Form

This form of complaint is for use by a purchaser under an installment sales contract to seek relief from forfeiture by way of restitution [*see Civ. Code § 3369*; *Petersen v. Hartell (1985) 40 Cal. 3d 102, 113, 219 Cal. Rptr. 170, 707 P.2d 232* , citing *Freedman v. St. Matthias Parish (1951) 37 Cal. 2d 16, 22, 230 P.2d 629* (not an installment sales case) and *Honey v. Henry's Franchise Leasing Corp. (1966) 64 Cal. 2d 801, 803, 52 Cal. Rptr. 18, 415 P.2d 833* ; *see also §§ 569.100[2], 569.104*]. Because restitution is applicable whether or not the transaction is based on an installment sales contract, the discussion in *§ 569.24[4],* and the cases in § 569.123[4][b] also apply to restitution under an installment sales contract. This form may be modified to seek restitution under a noninstallment contract by modifying the allegations of Paragraph 6 to describe the terms of the contract at issue.

This form may be modified for use as a cross complaint in response to a vendor's action foreclosing the purchaser's interest by changing the word "plaintiff" to "cross complainant" wherever it appears and by adding "cross" before the word "defendant" each time it appears. If modified for use as a cross complaint in a quiet title action, see Ch. 482, *Quieting Title* , for particular requirements and procedures applicable to quiet title actions.

If this form is used to seek alternative relief in a complaint based on the *forms in § 569.193* or *§ 569.194* for reinstatement or redemption, respectively, counsel may incorporate some of the earlier allegations by reference and can avoid redundancies, for example, by setting forth the composition of payments in the first Paragraph 10 and by omitting Paragraph 11 of the complaint if an incorporated paragraph sets forth sufficient facts about the notice of election by the vendor.

The most difficult part of a restitution action for the purchaser is that the vendor, not the purchaser, is entitled to elect which measure of damages will apply [*Honey v. Henry's Franchise Leasing Corp. (1966) 64 Cal. 2d 801, 804, 52 Cal. Rptr. 18 , 415 P.2d 833]* . In most cases, the value of the property will have increased during the interval between the formation of the contract and the breach, making the contract measure of damages more beneficial to the purchaser. If the vendor has taken some action before the purchaser brings the action for restitution, the vendor's election may be clear. For instance, if the vendor relied on a forfeiture provision in the contract and has not offered to restore benefits, the vendor should be locked into the contract measure of damages [*see Kudokas v. Balkus (1972) 26 Cal. App. 3d 744, 753, 756, 103 Cal. Rptr. 318]* .

[3] Allegations

In addition to the introductory allegations regarding the residence and capacities of the parties, the formation, subject matter, and relevant terms of the contract, as well as the extent of plaintiff's performance, including taking of possession and construction of improvements, if applicable (Paragraphs 1-10), the form of complaint alleges the following:

- The service and content of defendant's notice of election to terminate the contract (Paragraph 11).

- The fact of and circumstances regarding plaintiff's surrender of possession, if applicable (Paragraph 12).

- The extent of the damages to which the vendor is entitled, under either the rental value measure of

damages (Paragraph 13) [*see Behrendt v. Abraham (1966) 64 Cal. 2d 182, 186-188, 49 Cal. Rptr. 292, 410 P.2d 828]* or the breach of contract measure (Paragraph 14) [*see Honey v. Henry's Franchise Leasing Corp. (1966) 64 Cal. 2d 801, 803, 805, 52 Cal. Rptr. 18, 415 P.2d 833* ; *Kudokas v. Balkus (1972) 26 Cal. App. 3d 744, 752-758, 103 Cal. Rptr. 318* ; *Petersen v. Ridenour (1955) 135 Cal. App. 2d 720, 726, 287 P.2d 848* (if using rental measure, rental value, and if using contract measure, fair value of property at time of breach is essential to showing excess payments over damages)].

- That the payments by plaintiff under the contract for which plaintiff is entitled to credit exceed vendor's actual damages under the appropriate measure (Paragraph 15) [*see, e.g., Kudokas v. Balkus (1972) 26 Cal. App. 3d 744, 756-757, 103 Cal. Rptr. 318* (plaintiff cannot have credit for interest payments if the breach of contract measure of damages applies)].

- Either that demand for restitution has been made by plaintiff and refused by defendant (Paragraph 16) or that plaintiff wishes to assert the matter as a condition to defendant's quieting title (Paragraph 17).

[4] Jurisdiction

Because an action for restitution is not one of the enumerated cases in equity that are limited civil cases [*see Code Civ. Proc. § 86(b)*], jurisdiction is in the superior court [*Cal. Const., art. VI, § 10*].

[5] Venue

If the action is considered to be one on the contract, venue lies in the county in which the contract was formed or is to be performed or in which any defendant resides [*Code Civ. Proc. § 395(a)* (county in which contract formed as county of performance unless contract provides otherwise)].

[6] Decisions

Burden of proof is on purchaser to show excess of payments over vendor's damages; in absence of showing that payments by purchaser exceed vendor's damages, judgment quieting vendor's title without requiring refund of any part of purchase price was proper; proof of rental value and/or of fair value of property at time of breach was essential to such showing. *Petersen v. Ridenour (1955) 135 Cal. App. 2d 720, 726, 287 P.2d 848*

[7] Cross References

For related forms, see *§§ 569.190*, *569.193*, and *569.194*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesCauses of ActionGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesCauses of ActionBreach of ContractBusiness & Corporate LawDistributorships & FranchisesRemediesGeneral OverviewBusiness & Corporate LawDistributorships & FranchisesRemediesCompensatory DamagesBusiness & Corporate LawDistributorships & FranchisesTerminationsGeneral OverviewCivil ProcedureJurisdictionJurisdictional SourcesConstitutional SourcesCivil ProcedureEquityGeneral OverviewCivil ProcedureVenueGeneral OverviewCivil ProcedureVenueIndividual DefendantsCivil ProcedurePartiesGeneral OverviewCommercial Law (UCC)Sales (Article 2)RemediesGeneral OverviewContracts LawGeneral OverviewContracts LawBreachGeneral OverviewContracts LawContract Conditions & ProvisionsForfeiture ClausesContracts LawRemediesCompensatory DamagesGeneral OverviewContracts LawRemediesRestitutionContracts

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50-571 California Forms of Pleading and Practice--Annotated 571.syn

§ 571.syn Synopsis to Chapter 571: VENUE

§ 571.01 Scope of Chapter

§ 571.02 Cross References

§§ 571.03-571.09 [Reserved]

§ 571.10 Governing Statutes

§ 571.11 Venue Defined

§ 571.12 Jurisdiction Distinguished

§ 571.13 Jurisdictional Venue

§ 571.14 Subvenue, Filing, and Transfer of a Civil Case Within a Unified Court

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[1] Transitory Versus Local

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[c] Foreign Corporations

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[ii] Death or Injury to Person or Personal Property

[iii] Inverse Condemnation, Money or Damages

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[8] Transfer to Neutral County

[a] Generally

[b] Actions Against City, County, or Local Agency

[c] Actions by City, County, or Local Agency Against City, County, or Local Agency

[d] Actions by City, County, or Local Agency Against Resident of or Corporation Doing Business in Another City, County, or Local Agency

[i] General Rule

[ii] Corporate Defendants

[e] "Local Agency" Defined

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[4] Cross References

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[1] FORM

[2] Use of Form

[3] Domestic Corporations

[a] Alternative Places of Trial in Transitory Actions

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[4] Foreign Corporations

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[c] Impartial Trial Cannot Be Had

[d] No Qualified Judge

[5] Costs and Fees of Transfer

[6] Transfer of Action by or Against Local Government Entity Under Code Civ. Proc. § 394

[7] Cross References

§ 571.101 Proceedings for Change of Venue [Code Civ. Proc. §§ 396b, 397]--Declaration in Support of Motion--General Form

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[4] Impartial Trial Cannot Be Had

[5] No Judge in Court Qualified to Act

[6] Cross References

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[2] Use of Form

[3] Cross References

§ 571.104 Proceedings for Change of Venue [Code Civ. Proc. § 396b, 397]--Notice of Countermotion

[1] FORM

[2] Use of Form

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[2] Use of Form

[3] Cross References

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§ 571.01 Scope of Chapter

This chapter discusses and contains forms related to:

- Venue requirements and the proper place of trial for various actions [*see § 571.10* et seq., for forms,*see § 571.80* et seq.].

- Motions for change of venue for use when a party to an action seeks to transfer the action to another place for trial [*see § 571.30* et seq., for forms,*see § 571.100* et seq.].

The forms relating to venue are:

- Forms of allegation for use in actions dealing with personal right or obligations (transitory actions) [*see §§ 571.80 -571.83*].

- Forms of allegation for use in actions relating to title or interest in real property (local actions) [*see §§ 571.84 -571.86*].

- Forms for use in actions in which venue is determined by the party suing or being sued [*see §§ 571.87 -571.89*].

The forms relating to motion for change of venue are:

- A form for notice of motion for change of venue [*see § 571.100*] and a form for notice of countermotion to retain venue [*see § 571.104*].

- A form of declaration to support either the motion or countermotion [*see § 571.101*] and a form of declaration for action commenced in improper court [*see § 571.102*].

- A form of order granting a motion for change of venue [*see § 571.103*].

- A form of stipulation and order for use when the parties agree to a change of venue and wish to avoid the costs of the motion procedure [*see § 571.105*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueMotions to TransferGeneral Overview

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§ 571.02 Cross References

- For forms and discussion relating to venue in a proceeding for dissolution of marriage or legal separation, and for proceedings under the Family Code,*see* Ch. 221, *Dissolution of Marriage: Procedure* , and Ch. 258, *Family Law Enforcement: General Enforcement Principles and Remedies* .

- For forms and discussion relating to jurisdiction,*see* Ch. 324, *Jurisdiction: Subject Matter Jurisdiction* .

- For discussion and forms of the affidavit (or declaration under *Code Civ. Proc. § 2015.5*) regarding venue required under the Unruh Act by Civ. Code. § 1812.10,*see Ch. 501, Sales: Retail Installment Sales, § 502.102,* and *Ch. 502, Sales: Warranties, § 502.160[7].*

- For discussion of motions to transfer an action or proceeding that was commenced in a court lacking subject matter jurisdiction to a court with jurisdiction,*see* Ch. 324, *Jurisdiction: Subject Matter Jurisdiction* .

- For forms and discussion relating to the requisites of written notice,*see* Ch. 372, *Motions and Orders* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsExpress WarrantiesContracts LawContract Conditions & ProvisionsImplied WarrantiesGeneral OverviewContracts LawSecured TransactionsInstallment ContractsGeneral OverviewFamily LawChild SupportObligationsEnforcementGeneral OverviewFamily LawMarital Termination & Spousal SupportDissolution & DivorceProcedures

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[Reserved]

§§ 571.03[Reserved]

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A. Place of Trial

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§ 571.10 Governing Statutes

The general statutes governing venue or the place of trial in state civil actions are contained in *Code Civ. Proc. §§ 392-402*, and *Gov. Code §§ 955, 955.2* and *955.3*. There are also several statutes that govern venue in particular circumstances that are not contained in *Code Civ. Proc. §§ 392-402*, and that are not within the scope of this chapter [*see, e.g., Fam. Code §§ 8714(a)* (agency adoptions), 8802(a) (independent adoptions); *Prob. Code §§ 2201, 2202* (venue in conservatorship or guardianship proceedings)].

The statute governing venue in transitory actions is *Code Civ. Proc. § 395*. Venue in local actions is governed by *Code Civ. Proc. §§ 392, 393* and *395.1*. Venue in actions in which the type of party suing or being sued controls is governed by *Code Civ. Proc. §§ 395.2, 395.5* and *401*, and *Gov. Code §§ 955, 955.2* and *955.3*. *Code Civ. Proc. § 394* governs the transfer of an action to a neutral county when a city, county or other government agency is suing or being sued.

Legal Topics:

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

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§ 571.11 Venue Defined

Venue indicates the geographical location and political subdivision within which the courthouse that will hear the cause is situated. It refers to the place from which the jury is summoned [*Milliken v. Gray (1969) 276 Cal. App. 2d 595, 600, 81 Cal. Rptr. 525]* . Venue relates to and defines the particular county or city in which a court having jurisdiction may in the first instance properly hear and determine the case [*Arganbright v. Good (1941) 46 Cal. App. 2d Supp. 877, 878 , 116 P.2d 186]* .

Legal Topics:

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

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§ 571.12 Jurisdiction Distinguished

The distinction between jurisdiction and venue is plainly established. Jurisdiction refers to the power of the court to decide a case on the merits [*Milliken v. Gray (1969) 276 Cal. App. 2d 595, 600, 81 Cal. Rptr. 525]* . It includes the power to inquire into facts, to apply the law, to make decisions, and to declare judgment [*Arganbright v. Good (1941) 46 Cal. App. 2d Supp. 877, 878 , 116 P.2d 186]* .

As venue relates only to the place where suit should be heard, it is not jurisdictional in the fundamental sense. It does not relate to whether a particular court has the power to try the action [*Barquis v. Merchants Collection Assn. (1972) 7 Cal. 3d 94, 121, 101 Cal. Rptr. 745, 496 P.2d 817* ; *see § 571.13* regarding jurisdictional venue].

A court having subject matter jurisdiction over an action, even if not the proper venue, may try the action unless the defendant makes a timely motion for transfer to the proper court [*Lipari v. Department of Motor Vehicles (1993) 16 Cal. App. 4th 667, 672, 20 Cal. Rptr. 2d 246* ; *see Code Civ. Proc. § 396b(a)*, discussed in *§ 571.30* et seq., relating to Change of Venue]. Thus, although the defendant may obtain a transfer by timely motion, a defendant may not obtain dismissal, and it is error for the court to dismiss the action [*Lipari v. Department of Motor Vehicles (1993) 16 Cal. App. 4th 667, 672, 20 Cal. Rptr. 2d 246* (reversing judgment dismissing petition for writ of mandate)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionPersonal Jurisdiction & In Rem ActionsGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureVenueGeneral Overview

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§ 571.13 Jurisdictional Venue

When a statute makes a local place of trial a part of the grant of subject matter jurisdiction, venue is considered jurisdictional [*Barquis v. Merchants Collection Assn. (1972) 7 Cal. 3d 94, 121, 101 Cal. Rptr. 745, 496 P.2d 817]* . For example, in proceedings for the administration of a decedent's estate, the county of the decedent's residence or the location of his or her property at the time of death establishes jurisdiction of the subject matter in the superior court of that county [*see Prob. Code § 7050-7052*]. Another jurisdictional venue statute is *Welf. & Inst. Code § 3100*, which allows the district attorney to petition the superior court for the commitment of a person when the district attorney has probable cause to believe the person is a drug addict [*see Van Zanten v. Superior Court (1963) 214 Cal. App. 2d 510, 512-514, 29 Cal. Rptr. 625* (decided under former Penal Code § 6500, now *Welf. & Inst. Code § 3100*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionJurisdictional SourcesStatutory SourcesCivil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCriminal Law & ProcedureJurisdiction & VenueGeneral Overview

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§ 571.14 Subvenue, Filing, and Transfer of a Civil Case Within a Unified Court

With the complete unification of trial courts in California into only superior courts, several provisions providing for specific places of trial in municipal court are no longer applicable (a topic previously known as "subvenue" and reflecting issues of having the case heard in the county judicial district closest to the acts giving rise to the action) [*see, e.g.,* former *Code Civ. Proc. §§ 392(2), 395(c)*].

In recognition of unified courts, *Code Civ. Proc. § 402.5* was enacted in 1998 to provide that superior courts may transfer a limited civil case to another branch or location of the superior court in the same county. Effective January 1, 2003, *Code Civ. Proc. § 402.5* is repealed and the matter is addressed in *Code Civ. Proc. § 402*, which provides that except as otherwise provided by law:

- A superior court may specify by local rule the locations where certain types of actions or proceedings are to be filed.

- A superior court may specify by local rule the locations where certain types of actions or proceedings are to be heard or tried.

- A superior court may not dismiss a case, and the clerk may not reject a case for filing, because it is filed, or a person seeks to file it, in a court location other than the location specified by local rule. However, the court may transfer the case on its own motion to the proper court location.

- A superior court may transfer an action or proceeding filed in one location to another location of the superior court.

Code Civ. Proc. § 402 does not affect the authority of the presiding judge to apportion the business of the court as provided by the California Rules of Court.

It is always prudent to check local rules of court to determine if there is a central location for filing civil actions and if

status of the action as a limited or unlimited civil case provides for different treatment. For example, Santa Clara Co. Super. Ct. Rules, Rule 1(C) provides for the proper facility for filing a general civil case, stating:

> (1) All unlimited civil cases must be filed in the Downtown Superior Court.
>
> (2) All limited civil cases must be filed in the Downtown Superior Court or the South County Courthouse, subject to the following rules:
>
> > a. A tort case may be filed in the South County Courthouse if at least one defendant resides at a Gilroy, Morgan Hill, or San Martin address, or the injury or damage occurred in Gilroy, Morgan Hill, San Martin or a surrounding unincorporated area within Santa Clara County.
> >
> > b. A contract case may be filed in the South County Courthouse if at least one defendant resides at a Gilroy, Morgan Hill or San Martin address, or the contract was entered into or to be performed in Gilroy, Morgan Hill, San Martin, or a surrounding unincorporated area within Santa Clara County.
> >
> > c. Other types of cases may be filed in the South County Courthouse if at least one defendant resides at a Gilroy, Morgan Hill or San Martin address or the case requires a determination of a right in land that has a Gilroy, Morgan Hill or San Martin address.
> >
> > d. Upon the noticed motion of a party, or the Court's own motion, for good cause shown, a limited civil case may be transferred from the Downtown Superior Court to the South County Courthouse or vice versa.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueMotions to TransferGeneral Overview

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§ 571.15 Classification of Actions for Venue Purposes

[1] Transitory Versus Local

The rules of venue generally require actions to be classified mainly as transitory or local [*Brown v. Superior Court (1984) 37 Cal. 3d 477, 482* n.5, *208 Cal. Rptr. 724, 691 P.2d 272* ; *see Code Civ. Proc. §§ 392, 395*]. An action is transitory if the inquiry deals primarily with financial obligations or personal relationships. It is local if title to or injury to real property is the focus of trial [*Carlton v. Superior Court (1966) 240 Cal. App. 2d 586, 589, 49 Cal. Rptr. 759]* .

[2] Determined by Complaint

The cause of action affects or determines the place of trial, and whether an action is transitory or local will be ascertained from the complaint alone [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 603, 328 P.2d 953]* . The court will inspect the complaint to determine the character of the action and the judgment that may be rendered on default [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 603, 328 P.2d 953* ; *Eckstrand v. Wilshusen (1933) 217 Cal. 380, 381-382, 18 P.2d 931* ; *see* discussion in [3], *below*].

Thus, the plaintiff's theory of the action as set forth in the complaint determines venue [*Gallin v. Superior Court (1991) 230 Cal. App. 3d 541, 544, 281 Cal. Rptr. 304]* .

[3] Main Relief Rule

When a complaint states only one cause of action, the relief sought must be characterized as local or transitory to determine venue. Consequently, venue problems arise when the complaint, although stating a single cause of action, demands both local and transitory relief. If that is the case, the characterization will be controlled by the nature of the "main relief" sought, or "principal object" of the action [*Massae v. Superior Court (1981) 118 Cal. App. 3d 527, 535, 173 Cal. Rptr. 527]* . For a discussion relating to the effect of joinder of several causes of action or defendants covered by different venue statutes, *see* the discussion in *§ 571.20[1]*.

To apply the "main relief rule," the main relief sought should first be identified and characterized as local or transitory.

Then, if there is other relief sought that would be characterized differently, the nature of the main relief will control. If all of the relief can be similarly characterized, the "main relief rule" is inapplicable [*Massae v. Superior Court (1981) 118 Cal. App. 3d 527, 535-536, 173 Cal. Rptr. 527]* . For example, an action to recover damages for injury to real property is local under *Code Civ. Proc. § 392(a)* even though the complaint is framed in various counts according to theories of negligence, negligent breach of contract, and breach of warranty. The addition of the breach of warranty theory, which is transitory, does not transform the action into a transitory one because the subject matter of the action is for injury to real property, and the "main relief" sought is for damages therefor [*Stauffer Chemical Co. v. Superior Court (1968) 265 Cal. App. 2d 1, 4, 71 Cal. Rptr. 202* ; *see Code Civ. Proc. § 392(a)* (situs of subject matter controls in actions for injuries to real property)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueIndividual Defendants

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Volume 50: Usury thru Verification-Chs. 568-572
Chapter 571 VENUE
PART II. LEGAL BACKGROUND
A. Place of Trial

50-571 California Forms of Pleading and Practice--Annotated § 571.16

§ 571.16 Transitory Actions

[1] Basic Rule of Venue

[a] Residence of Defendant

Code Civ. Proc. § 395 controls venue in transitory actions [*Brown v. Superior Court (1984) 37 Cal. 3d 477, 482, 208 Cal. Rptr. 724, 691 P.2d 272]* . Section 395(a) states that, except as otherwise provided by law and subject to the power of the court to transfer actions or proceedings as provided in *Code Civ. Proc. §§ 392-404.8*, the superior court in the county where the defendants or some of them reside at the commencement of the action is the proper court for the trial of the action [*Code Civ. Proc. § 395(a)*]. Section 395(a) is intended to protect the defendant from the expense and inconvenience of being compelled to go to a distant county to defend himself or herself against an action commenced in that county [*Turlock Theatre Co. v. Laws (1939) 12 Cal. 2d 573, 576* ; *Smith v. Smith (1891) 88 Cal. 572, 575, 26 P. 356]* .

The phrase "except as otherwise provided by law" is a subordinating declaration that precludes application of *Code Civ. Proc. § 395(a)* if another venue provision applies to the cause of action [*see* *Brown v. Superior Court (1984) 37 Cal. 3d 477, 482-487, 208 Cal. Rptr. 724, 691 P.2d 272* ; *Tharp v. Superior Court (1982) 32 Cal. 3d 496, 502-503, 186 Cal. Rptr. 335, 651 P.2d 1141* (applying *Code Civ. Proc. § 393* rather than Section 395)]. For example, in *Brown*, the Court held that *Gov. Code § 12965*, the venue provision of the Fair Employment and Housing Act (FEHA) is a special venue provision that applies to cases involving FEHA claims joined with non-FEHA claims, so that it applied to the entire case and prevailed over Section 395 [*Brown v. Superior Court (1984) 37 Cal. 3d 477, 482-487, 208 Cal. Rptr. 724, 691 P.2d 272* (distinguishing the case from a mixed action in which different venue provisions apply to different causes of action)].

In the case of mixed actions, however, where the complaint alleges multiple causes of action subject to different venue provisions, Section 395 may prevail over the more specific provision [*see* *Gallin v. Superior Court (1991) 230 Cal. App. 3d 541, 545, 281 Cal. Rptr. 304* ; *see also* *Brown v. Superior Court (1984) 37 Cal. 3d 477, 487-488, 208 Cal. Rptr. 724, 691 P.2d 272]* . For discussion of venue in mixed actions,*see § 571.20[1]*.

[b] Multiple Defendants

A defendant is not entitled to have a transitory action tried in the county of his or her residence when there are several defendants who reside in different counties. *Code Civ. Proc. § 395* expressly provides for trial in the county in which the defendants "or some of them" reside. Thus, a plaintiff may bring a good transitory action against two or more defendants in the county of one defendant who is a proper party. The nonresident defendants cannot obtain a change of venue even if the resident defendant joins in the motion. This rule applies even though all of the causes of action do not affect all of the parties [*Colusa Air Pollution Control Dist. v. Superior Court (1991) 226 Cal. App. 3d 880, 890, 277 Cal. Rptr. 110]* . For further discussion,*see § 571.20[3]* regarding joinder of defendants.

[c] Residence Defined

Within the meaning of *Code Civ. Proc. § 395(a)*, a person can have only one residence. Residence depends on intention as well as fact. It has ordinarily been accepted to mean the place where one remains when not called elsewhere on business, pleasure, or for other temporary purposes. For example, the mere inhabitancy of a summer home or country house at certain seasons of the year or at certain times would not make the person inhabiting the house a resident of the county in which the house is situated. The material question is the intent to establish a permanent residence. The place of residence within the meaning of *Code Civ. Proc. § 395(a)* is the fixed home of a person as understood by himself or herself and his or her neighbors and friends [*Burt v. Scarborough (1961) 56 Cal. 2d 817, 820-821, 17 Cal. Rptr. 146, 366 P.2d 498* ; *see Gov. Code § 244(a)* (residence as the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he or she returns in seasons of repose)].

[d] Actions Subject to Basic Rule

The general rule of *Code Civ. Proc. § 395(a)* that the residence of the defendant is the proper place for trial applies to personal torts not involving physical injury, such as conversion [*Haurat v. Superior Court (1966) 241 Cal. App. 2d 330, 333, 50 Cal. Rptr. 520* ; *Mason v. Buck (1929) 99 Cal. App. 219, 221, 278 P. 461]* . Similarly, actions for libel, malicious prosecution, and false imprisonment are also triable solely at the defendant's residence [*Johnson v. Superior Court (1965) 232 Cal. App. 2d 212, 218, 42 Cal. Rptr. 645]* . This is also true of actions for abuse of process. Actions for abuse of process, like actions for malicious prosecution, are not actions for "injury to the person" that may be brought in the county in which plaintiff's injury occurred pursuant to *Code Civ. Proc. § 395(a)* [*Cacciaguidi v. Superior Court (1990) 226 Cal. App. 3d 181, 184-186]* . Further, subject to certain exceptions set out in *Code Civ. Proc. § 395(a)*, contract actions are also triable in the county where the defendant resides [*Haurat v. Superior Court (1966) 241 Cal. App. 2d 330, 333, 50 Cal. Rptr. 520* ; *see* discussion in *§ 571.16[3][a]* regarding alternate venues in contract actions].

[2] Rule for Actions Involving Injury to Person or Personal Property

If the action is for injury to a person or personal property or for death from wrongful act or negligence, either the county where the injury occurs or the injury causing death occurs or the county in which the defendants, or some of them, reside at the commencement of the action, shall be a proper county for the trial of the action [*Code Civ. Proc. § 395(a)*]. Thus, a defendant is entitled to have a negligence action tried either in the county of his or her residence or the county in which the tort occurred [*Maxwell v. Murray (1961) 190 Cal. App. 2d 440, 443, 11 Cal. Rptr. 916]* .

The phrase "injury to person" as it is used in *Code Civ. Proc. § 395(a)* is limited to physical injury or incapacity or death caused by the wrongful or negligent act of another. It does not apply to nonphysical injuries resulting from false imprisonment or malicious prosecution [*Monk v. Ehret (1923) 192 Cal. 186, 191-193, 219 P. 452* ; *Cacciaguidi v. Superior Court (1990) 226 Cal. App. 3d 181, 187]* . Nor does the phrase refer to injuries to character or reputation [*Carruth v. Superior Court (1978) 80 Cal. App. 3d 215, 219, 145 Cal. Rptr. 344]* . Actions sounding in tort, such as severe humiliation, anguish, emotional distress, and trauma, are also not encompassed in the phrase "injury to a person"

so as to justify grounding venue on them [*Cubic Corp. v. Superior Court (1986) 186 Cal. App. 3d 622, 625, 231 Cal. Rptr. 18]* . For a discussion of proper venue in actions for torts not involving physical injury,*see § 571.16[1][d]*.

[3] Rule for Contract Actions

[a] Alternative Venues

Subject to *Code Civ. Proc. § 395(b)* (venue in actions based on consumer obligations), when a defendant has contracted to perform an obligation in a particular county, the proper county for trial of an action founded on the obligation is either (1) the county in which the obligation is to be performed, (2) the county in which the contract in fact was entered into, or (3) the county in which the defendant or any defendant resides at the commencement of the action. The county in which the obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary [*Code Civ. Proc. § 395(a)*; *see Wathen v. Superior Court (1963) 212 Cal. App. 2d 125, 129, 27 Cal. Rptr. 840]* . This provision contains exceptions to the basic rule of residence venue [*Mosby v. Superior Court (1974) 43 Cal. App. 3d 219, 224, 117 Cal. Rptr. 588]* .

In effect, a defendant is entitled to have a contract action transferred to the county of his or her residence unless the obligation was incurred or was to be performed in another county [*Braunstein v. Superior Court (1964) 225 Cal. App. 2d 691, 694, 37 Cal. Rptr. 666]* . In fact, the plaintiff is entitled to have the action tried in the county in which it appears the contract was entered into despite the defendant's residence in another county [*Richardson v. Rose (1961) 197 Cal. App. 2d 318, 322, 17 Cal. Rptr. 84]* .

[b] Where Contract Entered Into

The place where the contract was made is the place where the last act necessary for its validity was done. This is usually the act constituting acceptance. Thus, when a contract is prepared in one county, and is forwarded to a party in another county for acceptance and signature, the latter county is the proper place for trial because that is where the contract was made [*Braunstein v. Superior Court (1964) 225 Cal. App. 2d 691, 696-697, 37 Cal. Rptr. 666]* . Similarly, when a contract is made by telephone, the contract is entered into at the place where the recipient of the telephone call is when he or she accepts the offer [*Friedman Bag Co., Inc. v. Shrier (1961) 194 Cal. App. 2d 561, 564, 15 Cal. Rptr. 38* ; *Wilson v. Scannavino (1958) 159 Cal. App. 2d 369, 371, 324 P.2d 350]* .

[c] Where Contract Is to Be Performed

The language of the contract provision of *Code Civ. Proc. § 395(a)* is unclear, and at first glance seems to offer a choice of three separate places for trial: (1) the county in which the contract is to be performed, (2) the county in which the contract was entered into, or (3) the county in which the defendant resides. However, by including the language that the county in which the obligation is incurred shall be deemed to be the county in which it is to be performed, *Code Civ. Proc. § 395(a)* effectively limits the counties in which an action may properly be tried to the county in which the defendant resides, and the county in which the contract was made. The language in *Code Civ. Proc. § 395(a)* providing for a special contract in writing creates an exception to this limitation. If there is a special contract designating the county of performance, that county is also a proper county for the trial of an action on contract [*Armstrong v. Smith (1942) 49 Cal. App. 2d 528, 531-532, 122 P.2d 115* ; *see Code Civ. Proc. § 395(a)*].

A special contract is one in which particular stipulations with respect to the obligations of the parties are expressed, and which, if omitted, the law will not supply [*Armstrong v. Smith (1942) 49 Cal. App. 2d 528, 535, 122 P.2d 115]* . Thus, before an action may be brought under *Code Civ. Proc. § 395(a)* in the county where the obligation forming the basis of the action is performable, the contract must specifically state the place of performance of the obligation [*Wathen v. Superior Court (1963) 212 Cal. App. 2d 125, 129, 27 Cal. Rptr. 840]* . The contract must specify a definite, certain place of performance, and any deficiency or lack of a specification cannot be remedied by extrinsic evidence [Fidelity Thrift & Loan Asso. v. Hall (1960) 186 Cal. App. 2d Supp. 895, 899 , *9 Cal. Rptr. 596]* . An agreement to pay money

in a particular county, or to deliver goods at a particular place, or to perform an obligation in a particular city are all sufficient [*Wathen v. Superior Court (1963) 212 Cal. App. 2d 125, 129, 27 Cal. Rptr. 840]* . Also, a geographic designation of the city or county without setting forth the address is enough to satisfy the requirement that the special contract must be specific. Thus, when a contract merely states the place of payment as the office of a trustee in a particular county, it is sufficient to give the plaintiff the right to specify that county as the proper place of trial in an action on the contract [*Stute v. Burinda (1981) 123 Cal. App. 3d Supp. 11, 16 , 177 Cal. Rptr. 102]* .

[d] Contract Actions Subject to Code Civ. Proc. § 395(b)

[i] Consumer Transactions

Code Civ. Proc. § 395(b) applies to actions arising from the offer or provision of goods, services, loans, or extensions of credit intended primarily for personal, family, or household use [*Code Civ. Proc. § 395(b)*].

As exceptions, section 395(b) does not apply to an action described in *Civ. Code § 1812.10* (Contract Actions Arising Out of Retail Installment Sales (Unruh Act), *see* [e], *below*) or 2984.4 (Contract Actions Arising Out of Motor Vehicle Sales (Rees-Levering Motor Vehicle Sales and Finance Act), *see* [f], *below*) [*Code Civ. Proc. § 395(b)*].

[ii] Unsolicited Telephone Calls and Electronic Transmissions

Code Civ. Proc. § 395(b) applies to actions arising from transactions consummated as a result of an unsolicited phone call by a seller engaged in the business of consummating transactions of that kind [*Code Civ. Proc. § 395(b)*].

[iii] Specific Venue Provision

If an action is governed by Section 395(b) the proper court for trial of the action is the superior court in the county where the buyer or lessee [*Code Civ. Proc. § 395(b)*]:

- In fact signed the contract,
- Resided at the time the contract was entered into, or
- Resides at the commencement of the action.

This venue provision is expressly subject to the court's power to transfer actions or proceedings as provided in *Code Civ. Proc. § 392 et seq.* [*Code Civ. Proc. § 395(b)*].

In the superior court designated in *Code Civ. Proc. § 395(b)* as the proper court, the proper court location for trial of a case is the location where the court tries that type of case that is nearest or most accessible to where the buyer or lessee resides, where the buyer or lessee in fact signed the contract, where the buyer or lessee resided at the time the contract was entered into, or where the buyer or lessee resides at the commencement of the action. Otherwise, any location of the superior court designated as the proper court in this subdivision is a proper court location for the trial. The court may specify by local rule the nearest or most accessible court location where the court tries that type of case [*Code Civ. Proc. § 395(b)*].

[iv] Provisions Not Subject to Waiver

Any provision of an obligation described in *Code Civ. Proc. § 395(b)* waiving those subdivisions is void and unenforceable [*Code Civ. Proc. § 395(c)*].

[e] Contract Actions Arising out of Retail Installment Sales (Unruh Act)

An action on a contract or installment account under the provisions of the Unruh Act [*Civ. Code § 1801 et seq.*] must be tried in the superior court in the county where the contract was in fact signed by the buyer, where the buyer resided at the time the contract was entered into, where the buyer resides at the commencement of the action, or where the goods purchased pursuant to the contract have been so affixed to real property as to become a part of that real property [Code Civ. Proc. § 1812.10(a)].

In the superior court designated as the proper court in Code Civ. Proc. § 1812.10(a), the proper court location for trial of an action under the Unruh Act is the location where the court tries that type of action that is nearest or most accessible to where the contract was in fact signed by the buyer, where the buyer resided at the time the contract was entered into, where the buyer resides at the commencement of the action, or where the goods purchased pursuant to the contract have been so affixed to real property as to become a part of that real property [Code Civ. Proc. § 1812.10(b)]. Otherwise, any location of the superior court designated as the proper court in Section 1812.10(a) is the proper court location for the trial of the action. The court may specify by local rule the nearest or most accessible court location where the court tries that type of case [Code Civ. Proc. § 1812.10(b)].

In any action subject to Code Civ. Proc. § 1812.10, concurrently with the filing of the complaint, the plaintiff must file an affidavit stating facts showing that the action has been commenced in a superior court and court location described in § 1812.10 as a proper place for the trial of the action [Code Civ. Proc. § 1812.10(c)]. Those facts may be stated in a verified complaint and must not be stated on information or belief. When that affidavit is filed with the complaint, a copy thereof must be served with the summons. If a plaintiff fails to file the affidavit or state facts in a verified complaint required by this section, no further proceedings may occur, but the court must, upon its own motion or upon motion of any party, dismiss the action without prejudice. The court may, on terms that are just, permit the affidavit to be filed subsequent to the filing of the complaint and a copy of the affidavit must be served on the defendant. The time to answer or otherwise plead must date from that service [Code Civ. Proc. § 1812.10(c)].

For discussion and forms of the affidavit (or declaration under *Code Civ. Proc. § 2015.5*) regarding venue required under the Unruh Act by Civ. Code. § 1812.10,*see Ch. 501, Sales: Retail Installment Sales, § 502.102,* and *Ch. 502, Sales: Warranties, § 502.160[7]*.

[f] Contract Actions Arising out of Motor Vehicle Sales (Rees-Levering Motor Vehicle Sales and Finance Act)

An action on a contract or purchase order under the provisions of the Rees-Levering Motor Vehicle Sales and Finance Act (*Civ. Code § 2981 et seq.*) must be tried in the county in which the contract or purchase order was in fact signed by the buyer, in the county in which the buyer resided at the commencement of the action, or in the county in which the motor vehicle purchased pursuant to the contract or purchase order is permanently garaged [*Civ. Code § 2984.4*, first paragraph]. In an action involving multiple claims, or causes of action, venue shall lie in the foregoing counties so long as there is at least one claim or cause of action arising from a contract subject to the provisions of the act [*Civ. Code § 2984.4*, second paragraph].

For discussion and a form of the affidavit (or declaration under *Code Civ. Proc. § 2015.5*) regarding venue required under the Rees-Levering Act by Civ. Code. § 2984.4,*see Ch. 89, Automobiles: Sales and Financing Under the Rees-Levering Act, §§ 89.27, 89.61*.

[4] Proceedings to Determine Parental Relationship

In a proceeding to determine parental relation under *Fam. Code § 7600 et seq.* (Uniform Parentage Act), the county in which the child resides is the proper county for the trial of the action [*Code Civ. Proc. § 395(a)*].

[5] Proceedings to Enforce Support Obligation

In a proceeding to enforce an obligation of support under *Fam. Code § 3900* (civil suit on behalf of child to enforce parents' obligations), or to establish and enforce a foreign judgment or court order for the support of a minor child, the county in which the child resides is the proper county for the trial of the action [*Code Civ. Proc. § 395(a)*].

[6] Nonresident Defendant or County of Residence Unknown

If none of the defendants reside in the state, or if they reside in the state and the county in which they reside is unknown to the plaintiff, the action may be tried in any county which the plaintiff may designate in his or her complaint [*Code Civ. Proc. § 395(a)*].

[7] Defendant About to Depart From State

If the defendant is about to depart from the state, the action may be tried in any county where either of the parties reside or service is made [*Code Civ. Proc. § 395(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 571.17 Local Actions

[1] Situs of Subject Matter of Action Controls

Subject to the power of the court to transfer actions and proceedings as provided in *Code Civ. Proc. § 392 et seq.*, the county in which the real property which is the subject of the action, or some part thereof, is situated is the proper county for trial for the recovery of real property, of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property [*Code Civ. Proc. § 392(a)(1)*].

The right of a plaintiff to have an action tried in a county other than that of the defendant's residence is exceptional. Thus, *Code Civ. Proc. § 392(1)(a)* is an exception to the basic rule of residence venue [*Kaluzok v. Brisson (1946) 27 Cal. 2d 760, 763-764, 167 P.2d 481]* .

[2] Action Local If It Turns on Title to or Possession of Real Property

An action must be wholly local in nature to be governed by *Code Civ. Proc. § 392(1)(a)* [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 605, 328 P.2d 953]* . An action is local when it turns on title to property as distinct from a personal obligation, and the decree operates by its own force on the title [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 604, 328 P.2d 953* ; *Thielen v. Superior Court (1963) 219 Cal. App. 2d 217, 219, 33 Cal. Rptr. 1]* . Whether an action is local as opposed to transitory is to be determined on the basis of the relief sought [*Massae v. Superior Court (1981) 118 Cal. App. 3d 527, 530, 173 Cal. Rptr. 527* ; *see* discussion in *§ 571.15[3]*]. One example of a local action would be when a complaint has for its sole and exclusive object the cancellation of a deed or a deed of trust [*Beutke v. American Securities Co. (1955) 132 Cal. App. 2d 354, 359, 282 P.2d 201* ; *see* discussion in *§ 571.15[2]*].

[3] Action Not Local If Title or Possession Incidentally Involved

When title to or possession of real property is only incidentally involved, an action is not local [*Marcacci v. Continental Baking Co. (1962) 202 Cal. App. 2d 224, 226, 20 Cal. Rptr. 567]* . This distinction is most clearly established when the main relief sought consists of a money judgment. For example, an action for the specific performance of a contract for the sale of realty is not local if it is brought by the vendor, since the vendor merely seeks

the purchase price. Conversely, if the action is brought by the vendee, it is local because the vendee seeks possession of the property [*Hammon v. American Etc. Mining Co. (1962) 203 Cal. App. 2d 306, 309, 21 Cal. Rptr. 409]* . Similarly, an action for damages for deceit in inducing a vendee to purchase real property, rather than for rescission and restitution resulting in reconveyance, is not a local action [*Kaluzok v. Brisson (1946) 27 Cal. 2d 760, 763-764, 167 P.2d 481* ; *see Etter v. Vollmer (1956) 139 Cal. App. 2d 718, 720, 294 P.2d 55* (action for fraud with respect to conveyance of real property local if vendee seeks to reobtain title)]. For a discussion of how the characterization of the relief controls venue, see the discussion in *§ 571.15[3]*.

By contrast, the fact that recovery of a money judgment is sought does not necessarily mean that an action is not local if the judgment is predicated on damages to real property [*Strosnider v. Pomin (1939) 32 Cal. App. 2d 103, 109, 89 P.2d 179* ; *see Code Civ. Proc. § 392(a)(1)* (action for injury to real property also local action); *see* discussion in *§ 571.15[3]* for main relief rule, and § 571.17[4] for an injury to real property]. Further, the local nature of an action is not changed because benefits may incidentally be ordered restored to a defendant in an action in which the main relief sought is the cancellation of a deed and corresponding contract of sale [*Etter v. Vollmer (1956) 139 Cal. App. 2d 718, 720, 294 P.2d 55]* . Also, allegations of costs and attorney's fees, and claims for punitive damages that are incidental to a claim of injury to real property does not destroy the essential character of an action as one within the scope of *Code Civ. Proc. § 392(a)(1)* [*Wick v. Mattison (1962) 207 Cal. App. 2d 608, 610, 24 Cal. Rptr. 677]* .

[4] Injury to Real Property

[a] Broadly Construed

The phrase "injury to real property" as used in *Code Civ. Proc. § 392(a)(1)* is not limited to physical injury to or interference with the land. It embraces every wrong that in legal contemplation is an injury to real property. It includes not only direct and forcible injury, but consequential and threatened injuries to land. It even includes mere nonfeasance, such as permissive waste [*Coley v. Hecker (1928) 206 Cal. 22, 28, 272 P. 1045* ; *Strosnider v. Pomin (1939) 32 Cal. App. 2d 103, 108, 89 P.2d 179]* . One example of consequential injuries would be when a plaintiff brings an action for damages because he or she was fraudulently compelled by the defendant to dismiss a prior action to quiet title to a right of way. If the defendant thereafter erected an obstruction on the right of way, any injury to the real property represented by the obstruction is a consequential injury resulting from the defendant's fraud, and plaintiff's action for damages is a local one under *Code Civ. Proc. § 392(a)(1)* [*Strosnider v. Pomin (1939) 32 Cal. App. 2d 103, 108, 89 P.2d 179]* .

Slander of title is also considered an indirect and consequential injury to real property [*Wick v. Mattison (1962) 207 Cal. App. 2d 608, 610, 24 Cal. Rptr. 677* ; *see Coley v. Hecker (1928) 206 Cal. 22, 26, 28, 272 P. 1045* (slander of title is a local action also on the theory that the action is one in which determination of an owner's right or interest in title is properly adjudicated)]. Similarly, a malicious prosecution action for damages has been found to be an action for injury to real property when it flows from an unfounded action to set aside a trustee's sale on the false ground that there was no default under a trust deed [*Wick v. Mattison (1962) 207 Cal. App. 2d 608, 609-610, 24 Cal. Rptr. 677]* .

[b] Construction Defects

Injury to real property includes actions for damage to buildings affixed to real property based on construction defects [*see Foundation Engineers, Inc. v. Superior Court (1993) 19 Cal. App. 4th 104, 111-113, 23 Cal. Rptr. 2d 469]* .

[5] Pleading Requirement for Unlawful Detainer Actions in Limited Civil Cases

Venue in unlawful detainer actions is governed by *Code Civ. Proc. § 392(a)(1)* [*Childs v. Eltinge (1973) 29 Cal. App. 3d 843, 851, 105 Cal. Rptr. 864]* .

Complaints for unlawful detainer actions that are limited civil cases (i.e., damages claimed are $25,000 or less) must state facts, verified by the plaintiff's oath or by the oath of the plaintiff's attorney, showing that the action has been

commenced in the proper court for the trial of the action or proceeding, and showing that the action is an action for an unlawful detainer [*Code Civ. Proc. §§ 86(a)(4), 396a*; *see Code Civ. Proc. § 1161* (unlawful detainer defined)]. Alternatively, the facts may be stated in an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) of the plaintiff or his or her attorney filed with the complaint [*Code Civ. Proc. § 396a(a)*].

For forms and discussion relating to allegation of proper venue in unlawful detainer actions,*see* Ch. 333, *Landlord and Tenant: Eviction Actions* .

[6] Foreclosure of Liens and Mortgages on Real Property

Subject to the courts' power to transfer actions and proceedings as provided in *Code Civ. Proc. §§ 392-404.8*, the county in which the real property, or some part thereof, which is the subject of the action is situated, is the proper county for trial for the foreclosure of all liens and mortgages on real property [*Code Civ. Proc. § 392(a)(2)*]. Under *Code Civ. Proc. § 392(a)(2)*, every judicial, ministerial and executive official act necessary to effect a foreclosure may be performed in any county in which any part of real property is situated [*Goldtree v. McAlister (1890) 86 Cal. 93, 106, 24 P. 801]* .

A complaint in an action to foreclose a mechanic's lien on real property may also seek a personal judgment for the amount of the debt secured by the lien without removing the action from *Code Civ. Proc. § 392(a)(2)*. As long as the complaint also alleges that the defendants against whom the personal judgment is sought also have an interest in the property, and as long as that the interest is subject to the lien, the action is still one to foreclose a lien; therefore it must be tried in the county in which the real property is situated [*Case v. Kirkwood (1931) 119 Cal. App. 207, 211, 6 P.2d 110]* .

[7] Where Cause Arose

[a] Actions for Penalty or Forfeiture

Subject to the courts' power to transfer actions and proceedings as provided by *Code Civ. Proc. §§ 392-404.8*, the county in which the cause, or some part of the cause, arose is the proper county for the trial for the recovery of a penalty or forfeiture imposed by statute [*Code Civ. Proc. § 393*].

If the penalty or forfeiture is imposed for an offense committed on a lake, river, or other stream of water situated in two or more counties, the action may be tried in any county bordering on the lake, river, or stream, and opposite to the place where the offense was committed [*Code Civ. Proc. § 393(a)*].

[b] Actions Against Public Officers

Subject to the power of the court to transfer actions and proceedings as provided by *Code Civ. Proc. §§ 392-404.8*, the county in which the cause, or some part of the cause, arose, is the proper county for the trial against a public officer or person especially appointed to execute his or her duties, for an act done by him or her by virtue of his or her office, or against a person who, by his or her command or in his or her aid, does anything touching the duties of an officer [*Code Civ. Proc. § 393(b)*; *Colusa Air Pollution Control Dist. v. Superior Court (1991) 226 Cal. App. 3d 880, 887-888, 277 Cal. Rptr. 110]* .

Code Civ. Proc. § 393(b) applies to acts by a public officer that directly interfere with the personal rights or property of the person complaining [*Harris v. Alcoholic Bev. Etc. Appeals Bd. (1961) 197 Cal. App. 2d 759, 768, 18 Cal. Rptr. 151]* . For example, *Code Civ. Proc. § 393(b)* would apply in an action against a state agency that deprives the plaintiff of his or her right to do business, and the county where the plaintiff carries on the business and in which he or she will be hurt by the agency's action is the proper county for trial [*Regents of University of California v. Superior Court (1970) 3 Cal. 3d 529, 538, 91 Cal. Rptr. 57, 476 P.2d 457* ; *see Colusa Air Pollution Control Dist. v. Superior Court*

(1991) 226 Cal. App. 3d 880, 888, 277 Cal. Rptr. 110] . However, *Code Civ. Proc. § 393(b)* only applies to affirmative acts, that is, acts done as distinguished from acts threatened. Thus, when a petitioner seeks a writ of prohibition to restrain a state board from taking further action, *Code Civ. Proc. § 393(b)* does not apply [*Harris v. Alcoholic Bev. Etc. Appeals Bd. (1961) 197 Cal. App. 2d 759, 768, 18 Cal. Rptr. 151]* .

[c] "Public Officer" Defined

A "public officer" within the meaning of *Code Civ. Proc. § 393(1)(b)* is not restricted to individuals. Absent a statutory designation of an administrative or enforcement officer, the term "public officer" also includes state agencies, departments, institutions, boards, or other public entities. This is the case even if an entity's individual members are not "public officers," as long as members collectively constitute the entity [*see* *Regents of University of California v. Superior Court (1970) 3 Cal. 3d 529, 537-538, 91 Cal. Rptr. 57, 476 P.2d 457* (giving as an example of an administrative or enforcement officer the Director of Agriculture, who serves as the chief executive of the Department of Agriculture under *Food & Agric. Code § 102*); Director has since been retitled as Secretary by 1993 Stats., ch. 42]. Thus, the governing board of a school district is a "public officer" within the meaning of *Code Civ. Proc. § 393(1)(b)* [*Sutter Union High School Dist. v. Superior Court (1983) 140 Cal. App. 3d 795, 797, 190 Cal. Rptr. 182* ; *see* *Regents of University of California v. Superior Court (1970) 3 Cal. 3d 529, 534-539, 91 Cal. Rptr. 57, 476 P.2d 457* (Regents of the University of California are a "public officer" under *Code Civ. Proc. § 393(1)(b)*)].

[8] Actions Against Personal Representative or Trustee

Except as otherwise provided in *Prob. Code § 17005* (venue for proceedings brought under the Trust Law), when a defendant is sued in an official or representative capacity as executor, administrator, guardian, conservator, or trustee on a claim for the payment of money or for the recovery of personal property, the county that has jurisdiction of the estate that the defendant represents shall be the proper county for the trial of the action [*Code Civ. Proc. § 395.1*; *see Prob. Code § 15000 et seq.* (Trust Law); for discussion of proceedings under the Trust Law, including venue for those proceedings,*see* Ch. 560, *Trusts: Express, Public, Charitable, and Totten Trusts*]. The word "claim" as it is used in *Code Civ. Proc. § 395.1* does not have any technical meaning. It is commonly defined to mean simply a demand for something rightfully or allegedly due. Therefore, application of *Code Civ. Proc. § 395.1* is not limited only to suits on rejected creditor's claims. For example, an action against an administratix and her attorney for the value of tax services performed for an estate is properly brought in the county that has jurisdiction over the estate [*Metzger v. Silverman (1976) 62 Cal. App. 3d Supp. 30, 36-37 , 133 Cal. Rptr. 355]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewEstate, Gift & Trust LawProbateProcedures in ProbateGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsEviction ActionsForcible Entry & Detainer

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Volume 50: Usury thru Verification-Chs. 568-572
Chapter 571 VENUE
PART II. LEGAL BACKGROUND
A. Place of Trial

50-571 California Forms of Pleading and Practice--Annotated § 571.18

§ 571.18 Venue Governed by Party

[1] Domestic Corporations

[a] Principal Place of Business or County Where Cause of Action Arises

A corporation or association may be sued in the county where the contract is made or is to be performed, where the obligation or liability arises, where the breach occurs, or in the county where the corporation's principal place of business is situated, subject to the power of the court to change the place of trial as in other cases [*Code Civ. Proc. § 395.5*].

Code Civ. Proc. § 395.5 governs venue in transitory actions against corporations [*Mission Imports, Inc. v. Superior Court (1982) 31 Cal. 3d 921, 927, 184 Cal. Rptr. 296, 647 P.2d 1075* ; *see* discussion in *§ 571.16* regarding transitory actions]. Its effect is to authorize plaintiffs to sue either at the place where the cause of action arises, or at the corporation's place of business [*Hale v. Bohannon (1952) 38 Cal. 2d 458, 476, 241 P.2d 4* (decided under former *Cal. Const., art. XII, § 16, now see Code Civ. Proc. § 395.5*)]. Although *Code Civ. Proc. § 395.5* appears to be addressing contract actions, it also governs actions sounding in tort [*Mission Imports, Inc. v. Superior Court (1982) 31 Cal. 3d 921, 928, 184 Cal. Rptr. 296, 647 P.2d 1075]* .

The object of *Code Civ. Proc. § 395.5* is to permit an action against a corporation to be brought in a county other than that of the corporation's principal place of business, and thus permit a wider venue than is afforded in actions against individual defendants [*Hale v. Bohannon (1952) 38 Cal. 2d 458, 469, 241 P.2d 4* ; *Mission Imports, Inc. v. Superior Court (1982) 31 Cal. 3d 921, 928, 184 Cal. Rptr. 296, 647 P.2d 1075* ; *Code Civ. Proc. § 395(a)*; *see also* discussion in *§ 571.15[1][a]* regarding alternate venues in contract actions]. Further, the contract provision of *Code Civ. Proc. § 395(a)* is not applicable in an action commenced solely against a corporate defendant, because it would be in direct conflict with *Code Civ. Proc. § 395.5*. Unlike Code Civ. Proc. *§ 395(a), Code Civ. Proc.* § 395.5 allows suit to be brought in the county where the contract is to be performed without any condition that the county must be specified in writing in the contract. Thus, if *Code Civ. Proc. § 395(a)* were applied to these types of actions, it would negate this provision [*see* *Hale v. Bohannon (1952) 38 Cal. 2d 458, 470-473, 241 P.2d 4* (decided under former *Cal. Const., art. XII, § 16, now see Code Civ. Proc. § 395.5*); *see* discussion in *§ 571.16[3]* for rules on contract actions].

For a discussion of how *Code Civ. Proc. § 395(a)* may govern venue in actions in which corporate and individual defendants are joined, *see* the discussion in *§ 571.20[3][b]*.

[b] Where Contract Is Made or to Be Performed

As in the contract provision of *Code Civ. Proc. § 395(a)*, the last act necessary to the validity of the contract, usually the act constituting acceptance, is the place of its making under *Code Civ. Proc. § 395.5*. Further, it is the defendant's performance that is determined under *Code Civ. Proc. § 395.5* [*Jhirmack Enterprises, Inc. v. Superior Court (1979) 96 Cal. App. 3d 715, 723, 158 Cal. Rptr. 192]* . However, unlike Code Civ. Proc. *§ 395(a), Code Civ. Proc.* § 395.5 does not contain any provision for a special contract in writing, and therefore, in an action on the contract of a corporation, where no place of performance is expressly stipulated, it will be held performable in the place where the circumstances, viewed in light of pertinent code provisions, indicate that the parties expected or intended it to be performed [*Burr v. Western States Life Ins. Co. (1931) 211 Cal. 568, 574, 296 P. 273]* . For example, *Com. Code § 2319(1)(a)* indicates that in certain f.o.b. shipments, a seller completes delivery, and no longer bears the risk, when it places goods in the possession of a carrier at the place of shipment. Thus, the place of performance is the county from which shipment is being made. It is not the county in which the shipment is to be delivered to the buyer [*see* *Jhirmack Enterprises, Inc. v. Superior Court (1979) 96 Cal. App. 3d 715, 723, 158 Cal. Rptr. 192* (also holding that the place where the shipment is to be delivered to buyer is not an accurate assessment of the place of breach)]. For a discussion of venue in contract actions in other cases, see the discussion in *§ 571.16[3]*.

[c] Where Obligation or Liability Arises

The place where the contract is made generally is the place where the obligation or liability arises [*Hale v. Bohannon (1952) 38 Cal. 2d 458, 479, 241 P.2d 4]* . Further, *Code Civ. Proc. § 395.5* permits tort claims against a corporation to be tried in any county in which the liability arises. Thus, in an action for wrongful interference with contractual relations when the cause of action is based on an intimidating letter sent to persons in several counties, venue is properly laid in any of the counties in which the plaintiff suffered injury resulting from the letters [*Mission Imports, Inc. v. Superior Court (1982) 31 Cal. 3d 921, 928, 184 Cal. Rptr. 296, 647 P.2d 1075]* .

[d] Where Breach Occurs

In general, the place of performance is also where the breach occurs [*Hale v. Bohannon (1952) 38 Cal. 2d 458, 479, 241 P.2d 4]* . However, it may also occur in the county in which a corporation has its principal place of business, as when the corporation mails a notice of repudiation to plaintiff from its office in that county [*Jhirmack Enterprises, Inc. v. Superior Court (1979) 96 Cal. App. 3d 715, 724, 158 Cal. Rptr. 192]* .

[e] Effect of Alter Ego Allegation

In an action for breach of contract, an alter ego allegation places the individual in the same position as the corporation, as a party to a contract. Venue is then proper where the action could be laid for breach of contract against either the individual or corporate defendant [*Lebastchi v. Superior Court (1995) 33 Cal. App. 4th 1465, 1467, 39 Cal. Rptr. 2d 787]* . If there is only one cause of action alleged against the individual and corporation, the suit does not constitute a "mixed action," which could be transfered to the individual defendant's county of residence [*Lebastchi v. Superior Court (1995) 33 Cal. App. 4th 1465, 1470, 39 Cal. Rptr. 2d 787* (denying change of venue from San Diego County, where corporation entered, performed, and breached contract to Placer County, where individual defendant lived)].

[2] Foreign Corporations

A foreign corporation may invoke *Code Civ. Proc. § 395.5* in the same manner as a domestic corporation, provided the foreign corporation establishes that it has qualified to do business in California under *Corp. Code § 2105* [*see* *Easton*

v. Superior Court (1970) 12 Cal. App. 3d 243, 246, 90 Cal. Rptr. 642 (decided under former *Cal. Const., art. XII, § 16*, now *Code Civ. Proc. § 395.5*, and former Corp. Code § 6403, now *Corp. Code § 2105*); for forms and discussion relating to qualification under *Corp. Code § 2105*, *see* Ch. 160, *Corporations: Capacity*]. The designation of the foreign corporation's principal place of business in California is contained in the statement that it must file with the Secretary of State pursuant to *Corp. Code § 2105* to qualify to do business in the state [*Bohn v. Better Biscuits (1938) 26 Cal. App. 2d 61, 64, 78 P.2d 1177* (decided under former *Civ. Code § 405*, now *Corp. Code § 2105*)]. However, a foreign corporation that does not establish that it has qualified to do business in California under *Corp. Code § 2105* may be sued in any county in the state [*Easton v. Superior Court (1970) 12 Cal. App. 3d 243, 246-247, 90 Cal. Rptr. 642]* .

[3] Unincorporated Associations

An unincorporated association means an unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not [*Corp. Code § 18035* (formerly *Corp. Code § 24000*); *Mosby v. Superior Court (1974) 43 Cal. App. 3d 219, 227, 117 Cal. Rptr. 588]* . Under *Code Civ. Proc. § 395.5* actions may be brought against unincorporated associations in the county where a contract is made, where the obligation or liability arises, or where the breach occurs [*Code Civ. Proc. § 395.5*; *Mosby v. Superior Court (1974) 43 Cal. App. 3d 219, 225, 117 Cal. Rptr. 588]* .

In applying the "liability or obligation" language of *Code Civ. Proc. § 395.5* to a lawsuit seeking to enforce a statutory obligation or liability against an unincorporated association, there is no reason to try to pigeonhole the action into contract, quasi-contract, or tort categories; instead, statutory liability cases should be analyzed independently for purposes of determining proper venue. An action for declaratory relief against an insurer may be commenced in the county where a third party claimant sues, because that is where the insurer's liability arises; the same rule should be applied where the obligation is created by a statute rather than an insurance contract. The "obligation or liability" provision of section 395.5 does not require that the defendant perform any act inside the county for venue to be proper; it merely requires that the obligation arise there [*Black Diamond Asphalt, Inc. v. Superior Court of San Joaquin County (2003) 109 Cal. App. 4th 166, 171, 134 Cal. Rptr. 2d 510]* .

Code Civ. Proc. § 395.5 also provides an alternative to lay venue in the county of the principal place of business, but this alternative applies only to corporations by its terms and does not apply to unicorporated associations [*Mosby v. Superior Court (1974) 43 Cal. App. 3d 219, 225, 117 Cal. Rptr. 588]* . However, if an unincorporated association has filed a statement with the Secretary of State pursuant to *Corp. Code § 18200* (formerly *Corp. Code § 24003*) listing its principal office in California, the proper county for the trial of an action against the unincorporated association is the same as it would be if the unincorporated association were a corporation. Thus, if the unincorporated association has a statement on file, the county of its principal place of business is a proper county for venue. For the purpose of determining the proper county, the principal place of business of the unincorporated association will be deemed to be the principal office in California listed in the statement [*Code Civ. Proc. § 395.2*; *see Code Civ. Proc. § 395.5*; *see* discussion in *§ 571.18[1]* regarding venue governed by actions involving domestic corporations]. For forms and discussion relating to the effect of *Corp. Code § 18200* statements on venue in actions against partnerships,*see* Ch. 402, *Partnerships: Actions Between General Partners and Partnership and Third Parties* . If an unincorporated association has no principal place of business, venue is proper in the county of residence of any member of the association [*Mosby v. Superior Court (1974) 43 Cal. App. 3d 219, 229 n.7, 117 Cal. Rptr. 588]* .

As with corporations, when a plaintiff brings an action against several defendants, including both individuals and unincorporated associations, in a county that is neither the residence nor principal place of business of any defendant, the individual defendant has the right, on a proper showing, to a change of venue to the county of his or her residence even though venue as initially laid may otherwise be justifiable on one of the four alternative grounds provided by *Code Civ. Proc. § 395.5* [*Mosby v. Superior Court (1974) 43 Cal. App. 3d 219, 226, 117 Cal. Rptr. 588* ; *Code Civ. Proc. § 395(a)*; *see* discussion in *§ 571.18[1][a]* regarding principle place of business or county where action arises].

Conversely, however, when an action is brought in the county in which an individual partner resides rather than in the county specified as the principal place of business, the individual partners have no right to a change of venue to the location of the office [*Buran Equipment Co. v. Superior Court (1987) 190 Cal. App. 3d 1662, 1666-1667, 236 Cal. Rptr. 171]* .

[3A] Limited Liability Companies

The statute governing venue for corporations and associations, *Code Civ. Proc. § 395.5*, does not expressly state that this section is applicable to limited liability companies [*see Corp. Code § 17000 et seq.*]. However, the term "association" may be broadly interpreted to include limited liability companies within the scope of *Code Civ. Proc. § 395.5* [*see, e.g., Buran Equipment Co. v. Superior Court (1987) 190 Cal. App. 3d 1662, 1665-1666, 236 Cal. Rptr. 171* (law partnership treated as "association" under related statute)]. As such, the provision of *Code Civ. Proc. § 395.5* and cases interpreting it would likely apply to limited liability companies.

Note that the discussion of unincorporated associations in [3], above, highlights the language of *Code Civ. Proc. § 395.5* that provides for additional venue "[i]n the county where the principal place of business of such corporation is situated ...," and that one court interpreted this alternative to lay venue did not apply to unincorporated associations because the clause only states "corporation" by its own terms [*see Mosby v. Superior Court (1974) 43 Cal. App. 3d 219, 225, 117 Cal. Rptr. 588]* . However, venue for an unincorporated association is the same as a corporation if the unincorporated association has filed a statement with the Secretary of State designating its principal office in California [*Code Civ. Proc. § 395.2*]. Given that a limited liability company must file articles of organization with the Secretary of State [*see Corp. Code § 17050*], it is probable that a limited liability company will be treated like a corporation for venue purposes, but clarification of this issue awaits a judicial decision or amendments to the Code of Civil Procedure and/or Corporations Code.

[4] State or Local Government or Agency

[a] Actions Against State

Unless otherwise designated by statute, the provisions for venue that pertain to other civil actions apply to actions against the state and its agencies [*Regents of University of California v. Superior Court (1970) 3 Cal. 3d 529, 534-535, 91 Cal. Rptr. 57, 476 P.2d 457* ; *see* discussion in *§ 571.16* regarding transitory actions, and § 571.17 regarding local actions]. For example, proceedings for writs of mandate and prohibition to compel a state agency to take or refrain from taking certain action are governed by *Code Civ. Proc. § 393(b)* [*Tharp v. Superior Court (1982) 32 Cal. 3d 496, 500-503, 186 Cal. Rptr. 335, 651 P.2d 1141]* .

There are several statutes covering actions against state agencies, officers, or public entities which operate to override the ordinary venue rules [*Regents of University of California v. Superior Court (1970) 3 Cal. 3d 529, 534-535, 91 Cal. Rptr. 57, 476 P.2d 457]* . For example, under *Code Civ. Proc. § 1060.5*, declaratory actions to establish nonresident tax status can only be commenced in Sacramento, San Francisco, or Los Angeles. Similarly, *Gov. Code § 955* provides that the place of trial of many actions against the state must be changed to Sacramento County on written demand by the Attorney General [*Gov. Code § 955*; *see* discussion in *§ 571.18[4][c]* regarding an action against a state for inverse condemnation, and § 571.18[4][d] regarding an action against a state for money or damages]. However, whenever any law of California provides that an action or proceeding against the state or a department, institution, board, commission, bureau, officer or other agency thereof shall or may be commenced in, tried in, or removed to the County of Sacramento, the same may be commenced and tried in any city or city and county of California in which the Attorney General has an office, that is, in the City and County of San Francisco, Los Angeles County, or Sacramento County [*Code Civ. Proc. § 401(1)*; *Harris v. Alcoholic Bev. Etc. Appeals Bd. (1961) 197 Cal. App. 2d 759, 762, 18 Cal. Rptr. 151]* .

[b] Actions by State

Whenever any law of California provides that the state or a department, institution, board, commission, bureau, officer, or other agency thereof shall or may commence an action or proceeding in Sacramento County, the same, on motion of the defendants or some of them, shall be removed for trial to the county or city and county in which the Attorney General has an office nearest to the county in which the defendants or some of them reside or have their principal office in California [*Code Civ. Proc. § 401(2)*; *see* discussion in *§ 571.18[4*] for discussion of actions against a state or local government agency].

[c] Action Against State for Inverse Condemnation

The proper court for trial of actions against the state for the taking or damaging of private property for public use is a court of competent jurisdiction in the county in which the property is situated [*Gov. Code § 955*].

[d] Action Against State for Money or Damages

Except as provided in *Gov. Code §§ 955.2* and *955.3*, on written demand of the Attorney General made on or before answering, the place of trial in actions other than those for for inverse condemnation shall be changed to Sacramento County [*Gov. Code § 955*]. Because this provision names Sacramento County, *Code Civ. Proc. § 401* applies, and the proper venue is either Sacramento, San Francisco, or Los Angeles [*Harris v. Alcoholic Bev. Etc. Appeals Bd. (1961) 197 Cal. App. 2d 759, 766, 18 Cal. Rptr. 151]* .

This is the general rule of venue in many actions against the state. However, it relates only to actions on claims for money or damages forwhich the filing of a claim is a statutory prerequisite under *Gov. Code §§ 905* (local public entities) and 905.2 (state), or in actions on claims for money or damages which are specifically exempted from the filing requirement, such as the specifically enumerated matters in *Gov. Code §§ 905* and *905.1* [*Tharp v. Superior Court (1982) 32 Cal. 3d 496, 499, 186 Cal. Rptr. 335, 651 P.2d 1141]* . Thus, for example, *Gov. Code § 955* will not support a change of venue in a proceeding for writs of mandate and prohibition to compel a state agency to take or refrain from taking certain action, because the proceeding is not a claim for money or damages for which the filing of a claim is a statutory prerequisite or one that is specifically exempted from the filing requirement [*Tharp v. Superior Court (1982) 32 Cal. 3d 496, 500-503, 186 Cal. Rptr. 335, 651 P.2d 1141* (holding proper statute to be *Code Civ. Proc. § 393(b)*, governing venue in actions against public officers)]. For forms and discussion relating to claims requirements against the state and local public entities,*see Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.20* et seq.

[e] Action for Death or Injury to Person or Personal Property

Notwithstanding any other provision of law, when the state is named as a defendant in any action or proceeding for death or injury to person or personal property and the injury or the injury causing death occurred within the state, the proper court for the trial of the action is a court of competent jurisdiction in the county where the injury occurred or where the injury causing death occurred. The court may, on motion, change the place of the trial in the same manner and under the same circumstances as the place of trial may be changed where an action is between private parties [*Gov. Code § 955.2*].

For forms and discussion relating to claims for money damages against the state for an injury for which it is liable,*see Ch. 464, Public Entities and Officers: California Tort Claims Act, § 464.20* et seq.

[f] Action by Local Government or Agency Against State

Notwithstanding any provision of law, when a city, county, city and county, or local agency is a plaintiff in an action or proceeding against the state, the action may be tried in any city or county, or city and county, where the city, county, city and county, or local agency is situated [*Gov. Code § 955.3*].

The Attorney General may, on behalf of the State of California, before answering, move to change the place of trial to Sacramento County, San Francisco County, or Los Angeles County in accordance with the provisions of *Code Civ. Proc. § 397* [*Gov. Code § 955.3*; *see Code Civ. Proc. § 401* (when proper place of trial is Sacramento, action may be moved to either Sacramento, San Francisco, or Los Angeles)].

For the purposes of *Gov. Code § 955.3*, "local agency" means any governmental district, board or agency, or any other local governmental body or corporation or elected local public official, but shall not include the state or any of its agencies, departments, commissions, or boards, or elected public officials in the executive branch of the state government [*Gov. Code § 955.3*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueCorporationsCivil ProcedureVenueIndividual DefendantsCivil ProcedureVenuePublic OfficialsReal Property LawInverse CondemnationProcedure

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§ 571.19 Actions Involving City or County

[1] Transfer to Neutral County

Code Civ. Proc. § 394 is a mass of cumbersome phraseology [*Kennedy/Jenks Consultants, Inc. v. Superior Court (2000) 80 Cal. App. 4th 948, 953 n.3, 95 Cal. Rptr. 2d 817* ; *Fitzpatrick v. Sonoma County (1929) 97 Cal. App. 588, 590, 276 P. 113]* . Generally, it provides that actions by or against a city, county, or other local government entity must be transferred to a neutral county [*Code Civ. Proc. § 394*; *see San Francisco Foundation v. Superior Court (1984) 37 Cal. 3d 285, 296, 208 Cal. Rptr. 31, 690 P.2d 1* (*Code Civ. Proc. § 394* as mandatory)]. A neutral county is other than that in which the plaintiff is situated, and other than that in which the defendant or defendants reside [*City of Stockton v. Wilson (1926) 79 Cal. App. 422, 424, 249 P. 835]* . The neutral county is selected by the trial court [*Central Contra Costa Sanitary Dist. v. Superior Court (1978) 84 Cal. App. 3d 702, 706, 148 Cal. Rptr. 801]* .

Code Civ. Proc. § 394 is a removal or change of venue statute that comes into operation only when the action is filed in a county that is proper under venue rules [*County of San Bernardino v. Superior Court (1994) 30 Cal. App. 4th 378, 381, 388-389, 35 Cal. Rptr. 2d 760* ; *Dorame v. Superior Court (1978) 81 Cal. App. 3d 70, 72, 146 Cal. Rptr. 162]* . This is confirmed by the proviso "subject to the power of the court to transfer actions and proceedings as provided in this title" contained in *Code Civ. Proc. §§ 392, 393*, and *395*. Thus, these statutes, which specify the proper county for initial filing of an action, are subject to the court's power to transfer under *Code Civ. Proc. § 394* [*County of Riverside v. Superior Court (1968) 69 Cal. 2d 828, 831, 447 P.2d 626* ; *see* discussion in *§ 571.16* regarding transitory actions, and § 571.17 regarding local actions]. Construing *Code Civ. Proc. § 394* to require the plaintiff to commence the case in a venue chosen according to the usual rules precludes the plaintiff from unilaterally choosing venue by selecting the neutral county most satisfactory to it, and allows the court to exercise its discretion not only in selecting an appropriate neutral county, but also with respect to the option of requesting appointment of a neutral judge [*County of San Bernardino v. Superior Court (1994) 30 Cal. App. 4th 378, 388-389, 35 Cal. Rptr. 2d 760]* .

It has been held that *Code Civ. Proc. § 394*, which refers specifically only to plaintiffs and defendants, applies to cross complainants and cross defendants [*Ohio Casualty Ins. Group v. Superior Court (1994) 30 Cal. App. 4th 444, 451, 35 Cal. Rptr. 2d 771* (Third Dist.; criticizing and declining to follow *City of Chico v. Superior Court (1979) 89 Cal. App.*

3d 187, 152 Cal. Rptr. 380 (First Dist. Div. Four)) ; *Kennedy/Jenks Consultants, Inc. v. Superior Court (2000) 80 Cal. App. 4th 948, 956, 95 Cal. Rptr. 2d 817* (First Dist., Div. Five; following *Ohio Casualty*)].

The residence venue provisions in *Code Civ. Proc. § 395(a)* are subordinate to the local venue provisions of *Code Civ. Proc. § 394* in mixed venue cases involving both provisions [*Central Contra Costa Sanitary Dist. v. Superior Court (1978) 84 Cal. App. 3d 702, 705, 148 Cal. Rptr. 801]* . Further, *Code Civ. Proc. § 394* modifies the venue rules in local actions. Thus, eminent domain proceedings properly brought in the county where the property sought to be taken is located may be transferred on a motion by the plaintiff county to a neutral county [*City of Stockton v. Ellingwood (1926) 78 Cal. App. 117, 121, 248 P. 272* ; *see City of Stockton v. Wilson (1926) 79 Cal. App. 422, 424, 249 P. 835* (holding that if land is situated in neutral county, no purpose would be served by transfer to another neutral county); *see Code Civ. Proc. § 1250.020* (venue in eminent domain proceedings)].

[2] Actions by City, County, or Local Agency Against City, County, or Local Agency

An action or proceeding against a county, city and county, city, or local agency, may be tried in that county or city and county, or in the county in which the city or local agency is situated, unless the action or proceeding is brought by a county, city and county, city, or local agency, in which case it may be tried in any county, or city and county, not a party to the action and in which the city or local agency is not situated [*Code Civ. Proc. § 394(a)*].

Thus, a plaintiff, other than a city, county, or other government entity located in the county, is permitted to commence and proceed to trial in an action or proceeding against a city, county, or other government entity, in the defendant county [*Fitzpatrick v. Sonoma County (1929) 97 Cal. App. 588, 276 P. 113]* . However, an action pitting a government entity against another government entity may not be brought in the home county of the plaintiff government entity [*see Westinghouse Electric Corp. v. Superior Court (1976) 17 Cal. 3d 259, 268, 131 Cal. Rptr. 231, 551 P.2d 847]* .

[3] Actions by City, County, or Local Agency Against Resident of or Corporation Doing Business in Another City, County, or Local Agency

[a] General Rule

Whenever an action or proceeding is brought by a county, city and county, city, or local agency within a certain county or city and county, against a resident of another county, city and county, or city, or against a corporation doing business in the latter, the action or proceeding must, on motion of either party, be transferred for trial to a county or city and county, other than the plaintiff, if the plaintiff is a county or city and county, and other than that in which the plaintiff is situated, if the plaintiff is a city or a local agency, and other than that in which the defendant resides, or is doing business, or is situated [*Code Civ. Proc. § 394(a)*; *see Kennedy/Jenks Consultants, Inc. v. Superior Court (2000) 80 Cal. App. 4th 948, 953-964, 95 Cal. Rptr. 2d 817* (applying this provision)].

The determination of whether an action is brought by a county agency within the meaning of *Code Civ. Proc. § 394* depends on the role of that county agency within the lawsuit [*Transamerica Homefirst, Inc. v. Superior Court (1999) 69 Cal. App. 4th 577, 579-580, 81 Cal. Rptr. 2d 705]* . Thus, for example, it has been held that when a district attorney represents the People of the State of California in a red light abatement action pursuant to *Pen. Code § 11226*, the district attorney acts on behalf of the state rather than the county and thus the mandatory transfer provisions of *Code Civ. Proc. § 394(a)* do not apply, so that, red light abatement actions are exempt from the mandatory transfer provisions of *Code Civ. Proc. § 394(a)* [*Nguyen v. Superior Court (1996) 49 Cal. App. 4th 1781, 1784, 1786-1791, 57 Cal. Rptr. 2d 611* (*Code Civ. Proc. § 394(c)* (*see now Code Civ. Proc. § 394(b)*) specifically excludes state action from the mandatory transfer provision; court may still transfer action on showing of prejudice under *Code Civ. Proc. § 397(b)*)]. Similarly, when an action is brought on behalf of a conservatee by the county's public guardian against a nonresident defendant, the action is not one brought by a county agency, within the meaning of section 394, and the action need not

be transferred pursuant to *Code Civ. Proc. § 394(a)* [*Transamerica Homefirst, Inc. v. Superior Court (1999) 69 Cal. App. 4th 577, 579-581, 81 Cal. Rptr. 2d 705]* .

Section 394 provides for an exception for actions initiated by the district attorney under several Welfare and Institutions Code sections relating to paternity and child support [*Code Civ. Proc. § 394(a)*]. These sections, however, have been repealed [*see* Stats. 1999, ch. 478, §§ 8, 9, 24, 33]. The new statutory scheme that replaced those statutes and moved the responsibility for enforcement from the district attorneys to local child support agencies, has a venue provision that applies notwithstanding any other law [*see Fam. Code § 17400(n)*]. For discussion of that provision, *see Ch. 259, Family Law Enforcement: Special Remedies for Support Enforcement, § 259.153[4][d]*.

Where a local agency files a compulsory cross-complaint asserting a claim in the county where it resides against a nonresident of that county, the cross-defendant has the right to move for a change of venue pursuant to *Code Civ. Proc. § 394* [*Metropolitan Transit System v. Superior Court (2007) 153 Cal. App. 4th 293, 304, 62 Cal. Rptr. 3d 517]* .

[b] Corporate Defendants

Code Civ. Proc. § 394(a) applies whenever an action or proceeding is brought by a county, city and county, city, or local agency within a certain county or city and county, against a corporation doing business in the latter [*Code Civ. Proc. § 394(a)*]. However, a defendant corporations's rights under *Code Civ. Proc. § 394* may be barred because of the existence, nature, and extent of its activities within the forum county. Activities sufficient to raise this bar are referred to in *Code Civ. Proc. § 394* as "doing business" within the county [*San Francisco Foundation v. Superior Court (1984) 37 Cal. 3d 285, 297-298, 208 Cal. Rptr. 31, 690 P.2d 1]* . Whether a corporation is "doing business" is not determined by the minimum-contacts test used to establish jurisdiction. Nor is merely holding oneself out to others as engaged in the selling of goods or services sufficient [*Westinghouse Electric Corp. v. Superior Court (1976) 17 Cal. 3d 259, 270, 131 Cal. Rptr. 231, 551 P.2d 847]* . Instead, "doing business" is defined in light of the purposes of *Code Civ. Proc. § 394*, and thus the standard turns on the extent to which the corporation is viewed as an outsider by the community [*San Francisco Foundation v. Superior Court (1984) 37 Cal. 3d 285, 298, 208 Cal. Rptr. 31, 690 P.2d 1* ; *see Kennedy/Jenks Consultants, Inc. v. Superior Court (2000) 80 Cal. App. 4th 948, 957-958, 95 Cal. Rptr. 2d 817]* .

The test is whether a corporation's activities are such that the corporation is reasonably likely to be viewed as an outsider, not whether it is actually so viewed. Thus, a corporation is doing business in the community for purposes of *Code Civ. Proc. § 394* only if its activities in the county are substantial enough that the corporation can reasonably be viewed as being intimately identified with the affairs, or closely associated with the people of the community [*San Francisco Foundation v. Superior Court (1984) 37 Cal. 3d 285, 299, 208 Cal. Rptr. 31, 690 P.2d 1* ; *Westinghouse Electric Corp. v. Superior Court of Alameda County (1976) 17 Cal. 3d 259, 271 n.7, 131 Cal. Rptr. 231, 551 P.2d 847]* . For example, it may become intimately identified with the affairs of a community, and closely associated with the people of the community if it owns a farm in the communtiy and grows products on the farm rather than engaging in carrying on a store or conducting a mill or foundry in the same community [*Westinghouse Electric Corp. v. Superior Court (1976) 17 Cal. 3d 259, 270, 131 Cal. Rptr. 231, 551 P.2d 847]* . It is the quality of the business connections, however, and not their quantity or duration, that determines whether a party is doing business locally. The qualitative analysis must focus on whether the types of contacts with the county are substantial enough for the company to be reasonably viewed as closely associated with the community [*Kennedy/Jenks Consultants, Inc. v. Superior Court (2000) 80 Cal. App. 4th 948, 961, 95 Cal. Rptr. 2d 817]* . If the defendant corporation is thus viewed as closely related to the communtiy, there is less likelihood of the local bias that *Code Civ. Proc. § 394* is designed to prevent [*San Francisco Foundation v. Superior Court (1984) 37 Cal. 3d 285, 299, 208 Cal. Rptr. 31, 690 P.2d 1]* .

Moreover, the relevant inquiry under *Code Civ. Proc. § 394* includes an analysis of the nature of the litigation as well as the activities of the party seeking a change of venue. When the nature of the case poses a reasonable risk that the defendant would be viewed as an outsider, a change of venue under *Code Civ. Proc. § 394(a)* is proper [*see* *San Francisco Foundation v. Superior Court (1984) 37 Cal. 3d 285, 299-301, 208 Cal. Rptr. 31, 690 P.2d 1* ;

Kennedy/Jenks Consultants, Inc. v. Superior Court (2000) 80 Cal. App. 4th 948, 963-964, 95 Cal. Rptr. 2d 817] .

[4] Actions Against City, County, or Local Agency

Whenever an action or proceeding is brought against a county, city and county, city, or local agency, in any county or city and county, other than defendant if the defendant is a county or city and county, or, if the defendant is a city, or local agency, other than that in which defendant is situated, the action or proceeding must be, on motion of the defendant, transferred for trial to a county, or city and county, other than that in which the plaintiff, or any of the plaintiffs, resides, is doing business, or is situated, and other than the plaintiff county, city and county, or county in which the plaintiff city or local agency is situated [*Code Civ. Proc. § 394(a)*].

This provision of *Code Civ. Proc. § 394(a)* contains a proviso that states that any action or proceeding against the city, county, city and county, or local agency for injury occurring within the city, county, or city and county, or within the county in which the local agency is situated, to person or property caused by the negligence or alleged negligence of such city, county, city and county, local agency, or its agents or employees, shall be tried in that county, or city and county, or if a city is a defendant, in that city or in the county in which the city is situated, or if a local agency is a defendant, in the county in which the local agency is situated [*Code Civ. Proc. § 394(a)*]. This provision is an exception to the general venue statute (*Code Civ. Proc. § 395*), which permits venue either in the county where the injury occurs or the injury causing death occurs or the county in which the defendants, or some of them, reside at the commencement of the action. For example, if a plaintiff sues both a county and individual defendants who reside outside the county for injuries occurring within the county, *Code Civ. Proc. § 394* requires the suit to be tried in defendant county, even though the general venue rules would have permitted trial in the county where the individual defendants reside [*County of Orange v. Superior Court (1999) 73 Cal. App. 4th 1189, 1192-1193, 86 Cal. Rptr.2d 923]* . Despite the mandatory language of this particular provision of *Code Civ. Proc. § 394(a)*, a plaintiff may nevertheless seek and obtain a change of venue to another county under the discretionary provision of *Code Civ. Proc. § 397(b)* [*see Paesano v. Superior Court (1988) 204 Cal. App. 3d 17, 19-20, 250 Cal. Rptr. 842* ; *see § 571.100* for form and discussion in *§ 571.34*].

If a plaintiff sues a county or local agency for injuries occurring within the county where the public agency is located, *Code Civ. Proc. § 394* requires the suit to be tried in the defendant county; and Section 394 unequivocally provides that an action brought against a county or local governmental agency for personal injuries occurring in the county must be brought in that county [*Ventura Unified School District v. Superior Court (2001) 92 Cal. App. 4th 811, 814, 112 Cal. Rptr. 2d 260]* . However, despite the mandatory language of Section 394, the right to transfer may be waived if there is unreasonable delay [*Ventura Unified School District v. Superior Court (2001) 92 Cal. App. 4th 811, 814, 112 Cal. Rptr. 2d 260* , citing *Newman v. County of Sonoma (1961) 56 Cal. 2d 625, 627-628, 15 Cal. Rptr. 914]* .

[5] Stipulation as to Place of Trial

In actions referred to in *Code Civ. Proc. § 394*, the parties may, by stipulation in writing, or made in open court, and entered in the minutes, agree on any county, or city and county, for the place of trial thereof [*Code Civ. Proc. § 394(a)*; *Newman v. County of Sonoma (1961) 56 Cal. 2d 625, 627, 15 Cal. Rptr. 914, 364 P.2d 850]* .

[6] Assignment of Disinterested Judge in Lieu of Transfer

When the action or proceeding is one in which a jury is not of right, or in case a jury is waived, then in lieu of transferring the cause the court in the original county may request the chairman of the Judicial Council to assign a disinterested judge from a neutral county to hear the cause and all proceedings in connection with it [*Code Civ. Proc. § 394(a)*].

This clause of *Code Civ. Proc. § 394(a)* applies only to actions between the governmental agencies specified in Section

394. The right of a governmental entity that lacks or waives any right to jury trial to have an action transferred or a disinterested judge assigned under Section 394 is not affected by the presence of another party plaintiff who has a right to jury trial. Section 394 does not require an action involving nongovernmental parties plaintiff to be transferred to a different county, so when plaintiffs include both a governmental entity and nongovernmental parties against another governmental entity, the court retains the option of either transferring the case to another county or requesting the assignment of a disinterested judge even though the nongovernmental plaintiff has a right to a jury trial. It is error for the court to deny the governmental entities' motion based on the presence of the nongovernmental party in the action [*see Brennan v. Superior Court (1994) 30 Cal. App. 4th 454, 460-462, 35 Cal. Rptr. 2d 693]* .

[7] "Local Agency" Defined

For the purposes of *Code Civ. Proc. § 394*, "local agency" shall mean any governmental district, board, or agency, or any other local governmental body or corporation, but shall not include the State of California or any of its agencies, departments, commissions or boards [*Code Civ. Proc. § 394(b)*].

[8] Motion to Transfer

[a] Procedure

The procedural requirements of *Code Civ. Proc. § 396b(a)*, governing motions for change of venue generally, do not govern a motion made pursuant to *Code Civ. Proc. § 394* [*Channell v. Superior Court (1964) 226 Cal. App. 2d 246, 252, 38 Cal. Rptr. 13]* . For example, *Code Civ. Proc. § 394* does not prescribe a time within which a motion for transfer to a neutral county must be made, as long as it is made within a reasonable time [*Adams v. Superior Court (1964) 226 Cal. App. 2d 365, 367, 38 Cal. Rptr. 164]* . Thus, the motion need not be made at the time of answer to a complaint or cross complaint as required by *Code Civ. Proc. § 396b(a)*, but may be made within a reasonable time thereafter [*Marin Community College Dist. v. Superior Court (1977) 72 Cal. App. 3d 719, 723, 140 Cal. Rptr. 310]* . Similarly, the motion to transfer may be made either before or a reasonable time after a demurrer has been heard and submitted for decision. However, if the motion is made after the demurrer has been heard and submitted to the court, the issues of law raised by the demurrer may be decided by the original court, and the moving party waives his or her right to have them transferred with the action to a neutral county [*see Adams v. Superior Court (1964) 226 Cal. App. 2d 365, 367-369, 38 Cal. Rptr. 164]* .

Although a motion to transfer under *Code Civ. Proc. § 394* need only be made within a reasonable time, the right to a change of venue may be waived for lack of diligence in prosecuting the motion. Thus, the failure of a party to assert his or her right to a transfer until after a demurrer has been submitted for decision constitutes a waiver of the right as it applies to the trial of the issues of law raised by the demurrer [*Adams v. Superior Court (1964) 226 Cal. App. 2d 365, 368-369, 38 Cal. Rptr. 164]* . Generally, however, the motion will not be denied on the ground that it is untimely unless it is pursued for dilatory purposes and unless the government entity can show substantial prejudice [*Marin Community College Dist. v. Superior Court (1977) 72 Cal. App. 3d 719, 723, 140 Cal. Rptr. 310]* .

[b] Burden of Proof

The burden of proof justifying a change of venue rests on the moving party [*Los Angeles v. Pac. Tel. & Tel. Co. (1958) 164 Cal. App. 2d 253, 260, 330 P.2d 888]* . However, the moving party is not required to show possible prejudice [*City of Alameda v. Superior Court (1974) 42 Cal. App. 3d 312, 317, 116 Cal. Rptr. 806]* . Nor is a defendant in an action brought by a city, county, or other government entity required to prove which counties are residences of other individual defendants, or places of business of corporate defendants. Thus, a defendant is only required to show (1) that the proceeding was brought in the county in which plaintiff government entity was situated, and (2) that the defendant lived in another county [*City of Oakland v. Darbee (1951) 102 Cal. App. 2d 493, 500, 227 P.2d 909]* . Once the moving party has met his or her burden, change of venue to a neutral county is mandatory [*see San Francisco Foundation v. Superior Court (1984) 37 Cal. 3d 285, 296, 208 Cal. Rptr. 31, 690 P.2d 1* (noting

mandatory change of venue provision in *Code Civ. Proc. § 394*); *see Code Civ. Proc. § 394* (second and third provisions stating that action must be transferred on motion)]. One court has stated the rule as being that under *Code Civ. Proc. § 394* prejudice is presumed and the granting of the motion is mandatory unless the trial court finds that the nonmoving party would suffer actual prejudice from the requested change of venue [*Ohio Casualty Ins. Group v. Superior Court (1994) 30 Cal. App. 4th 444, 452, 35 Cal. Rptr. 2d 771* (*dicta*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueCorporationsCivil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedureJudicial OfficersJudgesGeneral OverviewGovernmentsLocal GovernmentsClaims By & Against

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Chapter 571 VENUE
PART II. LEGAL BACKGROUND
A. Place of Trial

50-571 California Forms of Pleading and Practice--Annotated § 571.20

§ 571.20 Effect of Joinder on Venue

[1] Mixed Actions

Mixed venue actions occur when a plaintiff alleges two or more causes of action, each of which is governed by a different venue statute, or when two or more defendants are named who are subject to different venue standards [*Brown v. Superior Court (1984) 37 Cal. 3d 477, 488, 208 Cal. Rptr. 724, 691 P.2d 272* ; *see also Gallin v. Superior Court (1991) 230 Cal. App. 3d 541, 544, 281 Cal. Rptr. 304]* . These situations should be distinguished from cases in which there is only one cause of action, but different forms of relief are sought, thereby calling for application of the main relief rule [*see Smith v. Smith (1891) 88 Cal. 572, 576, 26 P. 356* (holding that defendant entitled to have action tried in his or her place of residence if plaintiff either joins a cause of action covered by *Code Civ. Proc. § 392* with one that is not so covered, or also seeks a remedy on matters not embraced by the statute); *see also § 571.15[3]* for discussion of Main Relief Rule].

A distinction must also be made in cases in which the complaint sets forth only one cause of action, but states several different legal theories labelled as separate causes of action. For example, in one case plaintiffs' complaint contained "causes of action" for breach of contract, conversion of certain structures and improvements, restoration and reinstallment of the improvements, and waste. The court, however, held that these were not separate causes of action, but alternative methods of pleading the plaintiffs' right to recover a money judgment for an alleged breach of a lease agreement. Therefore, because the plaintiffs had alleged but one wrong, the main relief rule was applied [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 605, 328 P.2d 953* ; *Foundation Engineers, Inc. v. Superior Court (1993) 19 Cal. App. 4th 104, 109-113, 23 Cal. Rptr. 2d 469* (and cases cited therein)].

When two or more inconsistent venue provisions apply in same case, a defendant's motion for change of venue must be granted if that defendant is entitled to a change of venue on any one cause of action. For instance, involuntary dissolution of a corporation is a local action, for which the proper venue is the county in which the corporation maintains its principal office. Thus, in an action for involuntary dissolution of a corporation, the corporation was entitled to have venue changed to the county in which it maintained its principal office, even though venue was proper as to nine other causes of action [*Capp Care, Inc. v. Superior Court (1987) 195 Cal. App. 3d 504, 508, 241 Cal. Rptr.*

741] .

[2] Joinder of Causes of Action

When transitory and local causes of action are joined in a single complaint, the general rule is that the action will be regarded as transitory in determining the place of trial [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 605, 328 P.2d 953* ; *see* discussion in *§ 571.16* regarding transitory actions, and § 571.17 regarding local actions]. A plaintiff cannot, by uniting in the complaint matters that form the subject of a transitory action with matters that form subject of a local action, compel the defendant to have both matters tried in a county other than that in which the defendant resides [*Smith v. Smith (1891) 88 Cal. 572, 576, 26 P. 356* ; *Channell v. Superior Court (1964) 226 Cal. App. 2d 246, 251, 38 Cal. Rptr. 13]* . Thus, if an action contains both a transitory cause of action and a local cause of action, the defendant is entitled to have the proceeding transferred to the county of his or her residence [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 605, 328 P.2d 953* ; *see* discussion in *§ 571.17[3]* regarding an action is not local if the title or possession is incidentally involved]. For discussion relating to the permissive joinder of actions generally,*see* Ch. 123, *Complaints and Cross Complaints* .

[3] Joinder of Defendants

[a] General Rule

When there are several defendants who reside in different counties, the plaintiff has the option and the right to commence the action in a county where any one of the defendants may reside [*Taff v. Goodman (1940) 41 Cal. App. 2d 771, 776, 107 P.2d 431* ; *Code Civ. Proc. § 395(a)*]. Thus, the defendant is not entitled to have an action removed to the county of his or her residence unless it appears that none of the other defendants are residents of the county where the action was brought. Even when all of the defendants join in a demand for or consent to a change of venue, the cause will be retained if the complaint attempts, in apparent good faith, to state a cause of action against a defendant who resides in the county where the action was commenced. Further, the fact that another and principal defendant resides in another county is immaterial when the defendant who resides in the county in which the action is brought is a necessary and proper party defendant [*Monogram Co. v. Kingsley (1951) 38 Cal. 2d 28, 30, 237 P.2d 265]* .

The plaintiff cannot join as defendants those who are not real parties in interest merely for the purpose of obtaining trial in the county of their residence [*see Code Civ. Proc. § 395(a)*; *Neet v. Holmes (1942) 19 Cal. 2d 605, 612, 122 P.2d 557]* .

The test to determine whether the resident defendant has been joined solely for the purpose of having the action tried in the county of his or her residence is whether the plaintiff had a cause of action against him or her [*Russello v. Mori (1957) 153 Cal. App. 2d 828, 830, 315 P.2d 343* ; *Taff v. Goodman (1940) 41 Cal. App. 2d 771, 776, 107 P.2d 431]* . If not, it is sufficient evidence to support the finding that the defendant was joined for the purpose of having the trial in a certain county [*Taff v. Goodman (1940) 41 Cal. App. 2d 771, 776, 107 P.2d 431]* . However, the issue is determined from examination of the pleadings before the court, and a cause of action purported to be stated against the defendant which is apparently pleaded in good faith is sufficient if it is not, prima facie, so glaringly and vitally defective as to be beyond correction by amendment [*Russello v. Mori (1957) 153 Cal. App. 2d 828, 830, 315 P.2d 343]* .

For a discussion relating to the joinder of parties generally,*see* Ch. 395, *Parties* .

[b] Individual and Corporate Defendants Joined

The general rules governing the effect of joinder of defendants on venue applies whether the defendants are individuals or corporations. Hence, the plaintiff may fix venue at the residence of either the individual or the corporation in an action stated against both, as long as joinder is in conformity with the statutes [*Dillman v. Superior Court (1962) 205 Cal. App. 2d 769, 772, 23 Cal. Rptr. 498* ; *Code Civ. Proc. § 395(a)*]. For example, when a corporation and an

individual are properly joined as defendants, and the action is commenced in a county where the corporation has its principal place of business, but which is not the county of the individual defendant's residence, the individual defendant may not have the action moved to the county of his or her residence based on *Code Civ. Proc. § 395(a)* [*Hale v. Bohannon (1952) 38 Cal. 2d 458, 472, 241 P.2d 4]* . The principal place of business of a corporation is its residence under *Code Civ. Proc. § 395(a)*, and the preference for residence venue under *Code Civ. Proc. § 395(a)* is satisfied when venue is laid in that county [*McClung v. Watt (1922) 190 Cal. 155, 158-159, 211 P. 17* ; *see* discussion in *§ 571.16* regarding transitory actions].

However, when a plaintiff joins an individual defendant with a corporate defendant, the plaintiff waives the benefit of *Code Civ. Proc. § 395.5*, at least in so far as the individual defendant is concerned [*Walker v. Wells Fargo Bk. & U. T. Co. (1937) 24 Cal. App. 2d 220, 222, 74 P.2d 849* (decided under former Cal. Const., art. XXI, § 16)]. Thus, if an action is commenced in a county that, although proper venue as to the corporate defendant under *Code Civ. Proc. § 395.5* (that is, where the contract was made or is to be performed, where the obligation or liability arises, or where the breach occurs), is not a proper place of trial for the individual defendant, the latter is entitled, under *Code Civ. Proc. § 395(a)*, to a change of venue of the entire case to the county of his or her residence [*State v. Superior Court of Los Angeles County (1967) 252 Cal. App. 2d 637, 642, 60 Cal. Rptr. 653* ; for discussion of venue relating to corporate defendants generally,*see § 571.18[1]*].

[c] State and Corporate Defendants Joined

A plaintiff waives the procedural rights granted by *Code Civ. Proc. § 395.5* by joining the state and a corporation as defendants in an action for personal injuries because *Gov. Code § 955.2* (venue in actions against state or state agency for death or injury to a person or personal property), by its terms, takes precedence [*State v. Superior Court of Los Angeles County (1967) 252 Cal. App. 2d 637, 643, 60 Cal. Rptr. 653]* . For a discussion relating to venue in actions involving the state or state agencies generally, *see* the discussion in *§ 571.18[4]* for actions against a state or local government agency.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueCorporationsCivil ProcedureVenueIndividual DefendantsCivil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedurePartiesJoinderGeneral OverviewCivil ProcedureJoinder of Claims & RemediesClaims

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[Reserved]

§§ 571.21[Reserved]

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§ 571.30 Governing Law

Motions for change of venue are specifically governed by *Code Civ. Proc. §§ 396a, 396b, 397,* and *398*. Noticed motions in general are governed by *Code Civ. Proc. §§ 1010-1020,* and *Cal. Rules of Ct., Rules 3.1100-3.1390*. *Code Civ. Proc. § 399* sets forth the procedure for transmitting the pleadings and papers to other court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral Overview

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§ 571.31 Grounds for Motion for Change of Venue

The court may, on motion, change the place of trial in the following cases:

- When the court designated in the complaint is not the proper court [*Code Civ. Proc. § 397(a)*].
- When there is reason to believe that an impartial trial cannot be had therein [*Code Civ. Proc. § 397(b)*].
- When the convenience of witnesses and the ends of justice would be promoted by the change [*Code Civ. Proc. § 397(c)*].
- When from any cause there is no judge of the court qualified to act [*Code Civ. Proc. § 397(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferConvenience of PartiesCivil ProcedureVenueMotions to TransferConvenience of WitnessesCivil ProcedureVenueMotions to TransferInterests of JusticeCivil ProcedureJudicial OfficersJudgesGeneral Overview

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§ 571.32 Action Commenced in Wrong Court

[1] Notice of Motion

Except as otherwise provided in *Code Civ. Proc. § 396a*, if an action or proceeding is commenced in a court other than the court designated as the proper court for the trial thereof by *Code Civ. Proc. §§ 392-404.8*, the defendant may, at the time he or she answers, demurs, or moves to strike, or, at his or her option, without answering, demurring, or moving to strike and within the time otherwise allowed to respond to the complaint, file with the clerk a notice of motion for an order transferring the action or proceeding to the proper court, together with proof of service, on the adverse party, of a copy of such papers [*Code Civ. Proc. § 396b(a)*; *see Code Civ. Proc. § 397(1)* (court may change place of trial when court designated in complaint is not proper court); *see Otsuka v. Balangue (1949) 92 Cal. App. 2d 788, 790, 208 P.2d 65* (holding that service rather than proof of service vests trial court with jurisdiction to act; technical objection to language of affidavit of proof of service disapproved); for discussion of the *Code Civ. Proc. § 396a* exception,*see § 571.45* regarding actions involving installment or automotive sales, consumer obligations, or unlawful detainer]. Alternatively, the parties may first wish to consider entering a stipulation to change venue [*see § 571.105* and discussion in *§ 571.32[2]* regarding expenses and attorney's fees].

A defendant has an absolute right to have an action that is brought against him or her tried in the county where he or she resides, but not in the remedy that secures that right. Thus, the defendant waives the right to have the action tried in the county of his or her residence unless he or she follows the procedure in *Code Civ. Proc. §§ 396b(a)* and *397* [*Bohn v. Bohn (1913) 164 Cal. 532, 535, 129 P. 981* ; *see* discussion in *§ 571.16* regarding transitory actions]. For forms and discussion relating to proof of service by mail,*see* Ch. 518, *Service of Summons and Papers* . For a discussion of the required showing by defendant to support a motion for change of venue based on Code Civ. Proc. §§ 396ba and *397(a)*, *see* the discussion in *§ 571.40[2][b]* regarding actions commenced in the wrong court.

On the hearing of a motion for an order transferring the action or proceeding to the proper court, the court shall, if it appears that the action or proceeding was not commenced in the proper court, order the action or proceeding transferred to the proper court [*Code Civ. Proc. § 396b(a)*; *see § 571.41* regarding selection of transferee court].

[2] Expenses and Attorney's Fees

In its discretion, the court may order the payment to the prevailing party of reasonable expenses and attorney's fees incurred in making or resisting the motion to transfer whether or not that party is otherwise entitled to recover his or her costs in the action. In determining whether an order for expenses and fees shall be made, the court shall take into consideration (1) whether an offer to stipulate to change of venue was reasonably made and rejected, and (2) whether the motion or selection of venue was made in good faith given the facts and law the party making the motion or selecting the venue knew or should have known. As between the party and his or her attorney, the expenses and fees shall be the personal liability of the attorney not chargeable to the party [*Code Civ. Proc. § 396b(b)*; *see also Lieppman v. Lieber (1986) 180 Cal. App. 3d 914, 919, 225 Cal. Rptr. 845* (imposition of sanctions as proper under *Code Civ. Proc. § 128.5* against party who makes frivolous motion for change of venue under *Code Civ. Proc. § 397(3)*; *see* discussion in *§ 571.33*, regarding convenience of witnesses and ends of justice].

Section 396b(b) sanctions may not be imposed except on notice contained in a party's papers, or on the court's own noticed motion, and after opportunity to be heard [*Code Civ. Proc. § 396b(b)*].

If the motion or opposition to it is frivolous or otherwise improper, sanctions may also be available under the general provisions of *Code Civ. Proc. §§ 128.5* (sanctions for frivolous tactics for cases filed before 1995) and 128.7 (sanctions for frivolous tactics in actions commenced in 1995 through 2005 unless the legislature changes the ending date). For discussion of sanctions under these statutes,*see* Ch. 510, *Sanctions* .

The court may award attorney's fees under *Code Civ. Proc. § 396b(b)* if, after reviewing the factual and legal presentation made by the losing party, it finds that no reasonable attorney would have honestly chosen the forum, and that it appears to have been selected to impair the defendant's right to defend. The attorney must carefully investigate the facts with a view to determining which court is proper. This task is complete when, following a thorough investigation, the attorney has an honest and reasonable belief that his or her client has a tenable contention, and the attorney believes that he or she can establish the existence of facts supporting the choice of venue to the satisfaction of the court. An attorney is expected to possess knowledge of those plain and elementary principles of law that are commonly known by well-informed attorneys, and to discover those additional rules of law that, although not commonly known, may be readily found by standard research techniques [*Metzger v. Silverman (1976) 62 Cal. App.3d Supp. 30, 38-39 , 133 Cal. Rptr. 355* ; *Cacciaguidi v. Superior Court (1990) 226 Cal. App. 3d 181, 276 Cal. Rptr. 465* (declining to award attorney's fees on issuing writ of mandate to compel trial court to grant motion when trial court had found real parties' arguments "inventive" and "compelling" and had denied the motion)].

[3] Pleading After Motion Denied

If the motion to transfer is denied, the court shall allow the defendant time to move to strike, demur, or otherwise plead if the defendant has not previously filed a response [*Code Civ. Proc. § 396b(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedurePleading & PracticeDefenses, Demurrers & ObjectionsGeneral OverviewCivil ProcedureJudicial OfficersJudgesDiscretionCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral Overview

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50-571 California Forms of Pleading and Practice--Annotated § 571.33

§ 571.33 Convenience of Witnesses and Ends of Justice

Unlike a motion to change venue based on *Code Civ. Proc. § 397(a)*, there is no statutory procedure relating to the filing of a notice of motion to change venue under *Code Civ. Proc. § 397(c)* based on the ground that the convenience of witnesses and the ends of justice would be promoted [*Thompson v. Superior Court (1972) 26 Cal. App. 3d 300, 306, 103 Cal. Rptr. 94* ; *see Code Civ. Proc. §§ 396b* (procedure for noticed motion and hearing when action not commenced in proper court), 397(a) (on motion, court may change place of trial when the court designated in the complaint is not the proper court); *see* discussion in *§ 571.32[1]* regarding notice of motion for an action commenced in a wrong court]. However, it does appear that *Code Civ. Proc. § 1010* (requisites of written notice) governs notices of motion made under *Code Civ. Proc. § 397(c)* [*see* *Willingham v. Pecora (1941) 44 Cal. App. 2d 289, 295, 112 P.2d 328* ; for form,*see § 571.100*].

There is no express time limit within which a notice of motion for change of venue based on *Code Civ. Proc. § 397(3)* must be made. However, it must be made within a reasonable time after the answer is filed [*Cooney v. Cooney (1944) 25 Cal. 2d 202, 208, 153 P.2d 334* ; *Thompson v. Superior Court (1972) 26 Cal. App. 3d 300, 306, 103 Cal. Rptr. 94]* . The court cannot entertain a motion for a change of venue on the ground of convenience of witnesses when the defendant has not yet filed an answer, because until the issues are joined, the court cannot determine what testimony will be material [*Johnson v. Superior Court (1965) 232 Cal. App. 2d 212, 214, 42 Cal. Rptr. 645]* . For similar reasons, the court cannot entertain a *Code Civ. Proc. § 397(3)* motion when the defendant has appeared only by demurrer [*Russello v. Mori (1957) 153 Cal. App. 2d 828, 832, 315 P.2d 343]* .

The court should not grant a *Code Civ. Proc. § 397(3)* motion unless both the convenience of the witnesses will be served and the ends of justice will be promoted [*Lieberman v. Superior Court (1987) 194 Cal. App. 3d 396, 401, 239 Cal. Rptr. 450* ; *Pearson v. Superior Court (1962) 199 Cal. App. 2d 69, 77, 18 Cal. Rptr. 578]* . In ruling on the motion, the court will normally consider the convenience only of witnesses who are neither parties to the action nor the employees of a party [*see* *Lieberman v. Superior Court (1987) 194 Cal. App. 3d 396, 401, 239 Cal. Rptr. 450* ; *Dillman v. Superior Court (1962) 205 Cal. App. 2d 769, 773, 23 Cal. Rptr.498* ; *Harden v. Skinner & Hammond (1955) 130 Cal. App. 2d 750, 754, 279 P.2d 978* ; *see also* *Peiser v. Mettler (1958) 50 Cal. 2d 594, 611, 328 P.2d 953* (convenience of expert witnesses as not considered except when they have personal knowledge of facts on which their

testimony is to be based)].

An exception to the rule prohibiting consideration of convenience to a party exists when the serious illness of a party will prevent his or her traveling to attend the trial in the other county and when his or her testimony is material [*Lieberman v. Superior Court (1987) 194 Cal. App. 3d 396, 401, 239 Cal. Rptr. 450]* . Likewise, a limited exception allows the court to consider the convenience of witnesses who are employees of a party when the employees are called as witnesses by the adverse party rather than on behalf of their employer [*Lieberman v. Superior Court (1987) 194 Cal. App. 3d 396, 401-402, 239 Cal. Rptr. 450]* . In *Lieberman*, however, the latter exception was held to be inapplicable because the trial court had erroneously granted the cross defendant's motion to change venue of the action for the convenience of its own employees who were to be called as witnesses to establish its defense to the cross complaint. Additionally, the trial court erroneously granted the cross complainant's motion to change venue for the convenience of the same witnesses because the employees would be called to testify by the cross defendant and would be available at that time to the cross complainant [*Lieberman v. Superior Court (1987) 194 Cal. App. 3d 396, 402-403, 239 Cal. Rptr. 450]* .

The moving party will meet part of his or her burden by showing that the proposed testimony of the witnesses is admissible, relevant, and material to some issue in the case, and that it will be inconvenient for the witnesses to attend trial [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 607, 328 P.2d 953* ; *Willingham v. Pecora (1941) 44 Cal. App. 2d 289, 293, 112 P.2d 328]* . The issue considered by the court is the convenience of witnesses in attending trial as opposed to the places of their actual residences [*Willingham v. Pecora (1941) 44 Cal. App. 2d 289, 293, 112 P.2d 328]* . The witnesses' residence is not determinative, but convenience may be shown by the fact that all the witnesses reside in the county to which the transfer is requested. Further, inconvenience may be presumed from the witnesses' distance from the county where trial is commenced [*Pearson v. Superior Court (1962) 199 Cal. App. 2d 69, 77, 18 Cal. Rptr. 578]* . For a discussion of the moving party's burden of proof under *Code Civ. Proc. § 397(c)*, see the discussion in *§ 571.40[2][c]*.

The moving party may show that the ends of justice will be promoted by demonstrating that delay and expense in court proceedings will be avoided and savings in the witnesses' time and expenses will be affected [*Pearson v. Superior Court (1962) 199 Cal. App. 2d 69, 77, 18 Cal. Rptr. 578* ; *Harden v. Skinner & Hammond (1955) 130 Cal. App. 2d 750, 754, 279 P.2d 978]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 571.34 Impartial Trial Cannot Be Had

Apparently, a motion based on *Code Civ. Proc. § 397(b)* must be made after the answer has been filed [*Cook v. Pendergast (1882) 61 Cal 72, 79]* . It may even be required that the motion be filed after a jury has been impaneled [*see J.I. Case T. Co. v. Copren Bros. (1917) 35 Cal. App. 70, 79, 169 P. 443* (court expressly stating that it did not so hold, but that it knew of no case when there had not been one trial or when some effort had not been made to obtain a jury)]. However, one court has held that there is no necessity to hold a decision on a motion in abeyance until an attempt to secure a fair and impartial jury had been made if, at the hearing, there appears sufficient reason to believe that an impartial trial cannot be had [*People v. Ocean Shore Railroad, Inc. (1938) 24 Cal. App. 2d 420, 427, 75 P.2d 560]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 571.35 No Judge Qualified to Act

The place of trial may be changed when the judges of the court in which the action is brought are disqualified to try the case [*Hancock v. Burton (1882) 61 Cal. 70, 71* ; *Code Civ. Proc. § 397(d)*]. However, motions based on *Code Civ. Proc. § 397(d)* rarely occur because a qualified judge from another county may always be assigned even if all the judges are disqualified [*People v. Spring Valley Co. (1952) 109 Cal. App. 2d 656, 672, 241 P.2d 1069]* . For forms and discussion relating to disqualification of judges,*see* Ch. 317, *Judges* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 571.36 Who May Make Motion

When an action is not brought in the proper county, any defendant, without joining any codefendants, may demand a transfer to the proper county [*People v. Ocean Shore Railroad, Inc. (1938) 24 Cal. App. 2d 420, 424, 75 P.2d 560]* . However, the moving defendant or defendants must show that none of the other defendants reside in the forum [*Goossen v. Clifton (1946) 75 Cal. App. 2d 44, 51, 170 P.2d 104]* . These rules apply to motions under any of the grounds stated in *Code Civ. Proc. § 397* [*see People v. Ocean Shore Railroad, Inc. (1938) 24 Cal. App. 2d 420, 424, 75 P.2d 560* (holding that right of defendant to have action tried where land situated or where some of the defendants reside is no higher nor entitled to more protection than right to have it tried where impartial trial may be had)].

A plaintiff may not move to change the place of trial on the ground that he or she has brought the action in the wrong county. However, he or she may move to change the place of trial on the grounds that the convenience of witnesses and ends of justice will be promoted. Further, a plaintiff may demand a transfer on the ground that a fair and impartial trial cannot be had in the county where the action was commenced, or when the plaintiff ascertains the disqualification of the judge [*Cook v. Pendergast (1882) 61 Cal. 72, 79* ; *see Code Civ. Proc. § 397*].

A plaintiff/cross-defendant against whom a compulsory cross-complaint has been filed is not entitled to seek a change of venue under *Code Civ. Proc. § 396b* based on a claim of improper venue as determined by reference to the cross-complaint. Rather, the cross-complaint is to be tried in the same county that has been established as the proper venue based on the original complaint [*K.R.L. Partnership v. Superior Court (2004) 120 Cal. App. 4th 490, 498, 15 Cal. Rptr. 3d 517]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 571.37 Costs and Fees of Transfer

When a transfer is sought on any ground specified in *Code Civ. Proc. § 397(b)-(d)*, the costs and fees of the transfer, and of filing the papers in the court to which the transfer is ordered, shall be paid at the time the motion is filed by the party making the motion for the transfer [*Code Civ. Proc. § 399*].

When the transfer is sought solely, or is ordered, because the action was commenced in a court other than that designated as proper by *Code Civ. Proc. §§ 392-404.8*, the costs and fees, including any expenses and attorney's fees awarded defendant pursuant to *Code Civ. Proc. § 396b*, shall be paid by the plaintiff before the transfer is made [*Code Civ. Proc. § 399*; *see § 571.32[2]* regarding expenses and attorney's fees]. If in any such case, the defendant has paid costs and fees at the time of filing the notice of motion, the costs and fees are to be repaid to him or her on the making of the order. If the plaintiff has not so paid the costs and fees within five days after service of notice of the order, then any other party interested therein, whether named in the complaint as a party or not, may pay the costs and fees, and the clerk shall then transmit the papers and pleadings as if the costs and fees had been originally paid by the plaintiff. In that case, the costs and fees shall be a proper item of costs of the party who paid them, recoverable by that party in the event he or she prevails in the action. Otherwise, the costs and fees shall be offset against and deducted from the amount, if any, awarded the plaintiff in the event the plaintiff prevails against that party in the action [*Code Civ. Proc. § 399*].

The action shall not be further prosecuted in any court until the costs and fees are paid. If they are not paid within 30 days after service of notice of the order, or if a petition for a writ of mandate pursuant to *Code Civ. Proc. § 400* is filed in the trial court or an appeal is taken pursuant to *Code Civ. Proc. § 904.2*, then within 30 days after notice of the finality of the order of transfer, the court on a duly noticed motion by any party may dismiss the action without prejudice to the cause. The dismissal will be on the condition that no other action on the cause may be commenced in another court prior to satisfaction of the court's order for costs and fees. If a petition for a writ of mandate or appeal does not result in a stay of proceedings, the time for payment of costs shall be 60 days after service of the notice of the order [*Code Civ. Proc. § 399*].

Legal Topics:

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§ 571.38 Power of Court Limited by Motion

The filing of motion for change of venue suspends the power of the trial court to act on any other question until the motion has been determined [*Moore v. Powell (1977) 70 Cal. App. 3d 583, 587, 138 Cal. Rptr. 914* ; *Adams v. Superior Court (1964) 226 Cal. App. 2d 365, 368, 38 Cal. Rptr. 164]* . Aside from certain exceptions provided for in *Code Civ. Proc. §§ 396b(c)* and *397(e)*, any order of the court made prior to the determination of the motion is a nullity [*Beard v. Superior Court (1940) 39 Cal. App. 2d 284, 286, 102 P.2d 1087]* . For example, the court has no authority to issue a temporary restraining order relating to the main action after a notice of motion for transfer has been filed [*County of Riverside v. Superior Court (1968) 69 Cal. 2d 828, 831, 73 Cal. Rptr. 386, 447 P.2d 626]* . Similarly, the court may not issue an order passing on a demurrer to the complaint [*see City of Oakland v. Darbee (1951) 102 Cal. App. 2d 493, 503, 227 P.2d 909* (also holding that rule inapplicable to motion made pursuant to *Code Civ. Proc. § 394*)].

Legal Topics:

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§ 571.39 Plaintiff's Opposition to Defendant's Motion for Change of Venue

[1] In General

In any case, if an answer is filed, the court may consider opposition to the motion to transfer, if any, and may retain the action in the county where commenced if it appears that the convenience of the witnesses or the ends of justice will thereby be promoted [*Code Civ. Proc. § 396b(d)*].

[2] By Counteraffidavit or Declaration

If the defendant's motion is made on the ground that (1) an impartial trial cannot be had, (2) that the change will promote the convenience of the witnesses and the ends of justice, or (3) that no judge of the court is qualified to act, the plaintiff may file counteraffidavits in response to the defendant's motion. However, the plaintiff may not respond with a countermotion [*Cook v. Pendergast (1882) 61 Cal. 72, 76* ; *Code Civ. Proc. §§ 397(b)* (impartial trial), 397(c) (convenience of witnesses and ends of justice) and 394(d) (no judge qualified to act)].

[3] By Countermotion

A plaintiff has the right to oppose a defendant's motion made on the ground that the action was not brought in the county of defendant's residence by showing, on a countermotion, that the convenience of the witnesses or the ends of justice would be promoted by refusing to change [*Cook v. Pendergast (1882) 61 Cal. 72, 76* ; *Braunstein v. Superior Court (1964) 225 Cal. App. 2d 691, 697, 37 Cal. Rptr. 666]* .

Like a motion under *Code Civ. Proc. § 397(c)*, a countermotion to retain a cause on the ground of convenience of the witnesses will not lie unless the answer has been filed at the time defendant's motion for change of venue is made. Until the issues of fact are settled by the answer, the court cannot determine what testimony will be material [*Gilman v. Nordin (1952)112 Cal. App. 2d 788, 793, 247 P.2d 394]* . Further, an attempt to retain venue as originally laid for the convenience of the witnesses cannot be made when only a demurrer has been filed [*Johnson v. Superior Court (1965) 232 Cal. App. 2d 212, 214, 42 Cal. Rptr. 645]* .

The courts of appeal are in conflict with respect to whether *Code Civ. Proc. § 396b(d)* requires a plaintiff who is seeking to retain the action in the county where it was commenced to show that both the convenience of the witnesses and the ends of justice will be served by retaining the action in that county, or if the plaintiff may prevail by showing that either the convenience of witnesses or the ends of justice would be promoted [*see Braunstein v. Superior Court (1964) 225 Cal. App. 2d 691, 698 n.2, 37 Cal. Rptr. 666* (showing either factor is sufficient, in contrast to requirement that defendant show both factors to win a change of venue under *Code Civ. Proc. § 397(c)*); *Maxwell v. Murray (1961) 190 Cal. App. 2d 440, 443, 11 Cal. Rptr. 916* (holding that both factors must be shown under *Code Civ. Proc. § 396b*)].

Legal Topics:

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§ 571.40 Burden of Proof

[1] Presumption of Proper Venue

The plaintiff's choice of venue is presumptively correct [*Buran Equipment Co. v. Superior Court (1987) 190 Cal. App. 3d 1662, 1666, 236 Cal. Rptr. 171* ; *Easton v. Superior Court (1970) 12 Cal. App. 3d 243, 246-247, 90 Cal. Rptr. 642*]. Thus, the county in which the title of the action shows that it is brought is, prima facie, the proper county for the commencement and trial of the action absent an affirmative showing to the contrary [*Mission Imports, Inc. v. Superior Court (1982) 31 Cal. 3d 921, 928, 184 Cal. Rptr. 296, 647 P.2d 1075* ; *Smith v. Stanford Research Institute (1963) 212 Cal. App. 2d 750, 753, 28 Cal. Rptr. 481*].

[2] Required Showing to Meet Burden

[a] In General

The general rule is that the moving party must show (1) that the action is proper in the county to which he or she seeks a transfer, and (2) that the county in which the action was filed was improper under any applicable theory [*Mosby v. Superior Court (1974) 43 Cal. App. 3d 219, 228, 117 Cal. Rptr. 588* ; *Sequoia Pine Mills, Inc. v. Superior Court (1968) 258 Cal. App. 2d 65, 68, 65 Cal. Rptr. 353*]. For example, a corporate defendant seeking a change of venue in a contract action brought in a county other than where it has its principal place of business must show that the contract was not made or to be performed in that county, or that the obligation or liability of the defendant did not arise there, or that any breach of obligation did not occur there [*Shores v. Chip Steak Co. (1955) 130 Cal. App. 2d 620,623, 279 P.2d 591* ; *see Code Civ. Proc. § 395.5* (venue in actions against corporations and associations); *see* discussion in *§ 571.18[1]*].

[b] Burden in Motion Based on Ground That Action Commenced in Wrong Court

When a motion to change venue is based on the ground that the action was "not in the proper court," the burden of showing facts to justify a change of venue is on the defendant [*Massae v. Superior Court (1981) 118 Cal. App. 3d 527, 530, 173 Cal. Rptr. 527* ; *see Code Civ. Proc. § 397(a)*]. For example, if the motion is based on the defendant's

residence under *Code Civ. Proc. § 395(a)*, the defendant is required to show that at the commencement of the action, he or she was not a resident of the county where the action was brought, and that he or she is a resident of the county to which he or she asks that the place of trial be moved [*Sequoia Pine Mills, Inc. v. Superior Court (1968) 258 Cal. App. 2d 65, 67-68, 65 Cal. Rptr. 353]* . If the defendant makes this showing, the burden of proof shifts back to the plaintiff [*Stute v. Burinda (1981) 123 Cal. App. 3d Supp. 11, 15* , *177 Cal. Rptr. 102]* . The plaintiff must then show that the case comes clearly within one of the statutory exceptions to the general rule that actions are triable at the place of defendant's residence [*Archer v. Superior Court (1961) 202 Cal. App. 2d 417, 420, 21 Cal. Rptr. 48* ; *see* discussion in *§ 571.16[3*] for rules in contract actions, and § 571.17[1] for local actions and how situs of subject matter of action controls].

[c] Burden in Motion Based on Other Grounds

If the motion is based on *Code Civ. Proc. § 397(a)-(d)*, the burden is on the moving party, whether he or she is plaintiff or defendant [*see* *City of Stockton v. Ellingwood (1926) 78 Cal. App. 117, 121-122, 248 P. 272* (countermotion by defendant based on convenience of witnesses); *see also* *J.I. Case T. Co. v. Copren Bros. (1917) 35 Cal. App. 70, 75-76, 169 P. 443* (motion by plaintiff based on absence of impartial trial)].

The moving party in a *Code Civ. Proc. § 397(c)* motion has the burden of proving that both the convenience of the witnesses and the ends of justice will be promoted by a change of venue [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 607, 328 P.2d 953* ; *Lieberman v. Superior Court (1987) 194 Cal. App. 3d 396, 401, 239 Cal. Rptr. 450]* . To meet this burden, he or she must first show that the witnesses' proposed testimony is admissible, relevant, and material to some issue in the case [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 607, 328 P.2d 953* ; *see* discussion in *§ 571.33* regarding convenience of witnesses and ends of justice]. The convenience of witnesses may be shown by the fact that the residence of all the witnesses is in the county to which the transfer of the cause is requested, and the inference that the ends of justice will be served may be created by showing that by moving the trial closer to the residence of the witnesses, delay and expense in court proceedings are avoided and savings in the witnesses' time and expenses are effected [*Pearson v. Superior Court (1962) 199 Cal. App. 2d 69, 77, 18 Cal. Rptr. 578]* .

Legal Topics:

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§ 571.41 Selection of Transferee Court

[1] Action Commenced in Wrong Court

If the court orders the action or proceeding transferred on the ground that it was commenced in the wrong court, it must be transferred to any proper court that the parties may agree on by stipulation in writing, or made in open court and entered in the minutes or docket. If the parties do not so agree, then the action or proceeding must be transferred to any proper court in the county in which the action or proceeding was commenced that the defendant may designate, or, if there is no proper court in that county, to any proper court, in a proper county, designated by the defendant. If the parties do not agree, and the defendant does not designate the court, or if the court orders the transfer on its own motion as provided by *Code Civ. Proc. §§ 392-404.8*, then the action or proceeding will be transferred to a proper court as determined by the court in which the action or proceeding is pending [*Code Civ. Proc. § 398*; *Cubic Corp. v. Superior Court (1986) 186 Cal. App. 3d 622, 625, 231 Cal. Rptr. 18]* .

[2] Motion Based on Other Grounds

If, for any cause specified in *Code Civ. Proc. § 397(b)*, *(c)*, and *(d)*, the court orders the transfer of an action or proceeding, it must be transferred to a court having jurisdiction of the subject matter of the action that the parties may agree on, by stipulation in writing, or made in open court and entered in the minutes or docket, or, if they do not so agree, then to the nearest or most accessible court, where the objection or cause for making the order does not exist [*Code Civ. Proc. § 398*].

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§ 571.42 Transfer of Pleadings and Papers

When an order is made transferring an action or proceeding under any of the provisions of *Code Civ. Proc. §§ 392-404.8*, the clerk shall, after expiration of the time within which a petition for writ of mandate could have been filed pursuant to *Code Civ. Proc. § 400*, or if the petition is filed, after judgment denying the writ becomes final and on payment of the costs and fees, transmit the pleadings and papers therein (or if the pleadings are oral, a transcript of them) to the clerk (or to the judge when there is no clerk) of the court to which the action or proceeding is being transferred [*Code Civ. Proc. § 399*; *see § 571.37* regarding costs and fees of transfer].

At the time of the transmittal of the papers and pleadings, the clerk shall mail notice to all parties who have appeared in the action or special proceeding, stating the date on which the transmittal occurred. Promptly on receipt of the papers and pleadings, the clerk of the court to which the action or proceeding is transferred shall mail notice to all parties who have appeared in the action or special proceeding, stating the date of the filing of the case and the number assigned to the case in the court [*Code Civ. Proc. § 399*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral OverviewGovernmentsCourtsClerks of Court

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50-571 California Forms of Pleading and Practice--Annotated § 571.43

§ 571.43 Effect of Granting Order on Jurisdiction

[1] Transferee Court

The court to which an action or proceeding is transferred under *Code Civ. Proc. §§ 392-404.8* shall have and exercise over the action or proceeding the same jurisdiction as if it had been originally commenced therein, all prior proceedings being saved, and the court may require such amendment of the pleadings, the filing and service of the amended, additional, or supplemental pleadings, and the giving of such notice as may be necessary for the proper presentation and determination of the action or proceeding in the court [*Code Civ. Proc. § 399*].

[2] Transferor Court

The court granting the motion for a change of venue is without jurisdiction to make any further order or take any further steps in the action [*Chase v. Superior Court (1908) 154 Cal. 789, 792, 99 P. 355* ; *Moore v. Powell (1977) 70 Cal. App. 3d 583, 587-588, 138 Cal. Rptr. 914]* . However, the transferor court may consider a motion to vacate the order made under *Code Civ. Proc. § 473*, which provides for relief from mistake, inadvertance, surprise, or excusable neglect [*Badella v. Miller (1955) 44 Cal. 2d 81, 86, 279 P.2d 729]* . Further, the court may dismiss the action if the transfer fees are not paid within 30 days of service of notice of the order transferring the action [*Moore v. Powell (1977) 70 Cal. App. 3d 583, 587-588, 138 Cal. Rptr. 914* ; *Code Civ. Proc. § 399*; *see § 571.37* regarding costs and fees of transfer].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral Overview

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§ 571.44 Renewal of Motion

A court has jurisdiction to consider a renewal of a motion for change of venue, but as a matter of policy and practice, renewal of the same motion is discouraged, and the renewed motion will almost invariably be denied when the grounds are the same. However, when circumstances have changed, renewal of the motion may be proper. In such a case, the renewed motion must be made within reasonable time after knowledge of the changed circumstances is or should have been acquired [*Thompson v. Superior Court (1972) 26 Cal. App. 3d 300, 306, 103 Cal. Rptr. 94]* .

There are several other circumstances when a renewed motion may be considered by the court. For example, a court is able to entertain a renewed motion if the first motion was expressly denied without prejudice [*Lundy v. Lettunich (1920) 50 Cal. App. 451, 454-455, 195 P. 451]* . Further, successive motions may be considered if they are made by different parties [*Marshall v. Dunlap (1955) 138 Cal. App. 2d 59, 60-61, 291 P.2d 538]* . A renewed motion may also be proper if it is made on a different ground than the previous one [*Seybert v. County of Imperial (1956) 139 Cal. App. 2d 221, 226-230, 293 P.2d 135]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedurePleading & PracticeMotion PracticeGeneral Overview

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§ 571.45 Actions Involving Installment or Automotive Sales, Consumer Obligations, or Unlawful Detainer

[1] Pleading Must Show Proper Venue

In limited civil cases dealing with certain consumer-related subjects, the fact that the action is filed in the proper court and falls within one of those subject matter areas must appear from a verified complaint or an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*Code Civ. Proc. § 396a*].

This requirement applies to actions or proceedings [*Code Civ. Proc. § 396a*]:

- Subject to *Civ. Code § 1812.10* (venue in installment contract actions under the Unruh and Rees-Levering Act).
- Subject to *Civ. Code § 2984.4* (venue in contract action under the Automobile Sales Finance Act).
- Subject to *Code Civ. Proc. § 395(b)*, which governs venue in actions arising from:
  - The offer or provision of goods, services, loans, or extensions of credit intended primarily for personal, family, or household use.
  - Transactions consummated as proximate result of unsolicited telephone calls made by a seller engaged in the business of consummating transactions of that kind.
  - Transactions consummated as proximate result of a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller.
- For an unlawful detainer [*see Code Civ. Proc. § 1161*].

[2] Transfer of Case

[a] Case Not Commenced in Proper Court

If it appears from the complaint, affidavit, or declaration, or otherwise, that the court in which the action or proceeding was commenced is not the proper court for its trial, the court in which the action or proceeding is commenced, or a judge thereof, shall, whenever that fact appears, transfer it to the proper court, on its own motion, or on motion of the defendant [*Code Civ. Proc. § 396a*]. If, however, the defendant consents in writing, or in open court (consent in open court being entered in the minutes or docket of the court) to keeping the action or proceeding in the court where it was commenced, it may continue in that court [*see Code Civ. Proc. § 396a* (requiring defendant to be represented by counsel at time of giving consent)].

If a case is ordered transferred under this provision and summons is served before the action or proceeding is filed in the court to which it is transferred, as to any defendant so served, who has not appeared in the action or proceeding, the time to answer or otherwise plead dates from service on that defendant of written notice of the filing [*Code Civ. Proc. § 396a*].

[b] Case Commenced in Proper Court

Even if it appears from the plaintiff's complaint or affidavit that the court in which the action or proceeding is commenced is a proper court for its trial, a motion for a transfer of the action or proceeding may be made as in other cases, within the time, on the grounds, and in the manner provided in *Code Civ. Proc. § 392 et seq.* If on that motion it appears that the action or proceeding is not pending in the proper court, or should for other cause be transferred, it is to be ordered transferred as provided in *Code Civ. Proc. § 392 et seq.* [*Code Civ. Proc. § 396a*].

[c] Procedure and Fees

When any action or proceeding is ordered transferred as provided in *Code Civ. Proc. § 396a*, proceedings are to be had, and the costs and fees to be paid, as provided in *Code Civ. Proc. §§ 398* and *399* [*Code Civ. Proc. § 396a*].

For discussion,*see § 571.41* regarding selection of transferee court, and § 571.37 regarding costs and fees of transfer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionGeneral OverviewCivil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsRequirementsCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewContracts LawTypes of ContractsInstallment Contracts

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§ 571.46 Review of Court Orders Relating to Motions for Change of Venue

[1] Motions in Superior Court

When an order is made by the superior court granting or denying a motion to change the place of trial, the party aggrieved by the order may, within 20 days after service of a written notice of the order, petition the court of appeal for the district in which the court granting or denying the motion is situated for a writ of mandate requiring trial of the case in the proper court. The superior court may, for good cause, and prior to the expiration of the initial 20-day period, extend the time for one additional period not to exceed 10 days [*Code Civ. Proc. § 400*].

The petitioner shall file a copy of the petition in the trial court immediately after the petition is filed in the court of appeal. The court of appeal may stay all proceedings in the case, pending judgment on the petition becoming final. The clerk of the court of appeal shall file with the clerk of the trial court a copy of any final order or final judgment immediately after the order or judgment becomes final [*Code Civ. Proc. § 400*]. For forms and discussion relating to mandate in general,*see* Ch. 358, *Mandate and Prohibition* .

[2] Standard of Review

When a change of venue is a matter of right, an appellate court will not disturb an order made on conflicting evidence unless it is clear that the order was the result of arbitrary action [*see Swartz v. Cal. Olive Growers Etc. Corp. (1942) 56 Cal. App. 2d 168, 170-171, 133 P.2d 20* (suit commenced in wrong court); *see Code Civ. Proc. § 396b(a)* (framed in mandatory language and requiring action or proceeding not commenced in proper court to be transferred to proper court)].

Granting or denying a *Code Civ. Proc. § 397(c)* motion is discretionary with the trial court, and an appellate court will reverse an order only on a clear showing of abuse of discretion. For example, the denial of a motion to change venue would be an abuse of discretion if there was a showing that the convenience of witnesses and ends of justice would be be promoted by the change, and there was absolutely no showing whatever to contrary. Under this circumstance, there would be no evidence to sustain the decision of the trial court [*Union Trust Life Ins. Co. v. Superior Court (1968) 259 Cal. App. 2d 23, 28, 66 Cal. Rptr. 270]* .

Thus, the appellate court is required to determine that sufficient facts have been shown on which the trial court could base its exercise of discretion [*Dillman v. Superior Court (1962) 205 Cal. App. 2d 769, 774, 23 Cal. Rptr. 498]* . The judgment will not be disturbed when the evidence on the motion for change of venue is conflicting [*Wheeler v. Moschetti (1961) 188 Cal. App. 2d 827, 829, 10 Cal. Rptr. 722]* . All conflicts are required to be resolved in favor of the prevailing party, and all reasonable inferences which are to be drawn must be in support of the trial court's order [*City of Long Beach v. Lakewood Park (1953) 118 Cal. App. 2d 596, 598, 258 P.2d 538]* . For forms and discussion relating to the scope of review on appeal in general,*see* Ch. 41, *Appeal: Review Standard and Appellate Rules of Law* .

[3] Time to Answer After Review

If the order granting or denying a motion to transfer pursuant to *Code Civ. Proc. §§ 396a* or *396b* is the subject of an appeal pursuant to *Code Civ. Proc. § 904.2* in which a stay is granted, or is the subject of a mandate proceeding pursuant to *Code Civ. Proc. § 400*, the court having jurisdiction over the trial, on application or on its own motion after the appeal or mandate proceeding becomes final or on earlier termination of a stay, shall allow the defendant a reasonable time to respond to the complaint. Notice of the order allowing the defendant further time to respond to the complaint shall be promptly served by the party who obtained such order or by the clerk if the order is made on the court's own motion [*Code Civ. Proc. § 586(a)(6)(C)*].

Legal Topics:

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

§§ 571.47[Reserved]

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A. Place of Trial

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§ 571.60 Related Matthew Bender Publications

For memoranda relating to forms in this chapter, *see* California Points and Authorities, Ch. 238, *Venue*

Legal Topics:

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

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§ 571.61 State Statutes

[1] Place of Trial

Place of trial in civil actions. *Code Civ. Proc. §§ 392-402*

[2] Small Claims

Venue and court location requirements in small claims court actions as same as in other civil actions. *Code Civ. Proc. § 116.370(a)*

[3] Venue in Other Actions

[a] Miscellaneous

Venue in actions against Board of Medical Examiners. *Bus. & Prof. Code § 2109*

Venue for action by Attorney General or county district attorney for violation of Cartwright Antitrust Act. *Bus. & Prof. Code § 16754*

Venue in agency adoption proceedings. *Fam. Code § 8714(a)*

Venue in independent adoption proceedings. *Fam. Code § 8802(a)*

Venue in proceedings to adopt an adult. *Fam. Code § 9300 et seq.*

Venue in actions on installment contracts under Unruh Act. *Civ. Code § 1812.10*

Venue in actions on installment contracts for sales of motor vehicles under Rees-Levering Act. *Civ. Code § 2984.4*

Venue in actions for partition of real and personal property. *Code Civ. Proc. § 872.110(b)(1)*

Venue in eminent domain proceedings. *Code Civ. Proc. § 1250.020(b)*

Venue for applications for change of name. *Code Civ. Proc. § 1276*

Venue in actions and proceedings under Uniform Transfers to Minors Act. *Prob. Code § 3921*

[b] Dissolution and Winding Up of Corporation

Proper county for venue as that in which principal executive office is located. *Corp. Code § 177*

Verified complaint for involuntary dissolution of corporation as able to be filed in superior court of proper county. *Corp. Code § 1800*

Superior court of proper county as able to take jurisdiction of proceeding for voluntary winding up of corporation. *Corp. Code § 1904*

[c] Guardianship and Conservatorship Proceedings

Venue for resident of state in guardianship and conservatorship proceedings. *Prob. Code § 2201*

Venue for nonresident of state in guardianship and conservatorship proceedings. *Prob. Code § 2202*

[4] Effect of Joinder on Venue

Residence of defendant improperly joined for purpose of establishing venue as not being considered in determining proper place of trial. *Code Civ. Proc. § 395(a)*

[5] Local Actions

Venue in action for recovery of, interest in, or injuries to real property, and for foreclosure of all liens and mortgages on real property as being at situs of real property. *Code Civ. Proc. § 392(a)*

Venue in actions for the recovery of penalty or forfeiture imposed by statute. *Code Civ. Proc. § 393(a)*

Venue in actions against public officers. *Code Civ. Proc. § 393(b)*

Venue in action in which executor, administrator, guardian, conservator, or trustee is sued in official or representative capacity on claim for payment of money. *Code Civ. Proc. § 395.1*

Street address or common designation and legal description of real property as required in quiet title action. *Code Civ. Proc. § 761.020(a)*

[6] Party Venue--Actions by or Against State

Venue in action by or against state as proper in any city or city and county where Attorney General has office. *Code Civ. Proc. § 401(1)*

Venue in actions against state for taking or damaging private property for public use. *Gov. Code § 955*

Venue in actions against state generally. *Gov. Code § 955*

Venue in action against state for death or injury to person or personal property. *Gov. Code § 955.2*

Venue in action against state by local government or agency. *Gov. Code § 955.3*

[7] Corporations and Unincorporated Associations

Venue in action against unincorporated association. *Code Civ. Proc. § 395.2*

Venue in action against corporation or association. *Code Civ. Proc. § 395.5*

[8] Transfer to Neutral County

Actions by or against county, city, or local agency as requiring transfer to neutral county. *Code Civ. Proc. § 394(a)*

"Local agency" defined. *Code Civ. Proc. § 394(b)*

[9] Transitory Actions

County in which defendants or some of them reside at commencement of action as proper county for trial of action. *Code Civ. Proc. § 395(a)*

Venue in actions involving injury to person or personal property or for death from wrongful act or negligence. *Code Civ. Proc. § 395(a)*

Venue in contract actions. *Code Civ. Proc. § 395(a)*

Venue in proceedings for dissolution of marriage. *Code Civ. Proc. § 395(a)*

Venue in proceedings to establish and enforce obligation of support of minor child. *Code Civ. Proc. § 395(a)*

Venue in proceedings under Uniform Parentage Act. *Code Civ. Proc. § 395(a)*

Venue when defendants do not reside in state, or plaintiff does not know county of residence, or defendant about to move. *Code Civ. Proc. § 395(a)*

Venue in actions involving consumer contracts. *Code Civ. Proc. § 395(b)*

Venue in action arising from transaction consummated as proximate result of seller's unsolicited telephone call. *Code Civ. Proc. § 395(b)*

Unlawful detainer and consumer actions require verified complaint or affidavit showing action commenced in proper court and that action is unlawful detainer or consumer action. *Code Civ. Proc. § 396a*

"Residence" defined. *Gov. Code § 244(a)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueCorporationsCivil ProcedureVenueIndividual DefendantsContracts LawTypes of ContractsInstallment ContractsFamily LawGuardiansGeneral OverviewGovernmentsState & Territorial GovernmentsClaims By & Against

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§ 571.62 Decisions

[1] Jurisdiction Distinguished

California venue requirement as not jurisdictional because proper venue may be waived if not timely asserted; challenge to state court venue as not defeating federal jurisdiction when state court venue not jurisdictional. *Transure, Inc. v. Marsh & McLennan, Inc. (9th Cir. 1985) 766 F.2d 1297, 1300-1301*

Venue as not jurisdictional, except in few cases in which statute makes local place of trial part of grant of subject matter jurisdiction. *Barquis v. Merchants Collection Assn. (1972) 7 Cal. 3d 94, 121, 101 Cal. Rptr. 745, 496 P.2d 817* ; *Newman v. County of Sonoma (1961) 56 Cal. 2d 625, 627, 15 Cal. Rptr. 914, 364 P.2d 850* ; *Channell v. Superior Court (1964) 226 Cal. App. 2d 246, 250, 38 Cal. Rptr. 13*

Under state law, a venue selection clause is purely an intrastate issue involving the selection of a county in which to hold the trial. By contrast, a forum selection clause usually chooses a court from among different states or nations. *Alexander v. Superior Court (2003) 114 Cal. App. 4th 723, 727, 8 Cal. Rptr. 3d 111*

[2] Venue Defined

Venue provisions as prescribing where action may be tried. *Channell v. Superior Court (1964) 226 Cal. App. 2d 246, 249, 38 Cal. Rptr. 13*

[3] Classification of Actions--Determined by Complaint

Nature of cause of action in so far as it affects or determines place of trial as ascertained from complaint alone. *Peiser v. Mettler (1958) 50 Cal. 2d 594, 601, 328 P.2d 953*

Question of transitory or local nature of causes of action as determined from allegations of complaint on file at time motion for change of venue made, and from nature of judgment which might be rendered on complaint. *Peiser v. Mettler (1958) 50 Cal. 2d 594, 603, 328 P.2d 953* ; *Neet v. Holmes (1942) 19 Cal. 2d 605, 607, 122 P.2d 557* ; *Thielen v. Superior Court (1963) 219 Cal. App. 2d 217, 218, 33 Cal. Rptr. 1* ; *Franco Western Oil Co. v. Cameron (1962) 200 Cal. App. 2d 37, 38, 19 Cal. Rptr. 304*

Pleader as required to frame complaint to show clearly that he or she is entitled to retain trial of action in county in which it was commenced. *Neet v. Holmes (1942) 19 Cal. 2d 605, 613, 122 P.2d 557*

Subject matter of action and issues involved as determinable from facts pleaded, rather than from title or prayer for relief. *Standard Brands of California v. Bryce (1934) 1 Cal. 2d 718, 721, 37 P.2d 446*

To the extent a venue selection clause disrupts statutory venue provisions, it is void as against the legislatively declared public policy fixing the place for trial. *Alexander v. Superior Court (2003) 114 Cal. App. 4th 723, 731-732, 8 Cal.Rptr. 3d 111*

[4] Main Relief Rule

When complaint states only one cause of action, characterization of cause of action as local or transitory as controlled by nature of "main relief" sought, or "principal object" of action. *Massae v. Superior Court (1981) 118 Cal. App. 3d 527, 535, 173 Cal. Rptr. 527*

Venue as determined by "main relief" rule when there is only one cause of action and different forms of relief are sought. *Dreher v. Fidelity & Casualty Co. (1957) 148 Cal. App. 2d 695, 697, 307 P.2d 407*

[5] Local Actions

[a] Generally

Right of plaintiff to have action tried in county other than that of defendant's residence as exceptional, and plaintiff who claims that right as required to bring himself or herself within exception. *Kaluzok v. Brisson (1946) 27 Cal. 2d 760, 763, 167 P.2d 481* ; *Johnson v. Superior Court (1965) 232 Cal. App. 2d 212, 215, 42 Cal. Rptr. 645* ; *Deas v. Lido Lumber Co. (1955) 132 Cal. App. 2d 402, 404, 282 P.2d 90*

Action as required to be tried in county where subject matter of action situated if subject matter is local and judgment sought is to operate directly on it. *Smith v. Smith (1891) 88 Cal. 572, 576, 26 P. 356* ; *Channell v. Superior Court (1964) 226 Cal. App. 2d 246, 251, 38 Cal. Rptr. 13* ; *Beutke v. American Securities Co. (1955) 132 Cal. App. 2d 354, 359, 282 P.2d 201*

Defendant as able to invoke *Code Civ. Proc. § 392* only when real estate alone is subject matter of action. *Smith v. Smith (1891) 88 Cal. 572, 576, 26 P.356* ; *Channell v. Superior Court (1964) 226 Cal. App. 2d 246, 251, 38 Cal. Rptr. 13* ; *All-Cool Alum. Etc. Co. v. Superior Court (1964) 224 Cal. App. 2d 660, 667, 36 Cal. Rptr. 769* ; *Beutke v. American Securities Co. (1955) 132 Cal. App. 2d 354, 360, 282 P.2d 201*

[b] Personal Representative or Trustee

All actions brought to recover money or personal property against executrix, executor, administrator, guardian or trustee as required to be brought in county that has jurisdiction over estate. *Metzger v. Silverman (1976) 62 Cal. App.*

3d Supp. 30, 37 , 133 Cal. Rptr. 355

Action against administrator or executor in his or her official capacity to recover personal property which had been entrusted to decedent as subject to *Code Civ. Proc. § 395.1*. *Haines v. Lamb (1962) 206 Cal. App. 2d 322, 325-326, 24 Cal. Rptr. 146*

[c] Foreclosure of Liens and Mortgages on Real Property

Action alleging that party against whom personal judgment is sought holds interest in real property and seeking foreclosure on that interest as action to foreclose lien, which must be tried in county in which land is situated. *Case v. Kirkwood (1931) 119 Cal. App. 207, 211, 6 P.2d 110*

[d] Injury to Real Property Defined

"Injury to real property" as used in *Code Civ. Proc. § 392(1)(a)* (*see now Code Civ. Proc. § 392(a)(1)*) as embracing every wrong that in legal contemplation is injury to real property, including not only direct and forcible injury, but consequential injuries, threatened injuries to land, and even mere nonfeasance, as permissive waste. *Coley v. Hecker (1928) 206 Cal. 22, 28, 272 P. 1045* ; *Strosnider v. Pomin (1939) 32 Cal. App. 2d 103, 108, 89 P.2d 179*

Construction defect actions asserting damage to buildings affixed to real property as stating claim for injury to real property, and therefore, pursuant to *Code Civ. Proc. § 392(1)(a)* (*see now Code Civ. Proc. § 392(a)(1)*), venue is appropriate in county where property is located. *Foundation Engineers, Inc. v. Superior Court (1993) 19 Cal. App. 4th 104, 111-113, 23 Cal. Rptr. 2d 469*

[e] Public Officers

State agency, department, institution, board, or other public entity as "public officer," absent statutory designation of administrative or enforcement officer, in action founded on its official action. *Regents of University of California v. Superior Court (1970) 3 Cal. 3d 529, 537, 91 Cal. Rptr. 57, 476 P.2d 457*

Bay Area Air Quality Management District, Colusa Air Pollution Control District, and Imperial, Santa Barbara, and Yolo-Solano County Air Pollution Control Districts, as public entities sued on claims arising from the conduct of their official action, as public officers within meaning of *Code Civ. Proc. § 393(1)(b)*, relating to venue of actions against public officers. *Colusa Air Pollution Control Dist. v. Superior Court (1991) 226 Cal. App. 3d 880, 888, 277 Cal. Rptr. 110*

Venue in mandamus action brought under *Code Civ. Proc. § 1094.5* as governed by *Code Civ. Proc. § 393(1)(b)* (*see now Code Civ. Proc. § 393(b)*). *Sutter Union High School Dist. v. Superior Court (1983) 140 Cal. App. 3d 795, 797, 190 Cal. Rptr. 182* ; *Lynch v. Superior Court (1970) 7 Cal. App. 3d 929, 931, 86 Cal. Rptr. 925*

Governing board of school district as public officer within meaning of *Code Civ. Proc. § 393*. *Sutter Union High School Dist. v. Superior Court (1983) 140 Cal. App. 3d 795, 797, 190 Cal. Rptr. 182*

Code Civ. Proc. § 393(1)(b) (*see now Code Civ. Proc. § 393(b)*) as applying only to affirmative acts that directly interfere with personal rights or property of person complaining, and to acts done as distinguished from acts threatened. *Harris v. Alcoholic Bev. Etc. Appeals Bd. (1961) 197 Cal. App. 2d 759, 768, 18 Cal. Rptr. 151*

Code Civ. Proc. § 393(1)(b) (*see now Code Civ. Proc. § 393(b)*) as taking precedence over *Code Civ. Proc. § 395*.

Cecil v. Superior Court (1943) 59 Cal. App. 2d 793, 794, 140 P.2d 125

[f] Title to or Possession of Real Property

Nature of action as local, and as required to be tried in county where land is situated, when action turns on title to property as distinct from personal obligation, and decree operates by its own force on title. *Peiser v. Mettler (1958) 50 Cal. 2d 594, 603, 328 P.2d 953* ; *Neet v. Holmes (1942) 19 Cal. 2d 605, 611-612, 122 P.2d 557* ; *Thielen v. Superior Court (1963) 219 Cal. App2d 217, 219, 33 Cal. Rptr. 1* ; *Ponderosa Sky Ranch v. Okay Improvement Corp. (1962) 204 Cal. App. 2d 227, 230, 22 Cal. Rptr. 90*

Action as required to be wholly local in nature to require it to be brought in county of situs as designated in *Code Civ. Proc. § 392(a)*. *Peiser v. Mettler (1958) 50 Cal. 2d 594, 605, 328 P.2d 953* ; *Radio K-Dan, Inc. v. Superior Court (1964) 229 Cal. App. 2d 544, 548, 40 Cal. Rptr. 382* ; *Hammon v. American Etc. Mining Co. (1962) 203 Cal. App. 2d 306, 311, 21 Cal. Rptr. 409*

Action to cancel deed on ground of fraud and to compel reconveyance to or reverting of title in plaintiff as local action. *Eckstrand v. Wilshusen (1933) 217 Cal. 380, 382-383, 18 P.2d 931*

Slander of title as local action on theory that action is one in which determination of owner's right or interest in title is properly adjudicated, and also that slander of title is injury to real property. *Coley v. Hecker (1928) 206 Cal. 22, 26, 272 P. 1045* ; *Wick v. Mattison (1962) 207 Cal. App. 2d 608, 609, 24 Cal. Rptr. 677*

Action to eliminate power of sale contained in deed of trust as having real and direct impact on right or interest in real property. *Massae v. Superior Court (1981) 118 Cal. App. 3d 527, 538-539, 173 Cal. Rptr. 527*

Landowner's or tenant's suit for damages to growing crops as real property action, with venue lying in county of land situs. *Stauffer Chemical Co. v. Superior Court (1968) 265 Cal. App. 2d 1, 3, 71 Cal. Rptr. 202*

Action for fraud with respect to conveyance of real property as transitory if vendee sues for damages and as local if vendee seeks to reobtain title. *Hammon v. American Etc. Mining Co. (1962) 203 Cal. App. 2d 306, 310, 21 Cal. Rptr. 409*

Action for specific performance of contract for sale of realty as deemed local if brought by vendee, since vendee seeks possession. *Hammon v. American Etc. Mining Co. (1962) 203 Cal. App. 2d 306, 309, 21 Cal. Rptr. 409*

Local action as not becoming partly transitory merely because it may require determination of amount of benefits received by plaintiff. *Franco Western Oil Co. v. Cameron (1962) 200 Cal. App. 2d 37, 40, 19 Cal. Rptr. 304*

Action as not rendered transitory because it may require determination of amount of benefits received by defendants. *Etter v. Vollmer (1956) 139 Cal. App. 2d 718, 720, 294 P.2d 55*

Determination of rights of homesteaders as heard in county where homestead is situated. *Wood v. Emig (1943) 58 Cal. App. 2d 851, 857, 137 P.2d 875*

Action for specific performance of contract for sale of realty as deemed local if brought by vendee, since vendee seeks possession. *Hammon v. American Etc. Mining Co. (1962) 203 Cal. App. 2d 306, 309, 21 Cal. Rptr. 409*

Complaint having for its sole and exclusive object cancellation of deed or deed of trust for fraud as local. *Beutke v. American Securities Co. (1955) 132 Cal. App. 2d 354, 359, 282 P.2d 201*

[g] Title or Possession Incidentally Involved

Nature of action as essentially transitory, and defendants as entitled to trial in county of their residence, if determination of estate or interest in land is merely incidental to determination of cause for equitable relief in trust, fraud, or contract. *Peiser v. Mettler (1958) 50 Cal. 2d 594, 603, 328 P.2d 953* ; *Neet v. Holmes (1942) 19 Cal. 2d 605, 611, 122 P.2d 557* ; *Ponderosa Sky Ranch v. Okay Improvement Corp. (1962) 204 Cal. App. 2d 227, 230, 22 Cal. Rptr. 90*

Action for damages for deceit in inducing plaintiffs to purchase real property, rather than for rescission and restitution resulting in reconveyance, as not within exception provided by *Code Civ. Proc. § 392(1)(a)* (*see now Code Civ. Proc. § 392(a)(1)*). *Kaluzok v. Brisson (1946) 27 Cal. 2d 760, 763-764, 167 P.2d 481*

Action as transitory rather than local when right to any real property sought by plaintiffs depends on outcome of controversy concerning personal obligation of defendants, and judgment rendered thereon would be one to enforce that obligation. *Radio K-Dan, Inc. v. Superior Court (1964) 229 Cal. App. 2d 544, 548, 40 Cal. Rptr. 382*

Action for breach of mineral lease, principally seeking royalties for removed minerals, injunction against encumbrance of claims covered by agreement, and decree establishing rights and duties of parties under contract as not becoming local action merely because realty may be involved. *Hammon v. American Etc. Mining Co. (1962) 203 Cal. App. 2d 306, 21 Cal. Rptr. 409*

Action as required to be classified as transitory when plaintiff's sole and main relief consists of money judgment, and other relief is incidental to that end, even if action involves realty. *Hammon v. American Etc. Mining Co. (1962) 203 Cal. App. 2d 306, 309, 21 Cal. Rptr. 409*

Action in which lessor sues for breach of lease as transitory even though rights in property may be involved. *Hammon v. American Etc. Mining Co. (1962) 203 Cal. App. 2d 306, 310, 21 Cal. Rptr. 409*

Action for specific performance of contract for sale of realty as deemed transitory if brought by vendor, because vendor merely seeks purchase price. *Hammon v. American Etc. Mining Co. (1962) 203 Cal. App. 2d 306, 309, 21 Cal. Rptr. 409*

Action in which lessor sues for breach of lease as transitory even though rights in property may be involved. *Hammon v. American Etc. Mining Co. (1962) 203 Cal. App. 2d 306, 310, 21 Cal. Rptr. 409*

Action by vendor for purchase price of land, or action by vendor for specific performance of vendee's contract to purchase land as not within Code Civ. Proc. § 392(1)(a) (*see now Code Civ. Proc. § 392(a)(1)*). *Marcacci v. Continental Baking Co. (1962) 202 Cal. App. 2d 224, 226-227, 20 Cal. Rptr. 567*

Action to cancel or reform a promissory note secured by deed of trust as transitory. *Beutke v. American Securities Co. (1955) 132 Cal. App. 2d 354, 359, 282 P.2d 201*

Trespass action seeking damages as not local. *Hardy v. White (1955) 130 Cal. App. 2d 550, 552, 279 P.2d 126*

[6] Transitory Actions

[a] Generally

Action as transitory when main relief sought is personal. *Brown v. Superior Court (1984) 37 Cal. 3d 477, 482 n.5,*

208 Cal. Rptr. 724, 691 P.2d 272

General spirit and policy of *Code Civ. Proc. § 395* as giving defendant right of having all personal actions against him or her tried in county of his or her residence. *Turlock Theatre Co. v. Laws (1939) 12 Cal. 2d 573, 576* ; *Smith v. Smith (1891) 88 Cal. 572, 575, 26 P. 356* ; *Enter v. Crutcher (1958) 159 Cal. App. 2d Supp. 841, 844* , *323 P.2d 586* ; *Postin v. Griggs (1944) 66 Cal. App. 2d 147, 149, 151 P.2d 887*

Code Civ. Proc. § 395 as intended to protect defendant from expense and inconvenience of being compelled to go to distant county to defend against action that might be commenced against him or her there. *Smith v. Smith (1891) 88 Cal. 572, 576, 26 P. 356*

Code Civ. Proc. § 395 as applying in absence of specific governing statute. *Sutter Union High School Dist. v. Superior Court (1983) 140 Cal. App. 3d 795, 798, 190 Cal. Rptr. 182*

Venue of transitory action against natural person as governed by *Code Civ. Proc. § 395*. *Mosby v. Superior Court (1974) 43 Cal. App. 3d 219, 223, 117 Cal. Rptr. 588*

Code Civ. Proc. § 395 as prevailing unless cause of action set forth in complaint falls wholly within provisions of *Code Civ. Proc. §§ 392-394*. *Channell v. Superior Court (1964) 226 Cal. App. 2d 246, 251, 38 Cal. Rptr. 13*

General rule states that defendant is entitled to have actions tried in county of his or her residence. *Maxwell v. Murray (1961) 190 Cal. App. 2d 440, 442, 11 Cal. Rptr. 916*

[b] Application of Basic Rule of Residence Venue

Venue for declaratory relief action as determined by reference to nature of subject matter of action, except when complaint seeks determination of alleged liability asserted by defendant against plaintiff, in which case venue is determined by the subject matter of defendant's cause of action. *Mission Imports, Inc. v. Superior Court (1982) 31 Cal. 3d 921, 930, 184 Cal. Rptr. 296, 647 P.2d 1075* ; *Standard Brands of California v. Bryce (1934) 1 Cal. 2d 718, 720-721, 37 P.2d 446*

Action for accounting as essentially personal action. *Bardwell v. Turner (1933) 219 Cal. 228, 230, 25 P.2d 978* ; *Smith v. Smith (1891) 88 Cal. 572, 576,26 P. 356* ; *Postin v. Griggs (1944) 66 Cal. App. 2d 147, 149, 151 P.2d 887* ; *Stesel v. Santa Ana River Water Co. (1939) 35 Cal. App. 2d 117, 126-127, 94 P.2d 1052*

Code Civ. Proc. § 395 as not giving person against whom alleged libel is published in newspaper right to maintain his or her action in any county in which newspaper may circulate. *Graham v. Mixon (1917) 177 Cal. 88, 93, 169 P. 1003*

In action arising from loan obtained primarily for personal, family, or household use, which was a consumer transaction specified in *Code Civ. Proc. § 395(b)*, where borrower resided in Santa Clara County at the time his action commenced, venue was proper in Santa Clara County. The court rejected the lender's argument that Section 395(b) applied only to actions against a consumer defendant, or, alternatively, does not apply where the consumer was the plaintiff and one of the defendants was an individual. *Fontaine v. Superior Court (Cashcall, Inc.) (2009) 175 Cal. App. 4th 830, 838, 96 Cal. Rptr. 3d 607*

Action based on injury to person or personal property which is not physical injury, such as libel, malicious prosecution, and false imprisonment, as triable solely at defendant's residence. *Johnson v. Superior Court (1965) 232 Cal. App. 2d 212, 218, 42 Cal. Rptr. 645*

Action to have judgment declared null and void based on alleged fraud and mistake, and prayer for equitable relief as personal and transitory action, and as not required to be tried in county where judgment was rendered. *Deas v. Lido Lumber Co. (1955) 132 Cal. App. 2d 402, 404, 282 P.2d 90*

Suit in equity, in personam, as transitory action. *Sloan v. Court Hotel (1945) 72 Cal. App. 2d 308, 316, 164 P.2d 516*

Action to cancel promissory note on ground of fraud as triable in county of defendant's residence. *Postin v. Griggs (1944) 66 Cal. App. 2d 147, 150, 151 P.2d 887*

Action for cancellation of contract for purchase and sale of realty and for money judgment based on alleged fraud as triable in county of defendant's residence. *Postin v. Griggs (1944) 66 Cal. App. 2d 147, 150, 151 P.2d 887*

Action for rescission of contract, accounting, and injunction based on fraud as personal action that defendants are entitled to have tried in county of their residence. *Postin v. Griggs (1944) 66 Cal. App. 2d 147, 150, 151 P.2d 887*

Action for conversion as required to be tried in county where defendant resides. *Mason v. Buck (1929) 99 Cal. App. 219, 221, 278 P. 461*

[c] Contract Actions

[i] Exception to Basic Rule of Residence Venue

Breach of contract as transitory cause of action. *Peiser v. Mettler (1958) 50 Cal. 2d 594, 601, 328 P.2d 953*

General rule that residence of defendant is proper place for trial as applying to contract actions with certain exceptions set out in former *Code Civ. Proc. § 395(1)* (*now see Code Civ. Proc. § 395(a)*). *Haurat v. Superior Court (1966) 241 Cal. App. 2d 330, 333, 50 Cal. Rptr. 520*

Under *Code Civ. Proc. § 395*, defendant as entitled to have action transferred to county of his or her residence unless obligation was incurred or was to be performed in another county. *Braunstein v. Superior Court (1964) 225 Cal. App. 2d 691, 694, 37 Cal. Rptr. 666*

Action as properly brought in county in which defendants or some of them reside if original cause of action was based on contract, which plaintiff sought to have interpreted or reformed and enforced. *Ponderosa Sky Ranchv. Okay Improv. Corp. (1962) 204 Cal. App. 2d 227, 230, 22 Cal. Rptr. 90*

Plaintiff as entitled to have action tried in county in which contract was entered into despite defendant's residence in another county. *Richardson v. Rose (1961) 197 Cal. App. 2d 318, 322, 17 Cal. Rptr. 84*

Action based on fraud, and in which plaintiff seeks rescission and accounting, as triable in county of defendant's residence regardless of where contract sought to be cancelled was executed, and as not "founded" on contract sought to be cancelled. *Postin v. Griggs (1944) 66 Cal. App. 2d 147, 150, 151 P.2d 887*

[ii] Where Contract Entered Into

Code Civ. Proc. § 395 as interpreted to mean that all actions arising on contract shall be tried in county in which defendant resides, or in which contract was made, unless defendant has contracted specially and in writing as to county in which his or her obligation is to be performed, in which event that county is also proper county for trial of action. *Dawson v. Goff (1954) 43 Cal. 2d 310, 314, 273 P.2d 1* ; *Braunstein v. Superior Court (1964) 225 Cal. App. 2d 691,*

695, 37 Cal. Rptr. 666 ; *Wilson v. Scannavino (1958) 159 Cal. App. 2d 369, 371, 324 P.2d 350* ; *Armstrong v. Smith (1942) 49 Cal. App. 2d 528, 532, 122 P.2d 115*

Obligation as incurred at time contract is made and obligations under it arise and are incurred in county in which it is made. *Dawson v. Goff (1954) 43 Cal. 2d 310, 315, 273 P.2d 1*

Obligation under option contract incurred when option contract made. *Dawson v. Goff (1954) 43 Cal. 2d 310, 318, 273 P.2d 1*

Contract as entered into in county in which it was signed. *Braunstein v. Superior Court (1964) 225 Cal. App. 2d 691, 694, 37 Cal. Rptr. 666*

Place at which contract bears date as prima facie place where it was made. *Braunstein v. Superior Court (1964) 225 Cal. App. 2d 691, 696, 37 Cal. Rptr. 666* ; *Archer v. Superior Court (1961) 202 Cal. App. 2d 417, 419, 21 Cal. Rptr. 48*

When contract made by telephone, contract as entered into where recipient of message accepted offer. *Friedman Bag Co., Inc. v. Shrier (1961) 194 Cal. App. 2d 561, 564, 15 Cal. Rptr. 38* ; *Wilson v. Scannavino (1958) 159 Cal. App. 2d 369, 371, 324 P.2d 350*

Place where contract actually becomes complete as place where it is made, and its consummation as place where last act necessary to complete its validity is performed. *Cal-Ore Lumber Sales v. Russell (1955) 133 Cal. App. 2d 296, 303-304, 284 P.2d 179* ; *Fitzhugh v. University Realty Co. (1920) 46 Cal. App. 198, 199, 188 P. 1023*

Allegation in complaint that oral agreement was to be performed in specific county, which is not denied by defendant, as admitted, and defendant as estopped to contend that contract not entered into in that county. *Gilman v. Nordin (1952) 112 Cal. App. 2d 788, 792, 247 P.2d 394*

Limitation in former *Code Civ. Proc. § 395(1)* (*now see Code Civ. Proc. § 395(a)*) stating that county in which obligation incurred shall be deemed to be county in which it is performed as effectively cutting down number of counties in which action on contract may properly be tried to two, namely, county in which defendant resides, and county in which contract was made. *Armstrong v. Smith (1942) 49 Cal. App. 2d 528, 531, 122 P.2d 115*

Absent special agreement as to place where contract is to be performed, contract as deemed performable at creditor's place of business, or absent contrary showing, contract deemed performable where it is made. Roos v. Jansen (1938) 30 Cal. App. 2d Supp. 773, 775, 78 P.2d 746

Quasi-contract as going into effect immediately on service of notice of rescission of original contract in county where notice was served. *Fitzhugh v. University Realty Co. (1920) 46 Cal. App. 198, 201, 188 P. 1023*

[iii] "Special Contract in Writing"

Place of performance exception in *Code Civ. Proc. § 395* as referring exclusively to place where defendant's obligation under contract is to be performed. *Mosby v. Superior Court (1974) 43 Cal. App. 3d 219, 224, 117 Cal. Rptr. 588*

"Special contract in writing" as contemplated by *Code Civ. Proc. § 395* as requiring express provision not dependent on implication. *Mitchell v. Superior Court (1986) 186 Cal. App. 3d 1040, 1047, 1049, 231 Cal. Rptr. 176* ; *Mosby v. Superior Court (1974) 43 Cal. App. 3d 219, 224, 117 Cal. Rptr. 588* ; *Braunstein v. Superior Court (1964) 225 Cal. App. 2d 691, 696, 37 Cal. Rptr. 666*

Contract as required to specifically state place of performance of obligation before action may be brought under *Code Civ. Proc. § 395* in county where obligation is performable. *Mitchell v. Superior Court (1986) 186 Cal. App. 3d 1040, 1047, 1049, 231 Cal. Rptr. 176* ; *Wathen v. Superior Court (1963) 212 Cal. App. 2d 125, 129, 27 Cal. Rptr. 840* ; *Armstrong v. Smith (1942) 49 Cal. App. 2d 528, 536, 122 P.2d 115* ; *Fidelity Thrift & Loan Asso. v. Hall (1960) 186 Cal. App. 2d Supp. 895, 899 , 9 Cal. Rptr. 596*

In contract action, venue and proper court for trial in particular judicial district as place where contractual obligation is to be performed as long as contract specifies in writing place of performance. *Stute v. Burinda (1981) 123 Cal. App. 3d Supp. 11, 14 , 177 Cal. Rptr. 102*

Mere specification of geographic location for payment in written contract as sufficient to satisfy "special contract" provision in *Code Civ. Proc. § 395(a)*, and as giving plaintiff right to specify place of payment as place for trial of action on contract. *Stute v. Burinda (1981) 123 Cal. App. 3d Supp. 11, 16 , 177 Cal. Rptr. 102*

"Special contract" requirement as met by agreement to pay money in particular county, to deliver goods at particular place, or to perform obligation in particular city. *Wathen v. Superior Court (1963) 212 Cal. App. 2d 125, 129, 27 Cal. Rptr. 840*

Requirements of "special contract" as met if express stipulation respecting obligation in question is embodied in agreement giving rise to action. *Armstrong v. Smith (1942) 49 Cal. App. 2d 528, 536, 122 P.2d 115*

[d] Injury to Person or Personal Property

"Injury to person" as used in *Code Civ. Proc. § 395* as referring only to injuries of a physical or bodily nature, and not to injuries to character or reputation. *Monk v. Ehret (1923) 192 Cal. 186, 193, 219 P. 452* ; *Carruth v. Superior Court (1978) 80 Cal. App. 3d 215, 219, 145 Cal. Rptr. 344*

"Injury to person" as limited to wrongful or negligent act of another, and as not intended to extend right of place of trial to trespass based on false imprisonment. *Monk v. Ehret (1923) 192 Cal. 186, 192-193, 219 P. 452*

Malicious prosecution as not a *Code Civ. Proc. § 395* "injury to person." *Carruth v. Superior Court (1978) 80 Cal. App. 3d 215, 219, 145 Cal. Rptr. 344*

Defendant as entitled to have negligence action tried either in county of his or her residence or in county where tort occurred. *Maxwell v. Murray (1961) 190 Cal. App. 2d 440, 443, 11 Cal. Rptr. 916*

[e] Residence Defined

Person as able to have only one residence at time. *Enter v. Crutcher (1958) 159 Cal. App. 2d Supp. 841, 844 , 323 P.2d 586*

"Residence" as used in *Code Civ. Proc. § 395* as not referring to "domicile," but used in sense of place in which to live, dwell, abide, sojourn, stay, remain, or lodge. *Enter v. Crutcher (1958) 159 Cal. App. 2d Supp. 841, 844-845 , 323 P.2d 586*

Residence as established by personal presence in fixed and permanent abode, with intent of remaining there. *Enter v. Crutcher (1958) 159 Cal. App. 2d Supp. 841, 845 , 323 P.2d 586*

Elements necessary to create residence as actual bodily presence in place combined with freely exercised intention of remaining there permanently or for indefinite time. *Enter v. Crutcher (1958) 159 Cal. App. 2d Supp. 841, 845 , 323 P.2d 586*

Address as not always synonymous with "residence." *Enter v. Crutcher (1958) 159 Cal. App. 2d Supp. 841, 846 , 323 P.2d 586*

[7] Venue Governed by Party

[a] When Basic Rule of Venue Applies to Corporations

Corporation as having no standing to move for transfer to its principal place of business if venue in county other than corporation's principal place of business is proper. *Mission Imports, Inc. v. Superior Court (1982) 31 Cal. 3d 921, 928, 184 Cal. Rptr. 296, 647 P.2d 1075* ; *Hale v. Bohannon (1952) 38 Cal. 2d 458, 478, 241 P.2d 4*

When corporation and individual defendant are properly joined as defendants, and action is commenced in county where corporation has its principal place of business, individual defendant as not able to have action moved to county of his or her residence for trial. *Hale v. Bohannon (1952) 38 Cal. 2d 458, 472, 241 P.2d 4* ; *Dillman v. Superior Court (1962) 205 Cal. App. 2d 769, 772, 23 Cal. Rptr. 498*

Principal place of business of corporation as its residence for purpose of determining venue. *Hale v. Bohannon (1952) 38 Cal. 2d 458, 472, 241 P.2d 4* ; *All-Cool Aluminum Awning Co. v. Superior Court of Kern County (1964) 224 Cal. App. 2d 660, 36 Cal. Rptr. 769* ; *Beutke v. American Securities Co. (1955) 132 Cal. App. 2d 354, 360, 282 P.2d 201*

[b] Domestic Corporations

[i] Generally

Purpose of *Code Civ. Proc. § 395.5* as to permit wider choice of venue in suits against corporation than is permitted in suits against individual. *Mission Imports, Inc. v. Superior Court (1982) 31 Cal. 3d 921, 928, 184 Cal. Rptr. 296, 647 P.2d 1075* ; *Hale v. Bohannon (1952) 38 Cal. 2d 458, 469, 241 P.2d 4*

Application of *Code Civ. Proc. § 395* to actions against corporations as in direct conflict with and narrowing former *Cal. Const. art. XII, § 16* (*now see Code Civ. Proc. § 395.5*) by materially reducing number of possible counties for trial of action. *Hale v. Bohannon (1952) 38 Cal. 2d 458, 470-471, 241 P.2d 4*

Effect of former *Cal. Const., art. XII, § 16* (*now see Code Civ. Proc. § 395.5*) as authorizing plaintiffs to sue at the place where the cause of action arises, or at the corporation's place of business. *Hale v. Bohannon (1952) 38 Cal. 2d 458, 476, 241 P.2d 4*

Corporation as entitled to change of venue to county of its principal place of business under last clause of former *Cal. Const., art. XII, § 16* (*now see Code Civ. Proc. § 395.5*) when plaintiff fails to bring action in any county specified therein. *Hale v. Bohannon (1952) 38 Cal. 2d 458, 478, 241 P.2d 4* ; *Beutke v. American Securities Co. (1955) 132 Cal. App. 2d 354, 361, 282 P.2d 201* ; *Shores v. Chip Steak Co. (1955) 130 Cal. App. 2d 620, 623, 279 P.2d 591*

Intention of former *Cal. Const., art. XII, § 16* (*now see Code Civ. Proc. § 395.5*) as to benefit plaintiff, who otherwise would be obliged to travel to corporation's principal place of business to commence action. *Hale v. Bohannon (1952) 38 Cal. 2d 458, 479, 241 P.2d 4*

Corporation is deemed bound by designation of principal place of business in corporate documents filed with Secretary of State and cannot defeat venue in that county by showing it has no office or place of business there. *Rosas v. Superior Court (1994) 25 Cal. App. 4th 671, 673-674, 30 Cal. Rptr. 2d 609*

Under former *Cal. Const. art. XII, § 16* (*now see Code Civ. Proc. § 395.5*), maintenance of action on quasi-contract against corporation as properly in county in which quasi-contract was made. *Fitzhugh v. University Realty Co. (1920) 46 Cal. App. 198, 201, 188 P. 1023*

[ii] Where Contract Is Made or to Be Performed

Contract of corporation as held performable in place where circumstances, viewed in light of pertinent code provisions, indicate that parties expected or intended it to be performed. *Burr v. Western States Life Ins. Co. (1931) 211 Cal. 568, 574, 296 P. 273*

Under *Code Civ. Proc. § 395.5*, place of contract's making as determined by last act necessary to validity of contract, usually act constituting acceptance. *Jhirmack Enterprises, Inc. v. Superior Court (1979) 96 Cal. App. 3d 715, 723, 158 Cal. Rptr. 192*

[iii] Where Obligation or Liability Arises

Under *Code Civ. Proc. § 395.5*, place of making contract as place where obligation arises. *Jhirmack Enterprises, Inc. v. Superior Court (1979) 96 Cal. App. 3d 715, 723, 158 Cal. Rptr. 192*

[c] Foreign Corporations

Foreign corporations that fail to comply with former *Civ. Code § 405* (*now see Corp. Code § 2105*) as having no "residence" within California; if corporation does comply, former *Cal. Const., art. XII, § 16* (*now see Code Civ. Proc. § 395.5*) applies. *Hale v. Bohannon (1952) 38 Cal. 2d 458, 475, 241 P.2d 4*

Foreign corporation that does not establish that it has qualified to do business in California under former Corp. Code § 6403 (*now see Corp. Code § 2105*) as subject to suit in any county in state. *Easton v. Superior Court (1970) 12 Cal. App. 3d 243, 246-247, 90 Cal. Rptr. 642*

Foreign corporation as residing at its principal place of business in this state, as designated in statement it is required to file in office of the Secretary of State pursuant to former *Code Civ. Proc. § 405* (*now see Corp. Code § 2105*), and as entitled to change of venue for same reasons applicable to domestic corporations. *Eckles v. Justice's Court (1948) 84 Cal. App. 2d 269, 271, 190 P.2d 224*

[d] State or Local Government or Agency

[i] Actions Against State

Provisions for venue that pertain to other civil actions apply to actions against state agencies and public entities, unless otherwise designated by statute. *Regents of University of California v. Superior Court (1970) 3 Cal. 3d 529, 534, 91 Cal. Rptr. 57, 476 P.2d 457*

Board of Regents of University of California characterized as state institution, public corporation, governmental

agency, and public agency, and rules of venue generally applicable to proceedings against state agencies govern actions against *Regents. Regents of University of California v. Superior Court (1970) 3 Cal. 3d 529, 534, 91 Cal. Rptr. 57, 476 P.2d 457*

Statutory provisions as to venue for actions against state agencies liberally construed in favor of private litigant. *Regents of University of California v. Superior Court (1970) 3 Cal. 3d 529, 536, 91 Cal. Rptr. 57, 476 P.2d 457*

Code Civ. Proc. § 401 is not limited to statutes that expressly name Sacramento County as place of trial. *Harris v. Alcoholic Bev. Etc. Appeals Bd. (1961) 197 Cal. App. 2d 759, 764-765, 18 Cal. Rptr. 151*

Ordinary venue rules apply to transitory actions against state boards, commissions, departments and agencies, and state agency or board located in Sacramento and involved in transitory action may assert venue there on basis of residence under *Code Civ. Proc. § 395*. *Harris v. Alcoholic Bev. Etc. Appeals Bd. (1961) 197 Cal. App. 2d 759, 765, 18 Cal. Rptr. 151*

Phrase in *Code Civ. Proc. § 401* stating "whenever it is provided by any law" encompasses situation in which (1) Sacramento County is named by law as county for commencement, trial, removal of action, or proceeding; and (2) by operation of general rules of venue found in *Code Civ. Proc. §§ 392-402*, Sacramento is county where action or proceeding is properly triable. *Harris v. Alcoholic Bev. Etc. Appeals Bd. (1961) 197 Cal. App. 2d 759, 766, 18 Cal. Rptr. 151*

Code Civ. Proc. § 401(1) is not limited to actions defended by *Attorney General. Harris v. Alcoholic Bev. Etc. Appeals Bd. (1961) 197 Cal. App. 2d 759, 767, 18 Cal. Rptr. 151*

Code Civ. Proc. § 401(1) as applicable irrespective of whether there is state or nonstate plaintiff. *Harris v. Alcoholic Bev. Etc. Appeals Bd. (1961) 197 Cal. App. 2d 759, 767, 18 Cal. Rptr. 151*

[ii] Death or Injury to Person or Personal Property

Discretion under *Gov. Code § 955.2* to choose different venue than county where injury occurred is conferred solely on superior court of county where injury occurred; superior court of county where injury did not occur is required to follow statute. *State of California v. Superior Court (1987) 193 Cal. App. 3d 328, 330, 238 Cal. Rptr. 315*

Gov. Code § 955.2 is specifically limited only to certain tort actions involving death or injury to person or personal property. *Hatcher v. California State University, Fresno (1983) 146 Cal. App. 3d Supp. 1, 3 , 194 Cal. Rptr. 756*

[iii] Inverse Condemnation, Money or Damages

Gov. Code § 955, which establishes venue in actions against State for taking or damaging property, relates only to actions on claims for money or damages for which filing of claim is statutory prerequisite, or to actions on claims for money or damages which are specifically exempted from filing requirement. *Tharp v. Superior Court (1982) 32 Cal. 3d 496, 500-501, 186 Cal. Rptr. 335, 651 P.2d 1141*

[e] Unincorporated Associations

In applying the "liability or obligation" language of *Code Civ. Proc. § 395.5* to a lawsuit seeking to enforce a statutory obligation or liability against an unincorporated association, there is no reason to try to pigeonhole the action into contract, quasi-contract, or tort categories; instead, statutory liability cases should be analyzed independently for

purposes of determining proper venue. An action for declaratory relief against an insurer may be commenced in the county where a third party claimant sues, because that is where the insurer's liability arises; the same rule should be applied where the obligation is created by a statute rather than an insurance contract. The "obligation or liability" provision of section 395.5 does not require that the defendant perform any act inside the county for venue to be proper; it merely requires that the obligation arise there. *Black Diamond Asphalt, Inc. v. Superior Court of San Joaquin County (2003) 109 Cal. App. 4th 166, 171, 134 Cal. Rptr. 2d 510*

Alternative provided by *Code Civ. Proc. § 395.5* to lay venue in county of principal place of business as applies only to corporations and not to unincorporated associations. *Mosby v. Superior Court (1974) 43 Cal. App. 3d 219, 225, 117 Cal. Rptr. 588*

Rule that when plaintiff brings action against several defendants, both individual and corporate, in county that is neither residence nor principal place of business of any defendant, individual defendant has right on proper showing to change of venue to county of his or her residence even though venue as initially laid may otherwise be justifiable on one of four alternative grounds provided by *Code Civ. Proc. § 395.5* applies to unincorporated associations. *Mosby v. Superior Court (1974) 43 Cal. App. 3d 219, 226, 117 Cal. Rptr. 588*

Principal place of business of unincorporated association is county of its residence for venue purposes. *Mosby v. Superior Court (1974) 43 Cal. App. 3d 219, 226, 117 Cal. Rptr. 588*

[8] Transfer to Neutral County

[a] Generally

Code Civ. Proc. § 394 is liberally construed. *San Francisco Foundation v. Superior Court (1984) 37 Cal. 3d 285, 296, 208 Cal. Rptr. 31, 690 P.2d 1* ; *Westinghouse Electric Corp. v. Superior Court (1976) 17 Cal. 3d 259, 266, 131 Cal. Rptr. 231, 551 P.2d 847* ; *Garrett v. Superior Court (1974) 11 Cal. 3d 245, 248, 113 Cal. Rptr. 152, 520 P.2d 968* ; *Finance & Construction Co. v. Sacramento (1928) 204 Cal. 491, 493, 269 P. 167*

Code Civ. Proc. § 394 is based on premise that there is substantial risk of prejudice in favor of local government entity. *San Francisco Foundation v. Superior Court (1984) 37 Cal. 3d 285, 298, 208 Cal. Rptr. 31, 690 P.2d 1* ; *Westinghouse Electric Corp. v. Superior Court (1976) 17 Cal. 3d 259, 271, 131 Cal. Rptr. 231, 551 P.2d 847*

Governmental entity has presumptive prejudicial advantage in action it brings in its own county. *Westinghouse Electric Corp. v. Superior Court (1976) 17 Cal. 3d 259, 272, 131 Cal. Rptr. 231, 551 P.2d 847*

Person doing business in county has unfair advantage over city situated outside county in trial of action in which person and city were arrayed against each other. *Finance & Construction Co. v. Sacramento (1928) 204 Cal. 491, 493, 269 P. 167*

Code Civ. Proc. § 394 applies to cross-complaints; given that purpose of *Code Civ. Proc. § 394* is to prevent corporate defendant from suffering prejudice in favor of local governmental entity, statute should be liberally construed to promote this policy. *Kennedy/Jenks Consultants, Inc. v. Superior Court (2000) 80 Cal. App. 4th 948, 954-957, 95 Cal. Rptr. 2d 817* (First Dist., Div. Five; following *Ohio Casualty Ins. Group v. Superior Court (1994) 30 Cal. App. 4th 444, 448-451, 35 Cal. Rptr. 2d 771 (Third Dist.)* and declining to follow *City of Chico v. Superior Court (1979) 89 Cal. App. 3d 187, 188-192, 152 Cal. Rptr. 380 (First Dist., Div. Four)*

Where a local agency filed a compulsory cross-complaint asserting a claim in the county where it resides against a nonresident of that county, cross-defendant had the right to move for a change of venue pursuant to *Code Civ. Proc. §*

394. Metropolitan Transit System v. Superior Court (2007) 153 Cal. App. 4th 293, 304, 62 Cal. Rptr. 3d 517

Code Civ. Proc. § 394 should receive liberal construction that will promote policy behind law; section 394 is intended to guard against possible local bias against out-of-county defendants; bias protected against is prejudice resulting from county citizens perceiving trial outcome as tied to their economic interests; statute, however, does not require that public entity have economic interest in outcome of lawsuit before nonresident defendant may seek transfer of venue, although court found it relevant that any recovery would go to conservatorship estate, not public coffers; absence of potential impact on county taxpayers' monetary interests meant protective purpose of section 394 was not thwarted by conclusion that statute was inapplicable. *Transamerica Homefirst, Inc. v. Superior Court (1999) 69 Cal. App. 4th 577, 581, 81 Cal. Rptr. 2d 705*

Purpose of *Code Civ. Proc. § 394* is to guard against possible local prejudice against out-of-county defendants; *Code Civ. Proc. § 394* is designed to protect party from prejudice resulting from citizens in county perceiving trial outcome as tied to their economic interests; court could find no case granting section 394 transfer when judgment had no potential impact on fiscal fortunes of citizens of county. *Nguyen v. Superior Court (1996) 49 Cal. App. 4th 1781, 1789-1790, 57 Cal. Rptr. 2d 611*

Code Civ. Proc. § 394 is removal or change of venue provision, and has no application unless and until action commenced under applicable venue rules. *County of San Bernardino v. Superior Court (1994) 30 Cal. App. 4th 378, 381, 388-389, 35 Cal. Rptr. 2d 760* ; *Sutter Union High School Dist. v. Superior Court (1983) 140 Cal. App. 3d 795, 797, 190 Cal. Rptr. 182* ; *Morrison v. Superior Court (1980) 100 Cal. App. 3d 852, 854, 161 Cal. Rptr. 169* ; *Dorame v. Superior Court (1978) 81 Cal. App. 3d 70, 72, 146 Cal. Rptr. 162*

"Plaintiff" and "defendant" as used in *Code Civ. Proc. § 394* include "cross complainant" and "cross defendant." *Ohio Casualty Ins. Group v. Superior Court (1994) 30 Cal. App. 4th 444, 448-449, 451, 35 Cal. Rptr. 2d 771* (criticizing and declining to follow *City of Chico v. Superior Court (1979) 89 Cal. App. 3d 187, 152 Cal. Rptr. 380* .

Code Civ. Proc. § 395 is subordinate to *Code Civ. Proc. § 394(1)* (*see now Code Civ. Proc. § 394(a)*) in mixed venue case involving both provisions. *Central Contra Costa Sanitary Dist. v. Superior Court (1978) 84 Cal. App. 3d 702, 705, 148 Cal. Rptr. 801* ; *Delgado v. Superior Court (1977) 74 Cal. App. 3d 560, 564, 141 Cal. Rptr. 528*

Neutral county is selected by trial court. *Central Contra Costa Sanitary Dist. v. Superior Court (1978) 84 Cal. App. 3d 702, 706, 148 Cal. Rptr. 801* ; *Adams v. Superior Court (1964) 226 Cal. App. 2d 365, 369, 38 Cal. Rptr. 164* ; *City of Oakland v. Darbee (1951) 102 Cal. App. 2d 493, 500, 227 P.2d 909*

[b] Actions Against City, County, or Local Agency

Third sentence of *Code Civ. Proc. § 394(1)* (*see now Code Civ. Proc. § 394(a)*) asproviding that in action brought against local agency of any kind, change of venue is available in most circumstances. *Westinghouse Electric Corp. v. Superior Court (1976) 17 Cal. 3d 259, 268, 131 Cal. Rptr. 231, 551 P.2d 847*

If a plaintiff sues a county or local agency for injuries occurring within the county where the public agency is located, *Code Civ. Proc. § 394* requires the suit to be tried in the defendant county, and Section 394 statute unequivocally provides that an action brought against a county or local governmental agency for personal injuries occurring in the county must be brought in that county; however, despite the mandatory language of this statute, the right to transfer may be waived if there is unreasonable delay. *Ventura Unified School Dist. v. Superior Court (2001) 112 Cal. Rptr. 2d 260*

Code Civ. Proc. § 394 (a) provision that any action against county for personal injury that occurred within that county caused by the negligence or alleged negligence of county or its agents or employees, shall be tried in that county is

exception to general venue statute (*Code Civ. Proc. § 395*), which permits venue either in the county where injury occurs or injury causing death occurs or the county in which defendants, or some of them, reside at commencement of the action; if plaintiff sues both county and individual defendants who reside outside county for injuries occurring within county, *Code Civ. Proc. § 394* requires suit to be tried in defendant county, even though general venue rules would have permitted trial in county where individual defendants reside. *County of Orange v. Superior Court (1999) 73 Cal. App. 4th 1189, 1192-1193, 86 Cal. Rptr. 2d 923*

Code Civ. Proc. § 394 does not giving plaintiff right to commence and proceed to trial in action in county where no reason exists for the selection of that particular county. *Fitzpatrick v. Sonoma County (1929) 97 Cal. App. 588, 276 P. 113*

[c] Actions by City, County, or Local Agency Against City, County, or Local Agency

A contractual provision purporting to waive a defendant's right to transfer an action to a neutral county pursuant to *Code Civ. Proc. § 394* is invalid. *Arntz Builders v. Superior Court (2004) 122 Cal. App. 4th 1195, 1198, 19 Cal. Rptr. 3d 346*

Under first sentence of *Code Civ. Proc. § 394(1)* (*see now Code Civ. Proc. § 394(a)*), when it is shown that both parties are cities within same county, transfer is required, and proceeding may be transferred to any other neutral county. *City of Alameda v. Superior Court (1974) 42 Cal. App. 3d 312, 316, 116 Cal. Rptr. 806*

[d] Actions by City, County, or Local Agency Against Resident of or Corporation Doing Business in Another City, County, or Local Agency

[i] General Rule

Only nonresident party itself may move for change of venue under *Code Civ. Proc. § 394*. *Westinghouse Electric Corp. v. Superior Court (1976) 17 Cal. 3d 259, 278, 131 Cal. Rptr. 231, 551 P.2d 847*

Code Civ. Proc. § 394 applies when lawsuit is "brought by" public entity within meaning of *Code Civ. Proc. § 394*, and determination whether action is brought by county agency depends on county agency's role within lawsuit; when action brought on conservatee's behalf by county's public guardian against nonresident defendant, action is not one brought by county agency, within meaning of section 394, and thus action need not be transferred pursuant to section 394(a). *Transamerica Homefirst, Inc. v. Superior Court (1999) 69 Cal. App. 4th 577, 579-581, 81 Cal. Rptr. 2d 705*

District attorney acts on behalf of state rather than county when district attorney represents People of the State of California in red light abatement action pursuant to *Pen. Code § 11226* and thus, mandatory transfer provisions of *Code Civ. Proc. § 394(a)* do not apply, that is, red light abatement actions are exempt from the mandatory transfer provisions of *Code Civ. Proc. § 394(a)*. *Nguyen v. Superior Court (1996) 49 Cal. App. 4th 1781, 1784, 1786-1791, 57 Cal. Rptr. 2d 611*

Code Civ. Proc. § 394 applies to any action or proceeding brought by city against nonresident on any kind of claim city might have against nonresident. *City of Oakland v. Darbee (1951) 102 Cal. App. 2d 493, 498, 227 P.2d 909*

[ii] Corporate Defendants

Defendant corporation's rights under *Code Civ. Proc. § 394* may be barred because of existence, nature, and extent of activities within forum county. *San Francisco Foundation v. Superior Court (1984) 37 Cal. 3d 285, 297-298, 208*

Cal. Rptr. 31, 690 P.2d 1

Question of whether corporation is doing business in county within meaning of *Code Civ. Proc. § 394* is whether corporation's activities are such that it is reasonably likely to be viewed as outsider, not whether it is actually so viewed. *San Francisco Foundation v. Superior Court (1984) 37 Cal. 3d 285, 299, 208 Cal. Rptr. 31, 690 P.2d 1* ; *Westinghouse Electric Corp. v. Superior Court (1976) 17 Cal. 3d 259, 271 n.7, 131 Cal. Rptr. 231, 551 P.2d 847*

Corporation with main place of business in county in which it is sued, or with major branch office in that county is not able to invoke *Code Civ. Proc. § 394*. *San Francisco Foundation v. Superior Court (1984) 37 Cal. 3d 285, 299, 208 Cal. Rptr. 31, 690 P.2d 1* ; *Westinghouse Electric Corp. v. Superior Court (1976) 17 Cal. 3d 259, 271, 131 Cal. Rptr. 231, 551 P.2d 847*

Corporation with principal place of business elsewhere, and with only limited contacts in county may obtain change of venue in action brought by local government entity. *Westinghouse Electric Corp. v. Superior Court (1976) 17 Cal. 3d 259, 271, 131 Cal. Rptr. 231, 551 P.2d 847*

Services related to subject matter of particular litigation are not normally type of activities that constitute "doing business" within purposes of *Code Civ. Proc. § 394*. *Westinghouse Electric Corp. v. Superior Court (1976) 17 Cal. 3d 259, 272, 131 Cal. Rptr. 231, 551 P.2d 847*

Corporation's right to transfer venue is not diminished by fact that one or more of other corporate defendants may be doing business in county. *Westinghouse Electric Corp. v. Superior Court (1976) 17 Cal. 3d 259, 275, 131 Cal. Rptr. 231, 551 P.2d 847*

Code Civ. Proc. § 394 does not specifically provide for treating unincorporatedassociation, such as joint venture, separately from its members, and close association of members with community mitigates presumed bias. *Westinghouse Electric Corp. v. Superior Court (1976) 17 Cal. 3d 259, 277, 131 Cal. Rptr. 231, 551 P.2d 847*

Quality of business connections and not their quantity or duration determines whether party is doing business locally; qualitative analysis must focus on whether types of contacts with county are substantial enough for company to be reasonably viewed as closely associated with community; relevant inquiry under *Code Civ. Proc. § 394* includes analysis of nature of litigation as well as activities of party seeking change of venue; defendant's section 394 motion to transfer under should have been granted given lack of evidence of activities by defendant to tie it to local community and nature of case, which posed reasonable risk that defendant would be viewed as outsider. *Kennedy/Jenks Consultants, Inc. v. Superior Court (2000) 80 Cal. App. 4th 948, 957-964, 95 Cal. Rptr. 2d 817*

[e] "Local Agency" Defined

BART is "local agency within certain county" for purposes of *Code Civ. Proc. § 394*. *Westinghouse Electric Corp. v. Superior Court (1976) 17 Cal. 3d 259, 268, 131 Cal. Rptr. 231, 551 P.2d 847*

[f] Motion to Transfer

[i] Generally

Motion for change of venue under *Code Civ. Proc. § 394* is required to be made only within a reasonable time. *Newman v. County of Sonoma (1961) 56 Cal. 2d 625, 627, 15 Cal. Rptr. 914, 364 P.2d 850* ; *Channell v. Superior Court (1964) 226 Cal. App. 2d 246, 252-253, 38 Cal. Rptr. 13* ; *Adams v. Superior Court (1964) 226 Cal. App. 2d 365, 367, 38 Cal. Rptr. 164*

Code Civ. Proc. § 394 motion as not required to be made at time of answer to complaint or cross complaint, but may be made within reasonable time thereafter. *Marin Community College Dist. v. Superior Court (1977) 72 Cal. App. 3d 719, 723, 140 Cal. Rptr. 310* ; *Adams v. Superior Court (1964) 226 Cal. App. 2d 365, 367, 38 Cal. Rptr. 164*

Code Civ. Proc. § 394 motion as not required to be denied on ground that it is untimely unless it is pursued for dilatory purposes and unless public agency can show substantial prejudice. *Marin Community College Dist. v. Superior Court (1977) 72 Cal. App. 3d 719, 723, 140 Cal. Rptr. 310*

Code Civ. Proc. § 394 motion to transfer as able to be made either before or a reasonable time after a demurrer has been heard and submitted for decision. *Adams v. Superior Court (1964) 226 Cal. App. 2d 365, 367, 38 Cal. Rptr. 164*

Right to change of venue under *Code Civ. Proc. § 394* as subject to waiver for lack of diligence in prosecuting motion. *Adams v. Superior Court (1964) 226 Cal. App. 2d 365, 368-369, 38 Cal. Rptr. 164*

Procedural requirements of *Code Civ. Proc. § 396b* as not governing motion pursuant to *Code Civ. Proc. § 394*. *Channell v. Superior Court (1964) 226 Cal. App. 2d 246, 252, 38 Cal. Rptr. 13*

In passing on sufficiency of showing in support of *Code Civ. Proc. § 394* motion to transfer, trial court as unable to try substantive issues. *City of Long Beach v. Lakewood Park (1953) 118 Cal. App. 2d 596, 598, 258 P.2d 538*

[ii] Burden of Proof

Change of venue because of actual prejudice as within purview of former *Code Civ. Proc. § 397(2)* (*now see Code Civ. Proc. § 397(b)*), not *Code Civ. Proc. § 394*. *San Francisco Foundation v. Superior Court (1984) 37 Cal. 3d 285, 299, 208 Cal. Rptr. 31, 690 P.2d 1* ; *Westinghouse Electric Corp. v. Superior Court (1976) 17 Cal. 3d 259, 271 n.7, 131 Cal. Rptr. 231, 551 P.2d 847*

Showing of possible prejudice as not required under *Code Civ. Proc. § 394*. *City of Alameda v. Superior Court (1974) 42 Cal. App. 3d 312, 317, 116 Cal. Rptr. 806*

Burden of proof justifying change of venue as resting on moving party. *Los Angeles v. Pac. Tel. & Tel. Co. (1958) 164 Cal. App. 2d 253, 260, 330 P.2d 888*

Code Civ. Proc. § 394 as not making defendant's right of transfer dependent on residence of other defendants, nor does it require moving party to select county or to make showing concerning county other than county of their residence or county in which city is situated. *City of Oakland v. Darbee (1951) 102 Cal. App. 2d 493, 497, 227 P.2d 909*

[9] Effect of Joinder on Venue

[a] Generally

Mixed action as being when two or more defendants are named who are subject to different venue standards. *Brown v. Superior Court (1984) 37 Cal. 3d 477, 488, 208 Cal. Rptr. 724, 691 P.2d 272*

Identifying characteristic of "mixed actions" as being two or more inconsistent venue provisions of Code of Civil Procedure or of Constitution that appear to be concurrently applicable in same case. *Brown v. Superior Court (1984) 37 Cal. 3d 477, 488, 208 Cal. Rptr. 724, 691 P.2d 272* ; *Channell v. Superior Court (1964) 226 Cal. App. 2d 246, 248, 38 Cal. Rptr. 13*

[b] Joinder of Causes of Action

General rule as that when action is partly local and partly transitory and is stated in separate causes of action, it is to be regarded as transitory in determining place of trial. *Peiser v. Mettler (1958) 50 Cal. 2d 594, 605, 328 P.2d 953*

Defendant as entitled to have proceeding transferred to county of his or her residence if there is personal cause of action joined with one that is local in nature. *Peiser v. Mettler (1958) 50 Cal. 2d 594, 605, 328 P.2d 953* ; *Hammon v. American Etc. Mining Co. (1962) 203 Cal. App. 2d 306, 311, 21 Cal. Rptr. 409* ; *Hardy v. White (1955) 130 Cal. App. 2d 550, 552, 279 P.2d 126*

Plaintiff as not entitled to unite matters that form subject of personal action with matters that form subject of local action in one complaint so as to compel defendant to have both matters tried in county other than that in which he or she resides. *Smith v. Smith (1891) 88 Cal. 572, 576, 26 P. 356* ; *Channell v. Superior Court (1964) 226 Cal. App. 2d 246, 251, 38 Cal. Rptr. 13* ; *All-Cool Alum. Etc. Co. v. Superior Court (1964) 224 Cal. App. 2d 660, 667, 36 Cal. Rptr. 769* ; *Beutke v. American Securities Co. (1955) 132 Cal. App. 2d 354, 359-360, 282 P.2d 201*

If defendant is entitled to change of venue as to one cause of action, entire action is transferred. *Gallin v. Superior Court (1991) 230 Cal. App. 3d 541, 545, 281 Cal. Rptr. 304*

Action as essentially transitory if personal property is involved, or if cause of action of personal nature is joined in good faith and not merely incidentally with local cause of action. *Myers v. Superior Court (1946) 75 Cal. App. 2d 925, 929, 172 P.2d 84*

Actions to quiet title to personal as well as real property, and for specific performance of contract relating to such personal and real property as essentially transitory. *Myers v. Superior Court (1946) 75 Cal. App. 2d 925, 930, 172 P.2d 84*

[c] Joinder of Defendants

[i] Generally

Defendant as not entitled to have action removed to county of his or her residence unless it appears that none of the other defendants are residents of county where action is brought. *Monogram Co. v. Kingsley (1951) 38 Cal. 2d 28, 30, 237 P.2d 265* ; *Hoag v. Superior Court (1962) 207 Cal. App. 2d 611, 616, 24 Cal. Rptr. 659*

Plaintiff as not entitled to join as defendants those who are not real parties in interest merely for purpose of obtaining trial in county of their residence. *Neet v. Holmes (1942) 19 Cal. 2d 605, 612, 122 P.2d 557*

Residence of defendant who was not joined in good faith but simply in attempt to defeat right of other defendant to trial at his or her residence under *Code Civ. Proc. § 395* as not considered in determining proper place for trial. *Hoag v. Superior Court (1962) 207 Cal. App. 2d 611, 617, 24 Cal. Rptr. 659* ; *Dreher v. Fidelity & Casualty Co. (1957) 148 Cal. App. 2d 695, 700, 307 P.2d 407*

Party joined as defendant because he or she cannot be joined as plaintiff as exception to general rule that when one defendant has residence or principal place of business in county in which action was brought, other defendants cannot change place of trial to county of their residence. *Stesel v. Santa Ana River Water Co. (1939) 35 Cal. App. 2d 117, 126-127, 94 P.2d 1052*

[ii] Individual and Corporate Defendants Joined

General rules governing joinder of defendants and effect of such joinder on venue as applying whether defendants are individuals or corporations. *Dillman v. Superior Court (1962) 205 Cal. App. 2d 769, 772, 23 Cal. Rptr. 498*

Plaintiff as entitled to fix venue at residence of either individual or corporation in cause of action stated against both, and joinder in conformity with statutes. *Dillman v. Superior Court (1962) 205 Cal. App. 2d 769, 772, 23 Cal. Rptr. 498*

[iii] State and Corporate Defendants Joined

Plaintiff as waiving procedural rights granted by former *Cal. Const., art. XII, § 16* (*now see Code Civ. Proc. § 395.5*) by joining state and corporation as defendants, because *Gov. Code § 955.2*, by its terms, takes precedence. *State v. Superior Court of Los Angeles County (1967) 252 Cal. App. 2d 637, 643, 60 Cal. Rptr. 653*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueCorporationsCivil ProcedureVenueIndividual DefendantsCivil ProcedureVenuePublic OfficialsEstate, Gift & Trust LawProbatePersonal RepresentativesGeneral OverviewReal Property LawTitle QualityAdverse Claim ActionsGeneral Overview

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A. Place of Trial

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§ 571.63 Text References

Witkin, California Procedure, Vol. 3, *Actions*, § 701 et seq. (4th ed. 1996)

Legal Topics:

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§ 571.70 State Statutes

[1] Motion for Change of Venue

[a] In General

Transfer of unlawful detainer or consumer actions commenced in wrong court to proper court. *Code Civ. Proc. § 396a*

Action commenced in wrong court that has subject matter jurisdiction as subject to trial therein absent defendant's motion for transfer. *Code Civ. Proc. § 396b(a)*

Court as able to consider ancillary motions during pendency of motion to transfer in proceeding for dissolution of marriage or legal separation. *Code Civ. Proc. § 396b(c)*

Grounds for change of venue. *Code Civ. Proc. § 397*

Determining transferee court. *Code Civ. Proc. § 398*

Costs and fees of transfer. *Code Civ. Proc. § 399*

Jurisdiction of court to which action is transferred. *Code Civ. Proc. § 399*

Transmittal of pleadings and papers to court to which action is transferred and notice of transmittal. *Code Civ. Proc. § 399*

Voluntary dismissal as not allowed if *Code Civ. Proc. § 396b* motion pending. *Code Civ. Proc. § 581(a)*

Transfer of action or proceeding not commenced in proper court. *Code Civ. Proc. §§ 396b(a), 397(a)*

Time to file response to action if motion for transfer denied, and if no response previously filed. *Code Civ. Proc. § 396b(e)*

Service and filing of motion as placing motion before court for all purposes. *Code Civ. Proc. § 1005.5*

Requisites of written notice. *Code Civ. Proc. § 1010*

Offer to stipulate to change of venue as considered in determining whether party to motion for change should be ordered to pay attorney's fees and cost. *Code Civ. Proc. § 396b*

Court to which case transferred as having same jurisdiction as if action originally commenced therein. *Code Civ. Proc. § 399*

[b] Action Commenced in Wrong Court

After hearing on defendant's motion, court as required to transfer action or proceeding not commenced in proper court. *Code Civ. Proc. § 396b(a)*

Payment of expenses and attorney's fees incurred in making or resisting motion to transfer. *Code Civ. Proc. § 396b(b)*

Court as required to allow defendant time to move to strike, demur, or otherwise plead if motion for transfer is denied and if no response previously filed. *Code Civ. Proc. § 396b(e)*

Court as able to change place of trial when court designated in complaint is not proper court. *Code Civ. Proc. § 397(a)*

[c] Convenience of Witnesses and Ends of Justice

Change of place of trial when convenience of witnesses and ends of justice would be promoted by change. *Code Civ. Proc. § 397(c)*

[d] Disqualification of Judges

Grounds for disqualification of judges. *Code Civ. Proc. § 170.1*

Court as able to change place of trial when no judge of court qualified to act. *Code Civ. Proc. § 397(d)*

[e] Impartial Trial Cannot Be Had

Change of place of trial when there is reason to believe that impartial trial cannot be had therein. *Code Civ. Proc. § 397(b)*

[f] In Specific Actions or Proceedings

Change of venue in dissolution of marriage proceedings. *Code Civ. Proc. § 397*

Transfer of proceedings under Family Law Act. *Code Civ. Proc. § 397.5*

[2] Plaintiff's Opposition to Defendant's Motion for Change of Venue

Consideration of plaintiff's opposition to motion to transfer. *Code Civ. Proc. § 396b(d)*

[3] Review of Court Orders

Review of superior court order granting or denying motion for change of venue by petition for writ of mandate. *Code Civ. Proc. § 400*

Court as required to allow extension of time to answer after appeal from order granting or denying motion to transfer or mandate proceeding pursuant to *Code Civ. Proc. § 400* becomes final. *Code Civ. Proc. § 586(a)(6)(C)*

[4] Transfer Within County

Power of superior court to transfer civil case to another branch or location of court in same county. *Code Civ. Proc. § 402*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedureVenueMotions to TransferConvenience of WitnessesCivil ProcedurePleading & PracticeMotion PracticeTime LimitationsCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral Overview

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§ 571.71 Decisions

[1] Action Commenced in Wrong Court

Like Code Civ. Proc. *§ 396, Welf. & Inst. Code* § 15657.3, part of the Elder Abuse Act, allows the probate court to determine that a matter should be determined in another portion of the court. Requiring a party to refile a case in the same courthouse, with possible statute of limitations issues, and additional costs to the party, is inconsistent with the legislative attempt to protect elderly *Californians. Conservatorship of Kayle (2005) 134 Cal. App. 4th 1, 6-7, n.3, 35 Cal. Rptr. 3d 671*

Award of attorney's fees as proper under *Code Civ. Proc. § 396b(b)* if, after reviewing factual and legal presentation made by losing party, court finds that no reasonable attorney would have honestly chosen such forum, and that forum appears to have been selected to impair defendant's right to defend. *Metzger v. Silverman (1976) 62 Cal. App. 3d Supp. 30, 38-39 , 133 Cal. Rptr. 355*

[2] Burden of Proof

Corporate defendant moving to change venue in action involving tort as required to prove that its principal place of business is not in county in which complaint was filed, and that alleged liability did not arise in that county. *Mission Imports, Inc. v. Superior Court (1982) 31 Cal. 3d 921, 929, 184 Cal. Rptr. 296, 647 P.2d 1075*

Affidavit of vice-president of defendant corporation in support of motion to change venue as to fact that none of the defendants, including nonmoving codefendant, were residents of county, which fact must depend on codefendants intent, as sufficient averment of such fact, although made on information and belief. *Brown v. Happy Valley Fruit Growers (1929) 206 Cal. 515, 520, 274 P. 977* ; *see also City of Santa Cruz v. Municipal Court (1989) 49 Cal. 3d 74, 87, 260 Cal. Rptr. 520, 776 P.2d 222*

Burden of showing facts to justify change of venue as on moving defendant because plaintiff's choice of venue is

presumptively correct. *Massae v. Superior Court (1981) 118 Cal. App. 3d 527, 530, 173 Cal. Rptr. 527*

Motion for change of venue as having two requirements: (1) it must be shown that action is proper in county to which moving party seeks transfer, and (2) it must be shown that county in which action was filed was improper under any applicable theory. *Mosby v. Superior Court (1974) 43 Cal. App. 3d 219, 228, 117 Cal. Rptr. 588* ; *Easton v. Superior Court (1970) 12 Cal. App. 3d 243, 245-246, 90 Cal. Rptr. 642* ; *Sequoia Pine Mills, Inc. v. Superior Court (1968) 258 Cal. App. 2d 65, 68, 65 Cal. Rptr. 353*

Presumption as that defendants are residents of county wherein action commenced, and burden of proof as cast on them to show that they were at commencement of action residents of counties other than that wherein suit is brought, to which they ask that the place of trial be removed. *Sequoia Pine Mills, Inc. v. Superior Court (1968) 258 Cal. App. 2d 65, 67-68, 65 Cal. Rptr. 353*

Burden as resting on one who seeks change of venue under former *Code Civ. Proc. § 397(3)* (*now see Code Civ. Proc. § 397(c)*) to prove that both convenience of witnesses and ends of justice will be promoted. *Braunstein v. Superior Court (1964) 225 Cal. App. 2d 691, 698-699, 37 Cal. Rptr. 666* ; *Dillman v. Superior Court (1962) 205 Cal. App. 2d 769, 773, 23 Cal. Rptr. 498*

Corporate defendant seeking change of venue as required to show not only place of residence or principal place of business, but also that contract was not made, that it was not to be performed, that obligation or liability did not arise, and that breach did not occur in venue originally determined by filing of plaintiff's complaint. *Smith v. Stanford Research Institute (1963) 212 Cal. App. 2d 750, 754, 28 Cal. Rptr. 481*

Burden as on plaintiff to show that case comes clearly within one of statutory exceptions to general rule that actions are triable at place of defendant's residence when defendant has made proper showing of nonresidence. *Archer v. Superior Court (1961) 202 Cal. App. 2d 417, 420, 21 Cal. Rptr. 48*

Statement by party as to his or place of residence in affidavit on motion for change of venue as constituting prima facie showing sufficient to support order directing change, if not overthrown by contrary evidence. *Taff v. Goodman (1940) 41 Cal. App. 2d 771, 774, 107 P.2d 431*

Affidavit of declaration made on information and belief by defendants on motion to change place of trial in relation to nonresidence of other defendants as sufficient. *Sims v. Mains (1933) 131 Cal. App. 307, 310, 21 P.2d 447*

[3] Convenience of Witnesses

Showing that proposed testimony of witnesses is admissible, relevant, and material to some issue in the case as required before witness' convenience may be considered as a ground for order granting a change of venue. *Peiser v. Mettler (1958) 50 Cal. 2d 594, 607, 328 P.2d 953* ; *Dillman v. Superior Court (1962) 205 Cal. App. 2d 769, 773, 23 Cal. Rptr. 498* ; *Harden v. Skinner & Hammond (1955) 130 Cal. App. 2d 750, 754, 755, 279 P.2d 978*

Both convenience of witnesses and ends of justice as required to occur, and moving party as having burden of proving that both conditions will be met. *Peiser v. Mettler (1958) 50 Cal. 2d 594, 607, 328 P.2d 953* ; *Pearson v. Superior Court (1962) 199 Cal. App. 2d 69, 77, 18 Cal. Rptr. 578* ; *Harden v. Skinner & Hammond (1955) 130 Cal. App. 2d 750, 754, 279 P.2d 978* ; *Willingham v. Pecora (1941) 44 Cal. App. 2d 289, 295, 112 P.2d 328*

Convenience of witnesses was shown by fact that all designated witnesses lived or worked, all relevant events allegedly took place, and all relevant documents were located in county to which transfer requested. *Richfield Hotel Management, Inc. v. Superior Court (1994) 22 Cal. App. 4th 222, 227, 27 Cal. Rptr. 2d 161*

Cross defendants may not defeat cross complainant's proper selection of venue even if all cross defendants concur in request for transfer to another venue that would also be proper; forum non conveniens motion based on convenience of witnesses as alternative remedy for cross defendant if trial court's order granting motion for change of venue reversed. *Tutor-Saliba-Perini Joint Venture v. Superior Court (1991) 233 Cal. App. 3d 736, 742-744, 285 Cal. Rptr. 1*

Although there is no special statutory procedure governing motion based on former *Code Civ. Proc. § 397(3)* (*now see Code Civ. Proc. § 397(c)*), and code expresses no time limit within which it must be made, motion must be made within reasonable time after answer is filed. *Thompson v. Superior Court (1972) 26 Cal. App. 3d 300, 306, 103 Cal. Rptr. 94*

Convenience to witnesses as only important consideration, not convenience of parties or employees of parties. *Dillman v. Superior Court (1962) 205 Cal. App. 2d 769, 773, 23 Cal. Rptr. 498* ; *Stute v. Burinda (1981) 123 Cal. App. 3d Supp. 11, 17 , 177 Cal. Rptr. 102*

Convenience of witnesses as shown by fact that residence of all witnesses is in county to which transfer of cause is requested. *Pearson v. Superior Court (1962) 199 Cal. App. 2d 69, 77, 18 Cal. Rptr. 578*

Inconvenience as able to be presumed from distance. *Pearson v. Superior Court (1962) 199 Cal. App. 2d 69, 78, 18 Cal. Rptr. 578*

Conclusion that ends of justice are promoted as able to be drawn from fact that by moving trial closer to residence of witnesses, delay and expense in court proceedings are avoided and savings in witnesses' time and expenses are effected. *Pearson v. Superior Court (1962) 199 Cal. App. 2d 69, 77, 18 Cal. Rptr. 578*

Granting of motion based on *Code Civ. Proc. § 397(3)* as discretionary with trial court. *Pearson v. Superior Court (1962) 199 Cal. App. 2d 69, 77, 18 Cal. Rptr. 578* ; *Harden v. Skinner & Hammond (1955) 130 Cal. App. 2d 750, 754, 279 P.2d 978* ; *Willingham v. Pecora (1941) 44 Cal. App. 2d 289, 293, 112 P.2d 328*

Motion for change of venue based on former *Code Civ. Proc. § 397(3)* (*now see Code Civ. Proc. § 397(c)*) as unable to be entertained when moving party has appeared only by demurrer and not by answer, as court cannot determine relevance and materiality of prospective witnesses. *Russello v. Mori (1957) 153 Cal. App. 2d 828, 832, 315 P.2d 343*

Mere numerical majority of witnesses on one side or other as not necessarily determining merits of motion. *Harden v. Skinner & Hammond (1955) 130 Cal. App. 2d 750, 754, 279 P.2d 978*

Convenience of witnesses in attending trial, rather than places of their actual residences, as issue to be decided by trial court. *Willingham v. Pecora (1941) 44 Cal. App. 2d 289, 293, 112 P.2d 328*

Code Civ. Proc. § 1010 as governing notices of motion made under *Code Civ. Proc. § 397(c)*. *Willingham v. Pecora (1941) 44 Cal. App. 2d 289, 295, 112 P.2d 328*

[4] Expenses and Attorney's Fees

Award of attorney's fees under *Code Civ. Proc. § 396b(b)* for services of defendants' attorney in making unsuccessful motion for change of venue and in obtaining issuance of writ of mandate compelling trial court to grant motion as inappropriate when trial court had found plaintiff's arguments "inventive" and "compelling" and denied motion for change of venue. *Cacciaguidi v. Superior Court (1990) 226 Cal. App. 3d 181, 187*

[5] Mixed Action

When two or more inconsistent venue provisions apply in same case, motion for change of venue is to be granted if defendant is entitled to change of venue on any one cause of action. *Capp Care, Inc. v. Superior Court (1987) 195 Cal. App. 3d 504, 508, 241 Cal. Rptr. 741*

[6] Plaintiff's Opposition to Defendant's Motion for Change of Venue--Counteraffidavits or Countermotion

Only case in which it can ever be necessary or proper for plaintiff to ask on cross motion that action be retained for trial in county where he or she has brought it as when defendant's motion is on ground that county designated in complaint is not proper county. *Cook v. Pendergast (1882) 61 Cal. 72, 76*

When defendant's motion was made on ground that impartial trial could not be had, that change would promote convenience of witnesses, or that judge is disqualified, cross motion as not available to plaintiff, but plaintiff as entitled to file counter affidavits. *Cook v. Pendergast (1882) 61 Cal. 72, 76*

When venue originally laid in improper court, motion to retain venue there on ground of convenience of witnesses as unavailable when demurrer, but no answer, has been filed. *Johnson v. Superior Court (1965) 232 Cal. App. 2d 212, 214, 42 Cal. Rptr. 645*

Determination as to whether to retain cause on account of convenience of witnesses as resting largely within discretion of trial court. *Harris v. Cannon (1941) 42 Cal. App. 2d 748, 749, 109 P.2d 961*

[7] Following Compulsory Cross-Complaint

A plaintiff/cross-defendant against whom a compulsory cross-complaint has been filed is not entitled to seek a change of venue under *Code Civ. Proc. § 396b* based on a claim of improper venue as determined by reference to the cross-complaint. Rather, the cross-complaint is to be tried in the same county that has been established as the proper venue based on the original complaint. *K.R.L. Partnership v. Superior Court (2004) 120 Cal. App. 4th 490, 498, 15 Cal. Rptr. 3d 517*

[8] Review of Court Orders

[a] Motions in the Superior Court

Code Civ. Proc. § 400 as providing that order of superior court granting or denying motion to change place of trial is reviewable solely by writ of mandate. *Milliken v. Gray (1969) 276 Cal. App. 2d 595, 599-600, 81 Cal. Rptr. 525*

[b] Standard of Review

Review of motion for change of venue made and determined on allegations of verified complaint, affidavits of respective parties as requiring that all conflicts be resolved in favor of prevailing party, and all reasonable inferences that are to be drawn must be in support of trial court's order. *Hale v. Bohannon (1952) 38 Cal. 2d 458, 466, 241 P.2d 4*

Appellate court uses abuse of discretion standard in reviewing order denying a venue change motion; trial court abused discretion in denying defendant's motion to change venue from Los Angeles to Sacramento County when all of the alleged acts occurred in Sacramento and venue was mandatory in Sacramento County under at least two of the three enumerated criteria listed in *Gov. Code § 12965(b)* (Fair Employment and Housing Act venue). *Ford Motor Credit*

Co. v. Superior Court (1996) 50 Cal. App. 4th 306, 310, 57 Cal. Rptr. 2d 682

For denial of motion to transfer venue pursuant to *Code Civ. Proc. § 397(b)*, not only is standard of review abuse of discretion, but actual prejudice must be shown. *Nguyen v. Superior Court (1996) 49 Cal. App. 4th 1781, 1791, 57 Cal. Rptr. 2d 611*

Appellate court as able to reverse order denying motion for change of venue on ground of convenience of witnesses only on clear showing of abuse of discretion. *Union Trust Life Ins. Co. v. Superior Court (1968) 259 Cal. App. 2d 23, 28, 66 Cal. Rptr. 270* ; *Dillman v. Superior Court (1962) 205 Cal. App. 2d 769, 774, 23 Cal. Rptr. 498* ; *Di Giorgio Fruit Corp. v. Zachary (1943) 60 Cal. App. 2d 560, 563, 141 P.2d 8*

Denial of motion to change venue as abuse of discretion when there is showing that convenience of witnesses and ends of justice will be promoted by change, and when there is absolutely no showing whatever to contrary, there being no evidence to sustain decision of trial court. *Union Trust Life Ins. Co. v. Superior Court (1968) 259 Cal. App. 2d 23, 28, 66 Cal. Rptr. 270*

Appeals court as required to determine that sufficient facts have been shown on which trial court could base exercise of discretion. *Dillman v. Superior Court (1962) 205 Cal. App. 2d 769, 774, 23 Cal. Rptr. 498*

Judgment as not disturbed on appeal when evidence on motion for change of venue conflicting. *Wheeler v. Moschetti (1961) 188 Cal. App. 2d 827, 829, 10 Cal. Rptr. 722*

When motion made and determined on allegations of verified complaint and affidavits of defendants, all conflicts as required to be resolved in favor of prevailing party, and all reasonable inferences which are to be drawn must be in support of trial court's order. *City of Long Beach v. Lakewood Park (1953) 118 Cal. App. 2d 596, 598, 258 P.2d 538*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedureVenueMotions to TransferConvenience of WitnessesCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral Overview

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[Reserved]

§§ 571.72[Reserved]

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50-571 California Forms of Pleading and Practice--Annotated § 571.80

§ 571.80 Venue Allegation in Complaint--Transitory Action--Controlled by Residence of Defendant [Code Civ. Proc. § 395(a)]

[1] FORM Venue Allegation in Complaint--Transitory Action--Controlled by Residence of Defendant [Code Civ. Proc. § 395(a)]

At all times herein mentioned, defendant _____[*name*] was and is a resident of [_____ (*city*),] _____ County, California.

[2] Use of Form

The form of allegation in [1], *above*, is for use in a complaint in an action that is governed by the basic rule of venue set out in the first sentence of *Code Civ. Proc. § 395(a)*, which provides that the superior court in the county where the defendants or some of them reside is the proper county for the trial of the action [*Code Civ. Proc. § 395(a)*]. This rule applies unless an action falls within some exception. Thus, if no other venue provision applies, venue is governed by *Code Civ. Proc. § 395* [*Brown v. Superior Court (1984) 37 Cal. 3d 477, 483, 208 Cal. Rptr. 724, 691 P.2d 272]* . For discussion of what constitutes a residence,*see § 571.16[1][c]*.

Code Civ. Proc. § 395(a) controls venue in transitory actions, that is, actions in which the main relief sought is personal [*Brown v. Superior Court (1984) 37 Cal. 3d 477, 482 n.5, 208 Cal. Rptr. 724, 691 P.2d 272]* . Transitory actions deal primarily with financial obligations or personal relationships [*Carlton v. Superior Court (1966) 240 Cal. App. 2d 586, 589, 49 Cal. Rptr. 759]* . In particular, the rule covers personal torts not involving physical injury [*Haurat v. Superior Court (1966) 241 Cal. App. 2d 330, 333, 50 Cal. Rptr. 520]* . For example, the foregoing form may be used in an action for conversion [*Haurat v. Superior Court (1966) 241 Cal. App. 2d 330, 333, 50 Cal. Rptr. 520* ; *Mason v. Buck (1929) 99 Cal. App. 219, 221, 278 P. 461]* . Also, it may be used in actions for libel, malicious prosecution, and false imprisonment [*Johnson v. Superior Court (1965) 232 Cal. App. 2d 212, 218, 42 Cal. Rptr. 645]* .

[3] Cross References

For a discussion of complaints and cross-complaints and associated forms, see Ch. 123, *Complaints and Cross-Complaints* .

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50-571 California Forms of Pleading and Practice--Annotated § 571.81

§ 571.81 Venue Allegation in Complaint--Transitory Action--Place Where Tortious Conduct Occurred [Code Civ. Proc. § 395(a)]

[1] FORM Venue Allegation in Complaint--Transitory Action--Place Where Tortious Conduct Occurred [Code Civ. Proc. § 395(a)]

On or about _____[*date*], in [_____ (*city*),] _____ County, California, defendant _____ [*specify physical injury or death to person or physical injury to personal property, e.g.*, assaulted and battered plaintiff by threatening to strike plaintiff and violently striking plaintiff in and about the face].

[2] Use of Form

The form of allegation in [1], *above*, is for use in a complaint in an action for injury to a person or personal property, or for death from a wrongful act or negligence. In such a case, either the county where the injury occurs or the injury causing death occurs, or the county where the defendants or some of them reside at the commencement of the action is the proper county for the trial of the action [*Code Civ. Proc. § 395(a)*].

Either the form in [1], *above*, or the *form in § 571.81* may be used in actions based on tortious conduct causing physical injury to persons or personal property because *Code Civ. Proc. § 395(a)* allows trial of a negligence action either in the county of defendant's residence or in the county where the tort occurred [*Maxwell v. Murray (1961) 190 Cal. App. 2d 440, 443, 11 Cal. Rptr. 916]* . Generally, the facts alleged to establish the elements of a particular tort will be sufficient to establish the place of trial in the county where the tort occurred. Further, if counsel wishes to establish venue in the county where the tort occurred, an allegation setting forth the defendant's place of residence need not be included in the complaint.

The phrase "injury to person" as used in *Code Civ. Proc. § 395(a)* is limited to physical injury or incapacity or death caused by the wrongful or negligent act of another [*Monk v. Ehret (1923) 192 Cal. 186, 191-193, 219 P. 452]* . Therefore, it refers only to injuries of a physical or bodily nature, and not to injuries to character or reputation [*Monk v. Ehret (1923) 192 Cal. 186, 193, 219 P. 452* ; *Carruth v. Superior Court (1978) 80 Cal. App. 3d 215, 219, 145 Cal.*

Rptr. 344] .

[3] Cross References

For a discussion of complaints and cross-complaints and associated forms, see Ch. 123, *Complaints and Cross-Complaints* .

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50-571 California Forms of Pleading and Practice--Annotated § 571.82

§ 571.82 Venue Allegation in Complaint--Transitory Action--Place Where Contract Entered Into [Code Civ. Proc. § 395(a)]

[1] FORM Venue Allegation in Complaint--Transitory Action--Place Where Contract Entered Into [Code Civ. Proc. § 395(a)]

The contract that created the obligation on which this action is based, _____ [which is set out herein *or* a copy of which is attached hereto, and marked Exhibit _____], was in fact entered into in [_____ (*city*),] _____ County, California.

[2] Use of Form

The form of allegation in [1], *above*, is for use in a complaint in an action founded on contract when the plaintiff wishes to bring the action in the county in which the contract was entered into [*see Code Civ. Proc. § 395(a)*]. The place where the contract was made is the place where the last act necessary for its validity was done. This is usually the act constituting acceptance [*Braunstein v. Superior Court of Monterey County (1964) 225 Cal. App. 2d 691, 696-697, 37 Cal. Rptr. 666]* .

[3] Alternative Places of Trial in Contract Actions

In addition to the county in which it was entered into, an action founded on contract may alternatively be tried in the county in which the defendant resides at the commencement of the action or in which the defendant has contracted specially and in writing to perform his or her obligation [*Wathen v. Superior Court (1963) 212 Cal. App. 2d 125, 129, 27 Cal. Rptr. 840* ; for forms alleging residence and place of performance*see § 571.80* and *§ 571.83*, respectively].

The alternatives in the contract provision in *Code Civ. Proc. § 395(a)* are exceptions to the general rule that the defendant is entitled to trial in his or her county of residence [*Mosby v. Superior Court (1974) 43 Cal. App. 3d 219, 224, 117 Cal. Rptr. 588]* . Thus, the plaintiff is entitled to have an action founded on a contract tried in the county in which it appears that the contract was entered into despite the defendant's residence in another county [*Richardson v. Rose (1961) 197 Cal. App. 2d 318, 322, 17 Cal. Rptr. 84]* .

[4] Cross References

For a discussion of complaints and cross-complaints and associated forms, see Ch. 123, *Complaints and Cross-Complaints* .

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50-571 California Forms of Pleading and Practice--Annotated § 571.83

§ 571.83 Venue Allegation in Complaint--Transitory Action--Place Where Contract to Be Performed [Code Civ. Proc. § 395(a)]

[1] FORM Venue Allegation in Complaint--Transitory Action--Place Where Contract to Be Performed [Code Civ. Proc. § 395(a)]

Pursuant to _____ [*specify provision in the contract that specifically states the place where defendant was to perform his or her obligation, e.g.,* Paragraph _____ of the contract on which this action is based(, a copy of which is attached as Exhibit _____ and made a part hereof)], defendant was to _____ [*specify obligation on which action is based, e.g.,* tender payment at plaintiff's address] in [_____ (*city*),] _____ County, California.

[2] Use of Form

The form of allegation in [1], *above*, is for use in a complaint in an action founded on a contract obligation when the plaintiff wishes to bring the action in the county in which the obligation was to be performed. If there is a special contract in writing in which the defendant has contracted to perform an obligation in a particular county, that county is one of the proper places for trial in an action founded on the obligation. Absent a special contract in writing to the contrary, the place of performance is presumed to be the place in which the obligation was incurred [*see Code Civ. Proc. § 395(a)*; *Armstrong v. Smith (1942) 49 Cal. App. 2d 528, 531-532, 122 P.2d 115]* .

[3] Special Contract in Writing Required

A "special contract in writing" must specifically state the place of performance of the obligation [*Wathen v. Superior Court (1963) 212 Cal. App. 2d 125, 129, 27 Cal. Rptr. 840]* . Any deficiency or lack of a specification cannot be remedied by extrinsic evidence [*Fidelity Thrift & Loan Asso. v. Hall (1960) 186 Cal. App. 2d Supp. 895, 899 , 9 Cal. Rptr. 596]* . However, a geographic designation of the city or county without setting forth the address is enough to satisfy the requirement [*Stute v. Burinda (1981) 123 Cal. App. 3d Supp. 11, 16 , 177 Cal. Rptr. 102]* .

[4] Cross References

For a discussion of complaints and cross-complaints and associated forms, see Ch. 123, *Complaints and Cross-Complaints* .

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50-571 California Forms of Pleading and Practice--Annotated § 571.84

§ 571.84 Venue Allegation in Complaint--Local Action--Controlled by Situs of Real Property [Code Civ. Proc. § 392(a)]

[1] FORM Venue Allegation in Complaint--Local Action--Controlled by Situs of Real Property [Code Civ. Proc. § 392(a)]

The real property that is the subject of this action is known as _____[*street address or common designation, and if any, city*], located _____[partly] in _____ County[, and is more particularly described as follows: _____ (*set forth legal description*)].

[2] Use of Form

The form of allegation in [1], *above*, is for use in a complaint in an action for the recovery of real property, for the recovery or determination of an estate or interest in the property, for injuries to the property, or for the foreclosure of liens or mortgages on the property. The proper venue for the trial of the action is any county in which all or part of the property is situated [*Code Civ. Proc. § 392(a)*]. For a form of allegation based on the residence of defendant,*see § 571.80*.

[3] Local Actions

[a] Recovery of Real Property, Recovery or Determination of Title to Real Property, Injury to Real Property

In a local action, the situs of the real property that is the subject matter of the action controls the place of trial [*see Code Civ. Proc. § 392*]. An action is local when it turns on title to property as distinct from a personal obligation, and the decree operates by its own force on the title [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 603, 328 P.2d 953* ; *Thielen v. Superior Court (1963) 219 Cal. App. 2d 217, 219, 33 Cal. Rptr. 1]* . An action is also local if it involves injury to real property, although *Code Civ. Proc. § 392(1)(a)* (*see now Code Civ. Proc. § 392(a)(1)*) is not limited to physical injury to or interference with the property. It may include nonfeasance, such as permissive waste. It may also include threatened injuries or consequential injuries to property resulting from tortious conduct [*Coley v. Hecker (1928) 206*

Cal. 22, 28, 272 P. 1045 ; *Strosnider v. Pomin (1939) 32 Cal. App. 2d 103, 108, 89 P.2d 179]* .

[b] Foreclosure of Lien or Mortgage on Real Property

The county where all or part of the real property that is the subject of the action is located is also the proper county for trial for the foreclosure of all liens and mortgages on the property [*Code Civ. Proc. § 392(a)(2)*; *see* *Goldtree v. McAlister (1890) 86 Cal. 93, 106, 24 P. 801* (every official act necessary to effect foreclosure can occur in any county in which all or part of the real property located)].

[c] Unlawful Detainer

In the court designated as the proper court in *Code Civ. Proc. § 392(a)*, the proper court location for trial of a proceeding for an unlawful detainer, as defined in *Code Civ. Proc. § 1161*, is the location where the court tries that type of proceeding that is nearest or most accessible to where the real property that is the subject of the action, or some part thereof, is situated. Otherwise any location of the superior court designated as the proper court in § 392(a) is a proper court location for the trial. The court may specify by local rule the nearest or most accessible court location where the court tries that type of case [*Code Civ. Proc. § 392(b)*].

[4] Description of Real Property in Quiet Title Action

The form in [1], *above*, contains optional language for use to provide the legal description of the property that is the subject of the action. This should be provided when the subject matter of the action involves determination of title to the property. For example, a complaint in a quiet title action must include a description of the property that is the subject of the action. In the case of real property, the description must include both its legal description and its street address or common designation, if any [*Code Civ. Proc. § 761.020(a)*]. For forms of complaints, and a detailed discussion of quiet title actions,*see* Ch. 482, *Quieting Title* .

[5] Cross References

For a discussion of complaints and cross-complaints and associated forms, see Ch. 123, *Complaints and Cross-Complaints* .

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50-571 California Forms of Pleading and Practice--Annotated § 571.85

§ 571.85 Venue Allegation in Complaint--Local Action--Where Cause of Action Arose--For Recovery of Penalty or Forfeiture Imposed by Statute or Act Done by Public Officer by Virtue of His or Her Office [Code Civ. Proc. § 393]

[1] FORM Venue Allegation in Complaint--Local Action--Where Cause of Action Arose--For Recovery of Penalty or Forfeiture Imposed by Statute or Act Done by Public Officer by Virtue of His or Her Office [Code Civ. Proc. § 393]

The _____ [*specify penalty or forfeiture or other act that is the subject of the action, e.g.,* action by defendant as herein described to revoke plaintiff's license to carry on his/her business] occurred in [_____ (*city*),] _____ County, California.

[2] Use of Form

The form of allegation in [1], *above*, is for use in a complaint in an action for the recovery of a penalty or forfeiture imposed by statute, or against a public officer for an act done by him or her by virtue of his or her office. The proper county for the trial of these actions is the county in which the cause, or some part thereof, arose [*Code Civ. Proc. § 393*].

[3] Penalty or Forfeiture

The county in which the cause, or some part thereof, arose is the proper county for the trial of an action for the recovery of a penalty or forfeiture imposed by statute. If the penalty or forfeiture was imposed for an offense committed on a lake, river, or other stream of water, situated in two or more counties, the action may be tried in any county bordering on the lake, river, or stream, and opposite to the place where the offense was committed [*Code Civ. Proc. § 393(a)*].

[4] Actions Against Public Officers

Code Civ. Proc. § 393(b) establishes venue in the county where an act was done by a public officer or person especially appointed to execute the public officer's duties by virtue of his or her office [*Code Civ. Proc. § 393*]. It applies to

affirmative acts by a public officer that directly interfere with the personal rights or property of a person, such as the right to do business. Thus, it does not apply to threats of future acts [*Harris v. Alcoholic Bev. Etc. Appeals Bd. (1961) 197 Cal. App. 2d 759, 768, 18 Cal. Rptr. 151]* .

[5] State Agencies as "Public Officers"

The form in [1], *above*, may be used against public entities, as well as against individuals, to establish venue in the county where the cause arose. Absent a statutory designation of an administrative or enforcement officer, the term "public officer" includes state agencies, departments, institutions, boards, or other public entities [Regents of University ofCalifornia v. *Superior Court (1970) 3 Cal. 3d 529, 537-538, 91 Cal. Rptr. 57, 476 P.2d 457]* .

[6] Cross References

For a form of allegation based on the residence of defendant,*see § 571.80*.

For a discussion of complaints and cross-complaints and associated forms, see Ch. 123, *Complaints and Cross-Complaints* .

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50-571 California Forms of Pleading and Practice--Annotated § 571.86

§ 571.86 Venue Allegation in Complaint--Local Action--Against Personal Representative or Trustee--County Which Has Jurisdiction of Estate [Code Civ. Proc. § 395.1]

[1] FORM Venue Allegation in Complaint--Local Action--Against Personal Representative or Trustee--County Which Has Jurisdiction of Estate [Code Civ. Proc. § 395.1]

Defendant is the _____ [executor *or* administrator *or* guardian *or* conservator *or* trustee] of _____ [*specify estate, e.g.,* the Estate of _____ (name), Deceased], Case Number _____, which is pending in the Superior Court of _____ County, California.

[2] Use of Form

The form of allegation in [1], *above*, is for use in a complaint in an action against an executor, administrator, guardian, conservator, or trustee in his or her official or representative capacity on a claim for the payment of money or for the recovery of personal property. In these actions, the county that has jurisdiction of the estate that the defendant represents is the proper county for the trial of the action [*Code Civ. Proc. § 395.1*]. The foregoing form is not for use in establishing venue in probate proceedings. It is for use in a collateral action against the personal representative of the estate.

[3] "Claim" Against the Estate Defined

The form in [1], *above*, may be used even if the plaintiff is not suing because of a rejected creditor's claim. For example, the plaintiff may sue a representative in the county having jurisdiction over an estate for services the plaintiff rendered to the estate. The word "claim" as it is used in *Code Civ. Proc. § 395.1* simply means a demand for something rightfully or allegedly due [*Metzger v. Silverman (1976) 62 Cal. App. 3d Supp. 30, 36-37 , 133 Cal. Rptr. 355]* .

[4] Cross References

For a discussion of complaints and cross-complaints and associated forms, see Ch. 123, *Complaints and*

Cross-Complaints .

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50-571 California Forms of Pleading and Practice--Annotated § 571.87

§ 571.87 Venue Allegation in Complaint--Type of Party [Code Civ. Proc. § 395.5]--Transitory Action Against Corporation

[1] FORM Venue Allegation in Complaint--Type of Party [Code Civ. Proc. § 395.5]--Transitory Action Against Corporation
[*EITHER, if domestic corporation*]

_____[*Name of corporation*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California, _____ [*specify basis on which venue is established, e.g.,* with its principal place of business] in _____ County, California.

[*OR, if foreign corporation authorized to do business in California*]

_____[*Name of corporation*] is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of _____, and authorized to transact, and transacting, intrastate business in California, _____ [*specify basis on which venue is established, e.g.,* with its principal place of business in this state in _____ County, California].

[2] Use of Form

The forms of allegation in [1], *above*, are for use in a complaint in an action brought against a corporation. A corporation may be sued in the county where its principal place of business is situated. It may also be sued where a contract is made or is to be performed, or where the obligation or liability arises, or a breach occurs [*Code Civ. Proc. § 395.5*; *Hale v. Bohannon (1952) 38 Cal. 2d 458, 476, 241 P.2d 4* (decided under former *Cal. Const. art. XII, § 16*, now *Code Civ. Proc. § 395.5*)].

[3] Domestic Corporations

[a] Alternative Places of Trial in Transitory Actions

The forms in [1], *above*, should be used in transitory actions against corporations [*Mission Imports, Inc. v. Superior Court (1982) 31 Cal3d 921, 927, 184 Cal. Rptr. 296, 647 P.2d 1075]* . *Code Civ. Proc. § 395.5* governs actions sounding in both contract and tort [*Mission Imports, Inc. v. Superior Court (1982) 31 Cal. 3d 921, 928, 184 Cal. Rptr. 296, 647 P.2d 1075]* . For a discussion relating to venue in actions against foreign corporations,*see § 571.18[2]*

[b] Where Contract Is Made or to Be Performed

The last act necessary to the validity of the contract, usually the act constituting acceptance, is the place of its making for purposes *Code Civ. Proc. § 395.5* [*Jhirmack Enterprises, Inc. v. Superior Court (1979) 96 Cal. App. 3d 715, 723, 158 Cal. Rptr. 192]* . In an action on the contract of a corporation, when no place of performance is expressly stipulated, it will be held performable in the place where the circumstances, viewed in light of pertinent code provisions, indicate that the parties expected or intended it to be performed. Thus, the place of performance may be implied [*Burr v. Western States Life Ins. Co. (1931) 211 Cal. 568, 574, 296 P. 273* ; *see* discussion in *§ 571.18[1][a]* regarding principle place of business or county where cause of action arises].

[c] Where Obligation or Liability Arises

Generally, the place where the contract is made is also the place where the obligation or liability arises [*Hale v. Bohannon (1952) 38 Cal. 2d 458, 479, 241 P.2d 4]* .

Code Civ. Proc. § 395.5 permits tort claims against a corporation to be tried in any county in which the liability arises [*Mission Imports, Inc. v. Superior Court (1982) 31 Cal. 3d 921, 928, 184 Cal. Rptr. 296, 647 P.2d 1075]* .

[d] Where the Breach Occurs

In general, the place of performance of a contract obligation is also where the breach occurs [*Hale v. Bohannon (1952) 38 Cal. 2d 458, 479, 241 P.2d 4]* . However, it may also occur in the county where a corporation has its principal place of business [*Jhirmack Enterprises, Inc. v. Superior Court (1979) 96 Cal. App. 3d 715, 724, 158 Cal. Rptr. 192]* .

[4] Foreign Corporations

The second alternative in the foregoing form is for use against a foreign corporation that has qualified to do business in *California. Code Civ. Proc. § 395.5* applies to a foreign corporation in the same manner as it does to a domestic corporation, provided that the foreign corporation establishes that it has qualified to do business in California under *Corp. Code § 2105* [*Easton v. Superior Court (1970) 12 Cal. App. 3d 243, 246, 90 Cal. Rptr. 642* (decided under former *Cal. Const. art. XII, § 16*, now *Code Civ. Proc. § 395.5*, and former Corp. Code § 6403, now *Corp. Code § 2105*)]. If a foreign corporation has not qualified to do business in California under *Corp. Code § 2105*, a plaintiff may sue it in any county in the state [*Easton v. Superior Court (1970) 12 Cal. App. 3d 243, 246-247, 90 Cal. Rptr. 642]* .

[5] Cross References

For a discussion of complaints and cross-complaints and associated forms, see Ch. 123, *Complaints and Cross-Complaints* .

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50-571 California Forms of Pleading and Practice--Annotated § 571.88

§ 571.88 Venue Allegation in Complaint--Type of Party [Code Civ. Proc. §§ 395.2, 395.5]--Unincorporated Associations

[1] FORM Venue Allegation in Complaint--Type of Party [Code Civ. Proc. §§ 395.2, 395.5]--Unincorporated Associations

_____[*Name of unincorporated association*] is, and at all times herein mentioned was, _____ [*state form of entity, e.g.,* a partnership], _____ [*state basis on which venue is to be established, e.g.,* with its principal place of business] in _____ County California.

[2] Use of Form

The form of allegation in [1], *above*, is for use in a complaint in an action against an incorporated association. The proper county for the trial of an action against an unincorporated association is the same as for corporations if the association has filed a statement with the Secretary of State pursuant to *Corp. Code § 18200* (formerly *Corp. Code § 24003*) listing its principal office in this state. For the purpose of determining the proper county, the association's principal place of business is deemed to be the principal office listed in the statement. If the association has not filed a statement, it may be sued in the county where the contract is made or is to be performed, where the obligation or liability arises, or where the breach occurs [*see Code Civ. Proc. §§ 395.2, 395.5*]. In addition, because an association that has not filed a statement has no principal place of business in California, venue is proper in the county of residence of any member of the association [*Mosby v. Superior Court (1974) 43 Cal. App. 3d 219, 229 n.7, 117 Cal. Rptr. 588* ; for further discussion,*see § 571.18[3]* regarding unincorporated associations].

Moreover, even if the association has filed a statement, if the action is against partners as individuals as well as the association, venue may be proper in the county or counties in which those partners reside [*Buran Equipment Co. v. Superior Court (1987) 190 Cal. App. 3d 1662, 1666-1667, 236 Cal. Rptr. 171]* .

[3] Cross References

For discussion relating to the effect of statements of unincorporated associations on venue in actions against partnerships,*see Ch. 402, Partnerships: Actions Between General Partners or Partnership and Third Parties, § 402.12[3]*.

For a discussion of complaints and cross-complaints and associated forms, see Ch. 123, *Complaints and Cross-Complaints* .

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50-571 California Forms of Pleading and Practice--Annotated § 571.89

§ 571.89 Venue Allegation in Complaint--Type of Party [Code Civ. Proc. § 401; Gov. Code §§ 955, 955.2]--Actions Against State or State Agency

[1] FORM Venue Allegation in Complaint--Type of Party [Code Civ. Proc. § 401; Gov. Code §§ 955, 955.2]--Actions Against State or State Agency
[*EITHER, if defendant is State of California*]

Defendant State of California is, and at all times herein mentioned was, a sovereign state of the United States of America, and _____ [*specify facts establishing venue, e.g.,* this action is brought in (_____ (city)), _____ County, California, wherein the injury herein described occurred].

[*OR, if defendant is state agency*]

Defendant _____[*name*] is, and at all times herein mentioned was, _____ [*specify facts showing defendant is a state agency, e.g.,* an Appeals Board for the Department of _____] of the State of California, and _____ [*specify facts establishing venue, e.g.,* this action is brought in the City (and County) of _____, wherein the Attorney General has his/her office].

[2] Use of Form

The forms of allegation in [1], *above*, are for use in a complaint in an action against the state or a state agency. Actions against the state or its agencies may be governed by the general venue rules in some actions *Regents of University of California v. Superior Court (1970) 3 Cal. 3d 529, 534-535, 91 Cal. Rptr. 57, 476 P.2d 457]* . There are a few statutes that fix venue in a particular place for specific actions (*see, e.g., Bus. & Prof. Code § 2019* (legal proceedings against the Medical Board of California must be instituted in either Sacramento, Los Angeles, San Diego, or San Francisco)). Generally, however, the Attorney General may make a written demand to move the place of trial to Sacramento in actions on claims for money or damages for which the filing of a claim is a statutory prerequisite under *Gov. Code §§ 905* (local public entities) and 905.2 (state), or in actions on claims for money or damages that are specifically exempted

from the filing requirement, such as the enumerated matters in *Gov. Code §§ 905* and *905.1* [*see Gov. Code § 955* (governing actions other than those for inverse condemnation or injury to a person or personal property); for further discussion,*see § 571.18[4]*]. In those cases, the action may be commenced and tried in any city or city and county of the state in which the Attorney General has an office, that is, Sacramento, San Francisco, or Los Angeles [*Code Civ. Proc. § 401(1)*].

The examples in the forms above are based on venue provisions that are peculiar to public enties. The first alternative paragraph uses the example of *Gov. Code 955.2* (proper court for trial of an action for injury to person or personal property; county where injury occurred)]. The example in the second alternative paragraph would be used when there is a specific statute establishing venue in Sacramento, or when the action is governed by *Gov. Code § 955*. In addition to those examples, the foregoing form may also be used in cases governed by the general venue rules in *Code Civ. Proc. §§ 392-402*, in which case the county of the agency's residence, the situs of the subject matter of the action, or other facts establishing the proper place for trial should be alleged instead of the examples given [*see §§ 571.80* 581.84 for forms; *see* discussion in *§ 571.18[4]* regarding actions against a state or local government agency].

[3] Cross References

For a discussion of complaints and cross-complaints and associated forms, see Ch. 123, *Complaints and Cross-Complaints* .

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[Reserved]

§§ 571.90[Reserved]

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50-571 California Forms of Pleading and Practice--Annotated § 571.100

§ 571.100 Proceedings for Change of Venue [Code Civ. Proc. §§ 396b, 397]--Notice of Motion

[1] FORM Proceedings for Change of Venue [Code Civ. Proc. §§ 396b, 397]--Notice of Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MOTION AND NOTICE OF MOTION FOR
_____ [*name*],	)	CHANGE OF VENUE
Plaintiff, vs. _____ [*name(s)*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.,* plaintiff] _____[*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], _____ [*identify party, e.g.,* defendant] will, and hereby does, move for an order pursuant to *Code of Civil Procedure section 397* to transfer the venue of this action to the Superior Court of the State of California in and for the County of _____. The motion will be made on the ground that under _____ *specify one of the grounds enumerated in Code Civ. Proc. § 397, i.e.,* the court designated in the complaint is not the proper court *or* there

is reason to believe that an impartial trial cannot be had in the court designated in the complaint *or* the convenience of the witnesses and the ends of justice will be promoted by the change *or* there is no judge of the court qualified to act]. [In addition, pursuant to *Code of Civil Procedure section 396b(b)*, _____ (*identify party, e.g.*, defendant) will, and hereby does, move for an award of reasonable expenses and attorney's fees incurred in making the motion to transfer, in the amount of $_____.]

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name*(*s*)] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

[2] Use of Form

The notice of motion in [1], *above*, is for use by a defendant to move for a change of venue based on *Code Civ. Proc. § 397(a)*, or for use by either party to move for a change of venue based on *Code Civ. Proc. § 397(a)-(d)* [*see Code Civ. Proc. § 396b*; *see also Cook v. Pendergast (1882) 61 Cal. 72, 79* (plaintiff may move to change venue on grounds that convenience of witnesses and ends of justice will be promoted, when a fair and impartial trial cannot be had, or whenever he or she ascertains the disqualification of the judge); *see § 571.31*, Grounds for Motion for Change of Venue].

The form contains optional language at the end of the first paragraph for use when the movant seeks to recover the reasonable expenses and attorney's fees incurred in making the motion for change of transfer [*see Code Civ. Proc. § 396b(b)*, and discussion in *§ 571.32[2]* regarding expenses and attorney's fees].

[3] Accompanying Papers

A supporting memorandum is required to be filed and a copy served with the notice of motion in [1], *above*, [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms,*see* Ch. 417, *Points and Authorities* .

[4] Procedure for Filing Motion

[a] When Action Commenced in Wrong Court

Code Civ. Proc. § 396b sets forth specific procedures to change venue when an action has been commenced in a county that is not a proper one for trial under *Code Civ. Proc. §§ 392-395.5*. Under *Code Civ. Proc. § 396b*, the defendant may file with the clerk a notice of motion for an order transferring the action or proceeding to the proper court, together with proof of service on the adverse party of a copy of such papers. The defendant may file the notice of motion at the time he or she answers, demurs, or moves to strike, or, at his or her option, without answering, demurring, or moving to strike and within the time otherwise allowed to respond to the complaint [*Code Civ. Proc. § 396b(a)*; *see Code Civ. Proc. § 397(a)* (court may change place of trial when court designated in complaint is not proper court)]. Limited civil actions and proceedings governed by *Code Civ. Proc. § 396a* (specified consumer obligations and unlawful detainer) are excepted from the coverage of *Code Civ. Proc. § 396b* [*Code Civ. Proc. § 396b(a)*].

Code Civ. Proc. § 396b(a) requires a notice of motion together with proof of service [*Otsuka v. Balangue (1949) 92*

Cal. App. 2d 788, 790, 208 P.2d 65] . Further, a *Code Civ. Proc. § 396b(a)* motion for change of venue is also governed by the requirements of *Code Civ. Proc. § 1010* [*Bohn v. Bohn (1913) 164 Cal. 532, 536, 129 P. 981]* . *Code Civ. Proc. § 1010* provides that written notices must state when the hearing on the motion will be held, the grounds on which the motion will be made, and the papers, if any, on which the motion is to be based. If the notice fairly advises the opposing counsel of the issues to be raised, the requirements of *Code Civ. Proc. §§ 396b, 397,* and *1010* will be satisfied [*Tarman v. Sherwin (1961) 189 Cal. App. 2d 49, 52, 10 Cal. Rptr. 787]* . It may be sufficient if the notice contains a statement that the motion will also be based on the papers served with it [*Modlin v. Walter's Fur Shop (1948) 83 Cal. App. 2d 384, 388, 188 P.2d 805* ; *see* *Butterfield v. Butterfield (1934) 1 Cal. 2d 227, 228, 34 P.2d 145* (holding that former Cal. Rules of Ct, Rule XIX, now *Cal. Rules of Ct., Rule 3.1113(a),* requiring a memorandum to be filed applies to motions for change of venue)]. In any event, any defect in the notice may be cured by amendment [*Joe Lowe Corp. v. Rasmusson (1942) 53 Cal. App. 2d 490, 497, 127 P.2d 1002]* .

[b] Convenience of Witnesses and Ends of Justice

The form of notice in [1], *above*, may also be used to move for change of venue on the ground that the convenience of the witnesses and the ends of justice will be promoted [*see Code Civ. Proc. § 397(c)*]. Although there is no express time limit within which the notice of motion must be made, it must be made within a reasonable time after the answer is filed [*Thompson v. Superior Court (1972) 26 Cal. App. 3d 300, 306, 103 Cal. Rptr. 94]* . However, the answer must be on file before the motion is made, because until the issues are joined, the court cannot determine whether the witnesses' testimony will be relevant [*Johnson v. Superior Court (1965) 232 Cal. App. 2d 212, 214, 42 Cal. Rptr. 645]* . For similar reasons, it is not enough that the defendant has appeared only by demurrer [*Russello v. Mori (1957) 153 Cal. App. 2d 828, 832, 315 P.2d 343]* .

Counsel should ensure that the statement of grounds in the notice follows the statutory language of *Code Civ. Proc. § 397(c),* because both the conditions in the statute must be met before a motion can be granted [*Pearson v. Superior Court (1962) 199 Cal. App. 2d 69, 77, 18 Cal. Rptr. 578]* . Thus, the moving party has the burden of proving that both the convenience of the witnesses and the ends of justice will be promoted by a change of venue [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 607, 328 P.2d 953]* .

[c] Impartial Trial Cannot Be Had

The form in [1], *above*, may also be used to give notice of a motion based on *Code Civ. Proc. § 397(b)*. The motion must be made after the answer has been filed, and possibly even after a jury has been impaneled [*Cook v. Pendergast (1882) 61 Cal. 72, 79* ; *see* *J.I. Case T. Co. v. Copren Bros. (1917) 35 Cal. App. 70, 79, 169 P. 443]* . However, counsel may not have to wait until an attempt to secure a fair and impartial jury has been made if, at the hearing, there appears sufficient reason to believe that an impartial trial cannot be had [*People v. Ocean Shore Railroad, Inc. (1938) 24 Cal. App. 2d 420, 427, 75 P.2d 560]* .

When motion based on ground that defendant joined to defeat right of real defendant to have cause removed to proper county for trial, ground as required to be distinctly specified in notice of motion. *McDonald v. California Timber Co. (1907) 151 Cal. 159, 161, 90 P. 548* .

[d] No Qualified Judge

The form of notice in [1], *above*, may be used for a motion to change venue based on *Code Civ. Proc. § 397(d)*. However, it is unlikely that this type of motion will ever be required, because a qualified judge from another county may always be assigned [*People v. Spring Valley Co. (1952) 109 Cal. App. 2d 656, 672, 241 P.2d 1069]* .

[5] Costs and Fees of Transfer

When a transfer is sought on any ground specified in *Code Civ. Proc. § 397(b), (c),* or *(d),* the costs and fees of the

transfer, and of filing the papers in the court to which the transfer is ordered, shall be paid by the party making the motion for the transfer at the time the motion is filed [*Code Civ. Proc. § 399*].

[6] Transfer of Action by or Against Local Government Entity Under Code Civ. Proc. § 394

The form in [1], *above*, may also be modified for use in moving for a change of venue to a neutral county in an action by or against a county or other local government agency [*see Code Civ. Proc. § 394(a)* (discussed in *§ 571.19*); *see also Dorame v. Superior Court (1978) 81 Cal. App. 3d 70, 72, 146 Cal. Rptr. 162* (holding that *Code Civ. Proc. § 394* is removal or change of venue statute)]. In such a case, counsel should specify the applicable grounds for transfer to a neutral county under *Code Civ. Proc. § 394(a)* rather than the grounds for change of venue set out in *Code Civ. Proc. § 397*.

Although one provision of *Code Civ. Proc. § 394(a)* states that an action against a county or other local entity "shall be tried" in that county when it involves injuries occurring in that county as a result of that county's negligence, a plaintiff in such a case may nevertheless seek a change of venue under the discretionary provision of *Code Civ. Proc. § 397(b)* [*see Paesano v. Superior Court (1988) 204 Cal. App. 3d 17, 19-20, 250 Cal. Rptr. 842]* .

[7] Cross References

For a declaration in support of a motion for change of venue, see *§ 571.101*.

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§ 571.101 Proceedings for Change of Venue [Code Civ. Proc. §§ 396b, 397]--Declaration in Support of Motion--General Form

[1] FORM Proceedings for Change of Venue [Code Civ. Proc. §§ 396b, 397]--Declaration in Support of Motion--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	DECLARATION OF _____
_____ [*name*],	)	[*name*] IN SUPPORT OF MOTION FOR CHANGE
Plaintiff, vs. _____ [*name(s)*],	)	OF VENUE
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____[*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for defendant *or other statement as appropriate*].

[*SET FORTH, in successively numbered paragraphs, facts supporting the ground on which the motion is being made, for example:*]

2. _____ [*Set forth the names and addresses of the witnesses and the nature of their testimony, e.g.,* Plaintiff expects to call as witnesses at the trial of the above-captioned action the following persons, who will testify in substance as follows: _____].

3. _____ [*Set forth facts showing reasons why attendance at the present place of trial would be inconvenient, e.g.,* These witnesses are beyond subpena range of this court, and are prevented from voluntarily attending this court because _____].

4. _____[*Set forth facts tending to show that change of venue will promote the ends of justice*].

[5. *If reasonable expenses and fees are sought pursuant to Code Civ. Proc. § 396b(b), set forth basis for award, e.g.,* I have contacted plaintiff's attorney by telephone on three separate occasions to discuss the possibility of a stipulation that the above-captioned action be transferred. I explained during each of the conversations that several of plaintiff's witnesses are beyond the subpoena range of this court and that they are prevented from voluntarily attending this court. Nevertheless, each time I have offered to stipulate to a change of venue, plaintiff's attorney has refused. As a result of these refusals, defendant has incurred expenses and attorney's fees in making this motion for change of venue, in the amount of $_____.]

[*CONTINUE*]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

[2] Use of Form

The general form of declaration in [1], *above*, is for use by either party to support a motion for change of venue. The example used in the form is based on the ground that the convenience of the witnesses and the ends of justice will be served by a change [*Code Civ. Proc. § 397(c)*]. However, the form may also be used to support a motion based on the grounds that there is reason to believe that an impartial trial cannot be had in the county where the action was commenced, or that there is no judge of the court qualified to act [*see Code Civ. Proc. §§ 397(b), (d)*]. If the form is used to support a motion based on *Code Civ. Proc. §§ 397(b)* or *(d)*, counsel should aver facts supporting those particular grounds.

Paragraph 5 of the form contains optional language for use when the movant seeks to recover the reasonable expenses and attorney's fees incurred in making the motion for change of transfer [*see Code Civ. Proc. § 396b(b)* and discussion in *§ 571.32[e]* regarding expenses and attorney's fees].

[3] Inconvenience of Witnesses

The moving party's burden of proving that both the convenience of the witnesses and the ends of justice will be promoted by a change of venue may be satisfied by affidavits or declarations to that effect [*Corfee v. Southern Cal. Edison Co. (1962) 202 Cal. App. 2d 473, 477, 20 Cal. Rptr. 870]* . The affidavits or declarations must set forth the names of the witnesses, the nature of the testimony expected from each, and the reasons why the attendance of each would be inconvenient [*Peiser v. Mettler (1958) 50 Cal. 2d 594, 607, 328 P.2d 953* (affidavits); *Stute v. Burinda*

(1981) 123 Cal. App. 3d Supp. 11, 17 , 177 Cal. Rptr. 102 (declarations)]. They must contain more than generalities and conclusions [*Dillman v. Superior Court (1962) 205 Cal. App. 2d 769, 773, 23 Cal. Rptr. 498]* . Thus, a bare conclusory averment that witnesses are material and necessary is insufficient [*Flanagan v. Flanagan (1959) 175 Cal. App. 2d 641, 644, 346 P.2d 418]* . The averments must reveal what the substance of the witnesses' testimony would be, and whether it would be favorable or unfavorable to the moving party. The convenience of witnesses whose testimony will be merely cumulative is entitled to little consideration [*Corfee v. Southern Cal. Edison Co. (1962) 202 Cal. App. 2d 473, 477, 20 Cal. Rptr. 870]* .

The declaration is also required to set forth facts from which the conclusion can be drawn that the ends of justice will be promoted. However, the court may rely not only on the direct facts set forth in the affidavits or declarations, but also on any reasonable and relevant inference therefrom [*Pearson v. Superior Court (1962) 199 Cal. App. 2d 69, 77, 18 Cal. Rptr. 578]* .

[4] Impartial Trial Cannot Be Had

Affidavits (or declarations under *Code Civ. Proc. § 2015.5*) may be used as evidence to support a motion for change of venue based on *Code Civ. Proc. § 397(b)*. Affidavits were held to be sufficient to establish that it would be extremely doubtful that an impartial trial could be held before a jury in a county when they tended to show, by reference to newspaper editorials and articles, reports of civic meetings, and statements made by numerous citizens of the county, a widespread feeling of prejudice extending over a long period of years [*People v. Ocean Shore Railroad, Inc. (1938) 24 Cal. App. 2d 420, 427-428, 75 P.2d 560]* .

[5] No Judge in Court Qualified to Act

The venue statutes provide no grounds for the disqualification of judges, nor is there any authority establishing the showing required for a motion for change of venue on this ground. However, it appears that such a motion may be supported by affidavit (or declaration under *Code Civ. Proc. § 2015.5*) [*see* *Meyer v. City of San Diego (1898) 121 Cal. 102, 103-104, 53 P. 434* (affidavit to support motion for change of venue showing judge was owner of real property located in defendant city which was subject to taxes for the payment of a bonded indebtedness such as the one that was the subject of the action); *see Code Civ. Proc. § 170.1* (grounds for disqualification of judges for cause)]. For forms and discussion relating to disqualification for judges for cause,*see* Ch. 317, *Judges* .

[6] Cross References

For forms and discussion relating to affidavits, certificates, and declarations under penalty of perjury,*see* Ch. 15, *Affidavits, Certificates, and Declarations*

For related form of notice of motion for change of venue,*see § 571.100*.

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50-571 California Forms of Pleading and Practice--Annotated § 571.102

§ 571.102 Proceedings for Change of Venue [Code Civ. Proc. §§ 396b, 397]--Declaration in Support of Motion--Action Commenced in Improper Court [Code Civ. Proc. §§ 396b(a), 397(a)]

[1] FORM Proceedings for Change of Venue [Code Civ. Proc. §§ 396b, 397]--Declaration in Support of Motion--Action Commenced in Improper Court [Code Civ. Proc. §§ 396b(a), 397(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	DECLARATION OF _____
_____ [*name*],	)	[*name*] IN SUPPORT OF MOTION FOR CHANGE
Plaintiff, vs. _____ [*name(s)*],	)	OF VENUE
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
		Trial Date: _____

_____

I, _____[*name of defendant*], declare:

1. I am the defendant in the above-captioned action.

[*EITHER, if motion based on situs of subject matter of action*]

2. The real property that is the subject of the above-captioned action is located _____[partly] in [_____ (*city*),] _____[*specify county where action should be tried*] County, California.

[3. No part of the subject real property is located in _____ (*specify county in which action has been commenced*) County, California.]

[*OR, if motion based on where the cause of action arose*]

2. The _____ [alleged offense which is the basis of the _____ (penalty *or* forfeiture) *or* act done by the _____ (*specify public officer*)] on which the above-captioned action is based occurred in [_____ (*city*),] _____ County, California.

[*OR, if motion based on residence of defendant or defendants*]

2. At the time of the commencement of this action, I resided in _____ County, California.

[*OR, if motion based on place where contract entered into or was to be performed*]

2. _____ [The contract and all other oral and written agreements between myself and plaintiff on which this action is founded were entered into *or* Pursuant to Provision _____ in the contract on which the above-captioned action is founded, the obligation which is the subject of this action was to be performed] in [_____ (*city*),] _____ County, California.

3. _____ [*Set forth facts showing either that contract was in fact entered into in another county, or that, pursuant to a special contract in writing, the obligation was to be performed in another county, e.g.,* I signed the contract on which this action is founded in (_____ (*city*),) _____ County, California, and there is no written provision in the contract specifying the place where the obligation was to be performed].

[*OR, if motion based on place where injury to person or personal property occurred*]

2. _____ [*Set forth facts showing that injury occurred in county other than where action commenced, e.g.,* The injury to my automobile on which the above-captioned action is based occurred] in [_____ (*city*)], _____ County, California.

[*CONTINUE*]

[3. *If reasonable expenses and fees are sought pursuant to Code Civ. Proc. § 396b(b), set forth basis for award, e.g.,* I have contacted plaintiff's attorney by telephone on three separate occasions to discuss the possibility of a stipulation that the above-captioned action be transferred. I explained during each of these conversations that no part of the subject real property is located in the county in which plaintiff's action was commenced, and that the proper venue would be in the county in which the property is located. Nevertheless, each time I have offered to stipulate to a change of venue, plaintiff's attorney has refused. As a result these refusals, defendant has incurred expenses and attorney's fees in making this motion for change of venue, in the amount of $_____.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____[*date*]

_____ [*signature*]

[2] Use of Form

The declaration in [1], *above*, is for use to support a motion for change of venue when an action has been commenced in the wrong court [*Code Civ. Proc. §§ 396b(a), 397(a)*]. Although there is no statutory requirement, it is general practice to support a motion with declarations or affidavits [*see Hagan v. Gilbert (1948) 83 Cal. App. 2d 570, 576, 189 P.2d 548* (where contract was entered into)]. For example, a declaration of residence will normally satisfy defendant's burden of proving that neither he or she, nor any other defendant, resided in the county in which the action was commenced [*see Carruth v. Superior Court (1978) 80 Cal. App. 3d 215, 223-224, 145 Cal. Rptr. 344]* . A defendant's affidavit may contain conclusory averments as to his or her own residence, but the same averments made in an affidavit by a third person about a defendant are legal conclusions, and therefore insufficient [*McKune v. McKune (1920) 48 Cal. App. 204, 205-206, 191 P. 958]* .

[3] Cross References

For related form of notice of motion for change of venue,*see § 571.100*.

For a form of declaration in support of a motion for change of venue for reasons other than commencement in the wrong court,*see § 571.101*.

For forms and discussion relating to affidavits, certificates, and declarations under penalty of perjury,*see* Ch. 15, *Affidavits, Certificates, and Declarations*

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50-571 California Forms of Pleading and Practice--Annotated § 571.103

§ 571.103 Proceedings for Change of Venue [Code Civ. Proc. §§ 396b, 397]--Order [Code Civ. Proc. § 398] Granting Motion

[1] FORM Proceedings for Change of Venue [Code Civ. Proc. §§ 396b, 397]--Order [Code Civ. Proc. § 398] Granting Motion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	ORDER GRANTING MOTION FOR CHANGE OF
_____ [*name*],	)	VENUE
Plaintiff, vs. _____ [*name(s)*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____
_____		

The motion of _____ [*identify party, e.g.*, defendant] for an order to transfer venue of the above-captioned action from this court to the Superior Court of the State of California for the County of _____, came on regularly for hearing by the court on _____[*date*]. Plaintiff appeared by counsel _____[*name*]; defendant appeared by counsel _____[*name*].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted and that the action of the above-captioned case is hereby

transferred to the Superior Court of California for the County of _____ on payment of all the necessary fees required by law. The clerk of this court is authorized to transfer all the pleadings and papers herein to the clerk of that court.

[IT IS FURTHER ORDERED that _____ (*specify attorney fo* r *opposing party, e.g.,* plaintiff's attorney, _____ (*name*),) pay _____ (*identify moving party, e.g.,* defendant) the sum of $_____ as the amount of reasonable expenses and attorney's fees incurred in making the motion to transfer.]

Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of order in [1], *above*, is for use when the court grants a motion for a change of venue pursuant to *Code Civ. Proc. § 397* [Code Civ. Proc. §§ 396b, 398, 399]. On the hearing of a motion for an order transferring the action or proceeding to the proper court, the court shall, if it appears that the action or proceeding was not commenced in the proper court, order the action or proceeding transferred to the proper court [*Code Civ. Proc. § 396b(a)*].

[3] Cross References

For related form of notice of motion for change of venue,*see § 571.100*.

For a form of declaration in support of a motion for change of venue for reasons other than commencement in the wrong court,*see § 571.101*.

For discussion of the possibility of recovering expenses and attorney's fees when the action or proceeding was originally brought in the wrong court,*see § 571.32[2]*.

For discussion of the procedure for making the transfer after the order has been granted,*see §§ 571.37* and *§ 571.42*.

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50-571 California Forms of Pleading and Practice--Annotated § 571.104

§ 571.104 Proceedings for Change of Venue [Code Civ. Proc. § 396b, 397]--Notice of Countermotion

[1] FORM Proceedings for Change of Venue [Code Civ. Proc. § 396b, 397]--Notice of Countermotion

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
	)	MOTION AND NOTICE OF MOTION TO RE-
_____ [*name*],	)	TAIN VENUE
Plaintiff, vs. _____ [*name(s)*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To defendant _____[*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], plaintiff will move for an order to retain the above-captioned action in the county where it was commenced. The motion will be made on the ground(s) that _____ [the convenience of the witnesses will be promoted *and/or* the ends of justice will be promoted]. [In addition, _____ (*identify party, e.g.*, plaintiff) will move at the aforementioned time and place for an award of reasonable expenses and attorney's fees incurred in opposing the motion to transfer, in the amount of $_____.]

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s*)] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for _____ [*moving party*]

[2] Use of Form

The notice of motion in [1], *above*, is for use by a plaintiff in response to a defendant's motion to change venue. The basis of the countermotion is that the convenience of the witnesses or the ends of justice or both will be promoted by retaining venue where the action was commenced [*Code Civ. Proc. § 396b(d)*]. The form may only be used if the defendant's motion was based on the ground that the action was not brought in the county of his or her residence. If the defendant's motion was based on other grounds, plaintiff's opposition based on convenience of the witnesses and ends of justice may only be asserted by counteraffidavits to defendant's motion [*Cook v. Pendergast (1882) 61 Cal. 72, 76* ; *Braunstein v. Superior Court of Monterey County (1964) 225 Cal. App. 2d 691, 697, 37 Cal. Rptr. 666]* .

A countermotion to retain venue based on *Code Civ. Proc. § 396b(d)* cannot be made unless the answer is filed, because until the issues of fact are settled by the answer, the court cannot determine what testimony will be material [*Gilman v. Nordin (1952) 112 Cal. App. 2d 788* . 793, *247 P.2d 394]* . For the same reasons, filing of a demurrer alone is not sufficient [*Johnson v. Superior Court (1965) 232 Cal. App. 2d 212, 214, 42 Cal. Rptr. 645]* .

Although the courts are in conflict on the issue, it may be sufficient to establish that either the convenience of witnesses or the ends of justice would be promoted [*see Braunstein v. Superior Court (1964) 225 Cal. App. 2d 691, 698 n.2, 37 Cal. Rptr. 666* (showing that either convenience of witnesses or ends of justice sufficient); *but see Maxwell v. Murray (1961) 190 Cal. App. 2d 440, 443, 11 Cal. Rptr. 916* (showing that both convenience of witnesses and ends of justice required); *see Code Civ. Proc. § 396b(d)* (action may be retained if it appears that convenience of witnesses or ends of justice will be promoted); *cf. Code Civ. Proc. § 397(c)* (court may change place of trial when convenience of witnesses and ends of justice would be promoted)].

The form contains optional language at the end of the first paragraph for use when the plaintiff seeks to recover the reasonable expenses and attorney's fees incurred in opposing the defendant's motion for change of venue [*see Code Civ. Proc. § 396b(b)* and discussion in *§ 571.32[2]*].

[3] Accompanying Papers

A supporting memorandum is required to be served and filed with the notice of motion in [1], *above* [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms,*see* Ch. 417, *Points and Authorities* .

The form in [1], *above*, should be supported by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) establishing facts showing that the convenience of witnesses or the ends of justice will be promoted [*see § 571.101*]. Affidavits or declarations supporting plaintiff's countermotion to retain venue under *Code Civ. Proc. § 396b(d)* are required so that the trial court can determine whether the witnesses' testimony will be material, relevant, and admissible. They must be specific as to the facts to which the witnesses will testify, and mere conclusions or indefinite statements are insufficient [*Braunstein v. Superior Court (1964) 225 Cal. App. 2d 691, 698, 37 Cal. Rptr. 666]* . The affidavit or declaration

must indicate the names of the witnesses, the nature of testimony that may be expected from them, and the reasons why they would be inconvenienced by a transfer [*Maxwell v. Murray (1961) 190 Cal. App. 2d 440, 443, 11 Cal. Rptr. 916]* .

[4] Cross References

For a related form of declaration in support of countermotion,*see § 571.101*.

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50-571 California Forms of Pleading and Practice--Annotated § 571.105

§ 571.105 Stipulation [Code Civ. Proc. § 283] and Order for Change of Place of Trial [Code Civ. Proc. §§ 397, 398]

[1] FORM Stipulation [Code Civ. Proc. § 283] and Order for Change of Place of Trial [Code Civ. Proc. §§ 397, 398]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff, vs. _____ [*name(s)*],	)	NO. _____
Defendant.	)	STIPULATION FOR CHANGE OF VENUE
	)	
	)	

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective counsel, that the place of trial of this action be changed to the superior court of _____[*name of county or judicial district*] and that payment of the costs and fees of such transfer be made by _____[*name of party or parties*].

Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff
_____ [*firm name, if any*]
By: _____ [*signature*]

_____ [*typed name*]
Attorney for Defendant

ORDER

The parties hereto having so stipulated, IT IS ORDERED that the the action of the above-captioned case is hereby transferred to the Superior Court of California for the County of _____ on payment by _____[*party or parties*] of all the necessary fees required by law. The clerk of this court is authorized to transfer all the pleadings and papers herein to the clerk of that court.

Dated: _____.

_____ [*signature*]
Judge of the _____ Court

[2] Use of Form

The form of stipulation and order in [1], *above*, is for use when the parties agree to a change of venue and wish to avoid the costs of making a motion for transfer under *Code Civ. Proc. § 396b(a)* [*see Code Civ. Proc. § 396b(b)*]. For discussion of the circumstances in which a court is authorized to transfer a case to a proper court,*see § 571.31*. For discussion of the procedure for making the transfer after the order has been granted,*see § 571.37*.

[3] Cross References

For discussion of stipulations in general,*see* Ch. 533, *Stipulations* .

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50-572 California Forms of Pleading and Practice--Annotated 572.syn

§ 572.syn Synopsis to Chapter 572: VERIFICATION

§ 572.01 Scope of Chapter

§ 572.02 Cross References

§§ 572.03through 572.09 [Reserved]

§ 572.10 Governing Statutes

§ 572.11 Verification Defined

§ 572.12 Forms of Verification

[1] Affidavit and Declaration

[2] Affidavit

[3] Declaration

§ 572.13 Verification of Pleadings

[1] Complaints

[2] Answers

[3] Evidentiary Value

§ 572.14 Who May Verify

[1] Parties

[2] Attorneys

[3] Other Persons With Knowledge of Facts

[4] Officer of a Corporation

§ 572.15 Criminal Consequences of Improper Verification

[1] False Verification

[2] False Personation

§ 572.16 Sufficiency of Verification

[1] Form and Substance

[2] Information and Belief

§ 572.17 Effect of Failure to Verify Pleadings

[1] Complaints

[2] Answers

[3] Omission Cured by Amendment

[4] When Pleading Not Verified or Improperly Verified

[a] Remedies Available

[b] Waiver of Defect

§§ 572.18through 572.29 [Reserved]

§ 572.30 Related Matthew Bender Publications

[1] California Points and Authorities

[2] California Legal Forms

§ 572.31 State Statutes

[1] General Verification Requirements

[2] Methods of Verification

[3] Papers Requiring Verification

[a] Actions

[b] Miscellaneous Proceedings

[c] Special Proceedings

[d] Criminal Consequences of Improper Verification

§ 572.32 Decisions

[1] Affidavit

[2] Answer

[3] Any Other Person

[4] Attorney Verification

[5] Declaration

[6] False Verification

[7] Lack of Verification

[8] Nature of Verification

[9] Objection and Waiver

[10] Officer of Corporation

[11] Public Entities

[12] Sufficiency of Verification

§ 572.33 Text References

§§ 572.34through 572.39 [Reserved]

§ 572.40 Verification of Pleading [Code Civ. Proc. § 446] or Paper--Affidavit [Code Civ. Proc. §§ 446, 2003, 2009]--By Party--Third Person Format

[1] FORM

[2] Use of Form

§ 572.41 Verification of Pleading [Code Civ. Proc. § 446] or Paper--Affidavit [Code Civ. Proc. §§ 446, 2003, 2009]--By Party--First Person Format

[1] FORM

[2] Use of Form

§ 572.42 Verification of Pleading [Code Civ. Proc. § 446] or Paper--Declaration Under Penalty of Perjury [Code Civ. Proc. §§ 446, 2015.5]--By Party

[1] FORM

[2] Use of Form

[3] Cross References

§ 572.43 Verification of Pleading [Code Civ. Proc. § 446] or Paper--Declaration Under Penalty of Perjury [Code Civ. Proc. §§ 446, 2015.5]--By Attorney

[1] FORM

[2] Use of Form

§ 572.44 Verification of Pleading [Code Civ. Proc. § 446] or Paper--Declaration Under Penalty of Perjury [Code Civ. Proc. §§ 446, 2015.5]--By Nonparty With Personal Knowledge of Pleaded Facts--General Form

[1] FORM

[2] Use of Form

[3] Information and Belief

§ 572.45 Verification of Pleading [Code Civ. Proc. § 446] or Paper--Declaration Under Penalty of Perjury [Code Civ. Proc. §§ 446, 2015.5]--By Nonparty With Personal Knowledge of Pleaded Facts--By Party's Attorney

[1] FORM

[2] Use of Form

§ 572.46 Verification of Pleading [Code Civ. Proc. § 446] or Paper--Declaration Under Penalty of Perjury [Code Civ. Proc. §§ 446, 2015.5]--By Nonparty With Personal Knowledge of Pleaded Facts--By Party's Assignor

[1] FORM

[2] Use of Form

§ 572.47 Verification of Pleading [Code Civ. Proc. § 446] or Paper--Declaration Under Penalty of Perjury [Code Civ. Proc. §§ 446, 2015.5]--By Nonparty With Personal Knowledge of Pleaded Facts--By Officer of Corporate Party

[1] FORM

[2] Use of Form

§ 572.48 Notice of Motion for Judgment [Code Civ. Proc. § 577] on the Pleadings--Failure to State a Defense--Unverified Answer to Verified Complaint [Code Civ. Proc. § 446]

[1] FORM

[2] Use of Form

[3] Accompanying Papers

[4] Cross References

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50-572 California Forms of Pleading and Practice--Annotated § 572.01

§ 572.01 Scope of Chapter

This chapter discusses and contains forms for use in verifying pleadings in actions and special proceedings. It includes the following forms:

- Two alternative forms of a sworn affidavit [*see §§ 572.40* and *572.41*].
- A declaration by a party [*see § 572.42*].
- Nonparty declarations by:
  - A party's attorney [*see §§ 572.43* and *572.44*].
  - Other nonparties [*see §§ 572.45* and *572.46*].
  - A corporate officer [*see § 572.47*].
- A notice of motion for judgment on the pleadings for use when an unverified answer to a verified complaint is filed [*see § 572.48*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedurePretrial JudgmentsJudgment on the PleadingsCivil ProcedureSanctionsBaseless FilingsCertification Requirements

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50-572 California Forms of Pleading and Practice--Annotated § 572.02

§ 572.02 Cross References

For discussion and forms regarding general forms of affidavit and declaration, *see* Ch. 15, *Affidavits, Certificates, and Declarations* .

For discussion of the general format of verified answers, *see* Ch. 26., *Answers* .

For discussion of general format of verified complaint, *see* Ch. 123, *Complaints and Cross-Complaints* ..

For discussion and forms for verified complaint for involuntary dissolution of corporations, *see* Ch. 170, *Corporations: Dissolution and Winding Up*

For discussion and general forms for motions for judgment on the pleadings, *see* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings*

For discussion of verified petitions relating to the appointment of conservators and guardians, *see* Ch. 280, *Guardianship and Conservatorship: Appointment of Guardians* , and Ch. 281, *Guardianship and Conservatorship: Appointment of Conservators*

For discussion of verified complaints and supporting declarations for temporary restraining orders, preliminary injunctions, and permanent injunctions, *see* Ch. 303, *Injunctions*

For discussion and forms of verification of preferred wage claims, *see Ch. 342, Liens and Wage Preferences, § 342.60* et seq.

For discussion of verification of both petitions and responses relating to writs of mandate, *see* Ch. 358, *Mandate and Prohibition*

For discussion of verification of both petitions and responses relating to writs of prohibition, *see* Ch. 358, *Mandate*

and Prohibition

For discussion and general forms for motions to strike, *see* Ch. 375, *Motions to Strike: Pleadings* ; Ch. 376, *Motions to Strike: Anti-SLAPP*

For discussion of verification of both petitions and responses relating to writs of review, *see* Ch. 492, *Review (Certiorari), Writ of*

For discussion of verification by petitioner in probate proceedings, *see* Ch. 442, *Probate: Initiating Probate Administration*

For verification of claim of mechanics' lien, *see* Ch. 361, *Mechanics' Liens*

For forms of declaration for attachment in unlawful detainer action, orders to show cause regarding the appointment of a receiver, and publication of summons, *see* Ch. 333, *Landlord and Tenant: Eviction Actions*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsDemurrersCivil ProceduresPleading & PracticePleadingsAnswersCivil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewCivil ProceduresPleading & PracticePleadingsComplaintsCross-ComplaintsCivil ProceduresRemediesWritsCommon Law WritsMandamus

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[Reserved]

§§ 572.03[Reserved]

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50-572 California Forms of Pleading and Practice--Annotated § 572.10

§ 572.10 Governing Statutes

Verification of pleadings is governed by *Code Civ. Proc. § 446*.

"Affidavit" is defined in *Code Civ. Proc. § 2003*, and the permissible uses of affidavits are set forth in *Code Civ. Proc. § 2009*.

Use of a declaration in lieu of a sworn affidavit is authorized by *Code Civ. Proc. §§ 446* and *2015.5*.

The criminal consequences of a false verification, and punishment therefor, are set out in *Penal Code §§ 27(b)*, *118*, *529*, and *777b*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedureSanctionsBaseless FilingsCertification RequirementsCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesAbuse of Public OfficeFalsificationGeneral Overview

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50-572 California Forms of Pleading and Practice--Annotated § 572.11

§ 572.11 Verification Defined

A "verification" is an affidavit verifying the truth of the matters covered by it [*Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 204, 151 Cal. Rptr. 721* ; *Albertson v. Raboff (1960) 185 Cal. App. 2d 372, 388, 8 Cal. Rptr. 398* ; *see Code Civ. Proc. § 2009*].

The objective of a verification is to insure good faith in the averments or statements of a party to litigation [*Silcox v. Lang (1889) 78 Cal. 118, 122, 20 P. 297* ; *Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 204, 151 Cal. Rptr. 721]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewCivil ProceduresSanctionsBaseless FilingsCertification Requirements

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50-572 California Forms of Pleading and Practice--Annotated § 572.12

§ 572.12 Forms of Verification

[1] Affidavit and Declaration

A verification may be in the form of an affidavit [*Code Civ. Proc. § 2009*; *see Code Civ. Proc. § 446*]. It may also be in the form of a declaration under penalty of perjury [*see Code Civ. Proc. §§ 446, 2015.5*]. A person verifying a pleading need not swear to the truth or his or her belief in the truth of the matters stated therein but may, instead, assert the truth or his or her belief in the truth of those matters "under penalty of perjury" [*Code Civ. Proc. § 446*]. In addition, whenever under any state law, rule, regulation, order or requirement, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn written statement, declaration, verification, certificate, oath, or affidavit (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), the matter may with like force and effect be supported, evidenced, established or proved by the unsworn written statement, declaration, verification, or certificate which recites that it is certified or declared by him or her to be true under penalty of perjury [*Code Civ. Proc. § 2015.5*].

[2] Affidavit

An affidavit is a written declaration under oath, made without notice to the adverse party [*Code Civ. Proc. § 2003*]. It may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, and in uncontested proceedings to establish a record of birth, or on a motion, and in any other case expressly permitted by statute [*Code Civ. Proc. § 2009*].

Although *Code Civ. Proc. § 446* refers to verification by affidavit, this form should be distinguished from an evidentiary affidavit used to establish the facts stated in it. When an affidavit is used as evidence, the requirements of *Code Civ. Proc. § 446* do not apply [*Toboni v. Pennington Millinery Co. (1959) 172 Cal. App. 2d 47, 52, 341 P.2d 845]* . For a discussion of the use of affidavits to establish evidentiary facts, *see* Ch. 15, *Affidavits, Certificates, and Declarations* .

When no particular affidavit format is prescribed by statute, any format appears to be sufficient even though the affidavit does not specifically state that the affiant was first duly sworn, as long as it indicates somewhere that it was

made under oath [*Osborn v. City of Whittier (1951) 103 Cal. App. 2d 609, 619, 230 P.2d 132* (form of affidavit verifying claim for damages against municipality, which indicated that it was "subscribed" and "sworn to" by plaintiff before a notary public whose signature was affixed, as sufficient verification)]. Presumably, this rule also applies to affidavits that verify pleadings, as neither *Code Civ. Proc. § 446* nor *Code Civ. Proc. § 2003* prescribe any particular format to be used to indicate that an affiant was first duly sworn [*see Code Civ. Proc. §§ 446, 2003*].

Although no particular affidavit format is required to verify pleadings, the mere acknowledgment of execution before a notary public is not equivalent to a verification [*Palm Springs Alpine Estates, Inc. v. Superior Court of Los Angeles County (1967) 255 Cal. App. 2d 883, 888, 63 Cal. Rptr. 618]* . There must also be a declaration that the statements in the affidavit are true of the affiant's own knowledge, except as to matters that are stated on information or belief, and as to those matters that they are believed to be true [*Code Civ. Proc. § 446*; *Borders v. Civil Service Commission (1963) 211 Cal. App. 2d 678, 683, 27 Cal. Rptr. 490* ; for a more detailed discussion of the form and contents of affidavits, *see* Ch. 15, *Affidavits, Certificates, and Declarations*].

[3] Declaration

An unsworn certification or declaration made under penalty of perjury may be used in lieu of a statement under oath [*Code Civ. Proc. § 2015.5*]. It should be in substantially the following forms:

If the declaration is executed within this state, it may say: "I certify (or declare) under penalty of perjury that the foregoing is true and correct." The declaration must bear the date and place of execution, and the declarant's signature [*Code Civ. Proc. § 2015.5(a)*].

If the declaration is executed at any place, within or without the state, it may say: "I certify (or declare) under penalty of perjury under the laws of the state of California that the foregoing is true and correct." The declaration need bear only the date of execution, and the declarant's signature [*Code Civ. Proc. § 2015.5(b)*].

The declaration need not appear at the end of the verified document although this is the better practice [*People v. Pierce (1967) 66 Cal. 2d 53, 59, 56 Cal. Rptr. 817, 423 P.2d 969]* . For a more detailed discussion of the form and contents of declarations *see* Ch. 15, *Affidavits, Certificates, and Declarations* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedureSanctionsBaseless FilingsCertification RequirementsCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesPerjuryGeneral Overview

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§ 572.13 Verification of Pleadings

[1] Complaints

Generally, a complaint need not be verified to commence a civil action [*Quick v. Corsaro (1960) 180 Cal. App. 2d 831, 836, 4 Cal. Rptr. 674]* . Moreover, when the plaintiff is the state, or a county, city, school district, district, public agency, or public corporation, or an officer of any of these entities in his or her official capacity, the complaint need not be verified [*Code Civ. Proc. § 446*]. However, there are numerous actions or proceedings in which a verification is required by statute. For example, the complaint in a quiet title action must be verified [*Code Civ. Proc. § 761.020*]. For a list of actions and proceedings in which a verification is specifically required, *see § 572.31[1]*.

Even in cases in which verification of a complaint is not required, other purposes may be served by doing so. For example, a verified complaint may:

- Serve as an affidavit to support a preliminary injunction [*Code Civ. Proc. § 527(a)*].

- Require the defendant in an unlimited civil case to file a verified answer and preclude use of a general denial [*Code Civ. Proc. §§ 431.30(d), 446*]. By contrast, in a limited civil case, verification of the complaint will not require the defendant to verify the answer or preclude use of a general denial, with the exception that if the cause of action is a claim assigned to a third party for collection, verification of the complaint will require the denial of the allegations to be made positively or on information and belief [*Code Civ. Proc. §§ 92(b), 431.30(d)*].

- Serve as a counter-affidavit on a motion for a change of venue or a motion to quash service of summons [*Atkins, Kroll & Co. v. Broadway Lbr Co. (1963) 222 Cal. App. 2d 646, 654, 35 Cal. Rptr. 385]* .

A verified complaint cannot, however, serve as a counter-affidavit to prove that there are triable issues of fact in opposition to a motion for summary judgment [*People v. City of Garden Grove (1958) 165 Cal. App. 2d 794, 802, 332 P.2d 841]* .

For a discussion of the effect of failure to verify a complaint when required by statute, *see § 572.17[1]*.

[2] Answers

When the complaint is verified, the answer must be verified [*Code Civ. Proc. § 446*; *French v. Smith Booth (1942) 56 Cal. App. 2d 23, 29, 131 P.2d 863]* . Conversely, when the complaint is not verified, the answer need not be [*Kraus v. Walt Disney Productions (1963) 221 Cal. App. 2d 736, 742, 34 Cal. Rptr. 702]* . Answers in a limited civil case need not be verified even if the complaint or cross complaint is verified [*Code Civ. Proc. § 92(b)*].

When the state, or a county, city, school district, district, public agency, public corporation, or any officer of any of these entities in his or her official capacity is the plaintiff, the answer shall be verified [*Code Civ. Proc. § 446*]. But when these entities or officers are the defendant, their answer to a complaint or petition need not be verified [*Code Civ. Proc. § 446*; *Seckels v. Department of Indus. Relations (1929) 98 Cal. App. 647, 648, 277 P. 497]* .

The requirement that an answer must be verified when a public entity or officer is the plaintiff does not apply if the admission of the truth of the complaint might subject the defendant to criminal prosecution [*Code Civ. Proc. § 446*]. The general requirement that answers must be verified when the complaint is verified is a separate provision of *Code Civ. Proc. § 446* and is not subject to this exception. However, a verified answer required by this provision may not be used against a defendant in subsequent criminal proceedings [*DeCamp v. First Kensington Corp. (1978) 83 Cal. App. 3d 268, 276, 147 Cal. Rptr. 869]* .

[3] Evidentiary Value

A verified pleading may constitute an affidavit competent to prove the facts stated in it [*Atkins, Kroll, & Co. v. Broadway Lbr. Co. (1963) 222 Cal. App. 2d 646, 654, 35 Cal. Rptr. 385]* . However, an unverified pleading cannot serve as an affidavit [*Sheard v. Superior Court (1974) 40 Cal. App. 3d 207, 212, 114 Cal. Rptr. 743]* . The circumstances under which a verified complaint may constitute an affidavit are *discussed under § 572.13[1]*.

Although an unverified pleading has no such evidentiary value, it does not follow that it must be ignored. For example, in a motion to quash service of an unverified cross complaint, the existence of the cross complaint may be a material fact if it defines a cause of action that has some bearing on whether it is fair and reasonable for the court to assert jurisdiction [*Mihlon v. Superior Court (1985) 169 Cal. App. 3d 703, 710, 215 Cal. Rptr. 442* ; *Lundgren v. Superior Court (1980) 111 Cal. App. 3d 477, 485, 168 Cal. Rptr. 717]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 572.14 Who May Verify

[1] Parties

Absent extenuating circumstances, a pleading shall be verified by the party litigant [*Code Civ. Proc. § 446*; *Perlman v. Municipal Court (1979) 99 Cal. App. 3d 568, 573, 160 Cal. Rptr. 567]* . When parties sue or are sued jointly, verification of a pleading by one coplaintiff or codefendant is sufficient [*Butterfield v. Graves (1902) 138 Cal. 155, 158, 71 P. 510* ; *Claiborne v. Castle (1893) 98 Cal. 30, 33, 32 P. 807]* .

In all cases of verification of pleadings by a party, the affidavit shall state that the same is true of his or her own knowledge, except as to the matters that are stated on his or her information and belief, and as to those matters that he or she believes it to be true [*Code Civ. Proc. § 446*].

[2] Attorneys

If a party is unable to verify a pleading because he or she is absent from the county where his or her attorney has his or her office, or if the party is unable to verify for some other cause, the attorney may verify the pleading [*Code Civ. Proc. § 446*; *Cummings v. Cummings (1929) 97 Cal. App. 144, 147, 275 P. 245* ; *Brown v. Sandell (1926) 79 Cal. App. 313, 315-316, 249 P. 209]* . For a discussion of attorney verification when he or she has personal knowledge of the facts, *see* [3], *below*.

The attorney's affidavit of verification shall state that he or she has read the pleading and that he or she is informed and believes that the matters in it are true and on that ground alleges that they are true [*Code Civ. Proc. § 446*; *see Bittleston Law etc. Agency v. Howard (1916) 172 Cal. 357, 361, 156 P. 515* (when party absent from county, or from some other cause is unable to verify pleading, attorney verification may be made on information or belief)]. However, in such a case the pleading will not be considered an affidavit or declaration establishing the facts alleged [*Code Civ. Proc. § 446*]. The effect of improper verification is *discussed under § 572.17[4][a]*.

The practice of attorney verification is discouraged, and to that end the provisions of the code allowing it are strictly construed [*Silcox v. Lang (1889) 78 Cal. 118, 122, 20 P. 297]* . Thus, attorney verifications are not authorized when the absence of the party creates no inability to verify, as when the absence is only temporary and there is still time to file

a verified pleading, or when the absence is contrived in order to circumvent the requirement of verification [*see DeCamp v. First Kensington Corp. (1978) 83 Cal. App. 3d 268, 275, 147 Cal. Rptr. 869]* .

When a pleading is verified by an attorney, he or she shall set forth in the affidavit the reasons why it is not made by one of the parties [Code *Civ. Proc. § 446*]. When the averments in the affidavit of the attorney state that the facts contained in the pleading are within his or her knowledge, it is deemed a sufficient statement as to why the party did not make the verification [*Oak Grove School Dist. v. City Title Ins. Co. (1963) 217 Cal. App. 2d 678, 707, 32 Cal. Rptr. 288]* .

[3] Other Persons With Knowledge of Facts

A person other than the party may verify a pleading if the facts are within his or her knowledge without regard to whether the party is absent from the county, or from some other cause is unable to verify the pleading [*Code Civ. Proc. § 446*; *Bittleston Law etc. Agency v. Howard (1916) 172 Cal. 357, 361, 156 P. 515]* . This person is not required to be the party's agent [*Ware v. Stafford (1962) 206 Cal. App. 2d 232, 24 Cal. Rptr. 153]* . As in an attorney verification, the person shall set forth in the affidavit the reasons why it is not made by one of the parties [*Code Civ. Proc. § 446*; *see* the discussion under [2], *above*].

An attorney may also verify a pleading if the facts are within his or her knowledge [*Code Civ. Proc. § 446*; *Bittleston Law etc. Agency v. Howard (1916) 172 Cal. 357, 361-62, 156 P. 515* ; *Oak Grove School Dist. v. City Title Ins. Co. (1963) 217 Cal. App. 2d 678, 707, 32 Cal. Rptr. 288]* . An attorney may verify a pleading based on information and belief, but a verification on information and belief is insufficient when the attorney does not also claim that the facts are within his or her knowledge [*Perlman v. Municipal Court (1979) 99 Cal. App. 3d 568, 574, 160 Cal. Rptr. 567]* . For a discussion of attorney verification when the party is out of the county, or for some other reason is unable to verify, *see § 572.14[2], above*.

[4] Officer of a Corporation

When a corporation is a party, a verification can be made by any of its officers. The affidavit shall state that the officer has read the pleading and that he or she is informed and believes that the matters in it are true and on that ground alleges that they are true. But the pleading shall not be considered an affidavit or declaration establishing the facts alleged [*Code Civ. Proc. § 446*].

This provision does not mean that only an officer is authorized to verify a pleading. The clause is permissive, not exclusive, and allows an attorney or other party to verify in a proper case [*Bittleston Law etc. Agency v. Howard (1916) 172 Cal. 357, 362, 156 P. 515]* .

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§ 572.15 Criminal Consequences of Improper Verification

[1] False Verification

Any person who willfully makes a false verification as to the truth of any material matter, which he or she knows to be false is guilty of perjury [PenalCode § 118(a); *People v. Agnew (1947) 77 Cal. App. 2d 748, 753, 176 P.2d 724* , *cert. denied, 337 U.S. 909, 69 S. Ct. 1041, 93 L. Ed. 1721* ; *see also Penal Code § 118(b)* (proof of falsity)]. This is true whether the false verification is made or subscribed within or without the state, and is punishable by the court in the jurisdictional territory where the related action or proceeding occurs [*Penal Code §§ 27(b), 118(a), 777b*].

Inconsistent *theories* of recovery in a pleading are permitted, but verification of inconsistent *facts* alleged in a complaint indicates perjury [*Manti v. Gunari (1970) 5 Cal. App. 3d 442, 449, 85 Cal. Rptr. 366]* .

Although verified complaints are not required by *Code Civ. Proc. § 446*, they are contemplated and given legal sanction by the statute. Therefore, it is perjury to render false statements in a verified complaint even though it could have been filed without being verified [*People v. Godines (1936) 17 Cal. App. 2d 721, 724, 62 P.2d 787]* . However, no charge of perjury can be maintained when an oath is not authorized or provided for by law [*see Penal Code § 118*]. For example, *Code Civ. Proc. § 446* provides an exception to the requirement that an answer to a verified complaint must be verified, when a defendant would be subjected to criminal prosecution should he or she file a verified answer to the complaint [*Code Civ. Proc. § 446*]. In such a case an oath is *not* authorized or provided for by law, and therefore is not subject to a perjury charge [*People v. Millsap (1927) 85 Cal. App. 732, 744-745, 260 P. 378]* .

[2] False Personation

When a person falsely personates another to make a verification, he or she is subject to a $10,000 fine, or imprisonment up to one year, or both [*Penal Code § 529*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 572.16 Sufficiency of Verification

[1] Form and Substance

The chief test of the sufficiency of an affidavit is whether it is so clear and certain that an indictment for perjury may be sustained on it if false [*Sheeley v. City of Santa Clara (1963) 215 Cal. App. 2d 83, 85, 30 Cal. Rptr. 121* ; *Borders v. Civil Service Commission (1963) 211 Cal. App. 2d 678, 684, 27 Cal. Rptr. 490]* . It must be made by a person authorized by law to do so, and it must comply in form and substance with statutory provisions [*see French v. Smith Booth Usher Co. (1942) 56 Cal. App. 2d 23, 29, 131 P.2d 863* (holding that if requirements satisfied, verification sufficient to install and support pleading)]. The statutory provisions regarding the form and substance of verifications and the persons authorized to verify are *discussed under §§ 572.12,* and *572.14, above* .

[2] Information and Belief

Code Civ. Proc. § 446 was adopted for the express purpose of permitting allegations to be verified on information and belief because parties often rely on information furnished to them by others [*North v. Cecil B. De Mille Productions, Inc. (1934) 2 Cal. 2d 55, 59, 39 P.2d 199]* . However, the provision in *Code Civ. Proc. § 446* authorizing verification on information and belief refers to pleadings that *join issues*, such as complaints and answers [*Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 204, 151 Cal. Rptr. 721]* . *Facts* purported to be stated on information and belief are hearsay [*Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 204, 151 Cal. Rptr. 721* ; *Sheard v. Superior Court (1974) 40 Cal. App. 3d 207, 212, 114 Cal. Rptr. 743]* . Thus, when a verification based on information and belief is to be used as evidence of facts to support a petition for a writ of mandate pursuant to *Code Civ. Proc. § 1086*, it must be disregarded [*Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 204, 151 Cal. Rptr. 721* ; *see also Burger v. Superior Court (1984) 151 Cal. App. 3d 1013, 1019, 199 Cal. Rptr. 227* (attorney's declaration on information and belief insufficient to support opposition to motion to expunge lis pendens)]. For discussion of party, attorney, or other person verification on information or belief, *see § 572.14*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 572.17 Effect of Failure to Verify Pleadings

[1] Complaints

The failure to verify a complaint when required by statute is only a defect in pleading and does not deprive the court of jurisdiction to hear the matter on the merits [*Ware v. Stafford (1962) 206 Cal. App. 2d 232, 237 24 Cal. Rptr. 153* ; *People v. Birch Securities Co. (1948) 86 Cal. App. 2d 703, 707, 196 P.2d 143* , *cert. denied, 336 U.S. 936, 69 S. Ct. 745, 93 L. Ed. 1095]* . At most, failure to verify a complaint when required to do so may render it fatally defective, and on a proper motion, the complaint may be stricken [*Silcox v. Lang (1889) 78 Cal. 118, 121-122, 20 P. 297* ; *Ware v. Stafford (1962) 206 Cal. App. 2d 232, 237, 24 Cal. Rptr. 153]* . For a discussion of remedies available for failure to verify pleadings, *see* [4][a], *below*. For a discussion of circumstances under which a verified complaint may be required, *see § 572.13[1]*.

[2] Answers

When a complaint is not verified, a general denial of its allegations in the answer is sufficient, but only puts in issue the material allegations of the complaint. If the complaint is verified, its allegations shall be positively denied or denied according to the information and belief of the defendant [*Code Civ. Proc. § 431.30(d)*]. Thus, a general denial to a verified complaint is insufficient to put the material allegations in the complaint in issue [*Hirons v. Clare (1918) 38 Cal. App. 608, 609, 177 P. 291]* . Further, anunverified answer to a verified complaint is an admission of the allegations in the complaint, and the answer may be subject to a motion for judgment on the pleadings [*DeCamp v. Kensington (1978) 83 Cal. App. 3d 268, 283, 147 Cal. Rptr. 869* ; *Patterson v. Blackburn (1920) 47 Cal. App. 362, 363, 190 P. 483]* . For a general form of a notice of motion for judgment on the pleadings, *see § 572.48*.

[3] Omission Cured by Amendment

Generally, an omission of a verification may be cured by amendment [*Ford v. Loaney (1959) 169 Cal. App. 2d 503, 509, 337 P.2d 527]* . A defective verification in a complaint may be cured by amendment even though the statute of limitations has run on the time to file the original complaint, since verification of a complaint is not a jurisdictional requirement [*United Farm Workers of America v. Agricultural Labor Relations Bd. (1985) 37 Cal. 3d 912, 915, 210 Cal. Rptr. 453, 694 P.2d 138* ; *Ware v. Stafford (1962) 206 Cal. App. 2d 232, 237, 24 Cal. Rptr. 153]* . However, this

does not appear to apply when a verified claim must be filed within a statutory period as a condition precedent to maintaining an action [*see Hoffman v. Palm Springs (1959) 169 Cal. App. 2d 645, 650-651, 337 P.2d 521* (amended claim filed against municipality after statutory period for filing had expired)].

[4] When Pleading Not Verified or Improperly Verified

[a] Remedies Available

An improper verification is not a proper ground for a demurrer [*Butterfield v. Graves (1902) 138 Cal. 155, 158, 71 P. 510* ; *Lapique v. Kelley (1927) 82 Cal. App. 586, 592, 256 P. 229]* . However, if an answer is not sufficiently verified it may be stricken, or judgment on the pleadings may be ordered [*French v. Smith Booth Usher Co. (1942) 56 Cal. App. 2d 23, 29, 131 P.2d 863* ; *Stockton Lumber Co. v. Blodgett (1906) 3 Cal. App. 94, 95, 84 P. 441* ; *see also Zavala v. Board of Trustees (1993) 16 Cal. App. 4th 1755, 1761, 20 Cal. Rptr. 2d 768* (dicta; proper remedy is motion to strike)]. For a form of a notice of motion for a judgment on the pleadings on the ground that the answer was not sufficiently verified, *see § 572.48*.

These remedies are not available when it is necessary to inquire into the truth of the verifying affidavit to show insufficiency. For example, the court will not entertain an objection to a verified complaint when the defendant attempts to show that the affiant did not have the personal knowledge of facts he or she claimed to have in the verification [*French v. Smith Booth Usher Co. (1942) 56 Cal. App. 2d 23, 29, 131 P.2d 863]* .

[b] Waiver of Defect

A defective verification of a pleading may be waived by proceeding to trial without proper objection [*Zavala v. Board of Trustees (1993) 16 Cal. App.4th 1755, 1761, 20 Cal. Rptr. 2d 768* ; *Ware v. Stafford (1962) 206 Cal. App. 2d 232, 237, 24 Cal. Rptr. 153* ; *People v. Birch Securities Co. (1948) 86 Cal. App. 2d 703, 707, 196 P.2d 143]* . However, a waiver of verification does not admit the sufficiency of an answer or dispense with the necessity of specific denial of a verified complaint [*Harney v. Porter (1881) 62 Cal. 511, 512]* .

Legal Topics:

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[Reserved]

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§ 572.30 Related Matthew Bender Publications

[1] California Points and Authorities

For a form of memorandum of points and authorities regarding a verified petition for writ of habeas corpus, *see* California Points and Authorities, Ch. 110, *Habeas Corpus*

[2] California Legal Forms

For verified certificates of amendments to and restated articles of incorporation, *see* California Legal Forms, Ch. 10, *Amendment of Articles*

Legal Topics:

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§ 572.31 State Statutes

[1] General Verification Requirements

Answer in limited civil case courts need not be verified *Code Civ. Proc. § 92(b)*

Positive denial or denial according to information and belief of material allegations of verified complaint. *Code Civ. Proc. § 431.30(d)*

Verification of pleadings, contents, and who may verify. *Code Civ. Proc. § 446*

Public agency or officer plaintiff exempt. *Code Civ. Proc. § 446*

Answer as required to be verified when plaintiff files verified complaint. *Code Civ. Proc. § 446*

Verified answer not required when public agency or officer is defendant. *Code Civ. Proc. § 446*

[2] Methods of Verification

Affidavit defined. *Code Civ. Proc. § 2003*

Use of affidavit. *Code Civ. Proc. § 2009*

Certification of declaration in lieu of sworn statement. *Code Civ. Proc. § 2015.5*

[3] Papers Requiring Verification

[a] Actions

Affidavits supporting permanent injunction. *Code Civ. Proc. § 526*

Preliminary injunction on verified complaint or affidavit. *Code Civ. Proc. § 527(a)*

Verified complaint in actions to determine adverse claims and clouds on title to real property. *Code Civ. Proc. §§ 749, 749.1*

Verified complaint in actions to reestablish destroyed land records. *Code Civ. Proc. § 751.04*

Verified complaint in quiet title action. *Code Civ. Proc. § 761.020*

[b] Miscellaneous Proceedings

Verified petition showing claim or right in escheated property. *Code Civ. Proc. § 1355*

Petition for writ of habeas corpus verified by oath or affirmation. *Penal Code §§ 1474, 1475*

Petitions, reports, and accounts filed pursuant to Probate Code and objections and responses filed pursuant to Probate Code to petition, report, or account. *Prob. Code § 1021(a)*

Verified petition for administration of estate or probate of will of missing person. Prob. Code § 1354

[c] Special Proceedings

Verified cross complaint in interpleader. *Code Civ. Proc. § 386*

Verified petition for writ of certiorari. *Code Civ. Proc. § 1069*

Verified petition for writ of mandate. *Code Civ. Proc. § 1086*

Verified petition for writ of prohibition. *Code Civ. Proc. § 1103*

Verified complaint for unlawful detainer or forcible entry or detainer. *Code Civ. Proc. § 1166*

Verified complaint for involuntary dissolution of a corporation. *Corp. C § 1800(b)*

Verified complaint in action against vessel. *Harb. & Nav. Code § 495*

[d] Criminal Consequences of Improper Verification

Perjury as punishable when committed outside of *California. Penal Code § 27(b)*

False declarations or certifications as perjury. *Penal Code § 118*

False declarations or certifications committed outside of California as punishable in *California. Penal Code § 777b*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCivil ProcedureRemediesWritsCommon Law WritsMandamusCivil ProcedureSanctionsBaseless FilingsCertification Requirements

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50-572 California Forms of Pleading and Practice--Annotated § 572.32

§ 572.32 Decisions

[1] Affidavit

Affidavits are ordinarily not allowed in evidence unless permitted by statute. *Estate of Fraysher (1956) 47 Cal. 2d 131, 135, 301 P.2d 848*

Affidavits do not constitute best evidence to prove issuable facts. *Lacrabere v. Wise (1904) 141 Cal. 554, 556, 75 P. 185*

Acknowledgment of execution of document before notary public is not equivalent of jurat or verification. *Palm Springs Alpine Estates, Inc. v. Superior Court of Los Angeles County (1967) 255 Cal. App. 2d 883, 888, 63 Cal. Rptr. 618*

Notice of appeal to civil service commission "subscribed and sworn to" before notary public does not constitute verification. *Borders v. Civil Service Commission (1963) 211 Cal. App. 2d 678, 683, 27 Cal. Rptr. 490*

Test of sufficiency of affidavit is whether it is so clear and certain that indictment for perjury may be sustained on it if false. *People v. Thompson (1935) 5 Cal. App. 2d 655, 664, 43 P.2d 600* ; *Application of Behymer (1933) 130 Cal. App. 200, 203, 19 P.2d 829* ; *Gee Chong Pong v. Harris (1918) 38 Cal. App. 214, 217, 175 P. 806*

[2] Answer

One defendant as able to verify answer when more than one defendant sued jointly and they claim an estate or interest adverse to plaintiff. *Butterfield v. Graves (1902) 138 Cal. 155, 158, 71 P. 510*

When complaint is verified, *Code Civ. Proc. § 446* requires answer to be verified. *Benham v. Connor (1896) 113 Cal. 168, 171, 45 P. 258* ; *French v. Smith Booth (1942) 56 Cal. App. 2d 23, 29, 131 P.2d 863* ; *Johnson v. Dixon Farms Co. (1915) 29 Cal. App. 52, 55, 155 P. 134*

Verification of pleading by one coplaintiff or codefendant as sufficient. *Claiborne v. Castle (1893) 98 Cal. 30, 33, 32 P. 807*

Complaint filed for injunctive relief by officer of state as not requiring verification. *California State University, Hayward v. National Collegiate Athletic Assn. (1975) 47 Cal. App. 3d 533, 545, 121 Cal. Rptr. 85*

When complaint is not verified, answer need not be verified. *Kraus v. Walt Disney Productions (1963) 221 Cal. App. 2d 736, 742, 34 Cal. Rptr. 702*

Answer of officer of state to complaint or petition as not requiring verification. *Seckels v. Department of Indus. Relations (1929) 98 Cal. App. 647, 648, 277 P. 497*

Unverified answer to verified complaint as admission of allegations in complaint. *Patterson v. Blackburn (1920) 47 Cal. App. 362, 363, 190 P. 483*

General denial to verified complaint as insufficient to put in issue material allegations in complaint. *Hirons v. Clare (1918) 38 Cal. App. 608, 609, 177 P. 291*

[3] Any Other Person

Verification by employee of party valid when employee had greater familiarity with facts than party. *Conservatorship of Isaac O. (1987) 190 Cal. App. 3d 50, 54-55, 235 Cal. Rptr. 133*

Provision of *Code Civ. Proc. § 446* permitting verification by "any other person" does not require that person verifying be party's agent. *Ware v. Stafford (1962) 206 Cal. App. 2d 232, 236, 24 Cal. Rptr. 153*

[4] Attorney Verification

Complaint verified by plaintiff's attorney who has knowledge of facts is sufficient to support application for preliminary injunction. *Continental Baking Co. v. Katz (1968) 68 Cal. 2d 512, 532, 67 Cal. Rptr. 761, 439 P.2d 889*

Attorney's verification of proposed answer to cross complaint on motion to set aside default and default judgment is proper when party is out of state. *Beard v. Beard (1940) 16 Cal. 2d 645, 649, 107 P.2d 385*

Attorney may verify pleading when facts are within his or her knowledge. *Bittleston Law etc. Agency v. Howard (1916) 172 Cal. 357, 362, 156 P. 515* ; *Oak Grove School Dist. v. City Title Ins. Co. (1963) 217 Cal. App. 2d 678, 707, 32 Cal. Rptr. 288*

Attorney verification is not authorized when absence of party creates no inability to verify. *DeCamp v. First Kensington Corp. (1978) 83 Cal. App. 3d 268, 275, 147 Cal. Rptr. 869*

Defective averment is not fatal when verification otherwise complies with any of three *Code Civ. Proc. § 446* contingencies allowing for attorney verification. *Milstein v. Sartain (1943) 56 Cal. App. 2d 924, 927, 133 P.2d 836*

Attorney of plaintiff is permitted under *Code Civ. Proc. § 446* to verify complaint when plaintiff is absent from county where attorney has his or her office. *Cummings v. Cummings (1929) 97 Cal. App. 144, 147, 275 P. 245* ; *Brown v. Sandell (1926) 79 Cal. App. 313, 315-316, 249 P. 209*

[5] Declaration

Declaration under penalty of perjury as not required to be at end of document, although this is better practice. *People v. Pierce (1967) 66 Cal. 2d 53, 59, 56 Cal. Rptr. 817, 423 P.2d 969*

Declaration under penalty of perjury is permitted by *Code Civ. Proc. § 2015.5* for use in lieu of affidavit to support petition for writ of mandate. *Hand v. Board of Examiners (1977) 66 Cal. App. 3d 605, 615, 136 Cal. Rptr. 187*

Addition of *Code Civ. Proc. § 2015.5* as expressly authorizing use of declaration in lieu of affidavit to establish existence of facts to support issuance of preliminary injunction. *People ex rel. Savage v. L. A. Trust Deed etc. Exchange (1961) 190 Cal. App. 2d 66, 70, 12 Cal. Rptr. 144*

Mere addition of jurat to letter, without indication that signers vouched for letter's statements, as not constituting verification. *Hoffman v. City of Palm Springs (1959) 169 Cal. App. 2d 645, 337 P.2d 521*

[6] False Verification

Oath or declarations required to be such that criminal sanctions of perjury might apply. *Ancora-Citronelle Corp. v. Green (1974) 41 Cal. App. 3d 146, 150, 115 Cal. Rptr. 879*

Verification of inconsistent facts alleged in complaint as perjury. *Manti v. Gunari (1970) 5 Cal. App. 3d 442, 449, 85 Cal. Rptr. 366*

Making false statement in pleading filed in judicial proceeding as perjury. *People v. Agnew (1947) 77 Cal. App. 2d 748, 753, 176 P.2d 724 , cert. denied, 337 U.S. 909, 69 S. Ct. 1041, 93 L. Ed. 1721*

False statements in verified complaint as possible perjury. *People v. Godines (1936) 17 Cal. App. 2d 721, 724, 62 P.2d 787*

Charge of perjury is not proper under *Penal Code § 118* when oath was not authorized or provided for by law. *People v. Millsap (1927) 85 Cal. App. 732, 744-745, 260 P. 378*

[7] Lack of Verification

Unverified petition for reconsideration in workers' compensation action as properly accepted where state as plaintiff is excused from verificationrequirements under *Code Civ. Proc. § 446*. *Wings West Airlines v. Workers' Comp. Appeals Bd. (1986) 187 Cal. App. 3d 1047, 1055, 232 Cal. Rptr. 343*

Improper verification is not proper ground for demurrer. *Butterfield v. Graves (1902) 138 Cal. 155, 158, 71 P. 510* ; *Lapique v. Kelley (1927) 82 Cal. App. 586, 592, 256 P. 229*

Unverified complaint and answer have no effect in presenting issues to court for consideration at trial. *Ponce v. Black (1964) 224 Cal. App. 2d 159, 164, 36 Cal. Rptr. 419*

Defective verification is curable by amendment even though statute of limitations has run on time to file original complaint. *Ware v. Stafford (1962) 206 Cal. App. 2d 232, 237, 24 Cal. Rptr. 153*

Defective verification does not deprive court of jurisdiction to hear matter on merits. *Ware v. Stafford (1962) 206*

Cal. App. 2d 232, 237 24 Cal. Rptr. 153

Failure to verify pleading when required by statute is mere defect in pleading. *People v. Birch Securities (1948) 86 Cal. App. 2d 703, 707, 196 P.2d 143* ; *In re Staser (1948) 84 Cal. App. 2d 746, 751, 191 P.2d 791*

Insufficiently verified answer is subject to motion to strike, or judgment on pleadings may be ordered. *French v. Smith Booth Usher Co. (1942) 56 Cal. App. 2d 23, 29, 131 P.2d 863*

Proposed unverified complaint accompanying notice of motion to set aside default and default judgment may be corrected after six month period allowed to file motion. *Roseborough v. Campbell (1941) 46 Cal. App. 2d 257, 262, 115 P.2d 839*

Plaintiff entitled to judgment on pleadings, and not limited to striking out answer, when unverified answer was filed to verified complaint. *Stockton Lumber Co. v. Blodgett (1906) 3 Cal. App. 94, 95, 84 P. 441*

[8] Nature of Verification

Verified answer is presumed to contain facts within knowledge or belief of adversary party. *Lindemann v. San Joaquin Cotton Oil Co. (1936) 5 Cal. 2d 480, 500, 55 P.2d 870*

Object of verification is to insure good faith in averments of party. *Silcox v. Lang (1889) 78 Cal. 118, 122, 20 P. 297* ; *Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 204, 151 Cal. Rptr. 721* ; *Hoffman v. City of Palm Springs (1959) 169 Cal. App. 2d 645, 648, 337 P.2d 521*

Verified pleading as affidavit competent to prove facts stated therein. *Lundgren v. Superior Court (1980) 111 Cal. App. 3d 477, 485, 168 Cal. Rptr. 717* ; *In re O'Brien Machinery, Inc. (1964) 224 Cal. App. 2d 563, 569, 36 Cal. Rptr. 782* ; *Atkins, Kroll, & Co. v. Broadway Lbr. Co. (1963) 222 Cal. App. 2d 646, 35 Cal. Rptr. 385*

Affidavit or declaration is not evidence absent statutory authorization, party stipulation, or waiver. *Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal. App. 3d 586, 597, 155 Cal. Rptr. 63*

Verification as affidavit verifying truth of matters covered by it. *Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 204, 151 Cal. Rptr. 721* ; *Sheeley v. City of Santa Clara (1963) 215 Cal. App. 2d 83, 85, 30 Cal. Rptr. 121* ; *Albertson v. Raboff (1960) 185 Cal. App. 2d 372, 388,8 Cal. Rptr. 398* ; *Hoffman v. City of Palm Springs (1959) 169 Cal. App. 2d 645, 648, 337 P.2d 521* ; *Osborn v. City of Whittier (1951) 103 Cal. App. 2d 609, 619, 230 P.2d 132*

[9] Objection and Waiver

Defective verification as waived by proceeding to trial without proper objection. *Security T. & S. Bk. v. Fidelity & Deposit Co. (1920) 184 Cal. 173, 176, 193 P. 102* ; *San Francisco v. Itsell (1889) 80 Cal. 57, 60, 22 P. 74* , dismissed *133 U.S. 65, 10 S. Ct. 241, 33 L. Ed. 570* ; *McCullough v. Clark (1871) 41 Cal. 298, 302* ; *Greenfield v. Steamer Gunnell (1856) 6 Cal. 67, 68* ; *Ware v. Stafford (1962) 206 Cal. App. 2d 232, 237, 24 Cal. Rptr. 153* ; *People v. Birch Securities Co. (1948) 86 Cal. App. 2d 703, 707, 196 P.2d 143* ; *Hill v. Nerle (1916) 29 Cal. App. 473, 475, 156 P. 981*

Waiver of verification as not admitting sufficiency of answer or dispensing with necessity of specific denial of verified complaint. *Harney v. Porter (1881) 62 Cal. 511, 512*

[10] Officer of Corporation

Clause in *Code Civ. Proc. § 446* providing for verification of pleading by an officer when corporation is party as not exclusive but permissive, and allowing attorney or other party to verify in proper case. *Bittleston Law etc. Agency v. Howard (1916) 172 Cal. 357, 362, 156 P. 515*

Notwithstanding *Code Civ. Proc. § 482.040*, which provides that verified complaint may be used in lieu of affidavit in attachment proceedings, *Code Civ. Proc. § 446* precludes cross complaint verified by corporate officer on behalf of corporation from supporting opposition for right to attach order. *Lorber Industries v. Turbulence, Inc. (1985) 175 Cal. App. 3d 532, 536, 221 Cal. Rptr. 233*

Manager of corporation as officer entitled to verify. *Stockton v. Blodgett (1906) 3 Cal. App. 94, 95, 84 P. 441*

[11] Public Entities

Answer filed by public entity in writ proceeding, as in a civil action, need not be verified. *Crowl v. Commission on Professional Competence (1990) 225 Cal. App. 3d 334, 342, 275 Cal. Rptr. 86* (relying on *Code Civ. Proc. § 446*)

Pleading by state or subdivision of state need not be verified (*Code Civ. Proc. § 446*), allegations are not legally incompetent on ground that they are not verified, and under *Code Civ. Proc. § 1091* factual allegations in answer to petition for writ of mandate are taken as true if not countervailed by proof at trial or by replication. *Elliott v. Contractors' State License Bd. (1990) 224 Cal. App. 3d 1048, 1054, 274 Cal. Rptr. 286*

[12] Sufficiency of Verification

Code Civ. Proc. § 446 was adopted for express purpose of permitting allegation to be verified on information and belief. *North v. Cecil B. De Mille Productions, Inc. (1934) 2 Cal. 2d 55, 59, 39 P.2d 199*

Affidavit based on information and belief to support petition for mandate is hearsay and insufficient to establish facts in it. *Star Motor Imports, Inc. (1979) 88 Cal. App. 3d 201, 204, 151 Cal. Rptr. 721*

Allegations on information and belief do not support injunction. *Ancora-Citronelle Corp. v. Green (1974) 41 Cal. App. 3d 146, 150, 115 Cal. Rptr. 879*

Facts stated in verified complaint are hearsay when made on information and belief. *Sheard v. Superior Court (1974) 40 Cal. App. 3d 207, 212, 114 Cal. Rptr. 743*

Chief test of sufficiency of affidavit is whether it is so clear and certain that indictment for perjury may be sustained on it if false. *Sheeley v. City of Santa Clara (1963) 215 Cal. App. 2d 83, 85, 30 Cal. Rptr. 121* ; *Borders v. Civil Service Commission (1963) 211 Cal. App. 2d 678, 684, 27 Cal. Rptr. 490* ; *Hoffman v. City of Palm Springs (1959) 169 Cal. App. 2d 645, 648, 337 P.2d 521* ; *Osborn v. City of Whittier (1951) 103 Cal. App. 2d 609, 619, 230 P.2d 132*

"Clear and certain" means that allegations in affidavit must show facts and circumstances from which ultimate facts sought to be proved may be deduced by court. *Ware v. Stafford (1962) 206 Cal. App. 2d 232, 238, 24 Cal. Rptr. 153*

Verification is sufficient when made by person authorized by law to do so, and in compliance in form and substance with statutory provisions. *French v. Smith Booth Usher Co. (1942) 56 Cal. App. 2d 23, 29, 131 P.2d 863*

Sufficiency of verification as not extending to cases in which inquiry into truth of verifying affidavit is necessary to show insufficiency. *French v. Smith Booth Usher Co. (1942) 56 Cal. App. 2d 23, 29, 131 P.2d 863*

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsCertification RequirementsCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesPerjuryGeneral Overview

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§ 572.33 Text References

California Civil Procedure Before Trial, Vol. 1, Ch. 22, *Drafting Complaints*, § 22.12 et seq. (3d ed. Cal. CEB 2000)

Witkin, California Procedure, Vol. 4, *Pleading*, § 490 et seq. (4th ed.)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticeGeneral OverviewCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsCertification Requirements

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[Reserved]

§§ 572.34[Reserved]

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50-572 California Forms of Pleading and Practice--Annotated § 572.40

§ 572.40 Verification of Pleading [Code Civ. Proc. § 446] or Paper--Affidavit [Code Civ. Proc. §§ 446, 2003, 2009]--By Party--Third Person Format

[1] FORM Verification of Pleading [Code Civ. Proc. § 446] or Paper--Affidavit [Code Civ. Proc. §§ 446, 2003, 2009]--By Party--Third Person Format

VERIFICATION

	)	
State of California	)	ss.
[City and] County of _____	)	

_____ [*Name*], being duly sworn, deposes and says:

He/She is [one of] the _____ [plaintiff(s) *or* defendant(s)] in the above-entitled action. He/she has read the foregoing _____ [*specify pleading or paper being verified, e.g.,* complaint] and knows the contents thereof. The same is true of his/her own knowledge [, except as to those matters which are therein alleged on information and belief, and as to those matters, he/she believes it to be true].

_____ [*signature*]

Subscribed and sworn to before me on _____ [*date*]

_____ [*signature of officer*]

_____ [*typed name of officer*]

_____ [*specify title of officer,*

e.g., Notary Public]

[*Seal*]

[2] Use of Form

The form of verification in [1], *above*, is styled as an affidavit, and is for use in verifying any pleading or paper which may or must be verified [*see Code Civ. Proc. §§ 446, 2003, 2009*]. It may be used to verify a pleading or a paper in a special proceeding, to prove the service of a summons, notice or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of a witness, or a stay of proceedings, and in uncontested proceedings to establish a record of birth, or on a motion, and in any other case expressly permitted by statute [*Code Civ. Proc. § 2009*].

Although authorized by statute [*Code Civ. Proc. §§ 446, 2009*], the affidavit form used in this form and in the form *set out in § 572.41* has almost entirely been superseded in practice by the unsworn declaration under penalty of perjury authorized by *Code Civ. Proc. §§ 446* and *2015.5* [for a form of declaration, *see § 572.42*].

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§ 572.41 Verification of Pleading [Code Civ. Proc. § 446] or Paper--Affidavit [Code Civ. Proc. §§ 446, 2003, 2009]--By Party--First Person Format

[1] FORM Verification of Pleading [Code Civ. Proc. § 446] or Paper--Affidavit [Code Civ. Proc. §§ 446, 2003, 2009]--By Party--First Person Format

VERIFICATION

	)	
State of California	)	ss.
[City and] County of _____	)	

I, _____ [*name*], being duly sworn, say:

I am [one of] the _____ [plaintiff(s) *or* defendant(s)] in the above-entitled action. I have read the foregoing _____ [*specify pleading or paper being verified, e.g.,* complaint] and know the contents thereof. The same is true of my own knowledge [, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true].

_____ [*signature*]

Subscribed and sworn to before me on _____ [*date*]

_____ [*signature of officer*]

_____ [*typed name of officer*]

_____ [*specify title of officer,*

e.g., Notary Public]

[*Seal*]

[2] Use of Form

The form of verification in [1], *above*, is styled as an affidavit, and is for use in verifying any pleading or paper which may or must be verified [*see Code Civ. Proc. §§ 2003, 2009*]. It may be used in any situation in which the *form in § 572.40* may be used. The only difference is that the above form uses the first person while § 572.40 uses the third person. Use of this form appears to be supplanting use of the third person form. However, both forms of affidavit are now much less used than the unsworn declaration under penalty of perjury authorized by *Code Civ. Proc. §§ 446* and *2015.5* [for a form of declaration, *see § 572.42*].

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§ 572.42 Verification of Pleading [Code Civ. Proc. § 446] or Paper--Declaration Under Penalty of Perjury [Code Civ. Proc. §§ 446, 2015.5]--By Party

[1] FORM Verification of Pleading [Code Civ. Proc. § 446] or Paper--Declaration Under Penalty of Perjury [Code Civ. Proc. §§ 446, 2015.5]--By Party

VERIFICATION

I, _____ [*name*], declare:

I am [one of] the _____ [plaintiff(s) *or* defendant(s)] in the above-entitled action. I have read the foregoing [*specify pleading or paper, e.g.,* complaint] and know the contents thereof. The same is true of my own knowledge [, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.]

I _____ [declare *or* certify] under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form of verification in [1], *above*, is styled as a declaration, and is for use in verifying any pleading or paper which may or must be verified [*see Code Civ. Proc. §§ 446, 2003, 2009*]. An unsworn declaration made under penalty of perjury may be used in lieu of a sworn affidavit [*see Code Civ. Proc. § 2015.5*; for forms of affidavits, *see §§ 572.40* and *572.41*]. A declaration may be executed within or without California if it states the date of execution and that it is certified or declared under the laws of California [*Code Civ. Proc. § 2015.5*].

[3] Cross References

For a form of verification by the declaration of a party's attorney, see *§§ 572.43*

For forms of verification by the declaration of a nonparty with personal knowledge of the facts, see *§§ 572.44 -572.47*

For general discussion and other forms of declaration under penalty of perjury, *See also* Ch. 15, *Affidavits, Certificates, and Declarations*

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§ 572.43 Verification of Pleading [Code Civ. Proc. § 446] or Paper--Declaration Under Penalty of Perjury [Code Civ. Proc. §§ 446, 2015.5]--By Attorney

[1] FORM Verification of Pleading [Code Civ. Proc. § 446] or Paper--Declaration Under Penalty of Perjury [Code Civ. Proc. §§ 446, 2015.5]--By Attorney

VERIFICATION

I, _____ [*name*], declare:

I am an attorney at law duly admitted and licensed to practice before all courts of this State and I have my professional office at _____ [*street address and city*], _____ County, California.

I am [one of] the attorney[s] of record for _____ [*specify party, e.g.,* plaintiff(s)] in the above-entitled action.

[*EITHER*]

The _____ [*specify party, e.g.,* plaintiff(s)] is/are absent from the county in which I have my office.

[*OR*]

The _____ [*specify party, e.g.,* plaintiff(s)] is/are unable to verify the _____ [*specify pleading or paper, e.g.,* complaint] because _____ [*set forth good cause reasons for party's inability to verify, e.g.,* plaintiff is currently hospitalized and incompetent to execute a verification].

[*CONTINUE*]

For that reason I am making this verification on his/her/their behalf.

I have read the foregoing _____ [*specify pleading or paper to be verified, e.g.,* complaint] and know the contents thereof. The same is true of my own knowledge [, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is for use by an attorney, acting in his or her capacity as a party's attorney, to verify a pleading or other paper for the party. An attorney may verify a pleading if the party is unable to verify because he or she is absent from the county in which the attorney has his or her office, or for some other cause [*Code Civ. Proc. § 446*; *see Beard v. Beard (1940) 16 Cal. 2d 645, 649, 107 P.2d 385* (attorney could verify proposed answer to cross complaint on motion to set aside default and default judgment when party was out of state)].

The verification must state that the attorney has read the pleading and that he or she is informed and believes that the matters in it are true and on that ground alleges that they are true. The attorney shall set forth the reasons why verification is not made by one of the parties [*Code Civ. Proc. § 446*; *see Code Civ. Proc. § 2015.5* (form of certification or declaration in lieu of sworn statement)].

An attorney may also verify a pleading in the same manner as any nonparty if he or she has personal knowledge of the facts to be verified [for forms, *see §§ 572.44* and *572.45*].

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50-572 California Forms of Pleading and Practice--Annotated § 572.44

§ 572.44 Verification of Pleading [Code Civ. Proc. § 446] or Paper--Declaration Under Penalty of Perjury [Code Civ. Proc. §§ 446, 2015.5]--By Nonparty With Personal Knowledge of Pleaded Facts--General Form

[1] FORM Verification of Pleading [Code Civ. Proc. § 446] or Paper--Declaration Under Penalty of Perjury [Code Civ. Proc. §§ 446, 2015.5]--By Nonparty With Personal Knowledge of Pleaded Facts--General Form

VERIFICATION

I, _____ [*name*], declare:

I have read the foregoing _____ [*specify pleading or paper to be verified, e.g.,* complaint] and know the contents thereof. The same is true of my own knowledge [, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true].

I make this verification because the facts set forth in the _____ [*specify pleading or paper verified, e.g.,* complaint] are within my knowledge [and because _____ (*specify facts showing cause, e.g.,* I am more familiar with such facts than is the plaintiff herein)].

I _____ [declare *or* certify] under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*Signature*]

[2] Use of Form

The form in [1], *above,* is for use by any person other than a party to verify a pleading or other paper if that person has personal knowledge of the facts alleged. Apparently, the verification may be made without regard to whether the party

is absent from the county, or from some other cause is unable to verify the pleading [*Code Civ. Proc. § 446*; *Bittleston Law etc. Agency v. Howard (1916) 172 Cal. 357, 361, 156 P. 515* (verification by plaintiff's assignor)]. *Code Civ. Proc. § 446* does not require that the other person verifying pleading on behalf of parties be parties' agent [*Ware v. Stafford (1962) 206 Cal. App. 2d 232, 24 Cal. Rptr. 153]* .

The person verifying must set forth the reason or reasons why the verification is not made by one of the parties [*Code Civ. Proc. § 446*]. When the averments in the verification state that the facts contained in the pleading are within the person's knowledge, it is deemed a sufficient statement as to why the party did not make the verification [*Oak Grove School Dist. v. City Title Ins. Co. (1963) 217 Cal. App. 2d 678, 707-708, 32 Cal. Rptr. 288]* . However, when another reason exists making verification by a nonparty preferable to verification by the party, that reason may also be stated.

For a form and discussion of the circumstances when a party's attorney or assignor may verify when he or she has knowledge of the facts, *see §§ 572.45* and *572.46*.

The use of a certification or declaration in lieu of a sworn statement is authorized by *Code Civ. Proc. § 2015.5*.

[3] Information and Belief

The form in [1], *above*, contains optional language allowing a person with knowledge of the facts to verify a pleading or paper on information and belief. *Code Civ. Proc. § 446* was adopted for the express purpose of permitting allegations to be verified on information and belief because parties often rely on information furnished to them by others [*North v. Cecil B. De Mille Productions, Inc. (1934) 2 Cal. 2d 55, 59, 39 P.2d 199]* . However, a verification based on information and belief is hearsay. *Code Civ. Proc. § 446*, insofar as it purports to permit verification on information and belief, refers to pleadings that join issues, such as a complaint or answer. When the verification is to be used as evidence of facts, *Code Civ. Proc. § 446* does not apply, and such facts cannot be verified on information and belief [*Star Motor Imports, Inc. v. Superior Court (1979) 88 Cal. App. 3d 201, 204-205, 151 Cal. Rptr. 721]* .

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50-572 California Forms of Pleading and Practice--Annotated § 572.45

§ 572.45 Verification of Pleading [Code Civ. Proc. § 446] or Paper--Declaration Under Penalty of Perjury [Code Civ. Proc. §§ 446, 2015.5]--By Nonparty With Personal Knowledge of Pleaded Facts--By Party's Attorney

[1] FORM Verification of Pleading [Code Civ. Proc. § 446] or Paper--Declaration Under Penalty of Perjury [Code Civ. Proc. §§ 446, 2015.5]--By Nonparty With Personal Knowledge of Pleaded Facts--By Party's Attorney

VERIFICATION

I, _____ [*name*], declare:

I am an attorney at law duly admitted and licensed to practice before all courts of this State and I am [one of] the attorney[s] of record for _____ [*specify party, e.g.,* plaintiff] in the above-entitled action.

I have read the foregoing _____ [*specify paper being verified, e.g.,* complaint] and know the contents thereof. The same is true of my own knowledge [, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true].

I make this verification because the facts set forth in said _____ [*specify verified paper, e.g.,* complaint] are within my knowledge [and because _____ (*specify facts showing cause, e.g.,* I am more familiar with such facts than is the plaintiff herein)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is for use by an attorney to verify a pleading or other paper on the ground that he or she has personal knowledge of the facts. An attorney may verify a pleading as within his or her own knowledge and also on information and belief [*Code Civ. Proc. § 446*; *see Continental Baking Co. v. Katz (1968) 68 Cal. 2d 512, 532, 67 Cal. Rptr. 761, 439 P.2d 889* (complaint verified by plaintiff's attorney, having knowledge of facts, is sufficient to support application for preliminary injunction)]. The circumstances under which an attorney who has knowledge of the facts may verify are the same as for any other person who has knowledge of the facts [*see § 572.44*].

Although *Code Civ. Proc. § 446* provides that a verification of a pleading may be made on information and belief, matters thus verified have no evidentiary value [*see § 572.44[3]*].

The use of a certification or declaration in lieu of a sworn statement is authorized by *Code Civ. Proc. § 2015.5*.

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50-572 California Forms of Pleading and Practice--Annotated § 572.46

§ 572.46 Verification of Pleading [Code Civ. Proc. § 446] or Paper--Declaration Under Penalty of Perjury [Code Civ. Proc. §§ 446, 2015.5]--By Nonparty With Personal Knowledge of Pleaded Facts--By Party's Assignor

[1] FORM Verification of Pleading [Code Civ. Proc. § 446] or Paper--Declaration Under Penalty of Perjury [Code Civ. Proc. §§ 446, 2015.5]--By Nonparty With Personal Knowledge of Pleaded Facts--By Party's Assignor

VERIFICATION

I, _____ [*name*], declare:

I am the assignor of _____ [*specify party, e.g.,* plaintiff] in the above-entitled action.

I make this verification because the facts set forth in the _____ [*specify pleading or paper to be verified, e.g.*, complaint] are within my knowledge [and because _____ (*specify facts showing cause, e.g.,* it was I who entered into the subject agreement with defendant)].

I have read the foregoing _____ [*specify verified pleading or paper, e.g.,* complaint] and know the contents thereof. The same is true of my own knowledge [, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true].

I _____ [declare *or* certify] under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is for use by a nonparty with personal knowledge of the facts to verify a complaint when the nonparty is the assignor of the party's claim [*Code Civ. Proc. § 446*]. A statement that the nonparty making the verification is the plaintiff's assignor, that facts are true of his or her own knowledge, and that the assignor is better informed as to the facts than is the plaintiff, is sufficient to support the nonparty verfication [*Bittleston Law etc. Agency v. Howard (1916) 172 Cal. 357, 360, 156 P. 515]* .

For discussion of nonparty verifications, *see §§ 572.44[2]* and *572.45[2]*.

The use of a certification or declaration in lieu of a sworn statement is authorized by *Code Civ. Proc. § 2015.5*.

Although *Code Civ. Proc. § 446* provides that a verification of a pleading may be made on information and belief, matters thus verified have no evidentiary value [*see § 572.44[3]*].

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50-572 California Forms of Pleading and Practice--Annotated § 572.47

§ 572.47 Verification of Pleading [Code Civ. Proc. § 446] or Paper--Declaration Under Penalty of Perjury [Code Civ. Proc. §§ 446, 2015.5]--By Nonparty With Personal Knowledge of Pleaded Facts--By Officer of Corporate Party

[1] FORM Verification of Pleading [Code Civ. Proc. § 446] or Paper--Declaration Under Penalty of Perjury [Code Civ. Proc. §§ 446, 2015.5]--By Nonparty With Personal Knowledge of Pleaded Facts--By Officer of Corporate Party

VERIFICATION

I, _____ [*name*], declare:

I am an officer, to wit: _____ [*specify title, e.g.,* President] of _____ [*specify name of corporation*], a corporation organized and existing under the laws of _____ [*specify state*]. _____ [*Name of corporation*] is the _____ [*specify party, e.g.,* plaintiff] in the above-entitled action, and I have been authorized to make this verification on its behalf.

I have read the foregoing _____ [*specify verified pleading or paper, e.g.,* complaint] and know the contents thereof. The same is true of my own knowledge [, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true].

I _____ [declare *or* certify] under penalty of perjury under the laws of the State of Califonia that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is for use by the officer of a corporate party to verify a pleading or other paper. When a corporation is a party to an action, a pleading may be verified by any of the corporation's officers. The affidavit must state that the officer has read the pleading and that he or she is informed and believes that the matters in it are true, and on that ground alleges that they are true [*Code Civ. Proc. § 446*; *see Stockton v. Blodgett (1906) 3 Cal. App. 94, 95, 84 P. 441* (manager or corporation was officer entitled to verify)].

The clause in *Code Civ. Proc. § 446* providing for verification of pleading by an officer of a corporate is party is not exclusive but permissive, and allows the party's attorney or other party to verify in proper case. *Bittleston Law etc. Agency v. Howard (1916) 172 Cal. 357, 362, 156 P. 515*

The use of a certification or declaration in lieu of a sworn statement is authorized by *Code Civ. Proc. § 2015.5*.

Although *Code Civ. Proc. § 446* provides that a verification of a pleading may be made on information and belief, matters thus verified have no evidentiary value [*see § 572.44[3]*].

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50-572 California Forms of Pleading and Practice--Annotated § 572.48

§ 572.48 Notice of Motion for Judgment [Code Civ. Proc. § 577] on the Pleadings--Failure to State a Defense--Unverified Answer to Verified Complaint [Code Civ. Proc. § 446]

[1] FORM Notice of Motion for Judgment [Code Civ. Proc. § 577] on the Pleadings--Failure to State a Defense--Unverified Answer to Verified Complaint [Code Civ. Proc. § 446]

SUPERIOR COURT OF CALIFORNIA
COUNTY OF _____

	)	
	)	NO. _____
_____ [*name*],	)	MOTION AND NOTICE OF MOTION FOR JUDG-
Plaintiff,	)	MENT ON THE PLEADINGS
vs.	)	Date: _____
_____ [*name*],	)	Time: _____
Defendant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

To _____ [*identify party, e.g.,* defendant] _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court,

located at _____ [*street address*], _____ [*city*], _____ [*specify party, e.g.,* plaintiff] will, and hereby does, move for an order of entry of judgment on the pleadings. The motion will be made on the ground that defendant's unverified answer to plaintiff's verified complaint does not state facts sufficient to constitute a defense in that it admits the material allegations in the complaint.

The motion will be based on this notice of motion and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated:_____.

_____ [*signature*]

Attorney for _____ [*moving party*]

[2] Use of Form

The notice of motion in [1], *above,* is for use by plaintiff to move for a judgment on the pleadings prior to trial when the defendant has filed anunverified answer to a verified complaint. When the complaint is verified, the answer must be verified in most instances [*see Code Civ. Proc. § 446*]. This requirement, however, does not apply in limited civil cases [*see Code Civ. Proc. §§ 91, 92(b)*]. Even in an unlimited civil case, verification of the complaint does not require a verified answer from a defendant public agency or public officer [*Code Civ. Proc. § 446*].

An unverified answer to a verified complaint is an admission of the allegations in the complaint, and the answer may be subject to a motion for judgment on the pleadings [*DeCamp v. First Kensington Corp. (1978) 83 Cal. App. 3d 268, 283, 147 Cal. Rptr. 869* ; *Patterson v. Blackburn (1920) 47 Cal. App. 362, 363, 190 P. 483]* .

In addition, verification of a complaint in an unlimited civil case requires positive denial or denial according to information and belief of the material allegations of the complaint [*Code Civ. Proc. § 431.30(d)*; *see Hirons v. Clare (1918) 38 Cal. App. 608, 609, 177 P. 291* (general denial to verified complaint was insufficient to put in issue material allegations in complaint)]. This requirement does not apply if the complaint is subject to *Code Civ. Proc. § 90 et seq.* (most limited civil cases) unless the cause of action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*].

[3] Accompanying Papers

A supporting memorandum must be filed and a copy served with the foregoing notice of motion [*Cal. Rules of Ct., Rule 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, *see* Ch. 417, *Points and Authorities* .

[4] Cross References

For discussion and general forms for motions for judgment on the pleadings, *see* Ch. 206, *Demurrers and Motions for Judgment on the Pleadings* For discussion and general forms for motions to strike, *see* Ch. 375, *Motions to Strike: Pleadings*

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51-573 California Forms of Pleading and Practice--Annotated 573.syn

§ 573.syn Synopsis to Chapter 573: VEXATIOUS LITIGANTS

§ 573.01 Scope of Chapter

§ 573.02 Cross References

§§ 573.03-573.09 [Reserved]

§ 573.10 Function and Purpose of Vexatious Litigant Statutes

§ 573.11 Application of Vexatious Litigant Statutes to Plaintiffs Litigating In Propria Persona

§ 573.12 Constitutionality of Vexatious Litigant Statutes

§ 573.13 Definitions

[1] Vexatious Litigant

[2] Other Definitions

[3] Interpreting Code Civ. Proc. § 391(b)

[a] Five Adverse or Unjustified Litigations in Seven Years

[b] Relitigation of Validity of Final Determination or of Cause of Action or Issues Finally Determined

[c] Frivolous Motions or Tactics

[d] Prior Determination as Vexatious Litigant in Action Based on Same Facts, Transaction, or Occurrence

§ 573.14 Prefiling Order Restricting Filing of New Litigation In Propria Persona

§§ 573.15-573.29 [Reserved]

§ 573.30 State Statutes

§ 573.31 Decisions

§§ 573.32-573.39 [Reserved]

§ 573.40 Notice of Motion and Supporting Declaration for Order Prohibiting Vexatious Litigant From Filing New Litigation In Propria Persona [Code Civ. Proc. § 391.7(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 573.41 Order Prohibiting Vexatious Litigant From Filing New Litigation In Propria Persona [Code Civ. Proc. § 391.7(a)]--Judicial Council Form MC-700

[1] FORM

[2] Use of Form

§ 573.42 Notice That Clerk Mistakenly Filed Litigation Subject to Prefiling Order [Code Civ. Proc. § 391.7(c)]

[1] FORM

[2] Use of Form

§ 573.43 Request and Order to File New Litigation by Vexatious Litigant--Judicial Council Form MC-701

[1] FORM

[2] Use of Form

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Chapter 573 VEXATIOUS LITIGANTS
PART I. SCOPE

51-573 California Forms of Pleading and Practice--Annotated § 573.01

§ 573.01 Scope of Chapter

This chapter discusses general provisions relating to vexatious litigants and includes forms for use in seeking a prefiling order to restrict the further filing of litigation by a vexatious litigant [*see §§ 573.40, 573.41*]. It also includes a form of notice that a clerk has mistakenly filed litigation that is subject to a prefiling order [*see § 573.42*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSelf-RepresentationSanctionsCivil ProcedureSanctionsBaseless FilingsVexatious Litigants

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51-573 California Forms of Pleading and Practice--Annotated § 573.02

§ 573.02 Cross References

For discussion of security for costs generally and forms for obtaining an order requiring a vexatious litigant to furnish security for costs, see *Ch. 174, Costs and Attorney's Fees, § 174.290* et seq. For a general discussion of judicial bonds and undertakings, see *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.40* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSelf-RepresentationSanctionsCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsVexatious Litigants

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[Reserved]

§§ 573.03[Reserved]

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51-573 California Forms of Pleading and Practice--Annotated § 573.10

§ 573.10 Function and Purpose of Vexatious Litigant Statutes

The vexatious litigant statutes (*Code Civ. Proc. § 391 et seq.*) enable a defendant who has become the target of a vexatious litigant to require the litigant to put up security for the defendant's reasonable expenses [*see Code Civ. Proc. §§ 391, 391.1, 391.3*; for definition of vexatious litigant *see § 573.13[1]*].

For discussion and forms relating to this procedure, see *Ch. 174, Costs and Attorney's Fees, § 174.90* et seq.

The statutes also permit such a defendant to obtain a prefiling order requiring a vexatious litigant to obtain leave of the presiding judge prior to filing new litigation in propria persona [*Code Civ. Proc. § 391.7*]. The purpose of the statutory scheme is to address the problem created by the persistent and obsessive litigant who has constantly pending a number of groundless actions. Often, such actions may be against the judges and other court officers who decided or were concerned in the decision of previous actions adversely to the litigant [*First Western Development Corp. v. Superior Court (1989) 212 Cal. App. 3d 860, 867-868, 261 Cal. Rptr. 116]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSelf-RepresentationSanctionsCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsVexatious Litigants

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51-573 California Forms of Pleading and Practice--Annotated § 573.11

§ 573.11 Application of Vexatious Litigant Statutes to Plaintiffs Litigating In Propria Persona

The vexatious litigant statutes are aimed specifically at litigants who vexatiously bring actions in propria persona, including an attorney at law acting in propria persona [*see Code Civ. Proc. § 391(b), (d)*]. If an attorney files an action on a plaintiff's behalf, the plaintiff generally will not be required to post security under the vexatious litigant statutes [*see Code Civ. Proc. §§ 391(b),(d), 391.1*]. Similarly, a prefiling order only restricts the filing of new litigation by a vexatious litigant seeking to file in propria persona [*Code Civ. Proc. § 391.7*].

In certain cases, however, a litigant presently represented by counsel may be deemed a vexatious litigant. Of the four defining acts that transform a plaintiff into a vexatious litigant [*see Code Civ. Proc. § 391(b), discussed under § 573.13[1*], each refers to acts committed while the person was in propria persona. Although the second and third acts described in the statute refer to a person acting in propria persona in the very proceeding in which a defendant attempts to obtain an order requiring the plaintiff to furnish security, the first and fourth do not. Consequently, with respect to the first and fourth described acts, *Code Civ. Proc. § 391* applies to persons currently represented by counsel whose conduct was vexatious when they represented themselves in the past [*Camerado Ins. Agency, Inc.v. Superior Court (1993) 12 Cal. App. 4th 838, 842, 16 Cal. Rptr. 2d 42* ; *see Code Civ. Proc. § 391(b)*].

A represented plaintiff may be required to post security for costs under statutes other than *Code Civ. Proc. § 391 et seq.* [*see, e.g., Code Civ. Proc. § 1029.6* (security for costs in certain actions for personal injury against medical practitioners)]. For further discussion, see *Ch. 174, Costs and Attorney's Fees, § 174.90* et seq.

In addition, although corporations generally cannot appear in propria persona, a corporation may be subject to the vexatious litigant provisions as the alter ego of a vexatious litigant who is using the corporation to circumvent Section 391 et seq. [*Say & Say, Inc. v. Ebershoff (1993) 20 Cal. App. 4th 1759, 1770* , 25 Cal. Rtpr. 2d 703].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSelf-RepresentationSanctionsCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsVexatious

Litigants

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51-573 California Forms of Pleading and Practice--Annotated § 573.12

§ 573.12 Constitutionality of Vexatious Litigant Statutes

The vexatious litigant statutes have withstood constitutional challenge on a number of grounds. Constitutionality of the statutes has been upheld under both the federal and state constitution, as well as the issue of due process and the right to counsel [In *Re R.H. (2009) 170 Cal. App. 4th 678, 700-708, 88 Cal. Rptr. 3d 650]* . The statutes do not unlawfully discriminate against litigants too poor to afford attorneys or litigants proceeding in propria persona [*Taliaferro v. Hoogs (1965) 236 Cal. App. 2d 521, 527, 46 Cal. Rptr. 147]* . In addition, the statutes do not operate to deprive a litigant of due process of law or of the right to a jury trial [*Taliaferro v. Hoogs (1965) 236 Cal. App. 2d 521, 528, 529, 46 Cal. Rptr. 147]* . The requirement that security must be furnished by one who is found to be a vexatious litigant if there is no reasonable probability that he or she will prevail is not unconstitutionally vague or uncertain [*Muller v. Tanner (1969) 2 Cal. App. 3d 445, 452-453, 82 Cal. Rptr. 738* ; *Taliaferro v. Hoogs (1965) 236 Cal. App. 2d 521, 529, 46 Cal. Rptr. 147]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSelf-RepresentationSanctionsCivil ProcedureSanctionsBaseless FilingsVexatious LitigantsConstitutional LawBill of RightsFundamental RightsProcedural Due ProcessScope of ProtectionConstitutional LawBill of RightsFundamental RightsTrial by Jury in Civil ActionsConstitutional LawEqual ProtectionPovertyGovernmentsLegislationOverbreadthGovernmentsLegislationVagueness

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51-573 California Forms of Pleading and Practice--Annotated § 573.13

§ 573.13 Definitions

[1] Vexatious Litigant

Code Civ. Proc. § 391(b) specifies four situations that result in a person being a vexatious litigant:

(1) In the immediately preceding seven-year period, the person has commenced, prosecuted, or maintained in propria persona at least five litigations, other than in a small claims court, that have been finally determined adversely to the person or unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing [*Code Civ. Proc. § 391(b)(1)*]. The immediately preceding seven-year period is measured from the filing of a motion for security under *Code Civ. Proc. § 391.1* [*Stolz v. Bank of America (1993) 15 Cal. App. 4th 217, 221-223, 19 Cal. Rptr. 2d 19* ; *see § 573.10*]. This definition of vexatious litigant applies whether the litigant brings the action in propria persona or is represented by counsel [*Camerado Ins. Agency, Inc. v. Superior Court (1993) 12 Cal. App. 4th 838, 842, 16 Cal. Rptr. 2d 42]* .

(2) After a litigation has been finally determined against the person, he or she repeatedly relitigates or attempts to relitigate in propria persona either the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined [*Code Civ. Proc. § 391(b)(2)*].

(3) In any litigation, while acting in propria persona, the person repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay [*Code Civ. Proc. § 391(b)(3)*].

(4) The person, whether acting in propria persona or represented by counsel, has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based on the same or substantially similar facts, transactions, or occurrences [*Code Civ. Proc. §*

391(b)(4); *see In re Shieh (1993) 17 Cal. App. 4th 1154, 1166, 21 Cal. Rptr. 2d 886]* .

[2] Other Definitions

For purposes of *Code Civ. Proc. § 391 et seq.*, "litigation" means any civil action or proceeding commenced, maintained, or pending in any state or federal court [*Code Civ. Proc. § 391(a)*]. This term has been construed to include appeals and civil writ proceedings [*McColm v. Westwood Park Assn. (1998) 62 Cal. App. 4th 1211, 1216, 73 Cal. Rptr. 2d 288]* . This term also applies to appeals and writs in dependency actions [In *Re R.H. (2009) 170 Cal. App. 4th 678, 693-700, 88 Cal. Rptr. 3d 650]* .

"Plaintiff" means the person who commences, institutes, or maintains a litigation or causes it to be commenced, instituted, or maintained, including an attorney at law acting in propria persona [*Code Civ. Proc. § 391(d)*; *see In re Shieh (1993) 17 Cal. App. 4th 1154, 1166, 21 Cal. Rptr. 2d 886* (holding that attorney-plaintiff in numerous actions was vexatious litigant); *Say & Say, Inc. v. Ebershoff (1993) 20 Cal. App. 4th 1759, 1770* , 25 Cal. Rtpr. 2d 703 (holding that corporation was alter ego of vexatious litigant attorney-plaintiff Shieh and was therefore subject to vexatious litigant statutes)]. "Defendant" means a person (including a corporation, association, partnership, firm, or governmental entity) against whom a litigation is brought or maintained or sought to be brought or maintained [*Code Civ. Proc. § 391(e)*].

[3] Interpreting Code Civ. Proc. § 391(b)

[a] Five Adverse or Unjustified Litigations in Seven Years

Code Civ. Proc. § 391(b)(1) applies whether the litigant is bringing the new litigation in propria persona or whether the litigant is represented by counsel [*Camerado Ins. Agency, Inc. v. Superior Court (1993) 12 Cal. App. 4th 838, 842, 16 Cal. Rptr. 2d 42]* . The legislative purpose of the statute would be frustrated if a litigant could avoid the vexatious litigant label simply by obtaining counsel for any further litigations once the litigant qualifies as vexatious [*Camerado Ins. Agency, Inc. v. Superior Court (1993) 12 Cal. App. 4th 838, 842, 16 Cal. Rptr. 2d 42]* . The term "litigation" is broadly defined as "any civil action or proceeding, commenced, maintained or pending in any state or federal court" [*Code Civ. Proc. § 391(a)*; *Fink v. Shemtov (2010) 180 Cal. App. 4th 1160, 1170, 103 Cal. Rptr. 3d 509* ; *see McColm v. Westwood Park Assn. (1998) 62 Cal. App. 4th 1211, 1215, 73 Cal. Rptr. 2d 288]* . "[A]ny civil action or proceeding" includes any appeal or writ proceeding. "[A]ny state or federal court" includes the California Court of Appeal [*Fink v. Shemtov (2010) 180 Cal. App. 4th 1160, 1170, 103 Cal. Rptr. 3d 509* ; *McColm v. Westwood Park Assn. (1998) 62 Cal. App. 4th 1211, 1215, 73 Cal. Rptr. 2d 288]* .

Although a writ proceeding generally qualifies as a litigation within the meaning of *Code Civ. Proc. § 391(a)*, summary denials of writ petitions do not necessarily constitute a litigation that has been "finally determined adversely to the person" [*Fink v. Shemtov (2010) 180 Cal. App. 4th 1160, 1171-1173, 103 Cal. Rptr. 3d 509]* . The "immediately preceding seven-year period" within which a litigant must have "commenced, prosecuted, or maintained in propria persona at least five litigations" that were determined adversely or unjustifiably permitted to remain pending with being brought to trial is measured from the date of the filing of the motion to declare the plaintiff a vexatious litigant [*Stolz v. Bank of America (1993) 15 Cal. App. 4th 217, 220, 19 Cal. Rptr. 2d 19]* .

The fact that a litigation was "commenced" outside the seven-year period does not necessarily exclude it from consideration if it was "prosecuted" or "maintained" within that window [*Stolz v. Bank of America (1993) 15 Cal. App. 4th 217, 225, 19 Cal. Rptr. 2d 19]* .

A voluntary dismissal without prejudice is considered an adverse determination for purposes of *Code Civ. Proc. § 391(b)(1)* [*Tokerud v. Capitolbank of Sacramento (1995) 38 Cal. App. 4th 775, 780, 45 Cal. Rptr. 2d 345]* . An action dismissed voluntarily is still a burden on the target of the litigation and on the judicial system [*Tokerud v. Capitolbank of Sacramento (1995) 38 Cal. App. 4th 775, 779, 45 Cal. Rptr. 2d 345]* .

Where the five adverse litigation requirement is not met and the motions are not unmeritorious or frivolous, a finding of the plaintiff as a vexatious litigant under *Code Civ. Proc. § 391(b)(3)* will not be upheld on appeal [*Morton v. Wagner (2007) 156 Cal. App. 4th 963, 972, 67 Cal. Rptr. 3d 818* (cases affirming the vexatious litigant designation involved situations where litigant filed "dozens" of motions)]. However, repeated motions on the same issue may form the basis for a vexatious litigant finding [*Morton v. Wagner (2007) 156 Cal. App. 4th 963, 972, 67 Cal. Rptr. 3d 818]* .

[b] Relitigation of Validity of Final Determination or of Cause of Action or Issues Finally Determined

A judgment is final within the meaning of *Code Civ. Proc. § 391(b)(2)* when all avenues for direct review have been exhausted [*First Western Development Corp. v. Superior Court (1989) 212 Cal. App. 3d 860, 864, 261 Cal. Rptr. 116]* . Thus, a plaintiff who had appeals pending in two prior cases, one in state court and one in federal court, could not be determined to be vexatious because there was not yet a final determination in those cases [*Childs v. PaineWebber Inc. (1994) 29 Cal. App. 4th 982, 993, 35 Cal. Rptr. 2d 93]* . Although one plaintiff attempted to relitigate matters that had been finally determined when he filed an untimely motion for reconsideration in a federal court case and then filed a similar action in state court, he did not repeatedly relitigate within the meaning of *Code Civ. Proc. § 391(b)(2)* [*Holcomb v. U.S. Bank (2005) 129 Cal. App. 4th 1494, 1505-1506, 29 Cal. Rptr. 3d 578]* .

[c] Frivolous Motions or Tactics

Repeatedly contending that the vexatious litigant statutes are unconstitutional when the issue had been previously decided by the court of appeals in the litigant's own prior case is a frivolous tactic within the meaning of *Code Civ. Proc. § 391(b)(3)* [*In re Whitaker (1992) 6 Cal. App. 4th 54, 56, 8 Cal. Rptr. 2d 249]* .

[d] Prior Determination as Vexatious Litigant in Action Based on Same Facts, Transaction, or Occurrence

Code Civ. Proc. § 391(b)(4) does not require the parties to be the same; it is enough that the proceedings arise from substantially similar facts. Therefore, in a series of disputes between a law firm and a paralegal formerly employed by the law firm, a replevin action by the law firm to recover documents taken by the paralegal and an indemnity action by the paralegal seeking indemnification from the firm for legal counsel were substantially similar despite having slightly different parties [*Devereaux v. Latham & Watkins (1995) 32 Cal. App. 4th 1571, 1581, 38 Cal. Rptr. 2d 849* (disapproved on other grounds in *Moran v. Murtaugh Miller Meyer & Nelson, LLP (2007) 40 Cal. 4th 780, 785 n.7, 55 Cal. Rptr. 3d 112, 152 P.3d 416*)]. For purposes of *Code Civ. Proc. § 391(b)(4)*, it is immaterial whether the litigant files in propria persona or is represented by counsel [*In re Shieh (1993) 17 Cal. App. 4th 1154, 1166, 21 Cal. Rptr. 2d 886* (plaintiff had been declared a vexatious litigant in the United States District Court for the Central District of California and by two separate superior court judges in three distinct cases, all of which were substantially similar to the instant case)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSelf-RepresentationSanctionsCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsVexatious Litigants

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§ 573.14 Prefiling Order Restricting Filing of New Litigation In Propria Persona

A court may, on its own motion or the motion of any party, enter a prefiling order that prohibits a vexatious litigant from filing any new litigation in California courts in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed [*Code Civ. Proc. § 391.7(a)*]. Determination that a person is a vexatious litigant may be made during an appeal [In *Re R.H. (2009) 170 Cal. App. 4th 678, 707, 88 Cal. Rptr. 3d 650]* . Prior to such a motion, the person must have either been declared a vexatious litigant in a prior proceeding or have been declared a vexatious litigant after a noticed hearing in the current proceeding [*Andrisani v. Hoodack (1992) 9 Cal. App. 4th 279, 281, 11 Cal. Rptr. 2d 511* (plaintiff had been declared a vexatious litigant in two prior published appellate court opinions); *Bravo v. Ismaj (2002) 99 Cal. App. 4th 211, 225, 120 Cal. Rptr. 2d 879* (plaintiff had not been declared vexatious by any court in the past, and therefore was entitled to a noticed motion and hearing before being declared vexatious and therefore subject to a prefiling order)]. The court issuing the prefiling order has discretion to limit the scope of the order to filings related to a specific matter [*Wilmot v. Commission on Professional Competence (1998) 64 Cal. App. 4th 1130, 1133, 75 Cal. Rptr. 2d 656]* . For forms for use in obtaining a prefiling order, see *§§ 573.40* and *573.41*. Disobedience of such an order by a vexatious litigant may be punished as a contempt of court [*Code Civ. Proc. § 391.7(a)*; *In re Shieh (1993) 17 Cal. App. 4th 1154, 1166, 21 Cal. Rptr. 2d 886]* .

The Judicial Council is required to keep a list of persons declared by courts to be vexatious litigants subject to prefiling orders [*Code Civ. Proc. § 391.7(e)*]. While the Judicial Council is required to keep a list, it is not required to make the list public, and nothing in Section 391.7 requires the Judicial Council to make the list public; Section 391.7(e) provides that the list is to be disseminated annually to "clerks of the courts of this state," and one court recommends Judicial Council Form MC-700 form should not be public [*Kobayashi v. Superior Court (2009) 175 Cal. App. 4th 536, 540, 96 Cal. Rptr. 3d 99]* . As stated in a 2009 case where the plaintiff falsely claimed he was not the same person as the one on the vexatious litigant list: "On the one hand, it is easy for vexatious litigants to make claims of mistaken identity. But on the other hand, our judicial system must protect the rights of innocent litigants who really do have the misfortune of simply sharing the same name as a vexatious litigant, or who, perhaps because of some typo, might be mistakenly placed on the vexatious litigant list [*Kobayashi v. Superior Court (2009) 175 Cal. App. 4th 536, 542, 96 Cal. Rptr. 3d 99]* . Should this issue arise, consult *Kobayashi* for a list of suggestions for determining if the plaintiff is on the Judicial Council list and for suggestions of improving the verification process. Note: Plaintiff in this case was referred to the county district attorney's office for possible criminal prosecution for perjury.

If a vexatious litigant seeks to file new litigation in propria persona after the entry of a prefiling order, the presiding judge may only permit the filing if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. The presiding judge may condition the filing of the litigation on the furnishing of security for the benefit of the defendants as provided in *Code Civ. Proc. § 391.3* [*Code Civ. Proc. § 391.7(b)*; for discussion and forms regarding security, *see Ch. 174, Costs and Attorney's Fees, § 174.90* et seq.]. Under *Code Civ. Proc. § 391.3*, the court must order a plaintiff to furnish security if the court determines that plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation. In determining whether there is a reasonable probability plaintiff will prevail, the court is permitted to weigh the evidence rather than simply assume the truth of plaintiff's alleged facts [*Moran v. Murtaugh Miller Meyer & Nelson, LLP (2007) 40 Cal. 4th 780, 785, 55 Cal. Rptr. 3d 112, 152 P.3d 416]* .

The clerk must not file any litigation presented by a vexatious litigant subject to a prefiling order unless the vexatious litigant first obtains an order from the presiding judge permitting the filing. If the clerk mistakenly files the litigation without such an order, any party may file with the clerk and serve on the plaintiff and other parties a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order as set forth in *Code Civ. Proc. § 391.7(a)* [*Code Civ. Proc. § 391.7(c)*; *see § 573.42*]. The filing of the notice automatically stays the litigation, and the litigation will be automatically dismissed unless the plaintiff within 10 days of the filing of the notice obtains an order permitting the filing of the litigation [*Code Civ. Proc. § 391.7(c)*].

Although it was formerly held that a Section 391.7 order does not require court approval for filing actions in small claims court [*Banks v. State of California (1993) 14 Cal. App. 4th 1147, 1149-1150, 18 Cal. Rptr. 2d 127]* , that decision was based on the construction of *Code Civ. Proc. § 391(a)*, which defined "litigation" in terms of courts of record. As amended by 1994 Stats., ch. 587, § 391, no longer limits the definition of litigation to courts of record, so it is likely that the court approval requirement applies to actions in small claims court.

The requirements of a prefiling order under *Code Civ. Proc. § 391.7* remain in effect throughout the life of a lawsuit and permit dismissal at any point when a vexatious litigant proceeds without counsel or without the permission of the presiding judge; therefore, a court may dismiss a suit under this statute when counsel withdraws representation just before trial and no new counsel is substituted [*Forrest v. State of California Dept. of Corporations (2007) 150 Cal. App. 4th 183, 197, 58 Cal. Rptr. 3d 466]* .

A prefiling order is, as defined by *Code Civ. Proc. § 391.7*, an injunction; and the order may be modified as provided in *Code Civ. Proc. § 533* based on a change in the facts, a change in the law, or when a change would serve the ends of justice [*Luckett v. Panos (2008) 161 Cal. App. 4th 77, 85, 73 Cal. Rptr. 3d 745*]. The factors for lifting the order include: 1) the litigant must show honesty in the presentation of relevant facts in his or her application for the lifting of the prefiling order, 2) the litigant must show genuine remorse for the costs of litigation inflicted on defendants in prior lawsuits, 3) the litigant must attempt restitution toward the targets of prior litigation, especially payment of cost orders made by the court, 4) the litigant must give up the "habit of suing people as a way of life," and 5) the vexatious litigant must file an application to lift a prefiling order in the same forum that originally entered the order [*Luckett v. Panos (2008) 161 Cal. App. 4th 77, 90-97, 73 Cal. Rptr. 3d 745*].

An appellate court may not require a defendant who has been declared a vexatious litigant to obtain leave of the presiding judge before filing an appeal of a judgment against him or her; a defendant who appeals an adverse ruling is not filing "new" litigation or "maintaining" litigation within the meaning of *Code Civ. Proc. §§ 391* and *391.7* [*Mahdavi v. Superior Court (2008) 166 Cal. App. 4th 32, 42, 82 Cal. Rptr. 3d 121*].

Legal Topics:

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

Civil ProcedurePartiesSelf-RepresentationSanctionsCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsVexatious LitigantsGovernmentsCourtsClerks of Court

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[Reserved]

§§ 573.15[Reserved]

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§ 573.30 State Statutes

Definition of vexatious litigant. *Code Civ. Proc. § 391(b)*

Procedure for requiring vexatious litigant to obtain leave of court before filing further litigation in propria persona. *Code Civ. Proc. § 391.7(a)*

Conditions for filing new litigation subject to prefiling order. *Code Civ. Proc. § 391.7(b)*

Notice re mistakenly filed litigation. *Code Civ. Proc. § 391.7(c)*

Judicial recordkeeping concerning prefiling orders. *Code Civ. Proc. § 391.7(e)*

Legal Topics:

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

Under *Code Civ. Proc. § 391.3*, the court must order a plaintiff to furnish security if the court determines that plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation. In determining whether there is a reasonable probability plaintiff will prevail, the court is permitted to weigh the evidence rather than simply assume the truth of plaintiff's alleged facts. *Moran v. Murtaugh Miller Meyer & Nelson, LLP (2007) 40 Cal. 4th 780, 785, 55 Cal. Rptr. 3d 112, 152 P.3d 416*

Trial court properly declared plaintiff vexatious litigant on ground he commenced, prosecuted, or maintained at least five separate litigations that were finally determined adversely to him, where plaintiff conceded first, second, and fifth cases listed in vexatious litigant order each qualified as litigation finally determined adversely to him, matter listed as third case in the vexatious litigant order also qualified as litigation finally determined adversely to plaintiff within meaning of *Code Civ. Proc. § 391(b)(1)*, because appellate court's decision showed plaintiff filed complaint in propria persona, judgment was entered in plaintiff's favor against entity defendant, but plaintiff appealed from judgment on ground judgment should have also been entered against individual defendants, and appellate court affirmed judgment, thereby finally determining appeal adversely to plaintiff; and two more litigations were determined adversely to him because his notices of appeal were untimely filed. However, record did not contain any evidence regarding nature of seven writ proceedings relied upon by trial court, other than trial court's statement that petitions had been "summarily denied," and summary denial of writ petition that merely sought relief from pretrial rulings and did not constitute exclusive means of obtaining appellate review did not qualify as litigation finally determined adversely as to plaintiff and could not count toward five litigations required for vexatious litigant status. *Fink v. Shemtov (2010) 180 Cal. App. 4th 1160, 1171-1174, 103 Cal. Rptr. 3d 509*

The vexatious litigant statutes are constitutional under both the California and federal constitution and apply to appeals and writs in dependency actions; determination that a person is a vexatious litigant may be made during an appeal. In *Re R.H. (2009) 170 Cal. App. 4th 678, 698-707, 88 Cal. Rptr. 3d 650*

The Judicial Council is required to keep a list of persons declared by courts to be vexatious litigants subject to prefiling orders; however, this list need not be made public. Plaintiffs claiming mistaken identity for being on the list may

petition the court for resolution, but falsely asserting mistaken identity may result in a referral to the district attorney's office for perjury prosecution. *Kobayashi v. Superior Court (2009) 175 Cal. App. 4th 536, 540, 96 Cal. Rptr. 3d 99*

An appellate court may not require a defendant who has been declared a vexatious litigant to obtain leave of the presiding judge before filing an appeal of a judgment against him or her; a defendant who appeals an adverse ruling is not filing "new" litigation or "maintaining" litigation within the meaning of *Code Civ. Proc. §§ 391* and *391.7. Mahdavi v. Superior Court (2008) 166 Cal. App. 4th 32, 42, 82 Cal. Rptr. 3d 121*

Vexatious litigant who has had prefiling order entered against him may seek to have the order lifted based on change in circumstances under injunction statute (*Code Civ. Proc. § 533*). The factors for lifting the order include: 1) the litigant must show honesty in the presentation of relevant facts in his or her application for the lifting of the prefiling order, 2) the litigant must show genuine remorse for the costs of litigation inflicted on defendants in prior lawsuits, 3) the litigant must attempt restitution toward the targets of prior litigation, especially payment of cost orders made by the court, 4) the litigant must give up the "habit of suing people as a way of life," and 5) the vexatious litigant must file an application to lift a prefiling order in the same forum that originally entered the order. Prefiling order retained because plaintiff had spent the past 16 years suing people, and he presented misleading facts in application for lifting of order. *Luckett v. Panos (2008) 161 Cal. App. 4th 77, 90-97, 73 Cal. Rptr. 3d 745*

Where the five adverse litigation requirement is not met and the motions are not unmeritorious or frivolous, a finding of the plaintiff as a vexatious litigant under *Code Civ. Proc. § 391(b)(3)* will not be upheld on appeal; however, repeated motions on the same issue may form the basis for a vexatious litigant finding. *Morton v. Wagner (2007) 156 Cal. App. 4th 963, 972, 67 Cal. Rptr. 3d 818*

In case where vexatious litigant plaintiff's counsel withdrew prior to trial, trial court properly dismissed plaintiff's action under *Code Civ. Proc. § 391.7(c)*; requirements of prefiling order remain in effect throughout life of lawsuit and permit dismissal at any time when plaintiff proceeds without counsel or without permission of presiding judge. *Forrest v. State of California Dept. of Corporations (2007) 150 Cal. App. 4th 183, 197, 58 Cal. Rptr. 3d 466*

Defendants were not entitled to attorney's fees when court dismissed vexatious litigant plaintiff's complaint for failure to post security; the vexatious litigant statutes do not authorize such an award. *Luckett v. Keylee (2007) 147 Cal. App. 4th 919, 926, 54 Cal. Rptr. 3d 718*

Although nonrepresentative class members cannot "commence, prosecute, or maintain" litigations within the meaning of *Code Civ. Proc. § 391(b)(1)*, they can engage in behavior qualifying them for vexatious litigant status under subdivisions (2) and (3). *In re Natural Gas Cases (2006) 137 Cal. App. 4th 387, 395-396, 39 Cal. Rptr. 3d 909*

Although court did not reach the issue of whether a vexatious litigant determination can be erased once made, the court did state that in order to remove the vexatious litigant label a court must find a change in the facts or circumstances leading to the original determination. In this case, the judge abused his discretion in undoing the vexatious litigant determination because there was no showing that the litigant changed the conduct that led to the vexatious litigant designation. *PBA, LLC, v. KPOD, Ltd. (2003) 112 Cal. App. 4th 965, 976, 5 Cal. Rptr. 3d 532*

The prefiling order authorized by *Code Civ. Proc. § 391.7* may be viewed as a form of injunction reversible under *Code Civ. Proc. § 533*. *PBA, LLC, v. KPOD, Ltd. (2003) 112 Cal. App.4th 965, 978, 5 Cal. Rptr. 3d 532*

Appellate court as determining that corporation was a vexatious litigant since it was alter ego of attorney who had previously been found to be a vexatious litigant. *Say & Say, Inc. v. Ebershoff (1993) 20 Cal. App. 4th 1759, 1770* , 25 Cal. Rtpr. 2d 703

Collateral estoppel as bar to relitigation of determination that particular litigation wasdetermined adversely or

unjustifiably permitted to remain pending for purposes of *Code Civ. Proc. § 391(b)*. *Stolz v. Bank of America (1993) 15 Cal. App. 4th 217, 221-223, 19 Cal. Rptr. 2d 19*

Appellate court as having authority to enter prefiling order under *Code Civ. Proc. § 391.7(a)*. *Andrisani v. Hoodack (1992) 9 Cal. App. 4th 279, 281, 11 Cal. Rptr. 2d 511*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesSelf-RepresentationSanctionsCivil ProcedureRemediesBondsGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewCivil ProcedureSanctionsBaseless FilingsVexatious LitigantsCivil ProcedureAppealsFrivolous Appeals

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[Reserved]

§§ 573.32[Reserved]

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§ 573.40 Notice of Motion and Supporting Declaration for Order Prohibiting Vexatious Litigant From Filing New Litigation In Propria Persona [Code Civ. Proc. § 391.7(a)]

[1] FORM Notice of Motion and Supporting Declaration for Order Prohibiting Vexatious Litigant From Filing New Litigation In Propria Persona [Code Civ. Proc. § 391.7(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff, vs. _____ [*name*],	)	NOTICE OF MOTION FOR PREFILING ORDER PROHIBITING VEXATIOUS LITIGANT FROM FILING NEW LITIGATION IN PROPRIA PERSONA, SUPPORTING DECLARATION OF _____ [*name*], AND SUPPORTING MEMORANDUM
Defendant.	)	[LIMITED CIVIL CASE]
	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Judge: _____]

_____

To _____ [*identify party if applicable, e.g.,* plaintiff] _____[*name*]:

NOTICE IS HEREBY GIVEN that, on _____[*date*], at _____[*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____[*street address*], _____[*city*], _____ [*identify party if applicable, e.g.,* defendant] _____[*name*] will move for an order prohibiting plaintiff

from filing any new litigation in propria persona in the California courts without first obtaining leave of the presiding judge of the court in which the litigation is proposed to be filed. The motion will be made on the ground that [*identify party if applicable, e.g.,* plaintiff] _____[*name*] is a vexatious litigant as defined under *section 391(b) of the Code of Civil Procedure.*

The motion will be based on this notice of motion, on the declaration(s) of_____[*name(s)*] and the memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____[*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*moving party*) *or other statement as appropriate*].

2. _____ [*Set forth facts supporting motion, e.g.,* _____ (*Name*) has, within the past seven years, maintained in propria persona eight civil actions in Paradise County Superior Court that have been finally determined adversely to plaintiff: _____ (*list docket numbers*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
_____ [*date*]

_____ [*signature*]

SUPPORTING MEMORANDUM

[*Add memorandum supporting motion.*]

[2] Use of Form

This notice of motion and supporting declaration may be used by any party to obtain an order prohibiting a vexatious litigant from filing additional litigation in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed [*Code Civ. Proc. § 391.7(a)*; for discussion, *see § 573.14*].

A supporting memorandum must be served with the notice of motion [*Cal. Rules of Ct., Rules 3.1100, 3.1113(a)*; *see Code Civ. Proc. §§ 1005(b), 1010*].

[3] Cross References

For the related form of order, see *§ 573.41*

For a discussion and forms relating to motions and orders generally, see Ch. 372, *Motions and Orders*

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51-573 California Forms of Pleading and Practice--Annotated § 573.41

§ 573.41 Order Prohibiting Vexatious Litigant From Filing New Litigation In Propria Persona [Code Civ. Proc. § 391.7(a)]--Judicial Council Form MC-700

[1] FORM Order Prohibiting Vexatious Litigant From Filing New Litigation In Propria Persona [Code Civ. Proc. § 391.7(a)]--Judicial Council Form MC-700

Click here to view image.

[2] Use of Form

The form of order illustrated in [1], *above*, is an illustration of the Judicial Council form [Form No. MC-700] for use when the court has granted a motion to have a prefiling order entered against a vexatious litigant, restricting the litigant's filing of further litigation in propria persona [*Code Civ. Proc. § 391.7(a)*]. Use of the Judcial Council form is mandatory.

This form is available in an interactive, electronic format in *LexisNexis(R) Automated California Judicial Council Forms*, which may be accessed at www.lexisone.com for an individual or monthly charge. A noninteractive version in PDF format also is available at www.lexisone.com at no charge.

After issuing a prefiling order against a vexatious litigant, the court will send a copy of the order to the Judicial Council, so that the Council may add the vexatious litigant's name to its annually disseminated list of vexatious litigants [*Code Civ. Proc. § 391.7(e)*].

For a form of notice of motion and supporting declaration that may be used to apply for this order, see *§ 573.40*.

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51-573 California Forms of Pleading and Practice--Annotated § 573.42

§ 573.42 Notice That Clerk Mistakenly Filed Litigation Subject to Prefiling Order [Code Civ. Proc. § 391.7(c)]

[1] FORM Notice That Clerk Mistakenly Filed Litigation Subject to Prefiling Order [Code Civ. Proc. § 391.7(c)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff, vs. _____ [*name*],	)	NO. _____
Defendant.	)	NOTICE THAT CLERK MISTAKENLY FILED
	)	LITIGATION SUBJECT TO PREFILING ORDER
	)	

_____

NOTICE IS HEREBY GIVEN that, on _____[*date*], the clerk of _____ [*specify court, e.g.,* Lincoln County Superior Court] mistakenly filed an _____ [action *or* proceeding] that was subject to a prefiling order pursuant to *Code of Civil Procedure section 391.7*. On _____[*date*], the _____ [*specify court issuing prefiling order, e.g.,* Paradise County Superior Court] entered an order against _____[*name of vexatious litigant*] prohibiting him/her from filing any new litigation in California courts in propria persona without first obtaining leave of the presiding judge of the court where the litigation is proposed to be filed. _____[*Name of vexatious litigant*] did not obtain such leave before filing the above-entitled litigation in this court, and consequently, the filing of this litigation by the clerk was improper.
Dated: _____.

_____ [*signature*]
Defendant

[2] Use of Form

The form of notice in [1], *above*, is for use when a clerk has mistakenly filed litigation that is subject to a prefiling order made pursuant to *Code Civ. Proc. § 391.7* [*see Code Civ. Proc. § 391.7(c)*; for discussion, *see § 573.14*]. The filing of

the notice automatically stays the litigation, and the litigation will be automatically dismissed unless the plaintiff within 10 days of the filing of the notice obtains an order permitting the filing of the litigation. If the presiding judge issues an order permitting the filing, the stay of litigation will remain in effect, and the defendants need not plead, until 10 days after the defendants are served with a copy of any such order [*Code Civ. Proc. § 391.7(c)*].

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California Forms of Pleading and Practice--Annotated

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Volume 51: Vexatious Litigants thru Zoning and Planning-Chs. 573-579
Chapter 573 VEXATIOUS LITIGANTS
PART IV. FORMS

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§ 573.43 Request and Order to File New Litigation by Vexatious Litigant--Judicial Council Form MC-701

[1] FORM Request and Order to File New Litigation by Vexatious Litigant

Click here to view image.

[2] Use of Form

Judicial Council Form MC-701, Request and Order to File New Litigation by Vexatious Litigant illustrated in [1], *above*, is approved by the Judicial Council for optional use [*Cal. Rules of Ct., Rule 1.35*].

This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format is also available at *www.lexisone.com* at no charge.

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Volume 51: Vexatious Litigants thru Zoning and Planning-Chs. 573-579
Chapter 575 WATERS
PART I. SCOPE

51-575 California Forms of Pleading and Practice--Annotated § 575.01

§ 575.01 Scope of Chapter

This chapter discusses the interaction between the federal and state governments regarding water. It also discusses the interaction between states when a stream system is interstate [*see § 575.30* et seq.].

This chapter also discusses riparian, appropriative, and prescriptive rights to water, including the statutory procedure for acquiring appropriative water rights [*see § 575.50* et seq.]. It includes forms for use before the State Water Board to apply for appropriative rights [*see §§ 575.350 -575.353*], to apply for changes in appropriative rights [*see §§ 575.355, 575.356*], to protest those applications [§§ 575.354, 575.357], to complain of a violation of a permit or license [*see § 575.361*], and to make a statement of water diversion [*see § 575.363*]. It also includes the permit [*see § 575.358*] and license [*see § 575.360*] issued by the board. This chapter includes forms for use in a petition for a writ of mandate to compel the board to issue a permit to appropriate water [*see § 575.364*] and to compel review of a cease and desist order issued by the board [*see § 575.365*].

This chapter also discusses the enforcement of appropriative water rights, including the procedures for obtaining a cease and desist order, and the effect of the procedures on private litigants [*see § 575.100* et seq.].

This chapter also discusses the adjudication of water rights by the State Water Resources Control Board and the judicial determination of water rights [*see § 575.120* et seq.]. It includes forms for use in statutory adjudication proceedings before the board to petition for determination of water rights [*see § 575.380*], to file proof of claim of water right [*see § 575.381*], and to object [*see § 575.382*] and to intervene [*see §§ 575.383, 575.384*] in board proceedings. For use in the judicial determination of water rights, this chapter includes a complaint for declaratory relief for determination of water rights and for injunctive relief [*see § 575.385*] and an order of reference to the board [*see § 575.386*]. It includes a form of complaint for damages by a lower riparian owner against an upper riparian owner for interference with water rights [*see § 575.387*] and forms of affirmative defenses to that complaint [*see §§ 575.388 -575.391*]. It includes forms of complaint [*see § 575.392*], notice of motion [*see § 575.393*], and preliminary injunction [*see § 575.394*] for a lower riparian owner seeking a temporary restraining order, injunctive relief, and damages against an upper riparian, and forms of notice of motion [*see § 575.395*], declaration [*see § 575.396*], and order [*see § 575.397*] for the upper riparian to seek to dissolve a preliminary injunction. Also included are a form of complaint by an overlying landowner for injunctive relief and damages for interference with underground water [*see § 575.398*], and a form of complaint to

quiet title to an easement and for injunctive relief and damages for interference with a water right [*see § 575.399*], and forms of allegation for use with that complaint [*see §§ 575.400 -575.402*].

The unauthorized diversion or use of water is a trespass, for which civil and administrative liability may be imposed [*see § 575.102[1]*].

This chapter also discusses actions under agreements to supply water [*see § 575.190* et seq.]. It contains a form of complaint [*see § 575.420*] for declaratory relief for a determination of rights under a water use agreement and for damages for its violation, a complaint [*see § 575.421*] for declaratory relief for a determination of rights appropriate when more than one supplier is involved, and a form of petition [*see § 575.422*] for writ of mandate to compel a water district to supply water. The liability of a utility in small claims court for delay of service under *Civ. Code § 1722(c)* is discussed in Ch. 545, *Telephone and Telegraph Communication* .

This chapter also discusses the formation of water districts [*see § 575.210* et seq.]. It contains forms for use in forming [*see § 575.440*], excluding land from [*see § 575.442*], and including land within [*see § 575.443*] a water storage district. Also included is a declaration of intention by a person to withdraw his or her name from the petition for formation of a water storage district [*see § 575.441*]. It contains a petition for use in forming [*see § 575.444*], including land within [*see § 575.446*], and detaching territory from [*see § 575.447*], a county water district, and a notice of hearing [*see § 575.445*] on the petition to form a county water district. Also included is a form for use in petitioning for formation [*see § 575.448*] of a municipal water district.

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§ 575.02 Cross References

For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions* .

For discussion and forms relating to adverse possession and use of real property, see Ch. 13, *Adverse Possession* .

For discussion and forms relating to the establishment of uncertain boundary lines, see Ch. 101, *Boundaries* .

For discussion, procedural checklist, and forms relating to actions in contract, see Ch. 140, *Contracts* .

For discussion and forms relating to pleading the nature and extent of tort damages, see Ch. 177, *Damages* .

For discussion and forms relating to declaratory relief actions, see Ch. 182, *Declaratory Relief* .

For discussion and forms relating to actions involving easements, see Ch. 240, *Easements* .

For discussion and forms relating to election proceedings generally, see Ch. 243, *Elections* .

For discussion and forms relating to eminent domain and inverse condemnation proceedings, see Ch. 247, *Eminent Domain* .

For discussion relating to termination of public utility service, see Ch. 277, *Gas and Electricity* .

For discussion and forms relating to procedures for seeking injunctive relief, see Ch. 303, *Injunctions* .

For discussion and forms relating to interference or wrongful use of irrigation water, see Ch. 315, *Irrigation* .

For discussion and forms relating to traditional mandate proceedings, see Ch. 358, *Mandate and Prohibition* .

For discussion and forms for use in petitioning for court review of an adjudicatory decision of an administrative agency through the use of administrative mandate under *Code Civ. Proc. § 1094.5*, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

For discussion and forms relating to use in proceedings before the California Public Utilities Commission, see Ch. 480, *Public Utilities* .

For discussion, procedural checklist, and forms relating to the resolution of conflicting claims of ownership to property through use of an action to quiet title, see Ch. 482, *Quieting Title* .

For discussion and forms relating to sanitation and sewerage districts, see Ch. 511, *Sanitation and Sewerage Districts* .

For detailed coverage of all aspects of California water law, see Slater, California Water Law and Policy (Matthew Bender)

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[Reserved]

§§ 575.03[Reserved]

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§ 575.10 Governing Law

The relationship between federal and state water law is generally governed by the United States Constitution, through which the federal government exercises its control, and is specifically governed by the Commerce Clause (U.S. *Const., art. I, § 8, cl. 3*), the Property Clause (U.S. *Const., art. IV, § 3*), and the General Welfare Clause (U.S. *Const., art. I, § 8*).

The appropriation of water rights is governed by *Water Code § 1200 et seq.* Enforcement of appropriative water rights is governed by *Water Code § 1825 et seq.* When a judicial determination of water rights is sought, and the court refers the action to the State Water Resources Control Board (State Board or Board), those procedures are governed by *Water Code § 2000 et seq.* Statutory adjudication of water rights by the State Board is controlled by *Water Code § 2500 et seq.*

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§ 575.11 Flood Waters

[1] Self-Protection by Landowner

Flood waters are those that escape from a stream or other body of water and overflow the adjacent territory. They are a common enemy, and a landowner may protect his or her land even to the detriment of neighbors. The common enemy rule only applies to flood waters in the strict sense; that is, waters escaping because of their height from the confinement of a stream and running over adjacent property. Implicit in the definition of flood waters is the element of abnormality; they are flood waters because of their escape from the usual channels under conditions that do not ordinarily occur [*Everett v. Davis (1941) 18 Cal. 2d 389, 393, 115 P.2d 821* ; *Beckley v. Reclamation Board (1962) 205 Cal. App. 2d 734, 743 n. 2, 23 Cal. Rptr. 428]* . Excessive storm waters that overflow the banks of a stream, but that later find their way back into the stream either by drainage or by percolation, as the stream subsides, are not flood waters, but are waters of the stream, the natural flow of which may not be interfered with to the damage of upper riparian owners of land [*Costello v. Bowen (1947) 80 Cal. App. 2d 621, 631, 182 P.2d 615]* .

Protection from flood waters may be used as a defense to a claim of negligence alleging damages from floodwaters [*see, e.g., Linvill v. Perello (1987) 189 Cal. App. 3d 195, 197, 234 Cal. Rptr. 392]* . It may also be an appropriate defense to an action seeking injunctive relief against the erection and continued maintenance of a fence, embankment, or levee that causes the diversion of flood waters [*see, e.g., Everett v. Davis (1941) 18 Cal. 2d 389, 390, 115 P.2d 821]* . For additional discussion of flood waters and a form of affirmative defense based on flood waters, see Ch. 421, *Premises Liability* .

[2] Protective Action by State

A public entity that undertakes construction or operation of a flood control project is liable for unreasonable conduct. Thus, when the public entity's design, construction, or maintenance of a flood control project is shown to have posed an unreasonable risk of harm to the plaintiffs, and the unreasonable design, construction, or maintenance constituted a substantial cause of the damage, plaintiffs may recover, regardless of the fact that the project's purpose was to to contain the common enemy of floodwaters [*Belair v. Riverside County Flood Control Dist. (1988) 47 Cal. 3d 550, 559-560,*

253 Cal. Rptr. 693, 764 P.2d 1070] . The *Belair* reasonableness standard applies in any flood control case when the failure of publicly managed flood control facilities causes damage to property historically subject to flooding, including cases involving the diversion of water from its natural flow [*Bunch v. Coachella Valley Water Dist. (1997) 15 Cal. 4th 432, 447, 63 Cal. Rptr. 2d 89, 935 P.2d 796]* . For forms and discussion relating to inverse condemantion, see Ch. 247, *Eminent Domain* .

[3] Protective Action Must Be Reasonable

The landowner may use every reasonable precaution to avert injury to his or her land. The reasonableness of the precautions is determined by existing conditions and not by aftereffects [*The Weinberg Co. v. Bixby (1921) 185 Cal. 87, 96, 196 P. 25* ; *Tahan v. Thomas (1970) 7 Cal. App. 3d 78, 81, 86 Cal. Rptr. 440]* . Although each case is decided on its own facts, one court has articulated a balancing test that weighs the utility of the diverter's use of his or her land against the gravity of the harm resulting from the alteration of the water flow as one factor in determining reasonableness. If the balance weighs on the side of the person who diverted the floodwaters, that is a factor tending to show that he or she has acted reasonably; if the harm to other landowners is severe, that is a factor tending to show that the economic costs incident to diversion of floodwaters should be borne by the owner who diverted the waters [*Linvill v. Perello (1987) 189 Cal. App. 3d 195, 199, 234 Cal. Rptr. 392]* . The protection from liability does not extend to an obstruction of the natural river channel or the creation of an artificial channel by which the natural stream waters of the river are carried onto the lands of another that would have been protected but for the creation of that channel [*Clement v. State Reclamation Board (1950) 35 Cal. 2d 628, 635-638, 220 P.2d 897]* . For forms and discussion pertaining to liability of landowners regarding waters that are not flood waters, see Ch. 421, *Premises Liability* . For forms and discussion pertaining to irrigation waters, see Ch. 315, *Irrigation* .

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§§ 575.12[Reserved]

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§ 575.30 Governing Law

The federal government has rights to the nation's navigable waters, including water within the state of California, through application of the Commerce Clause (U.S. *Const., art. I, § 8, cl. 3*), the Property Clause (U.S. *Const., art. IV, § 3*), and the General Welfare Clause (U.S. *Const., art. I, § 8*).

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§ 575.31 Control of Navigable Waters

[1] Federal Versus State Power

Under the Commerce Clause (U.S. *Const., art I, § 8, cl. 3*), the federal government has dominion, to the exclusion of the states, over navigable waters of the United States [*Tacoma v. Taxpayers of Tacoma (1958) 357 U.S. 320, 334, 78 S. Ct. 1209, 2 L. Ed. 2d 1345]* . This power has been validly exercised in a variety of ways, including the improvement of navigation and the development of power [*see Tacoma v. Taxpayers of Tacoma (1958) 357 U.S. 320, 334, 78 S. Ct. 1209, 2 L. Ed. 2d 1345* ; *Arizona v. California (1930) 283 U.S. 423, 452, 51 S. Ct. 522, 75 L. Ed. 1154]* .

Although the federal government has a dominant servitude over the navigable waters of the United States, the preexisting private proprietary rights under state law must be recognized unless the Congress, in exercising federal servitude, clearly authorizes their abolishment [*Federal Power Com. v. Niagara Mohawk P. Corp (1954) 347 U.S. 239, 241, 249-250, 74 S. Ct. 487, 98 L. Ed. 666]* . Thus, the state has absolute power to control, regulate, and utilize its navigable waterways and the lands beneath them, except as limited by the paramount supervisory power of the federal government over navigable waters [*Marks v. Whitney (1971) 6 Cal. 3d 251, 260, 98 Cal. Rptr. 790, 491 P.2d 374* ; *see Utah Division of State Lands v. U.S. (1987) 482 U.S. 193, 208-209, 107 S. Ct. 2318, 96 L. Ed. 2d 162]* .

Even when the federal government has acted to exercise its authority over navigable waters, unless the field is exclusively occupied for all purposes by the federal action, there may be a duality of control between the federal and state governments [*Calif. Oregon Power Co. v. Superior Court (1955) 45 Cal. 2d 858, 868, 291 P.2d 455 , cert. denied, 352 U.S. 823, 77 S. Ct. 30, 1 L. Ed. 2d 47 (1956)* (state had authority to abate nuisance created by federal public utility when federal act did not address nuisances)].

The navigable waters of the United States are subject to regulations for their use, administration, and navigation. Failure to comply with those regulations may be a misdemeanor [*see 33 U.S.C. § 1*]. Unless preempted by federal action, in California navigable waters and their frontages are subject to the right of public access and eminent domain [*see Cal. Const., art. X, §§ 1, 4*].

[2] Definitions

There are two federal definitions of navigable waters. The first, for purposes of the Commerce Clause, says that rivers which are actually used or are susceptible to being used, in their natural condition or with reasonable improvements, for purposes of trade and commerce are navigable in law. Substantially the same test is used for purposes of admiralty and maritime jurisdiction. The second definition, used to determine the respective rights of the states and the United States to the title of stream beds, is the basic Commerce Clause test, with two exceptions: it is applied to the stream in its natural condition, and it is determined as of the time of admission of the state to the United States. On the question of state versus federal rights, this test is mandatory in both the state and federal courts [*Hitchings v. Del Rio Woods Recreation & Park Dist. (1976) 55 Cal. App. 3d 560, 567, 127 Cal. Rptr. 830]* .

For purposes of public use of a state's navigable waters, the state may adopt a test of navigability different from and less stringent than the federal test. For example, in determining navigability for purposes of a public navigational easement, state law may evaluate navigability as of a date later than statehood [*Hitchings v. Del Rio Woods Recreation & Park Dist. (1976) 55 Cal. App. 3d 560, 568, 127 Cal. Rptr. 830]* .

In California, the test of navigability provides that rivers are regarded as public navigable rivers in law when they are navigable in fact. Rivers are navigable in fact when they are used, or are susceptible to being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. Navigability is determined by the character of the stream, its situation and availability as a highway of commerce, and other surrounding circumstances [*Bohn v. Albertson (1951) 107 Cal. App. 2d 738, 741, 238 P.2d 128]* .

[3] Public Trust

Through application of the public trust doctrine, the right of the public to use the navigable waters, whether federal or state, is extremely broad and encompasses the right to use rivers for all recreational purposes such as boating, swimming, fishing, and hunting. It is sufficiently flexible to encompass changing public needs, and includes preservation of those lands in their natural state, for ecological purposes. Indeed, the public's right of access to navigable waters is of great public importance and must be expansively interpreted [*see* *Marks v. Whitney (1971) 6 Cal. 3d 251, 259-260, 98 Cal. Rptr. 790, 491 P.2d 374* ; *Kern River Public Access Com. v. City of Bakersfield (1985) 170 Cal. App. 3d 1205, 1216 n. 4, 217 Cal. Rptr. 125]* . The public trust doctrine, however, is not applicable to nonnavigable waterways in the absence of any impact on navigable waters [*Golden Feather Community Assn. v. Thermalito Irrigation Dist. (1989) 209 Cal. App. 3d 1276, 1283-1287, 257 Cal. Rptr. 836* (doctrine held inapplicable to nonnavigable waterway in action to compel continued, authorized diversion from nonnavigable stream into artificial reservoir while precluding use of diverted water to maintain reservoir for recreational purposes)]. For discussion of the public trust doctrine, see *§ 575.57*.

If, at the time the state grants a land patent, there are navigable waters on the land, the right of navigation is reserved to the state and the landowner's rights are subject to the navigation rights of the public, even without an express reservation of the right [*Bohn v. Albertson (1951) 107 Cal. App. 2d 738, 741-742, 238 P.2d 128]* .

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§ 575.32 Nonnavigable Water

Through the Property Clause (U.S. *Const., art. IV, § 3*), the federal government also has control over nonnavigable waters on public lands and reservations of the United States [*Federal Power Com. v. Oregon (1955) 349 U.S. 435, 442-443, 75 S. Ct. 832, 99 L. Ed. 1215]* .

When the federal government withdraws its land from the public domain and reserves it for a federal purpose, it impliedly reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation; only the amount of water necessary is reserved [*Cappaert v. United States (1976) 426 U.S. 128, 138, 141, 96 S. Ct. 2062, 48 L. Ed. 2d 523]* . If a federal act expands the reserved water rights of the United States, the expanded rights are subordinate to any prior appropriation of water under state law [*United States v. New Mexico (1978) 438 U.S. 696, 713 n. 21, 98 S. Ct. 3012, 57 L. Ed. 2d 1052]* . Thus, while the initial reservation includes a water right of the highest priority, an expansion of the reserved right is allowed only if the excess water has not already been appropriated.

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§ 575.33 Federal Water Projects

[1] Federal Powers

In furthering the promotion of agriculture through the development of reclamation and irrigation projects, which is a valid public and national purpose, the federal government may expend funds and acquire property. The authority to do so arises from both the General Welfare Clause (U.S. *Const., art. I, § 8*) and the Property Clause (U.S. *Const., art. IV, § 3*)[*Ivanhoe Irrig. Dist. v. McCracken (1958) 357 U.S. 275, 294, 78 S. Ct. 1174, 2 L. Ed. 2d 1313 , reh'g denied, 358 U.S. 805, 79 S. Ct. 10, 3 L. Ed. 2d 94]* .

The federal government has the power to impose reasonable conditions on the use of federal funds, federal property, and federal privileges [*Ivanhoe Irrig. Dist. v. McCracken (1958) 357 U.S. 275, 295, 78 S. Ct. 1174, 2 L. Ed. 2d 1313 , reh'g denied, 358 U.S. 805, 79 S. Ct. 10, 3 L. Ed. 2d 94]* . Provisions of the Reclamation Act of 1902 (*43 U.S.C. § 371 et seq.*, as codified, incorporating 1982 amendment), which generally restrict the use of reclamation water at subsidized rates on lands in excess of certain acreage in single ownership, have been upheld as accomplishing the governmental purpose of supplying water to the greatest number of individuals and preventing federal subsidy of speculation [*Ivanhoe Irrig. Dist. v. McCracken (1958) 357 U.S. 275, 296-297, 78 S. Ct. 1174, 2 L. Ed. 2d 1313 , reh'g denied, 358 U.S. 805, 79 S. Ct. 10, 3 L. Ed. 2d 94]* . "Large landowners" (that is, those owning land in excess of specified acreage) have been unsuccessful in their constitutional attacks on contracts between water districts and the federal government, and related recordable contracts between the large landowners and the federal government (subjecting the excess lands that do receive reclaimed water to certain government control), asserting that the excess-acreage provisions amount to a taking of vested property rights and discrimination against excess landowners, in violation of *U.S. Const., amends. V* and *XIV* [*Ivanhoe Irrig. Dist. v. McCracken (1958) 357 U.S. 275, 294-297, 78 S. Ct. 1174, 2 L. Ed. 2d 1313 , reh'g denied, 358 U.S. 805, 79 S. Ct. 10, 3 L. Ed. 2d 94]* .

Moreover, large landowners were unsuccessful in attempts to obtain specific enforcement of those contracts following subsequent amendment of the Reclamation Act of 1902 that provided stricter limitations on the use of reclaimed water on excess lands than the limitations under the contracts (which reflected superseded law). The landowners could not

claim that the provision of the Reclamation Reform Act of 1982 (R.R.A; *43 U.S.C. §§ 373(a), 390aa*-390zz-1, 422e, 425b, 485h, 502), raising the subsidized rates, and shortening to 10 years the time period for which they could use reclaimed water on excess lands at the superseded rate, violated their rights under the due process and "taking" clauses of *U.S. Const., amend. V*, because they had no contractual right to receive water for those lands at subsidized rates for more than 10 years [*Barcellos and Wolfsen v. Westlands Water Dist. (9th Cir. 1990) 899 F.2d 814, 821-825* (construing *43 U.S.C. § 390ww(h)*)]. Similarly, water districts failed in a constitutional attack on provisions of the R.R.A. because they had no vested property right to the continuation of terms of their contracts with the federal government that conflicted with superseding federal statutes. The water districts sought unsuccessfully to invalidate the "hammer clause" of the R.R.A. (*43 U.S.C. § 390cc(a), (b)*), which essentially required that those receiving subsidized water from federal reclamation projects elect whether to (1) amend their contracts to conform to the requirements of the R.R.A., which increases the eligible single-ownership acreage from 160 to 960 acres, but increases the subsidized price and eliminates the "leasing loophole," which had exempted leased lands from the acreage limitations; or (2) continue to deliver water to leased lands in excess of 160 acres but pay the full cost rather than a subsidized price. Their claims of violation of due-process and "taking" clauses of *U.S. Const., amend. V*, failed because they had no vested property right to buy reclamation water for delivery to leased lands, and the statute was rationally related to the legitimate governmental purpose of promoting small farming operations, equitably distributing water under modern farming conditions, and conserving water [*Peterson v. United States Dep't of Interior (9th Cir. 1990) 899 F.2d 799, 813-814]* .

By contrast, when a federal act implementing a water project supplemental to the reclamation laws specifically recognizes certain landowners' vested or "presently perfected" property rights under state law to receive reclaimed water under certain conditions, those landowners are entitled to rights under the provisions of the supplemental act, rather than the reclamation laws that would otherwise apply [*Bryant v. Yellen (1980) 447 U.S. 352, 355, 100 S. Ct. 2232, 65 L. Ed. 2d 184* , *reh'g denied*, *448 U.S. 911, 101 S. Ct. 25, 65 L. Ed. 2d 1172* (regarding Boulder Canyon Project Act, *43 U.S.C. § 617 et seq.*)].

[2] State Powers

A state may impose conditions on a permit it grants to the United States to implement a federal water project so long as the conditions are not inconsistent with congressional provisions authorizing that project. Section 8 of the Reclamation Act of 1902 (*43 U.S.C. §§ 372, 383*), which requires compliance with state laws, requires the federal project to comply with state law in the purchase or condemnation of vested water rights, and also in the control, appropriation, use, or distribution of water. Congress intended to defer to the substance, as well as the form, of state water law [*California v. United States (1978) 438 U.S. 645, 672-675, 98 S. Ct. 2985, 57 L. Ed. 2d 1018]* . However, a state may not take an action that would be contrary to the congressional directive [*Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist. (1980) 26 Cal. 3d 183, 193, 161 Cal. Rptr. 466, 605 P.2d 1* (state had no authority to prevent federal dam construction)].

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§ 575.34 Riparian Rights on Federally Reserved Lands

In California, which recognizes riparian water rights as well as appropriative rights (*see §§ 575.54, 575.55*), the Supreme Court has held that the federal Constitution does not preclude the United States from acquiring riparian water rights under California law on federal reserved lands within the state [*In re Water of Hallett Creek Stream System (1988) 44 Cal. 3d 448, 466-467, 243 Cal. Rptr. 887, 749 P.2d 324]* . The Court stated that the underlying principle of deference to state law extends to any water right recognized under local law, including riparian rights. Furthermore, the federal government may exercise riparian rights on reserved lands for secondary purposes, such as wildlife enhancement, the same as any other ordinary proprietor, that is, the government's rights are not subordinate to rights of subsequent appropriators [*In re Water of Hallett Creek Stream System (1988) 44 Cal. 3d 448, 470, 243 Cal. Rptr. 887, 749 P.2d 324]* . If the riparian right is unexercised, however, that right may be subordinate to any uses of water authorized before the government attempts to exercise its right [*In re Water of Hallett Creek Stream System (1988) 44 Cal. 3d 448, 471-472, 243 Cal. Rptr. 887, 749 P.2d 324* ; *see § 575.54[6]*].

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§ 575.35 Adjudication of Federal Water Rights

Federal water rights are not dependent on state law or state procedures; water rights claims of the United States may be adjudicated in federal courts under the jurisdictional grant of *28 U.S.C. § 1345*, as well as in state courts [*Cappaert v. United States (1976) 426 U.S. 128, 145, 96 S. Ct. 2062, 48 L. Ed. 2d 523]* .

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§ 575.36 Interstate Waters

[1] Choice of Law

In determining the relative rights of states and their citizens in the waters of an interstate stream, if both states follow the same doctrine for determining water rights, that doctrine will be applied [*Wyoming v. Colorado (1921) 259 U.S. 419, 467-470, 42 S. Ct. 552, 66 L. Ed. 999]* .

When the states have different water doctrines, the federal common law doctrine of equitable apportionment will be applied. It is a flexible doctrine based on consideration of many factors to secure a just and equitable allocation of the waters, and includes a weighing of the harms and benefits to the competing states [*Colorado v. New Mexico (1982) 459 U.S. 176, 183-186, 103 S. Ct. 539, 74 L. Ed. 2d 348]* . The doctrine of equitable apportionment is only applied in the absence of a statute resolving interstate claims [*Arizona v. California (1963) 373 U.S. 546, 562, 83 S. Ct. 1468, 10 L. Ed. 2d 542]* .

[2] Interstate Compacts

States may make agreements or compacts between themselves as allowed by U.S. *Const., art. I, § 10(3)*. California has entered into compacts with both Oregon and Nevada concerning the use of water [*see Water Code §§ 5900-5901, 5950-5951* and *Water Code §§ 5975-5976*, respectively; *see also Water Code § 123*]. Additionally, *Civ. Code § 1410a* provides that the entire flow of any natural stream carrying water from California into another state is governed by California law.

[3] Jurisdiction

The United States Supreme Court has original jurisdiction of water rights controversies between states [U.S. *Const., art. III, § 2*; *Arizona v. California (1963) 373 U.S. 546, 564, 83 S. Ct. 1468, 10 L. Ed. 2d 542* ; *see Texas v. New Mexico (1987) 482 U.S. 124, 126-128, 107 S. Ct. 2279, 96 L. Ed. 2d 105* (interpretation of compact)]. When there is a dispute concerning water rights between citizens of different states, there is concurrent jurisdiction in the two states, and

whichever court first acquires jurisdiction is entitled to proceed to final determination without interference from the other [*Rickey Land & C. Co. v. Miller & Lux (1910) 218 U.S. 258, 262, 31 S. Ct. 11, 54 L. Ed. 1032]*
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§ 575.50 Governing Law

The appropriation of water rights is governed by *Water Code §§ 1200-1801*.

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§ 575.51 Manner of Acquiring Water Rights

California recognizes three methods of acquiring rights to the use of water. The riparian right is acquired by owning land adjoining a watercourse [*see § 575.54*]. The appropriative right is acquired by following statutory procedures to obtain a license [*see § 575.55*]. The prescriptive right is based on a taking that is hostile to the rights of another [*see § 575.80*].

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§ 575.52 State Water Policy

State policy requires that water resources be put to beneficial use to the fullest extent possible and that waste and unreasonable use be prevented [*Cal. Const., Art X, § 2*; *Water Code § 100*]. All water within California belongs to the people, but its use may be acquired by legal appropriation or riparian right [*Water Code §§ 101, 102*]. The right to use water will be regarded and protected as a real property interest, even though there is no ownership in the water itself [*Fullerton v. State Water Resources Control Bd. (1979) 90 Cal. App. 3d 590, 598, 153 Cal. Rptr. 518]* . However, no water right is inviolable, and all water rights, whether riparian or appropriative, are subject to government regulations requiring reasonable use [*United States v. State Water Resources Control Bd. (1986) 182 Cal. App. 3d 82, 105-106, 227 Cal. Rptr. 161]* .

California operates under a dual system of water rights that recognizes both the appropriation and the riparian doctrines. The riparian doctrine confers the right to the reasonable and beneficial use of water on that land on the owner of land contiguous to a watercourse. The appropriation doctrine contemplates the diversion of water and applies to any taking of water for other than riparian or overlying uses [*National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419, 441, 189 Cal. Rptr. 346, 658 P.2d 709]* . An appropriative taking of water that is wrongful may ripen into a prescriptive right [*see Civ. Code § 1007*; *Code Civ. Proc. § 321*; *California Water Service Co. v. Edward Sidebotham & Son (1964) 224 Cal. App. 2d 715, 726-727, 37 Cal. Rptr. 1]* . However, because the statutory procedure for obtaining appropriative rights is exclusive, there is some controversy over whether prescription is a valid means of acquiring a water right [*People v. Shirokow (1980) 26 Cal. 3d 301, 307-308, 162 Cal. Rptr. 30, 605 P.2d 859]* . For discussion of the riparian and appropriative rights, see *§§ 575.54, 575.55*. For discussion of prescriptive rights, see *§ 575.80*.

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§ 575.53 Constitutional Mandate

[1] Reasonably Beneficial Use

The general welfare requires that the state's water resources be put to beneficial use to the fullest extent of which they are capable, and that waste, unreasonable use, or unreasonable method of water use be prevented. Conservation of water must be exercised with a view to reasonable and beneficial use [*Cal. Const., Art. X, § 2*]. When the holder of an appropriative right fails to use the water as a result of conjunctive use of surface water and ground water, the reduction in use under the appropriative right is a reasonable and beneficial use [*Water Code § 1011.5*].

[2] Beneficial Use Not Equivalent to Reasonable Use

Beneficial use cannot be equated with reasonable use and a use may be beneficial without being reasonable [*Joslin v. Marin Mun. Water Dist. (1967) 67 Cal. 2d 132, 142-143, 60 Cal. Rptr. 377, 429 P.2d 889* (use of waters as an agent to depose silt and carry away salt was obviously beneficial to owner of land, but not reasonable)]. A use that is reasonable and beneficial when water is present in excess of all needs, may not be a reasonable beneficial use in an area of great scarcity and great need. Similarly, a use that is beneficial at one time may, because of changed circumstances, become a waste of water at a later time [*People ex rel. State Water Resources Control Bd. v. Forni (1976) 54 Cal. App. 3d 743, 750, 126 Cal. Rptr. 851* ; *Imperial Irrigation Dist. v. State Wat. Resources Control Bd. (1990) 225 Cal. App. 3d 548, 570, 275 Cal. Rptr. 250* (district's use of water may be beneficial but unreasonable if it does not promote water conservation)].

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§ 575.54 Riparian Rights

[1] Background

No riparian proprietor owns water in a stream; riparians (owners of lands contiguous to water) have only the right to the reasonable use of the water [*Williams v. Rankin (1966) 245 Cal. App. 2d 803, 819, 54 Cal. Rptr. 184]* . The right to the water of flowing streams originally vested in the state or federal governments in their capacities as riparian owners, not in their capacities as sovereigns, and the right remains vested in them prior to any sale or disposition of lands by them. When land is disposed of by either government entity, the riparian water right pertaining to that land passes to the purchaser as a part of that realty. The riparian rights cannot be divested from the riparian owners, and have not been divested from them, except (1) by their consent, expressed, as by statute or by actual grant or contract, or implied, as by prescription, or (2) by enforced taking for public use, as by condemnation [*Palmer v. Railroad Com. of California (1914) 167 Cal. 163, 173-174, 138 P. 997* ; see *Miller & Lux, Inc., v. Light & Power Corp. (1932) 120 Cal. App. 589, 612, 8 P.2d 560]* . For discussion of the nature of the federal government's riparian rights in reserved lands under California law, see *§ 575.34*.

[2] Elements

A landowner asserting a riparian right must plead the following three elements: (1) the riparian character of his or her land, (2) the quantity of water or the proportion of the watercourse to which he or she claims to be entitled, and (3) the location of his or her land with respect to the land of the other party [*Hudson v. West (1957) 47 Cal. 2d 823, 828, 306 P.2d 807]* .

The riparian character of the land may be pleaded either (1) by alleging the existence of ultimate facts, which if proved would establish the land as riparian, or (2) by alleging generally that the land is riparian to a stream or natural watercourse. Land will be established as riparian when three things are proved: (1) some part of the land must be contiguous to a stream or natural watercourse, (2) the land for which water is claimed must be within the watershed of the stream, and (3) the land for which water is claimed must be part of the smallest tract held under one title in the chain of title leading to the present owner--the land's riparian status must not have been lost by severance [*Hudson v. West*

(1957) 47 Cal. 2d 823, 828-829, 306 P.2d 807] .

When asserting a riparian right, the quantity of water sought must be definite. A specific number of inches of water without further qualification is an indefinite quantity of running water and is an insufficient allegation of quantity that may be subject to a special demurrer for uncertainty [*Hudson v. West (1957) 47 Cal. 2d 823, 828, 306 P.2d 807* (allegation stated to be sufficient in absence of special demurrer)]. When pleading a riparian right, gallons or acre-feet may be useful terms in expressing the quantity of water.

Land is only riparian at the times when it is reached by the stream [*Williams v. Rankin (1966) 245 Cal. App. 2d 803, 814, 54 Cal. Rptr. 184]* . If a tract of land has any access to the stream at all, and the other riparian elements exist, including the requirement that title to the tract is derived from a single source and has never been severed, the entire tract is riparian. It is the status of the land, not the quantity of water, and not the size of the tract, that is relevant in determining riparian status [*Rancho Santa Margarita v. Vail (1938) 11 Cal. 2d 501, 529, 533-534, 81 P.2d 533]* .

[3] Watercourse Defined

A watercourse consists of a stream flowing in a particular direction, though it need not flow continually, and may sometimes be dry. It must flow in a definite channel, stream, or body of water. A watercourse may exist even though it serves as a mere channel by means of which a particular watershed is drained; water runoff from usual and recurring rainfall constitutes a watercourse when it runs in a well-defined channel [*Van Zyl v. Spiegelberg (1969) 2 Cal. App. 3d 367, 374, 82 Cal. Rptr. 689* (negligence and nuisance action)].

The riparian right to use water on adjoining land applies to the water of a running stream, lake, pond, slough, or any natural body of water. Even if a pond or lake is caused solely by an overflow, has no other source of supply, and would soon disappear due to seepage and evaporation, the riparian owners have a right to the reasonable use of the water [*Turner v. The James Canal Co. (1909) 155 Cal. 82, 87, 90, 99 P. 520]* .

Although riparian rights usually exist only in natural watercourses, a channel for the diversion of water may have existed for such a length of time, and may have been used under such circumstances, that the manner of its creation is not material; it then has all the attributes of a water channel wholly natural in its origin, and bordering lands are riparian in the same manner and to the same extent as lands bordering on streams which are natural in their origin [*Chowchilla Farms Inc. v. Martin (1933) 219 Cal. 1, 19-20, 25 P.2d 435]* .

[4] Reasonable and Beneficial Use

Riparian use must comply with the constitutional requirement of reasonable and beneficial use [*In re Waters of Long Valley Creek Stream System (1979) 25 Cal. 3d 339, 351, 158 Cal. Rptr. 350, 599 P.2d 656]* . Riparian rights in a watercourse attach to, but to no more than, so much of the flow as may be required or put to a reasonable and beneficial use [*Cal. Const., Art. X, § 2*].

What constitutes a reasonable use or method of use of water is a question of fact to be determined according to the circumstances in each particular case [*Joslin v. Marin Mun. Water Dist. (1967) 67 Cal. 2d 132, 139, 60 Cal. Rptr. 377, 429 P.2d 889]* . The reasonableness of a riparian use cannot be determined without considering the effect of that use on all the needs of those in the stream system, nor can it be a context isolated from statewide considerations of transcendent importance such as maximum beneficial use of limited water resources, prevention of waste and unreasonable use, and conservation for the public welfare [*In re Waters of Long Valley Creek Stream System (1979) 25 Cal. 3d 339, 354, 158 Cal. Rptr. 350, 599 P.2d 656]* .

[5] Correlative Right

The riparian right is a correlative right, shared with other riparian owners on the same watercourse. The riparian rights of owners of land adjoining a stream, or any connected bay, inlet, or slough, are equal and coextensive with those of persons owning land bordering the main current or channel. However, when there is not enough water to supply the needs of all, factors such as quantity of land owned, the owners' respective interests, the quantity of the water in the smaller body as compared to the main one, and the quantity of water capable of being diverted naturally will be considered [*Turner v. The James Canal Co. (1909) 155 Cal. 82, 90-91, 99 P. 520]* .

[6] Dormant Rights

[a] Existence Without Exercise

The rights of a riparian owner are not destroyed or impaired by the fact that the water has not been used on the riparian lands, and the riparian right exists, whether exercised or not. A dormant riparian right may be qualified, but not extinguished, by active appropriative rights [*In re Waters of Long Valley Creek Stream System (1979) 25 Cal. 3d 339, 357-359, 158 Cal. Rptr. 350, 599 P.2d 656* ; *see In re Water of Hallett Creek Stream System (1988) 44 Cal. 3d 448, 471, 243 Cal. Rptr. 887, 749 P.2d 324]* .

[b] Assertion at Any Time

Dormant riparian rights are unrecorded and their quantity is unknown. They present a major source of uncertainty in water rights law. This uncertainty fosters recurrent, costly, and piecemeal litigation. The uncertainty arises because the riparian right is not an entitlement to a specific quantity of water; it is an entitlement to make reasonable use of a correlative share of the stream flow. What a riparian's actual entitlement is at any given time varies with the circumstances of the time and place. A new riparian user, from a recent patent of riparian land, a recent activation of a previously dormant riparian right, or the expanded use of an active riparian right, is entitled to share equally with all earlier riparian users. Thus, the other riparians can never know what their share will be in the future [*In re Waters of Long Valley Creek Stream System (1979) 25 Cal. 3d 339, 355, n. 10, 158 Cal. Rptr. 350, 599 P.2d 656]* .

[c] Priority Over Appropriation Rights

Furthermore, as against an appropriator, a riparian owner has a fixed priority of right. But the quantity of water to which the right attaches remains unfixed. Thus, an expanded riparian use has the potential to preempt an inferior appropriative right when the supply of water originally was sufficient to satisfy both uses [*In re Waters of Long Valley Creek Stream System (1979) 25 Cal. 3d 339, 355 n.10, 158 Cal. Rptr. 350, 599 P.2d 656]* .

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§ 575.55 Appropriation Rights

[1] Obtained by Permit Procedure

The appropriation right to water is acquired by complying with the procedures set forth in *Water Code § 1000 et seq.* Under this method, a person who wishes to appropriate water applies for a permit to appropriate water, a permit to construct necessary water works and divert water is granted, and on completion of the works, a license is issued. This procedure is the exclusive method of appropriating water in California, except as provided in *Water Code §§ 1226-1226.4*, which governs stockponds [*Water Code § 1225*; *Fullerton v. State Water Resources Control Bd. (1979) 90 Cal. App. 3d 590, 593 n. 2, 599-600, 153 Cal. Rptr. 518]* .

[2] Water Subject to Appropriation

[a] Water Available

All water flowing in any natural channel, whether surface or subterranean, unless already applied to useful and beneficial purposes on lands riparian thereto, or otherwise appropriated, is public water of the State and subject to appropriation [*Water Code §§ 1200, 1201*]. Whenever water in a watercourse, whether the water is foreign or part of the natural flow, is not reasonably required for beneficial use by the owners of existing rights to that water, those owners cannot prevent its beneficial use by other persons [*Miller & Lux, Inc. v. Bank of America (1963) 212 Cal. App. 2d 719, 729, 28 Cal. Rptr. 401]* .

Unappropriated water includes (1) all water that has never been appropriated, (2) all water appropriated before the effective date of the Water Commission Act (December 19, 1914) that has not been put to beneficial use or utilized for the purpose of the appropriation, (3) all water lawfully appropriated that has ceased to be put to the useful or beneficial purpose for which it was appropriated, and (4) water that flows back into a stream, lake, or other body of water after having been appropriated or used [*Water Code § 1202*].

If a municipality holds the right to use water in excess of existing municipal needs, anyone entitled to possession of land

on which the excess water may be put to beneficial use may appropriate that excess water, but only for the time during which that water is not needed by the municipality [*Water Code § 1203*].

In determining the amount of water available for appropriation for other beneficial uses, the State Board is required to take into account, whenever it is in the public interest, the amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources [*Water Code § 1243*].

[b] Fully Appropriated Stream System

Following notice and hearing, the State Board may adopt a declaration that a stream system is fully appropriated based on its finding that the stream system water is being fully applied to beneficial uses when previous water rights decisions have determined that no water remains available for appropriation [*see Water Code § 1205(a), (b)*].

From the date of adoption of a full appropriation declaration, and subject to *Water Code § 1206(b)*, the Board will not accept any application for a permit to appropriate water from the stream system described in the declaration, and may cancel any application pending on that date [*Water Code § 1206(a)*]. *Water Code § 1206(a)* does not apply to applications for temporary permits made pursuant to *Water Code §§ 1425-1431* or to any Water Code provision respecting change in point of diversion, place of use, or purpose of use [*Water Code § 1206(c)*]. For discussion of temporary permits, see *§ 575.67*. For discussion of changes in use, see *§ 575.75*.

Notwithstanding *Water Code § 1206(a)*, in its declaration the Board may provide for acceptance of applications to appropriate water under specified conditions. Any such provision must specify the conditions and may contain application limitations, including, but not limited to, limitations on the purpose of use, on the instantaneous rate of diversion, on the season of diversion, and on the amount of water that may be diverted annually. The Board may make those limitations applicable to individual applications to appropriate water, or to the aggregate of the applications, or both [*Water Code § 1206(b)*].

The Board may, either on its own motion or on petition of any interested person, after notice and hearing, revoke or revise a declaration that a stream system is fully appropriated [*Water Code § 1205(c)*].

Any notice of hearing pursuant to *Water Code §§ 1205-1207* must be published at least once a week for four consecutive weeks in one or more newspapers of general circulation published in each county in which any part of the stream system is situated, and publication must be complete at least 60 days prior to the date of hearing [*Water Code § 1207(a)*]. At least 60 days prior to the date of the hearing, the notice must be mailed to all persons known to the Board who own land that appears to be riparian to the stream system, who divert water from the stream system, or who have made written request to the Board for special notice of hearing pursuant to *Water Code §§ 1205-1207* [*Water Code § 1207(b)*].

[3] Elements of an Appropriation

To constitute an appropriation, there must be (1) an intent to take, (2) accompanied by an open, physical demonstration of that intent, (3) for a valuable use. The outward manifestation of all three elements is most often evidenced by a diversion of the water from its natural source prior to using it, although other means are also acceptable, such as watering livestock directly from the course. There must be physical use or control of the water in some fashion, however, either by artificial means (diversion or a storage structure) or by establishing a possessory right in the land to which the water is appurtenant [*Fullerton v. State Water Resources Control Bd. (1979) 90 Cal. App. 3d 590, 598-599, 601, 153 Cal. Rptr. 518* (Board properly denied permit to State Department of Fish and Game for "in-stream" appropriation to provide minimum flow guarantees to protect fish resources)].

Appropriation must be for some useful or beneficial purpose [*Cal. Const., Art. X, § 2*; *Water Code § 1240*].

Storing water underground, including the diversion of streams and the flowing of water on lands necessary to the accomplishment of that storage, can be a beneficial use [*Water Code § 1242*]. Storage of water to be released for the purpose of protecting or enhancing the quality of other waters which are put to beneficial uses may also be a beneficial use [*Water Code § 1242.5*].

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§ 575.56 Priority of Appropriation Rights

An appropriator has no right superior to the rights attaching to lands riparian to the same stream or to that of a prior appropriator on the same stream [*Miller & Lux, Inc. v. Bank of America (1963) 212 Cal. App. 2d 719, 728, 28 Cal. Rptr. 401* ; *see § 575.54[6][c]*].

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§ 575.57 Public Trust

[1] Relation to Appropriation Decisions

The concept of the public trust is that the sovereign owns all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people. This trust requires the state to protect navigable waters from harm caused by diversion of nonnavigable tributaries [*National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419, 425-427, 189 Cal. Rptr. 346, 658 P.2d 709]* .

Because the prosperity and habitability of much of the state requires the diversion of great quantities of water from its streams for purposes unconnected to public trust uses at the source stream, the state has the power to grant nonvested usufructuary rights to appropriate water even if diversions harm public trust uses, but it should attempt to avoid or minimize any harm to those interests before approving water diversions. Even if one trust is preferred to another in one instance, a state agency has no power to abrogate a public trust by authorizing a use inconsistent with it [*National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419, 439-441, 189 Cal. Rptr. 346, 658 P.2d 709]* .

[2] Continuing Supervision

The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Once an appropriation has been approved, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. In exercising its power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs; it may reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust [*National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419, 446-447, 189 Cal. Rptr. 346, 658 P.2d 709]* .

Members of the public as well as public interest groups have standing to bring an action to enjoin appropriation of water in violation of the public trust [*National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419, 431 n. 11, 189 Cal. Rptr. 346, 658 P.2d 709]* . The courts have concurrent jurisdiction with the board over such cases. The public trust

issue may be raised before the board by a proceeding to determine water rights in a stream system under *Water Code § 2501* [*National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419, 448, 189 Cal. Rptr. 346, 658 P.2d 709* ; *see §§ 575.140* and *575.380*].

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§ 575.58 Application to Appropriate Water

Any person may apply for and secure from the State Board, pursuant to statutory and regulatory provisions, a permit for any unappropriated water [*Water Code § 1252*; for the form of application, *see § 575.350*]. The Board must consider and act on all applications for permits to appropriate water and must do all things proper relating to those applications, including conducting necessary investigations [*Water Code §§ 1250, 1251*]. Appropriation rights and privileges may be conferred on the United States, on the State, and on any entity or organization capable of holding an interest in real property, as well as on a person [*Water Code § 1252.5*].

The Board will make necessary investigations of the state's water resources to secure information needed in connection with applications for appropriation of water [*Water Code § 1251*].

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§ 575.59 Appropriation Must Be in Public Interest

The State Board will allow the appropriation of unappropriated water for beneficial purposes under any terms and conditions that it judges will best develop, conserve, and utilize in the public interest the water sought to be appropriated [*Water Code § 1253*]. Proposed appropriations not best conserving the public interest will be rejected [*Water Code § 1255*]. In determining the public interest, the Board must consider any state-authorized plan pertaining to the control, protection, development, utilization, and conservation of water resources [*Water Code § 1256*]. The role of the Board in acting on permit applications is a necessary balancing process requiring maximum flexibility in considering the competing demands for water [*United States v. State Water Resources Control Bd. (1986) 182 Cal. App. 3d 82, 126, 227 Cal. Rptr. 161]* .

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§ 575.60 Factors Considered by State Board in Appropriation Decisions

[1] Generally

In acting on applications to appropriate water the State Board is guided by the policy that domestic use is the highest use and irrigation is the next highest use [*Water Code § 1254*]. The Board must also consider the relative benefit to be derived from (1) all beneficial uses of the water concerned including, but not limited to, use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, or mining and power purposes, and from any uses specifically protected under any relevant water quality control plan; and (2) the reuse or reclamation of the water sought to be appropriated, as proposed by the applicant. The Board may subject appropriations to whatever terms and conditions it finds to be in the public interest [*Water Code § 1257*; *see United States v. State Water Resources Control Board (1986) 182 Cal. App. 3d 82, 132-133, 227 Cal. Rptr. 161]* . Stream flow requirements proposed for fish and wildlife purposes pursuant to *Pub. Res. Code §§ 10001, 10002*, and water quality control plans established pursuant to the Porter-Cologne Water Quality Control Act (*Water Code § 13000 et seq.*) must be considered by the Board [*Water Code §§ 1257.5, 1258*]. Underlying all the necessary elements for the Board to consider in its appropriation decisions is the state goal of providing a decent home and suitable living environment for its inhabitants [*Water Code § 1259*].

[2] Amount of Water

In determining the amount of water available for appropriation, the State Board will take into account the amounts of water needed to remain in the source for protection of beneficial uses, including any uses specifically protected under any relevant water quality control plan [*Water Code § 1243.5*]. The Board will similarly take into account the amounts of water required for recreation and for the preservation and enhancement of fish and wildlife resources [*Water Code § 1243*].

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§ 575.61 Application Determines Priority

Any properly made application for appropriation gives the applicant a priority of right as of the date of the application until the application is either approved or rejected. That priority continues only so long as the applicant complies with applicable laws and regulations [*Water Code § 1450*]. If the permit is granted, that priority continues and gives the permittee the right to take and use the amount of water specified until the permit is revoked or until a license is issued [*Water Code § 1455*].

A municipality's application for a permit for water use for the municipality or for the domestic needs of its inhabitants is first in right, irrespective of whether it is first in time [*Water Code § 1460*]. The Water Code also provides a priority for specified situations, such as for an application by the Department of Water Resources in aid of a water plan or an application pertaining to action on certain types of hydroelectric plants that have no significant adverse environmental impact [*see Water Code §§ 1480, 1490-1491*, respectively].

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§ 575.62 Issuance of Permit

As prerequisites to the issuance of a permit to appropriate water, there must be an applicant, the application must contain prescribed information in the form required by the State Board, the intended use must be beneficial, there must be unappropriated water available for the applicant's supply, and all fees must be paid [*Water Code § 1375*]. Once the application is approved, the Board must issue a permit [*Water Code § 1380*; *see § 575.358*].

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§ 575.63 Terms and Conditions of Permit

Use of water following the issuance of a permit is limited to the extent and purpose allowed in the permit [*Water Code § 1381*]. A permit is effective only for the time the water actually appropriated under it is used for a useful and beneficial purpose [*Water Code § 1390*]. Every permit must include the enumeration of its conditions (in substance the provisions of *Water Code §§ 1390-1394*) and the statement that any appropriator of water to whom a permit is issued takes it subject to the conditions expressed in the permit [*Water Code § 1391*; *see United States v. State Water Resources Control Bd. (1986) 182 Cal. App. 3d 82, 132-133, 227 Cal. Rptr. 161]* . Every permittee accepts a permit under the condition that no value in excess of the actual amount paid to the State therefor shall at any time be claimed for the permit in respect to public entity regulation of the services rendered by the permittee or in respect to any valuation for purposes of sale to or purchase by, whether through condemnation proceedings or otherwise, a public entity of the rights and property of any permittee acquired through the permit process [*Water Code § 1392*].

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§ 575.64 Modification of Permit Terms

The State Board may reserve jurisdiction in whole or in part to amend or revise terms and conditions in a permit if the Board finds that there is insufficient information to finally determine the terms and conditions that will reasonably protect vested rights without resulting in waste of water or that will best develop, conserve, and utilize in the public interest the water sought to be appropriated, and that a period of actual operation or time for completion of studies is necessary to secure the required information. The Board may also reserve jurisdiction if (1) the application under consideration represents only part of a coordinated project and the other applications for the project are pending, and (2) the Board finds that the coordinated project requires coordinated terms and conditions that cannot reasonably be decided until a decision is reached on the other pending applications [*Water Code § 1394(a)*]. Jurisdiction will be reserved for no longer a period than is reasonably necessary and will not be exercised after the license is issued. Reserved jurisdiction can be exercised only after notice to the parties and a hearing [*Water Code § 1394(b)*]. The Board's decision or order reserving jurisdiction and its decision or order in the exercise of that reserved jurisdiction are both subject to reconsideration [*Water Code §§ 1120, 1122*].

Independent of its power to reserve jurisdiction under *Water Code § 1394*, the Board has the authority to modify a permit under its power to prevent waste or unreasonable use or methods of diversion of water. Because a determination of reasonable use depends on the totality of the circumstances presented, when the Board determines that changed circumstances reveal new information about the adverse effect of a water project, the Board may modify the permit to curtail use and diversion of the water on the ground that the project's use and diversion of the water has become unreasonable [*United States v. State Water Resources Control Bd. (1986) 182 Cal. App. 3d 82, 129-130, 227 Cal. Rptr. 161]* .

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§ 575.65 Permit Specifies Deadlines

The permit will specify deadlines for commencement and completion of construction work and for application of the water to beneficial use [Water Code §§ 1395, 1398]. Although both the construction work and utilization of water for beneficial purposes must be prosecuted with due diligence, the permit-specified time periods may be extended by the State Board for good cause shown [*Water Code §§ 1396, 1398*]. After any hearing on a petition for extension of time, the Board may revoke the permit [*Water Code §§ 1398(b), 1410*; for a form of petition, *see § 575.359*].

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§ 575.66 Revocation of Permit

[1] Failure to Comply With Deadlines

A permit may be revoked (1) if the work is not commenced, prosecuted with due diligence, and completed, or (2) if the water is not applied to beneficial use as contemplated in the permit and in accordance with statutory and regulatory requirements [*Water Code § 1410(a)*].

The State Board may revoke a permit if, after a hearing on a petition for an extension of time to complete a project and apply water to beneficial use, the Board finds that cause exists to revoke the permit [*Water Code § 1410(b)(1)*]. A permit may also be revoked if, after an investigation other than a hearing on a petition for an extension of time, it appears that cause exists to revoke a permit. The Board must give the permittee written notice of the proposed revocation. If the permittee fails to request a hearing within the required time period, the Board will revoke the permit and declare the water subject to appropriation. After any hearing requested by the permittee, the Board may, on a finding that cause exists, revoke the permit and declare the water subject to appropriation [*Water Code § 1410(b)(2)*].

[2] Recourse After Revocation

The State Board may act to revoke the permit without a hearing unless the permittee requests a hearing within 15 days after receiving notice of possible revocation [*Water Code § 1410.1*]. When a permit is revoked without a hearing, the permittee, within 90 days of the order, may file a request to set aside the revocation, and the Board, for good cause shown, may reinstate the permit [*Water Code § 1410.2*].

The holder of any permit that is revoked may file a petition for a writ of mandate to inquire into the revocation order's validity. The proceedings must be filed in superior court no later than 30 days from the date of final action by the Board [*Water Code § 1126*; *see Water Code § 1412* (proceedings pending on December 31, 1996, must have been filed in county in which proposed diversion was situated)]. The time for filing is extended if the holder seeks reconsideration by the Board [*Water Code § 1126*]. The right to petition will not be affected by the failure to seek reconsideration before the Board [*Water Code § 1126*].

For all proceedings pending on December 31, 1996, the priority of right of any permittee filing a petition for a writ of mandate continues under the permit until a final judgment is rendered as to the permit revocation [*Water Code § 1414*]. Unless the permittee files a petition for a writ of mandate, all of his or her rights under the permit cease [*Water Code § 1413*]. The findings of the Board on the revocation of a permit are prima facie correct until set aside by the court [*Water Code § 1411*]. Until and unless the order revoking the permit is ordered to be set aside by the court, the permittee must not exercise the right to take or use any water granted by the permit [*Water Code § 1415*]. Legislation enacted in 1996 repealed these provisions, effective prospectively [*Water Code § 1126.2*].

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§ 575.67 Temporary Permit

The State Board may issue a conditional, temporary permit to appropriate water to any person, whether or not that person is an applicant, permittee, or licensee, when that person has an urgent need to divert and use water. The temporary permit may be issued without requiring compliance with the regular permit procedures [*Water Code § 1425(a)*]. Before issuing a temporary permit, the Board must find (1) that the applicant has an urgent need for the water proposed to be diverted and used, (2) that the water may be diverted and used without injury to any lawful user of water and without unreasonable effect on fish, wildlife, or other instream beneficial uses, and (3) that the proposed diversion and use are in the public interest [*Water Code § 1425(b)*; *see Water Code § 1425(c)* ("urgent need" defined)]. The application for a temporary permit must be completed in accordance with the provisions of *Water Code § 1260* (contents of appropriation application), and must be accompanied by those maps, drawings, and other data required by the Board. The applicant must pay an application fee and a permit fee if a temporary permit is issued [*Water Code § 1426*]. Notice requirements for temporary permits are set forth in *Water Code § 1428*, although the Board may issue a temporary permit in advance of that notice [*Water Code § 1428*].

Before issuing a temporary permit the Board must review available records, files, and decisions relating to the availability of water from the source at the proposed point of diversion to serve the proposed temporary diversion and use, and relating to the rights of downstream users. The Board must consult with representatives of the Department of Fish and Game and may make a field investigation [*Water Code § 1427*]. The Board will supervise diversion and use of water under the temporary permit for the protection of all lawful users of waters and instream beneficial uses and to ensure compliance with permit conditions [*Water Code § 1429*].

No temporary permit will create a vested right, even of a temporary nature. The permit will be subject at all times to modification or revocation in the Board's discretion and will automatically expire within 180 days, unless the permittee requests a renewal of up to 180 days [*Water Code §§ 1430, 1431*].

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§ 575.68 Precursors to License

The permittee must report the completion of the construction of works and application of the water to the State Board [*Water Code § 1600*]. The Board will make a full inspection and examination of the works and the water use. The permittee must furnish the Board with any records, data, and information required to enable the Board to determine the amount of water that has been applied to beneficial use and whether the construction of the works and the use of the water from the works is in conformity with the law, the Board's rules and regulations, and the permit [*Water Code § 1605*].

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§ 575.69 License Determinations by State Board

If the State Board determines that the construction and condition of the works or the use of water do not conform to the law, the Board's rules and regulations, or the terms of the permit, it may revoke the permit as provided in *Water Code §§ 1410-1410.2* (permit revocation). The Board may allow a reasonable time for the permittee to correct discrepancies in the works or use of water before taking action to revoke the permit [*Water Code § 1611*]. For discussion of permit revocation procedures, see *§ 575.66*.

When the Board's determination as to completion is favorable to the permittee, the Board must issue a license which confirms the right to appropriate water in an amount applied to beneficial use [*Water Code § 1610*].

Before issuing a license for an amount of water or season of use less than that specified in the permit, the Board must either (1) obtain the permittee's consent or (2) afford the permittee an opportunity to show cause why the amount or season of use should not be reduced [*Water Code § 1610.5*].

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§ 575.70 Writ of Mandate Available for Limited License

A permittee to whom the State Board has issued a license for an amount of water or a season of use less than that specified in the permit may file a petition for a writ of mandate in the superior court to inquire into the order's validity [*Water Code § 1126*]. Unless the petition for a writ of mandate is filed within 30 days after issuance of the license, all rights of the permit holder except as specified in the license will cease [*Water Code § 1616* (applicable to all proceedings pending on December 31, 1996)]. After December 31, 1996, unless a petition is filed not later than 30 days from the date of final action by the Board, the Board's decision or order will not be subject to review by any court [*Water Code § 1126*].

With regard to proceedings pending on December 31, 1996, the rights of the permittee filing a petition for a writ of mandate will continue under the permit until the judgment in the proceedings has been entered and becomes final [*Water Code § 1617*]. However, until the Board's order is set aside or modified by the court, the permittee must take or use water only as specified in the license [*Water Code § 1618*]. In addition, these provisions have been repealed and are applicable only to proceedings filed before December 31, 1996 [*Water Code § 1126.2*].

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§ 575.71 Conditions of License

A license is only effective for the time the water appropriated under it is used for a beneficial purpose [*Water Code § 1627*]. Every licensee takes a license to appropriate water subject to the expressed conditions, including the general statutory conditions [*Water Code § 1628*]. Every license is accepted under the same conditions regarding valuation as is every permit [*Water Code § 1629*; *see § 575.63*].

Twenty years after a license has been granted, the state, any city or city and county, any municipal water, irrigation, or lighting district, or any political subdivision of the state, has the right to purchase the works and property occupied and used under the license and the works built or constructed for the enjoyment of the rights granted under the license [*Water Code § 1630*]. Valuation may be computed as in eminent domain proceedings [*Water Code § 1631*].

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§ 575.72 License Information Filed in County Recorder's Office

The State Board must file a copy of every license issued and every order modifying or changing a license within 30 days after its issuance in the office of the recorder of the county or counties in which the points of diversion lie and in the county or counties in which the places of use lie [*Water Code § 1650*]. Whenever an order revoking a license in whole or in part becomes final, a copy of the order must also be recorded [*Water Code § 1651*].

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§ 575.73 Revocation of License

[1] Result of Licensee's Actions

After a license is issued, if the State Board finds that the licensee never put the water granted under the license to a useful or beneficial purpose or has ceased to do so, or that the licensee has failed to observe any of the license conditions, the Board, after notice to the licensee, may revoke the license and declare the water to be subject to appropriation. Unless the licensee makes a written request for a hearing within 15 days of notice, the Board may act without a hearing. "Licensee" includes the heirs, successors, or assigns of the licensee [*Water Code §§ 1675, 1675.1*].

The findings of the Board on the revocation of a license are prima facie correct until the order revoking the license is ordered to be set aside by a court of competent jurisdiction [*Water Code § 1676* (repealed as of January 1, 1997, but applicable to all proceedings pending on December 31, 1996)].

[2] Challenging Revocation Order

The notice of proposed revocation of a license must contain a statement of facts on which the proposed revocation is based and warn the licensee that the State Board may take action without a hearing unless the licensee requests a hearing within 15 days after receiving the notice [*Water Code § 1675.1*]. Whenever a license is revoked without a hearing, the licensee, within 90 days, may file with the Board a request to set aside the revocation, and the Board, for good cause shown, may reinstate the license [*Water Code § 1675.2*].

The licensee may petition for a writ of mandate to inquire into the validity of an order of the Board revoking a license. That petition must be commenced within 30 days after the service of notice of revocation. The right to petition is not affected by the failure to seek reconsideration before the Board [*Water Code § 1677* (repealed as of January 1, 1997, but applicable to all proceedings pending on December 31, 1996); *Water Code § 1126* (applicable thereafter)].

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§ 575.74 Temporary Urgency Changes

Any permittee or licensee who has an urgent need to change a point of diversion, place of use, or purpose of use from that specified in the license or permit may petition for, and the State Board may issue, a conditional temporary change order without compliance with the procedures required in the issuance of a regular permit or license [*Water Code § 1435(a)*]. Before issuing a change order the Board must find (1) that the permittee or licensee has an urgent need for the proposed change, (2) that the change may be made without injury to any other lawful user of water and without unreasonable effect on fish, wildlife, or other instream beneficial uses, and (3) that the proposed change is in the public interest [*Water Code § 1435(b)*; *see Water Code § 1435(c)* ("urgent need" defined)]. Before issuing a change order the Board must also review available records, files, and decisions relating to the rights of other legal users and consult with representatives of the Department of Fish and Game. The Board may make a field investigation [*Water Code § 1437*].

Water Code § 1438(b) sets forth notice requirements for a temporary urgency change, but the Board may issue a temporary change order in advance of the notice required [*Water Code § 1438(a)*]. Regardless of the rate of diversion or the amount of storage, if the change order is to be in effect less than 10 days, the Board must exercise its discretion in requiring notice, both before and after issuance of the change order, and may require whatever proof of notice it deems appropriate [*Water Code § 1438(c)*].

Any interested person may file an objection to the temporary change with the Board, and the Board will send a copy of that objection to the permittee or licensee [*Water Code § 1438(d)*]. The Board must give prompt consideration to any objections, and may hold a hearing, after notice to all interested persons [*Water Code § 1438(e)*].

The Board will supervise the diversion and use of water under the temporary change order for the protection of all other lawful users of water and instream beneficial uses and for compliance with change order conditions [*Water Code § 1439*].

A temporary change order will not create any vested right, even of a temporary nature, and it is subject at all times to modification or revocation in the Board's discretion. Any temporary change order automatically expires within 180

days, although it may be renewed for up to 180 days [*Water Code §§ 1440, 1441*].

If the permittee or licensee fails to comply with any requirement, the temporary change will be automatically terminated [*Water Code § 1438(f)*].

Water Code §§ 1435-1442, which govern the temporary urgency changes, do not apply to any permittee or licensee petitioning for a temporary change pursuant to *Water Code § 1725 et seq.* (change involving transfer or exchange of water or water rights) [*Water Code § 1442*].

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§ 575.75 Change in Appropriative Use

[1] In General

Water appropriated for one specific purpose is not allowed to be appropriated for any other purpose. However, with the State Board's permission, any time after notice of an application is given, an applicant, permittee, or licensee may change the point of diversion, place of use, or purpose of use from that specified [*Water Code §§ 1700, 1701*]. The petitioner must give written notice of the proposed change to the Department of Fish and Game [*Water Code § 1703*]. Before granting permission to make a change, the petitioner must establish that the change will not operate to the injury of any legal user of the water involved [*Water Code § 1702*]. The Board may require the petitioner to publish or otherwise give notice of the change in a manner prescribed by the Board [*Water Code § 1703*].

Petitions for change must be on the form required by applicable regulations and contain specified information [*Water Code §§ 1701.1* (petition for change filed after notice of application), 1701.2 (petition for change in permit or license)]. After a petition is filed, the Board may request additional information reasonably necessary to clarify, amplify, correct, or otherwise supplement the information required to be submitted in the petition [*Water Code § 1701.3*]. If the petitioner does not provide the requested information, the Board may cancel the petition or, on a showing of good cause, allow additional time to submit the requested information [*Water Code § 1701.4*]. For forms requesting changes, *see §§ 575.355* and *575.356*.

[2] Protests

Any interested person may file a written protest against approval of the petition. The protest must be filed within the time allowed in the notice of petition or within the time allowed by the State Board on a showing of good cause [*Water Code § 1703.1*]. The protest must clearly and specifically set forth the protester's objections and the bases for the objections [*Water Code § 1703.2(c)*]. The protest must be served on the petitioner by mail or through service undertaken in a manner determined to be adequate by the Board [*Water Code § 1703.2(e)*]. The Board may request additional information that is reasonably necessary to clarify, amplify, correct, or otherwise supplement the information required to be submitted in the protest. It must provide a reasonable period for submitting the information, and may

allow additional time for good cause shown [*Water Code § 1703.3*].

The protester and the petitioner must make a good faith effort to resolve the protest not later than 180 days from the expiration date in the notice of petition. The Board may allow additional time on a showing of good cause [*Water Code § 1703.4*]. The Board may request additional information from the protester or the petitioner that the Board determines is reasonably necessary to attempt to resolve the protest. It must provide a reasonable period for submitting the information, and may allow additional time for good cause shown [*Water Code § 1703.5*].

The Board may cancel a protest or petition for failure to provide requested information within the time period provided [*Water Code § 1703.6(a)*; *see Water Code § 1703.6(c)* (cancellation when protest is based on injury to legal user of water), (d) (cancellation when protest is based on allegation of injury to other than legal user of water), (e) (cancellation when protest is based on both types of allegations)]. However, the Board may not cancel a protest for failure to submit information not in the possession or under the control of the protester if the protest meets the requirements of *Water Code § 1703.2* and the petitioner is or could be required to submit the information [*Water Code § 1703.6(b)*].

[3] Hearing

The State Board, after a hearing, may approve with conditions or deny a petition [*Water Code § 1704(a)*]. It must give notice of the hearing to the petitioner and any protester by registered mail not less than 20 days before the hearing date [*Water Code § 1704(b)*]. The Board may, but is not required to, hold a hearing before approving any unprotested petition [*Water Code § 1704(c)(1)*]. The Board may also hold a hearing if it determines that undisputed facts support the approval of the petition and there is no disputed issue of material fact [*Water Code § 1704(c)(2)*]. The Board may, but is not required to, hold a hearing before denying a petition, if, after notice, it determines that (1) the petition is defective, (2) the petition fails to provide information requested by the Board, or (3) undisputed facts support the denial of the petition and there is no disputed issue of material fact [*Water Code § 1704(c)(3)*]. A petition for a writ of mandate to inquire into the validity of the Board's order after a hearing must be filed within 30 days [*Water Code §§ 1126, 1705*].

[4] Minor Petition

A minor petition for change is one that does not involve direct diversions in excess of three cubic-feet per second or storage in excess of 200 acre-feet per year [*Water Code § 1704.4*]. The State Board will conduct a field investigation and prepare an analysis of all minor protested petitions for change. The Board must notify the parties not less than 20 days before conducting the field investigation, so that the parties can attend and present information to the Board [*Water Code § 1704.1*]. The Division of Water Rights may request that the parties submit information in support of their positions before, during, or after the field investigation. After the field investigation, the Division of Water Rights may conduct additional proceedings in accordance with the informal hearing procedure set forth in *Gov. Code § 11445.10 et seq.* [*Water Code § 1704.2*]. Based on the field investigation and any other information it has obtained, the Division of Water Rights must issue an order acting on the minor petition for change unless the Board determines that additional proceedings should be conducted [*Water Code § 1704.3*]. The order is subject to review as provided in *Water Code § 1120 et seq.* [*Water Code § 1704.3*].

[5] Change to Preserve or Enhance Environmental Resources or Recreational Uses

Any person entitled to use water based on an appropriative, riparian, or other right may petition the State Board for a change in use to preserve or enhance wetlands habitat, fish, and wildlife resources, or recreation in or on the water [*Water Code § 1707(a)*]. The petition may be filed pursuant to *Water Code §§ 1700 et seq.* [*see § 575.75*], 1435 et seq. [*see § 575.74*], or 1725 et seq. [*Water Code § 1707(a)*; *see § 575.76*].

The Board may approve the petition subject to any terms and conditions that the Board deems will best develop, conserve, and utilize the water at issue in the public interest. The petition may be approved regardless of whether the

proposed use involves a diversion of water. However, the proposed change must meet all of the following requirements: (1) it must not increase the amount of water the person is entitled to use, (2) it must not unreasonably affect any legal user of water, and (3) it must otherwise meet the requirements of *Water Code § 1000* [*Water Code § 1707(b)*]. The water at issue may be used to satisfy any applicable federal, state, or local regulatory requirements governing water quantity, water quality, instream flows, fish and wildlife, wetlands, recreation, and other instream beneficial uses [*Water Code § 1707(c), (d)*].

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§ 575.76 Transfer of Water or Water Rights

[1] Temporary Changes

A permittee or licensee may temporarily change the point of diversion, place of use, or purpose of use due to a transfer or exchange of water or water rights if that transfer (1) would only involve the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of the proposed temporary change, (2) would not injure any legal user of the water, and (3) would not unreasonably affect fish, wildlife, or other in-stream beneficial uses [*Water Code § 1725*]. For the purposes of *Water Code § 1725 et seq.* (temporary changes), the phrase "consumptively used" means the amount of water that has been consumed through use by evapotranspiration, has percolated underground, or has been otherwise removed from use in the downstream water supply as a result of direct diversion [*Water Code § 1725*]. A temporary change means any change of point of diversion, place of use, or purpose of use involving a transfer or exchange of water or water rights for a period of one year or less [*Water Code § 1728*]. The one-year period does not include any time required for monitoring, reporting, or mitigation before or after the temporary change is carried out. If, within a period of one year or less, the water involved in the temporary change is moved to off-stream storage outside of the watershed where the water originated, the change will be considered a temporary change, and the water moved to off-stream storage outside the watershed where the water originated may be put to beneficial use in the place of use and for the purposes of use specified in the order approving the temporary change either during or after that period [*Water Code § 1728*].

A permittee or licensee who proposes a temporary change must submit a petition to the State Board to change the terms of the permit or license [*Water Code § 1726(a)*]. The petition must refer to the permit or license that serves as the basis for the water transfer and must include a written description of the changes in water storage, timing and point of diversion, place and purpose of use, timing and point of return flow, and water quality of instream flows that are likely to occur as a result of the proposed temporary change [*Water Code § 1726(b)*]. The petitioner must also provide a copy of the petition to the Department of Fish and Game, the board of supervisors of the county or counties in which the petitioner stores or uses the water subject to the petition, and the board of supervisors of the county or counties to which the water is proposed to be transferred [*Water Code § 1726(c)*]. In addition, within 10 days of submitting the petition

the petitioner must publish notice in a newspaper of general circulation in the county or counties in which the petitioner stores or uses the water subject to the petition. The Board is required to provide the petitioner with a list of water right holders of record on file with the Board who may be affected by the transfer, and the petitioner must provide written notice to those water right holders not later than 10 days after the date on which the petition is submitted [*Water Code § 1726(d)*].

Within 10 days of receipt of a petition, the Board must begin an investigation of the proposed temporary change to determine if the water proposed to be transferred would have been consumptively used or stored pursuant to the petitioner's permit or license in the absence of the proposed transfer or conserved pursuant to *Water Code § 1011*. The Board must also evaluate the changes in water storage, timing and point of diversion, place and purpose of use, timing and point of return flow, water quality, and instream flows, and other changes likely to occur as a result of the proposed temporary change [*Water Code § 1726(e)*]. Affected water users and other interested parties may file written comments with the Board, within 30 days after the publication date of the notice [*Water Code § 1726(f)*].

The Board must render a decision in writing not later than 35 days after the date the investigation was commenced or notice was published, whichever is later. The deadline may be extended up to 20 days if comments have been filed. If the Board or the petitioner determines that an additional extension of time is necessary for the Board to make findings or that a hearing is necessary for the Board to make findings, the Board may extend the time for a decision with the petitioner's consent. If the petitioner agrees to a hearing, the Board must identify the issues for which additional evidence is required and provide notice of the time, place, and subject matter of the hearing to the petitioner, the Department of Fish and Game, the board of supervisors of the county or counties where the petitioner stores or uses the water subject to the petition, the water right holders of record, the proposed transferee, and any party who has filed a written comment [*Water Code § 1726(g)*].

The Board must approve a temporary change if it determines that a preponderance of the evidence shows that the proposed temporary change (1) would not injure any legal user of the water, during a potential hydrologic condition that the Board determines is likely to occur during the proposed change, through significant changes in water quantity, water quality, timing of diversion or use, consumptive use of the water, or reduction in return flows, and (2) would not unreasonably affect fish, wildlife, or other in-stream beneficial uses [*Water Code § 1727(b)*]. The petitioner has the burden of establishing that the proposed temporary change meets these requirements. If the Board determines that the petitioner has made a prima facie case, the burden of proof shifts to any party that has filed a comment. The Board may make its determination without a hearing [*Water Code § 1727(c)*].

In reviewing a petition for a temporary change, the Board may not modify any term or condition of the petitioner's permit or license, including those terms that protect other legal users of water, fish, wildlife, and other instream beneficial uses, except as necessary to carry out the temporary change. In addition, in determining that the proposed change would not injure any legal user of the water or unreasonably affect fish, wildlife, or other in-stream beneficial uses, the Board may not deny, or place conditions on, a temporary change to avoid or mitigate impacts that are not caused by the temporary change [*Water Code § 1727(d)*]. Furthermore, the Department of Fish and Game and any other state agency that comments on the proposed temporary change may not propose conditions to mitigate effects on fish, wildlife, or other in-stream beneficial uses caused by factors other than the proposed temporary change [*Water Code § 1727(e)*].

Within 30 days after final action by the Board, a party may file a petition for writ of mandate to inquire into the validity of the Board's finding or order. The right to petition is not affected by the failure to seek reconsideration before the Board [*Water Code § 1730(a)* (repealed as of January 1, 1997, but applicable to all proceedings pending on December 31, 1996); *Water Code § 1126* (applicable thereafter)]. In a writ of mandate proceeding, the court considers only those documents and materials that were in the administrative record before the Board made its finding or order. However, if the court finds that there is relevant evidence that, in the exercise of due diligence, could not have been produced, or that was improperly excluded from the administrative record by the Board, the court may admit the evidence at the

hearing of the writ [*Water Code § 1730(b)* (repealed as of January 1, 1997, but applicable to all proceedings pending on December 31, 1996)].

A proposed temporary change under *Water Code §§ 1725-1732* is exempt from the requirements of *Pub. Res. Code § 21000 et seq.* (The California Environmental Quality Act), relating to environmental quality [*Water Code § 1729*].

[2] Long-Term Transfers

The State Board may consider a petition for a long-term transfer (that is, a transfer for any period in excess of one year) of water or water rights involving a change of point of diversion, place of use, or purpose of use [*Water Code § 1735*]. Before approving the petition, the Board must provide notice and an opportunity for a hearing, including written notice to the Department of Fish and Game, which must be allowed an opportunity to review and to make recommendations. Thereafter, the Board may approve the petition if the change would not result in substantial injury to any legal user of water and would not unreasonably affect fish, wildlife, or other in-stream beneficial uses [*Water Code § 1736*].

[3] Expiration of Transfer Period

Following the expiration of the temporary or long-term transfer period, all rights automatically revert to the original holders of that right without any action by the State Board [*Water Code §§ 1016, 1731, 1737*]. After the conclusion of the term of a water transfer agreement, the transferee or any beneficiary of the transfer may not bring any claim for a continuation of the water supply made available by the agreement or claim any right to a continued supply of water as a result of the transfer, based on reliance, estoppel, intervening public use, prescription, water shortage emergency, unforeseen or unforeseeable increases in demand, or any other cause [*Water Code § 1016*].

[4] Transfer of Decreed Rights

Any water right determined under a court decree issued under *Water Code § 2500 et seq.* (relating to statutory adjudications) after January 1, 1981, is transferable under *Water Code §§ 1725-1737* (discussed in *§ 575.76[1]* and *[2]*) and *Water Code §§ 1700-1706* (discussed in *§ 575.75*). The court having the appropriate jurisdiction over the decreed rights may enter a supplemental decree modifying any rights involved on motion of the State Board or any party with a vested water right [*Water Code § 1740*].

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§ 575.77 Judicial Review of State Board's Decision

The power of the State Board to prevent unreasonable methods of water use must be broadly interpreted to enable the Board to strike the proper balance between the interests in water quality and water project activities to determine objectively whether a reasonable method of use is manifested [*United States v. State Water Resources Control Bd. (1986) 182 Cal. App. 3d 82, 129-130, 227 Cal. Rptr. 161]* .

In assessing the validity of conditions imposed by the Board on water appropriation permits in order to implement water quality standards in a Board-developed water quality control plan, the courts ordinarily apply the substantial evidence rule. In the context of water rights issues, this rule has been interpreted to require a search of the record for a reasonable factual basis for the Board's action. Accordingly, in reviewing challenged conditions, courts must determine whether the conditions are supported by precise and specific reasons founded on tangible record evidence [*United States v. State Water Resources Control Bd. (1986) 182 Cal. App. 3d 82, 115, 227 Cal. Rptr. 161]* .

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§ 575.78 Forfeiture of Appropriation Right

If the appropriator or a successor in interest ceases to use the water for a useful or beneficial purpose, the right of appropriation ceases [Water Code § 1240]. When the person entitled to the use of water fails to use beneficially for a period of five years all or any part of that water, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, the unused water may revert to the public and will be regarded as unappropriated public water. This reversion requires a finding by the State Board following notice to the permittee and a public hearing if one is requested by the permittee [*Water Code § 1241*].

The sale, lease, exchange, or transfer of water or water rights is not evidence of waste or unreasonable use, unreasonable method of use, or unreasonable method of diversion and will not affect any determination of forfeiture applicable to appropriated water [*Water Code § 1244*].

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§ 575.79 Appropriation of Water for Small Domestic and Livestock Stockpond Use

[1] Acquisition of Right

On or after January 1, 1989, to initiate any right to appropriate water for a "small domestic use," compliance with *Water Code §§ 1228-1229.1* is required; these provisions are the exclusive means of acquiring and maintaining the right [*Water Code § 1228.9*]. However, nothing in *Water Code §§ 1228-1229.1* may be construed as affecting any right initiated or acquired pursuant to permit or evidenced by license, and including any application filed but not permitted, before January 1, 1989 [*Water Code § 1228.9*]. Moreover, these provisions do not apply to those stream segments for which the Director of Fish and Game establishes proposed streamflow requirements under *Pub. Res. Code § 10002*, notwithstanding the July 1, 1989, deadline for preparation of the requirements [*Water Code § 1229.1*].

[2] "Small Domestic Use" Defined

"Small domestic use" means a domestic use, not to exceed direct diversion of 4,500 gallons per day or diversion by storage of 10 acre-feet per annum, as that use is defined by State Water Resources Control Board (State Board or Board) rule, and includes impoundment for incidental aesthetic, recreational, or fish and wildlife purposes [*Water Code § 1228.1(b)*].

[3] "Livestock Stockpond" Defined

"Livestock stockpond" means a water impoundment structure constructed for livestock watering use, not to exceed direct diversion of 4,500 gallons per day, or diversion by storage of 10 acre-feet per year, as that use is defined by the State Board, and includes impoundment for incidental aesthetic, recreational, or fish and wildlife purposes [*Water Code § 1228.1(c)*].

[4] Terms and Conditions

The State Board is required to establish, and may from time to time revise, reasonable general conditions to which all

appropriations made under *Water Code §§ 1228-1229.1* must be subject [*Water Code § 1228.6(a)*].

The conditions must include, but are not limited to, the following [*Water Code § 1228.6(a)*]:

- The appropriation is subject to prior rights.

- All conditions lawfully required by the Department of Fish and Game are conditions on the appropriations.

- Diversion works must be constructed and water applied to beneficial use with due diligence.

- Registration must be renewed and water use reported pursuant to law and to the rules of the Board.

Immediately on registration under *Water Code § 1228.3* (discussed in *§ 575.79[6]*), renewal of registration under *Water Code § 1228.5* (discussed in *§ 575.79[10]*), or amended registration under *Water Code § 1228.7* (discussed in *§ 575.79[9]*), the Board must provide the registrant with a written document setting forth the conditions required by *Water Code § 1228.6*, and the perfection and exercise of rights acquired under *Water Code §§ 1228-1229.1* must at all times be subject to those conditions [*Water Code § 1228.6(b)*].

The conditions are deemed "terms and conditions" within the meaning of *Water Code § 1825*, and the expression of legislative intent contained in that section apply to them [*Water Code § 1228.6(c)*]. *Water Code § 1825* expresses the legislative intent that the state take vigorous action to enforce the terms and conditions of existing permits and licenses to appropriate water and to prevent the unlawful diversion of water (see generally discussion in *§§ 575.100 -575.102*).

The Board's authority to enforce the terms and conditions of permits and licenses to appropriate water, and to prevent unlawful diversion of water, including, but not limited to, provisions regarding cease and desist orders and the revocation of permits and licenses, applies to appropriations initiated or perfected under *Water Code §§ 1228-1229.1* [*Water Code § 1228.6(c)*].

[5] Who May Register Water Use

Any person may, subject to *Water Code § 1228.2(b)*, obtain a right to appropriate water for a small domestic use or livestock stockpond use on first registering the use with the State Board and thereafter applying the water to reasonable and beneficial use with due diligence [*Water Code § 1228.2(a)*]. With regard to an appropriation for small domestic use, not more than one registration may be in effect at any time for any facility [*Water Code § 1228.2(a)*]. With regard to an appropriation for livestock stockpond use, more than one registration may be in effect at any time for a registrant if stockponds subject to registration for that registrant do not exceed the ratio of one per 50 acres [*Water Code § 1228.2(a)*]. *Water Code § 1228.2(b)* provides in turn that the initiation of the right to appropriate water is subject to *Water Code §§ 1205-1207* (discussed in *§ 575.55[2][b]*).

[6] Registration of Water Use

Registration of water use must be made on a form prescribed by the State Board that sets forth (1) the name and post office address of the registrant; (2) the source of water supply; (3) the nature and amount of the proposed use; (4) the proposed place of diversion; (5) the place where it is intended to use the water; (6) the time for completion of construction of diversion works and for complete application of the water to the proposed use; (7) a certification that the registrant has contacted a representative of the Department of Fish and Game designated by the department for that purpose, has provided information to that department that is set forth in the registration form, and has agreed to comply with all lawful conditions, including, but not limited to, conditions on the construction and operation of diversion works required by the Department of Fish and Game and the certification must include a copy of any conditions required by

the Department of Fish and Game; and (8) any other information that may reasonably be required by the Board [*Water Code § 1228.3(a)*]. Every person registering a small domestic or livestock stockpond use of water must pay the Board a registration fee [*Water Code § 1525(b)(2)*] and an annual fee thereafter [*Water Code § 1525(a)*; *see § 575.82*]. Registration is deemed completed on the date the form, executed in substantial compliance with the requirements of *Water Code § 1228.3*, and the registration fee are received by the Board [*Water Code § 1228.3(b)*].

The Board must not accept any registration that proposes as a source of water supply any stream system that has been unconditionally declared by the Board to be fully appropriated pursuant to *Water Code § 1205*, except that *Water Code § 1206(b)*, relating to conditional declarations of fully appropriated stream systems, apply to registration of water use under *Water Code §§ 1228-1229.1*, and the Board must accept those registrations if consistent with the conditions specified in any such declaration [*Water Code § 1228.2(b)*].

[7] Registration Lists

The State Board must issue, and mail to any person who so requests, a monthly list of registrations filed during the preceding month and containing the information required by *Water Code § 1228.3(a)(1)-(6)* (discussed in *§ 575.79[6]*) [*Water Code § 1228.3(c)*]. The list must include a date before which any interested person may file a written protest in opposition to the approval of a stockpond registration [discussed in *§ 575.79[12]*]. That date may not be later than 30 days from the date on which the list is issued [*Water Code § 1228.3(c)*].

[8] Effect of Registration

A completed registration gives the registrant, as of the date of completed registration, a priority of right to take and use the amount of water, not exceeding the amount of proposed use as shown on the registration form, ultimately applied with due diligence to reasonable and beneficial use thereunder [*Water Code § 1228.4(a)*]. The right remains in effect unless and until it is (1) forfeited for nonuse under *Water Code § 1241* (discussed in *§ 575.78*) or abandoned; (2) revoked because the registrant knowingly made any false statement, or knowingly concealed any material fact, in the registration; (3) revoked for failure to renew; or (4) revoked under *Water Code § 1228.6(c)* (discussed in *§ 575.79[4]*) [*Water Code § 1228.4(b)*].

[9] Amended Registration

Any registrant may change the point of diversion or place of use by delivering to the board an amended registration form in accordance with *Water Code § 1228.3* (*see § 575.79[6]*), including payment of the registration fee specified in *Water Code § 1228.8(a)* ($100), except that the purpose of the use may not be changed and the change may not operate to the injury of any legal user of the water involved [*Water Code § 1228.7(a)*]. *Editor's Note*: *Water Code § 1228.8*, referred to in *Water Code § 1228.7*, was repealed by 2003 Stats., ch 741, § 83.

A completed amended registration of water use continues in effect the priority of right as of the date of the original completed registration [*Water Code § 1228.7(b)*]. All provisions regarding appropriations made under *Water Code §§ 1228-1229.1*, including, but not limited to, provisions regarding enforcement, apply to the appropriation as described in the completed amended registration, except that the conditions established by the Board under *Water Code § 1228.6* (*see § 575.79[4]*) in effect at the time of completion of the amended registration supersede the conditions that applied to the original completed registration [*Water Code § 1228.7(c)*].

[10] Renewal of Registration

Registration must be renewed before the expiration of each five-year period following completed registration [*Water Code § 1228.5(a)*]. Renewal is made on a form prescribed by the State Board and must contain the report of water use made pursuant to the registration as may be required by the Board [*Water Code § 1228.5(b)*].

The conditions established by the Board under *Water Code § 1228.6* (*see § 575.79[4]*) that are in effect at the time of renewal supersede the conditions applicable to the original completed registration [*Water Code § 1228.5(c)*].

[11] Reports to the State Board

On or before June 30, 1989, and annually thereafter, the Division of Water Rights is required to prepare and submit to the State Board a report summarizing the location, nature, and amount of water appropriated under *Water Code §§ 1228-1229.1* [*Water Code § 1228.2(c)*]. The report must include a description of the availability of unappropriated water in those stream systems that may become fully appropriated with the next reporting period [*Water Code § 1228.2(c)*]. Whenever it can be reasonably anticipated that a stream system may become fully appropriated within the next reporting period, the Board must, following notice and hearing, determine whether that stream system should be declared fully appropriated under *Water Code §§ 1205-1207* (*see § 575.55[2][b]*) [*Water Code § 1228.2(d)*].

[12] Protest of Approval of Stockpond Registration

Before the date set forth on the monthly list of filed registrations [*see § 575.79[7]*], any interested person may file with the State Board a written protest opposing the approval of a stockpond registration [*Water Code § 1228.3(d)*]. The protest must clearly set forth the protester's objections to the registered use based on interference with prior rights [*Water Code § 1228.3(d)*]. The protester must serve the protest on the registrant by mailing a duplicate copy of the protest to the registrant, or through service undertaken in another manner determined to be adequate by the Board [*Water Code § 1228.3(d)*]. Review of a protested registration must be conducted in accordance with the procedures set forth in *Water Code §§ 1345-1348* [*Water Code § 1228.3(d)*].

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§ 575.80 Prescriptive Rights

An appropriative taking of water that is not surplus is wrongful and may ripen into a prescriptive right when the use is (1) actual, (2) open and notorious, (3) hostile and adverse to the original owners, (4) continuous and uninterrupted for the statutory period of five years, and (5) under claim of right. The permanent right acquired by prescription is commensurate to the rights enjoyed during the full prescriptive period [*see Civ. Code § 1007*; *Code Civ. Proc. § 321*; *California Water Service Co. v. Edward Sidebotham & Son (1964) 224 Cal. App. 2d 715, 726-727, 37 Cal. Rptr. 1]* . The person with the riparian or appropriative right to use the water must have knowledge of the diversion and must be made a party to the action to perfect a prescriptive right [*People v. Shirokow (1980) 26 Cal. 3d 301, 312, 162 Cal. Rptr. 30, 605 P.2d 859]* .

Neither public rights and properties that the state possesses and administers, nor the public trust as to their administration and exercise, can be destroyed by adverse possession. No one can acquire a prescriptive title to the public rights in the waters of the state that the State Board is charged to administer [*People v. Shirokow (1980) 26 Cal. 3d 301, 311, 162 Cal. Rptr. 30, 605 P.2d 859]* .

Moreover, because *Water Code § 1225* provides that no right to appropriate or use water subject to appropriation can be acquired except by compliance with *Water Code § 1000 et seq.*, there is some controversy over whether prescription is still a valid means of acquiring any water right [*People v. Shirokow (1980) 26 Cal. 3d 301, 306-307, 162 Cal. Rptr. 30, 605 P.2d 859]* .

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§ 575.81 Underground Basin Waters

[1] Right to Use Water

Rights to water in an underground basin are classified as overlying, appropriative, and prescriptive. The right of the owner of land overlying an underground basin is analogous to that of the riparian owner in a surface stream. The owner has the right to take water from the ground underneath for use on land within the basin or watershed; it is based on the ownership of the land and is appurtenant thereto [*California Water Service Co. v. Edward Sidebotham & Son (1964) 224 Cal. App. 2d 715, 725, 37 Cal. Rptr. 1]* .

Any water not needed for the reasonable beneficial use of those having prior rights to underground waters is excess or surplus water and may properly be appropriated on privately owned land for non-overlying use, such as devotion to public use or exportation beyond the basin or watershed. When there is a surplus, the holder of prior rights may not enjoin its appropriation [*California Water Service Co. v. Edward Sidebotham & Son (1964) 224 Cal. App. 2d 715, 725, 37 Cal. Rptr. 1]* . Moreover, ground water is exempted from the extensive appropriation procedural regulations applicable to surface water set forth in *Water Code § 1200 et seq.* [*Wright v. Goleta Water Dist. (1985) 174 Cal. App. 3d 74, 87, 219 Cal. Rptr. 740* ; *see Water Code § 1200*].

Appropriation of water that is not excess or surplus is an adverse taking of water and may ripen into a prescriptive right when the use is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for five years, and under claim of right. Adverse use begins with the first overdraft, or taking of nonsurplus water. Appropriative and prescriptive rights to groundwater are subject to loss by an adverse user; overlying rights are not [*California Water Service Co. v. Edward Sidebotham & Son (1964) 224 Cal. App. 2d 715, 726, 37 Cal. Rptr. 1]* .

[2] Priority of Competing Uses

The rights of overlying owners are correlative; they are mutual and reciprocal. When there is a sufficient quantity of water, each overlying owner has the right to take all that he or she can beneficially use on his or her land. If there is insufficient water for all the beneficial uses, each overlying owner is limited to his or her proportionate fair share of the

total amount available based on reasonable need [*City of Pasadena v. City of Alhambra (1949) 33 Cal. 2d 908, 926, 207 P.2d 17 , cert. denied, 339 U.S. 937, 70 S. Ct. 671, 94 L. Ed. 1354]* . The proportionate share of each owner is predicated not on past use over a specified period of time, nor on the time of commencement of pumping, but solely on the owner's current reasonable and beneficial need for water [*Tehachapi-Cummings County Water Dist. v. Armstrong (1975) 49 Cal. App. 3d 992, 1001, 122 Cal. Rptr. 918]* .

When there is insufficient water for the current reasonable needs of all the overlying owners, among the many factors to be considered in determining each owner's proportionate share are (1) the amount of water available, (2) the extent of ownership in the basin, and (3) the nature of the projected use. If the water is used for agriculture, the area sought to be irrigated, the character of the soil, the practicability of irrigation, and the comparative profit of the different crops are also considered [*Tehachapi-Cummings County Water Dist. v. Armstrong (1975) 49 Cal. App. 3d 992, 1001-1002, 122 Cal. Rptr. 918]* .

In the event of a shortage, an appropriator must yield to overlying owners who are making proper use of the water because the appropriator's right is limited to using the surplus amount of the water, unless the appropriator has gained prescriptive rights through the taking of nonsurplus water [*California Water Service Co. v. Edward Sidebotham & Son (1964) 224 Cal. App. 2d 715, 725, 37 Cal. Rptr. 1]* . As between appropriators, the one first in time is the first in right, and a prior appropriator is entitled to all the water reasonably needed, up to the amount taken in the past, before a subsequent appropriator may take any [*Civ. Code § 1414*; *California Water Service Co. v. Edward Sidebotham & Son (1964) 224 Cal. App. 2d 715, 725-726, 37 Cal. Rptr. 1]* .

[3] Overdraft

An overdraft results when more water is extracted from the basin than is naturally replenished [*Tehachapi-Cummings County Water Dist. v. Armstrong (1975) 49 Cal. App. 3d 992, 996 n.2, 122 Cal. Rptr. 918]* . Each taking of water in excess of the safe yield is wrongful because the overdraft, from its very beginning, operates progressively to reduce the total available supply [*California Water Service Co. v. Edward Sidebotham & Son (1964) 224 Cal. App. 2d 715, 726, 37 Cal. Rptr. 1]* . When the supply of water is limited, as it is in an overdrawn basin, the public interest requires that there be the greatest number of beneficial users that the supply can yield. The court must devise a physical solution, such as a proportional reduction in the amount available to each user, or the total elimination of one use, if possible [*California Water Service Co. v. Edward Sidebotham & Son (1964) 224 Cal. App. 2d 715, 731-732, 37 Cal. Rptr. 1]* .

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§ 575.82 Fees

Each person or entity who holds a permit or license to appropriate water, and each lessor of water [*see Water Code § 1020 et seq.* (water leases)], is required to pay an annual fee according to a fee schedule established by the State Water Resources Control Board [*Water Code §§ 1525(a), 1530*]. An annual fee is also imposed on each person or entity filing a "Notice of Extraction and Diversion of Water" in the County of Riverside, San Bernardino, Los Angeles, or Ventura [*Water Code § 1529*; *see Water Code § 4999 et seq.*].

In addition, each person or entity who files any of the following must pay a fee according to a fee schedule established by the State Board [*Water Code § 1525(b)*]:

- An application for a permit to appropriate water [*see § 575.350*].
- A registration of appropriation for a small domestic use or livestock stockpond.
- A petition for an extension of time within which to begin construction, to complete construction, or to apply the water to full beneficial use under a permit [*see § 575.359*].
- A petition to change the point of diversion, place of use, or purpose of use, under a permit or license [*see § 575.356*].
- A petition to change the conditions of a permit or license, requested by the permittee or licensee, that is not otherwise subject to the third and fourth bulleted items above.
- A petition to change the point of discharge, place of use, or purpose of use, of treated wastewater, under *Water Code § 1211*.
- An application for approval of a water lease agreement.

- A request for release from priority pursuant to *Water Code § 10504*.
- An application for an assignment of a state-filed application pursuant to *Water Code § 10504*.

For these listed filings, the schedule may provide for either a single filing fee or for an initial filing fee followed by an annual fee [*Water Code § 1525(d)(2)*].

Fees are also imposed on each person or entity who files a proof of claim of water right under *Water Code § 2575 et seq.* [*Water Code § 1528*; *see § 575.381* (proof of claim)].

If the State Board determines that the person or entity on whom a fee or expense is imposed will not pay the fee or expense based on the fact that the fee payer has sovereign immunity [*see Water Code § 1560*], the Board may allocate the fee or expense, or an appropriate portion of the fee or expense, to persons or entities who have contracts for the delivery of water from the person or entity on whom the fee or expense was initially imposed. The allocation of the fee or expense to these contractors does not affect ownership of any permit, license, or other water right, and does not vest any equitable title in the contractors [*Water Code § 1540*].

If a fee established under *Water Code §§ 1525(b)*, *1528*, or *13160.1* is not paid when due, the Board may cancel the application, registration, petition, request, or claim, or may refer the matter to the State Board of Equalization for collection of the unpaid fee [*Water Code § 1535(b)*]. In any proceeding pursuant to *Water Code § 1052* in which it is determined that there has been a violation of the prohibition against the unauthorized diversion or use of water, the Board or court may impose an additional liability in the amount of any annual fees that would have been required if the diversion or use had been authorized by a permit or license to appropriate water [*Water Code § 1538*]. If a permit or license holder fails to pay an annual fee for a period of five years, the Board may revoke the permit or license [*Water Code § 1539*].

A determination by the Board that a person or entity is required to pay a fee, or a Board determination regarding the amount of a fee, is subject to review under *Water Code § 1120 et seq.* and is not subject to a petition for redetermination by the State Board of Equalization [*Water Code § 1537(b)(2)*].

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[Reserved]

§§ 575.83[Reserved]

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51-575 California Forms of Pleading and Practice--Annotated § 575.100

§ 575.100 Governing Law

Enforcement of appropriative water rights is governed by *Water Code §§ 1825-1851*. Trespass, in the form of unauthorized diversion of water, is governed by *Water Code §§ 1052-1055.3*.

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§ 575.101 Enforcement of Appropriative Rights

[1] Cease and Desist Order--Violation of Right

If a violation of a term or condition of a permit, license, certification, or registration occurs or threatens to occur, the State Water Resources Control Board (State Board or Board) must give notice by personal notice or certified mail to the person allegedly engaged in the violation, informing the person that he or she may request a hearing not later than 20 days from the date on which the notice is received [*Water Code § 1834(a)*]. The notice must contain a statement of facts tending to show the proscribed action and notification that the State Board may adopt a proposed preliminary cease and desist order without a hearing unless the alleged violator makes a written request for a hearing within 20 days [*Water Code § 1834(a), (b)*]. "Person" is not restricted to natural persons and includes public entities such as a city, a county, a district, and the state [Water Code § 1835]. A private party may file a complaint with the Board for harm caused by an alleged violation [*see § 575.361*].

[2] Issuance of Cease and Desist Orders

If the State Board determines that a person is violating any term or condition of a permit, license, certification, or registration for the appropriation of water, or a prior decision or order of the Board in which the person or a predecessor in interest to that person was named as a party directly affected by the decision or order, the Board may issue an order to cease and desist from that violation [*Water Code § 1831(a), (d)*]. The cease and desist order will require either immediate compliance or compliance in accordance with a time schedule set by the Board [*Water Code § 1831(a), (b), (d)(2)*].

Cease and desist orders are effective on issuance. The Board may, after notice and opportunity for hearing, on its own motion or on application from an aggrieved person, modify, revoke, or stay in whole or in part the cease and desist order [*Water Code § 1832*].

The Board is not precluded from taking any action authorized by *Water Code § 275* (board initiated action to prevent waste) or *Water Code § 1052* (board initiated action to prevent trespass), and should take vigorous action to enforce the

terms and conditions of appropriation permits and licenses to prevent the unlawful diversion of water [*Water Code §§ 1825, 1836*].

[3] Judicial Review of Cease and Desist Order

Any aggrieved party may file a petition for a writ of mandate for review of a cease and desist order [*Water Code § 1126*; for discussion and forms relating to mandate proceedings, see Ch. 358, *Mandate and Prohibition*]. For a form of petition under *Water Code § 1126*, see *§ 575.365*.

Code Civ. Proc. § 1094.5 governs the mandate proceedings [*Water Code § 1126(c)*]. The petition for writ of mandate must be filed not later than 30 days from the date of final action by the State Board [*Water Code § 1126(b)*]. The court is required to exercise its independent judgment on the evidence in any case involving the judicial review of a cease and desist order [*Water Code § 1126(c)*].

[4] Enforcement of Cease and Desist Order

If any person fails to comply with any valid, final cease and desist order issued by the State Board, the Attorney General, at the Board's request, will petition the court for the issuance of appropriate prohibitory or mandatory injunctive relief [*Water Code § 1845(a)*]. The Attorney General will also petition for fines of up to $1,000 for each day of the violation [*Water Code § 1845(b)*]. The amount of the fine will be based on a consideration of all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and any corrective action taken by the violator [*Water Code § 1845(c)*].

Civil liability may also be imposed administratively by the Board [*Water Code §§ 1055, 1845(b)(3)*]. Under this procedure, the executive director of the Board issues a complaint [*Water Code § 1055(a)*], which is served by personal notice or certified mail on the alleged violator [*Water Code § 1055(b)*]. The violator may request a hearing within 20 days after service. The hearing is before a member of the Board [*Water Code § 1055(b)*], who reports a proposed decision and order to the Board and supplies a copy to the party served [*Water Code § 1055(c)*]. The Board independently reviews the record and may take additional evidence that is necessary and that could not reasonably have been offered before the hearing officer. The Board may then adopt, with or without revision, the proposed decision and order [*Water Code § 1055(c)*].

No person or entity may be subject to both civil liability imposed administratively under *Water Code § 1055* and civil liability imposed by the court under *Water Code § 1845* for the same act or failure to act [*Water Code § 1055.2*].

[5] Effect on Private Litigants

Any factual or legal determinations made in accordance with a cease and desist order are conclusive and preclude any party to the order from raising those issues in any subsequent administrative proceeding [*Water Code § 1850*]. The provisions of *Water Code §§ 1825-1851* governing enforcement of water rights do not limit the right of any person to bring an action for equitable or legal relief from harm caused by an unauthorized diversion or a violation of a term or condition of a permit or license. That person will not be required to exhaust any administrative remedy provided by *Water Code §§ 1825-1851* before bringing that action [*Water Code § 1851*].

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§ 575.102 Unauthorized Use Constitutes Trespass

[1] Civil Liability

The unauthorized diversion or use of water subject to *Water Code § 1000 et seq.* is a trespass [*Water Code § 1052(a)*]. Any person or entity committing a *Water Code § 1052* trespass may be liable for a sum not to exceed $500 for each day in which the trespass occurs. On request of the State Board, the Attorney General will petition the superior court to impose and recover that sum. In determining the appropriate amount, the court will take into consideration all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and the corrective action, if any, taken by the violator [*Water Code § 1052(d)*]. Similarly, on the Board's request, the Attorney General will institute an appropriate action for injunctive relief in the form of a temporary restraining order, preliminary injunction, or permanent injunction [*Water Code § 1052(c)* (action is to be instituted in superior court for county where diversion or use is threatened, is occurring, or has occurred)]. These remedies are cumulative, not alternative [*Water Code § 1052(f)*].

[2] Administrative Liability

The State Board may administratively impose civil liability in accordance with *Water Code § 1055* for a *Water Code § 1052* trespass in an amount not exceeding $500 for each day in which the trespass occurs [*Water Code § 1052(b)*]. Under this procedure, the executive director of the Board issues a complaint [*Water Code § 1055(a)*], which is served by personal notice or certified mail on the alleged trespasser [*Water Code § 1055(b)*]. The trespasser may request a hearing within 20 days after service. The hearing is before a member of the Board [*Water Code § 1055(b)*], who reports a proposed decision and order to the Board and supplies a copy to the party served [*Water Code § 1055(c)*]. The Board independently reviews the record and may take additional evidence that is necessary and that could not reasonably have been offered before the hearing officer. The Board may then adopt, with or without revision, the proposed decision and order [*Water Code § 1055(c)*]. The same procedure may be followed to impose civil liability on a person or entity for any willful misstatement in connection with the preparation of a statement of water diversion and use [*Water Code §§ 1055(a), 5107*].

In determining the amount of civil liability, the Board will consider all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and the corrective action, if any, taken by the violator [*Water Code § 1055.3*].

Any party aggrieved by a final order issued by the Board under *Water Code § 1055* may obtain review of the Board's order in superior court by filing a petition for writ of mandate within 30 days following the order's issuance. If no aggrieved party petitions for writ of mandate within the time provided, the Board's order is not subject to review by any court [*Water Code § 1055.1* (repealed as of January 1, 1997, but applicable to proceedings pending on December 31, 1996); *Water Code § 1126* (applicable thereafter)]. For discussion and forms relating to review by writ of mandate of an adminstrative hearing under *Code Civ. Proc. § 1094.5*, see Ch. 474C, *Procedures in Reviewing Agency Decisions* .

After the time for review has expired, the Board may apply to the clerk of the appropriate court for a judgment to collect the administrative civil liability imposed in accordance with *Water Code § 1055*. The application constitutes a sufficient showing to warrant issuance of the judgment, and the court clerk must enter the judgment immediately in conformity with the application. The judgment entered by the clerk has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action, and may be enforced in the same manner as any other judgment of the court in which it is entered [*Water Code § 1055.4*].

[3] Cease and Desist Orders

If the State Board determines that any person is violating or threatening to violate the prohibition against the unauthorized diversion of water set forth in *Water Code § 1052* or a prior decision or order of the Board in which the person or a predecessor in interest to that person was named as a party directly affected by the decision or order, the Board may issue an order to cease and desist from that violation [*Water Code § 1831(a), (d)*]. The cease and desist order will require either immediate compliance or compliance in accordance with a time schedule set by the Board [*Water Code § 1831(a), (b), (d)(2)*]. For a discussion of the issuance of cease and desist orders by the Board, see *§ 575.101[2]*.

[4] Civil and Administrative Liability Are Distinct

No person or entity will be subject to both civil liability imposed under *Water Code § 1055* and civil liability imposed by the superior court under *Water Code § 1052(d)* for the same act or failure to act [*Water Code § 1055.2*].

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[Reserved]

§§ 575.103[Reserved]

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51-575 California Forms of Pleading and Practice--Annotated § 575.120

§ 575.120 Governing Law

Adjudication of water rights by the State Water Resources Control Board (State Board or Board) is governed by *Water Code §§ 2500-2866*. The procedure by which a court may refer to the State Board an action in which a determination of water rights is sought is governed by *Water Code §§ 2000-2048*.

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[Reserved]

§§ 575.121[Reserved]

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51-575 California Forms of Pleading and Practice--Annotated § 575.140

§ 575.140 Statutory Adjudication of Water Rights in Stream System

Water Code §§ 2500-2866 establish a statutory procedure for the adjudication of water rights under which the Board may determine all rights to water of a stream system, whether based on appropriation, riparian right, or other basis of right [*Water Code § 2501*]. The State Board's determination is filed in court, which after a hearing will enter a decree determining the rights of all persons involved in the proceeding [*Water Code §§ 2750, 2768*]. "Stream system" includes stream, lake, or other body of water, and tributaries and contributory sources, but does not include an underground water supply other than a subterranean stream flowing through known and definite channels [*Water Code § 2500*].

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51-575 California Forms of Pleading and Practice--Annotated § 575.141

§ 575.141 Petition to Board

On petition by one or more claimants to water of any stream system, requesting the determination of the rights of the claimants to the water of that stream system, the State Board will investigate the relevant facts and conditions. If it finds that the public interest and necessity will be served by a determination of the water rights involved, the Board will enter an order granting the petition and begin determination procedures [*Water Code § 2525*; for a form of petition, *see § 575.380*].

The Board also has authority to initiate its own investigation of water waste and to take appropriate remedial action. Thus, the Board may begin or continue an investigation of water usage, even if parties who were contesting water rights have settled the dispute [*see Imperial Irrigation Dist. v. State Water Resources Control Bd. (1990) 225 Cal. App. 3d 548, 568-569, 275 Cal. Rptr. 250]* .

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§ 575.142 Notice of Proceedings

After granting the petition the State Board will issue a notice stating that the proceedings are pending, that all claimants to rights to the use of water of that stream system must inform the Board within 60 days from the date of the notice of their intention to file proof of claim, the date by which that written notice must be received, and the fact that all claimants will be required to make proof of their claims after the conclusion of the Board's investigation [*Water Code § 2526* (although the notice is not required to so state, an intent to file proof of claim may also be filed after the Board's investigation under *Water Code § 2555*)]. The notice must be published in generally circulating newspapers in the counties in which any part of the stream system is situated and must be mailed to riparian owners and appropriators of waters from the stream system [*Water Code § 2527*].

All interested claimants who received notice of the proceedings must notify the Board of their intention to file proof of claim and to appear and submit proof of their respective claims at the time and in the manner required by *Water Code §§ 2500-2866* [*Water Code § 2528*]. The proof of claim must be filed with the Board on a form provided by the Board [*Water Code § 2575*; *see § 575.381*].

Within 60 days of the date by which claimants were required to provide notice of their intent to file proof of claim, the Board must file for record in the county recorder's office of each county in which any part of the stream system is situated a notice setting forth facts enumerated in *Water Code § 2529(a)* [*Water Code § 2529(a)*]. It must identify the current owners of each parcel that appears to be riparian to the stream system or to which water is diverted from the stream, and must be recorded in a manner so that anyone researching the title of a parcel will find the notice [*Water Code § 2529(b)*; *see Water Code § 2529(c)* (supplementary notice if and when additional parcels are identified)].

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§ 575.143 Minor Quantity Exception

If the State Board finds that the use by any person under claim of right of only minor quantities of water would have no material effect on the rights of other claimants, it may exempt that person from being subject to statutory adjudicatory proceedings with respect to those minor quantities of water. However, any exempted person may elect to continue to be subject to the proceedings by giving prompt notice to the Board [*Water Code § 2502*]. "Minor quantities of water" means the diversion or extraction of water in an amount not exceeding 10 acre-feet per year [*Water Code § 2503*].

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§ 575.144 State Board Investigation

The State Board will investigate the diversion of water, the beneficial uses being made of the water, the water supply available for those uses, and any other essential data [*Water Code § 2550*]. The Board will conduct a detailed field investigation of the water uses of all water users known to the Board, giving 30 days written notice to those users who gave notice of intent to file proof of claim. The Board will define the place and purpose of use, determine the locations and capacity of each person's diversion works and conduits conveying water from the stream system, and the amount of water diverted and reasonably required to satisfy the uses being made [*Water Code §§ 2551, 2554*]. Each claimant must be present at some time during the field investigation in person or by an agent authorized to sign the proof of claim, and must cooperate in the investigation and provide necessary information to the Board [*Water Code §§ 2551, 2552*]. At the conclusion of that investigation the claimant will receive a copy of the factual determinations of the Board [*Water Code § 2553*].

Water users who were not present during the field investigation and those who did not file notice of intent to file proof of claim must, insofar as they are known, be supplied with a copy of the factual determinations of the representative of the Board and a blank proof of claim form. They may file proof of claim after completion of the investigation of their project by the Board's representatives on the same basis as persons who were present and who filed timely notice of intent [*Water Code § 2555*].

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§ 575.145 State Board Report

After all the field investigations are complete and the time for filing proofs of claims has expired, the State Board must prepare a report describing the water supply and abstracting the claim of water right of each claimant [*Water Code § 2600*]. The report must note separately any material difference between the claims and the Board's factual determinations and must include a map showing the use of the stream system, as well as any other necessary information [*Water Code §§ 2601*, *2602*]. The report must include a preliminary order of determination establishing the several rights to the water of the stream system, giving appropriate consideration to claims at variance with the Board's measurements and determinations [*Water Code § 2603*].

A copy of the report will be sent by registered mail to each claimant and to each person not filing a claim who appears in the report as a water user. A notice setting forth the objection procedure will accompany the report [*Water Code § 2604*].

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§ 575.146 Objection Procedure

The objection procedure notice accompanying the State Board's report must set a deadline of at least 60 days by which objections to the report or preliminary order of determination must be filed [*Water Code § 2604*]. It will also set a reasonably convenient time and place for inspection of the filed proofs of claim, Board measurements, and other data collected during the investigation. The period for inspection by all interested persons will last at least five days and will end at least 30 days before the deadline for filing objections [*Water Code §§ 2625-2627*].

Objections to the report and preliminary order of determination must be written and must state with reasonable certainty the grounds of the objection [*Water Code § 2628*; *see § 575.382*].

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§ 575.147 Hearing on Objections

The State Board will mail copies of the objections to the claimant or water user against whom the objections are directed and will notify by registered mail the persons whose rights are significantly affected to appear before it at a specified time and place when the objections will be heard. The notice will be sent within 10 days after the filing deadline and will specify a hearing date of at least 15 days later [*Water Code § 2650*].

The Board may adjourn the hearing of objections on reasonable notice to all parties in interest [*Water Code § 2651*]. At the hearing each party must pay for the direct examination of his or her own witness and the cross examination of the opponent's witness. The parties will share equally for that part of the examination directed by the Board's representative [*Water Code § 2652*]. The parties must also provide one copy of the transcript of hearing testimony to the Board at their own expense [*Water Code § 2653*].

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51-575 California Forms of Pleading and Practice--Annotated § 575.148

§ 575.148 Order of Determination

The State Board will adopt an order determining and establishing the several rights to the water of the stream system after the hearing or after the expiration of the filing time if no objections are filed [*Water Code § 2700*]. In its order, the Board may establish standards for the water's reasonable use. The Board has authority to set controls and conditions on water use, including standards of quality and prevention of waste. The Board may order a water user to develop and present a water conservation plan to remedy misuse of water, and may retain jurisdiction to review the adequacy of the water user's plans [*Imperial Irrigation Dist. v. State Wat. Resources Control Bd. (1990) 225 Cal. App. 3d 548, 570, 275 Cal. Rptr. 250]* . Notice of its adoption and a copy of the order of determination will be sent by registered mail to each claimant and each person whose rights are determined in the order [*Water Code § 2701*].

The Board may order a reconsideration of all or part of the order of determination on its own motion or on petition by any party affected by the order. The Board's authority to order reconsideration on its own motion expires 30 days after it adopts the order. A petition to reconsider must be filed within 30 days after the *Water Code § 2701* notice of it is sent. The Board must rule on a reconsideration petition within 90 days after the notice required by *Water Code § 2701* is sent [*Water Code § 2702(a)*].

The order of determination may be reconsidered by the Board on all the pertinent parts of the record and arguments, or a further hearing may be held, on notice to all affected parties, to receive additional evidence that the Board may, for cause, allow. The order on reconsideration has the same effect as an original order [*Water Code § 2702(b)*].

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§ 575.149 Filing Order in Court

[1] Notice of Hearing

A copy of the order, the original evidence, and the transcript of testimony certified by the State Board will be filed with the superior court of the county in which the stream system is situated [*Water Code § 2750*]. The court will issue an order setting the time for hearing and certified copies of the order will be sent by the Board to each known party in interest [*Water Code §§ 2751-2753*]. The Board will also publish the order in appropriate newspapers [*Water Code §§ 2754, 2755*].

Whenever the court finds the State is a necessary party to the action, it will make an order to that effect and copies of all pleadings and proceedings on file will be served on the Attorney General [*Water Code § 2765*].

[2] Exceptions to Order

Each party in interest who is dissatisfied with the order of determination may file with the court a notice of exceptions to the order of determination. The notice of exceptions must be filed and copies sent by registered mail to the State Board and to each person who was an adverse party to any issue raised by the exception at least 10 days before the hearing [*Water Code §§ 2757-2759*; for form of objection to determination, *see § 575.382*].

The hearing pleadings will consist of the order of determination, the statements or claims of claimants, and the exceptions made to the order of determination, although the court may allow additional pleadings as may be necessary to a final determination of the proceeding [*Water Code §§ 2760, 2761*]. If no exceptions are filed, the court will enter a decree affirming the order of determination [*Water Code § 2762*].

All proceedings on the hearing will accord as nearly as possible with the rules governing civil actions [*Water Code § 2764*]. All parties in interest who filed notices of exceptions will appear at the hearing, which will continue until all exceptions are settled [*Water Code § 2763*].

[3] Powers of Court

The court (1) may employ qualified persons to conduct additional investigations and to testify, (2) may take additional evidence on any issue, (3) may refer the case for further evidence to be taken by the State Board, and (4) may require a further determination by the State Board [*Water Code §§ 2766, 2767*]. It may also assess and adjudge costs against any party [*Water Code § 2770*].

[4] Court Decree

After the hearing the court will enter a decree determining the rights of all persons involved in the proceedings [*Water Code § 2768*]. The decree will declare the priority, amount, season of use, purpose of use, point of diversion, and place of use as to the water right adjudged to each party. For water used for irrigation, the decree will also declare the specific tracts of land to which it is appurtenant, together with any other factor necessary to define the right [*Water Code § 2769*].

[5] Conclusiveness of Decree

The decree is conclusive as to the rights of all existing claimants on the stream system lawfully embraced in the determination [*Water Code § 2773*]. When a decree has been entered, any claimant who has failed to appear and submit proof of his or her claim is barred and estopped from subsequently asserting any rights theretofore acquired on the stream system embraced in the proceedings, and will be held to have forfeited all rights to water theretofore claimed by him or her on the stream system, other than as provided in the decree, unless entitled to relief under the laws of this state [*Water Code § 2774*].

Appeals from the decree may be taken by the State Board or by any party in interest in the same manner and with the same effect as in civil cases [*Water Code § 2771*; *see* Ch. 40, *Appeal: An Overview*].

A certified copy of the decree will be filed for record in the office of the county recorder of each county in which any part of the stream system is situated [*Water Code § 2772*].

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§ 575.150 Intervention

A claimant who had no actual knowledge or notice that the proceedings were pending prior to entry of the order of determination by the State Board may intervene in the proceedings. The intervention, in the form of filing an exception to the order and a proof of claim containing all the matters required of noticed claimants, must be made at least 10 days before the hearing or within any further time the court may allow [*Water Code § 2780*]. The intervening claimant must apply for a court order prescribing the notice requirements to the other claimants and contests by them [*Water Code § 2781*]. The court will hear and determine the exception and proof of intervenor and any contest as nearly as possible in accordance with the provisions of *Water Code §§ 2750-2774*, which govern the court proceeding [*Water Code § 2782*; for a form of exception and an order prescribing notice *see §§ 575.383* and *575.384*].

The court may refer the matter to the Board for further evidence, and may require a further determination by the Board, for which the Board is entitled to reimbursement for expenses [*Water Code § 2783*].

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§ 575.151 Incomplete Appropriations--General Proceedings

Any person claiming rights under an incomplete appropriation, when properly notified, must appear and submit a proof of claim or be held to be in default and to have abandoned or to have no right, title, or interest in or to the water of the stream system, other than as that person may be found to be entitled by the State Board [*Water Code § 2801*].

The order of determination will provide that within the time prescribed for completion of the appropriation, or within such further time as the court may allow, the claimant must submit to the court proof of completion and the amount of water actually applied to beneficial use [*Water Code § 2803*; for discussion of the appropriation procedure, *see § 575.50* et seq.].

The time for completion may be extended by the court on a motion made prior, but not more than 90 days prior, to the expiration of the previous time limit [*Water Code §§ 2807, 2808*]. The court may refer the matter of the motion to the Board for its recommendation [*Water Code § 2810*]. After receipt of the Board's recommendation or after 90 days, the court will either deny the motion or grant an extension of time in the amount for which there is good and sufficient cause [*Water Code § 2811*]. If the motion is denied, the applicant has 10 days to file notice of intention to offer proof of completion with the court [*Water Code §§ 2812, 2813*].

The court may hear and determine proof offered as to completion of that right [*Water Code § 2806*]. If submission of proof of completion is made after entry of the court decree, the court must enter a supplemental decree determining the right before it; if no proof is submitted, the court must enter a supplemental decree denying the right [*Water Code § 2815*].

Any person claiming a right under incomplete appropriation who fails to complete his or her appropriation within the allowable time limit is deemed to have abandoned his or her right of appropriation as far as it remains incomplete, and has no right, title, or interest in or to the water of the stream system as far as the appropriation has not been completed [*Water Code § 2816*].

Appeals from any action of the court may be taken by the Board or by any party in interest in the same manner and with the same effect as in civil cases [*Water Code § 2817*].

Water Code §§ 2801-2820 will not be construed to confer any rights of appropriation on parties who abandoned their appropriations or failed to use due diligence in the application of the water to a beneficial use and in the completion of their appropriations [*Water Code § 2818*].

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§ 575.152 Supplemental Decrees

[1] Incomplete Appropriation

Incomplete appropriations initiated by application under the provisions of the Water Commision Act or the Water Code will be included in the decree but will continue to be administered by the State Board as in other cases. On issuance of a license by the Board and completion of any court review sought pursuant to *Water Code § 1126* and on motion of the licensee or the Board, the court will enter a supplemental decree confirming the right in accordance with the license [*Water Code § 2819*].

[2] Revocation or Change in Use

Any change authorized by the State Board pursuant to *Water Code §§ 1700-1707* (change in use) will also be the subject of a supplemental decree [*Water Code § 2819*]. A supplemental decree denying a right will be entered after Board revocation of a permit or license relating to a right included in the decree. This will be done on completion of a requested court review of the Board's action under either *Water Code §§ 1410-1450* (permits) or *Water Code §§ 1675-1675.2* (licenses), on a motion by the Board or any interested party [*Water Code § 2820*].

On entry of a supplemental decree establishing or modifying a right, the Board must furnish a copy of the supplemental decree to each claimant who could be significantly affected [*Water Code § 2826*].

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§ 575.153 Expenses

All expenses incurred by the State Board in performing the duties required of it by *Water Code §§ 2500-2866* in excess of the amount received from claimants at the time of submission of proofs will be equitably apportioned against the parties to the proceeding [*Water Code §§ 2851, 2852*]. A procedure to object to the expense apportionment is available to claimants [*Water Code §§ 2853-2859*].

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§ 575.154 Modification of Court Decrees

In rendering its decree for the determination of rights to water, whether in suits referred to the State Board under the provisions of *Water Code §§ 2000-2048* or in adjudications under the provisions of *Water Code §§ 2500-2866*, the court may provide that the Board or any party affected by the decree may, at any time within three years, apply to the court for a modification of the decree in its determination of quantities of water, and after hearing the motion and any competent and admissible evidence offered, the court may modify the decree by increasing or decreasing the quantities of water allowed [*Water Code § 2900*].

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[Reserved]

§§ 575.155[Reserved]

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51-575 California Forms of Pleading and Practice--Annotated § 575.170

§ 575.170 Jurisdiction of Water Rights Controversies

State courts have concurrent jurisdiction with the California State Water Resources Control Board in water rights controversies. A party need not exhaust administrative remedies with the State Board before filing suit in court. The courts may refer water rights disputes to the Board as referee, but will continue to exercise their original concurrent jurisdiction [*National Audubon Society v. Superior Court (1983) 33 Cal. 3d 419, 426, 449-451, 189 Cal. Rptr. 346, 658 P.2d 709* ; *see Water Code §§ 2000, 2001, 2075*].

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§ 575.171 Judicial Determination of Water Rights

[1] Declaratory Relief

[a] Protection Against Appropriators

Owners of riparian and overlying water rights have the right to obtain a judgment declaring their water rights and protecting their prospective beneficial uses even without the presence of substantial damage to their rights [*Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist. (1935) 3 Cal. 2d 489, 529-530, 45 P.2d 972* ; *Tehachapi-Cummings County Water Dist. v. Armstrong (1975) 49 Cal. App. 3d 992, 998, 122 Cal. Rptr. 918]* . This protects not only the actual reasonable beneficial use, but also the prospective reasonable beneficial use. As to the prospective reasonable beneficial uses, the quantity of water required cannot be fixed in amount until the need arises. Therefore, as to those uses, the court should declare them paramount to any right of any would-be appropriator. By such a declaratory judgment, an owner's rights will be fully protected against any appropriative use ripening into a right by prescription, but, until the owner needs the water, an appropriator may use it [*Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist. (1935) 3 Cal. 2d 489, 525, 45 P.2d 972]* . Because water rights are a species of real property, the action may also be characterized as a quiet title action to adjudicate conflicting claims to water [*Tehachapi-Cummings County Water Dist., v. Armstrong (1975) 49 Cal. App. 3d 992, 999 n.5, 122 Cal. Rptr. 918]* . For discussion and forms relating to quiet title actions, see Ch. 482, *Quieting Title* .

[b] Between Owners of Same Type of Right

When there is insufficient water for the uses of all those claiming riparian or overlying water rights, the trial court must ascertain whether there is a physical solution to the problem that will avoid waste and that will not unreasonably or adversely affect the rights of the parties. The court should work out, if possible, a physical solution [*Rancho Santa Margarita v. Vail (1938) 11 Cal. 2d 501, 558-559, 81 P.2d 533* (riparian); *see California Water Service Co. v. Edward Sidebotham & Son (1964) 224 Cal. App. 2d 715, 724-725, 37 Cal. Rptr. 1* (overlying)]. When the conflict is between those claiming appropriative rights, the one first in time is the first in right, and a prior appropriator is entitled to a

judgment entitling him or her to all the water he or she needs, up to the amount that he or she has taken in the past, before a subsequent appropriator may take any [*see California Water Service Co. v. Edward Sidebotham & Son (1964) 224 Cal. App. 2d 715, 725-726, 37 Cal. Rptr. 1]* .

The court may refer the matter to the State Board for the Board to referee any issue or for the Board to investigate the facts [*Water Code §§ 2000, 2001*, discussed in *§ 575.173[1]*].

[2] Injunctive Relief

Before ruling on a request for injunctive relief, the trial court must determine whether the owners, considering all the needs of those in the particular water field, are putting the waters to any reasonable beneficial uses, giving consideration to all factors involved, including reasonable methods of use and reasonable methods of diversion. From a consideration of those uses, the court must then determine whether there is a surplus in the water field subject to appropriation. If an owner is putting the water to any reasonable beneficial use, it is necessary for the court to find expressly the quantity so required and so used. A finding that the owner is using a reasonable amount for that purpose is insufficient. The court must fix the quantity required by each owner for his or her actual reasonable beneficial use [*Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist. (1935) 3 Cal. 2d 489, 524-525, 45 P.2d 972* (involving riparian right)].

In ascertaining the rights between riparians, and in ascertaining whether a lower riparian has suffered damages by reason of an upper riparian's diversion sufficient to warrant an injunction, the court should consider all of the water available to either party from the river, and then determine, considering the entire supply, the needs of the parties, their methods of use and diversion, and other necessary factors, whether the lower riparian has in fact suffered damage [*Rancho Santa Margarita v. Vail (1938) 11 Cal. 2d 501, 558, 81 P.2d 533]* . So long as a riparian owner takes no more than his or her reasonable share and uses it on his or her riparian land, without unreasonable waste, other riparian owners below have no right to inquire, how, or by what means, or at what place, that share is diverted from the stream [*Turner v. The James Canal Co. (1909) 155 Cal. 82, 92, 99 P. 520]* .

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§ 575.172 Inadequacy of Private Suits

Although parties who use substantial amounts of water may be ordered joined in the action, it may be impracticable to attempt to include every person having some actual or potential right to the water and its sources of supply. Persons not made parties are not bound by judgment nor are they injured by any injunction [*City of Pasadena v. City of Alhambra (1949) 33 Cal. 2d 908, 919-920, 207 P.2d 17 , cert. denied, 339 U.S. 937, 70 S. Ct. 671, 94 L. Ed. 1354]* .

A private suit for determining title to water binds only those who are parties to the suit. It may later be nullified by the assertion of a legitimate claim by a water user on the stream who was not a party to the suit. Moreover, private suits are inadequate because shortages in supply, new appropriations, or new riparian uses have the potential for bringing all water users on the stream in conflict [*In re Waters of Long Valley Creek Stream System (1979) 25 Cal. 3d 339, 347, 356, 158 Cal. Rptr. 350, 599 P.2d 656* (court retention of jurisdiction over prospective riparian claims may offer partial relief)].

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§ 575.173 Court Action

[1] Referral to Board

In any suit brought in any court of competent jurisdiction for determination of rights to water, the court may order a reference to the State Board, as referee, of any or all issues involved in the suit [*Water Code § 2000*]. The court may also refer the suit to the Board for an investigation of and a report on any or all of the physical facts involved [*Water Code § 2001*]. For a form of an order of reference to the Board, see *§ 575.386*.

The Board may either base its report solely on its own investigation or may hold additional hearings and take testimony [*Water Code § 2010*]. The report of the Board as referee must set forth the findings of fact and conclusions of law required by the court's order of reference and may contain its opinion on the law and the facts [*Water Code §§ 2011, 2012*].

Before filing its report the Board must announce it in the form of a draft [*Water Code § 2013*]. Notice and a copy of the draft must be mailed by the Board to the parties [*Water Code § 2014*].

[2] Objections to Report

Any party may file objections to the draft with the State Board within 30 days after the date the draft was mailed [*Water Code § 2015*]. Before filing its report as referee with the court, the Board will consider the objections and may hold a hearing on them [*Water Code § 2016*].

The report of the Board as referee is subject to review by the court on exceptions to it filed with the court clerk within 30 days after mailing notice of the filing of the report [*Water Code § 2017*]. The court will not consider an exception to the report unless that issue was presented as an objection to the Board, although this rule may be changed for good cause or in the court's discretion [*Water Code § 2018*].

The Board's report is prima facie evidence of the physical facts, but the court will hear any evidence offered by any party to rebut the report or the prima facie evidence [*Water Code § 2019*].

[3] Expenses

The State Board is not entitled to any fee for its services, but will be paid or reimbursed for its total expenses [*Water Code § 2040*]. The total expense will be equitably apportioned by the Board against the parties to the suit [*Water Code § 2043*]. If the Board lacks the funds to advance the expense of a reference, or if it feels that the payment of the expense of any reference is not reasonably certain, it must refuse to undertake a reference until adequate provision is made by the parties and approved by the court for the payment of expenses [*Water Code § 2041*]. While the reference is pending, the Board may move the court for an order for interim or partial payments. The order may only be granted after a hearing with at least 10 days notice to the parties [*Water Code § 2042*].

On written application by any aggrieved party within 30 days after the statement of final expense and its apportionment has been mailed to the parties, the court will set a hearing for the determination of any objections to the expenses or the apportionment. The court clerk is required to give at least 10 days notice of the hearing by mail to all the parties [*Water Code § 2045*]. Failure to object is deemed a waiver, and the court will enter a judgment against the parties and in favor of the Board ex parte if no objections are filed [*Water Code §§ 2046, 2047*]. If there is a hearing on any objection, the court will apportion the expenses equitably [*Water Code § 2048*].

[4] Federal Court Cases

The State Board may accept a reference as master or referee from a federal court if the case involves water rights within, or partially within, California [*Water Code § 2075*]. In so acting, the Board will proceed according to the rules of practice and procedure of the court or as otherwise directed by the court [*Water Code § 2076*].

[5] Reservation of Jurisdiction

The trial court may reserve jurisdiction over the parties to settle future disputes concerning their rights in the water [*Tehachapi-Cummings County Water Dist. v. Armstrong (1975) 49 Cal. App. 3d 992, 1002-1003, 122 Cal. Rptr. 918* (court may also appoint watermaster to monitor amount of future pumping from basin)]. Retention of jurisdiction is desirable so that when an owner claims the need for water, the prospective right to which was awarded under a declaratory decree, the court may determine whether the proposed new use, under all the circumstances, is a reasonably beneficial use and, if so, the quantity required [*Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist. (1935) 3 Cal. 2d 489, 525, 45 P.2d 972]* .

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[Reserved]

§§ 575.174[Reserved]

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§ 575.190 Governing Law

Private agreements to supply water are contracts and are controlled by contract law [*see, e.g.,* Riverside Water Co. v. Jurupa Ditch Co. (1960) 187 Cal. App. 2d 538, 542, *187 Cal. App. 2d 538, 9 Cal. Rptr. 742]* . Thus, the regular rules of contract interpretation will be applied to actions on contracts for the use of water [*see Acadia, California, Ltd. v. Herbert (1960) 54 Cal. 2d 328, 334-335, 5 Cal. Rptr. 686, 353 P.2d 294* ; *see also* Ch. 140, *Contracts*]. If a water servicer has made a dedication to public use, the consumer has certain vested rights and may seek declaratory relief for a continuation of service [*see, e.g., Vila v. Tahoe Southside Water Utility (1965) 233 Cal. App. 2d 469, 479-480, 43 Cal. Rptr. 654]* .

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§ 575.191 Essential Elements of Water Contract

[1] General Contract Principles

It is essential to the existence of a water contract between private parties that there be (1) parties capable of contracting, (2) consent by the parties, (3) a lawful object, and (4) a sufficient cause or consideration [*Civ. Code § 1550*; *see Marshall & Co. v. Weisel (1966) 242 Cal. App. 2d 191, 196, 51 Cal. Rptr. 183]* . When there is no agreement on the part of the user to buy the water offered for sale, a water contract is lacking in mutuality. Similarly, when there is no time specified to which the stated water rate applies, a water use contract is void due to uncertainty [*Schimmel v. Martin (1923) 190 Cal. 429, 431, 213 P. 33]* .

[2] Characterization of Water as Personal or Real Property

Water may be characterized as real or personal property for purposes of its sale. Water, in its natural state, whether in streams, lakes, or ponds, or in percolation through the soil, is part of the land. Water becomes personal property only when severed from the realty [*Copeland v. Fairview Land Etc. Co. (1913) 165 Cal. 148, 154, 131 P. 119]* .

When water is sold for domestic use and delivered by means of pipes to the premises, the pipes themselves are fixtures and part of the realty. Severance occurs and water becomes personal property when it is taken from the pipes by the consumer [*Copeland v. Fairview Land Etc. Co. (1913) 165 Cal. 148, 154, 131 P. 119]* . In comparison, irrigation water, even though delivered in pipes, permeates the soil and remains a part of the realty, so that no severance occurs and the water remains real property [*Copeland v. Fairview Land Etc. Co. (1913) 165 Cal. 148, 154, 131 P. 119]* .

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§ 575.192 Remedies Available for Breach

Breach of a water service contract may merit damages, declaratory relief, and injunctive relief [*see Acadia, California, Ltd. v. Herbert (1960) 54 Cal. 2d 328, 337, 5 Cal. Rptr. 686, 353 P.2d 294]* . An act which breaches a water service agreement may be actionable either as a breach of contract or as a tort. An action in tort may be the preferable remedy for a disruption of water service, because punitive damages and damages for mental distress may be available [*Acadia, California, Ltd. v. Herbert (1960) 54 Cal. 2d 328, 336-338, 5 Cal. Rptr. 686, 353 P.2d 294* ; *see* Ch. 362, *Mental Suffering and Emotional Distress*].

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§ 575.193 Damages

[1] Measure of Damages Varies

If there is a permanent failure of a contract to supply water which affects an easement in the water as a perpetual and inseparable part of the real property, the measure of damages is similar to that in eminent domain proceedings and is the difference between the market value of the land with and without the water [*Crane v. East Side Canal etc. Co. (1935) 6 Cal. App. 2d 361, 370-371, 44 P.2d 455]* .

When the failure to furnish water pursuant to water supply contract is only for a single season or a specified limited period of time, the measure of damages is the difference in the rental value of the land with and without the water [*see Crane v. East Side Canal etc. Co. (1935) 6 Cal. App. 2d 361, 370, 44 P.2d 455]* .

When a land lease agreement that includes irrigation rights is breached by denying access to irrigation water, the measure of damages is the difference between the rental value of the land with and without water for irrigation [*Pallett v. Murphy (1900) 131 Cal. 192, 197-198, 63 P. 366* ; for discussion and forms involving breach of covenants, see Ch. 332, *Landlord and Tenant: The Tenancy*].

If a contract for the sale of water as personal property is breached, the measure of damages is the amount that will compensate the party aggrieved for all the damage proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom [*Civ. Code § 3301*; for discussion and forms relating to contract damages, see Ch. 177, *Damages*]. The party aggrieved is required to mitigate damages [*see Schultz v. Lakeport (1936) 5 Cal. 2d 377, 383-385, 54 P.2d 1110, 55 P.2d 485]* . Moreover, if a water company's failure to supply water is a failure to comply with the applicable municipal regulations, the party aggrieved may recover from the water company twice the amount of damages sustained by reason of that failure [*Pub. Util. Code § 8203*].

[2] Limitation of Damages

A water company is not liable for damages resulting from a failure to supply water for a particular use in the absence of a specific undertaking to supply water for that use [*Gelhaus v. Nevada Irrigation Dist. (1955) 43 Cal. 2d 779, 782,*

278 P.2d 689] .

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§ 575.194 Water Companies

Any person, firm, or corporation, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating, or managing any water system within California, who sells, leases, rents, or delivers water to any person, firm, corporation, municipality, or other political subdivision, whether under contract or otherwise, is a public utility and is subject to the regulation of the Public Utilities Commission, unless specifically provided otherwise [*Pub. Util. Code § 2701*].

Any corporation or association organized for the purposes of delivering water to its stockholders and members at cost and that delivers water to no one except its stockholders or members, the state or any state agency or department, any public district, or any federal agency that provides fire protection or operates park facilities, or to any other mutual water company, at cost, is not a public utility and is not subject to the regulation of the Public Utilities Commission [*Pub. Util. Code § 2705*]. However, if this mutual type of corporation or association has a dual purpose or sells water to those outside its association for compensation, it is a public utility [*Pub. Util. Code §§ 2702, 2703*].

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§ 575.195 Dedication to Public Use

[1] Service to Public

Dedication of property to public use is never presumed without evidence of unequivocal intention. It need not be expressly stated; it is normally evidenced by some act which is reasonably interpreted and relied on by the public as a holding out or indication of willingness to provide service on equal terms to all who might apply. A water supplier is subject to the jurisdiction of the Public Utilities Commission only if a dedication to the public has been made [*see Cal. Water & Tel. Co. v. Public Util. Com. (1959) 51 Cal. 2d 478, 494, 334 P.2d 887]* . A public utility is bound to provide and maintain water service in accordance with the requirements imposed by law, custom, or special contract. Once a system is established as public, all persons to whose use the water is appropriated or dedicated are vested with a right to have the supply continued [*Coulter v. Sausalito Bay Water Co. (1932) 122 Cal. App. 480, 496, 10 P.2d 780]* .

[2] Dedication May Be Limited

The owner of a water supply may make a limited dedication of it to public use, confining the use to a limited territory, or dedicating only a part of the water to public use. Thus, a water company has the right to decline to furnish its water to persons not within the area it has undertaken to serve [*Cal. Water & Tel. Co. v. Public Util. Com. (1959) 51 Cal. 2d 478, 490, 334 P.2d 887]* .

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§ 575.196 Extension of Water Service

[1] Reasonable Necessity

The inhabitants of the city, as well as county or municipal authorities, may use mandate proceedings to compel a water district to extend its water mains and supply petitioners with water [*see Lukrawka v. Spring Valley Water Co. (1915) 169 Cal. 318, 320, 146 P. 640* ; *Boies & Soule v. East Bay Mun. Util. Dist. (1960) 186 Cal. App. 2d 843, 844, 9 Cal. Rptr. 464]* .

A public utility may not be compelled to extend its service beyond the territorial limits of its dedication. When a water company has dedicated its service to the inhabitants of a municipality, the territorial scope of its dedication may ordinarily be measured by the municipality's boundaries, and it may be required to make reasonable extensions of its lines to accommodate the increased demands of a growing municipality [*Cal. Water & Tel. Co. v. Public Util. Com. (1959) 51 Cal. 2d 478, 492-493, 334 P.2d 887]* . The duty of the water company is of a public nature and is to meet a public necessity for the supplying of water to the community. Its obligation is not to supply each or any number of inhabitants of the municipality on demand as an absolute right on their part, but it does have the public duty of furnishing water service when there is a reasonable demand for it and a reasonable extension of service can be made to meet the demand. The right to require the service and the duty of furnishing it by an extension of the water system is determined by the reasonableness of the demand, which is a question of fact [*Lukrawka v. Spring Valley Water Co. (1915) 169 Cal. 318, 332-333, 146 P. 640]* .

[2] Factors Determining Reasonableness

The expense of extending service is one of many factors in determining whether an extension of service is reasonable; it is not the deciding factor. Among the factors considered in determining reasonable necessity are the duties of the company, the rights of its stockholders, the supply of water which the company may control for distribution, the facilities for making extensions to a locality beyond its present point of service, the rights of existing customers, the wants and necessities of the locality demanding it, and how far the right of the community as a whole may be affected by the demanded extensions [*Lukrawka v. Spring Valley Water Co. (1915) 169 Cal. 318, 333-334, 146 P. 640]* .

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§ 575.197 Public and Private Water Companies

[1] Regulations for Service

A water company, whether privately or publicly owned and operated, has the right to require compliance with reasonable rules and regulations for service to customers and to provide for the discontinuance of the service for the violation thereof [*Schultz v. Lakeport (1936) 5 Cal. 2d 377, 381, 55 P.2d 485, 54 P.2d 1110]* .

[2] Remedies for Discontinuance of Service

If the water company is a privately owned "water corporation," that is, a corporation or person owning, controlling, operating, or managing any water system for compensation in California, the termination of residential water utility service is governed by statute [*Pub. Util. Code § 241*; *see Pub. Util. Code §§ 777-780*].

When there is a legitimate dispute as to consumer compliance, an injunction may be granted to restrain the threatened discontinuance of the service, whatever the character of the proprietorship [*see Coulter v. Sausalito Bay Water Co. (1932) 122 Cal. App. 480, 496, 10 P.2d 780]* . A water user may choose instead to recover damages, in which case the user will be required to mitigate damages [*see Schultz v. Lakeport (1936) 5 Cal. 2d 377, 383-385, 55 P.2d 485, 54 P.2d 1110]* .

For further discussion of termination of public utility service, including termination of residential service by a water corporation, see Ch. 277, *Gas and Electricity* .

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[Reserved]

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§ 575.210 Governing Law

Water storage districts are governed by *Water Code §§ 39000-48401*. County water districts are governed by *Water Code §§ 30000-33900*. Municipal water districts are governed by *Water Code §§ 71000-73001*.

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§ 575.211 Water Districts and Local Agency Formation Commission

The formation and organization of local agencies, including the various types of water districts, are governed by the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 [*Gov. Code § 56000 et seq.*]. Under the Act, the local agency formation commission (LAFCO) of the principal county of the entity proposing a change of organization or reorganization is the "conducting authority" for changes of organization or reorganization, unless another conducting authority is specified by law [*Gov. Code § 56029*]. However, a metropolitan water district is not a "district" or a "special district," and any proceedings for a change of organization involving the entity [*see Gov. Code § 57000 et seq.*] must be conducted in accordance with the principal act authorizing the establishment of that entity [*Gov. Code § 56036(b)*]. Furthermore, if the LAFCO determines that a water conservation district, water replenishment district, the Orange County Water District, a California water storage district, a water agency, a county water authority or a water authority is not a "district" or a "special district," any proceedings for a change of organization involving the entity [*see Gov. Code § 57000 et seq.*] must be conducted in accordance with the principal act authorizing the establishment of that entity [*Gov. Code § 56036(c)*].

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§ 575.212 Overlapping Districts

Some overlap of purpose and territory is inevitable given the broad scope of powers and purposes of water districts [*see, e.g., Water Code §§ 31000-31187* (county water districts); *Water Code §§ 43000-44105* (water storage districts); *Water Code §§ 71590-71759* (municipal water districts)]. While cooperation between water districts having overlapping territory and some overlapping purposes is often specifically provided for by statute, more frequently it is not [*see, e.g., Water Code §§ 31150-31162* and *Water Code §§ 31180-31182* (relations between county water districts and irrigation districts and municipality utility districts, respectively)].

When each district enjoys some powers not held by the other, neither district is of a greater or higher class. The overlapping of one district by another, each having different powers as well as some in common, does not affect the continued existence of either [*36 Ops. Cal. Att'y Gen. 299-300 (1960)* ; *see, e.g., Water Code § 30065* (public corporation or agency having substantially identical purposes as county water district is not destroyed, nor are its powers impaired, by annexation of all or part of agency's territory by county district)].

When one water district is adequately providing a particular service within an area under the jurisdiction of two districts having common powers over the subject, the district first in time and functioning in the area should continue to provide the service without duplication by the other. Any further problem should be solved by the governing bodies of the two districts in a manner which will work to the best advantage of the inhabitants and with the least tax burden [*see South Santa Clara Valley Water Conservation Dist. v. Santa Clara Valley Water Dist. (1978) 76 Cal. App. 3d 852, 861-862, 143 Cal. Rptr. 193]* .

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§ 575.213 District Merged With City

Only when all the territory of a district is annexed to or is entirely embraced within the boundaries of an incorporated city having powers equal to and greater than those of the district is the district dissolved and merged with the city by operation of law. The partial inclusion of a district within a city having powers equal to and greater than those of the district does not operate to dissolve the district in the overlapping area [36 Ops. Cal. Att'y Gen. 297-300 (1960)]
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[Reserved]

§§ 575.214[Reserved]

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§ 575.230 Federal Constitution

General Welfare Clause. U.S. *Const., art. I, § 8*

Commerce Clause. U.S. *Const., art. I, § 8(3)*

Compact Clause. U.S. *Const., art. I, § 10(3)*

Jurisdiction of United States Supreme Court. U.S. *Const., art. III, § 2*

Property Clause. U.S. *Const., art. IV, § 3*

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§ 575.231 State Constitution

Public access to navigable waters. *Cal. Const., Art. X, § 4*

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§ 575.232 Federal Statutes

Federal Power Act. *16 U.S.C. §§ 791a-828c*

Desert Land Act of 1877. *43 U.S.C. §§ 321-323*

Reclamation Act of 1902. *43 U.S.C. §§ 371-600e*

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§ 575.233 State Statutes

State is owner of water. *Civ. Code § 670*

Boundaries of land bordering navigable waters. *Civ. Code § 830*

Accession to real property resulting from actions of water. *Civ. Code §§ 1014-1018*

Stream flowing from California into another state is subject to California laws. *Civ. Code § 1410a*

Obstruction of navigable water is nuisance or misdemeanor. Civ. Code § 3479, Harb. & Nav. Code *§ 131, Penal Code* § 370

Public access to natural resources. *Gov. Code §§ 66478.1-66478.14*

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§ 575.234 Decisions

[1] Flood Waters

Landowner is not usually required to maintain obstruction built for purpose of protection from flood waters or to refrain from restoring natural conditions; when obstruction was intended to be permanent and community has adjusted itself to its existence, for time beyond prescriptive period, new condition will be regarded is though it were natural and landowner is not allowed to destroy it. *Clement v. State Reclamation Board (1950) 35 Cal. 2d 628, 638-639, 220 P.2d 897*

Flood waters is common enemy that must be guarded against; property owner is allowed to take defensive actions that are not calculated to interfere with current of natural channel to guard against water. *The Weinberg Co. v. Bixby (1921) 185 Cal. 87, 95, 196 P. 25*

Liability of defendants depends on reasonability of their conduct in action brought by neighbors for erosion of their property allegedly resulting from defendants' alteration of flow of creek by placing riprap (boulders) along banks to prevent washing away of their own property. *Weaver v. Bishop (1988) 206 Cal. App. 3d 1351, 1353-1359, 254 Cal. Rptr. 425*

Flood water is defined as extraordinary overflow of rivers and streams. *Martinson v. Hughey (1988) 199 Cal. App. 3d 318, 325, 244 Cal. Rptr. 795*

[2] Interplay Between Federal and State Rules

Federal Power Act (*16 U.S.C. § 791a et seq.*) preempts state regulation regarding minimum instream flow requirements for hydroelectric project of federally licensed power plant; federal interest in accomplishing congressional objectives of protecting wildlife and ensuring economical feasibility of federally licensed power plants, precludes California from

imposing significantly higher minimum stream flow requirements than those of *Federal Energy Regulatory Commission. State of California v. FERC (1990) 495 U.S. 490, 506-507, 110 S. Ct. 2024, 109 L. Ed. 2d 474*

State statute limiting transport of ground water to states granting reciprocal rights violates of Commerce Clause. *Sporhase v. Nebraska ex rel. Douglas (1982) 458 U.S. 941, 957-958, 102 S. Ct. 3456, 73 L. Ed. 2d 1254*

United States assertion of authority under Commerce Clause to utilize or regulate water flow of navigable water is not taking of property in *Fifth Amendment* sense because United States has superior navigation easement which precludes private ownership of water or its flow. *United States v. Grand River Dam Authority (1960) 363 U.S. 229, 231-232, 80 S. Ct. 1134, 4 L. Ed. 2d 1186 , reh'g denied, 364 U.S. 855, 81 S. Ct. 33, 5 L. Ed. 2d 78*

Equitable apportionment of benefits is doctrine governing interstate water controversies; controversies between states involve different considerations than controversies between private parties. *New Jersey v. New York (1930) 283 U.S. 336, 342-343, 51 S. Ct. 478, 75 L. Ed. 1104* ; *Connecticut v. Massachusetts (1930) 282 U.S. 660, 670-671, 51 S. Ct. 286, 75 L. Ed. 602*

Surcharge on price of water from project if water is put to agricultural or manufacturing use on land of one owner in excess of 160 acres is valid limitation of subsidy received by persons with large land holdings. *Metropolitan Water Dist. v. Marquardt (1963) 59 Cal. 2d 159, 186-188, 28 Cal. Rptr. 724, 379 P.2d 28*

Federal government has power to impose reasonable conditions on use of federal funds, property, and privileges, especially in regard to water projects; state is unable to compel use of federal property on terms other than those prescribed or authorized by *Congress. Ivanhoe Irrig. Dist. v. All Parties (1960) 53 Cal. 2d 692, 704, 3 Cal. Rptr. 317, 350 P.2d 69*

[3] Navigability Issues

Stream is not required to be navigable in fact throughout year in order to be navigable in law. *Hitchings v. Del Rio Woods Recreation & Park Dist. (1976) 55 Cal. App. 3d 560, 569-571, 127 Cal. Rptr. 830*

Navigability of river determines whether owners of riparian property may obstruct use of river because they own stream, banks, and bed or whether that obstruction would be nuisance under *Civ. Code § 3479*. *People ex rel. Baker v. Mack (1971) 19 Cal. App. 3d 1040, 1044, 97 Cal. Rptr. 448*

Stream capable of use, and used, for pleasure boating is navigable even though stream is not used for commercial purpose; failure of Legislature to include stream within list of navigable waters in *Harb. & Nav. Code §§ 101-106* is of no consequence in determining navigability. *People ex rel. Baker v. Mack (1971) 19 Cal. App. 3d 1040, 1044, 1047-1049, 97 Cal. Rptr. 448*

Navigability caused by flood waters creates public navigation right until owners of flooded land, in whom title remains, reclaim land. *Bohn v. Albertson (1951) 107 Cal. App. 2d 738, 749-750, 238 P.2d 128*

[4] Public Trust

On entering Union, state is given ownership in public trust over all lands under waters subject to ebb and flow of tide, whether or not those waters are navigable; ownership rights remain in title holders when state has previously relinquished public trust claim to tidelands. *Phillips Petroleum Co. v. Mississippi (1988) 484 U.S. 469, 476-484, 108 S. Ct. 791, 98 L. Ed. 2d 877*

Littoral property owners' fee simple title in shorezone of lake is impressed with public trust analagous to easement, acquired by state through prescription and held for benefit of public for purposes of commerce, navigation, fishing, recreation, and preservation of land in its natural state; public trust is applicable to lands between low and high watermarks of level of lake after construction of nearby dam since that was current level of lake. *State v. Superior Court of Lake County (1981) 29 Cal. 3d 210, 226-232, 172 Cal. Rptr. 696, 625 P.2d 239 (Clear Lake)* ; *Fogerty v. State of California (1986) 187 Cal. App. 3d 224, 233-234, 231 Cal. Rptr. 810 (Lake Tahoe)*

Tidelands public trust doctrine easement for commerce, navigation, and fishery exists only over those lands to which state acquired title on admission to Union; no easement for seawater flow through shallow lagoon as existing for property granted by Mexico to private ownership, ceded to United States, and patented under Act of 1851. *City of Los Angeles v. Venice Peninsula Properties (1988) 205 Cal. App. 3d 1522, 1530-1535, 253 Cal. Rptr. 331*

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§ 575.235 Attorney General Opinions

Ocean ecological reserves established under Marine Resources Protection Act of 1990 (Cal. Const., art. X B) is limited to scientific research; all other human activity is excluded. *75 Ops. Cal. Att'y Gen. 125, 129-130 (1992)*

State has authority to lease public lands beneath navigable lakes and rivers for purely private purposes and to exclude public from these lands except for privileged use in times of emergency to protect life or property. *61 Ops. Cal. Att'y Gen. 56 (1978)*

Governor as having power to order mandatory rationing of water during "state of emergency." *60 Ops. Cal. Att'y Gen. 99 (1977)*

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§ 575.236 Law Reviews

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[Reserved]

§§ 575.238[Reserved]

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Fees. *Water Code § 1525 et seq.*

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§ 575.251 Decisions

Owner of unimproved real property has no cause of action against Department of Health Services based on moratorium on new water service connections, when local water district imposed moratorium, and Department issued new permit to water district on condition that it continue existing moratorium; Department has discretion under former Health & Safety Code § 4010 et seq. (*now see Health & Safety Code § 116325 et seq.*) (procedures regarding issuance of water permits to water districts) to require water district to continue moratorium, and does not have nondiscretionary duty to issue permit without conditions once it made required potability determinations. *Gilbert v. State of California (1990) 218 Cal. App. 3d 234, 248-249, 266 Cal. Rptr. 891*

Potential water user does not possess absolute right to be afforded water service; cause of action for inverse condemnation under *Cal. Const., art. I, § 19*, is not established based on denial of application for new water service connection for use on real property that, when purchased, lacked service connection to water district system. *Gilbert v. State of California (1990) 218 Cal. App. 3d 234, 249-258, 266 Cal. Rptr. 891*

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§ 575.252 Text References

Slater, California Water Law and Policy (Matthew Bender)

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[Reserved]

§§ 575.253[Reserved]

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§ 575.270 State Constitution

General welfare of state requires fullest beneficial use of waters. *Cal. Const., art. X, § 2*

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§ 575.271 State Statutes

Conservation of fish and wildlife resources through protection of rivers, streams, and lakes. *Fish & Game Code § 1600 et seq.*

Diversion or obstruction of watercourse designated by Department of Fish and Game as wildlife resource without notice is unlawful. *Fish & Game Code § 1602*

Costa-Isenberg Water Transfer Act of 1986. *Water Code §§ 470-484*

Unauthorized diversion or use of water is trespass resulting in administratively imposed civil penalties. *Water Code § 1052 et seq.*

Appropriation of water and determination of water rights. *Water Code §§ 1200-2866*

Applications to appropriate water. *Water Code §§ 1250-1271*

Appropriation permits. *Water Code §§ 1375-1431*

Joint use and development. *Water Code §§ 1750-1814*

Agricultural Water Conservation and Management Act of 1992. *Water Code § 10520 et seq.*

Agricultural Water Management Planning Act. *Water Code §§ 10800-10855*

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§ 575.272 Decisions

[1] Appropriative Rights

Appellate court's direction to trial court to issue appropriate writs commanding State Water Resources Control Board to attach conditions mandated by *Fish & Game Code § 5946* to licenses that it issued to local power agency, requiring that agency release sufficient water from its dams into streams to protect preexisting fisheries, subject to immediate compliance by virtue of statutory mandate; water board not entitled to delay implementation of court directive while conducting administrative hearing to determine feasibility. *California Trout, Inc. v. Superior Court (1990) 218 Cal. App. 3d 187, 203, 207-213, 266 Cal. Rptr. 788*

Denial of petitions for writs of mandate seeking rescission of licenses confirming rights to appropriation of water improperly denied when licenses violated *Fish & Game Code §§ 5937* and *5946*, requiring licenses to appropriate water in Mono and Inyo counties to be conditioned on dam owners allowing sufficient flow of water to keep fish below dam in good condition; *Fish & Game Code § 5946* not limited to appropriation of water obtained by diversion from dams constructed after September 9, 1953, effective date of statute. *California Trout, Inc. v. State Water Resources Control Bd. (1989) 207 Cal. App. 3d 585, 598-633, 255 Cal. Rptr. 184*

Public trust imposes duty of continuing supervision on state over taking and use of appropriated water; state not confined to past allocation decisions which might be incorrect in light of current knowledge or inconsistent with current needs, but has power to reconsider allocation decisions; no vested rights bar that reconsideration. *United States v. State Water Resources Control Bd. (1986) 182 Cal. App. 3d 82, 149-150, 227 Cal. Rptr. 161*

Filing application for appropriative water right confers possessory interest in real property pending perfection of appropriator's right to take water; applicant able to maintain action against trespassers or hostile claimants. *Miller & Lux, Inc. v. Bank of America (1963) 212 Cal. App. 2d 719, 726, 28 Cal. Rptr. 401*

[2] Board Actions

Board has broad discretion to act on appropriation applications, but may not arbitrarily and capriciously reject application. *People v. Shirokow (1980) 26 Cal. 3d 301, 310, 162 Cal. Rptr. 30, 605 P.2d 859* ; *East Bay M. U. Dist. v. Dept. of P. Wks. (1934) 1 Cal. 2d 476, 481, 35 P.2d 1027*

Under *Water Code §§ 1253-1256*, "public interest" is primary statutory standard guiding board in acting on applications to appropriate water. *Bank of America v. State Water Resources Control Bd (1974) 42 Cal. App. 3d 198, 212, 116 Cal. Rptr. 770*

[3] Diversion Requirements in General

Fish & Game Code § 1603, requiring notice to Department of Fish and Game before any diversion or obstruction of streambed designated as wildlife resource by department, is constitutional, and violation is a misdemeanor. *Rutherford v. State of California (1987) 188 Cal. App. 3d 1267, 1278, 233 Cal. Rptr. 781*

[4] Generally

Watercourse is a stream, containing definite bed, banks, and channel, which flows into some other river, stream, lake, or sea; none of these characteristics is an absolute fixed factor. *South Santa Clara Etc. Dist. v. Johnson (1964) 231 Cal. App. 2d 388, 393-394, 403, 41 Cal. Rptr. 846*

Owner of land in which spring with no natural outlet lies owns water as completely as he or she does soil. *State of California v. Hansen (1961) 189 Cal. App. 2d 604, 610, 11 Cal. Rptr. 335*

[5] Prescription

Owner of prescriptive right who ceased for period of more than five years to apply any part of water to beneficial use loses right to water. *Bazet v. Nugget Bar Placers, Inc. (1931) 211 Cal. 607, 617-618, 296 P. 616*

Water easement rights conveyed by grant able to be enlarged by enlarged claim exercised openly, notoriously, continuously, and adversely during prescription period of five years. *Security Pac. Nat. Bank v. City of San Diego (1971) 19 Cal. App. 3d 421, 432, 432 n.3, 97 Cal. Rptr. 61*

[6] Riparian

Riparian right not lost by nonuse, but subject to appropriation and beneficial use by others. *In re Waters of Long Valley Creek Stream System (1979) 25 Cal. 3d 339, 358-359, 158 Cal. Rptr. 350, 599 P.2d 656* ; *Wright v. Goleta Water Dist. (1985) 174 Cal. App. 3d 74, 83, 219 Cal. Rptr. 740* ; *Orange County Water District v. City of Riverside (1959) 173 Cal. App. 2d 137, 184, 343 P.2d 450*

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§ 575.273 Attorney General Opinions

Ocean ecological reserves established under Marine Resources Protection Act of 1990 (Cal. Const., art, XB) limited to scientific research; all other human activity excluded. *75 Ops. Cal. Atty. Gen. 125, 129-130 (1992)*

Proposed regulations of State Water Resources Control Board providing procedure for determination of instream flow requirements not authorized under *Water Code §§ 1000-5976*. *63 Ops. Cal. Att'y Gen. 95 (1980)*

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51-575 California Forms of Pleading and Practice--Annotated § 575.274

§ 575.274 Law Reviews

Note, *Groundwater Rights on Public Land in California, 35 Hastings L.J. 1007 (1984)*

Comment, *The Application of California Riparian Water Rights Doctrine to Federal Lands in the Mono Lake Basin, 34 Hastings L.J. 1293 (1983)*

Comment, *Groundwater: A Call for A Comprehensive Management Program, 14 Pac. L.J. 1279 (1983)*

Rossmann and Steel, *Forging the New Water Law: Public Regulation of 'Proprietary' Groundwater Rights, 33 Hastings L.J. 903 (1982)*

Comment, *The Public Trust Doctrine and California Water Law: National Audubon Society v. Department of Water and Power, 33 Hastings L.J. 653 (1982)*

Note, *People v. Shirokow: Abolishing Prescriptive Water Rights Against the State, 69 Cal. L. Rev. 1204 (1981)*

Trelease, *Legal Solutions to Groundwater Problems: A General Overview, 11 Pac. L.J. 863 (1980)*

Comment, *Protecting Streamflows in California,* 8 Ecol. L.Q. 697 (1980)

Comment, *Protection of a Riparian's Right to Prospective Water Use: A Constitutional Shell Game, 11 Pac. L.J. 1113 (1980)*

Comment, *Administrative Water Rights Inspections in California, 12 U.C. Davis L. Rev. 105 (1979)*

Comment, *Litigation of the Reclamation Law in the Imperial Valley: Who has Standing to Challenge Which Law? 14*

Cal. W. L. Rev. 563 (1979)

Note, *Cappaert v. United States: A Dehydration of Private Groundwater Use? 14 Cal. W. L. Rev. 382 (1978)*

Comment, *California Civil Code Section 830: A Rule of Property Needed for the Protection of the Private Landowner, 9 Pac. L.J. 1011 (1978)*

Gleason, *Los Angeles v. San Fernando: Ground Water Management in the Grand Tradition, 4 Hastings Const. L.Q. 703 (1977)*

Maloney & Ausness, *A Modern Proposal for State Regulation of Consumptive Uses of Water, 22* Hastings L.J. 523 (1971)

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§ 575.275 Text References

Slater, California Water Law and Policy (Matthew Bender)

Witkin, Summary of California Law, vol. 4, *Real Property*, §§ 754-806 (9th ed. 1987)

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§ 575.290 State Statutes

References to State Water Resources Control Board. *Water Code §§ 2000-2048*

Adjudications involving statutory procedures. *Water Code §§ 2500-2866*

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§ 575.291 Decisions

New appropriator's burden of proving existence of surplus from which it can extract quantity of water it desires without injury to those with prior rights arises only after riparians first proved the amount required by them for reasonable beneficial purposes. *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist. (1935) 3 Cal. 2d 489, 535, 45 P.2d 972* ; *Peabody v. City of Vallejo (1935) 2 Cal. 2d 351, 381, 40 P.2d 486*

Appropriator is able to claim only amount necessary to properly supply needs, and is permitted no waste; appropriator is not bound to adopt best methods for utilizing water or to take extraordinary precautions to prevent waste. *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist. (1935) 3 Cal. 2d 489, 573, 45 P.2d 972*

Trial court with expressly reserved jurisdiction over consent judgment prohibiting water district from interfering with defendant water company's use of water from lake does not abdicate its responsibilities under public trust doctrine in refusing to consider adoption of plan of water district, allegedly designed to increase water use efficiency, interpreting and modifying physical solution injunction. *Big Bear Mun. Water Dist. v. Bear Valley Mutual Water Co. (1989) 207 Cal. App. 3d 363, 375-384, 254 Cal. Rptr. 757*

Board has power to adjudicate all competing water claims, even riparian claims and prescriptive claims which do not fall within appropriative licensing system. *Imperial Irrigation Dist. v. State Water Resources Control Bd. (1986) 186 Cal. App. 3d 1160, 1169, 231 Cal. Rptr. 283*

Judicial action is merited even without annual overdraft when sufficient injury can be shown either through requiring wells to be deepened or abandoned and through increased pumping costs throughout basin. *Tehachapi-Cummings County Water Dist. v. Armstrong (1975) 49 Cal. App. 3d 992, 999, 122 Cal. Rptr. 918*

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§ 575.292 Text References

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62, 63 Cal. Jur. 3d, *Waters*, §§ 442-513

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Safe Drinking Water Act. *42 U.S.C. § 300f et seq.*

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§ 575.311 State Statutes

[1] Definitions

Water system defined. *Pub Util. Code § 240*

Water corporation defined. *Pub. Util. Code § 241*

[2] Delivery Requirements

Requirement of water corporation to deliver water in reasonable manner. *Civ. Code § 549*

Standards of water delivered by public water systems. *Pub. Util. Code § 4010 et seq.*

Adequate water service requirements. *Pub. Util. Code §§ 8201-8204*

[3] Miscellaneous

Special rules apply to corporations formed to furnish water. *Civ. Code §§ 548-552*; *Corp. Code §§ 14300-14303*

Public acquisition of utility properties. Civ. Code § 1401et seq.

Actions by water utilities against unauthorized taking of services. *Civ. Code §§ 1882-1882.6*

Water company is quasi-public entity able to take water through eminent domain. *Code Civ. Proc. § 1245.320*; *Pub. Util. Code § 2729*

Water corporation is public utility. *Pub. Util. Code § 216*

Certificate of public convenience and necessity is required of water corporations. *Pub. Util. Code §§ 1001-1011*

Water companies are public utilities. *Pub. Util. Code §§ 2701-2714*

Duties and liabilities of municipal water franchises. *Pub. Util. Code §§ 6291-6302*

Municipality's rights in public lands and waters. *Pub. Util. Code §§ 10151-10155*

[4] Private Water Companies

Requirements for mutual water companies formed in connection with subdivided lands. *Corp. Code § 14310 et seq.*

Private and mutual water companies are not subject to Public Utilities Commission. *Pub Util. Code § 2705*

Private and mutual water service law. *Pub. Util. Code §§ 2725-2729*

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§ 575.312 Decisions

[1] Actions on Contract

Injunction to refrain from diverting water does not excuse water company from contract obligation to supply irrigation water, especially when injunction was three years old and water company took no steps to have injunction dissolved. *Sample v. Fresno Flume Etc. Co. (1900) 129 Cal. 222, 226-228, 61 P. 1085*

Municipality's acceptance of district's offer to supply water by enactment of ordinance creates binding contract; recovery of costs of system is based on landowner's proportionate share of capacity of whole line. *American-Hawaiian Steamship Co. v. Home Sav. and Loan Assn. (1974) 38 Cal. App. 3d 73, 80-81, 112 Cal. Rptr. 897*

Requirements contract between subdivision developer and water company binds subdivider to look to water company for all water service and binds company to extend its service into additional units whenever extension provisions went into operation. *Citizens Suburban Co. v. Rosemont Dev. Co. (1966) 244 Cal. App. 2d 666, 677-678, 53 Cal. Rptr. 551*

Regular rules of contract interpretation apply in contract dispute between water company and community service district. *Bakersfield Country Club v. Pacific Water Co. (1961) 192 Cal. App. 2d 528, 535-537, 13 Cal. Rptr. 573*

When contract consideration running to upstream promissor was that promisor could use water flowing in river without regard to downstream promissee's water rights, subsequent diminishment or drying up of river does not relieve promisor from liability on promise. *Riverside Water Co. v. Jurupa Ditch Co. (1960) 187 Cal. App. 2d 538, 542, 9 Cal. Rptr. 742*

[2] Extension of Service

Water public utility seeking to extend its main beyond its dedicated area was required to comply with terms and conditions in its main extension rule on file with Public Utilities Commission, and must obtain PUC authority for any

deviations; PUC was unable to compel water utility to extend its mains into a wholly new proposed residential community to be created in nondedicated territory. *Cal. Water & Tel. Co. v. Public Util. Com. (1959) 51 Cal. 2d 478, 501-502, 334 P.2d 887*

[3] Liability for Failure to Provide Water

Primary business of water company is being furnisher of water as commodity; liability for fire loss is not within ordinary relation of water distributor and consumer and is created only by express private contract to that effect. *Lainer Investments v. Department of Water & Power (1985) 170 Cal. App. 3d 1, 9-13, 215 Cal. Rptr. 812* ; *Luis v. Orcutt Town Water Co. (1962) 204 Cal. App. 2d 433, 438-440, 22 Cal. Rptr. 389*

[4] Miscellaneous

Water rights acquired from riparian owners are taxable. *San Francisco v. County of Alemeda (1936) 5 Cal. 2d 243, 246-247, 54 P.2d 462*

[5] Rates

City acquisition of water system of another community obligates city to deal fairly with customers in that community and to provide them with service at reasonable rates; rates established by lawful rate-fixing body are presumed reasonable, fair, and lawful; lack of uniformity in rates does not establish unreasonableness. *Hansen v. City of San Buenaventura (1986) 42 Cal. 3d 1172, 1180-1181, 233 Cal. Rptr. 22, 729 P.2d 186*

In action by water company against water district alleging excessive charges for water provided under water service agreement, and seeking declaration that charges were unconstitutional under Cal. Const., art. XIIIB (limiting government's authority to expend proceeds of taxes), defendant has burden of proving compliance with art. XIIIB, that is, that fees are not excessive and therefore "proceeds of taxes" for purposes of invoking constitutional prohibition. *Oildale Mutual Wat. Co. v. North of the River Mun. Wat. Dist. (1989) 215 Cal. App. 3d 1628, 1634, 264 Cal. Rptr. 544*

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§ 575.313 Law Reviews

Note, *The Thirst for Population Control: Water Hookup Moratoria and the Duty to Augment Supply*, *27 Hastings LJ 753 (1976)*

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62, 63 Cal. Jur. 3d, *Waters*, §§ 549-608, 820-843

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§§ 575.315[Reserved]

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§ 575.330 State Statutes

[1] Local Agencies

Uniform procedures for imposing standby charges. *Gov. Code § 54984 et seq.*

Local agency formation commission. *Gov. Code § 56300 et seq.*

Commission proceedings for change of organization or reorganization. *Gov. Code § 56650 et seq.*

Conducting authority proceedings for change of organization or reorganization. *Gov. Code § 57000 et seq.*

Conditions and effect of change of organization or reorganization. *Gov. Code § 57300 et seq.*

[2] Water Districts

County Water District Law. *Water Code § 30000 et seq.*

California Water District Law. *Water Code § 34000 et seq.*

California Water Storage District Law. *Water Code § 39000 et seq.*

Reclamation Districts. *Water Code § 50000 et seq.*

County Waterworks District Law. *Water Code § 55000 et seq.*

County Drainage District Act. *Water Code § 56000 et seq.*

Water Replenishment District Act. *Water Code § 60000 et seq.*

Levee District Law of 1959. *Water Code § 70000 et seq.*

Municipal Water District Law of 1911. *Water Code § 71000 et seq.*

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§ 575.331 Decisions

Writ of mandamus is proper to compel public irrigation district to fulfill its statutory duties; petition is required to show that (1) district has clear duty; (2) petitioner has beneficial interest in district's performance of that duty; (3) district has ability to perform duty; (4) district has failed to perform duty or has abused its discretion in performing duty; and (5) petitioner has no other plain, speedy, or adequate remedy. *Elmore v. Imperial Irrigation Dist. (1984) 159 Cal. App. 3d 185, 193, 205 Cal. Rptr. 433*

Municipal water district's promulgation of rates for water and sewer services is quasi-legislative and reviewable only by means of ordinary mandate under *Code Civ. Proc. § 1085*; standard of review is whether actions were arbitrary or capricious or whether district failed to follow procedure and give notices required by law. Car lton *Santee Corp. v. Padre Dam Mun. Water Dist. (1981) 120 Cal. App. 3d 14, 18-19, 174 Cal. Rptr. 413*

Municipal water district is quasi-municipal corporation with broad grant of legislative policy-making power; merger agreement by which two public agencies join to form one integrated water system is within authority of *Water Code §§ 71722, 71723*. *Hewitt v. Rincon del Diablo Municipal Water Dist. (1980) 107 Cal. App. 3d 78, 84, 89, 165 Cal. Rptr. 545*

General district first in time and functioning in area of overlap with special district continues to have authority within its own territory without interference. *South Santa Clara Valley Water Conservation Dist. v. Santa Clara Valley Water Dist. (1978) 76 Cal. App. 3d 852, 861-862, 143 Cal. Rptr. 193*

List of agencies in *Cal. Const., Art. XIII, § 40*, which prohibits incurring indebtedness exceeding income and revenue without election, is exclusive; water district's performing functions traditionally performed by county are not sufficient to subject it to debt limitation applicable to county. *Vanoni v. County of Sonoma (1974) 40 Cal. App. 3d 743, 748-750, 115 Cal. Rptr. 485*

Administrative mandamus under *Code Civ. Proc. § 1094.5* is not available to review water district's decision to grant or

withhold its consent to annexation of part of its territory by another water district. *Wilson v. Hidden Valley Mun. Water Dist. (1967) 256 Cal. App. 2d 271, 276-277, 63 Cal. Rptr. 889*

Consent is condition precedent to formation of new district containing in whole or in part territory of existing district or annexation by district of portion of another district. *Fuller v. San Bernardino Valley Mun. Wat. Dist. (1966) 242 Cal. App. 2d 52, 63, 51 Cal. Rptr. 120*

Water Code § 30065 requires consent of county water district before new public agency with substantial identity of purpose is formed within district; "purpose" as object to be attained or end sought. *Andressen v. Board of Supervisors (1965) 235 Cal. App. 2d 436, 442, 45 Cal. Rptr. 306*

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Comment, *Water Districts Contracting For Water With the Bureau of Reclamation--Can a State-Created Entity Violate State Laws? 11 UCD L Rev 473 (1978)*

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PART III. RESEARCH GUIDE
C. Water Districts: Formation; Inclusion; Exclusion

51-575 California Forms of Pleading and Practice--Annotated § 575.333

§ 575.333 Text References

Slater, California Water Law and Policy (Matthew Bender)

63 Cal. Jur. 3d, *Waters*, §§ 844-1036

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C. Water Districts: Formation; Inclusion; Exclusion

51-575 California Forms of Pleading and Practice--Annotated §§ 575.334-515.349

[Reserved]

§§ 575.334[Reserved]

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A. Rights to Water
1. Enforcement of Appropriative Rights

51-575 California Forms of Pleading and Practice--Annotated § 575.350

§ 575.350 Appropriation of Water--Application--State Board Form [Water Code § 1252]

[1] FORM Appropriation of Water--Application--State Board Form [Water Code § 1252]

Click here to view image.

[2] Use of Form

This form is a reproduction of the State Water Resources Control Board, Division of Water Rights, form for use to apply for a permit to appropriate water. Use of the form is mandatory [*see Water Code § 1252*; *23 Cal. Code Reg. § 705*]. An application will not be accepted unless the filing fee is also submitted [*23 Cal. Code Reg. § 676*; *see Water Code § 1525(b)(1)*]. An application is complete when the State Board has certified that the applicant has fully and completely disclosed all information required [*23 Cal. Code Reg. § 656(a)*; *see 23 Cal. Code Reg. § 683* regarding necessity of submitting environmental information; for the environmental information form, *see § 575.352*]. If an application is incomplete [*see 23 Cal. Code Reg. § 656(b)*], but the applicant has made a bona fide attempt to conform to the laws and regulations, the Board will notify the applicant of the incompleteness and allow 60 days for an amended and completed application to be filed. For good cause shown, this time may be extended. If an amended and completed application is not filed within the time allowed, the application may be canceled without notice [*see Water Code §§ 1270, 1270*; *23 Cal. Code Reg. § 679*].

After receipt of a conforming application, the Board will issue and deliver a notice of that application to the applicant and to the district attorney and the board of supervisors of each county in which water is to be diverted [*Water Code § 1300*]. The notice serves to provide information concerning protests to the application [*see Water Code § 1304*]. Appropriation rights to water may only be obtained through compliance with this application procedure [*Water Code § 1225*; *see § 575.55[2]*].

This form, as well as other Division of Water Rights forms and further water rights information, can be obtained at www.waterrights.ca.gov. The form is available in Adobe PDF format. The State Water Resources Control Board also maintains a useful website at www.swrcb.ca.gov.

[3] State Statutes

Water subject to appropriation. *Water Code §§ 1200-1202*

Treated waste water. *Water Code §§ 1210-1212*

Appropriation from interstate streams. *Water Code §§ 1230-1232*

Appropriation applications. *Water Code §§ 1250-1259*

Rejection of application. *Water Code § 1255*

Content of application. *Water Code §§ 1260-1266*

Notice of application. *Water Code §§ 1300-1324*

Proceedings on application. *Water Code §§ 1340-1353*

Priority of application. *Water Code § 1450*

Application fees. *Water Code § 1525(b)(1)*

[4] Administrative Regulations

Incomplete or defective applications. *23 Cal. Code Reg. §§ 656, 679-683*

Uses requiring separate applications. *23 Cal. Code Reg. §§ 686-689*

Instances of reasonable water requirements. *23 Cal. Code Reg. § 697*

Application for excessive amount of water. *23 Cal. Code Reg. § 698*

Content of application. *23 Cal. Code Reg. §§ 705-711*

Application and accompanying statements must be sworn to. *23 Cal. Code Reg. § 711*

Map requirements. *23 Cal. Code Reg. §§ 715-724*

Application when existing right is claimed. *23 Cal. Code Reg. § 731*

[5] Cross References

For related forms, see *§§ 575.351* and *575.352*.

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51-575 California Forms of Pleading and Practice--Annotated § 575.351

§ 575.351 Appropriation of Water--Supplement to Application--State Board Form [Water Code § 1252]

[1] FORM Appropriation of Water--Supplement to Application--Board Form [Water Code § 1252]

Click here to view image.

[2] Use of Form

This form is a reproduction of the State Water Resources Control Board, Division of Water Rights, form for use to supplement the application for a permit to appropriate water. When directed by the State Board, the applicant must supplement the application with a statement showing the maximum quantity of water, in acre-feet or other unit of measurement prescribed by the Board, that will be beneficially used each month during the proposed season of use [*23 Cal. Code Reg. § 708*].

[3] Cross References

For a related form, see *§ 575.350*.

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51-575 California Forms of Pleading and Practice--Annotated § 575.352

§ 575.352 Appropriation of Water--Environmental Information--State Board Form [Water Code § 1252]

[1] FORM Appropriation of Water--Environmental Information--State Board Form [Water Code § 1252]

Click here to view image.

[2] Use of Form

This form is a reproduction of the State Water Resources Control Board, Division of Water Rights, form for use to provide environmental information in an application for a permit to appropriate water. The State Board may request an applicant to supplement the application with information necessary to comply with the California Environmental Quality Act (*Pub. Res. Code § 21000 et seq.*). Failure by the applicant to comply with such a request within a reasonable time and in a responsive manner may be cause for the Board to cancel or reject the application [*see 23 Cal. Code Reg. § 683*].

This form, as well as other Division of Water Rights forms and further water rights information, can be obtained at www.waterrights.ca.gov. The form is available in Adobe PDF format. The State Board also maintains a useful website at www.swrcb.ca.gov. In addition, the regional water quality control boards provide detailed information about the individual boards, such as regional maps, news, events, activities, and meeting agendas within a particular region. To locate a particular region, go to www.swrcb.ca.gov/rwqcbs/index/html.

[3] Cross References

For a related form, see *§ 575.350*.

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51-575 California Forms of Pleading and Practice--Annotated § 575.353

§ 575.353 Appropriation of Water--Statement of Posting Notice--State Board Form [Water Code § 1300]

[1] FORM Appropriation of Water--Statement of Posting Notice--Board Form [Water Code § 1300]

Click here to view image.

[2] Use of Form

This form is a reproduction of the State Water Resources Control Board form for use by the applicant in posting notice of his or her application for a permit to appropriate water. As soon as practicable after receiving a complete application and, if an instream beneficial use assessment is required by *Water Code § 1250.5* (small hydroelectric project), as soon as practicable after the determination that the instream beneficial use assessment is adequate, the State Board will issue a notice. The applicant will be directed to post or publish it [*Water Code § 1300*; *23 Cal. Code Reg. § 684(a)*].

When the application is for three cubic feet or less per second or for 200 acre-feet or less per annum of storage, the Board will mail three copies of the notice to the applicant by registered mail and will send a copy by registered mail to each person known or judged by the Board to be interested in the application [*Water Code §§ 1320, 1321*]. The applicant must post the notice within 20 days of its issuance in at least two conspicuous places in the locality to be affected by the proposed application [*Water Code § 1322*].

The applicant, or the person posting notice on the applicant's behalf, must submit proof of posting by an affidavit (or declaration under *Code Civ. Proc. § 2015.5*) filed within 40 days from the date of issuance of the notice [*Water Code § 1323*]. Failure to file proof of posting may result in the Board's cancelling the application after giving the applicant notice and 15 days in which to file the proof [*Water Code § 1324*].

[3] State Statutes

Contents of notice. *Water Code §§ 1300-1304*

Publication of notice for more than three cubic feet per second or more than 200 acre-feet per annum of storage. *Water Code §§ 1310-1317*

Notice of petition for permission to change. *Water Code § 1703*

[4] Administrative Regulations

Issuance of new notice. *23 Cal. Code Reg. § 684(b)*

Effect of issuance of notice. *23 Cal. Code Reg. § 685*

Applications within wild and scenic river system. *23 Cal. Code Reg. § 734*

[5] Cross References

For a related form, see *§ 575.350*.

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51-575 California Forms of Pleading and Practice--Annotated § 575.354

§ 575.354 Appropriation of Water--Protest--State Board Form [Water Code § 1330]

[1] FORM Appropriation of Water--Protest--Board Form [Water Code § 1330]

Click here to view image.

[2] Use of Form

This form is a reproduction of the State Water Resources Control Board, Division of Water Rights, form for use by any interested person to protest an application to appropriate water. One side of the form is for use when the protest is based on injury to vested rights. The other side is for use when the protest is based on environmental considerations, public interest, public trust, and other issues. Any interested person may, within the time allowed in the notice of application or within a further time allowed for good cause, file a written protest [*Water Code § 1330*; *23 Cal. Code Reg. § 747*]. The time allowed for protests of an application for more than three cubic feet per second or for more than 200 acre-feet per annum of storage is 60 days from the date of issuance of the notice; for applications for those amounts or less, the time allowed is 40 days [*Water Code §§ 1302, 1303*].

A duplicate copy of the protest must be sent to the applicant. Depending on the grounds of the protest, it must contain specific allegations [*see 23 Cal. Code Reg. § 745*].

This form, as well as other Division of Water Rights forms and further water rights information, can be obtained at www.waterrights.ca.gov. The form is available in Adobe PDF format. The State Water Resources Control Board also maintains a useful website at www.swrcb.ca.gov.

[3] Resolving the Protest

The protestant and the applicant must make a good faith effort to resolve the protest within 180 days from the date on which the period provided under *Water Code § 1330* expires. However, for good cause, the State Board may allow additional time for the protestant and the applicant to attempt to resolve the protest [*Water Code § 1333*]. The Board

may request the protestant or the applicant to supply additional information that the Board determines is reasonably necessary to attempt to resolve the protest [*Water Code § 1334*], and may cancel a protest or application for failure to provide the information requested by the Board within the time period provided [*Water Code § 1335*].

[4] Field Investigations Required for Minor Applications

The State Board's Division of Water Rights must conduct a field investigation of all minor protested applications [*Water Code § 1345*]. "Minor applications" are applications that do not involve direct diversions in excess of three cubic-feet per second or storage in excess of 200 acre-feet per year [*Water Code § 1348*]. The Board must notify the parties not less than 20 days before conducting the field investigation, so that the parties may attend and present information to the Board [*Water Code § 1345*]. The Division of Water Rights may request the parties to submit information in support of their positions before, during, or after the field investigation. After the field investigation, the Division of Water Rights may conduct additional proceedings in accordance with the informal hearing procedure set forth in *Gov. Code § 11445.10 et seq.* [*Water Code § 1346*]. Based on the field investigation and any other information it has obtained, the Division of Water Rights must issue a decision unless the Board determines that additional proceedings should be conducted [*Water Code § 1347*]. The decision is subject to review as provided in *Water Code § 1120 et seq.* [*Water Code § 1347*].

[5] State Statutes

Protest of application. *Water Code §§ 1330, 1331*

Notice of hearing on protested application. *Water Code §§ 1340, 1341*

[6] Administrative Regulations

Protest requirements. *23 Cal. Code Reg. § 745*

Rejection of protest. *23 Cal. Code Reg. § 749*

Abandonment of protest. *23 Cal. Code Reg. § 750*

Answers to protests. *23 Cal. Code Reg. §§ 751, 752*

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51-575 California Forms of Pleading and Practice--Annotated § 575.355

§ 575.355 Appropriation of Water--Petition for Correction of Description--State Board Form [Water Code § 1701]

[1] FORM Appropriation of Water--Petition for Correction of Description--Board Form [Water Code § 1701]

Click here to view image.

[2] Use of Form

This form is a reproduction of the State Water Resources Control Board, Division of Water Rights, form for use to petition for correction of the description of the point of diversion or place of use. Changes in an application, permit, or license may be made with the State Board's permission [*Water Code § 1701*; *23 Cal. Code Reg. § 791*].

This form, as well as other Division of Water Rights forms and further water rights information, can be obtained at www.waterrights.ca.gov. The form is available in Adobe PDF format. The State Water Resources Control Board also maintains a useful website at www.swrcb.ca.gov.

[3] Administrative Regulations

Changes before notice of application. *23 Cal. Code Reg. § 797*

Changes to cover incidental uses of reservoir. *23 Cal. Code Reg. § 798*

[4] Cross References

For a related form, see *§ 575.356*.

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51-575 California Forms of Pleading and Practice--Annotated § 575.356

§ 575.356 Appropriation of Water--Petition for Change in Point of Diversion or Place of Use--State Board Form [Water Code § 1700]

[1] FORM Appropriation of Water--Petition for Change in Point of Diversion or Place of Use--Board Form [Water Code § 1700]

Click here to view image.

[2] Use of Form

This form is a reproduction of the State Water Resources Control Board, Division of Water Rights, form for use by an applicant, permittee, or licensee to petition the State Board for a change in the point of diversion or place of use from that specified in the application, permit, or license or for the addition of a point of rediversion. The change may be made at any time after notice of the application has been given, but only with the permission of the Board [*Water Code § 1701*; *23 Cal. Code Reg. § 791*]. The petitioner must also give written notice of the proposed change to the Department of Fish and Game [*Water Code § 1703*]. Before any change is granted, the petitioner must establish to the Board's satisfaction, and it must find, that the change will not operate to the injury of any legal user of the water involved. The required fee must be submitted before the petition will be considered [*Water Code § 1702*; *23 Cal. Code Reg. § 791*]. The Board may require that the petitioner publish or otherwise give notice of the change in a manner prescribed by the Board [*Water Code § 1703*; *23 Cal. Code Reg. § 745*].

The Board has other specific forms of petitions that should be used to petition for change in the distribution of storage water or for change in the purpose of water use.

This form, as well as other Division of Water Rights forms and further water rights information, can be obtained at www.waterrights.ca.gov. The form is available in Adobe PDF format. The State Water Resources Control Board also maintains a useful website at www.swrcb.ca.gov.

[3] State Statutes

Procedure on protests to change petition. *Water Code §§ 1703.1-1703.6, 1704-1705*

Change involving temporary or long-term transfer of water or water rights and transfer of decreed rights. *Water Code § 1725 et seq.*

Fees. *Water Code § 1525(b)(4)*

Preservation or enhancement of environmental resources or recreational uses is basis for petition for change of water use. *Water Code § 1707*

[4] Administrative Regulations

Maps and data required. *23 Cal. Code Reg. § 794*

Procedure on petitions. *23 Cal. Code Reg. § 796*

Changes with board authority. *23 Cal. Code Reg. §§ 791-799*

Temporary changes due to transfer of water or water right. *23 Cal. Code Reg. §§ 800-803*

Changes involving long-term transfer. *23 Cal. Code Reg. §§ 811-816*

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51-575 California Forms of Pleading and Practice--Annotated § 575.357

§ 575.357 Appropriation of Water--Protest to Change Petition--State Board Form [Water Code § 1704]

[1] FORM Appropriation of Water--Protest to Change Petition--Board Form [Water Code § 1704]

Click here to view image.

[2] Use of Form

This form is a reproduction of the State Water Resources Control Board, Division of Water Rights, form for use to protest a change petition or an extension of time. One side of the form is for use when the protest is based on injury to vested rights. The other side is for use when the protest is based on environmental or public interest considerations. If a protest against a proposed change is filed with the State Board at any time before the Board grants permission to make the change pursuant to *Water Code § 1701*, the Board will set a time and place for a hearing on the petition and the objections [*Water Code § 1704*].

This form, as well as other Division of Water Rights forms and further water rights information, can be obtained at www.waterrights.ca.gov. The form is available in Adobe PDF format. The State Water Resources Control Board also maintains a useful website at www.swrcb.ca.gov.

[3] Minor Petition for Change

A minor petition for change is one that does not involve direct diversions in excess of three cubic-feet per second or storage in excess of 200 acre-feet per year [*Water Code § 1704.4*]. In the case of minor petitions, a protest does not automatically result in a hearing. Rather, the State Board's Division of Water Rights will conduct a field investigation. The Board must notify the parties not less than 20 days before conducting the field investigation, so that the parties may attend and present information to the Board [*Water Code § 1704.1*]. The Division of Water Rights may request the parties to submit information in support of their positions before, during, or after the field investigation. After the field investigation, the Division of Water Rights may conduct additional proceedings in accordance with the informal hearing procedure set forth in *Gov. Code § 11445.10 et seq.* [*Water Code § 1704.2*]. Based on the field investigation and any

other information it has obtained, the Division of Water Rights must issue an order acting on the minor petition for change unless the Board determines that additional proceedings should be conducted [*Water Code § 1704.3*].

[4] Judicial Review

The order of the Division of Water Rights is subject to review as provided in *Water Code § 1120 et seq.* [*Water Code § 1704.3*]. Any petition for a writ of mandate to inquire into the validity of the State Board's order after the hearing must be filed not later than 30 days from the date of final action by the Board [*Water Code § 1126*].

[5] Administrative Regulations

Protest requirements. *23 Cal. Code Reg. §§ 745, 796*

Time for filing. *23 Cal. Code Reg. §§ 747, 753, 796*

Answers to protests. *23 Cal. Code Reg. §§ 751, 752, 796*

[6] Cross References

For related forms, see *§§ 575.354* and *575.356*.

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51-575 California Forms of Pleading and Practice--Annotated § 575.358

§ 575.358 Appropriation of Water--Permit for Diversion and Use of Water--State Board Form [Water Code § 1380]

[1] FORM Appropriation of Water--Permit for Diversion and Use of Water--State Board Form [Water Code § 1380]

Click here to view image.

[2] Use of Form

This form is a reproduction of the State Water Resources Control Board, Division of Water Rights, form of permit granted by the State Board after the hearing on the application if the application is granted [*Water Code § 1380*; *see § 575.62*].

[3] State Statutes

Prerequisites to issuance of permit. *Water Code § 1375*

Issuance of permit. *Water Code §§ 1380-1382*

Permit terms and conditions. *Water Code §§ 1390-1394*

Application to beneficial use. *Water Code §§ 1395-1398*

Revocation of permit. *Water Code §§ 1410-1410.2*

Temporary permits. *Water Code §§ 1425-1431*

Permit fees. *Water Code § 1525(a)*

[4] Administrative Regulations

Approval of application for partial season of use. *23 Cal. Code Reg. § 700*

Permit terms and conditions. *23 Cal. Code Reg. §§ 780-784*

Enforcement of terms and conditions. *23 Cal. Code Reg. §§ 820-823*

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51-575 California Forms of Pleading and Practice--Annotated § 575.359

§ 575.359 Appropriation of Water--Petition for Extension of Time--State Board Form [Water Code § 1398]

[1] FORM Appropriation of Water--Petition for Extension of Time--State Board Form [Water Code § 1398]

Click here to view image.

[2] Use of Form

This form is a reproduction of the State Water Resources Control Board, Division of Water Rights, form for use by the permittee to request an extension of time in putting the water to beneficial use [*Water Code § 1398*]. There is a mandatory fee, and extensions may be submitted on this form [*23 Cal. Code Reg. § 842*]. Actual construction work on any project must begin within the time specified in the permit, which must not be less than 60 days from the date of the permit [*Water Code § 1395*]. Due diligence must be exercised in construction and water utilization, although time extensions may be granted for good cause shown [*Water Code §§ 1396, 1398*]. An extension of time will be granted only on those conditions that the State Board finds are in the public interest and on a showing that due diligence has been exercised, that failure to comply with previous time requirements was caused by obstacles that could not reasonably be avoided, and that satisfactory progress will be made if an extension is granted. Good cause does not usually include lack of finances, occupation with other work, physical disability, and other conditions affecting the person and not the enterprise [*23 Cal. Code Reg. § 844*].

This form, as well as other Division of Water Rights forms and further water rights information, can be obtained at www.waterrights.ca.gov. The form is available in Adobe PDF format. The State Water Resources Control Board also maintains a useful website at www.swrcb.ca.gov.

[3] Notice

The State Board may require the permittee applying for an extension of time to cause notice to be given in a manner prescribed by the Board. Usually the Board does not require notice when the project is already under construction or a substantial financial commitment has been made, the project is not in an area of unusual competition for water, and the

project is not a large multi-stage project which may be behind schedule [*23 Cal. Code Reg. § 843(a)*]. Protests to the extension of time may be filed and the Board may require a hearing [*23 Cal. Code Reg. §§ 843(c), 844*]. After any hearing on a petition for extension of time, the Board may revoke the permit [*Water Code §§ 1398(b), 1410*].

[4] State Statutes

Revocation of permit. *Water Code § 1410*

Fee required. *Water Code § 1525(b)(3)*

[5] Administrative Regulations

Reasonable promptness in completion time. *23 Cal. Code Reg. § 840*

Notice of petitions and protests. *23 Cal. Code Reg. § 843*

Cause for extension. *23 Cal. Code Reg. § 844*

Withholding issuance of permit. *23 Cal. Code Reg. § 845*

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51-575 California Forms of Pleading and Practice--Annotated § 575.360

§ 575.360 Appropriation of Water--License for Diversion and Use of Water--State Board Form [Water Code § 1610]

[1] FORM Appropriation of Water--License for Diversion and Use of Water--State Board Form [Water Code § 1610]

Click here to view image.

[2] Use of Form

This form is a reproduction of the State Water Resources Control Board, Division of Water Rights, form of license granted by the board. After a full inspection and examination of the works constructed, the use of the water therefrom, and a determination as to completion favorable to the permittee, the State Board will issue a license which confirms the right to the appropriation of the amount of water applied to beneficial use [*Water Code §§ 1605, 1610*; *see § 575.68*].

[3] State Statutes

Fees. *Water Code § 1525(a)*

Permittee's report of completion. *Water Code § 1600*

Examination and inspection. *Water Code § 1605*

Issuance of license, revocation of permit. *Water Code §§ 1610, 1611*

Review by court. *Water Code § 1126*

Contents and conditions of license. *Water Code §§ 1625-1631*

Filing with county recorder. *Water Code §§ 1650, 1651*

Revocation of license. *Water Code §§ 1675-1675.2*

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51-575 California Forms of Pleading and Practice--Annotated § 575.361

§ 575.361 Appropriation of Water--Complaint--State Board Form [Water Code §§ 1410, 1675]

[1] FORM Appropriation of Water--Complaint--State Board Form [Water Code §§ 1410, 1675]

Click here to view image.

[2] Use of Form

This form is a reproduction of the State Water Resources Control Board, Division of Water Rights, form for use by any person to make a complaint concerning a violation of any term or condition of a permit or license. It may be based on the effect of the violation on the complainant or may be made for the benefit of the public [*23 Cal. Code Reg. § 820*]. The State Board may also act on its own motion [*23 Cal. Code Reg. § 823*].

If, after investigation, the Board's Division of Water Rights finds that a violation has occurred that might be cause for enforcement action by the Board, the matter may be referred to the Board for hearing. If it is found that no violation occurred, the complainant will be notified and no further action taken unless the complainant requests a hearing, in which event the Board will determine whether to hold a hearing based on information supplied by the complainant and the Board's staff [*23 Cal. Code Reg. § 821*].

After the requisite notice and hearing, if the Board finds that a violation has occurred, the Board may revoke the permit or license or take other appropriate action [*23 Cal. Code Reg. § 822*].

This form, as well as other Division of Water Rights forms and further water rights information, can be obtained at www.waterrights.ca.gov. The form is available in Adobe PDF format. The State Water Resources Control Board also maintains a useful website at www.swrcb.ca.gov.

[3] State Statutes

Revocation of permit. *Water Code §§ 1410-1410.2*

Revocation of license. *Water Code §§ 1675-1675.2*

[4] Administrative Regulations

Contents of complaint. *23 Cal. Code Reg. § 820*

Investigation of complaints. *23 Cal. Code Reg. § 821*

Revocation of permits and licenses. *23 Cal. Code Reg. §§ 850-852*

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51-575 California Forms of Pleading and Practice--Annotated § 575.362

§ 575.362 Appropriation of Water--Answer--State Board Form [Water Code §§ 1410, 1675]

[1] FORM Appropriation of Water--Answer--State Board Form [Water Code §§ 1410, 1675]

Click here to view image.

[2] Use of Form

This form is a reproduction of the State Water Resources Control Board, Division of Water Rights, form for use by any person to answer a complaint concerning a violation of any term or condition of a permit or license. For the State Board's form of complaint, see *§ 575.361*.

This form, as well as other Division of Water Rights forms and further water rights information, can be obtained at www.waterrights.ca.gov. The form is available in Adobe PDF format. The State Water Resources Control Board also maintains a useful website at www.swrcb.ca.gov.

[3] State Statutes

Revocation of permit. *Water Code §§ 1410-1410.2*

Revocation of license. *Water Code §§ 1675-1675.2*

[4] Administrative Regulations

Contents of complaint. *23 Cal. Code Reg. § 820*

Investigation of compaints. *23 Cal. Code Reg. § 821*

Revocation of permits and licenses. *23 Cal. Code Reg. §§ 850-852*

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Volume 51: Vexatious Litigants thru Zoning and Planning-Chs. 573-579
Chapter 575 WATERS
PART IV. FORMS
A. Rights to Water
1. Enforcement of Appropriative Rights

51-575 California Forms of Pleading and Practice--Annotated § 575.363

§ 575.363 Appropriation of Water--Statement of Water Diversion and Use--State Board Form [Water Code § 5101]

[1] FORM Appropriation of Water--Statement of Water Diversion and Use--State Board Form [Water Code § 5101]

Click here to view image.

[2] Use of Form

This form is a reproduction of the State Water Resources Control Board, Division of Water Rights, form for use to make a statement of water diversion and use. Each person who, after December 31, 1965, diverts water must file with the State Board, before July 1 of the succeeding year, a statement of diversion and use [*Water Code § 5101*]. However, *Water Code § 5101* lists several circumstances under which no statement needs to be filed, including diversions covered by an application, permit, or license to appropriate water on file with the Board. A separate statement must be filed for each point of diversion [*Water Code § 5102*]. Supplemental statements must be filed at three-year intervals [*Water Code § 5104*].

If any person fails to file the required statement, the Board may, at that person's expense, conduct its own investigation and determination, after first giving that person written notice of its intention and 60 days in which to file the statement without penalty [*Water Code § 5105*].

Neither the statements nor the Board determinations constitute evidence of a water right. However, they are evidence of the facts stated therein in a Board application proceeding [*Water Code §§ 5106, 5106*].

This form, as well as other Division of Water Rights forms and further water rights information, can be obtained at www.waterrights.ca.gov. The form is available in Adobe PDF format. The State Water Resources Control Board also maintains a useful website at www.swrcb.ca.gov.

[3] State Statutes

"Person" and "diversion" defined. *Water Code § 5100*

Contents of statement. *Water Code § 5103*

Penalties for willful misstatement. *Water Code § 5107*

Statements are for information purposes only. *Water Code § 5108*

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1. Enforcement of Appropriative Rights

51-575 California Forms of Pleading and Practice--Annotated § 575.364

§ 575.364 Petition for Writ of Mandate--To Compel State Water Resources Control Board to Issue Permit to Appropriate Water [Water Code § 1126]

[1] FORM Petition for Writ of Mandate--To Compel State Water Resources Control Board to Issue Permit to Appropriate Water [Water Code § 1126]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR WRIT OF MANDATE
Respondent.	)	
	)	
	)	

Petitioner respectfully represents:

1. _____ [*Set forth identity of petitioner and if petitioner is not an individual, set forth petitioner's identity as corporation, partnership, or other entity capable of holding an interest in real property and its interest in appropriating water, e.g.,* Petitioner is a water company which delivers, supplies, and distributes water for domestic and irrigation uses, and acquires or constructs dams, canals, ditches, land, rights-of-way, or other appurtenances that are necessary to accomplish its purpose].

2. Respondent State Water Resources Control Board of the State of California is the board within the Resources Agency of the State of California charged with the orderly and efficient administration of water resources. Under *Water Code Sections 1250 through 1259*, the State Board is charged with investigating all applications to appropriate water and to exercise its judgment in issuing permits for appropriations which will best utilize water for the public interest. Pursuant to *Water Code Section 1350*, the Board is required to hold a hearing before rejecting any application to appropriate water.

3. On _____ [*date*], petitioner filed with the Board an Application to Appropriate Water, application No. _____, for a permit to appropriate unappropriated water of the State of California to be used _____ [*specify beneficial purpose, e.g.,* for irrigation and domestic purposes]. Petitioner made the application on a printed blank form prescribed by the Board and complied with all the application requirements. A copy of the application is attached to this petition as Exhibit A and made a part of the petition.

4. In that application petitioner sought to appropriate water from _____ [*specify the natural channel, e.g.,* Muddy River], a natural channel beginning _____ [*specify source, e.g.,* in the foothills of the Sierra Madre Mountains] and flowing in a generally _____ [*specify direction, e.g.,* southeasterly] direction to its termination in _____ [*specify location, e.g.,* the Pacific Ocean]. Petitioner sought to divert the water at _____ [*specify diversion point*], which is situated in _____ County, California.

5. The water that petitioner sought to appropriate was from the _____ [*specify the natural channel, e.g.,* Muddy River] and was unappropriated, and was therefore public water subject to appropriation under *Section 1201 of the Water Code*.

6. The State Board held a hearing on the application on _____ [*date*], and rejected petitioner's application in an order dated _____ [*date*]. A copy of the order containing the facts and conclusions on which it is based is attached to this petition as Exhibit B, and made a part of this petition.

[7. On _____ [*date*], petitioner filed a reconsideration petition with the State Board, pursuant to *Section 1122 of the Water Code*, requesting a reconsideration of the Board's rejection of the application.]

[8. The Board (held a hearing on the reconsideration petition on _____ (*date*), and) rejected petitioner's application in an order dated _____ (*date*). A copy of the order containing the facts and conclusions on which it is based is attached to this petition as Exhibit C, and made a part of this petition.]

9. _____ [*Allege the reason why the decision is invalid, e.g.,* The Board's refusal to issue the appropriation permit to petitioner was arbitrary and was not supported by the evidence, which indicated that the appropriation was urgently needed for domestic and irrigation purposes]. _____ [A verbatim transcript of the record of the hearing, containing the evidence received, is attached to this petition as Exhibit D and made a part of this petition *or* The substance of the evidence received at the hearing is as follows: _____ (*state substance of evidence*)].

[*EITHER, if alleging that evidence does not support findings*]

10. The evidence does not support the findings for the following reasons: _____ [*specify*].

[*AND/OR, if alleging that incompetent evidence was received*]

10. Petitioner objected at the hearing to the following evidence, on the grounds indicated, but in each instance petitioner's objection was not sustained and the evidence was received: _____ [*identify evidence, e.g.,* the testimony of _____ (*name*), which was offered to show _____ (*specify*); _____ (*specify and state ground for objection, e.g.,* the evidence was objected to on the ground that _____ (*specify*))].

[*CONTINUE*]

[11. Petitioner has the following relevant evidence which was not presented at the hearing: _____ (*describe completely*). This evidence could not be produced at the hearing because _____ (*specify why, in the exercise of reasonable diligence, petitioner could not produce evidence*). This evidence tends to show that _____ (*state what evidence will prove*).]

[12. Petitioner is informed and believes and thereon alleges that respondent's action was arbitrary and capricious. As an incident of bringing and maintaining this proceeding, petitioner has become and is obligated personally to pay to his/her/its counsel _____ (*name*), attorney's fees _____ (exceeding $7,500 *or* in the sum of $_____).]

13. The Board has the duty to approve petitioner's application and issue an appropriation permit. Petitioner is the party beneficially interested, and has no plain, speedy, or adequate remedy at law, but brings this petition under the authority of *Section 1126 of the Water Code*.

WHEREFORE, petitioner prays judgment as follows:

[1. For an alternative writ of mandate directing respondent to set aside its order of _____ (*date*), rejecting petitioner's appropriation permit and to reconsider whether petitioner is entitled to receive a permit, or alternatively to show cause why a peremptory writ of mandate to the same effect should not be issued;]

[2. For an order restraining operation of the State Board's cease and desist order of _____ (*date*), _____ (*specify effect of cease and desist order*), until further order of the court and for an order to show cause why operation of that order should not be stayed pending the judgment in this proceeding;]

3. For a peremptory writ of mandate directing respondent to set aside its order of _____ [*date*], rejecting petitioner's appropriation permit and directing respondent to reconsider whether petitioner is entitled to receive a permit;

[4. For reasonable attorney's fees, in addition to any other relief granted or other costs awarded;]

5. For costs of suit; and

6. For such other and further relief as the court may deem equitable.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents tof this petition. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

This form of petition is for use by an applicant, whose application for a permit to appropriate water was denied, to petition the court for a writ of mandate for relief from that denial. Any interested person may petition for a writ of mandate inquiring into the State Water Resources Control Board action. The petition must be made within 30 days of the State Board action [*Water Code § 1126(b)*]. Optional Paragraphs 7 and 8 should be included when the applicant requested a reconsideration by the Board, although failure to seek a reconsideration does not affect the right to petition [*Water Code § 1126(b)*].

[3] Allegations

This petition for a writ of mandate alleges the following:

- The petitioner's identity as one capable of appropriating water (Paragraph 1) [*see Water Code §§ 1252, 1252.5*];

- The respondent's identity and capacity to make appropriation decision (Paragraph 2) [*see Code Civ. Proc. § 1094.5(a)*; *Water Code § 1253*];

- That an application was made to appropriate water (Paragraph 3) [*see Water Code §§ 1250-1258*];

- That the location of the diversion point is within the county (Paragraph 4);

- That the water to be appropriated is public water (Paragraph 5) [*Water Code § 1201*];

- That the respondent held a hearing and rejected the application (Paragraph 6) [*see Code Civ. Proc. § 1094.5(a)*; *Water Code § 1350*];

- That the respondent's decision is not supported by the evidence (Paragraph 9) [*see Code Civ. Proc. § 1094.5(a), (b)*];

- The specific reasons why the evidence does not support the findings (Paragraph(s) 10); and

- That the petitioner is beneficially interested and has no adequate or speedy legal remedy (Paragraph 13) [*see Code Civ. Proc. § 1086*].

The form includes optional paragraphs for use to allege (1) the petitioner's request for a reconsideration and respondent's denial (Paragraphs 7 and 8) [*see Water Code § 1122*], (2) the submission of any additional relevant evidence (Paragraph 11) [*see Code Civ. Proc. § 1094.5(e)*], and (3) arbitrary and capricious action by the State Board

warranting attorney's fees (Paragraph 12) [*see Gov. Code § 800*].

[4] Verification

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Proof of service on each respondent and real party in interest of a copy of a petition that seeks an alternative writ must accompany the petition when it is offered for filing except when, in its discretion and for good cause, the court has granted the application for the writ ex parte [*Code Civ. Proc. § 1107*; for a discussion of serving the petition, see Ch. 358, *Mandate and Prohibition*].

[5] Points and Authorities

Points and authorities also customarily accompany a petition filed in a superior court, although they do not appear to be expressly required by statute. When no alternative writ is sought, proof of service of a copy of the petition need not accompany the application, but proof of service of a copy of the filed petition must be lodged with the court before a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

[6] State Statutes

Writ of mandate to inquire into validity of administrative order. *Code Civ. Proc. § 1094.5*

Recovery of damages, costs, and attorney's fees from public entity. *Code Civ. Proc. § 1095*; *Gov. Code § 800*

Powers and duties of State Water Resources Control Board. *Water Code § 179*

Water available for appropriation. *Water Code §§ 1201, 1202*

No hearing necessary to approve unprotested application or if undisputed facts support the issuance of the permit and there is no disputed issue of material fact, or to reject defective application, or if the applicant fails to provide information requested by the board, or undisputed facts support the denial of the application and there is no disputed issue of material fact. *Water Code § 1351*

Prerequisites to issuing appropriation permit. *Water Code § 1375*

[7] Cross References

For discussion and forms relating to judicial review of administrative trials by writ of mandate pursuant to *Code Civ. Proc. § 1094.5*, see Ch. 474, *Availability of Judicial Review of Agency Decisions*

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PART IV. FORMS
A. Rights to Water
1. Enforcement of Appropriative Rights

51-575 California Forms of Pleading and Practice--Annotated § 575.365

§ 575.365 Petition for Writ of Mandate--To Compel Review of State Water Resources Control Board Cease and Desist Order [Water Code § 1126]

[1] FORM Petition for Writ of Mandate--To Compel Review of State Water Resources Control Board Cease and Desist Order [Water Code § 1126]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	
vs.	)	NO. _____
_____ [*name*],	)	PETITION FOR WRIT OF MANDATE
Respondent.	)	
	)	
	)	

Petitioner respectfully represents:

1. Petitioner _____ [*set forth petitioner's identity as one aggrieved by the preliminary cease and desist order, e.g.,* holds a permit to appropriate water from the Muddy River for domestic and irrigation purposes].

2. Respondent State Water Resources Control Board of the State of California is the board within the Resources Agency of the State of California charged with enforcement of the terms or conditions of any permit or license issued by it in order that the public interest is best served. Under *Water Code Sections 1825 through 1851*, the State Board is allowed

to issue preliminary cease and desist orders to prevent permit or license violations. Pursuant to *Water Code Sections 1831* and *1834*, when requested to do so by the person alleged to be committing a violation, the Board is required to hold a hearing before issuing a preliminary cease and desist order.

3. On _____ [*date*], petitioner _____ [delivered *or* mailed] a written request for a hearing to the State Board signed _____ [by *or* on behalf of] petitioner. On _____ [*date*], the Board held a hearing to receive evidence _____ [*specify issue of hearing, e.g.,* on whether or not a violation of petitioner's permit was occurring]. Petitioner attended the hearing.

4. On _____ [*date*], petitioner received the State Board's preliminary cease and desist order providing that _____[*specify terms of order*]. [A copy of the preliminary cease and desist order is attached to this petition as Exhibit A and made a part of this petition.]

[5. On _____ (*date*), petitioner received the State Board's final cease and desist order. A copy of the final cease and desist order is attached to this petition as Exhibit B and made a part of this petition.]

6. [*Invalidity of State Board's action. See § 575.364, Paragraph 9.*]

[7. *Description of evidence introduced at hearing or incorporation of transcript of hearing. See § 575.364, Paragraph 9.*]

[8. *Grounds for allowing submission of additional evidence. See § 575.364, Paragraph 11.*]

9. [*Attorney's fees allegation. See § 575.364, Paragraph 12.*]

10. The State Board has the duty to revoke any cease and desist order against petitioner because its continuance is not in the public interest. Petitioner is the party aggrieved by the cease and desist order, and has no adequate or speedy remedy at law, but brings this petition under the authority of *Section 1126 of the Water Code*.

WHEREFORE, petitioner prays judgment as follows:

[1. For an alternative writ of mandate directing respondent to set aside its cease and desist order of _____ (*date*), compelling petitioner to cease and desist from _____ (*specify*), or in the alternative to show cause why a peremptory writ of mandate to the same effect should not be issued;]

[2. For an order restraining operation of the State Board's cease and desist order of _____ (*date*), _____ (*specify effect of cease and desist order*), until further order of the court and to show cause why operation of that order should not be stayed pending the judgment in this proceeding;]

3. For a peremptory writ of mandate directing respondent to set aside its order of _____ [*date*], compelling petitioner to cease and desist from _____ [*specify*];

[4. For reasonable attorney's fees, in addition to any other relief granted or other costs awarded;]

5. For costs of suit; and

6. For such other and further relief as the court may deem equitable.

_____ [*signature*]
Attorney for _____ [*petitioner*]

[*Verification. See § 575.364.*]

CAUTION:

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Proof of service on each respondent and real party in interest of a copy of a petition that seeks an alternative writ must accompany the petition when it is offered for filing except when, in its discretion and for good cause, the court has granted the application for the writ ex parte [*Code Civ. Proc. § 1107*; for a discussion of serving the petition, see Ch. 358, *Mandate and Prohibition*]. Points and authorities also customarily accompany a petition filed in a superior court, although they do not appear to be expressly required by statute. When no alternative writ is sought, proof of service of a copy of the petition need not accompany the application, but proof of service of a copy of the filed petition must be lodged with the court before a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

[2] Use of Form

This form of petition for a writ of mandate is for use by a person aggrieved by a cease and desist order issued by the State Board to obtain judicial review of that order. After notifying the alleged violator, the Board may issue a preliminary cease and desist order when it determines that there is a violation of a permit or license to appropriate water [*Water Code §§ 1831, 1834*]. Any aggrieved person may file a petition for a writ of mandate for review of either a preliminary or a final cease and desist order. The petition should be filed within 30 days after receipt of the final cease and desist order [*Water Code § 1126*]. For further discussion of the enforcement of water rights, see *§ 575.101*.

[3] Allegations

This petition for a writ of mandate alleges (1) the petitioner's identity as one aggrieved by the cease and desist order (Paragraph 1) [*see Water Code § 1126*], (2) that the respondent is the state entity with discretion to make a decision (Paragraph 2) [*see Code Civ. Proc. § 1094.5(a)*; *Water Code §§ 1831-1836*], (3) that the respondent held a hearing (Paragraph 3) [*see Code Civ. Proc. § 1094.5(a)*; *Water Code § 1834*], (4) that the respondent issued a preliminary cease and desist order (Paragraph 4) [*see Water Code § 1831*], and (5) that the petitioner is an aggrieved person and has no adequate or speedy legal remedy (Paragraph 10) [*see Code Civ. Proc. § 1086*]. An optional paragraph is included for use when the State Board has issued a final cease and desist order (Paragraph 5) [*see Water Code § 1833*].

[4] State Statutes

Cease and desist orders. *Water Code §§ 1831-1836*

Sanctions for failure to comply with cease and desist order. *Water Code § 1845*

[5] Cross References

For a related form, see *§ 575.364*.

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51-575 California Forms of Pleading and Practice--Annotated §§ 575.366-575.379

[Reserved]

§§ 575.366[Reserved]

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A. Rights to Water
2. Adjudication of Water Rights

51-575 California Forms of Pleading and Practice--Annotated § 575.380

§ 575.380 Statutory Adjudication Proceedings--Petition to State Water Resources Control Board for Determination of Water Rights [Water Code § 2525]

[1] FORM Statutory Adjudication Proceedings--Petition to State Water Resources Control Board for Determination of Water Rights [Water Code § 2525]

BEFORE THE STATE WATER RESOURCES CONTROL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Determination of the Rights of the Various Claimants to the Waters of _____, and Its Tributaries, in _____, County, California

PETITION FOR DETERMINATION OF WATER RIGHTS

To The State Water Resources Control Board:

The undersigned, your petitioners, respectfully represent:

First--That they are claimants to water or use of water of the above-named stream system, to wit, said _____ and its tributaries, in _____ County, California.

Second--That there are various claimants to waters and the use of water of this stream system and to _____ [*specify nature of right, e.g.,* appropriative] rights in and to the waters of this petition.

Third--That the public interest and necessity will be served by a determination of the rights in and to the water of this stream system.

WHEREFORE, your petitioners request that a determination of the rights of the various claimants to the waters of this stream system be undertaken as provided for in Sections 2500 to 2900, inclusive, of the California Water Code.

Dated:

Petitioner	Post Office Address
_____	_____
_____	_____
_____	_____

[2] Use of Form

This form is for use by claimants to the water or the use of water in a stream system to petition the State Board for a determination of the rights of the various claimants to that water [*Water Code § 2525*; *23 Cal. Code Reg. § 945*]. For discussion of adjudications of water rights by the Board, see *§ 575.140*. The procedure of petitioning the Board is an alternative to filing an action for declaratory relief for determination of water rights in the courts, and is preferable in many ways [*see § 575.172*]. For a form of complaint for declaratory relief for determination of water rights to be filed with the court, see *§ 575.385*.

[3] State Statutes

Statutory adjudication of water rights. *Water Code §§ 2500-2866*

Petition and preliminary proceedings. *Water Code §§ 2525-2529*

[4] Administrative Regulations

Petition. *23 Cal. Code Reg. § 945*

Statutory adjudications. *23 Cal. Code Reg. §§ 945-951*

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2. Adjudication of Water Rights

51-575 California Forms of Pleading and Practice--Annotated § 575.381

§ 575.381 Statutory Adjudication Proceedings--Proof of Claim of Water Right--State Board Form [Water Code § 2575]

[1] FORM Statutory Adjudication Proceedings--Proof of Claim of Water Right--State Board Form [Water Code § 2575]

Click here to view image.

[2] Use of Form

This form is a reproduction of the State Water Resources Control Board form for use by a claimant as a proof of claim of a water right [*Water Code § 2575*; *23 Cal. Code Reg. § 947(a)*]. All interested claimants who receive notice of the determination proceedings must notify the State Board of their intention to file a proof of claim and to appear and submit proof of their claims [*Water Code § 2528*]. An interested claimant may provide the requisite notice of intention through a letter to the Board. A separate proof must be filed for each purpose of use, except that water for incidental domestic, stock watering, and recreational use may be claimed in the same proof with any other use [*23 Cal. Code Reg. § 947(b)*]. When a water right is held by two or more parties and the interests in that water right have been divided among the parties, each party must file a separate proof covering his or her individual interest in the water right [*23 Cal. Code Reg. § 947(f)*].

Any person not submitting a proof of claim by the conclusion of the investigation will be notified that his or her rights will be entered in the preliminary order of determination by the Board based on information gathered during the investigation unless a claim is submitted within 30 days [*Water Code § 2577*].

[3] State Statutes

Proof of claim. *Water Code §§ 2575-2577*

[4] Administrative Regulations

Signature of deponent claimant. *23 Cal. Code Reg. § 948*

Objections to proof of claim. *23 Cal. Code Reg. § 949*

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2. Adjudication of Water Rights

51-575 California Forms of Pleading and Practice--Annotated § 575.382

§ 575.382 Statutory Adjudication Proceedings--Objection to Determination of State Water Resources Control Board [Water Code § 2628]

[1] FORM Statutory Adjudication Proceedings--Objection to the Determination of the State Water Resources Control Board [Water Code § 2628]

BEFORE THE STATE WATER RESOURCES CONTROL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Determination of the Rights of the Various Claimants to the Waters of _____, and Its Tributaries, in _____, County, California

OBJECTION TO THE _____ [REPORT *and/or* ABSTRACT OF PROOFS OF CLAIMS *and/or* PRELIMINARY ORDER OF DETERMINATION] OF THE STATE WATER RESOURCES CONTROL BOARD

The undersigned hereby files objection to certain statements, claims, or preliminary water right determinations set forth in the State Water Resources Control Board report in the above-entitled matter, as follows:

[*Check appropriate item and state grounds for objection*]

1. Proof of claim No. _____ filed by _____.

[*State grounds for objection*] _____
_____
_____

2. The Preliminary order of determination.

[*State grounds for objection*] _____
_____
_____

3. Other information contained in the State Board's report.

[*State grounds for objection*] _____
_____
_____

Date _____
Signature _____

[2] Use of Form

This form is for use to object to the report, abstract of proofs of claims, or the preliminary order of determination of the State Board regarding the water rights in a stream system. The claimant has 60 days after the Board has made its report to file any objections [*Water Code § 2604*]. Objections must be written and state with reasonable certainty the grounds of the objection [*Water Code § 2628*; *23 Cal. Code Reg. § 949*]. For discussion of the entire process, see *§ 575.146*.

[3] State Statutes

Report and preliminary order of determination. *Water Code §§ 2600-2604*

Objections to report. *Water Code §§ 2625-2628*

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51-575 California Forms of Pleading and Practice--Annotated § 575.383

§ 575.383 Statutory Adjudication Proceedings--Exception and Proof of Claim of Claimant in Intervention [Water Code § 2780] and Application for Order Prescribing Service [Water Code § 2781]

[1] FORM Statutory Adjudication Proceedings--Exception and Proof of Claim of Claimant in Intervention [Water Code § 2780] and Application for Order Prescribing Service [Water Code § 2781]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	EXCEPTION AND PROOF OF CLAIM OF
_____ [*name*],	)	CLAIMANT IN INTERVENTION AND APPLICA-
Defendant(s).	)	TION FOR ORDER PRESCRIBING SERVICE
	)	[*Water Code §§ 2780, 2781*]
	)	

_____

_____ [*Name of intervenor*], alleges:

1. _____ [*Name of intervenor*], a claimant in intervention, takes exception to the order of determination of water rights of _____ [*specify watercourse system which is object of the determination, e.g.,* the Muddy River] by the State Water Resources Control Board dated _____.

2. Claimant in intervention takes exception to that order on the ground that the order fails to determine his/her/its right to take waters from _____ [*specify watercourse, e.g.,* the Muddy River].

3. _____ [*Name of intervenor*] claims a right to take waters from that watercourse system, in

_____ County, California, as fully set forth in his/her/its Proof of Claim of Water Right, a copy of which is attached to this proof of claim as Exhibit A and made a part of this proof of claim.

4. _____ [*Name of intervenor*] was not served with notice of the proceedings for the determination of the water rights to _____ [*specify watercourse, e.g.,* the Muddy River] before the State Water Resources Control Board, and had neither actual knowledge nor notice of the pendency of this proof of claim prior to the entry of the order of determination by the State Board.

5. Claimant in intervention first received knowledge of the proceedings on _____ [*date*], when _____ [*set forth how intervenor learned of proceedings*].

WHEREFORE, claimant in intervention prays:

1. That this court hold such hearings and take such other action as is necessary and proper to determine claimant's right to take water from _____ [*specify watercourse system, e.g.,* the Muddy River];

2. That this court issue an order prescribing the time and manner of service of this exception and proof of claim on other claimants and the time within which contests of the proof may be filed and served, as provided by *Section 2781 of the Water Code*.

_____ [*date and place*]

_____ [*Signature*]
Claimant in Intervention

[2] Use of Form

This form is for use by a claimant to intervene in, and take exception to, proceedings in superior court for the affirmation of the State Board's order of determination of water rights in a stream system. A claimant who had no actual knowledge or notice of the pendency of the proceedings prior to the entry of the order of determination by the Board may intervene [*Water Code § 2780*]. The claimant intervenor must also apply for an order prescribing the time and manner of service to the exception and proof on other claimants and the time within which contests of the proof may be filed with the court and served on the intervenor [*Water Code § 2781*; *see § 575.150*].

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51-575 California Forms of Pleading and Practice--Annotated § 575.384

§ 575.384 Statutory Adjudication Proceedings--Order Prescribing Time and Manner of Service of Exception and Proof of Claimant in Intervention and Time for Filing and Service of Contests [Water Code § 2781]

[1] FORM Statutory Adjudication Proceedings--Order Prescribing Time and Manner of Service of Exception and Proof of Claimant in Intervention and Time for Filing and Service of Contests [Water Code § 2781]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER PRESCRIBING TIME AND MANNER OF
vs.	)	SERVICE OF EXCEPTION AND PROOF OF
_____ [*name*],	)	CLAIMANT IN INTERVENTION AND TIME FOR
Defendant.	)	FILING AND SERVICE OF CONTESTS
	)	[*Water Code § 2781*]
	)	Date: _____
	)	Time: _____
		Location: _____
		[Trial Date: _____]

_____

The application of _____ [*identify claimant in intervention*] for an order prescribing the time and manner of service of the exception and proof of the claimant in intervention and the time for filing contests of the proof and serving them on the intervenor came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the application ought to be granted,

IT IS ORDERED that the application be, and it hereby is, granted and a copy of the exception and proof of claim of the claimant in intervention, together with a copy of this order, be served on each claimant herein by _____ [*specify manner of service, e.g.*, registered mail] on or before _____ [*date*].

IT IS FURTHER ORDERED that contest, if any, to intervenor's proof of claim must be filed with the court and served on claimant in intervention on or before _____ [*date*].
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use when a claimant is seeking intervention in the proceedings on the order of determination by the State Water Resources Control Board based on the claimant's lack of knowledge until after the order had been entered [*see Water Code §§ 2780, 2781*].

[3] Cross References

For a related form, see *§ 575.383*.

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51-575 California Forms of Pleading and Practice--Annotated § 575.385

§ 575.385 Complaint [Code Civ. Proc. § 425.10] for Declaratory Relief [Code Civ. Proc. § 1060] for Determination of Water Rights and for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)], and Permanent Injunction [Civ. Code § 3422]--General Form

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Declaratory Relief [Code Civ. Proc. § 1060] for Determination of Water Rights and for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)], and Permanent Injunction [Civ. Code § 3422]--General Form

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DECLARATORY RELIEF[,
_____ [*name*], [and DOES I	)	TEMPORARY RESTRAINING ORDER, AND
through _____,]	)	PRELIMINARY (AND PERMANENT) INJUNC-
Defendant(s).	)	TION(S)]
	)	(Determination of Water Rights)
		[(*Civ. Code § 3422*;) Code Civ. Proc. §(§ 526, 527(a),) 1060]

_____

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, the owner of land located at _____ [*address*], _____ County, California, more particularly described as follows: _____ [*set forth legal description*].

2. Defendant _____ [*name*] is, and at all times herein mentioned was, the owner of land located at _____ [*address*], _____ County, California, more particularly described as follows: _____ [*set forth legal description of land*].

[*IDENTIFY, in successively numbered paragraphs, each additional defendant claiming water rights adverse to plaintiff's claim; then CONTINUE*]

[3. Plaintiff is ignorant of the true names and capacities of defendants sued herein as DOES I-_____, inclusive, and therefore sues these defendants by such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. (Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is claiming an interest in the water described below.)]

[4. (Plaintiff is informed and believes and thereon alleges that) (A)t all times herein mentioned each of the defendants sued herein as DOES I-_____, (*specify number smaller than total number of does alleged to reflect only those to whom the agency allegation applies*) inclusive, was the agent and employee of each of the remaining defendants and was at all times acting within the course and scope of such agency and employment.]

[5. *If plaintiff is asserting a riparian right, add description of riparian ownership, e.g.,* Plaintiff has a right to the use of _____ (*specify amount in gallons, acre-feet, or other measure of water or proportion of watercourse*), in that his/her land is riparian to the Muddy River, located _____ (upstream *or* downstream) from defendant's land.]

6. Plaintiff is a claimant to water and the use of water of _____ [*specify water, e.g.,* the Muddy River and its tributaries)] in _____ County, California, for beneficial use as follows: _____ [*set forth particular use and amount of water in gallons, acre-feet, or other measure*].

7. Each of the defendants is a claimant to water and the use of water of _____ [*specify water, e.g.,* the Muddy River and its tributaries] in _____ County, California, [for uses which each defendant claims to be beneficial and in amounts which are unknown to plaintiff *or if the uses and amounts are known, plaintiff may describe them with particularity*].

8. An actual controversy has arisen and now exists among the various claimants to the water and the use of that water because of the disputed types and amounts of the various claims.

9. Plaintiff will suffer damages _____ [*describe type of damage, e.g.,* in the form of loss of crops due to inadequate irrigation water] as a result of defendants' use of water under their claimed water rights, which are adverse to the water rights claimed by plaintiff. The various claims of defendants are adverse to each other as well as to the claim of plaintiff.

10. Plaintiff has no plain, speedy, or adequate remedy at law, and a judicial declaration is necessary and appropriate at this time under the circumstances in order that plaintiff may ascertain the extent of his/her/its rights to the water and to the use of that water.

[11. The assertion and enforcement by defendants, and each of them, of their respective claims to the water and use of the water, unless and until enjoined and restrained by order of this court, will _____ (*specify particular facts establishing grounds for preliminary injunctive relief, e.g.,* cause great and irreparable injury to plaintiff in that plaintiff's land is planted in crops which require water, defendants' use of the water leaves no water available for plaintiff, and plaintiff has already lost a portion of his/her/its crop and may lose the entire crop if defendants' use of the water continues until this action can be brought to trial).]

[12. Plaintiff has no adequate remedy at law for the injuries _____ (currently being suffered *or* which are threatened) in that _____ (*specify any additional facts tending to show grounds for permanent injunctive relief, e.g.*, defendants will continue to use the water and plaintiff would be required to maintain a multiplicity of judicial proceedings to protect his/her interests).]

WHEREFORE, plaintiff prays judgment as follows:

1. For a declaration determining the rights of the various claimants to the waters of _____ [*specify the water in controversy, e.g.*, the Muddy River and its tributaries];

[2. For issuance of a temporary restraining order and preliminary injunction restraining and enjoining defendants from _____ [*specify, e.g.*, removing any water from the Muddy River];

[3. For issuance of a permanent injunction restraining and enjoining defendants from _____ [*specify, e.g.*, removing any water from the Muddy River];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents tof this petition. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

This form of complaint is for use by a plaintiff to bring an action for declaratory relief to determine water rights in a watercourse and to request injunctive relief from interference with that right [*see Civ. Code § 3422*; *Code Civ. Proc. §§ 526, 527(a), 1060*]. The plaintiff's claim may be based on a riparian right, an appropriative right, or both.

[3] Allegations

The above complaint alleges the following:

- Plaintiff's and defendant's ownership of land for purposes of venue (Paragraphs 1 and 2) [*see Code Civ. Proc. § 392(a)(1)*];

- Plaintiff's and defendants' claims to water (Optional Paragraph 5; Paragraphs 6 and 7);
- Existence of an actual controversy (Paragraph 8); and
- The necessity for a declaration of rights (Paragraphs 9 and 10) [*see Code Civ. Proc. § 1060*].

Optional Paragraph 5 is for use if plaintiff is asserting a riparian right. In that case, plaintiff must plead the following:

- The riparian character of the land;
- The quantity of water or the proportion of the watercourse to which entitlement is claimed; and
- The location of the land with regard to the land of the other party.

The riparian character of the land may be pleaded either by alleging the existence of ultimate facts, which if proved would establish the land as riparian, or by alleging generally that the land is riparian to a stream or natural watercourse. The following three facts must be proved to establish land as riparian [*see Hudson v. West (1957) 47 Cal. 2d 823, 828-830, 306 P.2d 807* (holding that quantity of water must be definite and if number of inches of running water is indefinite complaint is subject to demurrer for uncertainty)]:

- Some part of the land must be contiguous to a natural watercourse;
- The land for which water is claimed must be within the watershed of the stream; and
- The land for which water is claimed must be part of the smallest tract held under one title in the chain of title leading to the present owner.

The form also includes optional paragraphs for alleging the following:

- The fictitious names of defendants (Paragraph 3) [*see Code Civ. Proc. § 474*; *see also* Ch. 20, *Allegations Commonly Used*];
- The agency relationship of defendants (Paragraph 4) [*see* Ch. 427, *Principal and Agent*];
- Facts to support preliminary injunctive relief (Paragraph 11) [*see Code Civ. Proc. § 526*; *E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 7 L.R.R.M. (BNA) 686, 106 P.2d 1]* ; and
- Any additional facts necessary to support permanent injunctive relief (Paragraph 12) [*see Civ. Code § 3422*; *see also* Ch. 303, *Injunctions*].

[4] Verification

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 7 L.R.R.M. (BNA) 686, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order or preliminary

injunction, see Ch. 303, *Injunctions* .

[5] Jurisdiction and Venue

The county in which the real property through which plaintiff is asserting a right to the watercourse is situated is the proper county for the action [*Code Civ. Proc. § 392(a)(1)*]. The action must be brought in the superior court and is not a limited civil case [*Code Civ. Proc. §§ 85, 86(a)(7), (8), 580(b), 1060*].

[6] State Statutes

Permanent injunctive relief. *Civ. Code § 3422*

Preliminary injunctive relief. *Code Civ. Proc. §§ 526, 527(a)*

Declaratory relief for determination of rights to water in watercourse. *Code Civ. Proc. § 1060*

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and for fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to judicial remedy of declaratory relief, see Ch. 182, *Declaratory Relief*

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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51-575 California Forms of Pleading and Practice--Annotated § 575.386

§ 575.386 Order of Reference to State Water Resources Control Board [Water Code §§ 2000, 2001]--Action for Declaratory Relief [Code Civ. Proc. § 1060] for Determination of Water Rights and for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)], and Permanent Injunction [Civ. Code § 3422]

[1] FORM Order of Reference to State Water Resources Control Board [Water Code §§ 2000, 2001]--Action for Declaratory Relief [Code Civ. Proc. § 1060] for Determination of Water Rights and for Temporary Restraining Order, Preliminary Injunction [Code Civ. Proc. §§ 526, 527(a)], and Permanent Injunction [Civ. Code § 3422]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	ORDER OF REFERENCE TO STATE WATER RE-
_____ [*name*], [and DOES I	)	SOURCES CONTROL BOARD
through _____,]	)	[*Water Code §§ 2000, 2001*]
Defendant(s).	)	
	)	

The above-entitled action is one for a determination of the rights to water.

It appears to the court that [_____ (some *or* all) of the issues in this action should be referred to the State Water Resources Control Board as referee *or* this suit should be referred to the State Water Resources Control Board to investigate _____ (some *or* all) of the physical facts involved in this action], and good cause appearing therefor;

IT IS THEREFORE ORDERED:

[*EITHER*]

Pursuant to *Water Code Section 2000*, _____ [all of the *or* the following] issues are referred to the State Water Resources Control Board as referee [: _____ (*itemize issues, if fewer than all*)].

[*OR*]

Pursuant to *Water Code Section 2001*, this suit is referred to the State Water Resources Control Board for investigation of and report on _____ [all of the *or* the following] physical facts involved in this action [: _____ (*itemize facts, if fewer than all*)].

[*CONTINUE*]

The Board is further ordered to file its report _____ [seasonably *or* not later than _____ (*date*)] with this court.

[*Set forth any further requirements ordered by court*].

_____ [*date and place*]
_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This order is for use to refer an action for determination of water rights to the State Water Resources Control Board, either (1) for it to serve as a referee in some or all of the issues or (2) for it to investigate some or all of the physical facts relevant to a determination of the rights of the parties [*Water Code §§ 2000, 2001*; *see § 575.173[1]*].

[3] Cross References

For a related form, see *§ 575.385*.

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51-575 California Forms of Pleading and Practice--Annotated § 575.387

§ 575.387 Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] by Lower Riparian Owner Against Upper Riparian Owner--Interference With Right to Use Water

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Damages [Civ. Code § 3333] by Lower Riparian Owner Against Upper Riparian Owner--Interference With Right to Use Water

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DAMAGES
_____ [*name*], [and DOES I	)	[*Civ. Code § 3333*]
through _____,]	)	
Defendant(s).	)	
	)	

_____

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, the owner, in possession, and entitled to the possession of land located at _____ [*address*], _____ County, California, more particularly described as follows: _____ [*set forth legal description*] and to all right, title, and interest in and to any and all springs, streams, ditches, canals, flumes, rights-of-way, water locations, water rights, privileges, and licenses in any way connected with or appurtenant to that real property. Plaintiff has a right to the use of _____ [*specify amount of water in gallons, acre-feet, or other measure or proportion of watercourse*], in that his/her land is riparian to _____ [*specify watercourse, e.g.,* the Muddy River], and located _____ [upstream *or* downstream] from defendant's land.

[2. *Fictitious name allegation. See § 575.385, Paragraph 3.*]

[3. *Agency allegation. See § 575.385, Paragraph 4.*]

4. At all times herein mentioned, _____ [*specify watercourse, e.g.*, the Muddy River] was, and now is, a natural watercourse flowing in its natural course in a generally _____ [*specify direction, e.g.*, southerly] direction through, along, over, across, on, and past plaintiff's above-described real property, which is riparian tto this petition. _____ [*Specify manner in which water may be of use to plaintiff, e.g.*, A large portion of plaintiff's land is irrigated by the natural flow of the Muddy River across it. That natural irrigation renders the land capable of producing large quantities of pasturage for livestock.]

5. Plaintiff and his/her/its predecessors in interest, under their rights as riparian proprietors in _____ [*specify watercourse, e.g.*, the Muddy River], and by virtue of their ownership of the property bordering thereon, have for more than _____ years used, and are now using, except as that use has been interfered with by defendants as hereinafter alleged, the water of _____ [*specify watercourse, e.g.*, the Muddy River] for _____ [*set forth beneficial uses made of that water, e.g.*, stock, domestic, and agricultural purposes]. Plaintiff's use of his/her/its land has required the entire amount of his/her/its riparian right for those purposes, and will continue to so require.

[*EITHER*]

6. Defendant at all times herein mentioned was the owner of land located at _____ [*address*], _____ County, California, more particularly described as follows: _____ [*set forth legal description*], together with riparian rights on _____ [*specify watercourse, e.g.*, the Muddy River]. Defendant's riparian right on that watercourse is upper to plaintiff's.

[*OR*]

6. Defendant has not, and never had, any right whatsoever in or to the waters of _____ [*specify watercourse, e.g.*, the Muddy River], or any part tof this petition, or any right to divert any of its waters, and defendant's use of the water is neither a riparian use, nor the lawful exercise of a riparian right. If defendant had not wrongfully taken those waters, plaintiff would have put them to reasonable, lawful, and beneficial purposes.

[*CONTINUE*]

7. _____ [*Set forth defendant's use of the water of that watercourse which has injured plaintiff, e.g.*, During the past two years defendant has performed logging operations on his land, and in so doing, has wrongfully and unlawfully dammed up the Muddy River, taking large quantities of water from the river, thereby preventing the waters of the river from reaching plaintiff's land in sufficient quantities for plaintiff's purposes as set forth above, and interrupting the natural flow of the waters].

8. As a proximate result of defendant's unlawful and wrongful taking of the waters of _____ [*specify watercourse, e.g.*, the Muddy River], that water has not been reaching plaintiff's land in sufficient quantities to provide water for _____ [*specify purpose for which plaintiff used the water, e.g.*, pasturage for livestock] and plaintiff has sustained damages _____ [*specify nature and extent of damages, e.g.*, by being required to move his stock to another range, rent pasturage, hire extra help, and pay extra labor, all to his damage in the sum of

$_____].

[9. The aforementioned acts of the defendant were willful and _____ (oppressive *or* fraudulent *or* malicious *or any combination tof this petition*) in that _____ (*allege facts indicating presence of oppression, fraud, and/or malice*).]

WHEREFORE, plaintiff prays judgment as follows:

1. For general damages in the sum of $_____;

[2. For punitive damages;]

3. For costs of suit; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification. See § 575.385.*]

[2] Use of Form

This form of complaint is for use by a plaintiff to bring an action to recover damages for interference with a riparian water right against the owner of an upper riparian right. The form is adapted from the fact situation in *Eldridge v. Scott Lumber Co. (1960) 187 Cal. App. 2d 457, 9 Cal. Rptr. 623* .

[3] Allegations

The above complaint alleges (1) plaintiff's ownership of land for purposes of venue (Paragraph 1) [*see Code Civ. Proc. § 392(a)(1)*], (2) plaintiff's riparian right to water (Paragraphs 1 and 4) [*see Hudson v. West (1957) 47 Cal. 2d 823, 828-829, 306 P.2d 807]* , (3) plaintiff's beneficial riparian use (Paragraph 5), (4) defendant's riparian right or lack tof this petition (Paragraph 6), (5) facts showing the defendant's use causing injury (Paragraph 7), and (6) damages proximately caused by defendant's wrongful conduct (Paragraph 8). It also includes an optional allegation for punitive damages (Paragraph 9) [*Civ. Code § 3294*].

[4] Decisions

Lower riparian owner is entitled to damages when land used for grazing and cattle lost weight due to lack of water caused by upstream damming. *Eldridge v. Scott Lumber Co. (1960) 187 Cal. App. 2d 457, 460-461, 9 Cal. Rptr. 623*

[5] Cross References

For a related form, see *§ 575.385*.

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51-575 California Forms of Pleading and Practice--Annotated § 575.388

§ 575.388 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Action for Interference With Right to Use Water by Impounding Water--Absence of Watercourse; Only Surface Drainage Impounded

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Action for Interference With Right to Use Water by Impounding Water--Absence of Watercourse; Only Surface Drainage Impounded

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. The waters alleged in the complaint to have been impounded on his/her/its property were not waters of the watercourse specified in the complaint, nor of any other watercourse.

2. The waters impounded by defendant were, and are, in fact surface drainage waters only. These surface waters are, and were at all times mentioned in the complaint, fed only by the runoff of waters at times of heavy rainfall from natural drainage resulting solely from that rainfall. That runoff did not then, or now, consist of waters running in a well-defined channel.

[2] Use of Form

This form of affirmative defense is for use by a defendant in an answer to a complaint of interference with the riparian right of another through the impounding of waters. When the waters impounded are not part of a watercourse, but are merely surface drainage waters, there is no interference with a riparian right [*South Santa Clara Etc. Dist. v. Johnson (1964) 231 Cal. App. 2d 388, 394-395, 403, 41 Cal. Rptr. 846]* .

If more than one affirmative defense is set forth in the answer, each defense must be separately stated and numbered [*Code Civ. Proc. § 431.30(g)*; *Cal. Rules of Ct., Rule 2.112*]. If the complaint sets forth more than one cause of action, the affirmative defense must refer to the cause of action it is intended to answer [*Code Civ. Proc. § 431.30(g)*].

For discussion and forms relating to affirmative defenses, see Ch. 26, *Answers* .

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51-575 California Forms of Pleading and Practice--Annotated § 575.389

§ 575.389 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Action for Interference With Right to Use Water--Riparian Right to Reasonable Use of Water

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Action for Interference With Right to Use Water--Riparian Right to Reasonable Use of Water

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. At all times mentioned in the complaint, defendant was, and is, the riparian owner of the property described as belonging to him/her/it in the complaint. Defendant has a right to the use of _____ (*specify amount of water in gallons, acre-feet, or other measure or proportion of watercourse*), in that his/her/its land is riparian to _____ (*specify watercourse, e.g.,* the Muddy River), and his/her/its land is located _____ (upstream *or* downstream) from plaintiff's land.]

2. Defendant's use of waters on his/her/its property was in a reasonable amount necessary for beneficial enjoyment of his/her/its property in that _____ [*state facts showing reasonableness of defendant's use of water, e.g.,* defendant impounded water in an amount only as needed for domestic and irrigation use on his/her land].

[2] Use of Form

This form of affirmative defense is for use by a defendant in an answer to a complaint of interference with the riparian right of another. A riparian owner is permitted to use a reasonable amount of water necessary for beneficial enjoyment of the riparian property [*see Gutierrez v. Wege (1905) 145 Cal. 730, 734-735, 79 P. 449* (impounding of waters)].

[3] Cross References

For related forms, see *§§ 575.385* and *575.388*.

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51-575 California Forms of Pleading and Practice--Annotated § 575.390

§ 575.390 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Action for Interference With Right to Use Water--Sufficient Water Available to Plaintiff

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Action for Interference With Right to Use Water--Sufficient Water Available to Plaintiff

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. The water used by defendant on his/her/its property was the amount necessary for beneficial enjoyment of his/her/its property in that _____ [*state facts showing reasonableness of defendant's water use, e.g.,* defendant impounded water in an amount only as needed for irrigation use on his/her land].

2. As a riparian owner plaintiff was only entitled to the amount of water necessary for useful and beneficial purposes, and the amount of water which continued to reach plaintiff's land was sufficient to satisfy his/her/its reasonable demands.

[2] Use of Form

This form of affirmative defense is for use by a defendant in an answer to a complaint of interference with the riparian right of another. When a riparian owner has enough water to satisfy the reasonable demands on the riparian property, that owner has no authority to interfere with the use by another [*see Meridian, Ltd. v. San Francisco (1939) 13 Cal. 2d 424, 450, 90 P.2d 537, 91 P.2d 105* (impounding case suggesting that seepage, drainage, and spill causing return flow may be included in determining amount of water available to lower riparian)].

[3] Cross References

For a related form, see *§ 575.388*.

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2. Adjudication of Water Rights

51-575 California Forms of Pleading and Practice--Annotated § 575.391

§ 575.391 Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Action for Interference With Right to Use Water--Right by Prescription [Civ. Code § 1007, Code Civ. Proc. § 321]

[1] FORM Affirmative Defense Allegation [Code Civ. Proc. § 431.30(b)(2)]--Action for Interference With Right to Use Water--Right by Prescription [Civ. Code § 1007; Code Civ. Proc. § 321]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE [*if more than one cause of action alleged, state* TO THE _____ (*specify, e.g.,* SECOND) CAUSE OF ACTION], DEFENDANT ALLEGES that:

1. At all times mentioned in the complaint, defendant was, and is, the riparian owner of the property described as belonging to him/her/it in the complaint, and is thereby entitled to make reasonable use of the waters flowing on his/her/its property.

2. Defendant's use of waters on his/her/its property exceeded his/her/its riparian right and was adverse to the riparian rights of plaintiff in that _____ [*specify improper nature of water use, e.g.,* defendant impounded water during the dry season, retained it for an indefinite period of time, and released it only to suit his/her/its convenience].

3. For _____ [five *or more*] years defendant [and his/her/its predecessors in title] has/have openly, notoriously, continuously, and under a claim of right to do so, _____ [*state facts showing adverse use of water, e.g.,* diverted waters from the watercourse and impounded them for a beneficial purpose].

4. Through the above-described diversion of water, defendant has acquired a prescriptive right to the waters of the watercourse as against plaintiff.

[2] Use of Form

This form of affirmative defense is for use by a defendant in an answer to a complaint of interference with the riparian

right of another. An upper riparian owner may acquire a prescriptive right to the waters of a stream as against a lower riparian owner by an adverse use of those waters for the prescriptive period [*Moore v. Cal. Oregon Power Co. (1943) 22 Cal. 2d 725, 735, 140 P.2d 798]* . Adverse possession for a five-year period will ripen into title by prescription [*Civ. Code § 1007*; *Code Civ. Proc. § 321*].

For discussion and forms relating to adverse possession and use of real property, see Ch. 13, *Adverse Possession* .

[3] State Statutes

Right of prescription acquired by adverse possession for period of five years. *Civ. Code § 1007*; *Code Civ. Proc. § 321*

[4] Cross References

For a related form, see *§ 575.388*.

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51-575 California Forms of Pleading and Practice--Annotated § 575.392

§ 575.392 Complaint [Code Civ. Proc. § 425.10] by Lower Riparian Owner for Temporary Restraining Order [Code Civ. Proc. § 530], Preliminary [Code Civ. Proc. §§ 526, 527] and Permanent Injunctions [Civ. Code § 3422] and for Damages [Civ. Code § 3333]

[1] FORM Complaint [Code Civ. Proc. § 425.10] by Lower Riparian Owner for Temporary Restraining Order [Code Civ. Proc. § 530], Preliminary [Code Civ. Proc. §§ 526, 527] and Permanent Injunctions [Civ. Code § 3422] and for Damages [Civ. Code § 3333]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff, vs. _____ [*name*],	)	NO. _____
[and DOES I through _____,]	)	COMPLAINT FOR [TEMPORARY RESTRAIN-
Defendant(s).	)	ING ORDER,] PRELIMINARY AND PERMAN-
	)	ENT INJUNCTIONS AND DAMAGES
	)	[*Civ. Code §§ 3333, 3422, Code Civ. Proc. §§ 526, 527, 530*]

_____

Plaintiff alleges:

1. [*Plaintiff's ownership of land allegation. See § 575.387, Paragraph 1.*]

[2. *Fictitious name allegation. See § 575.385, Paragraph 3.*]

[3. *Agency allegation. See § 575.385, Paragraph 4.*]

4. Plaintiff has a riparian right to the use of _____ [*specify amount of water in gallons, acre-feet, or other measure of water or proportion of watercourse*] of _____ [*specify watercourse, e.g.,* the Muddy River] in that his/her/its above-described land is riparian to _____ [*specify watercourse, e.g.,* the Muddy River].

5. The average flow of water in that watercourse to plaintiff's land is _____ per year. Plaintiff took from that watercourse at a point on it within the boundaries of his/her/its above-described land _____ [*amount*] of water per year for _____ [*specify beneficial uses made of that water, e.g.,* the irrigation of 250 acres of orange trees and 500 acres of grain crops located] on that land. The entire amount of water taken by plaintiff was, and is now, necessary for those beneficial purposes.

[*EITHER, if seeking temporary restraining order without notice to defendant and diversion has occurred*]

6. Until _____ [*specify date within 10 days prior to the date this complaint will be filed*], plaintiff was in peaceful possession of the unobstructed flow of water from that watercourse. Beginning on _____ [*specify same date*], plaintiff has been deprived of his/her/its peaceful possession of the unobstructed flow of water from that watercourse by the wrongful diversion of that flow by defendant.

7. On or about _____ [*specify same date*], defendant _____ [*describe method by which defendant has wrongfully diverted water thereby interfering with plaintiff's right, e.g.,* willfully and without just cause constructed at a point approximately 300 feet upstream from plaintiff's land on the watercourse a diversion channel and dam by which defendant diverted and continues to divert all the water from the natural channels of that watercourse for use on lands not riparian to that watercourse].

[*OR, if seeking temporary restraining order without notice to defendant and diversion has only been threatened*]

6. Until _____ [*specify date within 10 days prior to the date this complaint will be filed*], plaintiff was in peaceful possession of the unobstructed flow of water from that watercourse. Beginning on _____ [*specify same date*], plaintiff has been deprived of his/her/its expectation of the continued peaceful possession of the unobstructed flow of water from that watercourse.

7. On or about _____ [*specify date within 10 days of the date this complaint will be filed*], defendant _____ [*set forth threat of wrongful diversion, e.g.,* told plaintiff that he wanted to eliminate plaintiff as an agricultural competitor and was going to kill plaintiff's trees and crops by constructing a diversion channel and dam at a point approximately 300 feet upstream from plaintiff's land on the watercourse and divert all the water from the natural channels of that watercourse for use on lands not riparian to that watercourse].

[*CONTINUE*]

8. _____ [*Specify present damages and any uncertainty as to amount, e.g.,* The trees and crops currently maturing on plaintiff's land are presently being damaged by the lack of water; therefore, the exact amount of damages is not known. Plaintiff will move to amend this complaint to state that amount when the same becomes known to him/her/it, or on proof tof this petition].

9. Unless defendant is restrained and enjoined from _____ [continuing the *or* carrying out the threatened] diversion of water _____ [*specify method of diversion, e.g.,* through use of the channel and dam], defendant will prevent the transmission of water to plaintiff's land and will thus _____ [*specify*

particular facts establishing grounds for preliminary injunctive relief, e.g., cause immediate great and irreparable injury to plaintiff through the impairment of the trees and crops].

10. Unless water continues to reach plaintiff's land, _____ [*specify any additional facts tending to show grounds for permanent injunctive relief, e.g.,* all the trees and crops currently growing will die and plaintiff would be required to maintain a multiplicity of judicial proceedings to protect his/her/its trees and crops in the future]. For these reasons, plaintiff has no plain, speedy, or adequate remedy at law.

WHEREFORE, plaintiff prays judgment as follows:

1. For an order requiring defendant to show cause, if any, why he/she/it should not be enjoined as hereinafter set forth, during the pendency of this action;

2. For [a temporary restraining order,] a preliminary injunction[,] and a permanent injunction, all enjoining defendant from diverting water from the watercourse in quantities to prevent the free flow of _____ [*amount*] of water per year in the natural channels of that watercourse to plaintiff's land;

3. For damages [in the sum of $_____ *or* according to proof];

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification. See § 575.387.*]

CERTIFICATION RE NOTICE

I hereby certify that _____ [*any of the following*: on _____ [*date*], I informed defendant of the time and place the foregoing application for a temporary restraining order would be made *or* in good faith I attempted to inform defendant of the time and place the foregoing application for a temporary restraining order would be made by _____ (*specify efforts made to inform defendant*), but I was unable to do so *or* notice to defendant of the foregoing application for a temporary restraining order should not be required for the reason that _____ (*specify*)].

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]
_____ [*signature*]
Attorney for Plaintiff

[2] Use of Form

This general form of complaint is for use by the owner of a riparian right to bring an action for damages and injunctive

relief against an upstream owner of a water right who has diverted or has threatened to divert water from the watercourse in an amount that interferes or would interfere with the amount needed by the plaintiff. The court will act to enjoin upstream diversion when it is wrongful and when the amount so diverted would be used for reasonable and beneficial purposes by the lower riparian plaintiff [*Carlsbad Etc. Co. v. San Luis Rey Etc. Co. (1947) 78 Cal. App. 2d 900, 914, 178 P.2d 844]* . The complaint may also be used to apply for a temporary restraining order if, within the 10 days preceeding the filing of the complaint, the plaintiff was in peaceable possession of the water flow and the defendant either actually deprived or threatened to deprive the plaintiff of the water [*see Code Civ. Proc. § 530*].

No temporary restraining order will be granted without notice to the opposing party unless the applicant or the applicant's attorney certifies one of the following to the court under oath [*Code Civ. Proc. § 527(c)*; *Cal. Rules of Ct., Rule 3.1204(b)*]:

- That within the applicable time period before the application, the applicant informed the opposing party or the opposing party's attorney at what time and where the application would be made;

- That the applicant in good faith attempted but was unable to inform the opposing party and the opposing party's attorney, specifying the efforts made to contact them; or

- That for reasons specified the applicant should not be required to so inform the opposing party or the opposing party's attorney.

[3] Allegations

This complaint alleges the following:

- That the plaintiff's beneficial use of water was wrongfully diverted (Paragraph 5) [*see Carlsbad Etc. Co. v. San Luis Rey Etc. Co. (1947) 78 Cal. App. 2d 900, 914, 178 P.2d 844]* ;

- Proximate damages (Paragraph 8) [*see Civ. Code § 3333*];

- Facts to support preliminary injunctive relief (Paragraph 9) [*see Code Civ. Proc. § 526*; *E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 7 L.R.R.M. (BNA) 686, 106 P.2d 1* ; *see also* Ch. 303, *Injunctions*]; and

- Any additional facts necessary to support permanent injunctive relief (Paragraph 10) [*see Civ. Code § 3422*].

Also included are optional alternative allegations for use when a temporary restraining order without notice to defendant is sought either because wrongful diversions or threats of wrongful diversion have occurred within the 10 days before filing the complaint (Paragraphs 6 and 7) [*see Code Civ. Proc. § 530*].

[4] Certification re Notice

In an action for an injunction or a restraining order brought to prevent the diversion, diminution, or increase of the flow of water in its natural channels, notice of the application must first be given to the defendant. However, if it appears from the verified complaint or affidavits on which the application is made that within 10 days prior to the time of application the plaintiff was in the peaceable possession of the flow of that water and that within that time the plaintiff has been deprived of the flow by the defendant's wrongful diversion or has received from the defendant threats to divert that water, notice is not required. If notice of that application is given and on the hearing it appears to the court that the plaintiff is entitled to the injunction, but that issuance of the injunction will cause great damage to the defendant and

that the plaintiff will not be greatly damaged by the acts complained of pending the litigation, and can be fully compensated for the damages suffered, the court may refuse to issue the injunction if the defendant gives a bond as provided in *Code Civ. Proc. § 532* [*Code Civ. Proc. § 530*].

When a temporary restraining order is sought without formal notice, the applicant or the applicant's attorney is required to certify to the court under oath that (1) within the applicable time period before the application he or she informed the opposing party or his or her attorney at what time and where the application would be made; (2) that he or she in good faith attempted to inform the opposing party or his or her attorney but was unable to do so, specifying the efforts made; or (3) that for reasons specified he or she should not be required to so inform the opposing party or his or her attorney [*Code Civ. Proc. § 527(c)*; *Cal. Rules of Ct., Rule 3.1204(b)*]. For a form of an application for a preliminary injunction and a form of preliminary injunction, see *§§ 575.393* and *575.394*, respectively.

[5] Verification

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 7 L.R.R.M. (BNA) 686, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . In a limited civil case, the court may issue temporary restraining orders and preliminary injunctions, but not permanent injunctive relief; thus, if permanent injunctive relief is sought, the action cannot be brought as a limited civil case [*see Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(1)*].

For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

[6] Cross References

For related forms, see *§§ 575.385* and *575.387*.

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51-575 California Forms of Pleading and Practice--Annotated § 575.393

§ 575.393 Proceedings for Temporary Restraining Order [Code Civ. Proc. § 530], Preliminary [Code Civ. Proc. §§ 526, 527] and Permanent Injunctions [Civ. Code § 3422] by Lower Riparian Owner to Enjoin Upstream Diversion of Water--Application for Preliminary Injunction [Code Civ. Proc. § 530]

[1] FORM Proceedings for Temporary Restraining Order [Code Civ. Proc. § 530], Preliminary [Code Civ. Proc. §§ 526, 527] and Permanent Injunctions [Civ. Code § 3422] by Lower Riparian Owner to Enjoin Upstream Diversion of Water--Application for Preliminary Injunction [Code Civ. Proc. § 530]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF APPLICATION FOR PRELIMINARY
vs.	)	INJUNCTION
_____ [*name*],	)	[*Code Civ. Proc. § 530*]
Defendant.	)	Date: _____
	)	Time: _____
	)	Location: _____
	)	[Trial Date: _____]

_____

To defendant _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ _____.M., or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*], _____ [*city*], plaintiff will apply for an order restraining you, during the pendency of this action, from diverting water from

_____ [*specify watercourse, e.g.*, the Muddy River] or otherwise interfering with the free flow of that water so as to prevent the free flow of _____ [*specify amount in gallons, acre-feet, or other measure*] of water per year in the natural channels of that watercourse to plaintiff's land described in the complaint filed and served herewith. The application will be made on the grounds that the diversion of that water by you produces great and irreparable injury to plaintiff for which pecuniary compensation provides inadequate relief.

The application will be based on this notice of application, on the declaration(s) of _____ [*name(s*)] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the application.
Dated: _____.

_____ [*signature*]
Attorney for _____ [*moving party*]

CAUTION:
A supporting memorandum is required to be served and filed with this notice of motion [*see Cal. Rules of Ct., Rule 3.1113*; see also *Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form is for use by a plaintiff to give notice of an application for a preliminary injunction in an action to enjoin diversion of water. Injunctive relief and diversion of water and procedures therefor are governed by *Code Civ. Proc. § 530*. For discussion and forms relating to injunctions generally, see Ch. 303, *Injunctions* .

[3] Cross References

For a related form, see *§ 575.392*.

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51-575 California Forms of Pleading and Practice--Annotated § 575.394

§ 575.394 Proceedings for Temporary Restraining Order [Code Civ. Proc. § 530], Preliminary [Code Civ. Proc. §§ 526, 527] and Permanent Injunctions [Civ. Code § 3422] by Lower Riparian Owner to Enjoin Upstream Diversion of Water--Preliminary Injunction [Code Civ. Proc. § 527]

[1] FORM Proceedings for Temporary Restraining Order [Code Civ. Proc. § 530], Preliminary [Code Civ. Proc. §§ 526, 527] and Permanent Injunctions [Civ. Code § 3422] by Lower Riparian Owner to Enjoin Upstream Diversion of Water--Preliminary Injunction [Code Civ. Proc. § 527]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	PRELIMINARY INJUNCTION
vs.	)	[*Code Civ. Proc. § 527*]
_____ [*name*],	)	Date: _____
Defendant.	)	Time: _____
	)	Location: _____
	)	[Trial Date: _____]
	)	

_____

The application of plaintiff for a preliminary injunction restraining defendant from diverting or otherwise interfering with the free flow of water from _____ [*specify watercourse, e.g.*, the Muddy River] came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

On proof made to the satisfaction of the court that the application ought to be granted,

IT IS ORDERED that during the pendency of this action the above-named defendant and his/her/its officers, agents, employees, representatives, and all persons acting in concert or participating with him/her/it, shall be and are hereby enjoined and restrained from diverting from the natural channels of _____ [*specify watercourse, e.g.*, the Muddy River] at any point on that watercourse upstream from plaintiff's lands described herein any quantity of water greater than _____ [*specify amount in gallons, acre-feet, or other measure*] of water per year or in any way interfering with the free flow of _____ [*specify amount in gallons, acre-feet, or other measure*] of water per year in the natural channels of that watercourse to plaintiff's land situated in _____, County, California, and described as follows: _____ [*set forth legal description*].

IT IS FURTHER ORDERED that, before this order shall take effect, plaintiff herein shall file a written undertaking in the sum of $_____, as required by *Section 529 of the Code of Civil Procedure*, for the purpose of indemnifying defendant for such damages as he/she/it may sustain by reason of this preliminary injunction if the court finally decides that plaintiff is not entitled to this petition.

IT IS FURTHER ORDERED that the preliminary injunction as set forth above shall issue on plaintiff's filing a written undertaking in the sum specified above.

The court reserves jurisdiction to modify this injunction as the ends of justice may require.
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of preliminary injunction is for use to prevent an upstream user from diverting water from the watercourse, thereby interfering with the water flow to plaintiff's land [*see Code Civ. Proc. § 530*].

[3] Cross References

For a related form, see *§ 575.392*.

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51-575 California Forms of Pleading and Practice--Annotated § 575.395

§ 575.395 Proceedings for Temporary Restraining Order [Code Civ. Proc. § 530], Preliminary [Code Civ. Proc. §§ 526, 527] and Permanent Injunctions [Civ. Code § 3422] by Lower Riparian Owner to Enjoin Upstream Diversion of Water--Notice of Motion for Order Dissolving or Modifying Preliminary Injunction [Code Civ. Proc. § 532]

[1] FORM Proceedings for Temporary Restraining Order [Code Civ. Proc. § 530], Preliminary [Code Civ. Proc. §§ 526, 527] and Permanent Injunctions [Civ. Code § 3422] by Lower Riparian Owner to Enjoin Upstream Diversion of Water--Notice of Motion for Order Dissolving or Modifying Preliminary Injunction [Code Civ. Proc. § 532]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	NOTICE OF MOTION FOR ORDER
vs.	)	_____ [DISSOLVING *or* MODIFY-
_____ [*name*],	)	ING] PRELIMINARY INJUNCTION
Defendant.	)	[*Code Civ. Proc. § 532*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Trial Date: _____]

_____

To plaintiff _____ [*name*] and to his/her attorney of record:

NOTICE IS HEREBY GIVEN that on _____ [*date*], at _____ _____.M., or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____

of] this court, located at _____ [*street address*], _____ [*city*], defendant will move for an order _____ [dissolving *or* modifying] the preliminary injunction. The motion will be made on the grounds that defendant will suffer great damages by continuation of the preliminary injunction, that plaintiff can be fully compensated for any damages he/she/it may suffer by reason of any such diversion of water from that watercourse by defendant during the pendency of this action, and that all water to be so diverted will be used for irrigational and domestic purposes only.

[_____ (*If the preliminary injunction is to be modified or only partially dissolved, specify the extent of that change*.]

The motion will be based on this notice of motion, on the declaration(s) of _____ [*name(s*)] and the supporting memorandum served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*signature*]
Attorney for Defendant

CAUTION:

A supporting memorandum is required to be served and filed with this notice of motion [*see Cal. Rules of Ct., Rule 3.1113*; *see also Code Civ. Proc. §§ 1005(b), 1010*]. For discussion and forms, see Ch. 417, *Points and Authorities* .

[2] Use of Form

This form is for use by a defendant who is subject to a preliminary injunction barring the diversion of water to give notice of a motion to dissolve or modify the injunction. In actions in which an injunction to prevent the diversion of water is available, the court may dissolve or modify the injunction (1) if the water is diverted for domestic or irrigation uses only, (2) if the defendant will suffer great damage if the injunction is continued, and (3) if the plaintiff can be fully compensated for damages sustained [*Code Civ. Proc. § 532*].

The dissolution or modification is subject to the person enjoined giving a bond in an amount fixed by the court, conditioned that the enjoined person will pay all damages that the person on whose behalf the injunction issued may suffer by reason of the continuance, during the litigation, of the acts complained of. On trial, the amount of the damages must be ascertained, and in case judgment is rendered for the person in whose behalf the injunction was granted, the amount fixed as damages must be included in the judgment, together with reasonable attorney's fees. In any proceedings to enforce the liability on the bond, the amount of the damages as fixed in the judgment is conclusive [*Code Civ. Proc. § 532(b)*]. For discussion of *Code Civ. Proc. § 530*, governing the injunction procedures, see *§ 575.392*.

[3] Cross References

For related forms, see *§§ 575.392 -575.394*.

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§ 575.396 Proceedings for Temporary Restraining Order [Code Civ. Proc. § 530], Preliminary [Code Civ. Proc. §§ 526, 527] and Permanent Injunctions [Civ. Code § 3422] by Lower Riparian Owner to Enjoin Upstream Diversion of Water--Declaration [Code Civ. Proc. § 2015.5] in Support of Motion Dissolving Preliminary Injunction [Code Civ. Proc. § 532]

[1] FORM Proceedings for Temporary Restraining Order [Code Civ. Proc. § 530], Preliminary [Code Civ. Proc. §§ 526, 527] and Permanent Injunctions [Civ. Code § 3422] by Lower Riparian Owner to Enjoin Upstream Diversion of Water--Declaration [Code Civ. Proc. § 2015.5] in Support of Motion Dissolving Preliminary Injunction [Code Civ. Proc. § 532]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	DECLARATION OF _____
vs.	)	[*name*] IN SUPPORT OF MOTION IN SUPPORT
_____ [*name*],	)	OF MOTION DISSOLVING PRELIMINARY IN-
Defendant.	)	JUNCTION
	)	[*Code Civ. Proc. § 532*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Trial Date: _____]

_____

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.,* an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for defendant *or other statement as appropriate*].

2. On _____ [*date*] this court issued a preliminary injunction restraining defendant from diverting water from _____ [*specify watercourse, e.g.,* the Muddy River] at any point on that watercourse upstream from the land described in plaintiff's complaint in the above-entitled action.

3. Defendant has fully complied with that order but if the order is continued, defendant will suffer great damages in that _____ [*set forth reasons for defendant's damage, e.g.,* defendant is a public water district supplying water to approximately _____ subscribers occupying approximately _____ acres in _____ County, California. Those subscribers have no other source of water for irrigating that land and defendant has been unable to procure any other adequate supply of water. Estimates by qualified engineers indicate that the cost of relocating the diversion point to a location downstream from plaintiff's land is $_____, a sum beyond defendant's ability to obtain a bond. The land serviced by defendant is planted in various agricultural products with an annual value of $_____. Declarant is informed and believes and thereon alleges that the entire production of those agricultural products will be destroyed unless an immediate supply of water sufficient for proper irrigation of those lands is made available].

4. All of the water proposed to be diverted from the watercourse will be used for irrigational and domestic purposes.

5. Trial of this action has been set for _____ [*date*]. The only damage that may result to plaintiff by dissolution of the preliminary injunction and defendant's diversion from the upstream location during the pendency of this action would be _____ [*specify potential damage, e.g.,* the loss of the orange crop from plaintiff's west orchard, amounting to $_____], which can be fully compensated for in damages.

6. Defendant is willing and able to post with the court a bond as provided in *Section 532 of the Code of Civil Procedure,* in the amount the court may fix conditioned on defendant's paying all damages that plaintiff may suffer by defendant's diversion of water from the upstream location during the pendency of this action.

I declare under penalty of perjury under the laws of the State of California that this is true and correct.

_____ [*date and place*]
_____ [*signature*]

[2] Use of Form

This form of declaration is for use by a defendant seeking the dissolution of a preliminary injunction. In specified circumstances, the court may dissolve a preliminary injunction which enjoined water diversion [*see Code Civ. Proc. § 532*]. For a related form, see *§ 575.395*.

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A. Rights to Water
2. Adjudication of Water Rights

51-575 California Forms of Pleading and Practice--Annotated § 575.397

§ 575.397 Proceedings for Temporary Restraining Order [Code Civ. Proc. § 530], Preliminary [Code Civ. Proc. §§ 526, 527] and Permanent Injunctions [Civ. Code § 3422] by Lower Riparian Owner to Enjoin Upstream Diversion of Water--Order [Code Civ. Proc. § 1003] Dissolving or Modifying Preliminary Injunction [Code Civ. Proc. § 532]

[1] FORM Proceedings for Temporary Restraining Order [Code Civ. Proc. § 530], Preliminary [Code Civ. Proc. §§ 526, 527] and Permanent Injunctions [Civ. Code § 3422] by Lower Riparian Owner to Enjoin Upstream Diversion of Water--Order [Code Civ. Proc. § 1003] Dissolving or Modifying Preliminary Injunction [Code Civ. Proc. § 532]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER GRANTING MOTION
vs.	)	_____ [DISSOLVING *or* MODIFY-
_____ [*name*],	)	ING] PRELIMINARY INJUNCTION
Defendant.	)	[*Code Civ. Proc. § 532*]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		[Trial Date: _____]

_____

The motion of defendant for an order _____ [modifying *or* dissolving] the preliminary injunction granted herein on _____ [*date*], came on regularly for hearing by the court on _____ [*date*]. Plaintiff appeared by counsel _____ [*name*]; defendant appeared by counsel _____ [*name*].

[*EITHER, if seeking dissolution*]

Proof having been made to the satisfaction of the court that great damage will be suffered by defendant if that injunction be continued, that plaintiff can be fully compensated for any damages he/she/it may suffer by reason of the continuance of the acts enjoined during the pendency of this litigation, and defendant having posted with the clerk of this court a bond in the amount previously ordered of $_____ conditioned as provided in *Section 532 of the Code of Civil Procedure*,

[*OR, if seeking modification*]

Proof having been made to the satisfaction of the court that defendant will suffer great damage if the injunction is not modified to allow him/her/it to divert from _____ [*specify watercourse*] a quantity of water not exceeding _____ [*specify amount in gallons, acre-feet, or other measure*] during the pendency of this action but that defendant will not otherwise be damaged by the continuation of that injunction, that plaintiff can be fully compensated for any damages he/she/it may suffer by reason of the diversion of that amount of water from that watercourse by defendant, and defendant having posted with the clerk of this court a bond in the amount previously ordered of $_____ conditioned as provided in *Section 532 of the Code of Civil Procedure*,

IT IS ORDERED that the preliminary injunction granted herein on _____ [*date*], be and hereby is _____ [dissolved *or* modified as follows: _____(*specify how injunction is modified, e.g.*, to allow defendant to divert, on or before _____ [*date*], a quantity of water not exceeding _____ [*specify amount in gallons, acre-feet, or other measure*] from that watercourse).] [As _____ (modified *or* partially dissolved), the injunction provides _____ (*set forth the terms of the injunction in full as they stand after modification or partial dissolution*).]
Dated: _____.

_____ [*signature*]
Judge of the Superior Court

[2] Use of Form

This form of order is for use to grant a motion to dissolve or modify a previously-granted preliminary injunction restraining defendant's diversion of water [*see Code Civ. Proc. § 532*].

[3] Cross References

For a related form, see *§ 575.395*.

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51-575 California Forms of Pleading and Practice--Annotated § 575.398

§ 575.398 Complaint [Code Civ. Proc. § 425.10] by Overlying Landowner for Preliminary [Code Civ. Proc. §§ 526, 527(a)] and Permanent Injunctions [Civ. Code § 3422] and for Damages [Civ. Code § 3333] for Interference With Underground and Percolating Water

[1] FORM Complaint [Code Civ. Proc. § 425.10] by Overlying Landowner for Preliminary [Code Civ. Proc. §§ 526, 527(a)] and Permanent Injunctions [Civ. Code § 3422] and for Damages [Civ. Code § 3333] for Interference With Underground and Percolating Water

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR PRELIMINARY AND PER-
_____ [*name*], [and DOES I	)	MANENT INJUNCTIONS AND DAMAGES
through _____,]	)	[*Civ. Code § 3422, 3333*; *Code Civ. Proc. §§ 526, 527(a)*]
Defendant(s).	)	
	)	

_____

Plaintiff alleges:

1. [*Plaintiff's status as owner of land. See § 575.385, Paragraph 1.*]

2. At all times herein mentioned, defendant was, and still is, the owner of real property adjoining plaintiff's above-described property on the _____ [*specify direction, e.g.*, south] and located at _____ [*address*], _____ County, California, more particularly described as follows: _____ [*set forth legal description*].

[3. *Fictitious name allegation. See § 575.385, Paragraph 3.*]

[4. *Agency allegation. See § 575.385, Paragraph 4.*]

5. Plaintiff had for many years [profitably] used the above-described land _____ [*specify uses to which land was put, e.g.,* for ranching and grazing]. Prior to the drilling and operation of the wells on defendant's property as described below, there was abundant water on plaintiff's land _____ [*specify indications of sufficient water for plaintiff's needs, e.g.,* as indicated by the lush grass and other foliage for use as pasturage].

6. Prior to the drilling and operation of the wells on defendant's property as described below, plaintiff's above-described land and soil were naturally well supplied with ground water, underground water, moisture, and percolating waters [and was particularly well adapted to the use plaintiff made of the land].

7. Between _____ [*date*], and _____ [*date*], defendant drilled wells on and into his/her/its property and maintained, and continues to maintain, pumping stations in close proximity to plaintiff's property. Defendant has used and operated and continues to use and operate those wells and pumping stations for the purpose of _____ [*specify purpose which requires the pumping and exportation of large quantities of water, e.g.,* supplying water to the inhabitants of the city of _____, _____ County, California, for household, domestic, commercial, industrial, and other purposes for profit].

8. Defendant's wells and pumps are large and powerful and have been, and are now, pumping great and excessive quantities of water by a system of ditches and pipelines, and withdraw from beneath the surface of plaintiff's property the greater part of the natural underground and percolating waters, lowering and continuing to lower the normal water table. Plaintiff's land and soil have been rendered dry and unproductive resulting in _____ [*specify injury, e.g.,* much lower profits than before the wells and pumps were drilled].

9. The water withdrawn, and now being withdrawn, by defendant's wells is from the underground waters common to the lands of plaintiff and defendant. Defendant is withdrawing a quantity of water greatly in excess of the amount to which he/she/it is entitled by law. The operation of those wells and pumps is unreasonable and has drained excessive quantities of water from beneath defendant's land and from part of the common water supply underlying plaintiff's land.

10. There are other and closer sources of water available to defendant to adequately _____ [*specify purpose for which supply is used, e.g.,* supply water to the inhabitants of the city of _____], but there is no other source of water available to plaintiff.

[11. Prior to commencing this action, plaintiff had made repeated demands to defendant to cease the pumping, but defendant refused to comply. Defendant continues the wrongful and unlawful pumping over the protests of plaintiff and without his/her/its consent.]

12. As a proximate result of defendant's unlawful and wrongful pumping, plaintiff has sustained damages _____ [*specify nature and extent of damages, e.g.,* in that the value of his/her/its land has decreased by $_____ and 200 head of cattle have died from lack of water], all to plaintiff's damage in the sum of $_____.

13. Defendant's pumping operations, unless and until enjoined and restrained by order of this court, will _____ (*specify particular facts establishing grounds for preliminary injunctive relief, e.g.,* cause great and irreparable injury to plaintiff in that plaintiff's land and soil have been rendered dry and unproductive resulting in the death of foliage and an inadequate amount of water for watering purposes, resulting in the death of several head of cattle and the possible death of the entire herd if defendant's pumping continues until this action can be brought to

trial).]

14. Plaintiff has no adequate remedy at law for the injuries currently being suffered in that _____ [*specify any additional facts tending to show grounds for permanent injunctive relief, e.g.,* defendants will continue to pump and export the water, rendering plaintiff's land so dry as to be useless for ranching purposes, the only purpose for which it is suitable, and plaintiff would be required to maintain a multiplicity of judicial proceedings to protect his/her/its interests].

WHEREFORE, plaintiff prays judgment as follows:

1. For issuance of a preliminary injunction and a permanent injunction restraining and enjoining defendants from _____ [*specify, e.g.,* withdrawing water from the common underground basin],

2. For damages in the sum of $_____,

3. For costs of suit herein incurred, and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Plaintiff _____ [*name*]

[*Verification. See § 575.385.*]

[2] Use of Form

This form of complaint is for use by a plaintiff to bring an action for damages and injunctive relief for interference with plaintiff's underground and percolating water caused by the defendant's drilling, pumping, and exporting of water from a common underground basin. The rights of an overlying landowner to underground water beneath the land are correlative and analagous to the riparian right, and injunctive relief may be appropriate [*see Tehachapi-Cummings County Water Dist. v. Armstrong (1975) 49 Cal. App. 3d 992, 999, 1001, 122 Cal. Rptr. 918* ; *see also § 575.81*]. Although in most instances the parties will be adjoining landowners, that relationship is not essential to the action.

[3] Allegations

This complaint alleges the following:

- That the plaintiff's use of his or her land required water, which was in ample supply before the defendant's pumping (Paragraphs 5 and 6);

- The defendant's wrongful drilling and pumping (Paragraphs 7 and 11);

- That the defendant's pumping of water from the common underground waters was in an amount greater than the defendant's share of those waters (Paragraphs 8 and 9) [*see City of Pasadena v. City of Alhambra (1949) 33 Cal. 2d 908, 926, 207 P.2d 17 , cert. denied, 339 U.S. 937, 70 S. Ct. 671, 94 L. Ed. 1354]* ;

- That the plaintiff had no other source of water, while the defendant did (Paragraph 10);

- The damages proximately caused by the defendant's pumping (Paragraph 12) [*see Civ. Code § 3333*];

- Facts to support preliminary injunctive relief (Paragraph 13) [*see Code Civ. Proc. § 526*; *E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 7 L.R.R.M. (BNA) 686, 106 P.2d 1]* ; and

- Any additional facts necessary to support permanent injunctive relief (Paragraph 14) [*see Civ. Code § 3422*; *see also* Ch. 303, *Injunctions*].

[4] Verification

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 7 L.R.R.M. (BNA) 686, 106 P.2d 1* ; *Finnie v. Town of Tiburon (1988) 199 Cal. App. 3d 1, 15, 244 Cal. Rptr. 581]* . In a limited civil case, the court may issue temporary restraining orders and preliminary injunctions, but not permanent injunctive relief; thus, if permanent injunctive relief is sought, the action cannot be brought as a limited civil case [*see Code Civ. Proc. §§ 85, 86(a)(8), 580(b)(1)*]. For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

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51-575 California Forms of Pleading and Practice--Annotated § 575.399

§ 575.399 Complaint [Code Civ. Proc. § 425.10] to Quiet Title [Code Civ. Proc. §§ 760.020(a), 761.020] to Easement by Adverse Possession [Code Civ. Proc. § 321] and for Temporary Restraining Order [Code Civ. Proc. § 530], Preliminary [Code Civ. Proc. §§ 526, 527(a)] and Permanent Injunctions [Civ. Code § 3422], and for Damages [Civ. Code § 3333] for Interference With Water Right

[1] FORM Complaint [Code Civ. Proc. § 425.10] to Quiet Title [Code Civ. Proc. §§ 760.020(a), 761.020] to Easement by Adverse Possession [Code Civ. Proc. § 321] and for Temporary Restraining Order [Code Civ. Proc. § 530], Preliminary [Code Civ. Proc. §§ 526, 527(a)] and Permanent Injunctions [Civ. Code § 3422], and for Damages [Civ. Code § 3333] for Interference With Water Right

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT TO QUIET TITLE, FOR
_____ [*name of known defendant*] [*if unknown defendants are included, add:* and all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud on plaintiff's title tto this petition] [; and DOES I-_____, inclusive],	)	[TEMPORARY RESTRAINING ORDER,] PRELIMINARY AND PERMANENT INJUNCTIONS AND DAMAGES (Interference with Water Right) [*Civ. Code §§ 3422, 3333*; *Code Civ. Proc. §§ 321, 526, 527(a)*, [530,] 760.020, 761.020(a)]
Defendant(s).	)	

_____

Plaintiff alleges:

FIRST COUNT
(Quiet Title)

1. [*Plaintiff's ownership of land. See § 575.385, Paragraph 1.*]

2. [*Defendant's ownership of adjoining land. See § 575.385, Paragraph 2.*]

[3. *Fictitious name allegation. See § 575.385, Paragraph 3.*]

[4. *Agency allegation. See § 575.385, Paragraph 4.*]

5. A natural spring is located on defendant's above-described property _____ [*specify position, e.g.,* at a point approximately 60 feet southeast of its northwest corner].

6. Plaintiff is the owner of an easement _____ [*describe easement, e.g.,* in the form of a pipeline running southeasterly from plaintiff's land across defendant's property to the base of the spring and including a catch basin at the base of that spring].

7. The basis of plaintiff's title is prescriptive, resulting from plaintiff's actual, open, exclusive, hostile, and adverse possession and use of the above-described easement for more than five years.

8. Plaintiff is seeking to quiet title against the claims of defendant(s) as follows: defendant(s) _____ [*name(s) of the named defendant(s)*], who _____ [*describe claim of named defendant(s), e.g.,* denies that plaintiff's use of the easement has been hostile or continuous for the requisite period and claims to have permitted plaintiff's use of the easement] [*continue with whichever are applicable:*; the claims of the successor defendants described in Paragraph _____; the claims of all unknown defendants described in Paragraph 9, whether or not the claim or cloud is known to plaintiff; and the unknown, uncertain, or contingent claim, if any, of _____ (*name*) more fully described in Paragraph 10]. Defendant's/Defendants' claim(s) is/are without any right whatever and that/those defendant(s) has/have no right, title, estate, lien, or interest whatever in the above-described property, or any part of that property[, except the following: _____ (*set forth any claims of which plaintiff admits the validity, e.g.,* ownership by defendant _____ (*name*) of the real property that is subject to plaintiff's easement)].

[9. *If "all persons unknown" are named as defendants, allege:* The defendants herein named as "all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the property described in the complaint adverse to plaintiff's title, or any cloud on plaintiff's title tto this petition" (hereinafter sometimes referred to as "the unknown defendants") are unknown to plaintiff(s). These unknown defendants, and each of them, claim some right, title, estate, lien, or interest in the above-described property adverse to plaintiff's/plaintiffs' title; and their claims, and each of them, constitute a cloud on plaintiff's/plaintiffs' title to that property.]

[10. *If the claim of a named defendant is unknown, uncertain, or contingent, allege:* The claim of _____ (*name of defendant*) is _____ (unknown *or* uncertain *or* contingent). (*If the lack of knowledge, uncertainty, or contingency is caused by a transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, allege:* _____ (*Name*), age _____, is the person who would be entitled to an adverse claim if _____ (*describe contingency*) had occurred prior to the commencement of this action.) (*If this person is subject to a legal disability, allege:* This person is subject to _____ (*specify legal disability*).)]

11. Plaintiff seeks to quiet title as of _____ [*date*]. [*If the date is a date other than the date the complaint is filed, allege why a determination as of that date is sought.*]

12. For _____ [five *or more*] years plaintiff [and his/her/its predecessors in title] has/have openly, notoriously, continuously, and under a claim of right to do so, diverted waters from that spring and used them for _____ [*specify beneficial purpose, e.g.,* irrigation of an orange grove and domestic use for plaintiff's household]. Through this diversion of water, plaintiff has acquired a prescriptive right to the waters of the spring.

SECOND COUNT
(Interference with Water Right)

13. Plaintiff refers to and herein incorporates Paragraphs 1-6 of the First Count.

14. At all times herein mentioned, the water diverted from that spring by plaintiff [and his/her/its predecessors in title], amounting to a maximum of _____ [*specify amount in gallons, acre-feet, or other measure*] per year, has been, and now is, applied for the above-described beneficial purposes and no others.

15. On or about _____ [*date*], defendant, without plaintiff's knowledge or consent, and without any right do to so, _____ [*describe interference with the flow of plaintiff's water, e.g.,* placed a cap on the two-inch water pipeline at the point where it protrudes into the catch basin, thereby preventing the flow of water from the spring to plaintiff's land].

16. Plaintiff has made demands on defendant that _____ [*describe demand, e.g.,* the cap be removed and the water be permitted to flow as it previously did], but defendant has refused, and continues to refuse, to do so.

[17. *Temporary restraining order allegation. See § 575.392, Paragraphs 6 and 7.*]

18. [*Proximate damage allegation. See § 575.392, Paragraph 8.*]

19. [*Preliminary injunctive relief allegation. See § 575.392, Paragraph 9.*]

20. [*Permanent injunctive relief allegation. See § 575.392, Paragraph 10.*]

WHEREFORE, plaintiff prays judgment as follows:

On the FIRST COUNT:

1. For a judgment that plaintiff is the owner of the easement and that defendant[s, and each of them] has/have no interest in the easement adverse to plaintiff's interest;

On the SECOND COUNT:

2. For an order requiring defendant[s, and each of them] to show cause, if any, why he/she/it/they should not be enjoined as hereinafter set forth, during the pendency of this action;

3. For [a temporary restraining order,] a preliminary injunction, and a permanent injunction, all enjoining defendant[s, and each of them], and their agents, servants, and employees, all persons acting under, in concert with, or for them:

a. From _____ [*specify each of the acts, courses of conduct, and conditions defendants are to be*

prohibited from doing, commencing, continuing, or maintaining, e.g., placing a cap on the pipeline and thus preventing the flow of water to plaintiff's property]; and

b. To _____ [*specify each of the acts, courses of conduct, and conditions defendants are to be commanded to do or undertake, e.g.*, maintain the pipeline in its present condition and refrain from in any way interfering with the flow of water through the pipeline to plaintiff's property];

4. For damages [in the sum of $_____ *or* according to proof];

On all COUNTS:

5. For costs of suit herein incurred; and

6. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification. See § 575.385.*]

[*Certification re Notice. See § 575.392.*]

CAUTION:
A complaint to quiet title must be verified [*Code Civ. Proc. § 761.020*]. The above form does not contain any allegations regarding defendants who are personal representatives [*Code Civ. Proc. § 762.030(a)*] or heirs and intestate or testate successors [*Code Civ. Proc. § 762.030(b)*] of persons known or believed by the plaintiff to be deceased. If those defendants are necessary in your particular situation, use the appropriate allegations from Ch. 482, *Quieting Title.*

[2] Use of Form

This form of complaint is for use by a plaintiff to quiet title to his or her interest in an easement and to seek damages for and injunctive relief against interference with a prescriptive water right. Although in most instances the parties will be adjoining landowners, that relationship is not essential to the action.

For discussions regarding who must be named as defendants in a quiet title action and the statutory designations for particular classes of defendants, see Ch. 482, *Quieting Title* . A plaintiff who intends to name unknown persons as defendants may wish to obtain a title report before commencing the action, because an examination of the record title and an inspection of the property will be necessary [*see Code Civ. Proc. § 762.060(b)*]. Also, the court may order plaintiff to obtain a title report and keep it available for inspection and copying by the parties [*Code Civ. Proc. § 762.040(b)*].

There is some question as to whether an attempt to base a right of prescription on a use that began after 1908 is valid, because since that time *Water Code § 1225* has required a permit for the right to appropriate [*see § 575.55[1]*]. Counsel should also be aware of the existence of *Water Code §§ 5100-5108*, requiring a statement of water use and diversion from all but those specifically excepted. Claimants under a prescriptive right are not within any of the exceptions [*Water Code § 5101*].

[3] Allegations

The first cause of action of the above complaint alleges (1) the parties' ownership and a description of the land (Paragraphs 1 and 2) [*see Code Civ. Proc. §§ 392(a)(1), 761.020(a)*], (2) location of a spring (Paragraph 5) [*see Code Civ. Proc. § 761.020(a)*], (3) plaintiff's ownership of an easement (Paragraph 6) [*see Code Civ. Proc. § 761.020(b)*], (4) the basis of plaintiff's title (Paragraph 7) [*see Code Civ. Proc. § 761.020(b); see* Ch. 13, *Adverse Possession*], (5) the adverse claim to plaintiff's title (Paragraph 8) [*see Code Civ. Proc. § 761.020(c)*; Ch. 482, *Quieting Title*], (6) the date as of which a determination is sought (Paragraph 11) [*see Code Civ. Proc. § 761.020(d)*], and (7) plaintiff's prescriptive right to the spring water (Paragraph 12) [*see Civ. Code § 1007*; *Code Civ. Proc. § 321*]. It also alleges plaintiff's beneficial use of the water, which is necessary in an action to quiet title to a water right (Paragraph 13) [*see Carlsbad Etc. Co. v. San Luis Rey Etc. Co. (1947) 78 Cal. App. 2d 900, 914, 178 P.2d 844]* . The complaint also includes optional paragraphs for use when unknown defendants have been named (Paragraph 9) [*see Code Civ. Proc. § 762.060(a)*], and when the claim of a named defendant is unknown (Paragraph 10) [*see Code Civ. Proc. § 762.020(b)*].

This form also incorporates fictitious name allegations (Paragraph 3) [*see Code Civ. Proc. § 474*]. Rules governing civil actions generally apply in quiet title actions unless they are inconsistent with quiet title provisions [*Code Civ. Proc. § 760.060*]. Some people also additionally designate testate and intestate successors or "all persons unknown" as DOES. That is not recommended because it differs from the statutory language of *Code Civ. Proc. §§ 762.030(b)(2), (3)* and *762.060*, by which those defendants are to be designated, and because it may limit the in rem effect of the judgment by limiting the number of adverse claimants in those classes [*see Code Civ. Proc. § 763.030(b)*].

The second cause of action of the complaint incorporates by reference the paragraphs setting forth plaintiff's ownership of the land, the location of the spring, and the nature of plaintiff's interest in the easement. The second cause of action alleges facts showing defendant's wrongful acts causing injury (Paragraphs 15 and 16).

[4] Lis Pendens

Immediately on filing the complaint in a quiet title action, the plaintiff must file a lis pendens in the office of the county recorder of each county in which any real property described in the complaint is located [*Code Civ. Proc. § 761.010*].

Before recording the notice, the plaintiff must mail a copy of the notice to be mailed, by registered or certified mail, return receipt requested, to all known addresses of the parties to whom the plaintiff's claim is adverse and to all owners of record of the real property affected by the plaintiff's claim as shown by the latest county assessment roll or more recent assessment information in the possession of the county. If there is no known address for service on an adverse party or owner, then as to that party or owner a declaration under penalty of perjury to that effect must be recorded in lieu of a filed proof of service, and service on that party is not required. Immediately after recording the notice, the plaintiff must file a copy of the notice in the court in which the action is pending. Upon an adverse party's being joined in the action, the notice must be served on that party [*Code Civ. Proc. § 405.22*].

Any notice of pendency of action is void and invalid as to any adverse party or owner of record unless mailing requirements have been met for that party or owner and a proof of service in the form and content specified in *Code Civ. Proc. § 1013a* has been recorded with the notice of pendency of action [*Code Civ. Proc. § 405.23*] (or an in lieu declaration has been recorded as described above).

From the time of recording of the notice of pendency of action, any purchaser, encumbrancer, or other transferee of the real property described in the notice is deemed to have notice of the pendency of the action as it relates to the real property, but only insofar as the action is pending against parties not fictitiously named. The plaintiff's rights and interest in the property, as ultimately determined in the pending noticed action, relate back to the date of recording of the notice [*Code Civ. Proc. § 405.24*].

For further discussion and forms, see Ch. 348, *Lis Pendens* .

[5] State Statutes

Acquisition of prescriptive water rights. *Civ. Code § 1007*; *Code Civ. Proc. § 321*

Injunctions specific to diversion of water. *Code Civ. Proc. §§ 530, 532, 533*

Actions to quiet title. *Code Civ. Proc. §§ 760.010-764.070*

[6] Cross References

For related forms, see *§§ 575.385* and *575.392*.

For discussion and forms relating to property rights of adjoining landowners generally, see Ch. 11, *Adjoining Landowners*

For discussion and forms relating to adverse possession and prescription, see Ch. 13, *Adverse Possession*

For discussion and forms for use in actions involving easements, see Ch. 240, *Easements*

For discussion and forms relating to interference with irrigation water, see Ch. 315, *Irrigation*

For discussion and forms relating to quiet title actions, see Ch. 482, *Quieting Title*

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51-575 California Forms of Pleading and Practice--Annotated § 575.400

§ 575.400 Allegation for Complaint or Affirmative Defense--Acquisition of Right to Water by Prescription [Civ. Code § 1007; Code Civ. Proc. § 321]

[1] FORM Allegation for Complaint or Affirmative Defense--Acquisition of Right to Water by Prescription [Civ. Code § 1007, Code Civ. Proc. § 321]

1. _____ [*Name of party pleading the right*] is, and at all times herein mentioned was, _____ [*specify activity requiring beneficial use of water, e.g.,* engaged in the cultivation of flowers for commercial florists] on the premises described as follows: _____ [*set forth legal description*].

2. For _____ [*number greater than five*] years prior to the commencement of this action, _____ [plaintiff *or* defendant], [and his/her/its predecessors in title], has/have hostilely, openly, notoriously, continuously, and without interruption, under a claim of absolute right, diverted and used _____ [*specify amount of water in gallons, acre-feet, or other measure*] of the water of _____ [*specify watercourse, e.g.,* the Muddy River], and _____ [plaintiff *or* defendant] is still beneficially using those waters for _____ [*specify uses to which the waters were put, e.g.,* the watering of the flower fields] for which _____ [plaintiff *or* defendant] has acquired the right to divert, direct, and use that water.

[2] Use of Form

This allegation is for use by a plaintiff in a complaint to enforce a water right based on prescription or by a defendant to assert such a right as an affirmative defense. Adverse use of water for a beneficial purpose for five years may confer a title by prescription [*see Civ. Code § 1007*; *Code Civ. Proc. § 321*; *Cal. Const., Art. X, § 2*].

There is some question as to whether an attempt to base a right of prescription on a use that began after 1908 is valid, because since that time *Water Code § 1225* has required a permit for the right to appropriate [*see § 575.55[1]*]. Counsel should also be aware of the existence of *Water Code §§ 5100-5108*, requiring a statement of water use and diversion from all but those specifically excepted. Claimants under a prescriptive right are not within any of the exceptions [

Water Code § 5101].

When using these paragraphs as allegations, they should replace Paragraphs 6 through 10 in § 575.399.

[3] Cross References

For a related form, see *§ 575.399*.

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A. Rights to Water
2. Adjudication of Water Rights

51-575 California Forms of Pleading and Practice--Annotated § 575.401

§ 575.401 Allegation for Complaint or Affirmative Defense--Loss of Prescriptive or Appropriative Water Right--By Nonuse

[1] FORM Allegation for Complaint or Affirmative Defense--Loss of Prescriptive or Appropriative Water Right--By Nonuse

[AS A (_____ [*if more than one, specify number, e.g.,* FIRST]) SEPARATE AND AFFIRMATIVE DEFENSE (*if more than one cause of action alleged, state* TO THE _____[*specify, e.g.,* SECOND] CAUSE OF ACTION), DEFENDANT ALLEGES that:]

1. _____ [*Name of opposing party*] has lost his/her/its _____ [prescriptive *or* appropriative] right in _____ [*describe water to which right had attached, e.g.,* Clear Stream] situated in _____ County, California. _____ [*Name of opposing party*] had the right to divert water therefrom _____ [*describe former use to which lost water right was put, e.g.,* for domestic uses on his/her land], but has lost that right in that for more than _____ [*number greater than five*] years _____ [*name of opposing party*] has failed to make any beneficial use of that water under his/her/its right.

2. [That water was appropriated by _____ (*name of opposing party*) for _____ (*describe use, e.g.,* domestic purposes for his/her garden and care of barnyard animals), and] since on or about _____ [*date*] _____ [*name of opposing party*] has failed to beneficially use that water [or to use that water for that purpose] and has thereby lost his/her/its right to that water.

3. On _____ [*date*], the State Water Resources Control Board made a [written] finding that _____ [*name of opposing party*] had failed to make beneficial use of the above-described water for _____ years and had thereby lost his/her/its rights to that water. [A copy of the finding is attached to this complaint as Exhibit A and made a part of this complaint.]

[2] Use of Form

This form of allegation is for use by a plaintiff in a complaint to claim a water right based on nonuse by the previous owner or by a defendant to assert that plaintiff's water right has been lost through nonuse. It may be used when the former owner's right was either prescriptive or appropriative [*see Water Code §§ 1240, 1241*]. A riparian owner's right will not be lost through nonuse, although to the extent the right is not exercised, riparian water is subject to appropriation and beneficial use by others [*Orange County Water District v. City of Riverside (1959) 173 Cal. App. 2d 137, 184, 343 P.2d 450]* .

When using these paragraphs as allegations in a complaint, omit the optional introductory paragraph; the allegations should replace Paragraphs 6-10 in § 575.399. For discussion of affirmative defenses, see *§ 575.388*.

Water that is unused may revert to the public and be available for appropriation by another. The reversion requires (1) a finding by the State Water Resources Control Board of nonuse for five years, (2) notice to the permittee, and (3) a public hearing if one is requested by the permittee [*Water Code § 1241*]. Before using the above allegation, it is advisable to have a finding of reversion by the State Board.

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2. Adjudication of Water Rights

51-575 California Forms of Pleading and Practice--Annotated § 575.402

§ 575.402 Allegation for Complaint or Affirmative Defense--Loss of Prescriptive or Appropriative Water Right--By Abandonment

[1] FORM Allegation for Complaint or Affirmative Defense--Loss of Prescriptive or Appropriative Water Right--By Abandonment

[AS A (_____ [*if more than one, specify number, e.g.,* FIRST]) SEPARATE AND AFFIRMATIVE DEFENSE (*if more than one cause of action alleged, state* TO THE _____ [*specify, e.g.,* SECOND] CAUSE OF ACTION), DEFENDANT ALLEGES that:]

1. Since _____ [*date*], _____ [*name of opposing party*] has abandoned any right he/she/it may have had to _____ [*describe water to which right had attached, e.g.,* Clear Stream] situated in _____ County, California, by relinquishing his/her/its possession and enjoyment tof this petition, in that he/she/it _____ [*set forth acts showing relinquishment, e.g.,* moved away from her house on the land near the stream]. _____ [*Name of opposing party*] intended that relinquishment to be an abandonment in that _____ [*set forth facts from which intention may be inferred, e.g.,* she sold her barnyard animals, failed to replant a garden, and no longer used the land or waters for any beneficial purpose].

2. On _____ [*date*], the State Water Resources Control Board made a [written] finding that _____ [*name of opposing party*] abandoned any right he/she/it may have had to that water on or about _____ [*date*], by relinquishing his/her/its possession and enjoyment tof this petition and that he/she/it thereby lost his/her/its rights to the water. [A copy of the finding is attached to this complaint/defense as Exhibit A and made a part of this complaint/defense.]

[2] Use of Form

This allegation is for use by any party to an action who claims a right to water, alleging abandonment by the previous appropriative or prescriptive owner [*see Water Code §§ 1240, 1241*]. It may be used by a plaintiff in a complaint to enforce a water right based on abandonment by the previous owner or by a defendant to assert that plaintiff's water right

has been lost through abandonment. Abandonment requires proof of an intent to permanently relinquish the possession and enjoyment of a property right. Nonuse affords evidence on which the intent to abandon may be inferred [*Lindblom v. Round Valley Water Co. (1918) 178 Cal. 450, 455, 173 P. 994]* . The previous owner's right ceases at the moment abandonment is complete [*Smith v. Hawkins (1895) 110 Cal. 122, 126-128, 42 P. 453]* .

When using these paragraphs as allegations, omit the optional introductory paragraph; the allegations should replace Paragraphs 6-10 in § 575.399. For discussion of affirmative defenses, see *§ 575.388*.

[3] Cross References

For a related form, see *§ 575.401*.

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51-575 California Forms of Pleading and Practice--Annotated §§ 575.403-575.419

[Reserved]

§§ 575.403[Reserved]

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51-575 California Forms of Pleading and Practice--Annotated § 575.420

§ 575.420 Complaint [Code Civ. Proc. § 425.10] for Declaratory Relief [Code Civ. Proc. § 1060] for Determination of Rights Under Water Use Agreement and for Damages [Civ. Code § 3300]--Dispute Between User and Supplier--By User

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Declaratory Relief [Code Civ. Proc. § 1060] for Determination of Rights Under Water Use Agreement and for Damages [Civ. Code § 3300]--Dispute Between User and Supplier--By User

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DECLARATORY RELIEF
_____ [*name*], [and DOES I	)	AND DAMAGES
through _____,]	)	[*Civ. Code § 3300*; *Code Civ. Proc. § 1060*]
Defendant(s).	)	
	)	

_____

Plaintiff alleges:

1. Plaintiff is, and at all times herein mentioned was, the owner of a parcel of land located at _____ [*address*], _____ County, California, more particularly described as follows: _____ [*set forth legal description*].

[2. *Fictitious name allegation. See § 575.387, Paragraph 3.*]

[3. *Agency allegation. See § 575.387, Paragraph 4.*]

[4. On or about _____ [*date*], defendant sold and conveyed to plaintiff the above-described parcel of real property (and a residence thereon).]

5. Without a supply of water the above-described parcel was worthless and uninhabitable, as it had no water of its own. _____ [*Describe defendant's knowledge of the land's condition and steps taken to make the land habitable, e.g.,* Defendant owned the parcels surrounding the parcel sold to plaintiff, planned to develop them for residential purposes, and toward that end, had developed a water system, consisting of a well, pump, and distribution lines for the purpose of supplying and distributing water to the entire tract, of which plaintiff's parcel was only a small portion].

6. [As part of the transaction conveying the above-described property to plaintiff, and for the same consideration,] [d]efendant and plaintiff executed a written water use agreement, _____ [a copy of which is attached to this complaint as Exhibit A and made a part of this complaint *or set forth terms of water use agreement*].

7. On or about_____ [*date*], and thereafter, defendant _____ [*specify defendant's acts in reducing the supply of water to plaintiff's land, e.g.,* installed additional gages, meters, pressure reducers, and pipes which diminished the flow and the pressure of water to plaintiff's land. By _____ [*date*], both the flow and pressure of the water had been so diminished as to effectively eliminate water service to plaintiff's land].

8. Plaintiff has performed all of the stipulations, conditions, and covenants required to be performed by him/her in accordance with the terms and conditions of the water use agreement. Plaintiff has made repeated requests to defendant to furnish water as provided in the agreement, but defendant has refused, and continues to refuse, to so furnish water.

9. At all times herein mentioned, _____ [*describe availability of water for delivery, e.g.,* the water well was capable of maintaining the water delivery at the original rate of flow and amount of pressure].

10. An actual controversy has arisen and now exists relating to the rights and duties of the parties herein in that the water use agreement _____ [*set forth point over which controversy has arisen, e.g.,* provides for the supply of the quantity of water reasonably necessary for domestic use, but does not define what is a reasonable amount]. Plaintiff contends that under the contract _____ [*set forth plaintiff's interpretation, e.g.,* he/she is entitled to up to _____ (*specify amount of water in gallons, acre-feet, or other measure that plaintiff contends to be reasonable*)]; whereas defendant contends that under the contract _____ [*set forth defendant's interpretation, e.g.,* plaintiff is only entitled to _____ (*specify amount of water in gallons, acre-feet, or other measure that defendant contends to be reasonable*)].

11. Plaintiff desires a judicial determination of his/her/its rights and duties and a declaration as to which party's interpretation of the water use agreement is correct.

12. A judicial declaration is necessary and appropriate at this time under the circumstances in order that plaintiff may ascertain his/her/its rights and duties under the above-described water use agreement. [*Allege any financial or other burden suffered by plaintiff by the unsettled situation*.]

13. As a result of defendant's breach of the water use agreement, plaintiff has _____ [*specify damages suffered, e.g.,* incurred costs and expenses in the transport of water from a supplier 50 miles away] to his/her damage in the sum of $_____.

WHEREFORE, plaintiff prays judgment as follows:

1. For a declaration that _____ [*state the determination the court is requested to render, e.g.,* under the

contract described above plaintiff is entitled to _____ (*specify amount of water in gallons, acre-feet, or other measure that plaintiff is entitled to under his/her interpretation of the contract*)];

2. For damages in the sum of $_____;

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 575.385.*]

[2] Use of Form

This form of complaint is for use by a plaintiff to bring an action for declaratory relief to determine his or her rights under a water service agreement, and to recover damages for breach of the agreement. The form suggests a well as the source of the water, but its use is not restricted to well water. Although the form seeks contract damages, denial of water service may support an action for mental suffering, for which tort damages, including exemplary damages, are available; both contract and tort damages will not be awarded [*Acadia, California, Ltd. v. Herbert (1960) 54 Cal. 2d 328, 337, 5 Cal. Rptr. 686, 353 P.2d 294* ; for discussion and forms relating to mental suffering, see Ch. 362, *Mental Suffering and Emotional Distress*].

With appropriate modifications, the form can be adapted and expanded to seek injunctive relief as well. For a complaint seeking injunctive relief against interference with a water right, see *§ 575.399*. The above form is adapted from the fact situation in *Acadia, California, Ltd. v. Herbert (1960) 54 Cal. 2d 328, 5 Cal. Rptr. 686, 353 P.2d 294* .

[3] Allegations

This complaint alleges: (1) plaintiff's ownership of land for purposes of venue (Paragraph 1) [*see Code Civ. Proc. § 392(a)(1)*], (2) factual background for existence of water use agreement (Paragraphs 4-6) [*see* Ch. 140, *Contracts*], (3) defendant's breach (Paragraph 7), (4) plaintiff's performance (Paragraph 8), (5) existence of sufficient water supply for delivery (Paragraph 9), (6) the existence of an actual controversy and the necessity for a judicial determination (Paragraphs 10-12) [*see Code Civ. Proc. § 1060*; *see also* Ch. 182, *Declaratory Relief*], and (7) damages (Paragraph 13) [*see Civ. Code § 3300*].

[4] Decisions

Declaratory judgment, injunctive relief, and damages are appropriate relief in action for breach of water delivery contract. *Robinson v. Nevada Irrigation Dist. (1980) 101 Cal. App. 3d 760, 769, 161 Cal. Rptr. 863*

For a related form, see *§ 575.387*.

[5] Cross References

For discussion and forms relating to contract actions, see Ch. 140, *Contracts*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion and forms relating to judicial remedy of declaratory relief, see Ch. 182, *Declaratory Relief*

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51-575 California Forms of Pleading and Practice--Annotated § 575.421

§ 575.421 Complaint [Code Civ. Proc. § 425.10] for Declaratory Relief [Code Civ. Proc. § 1060] for Determination of Rights Under Water Service Agreement--Dispute Over Supplying Subdivision--By Developer

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Declaratory Relief [Code Civ. Proc. § 1060] for Determination of Rights Under Water Service Agreement--Dispute Over Supplying Subdivision--By Developer

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DECLARATORY RELIEF
_____ [*name*], [and DOES I	)	[*Code Civ. Proc. § 1060*]
through _____,]	)	
Defendant(s).	)	
	)	

_____

Plaintiff alleges:

1. Plaintiff [_____ (*specify identity, e.g.,* Sunshine Development Company] is, and at all times herein mentioned was, the owner of a tract of land located near _____ [*city*] California, and known as Tract _____ in _____ County, California.

[2. *Fictitious name allegation. See § 575.387, Paragraph 3.*]

[3. *Agency allegation. See § 575.387, Paragraph 4.*]

4. Plaintiff and defendant _____ [*set forth identity of water company, e.g.,* Pacific Water Company]

entered a written contract on or about _____ [*date*], under the terms of which defendant agreed to provide water service to Tract _____ in accordance with the rules and regulations prescribed by the Public Utilities Commission and plaintiff agreed to pay the sum of $_____. _____ [A copy of that contract is attached to this complaint as Exhibit A and made a part of this complaint *or set forth terms of the contract*].

5. On or about _____ [*date*], defendant _____ [*set forth identity of water district, e.g.*, Dry Valley Water District], pursuant to a written contract, purchased the water system operated by defendant Water Company, which was within the boundaries of defendant Water District. Tract _____ is within the boundaries of defendant Water District and was encompassed within that sale.

6. In the purchase agreement between the defendants, defendant Water District agreed that it would fulfill the contract defendant Water Company had made with plaintiff _____ [*specify terms by which this was agreed*]. _____ [A copy of that contract is attached to this complaint as Exhibit B and made a part of this complaint *or set forth terms of the contract*].

7. Plaintiff subdivided Tract _____, promising all the purchasers that each lot would be supplied with water. _____ [Many *or* All] of the lots are now without water, and those lot purchasers have made demands on plaintiff to supply water.

8. Plaintiff has demanded that defendants Water Company and Water District supply water to the lots without water, but defendants have not performed.

9. Plaintiff has performed all of the stipulations, conditions, and covenants that he/she is required to perform under the terms and conditions of his/her/its contract with defendant Water Company, which was to be performed in _____County. By its terms, the purchase agreement contract between defendant Water Company and defendant Water District was also to be performed in _____ County.

10. An actual controversy has arisen and now exists relating to the rights and duties of the parties herein relative to the contracts [attached to this complaint as Exhibits A and B] in that _____ [*specify essence of controversy, e.g.*, defendant Water Company contends that under the terms of Exhibit B defendant Water District is responsible for the installation and operation of water facilities for the lots in Tract _____, whereas defendant Water District contends that the terms of Exhibit A take precedence and defendant Water Company remains responsible for the installation and operation of water facilities for the lots in Tract _____].

11. [*Desire for judicial determination allegation. See § 575.420, Paragraph 11.*]

[12. *Necessity of judicial declaration allegation. See § 575.420, Paragraph 12.*]

WHEREFORE, plaintiff prays judgment as follows:

1. For a declaration _____ [*state the determination the court is requested to render, e.g.*, determining who is responsible for providing water service to the lots in Tract _____ and the terms and conditions under which that water must be provided];

2. For costs of suit herein incurred; and

3. For such other and further relief as the court may deem proper.

_____ [*signature*]
Attorney for Plaintiff

[*Verification, if desired. See § 575.385.*]

[2] Use of Form

This complaint is for use by a subdivision developer to bring an action for declaratory relief to determine the rights and obligations of the parties to a contract for supplying water service to a subdivision. In the example used the dispute relates to the responsibility to perform particular obligations under the contract after the supplier has assigned the contract. A declaratory relief action is appropriate in ascertaining the duties of providing water when there is a controversy between the parties concerning contract responsibility [*see Code Civ. Proc. § 1060*; *Bakersfield Country Club v. Pacific Water Co. (1961) 192 Cal. App. 2d 528, 531, 13 Cal. Rptr. 573]* . The form is adapted from the fact situation in *Bakersfield Country Club v. Pacific Water Co. (1961) 192 Cal. App. 2d 528, 13 Cal. Rptr. 573* .

[3] Allegations

The complaint alleges: (1) plaintiff's identity and capacity (Paragraph 1), (2) existence of a contract (Paragraph 4) [*see* Ch. 140, *Contracts*], (3) a breach resulting in no water service (Paragraphs 7 and 8), (4) plaintiff's performance (Paragraph 9), and (5) existence of an actual controversy (Paragraph 10) [*see Code Civ. Proc. § 1060*; *see also* Ch. 182, *Declaratory Relief*].

Also included are optional paragraphs for use when defendant water company has been purchased or otherwise transferred (Paragraphs 5 and 6).

[4] Cross References

For a related form, see *§ 575.420*.

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51-575 California Forms of Pleading and Practice--Annotated § 575.422

§ 575.422 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Water District to Supply Water

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086] to Compel Water District to Supply Water

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION FOR WRIT OF MANDATE
_____ [*name*], [and DOES I	)	[*Code Civ. Proc. §§ 1085, 1086*]
through _____,]	)	
Respondent(s).	)	
	)	

Plaintiff alleges:

1. Petitioner is, and at all times herein mentioned was, the owner of land located at _____ [*address*], _____ County, California, more particularly described as follows: _____ [*set forth legal description*]. This land is situated within the area serviced with water by respondent _____ [*specify name of Water District*], a public corporation.

2. The respondent Water District is a public utility and in exclusive control of the water supplied to the inhabitants of the area surrounding and including petitioner's lot. By law, respondent has the duty to supply all inhabitants of that area with water.

3. At all times herein mentioned respondent Water District has consistently refused, and still refuses, to supply water to petitioner's above-described land as well as to the land of others with an equal right, even though petitioner has complied with all the rules and regulations for obtaining service and has submitted a demand for water service as described below.

4. Petitioner's land is within the flow of the conduit of respondent Water District. Respondent has sufficient water available to it to supply petitioner's land, but refuses to extend its water mains or service to petitioner's parcel of land.

5. On or about _____ [*date*], [and on or about _____ (*date*),] a written and/or oral demand was made on respondent requesting that water be supplied to petitioner's land. _____ [*Set forth details of demands including extension of water conduits, tender, if any, of legal water rates, etc.*].

6. Respondent Water District has consistently refused, and still refuses, to serve water to petitioner's land through its existing facilities and has consistently refused, and still refuses, _____ [*describe refusal to expand facilities to serve petitioner, e.g.,* to install or extend additional conduits or water mains to serve petitioner's parcel of land].

7. As a result of the refusal of the respondent to supply water to petitioner's above-described land, petitioner has suffered damages in that _____ [*specify damages, e.g.,* petitioner has been required to transport his/her own water supply for his/her living and garden needs from a town 50 miles away, at a cost of $_____].

[8. Petitioner is informed and believes and thereon alleges that the aforementioned acts of the respondent were willful and _____ (oppressive *or* fraudulent *or* malicious *or any combination tof this petition*) in that _____ (*allege facts indicating presence of oppression, fraud, malice, or any combination tof this petition*). Petitioner is therefore entitled to exemplary damages.]

9. Petitioner is a person beneficially interested in the issuance of a writ by virtue of the fact that _____ [*specify facts demonstrating that petitioner is beneficially interested in the issuance of a writ, e.g.,* the issuance of a writ ordering respondent to provide service will directly and immediately benefit petitioner who is still without water service].

10. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought herein, in that respondent, a public utility, has been granted the exclusive privilege from the State of California to supply water to the inhabitants of the area surrounding and including petitioner's land, and in that there is no other available water supply in that area.

WHEREFORE, petitioner prays:

1. That the court issue a peremptory writ of mandate ordering respondent Water District to supply petitioner with water;

2. For compensatory damages in the sum of $_____;

[3. For punitive damages;]

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]
By: _____ [*signature*]
_____ [*typed name*]
Attorney for Petitioner _____ [*name*]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read this petition and know the contents tof this petition. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that this is true and correct.

_____ [*date*]
_____ [*signature*]

[2] Use of Form

This form is for use by a person residing within the boundaries of a water district to petition for a writ of mandate to compel the water district to extend its mains and provide water service to the petitioner's property [*see Lukrawka v. Spring Valley Water Co. (1915) 169 Cal. 318, 320, 146 P. 640* ; *Boies & Soule v. East Bay Mun. Util. Dist. (1960) 186 Cal. App. 2d 843, 844, 9 Cal. Rptr. 464]* .

[3] Allegations

This petition alleges the following:

- The petitioner's capacity (Paragraph 1);
- The existence of the respondent's duty to provide water (Paragraph 2) [*see Code Civ. Proc. § 1085*; *Hildreth v. Montecito Creek W. Co. (1903) 139 Cal. 22, 25-26, 72 P. 395]* ;
- The petitioner's right to receive water (Paragraph 3) [*see Code Civ. Proc. § 1085*; *Hartigan v. Pacific Gas & Electric Co. (1918) 38 Cal. App. 763, 764, 177 P. 484]* ;
- The ability of the respondent to deliver water to all those entitled (Paragraph 4) [*see Cozzens v. North Fork Ditch Co. (1905) 2 Cal. App. 404, 414, 84 P. 342]* ;
- Demand made of respondent (Paragraph 5) [*see* Ch. 358, *Mandate and Prohibition*];
- Compensatory damages (Paragraph 7) [*see Code Civ. Proc. § 1095*];
- Petitioner is a beneficially interested person (Paragraph 9) [*see Code Civ. Proc. § 1086*]; and
- Lack of an adequate legal remedy (Paragraph 10) [*see Code Civ. Proc. § 1086*].

The form also includes an optional paragraph for alleging exemplary damages (Paragraph 8) [*see Civ. Code § 3294*; *Lowe v. Yolo County etc. Water Co. (1910) 157 Cal. 503, 510-512, 108 P. 297]* .

[4] Verification

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Proof of service on each respondent and real party in interest of a copy of a petition that seeks an alternative writ must accompany the petition when it is offered for filing except when, in its discretion and for good cause, the court has granted the application for the writ ex parte [Code Civ. Proc. § 1107; for a discussion of serving the petition, see Ch. 358, *Mandate and Prohibition*].

[5] Points and Authorities

Points and authorities also customarily accompany a petition filed in a superior court, although they do not appear to be expressly required by statute. When no alternative writ is sought, proof of service of a copy of the petition need not accompany the application, but proof of service of a copy of the filed petition must be lodged with the court before a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

[6] Decisions

When water company's obligation to connect water service was clear under its own rules, superior court has jurisdiction over action brought by prospective water user for mandatory injunction requiring provision of service and for compensatory and exemplary damages; existence and exercise of that jurisdiction is in aid and not in derogation of jurisdiction of *Public Utilities Commission. Vila v. Tahoe Southside Water Utility (1965) 233 Cal. App. 2d 469, 479-480, 43 Cal. Rptr. 654*

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[Reserved]

§§ 575.423[Reserved]

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C. Water Districts: Formation; Inclusion; Exclusion

51-575 California Forms of Pleading and Practice--Annotated § 575.440

§ 575.440 Proceedings Before Department of Water Resources--Petition for Formation of Water Storage District [Water Code §§ 39400, 39425]

[1] FORM Proceedings Before Department of Water Resources--Petition for Formation of Water Storage District [Water Code §§ 39400, 39425]

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF CALIFORNIA

Petition for Formation of Water Storage District

To the Department of Water Resources of the State of California:

Petitioners allege:

[*EITHER*]

1. Petitioners constitute a majority in number of the holders of title to land irrigated or susceptible of irrigation from a common source and by the same system of works and are also the holders of title to a majority in value of the land included within the proposed water storage district.

[*OR*]

1. Petitioners number not less than 500 persons, each of whom is the holder of title to land within the proposed water storage district, and include the holders of title to not less than 10 percent in value of the land included within the

proposed water storage district.

[*CONTINUE*]

2. The boundaries of the proposed water storage district, which lies within the _____ [County *or* Counties] of _____, California, are as follows: _____ [*set forth legal description*].

3. The proposed source(s) of water supply is/are as follows: _____ [*set forth general description, e.g.,* the Red River project for the importation of water into the proposed water district which may be used on lands within the district, as well as any project under Federal Reclamation Law, including any appropriate extensions or modifications].

[4. The location proposed for storage of water to be used for irrigation is as follows: _____ (*set forth location*).]

5. _____ [Drainage *or* Reclamation] connected with the project is as follows: _____ [*describe, e.g.*, the district will install and operate those drainage canals and works as are necessary and practicable for the removal of waters containing excessive amounts of salt, and operate whatever wells, pumping plants, and other facilities as are necessary and practicable to control the level of ground waters within the district].

[*EITHER*]

6. It is not proposed that the water storage district develop any hydroelectrical energy.

[*OR*]

6. Incidental development of hydroelectrical energy is as follows: _____ [*set forth description of any hydroelectrical energy resulting*].

[*CONTINUE*]

7. The nature of the proposed works to be developed is as follows: _____ [*set forth general description, e.g.,* the works will consist of conduits and distribution facilities necessary to deliver water to lands within the district, together with (temporary) surface storage facilities as described above, (and) the _____ (drainage *or* reclamation) facilities as described above(, and the facilities for the development of hydroelectric energy)].

8. Submitted and filed with this petition is a list of the names and addresses of all persons holding title to land within the proposed district as shown by the last equalized assessment roll of [each of] the affected _____ [county *or* counties].

9. Submitted and filed with this petition is the undertaking in the amount and form required by *Section 39428 of the Water Code*.

WHEREFORE, petitioners pray that the territory included within the proposed district be formed into a water storage district in accordance with the provisions of *Section 39000 et seq. of the Water Code*, and that the district be known as _____ Water Storage District.

Name	Residence	Date
_____ [*signature*]	_____	_____
_____ [*signature*]	_____	_____
_____ [*signature*]	_____	_____
_____ [*signature*]	_____	_____

[*COMPILE sufficient signatures to meet statutorily required number of holders of title*]

[2] Use of Form

This petition is for use by the holders of title to land susceptible of irrigation from a common source to petition for the formation of a water storage district. *Water Code § 39400* sets forth the qualifications and number of petitioners required. A water storage district need not consist of contiguous parcels of land and may include land situated within other water storage districts having different plans and purposes [*Water Code §§ 39401, 39402*].

The petition is submitted to the Department of Water Resources and must be accompanied (1) by an undertaking in an amount double to the formation cost and (2) by a list of the names and addresses of all persons holding title to land within the proposed district [*Water Code §§ 39427-39430*].

[3] Procedure After Filing of Petition

After the formation petition is filed, the department will determine the practicability, feasibility, and utility of the proposed project, and may make all necessary studies, examinations, surveys, plans, and estimates of cost [*Water Code § 39600*]. There will be a hearing on the petition at which its sufficiency and the notice compliance will be considered [*Water Code §§ 39750-39752*]. If the department finds compliance with the statutory requirements, a hearing on the petition is held, after which the department makes an order as specified by statute [Water Code §§ 39755-39800].

Within 60 days after filing its order, the department will give notice of an election to be held to determine whether the district should be formed [*Water Code § 39900*]. If a majority votes for formation, the department will declare the territory formed as a district under the name designated, and will file for record in the office of the county recorder of each affected county a certified copy of the order declaring the district formed [*Water Code §§ 40100-40101*]. Formation of the district is complete with the filing for record of the order [*Water Code § 40102*].

[4] State Statutes

California Water Storage District Law. *Water Code § 39000 et seq.*

Contents of formation petition. *Water Code § 39425*

Petition consists of duplicate separate instruments. *Water Code § 39426*

Publication of notice. *Water Code §§ 39460-39466*

Defective notice not fatal. *Water Code § 39464*

Personal notice by registered mail. *Water Code § 39465*

Election on formation. *Water Code §§ 39900-39933*

Establishment of district. *Water Code §§ 40100-40104*

Powers and functions of district. *Water Code § 43000 et seq.*

[5] Decisions

Notice required is statement of time, place, and purpose of election, posted in three public places for 20 days, and published once a week for three successive weeks; personal notice by mail to electors is not required; landowner is responsible for assuring that name appears on assessment roll and that he or she is eligible to vote. *Froehlich v. Board of Directors (1973) 35 Cal. App. 3d 98, 101-103, 110 Cal. Rptr. 456*

[6] Cross References

For discussion and forms relating to statutory bonds and undertakings, see Ch. 538, *Suretyship, Bonds, and Undertakings*

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51-575 California Forms of Pleading and Practice--Annotated § 575.441

§ 575.441 Proceedings Before Department of Water Resources--Declaration of Intention to Withdraw Name From Petition for Formation of Water Storage District [Water Code § 39431]

[1] FORM Proceedings Before Department of Water Resources--Declaration of Intention to Withdraw Name From Petition for Formation of Water Storage District [Water Code § 39431]

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF CALIFORNIA

Declaration of Intention to Withdraw Name From Petition for Formation of Water Storage District

To the Department of Water Resources of the State of California:

I _____ [*name*], declare that:

1. I am the owner of the following described real property located within the proposed _____ [*name*] Water Storage District, more particularly described as follows: _____ [*set forth legal description of real property*].

2. On or about _____ [*date*], I signed the petition for the formation of that water storage district.

3. It is my intention to withdraw my signature from that petition.

I declare under penalty of perjury under the laws of the State of California that this is true and correct.

_____ [*date and place*]
_____ [*signature*]
Declarant

ACKNOWLEDGMENT

	)	
State of _____,	)	ss.
County of _____.	)	

_____

On _____ [*date*], before me, _____ [*name and quality of officer*], personally appeared _____ [*name*], _____ [personally known to me *or* proved to me on the basis of satisfactory evidence] to be the person whose name is subscribed to this instrument, and acknowledged that he/she executed it.
Dated: _____.

_____ [*signature*]
[*name of office*]
[*seal of office*]

[2] Use of Form

This declaration is for use by a person who signed a petition for formation of a water storage district and who wants to withdraw his or her name from the petition. A petition signature may be withdrawn at any time before publication of the petition by filing a declaration signed and acknowledged by the petitioner stating that it is his or her intention to withdraw from the petition [*Water Code § 39431*]. Publication will not occur until five days after the petition is filed [*Water Code § 39461*].

[3] Cross References

For alternative forms of acknowledgement, see Ch. 9, *Acknowledgements*

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51-575 California Forms of Pleading and Practice--Annotated § 575.442

§ 575.442 Proceedings Before Board of Directors of Water Storage District--Petition for Exclusion of Land From Water Storage District [Water Code §§ 48000, 48001]

[1] FORM Proceedings Before Board of Directors of Water Storage District--Petition for Exclusion of Land From Water Storage District [Water Code §§ 48000, 48001]

BEFORE THE BOARD OF DIRECTORS OF THE
_____ WATER STORAGE DISTRICT

Petition for Exclusion of Land From _____ Water Storage District

To the Board of Directors of the _____ Water Storage District:

Petitioner alleges:

1. Petitioner is the holder of title to a tract of land located in _____, County, California, more particularly described as follows: _____ [*set forth description, which need not be more particular or certain than is required when the land is entered in the assessment book by the county assessor, as provided in Rev. & Tax. Code §§ 321-328*].

2. The boundaries of the _____ [*name*] Water Storage District are as follows: _____ [*describe*].

3. _____ [All *or* The following described portion] of petitioner's land is presently included within the boundaries of _____ [*name*] Water Storage District: _____ [*set forth description*].

[4. The following described tract(s) is/are contiguous to the tract(s) described in Paragraph 3 of this petition:

_____ (*set forth description*).]

5. The land described above in Paragraph 3 [and the contiguous tract(s) described above in Paragraph 4] should be excluded from the _____ [*name*] Water Storage District for the following reason: _____ [*set forth specific reason for exclusion, e.g.,* petitioner was not advised by registered mail or otherwise informed of the proposed formation of the _____ [*name*] Water Storage District and the inclusion of his/her land within it as required by *Section 39465 of the Water Code*].

[6. The _____ [*name*] Water Storage District, at the time of the filing of this petition, has no bonded indebtedness. Therefore, petitioner's exclusion from the district does not require the approval of any bondholders].

WHEREFORE, petitioner prays that the boundary of the _____ [*name*] Water Storage District be changed to exclude petitioner's land, and that the board hold hearings, duly noticed, and conduct other proceedings as are necessary and proper in accordance with the provisions of *Sections 48000 et seq. of the Water Code* to exclude petitioner's land from the boundaries of the _____ [*name*] Water Storage District.
Dated: _____.

_____ [*signature*]

[*Acknowledgment, see § 575.441*.]

[2] Use of Form

This form is for use by a holder of title to a tract of land within a water storage district to petition the board of directors of that water storage district to exclude that tract from the district. Holders may file jointly for exclusion of their tracts and any other contiguous tracts [*Water Code § 48000*].

The board must provide notice of the petition and the time of hearing [*Water Code §§ 48003, 48004*]. At the hearing the board will consider the petition and any written objections as well as supporting evidence for either position [*Water Code § 48025*]. Among other factors, the decision regarding exclusion will be based on the best interests of the district and whether the tract will be benefited by the operations of the district [*Water Code §§ 48029, 48030*].

[3] State Statutes

"Board" defined. *Water Code § 39016*

"Holder of title" defined. *Water Code § 39020*

Exclusion of land. *Water Code § 48000 et seq.*

Contents of petition. *Water Code § 48001*

Acknowledgment of petition. *Water Code § 48002*

Expenses required of petitioner. *Water Code § 48028*

Liability of excluded land. *Water Code §§ 48080-48087*

Assent of bondholders. *Water Code § 48055*

[4] Cross References

For a related form, see *§ 575.441*.

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51-575 California Forms of Pleading and Practice--Annotated § 575.443

§ 575.443 Proceedings Before Board of Directors of Water Storage District--Petition for Inclusion of Land Within Water Storage District [Water Code §§ 48200, 48201]

[1] FORM Proceedings Before Board of Directors of Water Storage District--Petition for Inclusion of Land Within Water Storage District [Water Code §§ 48200, 48201]

BEFORE THE BOARD OF DIRECTORS OF THE
_____ WATER STORAGE DISTRICT

Petition for Inclusion of Land Within _____ [*name*] Water Storage District

To the Board of Directors of the _____ [*name*] Water Storage District:

Petitioner alleges:

1. Petitioner is the holder of title to the following described tract of land which _____ [is *or* is not] contiguous to the existing boundaries of _____ [*name*] Water Storage District: _____ [*set forth description, which need not be more particular or certain than is required when the land is entered in the assessment book by the county assessor, as provided in Rev. & Tax. Code §§ 321-328*].

2. Petitioner expressly assents to the inclusion of the above-described land within the _____ [*name*] Water Storage District.

3. Petitioner is informed and believes and thereon alleges that it is feasible and practicable to irrigate that land.

4. Petitioner will advance to the board of directors of _____ [*name*] Water Storage District sufficient funds to pay the estimated costs of all proceedings on this petition.

WHEREFORE, petitioner prays that the boundary of the _____ [*name*] Water Storage District be changed to include petitioner's land, described above in Paragraph 1, and that the board hold hearings, duly noticed, and conduct other proceedings as are necessary and proper in accordance with the provisions of *Section 48200 et seq.of the Water Code* to include petitioner's land within the _____ [*name*] Water Storage District.
Dated: _____.

_____ [*signature*]

[*Acknowledgment, see § 575.441*.]

[2] Use of Form

This form is for use by a person holding title to land within the same watershed as an existing water storage district to petition the board of directors of that water storage district for the inclusion of the land within that district. The land to be included need not be contiguous to the existing district boundaries [*Water Code § 48200*]. The board must provide notice of the petition and the time of hearing [*Water Code §§ 48203, 48204*]. The board will order inclusion of the land (1) if it is in the best interests of the district, (2) if service is feasible by the system of works, (3) if no written protest is made, and (4) if no protests by holders of title are made pursuant to *Water Code § 48250* (inclusion election) [*Water Code § 48227*].

[3] State Statutes

"Board" defined. *Water Code § 39016*

"Holder of title" defined. *Water Code § 39020*

Inclusion of land. *Water Code § 48200 et seq.*

Contents of petition. *Water Code § 48201*

Acknowledgment of petition. *Water Code § 48202*

Advancement of costs by petition. *Water Code § 48205*

Inclusion elections. *Water Code §§ 48250-48260*

[4] Cross References

For related forms, see *§§ 575.441* and *575.442*.

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51-575 California Forms of Pleading and Practice--Annotated § 575.444

§ 575.444 Petition to County Board of Supervisors for Formation of County Water District [Water Code §§ 30200-30204]

[1] FORM Petition to County Board of Supervisors for Formation of County Water District [Water Code §§ 30200-30204]

Petition for Formation of County Water District

To the Board of Supervisors of _____ County, California:

1. Petitioners are voters residing within the boundaries of the proposed district hereinafter described. Petitioners hereby petition the Board of Supervisors of _____ County to initiate the procedures as may be required by law to organize and incorporate a county water district and request that territory lying within the proposed boundaries of the proposed district be incorporated into a county water district in accordance with the provisions of *Section 30000 et seq. of the Water Code*.

2. The boundaries for the proposed county water district are as follows: _____ [*describe*].

3. The territory within the proposed boundaries is situated _____ [entirely within the County of _____ *or* within the contiguous Counties of _____ and _____], California.

4. When organized, the proposed district shall be known as the _____ County Water District.

5. Petitioners constitute voters equal in number to at least 10 percent of the voters registered within the boundaries of the proposed district 30 days prior to the filing of this petition.

[6. The boundaries of the proposed county water district include (part of) the _____ (City *or* Cities) of

_____ (and _____).]

[7. This petition is signed by at least 10 percent of the voters of _____ (that *or* that part of the *or* each) municipal corporation and of the unincorporated territory included in the proposed district voting at the election.]

WHEREFORE, petitioners pray that the above-described territory be incorporated into a county water district to be known as the _____ County Water District, as prescribed by law.

Name	Residence	Date
_____ [*signature*]	_____	_____
_____ [*signature*]	_____	_____
_____ [*signature*]	_____	_____
_____ [*signature*]	_____	_____

[*COMPILE sufficient signatures to meet statutorily required percentage of residents*]

[2] Use of Form

This form is for use by residents of one or two or more contiguous counties to petition for the formation of a county water district [*Water Code § 30200*]. The petition must be signed by 10 percent of the registered voters within the proposed boundaries [*Water Code § 30202*]. If at least part of one or more municipal corporations is included within the proposed district, the petition must be signed by at least 10 percent of those voters as well [*Water Code § 30203*]. Optional Paragraphs 6 and 7 may be used in that situation.

The petition is presented to the board of supervisors of the county in which the greater portion of the district is located [*Water Code §§ 30064, 30260*]. The county elections official will publish notice of the petition and the time of hearing [*Water Code § 30230*]. The board of supervisors will hold a hearing on the petition and consider all relevant evidence [*Water Code §§ 30260-30263*]. The board of supervisors will make changes in the proposed boundaries as deemed advisable, and will either dismiss the petition and terminate the proceedings or call an election to determine whether the district should be organized, depending on which alternative it determines is in the public interest [*Water Code §§ 30264, 30264.1*]. The election will be held on the next established election date not less than 74 days after the final hearing on the formation petition [*Water Code § 30291*]. If there is a majority vote in favor of formation, the board of supervisors will declare the district formed [*Water Code § 30320*].

[3] State Statutes

[a] Formation

County Water District Law. *Water Code § 30000 et seq.*

Contents of petition. *Water Code § 30201*

Number of signatures required. *Water Code §§ 30202-30203*

Petition is authorized to be made up of separate instruments. *Water Code § 30204*

Notice of petition. *Water Code §§ 30230-30232*

Defect not fatal if sufficient number of qualified signatures. *Water Code § 30232*

Election on formation. *Water Code §§ 30290-30297*

Name must include "County Water District." *Water Code § 30292(c)*

[b] General

County water district is district of limited power. *Gov. Code § 56037*

Community Services District Law. *Gov. Code §§ 61000-61144*

Powers and purposes of county water district. *Water Code § 31000 et seq.*

[4] Decisions

Water Code § 31021 defines one purpose of county water district as conserving water supply for future as well as present use. *Atchison etc. Ry. Co. v. Kings Co. Water Dist. (1956) 47 Cal. 2d 140, 146-147, 302 P.2d 1*

County water districts are merely "taxing districts" and Legislature has plenary control over matters regarding organization and change of boundaries; extent of annexed territory is political question. Sacramento M. U. Dist. v. All Parties, etc. *(1936) 6 Cal. 2d 197, 201, 57 P.2d 506*

Failure of predecessor in interest to challenge inclusion within county water district precludes landowner from making collateral attack on tax proceeding based on delinquent district taxes. *Taylor v. Coachella Valley Water Dist. (1952) 108 Cal. App. 2d 743, 745, 239 P.2d 454*

[5] Attorney General Opinions

Annexation of city land from county water district does not require detachment. *61 Ops. Cal. Att'y Gen. 497, 498-502 (1978)*

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51-575 California Forms of Pleading and Practice--Annotated § 575.445

§ 575.445 Notice of Hearing on Petition for Formation of County Water District [Water Code §§ 30230, 30231]

[1] FORM Notice of Hearing on Petition for Formation of County Water District [Water Code §§ 30230, 30231]

Notice is hereby given that on _____ [*date*], a petition requesting the formation of a county water district, to be known as the _____ County Water District, was filed with the Board of Supervisors of the County of _____, State of California.

That petition is signed by _____ [*number*] voters within the proposed district, and the text of the petition, including _____ [*number, at least five*] of the names attached tto this petition, is as follows: _____ [*set forth text of petition*].

Notice is further given that the petition will be presented to and considered by the Board of Supervisors on _____ [*date*], at the hour of _____ _____. M., in the _____ [boardroom *or other room designation*] of the Board of Supervisors at _____ [*street address and city*], in _____ County, California. At that time and place, all persons interested may appear and be heard.

At the time and place stated in this notice, the Board of Supervisors of the County of _____ will hear the petition and those appearing thereon, together with any written protests filed with the Clerk of the Board prior to the hearing by or on behalf of owners of taxable property situated within the proposed district.
Dated: _____.

_____ [*signature*]
County Clerk
By: _____

[2] Use of Form

This notice is used to provide the requisite notice of hearing on a petition for formation of a county water district. The county elections official must publish the notice once a week for at least two weeks before the time of consideration of

the petition in at least one, but no more than three, newspapers published in the county [*Water Code § 30230*].

[3] State Statutes

Contents of notice. *Water Code § 30231*

Defect in notice not fatal. *Water Code § 30232*

[4] Cross References

For a related form, see *§ 575.444*.

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51-575 California Forms of Pleading and Practice--Annotated § 575.446

§ 575.446 Application to County Board of Supervisors for Inclusion of Land Within Proposed County Water District [Water Code § 30264(c)]

[1] FORM Application to County Board of Supervisors for Inclusion of Land Within Proposed County Water District [Water Code § 30264(c)]

Application for Inclusion of Land Within Proposed _____ County Water District

To the Board of Supervisors of _____ County, California:

The application of _____ [*name*] respectfully shows:

1. Applicant is the owner of the following described real property located in _____ County, more particularly described as follows: _____ [*set forth legal description of real property*].

2. That property has not been included within the boundaries of the proposed _____ County Water District, more particularly set forth in the petition for the formation of that county water district and in the notice of hearing thereon [published in _____ (*name of newspaper*) on _____ (*date*)].

3. Applicant's property will be benefited by the proposed county water district in that _____ [*specify benefit of inclusion within the proposed district, e.g.,* applicant's land is not included within any existing water district and applicant presently has no consistent and reliable access to water].

WHEREFORE, applicant prays that the real property above described be included within the proposed county water district.
Dated: _____.

_____ [*signature*]

[2] Use of Form

This form is for use by a landowner to apply for the inclusion of his or her land within a proposed county water district. The board of supervisors has the power to change the proposed boundaries of the proposed water district and may include land not included in the petition when that land will be benefited by inclusion within the district [*Water Code § 30264(c)*].

Because the board of supervisors only has the power to change the boundaries while the water district is still a proposal, the above form should be used before the district has been formed [*see Water Code § 30264(c)*].

[3] Cross References

For a related form, see *§ 575.444*.

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51-575 California Forms of Pleading and Practice--Annotated § 575.447

§ 575.447 Petition to Local Agency Formation Commission to Detach Territory [Gov. Code § 56700] From County Water District [Water Code § 32200]

[1] FORM Petition to Local Agency Formation Commission to Detach Territory [Gov. Code § 56700] From County Water District [Water Code § 32200]

Petition to Detach Territory From County Water District

To the Local Agency Formation Commission of _____ County, California:

Petitioners allege:

1. This petition is made pursuant to the provisions of *Section 56000 et seq. of the Government Code*.

2. Petitioner _____ [*name*] is the owner of the following described real property situated in _____ County, California: _____ [*set forth legal description*].

3. This-described real property is a tract of land located _____ [wholly *or* partially] within the _____ County Water District.

4. The _____ County Water District includes _____ [a portion of _____ County *or* portions of the Counties of _____ and _____], and the _____ [city *or* cities] of _____ [and _____]. A map of that water district showing its location relative to contiguous territories is attached to this petition as Exhibit A and made a part of this petition.

5. Petitioners propose that the above-described real property be excluded and detached from that water district.

[*EITHER*]

6. This-described real property proposed to be detached is inhabited in that _____ [*specify number of 12 or more*] persons who have been registered to vote within that territory _____ [*set forth date determined by legislative body, e.g.,* for at least 54 days prior to the date of initiation of preliminary proceedings herein] reside therein.

[*OR, if territory is uninhabited*]

6. This-described real property proposed to be detached is uninhabited in that it now contains, and has for _____ [*specify pertinent date as determined by legislative body, e.g.,* one year prior] to the initiation of these proceedings contained, less than 12 registered voters.

[*CONTINUE*]

7. A description of the exterior boundaries of the above-described real property proposed to be detached and excluded from _____ County Water District is as follows: _____ [*set forth legal description*]. A map of that district showing the exterior boundaries thereon of the territory to be excluded is attached to this petition as Exhibit B and made a part of this petition.

8. Petitioners propose the following changes in the organization of that county water district to accommodate the exclusion: _____ [*describe*].

9. Petitioners make this proposal for the reason that the above-described territory is not directly and substantially benefited by being included in that district in that _____ [*specify, e.g.,* the land is composed of granite and limestone with only a thin layer of topsoil and no amount of water will ever render it capable of a greater productive capacity].

10. This-described proposal _____ [is *or* is not] consistent with the sphere of influence of any affected city or district.

11. Petitioners respectfully request that proceedings be taken to effect the change in _____ [organization *or* reorganization] of that county water district as proposed herein [and that this Commission set a date and place for hearing on this petition and give notice tof this petition as the law requires].

[12. *To designate up to three persons as chief petitioners, pursuant to Gov. Code § 56700(a)(7) add, e.g.,* _____ (*Name(s*)) of _____ (*mailing address(es*)) are designated chief petitioners.]

Name	Residence	Date
_____ [*signature*]	_____	_____
_____ [*signature*]	_____	_____
_____ [*signature*]	_____	_____
_____ [*signature*]	_____	_____

[*COMPILE sufficient signatures to meet statutorily required percentage of residents*]

[2] Use of Form

This form is for use to petition a local agency formation commission to detach territory from a county water district [*see Gov. Code § 56650*; *Water Code § 32200*]. With appropriate modification, it may be used to have land annexed, rather than detached, from a county water district [*see Water Code § 32400*]. Land consisting of any portion of the county wherein the district was formed or of any municipality therein, or land in a county contiguous to the county wherein the district was formed or of any municipality therein, may be included within the district. It is not necessary that the land to be annexed be contiguous to any portion of the district [*Water Code § 32400*]. Commission proceedings for annexation of land to, or detachment of land from, a district after its formation may be initiated by petition or by resolution of an application [*see Gov. Code § 56650*].

[3] Petition Signature Requirements

A resident-voter petitioner is required to add to his or her signature his or her place of residence, giving street and number or a designation sufficient to enable the place of residency to be readily ascertained [*Gov. Code § 56704(b)*]. A landowner petitioner must affix the date on which he or she signs the petition, and include a written description sufficient to identify the location of the land owned [*Gov. Code § 56704(c)*]. The number of signatures required on petitions for district annexation or detachment is set forth in *Gov. Code §§ 56767* and *56768*.

[4] Commission Proceedings

The petition is filed with the executive officer who must determine within 30 days whether or not it is complete and acceptable for filing. Immediately after receiving an application, and before issuing a certificate of filing, the executive officer will give mailed notice of the application to each interested agency, each subject agency, and other affected county. If it is acceptable, the executive officer will issue a certificate of filing and set the proposal for hearing and give published notice. The hearing date must not be more than 90 days after issuance of the certificate of filing or after the application is deemed accepted, whichever is earlier [*Gov. Code § 56658*]. The executive officer must review each application and prepare a report, including his or her recommendations, on the application. The report must be completed at least five days before the hearing [*Gov. Code § 56665*].

At the hearing the commission must hear and receive any oral or written protests, objections or evidence made, presented, or filed and consider the report of the executive officer [*Gov. Code § 56666*]. In any order approving a proposal for an annexation to, or detachment from, a district, the commission may determine that any election called may be held within a specified territory [*Gov. Code § 56876*]. Not later than 35 days after the conclusion of the hearing, the commission must adopt a resolution making determinations approving or disapproving the plan. If it disapproves the proposed plan, no further proceedings will be taken [*Gov. Code § 56880*]. The resolution of the commission is to initiate protest proceedings [*see Gov. Code § 57000 et seq.*] in compliance with the resolution [*Gov. Code § 56881(d)*].

[5] Conducting Authority

Within 35 days following the adoption of the commission's resolution making determinations, and following the reconsideration period [*see Gov. Code § 56895* (person or agency seeking reconsideration must file written request within 30 days of adoption of initial or superseding resolution by commission making determinations)], the executive officer of the commission must set the proposal for hearing and give notice of that hearing by mailing, publication, and posting [*Gov. Code § 57002(a)*]. The date of the hearing must not be less than 21 days or more than 60 days after the date the notice is given [*Gov. Code § 57002(a)*]. The hearing may not be held before expiration of the reconsideration period [*Gov. Code § 57002(a)*; *see Gov. Code § 56895(b)* (reconsideration period)]. If authorized by the commission [

see Gov. Code § 56663] a change of organization or reorganization may be approved by resolution of the conducting authority without notice, hearing, and election [*Gov. Code § 57002(c)*]. The protest hearing must be held by the commission on the date and at the time specified in the notice given by the executive officer. It may be continued on a later date, not to exceed 60 days from the date specified [*Gov. Code § 57050(a)*].

In the case of annexations or detachments in registered voter districts, the commission, not more than 30 days after the hearing's conclusion, must make a finding regarding the value of extant written protests, and, in the case of inhabited territory, either terminate the proceedings or order an election by the registered voters residing within the affected territory, if extant protests have been filed by either of the following: (1) at least 25 percent, but less than 50 percent, of the registered voters residing in the affected territory, or (2) at least 25 percent of owners of land who also own at least 25 percent of the assessed value of land within the affected territory [*Gov. Code § 57075(a)*].

In the case of annexations or detachments in landowner-voter districts, the commission must either terminate the proceedings or make a finding regarding the value of extant written protests, and must order an election within the affected territory if extant protests have been filed representing either of the following: (1) 25 percent or more of the owners of land who also own 25 percent or more of the assessed value of land within the territory, or (2) 25 percent or more of the voting power of landowner voters entitled to vote as a result of owning property within the territory [*Gov. Code § 57076(b)*].

[6] Petition Signed by All Landowners

If a petition for an annexation or a detachment, or for a reorganization consisting solely of annexations or detachments, is signed by all the owners of land within the affected territory of the proposed change, the commission may approve or disapprove the change without notice and hearing [*Gov. Code § 56663(a)*]. The commission might also approve and authorize the conducting authority to conduct proceedings without notice, hearing, and an election [*Gov. Code § 56663(a)*].

[7] State Statutes

[a] Definitions

"Conducting authority" defined. *Gov. Code § 56029*

"Inhabited territory" and "uninhabited territory" defined. *Gov. Code § 56046*

"Interested agency" defined. *Gov. Code § 56047.5*

"Landowner-voter," "landowner-voter district" defined. *Gov. Code §§ 56049, 56050*

"District," "special district" defined. *Gov. Code § 56036*

[b] General Provisions

Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (formerly the Cortese-Knox Local Government Reorganization Act of 1985). *Gov. Code § 56000 et seq.*

Petition requirements. *Gov. Code §§ 56700-56711*

Commission proceedings. *Gov. Code §§ 56825-56898*

Conducting authority proceedings. *Gov. Code §§ 57000-57204*

Effect of reorganization. *Gov. Code §§ 57300-57550*

Exclusion of territory from county water district. *Water Code § 32200*

Inclusion of territory from county water district. *Water Code § 32400*

[8] Decisions

Mandamus is appropriate remedy to test proper exercise of discretion vested in local board; substantial evidence is test on review. *Atchison etc. Ry. Co. v. Kings Co. Water Dist. (1956) 47 Cal. 2d 140, 143, 302 P.2d 1*

Exclusion of land from county water district permissible only when there is no substantial and direct benefit to land; "no substantial and direct benefit test" applied to land itself, as distinguished from benefit to landowner's particular use of that land. *Atchison etc. Ry. Co. v. Kings Co. Water Dist. (1956) 47 Cal. 2d 140, 144-145, 302 P.2d 1*

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PART IV. FORMS
C. Water Districts: Formation; Inclusion; Exclusion

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§ 575.448 Petition to County Board of Supervisors for Formation of Municipal Water District [Water Code §§ 71120-71124]

[1] FORM Petition to County Board of Supervisors for Formation of Municipal Water District [Water Code §§ 71120-71124]

Petition for Formation of Municipal Water District

To the Board of Supervisors of _____ County, California:

The undersigned hereby petition for the formation of a municipal water district in accordance with the provisions of *Section 71000 et seq. of the Water Code*, and their petition respectfully shows:

1. The boundaries for the proposed municipal water district are: _____ [*set forth legal description*].

[*EITHER*]

2. Those boundaries include _____ [the entire *or* a portion of the] corporate area of the _____ [City *or* Cities] of _____ [and _____].

[*OR*]

2. Those boundaries do not include the entire or any portion of the corporate area of any city.

[*CONTINUE*]

3. Petitioners constitute qualified voters equal in number to at least 10 percent of the voters registered within the boundaries of the proposed district as of _____ [*specify date 30 days prior to the date petition is filed*].

[*EITHER, if one or more city is included*]

4. Petitioners constitute at least 10 percent of the voters in the _____ [City *or* Cities] of _____ [and _____, respectively], registered to vote therein as of _____ [*specify date 30 days prior to the date petition is filed*].

[*OR, if only portion of city; 12 or more resident voters*]

4. There are _____ [*specify number of 12 or more*] registered voters residing within that portion of the City of _____ that is included within the boundaries of the proposed municipal water district. Petitioners are voters residing within that portion equal in number to at least 10 percent of _____ [*specify the lesser of either* the total number of registered voters in that portion *or* the number of voters of that portion voting for all candidates for the office of Governor at the last general election prior to the filing of this petition].

[*OR, if only portion of city; less than 12 resident voters*]

4. There are _____ [*specify number less than 12*] registered voters residing within that portion of the City of _____ which is included within the boundaries of the proposed municipal water district. Petitioners are at least 50 percent of the voters residing in that portion.

[*CONTINUE*]

5. The proposed name for the district is the _____ Municipal Water District.

WHEREFORE, petitioners pray that the above-described territory be incorporated into a municipal water district to be known as the _____ Municipal Water District, as prescribed by law.

Name	Residence	Date
_____ [*signature*]	_____	_____
_____ [*signature*]	_____	_____
_____ [*signature*]	_____	_____
_____ [*signature*]	_____	_____

[*COMPILE sufficient signatures to meet statutorily required percentage of resident voters*]

[2] Use of Form

This form is for use to petition for formation of a municipal water district. The petition is filed with the elections official of the principal county, which is the county in which the greater portion of the land of a proposed district is situated [*Water Code §§ 71015, 71050, 71120*]. The formation petition may consist of separate documents [*Water Code § 71120*]. It must be signed by 10 percent of the registered voters within the boundaries of the proposed district. If a city is included within the boundaries, the petition must also be signed by 10 percent of its voters [*Water Code § 71121*]. If only a portion of a city is included, the petition must also include a specified percentage of its voters [*Water Code § 71122*]. The alternative Paragraphs 4 are for use to state that these requirements have been met, and one or more of them may be appropriate. If the second alternative Paragraph 2 is used, indicating that no portion of any city is within the proposed district boundaries, Paragraph 4 is not necessary.

After an examination and certification of the signatures of voters reveal that the petition is sufficient, the elections official presents the petition to the board of supervisors [*Water Code §§ 71126, 71133*]. The board of supervisors will make an order dividing the proposed district into five divisions based on population and will provide for an election to determine formation and election of the first board of directors [*Water Code §§ 71160, 71161*]. On a majority vote, the board of supervisors will declare the territory included within the proposed boundaries to be formed as a municipal water district under the designated name [*Water Code § 71190*].

[3] Supplemental Petition

If the petition is insufficient it may be amended by filing a supplemental petition to include the requisite number of signatures within 10 days [*Water Code § 71129*].

[4] State Statutes

Municipal Water District Law. *Water Code § 71000 et seq.*

Formation petition. *Water Code §§ 71120-71135*

Signatures required. *Water Code §§ 71121, 71122*

Contents of petition. *Water Code § 71123*

Powers and purposes of district. *Water Code §§ 71590-71759*

Formation election. *Water Code §§ 71160-71172*

Establishment of district. *Water Code §§ 71190-71196*

[5] Decisions

Municipal water districts have power to either regulate or contract as to rates. *Louisiana-Pacific Corp. v. Humboldt Bay Mun. Water Dist. (1982) 137 Cal. App. 3d 152, 158-161, 186 Cal. Rptr. 833*

Municipal water district are not required to consider benefit to land in its formation or exclusion decisions; water district is able to be formed and maintained for largely negative purposes as well as for positive purposes, and formation for purpose of preventing importation of water from another water district is valid. *Wilson v. Hidden Valley Mun. Water Dist. (1967) 256 Cal. App. 2d 271, 282-284, 285, 63 Cal. Rptr. 889*

[6] Attorney General Opinions

Municipal water district must consider effect of water pipeline on total environment. *58 Ops. Cal. Att'y Gen. 438, 442 (1975)*

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[15] Compensation

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[54] Preexisting Conditions and Subsequent Injuries

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[65] State Compensation Insurance Fund

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[70] Temporary Disability

[71] Third-Party Actions

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[o] Reimbursement and Off-Set for Compensation Benefits Paid

[p] Settlement

[q] Statute of Limitations

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§§ 577.359-577.369 [Reserved]

§ 577.370 Attorney's Fees Disclosure Statement [Lab. Code § 4906(e); 8 Cal. Code Reg. §§ 10134, 10135] [DWC Form 3]

[1] FORM

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[3] Cross References

§§ 577.371-577.372 [Reserved]

§ 577.373 Employee's Claim for Workers' Compensation Benefits [Lab. Code § 5401; 8 Cal. Code Reg. § 10118.1] [DWC Form 1]

[1] FORM

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[3] Form and Content

[4] Filing and Service of Claim Form

[5] Employer's Duties

[6] Cross References

§§ 577.374-577.389 [Reserved]

§ 577.390 Application for Adjudication of Claim [DWC/WCAB Form 1A]

[1] FORM

[2] Use of Form

[3] Service of Application

[4] Additional Allegations and Information

[5] Cross References

§ 577.391 Application for Adjudication of Claim [Lab. Code §§ 5500, 5503]--For Disability Compensation for Injuries Occurring on or After January 1, 1990, and Before January 1, 1994 [8 Cal. Code Reg. § 10408] [WCAB Form 1]

[1] FORM

[2] Use of Form

[3] Service of Application

[4] Additional Allegations and Information

[5] Cross References

§ 577.392 Application for Adjudication of Claim [Lab. Code §§ 5500, 5503]--For Death Benefits for Injuries Occurring Before January 1, 1990, or on or After January 1, 1994 [8 Cal. Code Reg. §§ 10408, 10412(b)] [DIA WCAB Form 2]

[1] FORM

[2] Use of Form

[3] Service of Application

[4] Cross References

§ 577.393 Application for Adjudication of Claim [Lab. Code §§ 5500, 5503]--For Death Benefits for Injuries Occurring on or After January 1, 1990, and Before January 1, 1994 [8 Cal. Code Reg. § 10408] [WCAB Form 1A]

[1] FORM

[2] Use of Form

[3] Service of Application

[4] Cross References

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[1] FORM

[2] Use of Form

[3] Time to File Answer

[4] Employee's Serious and Willful Misconduct

[5] Text References

§ 577.395 Answer to Application for Adjudication of Claim [Lab. Code §§ 5500(a), 5505]--For Injuries Occurring on or After January 1, 1990 and Before January 1, 1994 [8 Cal. Code Reg. § 10484; former 8 Cal. Code Reg. 10969] [WCAB Form 2]

[1] FORM

[2] Use of Form

[3] Time to File Answer

[4] Employee's Serious and Willful Misconduct

[5] Cross References

§ 577.396 Allegation of Entitlement to Increased Benefits Because Injury Caused by Employer's Serious and Willful Misconduct [Lab. Code §§ 4553, 4553.1; 8 Cal. Code Reg. §§ 10440, 10445]

[1] FORM

[2] Use of Form

[3] Serious and Willful Misconduct

[4] Pleading Requirements

[5] Service of Form

[6] Cross References

§ 577.397 Application for Subsequent Injuries Fund Benefits

[1] FORM

[2] Use of Form

[3] Subsequent Injuries Benefits Trust Fund

[4] Filing and Service of Application

[5] Service of Medical Reports

[6] Cross References

§ 577.397A Document Cover Sheet [DWC-CA Form 10232.1]

[1] FORM

[2] Use of Form

§ 577.397B Document Separator Sheet [DWC-CA Form 10232.2]

[1] FORM

[2] Use of Form

§ 577.398 Petition for Appointment of Guardian ad Litem and Trustee [Lab. Code § 5307.5(a); 8 Cal. Code Reg. § 10402] [DIA WCAB Form 8]

[1] FORM

[2] Use of Form

[3] Cross References

§ 577.399 Declaration of Readiness to Proceed [DWC-CA Form 10250.1]

[1] FORM

[2] Use of Form

[3] Cross References

§ 577.400 General Caption for Use on Paper Filed With WCAB

[1] FORM

[2] Use of Form

§ 577.401 WCAB--Data Entry Sheet

[1] FORM

[2] Use of Form

§§ 577.402-577.409 [Reserved]

§ 577.410 Subpoena [8 Cal. Code Reg. § 10530] With Proof of Service [8 Cal. Code Reg. § 10505(c)] [DIA WCAB Form 30]

[1] FORM

[2] Use of Form

[3] Cross References

§ 577.411 Subpoena Duces Tecum [8 Cal. Code Reg. § 10530], Declaration for Subpoena Duces Tecum [Code Civ. Proc. §§ 1987.5, 2015.5], and Declaration of Service [8 Cal. Code Reg. § 10505(c)] [DIA WCAB Form 32]

[1] FORM

[2] Use of Form

[3] Cross References

§ 577.412 Petition for Order to Compel Employee to Submit to Medical Examination and to Suspend Employee's Right to Begin or Maintain Proceeding for Collection of Workers' Compensation [Lab. Code §§ 4051, 4053, 4054, 5703.5]

[1] FORM

[2] Use of Form

[3] Failure to Submit to Examination

[4] Cross References

§ 577.413 Petition for Order Directing [Exhumation and] Autopsy [Lab. Code §§ 5706, 5707; 8 Cal. Code Reg. § 10342(c)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 577.414 Motion to Quash Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]

[1] FORM

[2] Use of Form

[3] Service of Motion

[4] Cross References

§ 577.415 Order Limiting Subpoena Duces Tecum [Code Civ. Proc. § 1987.1, 8 Cal. Code Reg. § 10530]

[1] FORM

[2] Use of Form

[3] Cross References

§ 577.416 Letter to Physician Regarding Motion to Quash Subpoena Duces Tecum [Code of Civ. Proc. § 1985.3]

[1] FORM

[2] Use of Form

[3] Cross References

§ 577.417 Letter to Copy Service Regarding Motion to Quash Subpoena Duces Tecum

[1] FORM

[2] Use of Form

[3] Cross References

§§ 577.418-577.419 [Reserved]

§ 577.420 Request for Informal Rating (by Insurance Carrier or Self-Insurer) [8 Cal. Code Reg. § 10167] [DEU Form 201]

[1] FORM

[2] Use of Form

[3] Cross References

§ 577.421 Employee's Disability Questionnaire [DWC-AD Form 100 (DEU)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 577.422 Request for Summary Rating Determination of Qualified Medical Evaluator's Report [DWC-AD Form 101 (DEU)]

[1] FORM

[2] Use of Form

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§ 577.423 Request for Summary Rating Determination of Primary Treating Physician's Report [DWC-AD Form 102 (DEU)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 577.424 Request for Consultative Rating [DWC-AD Form 104 (DEU)]

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[2] Use of Form

[3] Purpose of Requesting Consultative Rating Determination

[4] If Application for Adjudication Has Been Filed

[5] Cross References

§§ 577.425-577.429 [Reserved]

§ 577.430 Petition to Join Omitted Employers in Occupational Disease or Cumulative Injury Case [Lab. Code § 5500.5(b); 8 Cal. Code Reg. § 10380]

[1] FORM

[2] Use of Form

[3] Cross References

§ 577.431 Petition to Dismiss Improperly Joined Insurance Carrier [8 Cal. Code Reg. § 10570]

[1] FORM

[2] Use of Form

[3] Cross References

§§ 577.432-577.439 [Reserved]

§ 577.440 Substitution of Attorneys [Code Civ. Proc. § 284; 8 Cal. Code Reg. § 10774] [DIA WCAB Form 36]

[1] FORM

[2] Use of Form

[3] Cross References

§ 577.441 Notice of Dismissal of Attorney [Code Civ. Proc. § 285; 8 Cal. Code Reg. § 10774] [DIA WCAB Form 37]

[1] FORM

[2] Use of Form

§§ 577.442-577.449 [Reserved]

§ 577.450 Notice of Dismissal of Inactive Claim by Operation of Law When Claim Has Been Denied (Injuries Occurring Before January 1, 1994) [Lab. Code § 5404.5(a); 8 Cal. Code Reg. § 10141(a)]

[1] FORM

[2] Use of Form

[3] Service of Form

[4] Determining When Claim Is Not Inactive

§ 577.451 Notice of Dismissal of Inactive Claim by Operation of Law When Benefits Have Been Furnished (Injuries Occurring Before January 1, 1994) [Lab. Code § 5404.5(b); 8 Cal. Code Reg. § 10141(b)]

[1] FORM

[2] Use of Form

[3] Service of Form

[4] Determining When Claim Is Not Inactive

§ 577.452 Request for Dismissal by Employee [8 Cal. Code Reg. § 10780] [DWC WCAB Form 43]

[1] FORM

[2] Use of Form

[3] Cross References

§ 577.453 Petition for Dismissal by Defendant [Lab. Code § 5507; 8 Cal. Code Reg. §§ 10445, 10562, 10582]

[1] FORM

[2] Use of Form

[3] Notice of Intention

[4] Cross References

§§ 577.454-577.459 [Reserved]

§ 577.460 Compromise and Release [DWC-CA Form 10214(c)]

[1] FORM

[2] Use of Form

[3] Execution and Attestation or Acknowledgment

[4] Cross References

§ 577.461 Compromise and Release--Dependency Claim [DWC-CA Form 10214(d)]

[1] FORM

[2] Use of Form

[3] Service of Compromise and Release

[4] Cross References

§ 577.462 Compromise and Release--Third Party [DWC-CA Form 10214(e)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 577.463 Information Guidelines for Submission of Settlement Documents

[1] FORM

[2] Use of Form

[3] Cross References

§ 577.464 Settlement of Prospective Vocational Rehabilitation Services [RU 122 (Voc. Rehab.) § 10133.22]

[1] FORM

[2] Use of Form

[3] Cross References

§§ 577.465-577.469 [Reserved]

§ 577.470 Stipulations With Request for Award [DWC-CA Form 10214(a)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 577.471 Stipulations With Request for Award [DWC-CA Form 10214(b)]

[1] FORM

[2] Use of Form

[3] Cross References

§ 577.472 Stipulation and Award and/or Order

[1] FORM

[2] Use of Form

§§ 577.473-577.479 [Reserved]

§ 577.480 Notice and Request for Allowance of Lien [DWC/WCAB Form 6]

[1] FORM

[2] Use of Form

[3] Cross References

§ 577.481 Stipulation and Order to Pay Lien Claimant

[1] FORM

[2] Use of Form

§ 577.482 Declaration of Defendant re Resolution of Liens

[1] FORM

[2] Use of Form

§§ 577.483-577.489 [Reserved]

§ 577.490 Declaration of Readiness to Proceed to Expedited Hearing (Trial) [DWC-CA Form 10252.1]

[1] FORM

[2] Use of Form

[3] Entitlement to Expedited Hearing

[4] Cross References

§ 577.491 Pre-Trial Conference Statement [DWC-CA Form 10253.1]

[1] FORM

[2] Use of Form

[3] Failure to Disclose Evidence

[4] Filing and Service

[5] Penalties

[6] Cross References

§ 577.492 Pre-Trial Conference Statement (Multiple Parties) [DWC-CA Form 10253.1]

[1] FORM

[2] Use of Form

[3] Cross References

§§ 577.493-577.499 [Reserved]

§ 577.500 Petition for Certified Copy of Award [8 Cal. Code Reg. § 10820]--By Person Entitled to Benefits Under the Award

[1] FORM

[2] Use of Form

[3] Form and Contents of Petition

§ 577.501 Petition for Reconsideration [Lab. Code § 5902; 8 Cal. Code Reg. § 10842] [DIA WCAB Form 45]

[1] FORM

[2] Use of Form

[3] Grounds for Reconsideration

[4] Form and Contents

[5] Verification

[6] Cross References

§ 577.502 Petition to Reopen [Lab. Code § 5803; 8 Cal. Code Reg. § 10454] [DIA WCAB Form 42]

[1] FORM

[2] Use of Form

[3] Cross References

§ 577.503 Petition for Commutation of Future Benefits [Lab. Code § 5100] [DIA WCAB Form 49]

[1] FORM

[2] Use of Form

[3] Cross References

§ 577.504 Notice of Intent to Seek Multiple Penalties [Lab. Code § 5814]

[1] FORM

[2] Use of Form

[3] Separate and Distinct Acts of Delay

[4] Filing and Service

[5] Cross References

§ 577.505 Petition for Penalties [Lab. Code § 5814]

[1] FORM

[2] Use of Form

[3] Cross References

§ 577.506 Answer to Petition for Penalties [Lab. Code § 5814]

[1] FORM

[2] Use of Form

[3] Cross References

§§ 577.507-577.509 [Reserved]

§ 577.510 Petition for Writ of Review [Lab. Code § 5950; Cal. Rules of Ct., Rule 8.495(a)]--By Injured Employee or Dependent of Deceased Employee

[1] FORM

[2] Use of Form

[3] Contents of Petition

[4] Format and Copies

[5] Verification and Supporting Papers

[6] Cross References

§§ 577.511-577.519 [Reserved]

§ 577.520 Complaint for Damages [Civ. Code § 3333] or in Intervention [Code Civ. Proc. § 387; Lab. Code § 3853]--By Insurance Carrier Against Third-Party Tortfeasor [Lab. Code § 3852]

[1] FORM

[2] Use of Form

[3] Specification of Damages

[4] Allegations

[5] Pleading Employee's Cause of Action

[6] Verification

[7] Intervention

[a] Generally

[b] By Employee

[8] Service of Complaint on Employee

[9] Burden of Proof and Evidence

[10] Cross References

§ 577.521 Notice of Filing of Complaint Against Third Party [Lab. Code § 3853]--By Employee or Employer

[1] FORM

[2] Use of Form

§ 577.522 Complaint for Compensatory Damages [Civ. Code § 3333] by Injured Employee Against Negligent Employer Who Failed to Secure Compensation Under Workers' Compensation Law [Lab. Code § 3706]

[1] FORM

[2] Use of Form

[3] Allegations

[4] Specification of Damages

[5] Verification

[6] Cross References

§ 577.523 Allegation--Employment Excluded From Workers' Compensation Law Coverage [Lab. Code §§ 2800, 2801]

[1] FORM

[2] Use of Form

[3] Pleading Alternative: No Mention of Employment Relationship

§ 577.524 Complaint for Compensatory and Punitive Damages [Civ. Code §§ 3294, 3333] by Injured Employee Against Employer--Willful Physical Assault by Employer [Lab. Code § 3602(b)(1)]

[1] FORM

[2] Use of Form

[3] Allegations

§ 577.525 Complaint for Compensatory and Punitive Damages [Civ. Code §§ 3294, 3333] by Injured Employee Against Employer--Aggravation of Work-Related Injury by Fraudulent Concealment [Lab. Code § 3602(b)(2)]

[1] FORM

[2] Use of Form

[3] Allegations

§§ 577.526through 577.529 [Reserved]

§ 577.530 Employer's Affirmative Defense [Code Civ. Proc. § 431.30(b)(2), (g)]--Employee's Action Barred by Exclusive Remedy Principle of Workers' Compensation Law [Lab. Code § 3602(a)]

[1] FORM

[2] Use of Form

[3] Pleading Affirmative Defenses

§ 577.531 Employer's Affirmative Defense [Code Civ. Proc. § 431.30(b)(2), (g)]--Lack of Jurisdiction Due to Pending Workers' Compensation Appeals Board Proceeding

[1] FORM

[2] Use of Form

§ 577.532 Employer's Affirmative Defense [Code Civ. Proc. § 431.30(b)(2), (g)]--Negligence of Plaintiff [Lab. Code § 2801]

[1] FORM

[2] Use of Form

§§ 577.533through 577.539 [Reserved]

§ 577.540 Proceedings to Secure Lien Against Third-Party Judgment [Lab. Code § 3856(b)]--Notice of Motion [Code Civ. Proc. § 1010] and Supporting Declaration [Code Civ. Proc. § 2015.5]

[1] FORM

[2] Use of Form

[3] Filing Motion

[4] Supporting Papers

[5] Amount Claimed and Supplemental Applications

§ 577.541 Proceedings to Secure Lien Against Third-Party Judgment [Lab. Code § 3856(b)]--Order Granting Motion [Code Civ. Proc. § 1003]

[1] FORM

[2] Use of Form

[3] Enforcement of Lien

§ 577.542 Petition for Credit of Third-Party Judgment Against Compensation Liability [Lab. Code § 3861]

[1] FORM

[2] Use of Form

[3] Credit Allowed

[4] Comparative Negligence of Employer

[a] Determined in Judicial Forum

[b] Determined by Appeals Board

California Forms of Pleading and Practice--Annotated

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Volume 51: Vexatious Litigants thru Zoning and Planning-Chs. 573-579
Chapter 577 WORKERS' COMPENSATION
PART I. SCOPE

51-577 California Forms of Pleading and Practice--Annotated § 577.01

§ 577.01 Scope of Chapter

IMPORTANT NOTE: Comprehensive workers' compensation reform was recently enacted into law. Stats. 2004 Ch. 34 (SB 899) applies prospectively from the date of enactment (April 19, 2004), regardless of the date of injury, unless specified otherwise in the chaptered bill. Selected highlights of the reform legislation are set forth below. Detailed discussion of SB 899 is set forth throughout this chapter.

Medical Provider Networks. In enacting *Labor Code §§ 4616-4616.7*, the legislature has authorized insurers and employers beginning January 1, 2005, to create or modify medical provider networks within which their employees' industrial injuries must be treated. The Administrative Director has adopted regulations implementing the medical provider networks statutes, including regulations that establish procedures for making medical provider network modifications. The medical provider network statutes speak in terms of "economic profiling," which is defined as any evaluation of a particular physician, provider, medical group, or individual practice association based in whole or in part on the economic costs or utilization of services associated with medical care provided or authorized by that person or entity. The medical provider network statutes also set forth provisions for initial medical evaluation and independent medical review. [Note: For a summary of a worker's right to control medical treatment when there is *no* medical provider network in place, *see* summary highlight of amended *Labor Code § 4600*, below.]

Two-Year Temporary Disability Cap. In amending *Labor Code § 4656*, the legislature has provided that, for injuries occurring on or after April 19, 2004, temporary disability payments are limited to 104 compensable weeks within a period of two years from the date of the first payment, with *exceptions* specified for certain injuries and conditions to allow payment of temporary disability to be extended to 240 compensable weeks within five years from the date of injury.

Return-to-Work Program. In amending *Labor Code § 139.48*, effective July 1, 2004, the legislature has eliminated the payment of wage reimbursement and premium reimbursement from the program, made reimbursements under the program available for an eligible employer only, as defined, and provided that the Return-to-Work Fund will consist of certain penalties and transfers made by the Administrative Director from the Workers' Compensation Administration Revolving Fund.

Permanent Disability. In amending *Labor Code § 4650*, the legislature has provided that, for injuries occurring on or after April 19, 2004, timely payment of permanent disability indemnity, based on a reasonable estimate of the amount due, is to be commenced, regardless of whether the extent of permanent disability can be determined at the date on which the first payment is due. In amending *Labor Code §§ 4658* and *4660*, and in enacting *Labor Code § 4658.1*, the legislature has added a schedule for converting permanent disability ratings for injuries occurring on or after the effective date of the revised permanent disability schedule to be adopted by the Administrative Director, no later than January 1, 2005, pursuant to amended *Labor Code § 4660*. For compensable claims arising before April 30, 2004, the schedule set out in *Labor Code § 4658* does *not* apply to the determination of permanent disabilities when there has been either a comprehensive medical-legal report or a report by a treating physician, indicating the existence of permanent disability, or when the employer is required to provide the notice required by *Labor Code § 4061* to the injured worker. Newly enacted *Labor Code § 4658.1* contains provisions regarding the offer of regular, modified, or alternative work and its effect on permanent disability payments. In amending *Labor Code § 4660*, the legislature has placed various requirements on the Administrative Director regarding periodic revisions of the schedule for the determination of the percentage of permanent disability. In determining the percentages of permanent disability, account must be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, with consideration being given to an employee's *diminished future earning capacity*. For purposes of this statute, the "nature of the physical injury or disfigurement" must incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment* (5th Edition). For compensable claims arising before January 1, 2005, the schedule as revised by legislation during the 2003-2004 Regular and Extraordinary Sessions will apply to the determination of permanent disabilities when there has been either no comprehensive medical-legal report or no report by a treating physician indicating the existence of permanent disability, or when the employer is not required to provide the notice required by *Labor Code § 4061* to the injured worker [*see State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (2007) 146 Cal. App. 4th 1311, 1314-1316, 53 Cal. Rptr. 3d 568* (court of appeal, annulling WCAB decision that applied 1997 permanent disability rating schedule, held that WCAB's decision was not supported by substantial evidence, since 12/15/2004 single-sentence report by treating physician stating physician's belief that permanent disability was within reasonable medical probability as result of employee's 7/21/2004 industrial injury was not followed by any other treating physician's report that provided reasoning to support physician's 12/15/2004 conclusion, and medical opinion is not substantial evidence if it does not indicate reasoning behind physician's opinion)].

The Appeals Board in an en banc opinion held that an employee did not carry his burden of demonstrating that adoption of the 2005 Permanent Disability Rating Schedule by the Administrative Director was arbitrary and capricious or inconsistent with *Lab. Code § 4660(b)(2)*. Thus, the employee failed to rebut the presumptive validity of the 2005 Schedule. The Board pointed out that an administrative regulation is presumptively valid and that, if there is a reasonable basis for it, a reviewing court will not substitute its judgment for that of the administrative body. The role of the reviewing court is limited to inquiring into the legality, rather than the wisdom, of the challenged regulation. The evidentiary record in the reviewing court, when it evaluates the validity of a regulation, is limited to the rulemaking record. Extra-record evidence should not be admitted, the only exception being evidence that existed before the agency made its decision but that could not, in the exercise of reasonable diligence, be presented to the agency before its decision was made so that it could be considered and included in the administrative record. In the present case, the Board found that, although some evidence admitted at the trial existed before the Administrative Director made her decision to adopt the 2005 Schedule, no showing was made that, even with the exercise of reasonable diligence, this evidence could not have

been submitted to the Administrative Director before her decision was made. Thus, no basis was established to consider this extra-record evidence. Moreover, said the Board, even on the assumption that such evidence was properly in the record, the Board en banc had already held in *Costa v. Hardy Diagnostic* [Costa v. Hardy Diagnostic (2006) *71 Cal. Comp. Cases 1797 (Appeals Board en banc opinion)]* that Senate hearing testimony of both the Administrative Director and an expert witness indicated that empirical data from the 2003 RAND Interim Report were, as mandated by *Lab. Code § 4660(b)(2)*, used in formulating the 2005 Schedule, that the employee in that case had failed to meet his burden of proving the invalidity of 2005 Schedule because he had failed to demonstrate that the actions of the Administrative Director in adopting the 2005 Schedule were arbitrary, capricious, or not reasonably necessary to effectuate the purpose of, or were inconsistent with, *Lab. Code § 4660*, and that the Administrative Director's reasons for not pursuing a "crosswalk" study, which would correlate the disability ratings assigned under the 1997 Schedule to those assigned under the new 2005 Schedule, were neither arbitrary nor capricious [Boughner v. Comp USA (2008) *73 Cal. Comp. Cases 854, 859-869 (Appeals Board en banc opinion)]* .

The Appeals Board has issued four en banc opinions interpreting the third sentence of *Lab. Code § 4660(d)*, the latter two of which rescinded the preceding two.

In April 2007, the Appeals Board en banc, with three Commissioners dissenting, rescinded its prior en banc decision [*see* Baglione v. Hertz Car Sales (2007) *72 Cal. Comp. Cases 86 (Appeals Board en banc opinion)* (majority held that existence of pre-2005 comprehensive medical report, regardless of whether report indicated existence of permanent disability, required use of 1997 schedule)], from which three Commissioners had also dissented, and held that, for compensable claims arising before January 1, 2005, in order for the 1997 schedule for rating permanent disabilities to apply, pursuant to *Lab. Code § 4660(d)*, the existence of permanent disability must be indicated in either a pre-2005 comprehensive medical-legal report or a pre-2005 report from a treating physician, and that, otherwise, the 2005 permanent disability rating schedule applied. The Board's en banc majority found that the legislature's denomination of SB 899, which amended *Lab. Code § 4660(d)*, as an "urgency statute" that sought to provide relief from the state's workers' compensation crisis "at the earliest possible time" supported the majority's view that the 1997 schedule applied in the presence of a pre-2005 comprehensive medical-legal report only when that report indicated the existence of permanent disability. Also, in the majority's view, in light of *Lab. Code § 4660(d)*'s declaration that the schedule "shall promote consistency, uniformity and objectivity," no rationale existed for delaying the use of the 2005 schedule merely because a comprehensive medical-legal report had issued. The majority added that, although the reference to a "comprehensive medical-legal report" was not directly antecedent to the phrase "indicating the existence of permanent disability" in *Lab. Code § 4660(d)*, the language and the need to consider the obvious purpose of that statute required the Board to look beyond the mere order of words to the underlying intent of the statute. Finally, said the Board majority, the fact that *Lab. Code § 4658(d)(4)*, in addressing the same topic as the relevant clause in *Lab. Code § 4660(d)*, had virtually identical language, except that it contained a comma and *Lab. Code § 4660(d)* did not, did not indicate a different legislative intent and, thus, did not defeat implementation of the 2005 schedule [Baglione v. Hertz Car Sales (2007) *72 Cal. Comp. Cases 444, 448-452 (Appeals Board en banc opinion) , writ den. sub nom. Baglione v. W.C.A.B. (2008) 73 Cal. Comp. Cases 250, 254*].

Also in April 2007, the Board en banc, with three Commissioners dissenting, rescinded its prior en banc decision [*see* Pendergrass v. Duggan Plumbing (2007) *72 Cal. Comp. Cases 95 (Appeals Board en banc opinion)* (majority held that employer's duty to provide notice required by *Lab. Code § 4061* arose with first payment of temporary disability indemnity, so that, if first date of compensable temporary disability occurred prior to 1/1/2005, 1997 schedule applied)], from which three Commissioners had also dissented, and held that, for compensable claims arising before January 1, 2005, only if the last payment

of temporary disability indemnity was made for any period of temporary disability ending before that date would the 1997 schedule for rating permanent disabilities apply to determine the extent of permanent disability, pursuant to *Lab. Code § 4660(d)*, because *Lab. Code § 4061* required the employer to provide an injured employee with notice regarding permanent disability "[t]ogether with the last payment of temporary disability indemnity," and that, otherwise, the 2005 permanent disability rating schedule applied. The Board's en banc majority found that the "plain language" of *Lab. Code §§ 4660(d)* and *4061* stated that the employer's obligation to provide notice did not arise until the actual last payment of temporary disability indemnity, which in the present case had been made in July 2005. Finally, said the Board majority, the legislature's denomination of SB 899, which amended *Lab. Code § 4660(d)*, as an "urgency statute" that sought to provide relief from the state's workers' compensation crisis "at the earliest possible time" supported the majority's view [Pendergrass v. Duggan Plumbing (2007) *72 Cal. Comp. Cases 456, 460-463 (Appeals Board en banc opinion) , writ den. sub nom. Pendergrass v. W.C.A.B. (2008) 73 Cal. Comp. Cases 304, 309]* .

Subsequently, the court of appeal followed these en banc decisions of the Board [*Costco Wholesale Corp. v. Workers' Comp. Appeals Bd. (2007) 151 Cal. App. 4th 148, 153-157, 59 Cal. Rptr. 3d 611* ; *Zenith Insurance Co. v. Workers' Comp. Appeals Bd. (2007) 153 Cal. App. 4th 461, 465-466, 62 Cal. Rptr. 3d 683* ; *Energetic Painting and Drywall, Inc. v. Workers' Comp. Appeals Bd. (2007) 153 Cal. App. 4th 633, 636-639, 63 Cal. Rptr. 3d 210* ; *Vera v. Workers' Comp. Appeals Bd. (2007) 154 Cal. App. 4th 996, 1003-1008, 65 Cal. Rptr. 3d 151* ; *Tanimura & Antle v. Workers' Comp. Appeals Bd. (2007) 157 Cal. App. 4th 1489, 1494-1496, 69 Cal. Rptr. 3d 127]* .

The court of appeal, relying on *Costco Wholesale Corp. v. Workers' Comp. Appeals Bd. (2007) 151 Cal. App. 4th 148, 59 Cal. Rptr. 3d 611* , held that a pre-2005 comprehensive medical-legal report must indicate the existence of permanent disability to satisfy the *Lab. Code § 4660(d)* exception to application of the 2005 Permanent Disability Rating Schedule and, rejecting another court of appeal's decision in *Vera v. Workers' Comp. Appeals Bd. (2007) 154 Cal. App. 4th 996, 65 Cal. Rptr. 3d 151* , held that the employee's condition need not be permanent and stationary for a treating physician's report or a comprehensive medical-legal report to indicate the existence of permanent disability. The court of appeal remanded the case for the Appeals Board to determine whether a qualified medical evaluator's April 2004 report or the treating physician's 2004 reports constituted substantial evidence indicating the existence of permanent disability, as required by *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (2007) 146 Cal. App. 4th 1311, 53 Cal. Rptr. 3d 568* [*Genlyte Group, LLC v. Workers' Comp. Appeals Bd. (2008) 158 Cal. App. 4th 705, 716-724, 69 Cal. Rptr. 3d 903* ; *see Zenith Insurance Co. v. Workers' Comp. Appeals Bd. (2008) 159 Cal. App. 4th 483, 494-499, 71 Cal. Rptr. 3d 724* (following *Genlyte* to hold that employee's condition need not be permanent and stationary for treating physician's report or comprehensive medical-legal report to indicate existence of permanent disability); *Lewis v. Workers' Comp. Appeals Bd. (2008) 168 Cal. App. 4th 696, 700, 85 Cal. Rptr. 3d 661* (following *Genlyte* and *Zenith* to hold that comprehensive medical-legal report or treating physician's report need not state that injured worker's condition has reached permanent and stationary status to indicate existence of permanent disability within meaning of *Lab. Code § 4660(d)*, when treating physician's 12/17/2004 report stated that employee could not "return to his usual and customary job duties" and that "[v]ocational rehabilitation efforts are indicated," and court of appeal remanded matter to WCAB to determine whether treating physician's report was substantial evidence "indicating the existence of permanent disability")].

The Appeals Board en banc has held that the AMA *Guides* portion of the 2005 Permanent Disability Rating Schedule is rebuttable, that it is rebutted by showing that an impairment rating based on the *Guides* would result in a permanent disability award that would be inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability, and that, when an impairment rating

based on the *Guides* has been rebutted, the Appeals Board may make an impairment determination that considers medical opinions that are not based or are only partially based on the *Guides*. The Board en banc found that the *Guides* itself recognizes its limitations, indicates that it should not necessarily be the sole determinant of work impairment, and allows other factors to be considered. Moreover, said the Board, the *Guides* does not measure work impairment and recognizes that it is merely a first step for measuring work impairment. Therefore, the Board concluded, factors outside the *Guides* may be considered, including the impact of the injury on the employee's ability to perform work activities, and the *Guides* allows the evaluating physician, through exercise of his or her judgment, to modify the impairment rating [Almaraz v. Environmental Recovery Services; Guzman v. Milpitas Unified School District (2009) 74 Cal. Comp. Cases 201, 211-217, 233, 239-245 (Appeals Board en banc opinion)] . Subsequently, the Appeals Board en banc held that its above-discussed en banc decision on the issue of rebutting the AMA *Guides* portion of the 2005 Permanent Disability Rating Schedule constituted a "final" order, granted the defendant's petition for reconsideration in *Almaraz*, granted reconsideration on its on motion in *Guzman*, allowed the parties in *Guzman* a specified time to file briefs on the merits, allowed any interested persons or entities a specified time to file amicus curiae briefs on the issues addressed by its en banc opinion, and allowed each counsel a specified time to file a reply brief that responds to all of the amicus briefs [Almaraz v. Environmental Recovery Services; Guzman v. Milpitas Unified School District (2009) 74 Cal. Comp. Cases 470, 471-475 (Appeals Board en banc opinion)] .

Finally, in September 2009, the Appeals Board en banc, reconsidering its decision in *Almaraz/Guzman*, discussed above, and stating that "we clarify and modify our en banc decision of February 3, 2009," held, in a 4-3 decision, that (1) the language of *Lab. Code § 4660(c)*, which provides that "the schedule ... shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule," unambiguously means that a permanent disability rating established by the 2005 Schedule is rebuttable, (2) the burden of rebutting a scheduled permanent disability rating rests with the party disputing that rating, (3) one method of rebutting a scheduled permanent disability rating is to successfully challenge one of the component elements of that rating, such as the injured employee's whole person impairment under the AMA Guides, and (4) when determining the injured employee's whole person impairment, it is not permissible to go outside the four corners of the AMA Guides, but a physician may utilize any chapter, table, or method in the AMA Guides that most accurately reflects the injured employee's impairment. Moreover, the Board now specifically rejected the "inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability" standard set forth in its February 2009 opinion. It added that its present decision does *not* permit a physician to utilize any chapter, table, or method in the AMA Guides simply to achieve a desired result, e.g., a whole person impairment that would result in a permanent disability rating based directly or indirectly on any schedule in effect prior to 2005, that a physician's opinion regarding an injured employee's whole person impairment under the Guides must constitute substantial evidence, that the opinion must set forth facts and reasoning that justify it, and that a physician's whole person impairment opinion that is not based on the AMA Guides does not constitute substantial evidence [Almaraz v. Environmental Recovery Services; Guzman v. Milpitas Unified School District (2009) 74 Cal. Comp. Cases 1084, 1085-1087, 1114 (Appeals Board en banc opinion) , *pet. for writ of rev. filed sub nom.* Milpitas Unified School District v. W.C.A.B. (Guzman) 10/16/2009]. The three dissenting commissioners would have affirmed the February en banc decision. They disagreed with the majority's view that a party may never go outside the AMA Guides to rebut a scheduled permanent disability rating. In the dissenters' view, long-standing California case law is clear that a scheduled permanent disability rating may be rebutted if it is shown that the scheduled rating would result in a permanent disability award that would be inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability. Moreover, they suggested, the legislative shift from diminished ability to compete in the open labor market to the focus on whole person impairment under the AMA Guides and diminished future earning capacity is irrelevant to the question of what standard is used to *rebut* a scheduled permanent disability rating [

Almaraz v. Environmental Recovery Services; Guzman v. Milpitas Unified School District (2009) 74 Cal. Comp. Cases 1084, 1116, 1118 (Appeals Board en banc opinion) (Brass, Caplane, and Moresi, Comms., dissenting)].

On the same day that it decided *Almaraz/Guzman*, discussed above, the Appeals Board en banc decided another case in which it held that the diminished future earning capacity (DFEC) portion of the 2005 Permanent Disability Rating Schedule is rebuttable, since *Lab. Code § 4660(c)* provides that the 2005 Schedule is merely "prima facie evidence of the percentage of permanent disability to be attributed to each injury." The DFEC portion of the 2005 Schedule ordinarily is *not* rebutted, the Board cautioned, by establishing the percentage to which the injured employee's future earning capacity has been diminished, because, generally, an employee's DFEC percentage is not tantamount to his or her percentage of permanent disability. Nor is the DFEC portion of the 2005 Schedule ordinarily rebutted by taking two-thirds of the injured employee's estimated diminished future earnings, then comparing the resulting sum to the permanent disability money chart to approximate a corresponding permanent disability rating. Rather, the Board stated, in the usual case, the DFEC portion of the 2005 Schedule may be rebutted in a manner consistent with *Lab. Code § 4660*, including *Lab. Code § 4660(b)(2)* and the RAND data to which *Lab. Code § 4660(b)(2)* refers. According to the Board, such a DFEC rebuttal approach consists, in essence, of: (1) obtaining two sets of wage data (one for the injured employee and one for similarly situated employees), generally through the Employment Development Department; (2) doing some simple mathematical calculations with that wage data to determine the injured employee's individualized proportional earnings loss; (3) dividing the employee's whole person impairment rating by his proportional earnings loss to obtain a ratio; and (4) seeing if the ratio falls within certain ranges of the ratios in Table A of the 2005 Schedule. If it does, determination of the employee's DFEC adjustment factor relates back to the 2005 Schedule, but, if it does not, then a non-complex formula is used to perform additional calculations to determine the individualized DFEC adjustment factor [Ogilvie v. City and County of San Francisco (2009) *74 Cal. Comp. Cases 248, 255-274 (Appeals Board en banc opinion)]* . Commissioner Caplane dissented, stating that she would hold that the 2005 Schedule is rebutted when a party proves that the employee's diminished future earning capacity is disproportionate to the rating under the 2005 Schedule, and that she would further hold that, once the 2005 Schedule is rebutted, the permanent disability rating is the percentage loss of future earning capacity [Ogilvie v. City and County of San Francisco (2009) 74 Cal. Comp. Cases 248, 281 (Appeals Board en banc opinion) (Caplane, Comm., dissenting)]. Subsequently, the Appeals Board en banc held that its above-discussed en banc decision on the issue of rebutting the diminished future earning capacity portion of the 2005 Permanent Disability Rating Schedule constituted a "final" order, granted both parties' petitions for reconsideration, allowed any interested persons or entities a specified time to file amicus curiae briefs on the issues addressed by its en banc opinion, and allowed each counsel a specified time to file a reply brief that responds to all of the amicus briefs [Ogilvie v. City and County of San Francisco (2009) 74 Cal. Comp. Cases 478, 479-482 (Appeals Board en banc opinion)] .

Finally, in September 2009, the Appeals Board en banc, reconsidering its decision in *Ogilvie*, discussed above, and stating that "we clarify the holdings reached in our en banc decision of February 3, 2009," held that (1) the language of *Lab. Code § 4660(c)*, which provides that "the schedule... shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule," unambiguously means that a permanent disability rating established by the Schedule is rebuttable, (2) the burden of rebutting a scheduled permanent disability rating rests with the party disputing that rating, and (3) one method of rebutting a scheduled permanent disability rating is to successfully challenge one of the component elements of that rating, such as the injured employee's diminished future earning capacity adjustment factor, which may be accomplished by establishing that the individualized adjustment factor most accurately reflects the injured employee's diminished future earning capacity. However, stated the Board, any individualized diminished future earning capacity

adjustment factor must be consistent with *Lab. Code § 4660(b)(2)*, the RAND data to which it refers, and the numeric formula adopted by the Administrative Director in the 2005 Schedule. Moreover, any evidence presented to support a proposed individualized diminished future earning capacity adjustment factor must constitute substantial evidence on which the Board may rely, and, even if this rebuttal evidence is legally substantial, the Board as trier-of-fact may still determine that the evidence does not overcome the diminished future earning capacity adjustment factor component of the scheduled permanent disability rating [Ogilvie v. City and County of San Francisco (2009) 74 Cal. Comp. Cases 1127, 1129, 1130 (Appeals Board en banc opinion) , *pet. for writ of rev. filed* 10/7/2009]. Commissioner Caplane dissented, adopting and incorporating by reference her dissent to the Board's February 2009 decision, and stating that she still disagreed with the majority's restrictions on the nature and scope of the evidence a party may offer in rebuttal, noting specifically her view that *Lab. Code § 4660* does not limit the evidence a party may present to rebut a prima facie correct permanent disability rating established by the 2005 Schedule [Ogilvie v. City and County of San Francisco (2009) *74 Cal. Comp. Cases 1127, 1164-1166 (Appeals Board en banc opinion)* (Caplane, Comm., dissenting)].

Apportionment. In repealing, then adding a new version of, *Labor Code § 4663*, and in adding *Labor Code § 4664*, the legislature has recast the statutory treatment of the apportionment of permanent disability, including placement of new responsibilities on physicians who prepare reports addressing the issue of permanent disability due to claimed industrial injury. The new statute provides, among other things, that apportionment of permanent disability is to be based on *causation;* specifically, the employer is liable for only the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment. Any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury must in that report address the issue of causation of the permanent disability. An employee who claims an industrial injury must, upon request, disclose all previous permanent disabilities or physical impairments. If the applicant has received a prior award of permanent disability, it will be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof. The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee cannot exceed 100 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character.

In May 2007, the California Supreme Court resolved the uncertainty, generated by conflicting court of appeal opinions, regarding whether the language of *Lab. Code § 4663(c)*, plus the language of *Lab. Code § 4664(a)*, meant that the so-called apportionment "Formula A" adopted by the Supreme Court in *Fuentes* [*Fuentes v. Workers' Compensation Appeals Bd. (1976) 16 Cal. 3d 1, 128 Cal. Rptr. 673, 547 P.2d 449]* , pursuant to which the percentage of disability attributable to the new injury is calculated by subtracting the old permanent disability rating from the new permanent disability rating, then consulting the table for the award due this difference, remained the proper method for calculating apportionment. Injured employees had argued that statutory changes made by SB 899 mandated the use of "Formula C," rejected by th e Supreme Court in *Fuentes*, pursuant to which the dollar award for the new injury is calculated as if apportionment were not an issue, then the dollar award of the old injury is subtracted. The Supreme Court found that neither the plain language of relevant portions of SB 899 nor the legislative history of that bill evidenced any legislative intent to abandon "Formula A" [*Brodie v. Workers' Comp. Appeals Bd. (2007) 40 Cal. 4th 1313, 1323-1332, 57 Cal. Rptr. 3d 644, 156 P.3d 1100]* .

Penalties. In enacting a new version of *Labor Code § 5814*, effective June 1, 2004, and which is applicable to all injuries, regardless of whether the injury occurs before, on, or after the effective date of the statute, the legislature has provided, among other things, that when payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the

amount of the payment unreasonably delayed or refused will be increased up to 25 percent or $10,000, whichever is less. If, however, a potential violation of this statute is discovered by the employer prior to an employee claiming a penalty under it, the employer, within 90 days of the date of the discovery, may pay a self-imposed penalty in the amount of 10 percent of the amount of the payment unreasonably delayed or refused, along with the amount of the payment delayed or refused, in lieu of the 25 percent or $10,000 penalty. No action may be brought to recover penalties that may be awarded under this statute more than two years from the date the payment of compensation was due. In enacting *Labor Code § 5814.6*, the legislature has provided that any employer or insurer that knowingly violates *Labor Code § 5814* with a frequency that indicates a general business practice is liable for administrative penalties not to exceed $400,000.

Burden of Proof--Preponderance of the Evidence. The legislature has amended *Labor Code § 3202.5* to provide that all parties and lien claimants must meet the evidentiary burden of proof on all issues by a preponderance of evidence in order that all parties are considered equal before the law, and has redefined "preponderance of the evidence" as "that evidence that, when weighed with that opposed to it, has more convincing force and greater probability of truth."

Alternative Dispute Resolution--Collective Bargaining and Labor-Management Agreements. In amending *Labor Code §§ 3201.5* and *3201.7*, the legislature has provided that alternative dispute resolution procedures in collective bargaining agreements in construction-related industries and in labor-management agreements for any employer or groups of employers that meet certain requirements may allow the parties to negotiate for the delivery of medical benefits and disability compensation to employees who are eligible for group health benefits and non-occupational disability benefits through their employer.

Vocational Rehabilitation Reinstated for Injuries Before January 1, 2004. In reenacting *Labor Code § 139.5*, the legislature has reinstated vocational rehabilitation for injuries occurring before January 1, 2004. The reenacted statute will remain in effect only until January 1, 2009, and as of that date is repealed, unless a later-enacted statute, that is enacted before January 1, 2009, deletes or extends that date.

Medical Billing and Provider Fraud --Reporting-- Immunity From Civil Action. In amending *Labor Code § 3823*, the legislature has provided that no party, reporting in good faith what is believed to be a fraudulent claim made by a medical care provider, is subject to any civil liability.

Right to Request Qualified Medical Examination--Disputed Permanent Disability Rating. In amending *Labor Code § 4061*, the legislature has recastthe provisions governing the right of either party to request a qualified medical evaluation in the event of a disputed permanent disability rating.

Objections to Medical Determinations. In amending *Labor Code § 4062*, the legislature has recast the provisions governing objections by either the employee or the employer to a treating physician's determination of any medical issue not covered by *Labor Code § 4060* or *4061* and not subject to the utilization review process pursuant to *Labor Code § 4610*.

Comprehensive Medical-Legal Evaluations. In amending *Labor Code § 4060*, the legislature has recast the basic provisions governing entitlement to medical evaluations when compensability of an injury is disputed.

Comprehensive Medical Evaluations--Rights of Unrepresented Employee. In amending *Labor Code § 4062.1* by adding new subsections (b)-(e), the legislature has spelled out the procedures to be used

when either party seeks appointment of a qualified medical evaluator and the employee is not represented by an attorney. As of April 19, 2004, unrepresented employees must now select a Qualified Medical Examiner from a panel of three medical evaluators to resolve claim disputes. There are also time limits to make the request, to select a medical evaluator from the panel, and to make an appointment.

Comprehensive Medical Evaluations--Rights of Represented Employee. In repealing *Labor Code § 4062.2* and adding new *Labor Code § 4062.2*, the legislature has spelled out the procedures to be used when a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, either party seeks appointment of an agreed medical evaluator, and the employee is represented by an attorney. If, however, an Agreed Medical Evaluator is not used, then the parties may request a panel of three Qualified Medical Examiners from which an Agreed Medical Evaluator can be selected. There are also time limits to make the request, to select a medical evaluator from the panel, and to make an appointment.

Panel Qualified Medical Evaluators and Agreed Medical Evaluators--Information and Communication. In adding *Labor Code § 4062.3*, the legislature has spelled out the rules regarding information to be provided to, as well as communications with, Qualified Medical Examiners selected from a panel and Agreed Medical Evaluators.

Failure of Qualified Medical Evaluator to Complete Timely Evaluation. In amending *Labor Code § 4062.5*, the legislature has outlined the consequences for the parties of a Qualified Medical Examiner's failure to complete a timely medical evaluation.

Educational Materials to Train Physicians and Other Providers. In adding *Labor Code § 4062.8*, the legislature has instructed the Administrative Director to prepare educational materials to be used in training physicians and other providers in relevant aspects of workers' compensation law.

Treating Physician Presumption of Correctness Repealed. In repealing *Labor Code § 4062.9*, the legislature has deleted the provision that gave a presumption of correctness to the findings of a treating physician or chiropractor who had been designated by an injured worker as his or her personal physician prior to the industrial injury.

Worker's Choice of Physician --No Medical Network-- Predesignation of Personal Physician. The legislature has amended *Labor Code § 4600* to provide that, unless the employer or the employer's insurer has established a medical provider network as provided for in *Labor Code § 4616*, an industrially injured worker has the right to select his or her own physician after 30 days from the date on which the injury is reported to the employer. If an employee has notified his or her employer in writing before the date of injury that he or she has a personal physician, the employee has the right to be treated by that physician from the date of injury if the employer provides either nonoccupational group health coverage in a health care service plan or nonoccupational health coverage in a group health plan or a group health insurance policy.

Medical Treatment--Itemization--Amounts to Be Paid. In amending *Labor Code § 4603.2*, the legislature has specified that, in general, payments for medical treatment are to be made at reasonable maximum amounts in the official medical fee schedule in effect on the date of service. The legislature has made further amendments throughout *Labor Code § 4603.2*, including that payment to an employee-selected physician or physician designated by the employer must be made within 45 working days (60 working days if the employer is a governmental entity) after receipt of each separate *itemization* of medical services provided, together with any required medical reports and any written authorization for services that may have been received by the physician.

Medical Treatment Utilization Schedule--Rebutting Presumption of Correctness. In amending *Labor Code § 4604.5*, the legislature has provided that, upon adoption of this schedule by the Director, the recommended guidelines set forth in it are to be presumptively correct on the issue of extent and scope of medical treatment. The presumption is rebuttable and may be controverted by a preponderance of the scientific medical evidence establishing that a variance from the guidelines is reasonably required to cure or relieve the employee from the effects of his or her injury. The presumption created is one affecting the burden of proof. These recommended guidelines are to reflect practices that are evidence and scientifically based, nationally recognized, and peer-reviewed. For all injuries not covered by the Occupational Medicine Practice Guidelines or the official utilization schedule after adoption, authorized treatment is to be in accordance with other evidence-based medical treatment guidelines generally recognized by the national medical community and that are scientifically based.

Medical Treatment Reasonably Required to Cure or Relieve. The legislature amended *Labor Code § 4600* to provide that medical treatment "reasonably required to cure or relieve the injured worker from the effects of his or her injury" means treatment that is based on the guidelines adopted by the Administrative Director pursuant to *Labor Code § 5307.27* or, prior to the adoption of those guidelines, the updated American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines.

Evidence--Medical Treatment Utilization Guidelines. In amending *Labor Code § 5703*, the legislature has authorized the WCAB to receive medical treatment utilization guidelines as evidence.

Medical Treatment Utilization Schedule--Occupational Therapy. In amending *Labor Code § 4604.5*, the legislature has provided that an employee is entitled to no more than 24 occupational therapy visits per industrial injury.

Filing of Claim Form and Employer's Obligation for Medical Treatment. In amending *Labor Code § 5402*, the legislature has specified that the employer must provide medical treatment within one working day of the filing of a claim form by an employee and must continue to provide the treatment until the date the claim is accepted or rejected. Until that date, liability for medical treatment is limited to $10,000. Treatment so provided does not give rise to a presumption of liability on the part of the employer.

Medical and Hospital Liens--Lien Filing Fee. The legislature amended *Labor Code § 4903.05* to provide that a filing fee of $100 is to be charged for each initial lien filed by health care providers, or on behalf of providers, pursuant to *Labor Code § 4903(b)*. Effective July 1, 2006, however, the legislature repealed *Lab. Code § 4903.05*, thereby abolishing the filing fee [*see* Stats. 2006, ch. 69, § 25; *see also § 577.262*].

Injury and Illness Prevention Program. The legislature amended *Labor Code § 6401.7* to provide that insurers must conduct a review and provide a written report of the injury and illness prevention program of each of its insureds with an experience modification of 2.0 or greater within six months of the commencement of the initial insurance policy term. The reviewer must be or work under the direction of a licensed California Professional engineer, certified safety professional, or a certified industrial hygienist.

Labor Code Private Attorneys General Act. The legislature amended *Labor Code § 2699* to provide that the statute does not apply to the recovery of administrative and civil penalties in connection with workers' compensation laws as contained in Division 1, Dept. of Industrial Relations, and Division 4,

Workers' Compensation and Insurance, including, but not limited to, *Labor Code § 129.5* (audit penalties) and *Labor Code § 132a* (discrimination against injured workers).

Workers' Compensation Funds--Employer Surcharges. In amending *Labor Code § 62.5*, the legislature has clarified uncertainties generated by apparently conflicting provisions in different pieces of 2003 legislation and provided that theWorkers' Compensation Administration Revolving Fund, the Uninsured Employers Benefits Trust Fund, and the Subsequent Injuries Benefits Trust Fund are to be financed exclusively be surcharges levied by the Administrative Director against employers.

Workers' Compensation Insurance Rates. In enacting *Labor Code § 138.65*, the legislature has provided for a study of the effects of legislative reform on workers' compensation insurance rates and for the Governor and the Insurance Commissioner to make recommendations as to the appropriateness of regulating insurance rates. The legislation requires that the study be submitted by January 1, 2006.

This chapter discusses proceedings under California's workers' compensation law to recover compensation for work-related injury, illness or death. In addition, the chapter discusses the exclusive remedy principle and its exceptions, as well as third-party actions.

The legal background (contained in Part II of this chapter) begins by discussing the general purpose, scope, and coverage of workers' compensation law and time limitations on proceedings under that law [*see §§ 577.10 -577.25*].

Subpart A discusses proceedings for the adjudication of workers' compensation claims before the Workers' Compensation Appeals Board and addresses the following topics:

- Workers' compensation procedures that are preliminary to initiation of proceedings before the Appeals Board, such as initial attorney consulations and the requirements as to attorney's fees, fee agreements, and attorney's fees disclosure statements; initial notice requirements for employees and employers; and the benefits to be provided by the employer on notification of an injury, including procedures applicable to permanent disability benefits [*see §§ 577.40 -577.46*].

- Mandatory and voluntary arbitration of workers' compensation disputes [*see §§ 577.60 -577.70*].

- Proceedings for adjudication of claims, including procedures for initiation of a proceeding [*see §§ 577.80 -577.90*]; captions, verification, service, and filing of papers with the Workers' Compensation Appeals Board [*see §§ 577.100 -577.108*]; stipulations and requests for awards [*see §§ 577.120 -577.122*]; compromise and release agreements [*see §§ 577.130 -577.134*]; prehearing proceedings [*see §§ 577.140 -577.157*]; hearings [*see §§ 577.170 -577.182*]; findings and awards [*see §§ 577.190 -577.195*]; reconsideration [*see §§ 577.210 -577.212*]; supplemental proceedings [*see §§ 577.220 -577.225*]; payment, commutation, and enforcement of awards [*see §§ 577.240 -577.247*]; and lien claims [*see §§ 577.260 -577.265*].

- Judicial review of Appeals Board decisions [*see §§ 577.280 -577.294*].

Subpart B discusses the exclusive remedy principle of workers' compensation law and exceptions to that principle which allow injured employees to maintain civil actions against their employers [*see §§ 577.310 -577.321*].

Subpart C discusses third party actions, including the effect of employer negligence on the liability of third parties, the allocation of third-party judgments, and the subrogation rights of employers [*see §§ 577.330 -577.336*].

Part IV of this chapter contains forms for use in workers' compensation proceedings and in civil actions against

employers or third parties. Subpart A includes the following workers' compensation forms:

- Forms for filing workers compensation claims, and obtaining information regarding employee injuries [*see §§ 577.370* -577.376].

- Forms used to initiate proceedings before the Appeals Board, including Applications for Adjudication of Claim in disability and death cases [*see §§ 577.390 -577.401*].

- Forms used in the discovery process, including subpoenas and a petition to compel an employee to submit to a medical examination [*see §§ 577.410* -477.413].

- Forms used to obtain permanent disability ratings [*see §§ 577.420 -577.423*].

- Forms used to join and dismiss parties to a workers' compensation proceeding [*see §§ 577.430 -577.431*].

- Forms used to dismiss or substitute attorneys [*see §§ 577.440 -577.441*].

- Forms used to dismiss workers' compensation claims for inactivity or at the request of a party [*see §§ 577.450 -577.453*].

- Forms used to settle workers' compensation claims, including Compromise and Release Agreements and informational guidelines for submission of settlement documents [*see §§ 577.460 -577.463*].

- Forms used for stipulations and request for awards [*see §§ 577.470 -577.471*].

- Forms used in the resolution of lien claims [*see §§ 577.480 -577.482*].

- Forms used in pre-hearing proceedings and hearings, including pre-trial conference statements and a request for an expedited hearing [*see §§ 577.490 -577.492*].

- Forms used after an award is issued, including a form to request a certified copy of award, to petition for reconsideration, and to reopen a claim [*see §§ 577.500 -577.503*].

- Form of a petition for writ of review [*see § 577.510*].

Subpart B contains the following forms for use in civil actions:

- Forms of complaints for damages [*see §§ 577.520 -577.525*].

- Forms of affirmative defenses [*see §§ 577.530 -577.532*].

- Forms for use in securing liens against third-party judgments and obtaining credit against compensation liability [*see §§ 577.540* -57.542].

The chapter also contains a Research Guide (*see* Part III, *§ 577.350 et seq.*)

Legal Topics:

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

Workers' Compensation & SSDIAdministrative ProceedingsCosts & Attorney FeesWorkers' Compensation & SSDIAdministrative ProceedingsEvidenceMedical EvidenceWorkers' Compensation & SSDIAdministrative ProceedingsHearings & ReviewWorkers' Compensation & SSDIBenefit DeterminationsPermanent Partial DisabilitiesWorkers' Compensation & SSDIBenefit DeterminationsTemporary Total Disabilities

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Chapter 577 WORKERS' COMPENSATION
PART I. SCOPE

51-577 California Forms of Pleading and Practice--Annotated § 577.02

§ 577.02 Cross References

[1] Arbitration

For discussion and forms relating to arbitration, see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* , and Ch. 33, *Contractual Arbitration: Appointment of Arbitrator and Conduct of Proceedings*

[2] Exclusive Remedy Principles

For discussion of and forms for actions for injuries arising from willful physical assault, see Ch. 58, *Assault and Battery*

For discussion of and forms for wrongful death actions under the Code of Civil Procedure, see Ch. 181, *Death and Survival Actions*

For discussion of and forms for actions for wrongful termination from employment, see Ch. 249, *Employment Law: Termination and Discipline*

For discussion of principles of negligence and forms for actions for injuries caused by negligence, see Ch. 380, *Negligence*

For discussion of and forms for actions for injuries caused by defective products, see Ch. 460, *Products Liability*

[3] Judicial Review

For discussion, format requirements of papers filed in appellate courts, and related forms, see Ch. 40, *Appeal: An Overview* , and Ch. 50, *Appeal: Briefs*

For discussion and forms of petitions for writs of review under *Code Civ. Proc. §§ 1067-1077, 1107-1110* and related forms, see Ch. 492, *Review (Certiorari), Writ of*

[4] Jurisdiction

For discussion of federal-state jurisdiction and forms for use in actions under the Federal Employers' Liability Act (*45 U.S.C. § 51 et seq.*), the Safety Appliance Act (*45 U.S.C. § 1 et seq.*), and the Boiler Inspection Act (*45 U.S.C. § 22 et seq.*), see Ch. 485, *Railroads*

For discussion of federal-state jurisdiction and forms for use in actions under the Jones Act (*46 U.S.C. § 688*), the Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 30301 et seq.), and the Death on the High Seas Act (*46 U.S.C. § 761 et seq.*), see Ch. 522, *Ships and Shipping*

[5] Subrogation

For discussion and forms for use in subrogation actions, see Ch. 536, *Subrogation*

[6] Third Party Actions

For discussion and forms for use in actions by a decedent's heirs to recover damages for wrongful death, see Ch. 181, *Death and Survival Actions*

For discussion and forms for use in actions based on negligence or strict liability in torts, see Ch. 380, *Negligence* , and Ch. 460, *Products Liability* , respectively

For discussion and forms for use in actions in subrogation, see Ch. 536, *Subrogation*

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsFalse ImprisonmentGeneral OverviewTortsNegligenceGeneral OverviewTortsProducts LiabilityGeneral OverviewWorkers' Compensation & SSDIDefensesExclusivity ProvisionsWorkers' Compensation & SSDIRemedies Under Other LawsFederal Employers' Liability Act

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[Reserved]

§§ 577.03[Reserved]

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Chapter 577 WORKERS' COMPENSATION
PART II. LEGAL BACKGROUND
A. Administrative Actions
1. General Principles of Workers' Compensation Law

51-577 California Forms of Pleading and Practice--Annotated § 577.10

§ 577.10 Governing Law

[1] In General

Workers' compensation and insurance are governed by Cal. Const., art. XIV, *§ 4, Division 4 of the Labor Code* (*Lab. Code § 3200 et seq.*), and *8 Cal. Code Reg. § 10300 et seq.* Workers' compensation and insurance for state employees not otherwise covered are governed by Division 4.5 of the Labor Code (*Lab. Code § 6100 et seq.*). Division 4 does not apply to employers or employments engaged in interstate commerce or to employees injured while they are so engaged, except insofar as they are permitted to apply under the federal constitution or laws [*Lab. Code § 3203*].

Compensation proceedings are governed generally by *Lab. Code § 5300 et seq.* and by *8 Cal. Code Reg. § 10300 et seq.* The rules relating to workers' compensation matters adopted by the Administrative Director of the Division of Workers' Compensation are set forth in *8 Cal. Code Reg. § 9710 et seq.* and *10100 et seq.* Judicial review is governed by *Lab. Code §§ 5950-5956* and by *Cal. Rules of Ct., Rule 8.495*. Third-party actions are governed by *Lab. Code §§ 3850-3865*. Finally, rules of the Court Administrator, *8 Cal. Code Reg. §§ 10210*-10297, became effective on November 17, 2008.

Several federal laws also provide workers' compensation for injury to or death of members of various classes of employees. Examples are the Federal Employers' Liability Act (*45 U.S.C. § 51 et seq.*), the Longshore and Harbor Workers' Compensation Act (*33 U.S.C. § 901 et seq.*), the Jones Act (*46 U.S.C. § 688*), the Death on the High Seas Act (*46 U.S.C. § 761 et seq.*), the Outer Continental Shelf Lands Act (*43 U.S.C. § 1331 et seq.*), the Federal Employees' Compensation Act (*5 U.S.C. § 8101 et seq.*), the Defense Base Act (*42 U.S.C. § 1651 et seq.*), and the War Hazards Compensation Act (*42 U.S.C. § 1701 et seq.*). There may be some situations in which a particular worker will come under the protection of both the California workers' compensation law and a federal act [*see Duong v. Workers' Comp. Appeals Bd. (1985) 169 Cal. App. 3d 980, 981-984, 215 Cal. Rptr. 609* (land-based shipyard worker injured while repairing vessel docked on navigable waters held subject to both California law and Longshore and Harbor Workers' Compensation Act, *33 U.S.C. § 901 et seq.*)]. Employees of private contractors on federal lands or buildings are, however, covered by the workers' compensation law of the state in which the land or buildings are situated in some circumstances [*see 40 U.S.C. § 3172*].

[2] Applicability of 1989 and 1990 Amendments

In 1989, the Legislature enacted the Margolin-Bill Greene Workers' Compensation Reform Act of 1989 [1989 Stats., chs. 892, 893], which made numerous significant changes in the workers' compensation law and related provisions of the Labor Code, particularly workers' compensation procedure. These changes apply only to *injuries* occurring on or after January 1, 1990, unless a specific statutory provision provides otherwise [*see* 1989 Stats., ch. 893, § 6]. Thus, many proceedings, including some proceedings commenced *after* January 1, 1990, will continue to be governed by provisions of the Labor Code (and related administrative regulations) *as they existed prior to the 1989 amendments* if they involve injuries that occurred before January 1, 1990. Thus, when handling any workers' compensation proceeding, counsel must be careful to ascertain both:

- The date of injury (that is, whether it occurred before or after January 1, 1990), and

- Whether the particular provision(s) of the Labor Code relied on by counsel were amended by 1989 Stats., ch. 892 or 893.

In those instances in which a statutory provision or regulation has been affected by the 1989 legislation, this article discusses both the current law and the prior law. It also discusses the 1990 "cleanup" legislation [*see* 1990 Stats., ch. 1550].

For discussion of the what constitutes the date of injury for purposes of workers' compensation law, see *§ 577.14[3][c]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsJudicial ReviewGeneral OverviewWorkers' Compensation & SSDIMaritime Workers' ClaimsCompensabilityJones ActWorkers' Compensation & SSDIMaritime Workers' ClaimsCompensabilityLongshore & Harbor Workers' Compensation ActGeneral OverviewWorkers' Compensation & SSDIThird Party ActionsGeneral Overview

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1. General Principles of Workers' Compensation Law

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§ 577.11 Nature and Purpose of Law

The California workers' compensation law is designed to impose on employers the burden of injuries caused by work-related accidents while protecting workers from the special risks of employment [*Laeng v. Workmen's Comp. Appeals Bd. (1972) 6 Cal. 3d 771, 782, 100 Cal. Rptr. 377, 494 P.2d 1]* . The touchstone of the workers' compensation system is industrial injury that results in occupational disability or death [*Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 752, 7 Cal. Rptr. 2d 808, 828 P.2d 1195]* . A compensable injury is an injury that causes disability or the need for medical treatment, and compensable injuries may be physical, emotional, or both, so long as they are disabling [*see Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 752-753, 7 Cal. Rptr. 2d 808, 828 P.2d 1195]* . The workers' compensation system is designed, however, to compensate *only* for such disability or need for treatment that is occupationally related [*Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 753, 7 Cal. Rptr. 2d 808, 828 P.2d 1195]* . The basic purpose of the system is to compensate for a disabled worker's diminished ability to compete in the open labor market, and not to compensate for every work-related injury [*Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 753, 7 Cal. Rptr. 2d 808*]. Thus, it is theoretically possible to incur a work-related injury that results in no compensable industrial disability under the workers' compensation system [*Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 754, 7 Cal. Rptr. 2d 808, 828 P.2d 1195]* .

Pursuant to the plenary power the California Constitution has granted to the Legislature to create and enforce a complete system of workers' compensation under *Cal. Const., art. XIV, § 4*, the Legislature has created a statutory scheme requiring all employers to secure the payment of workers' compensation to injured employees, either by obtaining insurance coverage of their liability or by obtaining a certificate of consent to self-insure issued by the Director of Industrial Relations. The right to workers' compensation benefits is entirely statutory and is not derived from the common law [*DuBois v. Workers' Comp. Appeals Bd. (1993) 5 Cal. 4th 382, 388, 20 Cal. Rptr. 2d 523, 853 P.2d 978]* .

At its inception, a principal purpose of the law was to eliminate the three common law defenses that had prevented recovery for injuries received on the job:

- Contributory negligence;
- Assumption of risk; and
- Fault of a fellow employee.

Employees were relieved of these defenses and given the certainty of financial and other benefits whenever the "conditions of compensation" were established [*see Lab. Code § 3600* and *discussion under § 577.23*]. In exchange, employers were given an exemption from civil actions for damages [*see Shoemaker v. Myers (1990) 52 Cal. 3d 1, 16, 276 Cal. Rptr. 303, 801 P.2d 1054* (under workers' compensation law, employee is afforded relatively swift and certain payment of benefits to cure or relieve effects of industrial injury without having to prove fault, but, in exchange, gives up the wider range of damages potentially available in tort); *Hisel v. County of Los Angeles (1987) 193 Cal. App. 3d 969, 974-975, 238 Cal. Rptr. 678* (tracing legislative history of workers' compensation law); *see also,* discussion under subpart B, *§ 577.310 et seq*.].

The basic purpose of the law is to ensure that a worker who sustains injury in the course of employment, regardless of the fault of any party, and those who depend on the worker for support, will have adequate means of support while the worker is unable to work, and that the injured worker will be furnished with the medical and other remedial treatment required to cure and relieve him or her from the effects of the injury. The policy of the law is to accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character [*Cal. Const., art. XIV, § 4*; *see City etc. of San Francisco v. Workmen's Comp. App. Bd. (1970) 2 Cal. 3d 1001, 1010, 88 Cal. Rptr. 371, 472 P.2d 459]* . In sum, the purposes of the workers' compensation law are several [*S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 354, 256 Cal. Rptr. 543, 769 P.2d 399]* :

- To ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society;
- To guarantee prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production;
- To spur increased industrial safety; and
- In return, to insulate the employer from tort liability for his or her employees' injuries.

To these ends, the workers' compensation law is to be construed liberally [*Lab. Code § 3202*; *see Martinez v. Workers' Comp. Appeals Bd. (1976) 15 Cal. 3d 982, 987, 127 Cal. Rptr. 150, 544 P.2d 1350* ; *In-Home Supportive Services v. Workers' Comp. Appeals Bd. (1984) 152 Cal. App. 3d 720, 733, 199 Cal. Rptr. 697]* . The rule of liberal construction applies to all aspects of the workers' compensation law [*LeBoeuf v. Workers' Comp. Appeals Bd. (1983) 34 Cal. 3d 234, 241, 193 Cal. Rptr. 547, 666 P.2d 989]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDICompensabilityCourse of EmploymentGeneral OverviewWorkers' Compensation & SSDICompensabilityInjuriesGeneral OverviewWorkers' Compensation & SSDIDefensesExclusivity ProvisionsWorkers' Compensation & SSDIThird Party ActionsGeneral Overview

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§ 577.12 Administration of Law

[1] In General

The California workers' compensation law is administered by the Division of Workers' Compensation in the Department of Industrial Relations [*see Lab. Code §§ 19, 56*]. Prior to 1990, the division was called the Division of Industrial Accidents, and prior to 1966, the Industrial Accident Commission administered the law. Within the division, the Workers' Compensation Appeals Board (WCAB) exercises the judicial functions of adjudicating claims, whereas the other functions of the division are administered by the division's administrative director and court administrator [*see Lab. Code §§ 110, 111, 123, 123.5, 127, 127.5, 127.6, 138.1, 3200*].

The administrative director appoints the workers' compensation judges [*see Lab. Code §§ 123, 123.5(a)*] and is authorized to appoint a California licensed attorney as counsel to the division [*Lab. Code § 117*].

The Administrative Director has promulgated ethical standards to which the workers' compensation law judges (WCJ's) must adhere. Among the topics covered by these standards are: gifts, honoraria, and travel; disclosure requirements; disqualification; restriction on investments; financial interests in educational programs; duty to report ethics violations; an ethics advisory committee with investigatory powers; investigation and action by the Administrative Director or Court Administrator [*see 8 Cal. Code Reg. §§ 9720.1*-9723].

[2] Division of Workers' Compensation

The Division of Workers' Compensation is required to make available to employees, employers, and other interested parties information, assistance, and advice to assure the proper and timely furnishing of benefits and to assist in the resolution of disputes on an informal basis [*Lab. Code § 5450*; *see 8 Cal. Code Reg. §§ 9921-9929*]. The informal procedure is set forth in *Lab. Code §§ 5451-5455*.

[3] Workers' Compensation Appeals Board

[a] Jurisdiction

The jurisdiction of the WCAB is set forth in *Lab. Code §§ 5300-5305* [*see Marcus v. Workmen's Comp. Appeals Bd. (1973) 35 Cal. App. 3d 598, 602, 111 Cal. Rptr. 101]* . The following must be instituted before the WCAB, and may not be instituted elsewhere:

- Proceedings for recovery of workers' compensation, or concerning any right or liability arising out of or incidental to the proceedings.

- Proceedings for enforcement against an employer or an insurer of any liability for compensation imposed on him, her, or it by *Lab. Code § 3200 et seq.* in favor of an injured employee, an injured employee's dependents, or any third person.

- Proceedings for determination of any question as to the distribution of workers' compensation among dependents or other persons.

- Proceedings for determination of any question as to who are dependents of any deceased employee or what persons are entitled to any benefit under the compensation provisions of *Lab. Code § 3200 et seq.*

- Proceedings for obtaining any order that the WCAB is authorized to make pursuant to *Lab. Code § 3200 et seq.*

- Proceedings for determination of any other matter over which jurisdiction is vested by *Lab. Code § 3200 et seq.* in the Division of Workers' Compensation, including the administrative director and the WCAB.

A superior court does not have subject matter jurisdiction over an action to enjoin the WCAB from enforcing provisions of the Workers' Compensation Act [*Lab. Code § 5955*; *Greener v. Workers' Comp. Appeals Bd. (1993) 6 Cal. 4th 1028, 1034, 25 Cal. Rptr. 2d 539, 863 P.2d 784]* . A party who is aggrieved by an order of the WCAB applying the workers' compensation law to that party may seek relief by filing a petition for review of the WCAB's order with the Court of Appeal or the Supreme Court, or by filing a petition for a writ of mandate with the Court of Appeal or the Supreme Court if the criteria for extraordinary relief under *Code of Civil Procedure Section 1085* are satisfied [*Greener v. Workers' Comp. Appeals Bd. (1993) 6 Cal. 4th 1028, 1046, 25 Cal. Rptr. 2d 539, 863 P.2d 784]* . See *§ 577.280* et seq., for a discussion of judicial review.

Courts must resolve any reasonable doubts as to jurisdiction in favor of the WCAB [*Gilford v. State Compensation Ins. Fund (1974) 41 Cal. App. 3d 828, 831, 833-834, 116 Cal. Rptr. 615]* .

For further discussion of the exclusive nature of the jurisdiction of the WCAB, see subpart B, § 577.310 et seq.

[b] Power to Punish for Contempt

The WCAB and its members may issue all necessary process in proceedings for contempt in like manner and to the same extent as courts of record [*Lab. Code § 134*; *see Crawford v. Workers' Comp. Appeals Bd. (1989) 213 Cal. App. 3d 156, 164, 259 Cal. Rptr. 414* ; *Morton v. Workers' Comp. Appeals Bd. (1987) 193 Cal. App. 3d 924, 928, 238 Cal. Rptr. 651* ; *Rowen v. Workers' Comp. Appeals Bd. (1981) 119 Cal. App. 3d 633, 639, 639 n.5,174 Cal. Rptr. 185* ; *Marcus v. Workmen's Comp. Appeals Bd. (1973) 35 Cal. App. 3d 598, 602-605, 111 Cal. Rptr. 101]* . Accordingly, the WCAB must follow the applicable provisions of the Code of Civil Procedure pertaining to contempt (*Code Civ. Proc. §§ 1209-1222*) [*Crawford v. Workers' Comp. Appeals Bd. (1989) 213 Cal. App. 3d 156, 164, 259 Cal. Rptr. 414* ;

Morton v. Workers' Comp. Appeals Bd. (1987) 193 Cal. App. 3d 924, 928, 238 Cal. Rptr. 651 ; *Rowen v. Workers' Comp. Appeals Bd. (1981) 119 Cal. App. 3d 633, 643, 174 Cal. Rptr. 185]* . When the contempt is not committed in the WCAB's presence, the WCAB must proceed by way of order to show cause supported by affidavit [*see Code Civ. Proc. §§ 1211, 1212*] or declaration under penalty of perjury [*see Code Civ. Proc. § 2015.5*], and the alleged contemner is entitled to appear before and be heard by the WCAB [*Crawford v. Workers' Comp. Appeals Bd. (1989) 213 Cal. App. 3d 156, 164, 259 Cal. Rptr. 414* ; *Morton v. Workers' Comp. Appeals Bd. (1987) 193 Cal. App. 3d 924, 928, 238 Cal. Rptr. 651]* . Moreover, there is no right to reconsideration of a contempt order under *Lab. Code § 5900* [*Morton v. Workers' Comp. Appeals Bd. (1987) 193 Cal. App. 3d 924, 927 n.1, 238 Cal. Rptr. 651]* .

Judicial review of a finding of contempt by the WCAB may be had by filing a petition for a writ of certiorari or, in the case of a jail sentence, a writ of habeas corpus, addressed in either instance to the appropriate court of appeal [*Rowen v. Workers' Comp. Appeals Bd. (1981) 119 Cal. App. 3d 633, 637, 174 Cal. Rptr. 185* ; *Marcus v. Workmen's Comp. Appeals Bd. (1973) 35 Cal. App. 3d 598, 601 n.3, 111 Cal. Rptr. 101]* . Prohibition is also an appropriate remedy to restrain threatened contempt proceedings by the WCAB, if the WCAB is acting without or in excess of jurisdiction [*see Crawford v. Workers' Comp. Appeals Bd. (1989) 213 Cal. App. 3d 156, 171-172, 259 Cal. Rptr. 414]* . For discussion of when the WCAB may direct and order a workers' compensation judge to issue necessary process in proceedings for direct and hybrid contempt, see*§ 577.145[b]*.

For further discussion of contempt and for forms that may be adapted for use in contempt proceedings before the WCAB, as well as for forms for use in securing judicial review of a contempt adjudication, see Ch. 135, *Contempt* .

[c] Disciplinary Powers Over Representatives of Parties

After a hearing, the WCAB may remove, deny, or suspend the privilege of a person to represent any party in any proceeding before the WCAB or workers' compensation judges for a violation of *Lab. Code §§ 4900-4909.1* (*discussed under § 577.242*) or for other good cause [*Lab. Code § 4907*]. *Lab. Code § 4907*, by its terms, applies to attorneys, but this application was held unconstitutional under the separation of powers doctrine (*Cal. Const., art. III, § 3*) [*Hustedt v. Workers' Comp. Appeals Bd. (1981) 30 Cal. 3d 329, 335-346, 178 Cal. Rptr. 801, 636 P.2d 1139* ; *see Katz v. Workers' Comp. Appeals Bd. (1981) 30 Cal. 3d 353, 357, 178 Cal. Rptr. 815, 636 P.2d 1153]* .

[d] Establishment of Uniform Procedures and Forms

The court administrator is required to establish uniform district office procedures, uniform forms, and uniform time of court settings for all district offices of the Appeals Board. No district office or workers' compensation judge may require forms or procedures other than as established by the court administrator. A workers' compensation judge who violates this requirement may be subject to disciplinary proceedings [*Lab. Code § 5500.3(a)*]. The Appeals Board is required to establish uniform court procedures and uniform forms for all other proceedings of the Board. No district office or workers' compensation judge may require forms or procedures other than as established by the Board [*Lab. Code § 5500.3(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureSanctionsContemptCivil ContemptLegal EthicsSanctionsGeneral OverviewWorkers' Compensation & SSDIGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsHearings & Review

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§ 577.12A Electronic Adjudication Management System

[1] Using EAMS; General Characteristics

As DWC moves toward eventual use of electronic forms, the various DWC units are now referred to as "product delivery units" [*see 8 Cal. Code Reg. § 10210(bb)*]. The units are abbreviated as follows: Adjudication Unit "ADJ"; Disability Evaluation Unit "DEU"; Subsequent Injuries Benefits Trust Fund "SIF"; Uninsured Employers' Benefits Trust Fund "UEF"; Vocational Rehabilitation "VOC"; and Retraining and Return to Work Unit "RSU." For each product delivery unit, there is an area in EAMS in which the case management information related to that product delivery unit is stored. That area is called the "product delivery case." "INT" is the integrated case, which is the umbrella for the individual product delivery cases for each unit residing in EAMS. External users are being integrated into EAMS, meaning that attorneys and other interested parties will have much of their contact with DWC via EAMS. Once the shift to fully electronic forms is accomplished, each attorney or other interested party, in order to access EAMS, must have taken a computer-based training course. Upon passing this course, the participant will receive a user name and a password. Access to EAMS will be through a link to be added to the DIR/DWC website.

Clicking on the EAMS link from the DIR/DWC website will lead to the EAMS page, from which various functions may be performed:

- The General-Public-Search link that will appear on the EAMS page will allow a user to search for basic case information, such as the first and last names of an injured worker, the worker's date of birth, and the case number.

- Links to eForms will be provided, with forms grouped by unit area (e.g., ADJ, UEF, DEU), each of which may be filled out online and submitted electronically. Among the eForms to be available through EAMS will be Application for Adjudication of Claim, Compromise and Release, Declaration of Readiness to Proceed, Notice of Request for Allowance of Lien, Petition to Terminate Liability for Temporary Disability Indemnity, and Stipulations With Request for Award.

- The logon-to-EAMS link will lead to the EAMS logon page, through which information will be accessible to only those persons who have received an appropriate EAMS account, which will presumably include all representatives of injured workers, employers, or lien claimants.

Having selected the logon-to-EAMS link, the user will be led to the search page. This page will function as an EAMS home page. From it, the user may search by any field on the page, e.g., participant name, case number, worker's date of birth. With the search results, the user has the ability to sort the cases, by case number, injured worker, date of injury, and several other data categories.

The EAMS user will need to become familiar with some new terminology. For example, the "primary client" means the injured worker, and "Legacy Case ID" means the number previously used by the specific DWC unit (ADJ, DEU, SIF, VOC, RSU, UEF) to refer to the case. Under EAMS, a case will have one master number that will not change among the units. Another new term is the "product delivery case home page," also accessed via the search page. From the product delivery case home page, the user may navigate to items such as the case calendar or case events, which is the EAMS case history. If, for example, a case has a hearing scheduled, the user will see that hearing on the calendar, much like meetings noted on a Microsoft Outlook calendar. [Note: There will be a separate "product delivery case home page" for each type of case (ADJ, VOC, DEU, etc.).] The case home page contains details such as the "product name," i.e., the EAMS case type (ADJ, DEU, etc.); the "case reference," i.e., the EAMS case number; and the case status.

Another new concept with which attorneys and other participants in the workers' compensation system will need to become familiar is that of the "integrated case." This is the umbrella that contains the product delivery cases such as ADJ or UEF. The user will click on the Case Reference hyperlink to view a case. The integrated case contains information common to the product delivery cases, such as information about the injured worker, the employer, etc. From the integrated case, it will be possible to access the various product delivery cases via the Case Reference hyperlinks mentioned above. To access documents for a case, the user will click on the case type hyperlink in the Case Documents section. All case documents will be stored in EAMS, and case participants will be able to search for and access documents in their cases by Case ID, Case Type, Document Date, or Author.

EAMS will allow case files to be prepared more quickly, the number of human errors to be decreased, fewer resources to be used in the process, and the viewing of files to be done from the user's own office. For example, on the "Check In Check Out Documents" page, a list of case documents will appear. Once the user has located the document sought, it can be viewed by clicking on the document hyperlink. Thus, trips to a DWC District Office for the purpose of viewing case documents will be eliminated. Moreover, any changes that need to be made to a given document may be made online, followed by electronic submission of the new version to DWC.

With the proper access rights, a user is able to modify personal information in EAMS, including mailing address, e-mail address, and phone number. Again, no trip to a District Office or even a mailed letter will be required.

On the "Request for Action" page, an attorney will have the ability to request that DWC perform an action on one of his or her cases. The attorney may request an order taking the case off calendar, a rehabilitation conference change, or a continuance. When requesting an action, the user will be required to input the case type, the case ID, and the user's first and last names. For example, if requesting a continuance, the user will select Continuance from a dropdown list, enter the case number, the user's first and last name, then add "good cause" in the Reason box, informing DWC of the situation. When the user then clicks the Submit button, the Continuance request will be sent to the in-box of a DWC worker. The in-box will show that worker what activities he or she needs to perform.

[2] Case Names, Case Index, and Adjudication Files

An index of all cases filed with a district office will be maintained in EAMS under the name of the person claimed to

have been injured or the identification assigned to that person, whether or not that person is an applicant. Reference to the case will be by the name of the injured person and the case number [*8 Cal. Code Reg. § 10215*].

All cases filed on and after November 17, 2008, are required to be maintained by DWC in an electronic format in EAMS. All paper documents properly filed in such cases must be scanned into the EAMS adjudication file, then destroyed anytime more than 30 business days after filing [*8 Cal. Code Reg. § 10216(a)*].

All case opening documents are required to be given a case number by the district office when no case number has been previously assigned for the injured worker for the alleged date of injury. The parties must be notified of the case number by their preferred method of service, which may include U.S. Mail, fax, or e-mail [*8 Cal. Code Reg. § 10216(b)*].

If a case number has been previously assigned by DWC, a new case number will be assigned when a document is filed, as follows: the prefix "ADJ" will replace the previously assigned three-letter prefix (e.g., "OAK") and precede the assigned case number [*8 Cal. Code Reg. § 10216(c)*].

Except as provided in *8 Cal. Code Reg. § 10273* (retention, return, and destruction of records and exhibits), DWC is required to maintain a paper adjudication file until it is converted to an electronic adjudication file. If, however, a paper adjudication file is maintained on or after November 17, 2008, an electronic adjudication file must also be created, and any documents filed thereafter must be maintained electronically in EAMS, in accordance with *8 Cal. Code Reg. § 10216(c)* [*8 Cal. Code Reg. § 10216(d)*; *see above*].

A paper adjudication file or a portion of a paper adjudication file may be converted to an electronic adjudication file by DWC at any time. If a paper adjudication file is completely scanned into EAMS, DWC must notify the parties to the case of the change in how the file is maintained, and the paper adjudication file may then be destroyed anytime more than 30 business days after the issuance of the notification [*8 Cal. Code Reg. § 10216(e)*].

[3] Official Participant Record and Duty to Furnish Correct Address

DWC is required to maintain an official participant record for each adjudication file, which must contain the names of all parties and lien claimants and their attorneys or hearing representatives [*8 Cal. Code Reg. § 10217(a)*].

In order to ensure that case parties and documents are accurately associated to the correct electronic adjudication file, uniform names for claims administrators' offices and representatives' offices are required to be used when filing documents in EAMS. These names are assigned by DWC [*8 Cal. Code Reg. § 10217(b)*]. DWC will maintain a list on its website of uniform names and mailing addresses and preferred method of service for claims administrators' offices and representatives' offices [*8 Cal. Code Reg. § 10217(b)(1)*]. Additions for new claims administrators' offices and representatives' offices and changes of name, location or address, telephone number, fax number, e-mail address, or preferred method of service must be registered by the entity requesting the change with the Central Registration Unit [*8 Cal. Code Reg. § 10217(b)(2)*; *see 8 Cal. Code Reg. § 10210(f)* (Central Registration Unit is unit within DWC that maintains website list of uniform names and addresses)]. The entity requesting the change must fax or e-mail a letter on letterhead with a signature from an authorized individual requesting the change to DWC's Central Registration Unit within five business days of any change. The entity must also advise all parties of any change of name, mailing address, or telephone number by furnishing the current information within five business days of any change [*8 Cal. Code Reg. § 10217(b)(2)(A)*; *see 8 Cal. Code Reg. § 10217(b)(2)(B)* (fax number for Central Registration Unit is: 1 (888) 822-9309, and e-mail address for Central Registration Unit is: cru@dir.ca.gov); *8 Cal. Code Reg. § 10217(b)(2)(C)* (new uniform name or address and preferred method of service will be posted by Central Registration Unit within 10 business days of receipt of request)].

Except as required in the preceding paragraph, every party and every lien claimant having an interest in an active case pending before the district office or WCAB must advise the district office and all parties of any change of mailing

address and telephone numbers by furnishing the current information within five business days of any change [*8 Cal. Code Reg. § 10217(c)*]. Similarly, every lien claimant that has filed a lien in a case pending in a district office must advise all parties within five business days of any change in the identity and/or telephone number of the person with authority to resolve the lien by furnishing the correct name and daytime telephone number of that person to the interested parties, and must advise DWC of any such change after a declaration of readiness is filed [*8 Cal. Code Reg. § 10217(d)*]. Finally, every party and lien claimant having an interest in an inactive case must advise all other known parties, lien claimants, attorneys, and hearing representative within five business days of any change of address (which must include any change of mailing address and telephone numbers) by furnishing the correct and current address and/or number, and must advise DWC of any such change within five business days if there is an outstanding award of further medical treatment or if there is continuing jurisdiction pursuant to *Lab. Code §§ 5410, 5803*, and *5804* [*8 Cal. Code Reg. § 10217(e)*].

[4] Designated Preferred Method of Service

Claims administrators' offices [*see 8 Cal. Code Reg. § 10210(g)* ("claims administrator's office" defined)] and representatives' offices [*see 8 Cal. Code Reg. § 10210(dd)* ("representative's office" defined)] may designate first-class mail, electronic mail, or fax as their preferred method of service for receiving documents from the district office and the Appeals Board. The designated method of service must be the same for all active cases for that claims administrator's office or representative's office. A party, a lien claimant, or an attorney or other representative for a party or a lien claimant who does not designate a preferred method of service will be served by first-class mail [*8 Cal. Code Reg. § 10218(a)*].

Represented parties, lien claimants, or attorneys or other representatives for parties or lien claimants may agree among themselves that any method of service may be used for receiving documents among the parties to the agreement. If such an agreement is made, service pursuant to the agreement constitutes valid service. Absent such an agreement, service between these parties or entities must be made by first-class mail [*8 Cal. Code Reg. § 10218(b)*].

Service by or on an unrepresented injured worker, unrepresented dependent, or unrepresented uninsured employer must be made by first-class mail [*8 Cal. Code Reg. § 10218(c)*].

[5] Failure to Comply With Court Administrator's Rules

If a document is not filed in compliance with the Court Administrator's rules, because it does not comply with either the procedural requirements or with the place of filing requirements, the Court Administrator may in his or her discretion take the following actions [*8 Cal. Code Reg. § 10222(a)*]:

- Correct the defect and file the document.

- Notify the filer that the document is not accepted for filing by service of a Notice of Document Discrepancy. This Notice must state the discrepancy and the date of the attempted filing, and provide the filer with 15 business days from service to cure the discrepancy. If the document is corrected within 15 business days, or at a later date upon a showing of good cause, it will be deemed filed on the original date the document was submitted.

The following documents are not to be filed with the district office or the Appeals Board, except as a non-duplicative supporting exhibit or by order of a WCJ or the Board. Documents improperly submitted will not be accepted for filing or deemed filed and will not be acknowledged and may be discarded [*8 Cal. Code Reg. § 10222(b)*]:

- Letters to opposing parties or counsel.

- Subpoenas.
- Notices of taking deposition.
- Medical appointment letters.
- Proofs of service ordered pursuant to *8 Cal. Code Reg. § 10500*.
- Medical reports, except as required by *8 Cal. Code Reg. § 10233*.
- Copies of any decision of any federal or state court opinion otherwise available.
- Copies of any decision of the Appeals Board or a WCJ that is otherwise available.
- Duplicate medical and medical-legal reports.
- No diagnostic imaging as defined in *Lab. Code § 139.3(b)(1)* is to be transmitted to the district office or the Appeals Board unless it is ordered.

No document is to be sent by electronic mail or by fax directly to the district office or the Appeals Board. If a document is sent by electronic mail or fax directly to the district office, it will not be accepted for filing or deemed filed, will not be acknowledged, and may be discarded unless otherwise ordered by the WCJ or the Appeals Board [*8 Cal. Code Reg. § 10222(c)*].

Failure to comply with the rules of the Court Administrator will be deemed a bad faith action or tactic that is frivolous or solely intended to cause unnecessary delay unless that failure results from mistake, inadvertence, surprise, or excusable neglect [*8 Cal. Code Reg. § 10211*].

[6] Corrective Measures for Misfiled or Misdirected Documents Into the Case Management System

DWC may perform document substitution on filed documents, repair scanned documents, and move documents to other adjudication files [*8 Cal. Code Reg. § 10223(a)*; *see 8 Cal. Code Reg. § 10210(a)* ("adjudication file" defined)].

A document substitution may occur when a technical problem of readability and/or legibility exists with a filed document. The filer may seek a substitution of the document by filing a petition to substitute. The proposed document for substitution must be appended to a petition to substitute. If the petition to substitute is granted, the proposed document for substitution will replace the document that was unreadable or illegible [*8 Cal. Code Reg. § 10223(b)*].

A document repair may occur when a document scanned into an electronic adjudication file by DWC fails to reflect the original paper document. DWC may repair the document so that the scanned image accurately reflects the original paper document. DWC may repair a document at any time, or a party may request that a document be repaired. EAMS will retain as viewable the original document for those who have access to the electronic file [*8 Cal. Code Reg. § 10223(c)*].

A document may be moved when a document originally scanned by DWC is filed into the wrong electronic file [*8 Cal. Code Reg. § 10223(d)*].

Documents that are in the process of being substituted or repaired will not be moved [*8 Cal. Code Reg. § 10223(e)*].

DWC will provide notice to all parties of moved, substituted, or repaired documents within 15 business days [*8 Cal. Code Reg. § 10223(f)*].

[7] Extended System Unavailability

If, for any reason, there is a technical failure of EAMS for longer than 24 hours, the Court Administrator, in his or her discretion, may declare that EAMS is unavailable for an extended period of time [*8 Cal. Code Reg. § 10225(a)*]. After issuing a declaration of extended system unavailability, the Court Administrator must issue an order that includes, but is not limited to [*8 Cal. Code Reg. § 10225(b)*]:

- Requiring that the district office or the Appeals Board serve all documents by first-class mail.
- Providing that filed documents be maintained in temporary paper adjudication files.
- Providing that the time for performing any action, whether by the parties or by the district office, be extended by a specified period or until EAMS is declared to be operational.
- Requiring or allowing any other actions or remedies, as deemed appropriate under the circumstances.

The Court Administrator must post the declaration of extended system unavailability on DWC's website, if the website remains operational, and at every district office and the office of the Appeals Board [*8 Cal. Code Reg. § 10225(c)*].

Any declaration of extended unavailability remains in effect until the Court Administrator issues a subsequent declaration that EAMS is operational [*8 Cal. Code Reg. § 10225(d)*].

DWC will maintain on its website a list of all technical failures of EAMS that last longer than 24 hours [*8 Cal. Code Reg. § 10225(e)*].

EAMS will be backed up daily pursuant to the State of California's information technology standards [*8 Cal. Code Reg. § 10225(f)*].

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Volume 51: Vexatious Litigants thru Zoning and Planning-Chs. 573-579
Chapter 577 WORKERS' COMPENSATION
PART II. LEGAL BACKGROUND
A. Administrative Actions
1. General Principles of Workers' Compensation Law

51-577 California Forms of Pleading and Practice--Annotated § 577.13

§ 577.13 Employer's Liability for Workers' Compensation Benefits

[1] Basis for Liability

Liability for injury is based not on any act or omission of the employer but on the existence of the relationship that the employee bears to the employment [*Bell v. Industrial Vangas, Inc. (1981) 30 Cal. 3d 268, 277, 179 Cal. Rptr. 30, 637 P.2d 266]* . Determination of whether there is a sufficient relationship to impose liability cannot be determined simply from technical contractual or common law conceptions of employment and must be resolved by reference to the history and purposes of the workers' compensation law [*Laeng v. Workmen's Comp. Appeals Bd. (1972) 6 Cal. 3d 771, 777-778, 100 Cal. Rptr. 377, 494 P.2d 1* ; *see County of Los Angeles v. Workers' Comp. Appeals Bd. (1981) 30 Cal. 3d 391, 397, 179 Cal. Rptr. 214, 637 P.2d 681* ; *In-Home Supportive Services v. Workers' Comp. Appeals Bd. (1984) 152 Cal. App. 3d 720, 728, 199 Cal. Rptr. 697]* . For a full discussion of what constitutes an employment relationship for purposes of workers' compensation law, see *§ 577.22*.

[2] Extent of Liability

[a] Disability and Medical Treatment

The workers' compensation laws provide for a variety of benefits to injured employees, although the benefits are limited in comparison to tort damages. Benefits include compensation for temporary disability (*Lab. Code §§ 4650, 4650.5, 4652, 4653*), permanent disability (*Lab. Code §§ 4061* (operative for injuries occurring on and after January 1, 1991), 4062 (operative for injuries occurring on and after January 1, 1991), 4650, 4658-4660), and medical care (*Lab. Code §§ 4600-4614.1*). The separate statutory treatment of these benefits serves different legislative goals.Employer liability for medical and surgical services is provided in major part to facilitate the worker's speedy recovery and to maximize his or her productive employment. Temporary disability indemnity is intended primarily to substitute for the worker's lost wages, in order to maintain a steady stream of income. Permanent disability indemnity has a dual function: to compensate both for actual incapacity to work and for physical impairment of the worker's body, which may or may not be incapacitating [*Buhlert Trucking v. Workers' Comp. Appeals Bd. (1988) 199 Cal. App. 3d 1530, 1535, 247 Cal. Rptr. 190]* . For discussion of benefits for medical treatment, temporary disability, and permanent disability, see

discussion under § 577.45.

[b] Death Benefits

The death of an injured employee does not affect the employer's liability under *Lab. Code § 4600 et seq.* (relating to medical and hospital treatment) or *Lab. Code § 4650 et seq.* (relating to disability payments), but neither temporary nor permanent disability payments may be made for any period of time subsequent to the employee's death. Any accrued and unpaid compensation must be paid to the dependents or, if there are no dependents, to the deceased employee's personal representative or heirs or other persons entitled to it, without administration [*Lab. Code § 4700*]. A survivor's entitlement to a deceased employee's accrued and unpaid compensation does not diminish a survivor's entitlement to full statutory death benefits [*Lab. Code § 4702(a), (c)*].

The liability of the employer for burial expenses and death benefits is provided for in *Lab. Code § 4701*. The death benefit allowed is set forth in *Lab. Code § 4702*, the death benefit payable in cases of one total dependent and additional partial dependents or two or more total dependents, in *Lab. Code § 4703*, the amount and duration of death benefits payable when there are totally dependent minor children, in *Lab. Code § 4703.5*, the WCAB's power to adjust the allocation, in *Lab. Code § 4704*, and the payment of accrued benefits when a dependent beneficiary dies, in *Lab. Code § 4706*. Payments to the Department of Industrial Relations when the employee dies without dependents is covered in *Lab. Code § 4706.5* [*see Atlantic Richfield Co. v. Workers' Comp. Appeals Bd. (1982) 31 Cal. 3d 715, 727, 182 Cal. Rptr. 778, 644 P.2d 1257]* .

The court of appeal has held that *Lab. Code § 4702(a)(6)(B)*, which provides that, when a worker without dependents suffers a fatal industrial injury, the employer must pay $250,000 to the deceased worker's estate as a workers' compensation death benefit, is unconstitutional because the constitutional enabling provision, *Cal. Const., art. XIV, § 4*, does not identify estates as a class of beneficiaries entitled to workers' compensation death benefits, but rather identifies only three classes of beneficiaries of workers' compensation benefits, workers, dependents, and the State of California [*Six Flags, Inc. v. Workers' Comp. Appeals Bd. (2006) 145 Cal. App. 4th 91, 93-94, 51 Cal. Rptr. 3d 377*]. Subsequently, the court of appeal annulled an Appeals Board order requiring an employer to pay a full $125,000 death benefit to the Death Without Dependents Unit pursuant to *Lab. Code § 4706.5(a)*, when the court found that the employer had paid a deceased employee's mother/heir death benefits of $104,208 pursuant to *Lab. Code § 4702(a)(6)(B)*. The employer had ceased such payments following the decision in *Six Flags*, discussed above. Because death benefits were paid to the decedent's heir pursuant to *Lab. Code § 4702(a)(6)(B)* before it was declared unconstitutional, the Death Without Dependents Unit was not entitled to be paid any death benefit [*City of Los Angeles v. Workers' Comop. Appeals Bd. (Foster) (2009) 179 Cal. App. 4th 134, 146151, 101 Cal. Rptr. 3d 513*].

The person to whom the death benefit is paid for the use of several beneficiaries must apply it in compliance with the findings and directions of the WCAB [*Lab. Code § 4705*]. Special provisions apply when the deceased employee was a member of the Public Employees' Retirement System [*see Lab. Code §§ 4707, 4708*], to dependents of a deceased peace or law enforcement officer, an officer or employee of the Department of Corrections or the Department of Youth Authority, or a firefighter [*see Lab. Code § 4709*], and to the assassination of an elected public official [*see Lab. Code §§ 4720-4728*].

[3] Employer's Obligation to Secure Payment of Compensation

Every employer other than the State of California is required to secure the payment of workers' compensation [*Lab. Code § 3700*]. No part of thecost may be charged against the employee [*see Lab. Code §§ 3751, 3752*; *Muffett v. Royster (1983) 147 Cal. App. 3d 289, 301 n.6, 195 Cal. Rptr. 73* ; *Ralphs Grocery Co. v. Superior Court (2003) 112 Cal. App. 4th 1090, 1101-1102* (employee stated cause of action in alleging that employer violated *Lab. Code § 3751* by including workers' compensation costs incurred by store as one element in calculation of employee incentive bonus)]. For example, *Lab. Code § 3751* has been held to bar freight transportation companies from requiring independent

contractor truck owners/operators to pay the costs of their own workers' compensation insurance, when the parties had elected under *Lab. Code § 4150* to come under the workers' compensation law's compensation provisions, which include *Lab. Code § 3751* [*Albillo, et al. v. Intermodal Container Services, Inc.; Montoya v. W.C.A.B. (2003) 114 Cal. App. 4th 190, 197-207, 8 Cal. Rptr. 3d 350]* . Payment must be secured by the employer's:

- Being insured for workers' compensation liability by an insurer authorized to write this kind of insurance in California [*Lab. Code § 3700(a)*]; or

- Securing a certificate of consent to self-insure either as an individual employer or as one employer in a group of employers [*Lab. Code § 3700(b), (c)*; *see* *Self-Insurers' Security Fund v. ESIS, Inc. (1988) 204 Cal. App. 3d 1148, 1156, 251 Cal. Rptr. 693]* .

An employer can secure the payment of compensation on employees provided to the employer through an agreement with another employer, by entering into a valid and enforceable agreement with the other employer under which the other employer agrees to obtain, and does obtain, workers' compensation coverage for those employees [*Lab. Code § 3602(d)*]. In such cases, both employers will be considered to have secured the payment of compensation [*Lab. Code § 3602(d)*]. Employers who comply with this rule will not be subject to civil, criminal, or other penalties for failure to provide workers' compensation coverage or tort liability in the event an employee is injured, but may, in the absence of compliance, be subject to all three [*Lab. Code § 3602(d)*].

The means by which a private self-insurer provides compensation is detailed in *Lab. Code § 3701*. The statutory obligation to secure payment commences with the inception of employer status, and the duty must be discharged before the necessity for payment of any award arises [*Self-Insurers' Security Fund v. ESIS, Inc. (1988) 204 Cal. App. 3d 1148, 1156, 251 Cal. Rptr. 693]* . An employer who does not purchase insurance or qualify as a self-insurer is illegally uninsured, and numerous penalties and consequences may flow from this illegality [*Self-Insurers' Security Fund v. ESIS, Inc. (1988) 204 Cal. App. 3d 1148, 1157, 251 Cal. Rptr. 693* ; *see* discussion under *§ 577.13[4]*].

[4] Failure to Secure Payment of Compensation

[a] Criminal and Civil Penalties

The failure to secure the payment of compensation by one who knew, or because of his or her business knowledge or experience should be reasonably expected to have known, of the obligation to do so is a misdemeanor [*Lab. Code § 3700.5*; *see* *Muffett v. Royster (1983) 147 Cal. App. 3d 289, 300 n.5, 195 Cal. Rptr. 73]* . Furthermore, an injured employee or a deceased employee's dependents (as well as a "qualified alien" and his or her dependents) may sue an uninsured employer for damages for the injury or death as if the workers' compensation law did not apply [*Lab. Code § 3706*; *8 Cal. Code Reg. § 15740(b)*; *see* discussion in subpart B, § 577.312[2]; *see also § 577.522[1]*].

One court of appeal, with a strong dissent, has held that, since the duty to secure the payment of compensation is imposed on employers, the word "one," as used in *Lab. Code § 3700.5*, means an employer; and that the behavior proscribed by *Lab. Code § 3700.5* is confined to the employer's nonfeasance, or, in certain instances, the nonfeasance of those who control the employer by virtue of their shareholder or parent status, and cannot be expanded to impose liability on one who does not already possess a duty under the statutory scheme to secure the payment of compensation; that is, the statute does not extend to officers and managing employees of a corporate employer [*Self-Insurers' Security Fund v. ESIS, Inc. (1988) 204 Cal. App. 3d 1148, 1156, 1158-1159, 251 Cal. Rptr. 693]* . The same court further held that the purpose of *Lab. Code § 3700.5* is to secure the payment of compensation in the first instance, that prosecution under this statute would occur only when an employer was illegally uninsured, and that, once the obligation to secure payment of compensation is satisfied, *Lab. Code § 3700.5* does not apply to punish employers and their managers for inaccurately estimating liabilities or otherwise submitting incomplete annual reports, the penalties and remedies for which are provided for in other statutes [*Self-Insurers' Security Fund v. ESIS, Inc. (1988) 204 Cal. App.*

3d 1148, 1156, 1158-1160, 251 Cal. Rptr. 693] .

In addition to any other remedies provided by law, the Director of Industrial Relations may enforce a judgment against an uninsured employer by nonjudicial foreclosure of property not subject to *Code Civ. Proc. § 703.010 et seq.* (exemptions) [*see Lab. Code § 3716.3*]. Furthermore, if an employer has failed to secure compensation as required by *Lab. Code § 3700*, the Director must issue a stop order prohibiting the use of labor by that employer until the employer complies with *Lab. Code § 3700* [*Lab. Code § 3710.1*; *see Lab. Code § 3710.3* (transmission of stop order to Public Utilities Commission (PUC) or the Department of Motor Vehicles, whichever has jurisdiction over the affected carrier); *see also Pub. Util. Code §§ 1033.8(a), 5285.5(a), 5378.7(a)* (PUC's authority to investigate and impose appropriate penalties, including suspension of operating authoritywhen Director has issued stop order to carrier regulated by PUC)]. An employer may protest the issuance of a stop order according to the procedures set forth in *Lab. Code § 3710.1*.

The court of appeal has held that a penalty assessed against an employer for failure to have workers' compensation coverage would not be set aside, when the insurer had notified the employer that coverage would be canceled unless all past-due premiums were made by a specified date, the employer paid only a portion of that premium, so that on the date of the penalty assessment the employer had no coverage in effect, and the fact that, subsequently, coverage was reinstated retroactively to include the date of the penalty assessment could not rewrite history to establish that the lapse had not occurred and to invalidate the penalty assessment [*Leo's Assocs., Inc. v. Department of Indus. Relations (2004) 120 Cal. App. 4th 628, 631-632, 15 Cal. Rptr. 3d 594]* .

[b] Uninsured Employers Benefits Trust Fund

Except for certain residential employees [*see Lab. Code §§ 3351(d), 3715(a), (b)*], the employee or the deceased employee's dependents may also apply to the Workers' Compensation Appeals Board (WCAB) for an award of workers' compensation benefits. If the WCAB awards benefits and the employer neither pays the award nor furnishes a bond to secure payment of the award, the award will be paid from the Uninsured Employers Benefits Trust Fund [*see Lab. Code §§ 3715, 3716*; *see also Lab. Code § 5106* (order for lump-sum payment of present worth of benefits to be paid in future installments)]. The fund may pay the claimant only such benefits allowed, however, recognizing proper liens on them that would have accrued against an employer properly insured for workers' compensation liability, and is not liable for any penalties or interest on any awards [*Lab. Code § 3716.2*; *see Duncan v. Workers' Comp. Appeals Bd. (2008) 166 Cal. App. 4th 294, 300-304, 82 Cal. Rptr. 3d 664* (limitation of liability specified by *Lab. Code § 3716.2* precludes imposition of sanction against UEBTF pursuant to *Lab. Code § 5813* for bad-faith actions or tactics that are frivolous or intended solely to cause unnecessary delay)]. Alternatively, the Director of Industrial Relations, as administrator of the fund, may resolve the claim for benefits by compromise and release or stipulated findings and award if the WCAB has jurisdiction over the employer and the employer has been given notice and an opportunity to object [*see Lab. Code § 3715(e)*].

The UEBTF may not be joined in any proceedings unless a legal person or entity has been identified as an illegally uninsured employer in an application and special notice of lawsuit and that employer has been served with the application and special notice of lawsuit in the manner provided for service of summons in the Code of Civil Procedure [*Rea v. Workers' Comp. Appeals Bd. (2005) 127 Cal. App. 4th 625, 644-652, 25 Cal. Rptr. 3d 828* ; *see Code Civ. Proc. §§ 415.10, 415.20, 415.30, 415.40, 415.50*].

A findings and award of compensation benefits that is the subject of a demand on the fund, or an approved compromise and release or stipulated findings and award entered into by the Director of Industrial Relations pursuant to *Lab. Code § 3715(e)*, or a decision and order of the rehabilitation unit of the Division of Industrial Accidents (now the Division ofWorkers' Compensation) [*see Lab. Code § 110(c)*] that has become final, constitutes a liquidated claim for damages against the employer in the amount ascertained and fixed by the WCAB. The WCAB must certify the same to the Director who may then institute a civil action against the employer or obtain a judgment against the employer pursuant to *Lab. Code § 5806* (entry of judgment by superior court clerk in conformity with certified copy of WCAB's order,

decision or award filed with court by any party affected by it) [*Lab. Code § 3717(a)*]. In an action like this, the total amount of the award, including interest, other penalties, and attorney's fees granted by the award, must be sought, and recovery of awarded benefits in excess of the amounts paid the claimant by the fund must be paid over to the injured employee or the employee's representative as the case may be [*Lab. Code § 3716.2*; *see also Self-Insurers' Security Fund v. ESIS, Inc. (1988) 204 Cal. App. 3d 1148, 1157-1158, 251 Cal. Rptr. 693* (discussing foregoing, as well as additional, penalties and tracing statutory history); *Lab. Code § 3716.4* (when final judgment is entered under *Lab. Code § 3716.2* against carrier regulated by Public Utilities Commission (PUC) or Department of Motor Vehicles, Director may transmit copy of judgment to PUC or the Department of Motor Vehicles, whichever has jurisdiction over the affected carrier, with complaint requesting that the carrier's certificate of public convenience and necessity or permit be immediately revoked); *Pub. Util. Code §§ 1033.8(b), (c), 5285.6(b), (c)*, 5379.7(b), (c) (procedures when PUC receives complaint from Director)].

An uninsured employer's obligation to reimburse the Uninsured Employers Benefits Trust Fund for an award of workers' compensation benefits that the UEBTF paid to an injured employee is not an excise tax for purposes of federal bankruptcy law and is, therefore, dischargeable in bankruptcy proceedings [*George v. Uninsured Employers Fund (9th Cir. 2004) 361 F.3d 1157, 1162-1164]* .

In one case a plaintiff against whose property a lien had been filed by the UEF [now called the UEBTF] sued individual employees of the UEF to recover damages, alleging a federal civil rights claim and several state law claims. The trial court found that the federal claim was barred by the statute of limitations and that, on the state claims, the defendants were immune from suit. The case had arisen when an employee of another employer (not the plaintiff), who was using the plaintiff's contractor's license number without the plaintiff's consent, was injured. That employer had no workers' compensation insurance. The UEF paid benefits to the injured employee, then filed a lien on the plaintiff's residence. The court of appeal ruled that the plaintiff's federal civil rights claim was barred by the statute of limitations and that the state-law claims were barred by the California Government Claims Act, specifically by *Gov. Code § 821.6* [*Javor v. Taggart (2002) 98 Cal. App. 4th 795, 799-800, 120 Cal. Rptr. 2d 174]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewWorkers' Compensation & SSDIBenefit DeterminationsPermanent Total DisabilitiesWorkers' Compensation & SSDIBenefit DeterminationsTemporary Total DisabilitiesWorkers' Compensation & SSDICompensabilityCourse of EmploymentCausationWorkers' Compensation & SSDICoverageActions Against EmployersStatutory Requirements

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Chapter 577 WORKERS' COMPENSATION
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1. General Principles of Workers' Compensation Law

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§ 577.14 General Definitions

[1] Compensation

As used in the workers' compensation law, "compensation" includes every benefit or payment conferred by that law on an injured employee, or on his or her dependents in the event of the employee's death, without regard to negligence [*Lab. Code § 3207*; *see Adams v. Workers' Comp. Appeals Bd. (1976) 18 Cal. 3d 226, 231, 133 Cal. Rptr. 517, 555 P.2d 303* ; *Knopfer v. Flournoy (1973) 34 Cal. App. 3d 318, 320, 109 Cal. Rptr. 892]* .

[2] Dependency

[a] In General

For purposes of awarding benefits for the death of a covered employee, dependency is defined as reliance on another person for total or partial support. Total dependents are those who at the time of injury are supported solely by the decedent or who have a legal right to look to the decedent for their entire support. Partial dependents are those who at the time of the injury are partially supported by the decedent or who have a legal right to look to the decedent for partial support, but have some means of support other than the deceased's contributions [*see Mendoza v. Workers' Comp. Appeals Bd. (1976) 54 Cal. App. 3d 820, 823-824, 127 Cal. Rptr. 173]* .

No person is a dependent of any deceased employee unless, in good faith, he or she is a member of the family or household of the employee, or unless the person bears to the employee the relation of husband or wife, child, posthumous child, adopted child, stepchild, grandchild, father or mother, father-in-law or mother-in-law, grandfather or grandmother, brother or sister, uncle or aunt, brother-in-law or sister-in-law, or nephew or niece [*Lab. Code § 3503*; *see Donovan v. Workers' Comp. Appeals Bd. (1982) 138 Cal. App. 3d 323, 328-329, 187 Cal. Rptr. 869* (mere occupation of same residence does not confer status of dependency under *Lab. Code § 3503*)]. In allowing death benefits, the Legislature is not limited to dependents with a legal or moral claim to support from the deceased employee, but may, as it has done, extend the benefit to those whose maintenance has been voluntarily and gratuitously assumed by the employee [*Wings West Airlines v. Workers' Comp. Appeals Bd. (1986) 187 Cal. App. 3d 1047, 1051, 232 Cal. Rptr.*

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Dependency is determined as of the date of the employee's injury [*Lab. Code §§ 3501, 3502*; *see Wings West Airlines v. Workers' Comp. Appeals Bd. (1986) 187 Cal. App. 3d 1047, 1051, 232 Cal. Rptr. 343* ; *Donovan v. Workers' Comp. Appeals Bd. (1982) 138 Cal. App. 3d 323, 329 n.6, 187 Cal. Rptr. 869* ; *Roblyer v. Workers' Comp. Appeals Bd. (1976) 62 Cal. App. 3d 574, 580, 133 Cal. Rptr. 246]* . In cases involving cumulative injuries, the "time of injury" set forth in *Lab. Code § 3502* has the same meaning as the "date of injury" set forth in *Lab. Code § 5412* [*Department of the California Highway Patrol v. Workers' Comp. Appeals Bd. (1995) 33 Cal. App. 4th 1828, 1836, 40 Cal. Rptr. 2d 188]* .

[b] Presumption of Dependency

[i] Children

A child under 18 years of age, or a child of any age found by any trier of fact, whether contractual, administrative, regulatory, or judicial, to be physically or mentally incapacitated from earning, is conclusively presumed to be wholly dependent for support on a deceased employee-parent with whom the child was living at the time of the injury resulting in the parent's death or for whose maintenance the parent was legally liable at the time of the injury resulting in the parent's death, if there is no surviving totally dependent parent [*Lab. Code § 3501(a)*; *see Arp v. Workers' Comp. Appeals Bd. (1977) 19 Cal. 3d 395, 410, 138 Cal. Rptr. 293, 563 P.2d 849]* .

[ii] Spouses

For injuries occurring on or after January 1, 1990, a spouse to whom a deceased employee is married at the time of death is conclusively presumed to be wholly dependent for support on the deceased employee if the surviving spouse earned $30,000 or less in the 12 months immediately preceding the death [*Lab. Code § 3501(b)*].

[c] Actual Dependency

In all other cases, questions of entire or partial dependency and questions as to who are dependents and the extent of their dependency are determined in accordance with the facts as they exist at the time of the employee's injury [*Lab. Code § 3502*].

Actual dependency in fact, as opposed to presumptive dependency, is determined by the support actually given by the deceased and the extent of the dependent's reliance on that support [*see Mendoza v. Workers' Comp. Appeals Bd. (1976) 54 Cal. App. 3d 820, 824, 127 Cal. Rptr. 173* (partial dependency on income of deceased siblings established)]. For example, in a case requiring a determination of when parents should be considered "partial dependents" of their adult children living at home, for purposes of recovering death benefits, the court concluded that the deceased adult child had to have been providing a net financial benefit to the household, deducting first those costs attributable solely to the deceased. In that case, the adult child had been paying his parents $150 per month. Unrebutted testimony indicated that the monthly cost of the child's food exceeded this amount. Thus, said the court, the child's monthly payment, while making *him less dependent on them*, did not make them dependent on him. Expressing the same point another way, the court noted that, following the child's death, the household's monthly food bill decreased by more than the $150 that the child had been contributing to the household income. Consequently, the parents were not eligible to receive death benefits [*Smith v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 560, 568-570, 117 Cal. Rptr. 2d 420]* .

[3] Injury and Compensability

[a] In General

As used in the workers' compensation law, "injury" includes any injury or disease arising out of the employment [*Lab.*

Code § 3208; *see J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (1984) 153 Cal. App. 3d 327, 332-333, 200 Cal. Rptr. 219]* . The term includes:

- any disease that may be infectious, contagious, or the product or aggravation of a discogenic disease [*Chavez v. Workmen's Comp. Appeals Bd. (1973) 31 Cal. App. 3d 5, 11, 106 Cal. Rptr. 853]* ;

- illnesses such as heart disease that may result from the cumulative effect of each day's strain [*Chavez v. Workmen's Comp. Appeals Bd. (1973) 31 Cal. App. 3d 5, 8-10, 12 n.6, 106 Cal. Rptr. 853]* ;

- a psychoneurotic injury caused by the work environment [*Baker v. Workmen's Comp. Appeals Bd. (1971) 18 Cal. App. 3d 852, 861, 96 Cal. Rptr. 279]* ; and

- a psychiatric injury sustained in the course of the worker's employment [*see Cooper v. Workers' Comp. Appeals Bd. (1985) 173 Cal. App. 3d 44, 48-49, 218 Cal. Rptr. 783* ; *see also* discussion under *§ 577.140[3][d]*].

A number of statutes define "injury" to include certain illnesses or disabilities that manifest themselves during employment with respect to specified workers [*see Lab. Code §§ 3212, 3213*; *see also Lab. Code § 3208.05* ("injury" includes a reaction to or a side effect arising from health care provided by an employer to a health care worker that is intended to prevent the development or manifestation of any bloodborne disease, illness, syndrome, or condition recognized as occupationally incurred by Cal/OSHA, the Federal Centers for Disease Control, or other appropriate governmental entities)].

The California Supreme Court has stated that a compensable injury is an injury that causes disability or the need for medical treatment when the disability or need for medical treatment is occupationally related, and that a compensable injury may be physical, emotion, or both, so long as the injury is disabling [*Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 752-753, 7 Cal. Rptr. 2d 808, 828 P.2d 1195]* .

[b] Specific Versus Cumulative Injuries

An injury may be either "specific," occurring as the result of one incident or exposure that causes disability or the need for medical treatment, or "cumulative," occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes disability or the need for medical treatment [*Lab. Code § 3208.1*; *see Bassett-McGregor v. Workers' Comp. Appeals Bd. (1988) 205 Cal. App. 3d 1102, 1110, 252 Cal. Rptr. 868* ; *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (1984) 153 Cal. App. 3d 327, 332-333, 200 Cal. Rptr. 219* ; *Chavez v. Workmen's Comp. Appeals Bd. (1973) 31 Cal. App. 3d 5, 7-9, 11, 106 Cal. Rptr. 853]* .

An employee who suffers from a cumulative injury may invoke the rights and benefits provided under the workers' compensation laws if the cumulative effects of the repetitive events result in a compensable injury, i.e., one resulting in lost wages or the need for medical treatment [*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (1993) 16 Cal. App. 4th 227, 234, 20 Cal. Rptr. 2d 26]* . Under *Lab. Code § 3208.1*, an injury causing a need for medical treatment is compensable even in the absence of disability [*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (1993) 16 Cal. App. 4th 227, 236, 20 Cal. Rptr. 2d 26]* .

In any given case, there can be more than one injury, either specific or cumulative, or a combination of both, arising from the same event or from separate events. The number and nature of the injuries sustained are questions of fact for the WCJ or the WCAB. For example, one exposure may result in two distinct injuries, posing a question of fact for the WCJ or the WCAB. The nature and number of injuries suffered are determined by the events leading to the injury, the employee's medical history, and the medical testimony received [*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (1993) 16 Cal. App. 4th 227, 234-235, 20 Cal. Rptr. 2d 26* (stating that employee who suffered nervous

breakdown, and also developed ulcer, as result of work-related stress would have two distinct injuries from one exposure)].

[c] Date of Injury

[i] In General

Determining the date of injury is important because the date of injury is one of the events that may commence the running of the statute of limitations for recovery of medical or disability benefits [*see Lab. Code §§ 5404, 5405, 5407*; *see also § 577.25[2]*]. The date of injury is also relevant to determination of the applicability of those statutes amended and enacted by 1989 Stats., chs. 892 and 893, and the corresponding regulations [*see 8 Cal. Code Reg. §§ 10100-10137*], which apply only to injuries occurring on or after January 1, 1990 [*see discussion under § 577.10*].

[ii] Specific Injuries

The date of injury is the date during the employment on which the alleged incident or exposure occurred for the consequences of which compensation is claimed [*Lab. Code § 5411*].

[iii] Cumulative Injuries

In cases of occupational diseases or cumulative injuries, however, the date of injury is the date on which the employee first suffered disability from the disease or injury and either knew, or in the exercise of reasonable diligence should have known, that the disability was caused by his or her present or prior employment [*Lab. Code § 5412*; *see Lab. Code § 3208.1*; *see also Bassett-McGregor v. Workers' Comp. Appeals Bd. (1988) 205 Cal. App. 3d 1102, 1110, 252 Cal. Rptr. 868* ; *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (1984) 153 Cal. App. 3d 327, 336, 341-342, 200 Cal. Rptr. 219* ; *Hanna v. Workmen's Comp. Appeals Bd. (1973) 32 Cal. App. 3d 719, 722, 108 Cal. Rptr. 227]* . Thus, for the purpose of the statute of limitations, the date of a cumulative injury requires concurrence of two elements [*see Bassett-McGregor v. Workers' Comp. Appeals Bd. (1988) 205 Cal. App. 3d 1102, 1110, 252 Cal. Rptr. 868]* :

- Compensable disability; and
- Knowledge of causation by the employment.

[iv] Knowledge of Injury

Whether the employee knew, or in the exercise of reasonable diligence should have known, that the disability was caused by the employment is a question of fact. The employer has the burden of proof on this issue, and the burden is not sustained merely by showing that the employee knew he or she had some symptoms [*Chambers v. Workmen's Comp. App. Bd. (1968) 69 Cal. 2d 556, 559, 72 Cal. Rptr. 651, 446 P.2d 531* ; *City of Fresno v. Workers' Comp. Appeals Bd. (1985) 163 Cal. App. 3d 467, 471, 209 Cal. Rptr. 463]* .

With respect to when the employee knew or should have known that his or her disability was industrially caused, the Court of Appeal for the Fifth Appellate District has concluded, based on prior case law and other authorities, that an applicant will not be charged with knowledge that his or her disability is job-related without medical advice to that effect, unless the nature of the disability and the applicant's training, intelligence, and qualifications are such that the applicant should have recognized the relationship between the known adverse factors involved in the employment and his or her disability [*City of Fresno v. Workers' Comp. Appeals Bd. (1985) 163 Cal. App. 3d 467, 473, 209 Cal. Rptr. 463]* .

Division Two of the Court of Appeal for the Fourth Appellate District, however, characterizing the foregoing rule as "a bit overly expansive" in light of prior case law, said that the absence of a medical opinion confirming causation by the

employment is but one important circumstance to be considered together with other circumstances in determining in a particular case whether the applicant should reasonably have known that his or her injury was industrially caused [*Nielsen v. Workers' Comp. Appeals Bd. (1985) 164 Cal. App. 3d 918, 929-930, 210 Cal. Rptr. 843]* . In a subsequent case, the Court of Appeal for the Fifth Appellate District noted the conflict between *City of Fresno* and *Nielsen*, but concluded that, under the standards of either case, substantial evidence supported the WCAB's determination in the case before it that the applicant knew, or in the exercise of reasonable diligence should have known, that the applicant's disability was work related more than one year prior to filing her claim for cumulative disability [*Bassett-McGregor v. Workers' Comp. Appeals Bd. (1988) 205 Cal. App. 3d 1102, 1111-1113, 252 Cal. Rptr. 868]* .

[v] Date of Injury Versus Fact of Injury

The date of injury and the fact of injury are not equivalent, and it is therefore possible to find that an employee has sustained a cumulative industrial injury or occupational disease without making a finding as to the date of injury when the injury has caused no temporary or permanent disability, but has resulted in a need for medical treatment [*J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (1984) 153 Cal. App. 3d 327, 340, 200 Cal. Rptr. 219]* .

With respect to cumulative injuries, if the "date of injury" as determined pursuant to *Lab. Code § 5412* is on or after January 1, 1990, the parties and counsel must comply with the workers' compensation law as revised by 1989 Stats., chs. 892 and 893, and the corresponding regulations [*see 8 Cal. Code Reg. §§ 10100-101370*], and must use any applicable new forms promulgated by the Division of Workers' Compensation and the WCAB. The revised provisions govern, regardless of the fact that the conditions that caused the injury may have predated January 1, 1990.

[d] Psychiatric Injuries

[i] Causation; Actual Events of Employment

For injuries occurring on or after January 1, 1990, a psychiatric injury is compensable under the workers' compensation law if [*Lab. Code § 3208.3(a), (b)*].

- It is a mental disorder that causes disability or the need for medical treatment;

- It is diagnosed pursuant to procedures promulgated by the Administrative Director pursuant to *Lab. Code § 139.2(j)(4)*, or, until those procedures are promulgated, it is diagnosed using the terminology and criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine; and

- The employee demonstrates by a preponderance of the evidence that actual events of employment were responsible for at least 10 percent of the total causation from all sources contributing to the psychiatric injury (if the injury occurred prior to July 16, 1993) or that the actual events of employment were predominant as to all causes combined of the psychiatric injury (if the injury occurred on or after July 16, 1993).

In the case of employees whose injuries occurred on or after July 16, 1993, as the result of being a victim of a violent act or from direct exposure to a significant violent act, the employee is required to demonstrate by a preponderance of the evidence that actual events of employment were a "substantial cause" of the injury, meaning at least 35 to 40 percent of the causation from all sources combined [*Lab. Code § 3208.3(b)(2), (3)*]. It was the intent of the Legislature in enacting *Lab. Code § 3208.3* to establish a "new and higher threshold of compensability" for psychiatric injury under the workers' compensation law [*Lab. Code § 3208.3(c)*]. Thus, the phrase "predominant as to all causes" in *Lab. Code § 3208.3(b)(1)*, requires that the work-related cause of an employee's psychiatric injury be greater than 50 percent of the

entire set of causal factors [*Dept. of Corrections v. Workers' Comp. Appeals Bd. (1999) 76 Cal. App. 4th 810, 816, 90 Cal. Rptr. 2d 716]* .

The court of appeal has held that an employee's psychiatric injury satisfied the standard for compensability set forth in *Lab. Code § 3208.3(b)(1)* only if it was proven that events of employment were predominant as to all causes combined of the psychiatric disability taken as a whole. The court found that the legislative history of the statute indicated that the Appeals Board's award of benefits, even though the AME had found that the employee's overall psychiatric injury was only 35-percent industrially caused but stated that one of three separate diagnoses was caused exclusively by industrial factors, was contrary to the legislature's intention [*Sonoma State University v. Workers' Comp. Appeals Bd. (2006) 142 Cal. App. 4th 500, 504-506, 48 Cal. Rptr. 3d 330]* .

The statutory language has been held applicable to a psychiatric injury claimed as a compensable consequence of a precipitating physical injury, and the precipitating physical injury has been held to constitute an actual event of employment. That is, a *consequential* psychiatric injury is compensable if and only if it is more than half attributable to the physical industrial injury [*Lockheed Martin Corp. v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1237, 1249, 117 Cal. Rptr. 2d 865]* .

In one case, the court of appeal annulled and remanded the Appeals Board's award of benefits to an employee for work-related psychiatric injury, when it found that only one of the four factors relied on by the Board, namely, the employee's daily interactions with angry customers of his employer, fell within the definition of actual events of employment in *Lab. Code § 3208.3(b)(1)*, while the other three factors, namely, the downsizing of the employer, the loss of value of the employer's stock owned by the employee, and the employee's concern about his employer's future and his retirement funds, did not fall within the definition of actual events of employment. The court concluded that a reasonable probability existed that, but for the error, the Board would not have concluded that actual events of the employee's employment were predominant as to all causes combined of psychiatric injury [*Pacific Gas & Electric v. W.C.A.B. (Bryan) (2004) 114 Cal. App. 4th 1174, 1182-1184, 8 Cal. Rptr. 3d 467]* .

In another case, the court of appeal held that an employee did not suffer psychiatric injury AOE/COE as a result of actual events of employment that were predominant as to all causes combined, when it found that substantial evidence supported the Appeals Board's factual findings that the employee's supervisor and co-workers did not persecute or harass her and that it was the employee who caused a stressful work environment by being rude, inflexible, easily upset, and demeaning toward other employees. Moreover, said the court of appeal, the fact that the employee subjectively misperceived as harassment the disdainful reaction of her co-workers to her mistreatment of them did not entitle her to workers' compensation benefits for psychiatric injury, since the disdainful reactions of co-workers to the employee's abusive conduct toward them were neither "actual events of employment" nor the "predominant" cause of the employee's psychiatric injury. Rather, the predominant cause of the employee's injury was the employee herself, through her intentional abuse of her co-workers, whereas the "actual events of employment" language of *Lab. Code § 3208.3(b)(1)* required the employee to establish objective evidence of harassment, persecution, or other basis for the alleged psychiatric injury [*Verga v. Workers' Comp. Appeals Bd. (2008) 159 Cal. App. 4th 174, 183-189, 70 Cal. Rptr. 3d 871*].

The California Supreme Court has held the provisions of *Lab. Code § 3208.3* inapplicable to members of the California Public Employees' Retirement System (PERS). In this case, a public employee's application for disability retirement, alleging cumulative workplace trauma, including psychiatric injury, had been approved without a finding as to whether the psychiatric injury was industrial in character. The employee petitioned the Appeals Board, pursuant to *Gov. Code § 21166*, for a finding of fact on that issue, since public employee disability retirement benefits based on industrial injury are substantially higher than those based on non-industrial injury. *Gov. Code § 21166* mandates that in such situations theAppeals Board use "the same procedure as in workers' compensation hearings" to "determine whether the disability is industrial." The Court held that this language merely directs the Appeals Board to use its fact-finding apparatus, including rights of notice, hearing, and representation by counsel, to make this determination. The statutory language

does not, said the Court, direct the Appeals Board to apply workers' compensation *substantive* law, specifically not *Lab. Code § 3208.3*'s high threshold for finding a psychiatric injury to be industrial. Rather, *Gov. Code § 20046*'s lower threshold of disability, "as a result of injury or disease arising out of and in the course of ... employment," governs [*Pearl v. Workers' Comp. Appeals Bd. (2001) 26 Cal. 4th 189, 194-198, 109 Cal. Rptr. 2d 308, 26 P.3d 1044* ; *see also Abraham v. Workers' Comp. Appeals Bd. (2003) 113 Cal. App. 4th 1082, 1087-1089, 6 Cal. Rptr. 3d 820* (superior court had no jurisdiction to review Appeals Board decision when Board jurisdiction was invoked, pursuant to *Gov. Code § 21166*, for determination as to whether disability of public safety employee, member of Public Employees Retirement System, was industrial)].

[ii] Six-Month Rule

Notwithstanding any other provision of the workers' compensation law, workers' compensation will not be paid for a psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months. The six months of employment need not be continuous [*Lab. Code § 3208.3(d)*]. The six-month minimum employment period of *Lab. Code § 3208.3(d)* does not apply, however, if the psychiatric injury is caused by a sudden and extraordinary employment condition [*Matea v. Workers' Comp. Appeals Bd. (2006) 144 Cal. App. 4th 1435, 1447-1450, 51 Cal. Rptr. 3d 314* (employee met his burden of establishing that he suffered psychiatric injury as result of sudden and extraordinary employment condition, making psychiatric injury compensable even though it occurred during first six months of employment, when court of appeal found that lumber falling into aisle and onto employee's leg was such uncommon, unusual, and totally unexpected event that it would naturally be expected to cause psychic disturbances even in diligent and honest employee)]. *Lab. Code § 3208.3(d)* may not be construed to authorize an employee or the dependents of an employee to bring an action at law or equity for damages against an employer for a psychiatric injury, when those rights would not exist pursuant to the exclusive remedy doctrine [*see Lab. Code § 3602*] in the absence of the amendment of *Lab. Code § 3208.3* by 1991 Stats., ch. 115 [*Lab. Code § 3208.3(d)*].

The court of appeal has held that the rule regarding six months of employment applies to all claims of injury to the psyche (other than those subject to the statutory exception of having been caused by "a sudden and extraordinary employment condition"), including those claimed to have arisen out of physical industrial injuries [*Wal-Mart Stores, Inc. v. Workers' Comp. Appeals Bd. (2003) 112 Cal. App. 4th 1435, 1441-1443, 5 Cal. Rptr. 3d 822]* .

[iii] Post-Termination Claims

When the claim for compensation is filed after notice of termination of employment or layoff, including voluntary layoff, and the claim is for an injury occurring on or after July 16, 1993, and prior to the time of the notice, no compensation is payable unless the employee demonstrates by a preponderance of the evidence that actual events of employment werepredominant as to all causes combined of the psychiatric injury and that one or more of the following conditions exist [*Lab. Code § 3208.3(e)*]:

- Sudden and extraordinary events of employment were the cause of the injury.

- The employer has notice of the psychiatric injury prior to the notice of termination or layoff.

- The employee's medical records compiled prior to notice of termination of layoff contain evidence of treatment of the psychiatric injury.

- On a finding of sexual or racial harassment by any trier of fact, whether contractual, administrative, regulatory, or judicial.

- Evidence that the date of injury is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.

A notice of termination or layoff that is not followed within 60 days by a termination or layoff is not subject to the provisions, discussed above, and these provisions do not apply until receipt of a later notice of termination or layoff. The issuance of frequent notices of termination or layoff to an employee is considered a bad faith personnel action and makes the foregoing provisions inapplicable to the employee [*Lab. Code § 3208.3(g)*].

[iv] Good Faith Personnel Actions

No compensation is payable by an employer for a psychiatric injury that was substantially caused by a lawful, nondiscriminatory, good faith personnel action. The burden of proof rests with the party asserting the issue [*Lab. Code § 3208.3(h)*].

The Court of Appeal has interpreted this statutory language in a manner that allows for an employer's mistake. The employer had demoted an employee as part of an employer-wide reduction in force and after the employee's supervisor had led him to believe that his demotion might be avoidable. The court held that the correct legal standard is whether the employer made and carried out a regular and routine personnel decision with subjective good faith and whether the employer's actions were objectively reasonable. Here, the demotion was shown to have been justified by the employer's fiscal concerns and not to have been the product of an unlawful animus toward the employee, even if the employer had made mistakes in carrying out the demotion and attempting to protect the employee from demotion [*City of Oakland v. Workers' Comp. Appeals Bd. (2002) 99 Cal. App. 4th 261, 267-270, 120 Cal. Rptr. 2d 873]* .

In a case involving an employee who alleged psychiatric injury caused by allegations against him of racial discrimination against a fellow employee and by the employer's subsequent investigation of those allegations, the Court of Appeal concluded that the WCAB's finding that the investigation did not constitute a lawful, nondiscriminatory, good faith personnel action was not supported by substantial evidence. The court noted that the employer's investigation was mandated by law, that racial discrimination in employment is prohibited by both state and federal law, that the prohibition against workplace racial discrimination is a fundamental public policy, and that the employer's duty to prevent harassment and discrimination is affirmative and mandatory. That the employer was later, after investigating the racial discrimination claim, unable to substantiate the accusation did not remove the investigation from the realm of good faith employer personnel actions. There was no evidence, said the court, of an arbitrary or unlawful motive for the employer's investigation. Nor was there any evidence of an intent to mislead, deceive, or defraud or of collusion or unlawful design by an employee of the employer in the investigation [*Northrop Grumman Corp. v. Workers' Comp. Appeals Bd. (2002) 103 Cal. App. 4th 1021, 1035-1037, 127 Cal. Rptr. 2d 285]* .

[e] Multiple and Successive Injuries

When disability, need for medical treatment, or death results from the combined effects of two or more injuries, whether specific, cumulative, or both, all questions of fact and law must be separately determined with respect to each injury, including, but not limited to, the apportionment between the injuries of liability for disability benefits, the cost of medical treatment, and any death benefit [*Lab. Code § 3208.2*; *see Lab. Code § 5303*; *see also Aetna Cas. & Surety Co. v. Workmen's Comp. Appeals Bd. (1973) 35 Cal. App. 3d 329, 332-343, 110 Cal. Rptr. 780* ; *Chavez v. Workmen's Comp. Appeals Bd. (1973) 31 Cal. App. 3d 5, 9-10, 106 Cal. Rptr. 853]* . For example, if an employee becomes disabled, is off work, and then returns to work and again becomes disabled, there is a question of fact as to whether the new disability is due to the old injury or to the new and separate injury [*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (1993) 16 Cal. App. 4th 227, 234, 20 Cal. Rptr. 2d 26]* .

The purpose of *Lab. Code §§ 3208.2* and *5303* is to preclude the cumulation of injuries subject to separate statutory remedies in a single claim so as to escape the bar of the statute of limitations (discussed under *§ 577.25*) [*Wilkinson v. Workers' Comp Appeals Bd. (1977) 19 Cal. 3d 491, 501-502 n.5, 138 Cal. Rptr. 696, 564 P.2d 848* ; *Buhlert Trucking v. Workers' Comp. Appeals Bd. (1988) 199 Cal. App. 3d 1530, 1539, 247 Cal. Rptr. 190]* . *Lab. Code §§ 3208.2* and

5303 are unrelated to the substantive law of apportionment governed by *Lab. Code §§ 4663* and *4750* [4750 repealed in 2004], which govern liability for permanent disability caused by successive injuries [*see Wilkinson v. Workers' Comp Appeals Bd. (1977) 19 Cal. 3d 491, 501-502 n.5, 138 Cal. Rptr. 696, 564 P.2d 848* ; *Buhlert Trucking v. Workers' Comp. Appeals Bd. (1988) 199 Cal. App. 3d 1530, 1535, 1538, 247 Cal. Rptr. 190* ; *but see* Benson v. Workers' Comp. Appeals Bd. (2007) 72 Cal. Comp. Cases 1620, 1622, 1634-1635 (Appeals Board en banc opinion) (rule established by *Wilkinson v. W.C.A.B.*, which provided that injured worker who, while employed by same employer, sustained two separate injuries to same part of body, which became permanent and stationary at same time, was entitled to receive combined award of permanent disability, is no longer generally applicable because inconsistent with post-SB 899 requirement that apportionment be based on causation, and in light of current versions of *Lab. Code §§ 4663(a)* and *(c)* and *4664(a)*, as explained by *Brodie v. Workers' Comp. Appeals Bd. (2007) 40 Cal. 4th 1313, 57 Cal. Rptr. 3d 644, 156 P.3d 1100* , Appeals Board must now determine and apportion to cause of disability for each industrial injury, meaning that all potential causes of disability, whether from current industrial injury, prior or subsequent industrial injury, or prior or subsequent nonindustrial injury or condition, must be taken into consideration), *aff'd sub nom. Benson v. Workers' Comp. Appeals Bd. (2009) 170 Cal. App. 4th 1535, 1549-1560, 89 Cal. Rptr. 3d 166* ; *see also Schmidt v. Workers' Comp. Appeals Bd. (1994) 28 Cal. App. 4th 1458, 1463, 35 Cal. Rptr. 2d 279* (apportionment under *Lab. Code § 4663* requires that part of disability would have resulted from normal progress of underlying nonindustrial disease)].

Lab. Code § 3208.2 applies to the combination of injuries, not to periods of disability. Thus, if an employee has two periods of disability, i.e., the inability to work, but these two periods are connected by a continuous need for medical treatment caused by a single work-related cumulative injury, the two periods of disability are not considered distinct, and a WCJ does not impermissibly merge the two periods in violation of *§ 3208.2* [*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (1993) 16 Cal. App. 4th 227, 236-237, 20 Cal. Rptr. 2d 26]* .

If the applicant has received a prior award of permanent disability, it is conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury [*Lab. Code § 4664(b)*; *see Lab. Code § 4663(d)* (employee who claims industrial injury required, upon request, to disclose all previous permanent disabilities or physical impairments); *see also § 577.46[3][c]* (physician who prepares report addressing issue of permanent disability due to claimed industrial injury must in that report address issue of causation of permanent disability)]. This presumption is a presumption affecting the burden of proof [*Lab. Code § 4664(b)*].

The court of appeal has held that the Appeals Board correctly determined that, pursuant to *Lab. Code § 4664(b)*, an employee was not entitled to prove that he was medically rehabilitated from a prior permanent disability when he sustained a subsequent industrial injury, when the court found that the legislature intended the statute's presumption to be conclusive, not rebuttable, notwithstanding the second sentence in the statute, which states that this presumption affects the burden of proof. The court annulled the decision of the Appeals Board and held that the Board incorrectly determined that the employee had the burden of disproving overlap between the current permanent disability and the previous disability in order to establish his claim to permanent disability benefits. Rather, found the court, the employer, while able to rely, pursuant to *Lab. Code § 4664(b)*, on the conclusive presumption that the employee's permanent disability that was the subject of the prior award existed at the time of the subsequent industrial injury, nonetheless had the burden of proving overlap in order to establish its right to apportionment of the employee's permanent disability [*Kopping v. Workers' Comp. Appeals Bd. (2006) 142 Cal. App. 4th 1099, 1106-1115, 48 Cal. Rptr. 3d 618]* .

In 2006, the legislature amended *Lab. Code § 4663* to provide that the statute's apportionment provisions do not apply to injuries or illnesses covered under *Lab. Code §§ 3212 through 3213.2* [*Lab. Code § 4663(e)*]. Moreover, in adding this provision to the statute, the legislature stated that its intent was that this act be construed as declaratory of existing law [Stats. 2006, ch. 836, § 2].

Since April 19, 2004, the accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee cannot exceed 100 percent over the employee's lifetime, unless the employee's

injury or illness is conclusively presumed to be total in character pursuant to *Lab. Code § 4662* [*Lab. Code § 4664(c)(1)*]. As used in this statute, the regions of the body are [*Lab. Code § 4664(c)(1)*]:

- (A) Hearing.
- (B) Vision.
- (C) Mental and behavioral disorders.
- (D) The spine.
- (E) The upper extremities, including the shoulders.
- (F) The lower extremities, including the hip joints.
- (G) The head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in (A) through (F).

Nothing in this statute is to be construed to permit the permanent disability rating for each individual injury sustained by an employee arising from the same industrial accident, when added together, to exceed 100 percent [*Lab. Code § 4664(c)(2)*].

SB 899, effective April 19, 2004, contained Section 47, which stated that SB 899 "shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision, or award." The court of appeal has held that there was no "existing order, decision, or award" in the case before the court, within the meaning of Section 47 of SB 899, and that the legislature intended Section 47's language to be consistent with the general rule that statutory rights end during litigation with repeal or amendment of the statute unless appeals were exhausted and a final judgment existed. The court held that reopening in workers' compensation generally refers to reopening orders, decisions, or awards for new and further disability under *Lab. Code § 5410* and that the Section 47 language incorporated the language of good cause needed under the Appeals Board's continuing jurisdiction to rescind, alter, or amend an order, decision, or award under *Lab. Code §§ 5803* and *5804*. *Lab. Code §§ 5410*, *5803*, and *5804*, said the court, normally apply to orders, decisions, or awards that are beyond the reconsideration period or when appeals have been exhausted and the decision is final and no longer pending, and applying apportionment under new *Lab. Code §§ 4663* and *4664* in the present case did not reopen, rescind, alter, or amend a previous "existing order, decision, or award" of permanent disability. Thus, the employee's claims were pending and not final judgments, making *Lab. Code §§ 5410*, *5803*, and *5804* irrelevant, and application of SB 899 was not precluded by Section 47 [*Kleemann v. W.C.A.B. (2005) 127 Cal. App. 4th 274, 285-288, 25 Cal. Rptr. 3d 448]* .

Another court of appeal, following *Kleemann*, affirmed an Appeals Board order that had remanded the case to the WCJ for the purpose of determining the applicability of SB 899, which had been enacted 10 days after the WCJ's order denying apportionment, when the employer petitioned for reconsideration of the WCJ's order in light of SB 899. The court of appeal held that an Appeals Board determination was not "final" for purposes of considering apportionment under SB 899 until the Board had issued a final judgment and the appellate process had been exhausted, which had not occurred in the present case, so that the language of Section 47 of SB 899 that SB 899 "shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision, or award of the Workers' Compensation Appeals Board" was no barrier to applying SB 899's apportionment provisions to the present case [*Marsh v. Workers' Comp. Appeals Bd. (2005) 130 Cal. App. 4th 906, 912-916, 30 Cal. Rptr. 3d 598]* . Both *Kleemann* and *Marsh* were followed in another case in which the court of appeal held that repeal of former *Lab. Code § 4663* was effective immediately on enactment of SB 899 on April 19, 2004, and that new *Lab. Code §§ 4663* and *4664* were applicable to any case still pending, such as the present case, except those cases that were finally concluded, subject only to the Appeals Board's

continuing jurisdiction under *Lab. Code §§ 5803* and *5804*. The court of appeal found that the language of Section 47 of SB 899, stating that SB 899 "shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision, or award," essentially tracked the continuing jurisdiction language of *Lab. Code §§ 5803* and *5804*. Continuing jurisdiction to reopen a case was different, said the court of appeal, from the Appeals Board's reconsideration of a "final" order of the Board or a WCJ. The court of appeal found that it could presume that the Legislature, inusing the language quoted above, was intentionally referring to the Board's continuing jurisdiction authority under *Lab. Code §§ 5803* and *5804* [*Rio Linda Union School District v. W.C.A.B. (Scheftner) (2005) 131 Cal. App. 4th 517, 525-532, 31 Cal. Rptr. 3d 789]* .

In May 2007, the California Supreme Court resolved the uncertainty, generated by conflicting court of appeal opinions, regarding whether the language of *Lab. Code § 4663(c)*, plus the language of *Lab. Code § 4664(a)*, meant that the so-called apportionment "Formula A" adopted by the Supreme Court in *Fuentes* [*Fuentes v. Workers' Compensation Appeals Bd. (1976) 16 Cal. 3d 1, 128 Cal. Rptr. 673, 547 P.2d 449]* , pursuant to which the percentage of disability attributable to the new injury is calculated by subtracting the old permanent disability rating from the new permanent disability rating, then consulting the table for the award due this difference, remained the proper method for calculating apportionment. Injured employees had argued that statutory changes made by SB 899 mandated the use of "Formula C," rejected by the Supreme Court in *Fuentes*, pursuant to which the dollar award for the new injury is calculated as if apportionment were not an issue, then the dollar award of the old injury is subtracted. The Supreme Court found that neither the plain language of relevant portions of SB 899 nor the legislative history of that bill evidenced any legislative intent to abandon "Formula A" [*Brodie v. Workers' Comp. Appeals Bd. (2007) 40 Cal. 4th 1313, 1323-1332, 57 Cal. Rptr. 3d 644, 156 P.3d 1100]* .

[f] Excluded Injuries

The workers' compensation law relates to medical and/or occupational injuries, that is, to personal injuries, and to those risks to which the employee is exposed by the fact of being employed in the industry. Hence, the word "injury," as used in that law, does not include, for example, such things as damage to reputation as the result of slander [*Howland v. Balma (1983) 143 Cal. App. 3d 899, 904, 192 Cal. Rptr. 286]* . Nor does the law provide compensation for intentional infliction of emotional distress when no allegation of physical disability is made [*McGee v. McNally (1981) 119 Cal. App. 3d 891, 895, 174 Cal. Rptr. 253* ; *Renteria v. County of Orange (1978) 82 Cal. App. 3d 833, 840-842, 147 Cal. Rptr. 447]* . If physical injury or disability results as well as emotional distress, however, the workers' compensation law provides the exclusive remedy for the employee [*see Hollywood Refrigeration Sales Co. v. Superior Court (1985) 164 Cal. App. 3d 754, 758-759, 210 Cal. Rptr. 619* ; *Ankeny v. Lockheed Missile & Space Co. (1979) 88 Cal. App. 3d 531, 533-536, 151 Cal. Rptr. 828* ; *Lab. Code § 3208.3* (psychiatric injuries compensable under workers' compensation law); *see also Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 151, 157 n.9, 160, 162, 233 Cal. Rptr. 308, 729 P.2d 743* ; *Valenzuela v. State of California (1987) 194 Cal. App. 3d 916, 919, 922-924, 240 Cal. Rptr. 45* ; *Gates v. Trans Video Corp. (1979) 93 Cal. App. 3d 196, 204-206, 155 Cal. Rptr. 486]* . For discussion of the exclusive nature of workers' compensation remedies, see *§ 577.310 et seq*.

Language in the Supreme Court's decision in *Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 233 Cal. Rptr. 308, 729 P.2d 743* , suggests a distinction between emotional distress resulting in "disability," which is covered by workers' compensation, and emotional distress not resulting in disability. One court of appeal has concluded that the Court in *Cole* adopted an "alternative action theory," under which courts are required to analyze whether a tort action is authorized. Under this analysis, tort recovery is permitted if the tort plaintiff did not sustain "personal injury" within the meaning of the workers' compensation statute. If he or she did sustain "personal injury," tort recovery is denied if the injury "arose out of employment," but is otherwise permitted even if the injury is a type of harm covered by workers' compensation [*Jones v. Los Angeles Community College Dist. (1988) 198 Cal. App. 3d 794, 805, 244 Cal. Rptr. 37]* .

[4] Temporary Disability

The term "temporary disability" means an impairment of bodily function caused by industrial injury, reasonably expected to be completely curedor materially improved with proper medical attention [*see Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (1993) 16 Cal. App. 4th 227, 235, 20 Cal. Rptr. 2d 26* ; *Chavira v. Workers' Comp. Appeals Bd. (1991) 235 Cal. App. 3d 463, 473, 286 Cal. Rptr. 600]* . Temporary disability may either be partial, when the employee is able to earn some income during the healing period, or total, when the injury renders the employee unable to earn any income during that period [*Herrera v. Workers' Comp. Appeals Bd. (1969) 71 Cal. 2d 254, 257, 78 Cal. Rptr. 497, 455 P.2d 425* ; *see Lab. Code §§ 4653-4657* (standards of payment for partial and total temporary disability)]. Temporary disability benefits are primarily intended to replace lost earnings [*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (1993) 16 Cal. App. 4th 227, 235, 20 Cal. Rptr. 2d 26]* . If an employee has two discrete periods of temporary disability, they are not merged into a single disability, but are treated as separate entitlements to benefits [*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (1993) 16 Cal. App. 4th 227, 235-236, 20 Cal. Rptr. 2d 26]* . For discussion of temporary disability benefits, see *§ 577.45[3]* .

[5] Permanent Disability

A permanent disability is one that causes impairment of earning capacity or of normal use of a member, or results in a competitive handicap in the open labor market [*Sidders v. Workers' Comp. Appeals Bd. (1988) 205 Cal. App. 3d 613, 628, 252 Cal. Rptr. 304* ; *Franklin v. Workers' Comp. Appeals Bd. (1978) 79 Cal. App. 3d 224, 237, 145 Cal. Rptr. 22* ; *see Lab. Code § 4660(a)*].

A disability is considered permanent when the employee has reached maximal improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment [*8 Cal. Code Reg. § 10152*; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (1993) 16 Cal. App. 4th 227, 235, 20 Cal. Rptr. 2d 26]* . If applied to a progressive occupational disease, however, the foregoing definition is inadequate. The reference to "maximum improvement" obviously refers to the more classical concept of "injury," which envisions a traumatic incident resulting in corporal injury with a period of healing to a point of greatest improvement. The term did not envision an insidious, progressive disease process that results from a remote, undramatic work exposure and is of little or no use in determining the status of such a condition [*General Foundry Service v. Workers' Comp. Appeals Bd. (1986) 42 Cal. 3d 331, 335, 228 Cal. Rptr. 243, 721 P.2d 124]* .

A disability cannot be both permanent and temporary at the same time. If a disability changes from temporary to permanent, the permanent disability is considered a new and further disability [*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (1993) 16 Cal. App. 4th 227, 235, 20 Cal. Rptr. 2d 26]* . Whether a disability is permanent or temporary is a question of fact [*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (1993) 16 Cal. App. 4th 227, 236, 20 Cal. Rptr. 2d 26]* .

Permanent disability may be either partial or total [*see Lab. Code § 4662* (specific permanent disabilitites conclusively presumed total)]. Permanent disability benefits are intended to compensate an injured employee both for actual incapacity to work, and for the physical impairment suffered by the employee [*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (1993) 16 Cal. App. 4th 227, 235, 20 Cal. Rptr. 2d 26]* . For discussion of permanent disability benefits, see *§ 577.45[4]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDICompensabilityCourse of EmploymentCausationWorkers' Compensation & SSDICompensabilityInjuriesCumulative InjuriesWorkers' Compensation & SSDICompensabilityInjuriesPsychological InjuriesWorkers' Compensation & SSDICompensabilityInjuriesSuccessive InjuriesWorkers' Compensation & SSDIDefensesStatutes of Limitations

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§ 577.15 Employer's Death

The employer's death after sustaining an injury by an employee does not impair the employee's right to proceed before the appeals board against the employer's estate. The failure of the employee or of his or her dependents to cause a claim to be presented to the executor or administrator of the employer's estate does not bar or suspend the right [*Lab. Code § 5306*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDICoverageActions Against EmployersGeneral Overview

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§ 577.16 Employer's Bankruptcy

If an illegally uninsured employer petitions for bankruptcy after an employee has filed a claim for compensation benefits, an automatic stay goes into effect, barring any creditor from taking any action to collect [*see 11 U.S.C. § 362(a)(1)*]. Relief from the automatic stay in bankruptcy is, however, generally granted, on request, for workers' compensation proceedings [*Ortiz v. Workers' Comp. Appeals Bd. (1992) 4 Cal. App. 4th 392, 397, 5 Cal. Rptr. 2d 484]* . Relief from the stay may be obtained either by stipulation with counsel or by motion before the bankruptcy court [*Ortiz v. Workers' Comp. Appeals Bd. (1992) 4 Cal. App. 4th 392, 397, 5 Cal. Rptr. 2d 484]* .

An action before the WCAB to obtain judgment against an uninsured employer, which is a prerequisite to the UEBTF's obligation to pay benefits, is not barred by the bankruptcy discharge injunction. Moreover, in such situations no bankruptcy court order is necessary for the WCAB action to proceed [*In re Munoz (9th Cir. 2002) 287 B.R. 546, 550, 554-556]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawCase AdministrationAdministrative PowersStaysGeneral OverviewBankruptcy LawDischarge & DischargeabilityEffects of DischargeGeneral OverviewWorkers' Compensation & SSDICoverageActions Against EmployersStatutory Requirements

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§ 577.17 Serious and Willful Misconduct

[1] By Employee

When an employee's injury is caused by his or her own serious and willful misconduct, the compensation otherwise recoverable is reduced one half, except when [*Lab. Code § 4551*; *see also 8 Cal. Code Reg. § 10440*]:

- The injury results in death or permanent disability of 70 percent or more;

- The injury is caused by the employer's failure to comply with any law or safety order of the Division of Occupational Safety and Health relating to the safety of places of employment; or

- The injured employee is under 16 years of age at the time of injury.

The reduction in compensation is not enforceable, valid, or binding in any respect until the WCAB has so determined by its findings and award [*Lab. Code § 4552*; *see 8 Cal. Code Reg. §§ 10440-10445* (relating to pleading allegations of serious and willful misconduct); *§§ 577.394, 577.395*].

The standard of serious and willful misconduct is the same for an employee as it is for an employer [*Hawaiian Pineapple Co., Ltd. v. Ind. Acc. Com. (1953) 40 Cal. 2d 656, 664, 255 P.2d 431]* . Serious and willful conduct is something more than negligence, or even gross negligence. It involves conduct of a quasi-criminal nature and the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its possible consequences [*Mercer-Fraser Co. v. Industrial Acci. Com. (1953) 40 Cal. 2d 102, 117, 251 P.2d 955]* . For discussion of the time limitations on proceedingsto reduce compensation on the ground of the employee's serious and willful misconduct, see *§ 577.25[2][e]*. For discussion of the effect on compensation of an employer's serious and willful misconduct, see [2], *below*.

[2] By Employer

[a] In General

The amount of compensation otherwise recoverable is increased one half, together with costs and expenses not in excess of $250, when an employee is injured by reason of the serious and willful misconduct of any of the following [*Lab. Code § 4553*]:

- The employer or the employer's managing representative;
- If the employer is a partnership, one of the partners or a managing representative or general superintendent of the partnership; or
- If the employer is a corporation, an executive, managing officer, or general superintendent of the corporation.

Negligence of any degree, including gross negligence, does not constitute serious and willful misconduct [*Mercer-Fraser Co. v. Industrial Acci. Com. (1953) 40 Cal. 2d 102, 117, 251 P.2d 955]* . The employer must know of the dangerous condition, know that the probable consequences of its continuance will involve serious injury to an employee, and deliberately fail to take corrective action [*Johns-Manville Sales Corp. v. Workers' Comp. Appeals Bd. (1979) 96 Cal. App. 3d 923, 933, 158 Cal. Rptr. 463]* . When the employer's misconduct involves concealment of dangers in the workplace or a deliberate failure to assure that the workplace is safe, *Lab. Code § 4553* is the sole remedy for the additional compensation, and an action at law for damages is barred [*Johns-Manville Products Corp. v. Superior Court (1980) 27 Cal. 3d 465, 474, 165 Cal. Rptr. 858, 612 P.2d 948* ; *see also* subpart B, § 577.310 et seq.].

An increase in workers' compensation benefits due under *Lab. Code § 4553* applies not only to compensation indemnity benefits, but to every benefit or payment conferred by the provisions of the Workers' Compensation Act, including non-indemnity benefits such as vocational rehabilitation, medical treatment payments and medical-legal fees [*Ferguson v. Workers' Comp. Appeals Bd. (1995) 33 Cal. App. 4th 1613, 1624-1626, 39 Cal. Rptr. 2d 806]* . So long as an award for increased compensation calculated on the basis of all compensation received by the injured worker does not provide the injured worker more than is necessary to compensate the worker for all damages he or she sustained as a result of the willful misconduct of the employer, the award does not constitute punitive damages and is, therefore, not constitutionally excessive [*Ferguson v. Workers' Comp. Appeals Bd. (1995) 33 Cal. App. 4th 1613, 1624-1626, 39 Cal. Rptr. 2d 806]* .

For discussion of the time limitations on proceedings to increase compensation on the ground of the employer's serious and willful misconduct, see *§ 577.25[2][e]* . For a form of application for adjudication alleging serious and willful misconduct of an employer, see *§ 577.396*. For discussion of the effect on compensation of an employee's serious and willful misconduct, see [1], *above.*

[b] Willfully Uninsured Employer

When an employer has willfully failed to secure the payment of compensation, the amount of compensation recoverable by an injured employee, or by his or her dependents in the event of the employee's death, is increased by 10 percent [*Lab. Code § 4554*]. The failure to secure the payment of compensation as required by statute is prima facie evidence of willfulness [*Lab. Code § 4554*]. An employee is not, however, entitled to a 10 percent increase in the amount of damages recovered from the employer in a civil action pursuant to *Lab. Code § 3706* [*Leung v. Chinese Six Companies (1992) 2 Cal. App. 4th 801, 806-807, 3 Cal. Rptr. 2d 593* ; *see also* discussion in subpart B, *§ 577.312[2]*].

Legal Topics:

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

Workers' Compensation & SSDICompensabilityInjuriesSelf-Inflicted InjuriesWorkers' Compensation & SSDICoverageActions Against EmployersIntentional MisconductWorkers' Compensation & SSDICoverageActions Against EmployersStatutory Requirements

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51-577 California Forms of Pleading and Practice--Annotated § 577.18

§ 577.18 Unlawful Discrimination

[1] Against Injured Employee

No employer may discharge, threaten to discharge, or in any way discriminate against an employee because the employee has filed or made known his or her intention to file a claim for compensation with his or her employer or an application for adjudication with the WCAB, or has received a rating, award, or settlement. An employer engaging in such discrimination is guilty of a misdemeanor, and the employee's compensation is increased by one half, but in no event more than $10,000, together withcosts and expenses not in excess of $250. In addition, the employee is entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer [*Lab. Code § 132a(1)*]. *Lab. Code § 132a* reflects a broad policy against discrimination, and therefore an employer who discriminates against an injured employee may be guilty of a violation of that section without violating any of its specific prohibitions [*Judson Steel Corp. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 658, 667, 150 Cal. Rptr. 250, 586 P.2d 564]* .

An injured worker discriminated against because of disability from a work related injury may bring a claim before the WCAB under *Lab. Code § 132a* as well as an action in state court seeking remedies under the Fair Employment and Housing Act and common-law wrongful discharge theory [*City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 1156, 1161, 77 Cal. Rptr. 2d 445* (overruling *Portillo v. G. T. Price Products, Inc. (1982) 131 Cal. App. 3d 285, 182 Cal. Rptr. 291*); *see also* subpart B, *§ 577.310 et seq.*]. The statute serves a remedial function by providing some compensation to an employee who suffersdiscrimination as a result of an employment-related injury, and is to be liberally construed, as required by *Lab. Code § 3202* [*Judson Steel Corp. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 658, 668, 150 Cal. Rptr. 250, 586 P.2d 564* ; *see* *Crown Appliance v. Workers' Comp. Appeals Bd. (2004) 115 Cal. App. 4th 620, 9 Cal. Rptr. 3d 415* (finding that employer discriminated against employee in violation of *Lab. Code § 132a*, when evidence showed that employer believed employee was faking disability, that employer wanted to dismiss employee since employee returned to work on light duty, that employer's evidence of customer complaints against employee was not persuasive, and that employer terminated employee in retaliation for filing workers' compensation claim)].

The California Supreme Court has held that an employee made no prima facie showing of violation of *Lab. Code § 132a* when his employer refused to pay him temporary disability indemnity for time spent away from work attending medical treatment appointments, when the employee was permanent and stationary after his industrial injury, had returned to work, and received a medical treatment award. Moreover, the employee failed to show a right to prevent his employer from requiring him to use his sick leave and/or vacation leave while attending these medical appointments [*Department of Rehabilitation v. W.C.A.B. (Lauher) (2003) 30 Cal. 4th 1281, 1297, 1301, 135 Cal. Rptr. 2d 665, 70 P.3d 1076]* . However, the court of appeal, in a slightly different fact situation, held that an employer had discriminated against its employee, in violation of *Lab. Code § 132a*, by requiring the employee, who had returned to work following industrial injuries, to use earned vacation time rather than sick leave to attend medical appointments needed to care for those industrial injuries, while permitting employees with non-industrial injuries to use their sick leave for medical appointments. The court pointed out that local government entities (City of Santa Barbara in this case) and unions may not create policies that discriminate against their industrially injured employees to their detriment [*Andersen v. W.C.A.B. (2007) 149 Cal. App. 4th 1369, 1376-1380, 57 Cal. Rptr. 3d 839]* .

The court of appeal has held that an employee did not make a prima facie showing of discrimination in violation of *Lab. Code § 132a* in the following situation: The employee sustained an industrial injury to his neck and was taken off work by his treating physician. The reports and releases to return to work from the treating physician and the agreed medical evaluator received by the employer were unclear and ambiguous regarding the employee's ability to return to his usual and customary duties. When the agreed medical evaluator resolved that question in his 12/1/2006 deposition by testifying that he thought that the employee could probably perform his usual and customary job, the employer returned the employee to work on 1/8/2007. Because the employee presented no evidence that the employer treated him disadvantageously as a consequence of the industrial nature of his injury, as compared with how the employer treated any non-industrially injured employee, he failed to satisfy the test established in *Department of Rehabilitation v. W.C.A.B. (Lauher)*, discussed above, for making a prima facie showing of discrimination [*Gelson's Markets v. Workers' Comp. Appeals Bd. (Fowler) (2009) 179 Cal. App. 4th 201, 209-210, 101 Cal. Rptr. 3d 548*].

Proceedings for increased compensation pursuant to *Lab. Code § 132a(1)* must be instituted by filing an appropriate petition with the WCAB within one year from the discriminatory act or date of termination. The WCAB has full power, authority, and jurisdiction to try and determine finally all matters specified under *Lab. Code § 132a*, subject only to judicial review; except that it has no jurisdiction to try and determine a misdemeanor charge against the employer. In such a case, the WCAB may refer, and any worker may complain of, suspected violations of the criminal misdemeanor provisions of *Lab. Code § 132a* to the Division of Labor Standards Enforcement, or directly to the office of the public prosecutor [*Lab. Code § 132a*; *see 8 Cal. Code Reg. § 10447* (relating to pleadings in proceedings under *Lab. Code § 132a*)].

In a case not originating in the workers' compensation system, an employee's claim alleging wrongful termination in retaliation for filing a workers' compensation claim failed because the employer terminated the employee's employment for a legitimate, nondiscriminatory reason, i.e., management's loss of confidence in the employee. The court of appeal found that the employer made a statistical showing that it did not discharge employees for filing workers' compensation claims, and that, when, as here, the employee relies solely on temporal proximity in response to the employer's evidence of a non-retaliatory reason for termination, the employee does not create a triable issue as to pretext [*Arteaga v. Brink's, Inc. (2008) 163 Cal. App. 4th 327, 356-357, 77 Cal. Rptr. 3d 654]* .

In another case not originating in the workers' compensation system, an employer's policy regarding "cash out" payments of excess accumulated vacation hours to sheriff's deputies who were not on *Lab. Code § 4850* leave as a result of industrial injuries, as opposed to its policy regarding such payments to deputies who were on such leave, was held by the court of appeal to discriminate against the latter group in violation of *Lab. Code §§ 4850* and *132a*. Any deputy who accumulated more than 320 hours of vacation time could defer the hours in excess of 320 to the following year. If those excess hours were not used by the end of that year, the employer paid the deputy for them. Generally, if this "cash out" payment took place during the deputy's final compensation measurement period (the period used to determine the

deputy's salary for purposes of retirement benefits), the "cash out" payment was pensionable income, i.e., part of the calculation of the deputy's salary for purposes of retirement benefits. However, the employer would not "cash out" deferred excess hours of a deputy who had been on *Lab. Code § 4850* leave at any time during the deferral year. Rather, such a deputy's excess hours remained in his or her account, and such a deputy who retired in the year following the *Lab. Code § 4850* leave never had an opportunity to "cash out" or use those hours. Instead, such a deputy was compensated for those hours at retirement, but this compensation was not pensionable income. Thus, a deputy who accumulated excess vacation hours, but who had never been injured on duty, and a deputy who retired after taking leave due to a non-job-related injury, might collect more in retirement benefits than a deputy who retired after having suffered an industrial injury, even if all of these deputies had the same employment history in terms of rank, years of experience, etc. [*Los Angeles County Professional Peace Officers' Association v. County of Los Angeles (2008) 165 Cal. App. 4th 63, 67-72, 80 Cal. Rptr. 3d 572]* .

[2] Against Witness

If an employer discharges, threatens to discharge, or in any manner discriminates against an employee because the employee testified or made known his or her intentions to testify in another employee's case before a WCJ, the employer is guilty of a misdemeanor, and the employee is entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer [*Lab. Code § 132a(3)*].

Proceedings for lost wages and work benefits must be instituted by filing an appropriate petition with the WCAB within one year from the discriminatory act or date of termination. The WCAB has full power, authority, and jurisdiction to try and determine finally all matters specified under *Lab. Code § 132a*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewWorkers' Compensation & SSDICoverageActions Against EmployersRetaliatory Discharge

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§ 577.19 Fraudulent Workers' Compensation Claims

[1] In General

The Legislature has declared that workers' compensation fraud harms employers by contributing to increasingly high costs of workers' compensation insurance and self-insurance, and harms employees by undermining the perceived legitimacy of all workers' compensation claims. The Legislature has also declared its intent to prevent workers' compensation insurance fraud, thereby reducing costs, assisting in restoring confidence and faith in the workers' compensation system, and facilitating expedient and full compensation for employees injured at the workplace [*see Ins. Code § 1871(d), (e)*].

It is unlawful to do any of the following [*Ins. Code § 1871.4(a)*]:

- Make or cause to be made any knowingly false or fraudulent material statement or material representation for the purpose of obtaining or denying any compensation, as defined in *Lab. Code § 3207*.

- Present or cause to be presented any knowingly false or fraudulent written or oral material statement in support of, or in opposition to, any claim for compensation for the purpose of obtaining or denying any compensation, as defined in *Lab. Code § 3207*.

- Knowingly assist, abet, solicit, or conspire with any person who engages in an unlawful act under *Ins. Code § 1871.4*.

- Make or cause to be made any knowingly false or fraudulent statements with regard to entitlement to benefits with the intent to discourage an injured worker from claiming benefits or pursuing a claim.

- Make or cause to be made any knowingly false or fraudulent material statement or material

representation for the purpose of obtaining or denying any of the benefits or reimbursement provided in the Return-to-Work Program established under *Lab. Code § 139.48*.

- Make or cause to be made any knowingly false or fraudulent material statement or material representation for the purpose of discouraging an employer from claiming any of the benefits or reimbursement provided in this Return-to-Work Program.

For purposes of *Ins. Code § 1871.4*, the term "statement" includes but is not limited to any notice, proof of injury, bill for services, payment for services, hospital or doctor records, X rays, test results, medical-legal expense as defined in *Lab. Code § 4620*, other evidence of loss, injury, or expense, or payment [*Ins. Code § 1871.4(a)*]. An employee's false statements and misrepresentations made on deposition are sufficient to support a conviction pursuant to the statute [*People v. Post (2001) 94 Cal. App. 4th 467, 475-476, 114 Cal. Rptr. 2d 356]* .

The court of appeal, affirming the trial court's order pursuant to an employee's anti-SLAPP motion that struck the employer's complaint that alleged the employee's filing of a fraudulent workers' compensation claim, held that the employer failed to demonstrate a probability that it would prevail on the merits of its fraud claim because the employer could not establish either of two elements of a cause of action for fraud, justifiable reliance or resulting damages. The employer argued that justifiable reliance was shown by its forwarding of the employee's workers' compensation claim to its insurer, but the court of appeal found that the employer was required to do so both by law and by insurance policy provisions, not because it relied on the employee's alleged fraud. Similarly, when the employer argued that it was damaged in the form of increased premiums, the court of appeal found such an argument premature because the employee's workers' compensation claim had not yet been adjudicated. Finally, the court of appeal found sound policy considerations supporting its conclusions, in that permitting an employer to bring a civil action for fraud against an employee while a workers' compensation proceeding was pending could have a chilling effect on the employee's exercise of the right to file a workers' compensation claim [*Leegin Creative Leather Products, Inc. v. Diaz (2005) 131 Cal. App. 4th 1517, 1523-1527, 33 Cal. Rptr. 3d 139]* .

It is also illegal for a firm, corporation, partnership, association, or any person acting in his or her individual capacity as a public or private employee, to solicit, accept, or refer any business to any individual or entity with the knowledge that, or with reckless disregard for whether, the individual or entity for or from whom the solicitation or referral is made, or the individual or entity who is solicited or referred, intends to violate *Penal Code § 550* or *Ins. Code § 1871.4* [*Penal Code § 549*].

As of March 6, 2005, an insurer or self-insured employer must provide the following notice, in both English and Spanish, to an injured worker on or with a check for temporary disability benefits [*Ins. Code § 1871.8* (Stats. 2004, ch. 2 (4th ext. session) (operative January 1, 2005; effective March 6, 2005))]:

WARNING:
You are required to report to your employer or the insurance company any money that you earned for work during the time covered by this check, and before cashing this check. If you do not follow these rules, you may be in violation of the law and the penalty may be jail or prison, a fine, and loss of benefits.

[2] Enforcement of Anti-Fraud Laws

Ins. Code § 1871.4 is enforced by the Department of Insurance's Fraud Division [*Ins. Code § 1872*; *see also Ins. Code §§ 1872.3* (powers of Fraud Division), *1872.83(a)* (Division required to forward names of fraud suspects licensed under Business and Professions Code to appropriate disciplinary body), *1872.95* (Medical Board, Board of Chiropractic Examiners, and State Bar must designate employees to investigate and report on possible fraudulent activities relating to workers' compensation)]. The exchange of information between insurers and district attorneys, the office of the

Attorney General, the Department of Insurance, the Department of Industrial Relations, and licensing agencies is governed by the Workers' Compensation Insurance Fraud Reporting Act, *Ins. Code § 1877 et seq.* In order to facilitate such exchange of information, it has been held that insurers are absolutely privileged under *Civ. Code § 47* to report workers' compensation insurance fraud [*Fremont Compensation Insurance Co. v. Superior Court of Orange County (1996) 44 Cal. App. 4th 867, 875-877, 52 Cal. Rptr. 2d 211]* .

The court of appeal has held that a civil action for violation of *Ins. Code § 1871.7(b)* arising from fraudulent acts made unlawful by *Penal Code § 550(a)(10)* did not violate the exclusive remedy provision of the workers' compensation law. Moreover, said the court, a preponderance of the evidence was the appropriate standard of proof for liability under *Ins. Code § 1871.7*, since the court found no constitutional, statutory, or decisional law that imposed a burden to show liability by clear and convincing evidence [*People v. Thompson (2006) 136 Cal. App. 4th 24, 29-31, 37-38, 38 Cal. Rptr. 3d 677]* .

[3] Criminal and Civil Penalties

Violation of *Ins. Code § 1871.4* (discussed in [1], *above*) is punishable by imprisonment in county jail for one year, or in the state prison for two, three, or five years, or by a fine not exceeding $150,000 or double the value of the fraud, whichever is greater, or by both imprisonment and fine [*Ins. Code § 1871.4(b)*; *see also Ins. Code § 1871.4(c)* (enhancement for prior convictions); *People v. Webb (1999) 74 Cal. App. 4th 688, 693-694, 88 Cal. Rptr. 2d 259]* . Restitution must be ordered, including restitution for any medical evaluation or treatment services obtained or provided [*Ins. Code § 1871.4(b)*]. The court must determine the amount of restitution and the person or persons to whom the restitution must be paid [*Ins. Code § 1871.4(b)*]. A person convicted under this section may be charged the costs of investigation at the discretion of the court [*Ins. Code § 1871.4(b)*].

A conviction pursuant to *Ins. Code § 1871.4* that materially affects the basis of an order, decision, or award of the WCAB is sufficient grounds for a reconsideration of that order, decision, or award [*Lab. Code § 5803.5*]. *Ins. Code § 1871.4* may not be construed to preclude the applicability of any other provision of criminal law that applies or may apply to any transaction [*Ins. Code § 1871.4(d)*].

Following a workers' compensation fraud conviction, an employee who seeks to receive or retain workers' compensation benefits is barred from retaining or receiving any compensation which stems directly from the fraudulent representation [*Ins. Code § 1871.5*; *Tensfeldt v. Workers' Comp. Appeals Bd. (1998) 66 Cal. App. 4th 116, 123-124, 77 Cal. Rptr. 2d 691]* . However, whether the employee is barred from receiving *all* workers' compensation benefits following a fraud conviction must be determined on a case-by-case basis, depending on the nature of the employee's misrepresentation. To receive further workers' compensation benefits after a fraud conviction requires [*Tensfeldt v. Workers' Comp. Appeals Bd. (1998) 66 Cal. App. 4th 116, 125, 77 Cal. Rptr. 2d 691]* :

- An actual, otherwise compensable, industrial injury;

- Substantial medical evidence supporting an award of compensation not stemming from the fraudulent misrepresentation for which the employee was convicted; and

- That the employee's credibility is not completely destroyed so as to make the employee unbelievable with regard to any disputed issues in the compensation case.

An employee who is convicted for fraud because of a lie about the statutory compensability of an injury is precluded by *Ins. Code § 1871.5* from receiving or retaining *all* workers' compensation benefits, because the fraudulent misrepresentation is material to establishing an industrial injury and to entitlement to any benefits under the Labor Code [*Tensfeldt v. Workers' Comp. Appeals Bd. (1998) 66 Cal. App. 4th 116, 124, 77 Cal. Rptr. 2d 691]* . On the other hand, an employee who has been convicted of fraud may be able to retain or receive some compensation in the same

workers' compensation proceeding if it is shown that the compensation is not owed as a result of his or her unlawful conduct [*see Tensfeldt v. Workers' Comp. Appeals Bd. (1998) 66 Cal. App. 4th 116, 125, 77 Cal. Rptr. 2d 691]* . For example, a worker convicted of fraudulent misrepresentation in the acquisition of medically required special footwear, and ordered by the court to make restitution, was barred from receiving only future reimbursement for further purchases of shoes. Moreover, when the worker failed to make restitution as ordered, a credit sought by the defrauded insurer against other medical treatment was held an impermissible bar of benefits not directly emanating from the fraud [*Farmers Insurance Group v. W.C.A.B. (Sanchez) (2002) 104 Cal. App. 4th 684, 690-691, 128 Cal. Rptr. 2d 353]* .

In addition to the criminal penalties set forth in *Ins. Code § 1871.4*, *Lab. Code § 3820* provides civil money penalties for workers' compensation fraud.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesFraudFraud Against the GovernmentFalse ClaimsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsFraud

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51-577 California Forms of Pleading and Practice--Annotated § 577.20

§ 577.20 Consideration for Referral for Benefits

[1] In General

Lab. Code § 3215 provides that, except as otherwise permitted by law, it is a crime for any person acting individually or through his or her employees or agents to offer, deliver, receive, or accept any rebate, refund, commission, preference, patronage, dividend, discount, or other consideration, whether in the form of money or otherwise, as compensation orinducement for referring clients or patients to perform or obtain workers' compensation services or benefits [*Lab. Code § 3215*; *see also Lab. Code § 3218* (criminal penalty for violation); *Ins. Code § 1871.7* (civil penalty for use of runners or cappers to procure clients to perform or obtain workers' compensation services or benefits, or to procure clients to perform workers' compensation services or obtain benefits under an insurance contract)].

This prohibition does not, however, prevent an attorney or law firm from the following [*Ins. Code § 750.5*]:

- Dividing fees for legal services with a lawyer under circumstances expressly permitted by *Rule 2-200 of the Rules of Professional Conduct* of the State Bar.

- Offering or giving an incidental nonmonetary gift or gratuity to a person who has made a recommendation resulting in the employment of the attorney or law firm, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that the gift or gratuity would be forthcoming or that referrals would be made or encouraged in the future.

- Offering or giving a bonus to an employee who has made a referral or recommendation resulting in the employment of the attorney or law firm, provided that the bonus was not offered in consideration of any promise, agreement, or understanding that the bonus would be forthcoming or that referrals or recommendations would be made or encouraged in the future.

In addition, the prohibition does not apply to the recommendation of professional employment when the

recommendation is not prohibited by the State Bar Rules of Professional Conduct [*Lab. Code § 3217(a)*]. Similarly, it does not prohibit a public defender or assigned counsel from making known his or her availability as a criminal defense attorney to persons unable to afford legal counsel, whether or not those persons are in custody [*Lab. Code § 3217(b)*], nor does it preclude an attorney or law firm from providing persons or entities with legal services without charge or for a lawfully agreed upon attorney fee [*Lab. Code § 3217(e)*]. Finally, *Lab. Code § 3215* does not prohibit a workers' compensation insurer from offering an employer discounted rates based on the employer securing health or disability insurance from an affiliate of the insurer [*Lab. Code § 3217(f)*].

[2] Criminal and Civil Penalties

Lab. Code § 3219(a) provides that, except as otherwise permitted by law, any person acting individually or through his or her employees or agents, who offers or delivers any rebate, refund, commission, preference, patronage, dividend, discount, or other consideration to any adjuster of claims for compensation, as compensation, inducement, or reward for the referral or settlement of any claim, is guilty of a felony [*Lab. Code § 3219(a)(1)*]. It further provides that, except as otherwise permitted by law, any adjuster of claims for compensation who accepts or receives any rebate, refund, commission, preference, patronage, dividend, discount, or other consideration, as compensation, inducement, or reward for the referral or settlement of any claim, is guilty of a felony [*Lab. Code § 3219(a)(2)*].

Lab. Code § 3219(b) provides that any contract for professional services secured by any medical clinic, laboratory, physician, or other health care provider in this state in violation of *Ins. Code § 1871.4* or *Lab. Code §§ 3215* or *3219(a)* is void [*Lab. Code § 3219(b)*]. In any action against the provider, any judgment must include an order divesting the medical clinic, laboratory, physician, or other health care provider, and the owners and operators thereof, of any fees and other compensation received under the void contract. The judgment may also include an order prohibiting the person from further participation in any manner in the entity in which that person directly or indirectly owned or operated for a time period that the court deems appropriate [*Lab. Code § 3219(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesCrimes Against PersonsBriberyCommercial BriberyGeneral OverviewCriminal Law & ProcedureCriminal OffensesCrimes Against PersonsBriberyPublic OfficialsGeneral OverviewCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesAbuse of Public OfficeIllegal GratuitiesGeneral OverviewLegal EthicsClient RelationsAttorney FeesFee SplittingWorkers' Compensation & SSDIAdministrative ProceedingsCosts & Attorney Fees

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51-577 California Forms of Pleading and Practice--Annotated § 577.21

§ 577.21 Advertising

[1] False and Misleading Advertising

[a] In General

In 1992, the Legislature enacted the Workers' Compensation Truth in Advertising Act, the purpose of which is to assure truthful and adequate disclosure of all material and relevant information in advertising that solicits persons to file workers' compensation claims or to engage or consult an attorney or a medical care provider or clinic to consider a workers' compensation claim [*see Lab. Code §§ 5430, 5431*]. The implementing regulations specify that they do not apply to attorneys, physicians, government agencies, labor and charitable organizations, or non-profit tax-exempt bar associations whose primary business or purpose is other than providing workers' compensation services. However, they do apply to advertisers who may also be subject to attorney or physician workers' compensation advertising laws because they advertise with or for an attorney or physician [*8 Cal. Code Reg. § 9821(a)-(c)*]. The regulations may not be construed to obviate or lessen the obligations of attorneys or physicians under *Lab. Code §§ 5430-5434*, or under other provisions of law [*8 Cal. Code Reg. § 9821(a)*].

An "advertisement" is any form of communication in writing, photograph or picture, electronic broadcasting or transmission, that solicits any person

- To file a workers' compensation claim;
- To use any workers' compensation services [*see 8 Cal. Code Reg. § 9820(k)*]; or
- To engage or consult counsel or a medical care provider or clinic to consider a workers' compensation claim.

The form of advertisement may include, but is not limited to, advertising by newspaper, magazine, circular, form letter, publication, billboard, card, label, placard, transit advertisement, business card, envelope, book, list, directory, radio,

motion picture, video, television, or electronic mail [*8 Cal. Code Reg. § 9820(b)*]. Any such advertisements must contain a notice that making a false or fraudulent workers' compensation claim is a felony subject to up to five years in prison or a fine of up to $50,000 or double the value of the fraud, whichever is greater, or by both imprisonment and fine [*Lab. Code § 5432*; *see 8 Cal. Code Reg. § 9823(b)*]. Advertising by or on behalf of a non-attorney advisor or representative whose right to practice before the WCAB is suspended or revoked is completely prohibited [*8 Cal. Code Reg. § 9825*], as is advertising by or on behalf of a person who does not hold a valid, active license to provide medical goods or services for which a license is required [*8 Cal. Code Reg. § 9827*]. An advertisement for a workers' compensation non-attorney advisor or representative must identify the advertiser as a non-attorney by including a notice to that effect [*8 Cal. Code Reg. § 9824*]. An advertisement by or on behalf of one whose license to practice law in California is suspended or revoked must include a similar notice [*8 Cal. Code Reg. § 9826*].

Liability does not attach to third parties who merely disseminate false and misleading advertisements. This includes the following [*8 Cal. Code Reg. § 9820(c)*]:

- A publisher, printer, distributor, or circulator of a written medium;
- An operator of a broadcasting station, movie, or video production company;
- The operator of premises where advertisements are displayed; or
- An employee of anyone listed in items (1)-(3).

Any advertisement or other device designed to produce leads based on a response from a person to file a workers' compensation claim or to engage or consult an attorney or a medical care provider or clinic must disclose that an agent may contact the person if that is the fact. In addition, an individual who makes contact with a person as a result of acquiring that person's name from a lead-generating device must disclose that fact in the initial contact with that person [*Lab. Code § 5433(a)*]. The use of a name that is deceptive or misleading to solicit persons to file compensation claims is also prohibited, as is the use of misleading words, initials, letters, symbols, or other devices in advertisements [*Lab. Code § 5433(b)-(f)*; *see 8 Cal. Code Reg. § 9823(d)-(f)*]. Finally, advertisements may not imply that the reader, listener, or viewer may lose a right, privilege, or benefits under federal, state, or local law if he or she fails to respond to the advertisement [*Lab. Code § 5433(g)*].

[b] Criminal and Civil Penalties

The Administrative Director is responsible for investigating violations of the Act and regulations [*8 Cal. Code Reg. § 9833*]. To this end, he or she may issue orders to provide advertising-related information [*8 Cal. Code Reg. § 9834*] and compliance orders [*8 Cal. Code Reg. § 9835*]. Anyone aggrieved by an order issued by the director may request a hearing, which will be held in accordance with the Administrative Procedure Act [*8 Cal. Code Reg. § 9837*]. In addition to issuing compliance orders, the director may institute civil proceedings against any person for violation of the Act or regulations, or may refer any violation for civil, criminal, or professional disciplinary proceedings to others having jurisdiction. The director has discretion to pursue any or all available remedies [*8 Cal. Code Reg. § 9836*].

[2] Advertising Legal Services

In 1993, the Legislature enacted laws regarding advertising of legal services for obtaining workers' compensation benefits. Under the statute, any individual, firm, corporation, partnership, organization, or association that prints, displays, publishes, distributes, or broadcasts any advertising that purports to provide legal services for obtaining workers' compensation benefits must include the name of at least one attorney associated with the individual, firm, corporation, partnership, organization, or association in all such advertising [*Bus. & Prof. Code § 5499.30(a)*]. For purposes of this provision, "legal services" includes any service that refers potential clients to any attorney [*Bus. & Prof.*

Code § 5499.30(b)]. A violation of this provision is a misdemeanor, punishable by imprisonment in the county jail for up to one year or by a fine of up to $10,000, or both [*Bus. & Prof. Code § 5499.30(c)*].

In 1994, the Legislature enacted several laws regulating the advertising of legal services in general. In particular, *Bus. & Prof. Code § 6158* provides that, with regard to advertisements by electronic media, the message as a whole may not be false, misleading, or deceptive, and the message as a whole must be factually substantiated. For further discussion, see Ch. 72, *Attorney Practice and Ethics* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionFalse AdvertisingState RegulationCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewLegal EthicsLegal Services MarketingAdvertisingWorkers' Compensation & SSDIGeneral Overview

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§ 577.22 Employment Relationships

[1] In General

Coverage for work-related injuries is predicated on defined employment relationships, which are generally to be found not in the definition of employer but in the definitions of employee. That is, an "employee," as defined by specified employment relationships, is one who is entitled to workers' compensation coverage for an injury occurring in the course of the specified employment [*In-Home Supportive Services v. Workers' Comp. Appeals Bd. (1984) 152 Cal. App. 3d 720, 727, 199 Cal. Rptr. 697]* .

The term "employer" is defined as follows [*Lab. Code § 3300*]:

- The State of California and every state agency;
- Each county, city, district, and all public and quasi-public corporations and public agencies therein;
- Every person, including any public service corporation, that has any natural person in its service; and
- The legal representative of any deceased employer.

The term "employee" is broadly defined in *Lab. Code § 3351*. *Lab. Code §§ 3351* and *3351.5* specify several classes of persons as included within the definition of employee. Exclusions are set forth in *Lab. Code § 3352*. The court of appeal has held that *Lab. Code §§ 3351(d)* and *3352(h)* were the only relevant statutes for defining "employee" when the issue was whether an injured worker was a residential employee of the homeowners. The court stated that *Lab. Code § 3715(b)*, relied on by the Appeals Board in the present case, was inapplicable, since that statute applied to only uninsured homeowners, whereas the homeowners in the present case were insured. Thus, the injured worker was not an "employee" and was not entitled to workers' compensation benefits [*Cal. State Auto. Ass'n Inter-Ins. Bureau v. W.C.A.B. (Hestehauge) (2006) 137 Cal. App. 4th 1040, 1044-1048, 40 Cal. Rptr. 3d 743]* . In addition, the law contains

a number of statutes defining various employment relations as excluded from or included in the law [*see Lab. Code §§ 3352.94, 3358-3371*; *Graczyk v. Workers' Comp. Appeals Bd. (1986) 184 Cal. App. 3d 997, 1003-1004, 229 Cal. Rptr. 494* ; *see also Penal Code §§ 4017, 4017.5*; *Parsons v. Workers' Comp. Appeals Bd. (1981) 126 Cal. App. 3d 629, 634, 179 Cal. Rptr. 88* (jail inmates)]. An employee excluded from compensation benefits under *Lab. Code § 3352* retains his or her right to maintain a civil action for damages against his or her employer [*Graczyk v. Workers' Comp. Appeals Bd. (1986) 184 Cal. App. 3d 997, 1003-1004, 229 Cal. Rptr. 494]* .

For the purposes of the workers' compensation law, an employment relationship may exist prior to establishment of an employer-employee relationship in the contractual or common law sense [*see Laeng v. Workmen's Comp. Appeals Bd. (1972) 6 Cal. 3d 771, 774, 100 Cal. Rptr. 377, 494 P.2d 1* (person injured while participating in "tryout" for employment)] or after the employer-employee relationship has been terminated [*see Gates v. Trans Video Corp. (1979) 93 Cal. App. 3d 196, 202, 155 Cal. Rptr. 486* (discharged worker sustained injury while leaving jobsite)]. This does not apply, however, to a person merely calling at employment premises to inquire about the availability of employment, even though, if there were work, hiring would be a virtual certainty [*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (1976) 59 Cal. App. 3d 647, 654-655, 130 Cal. Rptr. 831]* .

[2] Special Employees

The employee of one employer may become the special employee of another employer so as to insulate the special employer from tort liability for injury to the employee, relegating the employee to the exclusive remedy provisions (*Lab. Code § 3602(a)*) of the workers' compensation law [*see Kowalski v. Shell Oil Co. (1979) 23 Cal. 3d 168, 174-179, 151 Cal. Rptr. 671, 588 P.2d 811* ; *Johnson v. Berkofsky-Barret Productions, Inc. (1989) 211 Cal. App. 3d 1067, 1074-1075, 260 Cal. Rptr. 67* ; *Barajas v. USA Petroleum Corp. (1986) 184 Cal. App. 3d 974, 983-985, 229 Cal. Rptr. 513]* . An employer can secure the payment of compensation on employees provided to the employer through an agreement with another employer, by entering into a valid and enforceable agreement with the other employer under which the other employer agrees to obtain, and does obtain, workers' compensation coverage for those employees [*Lab. Code § 3602(d)*]. In such cases, both employers will be considered to have secured the payment of compensation [*Lab. Code § 3602(d)*]. Employers who comply with this rule will not be subject to civil, criminal, or other penalties for failure to provide workers' compensation coverage or tort liability in the event an employee is injured, but may, in the absence of compliance, be subject to all three [*Lab. Code § 3602(d)*].

[3] Independent Contractors

[a] Defined

Independent contractors are not covered by the workers' compensation law. "Independent contractor" is defined as any person who renders service for a specified recompense for a specified result, under the control of his or her principal as to the result only and not as to the means by which it is accomplished [*Lab. Code § 3353*; *see S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 349, 256 Cal. Rptr. 543, 769 P.2d 399]* .

[b] Right to Control Work Test

Although the common law "control-of-work" test is included in the statutory definition of independent contractor [*see Lab. Code § 3353*, discussed under [a], *above*], the test must be applied in compensation cases with deference to the purposes of the workers' compensation law. The nature of the work and the overall arrangement between the parties must be examined to determine whether they come within the history and fundamental purposes of that law [*S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 353-354, 256 Cal. Rptr. 543, 769 P.2d 399* ; *see* discussion under *§ 577.11*].

The workers' compensation law intends comprehensive coverage of injuries in employment and accomplishes this goal by defining "employment" broadly in terms of "service to an employer" and by including a general presumption that any

person "in service to another" is a covered "employee." The express exclusion of "independent contractors" is purposeful and has a limited but important function; it recognizes those situations in which the goals of the workers' compensation law are best served by imposing the risk of "no-fault" work injuries directly on the provider, rather than the recipient, of a compensated service. This obviously is the case, for example, when the provider of service has the primary control over work safety, is best situated to distribute the risk and cost of injury as an expense of his or her own business, and has independently chosen the burdens and benefit of self-employment. This is the balance to be struck when deciding whether a worker is an employee or an independent contractor for the purposes of the workers' compensation law [*S.G.Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 354, 256 Cal. Rptr. 543*].

A business entity may not avoid its statutory obligations under the workers' compensation law by carving up its production process into minute steps, and then asserting that it lacks "control" over the exact means by which one such step is performed by the responsible workers [*S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 357, 256 Cal. Rptr. 543, 769 P.2d 399]* .

[c] Other Factors to Be Considered

Although the right to control work details is the "most important" or "most significant" consideration, several "secondary" indicia of the nature of a service relationship have been endorsed [*S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 350, 256 Cal. Rptr. 543, 769 P.2d 399]* . For example, strong evidence in support of an employment relationship is the right to discharge at will, without cause [*S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 350, 256 Cal. Rptr. 543, 769 P.2d 399* (citing *Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 949, 88 Cal. Rptr. 175, 471 P.2d 975* , and *Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43, 168 P.2d 686* , both involving unemployment insurance)].

Additional factors to be considered in deciding whether a worker is an employee or an independent contractor for the purposes of the workers' compensation law include those derived principally from Restatement (Second) of Agency § 220, as follows [*S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 351, 354, 256 Cal. Rptr. 543, 769 P.2d 399* (adding that, generally, the individual factors cannot be applied mechanically as separate tests, the factors are intertwined, and their weight often depends on particular combinations)]:

- Whether the one performing services is engaged in a distinct occupation or business;
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of a principal or by a specialist without supervision;
- The skill required in the particular occupation;
- Whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
- The length of time for which the services are to be performed;
- The method of payment, whether by the time or by the job;
- Whether or not the work is a part of the regular business of the principal; and
- Whether or not the parties believe they are creating the relationship of employer-employee.

The factors that must be established to prove independent contractor status in the case of a worker performing services

for which a license is required under *Bus. & Prof. Code § 7000 et seq.* (Contractors' State License Law) are set forth in *Lab. Code § 2750.5* [*see State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1985) 40 Cal. 3d 5, 9-10, 219 Cal. Rptr. 13, 706 P.2d 1146* ; *Truesdale v. Workers' Comp. Appeals Bd. (1987) 190 Cal. App. 3d 608, 614-618, 235 Cal. Rptr. 754* ; *Germann v. Workers' Comp. Appeals Bd. (1981) 123 Cal. App. 3d 776, 783-784, 176 Cal. Rptr. 868]* , and are also a helpful means of identifying the employee/contractor distinction generally [*S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 351, 351 n.5, 354, 256 Cal. Rptr. 543, 769 P.2d 399]* .

In addition, other jurisdictions have developed a six-part test to determine independent contractorship in light of the remedial purposes of the legislation, taking into account the "right to control the work," as well as factors similar to those set forth in Restatement (Second) of Agency § 220 and in *Lab. Code § 2750.5*. There are many points of similarity between these various tests, and all are logically pertinent to the inherently difficult determination of whether a provider of service is an employee or an excluded independent contractor for purposes of the workers' compensation law [*S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 354-355, 256 Cal. Rptr. 543, 769 P.2d 399]* .

The court of appeal has held that the exemption from the contractor's license requirement contained in *Bus. & Prof. Code § 7049* for construction or maintenance work incidental to "clearing or other work upon the land in rural districts for fire prevention purposes" meant that the trial court erred in ruling that the defendant was an employee as a matter of law pursuant to *Lab. Code § 2750.5*. The defendant, who was sued in civil court by the family of another worker whose death he was alleged to have negligently caused, had argued to the trial court that he was a fellow employee of the decedent and that, therefore, workers' compensation was the exclusive remedy. The court of appeal remanded the case for further proceedings on the question of fact of whether the defendant was an employee or an independent contractor [*Moehring v. Thomas (2005) 126 Cal. App. 4th 1515, 1520-1525, 25 Cal. Rptr. 3d 118]* .

In another case, the court of appeal, affirming the trial court's order denying plaintiff's petition for a writ of mandate, held that substantial evidence supported the determination by the Department of Industrial Relations that drivers for plaintiff courier service were functioning as employees rather than as true independent contractors. The court of appeal found that the question of the hiree's status must be considered in light of the history and remedial and social purposes of the Workers' Compensation Act, which are: (1) to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society; (2) to guarantee prompt, limited compensation for an employee's work injuries, regardless of fault, as an inevitable cost of production; (3) to spur increased industrial safety; and (4) in return, to insulate the employer from tort liability for employees' injuries. The court of appeal followed *S.G. Borello & Sons, Inc. v. Department of Industrial Relations [(1989) 48 Cal. 3d 341, 256 Cal. Rptr. 543, 769 P.2d 399]* , in finding that the functions performed by drivers (pick-up and delivery of papers and packages and driving in between) did not require a high degree of skill, that these functions constituted an integral heart of plaintiff's courier service business, that, by obtaining clients in need of this service and providing workers to conduct it, plaintiff retained all "necessary" control over the operation as a whole, and that these circumstances were enough to find an employment relationship for purposes of the Workers' Compensation Act, even in the absence of plaintiff's exercise of control over the details of work and with plaintiff being more concerned with the results of the work than with the means of its accomplishment [*JKH Enterprises, Inc. v. Department of Industrial Relations (2006) 142 Cal. App. 4th 1046, 1059-1066, 48 Cal. Rptr. 3d 563]* . In a subsequent case, the opposite result was reached when the court of appeal affirmed the trial court's judgment that the plaintiffs, representatives of a class of parcel and message drivers/deliverers, were independent contractors, not the defendant's employees. The court held that the trial court's jury instructions properly placed the burden on the defendant of rebutting the *Lab. Code § 3357* presumption that the plaintiffs were the defendant's employees and properly instructed the jury as to the factors to consider in resolving whether the plaintiffs were independent contractors. Moreover, said the court, the plaintiffs had not carried the burden of demonstrating that the trial court abused its discretion in declining to amend the class definition, since the plaintiffs failed to demonstrate that any trial court error in rulings regarding the class definition was sufficiently prejudicial to warrant reversal. Finally, the plaintiffs failed to carry the burden of demonstrating any evidentiary error when it failed even to identify specific testimony that was allegedly erroneously admitted [*Cristler v. Express Messenger Systems (2009) 171 Cal. App. 4th*

72, 79-90, 89 Cal. Rptr. 3d 34] .

Similarly, the court of appeal, affirming the trial court judgment denying an employer's petition for writ of administrative mandamus, held that the administrative record supported the conclusion that newspaper carriers were employees for purposes of the workers' compensation law, not independent contractors. Thus, the employer's workers' compensation insurer correctly classified the carriers as employees for purposes of the employer's workers' compensation policy. The court of appeal followed the analysis set forth in *S.G. Borello & Sons v. Department of Industrial Relations [(1989) 48 Cal. 3d 341, 256 Cal. Rptr. 543, 769 P.2d 399*] to find that the employer had the right to control the manner and means of the newspaper carriers' work, that various other *Borello* indicia demonstrated that the newspaper carriers were employees, and that the employer had failed to carry its burden of proving that the carriers were independent contractors [*Antelope Valley Press v. Steve Poizner as Insurance Commissioner (2008) 162 Cal. App. 4th 839, 842-843, 852-856, 75 Cal. Rptr. 3d 887*].

In a case not involving workers' compensation benefits, the court of appeal held that the Superior Court correctly denied an employers' association's requested declaratory relief to invalidate a precedential decision by the Unemployment Insurance Appeals Board (UIAB) that upheld an Employment Development Department (EDD) assessment of unemployment insurance employer contributions and penalties against a courier service, when the EDD had found that drivers for the courier service were employees, not independent contractors. The court of appeal found that California courts and administrative agencies were all authorized to apply the comprehensive and overlapping tests regarding employment status stated in *Borello* [*S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 256 Cal. Rptr. 543, 769 P.2d 399*] and that the reasoning of *Borello*, which arose in a workers' compensation context, applied equally to analysis of tax-related issues, such as employer contributions, requiring an employment determination [*see Unemp. Ins. Code § 621(b)*]. The court added that there was nothing in the record or in the UIAB's decision to suggest that there was no proper basis under the Unemployment Insurance Code's provisions for liability for employer assessments, independent of any liberal construction of the Code regarding benefits, or that there was any undue focus in the present case on employee protection, as opposed to employer rights. Finally, the court found that, contrary to the employer association's contentions, *Air Couriers International v. Employment Development Department* [*Air Couriers International v. Employment Development Department (2007) 150 Cal. App. 4th 923, 59 Cal. Rptr. 3d 37*] was correctly decided when it concluded that an employer had no basis to argue that the legal standards set forth in *Borello* were inapplicable in the unemployment insurance context [*Messenger Courier Association of the Americas v. California Unemployment Insurance Appeals Board (2009) 175 Cal. App. 4th 1074, 1089-1096, 96 Cal. Rptr. 3d 797*].

[d] Determination of Status

The determination of employee or independent-contractor status is one of fact if dependent on the resolution of disputed evidence or inferences. If the evidence is undisputed, the question becomes one of law. The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced [*S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 349, 256 Cal. Rptr. 543, 769 P.2d 399* (ruling that migrant harvesters of grower's cucumber crop were employees and not independent contractors, although written contract between harvesters and grower expressly provided that harvesters were independent contractors and not employees)].

[4] Presumptions

[a] Employee Status

Any person rendering services for another, other than as an independent contractor, or unless expressly excluded from coverage under the workers' compensation law, is presumed to be an employee [*Lab. Code § 3357*; *see Laeng v. Workmen's Comp. Appeals Bd. (1972) 6 Cal. 3d 771, 777, 100 Cal. Rptr. 377, 494 P.2d 1]* .

[b] Work for Which License Is Required

[i] In General

There is also a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to *Bus. & Prof. Code § 7000 et seq.* (Contractors' State License Law), or who is performing those services for a person who is required to obtain such a license, is an employee rather than an independent contractor [*Lab. Code § 2750.5*; *see State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1985) 40 Cal. 3d 5, 8-12, 15-16, 219 Cal. Rptr. 13, 706 P.2d 1146* ; *Campos Food Fair v. Superior Court (1987) 193 Cal. App. 3d 965, 967, 238 Cal. Rptr. 685* ; *Blew v. Horner (1986) 187 Cal. App. 3d 1380, 1384, 232 Cal. Rptr. 660]* .

[ii] Contractor's License

Any person performing any function or activity for which a contractor's license is required must hold a valid contractor's license as a condition of having independent contractor status [*Lab. Code § 2750.5*]. Thus, courts have held that a person lacking the requisite license may not be an independent contractor [*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1985) 40 Cal. 3d 5, 15, 291 Cal. Rptr. 13, 706 P.2d 1146* ; *Blew v. Horner (1986) 187 Cal. App. 3d 1380, 1384, 232 Cal. Rptr. 660]* .

In cases in which a contractor has represented to a principal that he or she is licensed, however, the contractor may be estopped to assert employee status [*see Chin v. Namvar (2008) 166 Cal. App. 4th 994, 1006-1009, 83 Cal. Rptr. 3d 294* (plaintiff, injured while performing painting services at shopping center owned by defendants, and who brought suit alleging causes of action for unfair competition, various Labor Code violations, wrongful termination, and negligence, was independent contractor, not employee of defendants, since *Lab. Code § 2750.5*, which creates rebuttable presumption that unlicensed person who performs work requiring license is employee, not independent contractor, was irrelevant because statute's presumption of employee status may be rebutted only as to persons who hold valid contractor's license, which plaintiff did not at time of injury, and trial court did not improperly impose on plaintiff burden of proving that he was employee but rather chose to believe defendants' evidence that plaintiff was independent contractor, with substantial evidence supporting trial court's finding that plaintiff was estopped to assert that he was employee because he had misrepresented himself to defendants as licensed contractor); *see also State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1985) 40 Cal. 3d 5, 16, 219 Cal. Rptr. 13, 706 P.2d 1146* (stating that mere failure of contractor to disclose to prospective employer that he or she is unlicensed is an insufficient basis for finding estoppel)]. But this does not apply to the employee of an unlicensed contractor because estoppel is an equitable doctrine and will not be applied against one who is blameless [*Nick Hagopian Drywall v. Workers' Comp. Appeals Bd. (1988) 204 Cal. App. 3d 767, 772, 251 Cal. Rptr. 455]* . Thus, if asubcontractor, for example, is unlicensed, workers' compensation liability for the subcontractor's employees will be imposed on the general contractor as a matter of law [*Nick Hagopian Drywall v. Workers' Comp. Appeals Bd. (1988) 204 Cal. App. 3d 767, 772, 251 Cal. Rptr. 455* ; *Rinaldi v. Workers' Comp. Appeals Bd. (1987) 196 Cal. App. 3d 571, 574, 242 Cal. Rptr. 895]* . In addition, the employee of an unlicensed subcontractor will be presumed to be an employee of the general contractor without regard to the fact that the unlicensed subcontractor was independently insured for workers' compensation [*Neighbours v. Buzz Oates Enterprises (1990) 217 Cal. App. 3d 325, 327-330, 333-334, 265 Cal. Rptr. 788]* .

The presumption of *Lab. Code § 2750.5* supplements rather than overrides the statutory definitions of employee and independent contractor. Therefore, although an unlicensed contractor who performs work for which a license is required cannot be an independent contractor, he or she may not be an employee either, if any of the statutory exclusions to workers' compensation coverage are applicable [*Furtado v. Schriefer (1991) 228 Cal. App. 3d 1608, 1617, 280 Cal. Rptr. 16* ; *see Lab. Code § 3352* (exclusions to workers' compensation law)]. For example, an unlicensed contractor was deemed to be an employee under *Lab. Code § 2750.5* for the purposes of pursuing a civil tort action against an allegedly negligent homeowner, even though he had not met the minimum hours required by *Lab. Code § 3352(h)* to be eligible for workers' compensation benefits [*Rosas v. Dishong (1998) 67 Cal. App. 4th 815, 821-823, 79 Cal. Rptr. 2d 339]* . Similarly, the court of appeal, reversing the trial court's dismissal of the plaintiff's tort action alleging the defendant's negligence, held that the plaintiff, injured while repairing the defendant's roof, was the defendant's employee pursuant to

Lab. Code § 2750.5, which operated to allow the plaintiff's lawsuit, despite the fact that the plaintiff, by virtue of *Lab. Code § 3352(h)*, was not an employee of the defendant for workers' compensation purposes, when the court of appeal found that the plaintiff was not a licensed roofing contractor and, therefore, not an independent contractor [*Mendoza v. Brodeur (2006) 142 Cal. App. 4th 72, 79-81, 47 Cal. Rptr. 3d 310]* .

The court of appeal has also held that an injured worker, employed by an unlicensed contractor to repair a homeowner's roof, and who had not worked on that job for the statutorily required number of hours to qualify as an employee ofthe homeowner, nevertheless remained an employee of the contractor for purposes of assigning liability for the injury. Thus, the worker was eligible to receive benefits from the Uninsured Employers Fund [now called the Uninsured Employers Benefits Trust Fund] and to pursue tort remedies against the contractor in civil court [*Cedillo v. Workers' Comp. Appeals Bd. (2003) 106 Cal. App. 4th 227, 232, 236-237, 130 Cal. Rptr. 2d 581]* .

The California Supreme Court has held that an injured worker of an unlicensed contractor hired to trim a homeowner's tree could not maintain a civil tort action against the homeowner that was grounded on the homeowner's alleged violation of CalOSHA tree-trimming safety regulations [*see 8 Cal. Code Reg. §§ 3421, 3427*]. The Court concluded that the regulations did not apply because the work in question fell within the "household domestic service" exception to the requirements of the California Occupational Safety and Health Act [*Fernandez v. Lawson (2003) 31 Cal. 4th 31, 36-38, 1 Cal. Rptr. 3d 422, 71 P.3d 779* ; *see Lab. Code § 6303(b)*]. The injured worker had previously filed a workers' compensation claim against the homeowner, which the homeowner's insurer had denied on the ground that the worker had not fulfilled the statutory hours-worked and wages-earned requirements to enable him to fall within thestatutory definition of an "employee" eligible for benefits [*Fernandez v. Lawson (2003) 31 Cal. 4th 31, 34-35, 1 Cal. Rptr. 3d 422, 71 P.3d 779* ; *see Lab. Code §§ 3351(d), 3352(h)*]. Having decided the CalOSHA issue, the Court specifically did not reach the other issue in the case: whether the worker may be estopped from denying the contractor's independent contractor status because of any licensing misrepresentations on the part of the contractor [*Fernandez v. Lawson (2003) 31 Cal. 4th 31, 38-39, 1 Cal. Rptr. 3d 422, 71 P.3d 779]* .

The interplay between contractor licensing requirements and the workers' compensation law is sometimes rather complicated. California law provides that persons performing certain services are required to obtain a contractor's license [*see Bus. & Prof. Code §§ 7000-7172*]. A condition precedent to the issuance, reinstatement, reactivation, renewal, or continued maintenance of such a license is that the applicant or licensee have on file a Certificate of Workers' Compensation Insurance or Certification of Self-Insurance [*Bus. & Prof. Code § 7125(a)*]. This requirement for certification of workers' compensation insurance does not apply, however, to an applicant or a licensee who files a statement with the Contractors State License Board that he or she does not employ any person in any manner so as to become subject to the workers' compensation laws [*Bus. & Prof. Code § 7125(b)*] and, effective January 1, 2007, does not hold a Class C-39 roofing contractor license, as defined in *16 Cal. Code Reg. § 832.39*. For any license that, on January 1, 2007, is active and includes a C-39 classification in addition to any other classification, the registrar of the Contractors State License Board is required, in lieu of the automatic license suspension otherwise required, to remove the C-39 classification from the license unless a valid Certificate of Workers' Compensation Insurance or Certification of Self-Insurance is received by the registrar prior to the operative date of this requirement, January 1, 2007 [*Bus. & Prof. Code § 7125(e)*]. These provisions addressed specifically to Class C-39 roofing contractor licenses remain in effect only until January 1, 2011, when they are repealed, unless a later-enacted statute, enacted before that date, deletes or extends the date [*Bus. & Prof. Code § 7125(f)*]. The same sunset provision applies to the requirement, effective January 1, 2007, that an insurer who issues a workers' compensation insurance policy to a roofing contractor holding a C-39 license perform an annual payroll audit for the contractor. The insurer may impose a surcharge on each policy holder so audited in an amount necessary to recoup the reasonable costs of conducting the audit [*Ins. Code § 11665(a), (c)*]. The failure of a licensee required to do so to maintain workers' compensation insurance results in the automatic suspension of the license by operation of law [*Bus. & Prof. Code § 7125.2(a)*]. As noted at the beginning of this subsection, California workers' compensation law provides that any person performing any function or activity for which a license is required pursuant to *Bus. & Prof. Code, Div. 3, Ch. 9 (commencing with § 7000)* must hold a valid contractor's license as a condition of having independent contractor status [*Lab. Code § 2750.5*].

In one case, the court of appeal was called upon to resolve an issue of liability involving the interplay of these statutory provisions. A company hired an independent contractor to paint one of the company's buildings. The contractor was licensed and had filed the required statement that he had no employees, thereby exempting himself from coverage pursuant to the workers' compensation laws. However, the contractor hired an employee to help paint the company's building, and this employee was injured in the course of performing the job. The employee applied for workers' compensation benefits, which were paid by the Uninsured Employers Fund (UEF) [now called the Uninsured Employers Benefits Trust Fund (UEBTF)]. The UEF then argued that, because the contractor had hired an employee, thereby rendering himself ineligible for continued exemption from the requirement that he maintain workers' compensation insurance, his contractor's license was, ipso facto, automatically suspended by operation of law, pursuant to *Bus. & Prof. Code § 7125.2(a)*. Consequently, argued the UEF, the contractor was in fact an employee of the hiring company whose building was being painted, as was the injured employee, with the resultthat the hiring company should be held liable to reimburse the UEF for workers' compensation benefits it had paid to the injured employee [*Smith v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 117, 120-122, 116 Cal. Rptr. 2d 728]* .

The court of appeal, however, pointed to other provisions of *Bus. & Prof. Code § 7125.2(a)*, specifically, to the requirements that the license board "notify any licensee who fails to maintain workers' compensation that his or her license shall be automatically suspended 30 days from the date of the notice" and that the board "provide the licensee with an additional notice that informs the licensee of thesuspension date, the cause for suspension, and reinstatement procedures" [*Bus. & Prof. Code § 7125.2(a)*]. Because these notices were not sent to the contractor in this case, the contractor remained a licensed independent contractor, albeit one in violation of California's workers' compensation laws, at the time of the employee's injury. Consequently, the hiring company was not the injured employee's employer and was not liable for reimbursing the UEF [*Smith v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 117, 124-125, 129, 116 Cal. Rptr. 2d 728]* .

In another case, the court of appeal held that the plaintiff, as an unlicensed contractor, could not sue for payment for work that required a license and that the homeowner defendants properly recovered the compensation they had paid to the plaintiff for work that required a license. The court found that, prior to the plaintiff's work for the defendants, the plaintiff's contractor's license had been automatically suspended, pursuant to Lab. Code § 7125.2(a)(2), for failure to *obtain* workers' compensation insurance, not, pursuant to Lab. Code § 7125.2(a)(1), for failure to *maintain* workers' compensation insurance. Suspension of a license for failure to *obtain* workers' compensation insurance does not require the notice from the registrar of contractors that is required for suspension of license for failure to *maintain* workers' compensation insurance. In any event, the court conclusively presumed that the plaintiff had failed to carry his burden in the trial court to prove lack of notice [*Wright v. Issak (2007) 149 Cal. App. 4th 1116, 1121-1123, 58 Cal. Rptr. 3d 1]* .

In a wrongful death action brought by a deceased worker's parents, the California Supreme Court held that homeowners neither had nor breached any statutory duty of care owed to a deceased worker under *Penal Code § 385(b)*, which provides that "[a]ny person who either personally or through an employee or agent, or as an employee or agent of another, operates ... or moves any tools ... [or] equipment ... within six feet of a high voltage overhead conductor is guilty of a misdemeanor." The Court found that the worker for an unlicensed contractor, who, through his own conduct, breached the duty of care embodied in *Penal Code § 385(b)* and was killed while trimming trees on the defendant homeowners' property, was not one of the class of persons for whose protection the statute was adopted. Moreover, said the Court, the homeowners had no control over the manner in which the unlicensed contractor or his workers performed their job. Finally, even if the homeowners were deemed to be the deceased worker's employers pursuant to *Lab. Code § 2750.5*, *Penal Code § 385(b)* did not give rise to any special standard of conduct or duty of care owed by them to the deceased worker to ensure that the tree trimming work would not result in his death or injury. The Court concluded that the plaintiffs' wrongful death suit was grounded in the common-law tort of negligence and was properly submitted to the jury based on evidence of the homeowners' allegedly negligent acts or omissions that may have caused or contributed to the deceased worker's fatal injuries, and the trial court properly refused to instruct on *Penal Code §*

385(b) and the plaintiffs' negligence per se theory [*Ramirez v. Nelson (2008) 44 Cal. 4th 908, 917-920, 80 Cal. Rptr. 3d 728, 188 P.3d 659]* .

[iii] Medical License

There is also a rebuttable presumption affecting the burden of proof that a physician and surgeon, licensed pursuant to *Bus. & Prof. Code § 500 et seq.* (healing arts), who enters into a contract for the performance of health services on behalf of a licensed primary care clinic, as defined in *Health & Safety Code § 1204(a)(1)*, is an independent contractor rather than an employee, but this does not authorize the employment of a physician and surgeon to provide professional services when the employment would violate any other provision of law [*Lab. Code § 2750.6*].

[5] Aliens/Undocumented Workers

Aliens are included in the statutory definition of "employee" under the workers' compensation law [*Lab. Code § 3351(a)*]. An "undocumented worker" is an employee who has neither a "green card," that is, a United States Permanent Resident card, nor a work visa [*see 8 U.S.C. § 1324a(a)(1)(A), (a)(2), (h)(3)* ("unauthorized alien")]. Although illegally employed, such workers are entitled to workers' compensation benefits when injured [*Lab. Code § 3351* (defining employee as "every person in the service of an employer ... whether lawfully or unlawfully employed ...")]. The legislature has declared that all protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have beenemployed, in California [*Lab. Code § 1171.5(a)*]. For purposes of enforcing state labor and employment laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiryis permitted into a person's immigration status except when the person seeking to make this inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law [*Lab. Code § 1171.5(b)*]. In enacting this statute, the legislature declared that its provisions are declaratory of existing law [*Lab. Code § 1171.5(c)*].

The court of appeal has held that a worker, who at the time of injury was an illegal alien who had obtained his job by showing the employer false Social Security and green cards, was an employee entitled to workers' compensation benefits, excluding reinstatement and back pay. The court found that, by virtue of *Lab. Code § 1171.5*, neither the Federal Immigration Reform and Control Act of 1986 nor *Hoffman Plastic Compounds v. NLRB* [*Hoffman Plastic Compounds v. NLRB (2002) 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed. 2d 271]* preempted California from providing workers' compensation coverage to a worker who was unlawfully employed. The court also held that the worker was an "employee" within *Lab. Code § 3351(a)*, when it found that, contrary to the employer's contention, there was no language in the statute to indicate that the legislature intended the statutory inclusion of a person "unlawfully employed" within the definition of "employee" to be limited to a person unlawfully employed by virtue of the employer's guilt in hiring the person in violation of federal law, and that, alternatively, since the employer did not prove that the worker was not an employee for purposes of workers' compensation law, the court assumed that the employer did not comply with federal requirements, so that the employer's own definition of "unlawfully employed" had been met. Finally, the court held that the *Ins. Code § 1871.4* provision that it is unlawful to make knowingly false or fraudulent statements for the purpose of obtaining workers' compensation benefits did not preclude the worker from receiving workers' compensation benefits, since there was no evidence of the worker's having been convicted of fraud, as required by the statute, and since the worker was not required to be a lawfully documented alien to be an employee entitled to workers' compensation benefits, and since it was employment, not a compensable injury, that the worker obtained as a direct result of the use of fraudulent documents [*Farmer Brothers Coffee v. W.C.A.B. (Ruiz) (2005) 133 Cal. App. 4th 533, 537-544, 35 Cal. Rptr. 3d 23]* .

When an employer offers modified or alternative work to an injured employee that meets the conditions of *Lab. Code § 4644(a)(5), (6)*, or *(7)*, then subsequently learns that the employee cannot lawfully perform modified or alternative work due to the employee's immigration status, the employer is not required to provide vocational rehabilitation services [*8*

Cal. Code Reg. § 10131(d)]. An undocumented employee is not entitled to vocational rehabilitation benefits when the employee is unable to return to work solely because of immigration status and is not precluded from returning to work due to disability, since an employee who was legally entitled to work in the United States would not be entitled to vocational rehabilitation benefits in the absence of permanent disability [*Del Taco v. Workers' Comp. Appeals Bd. (2000) 79 Cal. App. 4th 1437, 1442-1443, 94 Cal. Rptr. 2d 825* (providing undocumented worker with greater benefits than those available to legal workers violates *equal protection clause of United States Constitution*)].

The court of appeal has held in a civil action for medical malpractice that the trial court should have excluded from the trial all reference to the plaintiff's immigration status, when the plaintiff was not seeking damages for loss of earnings or earning capacity. The plaintiff's immigration status was neither relevant to any issue in the case nor admissible to attack the plaintiff's credibility. Moreover, the court held that the trial judge's remarks during a motion in limine hearing impugning the character of undocumented immigrants and discussing the plaintiff's residency status were highly inflammatory, gave the appearance of preconceived ideas based on stereotypes about undocumented aliens, were not fair, did not give the appearance of fairness, and would lead a reasonable person to doubt the trial judge's impartiality or the fairness of the proceedings. The appellate court reversed the judgment for the defendant and remanded for retrial, directing the presiding judge of the superior court to reassign the matter to a different judge [*Hernandez v. Paicius (2003) 109 Cal. App. 4th 452, 456-463, 468, 134 Cal. Rptr. 2d 756]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicensesImmigration LawDuties & Rights of AliensPublic BenefitsWorkers' Compensation & SSDICoverageEmployment RelationshipsBorrowed EmployeesWorkers' Compensation & SSDICoverageEmployment RelationshipsContractorsWorkers' Compensation & SSDIDefensesExclusivity Provisions

California Forms of Pleading and Practice--Annotated

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Chapter 577 WORKERS' COMPENSATION
PART II. LEGAL BACKGROUND
A. Administrative Actions
1. General Principles of Workers' Compensation Law

51-577 California Forms of Pleading and Practice--Annotated § 577.23

§ 577.23 Conditions of Compensation Liability

[1] In General

An employer is liable for workers' compensation benefits without regard to negligence for any injury sustained by an employee arising out of and in the course of the employment, and for the death of any employee if the injury proximately causes death, when specified "conditions of compensation" are satisfied [*Lab. Code § 3600(a)*]. The employer's liability for benefits is in lieu of any other liability to any person, except as discussed in subpart B, *§ 577.310* et seq. [*see Lab. Code §§ 3600(a), 3602, 3706, 4558*]. The "conditions of compensation" are the following:

- At the time of the injury both the employer and the employee were subject to the compensation provisions of the workers' compensation law, the employee was performing service growing out of and incidental to the employment and was acting within the course of the employment, and the injury was proximately caused by the employment either with or without negligence [*Lab. Code § 3600(a)(1)-(3)*];

- The injury was not caused by the injured employee's intoxication byalcohol or unlawful use of a controlled substance, was not intentionally self-inflicted, did not arise out of an altercation in which the injured employee was the initial physical aggressor [*see Mathews v. Workmen's Comp. Appeals Bd. (1972) 6 Cal. 3d 719, 726-728, 100 Cal. Rptr. 301, 493 P.2d 1165]* , and was not caused by the commissionof a felonious act by the injured employee for which he or she has been convicted [*Lab. Code § 3600(a)(4), (5), (7), (8)*]; and

- The injury did not arise out of voluntary participation in any off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except when these activities were a reasonable expectancy of, or were expressly or impliedly required by, the employment [*Lab. Code § 3600(a)(9)*; *see Hughes Aircraft Co. v. Workers' Comp. Appeals Bd. (1983) 149 Cal. App. 3d 571, 573-575, 196 Cal. Rptr. 904* ; *Mason v. Lake Dolores Group (2004) 117 Cal. App. 4th 822, 832-838, 11 Cal. Rptr. 3d 914* (question of whether employee was on duty or off duty at time of injury is not ultimate

test for whether injury was covered by compensation bargain and thus subject to exclusive remedy rule, but rather ultimate test is whether injury arose out of and in course of employment, and "reasonable expectancy" requirement of *Lab. Code § 3600(a)(9)* is simply one subset of ultimate issue of whether injury arose out of and in course of employment)].

In the case of claims for death benefits, the employee must not have deliberately and willfully caused his or her own death [*Lab. Code § 3600(a)(6)*].

[2] Proximate Causation

The phrase "proximately caused by the employment," as used in the statute, has been held to merely elaborate on the general requirement that the injury arise out of the employment and means only that the injury must be employment-caused or connected in the sense that there be a cause-and-effect relationship between the employment and the injury. All that *Lab. Code § 3600* requires is that the employment be one of the contributing causes without which the injury would not have occurred [*see Maher v. Workers' Comp. Appeals Bd. (1983) 33 Cal. 3d 729, 734 n.3, 190 Cal. Rptr. 904, 661 P.2d 1058* ; *Cooper v. Workers' Comp. Appeals Bd. (1985) 173 Cal. App. 3d 44, 49, 218 Cal. Rptr. 783]* . However, in one case a psychiatric injury suffered by a worker as a result of workplace gossip about her extramarital affair with a coworker was held, as a matter of law, not to have arisen out of employment. A finding of industrial injury is proper, said the court, only when the employment plays an "active" or "positive" role in the development of the psychological condition. An injury that grows out of a personal grievance between the injured employee and a third party does not arise out of the employment if the injury occurred merely by chance during working hours at the place of employment or if the employer's premises do not place the injured employee in a peculiarly dangerous position. In other words, gossip about an individual's personal life is not part of the employment relationship [*Atascadero Unified School District v. W.C.A.B. (Geredes) (2002) 98 Cal. App. 4th 880, 884-885, 120 Cal. Rptr. 2d 239]* .

[3] Post-Termination Claims

Except for psychiatric injuries, if the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring on or after July 16, 1993 and prior to the time of the notice, no compensation is payable unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply [*Lab. Code § 3600(a)(10)*]:

- The employer has notice of the injury prior to the notice of termination or layoff.

- The employee's medical records, compiled prior to the notice of termination or layoff, contain evidence of the injury.

- The date of injury, as specified in *Lab. Code § 5411*, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.

- The date of injury, as specified in *Lab. Code § 5412*, is subsequent to the date of the notice of termination or layoff.

This rule applies only to employer initiated separations, and does not apply to employees who resign from their employment [*CJS Co. v. Workers' Comp. Appeals Bd. (1999) 74 Cal. App. 4th 294, 298, 88 Cal. Rptr. 2d 109]* .

A notice of termination or layoff that is not followed within 60 days by that termination or layoff is not subject to the foregoing provisions, and these provisions do not apply until receipt of a later notice of termination or layoff. The issuance of frequent notices of termination or layoff to an employee is considered a bad faith personnel action and

makes these provisions inapplicable to the employee [*Lab. Code § 3600(a)(10)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDICompensabilityCourse of EmploymentCausationWorkers' Compensation & SSDICompensabilityCourse of EmploymentRecreational ActivitiesWorkers' Compensation & SSDICompensabilityInjuriesIntoxicationWorkers' Compensation & SSDICompensabilityInjuriesSelf-Inflicted InjuriesWorkers' Compensation & SSDIDefensesComparative & Contributory Negligence

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Volume 51: Vexatious Litigants thru Zoning and Planning-Chs. 573-579
Chapter 577 WORKERS' COMPENSATION
PART II. LEGAL BACKGROUND
A. Administrative Actions
1. General Principles of Workers' Compensation Law

51-577 California Forms of Pleading and Practice--Annotated § 577.24

§ 577.24 Arising Out of and in the Course of Employment

[1] In General

To be compensable, an injury must both arise out of the employment and occur in the course of employment [*see Lab. Code § 3600*; *Cooper v. Workers' Comp. Appeals Bd. (1985) 173 Cal. App. 3d 44, 48, 218 Cal. Rptr. 783* ; *Rogers v. Workers' Comp. Appeals Bd. (1985) 172 Cal. App. 3d 1195, 1199, 218 Cal. Rptr. 662]* . "Course of employment" generally refers to the time and place of the injury, whereas "arise out of employment" refers to a causal connection between the employment and the injury [*Maher v. Workers' Comp. Appeals Bd. (1983) 33 Cal. 3d 729, 733-734, 190 Cal. Rptr. 904, 661 P.2d 1058* ; *Rogers v. Workers' Comp. Appeals Bd. (1985) 172 Cal. App. 3d 1195, 1200, 218 Cal. Rptr. 662]* .

The phrase "in the course of employment" is frequently defined as such service as the employee is expected to render, when it occurs within the period of his or her employment, at a place where the employee may reasonably be for that purpose, and while the employee is engaged in fulfilling his or her duties or in doing something necessarily incident to them. The phrase ordinarily refers to the time, place, and circumstances under which the accident occurs [*Westbrooks v. Workers' Comp. Appeals Bd. (1988) 203 Cal. App. 3d 249, 252, 252 Cal. Rptr. 26* , quoting *Griffin v. Industrial Acci. Com. (1937) 19 Cal. App. 2d 727, 732-733, 66 P.2d 176]* . The determination whether injury-causing conduct was in the course of employment is necessarily decided on a case-by-case basis, taking into account the particular circumstances of the case, and both the WCAB and the courts are required to liberally interpret and apply the workers' compensation law in favor of conferring benefits on the injured employee. When the material facts of a case are not disputed, that determination is treated as a question of law [*Westbrooks v. Workers' Comp. Appeals Bd. (1988) 203 Cal. App. 3d 249, 252-253, 252 Cal. Rptr. 26]* .

In one case, the court of appeal held that an employee's death was not the result of an industrial injury, when the court found that the decedent, an accountant with a CPA license employed by the City of Los Angeles, died from injuries received from a fall while attending a CPA convention in Atlantic City, New Jersey. Neither the commercial traveler doctrine nor the special mission exception applied, said the court. The employer did not require the decedent to have a

CPA license, and traveling to attend the convention for CPA credit was not expressly or impliedly authorized by the decedent's employment contract. Moreover, the employer did not benefit from CPA licensure, and the employer provided the training it considered necessary for its accountants. The employer motivated or encouraged CPA licensure as a personal achievement by bonus salary only, not as an incentive to improve an accountant's ability to do the job [*City of Los Angeles v. Workers' Comp. Appeals Bd. (2007) 157 Cal. App. 4th 78, 68 Cal. Rptr. 3d 343*].

[2] Burden of Proof

The applicant for compensation has the burden of proving by a preponderance of the evidence that his or her injury arose both out of and in the course of employment [*Lundberg v. Workmen's Comp. App. Bd. (1968) 69 Cal. 2d 436, 439, 71 Cal. Rptr. 684, 445 P.2d 300* ; *Rogers v. Workers' Comp. Appeals Bd. (1985) 172 Cal. App. 3d 1195, 1199, 218 Cal. Rptr. 662* (citing *Lab. Code §§ 3202.5, 3600*, and *5705*)]. All parties are required to meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties be considered equal before the law [*Lab. Code § 3202.5* ("preponderance of the evidence" as "that evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth.")]. Nevertheless, the workers' compensation law must be liberally construed in the employee's favor [*see Lab. Code § 3202*], and all reasonable doubts as to whether the injury arose out of the employment are to be resolved in favor of the employee [*Garza v. Workers' Comp. Appeals Bd. (1970) 3 Cal. 3d 312, 317, 90 Cal. Rptr. 355, 475 P.2d 451* ; *Ferreira v. Workmen's Comp. Appeals Bd. (1974) 38 Cal. App. 3d 120, 125, 112 Cal. Rptr. 232* ; *see Westbrooks v. Workers' Comp. Appeals Bd. (1988) 203 Cal. App. 3d 249, 253, 252 Cal. Rptr. 26]* .

[3] Employee Misconduct

Employee misconduct, whether negligent, willful, or even criminal, does not necessarily preclude recovery under workers' compensation law. In the absence of an applicable statutory defense [*see discussion under § 577.23*], such misconduct will bar recovery only when it constitutes a deviation from the scope of employment. In determining whether misconduct takes an employee outside the scope of his or her employment, a distinction must be made between an unauthorized departure from the course of employment and the performance of a duty in an unauthorized manner. Injury occurring during the course of the former conduct is not compensable. The latter conduct, although it may in some instances constitute serious and willful misconduct resulting in a reduction of the employee's benefits [*see Lab. Code § 4551*], does not take the employee outside the course of his or her employment [*Westbrooks v. Workers' Comp. Appeals Bd. (1988) 203 Cal. App. 3d 249, 253, 252 Cal. Rptr. 26* (fact that bus driver was convicted of reckless driving while on assigned run for his employer did not take him outside course of employment so as to deprive him of workers' compensation benefits for emotional injury sustained in near-accident resulting from that reckless driving)]. For discussion of the effect of an employee's serious and willful misconduct, see *§ 577.17[1]* .

[4] Acts Personal to Employee

The employee need not have been rendering service to the employer at the time of the injury in order to recover compensation. Acts that are necessary to the life, comfort, and convenience of the employee, though strictly personal, are incidental to the service rendered, and an injury sustained in their performance arises out of and in the course of the employment. This rule includes the majority of an employee's acts on the employer's premises, such as eating lunch, getting a drink of water, smoking tobacco where not forbidden by the employer, "attending to the wants of nature," changing to or from working clothes, and many others. Such acts, although not themselves representing the rendition of service, are reasonably incidental thereto, and are considered to be acts for the mutual benefit and convenience of the employer and employee [*Dixon v. Ford Motor Co. (1975) 53 Cal. App. 3d 499, 504-505, 125 Cal. Rptr. 872* ; *see Todd v. Workers' Comp. Appeals Bd. (1988) 198 Cal. App. 3d 757, 760, 243 Cal. Rptr. 925* ; *State Comp. Ins. Fund v. Workmen's Comp. App. Bd. (1967) 67 Cal. 2d 925, 927-928, 64 Cal. Rptr. 323, 434 P.2d 619* ; *Duncan v. Workers' Comp. Appeals Bd. (1983) 150 Cal. App. 3d 117, 120, 197 Cal. Rptr. 474]* .

The "personal comfort doctrine" described above does not apply, however, to cases that come within the scope of *Lab. Code § 3600(a)(9)*, excluding from workers' compensation coverage injuries arising out of voluntary participation in any off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except when these activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment [*Todd v. Workers' Comp. Appeals Bd. (1988) 198 Cal. App. 3d 757, 760, 243 Cal. Rptr. 925]* . The court of appeal has noted that the question of whether an employee was on duty or off duty at the time of injury is not the ultimate test for whether the injury was covered by the compensation bargain and thus subject to the exclusive remedy rule. Rather, the ultimate test is whether the injury arose out of and in the course of the employment. Moreover, said the court, the "reasonable expectancy" requirement [*see Lab. Code § 3600(a)(9)*] is simply a subset of the ultimate issue, namely, whether the injury arose out of and in the course of the employment [*see Lab. Code § 3600(a)(2), (3)*]. The court found that the employee's injury did not arise out of or occur in the course of the employment, since the employee was engaging in an activity for his own enjoyment, using a water slide, that was specifically forbidden to employees by company policy and of no benefit to the employer [*Mason v. Lake Dolores Group (2004) 117 Cal. App. 4th 822, 832-838, 11 Cal. Rptr. 3d 914]* .

On the other hand, the court of appeal held that a police officer's physical training injury, even though occurring while he was on vacation, was a compensable injury because his training was, pursuant to *Lab. Code § 3600(a)(9)*, "a reasonable expectancy of ... the employment." The court found that the officer was injured on December 30, 2005, near the end of a three-mile run while on vacation in Wyoming. He was a member of his employer's SWAT team and was training for a physical fitness test to be administered in January 2006, which he was required to pass to retain his status as a SWAT team member. That test included a half-mile run. The court concluded that both requirements of *Ezzy v. W.C.A.B.* [*Ezzy v. Workers' Comp. Appeals Bd. (1983) 146 Cal. App. 3d 252, 194 Cal. Rptr. 90*] were satisfied, i.e., the officer believed that his employer expected him to train for the test while on vacation, and this belief was objectively reasonable [*Tomlin v. Workers' Comp. Appeals Bd. (2008) 162 Cal. App. 4th 1423, 1425-1426, 1428-1432, 76 Cal. Rptr. 3d 672*].

For purposes of determining whether to grant or deny a workers' compensation claim, if an employee is injured or killed by a third party in the course of the employee's employment, no personal relationship or personal connection will be deemed to exist between the employee and the third party based only on a determination that the third party injured or killed the employee solely because of the third party's personal beliefs relating to his or her perception of the employee's race, religious creed, color, national origin, age, gender, disability, sex, or sexual orientation [*Lab. Code § 3600(c)*].

[5] Emergency Efforts on Behalf of Employer

Emergency efforts to save the employer's property from fire, theft, or other hazards are within the course of employment, and the fact that the rescue effort takes place outside of working hours does not detract from its work-connected status [*Martinez v. Workers' Comp. Appeals Bd. (1976) 15 Cal. 3d 982, 986, 127 Cal. Rptr. 150, 544 P.2d 1350]* . Thus, an employee injured while visiting work on her day off when helping fellow employees hold up a collapsing shelf, thereby protecting her employer's property, was injured in the course of employment [*Wright v. Beverly Fabrics, Inc. (2002) 95 Cal. App. 4th 346, 348, 115 Cal. Rptr. 2d 503]* .

[6] Going and Coming Rule

[a] In General

One of the rules fashioned by the courts over the years to aid in determining whether an injury occurred within the "course of employment" is the "going and coming" rule. Broadly stated, the rule prohibits compensation for injuries received by an employee while traveling to and from work. Courts have reasoned that the employment relationship is suspended during this period and, therefore, injuries occurring when an employee is engaged in off-duty travel, off the employer's premises, are not within the "course of employment" for purposes of the Workers' Compensation Law [

Parks v. Workers' Comp. Appeals Bd. (1983) 33 Cal. 3d 585, 588-589 n.4, 190 Cal. Rptr. 158, 660 P.2d 382 ; *see Southern California Rapid Transit Dist., Inc. v. Workers' Comp. Appeals Bd. (1979) 23 Cal. 3d 158, 166, 151 Cal. Rptr. 666, 588 P.2d 806* ; *Hinojosa v. Workmen's Comp. Appeals Bd. (1972) 8 Cal. 3d 150, 157, 104 Cal. Rptr. 456, 501 P.2d 1176]* .

The "going and coming" rule applies to an employee who voluntarily participates in alternative commute programs sponsored by governmental entities, unless the employee is paid a salary to compensate for those periods of travel [*Lab. Code § 3600.8(a)*]. An employer's reimbursement of employee expenses or subsidization of costs related to an alternative commute program is not considered payment of a salary [*Lab. Code § 3600.8(b)*; *see also Rev. & Tax. Code § 17149*]. If an employee's salary is not based on the hours the employee works, payment of his or her salary is not considered compensation for the period of travel, absent a written agreement [*Lab. Code § 3600.8(b)*]. Vanpool programs may provide workers' compensation benefits to employees who participate in an alternative commute program by riding in a vanpool, if the vanpool vehicle is owned by the employer (or by the State if the State is the employer) [*Lab. Code § 3600.8(d)*].

Any alternative commute program provided, sponsored, or subsidized by an employer to comply with any trip reduction mandates of an air quality management district or local government is considered a program mandated by a governmental entity [*Lab. Code § 3600.8(b)*]. A "governmental entity" is any local jurisdiction authorized to enact air pollution or congestion management controls, including regional air districts, air quality management districts, and congestion management agencies [*Lab. Code § 3600.8(c)*].

The "going and coming" rule has been widely criticized and, because of its harshness, the courts have carved out numerous exceptions [*see Perez v. Workers' Comp. Appeals Bd. (1984) 152 Cal. App. 3d 60, 63, 199 Cal. Rptr. 280]* . The principal exceptions are discussed below.

Although not, strictly speaking, falling under the heading of the "going and coming" rule or its exceptions, injuries incurred by an employee en route to or from a medical appointment to obtain treatment for an industrial injury are compensable, as long as the employee is traveling a reasonable distance, within a reasonable geographic area, to or from that appointment. Determinations of the reasonableness of the geographic area limitation and of the distance the employee travels are made on a case-by-case basis, considering all of the relevant circumstances. Thus, in one case an employee sustained industrial injuries in 2003 and 2005 for which she received ongoing medical treatment. In 2007 she drove approximately 130 miles from her home to visit her mother. Within minutes of leaving her mother's home to drive 136 miles to keep a medical appointment for treatment of her industrial injuries, she sustained serious injuries in an automobile accident. The court of appeal held that her new injuries occurred outside the reasonable geographic area of her employer's risk for incurring compensability liability for such injuries [*Esquivel v. W.C.A.B. (2009) 178 Cal. App. 4th 330, 333-334, 344-345, 100 Cal. Rptr. 3d 380*].

[b] Exceptions to Rule

[i] Special Risk Exception

Under the special risk exception, the employee is entitled to compensation for injuries sustained within the field of that risk if:

- "But for" the employment the employee would not have been at the location where the injury occurred; and
- The risk is distinctive in nature or quantitatively greater than risks common to the public.

The principle applies when the employee is entering or leaving the employer's premises. But the fact that the accident

happens on a public road and that the danger is one to which the general public is likewise exposed does not preclude the existence of a causal relationship between the accident and the employment if the danger is one to which the employee, by reason of and in connection with his or her employment, is subjected peculiarly or to an abnormal degree [*Parks v. Workers' Comp. Appeals Bd. (1983) 33 Cal. 3d 585, 589-590, 190 Cal. Rptr. 158, 660 P.2d 382* ; *see Lefebvre v. Workers' Comp. Appeals Bd. (1980) 106 Cal. App. 3d 745, 750, 165 Cal. Rptr. 246]* .

[ii] Special Mission or Errand Exception

The special mission or the special errand exception has been defined as a business journey undertaken by an employee at the specific request of the employer. An injury suffered by an employee while performing such a special mission or errand is compensable [*Southern California Rapid Transit Dist., Inc. v. Workers' Comp. Appeals Bd. (1979) 23 Cal. 3d 158, 166, 151 Cal. Rptr. 666, 588 P.2d 806* ; *see Guest v. Workers' Comp. Appeals Bd. (1970) 2 Cal. 3d 670, 672-674, 87 Cal. Rptr. 193, 470 P.2d 1]* . The exception exists any time an injury is sustained by an employee performing a special mission for his or her employer. Thus, an injury sustained by an employee during his or her regular commute is compensable if the employee was also performing a special mission for the employer [*Perez v. Workers' Comp. Appeals Bd. (1984) 152 Cal. App. 3d 60, 65, 199 Cal. Rptr. 280* , adding that the rationale for the going and coming rule has in effect been abandoned in the special mission cases)]. By contrast, a police officer injured on his day off while traveling from home to the courthouse where he was to testify under subpoena about police matters was barred from workers' compensation benefits by the "going and coming rule," the court holding that the special mission exception did not apply, since testifying was not extraordinary in relation to the officer's routine duties [*City of San Diego v. Workers' Comp. Appeals Bd. (2001) 89 Cal. App. 4th 1385, 1388-1389, 108 Cal. Rptr. 2d 510]* . Similarly, the court of appeal held that an employee's injury was not industrial since the accident occurred after the business portion of the trip was complete and while the employee and his wife were engaged in non-industrial sightseeing in Italy. The court found that there was no continuing or resumed business purpose at the time of the accident and that the employee was neither a commercial traveler nor on a special mission for the employer at the time of the accident [*Fleetwood Enterprises, Inc. v. W.C.A.B. (Moody) (2005) 134 Cal. App. 4th 1316, 1323-1331, 37 Cal. Rptr. 3d 587]* .

In a case not involving workers' compensation, the court of appeal, reversing the trial court's grant of summary judgment to the defendant employer, held that the employer had failed to show that there were no triable issues of material fact as to whether its employee was acting within the course and scope of his employment at the time of an automobile accident causing injuries to the plaintiffs. The facts were as follows: The defendant employee was vice president of anti-piracy Internet operations of Warner Brothers. He attended a three-day business conference in Sunnyvale, California, sponsored by one of his employer's anti-piracy vendors. His employer approved the trip and paid for the employee's airfare, hotel, and airport parking. After leaving the conference, the employee flew back to Burbank Airport, where he retrieved his car from the airport parking lot. On his way home, he drove around the studio complex where his office was located without stopping and took his normal route home until he was involved in the automobile collision that gave rise to the present cause of action. The court of appeal found that the employee's attendance at the out-of-town business conference may be considered a special errand/special mission, and that, when the employee intended to drive home from this errand/mission, the errand/mission was not concluded simply because the employee drove his regular commute route. Rather, the errand/mission was concluded only when the employee returned home or deviated from the errand/mission for personal reasons. In short, the business conference could be found to be a special errand/mission that had not yet concluded at the time of the accident, and the fact that the employee coincidentally passed his office on his return route home was immaterial since he did not stop at the office and intended to return home from the airport [*Jeewarat v. Warner Brothers Entertainment, Inc. (2009) 177 Cal. App. 4th 427, 431, 436-439, 98 Cal. Rptr. 3d 837*].

[iii] Commercial Traveler Exception

The commercial traveler exception is similar to the special errand exception in that it applies to injuries incurred in the course of a business journey undertaken by an employee at the specific request of the employer, but it connotes a wider

range of activity and applies in those cases in which the employee's work entails travel away from the employer's premises [*see Hartford Acc. & Indem. Co. v. Workers' Comp. Appeals Bd. (1982) 132 Cal. App. 3d 796, 805, 183 Cal. Rptr. 440* ; *IBM Corp. v. Workers' Comp. Appeals Bd. (1978) 77 Cal. App. 3d 279, 282, 142 Cal. Rptr. 543]* . Common examples would include a traveling salesperson and other employees whose job requires their traveling to places other than the employer's place of business [*see Hartford Acc. & Indem. Co. v. Workers' Comp. Appeals Bd. (1982) 132 Cal. App. 3d 796, 805, 183 Cal. Rptr. 440* ; *IBM Corp. v. Workers' Comp. Appeals Bd. (1978) 77 Cal. App. 3d 279, 280-282, 142 Cal. Rptr. 543]* .

The commercial traveler is regarded as acting within the course of his or her employment during the entire period of travel on the employer's business, except when a distinct departure on a personal errand is shown. Thus, for example, a commercial traveler who obtains treatment for a preexisting non-occupational medical condition is not acting within the course of employment, and any secondary injury sustained while undergoing such treatment is noncompensable [*LaTourette v. Workers' Comp. Appeals Bd. (1998) 17 Cal. 4th 644, 655-656, 72 Cal. Rptr. 2d 217, 951 P.2d 1184]* . The employee's acts in traveling and in procuring food and shelter, however, are all incidents of the employment, and, when injuries are sustained during the course of such activities, the workers' compensation law applies [*Wiseman v. Industrial Acci. Com. (1956) 46 Cal. 2d 570, 572, 297 P.2d 649* ; *see IBM Corp. v. Workers' Comp. Appeals Bd. (1978) 77 Cal. App. 3d 279, 280-282, 142 Cal. Rptr. 543]* .

The court of appeal has held that the "commercial traveler rule" of workers' compensation law could not be incorporated into the respondeat superior doctrine of civil tort law. Thus, the plaintiff in a civil tort actioncould not join the alleged tortfeasor's employer as a defendant when the alleged tort occurred while the employee was engaged in an activity not occurring within the scope of his employment, as would be required for invocation of the respondeat superior doctrine, even though the employee was a commercial traveler within workers' compensation law at the time of allegedly committing the alleged tort [*Sunderland v. Lockheed Martin Aeronautical Systems Support Co. (2005) 130 Cal. App. 4th 1, 10-12, 29 Cal. Rptr. 3d 665]* .

[c] Meal Breaks

Compensation for injuries sustained during uncompensated meal breaks away from the employer's premises is usually denied under the aegis of the "going and coming" rule; the employer-employee relationship is considered suspended during that period because the employer does not pay for the employee's services and the employee provides no benefits in return [*McFadden v. Workers' Comp. Appeals Bd. (1988) 203 Cal. App. 3d 279, 281-282, 249 Cal. Rptr. 778* ; *see Mission Ins. Co. v. Workers' Comp. Appeals Bd. (1978) 84 Cal. App. 3d 50, 56-57, 148 Cal. Rptr. 292]* .

The rule is different, however, when the employee is compensated during the lunch break. In those situations, it is reasonable to infer that, by such an arrangement, the employer has impliedly agreed that service will continue during such period, and this is true whether the employee is salaried or paid at an hourly rate [*McFadden v. Workers' Comp. Appeals Bd. (1988) 203 Cal. App. 3d 279, 282, 249 Cal. Rptr. 778* ; *see also Duncan v. Workers' Comp. Appeals Bd. (1983) 150 Cal. App. 3d 117, 119-121, 197 Cal. Rptr. 474]* . For example, in *McFadden*, the court held that a salaried salesman who was injured while returning to work from an off-premises lunch with his supervisor and a coemployee at which business had been discussed was entitled to workers' compensation benefits because of the following [*McFadden v. Workers' Comp. Appeals Bd. (1988) 203 Cal. App. 3d 279, 283, 249 Cal. Rptr. 778]* :

- The salesman was salaried;
- He was authorized to take unscheduled lunch breaks;
- On numerous occasions, he had lunch, at which business was discussed, with his coemployees;
- His supervisor frequently joined them for lunch; and

- His employer had never notified him that his salary did not cover his meal periods and was not apportioned over the entire work day, which was from 8:30 a.m. until 4:30 or 5:00 p.m.

The *McFadden* court noted that it did not decide the broader issue of whether salaried employees are always entitled to workers' compensation benefits for injuries sustained during any break period [*see McFadden v. Workers' Comp. Appeals Bd. (1988) 203 Cal. App. 3d 279, 283 n.2, 249 Cal. Rptr. 778]* .

In another case, an employee who was injured in a traffic accident during an authorized lunch break was held to have been injured in the course and scope of her employment, when she was compensated on a commission basis, and continued to accrue commissions during her authorized lunch break [*Wood Pontiac Cadillac v. Superior Court (1992) 5 Cal. App. 4th 810, 812-814, 6 Cal. Rptr. 2d 924]* .

[7] Bunkhouse Rule

The bunkhouse rule renders injuries to an employee who is required to live on the employer's premises compensable under workers' compensation. Under the rule, if an employment contract contemplates, or the nature of the employment requires, an employee to reside on the employer's premises, the employee is entitled to workers' compensation for injuries received during the reasonable and anticipatible use of the premises [*Crawford v. Workers' Comp. Appeals Bd. (1986) 185 Cal. App. 3d 1265, 1268, 230 Cal. Rptr. 425]* .

In most situations in which the rule has been applied, sleeping on the premises was either required by the employer in order that the employer might more adequately avail himself or herself of the employee's services at any time, or as an extra compensation supplied to the employee in addition to the primary consideration of wages or salary paid [*Crawford v. Workers' Comp. Appeals Bd. (1986) 185 Cal. App. 3d 1265, 1268, 230 Cal. Rptr. 425]* .

In one case, the court of appeal held that the exclusive remedy rule of *Lab. Code § 3602(a)* barred the plaintiffs' civil action against the defendant for negligence and failure to make a house habitable for human occupation. The court found that the plaintiffs husband and wife lived in a ranch house owned by the defendant as an "employment benefit" of the husband's job as a park ranger employed by defendant. The plaintiff husband was injured when, attempting to get up from the bathroom floor of the house, where he had been observing leaking pipes while "on all fours," he slipped and fell. The bunkhouse rule, said the court, provides that, when an employee is injured while living on the employer's premises, the course-of-employment requirement of *Lab. Code § 3600(a)* is satisfied if the employment contract contemplates, or work necessity requires, the employee to reside on the employer's premises, which was true in the present case. Moreover, the employment and the injury must be linked in some causal fashion to satisfy the arising-out-of-employment requirement of *Lab. Code § 3600(a)*, and an injury occurring in employer-furnished housing in the course of employment ordinarily arises out of employment, which was true in the present case [*Vaught v. State of California, Department of Parks and Recreation (2007) 157 Cal. App. 4th 1538, 1544-1549, 69 Cal. Rptr. 3d 605*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDICompensabilityCourse of EmploymentBusiness TravelersWorkers' Compensation & SSDICompensabilityCourse of EmploymentCausationWorkers' Compensation & SSDICompensabilityCourse of EmploymentGoing & Coming RuleWorkers' Compensation & SSDICompensabilityCourse of EmploymentPersonal ComfortWorkers' Compensation & SSDICompensabilityCourse of EmploymentPlace & Time

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§ 577.25 Time Limitations

[1] In General

Limitations on proceedings for compensation are set forth in *Lab. Code § 5400 et seq.* (discussed below), which must be liberally construed in favor of the employee [*see Bland v. Workers' Comp. Appeals Bd. (1970) 3 Cal. 3d 324, 330-331, 90 Cal. Rptr. 431, 475 P.2d 663* ; *City of Fresno v. Workers' Comp. Appeals Bd. (1985) 163 Cal. App. 3d 467, 471, 209 Cal. Rptr. 463]* . These provisions do not apply, however, to further claims by the same person against the same defendants for the same injury if a timely claim for benefits was filed. The right to present further claims is governed by *Lab. Code §§ 5803-5805* (discussed in *§ 577.220* et seq.) [*Lab. Code § 5404*; *see J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (1984) 153 Cal. App. 3d 327, 343, 200 Cal. Rptr. 219]* .

The purpose of a statute of limitations for filing of claims is to cause an early submission of controversies while it is possible to obtain competent evidence concerning the alleged injury and its effects and, thus, to afford protection against false claims or those based on remote and unsatisfactory speculation as to the cause of a disability manifesting itself long after the accident [*Sidders v. Workers' Comp. Appeals Bd. (1988) 205 Cal. App.3d 613, 620, 252 Cal. Rptr. 304* ; *see also Bassett-McGregor v. Workers' Comp. Appeals Bd. (1988) 205 Cal. App. 3d 1102, 1115, 252 Cal. Rptr. 868]* .

An injured employee has a statutory duty to provide his or her employer with notice of the injury [*see Lab. Code § 5400*]. Similarly, the employer must provide the injured employee with certain information relating to the employee's rights under the workers' compensation law [*see Lab. Code § 5401*]. For a discussion of these requirements, and the effect on the statute of limitations of an employer's failure to comply with them, see *§ 577.40* et seq.

[2] Proceedings to Collect Compensation

[a] In General

The time within which a proceeding to collect benefits may be commenced is one year from (a) the date of injury, or (b)

the expiration of any period covered by payment under *Lab. Code §§ 4650-4663* (disability payments), or (c) the date any benefits provided for in *Lab. Code §§ 4600-4614.1* (medical and hospital treatment) were last furnished [*Lab. Code § 5405*; *see J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (1984) 153 Cal. App. 3d 327, 333-334, 340-341, 200 Cal. Rptr. 219* ; *Sidders v. Workers' Comp. Appeals Bd. (1988) 205 Cal. App. 3d 613, 619, 252 Cal. Rptr. 304]* . The purpose of (b) and (c), *above*, is to protect the injured employee from being lulled into a sense of security by voluntary payments of benefits until the time to commence formal proceedings has expired [*Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (1977) 19 Cal. 3d 329, 333, 137 Cal. Rptr. 878, 562 P.2d 1037]* .

Because the three points of time specified in *Lab. Code § 5405* at which the period of limitation starts to run are in the alternative, the defendant, to defeat the applicant's claim on the ground the action is barred by lapse of time, must prove that the time starting from any and all three of the points designated has elapsed [*City etc. of San Francisco v. Workmen's Comp. App. Bd. (1970) 2 Cal. 3d 1001, 1014, 88 Cal. Rptr. 371, 472 P.2d 459* ; *Colonial Ins. Co. v. Industrial Acci. Com. (1945) 27 Cal. 2d 437, 441, 164 P.2d 490]* .

[b] Cumulative Injury

Liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1981, is limited to those employers who employed the employee during a period of one year immediately preceding either the date of injury or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the disease or injury, whichever occurs first [*Lab. Code § 5500.5(a)*; *see J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (1984) 153 Cal. App. 3d 327, 337-338, 200 Cal. Rptr. 219]* . These time restrictions do not limit the period of recovery for a cumulative injury; rather, they reduce the burden placed on the entire compensation system of allocating costs among employers [*Flesher v. Worker's Comp. Appeals Bd. (1979) 23 Cal. 3d 322, 327-328, 152 Cal. Rptr. 459, 590 P.2d 35]* . If no employer during the foregoing periods is insured for workers' compensation coverage or an approved alternative, liability will be imposed on the last year of employment exposing the employee to the hazards of occupational disease or cumulative injury for which there is an insured employer [*see Lab. Code § 5500.5(a)*].

Any employer held liable under an occupational disease or cumulative injury award may, within one year after issuance of the award, institute proceedings before the WCAB for the purpose of determining an apportionment of liability or right of contribution under the award [*Lab. Code § 5500.5(e)*]. The statute of limitations begins to run when the initial award of benefits is issued, even if the initial award is not a final award determining the employee's entitlement to all benefits [*see Rex Club v. Workers' Comp. Appeals Bd. (1997) 53 Cal. App. 4th 1465, 1474, 62 Cal. Rptr. 2d 393]* .

Special provisions relating to liability for occupational disease or cumulative injury that results from exposure solely during employment by certain residential owners or occupants are set forth in *Lab. Code § 5500.6*.

The date of injury in cases of occupational diseases or cumulative injuries is the date on which the employee first suffered disability from such a disease or injury and either knew, or in the exercise of reasonable diligence should have known, that the disability was caused by his or her present or prior employment [*Lab. Code § 5412*; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (1993) 16 Cal. App. 4th 227, 238-239, 20 Cal. Rptr. 2d 26* (holding that employee first suffered disability in 1985 when he was hospitalized and that employee's testimony established that in 1985 he believed his problems were work related)].

In one case, an employee's application for benefits resulting from asbestosis was timely when there was no substantial evidence that the employee had a ratable permanent disability before filing the application, even though he had been hospitalized four years earlier for a respiratory infection, at which time his doctor told him he had asbestosis but also noted that the employee was able to perform his work and normal activities without limitations [*Chavira v. Workers' Comp. Appeals Bd. (1991) 235 Cal. App. 3d 463, 474-476, 286 Cal. Rptr. 600]* . Moreover, even assuming the employee had a permanent disability that could have been tentatively rated more than one year before he filed the application, the evidence did not support the WCAB's finding that the employee knew or reasonably should have known

he had a permanent disability [*see Chavira v. Workers' Comp. Appeals Bd. (1991) 235 Cal. App. 3d 463, 475-476, 286 Cal. Rptr. 600]* .

Apportioning liability for cumulative trauma injuries, pursuant to *Lab. Code § 5500.5*, requires either compensable temporary disability or permanent disability to satisfy the disability requirement of *Lab. Code § 5412*. Because actual wage loss is required for temporary disability, modified work alone is not a sufficient basis for compensable temporary disability, but it may indicate permanent impairment of earning capacity, especially if the worker is never able to return to the original job duties. Medical treatment alone is not disability, but it may be evidence of compensable permanent disability, as may a need for modified work. These are questions for the trier of fact to determine and may require expert medical opinion [*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte) (2004) 119 Cal. App. 4th 998, 1005-1006, 14 Cal. Rptr. 3d 793]* .

If the WCJ finds that the employee suffered one continuous cumulative injury, then, under the terms of *Lab. Code § 5500.5*, the insurance carrier who provided coverage during the one-year period immediately preceding the *date of injury* or the *date of last exposure, whichever occurs first* bears full responsibility for the payment of workers' compensation benefits [*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (1993) 16 Cal. App. 4th 227, 240-241, 20 Cal. Rptr. 2d 26]* .

[c] Vocational Rehabilitation Benefits

In 2003 the legislature abolished the workers' compensation vocational rehabilitation program, repealing *Lab. Code §§ 139.5, 4635-4647*, and *5405.5* [*see* Stats. 2003, ch. 635, §§ 14, 14.3, 16]. In its place, the legislature created a "supplemental job displacement benefit" for specified workers who are permanently partially disabled, to be used for retraining. The new system applies only to injuries occurring on or after January 1, 2004 [*see § 577.45[2A]*].

In 2004, the legislature reenacted one of the statutes it had repealed in 2003, *Lab. Code § 139.5*, reinstating vocational rehabilitation. *However, the reenacted statute applies only to injuries occurring before January 1, 2004*, and it will remain in effect only until January 1, 2009, and as of that date is repealed, unless a later-enacted statute, that is enacted before January 1, 2009, deletes or extends that date [*Lab. Code § 139.5(k)*, (*l*)]. Various other vocational rehabilitation statutes, e.g., *Lab. Code §§ 4642, 4644(d), (e)*, and *5405.5*, once cross-referred to in former *Lab. Code § 139.5* but repealed in 2003, are also cross-referred to in the reenacted *Lab. Code § 139.5* and are now identified with the designation "former." Thus, although the issue may be further clarified by administrative and judicial action, it now appears that the statutory law on vocational rehabilitation applicable to pre-2004 injuries is confined to *Lab. Code § 139.5*, those "former" statutes to which it cross-refers, and those statutes not repealed in 2003. For example, the 2002 amendment to former *Lab. Code § 4646*, which allowed settlement of prospective vocational rehabilitation benefits, has not been reenacted, while *Lab. Code § 5100.6*, forbidding such settlements, was never repealed and, thus, remains in force. As a consequence of these legislative developments, at least some of the discussion in this subsection regarding time limitations applicable to vocational rehabilitation benefits applies only to pre-2004 injuries.

Except as otherwise provided in *Lab. Code § 4644* (termination of employer's liability for vocational rehabilitation services) and *Lab. Code § 5410* (discussed in *§ 577.222[4]*), the period within which an employee may request vocational rehabilitation benefits provided by *Lab. Code §§ 4635-4647* is one year from the date of the last finding of permanent disability by the WCAB, or one year from the date that the WCAB approved a compromise and release of other issues [*Lab. Code § 5405.5*; *see also Lab. Code § 139.5(f)* (time within which an employee may request vocational rehabilitation services is set forth in *Lab. Code §§ 5405.5, 5410*, and *5803*)]. Therefore, although *Lab. Code § 5410* establishes a limitation period of five years from the date of the injury, *Lab. Code § 5405.5* operates to provide that an initial request for vocational rehabilitation may be made after that time if the request is filed within one year from the last finding of permanent disability or approval of a compromise and release of other issues [*Sanchez v. Workers' Comp. Appeals Bd. (1990) 217 Cal. App. 3d 346, 354-355, 266 Cal. Rptr. 21* ; *Youngblood v. Workers' Comp. Appeals Bd. (1989) 216 Cal. App. 3d 764, 772, 265 Cal. Rptr. 211* ; *see O'Loughlin v. Workers' Comp. Appeals*

Bd. (1990) 222 Cal. App. 3d 1518, 1521-1524, 272 Cal. Rptr. 499 (holding that *Lab. Code § 5405.5* applies to injuries occurring before enactment date)]. Once rehabilitation entitlement has been adjudicated, further requests for rehabilitatin must be made within the five-year period [*Youngblood v. Workers' Comp. Appeals Bd. (1989) 216 Cal. App. 3d 764, 773, 265 Cal. Rptr. 211]* .

If the applicant timely raises the issue of entitlement to vocational rehabilitation in the initial application for adjudication and the issue is still pending, the employee's failure to file a formal request for rehabilitation benefits with the WCAB within five years after the date of injury does not prevent an award of rehabilitation benefits [*Vasquez v. Workers' Comp. Appeals Bd. (1991) 226 Cal. App. 3d 867, 872-873, 277 Cal. Rptr. 102* ; *see Lab. Code §§ 5405.5, 5410*].

It has been held that an employee's telephone call to his or her employer's claims adjuster requesting vocational rehabilitation benefits constitutes a "request" for vocational rehabilitation benefits under *Lab. Code § 5405.5*, and that a written request is not required [*Visalia School District v. Workers' Comp. Appeals Bd. (Hernandez) (1995) 40 Cal. App. 4th 1211, 1228, 47 Cal. Rptr. 2d 696]* . However, in one case, a request for rehabilitation benefits following the approval of a compromise and release agreement was deemed to be an initial request subject to the limitations period of *Lab. Code § 5405.5* and not a supplemental request subject to the five-years-from-the-date-of-injury limitations period of *Lab. Code § 5410*, despite the applicant's having placed a check mark next to "rehabilitation" in the application form filed for adjudication of claim immediately following his injury [*Roberts v. Workers' Comp. Appeals Bd. (1992) 33 Cal. App. 4th 631, 635-638, 4 Cal. Rptr. 2d 576]* . It was undisputed that the applicant had not pursued a claim for rehabilitation benefits prior to the issuance of the order approving the compromise and release, and that the applicant's entitlement to those benefits had not previously been adjudicated [*Roberts v. Workers' Comp. Appeals Bd. (1992) 3 Cal. App. 4th 631, 637-638, 4 Cal. Rptr. 2d 576]* . Whether or not an applicant indicates in an application filed with the WCAB that rehabilitation is a disputed issue is irrelevant [*Roberts v. Workers' Comp. Appeals Bd. (1992) 3 Cal. App. 4th 631, 638, 4 Cal. Rptr. 2d 576]* .

[d] Proceeding to Collect Death Benefits

[i] In General

Except when death is from asbestosis or, in some cases, an HIV-related disease (discussed below), the period within which a proceeding to collect death benefits under *Lab. Code § 4700 et seq.* may be commenced is one year from [*Lab. Code § 5406*].

- The date of death when death occurs within one year from the date of injury;

- The date any benefits under *Lab. Code § 4550 et seq.* (compensation) were last furnished when death occurs more than one year after the date of injury; or

- The date of death when death occurs more than one year after the date of injury and compensation benefits have been furnished.

No such proceeding may be commenced more than one year after the date of death nor more than 240 weeks from the date of injury [*Lab. Code § 5406*; *see* *Johnson v. Workers' Comp. Appeals Bd. (1970) 2 Cal. 3d 964, 972, 88 Cal. Rptr. 202, 471 P.2d 1002* ; *Ruiz v. Industrial Acci. Com. (1955) 45 Cal. 2d 409, 411-414, 289 P.2d 229]* .

Under *Lab. Code § 5406*, no claim can ever accrue to an adult dependent for benefits from an industrially caused death that occurs more than 240 weeks after the date of injury [*Massey v. Workers' Comp. Appeals Bd. (1993) 5 Cal. 4th 674, 677, 20 Cal. Rptr. 2d 825, 854 P.2d 117]* . The 240-week filing period is not tolled prior to the employee's death for a minor claimant by *Lab. Code § 5408* (no limitation of time runs against minor absent appointment of guardian,

conservator of the estate, or trustee). Under *Lab. Code § 5406*, if the injured employee dies more than 240 weeks from the date of injury, no death benefit claim can arise even though the claimant is a minor at the time of injury and files a claim within 240 weeks of the employee's death [*Massey v. Workers' Comp. Appeals Bd. (1993) 5 Cal. 4th 674, 681-684, 20 Cal. Rptr. 2d 825, 854 P.2d 117]* .

For purposes of the accrual of a dependent's claim for death benefits, the date of injury may depend on the claimant's knowledge of the industrial nature of the injury that caused the employee's death [*Massey v. Workers'Comp. Appeals Bd. (1993) 5 Cal. 4th 674, 678 n.1, 20 Cal. Rptr. 2d 825, 854 P.2d 117]* .

[ii] Death From Asbestosis

In the case of the death of an asbestos worker or firefighter from asbestosis, the period within which proceedings for the collection of death benefits under *Lab. Code § 4700 et seq.* may be commenced is one year from the date of death [*Lab. Code § 5406.5*]. The limitations period of *Lab. Code § 5406.5* is tolled, however, until the dependent of the deceased asbestos worker knows, or in the exercise of reasonable diligence should know, that the worker's death was caused by the employment [*Clark v. Workers' Comp. Appeals Bd. (1991) 230 Cal. App. 3d 684, 696, 281 Cal. Rptr. 485]* . "Asbestosis" means any pathology, whether or not combined with preexisting pathology, that results in disability or need for medical treatment from inhalation of asbestos fibers [*Lab. Code § 4402(a)*]. For a definition of asbestos and discussion of its effects, see *General Foundry Service v. Workers' Comp. Appeals Bd. (1986) 42 Cal. 3d 331, 335-336 n.2, 228 Cal. Rptr. 243, 721 P.2d 124* ; *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (1984) 153 Cal. App. 3d 327, 330 n.1, 200 Cal. Rptr. 219* .

[iii] Death From HIV-Related Disease

In the case of the death of health care workers, public safety employees, and certain correctional peace officers from an HIV-related disease, the period within which proceedings may be commenced for the collection of death benefits under *Lab. Code § 4700 et seq.* is one year from the date of death, providing that [*Lab. Code § 5406.6(a)*]:

- A report of the injury or exposure was made to the employer or to a governmental agency authorized to administer industrial injury claims within one year of the date of the injury;

- The worker complied with the requisite notice provisions and the claim has not been finally determined to be noncompensable; or

- The employer provided, or was ordered to provide workers' compensation benefits for the injury prior to the date of death.

"Health care worker" means an employee who has direct contact, in the course of his or her employment, with blood or other bodily fluids contaminated with blood, or with other bodily fluids identified by the Division of Occupational Safety and Health as capable of transmitting HIV, who is either [*Lab. Code § 5406.6(b)*].

- Employed by a provider of health care under *Civ. Code § 56.05*, including but not limited to registered nurses, licensed vocational nurses, certified nurses aides, clinical laboratory technologists, dental hygienists, physicians, janitors or houskeeping workers; or

- Who provides direct patient care.

[e] Serious and Willful Misconduct

[i] By Employer

A proceeding to collect increased compensation under *Lab. Code § 4553* on the ground of the employer's serious and willful misconduct may be commenced within 12 months from the date of injury. This period is not extended by payment of compensation, agreement for payment, or the filing of an application for compensation benefits under other provisions of the workers' compensation law [*Lab. Code § 5407*]. For discussion of *Lab. Code § 4553*, see *§ 577.17[2]*.

After the one-year period allowed by the statute, additional employers (such as, in this case, a special employer) may not be joined in a claim for serious and willful misconduct timely commenced against another employer (here, the general employer), unless the employee was ignorant of the identity of the late-filed-against employer until after the running of the statute [*McGee Street Productions v. W.C.A.B. (Peterson) (2003) 108 Cal. App. 4th 717, 725-726, 133 Cal. Rptr. 2d 813]* .

[ii] By Employee

A proceeding to reduce compensation on the ground that the injury was caused by the serious and willful misconduct of the employee under *Lab. Code § 4551* may be commenced within 12 months from the date of injury. This limitation does not apply, however, if the employee has commenced proceedings for increased compensation on the ground of serious and willful misconduct of the employer [*Lab. Code § 5407.5*]. For discussion of *Lab. Code § 4551*, see *§ 577.17[1]*.

[3] Minors and Incompetents

If an injured employee or any of a deceased employee's dependents is under 18 years of age or incompetent at any time when any right or privilege accrues to the employee or dependent under the workers' compensation law, a guardian or conservator of the estate appointed by the court, or a guardian ad litem or trustee appointed by the WCAB, may, on behalf of the employee or dependent, claim and exercise any right or privilege with the same force and effect as if no disability existed [*Lab. Code § 5408*; *see also discussion under § 577.81*].

No time limitation runs against any person under 18 years of age or any incompetent unless and until a guardian, conservator of the estate, or trustee is appointed [*Lab. Code § 5408*; *see Fogarty v. Dept. of Indus. Relations (1928) 206 Cal. 102, 104-105, 273 P. 791* ; *Roblyer v. Workers' Comp. Appeals Bd. (1976) 62 Cal. App. 3d 574, 579, 133 Cal. Rptr. 246* (dependency must be determined as of date of injury in case involving death benefit claim of dependent who was a minor at time injury was sustained and an adult when injured employee died); *see also Fisher v. Workers' Comp. Appeals Bd. (1976) 62 Cal. App. 3d 924, 929, 133 Cal. Rptr. 471* (same)].

The WCAB may determine the fact of minority or incompetency of any injured employee and may appoint a trustee to receive and disburse compensation payments for the benefit of the minor or incompetent and his or her family [*Lab. Code § 5408*].

[4] Tolling of Statute on Submission to Information and Assistance Officer

Submission of any matter to an information and assistance officer of the Division of Workers' Compensation (formerly the Division of Industrial Accidents) [*see § 577.12[2]*] tolls any applicable statute of limitations for the period that the matter is under consideration by the officer and for 60 days following the issuance of his or her recommendation [*Lab. Code § 5454*].

[5] As Affirmative Defense

The running of the period of limitation is an affirmative defense and operates to bar the employee's remedy and not to extinguish his or her right [*Lab. Code § 5409*]. The burden of proving that the action is barred rests on the defendant employer [*Colonial Ins. Co. v. Industrial Acci. Com. (1945) 27 Cal. 2d 437, 440, 164 P.2d 490]* . The defense may, therefore, be waived, and failure to present it prior to the submission of the cause for decision is a sufficient waiver [

Lab. Code § 5409].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTollingWorkers' Compensation & SSDIBenefit DeterminationsCumulative & Successive DisabilitiesWorkers' Compensation & SSDIBenefit DeterminationsDeath BenefitsWorkers' Compensation & SSDICompensabilityInjuriesOccupational DiseasesWorkers' Compensation & SSDIDefensesStatutes of Limitations

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1. General Principles of Workers' Compensation Law

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[Reserved]

§§ 577.26[Reserved]

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§ 577.40 Governing Law

Initial attorney consultation requirements, including the requirements for attorney's fees and fee agreements, are governed by *Lab. Code § 4906* and *8 Cal. Code Reg. §§ 10134, 10135, 10135.1*. Notice requirements for employers and injured employees prior to initiation of a claim adjudication proceeding are governed by *Lab. Code §§ 5400-5403* and *8 Cal. Code Reg. §§ 10116-10119*. Medical benefits are covered by *Lab. Code §§ 4600-4614.1* and *8 Cal. Code Reg. §§ 9780-9787*; vocational rehabilitation benefits by *Lab. Code §§ 4635-4647* [repealed effective January 1, 2004] and *8 Cal. Code Reg. §§ 10122-10133.4*; permanent disability ratings by *8 Cal. Code Reg. §§ 10150-10168*; permanent disability and determination of medical issues for injuries occurring on and after January 1, 1991, by *Lab. Code §§ 4061-4067.5*; and temporary and permanent disability payments by *Lab. Code §§ 4650-4663*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsClaimsFiling RequirementsWorkers' Compensation & SSDIAdministrative ProceedingsCosts & Attorney FeesWorkers' Compensation & SSDIBenefit DeterminationsMedical BenefitsGeneral OverviewWorkers' Compensation & SSDIBenefit DeterminationsPermanent Total DisabilitiesWorkers' Compensation & SSDIBenefit DeterminationsTemporary Total Disabilities

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51-577 California Forms of Pleading and Practice--Annotated § 577.41

§ 577.41 Consultation With Attorney

[1] Disclosure Statement

An employee may consult an attorney prior to notifying his or her employer of an injury, or at any time subsequent to notification. When the employee consults an attorney with respect to an injury occurring on or after January 1, 1990, counsel is required, at the initial consultation, to furnish the employee with a written disclosure statement relating to attorney's fees [*Lab. Code § 4906(e)*; *8 Cal. Code Reg. §§ 10134, 10135*]. The form must be signed by the employee and his or her attorney, and the attorney must provide copies to the employee and to the employer, or to the employer's insurer or third-party administrator, if either is known, within 15 days of execution of the form by the employee and attorney [*Lab. Code § 4906(e)*; *8 Cal. Code Reg. §§ 10134, 10135.1*].

For a disclosure statement form, see *§ 577.370[1]*.

[2] [Reserved]

[3] Fees and Fee Agreements

No charge, claim, or agreement for attorney's fees pertaining to a workers' compensation claim is enforceable, valid, or binding in excess of a reasonable amount. The WCAB may determine what constitutes a reasonable amount [*Lab. Code §§ 4903(a), 4906(a)*]. Therefore, an attorney or agent may not demand or accept any fee from an employee or dependent of an employee for the purpose of representing the employee or dependent in any proceeding of the Division of Workers' Compensation, the WCAB, or any appellate procedure related to such proceedings, until the amount of the fee is approved or set by the WCAB [*Lab. Code § 4906(b)* (governing injuries occurring on or after January 1, 1990)]. Additionally, every fee agreement must be submitted to the WCAB for approval within 10 days after it is made [*Lab. Code § 4906(c)* (governing injuries occurring on or after January 1, 1990)].

In one case, the court of appeal, affirming an Appeals Board order denying reconsideration of the WCJ's finding that a

written attorney's fee agreement between an employee and his attorney was not binding, held that the legislature, in *Lab. Code § 4906*, has spoken clearly and decisively that attorney's fees in workers' compensation cases cannot exceed an amount that is "reasonable" and that the Appeals Board is the final arbiter of reasonableness in all cases. The court found that the fee agreement stated that SB 899 reduced permanent disability benefits, that the law firm could no longer afford to offer representation under Appeals Board attorney's fee guidelines, that the agreement was an attempt to draft around current policies under *Lab. Code § 4906*, "which are believed to be outdated," and that the parties, therefore, "agree that the fee will be set at $225 per hour to be paid out of permanent disability or 12% of the permanent disability award whichever is less." The agreement, stated the court, purported to override the Appeals Board's authority by guaranteeing that the attorney will receive fees according to a specified formula at the outset of the case, prior to and irrespective of any subsequent determination of reasonableness by the Board. To the extent that the agreement purported to "draft around" *Lab. Code § 4906* by depriving the Board of its statutory authority to fix attorney fees, it conflicted with state law and was not enforceable. After services had been rendered, said the court, the WCJ may approve, increase, or reduce the fees provided for in the agreement, taking into consideration the factors listed in *Lab. Code § 4906(d), 8* Cal. Code Reg. § 10775, and the Appeals Board Policy and Procedure Manual [*Vierra v. Workers' Comp. Appeals Bd. (2007) 154 Cal. App. 4th 1142, 1147-1150, 65 Cal. Rptr. 3d 423]* .

In establishing a reasonable attorney's fee, the WCAB will consider the responsibility assumed by the attorney, the care exercised in representing the applicant, the time involved, and the results obtained [*Lab. Code § 4906(d)* (governing injuries occurring on or after January 1, 1990)]. No fee for legal services may be awarded to a representative who is not an attorney licensed by the California State Bar, except with respect to claims for which an application under *Lab. Code § 5501* was filed on or before December 31, 1991, or for which a disclosure form under *Lab. Code § 4906* was sent to the employer, or insurer or third-party administrator if either is known, on or before December 31, 1991 [*Lab. Code § 4903(a)*; *see also Longval v. Workers' Comp. Appeals Bd. (1996) 51 Cal. App. 4th 792, 799-803* (*Lab. Code § 4903(a)*, allowing attorney's fees only for attorneys licensed in California, held constitutional)]. For a discussion of liens for attorney's fees, see *§ 577.261*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsAttorney FeesExcessive FeesLegal EthicsClient RelationsAttorney FeesFee AgreementsWorkers' Compensation & SSDIAdministrative ProceedingsCosts & Attorney Fees

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§ 577.42 Notice Requirements

[1] Employee's Duty to Notify Employer of Injury or Death

[a] In General

A claim to recover workers' compensation may not be maintained unless, within 30 days after the injury that caused the disability or death occurred, a written notice signed by the injured employee or someone in the employee's behalf, or, in the event of the employee's death, by a dependent or someone in the dependent's behalf, is served on the employer [*Lab. Code § 5400*].

For injuries occurring prior to January 1, 1990, the notice must state the name and address of the person injured, the time and place where the injury occurred, and the nature of the injury [former *Lab. Code § 5401*, prior to repeal by Stats. 1989, ch. 892 (governing injuries occurring prior to January 1, 1990)].

[b] Effect of Failure to Provide Notice

Failure to give the notice or any defect or inaccuracy in it is not a bar to recovery if it is found as a fact in the proceedings for collection of the claim that the employer was not in fact misled or prejudiced by it [*Lab. Code § 5403*; *see Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (1985) 39 Cal. 3d 57, 66, 216 Cal. Rptr. 115, 702 P.2d 197]* . Moreover, knowledge of the employee's injury obtained from any source by the employer or the employer's managing agent, superintendent, foreman, or other person in authority, or knowledge of the assertion of a claim of injury sufficient to afford the employer opportunity to make an investigation into the facts, is equivalent to service of the notice on the employer [*Lab. Code § 5402(a)*].

[2] Employer's Duty to Notify Injured Employee of Workers' Compensation Rights

[a] Injuries Occurring Prior to January 1, 1990

For injuries occurring prior to January 1, 1990, on receiving knowledge of the injury, the employer must, unless an application for benefits has been filed, notify the injured employee or, in the case of death, his or her dependents that the employee or dependents may be entitled to benefits under the workers' compensation law [*Lab. Code § 5402*, prior to amendment by Stats. 1989, ch. 892 (governing injuries occurring prior to January 1, 1990)]. Although the law applicable to injuries occurring prior to January 1, 1990, does not specifically require an employer to provide the employee with a claim form, notice must be within the time period and in the manner prescribed by the regulations of the Administrative Director [*Lab. Code § 5402*, prior to amendment by Stats. 1989, ch. 892 (governing injuries occurring prior to January 1, 1990)]. The employer should therefore follow the notice procedures for injuries occurring on or after January 1, 1990, as set forth in *8 Cal. Code Reg. §§ 10116-10119*. For discussion of these procedures, see [2][b], *below*.

[b] Injuries Occurring on or After January 1, 1990

For injuries occurring on or after January 1, 1990, within one working day of receiving notice or knowledge of an injury that results in lost time beyond the employee's work shift at the time of injury or results in medical treatment beyond first aid, or of the employee's request, the employer must provide the injured employee or, in the case of death, his or her dependents with a claim form and a notice of potential eligibility for benefits under the workers' compensation law [*Lab. Code § 5401(a)*; *see also Lab. Code §§ 138.3, 138.4* (Administrative Director's authority to promulgate regulations regarding notices to be given to injured employees); *8 Cal. Code Reg. §§ 9812, 9880* (regulations regarding manner and content of notices)].

If the employer's claims administrator obtains knowledge that the employer has not provided a claim form, the administrator must provide one to the employee within three working days of obtaining knowledge that the form was not provided [*8 Cal. Code Reg. § 10140(b)*]. If the administrator cannot determine if the employer has provided the employee with a claim form, the administrator must provide one within 30 days of the date the administrator had knowledge of the claim [*8 Cal. Code Reg. § 10140(c)*].

For purposes of the above requirement, the term "first aid" means any one-time treatment, and any follow-up visit for the purpose of observation, of minor scratches, cuts, burns, splinters, or other minor industrial injury, which do not ordinarily require medical care. This one-time treatment, and follow-up visit for the purpose of observation, is considered first aid even though provided by a physician or registered professional personnel. The term "minor industrial injury" does not include serious exposure to a hazardous substance as defined in *Lab. Code § 6302(i)* [*Lab. Code § 5401(a)*].

Insofar as practicable, the notice of potential eligibility for benefits and the claim form are to be a single document and are to instruct the injured employee to fully read the notice of potential eligibility. The form and content of the notice and claim form are to be prescribed by the Administrative Director after consultation with the Commission on Health and Safety and Workers' Compensation. The notice is to be easily understandable and available in both English and Spanish. The content must include, but need not be limited to, the following [*Lab. Code § 5401(b)*]:

- The procedure to be used to commence proceedings for the collection of compensation.
- A description of the different types of workers' compensation benefits.
- What happens to the claim form after it is filed.
- From whom the employee can obtain medical care for the injury.
- The role and function of the primary treating physician.

- The rights of an employee to select and change the treating physician pursuant to *Lab. Code §§ 3550(e)* and *4600*.

- How to get medical care while the claim is pending.

- The protections against discrimination provided pursuant to *Lab. Code § 132a*.

- The following written statements:

  - You have a right to disagree with decisions affecting your claim.

  - You can obtain free information from an information and assistance officer of the state Division of Workers' Compensation, or you can hear recorded information and a list of local offices by calling [applicable information and assistance telephone number(s)].

  - You can consult an attorney. Most attorneys offer one free consultation. If you decide to hire an attorney, his or her fee will be taken out of some of your benefits. For names of workers' compensation attorneys, call the State Bar of California at [telephone number of the State Bar of California's legal specialization program, or its equivalent].

[c] Victims of Crime

Employers are required to give any employee who is a victim of a crime that occurred on the employment premises written notice that the employee is eligible for workers' compensation, including psychiatric injuries, that may have resulted from the crime. The notice must be provided, either personally or by first-class mail, within one working day of the crime's occurrence or within one working day of the date that the employer reasonably should have known of the crime [*Lab. Code § 3553*].

[d] Failure to Give Employee Notice of Workers' Compensation Rights

For all injuries, whenever occurring, if the employer fails to provide the employee with notice of his or her rights under the workers' compensation law, the statute of limitations for filing a claim is tolled, provided the employee would be prejudiced if the statute were not tolled [*Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (1985) 39 Cal. 3d 57, 64-65, 67, 216 Cal. Rptr. 115, 702 P.2d 197* ; *Sidders v. Workers' Comp. Appeals Bd. (1988) 205 Cal. App. 3d 613, 621-622, 252 Cal. Rptr. 304]* . The tolling ends, however, at such time as the employee gains knowledge of his or her workers' compensation rights [*Gonzalez v. Workers' Comp. Appeals Bd. (1986) 186 Cal. App. 3d 514, 522, 230 Cal. Rptr. 649]* . Knowledge by the employee that a claim must be filed will not cease tolling of the statute if the employer fails to notify the employee of the applicable time limits for filing the claim, absent evidence that the employee otherwise knew of the applicable time limits [*Galloway v. Workers' Comp. Appeals Bd. (1998) 63 Cal. App. 4th 880, 887, 74 Cal. Rptr. 2d 374]* .

To avoid tolling of the statute, the employer has the burden not only to assert the running of the statute of limitations, but an affirmative burden to establish either that written notice was given to the employee or that the employee had, in fact, actual notice of his or her workers' compensation rights [*Sidders v. Workers' Comp. Appeals Bd. (1988) 205 Cal. App. 3d 613, 622, 252 Cal. Rptr. 304]* .

In one case, the court of appeal followed *Kaiser Foundation Hospitals v. W.C.A.B. (Martin)* and held that CIGA failed to meet its burden to prove that an employee gained actual knowledge of his potential eligibility for workers' compensation benefits for a 1997 injury more than one year prior to filing his claim. The court found that the employer had breached its statutory duty to notify an unaware employee of his or her workers' compensation rights, tolling the

one-year limitations period for filing a claim for benefits until the employee acquired actual knowledge of those rights. The court also found that there was no substantial evidence that the employee was actually aware that his 1997 injury was potentially compensable, and that his employer had, in fact, told him that his 1997 injury was not compensable. The employee's retention of counsel in 1999 to represent him in proceedings regarding a 1996 industrial injury was not evidence of the employee's knowledge of the compensable status of the 1997 injury. Moreover, the employee's attorney's 2002 request for a continuance of the trial regarding the 1996 injury in order to file a claim for the 1997 injury was not evidence that the employee, as opposed to the employee's attorney, had knowledge of the compensable nature of his 1997 injury. Finally, the court held that CIGA's conduct delayed the employee's filing of a claim for the 1997 injury, so that it was estopped to assert the statute of limitations. According to the court, CIGA's failure until May 2003 to admit that it had coverage for the 1997 injury delayed the employee's filing of an application for adjudication of the 1997 injury, making the employee's March 2004 filing of the application for adjudication timely [*California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd. (2008) 163 Cal. App. 4th 853, 856-857, 862-878, 77 Cal. Rptr. 3d 868]* .

For discussion of time limitations generally, see *§ 577.25*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTollingWorkers' Compensation & SSDIAdministrative ProceedingsClaimsTime LimitationsNotice PeriodsWorkers' Compensation & SSDIDefensesStatutes of Limitations

California Forms of Pleading and Practice--Annotated

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§ 577.43 Filing a Claim Form

[1] Source of Form

The Division of Workers' Compensation provides a claim form for use in filing a claim [*8 Cal. Code Reg. § 10139*; *see* form in *§ 577.373[1]*]. These forms are available at district offices of the Employment Development Department and the Division of Workers' Compensation, and may also be made available to the employee from other sources [*Lab. Code § 5401(a)*].

[2] Content of Form

The claim form must contain, prominently stated, the following statement [*Lab. Code § 5401.7*]:

> Any person who makes or causes to be made any knowingly false or fraudulent material statement or material representation for the purpose of obtaining or denying workers' compensation benefits or payments is guilty of a felony.

The form may, but is not required to, contain the statements required to be displayed by an insurer under *Ins. Code §§ 1871.2* and *1879.2* relating to false or fraudulent claims under a contract of insurance [*Lab. Code § 5401.7*].

[3] Manner of Filing Form

The injured employee or, in the case of death, a dependent of the injured employee or an agent of the employee or dependent must file the completed claim form with the employer [*Lab. Code § 5401(c)*]. The claim form must be filed with the employer before the injured employee becomes entitled to late payment supplements under *Lab. Code § 4650(d)* or requests a medical evaluation under *Lab. Code § 4061* or *4062* [*Lab. Code § 5401(d)*]. A claim form is deemed filed when it is personally delivered to the employer or received by the employer by first-class or certified mail [*Lab. Code § 5401(c)*].

[4] Employer's Duties on Receipt of Claim Form

[a] In General

Within one working day of receipt of a claim form, the employer must date the form and provide a dated copy to the employer's claims administrator and to the employee, dependent, or agent who filed the claim form [*Lab. Code § 5401(c)*; *8 Cal. Code Reg. § 10140(a)*]. The employer must also provide its insurer with a dated copy of the completed form [*Lab. Code § 5401(c)*].

Within one working day after an employee files a claim form under *Lab. Code § 5401*, the employer must authorize the provision of all treatment, consistent with the medical treatment utilization schedule under *Lab. Code § 5307.27* or the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines, for the alleged injury and must continue to provide the treatment until the date that liability for the claim is accepted or rejected [*Lab. Code § 5402(c)*]. Until that date, liability for medical treatment is limited to $10,000 [*Lab. Code § 5402(c)*]. Treatment so provided does not give rise to a presumption of liability on the part of the employer [*Lab. Code § 5402(d)*].

An employer's duty to provide timely compensation to an injured worker is not abrogated by an employee's failure to complete and file the claim form [*8 Cal. Code Reg. § 10137*].

[b] Denial of Claim

The claim is deemed denied on the date the written denial notice is personally served or, if the denial notice is mailed, five days after it is placed in the mail if the address is within California, 10 days if the address is outside California but within the United States, and 20 days if the address is outside the United States [*8 Cal. Code Reg. § 10142*]. In order to cease the claim form's tolling of the limitations period, the denial notice must be issued in accordance with the notice regulations [*8 Cal. Code Reg. § 10142*; *see 8 Cal. Code Reg. §§ 9812-9815*].

[c] Presumption of Compensability if Liability Not Rejected

If liability is not rejected within 90 days after the filing of the claim form under *Lab. Code § 5401*, the injury is presumed compensable [*Lab. Code § 5402*]. Application of the presumption is mandatory when liability is not timely denied, even if the claim is accepted and paid, and denied at a later date [*Williams v. Workers' Comp. Appeals Bd. (1999) 74 Cal. App. 4th 1260, 1265-1266, 88 Cal. Rptr. 2d 798]* .

The Supreme Court has rejected the proposition that this 90-day period, during which the employer's rejection of liability will avoid the presumption of compensability of the employee's injury, begins to run when the employer receives knowledge of an injury or asserted injury, even though no claim form has been filed. Rather, the 90-day period runs only from the date on which the employee files a claim form with the employer. The Court found that this rule was the clear and unambiguous command of *Lab. Code § 5402(b)* and was manifestly intended to relieve the employer and the insurer from having to investigate and evaluate every possible claim, some of which might never ripen into actual claims for benefits [*Honeywell v. Workers' Comp. Appeals Bd. (2005) 35 Cal. 4th 24, 33-35, 24 Cal. Rptr. 3d 179, 105 P.3d 544]* . The Court also noted that an employer generally will be estopped to deny that this 90-day period began running before the filing of a claim form *only* if: (1) the employer, knowing that the employee had suffered or was asserting an industrial injury, refused to provide a claim form or misrepresented the availability of or need for the employee to file a claim form; (2) the employee was actually misled into believing that no claim form was available or necessary and failed to file one for that reason; and (3) because of this reliance, the employee suffered some loss of benefits or setback as to the claim. Finally, the Court stated that the employee need not show that the employer's agents consciously or deliberately set out to prevent or delay the employee's filing of a claim. Rather, the employer's violation, through its negligence, of its duty to provide a claim form and notice of potential eligibility when it learns that an

industrial injury has occurred or is being asserted, resulting in the employee's prejudicial reliance, is sufficient to give rise to estoppel [*Honeywell v. Workers' Comp. Appeals Bd. (2005) 35 Cal. 4th 24, 37-38, 24 Cal. Rptr. 3d 179, 105 P.3d 544; see Fleetwood Enterprises, Inc. v. W.C.A.B. (Moody) (2005) 134 Cal. App. 4th 1316, 1323-1331, 37 Cal. Rptr. 3d 587]* .

The presumption is rebuttable only by evidence discovered subsequent to the 90-day period [*Lab. Code § 5402(b)*]. However, one court of appeal has held that the requirement that the employer reject liability within 90 days in order to avoid a presumption of compensability does not require the employer to actually *notify* the employee of the rejection within that time period so long as the claim itself was rejected within that time frame [*Rodriguez v. Workers' Comp. Appeals Bd. (1994) 30 Cal. App. 4th 1425, 1433, 35 Cal. Rptr. 2d 713* (noting, however, that failure to provide timely notice may hamper efforts to prove that timely rejection was indeed made)].

[5] Effect of Filing on Statute of Limitations

For injuries occurring on or after January 1, 1994, the filing of the claim form with the employer tolls the time limitations for commencing proceedings for workers' compensation benefits set forth in *Lab. Code §§ 5405* and *5406* until the employer denies the claim or the injury becomes presumptively compensable under *Lab. Code § 5402(b)* [*Lab. Code § 5401(d)*]. For purposes of this provision, a claim form is deemed filed when it is personally delivered to the employer or mailed to the employer by first-class or certified mail [*Lab. Code § 5401(d)*].

[6] Dismissal of Claim for Lack of Activity

[a] Injuries Occurring Prior to January 1, 1994

[i] If Claim Denied

If a claim form has been filed prior to January 1, 1994, and the claim is denied by the employer, the claim may be dismissed if there has been no activity for the previous 180 days and if the claims administrator has served notice specifying that the claim will be dismissed by operation of law unless an application for adjudication is filed within 180 days of service of the notice [*Lab. Code § 5404.5(a)*; *8 Cal. Code Reg. § 10141(a)*; *see § 577.450*].

[ii] If Benefits Furnished

If a claim form has been filed prior to January 1, 1994, and benefits have been furnished by the employer, the claim may be dismissed if there has been no activity for the previous 180 days and if the claims administrator has served notice specifying that the claim will be dismissed by operation of law unless an application for adjudication is filed within five years of the date of injury or within one year of the last furnishing of benefits, whichever is later [*Lab. Code § 5404.5(b)*; *8 Cal. Code Reg. § 10141(b)*; *see § 577.451*]. For these purposes, the date of last furnishing of benefits is the later of either [*8 Cal. Code Reg. § 10141(b)(2)*]:

- The last date the employee received medical or rehabilitation services, or

- The last date that payment of any compensation benefit was mailed or personally delivered to the employee or service provider.

[b] Injuries Occurring on or After January 1, 1990, and Before January 1, 1994

When an application for adjudication for an injury occurring on or after January 1, 1990, and before January 1, 1994, has not been filed by any of the parties, an employer or insurer seeking dismissal of a claim form for lack of prosecution must solely utilize the procedures set forth in *Labor Code Section 5404.5*, discussed above, and must not seek an order of dismissal from the WCAB by filing an application for adjudication, a request for a pre-application determination, or

any other petition or request [*8 Cal. Code Reg. § 10583*].

[c] Service of Notice of Dismissal

These notices dismissing inactive claims must be served on the employee pursuant the rules regarding service of summons in the Code of Civil Procedure [*Lab. Code § 5404.5(a), (b)*; *8 Cal. Code Reg. § 10141(d)*; *see Code Civ. Proc. § 415.10 et seq.*(rules of service)]. If the employee is represented by an attorney, the claims administrator must also serve a copy of the notice on the attorney by personal delivery or first class mail. If no Application for Adjudication of Claim has been filed, but the WCAB has assigned a case number to the matter because of pre-application filing, the claims administrator must also serve a copy of the notice on the Appeals Board with proof of service made in accordance with Rule 10975 of the Workers' Compensation Appeals Board's Rules of Practice and Procedure [*8 Cal. Code Reg. § 10141(d)*; *see 8 Cal. Code Reg. § 10975*].

[d] Evidence That Claim Is Active

The occurrence of any of the following during the 180 days before service of notice is evidence that the claim is not inactive, thus precluding dismissal due to inactivity [*8 Cal. Code Reg. § 10141(e)*]:

- The employee has made demand for payment or provision of benefits;
- The claims administrator has knowledge that there are benefits due and unpaid;
- There has been treatment rendered for the industrial injury;
- There has been a medical-legal evaluation of the employee;
- There has been a deposition in regard to the claim; or
- The claims administrator has other knowledge that the employee is actively pursuing the claim.

[e] Jurisdiction of WCAB

These provisions do not limit the jurisdiction of the WCAB [*Lab. Code § 5404.5(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceInferences & PresumptionsPresumptionsWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling RequirementsWorkers' Compensation & SSDICompensabilityPresumptionsWorkers' Compensation & SSDIDefensesStatutes of LimitationsWorkers' Compensation & SSDIPosting & Recordkeeping

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[Reserved]

§ 577.44[Reserved]

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§ 577.45 Provision of Benefits

[1] Medical Treatment

[a] In General

An employer is required to provide an injured employee with all medical, surgical, chiropractic, acupuncture, and hospital treatment that is reasonably required to cure or relieve the injury [*Lab. Code § 4600(a)*]. In 2004, the legislature defined medical treatment "reasonably required to cure or relieve the injured worker from the effects of his or her injury" to mean treatment that is based on the guidelines adopted by the Administrative Director pursuant to *Lab. Code § 5307.27* or, prior to the adoption of those guidelines, the updated American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines [*Lab. Code§ 4600(b)*]. SB 899, the bill that enacted these provisions [*see* Stats. 2004, ch. 34], also provided that the amendment, addition, or repeal of any law made by SB 899 applied prospectively from the date of SB 899's enactment (April 19, 2004), regardless of the date of injury [*see* Stats. 2004, ch. 34, § 47]. The court of appeal has held that this provision means that the ACOEM Guidelines apply to determine what is reasonable medical treatment in all cases in which no such determination had been made as of April 19, 2004. The court found that the medical treatment in the case before it was completed almost two months before enactment of SB 899 but that no determination of the reasonableness of that treatment was made until May 2005, when the WCJ found, per stipulation of the parties, that the value of the disputed chiropractic services was $6,430 and that the ACOEM Guidelines were not applicable to the case, following which the Appeals Board denied reconsideration. The court of appeal annulled the Board's decision and remanded the case for further proceedings [*Sierra Pacific Industries v. W.C.A.B. (Chatham) (2006) 140 Cal. App. 4th 1498, 1505-1512, 45 Cal. Rptr. 3d 550]* .

The requirement to provide medical treatment includes provision of nursing, medicines, medical and surgical supplies, crutches, and apparatus, including orthotic and prosthetic devices and services [*Lab. Code § 4600(a)*]. Also included are the following:

- Services provided by licensed physical therapists, chiropractic practitioners, and acupuncturists [*Lab. Code § 3209.5*];

- Services of licensed marriage, family, and child counselors and clinical social workers, if the injured person is referred by a licensed physician and surgeon, with the approval of the employer, for treatment of a condition arising out of the injury [*Lab. Code § 3209.8*];

- Services provided by registered psychological assistants who meet the requirements set forth in *Bus. & Prof. Code § 2913* [*Bus. & Prof. Code § 2913*; *Bergenstal v. Workers' Comp. Appeals Bd. (1996) 45 Cal. App. 4th 1272, 1279-1280, 53 Cal. Rptr. 2d 266]* ; and

- Any other form of therapy, treatment, or healing practice voluntarily agreed on in writing between the employer and employee [*Lab. Code § 3209.7*].

Within one working day after an employee files a claim form under *Lab. Code § 5401*, the employer must authorize the provision of all treatment, consistent with the medical treatment utilization schedule under *Lab. Code § 5307.27* or the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines, for the alleged injury and must continue to provide the treatment until the date that liability for the claim is accepted or rejected [*Lab. Code § 5402(c)*]. Until that date, liability for medical treatment is limited to $10,000 [*Lab. Code § 5402(c)*]. Treatment so provided does not give rise to a presumption of liability on the part of the employer [*Lab. Code § 5402(d)*].

An employer who neglects or refuses to promptly provide medical treatment benefits is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment [*Lab. Code § 4600(a)*]. The requirement that the employer approve a licensed physician's referral of an employee to a licensed marriage, family, or child counselor or social worker does not preclude reimbursement for self-procured treatment that is found by the WCAB to be otherwise compensable, if the employer has refused to authorize any treatment for the condition arising from the injury that is treated by the counselor or social worker [*Lab. Code § 3209.8*].

Medical treatment may be provided by a state-licensed physician assistant or nurse practitioner, acting under the review or supervision of a physician and surgeon pursuant to standardized procedures or protocols within their lawfully authorized scope of practice. "Medical treatment" includes the authority of the nurse practitioner or physician assistant to authorize the patient to receive time off from work for a period not to exceed three calendar days if the authority is included in a standardized procedure or protocol approved by the supervising physician. The nurse practitioner or physician assistant may cosign the Doctor's First Report of Occupational Injury or Illness. The treating physician, however, must make any determination of temporary disability and must sign the report [*Lab. Code § 3209.10*].

Provision of medical and hospital treatment benefits is governed by *Lab. Code § 4600 et seq.* [*see also 8 Cal. Code Reg. § 9780 et seq.*]. In 1992, the Legislature enacted *Lab. Code § 4612*, which authorized the Administrative Director to implement a pilot project for a three-year period under which an employer participating in the project would be authorized to contract with a health care service plan to be the exclusive provider of medical, surgical, and hospital treatment for occupational and nonoccupational injuries and illnesses incurred by its employees. In 2001, the Legislature ended these pilot projects by repealing *Lab. Code § 4612* [*see* Stats. 2001, ch. 115 § 24].

If an employee has filed a claim form pursuant to *Lab. Code § 5401* (*discussed under § 577.42[2][b]*), a provider of medical services who has actual knowledge that a claim is pending is prohibited from collecting money directly from the employee for services to cure or relieve the effects of the injury for which the claim was filed, unless the medical provider receives written notice that the employer has rejected liability for the injury and provides the employee with a copy of this notice. A medical provider who violates this prohibition is liable for three times the amount unlawfully collected, plus reasonable attorney's fees and costs [*Lab. Code § 3751(b)*].

An employer may comply with the requirement to provide medical treatment to its industrially injured employees by

contracting with a health care organization certified by the administrative director to provide such medical treatment [*Lab. Code §§ 4600.3, 4600.5*; *see 8 Cal. Code Reg. § 9779.3* (obligations of employer covered by contract with health care organization)].

Unless the employer or the employer's insurer has established a medical provider network, as provided for in *Lab. Code § 4616*, after 30 days from the date the injury is reported, the employee may be treated by a physician of his or her own choice or at a facility of his or her own choice within a reasonable geographic area [*Lab. Code § 4600(c)*].

If an employee has notified his or her employer in writing prior to the date of injury that he or she has a personal physician, the employee has the right to betreated by that physician from the date of injury, if the employer provides either non-occupational group health coverage in a health care service plan, licensed pursuant to *Health & Safety Code § 1340 et seq.* (the Knox-Keene Health Care Service Plan Act of 1975) or non-occupational health coverage in a group health plan or a group health insurance policy as described in *Lab. Code § 4616.7* (medical provider networks) [*Lab. Code § 4600(d)(1)*; *see* [d], *below*].

A personal physician must be the employee's regular physician and surgeon, licensed pursuant to *Bus. & Prof. Code § 2000 et seq.*, must be the employee's primary care physician who has previously directed the medical treatment of the employee and retains the employee's medical records, including his or her medical history, and must agree to be predesignated. "Personal physician" includes a medical group, if the medical group is a single corporation or partnership composed of licensed doctors of medicine or osteopathy, that operates an integrated multispecialty medical group providing comprehensive medical services predominantly for nonoccupational illnesses and injuries [*Lab. Code § 4600(d)(2)*; *see also 8 Cal. Code Reg. § 9780(g)* ("primary care physician" defined)].

If the employer provides non-occupational health care pursuant to the Knox-Keene Act, and the employer is given timely written notice of the employee's personal physician, all medical treatment, utilization review of medical treatment, access to medical treatment, and other medical treatment issues are governed by the Knox-Keene Act. Disputes regarding the provision of medical treatment must be resolved pursuant to *Health & Safety Code § 1374.30 et seq.* If the employer provides non-occupational health care, as described in *Lab. Code § 4616.7* (medical provider networks), all medical treatment, utilization review of medical treatment, access to medical treatment, and other medical treatment issues are governed by the applicable provisions of the Insurance Code [*Lab. Code § 4600(d)(3), (4)*].

The insurer may require prior authorization of any non-emergency treatment or diagnostic service and may conduct reasonably necessary utilization review pursuant to *Lab. Code § 4610* [*Lab. Code § 4600(d)(5)*].

An employee is entitled to all medically appropriate referrals by the personal physician to other physicians or medical providers within the non-occupational health plan. An employee is also entitled to treatment by physicians or other medical providers outside of the non-occupational health plan pursuant to standards established in *Health & Safety Code § 1367 et seq.* [*Lab. Code § 4600(d)(6)*].

[b] Official Medical Fee Schedule; Contractual Fees

In 2003 the Legislature, seeking to control rising costs of medical treatment in the workers' compensation system, repealed former *Lab. Code § 5307.1*, which had authorized official medical fee schedules, and enacted a new *Lab. Code § 5307.1*, creating a different, and statutorily more complex, regime of official medical fee schedules [Stats. 2003, ch. 639, §§ 34, 35].

Under the new system, the Administrative Director, after public hearings, is required to adopt and revise periodically an official medical fee schedule that establishes reasonable maximum fees paid for medical services (*other than physician services*), drugs and pharmacy services, health care facility fees, home health care, and all other treatment, care, services, and goods described in *Lab. Code § 4600(a)* and provided pursuant to this new official medical fee schedule

statute [*Lab. Code § 5307.1(a)*; *see 8 Cal. Code Reg. §§ 9789.10-9789.111*]. Except for physician services, all fees are to be in accordance with the fee-related structure and rules of the relevant Medicare and Medi-Cal payment systems, provided that employer liability for medical treatment, including issues of reasonable ness, necessity, frequency, and duration, are to be determined in accordance with *Lab. Code § 4600* [*Lab. Code § 5307.1(a)*].

Commencing January 1, 2004, and continuing until the time the Administrative Director adopted an official medical fee schedule in accordance with the fee-related structure and rules of the relevant Medicare payment systems, maximum reasonable fees were to be 120 percent of the estimated aggregate fees prescribed in the relevant Medicare payment system for the same class of services before application of inflation factors [*Lab. Code § 5307.1(a)*; *see 8 Cal. Code Reg. §§ 9789.20-9789.24* (inpatient hospital fee schedule, definitions, and payments for inpatient services); *see also 8 Cal. Code Reg. §§ 9789.20(c), 9789.111(b)* (regulations effective for inpatient hospital admissions with dates of discharge on or after July 1, 2004, while services for discharges after January 1, 2004, but before July 1, 2004, governed by "emergency" regulations that were effective on January 2, 2004, with bills for services with date of admission on or before December 31, 2003, reimbursed in accordance with *8 Cal. Code Reg. § 9792.1*)]. Pharmacy services and drugs were to be subject to the requirements of this statute, whether furnished through a pharmacy or dispensed directly by the practitioner pursuant to *Bus. & Prof. Code § 4024(b)* [*Lab. Code § 5307.1(a)*]. For pharmacy services and drugs that were not otherwise covered by a Medicare fee schedule payment for facility services, the maximum reasonable fees were 100 percent of fees prescribed in the relevant Medi-Cal payment system [*Lab. Code § 5307.1(a)*; *8 Cal. Code Reg. § 9789.40*; *see 8 Cal. Code Reg. § 9789.111(d)* (regulation for pharmacy effective for services rendered after January 1, 2004)].

Within the limits provided by *Lab. Code § 5307.1*, the rates or fees established are to be adequate to ensure a reasonable standard of services and care for injuredemployees [*Lab. Code § 5307.1(f)*]. In order to comply with these standards, the Administrative Director may adopt different conversion factors, diagnostic-related group weights, and other factors affecting payment amounts from those used in the Medicare payment system, provided estimated aggregate fees do not exceed 120 percent of the estimated aggregate fees paid for the same class of services in the relevant Medicare payment system [*Lab. Code § 5307.1(b)*; *see, e.g., 8 Cal. Code Reg. §§ 9789.23, 9789.24* (hospital composite factors and specific outlier factors, and diagnosis related groups, relative weights, and geometric length of stay)].

Notwithstanding any other provisions of the fee schedules statute, the maximum facility fee for services performed in an ambulatory surgical center, or in a hospital outpatient department, may not exceed 120 percent of the fee paid by Medicare for the same services performed in a hospital outpatient department [*Lab. Code § 5307.1(c)*; *see 8 Cal. Code Reg. §§ 9789.30-9789.38* (hospital outpatient departments and ambulatory surgical centers: definitions, adoption of standards, applicability of fee schedule, determination of maximum reasonable fee, election for high cost outlier, and federal Medicare regulations incorporated); *see also 8 Cal. Code Reg. § 9789.32(a)* (regulations apply to maximum allowable fees for emergency room visits and surgical procedures rendered on or after July 1, 2004); *8 Cal. Code Reg. § 9789.111(c)* (services rendered after January 1, 2004, but before July 1, 2004, governed by "emergency" regulations that were effective on January 2, 2004)].

The Appeals Board en banc has held, pursuant to *Kunz* [*see* Kunz v. Patterson Floor Coverings, Inc. (2002) *67 Cal. Comp. Cases 1588, 1598-1599 (Appeals Board en banc opinion)]* , that an outpatient surgery center lien claimant (or any medical lien claimant) has the burden of proving that its charges are reasonable. Moreover, held the Board, the outpatient surgery center lien claimant's billing, by itself, does not establish that the claimed fee is reasonable, so that, even in the absence of rebuttal evidence, a lien need not be allowed in full if it is unreasonable on its face. Any evidence relevant to reasonableness may be offered to support or rebut the lien. That evidence is not limited to fees accepted by other outpatient surgery centers in the same geographic area for services provided. In the case before the Board, the employee underwent surgery on her right wrist at the lien claimant's facility on April 9, 2002, for which the lien claimant billed $23,529, of which the employer had paid $1,667.66, leaving a claimed balance of $21,861.34. At the lien trial, the lien claimant offered no evidence that its billed amount was reasonable. The employer presented extensive rebuttal evidence that the billed amount was *not* reasonable, including evidence that the Official Medical Fee Schedule

for *inpatient* providers of the same services in the geographical area of the lien claimant would be $5,690.80, and that *Lab. Code § 5307.1(c)* and the Official Medical Fee Schedule pertaining to outpatient surgery center fees, which went into effect on January 1, 2004, i.e., after the date on which the lien claimant provided its services, would allow $1,770.34 as a reasonable fee. The Board found that this statute and fee schedule provided some measure of reasonableness, when considered in light of the evidence presented [Tapia v. Skill Master Staffing (2008) 73 Cal. Comp. Cases 1338, 1342-1346 (Appeals Board en banc opinion)] .

If the Administrative Director determines that a medical treatment, facility use, product, or service is not covered by a Medicare payment system, the Director is to establish maximum fees for that item, provided that the maximum fee paid is not to exceed 120 percent of the fees paid by Medicare for services that require comparable resources. If the Director determines that a pharmacy service or drug is not covered by a Medi-Cal payment system, the Director is to establish maximum fees for that item, provided, however, that the maximum fee paid is not to exceed 100 percent of the fees paid by Medi-Cal for pharmacy services or drugs that require comparable resources [*Lab. Code § 5307.1(d)*; *see 8 Cal. Code Reg. §§ 9789.50, 9789.60, 9789.70* (maximum reasonable fees for pathology and laboratory services, durable medical equipment, prosthetics, orthotics, miscellaneous supplies and services, and ambulance services); *see also 8 Cal. Code Reg. § 9789.111(e), (f), (g)* (regulations for pathology and laboratory, durable medical equipment, prosthetics, orthotics, and supplies, and ambulance services effective for services rendered after January 1, 2004)].

Prior to the adoption by the Administrative Director of a medical fee schedule pursuant to the fee schedules statute, for any treatment, facility use, product, or service not covered by a Medicare payment system, including acupuncture services, or, with regard to pharmacy services and drugs, for a pharmacy service or drug that is not covered by a Medi-Cal payment system, the maximum reasonable fee paid was not to exceed the fee specified in the official medical fee schedule in effect on December 31, 2003 [*Lab. Code § 5307.1(e)*].

The official medical fee schedule is to be adjusted to conform to any relevant changes in the Medicare and Medi-Cal payment systems no later than 60 days after the effective date of those changes, providing various, specified conditions are met [*Lab. Code § 5307.1(g)(1)*; *see Lab. Code § 5307.1(g)(2)* (duties of Administrative Director with respect to changes in fee schedule); *Lab. Code § 5307.1(g)(3)* (definitions of terms relevant tochanges in fee schedule); *see, e.g., 8 Cal. Code Reg. § 9789.20(d)* (inpatient hospital fee schedule to be adjusted to conform to relevant changes in Medicare payment schedule within 60 days); *8 Cal. Code Reg. § 9789.36* (regulations governing hospital outpatient departments and ambulatory surgical centers to be adjusted to conform to relevant changes in Medicare payment system); *8 Cal. Code Reg. § 9789.110* (update of regulations to reflect changes in Medicare payment system)].

Nothing in *Lab. Code § 5307.1* is to prohibit an employer or insurer from contracting with a medical provider for reimbursement rates different from those prescribed in the official medical fee schedule [*Lab. Code § 5307.1(h)*; *see also Lab. Code § 5307.11* (discussed below)].

Except as provided in *Lab. Code § 4626*, the official medical fee schedule does not apply to medical-legal expenses, as that term is defined by *Lab. Code § 4620* [*Lab. Code § 5307.1(i)*].

The following Medicare payment system components became part of the official medical fee schedule only on January 1, 2005 [*Lab. Code § 5307.1(j)*]:

- Inpatient skilled nursing facility care.

- Home health agency services.

- Inpatient services furnished by hospitals that are exempt from the prospective payment system for general acute care hospitals.

- Outpatient renal dialysis services.

Notwithstanding the provisions of *Lab. Code § 5307.1(a)*, for the calendar years 2004 and 2005, the existing official medical fee schedule rates for physician services were to remain in effect, but these rates were to be reduced by five percent. The Administrative Director could reduce fees of individual procedures by different amounts, but in no event was the Director to reduce the fee for a procedure that was currently reimbursed at a rate at or below the Medicare rate for the same procedure [*Lab. Code § 5307.1(k)*; *see 8 Cal. Code Reg. §§ 9789.10, 9789.11* ("physician services" defined and payment rates set forth); *see also 8 Cal. Code Reg. § 9789.111(a)* (regulations for physician services effective for services rendered on or after July 1, 2004, with services rendered after January 1, 2004, but before July 1, 2004, governed by "emergency" regulations that were effective on January 2, 2004). The Administrative Director's reduction of the maximum allowable reimbursement amount is set forth in *8 Cal. Code Reg. § 9789.11(b)*, and three tables of physician services fees (one for services rendered between July 1, 2004, and January 13, 2005, inclusive, one for services rendered between January 14, 2005, and May 13, 2005, inclusive, and one for services rendered on or after May 14, 2005), all of which set forth each individual procedure code with its corresponding relative value, conversion factor, percentage reduction calculation, and maximum reimbursable fee, are incorporated by reference in *8 Cal. Code Reg. § 9789.11(c)*. The tables ("Table A") may be obtained from the Division of Workers' Compensation website: www.dir.ca.gov/DWC/OMFS9904.htm].

Also notwithstanding the provisions of *Lab. Code § 5307.1(a)*, the Administrative Director, commencing January 1, 2006, is to have the authority, after public hearings, to adopt and revise, no less frequently than biennially, an official medical fee schedule for physician services. If the Director fails to adopt an official medical fee schedule for physician services by January 1, 2006, the existing official medical fee schedule rates for physician services is to remain in effect until a new schedule is adopted or the existing schedule is revised [*Lab. Code § 5307.1(l)*].

The Administrative Director is required to contract with an independent consulting firm to analyze whether there is adequate access to quality health care and products for injured workers. If the Director determines that there is insufficient access, he or she may make appropriate adjustments to medical and facilities' fees. When there has been a determination that substantial access problems exist, the Director may, in accordance with the notification and hearing requirements of *Lab. Code § 5307.1*, adopt fees in excess of 120 percent of the applicable Medicare payment system fee for the applicable services or products [*Lab. Code § 5307.2*].

The Official Medical Fee Schedule applies to all covered medical services provided, referred, or prescribed by physicians, as defined in *Lab. Code § 3209.3*, regardless of the type of facility in which the medical services are performed, including clinic and hospital-based physicians working on a contract basis. The schedule does not apply to inpatient medical services provided by employees of a health facility [*see 8 Cal. Code Reg. § 9790.1* ("inpatient," "health facility," and "medical services" defined); *8 Cal. Code Reg. § 9792.1* (reimbursement for inpatient medical services)], medical-legal expenses authorized under *Lab. Code § 4621*, and medical expenses payable pursuant to *8 Cal. Code Reg. § 9795*. Nothing in the schedule precludes any hospital, as defined in *Health & Safety Code § 1250*, from charging and collecting a facility fee for the use of its emergency or operating rooms [*8 Cal. Code Reg. § 9791*]. The report of the primary treating physician is payable in accordance with the schedule [*8 Cal. Code Reg. § 9785(i)*].

The schedule consists of the procedures, procedure numbers, descriptions, instructions, and unit values adopted by the Administrative Director, effective January 1, 1994 [*8 Cal. Code Reg. § 9791.1*]. For services provided on or after January 1, 1994, the conversion factors to be applied to unit values in the schedule are set forth in *8 Cal. Code Reg. § 9792* [*8 Cal. Code Reg. § 9792*].

A health care provider or health facility licensed pursuant to *Health and Safety Code § 1250*, and a contracting agent, employer, or carrier may contract for reimbursement rates different from those in the fee schedule adopted and revised pursuant to *Lab. Code § 5307.1*. In the event of such a contract, the medical fee schedule does not apply to the contracted reimbursement rates. Except as provided in *Lab. Code § 5307.1(b)*, the official medical fee schedule

establishes maximum reimbursement rates for all medical services for injuries provided by a health care provider or health care facility, other than those specified in contracts subject to this statute [*Lab. Code § 5307.11*].

Payment of physicians by employers, requirements governing the review of physicians' submitted bills, disputes regarding payments, and penalties and liabilities for late payments are governed by statute [*see Lab. Code § 4603.2*].

[c] Medical Treatment Utilization Schedule and Utilization Review Process

As required by statute [*see Lab. Code § 5307.27*], the Administrative Director, in consultation with the Commission on Health and Safety and Workers' Compensation, has adopted, after public hearings, a medical treatment utilization schedule [*8 Cal. Code Reg. §§ 9792.20*-9792.23]. This schedule incorporates the evidence-based, peer-reviewed, nationally recognized standards of care recommended by the Commission pursuant to *Lab. Code § 77.5*, and it addresses, the frequency, duration, intensity, and appropriateness of all treatment procedures and modalities commonly performed in workers' compensation cases [*Lab. Code § 5307.27*; *see 8 Cal. Code Reg. § 9792.20 (d), (j), (I), (k)* (defining, respectively, "evidence-based," "peer reviewed," "nationally recognized," "scientifically based")].

Upon adoption of this schedule by the Director, the recommended guidelines set forth in it are presumptively correct on the issue of extent and scope of medical treatment and diagnostic services addressed in the schedule for the duration of the medical condition [*Lab. Code § 4604.5(a)*; *8* Cal. Code Reg. § 9792.22(a)]. The presumption, which is a presumption affecting the burden of proof, is rebuttable and may be controverted by a preponderance of the scientific medical evidence establishing that a variance from the guidelines is reasonably required to cure or relieve the injured worker from the effects of his or her injury [*Lab. Code § 4604.5(a)*; *8* Cal. Code Reg. § 9792.22(a)]. These recommended guidelines reflect practices that are evidence- and scientifically based, nationally recognized, and peer-reviewed [*Lab. Code § 4604.5(b)*]. Moreover, they are designed to assist providers by offering an analytical framework for the evaluation and treatment of injured workers and to help those who make decisions regarding the medical treatment of injured workers understand what treatment has been proven effective in providing the best medical outcomes to those workers, in accordance with *Lab. Code § 4600* [*Lab. Code § 4604.5(b)*; *8* Cal. Code Reg. § 9792.21(b)].

The Administrative Director has adopted and incorporated by reference the following medical treatment guidelines into the medical treatment utilization schedule [*8 Cal. Code Reg. § 9792.21(a)*]:

1. The American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines (ACOEM Practice Guidelines), Second Edition (2004) [*see 8 Cal. Code Reg. § 9792.20(b)* ("ACOEM Practice Guidelines" defined), (g) ("medical treatment guidelines" defined)].

2. Acupuncture medical treatment guidelines, which supersede the ACOEM Practice Guidelines, Second Edition, relating to acupuncture, except for shoulder complaints [*see 8 Cal. Code Reg. § 9792.21(a)(2)* (details regarding permitted acupuncture treatment)].

Notwithstanding the medical treatment utilization schedule or the guidelines set forth in the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines, for injuries occurring on and after January 1, 2004, an employee is entitled to no more than 24 chiropractic, 24 occupational therapy, and 24 physical therapy visits per industrial injury [*Lab. Code § 4604.5(d)(1)*]. These limitations of *Lab. Code § 4604.5(d)(1)* do not apply when an employer authorizes, in writing, additional visits to a health care practitioner for physical medicine services [*Lab. Code § 4604.5(d)(2)*].

The court of appeal has upheld the constitutionality of *Lab. Code § 4604.5(d)*'s limitation to 24 chiropractic treatment visits per industrial injury. The court found that *Cal. Const., art. XIV, § 4*, vested the legislature with "plenary power" to create a "complete system of workers' compensation." This grant of power, the court noted, neither restricted the

legislature's ability to limit the number of chiropractic treatments for which the workers' compensation system must be financially responsible nor expanded an injured worker's constitutional rights to include entitlement to receive unlimited treatments. Moreover, the statutory exception allowing an employer to authorize chiropractic services in excess of 24 treatments did not constitute an unconstitutional delegation of legislative power, and, because an employer's decision to remove the 24-visit cap was not tethered to any factual or legal dispute requiring adjudication, due process under either the state or the federal constitution was not implicated. Finally, because the legislature's decision to reduce the unlimited availability of chiropractic treatments was rationally related to alleviating the perceived crisis in skyrocketing workers' compensation costs, the employee's rights to equal protection of the law were not violated [*Facundo-Guerrero v. W.C.A.B. (2008) 163 Cal. App. 4th 640, 646-656, 77 Cal. Rptr. 3d 731]* .

For all conditions or injuries not addressed by the medical treatment utilization schedule, authorized treatment and diagnostic services are to be in accordance with other evidence-based medical treatment guidelines generally recognized by the national medical community and that are scientifically based [*Lab. Code § 4604.5(e)*; *8* Cal. Code Reg. §§ 9792.8(a)(2), 9792.22(b); *see 8 Cal. Code Reg. § 9792.22(c)* (for conditions or injuries not otherwise covered by medical treatment utilization schedule)]. Treatment may not be denied on the sole basis that the condition or injury is not addressed by the medical treatment utilization schedule. In this situation, the claims administrator must authorize treatment if such treatment is in accordance with other scientifically and evidence-based, peer-reviewed, medical treatment guidelines that are nationally recognized by the medical community, in accordance with *8 Cal. Code Reg. § 9792.22(b), (c)*, and pursuant to the utilization review standards in *8 Cal. Code Reg. §§ 9792.6*-9792.10 [*8 Cal. Code Reg. § 9792.21(c)*; *see also 8 Cal. Code Reg. § 9792.23* (creation of medical evidence evaluation advisory committee to provide recommendations on matters concerning medical treatment utilization schedule)].

In addition to having created the medical treatment utilization schedule, discussed *above*, the legislature has mandated that every employer establish a utilization review process in compliance with *Lab. Code § 4610*, either directly or through its insurer or an entity with which an employer or insurer contracts for these services [*Lab. Code § 4610(b)*]. For purposes of this statute, "utilization review" means utilization review or utilization management functions that prospectively, retrospectively, or concurrently review and approve, modify, delay, or deny, based in whole or in part on medical necessity to cure and relieve, treatment recommendations by physicians, as defined in *Lab. Code § 3209.3*, prior to, retrospectively, or concurrent with the provision of medical treatment services pursuant to *Lab. Code § 4600* [*Lab. Code § 4610(a)*; *see 8 Cal. Code Reg. § 9792.6(s)* (utilization review does not include determinations of work-relatedness of injury or disease, or bill review for purpose of determining whether medical services were accurately billed)].

Each utilization review process is to be governed by written policies and procedures, which must ensure that decisions based on the medical necessity to cure and relieve of proposed medical treatment services are consistent with the schedule for medical treatment utilization adopted pursuant to *Lab. Code § 5307.27* [*Lab. Code § 4610(c)*; *see above*]. Prior to adoption of that schedule, these policies and procedures are to be consistent with the recommended standards set forth in the American College of Occupational and Environmental Medicine's Occupational and Environmental Medical Practice Guidelines [*Lab. Code § 4610(c)*; *see above*]. These policies and procedures, and a description of the utilization process, must be filed with the Administrative Director and disclosed by the employer to employees, physicians, and the public upon request [*Lab. Code § 4610(c)*. Upon request by the public, the claims administrator must make available the complete utilization review plan, consisting of the policies and procedures, and a description of the utilization review process. The claims administrator may make these available through electronic means. If a member of the public requests a hard copy of the utilization review plan, the claims administrator may charge reasonable copying and postage expenses related to disclosing the complete utilization review plan. Such charge must not exceed $0.25 per page plus actual postage costs. *8 Cal. Code Reg. § 9792.7(d)*].

The regulations adopted pursuant to *Lab. Code § 4610* provide that the utilization review process is to cover treatment rendered on or after January 1, 2004, regardless of date of injury, and that each utilization review process is to be set forth in a utilization review plan that must contain [*8 Cal. Code Reg. § 9792.7(a)*; *see 8 Cal. Code Reg. § 9792.6(r)*

("utilization review plan" means written plan filed with Administrative Director pursuant to *Lab. Code § 4610*, setting forth policies and procedures and description of utilization process)]:

1. The name, address, phone number, and medical license number of the employed or designated medical director, who holds an unrestricted license to practice medicine in California issued pursuant to *Bus. & Prof. Code § 2050* or *2450*.

2. A description of the process whereby requests for authorization are reviewed, and decisions on such requests are made, and a description of the process for handling expedited reviews [*see 8 Cal. Code Reg. § 9792.6(o)*] ("request for authorization" means written confirmation of oral request for specific course of proposed medical treatment pursuant to *Lab. Code § 4610(h)* or written request for specific course of proposed medical treatment; oral request for authorization must be followed by written confirmation of request within 72 hours, and both written confirmation of oral request and written request must be set forth on "Doctor's First Report of Occupational Injury or Illness," Form DLSR 5021 [*8 Cal. Code Reg. § 14006*] or on Primary Treating PhysicianProgress Report, DWC Form PR-2, in *8 Cal. Code Reg. § 9785.2*, or in narrative form containing same information required in PR-2 form, and, if narrative format is used, document must be clearly marked at top that it is request for authorization); *8 Cal. Code Reg. § 9792.6(b)* ("authorization" means assurance that appropriate reimbursement will be made for approved specific course of proposed medical treatment to cure or relieve effects of industrial injury pursuant to *Lab. Code § 4600*, subject to provisions of *Lab. Code § 5402*); *8 Cal. Code Reg. § 9792.6(g)* ("expedited review" means utilization review conducted when injured worker's condition is such that he or she faces imminent and serious threat to his or her health, including, but not limited to, potential loss of life, limb, or other major bodily function, or when normal time frame for decision-making process would be detrimental to injured worker's life or health or could jeopardize his or her permanent ability to regain maximum function)].

3. A description of the specific criteria utilized routinely in the review and throughout the decision-making process, including treatment protocols or standards used in the process. A description of the personnel and other sources used in the development and review of the criteria, and methods for updating the criteria.

4. A description of the qualifications and functions of the personnel involved in decision-making and implementation of the utilization review plan.

5. A description of the claims administrator's practice, if applicable, of any prior authorization process, including but not limited to, when authorization is provided without the submission of the request for authorization.

The complete utilization review plan, consisting of the policies and procedures, and a description of the utilization review process, must be filed by the claims administrator, or by the external utilization review organization contracted by the claims administrator to perform the utilization review, with the Administrative Director. In lieu of filing the utilization review plan, the claims administrator may submit a letter identifying the external utilization review organization contracted to perform the utilization review functions, provided that the utilization review organization has filed a complete utilization review plan with the Administrative Director. A modified utilization review plan must be filed with the Administrative Director within 30 calendar days after the claims administrator makes a material modification to the plan [*8 Cal. Code Reg. § 9792.7(c)*].

If an employer, insurer, or other entity requests medical information from a physician in order to determine whether to approve, modify, delay, or deny requests for authorization, the employer is to request only the information reasonably necessary to make the determination [*Lab. Code § 4610(d)*]. The employer, insurer, or other entity must employ or

designatea medical director who holds an unrestricted California license to practice medicine, who is to ensure that the process by which the employer or other entity reviews and approves, modifies, delays, or denies requests by physicians prior to, retrospectively, or concurrent with the provision of medical treatment services, complies with statutory and regulatory requirements [*Lab. Code § 4610(d)*; *8 Cal. Code Reg. § 9792.7(b)(1)*; *see 8 Cal. Code Reg. § 9792.6(c)* ("claims administrator" is self-administered workers' compensation insurer, insured employer, self-administered self-insured employer, self-administered legally uninsured employer, self-administered joint powers authority, third-party claims administrator, or other entity subject to *Lab. Code § 4610*; claims administrator may utilize entity contracted to conduct its utilization review responsibilities); *8 Cal. Code Reg. § 9792.6(n)* ("prospective review" means any utilization review conducted, except for utilization review conducted during inpatient stay, prior to delivery of requested medical services); *8 Cal. Code Reg. § 9792.6(p)* ("retrospective review" means utilization review conducted after medical services have been provided and for which approval has not already been given); *8 Cal. Code Reg. § 9792.6(d)* ("concurrent review" means utilization review conducted during inpatient stay)]. No person other than a licensed physician who is competent to evaluate the specific clinical issues involved in the medical treatment services (and when these services are within the scope of the physician's practice) requested by the physician may modify, delay, or deny requests for authorization of medical treatment for reasons of medical necessity to cure and relieve [*Lab. Code § 4610(e)*; *8 Cal. Code Reg. § 9792.7(b)(2)*; *8 Cal. Code Reg. § 9792.9(f)*]. The only exception to this rule is that a non-physician reviewer may be used to initially apply specified criteria to requests for authorization for medical services. A non-physician reviewer may approve requests for authorization of medical services. A non-physician reviewer may discuss applicable criteria with the requesting physician, should the treatment for which authorization is sought appear to be inconsistent with the criteria. In such instances, the requesting physician may voluntarily withdraw a portion or all of the treatment in question and submit an amended request for treatment authorization, and the non-physician reviewer may approve the amended request for treatment authorization. Additionally, a non-physician reviewer may reasonably request appropriate additional information that is necessary to render a decision, but in no event may this process exceed the time limitations imposed by the regulations [*8 Cal. Code Reg. § 9792.7(b)(3)*; *see 8 Cal. Code Reg. § 9792.9(b)(1), (b)(2), (c)* (utilization review process time frame requirements). Any time beyond the time specified in these paragraphs is subject to the provisions of *8 Cal. Code Reg. § 9792.9(g)(1)(A)-(C)* (grounds for extending time frames). *8 Cal. Code Reg. § 9792.7(b)(3).* For a full discussion of utilization review process time frames, *see below*].

Regardless of whether an employer has established a medical provider network or entered into a contract with a health care organization, an employer that authorizes medical treatment may not rescind or modify that authorization after the medical treatment has been provided based on that authorization for any reason, including, but not limited to, the employer's subsequent determination that the physician who provided the treatment was not eligible to treat that injured employee. If the authorized medical treatment consists of a series of treatments or services, the employer may rescind or modify the authorization only for the treatments or services that have not already been provided [*Lab. Code § 4610.3(a)*].

The coverage of this statute has been restricted in the following ways [*Lab. Code § 4610.3(b)-(d)*]:

> 1. The statute is not to be construed to expand or alter the benefits available under, or the terms and conditions of, any contract, including, but not limited to, existing medical provider network and health care organization contracts.
>
> 2. The statute is not to be construed to impact the ability of the employer to transfer treatment of an injured employee into a medical provider network or health care organization. This statement is declaratory of existing law.
>
> 3. The statute is not to be construed to establish that a provider of authorized medical treatment is the physician primarily responsible for managing the injured employee's care for purposes of rendering opinions on all medical issues necessary to determine eligibility for compensation.

The statute spells out the criteria or guidelines to be used in the utilization review process to determine whether to approve, modify, delay, or deny medical treatment services [*see Lab. Code § 4610(f)*; *8 Cal. Code Reg. § 9792.8(a)(2), (3)*; *8 Cal. Code Reg. § 9792.9(a), (j)*]. Similarly, the statute sets forth the requirements that must be met in determining whether to approve, modify, delay, or deny requests by physicians prior to, retrospectively, or concurrent with the provisions of medical treatment services to employees [*see Lab. Code § 4610(g)*; *§ 9792.9(b)(2), (3),* (c), *(e), (g)(2), (3), (4), (j), (k), (l)*; *8 Cal. Code Reg. § 9792.6(o)*].

Every employer, insurer, or other entity subject to this statute must maintain telephone access for physicians to request authorization for health care services [*Lab. Code § 4610(h)*; *see 8 Cal. Code Reg. § 9792.9(h)*].

If the request for authorization of medical treatment is not approved, or if the request for authorization for medical treatment is approved in part, any dispute must be resolved in accordance with *Lab. Code § 4062* [*8 Cal. Code Reg. § 9792.10(a)(1)*]. An objection to a decision disapproving in whole or in part a request for authorization of medical treatment must be communicated to the claims administrator by the injured worker or the injured worker's attorney in writing within 20 days of receipt of the utilization review decision. The 20-day time limit may be extended for good cause or by mutual agreement of the parties [*8 Cal. Code Reg. § 9792.10(a)(2)*]. Nothing in the regulation precludes the parties from participating in an internal utilization review appeal process on a voluntary basis, provided the injured worker and, if the injured worker is represented by counsel, the injured worker's attorney have been notified of the 20-day time limit to file an objection to the utilization review decision in accordance with *Lab. Code § 4062* [*8 Cal. Code Reg. § 9792.10(a)(3)*]. Additionally, the injured worker or the injured worker's attorney may file an Application for Adjudication of Claim, and a Request for Expedited Hearing, DWC Form 4, in accordance with the relevant regulations [*see 8 Cal. Code Reg. §§ 10252(b)(1), 10400, 10408* (requests for expedited hearings)] and request an expedited hearing and decision on his or her entitlement to medical treatment, if the request for medical treatment is not authorized within the time limitations set forth in *8 Cal. Code Reg. § 9792.9*, or when there exists a bona fide dispute as to entitlement to medical treatment [*8 Cal. Code Reg. § 9792.10(a)(4)*].

The Appeals Board en banc has held that the utilization review time deadlines of *Lab. Code § 4610(g)(1)* are mandatory. A defendant that fails to meet the mandatory deadlines is precluded from using the utilization review procedure. If a defendant undertakes an untimely utilization review procedure, any report it obtains is not admissible in evidence with respect to the particular medical treatment dispute in question, and any report it obtains cannot be forwarded to an AME or QME if *Lab. Code § 4062(a)* procedures are timely pursued [Sandhagen v. Cox & Cox Construction, Inc. (2004) 69 Cal. Comp. Cases 1452, 1456-1460 (Appeals Board en banc opinion)] .

The Supreme Court has held that, when deciding whether to approve or deny an injured employee's request for medical treatment, the employer must conduct utilization review pursuant to *Lab. Code § 4610* and that the employer may not, as an alternative to utilization review, elect to dispute the request for medical treatment pursuant to *Lab. Code § 4062*. The latter statute, said the Court, permits only *employees* to use its provisions to object to employers' decisions regarding treatment requests. The Court found that the legislature's intent regarding employers' use of *Lab. Code § 4062* to dispute treatment requests "could not be more clear," and that the historical evolution of treatment request and review processes, as exemplified by omnibus reforms enacted in SB 228, effective January 1, 2004, and SB 899, effective April 19, 2004, further demonstrates the legislature's intent that *Lab. Code § 4610* govern employers' review [*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (2008) 44 Cal. 4th 230, 233-234, 236-237, 239-245, 79 Cal. Rptr. 3d 171, 186 P.3d 535]* .

The following requirements must be met prior to a concurrent review decision to deny authorization for medical treatment and to resolve disputes [*8 Cal. Code Reg. § 9792.10(b)*]:

> 1. In the case of concurrent review, medical care may not be discontinued until the requesting physician has been notified of the decision and a care plan has been agreed on by the requesting physician that is

appropriate for the medical needs of the injured employee. In addition, the non-physician provider of goods or services identified in the request for authorization, and for whom contact information has been included, must be notified in writing of the decision modifying, delaying, or denying a request for authorization that is not to include the rationale, criteria, or guidelines used for the decision.

2. Medical care provided during a concurrent review must be medical treatment that is reasonably required to cure or relieve from the effects of the industrial injury.

The statute establishes procedures by which the Administrative Director is authorized to assess administrative penalties for failures by an employer, insurer, or other entity subject to the statute to meet any requirement under it [*Lab. Code § 4610(i)*] These administrative penalties are not deemed to be an exclusive remedy for the Administrative Director [*Lab. Code § 4610(i)*; *see 8 Cal. Code Reg. § 9792.11(b)*; *see also 8 Cal. Code Reg. §§ 9792.12*-9792.15 (administrative penalties)].

An employee is not entitled to an increase in compensation under *Lab. Code § 5814* for unreasonable delay in the provision of medical treatment for periods of time necessary to complete the utilization review process in compliance with *Lab. Code § 4610* [*Lab. Code § 4610.1*]. An increase under *Lab. Code § 5814* is appropriate, however, when an employer has unreasonably delayed or denied medical treatment due to an unreasonable delay in completion of the utilization review process set forth in *Lab. Code § 4610* [*Lab. Code § 4610.1*].

[d] Medical Provider Networks

[i] Creation and Approval of Medical Provider Network

In 2004, the legislature created medical provider networks as part of the year's major changes in workers' compensation law. The statutory scheme provides that as of January 1, 2005, an insurer or employer (for purposes of the medical provider networks statutes, "employer" means a self-insured employer, the Self-Insurer's Security Fund, a group of self-insured employers pursuant to *Lab. Code § 3700(b)* and as defined by *8 Cal. Code Reg. § 15201(s)*, a joint powers authority, or the state) [*Lab. Code § 4616.5*; *see 8 Cal. Code Reg. § 9767.1(a)(7)*] may establish or modify a medical provider network for the provision of medical treatment to injured employees [*Lab. Code § 4616(a)(1)*]. The network must include physicians primarily engaged in the treatment of occupational injuries and physicians primarily engaged in the treatment of nonoccupational injuries, with the goal being at least 25 percent of physicians primarily engaged in the treatment of nonoccupational injuries [*Lab. Code § 4616(a)(1)*]. The Administrative Director is instructed to encourage the integration of occupational and nonoccupational providers [*Lab. Code § 4616(a)(1)*]. The number of physicians in the medical provider network must be sufficient to enable treatment for injuries or conditions to be provided in a timely manner [*Lab. Code § 4616(a)(1)*]. Moreover, the provider network is required to include an adequate number and type of physicians, as described in *Lab. Code § 3209.3*, or other providers, as described in *Lab. Code § 3209.5*, to treat common injuries experienced by injured employees, based on the type of occupation or industry in which the employee is engaged, and the geographic area where the employees are employed [*Lab. Code § 4616(a)(1)*].

Medical treatment for injuries must be readily available at reasonable times to all employees [*Lab. Code § 4616(a)(2)*]. With respect to availability and accessibility of treatment, the Administrative Director is instructed to consider the needs of rural areas, specifically those in which health facilities are located at least 30 miles apart [*Lab. Code § 4616(a)(2)*].

The Administrative Director has considered the needs of rural areas in the regulation promulgated on the subject of access standards for medical provider networks [*8 Cal. Code Reg. § 9767.5*]. A medical provider network must have at least three physicians of each specialty expected to treat common injuries experienced by injured employees based on the type of occupation or industry in which the employee is engaged and within the access standards provided in the regulation. In addition, a medical provider network must have a primary care physician and a hospital for emergency health care services or if separate from such a hospital, a provider of all emergency health care services, within 30

minutes or 15 miles of each covered employee's residence or workplace. Finally, a medical provider network must have providers of occupational health services and specialists within 60 minutes or 30 miles of a covered employee's residence or workplace [*8 Cal. Code Reg. § 9767.5(a)-(c)*; *see 8 Cal. Code Reg. § 9767.5(d)* (alternative standards of accessibility)].

The medical provider network must have a written policy for arranging or approving non-emergency medical care for: (1) an employee authorized by the employer to temporarily work or travel for work outside the service area when the need for medical care arises; (2) a former employee whose employer has ongoing workers' compensation obligations and who permanently resides outside the service area; and (3) an injured employee who decides to temporarily reside outside the service area during recovery. This policy must provide such employees with the choice of at least three physicians outside the service area who either have been referred by the employee's primary treating physician within the medical provider network or have been selected by the employer. In addition to physicians within the network, the employee may change physicians among the referred physicians and may obtain a second and a third opinion from the referred physicians. The referred physicians must be located within the access standards described above. Nothing in this paragraph precludes an employer from having a written policy that allows an employee outside the service area to choose his or her own provider for non-emergency medical care [*8 Cal. Code Reg. § 9767.5(e)*].

For non-emergency services, the medical provider network must ensure that an appointment for initial treatment is available within three business days of receipt of a request for treatment within the network. For non-emergency specialist services to treat common injuries experienced by the covered employees based on the type of occupation or industry in which the employee is engaged, the medical provider network must ensure that an appointment is available within 20 business days of receipt of a referral to a specialist within the network [*8 Cal. Code Reg. § 9767.5(f), (g)*].

If the primary treating physician refers the employee to a type of specialist not included in the medical provider network, the employee may select a specialist from outside the network [*8 Cal. Code Reg. § 9767.5(h)*].

The employer must have a written policy to allow an injured employee to receive emergency health care services from a medical service or hospital provider who is not a member of the medical provider network [*8 Cal. Code Reg. § 9767.5(i)*].

To create a medical provider network, the employer or insurer must submit a plan to the Administrative Director for approval, which the Administrative Director must give if he or she determines that it meets the statutory requirements [*Lab. Code § 4616(b)*; *8 Cal. Code Reg. §§ 9767.2-9767.4, 9767.13*]. If the Administrative Director does not act on the plan within 60 days of its submission, it will be deemed approved [*Lab. Code § 4616(b)*; *8 Cal. Code Reg. § 9767.2(a)*]. The plan cannot structure physician compensation in order to achieve the goal of reducing, delaying, or denying medical treatment or restricting access to medical treatment [*Lab. Code § 4616(c)*]. However, if the employer or insurer meets the statutory requirements, the Administrative Director may not withhold approval or disapprove an employer's or insurer's medical provider network based solely on the selection of providers [*Lab. Code § 4616(d)*]. (The statutes and regulations specify requirements for approval of a health care organization certified pursuant to *Lab. Code § 4600.5*, a health care service plan licensed pursuant to the Knox-Keene Health Care Service Plan Act of 1975, and a group disability insurance policy as defined in *Ins. Code § 106(b)* as a medical provider network. *Lab. Code § 4616.7(a)-(c)*; *8 Cal. Code Reg. § 9767.3*. Any Taft-Hartley health and welfare fund is deemed approved for purposes of these statutes if it has a reasonable number of physicians with competency in occupational medicine, as determined by the Administrative Director. *Lab. Code § 4616.7(d)*.) In developing a medical provider network, an employer or insurer has the exclusive right to determine the members of the network [*Lab. Code § 4616(d)*].

All treatment provided by members of the network must be in accordance with the medical treatment utilization schedule established pursuant to *Lab. Code § 5307.27* or the American College of Occupational Medicine's Occupational Medicine Practice Guidelines, as appropriate [*Lab. Code § 4616(e)*; *8 Cal. Code Reg. § 9767.6*]. No person other than a licensed physician who is competent to evaluate the specific clinical issues involved in the medical

treatment services, when these services are within the scope of the physician's practice, may modify, delay, or deny requests for authorization of medical treatment [*Lab. Code § 4616(f)*].

In one case, the court of appeal held that the defendant, State Compensation Insurance Fund (SCIF), had denied the plaintiff, Palm Medical Group (Palm), admission into its preferred provider network in violation of the common-law fair procedure doctrine. The court found that the record included ample evidence to support the jury's finding that SCIF "possessed power so substantial over the market for the treatment of occupational injuries in the Fresno area in 2001-2002 that the failure to admit an ordinary, competent medical provider to its [PPN] would significantly impair that provider's ability to practice occupational medicine in the Fresno area" and, therefore, that SCIF owed Palm a duty of fair procedure in acting on its application to SCIF's preferred provider network. According to Palm's salespeople, approximately six of every 10 businesses solicited in Fresno were insured by SCIF. Also, in 2002, 61 percent of the total written premiums received by SCIF in Fresno County came from employers participating in its preferred provider network program. In July 2002 SCIF informed Palm that it had "significant concerns with [Palm's] prior and current performance and [could not] consider them for admission into the PPN at [that] time." The court stated that the common-law doctrine of fair procedure protects against arbitrary decisions by private organizations, including decisions to expel or exclude qualified persons without acting in a manner that is substantively rational and procedurally fair, that the doctrine applies primarily to decisions affecting membership in private organizations that affect the public interest, particularly when there are "substantial economic ramifications" from exclusion, and that the obligation to comply with the common-law right to fair procedure arises only when an organization, such as SCIF, possesses power so substantial that denial of membership significantly impairs the ability of an ordinary, competent physician to practice medicine o r a medical specialty in a particular geographic area, thereby affecting an important, substantial economic interest. The court concluded that the jury properly awarded Palm $1,131,000 in damages, but that Palm was not entitled to an injunction compelling its admission to SCIF's preferred provider network since that network has been replaced by a medical provider network, of which Palm was a member [*Palm Medical Group, Inc. v. State Compensation Insurance Fund (2008) 161 Cal. App. 4th 206, 210, 218-228, 74 Cal. Rptr. 3d 266*].

[ii] Economic Profiling of Providers

The medical provider network statutes and regulations speak in terms of "economic profiling," which they define as any evaluation of a particular physician, provider, medical group, or individual practice association based in whole or in part on the economic costs or utilization of services associated with medical care provided or authorized by that person or entity [*Lab. Code § 4616.1(c)*; *8 Cal. Code Reg. § 9767.1(a)(5)*]. An insurer or employer that offers a medical provider network and that uses economic profiling must file with the Administrative Director a description of any policies and procedures related to the economic profiling being utilized [*Lab. Code § 4616.1(a)*]. The filing must describe how these policies and procedures are used in utilization review, peer review, incentive and penalty programs, and in provider retention and termination decisions [*Lab. Code § 4616.1(a)*; *8 Cal. Code Reg. § 9767.11*]. The insurer or employer must provide a copy of the filing to an individual physician, provider, medical group, or individual practice association [*Lab. Code § 4616.1(a)*]. The Administrative Director is required to make each insurer's or employer's filing available to the public upon request [*Lab. Code § 4616.1(b)*]. However, the Administrative Director may not publicly disclose any information determined by him or her to be confidential pursuant to state or federal law [*Lab. Code § 4616.1(b)*].

[iii] Continuity of Care and Completion of Treatment by Terminated Providers

An insurer or employer that offers a medical provider network plan must notify each employee in writing about the use of the network, 30 days prior to the implementation of an approved network, at the time of hire, or when an existing employee transfers into the network, whichever is appropriate to ensure that the employee has received the initial notification. The notification must also be sent to an employee at the time of injury. The notification(s) must be written in English and Spanish. The initial written notification is to include the following information [*8 Cal. Code Reg. § 9767.12(a)*]:

1. How to contact the person designated by the insurer or employer to be the network contact for employees. The employer or insurer must provide a toll free telephone number if the network's service area includes more than one area code.

2. A description of network services.

3. How to review, receive, or access the network provider directory. Nothing precludes an insurer or employer from initially providing employees with a regional area listing of network providers in addition to maintaining and making available its complete provider listing in writing. If the provider directory is also accessible on a website, the URL address must be listed.

4. How to access initial care and subsequent care, and what the access standards are under *8 Cal. Code Reg. § 9767.5*.

5. How to access treatment if: (1) the employee is authorized by the employer to temporarily work or travel for work outside the network's geographical service area: (2) a former employee whose employer has ongoing workers' compensation obligations permanently resides outside the service area; and (3) an injured employee decides to temporarily reside outside the service area during recovery.

6. How to choose a physician within the network.

7. What to do if an employee has trouble getting an appointment with a provider within the network.

8. How to change a physician within the network.

9. How to obtain a referral to a specialist within the network or outside the network, if needed.

10. How to use the second and third opinion process.

11. How to request and receive an independent medical review.

12. A description of the standards for transfer of ongoing care into the network and a notification that a copy of the policy must be provided to an employee upon request.

13. A description of the continuity of care policy and a notification that a copy of the policy must be provided to an employee upon request.

At the time of the selection of the physician for a third opinion, the employee must be notified about the Independent Medical Review process. This notification must be written in English and Spanish [*8 Cal. Code Reg. § 9767.12(b)*; *see* [iv], [v], *below*].

Employees must be notified 30 days prior to a change of the medical provider network. If the network operator is an insurer, a copy of the notification must be served on the insured employer. This notification must be written in English and Spanish [*8 Cal. Code Reg. § 9767.12(c)*].

An insurer or employer that arranges for care for injured employees through a medical provider network must file a written continuity of care policy with the Administrative Director for approval [*Lab. Code § 4616.2(a)*]. Similarly, any revision of the continuity of care policy must be filed for approval if it makes a material change to the policy [*Lab. Code § 4616.2(b)*]. In addition, the insurer or employer must provide to all employees entering the workers' compensation system notice of its written continuity of care policy and information regarding the process for an

employee to request a review under the policy, and must provide, on request, a copy of the written policy to an employee [*Lab. Code § 4616.2(c)*].

If the employee's injury or illness does not meet the conditions set forth in items 1-4 in the list below, the employee may be transferred into the network for medical treatment. Until the injured employee is transferred into the network, the employee's physician may make referrals to providers within or outside the network. Nothing in this regulation precludes an insurer or employer from agreeing to provide medical care with providers outside of the network [*8 Cal. Code Reg. § 9767.9(a)-(c)*].

If an employee is being treated for an occupational injury or illness by a physician or provider prior to coverage of a medical provider network, and the employee's physician or provider becomes a provider within the network that applies to the employee, the insurer or employer must inform the employee and his or her physician or provider that his or her treatment is being provided by his or her physician or provider under the provisions of the network [*8 Cal. Code Reg. § 9767.9(d)*].

The insurer or employer must provide for the completion of treatment for employees who are being treated outside of the network for an occupational injury or illness that occurred prior to the coverage of the network and whose treating physician is not a provider within the network, including employees who pre-designated a physician and do not fall within *Lab. Code § 4600(d)*, for the following conditions [*8 Cal. Code Reg. § 9767.9(e)*]:

> 1. An acute condition. For purposes of this regulation, an acute condition is a medical condition that involves a sudden onset of symptoms due to an illness, injury, or other medical problem that requires prompt medical attention and that has a duration of less than 90 days. Completion of treatment must be provided for the duration of the acute condition.
>
> 2. A serious chronic condition. For purposes of this regulation, a serious chronic condition is a medical condition due to a disease, illness, catastrophic injury, or other medical problem or medical disorder that is serious in nature and that persists without full cure or worsens over 90 days and requires ongoing treatment to maintain remission or prevent deterioration. Completion of treatment must be provided for a period of time necessary, up to one year: (A) to complete a course of treatment approved by the employer or insurer; and (B) to arrange for transfer to another provider within the network, as determined by the insurer or employer. The one-year period for completion of treatment starts from the date of the injured employee's receipt of the notification [*see 8 Cal. Code Reg. § 9767.9(f)*] of the determination that the employee has a serious chronic condition.
>
> 3. A terminal illness. For purposes of this regulation, a terminal illness is an incurable or irreversible condition that has a high probability of causing death within one year or less. Completion of treatment must be provided for the duration of a terminal illness.
>
> 4. Performance of a surgery or other procedure that is authorized by the insurer or employer as part of a documented course of treatment and has been recommended and documented by the provider to occur within 180 days from the network coverage effective date.

If the employer or insurer decides to transfer the employee's medical care to the network, the insurer or employer must notify the employee of the determination regarding the completion of treatment and the decision to transfer medical care into the network. The notification is to be sent to the employee's residence, and a copy of the letter must be sent to the employee's primary treating physician. The notification must be written in English and Spanish and use layperson's terms to the maximum extent possible [*8 Cal. Code Reg. § 9767.9(f)*].

If the employee disputes the medical determination under this regulation, the employee must request a report from the

employee's primary treating physician that addresses whether the employee falls within any of the conditions set forth in items 1-4, above. The treating physician must provide the report to the employee within 20 calendar days of the request. If the treating physician fails to issue the report, then the determination made by the employer or insurer will apply [*8 Cal. Code Reg. § 9767.9(g)*; *see 8 Cal. Code Reg. § 9767.9(f)*].

If the employer or insurer or the employee objects to the medical determination by the treating physician, the dispute regarding the medical determination made by the treating physician concerning the transfer of care is to be resolved pursuant to *Lab. Code § 4062* [*8 Cal. Code Reg. § 9767.9(h)*].

If the treating physician agrees with the insurer's or employer's determination that the employee's medical condition does not meet the conditions set forth in items 1-4, above, the transfer of care will go forward during the dispute resolution process. If the treating physician does not agree with the insurer's or employer's determination that the employee's medical condition does not meet the conditions set forth in items 1-4, above, the transfer of care will not go forward until the dispute is resolved [*8 Cal. Code Reg. § 9767.9(i), (j)*].

As part of its continuity of care policy, an insurer or employer that offers a medical provider network must, at the request of an injured employee, provide the completion of treatment in certain situations by a terminated provider [*Lab. Code § 4616.2(d)(1)*]. Specifically, the completion of treatment must be provided by a terminated provider to an injured employee who, at the time of the contract's termination, was receiving services from that provider, subject to coverage through the workers' compensation system, for [*Lab. Code § 4616.2(d)(2), (3)*]:

1. An acute condition [*see Lab. Code § 4616.2(d)(3)(A)* ("An acute condition is a medical condition that involves a sudden onset of symptoms due to an illness, injury, or other medical problem that requires prompt medical attention and that has a limited duration." The relevant regulation provides that an acute condition, as referred to in this statute, has a duration of less than 90 days. *8 Cal. Code Reg. § 9767.10(b)*)], for which completion of treatment must be provided for its duration.

2. A serious chronic condition [*see Lab. Code § 4616.2(d)(3)(B)* ("A serious chronic condition is a medical condition due to a disease, illness, or other medical problem or medical disorder that is serious in nature and that persists without full cure or worsens over an extended period of time or requires ongoing treatment to maintain remission or prevent deterioration." The relevant regulation provides that an extended period of time, as referred to in this statute with regard to a serious and chronic condition, has a duration of at least 90 days. *8 Cal. Code Reg. § 9767.10(c)*)], for which completion of treatment must be provided for a period of time (not to exceed 12 months from the contract termination date) necessary to complete a course of treatment and to arrange for a safe transfer to another provider, as determined by the insurer or employer in consultation with the injured employee and the terminated provider and consistent with good professional practice.

3. A terminal illness [*see Lab. Code § 4616.2(d)(3)(C)* ("A terminal illness is an incurable or irreversible condition that has a high probability of causing death within one year or less")], for which completion of treatment must be provided for its duration.

4. Performance of a surgery or other procedure authorized by the insurer or employer as part of a documented course of treatment and has been recommended and documented by the provider to occur within 180 days of the contract's termination date.

The medical provider network's continuity of care policy must include a dispute resolution procedure that contains the following requirements [*8 Cal. Code Reg. § 9767.10(d)*]:

1. Following the employer's or insurer's determination of the employee's medical condition, the employer

or insurer must notify the covered employee of the determination regarding the completion of treatment and whether or not the employee will be required to select a new provider from within the network. The notification must be sent to the covered employee's residence, with a copy to the employee's primary treating physician. The notification is to be written in English and Spanish and use layperson's terms to the maximum extent possible.

2. If the terminated provider agrees to continue treating the injured covered employee in accordance with *Lab. Code § 4616.2*, and if the employee disputes the medical determination, the employee must request a report from the employee's primary treating physician that addresses whether the employee falls within any of the conditions set forth in *Lab. Code § 4616.2(d)(3)*; an acute condition; a serious chronic condition; a terminal illness; or a performance of a surgery or other procedure that is authorized by the insurer or employer as part of a documented course of treatment and has been recommended and documented by the provider to occur within 180 days of the contract's termination date. The treating physician must provide the report to the covered employee within 20 calendar days of the request. If the treating physician fails to issue the report, the determination made by the employer or insurer, referred to in paragraph 1, above, will apply.

3. If the employer or insurer or employee objects to the medical determination by the treating physician, the dispute regarding that medical determination concerning the continuity of care is to be resolved pursuant to *Lab. Code § 4062*.

4. If the treating physician agrees with the employer's or insurer's determination that the employee's medical condition does not meet the conditions set forth in *Lab. Code § 4616.2(d)(3)*, the employee must choose a new provider from within the medical provider network, during the dispute resolution process.

5. If the treating physician does not agree with the employer's or insurer's determination that the employees medical condition does not meet the conditions set forth in *Lab. Code § 4616.2(d)(3)*, the employee is to continue to treat with the terminated provider until the dispute is resolved.

The insurer or employer may require the terminated provider whose services are continued beyond the contract termination date to agree in writing to be subject to the same contractual terms and conditions that were imposed on the provider prior to termination [*Lab. Code § 4616.2(d)(4)(A)*]. If the terminated provider does not agree to comply or does not comply with these contractual terms and conditions, the insurer or employer is not required to continue the provider's services beyond the contract termination date [*Lab. Code § 4616.2(d)(4)(A)*].

Unless otherwise agreed by the terminated provider and the insurer or employer, the services rendered by the terminated provider are to be compensated at rates and methods of payment similar to those used by the insurer or employer for currently contracting providers providing similar services who are practicing in the same or a similar geographic area as the terminated provider [*Lab. Code § 4616.2(d)(4)(B)*]. The insurer or provider is not required to continue the services of a terminated provider if the provider does not accept these payment rates [*Lab. Code § 4616.2(d)(4)(B)*].

An insurer or employer must ensure that the requirements regarding continued employment of terminated providers are met [*Lab. Code § 4616.2(d)(5)*].

The statute does not require an insurer or employer to provide for completion of treatment by a provider whose contract with the insurer or employer has been terminated or not renewed for reasons relating to a medical disciplinary cause or reason [*see Bus. & Prof. Code § 805(a)(6)*], or fraud or other criminal activity, and nothing in the statute precludes an insurer or employer from providing continuity of care beyond the statutory requirements [*Lab. Code § 4616.2(d)(6), (7)*].

[iv] Injured Employee's Rights in Medical Provider Network

When the injured employee notifies the employer of the injury or files a claim for workers' compensation with the employer, the employer must arrange an initial medical evaluation and begin treatment as required by *Lab. Code § 4600* and in compliance with the access standards set forth in *8 Cal. Code Reg. § 9767.5* [*Lab. Code § 4616.3(a)*; *8 Cal. Code Reg. § 9767.6(a)*; *see* [i], *above*]. In fact, within one working day after an employee files a claim form under *Lab. Code § 5401*, the employer or insurer must provide for all treatment consistent with guidelines adopted by the Administrative Director pursuant to *Lab. Code § 5307.27* or, prior to the adoption of these guidelines, the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines (ACOEM). For all injuries not covered by the ACOEM guidelines or guidelines adopted by the Administrative Director, authorized treatment must be in accordance with other evidence-based medical treatment guidelines generally recognized by the national medical community and that are scientifically based. The Administrative Director incorporates by reference the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines (ACOEM), 2nd Edition (2004), published by OEM Press. A copy may be obtained from OEM Press, 8 West Street, Beverly Farms, Massachusetts 01915 (www.oempress.com). The employer or insurer must provide for the treatment with medical provider network providers for the alleged injury and must continue to provide the treatment until the date that liability for the claim is rejected. Until that date, liability for the claim is limited to $10,000 [*8 Cal. Code Reg. § 9767.6(b), (c)*]. The employer must notify the employee of his or her right to be treated by a physician of his or her choice after the first visit from the medical provider network, and the method by which the list of participating providers may be accessed by the employee [*Lab. Code § 4616.3(b)*; *8 Cal. Code Reg. § 9767.6(d)*]. Moreover, the regulation makes clear that, at any time after the initial medical evaluation with a network physician, the employee may select a physician of his or her choice from within the network [*8 Cal. Code Reg. § 9767.6(e)*]. Selection by the injured employee of a treating physician and any subsequentphysicians must be based on the physician's specialty or recognized expertise in treating the particular injury or condition in question [*Lab. Code § 4616.3(d)(1)*; *8 Cal. Code Reg. § 9767.7(e)*]. Treatment by a specialist who is not a member of the medicalprovider network may be permitted on a case-by-case basis if the medical provider network does not contain a physician who can provide the approved treatment and the treatment is approved by the employer or the insurer [*Lab. Code § 4616.3(d)(2)*]. The employer or insurer is not entitled to file a Petition for Change of Treating Physician, as set forth in *8 Cal. Code Reg. § 9786*, if an employee is treating with a physician within the network [*8 Cal. Code Reg. § 9767.6(f)*].

If an injured employee disputes either the diagnosis or the treatment prescribed by the treating physician, the employee may seek the opinion of another physician in the medical provider network [*Lab. Code § 4616.3(c)*]. If the injured employee disputes the diagnosis or treatment prescribed by the second physician, the employee may seek the opinion of a third physician in the medical provider network [*Lab. Code § 4616.3(c)*]. When an employee seeks the opinion of a second or a third physician, the statutes do not indicate which physician, first, second, or third, will subsequently provide treatment, when the second or the third physician either agrees or disagrees with the first. The regulation provides, however, that during this process, the employee is required to continue his or her treatment with the treating physician or a physician of his or her choice within the network [*8 Cal. Code Reg. § 9767.7(a)*].

If the employee disputes either the diagnosis or the treatment prescribed by the primary treating physician or the treating physician, it is the employee's responsibility to: (1) inform the insurer or employer that he or she disputes the treating physician's opinion and requests a second opinion (the employee may notify the person designated by the employer or insurer either in writing or orally); (2) select a physician or specialist from a list of available network providers; (3) make an appointment with the second opinion physician within 60 days; and (4) inform the insurer or employer of the appointment date. It is the insurer's or employer's responsibility to (1) provide a regional area listing of network providers and/or specialists to the employee for his or her selection based on the specialty or recognized expertise in treating the particular injury or condition in question and inform the employee of his or her right to request a copy of the medical records that will be sent to the second opinion physician; (2) contact the treating physician, provide a copy of the medical records or send the necessary medical records to the second opinion physician prior to the appointment date, and provide a copy of the records to the employee on request; and (3) notify the second opinion physician in

writing that he or she has been selected to provide a second opinion and the nature of the dispute, with a copy to the employee. If the appointment is not made within 60 days of receipt of the list of the available network providers, the employee will be deemed to have waived the second opinion process with regard to this disputed diagnosis or treatment of this treating physician [*8 Cal. Code Reg. § 9767.7(b)*].

If, after reviewing the employee's medical records, the second opinion physician determines that the employee's injury is outside the scope of hisor her practice, the physician must notify the insurer or employer and the employee, so that the insurer or employer can provide a new list of network providers and/or specialists to the employee for his or her selection based on the specialty or recognized expertise in treating the particular injury or condition in question [*8 Cal. Code Reg. § 9767.7(c)*].

If the employee disagrees with either the diagnosis or treatment prescribed by the second opinion physician, the employee may seek the opinion of a third physician within the network. It is the employee's responsibility to: (1) inform the insurer or employer that he or she disputes the treating physician's opinion and requests a third opinion (the employee may notify the person designated by the employer or insurer either in writing or orally); (2) select a physician or specialist from a list of available network providers; (3) make an appointment with the third opinion physician within 60 days; and (4) inform the insurer or employer of the appointment date. It is the insurer's or employer's responsibility to (1) provide a regional area listing of network providers and/or specialists to the employee for his or her selection based on the specialty or recognized expertise in treating the particular injury or condition in question and inform the employee of his or her right to request a copy of the medical records that will be sent to the third opinion physician; (2) contact the treating physician, provide a copy of the medical records or send the necessary medical records to the third opinion physician prior to the appointment date, and provide a copy of the records to the employee on request; and (3) notify the third opinion physician in writing that he or she has been selected to provide a third opinion and the nature of the dispute, with a copy to the employee. If the appointment is not made within 60 days of receipt of the list of the available network providers, the employee will be deemed to have waived the third opinion process with regard to this disputed diagnosis or treatment of this treating physician [*8 Cal. Code Reg. § 9767.7(d)*].

At the time of the selection of the physician for a third opinion, the medical provider network contact (MPN Contact) [*see 8 Cal. Code Reg. § 9768.1(a)(14)* ("medical provider network contact" means individual(s) designated by insurer or employer in employee notification who is responsible for answering employees' questions about medical provider network and is responsible for assisting employee in arranging for independent medical review)] must notify the employee about the independent medical review process and provide the employee with an Independent Medical Review Application form [*see 8 Cal. Code Reg. § 9768.10* (mandatory form)]. The MPN Contact is to fill out the "MPN Contact Section" of the form and list the specialty of the treating physician and an alternative specialty, if any, that is different from the specialty of the treating physician [*8 Cal. Code Reg. § 9768.9(a)*; *see also* [v], *below*].

If, after reviewing the employee's medical records, the third opinion physician determines that the employee's injury is outside the scope of his or her practice, the physician must notify the insurer or employer and theemployee, so that the insurer or employer can provide a new list of network providers and/or specialists to the employee for his or her selection based on the specialty or recognized expertise in treating the particular injury or condition in question [*8 Cal. Code Reg. § 9767.7(e)*].

The second and third opinion physicians must each render his or her opinion of the disputed diagnosis or treatment in writing and offer alternative diagnosis or treatment recommendations, if applicable. Any recommended treatment must be in accordance with *Lab. Code § 4616(e)*. The second and third opinion physicians may order diagnostic testing if medically necessary. A copy of the written report must be served on the employee, the insurer or employer, and the treating physician within 20 days of the date of the appointment or receipt of the results of the diagnostic tests, whichever is later [*8 Cal. Code Reg. § 9767.7(f)*].

The employer or insurer must permit the employee to obtain the recommended treatment within the network. The

employee may obtain the recommended treatment by changing physicians to the second opinion physician, third opinion physician, or other network physician [*8 Cal. Code Reg. § 9767.7(g)*].

[v] Independent Medical Review Process

If, after the third physician's opinion, the treatment or diagnostic service remains disputed, the injured employee may request independent medical review regarding the disputed treatment or diagnostic service [*Lab. Code § 4616.4(b)*; *8 Cal. Code Reg. §§ 9767.7(h), 9768.9(b)*. The statutes contain no provision regarding responsibility for payment for an independent medical review]. The standard to be utilized for independent medical review is identical to that contained in the medical treatment utilization schedule established in *Lab. Code § 5307.27*, or the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines, as appropriate [*Lab. Code § 4616.4(b)*]. Employers and insurers are required by regulation to pay for the services of the independent medical reviewers [*8 Cal. Code Reg. § 9768.15(a)*].

The Administrative Director is required to contract with individual physicians or an independent medical review organization to perform independent medical reviews [*Lab. Code § 4616.4(a)(1)*; *see 8 Cal. Code Reg. § 9768.4* (independent medical reviewer contract application procedures); *8 Cal. Code Reg. § 9768.5* (physician contract application form); *8 Cal. Code Reg. § 9768.6* (Administrative Director's action on contract application submitted by physician)]. Only physicians licensed pursuant to Bus. & Prof. Code Ch. 5 may be independent medical reviewers [*Lab. Code § 4616.4(a)(2)*].

The Administrative Director has the following obligations regarding the independent medical reviewers or those within the review organization do all of the following [*Lab. Code § 4616.4(a)(3)*]:

1. Ensure that the medical professionals are appropriately credentialed and privileged [*see 8 Cal. Code Reg. § 9768.3* (qualifications of independent medical reviewers)].

2. Ensure that the reviews provided by the medical professionals are timely, clear, and credible, and that reviews are monitored for quality on an ongoing basis [*see 8 Cal. Code Reg. § 9768.8* (removal of physicians from independent medical reviewer list)].

3. Ensure that the method of selecting medical professionals for individual cases achieves a fair and impartial panel of medical professionals who are qualified to render recommendations regarding the clinical conditions consistent with the medical utilization schedule established pursuant to *Lab. Code § 5307.27* or the American College of Occupation and Environmental Medicine's Occupational Medicine Practice Guidelines.

4. Ensure the confidentiality of medical records and the review materials, consistent with the requirements of this independent medical review statute and applicable state and federal law.

5. Ensure the independence of the medical professionals retained to perform the reviews through conflict-of-interest policies and prohibitions, and ensure adequate screening for conflicts of interest [*see 8 Cal. Code Reg. § 9768.2* (conflicts of interest); *8 Cal. Code Reg. § 9768.1(a)(5)* ("material familial affiliation" defined); *8 Cal. Code Reg. § 9768.1(a)(6)* ("material financial affiliation" defined); *8 Cal. Code Reg. § 9768.1(a)(7)* ("material professional affiliation" defined)].

Medical professionals selected by the Administrative Director or the independent medical review organizations to review medical treatment decisions must be physicians, as defined in Bus. & Prof. Code Ch. 5, who meet the following minimum requirements [*Lab. Code § 4616.4(a)(4)*; *see 8 Cal. Code Reg. § 9768.3* (qualifications of independent medical reviewers)]:

1. The medical professional must be a clinician knowledgeable in the treatment of the employee's medical condition, knowledgeable about the proposed treatment, and familiar with guidelines and protocols in the area of treatment under review.

2. Notwithstanding any other provision of law, the medical professional must hold a nonrestricted license in any state and, for physicians, a current certification by a recognized American medical specialty board in the area or areas appropriate to the condition or treatment under review.

3. The medical professional must have no history of disciplinary action or sanctions, including, but not limited to, loss of staff privileges or participation restrictions taken or pending by any hospital, government, or regulatory body.

Applications for independent medical review are to be submitted to the Administrative Director on a one-page form provided by him or her entitled "Independent Medical Review Application" [*Lab. Code § 4616.4(c)*; *8 Cal. Code Reg. § 9768.9(b)*; *see 8 Cal. Code Reg. § 9768.10* (mandatory independent medical review application form)]. At the time of the selection of the physician for a third opinion, the medical provider network contact (MPN Contact) [*see 8 Cal. Code Reg. § 9768.1(a)(9)* ("medical provider network contact" means individual(s) designated by insurer or employer in employee notification who is responsible for answering employees' questions about medical provider network and is responsible for assisting employee in arranging for independent medical review)] must notify the employee about the independent medical review process and provide the employee with an Independent Medical Review Application form. The MPN Contact is to fill out the "MPN Contact Section" of the form and list the specialty of the treating physician and an alternative specialty, if any, that is different from the specialty of the treating physician [*8 Cal. Code Reg. § 9768.9(a)*]. The employee completes the "employee section" of the form, indicates on the form whether he or she requests an in-person examination or record review, and may list an alternative specialty, if any, that is different from the specialty of the treating physician [*8 Cal. Code Reg. § 9768.9(b)*]. The form contains a signed release from the injured employee, or a person authorized pursuant to law to act on behalf of the injured employee, authorizing the release of medical and treatment information [*Lab. Code § 4616.4(c)*; *8 Cal. Code Reg. § 9768.10*]. The injured employee may provide any relevant material or documentation with the application [*Lab. Code § 4616.4(c)*; *8 Cal. Code Reg. § 9768.11(a)* (employee may furnish any relevant medical records or additional materials, with copy to MPN Contact)]. The Administrative Director or the independent medical review organization is to assign the independent medical reviewer [*Lab. Code § 4616.4(c)*]. Within 10 business days of receiving the independent medical review applicationform, the Administrative Director is to select an independent medical reviewer with an appropriate specialty. The Administrative Director's selection is to be based on the specialty of the treating physician, the alternative specialties listed by the employee and the MPN Contact, and the information submitted with the application [*8 Cal. Code Reg. § 9768.9(c)*].

If the employee requests an in-person examination, the Administrative Director must randomly select a physician from the panel of available independent medical reviewers, with an appropriate specialty, who has an office located within 30 miles of the employee's residence, to be the independent medical reviewer. If there is only one physician with an appropriate specialty within that distance, that physician must be selected to be the independent medical reviewer. If there is nophysician with an appropriate specialty within that distance, the Administrative Director is to search in increasing five-mile increments, until one physician is located. If there is no available physician with this appropriate specialty, theAdministrative Director may choose another specialty based on the information submitted [*8 Cal. Code Reg. § 9768.9(d)*].

If the employee requests a record review, the Administrative Director must randomly select a physician with an appropriate specialty from the panel of available independent medical reviewers. If there is no physician with an appropriate specialty, the Administrative Director may choose another specialty based on the information submitted [*8 Cal. Code Reg. § 9768.9(e)*].

The Administrative Director is required to send written notification of the name and contact information of the independent medical reviewer to the employee, the employee's attorney, if any, the MPN Contact, and the independent medical reviewer. In addition, the Administrative Director must send a copy of the completed independent medical review application to the independent medical reviewer [*8 Cal. Code Reg. § 9768.9(f)*].

The employee, MPN Contact, or the selected independent medical reviewer may object within 10 calendar days of receipt of the name of the independent medical reviewer to the selection if there is a conflict of interest [*see 8 Cal. Code Reg. § 9768.2*]. If the independent medical reviewer determines that he or she does not practice the appropriate specialty, he or she is to withdraw within 10 calendar days of receipt of the notification of selection. If this conflict is verified or the independent medical reviewer withdraws, the Administrative Director must select another independent medical reviewer from the same specialty. If there is no available physician with the same specialty, the Administrative Director may select an independent medical reviewer with another specialty based on the information submitted and in accordance with the procedure set forth above for an in-person examination or for a record review [*8 Cal. Code Reg. § 9768.9(g)*].

If the employee requests an in-person exam, the employee must contact the independent medical reviewer within 60 calendar days of receiving the reviewer's name to arrange an appointment. If the employee fails to contact the independent medical reviewer within this time frame for an appointment, the employee will be deemed to have waived the independent medical reviewer process with regard to this disputed diagnosis or treatment of this treating physician. The independent medical reviewer must schedule an appointment with the employee within 30 calendar days of the request for an appointment, unless all parties agree to a later date. The independent medical reviewer must notify the MPN Contact of the appointment date [*8 Cal. Code Reg. § 9768.9(h)*].

The employee must provide written notice to the Administrative Director and the MPN Contact if the he or she decides to withdraw the request for an independent medical review [*8 Cal. Code Reg. § 9768.9(i)*].

During this process, the employee is required to remain within the MPN for treatment [*8 Cal. Code Reg. § 9768.9(j)*; *see 8 Cal. Code Reg. § 9767.6*].

Following receipt of the application for independent medical review, the employer or insurer must provide the assigned independent medical reviewer with all information that was considered in relation to the disputed treatment or diagnostic service, including a copy of all correspondence from, and received by, any treating physician who provided a treatment or diagnostic service to the injured employee in connection with the injury, and a complete and legible copy of all medical records and other information used by the physicians in making a decision regarding the disputed treatment or diagnostic service [*Lab. Code § 4616.4(d)*]. A copy of the documents must be sent to the employee [*8 Cal. Code Reg. § 9768.11(a)*].

After receiving relevant information and documents, the independent medical reviewer conducts a physical examination of the injured employee at the employee's discretion [*Lab. Code § 4616.4(e)*]. If an in-person examination is requested and if a special form of transportation is required because of the employee's medical condition, it is the obligation of the MPN Contact to arrange for it. The MPN Contact is to furnish transportation and arrange for an interpreter, if necessary, in advance of the in-person examination. All reasonable expenses of transportation are to be incurred by the insurer or employer [*see Lab. Code § 4600*]. Except for the in-person examination itself, the independent medical reviewer is to have no ex parte contact with any party. Except for matters dealing with scheduling appointments, scheduling medical tests, and obtaining medical records, all communications between the independent medical reviewer and any party must be in writing, with copies served on all parties [*8 Cal. Code Reg. § 9768.11(a)*].

The reviewer may order any diagnostic tests necessary to make his or her determination [*Lab. Code § 4616.4(e)*]. However, if requiring further tests, the reviewer must notify the MPN Contact within one working day of the

appointment. All tests must be consistent with the medical treatment utilization schedule adopted pursuant to *Lab. Code § 5307.27* or, prior to the adoption of this schedule, the ACOEM guidelines, and for all injuries not covered by the medical treatment utilization schedule or the ACOEM guidelines, in accordance with other evidence-based medical treatment guidelines generally recognized by the national medical community and that are scientifically based [*8 Cal. Code Reg. § 9768.11(b)*]. The independent medical reviewer must not request the employee to submit to an unnecessary exam or procedure. If a test duplicates a test already given, the independent medical reviewer must, in his or her report, provide justification for the duplicative test [*8 Cal. Code Reg. § 9768.11(c)*].

If the employee fails to attend an examination with the independent medicalreviewer and fails to reschedule the appointment within five business days of the missed appointment, the independent medical reviewer is to perform a review of the records and make a determination based on those records [*8 Cal. Code Reg. § 9768.11(d)*].

Using the medical treatment utilization schedule established pursuant to *Lab. Code § 5307.27*, or the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines, as appropriate, and taking into account any reports and information provided, the reviewer is to determine whether the disputed health care service was consistent with *Lab. Code § 5307.27* or the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines, as appropriate, based on the specific medical needs of the injured employee [*Lab. Code § 4616.4(e)*; *8 Cal. Code Reg. § 9768.11(i)*. The regulation adds that, for injuries not covered by the medical treatment utilization schedule or by the ACOEM guidelines, the treatment rendered is to be in accordance with other evidence-based medical treatment guidelines that are generally recognized by the national medical community and scientifically based.].

The statute provides that the independent medical reviewer then issues, within 30 days of the examination of the injured employee, or within less time as prescribed by the Administrative Director, a written report to the Administrative Director, in layperson's terms to the maximum extent practicable, containing his or her analysis and determination as to whether the disputed health care service was consistent with the standards set forth in the above paragraph [*Lab. Code § 4616.4(f)*]. At present, the Administrative Director has prescribed that the independent medical reviewer serve the report on the Administrative Director, the MPN Contact, the employee, and the employee's attorney, if any, within *20* days after the in-person examination or completion of the record review [*8 Cal. Code Reg. § 9768.11(e)*]. The analysis must cite the injured employee's medical condition, the relevant documents in the record, and the relevant findings associated with the documents or any other information submitted to the reviewer in order to support the determination [*Lab. Code § 4616.4(g)*]. To these general statutory requirements, the relevant regulation elaborates a specific list of items to be included in the independent medical reviewer's report. These are [*8 Cal. Code Reg. § 9768.12(a)*]:

1. The date of the in-person examination or record review.

2. The patient's complaint(s).

3. A listing of all information received from the parties reviewed in preparation of the report or relied on for the formulation of the physician's opinion.

4. The patient's medical history relevant to the diagnostic services, diagnosis, or medical treatment.

5. Findings on record review or in-person examination.

6. The independent medical reviewer's diagnosis.

7. The physician's opinion whether or not the proposed treatment or diagnostic services are appropriate and indicated. If the proposed treatment or diagnostic services are not appropriate orindicated, any alternative diagnosis or treatment recommendation consistent with the medical treatment utilization

schedule is to be included.

8. An analysis and determination whether the disputed health care service is consistent with the medical treatment utilization schedule established pursuant to *Lab. Code § 5307.27* or, prior to the adoption of this schedule, the ACOEM guidelines. For injuries not covered by the medical treatment utilization schedule or by the ACOEM guidelines, an analysis and determination whether the treatment rendered is in accordance with other evidence-based medical treatment guidelines that are generally recognized by the national medical community and scientifically based.

9. The signature of the physician.

An independent medical reviewer must serve with each report the following executed declaration made under penalty of perjury [*8 Cal. Code Reg. § 9768.12(c)*]:

"I declare under penalty of perjury that this report is true and correct to the best of my knowledge and that I have not violated *Labor Code Section 139.3*."

If the disputed health care service has not been provided and the independent medical reviewer certifies in writing that an imminent and serious threat to the health of the injured employee may exist, including, but not limited to, serious pain, the potential loss of life, limb, or major bodily function, or the immediate and serious deterioration of the injured employee, the report must be expedited and rendered within three days of the examination by the independent medical reviewer [*Lab. Code § 4616.4(f)*; *8 Cal. Code Reg. § 9768.11(f)*]. The statute provides that the deadlines for analyses and determinations involving both regular and expedited reviews may be extended by the Administrative Director for up to three days in extraordinary circumstances or for good cause [*Lab. Code § 4616.4(f)*]. However, the Administrative Director's regulation provides that, subject to approval by the Administrative Director, reviews that are *not* expedited may be extended for up to three business days in extraordinary circumstances or for good cause [*8 Cal. Code Reg. § 9768.11(g)*]. Extensions for good cause must be granted for medical emergencies of the independent medical reviewer or the independent medical reviewer's family, death in the independent medical reviewer's family, or natural disasters or other community catastrophes that interrupt the independent medical reviewer's office operations [*8 Cal. Code Reg. § 9768.11(h)*].

The independent medical reviewer is forbidden to treat or offer to provide medical treatment for that injury or illness for which he or she has done an independent medical review evaluation for the employee unless a medical emergency arises during the in-person examination [*8 Cal. Code Reg. § 9768.11(j)*].

Payment for the services of the independent medical reviewers is to be made by the employer or the insurer. The fee is to be based on the Official Medical Fee Schedule using confirmatory consultation codes (99271 through 99275 for in-person examinations or 99271 through 99273 for evaluations not requiring an in-person examination), 99080 for reports, and 99358 for record reviews, and any other appropriate codes or modifiers. An independent medical reviewer may not accept any additional compensation from any source for his or her services as a reviewer except for services provided to treat a medical emergency that arose during an in-person examination [*8 Cal. Code Reg. § 9768.15*].

Neither the employee nor the employer nor the insurer has any liability for payment for the independent medical review that was not completed within the required time frames unless the employee and the employer each waives the right to a new independent medical review and elects to accept the original evaluation [*8 Cal. Code Reg. § 9768.11(k)*].

The Administrative Director must immediately adopt the determination of the independent medical reviewer and promptly issue a written decision to the parties [*Lab. Code § 4616.4(h)*]. The decision must be issued within five business days of receipt of the report [*8 Cal. Code Reg. § 9768.16(a)*].

The parties may appeal the Administrative Director's written decision by filing a petition with the Workers' Compensation Appeals Board and serving a copy on the Administrative Director, within 20 days after receipt of the decision [*8 Cal. Code Reg. § 9768.16(b)*].

The statute provides that, if the determination of the independent medical reviewer finds that the disputed treatment or diagnostic service is consistent with *Lab. Code § 5307.27* or the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines, the injured employee may seek the disputed treatment or diagnostic service from a physician of his or her choice from within or outside the medical provider network [*Lab. Code § 4616.4(i)*]. The relevant regulation, however, appears to treat the issue somewhat differently. It provides that, if the independent medical reviewer agrees with the diagnosis, diagnostic service, or medical treatment prescribed by the treating physician, the employee must continue to receive medical treatment from physicians within the MPN [*8 Cal. Code Reg. § 9768.17(a)*]. If the independent medical reviewer does not agree with the disputed diagnosis, diagnostic service, or medical treatment prescribed by the treating physician, the employee may seek medical treatment with a physician of his or her choice either within or outside the MPN. If the employee chooses to receive medical treatment with a physician outside the MPN, the treatment is limited to the treatment recommended by the independent medical reviewer or the diagnostic service recommended by the independent medical reviewer [*8 Cal. Code Reg. § 9768.17(b)*]. Treatment outside the medical provider network must be provided consistent with *Lab. Code § 5307.27* or theAmerican College of Occupational and Environmental Medicine's Occupational Practice Guidelines [*Lab. Code § 4616.4(i)*; *8 Cal. Code Reg. § 9768.17(c)*]. For injuries not covered by the medical treatment utilization schedule or by the ACOEM guidelines, the treatment rendered must be in accordance with other evidence-based medical treatment guidelines that are generally recognized by the national medical community and scientifically based [*8 Cal. Code Reg. § 9768.17(c)*]. The employer is liable for the cost of any approved medical treatment in accordance with *Lab. Code § 5307.1* or *5307.11* [*Lab. Code § 4616.4(i)*; *8 Cal. Code Reg. § 9768.17(d)*].

No additional examinations may be ordered by the Appeals Board, and no other reports are admissible to resolve any controversy arising out of the medical provider networks statutes [*Lab. Code § 4616.6*].

[2] Vocational Rehabilitation

IMPORTANT NOTE: The WCAB en banc has held that: (1) repeal of *Lab. Code § 139.5* terminated any rights to vocational rehabilitation benefits or services pursuant to orders or awards that were not final before January 1, 2009; (2) no saving clause was adopted to protect vocational rehabilitation rights in cases still pending on or after January 1, 2009; (3) vocational rehabilitation statutes that were repealed in 2003 do not continue to function as "ghost statutes" on or after January 1, 2009; (4) effective January 1, 2009, the WCAB lost jurisdiction over non-vested and inchoate vocational rehabilitation claims, but the WCAB continues to have jurisdiction under *Lab. Code §§ 5502(b)(3)* and *5803* to enforce or terminate vested rights; and (5) subject matter jurisdiction over non-vested and inchoate vocational rehabilitation claims cannot be conferred by waiver, estoppel, stipulation, or consent [Weiner v. Workers' Comp. Appeals Bd. (2009) 74 Cal. Comp. Cases 736, 737, 742-758 (Appeals Board en banc opinion)] .

With regard to the specified exceptions, the WCAB stated, "We conclude that sections 5502(b)(3) and 5803 give the WCAB jurisdiction to conduct hearings and make determinations regarding the enforcement or termination of vested vocational rehabilitation rights." That is, "... where an injured employee has vested vocational rehabilitation rights, the WCAB may conduct a hearing to enforce or terminate those rights." A right is "vested" when it is the subject of a final order. An order is "final" when it is no longer subject to appeal, because either the appeals have been exhausted or the time for filing appeals has expired [Weiner v. Workers' Comp. Appeals Bd. (2009) 74 Cal. Comp. Cases 736, 754, 755 (Appeals Board en banc opinion)].

Subsequently, the WCAB en banc, denying the employee's petition for reconsideration of the WCAB's prior en banc decision in the same case, *Weiner v. Ralphs Co.*, held now that, even if the WCAB

assumed that some vocational rehabilitation maintenance allowance was indisputably due to the employee prior to January 1, 2009, this does not mean that the employee's right to this vocational rehabilitation maintenance allowance had vested. The WCAB pointed out that a statutory right vests through a final order or award, that no final order or award of vocational rehabilitation maintenance allowance was made in the present case, and that repeal of *Lab. Code § 139.5* extinguished the employee's right to such an award [Weiner v. Ralphs Co. (2009) *74 Cal. Comp. Cases 958, 962-964 (Appeals Board en banc opinion) , pet. for writ of rev. filed* 9/28/2009].

A court of appeal has followed *Weiner v. Ralphs Co.* and held that an October 2008 WCAB decision that affirmed the WCJ's January 2008 award of vocational rehabilitation benefits to an employee was not a "final" decision, so that the employee lost all rights to vocational rehabilitation benefits as of the January 1, 2009, repeal of *Lab. Code § 139.5* [*Beverly Hilton Hotel v. Workers' Comp. Appeals Bd. (2009) 176 Cal. App. 4th 1597, 1604-1611, 99 Cal. Rptr. 3d 50*].

[a] Eligibility

In 2003 the legislature abolished the workers' compensation vocational rehabilitation program, repealing *Lab. Code §§ 139.5, 4635-4647,* and *5405.5* [*see* Stats. 2003, ch. 635, §§ 14, 14.3, 16]. In its place, the legislature created a "supplemental job displacement benefit" for specified workers who are permanently partially disabled, to be used for retraining. The new system, discussed in *§ 577.45[2A]*, applies only to injuries occurring on or after January 1, 2004.

In 2004, the legislature reenacted one of the statutes it had repealed in 2003, *Lab. Code § 139.5*, reinstating vocational rehabilitation. *However, the reenacted statute applies only to injuries occurring before January 1, 2004*, and it will remain in effect only until January 1, 2009, and as of that date is repealed, unless a later-enacted statute, that is enacted before January 1, 2009, deletes or extends that date [*Lab. Code § 139.5(k), (l)*]. Various other vocational rehabilitation statutes, e.g., *Lab. Code §§ 4642, 4644(d), (e),* and *5405.5*, once cross-referred to in former *Lab. Code § 139.5* but repealed in 2003, are also cross-referred to in the reenacted *Lab. Code § 139.5* and are now identified with the designation "former." Thus, although the issue may be further clarified by administrative and judicial action, it now appears that the statutory law on vocational rehabilitation applicable to pre-2004 injuries is confined to *Lab. Code § 139.5*, those "former" statutes to which it cross-refers, and those statutes not repealed in 2003. For example, the 2002 amendment to former *Lab. Code § 4646*, which allowed settlement of prospective vocational rehabilitation benefits, has not been reenacted, while *Lab. Code § 5100.6*, forbidding such settlements, was never repealed and, thus, remains in force. As a consequence of these legislative developments, at least some of the existing materials in this chapter on vocational rehabilitation will continue to be relevant for some time with respect to pre-2004 injuries.

An injured employee is eligible for vocational rehabilitation benefits under the following circumstances [*Lab. Code § 4635(a)* (governing injuries occurring on or after January 1, 1990); *see also* former *8 Cal. Code Reg. § 10003* (regulation governing pre-1990 injuries was repealed, effective December 27, 1996)]:

- The employee's expected permanent disability as a result of the injury, whether or not combined with the effects of a prior injury or disability, permanently precludes, or is likely to preclude, the employee from engaging in his or her usual occupation or the position in which he or she was engaged at the time of the injury; and

- The employee can reasonably be expected to return to suitable gainful employment through the provision of vocational rehabilitation services.

Once an injured employee's eligibility for vocational rehabilitation is determined, the employee's vocational feasibility must be determined by a qualified rehabilitation representative [*see 8 Cal. Code Reg. §§ 10124.1, 10127.3*; Admin. Guideline § 8-30-03].

For discussion of compromise and release agreements concerning vocational rehabilitation benefits, see *§ 577.131[2]*.

[b] Rehabilitation Unit

The Rehabilitation Unit, which is established within the Division of Workers' Compensation, Office of Benefit Determination, is responsible for implementation and enforcement of vocational rehabilitation plans, as well as for development of rules and regulations to expedite and facilitate identification, notification, and referral of industrially injured employees to vocational rehabilitation services [*Lab. Code § 139.5(a)*; *see Lab. Code § 4635 et seq.*; *8 Cal. Code Reg. § 10122 et seq.*; *see also Lab. Code § 139.5(g)* (offer of job within state service to specified state employees at same or similar salary and in same or similar geographic location as prima facie offer of vocational rehabilitation)].

[c] Cap on Expenses for Injuries on or After January 1, 1994

For injuries occurring on or after January 1, 1994, there is a $16,000 cap on vocational rehabilitation services incurred after the employee's request for such services, exclusive of temporary disability payments [*Lab. Code § 139.5(c)*]. An injured worker's right to continued receipt of vocational rehabilitation maintenance allowance benefits is dependent on his or her regular and consistent attendance at, and participation in, a vocational rehabilitation training program [*Lab. Code § 139.5(c)*].

[2A] Supplemental Job Displacement Benefits

[a] Nature of and Eligibility for Benefits

In 2003 the legislature abolished the workers' compensation vocational rehabilitation program, repealing *Lab. Code §§ 139.5*, *4635-4647*, and *5405.5* [*see* Stats. 2003, ch. 635, §§ 14, 14.3, 16]. In its place, the legislature created a "supplemental job displacement benefit" for specified workers who are permanently partially disabled, to be used for retraining. The new system, discussed below, applies only to injuries occurring on or after January 1, 2004. Consequently, the existing materials in this chapter on vocational rehabilitation will continue to be relevant for some time with respect to pre-2004 injuries [*see § 577.45[2]*].

For injuries occurring on or after January 1, 2004, if the injury causes permanent partial disability and the injured employee does not return to work for the employer within 60 days of the termination of temporary disability, the injured employee is eligible for a supplemental job displacement benefit in the form of a nontransferable voucher for education-related retraining or skill enhancement, or both, at state-approved or accredited schools, as follows [*Lab. Code § 4658.5(a), (d)*]:

- Up to $4,000 for permanent partial disability awards of less than 15 percent.
- Up to $6,000 for permanent partial disability awards between 15 and 25 percent.
- Up to $8,000 for permanent partial disability awards between 26 and 49 percent.
- Up to $10,000 for permanent partial disability awards between 50 and 99 percent.

The voucher may be used for payment of tuition, fees, books, and other expenses required by the school for retraining or skill enhancement. No more than 10 percent of the voucher moneys may be used for vocational or return-to-work counseling. The Administrative Director is to adopt regulations governing the form of payment, direct reimbursement to the injured employee upon presentation to the employer of appropriate documentation and receipts, and any other matters necessary to the proper administration of the supplemental job displacement benefit [*Lab. Code § 4658.5(b)*].

Within 10 days of the last payment of temporary disability, the employer must provide to the employee, in the form and manner prescribed by the Administrative Director, information that provides notice of rights under this statute. This notice must be sent by certified mail [*Lab. Code § 4658.5(c)*; *8 Cal. Code Reg. § 10133.51*; *see 8 Cal. Code Reg. § 10133.52* (mandatory form)].

The employer is not liable for the supplemental job displacement benefit if the employer meets either of the following conditions [*Lab. Code§ 4658.6*; *see 8 Cal. Code Reg. § 10133.53* (notice of offer of modified or alternative work)]:

- Within 30 days of the termination of temporary disability indemnity payments, the employer offers, and the employee rejects, or fails to accept, in the form and manner prescribed by the Administrative Director, modified work, accommodating the employee's work restrictions, lasting at least 12 months.

- Within 30 days of the termination of temporary disability indemnity payments, the employer offers, and the employee rejects, or fails to accept, in the form and manner prescribed by the Administrative Director, alternative work meeting all of the following conditions:

  - The employee has the ability to perform the essential functions of the job provided.

  - The job provided is in a regular position lasting at least 12 months.

  - The job provided offers wages and compensation that are within 15 percent of those paid to the employee at the time of injury.

  - The job provided is within reasonable commuting distance of the employee's residence at the time of injury.

[b] Dispute Resolution

For injuries occurring on or after January 1, 2004, when there is a dispute regarding the supplemental job displacement benefit, the employee or the claims administrator may request the Administrative Director to resolve the dispute [*8 Cal. Code Reg. § 10133.54(a), (b)*]. The party requesting the Administrative Director to resolve the dispute must [*8 Cal. Code Reg. § 10133.54(c)*]:

1. Complete Form DWC-AD 10133.55 "Request for Dispute Resolution Before the Administrative Director."

2. Clearly state the issue(s) and identify supporting information for each issue and position.

3. Attach all pertinent documents.

4. Submit the original request and all attached documents to the Administrative Director and serve a copy of the request and all attached documents on all parties.

5. Sign and date the proof of service section of Form DWC-AD 10133.55 "Request for Dispute Resolution before the Administrative Director."

The opposing party has 20 calendar days from the date of the proof of service of the Request to submit the original response and all attached documents to the Administrative Director and serve a copy of the response and all attached documents on all parties [*8 Cal. Code Reg. § 10133.54(d)*]. The Administrative Director or his or her designee may request additional information from the parties [*8 Cal. Code Reg. § 10133.54(e)*].

The Administrative Director or his or her designee must issue a written determination and order based solely on the request, response, and any attached documents within 30 calendar days of the date the opposing party's response and supporting information is due. If the Administrative Director or his or her designee requests additional information, the written determination must be issued within 30 calendar days from the receipt of the additional information. In the event no decision is issued within 60 calendar days of the date the opposing party's response is due or within 60 calendar days of the Administrative Director's receipt of the requested additional information, whichever is later, the request will be deemed to be denied [*8 Cal. Code Reg. § 10133.54(f)*].

Either party may appeal the determination and order of the Administrative Director by filing a written petition together with a Declaration of Readiness to Proceed pursuant to *W.C.A.B. Rules § 10250* with the local district office of the Appeals Board within 20 calendar days of the issuance of the decision or within 20 days after a request is deemed denied pursuant to the preceding paragraph. The petition must set forth the specific factual and/or legal reason(s) for the appeal. A copy of the petition and a copy of the Declaration of Readiness to Proceed must be concurrently served on the Administrative Director [*8 Cal. Code Reg. § 10133.54(g)*].

[c] Training Vouchers

For injuries occurring on or after January 1, 2004, an employee is eligible for the supplemental job displacement benefit when [*8 Cal. Code Reg. § 10133.56(a), (b)*]:

1. The injury causes permanent partial disability; and

2. Within 30 days of the termination of temporary disability indemnity payments, the claims administrator does not offer modified or alternative work in accordance with *Lab. Code § 4658.6*; and

3. Either the injured employee does not return to work for the employerwithin 60 days of the termination of temporary disability benefits; or

4. In the case of a seasonal employee, when the employee is unable to return to work within 60 days of the termination of temporary disability benefits because the work season has ended, the injured employee does not return to work on the next available work date of the next work season.

When the above requirements have been met, the claims administrator must provide a nontransferable voucher for education-related retraining or skill enhancement, or both, to the employee within 25 calendar days from the issuance of the permanent partial disability award by the WCJ or the Appeals Board [*8 Cal. Code Reg. § 10133.56(c)*]. The voucher mustbe issued to the employee, allowing direct reimbursement to the employee upon the employee's presentation to the claims administrator of documentation and receipts or as a direct payment to the provider of the education-related training or skill enhancement and/or to the VRTWC. The voucher must indicate the appropriate level of money available to the employee in compliance with *Lab. Code § 4658.5* [*8 Cal. Code Reg. § 10133.56(d), (e)*; *see 8 Cal. Code Reg. § 10133.57* (mandatory voucher form)]. The voucher must certify that the school is approved, and, if outside of California, approval is required similarly to the Bureau for Private Postsecondary and Vocational Education (BPPVE) [*8 Cal. Code Reg. § 10133.56(g)*; *see* [d], *below*]. The claims administrator must issue the reimbursement payments to the employee or direct payments to the VRTWC and the training providers within 45 calendar days from receipt of the completed voucher, receipts, and documentation [*8 Cal. Code Reg. § 10133.56(h)*].

[d] State Approved or Accredited Schools

Private providers of education-related retraining or skill enhancement selected to provide training as part of a supplemental job displacement benefit must be one of the following [*8 Cal. Code Reg. § 10133.58(b)*]:

1. Approved by the Bureau for Private Postsecondary and Vocational Education (www.bppve.ca.gov), or a California state agency that has an agreement with the Bureau for the regulation and oversight of non-degree-granting private postsecondary institutions.

2. Accredited by one of the Regional Associations of Schools and Colleges authorized by the United States Department of Education.

3. Certified by the Federal Aviation Administration.

Any training outside of California must be approved by an agency in that state similar to the Bureau for Private Postsecondary and Vocational Education [*8 Cal. Code Reg. § 10133.58(c)*].

[e] Vocational and Return to Work Counselors

For injuries occurring on or after January 1, 2004, the Administrative Director must maintain a list of Vocational and Return to Work Counselors (VRTWC) who perform the work of assisting injured employees. A VRTWC who meets the qualifications specified by regulation [*see 8 Cal. Code Reg. § 10133.50(a)(15)* ("A person or entity capable of assisting a person with a disability with development of a return to work strategy and whose regular duties involve the evaluation, counseling and placement of disabled persons. A VRTWC must have at least an undergraduate degree in any field and three or more years full time experience in conducting vocational evaluations, counseling and placement of disabled adults.")] must apply to the Administrative Director to be included on the list throughout the year. The list must be reviewed and revised on a yearly basis and must be made available on the website www.dir.ca.gov or upon request [*8 Cal. Code Reg. § 10133.59(a), (b)*]. The injured employee may select a Vocational and Return to Work Counselor whenever the assistance of such a person is needed to facilitate an employee's vocational training or return to work in connection with the supplemental job displacement benefit [*8 Cal. Code Reg. § 10133.59(c)*]. The injured employee is responsible for providing the VRTWC with any necessary medical reports. However, a claims administrator must provide a VRTWC with any medical reports, including permanent and stationary medical reports, upon an employee's written request and a signed release waiver. The VRTWC must communicate with the injured employee regarding the evaluation [*8 Cal. Code Reg. § 10133.59(d), (e)*].

[f] Termination of Claims Administrator's Liability for Supplemental Job Displacement Benefit

For injuries occurring on or after January 1, 2004, the claims administrator's liability to provide a supplemental job displacement voucher ends if either (1) or (2) in the following list occurs [*8 Cal. Code Reg. § 10133.60*]:

1. The claims administrator offers modified or alternative work to the employee, meeting the requirements of *Lab. Code § 4658.6*, on DWC-AD Form 10133.53 "Notice of Offer of Modified or Alternative Work." If the claims administrator offers modified or alternative work to the employee for 12 months of seasonal work, the offer must meet the following requirements:

   a. The employee was hired on a seasonal basis prior to injury.

   b. The offer of modified or alternative work is on a similar seasonal basis to the employee's previous employment.

2. The maximum funds of the voucher have been exhausted.

[3] Temporary Disability Indemnity

[a] Injuries Occurring Prior to January 1, 1990

If an injury occurring prior to January 1, 1990, causes temporary disability, adisability payment must be made for one week in advance as wages on the fourth day after the injured employee leaves work as a result of the injury [*Lab. Code § 4650*, prior to amendment by Stats. 1989, ch. 892 (governing injuries occurring prior to January 1, 1990)]. Except as provided by *Lab. Code § 4650.5* (relating to injuries to certain state employees resulting from acts of criminal violence), no disability payment is recoverable for the disability suffered during the first three days after the employee leaves work as a result of the injury [*Lab. Code § 4652*, prior to amendment by Stats. 1989, ch. 892 (governing injuries occurring prior to January 1, 1990)]. If the injury causes disability of more than 21 days or necessitates hospitalization, however, the disability payment must bemade from the first day the injured employee leaves work or is hospitalized as result of the injury [*Lab. Code § 4650*, prior to amendment by Stats. 1989, ch. 892 (governing injuries occurring prior to January 1, 1990)].

Subsequent payments must be made at least twice a month, unless otherwise ordered by the WCAB [*Lab. Code § 4651*, prior to amendment by Stats. 1989, ch. 892 (governing injuries occurring prior to January 1, 1990)].

[b] Injuries Occurring on or After January 1, 1990

For injuries occurring on or after January 1, 1990, if an injury causes temporary disability and liability for the injury has not been previously denied, the employer must make the first payment of temporary disability indemnity no later than 14 days after knowledge of the injury and disability. On that date, the total amount of indemnity then due must be paid. [*Lab. Code § 4650(a)*]. Subsequent payments must be made every two weeks on the day designated with the first payment [*Lab. Code § 4650(c)*]. The employer is subject to a penalty for failing to make timely payments unless it continues the employee's wages under a salary continuation plan as defined in *Lab. Code § 4650(g)* [*see Lab. Code § 4650(d)*].

Except as provided in *Lab. Code § 4650.5* (injuries to certain state employees resulting from criminal acts of violence), temporary disability indemnity is not available for disability suffered during a "waiting period," which consists of the first three days after the employee leaves work as a result of the injury. If temporary disability continues for more than 14 days or if the employee is hospitalized as an inpatient for treatment required by the injury, however, temporary disability indemnity will be payable from the date of disability. In calculating the waiting period, the day of the injury is included unless the employee was paid full wages for that day [*Lab. Code § 4652*].

Aggregate disability payments for a single injury occurring on or after January 1, 1979, and prior to April 19, 2004 (the effective date of *Lab. Code § 4656(c)*), causing temporary partial disability are not to extend for more than 240 compensable weeks within a period of five years from the date of the injury [*Lab. Code § 4656(b)*].

For injuries occurring on or after April 19, 2004, aggregate disability payments for a single injury causing temporary disability may not extend for more than 104 compensable weeks within two years from the date of commencement of temporary disability payment [*Lab. Code § 4656(c)(1)*]. However, for an employee who suffers from certain injuries or conditions, i.e., acute and chronic hepatitis B or C, amputations, severe burns, human immunodeficiency virus (HIV), high-velocity eye injuries, chemical burns to the eyes, pulmonary fibrosis, or chronic lung disease, aggregate disability payments for a single injury occurring on or after April 19, 2004, may extend to 240 compensable weeks within five years from the date of injury [*Lab. Code § 4656(c)(2)*].

The court of appeal has held that the one year of industrial disability leave payable to state employees under *Gov. Code §§ 19869-19877.1* falls within the ambit of the two-year limitation on aggregate temporary disability payments in *Lab. Code § 4656(c)(1)*. The court found that *Gov. Code § 19870(a)* provides that industrial disability leave "means temporary disability as defined in" the Labor Code workers' compensation provisions, and that the two-year limitation on payment of temporary disability benefits in *Lab. Code § 4656(c)(1)* does not restrict itself to only temporary disability benefits payable under the Workers' Compensation Act or the Labor Code, since it more broadly applies to "

[a]ggregate disability payments for a single injury" [*Brooks v. Workers' Comp. Appeals Bd. (2008) 161 Cal. App. 4th 1522, 1527-1538, 75 Cal. Rptr. 3d 277* (*emphasis in original*)].

In another case involving the same statute, but with a different result, the court of appeal held that, for purposes of determining the two-year limitation period on temporary disability indemnity, temporary disability payments commenced when a school district paid its injured employee her normal wages under *Ed. Code § 44043*. The employee sustained an industrial injury in June 2004. The first disability payment was made in February 2005. In February 2007 the employer sought an order terminating further liability for temporary disability. The parties stipulated that 85.71 weeks of the employer's payments were made pursuant to *Ed. Code § 44043*, which directs a school district to pay the normal wage of an injured employee receiving temporary disability benefits by supplementing those temporary disability benefits with the employee's accrued leave time. Thus, stated the court of appeal, entitlement to *Ed. Code § 44043* benefits is contingent on payment of workers' compensation temporary disability benefits, so that the date on which temporary disability payments commence can be no later than the date of the first payment under *Ed. Code § 44043* [*Mt. Diablo Unified School District v. W.C.A.B. (Rollick) (2003) 165 Cal. App. 4th 1154, 1158-1161, 81 Cal. Rptr. 3d 597]* .

When independent injuries result in concurrent periods of temporary disability, the 104-week, two-year limitation of *Lab. Code § 4656(c)(1)* likewise runs concurrently. For example, in one case the employee suffered industrial injuries on February 23, 2005, and April 13, 2005. The employee was unable to work only after the second injury, but both injuries contributed to the employee's becoming temporarily disabled at that time. The court of appeal held that the employee was entitled to two periods of temporary disability and that, to determine the impact of *Lab. Code § 4656* in a case involving multiple injuries, the evidence must be examined to determine whether any periods of temporary disability are distinct and independent, staggered, or entirely overlapping. In the present case, the court found that the employee's period of temporary disability for the first injury ran from April 14, 2005, through September 12, 2006, when that first injury became permanent and stationary, and that the employee's period of temporary disability for the second injury ran from April 14, 2005, until it was exhausted under the 104-week limitation of *Lab. Code § 4656*, completely overlapping the period of temporary disability for the first injury. Since the employer began paying temporary disability benefits on April 26, 2005, the employee was entitled to temporary disability benefits until April 26, 2007 [*Foster v. Workers' Comp. Appeals Bd. (2008) 161 Cal. App. 4th 1505, 1511-1513, 75 Cal. Rptr. 3d 272*].

[c] Notice Required With Last Payment of Temporary Disability Indemnity

For injuries occurring on and after January 1, 1991 [*see Lab. Code § 4067.5*], the employer is required to provide, together with the last payment of temporary disability indemnity, in a form prescribed by the administrative director pursuant to *Lab. Code § 138.4*, one of the following notices to the employee [*Lab. Code § 4061(a)*]:

- Either notice that no permanent disability indemnity will be paid because the employer alleges the employee has no permanent impairment or limitations resulting from the injury or notice of the amount of permanent disability indemnity determined by the employer to be payable. The notice must include information concerning how the employee may obtain a formal medical evaluation pursuant to *Lab. Code § 4061(c)* or *(d)* (*discussed under § 577.46[3]*) if he or she disagrees with the position taken by the employer. The notice must be accompanied by the form prescribed by the Administrative Director for requesting assignment of a panel of qualified medical evaluators, unless the employee is represented by an attorney. If the employer determines permanent disability indemnity is payable, the employer must advise the employee of the amount determined payable, the basis on which the determination was made, and whether there is need for continuing medical care; or

- Notice that permanent disability indemnity may be or is payable, but that the amount cannot be determined because the employee's medical condition is not yet permanent and stationary. The notice must advise the employee that his or her medical condition will be monitored until it is permanent and

> stationary, at which time the necessary evaluation will be performed to determine the existence and extent of permanent impairment and limitations for the purpose of rating permanent disability and to determine the need for continuing medical care, or at which time the employer will advise the employee of the amount of permanent disability indemnity the employer has determined to be payable. If an employee isprovided with this notice, and the employer later takes the position that the employee has no permanent impairment or limitations resulting from the injury, or later determines permanent disability indemnity is payable, the employer must, within 14 days of the des payable, the employer must, within 14 days of the determination to take this position, provide the employee with the notice specified *above.*

Each of the foregoing notices must describe the administrative procedures available to the injured employee and advise the employee of his or her right to consult an attorney or an information and assistance officer [*Lab. Code § 4061(b)*]. The notice must contain the following language [*Lab. Code § 4061(b)*]:

> Should you decide to be represented by an attorney, you may or may not receive a larger award, but, unless you are determined to be ineligible for an award, the attorney's fee will be deducted from any award you might receive for disability benefits. The decision to be represented by an attorney is yours to make, but it is voluntary and may not be necessary for you to receive your benefits.

[4] Permanent Disability Benefits

[a] In General

If the injury causes permanent disability, the first payment must be made within 14 days after the date of last payment of temporary disability indemnity. When the last payment of temporary disability indemnity has been made pursuant to *Lab. Code § 4656(c)* (maximum period for temporary disability payments for injuries occurring on and after April 19, 2004), and regardless of whether the extent of permanent disability can be determined at that date, the employer nevertheless must commence the timely payment of permanent disability indemnity and continue to make these payments until the employer's reasonable estimate of permanent disability indemnity due has been paid, and if the amount of permanent disability indemnity due has been determined, until that amount has been paid [*Lab. Code § 4650(b)*].

If, within 60 days of a disability becoming permanent and stationary, an employer does not offer the injured employee regular work, modified work, or alternative work, in the form and manner prescribed by the Administrative Director, for a period of at least 12 months, each disability payment remaining to be paid to the injured employee from the date of the end of the 60-day period will be increased by 15 percent [*Lab. Code § 4658(d)(2)*].

If, within 60 days of a disability becoming permanent and stationary, an employer offers the injured employee regular work, modified work, or alternative work, in the form and manner prescribed by the Administrative Director, for a period of at least 12 months, and regardless of whether the injured employee accepts or rejects the offer, each disability payment remaining to be paid from the date the offer was made will be decreased by 15 percent [*Lab. Code § 4658(d)(3)(A)*].

If the regular work, modified work, or alternative work is terminated by the employer before the end of the period for which disability payments are due, the amount of each of the remaining disability payments will be increased by 15 percent [*Lab. Code § 4658(d)(3)(B)*]. An employee who voluntarily terminates employment is not eligible for this increase in payment [*Lab. Code § 4658(d)(3)(B)*].

None of the provisions of the preceding three paragraphs applies to an employer that employs fewer than 50 employees [*Lab. Code § 4658(d)(2), (3)(B)*].

The court of appeal has held that, because the issues identified in the pretrial conference statement, together with the parties' stipulations, clearly alerted the WCJ that *Lab. Code § 4658(d)* was in issue, there was no basis for failing to apply the entire formula contained in that provision. The court found that in the pretrial conference statement the parties stipulated that the permanent disability benefits that the employer was already paying to the employee included a 15 percent increase pursuant to *Lab. Code § 4658(d)*, and that, by checking the boxes on the pretrial conference form labeled "Permanent Disability" and "Apportionment," the parties conveyed their intention that the WCJ calculate the award for permanent disability benefits under the applicable formula and the facts presented, including *Lab. Code § 4658(d)* [*Bontempo v. W.C.A.B (2009) 173 Cal. App. 4th 689, 701-704, 93 Cal. Rptr. 3d 229]* .

For compensable claims arising before April 30, 2004, the above schedule does not apply to the determination of permanent disabilities when there has been either a comprehensive medical-legal report or a report by a treating physician, indicating the existence of permanent disability, or when the employer is required to provide the notice required by *Lab. Code § 4061* to the injured worker [*Lab. Code § 4658(d)(4)*]. (In view of *Lab. Code § 4658(d)(1)*, the need for this provision is not apparent. Moreover, its existence appears to raise the question of which schedule applies to claims arising between April 30, 2004, and the effective date of the revised permanent disability schedule to be adopted by the Administrative Director, which is to be no later than January 1, 2005 [*see Lab. Code § 4660(e)*].)

"Regular work" means the employee's usual occupation or the position in which the employee was engaged at the time of injury and that offers wages and compensation equivalent to those paid to the employee at the time of injury, and located within a reasonable commuting distance of the employee's residence at the time of injury [*Lab. Code § 4658.1(a)*].

"Modified work" means regular work modified so that the employee has the ability to perform all the functions of the job and that offers wages and compensation that are at least 85 percent of those paid to the employee at the time of injury, and located within a reasonable commuting distance of the employee's residence at the time of injury [*Lab. Code § 4658.1(b)*].

"Alternative work" means work that the employee has the ability to perform, that offers wages and compensation that are at least 85 percent of those paid to the employee at the time of injury, and that is located within a reasonable commuting distance of the employee's residence at the time of injury [*Lab. Code § 4658.1(c)*].

For the purpose of determining whether wages and compensation are equivalent to those paid at the time of injury, the wages and compensation for anyincrease in working hours over the average hours worked at the time of injury are not to be considered [*Lab. Code § 4658.1(d)*].

For the purpose of determining whether wages and compensation are equivalent to those paid at the time of injury, actual wages and compensation are to be determined without regard to the minimums and maximums set forth in *Lab. Code § 4451 et seq.* [*Lab. Code § 4658.1(e)*].

The condition that regular, modified, or alternative work be located within a reasonable distance of the employee's residence at the time of injury may be waived by the employee [*Lab. Code § 4658.1(f)*]. The condition will be deemed to be waived if the employee accepts the regular, modified, or alternative work and does not object to the location within 20 days of being informed of the right to object [*Lab. Code § 4658.1(f)*]. The condition will be conclusively deemed to be satisfied if the offered work is at the same location and the same shift as the employment at the time of injury [*Lab. Code § 4658.1(f)*].

The Disability Evaluation Unit, under the direction and authority of the Administrative Director, will issue permanent disability ratings as required, utilizing the Schedule for Rating Permanent Disabilities adopted by the Administrative Director. The Disability Evaluation Unit prepares the following kinds of rating determinations: formal, summary, consultative, and informal [*8 Cal. Code Reg. § 10150*].

Reports of permanent disability rating specialists are deemed evidence only with regard to the relation between the disability described and the percentage of permanent disability but not to the existence of the disability [*8 Cal. Code Reg. §§ 10167(b), 10602*].

[b] Formal Rating Determinations

Formal rating determinations are prepared by the Disability Evaluation Unit on request of the WCAB or a WCJ [*8 Cal. Code Reg. § 10156*]. Formal rating determinations prepared by disability evaluators are deemed to constitute evidence only as to the relation between the disability or impairment standard(s) described and the percentage of permanent disability [*8 Cal. Code Reg. § 10158*].

[c] Informal Ratings

If no application for adjudication of claim (discussed under *§ 577.80* et seq.) has been filed and the parties wish to obtain a rating on the basis of medical reports, the Disability Evaluation Unit will issue an informal rating upon the joint request of the parties, or at the request of an information and assistance officer (discussed in *§ 577.12[2]*), providing the necessary information [*8 Cal. Code Reg. § 10167(a)*]. The request must be submitted on forms and in a manner prescribed by the administrative director [*8 Cal. Code Reg. § 10167(a)*; *see § 577.420[1]*]. All medical reports pertaining to the case must be submitted with the request [*8 Cal. Code Reg. § 10167(a)*].

The Unit will issue the informal rating, which will contain a statement that the informal rating is not a finding, award, order or decision of the Appeals Board, or evidence as to the existence of the factors of disability [*8 Cal. Code Reg. § 10167(b)*]. If the rating indicates a life pension or if provision for future medical treatment is indicated, the Unit will forward a copy of the rating to the information and assistance officer for the purpose of obtaining a stipulated award, or for other action as may be appropriate [*8 Cal. Code Reg. § 10167(c)*]. Self-ratings prepared by the employer are not acceptable substitutes for informal ratings prepared by the Unit [*8 Cal. Code Reg. § 10167(d)*].

[d] Summary Rating Determinations

[i] In General

Summary rating determinations are prepared by the Disability Evaluation Unit upon receipt of a properly prepared request [*8 Cal. Code Reg. §§ 10160* (unrepresented workers), *10160.5* (represented workers)]. The components of such a request differ depending on whether the injured worker is represented by an attorney [*see* [ii], [iii] *below*].

Once a summary rating determination has been issued to the parties, neither party is permitted to communicate with the Qualified Medical Evaluator. Any dispute with the summary rating or the evaluation on which it is based must be resolved by filing a request for reconsideration of a summary rating with the Administrative Director [*8 Cal. Code Reg. § 10164(a)*; *see § 577.46[3][f]*].

If the qualified medical evaluator's comprehensive evaluation indicates apportionment of the permanent disability, a summary rating determination may not be made until a WCJ reviews the medical evaluation to determine if the apportionment is inconsistent with the law. The determination of the WCJ is not admissible in any judicial proceeding [*8 Cal. Code Reg. § 10162(a)*].

[ii] Represented Employee

When an injured employee is represented by an attorney, a person requesting a summary rating must complete DWC-AD Form 101 (DEU), Request for Summary Rating Determination [*see § 577.422[1]*] and submit it to a Qualified or Agreed Medical Evaluator, as appropriate, together with all medical reports and medical records

concerning the case. Once the medical evaluator has completed the evaluation report, he or she must submit the report together with the completed DEU Form 101 to the appropriate office of the Disability Evaluation Unit specified on the form and serve copies on the party requesting the evaluation [*8 Cal. Code Reg. § 10160.5(b)*].

Notwithstanding the provisions of the preceding paragraph, a represented party who is uncertain as to the need for the expertise of a disability rater may wait to request a summary rating determination until after receiving the report of the Qualified Medical Evaluator or Agreed Medical Evaluator. If, after receiving the evaluator's report, a party determines that a summary rating is needed, he or she must file the Request for Summary Rating Determination of Qualified Medical Evaluator's Report and the medical report with the DEU office designated by the Administrative Director and must immediately serve a filed copy of the Summary Rating Determination on the other party [*8 Cal. Code Reg. § 10160.5(c)*].

In either case, the DEU will prepare a summary rating determination when it has received the completed Request and the evaluator's report [*8 Cal. Code Reg. § 10160.5(a)*]. If a case is settled prior to receipt of a summary rating that has been requested, the requesting party must notify the DEU office of the settlement [*8 Cal. Code Reg. § 10160.5(d)*].

If the agreed on medical evaluator or qualified medical evaluator apportions the permanent disability, the Disability Evaluation Unit will issue a summary rating determination "before apportionment" [*8 Cal. Code Reg. § 10162(d)*].

[iii] Unrepresented Employee

When an injured worker is not represented by an attorney, the insurance carrier or self-insurer must provide the worker with DWC-AD Form 100 (DEU), Employee's Disability Questionnaire [*see § 577.421[1]*] before the worker attends his or her scheduled examination by the Qualified Medical Evaluator. The worker will be instructed in the prescribed form and manner for completing the questionnaire. The worker will then give the completed form to the medical evaluator at the time of the examination [*8 Cal. Code Reg. § 10160(b)*].

Also prior to the injured workers' scheduled examination by the Qualified Medical Evaluator, the insurance carrier, self-insurer, or injured worker must complete DWC-AD Form 101 (DEU), Request for Summary Rating Determination [*see § 577.422[1]*] and send it to the medical evaluator, with a copy served on the opposing party, together with all medical reports and medical records relating to the case [*8 Cal. Code Reg. § 10160(c)*]. The form must include the address of the appropriate Disability Evaluation Unit. A list of the Unit's offices with their respective areas of jurisdiction is available from the Unit on request [*8 Cal. Code Reg. § 10160(c)*].

When a summary rating determination has been requested, the evaluator must submit the completed DWC-AD Form 100 (DEU) and DWC-AD Form 101 (DEU), together with the formal medical evaluation of the workers' condition and a document cover sheet and a separator sheet, pursuant to *8 Cal. Code Reg. § 10232(b)* (these sheets to be served on only the Disability Evaluation Unit), to the office of the Disability Evaluation Unit designated on the DWC-AD Form 101 (DEU), with a copy to the parties [*8 Cal. Code Reg. § 10160(d)*]. Once the Unit has received the completed DWC-AD Form 100 (DEU) and DWC-AD Form 101 (DEU) and the formal medical evaluation by the Qualified Medical Evaluator, the Unit will prepare a summary rating determination [*8 Cal. Code Reg. § 10160(a)*]. No formal medical evaluation will be considered received until the completed DWC-AD Form 100 (DEU) and DWC-AD Form 101 (DEU) and the medical evaluation are received in the office of the Disability Evaluation Unit having jurisdiction over the employee's area of residence. Any requests received without all the required documents will be returned to the sender [*8 Cal. Code Reg. § 10160(e)*].

When the injury has occurred on or after January 1, 1994, a summary rating determination may also be made for an unrepresented worker based on a report of the primary treating physician [*8 Cal. Code Reg. § 10160.1(a)*; *see 8 Cal. Code Reg. § 9785* (reports of primary treating physician)]. To request a summary rating determination based on the report of the primary treating physician, the carrier, self-insured employer, or employee must send a completed

DWC-AD Form 102 (DEU), Request for Summary Rating Determination of Primary Treating Physician's Report [*see § 577.423[1]*], along with a copy of the primary treating physician's report, if the report has not already been filed in EAMS, to the Disability Evaluation Unit [*8 Cal. Code Reg. § 10160.1(b)*]. A filed copy of the request and the report must also be served on the non-requesting party, along with proof of service [*8 Cal. Code Reg. § 10160.1(c)*].

[e] Consultative Rating Determinations

Consultative rating determinations may be requested for the purpose of determining the ratable significance of factors, reviewing proposed Compromise and Release Agreements for adequacy, determining commuted values, resolving occupational questions, or any other matters within the expertise of the disability evaluators [*see § 577.424*, for form]. These rating determinations are not admissible in judicial proceedings [*8 Cal. Code Reg. § 10166(b)*].

The Disability Evaluation Unit will prepare consultative rating determinations at the request of the WCAB, WCJs, WCJs pro tempore, Settlement Conference Referees, Arbitrators, and Information and Assistance Officers [*8 Cal. Code Reg. § 10166(a)*]. The Unit may also prepare consultative rating determinations on receipt of reasonable requests from employers, injured workers, or their respective representatives. A request is not considered reasonable when an insurance carrier or self-insurer seeks a rating determination for the purpose of terminating its liability or for negotiating a Compromise and Release settlement when the injured worker is not represented by an attorney. Consultative rating determinations cannot be used as a substitute for summary rating determinations [*8 Cal. Code Reg. § 10166(c)*].

In all cases, the person requesting a consultative rating determination must provide the Disability Evaluation Unit with the injured workers' occupation and age at the time of injury [*8 Cal. Code Reg. § 10166(d)*].

No consultative rating determination will be provided in cases in which an Application for Adjudication of Claim has been filed with the WCAB without prior written authorization of the WCAB, a WCJ, WCJ pro tempore, Settlement Conference Referee, Arbitrator, or Information and Assistance Officer. In cases inwhich an application has been filed, the disability evaluator may require that any request be accompanied by the WCAB file [*8 Cal. Code Reg. § 10166(e)*].

[5] Return-to-Work Program

[a] Term and Scope of Program

Commencing July 1, 2004 [*Lab. Code § 139.48(h)*; *see Lab. Code § 139.48(a)(2)* (statute to be implemented to extent funds are available); *see also* [d], *below*], and, unless otherwise continued by legislative action, sunsetting on January 1, 2009 [*Lab. Code § 139.48(i)*], this program is intended to promote the early and sustained return to work of employees following work-related injuries or illness [*Lab. Code §§ 139.47, 139.48(a)(1)*; *see 8 Cal. Code Reg. § 10119(d)*]. Its major features include creation of the Workers' Compensation Return-to-Work Fund, subject to appropriation by the legislature, from which an employer will be reimbursed, subject to various conditions and limitations, for wages, workplace modification expenses, and workers' compensation insurance premiums, when an employee returns to modified or alternative work, as defined in *Lab. Code § 4644(a)(5)* and *(6)*, during the period the employee is temporarily disabled. The Administrative Director has adapted regulations to carry out the program [*see Lab. Code §§ 139.47, 139.48, 139.49*; *8 Cal. Code Reg. §§ 10116*-10133.58]. The details of the program are outlined in [b]-[f], *below*.

[b] Obligations of Director of Industrial Relations

The Director of Industrial Relations is required to establish and maintain a program to encourage, facilitate, and educate employers to provide early and sustained return to work after occupational injury or illness. The program is to do both of the following [*see Lab. Code § 139.47*]:

- Develop educational materials and guides, in easily understandable language in both print and electronic form, for employers, health care providers, employees, and labor unions. These materials are

to address issues including, but not limited to, early return to work, assessment of functional abilities and limitations, development of appropriate work restrictions, job analysis, worksite modifications, assistive equipment and devices, and available resources.

- Conduct training for employee and employer organizations and health care providers concerning the accommodation of injured employees and the prevention of reinjury.

[c] Employer Reimbursement

Upon submission by an eligible employer of documentation in accordance with regulations [*see Lab. Code § 139.48(f)*; *8 Cal. Code Reg. § 10120* (Form DWC-AD 10128, Request for Reimbursement of Accommodation Expenses for Injuries on or After July 1, 1004); *see also Lab. Code § 139.48(e)(1)* ("eligible employer" means any employer, except state or employer that is one of state's political subdivisions eligible to become permissibly self-insured pursuant to *Lab. Code § 3700(c)*, who employs 50 or fewer full-time employees on date of injury); [d], *below*], the Administrative Director is to pay the workplace modification expense reimbursement allowed under the program [*Lab. Code § 139.48(b)*; *8 Cal. Code Reg. § 10119*].

The Administrative Director is to reimburse an eligible employer for expenses incurred to make workplace modifications to accommodate the employee's return to modified or alternative work, as follows [*Lab. Code § 139.48(c)*; *8 Cal. Code Reg. § 10119(f), (g)*; *see 8 Cal. Code Reg. § 10116.9(g)* ("modified work" means regular work modified so that employee has ability to perform all functions of job and that offers wages and compensation that are at least 85 percent of those paid to employee at time of injury, and located within reasonable commuting distance of employee's residence at time of injury); *8 Cal. Code Reg. § 10116.9(a)* ("alternative work" means work (1) offered either by employer who employed injured worker at time of injury, or by another employer when previous employment was seasonal work, (2) that employee has ability to perform, (3) that offers wages and compensation that are at least 85 percent of those paid to employee at time of injury, and (4) that is located within reasonable commuting distance of employee's residence at time of injury); *see also 8 Cal. Code Reg. § 10116.9(n)* ("regular work" means employee's usual occupation or position in which employee was engaged at time of injury and that offers wages and compensation equivalent to those paid to employee at time of injury, and located within reasonable commuting distance of employee's residence at time of injury); *8 Cal. Code Reg. § 10116.9(o)* ("seasonal work" means employment as daily hire, project hire, or annual season hire)]:

- The maximum reimbursement to an eligible employer for expenses to accommodate each temporarily disabled injured worker is one thousand two hundred fifty dollars ($1,250).

- The maximum reimbursement to an eligible employer for expenses to accommodate each permanently disabled worker who is a qualified injured worker is two thousand five hundred dollars ($2,500). If the employer received reimbursement under paragraph 1, the amount of the reimbursement under paragraph 1 and this paragraph is not to exceed two thousand five hundred dollars ($2,500).

- The modification expenses must be incurred in order to allow a temporarily disabled worker to perform modified or alternative work within physician-imposed temporary work restrictions, or to allow a permanently disabled worker who is an injured worker to return to sustained modified or alternative employment [*see 8 Cal. Code Reg. § 10119(f)(2)* ("sustained modified or alternative work" is work anticipated to last at least 12 months)] with the employer within physician-imposed permanent work restrictions.

- Allowable expenses may include physical modifications to the worksite, equipment, devices, furniture, tools, or other necessary costs for accommodation of the employee's restrictions.

An eligible employer seeking reimbursement must submit a "Request for Reimbursement of Accommodation Expenses" (Form DWC-AD 10120) within 90 calendar days from the date of the expenditure for which the employer is seeking reimbursement. As a condition to reimbursement, the expenditure must not have been paid for or covered by the employer's insurer or any source of funding other than the employer. Upon a showing of good cause, the filing date may be extended. The employer must attach to its request copies of all pertinent medical reports that contain the work restrictions being accommodated, any other documentation supporting the request, and all receipts for accommodation expenses. Requests should be sent to the mailing address for the Division of Workers' Compensation Return to Work Program listed in the website of the Division of Workers' Compensation at: http://www.dir.ca.gov/dwc/dwc_home_page.htm [*8 Cal. Code Reg. § 10119(h)*].

The Administrative Director or his or her designee is required to review each Request for Reimbursement of Accommodation Expenses and within 60 business days provide the employer with one of the following [*8 Cal. Code Reg. § 10119(i)*]:

- That the request has been approved, together with a check for the reimbursement allowed, and an explanation of the allowance, if less than the maximum amounts set forth in the statute.

- That the request has been denied, with an explanation of the basis for denial.

- That the request is deficient or incomplete and indicating what clarification or additional information is necessary.

An eligible employer may appeal the Administrative Director's notice under *8 Cal. Code Reg. § 10119(i)(1)* and *(2)* by filing a "Petition Appealing Administrative Director's Reimbursement Allowance" setting forth the basis of the appeal. The petition must be filed within 20 days from the date of the issuance of the Administrative Director's notice [*8 Cal. Code Reg. § 10294(a)*; *8 Cal. Code Reg. § 10119(k)*].

If an application for adjudication has been previously filed, the petition appealing the Administrative Director's notice must be filed at the district office having venue, and the case number assigned to the application for adjudication will be assigned to the petition. If an application for adjudication has not been previously filed, an application must be filed together with the petition, and venue must be determined in accordance with *Lab. Code § 5501.5* and *8* Cal. Code Reg. § 10409 [*8 Cal. Code Reg. § 10294(b)*].

A "Petition Appealing Administrative Director's Reimbursement Allowance" must be accompanied by a declaration of readiness [*8 Cal. Code Reg. § 10294(c)*].

A copy of the petition must be concurrently served on the Administrative Director [*8 Cal. Code Reg. § 10294(d)*].

This section does not create a preference in employment for injured employees over noninjured employees. It is unlawful for an employer to discriminatorily terminate, lay off, demote, or otherwise displace an employee in order to return an industrially injured employee to employment for the purpose of obtaining the reimbursement set forth in *Lab. Code § 139.48(c)* [*Lab. Code § 139.48(d)*].

For purposes of this section, "employee" means a worker who has suffered a work-related injury or illness on or after July 1, 2004 [*Lab. Code § 139.48(e)(2)*; *8 Cal. Code Reg. § 10119(a)*].

[d] Regulations and Funding

Among the regulations the Administrative Director was required to adopt to carry out the return-to-work program was a regulation containing a prioritization scheme to cover a situation in which budget funds are insufficient to implement

the workplace modification expense reimbursement provided for by the statute [*Lab. Code § 139.48(f)*; *see* [c], *above*]. Pursuant to this directive, the Administrative Director has provided that, in the event that there are insufficient funds in the Return to Work Fund to fully reimburse an employer or employers for workplace modification expenses as required by the statute, the Administrative Director will utilize the following priority list in establishing the amount of reimbursement or whether reimbursement is allowed, in order of decreasing priority [*8 Cal. Code Reg. § 10119(j)*]:

- Employers who have not previously received any reimbursement under this program.

- Employers who have not previously received any reimbursement under this program for the employee who is the subject of the request.

- Employers who are seeking reimbursement for accommodation required in returning a permanently disabled employee to sustained modified or alternative work.

- Employers who are requesting reimbursement for accommodation required by a temporarily disabled employee.

The Workers' Compensation Return-to-Work Fund is created as a special fund in the State Treasury. The fund consists of all penalties collected pursuant to *Lab. Code § 5814.6* and transfers made by the Administrative Director from the Workers' Compensation Administration Revolving Fund established pursuant to *Lab. Code § 62.5*. The fund is to be administered by the Administrative Director. Moneys in the fund may be expended by the Administrative Director, upon appropriation by the legislature, only for purposes of implementing the return-to-work program [*Lab. Code § 139.48(g)*; *see* Stats. 2002, ch. 6, § 86 (intent of legislature is that all reimbursement expended for return-to-work program be funded from annual premium tax, collected under *Rev. & Tax Code § 12201*, directly attributable to compensation benefit rates and amounts set forth in Rev. & Tax Code); *8 Cal. Code Reg. § 10119(e)*].

[e] Offer of Work; Adjustment of Permanent Disability Payments

As part of the return-to-work program, the Administrative Director has promulgated an additional regulation that applies only to injuries occurring on or after January 1, 2005, and to the following employers [*8 Cal. Code Reg. § 10117(a)*]:

1. Insured employers who employed 50 or more employees at the time of the most recent policy inception or renewal date for the insurance policy that was in effect at the time of the employee's injury.

2. Self-insured employers who employed 50 or more employees at the time of the most recent filing by the employer of the Self-Insurer's Annual Report that was in effect at the time of the employee's injury.

3. Legally uninsured employers who employed 50 or more employees at the time of injury.

Within 60 calendar days from the date that the condition of an injured employee with permanent partial disability becomes permanent and stationary [*8 Cal. Code Reg. §§ 9813.2, 10117(b)*; *see 8 Cal. Code Reg. § 10116.9*(*l*) ("permanent and stationary" defined)]:

1. If an employer does not serve the employee with a notice of offer of regular work, modified work, or alternative work [*see 8 Cal. Code Reg. § 10116.9(n)* ("regular work" means employee's usual occupation or position in which employee was engaged at time of injury and that offers wages and comp ensation equivalent to those paid to employee at time of injury, and located within reasonable commuting distance of employee's residence at time of injury); *8 Cal. Code Reg. § 10116.9(g)* ("modified work" means regular work modified so that employee has ability to perform all functions of job and that offers wages

and compensation that are at least 85 percent of those paid to employee at time of injury, and located within reasonable commuting distance of employee's residence at time of injury); *8 Cal. Code Reg. § 10116.9(a)* ("alternative work" means work (1) offered either by employer who employed injured worker at time of injury, or by another employer when previous employment was seasonal work; (2) that employee has ability to perform; (3) that offers wages and compensation that are at least 85 percent of those paid to employee at time of injury; and (4) that is located within reasonable commuting distance of employee's residence at time of injury)] for a period of at least 12 months, each payment of permanent partial disability remaining to be paid to the employee from the date of the end of the 60 day period is to be paid in accordance with *Lab. Code § 4658(d)(1)* and increased by 15 percent.

2. If an employer serves the employee with a notice of offer of regular work, modified work, or alternative work for a period of at least 12 months, and in accordance with the requirements set forth in paragraphs 3 and 4, below, each payment of permanent partial disability remaining to be paid from the date the offer was served on the employee is to be paid in accordance with *Lab. Code § 4658(d)(1)* and decreased by 15 percent, regardless of whether the employee accepts or rejects the offer.

3. The employer must use Form DWC-AD 10133.53 to offer modified or alternative work, or Form DWC-AD 10003 to offer regular work. The claims administrator may serve the offer of work on behalf of the employer.

4. The regular, alternative, or modified work that is offered by the employer pursuant to paragraph 2, above, must be located within a reasonable commuting distance of the employee's residence at the time of the injury, unless the employee waives this condition. This condition will be deemed to be waived if the employee accepts the regular, modified, or alternative work, and does not object to the location within 20 calendar days of being informed of the right to object. The condition will be conclusively deemed to be satisfied if the offered work is at the same location and the same shift as the employment at the time of injury.

If the claims administrator relies on a permanent and stationary date contained in a medical report prepared by the employee's treating physician, QME, or AME, but there is subsequently a dispute as to an employee's permanent and stationary status, and there has been a notice of offer of work served on the employee, the claims administrator may withhold 15 percent from each payment of permanent partial disability remaining to be paid from the date the notice of offer was served on the employee until there has been a final judicial determination of the date that the employee is permanent and stationary pursuant to *Lab. Code § 4062* [*8 Cal. Code Reg. § 10117(c)*].

1. When there is a final judicial determination that the employee is permanent and stationary on a date later than the date relied on by the employer in making its offer of work, the employee must be reimbursed any amount withheld up to the date a new notice of offer of work is served on the employee.

2. When there is a final judicial determination that the employee is not permanent and stationary, the employee must be reimbursed any amount withheld up to the date of the determination.

3. The claims administrator is not required to reimburse permanent partial disability benefit payments that have been withheld pursuant to this provision during any period for which the employee is entitled to temporary disability benefit payments.

If the employee's regular work, modified work, or alternative work, offered by the employer and accepted by the employee, is terminated prior to the end of the period for which permanent partial disability benefits are due, the amount of each remaining permanent partial disability payment from the date of the termination is to be paid in accordance with *Lab. Code § 4658(d)(1)*, as though no decrease in payments had been imposed, and increased by 15

percent. An employee who voluntarily terminates his or her regular work, modified work, or alternative work is not eligible for this 15 percent increase in permanent partial disability payments [*8 Cal. Code Reg. § 10117(d)*].

Nothing in this regulation prevents the parties from settling or agreeing to commute the permanent disability benefits to which an employee may be entitled. However, if the permanent disability benefits are commuted by a WCJ or the Appeals Board pursuant to *Lab. Code § 5100*, the commuted sum will account for any adjustment that would have been required by this regulation if payment had been made pursuant to *Lab. Code § 4658* [*8 Cal. Code Reg. § 10117(e)*].

When the employer offers regular, modified, or alternative work to the employee that meets the conditions of this regulation and subsequently learns that the employee cannot lawfully perform regular, modified, or alternative work, the employer is not required to provide the regular, modified, or alternative work [*8 Cal. Code Reg. § 10117(f)*].

If the employer offers regular, modified, or alternative seasonal work to the employee, the offer must meet all of the following requirements [*8 Cal. Code Reg. § 10117(g)*; *see 8 Cal. Code Reg. § 10116.9(o)* ("seasonal work" means employment as daily hire, project hire, or annual season hire)]:

1. The employee was hired for seasonal work prior to injury.

2. The offer of regular, modified, or alternative seasonal work is of reasonably similar hours and working conditions to the employee's previous employment, and the one-year requirement may be satisfied by cumulative periods of seasonal work.

3. The work must commence within 12 months of the date of the offer.

4. The offer meets the conditions set forth in this section.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIBenefit DeterminationsMedical BenefitsAuthorized TreatmentWorkers' Compensation & SSDIBenefit DeterminationsMedical BenefitsEmployee RightsWorkers' Compensation & SSDIBenefit DeterminationsMedical BenefitsRehabilitationWorkers' Compensation & SSDIBenefit DeterminationsPermanent Total DisabilitiesWorkers' Compensation & SSDIBenefit DeterminationsTemporary Total Disabilities

California Forms of Pleading and Practice--Annotated

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Chapter 577 WORKERS' COMPENSATION
PART II. LEGAL BACKGROUND
A. Administrative Actions
2. Filing a Workers' Compensation Claim--Initial Procedures

51-577 California Forms of Pleading and Practice--Annotated § 577.46

§ 577.46 Medical-Legal Evaluations

[1] Report of Treating Physician

The treating physician primarily responsible for managing the injured worker's care, or the physician designated by the treating physician, must, in accordance with rules promulgated by the Administrative Director, render opinions on all medical issues necessary to determine eligibility for compensation [*Lab. Code § 4061.5*; *see 8 Cal. Code Reg. § 9785*]. If there is more than one treating physician, a single report must be prepared by the physician primarily responsible for managing the injured worker's care that incorporates the findings of the various treating physicians [*Lab. Code § 4061.5*].

On determining that a treating physician's report contains opinions that are the result of conjecture, are not supported by adequate evidence, or indicate bias, the WCAB must so notify the Administrative Director in writing [*Lab. Code § 4068(a)*]. If the Administrative Director believes that any treating physician's reports show a pattern of unsupported opinions, the Director must notify the treating physician's licensing body [*Lab. Code § 4068(b)*].

[2] Medical Evaluation to Determine Compensability of Injury

[a] In General

When a dispute exists over the compensability of any injury, that is, when injury to some part of the body is not accepted as compensable by the employer, neither the employer nor the employee is liable for any comprehensive medical-legal evaluation [*see 8 Cal. Code Reg. § 9793(c)*; *see also 8 Cal. Code Reg. §§ 9794(a)(2), 9793(f), (1)* (reimbursement allowed for cost of follow-up and supplemental medical-legal evaluation reports)] performed by other than the treating physician, except as provided in *Lab. Code § 4060*. However, reports of treating physicians shall be admissible [*Lab. Code § 4060(a), (b)*]. If a medical evaluation is required to determine compensability at any time after the filing of the claim form, and the employee is represented by an attorney, a medical evaluation to determine compensability is to be obtained only by the procedure provided in *Lab. Code § 4062.2* [*Lab. Code § 4060(c)*; *see* [3][a], *below*].

[b] Unrepresented Employees

If a medical evaluation is required to determine compensability at any time after the claim form is filed, and the employee is not represented by an attorney, the employer must provide the employee with notice either that the employer requests a comprehensive medical evaluation to determine compensability or that the employer has not accepted liability and the employee may request a comprehensive medical evaluation to determine compensability. Either party may request a comprehensive medical evaluation to determine compensability. The evaluation is to be obtained only by the procedure provided in *Lab. Code § 4062.1* [*Lab. Code § 4060(d)*; *see* [3][b], *below*].

Each notice mentioned in the preceding paragraph must describe the administrative procedures available to the injured employee and advise the employee of his or her right to consult an information and assistance officer or an attorney [*Lab. Code § 4060(e)(1)*]. It must contain the following language: "Should you decide to be represented by an attorney, you may or may not receive a larger award, but, unless you are determined to be ineligible for an award, the attorney's fee will be deducted from any award you might receive for disability benefits. The decision to be represented by an attorney is yours to make, but it is voluntary and may not be necessary for you to receive your benefits" [*Lab. Code § 4060(e)(1)*]. The notice must be accompanied by the form prescribed by the Administrative Director for requesting the assignment of a panel of qualified medical evaluators [*Lab. Code § 4060(e)(2)*].

[3] Medical Evaluation When Parties Do Not Agree to Permanent Disability Rating or Need for Continuing Medical Care

[a] QME Panel Requests

IMPORTANT NOTE: For some time, the law was unclear as to the procedure to be followed in such cases when the injury has occurred in the interval between April 19, 2004 (the date of enactment of the present versions of *Lab. Code §§ 4061* and *4062.2*), and January 1, 2005. However, the court of appeal, in a pair of companion cases, has shed some light on the issue. In the first case, the court held that the pre-April 19, 2004, version of either *Lab. Code § 4061* or *4062* applied when a medical evaluation of a represented employee was required to resolve a dispute arising out of an injury occurring before January 1, 2005. The court found that the plain language of the post-April 19, 2004, *Lab. Code § 4062.2* limited its applicability to injuries occurring on or after January 1, 2005, and that it would be illogical to allow a vacuum in which an employer would have no right to have a medical evaluation performed. Moreover, said the court, this conclusion was consistent with § 47 of SB 899 (the major workers' compensation legislation that became law on April 19, 2004), which stated that SB 899 applied prospectively from the date of SB 899's enactment, regardless of the date of injury, unless otherwise specified, and SB 899's *Lab. Code § 4062.2* did otherwise specify, confining its applicability to injuries occurring on or after January 1, 2005 [*Nunez v. W.C.A.B. (2006) 38 Cal. Rptr. 3d 914*]. In the second case, the court held that, for the reasons set forth in the first case, *Nunez*, the medical evaluation and reporting procedure of pre-SB 899 *Lab. Code § 4062* applied to represented cases with a date of injury prior to January 1, 2005. Additionally, the court held that *Lab. Code § 4050* could not be utilized to circumvent the medical evaluation and reporting procedure of pre-SB 899 *Lab. Code § 4062*, and that *Lab. Code § 5701* should not be utilized to order a medical evaluation that appears to violate pre-SB 899 *Lab. Code § 4062* and that may generate a report that is inadmissible at trial [*Cortez v. Workers' Comp. Appeals Bd. (2006) 136 Cal. App. 4th 596, 601-602, 38 Cal. Rptr. 3d 922]* .

The relevant regulations provide that, when an injured employee is not represented by an attorney and either the employee or the claims administrator requests a QME panel pursuant to *Lab. Code § 4062.1*, the request is to be submitted on the mandated form [*see 8 Cal. Code Reg. § 105* (Request for QME Panel under *Lab. Code § 4062.1*)]. The claims administrator or, if none, the employer must provide Form 105 along with the Attachment to Form 105 (How to Request a Qualified Medical Evaluator if You Do Not Have an Attorney) to the unrepresented employee by means of personal delivery or by first class or certified mail [*8 Cal. Code Reg. § 30(a)*].

Requests for a QME panel in a represented case with a date of injury on or after January 1, 2005, or in which represented parties agree to obtain a panel of QMEs pursuant to the process in *Lab. Code § 4062.2*, are to be submitted on the mandated form [*see 8 Cal. Code Reg. § 106* (Request for QME Panel under *Lab. Code § 4062.2*)]. The party requesting a QME panel must: (1) identify the disputed issue that requires a comprehensive medical-legal report to be resolved; (2) attach a copy of the written proposal, naming one or more physicians to be an AME, that was sent to the opposing party once the dispute arose; (3) designate a specialty for the QME panel requested; (4) state the specialty preferred by the opposing party, if known; and (5) state the specialty of the treating physician. In represented cases with dates of injury prior to January 1, 2005, and only upon the parties' agreement to obtain a QME panel pursuant to *Lab. Code § 4062.2*, the party requesting a QME panel must submit QME Form 106 in compliance with the above requirements and provide written evidence of the parties' agreement. Once such a panel in a represented case with a date of injury prior to January 1, 2005, is issued, the parties are bound by the timelines and process in *Lab. Code § 4062.2* [*8 Cal. Code Reg. § 30(b)*].

If a request form is incomplete, or improperly completed, so that a QME panel selection cannot properly be made, the form will be returned to the requesting party with an explanation of why the QME panel selection could not be made. The Medical Director also may delay issuing a new QME panel, if necessary, until he or she receives additional reasonable information requested from a party or both parties needed to resolve the panel request. Reasonable information includes, but is not limited to, whether a QME panel previously issued to the injured employee was used [*8 Cal. Code Reg. § 30(c)*].

After a claim form has been filed, the claims administrator or, if none, the employer may request a panel of QMEs only as provided in *Lab. Code § 4060* to determine whether to accept or reject a claim within the 90-day period for rejecting liability [*see Lab. Code § 5402(b)*] and only after providing evidence of compliance with the relevant statutes [*8 Cal. Code Reg. § 30(d)(1)*; *see Lab. Code §§ 4062.1*, *4062.2*].

Once the claims administrator or, if none, the employer has accepted as compensable an injury to any body part in the claim, a request for a panel QME may be filed based only on a dispute arising under *Lab. Code § 4061* or *4062* [*8 Cal. Code Reg. § 30(d)(2)*].

When an injury or illness claim of an employee has been denied entirely by the claims administrator or, if none, by the employer, only the employee may request a panel of QMEs, as provided in *Lab. Code §§ 4060(d)* and *4062.1*, if unrepresented, or as provided in *Lab. Code §§ 4060(c)* and *4062.2*, if represented [*8 Cal. Code Reg. § 30(d)(3)*].

After the 90-day period for denying liability [*see Lab. Code § 5402(b)*] has expired, a request from the claims administrator or, if none, from the employer for a QME panel to determine compensability will be issued only upon presentation of: (1) a finding by a WCJ that the presumption of compensability [*see Lab. Code § 5402(b)*] has been rebutted; and (2) an order by the WCJ that a QME panel should be issued to determine compensability. The order must also specify the residential or, if applicable, the employment-based zip code from which to select QMEs and either the medical specialty of the panel or which party may select the medical specialty [*8 Cal. Code Reg. § 30(d)(4)*].

If the request form is submitted by or on behalf of an employee who no longer resides in California, the geographic area of the QME panel selection within the state must be determined by agreement between the claims administrator or, if none, the employer and the employee. If no agreement can be reached, the geographic area of the QME panel selection will be determined for an unrepresented employee by the employee's former residence in the state and for a represented employee by the office of the employee's attorney [*8 Cal. Code Reg. § 30(e)*].

To compile a panel list of three independent QMEs randomly selected from the specialty designated by the party holding the legal right to request a QME panel, the Medical Director must exclude from the panel, to the extent feasible, any QME who is listed by another QME as a business partner or as having a shared specified financial interest [*8 Cal.*

Code Reg. § 30(f); *see 8 Cal. Code Reg. §§ 1, 29* (specified financial interests)].

The panel request in a represented case must be sent to the Medical Unit address on QME Form 106 by first class mail. The Medical Unit will not accept panel requests in represented cases delivered in person by a party, the party's attorney, any other person, or by other commercial courier or delivery services [*8 Cal. Code Reg. § 30(g)*].

[b] Specialist Designation

The time periods specified in *Lab. Code §§ 4062.1(c)* and *4062.2(c)*, respectively, for selecting an evaluator from a QME panel and for scheduling an appointment, will be tolled whenever the Medical Director asks a party for additional information needed to resolve the panel request. These time periods will remain tolled until the date the Medical Director issues either a new QME panel or a decision on the panel request [*8 Cal. Code Reg. § 30(h)*; *see 8 Cal. Code Reg. § 30.5* (in QME panel selection process, Medical Director required to use type of specialist(s) indicated by requestor)].

[c] QME Panel Selection

When requested by an employee or employer pursuant to *Lab. Code § 4062.1*, the Medical Director is required to assign a three-member panel of qualified medical evaluators within five working days after receiving a request for a panel, and must notify the employee of the physicians selected for the panel. If a panel is not assigned within 15 working days, the employee has the right to obtain a medical evaluation from any QME of his or her choice [*Lab. Code § 139.2(h)*]. The panel must be selected at random from the appropriate specialty identified by the party who holds the legal right to designate the specialty, requested by the employee on the form, with consideration given to the proximity of the QME's office to the employee's residence [*8 Cal. Code Reg. § 31(a)*; *see Lab. Code § 139.2(d)* (requirements for proximity of QMEs to employee's residence)]. Once the panel has been selected, a selection form will be sent to the employee with (1) the names, addresses, and phone numbers of three physicians and a summary of each one's medical background; (2) the name and address of the employee and the name of the claims administrator; (3) a statement advising the employee that he or she is entitled to receive transportation expenses and temporary disability for each day necessary for the examination; and (4) the following statement in a clear and conspicuous location and type [*see 8 Cal. Code Reg. § 107* (IMC Form 107--panel selection form); *Lab. Code § 139.2(h)*]:

> You have the right to consult with an information and assistance officer at no cost to you prior to selecting the doctor to prepare your evaluation, or you may consult with an attorney. If your claim eventually goes to court, the judge will consider the evaluation prepared by the doctor you select to decide your claim.

Any physician who has served as the employee's primary treating physician or secondary physician and who is chosen for that employee's panel, must disqualify him or herself, and either party may request a replacement [*8 Cal. Code Reg. § 31(c)*]. The Medical Director is required to exclude from the panel selection process any QME who has informed him or her that he or she is unavailable [*8 Cal. Code Reg. § 31(b)*; *see 8 Cal. Code Reg. § 33* (unavailability of QME)].

For a panel to be issued in a selected specialty, there must be at least five active QMEs in the specialty at the time the panel selection is requested. If fewer than five QMEs are active in a requested specialty, the Medical Director must contact the party who holds the legal right to designate the specialty for an alternative specialty selection [*8 Cal. Code Reg. § 31(d)*].

[d] QME Panel Selection Disputes in Represented Cases

When the Medical Director receives two or more panel selection forms pursuant to *Lab. Code § 4062.2* on the same day and the forms designate different physician specialties for the QME panel, the Medical Director will use the following procedures [*8 Cal. Code Reg. § 31.1(a)*]:

1. If one party requests the same specialty as that of the treating physician, the panel will be issued in the specialty of the treating physician unless the Medical Director is persuaded by supporting documentation provided by the requestor that explains the medical basis for the requested specialty.

2. If no party requests a panel in the specialty of the treating physician, the Medical Director will select a specialty appropriate for the medical issue in dispute and issue a panel in that specialty.

3. Upon request by the Medical Director, the party requesting the panel will provide additional medical records to assist the Medical Director in determining the appropriate specialty.

If a party in a represented case wishes to request a QME panel pursuant to *Lab. Code § 4062.2* in a specialty other than the specialty of the treating physician, the party must submit with the panel request form any relevant documentation supporting the reason for requesting a different specialty [*8 Cal. Code Reg. § 31.1(b)*].

If the Medical Director is unable to issue a QME panel in a represented case within 30 calendar days of receiving the request, either party may seek an order from a WCJ that a QME panel be issued. Any such order must specify the specialty of the QME panel or the party to be designated to select the specialty [*8 Cal. Code Reg. § 31.1(c)*].

If the employee is represented and the parties have completed the conferring and striking processes described in *Lab. Code § 4062.2(c)*, the represented employee must schedule the appointment with the physician selected from the QME panel. If the represented employee fails to do so within 10 business days of the date a QME is selected from the panel, the claims administrator may arrange the appointment and notify the employee and the employee's attorney [*8 Cal. Code Reg. § 31.1(d)*].

[e] Scheduling Appointment With Panel QME

An unrepresented employee must, within 10 days of having been furnished with the relevant form, select a QME from the panel list, contact the QME to schedule an appointment, and inform the claims administrator of the QME selection and the appointment [*8 Cal. Code Reg. § 31.3(a)*].

Neither the employer, the claims administrator, nor any other representative of the employer is permitted to discuss the selection of the QME with an unrepresented employee who has the legal right to select the QME [*8 Cal. Code Reg. § 31.3(b)*].

If, within 10 days of the issuance of a QME panel, the unrepresented employee fails to select a QME from the panel or fails to schedule an appointment with the selected QME, the claims administrator may schedule an appointment with a panel QME, only as provided in *Lab. Code § 4062.1(c)*, and must notify the employee of the appointment, as provided in that statute [*8 Cal. Code Reg. § 31.3(c)*].

[f] QME Replacement Requests

A replacement QME to a panel, or at the discretion of the Medical Director a replacement of an entire panel of QMEs, will be selected at random by the Medical Director and provided upon request whenever any of the following occurs [*8 Cal. Code Reg. § 31.5(a)*]:

1. A QME on the panel issued does not practice in the specialty requested by the party holding the legal right to request the panel.

2. A QME on the panel issued cannot schedule an examination for the employee within 60 days of the

initial request for an appointment, or if the 60-day scheduling limit has been waived [*see 8 Cal. Code Reg. § 33(e)*], the QME cannot schedule the examination within 90 days of the date of the initial request for an appointment.

3. The injured worker has changed his or her residence address since the QME panel was issued and prior to the date of the initial evaluation of the injured worker.

4. A physician on the QME panel is a member of the same group practice [*see Lab. Code § 139.3*] as another QME on the panel.

5. The QME is unavailable [*see 8 Cal. Code Reg. § 33* (unavailability of QME)].

6. The evaluator who previously reported in the case is no longer available.

7. A QME named on the panel is currently, or has been, the employee's primary treating physician or secondary physician [*see 8 Cal. Code Reg. § 9785*] for the injury currently in dispute.

8. The claims administrator or, if none, the employer and the employee agree in writing, for the employee's convenience only, that a new panel may be issued in the geographic area of the employee's workplace and a copy of the employee's agreement is submitted with the panel replacement request.

9. The Medical Director, upon written request, finds good cause that a replacement QME or a replacement panel is appropriate for reasons related to the medical nature of the injury. For purposes of this subsection, "good cause" is defined as a documented medical or psychological impairment.

10. The Medical Director, upon written request, filed with a copy of the Doctor's First Report of Occupational Injury or Illness (Form DLSR 5021) [*see 8 Cal. Code Reg. §§ 14006, 14007*] and the most recent DWC Form PR-2 ("Primary Treating Physician's Progress Report" [*see 8 Cal. Code Reg. § 9785.2*] or narrative report filed in lieu of the PR-2, determines after a review of all appropriate records that the specialty chosen by the party holding the legal right to designate a specialty is medically or otherwise inappropriate for the disputed medical issue(s). The Medical Director may request either party to provide additional information or records necessary for the determination.

11. The evaluator has violated the regulation regarding appointment notification and cancellation [*see 8 Cal. Code Reg. § 34*], except that the evaluator will not be replaced for this reason whenever the request for a replacement by a party is made more than 15 calendar days from either the date the party became aware of the violation of the regulation or the date the report was served by the evaluator, whichever is earlier.

12. The evaluator failed to meet the deadlines regarding medical evaluation time frames [*see Lab. Code § 4062.5*; *8* Cal. Code Reg. § 38], and the party requesting the replacement objected to the report on the grounds of lateness prior to the date the evaluator served the report. A party requesting a replacement on this ground must attach to the request for a replacement a copy of the party's objection to the untimely report.

13. The QME has a disqualifying conflict of interest [*see 8 Cal. Code Reg. § 41.5*].

14. The Administrative Director has issued an order for additional QME evaluation [*see 8 Cal. Code Reg. § 10164(c)*].

15. The selected medical evaluator, who otherwise appears to be qualified and competent to address all disputed medical issues, refuses to provide, when requested by a party or by the Medical Director, either: (A) a complete medical evaluation [*see Lab. Code § 4062.3(i), (j)*]; or (B) a written statement that explains why the evaluator believes he or she is not medically qualified or medically competent to address one or more issues in dispute in the case.

16. The QME panel list was issued more than 24 months prior to the date the request for a replacement is received by the Medical Unit, and none of the QMEs on the panel list has examined the injured worker.

When the Medical Director determines that a request made for a QME replacement or QME panel replacement is valid, the time limit for an unrepresented employee to select a QME and schedule an appointment [*see Lab. Code § 4062.1(c)*] and the time limit for a represented employee to strike a QME name from the QME panel [*see Lab. Code § 4062.2(c)*] is tolled until the date the replacement QME name or QME panel is issued [*8 Cal. Code Reg. § 31.5(b)*].

In the event the parties in a represented case have struck two QME names from a panel and subsequently a valid ground arises to replace the remaining QME, none of the QMEs whose names appeared on the earlier QME panel may be included in the replacement QME panel [*8 Cal. Code Reg. § 31.5(c)*].

[g] Obtaining Additional QME Panel in Different Specialty

Once an AME, an Agreed Panel QME, or a panel QME has issued a comprehensive medical-legal report and a new medical dispute arises, the parties, to the extent possible, must obtain a follow-up evaluation or a supplemental evaluation from the same evaluator [*8 Cal. Code Reg. § 31.7(a)*].

Upon a showing of good cause that a panel of QME physicians in a different specialty is needed to assist the parties to reach an expeditious and just resolution of disputed medical issues, the Medical Director must issue an additional panel of QME physicians selected at random in the specialty requested. For the purpose of this section, good cause means any of the following [*8 Cal. Code Reg. § 31.7(b)*]:

1. An order by a WCJ for a panel of QME physicians that also either designates a party to select the specialty or states the specialty to be selected and the residential or employment-based Zip code from which to randomly select evaluators.

2. The AME or QME selected advises the parties and the Medical Director that he or she has completed or will complete a timely evaluation of the disputed medical issues within his or her scope of practice and areas of clinical competence but recommends that a new evaluator in another specialty is needed to evaluate one or more remaining disputed medical conditions, injuries, or issues that are outside of the evaluator's areas of clinical competence, and either the injured worker is unrepresented or the parties in a represented case have been unable to select an AME for that purpose.

3. A written agreement by the parties in a represented case that there is a need for an additional comprehensive medical-legal report by an evaluator in a different specialty, that attempts to select an AME pursuant to *Lab. Code § 4062.2* for that purpose have failed, and the specialty that the parties have agreed on for the additional evaluation.

4. In an unrepresented case, that the parties have conferred with an Information and Assistance Officer, have explained the need for an additional QME in another specialty to address disputed issues, and, as noted by the Information and Assistance Officer on the panel request form, have reached agreement in the presence of and with the assistance of the Officer on the specialty requested for the additional QME panel. The parties may confer with the Information and Assistance Officer in person or by conference

call.

[h] Consultations

When an acupuncturist has been selected by the injured worker from a three-member panel and an issue of disability is in dispute, the acupuncturist must request a consultation from a QME [*see 8 Cal. Code Reg. § 1(z)*] to evaluate the disability issue(s). The acupuncturist will evaluate all other issues as required for a complete evaluation. If requested by the QME acupuncturist to obtain a QME to provide the consulting evaluation, the Medical Director must issue a panel within 15 days of the request in the specialty selected by the QME acupuncturist [*8 Cal. Code Reg. § 32(a)*].

Except as provided in the preceding paragraph, no QME may obtain a consultation for the purpose of obtaining an opinion regarding permanent disability and apportionment consistent with the requirements of *Lab. Code §§ 4660 through 4664* and the AMA *Guides* [*8 Cal. Code Reg. § 32(b)*].

For injuries occurring on or after January 1, 1994, a QME may obtain a consultation from any physician as reasonable and necessary pursuant to *Lab. Code § 4064(a)* [*8 Cal. Code Reg. § 32(c)*].

Whenever an Agreed Panel QME or a QME determines that a consultation is necessary pursuant and the physician selected for the consultation is not selected by the parties from a QME panel issued by the Medical Director, the referring QME must arrange the consultation appointment and advise the injured employee and the claims administrator or, if none, the employer, and each party's attorney, if any, in writing of the appointment date, time, and place by use of QME Form 110 (QME Appointment Notification Form) [*8 Cal. Code Reg. § 32(d)*].

The consulting physician must serve the consulting report on the referring QME. On receipt of the consulting physician's report, the referring evaluator must review the report, incorporate it by reference into the referring evaluator's medical-legal report, and comment on the consulting physician's findings and conclusions in the discussion sections of the evaluator's report [*8 Cal. Code Reg. § 32(e)*].

The referring QME must file the comprehensive medical-legal report within the specified time periods [*see 8 Cal. Code Reg. § 38*]. In the event a consulting physician's report has not been received, or will not be received, in time to comply with the time periods, the referring QME must serve the comprehensive medical-legal report timely, and, on receipt of the consulting physician's report, the referring evaluator must, within 15 calendar days of its receipt, issue a supplemental report that incorporates the consulting physician's report by reference and comments on whether and how the findings in the consulting report change the referring evaluator's opinions. The referring evaluator must list, in the report commenting on a consulting physician's report, all reports and information received from each party for the consulting physician, indicate whether each item was forwarded to the consulting physician, and for items not forwarded the reason the referring evaluator determined it was not necessary to do so [*8 Cal. Code Reg. § 32(f)*].

With the exception of verbal communications between an injured worker and the consulting physician in the course of the consulting examination, all other communications by the parties, as well as any reports and other information from the parties for the consulting physician, if any, must be made in writing directed to only the referring QME, who may forward such communications on to the consulting physician as appropriate. With the exception of deposing the consulting physician if necessary and except as provided in this subdivision, neither party nor a party's attorney may communicate directly with nor send correspondence or records directly to the consulting physician [*8 Cal. Code Reg. § 32(g)*].

[i] Additional QME Evaluations Ordered by Appeals Board

The Medical Director must issue a panel of QMEs on receipt of an order of a WCJ or the Appeals Board that includes a finding that an additional evaluation is reasonable and necessary to resolve disputed issues under *Lab. Code § 4060,*

4061, or *4062*. The order must specify the residential or employment-based Zip code from which to randomly select evaluators, specify the specialty for the QME panel or designate the party who will select the specialty of the QME panel, and specify who will select a new specialty in the event there are too few QMEs in the specialty initially selected to issue a panel [*8 Cal. Code Reg. § 32.6*; *see 8 Cal. Code Reg. § 31(d)*].

[j] Appointment Notification and Cancellation

When an appointment for a comprehensive medical evaluation is made with a QME, the QME must complete an appointment notification form [*see 8 Cal. Code Reg. § 110* (QME appointment notification form)]. The completed form must be postmarked or sent by facsimile to the employee and the claims administrator or, if none, the employer within five business days of the date the appointment was made. In a represented case, a copy of the completed form must also be sent to the attorney who represents each party, if known. Failure to comply with this requirement constitutes grounds for denial of reappointment [*8 Cal. Code Reg. § 34(a)*; *see 8 Cal. Code Reg. § 51* (reappointment: failure to comply with time frames)].

The QME must schedule an appointment for a comprehensive medical-legal examination to be conducted only at the medical office listed on the panel selection form. However, on written request by the injured worker and only for his or her convenience, the evaluation appointment may be moved to another medical office of the selected QME if it is listed with the Medical Director as an additional office location [*8 Cal. Code Reg. § 34(b)*].

The QME must include in the notification whether a Certified Interpreter [*see Lab. Code § 5811*; *8* Cal. Code Reg. § 9795.3] is required and specify the language. The interpreter must be arranged by the party who is to pay the cost as provided in *Lab. Code § 5811* [*8 Cal. Code Reg. § 34(c)*].

An evaluator, whether an AME, an Agreed Panel QME, or a QME, may not cancel a scheduled appointment fewer than six business days prior to the appointment date, except for good cause. Whenever cancelling a scheduled appointment, the evaluator must advise the parties in writing of the reason for the cancellation. The Appeals Board retains jurisdiction to resolve disputes among the parties regarding whether an appointment cancellation pursuant to this subdivision was for good cause. The Administrative Director retains jurisdiction to take appropriate disciplinary action against any Agreed Panel QME or QME for violations of this section [*8 Cal. Code Reg. § 34(d)*].

An Agreed Panel QME or a QME who cancels a scheduled appointment must reschedule the appointment to a date within 30 calendar days of the date of cancellation. The rescheduled appointment date may not be more than 60 calendar days from the date of the initial request for an appointment, unless the parties agree in writing to accept a date beyond the 60-day limit [*8 Cal. Code Reg. § 34(e)*].

An AME who cancels a scheduled appointment must reschedule the appointment within 60 calendar days of the date of the cancellation, unless the parties agree in writing to accept an appointment date no more than 30 calendar days beyond the 60-day limit [*8 Cal. Code Reg. § 34(f)*].

Failure to receive relevant medical records [*see Lab. Code § 4062.3*; *8* Cal. Code Reg. § 35 (exchange of information and ex parte communications)] prior to a scheduled appointment does not constitute good cause under this section for the evaluator to cancel the appointment, unless the evaluator is a psychiatrist or psychologist performing an evaluation regarding a disputed injury to the psyche who states in the evaluation report that receipt of relevant medical records prior to the evaluation was necessary to conduct a full and fair evaluation [*8 Cal. Code Reg. § 34(g)*].

An appointment scheduled with an evaluator, whether an AME, an Agreed Panel QME, or a QME, may not be cancelled or rescheduled by a party or the party's attorney fewer than six business days before the appointment date, except for good cause. When the claims administrator or, if none, the employer, the injured worker, or either party's attorney cancels an appointment scheduled by an evaluator, the cancellation must be made in writing, state the reason

for the cancellation, and be served on the opposing party. Oral cancellations must be followed with a written confirming letter faxed or mailed by first class U.S. mail within 24 hours of the verbal cancellation and complying with this section. An injured worker is not liable for any missed appointment fee when an appointment is cancelled for good cause. The Appeals Board retains jurisdiction to resolve disputes regarding whether an appointment cancellation by a party was for good cause [*8 Cal. Code Reg. § 34(h)*].

The date of cancellation is determined from the date of postmark, if mailed, or from the facsimile receipt date as shown on the recipient's fax copy [*8 Cal. Code Reg. § 34(i)*].

[k] Compliance by AMEs and QMEs With Administrative Director Evaluation and Reporting Guidelines

Each evaluation examination and report completed pursuant to *Lab. Code § 4060, 4061, 4062, 4062.1, 4062.2, 4064, 4067,* or *5703.5* must be performed in compliance with all appropriate evaluation procedures [*8 Cal. Code Reg. § 35.5(a)*].

Each reporting evaluator must state in the body of the comprehensive medical-legal report the date of the examination and the street address at which it was performed. If the evaluator signs the report on any date other than the date on which it was completed, he or she must enter the date on which the report was signed next to or near his or her signature [*8 Cal. Code Reg. § 35.5(b)*].

The evaluator must address all contested medical issues arising from all injuries reported on one or more claim forms prior to the date of the employee's appointment with the evaluator that are issues within the evaluator's scope of practice and areas of clinical competence. The reporting evaluator must attempt to address each question raised by each party in the issue cover letter sent to the evaluator [*8 Cal. Code Reg. § 35.5(c)*; *see 8 Cal. Code Reg. § 35(a)(3)*].

At the evaluator's earliest opportunity, and no later than the date the report is served, the evaluator must advise the parties in writing of any disputed medical issues outside of the evaluator's scope of practice and area of clinical competency in order that the parties may initiate the process for obtaining an additional evaluation, pursuant to *Lab. Code § 4062.1* or *4062.2* and these regulations, in another specialty. In the case of an Agreed Panel QME or a panel QME, the evaluator must send a copy of the written notification provided to the parties to the Medical Director at the same time. However, only a party's request for an additional panel, with the evaluator's written notice under this section attached, or an order by a WCJ, will be acted on by the Medical Director to issue a new QME panel in another specialty [*8 Cal. Code Reg. § 35.5(d)*].

If a new injury or illness is claimed, involving the same type of body part or body system, and the parties are the same, or if either party objects to any new medical issue within the evaluator's scope of practice and clinical competence, the parties must use, to the extent possible, the same evaluator who reported previously [*8 Cal. Code Reg. § 35.5(e)*].

Unless the Appeals Board or a WCJ orders otherwise or the parties agree otherwise, when a party is legally entitled to depose the evaluator, the evaluator must make himself or herself available for deposition within 120 days of the notice of deposition and, on the request of the unrepresented injured worker, and, when consistent with *Lab. Code § 5710*, the deposition must be held at the location at which the evaluation examination was performed or at a facility or office chosen by the deposing party not more than 20 miles from the location of the evaluation examination [*8 Cal. Code Reg. § 35.5(f)*].

When an AME or a QME provides an opinion in a comprehensive medical-legal report on a disputed medical treatment issue, the evaluator's opinion must be consistent with, and apply the standards of, evidence-based medicine [*see 8 Cal. Code Reg. § 9792.20 et seq.* (medical treatment utilization schedule)]. If the disputed medical treatment, condition, or injury is not addressed by the Medical Treatment Utilization Schedule, the evaluator's medical opinion must be consistent with, and refer to, other evidence-based medical treatment guidelines, peer reviewed studies, and articles, if

any, and otherwise explain the medical basis for the evaluator's reasoning and conclusions [*8 Cal. Code Reg. § 35.5(g)*].

[*l*] Service of Comprehensive Medical-Legal Evaluation Reports by Medical Evaluators, Including Reports Under Lab. Code § 4061

When an injured worker is represented by an attorney, the evaluator must serve each comprehensive medical-legal evaluation report, follow-up comprehensive medical-legal evaluation report, and supplemental evaluation report on the injured worker, his or her attorney, and the claims administrator or, if none, the employer by completing QME Form 122 [*see 8 Cal. Code Reg. § 122* (AME or QME declaration of service of medical-legal report form)] and attaching QME Form 122 to the report, unless *8 Cal. Code Reg. § 36.5* [*see* [m], *below*] applies. If applicable in a claim involving disputed injury to the psyche, the evaluator must comply with the requirements of *8 Cal. Code Reg. § 36.5* [*8 Cal. Code Reg. § 36(a)*; *see 8 Cal. Code Reg. §§ 36.5, 120, 121*)].

When an injured worker is not represented by an attorney, the QME must serve each comprehensive medical-legal evaluation report, follow-up evaluation report, or supplemental report that addresses only disputed issues outside of the scope of *Lab. Code § 4061* by completing the questions and declaration of service on QME Form 111 [*see 8 Cal. Code Reg. § 111* (QME findings summary form)] and by serving the report, with QME Form 111 attached, on the injured worker and the claims administrator or, if none, on the employer, unless *8 Cal. Code Reg. § 36.5* applies. If applicable in a claim involving disputed injury to the psyche, the evaluator must comply with the requirements of Admin. Cir. Rule 36.5 [*8 Cal. Code Reg. § 36(b)*; *see 8 Cal. Code Reg. §§ 36.5, 120, 121*].

When the evaluator is serving a medical-legal evaluation report that addresses or describes findings and conclusions pertaining to permanent impairment, permanent disability, or apportionment of an unrepresented injured worker, the evaluator must serve the evaluation report, the completed QME Form 111 [*see 8 Cal. Code Reg. § 111* (QME findings summary form)], DWC-AD Form 100 (DEU) [*see 8 Cal. Code Reg. §§ 10160, 10161* (employee's disability questionnaire)], and DWC-AD Form 101 (DEU) [*see 8 Cal. Code Reg. §§ 10160, 10161* (request for summary rating determination of qualified medical evaluator's report)], with the document cover sheet, DWC-CA form 10232.1 [*see 8 Cal. Code Reg. § 10232.1*], and separator sheet, DWC-CA Form 10232.2 [*see 8 Cal. Code Reg. § 10232.2*], as required [*see 8 Cal. Code Reg. § 10160(d)(4)*], on the local DEU office, at the same time as serving the report, QME Form 111, DWC-AD Form 100 (DEU), and DWC-AD Form 101 (DEU) on the claims administrator or, if none, the employer, and on the unrepresented employee within the required time frames [*see 8 Cal. Code Reg. § 38*; *see also 8 Cal. Code Reg. § 36.5*]. If applicable, in cases involving disputed injury to the psyche, the evaluator must follow the procedures prescribed for such evaluations [*8 Cal. Code Reg. § 36(c)*; *see* [m], *below*].

If an evaluation report is completed for an unrepresented employee, in which the QME determines that the employee's condition has not become permanent and stationary as of the date of the evaluation, the parties must request any further evaluation from the same QME if he or she is currently an active QME and available at the time of the request for the additional evaluation. If the QME is unavailable, a new panel may be issued to resolve any disputed issue(s). If the evaluator is no longer a QME, he or she may issue a supplemental report as long as a face-to-face evaluation [*see 8 Cal. Code Reg. § 49(b)*] with the injured worker is not required. In no event may a physician who is not a QME or no longer a QME perform a follow-up evaluation on an unrepresented injured worker [*8 Cal. Code Reg. § 36(d)*].

After a QME has served a comprehensive medical-legal report that finds and describes permanent impairment, permanent disability, or apportionment in the case of an unrepresented injured worker, the QME may not issue any supplemental report on any of those issues in response to a party's request until after the DEU has issued an initial summary rating report, or unless the evaluator is otherwise directed to issue a supplemental report by the DEU, by the Administrative Director, or by a WCJ. A party wishing to request a supplemental report [*see 8 Cal. Code Reg. § 10160(f)*], based on the party's objection to or need for clarification of the evaluator's discussion of permanent impairment, permanent disability, or apportionment, may do so only by sending the detailed request, within the relevant time limits [*see 8 Cal. Code Reg. § 10160(f)*], directly to the DEU office where the report was served by the evaluator

and not to the evaluator until after the initial summary rating has been issued [*8 Cal. Code Reg. § 36(e)*].

[m] Service of Comprehensive Medical/Legal Report in Claims of Injury to Psyche

For any evaluation involving a claimed or disputed injury to the psyche, the injured worker must be advised by the evaluator that the employee's copy of the comprehensive medical-legal report, and any follow-up or supplemental reports, from the evaluation may be served either directly on the injured worker or instead on a physician designated in writing by the injured worker prior to leaving the evaluator's office, for the purpose of reviewing and discussing the evaluation report with the injured worker. The evaluator must explain that the designated physician may be, but need not be, the injured worker's primary treating physician in the workers' compensation claim and that the employer will be responsible for payment for one office visit with the designated physician for this purpose [*8 Cal. Code Reg. § 36.5(a)*].

When injury to the psyche is claimed and in the course of the evaluation the evaluator makes a determination pursuant to *Health & Safety Code § 123115(b)* that there is a substantial risk of significant adverse or detrimental medical consequences to the injured worker from seeing or receiving a copy of part or all of the evaluation report, which is a mental health record, the evaluator must do all of the following [*8 Cal. Code Reg. § 36.5(b)*]:

1. Complete QME Form 121 (Declaration Regarding Protection of Mental Health Record).

2. Advise the injured worker that the determination under *Health & Safety Code § 123115(b)* has been made regarding the evaluation report as a mental health record and that the evaluator may serve the injured worker's copy of the evaluation report on only a person who is a licensed physician [*see Lab. Code § 3209.3*], whose name the injured worker may designate in writing prior to leaving the evaluator's office, or on the employee's attorney, if any.

3. Permit inspection and copying of the mental health record(s) subject to the *Health & Safety Code § 123115(b)* determination by a licensed physician only [*see Lab. Code § 3209.3*] or another health care provider [*see Health & Safety Code § 123105(a)*].

4. Complete the QME Form 121 (Declaration Regarding Protection of Mental Health Record) and enter the name and address of the physician designated in writing by the injured worker on this form.

5. Attach a completed copy of QME Form 121 to the copy of the evaluation report in the injured worker's medical or medical-legal file.

6. Serve the completed comprehensive medical-legal evaluation report, follow-up medical-legal report, or supplemental medical-legal report(s) subject to the provisions of this section, with the completed QME Form 121 attached, on the licensed physician designated by the injured worker on QME Form 121, on the claims administrator, and on each party's attorney, if any [*see 8 Cal. Code Reg. § 36(a)*], and within the relevant time periods [*8 Cal. Code Reg. § 38*]. If the injured worker designates a physician on QME Form 121 other than the current primary treating physician in his or her workers' compensation claim, the evaluator must also serve a copy of the report with the QME Form 121 attached on the primary treating physician.

7. When the report addresses any permanent impairment, permanent disability, or apportionment and the injured worker is not represented by an attorney, a copy of the report with the completed QME Form 121 attached must also be served on the appropriate office of the DEU, along with the QME Form 111 [*see 8 Cal. Code Reg. § 111* (QME findings summary form)], DWC-AD form 100 (DEU) [*see 8 Cal. Code Reg. §§ 10160, 10161* (employee's disability questionnaire)], and DWC-AD Form 101 (DEU) [*see 8 Cal. Code Reg. §§ 10160, 10161* (request for summary rating determination of qualified medical evaluator's

report)], with the document cover sheet, DWC-CA form 10232.1 [*see 8 Cal. Code Reg. § 10232.1*], and separator sheet, DWC-CA Form 10232.2 [*see 8 Cal. Code Reg. § 10232.2*], as required [*see 8 Cal. Code Reg. § 10160(d)(4)*].

8. When the report addresses permanent impairment, permanent disability, or apportionment and the injured worker is represented by an attorney, a copy of the report with the completed QME Form 121 attached must be served with QME Form 122 (AME or QME Declaration of Service of Medical-Legal Report) on the physician designated by the injured worker, the injured worker's attorney, and the claims administrator's attorney or, if none, on the claims administrator.

"Mental health record" for the purposes of this subdivision means a medical treatment or evaluation record created by or received and reviewed by a licensed physician [*see Lab. Code § 3209.3*], in the course of treating or evaluating the injured worker in a workers' compensation claim, and includes for the purposes of this subdivision, but is not limited to, treatment records and comprehensive medical-legal reports [*8 Cal. Code Reg. § 36.5(c)*].

On serving the employee's copy of the medical-legal report in compliance with the relevant regulations [*see 8 Cal. Code Reg. § 36.5(b)(6), (7), (8)*] on the physician designated by the employee on the QME Form 121 (Declaration Regarding Protection of Mental Health Record), the evaluator's obligation to serve the report on the injured worker [*see Lab. Code §§ 139.2(j)(1), 4061(c)*; *8* Cal. Code Reg. § 36] will be deemed satisfied [*8 Cal. Code Reg. § 36.5(d)*].

Mental health records subject to a determination under *Health & Safety Code § 123115(b)* and this subdivision must be kept confidential by the claims administrator and all parties' attorneys unless ordered otherwise by a WCJ. When such a mental health record is filed by a party at the Appeals Board, the party filing it must request and obtain a protective order from a WCJ that specifies in what manner the mental health record may be inspected, copied, and entered into evidence [*8 Cal. Code Reg. § 36.5(e)*].

When the injured worker advises the evaluator that he or she prefers to have the evaluation report served on a designated physician [*see 8 Cal. Code Reg. § 36.5(b)*], and the evaluator does not make a determination pursuant to *Health & Safety Code § 123115(b)*, the evaluator must provide QME Form 120 (Voluntary Directive for Alternate Service of Medical-Legal Report) to the injured worker and request the injured worker to complete the form before leaving the evaluator's office [*8 Cal. Code Reg. § 36.5(f)*].

On receipt by the evaluator of a QME Form 120 completed by the injured worker, the evaluator must attach the original executed QME Form 120 to the original medical-legal report for service on the claims administrator or, if none, on the employer. The evaluator must serve the evaluation report with QME Form 120 attached by completing the questions and the declaration of proof of service on QME Form 111 (Qualified Medical Evaluator's Findings Summary Form). In the case of an unrepresented injured worker, the evaluator must serve the report with the required forms [*see 8 Cal. Code Reg. § 36.5(b)(7)*]. In the case of a represented injured worker, the evaluator must serve the report with QME Form 120 attached, by completing the declaration of service on QME Form 122 (AME or QME Declaration of Service of Medical-Legal Report) and serving it with the report [*8 Cal. Code Reg. § 36.5(g)*].

When an evaluation report is being served on a designated physician with QME Form 120 (Voluntary Directive for Alternate Service of Medical-Legal Report), the evaluator must serve two copies of the medical-legal report with the QME Form 120 attached on the physician designated on the form by the injured worker, at the same time as serving the copies of the medical-legal report on the claims administrator or, if none, on the employer and on the injured worker's attorney, if any. Service of a medical-legal report by an evaluator in compliance with this subdivision satisfies the evaluator's obligation to serve a copy of the report on the employee [*8 Cal. Code Reg. § 36.5(h)*; *see Lab. Code §§ 139.2(j)(1), 4061(c)*; *8* Cal. Code Reg. § 36].

The physician designated by the injured worker in writing and listed on QME Form 120 or QME Form 121 need not be

limited to the primary treating physician in the disputed workers' compensation claim. As an additional medical treatment expense incurred in the claim [*see Lab. Code § 4600*], the claims administrator or, if none, the employer, must reimburse the physician designated by the injured worker and listed on either the QME Form 121 (Declaration Regarding Protection of Mental Health Record) or the QME Form 120 (Voluntary Directive for Alternate Service of Medical-Legal Evaluation Report on Disputed Injury to the Psyche), for one office visit, when used, for the purpose of reviewing and discussing the evaluator's report with the injured worker, at the applicable rate [*see 8 Cal. Code Reg. § 9789.11* (physician services rendered on or after 7/1/2004)], for an office visit and may include, as appropriate, record review, any necessary face-to-face time during the visit in excess of that specified in the applicable CPT office visit code, and charges for time required to prepare a treatment report pertaining to the office visit, if necessary [*8 Cal. Code Reg. § 36.5(i)*].

When the comprehensive medical-legal report is served by the evaluator on a physician [*see 8 Cal. Code Reg. § 36.5(f)*] with the QME Form 120 (Voluntary Directive for Alternate Service of Medical-Legal Report on Disputed Injury to the Psyche) attached, one of the two copies of the medical-legal report served on the designated physician must be provided to the injured worker by the designated physician during the office visit [*8 Cal. Code Reg. § 36.5(j)*].

If the injured worker refuses or fails to designate a physician in writing to be listed on either QME Form 120 or QME Form 121, the evaluator must serve the report as appropriate [*see 8 Cal. Code Reg. §§ 36, 36.5*], and within the required time periods [*see 8 Cal. Code Reg. § 38*], except that the injured worker's copy of the report that is subject to a finding under *Health & Safety Code § 123115(b)* must then be served only on the injured worker's attorney, if represented, or, if not represented, on the injured worker's primary treating physician [*8 Cal. Code Reg. § 36.5(k)*].

[n] Medical Evaluation Time Frames; Extensions for QMEs and AMEs

The time frame for an initial or a follow-up comprehensive medical-legal evaluations report to be prepared and submitted must not exceed 30 days after the QME, Agreed Panel QME, or AME has seen the employee or otherwise commenced the comprehensive medical-legal evaluation procedure. If an evaluator fails to prepare and serve the initial or follow-up report within 30 days and the evaluator has failed to obtain approval from the Medical Director for an extension of time pursuant to this section, the employee or the employer may request a QME replacement [*see 8 Cal. Code Reg. § 31.5*]. Neither the employee nor the employer has any liability for payment for the medical evaluation that was not completed within the time frames required under this section unless the employee and the employer both waive the right to a new evaluation and elect to accept the original evaluation in writing or by signing and returning to the Medical Director either QME Form 113 (Notice of Denial of Request For Time Extension) or QME Form 116 (Notice of Late QME/AME Report-No Extension Requested) [*8 Cal. Code Reg. § 38(a)*].

All requests by an evaluator for extensions of time must be made on Form 112 (QME/AME Time Frame Extension Request). If the evaluation will not be completed on the original due date, the evaluator may request an extension from the Medical Director, not to exceed an additional 30 days. An extension of the time for completing the report will be approved, as follows [*8 Cal. Code Reg. § 38(b)*]:

1. When the evaluator has not received test results or the report of a consulting physician necessary to address all disputed medical issues in time to meet the initial 30-day deadline, an extension of up to 30 days will be granted.

2. When the evaluator has good cause [*see Lab. Code § 139.2(j)(1)(B)*], an extension of 15 days will be granted

Not later than five days before the initial 30-day period to complete and serve the report expires, the evaluator must notify the Medical Director, the employee, and the claims administrator or, if none, the employer of the request for an extension by use of QME Form 112 (QME/AME Time Extension Request) [*8 Cal. Code Reg. § 38(c)*].

The Medical Director must notify the requesting evaluator and the parties of the decision on the extension request by completion of the box at the bottom of QME Form 112 (QME/AME Time Frame Extension Request). If a request for an extension of time is denied, the Medical Director must also send the parties QME Form 113 (Notice of Denial of Request for Time Extension) to be used by each party to state whether the party wishes to request a new evaluator or to accept the late report of the original evaluator [*8 Cal. Code Reg. § 38(d)*].

When the Medical Director becomes aware that the report of a QME or an AME has not been completed within the required time and no extension of time was requested by the evaluator, the Medical Director must send the parties a Notice of Late QME/AME Report-No Extension Requested (QME Form 116). Each party must complete the form and return it to the Medical Director to indicate whether the party wishes to accept the late report [*8 Cal. Code Reg. § 38(e)*].

Good cause [*see Lab. Code § 139.2(j)(1)(B)*; *8* Cal. Code Reg. § 38(b)(2)] means [*8 Cal. Code Reg. § 38(f)*]:

1. Medical emergencies of the evaluator or the evaluator's family.

2. Death in the evaluator's family.

3. Natural disasters or other community catastrophes that interrupt the operation of the evaluator's office operations.

Extensions are not to be granted because relevant medical information/records (including Disability Evaluation Form 101 (Request for Summary Determination of Qualified Medical Evaluator's Report)) have not been received. The evaluator must complete the report based on the information available and state that the opinions and/or conclusions may or may not change after review of the relevant medical information/records [*8 Cal. Code Reg. § 38(g)*].

The time frame for supplemental reports is to be no more than 60 days from the date of a written or electronically transmitted request to the physician by a party. The request for a supplemental report must be accompanied by any new medical records that were unavailable to the evaluator at the time of the original evaluation and that were properly served on the opposing party as required by *Lab. Code § 4062.3*. An extension of the 60-day time frame for completing the supplemental report, of no more than 30 days, may be agreed to by the parties without the need to request an extension from the Medical Director [*8 Cal. Code Reg. § 38(h)*].

Evaluators requesting time extensions will be monitored and advised by the Medical Director when such a request appears unreasonable or excessive. Failure to comply with this section may constitute grounds for denial of the QME's request for reappointment [*8 Cal. Code Reg. § 38(i)*].

[o] Disclosure and Ethical Requirements for QMEs and AMEs

QMEs and AMEs are subject to various disclosure requirements [*see 8 Cal. Code Reg. § 40* (required disclosures to injured workers)], ethical requirements [*see 8 Cal. Code Reg. § 41*], and rules regarding conflicts of interest [*see Lab. Code § 139.2(o)*; *8* Cal. Code Reg. § 41.5; *see also 8 Cal. Code Reg. § 41.6* (procedures after notice of conflict of interest and waivers of conflicts of interest)]. Additionally, the regulations restrict gifts that may be accepted by an evaluator from any "source that handles California workers' compensation matters" [*see 8 Cal. Code Reg. § 41.7*].

[p] Methods of Evaluation and Minimum Time Guidelines of Various Disabilities

The regulations specify requirements for evaluating various disabilities [*see 8 Cal. Code Reg. § 43* (psychiatric disability); *8 Cal. Code Reg. § 44* (pulmonary disability); *8 Cal. Code Reg. § 45* (cardiac disability); *8 Cal. Code Reg. § 46* (neuromusculoskeletal disability); *8 Cal. Code Reg. § 46.1* (foot and ankle disability); *8 Cal. Code Reg. § 47*

(immunologic disability)].

Similarly, the regulations specify guidelines for the minimum "face to face time" [*see 8 Cal. Code Reg. § 49(b)* ("face to face time" defined)] for evaluating various disabilities [*see 8 Cal. Code Reg. § 49.2* (neuromusculoskeletal evaluation); *8 Cal. Code Reg. § 49.4* (cardiovascular evaluation); *8 Cal. Code Reg. § 49.6* (pulmonary evaluation); *8 Cal. Code Reg. § 49.8* (psychiatric evaluation); *8 Cal. Code Reg. § 49.9* (other evaluation)].

[q] Calculation and Service of Permanent Disability Rating by Administrative Director

Within 20 days after receipt, the administrative director will calculate the permanent disability rating according to *Lab. Code § 4660* (procedures and schedules for determining permanent disability rating) and serve the rating on the employee and employer by first class mail [*Lab. Code § 4061(e)*; *8 Cal. Code Reg. § 10165*]. At that time, the administrative director will also serve the employee with DEU Form 110, Notice of Options Following Disability Rating [*8 Cal. Code Reg. § 10165*]. The form explains what the rating is and advises the employee of the advantages and disadvantages of opting for a Stipulated Findings and Award or settlement by Compromise and Release. It also includes a specific notice to unrepresented employees that specifies the procedure for requesting administrative review of the rating determination [*see 8 Cal. Code Reg. § 10165.5* (form of notice)]. For discussion of the unrepresented employee's right to reconsideration of a rating determination, see [r], *below.* For discussion of permanent disability rating determinations, see *§ 577.45[4][d]*.

Any comprehensive medical evaluation concerning an unrepresented employee that indicates that part or all of an employee's permanent impairment or limitations may be subject to apportionment pursuant to *Lab. Code §§ 4663* and *4664* will first be submitted by the Office of BenefitDetermination to a workers' compensation judge who may refer the report back to the medical evaluator for correction or clarification if the judge determines the proposed apportionment is inconsistent with the law [*Lab. Code § 4061(f)*].

[r] Request for Reconsideration of Rating When Employee Is Unrepresented

Within 30 days after receipt of the rating, if the employee is unrepresented, the employee or employer may request that the administrative director reconsider the recommended rating or obtain additional information from the treating physician or medical evaluator to address issues not addressed or not completely addressed in the original comprehensive medical evaluation or not prepared in accord with the procedures of the Administrative Director promulgated under *Lab. Code§ 139.2(j)(2)* or *(3)* [*Lab. Code § 4061(g)*; *see 8 Cal. Code Reg. § 10164(a)*].

The request must be in writing, must specify the reasons the rating should be reconsidered, and must be accompanied by a copy of the rating, a copy of the comprehensive medical evaluation, proof of service on the other party, and any other information necessary to support the request [*Lab. Code § 4061(g)*; *8 Cal. Code Reg. § 10164(a)*]. Reconsideration will only be allowed for the following reasons [*8 Cal. Code Reg. § 10164(a)*; *see Lab. Code § 139.2(j)(2), (3)*]:

- The summary rating was calculated incorrectly;
- The evaluation failed to address one or more issues, or failed to do so completely; or
- The evaluation was not prepared in accordance with required procedures, including procedures required under the rules promulgated by the Administrative Director. The administrative director is not allowed to consider a supplemental or follow-up evaluation that was requested by a party after a summary rating determination had already been issued as a basis for a request for reconsideration [*8 Cal. Code Reg. § 10164(b)*].

If the administrative director finds that the comprehensive medical evaluation is not complete or is not in compliance

with the required procedures, the administrative director must return the report to the treating physician or qualified medical evaluator for appropriate action as the administrative director instructs [*Lab. Code § 4061(g)*]. If the administrative director determines that an additional evaluation from another Qualified Medical Evaluator is necessary, the matter will be referred to the Executive Medical Director for provision of another Qualified Medical Evaluator [*8 Cal. Code Reg. § 10164(c)*]. On receipt of the treating physician's or qualified medical evaluator's final comprehensive medical evaluation and summary form, the administrative director must recalculate the permanent disability rating according to *Lab. Code § 4660* and serve therating, the comprehensive medical evaluation, and the summary form on the employee and employer [*Lab. Code § 4061(g)*].

[s] Medical Evaluation of Permanent Disability as Condition Precedent to Filing Declaration of Readiness to Proceed

No issue relating to the existence or extent of permanent impairment and limitations resulting from the injury may be the subject of a declaration of readiness to proceed unless there has first been a medical evaluation by a treating physician or an agreed or qualified medical evaluator [*Lab. Code § 4061(i)*].

[t] Limitations on Informal Evaluation of Permanent Impairment or Need for Continuing Medical Care

Except for evaluations prepared by the treating physician or physicians, no evaluation of permanent impairment and limitations or need for continuing medical care resulting from the injury may be obtained prior to service of the comprehensive medical evaluation on the employee and employer if the employee is unrepresented, or prior to the attempt to select an agreed on medical evaluator if the employee is represented [*Lab. Code § 4061(i)*]. Evaluations obtained in violation of this prohibition are not admissible in any proceedings before the WCAB [*Lab. Code § 4061(i)*]. Nevertheless, the testimony, records, and reports offered by the treating physician or physicians who treated the employee for the injury and comprehensive medical evaluations prepared by a qualified medical evaluator selected by an unrepresented employee from a three-member panel are admissible [*Lab. Code § 4061(i)*].

[4] Objections to Determinations by Treating Physician

If either the employee or the employer objects to a medical determination made by the treating physician concerning any medical issues not covered by *Lab. Code § 4060* or *4061* and not subject to *Lab. Code § 4610*, the objecting party must give written notice of the objection to the other party within 20 days of receipt of the report, if the employee is represented by an attorney, or within 30 days of receipt of the report, if the employee is not represented by an attorney [*Lab. Code § 4062(a)*]. Employer objections to the treating physician's recommendation for spinal surgery are subject to *Lab. Code § 4062(b)* and, after denial of the physician's recommendation, in accordance with *Lab. Code § 4610* [*Lab. Code § 4062(a)*]. If the employee objects to a decision made pursuant to *Lab. Code § 4610* to modify, delay, or deny a treatment recommendation, the employee must give the employer written notice of the objection within 20 days of receipt of that decision [*Lab. Code § 4062(a)*]. These time limits may be extended for good cause or by mutual agreement [*Lab. Code § 4062(a)*]. If the employee is represented by an attorney, a medical evaluation to determinethe disputed medical issue must be obtained as provided in *Lab. Code § 4062.2*, and no other medical evaluation may be obtained [*Lab. Code § 4062(a)*]. If the employee is not represented by an attorney, the employer must immediately provide the employee with a form prescribed by the medical director with which to request assignment of a panel of three qualified medical evaluators, the evaluation must be obtained as provided in *Lab. Code § 4062.1*, and no other medical evaluation may be obtained [*Lab. Code § 4062(a)*].

The court of appeal, noting that an employer's challenge to an employee's claim of ongoing temporary disability must be made within 20 days of receipt of the physician's report of that disability, has held that the employer's claim of credit against permanent disability payments was allowable only for temporary disability payments made after June 2006, which was the last date for which the employee's treating physician reported that he was temporarily disabled. Any claim of credit for temporary disability payments made prior to that date was foreclosed by *Lab. Code § 4062(a)*.

However, the employer's claim for credit subsequent to June 2006 could not be denied on grounds of that statutory time limit [*J.C. Penney Co. v. Workers' Comp. Appeals Bd. (2009) 175 Cal. App. 4th 818, 829, 96 Cal. Rptr. 3d 469*].

The Supreme Court has held that, when deciding whether to approve or deny an injured employee's request for medical treatment, the employer must conduct utilization review pursuant to *Lab. Code § 4610* and that the employer may not, as an alternative to utilization review, elect to dispute the request for medical treatment pursuant to *Lab. Code § 4062*. The latter statute, said the Court, permits only *employees* to use its provisions to object to employers' decisions regarding treatment requests. The Court found that the legislature's intent regarding employers' use of *Lab. Code § 4062* to dispute treatment requests "could not be more clear," and that the historical evolution of treatment request and review processes, as exemplified by omnibus reforms enacted in SB 228, effective January 1, 2004, and SB 899, effective April 19, 2004, further demonstrates the legislature's intent that *Lab. Code § 4610* govern employers' review [*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (2008) 44 Cal. 4th 230, 233-234, 236-237, 239-245, 79 Cal. Rptr. 3d 171, 186 P.3d 535]* .

The employer may object to a report of the treating physician recommending that spinal surgery be performed, within 10 days of the receipt of the report [*Lab. Code § 4062(b)*]. If the employee is represented by an attorney, the parties must seek agreement with each other on a California licensed board-certified or board-eligible orthopedic surgeon or neurosurgeon to prepare a second opinion report resolving the disputed surgical recommendation [*Lab. Code § 4062(b)*]. If no agreement is reached within 10 days, or if the employee is not represented byan attorney, an orthopedic surgeon or neurosurgeon will be randomly selected by the Administrative Director to prepare a second opinion report resolving the disputed surgical recommendation [*Lab. Code § 4062(b)*]. Examinations are scheduled on an expedited basis, and the second opinion report must be served on the parties within 45 days of receipt of the treating physician's report [*Lab. Code § 4062(b)*]. If the second opinion report recommends surgery, the employer must authorize the surgery, and if the second opinion report does not recommend surgery, the employer must file a declaration of readiness to proceed [*Lab. Code § 4062(b)*]. The employer is not liable for medical treatment costs for the disputed surgical procedure, whether through a lien filed with the Appeals Board or as a self-procured medical expense, or for periods of temporary disability resulting from the surgery, if the disputed surgical procedure is performed prior to the completion of the required second opinion process [*Lab. Code § 4062(b)*].

The second opinion physician must not have any material professional, familial, or financial affiliation, as determined by the Administrative Director, with any of the following [*Lab. Code § 4062(c)*]:

1. The employer, his or her workers' compensation insurer, third-party claims administrator, or other entity contracted to provide utilization review services pursuant to *Lab. Code § 4610*.

2. Any officer, director, or employee of the employer's health care provider, workers' compensation insurer, or third-party claims administrator.

3. A physician, the physician's medical group, or the independent practice association involved in the health care service in dispute.

4. The facility or institution at which either the proposed health care service, or the alternative service, if any, recommended by the employer's health care provider, workers' compensation insurer, or third-party claims administrator, would be provided.

5. The development or manufacture of the principal drug, device, procedure, or other therapy proposed by the employee or his or her treating physician whose treatment is under review, or the alternative therapy, if any, recommended by the employer or other entity.

6. The employee or the employee's immediate family.

The Administrative Director has promulgated detailed regulations governing procedures for obtaining a second opinion when a treating physician recommends spinal surgery [*see 8 Cal. Code Reg. § 9788.01*(*l*) ("spinal surgery" defined)], the employer objects, and either the parties cannot agree on a second opinion physician or the employee is unrepresented [*see 8 Cal. Code Reg. §§ 9788.01-9788.91*; *see also 8 Cal. Code Reg. § 9788.01(k)* ("second opinion physician" defined as physician who is randomly selected pursuant to *Lab. Code § 4062(b)* to render second opinion on treating physician's recommendation of spinal surgery)]. Pursuant to these regulations, an employer who objects to the treating physician's recommendation for spinal surgery must serve the objection, written on a form prescribed by the Administrative Director, and with a copy of the treating physician's recommendation attached, by mail or other rapid means of delivery, on the Administrative Director, the employee, the employee's attorney, if any, and the treating physician within 10 days of receipt of the treating physician's report containing the recommendation [*8 Cal. Code Reg. § 9788.1(a)*; *see 8 Cal. Code Reg. § 9788.11* (DWC Form 233, Objection to Treating Physician's Recommendation for Spinal Surgery)]. The objection must include the employer's reasons, specific to the injured worker, for the objection to the recommended procedure, and it must include a declaration made under penalty of perjury, in the following form, of the date the report was first received by the employer, employer's insurance carrier, or administrator, the date and time the objection was sent, and the manner in which the objection was sent [*8 Cal. Code Reg. § 9788.1(a)*]:

> I declare under penalty of perjury of the laws of the State of California on (*date*), that the enclosed physician's report was first received by the employer, insurance carrier, or administrator on (*date*), and that on (*date*), I served the enclosed objection on (*names of persons served*) and on the Administrative Director by (*means of service*).

The declaration and form must be executed by a principal or employee of the employer, insurance carrier, or administrator, and the employer must serve the original and one photocopy, or two originals, of the objection on the Administrative Director [*8 Cal. Code Reg. § 9788.1(a)*].

The Appeals Board en banc has held that the procedures and timelines governing objections to a treating physician's recommendation for spinal surgery are contained in *Lab. Code §§ 4610* and *4062* and in *8 Cal. Code Reg. §§ 9788.1*, *9788.11*, and *9792.6(o)*. These procedures and timelines are [Cervantes v. Workers' Comp. Appeals Bd. (2009) 74 Cal. Comp. Cases 1336, 1338, 1341-1346, 1351-1355 (Appeals Board en banc opinion)]:

> 1. When a treating physician recommends spinal surgery, the employer must undertake utilization review.
>
> 2. If the utilization review approves the requested spinal surgery, or if the employer fails to timely complete the utilization review, the employer must authorize the surgery.
>
> 3. If the utilization review denies the spinal surgery request, the *employer* may object under *Lab. Code § 4062(b)*, but any objection must comply with *8 Cal. Code Reg. § 9788.1* and use the form required by *8 Cal. Code Reg. § 9788.11*.
>
> 4. The employer must complete its utilization review process within 10 days of its receipt of the treating physician's report, which must comply with *8 Cal. Code Reg. § 9792.6(o)*, and, if the utilization review denies the requested surgery, any *Lab. Code § 4062(b)* objection must be made within that same 10-day period.
>
> 5. If the employer fails to meet the 10-day timelines or comply with *8 Cal. Code Reg. §§ 9788.1* and *9788.11*, the employer loses its right to a second opinion report and must authorize the spinal surgery.

In the same case, the Board en banc also disapproved of *Brasher v. Nationwide Studio Fund (2006) 71 Cal. Comp.*

Cases 1282 (Appeals Board significant panel decision) to the extent that that case held that: (1) an employer may opt out of utilization review and instead dispute a requested spinal surgery using only the procedure specified in *Lab. Code § 4062(b)*; and (2) if the employer's utilization review denies the spinal surgery, it is the employee who must object under *Lab. Code § 4062(a)* [Cervantes v. Workers' Comp. Appeals Bd. (2009) 74 Cal. Comp. Cases 1336, 1338, 1350 (Appeals Board en banc opinion)].

[5] General Procedures Applicable to Comprehensive Medical Evaluations for Injuries Occurring on or After January 1, 1991

[a] Information Provided to Medical Evaluators

Any party may provide to the qualified medical evaluator selected from a panel the records prepared or maintained by the employee's treating physician or physicians and the medical and nonmedical records relevant to determination of the medical issue [*Lab. Code § 4062.3(a)*]. Information that a party proposes to provide to the selected qualified medical evaluator must be served on the opposing party 20 days before it is provided to the qualified medical evaluator [*Lab. Code § 4062.3(b)*]. If the opposing party objects to consideration of nonmedical records within 10 days thereafter, the records are not to be provided to the qualified medical evaluator [*Lab. Code § 4062.3(b)*]. Either party may use discovery to establish the accuracy or authenticity of nonmedical records prior to the evaluation [*Lab. Code § 4062.3(b)*]. If an agreed medical evaluator isselected, as part of their agreement on an agreed medical evaluator, the parties must agree on what information is to be provided to the agreed medical evaluator [*Lab. Code § 4062.3(c)*].

In any formal medical evaluation, the agreed medical evaluator or qualified medical evaluator must identify the following [*Lab. Code § 4062.3(d)*]:

1. All information received from the parties.

2. All information reviewed in preparation of the report.

3. All information relied on in the formulation of his or her opinion.

[b] Communications With Agreed or Qualified Medical Evaluator

All communications with an agreed medical evaluator or a qualified medical evaluator selected from a panel before a medical evaluation must be in writing and served on the opposing party 20 days in advance of the evaluation [*Lab. Code § 4062.3(e)*]. Any subsequent communication with the medical evaluator must be in writing and served on the opposing party when sent to the medical evaluator [*Lab. Code § 4062.3(e)*].

Ex parte communication with an agreed medical evaluator or a qualified medical evaluator selected from a panel is prohibited [*Lab. Code § 4062.3(f)*]. If a party communicates with the agreed medical evaluator or the qualified medical evaluator in violation of the preceding paragraph, the aggrieved party may elect to terminate the medical evaluation and seek a new evaluation from another qualified medical evaluator to be selected according to *Lab. Code § 4062.1* or *4062.2*, as applicable, or proceed with the initial evaluation [*Lab. Code § 4062.3(f)*; *see 8 Cal. Code Reg. § 35(f)*]. The party making the prohibited communication is subject to being charged with contempt before the Appeals Board and will be liable for thecosts incurred by the aggrieved party as a result of the prohibited communication, including the cost of the medical evaluation, additional discovery costs, and attorney's fees for related discovery [*Lab. Code § 4062.3(g)*]. These rules regarding communications with an agreed medical evaluator or a qualified medical evaluator do not apply to oral or written communications by the employee or, if the employee is deceased, the employee's dependent, in the course of the examination or at the request of the evaluator in connection with the examination [*Lab. Code § 4062.3(h)*].

[c] Failure to Complete Comprehensive Medical Evaluation in a Timely Manner

If a qualified medical evaluator selected from a panel fails to complete the formal medical evaluation within the time frames established by the Administrative Director pursuant to *Lab. Code § 139.2(j)(1)*, a new evaluation may be obtained upon the request of either party, as provided in *Lab. Code § 4062.1* or *4062.2* [*Lab. Code § 4062.5*]. Neither the employee nor the employer has any liability for payment for the formal medical evaluation that was not completed within the required time frames unless the employee or employer, on forms prescribed by the Administrative Director, each waives the right to a new evaluation and elects to accept the original evaluation even though it was not completed within the required time frames [*Lab. Code § 4062.5*].

[d] Procedure When Compensation Is Required by Comprehensive Medical Evaluation

If a comprehensive medical evaluation from the treating physician or an agreed medical evaluator or a qualified medical evaluator selected from a three-member panel resolves any issue so as to require the employer to provide compensation, the employer must either commence the payment of compensation or promptly commence proceedings before the WCAB to resolve the dispute for adjudication of claim [*Lab. Code §§ 4061(h)(1), 4063*].

With respect to a medical evaluation pursuant to *Lab. Code § 4061* (discussed under [3][c], *above*), if the employee and employer agree to a stipulated finding and award as provided under *Lab. Code § 5702* or to compromise and release the claim under *Lab. Code § 5000 et seq.*, or, if the employee wishes to commute the award under *Lab. Code § 5100 et seq.*, the WCAB must first determine whether the agreement or commutation is in the best interests of the employee and whether the proper procedures have been followed in determining the permanent disability rating [*Lab. Code § 4061(h)(2)*].

[e] Liability for Costs of Evaluations and Reports

For injuries occurring on and after January 1, 1991, the employer is liable for the cost of medical evaluations reasonably, actually, andnecessarily incurred, pursuant to *Lab. Code § 4060* (compensability of injury disputed), *Lab. Code § 4061(c)* and *(d)* (evaluation of permanent disability) or *Lab. Code § 4062(a)* (evaluation of other disputed medical issues) [*Lab. Code § 4064(a)*]. Each comprehensive medical-legal evaluation must address all contested medical issues arising from all injuries reported on one or more claim forms [*Lab. Code § 4064(a)*].

For injuries occurring on or after January 1, 2003, if an unrepresented employee obtains an attorney after the evaluation pursuant to *Lab. Code § 4061(d)* or § 4062(b) has been completed, the employee is entitled to the same reports at employer expense as an employee who has been represented from the time the dispute arose, and those reports are admissible in any proceeding before the Appeals Board [*Lab. Code § 4064(b)*].

The employer is not liable for the cost of any comprehensive medical evaluations obtained by the employee other than those authorized by *Lab. Code§§ 4060, 4061, 4062* [*Lab. Code § 4064(d)*]. However, a party is not prohibited from obtaining any medical evaluation or consultation at that party's own expense [*Lab. Code § 4064(d)*].

Costs of medical evaluations, diagnostic tests, and interpreters' services incidental to the production of a medical report may not be incurred earlier than the date of receipt by the employer, the employer's insurance carrier, or the attorney of record if the employee is represented, of all reports and documents required by the Administrative Director incidental to the services [*Lab. Code § 4621(a)*]. This provision is not applicable unless there has been compliance with *Lab. Code § 4620* [*Lab. Code § 4621(a)*].

Comprehensive medical-legal evaluations may be performed at any time after the claim form has been filed under *Lab. Code § 5401* if the employer has rejected the claim [*Lab. Code § 4621(c)*]. Except as provided in *Lab. Code §§ 4061, 4062*, or *4621(c)*, no comprehensive medical-legal evaluations, except those at the employer's request, may be performed during the first 60 days after the notice of claim has been filed [*Lab. Code § 4621(b)*]. Neither the employer nor the employee is liable for any expenses incurred for comprehensive medical-legal evaluations performed within this

60-day period [*Lab. Code § 4621(b)*].

[f] Liability for Attorney's Fees When Employer Files Application for Adjudication Contesting Comprehensive Medical Evaluation

For injuries occurring on and after January 1, 1991, when the employer files an application for adjudication of claim contesting the comprehensive medical evaluation prepared by an agreed medical evaluator, regardless of outcome, the workers' compensation judge or the WCAB must assess the employee's attorney's fees against the employer, subject to *Lab. Code § 4906* (reasonableness limitation for legal expenses) [*Lab. Code § 4066*]. Also subject to *Lab. Code § 4906*, if an employer files an application for adjudication and the employee is unrepresented at the time the applicationis filed, the employer is liable for any attorney's fees incurred by the employee in connection with the application for adjudication if the employee does not obtain a rebuttal report [*Lab. Code § 4064(c)*].

[g] Additional Medical Evaluations for Modified Compensation Awards

If the WCAB's jurisdiction is invoked pursuant to *Lab. Code § 5803* (WCAB's continuing jurisdiction to modify awards) on the grounds that the effects of the injury have recurred, increased, diminished, or terminated, a comprehensive medical evaluation must be obtained pursuant to *Lab. Code § 4061 et seq.* [*Lab. Code § 4067*]. If an agreed on or qualified medical evaluator selected by an unrepresented employee from a three-member panel has previously made a comprehensive medical evaluation of the same or similar issues, the subsequent or additional comprehensive medical evaluation must be conducted by the same agreed on or qualified medical evaluator, unless the workers' compensation judge has made a finding that he or she did not rely on the prior evaluator's comprehensive medical evaluation, any party contested the original medical evaluation by filing an application for adjudication, or the prior evaluator is no longer qualified or readily available to prepare a comprehensive medical evaluation, in which case, *Lab. Code § 4061* or *4062*, as the case may be, applies as if there had been no prior comprehensive medical evaluation [*Lab. Code § 4067*].

[h] Presumption That Treating Physician's Findings Are Correct

Effective April 19, 2004, the former presumption of correctness of the findings of an injured employee's personal physician or personal chiropractor has been repealed. This repeal applies to all cases, regardless of the date of injury, but does not constitute good cause to reopen or rescind, alter, or amend any existing order, decision, or award of the Appeals Board [Stats. 2004, ch. 34, §§ 22, 46 (repealing former *Lab. Code § 4062.9*)].

[i] Determination of Disability Rating When Comprehensive Medical Evaluation Is Contested

Effective January 1, 2003, the legislature has repealed the statutory provision that required the workers' compensation judge or the WCAB to choose between an employer's and an employee's proposed permanent disability rating, whenever either the employer or the employee had obtained an evaluation of the employee's permanent impairment and limitations from a qualified medical evaluator under *Lab. Code § 4061*, and either party contested the comprehensive medical evaluation of the other party [Stats. 2002, ch. 6, § 55; *see* former *Lab. Code § 4065*].

[6] Medical-Legal Fee Schedule

The Administrative Director, as required, has adopted a fee schedule for medical-legal expenses that is prima facie evidence of the reasonableness of fees charged for these expenses [*Lab. Code § 5307.6(a)*; *8 Cal. Code Reg. § 9795*]. A provider may not be paid fees in excess of those set forth in the schedule, unless the provider submits an itemization and explanation of the fee that shows it is both a reasonable fee and that extraordinary circumstances relating to the medical condition being evaluated justify a higher fee [*Lab. Code § 5307.6(b)*]. In no event may a provider charge a fee in excess of the provider's usual fee [*Lab. Code § 5307.6(b)*].

An evaluator may not request or accept any compensation from any source for medical-legal expenses if that compensation is in addition to the fees authorized, as described above [*Lab. Code § 5307.6(d)*]. A provider who violates this prohibition is subject to discipline under *Lab. Code § 139.2(k)* and to disciplinaryaction by the appropriate licensing board [*Lab. Code § 5307.6(d)*].

Following the adoption of the medical-legal fee schedule, there has been ongoing controversy over whether a medical-legal evaluator may charge a fee for missed medical appointments scheduled by or on behalf of an injured worker. The current medical fee schedule is silent on fees for missed appointments, and the issue has not yet been resolved by the Legislature or the courts. Regardless of whether expenses associated with missed appointments are properly construed to be medical-legal expenses, medical evaluators are not precluded from requesting or accepting compensation from an insurer, self-insured employer, or third party administrator for this type of expense [DWC Bulletin 94-7].

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsCosts & Attorney FeesWorkers' Compensation & SSDIBenefit DeterminationsMedical BenefitsAuthorized TreatmentWorkers' Compensation & SSDIBenefit DeterminationsMedical BenefitsEmployee Rights

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[Reserved]

§§ 577.47[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.60

§ 577.60 Governing Law

[1] In General

Arbitration of workers' compensation disputes is governed generally by *Lab. Code § 5270 et seq.* and 8 Cal. Code Reg. §§ 10997-10999. Reconsideration of arbitrators' decisions or awards is governed by *8 Cal. Code Reg. § 10866*. Arbitration of disputes concerning liens for expenses incurred by or on behalf of an injured employee as provided in *Lab. Code §§ 4600-4614.1* is authorized by *Lab. Code § 4903.4*. Most of the statutory provisions apply only to injuries occurring on or after January 1, 1990 [*see* 1989 Stats., ch. 893, § 6; *but see Lab. Code § 5275* (arbitration of certain disputes relating to insurance coverage and contribution mandatory regardless of date of injury; voluntary arbitration authorized for all injuries)].

[2] Representation Required

The provisions of *Lab. Code § 5270 et seq.* governing arbitration of workers' compensation disputes are applicable only when the injured employee or dependent is represented by an attorney [*Lab. Code § 5270*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselGeneral OverviewCivil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsAlternative Dispute Resolution

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51-577 California Forms of Pleading and Practice--Annotated § 577.61

§ 577.61 Disputes Subject to Arbitration

[1] Mandatory Arbitration

Any application for adjudication that lists one or more disputes involving an issue set forth in *Lab. Code § 5275(a)* must be accompanied by an arbitration submittal form, DWC-CA Form 10297. This form is available at the DIR/DWC website: http://www.dir.ca.gov/dwc/dwc_home_page.htm. The arbitration submittal form must indicate one of the following [*8 Cal. Code Reg. § 10295(b)*; *see 8 Cal. Code Reg. § 10295(a)* (rule applies to injuries occurring on or after January 1, 1990)]:

1. An arbitrator has been selected pursuant to *Lab. Code § 5271(a)* [*see § 577.63[2][a]*].

2. An unsuccessful attempt has been made to select an arbitrator, and the Presiding WCJ is requested, pursuant to *Lab. Code § 5271(b)*, to assign a panel of five arbitrators [s *ee* § 577.63[2][b]].

For discussion of form and content of arbitration submittal forms, see *§ 577.62*.

[2] Voluntary Arbitration

Any issue under *Lab. Code § 50 et seq.* (Department of Industrial Relations, including Division of Workers' Compensation) or *Lab. Code § 3200 et seq.* (workers' compensation law) may be submitted for arbitration by agreement of the parties, regardless of the date of injury [*Lab. Code § 5275(b)*].

At any time, the parties may agree to submit any issue for arbitration pursuant to *Lab. Code § 5275(b)* by submitting an arbitration submittal form that indicates that the parties have selected an arbitrator pursuant to *Lab. Code § 5271(a)* and by filing an application for adjudication if one has not been previously filed [*8 Cal. Code Reg. § 10296(a)*].

Within six days of receipt of the arbitration submittal form, the Presiding WCJ must order the issues in dispute submitted for arbitration pursuant to *Lab. Code §§ 5272, 5273, 5276*, and *5277* [*8 Cal. Code Reg. § 10296(b)*].

If the parties are unable to agree to an arbitrator under *Lab. Code § 5271(a)*, they may agree to follow the procedures for selecting an arbitrator under *Lab. Code § 5271(b)* and *(c)*, as set forth in *8 Cal. Code Reg. § 10295* [*8 Cal. Code Reg. § 10296(c)*; *see § 577.63[2*][b]].

For discussion of procedure for selecting an arbitrator pursuant to *Lab. Code § 5271(b)*, see *§ 577.63[2]*. In no event will arbitration be permitted after testimony has been taken in any proceeding [*8 Cal. Code Reg. § 10997*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMandatory ADRWorkers' Compensation & SSDIAdministrative ProceedingsAlternative Dispute ResolutionWorkers' Compensation & SSDIAdministrative ProceedingsAwardsTypesWorkers' Compensation & SSDIBenefit DeterminationsCumulative & Successive Disabilities

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§ 577.62 Arbitration Submittal Form

The arbitration submittal form must indicate one of the following [*8 Cal. Code Reg. § 10295(b)*; *see 8 Cal. Code Reg. § 10295(a)* (rule applies to injuries occurring on or after January 1, 1990)]:

1. An arbitrator has been selected pursuant to *Lab. Code § 5271(a)* [*see § 577.63[2][a]*].

2. An unsuccessful attempt has been made to select an arbitrator, and the Presiding WCJ is requested, pursuant to *Lab. Code § 5271(b)*, to assign a panel of five arbitrators [s *ee* § 577.63[2][b]].

For discussion relating to selection of arbitrators, see *§ 577.63[2]*.

Legal Topics:

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

[1] Qualifications and List of Eligible Arbitrators

Any attorney who is an active member of the California State Bar is eligible to become an arbitrator if he or she is any of the following [*Lab. Code § 5270.5(a)*]:

- A certified specialist in workers' compensation, or eligible to become certified;
- A retired workers' compensation judge;
- A retired WCAB member; or
- An attorney who has been certified to serve as a judge pro tempore.

The presiding workers' compensation judge at each district office is required to prepare a list of all eligible attorneys who apply to be placed on the list of eligible arbitrators [*Lab. Code § 5270.5(a)*].

No attorney may be included in a panel of arbitrators if he or she has served as a judge in any proceeding involving the same case, or has represented, or whose firm has represented, any party in the same case [*Lab. Code § 5270.5(b)*].

[2] Selection of Arbitrator

[a] Parties in Agreement

The parties to a dispute submitted for arbitration may select to serve as arbitrator any eligible attorney from the list prepared by the presiding workers' compensation judge. However, when the disputed issue involves insurance coverage, the parties may agree to select any attorney as arbitrator [*Lab. Code § 5271(a)*]. If the parties agree to an arbitrator pursuant to *Lab. Code § 5271(a)*, the presiding workers' compensation judge will, within six days after receipt of the

arbitration submittal form, order the issue or issues in dispute submitted for arbitration pursuant to *Lab. Code §§ 5272, 5273, 5276*, and *5277* [*8 Cal. Code Reg. § 10295(c)*].

[b] Parties Not in Agreement

If the parties cannot agree on an arbitrator, either party may request that the presiding workers' compensation judge assign a panel of five arbitrators selected at random from the list of eligible attorneys [*Lab. Code § 5271(b)*]. No more than three arbitrators on a five-member panel may be defense attorneys, no more than three may be applicant's attorneys, and no more than two may be retired workers' compensation judges or WCAB members [*Lab. Code § 5271(b)*].

When the number of parties exceeds one in the capacity of employer and one in the capacity of injured employee or lien claimant, the presiding judge will randomly select two additional arbitrators to add to the panel for each additional party [*Lab. Code § 5271(c)*; *8 Cal. Code Reg. § 10295(d)*]. When the additional party is an employer, injured employee, or lien claimant, one of these additional panelists must be a retired workers' compensation judge or a retired appeals board commissioner. The second additional panelist must be an applicant's attorney when the additional party is an employer, and a defense attorney when the additional party is an injured employee or a lien claimant. For each additional other party, the presiding judge will assign two arbitrators to the panel, in order of rotation from case to case, as follows: a retired workers' compensation judge or retired appeals board commissioner, an applicant's attorney, and a defense attorney [*Lab. Code § 5271(c)*].

If the arbitration submittal form requests a panel pursuant to *Lab. Code § 5271(b)*, the Presiding WCJ must, within six days of receipt of the form, serve on each of the parties an identical list of five arbitrators selected at random pursuant to *Lab. Code § 5271(b)*. Each party must strike two arbitrators from the list and return it to the Presiding WCJ within six days after service. Failure to timely return the list constitutes a waiver of a party's right to participate in the selection process. If one arbitrator remains, the Presiding WCJ must, within six days of return of the lists from the parties, order the issue or issues submitted for arbitration before the selected arbitrator pursuant to *Lab. Code §§ 5272, 5273, 5276* and *5277*. If more than one arbitrator remains on the panel, the Presiding WCJ must randomly select an arbitrator from the remaining panelists [*8 Cal. Code Reg. § 10295(d)*].

If the parties to the dispute have stricken all the arbitrators from the panel, the Presiding WCJ must, within six days of receipt of the last of the returned lists, serve on each of the parties to the dispute a new list of five arbitrators and any additional arbitrators required by *Lab. Code § 5271(c)*, selected at random but excluding the names of the arbitrators on the prior list. Each of the parties to the dispute must again strike two arbitrators from the list and return it to the Presiding WCJ within six days after service. This procedure will continue until one or more arbitrators remain on the lists returned to the Presiding WCJ [*8 Cal. Code Reg. § 10295(e)*].

The parties must provide all necessary materials to the arbitrator. Any paper file must remain in the custody of the district office [*8 Cal. Code Reg. § 10295(f)*].

A party may petition the presiding workers' compensation judge to remove a member from the panel pursuant to *Code Civ. Proc. § 170.1* (disqualification of judges for cause), and the presiding judge will assign another eligible attorney to replace any member so removed [*Lab. Code § 5271(d)*; *8 Cal. Code Reg. § 10998*]. For discussion relating to disqualification of panelists and arbitrators, see [3], *below*.

[3] Disqualification of Arbitrator

After service of a list of panel members pursuant to *8 Cal. Code Reg. § 10295*, any party may, within six days, petition the presiding workers' compensation judge to remove any member from the panel pursuant to *Code Civ. Proc. § 170.1* (disqualification of judges for cause) [*8 Cal. Code Reg. § 10998*; *see Lab. Code § 5271(d)*]. If the presiding workers'

compensation judge finds cause under *Code Civ. Proc. § 170.1*, he or she will remove the challenged member or members of the panel and will add to the original list the appropriate number of arbitrators at random to make a full panel. Within six days, the presiding judge will serve the list on the parties [*8 Cal. Code Reg. § 10998*].

If the presiding workers' compensation judge selects an arbitrator pursuant to *8 Cal. Code Reg. § 10295*, the parties have six days after service of the name of the arbitrator to petition to disqualify that arbitrator pursuant to *Code Civ. Proc. § 170.1*. If the presiding workers' compensation judge finds cause, he or she will assign another arbitrator pursuant to *Lab. Code § 5271(d)*

For discussion of disqualification of judges for cause, see Ch. 317, *Judges* .

[4] Duties and Responsibilities

Arbitrators have all the statutory and regulatory duties and responsibilities of a workers' compensation judge, as set forth in *Lab. Code § 5300 et seq.*, except the power to order the injured worker to be examined by a qualified medical evaluator pursuant to *Lab. Code §§ 5701* and *5703.5*, and the power of contempt [*Lab. Code § 5272*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsAlternative Dispute Resolution

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51-577 California Forms of Pleading and Practice--Annotated § 577.64

§ 577.64 Costs and Compensation Related to Arbitration

[1] In General

In disputes between an employee and an employer, the employer must pay all costs related to the arbitration proceeding, including use of facilities, hearing reporter's per diems, and transcript costs [*Lab. Code § 5273(a)*].

In all other disputes, the costs of the arbitration proceedings, including the arbitrator's compensation, must be paid as follows [*Lab. Code § 5273(b)*]:

- By the parties equally, in any dispute between an employer and an insurer or an employer and a lien claimant;

- By the parties equally, in proceedings subject to *Lab. Code § 5500.5* (occupational disease or cumulative injury arising out of more than one employment); and

- By the dependents in accordance with their proportionate share of death benefits, if there is no dispute as to the injury causing death.

The costs awarded must be reasonable in amount [*see 8 Cal. Code Reg. § 10999*].

[2] Resolution of Disputes Over Costs or Fees

Disputes regarding costs or fees for arbitration are within the exclusive jurisdiction of the WCAB and are determined initially by the presiding judge of the district office [*Lab. Code § 5273(c)*]. Any dispute involving an arbitrator's fee or cost must be resolved by the presiding workers' compensation judge of the appropriate local office or, in his or her absence, the acting presiding workers' compensation judge [*8 Cal. Code Reg. § 10999*].

Any request to resolve a dispute about arbitrator's fees or costs must be accompanied by any written agreement

pertaining to arbitrator's fees or costs and a statement that must set forth the nature of the dispute and an itemization of the hours spent in actual arbitration hearing, in preparation for arbitration, and in preparation of the decision. The statement must also include an itemization of the verifiable costs including use of facility, reporters, and transcript preparation [*8 Cal. Code Reg. § 10999*].

[3] Amount of Arbitrator's Fees

An arbitrator's fee must not exceed a reasonable amount. In establishing a reasonable fee, the presiding workers' compensation judge will consider the following [*8 Cal. Code Reg. § 10999*]:

- The responsibility assumed by the arbitrator;
- The arbitrator's experience;
- The number and complexity of the issues being arbitrated;
- The time involved; and
- The expeditiousness and completeness of issue resolution.

The presiding workers' compensation judge of each local office is required to maintain statistics on all arbitration fees awarded pursuant to *Lab. Code § 5273(c)* including the amount thereof and rationale or basis for the award pursuant to *8 Cal. Code Reg. § 10999(a)-(e)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsAlternative Dispute ResolutionWorkers' Compensation & SSDIAdministrative ProceedingsCosts & Attorney Fees

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51-577 California Forms of Pleading and Practice--Annotated § 577.65

§ 577.65 Time and Place of Arbitration

Arbitration proceedings may commence at any place and time agreed on by all parties [*Lab. Code § 5276(a)*]. If the parties cannot agree on a time or place, the arbitrator must order the date, time, and place for commencement of the proceeding [*Lab. Code § 5276(b)*].

Unless all parties agree otherwise, arbitration proceedings must commence not less than 30 days nor more than 60 days from the date that an arbitrator is selected [*Lab. Code § 5276(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsAlternative Dispute Resolution

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51-577 California Forms of Pleading and Practice--Annotated § 577.66

§ 577.66 Submission and Service of Papers

Ten days before the arbitration, each party must submit to the arbitrator and serve on the opposing party reports, records, and other documentary evidence on which that party intends to rely [*Lab. Code § 5276(c)*]. If a party intends to rely on excerpts of records or depositions, only copies of the excerpts are to be submitted to the arbitrator [*Lab. Code § 5276(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsAlternative Dispute Resolution

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§ 577.67 Communication With Arbitrator

[1] Disclosure of Settlement Offers Prohibited

Disclosure of any settlement offer made by any party may not be made to the arbitrator prior to the filing of the award [*Lab. Code § 5278(a)*].

[2] Ex Parte Communication

Ex parte communication with an arbitrator or potential arbitrator by counsel or the parties is prohibited except for the purpose of scheduling the arbitration hearing or requesting a continuance [*Lab. Code § 5278(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewEvidenceRelevanceCompromise & Settlement NegotiationsWorkers' Compensation & SSDIAdministrative ProceedingsAlternative Dispute ResolutionWorkers' Compensation & SSDIAdministrative ProceedingsSettlements

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51-577 California Forms of Pleading and Practice--Annotated § 577.68

§ 577.68 Arbitrator's Findings and Award

[1] In General

The arbitrator's findings and award must be served on all parties within 30 days of submission of the case for decision [*Lab. Code § 5277(a)*]. The award must comply with *Lab. Code § 5313* (findings by workers' compensation judges and WCAB) and be filed with the WCAB office pursuant to venue rules published by the WCAB [*Lab. Code § 5277(b)*; *8 Cal. Code Reg. §§ 10295(g), 10296(e)* (copy of final decision, order, or award from arbitrator, together with copy of record developed as set forth in *Lab. Code §§ 5276, 5277*, to be filed with Presiding WCJ of district office having venue, and district office to scan copies of arbitrator's decision, order, or award and record into EAMS adjudication file and, after scanning, destroy copies)]. The arbitrator's findings of fact, award, order, or decision has the same force and effect as an award, order, or decision of a workers' compensation judge [*Lab. Code § 5277(c)*]. For discussion of workers' compensation judge and WCAB findings and awards, see *§ 577.190* et seq.

Unless all parties agree to a longer period of time, the failure of the arbitrator to submit the decision within 30 days results in forfeiture of the arbitrator's fee and vacates the submission order and all stipulations [*Lab. Code § 5277(e)*].

When a compromise of a claim or an award is submitted to an arbitrator for approval, the parties must also file with the arbitrator any liens served on the parties [*Lab. Code § 4903.1(b)*].

[2] Reconsideration

[a] In General

Any final order, decision, or award filed by an arbitrator under *Lab. Code §§ 5270-5275* is subject to the reconsideration process set forth in *Lab. Code §§ 5900-5911* and *8 Cal. Code Reg. §§ 10840* and *10842* (reconsideration of decisions by workers' compensation judges and WCAB) [*8 Cal. Code Reg. § 10866*]. The parties, respectively, must serve the arbitrator with the petition for reconsideration and the answer [*8 Cal. Code Reg. § 10866*]. When a petition for reconsideration is filed from any final order, decision, or award made by an arbitrator under *Lab. Code §§ 5270-5275*,

the arbitrator must prepare and serve a report on reconsideration as provided in *8 Cal. Code Reg. § 10860* and must concurrently forward the file and the original report to the presiding workers' compensation judge. The judge will then promptly forward the file and report to the WCAB [*8 Cal. Code Reg. § 10866*].

For discussion of reconsideration procedure generally, see *§ 577.210* et seq.

[b] Alternative Dispute Resolution Systems

A petition for reconsideration from an arbitration decision made pursuant to *Lab. Code § 3201.5(a)(1)* (permitting collective baraining agreements that provide for an alternative dispute resolution system governing disputes between employees and employers), must be filed directly with the WCAB's office in San Francisco within 20 days of service of the final order, decision, or award made and filed by the arbitrator or board of arbitrators [*8 Cal. Code Reg. § 10865*]. A copy of the petition for reconsideration must be served on the arbitrator or board of arbitrators [*8 Cal. Code Reg. § 10865*]. A copy of that portion of the collective bargaining agreement relating to the arbitration and reconsideration process must be submitted by the petitioner [*8 Cal. Code Reg. § 10865*]. On receiving the petition for reconsideration, the arbitrator or board of arbitrators must forward to the WCAB in San Francisco the record of proceedings, including the transcript of proceedings, if any, a summary of testimony if the proceedings were not transcribed, the documentary evidence submitted by each of the parties, and an opinion that sets forth the rationale for the decision as to each contention raised by the petition [*8 Cal. Code Reg. § 10865*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsAlternative Dispute ResolutionWorkers' Compensation & SSDIAdministrative ProceedingsHearings & Review

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§ 577.69 Arbitration of Subsequent Issues or Proceedings

Use of an arbitrator for any part of a proceeding or any issue does not bind the parties to the use of the same arbitrator for any subsequent issues or proceedings [*Lab. Code § 5277(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsAlternative Dispute Resolution

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§ 577.70 Submission of Supplemental Proceedings

The presiding workers' compensation judge may submit supplemental proceedings to arbitration pursuant to *Lab. Code § 5270 et seq.* [*Lab. Code § 5277(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsAlternative Dispute Resolution

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51-577 California Forms of Pleading and Practice--Annotated §§ 577.71-577.79

[Reserved]

§§ 577.71[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.80

§ 577.80 Governing Law

The appointment of a guardian ad litem or trustee for a minor or incompetent employee or dependent is governed by *Lab. Code §§ 5307.5(a)* and *5408* and by *8 Cal. Code Reg. § 10402*.

Pleadings are governed by *Lab. Code §§ 5500, 5500.5, 5501,* and *5505,* and *8 Cal. Code Reg. §§ 10408,* 10250, 10251, *10480,* and *10484*.

Designation of the parties is governed by *Lab. Code § 5503* and *8 Cal. Code Reg. §§ 10364* and *10368*. Necessary parties are governed by *8 Cal. Code Reg. § 10360* and joinder of parties by *8 Cal. Code Reg. §§ 10372* and *10380*. Joinder of parties by the WCAB or a workers' compensation judge (hereinafter WCJ) is governed by *Lab. Code § 5307.5(b)*.

The effect of a defendant's failure to answer or appear is set forth in *Lab. Code § 5506* and the dismissal of an application that shows on its face that the applicant is not entitled to compensation is governed by *Lab. Code § 5507*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewCivil ProcedureParties JoinderNecessary PartiesCivil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedurePretrial JudgmentsDefaultGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling Requirements

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51-577 California Forms of Pleading and Practice--Annotated § 577.81

§ 577.81 Guardian ad Litem and Trustee

The WCAB or a WCJ may appoint a trustee or guardian ad litem to appear for and represent any minor or incompetent on the terms and conditions that it deems proper [*Lab. Code § 5307.5(a)*; *see* discussion under *§ 577.25[3*]; *see also* form in *§ 577.398[1]*]. The compensation allowed the trustee or guardian for his or her services is fixed by the WCAB or the superior court [*Lab. Code § 5307.5(a)*].

In one case, the court of appeal held that the Appeals Board had no basis for restricting the compensation of a guardian ad litem and conservator of an incompetent injured worker to non-duplicative care and that the employer, not the estate of the injured worker, should bear the expense. The court found that the parties had agreed in a compromise and release agreement that the guardian was entitled to compensation for duplicative care and that decisional law interpreting *Lab. Code § 4600* encompassed care provided by a lay person that might have been done by a professional, including a licensed vocational nurse. In the present case, the care for which the guardian requested compensation from the injured worker's employer did not fall under the duties of a conservator but were rather equivalent to medical treatment. Morever, stated the court, the Board should leave it to the superior court to ensure that the guardian was not compensated for the same care in the conservatorship. Finally, the court found that the guardian was entitled to a penalty assessment under *Lab. Code § 5814*, for unreasonable delay in the payment of compensation, and attorney's fees pursuant to *Lab. Code § 5814.5*, for her efforts to obtain the penalty [*Hodgman v. Workers' Comp. Appeals Bd. (2007) 155 Cal. App. 4th 44, 53-55, 65 Cal. Rptr. 3d 687]* .

If required by the WCAB, the guardian or trustee must give a bond in the amount determined by the WCAB and in the form and of the character required by law from a guardian appointed by a superior court [*Lab. Code § 5307.5(a)*]. For a discussion of bonds required from guardians appointed by a superior court, see Ch. 283, *Guardianship and Conservatorship: Bonds* . For a discussion and forms of bonds and undertakings, see *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.40* et seq. The bond must be approved by the WCAB, and the guardian or trustee will not be discharged from liability until he or she files an account with the WCAB or with the superior court and the account is approved [*Lab. Code § 5307.5(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewEstate, Gift & Trust LawTrustsTrusteesDuties & PowersClaims By & AgainstFamily LawGuardiansDuties & RightsWorkers' Compensation & SSDIAdministrative ProceedingsGeneral Overview

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51-577 California Forms of Pleading and Practice--Annotated § 577.82

§ 577.82 Pleadings

[1] Requirements, In General

The application and the answer are the only pleadings required in a proceeding for adjudication of a workers' compensation claim. Both must be in writing and conform to the forms prescribed by the WCAB's rules of practice and procedure. They must simply but clearly and completely delineate all relevant matters of agreement and all issues of disagreement within the jurisdiction of the WCAB, and provide for the furnishing of any additional information as the WCAB may properly determine is necessary to expedite its hearing and determination of the claim [*Lab. Code § 5500*]. Except for injuries occurring between January 1, 1990, and January 1, 1994, the filing of an application for adjudication, not the filing of a claim form, establishes jurisdiction of the Appeals Board and commences proceedings for the collection of benefits [*Lab. Code § 5500*].

[2] Amendment of Pleadings

The pleadings are deemed amended to conform to the stipulations and statement of issues agreed to by the parties on the record. Pleadings may be amended to conform to proof by the WCAB [*8 Cal. Code Reg. § 10492*].

[3] Proper Identification of Parties and Lien Claimants

Whenever any party or lien claimant (or any attorney or other representative for a party or lien claimant) either (i) files any application for adjudication, answer, stipulated findings and award, compromise and release, lien claim, petition or other pleading with the Appeals Board or (ii) states its appearance on the record at any hearing before the Appeals Board (including but not limited to stating its appearance on any pretrial conference statement, appearance sheet, or minutes of hearing), the party or lien claimant, or its attorney or other representative, must comply with the following requirements [*8 Cal. Code Reg. § 10550*]:

- Each party or lien claimant must set forth its full legal name, and each attorney or other representative must set forth the full legal name(s) of the party or parties he, she, or it is representing.

- If an adjusting agent or third-party claims administrator is appearing, it must disclose: (1) whether it is appearing on behalf of an employer, an insurance carrier, or both; (2) the identity or identities of the party or parties it is representing; and (3) if it is representing an insurance carrier, whether the policy includes a high self-insured retention, a large deductible, or any other provision that affects the identity of the entity or entities actually liable for the payment of compensation.

- If an insurance carrier is appearing, it must disclose: (1) whether it is appearing solely on its behalf, or also on behalf the insured employer; and (2) whether its policy includes a high self-insured retention, a large deductible, or any other provision that affects the identity of the entity actually liable for the payment of compensation.

- If a lien claim is being filed or amended, or if a lien claimant is appearing, the lien claimant must state whether it is the original owner of the alleged debt or whether it has purchased the alleged debt from the original owner or some subsequent purchaser.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling Requirements

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51-577 California Forms of Pleading and Practice--Annotated § 577.83

§ 577.83 Application for Adjudication and Answer

[1] Application

[a] By Party in Interest

An application for adjudication of claim may be filed by any party in interest or by the party's attorney or other representative authorized in writing [*Lab. Code § 5501*]. For injuries occurring on or after January 1, 1990, an application may be filed at any time there is a bona fide dispute after service of the claim form required by *Lab. Code § 5401* (*discussed under § 577.42[2][b]*) [*Lab. Code § 5500*]. For the WCAB office in which the application should be filed, see discussion in *§ 577.87[1]*. For the filing of papers generally and the manner in which the application for adjudication is served, see *discussion under § 577.108[4]*. For application for adjudication forms in disability and death cases, see *§§ 577.390 -577.393*.

A representative who is not an attorney licensed by the State Bar of California must notify the WCAB in writing of that fact [*Lab. Code § 5501*].

[b] By Lien Claimant

A medical lien claimant that provides medical services to an injured employee may initiate compensation proceedings by filing an application. The injured employee must be named as a party and served with notice but need not take part in the proceedings [*Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (1985) 39 Cal. 3d 57, 67, 216 Cal. Rptr. 115, 702 P.2d 197* ; *see Lab. Code § 5501*; *8 Cal. Code Reg. §§ 10360, 10364*]. Also, once an application is filed by an employee, a lien claimant may join the proceeding under *Lab. Code § 4903* (*discussed under § 577.261*). Moreover, a lien claimant may become a party when the applicant's case has been settled by way of a compromise and release, or when the applicant chooses not to proceed with his or her case. Furthermore, a lien claimant may reopen a case within five years after the WCAB's decision under *Lab. Code §§ 5410, 5803, 5804* (*discussed under § 577.220* et seq.) if there is further disability or good cause shown [*Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (1985) 39 Cal. 3d 57, 68 n.11, 216 Cal. Rptr. 115, 702 P.2d 197]* .

[c] Separate Application for Each Injury Required

There is but one cause of action for each injury coming within the provisions of the workers' compensation law [*Lab. Code § 5303*]. A separate application must be filed for each separate injury for which benefits are claimed even though the employer in each case is the same [*8 Cal. Code Reg. § 10401*]. No injury, whether specific or cumulative, shall for any purpose whatsoever, merge into or form a part of another injury, nor shall any award based on a cumulative injury include disability caused by any specific injury or by any other cumulative injury causing or contributing to the existing disability, need for medical treatment, or death [*Lab. Code § 5303*; *see Buhlert Trucking v. Workers' Comp. Appeals Bd. (1988) 199 Cal. App. 3d 1530, 1537-1539, 247 Cal. Rptr. 190* ; *Aetna Cas. & Surety Co. v. Workmen's Comp. Appeals Bd. (1973) 35 Cal. App. 3d 329, 333, 110 Cal. Rptr. 780* ; *see also* discussion in *§ 577.14[3]* (definition of injury and types of injuries)].

[d] Dismissal of Application That Shows No Right to Compensation

If an application shows on its face that the applicant is not entitled to compensation, the WCAB may, after the applicant has had an opportunity to be heard orally or to submit his or her claim or argument in writing, dismiss the application without any hearing on its own motion or on the motion of the adverse party [*Lab. Code § 5507*; *see § 577.453*]. The pendency of the motion or notice of intended dismissal does not, however, unless otherwise ordered by the WCAB, delay the hearing of the application on the merits [*Lab. Code § 5507*].

[2] Answer

[a] Grounds for Filing

An answer (*see* forms in *§§ 577.394[1], 577.395[1]*) may be filed and forthwith served on all adverse parties by any defendant who [*Lab. Code § 5505*].

- Desires to disclaim any interest in the subject matter of the claim in controversy;
- Considers that the application is in any respect inaccurate or incomplete; or
- Desires to bring any fact, paper, or document to the attention of the WCAB as a defense to the claim or otherwise.

[b] Time for Filing

An answer to each application for adjudication must be filed and served 10 days after service of the declaration of readiness to proceed required by *8 Cal. Code Reg. § 10250* or *8 Cal. Code Reg. § 10252* [*Lab. Code § 5505*; *8 Cal. Code Reg. § 10480*].

For discussion of the manner in which the answer may be served, see *§ 577.108[4]*.

[c] Appearances

[i] Appearances Required

All parties and lien claimants must appear at all hearings, except as provided below [*8 Cal. Code Reg. § 10240(a)*]:

1. When injury arising out of and in the course of employment is at issue, lien claimants not defined as a party [*see 8 Cal. Code Reg. § 10210(y)(3)* ("party" means: (1) person claiming to be injured employee or dependent of injured employee; (2) defendant; or (3) lien claimant when either (A) underlying case of

injured employee or employee's dependent has been resolved or (B) injured employee or employee's dependent chooses not to proceed with his, her, or their case)] are not required to appear at the mandatory settlement conference or trial, unless otherwise ordered by the WCJ.

2. When liability for the claim has been accepted, lien claimants not defined as a party, with a lien claim of $25,000 or more, must appear or have a representative appear at the mandatory settlement conference or lien conference, unless the appearance is excused by the WCJ.

3. Lien claimants not defined as a party, with liens of less than $25,000, must be available by telephone with settlement authority and must notify defendant(s) of the telephone number at which the defendant may reach them during the mandatory settlement conference or lien conference, although the WCJ may order the appearance of lien claimants not defined as a party, with liens of less than $25,000, at a mandatory settlement conference or lien conference.

4. All lien claimants must appear at trial at which their lien(s) is an issue to be decided.

All parties must have a person available with settlement authority at the mandatory settlement conference or lien conference, although the person with settlement authority need not be present if an attorney or representative who is present can obtain immediate authority by telephone [*8 Cal. Code Reg. § 10240(b)*].

Unless the notice otherwise provides, the applicant must be present at a mandatory settlement conference, as provided in *Lab. Code § 5502(e)* [*8 Cal. Code Reg. § 10240(c)*].

Appearance at a hearing not covered by this rule is at the discretion of the WCJ [*8 Cal. Code Reg. § 10240(d)*].

[ii] Failure to Appear

When a party or a lien claimant is served with notice of trial pursuant to *8 Cal. Code Reg. § 10240* [*see* [i], *above*] and fails to appear either in person or by attorney or representative, the WCJ may [*8 Cal. Code Reg. § 10241(a)*]:

1. Dismiss the application after issuing a notice of intention to dismiss pursuant to *8 Cal. Code Reg. § 10562*.

2. Dismiss the lien claim after issuing a notice of intention to dismiss pursuant to *8 Cal. Code Reg. § 10562*.

3. Hear the evidence and, after service of the minutes of hearing and summary of evidence that must include notice of intention to submit the case for decision pursuant to *8 Cal. Code Reg. § 10562*, submit the case for decision.

When a party or a lien claimant is served with notice of a conference or mandatory settlement conference pursuant to *8 Cal. Code Reg. § 10240* [*see* [i], *above*] and fails to appear at the conference, the WCJ may [*8 Cal. Code Reg. § 10241(b)*]:

1. Dismiss the application after issuing a notice of intention to dismiss pursuant to *8 Cal. Code Reg. § 10562*.

2. Dismiss the lien claim after issuing a notice of intention to dismiss with or without prejudice pursuant to *8 Cal. Code Reg. § 10562*.

3. Close discovery and forward the case to the Presiding WCJ to set for trial.

When a party, after notice, fails to appear at either a trial or a conference and good cause is shown for failure to appear, the WCJ may take the case off calendar or may continue the case to a date certain [*8 Cal. Code Reg. § 10241(c)*].

[iii] Appearances in Settled Cases

When the parties represent to the WCJ assigned to the case that a case has been settled, the case will be taken off calendar, and no appearances will be required [*8 Cal. Code Reg. § 10244*].

[iv] Procedures Following Failure to Appear

No default may be taken against a defendant who fails to answer or appear. Rather, the WCAB shall proceed to the hearing of the matter on such terms and conditions as it deems proper [*Lab. Code § 5506*]. Moreover, a defendant who fails to appear or answer, or who subsequently contends that no service was made on him or her, or who claims to be aggrieved in any other manner by lack of notice of the pendency of the proceeding, may apply to the WCAB for relief in accordance with the provisions of *Code Civ. Proc. § 473*, and the WCAB may grant such relief [*Lab. Code § 5506*].

No right to relief, including the claim that the findings and award of the WCAB or judgment entered thereon are void on their face [*see Code Civ. Proc. § 473(d)*], will accrue to a defendant who fails to answer or appear in any court unless prior application is made to the WCAB in accordance with *Lab. Code § 5506*. In no event will any petition to any court be allowed except as prescribed in *Lab. Code §§ 5950* and *5951* (petition for writ of review) [*Lab. Code § 5506*].

For discussion of the relief authorized by *Code Civ. Proc. § 473(b)* (relief from judgment, dismissal, order, or proceeding taken against party through mistake, inadvertence, surprise, or excusable neglect), and sixth paragraph (relief from void judgment or order), see Ch. 489, *Relief from Judgments and Orders* .

[3] Demurrers Prohibited

Demurrers, petitions for judgment on the pleadings, and petitions for summary judgment are not allowed. A continuance may be granted, however, on timely request and on such terms as may be reasonable under the circumstances, or may be ordered by the WCAB on its own motion if the pleading is so uncertain, unintelligible, or ambiguous as to render it impossible for the WCAB to understand or act on it, or if any party is prejudiced by omission or ambiguity of necessary allegations sufficient to prevent that party from adequately presenting a cause of action or defense [*8 Cal. Code Reg. § 10490*]. For discussion of continuances generally, see the discussion in *§ 577.157[2]*.

[4] Statement to Be Filed With Application or Answer

The employee, the insurer, the employer, and the attorneys for each party must sign and file with the WCAB a statement under penalty of perjury, with the application or answer, that they have not violated *Lab. Code § 139.3* (referral to person with whom physician has financial interest unlawful) and that they have not offered, delivered, received, or accepted any rebate, refund, commission, preference, patronage, dividend, discount, or other consideration, whether in the form of money or otherwise, as compensation or inducement for any referred examination or evaluation [*Lab. Code § 4906(g)*].

Failure to comply with this requirement must result in a refusal by the WCAB to file or process the party's application for adjudication or answer [*8 Cal. Code Reg. § 10404*]. If any of the parties who are required to file a statement are not available, cannot be located, or are unwilling to sign, a declaration under penalty of perjury setting forth in specific detail the reasons the party is not available, cannot be located, or is unwilling to sign, as well as good faith efforts to locate the party, may be filed with the application or answer [*8 Cal. Code Reg. § 10404*]. If the presiding workers' compensation judge, or designee, determines from the facts set forth in the declaration that good cause has been

established, he or she may accept the application or answer for filing [*8 Cal. Code Reg. § 10404*]. For purposes of this rule, a compromise and release agreement or stipulations with request for an award is not treated as an application for adjudication [*8 Cal. Code Reg. § 10404*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAnswersCivil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling RequirementsWorkers' Compensation & SSDIBenefit DeterminationsMedical BenefitsGeneral Overview

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51-577 California Forms of Pleading and Practice--Annotated § 577.84

§ 577.84 Initiation of Proceeding

[1] Filing

With specified exceptions [*see 8 Cal. Code Reg. §§ 10865, 10953*], proceedings for the adjudication of rights and liabilities before the Appeals Board are initiated by filing an Application for Adjudication, a case opening Compromise and Release Agreement, a case opening Stipulations with Request for Award, or a Request for Findings of Fact under *8 Cal. Code Reg. § 10405* [*8 Cal. Code Reg. § 10400(a)*]. A case opening Compromise and Release Agreement, a case opening Stipulations With Request for Award, and a Request for Findings of Fact under *8 Cal. Code Reg. § 10405* is each an "application" for purposes of invoking the jurisdiction of the Appeals Board, but none of these documents is deemed an application for purposes of *Lab. Code § 4064(c)* [*8 Cal. Code Reg. § 10400(b)*].

Upon the filing of an initial application, it will be assigned an adjudication case number and a venue [*8 Cal. Code Reg. § 10400(c)*].

When filing an amended application, the applicant must indicate in the box on the application form that it is an "amended" application [*8 Cal. Code Reg. § 10400(d)*].

[2] Service

Upon filing an Application for Adjudication, the filing party or lien claimant must concurrently serve a copy of the application and any accompanying documents on all other parties and lien claimants [*8 Cal. Code Reg. § 10400(e)*].

If the party filing the application is an unrepresented injured employee, an unrepresented dependent of a deceased employee, or a lien claimant or non-attorney representative of a lien claimant who falls within one of the exceptions of *8 Cal. Code Reg. § 10228(c)(5)(A)-(C)*, the Appeals Board [*8 Cal. Code Reg. § 10400(f)*]:

1. Must serve a conformed copy of the application on all parties and lien claimants, including the filing applicant, who are listed either on the application, on the proof of service to the application, or on the

address record (if an address record was previously created for an earlier application).

2. If it is an initial application, must concurrently give notification of the assigned adjudication case number and venue.

Such service is deemed service of a conformed copy of the application for purposes of *Lab. Code § 5501* [*8 Cal. Code Reg. § 10400(f)*].

For all other parties and lien claimants, the Appeals Board [*8 Cal. Code Reg. § 10400(g)*]:

1. Must serve a conformed copy of the application on the filing party or lien claimant (or, if represented, on the filing party or lien claimant's attorney or other representative).

2. If it is an initial application, must concurrently give notification of the assigned adjudication case number and venue.

Upon receipt of the conformed copy of the application, the filing party or lien claimant (or, if represented, the filing party or lien claimant's attorney or other representative) must forthwith serve a copy of the conformed application on all other parties and lien claimants who are listed on the application or on the proof of service to the application, and, if it is an initial application, concurrently notify all other parties and lien claimants of the assigned adjudication case number and venue [*8 Cal. Code Reg. § 10400(g)*]. Such service is deemed service of a conformed copy of the application for purposes of *Lab. Code § 5501* [*8 Cal. Code Reg. § 10400(g)*].

Disclosure of the applicant's social security number is voluntary, not mandatory. A failure to provide a social security number will not have any adverse consequences. Nevertheless, although an applicant is not required by law to provide that number, he or she is encouraged to do so. Social security numbers are used solely for identification and verification purposes in order to administer the workers' compensation system. A social security number will not be disclosed, made available, or otherwise used for purposes other than those specified, except with the consent of the applicant, or as permitted or required by statute, regulation, or judicial order [*8 Cal. Code Reg. § 10400(h)*].

[3] Failure to Comply With Court Administrator's Rules

If a document is not filed in compliance with the Court Administrator's rules, because it does not comply with either the procedural requirements or with the place of filing requirements, the Court Administrator may in his or her discretion take the following actions [*8 Cal. Code Reg. § 10222(a)*]:

- Correct the defect and file the document.

- Notify the filer that the document is not accepted for filing by service of a Notice of Document Discrepancy. This notice must state the discrepancy and the date of the attempted filing, and provide the filer with 15 business days from service to cure the discrepancy. If the document is corrected within 15 business days, or at a later date upon a showing of good cause, it will be deemed filed on the original date the document was submitted.

The following documents are not to be filed with the district office or the Appeals Board, except as a non-duplicative supporting exhibit or by order of a WCJ or the Board. Documents improperly submitted will not be accepted for filing or deemed filed and will not be acknowledged and may be discarded [*8 Cal. Code Reg. § 10222(b)*].

- Letters to opposing parties or counsel.

- Subpoenas.
- Notices of taking deposition.
- Medical appointment letters.
- Proofs of service ordered pursuant to *8 Cal. Code Reg. § 10500*.
- Medical reports, except as required by *8 Cal. Code Reg. § 10233*.
- Copies of any decision of any federal or state court opinion otherwise available.
- Copies of any decision of the Appeals Board or a WCJ that is otherwise available.
- Duplicate medical and medical-legal reports.
- No diagnostic imaging as defined in *Lab. Code § 139.3(b)(1)* is to be transmitted to the district office or the Appeals Board unless it is ordered.

No document is to be sent by electronic mail or by fax directly to the district office or the Appeals Board. If a document is sent by electronic mail or fax directly to the district office, it will not be accepted for filing or deemed filed, will not be acknowledged, and may be discarded unless otherwise ordered by the WCJ or the Appeals Board [*8 Cal. Code Reg. § 10222(c)*].

Failure to comply with the rules of the Court Administrator will be deemed a bad faith action or tactic that is frivolous or solely intended to cause unnecessary delay unless that failure results from mistake, inadvertence, surprise, or excusable neglect [*8 Cal. Code Reg. § 10211*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsComplaintsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling RequirementsWorkers' Compensation & SSDIAdministrative ProceedingsSettlements

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51-577 California Forms of Pleading and Practice--Annotated § 577.85

§ 577.85 Parties

[1] Designation

The person applying for compensation benefits is the applicant and the adverse party is the defendant [*Lab. Code § 5503*].

[2] Joinder of Applicants

Any person in whom any right to relief is alleged to exist may appear, or be joined, as an applicant [*8 Cal. Code Reg. § 10364*]. Any applicant other than the injured employee must join the injured employee as a party, in which case the application must include the employee's address if known or, if not known, a statement of that fact [*8 Cal. Code Reg. § 10360*]. In death cases, all persons who may be dependents must either join or be joined as applicants so that the entire liability of the employer or the insurer may be determined in one proceeding [*8 Cal. Code Reg. § 10372*].

[3] Joinder of Defendants

Any person against whom any right to relief is alleged may be joined as a defendant [*8 Cal. Code Reg. § 10368*]. The applicant may join as a defendant the employer's compensation carrier or file a separate application against it for any portion of the compensation to which he or she is entitled [*Lab. Code § 3753*; *see Royal Globe Ins. Co. v. Workers' Comp. Appeals Bd. (1978) 84 Cal. App. 3d 287, 292 n.4, 148 Cal. Rptr. 325]* . Joinder of employers in occupational disease cases is covered in *Lab. Code § 5500.5*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling RequirementsWorkers' Compensation & SSDICompensabilityInjuriesOccupational Diseases

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51-577 California Forms of Pleading and Practice--Annotated § 577.86

§ 577.86 Joinder of Claims

All claims of all persons arising out of the same injury to the same employee must be filed in the same proceeding [*8 Cal. Code Reg. § 10401*]. All claims for medical expense, disability payments, death benefits, burial expense, liens, or any other matter arising out of the injury may, in the WCAB's discretion, be joined in the same proceeding at any time [*Lab. Code § 5303*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewCivil ProcedurePartiesJoinderNecessary PartiesCivil ProcedureJoinder of Claims & RemediesClaimsWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling Requirements

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51-577 California Forms of Pleading and Practice--Annotated § 577.87

§ 577.87 Venue

[1] In General

The application for adjudication must be filed in one of the following places [*Lab. Code § 5501.5(a)*]:

(1) The county in which the injured employee or dependent of a deceased employee resides on the date of filing;

(2) The county where the injury allegedly occurred or, in cumulative trauma and industrial disease claims, where the last alleged injurious exposure occurred; or

(3) The county where the employee's attorney maintains his or her principal place of business, if the employee is represented by an attorney.

Written consent of the employee or dependent of a deceased employee to the selected venue site must be filed with the application [*Lab. Code § 5501.5(b)*]. Further, if the selected venue site is the county where the employee's attorney maintains his or her principal place of business, that attorney must indicate the venue site when he or she forwards the information request form required by *Lab. Code § 5401.5* for injuries occurring before January 1, 1994 (discussed under *§ 577.41[2]*). The employer then has 30 days from receipt of the information request form to object to the selected venue site. If the employer does object, the application must be filed pursuant to paragraphs (1) or (2), *above* [*Lab. Code § 5501.5(c)*].

If the county selected for filing has more than one WCAB office, the application must be filed at any WCAB office within that county that meets the criteria of (1), (2), or (3), *above* [*Lab. Code § 5501.5(b)*]. If there is no WCAB office in any county specified in paragraphs (1), (2), or (3), *above*, the application must be filed at the WCAB office nearest to one of the following [*Lab. Code § 5501.5(d)*]:

- The residence of the injured employee or dependent of a deceased employee on the date of filing;

- The place where the injury allegedly occurred, or, in cumulative trauma and industrial disease claims, the last injurious exposure occurred; or

- The location where the employee's attorney maintains his or her principal place of business, unless the employer objects pursuant to *Lab. Code § 5501.5(c)*.

The person or entity filing an initial application for adjudication (or other case opening document) must designate venue and specify whether venue is based on [*8 Cal. Code Reg. § 10409(a)*]:

1. The place of the employee or dependent's residence at the time of filing [*Lab. Code § 5501.5(a)(1)* or *(d)*].

2. The place where the injury allegedly occurred or, for cumulative trauma or industrial disease claims, where the last alleged injurious exposure occurred [*Lab. Code § 5501.5(a)(2)* or *(d)*].

3. The place where the employee's attorney maintains his or her principal place of business [*Lab. Code § 5501.5(a)(3)*].

When a Division of Workers' Compensation employee files his or her own application for adjudication or other case opening document, the following provisions apply [*8 Cal. Code Reg. § 10409(a)*]:

- Regardless of the venue designated by the employee, venue is determined as follows:

  - The parties may agree on a venue, subject to the approval of the presiding WCJ.

  - If the parties are unable to agree on a suitable venue, or for any other good cause shown, the presiding WCJ of the district office designated on the application or other case opening document must consult with the Secretary or other Deputy Commissioner of the Appeals Board to determine the appropriate venue, with the Secretary or other Deputy Commissioner issuing the appropriate venue order.

- The Secretary or other Deputy Commissioner of the Appeals Board will assign the case to a WCJ unfamiliar with the employee. When appropriate, a WCJ from a region other than the employee's region will be assigned.

[2] Asbestos-Related Injuries

All applications for asbestos-related injuries must be filed with and heard by either the San Francisco or the Long Beach branch of the WCAB, regardless of the date of injury. No other WCAB office will accept or hold any proceeding concerning these applications [*see* Memorandum to Presiding WCJs from John A. Merrill, Assistant Chief, Division of Workers' Compensation (July 11, 1990)].

[3] Petition for Change

An applicant or defendant may petition for a change of venue, specifically setting forth the reasons for the change. The petition will be granted for good cause. If the reason for the petition is the convenience of witnesses, the names and addresses of the witnesses and the substance of their testimony must be specifically set forth [*Lab. Code § 5501.6*].

Pursuant to *Lab. Code § 5501.5(c)*, any employer or insurance carrier listed on an initial application for adjudication may file an objection to a venue selection, based on the employee's attorney's principal place of business under *Lab. Code § 5501.5(a)(3)*, within 30 days after receiving notice of the adjudication case number and venue, stating under penalty of perjury the date when the notice of the adjudication case number and venue was received [*8 Cal. Code Reg. § 10410*].

A petition for change of venue pursuant to *Lab. Code § 5501.6* must be filed at the district office with venue. Any objection to a petition for a change of venue must be filed within 10 days of the filing of the petition. The presiding judge of the district office having venue, or his or her designee, must grant or deny the petition for change of venue, or serve notice of a status conference concerning the petition, within 30 days of the filing of the petition [*8 Cal. Code Reg. § 10411*].

When an order changing venue is issued, all further trial level proceedings must be conducted at, and all further trial level orders, decisions, and awards must be issued by, the district office to which venue was changed until another order changing venue is issued [*8 Cal. Code Reg. § 10412*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureVenueGeneral OverviewCivil ProcedureVenueMotions to TransferGeneral OverviewCivil ProcedureVenueMotions to TransferConvenience of WitnessesWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling Requirements

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51-577 California Forms of Pleading and Practice--Annotated § 577.88

§ 577.88 Declaration of Readiness to Proceed

[1] Service and Filing

Applications or petitions may not be placed on calendar for mandatory settlement conferences, status conferences, priority conferences, expedited hearing, or any other hearing unless one of the parties has filed and served a declaration of readiness to proceed in the form prescribed by the Court Administrator. The declaration of readiness must be served on all other parties and lien claimants [*8 Cal. Code Reg. § 10250(a)*; *see § 577.399[1*] (form)].

All declarations of readiness to proceed must state under penalty of perjury that the moving party has made a genuine, good faith effort to resolve the dispute before filing the declarations of readiness to proceed, and must state with specificity those efforts [*8 Cal. Code Reg. § 10250(b)*]. A false declaration or certification by any party, lien claimant, attorney, or representative may give rise to proceedings under *Lab. Code § 134* for contempt or *Lab. Code § 5813* for sanctions [*8 Cal. Code Reg. § 10250(c)*]. If a party or a lien claimant is represented by an attorney or representative, any declaration of readiness filed on behalf of the party must be executed by the attorney or representative [*8 Cal. Code Reg. § 10250(d)*].

The declaration may be filed with the application for adjudication. An application filed without an accompanying declaration will be placed in inactive status [*8 Cal. Code Reg. § 10582*].

A priority conference must be set upon the filing of a declaration of readiness requesting a priority conference that shows that the applicant is represented by an attorney and that the issues in dispute include employment and/or injury arising out of and in the course of employment [*8 Cal. Code Reg. § 10254(a)*]. Upon a showing of good cause, a WCJ may continue the matter to a status conference. At each priority or status conference, the parties must be prepared to set the matter for trial or to provide a plan to complete discovery [*8 Cal. Code Reg. § 10254(b)*]. To the extent possible, all priority and status conferences in a case are to be conducted by the same WCJ. When discovery is complete, or when the WCJ determines that the parties have had sufficient time to complete reasonable discovery, the case must be set for trial as expeditiously as possible [*8 Cal. Code Reg. § 10254(c)*].

[2] Objection to Declaration

Any objection to a declaration of readiness to proceed must be filed and served within 10 calendar days after service of the declaration. The objection must set forth, under penalty of perjury, specific reason why the case should not be set or why the requested proceedings are inappropriate [*8 Cal. Code Reg. § 10251(a)*].

If a party or lien claimant is represented, the attorney or representative must execute any objection to the declaration of readiness to proceed on behalf of the party. Declarations of readiness to proceed must be reviewed by the Presiding WCJ or any WCJ designated by the Presiding WCJ, who will determine on the basis of the facts stated in the declaration whether the objection should be sustained [*8 Cal. Code Reg. § 10251(c)*].

If a party has received a copy of the declaration of readiness to proceed and has not filed an objection under this rule, that party will be deemed to have waived all objections to proceeding on the issues specified in the declaration, absent extraordinary circumstances [*8 Cal. Code Reg. § 10251(d)*].

[3] False Declaration or Certification

A false declaration or certification filed under this section by any party, lien claimant, attorney, or representative may give rise to proceedings under *Lab. Code § 134* for contempt or *Lab. Code § 5813* for sanctions [*8 Cal. Code Reg. § 10251(b)*].

[4] Setting for Hearing Other Than as Requested

The WCAB, upon the receipt of a declaration of readiness to proceed, may, in its discretion, set the case for a type of proceeding other than that requested. It may on its own motion set any case for conference or trial [*8 Cal. Code Reg. § 10420*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConferencesCase ManagementWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling RequirementsWorkers' Compensation & SSDIAdministrative ProceedingsHearings & Review

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51-577 California Forms of Pleading and Practice--Annotated § 577.89

§ 577.89 Filing and Service of Physicians' Reports

[1] In General

All medical reports and medical-legal reports filed with the Appeals Board must be filed in accordance with the regulations of the Court Administrator, or as otherwise provided by the Appeals Board rules. Service of all medical reports and medical-legal reports on other parties and lien claimants must be made in accordance with the provisions of this rule [*8 Cal. Code Reg. § 10608(a)*].

After the filing of an Application for Adjudication, if a party or lien claimant is requested by another party or lien claimant to serve copies of medical reports and medical-legal reports relating to the claim, the party or lien claimant receiving the request must serve copies of the reports that are in its possession or under its control on the requesting party or lien claimant within six days of the request, if the reports have not been previously served. The party or lien claimant receiving the request must serve a copy of any subsequently received medical report or medical-legal report within six days of receipt of the report [*8 Cal. Code Reg. § 10608(b)*].

At the time of the filing of a Declaration of Readiness to Proceed or Declaration of Readiness to Proceed to Expedited Hearing, the filing declarant must concurrently serve copies of all medical reports and medical-legal reports relating to the claim that have not been previously served and that are in the possession or under the control of the filing declarant on (1) all other parties, whether or not they have previously requested service; and (2) all lien claimants that have previously requested service. The filing declarant also must serve a copy of any subsequently received medical report or medical-legal report relating to the claim within six days of receipt of the report [*8 Cal. Code Reg. § 10608(c)*].

Within six days after service of any Declaration of Readiness to Proceed or Declaration of Readiness to Proceed to Expedited Hearing, all other parties and lien claimants must serve copies of all medical reports and medical-legal reports relating to the claim that are in their possession or under their control, and that have not been previously served, on (1) all other parties, whether or not they have previously requested service; and (2) all lien claimants that have previously requested service. The other parties and lien claimants also must serve a copy of any subsequently received

medical report or medical-legal report relating to the claim within six days of receipt of the report, consistent with (1) and (2) in the preceding sentence [*8 Cal. Code Reg. § 10608(d)*].

If, at any time after the periods specified in *8 Cal. Code Reg. § 10608 (b), (c),* and *(d),* discussed above, a lien claimant initiates a request for service of medical reports and medical-legal reports, all parties and other lien claimants must serve the requesting lien claimant with copies of all medical reports and medical-legal reports relating to the claim that are in their possession or under their control, and that have not been previously served, within six days of receipt of the request. The parties and other lien claimants also must serve a copy of any subsequently received medical report or medical-legal report relating to the claim within six days of receipt of the report [*8 Cal. Code Reg. § 10608(e)*].

All medical reports or medical-legal reports relating to the claim that have not been previously served must be served on all other parties and lien claimants upon the filing of a compromise and release or stipulations with request for award, unless the rights and/or liabilities of those parties or lien claimants were previously fully resolved [*8 Cal. Code Reg. § 10608(f)*].

Except as provided by *8 Cal. Code Reg. § 10603* (regarding oversized exhibits, diagnostic imagining, physical exhibits, and exhibits on media), medical reports, medical-legal reports, medical records, and other records and documents must be filed only in accordance with the following provisions [*8 Cal. Code Reg. § 10233(a)*]. The provisions in the list, below, apply when a declaration of readiness (other than a declaration of readiness for an expedited hearing) is being filed, including a walk-through declaration of readiness [*8 Cal. Code Reg. § 10233(b)*].

> 1. When filing a declaration of readiness, the filing party or lien claimant must file the report of any agreed medical evaluator, any qualified medical evaluator, and any treating physician that: (A) are then in its possession or control, (B) are relevant to the issue being raised by the declaration of readiness, and (C) have not been filed previously. No other medical reports, medical-legal reports, medical records, or other documents may be filed at that time, unless otherwise ordered by the Appeals Board or a WCJ.
>
> 2. When filing an objection to a declaration of readiness, or within 10 days of the filing of the declaration of readiness if no objection is timely filed, each opposing party or lien claimant must file the reports of any agreed medical evaluator, any qualified medical evaluator, and any treating physician that: (A) are then in its possession or control, (B) are relevant to the issue being raised by the declaration of readiness, and (C) have not been filed previously. No other medical reports, medical-legal reports, medical records, or other documents may be filed at that time, unless otherwise ordered by the Appeals Board or a WCJ.

The provisions in the list, below, apply when a declaration of readiness for an expedited hearing is being filed [*8 Cal. Code Reg. § 10233(c)*].

> 1. When filing a declaration of readiness for an expedited hearing, the filing party or lien claimant must file the reports of any agreed medical evaluator, any qualified medical evaluator, and any treating physician that: (A) are then in its possession or control, (B) are relevant to the issue being raised by the declaration of readiness, and (C) have not been filed previously. No other medical reports, medical-legal reports, medical records, or other documents may be filed at that time.
>
> 2. When filing an objection to a declaration of readiness for an expedited hearing, or within 10 days of the filing of the declaration of readiness if no objection is timely filed, each opposing party or lien claimant must file the reports of any agreed medical evaluator, any qualified medical evaluator, and any treating physician that: (A) are then in its possession or control, (B) are relevant to the issue being raised by the declaration of readiness, and (C) have not been filed previously. No other medical reports, medical-legal reports, medical records, or other documents may be filed at that time.

3. All other medical reports, medical-legal reports, medical records, or other documents that are being proposed as exhibits with respect to the issue being raised by the declaration of readiness, and that have not been filed previously, must be filed at the time of trial, unless otherwise ordered by the Appeals Board or a WCJ.

The provisions in the list, below, apply when a compromise and release or a stipulations with request for award is being filed, with the exception that they do not apply when the compromise and release or the stipulations with request for award is being filed on a walk-through basis in accordance with *8 Cal. Code Reg. § 10280* [*8 Cal. Code Reg. § 10233(d)*].

1. When filing a compromise and release or a stipulations with request for award, the filing party must file all agreed medical evaluator reports, qualified medical evaluator reports, treating physician reports, any other medical records, or other records (e.g., wage statements) that: (A) are relevant to a determination of the adequacy of the compromise and release or stipulations with request for award, and (B) have not been filed previously.

2. If the compromise and release or the stipulations with request for award is not approved, and the matter is set for a hearing on the adequacy of the proposed settlement, any additional reports, records, or other documents not previously filed that are being proposed as exhibits must be filed at the time of the adequacy hearing, unless otherwise ordered by the Appeals Board or a WCJ.

3. If the compromise and release or the stipulations with request for award is not approved at or after the adequacy hearing, and the matter is set for a mandatory settlement conference or trial, then any additional medical reports, medical-legal reports, medical records, or other documents that are being proposed as exhibits must be filed in the same manner as set forth in *8 Cal. Code Reg. § 10233 (g)* and *(h)* [*see below*].

Excerpted portions of relevant physician, hospital, or dispensary records must be filed in accordance with *8 Cal. Code Reg. § 10232* [*8 Cal. Code Reg. § 10233(e)*; *see § 577.104*]. Similarly, excerpted portions of relevant personnel records, wage records and statements, job descriptions, and other business records must be filed in accordance with *8 Cal. Code Reg. § 10232* [*8 Cal. Code Reg. § 10233(f)*; *see § 577.104*].

At a mandatory settlement conference, rating mandatory settlement conference, priority conference, or lien conference, all other medical reports, medical-legal reports, medical records, or other documents that are being proposed as exhibits with respect to the issue being raised by the declaration of readiness, and that have not been filed previously, must be filed, but only if the matter is being set for trial, unless otherwise ordered by the Appeals Board or a WCJ [*8 Cal. Code Reg. § 10233(g)*].

At trial, any additional medical reports, medical-legal reports, medical records, or other documents that are being proposed as exhibits with respect to the issue being raised by the declaration of readiness must be filed, unless otherwise ordered by the Appeals Board or a WCJ [*8 Cal. Code Reg. § 10233(h)*].

[2] Content of Medical Reports

The matters that should be included in a physician's report are set forth in *8 Cal. Code Reg. § 10606*. A failure to set forth these matters will be considered by the workers' compensation judge in weighing this evidence [*8 Cal. Code Reg. § 10606*]. All medical-legal reports must comply with the provisions of *Lab. Code § 4628* (responsibilities of physician signing medical-legal report). Except as otherwise provided by the Labor Code and the WCAB's rules, a failure to comply with Section 4628 will not make the report inadmissible, but will be considered in weighing this evidence [*8 Cal. Code Reg. § 10606*].

[3] Form of Medical Evidence

The WCAB favors the production of medical evidence in the form of written reports. Direct examination of a medical witness will not be received at a trial except on a showing of good cause [*8 Cal. Code Reg. § 10606*]. A continuance for rebuttal testimony may be granted [*Lab. Code § 5502.5*; *8 Cal. Code Reg. § 10606*]. In death cases, the reports of non-examining physicians may be admitted into evidence in lieu or oral testimony [*8 Cal. Code Reg. § 10606*].

[4] Employer-Maintained Records

A written communication from a physician containing any information listed in *8 Cal. Code Reg. § 10606* that is contained in any record maintained by the employer as employer is deemed to be a physician's report [*8 Cal. Code Reg. § 10616*]. However, records from an employee assistance program are not required to be filed or served unless ordered by the WCAB [*8 Cal. Code Reg. § 10616*].

[5] Failure to Comply with Requirements

Failure to comply with the requirements concerning disclosure, service, and filing of medical reports may result in the report being deemed inadmissible in evidence [*see 8 Cal. Code Reg. § 10622*]. If a willful suppression of a medical report is demonstrated, it will be presumed that the findings, conclusions, and opinions contained in the report would be adverse if produced [*8 Cal. Code Reg. § 10622*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsClaimsFiling RequirementsWorkers' Compensation & SSDIAdministrative ProceedingsEvidenceMedical Evidence

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51-577 California Forms of Pleading and Practice--Annotated § 577.90

§ 577.90 Consolidatation of Cases

Consolidation of two or more related cases, involving either the same injured employee or multiple injured employees, rests in the sound discretion of the Appeals Board. In exercising that discretion, the Board is required to take into consideration any relevant factors, including but not limited to the following [*8 Cal. Code Reg. § 10589(a)*]:

1. Whether there are common issues of fact or law.

2. The complexity of the issues involved.

3. The potential prejudice to any party, including but not limited to whether granting consolidation would significantly delay the trial of any of the cases involved.

4. The avoidance of duplicate or inconsistent orders.

5. The efficient utilization of judicial resources.

Consolidation may be ordered for limited purposes or for all purposes [*8 Cal. Code Reg. § 10589(a)*].

Consolidation may be ordered by the Appeals Board on its own motion, or may be ordered based on a petition filed by one of the parties. A petition to consolidate must [*8 Cal. Code Reg. § 10589(b)*]:

1. List all named parties in each case.

2. Contain the adjudication case numbers of all the cases sought to be consolidated, with the lowest numbered case shown first.

3. Be filed in each case sought to be consolidated.

4. Be served on all attorneys or other representatives of record and on all non-represented parties in each case sought to be consolidated.

Any order regarding consolidation must be filed in each case to which the order relates [*8 Cal. Code Reg. § 10589(c)*].

If consolidation is ordered, the Appeals Board, in its discretion, may designate one case as the master file for exhibits and pleadings. If a master file is designated, any subsequent exhibits and pleadings filed by the parties and lien claimants during the period of consolidation are to be filed in the master case only. However, all pleadings and exhibit cover sheets filed must include the caption and case number of the master file case, followed by the case numbers of all of the other consolidated cases [*8 Cal. Code Reg. § 10589(d)*].

If a master file has been designated and the consolidated cases are tried, all relevant documentary evidence previously received in an individual case is deemed admitted in evidence in the consolidated proceedings under the master file and is deemed part of the record of each of the several consolidated cases. Evidence received subsequent to the designation of the master file is to be similarly received with like force and effect [*8 Cal. Code Reg. § 10589(e)*].

When cases are consolidated, joint minutes of hearing, summaries of evidence, opinions, decisions, orders, findings, or awards may be used. However, copies must be filed in the record of proceedings of each case [*8 Cal. Code Reg. § 10589(f)*].

Any request or petition to consolidate cases that are assigned to different WCJs in the same district office, or that have not been assigned but are venued at the same district office, must be referred to the Presiding WCJ of that office, whether the cases involve the same injured worker or multiple injured workers [*8 Cal. Code Reg. § 10260(a)*].

Any request or petition to consolidate cases involving the same injured worker that are assigned to WCJs at different district offices, or that have not been assigned but are venued at different district offices, must first be referred to the Presiding WCJs of the district offices to which the cases are assigned. If the Presiding WCJs are unable to agree on where the cases will be assigned for hearing, the conflict will be resolved by the Court Administrator upon referral by one of the presiding judges [*8 Cal. Code Reg. § 10260(b)*].

Any request or petition to consolidate cases involving multiple injured workers that are assigned to WCJs at different district offices, or that have not been assigned but are venued at different district offices, must be referred to the Court Administrator [*8 Cal. Code Reg. § 10260(c)*]. In resolving any request or petition to consolidate cases that are assigned to WCJs at different district offices, or that have not been assigned but are venued at different district offices, the Court Administrator must set the request or petition for a conference regarding the place of hearing. At or after the conference, the Court Administrator must determine the place of hearing and may determine the WCJ to whom the cases will be assigned, giving consideration to the factors set forth in *8 Cal. Code Reg. § 10589*. In reaching any determination, the Court Administrator may assign a WCJ to hear any discovery motions and disputes relevant to discovery in the action and to report their findings and recommendations to the Court Administrator [*8 Cal. Code Reg. § 10260(d)*]. Any party aggrieved by the determination of the Court Administrator may request proceedings pursuant to *Lab. Code § 5310*, except that an assignment to a particular WCJ may be challenged only in accordance with the provisions of *8 Cal. Code Reg. §§ 10452* and *10453* [*8 Cal. Code Reg. § 10260(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConsolidation of ActionsWorkers' Compensation & SSDIAdministrative ProceedingsClaimsGeneral Overview

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[Reserved]

§§ 577.91[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.100

§ 577.100 Governing Law

Captions are governed generally by *8 Cal. Code Reg. § 10232* and also by regulations pertaining to contents of specific documents. Verification is governed by *Code Civ. Proc. §§ 446* and *2015.5* and by various provisions of the workers' compensation law relating to specific papers [*see, e.g., Lab. Code §§ 5902, 5905* (petition for reconsideration and answer to petition)]. The filing of papers and documents is governed by *Lab. Code § 5501* and 8 Cal. Code Reg. §§ 10227-10236. Service of papers and proof of service are governed by *Lab. Code §§ 5316, 5501, 5504* and 8 Cal. Code Reg. §§ 10500-10510.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling Requirements

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51-577 California Forms of Pleading and Practice--Annotated § 577.101

§ 577.101 Caption of Papers

Most, but not all, papers filed in connection with a workers' compensation claim are filed with the WCAB and should be captioned accordingly. Common exceptions are the following:

- Requests for informal permanent disability ratings (*discussed under § 577.45[4][c]*), which are directed to the Division of Workers' Compensation, Office of Benefit Determination [*see 8 Cal. Code Reg. §§ 9732-9766*]; and

- Reports of occupational injury or illness, which, in the case of a self-insured employer, are filed directly with the Department of Industrial Relations, Division of Labor Statistics and Research, and, in the case of an insured employer, are filed with the insurer, which must immediately transmit a copy of the report to the Division of Labor Statistics and Research [*see Lab. Code § 6409*; *8 Cal. Code Reg. §§ 14000-14004*].

The caption, or heading, of all papers filed with the WCAB should include the WCAB's name, the title of the paper, the name of the injured employee (which may be included in the title of the case), the title of the case (that is, the name of the injured employee or of the applicant if other than the injured employee vs. the name of the employer and of the employer's insurance carrier, if any), and, in the case of pleadings and other papers filed subsequent to the application for adjudication, the WCAB case number [*see, e.g., 8 Cal. Code Reg. § 10232*]. The case is indexed and referred to by the name of the injured employee, whether or not the employee is the applicant [*8 Cal. Code Reg. § 10215*; *see § 577.12A[2]*].

For a general form of caption, see *§ 577.400*.

Legal Topics:

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

Civil ProcedurePleading & PracticePleadingsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling Requirements

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§ 577.102 Data Entry Sheet

A WCAB Data Entry Sheet must accompany all filings in which no case number has been previously assigned. This includes the Application for Adjudication, Compromise and Release Agreement, Stipulations with Requests for Award, petitions seeking recovery under *Lab. Code § 132a*, and pre-application filings for cases involving injuries between January 1, 1990 and December 31, 1993, in which no case number was previously assigned by the WCAB.

For a copy of the WCAB Data Entry Sheet, see form in *§ 577.401[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling Requirements

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51-577 California Forms of Pleading and Practice--Annotated § 577.103

§ 577.103 Petitions

A request for action by the WCAB, other than an application for adjudication, an answer, or a declaration of readiness, must be made by petition, the caption of which must contain the case title and adjudication case number and indicate the type of relief sought [*8 Cal. Code Reg. §§ 10210(z), 10450(a)*]. Any previously filed document must not be attached to a petition; any such document that is attached to a petition may be discarded [*8 Cal. Code Reg. § 10450(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsGeneral OverviewCivil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling Requirements

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51-577 California Forms of Pleading and Practice--Annotated § 577.104

§ 577.104 Form and Size Requirements of Papers

All documents, except the medical reports of treating physicians, secondary physicians, qualified or agreed medical evaluators, and proposed exhibits, must be filed in accordance with the following standards [*8 Cal. Code Reg. § 10232(a)*]:

1. Only one side of each paper is to be used.

2. All documents must be printed with black ink on white paper that is 81/2 x11 inches and at least 12 pound weight. All margins must be at least one inch and be without typed or handwritten text in any margin.

3. The first page must include a case caption that includes the name of the injured worker or dependent claiming benefits, the name of the employer and the employer's insurer or indicating that the employer is self-insured and a case number, if one has been assigned by the district office. If a case number has been assigned, the number must be preceded by the abbreviation "ADJ."

4. All non-form legal pleadings must contain a heading above the case caption containing the name of the filing attorney and his or her state bar membership number and the attorney's law firm name and address.

5. Except as otherwise provided in this regulation or in *8 Cal. Code Reg. § 10228(c)*, all OCR forms and documents must be printed in Times New Roman, Times, Courier, Palatino, Century Schoolbook, or similar serif font of at least 12 points in size.

6. Except as otherwise provided in *8 Cal. Code Reg. § 10228*, all text added to the OCR forms must be in capital letters.

7. Response to the request on the OCR forms for social security numbers is optional, not mandatory.

8. A list of body part codes is provided with the document cover sheet form and posted on the DWC website (http://www.dir.ca.gov/forms.html). The codes must be used on OCR forms to describe the part of the body injured.

9. A list of district office codes for place of venue is provided with the document cover sheet form and posted on the DWC website (http://www.dir.ca.gov/forms.html). The codes must be used on OCR forms to describe the district office venue.

10. No single document may exceed 25 pages in length without the prior permission of the Appeals Board or the Presiding WCJ of the district office with venue over the case.

11. The text of a document must be double spaced or one and one-half spaced; however, captions, headings, headers, footnotes, footers, and block quotations must be single spaced.

12. The documents must be flat, without folds and without staples.

13. OCR forms have bar codes at the top of the document. No other documents may have bar codes at the top of the document.

All documents must be filed with document cover sheets and document separator sheets, as follows [*8 Cal. Code Reg. § 10232(b)*]:

1. A completed document cover sheet must be the first page of each individual document or set of documents filed at one time in the same case. The cover sheet provides space for information regarding 15 companion cases. Only the pages filled out need to be filed. A document separator sheet must precede each document within a set of documents.

2. If an individual document includes an attachment, a completed document separator sheet must precede the attachment, and, if an individual document includes multiple attachments, a document separator sheet must precede each individual attachment. A document separator sheet must not be placed between a document and the proof of service for that document. However, when one proof of service is used for multiple documents, a document separator sheet must precede the proof of service.

3. A list of document titles is provided with the document separator sheet form and posted on the DWC website (http://www.dir.ca.gov/forms.html). These document titles must be used on a document separator sheet to describe the attached document.

4. The document separator sheet requires the filer to list the product delivery units [*see 8 Cal. Code Reg. § 10210(bb)*; *see also § 577.12A[1]*, the date of the attached document, and the author of the attached document.

5. The requirements set out in items [1]-[4] in this list do not apply to any unrepresented employees, unrepresented dependents, or unrepresented uninsured employers who do not have ready access to document cover sheets and document separator sheets.

Oversized documents must be filed at only the time of trial in accordance with the provisions of *8 Cal. Code Reg. § 10603* [*8 Cal. Code Reg. § 10232(c)*].

If an unrepresented worker, an unrepresented, uninsured employer, or an unrepresented dependent does not have ready access to a computer or a typewriter and compliance with *8 Cal. Code Reg. § 10232(a)*, items 4 and 5 [*see above*], is not feasible, a hand-printed document may be submitted. Any hand-printed document must be legible and must otherwise comply with *8 Cal. Code Reg. § 10232*, including the requirements of *8 Cal. Code Reg. § 10232(a)(2)* regarding margins and text in the margins [*8 Cal. Code Reg. § 10232(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling Requirements

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51-577 California Forms of Pleading and Practice--Annotated § 577.105

§ 577.105 Verification

Verification in the manner required for verified pleadings in courts of record is required for petitions for reconsideration and answers to such petitions [*Lab. Code §§ 5902, 5905*], but is not required for applications for adjudication or answers to applications or other documents filed with the WCAB. Verification by affidavit of pleadings in civil actions in courts of record is governed by *Code Civ. Proc. § 446* [*see Wings West Airlines v. Workers' Comp. Appeals Bd. (1986) 187 Cal. App. 3d 1047, 1055, 232 Cal. Rptr. 343* (under *Code Civ. Proc. § 446*, petition by Director of Department of Industrial Relations need not be verified)]. A declaration under penalty of perjury, in lieu of an affidavit, is permissible [*see Code Civ. Proc. §§ 446, 2015.5*], and is usually more convenient than an affidavit.

For forms of verification that may be adapted for use when required on papers filed with the WCAB, see Ch. 572, *Verifications* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling Requirements

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51-577 California Forms of Pleading and Practice--Annotated § 577.106

§ 577.106 Filing Papers

[1] In General

After the filing and processing of an initial application for adjudication of claim or other case-opening document, all documents required or permitted to be filed under the regulations must be filed with the district office of the Appeals Board having venue, except as provided by the rules of the Board, unless otherwise ordered by a WCJ or the Board [*8 Cal. Code Reg. § 10227(a)*].

[2] Manner of Filing Documents

Except as provided by *8 Cal. Code Reg. § 10603(a)* (regarding oversized exhibits, diagnostic imagining, physical exhibits, and exhibits on media), all documents are to be filed in paper form [*8 Cal. Code Reg. § 10228(a)*].

All paper documents will be scanned into the electronic adjudication file, then destroyed no sooner than 30 business days after filing, unless otherwise provided by these rules or ordered by a WCJ or the Appeals Board. A scanned document will have the same legal effect as a document filed in paper form [*8 Cal. Code Reg. § 10228(b)*].

Each of the following persons or entities must file optical character recognition forms completed by using a computer or typewriter with the exception of OCR forms that are prepared at a hearing or that, for good cause, are filed at trial [*8 Cal. Code Reg. § 10228(c)*; *see* Electronic Adjudication Management System (EAMS) Handbook/Instructional Manual for Optical Character Recognition (OCR) Form Filers, available on the DWC website (http://www.dir.ca.gov/dwc)]:

1. Any attorney representing any party or any lien claimant.

2. Any insurance carrier or any representative of any insurance carrier (including any claims adjustor).

3. Any self-insured employer or any representative of a self-insured employer (including any claims adjustor).

4. Any third-party administrator or any representative of a third-party administrator (including any claims adjustor).

5. Any lien claimant or any representative of any lien claimant, with the exception of: (A) a lien claimant (or a non-attorney representative of a lien claimant) asserting a living expenses lien under *Lab. Code § 4903(c)*; (B) a lien claimant (or a non-attorney representative of a lien claimant) asserting a burial expenses lien under *Lab. Code § 4903(d)*; or (C) a non-governmental lien claimant (or a non-attorney representative of a lien claimant) asserting a spousal or child support expenses lien under *Lab. Code § 4903(e)*.

OCR forms are posted in fillable format on the DWC website: http://www.dir.ca.gov/dwc/forms.html [*8 Cal. Code Reg. § 10228(d)*].

All unrepresented employees, unrepresented dependents, unrepresented uninsured employers, or lien claimants set forth in Item 5 in the list directly above must use OCR forms, where such forms are required, but if they do not have ready access to a computer or a typewriter, printed OCR forms will be available at the district offices, and the information added to the form may be hand-printed in black ink [*8 Cal. Code Reg. § 10228(e)*].

Whenever a party or lien claimant files a document using an OCR form, the party or lien claimant must use the appropriate OCR form required by these rules [*8 Cal. Code Reg. § 10228(f)*].

Except as set forth in *8 Cal. Code Reg. § 10228(e)* [*see above*], any OCR form that was not obtained from DWC's website must function with EAMS in an equivalent manner as the DWC form [*8 Cal. Code Reg. § 10228(g)*].

[3] Electronic Filing Exemption for Electronic Filing Trial

If a document is filed with EAMS as part of the electronic filing trial, that document does not need to be filed in compliance with *8 Cal. Code Reg. §§ 10228* and *10232* [*8 Cal. Code Reg. § 10229*].

[4] Time of Filing Documents

A paper document, including one filed by mail (regardless of when posted), is deemed filed on the date it is received, if received prior to 5 p.m. of a court day (i.e., Monday through Friday, except designated state holidays). A paper document received after 5 p.m. of a court day will be deemed filed as of the next court day [*8 Cal. Code Reg. § 10230(a)*].

When a document is filed by mail or by personal service, the Appeals Board or the district office that received the document for filing will affix on it an appropriate endorsement as evidence of receipt. The endorsement may be made by handwriting, hand-stamp, electronic date stamp, or by other means [*8 Cal. Code Reg. § 10230(b)*].

[5] Filing of Copies of Documents

Except as provided by *8 Cal. Code Reg. § 10603(a)* (regarding oversized exhibits, diagnostic imagining, physical exhibits, and exhibits on media), no "original" business, medical, or other documents may be filed with a district office [*8 Cal. Code Reg. § 10236(a)*]. Rather, only a photocopy or other reproduction of an original document may be filed, and it is presumed that the filed document is an accurate representation of the original document [*8 Cal. Code Reg. § 10236(b)*].

If a party or a lien claimant alleges that a filed document is inaccurate or unreliable, the party alleging that the document

is inaccurate or unreliable must state the basis for the objection. The filing party must establish that the document is an accurate representation of the original document [*8 Cal. Code Reg. § 10236(c)*].

A party or a lien claimant that elects to retain the original of an exhibit or proposed exhibit need not retain the original after either (1) the exhibit has been authenticated at trial or (2) a settlement that resolves all pending issues has been approved and all appeals have been exhausted or the time for seeking appellate review has expired [*8 Cal. Code Reg. § 10236(d)*].

For the discussion of the place for filing an application for adjudication of claim, see *discussion under § 577.87*.

[6] Petitions for Reconsideration or Removal and Subsequent Filings

At any time within 20 days after the service of the order or decision, or of the occurrence of the action in issue, any party may petition for removal, based on one or more of the following grounds [*8 Cal. Code Reg. § 10843(a)*]:

1. The order, decision, or action will result in significant prejudice.

2. The order, decision, or action will result in irreparable harm.

The petitioner must also demonstrate that reconsideration will not be an adequate remedy after the issuance of a final order, decision or award. Failure to file the petition to remove timely constitutes valid ground for dismissing the petition for removal [*8 Cal. Code Reg. § 10843(a)*].

The petition for removal and any answer must be verified on oath in the manner required for verified pleadings in courts of record [*8 Cal. Code Reg. § 10843(b)*].

A copy of the petition for removal must be served forthwith on all parties by the petitioner. Any adverse party may file an answer within 10 days after service. No supplemental petitions, pleadings, or responses will be considered unless requested or approved by the Appeals Board [*8 Cal. Code Reg. § 10843(c)*].

The WCJ may, within 15 days of the filing of the petition for removal, rescind the order or decision in issue, or take action to resolve the issue raised in the petition. If the judge so acts, or if the petitioner withdraws the petition at any time, the petition will be deemed automatically dismissed, requiring no further action by the Appeals Board. The issuance of a new order or decision, or the occurrence of a new action, will recommence the time period for filing a petition for removal, as described above [*8 Cal. Code Reg. § 10843(d)*].

The filing of a petition for removal does not terminate the judge's authority to proceed in a case or require the judge to continue or cancel a previously scheduled hearing, absent direction from the Appeals Board. After a petition for removal has been filed, the WCJ must consult with the presiding WCJ prior to proceeding in the case or continuing or canceling a scheduled hearing [*8 Cal. Code Reg. § 10843(e)*].

Except as otherwise provided by *8 Cal. Code Reg. § 10840* or *10865*, all documents filed in connection with any petition for reconsideration, petition for removal, petition for disqualification or any other matter pending before the Appeals Board must comply with the requirements of *8 Cal. Code Reg. §§ 10227*, *10228*, *10230*, *10232*, 10235, and *10236* [*see §§ 577.104*, *577.106[1], [2], [4], [5]*], including but not limited to the 25-page limitation of *8 Cal. Code Reg. § 10232(a)(10)* [*see § 577.104*], except that any supplemental petition or answer allowed by the Appeals Board under *8 Cal. Code Reg. § 10848* [*see below*] may not exceed 10 pages. Any verification, proof of service, exhibit, or document cover sheet filed with the petition or answer is not counted in determining the page limitation [*8 Cal. Code Reg. § 10845(a)*].

On its own motion, or on a clear and convincing showing of good cause, the Appeals Board may allow the filing of a petition, answer, or supplemental petition or answer that does not comply with the provisions set forth in the preceding paragraph, including but not limited to the page limitations. A request to exceed the page limitations must be made by a separate petition, made under penalty of perjury, that specifically sets forth the facts or other reasons why the request should be granted [*8 Cal. Code Reg. § 10845(b)*].

A document that has been sent directly to the Appeals Board by fax or e-mail will not be accepted for filing, unless otherwise ordered by the Appeals Board [*8 Cal. Code Reg. § 10845(c)*].

A petition for reconsideration, removal, or disqualification may be denied or dismissed if it is unsupported by specific references to the record and to the principles of law involved [*8 Cal. Code Reg. § 10846*].

When a petition for reconsideration, removal, or disqualification has been timely filed, supplemental petitions or pleadings or responses other than the answer will be considered only when specifically requested or approved by the Appeals Board. Supplemental petitions or pleadings or responses other than the answer, except as provided by this rule, will be neither accepted nor deemed filed for any purpose and will not be acknowledged or returned to the filing party [*8 Cal. Code Reg. § 10848*].

Service of copies of any petition for reconsideration, removal, or disqualification or any answer thereto must be made, in accordance with *8 Cal. Code Reg. § 10505* [*see § 577.108[2], [5][a] -[d]*], on all parties to the case and on any lien claimant, the validity of whose lien is specifically questioned by the petition, and to any case that has been consolidated therewith pursuant to *8 Cal. Code Reg. § 10589* [*see §§ 577.90, 577.146*]. Failure to file proof of service constitutes valid ground for dismissing the petition [*8 Cal. Code Reg. § 10850*].

[7] Papers That Will Not Be Filed

The following documents are not to be filed with the district office or the Appeals Board, except as a non-duplicative supporting exhibit or by order of a WCJ or the Board. Documents improperly submitted will not be accepted for filing or deemed filed and will not be acknowledged and may be discarded [*8 Cal. Code Reg. § 10222(b)*]:

- Letters to opposing parties or counsel.
- Subpoenas.
- Notices of taking deposition.
- Medical appointment letters.
- Proofs of service ordered pursuant to *8 Cal. Code Reg. § 10500*.
- Medical reports, except as required by *8 Cal. Code Reg. § 10233*.
- Copies of any decision of any federal or state court opinion otherwise available.
- Copies of any decision of the Appeals Board or a WCJ that is otherwise available.
- Duplicate medical and medical-legal reports.
- No diagnostic imaging as defined in *Lab. Code § 139.3(b)(1)* is to be transmitted to the district office or the Appeals Board unless it is ordered.

No document is to be sent by electronic mail or by fax directly to the district office or the Appeals Board. If a document is sent by electronic mail or fax directly to the district office, it will not be accepted for filing or deemed filed, will not be acknowledged, and may be discarded unless otherwise ordered by the WCJ or the Appeals Board [*8 Cal. Code Reg. § 10222(c)*].

Failure to comply with the rules of the Court Administrator will be deemed a bad faith action or tactic that is frivolous or solely intended to cause unnecessary delay unless that failure results from mistake, inadvertence, surprise, or excusable neglect [*8 Cal. Code Reg. § 10211*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsGeneral OverviewCivil ProceduresPleading & PracticePleadingsAnswersCivil ProceduresPleading & PracticePleadingsComplaintsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling Requirements

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51-577 California Forms of Pleading and Practice--Annotated § 577.107

§ 577.107 Duty to Furnish Correct Address

DWC is required to maintain an official participant record for each adjudication file, which must contain the names of all parties and lien claimants and their attorneys or hearing representatives [*8 Cal. Code Reg. § 10217(a)*].

In order to ensure that case parties and documents are accurately associated to the correct electronic adjudication file, uniform names for claims administrators' offices and representatives' offices are required to be used when filing documents in EAMS. These names are assigned by DWC [*8 Cal. Code Reg. § 10217(b)*]. DWC will maintain a list on its website of uniform names and mailing addresses and preferred method of service for claims administrators' offices and representatives' offices [*8 Cal. Code Reg. § 10217(b)(1)*]. Additions for new claims administrators' offices and representatives' offices and changes of name, location or address, telephone number, fax number, e-mail address, or preferred method of service must be registered by the entity requesting the change with the Central Registration Unit [*8 Cal. Code Reg. § 10217(b)(2)*; *see 8 Cal. Code Reg. § 10210(f)* (Central Registration Unit is unit within DWC that maintains website list of uniform names and addresses)]. The entity requesting the change must fax or e-mail a letter on letterhead with a signature from an authorized individual requesting the change to DWC's Central Registration Unit within five business days of any change. The entity must also advise all parties of any change of name, mailing address, or telephone number by furnishing the current information within five business days of any change [*8 Cal. Code Reg. § 10217(b)(2)(A)*; *see 8 Cal. Code Reg. § 10217(b)(2)(B)* (fax number for Central Registration Unit is: 1 (888) 822-9309, and e-mail address for Central Registration Unit is: cru@dir.ca.gov); *8 Cal. Code Reg. § 10217(b)(2)(C)* (new uniform name or address and preferred method of service will be posted by Central Registration Unit within 10 business days of receipt of request)].

Except as required in the preceding paragraph, every party and every lien claimant having an interest in an active case pending before the district office or the Appeals Board must advise the district office and all parties of any change of mailing address and telephone numbers by furnishing the current information within five business days of any change [*8 Cal. Code Reg. § 10217(c)*]. Similarly, every lien claimant that has filed a lien in a case pending in a district office must advise all parties within five business days of any change in the identity and/or telephone number of the person with authority to resolve the lien by furnishing the correct name and daytime telephone number of that person to the

interested parties, and must advise DWC of any such change after a declaration of readiness is filed [*8 Cal. Code Reg. § 10217(d)*]. Finally, every party and lien claimant having an interest in an inactive case must advise all other known parties, lien claimants, attorneys, and hearing representative within five business days of any change of address (which must include any change of mailing address and telephone numbers) by furnishing the correct and current address and/or number, and must advise DWC of any such change within five business days if there is an outstanding award of further medical treatment or if there is continuing jurisdiction pursuant to *Lab. Code §§ 5410, 5803*, and *5804* [*8 Cal. Code Reg. § 10217(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling Requirements

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51-577 California Forms of Pleading and Practice--Annotated § 577.108

§ 577.108 Service of Papers

[1] Application for Adjudication

Proceedings before the Appeals Board are initiated by the filing of an Application for Adjudication, a case opening Compromise and Release Agreement, a case opening Stipulations with Request for Award, or a Request for Findings of Fact under *8 Cal. Code Reg. § 10405* [*8 Cal. Code Reg. § 10400(a)*; *but see 8 Cal. Code Reg. §§ 10865, 10953* (exceptions)]. A case opening Compromise and Release Agreement, a case opening Stipulations with Request for Award, and a Request for Findings of Fact under *8 Cal. Code Reg. § 10405* is each an "application" for purposes of invoking the jurisdiction of the Appeals Board, but none of these documents is deemed an application for purposes of *Lab. Code § 4064(c)* [*8 Cal. Code Reg. § 10400(b)*].

When an initial application is filed, it will be assigned an adjudication case number and a venue [*8 Cal. Code Reg. § 10400(c)*]. (When filing an amended application, the applicant must indicate in the box on the application form that it is an "amended" application [*8 Cal. Code Reg. § 10400(d)*].)

The party or lien claimant filing an Application for Adjudication must concurrently serve a copy of the application and any accompanying documents on all other parties and lien claimants [*8 Cal. Code Reg. § 10400(e)*].

If the party filing the application is an unrepresented injured employee, an unrepresented dependent of a deceased employee, or a lien claimant or non-attorney representative of a lien claimant who falls within one of the exceptions of *8 Cal. Code Reg. § 10228(c)(5)(A)-(C)* [*see § 577.106[2]*], the Appeals Board [*8 Cal. Code Reg. § 10400(f)*]:

> 3. Must serve a conformed copy of the application on all parties and lien claimants, including the filing applicant, who are listed either on the application, on the proof of service to the application, or on the address record (if an address record was previously created for an earlier application).
>
> 4. If it is an initial application, must concurrently give notification of the assigned adjudication case

number and venue.

Such service is deemed service of a conformed copy of the application for purposes of *Lab. Code § 5501* [*8 Cal. Code Reg. § 10400(f)*].

For all other parties and lien claimants, the Appeals Board [*8 Cal. Code Reg. § 10400(g)*]:

3. Must serve a conformed copy of the application on the filing party or lien claimant (or, if represented, on the filing party or lien claimant's attorney or other representative).

4. If it is an initial application, must concurrently give notification of the assigned adjudication case number and venue.

Upon receipt of the conformed copy of the application, the filing party or lien claimant (or, if represented, the filing party or lien claimant's attorney or other representative) must forthwith serve a copy of the conformed application on all other parties and lien claimants who are listed on the application or on the proof of service to the application, and, if it is an initial application, concurrently notify all other parties and lien claimants of the assigned adjudication case number and venue [*8 Cal. Code Reg. § 10400(g)*]. Such service is deemed service of a conformed copy of the application for purposes of *Lab. Code § 5501* [*8 Cal. Code Reg. § 10400(g)*].

Disclosure of the applicant's social security number is voluntary, not mandatory. A failure to provide a social security number will not have any adverse consequences. Nevertheless, although an applicant is not required by law to provide that number, he or she is encouraged by the Appeals Board to do so. Social security numbers are used solely for identification and verification purposes in order to administer the workers' compensation system. A social security number will not be disclosed, made available, or otherwise used for purposes other than those specified, except with the consent of the applicant, or as permitted or required by statute, regulation, or judicial order [*8 Cal. Code Reg. § 10400(h)*].

[2] Other Papers Served by Party

The Appeals Board may, in its discretion, designate a party or lien claimant, or their attorney or agent of record, to make service of notices of the time and place of hearing, orders approving compromise and release, awards based on stipulations with request for award, and any interim or procedural orders. In deciding whether to exercise this discretion, the Appeals Board may consider whether service by it would be more efficient and cost-effective because most or all of the parties, lien claimants, attorneys, or agents of record to be served have specified e-mail or fax as their preferred method of service. If discretion is exercised so as to require designated service, the party, lien claimant, attorney, or agent of record designated to make service must retain the proof of service and not file it unless ordered to do so by the Appeals Board [*8 Cal. Code Reg. § 10500(a)*; *but see 8 Cal. Code Reg. § 10500(b)* (exceptions); *see also* [3], *below*].

The following specific rules apply when a document is served by a party, a lien claimant, or their attorney or other agent of record [*8 Cal. Code Reg. § 10505(a)*]. Except when a document is personally served, service of a document must be made by first-class mail or by an alternative method that will effect service that is equivalent to or more expeditious than first-class mail [*see 8 Cal. Code Reg. § 10505(b)* (acceptable alternative methods limited to express or priority mail or "a bona fide commercial delivery service or attorney service promising delivery within two business days, as shown on the service's invoice or receipt")], unless either of the following applies [*8 Cal. Code Reg. § 10505(b)*]:

1. The party, lien claimant, attorney, or agent being served has previously specified that a designated preferred method of service other than first-class mail may be used for any service, consistent with *8 Cal. Code Reg. § 10218* [*see § 577.12A[4]*].

2. The serving party, lien claimant, attorney, or agent and the receiving party, lien claimant, attorney, or agent previously agreed to some other method of service.

By prior agreement of the parties or lien claimants, or when authorized or requested by the receiving party or lien claimant, service of any document may be made by methods other than the designated preferred method of service [*8 Cal. Code Reg. § 10505(g)*].

The following rule applies when, after serving a document in accordance with *8 Cal. Code Reg. § 10505(d), (e), (f)* [*see* [5], *below*], and/or (g), the serving party or lien claimant (or their attorney or agent of record) subsequently receives notification that the service to one or more parties or lien claimants (or to their attorneys or agents of record) failed [*8 Cal. Code Reg. § 10505(h)*]:

1. When the serving party or lien claimant (or their attorney or agent of record) receives notification of failed service to any intended recipient(s), the server must promptly re-serve the document on the intended recipient(s), using the method of service (i.e., mail, e-mail, fax) best calculated to result in valid service on the intended recipient(s), even if the intended recipient(s) did not previously designate that method as their preferred method of service.

2. The server need not re-serve the document on intended recipients for whom the server did not receive notification of failed service.

3. On re-service, the server must execute a new proof of service in accordance with *8 Cal. Code Reg. § 10505(c), (d), (e)*, and/or *(f)* [*see* [5], *below*], showing re-service on the intended recipient(s).

Except for designated service under *8 Cal. Code Reg. § 10500* or as otherwise provided by the rules, service by any party or lien claimant must be made on the attorney(s) or agent(s) of record of each other affected party or affected lien claimant, unless that party or lien claimant is unrepresented, in which event service must be made directly on the party or lien claimant. Except as provided in *8 Cal. Code Reg. § 10500*, or as otherwise ordered by a WCJ or the Appeals Board, no party or lien claimant is required to serve any document on the injured employee or any dependent(s) of a deceased employee, if the employee or dependent is represented by an attorney or other agent of record [*8 Cal. Code Reg. § 10510(b)*].

Nothing in this rule precludes more comprehensive service, either as ordered by the Appeals Board or in the discretion of the Appeals Board or the parties [*8 Cal. Code Reg. § 10510(c)*].

No document, including letters or other writings, is to be filed by a party or lien claimant with the Appeals Board unless service of a copy is made on all parties, together with the filing of a proof of service as provided in *8 Cal. Code Reg. § 10505* [*8 Cal. Code Reg. § 10324(a)*].

[3] Other Papers Served by WCAB

All orders, decisions, findings, awards, minutes of hearing, notices of hearing, correspondence, and any other documents issued by the Appeals Board, including those being served by designated service in accordance with *8 Cal. Code Reg. § 10500*, must be served on [*8 Cal. Code Reg. § 10510(a)*]:

1. The injured employee or any dependent(s) of a deceased employee, whether or not the employee or dependent is represented by an attorney or other agent of record.

2. Each attorney or other agent of record of the injured employee or any dependent(s) of a deceased employee.

3. Each attorney or other agent of record for any other affected party or affected lien claimant, unless that party or lien claimant is unrepresented, in which event service is to be made directly on the party or lien claimant.

The Appeals Board must serve all parties and lien claimants of record notice of any final order, decision, or award issued by it on a disputed issue after submission. The Board may not designate a party or lien claimant, their attorney, or agent of record to serve any final order, decision, or award relating to a submitted disputed issue [*8 Cal. Code Reg. § 10500(b)*].

If the Appeals Board effects personal service of a document at a hearing or at a walk-through proceeding, the proof of personal service must be made by endorsement on the document, setting forth the fact of personal service, the name(s) of the person(s) served, and the date of service. The endorsement must bear the signature of the person making the service [*8 Cal. Code Reg. § 10500(c)*].

If the Appeals Board serves a document by mail, the proof of mail service must be made by endorsement on the document, setting forth the fact of mail service on the persons or entities listed on the official address record who have not designated e-mail or fax as their preferred method of service. The endorsement must state the date of mail service and bear the signature of the person making the service [*8 Cal. Code Reg. § 10500(d)*].

If the Appeals Board electronically serves a document through EAMS on persons or entities listed on the official address record who have designated e-mail or fax as their preferred method of service, the record of electronic service maintained in EAMS constitutes proof of service by the Board [*8 Cal. Code Reg. § 10500(e)*].

When an application for adjudication, stipulation with request for award, or compromise and release is filed in a death case in which there is a bona fide issue as to partial or total dependency, the filing party must serve copies of the documents on the Department of Industrial Relations, Death Without Dependents Unit [*8 Cal. Code Reg. § 10501*].

[4] Manner of Service

Service of any notice, order, or decision required by the workers' compensation law to be served on any person before, during, or after the institution of any proceeding before the WCAB may be made in the manner provided by *Code Civ. Proc. §§ 1010-1020* unless otherwise directed by the WCAB. In the latter event, the document must be served in accordance with the WCAB's direction or order [*Lab. Code § 5316*].

WCAB regulations provide that service of any document may be made by mail or personal service. Service of any document may be made by facsimile transmission by agreement of the parties or lien claimants, or when authorized or requested by the receiving party or lien claimant [*8 Cal. Code Reg. § 10505*].

If a document is served by mail, fax, e-mail, or any method other than personal service, the period of time for exercising or performing any right or duty to act or respond is extended by [*8 Cal. Code Reg. § 10507(a)*]:

- Five calendar days from the date of service, if the physical address of the party, lien claimant, attorney, or other agent of record being served is within California.

- Ten calendar days from the date of service, if the physical address of the party, lien claimant, attorney, or other agent of record being served is outside of California but within the United States.

- Twenty calendar days from the date of service, if the physical address of the party, lien claimant, attorney, or other agent of record being served is outside the United States.

For purposes of this rule, "physical address" means the street address or post office box of the party, lien claimant, attorney, or other agent of record being served, as reflected in the official address record at the time of service, even if the method of service actually used was fax, e-mail, or other agreed-upon method of service [*8 Cal. Code Reg. § 10507(b)*; *see 8 Cal. Code Reg. § 10217*; *see also § 577.12A[3*] (official participant record and duty to furnish correct address)].

This rule applies whether service is made by the Appeals Board, a party, a lien claimant, or an attorney or other agent of record [*8 Cal. Code Reg. § 10507(c)*].

If the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Appeals Board are closed, the act or response may be performed or exercised on the next business day [*8 Cal. Code Reg. § 10508*].

For discussion of service by mail in civil actions, see Ch. 518, *Service of Summons and Papers* .

When a district office of the WCAB maintains mailboxes for outgoing documents and allows consenting parties, lien claimants, and attorneys to obtain their documents from their mailboxes, documents so obtained are deemed to have been served on the party, lien claimant, or attorney by mail on the date of service specified on the document [*8 Cal. Code Reg. § 10506*].

The WCAB may, in the cases mentioned in the Code of Civil Procedure [*see Code Civ. Proc. § 415.50*], order service to be made by publication of notice of time and place of hearing. If service is ordered to be made by publication, the date of the hearing may be fixed at more than 30 days from the date of filing the application [*Lab. Code § 5316*].

[5] Proof of Service

[a] Personal Service

If a document is personally served by a party or lien claimant, the proof of personal service must be made by endorsement on the document, setting forth the fact of personal service, the name(s) of the person(s) served, and the date of service, and by the signature of the person making the service [*8 Cal. Code Reg. § 10505(c)*].

[b] Service by Mail

If a document is served by a party or lien claimant by mail on persons listed on the official address record who have designated mail as their preferred method of service, who have failed to make any designation, or who have previously agreed to accept mail service in accordance with *8 Cal. Code Reg. § 10505(g)*, the proof of mail service may be made by: (1) affidavit or declaration of service; (2) written statement endorsed on the document served and signed by the party making the statement; or (3) letter of transmittal. The proof of service must set forth the names and addresses of persons served, the fact of service by mail, the date of service, and the address(es) to which mailing was made [*8 Cal. Code Reg. § 10505(d)*].

[c] Service by E-Mail

If a document is served by a party or lien claimant by e-mail on persons listed on the official address record who have designated e-mail as their preferred method of service, or who have previously agreed to accept e-mail service in accordance with *8 Cal. Code Reg. § 10505(g)*, the proof of e-mail service must state [*8 Cal. Code Reg. § 10505(e)*]:

1. The e-mail address of the person making the e-mail service.

2. The date of the e-mail service.

3. The name(s) and e-mail address(es) of the person(s) served.

4. That the document was served by e-mail and that there was no report of any error or delay in the transmission of the e-mail.

Absent evidence to the contrary, service by e-mail is deemed complete at the time of transmission, unless a document is re-served in accordance with *8 Cal. Code Reg. § 10505(h)* [*8 Cal. Code Reg. § 10505(e)*].

[d] Service by Fax

If a document is served by a party or lien claimant by fax on persons listed on the official address record who have designated fax as their preferred method of service, or who have previously agreed to accept fax service in accordance with *8 Cal. Code Reg. § 10505(g)*, the proof of fax service must state [*8 Cal. Code Reg. § 10505(f)*]:

1. The sending fax machine telephone number of the person making the fax service.

2. The date and time of the fax service.

3. The name and the fax machine telephone number of the person served.

4. That the document was served via fax transmission and that the transmission was reported as complete and without error.

Absent evidence to the contrary, service by fax is deemed complete at the time of transmission, unless a document is re-served in accordance with *8 Cal. Code Reg. § 10505(h)* [*8 Cal. Code Reg. § 10505(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsGeneral OverviewCivil ProceduresPleading & PracticeService of ProcessMethodsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling Requirements

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[Reserved]

§§ 577.109[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.120

§ 577.120 Governing Law

Stipulations and requests for awards are governed by *Lab. Code § 5702* and *8 Cal. Code Reg. §§ 10400, 10496*, and *10497*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling Requirements

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51-577 California Forms of Pleading and Practice--Annotated § 577.121

§ 577.121 Written Stipulation

The parties may stipulate in writing regarding the facts relating to a matter in controversy and file the stipulation with the WCAB [*Lab. Code § 5702*]. The filing of a stipulation with a request for an award initiates a proceeding for the adjudication of rights and liabilities before the WCAB [*8 Cal. Code Reg. § 10400*]. When a compromise and release agreement or stipulations with request for an award is filed as an application for adjudication, it must be accompanied by a copy of the claim form for injuries occurring on or after January 1, 1990 [*8 Cal. Code Reg. § 10400*].

For a stipulations with request for award form in disability and death cases, see *§§ 577.470, 577.471*, respectively. For informational guidelines for submission of stipulations with request for award, see *§ 577.463*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling RequirementsWorkers' Compensation & SSDIAdministrative ProceedingsSettlements

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51-577 California Forms of Pleading and Practice--Annotated § 577.122

§ 577.122 Oral Stipulation

An award or order may be made based on an oral stipulation of the parties in open court, as well as on a written stipulation signed by the parties [*8 Cal. Code Reg. § 10496*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling RequirementsWorkers' Compensation & SSDIAdministrative ProceedingsSettlements

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51-577 California Forms of Pleading and Practice--Annotated § 577.123

§ 577.123 WCAB Action on Stipulation

The WCAB may either base its findings and award on the stipulation of the parties, or set the matter for hearing and take further testimony or make the further investigation necessary to enable it to determine the matter in controversy [*Lab. Code § 5702*; *see Draper v. Workers' Comp. Appeals Bd. (1983) 147 Cal. App. 3d 502, 507-508, 195 Cal. Rptr. 248* (stipulation not adequately reflecting applicant's disability should not be accepted by WCJ as basis for award)]. A stipulation does not have to be based on evidence to be binding on the parties. Thus, although the WCAB has discretion to reject factual stipulations, the discretion does not permit the WCAB to reject a stipulation solely on the ground that it is not supported by the evidence, absent good cause [*County of Sacramento v. Workers' Comp. Appeals Bd. (2000) 77 Cal. App. 4th 1114, 1121, 92 Cal. Rptr. 2d 290* (court of appeal reversed WCAB's action setting aside stipulation because it was not based on evidence, and held that stipulation could not be set aside absent good cause); *but see Turner Gas Co. v. Workmen's Comp. Appeals Bd. (1975) 47 Cal. App. 3d 286, 290, 120 Cal. Rptr. 663* (WCAB has discretion to reject stipulation and base its decision on the evidence presented at hearing)]. No finding may be made contrary to a stipulation of the parties on an issue, however, without providing the parties with notice and an opportunity to present evidence on the issue [*8 Cal. Code Reg. § 10497*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling RequirementsWorkers' Compensation & SSDIAdministrative ProceedingsHearings & ReviewWorkers' Compensation & SSDIAdministrative ProceedingsSettlements

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51-577 California Forms of Pleading and Practice--Annotated § 577.124

§ 577.124 Resolution of Liens

Before issuance of an award that resolves a case based upon the stipulations of the parties, if there remain any liens that have not been resolved or withdrawn, the parties must make a good-faith attempt to contact the lien claimants and resolve their liens. A good-faith attempt requires at least one contact of each lien claimant by telephone or letter [*8 Cal. Code Reg. § 10888*]. After issuing an award that resolves a case based upon the stipulations of the parties, if there remain any liens that have not been resolved or withdrawn, the workers' compensation judge must set the case for a lien conference, issue a 10-day notice of intention to order payment of any such lien in full or in part, or issue a 10-day notice of intention to disallow any such lien [*8 Cal. Code Reg. § 10888*]. Upon a showing of good cause, the workers' compensation judge may once continue a lien conference to another lien conference [*8 Cal. Code Reg. § 10888*]. If a lien cannot be resolved at a lien conference, the workers' compensation judge must set the case for trial [*8 Cal. Code Reg. § 10888*].

An agreement to "pay, adjust, or litigate" a lien, or its equivalent, or an award leaving a lien to be adjusted, is not a resolution of the lien [*8 Cal. Code Reg. § 10888*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticePleadingsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling RequirementsWorkers' Compensation & SSDIAdministrative ProceedingsSettlementsWorkers' Compensation & SSDIBenefit DeterminationsMedical BenefitsAuthorized Treatment

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51-577 California Forms of Pleading and Practice--Annotated §§ 577.125-577.129

[Reserved]

§§ 577.125[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.130

§ 577.130 Governing Law

Compromise and release agreements generally are governed by *Lab. Code §§ 5000-5004, 5100.6*, and compromise of occupational disease and cumulative injury claims is governed by *Lab. Code § 5005*. Settlement and release of claims against third-party tortfeasors is governed by *Lab. Code §§ 3859-3861* (discussed in subpart C § 577.330 et seq.). Agreements to release by compromise claims against the Subsequent Injuries Benefits Trust Fund are governed by *Lab. Code § 4754.5*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsAwardsTypesWorkers' Compensation & SSDIAdministrative ProceedingsSettlementsWorkers' Compensation & SSDIBenefit DeterminationsCumulative & Successive DisabilitiesWorkers' Compensation & SSDICompensabilityInjuriesOccupational DiseasesWorkers' Compensation & SSDIThird Party ActionsThird Party Liability

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51-577 California Forms of Pleading and Practice--Annotated § 577.131

§ 577.131 Right to Compromise and Release From Liability

[1] In General

No contract, rule, or regulation can exempt an employer from liability for compensation fixed by the workers' compensation law, but this does not impair the right of the interested parties to compromise any liability claimed to exist on account of injury or death [*Lab. Code § 5000(a)*]. Nor does it confer on an injured employee's dependents any interest that the employee may not release by compromise or for which the employee, or his or her estate, is in the event of such compromise accountable to dependents [*Lab. Code § 5000(b)*; *see Sumner v. Workers' Comp. Appeals Bd. (1983) 33 Cal. 3d 965, 967, 191 Cal. Rptr. 811, 663 P.2d 534* ; *Johnson v. Workers' Comp. Appeals Bd. (1970) 2 Cal. 3d 964, 969-972, 88 Cal. Rptr. 202, 471 P.2d 1002]* .

[2] Vocational Rehabilitation Benefits

In 2003 the legislature abolished the workers' compensation vocational rehabilitation program, repealing *Lab. Code §§ 139.5, 4635-4647,* and *5405.5* [*see* Stats. 2003, ch. 635, §§ 14, 14.3, 16]. In its place, the legislature created a "supplemental job displacement benefit" for specified workers who are permanently partially disabled, to be used for retraining. The new system applies only to injuries occurring on or after January 1, 2004 [*see § 577.45[2A]*].

In 2004, the legislature reenacted one of the statutes it had repealed in 2003, *Lab. Code § 139.5*, reinstating vocational rehabilitation. *However, the reenacted statute applies only to injuries occurring before January 1, 2004*, and it will remain in effect only until January 1, 2009, and as of that date is repealed, unless a later-enacted statute, that is enacted before January 1, 2009, deletes or extends that date [*Lab. Code § 139.5(k)*, (*l*)]. Various other vocational rehabilitation statutes, e.g., *Lab. Code §§ 4642, 4644(d), (e)*, and *5405.5*, once cross-referred to in former *Lab. Code § 139.5* but repealed in 2003, are also cross-referred to in the reenacted *Lab. Code § 139.5* and are now identified with the designation "former." Thus, although the issue may be further clarified by administrative and judicial action, it now appears that the statutory law on vocational rehabilitation applicable to pre-2004 injuries is confined to *Lab. Code § 139.5*, those "former" statutes to which it cross-refers, and those statutes not repealed in 2003. For example, the 2002 amendment to former *Lab. Code § 4646*, which allowed settlement of prospective vocational rehabilitation benefits, has

not been reenacted, while *Lab. Code § 5100.6*, forbidding such settlements, was never repealed and, thus, remains in force. As a consequence of these legislative developments, at least some of the discussion in this subsection applies only to pre-2004 injuries.

With respect to injuries occurring prior to January 1, 1990, the Labor Code provides that the WCAB may not permit the settlement of prospective compensation or indemnity payments or other benefits to which an employee is entitled under rehabilitation [*Lab. Code § 5100.6*]. The WCAB has held, however, that settlement of prospective rehabilitation benefits is permissible if there exists a good faith issue, which, if resolved against the employee, would defeat his or her claim to all workers' compensation benefits [*Thomas v. Sports Chalet, Inc. (1977) 42 Cal. Comp. Cases 625, 632-633]* . Prior to approving the agreement, the WCAB must make a finding that such a good faith issue exists [*8 Cal. Code Reg. § 10870*; *see State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (1983) 148 Cal. App. 3d 649, 652-653, 196 Cal. Rptr. 169]* .

In 1989, the Legislature adopted *Lab. Code § 4646*, and codified the WCAB's holding in *Thomas v. Sports Chalet*. For injuries occurring on or after January 1, 1990, settlement of prospective vocational rehabilitation services is not permitted pursuant to *Lab. Code § 5000 et seq.* unless a workers' compensation judge finds that there are good faith issues that, if resolved against the employee, would defeat the employee's right to all compensation under the workers' compensation law [*Lab. Code § 4646(a)*]. However, in 2002 the legislature amended *Lab. Code § 4646* to provide that an employer and a represented employee may agree to settle the employee's right to prospective vocational rehabilitation services with a one-time payment to the employee of not more than $10,000 for the employee's use in self-directed vocational rehabilitation. The settlement agreement must be submitted to, and approved by, the Vocational Rehabilitation Unit upon a finding that the employee has knowingly and voluntarily agreed to relinquish his or her rehabilitation rights. The Rehabilitation Unit may disapprove the settlement agreement only upon a finding that receipt of rehabilitation services is necessary to return the employee to suitable gainful employment [*Lab. Code § 4646(b)*; *see Lab. Code § 4644(a)(8)*]. Prior to entering into any such settlement agreement, the attorney for a represented employee must fully disclose and explain to the employee the nature and quality of the rights and privileges being waived [*Lab. Code § 4646(c)*]. The court of appeal has held that these amendments are procedural in nature and thus apply to injuries occurring prior to January 1, 2003, the date on which the amendments went into effect, as well as to injuries occurring after that date [*Pebworth v. Workers' Comp. Appeals Bd. (2004) 116 Cal. App. 4th 913, 917-919, 10 Cal. Rptr. 3d 832]* .

If a qualified injured worker signs a compromise and release that states he or she is not interested in receiving vocational rehabilitation services and the agreement does not release any claim to rehabilitation benefits, the workers' compensation judge is not required to make such a finding [*see Cisneros v. Workers' Comp. Appeals Bd. (1995) 41 Cal. App. 4th 759, 767, 48 Cal. Rptr. 2d 655]* .

For discussion of vocational rehabilitation benefits, see *§ 577.45[2]*.

For a form for settlement of prospective vocational rehabilitation services, see *§ 577.464*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsClaimsExemptions & WaiversWorkers' Compensation & SSDIAdministrative ProceedingsSettlementsWorkers' Compensation & SSDIBenefit DeterminationsMedical BenefitsRehabilitation

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51-577 California Forms of Pleading and Practice--Annotated § 577.132

§ 577.132 Compromise and Release Agreements

[1] Form and Contents of Agreement

The required form and contents of the agreement are set forth in *Lab. Code §§ 5003* (disability case) and 5004 (death case). Every compromise and release agreement must comply with these provisions and conform to the form provided by the WCAB [*8 Cal. Code Reg. § 10874*; *see forms in §§ 577.460 -577.462*.]

For informational guidelines for submission of compromise and release agreements, see *§ 577.463*.

[2] Filing Agreement

A copy of the compromise agreement signed by both parties must forthwith be filed with the WCAB [*Lab. Code § 5002*]. The filing of the agreement initiates the proceeding and constitutes the filing of an application for adjudication of rights and liabilities that may, in the WCAB's discretion, be set for hearing, reserving to the parties the right to put in issue facts that might otherwise have been admitted in the agreement [*8 Cal. Code Reg. §§ 10400, 10878*]. When a compromise of claim is submitted to the WCAB, an arbitrator, or a settlement conference referee for approval, the parties must also file with the WCAB, arbitrator, or settlement conference referee any liens served on the parties [*Lab. Code § 4903.1(b)*]. According to the DWC/WCAB Policy & Procedural Manual, parties may obtain approval of settlements by following a "walk-through" procedure established by each local office of the Board [DWC/WCAB Policy & Procedural Manual Index No. 6.7.4.1].

[3] Service of Agreement on Lien Claimants

If a lien claim is on file with the WCAB, or a party has been served with a lien, when the agreement is filed, a copy of the agreement must be served on the lien claimant by the parties [*8 Cal. Code Reg. § 10886*; *see 8 Cal. Code Reg. § 10505*]. No lien claim will be disallowed or reduced unless the lien claimant has been given notice and an opportunity to be heard [*8 Cal. Code Reg. § 10886*; *see also discussion under § 577.261*].

In a case of first impression, a court of appeal held that a medical lien claimant was denied due process and the right to a fair trial when it was not served with defense medical reports prior to trial and denied the right to cross-examine and make objections at trial. The court further held that the denial of the right to a fair trial as to the lien claimant was reversible per se. As stated by the court, a medical lien claimant has the right to participate in a workers' compensation hearing, must be served with notice of all hearings, and must be informed of the scope and purpose of any hearing that may affect its rights or liabilities [*Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd. (1994) 26 Cal. App. 4th 789, 803, 805-806, 32 Cal. Rptr. 2d 293]* .

[3A] Resolution of Liens

Before issuance of an order approving compromise and release that resolves a case, if there remain any liens that have not been resolved or withdrawn, the parties must make a good-faith attempt to contact the lien claimants and resolve their liens. A good-faith attempt requires at least one contact of each lien claimant by telephone or letter [*8 Cal. Code Reg. § 10888*]. After issuing an order approving compromise and release that resolves a case, if there remain any liens that have not been resolved or withdrawn, the workers' compensation judge must set the case for a lien conference, issue a 10-day notice of intention to order payment of any such lien in full or in part, or issue a 10-day notice of intention to disallow any such lien [*8 Cal. Code Reg. § 10888*]. Upon a showing of good cause, the workers' compensation judge may once continue a lien conference to another lien conference [*8 Cal. Code Reg. § 10888*]. If a lien cannot be resolved at a lien conference, the workers' compensation judge must set the case for trial [*8 Cal. Code Reg. § 10888*].

An agreement to "pay, adjust, or litigate" a lien, or its equivalent, or an award leaving a lien to be adjusted, is not a resolution of the lien [*8 Cal. Code Reg. § 10888*].

[4] WCAB Approval of Agreement Required

No release of liability or compromise agreement is valid unless approved by the WCAB or a WCJ [*Lab. Code § 5001*; *see Draper v. Workers' Comp. Appeals Bd. (1983) 147 Cal. App. 3d 502, 506-507, 195 Cal. Rptr. 248* ; *Kampner v. Workers' Comp. Appeals Bd. (1978) 86 Cal. App. 3d 376, 378 n.2, 150 Cal. Rptr. 222* ; *but see Lab. Code §§ 5272* (arbitrators and WCJs have same general statutory and regulatory duties and responsibilities), *5502(e)(2)* (settlement conference referees have authority to approve compromise and release agreements at settlement conferences)]. The effect of this requirement is to make every compromise invalid until it is approved [*see Sumner v. Workers' Comp. Appeals Bd. (1983) 33 Cal. 3d 965, 971, 191 Cal. Rptr. 811, 663 P.2d 534* ; *Johnson v. Workers' Comp. Appeals Bd. (1970) 2 Cal. 3d 964, 973, 88 Cal. Rptr. 202, 471 P.2d 1002]* .

[5] WCAB Action on Agreement

[a] Adequacy of Agreement

On the filing of the agreement and its approval, the WCAB may, without notice, on its own motion or on the application of either party, enter its award based on the agreement [*Lab. Code § 5002*]. The WCAB must inquire into the adequacy of the agreement, however, and may set the matter for hearing to take evidence when necessary to determine whether the agreement should be approved or disapproved or issue findings and awards [*8 Cal. Code Reg. § 10882*; *see Johnson v. Workers' Comp. Appeals Bd. (1970) 2 Cal. 3d 964, 973, 88 Cal. Rptr. 202, 471 P.2d 1002]* . If a hearing is held with the agreement used as an application, the defendants have available to them all defenses that were available as of the date the agreement was filed. The WCAB may thereafter either approve the agreement or disapprove it and issue findings and award after the hearing has been held and the matter submitted for decision [*8 Cal. Code Reg. § 10878*].

According to the DWC/WCAB Policy & Procedural Manual, a WCJ is required to communicate his or concerns about the adequacy of a proposed settlement in writing or by telephone before setting the issue for hearing. If no response is received within 15 days, the matter will be added to the WCJ's regular calendar; if an inadequate response is received, an order setting forth the missing evidence and suspending action will issue and be served on all parties and their

representatives, and a conference will be set within 30 days if the missing evidence is not received [DWC/WCAB Policy & Procedural Manual Index No. 6.7.4.1].

Agreements that provide for payment of less than the full amount of compensation due or to become due and that undertake to release the employer from all future liability will be approved only when it appears that a reasonable doubt exists as to the rights of the parties or that approval is in the best interest of the parties [*8 Cal. Code Reg. § 10870*].

[b] Proof of Service

Lab. Code § 3761 provides that if the employer notifies its compensation insurer, in writing, that, in the employer's opinion, no compensation is payable to an employee, at the employer's written request to the WCAB, the WCAB may approve a compromise and release agreement or stipulation that provides compensation to the employee only if there is proof of service on the employer by the insurer of notice of the time and place of the hearing at which the agreement or stipulation is to be approved [*Lab. Code § 3761(b)*]. The notice must be given to the employer at its last known address at least 15 days prior to the WCAB action, and proof of this service must be filed with the Appeals Board [*Lab. Code § 3761(b)*]. The insurer's failure to provide the required notice will not prohibit the WCAB from approving the compromise and release agreement or stipulation, but the WCAB must order the insurer to pay the employer's reasonable expenses under *Lab. Code § 5813* [*Lab. Code § 3761(b)*].

If the insurer has attached a declaration to the compromise and release agreement or stipulations with request for an award that it has complied with the provisions of *Lab. Code § 3761*, the WCAB may approve the compromise and release or stipulations with request for an award without a hearing or further proceedings [*8 Cal. Code Reg. § 10875*]. If the WCAB or a workers' compensation judge has approved a compromise and release or stipulations with request for an award and the insurer has failed to show proof of service pursuant to *Lab. Code § 3761(b)*, the WCAB or workers' compensation judge must award expenses under *Lab. Code § 5813* on the employer's request and after giving notice and an opportunity to be heard to the insurer [*8 Cal. Code Reg. § 10875*].

[6] Rescission of Agreement

A compromise and release agreement that has not been submitted to the WCAB for approval is neither valid nor binding on the parties [*see Lab. Code § 5001*]; therefore, a party may apparently withdraw from such an agreement at will. The WCAB may take into account any payment made to the employee, however, pursuant to the agreement in fixing the amount of compensation to paid [*see Lab. Code § 4909*].

[7] Reconsideration of Order Approving Agreement

An order approving a compromise and release agreement is subject to reconsideration on the same basis as any other final substantive order [*see Argonaut Ins. Exchange v. Industrial Acci. Com. (1958) 49 Cal. 2d 706, 710-711, 321 P.2d 460]* . If the time for reconsideration is past, a party seeking rescission may file a petition to reopen, on a showing of good cause [*see Silva v. Industrial Acci. Com. (1924) 68 Cal. App. 510, 514-515]* . For a discussion of reconsideration and petitons to reopen generally, see *§ 577.240* et seq.

[8] Effect of Compromise and Release on Non-Workers' Compensation Claims

The California Supreme Court has held that the standard language of the preprinted WCAB Form 15 [*see § 577.460[1]*], used in settling workers' compensation claims, releases only those claims within the scope of the workers' compensation system and does not apply to claims asserted in separate civil actions [*Claxton v. Waters (2004) 34 Cal. 4th 367, 376, 18 Cal. Rptr. 3d 246, 96 P.3d 496]* . Moreover, extrinsic evidence is not admissible to show that the preprinted form applies also to claims outside the workers' compensation system, since allowing such evidence would, said the Court, unduly burden the courts and create a trap for the unwary worker, while disallowing such extrinsic evidence would not be unfair to the parties [*Claxton v. Waters (2004) 34 Cal. 4th 367, 377-378, 18 Cal. Rptr. 3d 246,*

96 P.3d 496] . The Court also held that considerations of fairness and public policy required that the holdings in *Claxton* be applied prospectively only, i.e., to cases involving execution of the preprinted workers' compensation release form after finality of the Court's decision [*Claxton v. Waters (2004) 34 Cal. 4th 367, 378-379, 18 Cal. Rptr. 3d 246, 96 P.3d 496]* . The Court distinguished *Claxton* from *Jefferson v. Department of Youth Authority*, decided two years earlier, in which it had held that when an employee has knowledge of a potential claim against the employer at the time of executing a general release in a workers' compensation proceeding, but has not yet initiated litigation of that claim, the employee has the burden of expressly excepting the claim from the release. Absent this exception, and absent contrary extrinsic evidence, a court will enforce general language, such as was found in the compromise and release and attachment in the case before the Court, releasing all claims, including civil claims [*Jefferson v. California Department of Youth Authority (2002) 28 Cal. 4th 299, 310, 121 Cal. Rptr. 2d 391, 48 P.3d 423]* . In *Claxton*, the Court explained that it was the existence of an attachment to the preprinted form that led to the result in *Jefferson*, whereas no such attachment existed in *Claxton* [*Claxton v. Waters (2004) 34 Cal. 4th 367, 376, 18 Cal. Rptr. 3d 246, 96 P.3d 496]* . The *Jefferson* Court distinguished the factual configuration of the case before it from the facts existing in various court of appeal cases [*Lopez v. Sikkema (1991) 229 Cal. App. 3d 31, 36-39, 280 Cal. Rptr. 7* ; *Asare v. Hartford Fire Ins. Co. (1991) 1 Cal. App. 4th 856, 864-865,2 Cal. Rptr. 2d 452* ; *Delaney v. Superior Fast Freight (1993) 14 Cal. App. 4th 590, 599, 18 Cal. Rptr. 2d 33]* . In *Jefferson* the Court was ruling on a broadly worded agreement that expressly released "all claims and causes of action" relating to an injury and that included an attachment establishing the parties' intent to include civil claims within the scope of the release. In this situation, the Court held that the employee was barred from bringing a civil action under the California Fair Employment and Housing Act (FEHA) [*see Gov. Code § 12900 et seq.*] for damages relating to the same events that resulted in the injury [*Jefferson v. CaliforniaDepartment of Youth Authority (2002) 28 Cal. 4th 299, 301, 121 Cal. Rptr. 2d 391, 48 P.3d 423]* . The Court pointed out that in *Asare v. Hartford Fire Ins. Co.* extrinsic evidence established the parties' intent *not* to settle an FEHA action, whereas in *Jefferson* there was no such extrinsic evidence. Similarly, said the Court, in *Lopez v. Sikkema* and *Delaney v. Superior Fast Freight* there was no attachment to the compromise and release that made clear the parties' intent to settle civil claims in addition to workers' compensation claims. Moreover, the civil actions were already pending in those cases at the time the parties executed their workers' compensation settlements, whereas Jefferson had not filed her FEHA action when she executed the compromise and release, and the Youth Authority had no basis for assuming she intended to do so. In conclusion, the Court expressly neither approved nor disapproved the holdings in *Lopez* and *Delaney* [*Jefferson v. California Department of Youth Authority (2002) 28 Cal. 4th 299, 309-310, 121 Cal. Rptr. 2d 391, 48 P.3d 423]* . The various court of appeal cases that preceded *Jefferson* should be read with the Supreme Court's comments in mind. The *Claxton* Court noted that *Asare*, *Lopez*, and *Delaney* are not to be followed to the extent that they allow the admission of extrinsic evidence to try to show that the release extends to claims outside the workers' compensation system [*Claxton v. Waters (2004) 34 Cal. 4th 367, 379 n. 2, 18 Cal. Rptr. 3d 246, 96 P.3d 496]* .

In another case, decided prior to *Claxton v. Waters*, the court of appeal, reversing the trial court's grant of an employer's motion for summary judgment, held that settlement of an employee's workers' compensation claim via a document that included language agreeing "to settle any and all claims" did not so clearly operate to settle that same employee's FEHA civil action arising from the same alleged work-related incidents as to support dismissal of the employee's civil action via summary judgment, pursuant to *Jefferson*. The court of appeal found that extrinsic evidence was more than sufficient to establish the existence of a triable issue of fact concerning the parties' intent when the workers' compensation claim was settled, which extrinsic evidence included the facts that (1) the employee/applicant had two attorneys, one representing her in the workers' compensation action, the other representing her in the civil action, (2) the civil action was not mentioned in the compromise and release, (3) both the employer's workers' compensation lawyer and the WCJ, not merely the employee's workers' compensation attorney, conceded that the civil action was not discussed at any time during their negotiations, (4) the employee/applicant had no intent to include the civil action in the settlement of her workers' compensation case, since, at the time of that settlement, the employer's offer to settle the civil action for more than $1,000,000 was still open, and (5) after the workers' compensation settlement was signed, sealed, and paid, the employer again offered to settle the civil action for $1,100,000 plus the employee's attorney's fees, leaving no doubt in the court of appeal's mind that neither the workers' compensation attorneys nor their clients intended to include the civil action in the settlement of the workers' compensation claim [*Mitchell v. Union Central Life Ins. Co.*

(2004) 118 Cal. App. 4th 1331, 1341-1342, 13 Cal. Rptr. 3d 732] . In light of subsequently decided *Claxton v. Waters*, which discussed and did not criticize *Mitchell*, it appears that the *Mitchell* court reached the right result.

In this connection, it should be noted that the court of appeal has followed *Jefferson* in concluding that an employee's release of her workers' compensation claim against her employer, which released "all claims and causes of action" against the employer, included the release of the employee's civil action under FEHA, when the FEHA action had been filed prior to execution of the release but the employer had not yet been notified of that action [*Kohler v. Interstate Brands Corp. (2002) 103 Cal. App. 4th 1096, 1099-1102, 127 Cal. Rptr. 2d 366]* . In light of *Claxton*, the continued viability of this holding appears doubtful.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsClaimsFiling RequirementsWorkers' Compensation & SSDIAdministrative ProceedingsHearings & ReviewWorkers' Compensation & SSDIAdministrative ProceedingsSettlementsWorkers' Compensation & SSDIBenefit DeterminationsMedical BenefitsAuthorized TreatmentWorkers' Compensation & SSDIThird Party ActionsThird Party Liability

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§ 577.133 Occupational Disease or Cumulative Injury Case

In the case of a claim for occupational disease or cumulative injury [*see Lab. Code § 5500.5*], the employee and any employer or its insurance carrier may enter into a compromise and release agreement settling all or any part of the employee's claim, including a part of the employee's claim against any employer, but the agreement does not bar recovery from any one or all of the remaining employers or insurance carriers for the periods of exposure not so released [*Lab. Code § 5005*].

When approved by the WCAB or "referee" (now workers' compensation judge), the agreement is a total release as to the employer or insurance carrier for the portion or portions of the claim released [*Lab. Code § 5005*]. In approving the agreement, the WCAB or referee must determine the adequacy of the agreement as it shall then reflect the potential liability of the released exposure after apportionment, but need not make a final actual determination of the potential liability of the employer or employers for that portion of the exposure being released [*Lab. Code § 5005*].

In any case in which a compromise and release agreement of a portion of a claim has been made and approved, the employee may elect to proceed as provided in *Lab. Code § 5500.5* against any one or more of the remaining employers, or against an employer for that portion of its exposure not so released. In any such proceeding, that portion of liability attributable to the portion or portions of the exposure released will be assessed and deducted from the liability of the remaining defendant or defendants. No such defendant, however, can receive credit for any moneys paid by way of compromise and release in excess of the liability actually assessed against the released employments, and the employee will not receive any further benefits from the released employments for any liability assessed to them above what was paid by way of compromise and release [*Lab. Code § 5005*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsAwardsTypesWorkers' Compensation & SSDIAdministrative ProceedingsHearings & ReviewWorkers' Compensation & SSDIAdministrative

ProceedingsSettlementsWorkers' Compensation & SSDIBenefit DeterminationsCumulative & Successive DisabilitiesWorkers' Compensation & SSDICompensabilityInjuriesOccupational Diseases

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§ 577.134 Claims Against Subsequent Injuries Benefits Trust Fund

Subsequent injuries payments are governed by *Lab. Code §§ 4751-4755*. These sections do not, however, impair the right of the Attorney General or the Department of Industrial Relations to release by compromise any claims brought against the Subsequent Injuries Benefits Trust Fund [*Lab. Code § 4754.5*].

To be valid, any compromise and release agreement must be approved by the WCAB, but *Lab. Code §§ 5000-5004*, discussed *above*, do not apply [*Lab. Code § 4754.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsAwardsTypesWorkers' Compensation & SSDIAdministrative ProceedingsSettlementsWorkers' Compensation & SSDIBenefit DeterminationsCumulative & Successive DisabilitiesWorkers' Compensation & SSDICompensabilityInjuriesSuccessive Injuries

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[Reserved]

§§ 577.135[Reserved]

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§ 577.140 Governing Law

Investigations and hearings before the WCAB or a workers' compensation judge (hereinafter WCJ) are governed by the workers' compensation law and by the WCAB's Rules of Practice and Procedure [*Lab. Code § 5708*]. The WCAB's power to issue process is governed by *Lab. Code § 134*. Attachment is governed by *Lab. Code §§ 5600-5603*; removing and restoring cases to the active calendar by *8 Cal. Code Reg. §§ 10562* and *10582*; joinder and dismissal of parties by *Lab. Code §§ 5307.5(b)* and *5500.5(b)* and by *8 Cal. Code Reg. §§ 10380* and *10570*; dismissal of applications for adjudication by *Lab. Code § 5507* and *8 Cal. Code Reg. §§ 10562, 10582,* and *10780*; medical examinations by *Lab. Code §§ 4050-4056*; autopsies by *Lab. Code §§ 5706* and *5707*; assignment of cases and powers of WCJ's by *Lab. Code §§ 3715, 5309,* and *5310* and *8 Cal. Code Reg. §§ 10346* and *10348*; disqualification of WCJ's by *Lab. Code § 5311* and *8 Cal. Code Reg. § 10452*; subpoenas, subpoenas duces tecum, and witness fees by *Lab. Code §§ 130, 131,* and *4055.2* and *8 Cal. Code Reg. §§ 10530-10537*; depositions by *Lab. Code § 5710*; the WCAB's records and files by *8 Cal. Code Reg. § 10322*; mandatory settlement conferences by *Lab. Code § 5502(e)*; and substitution and dismissal of attorneys and agents by *8 Cal. Code Reg. § 10774*. Hearings are governed generally by *Lab. Code §§ 5700-5710* and by *8 Cal. Code Reg. §§ 10541*-10593, and expedited hearings governed by *Lab. Code § 5502(b)* and 8 Cal. Code Reg. §§ 10252, 10252.1.

Arbitration of workers' compensation disputes is governed generally by *Lab. Code §§ 4903.4, 5270 et seq.*, and 8 Cal. Code Reg. §§ 10997-10999 and is discussed in *§ 577.60* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesGeneral OverviewCivil ProcedureDiscoveryMethodsOral DepositionsWorkers' Compensation & SSDIAdministrative ProceedingsAlternative Dispute ResolutionWorkers' Compensation & SSDIAdministrative ProceedingsEvidenceMedical EvidenceWorkers' Compensation & SSDIAdministrative ProceedingsHearings & Review

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§ 577.141 Issuance of Process

The WCAB or any of its members may issue writs or summonses, warrants of attachment, and warrants of commitment, in like manner and to the same extent as courts of record [*Lab. Code § 134*]. The process so issued extends to all parts of California and may be served by any persons authorized to serve process of courts of record or any person designated for that purpose by the WCAB or any of its members. The person executing process will receive compensation allowed by the WCAB, which may not exceed the fees prescribed by law for similar services [*Lab. Code § 134*]. Fees prescribed by law for service of process are set forth in *Gov. Code §§ 26721* (sheriffs), 27821 (constables), 71266 (marshals and constables). The fees are paid in the same manner as witness fees [*Lab. Code § 134*; *see discussion under § 577.148*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeService of ProcessMethodsGeneral OverviewCivil ProceduresPleading & PracticeService of ProcessSummonsIssuanceCivil ProceduresRemediesWritsAncillary WritsWrits of Attachment

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§ 577.142 Attachment

In any case mentioned in *Code Civ. Proc. § 415.50* (service by publication) or in which the employer failed to secure the payment of compensation (*see* discussion in *§ 577.13[3]*), the WCAB may, on the filing of an application by or on behalf of an injured employee, his or her dependents, or any other party in interest, order the clerk of the superior court to issue writs of attachment authorizing the sheriff to attach the defendant's property as security for the payment of any compensation that may be awarded [*Lab. Code §§ 5600, 5602*]. The amount of the attachment is fixed by the WCAB and may not exceed the greatest probable award against the defendant in the matter [*Lab. Code § 5600*].

A writ of attachment may not be ordered if it appears from the application or supporting affidavit that the employer was, at the time of the injury, insured against workers' compensation liability [*Lab. Code § 5602*]. Moreover, if, at any time after the attachment is levied, it appears that the employer was insured and the requisites for dismissing the employer from the proceeding and substituting the insurer as defendant are established, the WCAB must forthwith discharge the attachment [*Lab. Code § 5602*]. In levying attachments, preference must be given to the employer's real property [*Lab. Code § 5603*].

Attachment procedures in workers' compensation proceedings are governed by the general civil attachment provisions set forth in *Code Civ. Proc. § 481.010 et seq.*, and the WCAB has the powers and duties of a court under those provisions [*see Lab. Code § 5601*]. For a discussion of *Code Civ. Proc. § 481.010 et seq.* and forms that may be adapted for use in proceedings under the workers' compensation law, see Ch. 62, *Attachment* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 577.143 Inactive Cases

[1] Removing and Restoring Cases to Calendar

In cases concerning injuries occurring prior to January 1, 1990, or on or after January 1, 1994, applications for adjudication filed without an accompanying declaration of readiness to proceed [*see § 577.399*] will be placed in inactive status. Further, any case that is set for hearing may be removed from the active calendar by an order taking off calendar [*8 Cal. Code Reg. § 10582*]. The WCAB may take any case off calendar when a party served with notice of trial fails to appear at the trial [*8 Cal. Code Reg. § 10562*; *see discussion under § 577.173*]. Cases in off-calendar status may be restored to the active calendar on the filing and service of a properly executed declaration of readiness to proceed [*8 Cal. Code Reg. § 10582*].

[2] Dismissal for Failure to Activate Case

Unless a case is activated for hearing within one year after the filing of the application for adjudication or the entry of an order taking it off calendar, the case may be dismissed after notice and opportunity to be heard. Dismissal may be entered at the request of an interested party or on the WCAB's own motion for lack of prosecution. A case may be dismissed after issuance of a 10-day notice of intention to dismiss and an opportunity to be heard, but not by an order with a clause rendering the order null and void if an objection showing good cause is filed [*8 Cal. Code Reg. § 10582*; *see § 577.453*].

At least 31 days before filing a petition to dismiss, a defendant must mail to the applicant and, if represented, the applicant's attorney or agent a letter stating his or her intention to file the petition 30 days after the date of the letter unless the applicant or his or her attorney or agent shows in writing some good reason for not dismissing the case. A copy of the letter and of any reply must be attached to the petition to dismiss, and a copy of the petition must be served on all parties and lien claimants [*8 Cal. Code Reg. § 10582*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteWorkers' Compensation & SSDIAdministrative ProceedingsAwardsTerminations

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§ 577.144 Joinder and Dismissal of Parties

After the application for adjudication has been filed, the WCAB, or a WCJ may order the joinder of additional parties necessary for the full adjudication of the case [*8 Cal. Code Reg. § 10380*; *see Lab. Code § 5307.5(b)*]. The procedure for joinder on request of any interested party of employers not named in the application for adjudication in occupational disease cases is set forth in *Lab. Code § 5500.5(b)*. A party not present or represented at the time of joinder must be served with copies of the order of joinder, the application, minutes of hearing and summary of evidence, medical reports, and other documents as directed in the order of joinder. The WCAB may designate the party or parties who are to make service [*8 Cal. Code Reg. § 10380*]. For a petition to join an omitted employer in a cumulative injury action, see *§ 577.430[1]*.

Improper or unnecessary parties may be dismissed by interlocutory or interim order [*8 Cal. Code Reg. § 10570*; *see § 577.431*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderNecessary PartiesWorkers' Compensation & SSDIAdministrative ProceedingsGeneral Overview

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§ 577.145 Workers' Compensation Judges

[1] Assignment of Cases to Workers' Compensation Judge

Cases are assigned to WCJs as provided in *8 Cal. Code Reg. § 10346* [*see Lab. Code § 5310*]. On the agreement of the parties, on the application of either, or on its own motion, and with or without notice, the appeals board may direct and order a WCJ [*Lab. Code § 5309(a), (b)*]:

- To try the issues in any proceeding before it, whether of fact or of law, and make and file a finding, decision, or award based on the issues; or

- To hold hearings and ascertain facts that are necessary for enabling the WCAB to determine any proceeding, for making any order, decision, or award, or for the board's information.

[2] Powers of Workers' Compensation Judge

[a] In General

The WCJ has full power, jurisdiction, and authority to hear and determine all issues of fact and law presented in any case regularly assigned for trial and to issue such interim, interlocutory, and final orders and such findings, decisions, and awards as may be necessary to the full adjudication of the case, including the fixing of the amount of the bond required in *Lab. Code § 3715* (bond required of employer who failed to secure payment of compensation) [*8 Cal. Code Reg. § 10348*].

[b] To Punish for Contempt and to Issue Process

The WCAB may, in accordance with its adopted rules of practice and procedure and on the agreement of the parties, on the application of either, or on its own motion, and with or without notice, direct and order a WCJ to issue writs or summons, warrants of attachment, warrants of commitment, and all necessary process in proceedings for direct and

hybrid contempt, in a like manner and to the same extent as courts of record [*Lab. Code § 5309(c)*; *8 Cal. Code Reg. § 10348*]. "Hybrid contempt" means a charge of contempt that arises from events occurring in the immediate presence of the WCJ for reasons that occur outside the presence of the WCJ [*Lab. Code § 5309(c)*].

The amendment of *Lab. Code § 5309* to add the foregoing subdivision (c) is apparently the Legislature's response to the holdings in *Morton v. Workers' Comp. Appeals Bd. (1987) 193 Cal. App. 3d 924, 238 Cal. Rptr. 651* , and *Marcus v. Workmen's Comp. Appeals Bd. (1973) 35 Cal. App. 3d 598, 111 Cal. Rptr. 101* , which had limited the exercise of the contempt power to the WCAB and its members [*see Lab. Code § 134*], and is indicative of the Legislature's intent that the WCAB have and exercise the contempt power of a court of record to protect its process in adjudicating workers' compensation claims [*Crawford v. Workers' Comp. Appeals Bd. (1989) 213 Cal. App. 3d 156, 171 n.8, 259 Cal. Rptr. 414]* . The WCJ may issue contempt orders only for willful misconduct. A finding of contempt is not an appropriate sanction for failure to appear at a workers' compensation conference or hearing, without evidence that the attorney violated an order to appear by the WCJ [*see Code of Civ. Proc. § 1209*; *Runnion v. Workers' Comp. Appeals Bd. (1997) 59 Cal. App. 4th 277, 286, 69 Cal. Rptr. 2d 105]* .

[c] Disqualification of Workers' Compensation Judge

[i] In General

Any party to a proceeding may object to a particular WCJ on any of the grounds specified in *Code Civ. Proc. § 641* (grounds of objection to referee in civil cases), and the objection will be heard and disposed of by the WCAB [*Lab. Code § 5311*]. The proceeding to disqualify is initiated by filing a petition for disqualification supported by an affidavit or declaration under penalty of perjury stating in detail the facts establishing the grounds for disqualification [*8 Cal. Code Reg. § 10452*].

For discussion of *Code Civ. Proc. § 641* and forms that may be adapted for use to object to a WCJ, see Ch, 38, *Reference* .

[ii] Petitions to Disqualify and for Reassignment

The requirements regarding when a petition to disqualify must be filed and the manner of its determination are set forth in *8 Cal. Code Reg. § 10452*. A petition for disqualification must be referred to the WCJ from whose decisions or actions relief is sought [*8 Cal. Code Reg. § 10860*].

Provisions governing petitions for automatic reassignment to another WCJ when a party or attorney believes that he or she cannot have a fair, expeditious, inexpensive, unencumbered, or impartial trial before the WCJ before whom the case is pending or to whom it is assigned, and the procedure to be followed, are set forth in *8 Cal. Code Reg. § 10453*.

[iii] WCAB's Action on Petition to Disqualify

The WCJ must prepare a report containing a statement of the contentions raised by the petition, a specific response to the allegations, and the action recommended on the petition [*8 Cal. Code Reg. § 10860*]. The WCJ must send the report and the WCAB file to the WCAB within 15 days after the petition is filed unless the WCAB grants an extension of time [*8 Cal. Code Reg. § 10860*]. At the same time the report is sent to the WCAB, the WCJ must serve a copy of the report on the parties and any lien claimant, the validity of whose lien is specifically affected by the petition for disqualification [*8 Cal. Code Reg. § 10860*].

Any order disqualifying a WCJ under *Lab. Code § 5311* may be made only by the WCAB [*8 Cal. Code Reg. § 10340(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudicial OfficersJudgesDisqualifications & RecusalsGroundsGeneral OverviewCivil ProcedureSanctionsContemptCivil ContemptWorkers' Compensation & SSDIAdministrative ProceedingsGeneral Overview

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§ 577.146 Consolidation of Cases

Consolidation of two or more related cases, involving either the same injured employee or multiple injured employees, rests in the sound discretion of the Appeals Board. In exercising that discretion, the Board is required to take into consideration any relevant factors, including but not limited to the following [*8 Cal. Code Reg. § 10589(a)*]:

1. Whether there are common issues of fact or law.

2. The complexity of the issues involved.

3. The potential prejudice to any party, including but not limited to whether granting consolidation would significantly delay the trial of any of the cases involved.

4. The avoidance of duplicate or inconsistent orders.

5. The efficient utilization of judicial resources.

Consolidation may be ordered for limited purposes or for all purposes [*8 Cal. Code Reg. § 10589(a)*].

Consolidation may be ordered by the Appeals Board on its own motion, or may be ordered based on a petition filed by one of the parties. A petition to consolidate must [*8 Cal. Code Reg. § 10589(b)*]:

1. List all named parties in each case.

2. Contain the adjudication case numbers of all the cases sought to be consolidated, with the lowest numbered case shown first.

3. Be filed in each case sought to be consolidated.

4. Be served on all attorneys or other representatives of record and on all non-represented parties in each case sought to be consolidated.

Any order regarding consolidation must be filed in each case to which the order relates [*8 Cal. Code Reg. § 10589(c)*].

If consolidation is ordered, the Appeals Board, in its discretion, may designate one case as the master file for exhibits and pleadings. If a master file is designated, any subsequent exhibits and pleadings filed by the parties and lien claimants during the period of consolidation are to be filed in the master case only. However, all pleadings and exhibit cover sheets filed must include the caption and case number of the master file case, followed by the case numbers of all of the other consolidated cases [*8 Cal. Code Reg. § 10589(d)*].

If a master file has been designated and the consolidated cases are tried, all relevant documentary evidence previously received in an individual case is deemed admitted in evidence in the consolidated proceedings under the master file and is deemed part of the record of each of the several consolidated cases. Evidence received subsequent to the designation of the master file is to be similarly received with like force and effect [*8 Cal. Code Reg. § 10589(e)*].

When cases are consolidated, joint minutes of hearing, summaries of evidence, opinions, decisions, orders, findings, or awards may be used. However, copies must be filed in the record of proceedings of each case [*8 Cal. Code Reg. § 10589(f)*].

Any request or petition to consolidate cases that are assigned to different WCJs in the same district office, or that have not been assigned but are venued at the same district office, must be referred to the Presiding WCJ of that office, whether the cases involve the same injured worker or multiple injured workers [*8 Cal. Code Reg. § 10260(a)*].

Any request or petition to consolidate cases involving the same injured worker that are assigned to WCJs at different district offices, or that have not been assigned but are venued at different district offices, must first be referred to the Presiding WCJs of the district offices to which the cases are assigned. If the Presiding WCJs are unable to agree on where the cases will be assigned for hearing, the conflict will be resolved by the Court Administrator upon referral by one of the presiding judges [*8 Cal. Code Reg. § 10260(b)*].

Any request or petition to consolidate cases involving multiple injured workers that are assigned to WCJs at different district offices, or that have not been assigned but are venued at different district offices, must be referred to the Court Administrator [*8 Cal. Code Reg. § 10260(c)*]. In resolving any request or petition to consolidate cases that are assigned to WCJs at different district offices, or that have not been assigned but are venued at different district offices, the Court Administrator must set the request or petition for a conference regarding the place of hearing. At or after the conference, the Court Administrator must determine the place of hearing and may determine the WCJ to whom the cases will be assigned, giving consideration to the factors set forth in *8 Cal. Code Reg. § 10589*. In reaching any determination, the Court Administrator may assign a WCJ to hear any discovery motions and disputes relevant to discovery in the action and to report their findings and recommendations to the Court Administrator [*8 Cal. Code Reg. § 10260(d)*]. Any party aggrieved by the determination of the Court Administrator may request proceedings pursuant to *Lab. Code § 5310*, except that an assignment to a particular WCJ may be challenged only in accordance with the provisions of *8 Cal. Code Reg. §§ 10452* and *10453* [*8 Cal. Code Reg. § 10260(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersConsolidation of ActionsWorkers' Compensation & SSDIAdministrative ProceedingsGeneral Overview

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51-577 California Forms of Pleading and Practice--Annotated § 577.147

§ 577.147 Subpoenas

[1] Issuance

The WCAB and each of its members, its secretary, assistant secretaries, and WCJ's may issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents, and testimony in any inquiry, investigation, hearing, or proceeding in any part of California [*Lab. Code § 130*]. The WCAB must issue subpoenas [*see § 577.410*] and subpoenas duces tecum [*see § 577.411*] on request in accordance with the provisions of *Code Civ. Proc. §§ 1985* and *1987.5* and *Gov. Code § 68097.1* [*8 Cal. Code Reg. § 10530*]. Subpoenas and subpoenas duces tecum must be on forms prescribed and approved by the WCAB, and for injuries occurring on or after January 1, 1990, must contain, in addition to the requirements of *Code Civ. Proc. § 1985*, an affidavit that a claim form has been duly filed pursuant to *Lab. Code § 5401(d)* [*8 Cal. Code Reg. § 10530*]. A notice to appear or produce in lieu of a subpoena or subpoena duces tecum in accordance with *Code Civ. Proc. § 1987* is, however, permissible [*8 Cal. Code Reg. § 10532*]. For forms of notices to appear or produce that may be adapted for use in workers' compensation proceedings, see Ch. 535, *Subpoena* .

[2] Recordings and Reproductions of Destroyed Originals

If records or other documentary evidence have been recorded or reproduced using the methods described in *Evid. Code § 1551* (lost or destroyed writings) and the original records destroyed, the film, legible print, or electronic recording must be produced in response to a subpoena duces tecum [*8 Cal. Code Reg. § 10534*].

[3] Service on Medical Witness

A subpoena requiring the appearance of a medical witness must be served not less than 10 days before the time the witness is required to appear and testify [*8 Cal. Code Reg. § 10537*].

[4] Personal Records

Any party who subpoenas any records in connection with a workers' compensation proceeding must, concurrently with the service of the subpoena on the person who has possession of the records, send a copy of the subpoena to all parties of record in the proceeding [*Lab. Code § 4055.2*].

[5] Employment Records

Any party who subpoenas employment records of an employee which are maintained by his or her current or former employer must notify the employee by delivering a copy of the subpoena, the affidavit supporting the issuance of the subpoena, and a specified notice that the records are being subpoenaed [*Code Civ. Proc. § 1985.6*].

[6] Records, Files, and Proceedings of WCAB

The records, files, and proceedings of the WCAB must not be taken from its offices either by informal request or in response to a subpoena duces tecum or any order issued out of any other court or tribunal. Except as precluded by *Civ. Code § 1798.24* (disclosure of information under Information Practices Act of 1977) or *Gov. Code § 6254* (exemption from disclosure of particular records), certified copies of portions of the records desired by litigants will be delivered on payment of the fees as provided in the Rules of the Administrative Director. [*8 Cal. Code Reg. § 10322*].

[7] Judicial Enforcement

[a] Petition to Compel

If a witness refuses to obey a subpoena issued by the WCAB or a WCJ, the WCAB or the WCJ before whom the testimony is to be given or produced may petition the superior court of the county in which the proceeding is pending for an order compelling the witness to attend and testify or produce the papers before the WCAB [*Lab. Code § 132*].

The petition must set forth the following:

- Due notice was given of the time and place of attendance of the witness, or the production of the papers;
- The witness was subpoenaed in the prescribed manner; and
- The witness failed and refused to obey the subpoena, or refused to answer questions propounded to him or her in the course of the proceeding.

The court will then issue an order directing the witness to appear before the court at a time (not more than 10 days from the date of the order) and place fixed in the order and show cause why he or she has not complied with the subpoena. A copy of the order must be served on the witness [*Lab. Code § 132*].

[b] WCAB's Action on Petition to Compel

If it appears to the court that the subpoena was regularly issued and that the witness was legally bound to comply with it, the court will enter an order that the witness appear before the WCAB or the WCJ at a time and place fixed in the order, and testify or produce the required papers, and on failure to obey the order, the witness will be treated as in contempt of court [*Lab. Code § 132*].

The foregoing remedy is cumulative and does not impair or interfere with the power of the WCAB or its members to enforce the attendance of witnesses and the production of papers, and to punish for contempt in the same manner and to the same extent as courts of record [*Lab. Code § 132*; *see discussion under § 577.12[3][b]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsScopeSubpoenasCivil ProcedurePretrial MattersSubpoenasWorkers' Compensation & SSDIAdministrative ProceedingsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsEvidenceWitnesses

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§ 577.148 Witness Fees

A witness who appears by order of the WCAB, any of its members, or a WCJ is entitled to receive, if demanded, the same fee and mileage allowed by law to a witness in civil cases [*Lab. Code § 131*]. The fees allowed a witness in civil cases are set forth in *Gov. Code § 68093* and *Evid. Code § 1563*. Payment of the fee is governed by *Lab. Code § 131*. The fee required to be paid medical examiners appointed by the WCAB or agreed to by the parties when subpoenaed for cross examination is set forth in *8 Cal. Code Reg. § 10536*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsCosts & Attorney Fees

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51-577 California Forms of Pleading and Practice--Annotated § 577.149

§ 577.149 Depositions

[1] In General

In any investigation or hearing before the WCAB, the WCAB, a WCJ, or any party may require the deposition of witnesses residing in or outside of California to be taken in the manner prescribed for like depositions in superior court civil actions, and, to that end, attendance of witnesses and the production of records may be required. Depositions may be taken outside California before any officer authorized to administer oaths [*Lab. Code § 5710(a)*]. The manner of taking depositions in civil actions is set forth in *Code Civ. Proc. §§ 2025.010-2025.620*. For a discussion of these provisions and forms that may be adapted for use in workers' compensation proceedings, see Ch. 193, *Discovery: Depositions* .

[2] Costs and Fees

If the employer or its insurance carrier requests that a deposition be taken of an injured employee or any person claiming benefits as a dependent of an injured employee, the deponent is entitled to receive the following, in addition to all other benefits [*Lab. Code § 5710(b)*]:

- All reasonable expenses of transportation, meals, and lodging incident to the deposition;
- Reimbursement for any loss of wages incurred during attendance at the deposition;
- A copy of the transcript of the deposition without cost;
- A reasonable allowance for attorney's fees for the deponent, if represented by an attorney licensed by the State Bar of California; and
- A reasonable allowance for interpreter's fees for the deponent if interpretation services are needed and provided by a language interpreter certified or deemed certified under *Gov. Code §§ 11513*

(inoperative 7/1/95 and repealed 1/1/96 per sunset legislation in Stats. 1993, ch. 701) or 68566 [*see 8 Cal. Code Reg. § 9795.3(a)(3)*].

The attorney's fee referred to in above is allowed at the discretion of the WCAB, which fixes the amount of the fee. The fee must be paid by the employer or the employer's insurer [*Lab. Code § 5710(b)*]. A non-attorney hearing representative who represents an employee at a deposition under the supervision of a licensed attorney may receive attorney's fees if the hearing representative's qualifications and the extent of the attorney's supervision is documented. The fees, however, should be awarded at a lower hourly rate than those awarded to licensed attorneys [*99 Cents Only Stores v. Workers' Comp. Appeals Bd. (2000) 80 Cal. App. 4th 644, 649-651, 95 Cal. Rptr. 2d 569]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency InvestigationsScopeSubpoenasCivil ProcedureDiscoveryMethodsOral DepositionsCivil ProcedureRemediesCosts & Attorney FeesCostsDepositions & TranscriptsWorkers' Compensation & SSDIAdministrative ProceedingsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsCosts & Attorney Fees

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51-577 California Forms of Pleading and Practice--Annotated § 577.150

§ 577.150 Sexual Harassment or Assault Cases

For injuries occurring on or after January 1, 1994 arising out of alleged conduct constituting sexual harassment, sexual assault, or sexual battery, any party seeking discovery concerning the applicant's sexual conduct with any person other than the defendant, whether consensual or nonconsensual or prior or subsequent to the alleged act complained of, must establish specific facts showing good cause for the discovery [*Lab. Code § 3208.4*]. These facts must be established on a noticed motion to the WCAB, and may not be made or considered at an ex parte hearing [*Lab. Code § 3208.4*].

The procedures set forth in *Evid. Code § 783* must be followed if evidence of the applicant's sexual conduct is offered to attack his or her credibility [*Lab. Code § 3208.4*]. Opinion evidence, evidence of reputation, and evidence of specific instances of the applicant's sexual conduct with any person other than the defendant, is not admissible by the defendant to prove consent by or the absence of injury to the applicant, unless the injury alleged by the applicant is in the nature of loss of consortium [*Lab. Code § 3208.4*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewCriminal Law & ProcedureCriminal OffensesSex CrimesSexual AssaultGeneral OverviewLabor & Employment LawDiscriminationHarassmentSexual HarassmentGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsGeneral Overview

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§ 577.151 X Rays

X rays may not be transmitted to the WCAB except under a specific order directing their production [*8 Cal. Code Reg. § 10608(f)*]. On order of the WCAB or a WCJ, a party must forthwith transmit all X rays to the person designated in the order [*8 Cal. Code Reg. § 10618*]. Additionally, on reasonable request of a party, X rays in the possession or subject to the control of an adverse party or lien claimant must be made available for examination by the requesting party or persons designated by that party at a time or place convenient to the persons to make the examination [*8 Cal. Code Reg. § 10618*; *see 8 Cal. Code Reg. § 10622* (penalty for refusing or preventing examination of X ray)].

X rays may be subpoenaed only when they are relevant to pending issues and there is a present and bona fide intent to offer them in evidence. X rays produced in violation of this provision will be ordered returned to their original custodian at the expense of the party causing them to be produced [*8 Cal. Code Reg. § 10618*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDiscoveryGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsEvidenceMedical Evidence

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51-577 California Forms of Pleading and Practice--Annotated § 577.152

§ 577.152 Notice of Medical Appointment

After the filing of an application for adjudication, each party must notify all parties, and their attorneys or representatives, of any medical appointment scheduled for the purposes of medical-legal evaluation. The notice must be given at the same time the injured worker is advised of the appointment [*8 Cal. Code Reg. § 10418*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsClaimsFiling RequirementsWorkers' Compensation & SSDIAdministrative ProceedingsEvidenceMedical Evidence

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51-577 California Forms of Pleading and Practice--Annotated § 577.153

§ 577.153 Substitution or Dismissal of Attorneys; Dismissal of Agents

Substitution or dismissal of attorneys must be made in the manner provided by *Code Civ. Proc. §§ 284, 285,* and *286* [*8 Cal. Code Reg. § 10774*; *see § 577.440*]. Dismissal of agents may be made by serving and filing a statement of dismissal [*8 Cal. Code Reg. § 10774*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureCounselDisqualificationsCivil ProcedureCounselSubstitutionsCivil ProcedureCounselWithdrawalsWorkers' Compensation & SSDIAdministrative ProceedingsClaimsGeneral Overview

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51-577 California Forms of Pleading and Practice--Annotated § 577.154

§ 577.154 Prehearing Motions

The WCJ to whom the case has been assigned may issue interim and interlocutory orders necessary to the adjudication of the case [*8 Cal. Code Reg. § 10348*]. Requests for orders are made by petition, the caption of which must contain the title and number of the case and indicate the type of relief sought [*8 Cal. Code Reg. § 10450*]. As a matter of practice, however, motions before trial are frequently in the form of letter requests.

If the particular motion involves a controversy between the parties, the WCJ may wait until the hearing to grant or deny the interlocutory order. Interlocutory orders are entered on the minutes of the hearing and become the order of the WCAB when they are filed [*8 Cal. Code Reg. §§ 10566(c), 10570*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeMotion PracticeGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsHearings & Review

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51-577 California Forms of Pleading and Practice--Annotated § 577.155

§ 577.155 Dismissals

[1] In General

Except as provided in *8 Cal. Code Reg. §§ 10562* (failure to appear) and 10582 (inactive cases), and unless good cause to the contrary appears, orders of dismissal of claim forms for injuries occurring on or after January 1, 1990, and before January 1, 1994, and orders of dismissal of applications for adjudication for injuries occurring before January 1, 1990, or on or after January 1, 1994, must be issued forthwith if requested by the employee [*8 Cal. Code Reg. § 10780*]. All other orders of dismissal of applications for adjudication for injuries occurring before January 1, 1990, or on or after January 1, 1994, must be issued only after service of a notice of intention, allowing at least 15 days for the adverse parties to show good cause to the contrary, and not by an order with a clause rendering the order null and void if an objection showing good cause is filed [*8 Cal. Code Reg. § 10780*].

For a petition for dismissal form, see *§ 577.453[1]*. For a request for dismissal by the employee form, see *§ 577.452[1]*. For discussion of mandatory settlement conferences generally, see *§ 577.157[1]*.

[2] Failure to Comply With Notice Requirement

Failure to comply with the 15-day notice requirement deprives the adverse parties of an adequate opportunity to present their objections and violates their due process rights; thus, any order of dismissal entered by a workers' compensation judge who fails to comply with the notice requirement must be vacated [*Fortich v. Workers' Comp. Appeals Bd. (1991) 233 Cal. App. 3d 1449, 1450-1454, 285 Cal. Rptr. 222]* .

[3] Grounds for Dismissal

An application may be dismissed, for example, by the WCAB after notice and opportunity to be heard as follows:

- When the applicant was served with a notice of trial but failed to appear [*8 Cal. Code Reg. § 10562*];

- When the application shows on its face that the applicant is not entitled to compensation [*Lab. Code § 5507* (discussed in *§ 577.83[1][d]*)];

- With respect to proceedings relating to injuries occurring before January 1, 1990, or on or after January 1, 1994, on the WCAB's own motion or on request of an interested party when the case has not been timely activated [*8 Cal. Code Reg. § 10582* (discussed in *§ 577.143[2]*)]; and

- When a party who has been served with notice of a mandatory settlement conference pursuant to *Lab. Code § 5502(e)* fails to appear at the conference [*see 8 Cal. Code Reg. § 10562*; *see also* discussion in *§ 577.157[5]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsGeneral OverviewCivil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedureDismissalsVoluntary DismissalsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsAwardsTerminationsWorkers' Compensation & SSDIAdministrative ProceedingsHearings & Review

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51-577 California Forms of Pleading and Practice--Annotated § 577.156

§ 577.156 Compelling Medical Examination or Autopsy

An employee is required, on the written request of his or her employer, to submit at reasonable intervals to examination by a practicing physician, provided and paid for by the employer, and to submit to examination at reasonable intervals by any physician selected by the Administrative Director of the Division of Workers' Compensation, the WCAB, or a WCJ [*Lab. Code § 4050*]. If the employee, after written request of the employer, fails or refuses to submit to or obstructs in any way the examination, his or her right to begin or maintain a workers' compensation proceeding is suspended [*Lab. Code § 4053*]. If the employee fails or refuses to submit to or obstructs in any way the examination after direction by the WCAB or a referee of the board, his or her right to disability payments accruing during the period of refusal or obstruction is barred [*Lab. Code § 4054*]. For a form of petition for an order to compel an employee to submit to a medical examination, see *§ 577.412[1]*.

An autopsy on the body of a deceased employee who dies as a result of industrial injuries may be ordered by the WCAB, subject to the consent of the dependents who have custody of the body [*Lab. Code §§ 5706, 5707*]. If the dependents, or a majority of them, having the custody of the body refuse to allow the autopsy, it shall not be performed. In such a case, on the hearing of any application for compensation, there is a disputable presumption that the injury or death was not due to causes entitling the claimants to death benefits under the workers' compensation law [*Lab. Code § 5707*]. For a form of petition for an order directing an exhumation and autopsy, see *§ 577.413[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsAwardsTerminationsWorkers' Compensation & SSDIAdministrative ProceedingsEvidenceMedical EvidenceWorkers' Compensation & SSDIBenefit DeterminationsDeath Benefits

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51-577 California Forms of Pleading and Practice--Annotated § 577.157

§ 577.157 Settlement Conference

[1] When Required

For all applications filed on and after January 1, 1991 (regardless of the date of injury), a mandatory settlement conference must be conducted not less than 10 nor more than 30 days after the filing of the declaration of readiness to proceed [*Lab. Code § 5502(e)(1)*].

A priority conference must be set upon the filing of a declaration of readiness requesting a priority conference that shows that the applicant is represented by an attorney and that the issues in dispute include employment and/or injury arising out of and in the course of employment [*8 Cal. Code Reg. § 10254(a)*]. Upon a showing of good cause, a WCJ may continue the matter to a status conference. At each priority or status conference, the parties must be prepared to set the matter for trial or to provide a plan to complete discovery [*8 Cal. Code Reg. § 10254(b)*]. To the extent possible, all priority and status conferences in a case are to be conducted by the same WCJ. When discovery is complete, or when the WCJ determines that the parties have had sufficient time to complete reasonable discovery, the case must be set for trial as expeditiously as possible [*8 Cal. Code Reg. § 10254(c)*].

[2] Continuances

Continuances of settlement conferences are not favored, but may be granted by a WCJ on any terms as are just on a showing of good cause [*Lab. Code § 5502.5*]. When determining a request for a continuance, the WCJ will take into consideration the complexity of the issues, the diligence of the parties, and the prejudice incurred on the part of any party as a result of granting or denying a continuance [*Lab. Code § 5502.5*].

[3] Qualifications of Referee

The settlement conference must be conducted by a workers' compensation judge or by a referee who is eligible to be either a WCJ or an arbitrator [*Lab. Code § 5502(e)(2)*; *see Lab. Code §§ 123.5(a)* (qualifications of WCJs), 5270.5 (qualifications of arbitrators)]. Settlement conference referees are employed by the administrative director and are

supervised in the performance of their judicial duties by the presiding workers' compensation judge [*see Lab. Code § 5502(e)(2)*].

[4] Conference Statement; Discovery; and Evidence

If the claim is not resolved at the mandatory settlement conference, the parties must file a pretrial conference statement (*see §§ 577.491[1]*, 577.492[1]) noting the specific issues in dispute, each party's proposed permanent disability rating, and listing the exhibits, and disclosing witnesses. Discovery closes on the date of the conference [*Lab. Code § 5502(e)(3)*]. *Lab. Code § 5502(e)(3)* further provides that "[e]vidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference." Although the preceding language is not entirely clear, this restriction on admissibility apparently refers to evidence that was not disclosed *at the settlement conference* or that was discovered after the conference.

The court of appeal has held admissible at trial the testimony of a vocational rehabilitation counselor developed as a consequence of meetings between the counselor and the injured employee, all of which took place following closure of discovery at the mandatory settlement conference. At the conference, the employee had identified the counselor as an expert trial witness. The court held that this was sufficient to comply with *Lab. Code § 5502*, stating that "discovery," as used in the statute, referred to pretrial processes undertaken to obtain information about an opposing party's case in preparation for trial, not to the collection and organization of information about one's own case. Thus, the statutory discovery restriction was not implicated in the present case [*Grupe Co. v. Workers' Comp. Appeals Bd. (2005) 132 Cal. App. 4th 977, 985-988, 34 Cal. Rptr. 3d 98]* .

[5] Appearance Required at Conference

All parties and lien claimants must appear at all hearings, except as provided below [*8 Cal. Code Reg. § 10240(a)*]:

> 1. When injury arising out of and in the course of employment is at issue, lien claimants not defined as a party [*see 8 Cal. Code Reg. § 10210(y)(3)* ("party" means: (1) person claiming to be injured employee or dependent of injured employee; (2) defendant; or (3) lien claimant when either (A) underlying case of injured employee or employee's dependent has been resolved or (B) injured employee or employee's dependent chooses not to proceed with his, her, or their case)] are not required to appear at the mandatory settlement conference or trial, unless otherwise ordered by the WCJ.
>
> 2. When liability for the claim has been accepted, lien claimants not defined as a party, with a lien claim of $25,000 or more, must appear or have a representative appear at the mandatory settlement conference or lien conference, unless the appearance is excused by the WCJ.
>
> 3. Lien claimants not defined as a party, with liens of less than $25,000, must be available by telephone with settlement authority and must notify defendant(s) of the telephone number at which the defendant may reach them during the mandatory settlement conference or lien conference, although the WCJ may order the appearance of lien claimants not defined as a party, with liens of less than $25,000, at a mandatory settlement conference or lien conference.
>
> 4. All lien claimants must appear at trial at which their lien(s) is an issue to be decided.

All parties must have a person available with settlement authority at the mandatory settlement conference or lien conference, although the person with settlement authority need not be present if an attorney or representative who is present can obtain immediate authority by telephone [*8 Cal. Code Reg. § 10240(b)*].

Unless the notice otherwise provides, the applicant must be present at a mandatory settlement conference, as provided in *Lab. Code § 5502(e)* [*8 Cal. Code Reg. § 10240(c)*].

Appearance at a hearing not covered by this rule is at the discretion of the WCJ [*8 Cal. Code Reg. § 10240(d)*].

If a party served with notice of a mandatory settlement conference fails to appear at the conference, the workers' compensation judge may dismiss the application for adjudication after issuing 10 days' notice of intention to dismiss [*8 Cal. Code Reg. § 10562*]. Alternatively, the workers' compensation judge may close discovery and forward the case to the presiding workers' compensation judge to set the case for trial [*8 Cal. Code Reg. § 10562*]. If a party, after notice, fails to appear at a conference, and on a showing of good cause for the failure to appear, the workers' compensation judge may take the case off calendar or may continue the case to a date certain [*8 Cal. Code Reg. § 10562*].

When a lien claimant served with notice of a conference fails to appear at the conference in person or by attorney or representative, and fails to have a person with settlement authority available by telephone, the workers' compensation judge may dismiss the lien claim after issuing a 10-day notice of intention to dismiss with or without prejudice, or may close discovery and forward the case to the presiding worker's compensation judge to set for trial [*8 Cal. Code Reg. § 10562(d)*].

[6] Conduct of Mandatory Conference

[a] In General

At the conference, the workers' compensation judge has authority to resolve the dispute, including the authority to inquire into the adequacy and completeness, including provision for lien claims, of compromise and release agreements or stipulations with request for award or orders, and to issue orders approving compromise and release agreements or awards or orders based on approved stipulations [*Lab. Code § 5502(e)(2)*; *8 Cal. Code Reg. § 10353(a)*]. The workers' compensation judge may also make orders and rulings regarding admission of evidence and discovery matters, including admission of offers of proof and stipulations of testimony when appropriate and necessary for resolution of the dispute, and may submit and decide the dispute on the record pursuant to the agreement of the parties. However, the workers' compensation judge may not hear sworn testimony at any conference [*8 Cal. Code Reg. § 10353(a)*].

Subject to the provisions of *Lab. Code § 5502(e)(1)* (time limitations for settlement conference), the workers' compensation judge may temporarily adjourn a conference to a time certain to facilitate a specific resolution of the dispute [*8 Cal. Code Reg. § 10353(b)*].

[b] Pre-Trial Statement

If the dispute cannot be resolved, the parties must file, at the mandatory settlement conference, a joint pretrial statement setting forth the issues and stipulations for trial, witnesses, exhibits, and the proposed permanent disability rating [*8 Cal. Code Reg. § 10353(c)*]. The parties may modify their proposed ratings only when evidence, relevant to the proposed ratings, and disclosed or obtained after the mandatory settlement conference, becomes admissible under *Lab. Code § 5502(e)(3)* [*Lab. Code § 5502(e)(2)*; *8 Cal. Code Reg. § 10353(c)*].

[c] Summary of Proceedings

A summary of the conference proceedings, including the joint pretrial statement and the disposition, must be filed by the workers' compensation judge in the record of the proceedings on a form prescribed and approved by the WCAB and must be served on the parties [*8 Cal. Code Reg. § 10353(c)*].

[7] Hearing Date When Dispute Unresolved by Settlement Conference

If the dispute is not resolved, the regular hearing must be held within 75 days after the declaration of readiness to proceed was filed [*Lab. Code § 5502(e)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteCivil ProcedurePretrial MattersGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsAwardsTerminationsWorkers' Compensation & SSDIAdministrative ProceedingsSettlementsWorkers' Compensation & SSDIBenefit DeterminationsMedical BenefitsAuthorized Treatment

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51-577 California Forms of Pleading and Practice--Annotated § 577.158

§ 577.158 Walk-Through Documents

A "walk-through" document is a document that is presented to a WCJ for immediate action. Notwithstanding the provisions of *8 Cal. Code Reg. § 10250* (relating to the filing of declarations of readiness) and *8 Cal. Code Reg. § 10544* (relating to notices of hearing), the following provisions govern walk-through documents [*8 Cal. Code Reg. § 10280(a)*].

Each district office will have a designee of the Presiding WCJ available to assign walk-through cases from 8:00 a.m. to 11:00 a.m. and 1:00 p.m. to 4:00 p.m. on court days [*8 Cal. Code Reg. § 10280(b)*].

The following documents may be submitted on a walk-through basis [*8 Cal. Code Reg. § 10280(c)*]:

1. Compromise and releases.

2. Stipulations with request for award.

3. Petitions for attorney's fees for representation of the applicant in vocational rehabilitation.

4. Petitions for attorney's fees for representation of the applicant at a deposition.

5. Petitions to compel attendance at a medical examination or deposition.

The following procedures are to be followed for filing walk-through documents [*8 Cal. Code Reg. § 10280(d)*]:

1. A walk-through settlement document (i.e., a compromise and release or a stipulations with request for award), and all supporting medical reports and other supporting documents not previously filed, must be filed directly with the WCJ at the date and time of the walk-through. The party presenting the walk-through settlement must use the appropriate form, document cover sheet, and document separator

sheet. Permanent and stationary medical or medical-legal reports must be indicated as such. In addition, each walk-through settlement document (i.e., a compromise and release or a stipulations with request for award) must be accompanied by a proof of service showing that the settlement document was served on all other parties to the settlement, on any defendant not executing the settlement who may be liable for the payment of additional compensation, and on all lien claimants whose liens have not been resolved. A case opening settlement document being submitted for a walk-through must be submitted no later than noon of the court day before any action on the walk-through, and must be designated as a walk-through document. All documents in support of the settlement document must be submitted at the walk-through with the assigned WCJ.

2. A walk-through petition (i.e., a petition for vocational rehabilitation attorney's fees, a petition for deposition attorney's fees, or a petition to compel attendance at a medical examination or deposition) and all other documents relating to the walk-through petition, including any supporting documentation, must be filed directly with the WCJ at the date and time of the walk-through. The party presenting the walk-through petition must use the appropriate form, document cover sheet, and document separator. In addition, at the date and time of the walk-through, the party filing the walk-through petition must file a proof of service directly to the WCJ, as follows:

A. For a petition for attorney's fees for representation of the applicant in vocational rehabilitation, a proof of service showing service on the injured worker and the defendant alleged to be liable for paying the fees.

B. For a petition for attorney's fees for representation of the applicant at a deposition, a proof of service showing service on the injured worker and the defendant alleged to be liable for paying the fees.

C. For a petition to compel attendance at a medical examination or deposition, a proof of service showing service on the injured worker, the injured worker's attorney, and all defendants.

When appearing for the walk-through proceeding, the party filing the walk-through document must appear before the district office staff person designated by the Presiding WCJ to assign the walk-through document to a WCJ. The filing party must then appear before the assigned judge. If the assigned judge is unavailable for any reason, the filing party must then proceed to the Presiding WCJ for possible reassignment to another judge [*8 Cal. Code Reg. § 10280(e)*].

A WCJ who is presented with a walk-through settlement document will approve it, disapprove it, suspend action on it, or accept it for later review and action. If a WCJ is presented with so many walk-through settlement documents that review of them will interfere with the cases scheduled before him or her for hearing, the judge may refer the walk-through settlement to the Presiding WCJ for possible reassignment to another WCJ [*8 Cal. Code Reg. § 10280(f)*].

A walk-through document may be acted on only by a WCJ at the district office that has venue. If an injured worker has existing cases at two or more district offices that have venue, a walk-through document may be filed at any office having venue over an existing case that is a subject of the walk-through document. An existing case is a case that has been filed and assigned a case number prior to the filing of the walk-through document [*8 Cal. Code Reg. § 10280(g)*].

A walk-through document may be acted on by any WCJ except as follows [*8 Cal. Code Reg. § 10280(h)*]:

1. If a judge has taken testimony, any walk-through document in that case must be acted on by the judge who took testimony if that judge works at the district office to which the case is assigned, unless the presiding judge allows it to be acted on by another judge.

2. If a judge has reviewed a document and declined to approve it, a walk-through document in that case must be acted on by the same judge, if that judge works at the district office to which the case is assigned, unless the presiding judge allows it to be acted on by another judge.

A WCJ who is presented with a walk-through petition for attorney's fees or petition to compel attendance must issue an order in compliance with *8 Cal. Code Reg. § 10349* [*8 Cal. Code Reg. § 10280(i)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsClaimsFiling RequirementsWorkers' Compensation & SSDIAdministrative ProceedingsCosts & Attorney FeesWorkers' Compensation & SSDIAdministrative ProceedingsEvidenceMedical EvidenceWorkers' Compensation & SSDIAdministrative ProceedingsHearings & ReviewWorkers' Compensation & SSDIAdministrative ProceedingsSettlements

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§ 577.159 Emergency Petitions for Stay

A party may present to the Presiding WCJ of the district office having venue a petition to stay an action by another party pending a hearing [*8 Cal. Code Reg. § 10281(a)*].

Each district office will have a designee of the Presiding WCJ available to assign petitions for stay from 8:00 a.m. to 11:00 a.m. and 1:00 p.m. to 4:00 p.m. on court days [*8 Cal. Code Reg. § 10281(b)*].

A party who walks through a petition to stay an action must provide notice to the opposing party or parties no later than 10:00 a.m. of the immediately preceding court day. This notice must (1) state with specificity the nature of the relief to be requested by the petition to stay; and (2) state the date, time, and place that the petition to stay will be presented. A copy of the petition to stay must be attached to the notice. The notice may be given by either fax or e-mail. If notice by fax or e-mail fails, or if an opposing party's fax number or e-mail address are unknown, notice must be given in the manner best calculated to expeditiously and timely advise the opposing party of the information set forth in this paragraph, including notice by phone or by overnight mail or delivery service. First-class mail may not be used for notice of a petition to stay an action [*8 Cal. Code Reg. § 10281(c)*].

A petition to stay an action must be accompanied by a declaration regarding notice, stating under penalty of perjury (1) the notice given, including the date, time, manner, and name of the party informed; (2) the relief sought; and (3) whether opposition is expected. In addition, if the petitioner was unable to give timely notice to the opposing party, the declaration under penalty of perjury also must state that the petitioner in good faith attempted to inform the opposing party but was unable to do so, specifying the efforts made to inform the opposing party [*8 Cal. Code Reg. § 10281(d)*].

Upon the receipt of a proper petition to stay an action, the Presiding WCJ or his or her designee must, in his or her discretion, either (1) deny the petition; (2) grant a temporary stay and set the petition for a formal hearing; or (3) set the petition for a formal hearing, without either denying the petition or granting a temporary stay [*8 Cal. Code Reg. § 10281(e)*].

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[Reserved]

§§ 577.160[Reserved]

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§ 577.170 Governing Law

Hearings are governed generally by *Lab. Code §§ 5700-5710* and by *8 Cal. Code Reg. §§ 10541*-10593, and expedited hearings governed by *Lab. Code § 5502(b)* and 8 Cal. Code Reg. §§ 10252, 10252.1.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsHearings & Review

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§ 577.171 Types of Hearings

"Hearing" means any trial, mandatory settlement conference, rating mandatory settlement conference, status conference, or priority conference [*8 Cal. Code Reg. § 10301(s)*; *see 8 Cal. Code Reg. § 10301(u),(v), (z), (aa), (dd)*]. All parties must be present at the time of trial, and the defendants must have a person available with settlement authority. If a lien claimant whose lien has not been resolved or withdrawn is not present at the time of trial, the lien claimant must have a person available with settlement authority, either in person or by telephone [*8 Cal. Code Reg. § 10240*; *see also § 577.157[5*] (appearances required at mandatory settlement conference)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsHearings & ReviewWorkers' Compensation & SSDIAdministrative ProceedingsSettlements

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§ 577.172 Time for Hearing

[1] In General

A hearing must be held not less than 10 days or more than 60 days after the date the declaration of readiness to proceed is filed, unless the issue or issues concerned require an expedited hearing or settlement conference pursuant to *Lab. Code § 5502(b), (c), (e)* [*Lab. Code § 5502(a)*]. When a claim form has been filed for an injury occurring between January 1, 1990, and January 1, 1994, an application for adjudication must accompany the declaration of readiness to proceed [*Lab. Code § 5502(a)*]. If the notice of hearing is served by publication, the hearing date may be fixed at more than 30 days from the date the application was filed [*Lab. Code § 5316*]. For a discussion of expedited hearings, see [3], *below*. For a discussion of settlement conferences, see *§ 577.157*.

The hearing provisions set forth in *Labor Code § 5502* do not apply in cases involving the Director of the Department of Industrial Relations in his or her capacity as administrator of the Uninsured Employers Benefits Trust Fund, unless proof of service, as specified in *Labor Code § 3716(d)(1)*, has been filed with the WCAB and provided to the Director, valid jurisdiction has been established over the employer, and the Fund has been joined [*Lab. Code § 5502(f)*]. The provisions in *Lab. Code § 5502* apply irrespective of the date of injury [*Lab. Code § 5502(g)*].

[2] Continuances

Continuances of hearings or expedited hearings (discussed under [3], *below*) are not favored, but may be granted by a WCJ on any terms as are just on a showing of good cause [*Lab. Code § 5502.5*; *8 Cal. Code Reg. § 10243*]. When determining a request for a continuance, the WCJ will take into consideration the complexity of the issues, the diligence of the parties, and the prejudice incurred on the part of any party as a result of granting or denying a continuance [*Lab. Code § 5502.5*].

According to the DWC/WCAB Policy & Procedural Manual, a conflict between a scheduled hearing and an attorney's court appearance elsewhere will not constitute good cause for a continuance unless the attorney provides notice of the conflict within 10 days, permitting another case to be substituted. Likewise, failure to be prepared, failure to complete

discovery, failure to complete medical evaluations despite the allowance of reasonable time to do so, and failure to have the requisite settlement authority do not constitute good cause to continue a case [DWC/WCAB Policy & Procedural Manual Index No. 6.7.4.1].

Cases that cannot be heard by the assigned WCJ because the WCJ is engaged in another trial will not automatically be continued, but will be referred to the Presiding Judge for possible reassignment to another WCJ who has time to hear the case that day. However, upon agreement, a case can be continued to another day when the originally assigned WCJ will be available, provided the order is served on all parties and representatives [DWC/WCAB Policy & Procedural Manual Index No. 6.7.4.1].

[3] Expedited Hearing Procedure

The Court Administrator has established, as required by *Lab. Code § 5502(b)*, a uniform priority calendar for issues requiring an expedited hearing and decision. In cases in which expedited hearing procedures apply, the hearing must be held, and a determination as to the rights of the parties made and filed, within 30 days after the declaration of readiness to proceed is filed [*Lab. Code § 5502(b)*].

When injury to any part or parts of the body is accepted as compensable by the employer, a party is entitled to an expedited priority hearing and decision upon the filing of an application for adjudication of claim and a declaration of readiness to proceed pursuant to *8 Cal. Code Reg. § 10250* establishing a bona fide, good faith dispute as to any of the following [*Lab Code § 5502(b)*; *8* Cal. Code Reg. § 10252(a); *see § 577.490* (required form for declaration of readiness to proceed to expedited hearing (trial))]:

1. The employee's entitlement to medical treatment pursuant to *Lab. Code § 4600*.

2. The employee's entitlement to, or the amount of, temporary disability indemnity payments.

3. The employee's entitlement to vocational rehabilitation services, or the termination of an employer's liability to provide these services to an employee.

4. The employee's entitlement to compensation from one or more responsible employers when two or more employers dispute liability as among themselves.

An expedited hearing may be set upon request when injury to any part or parts of the body is accepted as compensable by the employer and the issues include medical treatment or temporary disability for a disputed body part or parts [*8 Cal. Code Reg. § 10252(b)*].

A WCJ assigned to a case involving a disputed body part or parts may redesignate the expedited hearing as a mandatory settlement conference, receive a pretrial conference statement pursuant to *Lab. Code § 5502(e)(3)*, close discovery, and schedule the case for trial on the issues presented, if the WCJ determines, in consultation with the Presiding WCJ, that the case is not appropriate for expedited determination [*8 Cal. Code Reg. § 10252(c)*].

Grounds for the redesignation of an expedited hearing includes, but is not limited to, cases in which the direct and cross-examination of the applicant will be prolonged, or in which there are multiple witnesses who will offer extensive testimony [*8 Cal. Code Reg. § 10252(d)*].

The parties are expected to submit for decision all matters properly in issue at a single trial and to produce all necessary evidence, including witnesses, documents, medical reports, payroll statements, and all other matters considered essential in the proof of a party's claim or defense [*8 Cal. Code Reg. § 10252(e)*].

The Court Administrator has established a priority conference calendar for cases in which the employee is represented by an attorney and the issues in dispute are employment or injury arising out of employment or in the course of employment. The conference is to be conducted by a workers' compensation judge within 30 days after the declaration of readiness to proceed. If the dispute cannot be resolved at the conference, a trial will be set as expeditiously as possible, unless good cause is shown why discovery is not complete, in which case status conferences are to be held at regular intervals. The case will be set for trial when discovery is complete or the workers' compensation judge determines that the parties have had sufficient time in which to complete reasonable discovery. A determination as to the right of the parties must be made and filed within 30 days after the trial [*Lab. Code § 5502(c)*; *8 Cal. Code Reg. § 10254*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePretrial MattersContinuancesWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling RequirementsWorkers' Compensation & SSDIAdministrative ProceedingsHearings & Review

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§ 577.173 Notice of Hearing and Failure to Appear

[1] Notice

The WCAB generally serves notice of the time and place of the hearing on all parties and lien claimants and their attorneys or other agents of record by mail at their addresses of record or by personal service [*see Lab. Code §§ 5316, 5504; 8 Cal. Code Reg. § 10544*]. However, the WCAB may, in its discretion, designate a party or lien claimant to make service of notice of the time and place of hearing [*8 Cal. Code Reg. § 10500*].

The notice must also include a statement explaining the right to have an interpreter present, at the claim's administrator's expense, if the applicant does not proficiently speak or understand English [*8 Cal. Code Reg. §§ 9795.2, 9795.3(a)(4)*]. The WCAB must serve the notice not less than 10 days before the date of hearing, except when notice is waived, a different time is expressly agreed to by all parties and concurred in by the WCAB, or the proceedings involve a claim against the Subsequent Injuries Benefits Trust Fund [*8 Cal. Code Reg. § 10544*].

[2] Failure to Appear

When a party served with notice of trial fails to appear at trial either in person or by attorney or representative, the WCAB may dismiss the application for adjudication after issuing 10 days' notice of intention to dismiss, or may hear evidence and, after service of minutes of hearing and summary of evidence, which must include a 10-day notice of intention to submit, make decision that is just and proper [*8 Cal. Code Reg. § 10562*]. If a party, after notice, fails to appear at a trial, and on a showing of good cause for the failure to appear, the workers' compensation judge may take the case off calendar or may continue the case to a date certain [*8 Cal. Code Reg. § 10562*].

When a lien claimant served with notice of a trial fails to appear, the workers' compensation judge may dismiss the lien claim after issuing a 10-day notice of intention to dismiss with or without prejudice, or may hear the evidence and, after service of the minutes of hearing and summary of evidence that must include a 10-day notice of intention to submit, make a decision that is just and proper, or may defer the issue of the lien and submit the case on the remaining issues [*8 Cal. Code Reg. § 10562(e)*]. If the workers' compensation judge defers a lien issue, upon the issuance of his or her

decision on the remaining issues, the judge must issue a 10-day notice of intention to order payment of the lien in full or in part, or issue a 10-day notice of intention to disallow the lien, or continue the lien issue to a lien conference [*8 Cal. Code Reg. § 10562(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling RequirementsWorkers' Compensation & SSDIAdministrative ProceedingsHearings & Review

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§ 577.174 Single Trial Requirement

The parties are expected to submit for decision all matters properly in issue at a single trial and to produce at the trial all necessary evidence, including witnesses, documents, medical reports, payroll statements, and all other matters considered essential in the proof of a party's claim or defense. However, a WCJ may order that the issues in a case be bifurcated and tried separately, upon a showing of good cause [*8 Cal. Code Reg. § 10560*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDismissalsInvoluntary DismissalsFailures to ProsecuteWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling RequirementsWorkers' Compensation & SSDIAdministrative ProceedingsHearings & Review

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§ 577.175 Hearings in Cases Involving Uninsured Employers Benefits Trust Fund, Subsequent Injuries Benefits Trust Fund, or Death Without Dependents

Cases involving the Uninsured Employers Benefits Trust Fund or the Subsequent Injuries Benefits Trust Fund as a party, or involving death without dependents, may only be heard for conference, mandatory settlement conference, standby conference, or rating calendar at the district WCAB office located in San Francisco, Los Angeles, Van Nuys, Anaheim, Sacramento, or San Diego, except for good cause shown and with the Administrative Director's consent [*Lab. Code § 3714(a)*]. For these cases,the presiding judge of the WCAB located in the cities specified may permit a conference, in which no testimony will be taken, to be conducted by telephone conference call among the parties and their attorneys of record who do not reside in the county in which the WCAB is located [*Lab. Code § 3714(b)*].

Any filings of documents necessary for the proceedings may be served on the WCAB and the parties by facsimile machine, but, if so served, must also be served, as required by regulation, on the WCAB and the parties within five working days [*Lab. Code § 3714(c)*]. These provisions are effective for a period of two years commencing on the date the Administrative Director certifies that the rearrangement of judicial resources and conference call facilities required by these provisions are in place [*Lab. Code § 3714(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsHearings & ReviewWorkers' Compensation & SSDIAdministrative ProceedingsSettlementsWorkers' Compensation & SSDIBenefit DeterminationsDeath BenefitsWorkers' Compensation & SSDICoverageActions Against EmployersStatutory Requirements

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51-577 California Forms of Pleading and Practice--Annotated § 577.176

§ 577.176 Qualified Interpreters

[1] Definition

For purposes of these requirements, "qualified interpreter" means a language interpreter certified, or deemed certified, pursuant to Article 8 (commencing with Section 11435.05) of Chapter 4.5 of Part 1 of Division 3 of Title 2 of, or *Gov. Code § 68566* [*Lab. Code §§ 4600, 5811(b)*; *8 Cal. Code Reg. § 9795.1(f)*].

[2] Entitlement

When, at the request of the employer, the employer's insurer, the administrative director, the WCAB, or a workers' compensation judge, an employee submits to an examination by a physician and the employee does not proficiently speak or understand the English language, he or she is entitled to the services of a qualified interpreter in accordance with conditions and a fee schedule prescribed by the Administrative Director [*Lab. Code § 4600(f)*; *see* former *8 Cal. Code Reg. § 9795.3(b)* (fees for interpreter services provided before April 1, 1997); *8 Cal. Code Reg. § 9795.3* (operative December 30, 1996) (fees for interpreter services provided on or after April 1, 1997); *see also 8 Cal. Code Reg. § 9795.4(c)*]. These services must be provided by the employer [*Lab. Code § 4600(f)*].

The notice of a hearing, deposition, or other setting must include a statement explaining the employee's right to have an interpreter present if he or she does not proficiently speak or understand English. When a party is designated to serve notice, it is that party's responsibility to include the statement in the notice [*8 Cal. Code Reg. § 9795.2*].

[3] Fees

The employer's claims administrator may also be required to pay for interpreter fees in settings determined by the WCAB to be reasonable and necessary to determine the validity and extent of injury to an employee [*see Lab. Code § 5811(b)*]. Such settings specifically include depositions ofinjured employees and dependents seeking benefits, appeals board hearings, arbitrations, formal and informal rehabilitation conferences, conferences with information and assistance officers to assist in resolving disputes between injured employees and claims administrators, and

comprehensive medical-legal evaluations including any follow-up or supplemental evaluations [*8 Cal. Code Reg. § 9795.3(a)*].

It is the responsibility of any party producing a witness requiring an interpreter to arrange for the presence of a qualified interpreter [*Lab. Code § 5811(b)*]. For injuries occurring before January 1, 1994, interpreter fees that are reasonably, actually, and necessarily incurred must be allowed as a cost, provided they are in accordance with the Administrative Director's fee schedule [*Lab. Code § 5811(b)*; *8 Cal. Code Reg. § 10564*]. Recovery must be allowed in the amount charged by the interpreter unless proof of unreasonableness is entered by the party contesting the reasonableness of the charge, or the charge is manifestly unreasonable [*8 Cal. Code Reg. § 10564*]. For injuries occurring on or after January 1, 1994, interpreter's fees that are reasonably, actually, and necessarily incurred must be allowed as provided by *Lab. Code §§ 4600, 5710,* and *5811,* as amended July 16, 1993 [*8 Cal. Code Reg. § 10564*]. Interpreter's fees as defined in *Lab. Code § 4620,* which are reasonably, actually, and necessarily incurred as provided in *Lab. Code § 4621,* must be allowed in accordance with the Administrative Director's fee schedule [*8 Cal. Code Reg. § 10564*; *see* former *8 Cal. Code Reg. § 9795.3(b), (d)* (applicable to interpreter services provided before April 1, 1997); *8 Cal. Code Reg. §§ 9795.3(b), (d)* (operative December 30, 1996) (fees for interpreter services provided on or after April 1, 1997); *8 Cal. Code Reg. §§ 9795.3(c), (e)*; *see also 8 Cal. Code Reg. § 9795.4(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceCompetencyInterpretersWorkers' Compensation & SSDIAdministrative ProceedingsCosts & Attorney FeesWorkers' Compensation & SSDIAdministrative ProceedingsEvidenceWitnessesWorkers' Compensation & SSDIAdministrative ProceedingsHearings & Review

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§ 577.176A Devices to Assist the Hearing Impaired

In any administrative hearing of a public agency, when a party, witness, attorney, judicial employee, judge, juror, or other participant is hearing impaired, the individual who is hearing impaired, on his or her request, is to be provided with a functioning assistive listening system or a computer-aided transcription system. Any individual requiring this equipment must give advance notice of his or her need to the appropriate court or agency at the time the hearing is set or not later than five days before the hearing [*Civ. Code § 54.8(a)*]. "Individual who is hearing impaired" means an individual with a hearing loss, who, with sufficient amplification or a computer-aided transcription system, is able to fully participate in the proceeding [*Civ. Code § 54.8(j)*].

Assistive listening systems include, but are not limited to, special devices that transmit amplified speech by means of audio-induction loops, radio frequency systems (AM or FM), or infrared transmission. Personal receivers, headphones, and neck loops must be available on request by individuals who are hearing impaired [*Civ. Code § 54.8(b)*]. If a computer-aided transcription system is requested, sufficient display terminals must be provided to allow the individual who is hearing impaired to read the real-time transcript of the proceeding without difficulty [*Civ. Code § 54.8(c)*].

A sign must be posted in a prominent place indicating the availability of, and how to request, an assistive listening system and a computer-aided transcription system. Notice of the availability of the systems must be posted with notice of trials [*Civ. Code § 54.8(d)*].

In any administrative hearing of a public agency, in which the individual who is hearing impaired is a party, witness, attorney, judicial employee, judge, juror, or other participant, and has requested use of an assistive listening system or computer-aided transcription system, the proceedings are not to commence until the system is in place and functioning [*Civ. Code § 54.8(i)*]. In no case is this statute to be construed to prescribe a lesser standard of accessibility or usability than that provided by Title II of the Americans with Disabilities Act of 1990 and federal regulations adopted pursuant to that act [*Civ. Code § 54.8(k)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsCosts & Attorney FeesWorkers' Compensation & SSDIAdministrative ProceedingsEvidenceWitnessesWorkers' Compensation & SSDIAdministrative ProceedingsHearings & Review

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§ 577.177 Reporting of Proceedings and Transcripts

Oral testimony, objections, and rulings must be taken down in shorthand by a competent phonographic reporter, but, unless otherwise ordered by a commissioner, a deputy commissioner, or a presiding WCJ, testimony taken at the hearing will not be transcribed except on the request of a party accompanied by the prescribed fee [*Lab. Code § 5708*; *8 Cal. Code Reg. § 10740*]. The manner of making the request and deposit of the fee, as well as the proscription against making photographic copies of a transcript from the board file except on payment of the amount prescribed by law for a copy of the transcript, are set forth in *8 Cal. Code Reg. § 10740*.

Stenographic reporters' notes or electronic sound recording of testimony must be retained for a period of six years after the taking of them and thereafter may be destroyed or otherwise disposed of [*8 Cal. Code Reg. § 10273(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDocumentary EvidenceWritingsTranscripts & TranslationsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsHearings & Review

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51-577 California Forms of Pleading and Practice--Annotated § 577.178

§ 577.178 Evidence

[1] Rules of Evidence

The WCAB and WCJs are not bound by the common law or statutory rules of evidence and procedure in conducting hearings and investigations, but may make inquiry, through oral testimony and records, in the manner that is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of the workers' compensation law [*Lab. Code § 5708*]. Consequently, no order, decision, award, or rule will be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure. Nor will an order, decision, award, or rule be invalidated by any informality in the manner of taking testimony [*Lab. Code § 5709*].

[2] Form of Evidence

Reports, publications, and other writings that may be received in evidence are listed in *Lab. Code § 5703*. The admissibility of certified copies of reports and records of any governmental agency in lieu of the originals is authorized by *8 Cal. Code Reg. § 10604*. The extent to which permanent disability evaluation reports constitute evidence is set forth in *8 Cal. Code Reg. §§ 9750* and *10602*. Physicians' reports and waiver of the right to cross examine a physician on his or her report are governed by *8 Cal. Code Reg. §§ 10606-10616* and *10622*. Rules applicable to X rays are set forth in *8 Cal. Code Reg. § 10618*. Use of hospital and physicians' records are governed by *8 Cal. Code Reg. § 10626*, and the service of copies of documents, including videotapes, to be offered into evidence is governed by *8 Cal. Code Reg. § 10601*. The admissibility of optical image reproductions, photostatic, microfilm, microcard, miniature photographic, and other photographic copies or reproductions of writings preserved as business records is governed by *8 Cal. Code Reg. § 10605*. Similarly, the presumption of the accuracy of a printed representation of images stored on a video or digital medium, including the rules regarding attacks on and support of that presumption, are set forth in *8 Cal. Code Reg. § 10605*.

The filing of a document does not signify its receipt in evidence, and, except for the documents listed in *8 Cal. Code Reg. § 10750* (discussed under *§ 577.182*), only those documents that have been received in evidence will be included

in the record of proceedings on the case [*8 Cal. Code Reg. § 10600*].

[3] Procedure on Evidence Taken Without Notice

Transcripts or summaries of testimony taken without notice and copies of all reports and other matters added to the record, other than during the course of an open hearing, must be served on the parties to the proceeding. Unless it is otherwise expressly provided, the parties shall be allowed 10 days after service of such testimony and reports to produce evidence in explanation or rebuttal or to request further proceedings before the case will be deemed submitted for decision [*see Lab. Code § 5704*; *8 Cal. Code Reg. § 10580*].

[4] Return of Exhibits

Any party filing an original document or other pieces of evidence pursuant to *8 Cal. Code Reg. § 10603(a)* (regarding oversized exhibits, diagnostic imagining, physical exhibits, and exhibits on media) must, at the time of filing, either (1) arrange for the return of the document or evidence, at the filing party's sole expense, at the conclusion of all proceedings and appeals, or (2) be deemed by not making such arrangements to have consented to destruction, without notice, of the document or other evidence at the conclusion of all proceedings and appeals [*8 Cal. Code Reg. § 10273(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDocumentary EvidenceWritingsTranscripts & TranslationsGeneral OverviewEvidenceInferences & PresumptionsPresumptionsWorkers' Compensation & SSDIAdministrative ProceedingsEvidenceMedical EvidenceWorkers' Compensation & SSDIAdministrative ProceedingsEvidenceWitnessesWorkers' Compensation & SSDIAdministrative ProceedingsHearings & Review

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51-577 California Forms of Pleading and Practice--Annotated § 577.179

§ 577.179 Burden of Proof and Affirmative Defenses

[1] In General

The burden of proof rests on the party or lien claimant holding the affirmative of the issue [*Lab. Code § 5705*]. The following are affirmative defenses, and the burden of proof rests on the employer to establish them [*Lab. Code § 5705*]:

- The injured person was an independent contractor or otherwise excluded from the protection of the workers' compensation law, if there is proof that the injured person was at the time of injury actually performing service for the alleged employer [*see Germann v. Workers' Comp. Appeals Bd. (1981) 123 Cal. App. 3d 776, 781-782, 176 Cal. Rptr. 868* ; *Johnson v. Workmen's Comp. Appeals Bd. (1974) 41 Cal. App. 3d 318, 321, 115 Cal. Rptr. 871* ; *see also S.G. & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 349, 256 Cal. Rptr. 543, 769 P. 2d 399* ; discussion under *§ 577.22[3]*].

- The injury was caused by the employee's intoxication by alcohol or unlawful use of a controlled substance as defined in *Health & Safety Code § 11007* [*see Lab. Code § 3600(a)(4)* (injury not caused by intoxication or unlawful use of controlled substance is condition of compensation)].

- The injury was caused by the employee's willful misconduct [*see Lab. Code § 4551* (compensation reduced if injury caused by employee's serious and willful misconduct)].

- The disability was aggravated by the employee's unreasonable conduct [*see Lab. Code § 4056* (no compensation payable for disability aggravated by employee's unreasonable refusal to submit to medical treatment or surgery)].

- The employer was prejudiced by the employee's failure to give notice as required by *Lab. Code §§ 5400* and *5401* (notice of injury or death), *discussed under § 577.42[1]*.

[2] Preponderance of the Evidence

All parties are required to meet the evidentiary burden of proof on all issues by a preponderance of the evidence in order that all parties be considered equal before the law [*Lab. Code § 3202.5*; *see also Lab. Code § 3202* (requiring that workers' compensation law be liberally construed in favor of injured workers)]. "Preponderance of the evidence" means that evidence that when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence [*Lab. Code § 3202.5*; *see Rogers v. Workers' Comp. Appeals Bd. (1985) 172 Cal. App. 3d 1195, 1199, 218 Cal. Rptr. 662]* .

[3] Proof of Industrial Causation--Reasonable Probability

The employee has the burden or proving the industrial causation of his or her injury by a "reasonable probability." This burden manifestly does not require the employee to prove causation by a scientific certainty. The WCAB is bound to uphold a claim in which the proof of industrial causation is reasonably probable, although not certain or convincing, and even though the exact causal mechanism is unclear or even unknown [*Rosas v. Workers' Comp. Appeals Bd. (1993) 16 Cal. App. 4th 1692, 1700-1705, 20 Cal. Rptr. 2d 778]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceCausationProximate CauseGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsBurdens of ProofWorkers' Compensation & SSDIAdministrative ProceedingsHearings & ReviewWorkers' Compensation & SSDICompensabilityInjuriesIntoxicationWorkers' Compensation & SSDICompensabilityInjuriesSelf-Inflicted Injuries

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§ 577.180 Minutes of Hearing and Summary of Evidence

Minutes of the hearing and a summary of evidence must be prepared at the conclusion of each hearing, filed in the record of proceedings (discussed under *§ 577.182*), and must include the information specified in *8 Cal. Code Reg. § 10566* [*8 Cal. Code Reg. § 10566*]. The summary need not be filed, however, on waiver by the parties, or on issuance of a stipulated order, decision, or award [*8 Cal. Code Reg. § 10578*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsHearings & Review

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§ 577.181 Minute Orders

Interlocutory or interim orders, including dimissal of improper or unnecessary parties, may be entered on the minutes of hearing and will become the order of the WCAB on their filing [*8 Cal. Code Reg. § 10570*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 577.182 Record of Proceedings

The record of proceedings consists of the pleadings, declarations of readiness to proceed, minutes of hearing and summary of evidence, transcripts if prepared and filed, proofs of service, evidence received in the course of a hearing, exhibits marked but not received in evidence, notices, petitions, briefs, findings, orders, decisions, and awards. Documents that are in the WCAB file but have not been received in evidence are not part of the evidentiary record [*8 Cal. Code Reg. § 10750*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsHearings & Review

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[Reserved]

§§ 577.183[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.190

§ 577.190 Governing Law

Findings and awards are governed by *Lab. Code § 5800 et seq.* Reconsideration is governed by *Lab. Code §§ 115* and *5900 et seq.* and by *8 Cal. Code Reg. § 10840 et seq.* Supplemental proceedings are governed by *Lab. Code §§ 5410, 5803-5805* and by *8 Cal. Code Reg. §§ 10450, 10455*, and *10462-10469*. Supplemental claims for new and further disability or rehabilitation benefits are governed by *Lab. Code § 5410* and *8 Cal. Code Reg. §§ 10458* and *10470*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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51-577 California Forms of Pleading and Practice--Annotated § 577.191

§ 577.191 Findings and Award, Order, or Decision

[1] Filing and Content

The WCAB or WCJ must, within 30 days after a case is submitted, make and file findings on all facts involved in the controversy along with an award, order, or decision stating the determination as to the rights of the parties [*Lab. Code § 5313*; *see Industrial Indemnity Co. v. Workers' Comp. Appeals Bd. (1983) 145 Cal. App. 3d 480, 485, 193 Cal. Rptr. 471]* . The 30-day period runs from the date of submission of the application for decision, and the provisions requiring the decision within the 30-day period are mandatory and not merely directive [*Lab. Code § 5800.5*]. Every order, decision, or award, other than an order merely appointing a trustee or guardian, must contain a determination of all issues presented for determination by the WCAB prior thereto and not theretofore determined. Any issue not so determined will be deemed decided adversely as to the party in whose interest the issue was raised [*Lab. Code § 5815*].

Orders, findings, decisions, and awards issued by a WCJ are deemed to be the orders, findings, decisions, and awards of the WCAB unless reconsideration is granted [*8 Cal. Code Reg. § 10348*]. For a petition for certified copy of an award, see form in *§ 577.500[1]*.

[2] Summary of the Evidence

A summary of the evidence received and relied on and the reasons or grounds on which the determination was made, together with the findings, order, decision, or award, must be served on all parties to the proceedings [*Lab. Code § 5313*; *see 8 Cal. Code Reg. § 10782*]. Service may be made as provided in *Code Civ. Proc. § 1010 et seq.* (discussed in Ch. 518, *Service of Summons and Papers*), unless otherwise directed by the WCAB [*Lab. Code § 5316*].

In one case, the court of appeal held that it was mandatory for a WCJ to provide a summary of the trial evidence under *Lab. Code § 5313* and *8* Cal. Code Reg. § 10566 and that a failure to submit such a summary mandated that the matter be returned to the WCJ to prepare and submit one. The court found that the arbitrator in the case before it did not prepare a summary of the evidence and that arbitrators had the same duties and responsibilities as WCJs. The WCJ's summary of the evidence was a required document to accompany petitions for writ of review under Cal. Rules of Ct.,

Rule 8.494(a)(1)(B), because the court of appeal needed a summary to evaluate whether substantial evidence supported the Appeals Board's decision. Therefore, failure of the arbitrator to include a summary of the evidence required annulment of the Appeals Board decision that affirmed the arbitrator's findings on *Lab. Code § 3366(a)* issues, even absent the arbitrator's summary of the evidence, and remand of the matter to the arbitrator to prepare such a summary. Moreover, the Appeals Board's consideration of the existing evidence, absent a summary, was not justified, using any of three standards: the demurrer standard, the state of the decision standard, or the substantial compliance standard [*Sharareh v. W.C.A.B. (2007) 156 Cal. App. 4th 189, 192-195, 67 Cal. Rptr. 3d 147]* .

[3] Compensation Awarded

The WCAB in its award may fix and determine the total amount of compensation to be paid and specify the manner of payment, or may fix and determine the weekly disability payment to be made and order its payment during continuance of the disability [*Lab. Code § 5801*]. If it is proved that an injury has been suffered for which the employer would be liable to pay compensation had disability resulted from it, but it is not proved that any disability has resulted, the WCAB may, instead of dismissing the application, award nominal disability indemnity if it appears that disability is likely to result at a future time [*Lab. Code § 5802*].

[4] Filing Liens With WCAB

When an award is submitted to the WCAB for approval, the parties must file with the WCAB any liens served on the parties [*Lab. Code § 4903.1(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 577.192 Adoption, Modification, or Vacation by WCAB

Within 60 days after the findings and award, order, or decision of a WCJ are filed, the WCAB may confirm, adopt, modify, or set them aside and may, with or without further proceedings, and with or without notice, enter its own findings, award, order, or decision based on the record in the case [*Lab. Code § 5315*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 577.193 Interest and Costs

All awards of the WCAB carry interest at the same rate as judgments in civil actions [*Lab. Code § 5800*; *see Myers v. Workmen's Comp. Appeals Bd. (1971) 20 Cal. App. 3d 120, 122 n.1, 97 Cal. Rptr. 400* ; *Myers v. Workmen's Comp. Appeals Bd. (1969) 2 Cal. App. 3d 621, 626, 83 Cal. Rptr. 427* ; *see also Code Civ. Proc. § 685.010(a)* (interest on judgments)]. Interest runs from the date the award is made and filed as to amounts that are payable forthwith and, with respect to installment payments, the date each installment becomes due and payable [*Lab. Code § 5800*].

With respect to an award of lost wages and benefits, the California Supreme Court has held that the WCAB may and must, when the criteria of *Civ. Code § 3287* are met, add interest from the dates such wages and benefits would have become due had the employer not acted in violation of *Lab. Code § 132a*. The Court stated that although *Lab. Code § 132a* does not itself expressly authorize the addition of prejudgment interest to an award of backpay, *Civ. Code § 3287* requires such interest on damages due on a particular date, including awards of backpay, when they are certain or capable of being made certain by calculation. The Court found that neither *Lab. Code § 5800* nor any other provision of the Labor Code precluded the addition of interest to such an award. Moreover, the addition of interest would serve the remedial purpose of *Lab. Code § 132a* [*Currie v. Workers' Comp. Appeals Bd. (2001) 24 Cal. 4th 1109, 1119, 17 P.3d 749]* .

Costs as between the parties may be allowed by the WCAB [*Lab. Code § 5811(a)*]. The court of appeal has held that the Appeals Board has discretion to award costs, pursuant to *Lab. Code § 5811*, for a vocational rehabilitation expert's report, regardless of whether the report is admissible. The court found that nothing in the language of that statute suggests that the Board's discretion is circumscribed by rules of admissibility. Inadmissible reports, the court pointed out, might be valuable in preparing for a hearing or to further settlement negotiations. Finally, the court stated that *Costa v. Hardy Diagnostic* [Costa v. Hardy Diagnostic (2007) *72 Cal. Comp. Cases 1492 (Appeals Board en banc opinion)]* reflects a legislative policy to accord the Board discretion to evaluate whether the costs of a vocational rehabilitation consultant's report are reasonable and necessary, based on the facts of the case [*Barr v. Workers' Comp. Appeals Bd. (2008) 164 Cal. App. 4th 163, 176, 179, 181, 78 Cal. Rptr. 3d 732]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment InterestGeneral OverviewCivil ProcedureRemediesJudgment InterestPrejudgment InterestWorkers' Compensation & SSDIAdministrative ProceedingsAwardsTypesWorkers' Compensation & SSDIAdministrative ProceedingsCosts & Attorney FeesWorkers' Compensation & SSDIAdministrative ProceedingsHearings & Review

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§ 577.194 Sanctions

[1] Bad Faith Actions or Tactics

With regard to all applications for adjudication that are filed on or after January 1, 1994 [*see Lab. Code § 5813(c)*], the WCAB may order a party, the party's attorney, or both, to pay any reasonable expenses, including attorney's fees and costs, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay [*Lab. Code § 5813(a)*]. In addition, the WCAB, in its sole discretion, may order additional sanctions of up to $2,500 to be transmitted to the General Fund [*Lab. Code § 5813(a)*]. The determination of sanctions must be made after written application by the party seeking sanctions or on the WCAB's own motion [*Lab. Code § 5813(b)*].

For purposes of imposing sanctions, a "bad faith action or tactic" is one that results from a willful failure to comply with a statutory or regulatory obligation, or from a willful intent to disrupt or delay the WCAB's proceedings [*8 Cal. Code Reg. § 10561*]. A "frivolous bad faith action or tactic" is one that is done for an improper motive or is indisputably without merit [*8 Cal. Code Reg. § 10561*]. Violations subject to the provisions of *Lab. Code § 5813* include, but are not limited to the following [*8 Cal. Code Reg. § 10561*]:

- Failure to appear or appearing late at a conference or trial will be deemed a bad faith action or tactic solely intended to cause unnecessary delay if a reasonable excuse is not offered or the offending party has demonstrated a pattern of such conduct.

- Filing a pleading, petition, or legal document will be deemed a bad faith action or tactic that is frivolous or solely intended to cause unnecessary delay unless there is some reasonable justification for filing the document.

- Failure to timely serve evidentiary documents, including but not limited to medical reports pursuant to *8 Cal. Code Reg. § 10608*, will be deemed a bad faith action or tactic that is frivolous or solely intended to cause unnecessary delay unless that failure resulted from mistake, inadvertence, or excusable

neglect.

- Failing to comply with the WCAB's rules or an order of the WCAB, including a discovery order, will be deemed a bad faith action or tactic that is frivolous or solely intended to cause unnecessary delay unless the failure results from mistake, inadvertence, surprise, or excusable neglect.

[2] Imposition of Sanction

With regard to applications filed on or after January 1, 1994, the WCAB may order the payment of sanctions, as provided in *Lab. Code § 5813*, on its own motion or on the filing of a petition pursuant to *8 Cal. Code Reg. § 10450* [*8 Cal. Code Reg. § 10561*]. Before issuing such an order, the alleged offending party or attorney must be given notice and an opportunity to be heard [*8 Cal. Code Reg. § 10561*]. The WCAB must not impose a monetary sanction pursuant to *Lab. Code § 5813* if the person subject to the sanction acted with reasonable justification or other circumstances make imposition of the sanction unjust [*8 Cal. Code Reg. § 10561*]. The limitation of liability specified by *Lab. Code § 3716.2* precludes imposition of a sanction against the Uninsured Employers Benefits Trust Fund pursuant to *Lab. Code § 5813* for bad-faith actions or tactics that are frivolous or intended solely to cause unnecessary delay [*Duncan v. Workers' Comp. Appeals Bd. (2008) 166 Cal. App. 4th 294, 300-304, 82 Cal. Rptr. 3d 664]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureSanctionsBaseless FilingsFrivolous LawsuitsWorkers' Compensation & SSDIAdministrative ProceedingsCosts & Attorney FeesWorkers' Compensation & SSDIAdministrative ProceedingsHearings & Review

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§ 577.195 Correction of Errors

[1] Prior to Filing of Petition for Reconsideration

Before a petition for reconsideration (*discussed under § 577.212*) is filed, a WCJ may correct the decision for clerical, mathematical, or procedural error or amend the decision for good cause under the authority and subject to the limitations set forth in *Lab. Code §§ 5803* (continuing jurisdiction of WCAB) and 5804 (prohibiting rescission, alteration, or amendment of award after five years from date of injury) [*8 Cal. Code Reg. § 10858*].

[2] After Filing of Petition for Reconsideration

After a petition for reconsideration has been timely filed, a WCJ may, within 15 days following the date of filing of the petition for reconsideration, amend or modify the order, decision, or award, or rescind the order, decision, or award and conduct further proceedings. Further proceedings must be initiated within 30 days after the order of rescission. The time for filing a petition for reconsideration under *Lab. Code § 5903* runs from the filing of the new, amended, or modified decision [*8 Cal. Code Reg. § 10859*].

After the 15-day period following the filing of the petition for reconsideration has elapsed, a WCJ may not make any order in the case or correct any error until the WCAB has denied or dismissed the petition for reconsideration or issued an order after reconsideration [*8 Cal. Code Reg. § 10859*].

Legal Topics:

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

§§ 577.196[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.210

§ 577.210 Governing Law

Reconsideration is governed by *Lab. Code §§ 115* and *5900 et seq.* and by *8 Cal. Code Reg. § 10840 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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51-577 California Forms of Pleading and Practice--Annotated § 577.211

§ 577.211 Reconsideration on WCAB's Own Motion

The WCAB may, on its own motion, grant reconsideration of an order, decision, or award made by a WCJ and the accompanying report at any time within 60 days after they were filed [*Lab. Code § 5900(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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51-577 California Forms of Pleading and Practice--Annotated § 577.212

§ 577.212 Reconsideration on Petition of Aggrieved Person

[1] Time for Filing Petition

Any person aggrieved directly or indirectly by a final order, decision, or award of the WCAB or of a WCJ may, within 20 days after service of the order, decision, or award, petition the WCAB for reconsideration in respect to any matters determined or covered by the order, decision, or award [*Lab. Code §§ 5900(a), 5903*; *see Nestle Ice Cream Co. v. W.C.A.B. (Ryerson) (2007) 146 Cal. App. 4th 1104, 1108-1111, 53 Cal. Rptr. 3d 340* (when WCJ, in response to employee's request, amended award by increasing awarded amounts of retroactive temporary disability payments and vocational rehabilitation maintenance allowance, court of appeal held that employer's subsequent petition for reconsideration, timely filed as to amended award, but untimely as to original award, was timely filed, since WCJ's amended award effected substantial and material change in award and involved exercise of judicial function); *Scott v. Workers' Comp. Appeals Bd. (1981) 122 Cal. App. 3d 979, 984, 176 Cal. Rptr. 267* ; *Hartford Acc. & Indem. Co. v. Workers' Comp. Appeals Bd. (1978) 86 Cal. App. 3d 1, 3, 149 Cal. Rptr. 878* ; *§ 577.501*].

[2] Manner of Filing and Service

[a] Filing

A petition for reconsideration (*see § 577.501[1]*) from a final order, decision, or award must be filed at the WCAB district office from which the order, decision, or award issued. A petition for reconsideration from a final order, decision, or award issued by the WCAB at its main office in San Francisco must be filed at the San Francisco office [*8 Cal. Code Reg. § 10840*].

Unless otherwise ordered by the WCAB, filing suspends the affected order, decision, or award with respect to the parties to the petition for a period of 10 days. The WCAB may, however, on terms and conditions that it orders, stay, suspend, or postpone the order, decision, or award during the pendency of the reconsideration [*Lab. Code § 5910*].

[b] Service

The petitioner must forthwith serve a copy of the petition on all adverse parties and on any other persons designated by the WCAB [*Lab. Code § 5905*]. The WCAB requires that copies of the petition be served on all parties to the case, on a lien claimant if the validity of the claimant's lien is specifically questioned by the petition, and on all parties to any case that has been consolidated with the case pursuant to *8 Cal. Code Reg. § 10589* [*8 Cal. Code Reg. § 10850*]. Failure to file proof of this service constitutes a valid ground for dismissing the reconsideration petition [*8 Cal. Code Reg. § 10850*]. On a finding that the party to be served was subsequently served and was not prejudiced by the late service, however, the WCAB need not dismiss the petition for failure to have served it in a timely manner [*Wings West Airlines v. Workers' Comp. Appeals Bd. (1986) 187 Cal. App. 3d 1047, 1054-1055, 232 Cal. Rptr. 343]* .

[3] Final Orders

An order, decision, or award of the WCAB or a WCJ is final for purposes of a petition for reconsideration if it determines any substantive right or liability of those involved in the case. To be final, an order need not resolve all issues or represent a final determination of benefits. The term does not include intermediate procedural orders or discovery orders, but it does include orders dismissing a party, rejecting an affirmative defense, granting commutation, terminating liability, and other orders affecting substantive issues [*Rymer v. Hagler (1989) 211 Cal. App. 3d 1171, 1180, 260 Cal.Rptr. 76]* . In addition, whether or not an employer has provided workers' compensation coverage is a substantive issue and determines the forum for the dispute and the penalties to be imposed [*Rymer v. Hagler (1989) 211 Cal. App. 3d 1171, 1180, 260 Cal. Rptr. 76* ; *see Lab. Code §§ 3706, 3715*; *see also § 577.13[4]*, and *[2], below*].

[4] Grounds

Reconsideration may only be sought on the following grounds [*Lab. Code § 5903*]:

- The WCJ or WCAB acted without or in excess of its powers;

- The order, decision, or award was procured by fraud [*see Royal Globe Ins. Co. v. Workers' Comp. Appeals Bd. (1978) 84 Cal. App. 3d 287, 293 n.5, 148 Cal. Rptr. 325]* ;

- The findings of fact are not justified by the evidence [*see Gillette v. Workers' Comp. Appeals Bd. (1971) 20 Cal. App. 3d 312, 320-322, 97 Cal. Rptr. 542, 893]* ;

- The petitioner has discovered new material evidence that petitioner could not, with reasonable diligence, have discovered and produced at the hearing [*see Royal Globe Ins. Co. v. Workers' Comp. Appeals Bd. (1978) 84 Cal. App. 3d 287, 292-293, 148 Cal. Rptr. 325* (evidence in question was not newly discovered)]; or

- The order, decision, or award is not supported by the findings of fact [*see Michon v. Workers' Comp. Appeals Bd. (1971) 15 Cal. App. 3d 917, 923-925, 93 Cal. Rptr. 476]* .

[5] Answer to Petition

Any adverse party may file a verified answer within 10 days after service of the petition [*Lab. Code § 5905*]. The answer must be filed with at the WCAB district office from which the order, decision, or award issued. An answer to a petition for reconsideration from a final order, decision, or award issued by the WCAB at its main office in San Francisco must be filed at the San Francisco office [*8 Cal. Code Reg. § 10840*]. Copies of documents that have already been received in evidence or that have already been made part of the WCAB's legal file must not be attached as exhibits to an answer to a petition for reconsideration [*8 Cal. Code Reg. § 10842*]. Documents attached in violation of this rule may be detached from the answer and discarded [*8 Cal. Code Reg. § 10842*].

[6] Supplemental Petitions

When a petition for reconsideration has been timely filed, supplemental petitions, pleadings, or responses other than the answer must be considered by the WCAB only if specifically requested or approved by the WCAB [*8 Cal. Code Reg. § 10848*]. Supplemental petitions, pleadings, or responses other than the answer, that are not requested or approved by the WCAB, are neither accepted nor deemed filed for any purpose, and are not acknowledged or returned to the filing party [*8 Cal. Code Reg. § 10848*].

[7] Referral to Workers' Compensation Judge

Petitions for reconsideration will be referred to the WCJ from whose decision relief is sought. The WCJ will prepare a report containing the information specified in *8 Cal. Code Reg. § 10860*, within 15 days after the petition was filed (unless the WCAB grants an extension) submit the report and the case file to the WCAB, and at the same time serve a copy of it on the parties and any lien claimant whose lien is specifically questioned by the petition for reconsideration [*8 Cal. Code Reg. § 10860*].

[8] Denial of Petition by Inaction

The petition is deemed denied by the WCAB unless it is acted on within 60 days from the date it was filed [*Lab. Code § 5909*].

[9] Action of WCAB on Filing of Petition or Granting Reconsideration

[a] In General

On the filing of a petition for reconsideration, or on the WCAB's decision to grant reconsideration on its own motion, the WCAB may, with or without further proceedings and with or without notice, affirm, rescind, alter, or amend the order, decision, or award on the basis of the evidence previously submitted in the case, or may grant reconsideration and direct the taking of additional evidence. Notice of the time and place of any hearing on reconsideration must be given to the petitioner and adverse parties and to other persons as the WCAB orders [*Lab. Code § 5906*].

[b] Without Further Hearing

If, at time it grants reconsideration, the WCAB determines that no sufficient reason exists for taking further testimony, the WCAB may affirm, rescind, alter, or amend the order, decision, or award and may, without further proceedings, notice, or hearing, enter its findings, order, decision, or award based on the record in the case [*Lab. Code § 5907*].

[c] After Hearing

After taking additional evidence and considering all the facts, the WCAB may affirm, rescind, alter, or amend the original order, decision, or award. An order, decision, or award made following reconsideration that affirms, rescinds, alters, or amends the original order, decision, or award must be made by the WCAB but does not affect any right or the enforcement of any right arising from or by virtue of the original order, decision, or award, unless the WCAB so orders [*Lab. Code § 5908(a)*].

If the WCAB rescinds or reduces an order, decision, or award on the grounds that it was procured by fraud [*see Lab. Code § 5903(b)*], the WCAB must, if the employer is insured, refer the case to the Bureau of Fraudulent Claims [*see Ins. Code § 1872 et seq.*], or, if the employer is self-insured, to the district attorney of the county in which the fraud occurred [*Lab. Code § 5908(b)*].

[d] Form and Content of Decision

Any decision of the WCAB granting or denying a petition for reconsideration or affirming, rescinding, altering, or amending the original findings, orders, decision, or award following reconsideration must [*Lab. Code § 5908.5*; *see Lab. Code § 115*; *8 Cal. Code Reg. § 10340(a)-(c)*; *see also Painter v. Workers' Comp. Appeals Bd. (1985) 166 Cal. App. 3d 264, 268-271, 212 Cal. Rptr. 354* ; *City of Fresno v. Workers' Comp. Appeals Bd. (1985) 163 Cal. App. 3d 467, 470, 209 Cal. Rptr. 463]* :

- be made by the WCAB and not by a WCJ,
- be in writing, signed by a majority of the WCAB members assigned to the case, and
- state the evidence relied on and specify in detail the reasons for the decision.

The purpose of *Lab. Code § 5908.5* is to apprise the parties of the grounds for the WCAB's decision, to assist the reviewing court to ascertain the principles relied on by the WCAB, to help the WCAB avoid careless or arbitrary action, and to make the right of appeal or of seeking review more meaningful [*Yavitch v. Workers' Comp. Appeals Bd. (1983) 142 Cal. App. 3d 64, 69, 190 Cal. Rptr. 793* ; *see Cal-Nat Airways, Inc. v. Workmen's Comp. App. Bd. (1968) 268 Cal. App. 2d 93, 97, 73 Cal. Rptr. 815]* . For discussion of judicial review, see *§ 577.280* et seq.

[e] Referral for Proceedings on Reconsideration

If reconsideration is granted and the case referred to a WCJ for proceedings on reconsideration, the WCJ will, on conclusion of the proceedings, prepare and serve on the parties a summary of evidence received in the proceedings after reconsideration was granted [*8 Cal. Code Reg. § 10862*]. Unless otherwise instructed by the panel before which a case is pending, the WCJ may rule on requests for postponement or continuance of further hearing, join additional parties, dismiss unnecessary parties when not opposed by any other party to the case, make all interlocutory or procedural orders that are agreed to by all parties, issue subpoenas, rule on motions for discovery, rule on all evidentiary motions and objections, and make all other rulings necessary to expedite and facilitate the trial and disposition of the case [*8 Cal. Code Reg. § 10862*]. The WCJ may not, however, order a medical examination, obtain a recommended disability evaluation, make an order taking the case off calendar, or make an order approving or disapproving a compromise and release [*8 Cal. Code Reg. § 10862*].

Legal Topics:

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

§§ 577.213[Reserved]

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§ 577.220 Governing Law

Supplemental proceedings are governed by *Lab. Code §§ 5410, 5803-5805* and by *8 Cal. Code Reg. §§ 10450, 10455,* and *10462-10469*. Supplemental claims for new and further disability or rehabilitation benefits are governed by *Lab. Code § 5410* and *8 Cal. Code Reg. §§ 10458* and *10470*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsClaimsFiling RequirementsWorkers' Compensation & SSDIAdministrative ProceedingsHearings & Review

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§ 577.221 Continuing Jurisdiction of WCAB

The WCAB has continuing jurisdiction over all its orders, decisions, and awards under the workers' compensation law and the decisions and orders of the vocational rehabilitation unit established within the Office of Benefit Determination under *Lab. Code § 139.5*. At any time, after the the parties in interest are provided with notice and an opportunity to be heard, the WCAB may, for good cause shown, rescind, alter, or amend any order, decision, or award. This power includes the right to review, grant or regrant, diminish, increase, or terminate, within the limits prescribed by the workers' compensation law, any compensation awarded, on the grounds that the disability of the person in whose favor the award was made has recurred, increased, diminished, or terminated [*Lab. Code § 5803*; *see Bland v. Workers' Comp. Appeals Bd. (1970) 3 Cal. 3d 324, 329, 90 Cal. Rptr. 431, 475 P.2d 663* ; *Draper v. Workers' Comp. Appeals Bd. (1983) 147 Cal. App. 3d 502, 507, 195 Cal. Rptr. 248]* .

Any order, decision, or award rescinding, altering or amending a prior order, decision, or award has the same effect as an original order, decision, or award [*Lab. Code § 5805*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 577.222 Petition to Reopen

[1] Showing Good Cause

Petitions invoking the continuing jurisdiction of the WCAB must set forth specifically and in detail the facts relied on to establish good cause for reopening [*8 Cal. Code Reg. § 10455*]. A variety of factors and circumstances may constitute the requisite good cause. For example, good cause may be established by the following:

- Newly discovered evidence that could not have been produced at the original hearing and that indicates a more extensive disability than that recognized by the original findings;

- A subsequent clarification by a reviewing court of the applicable law that indicates that an employee was originally entitled to a different award than that given; or

- Any factor or circumstance unknown at the time the original award or order was made that renders the previous findings inequitable [*LeBoeuf v. Workers' Comp. Appeals Bd. (1983) 34 Cal. 3d 234, 241-242, 193 Cal. Rptr. 547, 666 P.2d 989]* .

Moreover, if an injured worker filed for and received a disability award that did not mention rehabilitation benefits because the worker did not initially seek them, a subsequent petition to reopen the award for the purpose of including them is, as a matter of law, supported by good cause [*Bekins Moving & Storage Co. v. Workers' Comp. Appeals Bd. (1982) 137 Cal. App. 3d 665, 672-673, 187 Cal. Rptr. 226]* .

[2] Scope of Reconsideration on Reopening

In a petition to reopen (*see § 577.502[1]*), an injured employee need not request any particular classification of compensation in order to vest the WCAB with jursidiction to reconsider the entire case [*Bland v. Workers' Comp. Appeals Bd. (1970) 3 Cal. 3d 324, 331, 90 Cal. Rptr. 431, 475 P.2d 663]* . The WCAB does not have the power, however, to find that there was no employment after an award has been made that determined there was employment, if

the time to petition for rehearing or reconsideration or review of the award has expired or if the petition has been determined [*Lab. Code § 5804*].

Although *Lab. Code §§ 5803* and *5804*, discussed *above*, refer to a petition and notice and opportunity to be heard, they do not direct that the petition be filed before the WCAB itself or that it take any particular form, and various documents filed with the Unit may be considered as petitions to reopen. Moreover, in view of the fact that in the area of rehabilitation benefits the Rehabilitation Unit of the Division of Workers' Compensation (formerly the Bureau of Rehabilitation) operates under the appellate supervision of the WCAB [*see 8 Cal. Code Reg. §§ 10014*, 10293], a rehabilitation request filed with the unit may be considered as a petition to reopen within the contemplation of *Lab. Code §§ 5803* and *5804* [*Bekins Moving & Storage Co. v. Workers' Comp. Appeals Bd. (1982) 137 Cal. App. 3d 665, 671-672, 187 Cal. Rptr. 226]* . The court of appeal has held that the Rehabilitation Unit's granting of an employer's request to terminate liability for rehabilitation services had no effect on the Appeals Board's continuing jurisdiction to act on the employee's timely petition, filed with the Board, to reopen and reinstate vocational rehabilitation [*Martino v. Workers' Comp. Appeals Bd. (2002) 103 Cal. App. 4th 485, 490, 126 Cal. Rptr. 2d 812]* .

[3] Time to File Petition and Counterpetition

A petition to reopen may be filed by a party in interest within five years from the date of injury. Any counterpetition seeking other relief and raisingissues in addition to those raised by the original petition may be filed by the adverse party within 30 days of the original petition [*Lab. Code § 5804*].

Neither *Lab. Code § 5804* nor *5410* (discussed under [4], *below*) defines "date of injury." The term is defined, however, in *Lab. Code § 5411* for injuries other than occpational disease or cumulative injury and in *Lab. Code § 5412* for occupational disease and cumulative injury cases (*see discussion under § 577.14[3][c]*). In cumulative injury and occupational disease cases, the *Lab. Code § 5412* definition of date of injury is to be used to determine the date of the injury under *Lab. Code §§ 5410* and *5804* [*Palmer v. Workers' Comp. Appeals Bd. (1987) 192 Cal. App. 3d 1241, 1243, 1249, 237 Cal. Rptr. 800]* . Under *Lab. Code § 5412*, the date of injury is the date on which the employee first suffered disability and either knew or, in the exercise of reasonable diligence, should have known that the disability was caused by the employment.

[4] New or Further Disability

[a] WCAB's Jurisdiction Over Claims--Five-Year Statute of Limitations

Although *Lab. Code §§ 5803-5805*, discussed above appear on their face to confer continuing jurisdiction over all classes of supplemental claims, courts have held that supplemental claims for new and further disability and vocational rehabilitation benefits are governed by *Lab. Code § 5410*, not by *Lab. Code §§ 5803-5805* [*see J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (1984) 153 Cal. App. 3d 327, 335, 335 n.12, 200 Cal. Rptr. 219]* .

Under *Lab. Code §§ 5410, 5803-5805*, once an employee files a claim for compensation against an employer for an injury, the WCAB's jurisdiction to award additional compensation arising out of the same injury (even if styled "new and further disability") from that employer is limited to five years from the date of injury [*see Nickelsberg v. Workers' Comp. Appeals Bd. (1991) 54 Cal. 3d 288, 300, 285 Cal. Rptr. 86, 814 P.2d 1328* ; *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (1984) 153 Cal. App. 3d 327, 335, 200 Cal. Rptr. 219]* . The five-year limitation period expresses a legislative concern for certainty and finality in the determination of compensation benefit obligations [*Nickelsberg v. Workers' Comp. Appeals Bd. (1991) 54 Cal. 3d 288, 299, 285 Cal. Rptr. 86, 814 P.2d 1328]* .

Lab. Code § 5410 provides that nothing contained in *Lab. Code §§ 5400-5412* (*discussed under § 577.25*) bars the right of an injured worker to institute proceedings for the collection of compensation, (including vocational rehabilitation services for injuries occurring on or after January 1, 1990), within five years after the date of the injury if the

proceedings are based on specified grounds. For injuries occurring prior to January 1, 1990, these grounds are that the original injury has caused new andfurther disability or the need for vocational rehabilitation benefits [*Lab. Code § 5410* prior to amendment by Stats. 1989, ch. 892]. *Lab. Code 5410* does not extend the limitation provided in *Lab. Code § 5407* (*discussed under § 577.25[2][e]*) [*Lab. Code § 5410*].

The WCAB does not have jurisdiction to award temporary disability indemnity, for example, more than five years after the date of the original injury for new and further disability resulting from surgery related to the original injury, even when an award of further medical treatment has been made [*Nickelsberg v. Workers' Comp. Appeals Bd. (1991) 54 Cal. 3d 288, 293-294, 285 Cal. Rptr. 86, 814 P.2d 1328]* . Thus, when an employee who had been awarded temporary and permanent disability indemnity and further medical treatment for an industrial injury petitioned to reopen the award more than nine years after the injury based on new and further temporary total disability resulting from surgery related to the injury, the California Supreme Court held that amendments to *Labor Code Section 4656* (providing for no maximum period for awarding temporary disability benefits resulting in period of total disability) did not give the WCAB jurisdiction to award temporary total disability indemnity for indefinite time periods for further surgical procedures to persons originally awarded further medical treatment [*Nickelsberg v. Workers' Comp. Appeals Bd. (1991) 54 Cal. 3d 288, 293-301, 285 Cal. Rptr. 86, 814 P.2d 1328]* . As a result, the employee's petition was time-barred by *Labor Code Sections 5804* and *5410* [*Nickelsberg v. Workers' Comp. Appeals Bd. (1991) 54 Cal. 3d 288, 301-302, 285 Cal. Rptr. 86, 814 P.2d 1328]* . However, the court of appeal has held that the Appeals Board had jurisdiction to order additional temporary disability benefits more than five years after the date of injury when the employee filed a timely petition to reopen and his new and further disability commenced within five years of the date of his injury. The court found that the employee's petition to reopen alleged a change in his condition and requested further temporary disability benefits, and it was not error for the WCJ to award temporary disability benefits commencing more than five years after the date of injury because there had been no need to award benefits earlier since the employer was making voluntary temporary disability payments until then [*Sarabi v. Workers' Comp. Appeals Bd. (2007) 151 Cal. App. 4th 920, 925-928, 60 Cal. Rptr. 3d 189]* .

[b] Invoking Jurisdiction

Jurisdiction of the WCAB under *Lab. Code § 5410* is invoked by a petition setting forth specifically and in detail the facts relied on to establish new and further disability. If no prior application for adjudication has been filed, jurisdiction is invoked by the filing of an original application for adjudication [*8 Cal. Code Reg. § 10458*].

[c] WCAB's Continued Jurisdiction to Enforce Previous Awards

Despite the five-year limitation on its continuing jurisdiction under *Lab. Code §§ 5804* and *5410*, the WCAB possesses inherent power, as in the case of any court, to *enforce* a previous order, decision, or award, independent of any limitations of time [*Nickelsberg v. Workers' Comp. Appeals Bd. (1991) 54 Cal. 3d 288, 297, 285 Cal. Rptr. 86, 814 P.2d 1328]* .

Legal Topics:

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§ 577.223 Attorney's Fees

If any party institutes proceedings to reduce the amount of temporary or permanent disability awarded and is unsuccessful, the WCAB may make a finding as to the amount of a reasonable attorney's fee incurred by the applicant in resisting the proceeding and assess the same as costs on the party instituting the proceeding to reduce temporary or permanent disability benefits [*Lab. Code §§ 4651.3, 5410.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 577.224 Vocational Rehabilitation Appeals

In 2003 the legislature abolished the workers' compensation vocational rehabilitation program, repealing *Lab. Code §§ 139.5, 4635-4647,* and *5405.5* [*see* Stats. 2003, ch. 635, §§ 14, 14.3, 16]. In its place, the legislature created a "supplemental job displacement benefit" for specified workers who are permanently partially disabled, to be used for retraining. The new system applies only to injuries occurring on or after January 1, 2004 [*see § 577.45[2A]*].

In 2004, the legislature reenacted one of the statutes it had repealed in 2003, *Lab. Code § 139.5*, reinstating vocational rehabilitation. *However, the reenacted statute applies only to injuries occurring before January 1, 2004*, and it will remain in effect only until January 1, 2009, and as of that date is repealed, unless a later-enacted statute, that is enacted before January 1, 2009, deletes or extends that date [*Lab. Code § 139.5(k), (l)*]. Various other vocational rehabilitation statutes, e.g., *Lab. Code §§ 4642, 4644(d), (e),* and *5405.5*, once cross-referred to in former *Lab. Code § 139.5* but repealed in 2003, are also cross-referred to in the reenacted *Lab. Code § 139.5* and are now identified with the designation "former." Thus, although the issue may be further clarified by administrative and judicial action, it now appears that the statutory law on vocational rehabilitation applicable to pre-2004 injuries is confined to *Lab. Code § 139.5*, those "former" statutes to which it cross-refers, and those statutes not repealed in 2003. For example, the 2002 amendment to former *Lab. Code § 4646*, which allowed settlement of prospective vocational rehabilitation benefits, has not been reenacted, while *Lab. Code § 5100.6*, forbidding such settlements, was never repealed and, thus, remains in force. As a consequence of these legislative developments, at least some of the discussion in this subsection regarding vocational rehabilitation appeals applies only to pre-2004 injuries.

Appeals from decisions of the DWC's Rehabilitation Unit must be commenced as follows [*8 Cal. Code Reg. § 10293(a)*]:

1. If an application for adjudication is already on file, by filing and serving a declaration of readiness and a petition setting forth the reason for the appeal.

2. If no application for adjudication is on file, by filing and serving an application for adjudication, a

declaration of readiness, and a petition setting forth the reason for the appeal.

The party appealing the Rehabilitation Unit decision and the party opposing the appeal must file and serve any documents that the parties deem relevant that have not already been filed in the Rehabilitation Unit case file [*8 Cal. Code Reg. § 10293(b)*].

If an application for adjudication has not been previously filed, venue must be designated and determined in accordance with *Lab. Code § 5501.5* and *8* Cal. Code Reg. § 10409. If an application for adjudication has been previously filed, the petition appealing a decision of the Rehabilitation Unit must be filed at the district office having venue, and the case number assigned to the application for adjudication will be assigned to the petition [*8 Cal. Code Reg. § 10293(c)*].

A petition appealing a decision of the Rehabilitation Unit must be filed within 20 days from the date of the issuance of the Rehabilitation Unit decision *8 Cal. Code Reg. § 10293(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 577.225 Notice of Compensation Due; Appeal of Notice

When, as the result of an audit by the Administrative Director [*see Lab. Code § 129(a)*], it is determined that any compensation, interest, or penalty is due and unpaid to an employee or dependent, the director may initiate a process culminating in the issuance and service on the employer's claims administrator a Notice of Compensation Due detailing the amounts due and unpaid and ordering the amounts to be paid to the person entitled to them [*Lab. Code § 129(c)*; *see 8 Cal. Code Reg. § 10110*]. The issuance of the notice may be appealed by filing an Appeal of Notice of Compensation Due with the WCAB and serving a copy on the injured worker or dependent within 15 days of service of the notice [*8 Cal. Code Reg. §§ 10115*, 10291].

Failure to pay or appeal a Notice of Compensation Due within 15 days of receipt may subject the claims administrator to administrative penalty [*Lab. Code § 129.5(a)(1)*; *see 8 Cal. Code Reg. §§ 10111(c)(1)* (penalty related to injuries on or after January 1, 1990, and before January 1, 1994), 10111.1(c)(1) (penalty related to injuries on or after January 1, 1994)]. If the claims administrator is a third-party administrator, it is jointly and severally liable with the subject of the audit (whether the employer or insurer) for any administrative penalty. Otherwise the claims administrator is solely liable [*8 Cal. Code Reg. § 10112*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsClaimsFiling RequirementsWorkers' Compensation & SSDIAdministrative ProceedingsHearings & ReviewWorkers' Compensation & SSDIBenefit DeterminationsGeneral Overview

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[Reserved]

§§ 577.226[Reserved]

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§ 577.240 Governing Law

Payment and assignment of claims for compensation or compensation awarded are governed by *Lab. Code §§ 4900-4909.1* and *8 Cal. Code Reg. §§ 10770-10772*. Payment of temporary and permanent disability is governed in *Lab. Code §§ 4650-4663*, payment of death benefits is governed by *Lab. Code §§ 4700-4709*, payment of public official death benefits is governed by *Lab. Code §§ 4720-4728*, and payment of subsequent injuries payments is governed by *Lab. Code §§ 4751-4755*.

Special provisions relating to California Highway Patrol members and certain other state law enforcement personnel are set forth in *Lab. Code §§ 4800-4810* [*see Knopfer v. Flournoy (1973) 34 Cal. App. 3d 318, 319-322, 109 Cal. Rptr. 892]* , and special provisions relating to city police and firefighters, sheriffs, and other specified public safety personnel are set forth in *Lab. Code §§ 4850-4855*.

The issuance of certified copies of the findings and award, entry of judgment, stay of execution, and satisfaction of judgment are governed by *Lab. Code §§ 5806-5809* and *8 Cal. Code Reg. §§ 10820-10832*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsAwardsEnforcementWorkers' Compensation & SSDIBenefit DeterminationsDeath BenefitsWorkers' Compensation & SSDIBenefit DeterminationsPermanent Partial DisabilitiesWorkers' Compensation & SSDIBenefit DeterminationsPermanent Total DisabilitiesWorkers' Compensation & SSDIBenefit DeterminationsTemporary Total Disabilities

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§ 577.241 Preference of Compensation Claim

A claim for compensation, or any award or judgment entered on the claim, has the same preference over the other debts of the employer or the employer's estate and of the insurer that is given by law to wage claims [*Lab. Code § 4908*; *see Code Civ. Proc. § 1204* (preference for certain wage claims)]. The preference is for the entire amount of the compensation to be paid, but this does not impair the lien of any previous award [*Lab. Code § 4908*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawClaimsTypesUnsecured Priority ClaimsCommissions & WagesCivil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionGeneral OverviewLabor & Employment LawWage & Hour LawsWage PaymentsWorkers' Compensation & SSDIBenefit DeterminationsGeneral Overview

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§ 577.242 Nonassignability of Claim or Compensation

Except as provided in *Lab. Code § 96* (assignment of claims or awards to Labor Commissioner), no claim for compensation is assignable before payment [*Lab. Code § 4900*]. Except as provided in *Lab. Code § 4900 et seq.* (payment and assignment of compensation and compensation claims), no claim for compensation or compensation awarded, adjudged, or paid is subject to being taken for the debts of the party entitled to it [*Lab. Code § 4901*]. Moreover, no compensation, whether awarded or voluntarily paid, shall be paid to any attorney at law or in fact or other agent, but shall be paid directly to the claimant entitled to it unless otherwise ordered by the WCAB. No payment made to any attorney at law or in fact or other agent in violation of the foregoing provision will be credited to the employer [*Lab. Code § 4902*; *see Knopfer v. Flournoy (1973) 34 Cal. App. 3d 318, 321-322, 109 Cal. Rptr. 892]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 577.243 Payment of Compensation

[1] Not Due or Pending Dispute

In the absence of an agreement to the contrary, no payment, allowance, or benefit received by an injured employee during the period of his or her incapacity, or by a deceased employee's dependents, which by the terms of the workers' compensation law was not then due and payable or while there was any dispute or question concerning the right to compensation, is an admission of liability for compensation on the part of the employer. Additionally, the acceptance of the payment, allowance, or benefit does not operate as a waiver of any right or claim that the employee or dependents have against the employer. The payment, allowance, or benefit, however, may be taken into account by the WCAB in fixing the amount of compensation to be paid [*Lab. Code § 4909*].

[2] Pursuant to Order

Payment of compensation in accordance with the order and direction of the WCAB discharges the employer for all claims for that compensation [*Lab. Code § 3603*].

[3] To Injured Minor

Compensation owed to an injured minor may be paid to the minor until his or her parent or guardian gives the employer or the employer's insurance carrier written notice that the parent or guardian claims it. Compensation paid to the injured minor prior to receipt of the written notice releases the employer and its carrier in full for the amount paid, and the minor cannot disaffirm the payment on appointment of a guardian or on coming of age [*Lab. Code § 3605*].

[4] Penalties for Delay or Nonpayment

[a] In General

As of June 1, 2004 [*Lab. Code § 5814(i)*], and applicable to all injuries, without regard to whether the injury occurs

before, on, or after that date [*Lab. Code § 5814(h)*], when payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, *the amount of the payment unreasonably delayed or refused* is to be increased by up to 25 percent or up to $10,000, whichever is less [*Lab. Code § 5814(a)*]. (Former *Lab. Code § 5814*, providing for a 10-percent penalty on "the full amount of the order, decision, or award," became inoperative on June 1, 2004, and, as of January 1, 2005, is repealed, unless a later-enacted statute, which becomes operative on or before January 1, 2005, deletes or extends the dates on which it becomes inoperative and is repealed [Former *Lab. Code § 5814(b)*].) In any proceeding under *Lab. Code § 5814*, the Appeals Board is to use its discretion to accomplish a fair balance and substantial justice between the parties [*Lab. Code § 5814(a)*; *see Kerley v. Workmen's Comp. Appeals Bd. (1971) 4 Cal. 3d 223, 227, 230, 93 Cal. Rptr. 192, 481 P.2d 200* (only satisfactory excuse for delay as genuine doubt from medical or legal standpoint as to liability for benefits); *Jensen v. Workers' Comp. Appeals Bd. (1985) 170 Cal. App. 3d 244, 247-249, 216 Cal. Rptr. 33* (same); *cf. Smith v. Workers' Comp. Appeals Bd. (1986) 186 Cal. App. 3d 1451, 1454-1457, 231 Cal. Rptr. 364* (distinguishing *Kerley*, rejecting *Jensen*, and holding 22-day delay based on misunderstanding of correct amount of compromise and release was not unreasonable); *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (1998) 18 Cal. 4th 1209, 1217, 1219-1220, 77 Cal. Rptr. 2d 528* (disapproving *Jensen* to extent it suggests that inadvertent delay is *per se* unreasonable, and holding solitary instance of human error, which was quickly corrected upon discovery (i.e., within seven days), was not unreasonable in light of no evidence in record that SCIF had history of improperly processing claimant's benefit payments or that SCIF failed to provide sufficient number of adjusters to handle caseload or otherwise configured its office or business practices in such a way that errors were likely or probable); *County of San Luis Obispo v. W.C.A.B. (Barnes) (2001)92 Cal. App. 4th 869, 876-879, 112 Cal. Rptr.2d 246* (in determining reasonableness of delay, court should considertotality of circumstances, balancing fairness between parties, and here inadvertent delay held reasonable when employer had paid employee's medical benefits for 25 years, late quarterly penalty check was sent as soon as error was discovered, no timetable existed in agreement between employee and employer for quarterly penalty payments, employer had no history of late payments or of institutional neglect, employee did not notify employer that check had not arrived within usual time frame, and award of penalty (in excess of $40,000) would upset balance of fairness, constitute windfall to employee, and be out of proportion to employer's conduct (late payment in amount of $97.87))].

The court of appeal has held that the present version of *Lab. Code § 5814*, which became operative on June 1, 2004, applies to all injuries in cases pending on that date, including injuries that occurred prior to that date, when the court found that the legislature intended the new statute to apply retroactively, and that the language of Section 47 of SB 899, the bill that enacted the present version of *Lab. Code § 5814*, to the effect that "The amendment, addition, or repeal of any provision of law ... shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision, or award" simply stated the rule that statutory changes do not apply to cases in which appeals have been exhausted and there is a final judgment, making Section 47 inapplicable to the present pending case, since the employee appealed the Appeals Board's decision, the appellate process had not yet been exhausted, and there was no final judgment [*Green v. Workers' Comp. Appeals Bd. (2005) 127 Cal. App. 4th 1426* ; *see McCarthy v. Workers' Comp. Appeals Bd. (2006) 135 Cal. App. 4th 1230* (following *Green*)].

The Appeals Board en banc has held that the amount of a penalty under *Lab. Code § 5814(a)* is discretionary and should be determined upon consideration of various factors, including, but not necessarily limited to [Ramirez v. Drive Financial Services (2008) *73 Cal. Comp. Cases 1324, 1329-1330 (Appeals Board en banc opinion)]* :

1. Evidence of the amount of the payment delayed.

2. Evidence of the length of the delay.

3. Evidence of whether the delay was inadvertent and promptly corrected.

4. Evidence of whether there was a history of delayed payments or, instead, whether the delay was a solitary instance of human error.

5. Evidence of whether there was any statutory, regulatory, or other requirement (e.g., an order or a stipulation of the parties) providing that payment was to be made within a specified number of days.

6. Evidence of whether the delay was due to the realities of the business of processing claims for benefits or the legitimate needs of administering workers' compensation insurance.

7. Evidence of whether there was institutional neglect by the defendant, such as whether the defendant provided a sufficient number of adjusters to handle the workload, provided sufficient training to its staff, or otherwise configured its office or business practices in a way that made errors unlikely or improbable.

8. Evidence of whether the employee contributed to the delay by failing to promptly notify the defendant of it.

9. Evidence of the effect of the delay on the injured employee.

In the case before it, the Board found that the employee's claim for cumulative trauma injury to various body parts was settled by way of an order approving a compromise and release, pursuant to which the employer was to pay the employee $57,000, plus $3,000 as settlement of prospective vocational rehabilitation services. The compromise and release provided that all penalty issues were waived if the employer made payment within 30 days. The employer was five days late in making its payments to the employee, whose attorney notified the employer of the late payments by multiple letters and requested penalties. The employer, without any penalty award, paid the employee penalties of $5,700 and $300. The WCJ found that no further penalties were owed for late payments but offered no explanation as to why he thought the penalties paid by the employer were appropriate penalty amounts under the "fair balance and substantial justice" test of *Lab. Code § 5814(a)*. The Board stated that the overriding consideration in determining what penalty amount to assess should be whether the penalty imposed would serve the purposes sought to be accomplished by *Lab. Code § 5814*, which are both penal (providing an incentive to employers and insurers to pay benefits promptly) and remedial (ameliorating economic hardship on the injured employee that results from delay in provision of benefits). The Board remanded the matter, instructing the WCJ to explain the reasons for his penalty determination [Ramirez v. Drive Financial Services (2008) *73 Cal. Comp. Cases 1324, 1328-1331 (Appeals Board en banc opinion)]* .

If a potential violation of *Lab. Code § 5814* is discovered by the employer before an employee claims a penalty under the statute, the employer, within 90 days of the date of the discovery, may pay a self-imposed penalty in the amount of 10 percent of the amount of the payment unreasonably delayed or refused, along with the amount of that payment [*Lab. Code § 5814(b)*]. This self-imposed penalty will be in lieu of the penalty in the amount of the lesser of 25 percent or $10,000 [*Lab. Code § 5814(b)*]. The court of appeal has held that the employer may avail itself of this provision, regardless of whether the employee discovered the potential violation of *Lab. Code § 5814* before the employer did, so long as the employee has not claimed a penalty before the employer discovers the potential violation, and the employer then timely pays the self-imposed penalty. Moreover, the court held that the provision's application is not limited to situations in which the employer learns of the potential violation through its own investigation rather than through an employee's or a third person's investigation [*New United Motors Manufacturing, Inc. v. W.C.A.B. (Gallegos) (2006) 141 Cal. App. 4th 1533, 1538-1539, 47 Cal. Rptr. 3d 200]* .

Upon the approval of a compromise and release, findings and awards, or stipulations and orders by the Appeals Board, it will be conclusively presumed that any accrued claims for penalty have been resolved, regardless of whether a petition for penalty has been filed, unless the claim for penalty is expressly excluded by the terms of the order or award [*Lab. Code § 5814(c)*]. Upon the submission of any issue for determination at a regular trial hearing, it will be conclusively presumed that any accrued claim for penalty in connection with the benefit at issue has been resolved, regardless of whether a petition for penalty has been filed, unless the issue of penalty is also submitted or is expressly excluded in the statement of issues being submitted [*Lab. Code § 5814(c)*].

The payment of any increased award pursuant to *Lab. Code § 5814(a)* will be reduced by any amount paid under *Lab. Code § 4650(d)* on the same unreasonably delayed or refused benefit payment [*Lab. Code § 5814(d)*].

No unreasonable delay in the provision of medical treatment will be found when the treatment has been authorized by the employer in a timely manner and the only dispute concerns payment of a billing submitted by a physician or medical provider as provided in *Lab. Code § 4603.2* [*Lab. Code § 5814(e)*].

Nothing in *Lab. Code § 5814* may be construed to create a civil cause of action [*Lab. Code § 5814(f)*].

No action may be brought to recover penalties that may be awarded under *Lab. Code § 5814* more than two years from the date the payment of compensation was due [*Lab. Code § 5814(g)*].

Any employer or insurer that knowingly violates *Lab. Code § 5814* with a frequency that indicates a general business practice is liable for administrative penalties not to exceed $400,000 [*Lab. Code § 5814.6(a)*]. These penalty payments are to be imposed by the Administrative Director, who may impose a penalty under either this statute or *Lab. Code § 129.5(e)* [*Lab. Code § 5814.6(a), (b)*].

For form of petition for penalties, see *§ 577.505[1]*.

[b] Purpose and Application of Penalty

The purpose of the penalty is to help the employee obtain promptly the cure or relief to which he or she is entitled and to compel the employer to provide it in timely fashion. The penalty has been applied to virtually all types of benefits, including temporary and permanent disability indemnity, interest on an award, and amounts awarded as reimbursement of medical-legal costs [*Adams v. Workers' Comp. Appeals Bd. (1976) 18 Cal. 3d 226, 229, 133 Cal. Rptr. 517, 555 P.2d 303]* . The penalty has even been applied when an employer unreasonably delayed the payment of industrial disability leave to which an injured state employee was entitled under *Gov. Code § 19869 et seq.* [*State of California v. Workers' Comp. Appeals Bd. (1996) 44 Cal. App. 4th 128, 146, 51 Cal. Rptr. 2d 606]* .

Lab. Code § 5814 is both a remedial and a penalty statute. The remedial aspect is to facilitate the injured employee's return to work as quickly as possible. The penal aspect is to compel the employer to comply with the law fully and promptly [*DuBois v. Workers' Comp. Appeals Bd. (1993) 5 Cal. 4th 382, 396, 20 Cal. Rptr. 2d 523, 853 P.2d 978]* .

[c] Penalty Assessed Against Amount Unreasonably Delayed

The penalty under *Lab. Code § 5814* is assessed against "the amount of thepayment unreasonably delayed or refused" [*Lab. Code § 5814(a)*]. This marks a significant departure from the former rule that assessed thepenalty against "the full amount of the order, decision, or award" [former *Lab. Code § 5814(a)* [*Rhiner v. Workers' Comp. Appeals Bd. (1993) 4 Cal. 4th 1213, 1227-1228, 18 Cal. Rptr. 2d 129, 848 P.2d 244* ; *Gallamore v. Workers' Comp. Appeals Bd. (1979) 23 Cal. 3d 815, 826, 153 Cal. Rptr. 590, 591 P.2d 1242* ; *see Avalon Bay Foods v. Workers' Comp. Appeals Bd. (1998) 18 Cal. 4th 1165, 1176-1177, 77 Cal. Rptr. 2d 552* (dictum that medical treatment transportation benefits were an element of overall medical treatment benefits)]. In computing the full amount of benefits awarded in a particular class, voluntary, timely preaward payments as well as all future awards were included [*Rhiner v. Workers' Comp. Appeals Bd. (1993) 4 Cal. 4th 1213, 1225-1227, 18 Cal. Rptr. 2d 129, 848 P.2d 244* ; *Consani v. Workers' Comp. Appeals Bd. (1991) 227 Cal. App. 3d 12, 24-25, 277 Cal. Rptr. 619]* .

[d] Multiple Penalties

Between January 1, 2003, and June 1, 2004, *Lab. Code § 5814* provided that multiple penalties were not to be awarded

for repeated delays in making a series of payments due for the same type or specie of benefit unless there had been a legally significant event between the delay and the subsequent delay in payments of the same type or specie of benefits [former *Lab. Code § 5814(a)*]. No such language appears in the version of *Lab. Code § 5814* that became operative on June 1, 2004. Moreover, as discussed in [c], *above*, whereas the pre-June 1, 2004, version of the statute assessed the penalty against "the full amount of the order, decision, or award" [former *Lab. Code § 5814(a)*], the post-June 1, 2004, version assesses the penalty against only "the amount of the payment unreasonably delayed or refused" [*Lab. Code § 5814(a)*]. The extent to which these legislative changes have affected the jurisprudence developed by California courts and the Appeals Board on the issue of when multiple and successive penalties may be awarded remains to be seen. On the one hand, questions of type or specie of benefit have presumably become irrelevant, since penalties are now assessed against simply the amount of the payment unreasonably delayed or refused. On the other hand, when, for example, several disability payments are unreasonably delayed due to a single error on the paying party's part, the courts and the Appeals Board may still interpret the statute as requiring something akin to the pre-June 1, 2004, mandate for "a legally significant event between the delay and the subsequent delay in payments" before imposing multiple penalties. Indeed, such a reading of the current statute may find support in the statute's admonition to the Appeals Board to use, in proceedings pursuant to *Lab. Code § 5814*, "its discretion to accomplish a fair balance and substantial justice between the parties" [*Lab. Code § 5814(a)*].

Prior to the January 1, 2003, introduction of the requirement of "a legally significant event between the delay and the subsequent delay" to justify imposition of multiple penalties, the law regarding multiple penalties hadbeen set forth in a series of cases. Pursuant to this case law, multiple penalties were permitted only when delay or nonpayment of benefits was attributable to separate and distinct acts [*Gallamore v. Workers' Comp. Appeals Bd. (1979) 23 Cal. 3d 815, 824, 153 Cal. Rptr. 590, 591 P.2d 1242* ; *Christian v. Workers' Comp. Appeals Bd. (1997) 15 Cal. 4th 505, 509, 936 P.2d 115* (reaffirming holding in *Gallamore* and concluding that employer's unreasonable termination of temporary disability benefits was a single act and did not become a separate and distinct act supporting additional penalties each time a benefit check should have been paid after the initial termination); *see § 577.504*, for discussion of notice required when seeking multiple penalties]. Similarly, when an employer or a carrier made one late benefit payment and failed to include interest in that payment, only a single penalty could be imposed under *Lab. Code § 5814* [*California Highway Patrol v. W.C.A.B. (Erebia) (2001) 89 Cal. App. 4th 1201, 1206-1207, 108 Cal. Rptr. 2d 118]* .

Since the preceding paragraphs were written, one court of appeal has held that agreed medical evaluator opinions and a stipulation may each result in liability under the new *Lab. Code § 5814* and may each qualify as a separate, legally significant event, and that the legislature did not eliminate multiple increases in compensation for conduct occurring either before or after the award, as long as the events were "separate and distinct" under *Christian*. The court of appeal remanded to the Appeals Board for determination of whether compensation owed pursuant to the opinions of the agreed medical evaluators and compensation owed pursuant to a stipulation were unreasonably delayed under the new *Lab. Code § 5814* [*Green v. Workers' Comp. Appeals Bd. (2005) 127 Cal. App. 4th 1426, 1443-1445, 26 Cal. Rptr. 3d 527]* .

The Appeals Board en banc held that, although, under *Lab. Code § 5814(a)*, a successive penalty may be awarded for an unreasonable delay in making a prior penalty payment, it should not be awarded when the employer had genuine doubt as to its liability or when there has been no legally significant intervening event. The Board found that, in the case before it, a significant possibility existed that, when the employer made penalty payments of $5,700 and $300, i.e., 10 percent of $57,000 and $3,000, respectively (the two payments it had agreed to make via compromise and release, and which it was five days late in making), it could have had genuine doubt from a legal standpoint regarding its liability for more than it paid, since there had been no order or award directing it to pay more than 10 percent. Indeed, there had been no order or award directing it to pay any penalty at all. Remanding the matter, the Board instructed the WCJ to decide whether a successive penalty would be justified [Ramirez v. Drive Financial Services (2008) *73 Cal. Comp. Cases 1324, 1331-1332 (Appeals Board en banc opinion)]* .

Lab. Code § 5814 makes no provision for any deductions or credits for payments made by the employer, including a

deduction or credit for the employer's timely preaward payments [*Rhiner v. Workers' Comp. Appeals Bd. (1993) 4 Cal. 4th 1213, 1225-1227, 18 Cal. Rptr. 2d 129, 848 P.2d 244]* .

[e] Uninsured Employers Benefits Trust Fund

The Uninsured Employers Benefits Trust Fund (UEBTF) is exempt from payment of the penalty under *Lab. Code § 5814* by virtue of *Lab. Code § 3716.2*, which provides that the UEBTF is not liable for any penalties, including penalties for its own unreasonable delay in paying benefits to an injured employee with whom it has stipulated to pay benefits [*DuBois v. Workers' Comp. Appeals Bd. (1993) 5 Cal. 4th 382, 398-399, 20 Cal. Rptr. 2d 523, 853 P.2d 978]* .

If payment of compensation was unreasonably delayed or refused prior to the issuance of an award, and the Administrative Director has provided discretionarycompensation pursuant to *Lab. Code § 4903.3* (payment from Uninsured Employers Benefits Trust Fund), the WCAB will award the Administrative Director a penalty to be paid by the employer in the amount of 10 percent of the compensation provided by the director. This penalty is in addition to the penalty imposed by *Lab. Code § 5814* [*Lab. Code § 5814.1*].

[f] Self-Insured Employers

When an employer that has secured the payment of compensation pursuant to *Lab. Code § 3700(c)* (self-insured public entity) unreasonably delays or refuses payment of compensation subsequent to the issuance of an award, the WCAB will, in addition to increasing the order, decision or award pursuant to *Lab. Code § 5814*, award reasonable attorney's fees incurred in enforcing payment of the compensation awarded [*Lab. Code § 5814.5*].

A self-insured employer's excess coverage policy provision that excluded indemnification for "payments made by the Insured in excess of benefits regularly required by the Workers Compensation Law if such excess payments are required because ... the Insured violated or failed to comply with any Workers Compensation Law" applied to exclude indemnification for *Lab. Code § 5814* penalties paid by the employer [*General Reinsurance Corp. v. St. Jude Hospital (Ballard) (2003) 107 Cal. App. 4th 1097, 1103-1108, 132 Cal. Rptr. 2d 540]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceHearsayExemptionsStatements by Party OpponentsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsExemptions & WaiversWorkers' Compensation & SSDIAdministrative ProceedingsCosts & Attorney FeesWorkers' Compensation & SSDIBenefit DeterminationsGeneral OverviewWorkers' Compensation & SSDICoverageActions Against EmployersStatutory Requirements

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§ 577.244 Commutation of Compensation to Lump Sum

The WCAB may, when it makes its award or at any time thereafter, on its own motion on notice, or on noticed application of either party [*see § 577.503*], commute the compensation payable to a lump sum and order it to be paid forthwith or at some future time if [*Lab. Code § 5100*]:

- The commutation is necessary for the protection of the person entitled to it, or for the best interest of the applicant;
- The commutation will avoid inequity and will not cause undue expense or hardship to the applicant;
- The employer has sold or otherwise disposed of the greater part of his or her assets or is about to do so; or
- The employer is not a resident of California.

The procedure to be followed is set forth in *Lab. Code §§ 5101-5106*. This does not apply, however, to compensation payable from the Subsequent Injuries Benefits Trust Fund under *Lab. Code § 4751* [*Lab. Code § 5100.5*] or prospective compensation, indemnity payments, or other benefits to which the employee is entitled under the rehabilitation provisions [*Lab. Code § 5100.6*].

In determining what is in the best interest of the applicant, the WCAB will consider the applicant's general financial condition, including withoutlimitation the applicant's ability to live without periodic indemnity payments and to discharge debts incurred prior to the date of injury [*Lab. Code § 5100(a)*].

Legal Topics:

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

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§ 577.245 Enforcement of Awards

On the request of a complaining party, the WCAB may issue an order to show cause directing the employer or insurance carrier to appear and show cause why the WCAB's order, decision, or award has not been complied with [*8 Cal. Code Reg. § 10832* (repealed October 21, 1996, and inoperative November 1, 1996, per 1996 revisions to regulations); *see Betancourt v. Workmen's Comp. App. Bd. (1971) 16 Cal. App. 3d 408, 410-413, 94 Cal. Rptr. 9* (mandate as proper remedy to compel issuance of order)]. Despite the five-year limitation on its continuing jurisdiction under *Lab. Code §§ 5804* and *5410*, the WCAB possesses inherent power, as in the case of any court, to enforce a previous order, decision, or award, independent of any limitations of time [*Nickelsberg v. Workers' Comp. Appeals Bd. (1991) 54 Cal. 3d 288, 297, 285 Cal. Rptr. 86, 814 P.2d 1328]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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51-577 California Forms of Pleading and Practice--Annotated § 577.246

§ 577.246 Execution

[1] Certified Copy of Award and Entry of Judgment

Certified copies of findings and awards or other final orders may be issued by the WCAB for the purpose of having judgment entered and execution issued by the clerk of the superior court. A certified copy will be issued, however, only on written request of a person entitled to benefits under the award or by his or her attorney or authorized representative and payment of the fee [*8 Cal. Code Reg. § 10820*]. Any party affected thereby may file a certified copy of the findings and order, decision, or award of the WCAB with the clerk of the superior court of any county, who must immediately issue judgment in conformity therewith. The words "any party affected thereby" include the Uninsured Employers Benefits Trust Fund, which is entitled to have judgment entered not only against the uninsured employer but also against any person who is a parent or substantial shareholder of the employer [*Lab. Code § 5806*]. For procedure and forms for use in executing on a judgment, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.

[2] Stay of Execution

The WCAB or any of its members may for good cause stay execution of a judgment entered on an order, decision, or award and may impose terms and conditions on the stay [*Lab. Code § 5808*]. A certified copy of the order is then filed with the clerk entering judgment. If a certified copy of the order, decision, or award and findings has not been issued, the WCAB or any of its members may order the certified copy to be withheld with the same forceand under the sameconditions as it might issue a stay of execution had the certified copy been issued and judgment entered on it [*Lab. Code § 5808*; *see 8 Cal. Code Reg. § 10825*].

Before staying execution or issuing an order withholding issuance of a certified copy of an order, decision, or award, the WCAB in its discretion may require the filing of a bond from an approved surety equivalent to twice the probable amount of liability in the case [*8 Cal. Code Reg. § 10825(a)*]. For discussion and forms of bonds, see *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.40* et seq.

[3] Liens Created by Recording Judgment

Liens on real property arising from lump-sum money judgments entered pursuant to the workers' compensation law are created by recording an abstract of the judgment as provided in *Code Civ. Proc. § 697.310* or, if the money judgment is for payment in installments, by recording a certified copy of the judgment as provided by *Code Civ. Proc. § 697.320*. Except as provided in the workers' compensation law, these liens are governed by the provisions of *Code Civ. Proc. §§ 697.310* (lump-sum judgments) and 697.320 (installment judgments) [*Code Civ. Proc. § 697.330(a)*]. For discussion of those provisions, see *Ch. 318, Judgments, § 318.90* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsEnforcement & ExecutionWrits of ExecutionCivil ProcedureJudgmentsEntry of JudgmentsStays of ProceedingsGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementWorkers' Compensation & SSDIAdministrative ProceedingsAwardsEnforcement

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§ 577.247 Satisfaction of Judgment

When a judgment is satisfied in fact, other than on an execution, the WCAB may, on motion of either party or on its own motion, order the entry of satisfaction of the judgment. The clerk will enter satisfaction of judgment only on the filing of a certified copy of the WCAB's order [*Lab. Code § 5809*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesJudgment LiensEnforcementWorkers' Compensation & SSDIAdministrative ProceedingsAwardsEnforcement

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[Reserved]

§§ 577.248[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.260

§ 577.260 Governing Law

Liens against compensation are governed by *Lab. Code §§ 4903-4909.1* and *8 Cal. Code Reg. §§ 10770-10772*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementWorkers' Compensation & SSDIAdministrative ProceedingsAwardsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsAwardsEnforcement

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51-577 California Forms of Pleading and Practice--Annotated § 577.261

§ 577.261 Kinds of Liens Allowed and Reimbursement

[1] In General

The WCAB must determine and allow as a first lien against any sum to be paid as compensation the amount of compensation, including the cost of medical treatment, provided by the Director of Industrial Relations from the Uninsured Employers Benefits Trust Fund pursuant to *Lab. Code § 4903.3* [*Lab. Code § 4903.3*]. If more than one lien is allowed, the WCAB may determine the priorities, if any, between them [*Lab. Code § 4903*].

The following liens against compensation may be determined and allowed by the WCAB:

(1) A reasonable attorney's fee for legal services pertaining to a workers' compensation claim before the WCAB or any of the appellate courts, and reasonable disbursements in connection therewith, but no fee for legal services may be awarded to a representative who is not an attorney licensed by the California State Bar, except with respect to claims for which an application under *Lab. Code § 5501* was filed on or before December 31, 1991, or for which a disclosure form under *Lab. Code § 4906* was sent to the employer, or insurer or third-party administrator if either is known, on or before December 31, 1991 [*Lab. Code § 4903(a)*; *see also Lab. Code § 4906*; *Longval v. Workers' Comp. Appeals Bd. (1996) 51 Cal. App. 4th 792, 799-803* (*Lab. Code § 4903(a)*, allowing attorney's fees only to attorneys licensed in California, held constitutional)];

(2) The reasonable expense of required medical treatment for the injury and, to the extent the employee is entitled to reimbursement under *Lab. Code § 4621*, medical-legal expenses as provided in *Lab. Code §§ 4620-4628* [*Lab. Code § 4903(b)*; *see also Lab. Code §§ 4903.4* (resolution of disputes regarding liens by arbitration), 4906(a); *Zenith Ins. Co. v. W.C.A.B. (2006) 138 Cal. App. 4th 373, 376-377, 41 Cal. Rptr. 3d 380* (Appeals Board's awards to lien claimants, outpatient medical treatment centers, were not supported by substantial evidence, because lien claimants, in order to establish their right to reimbursement, bore initial burden of proving they were properly licensed or accredited, and they had

not carried this burden)];

(3) The reasonable value of the employee's or dependents' living expenses subsequent to the injury [*Lab. Code § 4903(c)*; *see Prudential Insurance Co. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 776, 780, 151 Cal. Rptr. 537, 588 P.2d 239* (purpose of this lien is to protect persons who advance credit or loan money to dependents for necessary living expenses)];

(4) The deceased employee's reasonable burial expenses not to exceed the amount specified in *Lab. Code § 4701* (liability of employer for burial expenses and death benefits) [*Lab. Code § 4903(d)*];

(5) The reasonable living expenses of the injured employee's spouse, minor children, or both subsequent to the date of injury, if the employee hasdeserted or is neglecting his or her family [*Lab. Code § 4903(e)*];

(6) Unemployment compensation disability benefits paid under or pursuant to the Unemployment Insurance Code in those cases when, pending a determination under the workers' compensation law, there was uncertainty whether such benefits were payable under the workers' compensation law or the Unemployment Insurance Code [*Lab. Code § 4903(f)*; *see Lab. Code §§ 3865, 4903.2* (attorney's fees), *4904* (determination of amount of lien, effect ofdetermination, payment); *8 Cal. Code Reg. § 10772*; *California-Western States Life Ins. Co. v. Industrial Acci. Com. (1963) 59 Cal. 2d 257, 262-266, 28 Cal. Rptr. 872, 379 P.2d 328]* ;

(7) Unemployment compensation benefits and extended duration benefits paid to the injured employee for the same day or days for which he or she received, or was entitled to receive, temporary total disability indemnity payments [*Lab. Code § 4903(g)*; *see Lab. Code §§ 3865, 4903.2* (attorney's fees), *4904* (determination of amount of lien, effect of determination, payment); *8 Cal. Code Reg. § 10772*; *California-Western States Life Ins. Co. v. Industrial Acci. Com. (1963) 59 Cal. 2d 257, 262-266, 28 Cal. Rptr. 872, 379 P.2d 328]* ;

(8) The amount of family temporary disability insurance benefits paid to the injured employee pursuant to the Unemployment Insurance Code for the same days for which the employee is entitled to receive temporary total disability benefits, as this lien is allowed by *Lab. Code § 4904(b)(3)* [*Lab. Code § 4903(h)*];

(9) The amount of indemnification granted pursuant to *Gov. Code § 13950 et seq.* (victims of crime) [*Lab. Code § 4903(i)*]; and

(10) The amount of compensation, including expenses of medical treatment, and recoverable costs paid by the Asbestos Workers' Account pursuant to the provisions of *Lab. Code § 4401 et seq.* [*Lab. Code § 4903(j)*].

For notice and request for allowance of lien form, see *§ 577.480*. See also *§§ 577.481[1], 577.482[1]* for forms used when liens are reduced or settled.

[2] Asbestos Workers

With respect to asbestos workers, it should be noted that the provisions of *Lab. Code §§ 4401-4418* that provide for the payment of workers' compensation asbestos workers' benefits from the Asbestos Workers Account were repealed by their own terms on January 1, 1989. As of that date, all payments from the fund were terminated and the state had no further obligation to pay asbestos workers' benefits. The authority of the Asbestos Workers' Account under *Lab. Code*

§§ 4401-4418 to recover the benefits and costs paid to asbestos workers prior to January 1, 1989, however, continue until the benefits and costs have been recovered [*Lab. Code § 4418*]. Therefore, the WCAB apparently may still determine and allow a lien filed by the Asbestos Workers' Account to recover moneys expended for compensation benefits [*see Lab. Code § 4414* (filing of lien by Account)].

[3] Reimbursement for Benefits or Services Provided in Award or Approval of Compromise and Release Agreement

Before issuing an award or approval of any compromise of claim, the WCAB, arbitrator, or settlement conference referee must determine, on thebasis of the liens filed pursuant to *Lab. Code § 4903.1(b)* or discussed under *(c)*, [*§ 577.262*], whether any benefits have been paid or services provided by a health care provider, a health care service plan, a group disability policy, including a loss of income policy, a self-insured employee welfare benefit plan, or a hospital service contract, and its award or approval must provide for reimbursement for benefits paid or services provided under such plans as set forth in *Lab. Code § 4903.1(a)(1)-(4)* [*Lab. Code § 4903.1(a)*].

When a Medi-Cal lien filed by the Department of Human Services is settled as part of a compromise and release agreement, recovery on the lien is limited to an amount derived from applying *Welf. & Inst. Code § 14124.72*, *14124.76*, or *14124.78*, whichever is less [*Welf. & Inst. Code § 14124.785*]. However, when the Medi-Cal lien is not included in the compromise and release, it may, like any other successfully litigated lien in this situation, be recovered in its full amount [*Boehm & Associates v. Workers' Comp. Appeals Bd. (2003) 108 Cal. App. 4th 137, 150152, 133 Cal. Rptr. 2d 396* (medical provider in this situation who has received payment under Medi-Cal is entitled to file lien for services but may recover on lien only after reimbursing any fees paid by Medi-Cal)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensEnforcementContracts LawSecured TransactionsPerfection & PriorityPriorityLiensWorkers' Compensation & SSDIAdministrative ProceedingsAwardsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsCosts & Attorney FeesWorkers' Compensation & SSDIBenefit DeterminationsMedical BenefitsAuthorized Treatment

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§ 577.262 Procedure for Claiming

Unless the lien claimant is excepted by *8 Cal. Code Reg. § 10228(c)(5)(A)-(C)* [*see § 577.106[2]*], any lien claimant under *Lab. Code § 4903* or *4903.1* [*see* [1], [2], *above*] must file its lien in writing using an optical character recognition (OCR) lien form approved by the Appeals Board or electronically as approved by the Administrative Director or the Court Administrator [*see § 577.480[1]*]. Lien claimants excepted by *8 Cal. Code Reg. § 10228(c)(5)(A)-(C)* [*see § 577.106[2]*] may file a lien using a non-optical character recognition form, provided that it is in the same format and contains the same information as the corresponding OCR form approved by the Appeals Board [*8 Cal. Code Reg. § 10770(a)*].

All lien claims filed must be accompanied by (1) a full statement or itemized voucher supporting the lien and justifying the right to reimbursement; and (2) a proof of service [*8 Cal. Code Reg. § 10770(b)*].

All liens, along with the full statement or itemized voucher supporting the lien, must be concurrently served as follows [*8 Cal. Code Reg. § 10770(c)*]:

1. The injured worker (or, if deceased, the worker's dependent(s)) must be served, unless (A) the worker or dependent is represented by an attorney or other agent of record, in which event service may be made solely on the attorney or agent of record; or (B) the underlying case of the worker or dependent(s) has been resolved. For purposes of this rule, the underlying case will be deemed to have been resolved if any of the following has occurred:

i. In a stipulated findings and award or in a compromise and release agreement, a defendant has agreed to hold the worker or dependent(s) harmless from the specific lien claim being filed and has agreed to pay, adjust, or litigate that lien.

ii. A defendant had written notice of the lien in accordance with *Lab. Code § 4904(a)* before the lien was filed and, in a stipulated findings and award or in a compromise and

release agreement, that defendant has agreed to hold the worker or dependent harmless from all lien claims and has agreed to pay, adjust, or litigate all liens.

iii. The application for adjudication of claim filed by the worker or the dependent(s) has been dismissed, and the lien claimant is filing or has filed a new application.

iv. The worker or the dependent(s) choose(s) not to proceed with his, her, or their case.

2. Any employer(s) or insurance carrier(s) that are parties to the case must be served, unless the employer(s) or insurance carrier(s) is/are represented by an attorney or other agent of record, in which event service may be made solely upon the attorney(s) or other agent(s) of record.

Service of a lien on a party constitutes notice to it of the existence of the lien.

The Appeals Board will not accept for filing a lien that does not bear an adjudication case number previously assigned by the Board for the injury, unless the lien claimant is also filing an initial (case opening) application in accordance with *8 Cal. Code Reg. § 10770.5* [*8 Cal. Code Reg. § 10770(d)*].

The lien claimant must provide the name, mailing address, and daytime telephone number of a person who will be available at the time of all conferences and trials, and who will have authority to resolve the lien on behalf of the lien claimant [*8 Cal. Code Reg. § 10770(e)*].

After a lien has been filed, the lien claimant must file any amendments to the lien, together with a full statement or itemized voucher supporting the amendment, and serve the amended lien in accordance with the service provisions set forth above. When filing an amended lien, the lien claimant must indicate on the box set forth on the lien form that it is an "amended" lien. For purposes of this rule, an "amended" lien includes (1) a lien that is for or includes additional services or charges for the same injured employee for the same date or dates of injury; (2) a lien that reflects a change in the amount of the lien based on payments made by the defendant; or (3) a lien that has been corrected for clerical or mathematical error. A subsequent lien claim that adds an additional adjudication case number or numbers is an "amended" lien with respect to the adjudication case number(s) originally listed [*8 Cal. Code Reg. § 10770(f)*].

Within five business days after a lien has been resolved or withdrawn, the lien claimant must notify the Appeals Board, the party defendant(s), and the worker or dependent(s) (except as provided in subsection (c), discussed above) [*8 Cal. Code Reg. § 10770(g)*].

The lien claimant must be notified by the Appeals Board when any hearing is scheduled, whether or not the hearing directly involves the lien [*8 Cal. Code Reg. § 10770(h)*].

Inclusion of the injured employee's Social Security number on a lien form is voluntary, not mandatory. A failure to provide a Social Security number will not have any adverse consequences. Nevertheless, although a lien claimant is not required by law to include the employee's social security number, lien claimants are encouraged to do so because this will facilitate the processing and filing of the lien claim. Social security numbers are used solely for identification and verification purposes in order to administer the workers' compensation system. A social security number will not be disclosed, made available, or otherwise used for purposes other than those specified, except with the consent of the employee, or as permitted or required by statute, regulation, or judicial order [*8 Cal. Code Reg. § 10770(i)*].

In 2003 the legislature enacted, and in 2004 amended, *Lab. Code § 4903.05*, establishing a filing fee of $100 for medical liens. Liens filed by the Veterans Administration, the Medi-Cal program, and public hospitals were excepted from the requirement [*see* Stats. 2003, ch. 639, § 33; Stats. 2004, ch. 34, § 39]. Effective July 1, 2006, however, the legislature repealed *Lab. Code § 4903.05*, thereby abolishing the filing fee [*see* Stats. 2006, ch. 69, § 25]. According to

the Division of Workers' Compensation, the intent of requiring a filing fee was to share costs of the workers' compensation system, which was otherwise funded entirely by employers, and to stop medical providers from filing unnecessary liens when reimbursement for their services was not in doubt. However, the cost of filing the liens was being passed through to employers, and the number of liens filed did not decrease. At the same time, the DWC had to process the liens and related filing fees, which did not positively impact the system or the settling of claims, but instead created a process that was inefficient and took DWC staff away from other duties. It is assumed that the regulation promulgated pursuant to former *Lab. Code § 4903.05* will be repealed or amended [*see 8 Cal. Code Reg. § 10250*].

In an apparent attempt to address some of the problems that gave rise to the now-being-repealed *Lab. Code § 4903.05*, the legislature enacted *Lab. Code § 4903.6*, effective July 1, 2006. This statute provides that, except as necessary to satisfy the statute of limitations governing the filing of liens for medical treatment expenses and medical-legal expenses [*see Lab. Code § 4903.5*], no such lien claim or application for adjudication may be filed until the expiration of one of the following [*Lab. Code § 4903.6(a)*; *see Lab. Code § 4903(b)* (authorizing payment of liens for medical treatment expenses and medical-legal expenses)]:

- Sixty days after the date of acceptance or rejection of liability for the claim, or expiration of the time provided for investigation of liability pursuant to *Lab. Code § 5402(b)*, whichever date is earlier.

- The time provided for payment of medical treatment bills pursuant to *Lab. Code § 4603.2*.

- The time provided for payment of medical-legal expenses pursuant to *Lab. Code § 4622*.

No declaration of readiness to proceed may be filed for a medical expenses lien or a medical-legal expenses lien until the underlying case has been resolved or when the employee chooses not to proceed with his or her case [*Lab. Code § 4903.6(b)*].

The Appeals Board is required to adopt reasonable regulations to ensure compliance with *Lab. Code § 4903.6*, and it is instructed to take any further steps that may be necessary to enforce the regulations, including, but not limited to, impositions of sanctions pursuant to *Lab. Code § 5813* [*Lab. Code § 4903.6(c)*].

The prohibitions of *Lab. Code § 4903.6* do not apply to lien claims, applications for adjudication, or declarations of readiness to proceed filed by or on behalf of the employee, or to the filings by or on behalf of the employer [*Lab. Code § 4903.6(d)*].

In 2002, the legislature enacted a statute of limitations governing the filing of lien claims [*see* Stats. 2002, ch. 6, § 70].

Effective January 1, 2003, no lien claim for expenses as provided in *Lab. Code § 4903(b)* may be filed after whichever is the latest date among the following [*Lab. Code § 4903.5(a)*]:

- Six months from the date on which the Appeals Board or a workers' compensation administrative law judge issues a final decision, findings, order (including an order approving compromise and release), or award, on the merits of the claim.

- Five years from the date of the injury for which the services were provided.

- One year from the date the services were provided.

Notwithstanding these time limits, any health care provider, health care service plan, group disability insurer, employee benefit plan, or other entity providing medical benefits on a nonindustrial basis, may file a lien claim for expenses as provided in *Lab. Code § 4903(b)* within six months after the person or entity first has knowledge that an industrial

injury is being claimed [*Lab. Code § 4903.5(b)*].

The injured worker is not liable for any underlying obligation if a lien claim hasnot been filed and served within the allowable period. Except when the lien claimant is the applicant as provided in *Lab. Code § 5501*, a lien claimant may not file a declaration of readiness to proceed in any case until the case-in-chief has been resolved [*Lab. Code § 4903.5(c)*].

This section does not apply to civil actions brought under the Cartwright Act (Bus. & Prof. Code, Div. 7, Part 2, Ch. 2), the Unfair Practices Act (Bus. & Prof. Code, Div. 7, Part 2, Ch. 4), or the federal Racketeer Influenced and Corrupt Organization Act (18 U.S.C. Ch. 96) based on concerted action with other insurers that are not parties to the case in which the lien or claim is filed [*Lab. Code § 4903.5(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensEnforcementContracts LawSecured TransactionsPerfection & PriorityPriorityLiensWorkers' Compensation & SSDIAdministrative ProceedingsAwardsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsCosts & Attorney FeesWorkers' Compensation & SSDIBenefit DeterminationsMedical BenefitsAuthorized Treatment

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§ 577.263 Notice of Lien

[1] In General

If written notice is given to the insurer or uninsured employer of the nature and extent of any claim that is allowable as a lien, the claim is a lien against any amount thereafter payable as compensation, subject to the determination of the amount and approval of the lien by the WCAB [*Lab. Code § 4904*].

[2] Employment Development Department Liens

If the Employment Development Department (EDD) serves an insurer or employer with a lien claim, the insurer or employer must provide the EDD with written notice of commencing disability indemnity payments. The notice must be provided as soon as possible, but in no event later than 15 working days after the payments commence. Further, the insurer or employer must notify the EDD, in writing, within 10 working days of filing with the WCAB an application for adjudication, a stipulated award, or a compromise and release [*Lab. Code § 4904*].

Legal Topics:

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

After a lien has been filed, the lien claimant must continue to serve amendments to it on the parties. Amendments must be filed only upon the filing of a declaration of readiness, compromise and release, or stipulations with request for award or order, or upon receipt of a notice of hearing. An amendment to a lien filed at any other time, and any attachments to such an amendment, will not be filed and may be discarded by the WCAB. If a lien has been filed electronically, upon the filing of a declaration of readiness, compromise and release, or stipulations with request for award or order, or upon receipt of a notice of hearing, the lien claimant must file a full statement or itemized voucher supporting the lien unless the lien claimant advises in writing, or electronically, that the lien has been resolved or withdrawn [*8 Cal. Code Reg. § 10770(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePleading & PracticePleadingsAmended PleadingsGeneral OverviewCivil ProcedureRemediesJudgment LiensEnforcementWorkers' Compensation & SSDIAdministrative ProceedingsAwardsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling Requirements

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§ 577.265 Payment of Lien

The WCAB may order the amount of any lien claim, as determined and allowed by it, to be paid directly to the person entitled, either in a lump sum or in installments [*Lab. Code § 4904*]. The payment of liens does not affect the commencement of immediate payments on any balance of the award to the injured claimant when an installment payment for his or her disability has been determined [*Lab. Code § 4904.1*].

[1] Order to Pay Claim When No Lien Requested

When it appears that a lien should be allowed, had it been duly requested by the party entitled to it, the WCAB may, without any request for the lien having been made, order the payment of the claim to be made directly to the person entitled, in the same manner and with the same effect as though the lien had been regularly requested. The award constitutes a lien against unpaid compensation due at the time the award is served [*Lab. Code § 4905*].

[2] Compromise and Release Agreements

The WCAB may approve a compromise and release agreement on all other issues and may defer to subsequent proceedings determination ofa lien claimant's entitlement to reimbursement if the defendant agrees to pay the amount subsequently determined to be due under the lien claim [*Lab. Code § 4904*]. For discussion and forms concerning compromise and release generally, see *§ 577.130* et seq. and §§ 477.460 -*577.462*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesJudgment LiensEnforcementWorkers' Compensation & SSDIAdministrative ProceedingsAwardsGeneral OverviewWorkers' Compensation & SSDIAdministrative ProceedingsClaimsFiling Requirements

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[Reserved]

§§ 577.266[Reserved]

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§ 577.280 Governing Law

Judicial review of the WCAB's orders, rules, decisions, and awards is governed by *Lab. Code §§ 5950-5956* and *Cal. Rules of Ct., Rule 8.495*. Insofar as they are appropriate, the provisions of the Code of Civil Procedure relating to writs of review (*Code Civ. Proc. §§ 1067-1077, 1107-1110*) apply [*Lab. Code § 5954*]. For a discussion of *Code Civ. Proc. §§ 1067-1077, 1107-1110*, see Ch. 492, *Review (Certiorari), Writ of.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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51-577 California Forms of Pleading and Practice--Annotated § 577.281

§ 577.281 Manner of Review and Jurisdiction

Judicial review is by writ of review [*see Lab. Code §§ 5810, 5950, 5952*]. Jurisdiction to issue such writs is in the California Supreme Court and courts of appeal [*Lab. Code § 5955*; *see Cal. Const., art. XIV, § 4*; *Lab. Code §§ 5910, 5950*]. No new or additional evidence can be introduced on such review and the cause must be heard on the WCAB's certified record [*Lab. Code § 5951*].

A superior court does not have subject matter jurisdiction over an action to declare provisions of the Workers' Compensation Act invalid and to enjoin the WCAB from enforcing those provisions [*Lab. Code § 5955*; *Greener v. Workers' Comp. Appeals Bd. (1993) 6 Cal. 4th 1028, 1034, 25 Cal. Rptr. 2d 539, 863 P.2d 784]* . Only the Courts of Appeal and the Supreme Court have jurisdiction to entertain challenges to the constitutional validity of provisions of the workers' compensation law [*Greener v. Workers' Comp. Appeals Bd. (1993) 6 Cal. 4th 1028, 1046, 25 Cal. Rptr. 2d 539, 863 P.2d 784]* . Similarly, the superior court has no jurisdiction to review Appeals Board decisions, invoked pursuant to *Gov. Code § 21166*, to determine the industrial nature of the disability of a public safety employee who is a member of the Public Employees Retirement System. Rather, appeals of such decisions must be taken to the court of appeal or the Supreme Court, as in workers' compensation cases generally [*Abraham v. Workers' Comp. Appeals Bd. (2003) 113 Cal. App. 4th 1082, 1087-1089, 6 Cal. Rptr. 3d 820]* . A party who is aggrieved by an order of the WCAB applying the workers' compensation law to that party may seek relief by filing a petition forreview of the WCAB's order with the Court of Appeal or the Supreme Court, or by filing a petition for a writ of mandate with the Court of Appeal or the Supreme Court if the criteria for extraordinary relief under *Code Civ. Proc. § 1085* are satisfied [*Greener v. Workers' Comp. Appeals Bd. (1993) 6 Cal. 4th 1028, 1046, 25 Cal. Rptr. 2d 539, 863 P.2d 784]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsAppellate JurisdictionState Court ReviewWorkers' Compensation & SSDIAdministrative ProceedingsJudicial ReviewGeneral Overview

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§ 577.282 Scope of Review

Judicial review is limited to determining whether [*Lab. Code § 5952*; *see Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd. (1983) 34 Cal. 3d 159, 164, 193 Cal. Rptr. 157, 666 P.2d 14]* :

- The WCAB acted without or in excess of its powers;
- The order, decision, or award was procured by fraud;
- The order, decision, or award was unreasonable;
- The order, decision, or award was not supported by substantial evidence; or
- The findings of fact, if any, support the order, decision, or award.

In making these determinations, the court may not hold a trial de novo, take evidence, or exercise its independent judgment on the evidence [*Lab. Code § 5952*].

The WCAB's findings and conclusions on questions of fact are conclusive and final and are not subject to review so long as, based on the entire record, the are supported by substantial evidence. Questions of fact include ultimate facts and the findings and conclusions of the WCAB [*Lab. Code § 5953*]. However, the reviewing court is not bound to accept the WCAB's findings if the findings are unreasonable [*Rouseyrol v. Workers' Comp. Appeals Bd. (1991) 234 Cal. App. 3d 1476, 1483, 286 Cal. Rptr. 250]* . Moreover, a reviewing court is not bound by the WCAB's conclusions on questions of law. When a compensation award is based on an erroneous interpretation of law, it will be annulled by the reviewing court [*Save Mart Stores v. Workers' Comp. Appeals Bd. (1992) 3 Cal. App. 4th 720, 723, 4 Cal. Rptr. 2d 597]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewStandards of ReviewSubstantial EvidenceCivil ProcedureAppealsAppellate JurisdictionState Court ReviewWorkers' Compensation & SSDIAdministrative ProceedingsJudicial ReviewGeneral Overview

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§ 577.283 Who May Apply for Writ

Any person affected by an order, decision, or award of the WCAB may apply to the Supreme Court or to the court of appeal for the appellate district in which he or she resides for a writ of review to inquire into and determine the lawfulness of the original order, decision, or award or of the order, decision, or award following reconsideration [*Lab. Code § 5950*]. As a matter of practice, applications for a writ of review are filed in the courts of appeal rather than in the Supreme Court.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingPersonal StakeCivil ProcedureAppealsAppellate JurisdictionState Court ReviewWorkers' Compensation & SSDIAdministrative ProceedingsJudicial ReviewGeneral Overview

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§ 577.284 Time to Apply for Writ

The application for a writ of review must be made within 45 days after a petition for reconsideration was denied, or, if the petition for reconsideration was granted or reconsideration was had on the appeal board's own motion, within 45 days after the filing of the order, decision, or award following reconsideration [*Lab. Code § 5950*; *see Lab. Code § 5901*; *Nelson & Sloan v. Workers' Comp. Appeals Bd. (1978) 79 Cal. App. 3d 51, 53-55, 144 Cal. Rptr. 614]* . This 45-day time limitation is jurisdictional, and is not extended by 5 days pursuant to the provisions of *Code Civ. Proc. § 1013(a)* when service of the WCAB's decision on reconsideration is made by mail [*Camper v. Workers' Comp. Appeals Bd. (1992) 3 Cal. 4th 679, 684-688, 12 Cal. Rptr. 2d 101, 836 P.2d 888* ; *Malloy v. Workers' Comp. Appeals Bd. (1991) 1 Cal. App. 4th 1658, 1660-1662, 2 Cal. Rptr. 2d 820* ; *Southwest Airlines v. Workers' Comp. Appeals Bd. (1991) 234 Cal. App. 3d 1421, 1423-1431, 286 Cal. Rptr. 347]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 577.285 Manner of Applying

An application for a writ of review is made on the verified petition of the party beneficially interested [*Code Civ. Proc. § 1069*; *see also § 577.510[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 577.286 Proof of Service

The petition must be accompanied by proof of service of two copies on the WCAB and of one copy on each party who entered an appearance in the proceeding before the WCAB in San Francisco and whose interest is adverse to the party filing the petition. Service on the WCAB's local district office is not required [*Cal. Rules of Ct., Rule 8.495(a)(3)*; *see also Lab. Code § 5954, discussed under § 577.292*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 577.287 Stay of Order, Rule, Decision, or Award

The filing of a petition, or the pendency of a review proceeding, does not automatically stay or suspend operation of the WCAB's order, rule, decision, or award, but the court may, on the giving of an appropriate undertaking as required by *Lab. Code §§ 6000-6002*, stay or suspend its operation in whole or in part on the terms and conditions that it directs [*Lab. Code § 5956*].

Moreover, the WCAB may by order direct that no certified copy of the final order, decision, or award be issued. This order has the same effect as an order staying execution [*see 8 Cal. Code Reg. § 10825*]. When a party intending to file for a writ of review requests a stay of execution or withholding issuance of a certified copy of the order, decision, or award that is the subject of the party's complaint, the request will ordinarily be granted, conditioned on the filing of a bond from an approved suretyequivalent to twice the probable amount of liability in the case [*8 Cal. Code Reg § 10828*]. For discussion and forms of bonds and undertakings and procedure, see *Ch. 538, Suretyship, Bonds, and Undertakings, § 538.40* et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsGeneral OverviewCivil ProcedureJudgmentsEntry of JudgmentsStays Pending AppealsSupersedeas BondsCivil ProcedureAppealsAppellate JurisdictionState Court ReviewWorkers' Compensation & SSDIAdministrative ProceedingsJudicial ReviewGeneral Overview

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§ 577.288 Return of Writ

The writ is made returnable at a time and place then or thereafter specified by court order and directs the appeals board to certify its record in the case to the court within a specified time [*Lab. Code § 5951*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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51-577 California Forms of Pleading and Practice--Annotated § 577.289

§ 577.289 Right of Appeals Board and Parties to Appear

The appeals board and each party to the proceeding before the board has the right to appear in the proceeding [*Lab. Code § 5953*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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51-577 California Forms of Pleading and Practice--Annotated § 577.290

§ 577.290 Answer to Petition

Within 25 days after service of the petition, the appeals board and any real party in interest may serve and file or join in the filing of an answer and brief [*Cal. Rules of Ct., Rule 8.495(b)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 577.291 Reply Brief

Within 15 days after service of the answer, the petitioner may serve and file a reply brief [*Cal. Rules of Ct., Rule 8.495(b)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 577.292 Service of Pleadings and Papers

A copy of every pleading filed must be served on the appeals board and on every party who entered an appearance in the proceeding before the appeals board and whose interest is adverse to the party filing the pleading [*Lab. Code § 5954*; *see Cal. Rules of Ct., Rule 8.495(a)(3)*; *see also* discussion under *§ 577.286*].

Legal Topics:

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

On the hearing, the court must enter judgment either affirming or annulling the order, decision, or award, or remanding the case for further proceedings before the appeals board [*Lab. Code § 5953*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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51-577 California Forms of Pleading and Practice--Annotated § 577.294

§ 577.294 Supplemental Award of Attorney's Fees and Costs

In the event the injured employee or his or her dependent prevails on any petition by the employer for a writ of review from an award of the appeals board and the reviewing court finds that there is no reasonable basis for the petition, the reviewing court shall remand the cause to the appeals board for the purpose of making a supplemental award of areasonable attorney's fee for services rendered in connection with the petition. Any such fee is in addition to the amount of compensation otherwise recoverable and must be paid as part of the award by the party liable to pay the award [*Lab. Code § 5801*; *see Nelson & Sloan v. Workers' Comp. Appeals Bd. (1978) 79 Cal. App. 3d 51, 53, 144 Cal. Rptr. 614]* . Moreover, under *Lab. Code § 5811(a)*, providing that in all proceedings before the Workers' Compensation Appeals Board costs as between the parties may be allowed by the board, the board is authorized to award reasonable costs, including printing costs, incurred by an injured employee in answering a petition for a writ of review filed by a compensation carrier which is summarily denied by the reviewing court [*Johnson v. Workers' Comp. Appeals Bd. (1984) 37 Cal. 3d 235, 242, 207 Cal. Rptr. 857, 689 P.2d 1127* (disapproving contrary dictum in *Employers Mut. Liab. Ins. Co. v. Workmen's Comp. Appeals Bd. (1975) 46 Cal. App. 3d 104, 108 n.2, 120 Cal. Rptr. 48*)].

Legal Topics:

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

§§ 577.295[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.310

§ 577.310 Governing Law

The exclusive remedy principle is found in *Lab. Code §§ 3600(a), 3601(a),* and *3602(a)*. Statutory exceptions are set forth in *Lab. Code §§ 3601(b), 3602(b), 3706,* and *4558*. Other exceptions of judicial creation that predate the 1982 amendments to *Lab. Code §§ 3600, 3601,* and *3602* have not all been expressly abrogated, but are of questionable continuing validity [*see Continental Casualty Co. v. Superior Court (1987) 190 Cal. App. 3d 156, 162, 235 Cal. Rptr. 260* , discussed under *§ 577.313[3]*].

Lab. Code §§ 2801 and *2803* apply to actions by an employee against his or her employer for injury within the scope of employment due to the employer's negligence if the employment is excluded from workers' compensation coverage. *Lab. Code §§ 3700-3709.5* govern actions by an employee against his or her uninsured employer based on the employer's negligence. The conditions of compensation are set forth in *Lab. Code § 3600(a),* and employment relationships are defined for the purposes of the workers' compensation law in *Lab. Code §§ 3350-3353*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIDefensesExclusivity ProvisionsWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityGeneral OverviewWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityEmployees & EmployersWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityExceptions

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§ 577.311 Workers' Compensation as Exclusive Remedy in Employee Injury Cases

[1] Scope of Principle

As a general rule, if all the conditions of compensation have been met, workers' compensation is the exclusive remedy for employment-related injuries [*Lab. Code §§ 3601, 3602*; *see Lab. Code § 3600(a)*; *see also* the General Introduction under Conditions of Compensation Liability]. This principle provides tort immunity for the employer of an injured worker for any injury that is within the scope of workers' compensation coverage [*Lab. Code § 3602(a)*; *see Logan v. Masters (1981) 120 Cal. App. 3d 145, 147, 174 Cal. Rptr. 465* ; *see also Shoemaker v. Myers (1990) 52 Cal. 3d 1, 15, 276 Cal. Rptr. 303, 801 P.2d 1054* (basis for workers' compensation and the exclusive remedy provisions is an injury sustained during and arising out of the course of employment)]. The employer's workers' compensation insurance carrier stands in the employer's shoes, and may invoke the exclusive remedy defense [*Continental Casualty Co. v. Superior Court (1987) 190 Cal. App. 3d 156, 159, 235 Cal. Rptr. 260* ; *see Lab. Code § 3850(b)*; *see also discussion under § 577.312*].

[2] Application of Principle

This immunity applies to an action for damages arising from the industrial injury brought by any person on any theory [*Lab. Code § 3600(a)*; *see Salin v. Pacific Gas & Electric Co. (1982) 136 Cal. App. 3d 185, 190-193, 185 Cal. Rptr. 899* (and cases cited therein)]. Also as a general rule, suits against coemployees are also barred by the exclusive remedy principle in the same manner as suits against employers [*Lab. Code § 3601(a)*]. There are, however, express statutory exceptions to the exclusive remedy principle [*see Lab. Code §§ 3601, 3602(b)*, discussed in *§§ 577.312, 577.317*].

The fact that either the employer or the employee also occupied another or dual capacity prior to or at the time of the employee's industrial injury does not negate the operation of the exclusive remedy principle [*Lab. Code § 3602(a)*]. This statutory rule negates the common-law "dual capacity" doctrine, under which an employer who would otherwise be shielded from tort liability by the exclusive remedy principle became liable in tort to an employee if the employer occupied a second capacity that conferred obligations independent of those imposed by the employment relationship [*see, e.g., Power Fabricating, Inc. v. State Compensation Ins. Fund (2008) 167 Cal. App. 4th 1446, 1453-1454, 84 Cal. Rptr. 3d 770*]. An employee may, however, be permitted to bring an action at law for damages against the

employer when the employer's dual capacity did not exist at the time of the injury, but rather arose after the injury.

For example, an employee of a medical center who was injured on the job and who was treated for these injuries at the center was held entitled to bring a malpractice action against her employer and the treating physician, since the employer's dual capacity did not exist until after the injury [*Sturtevant v. County of Monterey (1991) 228 Cal. App. 3d 758, 764-767, 279 Cal. Rptr. 161]* . Similarly, an action by an injured employee against the employer for negligent spoliation of evidence (no longer a recognized tort in California, *see § 577.313[5]*) was not barred by *Lab. Code § 3602(a)* because the second or dual capacity that the employer allegedly occupied when it lost the evidence came into existence after, not prior to or at the time of, the employee's injury [*Coca-Cola Bottling Co. v. Superior Court (1991) 233 Cal. App. 3d 1273, 1292-1293, 286 Cal. Rptr. 855]* .

The exclusive remedy principle does not apply to an action against a third party whose conduct is alleged to have been a cause of the employee's injury [*see Lab. Code § 3852*, discussed in Subpart C, § 577.330 et seq.].

[3] Burden of Proof

As a general rule, the employer-defendant has the burden of pleading and proving as an affirmative defense that the Workers' Compensation Act is a bar to an employee's civil action [*Popejoy v. Hannon (1951) 37 Cal. 2d 159, 173-174, 231 P.2d 484* ; *Green v. City of Oceanside (1987) 194 Cal. App. 3d 212, 224, 239 Cal. Rptr. 470* ; *Iverson v. Atlas Pacific Engineering (1983) 143 Cal. App. 3d 219, 224, 191 Cal. Rptr. 696* ; *Power Fabricating, Inc. v. State Compensation Insurance Fund (2008) 167 Cal. App. 4th 1446, 1453-1454, 84 Cal. Rptr. 3d 770*]. Failure to plead the exclusive remedy principle as an affirmative defense results in a waiver of that defense [*Green v. City of Oceanside (1987) 194 Cal. App. 3d 212, 224, 239 Cal. Rptr. 470]* . However, if the complaint affirmatively alleges facts indicating coverage by the workers' compensation laws and fails to allege additional facts negating application of the exclusive remedy principle, no civil action will lie and the complaint is subject to demurrer [*Colombo v. State of California (1991) 3 Cal. App. 4th 594, 599, 5 Cal. Rptr. 2d 567* ; *Halliman v. Los Angeles Unified School Dist. (1984) 163 Cal. App. 3d 46, 50, 209 Cal. Rptr. 175* (allegation in complaint that plaintiff was defendant's employee, that accident occurred during work hours and on work premises, and that plaintiff was acting with scope of employment)].

For a form for an affirmative defense alleging that an action is barred by the exclusive remedy principle, see § 522.530[1].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProceduresPleading & PracticeDefenses, Demurrers & ObjectionsAffirmative DefensesGeneral OverviewEvidenceProcedural ConsiderationsBurdens of ProofGeneral OverviewWorkers' Compensation & SSDIDefensesExclusivity Provisions

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§ 577.312 Exceptions to Exclusive Remedy Principle Permitting Suit Against Employer

[1] In General

An employee or his or her dependents may avoid the application of the Workers' Compensation Act and bring a tort action against the employer only if the action falls within an exception to the exclusive remedy principle. The exclusive remedy principle may be avoided by showing one or more of the following:

- That the employer of the injured worker was uninsured [*see Lab. Code § 3706*, discussed under [2], *below*].

- That one or more of the conditions to compensation have not been met, and thus, the injury is of a type that is outside of the application of workers' compensation law [*see Lab. Code § 3602(c)*, discussed in [3], *below*; *Shoemaker v. Myers (1990) 52 Cal. 3d 1, 14-15, 276 Cal. Rptr. 303, 801 P.2d 1054* (exclusive remedy principle as applicable only in the case of personal injury or death sustained in and arising out of course of employment); *see also Lab. Code § 3600(a)(1)-(10)*, discussed under *§ 577.23*].

- That the employee's injury or death falls within one of the four express statutory exceptions to the exclusive remedy principle that apply to insured employers and injuries within the scope of workers' compensation [*see Lab. Code §§ 3602(b), 4558*, discussed under [2], *below*].

- That the action involves conduct by an employer that violates fundamental public policy or is otherwise outside the scope of the "compensation bargain" [*see City of Moorpark v. Superior Court of Ventura County (1998) 18 Cal. 4th 1143, 1152-1153 Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1101, 4 Cal. Rptr. 2d 874, 824 P.2d 680* ; *Shoemaker v. Myers (1990) 52 Cal. 3d 1, 16, 276 Cal. Rptr. 303, 801 P.2d 1054* ; *see also § 577.315[2]*]. The court of appeal has relied on *City of Moorpark* to support the view that the workers' compensation laws do not provide the exclusive remedy for a plaintiff pleading a Fair Employment and Housing Act claim for physical damages as a result of an employer's unlawful business practice, as defined by *Gov. Code § 12940(m)*, of failing to provide reasonable

accommodation for the plaintiff's nonindustrial disability from polio. Such an unlawful business practice, said the court, was not part of the compensation bargain. Moreover, the public policies enacted in the Fair Employment and Housing Act precluded a finding that workers' compensation was the exclusive remedy for the plaintiff's claim [*Bagatti v. Department of Rehabilitation (2002) 97 Cal. App. 4th 344, 356-357, 364-367, 118 Cal. Rptr. 2d 443]* . On the other hand, in a civil action by an injured agricultural laborer against his employer (a licensed farm labor contractor), the court of appeal has held that the California Farm Labor Contractors Act, *Lab. Code § 1682 et seq.*, does not provide an exception to the exclusive remedy rule of the workers' compensation laws [*Ruiz v. Cabrera (2002) 98 Cal. App. 4th 1198, 1199, 120 Cal. Rptr. 2d 320]* .

In one case, the exclusive remedy rule was held not to bar a civil action between an injured workers' union and the employer in which the union sought to compel the employer to arbitrate the worker's return to work under terms of the collective bargaining agreement. Such an action, the court held, is an equitable action to compel specific performance of the contract and is thus not an "action at law" pursuant to *Lab. Code § 3602(a)* that would be prohibited by the exclusive remedy rule. The worker was seeking arbitration on the claim for her salary for the period when she was allegedly no longer suffering the disabling effects of an industrial injury and was able to work, but denied the right to work guaranteed in the collective bargaining agreement. This, said the court, was not a workers' compensation issue. The worker was also seeking arbitration of her demand to be returned to work, and the court noted that a return to work is not one of the workers' compensation benefits available by statute to which the exclusive remedy rule would apply [*Amalgamated Transit Union, Local 1277 v. Amalgamated Transit Union Local 1277 (2003) 107 Cal. App. 4th 673, 682-684, 132 Cal. Rptr. 2d 207]* .

[2] Civil Action Against Uninsured Employer

[a] In General

If an employer has failed to secure the payment of workers' compensation, any injured employee (or his or her dependents) may bring an action at law against the employer for damages as if the Workers' Compensation Act did not apply [*Lab. Code § 3706*]. A copy of the complaint must be served on the Uninsured Employers Benefits Trust Fund [*Lab. Code § 3708.5*]. In addition, the plaintiff may also file for workers' compensation benefits to be paid from the Fund [*Lab. Code § 3715*; *see discussion under § 577.13[4]*]. Jurisdiction of the superior court to try claims of an employee against his or her employer for damages under *Lab. Code § 3706* arises only when payment of compensation is not secured. Under the exclusivity provisions of the workers' compensation law, this is true even though, in some instances, a particular worker may have a better claim in a state civil action [*Rymer v. Hagler (1989) 211 Cal. App. 3d 1171, 1177, 260 Cal. Rptr. 76]* .

A failure to secure compensation refers to a failure by the employer to obtain insurance or to be self-insured, as required by *Lab. Code § 3700* [*see § 577.13[3]*]. No such action may be brought simply because the employer or its insurer has denied payment. In the civil action, the plaintiff must plead and prove a violation of *Lab. Code § 3700*, which sets forth employer insurance requirements [*Campos Food Fair v. Superior Court (1987) 193 Cal. App. 3d 965, 968, 238 Cal. Rptr. 685]* . That is, the employee has the burden of showing that there was no workers' compensation coverage [*Rymer v. Hagler (1989) 211 Cal. App. 3d 1171, 1178, 260 Cal. Rptr. 76]* . However, if the plaintiff does not allege an employment relationship, a defendant who is found to be an employer must show that compensation was secured [*Muffett v. Royster (1983) 147 Cal. App. 3d 289, 299, 195 Cal. Rptr. 73]* .

In any action against an uninsured employer, principles of fault apply [*see Logan v. Masters (1981) 120 Cal. App. 3d 145, 148, 174 Cal. Rptr. 465]* . However, except in the case of certain household employees, it is presumed that the injury to the employee directly resulted from and grew out of the negligence of the employer. The burden of proof is on the employer to rebut this presumption. Comparative negligence, either of the employee or of a coemployee, and assumption of the risk are not defenses to the action, regardless of the provision of any contract [*Lab. Code § 3708*; *see*

Logan v. Masters (1981) 120 Cal. App. 3d 145, 174 Cal. Rptr. 465] . The statutory presumption that the employee's injury was due to the uninsured employer's negligence does not extend, however, to a presumption that the employee's claimed injury arose in the course of employment. Rather, an employee seeking damages from an uninsured employer has the same burden of proof as an employee seeking workers' compensation benefits, i.e., the employee bears the burden of proving that the injury was sustained in the course of employment. Thus, if an injury arising from the employment is shown, it is presumed to have resulted from the employer's negligence, and the employer is then required to rebut that presumption to avoid liability [*Huang v. L.A. Haute (2003) 106 Cal. App. 4th 284, 289-291, 130 Cal. Rptr. 2d 619]* . For discussion of comparative negligence generally, see Ch. 380, *Negligence* , and Levy, Golden & Sacks, California Torts, ch. 4 (Matthew Bender).

It is no defense that the employer did not intentionally fail to secure payment [*Hicks v. Ocean Shore Railroad, Inc. (1941) 18 Cal. 2d 773, 787, 117 P.2d 850]* . The fact that an employer pays the employee's medical bills and wages during disability or otherwise compensates the employee does not bar a suit for damages if the employer was not properly secured prior to the injury [*see* *Coffin v. Bloodworth (1938) 28 Cal. App. 2d 522, 524, 82 P.2d 953]* . In a case of dual employment, if one employer is insured and the other is not, the injured employee (or his or her dependents) may obtain a workers' compensation award jointly and severally against both employers and still maintain an action at law against the uninsured employer [*Strickland v. Foster (1985) 165 Cal. App. 3d 114, 118-119, 211 Cal. Rptr. 305* ; for further discussion of dual employment, *see § 577.22[2]*].

The court of appeal has held that, in a plaintiff's personal injury action filed under *Lab. Code § 3706*, the employer's liability is determined under rules of pleading and proof that differ significantly from those of a common-law personal injury action. Consequently, this statute creates a statutory cause of action for personal injuries subject to the three-year statute of limitations in *Code of Civ. Proc. § 338(a)* [*Valdez v. Himmelfarb (2006) 144 Cal. App. 4th 1261, 1269-1270, 51 Cal. Rptr. 3d 195]* .

For a form for a complaint for use in a civil action against an uninsured employer, see *§ 577.522[1]*.

[b] Attachment of Employer's Property

At any time on or after the institution of the action, the plaintiff may attach the property of the employer, in an amount fixed by the court, to secure the payment of any judgment that is ultimately obtained. The provisions of the Code of Civil Procedure generally govern the issuance of and proceedings on the attachment [*Lab. Code § 3707*; *see* Ch. 62, *Attachment*].

[c] Judgment

Any compensation awarded, paid, or secured by the employer must be credited against the judgment. The court must allow the amount of any compensation paid from the Uninsured Employers Benefits Trust Fund as a first lien against the judgment. There is also a similar lien against any proceeds of settlement, either before or after judgment. The judgment must include a reasonable attorney's fee fixed by the court [*Lab. Code § 3709*].

The amount of the judgment may not be increased by 10 percent for the employer's failure to insure pursuant to *Lab. Code § 4554*, because thatsection provides for an increase only in the amount of "compensation" payable and not in the amount of "damages" payable pursuant to a civil action under *Lab. Code § 3706* [*Leung v. Chinese Six Companies (1992) 2 Cal. App. 4th 801, 806-807]* .

[d] Employees of Unlicensed and Uninsured Subcontractors

Although an injured employee of an unlicensed and uninsured subcontractor is covered by a general contractor's workers' compensation insurance under the provisions of Lab. Code § 2750.2, the uninsured subcontractor may,

nevertheless, be liable in tort to the injured employee pursuant to *Lab. Code § 3706* [*Hernandez v. Chavez Roofing, Inc. (1991) 235 Cal. App. 3d 1092, 1094-1095, 286 Cal. Rptr. 919* ; *Cedillo v. Workers' Comp. Appeals Bd. (2003) 106 Cal. App. 4th 227, 232, 236-237, 130 Cal. Rptr. 2d 581]* .

[3] Civil Action if Conditions of Compensation Have Not Been Met

[a] In General

In all cases in which the conditions of compensation of *Lab. Code § 3600* do not concur, the liability of the employer is the same as if there were no workers' compensation law [*Lab. Code § 3602(c)*; *see Lab. Code § 3600(a)(1)-(10)* (conditions of compensation), *discussed under § 577.23*].

[b] Excluded Employment

[i] In General

One of the conditions of compensation is that both the employer and employee be subject to workers' compensation provisions [*Lab. Code § 3600(a)(1)*]. Thus, if the particular employment is excluded from workers' compensation requirements under *Lab. Code § 3352*, the exclusive remedy principle does not bar a civil action against the employer based on common law tort principles [*see Mantonya v. Bratlie (1948) 33 Cal. 2d 120, 124, 199 P.2d 677* ; *Graczyk v. Workers' Comp. Appeals Bd. (1986) 184 Cal. App. 3d 997, 1003-1004, 229 Cal. Rptr. 494]* . For discussion of employers and employees covered and excluded from coverage under the workers' compensation law, see *§ 577.22*.

For a form for a complaint by an employee whose employment is excluded from workers' compensation coverage alleging injury due to the employer's negligence, see *§ 577.523[1]*. For a form for an affirmative defense alleging the negligence of the plaintiff in such an action, see *§ 577.532*.

[ii] Contributory and Comparative Negligence

Such an action, by one whose employment is outside the scope of workers' compensation, is subject to *Lab. Code §§ 2800* and *2801* [*Devens v. Goldberg (1948) 33 Cal. 2d 173, 176-177, 199 P.2d 943* ; *see Logan v. Masters (1981) 120 Cal. App. 3d 145, 147, 174 Cal. Rptr. 465]* . *Lab. Code § 2800* simply states that an employer is liable for negligence to an employee, negligence that for most employment is remedied exclusively by workers' compensation. However, *Lab. Code § 2801* is a special rule of employee "contributory negligence" that predates the adoption in California of principles of comparative negligence [*see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226]* . Under this rule, the fact that the employee has been guilty of contributory negligence does not bar recovery if the employee's negligence was slight and that of the employer was gross in comparison. However, damages may be diminished in proportion to the employee's negligence [*Lab. Code § 2801*]. The effect of the adoption of comparative negligence on this statute has not been resolved. If the statute is not affected by comparative negligence, it would appear that the defense of contributory negligence would bar an action if the employee's negligence were deemed to be greater than that of the employer.

There is also a conclusive presumption that the employee was not guilty of contributory negligence in any case in which the violation of any law enacted for the safety of employees contributed to the employee's injury [*Lab. Code § 2801*]. The employer also cannot assert the defenses of express or implied assumption of risk and of coemployee negligence [*Lab. Code § 2801(a), (b)*]. The court of appeal has held, however, that ski resort employees who are exempt from workers' compensation coverage under *Lab. Code § 3352(f)* are not also exempt from assumption of risk under *Lab. Code § 2801*, because the latter statute bars employers from raising assumption of risk as a defense in negligence actions by employees only when the employee has been injured in the course of employment. The court found that the legislature, by virtue of it use of the phrase "the course of his employment as such" in *Lab. Code § 2801*, contemplated a more restrictive concept of course of employment in that statute than in the workers' compensation statutes, only the

latter of which include off-duty recreational activities if they are a reasonable expectancy of employment [*Vine v. Bear Valley Ski Co. (2004) 118 Cal. App. 4th 577, 587-590, 13 Cal. Rptr. 3d 370]* .

No contract or regulation may exempt the employer from the provisions of *Lab. Code § 2801* [*Lab. Code § 2801*]. Any contract or agreement, express or implied, made by any employee to waive these rights is null and void [*see Lab. Code § 2804*].

[c] Injury Outside Scope of Employment

The employee must be performing service growing out of or incidental to the employment and acting within the course of the employment as another condition to receiving compensation through the operation of the exclusive remedy principle [*Lab. Code § 3600(a)(2)*]. Thus, an employeemay bring a civil action against the employer for an injury incurred due to the employer's negligence but while the employee was outside of the scope of employment [*Seymour v. Setzer Forest Products, Inc. (1954) 124 Cal. App. 2d 608, 610-611, 268 P.2d 1084* (employee was on premises on his own time before shift began); *but see Wright v. Beverly Fabrics, Inc. (2002) 95 Cal. App. 4th 346, 357, 115 Cal. Rptr. 2d 503* (employee's civil negligence suit against her employer barred because workers' compensation law was exclusive remedy, when employee was injured while visiting work on her day off and helping fellow employees hold up collapsing shelf)]. For discussion of the covered scope of employment under the workers' compensation law, see *§ 577.24*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesProvisional RemediesAttachmentsWorkers' Compensation & SSDICompensabilityCourse of EmploymentGeneral OverviewWorkers' Compensation & SSDICoverageActions Against EmployersStatutory RequirementsWorkers' Compensation & SSDIDefensesComparative & Contributory NegligenceWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityExceptions

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Volume 51: Vexatious Litigants thru Zoning and Planning-Chs. 573-579
Chapter 577 WORKERS' COMPENSATION
PART II. LEGAL BACKGROUND
B. Civil Actions Against Employer--Exclusive Remedy Principle

51-577 California Forms of Pleading and Practice--Annotated § 577.313

§ 577.313 Civil Action for Non-Disabling or Non-Compensable Injuries

[1] Physical Injury

Generally, compensability of an injury is not one of the conditions of compensation that triggers workers' compensation coverage under *Lab. Code § 3600(a)*. Thus, the fact that a particular physical industrial injury is not of a kind that is compensable under workers' compensation law does not avoid the exclusive remedy principle pursuant to *Lab. Code § 3602* and permit a civil action. For example, even if a particular injury results in little or no occupational handicap and therefore is subject to little or no permanent disability rating, it does not bring the injury outside of the exclusive remedy principle [*Williams v. State Compensation Ins. Fund (1975) 50 Cal. App. 3d 116, 121-123, 123 Cal. Rptr. 812* (sexual dysfunction)].

[2] Emotional Distress

Emotional injuries that cause disability are generally compensable under workers' compensation law [*see* *Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 753-754, 7 Cal. Rptr. 2d 808, 828 P.2d 1195* ; *Lab. Code § 3208.3*]. Even if an employee suffers emotional distress that is not disabling, and thus not compensable, the exclusive remedy doctrine will nevertheless bar a civil actions seeking damages for that distress unless the distress is caused by employer actions that contravene fundamental public policy or are otherwise outside the risks inherent in the employment relationship [*Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 754-755, 7 Cal. Rptr. 2d 808, 828 P.2d 1195]* . For further discussion, see *§ 577.315[2]*.

[3] Defamation

It has been held that injury to reputation is not the kind of injury contemplated under the workers' compensation system, and that therefore an action for defamation by an employee against his or her employer isnot barred by the exclusive remedy principle [*Howland v. Balma (1983) 143 Cal. App. 3d 899, 902-905, 192 Cal. Rptr. 286* ; *see* *Shoemaker v. Myers (1990) 52 Cal. 3d 1, 16, 276 Cal. Rptr. 303, 801 P.2d 1054* (citing *Howland* with apparent approval); *see also* *Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 757, 7 Cal. Rptr. 2d 808, 828 P.2d 1195* (assuming, without deciding, that certain defamatory remarks in the employment context may be subject to workers' compensation, the

seriousness of the allegations in plaintiff's complaint raised issue of whether defendants' conduct was outside the scope and normal risks of employment, and court of appeal directed to address this issue on remand)].

Communications about an employee made by the employee's supervisor to other managers within the organization were presumed to be privileged communications under *Civ. Code § 47(c)* and, thus, the employee's cause of action against the supervisor for slander per se was properly dismissed when the employee did not meet the burden of defeating this privilege [*Kacludis v. GTE Sprint Communications Corp. (N.D. Cal. 1992) 806 F. Supp. 866, 872]* . However, it was held that an employee was entitled to bring a defamation action against her employer when the employer had falsely told other employees that she was stealing money from the company and had worked out a deal with the company's health insurer to receive her health insurance benefits to the detriment of other employees [*Davaris v. Cubaleski (1993) 12 Cal. App. 4th 1583, 1590-1591, 16 Cal. Rptr. 2d 330]* .

[4] Contract Damages

At least one court has held that when an employee sues an employer for breach of contract, and the same conduct also caused an injury compensable under the workers' compensation law, the employee will be precluded from recovering only those damages caused by the compensable injury [*Pichon v. Pacific Gas & Electric Co. (1989) 212 Cal. App. 3d 488, 500, 260 Cal. Rptr. 677]* . However, as workers' compensation provides for lost wages for the period of disability, and there is therefore a substantial risk of double recovery in these cases, the amount of workers' compensation paid must be set off from the contract damages [*Pichon v. Pacific Gas & Electric Co. (1989) 212 Cal. App. 3d 488, 501, 260 Cal. Rptr. 677]* .

In a different context, the court of appeal held that a petition for writ of mandate filed by a public school employee, seeking differential pay and reinstatement under *Ed. Code §§ 44977* and 44987.1, not tort damages for a work-related injury, was not preempted by the exclusivity provisions of workers' compensation law [*Veguez v. Governing Board of the Long Beach Unified School District (2005) 127 Cal. App. 4th 406, 417-418, 25 Cal. Rptr. 3d 526]* .

[5] Spoliation of Evidence

Following two landmark decisions by the California Supreme Court, the tort of intentional spoliation of evidence no longer exists in California, evenif the alleged spoliator is not a party to the litigation [*Cedars-Sinai Medical Center v. Superior Court (1998) 18 Cal. 4th 1, 17-18, 74 Cal. Rptr. 2d 248, 954 P.2d 511* ; *Temple Community Hospital v. Superior Court (1999) 20 Cal. 4th 464, 478, 84 Cal. Rptr. 2d 852, 976 P.2d 223]* . Thus, an employee has no remedy against his or her employer for spoliation of evidence relevant to a third-party action. Although the Supreme Court did not address the tort of negligent spoliation of evidence in either of its decisions, it appears very unlikely that this is still a viable theory of recovery given the Court's refusal to recognize the even more egregious conduct-- *intentional* spoliation--as a basis for tort recovery.

Prior court of appeal decisions have held that the exclusive remedy rule does not bar an employee's tort claim against an employer for negligent spoliation of evidence, since the claim involves an injury to property interests, rather than to the person [*see* *Coca-Cola Bottling Co. v. Superior Court (1991) 233 Cal. App. 3d 1273, 1285-1287, 286 Cal. Rptr. 855* ; *Gomez v. Acquistapace (1996) 50 Cal. App. 4th 740, 748-752, 57 Cal. Rptr. 2d 821]* .

PRACTICE TIP:

Preservation of Evidence. Although employers and insurance carriers are no longer liable in tort for the intentional spoliation of evidence, defense attorneys would be wise to counsel their clients to preserve any evidence which may be useful in a third-party action. If such evidence is destroyed or damaged, an injured worker's case against a third-party may be significantly weakened, in turn, diminishing the employers opportunity to receive credit or reimbursement for workers' compensation benefits paid to the employee.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawGeneral OverviewTortsIntentional TortsDefamationGeneral OverviewWorkers' Compensation & SSDICompensabilityCourse of EmploymentGeneral OverviewWorkers' Compensation & SSDICompensabilityInjuriesPsychological InjuriesWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityExceptions

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51-577 California Forms of Pleading and Practice--Annotated § 577.314

§ 577.314 Civil Action Against Employer for Injury Also Within Workers' Compensation Coverage

[1] In General

Lab. Code § 3602(b), as amended in 1982, sets forth three express circumstances under which an employee may bring a civil action against an insured employer for an industrial injury that is also within the scope of workers' compensation coverage [*Lab. Code § 3602(b)*; *see* discussion below]:

- For the employer's willful assault;
- For the employer's fraudulent concealment of the injury or its relation to the employment; and
- In certain products liability cases.

A fourth express statutory exception involves a failure to install or the removal of a guard on a power press [*Lab. Code § 4558*; discussed *below*].

These exceptions represent codifications of some of the previous judicially created exceptions to the exclusive remedy principle [*see, e.g., Johns-Manville Products Corp. v. Superior Court (1980) 27 Cal. 3d 465, 165 Cal. Rptr. 858, 612 P.2d 948* (fraudulent concealment of asbestosis)]. Other judicially created exceptions that were not expressly codified in the 1982 amendments [*see, e.g., Ramey v. General Petroleum Corp. (1959) 173 Cal. App. 2d 386, 343 P.2d 787* (alleged fraudulent concealment by employer of third-party tortfeasor's culpability for injury until after statute of limitations had run as to third party)] may no longer be valid [*see Lab. Code § 3602(a)* (only exceptions to exclusive remedy doctrine are those set forth in *Lab. Code §§ 3602(b), 3706*, and *4558*); *see also Continental Casualty Co. v. Superior Court (1987) 190 Cal. App. 3d 156, 162, 235 Cal. Rptr. 260* (stating that statute implies that no other exceptions exist)].

[2] Willful Assault

[a] In General

The exclusive remedy principle does not apply if the employee's injury was proximately caused by a willful physical assault by the employer [Lab. Code § 3602(b)(1)]. In cases decided before the willful-assault exception was statutory, it has been held that the exclusive remedy principle does not apply in the case of an assault committed against an employee by a partner when the employer is a partnership [*see Magliulo v. Superior Court (1975) 47 Cal. App. 3d 760, 767-780, 121 Cal. Rptr. 621]* , or in the case of an assault committed by an officer of a labor union [*see Meyer v. Graphic Arts International Union (1979) 88 Cal. App. 3d 176, 178, 151 Cal. Rptr. 597* (characterizing officer as agent of union)].

For a form for a complaint against an employer for willful assault, see *§ 577.524[1]*.

[b] Assault by Co-employee

In the case of an assault committed by a coemployee, employer liability must be predicated on the employer's positive misconduct constituting ratification of the assault [*Iverson v. Atlas Pacific Engineering (1983) 143 Cal. App. 3d 219, 227-228, 191 Cal. Rptr. 696* ; *see Lab. Code § 3601(b)*]. At least one court has reaffirmed this rule as still valid under the statutory expression of the exception [*Hart v. National Mortgage & Land Co. (1987) 189 Cal. App. 3d 1420, 1432, 235 Cal. Rptr. 68]* . Thus, the exception to the exclusivity rule contained in *Lab. Code § 3602(b)(1)*, does not authorize civil actions against employers for injury resulting from willful assaults by co-employees based on a theory of respondeat superior, when there is no employer ratification of the co-employee's conduct [*Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1491, 82 Cal. Rptr. 2d 359]* .

Additionally, one court of appeal has held that a covered employer cannot be sued by employees for negligent or reckless failure to provide adequate security on the employer's premises, despite knowledge of the potential danger [*Arendell v. Auto Parts Club, Inc. (1994) 29 Cal. App. 4th 1261, 1265, 35 Cal. Rptr. 2d 83* (failure allegedly resulted in assault and kidnapping against two employees perpetrated by non-employee third parties)].

[3] Fraudulent Concealment

[a] In General

The exclusive remedy principle does not apply if the employee's injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment. In such a case, the employer's liability is limited to those damages proximately caused by the aggravation. The burden of proof respecting apportionment of damages between the injury and any subsequent aggravation is on the employer [*Lab. Code § 3602(b)(2)*]. This statute codifies the holding of *Johns-Manville v. Superior Court*, in which the California Supreme Court refused to invoke the exclusive remedy principle to bar an action alleging that the employer had fraudulently concealed from its employees its knowledge of the harmful health effects of exposure to asbestos [*see Johns-Manville ProductsCorp. v. Superior Court (1980) 27 Cal. 3d 465, 165 Cal. Rptr. 858, 612 P.2d 948]* . Punitive damages may also be recovered [*McDonald v. Superior Court (1986) 180 Cal. App. 3d 297, 300-303, 225 Cal. Rptr. 394* ; *see also Transport Indemnity Co. v. Aerojet General Corp. (1988) 202 Cal. App. 3d 1184, 1186-1191, 249 Cal. Rptr. 463* (holding employer's aggravation of injuries by fraudulent concealment is not necessarily a willful act within meaning of *Ins. Code § 533*, and as not necessarily releasing insurer from duty to defend or indemnify employer in civil action by employee for aggravation of injury caused by employer's fraudulent concealment of nature and extent of work-induced injuries)].

For a form of complaint for use against an employer alleging fraudulent concealment of injury and its connection with employment, see *§ 577.525[1]*.

[b] Affirmative Misrepresentation Not Required

An affirmative misrepresentation is not required; fraudulent concealment encompasses the failure of the employer to reveal pertinent information to the employee. However, the plaintiff must establish the employer's actual knowledge of the information [*Foster v. Xerox Corp. (1985) 40 Cal. 3d 306, 309-312, 219 Cal. Rptr. 485, 707 P.2d 858* ; *see Palestini v. General Dynamics Corp. (2002) 99 Cal. App. 4th 80, 89-90, 120 Cal. Rptr. 2d 741* (following *Foster* in holding that employee seeking to state cause of action need only "in general terms" plead facts that if found true by trier of fact establish existence of three essential elements under *Lab. Code § 3602(b)(2)*, i.e., (1) employer knew that plaintiff had suffered work-related injury, (2) employer concealed that knowledge from plaintiff, and (3) plaintiff's injury was aggravated as result of concealment, and that in determining whether allegations in complaint are legally sufficient trial court must liberally construe pleading with view to achieving substantial justice between parties); *see also Ashdown v. Ameron International Corp. (2000) 83 Cal. App. 4th 868, 881, 100 Cal. Rptr. 2d 20* (fraudulent concealment exception to exclusive remedy rule did not apply to claims stemming from decedent's asbestos related injury and death, when there was no evidence indicating employers knew decedent had asbestos-related disease); *Santiago v. Firestone Tire & Rubber Co. (1990) 224 Cal. App. 3d 1318, 1334, 274 Cal. Rptr. 576* (trial court properly instructed jury that actual knowledge is required for action under *Lab. Code § 3602*, and did not err in failing to instruct as to constructive knowledge, imputed knowledge, and reckless misrepresentation); *Hughes Aircraft Co. v. Superior Court of Orange County (1996) 44 Cal. App. 4th 1790, 1797, 52 Cal. Rptr. 2d 514* (employer's prior knowledge of its unsafe work environment was insufficient to establish that employer had actual prior knowledge of employee's injuries as required under *Lab. Code § 3602*)].

For example, when the employer established by uncontroverted evidence that the employee had known for years about the possible health problems arising from exposure to asbestos and other chemicals used in the course of his work, and when there was nothing in the record to suggest that the employer withheld any information relevant to the employee's condition from him, the employee was not entitled, as a matter of law, to bring a civil action against the employer pursuant to *Lab. Code § 3602(b)(2)* [*Davis v. Lockheed Corp. (1993) 13 Cal. App. 4th 519, 522-523, 17 Cal. Rptr. 2d 233* ; *see Jensen v. Amgen, Inc. (2003) 105 Cal. App. 4th 1322, 1326-1327, 129 Cal. Rptr. 2d 899]* .

[c] Statute of Limitations

The fraudulent concealment is regarded as a separate injury from the contraction of the injury in the first instance. Thus, the applicable statute of limitations is not tolled for the purposes of the civil action for fraudulent concealment by the filing of an application for workers' compensation benefits for the injury itself [*Aerojet General Corp. v. Superior Court (1986) 177 Cal. App. 3d 950, 954-957, 223 Cal. Rptr. 249]* .

[4] Products Liability

The exclusive remedy principle does not apply if the employee's injury or death was proximately caused by a defective product that was manufactured by the employer and sold, leased, or otherwise transferred for valuable consideration to an independent third person, and the product is thereafter provided for the employee's use by a third person [*Lab. Code § 3602(b)(3)*]. This statute represents a legislative preservation of one aspect of the otherwise-discarded dual capacity doctrine [*see Lab. Code § 3602(a)* (eliminating dual capacity doctrine in all but above limited products liability circumstances)]. This exception to the exclusive remedy rule was held to be inapplicable in a case in which the employee came into contact with an allegedly defective product as the primary objective of her job, and not as a consumer. In essence, the employee was not provided with the product for her use, but rather it was her job to perform tasks using the product [*Behrens v. Fayette Manufacturing Co. (1992) 4 Cal. App. 4th 1567, 1574-1575, 7 Cal. Rptr. 2d 264]* .

[5] Power Press Guard

[a] Removal of or Failure to Install Guard

An employee (or his or her dependents in the case of death) may bring an action at law for damages against the

employer if the employee's injury or death is proximately caused by the employer's knowing removal of, or knowing failure to install, a point-of-operation guard on a power press. The removal of or failure to install the guard must have been specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death [*Lab. Code § 4558(b)*; *see Lab. Code §§ 3600(a), 3602(a)*; *see also Watters Associates v. Superior Court (1990)218 Cal. App. 3d 1322, 1325, 267 Cal. Rptr. 696* (temporary machine operator trainee injured because of unguarded power press may not maintain cause of action against employment agency that placed him in job, as he did not allege that employment agency removed or authorized removal of guard; *Lab. Code § 4558* as applicable only to employers who directly authorize removal of guard and general agency allegation as insufficient to support cause of action)].

An employee who brings a civil action pursuant to *Lab. Code § 4558* may not also allege other causes of action such as negligence and strict liability that require a lesser standard of proof to establish liability [*Award Metals, Inc. v. Superior Court (1991) 228 Cal. App. 3d 1128, 1131, 279 Cal. Rptr. 459]* .

[b] Actual Knowledge Required

It appears that the Legislature used the word "known" in *Lab. Code § 4558* in the sense of actual awareness. Nothing in that section indicates that the courts may impute knowledge to or impose constructive knowledge on the employer [*Saldana v. Globe-Weis Systems Co. (1991) 233 Cal. App. 3d 1505, 1516-1517, 285 Cal. Rptr. 385]* . Moreover, that section does not encompass situations in which the employer does not know of any danger at the time the employer replaces a guard initially installed by the manufacturer, and is subsequently negligent in failing to maintain the replacement guard, since the statute requires that the employer know of the potential danger in removing or replacing the guard at the time the employer actually removes or replaces it [*Saldana v. Globe-Weis Systems Co. (1991) 233 Cal. App. 3d 1505, 1519, 285 Cal. Rptr. 385]* . Finally, *Lab. Code § 4558* does not apply to an employer's mere act of removing the manufacturer's guard and replacing it with a new guard, without regard to the employer's state of mind in doing so [*Saldana v. Globe-Weis Systems Co. (1991) 233 Cal. App. 3d 1505, 1519-1520, 285 Cal. Rptr. 385]* .

The employer is not civilly liable absent proof that the manufacturer designed, installed, required, or otherwise provided by specification for the attachment of the guards and conveyed knowledge of that fact to the employer [*Lab. Code § 4558(c)*; *see Jones v. Keppeler (1991) 228 Cal. App. 3d 705, 710-713, 279 Cal. Rptr. 168* (employer held not liable under *Lab. Code § 4558* when information about guard was provided by previous owner of machine and by manufacturer of control system added as modification to machine but was not provided by original manufacturer); *Swanson v. Matthews Products, Inc. (1985) 175 Cal. App. 3d 901, 906-907, 221 Cal. Rptr. 84* (proof that press did not meet federal occupational safety standards irrelevant if manufacturer did not communicate specification to employer); *see also E. W. Bliss Co. v. Superior Court (1989) 210 Cal. App. 3d 1254, 1259, 258 Cal. Rptr. 783* (mandate proceeding arising out of an action by an employee injured by a punch press against his employer and the manufacturer and seller of the press, in which the court construed *Lab. Code § 4558(d)*, which prohibits any action for contribution or indemnity by any defendant against the employer, but allows a defendant to seek contribution after the employee secures a judgment against the employer pursuant to *Lab. Code § 4558* and fails to discharge his or her comparative share of judgment)].

[c] Definitions

[i] Guard

The term "guard," as used in *Lab. Code § 4558*, includes the myriad types of apparatus available to keep workers' hands outside the point of operation, and is not a term of art [*Bingham v. CTS Corp. (1991) 231 Cal. App. 3d 56, 65, 282 Cal. Rptr. 161]* . A point of operation guard is "removed" for purposes of *Lab. Code § 4558* when it is rendered dysfunctional or unavailable for use by the operator for the particular task assigned [*Bingham v. CTS Corp. (1991) 231 Cal. App. 3d 56, 68, 282 Cal. Rptr. 161]* .

[ii] Power Press

The term "power press," as used in *Lab. Code § 4558*, means any material-forming machine that utilizes a die designed for use in the manufacture of other products. Thus, under the statutory definition, a machine such as a printing press, that does not form materials to be used in the manufacture of other products does not constitute a "power press" [*McCoy v. Zahniser Graphics, Inc. (1995) 39 Cal. App. 4th 107, 111, 45 Cal. Rptr. 2d 871]* . Similarly, a material-forming machine that does not use a "die" does not satisfy the definition of a "power press" [*Graham v. Hopkins (1993) 13 Cal. App. 4th 1483, 1487-1489, 17 Cal. Rptr. 2d 82]* .

Affirming the earlier court of appeal decisions defining the term "die" [*see Ceja v. J. R. Wood, Inc. (1987) 196 Cal. App. 3d 1372, 1377, 242 Cal. Rptr. 531* ; *Graham v. Hopkins (1993) 13 Cal. App. 4th 1483, 1487-1489, 17 Cal. Rptr. 2d 82]* , the California Supreme Court described a "die" as a tool that imparts some version of its own shape to material by pressing or impacting against or through the material, in a punching, stamping, or extruding motion. Thus, the Court held that a V-notching tool which formed material by cutting along its surface in the manner of a blade was not a die under *Labor Code § 4558* [*Rosales v. Depuy Ace Medical Co. (2000) 22 Cal. 4th 279, 285, 92 Cal. Rptr. 2d 465, 991 P.2d 1256]* .

The question of whether a machine is a "power press" within the meaning of *Lab. Code § 4558(a)(4)* is one for the jury [*Islas v. D & G Manufacturing Co., Inc. (2004) 120 Cal. App. 4th 571, 577580, 15 Cal. Rptr. 3d 559]* .

[d] Employer as Manufacturer

An employer who designs, manufactures, and installs its own power presses is considered to be a "manufacturer" for purposes of *Lab. Code § 4558*. In an action against an employer-manufacturer of a power press for failure to install a point-of-operation guard, the injured employee must prove that the employer's design of the press provided for a guard that was later removed or never installed, or, alternatively, that one was required to protect against a known risk of serious injury, but was deliberately omitted by the employer from the design fabrication or assembly of the machine. An employer may be liable even if the design of the press did not provide for attachment of a guard, as long as a guard was required to protect against a known risk of serious injury and the press was capable of functioning with the required guard [*Flowmaster, Inc. v. Superior Court (1993) 16 Cal. App. 4th 1019, 20 Cal. Rptr. 2d 666]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationStatutes of LimitationsTime LimitationsTortsBusiness TortsFraud & MisrepresentationActual FraudGeneral OverviewTortsIntentional TortsAssault & BatteryGeneral OverviewTortsProducts LiabilityGeneral OverviewWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityExceptions

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Chapter 577 WORKERS' COMPENSATION
PART II. LEGAL BACKGROUND
B. Civil Actions Against Employer--Exclusive Remedy Principle

51-577 California Forms of Pleading and Practice--Annotated § 577.315

§ 577.315 Termination, Discipline, and Related Conduct

[1] Civil Action Generally Preempted

Workers' compensation is generally an employee's exclusive remedy for emotional or physical injuries that result from employer misconduct that is a "normal part of the employment relationship," such as demotions, promotions, criticism of work practices, and friction in grievance negotiations [*Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 160-161, 233 Cal. Rptr. 308, 729 P.2d 743]* .

Termination of employment, and the events leading up to termination, are also deemed a "normal part" of the employment relationship for purposes of the exclusive remedy doctrine [*Shoemaker v. Myers (1990) 52 Cal. 3d 1, 17-19, 276 Cal. Rptr. 303, 801 P.2d 1054* ; *see Horn v. Bradco Internat., Ltd. (1991) 232 Cal. App. 3d 653, 662-665, 283 Cal. Rptr. 721* ; *Jenkins v. Family Health Program (1989) 214 Cal. App. 3d 440, 450, 262 Cal. Rptr. 798* ; *Pichon v. Pacific Gas & Electric Co. (1989) 212 Cal. App. 3d 488, 496, 260 Cal. Rptr. 677]* . In such cases, the exclusive remedy doctrine cannot be avoided by allegations that the injury resulted from intentional conduct of the employer or that the employer's conduct was unfair, outrageous, harassing, or intended to cause emotional distress [*Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308, 729 P.2d 743* ; *see Shoemaker v. Myers (1990) 52 Cal. 3d 1, 15, 276 Cal. Rptr. 303, 801 P.2d 1054]* . However, it has been held that an employee's damages for emotional distress resulting from the employer's misrepresentations made to induce the employee to enter the employment relationship, were not a consequence of a normal part of that relationship or a risk reasonably encompassed within the compensation bargain. In making these misrepresentations (regarding the employer's financial stability, its future plans to relocate its operations, and the prospective employee's promotion in the corporate ranks), the employer stepped out of its proper role as an employer, engaging in behavior that is not a normal part of the employment relationship. Thus, the exclusive remedy rule did not bar the employee's civil damages for emotional distress [*Lenk v. Total-Western, Inc. (2001) 89 Cal. App. 4th 959, 971-973, 108 Cal. Rptr. 2d 34]* .

An employer does not step out of its proper role as an employer by discussing with an employee the form the termination will take, as, for example, the ramifications of a voluntary as opposed to an involuntary retirement [*Horn v. Bradco Internat., Ltd. (1991) 232 Cal. App. 3d 653, 663, 283 Cal. Rptr. 721]* . Any statements by the employer that

an involuntary resignation could reflect negatively on future job references are deemed to be a normal and inherent part of the employment relationship and therefore within the exclusive remedy provisions of the compensation system [*Horn v. Bradco Internat., Ltd. (1991) 232 Cal. App. 3d 653, 664-665, 283 Cal. Rptr. 721]* .

The employer's motivation for its conduct is irrelevant; thus, the fact that the employer's conduct may have been motivated by its desire to extract a waiver from the employee of his or her right to sue for wrongful termination does not remove the injury from the workers' compensation system [*Horn v. Bradco Internat., Ltd. (1991) 232 Cal. App. 3d 653, 664, 283 Cal. Rptr. 721]* . Moreover, the exclusive remedy rule is applicable even when part of the employer's alleged wrongful conduct occurs after the termination, since the temporal sequence of events is not the conclusive test of whether the injury arose out of the employment relationship [*Horn v. Bradco Internat., Ltd. (1991) 232 Cal. App. 3d 653, 663-664, 283 Cal. Rptr. 721]* .

[2] Exceptions to General Rule

[a] Violation of Public Policy

The exclusive remedy doctrine will not apply if the employer's conduct contravenes fundamental public policy [*Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1100-1101, 4 Cal. Rptr. 2d 874, 824 P.2d 680]* .

For example, in *Gantt*, the employee was allegedly terminated in retaliation for testifying truthfully before the Department of Fair Employment and Housing in support of a coworker's claim of sexual harassment. The public policy that was allegedly violated by the employer was the prohibition set forth in *Gov. Code § 12975* against obstructing an official investigation of sexual harassment. The Court noted that when an employer's decision to discharge an employee results from an animus that violates the fundamental policy of this state proscribing any interference in the official investigation of sexual harassment, this misconduct cannot, under any reasonable viewpoint, be considered a normal part of the employment relationship or a risk reasonably encompassed within the compensation bargain [*Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1100-1101, 4 Cal. Rptr. 2d 874, 824 P.2d 680]* .

See also, Operating Engineers Local 3 v. *Johnson (2003) 110 Cal. App. 4th 180, 184-192, 1 Cal. Rptr. 3d 552* (worker's civil cause of action against her employer for invasion of privacy was not barred by exclusive remedy rule when worker's supervisor reprimanded worker and disseminated information about reprimand to other employees who had no reason to know this information, thereby violating worker's right of privacy conferred by California Constitution and thus contrary to fundamental public policy); *Phillips v. Gemini Moving Specialists (1998) 63 Cal. App. 4th 563, 571-574, 577, 74 Cal. Rptr. 2d 29* (wrongful discharge action based on termination for complaining of illegal wage withholding was proper based on wage protections found in various Labor Code provisions and *Code Civ. Proc. § 487.020*, and recovery of emotional distress damages was not preempted by exclusive remedy provision); *Maynard v. City of San Jose (9th Cir. 1994) 37 F.3d 1396, 1405-1406* (claims under California law for intentional and negligent infliction of emotional distress caused by personnel moves are not preempted by California workers' compensation statute when claims implicate fundamental public policy considerations embodied in *Gov. Code § 12940(f)* and *Lab. Code § 1102.5*, which prohibit retaliatory discrimination); *Shoemaker v. Myers (1992) 2 Cal. App. 4th 1407, 1418-1419, 4 Cal. Rptr. 2d 203* (employee's cause of action against employer for wrongful discharge was not preempted by workers' compensation law when employee alleged that he was terminated in retaliation for exercising his right to counsel under Public Safety Officers Procedural *Bill of Rights* Act (*Gov. Code § 3300 et seq.*)); *City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 1148, 77 Cal. Rptr. 2d 445* (injured worker not precluded from bringing claim before WCAB under *Lab. Code § 132a* and action in state court seeking remedies under FEHA and common-law wrongful discharge theory when disability discrimination at issue violated public policy).

In one case, the court of appeal reached a contrary result when it held that the workers' compensation exclusive remedy provisions applied to an industrial injury, including the plaintiff's emotional distress as a result of that injury, that followed an allegedly unlawful demotion because of the plaintiff's age, in violation of public policy and the Fair

Employment and Housing Act, when the court found that evidence demonstrated that the alleged discriminatory act was not a "substantial factor" in causing the subsequent industrial injury [*Huffman v. Interstate Brands Cos. (2004) 121 Cal. App. 4th 679, 692-700, 17 Cal. Rptr. 3d 397]* .

For further discussion of civil actions for wrongful termination in violation of public policy, see Ch. 249, *Employment Law: Termination and Discipline* .

[b] Employer Conduct Outside the Compensation Bargain

[i] In General

The exclusive remedy doctrine does not apply if the employer's conduct does not constitute "a risk reasonably encompassed within the compensation bargain" [*Shoemaker v. Myers (1990) 52 Cal. 3d 1, 16, 276 Cal. Rptr. 303, 801 P.2d 1054* ; *see* *Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 757, 7 Cal. Rptr. 2d 808, 828 P.2d 1195* (case remanded to court of appeal to determine whether defendants' conduct was "a normal part of the employment relationship" when plaintiff alleged that defendants had engaged in a campaign of outrageous and harassing conduct resulting in his wrongful termination, which included falsely claiming that plaintiff embezzled money from the company and tried to sabotage its product and forcing plaintiff to sell his independent distribution company, which had been distributing the company's product, under threat of retaliation if he refused); *City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 1152-1153, 77 Cal. Rptr. 2d 445* ; *Hart v. National Mortgage & Land Co. (1987) 189 Cal. App. 3d 1420, 1427-1432, 235 Cal. Rptr. 68* (employer's harassment, assault, and battery through obscene gestures and acts held not be "normal" part of relationship)].

[ii] Whistleblowing

Although the full scope of this exception awaits further definition by the courts, it appears that statutory causes of action that protect employees against various types of discrimination or retaliation are deemed to be not "within the compensation bargain." In *Shoemaker*, for example, the Supreme Court held that a civil action alleging a violation of a statute that protected governmental "whistleblowers" from discipline and discharge and expressly allowed a civil damages action for such violations [*see* former *Gov. Code § 19683*] was outside the scope of the compensation bargain and constituted a statutory exception to the exclusive remedy provisions [*Shoemaker v. Myers (1990) 52 Cal. 3d 1, 22-23, 276 Cal. Rptr. 303, 801 P.2d 1054]* .

[iii] Discrimination in Violation of the Fair Employment and Housing Act

Several courts of appeal have held that the exclusive remedy principle of the workers' compensation law does not bar a statutory employment discrimination action by an employee who alleges that he or she suffered physical, mental, or emotional injury resulting from violations of the Fair Employment and Housing Act (FEHA) [*Gov. Code § 12900 et seq.*], which prohibits discrimination on the basis of sex, sexual orientation, race, ancestry, color, marital status, medical condition, national origin, physical handicap, religion, age over 40 years, or pregnancy [*see Gov. Code §§ 12940, 12941, 12945*].

The courts have reasoned that the workers' compensation law and the FEHA are designed to remedy different evils, and the Legislature did not intend that the objectives of the civil rights statutes would be defeated by the bar of the exclusive remedy principle of the workers' compensation law.The FEHA must be liberally construed to achieve its purposes [*see Gov. Code § 12993*], and its purpose is to provide effective remedies to eliminate discriminatory practices [*Jones v Los Angeles Community College Dist. (1988) 198 Cal. App. 3d 794, 804, 807-808, 244 Cal. Rptr. 37* (race discrimination); *see Gov. Code § 12920*; *see also* *Goldman v. Wilsey Foods, Inc. (1989) 216 Cal. App. 3d 1085, 1095-1096, 265 Cal. Rptr. 294* (religious discrimination); *Meninga v. Raley's, Inc. (1989) 216 Cal. App. 3d 79, 91, 264 Cal. Rptr. 319* (sex discrimination); *Watson v. Department of Rehabilitation (1989) 212 Cal. App. 3d 1271, 1286-1287* (age and race discrimination)].

In *City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 77 Cal. Rptr. 2d 445* , the Supreme Court held that discrimination based on a work-related physical disability, which was outside the compensation bargain, is not subject to the exclusive remedy of *Lab. Code § 132a*. The employee, an administrative secretary, was terminated after she sustained an industrial knee injury. The employer stated that the employee's residual disability from her industrial injury prevented her from performing essential job functions. However, she apparently was able to perform her job duties and was willing to return to work. The Court held that *Lab. Code § 132a* is not an injured worker's exclusive remedy for discrimination based on a work related disability and, thus, does not preclude injured workers from bringing claims before the WCAB under *Lab. Code § 132a* and actions in state court seeking remedies under the Fair Employment and Housing Act and common-law wrongful discharge theory [*City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 1147-1149, 1161, 77 Cal. Rptr. 2d 445* ; *see* *Green v. State of California (2007) 42 Cal. 4th 254, 262-264, 64 Cal. Rptr. 3d 390, 165 P.3d 118* (FEHA requires employee to prove that he or she is "qualified individual" when alleging discrimination on grounds of disability, meaning that plaintiff's burden of proving actionable discrimination on basis of disability includes proof that he or she has ability to perform essential duties of position with reasonable accommodation); *see also* *Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1484-1486, 82 Cal. Rptr. 2d 359]* .

Based on the holding in *City of Moorpark*, an employee's emotional distress claims seeking damages for work-related injury discrimination are not barred by the exclusivity rule since such discrimination is not a normal risk of the compensation bargain [*Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1492, 82 Cal. Rptr. 2d 359]* .

In one case, the court of appeal reached a contrary result when it held that the workers' compensation exclusive remedy provisions applied to an industrial injury, including the plaintiff's emotional distress as a result of that injury, that followed an allegedly unlawful demotion because of the plaintiff's age, in violation of the Fair Employment and Housing Act and of public policy, when the court found that evidence demonstrated that the alleged discriminatory act was not a "substantial factor" in causing the subsequent industrial injury [*Huffman v. Interstate Brands Cos. (2004) 121 Cal. App. 4th 679, 692-700, 17 Cal. Rptr. 3d 397]* .

For discussion of civil actions under the FEHA, see Ch. 115, *Civil Rights: Employment Discrimination* .

[iv] False Imprisonment

The California Supreme Court has held that false imprisonment committed by an employer against an employee is always outside of the compensation bargain; therefore, an action based on such a claim is not barred by the exclusive remedy provisions of the workers' compensation law [*Fermino v. Fedco, Inc. (1994) 7 Cal. 4th 701, 723-724, 30 Cal. Rptr. 2d 18, 872 P.2d 559]* . In *Fermino*, an employee brought a civil action for false imprisonment alleging that her employer accused her of theft, threatened to have her arrested, held her against her will for over one hour, and interrogated her until she became hysterical. The Supreme Court reversed the trial court's decision sustaining the employer's demurrer to plaintiff's complaint. In doing so, the Court found that, although reasonable attempts to investigate an employee's theft are a normal part of the employment relationship entitled to the protection of the exclusivity rule, an employer's actions that go beyond the bounds of reasonble interrogation and detention and thereby constitute false imprisonment, are not entitled to such protection [*see* *Fermino v. Fedco, Inc. (1994) 7 Cal. 4th 701, 723-724, 30 Cal. Rptr. 2d 18, 872 P.2d 559]* .

[v] No Exception for Reckless, Negligent or Criminally Negligent Conduct

In applying the California Supreme Court's *Fermino* analysis, one court of appeal stressed that there is no "beyond the compensation bargain" exception for employer behavior that is merely negligent or reckless [*Arendell v. Auto Parts Club, Inc. (1994) 29 Cal. App. 4th 1261, 1265, 35 Cal. Rptr. 2d 83* (exclusivity doctrine barred action against employer for negligent or reckless failure to provide adequate security on its premises, despite knowledge of potential danger)].

Another court applied the same analysis to find that even conduct which could be construed as criminally negligent, including involuntary manslaughter caused by unsafe working conditions, is not beyond the compensation bargain [*Vuillemainroy v. American Rock & Asphalt, Inc. (1999) 70 Cal. App. 4th 1280, 1285-1286, 83 Cal. Rptr. 2d 269]* . Similarly, a court has held that an employer's conduct of providing employees with a hazardous chemical substance to clean a film processing laboratory, concealing known unsafe working conditions, and violating environmental safety regulations was within the compensation bargain, making workers' compensation benefits the employees' exclusive remedy [*Gunnell v. Metrocolor Laboratories, Inc. (2001) 92 Cal. App. 4th 710, 714, 112 Cal. Rptr. 2d 195]* .

[c] Retaliation for Claiming Workers' Compensation Benefits

Lab. Code § 132a is not the exclusive remedy for discrimination due to disability from work related injury [*City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 1158, 77 Cal. Rptr. 2d 445* (overruling *Portillo v. G. T. Price Products, Inc. (1982) 131 Cal. App. 3d 285, 182 Cal. Rptr. 291*)]. As pointed out by the Court, *Lab. Code § 132a* is contained in Division 1 of the Labor Code, and the plain language of the exclusive remedy provisions of the workers' compensation law apparently limits those provisions to those set forth in Division 4 of the Labor Code. The Court reasoned that remedies that the Legislature placed in other divisions of the Labor Code are simply not subject to the workers' compensation exclusive remedy provisions [*City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 1154-1155, 77 Cal. Rptr. 2d 445]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawWrongful TerminationGeneral OverviewLabor & Employment LawWrongful TerminationPublic PolicyTortsBusiness TortsFraud & MisrepresentationGeneral OverviewTortsIntentional TortsFalse ImprisonmentGeneral OverviewWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityExceptions

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51-577 California Forms of Pleading and Practice--Annotated § 577.316

§ 577.316 Exceptions to Exclusive Remedy Principle Permitting Suit Against Coemployee

[1] In General

If the conditions of compensation set forth in *Lab. Code § 3600(a)* concur [*see § 577.23*], the right to recover workers' compensation benefits is the sole remedy of an injured employee against a coemployee acting within the scope of his or her employment [*Lab. Code § 3601(a)*]. This exclusive remedy principle is subject to two exceptions [*Lab. Code § 3601(a)(1), (2)*]:

- If the injury or death is proximately caused by the willful and unprovoked physical act of aggression of the other employee.

- If the injury or death is proximately caused by the intoxication of the other employee.

If either of the exceptions apply, the injured employee (or his or her dependents in the case of death), in addition to recovering compensation benefits from the employer, has a right to bring an action at law for damages against the other employee as if workers' compensation law did not apply [*Lab. Code § 3601(a)*].

[a] Employer Liability for Act of Coemployee

In no event, neither by legal action nor by agreement, may the employer be held vicariously liable, directly or indirectly, for damages awarded against, or for a liability incurred by, the other employee [*Lab. Code § 3601(b)*]. However, the employer may be held directly liable for a willful physical assault under *Lab. Code § 3602(b)(1)* as a joint participant if its conduct constitutes subsequent ratification of the act of the coemployee [*Iverson v. Atlas Pacific Engineering (1983) 143 Cal. App. 3d 219, 227-228, 191 Cal. Rptr. 696]* .

[b] Employee Liability for Injury or Death of Coemployee

No employee may be held liable, directly or indirectly, to his or her employer for an injury to or the death of a

coemployee unless the injured employee (or the dependents) obtains a recovery against the coemployee [*Lab. Code § 3601(c)*].

[c] Willful and Unprovoked Physical Act of Aggression

The "willful and unprovoked physical act of aggression" requirement of *Lab. Code § 3601(a)(1)* does not require conduct that would constitute a battery; that is, there need not be physical contact. One who by physical conduct first places another in reasonable fear of bodily harm may be liable under the exception [*Iverson v. Atlas Pacific Engineering (1983) 143 Cal. App. 3d 219, 225, 191 Cal. Rptr. 696* ; *see* *Mathews v. Workmen's Comp. Appeals Bd. (1972) 6 Cal. 3d 719, 727, 100 Cal. Rptr. 301, 493 P.2d 1165]* . The trial court may properly instruct the jury that the plaintiff must prove that the co-worker had intent to injure the plaintiff [*Torres v. Parkhouse Tire Service, Inc. (2001) 26 Cal. 4th 995, 1003-1006, 111 Cal. Rptr. 2d 564, 30 P.3d 57]* . Allegations based on such an act may also be sufficient to state a cause of action for intentional infliction of emotional distress [*Iverson v. Atlas Pacific Engineering (1983) 143 Cal. App. 3d 219, 229-231, 191 Cal. Rptr. 696]* .

[2] Injuries Caused by Acts Outside Coemployee's Scope of Employment

The coemployee exclusive remedy principle applies only to tortious conduct of a coemployee that is "within the scope of his or her employment" [*Lab. Code § 3601(a)*]. The scope of employment of a coemployee is not coterminous with the "course-of-employment" standard that entitles the injured employee to workers' compensation. Thus, the injured employee may be acting within the course of his or her employment, and therefore entitled to workers' compensation [*see Lab. Code § 3600(a)(2)*], even though the tortfeasor employee is found not to be within the scope of his or her employment for purposes of the exclusive remedy principle [*see* *Saala v. McFarland (1965) 63 Cal. 2d 124, 128-130, 45 Cal. Rptr. 144, 403 P.2d 400* (injured employee was within course of employment while in employer's parking lot after shift had ended, while coemployee who struck her with his car while also leaving work was outside scope of his employment)].

One court has held that the coemployee's "scope of employment" is coterminous with the standard by which it would be determined whether the employer was vicariously liable for the acts of the employee to a nonemployee third person under the doctrine of respondeat superior [*see* *Brittell v. Young (1979) 90 Cal. App. 3d 400, 402-407, 153 Cal. Rptr. 387* (injured employee who was arriving for meeting was within course of employment; coemployee who was on premises but working on own vehicle after work was also within scope of employment)].

Lab. Code § 3602(a), as amended in 1982, which sharply limited the application of the dual capacity doctrine with respect to employers [*see § 577.311*], does not protect coemployees from civil liability; but coemployees do enjoy the immunity created by *Lab. Code § 3601*, which expressly immunizes them for acts within the scope of their employment [*Hendy v. Losse (1991) 54 Cal. 3d 723, 737-738, 1 Cal. Rptr. 2d 543, 819 P.2d 1]* .

The California Supreme Court has held that the 1982 amendment of *Lab. Code § 3602* confirms that there can be no judicially created dual capacity exceptions to the immunity from civil liability granted to coemployees [*Hendy v. Losse (1991) 54 Cal. 3d 723, 737-738, 1 Cal. Rptr. 2d 543, 819 P.2d 1]* . Thus, a physician who was employed by a professional football team to provide treatment to players injured in the course of their employment by the team was protected from a malpractice suit by the statutory immunity of *Lab. Code § 3601*, since the physician was acting within the scope of his employment when he diagnosed and treated the plaintiff whose injury was proximately caused by his employment by the team [*Hendy v. Losse (1991) 54 Cal. 3d 723, 738-739, 1 Cal. Rptr. 2d 543, 819 P.2d 1.]*

However, if a coemployee provides medical services other than those contemplated by the employee's employment and in so doing is not acting for the employer, he or she no longer enjoys the immunity from suit provided by *Lab. Code § 3601* for acts that are within the scope of employment [*Hendy v. Losse (1991) 54 Cal. 3d 723, 741, 1 Cal. Rptr. 2d 543, 819 P.2d 1* (disapproving contrary holding in *Hoffman v. Rogers (1972) 22 Cal. App. 3d 655, 99 Cal. Rptr. 455*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsIntentional TortsAssault & BatteryGeneral OverviewWorkers' Compensation & SSDICompensabilityInjuriesIntoxicationWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityEmployees & EmployersWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityExceptions

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51-577 California Forms of Pleading and Practice--Annotated § 577.317

§ 577.317 Exceptions to Exclusive Remedy Principle Permitting Suit Against Insurer

[1] Insurer's Liability for Deceitful and Intentional Practices

[a] Pre-1982 Statutory Amendments

The inclusion of the employer's workers' compensation insurer within the scope of those protected by the exclusive remedy principle arises from the statutory exclusion of the insurer as a third party against whom a civil action may be filed [*Lab. Code §§ 3850(b), 3852* ("employer" includes insurer for purposes of third-party subrogation action, which may be filed against person other than employer); *see Jablonski v. Royal Globe Ins. Co. (1988) 204 Cal. App. 3d 379, 385-386, 251 Cal. Rptr. 160]* . Prior to the 1982 amendments to the exclusive remedy provisions of workers' compensation law [*see Lab. Code §§ 3600-3602*], the California Supreme Court held that a compensation insurer forfeited its immunity from civil suit for intentional torts if it engaged in deceitful conduct in investigating an injured employee's claim. In so holding, the Court stated that by embarking on a deceitful course of conduct, the insurer was abandoning its proper role within the framework of the workers' compensation system. Therefore, in so acting, the insurer became a person other than the employer and was subject to civil suit [*Unruh v. Truck Insurance Exchange (1972) 7 Cal. 3d 616, 629-631, 102 Cal. Rptr. 815, 498 P.2d 1063]* .

[b] Post-1982 Statutory Amendments

[i] No Express Exception to Exclusive Remedy Principle

Under the 1982 amendments, no express exception to the exclusive remedy principle was preserved by statute for intentional and deceitful insurance practices [*see Lab. Code § 3602(b)*]. Several courts are of the opinion that no common-law exceptions to the exclusive remedy principle remain valid except those specifically preserved by statute [*see Continental Casualty Co. v. Superior Court (1987) 190 Cal. App. 3d 156, 162, 235 Cal. Rptr. 260* (stating that statute implies that no other exceptions exist); *see also Lab. Code § 3602(a)*; *Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 153-155, 233 Cal. Rptr. 308, 729 P.2d 743* ; *but see Hart v. National Mortgage & Land Co. (1987) 189 Cal. App. 3d 1420, 1431, 235 Cal. Rptr. 68* (finding cause of action for intentionally inflicted emotional distress still permitted under some circumstances despite lack of statutory preservation)].

[ii] Effect of Amendments

One court has reaffirmed the holding of *Unruh* under current law without discussion of any possible effect of the 1982 amendments. The court held that allegations of the insurer's fraudulent denial of the existence of a workers' compensation policy, and allegations that the insurer destroyed the policy, stated causes of action for fraud and spoliation of evidence that were not preempted by the exclusive remedy principle. The court stated that the exclusive remedy principle does not apply if the acts alleged are in themselves fraudulent, deceitful, outrageous, perfidious, or so extreme or abnormal as to fit in the class of misconduct considered in *Unruh*. Such conduct falls outside the permissible boundary of protected behavior by a compensation carrier [*Jablonski v. Royal Globe Ins. Co. (1988) 204 Cal. App. 3d 379, 387-391, 391 n.6, 251 Cal. Rptr. 160* (also noting that standard is not identical with that applicable to tort of intentional infliction of emotional distress); *see Everfield v. State Comp. Ins. Fund (1981) 115 Cal. App. 3d 15, 18, 171 Cal. Rptr. 164]* .

To the extent that the exception of *Unruh* is still valid, it does not apply to mere negligence in the conduct of an investigation or handling of a claim [*Unruh v. Truck Insurance Exchange (1972) 7 Cal. 3d 616, 627-629, 102 Cal. Rptr. 815, 498 P.2d 1063]* . Delay in payment or other conduct related to the improper processing of a claim does not cause the insurer to lose its exclusivity defense [*see Jablonski v. Royal Globe Ins. Co. (1988) 204 Cal. App. 3d 379, 388, 251 Cal. Rptr. 160* (and cases cited therein); *see also Mitchell v. Scott Wetzel Services, Inc. (1991) 227 Cal. App. 3d 1474, 1480-1481, 278 Cal. Rptr. 474* (action by injured employee against self-insured employer's workers' compensation administrator alleging perjury before WCAB and misrepresentation regarding benefit checks and availability of rental car as within exclusive jurisdiction of workers' compensation system)].

The exclusive remedy principle is also not negated simply because the injured employee alleges that the insurer's conduct violates the Insurance Code [*Jablonski v. Royal Globe Ins. Co. (1988) 204 Cal. App. 3d 379, 392, 251 Cal. Rptr. 160* (rejecting argument that exclusive remedy principle did not apply to cause of action for unfair insurance claims practices under *Ins. Code § 790.03(h)*)]. It has also been held that *Unruh* does not apply to a self-insured employer for acts done in the course of investigating a compensation claim [*Gallo Glass Co. v. Superior Court (1983) 148 Cal. App. 3d 485, 488-490, 196 Cal. Rptr. 23]* .

In *Marsh & McLennan, Inc. v. Superior Court [(1989) 49 Cal. 3d 1, 259 Cal. Rptr. 733, 774 P.2d 762]* , in the course of holding that the California workers' compensation system preempts a private cause of action by an injured worker against an independent claims administrator of his self-insured employer for the delay or refusal to pay compensation benefits and that the exclusive jurisdiction over such matters is in the Workers' Compensation Appeals Board, the Supreme Court affirmed its holding in *Unruh*.

The Court pointed out that in *Unruh* it had carved out a narrow exception to the appeals board's exclusive jurisdiction over the claims of an injured employee against her employer's insurance carrier by allowing the employee to bring an action against the insurer for assault and intentional infliction of emotional distress based on the tortious acts of the insurer's private investigator because the insurer's misconduct was so extreme and outrageous that it had in fact stepped out of its role as an insurer and could, therefore, be held liable under *Lab. Code § 3852* as a person other than the employer [*see also Lab. Code § 3850(b)* (defining "employer" as used in the workers' compensation law as including "insurer")]. The Court added that in *Unruh* it had also noted that the workers' compensation law did not preclude the plaintiff from bringing a separate suit against the insurer's investigator, since investigators are neither employers nor insurers under the workers' compensation law [*Marsh & McLennan, Inc. v. Superior Court (1989) 49 Cal. 3d 1, 6-7, 259 Cal. Rptr. 733, 774 P.2d 762]* .

An injured worker's civil action against his employer's workers' compensation insurer for malicious prosecution of an insurance fraud criminal complaint against the worker has been held not barred by the exclusive remedy rule of workers' compensation law. An allegation that the insurer acted with malice amounts to an allegation that the insurer stepped out of its role in processing workers' compensation claims and, thus, places the insurer's act of reporting alleged insurance

fraud outside the compensation bargain [*Mosby v. Liberty Mutual Insurance Co. (2003) 110 Cal. App. 4th 995, 999, 1004-1006, 2 Cal. Rptr. 3d 286]* .

Similarly, a workers' compensation insurer for an employee leasing company was held to have engaged in breach of contract, insurance bad faith, and fraud when it denied coverage to an injured employee working for the contractor to whom the leasing company had leased employees [*Diamond Woodworks, Inc. v. Argonaut Insurance Co. (2003) 109 Cal. App. 4th 1020, 1030-1049, 135 Cal. Rptr. 2d 736]* .

[2] Insurer's Liability to Medical Providers for Mishandling Lien Claims

Economic injuries sustained by medical providers to their businesses resulting from failure to receive full and timely payment on their lien claims from insurance carriers fall within the scope of the exclusivity provisions. However, medical providers may bring civil actions against insurers for acts by the insurers that fall outside the scope of the compensation bargain, thereby violating public policy [*Vacanti v. State Compensation Ins. Fund (2001) 24 Cal. 4th 800, 814, 102 Cal. Rptr. 2d 562, 14 P.3d 234* ; *see also Marsh & McLennan, Inc. v. Superior Court (1989) 49 Cal. 3d 1, 6, 259 Cal. Rptr. 733, 774 P.2d 762* ; *Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 629-631, 102 Cal. Rptr. 815, 498 P.2d 1063]* .

In *Vacanti v. State Compensation Ins. Fund*, a group of medical providers sued various workers' compensation insurers, claiming that the insurers conspired to put them out of business by intentionally mishandling their lien claims before the Appeals Board. The providers alleged causes of actions for: (1) abuse of process; (2) fraud; (3) violations of the Cartwright Act; (4) RICO violations; (5) conspiracy to violate RICO; (6) intentional and negligent interference with ongoing businesses; (7) intentional and negligent interference with contractual and prospective economic relations; and (8) violations of the unfair compensation law (UCL). The California Supreme Court concluded that the exclusive remedy provisions barred some, but not all, of the claims brought by the providers [*Vacanti v. State Compensation Ins. Fund (2001) 24 Cal. 4th 800, 823-828, 102 Cal. Rptr. 2d 562, 14 P.3d 234]* .

In analyzing this issue of first impression, the Court first determined that the alleged injury underlying all of the medical providers' causes of action was collateral to or derivative of a compensable workplace injury since the providers' lien claims were to recover compensation for medical services provided to injured workers. Therefore, the injury fell within the ambit of the exclusive remedy rule [*Vacanti v. State Compensation Ins. Fund (2001) 24 Cal. 4th 800, 811, 102 Cal. Rptr. 2d 562, 14 P.3d 234]* . The Court next considered whether there were any applicable exceptions to the exclusivity rule which would allow the providers to pursue their causes of action, based on conduct by the insurers which fell outside the scope of the employment bargain and violated public policy. After reviewing the acts and motives giving rise to the providers' claims, the Court concluded that the abuse of process and fraud claims did not fall within any exception, because the insurers' acts and motives were closely connected to normal insurer activity--the processing and payment of medical lien claims--and fell within the risks contemplated by the compensation bargain [*Vacanti v. State Compensation Ins. Fund (2001) 24 Cal. 4th 800, 823-824, 102 Cal. Rptr. 2d 562, 14 P.3d 234]* . In contrast, however, the Court found that the providers' Cartwright Act and RICO claims were not barred by the exclusivity doctrine because the acts and motives giving rise to these claims, by their very nature, fell outside the compensation bargain [*Vacanti v. State Compensation Ins. Fund (2001) 24 Cal. 4th 800, 825-827, 102 Cal. Rptr. 2d 562, 14 P.3d 234]* . With regard to tortious interference with business relations and violations of the UCL, the Court concluded that the claims were barred to the extent that they focused on the individual misdeeds of each individual insurer because such misconduct was connected with normal insurer activity. However, the claims were not precluded to the extent they were predicated on the conspiratorial misconduct of the insurers [*Vacanti v. State Compensation Ins. Fund (2001) 24 Cal. 4th 800, 827-828, 102 Cal. Rptr. 2d 562, 14 P.3d 234]* .

Although he concurred with the disposition and much of the reasoning of the majority opinion, Justice Werdegar determined that the exclusivity provisions did not apply to health care providers and, therefore, it was unnecessary to consider the application of exceptions [*Vacanti v. State Compensation Ins. Fund (2001) 24 Cal. 4th 800, 829, 102*

Cal. Rptr. 2d 562, 14 P.3d 234] .

In a civil action that arose out of successful attempts by the California Insurance Guarantee Association and numerous insurers and employers to have the Appeals Board consolidate many different medical lien claims in order to obtain a determination from the Board as to whether Premier Medical Management Systems, Inc., was improperly representing treating physicians in Appeals Board proceedings, Premier and five affiliated treating physicians sued the insurers and employers, alleging various tort and statutory causes of action based on claims that the defendants were engaged in anti-competitive activity. The gravamen of the complaint was that, after Premier submitted the plaintiff physicians' bills to the defendants for payment and filed liens in numerous workers' compensation cases before the Appeals Board, the defendants collectively conspired to contest, delay, and avoid payment of those bills and liens [*Premier Med. Mgmt. Sys., Inc. v. Cal. Ins. Guarantee Ass'n (2006) 136 Cal. App. 4th 464, 468-470, 39 Cal. Rptr. 3d 43]* . The defendants argued that the complaint was an anti-SLAPP (Strategic Lawsuit Against Public Participation) lawsuit because it was based entirely on the defendants' constitutional right to petition the Appeals Board [*see Code of Civ. Proc. § 425.16*]. The court of appeal agreed with the defendants, finding that the anti-SLAPP statute applied because the defendants had shown that the plaintiffs' complaint related to activity that was a protected activity, i.e., the right to petition the Appeals Board and litigate lien claims before the Board, and that the defendants had a probability of prevailing on the plaintiffs' complaint, based on the applicability of the *Noerr-Pennington* doctrine that parties who petition the government for redress are generally immune from antitrust liability. Consequently, the court of appeal reversed the trial court's order denying the defendants' special motion to strike the complaint [*Premier Med. Mgmt. Sys., Inc. v. Cal. Ins. Guarantee Ass'n (2006) 136 Cal. App. 4th 464, 472-480, 39 Cal. Rptr. 3d 43* ; *see Eastern R. Presidents Conf. v. Noerr Motor Freight, Inc. (1961) 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464* ; *United Mine Workers v. Pennington (1965) 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDefensesPublic Policy ViolationsTortsBusiness TortsFraud & MisrepresentationGeneral OverviewWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityExceptions

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PART II. LEGAL BACKGROUND
B. Civil Actions Against Employer--Exclusive Remedy Principle

51-577 California Forms of Pleading and Practice--Annotated § 577.318

§ 577.318 Effect of Exclusive Remedy Doctrine on Tort Actions by Employee's Relatives and Heirs

[1] In General

If the conditions of compensation exist, the employer's liability to pay compensation is "in lieu of any other liability whatsoever to any person" [*Lab. Code § 3600(a)*; *see Williams v. Schwartz (1976) 61 Cal. App. 3d 628, 634, 131 Cal. Rptr. 200]* . Thus, any action by any person that arises from an injury to an employee sustained in the course of employment is barred by the exclusive remedy principle [*Soil Engineering Construction, Inc. v. Superior Court (1982) 136 Cal. App. 3d 329, 332-333, 186 Cal. Rptr. 209]* .

[2] Wrongful Death

The exclusive remedy principle applies to wrongful death actions in the same manner as it does to the underlying injury causing death [*see Lab. Code §§ 3600-3602*]. Thus, if a tortious act causing death falls within the exclusive remedy principles of workers' compensation law, an action for wrongful death will be barred, whether or not the parties suffering damages as a result of the "wrongful death" are entitled to benefits under workers' compensation law based on their status as dependents of the deceased worker [*see Soil Engineering Construction, Inc. v. Superior Court (1982) 136 Cal. App. 3d 329, 332-333, 186 Cal. Rptr. 209* ; *see also Lab. Code §§ 4700-4709* (governing availability of death benefits)].

A wrongful death action against an employer who is not a covered employer under workers' compensation is specifically preserved by statute [*see § 577.312[2]*]. If death, whether happening instantaneously or otherwise, results from an injury to an employee caused by the want of ordinary or reasonable care of an employer or of any officer, agent, or servant of the employer, the personal representative of the employee has a right of action against the employer, and may recover damages for and on behalf of the surviving spouse, children, dependent parents, and dependent brothers and sisters, in order of precedence as stated. No more than one such action may be brought [*Lab. Code § 2803*].

Lab. Code § 2803 provides a more restrictive remedy than that provided under *Code Civ. Proc. §§ 377.60-377.62*, the general wrongful death statutes. First, under *Lab. Code § 2803*, in the absence of a surviving spouse and children, the action may only be brought by dependent parentsand siblings, whereas a wrongful death action may be brought by any

person entitled to succeed to the decedent's property by intestate succession (if there is no surviving spouse, child, or issue of a deceased child) [*compare Lab. Code § 2803 with Code Civ. Proc. § 377.60(a)*]. These persons are not required to be dependent on the decedent to maintain a wrongful death action [*see Code Civ. Proc. § 377.60(a)*]. Furthermore, certain additional classes of dependents (beyond parents and siblings) are eligible to bring a wrongful death action [*see Code Civ. Proc. § 377.60(b), (c)*]. In those cases in which an exception to the exclusive remedy doctrine exists, it appears that any person entitled to bring an action under the general wrongful death statute may do so, regardless of the limitations set forth in *Lab. Code § 2803* [*see Gonsalves v. Petaluma etc. Ry. Co. (1916) 173 Cal. 264, 266-268, 159 P. 724* (construing similar former statutes)].

The Supreme Court has held that a Medi-Cal lien could not be asserted against a wrongful death action, when the damages recoverable by the plaintiff in that action did not and could not include compensation for medical services provided to the decedent by Medi-Cal. The Court found that in California a wrongful death action is a cause of action in favor of the heirs as beneficiaries, based on their own independent pecuniary injury suffered by the loss of a relative. Thus, it is distinct from any action that the deceased might have maintained, had he or she survived, so that the damages awarded in a wrongful death action are for harm done to the survivors, not to the deceased [*Fitch v. Select Products Co. (2005) 36 Cal. 4th 812, 819-822, 115 P.3d 1233]* .

For a form of complaint based on wrongful death, see Ch. 181, *Death and Survival Actions* .

[3] Loss of Consortium

Actions against an employer to recover damages for loss of consortium are barred if they are based on an injury to an employee that is within the exclusive coverage of workers' compensation [*Santiago v. Employee Benefits Services (1985) 168 Cal. App. 3d 898, 906, 214 Cal. Rptr. 679* ; *Casaccia v. Green Valley Disposal Co. (1976) 62 Cal. App. 3d 610, 612, 133 Cal. Rptr. 295]* . Similarly, actions by a nonemployee for infliction of emotional distress that are based on a tortious act of an employer towards an employee are not permitted as long as the harm to the employee is within the exclusive jurisdiction of the Workers' Compensation Act [*Williams v. Schwartz (1976) 61 Cal. App. 3d 628, 632-634, 131 Cal. Rptr. 200]* .

[4] Fetal Injury

The exclusive remedy provisions of the workers' compensation law do not apply to independent fetal injuries caused by an employer's negligent conduct towards a pregnant employee [*Snyder v. Michael's Stores, Inc. (1997) 16 Cal. 4th 991, 994, 1005, 68 Cal. Rptr. 2d 476, 945 P.2d 781]* .In *Snyder v. Michael's Stores, Inc.*, the California Supreme Court overruled an earlier decision in which a court of appeal applied the "derivative injury rule" to hold that workers' compensation was the only remedy available to an injured fetus because the child's prenatal injury flowed or derived from the injury to the mother [*see Bell v. Macy's California (1989) 212 Cal. App. 3d 1442, 1443, 1445, 261 Cal. Rptr. 447]* . The Court criticized the appellate court's application of the "derivative injury rule," finding that fetal injuries are not necessarily derivative of the mother's injuries, but may be separate and distinct, entitling the fetus to an independent claim.

The Court explained that, generally, a business is civilly liable to an independent third party, including the unborn child of a non-employee, whom is injured as a result of the businesses negligent conduct [*see Civ. Code § 43.1*]; there is nothing to indicate a legislative intent that prenatal injuries to the children of employee's be treated any differently. The Court concluded that the exclusive remedy doctrine does not bar civil claims for independent injuries sustained by the unborn child of an employee [*Snyder v. Michael's Stores, Inc. (1997)16 Cal. 4th 991, 997-1000, 68 Cal. Rptr. 2d 476, 945 P.2d 781]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsDamagesConsortium DamagesGeneral OverviewTortsWrongful Death & Survival ActionsGeneral OverviewTortsWrongful Death & Survival ActionsDeceased PersonsWorkers' Compensation & SSDIDefensesExclusivity Provisions

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§ 577.319 Dual Remedies

[1] In General

If the exclusive remedy principle does not apply, the remedies of workers' compensation and civil damages are cumulative and not alternative [*Burnelle v. Continental Can Co., Inc. (1987) 193 Cal. App. 3d 315, 320, 238 Cal. Rptr. 253* ; *see Lab. Code § 3600(b)*; *but see Hollywood Refrigeration Sales Co. v. Superior Court (1985) 164 Cal. App. 3d 754, 757-758, 210 Cal. Rptr. 619* (decided under prior law but after 1982 enactment of statute, noting that issue of whether workers' compensation and tort damages are ultimately cumulative or alternative is essentially unsettled)].

If an employee (or his or her dependents) receives workers' compensation and also secures a judgment for or settlement of civil damages under an exception to the exclusive remedy principle, workers' compensation benefits are to be credited against the tort judgment or settlement. The employer is also relieved of the obligation to pay further workers' compensation up to the net amount of the judgment or settlement, or up to the portion of the judgment that has been satisfied [*Lab. Code § 3600(b)*]. Compensation includes sums received by the employee prior to a final adjudication of the workers' compensation claim and sums received by the employee in the form of an award following a final adjudication of the workers' compensation claim [*Burnelle v. Continental Can Co., Inc. (1987) 193 Cal. App. 3d 315, 320, 238 Cal. Rptr. 253]* .

Dual remedies with setoff principles are also statutorily authorized in an action against an uninsured employer [*see Lab. Code § 3709*]. For further discussion, see *§ 577.312[2]*.

[2] Jurisdiction and Res Judicata

[a] In General

In many cases, it is not clear whether the conditions of workers' compensation exist or whether an exception to the exclusive remedy principle applies. Thus, the employee must decide whether to pursue dual remedies simultaneously or to elect one remedy to pursue first. If any doubt exists, it is proper to protect against the running of the statute of limitations by filing both a civil action and an application for workers' compensation benefits [*Dixon v. Ford Motor*

Co. (1975) 53 Cal. App. 3d 499, 502 n.*, *125 Cal. Rptr. 872]* .

The civil courts and the WCAB have concurrent jurisdiction to determine jurisdiction [*Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 976, 104 Cal. Rptr. 42, 500 P.2d 1386]* . If an exception to the exclusive remedy principle applies, the injured worker's remedies are cumulative [*Burnelle v. Continental Can Co., Inc. (1987) 193 Cal. App. 3d 315, 320, 238 Cal. Rptr. 253* ; *see Lab. Code § 3600(b)*; *but see Hollywood Refrigeration Sales Co. v. Superior Court (1985) 164 Cal. App. 3d 754, 757-758, 210 Cal. Rptr. 619* (decided under prior law but after 1982 enactment of statute, noting that issue of whether workers' compensation and tort damages are ultimately cumulative or alternative is essentially unsettled); for discussion, *see* [1], *above*].

[b] If Remedies Are Cumulative

If workers' compensation and civil remedies are cumulative, a determination in one forum is not subject to merger and bar under the doctrine of res judicata [*Burnelle v. Continental Can Co., Inc. (1987) 193 Cal. App. 3d 315, 320, 238 Cal. Rptr. 253]* .

[c] If Remedies Are Not Cumulative

If remedies are not cumulative, the tribunal assuming jurisdiction retains it to the exclusion of all other tribunals. Once a tribunal determines that is has jurisdiction over the case, jurisdiction becomes exclusive, and the final determination regarding jurisdiction is res judicata before the other tribunal with regard to the same parties [*Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 976, 104 Cal. Rptr. 42, 500 P.2d 1386* ; *Scott v. Industrial Acci. Com. (1956) 46 Cal. 2d 76, 81, 293 P.2d 18]* . A party may obtain an order preventing the second tribunal from acting pending determination by the first tribunal of the jurisdictional question [*Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 976, 104 Cal. Rptr. 42, 500 P.2d 1386* ; *Taylor v. Superior Court (1956) 47 Cal. 2d 148, 151, 301 P.2d 866]* . For a form for an affirmative defense to a civil action alleging that the WCAB has already assumed exclusive jurisdiction, see *§ 577.531[1]*.

[d] Res Judicata Effect of Determination by WCAB That Injury Compensable Under Workers' Compensation

A determination by the WCAB that the conditions of compensation exist and that an injury is compensable under workers' compensation is res judicata as to that issue in a civil action based on the same injury. Thus, if the right to bring the civil action is based on a noncompensable injury, the action is barred by the prior determination of compensability. In addition, a compromise settlement approved by the WCAB has the same force and effect as a judgment made after a full hearing and is entitled to full res judicata effect [*Hollywood Refrigeration Sales Co. v. Superior Court (1985) 164 Cal. App. 3d 754, 759, 210 Cal. Rptr. 619]* . However, to preclude an action, the compromise settlement must include the determination that all of the claims released are compensable under workers' compensation law; if it does not do so, res judicata principles do not preclude relitigation of the issue [*Lopez v. Sikkema (1991) 229 Cal. App. 3d 31, 40-44, 280 Cal. Rptr. 7* (compromise and release approved by WCAB, which did not clearly determine that all claims were compensable under workers' compensation law, did not preclude tort action based on employer's conduct outside compensation bargain; triable issue of fact remained regarding scope of release)].

The fact that the compromise and release sets forth the nature of the injury suffered does not, by itself, support the conclusion that all claims arising from that injury were covered by the settlement [*Lopez v. Sikkema (1991) 229 Cal. App. 3d 31, 44, 280 Cal. Rptr. 7* (triable issue of fact remained regardless of whether settlement was intended to cover claims for civil rights violation and intentional physical injury)]. A WCAB decision has no res judicata effect on matters that are unnecessary to the determination [*Young v. Libbey-Owens Ford Co. (1985) 168 Cal. App. 3d 1037, 1042-1043, 214 Cal. Rptr. 400]* .

[e] Effect of Determination That Employee Sought Unavailable Remedy

If a civil judgment or WCAB determination is rendered for the employer because the employee has sought a remedy that is not available to him or her, that judgment or determination does not bar a proceeding in the proper tribunal for a proper remedy [*see Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 974, 104 Cal. Rptr. 42, 500 P.2d 1386]* .

[3] Tolling of Statute of Limitations

The filing of a claim for workers' compensation effectively tolls the statute of limitations for the purposes of a later tort claim based on the same facts [*Elkins v. Derby (1974) 12 Cal. 3d 410, 412, 115 Cal. Rptr. 641, 525 P.2d 81]* . However, the filing of a claim for workers' compensation does not toll an action against an employer for aggravation of an injury resulting fromthe employer's fraudulent concealment of the cause of the injury [*Aerojet General Corp. v. Superior Court (1986) 177 Cal. App. 3d 950, 955-957, 223 Cal. Rptr. 249* ; *see § 577.314[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 577.320 Employer's Duty and Proof of Negligence

[1] In General

In a civil action by an employee against an employer under any exception to the exclusive remedy principle, principles of fault apply. If the alleged wrong is negligence, the employer's obligation is simply to use reasonable care, which is that degree of care that one of ordinary prudence in the same line of business would be expected to exercise to secure his or her own safety in doing the work [*Hall v. Burton (1962) 201 Cal. App. 2d 72, 80, 19 Cal. Rptr. 797]* .

An employer must exercise ordinary and reasonable care to provide safe tools, machinery, and appliances. To establish a breach of this duty, it must be shown that the employer either had actual knowledge of any defect or should have discovered the defect in the exercise of reasonable care [*Hall v. Burton (1962) 201 Cal. App. 2d 72, 80, 19 Cal. Rptr. 797]* . The employer also has a continuing duty of careful inspection at reasonable intervals [*Hall v. Burton (1962) 201 Cal. App. 2d 72, 80, 19 Cal. Rptr. 797]* .

The employer has a duty to warn the employee of any dangers connected with the work of which the employer is aware, or that might be discovered with proper care, and of which the employee might reasonably be expected to be unaware. This duty is particularly true with regard to an inexperienced employee. However, no warning is necessary if the danger should be obvious to the employee. An experienced employee may be assumed to be aware of the ordinary dangers of the work, even if they are not apparent to one unfamiliar with the work [*Baez v. Southern Pacific Co. (1962) 210 Cal. App. 2d 714, 717, 26 Cal. Rptr. 899]* .

The exclusive remedy rule bars an employee's civil tort action against his or her employer for aggravation of pre-existing illness resulting from negligent diagnostic treatment voluntarily provided by the employer, regardless of the cause of the pre-existing illness. For example, when an employer administered regular hearing tests as an ongoing condition of employment to determine whether the noise to which the employee was exposed on the job had adversely affected his hearing, the employer's failure to notify the employee of a test result that indicated a possible brain tumor (whose genesis had nothing to do with the employee's job) until the tumor had caused permanent injury to the employee was held to constitute an industrial injury subject to the exclusive remedy rule [*Weber v. United Parcel Service, Inc.*

(2003) 107 Cal. App. 4th 801, 806-809, 132 Cal. Rptr. 2d 412] .

[2] Admissibility of Occupational Safety Statutes

California's occupational safety statutes [*Lab. Code § 6300 et seq.*] are admissible and may be considered in a personal injury or wrongful death action between an employee and employer [*see Lab. Code § 6304.5*]. The Supreme Court has held that *Lab. Code § 6304.5*, as amended effective January 1, 2000, allows plaintiffs to use Cal-OSHA provisions to show duty or standard of care to the same extent as any other regulation or statute, whether the defendant is the plaintiff's employer or a third party [*Elsner v. Uveges (2004) 34 Cal. 4th 915, 927-928, 935-936, 22 Cal. Rptr. 3d 530, 102 P.3d 915]* . The Court held, moreover, that these amendments to *Lab. Code § 6304.5* were not applicable to litigation arising from an injury that occurred prior to their effective date, January 1, 2000, when the Court found that the amendments created a new standard of care for the defendant and shifted the burden of proof to the defendant [*Elsner v. Uveges (2004) 34 Cal. 4th 915, 937-940, 22 Cal. Rptr. 3d 530, 102 P.3d 915* (holding also that trial court's rulings that made amendments applicable to this litigation did not constitute harmless error)].

[3] Injury Caused by Negligence of Coemployee

In the case of injury caused by the negligence of a coemployee, the employer's lack of ordinary care may be shown by retention of an unfit employee after the employer has knowledge of the employee's unfitness, or by the employer's failure to use due diligence in selecting an employee who, as it happens, is unfit [*Gier v. Los Angeles C. E. R. Co. (1895) 108 Cal. 129, 133, 41 P. 22]* .

[4] Actions Against Uninsured Employers

In an action against an uninsured employer, there is a rebuttable presumption of employer negligence [*Lab. Code § 3708*]. For discussion, see *§ 577.312[2]* . Special rules of comparative negligence also apply in actions against uninsured employers and actions by employees whose employment is excluded from workers' compensation coverage [*see Lab. Code §§ 2801, 3708*]. For discussion, see *§§ 577.312[2], [3]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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51-577 California Forms of Pleading and Practice--Annotated § 577.321

§ 577.321 Interrelationship Between Exclusive Remedy Doctrine and Americans With Disabilities Act (ADA)

[1] Federal Preemption

The interrelationship between the exclusive remedy doctrine in the California Workers' Compensation Act and the federal Americans with Disabilities Act (ADA) [*see 42 U.S.C. § 12101 et seq.*] is not altogether settled at this point. However, a case of first impression from the United States District Court, Northern District of California, has held that theexclusive remedy doctrine is preempted by the ADA [*see Wood v. County of Alameda (N.D. Cal. 1995) 875 F. Supp. 659, 665]* .

In *Wood v. County of Alameda*, the plaintiff suffered an injury on the job in 1992, became disabled, and filed for workers' compensation benefits under California law. When plaintiff was cleared by her physician to return to work, she was not returned to her formerly held position or a comparable position with her employer. Plaintiff alleged that the defendant employer's actions represented a denial of "reasonable accommodation" to a "qualified individual with a disability" in violation of the ADA. The defendant argued that plaintiff was barred from bringing the ADA claim on the ground that California's Workers' Compensation Act provided the sole remedy for such claims [*Wood v. County of Alameda (N.D. Cal. 1995) 875 F. Supp. 659, 660-661]* .

The court followed the analytical framework set forth in *Adams Fruit Co. v. Barrett (1990) 494 U.S. 638, 642, 110 S. Ct. 1384, 108 L. Ed. 2d 585* :

- Does the federal statute explicitly or implicitly indicate that Congress intended the statute to defer to state law in situations like the one at issue?

- If it does not, do preemption principles mandate that all or part of the state law be denied effect in light of Congress's intent in enacting the federal law?

The court recognized that "[i]n either case, the issue turns on the language of the statute and, where the language is not dispositive, on the intent of Congress as revealed in the history and purposes of the statutory scheme" [*Wood v. County*

of Alameda (N.D. Cal. 1995) 875 F. Supp. 659, 662] .

[2] Application of Analysis to Determine That Exclusive Remedy Doctrine Preempted

In applying the first part of the *Adams Fruit* analysis, the court found that the language of the ADA in *42 U.S.C. § 12101(b)* that it does not "limit or invalidate" certain state laws basically meant that it does not excuse defendants from fulfilling their parallel obligations under other compatible state laws. Thus, the court found that Congress did not intend the ADA to defer to the California workers' compensation law at issue here. The court further noted that, unlike the War Hazards Compensation Act in which Congress has expressed clearly its intent to limit the availability of a federal remedy when the claimant has received workers' compensation benefits related to the same injury, the court believed that, had Congress intended the ADA to defer to circumstances like those presented in the instant case, it would have so stated [*Wood v. County of Alameda (N.D. Cal. 1995) 875 F. Supp. 659, 662-664]* .

In applying the second part of the *Adams Fruit* analysis, the court found that the exclusive remedy doctrine of the California Workers' Compensation Act is preempted by the ADA. The court stated that, under the Supremacy Clause contained in Article VI of the Constitution, which provides that state law is preempted to the extent it actually conflicts with federal law or when the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, giving effect to the exclusive remedy doctrine in the state statute in a manner that limits the availability of federal remedies would clearly stand as an obstacle to the accomplishment of Congress' stated purpose in enacting the ADA to provide a national mandate for the elimination of discrimination against the disabled, to establish strong and consistent standards addressing such discrimination, and to ensure that the federal government plays a central role in remedying this discrimination [*Wood v. County of Alameda (N.D. Cal. 1995) 875 F. Supp. 659, 664-665]* .

The court limited its holding in *Wood*, however, providing that only the exclusive remedy doctrine, and not the substantive protections, of the California Workers' Compensation Act is preempted by the ADA. As stated by the court, Congress intended plaintiffs to have the benefit of both federal and state causes of action to the extent that the two are compatible. When, as here, they are not wholly compatible, preemption principles clearly require that those parts (and only those parts) of the state law that hinder the accomplishment of federal objectives be denied effect [*Wood v. County of Alameda (N.D. Cal. 1995) 875 F. Supp. 659, 665-666]* .

For further discussion of the ADA, see *California Employment Law, Vol. 2, § 40.22A* (Matthew Bender); Larson's Worker's Compensation Law, Vol. 2, § 61.26 (Matthew Bender); Americans With Disabilities Act, chs. 6, 8 (Matthew Bender); Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 10, §§ 10.607 -*10.63, ch. 35, §§ 35.90 -35.104* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawSupremacy ClauseFederal PreemptionLabor & Employment LawDiscriminationDisability DiscriminationFederal & State InterrelationshipsWorkers' Compensation & SSDIDefensesExclusivity ProvisionsWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityExceptions

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[Reserved]

§§ 577.322[Reserved]

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§ 577.330 Governing Law

Actions by injured employees or their dependents and employers or their insurance carriers against third parties who are responsible for the employee's injuries in whole or in part and the employer's right to subrogation are governed by *Lab. Code §§ 3850-3864* and by the substantive law of the particular tort involved. Wrongful death actions are governed by *Code Civ. Proc. §§ 377.60-377.62*. The right of the Director of Industrial Relations to recover damages from any person or entity, other than the employer, whose tortious act or omission proximately caused the injury to or death of the employee is governed by *Lab. Code § 3732*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIThird Party ActionsGeneral OverviewWorkers' Compensation & SSDIThird Party ActionsSubrogation

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§ 577.331 Definitions

[1] Employee

As used in *Lab. Code §§ 3850-3864*, "employee" includes the person injured and any other person to whom a claim accrues by reason of the injury or death of the person injured [*Lab. Code § 3850(a)*].

[2] Employer

The term "employer" includes the employer's compensation carrier and the Self-Insurer's Security Fund when the employer's compensation obligations have been assumed pursuant to *Lab. Code § 3743* (insolvent self-insurer) [*Lab. Code § 3850(b), (c)*; *see Chase Chemical Co. v. Hartford Accident & Indemnity Co. (1984) 159 Cal. App. 3d 229, 237, 205 Cal. Rptr. 469* ; *Johnson v. Santos (1983) 148 Cal. App. 3d 566, 570, 196 Cal. Rptr. 145]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDICoverageEmployment RelationshipsEmployeesWorkers' Compensation & SSDICoverageEmployment RelationshipsEmployersWorkers' Compensation & SSDIThird Party ActionsGeneral Overview

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§ 577.332 Actions Against Third-Party Tortfeasor

[1] In General

A claim for workers' compensation benefits does not affect the injured employee's claim or right of action or of that of his or her heirs for all damages proximately resulting from the injury or death against any person other than the employer [*Lab. Code § 3852*]. Hence, notwithstanding the recovery of workers' compensation benefits, the injured employee, or the employee's heirs in the event of the employee's death, are free to sue a third-party tortfeasor for all the damages sustained as a result of the employee's injury or death [*see Rodgers v. Workers' Comp. Appeals Bd. (1984) 36 Cal. 3d 330, 334, 204 Cal. Rptr. 403, 682 P.2d 1068* ; *Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 829, 833, 150 Cal. Rptr. 888, 587 P.2d 684* ; *see also* complaint for damages in § 577.520[1]].

Moreover, except to the extent the rule has been modified by statute (see *Civ. Code § 3333.1(a), (b)*, exempting negligent health care providers from any duty to reimburse employers or their carriers for workers' compensation benefits paid as a result of the negligence of the health care providers) and *Barme v. Wood (1984) 37 Cal. 3d 174, 180-182, 207 Cal. Rptr. 816, 689 P.2d 446* , upholding the legal validity of *Civ. Code § 3333.1*; *see also Graham v. Workers' Comp. Appeals Bd. (1989) 210 Cal. App. 3d 499, 501, 504, 258 Cal. Rptr. 376* , and discussion under [12], *below*) any employer, or its compensation carrier, who pays or becomes obligated to pay compensation, or who pays or becomes obligated to pay salary in lieu of compensation, or who pays or becomes obligated to pay an amount to the Department of Industrial Relations pursuant to *Lab. Code § 4706.5* (payment when deceased employee left no dependents), may likewise make a claimor bring an action against the third person [*Lab. Code § 3852*; *see § 577.521*].

Thus, under *Lab. Code § 3852*, both the employee and the employer, except as noted above, may sue a third party who may be responsible for the employee's injuries [*Buell v. CBS, Inc. (1982) 136 Cal. App. 3d 823, 825, 186 Cal. Rptr. 455]* . In addition, in the event of the employee's death, his or her heirs may sue for wrongful death under former *Code Civ. Proc. § 377* (now *Code Civ. Proc. §§ 377.60-377.62*). However, a wrongful death action under former *Code Civ. Proc. § 377* (now *Code Civ. Proc. §§ 377.60-377.62*) is in no way a claim derived from the decedent via the survival of a claim the decedent may have had and, being original rather than derivative in nature, is independent of the employer's

or its insurance carrier's action for recovery of funds paid out under *Lab. Code § 3852* [*Eli v. Travelers Indemnity Co. (1987) 190 Cal. App. 3d 901, 904-905, 235 Cal. Rptr. 704]* . The court of appeal has held that, pursuant to *Lab. Code § 3852*, a workers' compensation carrier stated a cause of action against alleged third-party tortfeasors for recoupment of death benefits the carrier paid to a deceased employee's survivor, who was an actual dependent of the employee but who had no standing to bring a wrongful death action against the alleged tortfeasors. The court held that the carrier's right to sue was not limited to its status as subrogee of the survivor and that the wrongful death statute, with its limited standing provisions, was irrelevant in determining the carrier's right to sue [*Fremont Comp. Ins. Co. v. Sierra Pine, Ltd. (2004) 121 Cal. App. 4th 389, 394-401, 17 Cal. Rptr. 3d 80]* .

[1A] Attorney's Duty to Advise Regarding Possible Third Party Action

Failure by an attorney representing an employee in a workers' compensation proceeding to timely advise the employee that he or she may have a viable personal injury action against third parties may constitute malpractice or negligence. The elements of a cause of action in tort for professional negligence are: (1) the duty of the professional to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence [*Budd v. Nixen (1971) 6 Cal. 3d 195, 200, 98 Cal. Rptr. 849, 491 P.2d 433]* . As part of the third element--proof that any loss suffered by plaintiff was proximately caused by defendant's negligence--plaintiff must prove that the third party action would have resulted in a favorable judgment and that at least some portion of that judgment would have been collectible [*Campbell v. Magana (1960) 184 Cal. App. 2d 751, 754, 8 Cal. Rptr. 32]* . Thus, plaintiff's failure in the malpractice action to present any evidence regarding the collectibility of some portion of a judgment in the third party action will defeat the malpractice action [*Garretson v. Miller (2002) 99 Cal. App. 4th 563, 571-573, 121 Cal. Rptr. 2d 317]* .

[2] Purpose of Law

The purpose of *Lab. Code § 3850 et seq.* is to insure, first, that, regardless of whether it is the employee or the employer who sues the third party, both the employee and the employer recover their due, and, second, that, as far as possible, the third party need defend only one lawsuit [*Board of Administration v. Glover (1983) 34 Cal. 3d 906, 912, 196 Cal. Rptr. 330, 671 P.2d 834* ; *County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 872, 140 Cal. Rptr. 638, 568 P.2d 363]* .

[3] Nature of Law

The claim of the employer and its compensation carrier against the third-party tortfeasor derive from the injured employee's claim against the tortfeasor for damages for personal injuries. In their own right, the employer and its carrier possess no claims of their own against the tortfeasor, since the tortfeasor has committed no wrong against them. Only because they have carried part of the costs of the injured person's losses do they acquire claims against the tortfeasor as subrogees to the injured person's claims for damages for personal injuries [*Board of Administration v. Glover (1983) 34 Cal. 3d 906, 915, 196 Cal. Rptr. 330, 671 P.2d 834* ; *see Breese v. Price (1981) 29 Cal. 3d 923, 928-931, 176 Cal. Rptr. 791, 633 P.2d 987* ; *Mendenhall v. Curtis (1980) 102 Cal. App. 3d 786, 791-794, 162 Cal. Rptr. 569* ; *see also § 577.520*]. Thus, although employer and employee actions are interchangeable, substantively as well as procedurally, Lab. Code § 3282 does not enlarge the tort remedy of a compensation carrier beyond that of the injured employee [*Eli v. Travelers Indemnity Co. (1987) 190 Cal. App. 3d 901, 904, 235 Cal. Rptr. 704]* .

[4] Applicability of Substantive Tort Law

Lab. Code § 3850 et seq. governing employer and employee actions against third parties, does not define the substantive law that determines whether an employee or an employer will in fact recover. Instead, the substantive law that governs employer and employee actions is usually the general tort law. As applied in cases involving employee and employer third-party claims, however, the general tort law works in parallel with the procedures that the Legislature has

set up in *Lab. Code §§ 3850-3864*.

Substantively, as well as procedurally, employer and employee actions are interchangeable. Hence, regardless of who brings an action, it is essentially the same lawsuit. Thus, the employee's general damage claim, whether prosecuted by the employee personally or by the employee's employer or its insurance carrier on the employer's behalf, is solely one in tort for personal injuries arising out of the negligence of the third-party tortfeasor, and the tort liability of the third-party tortfeasor remains the same [*County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 873-875, 140 Cal. Rptr. 638, 568 P.2d 363* ; *Finney v. Manpower, Inc. (1981) 123 Cal. App. 3d 1066, 1070, 177 Cal. Rptr. 74]* . For a discussion of the substantive tort law that applies and forms of complaints that may be used by an employee to sue a third-party tortfeasor for damages or adapted for use by the employer to recover workers' compensation or death benefits it has paid because of the third party's tort, see the appropriate chapter in this publication, for example, Ch. 362, *Mental Suffering and Emotional Distress* , Ch. 380, *Negligence* , and Ch. 460, *Products Liability* .

[5] Survival of Action

The death of the employee or of any other person does not abate any right of action established by *Lab. Code § 3850 et seq.* [*Lab. Code § 3851*].

[6] Joinder and Consolidation

If the action is brought by either the employer or the employee, the other may, at any time before trial on the facts, join as party plaintiff or must consolidate his or her action, if brought independently [*Lab. Code § 3853*; *see County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 872, 140 Cal. Rptr. 638, 568 P.2d 363* ; *Johnson v. De Santos (1983) 148 Cal. App. 3d 566, 570, 196 Cal. Rptr. 145* ; *see also San Diego Unified Port Dist. v. Superior Court (1988) 197 Cal. App. 3d 843, 846, 243 Cal. Rptr. 163]* .

[7] Intervention

Under *Lab. Code § 3853*, the employer or employee may also intervene in the other's action [*Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 829, 833, 150 Cal. Rptr. 888, 587 P.2d 684* ; *County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 872, 140 Cal. Rptr. 638, 568 P.2d 363* ; *San Diego Unified Port Dist. v. Superior Court (1988) 197 Cal. App. 3d 843, 846, 243 Cal. Rptr. 163* ; *Buell v. CBS, Inc. (1982) 136 Cal. App. 3d 823, 825 n.2, 186 Cal. Rptr. 455* ; *see Code Civ. Proc. § 387* and § 577.521].

The right to intervene before trial commences is unconditional [*Buell v. CBS, Inc. (1982) 136 Cal. App. 3d 823, 825 n.2, 186 Cal. Rptr. 455]* . However, since one of the purposes of intervention is to avoid delay in litigation [*State Compensation Ins. Fund v. Selma Trailer & Manufacturing Co. (1989) 210 Cal. App. 3d 740, 754-755, 258 Cal. Rptr. 545]* , when an employee's third-party action has been dismissed for failure to effect timely service of the summons, the employee may not intervene in the action maintained by the employer's compensation carrier, who had intervened in the employee's action [*Bishop v. Silva (1991) 234 Cal. App. 3d 1317, 1324-1327, 285 Cal. Rptr. 910]* . Similarly, when an employee's action has been dismissed for failure to diligently prosecute the action, the employee is not permitted to intervene in the employer's independent subrogation action [*Fairmont Ins. Co. v. Frank (1996) 42 Cal. App. 4th 457, 460, 49 Cal. Rptr. 2d 670]* .

As noted above, under *Lab. Code § 3853*, an employer has an unconditional right to intervene in the employee's third-party action at any time before a trial on the facts. When the employer makes a pretrial motion to be joined as a party, the employer has, as a matter of law, satisfied the "upon timely application" requirement of *Code Civ. Proc. § 387*, which governs intervention in general. Thus, the trial court erred in refusing an employer's pretrial request to intervene in an employee's action when, although the employee and the third party had settled, there still remained for trial the insurance carrier's complaint to recover the amount of compensation benefits it had paid to the employer [*Mar*

v. Sakti Internat. Corp. (1992) 9 Cal. App. 4th 1780, 1784-1785, 12 Cal. Rptr. 2d 388] .

[8] Statute of Limitations

A complaint by the employee against the third-party tortfeasor for damages for personal injuries must be filed within two years from the date the injury was sustained [*see Code Civ. Proc. § 335.1*]. A complaint against the third-party tortfeasor by the employer to recover compensation benefits paid is subject to the same period of limitation; that is, it must be filed within the statutory limitations period from the date of the employee's injury and not from the date workers' compensation benefits were paid [*County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 868-886, 140 Cal. Rptr. 638, 568 P.2d 363]* .

However, a complaint in intervention filed in the employee's action is timely, even if filed after the running of the statute of limitations, if the statute had not yet run at the time the employee's complaint was filed and the complaint in intervention is filed before trial [*see Lab. Code § 3853*; *see also County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 885, 140 Cal. Rptr. 638, 568 P.2d 363]* . This is also true with respect to a complaint in intervention filed by the employee in a prior timely filed action by the employer or its insurance carrier [*see State Compensation Ins. Fund v. Selma Trailer & Manufacturing Co. (1989) 210 Cal. App. 3d 740, 754-755, 258 Cal. Rptr. 545* ; *Buell v. CBS, Inc. (1982) 136 Cal. App. 3d 823, 826, 186 Cal. Rptr. 455* ; *Jordan v. Superior Court (1981) 116 Cal. App. 3d 202, 206-211, 172 Cal. Rptr. 30* ; *State Comp. Ins. Fund v. Matulich (1942) 55 Cal. App. 2d 528, 529-530, 131 P.2d 21]* .

[9] Effect of Delay in Prosecution

Delay in prosecuting the third-party action may result in the involuntary dismissal of the complaint [*see generally Code Civ. Proc. §§ 581, 583.110-583.430*; *see also* Ch. 212, *Dismissal*] and of the complaint in intervention. *Lab. Code § 3853*, which permits the filing of a complaint in intervention, does not qualify or eliminate the intervenor's obligation to pursue his or her claim diligently from the beginning [*State Compensation Ins. Fund v. Selma Trailer & Manufacturing Co. (1989) 210 Cal. App. 3d 740, 755, 258 Cal. Rptr. 545]* . Because the complaint and the complaint in intervention are essentially the same lawsuit, the intervenor may rely on the plaintiff's exercise of due diligence, but if the plaintiff failed to exercise diligence, then the intervenor must demonstrate the exercise of diligence from the date the complaint was filed, not the date the complaint in intervention was filed, to avoid involuntary dismissal of the complaint in intervention for delay in prosecution [*State Compensation Ins. Fund v. Selma Trailer & Manufacturing Co. (1989) 210 Cal. App. 3d 740, 755, 258 Cal. Rptr. 545]* .

The rule does not operate inflexibly and perhaps unjustly as would be the case if the plaintiff's delays and conduct were imputed to the intervenor or vice-versa. Rather, the plaintiff and the intervenor will each be judged on his or her own actions and conduct in pursuing the litigation [*State Compensation Ins. Fund v. Selma Trailer & Manufacturing Co. (1989) 210 Cal. App. 3d 740, 756, 258 Cal. Rptr. 545* (affirming judgment dismissing compensation carrier's complaint and employee's complaint in intervention for lack of diligent prosecution in bringing action to trial within three years (now two years) from date complaint was filed); *see Code Civ. Proc. §§ 583.410, 583.420(a)(2)*].

[10] Service of Complaint on Nonfiling Employee or Employer

If either the employee or the employer institutes a third-party action, he or she must give to the other a copy of the complaint by personal service or certified mail, and proof of service must be filed in the action [*Lab. Code § 3853*; *see § 577.521*].

[11] Proof of Damages

[a] Actions Prosecuted by Employer

If the action is prosecuted by the employer alone, evidence of any amount that the employer has paid or become

obligated to pay because the employee's injury or death is admissible, and the expenditures or liability are considered as proximately resulting from the injury or death in addition to any other items of damage proximately resulting therefrom [*Lab. Code § 3854*]. This does not mean, however, that the employer can recover from the alleged third-party tortfeasor workers' compensation benefits paid when the jury finds that the tortfeasor's negligence was not the proximate cause of any injury to the employee [*Mendenhall v. Curtis (1980) 102 Cal. App. 3d 786, 791-794, 162 Cal. Rptr. 569* ; *see Breese v. Price (1981) 29 Cal. 3d 923, 928-931, 176 Cal. Rptr. 791, 633 P.2d 987* ; *see also § 577.520*]. The employer may also not recover from the third-party tortfeasor increased workers' compensation insurance premiums and resulting lost profits, as these are not "compensation" within the meaning of *Lab. Code § 3852* [*Fischl v. Paller & Goldstein (1991) 231 Cal. App. 3d 1299, 1304-1305, 282 Cal. Rptr. 802]* .

[b] Actions Prosecuted or Joined By Employee

If the employee joins in or prosecutes the action, either evidence of the amount of disability indemnity or death benefit paid or to be paid by the employer or evidence of the loss of earning capacity by the employee is admissible, but not both [*Lab. Code § 3855*; *see* *Slayton v. Wright (1969) 271 Cal. App. 2d 219, 234, 76 Cal. Rptr. 494]* . Proof of all other items of damage to either the employer or the employee proximately resulting from the injury or death is admissible and is part of the damages [*Lab. Code § 3855*].

[12] Medical Practitioner As Third-Party Tortfeasor--Limitation on Employer's Right to Reimbursement or Credit

Civ. Code § 3333.1 abrogates the collateral source rule in medical malpractice actions [*Graham v. Workers' Comp. Appeals Bd. (1989) 210 Cal. App. 3d 499, 501, 504, 258 Cal. Rptr. 376]* . It provides that:

- In an action against a health care provider for personal injuries based on professional negligence, the defendant, if he or she so elects, may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to, among other things, any workers compensation act [*Civ. Code § 3333.1(a)*]; and

- No source of collateral benefits introduced pursuant to *Civ. Code § 3333.1(a)* shall recover any amount against the plaintiff, nor shall it be subrogated to the rights of the plaintiff against a defendant [*Civ. Code § 3333.1(b)*].

Under *Civ. Code § 3333.1*, the employer's right to reimbursement under *Lab. Code § 3852* for compensation benefits paid from amounts recovered by the worker in an action against a third-party medical practitioner is barred [*Graham v. Workers' Comp. Appeals Bd. (1989) 210 Cal. App. 3d 499, 505-506, 258 Cal. Rptr. 376* (quoting from *Miller v. Sciaroni (1985) 172 Cal. App. 3d 306, 310-312, 218 Cal. Rptr. 219*)]. Furthermore, Civ. Code § 3333.1 overrides the employer's right under *Lab. Code §§ 3858* and *3861* to a credit of any such recovery against its liability for workers' compensation when an employee settles, rather than tries, his or her medical malpractice action and the evidence establishes that the employee and third party deducted the amount of the employee's workers' compensation benefits from the settlement [*Graham v. Workers' Comp. Appeals Bd. (1989) 210 Cal. App. 3d 499, 501, 506-508, 258 Cal. Rptr. 376]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedurePartiesJoinderGeneral OverviewTortsDamagesCollateral Source RuleEmployment Benefits & Workers' CompensationTortsMalpractice & Professional LiabilityAttorneysWorkers' Compensation & SSDIThird Party ActionsSubrogationWorkers' Compensation & SSDIThird Party ActionsThird Party Liability

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§ 577.333 Employer's Recovery in Third-Party Action

[1] In General

An employer who makes a claim or brings an action against a third-party tortfeasor may recover in the same suit, in addition to the total amount of compensation, damages for which he or she was liable including all salary, wage, pension, or other emolument paid to the employee or to his or her dependents [*Lab. Code § 3852*; *see discussion under § 577.332[11]*]. The employer or its carrier may not, however, recover any damages in excess of those recoverable by the employee [*San Diego Unified Port Dist. v. Superior Court (1988) 197 Cal. App. 3d 843, 847, 243 Cal. Rptr. 163]* .

The respective rights against the third person of the heirs of an employee claiming under *Code Civ. Proc. §§ 377.60-377.62* (wrongful death action) and of the employer claiming pursuant to *Lab. Code § 3852* will be determined by the court [*Lab. Code § 3852*]. Were it not for *Lab. Code § 3852*, a court would have no interest or reason to involve itself in the determination of the competing claims. But by mandating that the respective rights against the third person of the heirs of an employee claiming under *Code Civ. Proc. §§ 377.60-377.62* and an employer claiming pursuant to *Lab. Code § 3852* shall be determined by the court, *Lab. Code § 3852* makes manifest that neither claim is to have "priority" over the other as a matter of law. Rather, the court is required to ascertain the damages to which each claimant is entitled and then to apportion the total award accordingly [*Eli v. Travelers Indemnity Co. (1987) 190 Cal. App. 3d 901, 905, 235 Cal. Rptr. 704]* . In this regard, it is to be noted that *Lab. Code § 3856* (*discussed under § 577.335[2]*), allowing the employer a lien on the employee's recovery, does not apply to the heirs' recovery in a wrongful death action [*Eli v. Travelers Indemnity Co. (1987) 190 Cal. App. 3d 901, 906, 235 Cal. Rptr. 704]* .

[2] Effect of Employee's Concurrent Negligence

The employer can never recover more from the third party than the amount representing the third party's proportional share of the responsibility for the injury. Thus, if the third party and the employee are each found 50 percent responsible for the employee's injuries and the employer is found to be without fault, the employer-insurer's recovery from the third party is limited to half of the total amount of damages found to have been suffered by the employee [*Finney v. Manpower, Inc. (1981) 123 Cal. App. 3d 1066, 1071, 177 Cal. Rptr. 74]* .

[3] Effect of Employer's Concurrent Negligence

[a] In General

If the employee's injury was caused by the concurrent negligence of a third party and the employer, the employer's claim for reimbursement is limited to the amount that exceeds the employer's percentage share of the employee's total recovery according to the principles of comparative negligence [*Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 829, 842, 150 Cal. Rptr. 888, 587 P.2d 684* ; *see Rodgers v. Workers' Comp. Appeals Bd. (1984) 36 Cal. 3d 330, 334-335* , 204 Cal. Rpr 403, *682 P.2d 1068* ; *Del Monte Corp. v. Superior Court (1982) 127 Cal. App. 3d 1049, 1052-1053, 179 Cal. Rptr. 855]* .

To prevent double recovery, the amount of workers' compensation benefits paid up to the time of trial is deducted from the employee's recovery of economic damages [*see Civ. Code § 1431.2*] against the third party, to the extent that those benefits do not exceed the employer's proportionate share of responsibility under comparative fault principles [*see Torres v. Xomox Corp. (1996) 49 Cal. App. 4th 1, 25-37, 42, 56 Cal. Rptr. 2d 455* ; *Scalice v. Performance Cleaning Systems (1996) 50 Cal. App. 4th 221, 225-238, 57 Cal. Rptr. 2d 711* ; *Rosales v. Thermex-Thermatron, Inc. (1998) 67 Cal. App. 4th 187, 197-198, 78 Cal. Rptr. 2d 861]* . After deducting those amounts, the third party is jointly and severally liable for all of the employee's "economic damages," as defined by Proposition 51 [*see Civ. Code § 1431.2*], such as damages for medical expenses and lost wages [*see DaFonte v. Up-Right, Inc. (1992) 2 Cal. 4th 593, 600, 7 Cal. Rptr. 2d 238, 828 P.2d 140* ; *Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 829, 842-843 n.9, 150 Cal. Rptr. 888, 587 P.2d 684]* . Under Proposition 51, however, the third party's liability to the employee for "non-economic damages," such as damages for mental suffering and emotional distress, is limited to the third party's proportionate share of those damages as determined under comparative fault principles [*DaFonte v. Up-Right, Inc. (1992) 2 Cal. 4th 593, 600-604, 7 Cal. Rptr. 2d 238, 828 P.2d 140* ; *see Civ. Code § 1431.2*].

For further discussion of comparative fault principles and the effect on Proposition 51 on those principles, see *Ch. 300, Indemnity and Contribution, § 300.90* et seq., and Ch. 380, *Negligence* .

[b] Raising Issue of Concurrent Negligence--Procedure

The California Courts of Appeal are split on the issue of whether an employer and carrier may be brought into an employee's lawsuit by a third-party defendant's cross-complaint for declaratory relief [*compare Difko Admin. (US) Inc. v. Superior Court (1994) 24 Cal. App. 4th 126, 134-135, 29 Cal. Rptr. 2d 291* , *C.J.L. Construction, Inc. v. Universal Plumbing (1993) 18 Cal. App. 4th 376, 391-392, 22 Cal. Rptr. 2d 360* , *and State of California v. Superior Court (1998) 60 Cal. App. 4th 659, 664-665, 71 Cal. Rptr. 2d 256* , *with Del Monte Corp. v. Superior Court (1982) 127 Cal. App. 3d 1049, 1053-1055, 179 Cal. Rptr. 855]* . One line of cases holds that a third-party defendant who wishes to establish the concurrent negligence of an employer that is not a party to the employee's lawsuit may do so by pleading the issue as an affirmative defense to the employee's complaint, but may not join the employer by way of cross-complaint [*Difko Admin. (US) Inc. v. Superior Court (1994) 24 Cal. App. 4th 126, 134-135, 29 Cal. Rptr. 2d 291* ; *C.J.L. Construction, Inc. v. Universal Plumbing (1993) 18 Cal. App. 4th 376, 391-392, 22 Cal. Rptr. 2d 360* ; *see also State of California v. Superior Court (1998) 60 Cal. App. 4th 659, 664-665, 71 Cal. Rptr. 2d 256]* .

The other line of authority holds that if the employer and carrier are not parties to the employee's action and there is a justiciable issue as to the concurrent negligence or fault of the employer, the third-party defendant may bring the employer into the lawsuit by cross complaint for declaratory relief as to the third-party defendant's right to have any judgment against him or her reduced by the amount of compensation benefits paid up to the amount of the employer's proportionate share of fault [*Del Monte Corp. v. Superior Court (1982) 127 Cal. App. 3d 1049, 1054-1055, 179 Cal. Rptr. 855]* . Until this issue is resolved, attorneys should exercise caution when raising the claim of concurrent employer negligence. It is always wise to plead the claim as an affirmative defense since this is a proper procedure for establishing employer negligence under both lines of cases.

[c] Determination of Issue

Once the issue of the employer's concurrent negligence is raised, the trier of fact should determine the employer's degree of fault. The court should then deduct the employer's percentage share of the employee's total recovery from the third party's liability up to the amount of the workers' compensation benefits assessed against the employer. Correspondingly, the employer should be denied any claim of reimbursement, or any lien under *Lab. Code § 3856(b)* (discussed under *§ 577.335[2]*), to the extent that his or her contribution would then fall short of his or her percentage share of responsibility for the employee's total recovery [*Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 829, 842, 150 Cal. Rptr. 888, 587 P.2d 684* ; *see Rodgers v. Workers' Comp. Appeals Bd. (1984) 36 Cal. 3d 330, 335, 204 Cal. Rptr. 403, 682 P.2d 1068]* . In such case, the employer may seek reimbursement or credit (discussed under *§ 577.335[4]*) only for the amount by which his or her compensation liability exceeds his or her proportional share of the injured employee's recovery [*Kramer v. Cedu Foundation, Inc. (1979) 93 Cal. App. 3d 1, 7, 155 Cal. Rptr. 552]* .

Workers' compensation benefits previously paid by the employer must be included in calculating the employer's credit threshold, and the employer's credit threshold must be reduced by any amounts the employer receives by way of lien settlement from the third party [*Southern Cal. Edison Co. v. Workers' Comp. Appeals Bd. (1997) 58 Cal. App. 4th 766, 771-772, 68 Cal. Rptr. 2d 265]* .

[d] Effect of Third Party's Failure to Raise Issue

If, in an action by the employee against the third party, the defendant does not have the employer joined and neither introduces nor offers any evidence bearing on the concurrent negligence of the employer or show that the negligence, if any, proximately caused the injury or death, a judgment for plaintiff, without reduction by the amount of compensation benefits paid, will be affirmed [*De Cruz v. Reid (1968) 69 Cal. 2d 217, 223, 70 Cal. Rptr. 550, 444 P.2d 342* ; *Curtis v. State of California ex rel. Dept. of Transportation (1982) 128 Cal. App. 3d 668, 683-685, 180 Cal. Rptr. 843]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsNegligenceDefensesComparative NegligenceGeneral OverviewTortsNegligenceDefensesComparative NegligenceMultiple PartiesGeneral OverviewWorkers' Compensation & SSDIThird Party ActionsSubrogationWorkers' Compensation & SSDIThird Party ActionsThird Party Liability

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51-577 California Forms of Pleading and Practice--Annotated § 577.334

§ 577.334 Allocation of Judgment in Third-Party Action

[1] Action by Employer Alone

If the action is prosecuted by the employer alone, the court must first order paid from any judgment for damages recovered the reasonable litigation expenses incurred in the preparation and prosecution of the action, together with a reasonable attorney's fee that shall be based solely on the services rendered by the employer's attorney in effecting recovery both for the benefit of the employer and the employee. After payment of these expenses and attorney's fee, the court shall apply out of the amount of the judgment an amount sufficient to reimburse the employer for the amount of his or her expenditure for compensation together with any amounts to which he or she may be entitled as special damages under *Lab. Code § 3852* and shall order any excess paid to the injured employee or other person entitled to it [*Lab. Code § 3856(a)*; *see County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 872-873, 140 Cal. Rptr. 638, 568 P.2d 363* ; *Walsh v. Woods (1986) 187 Cal. App. 3d 1273, 1277, 232 Cal. Rptr. 629* (apportionment of attorney fee)].

[2] Action by Employee Alone

If the action is prosecuted by the employee alone, the court must first order paid from any judgment for damages recovered the reasonable litigation expenses incurred in preparation and prosecution of the action, together with a reasonable attorney's fee that shall be based solely on the services rendered by the employee's attorney in effecting recovery both for the benefit of the employee and the employer [*Lab. Code § 3856(b)*; *see Quinn v. State of California (1975) 15 Cal. 3d 162, 169-176, 124 Cal. Rptr. 1, 539 P.2d 761* (apportionment of attorney's fee); *Walsh v. Woods (1986) 187 Cal. App. 3d 1273, 1277, 232 Cal. Rptr. 629* (same)]. After the payment of these expenses and attorney's fee, the court will allow the employer a lien against the judgment for reimbusement of compensation benefits paid as provided in *Lab. Code § 3856(b)* (discussed under *§ 577.335[2]*).

[3] Action by Both Employee and Employer

When the employer intervenes in an employee's third-party action, the employer's status is akin to that of a subrogee. Thus, the employer's right to recover workers' compensation benefits paid to the employee derives from and does not

extend beyond the employee's tort remedy against the third party. Although the employer and employee are entitled to verdicts and judgments setting forth their respective rights, the damages awarded must be segregated between them to prevent a double recovery against the third party. In general, the employer may recover the amount of compensation benefits paid, but the amount of its judgment may not exceed the total amount of tort damages suffered by the employee.

The employee is entitled to have the jury determine his or her total tort damages, but may recover only a net judgment for the difference, if any, between the total tort damages and the workers' compensation benefits received. To prevent a double recovery, the trial court may instruct the jury to segregate the types of damage as between the employee and the employer, awarding to the employer only those tort damages not recoverable by the employer. Alternatively, the jury may be instructed on the types of tort damages to which the employee may be entitled, and then given a special verdict form that requires it to find whether the defendant was negligent, whether the negligence was the proximate cause of the employee's injuries, what the employee's total tort damages are, without taking into account his or her receipt of compensation benefits, and what the reasonable amount of benefits paid by the employer were. Thereafter, the court will enter individual judgments on the special verdict for the amounts to which the employee and the employer are entitled [*Demkowski v. Lee (1991) 233 Cal. App. 3d 1251, 1258-1259, 284 Cal. Rptr. 919]* .

An employer is not entitled to a right to reimbursement under *Lab. Code § 3856(c)* if it begins as a party plaintiff, but later chooses to abstain and file for a lien on the judgment prior to trial. *Lab. Code § 3856(c)* applies only if the action is prosecuted both by the employee and the employer. If the employer remains a formal party to the proceedings, its right to reimbursement must be expressly set forth in both the verdict and in the judgment obtained by the employee against the third party; however, this is unnecessary if its interests are protected by a lien on the judgment [*Manthey v. San Luis Rey Downs Enterprises, Inc. (1993) 16 Cal. App. 4th 782, 787-788, 20 Cal. Rptr. 2d 265]* .

[4] Litigation Expenses and Attorney's Fees

[a] Entitlement and Amount

The amount of reasonable litigation expenses and the amount of attorney's fees under *Lab. Code § 3856(a)-(c)* are fixed by the court. When the employer and employee are respresented by separate attorneys, they may propose to the court, for its consideration and determination, the amount and division of the expenses and fees [*Lab. Code § 3856(d)*].

An insurer is subrogated not only to an employer's right of action against a third party, but also to the employer's additional rights and liabilities. Thus, if the employer and the third-party tortfeasor have a prior contractual agreement in which the prevailing party has a right to attorney's fees from the other party in the event of litigation, the insurance carrier who brings a claim for reimbursement directly against the alleged tortfeasor is liable for the third-party's attorney's fees under the contract to the same extent as would be the employer [*Employers Muttal Liability Ins. Co. v. Tutor-Saliva Corp. (1998) 17 Cal. 4th 632, 640, 71 Cal. Rptr. 2d 851, 951 P.2d 420]* .

[b] Payment From Judgment

If the action is prosecuted by both the employee and the employer, in a single action or in consolidated actions, and they are represented by the same agreed attorney or by separate attorneys, the court must first order paid from any judgment for damages recovered, the reasonable litigation expenses incurred in the preparation and prosecution of the action or actions, together with reasonable attorney's fees based solely on the services rendered for the benefit of both parties if they are represented by the same attorney, and, if they are respresented by separate attorneys, based solely on the service rendered in each instance by the attorney in effecting recovery for the benefit of the party represented [*Lab. Code § 3856(c)*; *see Walsh v. Woods (1986) 187 Cal. App. 3d 1273, 1277-1278, 232 Cal. Rptr. 629* (when each party is represented by separate attorney, award of fees to each attorney as based, not on services benefitting both parties, but on service rendered in each instance by attorney in effecting recovery for benefit of party represented)]. After the

payment of these expenses and attorney's fees, the court shall apply out of the amount of the judgment for damages an amount sufficient to reimburse the employer for the amount of his or her expenditures for compensation together with any other amounts to which he or she may be entitled as special damages under *Lab. Code § 3852* [*Lab. Code § 3856(c)*].

However, when the employee and the employer settle the action against the third-party tortfeasor for a sum that is less than the employer's reimbursable compensation costs, so that the employee recovers nothing from the settlement, and the employee has a contingency fee agreement with his or her attorney, the employee's attorney is entitled to no fee out of the settlement proceeds, and the employee owes no attorney's fees [*Draper v. Aceto (2001) 26 Cal. 4th 1086, 113 Cal. Rptr. 2d 61, 33 P.3d 479]* .

[5] Release of Employer by Satisfaction of Third-Party Judgment

After payment of the litigation expenses and attorney's fees fixed by the court pursuant to *Lab. Code § 3856* and payment of the employer's lien, the employer shall be relieved from the obligation to pay further compensation to or on behalf of the employee up to the entire amount of the balance of the judgment, if satisfied, without any deduction. No satisfaction of the judgment in whole or in part shall be valid without giving the employer notice and a reasonable opportunity to perfect and satisfy his or her lien [*Lab. Code § 3858*; *see § 577.335[4]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJudgmentsRelief From JudgmentDischarge, Release & SatisfactionCivil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewTortsDamagesCollateral Source RuleEmployment Benefits & Workers' CompensationWorkers' Compensation & SSDIThird Party ActionsSubrogationWorkers' Compensation & SSDIThird Party ActionsThird Party Liability

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51-577 California Forms of Pleading and Practice--Annotated § 577.335

§ 577.335 Other Employer Remedies

[1] In General

Instead of suing the third-party tortfeasor, the employer may

- File an application for a lien against the employee's judgment in the employee's action against the tortfeasor [*Lab. Code § 3856* (discussed in [2], *below*); *see also San Diego Unified Port Dist. v. Superior Court (1988) 197 Cal. App. 3d 843, 849, 243 Cal. Rptr. 163]* ;

- Enter into a settlement with the third-party tortfeasor and the employee [*Lab. Code §§ 3859, 3860* (*see* discussions in *§ 577.130*et seq., and *[3], below*)]; and

- Apply to the Workers' Compensation Appeals Board for a credit against compensation liability of the amount recovered by the employee by settlement or after judgment [*Lab. Code § 3861* (discussed under [4], *below*); *see Rodgers v. Workers' Comp. Appeals Bd. (1984) 36 Cal. 3d 330, 334, 204 Cal. Rptr. 403, 682 P.2d 1068* ; *Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 829, 833, 150 Cal. Rptr. 888, 587 P.2d 684* ; *County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 872-873, 140 Cal. Rptr. 638, 568 P.2d 363]* .

[2] Employer's Lien

[a] Entitlement

When judgment is rendered in favor of the employee in an action against the third-party tortfeasor prosecuted by the employee alone, after payment of the expenses and attorney's fees (discussed under *§ 577.334[2]*), the court, on application of the employer or its carrier, must allow as a first lien against the amount of the judgment the amount of the employer's expenditure for compensation together with any amount to which he or she may be entitled as special damages under *Lab. Code § 3852* [*Lab. Code § 3856(b)*; *see also § 577.540[1*], for form of a notice of motion to secure lien against third-party judgment].

Moreover, the court must, on further application at any time before the judgment is satisfied, allow as a further lien the amount of any expenditures of the employer for compensation subsequent to the original order [*Lab. Code § 3857*; *see also* [4][b], *below*]. Under *Lab. Code § 3857*, *above*, and *Lab. Code § 3858* (discussed under [5], *below*), an employer can apply for a lien in the employee's pending third-party action at any time before satisfaction of judgment. Thus, an application for a lien can be made after the statute of limitations has barred the employer from bringing an independent action or after the entry of judgment has barred the employer from intervening [California Workers' Damages Practice, *Reimbursement*, § 4.32 *Burrow v. Pike (1987) 190 Cal. App. 3d 384, 395, 235 Cal. Rptr. 408* (quoting Peyrat, California Workers' Damages Practice, *Reimbursement*, § 4.32)].

However, if the third-party tortfeasor has raised as a defense in the lawsuit that the employer's negligence contributed to the employee's injuries, the employer's mere filing of a lien is insufficient to protect its claim for reimbursement [*Aetna Casualty & Surety Co. v. Superior Court (1993) 20 Cal. App. 4th 1502, 1509, 25 Cal. Rptr. 2d 301]* . For the effect of the employer's concurrent negligence on his or her lien, see *§ 577.333[3][c]*.

[b] Enforcement

Any employer entitled to and who has been allowed and perfected a lien on the judgment or award in favor of an employee against a third party for damages occasioned to the same employer by payment of compensation, expenses of medical treatment, and any other charges under the Workers' Compensation Law, may enforce payment of the lien against the third party, or, in case the damages recovered by the employee have been paid to the employee, against the employee to the extent of the lien, in the manner provided for enforcement of money judgments generally [*Lab. Code § 3862*; *Burrow v. Pike (1987) 190 Cal. App. 3d 384, 395, 235 Cal. Rptr. 408]* . For discussion and forms for use in enforcing money judgments, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq.

[c] Amount of Lien

An employer's workers' compensation lien claim may not exceed the amount of damages the employee recovers from the third-party tortfeasor. In general, the employer may recover the amount of workers' compensation benefits paid, but the amount of the employer's judgment may not exceed the total amount of tort damages suffered by the employee. The employee is entitled to have the jury determine his or her total tort damages, but may recover only a net judgment for the difference between the tort damages and the workers' compensation benefits received [*Crampton v. Takegoshi (1993) 17 Cal. App. 4th 308, 320, 21 Cal. Rptr. 2d 284 , rev'd on other grounds, Phelps v. Stostad (1997) 16 Cal. 4th 23, 34, 65 Cal. Rptr. 2d 360, 939 P.2d 760]* .

[d] Purchase of Lien by Third-Party

If the employer has filed a lien claim on any judgment, recovery, or settlement in the injured employee's third-party action, and subsequently sells the lien to the third party, the workers' compensation benefits paid to the employee represent a lien as to the third party and not a right to reimbursement under *Lab. Code § 3856(c)*. When the third-party tortfeasor purchases the employer's compensation lien, it steps into the shoes of the employer and gains no greater rights than those originally owned by the employer [*Manthey v. San Luis Rey Downs Enterprises, Inc. (1993) 16 Cal. App. 4th 782, 786-787, 20 Cal. Rptr. 2d 265]* . Until a judgment is entered, the third party merely holds an expectancy, and if the employee fails to obtain a judgment in his or her favor, the lien simply "evaporates" [*Manthey v. San Luis Rey Downs Enterprises, Inc. (1993) 16 Cal. App. 4th 782, 787, 20 Cal. Rptr. 2d 265]* .

[3] Settlement of Claim

[a] Restrictions on Right to Settle

[i] Notice and Consent Requirements

No release or settlement of any claim as to either the employee or the employer is valid without the written consent of both. Proof of service filed with the court is sufficient in any action or proceeding in which such approval is required by law [*Lab. Code § 3859(a)*]. Moreover, no release or settlement under *Lab. Code §§ 3850-3864*, with or without suit, is valid or binding as to any party thereto without notice to both the employer and the employee, with opportunity to the employer to recover the amount of compensation it has paid or become obligated to pay and any special damages to which it may be entitled under *Lab. Code § 3852*, and opportunity to the employee to recover all damages he or she has suffered and with provision for determination of expenses and attorney's fees as provided in *Lab. Code § 3860* [*Lab. Code § 3860(a)*; *see San Diego Unified Port Dist. v. Superior Court (1988) 197 Cal. App. 3d 843, 849, 243 Cal. Rptr. 163]* . Thus, in one case the court of appeal, reversing the trial court's summary judgment in favor of the alleged third-party tortfeasor, held that, pursuant to *Lab. Code §§ 3853, 3859*, and *3860(a)*, when the employer fails to adequately notify its employee of its subrogation lawsuit and proposed settlement involving an alleged third-party tortfeasor and fails to obtain the employee's consent to settlement of that suit, and when the settling alleged third-party tortfeasor, prior to settlement, was or reasonably should have been aware of the possibility of the employee's claim for damages against the tortfeasor, the alleged tortfeasor cannot use the mere settlement and dismissal of the employer's subrogation action to bar the employee from maintaining an action for damages against the alleged tortfeasor. However, the employee's action for damages against the alleged tortfeasor must account for any workers' compensation benefits paid to the employee, or to be paid, so as to preclude double recovery for the employee and double liability for the tortfeasor. The court of appeal found that the employer did not serve by personal service or certified mail the statutorily-required copy of the employer's complaint against the alleged tortfeasor, the employee never gave the statutorily-required consent to the employer's settlement of its action against the alleged tortfeasor, and the alleged tortfeasor, prior to settlement, was or reasonably should have been aware of the possibility of the employee's claim for damages [*McKinnon v. Otis Elevator Co. (2007) 149 Cal. App. 4th 1125, 1128, 1131-1137, 57 Cal. Rptr. 3d 723]* .

[ii] Settlement Without Employer's Consent

An employee may settle and release any claim he or she may have against a third party without the consent of the employer, but the settlement or release shall be subject to the employer's right to proceed in accordancewith *Lab. Code § 3852* to recover the compensation it has paid [*Lab. Code § 3859(b)*; *see Associated Construction & Engineering Co. v. Workers' Compensation Appeals Bd. (1978) 22 Cal. 3d 829, 837-840, 150 Cal. Rptr. 888, 587 P.2d 684* ; *San Diego Unified Port Dist. v. Superior Court (1988) 197 Cal. App. 3d 843, 849, 243 Cal. Rptr. 163]* . Except as provided in *Lab. Code § 3859*, the entire amount of the settlement, with or without suit, is subject to the employer's full claim for reimbursement for compensation that it has paid or become obligated to pay and any special damages to which it may be entitled under *Lab. Code § 3852*, together with expenses and attorney's fees, if any, subject to the limitations set forth in *Lab. Code § 3860* [*Lab. Code § 3860(b)*].

The purpose of *Lab. Code § 3859(b)* and the introductory phrase in *Lab. Code § 3860(b)* ("Except as provided in Section 3859") is to permit an employee to segregate his or her own damage claim against a third party from the employer's claim against that third party for reimbursement for workers' compensation benefits paid. The employee thus is permitted to settle his or her own claim for a sum exclusive of amounts already received in the form of a workers' compensation award without jeopardizing the employer's subrogation right. This exception to the rule requiring an employer's consent to an employee's settlement is a limited one; the settlement is free from the employer's claim for reimbursement only when the settlement is exclusive of the amount of workers' compensation benefits paid by the employer [*Board of Administration v. Glover (1983) 34 Cal. 3d 906, 913-914, 196 Cal. Rptr. 330, 671 P.2d 834* ; *but see Ellis v. Wells Manufacturing, Inc. (1989) 216 Cal. App. 3d 312, 317, 264 Cal. Rptr. 648* (lien by workers' compensation carrier on settlement between employee and third party as improper even though settlement included workers' compensation benefits paid to employee, as employer's negligence was alleged by third party and not litigated, and settlement provided that employee would hold third party harmless against any claim by employer)].

The employee's failure to secure the employer's consent prior to settling the claim with the third-party tortfeasor and

executing a general release in the tortfeasor's favor may subject the settlement to the employer's claim for reimbursement of compensation benefits paid. It may also subject the third-party tortfeasor, who was, or reasonably should have been, aware of the possibility of the employer's claim and who failed to notify the employer of the settlement and obtain its consent, to liability under *Lab. Code § 3850 et seq.* [*see Board of Administration v. Glover (1983) 34 Cal. 3d 906, 914-919, 196 Cal. Rptr. 330, 671 P.2d 834* ; *American Home Assurance Co. v. Hagadorn (1996) 48 Cal. App. 4th 1898, 1907, 56 Cal. Rptr. 2d 536* (employer had right to maintain action against employee for breach of duty to notify employer of third-party settlement); *see also Insurance Co. of North America v. T.L.C. Lines, Inc. (1996) 50 Cal. App. 4th 90, 101-102, 57 Cal. Rptr. 2d 542* (third-party tortfeasor's good-faith settlement and release of liability extinguished workers' compensation insurer's right to seek reimbursement from tortfeasor)].

[b] Division of Settlement

[i] Amount of Expenses and Attorney's Fees

The amount of expenses and attorney's fees shall, on settlement of suit, or on any settlement requiring court approval, be set by the court. In all other cases these amounts shall be set by the Workers' Compensation Appeals Board (WCAB). When the employer and the employee are represented by separate attorneys they may propose to the court or the appeals board, for consideration and determination, the amount and division of the expenses and fees [*Lab. Code § 3860(f)*].

Lab. Code § 3860(f) does not specify the time in which the WCAB must rule on the amount of attorney's fees and expenses, and does not require that the applicant raise the issue in any specified way. Hence, when the employer's compensation carrier petitions the WCAB for credit against its compensation liability for the amount of the worker's settlement of his or her third-party action, the amount of the credit is necessarily placed in issue. If the evidence presented establishes the amounts of the worker's attorney's fees and expenses in the third-party action, those amounts should be deducted from the worker's gross recovery to reach the amount of credit to be allowed [*see Griffith v. Workers' Comp. Appeals Bd. (1989) 209 Cal. App. 3d 1260, 1263-1264, 257 Cal. Rptr. 813]* .

[ii] Payment of Expenses and Attorney's Fees if Settlement Effected by Either Employer's or Employee's Attorney

If the settlement is effected with or without suit solely through the efforts of either the employee's or employer's attorney, but not both, then, prior to the reimbursement of the employer as provided in *Lab. Code § 3860(b)*, there shall be deducted from the amount of the settlement the reasonble expenses incurred in effecting the settlement, including costs of suit, if any, together with a reasonable attorney's fee to be paid to the attorney for his or her services in securing and effecting settlement for the benefit of both the employer and the employee [*Lab. Code 3860(c), (d)*; *see Quinn v. State of California (1975) 15 Cal. 3d 162, 169-176 n.20, 124 Cal. Rptr. 1, 539 P.2d 761* (involving apportionment of attorney's fee under *Lab. Code § 3856, discussed under § 577.334[4*], but disapproving following cases involving *Lab. Code § 3860*: *Fuchs v. Western Oil Fields Supply (1972) 25 Cal. App. 3d 728, 102 Cal. Rptr. 74* ; *Moreno v. Venturini (1969) 1 Cal. App. 3d 286, 81 Cal. Rptr. 551* ; *Johnson v. L.D.S. Trucking Co. (1967) 254 Cal. App. 2d 496, 62 Cal. Rptr. 501*)]. When the employee's attorney alone effects third-party settlement, the attorney is entitled to an award of attorney's fees, even if the employer participates in the litigation and its reimbursement claim exceeds the amount of the settlement [*Luque v. Herrera (2000) 81 Cal. App. 4th 558, 563, 96 Cal. Rptr. 2d 853]* .

In contradistinction to the situation involving an award of attorney's fees following a jury trial that resulted in a judgment, payment of whose total included the employer's lien amount, it was error for the trial court, in calculating fees for an employee's attorney, to include the amount of the employer's workers' compensation lien, which the employer assigned to the third party as part of the settlement between them and which the third party then gave up the right to enforce against the employee as part of the settlement between *them*. Similarly, it was error for the trial court to award the employee's attorney's fees based on the total settlement achieved among the employee, the employer, and the third party without addressing the issue of whether that settlement was obtained solely through the efforts of the

employee's attorney [*Manriquez v. Adams (2003) 108 Cal. App. 4th 340, 346-348, 133 Cal. Rptr. 2d 449]* .

In one case not involving workers' compensation insurance, the California Supreme Court held that, although the made-whole rule applies in the medical payments insurance context, and the insured must be made whole as to all damages proximately caused by the injury, liability for attorney's fees is not included under the made-whole rule, but is instead subject to the equitable apportionment rule. In this case, the insured settled a claim for damages, arising from an automobile accident, against a third party for $6,000, which sum represented her total damages. The insured incurred approximately $2,000 in attorney's fees in obtaining that settlement. The insurer paid the insured $1,000 under her insurance policy's medical payments provision. The policy required the insured to reimburse the insurer for monies she recovered from a third party that duplicated her recovery under her policy. The insured reimbursed the insurer in the amount of $600, arrived at by subtracting attorney's fees of $400 (the insurer's pro rata share of the total attorney's fees of $2,000) from the $1,000 in medical payments the insured received from the insurer. The Court held that the insured was not entitled to withhold reimbursement from the insurer on the grounds that she had not been reimbursed for 100 percent of the attorney's fees she incurred [21st *Century Insurance Co. v. Superior Court of San Diego County; Silvia Quintana, Real Party in Interest (2009) 47 Cal. 4th 511, 527-528, 98 Cal. Rptr. 3d 516, 213 P.3d 972*].

[iii] Payment of Expenses and Attorney's Fees if Settlement Effected by Both Employer's and Employee's Attorney

When both the employer and the employee are represented by the same agreed attorney or by separate attorneys in effecting a settlement, prior to reimbursement of the employer as provided in *Lab. Code § 3860(b)*, there shall be deducted from the amount of the settlement the reasonable expenses incurred by both the employer and the employee or on behalf of either, including costs of suit, if any, together with reasonable attorney's fees to be paid to the respective attorneys for the employer and the employee, based on the respective services rendered in securing and effecting settlement for the benefit of the party represented.

If both parties are represented by the same attorney, by agreement, the attorney's fee shall be based on the services rendered for the benefit of both [*Lab. Code § 3860(e)*]. According to the California Supreme Court's interpretation of *Labor Code § 3860(e)*, when the employer and employee are separately represented by attorneys who each actively participate in achieving a settlement, the fees awarded to the employer's attorney and the employer's pro rata share of other litigation costs must be deducted from the amount paid to the employer out of the settlement proceeds as reimbursement for its workers' compensation expenses, rather than being paid out of the employee's share of the proceeds [*Summers v. Newman (1999) 20 Cal. 4th 1021, 1035-1036, 86 Cal. Rptr. 2d 303, 978 P.2d 1225]* .

Interpreting the provisions of *Lab. Code § 3860*, the court of appeal has held that equitable apportionment of settlement funds between the employee and the employer is not allowed, even when the funds are insufficient to fully reimburse the employer and pay the employee for pain and suffering and other losses not covered by workers' compensation [*Gapusan v. Jay (1998) 66 Cal. App. 4th 734, 742, 78 Cal. Rptr. 2d 250]* . In such a case, the employer is entitled to full reimbursement for compensation paid pursuant to *Lab. Code § 3860(b)*. Portions of a settlement allocated to a claim independent of the employee's claim, such as a claim for loss of consortium by an employee's wife, are not subject to an employer's claim for credit or reimbursement [*Gapusan v. Jay (1998) 66 Cal. App. 4th 734, 742-743, 78 Cal. Rptr. 2d 250]* .

[4] Credit Against Employer's Liability

[a] In General

The appeals board must allow, as a credit to the employer to be applied against his or her liability for compensation, the amount of any recovery by the employee, either by settlement or after judgment, as has not theretofore been applied to the payment of expenses or attorney's fees pursuant to *Lab. Code §§ 3856, 3858*, and *3860*, or has not been applied to

reimburse the employer [*Lab. Code § 3861*; *see Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 829, 833-840, 150 Cal. Rptr. 888, 587 P.2d 684* ; *see also Lab. Code § 3858*, discussed under [5], *above*; *§ 577.542*].

Thus, an employer who has not completely paid compensation benefits to the employee may receive a credit before the appeals board for money obtained in a third-party judgment in the employee's favor [*Del Monte Corp. v. Superior Court (1982) 127 Cal. App. 3d 1049, 1052, 179 Cal. Rptr. 855]* . Portions of a settlement allocated to a claim independent of the employee's claim, such as a claim for loss of consortium by an employee's wife, are not subject to an employer's claim for credit [*Gapusan v. Jay (1998) 66 Cal. App. 4th 734, 742-743, 78 Cal. Rptr. 2d 250]* . For the effect on the employer's right to a credit of the employer's concurrent negligence, see *§ 577.333[3][c]*, and *§ 577.542*.

The court of appeal has held that, pursuant to *Lab. Code § 3861*, an employer was entitled to credit against future workers' compensation benefits to be paid to an employee in the amount of the net settlement of the employee's action against a third-party tortfeasor, paid to the employee by CIGA. The court found that the employee sustained an industrial injury at the hands of the third party tortfeasor, that the employer had provided the employee with $74,408.79 in workers' compensation benefits, and that the employee's lawsuit against the third party tortfeasor was settled for $50,000, with the employer releasing its lien against workers' compensation benefits already paid to the employee. With the employer claiming credit against its liability for future workers' compensation benefits up to $50,000, the court found that CIGA was obligated under *Ins. Code §§ 1063.1(c)(1)* and *1063.2(a)* to pay the settlement, regardless of whether the employer was entitled to credit, that CIGA's assets were unaffected by grant or denial of the credit to the employer, and that, if credit were denied, the employee would be in a better position than if the third party tortfeasor's insurer had remained solvent [*Baur v. Workers' Comp. appeals Bd. (2009) 176 Cal. App. 4th 1260, 1264-1267, 98 Cal. Rptr. 3d 493*].

[b] Credit and Lien Distinguished

The employer's right to a credit and right to a lien are separate and distinct. The lien allows the employer to be reimbursed for money already paid, whereas the credit is taken against sums that may become due in the future. The employer loses the credit right only through express waiver or settlement and not by mere satisfaction of a lien claim [*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1982) 130 Cal. App. 3d 933, 938 n.2, 182 Cal. Rptr. 171* ; *see Hodge v. Workers' Comp. Appeals Bd. (1981) 123 Cal. App. 3d 501, 511-512, 176 Cal. Rptr. 675]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewTortsDamagesCollateral Source RuleEmployment Benefits & Workers' CompensationWorkers' Compensation & SSDIAdministrative ProceedingsSettlementsWorkers' Compensation & SSDIThird Party ActionsSubrogationWorkers' Compensation & SSDIThird Party ActionsThird Party Liability

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§ 577.336 Nonliability of Employer to Indemnify Tortfeasor

[1] In General

If an action by the employee, the employer, or both jointly against the third person results in judgment against the third person or settlement by the third person, the employer has no liability to reimburse or hold the third person harmless on the judgment or settlement in absence of a written agreement to do so executed prior to the injury [*Lab. Code § 3864*]. The legislative purpose in enacting *Lab. Code § 3864* was to eliminate the employer's liability for implied indemnity in the absence of a written agreement, because implied indemnity imposed a greater burden on the employer than was contemplated under the workers' compensation system [*Chase Chemical Co. v. Hartford Accident & Indemnity Co. (1984) 159 Cal. App. 3d 229, 237, 205 Cal. Rptr. 469]* .

The Legislature enacted *Lab. Code § 3864* because the doctrine of implied indemnity imposed a greater burden on the employer than was contemplated under the workers' compensation system [*Up-Right, Inc. v. Van Erickson (1992) 5 Cal. App. 4th 579, 582, 7 Cal. Rptr. 2d 34]* . Without this section, the employer's protection of a limit on the economic consequences of claims made under the system could be easily circumvented [*Up-Right, Inc. v. Van Erickson (1992) 5 Cal. App. 4th 579, 582, 7 Cal. Rptr. 2d 34]* . When a third-party defendant files a cross complaint for indemnity against the employer, the cross complaint must allege the existence of a written indemnity agreement or it will be subject to demurrer [*Up-Right, Inc. v. Van Erickson (1992) 5 Cal. App. 4th 579, 582-584, 7 Cal. Rptr. 2d 34]* .

If the existence of such an agreement is not alleged, *Lab. Code § 3864* precludes a third party from filing a cross-complaint, even if there is a showing that the employer was concurrently negligent in causing the employee's injuries [*State of California v. Superior Court (1998) 60 Cal. App. 4th 659, 664-665, 71 Cal. Rptr. 2d 256]* . Moreover, a third party is not excused from the requirement of a written indemnity agreement under *Lab. Code § 3864* by allegations that the employer engaged in criminal conduct by violating the child labor laws, since such criminal conduct by the employer will not render workers' compensation inapplicable [*Up-Right, Inc. v. Van Erickson (1992) 5 Cal. App. 4th 579, 583-584, 7 Cal. Rptr. 2d 34]* .

[2] Multiple Employers

When an employee has more than one employer, one employer held liable in tort to the employee may be considered a "third party" under *Lab. Code § 3864* with respect to the others. For example, the temporary employer of a worker injured because of an unguarded power press may not seek indemnity from the employment agency that placed the worker in the job. If the worker successfully meets the requisites for *Lab. Code § 4558* (exception to exclusivity rule of workers' compensation for power press guard injuries) [*see discussion under § 577.314[5]*], the employer will be considered a third party liable in tort to the employee but barred by *Lab. Code § 3864* from seeking indemnity from the employment agency. If the employee cannot meet the requisites for *Lab. Code § 4558*, the civil action will be barred, and there will be nothing to support the indemnity action against the agency [*Watters Associates v. Superior Court (1991) 227 Cal. App. 3d 1341, 1344, 278 Cal. Rptr. 417]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
TortsVicarious LiabilityAgentsIndemnityWorkers' Compensation & SSDIAdministrative ProceedingsSettlementsWorkers' Compensation & SSDIThird Party ActionsThird Party Liability

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[Reserved]

§§ 577.337[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.350

§ 577.350 Related Matthew Bender Publications

[1] Workers' Compensation Principles--In General

Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 1, §§ 1.10 -1.23 (administration); *ch. 2, § 2.03 (anti-fraud provisions)*; ch. 3, §§ 3.01-3.08, 3.130-3.133, *3.142 (employees, independent contractors, and special employees)*; ch. 4 (injuries arising out of and in course of employment); *ch. 7, § 7.01 (temporary disability)*; *ch. 8, § 8.01 (permanent disability)*; *ch. 9, §§ 9.01, 9.05 (dependency and death benefits)*; ch. 10, §§ 10.01-10.28 (penalties); ch. 24, §§ 24.02-24.05 (time limitations) (Matthew Bender)

Larson's Workers' Compensation Law (Matthew Bender)

Levy, Golden & Sacks, California Torts, ch. 10 (Matthew Bender)

Wilcox, California Employment Law, ch. 20 (Matthew Bender)

[2] Filing a Workers' Compensation Claim

Hanna, California Law of Employee Injuries and Workers' Compensation, chs. 5, 7, 8, 20, 25, 32, 35 (Matthew Bender)

[3] Initiating Proceedings to Collect Benefits

Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 25 (Matthew Bender)

[4] Filing and Service of Papers

Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 23, §§ 23.12[2], 23.14; *ch. 25, § 25.06* (Matthew Bender)

[5] Arbitration

Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 33, § 33.01 (Matthew Bender)

[6] Settling Claims

Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 29 (Matthew Bender)

[7] Stipulations and Requests for Award

Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 23, § 23.11[2]; *ch. 26, § 26.06[2]* (Matthew Bender)

[8] Pre-Hearing Proceedings and Hearings

Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 5, *Medical and Hospital Treatment* ; ch. 22, *Medical-Legal Procedure* ; ch. 26, *Prehearing and Hearing Procedure* (Matthew Bender)

[9] Findings and Awards, Reconsideration and Supplemental Proceedings

Hanna, California Law of Employee Injuries and Workers' Compensation, chs. 27, 28, 31 (Matthew Bender)

[10] Payment and Enforcement of Awards

Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 10, *Added Benefits and Penalties ;* ch. 27, *The Award and Its Enforcement ;* ch. 30, *Liens and Lien Enforcement* (Matthew Bender)

[11] Judicial Review

Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 34 (Matthew Bender)

For related jury instructions regarding workers' compensation, see Judicial Council of California Civil Jury Instructions, Series 2800 (Matthew Bender), also available in Lexisnexis Automated Judicial Council of California Civil Jury Instructions

[12] Exclusive Remedy Principles and Exceptions

For memoranda of points and authorities for use in an action by an employee against the employee's employer or a coemployee supporting and opposing the contention that the claim sued on is within the exclusive jurisdiction of the WCAB, see California Points and Authorities, Ch. 100, *Employer and Employee* , Pt. III (Matthew Bender)

Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 11, *Actions Against the Employer Under State Law and Third-Party Tort Actions* ; ch. 21, *Jurisdiction* (Matthew Bender)

Levy, Golden & Sacks, California Torts, ch. 10 (Matthew Bender)

Wilcox, California Employment Law, ch. 20 (Matthew Bender)

For related jury instructions regarding workers' compensation, see Judicial Council of California Civil Jury Instructions, Series 2800 (Matthew Bender), also available in Lexisnexis Automated Judicial Council of California Civil Jury Instructions

[13] Third-Party Actions

Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 11

larson's Workers' Compensation Law, Vol. 6, Chs. 110-118 (Matthew Bender)

Wilcox, California Employment Law, ch. 20 (Matthew Bender)

For related jury instructions regarding workers' compensation, see Judicial Council of California Civil Jury Instructions, Series 2800 (Matthew Bender), also available in Lexisnexis Automated Judicial Council of California Civil Jury Instructions

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51-577 California Forms of Pleading and Practice--Annotated § 577.351

§ 577.351 California Constitution

Establishment of statutory workers' compensation system authorized. *Cal. Const., art. XIV, § 4*

Original jurisdiction of Supreme Court and courts of appeal for extraordinary relief in nature of certiorari. *Cal. Const., art. VI, § 10*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsGeneral OverviewCivil ProcedureAppealsAppellate JurisdictionState Court Review

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§ 577.352 Federal Statutes

Occupational Safety and Health Act of 1970. *29 U.S.C. §§ 651-678*

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawOccupational Safety & HealthGeneral Overview

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51-577 California Forms of Pleading and Practice--Annotated § 577.353

§ 577.353 State Statutes

[1] Administrative Assistance

Availability and procedure. *Lab. Code §§ 5450-5455*

[2] Administrative Director

"Administrative director," as used in *Lab. Code § 110 et seq.*, as meaning Administrative Director of the Division of Workers' Compensation. *Lab. Code § 110(b)*

Appointment of medical director by Administrative Director and medical director's duties. *Lab. Code § 122*

Duty to make annual report to Governor and Legislature. *Lab. Code § 111(b)*

Authority to appoint California licensed attorney as counsel to Division of Workers' Compensation. *Lab. Code § 117*

Appointment of workers' compensation judges. *Lab. Code § 123*

Development of cost-efficient workers' compensation information system in consultation with Insurance Commissioner and Workers' Compensation Insurance Rating Bureau, and adoption of regulations specifying data elements to be collected by electronic data interchange. *Lab. Code § 138.6*

Duty of administrative director to adopt regulations allowing reasonable access to individually identifiable information to various persons or entities for the purpose of bona fide statistical research. *Lab. Code § 138.7*

Duties of Administrative Director regarding qualified medical evaluators. *Lab. Code § 139.2(a)-(h)*

Requirement that Administrative Director promulgate rules and regulations concerning matters set forth in *Lab. Code §*

139.2(j)(1)-(6). Lab. Code § 139.2(j)

When Administrative Director may suspend or terminate privilege of physician to serve as qualified medical evaluator. *Lab. Code § 139.2(k), (m)*

When Administrative Director is required to cite qualified medical evaluator for violation and hold hearing; penalties imposed on finding of violation, including report of violation to appropriate licensing board. *Lab. Code § 139.2(l)*

Administrative Director authorized to review advertising copy. *Lab. Code § 139.4*

Authority of administrative director or his or her designees, on submission of matter to information and assistance officer, on agreement of party to pay cost, and with consent of unrepresented employee, to direct injured employee to be examined by qualified medical evaluator selected by medical director to report on clinical question; 1989 and 1990 amendments to section as operative for injuries occurring on or after January 1, 1991. *Lab. Code § 5703.5(b)*

[3] Advertising

False, misleading, or deceptive advertising concerning workers' compensation benefits as misdemeanor; prohibition as not applicable to attorneys and physicians. *Lab. Code § 139.43*

False and misleading advertisements defined. *Lab. Code § 139.45*

False, deceptive, and misleading advertising in electronic media. *Bus. & Prof. Code § 6158*

Workers' Compensation Truth in Advertising Act of 1992. *Lab. Code §§ 5430-5434*

[4] Administrative and Civil Penalties

Administrative and civil penalties; schedule of violations. *Lab. Code § 129.5*

[5] Appeals Board

Authority of WCAB. *Lab. Code §§ 110(a), 111(a)*

Judicial powers. *Lab. Code §§ 116, 130, 134*

Jurisdiction. *Lab. Code §§ 5300-5317*

WCAB's power, at any time after application is filed and prior to expiration of its jurisdiction, on agreement of party to pay cost, to direct unrepresented employee to be examined by qualified medical examiner selected by appeals board to report on clinical question; 1989 and 1990 amendments to section as operative for injuries occurring on or after January 1, 1991. *Lab. Code § 5703.5(a)*

[6] Arbitration

Arbitration provisions as applicable only when employee or dependent represented by counsel. *Lab. Code § 5270*

Qualifications of arbitrators. *Lab. Code § 5270.5*

Selection of arbitrators. *Lab. Code § 5271*

Duties and responsibilities of arbitrators. *Lab. Code § 5272*

Costs and fees. *Lab. Code § 5273*

Mandatory arbitration. *Lab. Code § 5275(a)*

Voluntary arbitration. *Lab. Code § 5275(b)*

Time and place for arbitration. *Lab. Code § 5276(a), (b)*

Service and submission of documents. *Lab. Code § 5276(c)*

Findings and award. *Lab. Code § 5277(a)-(c), (e)*

Use of an arbitrator for part of proceeding as not binding parties to use of same arbitrator for subsequent proceedings. *Lab. Code § 5277(d)*

Submission of supplemental proceedings to arbitration. *Lab. Code § 5277(f)*

Prior to filing of award, disclosure to arbitrator of settlement offer by party as prohibited. *Lab. Code § 5278(a)*

Ex parte communication with arbitrator or potential arbitrator by counsel or party as prohibited except to schedule arbitration hearing or request continuance. *Lab. Code § 5278(b)*

[7] Attorneys and Representatives

[a] Substitution and Dismissal

Substitution and dismissal of attorneys. *Code Civ. Proc. §§ 284, 285, 286*

[b] Fees--In General

Award of attorney's fees in successfully resisting petition to decrease or terminate temporary or permanent disability benefits. *Lab. Code §§ 4651.3, 5410.1*

Charge, claim, or agreement for attorney's fees as not enforceable, valid, or binding in excess of a reasonable amount; WCAB as authorized to determine what constitutes reasonable amount. *Lab. Code § 4906(a)*

For injuries occurring on or after January 1, 1990, attorney as not permitted to demand or accept any fee from injured employee or dependent of injured employee for workers' compensation representation until WCAB approves or sets amount of fee. *Lab. Code § 4906(b)*

For injuries occurring on or after January 1, 1990, attorney's fees agreement as required to be submitted to WCAB for approval within 10 days after it is made. *Lab. Code § 4906(c)*

Factors considered by WCAB in establishing reasonable attorney's fees for injuries occurring on or after January 1, 1990. *Lab. Code § 4906(d)*

[c] Fee Disclosure Statement

Attorney as required at initial consulatation to furnish employee injured on or after January 1, 1990, with attorney's fees disclosure statement. *Lab. Code § 4906(e)*

[8] Audits

Audits by Administrative Director. *Lab. Code § 129*

[9] Autopsies

Exhumation and autopsy proceedings. *Lab. Code §§ 5706, 5707*

When WCAB may require autopsy. *Lab. Code § 5706*

Physician's autopsy report as received in any proceedings theretofore or thereafter brought. *Lab. Code § 5706*

Coroner's duty on request for autopsy. *Lab. Code § 5706*

WCAB as permitted to authorize performance of autopsy and, if necessary, exhumation of body when body of deceased employee is not in coroner's custody. *Lab. Code § 5707*

Effect of dependents' refusal to permit autopsy. *Lab. Code § 5707*

[10] Benefits

Permanent disability ratings; determination of medical issues. *Lab. Code §§ 4061-4067.5* (operative for injuries occurring on and after January 1, 1991)

Medical services. *Lab. Code §§ 4600-4614.1*

Vocational rehabilitation. *Lab. Code §§ 4635-4647* [repealed effective January 1, 2004]

Temporary and permanent disability payments. *Lab. Code §§ 4650-4664*

Supplemental job displacement benefits. *Lab. Code §§ 4658.5, 4658.6*

[11] Claim Procedure

Claims form; contents, employer's duties, effect of filing. *Lab. Code § 5401*

Injury presumed compensable if liability not rejected by employer within 90 days after filing of claim form under *Lab. Code § 5401*. *Lab. Code § 5402(b)*

[12] Collateral Estoppel

A determination of facts by WCAB under certain provisions relating to workers' compensation would not have collateral estoppel effect on any subsequent criminal proceeding. *Lab. Code §§ 5006, 5413, 5816*

[13] Collective Bargaining Agreement

Extent to which collective bargaining agreement may alter parties' rights and obligations under compensation law. *Lab. Code §§ 3201.5, 3201.7*

[14] Commission on Health and Safety and Workers' Compensation

Commission on Health and Safety and Workers' Compensation in Department of Industrial Relations as reviewing and approving applications from employers and employee organizations for grants to assist in establishng effective occupational injury and illness prevention programs, and as required to conduct continuing examination of workers' compensation system and of state's activities to prevent industrial injuries and occupational diseases and to issue annual report on state of workers' compensation system, including recommendations for administrative or legislative modifications that would improve operation of system. *Lab. Code §§ 75-78*

[15] Compensation

"Compensation" defined. *Lab. Code § 3207*

Computing average earnings for disability indemnity. *Lab. Code §§ 4453, 4454-4459*

Compensation schedules. *Lab. Code §§ 4550-4855*

[16] Compromise and Release Agreements

For injuries occurring on or after January 1, 1990, settlement of prospective vocational rehabilitation services not permitted absent finding by workers' compensation judge of good faith issues that, if resolved against employee, would defeat the employee's right to all workers'compensation benefits, although limited exception allowed for represented employee to receive one-time payment of no more than $10,000. *Lab. Code § 4646*

Compromise and release agreements involving subsequent injuries payments. *Lab. Code § 4754.5*

Compromise and release agreements generally. *Lab. Code §§ 5000-5006*

Prohibition against settlement of prospective benefits to which employee is entitled under rehabilitation. *Lab. Code § 5100.6*

[17] Construction of Law

As used in Labor Code, "shall" as mandatory and "may" as permissive. *Lab. Code § 15*

Workers' compensation law and safety in employment law as liberally construed. *Lab. Code § 3202*

[18] Counsel to Division of Workers' Compensation

Appointment. *Lab. Code § 117*

[18A] Court Administrator

"Court administrator," as used in *Lab. Code § 110 et seq.*, means administrator of workers' compensation adjudicatory process at trial level. *Lab. Code § 110(f)*

Duty of court administrator to establish priority calendar for issues requiring expedited hearing and decision. *Lab. Code § 5502(b), (c)*

Requirement that court administrator report quarterly to Governor and Legislature concerning frequency and types of issues that are not heard and decided within time period prescribed in *Lab. Code § 5502* and reasons why. *Lab. Code § 5502(d)*

[19] Dangerous Business Practices

Employer with actual knowledge of serious concealed danger subject to regulatory authority as criminally liable for knowingly failing to disclose condition to affected employees and appropriate governmental agency. *Penal Code § 387*

[20] Death Benefits

Death benefits. *Lab. Code §§ 4700-4709*

Statute of limitations on recovery of death benefits. *Lab. Code §§ 5406, 5406.5, 5406.6*

[21] Dependents

Presumption of dependency of children of deceased employee-parent. *Lab. Code § 3501(a)*

When spouse of deceased employee is conclusively presumed to be wholly dependent. *Lab. Code § 3501(b)*

Determination of dependency questions. *Lab. Code § 3502*

Requisite relationship. *Lab. Code § 3503*

[22] Depositions

Depositions in workers' compensation cases. *Lab. Code § 5710*

[23] Disability

Permanent total and permanent partial disability defined. *Lab. Code § 4452.5*

Temporary and permanent disability payments. *Lab. Code §§ 4650-4663*

Statute of limitations on filing application for disability benefits. *Lab. Code § 5405*

[24] Dismissal

Dismissal of application that shows on its face that applicant is not entitled to compensation. *Lab. Code § 5507*

[25] Employees

Presumptions that worker is employee. *Lab. Code §§ 2750.5, 3357*

Effect of employee negligence on action for injuries arising in course of employment not covered by workers' compensation. *Lab. Code § 2801*

Employee defined for purposes of workers' compensation. *Lab. Code § 3351-3353*

Specific classes of persons included or excluded within meaning of term employee. *Lab. Code §§ 3351-3371*; *Penal Code §§ 4017, 4017.5*

Workers' compensation coverage provided to members of California National Guard and state militia who are injured, disabled, or killed while on active duty. *Mil. & Vet. Code §§ 340-340.2*

[26] Employers

Employer defined; exclusions. *Lab. Code §§ 3300, 3301*

Duty to secure payment of compensation. *Lab. Code §§ 3700-3800*

"Employer" as including workers' compensation insurer for purpose of third-party action, thereby entitling insurer to protection of exclusive remedy principle. *Lab. Code § 3850(b)*

Election of employer and worker to be subject to compensation provisions of workers' compensation law. *Lab. Code §§ 4150-4157*

[27] Employer Remedies

Workplace Violence Safety Act as allowing employer whose employee has been a victim of workplace violence to seek temporary restraining order or injunction on behalf of employee, prohibiting further violence. Pen. Code § 527.8

[28] Employment Safety Standards

Employment safety laws. *Lab. Code §§ 6300-9061*

Applicability of statutory safety standards to civil action between employer and employee. *Lab. Code § 6304.5*

[29] Evidence

Admissible evidence. *Lab. Code § 5703*

Common law and statutory rules of evidence and procedure as not applicable. *Lab. Code § 5708*

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[30] Exclusive Remedy Principles and Exceptions

Exclusive remedy principle and exception with regard to discrimination because of disability caused by work related injury. *Lab. Code § 132a*

Conditions of compensation. *Lab. Code § 3600(a)*

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Exclusive remedy principle and exceptions with regard to coemployee of injured employee. *Lab. Code § 3601*

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[31] Filing of Papers

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[32] Findings and Awards

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[33] Funds

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[34] Hearings

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[35] Independent Contractor

Factors required to prove independent contractor status. *Lab. Code § 2750.5*

Independent contractor defined. *Lab. Code § 3353*

[36] Independent Medical Examiner

Term "independent medical examiner," wherever it appears in Labor Code, as meaning "qualified medical evaluator" for injuries occurring on and after January 1, 1991. *Lab. Code § 28*

[37] [Reserved]

[38] Information Request Form

Employee's attorney as required to send information request form to employer, or insurer or third-party administrator; contents. *Lab. Code § 5401.5*

Employer, insurer or third-party administrator as required to serve employee's attorney with response within 30 days of receving information request form; contents. *Lab. Code § 5401.6(a), (b)*

Information furnished by employee and employer in information request form and response as not admissible in proceedings before WCAB. *Lab. Code § 5401.6(c)*

[39] Injury

"Injury" defined. *Lab. Code § 3208*

Specific and cumulative injuries distinguished. *Lab. Code § 3208.1*

Procedure when disability, need for medical treatment, or death results from combined effect of two or more injuries. *Lab. Code § 3208.2*

Determination of date of injury. *Lab. Code §§ 5411, 5412*

When employee injured or killed by third party in course of employee's employment, no personal relationship or personal connection deemed to exist between employee and third party based only on determination that third party injured or killed employee solely because of third party's personal beliefs relating to his or her perception of employee's race, religious creed, color, national origin, age, gender, disability, sex, or sexual orientation. *Lab. Code § 3600(c)*

[40] Insurers

"Insurer" defined. *Lab. Code § 3211*

Required notice of non-renewal of workers' compensation insurance policies. *Ins. Code § 11664*

State rate supervision. *Ins. Code §§ 11730-11739*

Required notice in compensation policies regarding changes in the rating laws. *Ins. Code § 11752.8*

[41] Interstate Commerce

Inapplicability of workers' compensation laws to employers or employments engaged in interstate commerce. *Lab. Code § 3203*

[42] Judgment

Creation and duration of judgment lien based on workers' compensation award. *Code Civ. Proc. § 697.330*

Filing of certified copy of WCAB's findings and order, decision, or award with superior court and entry of judgment. *Lab. Code § 5806*

Judgment roll as consisting of certified copy of appeal board's findings and order, decision, or award, and copy of judgment. *Lab. Code § 5807*

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Entry of satisfaction of judgment other than on execution. *Lab. Code § 5809*

Court clerk as prohibited from charging any fee for performance of any service required by workers' compensation law, except for docketing of awards as judgments and for certified copies of transcripts thereof. *Lab. Code § 5811*

[43] Judicial Review

Prerequisites to seeking review. *Lab. Code § 5901*

Issues not raised and objections not stated in petition for reconsideration deemed waived. *Lab. Code § 5904*

Application for writ to review original order, decision, or award of appeals board or order, decision, or award following

reconsideration. *Lab. Code § 5950*

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Cause as required to be heard on basis of certified record. *Lab. Code § 5951*

Scope of judicial review. *Lab. Code § 5952*

Effect of appeals board's findings and conclusions; appearances; and judgment. *Lab. Code § 5953*

Applicability of Code of Civil Procedure provisions relating to writs of review (*Code Civ. Proc. §§ 1067-1077, 1107-1110*) to proceedings under Labor Code. *Lab. Code § 5954*

Service of pleadings. *Lab. Code § 5954*

No California court, except Supreme Court and courts of appeal, as having jurisdiction to review, reverse, correct, or annul order, rule, decision, or award of appeals board, or to suspend or delay operation or execution thereof, or to restrain, enjoin, or interfere with appeals board in performance of its duties, but writ of mandate as lying from Supreme Court or court of appeal in all proper cases. *Lab. Code § 5955*

Stay of appeals board's order, rule, decision, or award during pendency of writ of review. *Lab. Code § 5956*

Undertaking required for stay. *Lab. Code §§ 6000-6002*

[44] Liens

Liens against compensation. *Lab. Code §§ 4903-4903.3*

Restrictions on filing liens for medical treatment. *Lab. Code § 4903.6*

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Effect of payment of lien on immediate payment of balance of award. *Lab. Code § 4904.1*

Order for payment of lien without request. *Lab. Code § 4905*

Reasonableness of claim for legal and medical services. *Lab. Code § 4906(a)*

[44A] Lifeguards

Presumption of industrial causation applies to skin cancer that develops or manifests itself during period of employment of active lifeguards employed by city, county, district, or other public or municipal corporation or political subdivision and active state lifeguards employed by Department of Parks and Recreation who have been employed for more than three consecutive months in calendar year. *Lab. Code § 3212.11*

[45] Medical Director

Term "medical director" as meaning physician appointed by Administrative Director pursuant to *Lab. Code § 122*. *Lab.*

Code § 29

Requirement that medical director continuously review quality of comprehensive medical evaluations and reports prepared by agreed and qualified medical evaluators. *Lab. Code § 139.2(i)*

[46] Medical Evaluators

Physicians are prohibited from performing medical evaluations for which an evaluator is required to be certified as a qualified medical evaluator without having first obtained that certification; a violation of this prohibition constitutes unprofessional conduct and grounds for disciplinary action. *Bus. & Prof. Code § 730*

"Qualified medical evaluator" means physicians appointed by Administrative Director. *Lab. Code § 110(e)*

Appointment and qualifications of qualified medical evaluators. *Lab. Code § 139.2*

Review by medical director of comprehensive medical evaluations and reports prepared by agreed and qualified medical evaluators. *Lab. Code § 139.2(i)*

Rules and regulations to be adopted concerning standards governing time frames within which formal medical evaluations shall be prepared and submitted by agreed and qualified medical examiners. *Lab. Code § 139.2(j)(1)*

Guidelines to be adopted for range of time normally required to perform initial comprehensive medical-legal evaluation, treatment procedures that have not been defined and valued on Administrative Director's Official Medical Fee Schedule, and any other evaluation procedure requested by the Insurance Commissioner, or deemed appropriate by the Administrative Director. *Lab. Code § 139.2(j)(5)*

Qualified medical evaluators to pay fee for appointment or reappointment. *Lab. Code § 139.2(n)*

Qualified medical evaluators prohibited from requesting or accepting compensation that could create conflict of interest with their duties as evaluators. *Lab. Code § 139.2(o)*

Unlawful for physician to refer person for clinical laboratory, diagnostic nuclear medicine, radiation oncology, physical therapy, physical rehabilitation, psychometric testing, home infusion therapy, outpatient surgery, or diagnostic imaging goods or services, whether for treatment or medical-legal purposes, if physician or his or her immediate family has financial interest with person or in entity receiving the referral. *Lab. Code § 139.3(a)*

Unlawful for licensee to enter into cross-referral arrangement having principal purpose of ensuring referrals by licensee to particular entity. *Lab. Code § 139.3(c)(1)*

Unlawful for physician to offer, deliver, receive, or accept any rebate, refund, commission, preference, patronage dividend, discount, or other consideration, whether in the form of money or otherwise, as compensation or inducement for referred evaluation or consultation. *Lab. Code § 139.3(c)(2)*

No claim for payment may be presented by entity to any individual, third-party payor, or other entity for a good or service furnished pursuant to a prohibited referral. *Lab. Code § 139.3(d)*

Physician who refers to or seeks consultation from organization in which physician has financial interest must disclose this interest to patient at time of referral. *Lab. Code § 139.3(e)*

No insurer, self-insurer, or other payor may pay charge or lien for any good or service resulting from a prohibited referral. *Lab. Code § 139.3(f)*

Types of physician referrals that are not prohibited. *Lab. Code § 139.31*

When WCAB board may direct unrepresented employee to be examined by qualified medical evaluator selected by appeals board to report on clinical issue. *Lab. Code § 5703.5(a)*

When administrative director or his or her designees may direct injured employee to be examined by qualified medical evaluator selected by medical director to report on clinical issue. *Lab. Code § 5703.5(b)*

[47] Medical Personnel, Treatment and Evaluation

"Physician," "psychologist," and "acupuncturist," defined. *Lab. Code § 3209.3*

Medical, surgical, and hospital treatment as including services and supplies by physical therapists and chiropractic practitioners. *Lab. Code § 3209.5*

Treatment to cure or relieve from effects of injury as including services under specified conditions of marriage, family, and child counselors and clinical social workers licensed by California law. *Lab. Code § 3209.8*

Medical treatment may be provided by state-licensed physician assistant or nurse practitioner, acting under review or supervision of physician and surgeon pursuant to standardized procedures or protocols; "medical treatment" includes authority of nurse practitioner or physician assistant to authorize patient to receive time off from work for up to three calendar days, but does not include authority to make any determination of temporary disability. *Lab. Code § 3209.10*

Employee's duty to submit to medical examinations. *Lab. Code §§ 4050, 4051, 4053, 4054*

Right of employee at his or her own expense to have physician present at examination required by employer. *Lab. Code § 4052*

Determination of medical issues. *Lab. Code §§ 4060-4062.5*

Educational materials to train physicians and other health care providers in relevant aspects of workers' compensation law. *Lab. Code § 4062.8*

Physician who makes or is present at employee's medical examination as subject to being required to report or testify as to results. *Lab. Code § 4055*

Medical and hospital treatment. *Lab. Code §§ 4600-4614.1*

Medical provider networks. *Lab. Code §§ 4616-4616.7*

Power of WCAB to direct employee claiming compensation to be examined by regular physician and report results of examination to WCAB. *Lab. Code § 5701*

When WCAB may direct unrepresented employee to be examined by qualified medical evaluator selected by WCAB to report on any clinical question, other than those issues specified in *Lab. Code §§ 4061* and *4062*, then at issue before WCAB. *Lab. Code § 5703.5(a)*

Confidentiality of Medical Information Act. *Civ. Code § 56 et seq.*

Employee's predesignation of personal physician. *Lab. Code § 4600*

[48] Medical-Legal Expenses

Payment of medical-legal expenses. *Lab. Code §§ 4620-4627*

Medical-legal expenses as consisting of costs and expenses incurred by or on behalf of any party, Administrative Director, WCAB, or referee, for X rays, laboratory fees, other diagnostic tests, medical reports, medical records, medical testimony, and, as needed, interpreter's fees, for purpose of proving or disproving contested claim. *Lab. Code § 4620(a)*

Costs of medical evaluations, diagnostic tests, and interpreters incidental to production of medical report as not constituting medical-legal expenses unless medical report is capable of proving or disproving disputed medical fact, the determination of which is essential to adjudication of employee's claim for benefits. *Lab. Code § 4620(c)*

Costs for medical evaluations, diagnostic tests, and interpreters' services incidental to production of medical report as not permitted to be incurred earlier than date of receipt of all reports and documents required by Administrative Director incidental to the services. *Lab. Code § 4621(a)*

Designated treating physician presumption. *Lab. Code §§ 5307.1, 5307.2*

Health care provider or health facility licensed pursuant to *Health and Safety Code § 1250* and contracting agent, employer, or carrier may contract for reimbursement rates different from those in fee schedule adopted and revised pursuant to *Lab. Code § 5307.1*. *Lab. Code § 5307.11*

Payment of physicians by employers, requirements governing review of physicians' submitted bills, disputes regarding payments, and penalties and liabilities for late payments. *Lab. Code § 4603.2*

[49] Minors and Incompetents

Appointment of guardian ad litem or trustee for minor or incompetent employee or dependent. *Lab. Code § 5307.5(a)*

Power of guardian or conservator appointed by court or guardian ad litem or trustee appointed by appeals board. *Lab. Code § 5408*

Power of WCAB to determine fact of minority or incompetency and to appoint trustee to receive and disburse compensation payments for benefit of minor or incompetent and his or her family. *Lab. Code § 5408*

[50] Notice to Employer of Injury or Death

Employee or person on employee's behalf as required to notify employer of injury or death within 30 days of occurrence of injury. *Lab. Code § 5400*

Knowledge of employee's injury obtained from any source on part of employer or employer's managing agent, superintendent, foreman, or other person in authority, or knowledge of assertion of claim of injury sufficient to afford

employer opportunity to investigate facts as equivalent to service of notice of injury under *Lab. Code § 5400. Lab. Code § 5402(a)*

Failure of employee to notify employer of injury not a bar to recovery if employer not misled or prejudiced thereby. *Lab. Code § 5403*

[51] Parties

Joinder of insurance carrier as defendant. *Lab. Code § 3753*

Joinder of parties by WCAB or WCJ. *Lab. Code § 5307.5(b)*

Designation of parties. *Lab. Code § 5503*

Joinder of parties in occupational disease and cumulative injury cases arising out of more than one employment. *Lab. Code § 5500.5(b)*

[52] Payment and Assignment

Payment and assignment of claims and awards for compensation, including liens. *Lab. Code §§ 4900-4909.1*

Lump sum payment. *Lab. Code §§ 5100-5106*

[53] Peace Officers

Pursuant to collective bargaining agreement, members of California State University Police Department whose principal duties consist of active law enforcement as entitled to industrial disability leave equal to their take-home salary on date of injury, for period of one year. *Lab. Code §§ 4806, 4816-4820*

For certain law enforcement personnel required to wear duty belt, lower back impairment that develops or manifests itself during period of employment and for specified periods following termination of service is disputably presumed to arise out of and be in course of employment. *Lab. Code § 3213.2*

Presumption of industrial causation applies to heart trouble, pneumonia, tuberculosis, and meningitis that develops or manifests itself during period in which peace officer of Department of Corrections who has custodial or supervisory duties of inmates or parolees, peace officer of Department of Youth Authority who has custodial or supervisory duties of wards or parolees, or peace officer as defined in *Penal Code § 830.5* and employed by a local agency is in service of department or unit. *Lab. Code § 3212.10*

Presumption of industrial causation applies to illness or resulting death due to exposure to biochemical substance, as defined, that develops or occurs during period in which peace officer or member of fire department, as defined, is in service of department or unit. *Lab. Code § 3212.85*

[54] Penalties

Penalties for unreasonable delay in payment of compensation. *Lab. Code §§ 5814-5814.6*

[55] Permanent Disability Medical Issues

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[56] Pleadings

Required pleadings. *Lab. Code § 5500*

Application in occupational disease and cumulative injury cases arising out of more than one employment. *Lab. Code § 5500.5(b)*

Answer. *Lab. Code § 5505*

Effect of failure to answer or appear. *Lab. Code § 5506*

Dismissal of application that shows applicant not entitled to compensation. *Lab. Code § 5507*

[57] Process

Issuance of process by WCAB or any of its members. *Lab. Code § 134*

[57A] Return-to-Work Program

Early and sustained return to work. *Lab. Code § 139.47*

Reimbursement; restrictions on return to work; contingent implementation. *Lab. Code § 139.48*

Study of return-to-work program. *Lab. Code § 139.49*

[58] Self-Insured Employers

Requirement that Director of Industrial Relations ensure that all private self-insured employers are audited within three-year cycle by Office of Self Insurance Plans. *Lab. Code § 3702.6(a)*

Requirement that each public self-insured employer advise its governing board within 90 days after submission of its annual report of the total workers' compensation liabilities reported and whether current funding of those liabilities is in compliance with the requirements of Government Accounting Standards Board Publication No. 10. *Lab. Code § 3702.6(b)*

Requirement that Director of Industrial Relations, on a showing of good cause, order a special audit of any public self-insured employer to determine the adequacy of its estimates of future liability of compensation claims. *Lab. Code § 3702.6(c), (d)*

[59] Serious and Willful Misconduct

Of employee. *Lab. Code § 4551*

Of employer. *Lab. Code § 4553*

[60] Service of Papers

Time extensions when service is by mail. *Code Civ. Proc. § 1013*

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[61] Settlement Conferences

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[62] State Employees Not Otherwise Covered

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[63] Statutes of Limitation

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[64] Stipulations and Requests for Award

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[65] Subrogation

Employer or insurer's right to subrogation. *Lab. Code §§ 3850-3865*

[66] Subsequent Injuries Benefits Trust Fund

State is represented by Attorney General or attorneys of Department of Industrial Relations in any proceeding involving Subsequent Injuries Benefits Trust Fund. *Lab. Code § 4753.5*

Compromise and release of claim. *Lab. Code § 4754.5*

[67] Supplemental Proceedings

Supplemental proceedings. *Lab. Code §§ 5410, 5803-5805*

[68] Third-Party Actions

Right of Director of Industrial Relations to recover damages from any person or entity, other than employer, whose tortious act or omission proximately caused injury or death of employee when compensation is paid or becomes payable from Uninsured Employers Benefits Trust Fund. *Lab. Code § 3732*

In determining credit to Uninsured Employers Benefits Trust Fund provided by *Lab. Code § 3861*, negligence of employer is not taken into consideration and credit is allowed for entire amount of employee's recovery by settlement or after judgment except for amounts applied to payment of expenses or attorney's fees. *Lab. Code § 3732(e)*

Subrogation rights of employer or insurance carrier. *Lab. Code §§ 3850-3864*; *Ins. Code § 11662*

Settlement and release of claims against third parties. *Lab. Code §§ 3859-3861*

Judgment or settlement of action as provided for in *Lab. Code §§ 3850-3865* as subject, on notice to court, to same lien claims of Employment Development Department as are provided for in *Lab. Code §§ 4900-4909.1* (liens for legal, medical, and other expenses) and are to be allowed by court as it determines necessary to avoid duplication of payment as compensation to employee for lost earnings. *Lab. Code § 3865*

[69] Uninsured Employers

Requirement that all covered employers secure payment of workers' compensation through insurance or by self insuring. *Lab. Code § 3700*

Exception to exclusive remedy principle in case of uninsured employer. *Lab. Code § 3706*

Plaintiff as entitled to attach employer's property to secure payment of judgment. *Lab. Code § 3707*

Limitations on employer's defenses. *Lab. Code § 3708*

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[70] [Reserved]

[71] Witnesses

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[72] Workers' Compensation Judges or Referees

Term "workers' compensation judge" or "workers' compensation referee" as used in relation to workers' compensation law means "workers' compensation administrative law judge." *Lab. Code § 27*

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Workers' compensation administrative law judges are required to subscribe to the Code of Judicial Ethics adopted by the Supreme Court. *Lab. Code § 123.6(a)*

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Required oath. *Lab. Code § 5312*

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Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsClaimsFiling RequirementsWorkers' Compensation & SSDIAdministrative ProceedingsCosts & Attorney FeesWorkers' Compensation & SSDIAdministrative ProceedingsHearings & ReviewWorkers' Compensation & SSDIBenefit DeterminationsPermanent Total DisabilitiesWorkers' Compensation & SSDIBenefit DeterminationsTemporary Total Disabilities

California Forms of Pleading and Practice--Annotated

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[13] Consolidation of Cases

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[14] Continuances

Deficient claim. *8 Cal. Code Reg. § 10490*

General rules and policy. *8 Cal. Code Reg. § 10243*

[14A] Court Administrator

Definitions and general provisions. *8 Cal. Code Reg. §§ 10210*-10214

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[15] Declaration of Readiness to Proceed

Filing. *8 Cal. Code Reg. § 10250*

Objections to declaration. *8 Cal. Code Reg. § 10251*

Setting case on receipt of declaration. *8 Cal. Code Reg. § 10420*

Application for adjudication with respect to injuries occurring prior to January 1, 1990, or on or after January 1, 1994, filed without declaration as placed in inactive status. *8 Cal. Code Reg. § 10582*

[15A] Disability Evaluation Unit Regulations

Disability Evaluation Unit regulations. *8 Cal. Code Reg. §§ 10150*-10167

[16] Dismissal

Dismissal for failure to appear after service of notice of trial. *8 Cal. Code Reg. § 10562*

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[17] Employers' Duties

Employee information. *8 Cal. Code Reg. §§ 9880-9884*

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[18] Evidence

Production and evaluation of medical evidence; direct and cross-examination of physicians. *8 Cal. Code Reg. § 10606*

Evidence that may be considered by workers' compensation judge in determining permanent disability rating. *8 Cal. Code Reg. §§ 10632, 10633*

Reproductions of documents; photocopies of business records; printed representations of images stored on video or digital medium. *8 Cal. Code Reg. § 10605*

[19] Fees

Medical-legal fee schedule. *8 Cal. Code Reg. § 9795*

Fees for transcripts, copies of documents, certifications, inspection of case files, and electronic transmissions. *8 Cal. Code Reg. §§ 9990-9994*

[20] Filing of Papers

Papers not accepted for filing by WCAB in absence of proof of service. *8 Cal. Code Reg. § 10324*

Time of filing documents. *8 Cal. Code Reg. § 10230*

Form and size requirements of filed documents. *8 Cal. Code Reg. § 10232*

Documents that will not be filed. *8 Cal. Code Reg. § 10222*

[21] Findings and Awards

Request for findings of fact in specified proceedings. *8 Cal. Code Reg. § 10405*

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When certified copies of findings and awards or other final orders may be issued for purpose of having judgment entered and execution issued by clerk of superior court. *8 Cal. Code Reg. § 10820*

Withholding certified copies. *8 Cal. Code Reg. § 10825*

Stay of execution or withholding of certified copies of order, decision, or award on request of party intending to file for writ of review and filing of bond. *8 Cal. Code Reg. § 10828*

[22] Health Care

Regulations implementing the Workers' Compensation Health Care Provider Organization Act of 1993. 10 Cal. Code Reg. §§ 1956-1999

[23] Hearings

Expedited hearings. *8 Cal. Code Reg. §§ 10252, 10252.1*

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Attorneys and representatives. *8 Cal. Code Reg. §§ 10774-10779*

[24] Information and Assistance Program

Operation of Information and Assistance Program of Division of Industrial Accidents. *8 Cal. Code Reg. §§ 9921-9929*

[25] [Reserved]

[26] Interpreter's Fees

Allowance of interpreter's fees as a cost. *8 Cal. Code Reg. § 10564*

[27] Judicial Review

Order withholding issuance of certified copy of order, decision, or award as alternative to issuance of order staying execution. *8 Cal. Code Reg. § 10825*

Request of party intending to file for writ of review to stay execution or to withhold issuance of certified copy of order, decision, or award, and bond requirement. *8 Cal. Code Reg. § 10828*

[28] Liens

Filing fee for medical lien procedures. *8 Cal. Code Reg. § 10250(b)*

Lien claimant under *Lab. Code § 4903* or *4903.1* as required to file its lien in writing on form approved by WCAB or electronically as approved by the Administrative Director. *8 Cal. Code Reg. § 10770*

Unemployment compensation disability lien. *8 Cal. Code Reg. § 10772*

[29] Medical Reports

Filing and service of physicians' reports. *8 Cal. Code Reg. §§ 10608, 10615*

[30] Parties

Necessary parties. *8 Cal. Code Reg. § 10360*

Joinder of applicants and defendants. *8 Cal. Code Reg. §§ 10364, 10368*

Parties in death cases. *8 Cal. Code Reg. § 10372*

Joinder of parties. *8 Cal. Code Reg. §§ 10372, 10380*

Dismissal of improper or unnecessary parties. *8 Cal. Code Reg. § 10570*

[31] Pensions

Tables for computation of life pensions. *8 Cal. Code Reg. §§ 10169, 10169.1*

[32] Petitions

Request for action by WCAB, other than application for adjudication, answer, or declaration of readiness, as made by petition. *8 Cal. Code Reg. § 10450*

[33] Pleadings

Form and content of application for adjudication. *8 Cal. Code Reg. §§ 10401, 10404, 10408*

Pleading serious and willful misconduct of employee or employer. *8 Cal. Code Reg. §§ 10440, 10445*

Application for Subsequent Injuries Benefits Trust Fund benefits. *8 Cal. Code Reg. § 10940*

Proceedings under *Lab. Code § 132a*, relating to discrimination by employer or insurer against employee for filing, or making known intention to file, workers'compensation claim. *8 Cal. Code Reg. § 10447*

Form and content of answer. *8 Cal. Code Reg. § 10484*

Prohibition against demurrers, petitions for judgment on pleadings, and petitions for summary judgment. *8 Cal. Code Reg. § 10490*

When pleadings are deemed amended. *8 Cal. Code Reg. § 10492*

[34] [Reserved]

[35] Qualified Medical Examiners

General regulations governing appointment, eligibility, assignment, selection, and discipline of qualified medical evaluators. *8 Cal. Code Reg. §§ 1-65*

Regulation of advertising by qualified medical evaluators and other physicians with respect to industrial injuries or illnesses. *8 Cal. Code Reg. §§ 150-159*

Determination of fees of physicians seeking status as qualified medical evaluators. *8 Cal. Code Reg. §§ 16-19*

Methods for evaluating psychiatric, pulmonary, cardiac, neuromusuloskeletal and immunologic disabilities *8 Cal. Code Reg. §§ 43-47*

Disclosure requirements of qualified medical evaluators to unrepresented workers. *8 Cal. Code Reg. § 40*

Ethical guidelines to be followed by qualified medical evaluators. *8 Cal. Code Reg. § 41*

Procedures for discipline of qualified medical evaluators. *8 Cal. Code Reg. §§ 60-65*

Minimal time guidelines to be followed by qualified medical evaluators in evaluating disabilities. *8 Cal. Code Reg. §§ 49-49.9*

Treatment Guidelines for occupational asthma, contact dermatitis, post-traumatic stress disorder, carpal tunnel syndrome, and injuries to the knee, lower back, neck, shoulder, and elbow. *8 Cal. Code Reg. §§ 70-77*

[36] Reconsideration

Procedure on petition for reconsideration. *8 Cal. Code Reg. § 10840 et seq.*

[36A] Retraining and Return to Work Regulations

Retraining and return to work definitions and general provisions. *8 Cal. Code Reg. §§ 10116*-10116.8

Return to work. *8 Cal. Code Reg. §§ 10117*-10120

Vocational Rehabilitation. *8 Cal. Code Reg. §§ 10123*-10133.3

Supplemental job displacement benefit. *8 Cal. Code Reg. §§ 10133.50*-10133.58

[37] Sanctions

Procedure for imposing sanctions for bad faith actions or tactics. *8 Cal. Code Reg. § 10561*

[38] Self-Insured Employers

Administration of self-insurance plans. *8 Cal. Code Reg. §§ 15200-15481*

[39] Service of Papers

Service of papers by WCAB. *8 Cal. Code Reg. § 10500*

Service in death cases. *8 Cal. Code Reg. § 10501*

Service by parties and lien claimants. *8 Cal. Code Reg. §§ 10500, 10505*

Mail and fax service. *8 Cal. Code Reg. § 10507*

Service via mailbox for outgoing documents at WCAB district office. *8 Cal. Code Reg. § 10506*

Service on attorney or agent. *8 Cal. Code Reg. § 10510*

Duty of parties and lien claimants to furnish WCAB and other parties with correct address. *8 Cal. Code Reg. § 10217*

[40] Settlement Conferences

Authority of settlement conference judge. *8 Cal. Code Reg. § 10353*

[41] Stipulations and Requests for Award

Proceeding for adjudication of rights and liabilities as initiated by filing of stipulations with request for award. *8 Cal. Code Reg. § 10400*

Awards and orders as properly based on oral or written stipulations of parties. *8 Cal. Code Reg. § 10496*

Finding contrary to a stipulation of the parties on an issue as not permitted to be made without providing notice and

opportunity to present evidence. *8 Cal. Code Reg. § 10497*

[42] Subpoenas

Appeals board's records as not subject to subpoena. *8 Cal. Code Reg. § 10322*

Issuance of subpoenas and subpoenas duces tecum. *8 Cal. Code Reg. §§ 10530, 10536, 10537*

Notice to appear or produce in lieu of subpoena or subpoena duces tecum. *8 Cal. Code Reg. § 10532*

Production of film, legible print, or electronic recording if original record destroyed. *8 Cal. Code Reg. § 10534*

[43] Subsequent Injuries Benefits Trust Fund

Claims against Subsequent Injuries Benefits Trust Fund. *8 Cal. Code Reg. §§ 10940-10946*

Service of previously filed medical reports when application is filed against Subsequent Injuries Benefits Trust Fund. *8 Cal. Code Reg. § 10946*

Eligibility requirements for "qualified alien" seeking benefits from Subsequent Injuries Benefits Trust Fund. *8 Cal. Code Reg. §§ 15740, 15741*

[44] Supplemental Proceedings

Petition to reopen. *8 Cal. Code Reg. § 10455*

Petition for new and further disability. *8 Cal. Code Reg. § 10458*

Petition to terminate liability and objections. *8 Cal. Code Reg. §§ 10462-10466*

[45] Witness Fees

Medical examiners. *8 Cal. Code Reg. § 10536*

[46] Workers' Compensation Judge

Ethical standards. *8 Cal. Code Reg. §§ 9720.1*-9723

Ex parte communication with WCJ regarding merits of case prohibited. *8 Cal. Code Reg. § 10324*

Assignment of cases to WCJ. *8 Cal. Code Reg. § 10346*

Appointment, authority, and review of order, decision, or award of pro tempore WCJ. *8 Cal. Code Reg. §§ 10350-10352*

Disqualification of WCJ. *8 Cal. Code Reg. § 10452*

Petition for automatic reassignment of hearing to another WCJ. *8 Cal. Code Reg. § 10453*

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsCosts & Attorney FeesWorkers' Compensation & SSDIAdministrative ProceedingsHearings & ReviewWorkers' Compensation & SSDIBenefit DeterminationsMedical BenefitsAuthorized TreatmentWorkers' Compensation & SSDIBenefit DeterminationsMedical BenefitsRehabilitationWorkers' Compensation & SSDIBenefit DeterminationsPermanent Total Disabilities

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§ 577.355 California Rules of Court

[1] Judicial Review

Requirements of petition to review appeals board's order or award. Cal. Rules of Ct., Rule 8.494(a)

Answer to petition and briefs. Cal. Rules of Ct., Rule 8.494(b)

Certificate of Interested Entities or Persons. Cal. Rules of Ct., Rule 8.494(c)

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§ 577.355A California Civil Jury Instructions (CACI)

For related jury instructions regarding workers' compensation, see Judicial Council of California Civil Jury Instructions (CACI), Series 2800 (LexisNexis Matthew Bender, Official Publisher), also available in LexisNexis Automated Judicial Council of California Civil Jury Instructions

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§ 577.356 Decisions

[1] In General

Lab. Code § 3751 bars freight transportation companies from requiring independent contractor truck owners/operators to pay costs of their own workers' compensation insurance, when parties had elected under *Lab. Code § 4150* to come under workers' compensation law's compensation provisions, which include *Lab. Code § 3751*. Albillo, et al. v. *Intermodal Container Services, Inc.; Montoya v. W.C.A.B. (2003) 114 Cal. App. 4th 190, 197-207, 8 Cal. Rptr. 3d 350*

WCAB as duty-bound to interpret and apply all aspects of workers' compensation law, especially Labor Code provisions and its own regulations, liberally in favor of worker consistent with underlying policy of pervasive and abiding solicitude for worker. *Hansen v. Workers' Comp. Appeals Bd. (1989) 211 Cal. App. 3d 717, 722, 259 Cal. Rptr. 506*

Person who suffers work-related injury as required generally to seek relief within workers' compensation system, and all proceedings as required to be before WCAB, which operates under rules of procedure and evidence substantially different from those in superior court, all of which are liberally construed in favor of workers' claims; intent of this special forum as being to compensate worker quickly and its jurisdiction as controlling, even though worker might have better claim against employer in civil action brought in superior court. *Potter v. Arizona So. Coach Lines, Inc. (1988) 202 Cal. App. 3d 126, 131, 248 Cal. Rptr. 284*

Workers' compensation law as implementing mandate of *Cal. Const., art. XIV, § 4*, that Legislature create "complete system" of compensation for injury or death to employee incurred in course of employment; since source of this law is statutory, rights and liabilities of parties as required to be predicated on statutes and cases that interpret them. *Buhlert Trucking v. Workers' Comp. Appeals Bd. (1988) 199 Cal. App. 3d 1530, 1533, 247 Cal. Rptr. 190*

Workers' compensation law as compensating employees for injuries arising out of unsafe work place conditions, including enhanced compensation under *Lab. Code § 4553* in cases involving serious and willful employer misconduct. *Jones v. Los Angeles Community College Dist. (1988) 198 Cal. App. 3d 794, 804, 244 Cal. Rptr. 37*

Workers' compensation system as not avoided by direct contract, and subterfuges designed to avoid workers' compensation laws as not countenanced; hence, contract between alleged employer and employee as unable to affect true relationship of parties to it or to place employee in different position from that which he or she actually held. *Truesdale v. Workers' Comp. Appeals Bd. (1987) 190 Cal. App. 3d 608, 614, 235 Cal. Rptr. 754* (contract falsely designating worker as independent contractor)

WCAB as having approved citation of writ-denied summaries published in California Compensation Cases, and, accordingly, courts as permitting citation of California Compensation Cases and as occasionally citing them in published opinions. *Wings West Airlines v. Workers' Comp. Appeals Bd. (1986) 187 Cal. App. 3d 1047, 1053 n.4, 232 Cal. Rptr. 343*

California workers' compensation law as statutory system enacted pursuant to constitutional grant of plenary power to Legislature to establish complete and exclusive system of workers' compensation (*Cal. Const., art. XIV, § 4*); law as expression and valid exercise of police power. *Graczyk v. Workers' Comp. Appeals Bd. (1986) 184 Cal. App. 3d 997, 1002, 229 Cal. Rptr. 494*

Right to workers' compensation benefits as wholly statutory and not derived from common law; statutory right as exclusive of all other statutory and common law remedies and as substituting new system of rights and obligations for common law rules governing liability of employers for injuries to their employees; rights, remedies, and obligations as resting on status of employer-employee relationship, rather than on contract or tort. *Graczyk v. Workers' Comp. Appeals Bd. (1986) 184 Cal. App. 3d 997, 1002-1003, 229 Cal. Rptr. 494*

[2] Affirmative Defenses

Finding of intentional injury under *Lab. Code § 3600(a)(5)*, requires proof that employee deliberately intended to injury himself or herself; employee who injured hand when he intentionally struck wall was not barred from receiving benefits under *Lab. Code § 3600(a)(5)*, when there was no evidence employee intended to injure himself. *Smith v. Workers' Comp. Appeals Bd. (2000) 79 Cal. App. 4th 530, 533, 94 Cal. Rptr. 2d 186*

Employer as precluded from raising as a defense under *Lab. Code § 4056* plaintiff's refusal to submit to medical treatment when, at the time plaintiff's injuries were discovered, there was no admitted or adjudicated industrial injury and no tender of medical treatment by employer. *See Thompson v. Workers' Comp. Appeals Bd. (1994) 25 Cal. App. 4th 1781, 1787-1788, 31 Cal. Rptr. 2d 242*

Lab. Code § 3708 as expressly abolishing common-law defense of contributory negligence in workers' compensation proceedings. *Thompson v. Workers' Comp. Appeals Bd. (1994) 25 Cal. App. 4th 1781, 1787-1788, 31 Cal. Rptr. 2d 242*

Employer asserting affirmative defense of employee's intoxication is proximate cause or substantial factor in employee's injury or death. *Smith v. Workers' Comp. Appeals Bd. (1981) 123 Cal. App. 3d 763, 773, 176 Cal. Rptr. 843*

[2A] Aliens/Undocumented Workers

Worker, who at time of injury was illegal alien who had obtained job by showing employer false Social Security and green cards, was employee entitled to workers' compensation benefits, excluding reinstatement and back pay. *Farmer Brothers Coffee v. W.C.A.B. (Ruiz) (2005) 133 Cal. App. 4th 533, 537-544, 35 Cal. Rptr. 3d 23*

Undocumented employee is not entitled to vocational rehabilitation benefits when employee is unable to return to work

solely because of immigration status, since providing undocumented worker with greater benefits than those available to legal workers violates *equal protection clause of the United States Constitution*. *Del Taco v. Workers' Comp. Appeals Bd. (2000) 79 Cal. App. 4th 1437, 1442-1443, 94 Cal. Rptr. 2d 825*

In civil action for medical malpractice, trial court should have excluded from trial all reference to plaintiff's immigration status, when plaintiff was not seeking damages for loss of earnings or earning capacity, since plaintiff's immigration status was neither relevant to any issue in case nor admissible to attack plaintiff's credibility. *Hernandez v. Paicius (2003) 109 Cal. App. 4th 452, 456-463, 468, 134 Cal. Rptr. 2d 756*

[3] Appeals Board

Legislature as having vested all judicial powers under Workers' Compensation Act in WCAB (*Lab. Code § 111*); WCAB as authorized to exercise judicial power in all disputes arising under Workers' Compensation Act as a constitutional court subject to general legal principles that circumscribe and regulate judgment of all judicial tribunals and in general as having inherent power to control its practice and procedure to prevent frustration, abuse, or disregard of its process. *Crawford v. Workers' Comp. Appeals Bd. (1989) 213 Cal. App. 3d 156, 164, 259 Cal. Rptr. 414*

[4] Applications for Adjudication of Claim

WCAB abused its discretion by finding that applicant did not sustain industrial injury based on facts that medical evidence did not support finding of specific injury and applicant did not amend specific injury claim to include cumulative injury, when evidence supported finding of cumulative injury and employer had early knowledge of potential cumulative injury claim despite employees failure to amend pleadings. *Beckstead v. Workers' Comp. Appeals Bd. (1997) 60 Cal. App. 4th 787, 792, 71 Cal. Rptr. 2d 254*

Amendment to original application to substitute cumulative-injury claim for specific-injury claim as proper and as not constituting new and different cause of action so as to subject amended claim to bar of statute of limitations when disability is the same and both claims arose from same set of facts. *Bassett-McGregor v. Workers' Comp. Appeals Bd. (1988) 205 Cal. App. 3d 1102, 1116, 252 Cal. Rptr. 868*

Inadvertent defect in application as ignored when defendant is not prejudiced by it. *Brennfleck v. Workmen's Comp. App. Bd. (1968) 265 Cal. App. 2d 738, 742-743, 71 Cal. Rptr. 525*

[5] Apportionment

Language of *Lab. Code § 4663(c)*, plus language of *Lab. Code § 4664(a)*, meant that so-called apportionment "Formula A" adopted by Supreme Court in *Fuentes v. Workers' Compensation Appeals Bd. (1976) 16 Cal. 3d 1, 128 Cal. Rptr. 673, 547 P.2d 449* , pursuant to which percentage of disability attributable to new injury is calculated by subtracting old permanent disability rating from new permanent disability rating, then consulting table for award due this difference, remained proper method for calculating apportionment, and statutory changes made by SB 899 did not mandate use of "Formula C," rejected by Supreme Court in *Fuentes*, pursuant to which dollar award for new injury is calculated as if apportionment were not issue, then dollar award of old injury is subtracted. *Brodie v. Workers' Comp. Appeals Bd. (2007) 40 Cal. 4th 1313, 1323-1332, 57 Cal. Rptr. 3d 644, 156 P.3d 1100*

AMA *Guides* portion of 2005 Permanent Disability Rating Schedule is rebuttable, and it is rebutted by showing that impairment rating based on *Guides* would result in permanent disability award that would be inequitable, disproportionate, and not fair and accurate measure of employee's permanent disability. Almaraz v. Environmental Recovery Services; Guzman v. Milpitas Unified School District (2009) 74 Cal. Comp. Cases 201, 211-217, 233,

239-245 (Appeals Board en banc opinion) , *recon. granted* Almaraz v. Environmental Recovery Services; Guzman v. Milpitas Unified School District (2009) 74 Cal. Comp. Cas. 478, 479-482 (Appeals Board en banc opinion)

Diminished future earning capacity portion of 2005 Permanent Disability Rating Schedule is rebuttable, since *Lab. Code § 4660(c)* provides that 2005 Schedule is merely "prima facie evidence of percentage of permanent disability to be attributed to each injury." Ogilvie v. City and County of San Francisco (2009) *74 Cal. Comp. Cases 248, 255-274 (Appeals Board en banc opinion)* , *recon. granted* Ogilvie v. City and County of San Francisco (2009) 74 Cal. Comp. Cases 478, 479-482 (Appeals Board en banc opinion)

Appeals Board en banc has specifically rejected "inequitable, disproportionate, and not a fair and accurate measure of the employee's permanent disability" standard set forth in its previous en banc opinion in same case. Almaraz v. Environmental Recovery Services; Guzman v. Milpitas Unified School District (2009) 74 Cal. Comp. Cases 1084, 1085-1087, 1114 (Appeals Board en banc opinion) , *pet. for writ of rev. filed sub nom.* Milpitas Unified School District v. W.C.A.B. (Guzman) 10/16/2009

Appeals Board en banc has held that any individualized diminished future earning capacity adjustment factor must be consistent with *Lab Code § 4660(b)(2)*, RAND data to which it refers, and numeric formula adopted by Administrative Director in 2005 Schedule. Oglevie v. Workers' Comp. Appeals Bd. (2009) 74 Cal. Comp. Cases 1127, 1129, 1130 (Appeals Board en banc opinion) , *pet. for writ of rev. filed* 10/7/2009

Rule of *Wilkinson v. W.C.A.B. (1977) 19 Cal. 3d 491* , which provided that injured worker who, while employed by same employer, sustained two separate injuries to same part of body, which became permanent and stationary at same time, was entitled to receive combined award of permanent disability, is no longer generally applicable because inconsistent with post-SB 899 requirement that apportionment be based on causation, and in light of current versions of *Lab. Code §§ 4663(a)* and *(c)* and *4664(a)*, as explained by *Brodie v. Workers' Comp. Appeals Bd. (2007) 40 Cal. 4th 1313* , Appeals Board must now determine and apportion to cause of disability for each industrial injury, meaning that all potential causes of disability, whether from current industrial injury, prior or subsequent industrial injury, or prior or subsequent nonindustrial injury or condition, must be taken into consideration. Benson v. Workers' Comp. Appeals Bd. (2007) 72 Cal. Comp. Cases 1620, 1622, 1634-1635 (Appeals Board en banc opinion) , *aff'd sub nom. Benson v. Workers' Comp. Appeals Bd. [2009) 170 Cal. App. 4th 1535, 1549-1560, 89 Cal. Rptr. 3d 166*

Pursuant to *Lab. Code § 4664(b)*, employee was not entitled to prove that he was medically rehabilitated from prior permanent disability when he sustained subsequent industrial injury, when court of appeal found that legislature intended statute's presumption to be conclusive, not rebuttable, notwithstanding second sentence in statute, which states that this presumption affects burden of proof, and court annulled decision of Appeals Board and held that Board incorrectly determined that employee had burden of disproving overlap between current permanent disability and previous disability in order to establish his claim to permanent disability benefits, but court found that employer, while able to rely, pursuant to *Lab. Code § 4664(b)*, on conclusive presumption that employee's permanent disability that was subject of prior award existed at time of subsequent industrial injury, nonetheless had burden of proving overlap in order to establish its right to apportionment of employee's permanent disability. *Kopping v. Workers' Comp. Appeals Bd. (2006) 142 Cal. App. 4th 1099, 1106-1115, 48 Cal. Rptr. 3d 618*

There was no "existing order, decision, or award" in case before court of appeal, within meaning of § 47 of SB 899, and Legislature intended § 47's language that SB 899 "shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision, or award" to be consistent with general rule that statutory rights end during litigation with repeal or amendment of statute unless appeals were exhausted and final judgment existed. *Kleemann v. W.C.A.B. (2005) 127 Cal. App. 4th 274, 285-288, 25 Cal. Rptr. 3d 448*

Appeals Board determination was not "final" for purposes of considering apportionment under SB 899 until Board had issued final judgment and appellate process had been exhausted, which had not occurred in present case, so that

language ofSection 47 of SB 899 that SB 899 "shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision, or award of the Workers' Compensation Appeals Board" was no barrier to applying SB 899's apportionment provisions to present case. *Marsh v. Workers' Comp. Appeals Bd. (2005) 130 Cal. App. 4th 906, 912-916, 30 Cal. Rptr. 3d 598*

Submission orders and orders closing discovery, issued prior to effective date of SB 899, April 19, 2004, were not "existing" orders that could not be reopened due to prohibition set forth in Sec. 47 of SB 899, so that SB 899's repeal of former apportionment statutes, *Lab. Code §§ 4663, 4750,* and *4750.5*, and enactment of new apportionment statutes, *Lab. Code §§ 4663* and *4664*, applied to present case. *Rio Linda Union School District v. W.C.A.B. (Scheftner) (2005) 131 Cal. App. 4th 517, 525-532, 31 Cal. Rptr. 3d 789*

Apportioning liability for cumulative trauma injuries, pursuant to *Lab. Code § 5500.5*, requires either compensable temporary disability or permanent disability to satisfy disability requirement of *Lab. Code § 5412*. *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte) (2004) 119 Cal. App. 4th 998, 1005-1006, 14 Cal. Rptr. 3d 793*

Under *Lab. Code § 4750.5* [repealed in 2004], an "unrelated noncompensable injury" is a disabling event which, if work related, would be compensable; the word "solely" has been interpreted to incorporate the existing rules applicable to the apportionment of successive disabilities. *Fresno Unified School Dist. v. Workers' Comp. Appeals Bd. (2000) 84 Cal. App. 4th 1295, 1308, 1311, 101 Cal. Rptr. 2d 569*

Doctor's report that apportioned applicant's permanent disability based upon incorrect legal theory, was insufficient to support WCAB's apportionment. *Martins v. Workers' Comp. Appeals Bd. (1995) 40 Cal. App. 4th 1090, 1094-1095, 47 Cal. Rptr. 2d 386*

Lab. Code § 4750.5 [repealed in 2004] not applicable in permitting apportionment of applicant's permanent disability to her pregnancy or her unemployment since neither condition constituted a "non-compensable injury" within the meaning of the statute; in enacting *Lab. Code § 4750.5* [repealed in 2004], Legislature intended to make distinction between compensable and noncompensable injuries, rather than to expand meaning of "injury" to include conditions and circumstances not relevant in apportionment. *Ashley v. Workers' Comp. Appeals Bd. (1995) 37 Cal. App. 4th 320, 328-329, 43 Cal. Rptr. 2d 589*

[6] Arising Out of and in Course of Employment

Although illegal conduct in performance of job-related act will not preclude finding that resulting disability is service-connected, illegal activity wholly unrelated to worker's duties as outside scope of employment. *Traub v. Board of Retirement (1983) 34 Cal. 3d 793, 799, 195 Cal. Rptr. 681, 670 P.2d 335*

Police officer's physical training injury, even though occurring while he was on vacation, was compensable injury because his training was, pursuant to *Lab. Code § 3600(a)(9)*, "a reasonable expectancy of ... the employment." *Tomlin v. Workers' Comp. Appeals Bd. (2008) 162 Cal. App. 4th 1423, 1425-1426, 1428-1432, 76 Cal. Rptr. 3d 672*

Employee's death was not result of industrial injury, when court found that decedent, accountant with CPA license employed by City of Los Angeles, died from injuries received from fall while attending CPA convention in Atlantic City, New Jersey, since employer did not require decedent to have CPA license, and traveling to attend the convention for CPA credit was not expressly or impliedly authorized by decedent's employment contract. *City of Los Angeles v. Workers' Comp. Appeals Bd. (2007) 157 Cal. App. 4th 78*

Court of appeal affirmed award of workers' compensation benefits to police officer who was exposed to benzene during his employment and contracted kidney cancer during his employment, holding, pursuant to *Lab. Code § 3212.1*, that

employer failed to rebut presumption that cancer was industrial injury when it established merely absence of medical evidence that benzene had been shown to cause kidney cancer. *City of Long Beach v. Workers' Comp. Appeals Bd. (2005) 126 Cal. App. 4th 298, 314-321, 23 Cal. Rptr. 3d 782*

Ski resort employees who are exempt from workers' compensation coverage under *Lab. Code § 3352(f)* are not also exempt from assumption of risk under *Lab. Code § 2801*, because latter statute bars employers from raising assumption of risk as defense in negligence actions by employees only when employee has been injured in course of employment, and legislature, by virtue of it use of phrase "course of his employment as such" in *Lab. Code § 2801*, contemplated more restrictive concept of course of employment in that statute than in workers' compensation statutes, only latter of which include off-duty recreational activities if they are reasonable expectancy of employment. *Vine v. Bear Valley Ski Co. (2004) 118 Cal. App. 4th 577, 587-590, 13 Cal. Rptr. 3d 370*

Question of whether employee was on duty or off duty at time of injury is not ultimate test for whether injury was covered by compensation bargain and thus subject to exclusive remedy rule, but rather ultimate test is whether injury arose out of and in course of employment, and "reasonable expectancy" requirement of *Lab. Code § 3600(a)(9)* is simply one subset of ultimate issue of whether injury arose out of and in course of employment. *Mason v. Lake Dolores Group, L.L.C. (2004) 117 Cal. App. 4th 822, 832-838, 11 Cal. Rptr. 3d 914*

Employee who suffered fatal heart attack at home after telephoning her employer day before she was to return to work following seven-month periodof disability, was not acting in course of her employment since she was off-duty, off-premises, and not performing services incidental to her employment when she suffered heart attack; phone call made by employee just before heart attack to inform her employer that she would be working part-time schedule, did not bring employee within course of employment. *Ralphs Grocery Co. v. Workers' Comp. Appeals Bd. (1997) 58 Cal. App. 4th 647, 651, 68 Cal. Rptr. 2d 161*

Evidence supported conclusion that probationary sergeant's severe depression caused by his being unable to perform his job duties resulted in suicide and that suicide was compensable since it was the proximate result of injury arising out of and in the course of employment. *Chu v. Workers' Comp. Appeals Bd. (1996) 49 Cal. App. 4th 1176, 1185, 57 Cal. Rptr. 2d 221*

Test for whether an injury arises out of and in the course of employment under workers' compensation law is broader than test for scope of employment under respondeat superior doctrine. *Bailey v. Filco, Inc. dba Filco Discount Centers (1996) 48 Cal. App. 4th 1552, 1562, 56 Cal. Rptr. 2d 333*

Lab. Code § 3212.1 as requiring firefighter to establish reasonable causal link between industrial exposure to carcinogens and stomach cancer; although not required to prove proximate cause under statute, firefighter as required to show logical connection between injury and exposure. *Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd. (1994) 23 Cal. App. 4th 1120, 1125, 28 Cal. Rptr. 2d 601*

Emotional distress injuries caused by termination of employment as arising out of and in the course of employment, and therefore compensable under workers' compensation law. *Jenkins v. Family Health Program (1989) 214 Cal. App. 3d 440, 450, 262 Cal. Rptr. 798* ; *Pichon v. Pacific Gas & Electric Co. (1989) 212 Cal. App. 3d 488, 495-496, 260 Cal. Rptr. 677*

Employee misconduct, whether negligent, willful, or even criminal, as not necessarily precluding recovery of workers' compensation benefits; in absence of applicable statutory defense, such misconduct as barring recovery only when it constitutes deviation from scope of employment. *Westbrooks v. Workers' Comp. Appeals Bd. (1988) 203 Cal. App. 3d 249, 253, 253 n.4, 252 Cal. Rptr. 26* (also noting that compensation is precluded by *Lab. Code § 3600(a)(8)* when injury is caused by commission of felonious act by injured employee for which he or she has been convicted)

WCAB as having erred in denying bus driver's claim for benefits for emotional injury arising out of accident that occurred while driver was on assigned run on ground that driver's reckless driving, for which he was convicted, took him outside course of his employment. *Westbrooks v. Workers' Comp. Appeals Bd. (1988) 203 Cal. App. 3d 249, 251, 254, 252 Cal. Rptr. 26*

Generally, employee injured outside workplace and ordinary working hours as not entitled to workers' compensation benefits. *Luna v. Workers' Comp. Appeals Bd. (1988) 199 Cal. App. 3d 77, 80, 244 Cal. Rptr. 596*

For purposes of workers' compensation law, "in course of employment" as generally referring to time and place of injury and meaning that injured must be engaged in work he or she has been hired to perform, and "arise out of employment" as referring to causal connection between injury and employment. *West American Ins. Co. v. California Mutual Ins. Co. (1987) 195 Cal. App. 3d 314, 321, 240 Cal. Rptr. 540* (distinguishing terms as used in workers' compensation law from terms as used under doctrine of respondeat superior and in private liability insurance law)

To be compensable under *Lab. Code § 3600*, injury as required not only to be sustained in course of employment and during performance of service, but also to be one arising out of and proximately caused by employment; requirement that injury arise out of and be proximately caused by employment as referring to causal connection between employment and injury. *Gonzalez v. Workers' Comp. Appeals Bd. (1986) 186 Cal. App. 3d 514, 518, 230 Cal. Rptr. 649*

If there is no real dispute as to facts, question of whether injury was suffered in course of employment as one of law. *Gonzalez v. Workers' Comp. Appeals Bd. (1986) 186 Cal. App. 3d 514, 519, 230 Cal. Rptr. 649*

Statutory requirements that injury occur in course of employment and arise out ofemployment (*Lab. Code §§ 3370, 3600*) as conjunctive, and both as required to be satisfied for injury to be compensable. *Crawford v. Workers' Comp. Appeals Bd. (1986) 185 Cal. App. 3d 1265, 1268, 230 Cal. Rptr. 425*

Whether assault on employee by third person arises out of and in course of employment as dependent on whether assault was connected with employment or without any relation to it. *Rogers v. Workers' Comp. Appeals Bd. (1985) 172 Cal. App. 3d 1195, 1200, 218 Cal. Rptr. 662* ; *Western Airlines v. Workers' Comp. Appeals Bd. (1984) 155 Cal. App. 3d 366, 369, 202 Cal. Rptr. 74* ; *California State Polytechnic University v. Workers' Comp. Appeals Bd. (1982) 127 Cal. App. 3d 514, 518, 179 Cal. Rptr. 605* ; *Murphy v. Workers' Comp. Appeals Bd. (1978) 86 Cal. App. 3d 996, 998-1002, 150 Cal. Rptr. 561*

"Arising out of and in course of employment" test used in workers' compensation law as less restrictive than "scope of employment" test used in respondeat superior doctrine. *Wank v. Richman & Garrett (1985) 165 Cal. App. 3d 1103, 1110-1111, 211 Cal. Rptr. 919*

[7] Asbestos

Discussion of asbestos and its effects. *General Foundry Service v. Workers' Comp. Appeals Bd. (1986) 42 Cal. 3d 331, 335-336 n.2, 228 Cal. Rptr. 243, 721 P.2d 124*

Mesothelioma and asbestosis as separate and distinct diseases resulting in separate and distinct disabilities; survivors of deceased employee entitled to a later date of injury for mesothelioma for purposes of calculating rate of death benefits. *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd. (1990) 219 Cal. App. 3d 1265, 1271-1273, 268 Cal. Rptr. 699*

[8] Athletes

Under *Lab. Code § 3352*, term "employee," as used in workers' compensation law, as excluding (1) any person, other than regular employee, participating in sports or athletics who receives no compensation for such participation other than use of athletic equipment, uniforms, transportation, travel, meals, lodgings, or other expenses incidental thereto (*Lab. Code § 3352(g)*, added in 1965); and (2) any student participating as an athlete in amateur sporting events sponsored by any public agency, public or private nonprofit college, university, or school, who receives no remuneration for such participation other than use of athletic equipment, uniforms, transportation, travel, meals, lodgings, scholarships, grants-in-aid, or other expenses incidental thereto (*Lab. Code § 3352(k)*, added in 1981); 1981 legislation as retroactive; hence, student of California State University injured while playing varsity college football in 1978 as not an employee within meaning of workers' compensation law, and as not entitled to workers' compensation. *Graczyk v. Workers' Comp. Appeals Bd. (1986) 184 Cal. App. 3d 997, 1002-1009, 229 Cal. Rptr. 494*

[9] Athletic, Social, or Recreational Activities

Evidence did not support finding that police officer subjectively believed that his employer expected him to engage in occasional pickup game of basketball, and, even if there were evidence of officer's subjective belief, that belief would not have been objectively reasonable. *City of Stockton v. W.C.A.B. (Jenneiahn) (2006) 135 Cal. App. 4th 1513, 1525-1526, 38 Cal. Rptr. 3d 474*

Injury suffered by applicant while participating in basketball game after work was not compensable under *Lab. Code § 3600(a)(9)*, since there was insufficient evidence to indicate that applicant reasonably believed that he was expected to participate in game, or that participation was expressly or impliedly required by his employment. *Tensfeldt v. Workers' Comp. Appeals Bd. (1998) 66 Cal. App. 4th 116, 126-127, 77 Cal. Rptr. 2d 691*

Highway patrol officer's belief that practicing the long jump while at home was a reasonable expectancy of her employment, was reasonable as a matter of law, since long jump was a required element of annual physical fitness test administered by employer. *Kidwell v. Workers' Comp. Appeals Bd. (1995) 33 Cal. App. 4th 1130, 1139, 39 Cal. Rptr. 2d 540*

"Reasonable expectancy of employment" test under *Lab. Code § 3600(a)(9)*, providing that employee is not entitled to workers' compensation for injury sustained while voluntarily participating in off-duty recreational or athletic activities unless activities are reasonable expectancy of, or are expressly or impliedly required by, employment, as legal question consisting of two elements: (1) whether employee subjectively believes his or her participation in activity is expected by employer and (2) whether that belief is objectively reasonable. *Taylor v. Workers' Comp. Appeals Bd. (1988) 199 Cal. App. 3d 211, 215, 244 Cal. Rptr. 643* ; *Wilson v. Workers' Comp. Appeals Bd. (1987) 196 Cal. App. 3d 902, 905-906, 239 Cal. Rptr. 719* ; *Childers v. Shasta Livestock Auction Yard, Inc. (1987) 190 Cal. App. 3d 792, 816, 235 Cal. Rptr. 641* (plaintiff's participation in drinking alcoholic beverages at job site held a reasonable expectancy of employment, and under facts of case, that belief that worker's participation in drinking was expected by employer was objectively reasonable); *Aetna Casualty & Surety Co. v. Workers' Comp. Appeals Bd. (1986) 187 Cal. App. 3d 922, 930, 232 Cal. Rptr. 257*

When employer expects employees to participate in recreational or athletic activities to maintain certain standards of physical fitness necessary for performance of their work, employer as able to limit its liability for workers' compensation to injuries sustained in designated and preapproved athletic activities. *Taylor v. Workers' Comp. Appeals Bd. (1988) 199 Cal. App. 3d 211, 215-216, 244 Cal. Rptr. 643* (distinguishing *Wilson v. Workers' Comp. Appeals Bd. (1987) 196 Cal. App. 3d 902, 239 Cal. Rptr. 719*)

Employee injured while voluntarily participating in basketball game on employer's premises during uncompensated lunch break when there was no substantial evidence that employee reasonably believed he was expected to participate, that participation was expressly or impliedly required by employment, or that employer required, encouraged, or

sponsored activity, although employer condoned it, as not entitled to workers' compensation. *Todd v. Workers' Comp. Appeals Bd. (1988) 198 Cal. App. 3d 757, 759-760, 243 Cal. Rptr. 925*

Failure of employer to post required notice regarding provisions of *Lab. Code § 3600(a)(9)*, relating to voluntary off-duty recreational, social, or athletic activity, as not resulting in liability that would not otherwise exist. *Todd v. Workers' Comp. Appeals Bd. (1988) 198 Cal. App. 3d 757, 761, 243 Cal. Rptr. 925*

Injury to policeman incurred off-duty while running to keep himself in physical condition to pass tests required by city to remain member of police department's special emergency reaction team as arising out of and in course of employment and hence compensable under workers' compensation law. *Wilson v. Workers' Comp. Appeals Bd. (1987) 196 Cal. App. 3d 902, 904, 239 Cal. Rptr. 719*

Former *Lab. Code § 3600(a)(8)* [*now see Lab. Code § 3600(a)(9)*], excluding liability of employer for workers' compensation when injury arises out of voluntary participation in off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except when these activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment, as inapplicable to detective employed by county sheriff's office who was injured while engaged in softball game between sheriffs' departments of neighboring counties when, at time of injury, detective was on standby duty and engaged in activity at place to which his employer had consented. *Gonzalez v. Workers' Comp. Appeals Bd. (1986) 186 Cal. App. 3d 514, 519-521, 230 Cal. Rptr. 649*

To qualify for compensation for injury sustained in off-duty activities, employee as required not only to satisfy burden of proving subjective belief that participation in off-duty activities was expected by employer [*see Lab. Code § 3600(a)(9)*] but also to show subjective belief was reasonable. *Meyer v. Workers' Comp. Appeals Bd. (1984) 157 Cal. App. 3d 1036, 1042-1044, 204 Cal. Rptr. 74*

[10] Attorney's Fees

Written attorney's fee agreement between employee and his attorney was not binding to extent that it purported to "draft around" *Lab. Code § 4906* by depriving Appeals Board of its statutory authority to fix attorney fees, making it in conflict with state law and unenforceable. *Vierra v. Workers' Comp. Appeals Bd. (2007) 154 Cal. App. 4th 1142, 1147-1150, 65 Cal. Rptr. 3d 423*

Lab. Code § 5710(b)(4), allowing deposition attorney's fees only to attorney's licensed in California, is constitutional since it is rationally related to the state's goal of eliminating fraudulent workers' compensation claims. *Longval v. Workers' Comp. Appeals Bd. (Amaral) (1996) 50 Cal. App. 4th 1056, 1066-1068*

WCAB erred by applying rule in *Goler v. W & J Sloane Co.* in awarding attorney's fee's to applicant's attorney who provided services that significantly increased the benefits received by applicant; WCAB should have also considered factors listed in *WCAB Rule 10775* (*8 Cal. Code Reg. § 10775*) in awarding attorney's fees. *Wheeler & Beaton v. Workers' Comp. Appeals Bd. (1995) 40 Cal. App. 4th 389, 396-397, 46 Cal. Rptr. 2d 581*

Workers' compensation judge and WCAB as properly denying attorney's fee awarded pursuant to stipulation that fee be paid from "far end of the award," when no accrued but unpaid disability indemnity payments were due to employee at time of his death. *Price v. Workers' Comp. Appeals Bd. (1992) 10 Cal. App. 4th 959, 12 Cal. Rptr. 2d 831*

WCAB, in awarding attorney's fees, as required to adequately consider and discuss the criteria listed in *8 Cal. Code Reg. § 10775* and in its own guidelines on attorney's fees. *Lawrence Drasin & Associates v. Workers' Comp. Appeals Bd. (1992) 3 Cal. App. 4th 1564, 1573, 5 Cal. Rptr. 2d 215*

WCAB as required to base attorney's fee on the amount of all benefits obtained for the applicant through the attorney's efforts. *Lawrence Drasin & Associates v. Workers' Comp. Appeals Bd. (1992) 3 Cal. App. 4th 1564, 1572-1573, 5 Cal. Rptr. 2d 215*

Statement that an award of attorney's fees is reasonable under the circumstances given the time, effort, and skill expended by the applicant's attorney on the applicant's behalf and the result ultimately achieved as not constituting either a statement of the evidence relied on by the WCAB nor a specification of the reasons for the WCAB's decision. *Lawrence Drasin & Associates v. Workers' Comp. Appeals Bd. (1992) 3 Cal. App. 4th 1564, 1572, 5 Cal. Rptr. 2d 215*

Attorneys as entitled to a careful appraisal of the value of the services rendered, and fees should not be fixed by the WCAB solely to save applicants from expense or be so low that competent attorneys will be discouraged from accepting employment in workers' compensation matters. *Lawrence Drasin & Associates v. Workers' Comp. Appeals Bd. (1992) 3 Cal. App. 4th 1564, 1572, 5 Cal. Rptr. 2d 215*

Request for commutation of attorney's fees in a workers' compensation case as required to be first addressed to the WCAB and not to the appellate court. *Lawrence Drasin & Associates v. Workers' Comp. Appeals Bd. (1992) 3 Cal. App. 4th 1564, 1569 n.2, 5 Cal. Rptr. 2d 215*

[11] Average Earnings

Post injury earnings as significant to computation of average earnings, insofar as they illuminate earning capacity at earlier date. *Goytia v. Workmen's Comp. Appeals Bd. (1972) 6 Cal. 3d 660, 662, 100 Cal. Rptr. 136, 493 P.2d 864*

Average weekly earnings calculated by applying *Lab. Code § 4453(c)(4)* when employee's regular employment as attorney made him maximum wage earner for purposes of calculating his temporary and permanent disability indemnity benefits but who was injured AOE/COE while on jury duty, which employment paid nominal sum only, when court of appeal held that fact of having been injured while on jury duty did not justify paying employee benefits computed at less than maximum rate of pay. *County of San Joaquin v. W.C.A.B. (Davis) (2007) 147 Cal. App. 4th 1459, 1464-1468, 55 Cal. Rptr. 3d 152*

"Average weekly earning capacity" under *Lab. Code § 4453(c)(4)*, providing for disability indemnity based on employee's average weekly earning capacity, as not limited to actual earnings; although due consideration as required to be given to his or her actual earnings from all sources and employments, other relevant factors required to be considered as being applicant's history of earnings before injury, postinjury earnings, ability to work, age, health, skill, education, and opportunities to work. *Elliot v. Workers' Comp. Appeals Board (1987) 196 Cal. App. 3d 1497, 1502-1503, 242 Cal. Rptr. 601*

Average weekly earnings under *Lab. Code § 4453(a), (d)*, as actual earnings of full-time employee at time of injury when amount fairly reflects earning capacity; however, if there is specific demonstrable evidence that injured employee would, but for injury, have received increased earnings, average earnings as computed on basis of earning capacity. *Toccalino v. Workers' Comp. Appeals Bd. (1982) 128 Cal. App. 3d 543, 560, 180 Cal. Rptr. 427*

Average earnings as prediction of what employee's earnings would have been had he or she not been injured. *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (1976) 59 Cal. App. 3d 647, 655, 130 Cal. Rptr. 831*

[12] Awards

Award of compensation as including right to interest, to have judgment on award entered in superior court, to obtain judgment lien, and to enforce judgment by execution. *Myers v. Workmen's Comp. Appeals Bd. (1969) 2 Cal. App. 3d*

621, 626, 83 Cal. Rptr. 427

[13] Bunkhouse Rule

Exclusive remedy rule of *Lab. Code § 3602(a)* barred plaintiffs' civil action against defendant for negligence and failure to make house habitable for human occupation, when court found that plaintiffs husband and wife lived in ranch house owned by defendant as "employment benefit" of husband's job as park ranger employed by defendant and that plaintiff husband was injured when, attempting to get up from bathroom floor of house, where he had been observing leaking pipes while "on all fours," he slipped and fell. *Vaught v. State of California, Department of Parks and Recreation (2007) 157 Cal. App. 4th 1538, 1544-1549, 69 Cal. Rptr. 3d 605*

Bunkhouse rule was inapplicable to an injured worker who worked as a cook at a ski resort and resided in apartments owned by her employer; since the worker was injured while skiing on her day off, she was expressly precluded from recovering workers' compensation benefits under *Lab. Code § 3352(f)*. *Northstar at Tahoe v. Workers' Comp. Appeals Bd. (1996) 42 Cal. App. 4th 1481, 1485, 50 Cal. Rptr. 2d 475*

Bunkhouse rule as specific application of statutory requirements that injury arise out of and in course of assigned employment [*Lab. Code § 3600*] and hence inapplicable to state prisoner [*see Penal Code § 2601(i)*; *Lab. Code § 3370*] injured while off-duty at forestry conservation camp where he lived and worked while serving his sentence, because his living on premises was result of his custodial status as a prisoner. *Crawford v. Workers' Comp. Appeals Bd. (1986) 185 Cal. App. 3d 1265, 1268-1269, 230 Cal. Rptr. 425*

[14] Burden of Proof

Employee as having burden of proving that injury was sustained in course of employment. *Lundberg v. Workmen's Comp. App. Bd. (1968) 69 Cal. 2d 436, 439, 71 Cal. Rptr. 684, 445 P.2d 300*

Once presumption of employment comes into play, burden as shifting to employer to establish that injured person was independent contractor or otherwise excluded from workers' compensation coverage; in addition to relying on specific exclusion to rebut presumption of employee status, alleged employer as permitted to seek to prove that essential contract of hire required under definition of employee in *Lab. Code § 3351* is absent. *Barragan v. Workers' Comp. Appeals Bd. (1987) 195 Cal. App. 3d 637, 642-643, 240 Cal. Rptr. 811*

Burden of proving that claimant for workers' compensation was an independent contractor rather than an employee as on alleged employer under *Lab. Code § 5705*. *Truesdale v. Workers' Comp. Appeals Bd. (1987) 190 Cal. App. 3d 608, 613, 235 Cal. Rptr. 754*

[15] Civil Action

When doubt exists whether death or injury was sustained in course of employment, claimant's filing of civil action to protect against running of statute of limitations together with filing of application for workers' compensation as proper. *Dixon v. Ford Motor Co. (1975) 53 Cal. App. 3d 499, 502, 125 Cal. Rptr. 872*

[16] Claim Procedure

Employee's knowledge that claim must be filed will not cease tolling of statute of limitations if employer fails to notify employee of applicable time limits, absent evidence that employee otherwise knew of applicable time limits.

Galloway v. Workers' Comp. Appeals Bd. (1998) 63 Cal. App. 4th 880, 888, 74 Cal. Rptr. 2d 374

[17] Clerical Errors

Regardless of lapse of time or finality of judgment, court as able, on its own motion, to correct clerical error in judgment even if error was made by court and consisted of failure to provide for reservation of jurisdiction; similarly, Rehabilitation Bureau as able to correct clerical error in its order (order erroneously stated that worker's case was closed on grounds worker declined rehabilitation instead of stating that rehabilitation was suspended while worker sought medical treatment). *Poole v. Workers' Comp. Appeals Bd. (1989) 211 Cal. App. 3d 694, 697, 259 Cal. Rptr. 564*

Appeals board or workers' compensation judge as able to correct clerical error at any time and without necessity for further hearings, notwithstanding lapse of statutory period for filing petition for reconsideration. *Toccalino v. Workers' Comp. Appeals Bd. (1982) 128 Cal. App. 3d 543, 558, 180 Cal. Rptr. 427*

[18] Compensation

Burial expenses as compensation under *Lab. Code §§ 3207, 4701* (death benefits), and *Lab. Code § 4707* (benefits payable on death of member of Public Employees' Retirement System) as excepting such expenses from any prohibition against payment of workers' compensation benefits when amount of such benefits is less than total death allowance paid to widow or minor children of deceased worker under Public Employees' Retirement Law. *Jones v. Kaiser Industries Corp. (1987) 43 Cal. 3d 552, 557 n.7, 237 Cal. Rptr. 568, 737 P.2d 771*

Under worker's compensation law, injured employee as not, in ordinary case, entitled to greater compensation than wages would have been had worker not been injured. *Herrera v. Workers' Comp. Appeals Bd. (1969) 71 Cal. 2d 254, 259, 78 Cal. Rptr. 497, 455 P.2d 425*

Portion of workers' compensation lump sum settlement proceeds received by injured worker/spouse during marriage is community property, if attributable to disability or pension payments owed during marriage or to medical expenses paid with community funds, and such settlement's proceeds are injured spouse's separate property, if intended to compensate for injured spouse's diminished earning capacity and/or medical expense after marriage has ended. *Raphael v. Bloomfield (2003) 113 Cal. App. 4th 617, 621-627, 6 Cal. Rptr. 3d 583*

Worker who was awarded partial permanent disability compensation for industrial back injury, entered vocational rehabilitation on-the-job training program, and sustained further back injury while engaged in program, as entitled to receive compensation for permanent disability resulting from cumulative injury not at rate in effect on date of original injury but at rate in effect at time of rehabilitation injury; any hardship to insurer in paying indemnity at higher rate as outweighed by employer's rehabilitation duties and public policy of securing maximum rehabilitation benefits to injured employee. *Trevino v. Workers' Comp. Appeals Bd. (1989) 207 Cal. App. 3d 1012, 1016, 255 Cal. Rptr. 162*

Person injured while on job as entitled to compensation under workers' compensation law, not because of any act or omission of employer, but because employment relationship exists. *Barragan v. Workers' Comp. Appeals Bd. (1987) 195 Cal. App. 3d 637, 642, 240 Cal. Rptr. 811*

[19] Compromise and Release Agreement

[a] In General

Compromise and release agreement that recited that employee had "sustained injury arising out of and in the course of

his employment to 1) Back 2) Psyche," and that further recited that the employee "releases and forever discharges said employer from all claims and causes of action, whether now known or ascertained, or which may hereafter arise or develop as a result of said injury," as not precluding employee from pursuing civil claim against employer for emotional distress resulting from discrimination based on employee's sexual orientation; form release executed by parties that made no specific reference to potentially independent civil rights or remedies as releasing only those claims that traditionally fall within scope of workers' compensation system. *Delaney v. Superior Fast Freight (1993) 14 Cal. App. 4th 590, 599, 18 Cal. Rptr. 2d 33*

Compromise and release executed in workers' compensation proceeding as not barring, as a matter of law, employee's subsequent civil action against employer, three related entities, and coemployee for discrimination under Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*), when release did not mention discrimination claims, even though parties' attorneys were aware of them. *Asare v. Hartford Fire Ins. Co. (1991) 1 Cal. App. 4th 856, 863, 2 Cal. Rptr. 2d 452*

Compromise and release agreement executed by surviving family members of agricultural worker shot and killed during strike as ambiguous regarding whether it released employer from liability for civil damages not compensable under workers' compensation law; absent express language, employer as not released as matter of law for civil damages. *Lopez v. Sikkema (1991) 229 Cal. App. 3d 31, 39, 280 Cal. Rptr. 7*

Compromise and release by settlement of workers' compensation claims as not eliminating worker's right to pursue other remedies for invasion of other interests in other forums, absent specific provision to that effect; workers' compensation compromise and release for emotional injuries arising from employer's action does not bar employee's claim for breach of implied covenant of good faith and fair dealing in wrongfully terminating employee. *Ortiz v. Bank of America Nat. Trust and Sav. Ass'n (9th Cir. 1987) 824 F.2d 692, 694, 695-696*

WCAB as restricted to approving or disapproving compromise and release agreement as a whole. *Burbank Studios v. Workers' Comp. Appeals Bd. (1982) 134 Cal. App. 3d 929, 936-937, 184 Cal. Rptr. 879*

Workers' compensation and tort releases distinguished. *Sumner v. Workers' Comp. Appeals Bd. (1983) 33 Cal. 3d 965, 971, 191 Cal. Rptr. 811, 663 P.2d 534* ; *Johnson v. Workers' Comp. Appeals Bd. (1970) 2 Cal. 3d 964, 973, 88 Cal. Rptr. 202, 471 P.2d 1002* ; *City of Anaheim v. Workers' Comp. Appeals Bd. (1982) 128 Cal. App. 3d 200, 206, 180 Cal. Rptr. 132*

[b] Constitutionality

Barring death benefits pursuant to compromise and release [*Lab. Code § 5000(b)*] as not depriving dependents of constitutional right, because contingent rights to such benefits derive exclusively from statute. *Sumner v. Workers' Comp. Appeals Bd. (1983) 33 Cal. 3d 965, 969-970, 191 Cal. Rptr. 811, 663 P.2d 534*

Although *Lab. Code § 5000(b)*, providing that dependents have no interest in injured employee's claim, which employee may not release by compromise, does not deny due process or equal protection of laws, dismissal of application for death benefits before responsive pleadings have been filed as precipitous when affirmative defense of release has not yet been raised and might be avoided. *Johnson v. Workers' Comp. Appeals Bd. (1970) 2 Cal. 3d 964, 974-975, 88 Cal. Rptr. 202, 471 P.2d 1002*

Lab. Code § 5000(b), conferring on injured employee power to compromise dependents' claims to death benefits, as not denying dependent due process of law or equal protection of laws. *Sumner v. Workers' Comp. Appeals Bd. (1983) 33 Cal. 3d 965, 969-970, 191 Cal. Rptr. 811, 663 P.2d 534* ; *Johnson v. Workers' Comp. Appeals Bd. (1970) 2 Cal. 3d 964, 970-972, 88 Cal. Rptr. 202, 471 P.2d 1002*

[c] Effect

Standard language of preprinted WCAB Form 15, used in settling workers' compensation claims, releases only those claims within scope of workers' compensation system and does not apply to claims asserted in separate civil actions, and extrinsic evidence is not admissible to show that preprinted form applies also to claims outside workers' compensation system. *Claxton v. Waters (2004) 34 Cal. 4th 367, 376-378, 18 Cal. Rptr. 3d 246, 96 P.3d 496*

Effect of compromise and release agreement on civil claims, when agreement contains attachment arguably relevant to civil claims, depends on whether employee has knowledge of potential claim against employer at time of executing general release in workers' compensation proceeding, but has not yet initiated litigation of that claim, in which case employee has burden of expressly excepting claim from release, and, absent this exception and absent contrary extrinsic evidence, court will enforce agreement's general language, releasing all claims, including civil claims. *Jefferson v. California Department of Youth Authority (2002) 28 Cal. 4th 299, 310, 121 Cal. Rptr. 2d 391, 48 P.3d 423*

Settlement of employee's workers' compensation claim via document that included language agreeing "to settle any and all claims" did not so clearly operate to settle that same employee's FEHA civil action arising from same alleged work-related incidents as to support dismissal of employee's civil action via summary judgment, pursuant to *Jefferson v. California Department of Youth Authority*. *Mitchell v. Union Central Life Ins. Co. (2004) 118 Cal. App. 4th 1331, 1341-1342, 13 Cal. Rptr. 3d 732*

Court of appeal followed *Jefferson v. California Department of Youth Authority* in concluding that employee's release of her workers' compensation claim against her employer, which released "all claims and causes of action" against employer, included release of employee's civil action under FEHA, when FEHA action had been filed prior to execution of release but employer had not yet been notified of that action. *Kohler v. Interstate Brands Corp. (2002) 103 Cal. App. 4th 1096, 1099-1102, 127 Cal. Rptr. 2d 366*

Appeals Board had insufficient medical evidence to determine whether res judicata effect of employee's compromise and release agreement for two pulmonary injuries due to asthma barred applicant's subsequent claim of injury due to asbestos exposure. *General Dynamics Corp. v. Workers' Comp. Appeals Bd. (1999) 71 Cal. App. 4th 624, 631, 83 Cal. Rptr. 2d 907*

Order approving compromise and release agreement as final judgment entitled to full res judicata effect when WCAB's jurisdiction to rescind, alter, or amend terminates on expiration of five years after date of injury. *Smith v. Workers' Comp. Appeals Bd. (1985) 168 Cal. App. 3d 1160, 1169-1170, 214 Cal. Rptr. 765*

Compromise and release agreement as determinative of rights of parties in dispute. *Burbank Studios v. Workers' Comp. Appeals Bd. (1982) 134 Cal. App. 3d 929, 935, 184 Cal. Rptr. 879*

Payment of compromise and release approved by WCAB as terminating liability of employer and insurance carrier on account of injury involved, including any liability for increased disability, unless order approving agreement is vacated for legal cause. *City of Anaheim v. Workers' Comp. Appeals Bd. (1982) 128 Cal. App. 3d 200, 206, 180 Cal. Rptr. 132*

Obvious purpose of *Lab. Code §§ 3859, 3860* as being to protect subrogation rights to which employer is legally entitled. *Garrett v. Shenson Meat Co. (1970) 5 Cal. App. 3d 69, 75-76, 85 Cal. Rptr. 65*

Compromise and release agreement between insurance carrier and employee covering ordinary compensation benefits as not defeating employee's claim for additional benefits predicated on serious and willful misconduct of employer. *Ray v. Industrial Acci. Com. (1956) 146 Cal. App. 2d 393, 397, 303 P.2d 793*

Compromise and release as releasing employer and its insurance carrier from liability but as having no effect on employee's right of action for malpractice for new and aggravated injury inflicted by physician in negligently treating employee's industrial injury. *Smith v. Coleman (1941) 46 Cal. App. 2d 507, 513, 116 P.2d 133*

[d] Setting Aside Agreement

Compromise and release agreement once approved as subject to being set aside only for good cause on petition to reopen demonstrating agreement was result of fraud, mistake, duress, or undue influence. *Draper v. Workers' Comp. Appeals Bd. (1983) 147 Cal. App. 3d 502, 507, 195 Cal. Rptr. 248*

Incompetency of employee at time of execution of compromise and release as ground for setting aside agreement. *Sun Indem. Co. v. Industrial Acci. Com. (1948) 85 Cal. App. 2d 171, 173, 176-177, 181, 192 P.2d 765*

[e] Subsequent Injury

Compromise and release agreement with regard to injury sustained at work as not barring claim for benefits for subsequent injury sustained in rehabilitation program in which worker participated because of first injury. *Rodgers v. Workers' Comp. Appeals Bd. (1985) 168 Cal. App. 3d 567, 575-576, 214 Cal. Rptr. 303*

[f] Vocational Rehabilitation Benefits

Despite *Lab. Code § 5100.6* (prohibiting settlement of rehabilitation benefits), employer's mandatory duty to provide rehabilitation benefits [*Lab. Code § 139.5(c)*] as subject to compromise and release when serious and good faith issue exists as to validity of claim that, if resolved against applicant, would result in denial of all benefits. *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (1983) 148 Cal. App. 3d 649, 652, 196 Cal. Rptr. 169*

[20] Contempt Proceedings

[a] In General

Legislature as having vested all judicial powers under Workers' Compensation Act in WCAB, including power to issue all necessary process in proceedings for contempt. *Crawford v. Workers' Comp. Appeals Bd. (1989) 213 Cal. App. 3d 156, 164, 259 Cal. Rptr. 414* (citing *Lab. Code §§ 111, 134*)

[b] Acts Constituting Contempt

Inexcusable failure to comply with rule of practice and procedure adopted by WCAB pursuant to statutory authorization pertaining to orderly conduct of proceedings before WCAB, such as *8 Cal. Code Reg. § 10606*, relating to medical reports, as constituting unlawful interference with WCAB's proceedings within meaning of *Code Civ. Proc. § 1209* and hence as constituting contempt. *Crawford v. Workers' Comp. Appeals Bd. (1989) 213 Cal. App. 3d 156, 169, 259 Cal. Rptr. 414*

[c] Indirect Contempt

Affidavit for indirect contempt as not required to state all facts on which WCAB relied in deciding to issue order to show cause regarding contempt, but as required only to make prima facie showing of elements of contempt; elements of

contempt as being that court made lawful order, person cited for contempt had knowledge or notice of order, and person was able to comply, yet willfully disobeyed order; support for order to show cause re contempt as permitted to be provided by combination of documents, and supporting documents as required only to make prima facie showing of contemptuous conduct. *Crawford v. Workers' Comp. Appeals Bd. (1989) 213 Cal. App. 3d 156, 169-170, 259 Cal. Rptr. 414*

Under *Code Civ. Proc. § 1211.5*, defect or imperfection in form that does not prejudice substantial right of accused on merits as not affecting trial, order, judgment, or other proceeding; order or judgment of conviction as not to be set aside for pleading error in affidavit or statement of facts, unless, after examining entire case, including evidence, court finds that error complained of has resulted in miscarriage of justice. *Crawford v. Workers' Comp. Appeals Bd. (1989) 213 Cal. App. 3d 156, 169-170, 259 Cal. Rptr. 414*

[d] Nature of Proceeding

Although contempt proceedings are quasi-criminal in nature, purpose of such proceedings as being to protect dignity, authority, or process of court or tribunal and to provide court or tribunal with means of controlling its proceedings; thus, WCAB as having inherent power to exercise reasonable control over all proceedings before it to ensure orderly administration of justice, to maintain its dignity and authority, and to punish acts that embarrass or obstruct it in discharge of its duties. *Crawford v. Workers' Comp. Appeals Bd. (1989) 213 Cal. App. 3d 156, 165, 259 Cal. Rptr. 414*

[e] Procedure

In proceedings for contempt, WCAB as required to follow applicable provisions of *Code Civ. Proc. § 1209 et seq.*, and, when alleged contempt is not committed in WCAB's presence, contempt proceedings as being in nature of indirect contempt; in such case, WCAB as required to proceed by way of order to show cause supported by affidavit [*Code Civ. Proc. § 1212*], and alleged contemner as entitled to appear before and be heard by WCAB. *Crawford v. Workers' Comp. Appeals Bd. (1989) 213 Cal. App. 3d 156, 164*

[f] Statutes of Limitations

Neither *Penal Code § 802* (imposing one-year limitation on prosecution of offense not punishable by death or imprisonment in state prison) nor *Code Civ. Proc. § 340* (imposing one-year limitation on action on statute for forfeiture or penalty to people of this state) as applying to contempt proceeding by WCAB against medical doctor for willful violation of *8 Cal. Code Reg. § 10606* (requiring physician who submits medical report in workers' compensation case to disclose name of any person other than reporting physician who participated in taking medical history); whether WCAB loses jurisdiction of proceeding by passage of time as question of fact dependent on whether delay in prosecution was unreasonable and to contemner's prejudice, and contemner as having burden of demonstrating that delay was unreasonable and prejudiced his or her defense. *Crawford v. Workers' Comp. Appeals Bd. (1989) 213 Cal. App. 3d 156, 165-167, 259 Cal. Rptr. 414*

[21] Contract of Hire

Contract for hire was formed in California under *Lab. Code §§ 3600.5* and *5305* when professional baseball player signed contract in California accepting offer from out of state team, and approval of baseball Commissioner was a condition subsequent to employment. *Bowen v. Workers' Comp. Appeals Bd. (1999) 73 Cal. App. 4th 15, 26-27, 86 Cal. Rptr. 2d 95*

Consideration other than wages as supporting contract of hire within meaning of *Lab. Code § 3351* (defining "employee"). *Morales v. Workers' Comp. Appeals Bd. (1986) 186 Cal. App. 3d 283, 289, 230 Cal. Rptr. 575*

[21A] Costs

Appeals Board has discretion to award costs, pursuant to *Lab. Code § 5811*, for vocational rehabilitation expert's report, regardless of whether report is admissible. *Barr v. Workers' Comp. Appeals Bd. (2008) 164 Cal. App. 4th 173, 176, 179, 181, 78 Cal. Rptr. 3d 732*

[22] Credit Against Compensation

Discussion of extent to which city fireman's disability pension, partially funded by employer, can be offset against workers' compensation. *Symington v. City of Albany (1971) 5 Cal. 3d 23, 26, 28-33, 95 Cal. Rptr. 206, 485 P.2d 270*

Employer's challenge to employee's claim of ongoing temporary disability must be made within 20 days of receipt of physician's report of that disability, so that in present case employer's claim of credit against permanent disability payments was allowable only for temporary disability payments made after June 2006, which was last date for which employee's treating physician reported that he was temporarily disabled, and any claim of credit for temporary disability payments made prior to that date was foreclosed by *Lab. Code § 4062(a)*. *J.C. Penney Co. v. Workers' Comp. Appeals Bd. (2009) 175 Cal. App. 4th 818, 829, 96 Cal. Rptr. 3d 469*

Pursuant to *Lab. Code § 3861*, employer was entitled to credit against future workers' compensation benefits to be paid to employee in amount of net settlement of employee's action against third-party tortfeasor, paid to employee by CIGA, when CIGA was obligated under *Ins. Code §§ 1063.1(c)(1)* and *1063.2(a)* to pay settlement, regardless of whether employer was entitled to credit, and, since CIGA's assets were unaffected by grant or denial of credit to employer, if credit were denied, employee would be in better position than if third party tortfeasor's insurer had remained solvent. *Baur v. Workers' Comp. Appeals Bd. (2009) 176 Cal. App. 4th 1260, 1264-1267, 98 Cal. Rptr. 3d 493*

Employer as entitled to credit pursuant to *Lab. Code § 4909* against employee's permanent disability indemnity when employee received benefits under employer's sickness and accident disability plan; employer's committee as determining that plan benefits were of same character and function as workers' compensation benefits and obligating plan to provide all benefits contemplated by workers'compensation law. *Appleby v. Workers' Comp. Appeals Bd. (1994) 27 Cal. App. 4th 184, 192-193, 32 Cal. Rptr. 2d 375*

If industrially injured public safety worker entitled to leave at full salary for up to one year in lieu of temporary disability payments under *Lab. Code § 4850* receives earnings from self-employment during leave, employer as entitled to credit such earnings against its obligation to pay full salary. *Kosowski v. Workers' Comp. Appeals Bd. (1985) 170 Cal. App. 3d 632, 634, 216 Cal. Rptr. 280*

[23] Death Benefits

Because employer had paid deceased employee's mother/heir death benefits pursuant to *Lab. Code § 4702(a)(6)(B)*, before ceasing such payments following decision in *Six Flags, Inc. v. W.C.A.B.* that declared that statute unconstitutional, Death Without Dependents Unit was not entitled to be paid any death benefit. *City of Los Angeles v. Workers' Comp. Appeals Bd. (2009) 179 Cal. App. 4th 134, 146151, 101 Cal. Rptr. 3d 513*

Lab. Code § 4702(a)(6)(B), which provides that, when worker without dependents suffers fatal industrial injury,

employer must pay $250,000 to deceased worker's estate as workers' compensation death benefit, is unconstitutional because constitutional enabling provision, *Cal. Const., art. XIV, § 4*, does not identify estates as class of beneficiaries entitled to workers' compensation death benefits. *Six Flags, Inc. v. Workers' Comp. Appeals Bd. (2006) 145 Cal. App. 4th 91, 93-94, 51 Cal. Rptr. 3d 377*

Employer as required to pay death benefits to Department of Industrial Relations under *Lab. Code § 4706.5* only when deceased employee left no dependents, total or partial. *Atlantic Richfield Co. v. Workers' Comp. Appeals Bd. (1982) 31 Cal. 3d 715, 727, 182 Cal. Rptr. 778, 644 P.2d 1257* (disapproving *Department of Industrail Relations v. Workers' Comp. Appeals Bd. (1979) 94 Cal. App. 3d 72, 79, 156 Cal. Rptr. 183*); *Travelers Ins. Co. v. Workers' Comp. Appeals Bd. (1982) 138 Cal. App. 3d 244, 246, 187 Cal. Rptr. 838*)

Lab. Code § 4707 as precluding award under workers' compensation law of death benefit to decedent's minor child when decedent's widow received special death benefit under *Gov. Code § 21363* and former *Gov. Code § 21364* (*now Gov. Code § 21541*) (Public Employees' Retirement Law). *Department of Corrections v. Workers Comp. Appeals Bd. (1979) 23 Cal. 3d 197, 204, 152 Cal. Rptr. 345, 589 P.2d 853*

Deceased employee's grandchild qualifying as "totally dependent minor child" as entitled to special death benefit under *Lab. Code § 4703.5*; grandchild as having resided with grandparents since birth and employee's widow as having continued to support grandchild after employee's death. *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1993) 19 Cal. App. 4th 1645, 1650-1651, 24 Cal. Rptr. 2d 67*

Dependent's right to statutory death benefits under workers' compensation law as not derived from rights of deceased employee, but as independentand severable from employee's claim for disability compensation. *Berkebile v. Workers' Comp. Appeals Bd. (1983) 144 Cal. App. 3d 940, 944, 193 Cal. Rptr. 12*

[24] Declaration of Readiness

WCAB as having erred in reversing decision of WCJ setting aside Rehabilitation Bureau's decision terminating workers' compensation applicant's rehabilitation benefits without hearing and in reinstating bureau's decision based on procedural technicality that worker's declaration of readiness did not meet formal requirements for filing appeal from bureau decision; workers' compensation pleadings and proceedings as informal and not to be utilized to preclude WCAB jurisdiction in view of *Cal. Const., art. XIV, § 4*, and *Lab. Code § 3202*, mandating that workers' compensation laws be liberally construed in favor of affording substantial justice to injured workers. *Rivera v. Workers' Comp. Appeals Bd. (1987) 190 Cal. App. 3d 1452, 1456, 236 Cal. Rptr. 28*

[25] Dependents

[a] In General

Dependent's right to statutory death benefits as not derived from rights of deceased employee, but as independent and severable from employee's claim for disability compensation; amount of death benefits as fixed by statute and as not varying with employee's earnings; size of benefits as depending on relationship and extent of dependency. *Wings West Airlines v. Workers' Comp. Appeals Bd. (1986) 187 Cal. App. 3d 1047, 1051, 232 Cal. Rptr. 343*

True test of dependency in fact as not whether dependent was compelled to rely on deceased employee's contributions for bare necessities of life, but whether dependent relied on contributions for support according to his or her accustomed mode of living; rule of liberal construction as not to be used to relieve party from meeting evidentiary burden of proving dependency by preponderance of the evidence. *Wings West Airlines v. Workers' Comp. Appeals Bd. (1986) 187 Cal. App. 3d 1047, 1051-1052, 232 Cal. Rptr. 343*

Mere promise of future support as not, as a rule, a basis for a dependency finding, except when circumstances indicate a bona fide assumption of responsibility for support without opportunity to make contributions prior to the injury. *Wings West Airlines v. Workers' Comp. Appeals Bd. (1986) 187 Cal. App. 3d 1047, 1052, 232 Cal. Rptr. 343*

WCAB as erring in failing to make finding as to dependency status of live-in associate and alleged dependent of deputy district attorney who had been found to be 100 percent disabled and died following short hospitalization caused by suicide attempt because person who is found not to be dependent is not entitled to any award. *Donovan v. Workers' Comp. Appeals Bd. (1982) 138 Cal. App. 3d 323, 328, 187 Cal. Rptr. 869*

Burden of proof as to dependency of deceased workers' parents as on state when parents and state maintain conflicting positions on whether parents were dependent, and therefore beneficiaries, because state recovers benefits if there are no dependents. *State of California v. Workers' Co. Appeals Bd. (1980) 101 Cal. App. 3d 673, 678, 161 Cal. Rptr. 821*

[b] Partial Dependents

Computing amount of award to partial dependent pursuant to *Lab. Code § 4702* when both spouses were employed prior to death of one spouse. *Atlantic Richfield Co. v. Workers' Comp. Appeals Bd. (1982) 31 Cal. 3d 715, 719-723, 182 Cal. Rptr. 778, 644 P.2d 1257*

For parents to be considered "partial dependents" of adult children living at home, deceased adult child had to have been providing net financial benefit to household, so that when unrebutted testimony indicated monthly cost of adult child's food exceeded child's contribution to household, child's monthly payment, while making him less dependent on parents, did not make them dependent on him, with consequence that parents were not eligible to receive death benefits. *Smith v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 560, 568-570, 117 Cal. Rptr. 2d 420*

In computing death benefits to partially dependent surviving spouse under *Lab. Code § 4702*, expenses related to the community's standard of living as relevant, whereas expenses personal to decedent as not relevant; decedent's food, clothing, and transportation costs related to employment as spent for benefit of community and properly apportioned to community and support of surviving spouse rather than to personal use. *Lynch v. Workers' Comp. Appeals Bd. (1985) 164 Cal. App. 3d 594, 598-599, 210 Cal. Rptr. 589*

Partial dependents as receiving death benefits only when decedent's only dependents are partial dependents; total dependents as receiving entire death benefit to exclusion of partial dependents, who receive nothing. *Travelers Ins. Co. v. Workers' Comp. Appeals Bd. (1982) 138 Cal. App. 3d 244, 247, 187 Cal. Rptr. 838*

[c] Putative Spouse

Putative spouse as entitled to widow's benefits under *Lab. Code §§ 4702* and *3503*. *Neureither v. Workmen's Comp. App. Bd. (1971) 15 Cal. App. 3d 429, 433-435, 93 Cal. Rptr. 162* ; *Brennfleck v. Workmen's Comp. Appeals Bd. (1970) 3 Cal. App. 3d 666, 672, 84 Cal. Rptr. 50* ; *Brennfleck v. Workmen's Comp. App. Bd. (1968) 265 Cal. App. 2d 738, 743, 71 Cal. Rptr. 525*

[26] Disability Defined

Disability, under workers' compensation law, as connoting an inability to work. *Herrera v. Workers' Comp. Appeals Bd. (1969) 71 Cal. 2d 254, 257, 78 Cal. Rptr. 497, 455 P.2d 425*

Temporary total disability and temporary partial disability distinguished, and payment for each. *Herrera v. Workers' Comp. Appeals Bd. (1969) 71 Cal. 2d 254, 257, 78 Cal. Rptr. 497, 455 P.2d 425* ; *Moore v. American United Life Ins. Co. (1984) 150 Cal. App. 3d 610, 629, 197 Cal. Rptr. 878*

Disability as meaning an impairment of bodily functions that results in impairment of earning capacity. *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (1984) 153 Cal. App. 3d 327, 336, 200 Cal. Rptr. 219*

Disability as having two elements: (1) actual incapacity to perform tasks usually encountered in one's employment and wage loss resulting therefrom and (2) physical impairment of body. *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (1984) 153 Cal. App. 3d 327, 336 n.14, 200 Cal. Rptr. 219* (citing *Perry v. Workers' Comp. Appeals Bd. (1977) 66 Cal. App. 3d 887, 890, 136 Cal. Rptr. 309*)

Permanent disability in workers' compensation as disability that causes impairment of earning capacity, impairment of normal use of member, or competitive handicap in open labor market. *Winn v. Board of Pension Commissioners (1983) 149 Cal. App. 3d 532, 539, 197 Cal. Rptr. 111*

[27] Discovery

Parties' duty to disclose all available evidence at MSC supersedes WCAB's duty to develop record, so that employee's attorney's tactical decision at MSC not to disclose certain medical records deprived WCAB of power to order WCJ to admit those records. *Telles Transport, Inc. v. Workers' Comp. Appeals Bd. (Zuniga) (2001) 92 Cal. App. 4th 1159, 112 Cal. Rptr. 2d 540*

WCJ was permitted to develop record by admitting evidence obtained after trial and, thus, not disclosed pursuant to *Lab. Code § 5502(d)(3)*, when due process required that such evidence be admitted in the interest of substantial justice to rebut unanticipated trial testimony. *Kuykendall v. Workers' Comp. Appeals Bd. (2000) 79 Cal. App. 4th 396, 399, 406, 94 Cal. Rptr. 2d 130*

WCAB abused its discretion by admitting doctor's report and allowing witness to testify at trial, when neither were disclosed at MSC and employee provided no explanation for failing to disclose evidence; absence of prejudice to opposing party does not affect admissibility of undisclosed evidence under *Lab. Code § 5502(d)(3)*; parties' duty to disclose evidence under *Lab. Code § 5502(d)(3)* can not be circumvented by WCAB's duty to develop record under *Lab. Code §§ 5701* or *5906*. *San Bernardino Community Hospital v. Workers' Comp. Appeals Bd. (1999) 74 Cal. App. 4th 928, 932-935, 88 Cal. Rptr. 2d 516*

WCJs have authority under *Lab. Code § 5310* to hear discovery disputes and make orders regarding such disputes. *Allison v. Workers' Comp. Appeals Bd. (1999) 72 Cal. App. 4th 654, 664, 84 Cal. Rptr. 2d 915*

Employee did not entirely waive doctor/patient privilege by filing workers' compensation claim for cumulative injury to her wrists from February 1996 through June 1997; WCJ's discovery order allowing employee to be questioned regarding her hospitalization history prior to 1965 violated doctor/patient privilege and was overbroad. *Allison v. Workers' Comp. Appeals Bd. (1999) 72 Cal. App. 4th 654, 661, 84 Cal. Rptr. 2d 915*

WCJ improperly violated mandatory requirement under *Lab. Code § 5502(d)(3)* that discovery be closed at MSC by allowing record to remain open so employee could obtain supplemental QME report; supplemental report obtained after MSC was inadmissible and Board's temporary disability award based on report was annulled. *County of Sacramento v. Worker's Comp. Appeals Bd. (1999) 68 Cal. App. 4th 1429, 1433-1434, 81 Cal. Rptr. 2d 266*

[28] Discrimination Against Injured Workers, Claimants, Participants

Employee made no prima facie showing of violation of *Lab. Code § 132a* when his employer refused to pay him temporary disability indemnity for time spent away from work attending medical treatment appointments, when employee was permanent and stationary after his industrial injury, had returned to work, and received medical treatment award, and when employee failed to show right to prevent his employer from requiring him to use sick leave and/or vacation leave while attending these medical appointments. *Department of Rehabilitation v. W.C.A.B. (Lauher) (2003) 30 Cal. 4th 1281, 1297, 1301, 135 Cal. Rptr. 2d 665, 70 P.3d 1076*

WCAB may and must, when criteria of *Civ. Code § 3287* are met, add interest from the dates such wages and benefits would have become due had the employer not acted in violation of *Lab. Code § 132a*; although *Lab. Code § 132a* does not itself expressly authorize addition of prejudgment interest to award of backpay, *Civ. Code § 3287* requires such interest on damages due on a particular date, including awards of back pay, when they are certain or capable of being made certain by calculation. *Currie v. Workers' Comp. Appeals Bd. (2001) 24 Cal. 4th 1109, 104 Cal. Rptr. 2d 392, 17 P.3d 749*

Employee did not make prima facie showing of discrimination in violation of *Lab. Code § 132a*, when employee sustained industrial injury and was taken off work by his treating physician, and reports and releases to return to work from treating physician and agreed medical evaluator were unclear and ambiguous regarding employee's ability to return to his usual and customary duties. *Gelson's Markets v. Workers' Comp. Appeals Bd. (Fowler) (2009) 179 Cal. App. 4th 201, 209-210, 101 Cal. Rptr. 3d 548*

Employee's claim alleging wrongful termination in retaliation for filing workers' compensation claim failed because employer terminated employee's employment for legitimate, nondiscriminatory reason, i.e., management's loss of confidence in employee. *Arteaga v. Brink's, Inc. (2008) 163 Cal. App. 4th 327, 356-357, 77 Cal. Rptr. 3d 654*

Employer's policy regarding "cash out" payments of excess accumulated vacation hours to sheriff's deputies who were not on *Lab. Code § 4850* leave as result of industrial injuries, as opposed to its policy regarding such payments to deputies who were on such leave, held to discriminate against latter group in violation of *Lab. Code §§ 4850* and *132a*. *Los Angeles County Professional Peace Officers' Association v. County of Los Angeles (2008) 165 Cal. App. 4th 63, 67-72, 80 Cal. Rptr. 3d 572*

Employer discriminated against its employee, in violation of *Lab. Code § 132a*, by requiring employee, who had returned to work following industrial injuries, to use earned vacation time rather than sick leave to attend medical appointments needed to care for those industrial injuries, while permitting employees with non-industrial injuries to use their sick leave for medical appointments. *Andersen v. W.C.A.B. (2007) 149 Cal. App. 4th 1369, 1376-1380, 57 Cal. Rptr. 3d 839*

Employer discriminated against employee in violation of *Lab. Code § 132a*, when evidence showed that employer believed employee was faking disability, that employer wanted to dismiss employee since employee returned to work on light duty, that employer's evidence of customer complaints against employee was not persuasive, and that employer terminated employee in retaliation for filing workers' compensation claim. *Crown Appliance v. Workers' Comp. Appeals Bd. (2004) 115 Cal. App. 4th 620, 9 Cal. Rptr. 3d 415*

Lab. Code § 132a is not exclusive remedy for discrimination due to disability from work related injury. *City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 1156, 77 Cal. Rptr. 2d 445, 959 P.2d 752* (overruling *Portillo v. G. T. Price Products, Inc. (1982) 131 Cal. App. 3d 285, 182 Cal. Rptr. 291* , and other cases that held *Lab. Code § 132a* was exclusive remedy for disability discrimination)

Injured workers discriminated against because of disability from work related injury may bring claims before Workers' Compensation Appeals Board under *Lab. Code § 132a* and actions to state court seeking remedies under Fair

Employment and Housing Act and common-law wrongful discharge theory. *City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 1158, 77 Cal. Rptr. 2d 445, 959 P.2d 752* (overruling *Portillo v. G. T. Price Products, Inc. (1982) 131 Cal. App. 3d 285, 182 Cal. Rptr. 291*)

Employer's termination of employee's seniority rights and, ultimately, his employment because of employee's absence from his job as result of industrial injury as unlawful discrimination within meaning of *Lab. Code § 132a*, thus triggering application of increased award provisions of *Lab. Code § 4553*. *Judson Steel Corp. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 658, 661-662, 666-668, 150 Cal. Rptr. 250, 586 P.2d 564*

Employer as not permitted to defend discriminatory employment practice proscribed by *Lab. Code § 132a* (discrimination against employee for filing or making known intention to file workers' compensation claim) on basis of provisions of collective bargaining agreement. *Judson Steel Corp. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 658, 665 n.5, 150 Cal. Rptr. 250, 586 P.2d 564*

WCAB as properly concluding that licensee of residential care facility was employee's employer for purposes of *Lab. Code § 132a* liability when licensee failed to object to its status as employer despite being served with applications, notices, liens and orders and having previously stipulated tobeing the employer; management company that began operating facility after employee's termination as not liable for *Lab. Code § 132a* remedies because, although management company participated in WCAB proceedings, record did not disclose information regarding circumstances of management transfer or whether management company knew of employee's pending claim at time of transfer. *Superior Care Facilities v. Workers' Comp. Appeals Bd. (1994) 27 Cal. App. 4th 1015, 1023, 1029, 32 Cal. Rptr. 2d 918*

Reinstatement of employee under *Lab. Code § 132a* as probationary rather than permanent as proper when no finding that employee performed or could perform job duties up to standards required by employer and no finding that, but for employee's injury, she would have successfully completed probationary period; Board's refusal to award lost wages and benefits as proper when no finding that employee sought or was ready, willing, and able to maintain employment. *Dyer v. Workers' Comp. Appeals Bd. (1994) 22 Cal. App. 4th 1376, 1384-1386, 28 Cal. Rptr. 2d 30*

Public employer's failure to award safety incentive bonus to worker due to time lost on account of work-related injury as not illegal discrimination in violation of *Lab. Code § 132a* (prohibiting discrimination against workers injured in course of their employment); *Gov. Code § 19994.20*, under which safety incentive program was adopted and which provides for implementation of accident prevention incentive award programs the purpose of which is to reduce number of on-the-job injuries to, and use of sick leave by, state employees, as dealing only with state employees and their collective bargaining agreements, and, being the more specific statute, as prevailing over *Lab. Code § 132a* in any conflict between them. *Stemler v. Workers' Comp. Appeals Bd. (1988) 204 Cal. App. 3d 577, 581-582, 251 Cal. Rptr. 364*

Lab. Code § 132a, prohibiting discrimination by employers against workers who are injured in course and scope of their employment, as serving remedial function by providing compensation to aggrieved worker for discrimination incurred as result of worker's work-related injury; employer as not permitted to discharge employee absent from job as result of work-related injury. *Potter v. Arizona So. Coach Lines, Inc. (1988) 202 Cal. App. 3d 126, 131, 133, 248 Cal. Rptr. 284*

Construction of *Lab. Code § 132a* (policy opposing discrimination against workers injured in course and scope of their employment). *St. Cyr v. Workers' Comp. Appeals Bd. (1987) 196 Cal. App. 3d 468, 471-473, 243 Cal. Rptr. 1*

Penalty petition for discrimination under *Lab. Code § 132a* (policy opposing discrimination against workers injured in course and scope of their employment) filed within one year from termination date, as opposed to date of notice of termination, as timely. *St. Cyr v. Workers' Comp. Appeals Bd. (1987) 196 Cal. App. 3d 468, 473, 243 Cal. Rptr. 1*

"Discriminate" as meaning to act or to fail to act (when there is a duty to do so), with consequence that some adverse result ensues. *Leamon v. Workers' Comp. Appeals Bd. (1987) 190 Cal. App. 3d 1409, 1417, 235 Cal. Rptr. 912*

Before employer's action against industrially injured employee may be deemed discriminatory under *Lab. Code § 132a*, employer as required to have beenaware of fact of industrial injury at time of its action. *Leamon v. Workers' Comp. Appeals Bd. (1987) 190 Cal. App. 3d 1409, 1414, 235 Cal. Rptr. 912*

Although *Lab. Code § 132a* prohibits discrimination against employee based on employee's industrial disability or receipt of workers' compensation award, WCAB's award to employee, consisting of additional service credits and increased compensation, on asserted basis that employer discriminated against employee in that it refused to grant additional pension service credits for years during which she did not work as result of injury, as preempted by federal Employee Retirement Income Security Act of 1974 (ERISA) (*29 U.S.C. §§ 1001-1461*) and federal regulations promulgated pursuant thereto (*see 29 C.F.R. § 2530.200b-2(a)(2)*), which provide that employer may refuse pension service credits for year during which employee actually worked less than 1000 hours for variety of reasons, including employee's industrially caused disability. *Pacific Bell v. Workers' Comp. Appeals. Bd. (1986) 186 Cal. App. 3d 1603, 1605-1606, 1614-1615, 231 Cal. Rptr. 484*

[29] Dismissals

Circumstances under which dismissal is permitted. *Roth v. Workmen's Comp. Appeals Bd. (1971) 20 Cal. App. 3d 452, 458-460, 97 Cal. Rptr. 605*

[30] Employees

Extending workers' compensation coverage to persons not within general definition of "employee" on terms different from those generally provided, as not violating state constitutional provisions regarding classification when reasonable basis for distinctions may be found. *Mathews v. Workmen's Comp. Appeals Bd. (1972) 6 Cal. 3d 719, 739, 100 Cal. Rptr. 301, 493 P.2d 1165*

College student, injured while enrolled in animal husbandry class and working for non-profit foundation on commercial cattle breeding project, was not employee, because student had paid college for class credit, did not receive wages (but shared in profits of project), project was created exclusively for educational purpose, and student was not rendering service for college. *Land v. Workers' Comp. Appeals Bd. (2002) 102 Cal. App. 4th 491, 496-497, 125 Cal. Rptr. 2d 432*

Juror was considered an "employee" of defendant County within the meaning of the Workers' Compensation Act, since the County exercised a degree of control over the juror's work environment and benefitted from the juror's services, thereby giving the County responsibility to insure against injuries the juror may have sustained while providing services to the County. *Waggener v. County of Los Angeles (1995) 39 Cal. App. 4th 1078, 1083, 46 Cal. Rptr. 2d 141*

Doorman as employee of condominium homeowners' association but not of individual homeowners who had no ability to control or discharge him or otherwise exercise the control of an employer over an employee. *Holmes v. Roth (1992) 11 Cal. App. 4th 931, 936-937, 14 Cal. Rptr. 2d 315*

No special test, fact, or circumstance as existing that conclusively defines "employee" for all purposes; question of whether worker is an employee within meaning of workers' compensation law as one of mixed law and factto be proved like any other question; question as one of fact when facts are in dispute and as one of law only when but one inference can reasonably be drawn from facts. *Spradlin v. Cox (1988) 201 Cal. App. 3d 799, 806, 247 Cal. Rptr. 347*

Although person who renders service to another is presumed to be "employee" [*see Lab. Code § 3357*], presumption as overcome if essential contract of hire, express or implied, is not present. *Spradlin v. Cox (1988) 201 Cal. App. 3d 799, 807, 247 Cal. Rptr. 347*

Question of whether person is employee as one of fact, of mixed law and fact, or of law only; if facts are undisputed, question as one of law and court of appeal may independently review those facts to determine correct answer. *Barragan v. Workers' Comp. Appeals Bd. (1987) 195 Cal. App. 3d 637, 642, 240 Cal. Rptr. 811*

Whether worker is an employee within meaning of Workers' Compensation Law as mixed question of law and fact to be proved like any other question; whether worker is employee as question of fact when facts are in dispute and as question of law only when but one inference can reasonably be drawn from facts. *Gigax v. Ralston Purina Co. (1982) 136 Cal. App. 3d 591, 599, 186 Cal. Rptr. 395*

When facts of employment are not disputed, whether worker is within covered employment relationship as question of law. *In-Home Supportive Services v. Workers' Comp. Appeals Bd. (1984) 152 Cal. App. 3d 720, 729, 199 Cal. Rptr. 697* ; *Johnson v. Workmen's Comp. Appeals Bd. (1974) 41 Cal. App. 3d 318, 320, 115 Cal. Rptr. 871*

[31] Employment Contract

Traditional features of employment contract as being (1) consent of parties, (2) consideration for services rendered, and (3) control by employer over employee; although these common law contract requirements are not to be rigidly applied, consensual relationship between worker and alleged employer as nevertheless indispensable prerequisite to existence of employment contract under *Lab. Code § 3551*. *Spradlin v. Cox (1988) 201 Cal. App. 3d 799, 807, 247 Cal. Rptr. 347* ; *Barragan v. Workers' Comp. Appeals Bd. (1987) 195 Cal. App. 3d 637, 643, 240 Cal. Rptr. 811* (noting that other cases have held that control by employer is most important factor in establishing employment relation for purposes of workers' compensation law)

[32] Employment Relationship

Superior Court correctly denied employers' association's requested declaratory relief to invalidate precedential decision by Unemployment Insurance Appeals Board that upheld Employment Development Department (EDD) assessment of unemployment insurance employer contributions and penalties against courier service, when EDD had found that drivers for courier service were employees, not independent contractors. *Messenger Courier Association of the Americas v. California Unemployment Insurance Appeals Board (2009) 175 Cal. App. 4th 1074, 1089-1096, 96 Cal. Rptr. 3d 797*

Administrative record supported conclusion that newspaper carriers were employees for purposes of the workers' compensation law, not independent contractors, pursuant to analysis set forth in *S.G. Borello & Sons v. Department of Industrial Relations. Antelope Valley Press v. Steve Poizner as Insurance Commissioner (2008) 162 Cal. App. 4th 839, 842-843, 852-856, 75 Cal. Rptr. 3d 887*

Plaintiff, injured while repairing defendant's roof, was defendant's employee pursuant to *Lab. Code § 2750.5*, which operated to allow plaintiff's lawsuit alleging defendant's negligence, despite fact that plaintiff, by virtue of *Lab. Code § 3352(h)*, was not employee of defendant for workers' compensation purposes, when court of appeal found that plaintiff was not licensed roofing contractor and, therefore, not independent contractor. *Mendoza v. Brodeur (2006) 142 Cal. App. 4th 72, 79-81, 47 Cal. Rptr. 3d 310*

Lab. Code §§ 3351(d) and *3352(h)* were only relevant statutes for defining "employee" when issue was whether injured

worker was residential employee of homeowners, because *Lab. Code § 3715(b)*, relied on by Appeals Board in present case, was inapplicable, since that statute applied to only uninsured homeowners, whereas homeowners in present case were insured, so that injured worker was not "employee" and was not entitled to workers' compensation benefits. *Cal. State Auto. Ass'n Inter-Ins. Bureau v. W.C.A.B. (Hestehauge) (2006) 137 Cal. App. 4th 1040, 1044-1048, 40 Cal. Rptr. 3d 743*

Injured worker of unlicensed contractor hired to trim homeowner's tree could not maintain civil tort action against homeowner that was grounded on homeowner's alleged violation of Cal-OSHA tree-trimming safety regulations. *Fernandez v. Lawson (2003) 31 Cal. 4th 31, 36-38, 1 Cal. Rptr. 3d 422, 71 P.3d 779*

Injured worker, employed by unlicensed contractor to repair homeowner's roof, and who had not worked on that job for statutorily required number of hours to qualify as employee of homeowner, nevertheless remained employee of contractor for purposes of assigning liability for injury, so that worker was eligible to receive benefits from Uninsured Employers Fund [now called theUninsured Employers Benefits Trust Fund] and to pursue tort remedies against contractor in civil court. *Cedillo v. Workers' Comp. Appeals Bd. (2003) 106 Cal. App. 4th 227, 232, 236-237, 130 Cal. Rptr. 2d 581*

Newspaper carrier injured in traffic accident while delivering newspapers was considered employee entitled to workers' compensation benefits when employer, as a matter of law, failed to demonstrate that carrier was independent contractor excluded from coverage. *Gonzalez v. Workers' Comp. Appeals Bd. (1996) 46 Cal. App. 4th 1584, 1594, 54 Cal. Rptr. 2d 308*

Taxicab company as employer of injured cabdriver for purposes of workers' compensation notwithstanding agreement between driver and company that purportedly established a lessor-lessee relationship; company as exercising all necessary control over driver's work and driver as therefore not independent contractor. *Yellow Cab Cooperative, Inc. v. Workers' Comp. Appeals Bd. (1991) 226 Cal. App. 3d 1288, 1297-1300, 277 Cal. Rptr. 434*

If facts of employment are not disputed, existence of relationship covered by worker's compensation as question of law. *Johnson v. Berkofsky-Barret Productions, Inc. (1989) 211 Cal. App. 3d 1067, 1071, 260 Cal. Rptr. 67*

Factors considered in determining whether worker is employee and covered by workers' compensation law. *Johnson v. Berkofsky-Barret Productions, Inc. (1989) 211 Cal. App. 3d 1067, 1072-1073, 260 Cal. Rptr. 67*

Question of whether employment relationship exists as generally a question of fact reserved for trier of fact, and this as remaining true if evidence, though not in conflict, permits conflicting inferences; but if neither evidence nor inferences are in conflict, question of whether employment relationship exists as becoming question of law, which may be resolved by summary judgment. *Riley v. Southwest Marine, Inc. (1988) 203 Cal. App. 3d 1242, 1248, 250 Cal. Rptr. 718*

Employer-employee relationship as required to exist to bring workers' compensation law into effect; whether or not employment relationship exists as usually one of fact for determination of trier of fact, particularly when facts as to employment relationship are in conflict. *Spradlin v. Cox (1988) 201 Cal. App. 3d 799, 806, 247 Cal. Rptr. 347*

Although it may be true that provisions of workers' compensation law are to beliberally construed in favor of awarding benefits even when it may be to advantage of particular plaintiff to avoid them and seek remedy at law, courts as generally being more exacting in requiring proof of employment relationship when such relationship is asserted as defense by employer to common law action. *Spradlin v. Cox (1988) 201 Cal. App. 3d 799, 807-808, 247 Cal. Rptr. 347*

Right to control manner in which worker performed work as preeminent factor in determining existence of employer-employee relationship. *Spradlin v. Cox (1988) 201 Cal. App. 3d 799, 808 n.3, 247 Cal. Rptr. 347*

Employment relationship as existing between hospital and college student who was performing services for hospital as part of externship program that was required for her degree when objective actions of hospital and student indicated they both intended arrangement whereby student would perform services for hospital in exchange for training and instruction by hospital to enable her to earn her degree; monetary consideration as not required tocreate contract. *Barragan v. Workers' Comp. Appeals Bd. (1987) 195 Cal. App. 3d 637, 643-648, 650-651, 240 Cal. Rptr. 811*

Principal test of employment relationship as being whether person to whom service is rendered has right to control manner and means of accomplishing result desired. *Truesdale v. Workers' Comp. Appeals Bd. (1987) 190 Cal. App. 3d 608, 614, 235 Cal. Rptr. 754*

[33] Evidence

In civil action for medical malpractice, trial court should have excluded from trial all reference to plaintiff's immigration status, when plaintiff was not seeking damages for loss of earnings or earning capacity, since plaintiff's immigration status was neither relevant to any issue in case nor admissible to attack plaintiff's credibility. *Hernandez v. Paicius (2003) 109 Cal. App. 4th 452, 456-463, 468, 134 Cal. Rptr. 2d 756*

WCAB as entitled to rely on relevant and considered opinion of a single physician, although in conflict with other medical opinions, as sufficient to constitute substantial evidence of a factual determination. *Nash v. Workers' Comp. Appeals Bd. (1994) 24 Cal. App. 4th 1793, 1810, 30 Cal. Rptr. 2d 454*

WCAB as not entitled to rely on physician's opinion based on inadequate medical history or misunderstanding of legal standards or relevant facts; WCAB as not entitled to disregard portions of physician's testimony that contradicted his or her own opinion. *Rosas v. Workers' Comp. Appeals Bd. (1993) 16 Cal. App. 4th 1692, 1701-1705, 20 Cal. Rptr. 2d 778*

WCAB as having power to direct taking of additional evidence when it grants reconsideration; thus, in determining reconsideration petition in preexisting disease case involving issue of apportionment, WCAB as having authority to decide that the employer has had an adequate opportunity to meet its burden of proof on apportionment and enter an award denying apportionment, or conclude that the record should be developed further on one or more of the apportionment issues and direct the taking of further evidence on apportionment. *King v. Workers' Comp. Appeals Bd. (1991) 231 Cal. App. 3d 1640, 1649, 283 Cal. Rptr. 98* .

Neither WCAB nor court as required to accept opinion of independent medical examiner appointed by WCAB when conflict in medical evidence exists; WCAB and not physician as trier of fact. *Robinson v. Workers' Comp. Appeals Bd. (1987) 194 Cal. App. 3d 784, 792-793, 239 Cal. Rptr. 841*

WCAB as permitted to choose between conflicting medical opinions, and relevant and considered opinion of one physician, although inconsistent with other medical opinions, as sufficient to constitute substantial evidence in support of WCAB's decision; WCAB as not permitted, however, to rely on report that is known to be erroneous, is no longer germane, or is based on inadequate medical history or examination. *Kyles v. Workers' Comp. Appeals Bd. (1987) 195 Cal. App. 3d 614, 621, 240 Cal. Rptr. 886*

Medical reports and opinions as not substantial evidence if known to be erroneous or based on facts no longer germane, on inadquate medical histories and examinations, or on incorrect legal theories; medical opinion as also failing to support WCAB's finding if based on surmise, speculation,conjecture, or guess. *Georgia-Pacific Corp. v. Workers' Comp. Appeals Bd. (1983) 144 Cal. App. 3d 72, 76, 192 Cal. Rptr. 643* ; *Twentieth Century-Fox Film Corp. v. Workers' Comp. Appeals Bd. (1983) 141 Cal. App. 3d 778, 785, 190 Cal. Rptr. 560* ; *Baptist v. Workers' Comp.*

Appeals Bd. (1982) 137 Cal. App. 3d 903, 906, 187 Cal. Rptr. 270

Words of conjecture in medical report as permitted to be construed, in proper contexts, as statements of medical probability, and WCAB as permitted to choose most persuasive among conflicting medical reports. *Scott Co. v. Workers' Comp. Appeals Bd. (1983) 139 Cal. App. 3d 98, 106, 188 Cal. Rptr. 537*

WCAB as required to accept as true intended meaning of evidence that is uncontradicted and unimpeached. *LeVesque v. Workmen's Comp. App. Bd. (1970) 1 Cal. 3d 627, 639, 83 Cal. Rptr. 208, 463 P.2d 432* ; *Erickson v. Workmen's Comp. App. Bd. (1970) 12 Cal. App. 3d 388, 391, 90 Cal. Rptr. 706*

Referee (now WCJ) or WCAB as not permitted to leave undeveloped matters that its acquired specialized knowledge should identify as requiring further evidence. *W.M. Lyles Co. v. Workers' Comp. Appeals Bd. (1969) 3 Cal. App. 3d 132, 138, 82 Cal. Rptr. 891*

[34] Exclusive Remedy Principles and Exceptions

[a] In General

Worker's civil cause of action against her employer for invasion of privacy was not barred by exclusive remedy rule when worker's supervisor reprimanded worker and disseminated information about reprimand to other employees who had no reason to know this information, thereby violating worker's right of privacy conferred by California Constitution and thus contrary to fundamental public policy. Operating Engineers Local 3 v. *Johnson (2003) 110 Cal. App. 4th 180, 184-192, 1 Cal. Rptr. 3d 552*

Exclusive remedy rule bars employee's civil tort action against employer for aggravation of pre-existing illness resulting from negligent diagnostic treatment voluntarily provided by employer, regardless of cause of pre-existing illness. *Weber v. United Parcel Service, Inc. (2003) 107 Cal. App. 4th 801, 806-809, 132 Cal. Rptr. 2d 412*

Exclusive remedy rule does not bar civil action between injured worker's union and employer in which union seeks to compel employer to arbitrate worker's return to work under terms of collective bargaining agreement. *Amalgamated Transit Union, Local 1277 v. Amalgamated Transit Union Local 1277 (2003) 107 Cal. App. 4th 673, 682-684, 132 Cal. Rptr. 2d 207*

Employee's civil negligence suit against her employer barred because workers' compensation law was exclusive remedy, when employee was injured while visiting work on her day off and helping fellow employees hold up collapsing shelf. *Wright v. Beverly Fabrics, Inc. (2002) 95 Cal. App. 4th 346, 357, 115 Cal. Rptr. 2d 503*

Public policies enacted in Fair Employment and Housing Act preclude finding that workers' compensation is exclusive remedy for plaintiff pleading claim for physical damages as result of employer's unlawful business practice, as defined by *Gov. Code § 12940(m)*, of failing to provide reasonable accommodation for plaintiff's nonindustrial disability from polio. *Bagatti v. Department of Rehabilitation (2002) 97 Cal. App. 4th 344, 356-357, 364-367, 118 Cal. Rptr. 2d 443*

In civil action by injured agricultural laborer against his employer (licensed farm labor contractor), California Farm Labor Contractors Act, *Lab. Code § 1682 et seq.*, does not provide exception to exclusive remedy rule of workers' compensation laws. *Ruiz v. Cabrera (2002) 98 Cal. App. 4th 1198, 1202-1203, 120 Cal. Rptr. 2d 320*

Doorman who was employee of condominium homeowners' association but not of individual homeowners as not barred by exclusive remedy rule from bringing civil action against negligent homeowner. *Holmes v. Roth (1992) 11 Cal. App. 4th 931, 936-937, 14 Cal. Rptr. 2d 315*

Under workers' compensation law, employee as afforded relatively swift and certain payment of benefits to cure or relieve effects of industrial injury without having to prove fault, but, in exchange, gives up wider range of damages potentially available in tort. *Shoemaker v. Myers (1990) 52 Cal. 3d 1, 16, 276 Cal. Rptr. 303, 801 P.2d 1054* ; *City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 1152, 77 Cal. Rptr. 2d 445, 959 P.2d 752*

Exclusive remedy doctrine as inapplicable when injury is result of conduct that does not "reasonably [come] within the compensation bargain." *Shoemaker v. Myers (1990) 52 Cal. 3d 1, 16, 276 Cal. Rptr. 303, 801 P.2d 1054*

Worker's claim based on conduct normally occurring in workplace as within exclusive jurisdiction of WCAB. *Shoemaker v. Myers (1990) 52 Cal. 3d 1, 15, 276 Cal. Rptr. 303, 801 P.2d 1054* ; *Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 151, 233 Cal. Rptr. 308, 729 P.2d 743*

Exclusive remedy provisions of workers' compensation system as designed to provide quick, simple, and readily accessible method of claiming and receiving compensation. *Marsh & McLennan, Inc. v. Superior Court (1989) 49 Cal. 3d 1, 6, 259 Cal. Rptr. 733, 774 P.2d 762*

Lab. Code §§ 3602, 5300, and *5814* as creating statutory scheme that preempts private causes of action by injured employees against independent insurance claims administrators and adjusters hired by their self-insured employers that unreasonably delay or refuse to pay compensation benefits. *Marsh & McLennan, Inc. v. Superior Court (1989) 49 Cal. 3d 1, 10, 259 Cal. Rptr. 733, 774 P.2d 762*

Workers' compensation law as not superseding tenured teachers' procedureal entitlements under *Education Code. Raven v. Oakland Unified School Dist. (1989) 213 Cal. App. 3d 1347, 1364-1366, 262 Cal. Rptr. 354* (involving procedural requirements under *Educ. Code § 44942* to suspend certifiecated employe or transfer such employee to other duties based on mental illness that renders employee incompetent to perform duties)

Although workers' compensation also provides rehabilitation and disability allowances similar to those afforded by State Teachers' Retirement System, these latter benefits as not falling within exclusive purview of workers' compensation law. *Raven v. Oakland Unified School Dist. (1989) 213 Cal. App. 3d 1347, 1364-1366, 262 Cal. Rptr. 354*

Expressed intent of legislative authors of workers' compensation statutes as being that statutory remedy is exclusive remedy against employer for injuries occurring within scope of employment. *Riley v. Southwest Marine, Inc. (1988) 203 Cal. App. 3d 1242, 1258, 250 Cal. Rptr. 718*

Legislature's failure to include in workers' compensation law an element of damages recoverable at common law as not subject to judicial correction. *Potter v. Arizona So. Coach Lines, Inc. (1988) 202 Cal. App. 3d 126, 131, 248 Cal. Rptr. 284*

Workers' compensation law as precluding civil action by former employee and his wife against former employer and supervisor for damages incident to employer's failure to notify of employment termination resulting in employee's loss of right to convert group insurance policy to individual coverage. *Potter v. Arizona So. Coach Lines, Inc. (1988) 202 Cal. App. 3d 126, 131-136, 248 Cal. Rptr. 284*

Under workers' compensation scheme, employee's remedy against employer for work-related injury as generally exclusively limited to benefits provided by workers' compensation law. *Spradlin v. Cox (1988) 201 Cal. App. 3d 799, 806, 247 Cal. Rptr. 347*

Injured worker's exclusive remedy for insurer's intentional misconduct in persistent withholding of compensation

payments, notwithstanding order by workers' compensation judge to pay, as lying within penalty provisions of workers' compensation law (i.e., *Lab. Code § 5814*). *Stoddard v. Western Employers Ins. Co. (1988) 200 Cal. App. 3d 165, 171-172, 245 Cal. Rptr. 820*

When special employment relationship exists between temporary employee and employer, employee's exclusive remedy for job-related injuries as being workers' compensation. *Santa Cruz Poultry, Inc. v. Superior Court (1987) 194 Cal. App. 3d 575, 577, 239 Cal. Rptr. 578*

When employee consumes alcohol in scope of his or her employment, employer as liable under doctrine of respondeat superior (*Civ. Code § 2338*) for injuries proximately caused to members of public by consumption of alcohol and as immunized from liability neither by *Civ. Code § 1714* nor by *Bus. & Prof. Code § 25602* (generally immunizing furnishers of alcoholic beverages for injuries resulting from alcohol caused accidents); but when injury is to coemployee off employer's premises under circumstances in which workers' compensation would have been barred by going and coming rule but resulted from "special risk" causally related to employment and was sustained within field of that risk, injured coemployee's claim as coming within exclusive remedy provisions of workers' compensation law and tort action by coemployee against employer as barred. *Childers v. Shasta Livestock Auction Yard, Inc. (1987) 190 Cal. App. 3d 792, 798, 800-816, 235 Cal. Rptr. 641*

Existence of injury not compensable under workers' compensation as not, without more, abrogating workers' compensation law's exclusive remedy provisions. *Spratley v. Winchell Donut House, Inc. (1987) 188 Cal. App. 3d 1408, 1414, 234 Cal. Rptr. 121*

[b] Americans With Disabilities Act (ADA)

Exclusive remedy doctrine of California Workers' Compensation Act is preempted by federal Americans With Disabilities Act (*42 U.S.C. § 12101* et seq.); plaintiff is allowed to simultaneously pursue workers' compensation claim and federal claim. *Wood v. County of Alameda (N.D. Cal. 1995) 875 F. Supp. 659, 665*

Third-party seeking to mitigate its damages lacked standing to bring action under the Americans With Disabilities Act against an employer for alleged unlawful discrimination. *Ventura County Railway Company, Inc. v. Hadley Auto Transport (1995) 38 Cal. App. 4th 878, 882, 45 Cal. Rptr. 2d 362*

[c] Assault and Battery

Covered employer was protected from suit by employees for negligent or reckless failure to provide adequate security on employer's premises, despite knowledge of potential danger, although failure allegedly resulted in assault and kidnapping against two employees perpetrated by third parties who were not employees. *Arendell v. Auto Parts Club, Inc. (1994) 29 Cal. App. 4th 1261, 1265, 35 Cal. Rptr. 2d 83*

Action brought by security guard against director of hotel security for threatening guard with gun as not barred by exclusive remedy provisions of workers' compensation act, since director's threat constituted physical assault under *Lab. Code § 3602*. *Herrick v. Quality Hotels, Inns & Resorts, Inc. (1993) 19 Cal. App. 4th 1608, 1616-1617, 24 Cal. Rptr. 2d 203*

Plaintiff as required to show that co-employee specifically intended to injure him or her to come within exception to exclusive remedy rule of *Lab. Code § 3601(a)*, which permits a civil action against against co-employee for injuries caused by willful and unprovoked physical act of aggression. *Soares v. City of Oakland (1992) 9 Cal. App. 4th 1822, 1825-1831, 12 Cal. Rptr. 2d 405*

"Willful" assaults under *Lab. Code § 3601(a)* as not including all common-law batteries, but only those that are specifically intended to injure. *Soares v. City of Oakland (1992) 9 Cal. App. 4th 1822, 1825-1831, 12 Cal. Rptr. 2d 405*

Exclusivity doctrine as not applying to prevent employee's action against employer for assault and battery [*see Lab. Code § 3602(b)(1)*]; assault as not required to have been personally committed by employer but only ratified by employer. *Hart v. National Mortgage & Land Co. (1987) 189 Cal. App. 3d 1420, 1432, 235 Cal. Rptr. 68*

[d] Co-employees, Acts of

Trial court may properly instruct jury that plaintiff must prove co-worker had intent to injure plaintiff, for plaintiff to come within exception of exclusive remedy rule of *Lab. Code § 3601(a)*. *Torres v. Parkhouse Tire Service, Inc. (2001) 26 Cal. 4th 995, 1003-1006, 111 Cal. Rptr. 2d 564, 30 P.3d 57*

WCAB properly found that pranks and practical jokes condoned by employer were within co-employee's scope of employment under *Lab. Code § 3601*, since condoned pranks and jokes were within scope of co-worker's employment, and specific exceptions of *Lab. Code § 3601* were inapplicable, co-worker was immune from negligence liability. *Oliva v. Heath (1995) 35 Cal. App. 4th 926, 933-934, 41 Cal. Rptr. 2d 613*

Owner of motor vehicle as statutorily liable under *Veh. Code § 17150* to employee for injuries sustained as result of co-employee's negligent operation of motor vehicle when co-employee was operating vehicle with owner's permission; owner as not immune from civil liability because co-employee was immune by virtue of *Lab. Code § 3601*. *Galvis v. Petito (1993) 13 Cal. App. 4th 551, 556-564, 16 Cal. Rptr. 2d 560*

Lab. Code § 3601 as expressly immunizing coemployee from civil liability for acts within the scope of their employment, and 1982 amendment of that statute confirms that there can be no judicially created exceptions to the immunity granted to coemployees. *Hendy v. Losse (1991) 54 Cal. 3d 723, 737-738, 1 Cal. Rptr. 2d 543, 819 P.2d 1*

When coemployee is injured off employer's premises under circumstances in which workers' compensation would have been barred by going and coming rule but resulted from "special risk" causally related to employment and was sustained within field of that risk, injured coemployee's claim as coming within exclusive remedy provisions of workers' compensation law and tort action by coemployee against employer as barred. *Childers v. Shasta Livestock Auction Yard, Inc. (1987) 190 Cal. App. 3d 792, 798, 800-816, 235 Cal. Rptr. 641*

[e] Contract Damages

Petition for writ of mandate filed by public school employee, seeking differential pay and reinstatement under *Ed. Code §§ 44977* and 44987.1, not tort damages for work-related injury, was not preempted by exclusivity provisions of workers' compensation law. *Veguez v. Governing Board of the Long Beach Unified School District (2005) 127 Cal. App. 4th 406, 417-418, 25 Cal. Rptr. 3d 526*

Employee who sues for breach of contract when same conduct also caused injury compensable under workers' compensation law as precluded from recovering only those damages caused by the compensable injury; amount of workers' compensation paid as required to be set off from contract damages. *Pichon v. Pacific Gas & Electric Co. (1989) 212 Cal. App. 3d 488, 500-501, 260 Cal. Rptr. 677*

[f] Discrimination

FEHA requires employee to prove that he or she is "qualified individual" when alleging discrimination on grounds of disability, meaning that plaintiff's burden of proving actionable discrimination on basis of disability includes proof that he or she has ability to perform essential duties of position with reasonable accommodation. *Green v. State of California (2007) 42 Cal. 4th 254, 262-264, 65 P.3d 118*

Injured workers discriminated against because of disability from work related injury may bring claims before Workers' Compensation Appeals Board under *Lab. Code § 132a* and actions to state court seeking remedies under Fair Employment and Housing Act and common-law wrongful discharge theory. *City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 1158, 77 Cal. Rptr. 2d 445, 959 P.2d 752* (overruling *Portillo v. G. T. Price Products, Inc. (1982) 131 Cal. App. 3d 285, 182 Cal. Rptr. 291*)

Plaintiff was estopped from claiming that she could perform her work adequately in FEHA age discrimination action against her employer when she had previously obtained a favorable settlement in her workers' compensation case based on her assertion that she was unable to work; employer entitled to summary judgment in FEHA age discrimination case when plaintiff failed to prove all the elements of age discrimination. Rissetto v. Plumbers and Steamfitters Local 343 *(1996) 94 F.3d 597, 606*

Workers' compensation exclusive remedy provisions applied to industrial injury, including plaintiff's emotional distress as result of that injury, that followed allegedly unlawful demotion because of plaintiff's age, in violation of FEHA and of public policy, when evidence demonstrated that alleged discriminatory act was not "substantial factor" in causing subsequent industrial injury. *Huffman v. Interstate Brands Cos. (2004) 121 Cal. App. 4th 679, 692-700, 17 Cal. Rptr. 3d 397*

Reinstatement of employee under *Lab. Code § 132a* as probationary rather than permanent as proper when no finding that employee performed or could perform job duties up to standards required by employer and no finding that, but for employee's injury, she would have successfully completed probationary period; Board's refusal to award lost wages and benefits as proper when no finding that employee sought or was ready, willing, and able to maintain employment. *Dyer v. Workers' Comp. Appeals Bd. (1994) 22 Cal. App. 4th 1376, 1384-1386, 28 Cal. Rptr. 2d 30*

Statutory discrimination action by employee alleging physical, mental, or emotional injury resulting from racial discrimination by employer as not barred by exclusivity doctrine. *Jones v. Los Angeles Community College Dist. (1988) 198 Cal. App. 3d 794, 804, 807-808, 244 Cal. Rptr. 37* ; *see also* *Goldman v. Wilsey Foods, Inc. (1989) 216 Cal. App. 3d 1085, 1095-1096, 265 Cal. Rptr. 294* (religious discrimination); *Meninga v. Raley's, Inc. (1989) 216 Cal. App. 3d 79, 91, 264 Cal. Rptr. 319* (sexual discrimination); *Watson v. Department of Rehabilitation (1989) 212 Cal. App. 3d 1271, 1286-1287, 261 Cal. Rptr. 204* (age and racial discrimination)

Injured workers discriminated against because of disability from work related injury may bring claims before the Workers' Compensation Appeals Board under *Lab. Code § 132a* and actions to state court seeking remedies under Fair Employment and Housing Act and common-law wrongful discharge theory. *City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 1158, 77 Cal. Rptr. 2d 445, 959 P.2d 752* (overruling *Portillo v. G. T. Price Products, Inc. (1982) 131 Cal. App. 3d 285, 182 Cal. Rptr. 291*)

[g] Dual Capacity Doctrine

Hospital employee who sustained nerve injury while voluntarily undergoing treatment by employer pursuant to a protocol put in place by employer for treating employees exposed to blood or other bodily fluids, was barred by exclusive remedy rule from pursuing tort action against employer. *Alander v. Vaca Valley Hospital (1996) 49 Cal. App. 4th 1298, 1304, 1307, 57 Cal. Rptr. 2d 40*

Lab. Code § 3602(a), barring dual capacity doctrine, as inapplicable to coemployees; however, coemployees as expressly immunized from civil liability for acts within the scope of their employment by virtue of *Lab. Code § 3601*. *Hendy v. Losse (1991) 54 Cal. 3d 723, 737-738, 1 Cal. Rptr. 2d 543, 819 P.2d 1*

Employee was permitted to maintain action against her employer under dual capacity doctrine for injuries sustained as result of "slip and fall" while on employer's premises in course of treatment for prior work-related injury, based on theory that employer could be liable under common-law duty of reasonable care owed by landowner to invitee. *Weinstein v. St. Mary's Medical Center (1997) 58 Cal. App. 4th 1223, 1237, 68 Cal. Rptr. 2d 461*

Dual capacity exception did not apply in an action brought by a hospital employee who sustained a nerve injury while voluntarily undergoing treatment by her employer pursuant to a protocol put in place by the employer for treating employee's exposed to blood or other bodily fluids. *Alander v. Vaca Valley Hospital (1996) 49 Cal. App. 4th 1298, 1307, 57 Cal. Rptr. 2d 40*

WCAB as correct in determining that dual capacity exception to rule of exclusivity inapplicable when employee of chiropractic center who sued chiropractic center for injuries received while undergoing chiropractic treatment was patient of center prior to and at time of her injury. *Lake v. Lakewood Chiropractic Center (1993) 20 Cal. App. 4th 47, 53, 24 Cal. Rptr. 2d 358*

Lab. Code § 3602(a) as inapplicable to preclude employee's action against employer, when employer's second or dual capacity came into existence after, not prior to or at the time of, the employee's injury. *Coca-Cola Bottling Co. v. Superior Court (1991) 233 Cal. App. 3d 1273, 1292-1293, 285 Cal. Rptr. 183* ; *Sturtevant v. County of Monterey (1991) 228 Cal. App. 3d 758, 761-764, 279 Cal. Rptr. 161*

Lab. Code § 3602(a), as amended, abolishing dual capacity doctrine in most cases, as not retroactive. *Perry v. Heavenly Valley (1985) 163 Cal. App. 3d 495, 504-505, 209 Cal. Rptr. 771*

[h] Emotional Distress

Employee's damages for emotional distress resulting from employer's misrepresentations made to induce employee to enter employment relationship were not consequence of normal part of that relationship or risk reasonably encompassed within compensation bargain; in making these misrepresentations (regarding employer's financial stability, its future plans to relocate its operations, and prospective employee's promotion in corporate ranks), employer stepped out of its proper role as employer, engaging in behavior that is not normal part of employment relationship, so that exclusive remedy rule did not bar employee's civil damages for emotional distress. *Lenk v. Total-Western, Inc. (2001) 89 Cal. App. 4th 959, 971-973, 108 Cal. Rptr. 2d 34*

Workers' compensation was employee's sole remedy for work-related emotional distress under *Lab. Code § 3601(a)*. *Gibbs v. American Airlines, Inc. (1999) 74 Cal. App. 4th 1, 10, 87 Cal. Rptr. 2d 554*

Employee's emotional distress claims seeking damages for alleged work--related injury discrimination were not barred by the exclusivity rule since work--related injury discrimination is not a normal risk of the compensation bargain. *Fretland v. County of Humboldt (1999) 69 Cal. App. 4th 1478, 1492, 82 Cal. Rptr. 2d 359*

Trial court erred in determining that plaintiff's cause of action for intentional infliction of emotional distress was barred by exclusive remedy rule, when evidence created triable issue of fact as to whether reasonable person would have found working conditions created by defendant to be intolerable, and as to whether conduct experienced by plaintiff was outrageous. *Kovatch v. California Casualty Management Co., Inc. (1998) 65 Cal. App. 4th 1256, 1277-1278, 77 Cal. Rptr. 2d 217*

Emotional distress damages may be recovered as part of compensatory damages if plaintiff has cause of action for wrongful termination in violation of public policy or wrongful termination in violation of express statute. *Phillips v. Gemini Moving Specialists (1998) 63 Cal. App. 4th 563, 577, 74 Cal. Rptr. 2d 29*

Claims under California law for intentional and negligent infliction of emotional distress caused by personnel moves were not preempted by California workers' compensation statute when claims implicated fundamental public policy considerations embodied in *Gov. Code § 12940(f)* and *Lab. Code § 1102.5*, which prohibit certain retaliatory discrimination. *Maynard v. City of San Jose (9th Cir. 1994) 37 F.3d 1396, 1405-1406*

In action by three firefighters against city, its fire chief and its city manager for wrongly refusing to grant promotions, defendants waived claim that damages for emotional distress barred by the exclusive remedy provisions of workers' compensation act as defendants failed to raise issue before or during trial. *Lucich v. City of Oakland (1993) 19 Cal. App. 4th 494, 498, 23 Cal. Rptr. 2d 450*

Exclusive remedy provisions of workers' compensation system as barring civil action for intentional or negligent infliction of emotional distress unless employer's conduct exceeds risks inherent in employment relationship or contravenes public policy. *Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 754-755, 7 Cal. Rptr. 2d 808, 828 P.2d 1195*

Workers' compensation law as exclusive remedy for emotional distress resulting from termination of employment, even if employee does not suffer physical injury. *Horn v. Bradco Internat., Ltd. (1991) 232 Cal. App. 3d 653, 665-670, 283 Cal. Rptr. 721*

Workers' compensation law as exclusive remedy for emotional distress caused by employer's intentional conduct even if unaccompanied by physical injury, so long as employer's conduct was a normal incident of the employment relationship. *Horn v. Bradco Internat., Ltd. (1991) 232 Cal. App. 3d 653, 665-670, 283 Cal. Rptr. 721*

Workers' compensation law as exclusive remedy for claim of negligent infliction of emotional distress resulting from termination of employment, even if no accompanying physical injury or disability alleged. *Robomatic, Inc. v. Vetco Offshore (1990) 225 Cal. App. 3d 270, 274-275, 275 Cal. Rptr. 70*

Employee's cause of action for intentional infliction of emotional distress as a result of employment termination as precluded by exclusive remedy of workers' compensation; termination as necessarily arising out of the employment relationship. *Jenkins v. Family Health Program (1989) 214 Cal. App. 3d 440, 450, 262 Cal. Rptr. 798* ; *Pichon v. Pacific Gas & Electric Co. (1989) 212 Cal. App. 3d 488, 495-496, 260 Cal. Rptr. 677*

Action for intentional infliction of emotional distress against State of California by traffic officer employed by Highway Patrol, who allegedly took disability retirement because of campaign of harassment by superior, as barred by exclusive remedy provisions of workers' compensation law when claim was based on conduct normally occuring in work place and when alleged harassment caused both mental and physical injuries. *Valenzuela v. State of California (1987) 194 Cal. App. 3d 916, 919, 922-924, 240 Cal. Rptr. 45*

When misconduct attributed to employer consists of actions that are normal part of employment relationship, such as demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances, employee suffering emotional distress causing disability as unable to avoid exclusive remedy provisions of Labor Code and maintain independent action against employer for intentional infliction of emotional distress by characterizing employer's decisions as manifestly unfair, outrageous, harassing, or intended to cause emotional disturbance resulting in disability; when worker's causes of action are barred by exclusive remedy provisions of workers' compensation law, spouse's causes of action for intentional infliction of emotional distress and loss of consortium as also barred. *Shoemaker v.*

Myers (1990) 52 Cal. 3d 1, 15, 276 Cal. Rptr. 303, 801 P.2d 1054 ; *Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 160-163, 233 Cal. Rptr. 308, 729 P.2d 743* ; *Hart v. National Mortgage & Land Co. (1987) 189 Cal. App. 3d 1420, 1429-1430, 235 Cal. Rptr. 68*

Proper test in determining whether workers' compensation is exclusive remedy available to employee alleging intentional infliction of emotional distress as being whether acts complained of were normal part of employment relationship or incidents of employment relationship. *Hart v. National Mortgage & Land Co. (1987) 189 Cal. App. 3d 1420, 1429, 235 Cal. Rptr. 68*

California's workers' compensation law as not providing sole and exclusive remedy for employee's claim of negligent infliction of emotional distress resulting from wrongful termination of employee's employment when there has been no physical injury because emotional distress without accompanying physical injury or disability is not compensable under *Lab. Code § 3600*. *Robards v. Gaylord Bros., Inc. (9th Cir. 1988) 854 F.2d 1152, 1157-1158* (affirming judgment for plaintiff for damages for breach of implied contract and negligent infliction of emotional distress); *see also Miller v. Fairchild Industries, Inc. (9th Cir. 1989) 885 F.2d 498, 510* (actions for negligent and intentional infliction of emotional distress based on termination after settlement negotiations concerning complaints of racial discrimination as permissible when no physical injury or disability alleged).

Action for intentional infliction of emotional distress based on insurer's delay in paying benefits, change in amounts paid, and disobedience to subpoena duces tecum issued by WCAB as barred by exclusivity of workers' compensation remedy. *Everfield v. State Comp. Ins. Fund (1981) 115 Cal. App. 3d 15, 18-21, 171 Cal. Rptr. 164*

Workers' compensation as employee's exclusive remedy for employer's intentional infliction of emotional distress on employer's premises and while employee was still an employee for workers' compensation purposes when emotional distress that was inflicted resulted in physical disabilities to employee. *Gates v. Trans Video Corp. (1979) 93 Cal. App. 3d 196, 201-206, 155 Cal. Rptr. 486*

[i] Federal Law; Preemption

Exclusivity provisions of state workers' compensation laws as not precluding federal remedies under the Migrant and Seasonal Agricultural Worker Protection Act (*29 U.S.C. § 1801 et seq.*). *Adams Fruit Co. v. Barrett (1990) 494 U.S. 638, 110 S. Ct. 1384, 108 L. Ed. 2d 585, 597-598*

Former employee's claim under *Lab. Code § 3602(b)(2)* that employer fraudulently concealed fact that her illness was caused by exposure to toxic chemicals in workplace as not preempted by Section 301 of federal Labor Management Relations Act, which provides for federal preemption of state claim if application of law is substantially dependent on analysis of collective bargaining agreement or if claim is founded directly on rights created by such agreement. Lopez v. Continental Can Co., Inc. (9th Cir. [Cal.] 1992) *961 F.2d 147, 148-149*

[i.1] Fraudulent Concealment

Reviewing factual conditions employee must prove in civil tort action against employer pursuant to fraudulent concealment exception to exclusive remedy rule. *Jensen v. Amgen, Inc. (2003) 105 Cal. App. 4th 1322, 1326-1327, 129 Cal. Rptr. 2d 899*

Employee seeking to state cause of action for fraudulent concealment need only "in general terms" plead facts that if found true by trier of fact establish existence of essential elements under *Lab. Code § 3602(b)(2)*, and in determining whether allegations in complaint are legally sufficient trial court must liberally construe pleading with view to achieving substantial justice between parties. *Palestini v. General Dynamics Corp. (2002) 99 Cal. App. 4th 80, 89-90, 120 Cal.*

Rptr. 2d 741

[j] Insurer's Duty to Defend

Court of appeal, affirming Superior Court's dismissal of plaintiff employer's civil suit against its insurer, which alleged breach of contract, breach of covenant of good faith and fair dealing, and fraud, for failure to defend plaintiff against employee's civil action for damages, held that plaintiff failed to state cause of action, since employee suffered injury compensable under workers' compensation law and insurer had provided both defense and indemnification to employee's workers' compensation claim, making applicable insurance policy's unambiguous provision that excluded any obligation by insurer to defend civil action against employer by employee who had received workers' compensation benefits for injury that was subject of civil action. *Stephenson v. Argonaut Insurance Co. (2004) 125 Cal. App. 4th 962, 969-975, 23 Cal. Rptr. 3d 195*

Insurers had no duty to defend or indemnify insured employer under the workers' compensation or employer's liability portions of their policies when insured's claim was based on discrimination and intentional conduct that was excluded from coverage under the policy. *General Star Indemnity Co. v. Schools Excess Liability Fund (N.D. Cal. 1995) 888 F. Supp. 1022, 1026-1027*

Compensation insurer as having no duty to defend against former employee's civil wrongful termination action when "Workers' Compensation Liability" portion of insurance policy was susceptible of no other objective construction than providing coverage solely for workers' compensation benefits, or claims, proceedings, or suits for such benefits, and not for civil suits for damages; furthermore, civil action involved no potential for damages within the coverage of the policy because superior court has no jurisdiction to award workers' compensation benefits; such award of benefits is exclusively within jurisdiction of WCAB. *La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co. (1994) 9 Cal. 4th 27, 41-44, 36 Cal. Rptr. 2d 100, 884 P.2d 1048* (disapproving *Wong v. State Compensation Insurance Fund (1993) 12 Cal. App. 4th 686, 693-696, 16 Cal. Rptr. 2d 1* , to extent it is inconsistent with La Jolla)

Insurer had no duty to indemnify or defend employer against sexual harassment claim, when neither workers' compensation policy nor general liability policy provided coverage for such claim. *Michaelian v. State Comp. Ins. Fund (1996) 50 Cal. App. 4th 1093, 1105-1106, 58 Cal. Rptr. 2d 133*

Workers' compensation insurer had no duty to defend insured employer in civil action based on former employee's claim of defamatory post-termination disparagement of performance when insured failed to show that there was any potential for coverage under the workers' compensation insurance policy. *Frank and Freedus v. Allstate Ins. Co. (1996) 45 Cal. App. 4th 461, 473, 52 Cal. Rptr. 2d 678*

Employer's liability insurer has no duty to defend employer against suit brought under federal statute by employees and survivors of other employees when liability policy clearly covered only liability arising under California law. *Martinez v. SCIF (1995) 32 Cal. App. 4th 1589, 1593, 1597, 38 Cal. Rptr. 2d 639*

Employer's liability insurer has no duty to defend employer against cross-complaints for indemnification brought by additional defendants in suit brought by injured employee alleging intentional concealment and aggravation of injury and intentional infliction of emotional distress, even though insurer defended and eventually settled employee's suit, when insurance policy clearly excluded coverage for bodily injury intentionally caused or aggravated by insured. *Reagen's Vacuum Truck Service, Inc. v. Beaver Insurance Company (1995) 31 Cal. App. 4th 375, 388, 37 Cal. Rptr. 2d 89*

Insurer has no duty under liability portion of insurance contract to defend insured employer against suit for damages brought by injured former employee when former employee received workers' compensation benefits for emotional

distress caused by termination from employment, suit brought against employer alleged sex discrimination, wrongful termination, and related claims, insurance contract clearly stated that insured was not covered under liability portion of policy when underlying claim was covered by workers' compensation, and liability portion of policy clearly excluded coverage for claims based on either wrongful termination or sex discrimination. *Transamerica Insurance Company v. Superior Court of Los Angeles County (1994) 29 Cal. App. 4th 1705, 1715, 35 Cal. Rptr. 2d 259*

Compensation insurer as not absolved of its duty to defend insured employer on ground that employee's civil action against employer for wrongful termination was barred by exclusive remedy rule when employee's complaint alleged violations of fundamental and substantial public policies that were excepted from exclusive remedy provisions of *Workers' Compensation Act. B & E Convalescent Center v. State Compensation Ins. Fund (1992) 8 Cal. App. 4th 78, 89-92, 9 Cal. Rptr. 2d 894*

Employer's liability portion of compensation insurance policy as requiring insurer to defend employer against employee's civil action when potential for coverage exists or employer has reasonable expectation of coverage given nature and kind of risks covered by policy. *B & E Convalescent Center v. State Compensation Ins. Fund (1992) 8 Cal. App. 4th 78, 92, 9 Cal. Rptr. 2d 894*

Compensation insurer as having no duty to defend insured employer for employer's willful acts pursuant to *Ins. Code § 533* when employer had intentionally interfered with employee's protected labor union rights and had discriminated against employee on basis of her age, gender, and ethnicity. *B & E Convealescent Center v. State Compensation Ins. Fund (1992) 8 Cal. App. 4th 78, 92-102, 9 Cal. Rptr. 2d 894*

[k] Insurance Carriers, Administrators or Adjusters, Actions Against

Defendant, third party administrator, had duty of care to plaintiff, employer bank's excess insurer, plaintiff was third party beneficiary of contract between employer and defendant, and plaintiff was subrogated to employer's rights against defendant. *National Union Fire Insurance Co. v. Cambridge Integrated Services Group (2009) 171 Cal. App. 4th 35, 45-56, 89 Cal. Rptr. 3d 473*

In civil action that arose out of successful attempts by California Insurance Guarantee Association and numerous insurers and employers to have Appeals Board consolidate many different medical lien claims in order to obtain determination from Board as to whether Premier Medical Management Systems, Inc., was improperly representing treating physicians in Appeals Board proceedings, Premier and five affiliated treating physicians sued insurers and employers, alleging various tort and statutory causes of action based on claims that defendants were engaged in anti-competitive activity, gravamen of complaint being that, after Premier submitted plaintiff physicians' bills to defendants for payment and filed liens in numerous workers' compensation cases before Appeals Board, defendants collectively conspired to contest, delay, and avoid payment of those bills and liens, defendants argued that complaint was anti-SLAPP (Strategic Lawsuit Against Public Participation) lawsuit because it was based entirely on defendants' constitutional right to petition Appeals Board, and court of appeal agreed with defendants, finding that anti-SLAPP statute applied because defendants had shown that plaintiffs' complaint related to activity that was protected activity, i.e., right to petition Appeals Board and litigate lien claims before Board, and that defendants had probability of prevailing on plaintiffs' complaint, based on doctrine that parties who petition government for redress are generally immune from antitrust liability. *Premier Med. Mgmt. Sys., Inc. v. Cal. Ins. Guarantee Ass'n (2006) 136 Cal. App. 4th 464*

Superior court had no jurisdiction to decide employee's claim against employer's workers' compensation insurer for allegedly mishandling its lien on employee's third-party settlement; WCAB had exclusive jurisdiction over claim under *Lab. Code §§ 3860* and *5800*. *Hughes v. Argonaut Insurance Co. (2001) 88 Cal. App. 4th 517, 531, 105 Cal. Rptr. 2d 877*

Economic injuries sustained by medical providers to their businesses resulting from failure to receive full and timely payment on their lien claims from insurance carriers fall within the scope of exclusivity provisions; however, medical providers may bring civil actions against insurers for acts by the insurers that fall outside the scope of the compensation bargain, including Cartwright Act and RICO claims, and tortious interference with business relations and violations of the UCL to the extent they are predicated on the conspiratorial misconduct of the insurers. *Vacanti v. State Compensation Ins. Fund (2001) 24 Cal. 4th 800, 814, 825-828, 102 Cal. Rptr. 2d 562, 14 P.3d 234*

Delays in making payments to injured worker and changes in amounts of payment as matters exclusively within jurisdiction of WCAB; hence, action by injured worker against independent claims administrator of self-insured employer for delay or refusal to pay compensation benefits as preempted by California's workers' compensation system. *Marsh & McLennan, Inc. v. Superior Court (1989) 49 Cal. 3d 1, 7-10, 259 Cal. Rptr. 733, 774 P.2d 762* ("rejecting" contrary holding in *Dill v. Claims Admin. Services, Inc. (1986) 178 Cal. App. 3d 1184, 224 Cal. Rptr. 273*)

Fraudulent misrepresentation by compensation carrier and its independent claims administrators that no policy of insurance existed, made for purpose of advancing carrier's economic interest and defeating injured employee's just entitlement, and subsequent intentional destruction of evidence establishing fraud, as constituting type of outrageously reprehensible conduct that falls outside permissible boundary of protected behavior by compensation carrier and subjects tortfeasors to liability in civil action for fraud and intentional spoliation of evidence. *Jablonski v. Royal Globe Ins. Co. (1988) 204 Cal. App. 3d 379, 390-394, 251 Cal. Rptr. 160*

Action for damages against self-insured employer's independent claims administrator who unreasonably refused to pay workers' compensation benefitsas barred by exclusive remedy provisions of workers' compensation law; court as having no jurisdiction to hear claim based on delay or refusal to pay workers' compensation benefits, even against third party, except in unusual circumstances when there is intentional, outrageous conduct outside normal scope of duty; mere allegations of emotional distress as not sufficient to trigger this exception. *Phillips v. Crawford & Co. (1988) 202 Cal. App. 3d 383, 385-386, 389 n.6, 248 Cal. Rptr. 371*

Exclusive remedy provision as constituting bar to civil action by employee against independent claims adjuster of self-insured employer for damages based on delay and failure to pay benefits arising from employee's industrial injury. *Mottola v. R. L. Kautz & Co. (1988) 199 Cal. App. 3d 98, 101, 105-109, 244 Cal. Rptr. 737*

Although *Lab. Code §§ 3850* and *3852* authorize independent actions against persons other than employer who are liable for damages resulting from injury, employer's insurance carrier as not a person other than employer but stands in employer's shoes and may invoke exclusivity defense when injury is plainly industrial and compensable within system [*see Lab. Code § 3850(b)*]); hence, employee's action against carrier for (1) negligent failure to make sure employer preserved defective ladder as evidence in employee's third-party product liability lawsuit and (2) negligent failure to notify employee of facts giving rise to third-party liability in time for him to have acted to preserve evidence as barred. *Continental Casualty Co. v. Superior Court (1987) 190 Cal. App. 3d 156, 158-162, 235 Cal. Rptr. 260]* .

Workers' compensation as exclusive remedy for refusal of independent adjusting agency, as administrator of employer's compensation program, to pay benefits awarded to injured employee. *Santiago v. Employee Benefits Services (1985) 168 Cal. App. 3d 898, 905, 214 Cal. Rptr. 679*

Worker's action against insurance carrier under *Ins. Code § 790.03* for failure to pay benefits as within exclusive jurisdiction of WCAB when alleged conduct did not come within exception for outrageous and extreme conduct. *Depew v. Hartford Acc. & Indem. Co. (1982) 135 Cal. App. 3d 574, 577-579, 185 Cal. Rptr. 472* ; *see* *Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58* (prospectively abrogating private third-party standing under *Ins. Code § 790.03*)

[l] Medical Malpractice

Physician employed by professional football team to provide treatment to players injured in course of their employment by team as not protected from malpractice suit by exclusive remedy provisions of *Lab. Code § 3602*, which applies only to employers; however, physician was immune from such suit by virtue of *Lab. Code § 3601*, which expressly immunizes coemployees for acts within the scope of their employment, because the physician was acting within scope of his employment when he diagnosed and treated plaintiff whose injury was proximately caused by his employment by the team. *Hendy v. Losse (1991) 54 Cal. 3d 723, 737-738, 1 Cal. Rptr. 2d 543, 819 P.2d 1*

Employee injured in industrial accident and further injured by negligence of treating physician as having separate remedies available against employer and physician; jurisdiction of claim against employer for injury and aggravation as within exclusive jurisdiction of WCAB, which has no jurisdiction overaction against physician for malpractice. *Nation v. Certainteed Corp. (1978) 84 Cal. App. 3d 813, 816, 817, 149 Cal. Rptr. 62*

[m] Peculiar Risk Doctrine

Landowner who hires independent contractor may be liable to contractor's employee injured by undisclosed hazard on hirer's land, even if hirer does not retain control over work, if following conditions are present: (1) landowner knew, or should have known, of latent or concealed preexisting hazardous condition on its property, (2) contractor did not know of, and could not have reasonably discovered, this hazardous condition, and (3) landowner failed to warn contractor about this condition. *Kinsman v. Unocal Corp. (2005) 37 Cal. 4th 659, 678-683, 36 Cal. Rptr. 3d 495, 123 P.3d 931*

Gov. Code § 815.4 (Government Claims Act) provides statutory basis for public entity potentially to be held liable on retained control theory under *Hooker* and its progeny, and plaintiff could bring claim on this theory. *McCarty v. State of California/Department of Transportation (2008) 164 Cal. App. 4th 955, 976-979, 79 Cal. Rptr. 3d 777*

Privette and *Kinsman* doctrines applied to issue of liability of hirers of subcontractors for injuries to those who worked for those subcontractors, regardless of whether those injured were employees of subcontractors or independent contractors. *Michael v. Denbeste Transp., Inc. (2006) 137 Cal. App. 4th 1082, 1093-1096, 40 Cal. Rptr. 3d 777*

Employee of independent contractor may sue hirer of contractor for tort of negligent exercise of retained control, provided hirer's exercise of retained control affirmatively contributed to employee's injuries. *Hooker v. Department of Transportation (2002) 27 Cal. 4th 198, 202, 115 Cal. Rptr. 2d 853, 38 P.3d 1081*

Hirer of independent contractor is liable in civil action to employee of contractor insofar as hirer's provision of unsafe equipment affirmatively contributed to employee's injury. *McKown v. Wal-Mart Stores, Inc. (2002) 27 Cal. 4th 219, 222, 115 Cal. Rptr. 2d 868, 38 P.3d 1094*

California Supreme Court holdings in *Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721* , and *Toland v. Sunland Housing Group, Inc. (1998) 18 Cal. 4th 253, 74 Cal. Rptr. 2d 878, 955 P.2d 504* , extended to bar injured employee of independent contractor from suing contractor's hirer for negligent hiring, with Court citing two related policy considerations in support of its conclusion: (1) rule of workers' compensation exclusivity, which shields independent contractor who pays workers' compensation insurance premiums from further liability to its employees, should apply equally to person hiring contractor because hirer has indirectly paid cost of this coverage inasmuch as it was presumably calculated into contract price; (2) permitting such recovery would give employees of independent contractors unwarranted windfall, something that is denied other workers, i.e., right to recover tort damages for industrial injuries caused by their employer's failure to provide safe working environment. *Camargo v. Tjaarda Dairy (2001) 25 Cal. 4th 1235, 1244-1245, 108 Cal. Rptr. 2d 617, 25 P.3d 1096*

General contractor was not liable to injured employee of subcontractor, when court of appeal followed *Hooker v. Department of Transportation* and found that, even if it could be shown that general contractor retained control over safety conditions at worksite, there was no triable issue of fact that general contractor affirmatively contributed to subcontractor's employee's injuries. *Millard v. Biosources, Inc. (2007) 156 Cal. App. 4th 1338, 1348-1349, 68 Cal. Rptr. 3d 177*

Neither 1999 amendments to *Lab. Code § 6304.5* nor California Supreme Court's analysis of those amendments in *Elsner v. Uveges (2004) 34 Cal. 4th 915* , abrogated liability rules established by *Privette v. Superior Court* and its progeny. *Millard v. Biosources, Inc. (2007) 156 Cal. App. 4th 1338, 1349-1352, 68 Cal. Rptr. 3d 177*

Policy considerations relied on in *Privette* and *Hooker*, which established that hirer of subcontractor whose employee was injured on job as result of subcontractor's negligence was not vicariously liable under peculiar risk doctrine for employee's injuries, were equally applicable to claims against hirer's agent and thus barred civil action against that agent. *Ruiz v. Herman Weissker, Inc. (2005) 130 Cal. App. 4th 52, 61-62, 29 Cal. Rptr. 3d 641*

Even assuming, as plaintiff argued, that hirer had nondelegable duties under Public Utilities Code and PUC regulations to ensure safety of premises where employee of independent contractor was fatally injured, hirer's attempt to delegate such duties to agent created no liability on part of that agent. *Ruiz v. Herman Weissker, Inc. (2005) 130 Cal. App. 4th 52, 64, 29 Cal. Rptr. 3d 641*

Although hirer of independent contractor remains liable to employee of that contractor who is injured during course of the work when hirer retains control over details of work and its conduct affirmatively contributes to employee's injuries, no evidence in this case showed that hirer's agent asserted authority over independent contractor's crew or instructed them as to what safety procedures to use, so that no evidence showed that hirer's agent affirmatively contributed to contractor's employee's death by some negligent act or omission. *Ruiz v. Herman Weissker, Inc. (2005) 130 Cal. App. 4th 52, 65-67, 29 Cal. Rptr. 3d 641*

Defendant homeowners' association, which had contracted with plaintiff's employer for security services, had no liability for injuries received by plaintiff when assaulted on homeowner's premises, since defendant owed plaintiff no duty to restrict access to community's premises or to restrict youth parties within its premises, and plaintiff had assumed risk of injuries he suffered, when undisputed evidence demonstrated that defendant neither required nor expected its unarmed security personnel to confront potentially violent persons, or otherwise place themselves in danger, and did nothing to alter basic scope of its security guards' "observe and report" responsibilities, so that it could not be held liable for consequences of plaintiff's decision to take action beyond scope of his duties by attempting to arrest assailant, nor could defendant's failure to take affirmative steps to restrict or control juvenile parties within its property be construed as having affirmatively contributed to plaintiff's injuries for purposes of peculiar risk doctrine. *Tilley v. CZ Master Assn. (2005) 131 Cal. App. 4th 464, 482-490, 32 Cal. Rptr. 3d 151*

Court of appeal reversed trial court's summary judgment in favor of defendant property owner and held that record showed triable issues of material fact as to whether defendant, who was hirer of plaintiff-employee's employer, breached nondelegable regulatory duty to provide fire extinguishers, pursuant to California Fire Code, and whether such breach affirmatively contributed to plaintiff's injuries. Court of appeal found that plaintiff's lawsuit was not foreclosed by *Privette v. Superior Court* and its progeny, and found, instead, that 24 Cal. Code Reg. § 7904.4.9.2, applicable to petroleum bulk plant facilities such as defendant's, requiring fire extinguishers within 75 feet of those portions of facility where fires are likely to occur, supported plaintiff's lawsuit. *Barclay v. Jesse M. Lange Distributor, Inc. (2005) 129 Cal. App. 4th 281, 295-301, 28 Cal. Rptr. 3d 242*

Court of appeal reversed trial court's summary judgment for hirer and general contractor defendants in civil action by plaintiff, employee of subcontractor, who was injured in fall from ladder while installing sprinkler system in hirer's new

building, holding that furnishing and abrupt withdrawal of safety equipment by defendants could be found to constitute negligent performance of voluntary undertaking, affirmatively contributing to plaintiff's injuries and thereby subjecting defendants to liability, when appellate court found that defendants had made no attempt to refute plaintiff's allegations and evidence that defendants had provided, then removed, hydraulic scissor lifts from room in which sprinklers were being installed, resulting in plaintiff's having to use ladder, and had also provided, then removed, suspended anchoring cables to which workers could secure their safety lanyards, resulting in plaintiff's having nothing to which to fasten his safety lanyard, and defendants had presented no evidence precluding finding that they affirmatively contributed to plaintiff's injuries, or affirmatively demonstrating that plaintiff lacked evidence to prove such affirmative contribution, and evidence raised strong possibility, at least, that defendants not only actively contributed to plaintiff's injuries, but actually created situation in which such injuries were likely to occur. *Browne v. Turner Construction Co. (2005) 127 Cal. App. 4th 1334, 1345-1348, 26 Cal. Rptr. 3d 433*

Landowner had no duty to employee of employer (premises occupant) for injuries arising from employee's performance of his job on landowner's land, when hazardous conditions were created by functioning of employer's business, and were not danger existing on land independently of employer's activity, and when there was no evidence of landlord-tenant relationship between landowner and employer or of any other legal relationship giving landowner right of access or control, no evidence showing what reasonable inspection would have disclosed, and no evidence that landowner had ability to detect and avoid unreasonable risk of harm to employee. *Laico v. Chevron U.S.A., Inc. (2004) 123 Cal. App. 4th 649, 670, 20 Cal. Rptr. 3d 307*

Hirer did not affirmatively contribute to employee's injury, and court of appeal rejected injured employee's argument that public policies behind *Privette* and its progeny did not apply and that hirer should be subject to liability for employee's injury because employee's employer was uninsured against workers' compensation at time of employee's injury, with court pointing out that, although uninsured at time of employee's injury, employer had been so insured and had so informed hirer at time contract of hire was entered. *Bell v. Greg Agee Constr., Inc. (2004) 125 Cal. App. 4th 453, 466-468, 23 Cal. Rptr. 3d 33*

Court of appeal affirmed summary judgment in favor of general contractor in civil action against general contractor by employee whose employer was hired by general contractor for construction project on which employee was injured, when court found no triable issues of fact on theories of general contractor negligence, general contractor negligent exercise of retained control, or premises liability, and court found *Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721* , and its progeny applied and precluded employee from prevailing on such theories of liability against general contractor. *Sheeler v. Greystone Homes, Inc. (2003) 113 Cal. App. 4th 908, 918-922, 6 Cal. Rptr. 3d 683*

Although hirer of contractor, having generated hazardous waste that it hired contractor to remove, and which injured employee, had nondelegable duty under hazardous waste statutes [*42 U.S.C. § 6901 et seq.*; *Health & Safety Code § 25100 et seq.*] to properly dispose of such waste, nevertheless *Privette/Toland* doctrine means that generator of hazardous waste is not liable to employee of contractor it hires to dispose of that waste unless generator's conduct affirmatively contributed to employee's injuries. *Park v. Burlington Northern Santa Fe Railway Co. (2003) 108 Cal. App. 4th 595, 606-611, 133 Cal. Rptr. 2d 757*

Employee of uninsured subcontractor on construction project not permitted to sue property owner, because employee had workers' compensation coverage via Uninsured Employers Fund [now called the Uninsured Employers Benefits Trust Fund] and allowing suit would tend to discourage employers from obtaining coverage, so that rationales of exclusive remedy rule fully applied, nor was suit allowed on grounds that property owner retained control over construction project by virtue of project's defective architectural plans, because alleged defective plans may give rise to action against architect but, in absence of evidence that property owner exercised any retained control over project, exclusive remedy doctrine applied to foreclose employee's suit against owner. *Lopez v. C.G.M. Development, Inc. (2002) 101 Cal. App. 4th 430, 444-446, 124 Cal. Rptr. 2d 227*

Widow's civil negligence action against property owner and general contractor of construction project on which her husband, employee of subcontractor, had been killed, presented triable issues of fact on whether defendants each had general duty of care to protect public roadway for persons traveling on it (and on which her husband had been killed), whether each of defendants breached this duty, and whether these breaches caused decedent's fatal injury. *Ray v. Silverado Constructors (2002) 98 Cal. App. 4th 1120, 1123, 120 Cal. Rptr. 2d 251*

Liability for accidental death of independent contractor's employee could not be imposed on hirer/general contractor under theory of retained control when general contractor's failure was not shown to have affirmatively contributed to creation or persistence of hazard causing decedent's death. *Villafana v. Camco Pacific Construction Co. (2001) 91 Cal. App. 4th 189, 197-198, 110 Cal. Rptr. 2d 170*

Subcontractor's employee barred from pursuing an action against general contractor based upon contractor's failure to require subcontractor to take safety precautions, when general contractor's failure did not affirmatively contribute to creation or continued existence of dangerous condition causing injury to the subcontractor's employee. *Kinney v. CSB Construction, Inc. (2001) 87 Cal. App. 4th 28, 39, 103 Cal. Rptr. 2d 594*

Employee of subcontractor injured on construction project who received workers' compensation benefits for injury was barred from pursuing civil action for same injury against employer, construction project manager, and construction project owner. *Zamudio v. City and County of San Francisco (1999) 70 Cal. App. 4th 445, 455, 82 Cal. Rptr. 2d 664*

Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721 , precludes application of peculiar risk doctrine to employees of independent contractors who are injured through the negligence of the contractor even when the hirer fails to provide in the contract, or in some other manner, that special precautions be taken to avert the peculiar risks of the work. *Toland v. Sunland Housing Group, Inc. (1998) 18 Cal.4th 253, 267, 74 Cal. Rptr. 2d 878, 955 P.2d 504*

Supreme Court's decision in *Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721* , does not abrogate California law that hirer of an independent contractor may be liable to independent contractor's employee for hirer's own negligence. *Grahn v. Tosco Corp. (1997) 58 Cal. App. 4th 1373, 1389*

Indemnification agreement in which contractor agreed to indemnify person who hired independent contractor against liability under peculiar risk doctrine did not create basis for exception to rule in *Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721* , that person who hires independent contractor is not liable for workplace injuries sustained by contractor's employees. *Redfeather v. Chevron USA, Inc. (1997) 57 Cal. App. 4th 702, 705, 67 Cal. Rptr. 2d 159*

Employee of independent contractor who sued property owner and property lessee for injuries sustained when trench in which he was working collapsed was precluded from recovering under the peculiar risk doctrine pursuant to *Privette v. Superior Court*, even though independent contractor was hired by property lessor rather than owner. *Lopez v. University Partners (1997) 54 Cal. App. 4th 1117, 1125, 63 Cal. Rptr. 2d 359*

Under California Supreme Court's decision in *Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721* , government was not liable to independent contractor's employee for negligent failure to supervise the precautions taken by independent contractor or for failure to take precautions itself; government not entitled to summary judgment when evidence indicated that it could be liable to employee of independent contractor for failure to correct known dangerous condition. *Yanez v. United States of America (9th Cir. 1995) 63 F.3d 870, 875*

Excess insurers that provided overlapping coverage for the same risk, equally shared the excess cost of settlement when the plaintiff alleged causes of action against a landowner and general contractor for negligence and peculiar risk. *Fire*

Insurance Exchange v. American States Insurance Co. (1995) 39 Cal. App. 4th 653, 664-665, 46 Cal. Rptr. 2d 135

General contractor has no duty to warn employee of independent contractor of obvious dangerous condition; California Supreme Court's holding in *Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721* was not applicable to case involving nondelegable duty. *Felmlee v. Falcon Cable TV (1995) 36 Cal. App. 4th 1032, 1038, 1040, 43 Cal. Rptr. 2d 158*

California Supreme Court's decision in *Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721* , abrogating peculiar risk doctrine insofar as it allowed employees of independent contractor's to sue employer of contractor, applied retroactively; reversal of trial court's decision applying peculiar risk doctrine was not required by *Privette*, since judgment against defendant rested on finding of defendant's own negligence, rather than on negligence of subcontractor imputed to defendant under peculiar risk doctrine. *Whitford v. Swinerton & Walberg Co. (1995) 34 Cal. App. 4th 1054, 1060, 40 Cal. Rptr. 2d 688*

Person who hires independent contractor to perform work that is inherently dangerous as liable in tort under peculiar risk doctrine for damages if contractor's negligent performance of work causes injury to others; this liability as not extending to contractor's employees who must seek recovery from workers' compensation system; peculiar risk doctrine's policies of insuring that injuries caused by contracted work are compensated, that risk of loss for those injuries is spread to person who primarily benefited from work, and that adequate safety measures are taken, as achieved by workers'compensation system. *Privette v. Superior Court (1993) 5 Cal. 4th 689, 691-702, 21 Cal. Rptr. 2d 72, 854 P.2d 721* ; *Owens v. Giannetta-Heinrich Construction Co. (1994) 23 Cal. App. 4th 1662, 1667, 29 Cal. Rptr. 2d 11*

Where jury found general contractor responsible for plaintiff's injuries only on theory of vicarious liability, plaintiff's recovery as barred by retroactive application of rule announced by California Supreme Court prohibiting application of peculiar risk doctrine to employee of contractor who seeks recovery of tort damages from person who hired contractor but did not cause injuries; employees of independent contractors may still recover workers' compensation benefits and damages from negligent third parties. *Owens v. Giannetta-Heinrich Construction Co. (1994) 23 Cal. App. 4th 1662, 1667-1671, 29 Cal. Rptr. 2d 11*

[n] Power Press Injuries

Question of whether machine is "power press" within meaning of *Lab. Code § 4558(a)(4)* is one for jury. *Islas v. D & G Manufacturing Co., Inc. (2004) 120 Cal. App. 4th 571, 577580, 15 Cal. Rptr. 3d 559*

Exclusive remedy section of Longshore and Harbor Workers' Compensation Act [*33 U.S.C. § 905(a)*] did not bar shore-based maritime employee's tort action against employer under *Lab. Code §§ 3602(a)* and *4558*, in which employee alleged that his injury was caused by employer's removal of or failure to install guard on power press. *Lenane v. Continental Maritime of San Diego, Inc. (1998) 61 Cal. App. 4th 1073, 1089, 72 Cal. Rptr. 2d 121*

Trial court properly set aside summary judgment order in favor of employer issued on basis that *Lab. Code § 4558* cause of action was precluded because a guard was not available for model of machine that injured employee, when, after summary judgment was granted, employee discovered evidence indicating that guard was available. *Uriarte v. United States Pipe & Foundry Co. (1996) 51 Cal. App. 4th 780, 791, 59 Cal. Rptr. 2d 332*

Trial court granted employer's motion for summary judgment in action by injured employee under power press exception to exclusive remedy doctrine when employee failed to provide evidence that employer was aware that machine was missing point of operation guard. *Aguilera v. Henry Soss & Company (1996) 42 Cal. App. 4th 1724, 1731, 50 Cal. Rptr. 2d 477*

A printing press is not a "power press" within the meaning of *Lab. Code § 4558* because it does not form materials to be used in the manufacture of other products. *McCoy v. Zahniser Graphics, Inc. (1995) 39 Cal. App. 4th 107, 111, 45 Cal. Rptr. 2d 871*

Application of power press exception under *Lab. Code § 4558(c)* requires proof that manufacturer informed employer of need for point of operation guard; existence of hole in pasta machine where safety guard was missing was insufficient to constitute the requisite conveyance of knowledge by the manufacturer. *Bryer v. Santa Cruz Pasta Factory (1995) 38 Cal. App. 4th 1711, 1714-1715, 45 Cal. Rptr. 2d 750*

[o] Premises Liability

Exclusivity doctrine barred action against employer for negligent or reckless failure to provide adequate security on employer's premises, despite knowledge of potential danger. *Arendell v. Auto Parts Club, Inc. (1994) 29 Cal. App. 4th 1261, 1265, 35 Cal. Rptr. 2d 83*

Lab. Code § 3602(a) as not barring waitress who received workers' compensation benefits from corporation owning restaurant from bringing third-party premises liability action against owners of property on which restaurant operated, even though property owners owned stock in restaurant; waitress as not employee of property owners. *Miller v. King (1993) 19 Cal. App. 4th 1732, 1733-1734, 24 Cal. Rptr. 2d 284*

[p] Spouses of Employees, Independent Actions

When worker's causes of action against employer are barred by exclusive remedy provisions of Labor Code, worker's spouse's causes of action based on physical injury to or disability of worker as also barred. *Cole v. Fair Oaks Fire Protection Dist. (1987) 43 Cal. 3d 148, 162-163, 233 Cal. Rptr. 308, 729 P.2d 743*

Spouse of injured employee as having no independent civil action against the employer for loss of consortium. *Colombo v. State of California (1991) 3 Cal. App. 4th 594, 599, 5 Cal. Rptr. 2d 567*

[q] Uninsured Employers

In plaintiff's personal injury action filed under *Lab. Code § 3706*, employer's liability is determined under rules of pleading and proof that differ significantly from those of common-law personal injury action, so that this statute creates statutory cause of action for personal injuries subject to three-year statute of limitations in *Code of Civ. Proc. § 338(a). Valdez v. Himmelfarb (2006) 144 Cal. App. 4th 1261, 1269-1270, 51 Cal. Rptr. 3d 195*

Workers' compensation insurer's civil action against illegally uninsured employer for reimbursement of award of benefits to employee for cumulative trauma was permitted by *Lab. Code § 5500.5(a)* as exception to exclusive remedy rule, and jurisdiction of action was not limited to Appeals Board. *Graphics Arts Mutual Ins. Co. v. Time Travel Internat., Inc. (2005) 126 Cal. App. 4th 405, 413-415, 23 Cal. Rptr. 3d 864*

Statutory presumption that employee's injury was due to uninsured employer's negligence does not extend to presumption that employee's claimed injury arose in course of employment, so that employee seeking damages from uninsured employer has same burden of proof as employee seeking workers' compensation benefits, i.e., burden of proving that injury was sustained in course of employment. *Huang v. L.A. Haute (2003) 106 Cal. App. 4th 284, 289-291, 130 Cal. Rptr. 2d 619*

Public entity operating under self-insured workers' compensation program pursuant to a certificate issued under *Lab. Code § 3700(c)* was not permitted to unilaterally extend its coverage to private entity acting as an agency of public entity. *Huffman v. City of Poway (2000) 84 Cal. App. 4th 975, 986, 101 Cal. Rptr. 2d 325*

Lab. Code § 3706, providing that, if any employer fails to secure payment of compensation, any injured employee or his or her dependents may bring action at law against such employer as if workers' compensation law did not apply, as one of principal exceptions to workers' compensation law's exclusive remedy rule, and as providing an alternative remedy to injured worker when employer has failed to secure payment of compensation as required by *Lab. Code § 3700*. *Rymer v. Hagler (1989) 211 Cal. App. 3d 1171, 1177, 260 Cal. Rptr. 76*

Jurisdiction of superior court to try claims of employee against his or her employer for damages under *Lab. Code § 3706* as arising only when payment of compensation is not secured, even though, in some instances, particular worker may have better claim in state civil action; employee who seeks recovery in civil action against employer for work-related injuries as barred by exclusivity rule unless he or she can establish that employer failed to secure payment of compensation as required by workers' compensation law, and employee as having burden of showing there was no coverage. *Rymer v. Hagler (1989) 211 Cal. App. 3d 1171, 1177-1178, 260 Cal. Rptr. 76*

Requirement of *Lab. Code § 3700* that private employer in California secure payment of compensation by securing insurance against liability from one or more insurers authorized to write compensation insurance in California or obtaining certificate of self-insurance pursuant to *Lab. Code § 3715* as satisfied so as to preclude civil action under *Lab. Code § 3706* when insurer is estopped to deny coverage. *Rymer v. Hagler (1989) 211 Cal. App. 3d 1171, 1183-1184, 260 Cal. Rptr. 76*

Ruling of workers' compensation judge, after hearing arguments of counsel, denying employee's motion to exclude insurance company from workers' compensation proceeding on ground it was not employer's compensation carrier at time employee was injured, and finding that insurer was employer's compensation carrier on date of injury or was estopped to deny workers' compensation coverage, as deciding issue of coverage; ruling as final order for purposes of collateral estoppel in employee's civil action against employer pursuant to *Lab. Code § 3706* for failure to secure payment of compensation, particularly when employee did not seek reconsideration of coverage ruling and dismissed workers' compensation proceeding without making any effort to challenge workers' compensation judge's decision; hence, trial court as having properly granted employer's motion for judgment on pleadings in employee's civil action againsthim. *Rymer v. Hagler (1989) 211 Cal. App. 3d 1171, 1180, 1182, 1183, 260 Cal. Rptr. 76*

In statutory action under *Lab. Code § 3706*, when employer fails to secure payment of workers' compensation as required by *Lab. Code § 3700*, employee as obligated to both plead and prove violation of *Lab. Code § 3700* and employer's failure to carry workers' compensation insurance. *Campos Food Fair v. Superior Court (1987) 193 Cal. App. 3d 965, 968, 238 Cal. Rptr. 685*

Defense of comparative negligence as unavailable to employer by virtue of *Lab. Code § 3708* in action at law by employee for personal injuries against employer who fails to secure workers' compensation insurance coverage. *Logan v. Masters (1981) 120 Cal. App. 3d 145, 148, 174 Cal. Rptr. 465*

Decision of WCAB, when final, as res judicata, in subsequent superior action, on issue of insurance. *Jones v. Brown (1970) 13 Cal. App. 3d 513, 522, 89 Cal. Rptr. 651*

Employer's failure to comply with requirement to carry workers' compensation insurance [*Lab. Code § 3700*] as not to be inferred if complaint silent on that subject. *Singleton v. Bonnesen (1955) 131 Cal. App. 2d 327, 331, 280 P.2d 481*

Employer-employee relationship as element of cause of action under *Lab. Code § 3706*; employee as without rights under that section if employer not subject to workers' compensation and insurance laws. *Mantonya v. Bratlie (1948)*

33 Cal. 2d 120, 124-125, 199 P.2d 677

Employer's failure to pay compensation as not constituting failure to secure compensation and, therefore, as not giving right of action under *Lab. Code § 3706*. *Pecor v. Norton-Lilly Co. (1931) 111 Cal. App. 241, 243, 295 P. 582*

Provision of predecessor to *Lab. Code § 3709* for attorney's fees as constitutional. *Marshall v. Foote (1927) 81 Cal. App. 98, 103-104, 252 P. 1075*

[r] Unlicensed Contractors

Contractor's license is automatically suspended, pursuant to Lab. Code § 7125.2(a)(2), for failure to *obtain* workers' compensation insurance, whereas, pursuant to Lab. Code § 7125.2(a)(1), suspension of license for failure to *maintain* workers' compensation insurance requires notice from registrar of contractors. *Wright v. Issak (2007) 149 Cal. App. 4th 1116, 1121-1123, 58 Cal. Rptr. 3d 1*

Plaintiff, injured while repairing defendant's roof, was defendant's employee pursuant to *Lab. Code § 2750.5*, which operated to allow plaintiff's lawsuit alleging defendant's negligence, despite fact that plaintiff, by virtue of *Lab. Code § 3352(h)*, was not employee of defendant for workers' compensation purposes, when court of appeal found that plaintiff was not licensed roofing contractor and, therefore, not independent contractor. *Mendoza v. Brodeur (2006) 142 Cal. App. 4th 72, 79-81, 47 Cal. Rptr. 3d 310*

Injured worker, employed by unlicensed contractor to repair homeowner's roof, and who had not worked on that job for statutorily required number of hours to qualify as employee of homeowner, nevertheless remained employee of contractor for purposes of assigning liability for injury, so that worker was eligible to receive benefits from Uninsured Employers Fund [now called the Uninsured Employers Benefits Trust Fund] and to pursue tort remedies against contractor in civil court. *Cedillo v. Workers' Comp. Appeals Bd. (2003) 106 Cal. App. 4th 227, 232, 236-237, 130 Cal. Rptr. 2d 581*

Unlicensed contractor and its employees as matter of law as employees of person hiring work done and unable to maintain civil action against hirer for damages for injuries at workplace but as required to resort to exclusive remedy of workers' compensation. *Campos Food Fair v. Superior Court (1987) 193 Cal. App. 3d 965, 967*

[s] Unsafe Workplace

Employer's conduct of providing employees with hazardous chemical substance to clean film processing laboratory, concealing known unsafe working conditions, and violating environmental safety regulations was within compensation bargain, making workers' compensation benefits employees' exclusive remedy. *Gunnell v. Metrocolor Laboratories, Inc. (2001) 92 Cal. App. 4th 710, 714, 112 Cal. Rptr. 2d 195*

Workers' compensation as sole remedy for employee injured by employer's failure to provide safe workplace; exclusive remedy provisions of workers' compensation law as not avoided by worker's alleging in tort action against employer fraud in the inducement (misrepresentations by employer of safety precautions taken and to be taken to protect worker from burglars made to induce worker to accept employment after worker had said she did not wish to do so because she feared working alone at night at shop where burglary had recently occurred) when worker sustained injury resulting from employer's alleged fraud, discovered alleged fraud only during employment relationship, and injury (fractured jaw and skull) arose out of and in course of employment relationship. *Spratley v. Winchell Donut House, Inc. (1987) 188 Cal. App. 3d 1408, 1412-1413, 234 Cal. Rptr. 121*

Failure to assure safe working environment as not creating exception to exclusive remedy provisions of workers'

compensation law. *Halliman v. Los Angeles Unified School Dist. (1984) 163 Cal. App. 3d 46, 51, 209 Cal. Rptr. 175*

[t] Vicarious Liability

Complaint against parent corporation for negligence and wrongful death was subject to demurrer, when it alleged that parent controlled budget of its subsidiary and thereby prevented subsidiary from replacing or repairing dangerous and improperly maintained trash truck that killed decedent employee, for whose death plaintiffs were receiving workers' compensation benefits, since complaint did not allege any independent tort committed by parent, and plaintiffs' claim that parent caused unsafe working conditions by controlling subsidiary's fiscal policies and management decisions was nothing more than claim that parent was responsible for acts or omissions of subsidiary, in which case parent was sheltered by exclusive remedy rule. *Waste Mgmt., Inc. v. Superior Court (2004) 119 Cal. App. 4th 105, 111-114, 13 Cal. Rptr. 3d 910*

Based on reasoning in *Privette*, injured employee is barred from pursuing personal injury action against non-negligent member of joint venture or enterprise when another member of joint venture negligently injures employee and provides workers' compensation coverage. *Orosco v. Sun-Diamond Corp. (1997) 51 Cal. App. 4th 1659, 1669-1670, 60 Cal. Rptr. 2d 179*

Parent corporation is not liable in tort under theories of alter ego and vicarious liability for actions of subsidiary corporation when heirs of decedent employees of subsidiary corporation brought suit for negligence and premises liability against parent corporation and exclusivity doctrine precluded suit against subsidiary corporation. *Doney v. TRW, Inc. (1995) 33 Cal. App. 4th 245, 249-250, 39 Cal. Rptr. 2d 292*

[u] Wrongful Death Actions

Medi-Cal lien could not be asserted against wrongful death action, when damages recoverable by plaintiff in that action did not and could not include compensation for medical services provided to decedent by Medi-Cal, since in California wrongful death action is cause of action in favor of heirs as beneficiaries, based on their own independent pecuniary injury suffered by loss of relative, distinct from any action that deceased might have maintained, had he or she survived, so that damages awarded in wrongful death action are for harm done to survivors, not to deceased. *Fitch v. Select Products Co. (2005) 36 Cal. 4th 812, 819-822, 115 P.3d 1233*

Wrongful death action by parents of minor employee against employer as barred by exclusive remedy doctrine when minor died in automobile accident on way home from work after being required to work beyond statutorily prescribed hours for minors; "special risk" exception to going and coming rule applicable as employer subjected minor to risk of automobile accident due to exhaustion. *Johnson v. Stratlaw, Inc. (1990) 224 Cal. App. 3d 1156, 1162-1164, 274 Cal. Rptr. 363*

Death action against employer by nondependent heirs of deceased employee as barred by exclusive remedy provisions of workers' compensation law (*Lab. Code §§ 3601, 3602*); legislative intention in its 1982 amendment of *Lab. Code § 3600* and its division of former *Lab. Code § 3601* into two sections, one addressed to suits against coemployees [*Lab. Code § 3601*] and other to actions against employers [*Lab. Code § 3602*] as intended to accommodate changes in dual capacity doctrine and include new exception for power press accidents and not to overthrow long established principles of law and precedent by permitting actions at law by nondependent heirs, notwithstanding fact that *Lab. Code § 3602* makes workers' compensation sole and exclusive remedy of employee or his or her "dependents" against employer. *Hisel v. County of Los Angeles (1987) 193 Cal. App. 3d 969, 972-979, 238 Cal. Rptr. 678* (tracing legislative and case history of relevant code provisions)

Action by widow and minor children of employee of company under contract with United States Army who was killed

clearing unexploded ordinance and other debris from former hand grenade range for damages for wrongful death, ultrahazardous substance and activity, and fraud as barred by exclusive remedy provisions of *Lab. Code §§ 3600, 3601*, and *4553* for work-related injuries and death when harm complained of was not aggravation of work-related injury but injury itself and no facts were adduced indicating that employer intended that employee be injured; moreover, there is no exception to the exclusivity provisions based on "substantial certainty" of harm from employer's misconduct. *Stalnaker v. Boeing Co. (1986) 186 Cal. App. 3d 1291, 1296, 1298-1301, 231 Cal. Rptr. 323*

Parent of deceased employee as barred from bringing wrongful death action by *Lab. Code §§ 3600* and *3601*, even though parent is nondependent and therefore not entitled to recover under workers' compensation law. *Seide v. Bethlehem Steel Corp. (1985) 169 Cal. App. 3d 985, 990-991, 215 Cal. Rptr. 629*

Workers' compensation as exclusive remedy barring action for wrongful death of employee brought by nondependent heirs and personal representatives of deceased employee. *Soil Engineering Construction, Inc. v. Superior Court (1982) 136 Cal. App. 3d 329, 333, 186 Cal. Rptr. 209*

[v] Wrongful Discharge

Exclusive remedy provisions of workers' compensation system as not barring court action for tortious discharge in violation of public policy. *Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1101, 4 Cal. Rptr. 2d 874, 824 P.2d 680* ; *City of Moorpark v. Superior Court (1998) 18 Cal. 4th 1143, 1155, 77 Cal. Rptr. 2d 445, 959 P.2d 752*

Employee allegedly terminated for questioning employer about illegal payroll deduction stated cause of action for wrongful discharge in violation of public policy based on fundamental and substantial public policy, embodied in various Labor Code provisions and *Code Civ. Proc. § 487.020*, protecting employee's right to receive his or her wages. *Phillips v. Gemini Moving Specialists (1998) 63 Cal. App. 4th 563, 571-574, 74 Cal. Rptr. 2d 29*

Trial court erred in entering summary judgment against plaintiff on his cause of action for wrongful termination in violation of public policy, when evidence created triable issue of fact as to whether plaintiff was constructively terminated from his employment as result of harassment in violation of fundamental public policy against sexual orientation discrimination. *Kovatch v. California Casualty Management Co., Inc. (1998) 65 Cal. App. 4th 1256, 1275, 77 Cal. Rptr. 2d 217*

Employee had a claim under the California Fair Employment and Housing Act (FEHA) when he alleged he was terminated due to a non-industrial bone defect, and not because an industrial injury rendered him unfit to work. *Jimeno v. Mobil Oil Corp. (9th Cir. 1995) 66 F.3d 1514, 1535*

"Litigation specialist" for insurance company as failing to state cause of action for wrongful termination in violation of public policy when he alleged that he was terminated for refusing to artificially inflate case reserves, a practice which he alleged violated Proposition 103; neither Proposition 103 nor any other statute as restricting amount of case reserves an insurer must set aside. *Sequoia Ins. Co. v. Superior Court (1993) 13 Cal. App. 4th 1472, 1480-1481, 16 Cal. Rptr. 2d 888*

Employee as failing to state cause of action for wrongful termination in violation of public policy when she was terminated for requesting six-month medical leave and public policy allegedly violated was statutory requirement that employer maintain safe and healthful workplace (*Lab. Code §§ 6401, 6403*); employee's contention that statutes cited by employee support public policy of encouraging proper medical care as rejected by court. *Davaris v. Cubaleski (1993) 12 Cal. App. 4th 1583, 1588-1589, 16 Cal. Rptr. 2d 330*

Workers' compensation law as not preempting employee's cause of action against former employer for wrongful

termination of employment in violation of the California Fair Employment and Housing Act (*Gov. Code § 12900 et seq.*), when employee alleged he was discharged in retaliation for his efforts to prevent a subordinate from being sexually harassed. *Flait v. North American Watch Corp. (1992) 3 Cal. App. 4th 467, 475-478, 4 Cal. Rptr. 2d 522*

Generalized statements by supervisor to employee concerning supervisor's intent to assist employee in finding replacement employment as not sufficient to take case out of ambit of workers' compensation because to hold otherwise would exempt all cases of physical or emotional injury resulting from termination from workers' compensation system simply by claiming that employer led employee to believe he or she would not be fired. *Kacludis v. GTE Sprint Communications Corp. (N.D. Cal. 1992) 806 F. Supp. 866, 871*

Employee's cause of action against employer for tortious discharge against public policy, when employee was allegedly terminated in retaliation for testifying truthfully in official investigation of coworker's sexual harassment claim, as not barred by exclusive remedy provisions of compensation law, because employer's alleged misconduct could not be considered a normal part of the employment relationship or a risk reasonably encompassed within the compensation bargain. *Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1100-1101, 4 Cal. Rptr. 2d 874, 824 P.2d 680*

Termination of employment, and events leading up to termination, as "normal part of the employment relationship" for purposes of the exclusive remedy doctrine; thus, civil action to recover damages for emotional injuries sustained as result of termination of employment, or events leading up to termination, as barred by exclusive remedy doctrine unless the injury is the result of conduct that does not "reasonably [come] within the compensation bargain." *Shoemaker v. Myers (1990) 52 Cal. 3d 1, 17-20, 276 Cal. Rptr. 303, 801 P.2d 1054* (holding that violation of former *Gov. Code § 19683* (protecting governmental "whistleblowers" from discipline and discharge and expressly allowing civil damages action for such violations) is outside scope of compensation bargain and constitutes statutory exception to workers' compensation exclusive remedy provisions)

Settlement of workers' compensation claim for psychic injuries producing continuing disability for which former employee agreed to release and forever discharge employer from all claims and causes of action known or that might thereafter develop as result of injury as not barring former employee's claim that employer breached covenant of good faith and fair dealing by unfairly and in bad faith depriving employee of right to receive benefits of employment by discharging her; under California doctrine of primary rights, right protected by workers' compensation law as right not to be physically or emotionally injured on the job, whereas right protected by covenant of good faith is right not to be unfairly deprived of benefits of employment; release of claims in workers' compensation settlement as not eliminating right to pursue other remedies for invasion of other interests in other forums, absent a specific provision to that effect. *Ortiz v. Bank of America Nat. Trust and Sav. Ass'n (9th Cir. 1988) 852 F.2d 383, 388*

[35] Federal Law

Supremacy clause of U.S. Const., art. VI, as not barring state from enforcing its workers' compensation law against private operator of federally owned nuclear production facility under contract to Department of Energy; such application of state law as authorized by *40 U.S.C. § 290* [now *40 U.S.C. § 3172*]. *Goodyear Atomic Corp. v. Miller (1988) 486 U.S. 174, 176, 182, 182 n.4, 108 S. Ct. 1704, 100 L. Ed. 2d 158* (Ohio law providing for increased workers' compensation award for injuries resulting from employer's violation of state safety regulation)

[36] Federal-State Jurisdiction

California Lab. Code § 3700, which requires employers to maintain workers' compensation coverage, is not preempted by ERISA, the National Labor Relations Act, the Federal Arbitration Act, or the Labor Management Relations Act. *Contract Services Network, Inc. v. Aubry (9th Cir. 1995) 62 F.3d 294, 297*

California's insistence on a separately administered workers' compensation plan (*Lab. Code § 3700*) as not relating to ERISA covered plan but rather to plan that is specifically exempt from ERISA regulation and not preempted by *ERISA. Barker v. Pick N Pull Auto Dismantlers, Inc. (E.D. Cal. 1993) 819 F. Supp. 889, 894*

Exclusive remedy section of Longshore and Harbor Workers' Compensation Act [*33 U.S.C. § 905(a)*] did not bar shore-based maritime employee's tort action against employer under *Lab. Code §§ 3602(a)* and *4558*, in which employee alleged that his injury was cause by employer's removal of or failure to install guard on power press. *Lenane v. Continental Maritime of San Diego, Inc. (1998) 61 Cal. App. 4th 1073, 1089, 72 Cal. Rptr. 2d 121*

Concurrent federal-state jurisdiction over actions for personal injuries occurring in outer continental shelf. *Bobbitt v. Workers' Comp. Appeals Bd. (1983) 143 Cal. App. 3d 845, 848-849, 192 Cal. Rptr. 267*

Applicability of maritime law in cases within maritime jurisdiction as exclusive and Industrial Accident Commission (now WCAB) as having no jurisdiction to award compensation in these cases. *De Court v. Beckman Instruments, Inc. (1973) 32 Cal. App. 3d 628, 633, 108 Cal. Rptr. 109*

[37] Firefighters

Wage premium mandated by federal Fair Labor Standards Act (FLSA), *29 U.S.C. § 207(k)(2)*, was not included as part of firefighter's salary in lieu of disability compensation when firefighter, by virtue of his disability, had not worked number of hours required by FLSA to earn premium. *Fenn v. Workers' Comp. Appeals Bd. (2003) 107 Cal. App. 4th 1292, 1296-1298, 132 Cal. Rptr. 2d 878*

Fire recruit injured during training was not firefighter within meaning of *Lab. Code § 4850* and was excluded from receiving leave of absence benefits under *Lab. Code § 4850(b)*, based on that statute and employer's fire recruit job description. *City of Sacramento v. Workers' Comp. Appeals Bd. (2002) 94 Cal. App. 4th 1304, 1308-1310, 115 Cal. Rptr. 2d 63*

Injured paramedic who operated from city fire station, wore firefighter's gear, and had some of same training and duties as firefighters as entitled under *Lab. Code § 4850* (city, county, or district firefighters) to leave of absence without loss of salary in lieu of less generous temporary disability benefits, when emergency medical services routinely provided by paramedic were also occasionally performed by firefighters. *Charles v. Workers' Comp. Appeals Bd. (1988) 202 Cal. App. 3d 781, 782-784, 248 Cal. Rptr. 805*

[38] Going and Coming Rule; Exceptions

Defendant employer failed to show that there were no triable issues of material fact as to whether its employee was acting within course and scope of his employment at time of automobile accident that injured plaintiffs, when defendant employee had attended three-day, out-of-town business conference, flew back to home airport and retrieved his car from airport parking lot, on his way home drove around studio complex where his office was located without stopping and took his normal route home until he was involved in collision that gave rise to present cause of action, so that employee's attendance at business conference may be considered special errand/special mission, and that, when employee intended to drive home from this errand/mission, errand/mission was not concluded simply because employee drove his regular commute route. *Jeewarat v. Warner Brothers Entertainment, Inc. (2009) 177 Cal. App. 4th 427, 431, 436-439, 98 Cal. Rptr. 3d 837*

Employee who, upon leaving her mother's home where she had gone to visit, was injured while driving 136 miles to keep medical appointment for treatment of her industrial injuries, did not suffer new compensable injuries because those injuries were sustained outside reasonable geographic area of her employer's risk for incurring compensability liability

for such injuries. *Esquivel v. W.C.A.B. (2009) 178 Cal. App. 4th 330, 333-334, 344-345, 100 Cal. Rptr. 3d 380*

Employee's injury held not industrial since accident occurred after business portion of trip was complete and while employee and his wife were engaged in non-industrial sightseeing in Italy, and with no continuing or resumed business purpose employee was neither commercial traveler nor on special mission for employer at time of accident. *Fleetwood Enterprises, Inc. v. W.C.A.B. (Moody) (2005) 134 Cal. App. 4th 1316, 1323-1331, 37 Cal. Rptr. 3d 587*

"Commercial traveler rule" of workers' compensation law could not be incorporated into respondeat superior doctrine of civil tort law, so that plaintiff in civil tort action could not join alleged tortfeasor's employer as defendant when alleged tort occurred while employee was engaged in activity not occurring within scope of his employment, as would be required for invocation of respondeat superior doctrine, even though employee was commercial traveler within workers' compensation law at time of allegedly committing alleged tort. *Sunderland v. Lockheed Martin Aeronautical Systems Support Co. (2005) 130 Cal. App. 4th 1, 10-12, 29 Cal. Rptr. 3d 665*

In civil tort action, defendant's employee held not to have been acting within scope of her employment when she hit plaintiff and his dog with her car on her way into defendant's parking lot, when court found that "premises line" rule, as used in workers' compensation law, did not apply in civil tort cases involving going-and-coming rule for purposes of respondeat superior, that "scope of employment" for purposes of respondeat superior was more restrictive than "arising out of and in course of employment" for workers' compensation, and that premises line rule, developed in context of policies behind workers' compensation, did not fit policy justification for making employers vicariously liable for their employee's torts. *Hartline v. Kaiser Foundation Hospitals (2005) 132 Cal. App. 4th 458, 465-470, 33 Cal. Rptr. 3d 713*

Police officer injured on his day off while traveling from home to courthouse where he was to testify under subpoena about police matters was barredfrom workers' compensation benefits by "going and coming rule," and special mission exception did not apply, since testifying was not extraordinary in relation to officer's routine duties. *City of San Diego v. Workers' Comp. Appeals Bd. (2001) 89 Cal. App. 4th 1385, 1388-1389, 108 Cal. Rptr. 2d 510*

Special risk exception to going and coming rule was not applicable to employee injured on his way to work since driving on street near employer's facility did not subject employee to distinct or quantitatively greater risk than members of general public would be subjected to while driving on same street. *GE Engine Maintenance v. Workers' Comp. Appeals Bd. (1998) 69 Cal. App. 4th 1528, 1533, 82 Cal. Rptr. 2d 199*

Wrongful death action by parents of minor employee against employer as barred by exclusive remedy doctrine when minor died in automobile accident on way home from work after being required to work beyond statutorily prescribed hours for minors; "special risk" exception to going and coming rule applicable as employer subjected minor to risk of automobile accident due to exhaustion. *Johnson v. Stratlaw, Inc. (1990) 224 Cal. App. 3d 1156, 1162-1164, 274 Cal. Rptr. 363*

When coemployee is injured off employer's premises under circumstances in which workers' compensation would have been barred by going and coming rule but resulted from "special risk" causally related to employment and was sustained within field of that risk, injured coemployee's claim as coming within exclusive remedy provisions of workers' compensation law and tort action by coemployee against employer as barred. *Childers v. Shasta Livestock Auction Yard, Inc. (1987) 190 Cal. App. 3d 792, 798, 800-816, 235 Cal. Rptr. 641*

Going and coming rule, broadly stated, as prohibiting compensation for injuries received while traveling to and from work; rule as subject to numerous exceptions. *Parks v. Workers' Comp. Appeals Bd. (1983) 33 Cal. 3d 585, 588-589, 190 Cal. Rptr. 158, 660 P.2d 382* ; *Childers v. Shasta Livestock Auction Yard, Inc. (1987) 190 Cal. App. 3d 792, 802, 235 Cal. Rptr. 641* ; *Green v. Workers' Comp. Appeals Bd. (1986) 187 Cal. App. 3d 1419, 1422, 232 Cal. Rptr. 465* ; *Aetna Casualty & Surety Co. v. Workers' Comp. Appeals Bd. (1986) 187 Cal. App. 3d 922, 927-928, 232 Cal. Rptr. 257*

Special risk exception to going and coming rule. *Parks v. Workers' Comp. Appeals Bd. (1983) 33 Cal. 3d 585, 589-590, 592-593, 190 Cal. Rptr. 158, 660 P.2d 382* ; *Johnson v. Stratlaw, Inc. (1990) 224 Cal. App. 3d 1156, 1162-1164, 274 Cal. Rptr. 363* ; *Lefebvre v. Workers' Comp. Appeals Bd. (1980) 106 Cal. App. 3d 745, 750, 165 Cal. Rptr. 246*

Special errand or special mission exception to going and coming rule. *Southern California Rapid Transit Dist., Inc. v. Workers' Comp. Appeals Bd. (1979) 23 Cal. 3d 158, 166-167, 151 Cal. Rptr. 666, 588 P.2d 806* ; *Guest v. Workers' Comp. Appeals Bd. (1970) 2 Cal. 3d 670, 672-674, 87 Cal. Rptr. 193, 470 P.2d 1* ; *Felix v. Asai (1987) 192 Cal. App. 3d 926, 931, 237 Cal. Rptr. 718* (involving injury to third party rather than injury to employee); *Childers v. Shasta Livestock Auction Yard, Inc. (1987) 190 Cal. App. 3d 792, 802, 235 Cal. Rptr. 641* ; *Green v. Workers' Comp. Appeals Bd. (1986) 187 Cal. App. 3d 1419, 1422-1425, 232 Cal. Rptr. 465* ; *Perez v. Workers' Comp. Appeals Bd. (1984) 152 Cal. App. 3d 60, 63-64, 199 Cal. Rptr. 280*

No exception to going and coming rule applied to on-call employee having status as a peace officer, who carried a gun and pager but was not wearinga uniform when he left house to go to work and was injured in a slip and fall before entering car furnished by employer. *State Lottery Com. v. Workers' Comp. Appeals Bd. (1996) 50 Cal. App. 4th 311, 318, 57 Cal. Rptr. 2d 745*

Rule that compensation for injuries sustained during uncompensated meal breaks away from employer's premises is denied under aegis of "going and coming" rule, on ground employer-employee relationship is suspended during that period because employer does not pay for employee's services and employee provides no benefits in return, as inapplicable when employee, whether salaried or paid at hourly rate, is compensated during lunch break; by such arrangement, employer as impliedly agreeing that service will continue during such period and worker as entitled to compensation benefits for any injuries sustained during lunch break. *McFadden v. Workers' Comp. Appeals Bd. (1988) 203 Cal. App. 3d 279, 281-283, 249 Cal. Rptr. 778*

Special mission exception to going and coming rule as applicable when employee is requested to perform unusual service or usual service at an odd hour; trip as becoming "special" because bother and effort of trip itself is important part of what employee is being compensated for. *Luna v. Workers' Comp. Appeals Bd. (1988) 199 Cal. App. 3d 77, 82, 244 Cal. Rptr. 596*

Uniformed officer on-call exception to going and coming rule as existing when peace officer is injured while engaged in off-duty conduct reasonably directed toward fulfillment of employer's requirements and performed for benefit and advantage of employer; decisions upholding awards on this theory as invariably involving employers who expect to receive benefit of their employees' service during the commute; factors to be considered as including whether (1) express policy or routine practice exists, (2) failure to render services may result in disciplinary measures, (3) employee was in uniform at time of incident, and (4) employer provides on-site accommodation for changing or storing clothing and equipment. *Luna v. Workers' Comp. Appeals Bd. (1988) 199 Cal. App. 3d 77, 83-84, 244 Cal. Rptr. 596*

Exception to going and coming rule when employee consumes alcohol in scope of his or her employment, which consumption creates a risk of danger, and that risk was proximate cause of accident and of plaintiff's injuries, even though accident occurred while employee was going home from work. *Childers v. Shasta Livestock Auction Yard, Inc. (1987) 190 Cal. App. 3d 792, 802-803, 235 Cal. Rptr. 641*

Commercial traveler exception to going and coming rule. *Hartford Acc. & Indem. Co. v. Workers' Comp. Appeals Bd. (1982) 132 Cal. App. 3d 796, 805, 183 Cal. Rptr. 440*

[39] Independent Contractors

In wrongful death action brought by deceased worker's parents, California Supreme Court held that homeowners neither had nor breached any statutory duty of care owed to deceased worker under *Penal Code § 385(b)*, which provides that "[a]ny person who either personally or through an employee or agent, or as an employee or agent of another, operates ... or moves any tools ... [or] equipment ... within six feet of a high voltage overhead conductor is guilty of a misdemeanor," since worker for unlicensed contractor, who, through his own conduct, breached duty of care embodied in *Penal Code § 385(b)* and was killed while trimming trees on defendant homeowners' property, was not one of class of persons for whose protection statute was adopted. *Ramirez v. Nelson (2008) 44 Cal. 4th 908, 917-920, 80 Cal. Rptr. 3d 728, 188 P.3d 659*

Lab. Code § 6304.5, as amended effective January 1, 2000, allows plaintiffs to use Cal-OSHA provisions to show duty or standard of care to same extent as any other regulation or statute, whether defendant is plaintiff's employer or third party. *Elsner v. Uveges (2004) 34 Cal. 4th 915, 927-928, 935-936, 22 Cal. Rptr. 3d 530, 102 P.3d 915*

Court of appeal affirmed the trial court's judgment that plaintiffs, representatives of class of parcel and message drivers/deliverers, were independent contractors, not defendant's employees, when court of appeal held that trial court's jury instructions properly placed burden on defendant of rebutting the *Lab. Code § 3357* presumption that plaintiffs were defendant's employees and properly instructed jury as to factors to consider in resolving whether plaintiffs were independent contractors. *Cristler v. Express Messenger Systems (2009) 171 Cal. App. 4th 72, 79-90, 89 Cal. Rptr. 3d 34*

Lab. Code § 2750.5, which creates rebuttable presumption that unlicensed person who performs work requiring license is employee, not independent contractor, was irrelevant because statute's presumption of employee status may be rebutted only as to persons who hold valid contractor's license, which plaintiff did not at time of his injury, and substantial evidence supported trial court's finding that plaintiff was estopped to assert that he was employee because he had misrepresented himself to defendants as licensed contractor. *Chin v. Namvar (2008) 166 Cal. App. 4th 994, 1006-1009, 83 Cal. Rptr. 3d 294*

Substantial evidence supported determination by Department of Industrial Relations that drivers for plaintiff courier service were functioning as employees rather than as true independent contractors, and court of appeal found that question of hiree's status must be considered in light of history and remedial and social purposes of Workers' Compensation Act, and court of appeal followed *S.G. Borello & Sons, Inc. v. Department of Industrial Relations [(1989) 48 Cal. 3d 341, 256 Cal. Rptr. 543, 769 P.2d 399]* , in finding that functions performed by drivers did not require high degree of skill, that these functions constituted integral heart of plaintiff's courier service business, that, by obtaining clients in need of this service and providing workers to conduct it, plaintiff retained all "necessary" control over operation as a whole, and that these circumstances were enough to find employment relationship for purposes of Workers' Compensation Act, even in absence of plaintiff's exercise of control over details of work and with plaintiff being more concerned with results of work than with means of its accomplishment. *JKH Enterprises, Inc. v. Department of Industrial Relations (2006) 142 Cal. App. 4th 1046, 1059-1066, 48 Cal. Rptr. 3d 563*

Exemption from contractor's license requirement contained in *Bus. & Prof. Code § 7049* for construction or maintenance work incidental to "clearingor other work upon the land in rural districts for fire prevention purposes" meant that trial court erred in ruling that defendant was employee as matter of law pursuant to *Lab. Code § 2750.5*. *Moehring v. Thomas (2005) 126 Cal. App. 4th 1515, 1520-1525, 25 Cal. Rptr. 3d 118*

Licensed contractor who had filed required statement that he had no employees, thereby exempting himself from coverage pursuant to workers' compensation laws, and who subsequently hired employee who was then injured in course of employment, did not, ipso facto, suffer suspension of his contractor's license pursuant to *Bus. & Prof. Code § 7125.2(a)*, but instead, by virtue of *Bus. & Prof. Code § 7125.2(a)*, retained license because license board was required to "notify any licensee who fails to maintain workers' compensation that his or her license shall be automatically

suspended 30 days from the date of the notice" and must "provide the licensee with an additional notice that informs the licensee of the suspension date, the cause for suspension, and reinstatement procedures," and these notices had not been sent to contractor. *Smith v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 117, 124-134, 116 Cal. Rptr. 2d 728*

Exclusive remedy doctrine barred plaintiff's civil claims against property owner, when plaintiff was working for contractor hired by property owner who was unlicensed on date of plaintiff's injury and was, therefore, treated as employee of property owner under *Lab. Code § 2750.5*; fact that contractor was licensed at time he contracted with property owner was not dispositive of plaintiff's employment status when contractor was unlicensed on date of injury. *Zellers v. Playa Pacifica, Ltd. (1998) 61 Cal. App. 4th 129, 134-135, 70 Cal. Rptr. 2d 919*

Truck drivers hired by trucking broker are independent contractors as matter of law when truckers (1) had complete control over working conditions, (2) could terminate contracts or be terminated at will, (3) were engaged in distinct occupation and had own trade association, (4) could work for other businesses, (5) made capital investments in providing own trucks, (6) were compensated by job and could refuse any assignment without retribution, and (7) expressly and voluntarily agreed to independent contractor status. *State Compensation Insurance Fund v. Brown (1995) 32 Cal. App. 4th 188, 203, 38 Cal. Rptr. 2d 98*

"Peculiar risk" doctrine, which imposes liability on a principal for harm to "others" caused by the negligence of an independent contractor, including the contractor's employees, as not providing a basis for holding a principal liable for injuries suffered by the contractor himself or herself. *Torres v. Reardon (1992) 3 Cal. App. 4th 831, 839-841, 5 Cal. Rptr. 2d 52*

Question of whether a person who is engaged to perform services for another is an employee or an independent contractor as ordinarily a question of fact, but if onlyone inference may be drawn from all of the facts, that question as one of law. *Torres v. Reardon (1992) 3 Cal. App. 4th 831, 838, 5 Cal. Rptr. 2d 52*

Self-employed gardener as independent contractor, as a matter of law, when he was engaged to produce a result and the means by which the result was to be produced were not discussed and were not part of any agreement, the work was performed in the course of the gardener's independently established business in which he customarily engaged, he supplied the equipment, he was not hired by the day or hour but by the job, the work wasnot ordinarily done in the course of the clients' business, the gardener had a substantial investment in his business, and he had employees who assisted him. *Torres v. Reardon (1992) 3 Cal. App. 4th 831, 837-838, 5 Cal. Rptr. 2d 52*

Injured agricultural worker as not employed solely by uninsured crew supervisor who had agreed with grower to prune and harvest growers' almond trees; crew supervisor as not independent contractor due to grower's power of control over performance of work, and injured worker as therefore employee of grower for purposes of workers' compensation. *Rinaldi v. Workers' Comp. Appeals Bd. (1991) 227 Cal. App. 3d 756, 760-765, 278 Cal. Rptr. 105*

Lab. Code § 2750.5, creating rebuttable presumption that worker performing services for which contractor's license is required is employee and not independent contractor, as applying to workers' compensation cases, and, regardless of factors contained in *Lab. Code § 2750.5(a)-(c)*, valid contractor's license as necessary condition of independent contractor status; hence, licensed contractor that employed unlicensed subcontractor, who falsely represented to contractor that he had contractor's license, as liable as matter of law to employee of unlicensed subcontractor for workers' compensation benefits for injuries sustained on job, and employee as not estopped to deny subcontractor's independent contractor status. *Nick Hagopian Drywall v. Workers' Comp. Appeals Bd. (1988) 204 Cal. App. 3d 767, 770-773, 251 Cal. Rptr. 455*

Licensed general contractor who contracted with homeowners to remodel their home as liable under *Lab. Code § 2750.5* for workers' compensation paid by Uninsured Employers Fund [now called the Uninsured Employers Benefits Trust Fund] to injured employee of uninsured subcontractor who had subcontracted to finish job; even if subcontractor,

who falsely represented to contractor that he was licensed, was estopped to deny that he was unlicensed and hence able to claim workers' compensation benefits against licensed contractor, subcontractor's employee, who made no misrepresentations and held no license, as not in privity with subcontractor and hence as not estopped to claim workers' compensation benefits for job-related injury against licensed but uninsured contractor. *Rinaldi v. Workers' Comp. Appeals Bd. (1988) 199 Cal. App. 3d 217, 221-227, 244 Cal. Rptr. 637*

Uninsured Employers Fund [now called the Uninsured Employers Benefits Trust Fund] as not estopped to claim reimbursement from licensed but uninsured contractor of sums paid under compromise and release to injured employee of unlicensed and uninsured subcontractor who misrepresented his licensed status to contractor. *Rinaldi v. Workers' Comp. Appeals Bd. (1988) 199 Cal. App. 3d 217, 224-227, 244 Cal. Rptr. 637*

Illegally unlicensed subcontractor hired as independent contractor to do roofing on construction project as employee of general contractor as matter of law under *Lab. Code § 2750.5*; subcontractor's employee as employee of general contractor as well and barred by exclusive remedy provisions of workers' compensation law from suing general contractor in tort for injuries sustained on project. *Blew v. Horner (1986) 187 Cal. App. 3d 1380, 1383-1390, 232 Cal. Rptr. 660*

Workers' compensation liability for employees of unlicensed subcontractor as imposed on general contractor as matter of law, whereas workers' compensation liability of general contractor for employees of licensed subcontractorwho is unlawfully uninsured for workers' compensation as question of fact. *Blew v. Horner (1986) 187 Cal. App. 3d 1380, 1390 n.5, 232 Cal. Rptr. 660*

Right to control as dominant criterion and most significant test in determining whether worker is employee or independent contractor. *Muffett v. Royster (1983) 147 Cal. App. 3d 289, 302, 195 Cal. Rptr. 73*

Tests for determining whether alleged third-party tortfeasor is in fact employee's employer and hence insulated from employee's action for damages by workers' compensation laws as being same in workers' compensation cases as in factors to be considered. *Gigax v. Ralston Purina Co. (1982) 136 Cal. App. 3d 591, 599-601, 186 Cal. Rptr. 395*

[40] Injuries

Substantial evidence supported WCAB's decision that employee was not injured AOE/COE when, on his way to work as correctional officer for California Department of Corrections, employee stopped to render aid at accident scene and was injured when oncoming car struck truck involved in original accident and truck struck employee, when court of appeal found that employee had no peace officer status outside grounds of prison where he worked, that employee was not on duty at time of injury, and that there was no evidence that employee was paid for stopping to help at accident scene. *Pettigrew v. W.C.A.B. (2006) 143 Cal. App. 4th 397, 405-408, 48 Cal. Rptr. 3d 922*

Employee who suffers from a psychoneurotic injury arising out of his or her employment as entitled to receive compensation benefits. *Save Mart Stores v. Workers' Comp. Appeals Bd. (1992) 3 Cal. App. 4th 720, 724, 4 Cal. Rptr. 2d 597*

Under workers' compensation law, compensation as awardable for any injury or disease arising out of and in course of employment. *Kyles v. Workers' Comp. Appeals Bd. (1987) 195 Cal. App. 3d 614, 619, 240 Cal. Rptr. 886*

Compensable injuries under workers' compensation law as generally falling into one of four categories: (1) specific injuries incurred as result of one incident or exposure in employment, effects of which are realized or realizable; (2) industrial injuries suffered as result of specific incident or exposure that have latent effects; (3) continuous cumulative traumatic injuries suffered as result of number of minor strains over period of time; and (4) cumulative injuries, such as

silicosis, resulting from continuous exposure to harmful substance. *State Comp. Ins. Fund v. Workmen's Comp. App. Bd. (1969) 1 Cal. App. 3d 812, 817, 82 Cal. Rptr. 102*

[41] Insurance Carriers

Insurer's alleged failure to properly investigate third-party responsibility for accident suffered by insured's employee, resulting in allegedly unreasonably low settlement of insurer's claim against third party, causing increase in insured's workers' compensation insurance premiums, did not give rise to cause of action for tortious breach of covenant of good faith and fair dealing or cause of action for breach of contract. *Tilbury Constructors, Inc. v. State Comp. Ins. Fund (2006) 137 Cal. App. 4th 466, 474-482, 40 Cal. Rptr. 3d 392*

Workers' compensation insurer's civil action against illegally uninsured employer for reimbursement of award of benefits to employee for cumulative trauma waspermitted by *Lab. Code § 5500.5(a)* as exception to exclusive remedy rule, and jurisdiction of action was not limited to Appeals Board. *Graphics Arts Mutual Ins. Co. v. Time Travel Internat., Inc (2005) 126 Cal. App. 4th 405, 413-415*

Injured worker's civil action against his employer's worker's compensation insurer for malicious prosecution of insurance fraud criminal complaint against worker is not barred by exclusive remedy rule of workers' compensation law. *Mosby v. Liberty Mutual Insurance Co. (2003) 110 Cal. App. 4th 995, 999, 1004-1006, 2 Cal. Rptr. 3d 286*

Workers' compensation insurer for employee leasing company held to have engaged in breach of contract, insurance bad faith, and fraud when it denied coverage to injured employee working for contractor to whom leasing company had leased employees. *Diamond Woodworks, Inc. v. Argonaut Insurance Co. (2003) 109 Cal. App. 4th 1020, 1030-1049, 135 Cal. Rptr. 2d 736*

Insurer's duty of good faith and fair dealing with insured includes setting reserves at reasonable expectation of claim's value. *Lance Camper Mfg. Corp. v. Republic Indemnity Co. (2001) 90 Cal. App. 4th 1151, 1156-1159, 109 Cal. Rptr. 2d 515*

Employer was not required to exhaust administrative remedies before bringing a civil action for breach of contract and bad faith challenging the claims handling practices of its workers' compensation insurer. *Lance Camper Manufacturing Corp. v. Republic Indemnity Co. of America (1996) 44 Cal. App. 4th 194, 204, 51 Cal. Rptr. 2d 622*

[42] Insurance Fraud

Civil action for violation of *Ins. Code § 1871.7(b)* arising from fraudulent acts made unlawful by *Pen. Code § 550(a)(10)* did not violate exclusive remedy provision of workers' compensation law, and preponderance of evidence was appropriate standard of proof for liability under *Ins. Code § 1871.7*. *People v. Thompson (2006) 136 Cal. App. 4th 24, 29-31, 37-38, 38 Cal. Rptr. 3d 677*

Court of appeal, affirming trial court's order that struck employer's complaint that alleged employee's filing of fraudulent workers' compensation claim, held that employer failed to demonstrate probability that it would prevail on the merits of its fraud claim because the employer could not establish either of two elements of a cause of action for fraud, justifiable reliance or resulting damages, and court of appeal found that permitting employer to bring civil action for fraud against employee while workers' compensation proceeding was pending could have chilling effect on employee's exercise of right to file workers' compensation claim. *Leegin Creative Leather Products, Inc. v. Diaz (2005) 131 Cal. App. 4th 1517, 1523-1527, 33 Cal. Rptr. 3d 139*

Worker convicted of fraudulent misrepresentation in acquisition of medically required special footwear, and ordered by

court to make restitution, was barred from receiving only future reimbursement for further purchases of shoes, and when worker failed to make restitution as ordered, credit sought by defrauded insurer against other medical treatment was held impermissible bar of benefits not directly emanating from the fraud. *Farmers Insurance Group v. W.C.A.B. (Sanchez) (2002) 104 Cal. App. 4th 684, 690-691, 128 Cal. Rptr. 2d 353*

Employee's false statements and misrepresentations made on deposition are sufficient to support a conviction pursuant to *Ins. Code § 1871.4(a)(1).* *People v. Post (2001) 94 Cal. App. 4th 467, 475-476, 114 Cal. Rptr. 2d 356*

Workers' compensation insurer was entitled to restitution for losses resulting from employee's fraudulent claim, when employee pled no contest to fraud under *Lab. Code § 3207* and *Ins. Code § 1871.4(a)(1)* and court found insurer was a direct crime victim under *Pen. Code § 1202.4.* *People v. O'Casey (2001) 88 Cal. App. 4th 967, 973, 106 Cal. Rptr. 2d 263*

Civil courts have jurisdiction to order restitution in cases of workers' compensation insurance fraud under *Ins. Code § 1871.4.* *People v. Amin (2000) 85 Cal. App. 4th 58, 64, 101 Cal. Rptr. 2d 756*

Employee's intentional concealment of prior injuries for purposes of obtaining workers' compensation benefits was "material" under *Ins. Code § 1871.4(a)* despite his claim that prior injuries caused no residual disability, when failure to disclose prior injuries misled QMEs into attributing employee's knee condition to industrial causes and effectively precluded employer from raising apportionment as a defense. *People v. Gillard (1997) 57 Cal. App. 4th 136, 153, 66 Cal. Rptr. 2d 790*

[43] Joint Ventures and Partnerships

No joint enterprise existed between injured employee's employer and various other companies, when other companies had no control over production or sale of employer's goods, did not share profits with employer, and had no ownership interest in employer's assets. *Orosco v. Sun-Diamond Corp. (1997) 51 Cal. App. 4th 1659, 1670, 60 Cal. Rptr. 2d 179*

Although employee of joint venture or partnership is employee of each joint venturer or partner, employee of one joint venturer or partner as not, as matter of law, also employee of joint venture or partnership itself or other joint venturers or partners and therefore not limited to his or her workers' compensation remedy in seeking recovery of damages from other joint venturers or partners for injuries sustained on work of joint venture or partnership as result of their negligence. *Rogness v. English Moss Joint Venturers (1987) 194 Cal. App. 3d 190, 191, 193-194, 239 Cal. Rptr. 387*

[44] Judicial Review

[a] Effect of Appeals Board Decisions on Appellate Courts

Although WCAB cases denied writ of review by the Court of Appeal are not binding authority on the appellate courts, they are citable authority as to the holding of the *WCAB. Ralph's Grocery Co. v. Workers' Comp. Appeals Bd. (1995) 38 Cal. App. 4th 820, 827, n.7, 45 Cal. Rptr. 2d 197*

Decision of Workers' Compensation Appeals Board reported in California Workers' Compensation Reporter as properly citable authority, especially as indication of contemporaneous interpretation and application of workers' compensation laws. *Griffith v. Workers' Comp. Appeals Bd. (1989) 209 Cal. App. 3d 1260, 1264 n.2, 257 Cal. Rptr. 813*

Decisions of Workers' Compensation Appeals Board as not binding on appellate courts, and denial of review by appellate court of board decisions as not necessarily indicating court's agreement with board's decision on issues

presented. *Leeth v. Workers' Comp. Appeals Bd. (1986) 186 Cal. App. 3d 1550, 1556 n.5, 231 Cal. Rptr. 468*

[b] WCAB Orders

WCAB finding on reconsideration that employee was not entitled to *Lab. Code § 5402* presumption of compensability was a "final order" subject to a petition for writ of review because finding conclusively determined a substantial issue central to employee's entitlement to benefits, even though matter was remanded for new trial on all issues. *Maranian v. Workers' Comp. Appeals Bd. (2000) 81 Cal. App. 4th 1068, 1078-1081, 97 Cal. Rptr. 2d 418*

Order of Workers' Compensation Appeals Board, following board's granting reconsideration of workers' compensation judge's allowance to employer of credit against its compensation liability for injured employee's recovery in settlement of related medical malpractice action, in which board determined that *Civ. Code § 3333.1*, abolishing collateral source rule in medical malpractice cases, does not preclude employer from asserting such a credit and in which board remanded case to workers' compensation judge for determination of extent of employer's credit rights, as threshhold determination and as appealable even though case was not final. *Graham v. Workers' Comp. Appeals Bd. (1989) 210 Cal. App. 3d 499, 503, 258 Cal. Rptr. 376*

Whether court must entertain review of interim order of appeals board as essentially in hands of board; if board permits reconsideration under *Lab. Code § 5900*, its subsequent decision is "final" for purposes of appellate review. *Kosowski v. Workers' Comp. Appeals Bd. (1985) 170 Cal. App. 3d 632, 636 n.2, 216 Cal. Rptr. 280*

[c] Petitions for Writ of Review

Timely petition for writ of review filed in incorrect appellate district and transferred to proper district after time for filing had lapsed as not requiring dismissal and transferee court as retaining jurisdiction. *National Kinney v. Workers' Comp. Appeals Bd. (1980) 113 Cal. App. 3d 203, 206-209, 169 Cal. Rptr. 801*

[d] Prerequisite to Seeking Appellate Review

Although petition for reconsideration is proper when appeals board, in its initial decision on reconsideration, reverses WCJ's decision, such petition is not a prerequisite to seeking writ of review. *Lamb v. Workmen's Comp. Appeals Bd. (1974) 11 Cal. 3d 274, 279, fn. 5, 113 Cal. Rptr. 162, 520 P.2d 978*

[e] Scope of Review

[i] In General

Appellate court's authority to consider petition for writ of review of decision of WCAB as limited to determining whether evidence, viewed in light of entire record, supports decision; appellate court as not entitled to reweigh evidence or to decide disputed questions of fact; appellate court as not bound to accept WCAB's factual findings if determined to be unreasonable, illogical, improbable, or inequitable when viewed in light of overall statutory scheme; appellate court as entitled to decide questions of statutory interpretation. *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (1993) 16 Cal. App. 4th 227, 233, 20 Cal. Rptr. 2d 26*

Contemporaneous administrative construction of statute by Workers' Compensation Appeals Board, as administrative agency charged with its enforcement and interpretation, while not necessarily controlling, as being of great weight; courts as not departing from such construction unless it is clearly erroneous. *Griffith v. Workers' Comp. Appeals Bd. (1989) 209 Cal. App. 3d 1260, 1264, 257 Cal. Rptr. 813*

Reviewing court as not bound by decision of Workers' Compensation Appeals Board dealing only with questions of law. *Wilson v. Workers' Comp. Appeals Bd. (1987) 196 Cal. App. 3d 902, 904-905, 239 Cal. Rptr. 719*

In workers' compensation proceedings, refusal to allow presentation of relevant evidence as appropriate basis for annulling decision of appeals board. *Truesdale v. Workers' Comp. Appeals Bd. (1987) 190 Cal. App. 3d 608, 612 n.1, 235 Cal. Rptr. 754*

In workers' compensation proceeding in which facts would support but one conclusion, issue as a legal one and contrary finding by appeals board as not sustainable. *Truesdale v. Workers' Comp. Appeals Bd. (1987) 190 Cal. App. 3d 608, 613, 235 Cal. Rptr. 754*

WCJ's finding adopted by WCAB that applicant's claim for workers' compensation was not barred by going and coming rule as not limiting court's review of decision when finding constitutes conclusion of law based on application of law to substantially undisputed facts. *Aetna Casualty & Surety Co. v. Workers' Comp. Appeals Bd. (1986) 187 Cal. App. 3d 922, 928, 232 Cal. Rptr. 257*

Under *Lab. Code § 5313* requiring appeals board or referee (now workers' compensation judge) to make and file all findings of fact within 30 days after case submitted, award that fails to make finding on material fact as unable to stand. *Industrial Indemnity Co. v. Workers' Comp. Appeals Bd. (1983) 145 Cal. App. 3d 480, 485, 193 Cal. Rptr. 471*

When pertinent facts are not in dispute, whether employee sustained injury in scope of employment as presenting question of law, and reviewing court as not bound by conclusionary findings on issue by appeals board. *Perez v. Workers' Comp. Appeals Bd. (1984) 152 Cal. App. 3d 60, 65, 199 Cal. Rptr. 280* ; *C.L. Pharris Sand & Gravel, Inc. v. Workers' Comp. Appeals Bd. (1982) 138 Cal. App. 3d 584, 589, 187 Cal. Rptr. 899*

Scope of review of appeals board's interpretation of statute as being whether interpretation was clearly erroneous; interpretation as clearly erroneous when contrary to language of statute. *City of Anaheim v. Workers' Comp. Appeals Bd. (1981) 124 Cal. App. 3d 609, 613, 177 Cal. Rptr. 441*

Under Lab. Code § 5053, relating to effect of board's findings and conclusions, award as not disturbed if findings are supported by inferences that may fairly be drawn from evidence, even though evidence is susceptible of opposing inferences. *Judson Steel Corp. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 658, 664, 150 Cal. Rptr. 250, 586 P.2d 564*

[ii] Statement of Evidence and Reasons for Decision

It is mandatory for WCJ to provide summary of trial evidence under *Lab. Code § 5313* and *8* Cal. Code Reg. § 10566, and failure to submit such summary mandated that matter be returned to WCJ to prepare and submit one. *Sharareh v. W.C.A.B. (2007) 156 Cal. App. 4th 189, 192-195, 67 Cal. Rptr. 3d 147*

Failure of appeals board to comply with *Lab. Code § 5908.5*, requiring board in granting or denying reconsideration to state evidence relied on and specify in detail reasons therefor, as requiring that its decision after reconsideration be annulled. *Evans v. Workers' Comp. Appeals Bd. (1968) 68 Cal. 2d 753, 754, 68 Cal. Rptr. 825, 441 P.2d 633* ; *see Fairview State Hospital v. Workers' Comp. Appeals Bd. (1982) 138 Cal. App. 3d 595, 599-600, 188 Cal. Rptr. 51* ; *City of Santa Ana v. Workers' Comp. Appeals Bd. (1982) 128 Cal. App. 3d 212, 219, 180 Cal. Rptr. 125* ; *Zozaya v. Workmen's Comp. Appeals Bd. (1972) 27 Cal. App. 3d 464, 470-472, 103 Cal. Rptr. 793* ; *Solomon v. Workmen's Comp. Appeals Bd. (1972) 24 Cal. App. 3d 282, 286-287, 100 Cal. Rptr. 899*

Lab. Code § 5908.5, requiring appeals board's decision to state evidence relied on and reasons for decision, as not requiring annulment of order when parties were in no doubt as to issue litigated. *Albert Van Luit Wallpaper Co. v. Workmen's Compensation Appeals Bd. (1973) 36 Cal. App. 3d 88, 91-92, 111 Cal. Rptr. 247*

[iii] Substantial Evidence

Court review of appeals board's award as confined to determining whether award is supported by substantial evidence. *Judson Steel Corp. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 658, 664, 150 Cal. Rptr. 250, 586 P.2d 564* ; *Jordan v. Workers' Comp. Appeals Bd. (1985) 175 Cal. App. 3d 162, 164, 220 Cal. Rptr. 554*

Challenged finding of appeals board as required to be upheld if supported by substantial evidence in light of entire record. *LeVesque v. Workmen's Comp. App. Bd. (1970) 1 Cal. 3d 627, 637, 83 Cal. Rptr. 208, 463 P.2d 432* ; *Ferreira v. Workmen's Comp. Appeals Bd. (1974) 38 Cal. App. 3d 120, 124, 112 Cal. Rptr. 232*

Substantial evidence as supporting finding of WCJ and WCAB that employee, who suffered recurrent major depression, suffered single compensable injury; appellate court as bound by finding on review. *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (1993) 16 Cal. App. 4th 227, 235, 20 Cal. Rptr. 2d 26*

Appeals board's decision as required to state evidence relied on and specify in detail reasons for decision; substantial evidence to support decision as measured on basis of entire record, rather than by simply isolating evidence that supports board and ignoring other relevant facts of record that rebut or explain that evidence; if evidence relied on and reasons stated for decision do not support it, decision as required to be annulled. *Bassett-McGregor v. Workers' Comp. Appeals Bd. (1988) 205 Cal. App. 3d 1102, 1111, 252 Cal. Rptr. 868*

Court as not interfering with appeals board's factual findings if they are supported by substantial evidence or by reasonable inferences drawn from testimony adduced. *City of Fresno v. Workers' Comp. Appeals Bd. (1985) 163 Cal. App. 3d 467, 471, 209 Cal. Rptr. 463*

In determining whether order, decision, or award is supported by substantial evidence, court as required to consider weight or persuasiveness of all evidence, not just existence of substantial evidence in favor of respondent. *Skip Fordyce, Inc. v. Workers' Comp. Appeals Bd. (1983) 149 Cal. App. 3d 915, 920, 197 Cal. Rptr. 626*

Opinion of medical expert as not supported by substantial evidence when it was based on surmise, speculation, or conjecture. *Baptist v. Workers' Comp. Appeals Bd. (1982) 137 Cal. App. 3d 903, 906-908, 187 Cal. Rptr. 270*

In reviewing appeals board's decision, court as reviewing entire record before appeals board to determine whether decision is supported by substantial evidence. *Greenberg v. Workmen's Comp. Appeals Bd. (1974) 37 Cal. App. 3d 792, 798-799, 112 Cal. Rptr. 626*

On review of decision of appeals board after board, on reconsideration, set aside referee's (now workers' compensation judge's) decision and made its own finding based on independent examination of record, decision presented for review is that of board rather than of referee, and board's factual determinations as required to be upheld if there is substantial supporting evidence in record. *Erickson v. Workmen's Comp. App. Bd. (1970) 12 Cal. App. 3d 388, 391, 90 Cal. Rptr. 706*

[f] Waiver of Issues on Appeal

Failure to raise factual issue before workers' compensation judge or appeals board as precluding its consideration on judicial review. *Griffith v. Workers' Comp. Appeals Bd. (1989) 209 Cal. App. 3d 1260, 1265, 257 Cal. Rptr. 813*

[45] Jurisdiction

Workers' compensation insurer's civil action against illegally uninsured employer for reimbursement of award of benefits to employee for cumulative trauma was permitted by *Lab. Code § 5500.5(a)* as exception to exclusive remedy rule, and jurisdiction of action was not limited to Appeals Board. *Graphics Arts Mutual Ins. Co. v. Time Travel Internat., Inc. (2005) 126 Cal. App. 4th 405, 413-415*

Superior court had no jurisdiction to review Appeals Board decision when Board jurisdiction was invoked, pursuant to *Gov. Code § 21166*, for determination as to whether disability of public safety employee, member of Public Employees Retirement System, was industrial. *Abraham v. Workers' Comp. Appeals Bd. (2003) 113 Cal. App. 4th 1082, 1087-1089, 6 Cal. Rptr. 3d 820*

WCAB had no jurisdiction under *Lab. Code § 5500.5* or otherwise, to resolve contribution dispute between city and county agency members of a joint powers agency, when members' rights and obligations were established pursuant to formal joint powers agreement and concept of contribution did not apply. *Victor Valley Transit Authority v. Workers' Comp. Appeals Bd. (2000) 83 Cal. App. 4th 1068, 100 Cal. Rptr. 2d 235* .

In controversy over payment of medical treatment, WCAB had jurisdiction to determine whether licensed physician may use medical assistants to perform certain services. *PM & R Associates v. Workers' Comp. Appeals Bd. (2000) 80 Cal. App. 4th 357, 364, 94 Cal. Rptr. 2d 887*

WCAB had jurisdiction, pursuant to *Lab. Code §§ 3600.5* and *5305*, to award workers' compensation benefits to professional baseball player injured out-of-state who signed player's contract for out of state team in California, even though the contract was signed by the team outside of California and, as a condition of the contract, the baseball Commissioner had to approve the contract. *Bowen v. Workers' Comp. Appeals Bd. (1999) 73 Cal. App. 4th 15, 26-27, 86 Cal. Rptr. 2d 95*

WCAB had subject matter jurisdiction to award death benefits to daughter of deceased employee killed in airplane crash while working in Wyoming for Wyoming employer, when deceased employee entered into employment contract in *California. Janzen v. Workers' Comp. Appeals Bd. (1998) 61 Cal. App. 4th 109, 117, 71 Cal. Rptr. 2d 260*

WCAB has jurisdiction to determine whether housing authority's chief of police is employee within the meaning of *Lab. Code § 4850*. *Housing Authority v. Workers' Comp. Appeals Bd. (1998) 60 Cal. App. 4th 1076, 1082, 70 Cal. Rptr. 2d 738*

WCAB does not have subject matter jurisdiction over federally recognized Indian tribe for purposes of enforcing workers' compensation laws. *Middletown Rancheria v. Workers' Comp. Appeals Bd. (1998) 60 Cal. App. 4th 1340, 1356, 71 Cal. Rptr. 2d 105*

Ohio corporation that paid survivors' benefits under California law to family of an employee who was killed while working in California, was entitled to reimbursement from a third-party tortfeasor even though the survivors claimed workers' compensation benefits only in Ohio and State of Ohio did not allow for reimbursement. *Dailey v. Dallas Carriers Corp. (1996) 43 Cal. App. 4th 720, 727, 51 Cal. Rptr. 2d 48*

Defendant-employer must plead facts showing that (1) the injury complained of in the tort action occurred at a time when both the plaintiff-employee and the defendant-employer were subject to the provisions of *Lab. Code § 3600(a)(1)*; (2) at the time of the injury, the employee was performing service growing out of and incidental to his or her employment and was acting within the course of that employment; and (3) the injury was proximately caused by the employment, with or without negligence. *Coca-Cola Bottling Co. v. Superior Court (1991) 233 Cal. App. 3d 1273,*

1285, 285 Cal. Rptr. 183

When the complaint affirmatively alleges facts indicating workers' compensation coverage, the defendant-employer may demur to the complaint or move for judgment on the pleadings. *Coca-Cola Bottling Co. v. Superior Court (1991) 233 Cal. App. 3d 1273, 1285, 285 Cal. Rptr. 183*

Superior court as having jurisdiction over compensation insurer's declaratory relief action concerning whether it had duty to defend or indemnify employer with respect to employee's injury. *Aetna Casualty & Surety Co. v. Aceves (1991) 233 Cal. App. 3d 544, 551-554, 284 Cal. Rptr. 477*

Under *Lab. Code § 5300(a), (b)*, WCAB as having exclusive jurisdiction over disputes regarding employee's right to compensation or liability of employer. *Marsh & McLennan, Inc. v. Superior Court (1989) 49 Cal. 3d 1, 5, 259 Cal. Rptr. 733, 774 P.2d 762*

WCAB as tribunal of limited jurisdiction with no powers beyond those conferred on it by *Cal. Const., art. XIV, § 4*, and the provisions of the *Labor Code. Morton v. Workers' Comp. Appeals Bd. (1987) 193 Cal. App. 3d 924, 927-928, 238 Cal. Rptr. 651*

Although WCAB has no jurisdiction to make an award of *Lab. Code § 4850* benefits (payment of salary in lieu of temporary disability payments to city firefighters among others), WCAB as having jurisdiction under *Lab. Code § 4851* to determine whether disability referred to in *Lab. Code § 4850* arose out of and in course of employment and, in disputed case, to determine when such disability commenced and ceased and amount of benefits to which employee is entitled during period of such disability. *Kosowski v. Workers' Comp. Appeals Bd. (1985) 170 Cal. App. 3d 632, 637, 216 Cal. Rptr. 280*

Employment contract of Nevada resident as formed in Nevada when words accepting employment were uttered from Nevada telephone, not when work orders were picked up from union local in California, and WCAB as having no jurisdiction over worker's compensation claim for cumulative injury sustained at Nevada jobsite.

Ledbetter Erection Corp. v. Workers' Comp. App. Bd. (1984) 156 Cal. App. 3d 1097, 1105-1106, 203 Cal. Rptr. 396

Both WCAB and superior court as having concurrent precedential jurisdiction to determine threshold question of subject matter jurisdiction, namely, whether cause comes within exclusive jurisdiction of *WCAB. Yavitch v. Workers' Comp. Appeals Bd. (1983) 142 Cal. App. 3d 64, 70, 190 Cal. Rptr. 793* ; *Jones v. Brown (1970) 13 Cal. App. 3d 513, 520, 89 Cal. Rptr. 651*

[46] Liens

Outpatient surgery center lien claimant (or any medical lien claimant) has burden of proving that its charges are reasonable, and outpatient surgery center lien claimant's billing, by itself, does not establish that claimed fee is reasonable, so that, even in absence of rebuttal evidence, lien need not be allowed in full if unreasonable on its face. Tapia v. Skill Master Staffing (2008) 73 Cal. Comp. Cases 1338, 1342-1346 (Appeals Board en banc opinion)

Appeals Board's awards to lien claimants, outpatient medical treatment centers, were not supported by substantial evidence, when court of appeal found that lien claimants, in order to establish their right to reimbursement, bore initial burden of proving they were properly licensed or accredited, and that they had not carried this burden in present case. *Zenith Ins. Co. v. W.C.A.B. (2006) 138 Cal. App. 4th 373, 376-377, 41 Cal. Rptr. 3d 380*

Recovery from employer or insurer on Medi-Cal lien filed by Department of Human Services is not limited to amount

equal to one-half of employee's net recovery. *Boehm & Associates v. Workers' Comp. Appeals Bd. (2003) 108 Cal. App. 4th 137, 150152, 133 Cal. Rptr. 2d 396*

Provisions of *Lab. Code § 4661.5* applied to lien claimant's *Lab. Code § 4903.1* lien for reimbursement of disability payments made to injured employee, entitling lien claimant to reimbursement at the temporary disability rate applicable at the time payments were made rather than at the rate in effect during the actual period of temporary disability. *Midas Recovery Services, Inc. v. Workers' Comp. Appeals Bd. (1997) 55 Cal. App. 4th 1321, 1325, 64 Cal. Rptr. 2d 574*

Medical lien claimants were not denied due process by reliance of WCJ and WCAB on reports filed by AME and a specialist appointed by the employer when lien claimants participated fully in lien hearing and were served with the AME's and the specialist's reports before the hearing; WCAB properly disallowed claim by a rehabilitation center for services of an occupational therapy assistant, because therapy assistant not licensed to provide occupational therapy unless it was under direct supervision of a licensed therapist or physician; WCAB properly rejected rehabilitation center's lien claim because center failed to file a fictitious business name statement as required by *Bus. & Prof. Code § 17918*. *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd. (1995) 34 Cal. App. 4th 1204, 1212-1215, 40 Cal. Rptr. 2d 734*

Medical lien claimant as denied due process and right to fair trial when it was not served with defense medical reports prior to trial and denied right to cross-examine and make objections at trial; denial of right to fair trial to lien claimant as reversible per se; medical lien claimant has right to participate in workers' compensation hearing, must be served with noticeof all hearings, and must be informed of scope and purpose of any hearing that may affect its rights or liabilities. *Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd. (1994) 26 Cal. App. 4th 789, 803, 805-806, 32 Cal. Rptr. 2d 293*

WCAB as permitted to allow lien claim for medical and hospital treatment, but as not permitted to reduce amount. *Kaiser Foundation Hospitals v. Workmen's Comp. Appeals Bd. (1974) 13 Cal. 3d 20, 28, 117 Cal. Rptr. 678, 528 P.2d 766*

County that paid moneys to employee under Aid to Families With Dependent Children program during period when employee was no longer receiving compensation disability payments and when claim for additional compensation benefits was pending and disputed as not entitled to lien on subsequent recovery by employee. *Ogdon v. Workmen's Comp. Appeals Bd. (1974) 11 Cal. 3d 192, 208, 113 Cal. Rptr. 206, 520 P.2d 1022*

Lien claimant as entitled to seek relief from the consequences of a failure to appear at a hearing on the claim by utilizing a procedure substantially similar to that provided for a relief from default by *Code Civ. Proc. § 473*. *Fox v. Workers' Comp. Appeals Bd. (1992) 4 Cal. App. 4th 1196, 1205, 6 Cal. Rptr. 2d 252*

WCAB as having exclusive jurisdiction over medical liens. *Fox v. Workers' Comp. Appeals Bd. (1992) 4 Cal. App. 4th 1196, 1204, 6 Cal. Rptr. 2d 252*

Lab. Code § 4903(b) as broadly interpreted by the courts to authorize reimbursement for most medical services provided to an industrially injured employee, and as limiting the WCAB's discretion to determining whether or not the amount of the lien is reasonable in relation to the medical services rendered to treat the employee's injuries; WCAB as permitted to reduce a physician's fee if it is considered excessive after giving the physician notice and an opportunity to be heard. *Fox v. Workers' Comp. Appeals Bd. (1992) 4 Cal. App. 4th 1196, 1203-1204, 6 Cal. Rptr. 2d 252*

Lien against workers' compensation award in favor of insurer for overpayment of uninsured motorist insurance benefits as not authorized under *Lab. Code § 4903* and as therefore not permitted. *Coltherd v. Workers' Comp. Appeals Bd. (1990) 225 Cal. App. 3d 455, 461-463, 275 Cal. Rptr. 130*

As used in *Lab. Code § 4903*, relating to liens against workers' compensation, phrase "any sum to be paid as compensation," as meaning any benefit or payment under workers' compensation law and as including both temporary and permanent disability awards; hence, amount of indemnification crime victim receives under victims of violent crime program as allowable lien against both temporary and permanent disability awards. *Burnsed v. State Bd. of Control (1987) 189 Cal. App. 3d 213, 218, 234 Cal. Rptr. 316*

Even though WCAB has authority to determine amount of living expenses for which injured worker may be allowed lien against workers' compensation award under *Lab. Code § 4903(c)* and WCAB may award less than that demanded, WCAB as not having power to modify or to compromise order for restitution in criminal proceeding in absence of an agreement. *People v. Shelton (1986) 188 Cal. App. 3d 371, 373, 232 Cal. Rptr. 783* (welfare fraud)

Burial expenses paid by third party as required, under *Lab. Code § 4903(d)*, to be awarded to widow subject to lien in favor of third party, and not tobe awarded directly to third party. *City and County of San Francisco v. Workmen's Comp. Appeals Bd. (1973) 36 Cal. App. 3d 412, 415, 111 Cal. Rptr. 387*

Landlord's lien for employee's unpaid back rent as limited by *Lab. Code § 4903(c)* to amount of rent due after injury and to amount of rent constituting maintenance for employee and employee's dependents only; WCAB as having no jurisdiction to award any amount for rent due before injury, despite either employee's consent to such arrangement or employee's joint and several liability with others for rent owed. *Williams v. Workers' Comp. Appeals Bd. (1993) 17 Cal. App. 4th 582, 591-593, 21 Cal. Rptr. 2d 438*

[47] Mandatory Settlement Conferences--Disclosure of Evidence

Testimony of vocational rehabilitation counselor developed as consequence of meetings between counselor and injured employee that took place following closure of discovery at mandatory settlement conference, held admissible at trial, when, at conference, employee had identified counselor as expert trial witness, which court of appeal held was sufficient to comply with *Lab. Code § 5502*. *Grupe Co. v. Workers' Comp. Appeals Bd. (2005) 132 Cal. App. 4th 977, 985-988, 34 Cal. Rptr. 3d 98*

Lab. Code § 5502 permits party to call and cross-examine any witness disclosed at mandatory settlement conference, even if witness was only disclosed by other party. *Dole Bakersfield v. Workers' Comp. Appeals Bd. (1998) 64 Cal. App. 4th 1273, 1277, 75 Cal. Rptr. 2d 836*

[48] Medical-Legal Evaluations

Pre-April 19, 2004, version of either *Lab. Code § 4061* or *4062* applied when medical evaluation of represented employee was required to resolve dispute arising out of injury occurring before January 1, 2005, since plain language of post-April 19, 2004, *Lab. Code § 4062.2* limited its applicability to injuries occurring on or after January 1, 2005, and it would be illogical to allow vacuum in which employer would have no right to have medical evaluation performed. *Nunez v. Workers' Comp. Appeals Bd. (2006) 136 Cal. App. 4th 584, 591-593, 38 Cal. Rptr. 3d 914*

For reasons set forth in *Nunez*, medical evaluation and reporting procedure of pre-April 19, 2004, *Lab. Code § 4062* applied to represented cases with date of injury prior to January 1, 2005, and *Lab. Code § 4050* could not be utilized to circumvent medical evaluation and reporting procedure of pre-April 19, 2004, *Lab. Code § 4062*, and *Lab. Code § 5701* should not be utilized to order medical evaluation that appears to violate pre-April 19, 2004, *Lab. Code § 4062* and that may generate report that is inadmissible at trial. *Cortez v. Workers' Comp. Appeals Bd. (2006) 136 Cal. App. 4th 596, 601-602, 38 Cal. Rptr. 3d 922*

Physician's disclosures to employee's supervisor regarding employee's treatment violated neither Confidentiality of

Medical Information Act nor right to privacy. *Garrett v. Young (2003) 109 Cal. App. 4th 1393, 1406-1412, 1 Cal. Rptr. 3d 134*

Employer is not entitled to delayed restitution under *Lab. Code §§ 4622* and *4625*, or equitable restitution for negotiated and unprotested payments to medical-legal evaluator. *American Psychometric Consultants, Inc. v. Workers' Comp. Appeals Bd. (1995) 36 Cal. App. 4th 1626, 1645, 1647, 43 Cal. Rptr. 2d 254*

Even absent physician-patient relationship, physician who evaluates workers' compensation claimant at request of defense counsel is liable to claimant for negligence or medical malpractice for injuries incurred during examination. *Mero v. Sadoff (1995) 31 Cal. App. 4th 1466, 1478, 37 Cal. Rptr. 2d 769*

Distance limitation and worker's physical condition as relevant factors in determining place of defense medical examination of worker under *Lab. Code § 4051*. *Hansen v. Workers' Comp. Appeals Bd. (1989) 211 Cal. App. 3d 717, 721, 259 Cal. Rptr. 506*

[48A] Medical Provider Networks

Defendant insurer denied plaintiff medical services provider admission into its preferred provider network in violation of common-law fair procedure doctrine. *Palm Medical Group, Inc. v. State Compensation Insurance Fund (2008) 161 Cal. App. 4th 206, 210, 218-228, 74 Cal. Rptr. 3d 266*

[49] Medical Treatment Benefits

Constitutionality of *Lab. Code § 4604.5(d)*'s limitation to 24 chiropractic treatment visits per industrial injury upheld, when court of appeal found that *Cal. Const., art. XIV, § 4*, vested legislature with "plenary power" to create "complete system of workers' compensation," which neither restricted legislature's ability to limit number of chiropractic treatments for which workers' compensation system must be financially responsible nor expanded injured worker's constitutional rights to include entitlement to receive unlimited treatments. *Facundo-Guerrero v. W.C.A.B. (2008) 163 Cal. App. 4th 640, 646-656, 77 Cal. Rptr. 3d 731*

Because SB 899 provided that amendment, addition, or repeal of any law made by SB 899 applied prospectively from date of SB 899's enactment (April 19, 2004), regardless of date of injury, court of appeal held that this provision meant that ACOEM Guidelines applied to determine what is reasonable medical treatment in all cases in which no such determination had been made as of April 19, 2004, so that, since court found that medical treatment in case before it was completed almost two months before enactment of SB 899 but that no determination of reasonableness of that treatment was made until May 2005, when WCJ found, per stipulation of parties, that value of disputed chiropractic services was $6,430 and that ACOEM Guidelines were not applicable to case, following which Appeals Board denied reconsideration, court of appeal annulled Board's decision and remanded for further proceedings. *Sierra Pacific Industries v. W.C.A.B. (Chatham) (2006) 140 Cal. App. 4th 1498, 1505-1512, 45 Cal. Rptr. 3d 550*

Employer as liable to provide employee 24-hour attendant care for life under *Lab. Code § 4600* once it was established that employee's industrial injurycontributed to need for such care, even though natural progression of employee's preexisting polio would have resulted in need for same level of care if there had been no industrial injury. *Rouseyrol v. Workers' Comp. Appeals Bd. (1991) 234 Cal. App. 3d 1476, 1484-1485, 286 Cal. Rptr. 250*

Lab. Code §§ 4600 (medical benefits) and 4601 (services of consulting physician at expense of employer) as precluding apportionment of liability for medical expenses rendered to injured worker, even if expenses were partially made necessary by preexisting injury, whether or not industrially caused. *Buhlert Trucking v. Workers' Comp. Appeals Bd. (1988) 199 Cal. App. 3d 1530, 1534-1535, 247 Cal. Rptr. 190*

Compensable injury as rendering employer liable for cost of medical treatment under *Lab. Code § 4600*; although medical expenses must be reasonably necessary to cure or relieve from effects of industrial injury, no finding of disability, temporary or permanent, as required condition to such recovery. *Kyles v. Workers' Comp. Appeals Bd. (1987) 195 Cal. App. 3d 614, 619-620, 240 Cal. Rptr. 886*

Medical treatment and disability indemnity as separate and distinct elements of compensation that fulfill different, though complementary, legislative goals. *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (1984) 153 Cal. App. 3d 327, 333, 200 Cal. Rptr. 219*

Licensed marriage, family and child counselor without license in clinical psychology as not "physician" within meaning of *Lab. Code §§ 3209.3* and *3209.8*; therefore, counselor as not subject to civil penalty under *Lab. Code § 4628(f)* for submitting psychological report regarding claimant without counselor's personal examination of claimant. *Stress Care, Inc. v. Workers' Comp. Appeals Bd. (1994) 26 Cal. App. 4th 909, 917, 32 Cal. Rptr. 2d 426*

Lab. Code § 4600 as precluding apportionment of employee's medical treatmentaward except when industrial and non-industrial causes of disability can be easily differentiated and when treatment for non-industrial condition is not necessary to relieve effects of industrial injury. *Fisk v. Workers' Comp. Appeals Bd. (1993) 20 Cal. App. 4th 1078, 1085, 25 Cal. Rptr. 2d 174*

[50] Nature and Purpose of Workers' Compensation

Employee stated cause of action in alleging that employer violated *Lab. Code § 3751* by including workers' compensation costs incurred by store as one element in calculation of employee incentive bonus. *Ralphs Grocery Co. v. Superior Court (2003) 112 Cal. App. 4th 1090, 1101-1102*

Workers' compensation statutes as reflecting legislative compromise between interests of employees and concerns of employers; quid pro quo as existing on both sides; in return for guarantee of compensation, employees as surrendering common-law remedies against their employers for work-related injuries, and reward of employer for securing compensation as being immunity from employee tort suits. *Riley v. Southwest Marine, Inc. (1988) 203 Cal. App. 3d 1242, 1254-1255 n.8, 250 Cal. Rptr. 718*

Fundamental policy underlying workers' compensation laws as being that those hiring others to perform services should bear risk of injuries incurred in undertakings; workers' compensation system as differing from tort lawbecause it provides for (1) liability without fault, (2) compulsory insurance, (3) automatic delivery of benefits, (4) limited benefits, and (5) expeditious machinery for resolving disputes. *Riley v. Southwest Marine, Inc. (1988) 203 Cal. App. 3d 1242, 1257-1258, 250 Cal. Rptr. 718*

[51] Peace Officers

Employee was not entitled to heart trouble presumption in *Lab. Code § 3212* because even if employee, investigator for employer, was police officer of political subdivision, only presumption that applied to that class of employees was hernia presumption, not heart trouble presumption. *California Horse Racing Bd. v. Workers' Comp. Appeals Bd. (2007) 153 Cal. App. 4th 1169, 1174-1177, 64 Cal. Rptr. 3d 222*

Employer failed to rebut presumption in *Lab. Code § 3212.2* that deceased employee's heart trouble, in form of heart attack stemming from upper respiratory infection, arose out of and in course of his employment as correctional officer, when employer's only evidence regarding decedent's heart trouble was in form of physician's report, which stated "there is nothing specific about the patient's occupation that would lead us to conclude that his viral infection and the

secondary myocarditis was occupationally related," and simply pointing out that there was nothing specific about decedent's job that caused his heart attack or put him at greater risk for this condition did not satisfy employer's burden to prove that contemporaneous nonwork-related event was sole cause of decedent's heart attack. *Jackson v. Workers' Comp. Appeals Bd. (2005) 133 Cal. App. 4th 965, 970-972, 35 Cal. Rptr. 3d 256*

Lab. Code § 3212.2 presumption of industrial causation with regard to heart trouble applies to members of the Department of Corrections having *any* custodial duties, not only those whose primary duties consist of the supervision of inmates. *Reeves v. Workers' Comp. Appeals Bd. (2000) 80 Cal. App. 4th 22, 29, 95 Cal. Rptr. 2d 74*

University of California police trainee as not entitled to leave of absence without loss of salary pursuant to *Lab. Code § 4806*, which applies only to officers who have completed training and qualify for active law enforcement. *Regents of University of California v. Workers' Comp. Appeals Bd. (1994) 27 Cal. App. 4th 1101, 1104, 33 Cal. Rptr. 2d 44*

Once operative, presumption of *Lab. Code § 3212.5* (heart trouble of specified peace officers manifesting itself during period of service as peace officer as presumed to arise out of and in course of employment) as not rebuttable by showing that heart trouble, in some undetected form, really preexisted employment; when facts giving rise to presumption have been proven at outset, burden of proof negating presumption as falling on employer; to be entitled to presumption, applicant as required first to show disability can be characterized as "heart trouble" within meaning of *Lab. Code § 3212.5*. *Parish v. Workers' Comp. Appeals Bd. (1989) 210 Cal. App. 3d 92, 97, 258 Cal. Rptr. 287*

Term "heart trouble," as used in compensation law, as having rather expansive meaning and as encompassing any affliction to, or additional exertion of, heart caused directly by heart or cardiovascular system or to heart or cardiovascular system through interaction with other afflicted areas of body. *Parish v. Workers' Comp. Appeals Bd. (1989) 210 Cal. App. 3d 92, 97-98, 258 Cal. Rptr. 287*

Under *Lab. Code § 3600.2(a)*, peace officer as entitled to workers' compensation benefits if he or she is injured when acting to apprehend law violator or suspected law violator, or to preserve life, property, or peace, even though not acting under immediate direction of employer; peace officer as notentitled to benefits under *Lab. Code § 3600.2(a)* when officer was injured on way to work by speeding automobile before he could act on thoughts of apprehending its driver. *Luna v. Workers' Comp. Appeals Bd. (1988) 199 Cal. App. 3d 77, 80, 244 Cal. Rptr. 596*

[52] Penalties for Delay in Payment

Overriding consideration in determining what penalty amount to assess should be whether penalty imposed would serve purposes sought to be accomplished by *Lab. Code § 5814*, which are both penal and remedial. Ramirez v. Drive Financial Services (2008) *73 Cal. Comp. Cases 1324, 1329-1330 (Appeals Board en banc opinion)*

Although, under *Lab. Code § 5814(a)*, successive penalty may be awarded for unreasonable delay in making prior penalty payment, it should not be awarded when employer had genuine doubt as to its liability or when there has been no legally significant intervening event. Ramirez v. Drive Financial Services (2008) *73 Cal. Comp. Cases 1324, 1331-1332 (Appeals Board en banc opinion)*

Employer may avail itself of *Lab. Code § 5814(b)*, regardless of whether employee discovered potential violation of *Lab. Code § 5814* before employer did, so long as employee had not claimed penalty before employer discovered potential violation, and employer then timely pays self-imposed penalty, and this provision's application was not limited to situations in which employer learned of potential violation through its own investigation rather than through employee's or third person's investigation. *New United Motors Manufacturing, Inc. v. W.C.A.B. (Gallegos) (2006) 141 Cal. App. 4th 1533, 1538-1539, 47 Cal. Rptr. 3d 200*

SB 899 version of *Lab. Code § 5814* applied to unreasonable delays or refusals to pay compensation that occurred prior to June 1, 2004, operative date of statute. *McCarthy v. W.C.A.B. (2006) 135 Cal. App. 4th 1230, 1235-1238, 37 Cal. Rptr. 3d 909*

Present version of *Lab. Code § 5814*, which became operative on June 1, 2004, applies to all injuries in cases pending on that date, including injuries that occurred prior to that date. *Green v. Workers' Comp. Appeals Bd. (2005) 127 Cal. App. 4th 1426, 1437-1443, 26 Cal. Rptr. 3d 527*

Agreed medical evaluator opinions and stipulation may each result in liability under the new *Lab. Code § 5814* and may each qualify as separate, legally significant event, and legislature did not eliminate multiple increases in compensation for conduct occurring either before or after award, as long as events were "separate and distinct." *Green v. Workers' Comp. Appeals Bd. (2005) 127 Cal. App. 4th 1426, 1443-1445, 26 Cal. Rptr. 3d 527*

Lab. Code § 4650 self-imposed penalty applies to accrued as well as periodic temporary and permanent indemnity payments, but not to future indemnity payments that are commuted into lump sum. *Rivera v. Workers' Comp. Appeals Bd. (2003) 112 Cal. App. 4th 1124, 1134-1136, 6 Cal. Rptr. 3d 16*

Employer or carrier making one late benefit payment and failing to include interest in that payment incurs only single penalty under *Lab. Code § 5814*. *CaliforniaHighway Patrol v. W.C.A.B. (Erebia) (2001) 89 Cal. App. 4th 1201, 1206-1207, 108 Cal. Rptr. 2d 118*

In determining reasonableness of delay, court should consider totality of circumstances, balancing fairness between parties, and here inadvertent delay held reasonable when employer had paid employee's medical benefits for 25 years, late quarterly penalty check was sent as soon as error was discovered, no timetable existed in agreement between employee and employer for quarterly penalty payments, employer had no history of late payments or of institutional neglect, employee did not notify employer that check had not arrived within usual time frame, and award of penalty (in excess of $40,000) would upset balance of fairness, constitute windfall to employee, and be out of proportion to employer's conduct (late payment in amount of $97.87). *County of San Luis Obispo v. Workers' Comp. Appeals Bd. (2001) 92 Cal. App. 4th 869, 876-879, 112 Cal. Rptr. 2d 246*

Employer's failure to self-assess *Lab. Code § 4650* penalty for late payment of temporary disability subjected employer to multiple *Lab. Code § 5814* [pre-2004 version] penalties since failure to self-assess penalty was a separate act of misconduct subject to a separate penalty rather than a "single continuous act of misconduct." *Moulton v. Workers' Comp. Appeals Bd. (2000) 84 Cal. App. 4th 837, 844-845, 101 Cal. Rptr. 2d 175*

Lab. Code § 5814 penalty was imposed for employer's failure to pay permanent disability advances requested by employee, when employee's failure to pay was allegedly based upon its reliance on outdated authority and found to be unjustified. *Rucker v. Workers' Comp. Appeals Bd. (2000) 82 Cal. App. 4th 151, 159, 97 Cal. Rptr. 2d 852*

Lab. Code § 5814 penalty was imposed for defendant's repeated and continuous late payment of permanent disability, when there was no reasonable explanation for delays in payment and no prompt correction of errors, and there was no showing that delays were caused by clerical errors or expected in the normal course of business. *Waters v. Workers' Comp. Appeals Bd. (2000) 80 Cal. App. 4th 652, 664-665, 95 Cal. Rptr. 2d 574*

When employer unreasonably delayed paying permanent disability advances under *Lab. Code § 139.5* to an injured worker receiving VRMA, *Lab. Code § 5814* [pre-2004 version] penalty assessed against full amount of permanent disability benefits, not against VRMA supplemented by permanent disability advances. *Kopitske v. Workers' Comp. Appeals Bd. (1999) 74 Cal. App. 4th 623, 633, 88 Cal. Rptr. 2d 216*

Lab. Code § 5814 [pre-2004 version] penalty applied against all compensable medical benefits paid before and after

approval of compromise and release agreement, when defendant unreasonably delayed payment of pharmacy bills for one year; court of appeal reversed WCAB's finding that penalty should only be imposed against medical expenses paid after the compromise and release was approved due to language in the agreement settling all future compensation claims. *Neel v. Workers' Comp. Appeals Bd. (1998) 67 Cal. App. 4th 847, 852, 79 Cal. Rptr. 2d 353*

Insurer was not liable for a penalty for its eight day delay in paying death benefits check, when brief delay was due to clerical error which was promptly corrected and, therefore, was not unreasonable. *County of Sacramento v. Workers' Comp. Appeals Bd. (1999) 69 Cal. App. 4th 726, 733, 81 Cal. Rptr. 2d 780*

Penalty as required to be applied to the full amount of the award for the class of compensation to which the payment was unreasonably delayed or refused, without deduction or credit for any timely preaward payments made by the employer. *Rhiner v. Workers' Comp. Appeals Bd. (1993) 4 Cal. 4th 1213, 1227-1228, 18 Cal. Rptr. 2d 129, 848 P.2d 244*

Only satisfactory excuse for delay in payment of disability benefits, whether prior or subsequent to award, that would relieve employer or carrier from penalty provisions of *Lab. Code § 5814* as being genuine doubt from medical or legal standpoint as to liability for benefits. *General Foundry Service v. Workers' Comp. Appeals Bd. (1986) 42 Cal. 3d 331, 338, 338 n.4, 228 Cal. Rptr. 243, 721 P.2d 124* ; *Kerley v. Workmen's Comp. Appeals Bd. (1971) 4 Cal. 3d 223, 230, 93 Cal. Rptr. 192, 481 P.2d 200* ; *Jensen v. Workers' Comp. Appeals Bd. (1985) 170 Cal. App. 3d 244, 247-248, 216 Cal. Rptr. 33* (repudiating holding in *Kampner v. Workers' Comp. Appeals Bd. (1978) 86 Cal. App. 3d 376, 384, 150 Cal. Rptr. 222* , that each case had to be judged on its own facts to determine whether delay was reasonable); *Rohrbach v. Workers' Comp. Appeals Bd. (1983) 144 Cal. App. 3d 896, 897-898, 901-902, 193 Cal. Rptr. 558* ; *cf. Smith v. Workers' Comp. Appeals Bd. (1986) 186 Cal. App. 3d 1451, 1454-1457, 231 Cal. Rptr. 364* (distinguishing *Kerley*, rejecting *Jensen*, and holding 22-day delay based on misunderstanding of to correct amount of compromise and release was not unreasonable)

Injured worker's exclusive remedy for insurer's intentional misconduct in persistent withholding of compensation payments, notwithstanding order by workers' compensation judge to pay, as lying within penalty provisions of workers' compensation law (i.e., *Lab. Code § 5814*). *Stoddard v. Western Employers Ins. Co. (1988) 200 Cal. App. 3d 165, 171-172, 245 Cal. Rptr. 820*

Preaward and postaward delinquencies as subject to 10-percent penalty under *Lab. Code § 5814* [pre-2004 version], penalty as mandatory despite arguable de minimus nature of amounts involved, and multiple penalties as assessed for successive delays so long as separate and distinct acts of misconduct are involved. *Gallamore v. Workers' Comp. Appeals Bd. (1979) 23 Cal. 3d 815, 821-828, 153 Cal. Rptr. 590, 591 P.2d 1242* ; *Viegas v. Workers' Comp. Appeals Bd. (1983) 148 Cal. App. 3d 423, 427, 196 Cal. Rptr. 10*

Defendant did not violate *Lab. Code § 4651* and no penalty was assessed under *Lab. Code § 5814* for unreasonable delay in paying applicant amount due under structured settlement agreement, when defendant immediately issued check to applicant pursuant to agreement and funds became available within three business days of payment period agreed to by parties. *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (1998) 66 Cal. App. 4th 1154, 1161, 78 Cal. Rptr. 2d 448*

Employee entitled to award of multiple penalties under *Lab. Code §§ 5814* [pre-2004 version], 4650(d) and 4661.5 for employer's unreasonable failure to provide temporary disability benefits and delay in providing such benefits at proper rate, when employee's prior stipulation to lower temporary disability rate did not waivehis right to future statutory increases, employee raised issue of increased rate at two hearings, and employer conceded its failure to timely pay temporary disability benefits and to pay at correct rate; multiple penalties awarded for employer's unreasonable delay in providing medical care, failure to reimburse self-procured expenses, and delay in paying expenses for medication, when employer knew of employee's requests for medical care and medication, medical reports supported these requests, and

employee was awarded further medical treatment and reimbursement for self-procured treatment. *Mote v. Workers' Comp. Appeals Bd. (1997) 56 Cal. App. 4th 902, 910-912, 914, 65 Cal. Rptr. 2d 806*

Penalty for employer's unreasonable delay in payment of interest on amount of stipulated award was assessed against total award of benefits per class under *Lab. Code § 5814* [pre-2004 version], including benefits paid prior to unreasonable failure to pay interest; employer's unreasonable failure to timely pay interest on stipulated award, and subsequent payment of interest at improper rate, constituted single course of conduct resulting in only one penalty assessment. *Soto v. Workers' Comp. Appeals Bd. (1996) 46 Cal. App. 4th 1356, 1363, 54 Cal. Rptr. 2d 446*

Award of penalty was allowed based on employer's denial of applicant's request for a second change of physician and interruption of temporary disability benefits when, given the clarity of the law in California on the issue of an applicant's right to choose treating physician, the employer could not have reasonably entertained a genuine doubt regarding its obligation to allow applicant to change her choice of treating physicians. *Ralphs Grocery Co. v. Workers' Compensation Appeals Bd. (1995) 38 Cal. App. 4th 820, 832, 45 Cal. Rptr. 2d 197*

When there is no reasonable basis for review petition under *Lab. Code § 5801*, penalty pursuant to *Lab. Code § 5814* (unreasonable delay in payment of compensation) as proper under appropriate circumstances without chilling effect on right to petition for writ of review; employer as subject to penaltywhen review petition merely challenged substantiality of evidence to support finding of total disability, raised no substantial legal issue, and was apparently filed and maintained merely to delay effect of award. *Klee v. Workers' Comp. Appeals Bd. (1989) 211 Cal. App. 3d 1519, 1525-1526, 260 Cal. Rptr. 217*

Lab. Code § 5814 as providing specific penalty for delay in payment of compensation benefits and, under *Lab. Code § 3602*, that remedy as exclusive. *Soto v. Royal Globe Ins. Co. (1986) 184 Cal. App. 3d 420, 426-427, 429-430, 229 Cal. Rptr. 192* (affirming judgment dismissing complaint by worker and his family against employer's insurance carrier for damages for delayed payment of compensation benefits on theories of (1) intentional infliction of emotional distress, (2) negligent infliction of emotional distress, (3) insurer's alleged violation of *Ins. Code § 790.03(h)(5)*, and *(4)* breach of implied covenant of good faith and fair dealing; dismissal as to family members further affirmed on additional grounds); *see* *Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal. 3d 287, 297-305, 250 Cal. Rptr. 116, 758 P.2d 58* (prospectively abrogating third-party private standing under *Ins. Code § 790.03*)

Under *Lab. Code § 5814* [pre-2004 version], penalty as imposed on entire amount of benefit withheld, regardless of whether delinquency was preaward or postaward or "de minimus." *Toccalino v. Workers' Comp. Appeals Bd. (1982) 128 Cal. App. 3d 543, 554, 180 Cal. Rptr. 427*

Penalty assessed for delay in payment of attorney's fees award as computed as 10 percent of attorney's fees, not 10 percent of total disability award. *General Accident Group v. Workers' Comp. Appeals Bd. (1981) 117 Cal. App. 3d 151, 154, 172 Cal. Rptr. 754* ; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (1981) 117 Cal. App. 3d 143, 149-150, 172 Cal. Rptr. 557*

When penalty under *Lab. Code § 5814* [pre-2004 version] has been imposed and not paid and another penalty is imposed, second penalty as imposed on entire award, not just on unpaid penalty. *Anderson v. Workers' Comp. Appeals Bd. (1981) 116 Cal. App. 3d 954, 960-961, 172 Cal. Rptr. 398*

Successive penalties for unreasonable delay of disability payments under *Lab. Code § 5814* [pre-2004 version] as appropriate only in situations of separate, distinct acts of delay or nonpayment, and when prior notice has been given by worker of intent to seek separate penalties. *Los Angeles Unified School Dist. v. Workers' Comp. Appeals Bd. (1981) 115 Cal. App. 3d 662, 664-666, 171 Cal. Rptr. 522*

Penalty for delay in paying one kind of disability benefit as applicable only to payments of that specific type of

disability benefit. *Ryerson Concrete Co. v. Workmen's Comp. Appeals Bd. (1973) 34 Cal. App. 3d 685, 687-689, 110 Cal. Rptr. 319* [decided pursuant to pre-2004 version of *Lab. Code § 5814*]

[53] Permanent Disability Benefits

Because in pretrial conference statement parties stipulated that permanent disability benefits that employer was already paying to employee included 15- percent increase pursuant to *Lab. Code § 4658(d)*, and because, by checking boxes on pretrial conference form labeled "Permanent Disability" and "Apportionment," parties conveyed their intention that WCJ calculate award for permanent disability benefits under applicable formula and facts presented, including *Lab. Code § 4658(d)*. *Bontempo v. W.C.A.B [2009) 173 Cal. App. 4th 689, 701-704, 93 Cal. Rptr. 3d 229*

Employee did not carry his burden of demonstrating that adoption of 2005 Permanent Disability Rating Schedule by Administrative Director was arbitrary and capricious or inconsistent with *Lab. Code § 4660(b)(2)*, so that employee failed to rebut presumptive validity of 2005 Schedule. Boughner v. Comp USA (2008) *73 Cal. Comp. Cases 854, 859-869 (Appeals Board en banc opinion)*

Comprehensive medical-legal report or treating physician's report need not state that injured worker's condition has reached permanent and stationary status to indicate existence of permanent disability within meaning of *Lab. Code § 4660(d)*. *Lewis v. Workers' Comp. Appeals Bd. (2008) 168 Cal. App. 4th 696, 700, 85 Cal. Rptr. 3d 661*

Court of appeal, relying on *Costco Wholesale Corp. v. Workers' Comp. Appeals Bd. (2007) 151 Cal. App. 4th 148, 59 Cal. Rptr. 3d 611* , held that pre-2005 comprehensive medical-legal report must indicate existence of permanent disability to satisfy *Lab. Code § 4660(d)* exception to application of 2005 Permanent Disability Rating Schedule and, rejecting another court of appeal's decision in *Vera v. Workers' Comp. Appeals Bd. (2007) 154 Cal. App. 4th 996, 65 Cal. Rptr. 3d 151* , held that employee's condition need not be permanent and stationary for treating physician's report or comprehensive medical-legal report to indicate existence of permanent disability. *Genlyte Group, LLC v. W.C.A.B. Workers' Comp. Appeals Bd. (2008) 158 Cal. App. 4th 705, 716-724, 69 Cal. Rptr. 3d 903* ; *see* *Zenith Insurance Co. v. Workers' Comp. Appeals Bd. (2008) 159 Cal. App. 4th 483, 494499, 71 Cal. Rptr. 3d 724* (following *Genlyte* to hold that employee's condition need not be permanent and stationary for treating physician's report or comprehensive medical-legal report to indicate existence of permanent disability)

Employer, who paid injured employee temporary disability benefits through March 2006, was not required to provide employee with *Lab. Code § 4061* notice until that date, and, therefore, no exception in *Lab. Code § 4660(d)* justified use of 1997 Schedule for Rating Permanent Disabilities in rating employee's permanent disability, and 2005 Permanent Disability Rating Schedule was to be used instead. *Tanimura & Antle v. Workers' Comp. Appeals Bd. (2007) 157 Cal. App. 4th 1489, 1494-1496, 69 Cal. Rptr. 3d 127*

Employer, who paid injured employee temporary disability benefits through March 2005, was not required to provide employee with *Lab. Code § 4061* notice until that date, that, therefore, no exception in *Lab. Code § 4660(d)* justified use of 1997 Schedule for Rating Permanent Disabilities in rating employee's permanent disability, and that 2005 Permanent Disability Rating Schedule was to be used instead. *Energetic Painting and Drywall, Inc. v. Workers' Comp. Appeals Bd. (2007) 153 Cal. App. 4th 633, 636-639, 63 Cal. Rptr. 3d 210*

Treating physician's report dated April 26, 2004, which stated that employee had existence of permanent disability but that employee had not reached permanent and stationary status, was not pre-2005 treating physician report indicating existence of permanent disability, because disability is not ratable if it has not reached permanent and stationary status. *Vera v. Workers' Comp. Appeals Bd. (2007) 154 Cal. App. 4th 996, 1003-1008, 65 Cal. Rptr. 3d 151*

Court of appeal, annulling WCAB decision that applied 1997 permanent disability rating schedule, held that WCAB's

decision was not supported by substantial evidence, since 12/15/2004 single-sentence report by treating physician stating physician's belief that permanent disability was within reasonable medical probability as result of employee's 7/21/2004 industrial injury was not followed by any other treating physician's report that provided reasoning to support physician's 12/15/2004 conclusion, and medical opinion is not substantial evidence if it does not indicate reasoning behind physician's opinion. *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (2007) 146 Cal. App. 4th 1311, 1314-1316, 53 Cal. Rptr. 3d 568*

For compensable claims arising before January 1, 2005, in order for 1997 schedule for rating permanent disabilities to apply, pursuant to *Lab. Code § 4660(d)*, existence of permanent disability must be indicated in either pre-2005 comprehensive medical-legal report or pre-2005 report from treating physician; otherwise, 2005 permanent disability rating schedule applied. Baglione v. Hertz Car Sales (2007) *72 Cal. Comp. Cases 444, 448-452 (Appeals Board en banc opinion) , pet. for writ of rev. filed 5/21/2007*; *Costco Wholesale Corp. v. Workers' Comp. Appeals Bd. (2007) 151 Cal. App. 4th 148, 153-157, 59 Cal. Rptr. 3d 611*

For compensable claims arising before January 1, 2005, only if last payment of temporary disability indemnity was made for any period of temporary disability ending before that date would 1997 schedule for rating permanent disabilities apply to determine extent of permanent disability, pursuant to *Lab. Code § 4660(d)*, because *Lab. Code § 4061* required employer to provide injured employee with notice regarding permanent disability "[t]ogether with the last payment of temporary disability indemnity"; otherwise, 2005 permanent disability rating schedule applied. Pendergrass v. Duggan Plumbing (2007) *72 Cal. Comp. Cases 456, 460-463 (Appeals Board en banc opinion) , pet. for writ of rev. filed 5/21/2007*; *Costco Wholesale Corp. v. Workers' Comp. Appeals Bd. (2007) 151 Cal. App. 4th 148, 153-157, 59 Cal. Rptr. 3d 611* ; *Zenith Insurance Co. v. Workers' Comp. Appeals Bd. (2007) 153 Cal. App. 4th 461, 465-466, 62 Cal. Rptr. 3d 683*

WCAB as without jurisdiction to alter permanent and stationary date of earliest injury sustained by employee and to award employee a single combined permanent disability rating of 100 percent for three successive industrial injuries, since award of permanent disability for earliest injury was final. *Dept. of Education v. Workers' Comp. Appeals Bd. (1993) 14 Cal. App. 4th 1348, 18 Cal. Rptr. 2d 900*

Permanent disability payments as provided for permanent bodily impairment, to indemnify injured worker for impaired future earning capacity or decreased ability to compete in open labor market. *Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 753, 7 Cal. Rptr. 2d 808, 828 P.2d 1195*

In case of employee with progressive disease, WCAB as potentially required to rate worker's permanent disability in stages at several subsequent proceedings; if WCAB concludes at end of each proceeding that condition is not either (1) permanent and stationary, or (2) a total (100 percent) permanent disability, WCAB as permitted to continue to reserve its jurisdiction for future final determination of permanent disability. *General Foundry Service v. Workers' Comp. Appeals Bd. (1986) 42 Cal. 3d 331, 338, 338 n.4, 228 Cal. Rptr. 243, 721 P.2d 124*

Right to permanent disability compensation as not arising until injured worker's condition becomes permanent and stationary. *LeBoeuf v. Workers' Comp. Appeals Bd. (1983) 34 Cal. 3d 234, 238 n.2, 193 Cal. Rptr. 547, 666 P.2d 989*

Employee as not entitled to a combined permanent disability rating for two successive, specific industrial injuries, one to left knee and one to right knee, separated in timeby approximately 18 months, even though both injuries became permanent and stationary at same time, since injuries were not to same part of body. *Parker v. Workers' Comp. Appeals Bd. (1992) 9 Cal. App. 4th 1636, 1641-1647, 12 Cal. Rptr. 2d 370*

Permanent disability compensation as serving a dual function: to compensate both for (1) an actual incapacity to work, and (2) physical impairment of the employee's body that may or may not be incapacitating. *Chavira v. Workers' Comp. Appeals Bd. (1991) 235 Cal. App. 3d 463, 473, 286 Cal. Rptr. 600*

Permanent disability as one that causes impairment of earning capacity, impairment of normal use of a member, or a competitive handicap in open labor market. *Sidders v. Workers' Comp. Appeals Bd. (1988) 205 Cal. App. 3d 613, 628, 252 Cal. Rptr. 304* ; *Franklin v. Workers' Comp. Appeals Bd. (1978) 79 Cal. App. 3d 224, 237, 145 Cal. Rptr. 22*

Percentage of permanent disability as function of part of body injured, extent of physical disability or impairment, age of employee at time of injury, and injured's occupation at time of injury; hence, occupational variant as having direct impact on size of permanent disability award. *Holt v. Workers' Comp. Appeals Bd. (1986) 187 Cal. App. 3d 1257, 1260, 232 Cal. Rptr. 442*

Although employee who performs duties of two occupations is entitled to rating based on occupation carrying higher percentage of disability, employee as required to prove that he or she actually performed duties required of the more arduous occupation. *Holt v. Workers' Comp. Appeals Bd. (1986) 187 Cal. App. 3d 1257, 1262, 232 Cal. Rptr. 442*

Permanent disability indemnity as having dual function: to compensate both for actual incapacity to work and for physical impairment of worker's body, which may or may not be incapacitating. *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (1984) 153 Cal. App. 3d 327, 333, 200 Cal. Rptr. 219*

[54] Preexisting Conditions and Subsequent Injuries

Employee suffering from preexisting condition and disabled by industrial injury as entitled to compensation and reimbursement of medical expense even though healthy person would not have been injured by event. *Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd. (1983) 34 Cal. 3d 159, 165, 193 Cal. Rptr. 157, 666 P.2d 14* ; *Lamb v. Workmen's Comp. Appeals Bd. (1974) 11 Cal. 3d 274, 282, 113 Cal. Rptr. 162, 520 P.2d 978*

Liability for full disability without proration as imposed on employer when subsequent injury lights up or aggravates previously existing condition resulting in disability; apportionment allowed only in those cases in which part of disability would haveresulted, in absence of industrial injury, from normal progress of preexisting disease. *Ballard v. Workers' Comp. Appeals Bd. (1971) 3 Cal. 3d 832, 837, 92 Cal. Rptr. 1, 478 P.2d 937*

Under *Lab. Code § 4600*, employer as liable for full award of costs of future medical treatment to employee injured in course of employment when need for such medical treatment is partially attributable to previous industrial injury; *Lab. Code § 4600* as not impliedly repealed or amended by later enactment of *Lab. Code § 3208.2*, which requires separate determination of apportionment issues in cases involving combined effect of two or more injuries so as to preclude avoidance of statute of limitations. *Buhlert Trucking v. Workers' Comp. Appeals Bd. (1988) 199 Cal. App. 3d 1530, 1532, 247 Cal. Rptr. 190*

Employer as liable only for portion of disability attributable to subsequent industrial injuries, not to preexisting condition of employee unless rehabilitation has occurred. *Newman v. Workers' Comp. Appeals Bd. (1984) 152 Cal. App. 3d 219, 222, 199 Cal. Rptr. 422*

Apportionment between different employers as not permitted to be used to diminish employee's recovery. *Jensen v. Workers' Comp. Appeals Bd. (1982) 136 Cal. App. 3d 1042, 1047, 186 Cal. Rptr. 570*

Apportionment as inappropriate when successive and cumulative injuries to same part of body become permanent and stationary at same time. *Rielli v. Workers' Comp. Appeals Bd. (1982) 134 Cal. App. 3d 721, 724, 184 Cal. Rptr. 825*

[55] Presumptions

Ninety-day period, during which employer's rejection of liability will avoid presumption of compensability of employee's injury, does not begin to run when employer receives knowledge of injury or asserted injury, even though no claim form has been filed; rather, 90-day period runs only from date on which employee files claim form with employer. *Honeywell v. Workers' Comp. Appeals Bd. (2005) 35 Cal. 4th 24, 37-38, 24 Cal. Rptr. 3d 179, 105 P.3d 544*

Lab. Code § 4663, as enacted in 2004 by SB 899, did not repeal non-attribution presumptions of *Lab. Code §§ 3212-3213.2*, and subsequent legislative enactments mean that non-apportionability of permanent disability awards made pursuant to *Lab. Code §§ 3212-3213.2* has been law since 2004 enactment of *Lab. Code § 4663* by SB 899. *Department of Corrections and Rehabilitation v. W.C.A.B. (Alexander) (2008) 166 Cal. App. 4th 911, 917-919, 82 Cal. Rptr. 3d 920*

Employer's duty to notify employee that his or her claim is rejected arises only when employee actually files formal claim, and only exception to this rule is estoppel when employer has led employee to believe that filing of claim form is not necessary, in which case employer's 90-day period for rejecting claim pursuant to *Lab. Code § 5402(b)*, and avoiding presumption of compensability, may begin before claim is actually filed if employee suffered some loss of benefits or setback as to claim. *Fleetwood Enterprises, Inc. v. W.C.A.B. (Moody) (2005) 134 Cal. App. 4th 1316, 1321-1322, 37 Cal. Rptr. 3d 587*

Statutory presumption that employee's injury was due to uninsured employer's negligence does not extend to presumption that employee's claimed injury arose in course of employment, so that employee seeking damages from uninsured employer has same burden of proof as employee seeking workers' compensation benefits, i.e., burden of proving that injury was sustained in course of employment. *Huang v. L.A. Haute (2003) 106 Cal. App. 4th 284, 289-291, 130 Cal. Rptr. 2d 619*

WCAB applied presumption of compensability under *Lab. Code § 5402* when employer accepted claim within 90 days of receiving claim form without thoroughly investigating claim, then denied liability after paying benefits for almost two years; application of presumption is mandatory when liability is not denied within 90 days, even if claim is accepted and paid but later denied. *Williams v. Workers' Comp. Appeals Bd. (1999) 74 Cal. App. 4th 1260, 1265-1266, 88 Cal. Rptr. 2d 798*

Provisions of *Lab. Code § 5402* did not bar employer from disputing liability for employee's alleged psychiatric injury based on fact that employee did not meetsix-month employment requirement set forth in *Lab. Code § 3208.3*, even though employer did not deny claim for psychiatric injury within the 90-day period allowed under *Lab. Code § 5402*. *James v. Workers' Comp. Appeals Bd. (1997) 55 Cal. App. 4th 1053, 1057, 64 Cal. Rptr. 2d 392*

Employer's failure to reject applicant's claim for workers' compensation within 90 days created presumption of compensability under *Lab. Code § 5402*; evidence contained in defendant's medical reports and records of lien claimant as inadmissible to rebut presumption of compensability since such evidence could have reasonably been obtained within the 90-day period. *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Welcher) (1995) 37 Cal. App. 4th 675, 683-685, 43 Cal. Rptr. 2d 660*

[56] Prisoners

Inmate earning no cash wages at time of industrial injury entitled to no temporary disability benefits. *Department of Corrections v. W.C.A.B. (Stentz) (2003) 109 Cal. App. 4th 1720, 1723, 1726, 1 Cal. Rptr. 3d 348*

Person convicted of crime who is not incarcerated but undertakes community service for county in lieu of paying fine is "employee" as matter of law for purposes of exclusive remedy doctrine of workers' compensation law. *Arriaga v.*

County of Alameda (1995) 9 Cal. 4th 1055, 1066-1067, 40 Cal. Rptr. 2d 116, 892 P.2d 150 (expressly disapproving of contrary holding in *California State Univ. Fullerton v. Workers' Comp. Appeals Bd. (1993) 16 Cal. App. 4th 1819, 21 Cal. Rptr. 2d 50*)

County jail inmate who received consideration in form of release from confinement during hours he was not performing work for county pursuant to work release program, for which he volunteered, as an employee within meaning of *Lab. Code § 3351* and entitled to workers' compensation for injury sustained while performing work activities for county under work release program. *Morales v. Workers' Comp. Appeals Bd. (1986) 186 Cal. App. 3d 283, 289-290, 230 Cal. Rptr. 575*

[57] Psychiatric Injury

Provisions of *Lab. Code § 3208.3* as inapplicable to members of California Public Employees' Retirement System (PERS); *Gov. Code § 20046*'s lower threshold of disability, "as a result of injury or disease arising out of and in the course of ... employment," governs. *Pearl v. Workers' Comp. Appeals Bd. (2001) 26 Cal. 4th 189, 194-198, 109 Cal. Rptr. 2d 308, 26 P.3d 1044*

Employee did not suffer psychiatric injury AOE/COE as result of actual events of employment that were predominant as to all causes combined, as required by *Lab. Code § 3208.3(b)(1)*, when substantial evidence supported Appeals Board's factual findings that employee's supervisor and co-workers did not persecute or harass her and that it was employee who caused stressful work environment by being rude, inflexible, easily upset, and demeaning toward other employees. *Verga v. Workers' Comp. Appeals Bd. (2008) 159 Cal. App. 4th 174, 183-189, 70 Cal. Rptr. 3d 871*

Employee met his burden of establishing that he suffered psychiatric injury as result of sudden and extraordinary employment condition, making psychiatric injury compensable even though it occurred during first six months of employment, when court of appeal found that lumber falling into aisle and onto employee's leg wassuch uncommon, unusual, and totally unexpected event that it would naturally be expected to cause psychic disturbances even in diligent and honest employee. *Matea v. Workers' Comp. Appeals Bd. (2006) 144 Cal. App. 4th 1435, 1447-1450, 51 Cal. Rptr. 3d 314*

Employee's psychiatric injury satisfied standard for compensability set forth in *Lab. Code § 3208.3(b)(1)* only if it was proven that events of employment were predominant as to all causes combined of psychiatric disability taken as whole, when legislative history of statute indicated that Appeals Board's award of benefits, even though AME found that employee's overall psychiatric injury was only 35 percent industrially caused but stated that one of three separate diagnoses was caused exclusively by industrial factors, was contrary to legislature's intention. *Sonoma State University v. Workers' Comp. Appeals Bd. (2006) 142 Cal. App. 4th 500, 504-506, 48 Cal. Rptr. 3d 330*

Court of appeal annulled and remanded Appeals Board's award of benefits to employee for work-related psychiatric injury, when it found that only one of four factors relied on by Board, namely, employee's daily interactions with angry customers of his employer, fell within definition of actual events of employment in *Lab. Code § 3208.3(b)(1)*, while other three factors, namely, downsizing of employer, loss of value of employer's stock owned by employee, and employee's concern about his employer's future and his retirement funds, did not fall within definition of actual events of employment. *Pacific Gas & Electric v. W.C.A.B. (Bryan) (2004) 114 Cal. App. 4th 1174, 1182-1184, 8 Cal. Rptr. 3d 467*

Rule regarding six months of employment applies to all claims of injury to psyche (other than those subject to statutory exception of having been caused by "sudden and extraordinary employment condition"), including those claimed to have arisen out of physical industrial injuries. *Wal-Mart Stores, Inc. v. Workers' Comp. Appeals Bd. (2003) 112 Cal. App. 4th 1435, 1441-1443, 5 Cal. Rptr. 3d 822*

Employer's investigation of employee's allegations against another employee of racial discrimination constituted good faith personnel action in face of accused employee's claim for psychiatric injury. *Northrop Grumman Corp. v. Workers' Comp. Appeals Bd. (2002) 103 Cal. App. 4th 1021, 1035-1037, 127 Cal. Rptr. 2d 285*

Correct legal standard for determining good faith personnel actions is whetheremployer made and carried out regular and routine personnel decision with subjective good faith and whether employer's actions were objectively reasonable, not product of unlawful animus toward employee, in which case employer's mistakes in carrying out personnel action do not render that action unlawful. *City of Oakland v. Workers' Comp. Appeals Bd. (2002) 99 Cal. App. 4th 261, 267-270, 120 Cal. Rptr. 2d 873*

Language of *Lab. Code § 3208.3* applies to psychiatric injury claimed as compensable consequence of precipitating physical injury, and precipitating physical injury constitutes actual event of employment, so that consequential psychiatric injury is compensable if and only if it is more than half attributable to physical industrial injury. *Lockheed Martin Corp. v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1237, 1249, 117 Cal. Rptr. 2d 865*

Psychiatric injury suffered by worker as result of workplace gossip about her extramarital affair with coworker was held, as matter of law, not to have arisen out of employment, since finding of industrial injury is proper only when employment plays "active" or "positive" role in development of psychological condition, so that injury that grows out of personal grievance between injured employee and third party does not arise out of employment if injury occurred merely by chance during working hours at place of employment or if employer's premises do not place injured employee in peculiarly dangerous position. *Atascadero Unified School District v. W.C.A.B. (Geredes) (2002) 98 Cal. App. 4th 880, 882, 884-885, 120 Cal. Rptr. 2d 239*

Lab. Code § 3208.3(b)(1), establishing a test of predominance for psychiatric injury claim, is rationally related to a legitimate governmental purpose and does not unconstitutionally violate employee's due process rights. *Sakotas v. Workers' Comp. Appeals Bd. (2000) 80 Cal. App. 4th 262, 272, 95 Cal. Rptr. 2d 153*

Provisions of *Lab. Code § 5402* did not bar employer from disputing liability for employee's alleged psychiatric injury based on fact that employee did not meet six-month employment requirement set forth in *Lab. Code § 3208.3*, even though employer did not deny claim for psychiatric injury within the 90-day period allowed under *Lab. Code § 5402*. *James v. Workers' Comp. Appeals Bd. (1997) 55 Cal. App. 4th 1053, 1057, 64 Cal. Rptr. 2d 392*

Discharged employee as not entitled to workers' compensation benefits for psychiatric injury arising solely as result of termination from employment; *Lab. Code § 3208.3* as inapplicable to post-termination psychiatric injury. *Bray v. Workers' Comp. Appeals Bd. (1994) 26 Cal. App. 4th 530, 539-540, 31 Cal. Rptr. 2d 580*

WCAB as properly finding that employee did not sustain industrial psychiatric injurywhen physician found that employee's psychiatric injury resulted from his reaction to employer's discontinuation of vocational rehabilitation benefits in reliance on physician's opinion that employee was not a qualified injured worker; employee's emotional reaction to physicians opinion and employer's reliance on that opinion as not compensable consequences oforiginal industrial injury. *Rodriguez v. Workers' Comp. Appeals Bd. (1994) 21 Cal. App. 4th 1747, 1760, 27 Cal. Rptr. 2d 93*

Lab. Code § 3208.3(d), requiring at least six months of employment before employee eligible for workers' compensation benefits based on claim of psychiatric injury, as not so arbitrary or irrational to unconstitutionally violate employee's equal protection or due process rights. *Hansen v. Workers' Comp. Appeals Bd. (1993) 18 Cal. App. 4th 1179, 1184, 23 Cal. Rptr. 2d 30*

[58] Reconsideration

Standards of review on reconsideration. *Lamb v. Workers' Comp. Appeals Bd. (1974) 11 Cal. 3d 274, 280-281*

When WCJ, in response to employee's request, amended award by increasing awarded amounts of retroactive temporary disability payments and vocational rehabilitation maintenance allowance, court of appeal held that employer's subsequent petition for reconsideration, timely filed as to amended award, but untimely as to original award, was timely filed, since WCJ's amended award effected substantial and material change in award and involved exercise of judicial function. *Nestle IceCream Co. v. W.C.A.B. (Ryerson) (2007) 146 Cal. App. 4th 1104, 1108-1111, 53 Cal. Rptr. 3d 340*

Effect of WCAB's failure to distinguish between its role as reviewing body and as trier of fact in receiving evidence without referee (now WCJ) and without permitting full cross examination and rebutal testimony. *Redner v. Workmen's Comp. Appeals Bd. (1971) 5 Cal. 3d 83, 86-95, 89 n.5, 95 Cal. Rptr. 447, 485 P.2d 799*

WCAB, under *Lab. Code § 5908.5*, as permitted to deny petition for reconsideration of decision by memorandum order incorporating report of referee (now WCJ), provided it states evidence relied on and specifies in detail reasons for decision. *LeVesque v. Workmen's Comp. App. Bd. (1970) 1 Cal. 3d 627, 635, 83 Cal. Rptr. 208, 463 P.2d 432*

Time period after which a petition for reconsideration is deemed denied by operation of law pursuant to *Lab. Code § 5909* as tolled during period WCAB had misplaced the applicant's file, as file was lost through no fault of the applicant and due to circumstances entirely beyond his control. *Shipley v. Workers' Comp. Appeals Bd. (1992) 7 Cal. App. 4th 1104, 1107-1108, 9 Cal. Rptr. 2d 345*

WCAB as committing reversible error by denying employer's petition for reconsideration of an award in favor of employee when employer had been deprived of due process since he had never been served with notice of additional injuries claimed by employee or with notice of proceedings before the workers' compensation judge. *Katzin v. Workers' Comp. Appeals Bd. (1992) 5 Cal. App. 4th 703, 711-712, 7 Cal. Rptr. 2d 66*

WCAB as exceeding its authority in denying reconsideration of workers' compensation award that expressly excluded chiropractic treatment chosen by employee. *Derrick v. Workers' Comp. Appeals Bd. (1984) 159 Cal. App. 3d 451, 454-456, 205 Cal. Rptr. 595*

Decision of WCAB on reconsideration as not permitted to incorporate petition for reconsideration. *Urlwin v. Workers' Comp. Appeals Bd. (1981) 126 Cal. App. 3d 466, 469-470, 178 Cal. Rptr. 758*

WCJ's order as sufficiently final for purposes of reconsideration when it resolves current issue affecting substantive rights of parties. *Scott v. Workers' Comp. Appeals Bd. (1981) 122 Cal. App. 3d 979, 984, 176 Cal. Rptr. 267*

[59] Res Judicata and Collateral Estoppel

Workers' compensation award for emotional injuries as barring injured employee's later claim for emotional distress against municipal employer infederal civil rights action under *42 U.S.C. § 1983*. *Sanchez v. City of Santa Ana (9th Cir. 1990) 915 F.2d 424, 431-432*

Housing authority was barred by doctrine of collateral estoppel from denying employee *Lab. Code § 4850* benefits, since issue had been decided against Housing Authority in previous WCAB proceeding. *Housing Authority v. Workers' Comp. Appeals Bd. (1998) 60 Cal. App. 4th 1076, 1086-1087, 70 Cal. Rptr. 2d 738*

WCAB as a constitutional court with the result that its final decisions are given res judicata effect with respect to both

subsequent civil actions and subsequent workers' compensation proceedings. *Azadigian v. Workers' Comp. Appeals Bd. (1992) 7 Cal. App. 4th 372, 376, 8 Cal. Rptr. 2d 643*

Issue necessarily decided by prior criminal conviction as conclusive against convicted person in subsequent civil action, including proceeding before WCAB. *Westbrooks v. Workers' Comp. Appeals Bd. (1988) 203 Cal. App. 3d 249, 251-252 ns.1, 2, 252 Cal. Rptr. 26*

When doctrines of res judicata and collateral estoppel apply to WCAB finding or order. *Clemente v. State of California (1985) 40 Cal. 3d 202, 222, 219 Cal. Rptr. 445, 707 P.2d 818* ; *Hughes v. Atlantic Pacific Construction Co. (1987) 194 Cal. App. 3d 987, 1001-1003, 240 Cal. Rptr. 200* (finding not res judicata in tort action); *Dakins v. Board of Pension Commissioners (1982) 134 Cal. App. 3d 374, 381, 184 Cal. Rptr. 576* ; *De Court v. Beckman Instruments, Inc. (1973) 32 Cal. App. 3d 628, 635, 108 Cal. Rptr. 109*

WCAB's opinions as valid authority and looked to by courts of law. *Ezzy v. Workers' Comp. Appeals Bd. (1983) 146 Cal. App. 3d 252, 261 n.4, 194 Cal. Rptr. 90*

[60] Sanctions

Lab. Code § 5813 sanctions imposed on attorney who failed to appear at conference set on issue of employee's earnings, told claims adjuster he would not appear and that adjuster could take employee's deposition, and failed to notify WCJ that he would not attend. *Runnion v. Workers' Comp. Appeals Bd. (1997) 59 Cal. App. 4th 277, 287-288, 69 Cal. Rptr. 2d 105*

[61] Self-Insurers' Security Fund

Self-Insurers' Security Fund as empowered to bring any action against any person to recover compensation paid and liability assumed by fund [*see Lab. Code § 3744(c)*]; purpose of this provision as being to allow fund to seek legal redress against others to recover moneys it expends in continuing insolvent self-insured's compensation payments; term "any person" as sufficiently broad, without specifying language of 1986 amendments, to include one whose actions contributed to inadequacy of sel f-insured's security deposit, thereby necessitating fund's assumption and continued payment of workers' compensation liabilities; by initially not specifying entities whom fund could pursue, Legislature as in effect conferring standing on fund in all instances in which legal theory for recovery could be stated against defendant. *Self-Insurers' Security Fund v. ESIS, Inc. (1988) 204 Cal. App. 3d 1148, 1154-1155, 251 Cal. Rptr. 693* (involving theory of equitable subrogation)

[62] Serious and Willful Misconduct by Employer

After one-year period allowed by statute of limitations, additional employers (such as, in this case, special employer) may not be joined in claim for serious and willful misconduct timely commenced against another employer (here, general employer), unless employee was ignorant of identity of late-filed-against employer until after running of statute. *McGee Street Productions v. W.C.A.B. (Peterson) (2003) 108 Cal. App. 4th 717, 725-726, 133 Cal. Rptr. 2d 813*

WCAB used proper standard to determine that employer willfully violated an occupational safety standard; finding of willful violation of safety standard does not require showing of actual intent and knowledge to do harm; rather, the standard requires proof by a preponderance of the evidence that the act committed by the employer was the desired consequence of employer's intent, and that employer was aware that act violated a safety order. *Rick's Electric, Inc. v. Occupational Safety & Health Appeals Bd. (2000) 80 Cal. App. 4th 1023, 1037-1039, 95 Cal. Rptr. 2d 847*

Lab. Code § 4553 (increase of compensation if injury results from employer's serious and willful misconduct) as applicable to employer that is governmental entity. *State Dept. of Corrections v. Workmen's Comp. App. Bd. (1971) 5 Cal. 3d 885, 887-891, 97 Cal. Rptr. 786, 489 P.2d 818*

"Serious and willful misconduct" defined. *Hawaiian Pineapple Co., Ltd. v. Ind. Acc. Com. (1953) 40 Cal. 2d 656, 662-665, 255 P.2d 431* ; *White v. Workers' Comp. Appeals Bd. (1968) 265 Cal. App. 2d 115, 120-121, 71 Cal. Rptr. 49*

Lab. Code § 4553 as sole remedy for additional compensation when employee was injured as result of deliberate failure to ensure safe place to work. *United States Borax & Chemical Corp. v. Superior Court (1985) 167 Cal. App. 3d 406, 410-411, 213 Cal. Rptr. 155*

[63] Services Performed for Aid or Sustenance

Exclusion of employee from workers' compensation coverage under *Lab. Code § 3352(b)* (services performed in return for aid and sustenance from charitable organization) as properly based on whether services are provided at minimal leval to obtain necessities of life, or are instead part of normal employment relationship; employment by church for pay that is above the minimum wage and not gauged by employee's necessities as outside scope of *Lab. Code § 3352(b)* and employee as therefore covered by workers' compensation law. *Hoppmann v. Workers' Comp. Appeals Bd. (1991) 226 Cal. App. 3d 1119, 1123, 277 Cal. Rptr. 116*

[64] Special Employees

Firefighter who was employed by California Department of Forestry and Fire Protection and was killed fighting forest fire while under contract to U.S. Interior Department as "special employee" of U.S. government, which was thereby immune from wrongful death suit under Federal Tort Claims Act but subject to payment of compensation under California's workers' compensation law. *Enslow v. U.S. (C.D. Cal. 1992) 811 F. Supp. 503, 506*

Triable issue of fact existed as to whether defendant was plaintiff's special employer, when evidence on issue of control as well as other factors supported conflicting inferences. *Brassinga v. City of Mountainview (1998) 66 Cal. App. 4th 195, 219, 77 Cal. Rptr. 2d 660*

Temporary employment agency employee was barred by exclusive remedy doctrine from bringing tort action against her assigned employer, when evidence showing that assigned employer had right to control and direct manner in which employee's work was performed supported special employment relationship as matter of law. *Wedeck v. Unocal Corp. (1997) 59 Cal. App. 4th 848, 862, 69 Cal. Rptr. 2d 501*

Finding that tanker owner was plaintiff's "special employer" as proper notwithstanding that owner failed to allege exclusive remedy doctrine as affirmative defense in answer, since all parties had actual notice that owner was relying on employment as defense to liability and tried case accordingly; if tanker owner failed to secure workers' compensation insurance pursuant to *Lab. Code § 3700*, it will be liable to plaintiff for civil damages despite special employment relationship. *Douglas Oil Co. v. Western Asphalt Service (1994) 22 Cal. App. 4th 372, 381, 394, 28 Cal. Rptr. 2d 269*

Special employment relationship as arising when employer lends employee to another employer and relinquishes to borrowing employer all right of control over employee's activities. *Johnson v. Berkofsky-Barret Productions, Inc. (1989) 211 Cal. App. 3d 1067, 1070 n.3, 260 Cal. Rptr. 67* ; *Riley v. Southwest Marine, Inc. (1988) 203 Cal. App. 3d 1242, 1247, 250 Cal. Rptr. 718*

Factors to be considered in determining whether individual is "special employee" or "employee" as essentially identical; in each case, presence of right to control alleged employee as primary factor; label placed by parties on their

relationship as not dispositive. *Johnson v. Berkofsky-Barret Productions, Inc. (1989) 211 Cal. App. 3d 1067, 1072 n.4, 1072, 260 Cal. Rptr. 67*

Special employment (or borrowed servant) doctrine as applying to labor brokerage situation and as barring employee who is injured while on assignment from labor broker from bringing tort suit against assigned employer. *Johnson v. Berkofsky-Barret Productions, Inc. (1989) 211 Cal. App. 3d 1067, 1074, 260 Cal. Rptr. 67*

Borrowed employee as held to have two employers; his or her original or "general" employer and a second, the "special" employer; in this dual employer situation, employee as generally limited to statutory workers' compensation remedy for injuries received in course of employment with special employer and as not permitted to bring separate tort action against either employer. *Riley v. Southwest Marine, Inc. (1988) 203 Cal. App. 3d 1242, 1248, 1249, 1251, 250 Cal. Rptr. 718*

Primary consideration in determining whether special employment relationship exists as being whether special employer has right to control and direct activities of alleged employee or manner and method in which work is performed, whether exercised or not; factors relevant to determining whether employee is borrowed employee of another as including (1) whether borrowing employer's control over employee and work that employee is performing extends beyond mere suggestion of details or cooperation; (2) whether there was an agreement, understanding, or meeting of minds between original and special employer; (3) whether employee acquiesced in new work situation; (4) whether original employer terminated his or her relationship with employee; (5) whether special employer furnished tools and place for performance; (6) whether new employment was over considerable length of time; (7) whether borrowing employer had right to fire employee; and (8) whether borrowing employer had obligation to pay employee. *Riley v. Southwest Marine, Inc. (1988) 203 Cal. App. 3d 1242, 1250, 250 Cal. Rptr. 718*

Circumstances that tend to negate existence of special employment relationship as including following factors: (1) worker is skilled and has substantial control over operational details; (2) worker is not engaged in borrower's usual business; (3) worker works only for brief period of time and does not use tools or equipment of borrowing employer, but uses his or her own tools or tools of lending employer; and (4) borrowing employer neither pays worker nor has right to discharge worker. *Riley v. Southwest Marine, Inc. (1988) 203 Cal. App. 3d 1242, 1250, 250 Cal. Rptr. 718*

When alleged special employer was exercising direct supervision over exact task during accomplishment of which employee was injured, status of special employer as required to be found to exist as to claim for that injury. *Riley v. Southwest Marine, Inc. (1988) 203 Cal. App. 3d 1242, 1251, 250 Cal. Rptr. 718*

Extensive nationwide case law, interpreting both state workers' compensation statutes and Longshore and Harbor Workers' Compensation Act (*33 U.S.C. § 901 et seq.*), as holding "special employment" or "borrowed servant" doctrine applies to labor brokerage situation and bars employee who is injured while on assignment from labor broker from bringing tort suit against assigned employer. *Riley v. Southwest Marine, Inc. (1988) 203 Cal. App. 3d 1242, 1251, 250 Cal. Rptr. 718*

Worker as able to have more than one employer for purposes of workers' compensation; thus, employee of temporary employment agency (general employer) employed on one-day job assignment as employee of temporary employer (special employer) for purposes of workers' compensation when temporary employer had supervision and control over employee's job duties. *Santa Cruz Poultry, Inc. v. Superior Court (1987) 194 Cal. App. 3d 575, 577-579, 239 Cal. Rptr. 578*

When special employment relationship exists between temporary employee and employer, employee's exclusive remedy for job-related injuries as being workers' compensation. *Santa Cruz Poultry, Inc. v. Superior Court (1987) 194 Cal. App. 3d 575, 577, 239 Cal. Rptr. 578*

Neither right to control nor exercise of control by alleged special employer as exclusive consideration in determining whether worker is special employee (employee of one employer sent to do work for another employer) precluding employee's tort action against alleged special employer and relegating employee to exclusive remedy provisions of workers' compensation law (*Lab. Code § 3602(a)*). *Barajas v. USA Petroleum Corp. (1986) 184 Cal. App. 3d 974, 983, 229 Cal. Rptr. 513*

[65] State Compensation Insurance Fund

Supreme Court held State Compensation Insurance Fund was not immune from civil liability under *Ins. Code § 11758* for allegedly misallocating an insured employer's medical-legal expenses and reporting that misinformation to a ratemaking organization, resulting in higher premiums for its insured. *State Compensation Insurance Fund v. Superior Court of Orange County (2001) 24 Cal. 4th 930, 932, 103 Cal. Rptr. 2d 662, 16 P.3d 85*

State Compensation Insurance Fund's actions in requiring non-refundable premium were not negligent or deceitful, unfair, unlawful, or arbitrary. *Rail Services of America v. State Compensation Insurance Fund (2003) 110 Cal. App. 4th 323, 333-338, 1 Cal. Rptr. 3d 700*

Court of appeal upheld jury verdict finding State Compensation Insurance Fund (SCIF) liable for compensatory and punitive damages based on its breach of implied covenant of good faith and fair dealing and fraudulent business practices; court of appeal upheld trial court's order enjoining SCIF from various business practices. *Notrica v. State Compensation Ins. Fund (1999) 70 Cal. App. 4th 911, 925, 83 Cal. Rptr. 2d 89*

Insured employer is entitled to bring a civil action against State Compensation Insurance Fund for refusal to defend and indemnify in a workers' compensation action. *Salimi v. State Comp. Ins. Fund (1997) 54 Cal. App. 4th 216, 222, 62 Cal. Rptr. 2d 640*

Insured employer is entitled to present evidence of negligent claims handling as circumstantial evidence of bad faith and breach of contract by *State Compensation Insurance Fund. Tricor California, Inc. v. State Compensation Insurance Fund (1994) 30 Cal. App. 4th 230, 238, 35 Cal. Rptr. 2d 550*

Adequate and prompt investigation of claims, payment of only legitimate claims in proper amounts, permitting insured employer to review and audit files, and accurate and fair setting of rates paid by employers are implied contractual duties of State Compensation Insurance Fund, violation of which may be actionable by insured under breach of contract and violation of implied covenant of good faith and fair dealing. *Tricor California, Inc. v. State Compensation Insurance Fund (1994) 30 Cal. App. 4th 230, 238, 35 Cal. Rptr. 2d 550*

State Compensation Insurance Fund is not immune from payment of punitive damages based on status as quasi-governmental agency. *Tricor California, Inc. v. State Compensation Insurance Fund (1994) 30 Cal. App. 4th 230, 241, 35 Cal. Rptr. 2d 550*

Insured employer is not required to exhaust administrative remedies prior to bringing suit against State Compensation Insurance Fund for bad faith practices. *Tricor California, Inc. v. State Compensation Insurance Fund (1994) 30 Cal. App. 4th 230, 242, 35 Cal. Rptr. 2d 550*

State Compensation Insurance Fund as not entitled to governmental immunity from tort claims. *Security Officers Service, Inc. v. State Compensation Ins. Fund (1993) 17 Cal. App. 4th 887, 892-893, 21 Cal. Rptr. 2d 653*

State Compensation Insurance Fund as required to conduct its functions of defending, investigating, allocating reserves, and settling claims with good faith regard for their effect on insured's premiums and dividends, as determined under the

policy and governing regulations. *Security OfficersService, Inc. v. State Compensation Ins. Fund (1993) 17 Cal. App. 4th 887, 893-898, 21 Cal. Rptr. 2d 653*

Insured as entitled to bring suit against State Compensation Insurance Fund for tortious breach of implied covenant of good faith and fair dealing and for negligence based on Fund's delay in processing claims and its overestimation of reserves for claims that adversely affected insured's premiums and policy dividends. *Security Officers Service, Inc. v. State Compensation Ins. Fund (1993) 17 Cal. App. 4th 887, 899-900, 21 Cal. Rptr. 2d 653*

Tort Claims Act as not applicable to State Compensation Insurance Fund by virtue of *Ins. Code § 11873*, which excludes Fund from immunities of Act and places Fund in same position as other workers' compensation insurers. *Maxon Industries, Inc. v. State Compensation Ins. Fund (1993) 16 Cal. App. 4th 1387, 1390-1395, 20 Cal. Rptr. 2d 730*

Purpose of State Compensation Insurance Fund as to ensure that affordable compensation coverage will be available to all employers. *Courtesy Ambulance Service v. Superior Court (1992) 8 Cal. App. 4th 1504, 1511, 11 Cal. Rptr. 2d 161*

State Compensation Insurance Fund as granted greater freedom in conducting its affairs by *Ins. Code §§ 11770-11881* than that granted to most other state agencies, enabling it to compete with private insurers. *Courtesy Ambulance Service v. Superior Court (1992) 8 Cal. App. 4th 1504, 1511-1513, 11 Cal. Rptr. 2d 161*

By virtue of *Ins. Code § 11873*, State Compensation Insurance Fund as not entitled to protection from liability for punitive damages provided by *Gov. Code § 818* to most public entities. *Courtesy Ambulance Service v. Superior Court (1992) 8 Cal. App. 4th 1504, 1513-1519, 11 Cal. Rptr. 2d 161*

[66] Statute of Limitations

WCAB as proper forum for resolving issues regarding limitation period for claim filing by dependents of deceased employees. *Marsh & McLennan, Inc. v. Superior Court (1989) 49 Cal. 3d 1, 5 n.1, 259 Cal. Rptr. 733, 774 P.2d 762*

Although *Lab. Code § 4600* imposes broad duty on employer to provide medical and other treatment to employee and makes employer liable for expenses incurred by employee or by third parties on employee's behalf when employer fails to do so, *Lab. Code § 5405* as setting clear limits on time period within which procedures for enforcement of that duty must be invoked. *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (1977) 19 Cal. 3d 329, 336, 137 Cal. Rptr. 878, 562 P.2d 1037*

CIGA failed to meet its burden to prove that employee gained actual knowledge of his potential eligibility for workers' compensation benefits for 1997 injury more than one year prior to filing his claim, when court of appeal found that employer had breached its statutory duty to notify unaware employee of his or her workers' compensation rights, so that one-year limitations period for filing claim for benefits was tolled until employee acquired actual knowledge of those rights. *California Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd. (2008) 163 Cal. App. 4th 853, 856-857, 862-878, 77 Cal. Rptr. 3d 868*

Workers' compensation claim as not barred by statute of limitations unless worker knew, or in exercise of reasonable diligence should have known, that disability was caused by employment. *Chambers v. Workmen's Comp. App. Bd. (1968) 69 Cal. 2d 556, 559, 72 Cal. Rptr. 651, 446 P.2d 531* (involving occupational disease); *City of Fresno v. Workers' Comp. Appeals Bd. (1985) 163 Cal. App. 3d 467, 470-471, 209 Cal. Rptr. 463* (involving cumulative injuries)

Insurance carrier paying workers' compensation benefits on behalf of insured employer must file contribution claim against employer's other insurance carriers under *Lab. Code § 5500.5(e)* within one year from the date of award; *Lab. Code § 5500.5(e)* is not satisfied merely by joining another insurance carrier or employer as additional party in workers'

compensation action. *General Accident Insurance Co. v. Workers' Comp. Appeals Bd. (1996) 47 Cal. App. 4th 1141, 1148, 55 Cal. Rptr. 2d 272*

Employee's psychiatric injury sustained during course of vocational rehabilitation for prior industrial injury as not barred by five-year statutory time limitations on WCAB's continuing jurisdiction under *Lab. Code §§ 5410* and *5804*; claim for psychiatric injury as new injury claim subject to time limitations set forth in *Lab. Code § 5405*. *Newton v. Workers' Comp. Appeals Bd. (1993) 17 Cal. App. 4th 147, 21 Cal. Rptr. 2d 146*

Partial payment of injured employee's health care expenses by employer or insurer with knowledge of potential workers' compensation claim as tolling one-year period within which original proceeding must be filed under *Lab. Code § 5405* and triggering five-year period of *Lab. Code § 5410*; subsequent notice of denial of liability as terminating five-year limitation and commencing new one-year period. *McDaniel v. Workers' Comp. Appeals Bd. (1990) 218 Cal. App. 3d 1011, 1016-1019, 267 Cal. Rptr. 440*

For purposes of statute of limitations, date of cumulative injury as requiring concurrence of two elements: (1) compensable disability and (2) knowledge of industrial causation; these elements as presenting questions of fact to be determined by WCAB, and burden of proving them as being on employer. *Bassett-McGregor v. Workers' Comp. Appeals Bd. (1988) 205 Cal. App. 3d 1102, 1110, 252 Cal. Rptr. 868*

If employer or its compensation carrier, knowing of potential claim, furnishes treatment or advances sums for any purpose relating to industrial injury, such benefits as deemed given under Labor Code so as to toll statute of limitations. *Gonzalez v. Workers' Comp. Appeals Bd. (1986) 186 Cal. App. 3d 514, 523, 230 Cal. Rptr. 649*

Amended application for workers' compensation specifying willful misconduct by employer, filed more than one year after injury, as not barred by statute of limitations when original application, though deficient in setting forth factual basis for claim, identified issue and commenced action, and amendment presented no new legal theory or cause of action. *Rubio v. Workers' Comp. Appeals Bd. (1985) 165 Cal. App. 3d 196, 200-202, 211 Cal. Rptr. 461*

Claims for vocational rehabilitation benefits as governed by five-year limitation period of *Lab. Code § 5804*, rather than by one-year limitation period for claiming medical and disability payments of *Lab. Code § 5405*. *Bekins Moving & Storage Co. v. Workers' Comp. Appeals Bd. (1982) 137 Cal. App. 3d 665, 668-670, 187 Cal. Rptr. 226*

[67] Stipulations and Requests for Award

WCAB exceeded its authority by rescinding award based on stipulation to industrial injury and rendering finding of no industrial injury when rescission was based on conflicting AME opinion and erroneous legal interpretation. *Brannen v. Workers' Comp. Appeals Bd. (1996) 46 Cal. App. 4th 377, 383-384, 53 Cal. Rptr. 2d 768*

Stipulations as permissible in workers' compensation cases and as treated as evidence in nature of admission, but as not binding on WCJ or WCAB; stipulations as encouraged, however, to expedite proceedings, and as not subject to being set aside absent inadvertence, excusable neglect, fraud, mistake of fact or law, or when facts stipulated have changed or there has been change in underlying conditions that could not have been anticipated, or when special circumstances exist rendering it unjust to enforce stipulation. *Robinson v. Workers' Comp. Appeals Bd. (1987) 194 Cal. App. 3d 784, 790-791, 239 Cal. Rptr. 841*

Stipulation on material fact as evidence in nature of an admission, and party who did not sign stipulation as permitted to take advantage of it. *Turner Gas Co. v. Workmen's Comp. Appeals Bd. (1975) 47 Cal. App. 3d 286, 291-292, 120 Cal. Rptr. 663*

[68] Suicide

When suicide may be considered result of industrial injury. *Donovan v. Workers' Comp. Appeals Bd. (1982) 138 Cal. App. 3d 323, 327-328, 187 Cal. Rptr. 869*

[69] Supplemental Proceedings

Petition to terminate liability for precautionary award of medical benefits must be filed within five years from the date of injury. *Barnes v. Workers' Comp. Appeals Bd. (2000) 23 Cal. 4th 679, 690, 97 Cal. Rptr. 2d 638, 2 P.3d 1180*

Appeals Board had jurisdiction to order additional temporary disability benefits more than five years after date of injury when employee filed timely petition to reopen and his new and further disability commenced within five years of date of his injury, when court found that employee's petition to reopen alleged change in his condition and requested further temporary disability benefits, and it was not error for WCJ to award temporary disability benefits commencing more than five years after date of injury because there had been no need to award benefits earlier since employer was making voluntary temporary disability payments until then. *Sarabi v. Workers' Comp. Appeals Bd. (2007) 151 Cal. App. 4th 920, 925-928, 60 Cal. Rptr. 3d 189*

Good cause for reopening as found in mistake of law, inadvertence, newly discovered evidence, fraud, or any factor or circumstance unknown at time of original award or order that renders it inequitable. *LeBoeuf v. Workers' Comp. Appeals Bd. (1983) 34 Cal. 3d 234, 241-242, 193 Cal. Rptr. 547, 666 P.2d 989* ; *Arias v. Workers' Comp. Appeals Bd. (1983) 146 Cal. App. 3d 813, 821, 194 Cal. Rptr. 640*

Good cause to reopen permanent disability proceeding under *Lab. Code § 5803* as established when injured worker was found by WCAB to be less than totally disabled and Bureau of Rehabilitation refused to find worker qualified for rehabilitation benefits. *LeBoeuf v. Workers' Comp. Appeals Bd. (1983) 34 Cal. 3d 234, 240-245, 193 Cal. Rptr. 547, 666 P.2d 989*

Award of medical-legal expenses, self-procured medical expense, and additional permanent disability on applicant's petition to reopen as not constituting termination of prior awards of future medical care, when further medical care was not listed as issue at hearing, award did not expressly rescind future medical care awards, and evidence before WCAB would not have supported determination that worker was not entitled to further medical treatment. *Cedillo v. Workmen's Comp. Appeals Bd. (1971) 5 Cal. 3d 450, 453-457, 96 Cal. Rptr. 471, 487 P.2d 1039*

Petition to reopen case pursuant to *Lab. Code §§ 5803* and *5804* as enabling WCAB to exercise jurisdiction and to award relief not specifically requested (temporary disability when petition requested permanent disability). *Bland v. Workers' Comp. Appeals Bd. (1970) 3 Cal. 3d 324, 328-329, 331, 90 Cal. Rptr. 431, 475 P.2d 663*

Employee, who does not timely object to the termination of rehabilitation services, is required to fulfill requirements of *Lab. Code § 5410* to reopen rehabilitation. *Cisneros v. Workers' Comp. Appeals Bd. (1995) 41 Cal. App. 4th 759, 768-769, 48 Cal. Rptr. 2d 655*

Lab. Code §§ 5410 and *5804* as precluding award of temporary total disability indemnity more than five years after date of injury, even though in case of progressive disease, WCAB may tentatively rate employee's permanent disability and reserve jurisdiction to make final determination of permanent disability beyond five-year period; 1978 amendment of *Lab. Code § 4656*, removing 240-week limitation on awards of temporary total disability, as permitting award of temporary total disability beyond five-year period only when disability commences within five-year period and is continuous; amendment to *Lab. Code § 4656* as not altering time and jurisdictional limits of *Lab. Code §§ 5410* and

5804; WCAB as having no power to reserve jurisdiction to award temporary total disability indemnity for surgery that might take place more than five years after date of employee's specific injuries. *Hartsuiker v. Workers' Comp. Appeals Bd. (1993) 12 Cal. App. 4th 209, 213-220, 15 Cal. Rptr. 2d 719*

Existence of good cause as essential to WCAB's exercise of its continuing jurisdiction over its orders, decisions, and awards pursuant to *Lab. Code § 5803*; without proof of good cause, WCAB has no power to disturb its prior ruling. *Azadigian v. Workers' Comp. Appeals Bd. (1992) 7 Cal. App. 4th 372, 378, 8 Cal. Rptr. 2d 643*

Employee as entitled to full award for a 100 percent permanent disability under a single award for a combined disability arising from two separate industrial injuries for which the employee had filed two separate cases, even though the WCAB had properly determined that it lacked jurisdiction to reopen the earlier case since the petition to reopen was filed more than five years after the first injury. *Stoiber v. Workers' Comp. Appeals Bd. (1992) 5 Cal. App. 4th 1403, 1407-1410, 7 Cal. Rptr. 2d 470*

Failure of efforts at self-rehabilitation as change of circumstances constituting good cause why initial award should be reopened to determine whether applicant is entitled to rehabilitation benefits not initially requested. *Bekins Moving & Storage Co. v. Workers' Comp. Appeals Bd. (1982) 137 Cal. App. 3d 665, 672, 187 Cal. Rptr. 226*

Reopening case more than five years after date of injury as proper when petition to reopen was filed within five years of date of injury. *Aliano v. Workers' Comp. Appeals Bd. (1979) 100 Cal. App. 3d 341, 365, 161 Cal. Rptr. 190*

Subsequent judicial interpretation of compensation statutes contrary to prior administrative interpretation as good cause to reopen case under *Lab. Code § 5803* when request to reopen is made within five years from date of injury. *Knowles v. Workers' Comp. Appeals Bd. (1970) 10 Cal. App. 3d 1027, 1030, 89 Cal. Rptr. 356*

[70] Temporary Disability

Injured employee not entitled to temporary disability benefits to reimburse him or her for wages lost while pursuing medical treatment for industrial injury,once that injury has become permanent and stationary and employee has returned to work with medical award. *Department of Rehabilitation v. W.C.A.B. (Lauher) (2003) 30 Cal. 4th 1281, 1297, 1301, 135 Cal. Rptr. 2d 665, 70 P.3d 1076*

One year of industrial disability leave payable to state employees under *Gov. Code §§ 19869-19877.1* falls within the ambit of the two-year limitation on aggregate temporary disability payments in *Lab. Code § 4656(c)(1)*. *Brooks v. Workers' Comp. Appeals Bd. (2008) 161 Cal. App. 4th 1522, 1527-1538, 75 Cal. Rptr. 3d 277*

For purposes of determining two-year limitation period on temporary disability indemnity, temporary disability payments commenced when school district paid its injured employee her normal wages under *Ed. Code § 44043*. *Mt. Diablo Unified School District v. W.C.A.B. (Rollick) (2003) 165 Cal. App. 4th 1154, 1158-1161, 81 Cal. Rptr. 3d 597*

When independent injuries result in concurrent periods of temporary disability, 104-week, two-year limitation of *Lab. Code § 4656(c)(1)* likewise runs concurrently. *Foster v. Workers' Comp. Appeals Bd. (2008) 161 Cal. App. 4th 1505, 1511-1513, 75 Cal. Rptr. 3d 272*

Pursuant to *Lab. Code § 4653*, temporary disability during seasonal employee's in-season period of regular employment was payable based on two-thirds of employee's in-season average weekly earnings, but seasonal employee was not entitled to temporary disability during off-season when parties stipulated that employee did not have any off-season earnings, and court stated that temporary disability was intended as substitute for injured employee's lost wages, so it would be illogical to award employee temporary disability as wage replacement when it was undisputed that there

would be no wage to replace. *Signature Fruit Co. v. Workers' Comp. Appeals Bd. (2006) 142 Cal. App. 4th 790, 800-804, 47 Cal. Rptr. 3d 878*

Employee was not entitled to temporary disability indemnity after her retirement date, when she indicated an intent to retire from all employment and, therefore, had zero earning capacity after her retirement date. *Gonzales v. Workers' Comp. Appeals Bd. (1998) 68 Cal. App. 4th 843, 850, 81 Cal. Rptr. 2d 54*

Employer's failure to reject appliant's claim for workers' compensation within 90 days created presumption of compensability under *Lab. Code § 5402*; evidence contained in employer's medical reports and records of lien claimant was inadmissible to rebut prsumption of compensability since such evidence could have reasonably been obtained within the 90-day period. *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (1995) 37 Cal. App. 4th 675, 683-685, 43 Cal. Rptr. 2d 660*

Requirement of *Lab. Code § 5402* that employer rejuect liability within 90 days in order to aboid presumption of compensability does not require that employer actually *notify* employee of rejection within that time period. *Rodriguez v. Workers' Comp. Appeals Bd. (1994) 30 Cal. App. 4th 1425, 1433, 35 Cal. Rptr. 2d 713*

Temporary disability benefits as a substitute for lost wages during period of temporary incapacity from working. *Livitsanos v. Superior Court (1992) 2 Cal. 4th 744, 753, 7 Cal. Rptr. 2d 808, 828 P.2d 1195*

Lab. Code § 4656 (maximum period for temporary disability payments) as not authorizing unlimited temporary total disability as consequence of award of further medical treatment. *Nickelsberg v. Workers' Comp. Appeals Bd. (1991) 54 Cal. 3d 288, 302, 285 Cal. Rptr. 86, 814 P.2d 1328*

Temporary disability as rated as total or partial, depending on employee's ability to work during period of convalescence; under "odd lot" doctrine, worker who is only partially disabled as permitted to receive total disability payments if partial disability results in total loss of wages; this doctrine as placing burden on employer to show that work within capabilities of partially disabled employee is available; if employer does not make this showing, employee as entitled to temporary total disability benefits. *General Foundry Service v. Workers' Comp. Appeals Bd. (1986) 42 Cal. 3d 331, 338, 339 n.5, 228 Cal. Rptr. 243, 721 P.2d 124*

Period of temporary total disability as that period when employee is totally incapacitated for work and during which he or she may reasonably be expected to be cured or materially improved with proper medical attention, or until his or her condition becomes permanent and stationary; whether condition has become permanent and stationary as purely question of fact to be determined from evidence. *Robinson v. Workers' Comp. Appeals Bd. (1987) 194 Cal. App. 3d 784, 792, 239 Cal. Rptr. 841*

Temporary disability indemnity as intended primarily to substitute for worker's lost wages, in order to maintain steady stream of income. *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (1984) 153 Cal. App. 3d 327, 333, 200 Cal. Rptr. 219*

[71] Third-Party Actions

[a] In General

Trial court properly granted summary judgment for employer and labor union as to employee's claims for breach of the union's statutory duty of fair representation and wrongful termination by employer without just cause in violation of collective bargaining agreement when employee injured in 1991 was unable to return to full job duties with employer and employer refused to hire her back. *Conkle v. Sulinna Jeong (1995) 73 F.3d 909, 916*

California workers' compensation laws (1) as allowing both employee and employer to sue third party who may be responsible for employee's injuries (*see Lab. Code § 3852*); (2) as authorizing employee and employer to intervene in each other's action (*see Lab. Code § 3853*); (3) as providing for mandatory consolidation of their lawsuits (*see Lab. Code § 3853*); (4) as allowing employer to sue on employee's behalf for employee's damages (*see Lab. Code § 3852, 3853, 3854, 3859*); and (5) as granting employee and employer right to share in each other's judgment or settlement (*see Lab. Code §§ 3856, 3860*). *County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 868, 868 n.1, 872-873, 140 Cal. Rptr. 638, 568 P.2d 363*

Surviving wife and children of tow truck driver, who was killed when struck by passing motorist while working to remove defendant's car from side of highway, had no third-party cause of action against defendant when defendant's car had been left on side of highway after defendant had been stopped and arrested by police for driving while intoxicated. *Bryant v. Glastetter (1995) 32 Cal. App. 4th 770, 782-783, 38 Cal. Rptr. 2d 291*

Even absent physician-patient relationship, physician who evaluates workers' compensation claimant at request of defense counsel is liable to claimant for negligence or medical malpractice for injuries incurred during examination. *Mero v. Sadoff (1995) 31 Cal. App. 4th 1466, 1478, 37 Cal. Rptr. 2d 769*

Injured worker as entitled to pursue malpractice claim against his attorneys for failure to advise him of possibility of filing third-party action and of applicable statute of limitations. *Nichols v. Keller (1993) 15 Cal. App. 4th 1672, 19 Cal. Rptr. 2d 601*

Under *Lab. Code § 3853*, if action against third party is brought by either employer or employee, other as permitted at any time before trial on facts to join as party plaintiff or shall consolidate his or her action if brought independently; workers' compensation insurance carrier under *Lab. Code § 3850(b)* as having same right to sue as employer. *Buell v. CBS, Inc. (1982) 136 Cal. App. 3d 823, 825 ns.1, 2, 186 Cal. Rptr. 455*

[b] Aggravation of Injuries

In addition to workers' compensation proceeding, employee injured in industrial accident as permitted to institute and pursue civil suit at common law against treating doctor for aggravation of injury through negligent treatment. *Nation v. Certainteed Corp. (1978) 84 Cal. App. 3d 813, 816, 149 Cal. Rptr. 62*

[b.1] Attorney's Duty to Advise Regarding Possible Third Party Action

Failure by attorney representing employee in workers' compensation proceeding to timely advise employee of possible personal injury action against third parties may constitute malpractice or negligence, but plaintiff's failure in malpractice action against workers' compensation attorney to present any evidence regarding collectibility of some portion of judgment in any third party action defeats malpractice action. *Garretson v. Miller (2002) 99 Cal. App. 4th 563, 571-573, 121 Cal. Rptr. 2d 317*

Workers' compensation insurer's attorneys owe no duty to employer after employer's dismissal from workers' compensation case by operation of *Lab. Code § 3755*, in absence of extenuating facts. *Canton Poultry & Deli, Inc. v. Stockwell, Harris, Widom & Woolverton (2003) 109 Cal. App. 4th 1219, 1227-1229, 135 Cal. Rptr. 2d 695*

[c] Attorney's Fees

Although made-whole rule applies in medical payments insurance context, and insured must be made whole as to all

damages proximately caused by injury, liability for attorney's fees is not included under made-whole rule, but is instead subject to equitable apportionment rule. 21st *Century Insurance Co. v. Superior Court of San Diego County; Silvia Quintana, Real Party in Interest (2009) 47 Cal. 4th 511, 527-528, 98 Cal. Rptr. 3d 516, 213 P.3d 972*

When employee and employer settle action against third-party tortfeasor for sum that is less than employer's reimbursable compensation costs, so that employee recovers nothing from settlement, and employee has contingency fee agreement with his or her attorney, employee's attorney is entitled to no fee out of settlement proceeds, and employee owes no attorney's fees. *Draper v. Aceto (2001) 26 Cal. 4th 1086, 113 Cal. Rptr. 2d 61, 33 P.3d 479*

When employer and third-party tortfeasor have prior contractual agreement in which prevailing party has right to attorney's fees from other party in event of litigation, subrogated insurance carrier who brings claim for reimbursement directly against alleged tortfeasor is liable for third-party's attorney's fees under contract to same extent as employer. *Employers Muttal Liability Ins. Co. v. Tutor-Saliva Corp. (1998) 17 Cal. 4th 632, 640, 71 Cal. Rptr. 2d 851, 951 P.2d 420*

Code Civ. Proc. § 1141.21(a)(ii) did not bar allocation of portion of plaintiff-employee's trial judgment proceeds for payment of reasonable litigation expenses and attorney's fees pursuant to *Lab. Code § 3856*, even though plaintiff rejected more favorable settlement offer. *Phelps v. Stostad (1997) 16 Cal. 4th 23, 34, 65 Cal. Rptr. 2d 360, 939 P.2d 760*

Fee of plaintiff's attorney under *Lab. Code § 3856(b)* in successful action by employee against third-party tortfeasor in which employer's compensation carrier filed lien to recover workers' compensation benefits paid as apportioned between parties benefitted by judgment by trial court on motion after judgment after court first calculates reasonable fee reflecting total services rendered to both beneficiaries. *Quinn v. State of California (1975) 15 Cal. 3d 162, 164-167, 175-176, 124 Cal. Rptr. 1, 539 P.2d 761*

Error for trial court, in calculating fees for employee's attorney, to include amount of employer's workers' compensation lien, which employer assigned to third party as part of settlement between them and which third party then gave up right to enforce against employee as part of settlement between them, and error for trial court to award employee's attorney's fees based on total settlement achieved among employee, employer, and third party without addressing issue of whether that settlement was obtained solely through efforts of employee's attorney. *Manriquez v. Adams (2003) 108 Cal. App. 4th 340, 346-348, 133 Cal. Rptr. 2d 449*

Plaintiff employee in action against third party is entitled under *Lab. Code § 3856(b)* to attorney's fees and costs allocated from workers' compensation lien when carrier's attorney's participation in lawsuit was limited to attending three of four depositions but asking only one question of one witness, submitting expert witness list naming "all such witnesses so designated by the plaintiff and defendants in this case," and allegedly spending 86.25 hours on case without specifying how hours were spent. *Kindt v. Otis Elevator Company (1995) 32 Cal. App. 4th 452, 460, 38 Cal. Rptr. 2d 121*

Plaintiff-employee as entitled to attorney's fees under *Lab. Code § 3856(b)* even though plaintiff's damages award was less than amount spent on workers' compensation benefits and resulted in no net recovery; despite lack of net recovery, benefit as conferred on plaintiff's employer who, without plaintiff's efforts, would not have had any fund from which to recoup or offset amount of benefits paid to plaintiff; when employer sold its workers' compensation lien to defendant, defendant as having stepped into employer's shoes for all purposes; lien rights as allowable against judgment only after payment of litigation and attorney's fees. *Crampton v. Takegoshi (1993) 17 Cal. App. 4th 308, 316-319, 21 Cal. Rptr. 2d 284 , overruled on other grounds by Phelps v. Stostad (1997) 16 Cal. 4th 23*

Plaintiff's claim for attorney's fees under *Lab. Code § 3856(d)* as not precluded by *Code Civ. Proc. § 1141.21*, when plaintiff recovered more at trial de novo than from arbitration in terms of damages awarded, notwithstanding that

plaintiff's net recovery at trial was zero as a result of amount paid for workers' compensation benefits; assigned lien as not a factor in determining whether plaintiff's damages at trial were more favorable or not when employer assigned its lien to defendant and was not a party; *Code Civ. Proc. § 1141.21* as inapplicable when verdict between plaintiff and defendant was larger than arbitrator's award. *Crampton v. Takegoshi (1993) 17 Cal. App. 4th 308, 319-321, 21 Cal. Rptr. 2d 284 , overruled on other grounds by Phelps v. Stostad (1997) 16 Cal. 4th 23*

When compensation insurer assigns worker's compensation lien to third party, if third party desires to avoid apportionment of attorney's fees under *Lab. Code § 3856*, third party must provide court with sufficient factual detail to establish that activities of insurer's attorney constituted a conscientious effort to address the substantive issues in the case; apportionment as not avoided if the only evidence presented by the third party consists of the attorney's declaration that fails to explain the nature of his services and provides no evidence of the hours expended. *Hartwig v. Zacky Farms (1992) 2 Cal. App. 4th 1550, 1556-1557, 3 Cal. Rptr. 2d 828*

Employer as not passive beneficiary of employee's third-party litigation when employer was represented in that action by its own attorney and this attorney was involved in discovery and pretrial settlement conference, designated several expert witnesses for trial, and appeared at trial and engaged in some questioning of witnesses; thus, employee's attorney was not entitled to an attorney's fee out of employer's recovery in action. *Kavanaugh v. City of Sunnyvale (1991) 233 Cal. App. 3d 903, 916, 284 Cal. Rptr. 698*

Principle of equitable apportionment of attorney's fees in action against third-party tortfeasor as applying when both employee and employer, or employer's workers' compensation carrier, retain separate attorneys so long as resulting fund is produced through efforts of only one of them; employee's attorney is entitled to attorney's fees based on amount of lien unless attorney for lienholder actively participated in prosecuting suit; attorney's fees are recoverable from liened portion of judgment even when lien has been assigned to third-party tortfeasor. *Raisola v. Flower Street Ltd. (1988) 205 Cal. App. 3d 1004, 1009, 252 Cal. Rptr. 726*

Under *Lab. Code § 3856(c)*, when two attorneys are involved rendering services on behalf of their respective clients, the employer and the employee, in action against third-party tortfeasor award of fees to each attorney as based not on services benefitting both parties, but rather on service rendered in each instance by attorney in effecting recovery for benefit of party represented. *Walsh v. Woods (1986) 187 Cal. App. 3d 1273, 1278, 232 Cal. Rptr. 629*

Under *Lab. Code § 3856(b)*, amount of judgment in action begun by employee against third party and awarded to plaintiff's employer for reimbursement of compensation benefits paid to plaintiff as subject to deduction of costs and attorney's fees when resulting award was produced solely through active efforts of plaintiff's attorney in successfully prosecuting suit to judgment even though employer was represented by its own attorney if attorney did not actively participate in case. *Walsh v. Woods (1982) 133 Cal. App. 3d 764, 768, 184 Cal. Rptr. 267* (remanding case for finding on issue of attorney participation)

[d] Comparative Negligence

Raising issue of employer's concurrent negligence by affirmative defense in defendant third-party tortfeasor's answer. *Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 829, 842, 150 Cal. Rptr. 888, 587 P.2d 684* ; *Burrow v. Pike (1987) 190 Cal. App. 3d 384, 392-393, 235 Cal. Rptr. 408*

Raising issue of employer's concurrent negligence by cross complaint of defendant third-party tortfeasor against employer. *Del Monte Corp. v. Superior Court (1982) 127 Cal. App. 3d 1049, 1053-1055, 179 Cal. Rptr. 855*

Third party sued by employee for injuries sustained in course of employment as not barred by Workers' Compensation Law from filing cross complaint for comparative indemnity against insurer who fraudulently concealed existence of

injury from employee, as such conduct goes beyond normal role of insurer in compensation scheme intended to protect worker. *Chase Chemical Co. v. Hartford Accident & Indemnity Co. (1984) 159 Cal. App. 3d 229, 239, 205 Cal. Rptr. 469*

Principles of comparative negligence as applicable to employers' subrogation rights within workers' compensation system. *Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 829, 832-833, 846-847, 150 Cal. Rptr. 888, 587 P.2d 684* (modifying rule of *Witt v. Jackson (1961) 57 Cal. 2d 57, 17 Cal. Rptr. 369, 366 P.2d 641* , and *Roe v. Workmen's Comp. Appeals Bd. (1974) 12 Cal. 3d 884, 117 Cal. Rptr. 683, 528 P.2d 771* , which prevented negligent employer from obtaining any reimbursement of benefits paid or credit toward future workers' compensation liability when injured employee recovered from third party, to allowemployer reimbursement or credit against workers' compensation obligations that exceed proportionate liability employer would incur for indemnification of third party under comparative system of allocating tort responsibility among multiple wrongdoers); *Del Monte Corp. v. Superior Court (1982) 127 Cal. App. 3d 1049, 1052, 179 Cal. Rptr. 855*

[e] Credit Against Compensation Liability

Workers' compensation attorney's fees are considered "compensation" under *Lab. Code § 3861* and are subject to a statutory credit for third-party recovery. *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (1997) 53 Cal. App. 4th 579, 585-586, 61 Cal. Rptr. 2d 794*

When worker slipped and fell on spilled liquid detergent, employer and building management that failed to clean spill were concurrently negligent; employer's liability for purposes of credit against future indemnity and medical costs under *Lab. Code § 3861* was greater than 5 percent as a matter of law due to employer's obligation to provide a safe workplace. *Bonner v. Workers' Comp. Appeals Bd. (1990) 225 Cal. App. 3d 1023, 1036-1037, 275 Cal. Rptr. 337*

Application of *Lab. Code § 3732*, requiring that Uninsured Employers Fund [now called the Uninsured Employers Benefits Trust Fund] be given as credit against its liability amount equal to injured employee's recovery from third-party tortfeasor, as not retrospective when employee was injured prior to its enactment but received award from Fund subsequent to effective date of statute. *Sobiniak v. Workers' Comp. Appeals Bd. (1984) 156 Cal. App. 3d 448, 451, 202 Cal. Rptr. 789*

Employer's comparative degree of negligence, determined by jury in prior strict products liability action arising out of work-related accident, as making employer joint tortfeasor, precluding employer's insurer from receiving credit for amount of damages attributed to employer's negligence. *Anderson-Cottonwood Disposal Service v. Workers' Comp. Appeals Bd. (1982) 135 Cal. App. 3d 326, 331, 185 Cal. Rptr. 336*

Compensation liability against which *Lab. Code § 3861* credit applies as including penalty assessed for incorrect payment of temporary disability. *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1982) 130 Cal. App. 3d 933, 940-941, 182 Cal. Rptr. 171*

Employer adjudicated concurrently negligent as entitled to application of comparative negligence principles to any credit claim. *Curtis v. State of California ex rel. Dept. of Transportation (1982) 128 Cal. App. 3d 668, 683, 180 Cal. Rptr. 843*

Employer's failure to raise possibility of credit for amount awarded to employee in third-party action, or to reserve appeals board jurisdiction over issue in original compensation proceeding, as not waiving subsequent right to claim credit. *Hodge v. Workers' Comp. Appeals Bd. (1981) 123 Cal. App. 3d 501, 510, 176 Cal. Rptr. 675*

When third party's negligence was subsequent to and exacerbated employee's work-related injury, employer as entitled

to credit for employee's recovery against third party only with respect to portion of compensation benefits paid as result of third party's exacerbation of injury. *Hodge v. Workers' Comp. Appeals Bd. (1981) 123 Cal. App. 3d 501, 515, 176 Cal. Rptr. 675*

County as entitled to credit, to be applied against future workers' compensation to injured employee, for injured employee's award recovered from third party. *Herr v. Workers' Comp. Appeals Bd. (1979) 98 Cal. App. 3d 321, 329, 159 Cal. Rptr. 435*

Effect of *Lab. Code §§ 3858* and *3861* as being to vest in and continue in Workers' Compensation Appeals Board exclusive jurisdiction to determine compensation, even though action against third party to recover for injured employee's injuries is brought before jurisdiction of board is invoked. *Nelsen v. Workmen's Comp. App. Bd. (1970) 11 Cal. App. 3d 472, 478, 89 Cal. Rptr. 638*

[f] Damages and Liability

Trial court erred by deducting amount of workers' compensation lien purchased by defendant from judgment prior to determining that defendant obtained a more favorable judgment than the settlement offered under *Code of Civ. Proc. § 998*; *Code of Civ. Proc. § 998* determination should be made before workers' compensation benefits are deducted from judgment. *Poire v. C.L. Peck/Jones Bros. Construction Corp. (1995) 39 Cal. App. 4th 1832, 1842-1843, 46 Cal. Rptr. 2d 631*

Lab. Code § 3956(d) as unimbiguously requiring that workers' compensation lien be satisfied out of judgment recovered by injured employee against third-party tortfeasor and not out of verdict; verdict and judgment as properly referring only to plaintiff-employee and to third-party tortfeasor when employer elected to abstain from participating in third-party action and to claim lien on judgment. *Manthey v. San Luis Rey Downs Enterprises, Inc. (1993) 16 Cal. App. 4th 782, 788-789, 20 Cal. Rptr. 2d 265*

Amount of workers' compensation lien as required to be taken in partial satisfaction of judgment against third party after it is entered; offsetting amount of compensation lien against verdict as error. *Manthey v. San Luis Rey Downs Enterprises, Inc. (1993) 16 Cal. App. 4th 782, 789, 20 Cal. Rptr. 2d 265*

Method of computing injured employee's recovery against third-party tortfeasor as proper when proportionate amount of employee's negligence is first substracted from total award and proportionate amount attributable to employer's negligence up to amount of workers' compensation benefits paid is then subtracted. *Engle v. Endlich (1992) 9 Cal. App. 4th 1152, 1162-1163, 12 Cal. Rptr. 2d 145*

Third-part tortfeasor as jointly liable with employer for all economic damages, but with respect to noneconomic damages, third party's liability as several only and limited to his or her comparative fault. *Engle v. Endlich (1992) 9 Cal. App. 4th 1152, 1159-1160, 12 Cal. Rptr. 2d 145*

Employer and employee as entitled to verdicts and judgments in third-party action setting forth their respective rights, but damages must be segregated between them to prevent double recovery against third party. *Demkowski v. Lee (1991) 233 Cal. App. 3d 1251, 1258-1259, 284 Cal. Rptr. 919*

While negligent employee's recovery from third-party tortfeasor will be reduced in proportion to his or her own degree of fault, employee's award as required also to be reduced by amount of workers' compensation benefits receivedfrom nonnegligent employer in order to prevent double recovery and employer receives from judgment reimbursement for amount of workers' compensation benefits it has paid. *Jarvis v. Southern Pac. Transportation Co. (1983) 142 Cal. App. 3d 246, 258-259, 191 Cal. Rptr. 29*

When there is no finding of negligence on part of employer, jury verdict as not reducible for workers' compensation benefits paid; reduction in jury verdict as proper only when third-party tortfeasor is entitled to setoff because of employer's concurrent negligence, to which principles of comparative neligence apply, and only then as to compensation benefits paid as of time of trial and not for future compensation benefits. *Curtis v. State of California ex rel. Dept. of Transportation (1982) 128 Cal. App. 3d 668, 683, 180 Cal. Rptr. 843*

Third-party tortfeasor as liable for only his or her proportional share of responsibility, even when that share is less than compensation benefit paid by employer's compensation carrier. *Finney v. Manpower, Inc. (1981) 123 Cal. App. 3d 1066, 1071, 177 Cal. Rptr. 74*

Third-party tortfeasor who establishes that injury to worker was concurrently caused by negligence of employer as entitled to have judgment against him reduced by amount of workers' compensation benefits already paid, but not benefits to be paid. *Patterson v. Sharp (1970) 10 Cal. App. 3d 990, 996, 89 Cal. Rptr. 396* ; *Slayton v. Wright (1969) 271 Cal. App. 2d 219, 230-234, 76 Cal. Rptr. 494*

Principle that judgment against third-party tortfeasor is reduced by compensation paid by employer whose negligence contributed to injury as not extending to benefits required to be paid by employer in the future. *Gastelum v. City of Torrance (1969) 2 Cal. App. 3d 582, 583-584, 82 Cal. Rptr. 732* (death benefits payable in installments); *Slayton v. Wright (1969) 271 Cal. App. 2d 219, 232, 76 Cal. Rptr. 494* (permanent disability benefits payable in future)

[g] Discovery

In third-party action by injured employee against manufacturer and distributor of power press, trial court improperly referred discovery dispute involving production of documents to referee when discovery issues were not sufficiently complex or time consuming so as to require referee. *DeBlase v. Superior Court (1995) 40 Cal. App. 4th 1188, 1196-1197, 48 Cal. Rptr. 2d 224*

Trial Court issued a protective order that: (1) allowed plaintiff's counsel to disclose trade secrets and other confidential information to counsel in similar cases only if plaintiff's counsel executed a stipulation agreeing to be bound by the order, and (2) required plaintiff's counsel to notify the defense counsel when disclosure was made. *Raymond Handling Concepts Corp. v. Superior Court of the State of California for the County of Alameda (1995) 39 Cal. App. 4th 584, 590-591, 45 Cal. Rptr. 2d 885*

[h] Dismissal

Action was barred by one-year statute of limitations under former *Code of Civ. Proc. § 340(3)* and equitable tolling doctrine did not apply to extend plaintiff's time to file action against defendants, when plaintiff sustained industrial injury in 1997, filed application for workers' compensation benefits in 1998, joined defendants in workers' compensation proceeding in 1999, months after statute of limitations had expired, with no proceeding of any sort filed against defendants within period of one-year statute of limitations, so defendants had no timely notice of potential claim against them that would justify application of equitable tolling doctrine, and plaintiff filed present civil action against defendants in 2007, almost 10 years after his injury. *Aguilera v. Heiman (2009) 174 Cal. App. 4th 590, 596-602, 95 Cal. Rptr. 3d 18*

Doe defendant as properly dismissed in third-party action when defendant was not named and served within the one-year statute of limitations for personalinjuries [former *Code Civ. Proc. § 340(3)*]; injured worker as not having the right to intervene in his own third-party action following a complaint in intervention by another intervener in the third-party action and bring back into the action a Doe defendant who had been previously dismissed from that action

because of the worker's failure to name and serve the Doe defendant within the one-year statute of limitations. *Taito v. Owens Corning (1992) 7 Cal. App. 4th 798, 801-803, 9 Cal. Rptr. 2d 687*

Dismissal of entire third-party action, including compensation insurer's complaint in intervention as proper pursuant to *Code Civ. Proc. § 583.410* for delay in prosecution when during the four years following the filing of the complaint the only action taken by the insurer was to participate in one deposition and to exchange interrogatories, and when the insurer consented to drop its case from the civil active list after the plaintiff dropped her case from judicial arbitration, and thereafter the insurer failed to file an at-issue memorandum or otherwise prosecute its case. *Wagner v. Rios (1992) 4 Cal. App. 4th 608, 611-612, 5 Cal. Rptr. 2d 731*

Date original complaint is filed as beginning five-year period of former *Code Civ. Proc. § 583(b)* (*now see Code Civ. Proc. §§ 583.310-583.360*) for dismissal for failure to prosecute as to intervener in workers' compensation action, although complaint in intervention was filed later. *Johnson v. De Santos (1983) 148 Cal. App. 3d 566, 571, 196 Cal. Rptr. 145* (nevertheless holding five-year period was tolled as to intervening compensation carrier because of plaintiff employee's election for arbitration in which carrier had not joined)

Trial court as erring in failing to grant defendant's motion to dismiss action for personal injuries, based on faulty repair of vehicle that allegedly led to accident, for plaintiff's failure to serve summons and complaint within three years after action was filed [*Code Civ. Proc. § 583.210*] because defendant had filed answer to complaint in intervention by employer to recover workers' compensation benefits paid to plaintiffs; filing of answer to complaint in intervention that was subsequently dismissed with prejudice at request of intervenor as not constituting general appearance in main action so as to relieve plaintiffs of duty to timely serve summons and complaint. *Duckett v. Superior Court (1989) 207 Cal. App. 3d 1419, 1422-1425, 255 Cal. Rptr. 733* (distinguishing on facts *Rhode v. National Medical Hosp. (1979) 93 Cal. App. 3d 528, 155 Cal. Rptr. 797* , and disagreeing with *Rhode*'s view that complaint in intervention is inextricably linked to main action)

[i] Employer's Right to Notice of Third-Party Action

Employee's failure to give employer notice of employee's action against third party, as required by *Lab. Code § 3853*, until two months before trial and one month before mandatory settlement conference, was insufficient as matter of law, even though employer may have had actual notice of action. *O'Dell v. Freightliner Corp. (1992) 10 Cal. App. 4th 645, 656-657, 12 Cal. Rptr. 2d 774*

Employee as having duty to give employer notice of impending settlement of action with third party, but no such duty to notify is imposed on third party. *O'Dell v. Freightliner Corp. (1992) 10 Cal. App. 4th 645, 657, 662-663, 12 Cal. Rptr. 2d 774*

Employer as having no standing to move to set aside dismissal of employee's third-party action pursuant to *Code Civ. Proc. § 473*, on grounds that employee failed to notify employer of that action, when employer is not a party to the action; employer as limited to suing employee for breach of duty to notify or to taking a credit against future compensation payable to employee. *O'Dell v. Freightliner Corp. (1992) 10 Cal. App. 4th 645, 658-662, 12 Cal. Rptr. 2d 774*

[j] Firefighter's Rule

County probation corrections officer's assumption of risk included risk of being injured during training, so that firefighter's rule barred officer's civil action against training company and instructor, and no statutory exception was applicable. *Hamilton v. Martinelli & Associates (2003) 110 Cal. App. 4th 1012, 1023-1030, 2 Cal. Rptr. 3d 168*

Police officer not barred from bringing civil action against owner and driver of truck whose alleged negligence caused collision that injured officer while driving to respond to domestic disturbance, since defendants' alleged negligence was independent cause separate from misconduct that summoned officer. *Terry v. Garcia (2003) 109 Cal. App. 4th 245, 252-253, 134 Cal. Rptr. 2d 565* .

Restaurant cook whose assault on fellow employee in restaurant kitchen led to presence of police officer, who announced his presence to cook, owed duty of care to officer, notwithstanding firefighter's rule. *Yamaguchi v. Harnsmut (2003) 106 Cal. App. 4th 472, 480-481, 130 Cal. Rptr. 2d 706*

Statutory exceptions to firefighters' rule do not apply to fellow public safety members jointly engaged in discharge of their duties, and public safety members were "jointly engaged" in ongoing car chase, even though not engaged in formally coordinated efforts, and even though one group of officers was ignorant of specific nature of chase. *McElroy v. State of California (2002) 100 Cal. App. 4th 546, 548-549, 122 Cal. Rptr. 2d 612*

Police officer bitten by another officer's police dog at scene of an arrest was barred by "firefighter's rule" from suing other officer's employer for his injuries because bitten officer was engaged in dangerous activity; both officers shared objective to effect a felony arrest under dangerous conditions; duty of care officers owed to public under these circumstances precluded their owing duty of care to each other; and hazard posed by police dog was inherent in activity the public hired officers to perform. *Farnam v. California Highway Patrol (2000) 84 Cal. App. 4th 1448, 1455, 101 Cal. Rptr. 2d 642*

Public lifeguard injured while involved in a rescue was barred by "firefighter's rule" from pursuing tort action against employer and co-worker, pursuant to *Calatayud v. State of California (1998) 18 Cal. 4th 1057, 77 Cal. Rptr. 2d 202, 959 P.2d 360* . *City of Oceanside v. Superior Court (2000) 81 Cal. App. 4th 269, 285, 96 Cal. Rptr. 2d 621*

"Firefighter's rule" did not bar claim by police officer who was shot by man after responding to a 911 call when man's wife affirmatively misstated to police officer that her husband was not violent, since risk that someone would deceive officer about suspect's violent tendencies is not an inherent risk of police officer's job; wife of man who shot police officer owed officerduty of care under *Civ. Code § 1714.9* not to affirmatively misrepresent nature of hazard officer encountered in responding to 911 call. *Boon v. Rivera (2000) 80 Cal. App. 4th 1322, 1330, 1333, 96 Cal. Rptr. 2d 276*

"Firefighter's rule" did not bar claim against manufacturer of garage door opener by firefighter injured in a garage fire after the garage door malfunctioned, where the malfunction was independent of the fire. *Stapper v. GMI Holdings, Inc. (1999) 73 Cal. App. 4th 787, 796, 86 Cal. Rptr. 2d 688*

"Firefighter's rule" barred action by police officer against psychiatrist for negligent care, where officer was shot by psychiatric patient after responding to a call of shots being fired and court found that risk of being shot while on duty in response to such a call is one the officer assumes under the "firefighter's rule"; psychiatrist's failure to warn police department of the shooter's homicidal feelings toward his work supervisor pursuant to *Civil Code Section 43.92* did not abrogate application of the "firefighter's rule" since psychiatrist had no reason to know that shooter may have been homicidal toward officer. *Tilley v. Schulte (1999) 70 Cal. App. 4th 79, 85-86, 82 Cal. Rptr. 2d 497*

Civ. Code § 1714.9(a)(1) exception to firefighters' rule did not apply to plaintiff police officer who was injured by fellow officer while they were jointly engaged in discharge of their duties. *Calatayud v. State of California (1998) 18 Cal. 4th 1057, 1072, 77 Cal. Rptr. 2d 202, 959 P.2d 360*

"Firefighter's rule" barred recovery of damages for personal injuries suffered by off-duty deputy sheriff when he confronted and struggled with, then shot and killed, suspected burglar who had broken into garage of apartment building where the deputy lived. *Hodges v. Yarian (1997) 53 Cal. App. 4th 973, 980, 62 Cal. Rptr. 2d 130*

Privately employed safety supervisor required to engage in periodic fire-fighting duties have cause of action against third party for injuries caused by third party's negligence in starting fire; claim as not barred by firefighter's rule or doctrine of assumption of risk. *Neighbarger v. Irwin Industries, Inc. (1994) 8 Cal. 4th 532, 547, 34 Cal. Rptr. 2d 630, 882 P.2d 347*

Federal court following *Civ. Code § 1714.9(e)* and reviewing and following California Supreme Court and court of appeal cases. *Vasquez v. North County Transit District, 292 F.3d 1049, 1056-1060 (9th Cir. 2002)*

[k] Indemnity

General contractor's indemnity claim against subcontractor for injuries to subcontractor's employee was barred when indemnification clause was never signed by subcontractor, rendering it ineffective under *Lab. Code § 3864*. *Robert E. Blake v. Excel Environmental (1997) 104 F.3d 1158, 1162*

Trial court erred in denying employer's motion for summary judgment on issue of third party's claims for express indemnity when indemnity provision in equipment lease agreement between employer and equipment lessor was unenforceable under *Lab. Code § 3864* since agreement was not signed by equipment lessor before the date of employee's injury. *Hansen Mechanical, Inc. v. Superior Court of Los Angeles County (1995) 40 Cal. App. 4th 722, 731-732, 47 Cal. Rptr. 2d 47*

Lab. Code § 3864 as requiring that signatures of all parties to indemnity agreement be affixed to agreement prior to occurrence of employee's injury;indemnity agreement as not binding when indemnitee signed agreement only after employee's injury. *Nielsen Construction Co. v. International Iron Products (1993) 18 Cal. App. 4th 863, 869, 22 Cal. Rptr. 2d 497*

[l] Intervention

Any person having interest recognized by law in subject matter of judgment, which interest is injuriously affected by judgment, as being party aggrieved and entitled to be heard on appeal; appellant's interest as required to be immediate, pecuniary, and substantial, and not nominal or remote consequence of judgment. *Burrow v. Pike (1987) 190 Cal. App. 3d 384, 392, 235 Cal. Rptr. 408* (appeal from judgment by employer who filed and subsequently dismissed complaint in intervention in employee's action against third-party tortfeasor)

To ensure that both employee and employer recover their damages from third-party tortfeasor, regardless of which one of them sues, and in order to enable third party to settle all claims in only one lawsuit, statutory scheme (*Lab. Code § 3853*) as authorizing employee and employer to intervene in each other's actions, and right to so so as unconditional when intervention is made before trial commences. *Buell v. CBS, Inc. (1982) 136 Cal. App. 3d 823, 825 n.2, 186 Cal. Rptr. 455*

[m] Jurisdiction

Under California choice of law principles, Dominican Republic law governed personal injury action brought in California superior court against employer for injuries suffered by California resident in course of employment in that country pursuant to employment contract entered into in California, when Dominican Republic had particular interest in applying its law to incidents occurring within its borders, plaintiff would receive all workers' compensation benefits to which she might be entitled under either jurisdiction and Dominican Republic's social security system's benefits, employer's Dominican Republic workers' compensation insurer had already paid plaintiff's medical treatment bills of $110,000, lawsuit plaintiff was attempting to bring against her employer was not permitted under Dominican Republic

law, and allowing plaintiff to sue for tort damages under California law would seriously undermine California's workers' compensation exclusivity principles. *Tucci v. Club Mediterranee, S.A. (2001) 89 Cal. App. 4th 180, 189-194, 107 Cal. Rptr. 2d 401*

Workers' compensation insurer as assignee within meaning of former *Code Civ. Proc. § 117.5* (*now see Code Civ. Proc. § 116.420*) and therefore unable to sue third-party tortfeasor in small claims court to recoup compensation benefits paid to injured employee. *Allianz Insurance Co. v. Municipal Court (1981) 126 Cal. App. 3d 1043, 1046, 179 Cal. Rptr. 334*

[n] Liens

Employer or its workers' compensation carrier as permitted to assign to third-party tortfeasor its rights to lien on any recovery by worker from third-party tortfeasor for workers' compensation benefits paid. *Raisola v. Flower Street, Ltd. (1988) 205 Cal. App. 3d 1004, 1008-1009, 252 Cal. Rptr. 726*

Appeals board as erring in awarding employee's attorney priority lien for fees against compensation to be paid payable in advance of deduction of credit against settlement proceeds in employee's third-party action when entire amount of compensation to be paid, including penalties, is offset by credit against amount received by employee in settlement of his claim against third-party tortfeasor as that would result in employer's having to pay an amount in excess of that awarded in compensation proceeding. *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1982) 130 Cal. App. 3d 933, 942, 182 Cal. Rptr. 171*

[o] Reimbursement and Off-Set for Compensation Benefits Paid

Employer could pursue reimbursement from third-party defendants for workers' compensation benefits paid to employee, when applicant and third party reached settlement in third-party action. *Bailey v. Reliance Ins. Co. (2000) 79 Cal. App. 4th 449, 455-457, 94 Cal. Rptr. 2d 149*

Third-party tortfeasor as entitled to seek offset of award against third party based on amount of workers' compensation benefits paid to or owed on behalf of employee, even if employer has not joined as a party in employee's action, filed complaint in intervention, or sought to interpose a lien; accordingly, in third-party action in which employer is determined to be concurrently negligent, court as required to deduct employer's percentage share of employee's total recovery from third party's liability, up to amount of compensation benefits assessed against employer. *Engle v. Endlich (1992) 9 Cal. App. 4th 1152, 1161-1162, 12 Cal. Rptr. 2d 145*

Third-party tortfeasor as not precluded from seeking offset of workers' compensation benefits paid to employee, even though tortfeasor had stipulated to good faith settlement of another tortfeasor that included employer's lien; settling tortfeasor's waiver of its right to assert any offset as not binding on nonsettling tortfeasor. *Engle v. Endlich (1992) 9 Cal. App. 4th 1152, 1165-1166, 12 Cal. Rptr. 2d 145*

Concurrently negligent employer as entitled to either credit or reimbursement for amount by which its workers' compensation liability exceeds its proportional share of injured employee's recovery, even though negligent employer is barred from reimbursement for any workers' compensation benefits paid to injured employee; injured employee's damages assessed in third-party action as having to be reduced by amount of workers' compensation benefits received since double recovery not allowed. *Engle v. Endlich (1992) 9 Cal. App. 4th 1152, 1160-1161, 12 Cal. Rptr. 2d 145*

Rule against double recovery as not barring assignment of employer's lien for workers' compensation benefits to injured employee who, in asserting lien in third-party action, does so in capacity of assignee of employer or insurer and not as "plaintiff." *Engle v. Endlich (1992) 9 Cal. App. 4th 1152, 1164-1165, 12 Cal. Rptr. 2d 145*

Employer's failure to file claim for reimbusement in liquidation proceeding against third-party tortfeasor's insurer within six months after notice of such proceeding as required by *Ins. Code §§ 1021* and *1063.1* as not defeating employer's right to file lien against any judgment recovered by employee in employee's personal injury action; employer as able to enforce lien against third-party torfeasor or, if damages have been paid to employee, againstemployee under *Lab. Code § 3862*; employer as authorized to apply for lien in employee's pending third-party action at any time before satisfaction of judgment (*see Lab. Code §§ 3857, 3858*) and, hence, application for lien can be made after statute of limitations has barred employer from bringing independent action or after entry of judgment has barred employer from intervening. *Burrow v. Pike (1987) 190 Cal. App. 3d 384, 394-395, 235 Cal. Rptr. 408*

Civ. Code § 3333.1(b), precluding collateral source that has provided medical expenses to plaintiff in medical malpractice case from obtaining reimbursement from medical malpractice defendant, as not unconstitutional as applied to city, which under the statute was barred from seeking reimbursement for workers' compensation benefits paid to policeman who suffered heart attack while on duty and subsequently sued hospital and doctors for negligently causing brain damage during heart surgery. *Barme v. Wood (1984) 37 Cal. 3d 174, 179-182, 207 Cal. Rptr. 816, 689 P.2d 446*

City as not entitled under *Lab. Code § 3852* to recover compensation and other benefits paid to city policeman whose action for damages for injuries sustained in accident had been dismissed pursuant to "fireman's rule," which is applicable to policeman; because employer's action under *Lab. Code § 3852* is derivative of employee's right to sue, employer who has paid benefits to injured employee cannot collect reimbursement from party who is immune to suit by employee. *Hubbard v. Boelt (1983) 140 Cal. App. 3d 882, 882-885, 190 Cal. Rptr. 15*

In injured employee's action against third-party tortfeasor, employer as no longer precluded from recovering reimbursement of its workers' compensation payments due to its own negligence; recovery for workers' compensation benefits of employer who was concurrently negligent as limited to excess of those benefits after deducting employer's proportionate share of employee's damages. *Jarvis v. Southern Pac. Transportation Co. (1983) 142 Cal. App. 3d 246, 257, 191 Cal. Rptr. 29*

Third-party tortfeasor and his insurer, which purchased, for one half its face amount, lien claim from employer's compensation insurer, which had become insolvent, as properly allowed setoff in face amount of lien against judgment for employee in latter's action against third-party tortfeasor. *Quinn v. Warnes (1983) 144 Cal. App. 3d 309, 314-318, 192 Cal. Rptr. 660*

Employer adjudicated concurrently negligent as entitled to application of comparative negligence principles to any reimbursement claim. *Curtis v. State of California ex rel. Dept. of Transportation (1982) 128 Cal. App. 3d 668, 683, 180 Cal. Rptr. 843*

Comparative negligence principles as applicable to employer's right to reimbursement from third-party tortfeasor so that concurrently negligent employer is limited to recovering amount by which its workers' compensation liability exceeds its share of tort damages. *Rodgers v. Workers' Comp. Appeals Bd. (1984) 36 Cal. 3d 330, 334-336, 204 Cal. Rptr. 403, 682 P.2d 1068* ; *Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 829, 844-845, 150 Cal. Rptr. 888, 587 P.2d 684* ; *Del Monte Corp. v. Superior Court (1982) 127 Cal. App. 3d 1049, 1052, 179 Cal. Rptr. 855*

Employer as entitled to full reimbursement for compensation payments when third-party defendant's tort liability is established in amount equal to or in excess of such expenditure. *Breese v. Price (1981) 29 Cal. 3d 923, 929, 176 Cal. Rptr. 791, 633 P.2d 987*

Nonnegligent employer, or its workers' compensation carrier, as entitled to complete reimbursement from third-party

tortfeasor for amount paid to employee in compensation benefits, to extent that tortfeasor is proportionately liable for employee's damages. *Kemerer v. Challenge Milk Co. (1980) 105 Cal. App. 3d 334, 338, 164 Cal. Rptr. 397*

Jury determination that alleged third-party tortfeasor's negligence was not proximate cause of any injury to employee as defeating employer's right to reimbursement for workers' compensation benefits paid. *Mendenhall v. Curtis (1980) 102 Cal. App. 3d 786, 790-794, 162 Cal. Rptr. 569*

[p] Settlement

Good faith settlement of claim for damages made between third-party tortfeasor and employee as precluding action by county retirement board against third party for disability benefits it paid to employee, although retirement board did not receive statutorily mandated notice under *Lab. Code § 3860* or consent to settlement under *Lab. Code § 3859*; when third-party defendant has absolutely no knowledge of possibility of subrogation claim, burden of failure to comply with notice and consent statutes as falling on employee and not third party, and retirement board as confined to action against injured employee to recover reimbursement for benefits paid. *Board of Administration v. Glover (1983) 34 Cal. 3d 906, 911, 196 Cal. Rptr. 330, 671 P.2d 834*

Pursuant to *Lab. Code §§ 3853, 3859,* and *3860(a),* when employer fails to adequately notify its employee of its subrogation lawsuit and proposed settlement involving alleged third-party tortfeasor and fails to obtain employee's consent to settlement of that suit, and when settling alleged third-party tortfeasor, prior to settlement, was or reasonably should have been aware of possibility of employee's claim for damages against tortfeasor, alleged tortfeasor cannot use mere settlement and dismissal of employer's subrogation action to bar employee from maintaining action for damages against alleged tortfeasor. *McKinnon v. Otis Elevator Co. (2007) 149 Cal. App. 4th 1125, 1128, 1131-1137, 57 Cal. Rptr. 3d 723*

Third-party settlement offer signed by parties' counsel but not by litigants was unenforceable under *Code of Civ. Proc. § 664.6*. *Burckhard v. Del Monte Corp. (1996) 48 Cal. App. 4th 1912, 1919, 56 Cal. Rptr. 2d 569*

Compensation insurer as not without remedy for the collection of its proportionate share of the settlement of a third-party action of which it had no notice when the insurer is entitled to bring a separate action against the employee to collect its proportionate share, including a quasi-contractual cause of action and an action for breach of the statutory duty to notify the insurer of the impending satisfaction of judgment. *Abdala v. Aziz (1992) 3 Cal. App. 4th 369, 378-381, 4 Cal. Rptr. 2d 130*

[q] Statute of Limitations

Complaint in intervention by employer or compensation carrier filed in employee's action as timely, even if filed after statute of limitations has run, provided statute had not yet run at time employee's complaint was filed and complaint in intervention was filed before trial. *County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 872, 885, 140 Cal. Rptr. 638, 568 P.2d 363* ; *Buell v. CBS, Inc. (1982) 136 Cal. App. 3d 823, 826, 186 Cal. Rptr. 455*

Employer's complaint against third-party tortfeasor as required to be filed within one year from date of employee's injury (see former *Code Civ. Proc. § 340(3)*) and not from date workers' compensation benefits were paid. *County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 868-886, 140 Cal. Rptr. 638, 568 P.2d 363*

Asbestosis victims death triggered statute of limitations set forth in *Code Civ. Proc. § 340.6* for legal malpractice claim; statute of limitations not tolled under exceptions set forth in *Code Civ. Proc. § 340.6*. *Gailing v. Rose, Klein & Marias (1996) 43 Cal. App. 4th 1570, 1577, 51 Cal. Rptr. 2d 381*

Statute of limitations did not bar applicant's second amended complaint for general negligence that changed situs of his accident when second amended complaint related back to filing of original complaint since it was based on the same facts and injuries. *Idding v. North Bay Construction Company, Inc. (1995) 39 Cal. App. 4th 1111, 1115, 46 Cal. Rptr. 2d 149*

Doe defendant as properly dismissed in third-party action when defendant was not named and served within the one-year statute of limitations for personal injuries [*Code Civ. Proc. § 340(3)*]; injured worker as not having the right to intervene in his own third-party action following a complaint in intervention by another intervener in the third-party action and bring back into the action a Doe defendant who had been previously dismissed from that action because of the worker's failure to name and serve the Doe defendant within the one-year statute of limitations. *Taito v. Owens Corning (1992) 7 Cal. App. 4th 798, 801-803, 9 Cal. Rptr. 2d 687*

Right of employee to intervene in employer's action against third party tortfeasor before trial commences as unconditional; right of employer and employee to intervene in timely filed action of the other as not dependent on their own compliance with statute of limitations. *Buell v. CBS, Inc. (1982) 136 Cal. App. 3d 823, 825 n.2, 826, 186 Cal. Rptr. 455*

In action by insurer against third-party tortfeasor, *Lab. Code § 3853* as granting unconditional right to injured employee to intervene in suit at any time prior to trial, even though employee's claim was presented more than one year after injury (statute of limitations for personal injury suits). *Jordan v. Superior Court (1981) 116 Cal. App. 3d 202, 206-211, 172 Cal. Rptr. 30*

Complaint in intervention filed by employer's compensation insurer in action by injured employee against third party as not barred by statute of limitations when plaintiff's complaint was timely filed, although complaint in intervention was filed almost three years after employee's injury. *Harrison v. Englebrick (1967) 254 Cal. App. 2d 871, 873, 874, 62 Cal. Rptr. 831*

[r] Subrogation

Pursuant to *Lab. Code § 3852*, workers' compensation carrier stated cause of action against alleged third-party tortfeasors for recoupment of death benefits carrier paid to deceased employee's survivor, who was actual dependent of employee but who had no standing to bring wrongful death action against alleged tortfeasors, and carrier's right to sue was not limited to its status as subrogee of survivor, and wrongful death statute, with its limited standing provisions, was irrelevant in determining carrier's right to sue. *Fremont Comp. Ins. Co. v. Sierra Pine, Ltd. (2004) 121 Cal. App. 4th 389, 394-401, 17 Cal. Rptr. 3d 80*

Workers' compensation law as not imposing a duty on a compensation insurer to pursue its subrogation rights at all or in any particular manner, since subrogation is a right and not an obligation; trial court as properly dismissing employer's complaint against its insurer alleging that the insurer was negligent in not actively pursuing its subrogation rights against a third party who was responsible for the employee's injury, even though the employer alleged it would have received a refund of some increased premiums if the insurer had recovered from the third party. *New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co. (1992) 7 Cal. App. 4th 1088, 1093-1095, 9 Cal. Rptr. 2d 469*

Employer who becomes obligated to pay workers' compensation benefits to an employee injured by a third party as having the right to recover the total amount of compensation paid in addition to damages for which the employer was liable; if the employer is insured for workers' compensation liability, the insurer as having the right to be put into the position of its insured against a third party who is legally responsible to the insured for the loss for which the insurer has both insured and paid. *New Plumbing Contractors, Inc. v. Nationwide Mutual Ins. Co. (1992) 7 Cal. App. 4th 1088, 1093, 9 Cal. Rptr. 2d 469*

Lab. Code § 3852 as allowing employers subrogation rights whenever, and to whatever extent, an employee suffers a subsequent tortious injury that also increases the employer's liability for compensation, whether or not the subsequent injury is industrial or nonindustrial. *Abdala v. Aziz (1992) 3 Cal. App. 4th 369, 375, 4 Cal. Rptr. 2d 130*

Employer's action under *Lab. Code § 3852* as derivative of employee's right to sue, and employer that has paid benefits to injured employee as not able to collect reimbursement from party who is immune to suit by employee. *Hubbard v. Boelt (1983) 140 Cal. App. 3d 882, 884, 190 Cal. Rptr. 15* (defendant immune to suit by policeman employee under fireman's rule)

Employer or its compensation insurer as entitled to sue third-party tortfeasor to recover money paid to state pursuant to *Lab. Code § 4706.5* (death of injured employee without dependents) because such payments are not taxes but compensation within meaning of *Lab. Code § 3852* (providing for recovery from third-party tortfeasors of compensation paid by employer). *Travelers Insurance Co. v. Sierra Pacific Airlines (1983) 149 Cal. App. 3d 1144, 1155-1157, 197 Cal. Rptr. 416* ; *Associated Indemnity Corp. v. Pacific Southwest Airlines (1982) 128 Cal. App. 3d 898, 904-907, 180 Cal. Rptr. 685*

Employer's recovery under *Lab. Code § 3852* (subrogation action against third-party tortfeasor) as limited to damages proximately caused by injury; burden of establishing proximate cause as on employer. *Breese v. Price (1981) 29 Cal. 3d 923, 928, 176 Cal. Rptr. 791, 633 P.2d 987*

Although employer's right to recover against negligent third party, or to lien employee's judgment against that party, is legislative recognition of equitable doctrine of subrogation, those rights as being wholly statutory. *Nelsen v. Workmen's Comp. App. Bd. (1970) 11 Cal. App. 3d 472, 477, 89 Cal. Rptr. 638*

Essential allegations in action against estate. *Fidelity & Cas. Co. of New York v. McMurry (1963) 217 Cal. App. 2d 767, 32 Cal. Rptr. 243*

Right of insurance carrier to bring independent action to recover medical, hospital and burial expenses after obtaining a lien for death benefits in a wrongful death action by the employee's heirs. *v. Hartford Steam Boiler Inspection & Ins. Co. (1956) 143 Cal. App. 2d 646, 299 P.2d 928*

[s] Uninsured Motorist Insurance

Employee injured by uninsured motorist while acting within course and scope of employment as entitled to make claim under uninsured motorist coverage provided by employee's automobile insurance policy as well as filing workers' compensation claim against his or her employer. *Rangel v. Interinsurance Exchange (1992) 4 Cal. 4th 1, 8, 14 Cal. Rptr. 2d 783, 842 P.2d 82*

Insurer as having no duty to pay its insured benefits under uninsured motorist provision until insured's workers' compensation claim is resolved. *Rangel v. Interinsurance Exchange (1992) 4 Cal. 4th 1, 17, 14 Cal. Rptr. 2d 783, 842 P.2d 82*

Ins. Code § 11580.2, relating to uninsured motorist coverage in motor vehicle liability policies, as contemplating that worker who is entitled to workers' compensation for injury caused by negligence of uninsured third-party motorist may also make claim for uninsured motorist coverage, but *Ins. Code § 11580.2(h)* as providing that recovery under uninsured motorist coverage shall be reduced by amount paid under workers' compensation law. *Rankin v. West American Ins. Co. (1978) 84 Cal. App. 3d 829, 836, 149 Cal. Rptr. 57*

[t] Waiver of Rights

Waiver by nonnegligent employer of subrogation rights against third-party tortfeasor for compensation paid as inuring to benefit of injured employee or employee's dependents, as case may be, as payments received by them from a collateral source, and not to benefit of third-party tortfeasor. *De Cruz v. Reid (1968) 69 Cal. 2d 217, 227, 70 Cal. Rptr. 550, 444 P.2d 342*

Waiver of subrogration rights by employer who was concurrently negligent as not barring third-party tortfeasor's assertion of such negligence so as to reduce any judgment against third party tortfeasor by injured employee or employee's dependents. *De Cruz v. Reid (1968) 69 Cal. 2d 217, 227, 70 Cal. Rptr. 550, 444 P.2d 342*

Injured employee's purchase of employer's lien for workers' compensation benefits and employer's waiver of right to lien as not barring third-party tortfeasor found partially liable to employer from asserting offset for these benefits. *Engle v. Endlich (1992) 9 Cal. App. 4th 1152, 1167-1168, 12 Cal. Rptr. 2d 145*

Settling tortfeasor's waiver of its right to assert any offset as not binding on nonsettling tortfeasor; nonsettling tortfeasor as not waiving its right to assert offset by agreeing that settlement was in good faith. *Engle v. Endlich (1992) 9 Cal. App. 4th 1152, 1165-1166, 12 Cal. Rptr. 2d 145*

Employer's waiver of right to reimbursement as not constituting waiver of its right to a credit. *Curtis v. State of California ex rel. Dept. of Transportation (1982) 128 Cal. App. 3d 668, 683, 180 Cal. Rptr. 843*

[72] Treating Physicians

When responding to employee's request to change physicians during 30 days following date of injury, employer, in order to retain control, including retention of power to designate primary treating physician, must follow notice provisions of *Lab. Code § 4601* and Admin. Dir. Rule 9781, which provisions have been held to require that notice to employee name specific physician being designated by employer, specifically indicate that notice is being given in response to employee's request to change physicians, and make clear that designated alternative physician is primary treating physician. *Pinkerton, Inc. v. Workers' Comp. Appeals Bd. (2001) 89 Cal. App. 4th 1019, 1027-1030, 107 Cal. Rptr. 2d 787*

Limitation of "one time change of physician" set forth in *Lab. Code § 4601* does not apply to applicant who was exercising her right to control medical treatment by selecting her own physician. *Ralphs Grocery Co. v. Workers' Compensation Appeals Bd. (1995) 38 Cal. App. 4th 820, 829, 45 Cal. Rptr. 2d 197*

[73] Uninsured Employers

Workers' compensation insurer's civil action against illegally uninsured employer for reimbursement of award of benefits to employee for cumulative trauma was permitted by *Lab. Code § 5500.5(a)* as exception to exclusive remedy rule, and jurisdiction of action was not limited to Appeals Board. *Graphics Arts Mutual Ins. Co. v. Time Travel Internat., Inc. (2005) 126 Cal. App. 4th 405, 413-415*

Penalty assessed against employer for failure to have workers' compensation coverage would not be set aside, since subsequent reinstatement of employer's lapsed coverage to include retroactively date of penalty assessment could not invalidate penalty assessment. *Leo's Assocs., Inc. v. Department of Indus. Relations (2004) 120 Cal. App. 4th 628, 631-632, 15 Cal. Rptr. 3d 594*

Employer as not relieved of penalty under *Lab. Code § 3722* for failure to secure workers' compensation insurance coverage at the time investigator issued stop order against employer pursuant to *Lab. Code § 3710.1* notwithstanding that, immediately after stop order was issued, employer obtained insurance providing coverage for the hours preceding and including investigator's visit; *Lab. Code § 3722* as providing for imposition of penalty at the moment stop order issues. *Woodline Furniture Mfg. Co. v. Department of Industrial Relations (1994) 23 Cal. App. 4th 1653, 1658-1659, 29 Cal. Rptr. 2d 17*

[74] Uninsured Employers Benefits Trust Fund

Limitation of liability specified by *Lab. Code § 3716.2* precludes imposition of sanction against UEBTF pursuant to *Lab. Code § 5813* for bad-faith actions or tactics that are frivolous or intended solely to cause unnecessary delay. *Duncan v. Workers' Comp. Appeals Bd. (2008) 166 Cal. App. 4th 294, 300-304, 82 Cal. Rptr. 3d 664*

UEBTF may not be joined in any proceedings unless legal person or entity has been identified as illegally uninsured employer in application and special notice of lawsuit and that employer has been served with application and special notice of lawsuit in manner provided for service of summons in Code of Civil Procedure. *Rea v. Workers' Comp. Appeals Bd. (2005) 127 Cal. App. 4th 625, 644-652*

Uninsured employer's obligation to reimburse UEBTF for award of workers' compensation benefits that UEBTF paid to injured employee is not excise tax for purposes of federal bankruptcy law and is, therefore, dischargeable in bankruptcy proceedings. *George v. Uninsured Employers Fund (9th Cir. 2004) 361 F.3d 1157, 1162-1164*

Action before W.C.A.B. to obtain judgment against uninsured employer, which is prerequisite to the UEBTF's obligation to pay benefits, is not barred by bankruptcy discharge injunction, nor is bankruptcy court order necessary for W.C.A.B. action to proceed. *In re Munoz (9th Cir. 2002) 287 B.R. 546, 550, 554-556*

Uninsured Employers Fund [now called the Uninsured Employers Benefits Trust Fund] as created to provide source of funds for injured workers whose employers have failed or refused either to obtain workers' compensation insurance coverage or to qualify as self-insurers for employers' liability; Fund as designed to be financed from various penalties that may be assessed against uninsured employers as well as from state tax revenues. *DuBois v. Workers' Comp. Appeals Bd. (1993) 5 Cal. 4th 382, 388-389, 20 Cal. Rptr. 2d 523, 853 P.2d 978*

Liability of Uninsured Employers Fund [now called the Uninsured Employers Benefits Trust Fund] for payment of award of workers' compensation benefits as derivative rather than vicarious; employer as primarily responsible for payment of award even when Fund has participated and is ultimately required to pay award; Fund as not liable to pay any amount in excess of, or different from, amount awarded against uninsured employer. *DuBois v. Workers' Comp. Appeals Bd. (1993) 5 Cal. 4th 382, 390, 20 Cal. Rptr. 2d 523, 853 P.2d 978*

Suit to recover damages against individual employees of UEF [now called the UEBTF] by plaintiff against whose property lien had been filed by UEF, alleging federal civil rights claim and several state law claims, barred by federal claim by statute of limitations and California Government Claims Act (i.e., *Gov. Code § 821.6*), respectively. *Javor v. Taggart (2002) 98 Cal. App. 4th 795, 799-800, 120 Cal. Rptr. 2d 174*

[74A] Utilization Review

When deciding whether to approve or deny injured employee's request for medical treatment, employer must conduct utilization review pursuant to *Lab. Code § 4610* and may not, as alternative to utilization review, elect to dispute request for medical treatment pursuant to *Lab. Code § 4062*, which permits only *employees* to use its provisions to object to employers' decisions regarding treatment requests. *State Compensation Insurance Fund v. Workers' Comp. Appeals*

Bd. (2008) 44 Cal. 4th 230, 233-234, 236-237, 239-245, 79 Cal. Rptr. 3d 171, 186 P.3d 535

Procedures and timelines governing objections to treating physician's recommendation for spinal surgery are contained in *Lab. Code §§ 4610* and *4062* and in *8 Cal. Code Reg. §§ 9788.1, 9788.11,* and *9792.6(o),* as elucidated by Appeals Board en banc. Cervantes v. Workers' Comp. Appeals Bd. (2009) 74 Cal. Comp. Cases 1336, 1338, 1341-1346, 1351-1355 (Appeals Board en banc opinion)

[75] Vocational Rehabilitation

WCAB en banc held that: (1) repeal of *Lab. Code § 139.5* terminated any rights to vocational rehabilitation benefits or services pursuant to orders or awards that were not final before January 1, 2009; (2) no saving clause was adopted to protect vocational rehabilitation rights in cases still pending on or after January 1, 2009; (3) vocational rehabilitation statutes that were repealed in 2003 do not continue to function as "ghost statutes" on or after January 1, 2009; (4) effective January 1, 2009, the WCAB lost jurisdiction over non-vested and inchoate vocational rehabilitation claims, but the WCAB continues to have jurisdiction under *Lab. Code §§ 5502(b)(3)* and *5803* to enforce or terminate vested rights; and (5) subject matter jurisdiction over non-vested and inchoate vocational rehabilitation claims cannot be conferred by waiver, estoppel, stipulation, or consent. Weiner v. Workers' Comp. Appeals Bd. (2009) 74 Cal. Comp. Cases 736, 737, 742-758 (Appeals Board en banc opinion)

Even if WCAB assumed that some vocational rehabilitation maintenance allowance was indisputably due to employee prior to January 1, 2009, this does not mean that employee's right to this vocational rehabilitation maintenance allowance had vested, since statutory right vests through final order or award, but no final order or award of vocational rehabilitation maintenance allowance was made in present case, and repeal of *Lab. Code § 139.5* extinguished employee's right to such award. Weiner v. Ralphs Co. (2009) *74 Cal. Comp. Cases 958, 962-964 (Appeals Board en banc opinion) , pet. for writ of rev. filed* 9/28/2009

Court of appeal followed *Weiner v. Ralphs Co.* and held that October 2008 WCAB decision that affirmed WCJ's January 2008 award of vocational rehabilitation benefits to employee was not "final" decision, so that employee lost all rights to vocational rehabilitation benefits as of January 1, 2009, repeal of *Lab. Code § 139.5*. *Beverly Hilton Hotel v. Workers' Comp. Appeals Bd. (2009) 176 Cal. App. 4th 1597, 1604-1611, 99 Cal. Rptr. 3d 50*

Amendments to *Lab. Code § 4646* are procedural in nature and thus apply to injuries occurring prior to January 1, 2003, date on which amendments went into effect, as well as to injuries occurring after that date. *Pebworth v. Workers' Comp. Appeals Bd. (2004) 116 Cal. App. 4th 913, 917-919, 10 Cal. Rptr. 3d 832*

Employer's letter sent to employee, who had been terminated following industrial injury, indicating that it "would have offered" employee specified alternative position "had he not been terminated for breaching the attendance policy," did not constitute actual offer of alternative position. *Robertson v. W.C.A.B. (2003) 112 Cal. App. 4th 893, 899-901, 5 Cal. Rptr. 3d 485*

Rehabilitation Unit's grant of employer's request to terminate liability for rehabilitation services had no effect on Appeals Board's continuing jurisdiction to act on employee's timely petition, filed with Board, to reopen and reinstate vocational rehabilitation. *Martino v. Workers' Comp. Appeals Bd. (2002) 103 Cal. App. 4th 485, 490, 126 Cal. Rptr. 2d 812*

Writing letter to employer requesting vocational rehabilitation is sufficient to constitute an "initial" request for services, even when letter is not sent torehabilitation unit; timely request for vocational rehabilitation does not become untimely solely because interruption ends beyond the limitations period. *Martinez v. Workers' Comp. Appeals Bd. (2000) 84 Cal. App. 4th 1079, 1085-1086, 101 Cal. Rptr. 2d 406*

Undocumented employee is not entitled to vocational rehabilitation benefits when employee is unable to return to work solely because of immigration status, since providing undocumented worker with greater benefits than those available to legal workers violates *equal protection clause of the United States Constitution*. *Del Taco v. Workers' Comp. Appeals Bd. (2000) 79 Cal. App. 4th 1437, 1442-1443, 94 Cal. Rptr. 2d 825*

Appeals Board loses jurisdiction to award further vocational rehabilitation benefits following an interruption of services for a defined period of time and more than five years after the date of injury, absent an express reservation of jurisdiction. *Sacramento County Office of Education v. W.C.A.B. (2000) 82 Cal. App. 4th 107, 118, 97 Cal. Rptr. 2d 699*

Salary benefits paid under *Lab. Code § 4800.5* to California Highway Patrol officer during participation in vocational rehabilitation were in lieu of temporary disability benefits but not in lieu of vocational rehabilitation maintenance allowance and therefore were not credited toward the *Lab. Code § 139.5* $16,000 vocational rehabilitation cap. *Sabath v. Workers' Comp. Appeals Bd. (1998) 67 Cal. App. 4th 286, 292, 79 Cal. Rptr. 2d 1*

Employer's offer of alternate seasonal work to injured ski instructor was sufficient to meet requirements of *Lab. Code § 4644(a)(6)(B)*, even though the alternate work was provided only during the ski season and not for 12 consecutive months. *Henry v. Workers' Comp. Appeals Bd. (1998) 68 Cal. App. 4th 981, 985-986, 80 Cal. Rptr. 2d 631*

Leave of absence salary benefits paid to police officer under former *Lab. Code § 4800* during officer's participation in vocational rehabilitation was not in lieu of vocational rehabilitation maintenance allowance; Legislature did not intend that portion of leave of absence benefits, in maximum weekly amount of $246 as provided in *Lab. Code § 139.5(c)*, be included in calculating vocational rehabilitation benefits that must be provided to injured police officer under $16,000 vocational rehabilitation cap; employer was not entitled to apply $246 per week credit against vocational rehabilitation cap during period officer received leave of absence benefits under former *Lab. Code § 4800* while participating in vocational rehabilitation. *Edgar v. Workers' Comp. Appeals Bd. (1998) 65 Cal. App. 4th 1, 19-20, 76 Cal. Rptr. 2d 83*

Applicant's possible ineligibility to participate in vocational rehabilitation does not preclude entitlement to benefits during period between application for benefits and date WCAB makes finding of qualified injured worker status. *Johnson v. Workers' Comp. Appeals Bd. (1998) 65 Cal. App. 4th 197, 202, 76 Cal. Rptr. 2d 422*

Injured employee who was QIW pursuant to stipulation was entitled to VRTD benefits retroactive to date of employee's demand for benefits, or to earlier date if evidence showed earlier date applied; employer entitled to credit against retroactive payments for temporary disability or other duplicative benefits made to injured worker after date of employee's demand for vocationalrehabilitation benefits. *Estrada v. Workers' Comp. Appeals Bd. (1997) 58 Cal. App. 4th 1458, 69 Cal. Rptr. 2d 176*

WCAB as correctly determining that *Lab. Code §§ 4850* and *4853* terminated city's liability for vocational rehabilitation maintenance allowance (VRMA) on date of detective's retirement; legislative history of relevant statutes indicates intent that VRMA be treated as form of temporary disability and, like temporary disability, must terminate upon disability retirement for employees covered by *Lab. Code §§ 4850* and *4853*. *Ritchie v. Workers' Comp. Appeals Bd. (1994) 24 Cal. App. 4th 1174, 1189, 29 Cal. Rptr. 2d 722*

Qualified employee as having statutory right (*Lab. Code § 139.5*) to rehabilitation and right to continued payment of temporary disability benefits from moment of his or her choice to undergo rehabilitation; employer as having primary duty for making rehabilitation available, which includes duty to inform employee of potential right to rehabilitation; if employer breaches its duty of notifying employee, employer as obligated to pay temporary rehabilitation benefits from date of its breach. *General Foundry Service v. Workers' Comp. Appeals Bd. (1986) 42 Cal. 3d 331, 340, 340 n.6, 228 Cal. Rptr. 243, 721 P.2d 124*

Statutory scheme as envisioning that vocational rehabilitation will be provided injured worker before final decision is reached on nature and extent of his or her permanent disability. *General Foundry Service v. Workers' Comp. Appeals Bd. (1986) 42 Cal. 3d 331, 340, 228 Cal. Rptr. 243, 721 P.2d 124*

Employee as entitled to receive vocational rehabilitation benefits during evaluation period despite ultimate determination that he or she is not a qualified injured worker if worker in good faith provides prima facie evidence to support request for rehabilitation benefits. *General Foundry Service v. Workers' Comp. Appeals Bd. (1986) 42 Cal. 3d 331, 340 n.6, 228 Cal. Rptr. 243, 721 P.2d 124*

Vocational rehabilitation as particularly effective in case of partially disabled employee with progressive disease whose health precludes his or her returning to former job but whose physical condition may still allow worker to pursue another occupation. *General Foundry Service v. Workers' Comp. Appeals Bd. (1986) 42 Cal. 3d 331, 340, 228 Cal. Rptr. 243, 721 P.2d 124*

Pursuant to *Lab. Code § 139.5*, employers as having mandatory duty to provide rehabilitation benefits to employees who seek them. *LeBoeuf v. Workers' Comp. Appeals Bd. (1983) 34 Cal. 3d 234, 242, 193 Cal. Rptr. 547, 666 P.2d 989*

Order of WCAB denying injured worker's claim for retroactive vocational rehabilitation temporary disability benefits (for injury occurring before 1990) as not res judicata regarding worker's subsequent claim for these benefits when worker's initial claim was denied before he was found to be both medically and vocationally qualified for these benefits and when his subsequent claim was denied after he had been found to be so qualified. *Belmontez v. Workers' Comp. Appeals Bd. (1992) 7 Cal. App. 4th 786, 795-796, 9 Cal. Rptr. 2d 405*

Qualified injured worker as entitled to vocational rehabilitation temporary disability benefits (for injury occurring before 1990) beginning on date on which worker first requested rehabilitation; allegation in application filed with WCAB that parties have dispute regarding vocational rehabilitation as sufficient request for those benefits. *Belmontez v. Workers' Comp. Appeals Bd. (1992) 7 Cal. App. 4th 786, 794-795, 9 Cal. Rptr. 2d 405*

Employee as not qualified injured worker for purposes of award of vocational rehabilitation benefits when, although she was unable to return to work at her former position for same supervisor because of injury to her psyche, she was able to return to equivalent position with same employer; concept of "qualified injured worker" as focusing on performance of duties within labor market, and as not focusing on identity of persons with whom or under whom injured worker performed those duties. *Save Mart Stores v. Workers' Comp. Appeals Bd. (1992) 3 Cal. App. 4th 720, 723-727, 4 Cal. Rptr. 2d 597*

Request for vocational rehabilitation benefits as required to be supported by medical evidence. *Malloy v. Workers' Comp. Appeals Bd. (1991) 1 Cal. App. 4th 1658, 1662-1663, 2 Cal. Rptr. 2d 820*

Once Rehabilitation Bureau (now Rehabilitation Unit of the Office of Benefit Determination) has determined that employee is qualified injured worker under *Lab. Code § 139.5*, employer as having duty to develop rehabilitation program for worker so that worker may return as soon as possible to maximum self-support. *Armodia v. Workers' Comp. Appeals Bd. (1988) 202 Cal. App. 3d 554, 560, 249 Cal. Rptr. 156*

History of *Lab. Code § 139.5* as indicating legislative intent to encourage employees to enroll in rehabilitation programs and to place on employers primary duty of promptly making rehabilitation services available. *Pereira v. Workers' Comp. Appeals Bd. (1987) 196 Cal. App. 3d 1, 5, 241 Cal. Rptr. 302*

[76] Voluntary Services

Lab. Code § 3352(i), excluding from workers' compensation any person performing voluntary service for public agency or private, nonprofit organization who receives no remuneration for such services other than meals, transportation, lodging, or reimbursement for incidental expenses, as inapplicable to student medical student providing services to hospital as part of externship program required to obtain degree when program was mandatory, student's services were not voluntary, and hospital presented no evidence that it was private, nonprofit organization, and, even if it had, training received by student constituted sufficient remuneration to make *Lab. Code § 3352* inapplicable. *Barragan v. Workers' Comp. Appeals Bd. (1987) 195 Cal. App. 3d 637, 648-650, 240 Cal. Rptr. 811*

[77] Work Place

Employee as not able to sue employer for injuries resulting from employer's failure to comply with employer's duties as landowner or to provide safe place to work. *Jones v. Kaiser Industries Corp. (1987) 43 Cal. 3d 552, 561, 237 Cal. Rptr. 568, 737 P.2d 771*

Workers' compensation law as compensating employees for injuries arising out of unsafe work place conditions, including enhanced compensation under *Lab. Code § 4553* in cases involving serious and willful employer misconduct. *Spratley v. Winchell Donut House, Inc. (1987) 188 Cal. App. 3d 1408, 1411-1412, 234 Cal. Rptr. 121*

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Forms of Pleading and Practice--Annotated

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Note, *Tackling Workers' Compensation in California: The Margolin-Bill Greene Workers' Compensation Reform Act of 1989, 21 Pac. L.J. 853 (1990)*

Erlich, *Inside the Workers' Comp Mess*, 8(10) Cal. Law. 53 (1988)

Note, *Scientific Decisionmaking in Workers' Compensation: A Long Overdue Reform, 59 S. Cal. L. Rev. 911 (1986)*

Note, *California's Going and Coming Rule in Workers' Compensation: A New Model for Consistency, 36 Hastings L.J. 969 (1985)*

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Bouret, *The California Going and Coming Rule: A Plea for Legislative Clarification, 15 Cal. W.L. Rev. 116 (1979)*

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Comment, *Employee or Independent Contractor: The Need for a Reassessment of the Standard Used Under California Workmen's Compensation, 10 U.S.F. L. Rev. 133 (1975)*

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Comment, *Indemnity Clauses and Workers' Compensation: A Proposal for Preserving the Employer's Limited Liability, 70 Cal. L. Rev. 1421 (1982)*

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Comment, *The Scope of the Exclusive Remedy Clause in California Worker's Compensation Act: Should It Include Third Party Actions for Loss of Consortium? 10 U.S.F. L. Rev. 252 (1975)*

Demler, *Remedy for the Intentional Torts of a Workmen's Compensation Carrier, 1 Pepperdine L. Rev. 54 (1973)*

[3] Third-Party Actions

Love, *Retaliatory Discharge for Filing a Workers' Compensation Claim: The Development of a Modern Tort Action, 37 Hastings L.J. 551 (1986)*

The California Supreme Court Survey--A Review of Decisions: July 1981-December 1981, 9 Pepperdine L. Rev. 939, 1058 (1982)

Note, *Associated Construction and Engineering Co. of California v. Workers' Compensation Appeals Board: Comparative Negligence in the Workers' Compensation System, 68 Cal. Law Rev. 895 (1980)*

A Critique of the Justification for Employee Suits in Strict Products Liability Against Third Party Manufacturers, 25 UCLA L. Rev. 125 (1977)

Note, *Third Party and Employer Liability After Nga Li v. Yellow Cab Company for Injuries to Employerss Covered by Workers' Compensation, 50 So. Cal. L. Rev. 1029 (1977)*

Note, *Roe v. Workmen's Compensation Appeals Board: Something Fishy in California Workers' Compensation Law, 27 Hastings L.J. 637 (1976)*

Lasky, *Subrogation Under the California Workmen's Compensation Laws--Rules, Remedies and Side Effects, 12 Santa Clara L. Rev. 1 (1972)*

Comment, *Workmen's Compensation: The Impact of the Witt v. Jackson Rule on the Law of Third Party Settlements, 17 UCLA L. Rev. 651 (1970)*

Note, *Attorney's Fees in Third Party Actions, 21 Hastings L.J. 717 (1970)*

Note, *Workmen's Compensation and Third Party Suits: The Aftermath of Witt v. Jackson, 21 Hastings L.J. 661 (1970)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDICompensabilityCourse of EmploymentGoing & Coming RuleWorkers' Compensation & SSDICompensabilityInjuriesPsychological InjuriesWorkers' Compensation & SSDIDefensesComparative & Contributory NegligenceWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityExceptionsWorkers' Compensation & SSDIThird Party ActionsGeneral Overview

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51-577 California Forms of Pleading and Practice--Annotated § 577.358

§ 577.358 Text References

[1] Workers' Compensation Principles--In General

California Workers' Compensation Practice, ch. 1, (Cal. C.E.B. 4th ed. 2000)

Witkin, Summary of California Law, vol. 2, *Insurance, § 12*; vol. 2, *Worker's Compensation*, §§ 2-20, 118-258, 366-384 (10th ed. 2005)

[2] Filing a Workers' Compensation Claim

California Workers' Compensation Practice, ch. 1, §§ 1.16-1.37 (Cal. C.E.B. 4th ed. 2000)

Witkin, Summary of California Law, vol. 2, *Workers' Compensation*, §§ 259-302, 385, 386 (10th ed. 2005)

[3] Initiating Proceedings to Collect Benefits

California Workers' Compensation Practice, ch. 13, §§ 13.22-13.91 (Cal. C.E.B. 4th ed. 2000)

Witkin, Summary of California Law, vol. 2, *Worker's Compensation*, §§ 385-389 (10th ed. 2005)

[4] Filing and Service of Papers

Witkin, Summary of California Law, vol. 2, *Worker's Compensation*, §§ 388-390 (10th ed. 2005)

[5] Arbitration

California Workers' Compensation Practice, ch. 19 (Cal. C.E.B. 4th *Ed. 2000*)

[6] Settling Claims

California Workers' Compensation Practice, ch. 16 (Cal. C.E.B. 4th *Ed. 2000*)

Witkin, Summary of California Law, vol. 2, *Workers' Compensation*, §§ 354-361 (10th ed. 2005)

[7] Stipulations and Requests for Award

California Workers' Compensation Practice, ch. 16, §§ 16.70-16.85 (Cal. C.E.B. 4th *Ed. 2000*)

Witkin, Summary of California Law, vol. 2, *Worker's Compensation*, §§ 390-391 (10th ed. 2005)

[8] Pre-Hearing Proceedings and Hearings

California Workers' Compensation Practice, ch. 17, §§ 17.1-17.44, ch. 18, (Cal. C.E.B. 4th *Ed. 2000*)

Witkin, Summary of California Law, vol. 2, *Worker's Compensation*, §§ 390, 394-401 (10th ed. 2005)

[9] Findings and Awards, Reconsideration and Supplemental Proceedings

California Workers' Compensation Practice, chs. 20, 21 and 23 (Cal. C.E.B. 4th *Ed. 2000*)

Witkin, Summary of California Law, vol. 2, *Worker's Compensation*, §§ 394-433 (10th ed. 2005)

[10] Payment and Enforcement of Awards

California Workers' Compensation Practice, ch. 8, §§ 8.6-8.24; ch. 20, §§ 20.23-20.49 (Cal. C.E.B. 4th *Ed. 2000*)

Witkin, Summary of California Law, vol. 2, *Worker's Compensation*, §§ 405-413 (10th ed. 2005)

[11] Judicial Review

California Workers' Compensation Practice ch. 22 (Cal. C.E.B. 4th *Ed. 2000*)

Witkin, Summary of California Law, vol. 2, *Worker's Compensation*, §§ 434-451 (10th ed. 2005)

[12] Exclusive Remedy Principles and Exceptions

Witkin, Summary of California Law, vol. 2, *Workers' Compensation*, §§ 20, 24-29, 31-47, 49-55, 57-105 (10th ed. 2005)

[13] Third-Party Actions

California Worker's Compensation Practice ch. 1 §§ 1.38-1.47 (Cal. C.E.B. 4th *Ed. 2000*)

Witkin, Summary of California Law, vol. 2, *Worker's Compensation*, §§ 27, 40-41, 43-47, 49-55, 57-105 (10th ed. 2005)

Legal Topics:

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

§§ 577.359[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.370

§ 577.370 Attorney's Fees Disclosure Statement [Lab. Code § 4906(e); 8 Cal. Code Reg. §§ 10134, 10135] [DWC Form 3]

[1] FORM Attorney's Fees Disclosure Statement [Lab. Code § 4906(e); 8 Cal. Code Reg. §§ 10134, 10135] [DWC Form 3]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of DWC Form 3, a disclosure statement relating to attorney's fees. When an employee's injury occurred on or after January 1, 1990, counsel is required to furnish the employee with this form at the initial attorney consultation [*Lab. Code § 4906(e)*; *8 Cal. Code Reg. §§ 10134-10135.1*]. The form must be signed by the employee and the attorney, and copies provided to the employee and to the employer, or to the employer's insurer or third-party administrator, if either is known, within 15 days of execution of the form by the employee and attorney [*Lab. Code § 4906(e)*; *8 Cal. Code Reg. §§ 10134, 10135.1*].

The disclosure statement provides general information concerning workers' compensation attorney's fees, sets forth the range of attorney's fees customarily approved by the appeals board, and includes the telephone number of the Office of Benefit Assistance and Enforcement where the employee may receive answers to questions concerning workers' compensation benefits [*8 Cal. Code Reg. § 10134*; *see also Lab. Code § 4906(e)*].

The foregoing is the English-language version of the form. A Spanish-language version is also available from the Division of Workers' Compensation.

For further discussion, see *§ 577.41[1]*.

[3] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 20, § 20.01[4]* (Matthew Bender)

California Workers' Compensation Practice, ch. 17, §§ 17.6-17.12 (Cal. C.E.B. 3d ed. 1985)

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51-577 California Forms of Pleading and Practice--Annotated §§ 577.371-577.372

[Reserved]

§§ 577.371[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.373

§ 577.373 Employee's Claim for Workers' Compensation Benefits [Lab. Code § 5401; 8 Cal. Code Reg. § 10118.1] [DWC Form 1]

[1] FORM Employee's Claim for Workers' Compensation Benefits [Lab. Code § 5401; 8 Cal. Code Reg. § 10118.1] [DWC Form 1]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of DWC Form 1, for use by an employee, his or her agent, or, in case of death, his or her dependents in filing a claim for workers' compensation benefits [*Lab. Code § 5401*; *8 Cal. Code Reg. §§ 10136*-10142]. Copies are available at district offices of the Employment Development Department and the Division of Workers' Compensation [*Lab. Code § 5401(a)*].

[3] Form and Content

The employer's portion of the claim form may include information pertinent to the employer in addition to the information included on the official form, including a logo or other employer-identifying information, but inclusion of such information does not impose additional duties or prohibitions on the employee [*8 Cal. Code Reg. § 10138*].

The claim form consists of an original and three copies [*8 Cal. Code Reg. § 10138*]. The form must be made available in both English and Spanish [*Lab. Code § 5401(b)*].

For further discussion, see *§ 577.43*.

[4] Filing and Service of Claim Form

The completed claim form must be filed with the employer [*Lab. Code § 5401(c)*]. A claim form is deemed filed when

it is personally delivered to the employer or received by the employer by first-class or certified mail [*Lab. Code § 5401(c)*].

The claim form must be filed with the employer prior to the injured employee's entitlement to late payment supplements under *Lab. Code § 4650(d)*, or prior to the employee's request for a medical evaluation under *Lab. Code §§ 4061* or *4062* [*Lab. Code § 5401(d)*]. For injuries occurring on or after January 1, 1994, the filing of the claim form with the employer tolls the time limitations for commencing proceedings for workers' compensation benefits set forth in *Lab. Code §§ 5405* and *5406* until the employer denies the claim or the injury becomes presumptively compensable under *Lab. Code § 5402(b)* [*Lab. Code § 5401(d)*]. For purposes of this provision, a claim form is deemed filed when it is personally delivered to the employer or mailed to the employer by first-class or certified mail [*Lab. Code § 5401(d)*].

[5] Employer's Duties

For injuries occurring on or after January 1, 1990, the employer must provide the injured employee or, in the case of death, his or her dependents with a copy of the claim form, along with a notice of potential eligibility for workers' compensation benefits, within one working day of receiving notice or knowledge of an injury that results in lost time beyond the employee's work shift at the time of injury or that results in medical treatment beyond first aid, or of the employee's request for a form [*Lab. Code § 5401(a)*]. For these purposes, the term "first aid" means any one-time treatment, and any follow-up visit for the purpose of observation, of minor scratches, cuts, burns, splinters, or other minor industrial injury, which do not ordinarily require medical care. This one-time treatment, and follow-up visit for the purpose of observation, is considered first aid even though provided by a physician or registered professional personnel. The term "minor industrial injury" does not include serious exposure to a hazardous substance as defined in *Lab. Code § 6302(i)* [*Lab. Code § 5401(a)*].

If the employer's claims administrator obtains knowledge that the employer has not provided a claim form, the administrator must provide one to the employee within three working days of obtaining knowledge that the form was not provided [*8 Cal. Code Reg. § 10140(b)*]. If the administrator cannot determine if the employer has provided the employee with a claim form, the administrator must provide one within 30 days of the date the administrator has knowledge of the claim [*8 Cal. Code Reg. § 10140(c)*].

Within one working day of receipt of the completed claim form, the employer must date the form and provide a dated copy to its claims administrator and to the employee, dependent, or agent who filed the claim form [*Lab. Code § 5401(c)*; *8 Cal. Code Reg. § 10140(a)*]. The employer must also provide its insurer with a dated copy of the completed form [*Lab. Code § 5401(c)*].

[6] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 25, § 25.03[2]* (Matthew Bender)

California Workers' Compensation Practice, ch. 1, §§ 1.16-1.22, ch. 13, § 13.114 (Cal. C.E.B. 4th ed. 2000)

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51-577 California Forms of Pleading and Practice--Annotated §§ 577.374-577.389

[Reserved]

§§ 577.374[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.390

§ 577.390 Application for Adjudication of Claim [DWC/WCAB Form 1A]

[1] FORM Application for Adjudication of Claim [DWC/WCAB Form 1A]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of an application for adjudication of claim for compensation benefits. The application must be on forms prescribed and approved by the WCAB [*8 Cal. Code Reg. § 10408*]. A separate application must be filed for each separate injury for which benefits are claimed, even if the employer is the same in each case [*8 Cal. Code Reg. § 10401*].

Effective November 17, 2008 [*see 8 Cal. Code Reg. §§ 10210*-10297 (Rules of Court Administrator, including regulations relating to Electronic Adjudication Management System (EAMS))], DWC requires (with a handful of exceptions) that all documents designed and created by DWC to be read by electronic scanners be used in place of the previous, equivalent DWC forms. These new forms, called "optical character recognition forms" (OCR forms) [*see 8 Cal. Code Reg. § 10210(x)* ("OCR form" defined)], may be downloaded and saved, then filled in and printed, as needed, with the printouts being filed with DWC and served on other parties and attorneys, as required by regulations. The form in [1], above, is one such form. Readers should check, periodically, DWC's website for further developments in the implementation of EAMS. DWC's website address is: http://www.dir.ca.gov/dwc/dwc_home_page.htm

For discussion of EAMS, see *§ 577.12A*.

The statute of limitations applicable to an ordinary claim for medical, surgical, hospital, and disability benefits is *Lab. Code § 5405*, discussed under *§ 577.25[2]*.

Venue is at the district office where the application for adjudication is filed pursuant to *Lab. Code § 5501.5* [*8 Cal. Code Reg. § 10408*].

For further discussion, see *§ 577.83*.

[3] Service of Application

Upon filing an Application for Adjudication, the filing party or lien claimant must concurrently serve a copy of the application and any accompanying documents on all other parties and lien claimants [*8 Cal. Code Reg. § 10400(e)*].

For further discussion of service of the application and other documents, see *§ 577.108*.

[4] Additional Allegations and Information

Additional allegations are required in cases involving serious and willful misconduct by the employer [*8 Cal. Code Reg. §§ 10440, 10445*; *see § 577.396*], subsequent injury cases [*8 Cal. Code Reg. § 10940*; *see § 577.397*], and *Lab. Code § 132a* cases (employer discrimination against employee for filing or making known intention to file an application for adjudication) [*8 Cal. Code Reg. § 10447*]. In such cases, the additional allegations may be attached to the foregoing form or alleged in a separate application for adjudication of claim.

In an occupational disease or cumulative injury case, the application must state the names and addresses of all employers liable under *Lab. Code § 5500.5(a)*, the places of employment, and the approximate periods of employment during which the employee was exposed to the hazards of the occupational disease or cumulative injury [*Lab. Code § 5500.5(b)*].

For a form of petition to compel joinder when the application fails to comply with this requirement, see *§ 577.430[1]*.

[5] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 25, § 25.05* (Matthew Bender)

California Workers' Compensation Practice, ch. 13, §§ 13.25-13.57 (Cal. C.E.B. 4th ed. 2000)

Witkin, Summary of California Law, vol. 2, *Worker's Compensation*, §§ 387-388 (10th ed. 2005)

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51-577 California Forms of Pleading and Practice--Annotated § 577.391

§ 577.391 Application for Adjudication of Claim [Lab. Code §§ 5500, 5503]--For Disability Compensation for Injuries Occurring on or After January 1, 1990, and Before January 1, 1994 [8 Cal. Code Reg. § 10408] [WCAB Form 1]

[1] FORM Application for Adjudication of Claim [Lab. Code §§ 5500, 5503]--For Disability Compensation for Injuries Occurring on or After January 1, 1990, and before January 1, 1994 [8 Cal. Code Reg. §§ 10408] [WCAB Form 1]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of an application for adjudication of claim for compensation benefits. The application must be on forms prescribed and approved by the WCAB [*8 Cal. Code Reg. § 10408*]. A separate application must be filed for each separate injury for which benefits are claimed, even if the employer is the same in each case [*8 Cal. Code Reg. § 10401*].

The foregoing form is a reproduction of the form prescribed by *8 Cal. Code Reg. § 10965* (repealed January 1, 1994) (WCAB Form 1) for use by an injured worker to apply for workers' compensation disability benefits with respect to an injury occurring on or after January 1, 1990, and before January 1, 1994 [*8 Cal. Code Reg. § 10965*]. An application may be filed at any time there is a bona fide dispute after service of the claim form required by *Lab. Code § 5401* (discussed under *§ 577.42[2][b]*). The reverse side of the first page of the form contains instructions for filling out the application and other information relating to the proceeding and to arbitration of the dispute. Copies may be obtained at any WCAB office.

The statute of limitations applicable to an ordinary claim for medical, surgical, hospital, and disability benefits is *Lab. Code § 5405*, discussed under *§ 577.25[2]*.

Venue is at the district office where the application for adjudication is filed pursuant to *Lab. Code § 5501.5* [*8 Cal.*

Code Reg. § 10408].

For further discussion, see *§ 577.83*.

[3] Service of Application

Upon filing an application for adjudication, the filing party or lien claimant must concurrently serve a copy of the application and any accompanying documents on all other parties and lien claimants [*8 Cal. Code Reg. § 10400(e)*].

If the party filing the application is an unrepresented injured employee, an unrepresented dependent of a deceased employee, or a lien claimant or non-attorney representative of a lien claimant who falls within one of the exceptions of *8 Cal. Code Reg. § 10228(c)(5)(A)-(C)*, the Appeals Board [*8 Cal. Code Reg. § 10400(f)*]:

1. Must serve a conformed copy of the application on all parties and lien claimants, including the filing applicant, who are listed either on the application, on the proof of service to the application, or on the address record (if an address record was previously created for an earlier application).

2. If it is an initial application, must concurrently give notification of the assigned adjudication case number and venue.

Such service is deemed service of a conformed copy of the application for purposes of *Lab. Code § 5501* [*8 Cal. Code Reg. § 10400(f)*].

For all other parties and lien claimants, the Appeals Board [*8 Cal. Code Reg. § 10400(g)*]:

1. Must serve a conformed copy of the application on the filing party or lien claimant (or, if represented, on the filing party or lien claimant's attorney or other representative).

2. If it is an initial application, must concurrently give notification of the assigned adjudication case number and venue.

Upon receipt of the conformed copy of the application, the filing party or lien claimant (or, if represented, the filing party or lien claimant's attorney or other representative) must forthwith serve a copy of the conformed application on all other parties and lien claimants who are listed on the application or on the proof of service to the application, and, if it is an initial application, concurrently notify all other parties and lien claimants of the assigned adjudication case number and venue [*8 Cal. Code Reg. § 10400(g)*]. Such service is deemed service of a conformed copy of the application for purposes of *Lab. Code § 5501* [*8 Cal. Code Reg. § 10400(g)*].

[4] Additional Allegations and Information

Additional allegations are required in cases involving serious and willful misconduct by the employer [*8 Cal. Code Reg. §§ 10440, 10445*; *see § 577.396*], subsequent injury cases [*8 Cal. Code Reg. § 10940*; *see § 577.396*], and *Lab. Code § 132a* cases (employer discrimination against employee for filing or making known intention to file an application for adjudication) [*8 Cal. Code Reg. § 10447*]. In such cases, the additional allegations may be attached to the foregoing form or alleged in a separate application for adjudication of claim.

In an occupational disease or cumulative injury case, the application must state the names and addresses of all employers liable under *Lab. Code § 5500.5(a)*, the places of employment, and the approximate periods of employment during which the employee was exposed to the hazards of the occupational disease or cumulative injury [*Lab. Code § 5500.5(b)*]. For a form of petition to compel joinder when the application fails to comply with this requirement, see *§*

577.430[1].

[5] Cross References

1 Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 25, § 25.05* (Matthew Bender)

California Workers' Compensation Practice, ch. 13, §§ 13.58-13.67 (Cal. C.E.B. 4th ed. 2000)

Witkin, Summary of California Law, vol. 2, *Worker's Compensation*, §§ 387-388 (10th ed. 2005)

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51-577 California Forms of Pleading and Practice--Annotated § 577.392

§ 577.392 Application for Adjudication of Claim [Lab. Code §§ 5500, 5503]--For Death Benefits for Injuries Occurring Before January 1, 1990, or on or After January 1, 1994 [8 Cal. Code Reg. §§ 10408, 10412(b)] [DIA WCAB Form 2]

[1] FORM Application for Adjudication of Claim [Lab. Code §§ 5500, 5503]--For Death Benefits for Injuries Occurring Before January 1, 1990, or on or after January 1, 1994 [8 Cal. Code Reg. §§ 10408, 10412(b)] [DIA WCAB Form 2]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of an application for adjudication of claim for death benefits. The application must be in writing on forms prescribed and approved by the WCAB [*see Lab. Code § 5500*; *8 Cal. Code Reg. § 10408*].

The foregoing is a reproduction of the form prescribed by *8 Cal. Code Reg. § 10412(b)* (repealed January 1, 1994) (DIA WCAB Form 2) for use by the dependents of a deceased worker to apply for workers' compensation death benefits with respect to an injury occurring before January 1, 1990, or on or after January 1, 1994. The reverse side of the form contains the notice that "filing and service of a declaration of readiness (DIA WCAB Form 9) [*see § 577.399[1]*] is prerequisite to the setting of a case for hearing." It also contains instructions for filling out the application and other information relating to the proceeding. Copies may be obtained at any WCAB office.

The statute of limitations applicable to a claim for death benefits is set forth in *Lab. Code § 5406*, discussed under *§ 577.25[2]*. For discussion of the definitions of "dependency" and "dependents," see *§ 577.14[2]*.

Venue is at the district office where the application for adjudication is filed pursuant to *Lab. Code § 5501.5* [*8 Cal. Code Reg. § 10408*].

For further discussion, see *§ 577.83*. See also, *§§ 577.390*, *577.391* and *577.393*.

[3] Service of Application

Upon filing an application for adjudication, the filing party or lien claimant must concurrently serve a copy of the application and any accompanying documents on all other parties and lien claimants [*8 Cal. Code Reg. § 10400(e)*].

If the party filing the application is an unrepresented injured employee, an unrepresented dependent of a deceased employee, or a lien claimant or non-attorney representative of a lien claimant who falls within one of the exceptions of *8 Cal. Code Reg. § 10228(c)(5)(A)-(C)*, the Appeals Board [*8 Cal. Code Reg. § 10400(f)*]:

1. Must serve a conformed copy of the application on all parties and lien claimants, including the filing applicant, who are listed either on the application, on the proof of service to the application, or on the address record (if an address record was previously created for an earlier application).

2. If it is an initial application, must concurrently give notification of the assigned adjudication case number and venue.

Such service is deemed service of a conformed copy of the application for purposes of *Lab. Code § 5501* [*8 Cal. Code Reg. § 10400(f)*].

For all other parties and lien claimants, the Appeals Board [*8 Cal. Code Reg. § 10400(g)*]:

1. Must serve a conformed copy of the application on the filing party or lien claimant (or, if represented, on the filing party or lien claimant's attorney or other representative).

2. If it is an initial application, must concurrently give notification of the assigned adjudication case number and venue.

Upon receipt of the conformed copy of the application, the filing party or lien claimant (or, if represented, the filing party or lien claimant's attorney or other representative) must forthwith serve a copy of the conformed application on all other parties and lien claimants who are listed on the application or on the proof of service to the application, and, if it is an initial application, concurrently notify all other parties and lien claimants of the assigned adjudication case number and venue [*8 Cal. Code Reg. § 10400(g)*]. Such service is deemed service of a conformed copy of the application for purposes of *Lab. Code § 5501* [*8 Cal. Code Reg. § 10400(g)*]. When the application is filed in a death case in which there is a bona fide issue as to partial or total dependency, the filing party must serve a copy of the application on the Department of Industrial Relations, Death Without Dependents Unit [*8 Cal. Code Reg. § 10501*].

[4] Cross References

Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 25, § 25.05 (Matthew Bender)

California Workers' Compensation Practice, ch. 13, §§ 13.68-13.76 (Cal. C.E.B. 4th ed. 2000)

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§ 577.393 Application for Adjudication of Claim [Lab. Code §§ 5500, 5503]--For Death Benefits for Injuries Occurring on or After January 1, 1990, and Before January 1, 1994 [8 Cal. Code Reg. § 10408] [WCAB Form 1A]

[1] FORM Application for Adjudication of Claim [Lab. Code §§ 5500, 5503]--For Death Benefits for Injuries Occurring On or After January 1, 1990 and Before January 1, 1994 [8 Cal. Code Reg. §§ 10408] [WCAB Form 1A]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of an application for adjudication of claim for death benefits. The application must be in writing on forms prescribed and approved by the WCAB [*see Lab. Code § 5500*; *8 Cal. Code Reg. § 10408*].

The foregoing form is a reproduction of the form prescribed by *8 Cal. Code Reg. § 10965* (repealed January 1, 1994) (WCAB Form 1A) for use by the dependents of a deceased worker to apply for workers' compensation death benefits with respect to an injury occuring on or after January 1, 1990 and before January 1, 1994 [*8 Cal. Code Reg. § 10965*]. The reverse side of the first page of the form contains instructions for filling out the application and other information relating to the proceedings. Copies may be obtained at any WCAB office.

The statute of limitations applicable to a claim for death benefits is set forth in *Lab. Code § 5406*, discussed under *§ 577.25[2]* . For discussion of the definitions of "dependency" and "dependents," see *§ 577.14[2]*.

Venue is at the district office where the application for adjudication is filed pursuant to *Lab. Code § 5501.5* [*8 Cal. Code Reg. § 10408*].

For further discussion, see *§ 577.83*. See also, *§§ 577.390 -577.392*.

[3] Service of Application

Upon filing an application for adjudication, the filing party or lien claimant must concurrently serve a copy of the application and any accompanying documents on all other parties and lien claimants [*8 Cal. Code Reg. § 10400(e)*].

If the party filing the application is an unrepresented injured employee, an unrepresented dependent of a deceased employee, or a lien claimant or non-attorney representative of a lien claimant who falls within one of the exceptions of *8 Cal. Code Reg. § 10228(c)(5)(A)-(C)*, the Appeals Board [*8 Cal. Code Reg. § 10400(f)*]:

> 3. Must serve a conformed copy of the application on all parties and lien claimants, including the filing applicant, who are listed either on the application, on the proof of service to the application, or on the address record (if an address record was previously created for an earlier application).
>
> 4. If it is an initial application, must concurrently give notification of the assigned adjudication case number and venue.

Such service is deemed service of a conformed copy of the application for purposes of *Lab. Code § 5501* [*8 Cal. Code Reg. § 10400(f)*].

For all other parties and lien claimants, the Appeals Board [*8 Cal. Code Reg. § 10400(g)*]:

> 3. Must serve a conformed copy of the application on the filing party or lien claimant (or, if represented, on the filing party or lien claimant's attorney or other representative).
>
> 4. If it is an initial application, must concurrently give notification of the assigned adjudication case number and venue.

Upon receipt of the conformed copy of the application, the filing party or lien claimant (or, if represented, the filing party or lien claimant's attorney or other representative) must forthwith serve a copy of the conformed application on all other parties and lien claimants who are listed on the application or on the proof of service to the application, and, if it is an initial application, concurrently notify all other parties and lien claimants of the assigned adjudication case number and venue [*8 Cal. Code Reg. § 10400(g)*]. Such service is deemed service of a conformed copy of the application for purposes of *Lab. Code § 5501* [*8 Cal. Code Reg. § 10400(g)*]. When the application is filed in a death case in which there is a bona fide issue as to partial or total dependency, the filing party must serve a copy of the application on the Department of Industrial Relations, Death Without Dependents Unit [*8 Cal. Code Reg. § 10501*].

[4] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 25, § 25.05*

California Workers' Compensation Practice, ch. 13, §§ 13.77-13.79 (Cal. C.E.B. 3d ed. 1985)

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51-577 California Forms of Pleading and Practice--Annotated § 577.394

§ 577.394 Answer to Application for Adjudication of Claim [DWC/WCAB Form 10]

[1] FORM Answer to Application for Adjudication of Claim [DWC/WCAB Form 10]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of the form of answer [*see Lab. Code §§ 5500, 5505*] prescribed by the WCAB for use by the defendant in answering an application for adjudication of claims.

The answer must be in writing, conform to the form prescribed by the WCAB, and set forth the particulars in which the application is alleged to be inaccurate or incomplete and the facts on which the defendant intends to rely [*Lab. Code §§ 5500, 5505*; *see 8 Cal. Code Reg. § 10484*]. Additional matters may be pleaded as deemed necessary, but a general denial is not an answer [*8 Cal. Code Reg. § 10484*].

Effective November 17, 2008 [*see 8 Cal. Code Reg. §§ 10210*-10297 (Rules of Court Administrator, including regulations relating to Electronic Adjudication Management System (EAMS))], DWC requires (with a handful of exceptions) that all documents designed and created by DWC to be read by electronic scanners be used in place of the previous, equivalent DWC forms. These new forms, called "optical character recognition forms" (OCR forms) [*see 8 Cal. Code Reg. § 10210(x)* ("OCR form" defined)], may be downloaded and saved, then filled in and printed, as needed, with the printouts being filed with DWC and served on other parties and attorneys, as required by regulations. The form in [1], above, is one such form. Readers should check, periodically, DWC's website for further developments in the implementation of EAMS. DWC's website address is: http://www.dir.ca.gov/dwc/dwc_home_page.htm

For discussion of EAMS, see *§ 577.12A*.

Evidence on matters and affirmative defenses not pleaded in the answer will be allowed only on such terms and conditions as the WCAB or WCJ may in their discretion impose [*Lab. Code § 5505*; *8 Cal. Code Reg. § 10484*].

For further discussion, see *§ 577.83[2]*. See also, *§§ 577.390*, *577.391* and *577.395*.

[3] Time to File Answer

An answer to each application for adjudication must be filed and served 10 days after service of the declaration of readiness to proceed [*Lab. Code § 5505*; *8 Cal. Code Reg. § 10480*].

[4] Employee's Serious and Willful Misconduct

If the employer seeks to reduce the compensation payable to the employee because of the employee's serious and willful misconduct [*see Lab. Code § 4551*], the allegations of serious and willful misconduct must be separately pleaded in the answer and must set out in sufficient detail the specific basis on which the charge is founded so that the adverse parties and the WCAB may be fully advised [*8 Cal. Code Reg. § 10440*]. The allegations may be set forth on a separate document and attached to the official form. For general discussion of serious and willful misconduct of an employee, see discussion under *§ 577.17[1]*.

[5] Text References

Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 25, §§ 25.22-25.24 (Matthew Bender)

California Workers' Compensation Practice, ch. 13, §§ 13.136-13.142 (Cal. C.E.B. 4th ed. 2000)

Witkin, Summary of California Law, vol. 2, *Worker's Compensation*, § 389 (10th ed. 2005)

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51-577 California Forms of Pleading and Practice--Annotated § 577.395

§ 577.395 Answer to Application for Adjudication of Claim [Lab. Code §§ 5500(a), 5505]--For Injuries Occurring on or After January 1, 1990 and Before January 1, 1994 [8 Cal. Code Reg. § 10484; former 8 Cal. Code Reg. 10969] [WCAB Form 2]

[1] FORM Answer to Application for Adjudication of Claim [Lab. Code §§ 5500(a), 5505]--For Injuries Occurring on or After January 1, 1990 [8 Cal. Code Reg. § 10484; former 8 Cal. Code Reg. 10969] [WCAB Form 2]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of the form of answer [*see Lab. Code §§ 5500, 5505*] prescribed by the WCAB (WCAB Form 2) pursuant to former Rule 10969, for use by the defendant in answering an application for adjudication of claims relating to injuries occurring on or after January 1, 1990. Former Rule 10969 was repealed by the WCAB effective January 1, 1994. Until a new form of answer is approved by the WCAB, it would appear that with regard to claims involving injuries occuring on or after January 1, 1994, a defendant may use either the form set forth in former Rule 10969 or the form set forth in former Rule 10488 for injuries occurring prior to January 1, 1990 (*see § 577.394*). Until a new answer form is promulgated, counsel should contact the local workers' compensation district office to determine which form is being accepted.

Pursuant to former Rule 10969, the answer must be in writing, conform to the form prescribed by the WCAB, and set forth the particulars in which the application is inaccurate or incomplete and the facts on which the defendant intends to rely [*Lab. Code §§ 5500, 5505*; *see* former *8 Cal. Code Reg. § 10969*]. The answer may allege affirmative defenses and bona fide issues not raised in the application, but must respond to each substantive issue raised in the application [former *8 Cal. Code Reg. § 10969(e), (g)*]. The answer may also contain any objection to the application on the following grounds [former *8 Cal. Code Reg. § 10969(h)*]:

- There are no bona fide issues;

- Specific efforts have not been made to resolve disputed issues; or
- The proceedings requested are inappropriate.

Evidence on matters and affirmative defenses not pleaded in the answer will be allowed only on such terms and conditions imposed by the WCAB or the workers' compensation judge holding the hearing [*Lab. Code § 5505*].

For further discussion, see *§ 577.83[2]*. See also, *§§ 577.390, 577.391* and *577.394*.

[3] Time to File Answer

An answer to each application for adjudication must be filed and served 10 days after service of the declaration of readiness to proceed [*Lab. Code § 5505*; *8 Cal. Code Reg. § 10480*].

[4] Employee's Serious and Willful Misconduct

If the employer seeks to reduce the compensation payable to the employee because of the employee's serious and willful misconduct [*see Lab. Code § 4551*], the allegations of serious and willful misconduct must be separately pleaded in the answer and must set out in sufficient detail the specific basis on which the charge is founded so that the adverse parties and the WCAB may be fully advised [*8 Cal. Code Reg. § 10440*]. The allegations may be set forth on a separate document and attached to the official form. For general discussion of serious and willful misconduct of an employee, see discussion under *§ 577.17[1]*.

[5] Cross References

Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 25, §§ 25.22-25.24 (Matthew Bender)

California Workers' Compensation Practice, ch. 5, §§ 5.34-5.37 (Cal. C.E.B. 3d ed. 1985)

Witkin, Summary of California Law, vol. 2, *Worker's Compensation*, § 389 (10th ed. 2005)

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51-577 California Forms of Pleading and Practice--Annotated § 577.396

§ 577.396 Allegation of Entitlement to Increased Benefits Because Injury Caused by Employer's Serious and Willful Misconduct [Lab. Code §§ 4553, 4553.1; 8 Cal. Code Reg. §§ 10440, 10445]

[1] FORM Allegation of Entitlement to Increased Benefits Because Injury Caused by Employer's Serious and Willful Misconduct [Lab. Code §§ 4553, 4553.1; 8 Cal. Code Reg. §§ 10440, 10445]

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD

_____ [*name*],	)	
Applicant,	)	CASE NO.
vs.	)	_____
_____ [*name*],	)	ALLEGATION OF ENTITLEMENT TO IN-
Defendant.	)	CREASED BENEFITS BECAUSE OF EMPLOY-
	)	ER'S SERIOUS AND WILLFUL MISCONDUCT
	)	

Applicant _____ [*name*] alleges that the injury to _____ [*applicant or name of deceased employee*] described in the attached application for adjudication of claim was caused by serious and willful misconduct on the part of the employer as follows:

FIRST THEORY
(Failure to Provide Safe Place to Work)

1. At all times herein mentioned, defendant _____ [*name of employer*] was, and is, _____ [*specify type of business entity, e.g.,* a corporation organized and existing under the laws of California].

[2. At all times herein mentioned, _____ (*name*) was defendant's _____ (*specify title, e.g.,* managing officer).]

3. On _____ [*date*], _____ [*applicant or name of deceased employee*] [hereinafter "the employee"], while employed by defendant as _____ [*job title or description of work*], was engaged in the performance of his/her duties in the course of his/her employment at _____ [*address*] under the immediate supervision and direction of _____ [*name*], _____ [*specify title, e.g.,* defendant's managing officer].

4. On the above stated date, at about _____ [*time*], _____ [applicant *or* the employee] was directed by _____ [*name*], _____ [*specify, e.g.,* defendant's managing officer], to _____ [*describe work during which injury occurred*].

5. At all times herein mentioned, defendant willfully and with knowledge that serious injury to _____ [applicant *or* the employee] was a probable result _____ [*specify, e.g.,* failed to furnish and use safety devices and safeguards for the benefit of _____ (applicant *or* the employee), failed to adopt and use methods and processes reasonably adequate to render _____ (applicant's *or* the employee's) employment and place of employment safe, and failed to do those things reasonably necessary to protect the life and safety of _____ (applicant *or* the employee)], in that _____ [*specify in detail specific act or omission on which charge of serious and willful misconduct is founded*].

6. As a proximate result of the serious and willful misconduct of the defendant, as herein alleged, _____ [*describe the accident that occurred and the applicant's or employee's involvement in it*].

[*EITHER, if applicant is the injured employee*]

7. As a further proximate result of the serious and willful misconduct of the defendant and the accident, applicant sustained serious injuries resulting in _____ [*specify, e.g.,* temporary and permanent disability, loss of work from _____ (*date*), to _____ (*specify date or* the present), and the need for medical treatment (at various times) _____ (between _____ and _____ (*dates*) *or* commencing on the date of the accident and continuing to the present)].

[*OR, if applicant is a dependent*]

7. As a further proximate result of the serious and willful misconduct of the defendant and the accident, the employee sustained serious injuries resulting in his/her death.

[*CONTINUE*]

SECOND THEORY
(Violation of Safety Order)

8. Applicant incorporates herein Paragraphs 1-4, inclusive, and 6 and 7 of the First Theory.

9. _____ [*Identify safety order violated*], entitled _____ [*specify title of order*] (hereinafter, "the safety order"), [providing _____ (*quote in full if desired*),] was applicable to the work being performed by _____ [applicant *or* the employee] on _____ [*date of injury*], in that _____ [*describe conditions making safety order applicable*].

[*EITHER*]

10. The safety order and the conditions making it applicable to _____ [applicant's *or* the employee's] work at the time of injury were known by _____ [defendant *or* _____ (*name*), defendant's _____ (*e.g.*, managing officer)].

[*OR*]

10. The condition making the safety order applicable was obvious, created a probability of serious injury, and the failure of _____[defendant *or* _____ (*name*), defendant's _____ (*e.g.*, managing officer)] to correct the condition constituted a reckless disregard for the probable consequences.

[*CONTINUE*]

11. The safety order was violated by _____ [defendant *or* _____ (*name*), defendant's _____ (*e.g.*, managing officer)] in that _____ [*describe specific manner in which order was violated*].

12. The violation of the safety order as herein alleged proximately caused _____ [applicant's injury *or* the death of the employee] in that _____ [*specify manner in which violation constituted the proximate cause*].

WHEREFORE, applicant requests that the amount of compensation otherwise recoverable be increased one half, together with costs and expenses not to exceed $250.00, as authorized by *Labor Code Section 4553*.

Dated at _____ [*city*], California, on _____ [*date*].

_____ [*signature*]

Applicant

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Applicant

[*Attach proof of service. See § 577.108[5].*]

[2] Use of Form

The form in [1], *above*, may be used by an injured employee or a deceased employee's dependents to seek increased compensation on the ground the injury or death was caused by the employer's serious and willful misconduct [*see Lab. Code § 4553*]. The form set out above is drafted on the assumption that it will be attached to the official WCAB form of application for adjudication of claim [*see* forms in *§§ 577.390 -577.393*]. If attached to the official form of application, the attachment should be referred to and incorporated by reference in the official form, in the space provided for describing the nature of the dispute.

Alternatively, the applicant may submit a separate typed application for adjudication of claim containing the allegations set forth in the foregoing form [*see* 1 *Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 5, § 5.01[2][l]* (Matthew Bender); California Workers' Compensation Practice, ch. 5, § 5.23 (Cal. C.E.B. 3d ed. 1985)]. A separate typed application may be used when an official application has not yet been filed (allowing the WCAB to open a file on the matter and give it a number pending filing of the application), or when the serious and willful misconduct is alleged after the official application is already on file. If a separate typed application is filed, it would only place in issue the additional compensation afforded by statute for serious and willful misconduct. Therefore, an official application must be filed as well to claim other benefits. If a separate application is filed, it should conform as closely as possible to, and contain all the information required by, the official general form (unless such a form is already on file).

Regardless of whether filed separately or attached to an official WCAB application form, and irrespective of the date of injury, any allegation of serious and willful misconduct must comply with the requirements of *8 Cal. Code Reg. §§ 10440* and *10445*, discussed in *§ 577.396[4]*. The statute of limitations applicable to a claim of increased compensation based on an employer's serious and willful misconduct is *Lab. Code § 5407*, discussed in *§ 577.25[e]*.

Although an insurer may provide insurance against the expense of defending a suit for serious and willful misconduct, it is prohibited from insuring against the additional compensation recoverable for such misconduct [*Ins. Code § 11661*; *see Hawaiian Pineapple Co., Ltd. v. Ind. Acc. Com. (1953) 40 Cal. 2d 656, 662, 255 P.2d 431* ; *Imperial Irrigation Dist. v. Chubb/Pacific Indemnity Group (1979) 95 Cal. App. 3d 317, 320, 321, 157 Cal. Rptr. 733]* . Hence, the employer's insurer should not be named as a party. Because it may defend the proceeding, however, it should be served with a copy of the application. If the employer is self-insured or uninsured and represented by counsel, a copy should be served on counsel.

For further discussion, see § 57.17[2]. See also, *§§ 577.390 -577.393*.

[3] Serious and Willful Misconduct

The claim may be filed if the employee was injured by reason of the serious and willful misconduct (a) of the employer or his or her managing representative; or (b) if the employer is a partnership, of one of the partners or a managing representative or general superintendent; or (c) if the employer is a corporation, of an executive, managing officer, or general superintendent. The amount of compensation otherwise recoverable is increased by one half, together with costs and expenses not to exceed $250 [*Lab. Code § 4553*].

For general discussion of an employer's serious and willful misconduct, see *§ 577.17[2]*.

[4] Pleading Requirements

All allegations that an injury was caused by the serious and willful misconduct of the employer must be separately pleaded and the pleading must set out in sufficient detail the specific basis on which the charge is founded so that the adverse parties and the WCAB may be fully advised [*8 Cal. Code Reg. § 10440*]. If the charge is based on more than one theory, each theory must be separately set forth [*8 Cal. Code Reg. § 10445(a)*]. If the charge is predicated on the violation of a particular safety order, the application must allege the following [*Lab. Code § 4553.1*; *8 Cal. Code Reg. § 10445(b)*]:

- The correct citation or reference of the safety order;
- The specific manner in which the order was violated;
- The specific manner in which the violation proximately caused the injury or death; and
- That the safety order and the conditions making it applicable were known to and violated by a particular named person, either the employer or a representative as designated in *Lab. Code § 4553*, or that the condition making the safety order applicable was obvious, created a probability of serious injury, and the failure of the employer or its representative to correct the condition constituted a reckless disregard for the probable consequences.

[5] Service of Form

All documents other than those specified in *8 Cal. Code Reg. §§ 10500* and *10501* (discussed under *§ 577.108*) must be served by the parties or lien claimants [*see 8 Cal. Code Reg. § 10505*]. Such documents must be served on all attorneys or agents of record unless a party or lien claimant is unrepresented, in which case service must be made directly on the party or lien claimant [*see 8 Cal. Code Reg. § 10510*].

For discussion of service of papers in workers' compensation proceedings, see the discussion under *§ 577.108*. For discussion of the methods of proving service in civil actions, as well as a form of proof of service by mail that may be adapted for use to prove service by mail in a workers' compensation proceeding, see Ch. 518, *Service of Summons and Papers* .

[6] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 25, § 25.05[4]* (Matthew Bender)

California Workers' Compensation Practice, ch. 5, §§ 5.23-5.26 (Cal. C.E.B. 3d ed. 1985)

Witkin, Summary of California Law, vol. 2, *Worker's Compensation*, §§ 316-324 (10th ed. 2005)

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51-577 California Forms of Pleading and Practice--Annotated § 577.397

§ 577.397 Application for Subsequent Injuries Fund Benefits

[1] FORM Application for Subsequent Injuries Fund Benefits

Click here to view image.

[2] Use of Form

The form in [1], *above*, is for use in a subsequent injury case to claim benefits from the Subsequent Injuries Benefits Trust Fund. Additional compensation for subsequent injuries is covered by *Lab. Code §§ 4751-4755*. It has been suggested that, to avoid the running of the period of limitation within which the claim may be filed [*see* [4], *below*], applicants would be well advised to join the Subsequent Injuries Benefits Trust Fund with the employer in every proceeding seeking permanent disability benefits [*Subsequent Injuries Fund v. Workmen's Comp. App. Bd. (1970) 2 Cal. 3d 56, 65-66, 84 Cal. Rptr. 140, 465 P.2d 28]* . In any case, the fund should be joined before the extent of the employer's liability is determined to avoid a relitigation of that issue by the fund that could result in the employee being faced with conflicting decisions with respect to the benefits to which he or she is entitled [*see Subsequent Injuries Fund v. Workmen's Comp. Appeals Bd. (1974) 40 Cal. App. 3d 403, 409, 115 Cal. Rptr. 204]* .

Claims against the Subsequent Injuries Benefits Trust Fund must be by written application. The application must set forth the date and nature of the industrial injury, together with all factors of disability alleged to have preexisted the injury [*8 Cal. Code Reg. § 10940*]. Allegations of additional factors must be made by amended application [*8 Cal. Code Reg. § 10940*].

Effective November 17, 2008 [*see 8 Cal. Code Reg. §§ 10210*-10297 (Rules of Court Administrator, including regulations relating to Electronic Adjudication Management System (EAMS))], DWC requires (with a handful of exceptions) that all documents designed and created by DWC to be read by electronic scanners be used in place of the previous, equivalent DWC forms. These new forms, called "optical character recognition forms" (OCR forms) [*see 8 Cal. Code Reg. § 10210(x)* ("OCR form" defined)], may be downloaded and saved, then filled in and printed, as needed, with the printouts being filed with DWC and served on other parties and attorneys, as required by regulations. The form

in [1], above, is one such form. Readers should check, periodically, DWC's website for further developments in the implementation of EAMS. DWC's website address is: http://www.dir.ca.gov/dwc/dwc_home_page.htm

For discussion of EAMS, see *§ 577.12A*.

See also, discussion under *§§ 577.390, 577.391*.

[3] Subsequent Injuries Benefits Trust Fund

A permanently disabled employee who sustains a subsequent permanent injury may not receive compensation for the subsequent injury from his or her employer in excess of that allowed for the subsequent injury alone. Therefore, the employer is not liable for the combined effect of the disabilities, but only for that portion due to the later injury [*see Lab. Code §§ 4663(a), 4664*]. When a permanently partially disabled employee receives a subsequent compensable injury, however, the degree of disability caused by the combination of both disabilities is greater than that which would have resulted from the subsequent injury alone, and the combined effect of the injuries is a permanent disability equal to 70 percent or more of total, the employee may apply for benefits from a fund administered by the State Compensation Insurance Fund, known as the Subsequent Injuries Benefits Trust Fund [*see Lab. Code §§ 4751, 4754*]. The employee is entitled to compensation from the fund in the amount of the difference between the amount payable for the last injury, and the total disability percentage, provided that either of the following conditions applies [*Lab. Code § 4751*]:

- The previous disability or impairment affects a hand, an arm, a foot, or an eye, and the permanent disability resulting from the subsequent injury affects the opposite and corresponding member to the extent of 5 percent of total, without adjustment for age and occupation; or

- The permanent disability resulting from the subsequent injury, disregarding adjustment for age and occupation, is equal to 35 percent or more of total.

A "qualified alien" may also apply for benefits from the Subsequent Injuries Benefits Trust Fund, but must fill out Form UEF-1, "Statement of Citizenship, Alienage, and Immigration Status for State Public Benefits" [*8 Cal. Code Reg. § 15740(e)(3)*; *see also 8 Cal. Code Reg. § 15741*].

[4] Filing and Service of Application

An application against the Subsequent Injuries Benefits Trust Fund may be filed by the injured worker with the original application for workers' compensation benefits [*see §§ 577.390, 577.391*] or thereafter [*see Subsequent Injuries Fund v. Workmen's Comp. App. Bd. (1970) 2 Cal. 3d 56, 61-62, 65-66, 84 Cal. Rptr. 140, 465 P.2d 28]* . There is no statute specifying a period of limitation within which the application must be filed to avoid being barred. Under case law, however, a claim against the fund is barred if not brought within five years from the date of injury, as set forth in *Lab. Code § 5410*, if during that period the worker knew or could reasonably be deemed to have known that there was substantial likelihood that he or she was entitled to subsequent injuries benefits [*Subsequent Injuries Fund v. Workmen's Comp. App. Bd. (1970) 2 Cal. 3d 74, 76, 84 Cal. Rptr. 151, 465 P.2d 39]* .

Conversely, if the worker, prior to expiration of the five-year period, did not know and could not reasonably have been deemed to have known that there would be substantial liklihood that he or she would become entitled to subsequent injuries benefits, the application against the fund will not be barred if he or she files a proceeding against the fund within a reasonable time after learning from the WCAB's findings on the issue of permanent disability that the fund has probable liability [*Subsequent Injuries Fund v. Workmen's Comp. App. Bd. (1970) 2 Cal. 3d 56, 65, 84 Cal. Rptr. 140, 465 P.2d 28* (disapproving inconsistent langauge in *State, Subsequent Injuries Fund v. Industrial Acci. Com. (1962) 198 Cal. App. 2d 818, 18 Cal. Rptr. 458* , and *Subsequent Injuries Fund v. Industrial Acci. Com. (1960) 178 Cal. App. 2d 55, 2 Cal. Rptr. 646*)].

Applications against the Subsequent Injuries Benefits Trust Fund must be filed with the WCAB and a copy served by mail on the Fund, in accordance with *8 Cal. Code Reg. §§ 10507* and *10505*. If joinder of the Subsequent Injuries Benefits Trust Fund is ordered by the WCAB or the WCJ, the applicant must forthwith file and serve an application as above [*8 Cal. Code Reg. § 10940*].

[5] Service of Medical Reports

Any party who has previously filed medical reports must, unless service is waived, forthwith, and in no case later than 30 days prior to the mandatory settlement conference, serve copies of the reports on the Fund [*8 Cal. Code Reg. § 10946*].

[6] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 8, § 8.09*; *ch. 25, § 25.05[7]* (Matthew Bender)

California Workers' Compensation Practice, ch. 5, §§ 5.29, 5.30 (Cal. C.E.B. 3d ed. 1985)

Witkin, Summary of California Law, vol. 2, *Worker's Compensation*, §§ 297-300 (10th ed. 2005)

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§ 577.397A Document Cover Sheet [DWC-CA Form 10232.1]

[1] FORM Document Cover Sheet [DWC-CA Form 10232.1]

Click here to view image.

[2] Use of Form

All documents must be filed with document cover sheets and document separator sheets [*see § 577.397B* (document separator sheet)]. A completed document cover sheet must be the first page of each individual document or set of documents filed at one time in the same case. The cover sheet provides space for information regarding 15 companion cases. Only the pages filled out need to be filed. The requirements regarding use of document cover sheets do not apply to any unrepresented employees, unrepresented dependents, or unrepresented uninsured employers who do not have ready access to document cover sheets [*8 Cal. Code Reg. § 10232(b)*].

For further discussion of document cover sheets, see *§ 577.104*.

Effective November 17, 2008 [*see 8 Cal. Code Reg. §§ 10210*-10297 (Rules of Court Administrator, including regulations relating to Electronic Adjudication Management System (EAMS))], DWC requires (with a handful of exceptions) that all documents designed and created by DWC to be read by electronic scanners be used in place of the previous, equivalent DWC forms. These new forms, called "optical character recognition forms" (OCR forms) [*see 8 Cal. Code Reg. § 10210(x)* ("OCR form" defined)], may be downloaded and saved, then filled in and printed, as needed, with the printouts being filed with DWC and served on other parties and attorneys, as required by regulations. The form in [1], above, is one such form. Readers should check, periodically, DWC's website for further developments in the implementation of EAMS. DWC's website address is: http://www.dir.ca.gov/dwc/dwc_home_page.htm

For discussion of EAMS, see *§ 577.12A*.

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51-577 California Forms of Pleading and Practice--Annotated § 577.397B

§ 577.397B Document Separator Sheet [DWC-CA Form 10232.2]

[1] FORM Document Separator Sheet [DWC-CA Form 10232.2]

Click here to view image.

[2] Use of Form

All documents must be filed with document cover sheets [*see § 577.397A* (document cover sheet)] and document separator sheets. If an individual document includes an attachment, a completed document separator sheet must precede the attachment, and, if an individual document includes multiple attachments, a document separator sheet must precede each individual attachment. A document separator sheet must not be placed between a document and the proof of service for that document. However, when one proof of service is used for multiple documents, a document separator sheet must precede the proof of service. A list of document titles is provided with the document separator sheet form and posted on the DWC website (http://www.dir.ca.gov/forms.html). These document titles must be used on a document separator sheet to describe the attached document. The document separator sheet requires the filer to list the product delivery units [*see 8 Cal. Code Reg. § 10210(bb)*; *see also § 577.12A[1]*] and the date and the author of the attached document. The requirements regarding use of document separator sheets do not apply to any unrepresented employees, unrepresented dependents, or unrepresented uninsured employers who do not have ready access to document cover sheets and document separator sheets [*8 Cal. Code Reg. § 10232(b)*].

For further discussion of document separator sheets, see *§ 577.104*.

Effective November 17, 2008 [*see 8 Cal. Code Reg. §§ 10210*-10297 (Rules of Court Administrator, including regulations relating to Electronic Adjudication Management System (EAMS))], DWC requires (with a handful of exceptions) that all documents designed and created by DWC to be read by electronic scanners be used in place of the previous, equivalent DWC forms. These new forms, called "optical character recognition forms" (OCR forms) [*see 8 Cal. Code Reg. § 10210(x)* ("OCR form" defined)], may be downloaded and saved, then filled in and printed, as needed, with the printouts being filed with DWC and served on other parties and attorneys, as required by regulations. The form

in [1], above, is one such form. Readers should check, periodically, DWC's website for further developments in the implementation of EAMS. DWC's website address is: http://www.dir.ca.gov/dwc/dwc_home_page.htm

For discussion of EAMS, see *§ 577.12A*.

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51-577 California Forms of Pleading and Practice--Annotated § 577.398

§ 577.398 Petition for Appointment of Guardian ad Litem and Trustee [Lab. Code § 5307.5(a); 8 Cal. Code Reg. § 10402] [DIA WCAB Form 8]

[1] FORM Petition for Appointment of Guardian ad Litem and Trustee [Lab. Code § 5307.5(a); 8 Cal. Code Reg. § 10402] [DIA WCAB Form 8]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of the form (DWC WCAB Form 8) prescribed by the WCAB for use to secure the appointment of a guardian ad litem and trustee for a minor or incompetent injured employee or dependent of a deceased employee [*see Lab. Code § 5307.5(a)*; *8 Cal. Code Reg. § 10402*]. Blank forms may be obtained at any WCAB office. For the tolling of the statute of limitations until a guardian is appointed, see *§ 577.25[3]*.

If the applicant is a minor or incompetent, the application for adjudication must be accompanied by the foregoing petition. If the minor has the right of nomination, the nomination must be included in the petition [*8 Cal. Code Reg. § 10402*; *see § 577.81*].

[3] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 24, § 24.05[1]*; *ch. 31, § 31.21* (Matthew Bender)

California Workers' Compensation Practice, ch. 5, §§ 5.31-5.33 (Cal. C.E.B. 3d ed. 1985)

Witkin, Summary of California Law, vol. 2, *Worker's Compensation*, § 374 (10th ed. 2005)

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51-577 California Forms of Pleading and Practice--Annotated § 577.399

§ 577.399 Declaration of Readiness to Proceed [DWC-CA Form 10250.1]

[1] FORM Declaration of Readiness to Proceed [DWC-CA Form 10250.1]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of DWC-CA Form 10250.1, which is used to have a case set for mandatory settlement conferences, status conferences, priority conferences [*see 8 Cal. Code Reg. § 10301 (v), (z), (dd)*], or any other hearing. The Appeals Board may, in its discretion, designate a party or lien claimant, or their attorney or agent of record, to make service of notices of the time and place of hearing, orders approving compromise and release, awards based on stipulations with request for award, and any interim or procedural orders. In deciding whether to exercise this discretion, the Appeals Board may consider whether service by it would be more efficient and cost-effective because most or all of the parties, lien claimants, attorneys, or agents of record to be served have specified e-mail or fax as their preferred method of service. If discretion is exercised so as to require designated service, the party, lien claimant, attorney, or agent of record designated to make service must retain the proof of service and not file it unless ordered to do so by the Appeals Board [*8 Cal. Code Reg. § 10500(a)*; *but see 8 Cal. Code Reg. § 10500(b)* (exceptions)].

Applications or petitions may not be placed on calendar for mandatory settlement conferences, status conferences, priority conferences, expedited hearing, or any other hearing unless one of the parties has filed and served a declaration of readiness to proceed in the form prescribed by the Court Administrator. The declaration of readiness must be served on all other parties and lien claimants [*8 Cal. Code Reg. § 10250(a)*].

All declarations of readiness to proceed must state under penalty of perjury that the moving party has made a genuine, good faith effort to resolve the dispute before filing the declarations of readiness to proceed, and must state with specificity those efforts [*8 Cal. Code Reg. § 10250(b)*]. A false declaration or certification by any party, lien claimant, attorney, or representative may give rise to proceedings under *Lab. Code § 134* for contempt or *Lab. Code § 5813* for sanctions [*8 Cal. Code Reg. § 10250(c)*]. If a party or a lien claimant is represented by an attorney or representative, any

declaration of readiness filed on behalf of the party must be executed by the attorney or representative [*8 Cal. Code Reg. § 10250(d)*].

For discussion of declarations of readiness to proceed, see *§ 577.88*.

Effective November 17, 2008 [*see 8 Cal. Code Reg. §§ 10210*-10297 (Rules of Court Administrator, including regulations relating to Electronic Adjudication Management System (EAMS))], DWC requires (with a handful of exceptions) that all documents designed and created by DWC to be read by electronic scanners be used in place of the previous, equivalent DWC forms. These new forms, called "optical character recognition forms" (OCR forms) [*see 8 Cal. Code Reg. § 10210(x)* ("OCR form" defined)], may be downloaded and saved, then filled in and printed, as needed, with the printouts being filed with DWC and served on other parties and attorneys, as required by regulations. The form in [1], above, is one such form. Readers should check, periodically, DWC's website for further developments in the implementation of EAMS. DWC's website address is: http://www.dir.ca.gov/dwc/dwc_home_page.htm

For discussion of EAMS, see *§ 577.12A*.

It may be filed with the application for adjudication [*see 8 Cal. Code Reg. §§ 10250(a), 10582*].

For further discussion, see *§ 577.88*.

[3] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 25, § 25.08* (Matthew Bender)

California Workers' Compensation Practice, ch. 6, §§ 6.17-6.24 (Cal. C.E.B. 3d ed. 1985)

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51-577 California Forms of Pleading and Practice--Annotated § 577.400

§ 577.400 General Caption for Use on Paper Filed With WCAB

[1] FORM General Caption for Use on Paper Filed With WCAB

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD

_____ [*name of employee or other applicant*], _____ [Applicant *or* Employee] [_____ (*address*)] [Employee's Social Security No._____]	)
vs.	)
_____ [*name of employer*] _____ [Defendant *or* Employee] [_____ (*address*)] _____ [*name*], Insurance Carrier [_____ (*address*)]	)
[*If applicant is someone other than injured employee, add following:*] [_____ (*name of employee*), Employee _____ (*address*) Employee's Social Security No. _____]	)
	CASE NO. _____ _____ [*Title of document, e.g.,* PETITION FOR _____ (*specify*)]

_____

[2] Use of Form

The form in [1], *above*, illustrates a general form of caption which may be adapted for use on papers filed with the WCAB either before or after the filing of an application for adjudication of claim.

If filed after the application for adjudication has been filed, the parties would be referred to as "applicant" and "defendant," as designated in the application. If someone other than the injured employee is the applicant (e.g., dependents in a death case), the name and address of the employee must be included in the caption [*8 Cal. Code Reg. § 10360*].

Ordinarily, printed forms provided by the WCAB are used for the original pleadings [*see §§ 577.390[1] -577.393[1], 577.394[1], 577.395[1]*].

For additional discussion of captions, see *§ 577.101* .

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51-577 California Forms of Pleading and Practice--Annotated § 577.401

§ 577.401 WCAB--Data Entry Sheet

[1] FORM WCAB--Data Entry Sheet

Click here to view image.

[2] Use of Form

The form in [1], *above*, is an illustration of the WCAB Data Entry Sheet that must accompany all filings in which no case number has been previously assigned. This includes the following:

- The Application for Adjudication [*see §§ 577.390 -577.393*].
- A Compromise and Release Agreement [*see §§ 577.460 -577.462*].
- Stipulations with Requests for Award [*see § 577.470*].
- Petitions seeking recovery under *Lab. Code § 132a*.
- Pre-application filings for cases involving injuries between January 1, 1990 and December 31, 1993, in which no case number was previously assigned by the WCAB.

Copies of the form may be obtained at any WCAB office.

For additional discussion, see *§ 577.102*.

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51-577 California Forms of Pleading and Practice--Annotated §§ 577.402-577.409

[Reserved]

§§ 577.402[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.410

§ 577.410 Subpoena [8 Cal. Code Reg. § 10530] With Proof of Service [8 Cal. Code Reg. § 10505(c)] [DIA WCAB Form 30]

[1] FORM Subpoena [8 Cal. Code Reg. § 10530] With Proof of Service [8 Cal. Code Reg. § 10505(c)] [DIA WCAB Form 30]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of DIA WCAB Form 30 for use by a party to subpoena a witness to testify. On request, the WCAB will issue subpoenas in accordance with the provisions of *Code Civ. Proc. §§ 1985* and *1987.5* and *Gov. Code § 68097.1* [*8 Cal. Code Reg. § 10530*; *see* discussion under *§§ 577.147, 577.148*]. For injuries occurring on or after January 1, 1990, subpoenas must contain, in addition to the requirements of *Code Civ. Proc. § 1985*, an affidavit that a claim form has been duly filed pursuant to *Lab. Code § 5401(d)* [*8 Cal. Code Reg. § 10530*]. Copies of the foregoing form may be obtained at any WCAB office.

[3] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 25, § 25.43* (Matthew Bender)

California Workers' Compensation Practice, ch. 8, §§ 8.9-8.11 (Cal. C.E.B. 3d ed. 1985)

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51-577 California Forms of Pleading and Practice--Annotated § 577.411

§ 577.411 Subpoena Duces Tecum [8 Cal. Code Reg. § 10530], Declaration for Subpoena Duces Tecum [Code Civ. Proc. §§ 1987.5, 2015.5], and Declaration of Service [8 Cal. Code Reg. § 10505(c)] [DIA WCAB Form 32]

[1] FORM Subpoena Duces Tecum [8 Cal. Code Reg. § 10530], Declaration for Subpoena Duces Tecum [Code Civ. Proc. §§ 1987.5, 2015.5], and Declaration of Service [8 Cal. Code Reg. § 10505(c)] [DIA WCAB Form 32]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of DIA WCAB Form 32 for use by a party to subpoena a witness to testify and produce documents, papers, books, and records [*see Code Civ. Proc. §§ 1985, 1987.5, 2015.5; 8 Cal. Code Reg. § 10530*].

For injuries occurring on or after January 1, 1990, subpoenas duces tecum must contain, in addition to the requirements of *Code Civ. Proc. § 1985*, an affidavit that a claim form has been duly filed pursuant to *Lab. Code § 5401(d)* [*8 Cal. Code Reg. § 10530*].

For further discussion, see *§ 577.147*. See also *§ 577.410*.

[3] Cross References

Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 25, § 25.43 (Matthew Bender)

California Workers' Compensation Practice, ch. 8, § 8.14 (Cal. C.E.B. 3d ed. 1985)

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51-577 California Forms of Pleading and Practice--Annotated § 577.412

§ 577.412 Petition for Order to Compel Employee to Submit to Medical Examination and to Suspend Employee's Right to Begin or Maintain Proceeding for Collection of Workers' Compensation [Lab. Code §§ 4051, 4053, 4054, 5703.5]

[1] FORM Petition for Order to Compel Employee to Submit to Medical Examination and to Suspend Employee's Right to Begin or Maintain Proceeding for Collection of Workers' Compensation [Lab. Code §§ 4051, 4053, 4054, 5703.5]

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD

_____ [*name of employee or other applicant*], _____ [Applicant *or* Employee] [_____ (*address*)] [Employee's Social Security No. _____] vs. _____ [*name of employer*] _____ [Defendant *or* Employer] [_____ (*address*)] _____ [*name*], Insurance Carrier [_____ (*address*)] [*If applicant is someone other than injured employee, add following:*] [_____ (*name of employee*), Employee _____ (*address*)	CASE NO. _____ _____ [*Title of document, e.g.,* PETITION FOR _____ (*specify*)]

Employee's Social Security No. _____]

_____

Petitioner alleges:

1. Petitioner is, and at all times herein mentioned was, _____ [*specify, e.g.,* the defendant in this proceeding *or* the workers' compensation carrier for _____ (*name of employer*)].

[*EITHER, if no application for adjudication has been filed*]

2. _____ [*Name of worker*] claims to have been an employee of _____ [*name of employer*] and that on _____ [date], he/she sustained an injury arising out of and occurring in the course of his/her employment.

[*OR, if application has been filed*]

2. On _____ [*date*], an application was filed by _____ [*name of worker*] alleging that on _____ [*date*], he/she sustained injury arising out of and occurring in the course of his/her employment with _____ [*name of employer*] and claiming temporary and permanent disability compensation.

[*CONTINUE*]

3. On _____ [*date*], petitioner delivered a writing to the employee requesting that he/she submit to a medical examination by _____ [*name*], M.D., to be conducted at the latter's office located at _____ [*address*] on _____ [*date*], at _____ [*time*].

4. The examination was arranged at a time and place that gave due consideration to the convenience of the employee and to his/her physical condition and ability to attend. Petitioner offered to pay, and is still willing and able to pay, all costs in connection with the examination [and did, in fact, pay the employee for travel and other expenses in advance of the scheduled examination date].

5. Without any cause whatsoever, the employee failed and refused to report for the examination.

6. The examination is necessary to enable petitioner to be informed concerning the nature, extent, and causes of the employee's injury, illness, or disability, if any, and to defend against the employee's claim for continuing temporary disability and other workers' compensation benefits.

WHEREFORE, petitioner requests that an order issue:

1. Requiring the employee to report to _____ [*name*], M.D., at _____ [*address*] on or before _____ [*date*], and to submit to a medical examination; and

2. Admonishing employee that his/her failure to appear for the above examination shall result in suspension of his/her right to maintain any proceeding for collection of compensation and forfeiture of his/her right to disability payments for

the period during which he/she refuses to submit to the examination; and

3. Granting all other and further relief that may be necessary and proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[*Attach proof of service. See § 577.108[5].*]

[2] Use of Form

The form in [1], *above*, illustrates a petition for use to secure an order compelling an employee to submit to a medical examination after the employee has refused to do so [*see generally Lab. Code §§ 4050-4054, 5703.5*]. As noted in § 577.156, if an employee fails or refuses to submit to a medical examination after being requested to do so by the employer under *Lab. Code §§ 4050, 4051*, or obstructs the examination, the employee's right to begin or maintain a proceeding to collect compensation is suspended during the period of such failure, refusal, or obstruction [*Lab. Code § 4053*]. Furthermore, if the employee fails or refuses to submit to an examination after being directed to do so by the WCAB or by a WCJ, the employee's right to disability payments accruing during the period of failure, refusal, or obstruction is barred [*Lab. Code § 4054*].

For a discussion of service of papers and proof of service, see *§ 577.108*.

[3] Failure to Submit to Examination

Although neither the Labor Code nor the WCAB regulations clearly specify the procedure to be followed when an employee fails or refuses to submit to a medical examination, the foregoing petition apparently may be filed either before or after the employee files an application for adjudication of claim, as a preliminary step to the employer's terminating payment of disability benefits under *Lab. Code § 4054*. If the employee has filed an application already, the employer may also wish to include in the answer [*see §§ 577.394, 577.395*] allegations regarding the employee's previous failure to submit to a medical examination requested by the employer under *Lab. Code §§ 4050, 4051* and request a finding that the employee's right to maintain the proceeding is suspended pursuant to *Lab. Code § 4053*. Note, however, that, although the right to maintain the proceeding is suspended in such cases, the Labor Code and WCAB regulations do not appear to allow dismissal of the application. At the very least, the applicant is entitled to notice and an opportunity to be heard before the case may be dismissed for failure to submit to a medical examination [*see Roth v. Workmen's Comp. Appeals Bd. (1971) 20 Cal. App. 3d 452, 457-460, 97 Cal. Rptr. 605]* .

The Labor Code and WCAB regulations also do not indicate the procedure the employer should follow if the employee fails or refuses to submit to an examination after an award has already been entered by the WCAB. Apparently, however, the employer, at the very least, should seek an order compelling the employee to submit to an examination before terminating payment of any disability benefits on this basis [*see Lab. Code § 4054*]. For general discussion of supplemental proceedings after entry of an award, see *§ 577.220* et seq.

If an application is on file, the number of the case and the usual caption showing the title and cause should be specified [

see 8 Cal. Code Reg. §§ 10301(y), 10450; *§ 577.400*]. If no application is on file, the possibility that the injury occurred as the result of an industrial injury should be set forth.

[4] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 22, § 22.07[2]* (Matthew Bender)

California Workers' Compensation Practice, ch. 7, § 7.62 (Cal. C.E.B. 3d ed. 1985)

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51-577 California Forms of Pleading and Practice--Annotated § 577.413

§ 577.413 Petition for Order Directing [Exhumation and] Autopsy [Lab. Code §§ 5706, 5707; 8 Cal. Code Reg. § 10342(c)]

[1] FORM Petition for Order Directing [Exhumation and] Autopsy [Lab. Code §§ 5706, 5707; 8 Cal. Code Reg. § 10342(c)]

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD

_____ [*name of employee or other applicant*], _____ [Applicant *or* Employee] [_____ (*address*)] [Employee's Social Security No. _____]	)	CASE NO. _____
vs.	)	_____ [*Title of document, e.g.,* PETITION FOR _____ (*specify*)]
_____ [*name of employer*] _____ [Defendant *or* Employer] [_____ (*address*)] _____ [*name*], Insurance Carrier [_____ (*address*)]	)	
[*If applicant is someone other than injured employee, add following:*] [_____ (*name of employee*), Employee _____ (*address*) Employee's Social Security No. _____]		

_____

Petitioner hereby requests an order directing an [exhumation and] autopsy and, in support thereof, alleges:

1. Petitioner [is, and] was on _____ [*date*], the workers' compensation insurance carrier for _____ [*name of employer*], which was the employer of _____ [*name of deceased worker*], who died on _____ [*date*].

[*EITHER, if no application for adjudication has been filed*]

2. Petitioner is informed and believes, and thereon alleges, that a claim will be made that the death of _____ [*name of worker*] was due to an injury arising out of and occurring in the course of his/her employment by _____ [*name of employer*]. Should such a claim be made it will not be possible to make a determination of liability in the absence of an autopsy showing the cause of death.

[*OR, if application for adjudication has been filed*]

2. The application for death benefits herein claims that the death of _____ [*name of worker*] was due to an injury arising out of and occurring in the course of his/her employment by _____ [*name of employer*]. An autopsy on the body of the decedent will be of material assistance in determining the cause of death.

[*CONTINUE*]

3. Petitioner will pay all reasonable and necessary expenses in connection with this autopsy, and nominates _____ [*name*], M.D., to perform the autopsy.

WHEREFORE, petitioner requests that an order issue:

1. Directing and authorizing the performance of an autopsy on the body of _____ [*name of deceased employee*] by _____ [*name*], M.D., or any other physician licensed to practice in the State of California;

2. Directing and authorizing that an autopsy surgeon take, for expert microscopic or pathological examination, all specimens that may be reasonably necessary for a determination of the decedent's cause of death;

[3. Directing and authorizing the exhumation of the decedent's body for these purposes;]

4. Directing petitioner to pay reasonable and necessary expenses in connection with the [exhumation,] autopsy[,] and microscopic or pathological examination; and

5. Granting all other and further relief that may be necessary and proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Use of Form

The form in [1], *above*, illustrates a petition for use to secure an order directing that an autopsy be performed on the body of a deceased worker who allegedly died as the result of an injury sustained in the course of his or her employment. The form also includes optional language to require exhumation of the body, if necessary [*see Lab. Code § 5707*].

If an application is on file, the number of the case and the usual caption showing the title and cause should be specified [*see 8 Cal. Code Reg. §§ 10301(y), 10450*; *§ 577.400*]. If no application is on file, the possibility that death occurred as the result of an industrial injury should be set forth. The name of the pathologist or other qualified physician who is to do the autopsy should be specified so that he or she can be duly appointed. The WCAB will ordinarily issue an order for autopsy without a hearing. If the dependents, or a majority of them, having custody of the body refuse to allow the autopsy, however, it shall not be performed [*Lab. Code § 5707*; *see* discussion in *§ 577.156*]. In such a case, at the hearing on any application for compensation, there is a disputable presumption that the injury or death was not due to causes entitling the claimants to workers' compensation benefits [*Lab. Code § 5707*].

For a discussion of service of papers and proof of service, see *§ 577.108*.

[3] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 31, § 31.12* (Matthew Bender)

California Workers' Compensation Practice, ch. 17, § 17.112 (Cal. C.E.B. 4th ed. 2000)

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51-577 California Forms of Pleading and Practice--Annotated § 577.414

§ 577.414 Motion to Quash Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]

[1] FORM Motion to Quash Subpoena Duces Tecum [Code Civ. Proc. § 1987.1]

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

_____,	)	
Applicant	)	CASE NO.
vs.	)	_____
_____,	)	MOTION TO QUASH SUBPOENA
Defendants.	)	DUCES TECUM
	)	
	)	

TO DEFENDANTS AND EACH OF YOU:

Please take notice that Applicant moves to quash Defendant's _____ [*name of defendant*] Subpoena Duces Tecum directed to _____ [*specify witness*] seeking the production of "ANY AND ALL MEDICAL RECORDS ... "

1. The subpoena is over broad.

2. The subpoena is not reasonably calculated to lead to the discovery of relevant evidence.

3. Defendant's attempt to obtain "any and all" records on Applicant violates Applicant's legitimate rights to privacy.

4. The subpoena fails to comply with *Code of Civ. Proc. § 1985(b)* in that the affidavit affixed thereto is merely conclusory, stating that the matter sought is necessary and relevant. Defendants are required to state under penalty of perjury "in full detail the materiality of the material sought to the issues involved in this case" [*Code of Civ. Proc. § 1985(b)*].

5. The subpoena is so over inclusive and over broad it would generate production of material not relevant to the workers' compensation case and would invade Applicant's right to privacy.

6. A copy of the subpoena and affidavit are attached hereto and incorporated by reference herein.

WHEREFORE, Applicant respectfully requests that the enclosed Order Quashing/Limiting Subpoena Duces Tecum issue forthwith.
Dated: _____.

RESPECTFULLY SUBMITTED,

_____

[*name of attorney*]

[*name of law firm*]

[*street address of law firm*]

[*city/state/zip code of law firm*]

[*telephone number of law firm*]

State Bar No. _____

Attorney for Applicant

[2] Use of Form

The form in [1], *above* is for optional use by a party whose personal records are subpoenaed and who moves to quash or modify the subpoena, on the grounds that the subpoena requests the disclosure of privileged information or constitutes an invasion of privacy [*see Code of Civ. Proc. § 1987.1*]. A Motion to Quash Subpoena Duces Tecum is the only remedy to prevent a witness from producing original records sought by the subpoena duces tecum [*see Code of Civ. Proc. § 1985.3(g)*; *8 Cal. Code Reg. § 10530*].

[3] Service of Motion

The Motion to Quash, along with a copy of the subpoena, and the form letter should be served on the requesting party at least five days before the date of production. The notice must specify the specific grounds on which production of the personal records should be prohibited. The motion must also be served on opposing counsel, the copy service directed to copy the subpoenaed records, and the medical provider from whom the records are being sought [*Code of Civ. Proc. § 1985.3(g)*].

For further discussion, see *§ 577.147*. See also *§ 577.410*.

[4] Cross References

Hanna, California Law of Employee Injuries and Workers' Compensation, Ch. 25, § 25.43 (Matthew Bender)

California Workers' Compensation Practice, Ch. 17, § 17.48-17.51 (Cal. C.E.B. 4th ed. 2000)

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51-577 California Forms of Pleading and Practice--Annotated § 577.415

§ 577.415 Order Limiting Subpoena Duces Tecum [Code Civ. Proc. § 1987.1, 8 Cal. Code Reg. § 10530]

[1] FORM Order Limiting Subpoena Duces Tecum [Code Civ. Proc. § 1987.1, 8 Cal. Code Reg. § 10530]

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

_____,	)	
Applicant	)	CASE NO.
vs.	)	_____
_____,	)	ORDER LIMITING
Defendants.	)	SUBPOENA DUCES TECUM
	)	
	)	

Pursuant to Applicant's Motion To Quash Subpoena Duces Tecum and good cause appearing therefore,

IT IS HEREBY ORDERED:

That Defendant's Subpoena Duces Tecum dated _____ [*date*] to _____ [*specify witnesses*] shall be limited to only the following records: medical records regarding the _____ [*specify medical records*]. Any other medical records are excluded from the subpoenas and shall not be produced.

Defendant is ordered to notify, in writing, each witness whose records were subpoenaed forthwith that only the records set forth above are to be produced, and that all other records are not to be produced. Defendant shall send copies of its written notice to Applicant's counsel.
Dated: _____.

_____

Workers' Compensation Judge

[2] Use of Form

When a subpoena has been served requiring the attendance of a witness or the production of books, documents, or other items before the Appeals Board, the Board on motion by a party, a witness, or a consumer as described in *Code of Civil Procedure Section 1985.3*, or on its own motion after notice and opportunity to be heard, may make an order quashing the subpoena entirely, modifying it, or directing compliance on certain terms or conditions, including protective orders. A prepared copy of the form in [1], *above*, may be filed along with the Motion to Quash Subpoena Duces Tecum.

For further discussion of subpoenas and motions to quash, see *§§ 577.410*, *577.411* and *577.414*.

[3] Cross References

Hanna, California Law of Employee Injuries and Workers' Compensation, Ch. 25, § 25.43 (Matthew Bender)

California Workers' Compensation Practice, Ch. 17, § 17.48-17.51 (Cal. C.E.B. 4th ed. 2000)

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51-577 California Forms of Pleading and Practice--Annotated § 577.416

§ 577.416 Letter to Physician Regarding Motion to Quash Subpoena Duces Tecum [Code of Civ. Proc. § 1985.3]

[1] FORM Letter to Physician Regarding Motion to Quash Subpoena Duces Tecum [Code of Civ. Proc. § 1985.3]

[*Date*]

[*Name and address*]

Re: _____

Gentlepersons:

This office represents _____ [*name of applicant*] in [*his* or *her*] workers' compensation case. Recently you were served with an invalid and illegal Subpoena Duces Tecum by the defendants in that case. A copy of the subpoena is attached.

This office has filed a Motion to Quash that subpoena since it is without legal authority. You are being served with a copy of the Motion to Quash Subpoena Duces Tecum.

Please be advised that until a Court rules on this matter you should not release any records. If you do release any records prior to the time the Court issues an order, you may be liable for compensatory and punitive damages as well as attorneys fees and costs.

You should disregard the subpoena until the Judge rules.

Very truly yours,

_____

[*name of attorney*]

Attorney at Law

cc: _____

[2] Use of Form

The letter in [1], *above* may be sent to the medical provider advising the provider that no records should be produced or disseminated until the Appeals Board rules on a Motion to Quash the Subpoena Duces Tecum. The letter should not be sent to the Appeals Board; rather, the letter and a copy of the subpoena, and the Motion to Quash should be directed to the custodian of records or another person qualified to certify the records [*Code of Civ. Proc. § 1985.3*; *8 Cal. Code Reg. § 10222*].

Failure to provide notice in the form of a letter to the witness or medical provider that a Motion to Quash is being sought does not invalidate the motion to quash or modify the subpoena, but it may be raised by the witness or medical provider as an affirmative defense in any action for liability for improper release of records [*Code of Civ. Proc. § 1985.3(g)*].

For further discussion of subpoenas and motions to quash, see *§§ 577.410*, *577.411* and *577.414*.

[3] Cross References

Hanna, California Law of Employee Injuries and Workers' Compensation, Ch. 25, § 25.43 (Matthew Bender)

California Workers' Compensation Practice, Ch. 17, § 17.48-17.51 (Cal. C.E.B. 4th ed. 2000)

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51-577 California Forms of Pleading and Practice--Annotated § 577.417

§ 577.417 Letter to Copy Service Regarding Motion to Quash Subpoena Duces Tecum

[1] FORM Letter to Copy Service Regarding Motion to Quash Subpoena Duces Tecum

[*Date*]

[*Name and address*]

Re: _____

Gentlepersons:

You have issued a _____ subpoena at the request of _____ in the case of _____ [*name of case*]. The subpoena is legally invalid for multiple reasons.

Do not accept any records from _____ [*name of witness*] in this matter until the Judge has ruled on the Applicant's Motion to Quash Subpoena Duces Tecum. Only if the Judge allows the subpoena to go forward should you receive records, copy them and disseminate them.

If you have already received any records from _____ [*name of witness*] you must return them to _____ [*name of witness*] immediately. If any copies have been made of the records they must be destroyed immediately.

Please note that if you disseminate these records while the Motion to Quash is pending you may be liable for compensatory and punitive damages, costs, attorneys fees and fines for contempt of Court.

Thank you for your attention to this matter.

Very truly yours,

_____

[*name of attorney*]

Attorney at Law

[2] Use of Form

The letter in [1], *above* may be sent to the copy service advising the service that it has issued a subpoena at the request of the named party and that the subpoena is invalid. The copy service should also be notified that a Motion to Quash has been filed, that the service should not accept records from the "witness" or "medical provider," and that the records should be returned immediately if procured. The letter should not be sent to the Appeals Board; rather, the letter and a copy of the subpoena, and the Motion to Quash should be directed to the custodian of records or another person qualified to certify the records [*Code of Civ. Proc. § 1985.3*; *8 Cal. Code Reg. § 10222*].

Failure to provide notice in the form of a letter to the copy service that a Motion to Quash is being sought does not invalidate the motion to quash or modify the subpoena, but it may be raised by the copy service as an affirmative defense in any action for liability for improper release of records [*Code of Civ. Proc. § 1985.3(g)*].

For further discussion of subpoenas and motions to quash, see *§§ 577.410*, *577.411* and *577.414*.

[3] Cross References

Hanna, California Law of Employee Injuries and Workers' Compensation, Ch. 25, § 25.43 (Matthew Bender)

California Workers' Compensation Practice, Ch. 17, § 17.48-17.51 (Cal. C.E.B. 4th ed. 2000)

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51-577 California Forms of Pleading and Practice--Annotated §§ 577.418-577.419

[Reserved]

§§ 577.418[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.420

§ 577.420 Request for Informal Rating (by Insurance Carrier or Self-Insurer) [8 Cal. Code Reg. § 10167] [DEU Form 201]

[1] FORM Request for Informal Rating (by Insurance Carrier or Self-Insurer) [8 Cal. Code Reg. § 10167] [DEU Form 201]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of DEU Form 201 for use by an insurance carrier or a self-insured employer to request an informal rating from the Disability Evaluation Unit. The form should be used for all injuries occurring prior to January 1, 1991 [*see Lab. Code § 4067.5*]. All requests for ratings must be made in the manner prescribed and on forms provided by the Adminstrative Director. An informal rating will be issued only when no application for adjudication of a claim has been filed with the WCAB [*8 Cal. Code Reg. § 10167*].

For discussion of informal permanent disability ratings, see *§ 577.45[4][c]*.

[3] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, Ch. 32, § 32.05[4]* (Matthew Bender)

California Workers' Compensation Practice, Ch. 16, § 16.15 (Cal. C.E.B. 3d ed. 1985)

http://www.dir.ca.gov/DWC/forms.html

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51-577 California Forms of Pleading and Practice--Annotated § 577.421

§ 577.421 Employee's Disability Questionnaire [DWC-AD Form 100 (DEU)]

[1] FORM Employee's Permanent Disability Questionnaire [DWC-AD Form 100 (DEU)]

Click here to view image.

[2] Use of Form

This form in [1], *above*, is a reproduction of DWC-AD Form 100 (DEU), Employee's Disability Questionnaire, which must be provided to an unrepresented injured worker by the insurance carrier or self-insurer before the worker's scheduled examination by the Qualified Medical Evaluator [*8 Cal. Code Reg. § 10160(b)*]. The questionnaire may be reproduced by automated office equipment or other means as long as the printed content and layout of the form are identical to that in the foregoing form [*8 Cal. Code Reg. § 10161.1*].

Effective November 17, 2008 [*see 8 Cal. Code Reg. §§ 10210*-10297 (Rules of Court Administrator, including regulations relating to Electronic Adjudication Management System (EAMS))], DWC requires (with a handful of exceptions) that all documents designed and created by DWC to be read by electronic scanners be used in place of the previous, equivalent DWC forms. These new forms, called "optical character recognition forms" (OCR forms) [*see 8 Cal. Code Reg. § 10210(x)* ("OCR form" defined)], may be downloaded and saved, then filled in and printed, as needed, with the printouts being filed with DWC and served on other parties and attorneys, as required by regulations. The form in [1], above, is one such form. Readers should check, periodically, DWC's website for further developments in the implementation of EAMS. DWC's website address is: http://www.dir.ca.gov/dwc/dwc_home_page.htm

For discussion of EAMS, see *§ 577.12A*.

The injured worker will be instructed to complete the questionnaire and to provide it to the Qualified Medical Evaluator at the time of the examination [*8 Cal. Code Reg. § 10160(b)*]. The medical evaluator must submit the following items:

- The questionnaire;

- A completed DWC-AD Form 101 (DEU), Request for Summary Rating Determination, which must be supplied to the medical evaluator by the insurance carrier, self-insurer, or injured worker [*8 Cal. Code Reg. § 10160(c)*; *see § 577.422*]; and

- The evaluator's formal medical evaluation, to the Disability Evaluation Unit.

Once the Unit has received all of these documents from the medical evaluator, it will prepare the summary rating determination [*8 Cal. Code Reg. § 10160(a)*].

A request for a formal medical evaluation will not be considered received until all of these documents are received in the office of the Disability Evaluation Unit having jurisdiction over the injured employee's area of residence. Any requests received without all the required documents will be returned to the sender [*8 Cal. Code Reg. § 10160(e)*]. On request, the Unit will provide a listing of its offices with their respective areas of jurisdiction [*8 Cal. Code Reg. § 10160(c)*].

[3] Cross References

http://www.dir.ca.gov/DWC/forms.html

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51-577 California Forms of Pleading and Practice--Annotated § 577.422

§ 577.422 Request for Summary Rating Determination of Qualified Medical Evaluator's Report [DWC-AD Form 101 (DEU)]

[1] FORM Request for Summary Rating Determination of Qualified or Agreed Medical Examiner's Report [DWC-AD Form 101 (DEU)]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of DWC-AD Form 101 (DEU), Request for Summary Rating Determination of Qualified Medical Evaluator's Report [*8 Cal. Code Reg. § 10161(b)*]. The form may be reproduced by automated office equipment or other means as long as the printed content and layout of the form are identical to that in the official form [*8 Cal. Code Reg. § 10161.1*]. The form is one of the documents that constitute an injured employee's properly prepared request for a summary rating [*8 Cal. Code Reg. §§ 10160(a)* (unrepresented workers), 10160.5(a) (represented workers)].

For injuries occurring on or after January 1, 1991, and before January 1, 1994, if the injured worker is represented by an attorney, an informal request for a summary rating is often requested because of the backlog of cases needing summary ratings. If, for some reason, an informal request has not been made, the person requesting the summary rating must complete DEU Form 101 and submit it, together will all medical reports and medical records concerning the case, to the Qualified or Agreed Medical Evaluator [*8 Cal. Code Reg. § 10160.5(a), (b)*]. Once the medical evaluator has completed the evaluation, the completed medical evaluation report must be sent together with the completed DEU Form 101 to the office of the Disability Evaluation Unit designated on the form, with copies sent to the party or parties requesting the evaluation [*8 Cal. Code Reg. § 10160.5(b)*]. Once the Unit has received these documents, it will prepare a summary rating determination [*8 Cal. Code Reg. § 10160.5(a)*]. If a case is settled after a rating has been requested but before the rating is issued, the person who requested the rating must notify the Unit office that the case has been settled [*8 Cal. Code Reg. § 10160.5(d)*].

Effective November 17, 2008 [*see 8 Cal. Code Reg. §§ 10210*-10297 (Rules of Court Administrator, including regulations relating to Electronic Adjudication Management System (EAMS))], DWC requires (with a handful of exceptions) that all documents designed and created by DWC to be read by electronic scanners be used in place of the previous, equivalent DWC forms. These new forms, called "optical character recognition forms" (OCR forms) [*see 8 Cal. Code Reg. § 10210(x)* ("OCR form" defined)], may be downloaded and saved, then filled in and printed, as needed, with the printouts being filed with DWC and served on other parties and attorneys, as required by regulations. The form in [1], above, is one such form. Readers should check, periodically, DWC's website for further developments in the implementation of EAMS. DWC's website address is: http://www.dir.ca.gov/dwc/dwc_home_page.htm

For discussion of EAMS, see *§ 577.12A*.

For further discussion of summary rating determinations, see *§ 577.45[4][d]*.

[3] Unrepresented Employees

If the injured employee is not represented by an attorney, the request must be completed by the insurance carrier, self-insurer, or injured worker and sent, together with all medical reports and medical records relating to the case, to the Qualified Medical Evaluator before the employee's scheduled examination. A copy of the request must also be served on the opposing party [*8 Cal. Code Reg. § 10160(c)*]. When a summary rating determination has been requested, the medical evaluator must submit the completed DWC-AD Form 101 (DEU), together with a completed DWC-AD Form 100 (DEU), Employee's Disability Questionnaire, which was submitted by the employee prior to the examination [*see § 577.421*], the evaluator's formal medical evaluation, and a document cover sheet and a separator sheet, pursuant to *8 Cal. Code Reg. § 10232(b)* (these sheets to be served on only the Disability Evaluation Unit), to the office of the Disability Evaluation Unit having jurisdiction over the employee's area of residence, with a copy to the parties [*8 Cal. Code Reg. § 10160(d)*].

A list of the Unit's offices with their respective areas of jurisdiction is available from the Unit on request [*8 Cal. Code Reg. § 10160(c)*]. Once the Unit has received all of these documents from the medical evaluator, it will prepare the summary rating determination [*8 Cal. Code Reg. § 10160(a)*]. A request for a formal medical evaluation will not be considered received until all of these documents are received in the office of the Disability Evaluation Unit having jurisdiction over the injured employee's area of residence. Any requests received without all the required documents will be returned to the sender [*8 Cal. Code Reg. § 10160(e)*].

[4] Cross References

http://www.dir.ca.gov/DWC/forms.html

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51-577 California Forms of Pleading and Practice--Annotated § 577.423

§ 577.423 Request for Summary Rating Determination of Primary Treating Physician's Report [DWC-AD Form 102 (DEU)]

[1] FORM Request for Summary Rating Determination of Primary Treating Physician's Report [DWC-AD Form 102 (DEU)]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of DWC-AD Form 102 (DEU), Request for Summary Rating Determination of Primary Treating Physician's Report [*8 Cal. Code Reg. § 10161(c)*]. The form is used to obtain a summary rating determination from a Disability Evaluation Unit based on the primary treating physician's report [*8 Cal. Code Reg. § 10160.1*; *see 8 Cal. Code Reg. § 9785*]. The form may only be used if the injury occurred on or after January 1, 1994, and the injured worker is unrepresented [*8 Cal. Code Reg. § 10160.1*]. The form may be reproduced by automated office equipment or other means as long as the printed content and layout of the form are identical to that in the official form [*8 Cal. Code Reg. § 10161.1*].

Effective November 17, 2008 [*see 8 Cal. Code Reg. §§ 10210*-10297 (Rules of Court Administrator, including regulations relating to Electronic Adjudication Management System (EAMS))], DWC requires (with a handful of exceptions) that all documents designed and created by DWC to be read by electronic scanners be used in place of the previous, equivalent DWC forms. These new forms, called "optical character recognition forms" (OCR forms) [*see 8 Cal. Code Reg. § 10210(x)* ("OCR form" defined)], may be downloaded and saved, then filled in and printed, as needed, with the printouts being filed with DWC and served on other parties and attorneys, as required by regulations. The form in [1], above, is one such form. Readers should check, periodically, DWC's website for further developments in the implementation of EAMS. DWC's website address is: http://www.dir.ca.gov/dwc/dwc_home_page.htm

For discussion of EAMS, see *§ 577.12A*.

To request a summary rating determination based on the report of the primary treating physician, the carrier, self-insured employer, or employee must file this form along with a copy of the primary treating physician's report, if the report has not already been filed in EAMS, with the Disability Evaluation Unit *8 Cal. Code Reg. § 10160.1(b)*]. A copy of the request and the report must also be served on the non-requesting party, along with proof of service [*8 Cal. Code Reg. § 10160.1(c)*].

For a discussion of summary rating determinations, see *§ 577.45[4][d]*.

[3] Cross References

http://www.dir.ca.gov/DWC/forms.html

Hanna, *California Law of Employee Injuries and Workers' Compensation, Ch. 32, § 32.05[3]* (Matthew Bender)

California Workers' Compensation Practice, Ch. 5, § 5.60 (Cal. C.E.B. 4th ed. 2000)

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51-577 California Forms of Pleading and Practice--Annotated § 577.424

§ 577.424 Request for Consultative Rating [DWC-AD Form 104 (DEU)]

[1] FORM Request for Consultative Rating [DWC-AD Form 104 (DEU)]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of DWC-AD Form 104 (DEU), Request for Consultative Rating [*8 Cal. Code Reg. § 10166*]. The form may be used by the WCAB, WCJs, WCJs Pro-Tempore, Settlement Conference Referees, Arbitrators, and Information and Assistance Officers to request a consultative rating for a represented injured worker [*8 Cal. Code Reg. § 10166(a), (b)*]. The form may also be submitted to the DEU by employers, injured workers or their respective representatives to make reasonable requests for consultative rating determinations [*8 Cal. Code Reg. § 10166(c)*].

Effective November 17, 2008 [*see 8 Cal. Code Reg. §§ 10210*-10297 (Rules of Court Administrator, including regulations relating to Electronic Adjudication Management System (EAMS))], DWC requires (with a handful of exceptions) that all documents designed and created by DWC to be read by electronic scanners be used in place of the previous, equivalent DWC forms. These new forms, called "optical character recognition forms" (OCR forms) [*see 8 Cal. Code Reg. § 10210(x)* ("OCR form" defined)], may be downloaded and saved, then filled in and printed, as needed, with the printouts being filed with DWC and served on other parties and attorneys, as required by regulations. The form in [1], above, is one such form. Readers should check, periodically, DWC's website for further developments in the implementation of EAMS. DWC's website address is: http://www.dir.ca.gov/dwc/dwc_home_page.htm

For discussion of EAMS, see *§ 577.12A*.

For a discussion of consultative rating determinations, see *§ 577.45[4][e]*.

[3] Purpose of Requesting Consultative Rating Determination

Consultative rating determinations may be requested to determine the ratable significance of factors, review proposed compromise and release agreements for adequacy, determine commuted values, resolve occupational questions or any other matter within the expertise of disability evaluators [*8 Cal. Code Reg. § 10166(b)*].

[4] If Application for Adjudication Has Been Filed

No consultative rating determination will be provided for a case in which an application for adjudication of claim has been filed without prior written authorization of the Appeals Board, a WCJ, a WCJ pro tempore, a settlement conference referee, an arbitrator, or an information and assistance officer. If an application has been filed, the disability evaluator may require that any request for consultative rating determination be accompanied by the Appeals Board file [*8 Cal. Code Reg. § 10166(e)*].

[5] Cross References

http://www.dir.ca.gov/DWC/forms.html

Hanna, *California Law of Employee Injuries and Workers' Compensation, Ch. 32, § 32.05[5]* (Matthew Bender)

California Workers' Compensation Practice, Ch. 5, § 5.62 (Cal. C.E.B. 4th ed. 2000)

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51-577 California Forms of Pleading and Practice--Annotated §§ 577.425-577.429

[Reserved]

§§ 577.425[Reserved]

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5. Joinder and Dismissal of Parties

51-577 California Forms of Pleading and Practice--Annotated § 577.430

§ 577.430 Petition to Join Omitted Employers in Occupational Disease or Cumulative Injury Case [Lab. Code § 5500.5(b); 8 Cal. Code Reg. § 10380]

[1] FORM Petition to Join Omitted Employers in Occupational Disease or Cumulative Injury Case [Lab. Code § 5500.5(b); 8 Cal. Code Reg. § 10380]

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD

_____ [*name of employee or other applicant*], _____ [Applicant *or* Employee] [_____ (*address*)] [Employee's Social Security No. _____] vs. _____ [*name of employer*] _____ [Defendant *or* Employer] [_____ (*address*)] _____ [*name*], Insurance Carrier [_____ (*address*)] [*If applicant is someone other than injured employee, add following:*] [_____ (*name of employee*), Employee _____ (*address*) Employee's Social Security No. _____]	CASE NO. _____ _____ [*Title of document, e.g.,* PETITION FOR _____ (*specify*)]

_____

Petitioner _____ [*name*], _____ [*status, e.g.,* a defendant herein], applies for an order joining other employers as parties defendant and in support of this request avers:

1. The application of _____ [*name*] states that between _____ and _____ [*dates*], he/she developed _____ [*specify* occupational disease *or* cumulative injury], which arose out of and occurred during the course of his/her employment during that period.

2. Applicant was in the employ of petitioner from _____ to _____ [*dates*], and at no other time.

3. Other employers who employed the applicant during the alleged period of exposure to the hazards causing the applicant's _____ [occupational disease *or* cumulative injury] are as follows: _____ [*specify name of each of the other employers and dates or approximate dates of employment by each*]. All or part of applicant's alleged _____ [occupational disease *or* cumulative injury], if shown to have been industrially caused, arose out of and occurred in the course of applicant's employment by the foregoing named employers.

WHEREFORE, petitioner requests that an order issue directing that _____ [*names of other employers*] [and all other employers of applicant during the period _____ to _____ (*dates*),] be joined as defendants in this proceeding.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Use of Form

The form in [1], *above*, illustrates a petition for use by a party to request the joinder of other persons or entities as parties defendant in a case arising out of an occupational disease or cumulative injury [*see Lab. Code § 5500.5(b)*; *see also* discussion under *§ 577.144*]. For a discussion of service of papers and proof of service, see *§ 577.108* . See also Ch. 518, *Service of Summons and Papers* .

[3] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 26, § 26.01[2][c]* (Matthew Bender)

California Workers' Compensation Practice, ch. 7, § 7.60 (Cal. C.E.B. 3d ed. 1985)

Witkin, Summary of California Law, vol. 2, *Worker's Compensation*, § 352 (10th ed. 2005)

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5. Joinder and Dismissal of Parties

51-577 California Forms of Pleading and Practice--Annotated § 577.431

§ 577.431 Petition to Dismiss Improperly Joined Insurance Carrier [8 Cal. Code Reg. § 10570]

[1] FORM Petition to Dismiss Improperly Joined Insurance Carrier [8 Cal. Code Reg. § 10570]

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD

_____ [*name of employee or other applicant*], _____ [Applicant *or* Employee] [_____ (*address*)] [Employee's Social Security No. _____]	CASE NO. _____
vs.	_____ [*Title of document, e.g.,* PETITION FOR _____ (*specify*)]
_____ [*name of employer*] _____ [Defendant *or* Employer] [_____ (*address*)] _____ [*name*], Insurance Carrier [_____ (*address*)] [*If applicant is someone other than injured employee, add following:*] [_____ (*name of employee*), Employee _____ (*address*) Employee's Social Security No. _____]	

Petitioner _____ [*name*], a defendant herein, hereby requests its dismissal from this proceeding and in support of its request avers:

1. The application of _____ [*name*] states that applicant received an injury arising out of and in the course of his/her employment with defendant _____ [*name of employer*] on _____ [*date of injury*], and that petitioner _____ [*name of insurance carrier*] was the employer's insurance carrier on that date.

2. Petitioner _____ [*name*] was not the insurance carrier of _____ [*name of employer*] at the time of injury, and _____ [has never been, and is not now, the insurance carrier for that employer *or* ceased to insure that employer for workers' compensation liability on _____ (*date before injury*) *or* did not begin to insure that employer for workers' compensation liability until _____ (*date after injury*)].

[3. On the date of applicant's injury, the employer's compensation insurance carrier was _____ (*name*).]

WHEREFORE, petitioner requests that it be dismissed as a party to this proceeding and that it be granted all other and further relief that is necessary and proper.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Use of Form

The form in [1], *above*, illustrates a petition for use by an insurance carrier that has been improperly joined as a defendant in a workers' compensation proceeding to obtain its dismissal from the case. Dismissal of improper or unnecessary parties may be made by interlocutory order [*8 Cal. Code Reg. § 10570*].

For further discussion on dismissal of parties, see *§ 577.144*. See also *§ 577.430*.

[3] Cross References

California Workers' Compensation Practice, ch. 7, § 7.59 (Cal. C.E.B. 3d ed. 1985)

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51-577 California Forms of Pleading and Practice--Annotated §§ 577.432-577.439

[Reserved]

§§ 577.432[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.440

§ 577.440 Substitution of Attorneys [Code Civ. Proc. § 284; 8 Cal. Code Reg. § 10774] [DIA WCAB Form 36]

[1] FORM Substitution of Attorneys [Code Civ. Proc. § 284; 8 Cal. Code Reg. § 10774] [DIA WCAB Form 36]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of DIA WCAB Form 36 for use by a party to substitute attorneys. Copies may be obtained at any WCAB office [*see Code Civ. Proc. § 284*; *8 Cal. Code Reg. § 10774*].

Substitution or dismissal of attorneys must be made in the manner provided by *Code Civ. Proc. §§ 284, 285*, and *286* [*8 Cal. Code Reg. § 10774*]. *Code Civ. Proc. § 284* authorizes substitution

- On the consent of both the attorney and client filed in the case or entered in the minutes; or
- By order on application of either attorney or client.

Code Civ. Proc. § 285 requires notice of the substitution be given to the adverse parties.

Code Civ. Proc. § 286 covers the situation in which an attorney dies, is removed or suspended, or ceases to act as such. For further discussion of these statutes, see Ch. 72, *Attorney Practice and Ethics* .

[3] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 20, § 20.03*

California Workers' Compensation Practice, ch. 5, §§ 5.47-5.49 (Cal. C.E.B. 3d ed. 1985)

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51-577 California Forms of Pleading and Practice--Annotated § 577.441

§ 577.441 Notice of Dismissal of Attorney [Code Civ. Proc. § 285; 8 Cal. Code Reg. § 10774] [DIA WCAB Form 37]

[1] FORM Notice of Dismissal of Attorney [Code Civ. Proc. § 285; 8 Cal. Code Reg. § 10774] [DIA WCAB Form 37]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of DIA WCAB Form 37 for use by a party to give adverse parties notice that the party has dismissed his or her attorney and in effect substituted himself or herself in propria persona [*see Code Civ. Proc. § 285*; *8 Cal. Code Reg. § 10774*]. Copies may be obtained at any WCAB office. For further discussion, see *§ 577.440*.

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51-577 California Forms of Pleading and Practice--Annotated §§ 577.442-577.449

[Reserved]

§§ 577.442[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.450

§ 577.450 Notice of Dismissal of Inactive Claim by Operation of Law When Claim Has Been Denied (Injuries Occurring Before January 1, 1994) [Lab. Code § 5404.5(a); 8 Cal. Code Reg. § 10141(a)]

[1] FORM Notice of Dismissal of Inactive Claim by Operation of Law When Claim Has Been Denied (Injuries Occurring Before January 1, 1994) [Lab. Code § 5404.5(a); 8 Cal. Code Reg. § 10141(a)]

NOTICE REGARDING WORKERS'
COMPENSATION CLAIM

Date(s) of Injury: _____ [*date(s)*]
Name of Employee: _____ [*name*]
Name of Employer: _____ [*name*]
Claims Administrator: _____ [*name, address, telephone number*]
Claim Number, if any: _____ [*number or* N/A]

You applied for workers' compensation benefits. A copy of your claim form is attached. We have not heard from you since we sent you a letter denying your claim on [date]. Your case has been inactive for at least 180 days. If you are still claiming benefits, you must file an Application for Adjudication of Claim with the Workers' Compensation Appeals Board within 180 days of the date this notice is served on you. The date of service is listed at the bottom of this form. IF YOU DO NOT FILE THE APPLICATION BY THE DEADLINE, THE CLAIM WILL AUTOMATICALLY BE DISMISSED "BY OPERATION OF LAW." This means you will not be able to claim benefits for the injury or illness listed on the claim form unless you file the Application for Adjudication of Claim by the deadline. Please call me at [*telephone number*] if you want more information or help figuring out the deadline for filing an Application.

You can get the Application form, help figuring out the deadline for filing an Application, and information about your claim by calling the State of California Division of Workers' Compensation Information and Assistance Office. [*telephone number of office closest to injured worker's residence*]. You may hear recorded information by calling

1-800-736-7401. You may also consult an attorney.

_____ [*signature*]

_____ [*typed name of Claims Administrator Representative*]

Date Notice Is Served: _____

[2] Use of Form

The form in [1], *above*, is for use by the employer's claims administrator seeking to dismiss an injured employee's claim for benefits by operation of law for an injury that occurred before January 1, 1994, when the claim has been denied and there has been no activity for at least 180 days [*Lab. Code § 5404.5(a)*; *8 Cal. Code Reg. § 10141(a)*].

The text of the form is specifically prescribed by regulation [*see 8 Cal. Code Reg. § 10141(a)(1), (c)*], and the blanks must be completed by the claims administrator to specify the information described in brackets [*8 Cal. Code Reg. § 10141(a)(2)*]. A copy of the employee's claim for must be attached to the claim form prior to service [*8 Cal. Code Reg. § 10141(c)*].

For further discussion of dismissal of inactive claims, see *§ 577.43[6]*.

[3] Service of Form

The form must be served on the employee in the manner prescribed by the Code of Civil Procedure for service of summons [*Lab. Code § 5404.5(a)*; *8 Cal. Code Reg. § 10141(d)*; *see Code Civ. Proc. § 415.10 et seq.* (rules of service)]. If the employee is represented by an attorney, the claims administrator must also serve a copy of the notice on the attorney by personal delivery or first class mail. When no Application for Adjudication of Claim has been filed, but the WCAB has assigned a case number to the matter because of a pre-Application filing, the claims administrator must also serve a copy of the notice on the Appeals Board with proof of service made according to Rule 10975 of the Workers' Compensation Appeals Board's Rules of Practice and Procedure [*8 Cal. Code Reg. § 10141(d)*; *see 8 Cal. Code Reg. § 10975*].

The date of service must be inserted by the claims administrator or process server to accurately reflect the date service is effected in accordance with the Code of Civil Procedure [*8 Cal. Code Reg. § 10141(a)(2)*].

[4] Determining When Claim Is Not Inactive

For purposes of this form, a claim is *not* inactive, and therefore not subject to dismissal by operation of law if, during the 180 days before the notice is served [*8 Cal. Code Reg. § 10141(e)*],

- The employee has demanded payment or provision of any type of benefits;
- The claims administrator knows that there are benefits due and unpaid;
- Treatment has been rendered for the industrial injury;
- There has been a medical-legal evaluation of the employee;
- There has been a deposition with regard to the claim; or

- The claims administrator has other knowledge that the employee is actively pursuing the claim.

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51-577 California Forms of Pleading and Practice--Annotated § 577.451

§ 577.451 Notice of Dismissal of Inactive Claim by Operation of Law When Benefits Have Been Furnished (Injuries Occurring Before January 1, 1994) [Lab. Code § 5404.5(b); 8 Cal. Code Reg. § 10141(b)]

[1] FORM Notice of Dismissal of Inactive Claim by Operation of Law When Benefits Have Been Furnished (Injuries Occurring Before January 1, 1994) [Lab. Code § 5404.5(b); 8 Cal. Code Reg. § 10141(b)]

NOTICE REGARDING WORKERS'
COMPENSATION CLAIM

Date(s) of Injury: _____ [*date(s)*]

Name of Employee: _____ [*name*]

Name of Employer: _____ [*name*]

Claims Administrator: _____ [*name, address, telephone number*]

Claim Number, if any: _____ [*number or* N/A]

You applied for workers' compensation benefits. A copy of your claim form is attached. Your case has been inactive for at least 180 days.

Your right to workers' compensation benefits will end on [insert date--either five years from the date of injury or one year from the last furnishing of benefits, whichever is later], unless you file an Application for Adjudication of Claim by that date. That date is [*insert either* five years from the date of you injury *or* one year from the date of the last benefit provided to you].

IF YOU DO NOT FILE THE APPLICATION BY THE DEADLINE, THE CLAIM WILL AUTOMATICALLY BE DISMISSED "BY OPERATION OF LAW." This means you will not be able to claim benefits for the injury or illness listed on the claim form unless you file the Application for Adjudication of Claim by the deadline. Please call me at [*telephone number*] if you want more information.

You can get the Application form and information about your claim by calling the State of California Division of Workers' Compensation Information and Assistance Office. [*telephone number of office closest to injured worker's residence*]. You may hear recorded information by calling 1-800-736-7401. You may also consult an attorney.

_____ [*signature*]

_____ [*typed name of Claims Administrator Representative*]

Date Notice Is Served: _____

[2] Use of Form

The form in [1], *above*, is for use by the employer's claims administrator seeking to dismiss an injured employee's claim for benefits by operation of law when a claim form has been filed for an injury that occurred before January 1, 1994, benefits have been furnished, and there has been no activity for at least 180 days [*Lab. Code § 5404.5(b)*; *8 Cal. Code Reg. § 10141(b)*].

The text of the form is specifically prescribed by regulation [*see 8 Cal. Code Reg. § 10141(b)(1)(c)*], and the blanks must be completed by the claims administrator to specify the information described in brackets [*8 Cal. Code Reg. § 10141(b)(3)*]. A copy of the employee's claim for must be attached to the claim form prior to service [*8 Cal. Code Reg. § 10141(c)*].

The date of last furnishing of benefits is the later of the following [*8 Cal. Code Reg. § 10120(b)(2)*]:

- The latest date the employee received medical or rehabilitation services; or

- The latest date that payment of any compensation benefit was mailed or personally delivered to the employee or service provider.

For further discussion of dismissal of inactive claims, see *§ 577.43[6]*.

[3] Service of Form

The form must be served on the employee in the manner prescribed by the Code of Civil Procedure for service of summons [*Lab. Code § 5404.5(b)*; *8 Cal. Code Reg. § 10141(d)*; *see Code Civ. Proc. § 415.10 et seq.* (rules of service)]. If the employee is represented by an attorney, the claims administrator must also serve a copy of the notice on the attorney by personal delivery or first class mail. When no Application for Adjudication of Claim has been filed, but the WCAB has assigned a case number to the matter because of a pre-Application filing, the claims administrator must also serve a copy of the notice on the Appeals Board with proof of service made according to Rule 10975 of the Workers' Compensation Appeals Board's Rules of Practice and Procedure [*8 Cal. Code Reg. § 10141(d)*; *see 8 Cal. Code Reg. § 10975*].

The date of service should be inserted by the claims administrator or process server to accurately reflect the date service is effected in accordance with the Code of Civil Procedure.

[4] Determining When Claim Is Not Inactive

For purposes of this form, a claim is *not* inactive, and therefore not subject to dismissal by operation of law if, during the 180 days before the notice is served [*8 Cal. Code Reg. § 10141(e)*],

- The employee has demanded payment or provision of any type of benefits;
- The claims administrator knows that there are benefits due and unpaid;
- Treatment has been rendered for the industrial injury;
- There has been a medical-legal evaluation of the employee;
- There has been a deposition with regard to the claim; or
- The claims administrator has other knowledge that the employee is actively pursuing the claim.

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51-577 California Forms of Pleading and Practice--Annotated § 577.452

§ 577.452 Request for Dismissal by Employee [8 Cal. Code Reg. § 10780] [DWC WCAB Form 43]

[1] FORM Request for Dismissal by Employee [8 Cal. Code Reg. § 10780] [DWC WCAB Form 43]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of DWC WCAB Form 43 for use by an employee to request dismissal of the proceeding without prejudice. Except as provided in *8 Cal. Code Reg. §§ 10562* (failure to appear), 10582 (inactive cases), and unless good cause to the contrary appears, orders of dismissal of claim forms for injuries occurring on or after January 1, 1990, and before January 1, 1994, and orders of dismissal of applications for adjudication for injuries occurring before January 1, 1990, or on or after January 1, 1994, must be issued forthwith when requested by the employee [*8 Cal. Code Reg. § 10780*].

For a discussion of dismissals, generally, see *§ 577.155*.

[3] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 23, § 23.11[4][b]* (Matthew Bender)

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51-577 California Forms of Pleading and Practice--Annotated § 577.453

§ 577.453 Petition for Dismissal by Defendant [Lab. Code § 5507; 8 Cal. Code Reg. §§ 10445, 10562, 10582]

[1] FORM Petition for Dismissal by Defendant [Lab. Code § 5507; 8 Cal. Code Reg. §§ 10445, 10562, 10582]

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD

_____ [*name of employee or other applicant*], _____ [Applicant *or* Employee] [_____ (*address*)] [Employee's Social Security No. _____] vs. _____ [*name of employer*] _____ [Defendant *or* Employer] [_____ (*address*)] _____ [*name*], Insurance Carrier [_____ (*address*)] [*If applicant is someone other than injured employee, add following:*] [_____ (*name of employee*), Employee _____ (*address*) Employee's Social Security No. _____]	CASE NO. _____ _____ [*Title of document, e.g.,* PETITION FOR _____ (*specify*)]

Defendant _____ [*name*] hereby requests that the application for adjudication herein be dismissed without prejudice for the following reasons(s):

[*Specify all appropriate grounds for dismissal, such as the following*]

1. The application shows on its face that the applicant is not entitled to compensation in that _____ [*specify how fact is shown*].

2. The application was filed on _____ [*date*], and was not activated for hearing within one year thereafter.

3. It appears of record that the applicant was served with the notice of hearing on _____ [*date*], but failed to appear at the hearing, either in person or by attorney or agent.

4. The applicant has claimed that his/her injury was the result of the willful and serious misconduct of the employer but failed to state the basis of the claim in his/her application.

[*CONTINUE*]

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Defendant _____ [*name*]

[2] Use of Form

The form in [1], *above*, is for use by a defendant to petition for an order dismissing the application [*see* discussion in *§§ 577.83, 577.143[2], 577.155* and *577.396*]. For a discussion of service of papers and proof of service, see *§ 577.108* .

[3] Notice of Intention

All orders of dismissal, except those requested by an applicant, will issue only after service of a notice of intention allowing at least 15 days for the applicant to show good cause to the contrary [*8 Cal. Code Reg. § 10780*].

[4] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 25, § 25.26* (Matthew Bender)

California Workers' Compensation Practice, ch. 6, § 6.44; ch. 7, § 7.58 (Cal. C.E.B. 3d ed. 1985)

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51-577 California Forms of Pleading and Practice--Annotated §§ 577.454-577.459

[Reserved]

§§ 577.454[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.460

§ 577.460 Compromise and Release [DWC-CA Form 10214(c)]

[1] FORM Compromise and Release [DWC-CA Form 10214(c)]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of DWC-CA Form 10214(c) for use in compromising an employee's claim for workers' disability benefits and releasing the employer and its insurer from further liability [*see Lab. Code §§ 5000, 5003*; *8 Cal. Code Reg. § 10874*].

Paragraph 2 of the form is the release clause, providing that the employee releases the employer and the employer's insurer of all liability for the specified industrial injury. It specifically includes release of liability to the employee's "dependents, heirs, executors, representatives, administrators or assigns." Paragraph 2 concludes with the following limitation: "Execution of this form has no effect on claims that are not within the scope of the workers' compensation law or claims that are not subject to the exclusivity provisions of the workers' compensation law, unless otherwise expressly stated."

Paragraph 4 provides that, unless otherwise expressly stated, the agreement releases all claims of the employee's dependents to death benefits relating to the injury covered by the agreement. It adds that the parties have considered the release of these benefits in arriving at the sum of money set forth in the agreement, and it concludes that any addendum duplicating the language of this paragraph is no longer necessary and is not to be attached.

Paragraph 5 states that, unless otherwise expressly ordered by the Appeals Board or a WCJ, approval of the agreement does not release any claim the employee may have for vocational rehabilitation benefits or supplemental job displacement benefits.

Any accrued claims for *Lab. Code § 5814* penalties are included in this settlement unless expressly excluded.

Effective November 17, 2008 [*see 8 Cal. Code Reg. §§ 10210*-10297 (Rules of Court Administrator, including regulations relating to Electronic Adjudication Management System (EAMS))], DWC requires (with a handful of exceptions) that all documents designed and created by DWC to be read by electronic scanners be used in place of the previous, equivalent DWC forms. These new forms, called "optical character recognition forms" (OCR forms) [*see 8 Cal. Code Reg. § 10210(x)* ("OCR form" defined)], may be downloaded and saved, then filled in and printed, as needed, with the printouts being filed with DWC and served on other parties and attorneys, as required by regulations. The form in [1], above, is one such form. Readers should check, periodically, DWC's website for further developments in the implementation of EAMS. DWC's website address is: http://www.dir.ca.gov/dwc/dwc_home_page.htm

For discussion of EAMS, see *§ 577.12A.*

For forms for use in death cases and third-party cases, see *§§ 577.461*, *577.462*, respectively.

For a general discussion of compromise and release agreements, see *§ 577.130* et seq.

[3] Execution and Attestation or Acknowledgment

Every release or compromise agreement must be duly executed, and the signature of the employee or other beneficiary must be attested by two disinterested witnesses or acknowledged before a notary public [*Lab. Code § 5003*].

[4] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 29, § 29.03[1]*

California Workers' Compensation Practice, ch. 13, § 13.20 (Cal. C.E.B. 3d ed. 1985)

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51-577 California Forms of Pleading and Practice--Annotated § 577.461

§ 577.461 Compromise and Release--Dependency Claim [DWC-CA Form 10214(d)]

[1] FORM Compromise and Release--Dependency Claim [DWC-CA Form 10214(d)]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of DWC-CA Form 10214(d) for use by the dependents of a deceased employee to compromise their claim for workers' death benefits and to release the employer and its insurer from further liability [*see Lab. Code §§ 5000, 5003, 5004*; *8 Cal. Code Reg. § 10874*]. For discussion of persons who are dependents, see *§ 577.14[2]*. For a general discussion of compromise and release agreements, see *§ 577.130* et seq. See also, *§ 577.460*.

Effective November 17, 2008 [*see 8 Cal. Code Reg. §§ 10210*-10297 (Rules of Court Administrator, including regulations relating to Electronic Adjudication Management System (EAMS))], DWC requires (with a handful of exceptions) that all documents designed and created by DWC to be read by electronic scanners be used in place of the previous, equivalent DWC forms. These new forms, called "optical character recognition forms" (OCR forms) [*see 8 Cal. Code Reg. § 10210(x)* ("OCR form" defined)], may be downloaded and saved, then filled in and printed, as needed, with the printouts being filed with DWC and served on other parties and attorneys, as required by regulations. The form in [1], above, is one such form. Readers should check, periodically, DWC's website for further developments in the implementation of EAMS. DWC's website address is: http://www.dir.ca.gov/dwc/dwc_home_page.htm

For discussion of EAMS, see *§ 577.12A*.

[3] Service of Compromise and Release

When a compromise and release is filed in a death case in which there is a bona fide issue as to partial or total dependency, the filing party must serve copies of the document on the Department of Industrial Relations, Death

Without Dependents Unit [*8 Cal. Code Reg. § 10501*].

[4] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 29, § 29.03[4]*

California Workers' Compensation Practice, ch. 13, § 13.40 (Cal. C.E.B. 3d ed. 1985)

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51-577 California Forms of Pleading and Practice--Annotated § 577.462

§ 577.462 Compromise and Release--Third Party [DWC-CA Form 10214(e)]

[1] FORM Compromise and Release--Third Party [DWC-CA Form 10214(e)]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of DWC-CA Form 10214(e) for use as a compromise and release agreement between the employee and the employer after settlement of a claim against a third party for injury to the employee [*see Lab. Code §§ 3860(f), 3861, 5000, 5003*; *8 Cal. Code Reg. § 10874*]. Paragraph 4 of the Instructions of the form requires that a copy of the settlement agreement with the third-party tortfeasor, if in writing, be attached. For a discussion of third-party liability and limitations on the rights of the employee and employer to settle their claims against the third party, see *§ 577.335[3][a]*. For a general discussion of compromise and release agreements, see *§ 577.130* et seq. See also *§§ 577.460, 577.461*.

Effective November 17, 2008 [*see 8 Cal. Code Reg. §§ 10210*-10297 (Rules of Court Administrator, including regulations relating to Electronic Adjudication Management System (EAMS))], DWC requires (with a handful of exceptions) that all documents designed and created by DWC to be read by electronic scanners be used in place of the previous, equivalent DWC forms. These new forms, called "optical character recognition forms" (OCR forms) [*see 8 Cal. Code Reg. § 10210(x)* ("OCR form" defined)], may be downloaded and saved, then filled in and printed, as needed, with the printouts being filed with DWC and served on other parties and attorneys, as required by regulations. The form in [1], above, is one such form. Readers should check, periodically, DWC's website for further developments in the implementation of EAMS. DWC's website address is: http://www.dir.ca.gov/dwc/dwc_home_page.htm

For discussion of EAMS, see *§ 577.12A*.

[3] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 29, § 29.07*

California Workers' Compensation Practice, ch. 13, § 13.41 (Cal. C.E.B. 3d ed. 1985)

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51-577 California Forms of Pleading and Practice--Annotated § 577.463

§ 577.463 Information Guidelines for Submission of Settlement Documents

[1] FORM Information Guidelines for Submission of Settlement Documents

Click here to view image.

[2] Use of Form

The form in [1], *above*, may be used as a reference or settlement checklist by parties to aid in the settlement of workers' compensation claims by way of compromise and release agreements [*see §§ 577.460 -577.462*] or stipulations with request for award [*see §§ 577.470, 577.471*]. WCJs may choose to refer to this form to identify inadequacies in proposed settlement documents or when requesting additional information from settling parties.

The informational sheet was developed to help claims personnel and others involved in the settlement of workers' compensation claims avoid problems that frequently arise when drafting settlement documents for submission to the WCAB. The form attempts to cover common problems that frequently exist in proposed settlement agreements, causing delays in approval by the WCAB. In addition, the form attempts to set forth the most important settlement requirements in a single document that can be quickly consulted.

Use of this form is completely voluntary. It is intended solely as a reference and need not be completed by the parties, filed, or served.

For further discussion regarding the settlement of workers' compensation claims by way of stipulations with request for award or compromise and release agreements, see *§§ 577.120 et seq., 577.130* et seq.

[3] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 23, § 23.11[2]*; *ch. 26, § 26.06[2]*; ch.

29 (Matthew Bender)

http://www.dir.ca.gov/DWC/forms.html

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51-577 California Forms of Pleading and Practice--Annotated § 577.464

§ 577.464 Settlement of Prospective Vocational Rehabilitation Services [RU 122 (Voc. Rehab.) § 10133.22]

[1] FORM Settlement of Prospective Vocational Rehabilitation Services [RU 122 (Voc. Rehab.) § 10133.22]

Click here to view image.

[2] Use of Form

In 2003 the legislature abolished the workers' compensation vocational rehabilitation program, repealing *Lab. Code §§ 139.5, 4635-4647*, and *5405.5* [*see* Stats. 2003, ch. 635, §§ 14, 14.3, 16]. In its place, the legislature created a "supplemental job displacement benefit" for specified workers who are permanently partially disabled, to be used for retraining. The new system applies only to injuries occurring on or after January 1, 2004 [*see § 577.45[2A]*]. Consequently, the form in this section may be used only for pre-2004 injuries.

The form in [1], *above*, is a reproduction of RU 122 (Voc. Rehab.) § 10133.22 for use as an agreement between the employee and the employer to settle prospective vocational rehabilitation services for injuries on or after January 1, 2003 [*see Lab. Code §§ 4644(a)(8), 4646(b), (c)*; *8 Cal. Code Reg. §§ 10131.2, 10133.22*]. Copies of the form may be obtained from the Department of Industrial Relations website: www.dir.ca.gov/DWC/forms. As explained in the instructions on page 5 of the form, the form is to be submitted to the applicable Rehabilitation Unit district office. For a discussion of settlement of vocational rehabilitation services, see *§ 577.131[2]*. For a general discussion of compromise and release agreements, see *§ 577.130* et seq. See also *§§ 577.460, 577.461, 577.462*.

Effective November 17, 2008 [*see 8 Cal. Code Reg. §§ 10210*-10297 (Rules of Court Administrator, including regulations relating to Electronic Adjudication Management System (EAMS))], DWC requires (with a handful of exceptions) that all documents designed and created by DWC to be read by electronic scanners be used in place of the previous, equivalent DWC forms. These new forms, called "optical character recognition forms" (OCR forms) [*see 8 Cal. Code Reg. § 10210(x)* ("OCR form" defined)], may be downloaded and saved, then filled in and printed, as needed, with the printouts being filed with DWC and served on other parties and attorneys, as required by regulations. The form in [1], above, is one such form. Readers should check, periodically, DWC's website for further developments in the

implementation of EAMS. DWC's website address is: http://www.dir.ca.gov/dwc/dwc_home_page.htm

For discussion of EAMS, see *§ 577.12A.*

[3] Cross References

Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 35, § 35.54 (LexisNexis)

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51-577 California Forms of Pleading and Practice--Annotated §§ 577.465-577.469

[Reserved]

§§ 577.465[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.470

§ 577.470 Stipulations With Request for Award [DWC-CA Form 10214(a)]

[1] FORM Stipulations With Request for Award [DWC-CA Form 10214(a)]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of DWC-CA Form 10214(a) for use by the parties in a disability case to stipulate to the facts and to request issuance of an award [*see Lab. Code § 5702*; *8 Cal. Code Reg. § 10496*]. For further discussion of stipulations with request for award, see *§ 577.121*.

Effective November 17, 2008 [*see 8 Cal. Code Reg. §§ 10210*-10297 (Rules of Court Administrator, including regulations relating to Electronic Adjudication Management System (EAMS))], DWC requires (with a handful of exceptions) that all documents designed and created by DWC to be read by electronic scanners be used in place of the previous, equivalent DWC forms. These new forms, called "optical character recognition forms" (OCR forms) [*see 8 Cal. Code Reg. § 10210(x)* ("OCR form" defined)], may be downloaded and saved, then filled in and printed, as needed, with the printouts being filed with DWC and served on other parties and attorneys, as required by regulations. The form in [1], above, is one such form. Readers should check, periodically, DWC's website for further developments in the implementation of EAMS. DWC's website address is: http://www.dir.ca.gov/dwc/dwc_home_page.htm

For discussion of EAMS, see *§ 577.12A*.

In death cases, a different form is used for making the stipulation, [*see Lab. Code § 5702*; *8 Cal. Code Reg. §§ 10496, 10501*; *see also § 577.471*].

[3] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 23, § 23.11[2]*; *ch. 26, § 26.06[2]* (Matthew Bender)

California Workers' Compensation Practice, ch. 5, § 5.43 (Cal. C.E.B. 3d ed. 1985)

Witkin, Summary of California Law, vol. 2, *Worker's Compensation*, §§ 390-391 (10th ed. 2005)

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51-577 California Forms of Pleading and Practice--Annotated § 577.471

§ 577.471 Stipulations With Request for Award [DWC-CA Form 10214(b)]

[1] FORM Stipulations With Request for Award [DWC-CA Form 10214(b)]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of DWC-CA Form 10214(b) for use by the parties in death cases to stipulate to the facts of the employee's death, the status of the employee's dependents, and request the issuance of a Findings and Award consistent with the stipulations [*see Lab. Code § 5702*; *8 Cal. Code Reg. §§ 10496*, *10501*].

Effective November 17, 2008 [*see 8 Cal. Code Reg. §§ 10210*-10297 (Rules of Court Administrator, including regulations relating to Electronic Adjudication Management System (EAMS))], DWC requires (with a handful of exceptions) that all documents designed and created by DWC to be read by electronic scanners be used in place of the previous, equivalent DWC forms. These new forms, called "optical character recognition forms" (OCR forms) [*see 8 Cal. Code Reg. § 10210(x)* ("OCR form" defined)], may be downloaded and saved, then filled in and printed, as needed, with the printouts being filed with DWC and served on other parties and attorneys, as required by regulations. The form in [1], above, is one such form. Readers should check, periodically, DWC's website for further developments in the implementation of EAMS. DWC's website address is: http://www.dir.ca.gov/dwc/dwc_home_page.htm

For discussion of EAMS, see *§ 577.12A*.

For further discussion of stipulations with request for award, see *§ 577.121*. See also *§§ 577.390 -577.392*.

[3] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 23, § 23.11[2]*; *ch. 26, § 26.06[2]*

(Matthew Bender)

California Workers' Compensation Practice, ch. 5, §§ 5.43 (Cal. C.E.B. 3d ed. 1985)

Witkin, Summary of California Law, vol. 2, *Workers' Compensation*, §§ 390-391 (10th ed. 2005)

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51-577 California Forms of Pleading and Practice--Annotated § 577.472

§ 577.472 Stipulation and Award and/or Order

[1] FORM Stipulation and Award and/or Order

Click here to view image.

[2] Use of Form

This form, DWC WCAB Form 5, is sometimes used when the parties stipulate to some matter at issue at the hearing, or when the parties' attorneys are willing to "submit" an issue when they cannot get authority from their clients to agree to it, but are willing to have the issue decided without a hearing. The form contains a waiver of *Lab. Code § 5313*, which requires that the Appeals Board and the WCJs set forth in writing the evidence relied on and the reasons or grounds upon which any decision is made. By waiving this statute, and thus waiving the creation of a record, the parties are effectively waiving the right to reconsideration of the issue.

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51-577 California Forms of Pleading and Practice--Annotated §§ 577.473-577.479

[Reserved]

§§ 577.473[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.480

§ 577.480 Notice and Request for Allowance of Lien [DWC/WCAB Form 6]

[1] FORM Notice and Request for Allowance of Lien [DWC/WCAB Form 6]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of DWC WCAB Form 6 for use by a lien claimant to request a lien against any compensation recovered by an injured worker or his or her dependents [*see Lab. Code § 4904*; *8 Cal. Code Reg. § 10770*]. For discussion of liens, see *§ 577.260*.

Effective November 17, 2008 [*see 8 Cal. Code Reg. §§ 10210*-10297 (Rules of Court Administrator, including regulations relating to Electronic Adjudication Management System (EAMS))], DWC requires (with a handful of exceptions) that all documents designed and created by DWC to be read by electronic scanners be used in place of the previous, equivalent DWC forms. These new forms, called "optical character recognition forms" (OCR forms) [*see 8 Cal. Code Reg. § 10210(x)* ("OCR form" defined)], may be downloaded and saved, then filled in and printed, as needed, with the printouts being filed with DWC and served on other parties and attorneys, as required by regulations. The form in [1], above, is one such form. Readers should check, periodically, DWC's website for further developments in the implementation of EAMS. DWC's website address is: http://www.dir.ca.gov/dwc/dwc_home_page.htm

For discussion of EAMS, see *§ 577.12A*.

[3] Cross References

Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 30, §§ 30.20-30.23

California Workers' Compensation Practice, ch. 17, §§ 17.35-17.38 (Cal. C.E.B. 3d ed. 1985)

Witkin, Summary of California Law, vol. 2, *Worker's Compensation*, § 408 (10th ed. 2005)

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51-577 California Forms of Pleading and Practice--Annotated § 577.481

§ 577.481 Stipulation and Order to Pay Lien Claimant

[1] FORM Stipulation and Order to Pay Lien Claimant

Click here to view image.

[2] Use of Form

This form in [1], *above*, is used by many lien claimants and defendants to reduce a lien settlement to a written stipulation and to obtain an enforceable Order reflecting the stipulation. It is often used when a lien settlement is reached at a conference or trial.

For discussion of liens against compensation, see *§ 577.260*. See also *§ 577.480*.

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51-577 California Forms of Pleading and Practice--Annotated § 577.482

§ 577.482 Declaration of Defendant re Resolution of Liens

[1] FORM Declaration of Defendant Re: Resolution of Liens

Click here to view image.

[2] Use of Form

The form in [1], *above,* when completed with specific information regarding lien settlement efforts, is accepted by many WCJ's as evidence that satisfactory efforts have been made to resolve outstanding liens. In order to avoid supplementary proceedings, the WCAB strongly encourages settlement of all outstanding liens at the time an applicant's case is settled by Compromise and Release Agreement or Stipulations. WCJ's are instructed to insure that the defendant has made reasonable efforts to settle liens before an Order Approving Compromise and Release or an Award on Stipulations issued.

For discussion of liens against compensation, see *§ 577.260*. See also *§§ 577.480, 577.481*.

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[Reserved]

§§ 577.483[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.490

§ 577.490 Declaration of Readiness to Proceed to Expedited Hearing (Trial) [DWC-CA Form 10252.1]

[1] FORM Declaration of Readiness to Proceed to Expedited Hearing (Trial) [DWC-CA Form 10252.1]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of DWC-CA Form 10252.1, promulgated by the Court Administrator, for use to request an expedited hearing and decision [*see Lab. Code § 5502(b)*]. In cases in which an expedited hearing is appropriate, the hearing must be held, and a determination as to the rights of the parties made and filed, within 30 days after filing of the declaration of readiness to proceed [*Lab. Code § 5502(b)*].

The form must be filed with a an application for adjudication of claim [*8 Cal. Code Reg. § 10252(a)*].

Effective November 17, 2008 [*see 8 Cal. Code Reg. §§ 10210*-10297 (Rules of Court Administrator, including regulations relating to Electronic Adjudication Management System (EAMS))], DWC requires (with a handful of exceptions) that all documents designed and created by DWC to be read by electronic scanners be used in place of the previous, equivalent DWC forms. These new forms, called "optical character recognition forms" (OCR forms) [*see 8 Cal. Code Reg. § 10210(x)* ("OCR form" defined)], may be downloaded and saved, then filled in and printed, as needed, with the printouts being filed with DWC and served on other parties and attorneys, as required by regulations. The form in [1], above, is one such form. Readers should check, periodically, DWC's website for further developments in the implementation of EAMS. DWC's website address is: http://www.dir.ca.gov/dwc/dwc_home_page.htm

For discussion of EAMS, see *§ 577.12A*.

[3] Entitlement to Expedited Hearing

When injury to any part or parts of the body is accepted as compensable by the employer, a party is entitled to an

expedited priority hearing and decision upon the filing of an application for adjudication of claim and a declaration of readiness to proceed pursuant to *8 Cal. Code Reg. § 10250* establishing a bona fide, good faith dispute as to any of the following [*Lab Code § 5502(b)*; *8* Cal. Code Reg. § 10252(a)]:

1. The employee's entitlement to medical treatment pursuant to *Lab. Code § 4600*.

2. The employee's entitlement to, or the amount of, temporary disability indemnity payments.

3. The employee's entitlement to vocational rehabilitation services, or the termination of an employer's liability to provide these services to an employee.

4. The employee's entitlement to compensation from one or more responsible employers when two or more employers dispute liability as among themselves.

For discussion of expedited hearings, see *§ 577.172[3]*.

[4] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 26, § 26.02[1]* (Matthew Bender)

California Workers' Compensation Practice, ch. 1, § 1.8; ch. 6, §§ 6.9, 6.17 (Cal. C.E.B. 3d ed. Special Supp. 1990)

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51-577 California Forms of Pleading and Practice--Annotated § 577.491

§ 577.491 Pre-Trial Conference Statement [DWC-CA Form 10253.1]

[1] FORM Pre-Trial Conference Statement [DWC-CA Form 10253.1]

Click here to view image.

[2] Use of Form

The form in [1], *above*, was developed for use at the time of the Mandatory Settlement Conference (MSC) preceding a hearing. If the case is not resolved at the MSC, the parties are required to complete and file this form, noting the specific issues in dispute, each party's proposed permanent disability rating, and listing the exhibits and witnesses to be presented at trial [*Lab. Code § 5502(e)(3)*]. The form is also used as a notice of hearing, and provides space for the WCJ to enter any orders or dispositions arising at the MSC.

Although the form provides space for multiple case numbers, many WCJs require that the parties complete a separate pre-trial conference statement for each case. Some judges prefer the parties to complete the pre-trial conference statement used in multiple party cases [*see § 577.492[1]*], which provides summary information concerning matters involving multiple dates of injury or continuous trauma claims involving multiple employers and/or insurance carriers.

For further discussion of mandatory settlement conferences and conference statements, see *§ 577.157[4]*.

[3] Failure to Disclose Evidence

Discovery closes on the date of the MSC. Evidence not disclosed in the Pre-Trial Conference Statement or obtained after the conference is inadmissible unless the proponent of the evidence demonstrates that the evidence was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference [*Lab. Code § 5502(e)(3)*; *see § 577.157[4]*].

[4] Filing and Service

The Appeals Board may, in its discretion, designate a party or lien claimant, or their attorney or agent of record, to make service of notices of the time and place of hearing, orders approving compromise and release, awards based on stipulations with request for award, and any interim or procedural orders, such as a pre-trial conference statement. In deciding whether to exercise this discretion, the Appeals Board may consider whether service by it would be more efficient and cost-effective because most or all of the parties, lien claimants, attorneys, or agents of record to be served have specified e-mail or fax as their preferred method of service. The party, lien claimant, attorney, or agent of record designated to make service must retain the proof of service and not file it unless ordered to do so by the Appeals Board [*8 Cal. Code Reg. § 10500(a)*; *but see 8 Cal. Code Reg. § 10500(b)* (exceptions)].

The WCJ may choose to personally serve the Pre-Trial Conference Statement on a particular party.

For a discussion of service of papers and proof of service, see *§ 577.108* .

[5] Penalties

A false declaration or certification by any party, lien claimant, attorney, or representative may give rise to proceedings under *Lab. Code § 134* for contempt or *Lab. Code § 5813* for sanctions [*8 Cal. Code Reg. § 10250(c)*].

For further discussion of penalties and the WCAB's power to punish for contempt, see *§§ 577.12[3][b]*, *577.194*.

[6] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 26, § 26.04[2]* (Matthew Bender)

http://www.dir.ca.gov/DWC/forms.html

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51-577 California Forms of Pleading and Practice--Annotated § 577.492

§ 577.492 Pre-Trial Conference Statement (Multiple Parties) [DWC-CA Form 10253.1]

[1] FORM Pre-Trial Conference Statement (Multiple Parties) [DWC-CA Form 10253.1]

Click here to view image.

[2] Use of Form

The form in [1], *above*, was developed for optional use at the time of the Mandatory Settlement Conference (MSC) as an adjunct to the Pre-Trial Conference Statement [*see § 577.491[1]*], when an injured worker has multiple injuries which occurred on different dates and/or a continuous trauma claim which involves multiple employers and/or insurance carriers. Because the information on this form is not as detailed as that required on the Pre-Trial Conference Statement, WCJs have the option of using this form or requesting the parties to fully complete a separate Pre-Trial Settlement Conference Statement for each date of injury. Thus, before completing this form, the parties should check with the assigned judge to determine whether the form may be used.

For further discussion, see *§§ 577.157[4], 577.491*.

[3] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 26, § 26.04[2]* (Matthew Bender)

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[Reserved]

§§ 577.493[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.500

§ 577.500 Petition for Certified Copy of Award [8 Cal. Code Reg. § 10820]--By Person Entitled to Benefits Under the Award

[1] FORM Petition for Certified Copy of Award [8 Cal. Code Reg. § 10820]--By Person Entitled to Benefits Under the Award

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD

_____ [*name of employee or other applicant*], _____ [Applicant *or* Employee] [_____ (*address*)] [Employee's Social Security No. _____]	)	CASE NO. _____
vs.	)	_____ [*Title of document, e.g.,* PETITION FOR _____ (*specify*)]
_____ [*name of employer*] _____ [Defendant *or* Employer] [_____ (*address*)] _____ [*name*], Insurance Carrier [_____ (*address*)]	)	
[*If applicant is someone other than injured employee, add following:*] [_____ (*name of employee*), Employee _____ (*address*) Employee's Social Security No. _____]		

_____

Petitioner _____ [*name*] is the applicant in the above-entitled case and hereby requests a certified copy of the _____ [*describe, e.g.,* Decision and Award] herein made by the Workers' Compensation Appeals Board for the purpose of having judgment on the award entered in the superior court and execution issued. In support of this request, petitioner states:

1. On _____ [*date*], the Appeals Board issued its _____ [*e.g.,* Decision and Award] awarding applicant _____ [*specify amount and terms of award*].

2. _____ [*Specify whether proceedings are pending on reconsideration or judicial review, whether a petition for reconsideration or writ of review has been filed, and whether the decision has become final* .]
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

[Applicant *or* Attorney for Applicant or other authorized representative]

[2] Use of Form

The form in [1], *above*, is for use by a person awarded benefits by the WCAB to request issuance of a certified copy of the findings and award or other final order of the WCAB for the purpose of having judgment entered and execution issued by the clerk of the superior court [*8 Cal. Code Reg. § 10820*; *see Lab. Code § 5806*]. If the request is granted, the copy will issue on payment of the fee prescribed by rules of the Administrative Director of the Division of Workers' Compensation (formerly the Division of Industrial Accidents) [*8 Cal. Code Reg. § 10820*]. The request may be made by the person entitled to benefits under the award or by the person's attorney or authorized representative [*8 Cal. Code Reg. § 10820*]. For discussion of awards, generally, see *§ 577.191*.

[3] Form and Contents of Petition

The request must be in writing and must state the following [*8 Cal. Code Reg. § 10820*]:

- Whether proceedings are pending on reconsideration or judicial review;
- Whether a petition for reconsideration or writ of review has been filed; and
- Whether the decision, a certified copy of which is requested, has become final.

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51-577 California Forms of Pleading and Practice--Annotated § 577.501

§ 577.501 Petition for Reconsideration [Lab. Code § 5902; 8 Cal. Code Reg. § 10842] [DIA WCAB Form 45]

[1] FORM Petition for Reconsideration [Lab. Code § 5902; 8 Cal. Code Reg. § 10842] [DIA WCAB Form 45]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of DIA WCAB Form 45 for use to petition the WCAB for reconsideration of a final order, decision, or award made by the WCAB or by a workers' compensation judge [*see Lab. Code § 5902*]. Copies of the form may be obtained at any WCAB office.

[3] Grounds for Reconsideration

The sole grounds on which reconsideration may be sought are as follows [*Lab. Code § 5903*]:

- The workers' compensation judge or WCAB acted without or in excess of its powers;

- The order, decision, or award was procured by fraud [*see Royal Globe Ins. Co. v. Workers' Comp. Appeals Bd. (1978) 84 Cal. App. 3d 287, 293 n.5, 148 Cal. Rptr. 325]* ;

- The findings of fact are not justified by the evidence [*see Gillette v. Workers' Comp. Appeals Bd. (1971) 20 Cal. App. 3d 312, 320-322, 97 Cal. Rptr. 542]* ;

- Petitioner has discovered new material evidence that he or she could not, with reasonable diligence, have discovered and produced at the hearing [*see Royal Globe Ins. Co. v. Workers' Comp. Appeals Bd. (1978) 84 Cal. App. 3d 287, 292-293, 148 Cal. Rptr. 325* (evidence in question was not newly discovered)]; or

- the order, decision, or award is not supported by the findings of fact [*see Michon v. Workers' Comp. Appeals Bd. (1971) 15 Cal. App. 3d 917, 923-925, 93 Cal. Rptr. 476]* .

[4] Form and Contents

The petition must set forth specifically and in full detail the grounds on which the petitioner considers the final order, decision, or award to be unjust or unlawful, and every issue to be considered, and must contain a statement of any evidence or other matters on which the applicant relies [*Lab. Code § 5902*]. It must fairly state all the material evidence relative to the point or points at issue, and each contention must be separately stated and clearly set forth [*8 Cal. Code Reg. § 10842*]. Copies of documents that have been received in evidence or that have been made a part of the WCAB's legal file must not be attached as exhibits [*8 Cal. Code Reg. § 10842*]. Documents attached in violation of this rule may be detached from the petition and discarded [*8 Cal. Code Reg. § 10842*]. A petition that contains no more than allegations of the statutory grounds for reconsideration unsupported by specific references to the record and principles of law involved may be denied [*8 Cal. Code Reg. § 10846*].

If reconsideration is sought on the ground that the findings are not justified by the evidence, the petition must set out specifically and in detail how the evidence fails to justify the findings [*8 Cal. Code Reg. § 10852*]. If reconsideration is sought on the ground of newly discovered evidence or that the decision was procured by fraud, the petition must contain a specific and detailed offer of proof providing the following information [*8 Cal. Code Reg. § 10856*]:

- The names of witnesses to be produced;
- A summary of the testimony to be elicited;
- A description of any documentary evidence to be offered;
- The effect the evidence will have on the record and on the prior decision; and
- As to newly discovered evidence, a full and accurate statement of the reasons why such testimony or exhibits could not reasonably have been discovered or produced before submission of the case.

The petition may be denied if it fails to meet these requirements or is based on cumulative evidence [*8 Cal. Code Reg. § 10856*].

Any objections, irregularities, or illegalities, other than those set forth in the petition, are deemed waived by the petitioner [*Lab. Code § 5904*].

For further discussion of filing petitions for reconsideration, see *§ 577.212*.

[5] Verification

The form in [1], *above*, must be verified [*Lab. Code § 5902*].

[6] Cross References

Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 28, §§ 28.20-28.23 (Matthew Bender)

California Workers' Compensation Practice, ch. 10, §§ 10.15-10.32 (Cal. C.E.B. 3d ed. 1985)

Witkin, Summary of California Law, vol. 2, *Worker's Compensation*, §§ 418-420 (10th ed. 2005)

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51-577 California Forms of Pleading and Practice--Annotated § 577.502

§ 577.502 Petition to Reopen [Lab. Code § 5803; 8 Cal. Code Reg. § 10454] [DIA WCAB Form 42]

[1] FORM Petition to Reopen [Lab. Code § 5803; 8 Cal. Code Reg. § 10454] [DIA WCAB Form 42]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of DIA WCAB Form 42 for use to petition the WCAB to reopen an order, decision, or award [*see Lab. Code §§ 5803*, *5804*; *see also § 577.222*].

[3] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 31, § 31.04[4][a]* (Matthew Bender)

California Workers' Compensation Practice, ch. 12, §§ 12.6-12.19 (Cal. C.E.B. 3d ed. 1985)

Witkin, Summary of California Law, vol. 2, *Worker's Compensation*, §§ 426-429, 432 (10th ed. 2005)

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51-577 California Forms of Pleading and Practice--Annotated § 577.503

§ 577.503 Petition for Commutation of Future Benefits [Lab. Code § 5100] [DIA WCAB Form 49]

[1] FORM Petition for Commutation of Future Benefits [Lab. Code § 5100] [DIA WCAB Form 49]

Click here to view image.

[2] Use of Form

The form in [1], *above*, is a reproduction of DIA WCAB Form 49 for use by either party to request an order that the compensation payable be commuted to a lump sum to be paid forthwith or at some future time [*see Lab. Code § 5100*]. Copies of the form may be obtained from any WCAB office. For discussion of commutation of awards, see *§ 577.244*.

[3] Cross References

Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 27, § 27.02

California Workers' Compensation Practice, ch. 23, § 23.63 (Cal. C.E.B. 4th ed. 2000)

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51-577 California Forms of Pleading and Practice--Annotated § 577.504

§ 577.504 Notice of Intent to Seek Multiple Penalties [Lab. Code § 5814]

[1] FORM Notice of Intent to Seek Multiple Penalties [Lab. Code § 5814]

[*Name of Attorney*]
[*Name of Law Firm*]
[*Street Address*]
[*City, State, Zip Code*]
[*Telephone Number*]
State Bar No. _____
Attorney for Applicant

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

_____ [*Applicant's Name*], Applicant	)	CASE NO. _____
vs.	)	NOTICE OF INTENT TO SEEK MULTIPLE PENALTIES
_____ [*Defendants' Names*], Defendants.	)	(*Lab. Code § 5814*)

TO DEFENDANTS HEREIN, _____ AND THEIR ATTORNEYS OF RECORD:

Applicant _____ [*name*] hereby gives Notice of Intent to seek separate or additional penalties for each separate and distinct act of delay or failure to pay benefits.
Dated: _____
.....

_____

..... Attorney for the Applicant

Attachments:

Proof of service by mail

[2] Use of Form

The form in [1], *above*, may be used by an injured employee to notify the employer or carrier that the employee is seeking multiple penalties under *Labor Code § 5814* for an unreasonable delay or refusal to pay compensation due, either before or after an award is issued. The purpose of the form is to put the employer or carrier on notice that the employee is seeking separate penalties for each separate and distinct act of delay. Failure to provide such notice to the employer or carrier may preclude the employee from seeking multiple penalties.

For a general discussion of multiple penalties for delay or non-payment of compensation, see *§ 577.243[4][d]*. See also *§ 577.505[1]*, for petition for penalty form.

[3] Separate and Distinct Acts of Delay

When multiple, separate penalties are sought for more than one distinct act of delay, the employee must give the employer or carrier timely notice of his or her intent to claim multiple or successive penalties in the same penalty proceeding. The bare allegation that a penalty for unreasonable delay in payment of compensation is being sought is not sufficient to raise the issue of liability for multiple or successive penalties [*see Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 10, § 10.40[5], ch. 27, § 27.12[2][d]* (Matthew Bender); California Workers' Compensation Practice, ch. 8, §§ 8.22-8.24 (Cal. C.E.B. 4th ed. 2000)].

[4] Filing and Service

This form should be filed prior to the petition for penalties in those cases where multiple penalties are sought. The notice must be served on the employer or carrier.

[5] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 10, § 10.40[5], ch. 27, § 27.12[2][d]* (Matthew Bender)

California Workers' Compensation Practice, ch. 8, §§ 8.22-8.24 (Cal. C.E.B. 4th ed. 2000)

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51-577 California Forms of Pleading and Practice--Annotated § 577.505

§ 577.505 Petition for Penalties [Lab. Code § 5814]

[1] FORM Petition for Penalties [Lab. Code § 5814]

[*Name of Attorney*]
[*Name of Law Firm*]
[*Street Address*]
[*City, State, Zip Code*]
[*Telephone Number*]
State Bar No. _____
Attorney for Applicant

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

_____ [*Applicant's Name*], Applicant	)	
vs.	)	CASE NO. _____
_____ [*Defendants' Names*],	)	PETITION FOR PENALTIES
Defendants.	)	(*Lab. Code § 5814*)

Petitioner alleges that multiple payments of benefits have been unreasonably delayed and seeks an Order of this Board assessing multiple penalties against all of these unreasonably delayed payments of temporary disability, permanent

disability and medical benefits pursuant to *Lab. Code §§ 4600, 4650, 5800* and *5814*, and in support thereof, alleges that:

Count 1

1. On [*date*] Defendants issued their first temporary disability check, paying benefits from [*date*] to [*date*].

2. This payment was not made within a reasonable time.

3. There was no genuine medical or legal doubt as to the Defendants' obligation to pay this compensation.

4. Said failure to pay properly constituted an unreasonable delay in benefits.

Count 2

1. On [*date*], Defendants issued their first temporary disability check, paying benefits from [*date*] to [*date*].

2. This check did not pay benefits in accordance with *Lab. Code § 4650(a)*.

3. There was no genuine medical or legal doubt as to the Defendants' obligation to pay this compensation.

4. Said failure to pay properly constituted an unreasonable delay in benefits.

Count 3

1. On [*date*], Defendants issued their first temporary disability check, paying benefits from [*date*] to [*date*].

2. This check did not include the penalty assessment as mandated by *Lab. Code § 4650(d)*.

3. This check did not include interest as mandated by *Lab. Code § 5800*.

4. There was no genuine medical or legal doubt as to the Defendants' obligation to pay this penalty and interest.

5. Said failure to pay properly constituted an unreasonably delay in benefits.

Count 4

1. On [*date*], Applicant was declared permanent and stationary by Dr. _____, who also described permanent disability consisting of a limitation to light work.

2. The Defendants have not paid any permanent disability advances.

3. There was no genuine medical or legal doubt as to the Defendants' obligation to pay this compensation.

4. Said failure to pay properly constituted an unreasonable delay in benefits.

Count 5

1. The earnings of the injured worker were found to be $_____ per week.

2. Pursuant to *Lab. Code § 4661.5*, the injured worker's temporary disability rate as of [*enter two-year anniversary date*] was [*enter current maximum or 2/3 of average weekly wage, whichever is less*].

3. On [*date*] Defendants issued a temporary disability check incorrectly paying benefits at the rate of $_____ per week.

4. There was no genuine medical or legal doubt as to the Defendants' obligation to pay compensation at the proper rate.

5. Said failure to pay at the correct rate constituted an unreasonable delay in benefits.

Count 6

1. At all times pertinent, Dr. [*name of treating physician*] was the authorized treating physician.

2. By report of [*date of medical report*], Dr. [*name of treater*] prescribed a _____. More than thirty days have elapsed from the request and this appliance has not been authorized despite repeated requests.

3. By report of [*date of medical report*], Dr. [*name of treater*] requested a referral to [*name of facility or treater*] for _____. More than thirty days have elapsed from the request and this referral has not been authorized.

4. The Defendants have not produced any medical report or other evidence indicating that the requested diagnostic study and mode of treatment are not reasonable or necessary. No petition to change the treating physician has been filed. The refusal to authorize this treatment constitutes an unreasonable refusal to provide benefits.

Count 7

1. Defendant failed to pay the injured worker the 10 percent increase in benefits as a self-assessed increase as required by *Labor Code § 4650(d)* at the time it made the late payment. The benefit remains unpaid.

2. In *Farris v. Industrial Wire Products (2000) 65 Cal. Comp. Cases 824* , the Appeals Board en banc held that " ... when a 4650(d) penalty has been unreasonably delayed, the 10 percent penalty under section 5814 for that unreasonable delay applies to all payments of the underlying species of disability indemnity (past, present, and future), ... as increased by the section 4650(d) penalty amount." (65 Cal. Comp. Cases 824, 829 .) (See also *Moulton v. Workers' Comp. Appeals Bd.Moulton v. Workers' Comp. Appeals Bd. (2000) 84 Cal. App. 4th 837, 65 Cal. Comp. Cases 1259* , *E & J Gallo Winery, PSI v. Workers' Comp. Appeals Bd. (Vega) (2001) 66 Cal. Comp. Cases 1547* (writ denied).) In *Peter Kiewit Sons, Inc. v. Workers' Comp. Appeals Bd. (Garland) (1998) 63 Cal. Comp. Cases 331* (writ denied), the Appeals Board imposed two penalties on permanent disability indemnity because defendant failed to pay at the correct rate and failed to assess self-imposed penalty under Labor Code § 4560.

3. The failure to timely pay the Labor Code § 4560(d) amount and the delay in payment of that penalty to the present constitutes an unreasonable delay in the payment of indemnity due the injured worker entitling _____ [him *or* her] to a penalty under *Labor Code § 5814*.

Count 8

1. The Findings and Award issued herein on [*date*]. That award required payment of substantial benefits, which were both unpaid and late. The amount of unpaid disability indemnity by the defendant's own calculations, amounts to $_____.

2. *Labor Code § 4650(d)* provides that if any indemnity payment is not made timely, the amount of the late payment shall be increased 10 percent and shall be paid, without application, to the employee.

3. A "good faith" belief on the part of the defendant that the benefits are not payable does not excuse the obligation to pay the *Labor Code § 4650(d)* penalty when an Award of the appeals board requires payment.

4. In *Rhiner v. Workers' Comp. Appeals Bd.Rhiner v. Workers' Comp. Appeals Bd.Rhiner v. Workers' Comp. Appeals Bd. (1993) 4 Cal. 4th 1213, 1227, 58 Cal. Comp. Cases 172, 183* , the Supreme Court stated that the penalty under *Labor Code § 4650(d)* is " ... a self-executing, strict liability provision, that applies only to delays in the payment of temporary or permanent disability payments ... " (See also *Christian v. Workers' Comp. Appeals Bd.Christian v. Workers' Comp. Appeals Bd. (1997) 15 Cal. 4th 505, 517* ; *Mote v. Workers' Comp. Appeals Bd.Mote v. Workers' Comp. Appeals Bd. (1997) 56 Cal. App. 4th 902, 910, 62 Cal. Comp. Cases 891, 895* ; *State of California v. Workers' Comp. Appeals Bd. (Ellison)State of California v. Workers' Comp. Appeals Bd. (Ellison) (1996) 44 Cal. App. 4th 128, 139, 61 Cal. Comp. Cases 325, 333* .)

5. In *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Stuart)State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Stuart)State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Stuart) (1998) 18 Cal. 4th 1209, 1213, 63 Cal. Comp. Cases 916, 918* , the Supreme Court again observed that " ... if a payment is late, that individual payment is automatically increased by 10 percent, and this penalty [under *Labor Code § 4650(d)*] applies irrespective of the reason for the delay."

6. In *Gangwish v. Workers' Comp. Appeals Bd. (2001) 89 Cal. App. 4th 1284, 1293* , the Court of Appeals discussed the purpose that the legislative purpose of enacting the changes to *Labor Code § 4650* was to promote prompt payment of benefits and certainty of timing. "The new legislation also included increased compensation for late payment as an incentive, apart from the increased compensation for unreasonable refusal or delay under section 5814." (66 Cal. Comp. Cases 584, at 590-591 .)

7. The condition for imposition of penalty under *Labor Code § 4650(d)* is that a periodic payment of temporary or permanent disability is delayed. It is the delay that triggers the entitlement to the penalty, which is a "self-executing, strict liability" (see *Rhiner, Christian, Mote supra*), which "applies irrespective of the reason for the delay" (see *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Stuart)* , supra), the purpose of which is "to promote prompt payment of benefits and certainty of timing." (see *Gangwish* , supra)

8. The failure to timely pay permanent disability indemnity that the Findings and Award determined to be due requires a *Labor Code § 4650(d)* penalty at the time of payment.

Count 9

1. The failure of the defendant to pay the *Labor Code § 4650(d)* penalty on the delayed permanent disability awarded entitles the applicant to an additional penalty under *Labor Code § 5814*. As discussed above regarding Count 7, the failure to pay, or the delay in the payment of a *Labor Code § 4650(d)* penalty gives rise to increasing the benefits in accordance with the provisions of *Labor Code § 5814*.

2. In this case, applicant's attorney wrote to defendant's attorney on [*date*], and specifically requested the voluntary payment of the *Labor Code § 4650(d)* penalty. Defendant has failed to pay.

As to all Counts, a Notice of Intent to Seek Multiple Penalties was properly served upon the Defendants.

WHEREFORE, Petitioner prays for penalties to be assessed as follows:

1. A 25-percent penalty, up to $10,000, whichever is less, against delayed payments alleged in Count One.

2. A 25-percent penalty, up to $10,000, whichever is less, against delayed payments alleged in Count Two.

3. A 25-percent penalty, up to $10,000, whichever is less, against delayed payments alleged in Count 3.

4. A 25-percent penalty, up to $10,000, whichever is less, against delayed payments alleged in Count 4.

5. A 25-percent penalty, up to $10,000, whichever is less, against delayed payments alleged in Count 5.

6. A 25-percent penalty, up to $10,000, whichever is less, against delayed payments alleged in Count 6.

7. A 25-percent penalty, up to $10,000, whichever is less, against delayed payments alleged in Count 7.

8. A 25-percent penalty, up to $10,000, whichever is less, against delayed payments alleged in Count 8.

9. A 25-percent penalty, up to $10,000, whichever is less, against delayed payments alleged in Count 9.

10. All other relief under the law.

Respectfully submitted,

_____

Attorney for the Applicant

Dated: _____

Attachments:
Exhibits
Proof of service by mail
Proposed Order

[2] Use of Form

IMPORTANT NOTE: Practitioners should be aware that SB 899 (Stats. 2004 Ch. 34) added new *Labor Code § 5814(g)*, which provides that "[n]otwithstanding any other provisions of law, no action may be brought to recover penalties that may be awarded under this section more than two years from the date the payment of compensation was due." Whether or not this section applies to injuries and/or delayed compensation before June 1, 2004, and/or during the period June 1, 2004 through December 31, 2004, is not clear and is the subject of litigation.

The form in [1], *above*, illustrates a petition for penalties which may be used by an applicant seeking penalties under *Labor Code § 5814* if payment of compensation is unreasonably delayed or refused, either before or after an award is issued.

For a general discussion of penalties for delay or non-payment of compensation, see *§ 577.243[4]*. See also *§ 577.504[1]*, for form of notice required when seeking multiple penalties.

[3] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 10, § 10.40, ch. 27, § 27.12[2]* (Matthew Bender)

California Workers' Compensation Practice, ch. 8, §§ 8.6-8.24 (Cal. C.E.B. 4th ed. 2000)

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51-577 California Forms of Pleading and Practice--Annotated § 577.506

§ 577.506 Answer to Petition for Penalties [Lab. Code § 5814]

[1] FORM Answer to Petition for Penalties [Lab. Code § 5814]

[*Name of Attorney*]
[*Name of Law Firm*]
[*Street Address*]
[*City, State, Zip Code*]
[*Telephone Number*]
State Bar No. _____
Attorney for Defendants _____

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

_____ [*Applicant's Name*],	)	
Applicant	)	CASE NO. _____
vs.	)	ANSWER TO PETITION FOR PENALTIES
_____ [*Defendants' Names*],	)	(*Lab. Code § 5814*)
Defendants.	)	
	)	
	)	

_____

COME NOW Defendants, [*Defendants' names*], in answer to the Petition for Penalties filed by the Applicant herein, admit, deny, and allege as follows:

Count 1

1. Defendants deny the allegations of Count 1.

2. Defendants allege that, at all times pertinent, there existed a genuine doubt as to liability for the allegedly delayed amounts.

3. Defendants further aver that if there was a delay, it was a reasonable delay, occurring in the normal course of business or that the delays complained of were not unreasonable.

4. Defendants further aver that if a penalty is to be awarded, the appropriate penalty is an amount considerably less than 25 percent of the delayed benefit, taking into consideration previously paid amounts pursuant to *Labor Code § 4650*.

5. Defendants further aver that they have voluntarily paid the delayed benefit along with a 10-percent penalty on the delayed benefit within the time frames outlined in *Labor Code § 5814(b)*.

6. Defendants deny that they were provided notice of Applicant's treatment, nor were they afforded the opportunity to control care in accordance with *Labor Code § 4616 et seq.*

7. Defendants deny that the care that Applicant self-procured was reasonably related to the claim form that Applicant filed.

Count 2

1. Defendants deny the allegations of Count 2.

2. Defendants allege that, at all times pertinent, there existed a genuine doubt as to liability for the allegedly delayed amounts.

3. Defendants further aver that if there was a delay, it was a reasonable delay, occurring in the normal course of business or that the delays complained of were not unreasonable.

4. Defendants further aver that if a penalty is to be awarded, the appropriate penalty is an amount considerably less than 25 percent of the delayed benefit, taking into consideration previously paid amounts pursuant to *Labor Code § 4650*.

Count 3

1. Defendants deny each and every one of the allegations of Count 3.

2. Defendants further deny that any of the payments referred to in the petition were delayed.

3. Defendants further aver that if there was a delay, it was a reasonable delay, occurring in the normal course of business, and that the delays complained of were not unreasonable.

4. Defendants further aver that if a penalty is to be awarded, the appropriate penalty is an amount considerably less than 25 percent of the delayed benefit, taking into consideration previously paid amounts pursuant to *Labor Code § 4650*.

Count 4

1. Defendants deny the allegations of Count 4.

2. Defendants allege that, at all times pertinent, there existed a genuine doubt as to liability for the allegedly delayed amounts.

3. Defendants further aver that if there was a delay, it was a reasonable delay, occurring in the normal course of business, or that the delays complained of were not unreasonable.

4. Defendants further aver that if a penalty is to be awarded, the appropriate penalty is an amount considerably less than 25 percent of the delayed benefit, taking into consideration previously paid amounts pursuant to *Labor Code § 4650*.

Count 5

1. Defendants deny the allegations of Count 5.

2. Defendants allege that, at all times pertinent, there existed a genuine doubt as to liability for the allegedly delayed amounts.

3. Defendants further aver that if there was a delay, it was a reasonable delay, occurring in the normal course of business, or that the delays complained of were not unreasonable.

4. Defendants further aver that if a penalty is to be awarded, the appropriate penalty is an amount considerably less than 25 percent of the delayed benefit, taking into consideration previously paid amounts pursuant to *Labor Code § 4650*.

Count 6

1. Defendants deny the allegations of Count 6.

2. Defendants allege that, at all times pertinent, there existed a genuine doubt as to liability for the allegedly delayed amounts.

3. Defendants further aver that if there was a delay, it was a reasonable delay, occurring in the normal course of business, or that the delays complained of were not unreasonable.

4. Defendants further aver that if a penalty is to be awarded, the appropriate penalty is an amount considerably less than 25 percent of the delayed benefit, taking into consideration previously paid amounts pursuant to *Labor Code § 4650*.

Count 7

1. Defendants deny the allegations of Count 7.

2. Defendants allege that, at all times pertinent, there existed a genuine doubt as to the liability for the medical treatment requested.

3. Defendants allege that any denial or delay of the requested medical treatment was based on the reasonable use of the Utilization Review process described in *Labor Code § 4610* and *8 Cal. Code Reg. § 9792* et seq.

4. Defendants further aver that if there was a delay, it was a reasonable delay, occurring in the normal course of business, or that the delays complained of were not unreasonable.

5. Defendants further aver that if a penalty is to be awarded, the appropriate penalty is an amount considerably less that 25 percent of the delayed benefit, taking into consideration previously paid amounts pursuant to *Labor Code § 4650*.

Count 8

1. Defendants deny the allegations of Count 8.

2. Defendants deny that there was any delay in the payments of benefits such as to provide for a self-assessed increase as provided for in *Labor Code § 4650(d)*.

3. Defendants further aver that if a penalty is to be awarded, the appropriate penalty is an amount considerably less than 25 percent of the delayed benefit.

Count 9

1. Defendants deny the allegations of Count 9.

2. Defendants further aver that if there was a delay, it was a reasonable delay, occurring in the normal course of business, or that the delays complained of were not unreasonable in light of the complexity of the payments under the Findings and Award.

3. Defendants further aver that if a penalty is to be awarded, the appropriate penalty is an amount considerably less than 25 percent of the delayed benefit, taking into consideration previously paid amounts pursuant to *Labor Code § 4650*.

4. Defendants further aver that they have voluntarily paid the delayed benefits along with a 10-percent penalty on the delayed benefit within the time frames outlined in *Labor Code § 5814(b)*.

5. Defendants further aver that if a penalty under *Labor Code § 5814* is to be granted, the total maximum penalty is $10,000, without regard to the number of different species of benefits that were delayed.

6. Defendants further aver that no attorney fees should be awarded under *Labor Code § 5814.5*, since Applicant's Petition for Penalties was not a Petition to Enforce Award because the Award had been paid prior to the Petition for Penalties.

Count 10

1. Defendants deny the allegations of Count 10.

2. Defendants allege that, at all times pertinent, there existed a genuine doubt as to liability for the allegedly delayed amounts.

3. Defendants further aver that if there was a delay, it was a reasonable delay, occurring in the normal course of business or that the delays complained of were not unreasonable.

4. Defendants further aver that if a penalty is to be awarded, the appropriate penalty is an amount considerably less than 25 percent of the delayed benefit, taking into consideration previously paid amounts pursuant to *Labor Code § 4650*.

AFFIRMATIVE DEFENSES

In addition, the Answering Defendants allege all of the following as separate and affirmative defenses:

FIRST AFFIRMATIVE DEFENSE
Failure to State Facts Sufficient to Constitute the Imposition of a Penalty

As and for a first separate and affirmative defense to the Petition for Penalties herein, the Answering Defendants allege that the Petition fails to allege facts sufficient to constitute the imposition of a penalty, andfurther fails to allege facts sufficient to entitle Applicant to the relief sought, or to any relief whatsoever against the Answering Defendants.

SECOND AFFIRMATIVE DEFENSE
Fault of Third Parties

As and for a second separate and affirmative defense to the Petition for Penalties herein, the Answering Defendants allege that the Applicant in the Petition seeks damages against the Answering Defendants for the acts or omissions caused in whole or in part by the acts or omissions of third parties for whom the Answering Defendants bear no legal responsibility, and fails to entitle Applicant to the relief sought, or to any relief whatsoever against the Answering Defendants.

THIRD AFFIRMATIVE DEFENSE
Previously Resolved

As and for a third separate and affirmative defense to the Petition for Penalties herein, the Answering Defendants allege that the alleged delays occurred prior to an order as defined in *Labor Code § 5814(c)* and accordingly are conclusively presumed to have been resolved.

FOURTH AFFIRMATIVE DEFENSE
Statute of Limitations

As and for a fourth separate and affirmative defense to the Petition for Penalties herein, the Answering Defendants allege that whatever compensation was allegedly due was due more than two years prior to the filing of the Petition for Penalties and accordingly is barred by *Labor Code § 5814(g)*.

FIFTH AFFIRMATIVE DEFENSE
Labor Code § 5814(b)

As and for a firth separate and affirmative defense to the Petition for Penalties herein, the Answering Defendants allege that as to any delays in the payment of compensation, Defendants have voluntarily paid the delayed benefit along with a 10-percent penalty on the delayed benefit within the time frames outlined in *Labor Code § 5814(b)*.

POINTS AND AUTHORITIES

Penalties are authorized under *Labor Code § 5814* when payment of compensation has been unreasonably delayed or refused. Not all delays are unreasonable. In the landmark case of *Gallamore v. Workers' Comp. Appeals Bd. (1979) 23 Cal. 3d 815, 828, 153 Cal. Rptr. 590, 591 P.2d 1242* , the Supreme Court cautioned, "In penalty cases the board should proceed with a view toward achieving a fair balance between the right of the employee to prompt payment of compensation benefits, and the avoidance of imposition upon the employer or carrier of harsh and unreasonable penalties." In the case of *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Stuart) (1998) 18 Cal. 4th 1209, 1216, 77 Cal. Rptr.2d 528, 959 P.2d 1204* , the Supreme Court commented on the showing necessary to establish an unreasonable delay: "A reasonably short delay attributable to human error cannot, standing alone, be considered unreasonable. In requiring a finding of unreasonableness as the trigger for a section 5814 penalty, our Legislature intended something *beyond the mere existence of any delay in the payment of benefits*." (emphasis added) In fact, in its earlier *Kampner* decision (*Kampner v. Workers' Comp. Appeals Bd. (1978) 86 Cal. App. 3d 376, 150 Cal. Rptr. 222*), the court held that, under appropriate circumstances, a short delay of an additional few days was not in itself unreasonable.

"The touchstone of a section 5814 penalty is a delay or refusal to pay benefits that is *unreasonable*." (*Stuart, supra, 18 Cal. 4th at p. 1214* (emphasis by court)) An unreasonable delay or refusal occurs when there is no genuine doubt that benefits are owed from a medical or legal standpoint. (*Kerley v. Workmen's Comp. Appeals Bd. (1971) 4 Cal. 3d 223, 93 Cal. Rptr. 192, 481 P.2d 200*)

The procedures and standards for evaluating the appropriateness of a penalty enhancement are clearly enunciated in the leading cases. The initial burden is on the employee to establish entitlement to the benefit and delay in its provision. The burden then shifts to the employer to establish that a delay was reasonable. (*Kerley, supra*)

In determining whether a given delay is unreasonable, the Board must look beyond simply the number of days that benefits were delayed, but rather consider all of the relevant circumstances, including the reason for the employer's action or inaction. (*Kampner, supra*) Mere inadvertence, causing a brief delay, may not support the imposition of *Labor Code § 5814* penalties. (*County of Sacramento v. Workers' Comp. Appeals Bd. (Souza) (1999) 69 Cal. App. 4th 726, 81 Cal. Rptr. 2d 780*)

With all due respect to the allegations of the petition, an inquiry into the circumstances of the administration of this claim will reveal that the delays complained of were, for the most part, occasioned by the realities of the business of processing claims, and thus not unreasonable, since this is the type of delay that would have occurred in the normal course of business. The question to be answered is how long the procedure should have taken, as opposed to any "delay" at all.

With respect to the question of multiple penalties, *Christian v. Workers' Comp. Appeals Bd. (1997) 15 Cal. 4th 505, 63 Cal. Rptr. 2d 336, 936 P.2d 115* , instructs that those penalties have been approved only when the refusal of, or delay in payment of, benefits necessarily involved separate and distinct unreasonable acts by the insurance carrier. Multiple penalties may be imposed when there are separate classes of benefits, individual claims for payment of reimbursement of medical or travel expenses, or a repeated refusal or delay in payment of a benefit after the same conduct had already been found by the Board to be unreasonable and a priorpenalty imposed, or some analogous, legally significant event

such as a stipulation of liability by the carrier had intervened between the first act for which a penalty was imposed and the second act. Multiple penalties do not apply when repeated delays in paying a benefit arise out of a single, unreasonable act by the employer and there is no subsequent legally significant event establishing the employer's liability.

Lastly, we ask that you to consider that, in *Gallamore*, the court admonished the Board to strike "a fair balance between the right of the employee to prompt payment of compensation benefits, and the avoidance of imposition upon the employer or carrier of harsh and unreasonable penalties." (*Gallamore, supra*)

For these reasons, it is respectfully submitted that no penalties should be assessed, because the delays complained of were not unreasonable.

Respectfully submitted,

_____

Attorney for the Defendants

Dated: _____

Attachments:
Exhibits
Proof of service by mail
Proposed Order

[2] Use of Form

IMPORTANT NOTE: Practitioners should be aware that SB 899 (Stats. 2004 Ch. 34) added new *Labor Code § 5814(g)*, which provides that "[n]otwithstanding any other provisions of law, no action may be brought to recover penalties that may be awarded under this section more than two years from the date the payment of compensation was due." Whether or not this section applies to injuries and/or delayed compensation before June 1, 2004, and/or during the period June 1, 2004, through December 31, 2004, is not clear and is the subject of litigation.

The form in [1], *above*, illustrates an answer to a petition for penalties that may be used by a defendant in responding to an applicant seeking penalties under *Labor Code § 5814* and alleging that payment of compensation is unreasonably delayed or refused, either before or after an award is issued.

For a general discussion of penalties for delay or non-payment of compensation, see *§ 577.243[4]*. See also *§ 577.505[1]*, for a petition for penalties, and § 577.504[1], for form of notice required when seeking multiple penalties.

[3] Cross References

Hanna, California Law of Employee Injuries and Workers' Compensation, ch. 10, § 10.40, ch. 27, § 27.12[2] (Matthew Bender)

California Workers' Compensation Practice, ch. 8, §§ 8.6-8.24 (Cal. C.E.B. 4th ed. 2000)

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Chapter 577 WORKERS' COMPENSATION
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12 Awards, Reconsideration and Supplemental Proceedings

51-577 California Forms of Pleading and Practice--Annotated §§ 577.507-577.509

[Reserved]

§§ 577.507[Reserved]

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Chapter 577 WORKERS' COMPENSATION
PART IV. FORMS
A. Administrative Procedures and Proceedings
13. Judicial Review of Administrative Proceedings

51-577 California Forms of Pleading and Practice--Annotated § 577.510

§ 577.510 Petition for Writ of Review [Lab. Code § 5950; Cal. Rules of Ct., Rule 8.495(a)]--By Injured Employee or Dependent of Deceased Employee

[1] FORM Petition for Writ of Review [Lab. Code § 5950; Cal. Rules of Ct., Rule 8.495(a)]--By Injured Employee or Dependent of Deceased Employee

[IN THE] COURT OF APPEAL
OF THE STATE OF CALIFORNIA,
_____ APPELLATE DISTRICT

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION FOR WRIT OF REVIEW
THE WORKERS' COMPENSATION APPEALS	)	[*Lab. Code § 5950*]
BOARD OF THE STATE OF CALIFORNIA, and	)	
_____ [*names*],	)	
Respondents.	)	

[TO THE HONORABLE (PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE) COURT OF APPEAL, _____ APPELLATE DISTRICT:]

Petitioner requests issuance of a writ of review for the purpose of inquiring into and determining the lawfulness of the _____ [*specify order, decision, or award, e.g.,* Findings and Award], made and filed on

_____ [*date*], by respondent Workers' Compensation Appeals Board (hereinafter "Appeals Board"), and in support thereof alleges:

1. At all times herein mentioned, _____ [*name of employer*] (hereinafter "employer") was[, and is,] _____ [*specify capacity, e.g.,* a corporation organized and existing under the laws of California authorized to transact, and transacting, business as a _____ (*specify*), in _____ County, California], and _____ [*name of insurance company*] was, and is, a corporation duly authorized to transact, and transacting, business as a workers' compensation insurer in California, with its principal place of business in _____ County, California, and at all times herein mentioned insured the employer against liability arising under the California workers' compensation law.

2. On _____ [*date*], _____ [petitioner *or* _____ (*name of worker*) (hereinafter "petitioner's decedent")] was employed by the employer as a _____ [*specify job position*]. On that day, _____ [petitioner *or* petitioner's decedent] sustained the following-described injury:_____ [*briefly describe injury*]. The injury arose out of the employment and occurred in the course of the employment as follows: _____ [*briefly describe manner in which injury was sustained*]. The injury resulted in _____ [*briefly describe general effects of injury, e.g.,* petitioner's total disability to work for a period of _____ months *or* the death of petitioner's decedent].

3. On _____ [*date*], petitioner filed an application for adjudication of claim with the Appeals Board. Thereafter, on _____ [*date*], a hearing in the matter was held before a workers' compensation judge. The matter was submitted for decision and on _____ [*date*], the workers' compensation judge issued his/her _____ [*specify, e.g.,* Findings and Award], a copy of which is attached hereto as Exhibit A and made a part hereof.

4. On _____ [*date*], within the time prescribed by law, petitioner filed with the Appeals Board a petition for reconsideration, a copy of which is attached hereto as Exhibit B and made a part hereof.

[5. The Appeals Board referred the matter to the workers' compensation judge from whose decision reconsideration was sought. On _____ [*date*], the workers' compensation judge prepared, served, and submitted to the Appeals Board his/her Report and Recommendations, a copy of which is attached hereto as Exhibit C and made a part hereof.]

6. On _____ [*date*], the Appeals Board issued its order _____ [denying the petition for reconsideration. A copy of the Order *or* granted reconsideration and, after reconsideration, issued its decision _____ (*specify, e.g.,* affirming) the _____ (*e.g.,* Findings and Award) filed by the workers' compensation appeals judge. A copy of the Decision] is attached hereto as Exhibit D and made a part hereof.

7. The _____ [*specify order, decision, or award, e.g.,* Findings and Award] was _____ [without or in excess of the Appeals Board's powers *or* procured by fraud *or* unreasonable *or* not supported by substantial evidence *or* not supported by the findings of fact] in that _____ [*specify*].

[*ADD, if claim is that the decision is not supported by substantial evidence*]

[8. All the material evidence relative to the point at issue is _____ [set forth in the Statement of Material Evidence appended to this decision, which, by this reference, is incorporated herein *or* as follows: _____ (*summarize testimony and any statments in writings introduced in evidence relative to the point, and attach to this petition as an exhibit and incorporate by reference a copy of each writing referred to*).]

[*CONTINUE*]

9. Petitioner has no right to appeal from the Findings and Award or from the order denying reconsideration and has no other plain, speedy, and adequate remedy or any remedy other than by writ of review.

WHEREFORE, petitioner prays:

1. That a writ of review issue out of this court to the Workers' Compensation Appeals Board, directing it to certify fully to this court at a specified time and place the records and proceedings of the cause so that the same may be inquired into and determined by this court;

2. That following the inquiry and determination by this court, the _____ [*specify, e.g.,* Findings and Award be annulled];

3. That _____ [*specify particular relief desired, e.g.,* the court further declare that as a matter of law _____ (petitioner *or* petitioner's decedent) was acting in the course and scope of his/her employment when the injury was sustained and that the cause be remanded to the Workers' Compensation Appeals Board for further proceedings consistent with that declaration]; and

4. That petitioner be granted such other and further relief as may be proper and just in the premises.
Dated: _____.

Respectfully submitted,_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[Verification.]

[STATEMENT OF MATERIAL EVIDENCE]

[*If the claim is that the decision is not supported by substantial evidence and all material evidence relative to the claim is not set forth in the body of the petition (see Paragraph 8), set forth that evidence in this statement. The statement should summarize all testimony and any written statements introduced in evidence relative to the point. A copy of any writing referred to should be attached as an exhibit and incorporated by reference.*]

[2] Use of Form

The form in [1], *above*, is for use by an injured employee or the dependents of a deceased employee to seek judicial review of an order, ruling, decision, or award of the appeals board. It may be modified for use by an employer to seek review of an adverse order, ruling, decision, or award [*see Lab. Code §§ 5810, 5950, 5952*]. In the latter case, the petition may include a prayer for an order directing the appeals board not to take any further proceedings in the matter and for an order staying or suspending, in whole or in part, operation of the appeals board's order, ruling, decision, or

award pending the court's determination of the petition for writ of review [*see Lab. Code § 5956*; for the undertaking required as a prerequisite to a stay order, see *Lab. Code § 6000*].

For discussion of judicial review, see *§ 577.280* et seq.

[3] Contents of Petition

The petition must include, as exhibits, copies of the following documents [*Cal. Rules of Ct., Rule 8.495(a)(1)*]:

- Each order, decision, or award to be reviewed; and

- The workers' compensation judge's minutes of hearing and summary of evidence, findings and decisions, and his or her report and recommendation on the petition for reconsideration.

If it is claimed that the decision is not supported by substantial evidence, the petition must fairly state and attach copies of all the material evidence relative to the point at issue [*Cal. Rules of Ct., Rule 8.495(a)(2)*].

Effective July 1, 2006, each party other than the Appeals Board must comply with the requirements of *Cal. Rules of Ct., Rule 8.208*, concerning serving and filing a Certificate of Interested Entities or Persons. The petitioner's certificate must be included in the petition and must appear after the cover and before the tables. If the petitioner fails to file the certificate as required, the clerk will notify the petitioner that the certificate must be filed within 10 days and that failure to comply will result in the court's striking the petition [*Cal. Rules of Ct., Rule 8.495(c)*].

[4] Format and Copies

The petition for writ of review may be typed or printed in accordance with court rules as to format [*Cal. Rules of Ct., Rule 8.40(a)*]. It must have a cover containing the title of the case, the designation of the paper (Petition for Writ of Review), and the name, address, California State Bar membership number, and phone number of the attorney filing the petition [*Cal. Rules of Ct, Rule 8.204(b)*]. The cover should be red [*Cal. Rules of Ct., Rule 8.40(b)*]. An original and four copies of the petition must be presented to the clerk of the appellate court for filing [*Cal. Rules of Ct., Rule 8.44(b)(3)*].

Recycled paper must be used for an original brief or other paper filed with a reviewing court and for all copies of a brief or other paper whether filed with the court or served on other parties. The use of recycled paper for the cover of the brief is encouraged [*Cal. Rules of Ct., Rule 8.204(b)(10)*].

For the format requirements of petitions filed in a court of appeal and related procedures and forms for use in review proceedings, see Ch. 492, *Review (Certiorari), Writ of.*

[5] Verification and Supporting Papers

The petition must be verified and accompanied by a memorandum [see *Lab. Code § 5954*; *Code Civ. Proc. § 1069*; *Cal. Rules of Ct., Rule 8.486(a), (5)*]. It must also be accompanied by proof of service of two copies on the appeals board in San Francisco and one copy on each party who entered an appearance in the proceeding before the appeals board and whose interest is adverse to the petitioner. Service on the board's local district office is not required [*Cal. Rules of Ct., Rule 8.495(a)(3)*].

[6] Cross References

Hanna, *California Law of Employee Injuries and Workers' Compensation, ch. 34, §§ 34.11, 34.12*

California Workers' Compensation Practice (3d ed, Cal. CEB 1985), Ch. 11, *Judicial Review*, §§ 11.1, 11.24-11.49

Witkin, Summary of California Law, vol. 2, *Worker's Compensation*, § 438 (10th ed. 2005)

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51-577 California Forms of Pleading and Practice--Annotated §§ 577.511-577.519

[Reserved]

§§ 577.511[Reserved]

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PART IV. FORMS
B. Civil Actions Against Employer or Third-Party
1. Complaints for Damages

51-577 California Forms of Pleading and Practice--Annotated § 577.520

§ 577.520 Complaint for Damages [Civ. Code § 3333] or in Intervention [Code Civ. Proc. § 387; Lab. Code § 3853]--By Insurance Carrier Against Third-Party Tortfeasor [Lab. Code § 3852]

[1] FORM Complaint for Damages [Civ. Code § 3333] or in Intervention [Code Civ. Proc. § 387; Lab. Code § 3853]--By Insurance Carrier Against Third-Party Tortfeasor [Lab. Code § 3852]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT _____ [FOR DAM-
_____ [*name*],	)	AGES *or* IN INTERVENTION]
[and DOES I through _____,]	)	[Amount demanded _____ (exceeds
Defendant(s)[; _____ (*name*),	)	*or* does not exceed) $10,000]
Intervener].	)	[LIMITED CIVIL CASE]
	)	

_____

_____ [Plaintiff alleges *or* Intervener joins with plaintiff herein and alleges]:

1. At all times herein mentioned, _____ [plaintiff *or* intervener] _____ [*name*] was, and now is, _____ [*specify form of business organization, e.g.,* a corporation organized and existing under the laws of the State of California], authorized to write workers' compensation insurance in California, and at all times herein mentioned insured _____ [*name of employer*] (hereinafter "the employer") against liability to its employees for compensation benefits under the Workers' Compensation Law of the State of California.

2. At all times herein mentioned, the employer was the employer of _____ [*name of employee*] (hereinafter "the employee").

[3. The true names and capacities, whether individual, corporate, associate, or otherwise, of defendants DOES I through _____ are unknown to _____ [plaintiff *or* intervener], who therefore sues these defendants by such fictitious names, and will amend this complaint to show their true names and capacities when ascertained.]

4. Defendant _____ [*name*] is, and at all times herein mentioned was, [_____ (*specify capacity if not a natural person, e.g.,* a corporation organized and existing under the laws of the State of _____ and authorized to transact business in California, and was and is] _____ [*specify status giving rise to duty to injured employee, e.g.,* engaged in the manufacture of _____ (*product causing injury*) *or* the owner of _____ (*describe property the negligent use of which proximately caused the injury*)].

5. On _____ [*date*], at about _____ [*time*], while the employee was _____ [*describe employee's activities at time of injury, e.g.,* driving a [*date*] _____ (*describe vehicle*) in a southerly direction over and along _____ (*name of street, road, or highway*) in the _____ (city *or* county) of _____ (*name*) at its intersection with _____ (*name of street, road, or highway*)], he/she sustained injuries, as hereinafter alleged, whicharose out of and occurred in the course of his/her employment [and from which he/she died].

6. _____ [*Allege tort giving rise to liability, e.g.:* At the time and place the injuries were sustained, defendants, and each of them, _____ (*describe act(s) or omission(s), e.g.,* so negligently owned, maintained, operated, and repaired their above described vehicle) as to cause _____ [*specify circumstances of accident, e.g.,* it to collide with the vehicle being driven by the employee].

7. As a proximate result of the _____ [*specify tort, e.g.,* negligence] of defendants, and each of them, the employee sustained _____ [severe bodily injuries *or specify injuries*] [from which he/she died].

8. As a proximate result of the _____ [*e.g.,* negligence] of defendants, and each of them, and of the resulting injuries sustained by [, and the death of,] the employee, _____ [plaintiff *or* intervener] has been obligated to pay, and has paid, workers' compensation [death] benefits to _____ [the employee *or* _____ (*name(s)*), who is/are the (sole) dependent(s) of the employee (hereinafter "the employee's dependent(s)") *or* the California State Department of Industrial Relations pursuant to the provisions of *Section 4706.5 of the Labor Code*] [*if limited civil case, specify amount of damages, e.g.,* as follows:

a. Temporary disability benefits in the amount of $_____;

b. Permanent disability benefits in the amount of $_____; and

c. Medical benefits in the amount of $_____].

[9. _____ (Plaintiff *or* Intervener) is informed and believes, and thereon alleges, that it will be required

to pay further disability benefits and sums for medical care and treatment for an indefinite time in the future, and _____ (plaintiff *or* intervener) prays that when the _____ (extent of this liability is *or* total amount of such expenditures are) ascertained this complaint (in intervention) may be amended accordingly.]

WHEREFORE, _____ [plaintiff *or* intervener] prays judgment against defendants, and each of them, for:

1. Workers' _____ [compensation *or* death] benefits paid to the _____ [employee *or* employee's dependent(s) *or* California State Department of Industrial Relations] [in the amount of $_____];

2. Future disability benefits and costs of medical care and treatment according to proof;

3. Costs of suit herein incurred; and

4. Such other and further relief as this court deems just.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for [Plaintiff *or* Intervener]

VERIFICATION

I, _____ [*name*], am the _____ [*specify title, e.g.,* President] of _____ [plaintiff *or* intervener] _____ [*name of corporation*] and am authorized to make this verification on its behalf.

I have read the foregoing complaint [in intervention] and know the contents thereof. The same is true of my own knowledge, except as to those matters that are therein alleged on information and belief, and, as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, illustrates a complaint for use by a workers' compensation insurance carrier (or by the employer if self-insured) to sue a third-party tortfeasor to recover the workers' compensation benefits paid as a result of an injury to or death of an employee in the course and scope of his or her employment [*see Lab. Code § 3852*]. The form may be used to commence an original action or as a complaint in intervention by the carrier in an action commenced by the

injured employee [*see* discussion under *§§ 577.332[6], [7]*]. For when the complaint must be filed, see discussion under *§ 577.332[8]*. For general discussion of third party actions, see *§ 577.330* et seq.

For additional or alternative allegations that may or must be included, depending on the nature of the specific tort involved, see the chapter in this publication covering that tort or subject, for example, Ch. 83, *Automobiles: Bringing the Action* , Ch. 380, *Negligence* , and Ch. 460, *Products Liability* .

For a comprehensive procedural guide that chronologically outlines all the procedures in a typical civil action brought in a California state court, see Ch. 2, *Procedural Guide for Civil Actions* .

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions* .

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints* .

[3] Specification of Damages

In an unlimited civil case in superior court brought to recover damages for personal injury or wrongful death, the complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see *Ch. 177, Damages, § 177.40* et seq., and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

For alternative forms of prayers, see Ch. 420, *Prayers* .

[4] Allegations

The complaint alleges the following:

- Plaintiff's standing as the employer's workers' compensation insurance carrier (Paragraph 1);

- the defendant's duty to the class of persons of which the employee is a member (Paragraph 4) [*see Civ. Code § 1714*, and, e.g., Ch. 460, *Products Liability* (duty of a manufacturer of products not to place defective products into the stream of commerce) and Ch. 421, *Premises Liability* (duty of an owner of property to exercise due care in its management so as not to injure others)];

- injury to the employee arising out of and in the course of his or her employment, establishing plaintiff's duty to pay compensation benefits (Paragraphs 2, 5 and 7) [*see Civ. Code §§ 3282, 3333*; *Lab. Code § 3600*];

- defendant's tortious conduct, that is, defendant's breach of duty to the employee (Paragraph 6) [*see Civ. Code § 1714*];

- defendant's breach of duty as the proximate cause of the employee's injuries (Paragraph 7) [*see Civ. Code § 3333*];

- that plaintiff suffered a loss in the form of having to pay benefits as a result of defendant's breach of duty to the employee (Paragraph 8) [*see Civ. Code §§ 3282, 3333*]; and

- the amount of plaintiff's damages (Paragraph 8) [*see Civ. Code §§ 3281, 3333*; *Lab. Code § 3852*].

An optional allegation is included for use to allege the probability of additional compensation payments being required before the present action is adjudicated, that is, additional detriment and damages (Paragraph 9) [*see Civ. Code §§ 3281, 3282, 3333*].

The court of appeal has held that, pursuant to *Lab. Code § 3852*, a workers' compensation carrier stated a cause of action against alleged third-party tortfeasors for recoupment of death benefits the carrier paid to a deceased employee's survivor, who was an actual dependent of the employee but who had no standing to bring a wrongful death action against the alleged tortfeasors. The court held that the carrier's right to sue was not limited to its status as subrogee of the survivor and that the wrongful death statute, with its limited standing provisions, was irrelevant in determining the carrier's right to sue [*Fremont Comp. Ins. Co. v. Sierra Pine, Ltd. (2004) 121 Cal. App. 4th 389, 394-401, 17 Cal. Rptr. 3d 80]* .

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used* .

[5] Pleading Employee's Cause of Action

If the employee has failed to file an action against the third-party tortfeasor, the foregoing complaint may allege the employee's damages, even if the employee has not been joined as a party [*State Comp. Ins. Fund v. Matulich (1942) 55 Cal. App. 2d 528, 530-531, 131 P.2d 21* ; *see* *County of San Diego v. Sanfax Corp. (1977) 19 Cal. 3d 862, 873, 140 Cal. Rptr. 638, 568 P.2d 363* ; *Buell v. CBS, Inc. (1982) 136 Cal. App. 3d 823, 826, 186 Cal. Rptr. 455]* .

[6] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (section repealed on January 1, 2006, unless a later-enacted statute deletes or extends the repeal date)], verification will requireany answer to be verified in an unlimited civil case in the superior court [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

For alternative forms of verification, see Ch. 572, *Verification* .

[7] Intervention

[a] Generally

Normally, leave to file a complaint in intervention may be obtained by noticed motion or by ex parte application. For forms for use in seeking leave to intervene as well as a form of order granting intervention, see Ch. 395, *Parties* .

For discussion and forms for use in seeking to intervene in the action of another, see Ch. 395, *Parties* .

[b] By Employee

The employee may also intervene in a pending action by the employer or its compensation carrier against the third-party tortfeasor [*Buell v. CBS, Inc. (1982) 136 Cal. App. 3d 823, 825 n.2, 186 Cal. Rptr. 455* ; *Jordan v. Superior Court (1981) 116 Cal. App. 3d 202, 206-211, 172 Cal Rptr 30* ; *State Comp. Ins. Fund v. Matulich (1942) 55 Cal. App. 2d 528, 529-530, 131 P.2d 21* ; discussion under *see §§ 577.332[6], [7]*]. For forms of complaints for damages that may be used by the employee to sue the third-party tortfeasor either by a complaint in intervention or an original action, see the appropriate tort title in this set.

[8] Service of Complaint on Employee

If used as an original complaint, a copy of the foregoing complaint must be served forthwith on the employee personally or by registered mail [*Lab. Code § 3853*; *see § 577.521*].

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers* .

[9] Burden of Proof and Evidence

An employer seeking reimbursement for compensation benefits bears the burden of establishing that the defendant's negligence is the proximate cause of the employee's injuries and the amount of tort damages reasonably resulting therefrom. In a third-party tort action, the defendant must be permitted the opportunity of presenting evidence to the contrary, and this is so whether the claim is asserted by an employee for his or her own injury, or by an employer (or its carrier) for reimbursement of compensation paid [*Breese v. Price (1981) 29 Cal. 3d 923, 930-931, 176 Cal. Rptr. 791, 633 P.2d 987]* .

[10] Cross References

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For discussion and forms for use in actions in subrogation generally, see Ch. 536, *Subrogation*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

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B. Civil Actions Against Employer or Third-Party
1. Complaints for Damages

51-577 California Forms of Pleading and Practice--Annotated § 577.521

§ 577.521 Notice of Filing of Complaint Against Third Party [Lab. Code § 3853]--By Employee or Employer

[1] FORM Notice of Filing of Complaint Against Third Party [Lab. Code § 3853]--By Employee or Employer

SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____

[*or other as appropriate*]

_____ [*name*], Plaintiff,	)	
vs.	)	NO. _____
_____ [*name*], [and DOES I	)	NOTICE OF FILING OF COMPLAINT
through _____,] Defendant(s).	)	
	)	

_____

You are hereby notified that on _____ [*date*], plaintiff _____ [*name of employee or employer*] filed the _____ [attached *or* enclosed] complaint for damages in the _____ Court of _____ [*name of court*], Civil No. _____, against defendant _____ [*name*]. This action is based on an injury sustained by _____ [plaintiff or name of employee] on _____ [*date*], arising out of and in the course of his/her employment with _____ [plaintiff *or name of employer*], which was insured for workers' compensation liability at the time of the injury by _____ [*name of insurance carrier*]. This copy of the complaint is delivered to you pursuant to the provisions of *Section 3853 of the Labor Code*.

Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[2] Use of Form

The form in [1], *above*, is for use by an injured employee or his or her employer to give notice to the other of the filing of a complaint against a third-party tortfeasor for damages arising out of the injury for which workers' compensation benefits were paid.

Under *Lab. Code § 3853* prior to its 1980 amendment, the employee or employer filing a third-party action was required forthwith to give written notice of the filing to the other. As amended, *Lab. Code § 3853* requires only that a copy of the complaint be forthwith given to the other. Under both the original and amended versions of the statute, delivery must be personal or by registered mail and proof of the service must be filed in the action (*see § 577.332[10]*).

Although the foregoing notice is no longer required, counsel may nevertheless wish to include it, or a formal letter, with the copy of the complaint delivered, particularly where the complaint is delivered by registered mail, to notify the recipient of the reason for it.

For forms of proof of service by mail, which may be adapted for use when service is by registered mail or when delivery is made in person, see Ch. 518, *Service of Summons and Papers* .

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51-577 California Forms of Pleading and Practice--Annotated § 577.522

§ 577.522 Complaint for Compensatory Damages [Civ. Code § 3333] by Injured Employee Against Negligent Employer Who Failed to Secure Compensation Under Workers' Compensation Law [Lab. Code § 3706]

[1] FORM Complaint for Compensatory Damages [Civ. Code § 3333] by Injured Employee Against Negligent Employer Who Failed to Secure Compensation Under Workers' Compensation Law [Lab. Code § 3706]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name of employee*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Negligence)
_____ [*name of employer*], and	)	[Amount demanded _____ (exceeds
DOES I through _____, Defend-	)	*or* does not exceed) $10,000]
ants.	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. Defendant _____ [*name of employer*] is, and at all times mentioned herein was,

_____ [*capacity, e.g.,* a corporation organized and existing under the laws of the State of California with its principal place of business in _____ (*city*), _____ County, California].

2. Defendants Doe I through Doe _____, inclusive, are sued herein under fictitious names. Their true names and capacities are unknown to plaintiff. When their true names and capacities are ascertained, plaintff will amend this complaint by inserting their true names and capacities herein. Plaintiff is informed and believes and thereon alleges that each of the fictitiously named defendants is responsible in some manner for the occurrences herein alleged, and that plaintiff's damages as herein alleged were proximately caused by those defendants. Each reference in this complaint to "defendant," "defendants," or a specifically named defendant refers also to all defendants sued under fictitious names.

3. Plaintiff is informed and believes and thereon alleges that at all times herein mentioned each of the defendants, including all defendants sued under fictitious names, was the agent and employee of each of the remaining defendants, and in doing the things hereinafter alleged, was acting within the course and scope of this agency and employment.

4. On or about _____ [*date*], at _____ [*city*], _____ County, California, plaintiff and defendant entered into _____ [a written *or* an oral] agreement for the employment of plaintiff by defendant _____[*describe general nature of work, e.g.,* to perform construction work for defendant's construction company]. Pursuant to this employment, defendant _____ [*name of employer*] was required to secure payment of workers' compensation benefits as required by *Labor Code Section 3700*.

5. Plaintiff subsequently entered into employment pursuant to the above-described agreement.

[6. _____ (*Allege any specific duty of care imposed on employer by statute or regulation*).]

7. _____ [*Allege facts showing defendant's duty of care in particular, e.g.,* At all times mentioned herein, defendant owned, maintained, controlled, operated, and provided a certain _____ (*specify, e.g.,* scaffolding) for use by employees, including plaintiff, in performing work.]

8. _____ [*Allege defendant's breach of duty of care, e.g.,* Defendant negligently maintained the _____(*specify, e.g.,* scaffolding) in a dangerous and unsafe condition, in that _____ (*specify*).]

9. _____ [*Allege plaintiff's injury and causal relationship with defendant's breach of duty of care, e.g.,* On or about _____ [date], plaintiff was using the _____ (*specify, e.g.,* scaffolding) for an intended purpose, namely _____ (*specify*), in the course and scope of plaintiff's employment, at _____ (*place*). Plaintiff was then and there injured, as more particularly alleged hereinafter, as a proximate result of _____ (*specify, e.g.,* the scaffolding's breaking and causing plaintiff to fall two stories and strike the ground).]

10. As a proximate result of the acts and omissions of defendant, plaintiff was hurt and injured in his/her health, strength, and activity, sustaining injury to his/her nervous system and person, all of which have caused, and continue to cause, plaintiff great mental, physical, and nervous pain and suffering. [Plain tiff is informed and believes and thereon alleges that these injuries will result in some permanent disability to him/her.] As a result of these injuries, plaintiff has suffered general damages [in the amount of $_____].

[*EITHER*]

11. As a further proximate result of defendant's acts, plaintiff has been damaged in that he/she has been required to

expend money and incur obligations for medical services, X rays, drugs, and sundries reasonably required in the treatment and relief of the injuries herein alleged [in the sum of $_____].

[*OR*]

11. As a further proximate result of the acts of defendant, plaintiff has incurred, and will continue to incur, medical and related expenses. The full amount of these expenses is not known to plaintiff at this time. Plaintiff will move to amend this complaint to state the amount when it becomes known to him/her, or on proof thereof.

[*EITHER*]

12. As a further proximate result of the acts of defendant, plaintiff was prevented from attending to his/her employment at a _____ [wage *or* salary] of _____ [*specify amount and term, e.g.*, $2,000.00 per month] for a period of _____ [*specify, e.g.*, 2 months] and thereby lost earnings to his/her damage [in the sum of $_____].

[*OR*]

12. As a further proximate result of the acts of defendant, plaintiff was prevented from attending to his/her employment at a _____ [wage *or* salary] of _____ [*specify amount and term, e.g.*, $2,000.00 per month] for a period of _____ [*specify, e.g.*, 2 months] as of the date of this complaint and continuing for an as yet undetermined period. Plaintiff thereby has lost and will lose earnings in an as yet unascertained amount. Plaintiff will seek to amend this complaint at such time as the amount is ascertained. [As a further proximate result of the acts of defendant, plaintiff's present and future earning capacity has been greatly impaired. The exact amount of this loss is not known to plaintiff at this time, and plaintiff will move to amend this complaint to state the amount when it becomes known to him/her, or on proof thereof.]

[*CONTINUE*]

13. [On _____ (*date*), in a proceeding entitled _____ (*specify*), No. _____, the Workers' Compensation Appeals Board made and entered findings and conclusions determining that at the time of the injury suffered by plaintiff as alleged herein, plaintiff and defendant were subject to the workers' compensation insurance and safety laws, and that] [D]efendant failed to secure the payment of compensation in one or more of the ways specified in *Labor Code Section 3700*.

14. A copy of this complaint _____ [has been *or* forthwith will be] given to the Uninsured Employers Benefits Trust Fund by _____ [personal service *or* certified mail], and proof of such service _____ [is attached hereto *or* will be filed herein].

WHEREFORE, plaintiff prays judgment against defendant(s) as follows:

1. For general damages [in the sum of $_____];

2. For medical and related expenses _____ [in the sum of $_____ *or* according to proof];

3. For lost earnings, past and future, _____ [in the sum of $_____ *or* according to proof];

4. For interest as allowed by law;

5. For costs of suit incurred herein;

6. For reasonable attorney's fees; and

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

VERIFICATION (*if desired*)

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

The form in [1], *above*, is for use by an employee to obtain damages from an employer who has failed to secure compensation pursuant to the workers' compensation and insurance laws [*see Lab. Code § 3706*]. For discussion of actions against uninsured employers under *Lab. Code § 3706*, see *§ 577.312[2]*.

Such an action may be maintained only if the workers' compensation law is otherwise applicable to the employee [*see Lab. Code § 3706* (action may be brought by employee); *see also Lab. Code § 3352* (persons excluded from definition of "employee")]. For a complaint for use in the case of excluded employment, see *§ 577.522[1]*.

An action may also be maintained by the dependents of an employee who died from his or her injuries [*Lab. Code § 3706*]. For discussion and forms for use in actions by an employee's dependents, see Ch. 181, *Death and Survival Actions*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions* .

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints* .

[3] Allegations

In an action under *Lab. Code § 3706*, the complaint must allege the following [*see Coleman v. Silverberg Plumbing Co. (1968) 263 Cal. App. 2d 74, 79, 69 Cal. Rptr. 158* ; *Mantonya v Bratlie (1948) 33 Cal. 2d 120, 124-125, 199 P.2d 677* ; *see also § 577.22*, for discussion of who is employer and employee subject to workers' compensation requirements]:

- There was an employer-employee relationship between plaintiff and defendant, pursuant to which defendant was required to secure payment of workers' compensation (Paragraphs 4 and 5); and

- The employer failed to carry workers' compensation insurance in violation of *Labor Code § 3700* (Paragraph 13).

This complaint also alleges that a copy of the complaint was sent to the Uninsured Employers Benefits Trust Fund as required by *Lab. Code § 3708.5*.

The findings and conclusions of the Workers' Compensation Appeals Board on questions of fact are conclusive and final and are not subject to review [*Lab. Code § 5953*]. Thus, if the WCAB has determined that defendant (employer) failed to secure compensation as required by *Lab. Code § 3700*, that fact should be alleged (Paragraph 13).

There is a statutory presumption that an injury to an employee of an uninsured employer was a direct result of, and grew out of, the negligence of the employer. The burden of proof is on the employer to rebut this presumption [*Lab. Code § 3708*]. Nevertheless, the elements of negligence should be alleged because the presumption is a rule of evidence only, and it does not relieve the injured employee of the burden of pleading facts showing a cause of action based on negligence [*see Graybiel v. Consolidated Ass'ns, Ltd. (1936) 16 Cal. App. 2d 20, 25-26, 28, 60 P.2d 164]* . Therefore, the complaint alleges the following four elements of a cause of action for negligence [*see, e.g., Miglierini v. Havemann (1966) 240 Cal. App. 2d 570, 572, 49 Cal. Rptr. 795]* :

- The existence of a duty of care owed by defendant to plaintiff;

- Breach of that duty by defendant;

- Damage to plaintiff; and

- A causal relationship between the defendant's breach of duty and the damage suffered by plaintiff (Paragraphs 6-9).

The foregoing form also contains allegations of general damages (Paragraph 10), special damages for medical expenses (Alternative Paragraphs 11), and special damages for lost earnings (Alternative Paragraphs 12). The first alternative of Paragraph 11 alleges a fixed and known amount of medical expenses. The second alternative is for use if the amount of medical expenses is not known at the time when the complaint is filed. The first alternative of Paragraph 12 alleges a fixed and known amount of lost earnings. The second alternative is for use if the total amount of lost earnings cannot yet be ascertained and the plaintiff's future earning capacity has been impaired.

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used* .

[4] Specification of Damages

In an unlimited civil case in superior court brought to recover damages for personal injury or wrongful death, the

complaint must not state the amount of actual or punitive damages demanded [*Code Civ. Proc. § 425.10(b)*].

Otherwise, the amounts claimed as damages must be alleged [*Code Civ. Proc. § 425.10(b)*] or an equivalent statement must be included, for example, a statement that the damages for a particular loss or harm sustained [*see Civ. Code §§ 3281, 3282*] are not known and that leave will be sought to amend the complaint to state the exact amount when ascertained. If this is done, counsel must remember to seek leave to amend the complaint to so state before judgment.

No claim for punitive damages may state an amount sought regardless of the nature of the case or whether it is a limited civil case [*Civ. Code § 3295(e)*].

For discussion of and forms for requesting and stating the amount of damages sought when they are not stated in the complaint, see *Ch. 177, Damages, § 177.40* et seq., and Ch. 205, *Defaults and Default Judgments* [*Code Civ. Proc. §§ 425.11, 425.115*].

For alternative forms of prayers, see Ch. 420, *Prayers* .

[5] Verification

Although verification of this complaint is not required [*see Code Civ. Proc. § 128.7(a)* (section repealed on January 1, 2006, unless a later-enacted statute deletes or extends the repeal date)], verification will require any answer to be verified in an unlimited civil case in the superior court [*Code Civ. Proc. §§ 92(b), 446*]. Verification will also preclude a general denial in an unlimited civil case, and will preclude a general denial even in a limited civil case when the action is a claim assigned to a third party for collection [*Code Civ. Proc. § 431.30(d)*]. For further discussion see Ch. 26, *Answers* .

For alternative forms of verification, see Ch. 572, *Verification* .

[6] Cross References

For discussion of jurisdiction in California courts in general, see Ch. 324, *Jurisdiction: Subject Matter*

For discussion and forms relating to pleading a cause of action for negligence, see Ch. 380, *Negligence*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

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51-577 California Forms of Pleading and Practice--Annotated § 577.523

§ 577.523 Allegation--Employment Excluded From Workers' Compensation Law Coverage [Lab. Code §§ 2800, 2801]

[1] FORM Allegation--Employment Excluded From Workers' Compensation Law Coverage [Lab. Code §§ 2800, 2801]

On or about _____ [*date*], at _____ [*city*], _____ County, California, plaintiff and defendant entered into _____ [a written *or* an oral] agreement for the employment of plaintiff by defendant _____ [*describe general nature of work, e.g.,* to perform domestic and household services]. Pursuant to the terms of this agreement, plaintiff was not an employee within the meaning of California's workers' compensation law in that _____ [*specify reason and cite statutory exclusion, e.g.,* under *Section 3352(h) of the Labor Code*, plaintiff earned less than $100 in wages from defendant during the 90 calendar days immediately preceding the date of the injury hereinafter alleged].

[2] Use of Form

The form in [1], *above*, illustrates allegation in a complaint by an employee against his or her employer based on the employer's negligence. The form alleges that the employment relationship between the parties is one that is excluded under workers' compensation law [*see Lab. Code §§ 3351-3352*]. This allegation may be substituted for the allegation in Paragraph 4 of the complaint in *§ 577.522[1]*.

Such a civil action is subject to the special rules of *Lab. Code § 2801*, which define and limit the employer's defenses. For discussion, see *§ 577.312[3][b]*. For a form for an affirmative defense alleging the plaintiff's negligence in such an action, see Form 162. See also, *§ 577.522*.

[3] Pleading Alternative: No Mention of Employment Relationship

As an alternative to the use of this form, the plaintiff may plead the action as any other negligence action, without reference to any employment relationship between the parties. Such a pleading puts the burden on the defendant to raise

any possible exclusive remedy issue as an affirmative defense [*see Green v. City of Oceanside (1987) 194 Cal. App. 3d 212, 224, 239 Cal. Rptr. 470]* . However, any reference in the complaint to an employment relationship should be accompanied by the pleading of facts that remove the case from the exclusive remedy principle [*see Halliman v. Los Angeles Unified School Dist. (1984) 163 Cal. App. 3d 46, 50, 209 Cal. Rptr. 175]* . In this case, such an allegation would set forth facts that establish excluded employment. For further discussion, see *§ 577.311[3]*.

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51-577 California Forms of Pleading and Practice--Annotated § 577.524

§ 577.524 Complaint for Compensatory and Punitive Damages [Civ. Code §§ 3294, 3333] by Injured Employee Against Employer--Willful Physical Assault by Employer [Lab. Code § 3602(b)(1)]

[1] FORM Complaint for Compensatory and Punitive Damages [Civ. Code §§ 3294, 3333] by Injured Employee Against Employer--Willful Physical Assault by Employer [Lab. Code § 3602(b)(1)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name of employee*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Assault and Battery)
_____ [*name of employer*], [and	)	[Amount demanded _____ (exceeds
DOES I through _____,] De-	)	*or* does not exceed) $10,000]
fendants.	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. [*Allegation of defendant employer's capacity. See Paragraph 1 of complaint in § 577.522[1].*]

2. [*Fictitious name allegation. See Paragraph 2 of complaint in § 577.522[1].*]

3. [*Agency allegation. See Paragraph 3 of complaint in § 577.522[1].*]

[4. *Allegations of contractual employment relationship between plaintiff and defendant, if desired. See Paragraphs 4 and 5 of compalaint in § 577.522[1].*]

5. On or about _____ [*date*], at _____ [*location*] in _____ [*city*], California, defendant _____ [*name*] _____ [*state all acts of defendant that placed plaintiff in fear of a harmful or offensive contact, e.g.,* drove a fork lift truck directly toward plaintiff, who was standing with his back to an interior wall and unable to escape].

6. In doing the acts as alleged above, defendant intended to cause, or to place plaintiff in apprehension of, a harmful contact with plaintiff's person.

7. As a result of defendant's acts as alleged above, plaintiff was in fact placed in great apprehension of a harmful contact with plaintiff's person.

8. Immediately thereafter, defendant _____ [*name*] _____ [*state all acts of defendant that constituted a harmful contact with plaintiff, e.g.,* did in fact strike plaintiff with the forklift truck that he was driving].

9. In doing the acts as alleged above, defendant acted with the intent to make a contact with plaintiff's person.

10. At no time did plaintiff consent to any of the acts of defendant as alleged above.

[11. _____ (*Allege any specific physical injuries suffered by plaintiff, e.g.,* As a proximate result of the acts of defendant as alleged above, plaintiff suffered several cracked ribs, a dislocated hip, and numerous contusions and abrasion over his body).]

12. [*Allegation of general damages. See Paragraph 10 of complaint in § 577.522[1].*]

13. [*Damages allegation for medical expenses. See alternative Paragraphs 11 of complain in § 577.522[1].*]

14. [*Damages allegation for lost earnings. See Alternative Paragraphs 12 of complaing in § 577.522[1].*]

15. The aforementioned conduct of defendant was willful and malicious and was _____ [intended to harm plaintiff *or* in conscious disregard of plaintiff's rights and safety]. Plaintiff may therefore recover an award of punitive damages.

WHEREFORE, plaintiff prays judgment on both causes of action against defendant(s) as follows:

1. For general damages [in the sum of $_____];

2. For medical and related expenses _____ [in the sum of $_____ *or* according to proof];

3. For lost earnings, past and future, _____ [in the sum of $_____ *or* according to proof];

4. For punitive damages;

5. For interest as allowed by law;

6. For costs of suit incurred herein; and

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 577.522[1].*]

[2] Use of Form

The form in [1], *above*, illustrates a complaint for damages caused by a willful physical assault committed by an employer against an employee. Such an action is an express statutory exception to the exclusive remedy principle of workers' compensation law, permitting the employer to bring a civil action against the employer [*see Lab. Code § 3602(b)(1)*]. For further discussion, see *§ 577.314[2]*. See also, *§§ 577.522* and *577.523* and Ch. 58, *Assault and Battery* .

[3] Allegations

In addition to incorporating standard allegations of capacity, fictitiously named defendants, and agency, this form contains the following necessary allegations of the elements of causes of action for assault and battery [*see Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 375, 193 Cal. Rptr. 422* (battery); *Lowry v. Standard Oil Co. (1944) 63 Cal. App. 2d 1, 6-7, 146 P.2d 57* (assault)]:

- Defendant's act that placed plaintiff in fear of a harmful bodily contact (Paragraph 5),
- Defendant's intent to cause the apprehension (Paragraph 6);
- Plaintiff's actual apprehension of the contact (Paragraph 7);
- Defendant's act that produced the harmful contact or battery (Paragraph 8);
- Defendant's intent to make the contact (Paragraph 9); and
- Plaintiff's lack of consent to defendant's conduct (Paragraph 10).

For discussion, see Ch. 58, *Assault and Battery* .

This complaint contains an optional paragraph to allege any specific bodily injury that plaintiff may have received as a

result of the defendant's conduct (Paragraph 11). Standard damages allegations for general damages for pain and suffering and for compensatory damages for medical expenses and lost income are also incorporated (Paragraphs 12-14). An allegation for punitive damages is also included (Paragraph 15).

Paragraph 5 alleges the employment relationship between the parties. This paragraph is optional because the burden is on the defendant to plead and prove the applicability of the exclusive remedy principle of workers' compensation law [*see Green v. City of Oceanside (1987) 194 Cal. App. 3d 212, 224, 239 Cal. Rptr. 470]* . If the plaintiff alleges the relationship, the complaint must also show sufficient facts to show an exception to the exclusive remedy principle [*see Halliman v. Los Angeles Unified School Dist. (1984) 163 Cal. App. 3d 46, 50, 209 Cal. Rptr. 175]* . This requirement is met by allegations of a willful physical assault by the employer [*see Lab. Code § 3602(b)(1)*]. For further discussion, see § 522.311[3].

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§ 577.525 Complaint for Compensatory and Punitive Damages [Civ. Code §§ 3294, 3333] by Injured Employee Against Employer--Aggravation of Work-Related Injury by Fraudulent Concealment [Lab. Code § 3602(b)(2)]

[1] FORM Complaint for Compensatory and Punitive Damages [Civ. Code §§ 3294, 3333] by Injured Employee Against Employer--Aggravation of Work-Related Injury by Fraudulent Concealment [Lab. Code § 3602(b)(2)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name of employee*],	)	NO. _____
Plaintiff,	)	COMPLAINT FOR DAMAGES
vs.	)	(Fraudulent Concealment of Industrial Injury)
_____ [*name of employer*], and	)	[Amount demanded _____ (exceeds
DOES I through _____, Defend-	)	*or* does not exceed) $10,000]
ants.	)	[LIMITED CIVIL CASE]

Plaintiff alleges:

1. [*Allegation of defendant employer's capacity. See Paragraph 1 of complaint in § 577.522[1].*]

2. [*Fictitious name allegation. See Paragraph 2 of complaint in § 577.522[1].*]

3. [*Agency allegation. See Paragraph 3 of complaint in § 577.522[1].*]

[4. *Allegations of contractual employment relationship between plaintiff and defendant, if desired. See Paragraphs 4 and 5 of complaint in § 577.522[1].*]

5. _____ [*Allege conditions of employment or occurrence of event that caused plaintiff's initial work-related injury, e.g.,* At all times herein mentioned, defendant was engaged in the business of milling, manufacturing, and packaging asbestos. Plaintiff's employment contract required that he/she work in proximity to all aspects of defendant's business, and thus during the period of his/her employment, he/she was continuously exposed to asbestos.]

6. _____ [*Allege initial work-related injury, e.g.,* As a proximate result of being continuously exposed to asbestos, plaintiff developed frequent instances of pulmonary infections and dysfunctions.]

7. _____ [*Allege defendant's fraudulent concealment of plaintiff's condition and its cause, e.g.,* Defendant has known since _____ (date), that long exposure to asbestos or the ingestion of that substance is dangerous to health, yet concealed this knowledge from plaintiff, advised him/her that it was safe to work in proximity to asbestos, and failed to provide protective devices to prevent plaintiff's exposure to asbestos. By _____ (date), defendant learned that plaintiff was suffering from a pulmonary disease but failed to inform plaintiff that his/her illness was caused by exposure to asbestos or to take any measures to cure the disease or to prevent plaintiff from further exposure to asbestos. Doctors retained by defendant were neither qualified nor supplied with adequate information regarding the risk of asbestos exposure. Defendant failed to advise these doctors of the development of pulmonary disease in plaintiff or of the fact that the disease was the result of the working conditions at defendant's place of employment.]

[8. _____ (*Allege any further actions of fraudulent concealment, if appropriate, e.g.,* In addition to the foregoing acts designed to conceal from the plaintiff the nature and cause of his/her illness, defendant willfully failed to file a First Report of Occupational Injury or Illness with the State of California regarding plaintiff's injury, as required by law).]

9. Each of the acts and omissions described in Paragraphs 6 and 7[, and 8,] was done falsely and fraudulently by defendant, with the intent to induce plaintiff to continue to work in a dangerous environment. Plaintiff was ignorant of the risks involved and would not have continued to work in such an environment if he/she had known the facts.

10. _____ [*Allege specific aggravation of physical injuries suffered by plaintiff, e.g.,* As a proximate result of the acts of defendant as alleged above, plaintiff developed pneumoconiosis, lung cancer, and other asbestos-related injuries].

11. [*Allegation of general damages for pain and suffering. See Paragraph 10 of complaint in § 577.522[1].*]

12. [*Damages allegation for medical expenses. See alternative Paragraphs 11 of complaint in § 577.522[1].*]

13. [*Damages allegation for lost earnings. See alternative Paragraphs 12 of complaint in § 577.522[1].*]

14. [*Punitive damages allegation. See Paragraph 15 of complaint in § 577.524[1].*]

WHEREFORE, plaintiff prays judgment on both causes of action against defendant(s) as follows:

1. For general damages [in the sum of $_____];

2. For medical and related expenses _____ [in the sum of $_____ *or* according to proof];

3. For lost earnings, past and future, _____ [in the sum of $_____ *or* according to proof];

4. For punitive damages;

5. For interest as allowed by law;

6. For costs of suit incurred herein; and

7. For such other and further relief as the court may deem proper.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Plaintiff

[*Verification, if desired. See § 577.522[1].*]

[2] Use of Form

The form in [1], *above*, illustrates a complaint by an employee against his or her employer to recover damages for the aggravation of an injury or disease because the employer fraudulently concealed the injury from the employee [*see Lab. Code § 3602(b)(2)*; *Johns-Manville Products Corp. v. Superior Court (1980) 27 Cal. 3d 465, 477-479, 165 Cal. Rptr. 858, 612 P.2d 948]* . Such a cause of action is an exception to the exclusive remedy principle of workers' compensation law [*see Lab. Code § 3602(b)(2)*; *Johns-Manville Products Corp. v. Superior Court (1980) 27 Cal. 3d 465, 477-479, 165 Cal. Rptr. 858, 612 P.2d 948]* . For further discussion, see the § 577.314[3]. See also, *§§ 577.522, 577.524*.

[3] Allegations

In addition to incorporating standard allegations of capacity, fictitiously named defendants, and agency (Paragraphs 1-3), this form sets forth the following allegations:

- The general conditions of employ ment leading to the injury (Paragraph 5);

- The initial onset of industrial injury (Paragraph 6);

- The acts of the defendant employer of fraudulently concealment of the disease and its connection to the employment from the employee (Paragraphs 7 and 8); and

- The ultimate extent of the injury attributable to the aggravation caused by the fraudulent

concealment (Paragraph 10).

Paragraph 9 alleges plaintiff's reliance on defendant's conduct. Such an allegation may not be required, in that an action under *Lab. Code § 3602(b)(2)* does not appear to be one for common-law fraud [*see Foster v. Xerox Corp. (1985) 40 Cal. 3d 306, 309-312, 219 Cal. Rptr. 485, 707 P.2d 858* (complaint pleaded on strict-liability theory held sufficient; apparently no allegation of plaintiff's reliance on defendant's conduct); *see also Civ. Code §§ 1709, 1710*; *South Tahoe Gas Co. v. Hofmann Land Improvement Co., (1972) 25 Cal. App. 3d 750, 765, 102 Cal. Rptr. 286* (elements of tort of fraud); *but see Chase Chemical Co. v. Hartford Accident & Indemnity Co. (1984) 159 Cal. App. 3d 229, 242, 205 Cal. Rptr. 469* (finding cause of action for fraudulent concealment against insurer insufficient for failure to allege facts on which common-law fraud element of duty to disclose may be predicated)]. For discussion of common-law fraud, see Ch. 269, *Fraud and Deceit* .

Paragraphs 11-13 incorporate standard allegations of general damages for pain and suffering, special damages for medical expenses, and special damages for lost earnings. Paragraph 14 incorporates an allegation for punitive damages [*see Civ. Code § 3294*; *see also McDonald v. Superior Court (1986) 180 Cal. App. 3d 297, 300-303, 225 Cal. Rptr. 394]* . Only the plaintiff's damages that were proximately caused by the aggravation of the original injury because of the fraudulent concealment may be recovered. However, the defendant has the burden with regard to apportionment [*Lab. Code § 3602(b)(2)*].

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[Reserved]

§§ 577.526[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.530

§ 577.530 Employer's Affirmative Defense [Code Civ. Proc. § 431.30(b)(2), (g)]--Employee's Action Barred by Exclusive Remedy Principle of Workers' Compensation Law [Lab. Code § 3602(a)]

[1] FORM Employer's Affirmative Defense [Code Civ. Proc. § 431.30(b)(2), (g)]--Employee's Action Barred by Exclusive Remedy Principle of Workers' Compensation Law [Lab. Code § 3602(a)]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE TO THE _____ [*specify, e.g.,* FIRST THROUGH FIFTH] CAUSE(S) OF ACTION, defendant alleges:

1. At the time and place of plaintiff's alleged injury, plaintiff was an employee of defendant, was performing service growing out of and incidental to his/her employment, and was acting within the course of his/her employment. Therefore, plaintiff's exclusive remedy is that provided by Workers' Compensation pursuant to *Sections 3201-6208 of the Labor Code*.

[2] Use of Form

The form in [1], *above*, illustrates an affirmative defense in an answer to a complaint for damages brought by an employee against his or her employer for an injury that is within the exclusive remedy principle of workers' compensation law [*see Lab. Code §§ 3600(a)* (conditions of compensation), 3602(a) (exclusiveness of remedy)]. This form may be inserted into a general form of answer, to be found in Ch. 26, *Answers* .

The defendant has the burden of pleading and proving that a civil action is barred by the exclusive remedy principle [*Green v. City of Oceanside (1987) 194 Cal. App. 3d 212, 224, 239 Cal. Rptr. 470* ; *see § 577.311[3]*]. Therefore, this defense should always be included in any answer to a complaint by an employee against an employer unless an exception to the principle is conceded.

[3] Pleading Affirmative Defenses

Defenses set forth in an answer must be separately stated. Each defense must refer to the causes of action that it is intended to answer in a manner by which it may be intelligibly distinguished [*Code Civ. Proc. § 431.30(g)*]. For further discussion, see Ch. 26, *Answers* . If the defense appears on the face of the complaint, the objection may be made by a demurrer to the complaint [*see Code Civ. Proc. § 430.30(a)*; *see also Colombo v. State of California (1991) 3 Cal. App. 4th 594, 599, 5 Cal. Rptr. 2d 567* ; *Halliman v. Los Angeles Unified School Dist. (1984) 163 Cal. App. 3d 46, 50, 209 Cal. Rptr. 175* (if facts indicating applicability of exclusive remedy principle appear on face of complaint and no facts are alleged to bring action within exception to principle, complaint is subject to demurrer)].

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51-577 California Forms of Pleading and Practice--Annotated § 577.531

§ 577.531 Employer's Affirmative Defense [Code Civ. Proc. § 431.30(b)(2), (g)]--Lack of Jurisdiction Due to Pending Workers' Compensation Appeals Board Proceeding

[1] FORM Employer's Affirmative Defense [Code Civ. Proc. § 431.30(b)(2), (g)]--Lack of Jurisdiction Due to Pending Workers' Compensation Appeals Board Proceeding

AS A [_____ (*if more than one, specify number, e.g.,* SECOND)] SEPARATE AND AFFIRMATIVE DEFENSE TO THE _____ [*specify, e.g.,* FIRST THROUGH FIFTH] CAUSE(S) OF ACTION, defendant alleges:

1. The court has no jurisdiction to proceed with plaintiff's action, because on _____ [*date*], an application for compensation relating to the same injury that is the subject matter of plaintiff's action, entitled _____ [*specify*], WCAB No. _____, was filed with the Workers' Compensation Appeals Board. The WCAB, therefore, has exclusive jurisdiction to proceed in this matter.

[2] Use of Form

The form in [1], *above*, is for use by an employer as an affirmative defense to an action by an employee brought subsequent to an application for workers' compensation benefits on account of the same injury. The employer may seek to have the civil action abated in court until the issue of the exclusive jurisdiction of the workers' compensation laws can be decided by the Workers' Compensation Appeals Board [*see Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 976, 104 Cal. Rptr. 42, 500 P.2d 1386* ; *Taylor v. Superior Court (1956) 47 Cal. 2d 148, 151, 301 P.2d 866]* .

This form is for use if it is clear that the employee's remedies of civil damages and workers' compensation are mutually exclusive, but the proper remedy turns on a finding of facts. For example, the issue may be whether the injury will be deemed to have occurred within the course of employment within the meaning of workers' compensation law [*see Lab. Code § 3600(a)*]. In such a case, the tribunal first assuming jurisdiction retains it to the exclusion of all other tribunals in which the action might have been initiated [*Busick v. Workmen's Comp. Appeals Bd. (1972) 7 Cal. 3d 967, 976, 104 Cal. Rptr. 42, 500 P.2d 1386]* .

The affirmative defense presented in this form will be of no avail if the issue is whether one of the statutory exceptions to the exclusive remedy principle applies. In such a case, there is concurrent jurisdiction, and the employee may pursue both remedies, subject to principles of set-off [*Lab. Code § 3600(b)*]. For further discussion, see *§§ 577.319*, *577.530*.

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51-577 California Forms of Pleading and Practice--Annotated § 577.532

§ 577.532 Employer's Affirmative Defense [Code Civ. Proc. § 431.30(b)(2), (g)]--Negligence of Plaintiff [Lab. Code § 2801]

[1] FORM Employer's Affirmative Defense [Code Civ. Proc. § 431.30(b)(2), (g)]--Negligence of Plaintiff [Lab. Code § 2801]

AS A [_____ (*if more than one, specify number, e.g.,* FIRST)] SEPARATE AND AFFIRMATIVE DEFENSE TO THE _____ [*specify, e.g.,* FIRST THROUGH FIFTH] CAUSE(S) OF ACTION, defendant alleges:

1. At the time and place of the accident alleged in the complaint, plaintiff himself/herself did not exercise ordinary care, caution, or prudence to avoid the accident, and the resulting injuries, if any, sustained by plaintiff were proximately caused and contributed to by the negligence of plaintiff in that _____ [*set out acts of plaintiff constituting negligence*].

[2] Use of Form

The form in [1], *above*, is for use as an affirmative defense to be included in an answer to a complaint charging an employer with negligence proximately resulting in personal injuries to an employee not subject to compensation under the workers' compensation and insurance law [*see Fonseca v. County of Orange (1972) 28 Cal. App. 3d 361, 367, 104 Cal. Rptr. 566]* . The form alleges the contributory (or comparative) negligence of the employee as a proximate cause of his or her injury.

In such an action, contributory negligence is not a bar to recovery if the employee's negligence is slight and that of the employer is gross in comparison [*Lab. Code § 2801*]. This statute has not been construed or amended since the adoption of principles of comparative negligence and the demise of contributory negligence as a complete bar to a negligence action in 1975 [*see Li v. Yellow Cab Co. (1975) 13 Cal. 3d 804, 828-829, 119 Cal. Rptr. 858, 532 P.2d 1226]* . Therefore, the effect of "gross" negligence on the part of the employee in comparison to "slight" negligence on the part of the employer is an open question. For further discussion, see *§§ 577.312[3][b], 577.530*.

Defendant is permitted to allege that plaintiff was negligent in and about matters alleged in complaint and that such negligence contributed to plaintiff's injury. *Singer v. Superior Court (1960) 54 Cal. 2d 318, 323-324, 5 Cal. Rptr. 697, 353 P.2d 305* .

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[Reserved]

§§ 577.533[Reserved]

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51-577 California Forms of Pleading and Practice--Annotated § 577.540

§ 577.540 Proceedings to Secure Lien Against Third-Party Judgment [Lab. Code § 3856(b)]--Notice of Motion [Code Civ. Proc. § 1010] and Supporting Declaration [Code Civ. Proc. § 2015.5]

[1] FORM Proceedings to Secure Lien Against Third-Party Judgment [Lab. Code § 3856(b)]--Notice of Motion [Code Civ. Proc. § 1010] and Supporting Declaration [Code Civ. Proc. § 2015.5]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	MOTION AND NOTICE OF MOTION FOR LIEN
_____ [*name*],	)	AGAINST JUDGMENT[, SUPPORTING DECLAR-
Defendant.	)	ATION OF _____ (*name*), AND
_____ [*name*],	)	MEMORANDUM OF POINTS AND AUTHORIT-
Lien Claimant.	)	IES]
	)	[Telephone Appearance]
	)	Date: _____
	)	Time: _____
	)	Location: _____
		Judge: _____
		Date Action Filed: _____
		Trial Date: _____

_____

To each _____ [*identify party, e.g.*, plaintiff] named above, and to the attorney of record for each such party:

NOTICE IS HEREBY GIVEN that, on _____ [*date*], at _____ [*time*], or as soon thereafter as the matter may be heard, in [_____ (Department *or* Division) _____ of] this court, located at _____ [*street address*],_____ [*city*],_____ [*identify party, e.g.*, defendant] _____ [*name*] will, and hereby does, move for an order allowing it a first lien for workers' compensation benefits paid to plaintiff _____ [*name of employee*] against the amount of the judgment rendered in this action on _____ [*date*], in favor of plaintiff. The motion will be made on the grounds that the lien claimant has paid to the plaintiff workers' compensation benefits for the same injuries that are the subject of this lawsuit and is entitled to reimbursement from the judgment herein rendered.

The motion will be based on this notice of motion, on the _____ [affidavit(s) *or* declaration(s)] of _____ [*name(s)*] and the memorandum of points and authorities served and filed herewith, on the records and file herein, and on such evidence as may be presented at the hearing of the motion.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Lien Claimant _____ [*name*]

SUPPORTING DECLARATION OF _____ [*name*]

I, _____ [*name*], declare:

1. I am _____ [*identify declarant, e.g.*, an attorney at law duly admitted to practice before all the courts of the State of California and the attorney of record herein for _____ (*name of insurance carrier*) (hereinafter, "the lien claimant") or other statement as appropriate].

2. At all times herein mentioned, the lien claimant was[, and is,] a corporation [incorporated and] duly authorized to do business in the State of California as a workers' compensation insurance company.

3. At all times herein mentioned, the lien claimant was the workers' compensation insurance carrier for _____ [*name of employer*] (hereinafter "the employer"), pursuant to a policy of workers' compensation insurance, under which the lien claimant was obligated to pay workers' compensation benefits to those employees of the employer who sustained injuries arising out of and in the course of their employment.

4. On _____ [*date of injury*], plaintiff _____ [*name of employee*] (hereinafter "the employee") was an employee of the employer, and sustained injuries that arose out of and in the course of his/her employment.

5. The above-entitled action is by the employee against the third-party tortfeasor to recover damages arising out of the same happening for the same injuries.

6. As a proximate result of the injuries sustained by the employee, the lien claimant has been obligated to pay, and has paid, the following benefits to the employee: _____ [*specify, e.g.:*]

a. Temporary disability benefits in the amount of $_____;

b. Permanent disability benefits in the amount of $_____;

c. Medical benefits in the amount of $_____.

[7. In addition to the total amount of workers' compensation benefits paid to the employee, the lien claimant has been required to pay the following sums: _____ (*specify any salary, wage, pension, or other emolument paid in addition to compensation benefits*).]

[WHEREFORE, the lien claimant requests the allowance of a first lien in the amount of $_____ against the balance of a judgment in favor of plaintiff, _____ (*name*), after the court has ordered payment of plaintiff's litigation expenses and attorney's fees.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Lien Claimant _____ [*name*]

[MEMORANDUM OF POINTS AND AUTHORITIES]

[*Add points and authorities supporting motion, if desired*]

Respectfully Submitted,_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Lien Claimant _____ [*name*]

[2] Use of Form

The form in [1], *above*, is for use by the employer's compensation carrier, which has paid workers' compensation benefits to an injured employee, to secure a lien against a judgment rendered in favor of the employee in an action by the employee against a third-party tortfeasor. The court will, on application of the insurance carrier, after the payment of expenses and attorney's fees from the third-party judgment, allow as a first lien against the amount of the judgment, the amount of the carrier's expenditure for compensation benefits [*Lab. Code § 3856(b)*].

The declaration should set forth facts establishing the grounds of the motion and should be made and executed by a person having personal knowledge of the facts [*see Code Civ. Proc. §§ 2002(1), 2003, 2009, 2015.5*; *Evid. Code § 702*].

If the motion is made before judgment [*see* discussion under [3], *below*], it would appear that the application should be filed separately from the notice of hearing; that is, the application should take the form of a written motion, and a subsequent notice of hearing, set on a date following the judgment, should be prepared and served. For a discussion of written and noticed motions, see Ch. 372, *Motions and Orders* . For further discussion of lien claims, see *§ 577.335[2][a]*.

[3] Filing Motion

Prior to the 1959 enactment of *Lab. Code § 3856* and repeal of the former section, it was held that the application for a lien could be filed at any time before judgment was satisfied [*see Duprey v. Shane (1952) 39 Cal. 2d 781, 796, 249 P.2d 8* ; *Jacobsen v. Industrial Acci. Com. (1931) 212 Cal. 440, 448, 299 P. 66* ; *Dighton v. Martin (1935) 4 Cal. App. 2d 401, 403, 41 P.2d 197]* . Subsequent to 1959, the rule appears to be that the employer, or its compensation carrier, who does not intervene or file a separate action can file its application for a lien before judgment, but under *Lab. Code § 3856(b)*, the court may not allow the lien until after judgment and after the payment of the expenses and attorney's fees. Certainly, the court cannot, on the hearing of the motion to establish a lien before trial, determine whether the employer's right to reimbursement is defeated [in whole or in part] because of the concurring negligence of the employer [*see* Liberty Mut. Ins. Co. v. Fabian (1964), (Los Angeles County Superior Court No. 814000, order denying without prejudice compensation carrier's motion for order imposing a first lien on any judgment rendered in favor of plaintiff, which was set for hearing before judgment)].

[4] Supporting Papers

Although not expressly required by the Civil Law and Motion Rules (*Cal. Rules of Ct., Rules 3.1100-3.1362*) [*see Cal. Rules of Ct., Rule 3.1103*], the better practice is to prepare, serve, and file a memorandum with the foregoing notice of motion if there is any question about the moving party's right to a lien or its amount [*see* generally *Code Civ. Proc. §§ 1005, 1010*]. The form and content of the memorandum are covered in *Cal. Rules of Ct., Rule 3.1113*. For discussion and forms, see Ch. 417, *Points and Authorities* .

[5] Amount Claimed and Supplemental Applications

When a lien is sought at the time of entry of judgment, it should be for the amount of expenditures for compensation made to that date [*see Lab. Code § 3856(b)*]. A supplemental application may be made at any time before the judgment is satisfied for the amount of any additional expenditures by the employer or its carrier for compensation subsequent to the original order [*Lab. Code § 3857*].

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§ 577.541 Proceedings to Secure Lien Against Third-Party Judgment [Lab. Code § 3856(b)]--Order Granting Motion [Code Civ. Proc. § 1003]

[1] FORM Proceedings to Secure Lien Against Third-Party Judgment [Lab. Code § 3856(b)]--Order Granting Motion [Code Civ. Proc. § 1003]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

[*or other as appropriate*]

	)	
_____ [*name*],	)	NO. _____
Plaintiff,	)	ORDER GRANTING MOTION FOR LIEN
vs.	)	AGAINST JUDGMENT
_____ [*name*],	)	[*Lab. Code § 3856(b)*]
Defendant;	)	Date: _____
_____ [*name*],	)	Time: _____
Lien Claimant.	)	Location: _____
	)	Judge: _____
	)	Date Action Filed: _____
	)	Trial Date: _____

_____

The motion of _____ [*name of insurance carrier*], the lien claimant, for an order allowing a first lien against the judgment herein rendered in favor of plaintiff came on regularly for hearing by the court on _____ [*date*]. Moving lien claimant appeared by counsel _____ [*name*]; plaintiff appeared by counsel _____ [*name*][; defendant appeared by counsel _____ (*name*)].

On proof made to the satisfaction of the court that the motion ought to be granted,

IT IS ORDERED that the motion be, and it hereby is, granted, and that _____ [*name of lien claimant*] have a first lien in the sum of $_____ against the balance of the judgment after plaintiff's litigation expenses and attorney's fees have been paid.
Dated: _____.

_____ [*signature*]

Judge of the _____ Court

[2] Use of Form

The form in [1], *above*, illustrates a formal order granting the lien claimant's motion for a lien [*see Lab. Code § 3856(b)*; *see also § 577.540*].

[3] Enforcement of Lien

Any employer or the employer's workers' compensation carrier entitled to and who has been allowed and has perfected a lien on the judgment or award in favor of an employee against any third party for damages occasioned to the same employer by payment of compensation, expenses of medical treatment, and any other charges under the Workers' Compensation Law, may enforce payment of the lien against the third party, or, in case the damages recovered by the employee have been paid to the employee, against the employee to the extent of the lien, in the manner provided for enforcement of money judgments generally [*Lab. Code § 3862*]. For discussion and forms for use in enforcing money judgments, see *Ch. 254, Executions and Enforcement of Judgments, § 254.40* et seq. For further discussion of enforcement of liens, see *§ 577.335[2][b]*.

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§ 577.542 Petition for Credit of Third-Party Judgment Against Compensation Liability [Lab. Code § 3861]

[1] FORM Petition for Credit of Third-Party Judgment Against Compensation Liability [Lab. Code § 3861]

[*Caption. See § 577.400[1].*]

Petitioner alleges:

1. Petitioner was [and is] the workers' compensation insurance carrier for _____, the employer of _____ [*name of employee*] (hereinafter "the employee"), at the time the employee sustained an industrial injury on _____ [*date*].

2. Pursuant to the Workers' Compensation Appeals Board's Findings and Award issued on _____ [*date*], petitioner is required to pay _____ [*specify, e.g.:*]

(a) Permanent disability benefits in the amount of $_____; and

(b) Future medical benefits in the amount of $_____.

3. Under the Findings and Award there is a balance of $_____ unpaid for _____ [*describe benefits*] [and an indefinite amount due and to become due for the award of continuing medical benefits].

4. The injury to the employee was the result of the negligence of a third party, and a _____ [judgment *or* settlement] has been obtained and satisfied against the third party in the amount of $_____. [The court ordered a total of $_____ to be paid from the judgment for litigation expenses, attorney's fees, and a lien for compensation benefits paid, leaving a balance of $_____.]

5. Petitioner is entitled, under *Section 3861 of the Labor Code*, to a credit for the _____ [balance of the judgment *or* settlement] against its liability for compensation due or to become due under the Findings and Award.

WHEREFORE, petitioner requests that the Appeals Board make and issue its order allowing a credit to petitioner in the amount of $_____ against petitioner's liability for workers' compensation benefits.
Dated: _____.

_____ [*firm name, if any*]

By: _____ [*signature*]

_____ [*typed name*]

Attorney for Petitioner _____ [*name*]

[2] Use of Form

The form in [1], *above*, is for use by an employer or its insurance carrier to petition the appeals board for an order allowing as a credit against the amount of compensation to be paid, the balance of the amount recovered against a third-party tortfeasor by judgment or settlement after deduction of the expenses of litigation and attorney's fees and any amount used to reimburse the employer or its insurance carrier for compensation benefits paid [*see Lab. Code § 3861*].

[3] Credit Allowed

The appeals board will allow as a credit to the employer or its insurance carrier against liability for workers' compensation the amount of any recovery by an employee for his or her injury, either by settlement with or after judgment against a third-party tortfeasor that has not been applied to the payment of expenses or attorney's fees pursuant to *Lab. Code §§ 3856, 3858*, and *3860*, or has not been applied to reimburse the employer [*Lab. Code § 3861*; *see also § 577.335[4]*].

[4] Comparative Negligence of Employer

[a] Determined in Judicial Forum

When the comparative fault of the employer, employee, and third-party tortfeasor has been determined in the third-party action, and the employer thereafter seeks to invoke the credit of *Lab. Code § 3861* against future payments, the appeals board should deny the employer credit until the ratio of his or her contribution to the employee's damages corresponds to his or her proportional share of fault. Once the employer's workers' compensation contribution reaches this level, he or she should be granted credit for the full amount available under *Lab. Code § 3861* [*Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 829, 843, 150 Cal. Rptr. 888, 587 P.2d 684]* . That is, the employer is entitled to credit once it has paid the employee a threshold amount of benefits equal to its own proportionate share of the employee's total civil damages, and it is not obligated to first pay benefits equal to the combined share of both the employee and the employer prior to invoking the statutory credit [*Rodgers v. Workers' Comp. Appeals Bd. (1984) 36 Cal. 3d 330, 338, 204 Cal. Rptr. 403, 682 P.2d 1068]* .

[b] Determined by Appeals Board

When the issue of an employer's concurrent negligence arises in the context of his or her credit claim based on a third party settlement, the appeals board must determine the appropriate contribution of the employer because the employee's recovery does not represent a judicial determination of tort damages. Specifically, the board must determine the following:

- The degree of fault of the employer; and
- The total damages to which the employee is entitled.

The board must then deny the employer credit until the ratio of his or her contribution to the employee's damages corresponds to the employer's proportional share of fault. Once the employer's workers' compensation contribution reaches this level, the employer should be granted a credit for the full amount available under *Lab. Code § 3861* [*Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 829, 843, 150 Cal. Rptr. 888, 587 P.2d 684* ; *see Rodgers v. Workers' Comp. Appeals Bd. (1984) 36 Cal. 3d 330, 333, 341-342, 204 Cal. Rptr. 403, 682 P.2d 1068* ; and *Kramer v. Cedu Foundation, Inc. (1979) 93 Cal. App. 3d 1, 8, 155 Cal. Rptr. 552]* . Workers' compensation benefits previously paid by the employer must be included in calculating the employer's credit threshold, and the employer's credit threshold must be reduced by any amounts the employer receives by way of lien settlement from the third party [*Southern Cal. Edison Co. v. Workers' Comp. Appeals Bd. (1997) 58 Cal. App. 4th 766, 771-772, 68 Cal. Rptr. 2d 265]* .

By way of example, assume an employee receives $20,000 in workers' compensation benefits, later sues a third party to recover for the same injury, and settles the case without the consent of the employer. Out of the settlement, the employee actually receives, after payment of expenses and attorney's fees within the meaning of *Lab. Code § 3861*, the sum of $25,000. (Out of the settlement, a nonnegligent employer would normally be entitled to reimbursement of the full $20,000 it paid and to a credit against its future liability of the $5,000 balance [*see Lab. Code § 3860(b)*, discussed in *§ 577.335[3]*].) Suppose the employee then seeks further benefits from the appeals board, and his or her employer claims a credit in the amount of the $25,000 settlement recovery. Under the foregoing principles, the board would then determine the employer's degree of fault and the employee's total damages. Should the board find the employer free of negligence, the employer would receive the benefit of the entire $25,000 settlement as a credit against future payments. Were the board, however, to determine that the employer was 50 percent negligent, and that the employee is entitled to $100,000 in damages, then the employer could not claim a credit until he or she contributed an additional $30,000 in benefits. The employer would then have contributed a total of $50,000 to the employee's recovery, or 50 percent of the employee's total damages of $100,000, and the ratio of his or her contribution to the employee's damages would correspond to his or her degree of fault [*Associated Construction & Engineering Co. v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 829, 843 n.10, 150 Cal. Rptr. 888, 587 P.2d 684* ; *see Rodgers v. Workers' Comp. Appeals Bd. (1984) 36 Cal. 3d 330, 336, 204 Cal. Rptr. 403, 682 P.2d 1068]* .

Had the employer received any settlement from the third party for workers' compensation benefits paid to the employee, the employer's credit threshold would be reduced by that amount. For example, if the employer had received $10,000 from the third-party tortfeasor as settlement of its $20,000 workers' compensation lien, the employer would not be entitled to claim credit until it paid the employee an additional $40,000 in workers' compensation benefits [*Southern Cal. Edison Co. v. Workers' Comp. Appeals Bd. (1997) 58 Cal. App. 4th 766, 771-772, 68 Cal. Rptr. 2d 265]* .

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§ 579.01 Scope of Chapter

This chapter discusses zoning and planning. The legal background analysis is divided into subparts, discussing use zoning and the purposes of zoning [*see § 579.30* et seq.], general and specific plans [*see § 579.50* et seq.], zoning ordinances [*see § 579.70* et seq.], interim zoning [*see § 579.90* et seq.], variances and conditional use permits [*see § 579.110* et seq.], building permits [*see § 579.130* et seq.], nonconforming uses [*see § 579.160* et seq.], the coastal zone [*see § 579.180* et seq.], and judicial review and enforcement [*see § 579.210* et seq.]. It includes a form of complaint for declaratory and injunctive relief from an unconstitutional zoning ordinance [*see § 579.370*], and petitions for writ of mandate to review administrative decisions [*see §§ 579.371 -579.373*].

This chapter also discusses the Subdivision Map Act [*see § 579.260* et seq.]. It also discusses the Subdivided Lands Act, the regulation of time-share developments, and the Interstate Land Sales Full Disclosure Act, which contain provisions controlling the development and sale of subdivisions and other subdivided lands.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusEnvironmental LawNatural Resources & Public LandsCoastal Zone ManagementEnforcementEnvironmental LawZoning & Land UseConditional Use Permits & VariancesReal Property LawPurchase & SaleInterstate Land Sales Full Disclosure ActReal Property LawZoning & Land UseJudicial Review

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§ 579.02 Cross References

For discussion relating to notice requirements for proposed change in the use of a cemetery for other than cemetery purposes, see Ch. 180, *Dead Bodies and Cemeteries*

For discussion of eminent domain, see Ch. 247, *Eminent Domain and Inverse Condemnation*

For additional coverage of zoning, planning, and the Subdivision Map Act, see Manaster and Selmi, California Environmental Law and Land Use Practice, Ch. 60, *Zoning* , Ch. 61, *Subdivision Regulation* , and Ch. 62, *Planning* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawEminent Domain ProceedingsGeneral OverviewReal Property LawInverse CondemnationGeneral Overview

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§ 579.10 Governing Law

The necessity for compensation for the public taking of private property is governed by *U.S. Const., amends. V, XIV § 1*, and *Cal. Const., art. I, § 19*. Planning and zoning is governed generally by *Gov. Code § 65000 et seq.*, and by city and county ordinances and regulations.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsEminent Domain & TakingsReal Property LawZoning & Land UseLocal PlanningReal Property LawZoning & Land UseState & Regional Planning

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Volume 51: Vexatious Litigants thru Zoning and Planning-Chs. 573-579
Chapter 579 ZONING AND PLANNING
PART II. LEGAL BACKGROUND
A. Introduction to Zoning and Planning Laws

51-579 California Forms of Pleading and Practice--Annotated § 579.11

§ 579.11 Relationship of Zoning and Planning

Although local planning embraces zoning, the converse does not hold true. While not devoid of planning, zoning does not include the whole of planning. Zoning is a separation of the local legislative body into districts, the regulation of buildings and structures, according to their construction and use, and the regulation of the nature and extent of land uses. Planning has a much broader connotation. It is concerned with the physical development of the community in relation to its social and economic well-being, according to a master plan based on comprehensive surveys of present conditions and the prospects of future growth. It is an exercise of the state's inherent authority to have recourse to those measures that may serve the basic common moral and material needs [*O'Loane v. O'Rourke (1965) 231 Cal. App. 2d 774, 780, 42 Cal. Rptr. 283]* . Zoning changes can promote rational and orderly land-use planning. Zoning changes must conform to the city's general plan, which must in turn conform to requirements established by state statute [*Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal. 3d 511, 524, 169 Cal. Rptr. 904, 620 P.2d 565]* .

For detailed coverage of zoning and planning, see Manaster and Selmi, California Environmental Law and Land Use Practice, Chs. 60 *Zoning* , and 62 *Planning* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawZoning & Land UseGeneral OverviewReal Property LawZoning & Land UseLocal PlanningReal Property LawZoning & Land UseState & Regional Planning

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§ 579.12 Zoning Agencies and Tools

[1] Advisory Agencies

The Office of Planning and Research (OPR) is governed by *Gov. Code §§ 65025-65049*. It is responsible for developing state land use policies, coordinating planning of all state agencies, and assisting and monitoring local and regional planning, but OPR has no direct operating or regulatory powers [*see Gov. Code § 65035*]. Similarly, a regional district may develop a regional plan setting forth a comprehensive, long-term general plan for the physical development of that region. That plan is advisory only, and does not bind local planning [*see generally Gov. Code §§ 65060-65060.8*].

[2] Cities and Counties

[a] Agencies

Each city and county has the power necessary to carry out the purposes of *Gov. Code §§ 65000-66499.58* (planning and land use), either through an assigned planning agency or through its legislative body. The legislative body of each city and county may assign the functions of the planning agency to a planning department, one or more planning commissions, administrative bodies or hearing officers, the legislative body itself, or any combination thereof, as it deems appropriate. In the absence of such an assignment, the legislative body will carry out all the functions of the planning agency [*Gov. Code § 65100*].

[b] Plans and Ordinances

Each planning agency must prepare, and the legislative body of each city and county must adopt, a general plan for that city or county [*see Gov. Code § 65300*]. The planning agency may prepare specific plans for the systematic implementation of the general plan for adoption by the legislative body [*Gov. Code §§ 65450, 65453*]. Revision and implementation of the general plan through the administration of specific plans and zoning and subdivision ordinances is a function of the planning agency [*see Gov. Code § 65103*].

The legislative body of any city or county may adopt zoning ordinances [*Gov. Code § 65850*]. County or city zoning

ordinances must be consistent with the general plan of that county or city [*Gov. Code § 65860(a)*]. That legislative body may establish a board of zoning adjustment, an office of zoning administrator, and a board of appeals to hear and decide on applications for variances, conditional use permits, and other permits [*see Gov. Code §§ 65900, 65901*].

The development of subdivisions is governed by the Subdivision Map Act which sets forth statewide requirements, but which vests powers of regulation and control in the legislative bodies of cities and counties [*see Gov. Code §§ 66410-66499.37, 66411, 66420*]. The statewide building requirements set forth in *Health & Safety Code §§ 17910-17995.5* are generally enforced by the planning or building department designated to do so by each city and county [*see Health & Safety Code § 17964*].

[c] Permits

As a practical manner, zoning decisions are based on the permit process, which involves an application for a permit, review of the application, and a decision by the administrative agency. Review of that decision may be available as part of the administrative process, and is available through judicial review. Even if a zoning ordinance does not require a permit for a specified use, typically a building permit will be required. Moreover, a zoning ordinance may necessitate a conditional use permit or a variance for specified uses. The map requirement for development of a subdivision is very similar to a permit. Development within the coastal zone requires a coastal development permit.

[3] Coastal Commission

If land is within the coastal zone, it is within the jurisdiction of the California Coastal Commission, and applications for development permits will be made to the local government, with rights of appeal to the commission [*see generally Pub. Res. Code §§ 30330-30355, 30600-30627*].

[4] Distinguished From Unconstitutional Taking of Property

All zoning restricts an owner regarding the uses that can be made of his or her property, thereby possibly resulting in some sort of diminution in the value of property [*see Mid-Way Cabinet etc. Mfg. v. County of San Joaquin (1967) 257 Cal. App. 2d 181, 188-192, 65 Cal. Rptr. 37]* . However, the federal and state governments are prohibited from taking private property for public use without just compensation [*U.S. Const., Amends. V, XIV, § 1*; *Cal. Const., art. I, § 19*].

The conflicting concepts of the constitutional mandate which states that compensation must be paid when private property is taken for a public purpose and the police power to zone under which compensation need not be paid are not clearly differentiated and each case must stand or fall on its own particular facts [*Southern Pac. Co. v. City of Los Angeles (1966) 242 Cal. App. 2d 38, 46, 51 Cal. Rptr. 197]* . Where that line will be drawn is essentially a question of reasonableness. The determination of reasonableness is a factual one encompassing the interests of the public, the appropriateness of the means, and the oppressiveness of the action [*Dahl v. City of Palo Alto (ND Cal. 1974) 372 F. Supp. 647, 648]* .

An ordinance that on its face results in a mere diminution in the value of property is not per se improper. However, if the zoning regulation is so unreasonable or arbitrary as to deprive a person of the complete use and enjoyment of his or her property, it may be unconstitutionally excessive [*Agins v. Tiburon (1979) 24 Cal. 3d 266, 272, 277, 157 Cal. Rptr. 372, 598 P.2d 25 , aff'd, 447 U.S. 255, 259, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)]* . An amendment to a zoning ordinance may be an unconstitutionally excessive regulation. For example, when an ordinance contained a provision for a special use permit, amendment of that ordinance eliminating the possibility of that permit may be unconstitutional when the use formerly allowed by the permit is the only suitable use of a parcel of land, thereby depriving the landowner of substantially all reasonable use of the property [*see North Sacramento Land Co. v. City of Sacramento (1983) 140 Cal. App. 3d 576, 579-580, 189 Cal. Rptr. 739]* .

Although a development pemit under a zoning ordinance may include conditions that would be considered a public taking of private property ifnot attached to the permit, there must be a nexus between the prohibition or restriction on the landowner and the public purpose advanced as justification for the prohibition. For example, a coastal development permit to build a home conditioned on the landowner conveying an easement allowing the public to pass along a beach, imposed to further the governmental interest of preserving the public's access to and view of the ocean, was held to be invalid as a public taking without compensation [*Nollan v. California Coastal Comm'n (1987) 483 U.S. 825, 836, 107 S. Ct. 3141, 97 L. Ed. 2d 677* (suggesting that requiring an easement from the street to the beach or for a view point might have been so related to the stated governmental interest as to be a valid condition)]. If the essential nexus is found, there must be an inquiry into whether there is a "rough proportionality" between the conditions imposed on approval of the permit and their impact on the property owner's proposed development. No precise mathematical calculation is required, but the local governmental entity responsible for ruling on the permit must make some sort of individualized determination that the conditions imposed are related both in nature and extent to the projected impact of the proposed development [*see* *Dolan v. City of Tigard (1994) 512 U.S. 374, 391, 114 S. Ct. 2309, 129 L. Ed. 2d 304* (approval of building permit conditioned on dedication of portion of applicant's property for flood control and traffic purposes was unconstitutional taking)].

The constitutional property rights preserved to the individual are held in subordination to the rights of society. Incidental damages to property resulting from governmental activities or laws passed in the promotion of the public welfare are not considered a taking of the property for which compensation must be made [*HFH, Ltd. v. Superior Court (1975) 15 Cal. 3d 508, 513-515, 125 Cal. Rptr. 365, 542 P.2d 237]* . For example, an ordinance prohibiting a landowner from removing rental units from the housing market by conversion or demolition without a removal permit is valid. Adequate housing for its residents is a legitimate government interest, and since the regulation did not interfere with the owner's primary, investment-backed expectations and did not render the owner unable to receive a reasonable return on his or her investment, there was no taking of property [*Nash v. City of Santa Monica (1984) 37 Cal. 3d 97, 102-103, 207 Cal. Rptr. 285, 688 P.2d 894]* .

Great financial losses should not be inflicted on an individual property owner when the benefits to the public are negligible, but public welfare and public convenience do control [*Consolidated Rock Products Co. v. City of Los Angeles (1962) 57 Cal. 2d 515, 532, 20 Cal. Rptr. 638, 370 P.2d 342]* . A zoning ordinance will be upheld, against a due process attack, unless its provisions are clearly arbitrary and unreasonable, and have no substantial relation to the public health, safety, morals, or general welfare [*Nash v. City of Santa Monica (1984) 37 Cal. 3d 97, 103, 207 Cal. Rptr. 285, 688 P.2d 894]* .

If, however, a zoning regulation is ultimately held to be unconstitutional as a taking of property, the landowner is entitled to compensation for the period during which the regulation deprived the landowner of all use of his or her land [*First Lutheran Church v. Los Angeles County (1987) 482 U.S. 304, 320, 107 S. Ct. 2378, 96 L. Ed. 2d 250* (this compensation requirement apparently is limited to the situation in which the owner is deprived of all use of its property; it is not required in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like)].

[5] Raising Constitutional Issues

[a] Direct Challenge

A landowner alleging that a zoning ordinance has deprived him or her of substantially all use of his or her land may attempt through declaratory relief or mandamus to invalidate the ordinance as excessive regulation in violation of *U.S. Const., amend. V*, and *Cal. Const., art. I, § 19* [*Agins v. Tiburon (1979) 24 Cal. 3d 266, 273, 157 Cal. Rptr. 372, 598 P.2d 25 , aff'd, 447 U.S. 255, 259, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)]* .

A challenge asserting that a zoning statute or ordinance is facially unconstitutional is made by an action for declaratory

relief [*see Agins v. Tiburon (1979) 24 Cal. 3d 266, 272-273, 276-277, 157 Cal. Rptr. 372, 598 P.2d 25 , aff'd, 447 U.S. 255, 259, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)]* . Injunctive relief is also available to prevent the enforcement of, and the expenditure of public funds on, a facially unconstitutional ordinance [*see State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 250-252, 255, 115 Cal. Rptr. 497, 524 P.2d 1281]* . For a form of complaint challenging the constitutionality of a zoning ordinance, see *§ 579.370*.

On the other hand, neither declaratory nor injunctive relief is appropriate to challenge an administrative decision applying an ordinance to the land of an individual property owner. In that case, a writ of administrative mandate would be the proper vehicle for review [*see Agins v. Tiburon (1979) 24 Cal. 3d 266, 272-273, 276-277, 157 Cal. Rptr. 372, 598 P.2d 25 , aff'd, 447 U.S. 255, 259, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)* ; *State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 249, 251, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *see also §§ 579.371 -579.373*].

The California Supreme Court has held that a landowner may not elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid [*Agins v. Tiburon (1979) 24 Cal. 3d 266, 272-273, 157 Cal. Rptr. 372, 598 P.2d 25 , aff'd, 447 U.S. 255, 259, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)]* . However, although a landowner may not use inverse condemnation to compel the exercise of eminent domain prospectively with respect to an unconstitutional regulation, and the governmental entity remains free to abandon or modify the regulation, orto choose to exercise eminent domain, the landowner is entitled to compensation for the period of time during which the regulation denied that landowner the use of all of his or her land. This compensation requirement, however, is limited to the situation in which the owner is deprived of all use of its property [*First Lutheran Church v. Los Angeles County (1987) 482 U.S. 304, 321, 107 S. Ct. 2378, 96 L. Ed. 2d 250]* . The U.S. Supreme Court expressly stated that it was not dealing with the questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like [*First Lutheran Church v. Los Angeles County (1987) 482 U.S. 304, 321, 107 S. Ct. 2378, 96 L. Ed. 2d 250]* . For discussion of inverse condemnation, see Ch. 247, *Eminent Domain and Inverse Condemnation* .

[b] Collateral Attack in Eminent Domain Proceeding

Although typically a collateral attack on zoning is not permitted in an eminent domain proceeding, when the condemner purporting to exercise its police power by enacting a zoning ordinance has in reality discriminated against a particular parcel or parcels of land to depress their value with a view to future takings in eminent domain, the condemnee may attack the validity of the invalid zoning ordinance in the eminent domain action and, if successful, require that his or her property be valued free of the zoning restrictions [*People ex rel. Dept. of Public Works v. Southern Pac. Trans. Co. (1973) 33 Cal. App. 3d 960, 965, 109 Cal. Rptr. 525* ; *see Toso v. City of Santa Barbara (1980) 101 Cal. App. 3d 934, 949, 162 Cal. Rptr. 210* (action by former holder of option to purchase land, not landowner); *Peacock v. County of Sacramento (1969) 271 Cal. App. 2d 845, 856-863, 77 Cal. Rptr. 391]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsGeneral OverviewEnvironmental LawZoning & Land UseGeneral OverviewReal Property LawSubdivisionsGeneral OverviewReal Property LawZoning & Land UseConstitutional LimitsReal Property LawZoning & Land UseOrdinances

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§ 579.13 Zoning Generally

[1] Exercise of Police Power

A local legislative body has the right to divide land into districts and prescribe regulations for its use, consistent with the reasonable exercise of the police power. However, that police power is not unlimited, and regulation of the use of property must be reasonable. Local governments may not impose restrictions that are oppressive, unnecessary, or unreasonable on the use of private property or the pursuit of useful activities [*Skalko v. City of Sunnyvale (1939) 14 Cal. 2d 213, 215-216, 93 P.2d 93]* . It is not required that the proscribed use of each individual lot in a zone will have a negative effect on the surrounding property if the zoning plan, as a whole, promotes the objectives of the police power [*Hamer v. Town of Ross (1963) 59 Cal. 2d 776, 788, 31 Cal. Rptr. 335, 382 P.2d 375]* . The zoning power has a much wider scope than the mere suppression of the offensive uses of property; it may be invoked not only negatively, but constructively and affirmatively for the promotion of the public welfare [*see* *Clemons v. City of Los Angeles (1950) 36 Cal. 2d 95, 103-104, 222 P.2d 439]* .

The segregation of residences, industries, commercial, and mercantile businesses of diverse kinds to particular localities is within the local police power, and bears a rational relation to the health, safety, and general welfare of the community. In recognition of the fact that the introduction of some uses, such as business or industry, into some districts, such as a strictly uniform residential district, operates in some measure to lower the value and depreciate the desirability of surrounding property, a city may establish and maintain residential and quasi-residential districts and exclude all nonconforming and conflicting uses from those districts [*see* *Fourcade v. San Francisco (1925) 196 Cal. 655, 662, 664, 238 P. 934* ; *Sechrist v. Municipal Court (1976) 64 Cal. App. 3d 737, 743, 134 Cal. Rptr. 733]* .

Property owners have no vested right to continuity of the zoning of the general area in which they reside [*Robinson v. City of Los Angeles (1956) 146 Cal. App. 2d 810, 816, 304 P.2d 814]* . A change in the zoning restrictions in an area does not impair the enforceability of existing deed restrictions. In other words, while rezoning makes possible a change in an area, it cannot by itself create the change [*Seaton v. Clifford (1972) 24 Cal. App. 3d 46, 52, 100 Cal. Rptr. 779]* .

[2] By General Law Cities and Counties

[a] Ordinance and Regulation

A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws [*Cal. Const., art. XI, § 7*]. *Gov. Code §§ 65800-65912* provide for the adoption and administration of zoning laws, ordinances, rules, and regulations by general law counties and cities.

[b] Initiative or Referendum

The powers of initiative and referendum are reserved to the people and may be exercised by the electors of each city or county under procedures provided by the Legislature [*Cal. Const., art. II, § 11*; *art. IV, § 1*; *see Elec. Code §§ 3700-3720, 4000-4021* (county and city initiatives, respectively); *Elec. Code §§ 3750 et seq., 4050-4061* (county and city referenda, respectively); *see also* Ch. 302, *Initiative, Referendum, and Recall* [. These procedures may be used to enact zoning ordinances [*see Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 588, 593, 135 Cal. Rptr. 41, 557 P.2d 473]* . These procedures do not apply to cities governed by charter rather than by general law [*Cal. Const., art. II, § 11*; *Elec. Code § 4061*; *see § 579.13[3]*].

The notice and hearing provisions of *Gov. Code §§ 65853-65857* do not apply to zoning by initiative [*Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 596, 135 Cal. Rptr. 41, 557 P.2d 473* ; for discussion of *Gov. Code §§ 65853-65857, see § 579.71*]. Although zoning by initiative is not required to provide the notice to landowners required of legislative zoning by *Gov. Code § 65856*, affected landowners have the opportunity to present their case to the electorate [*Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal. 3d 511, 524, 169 Cal. Rptr. 904, 620 P.2d 565]* . A zoning ordinance adopted by initiative may not be amended or repealed except by a vote of the people, absent a provision otherwise [*Elec. Code § 4013*; *C-Y Development Co. v. City of Redlands (1982) 137 Cal. App. 3d 926, 932, 187 Cal. Rptr. 370]* .

[3] By Chartered Cities and Counties

[a] Ordinance and Regulation

A chartered county or chartered city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations with respect to its affairs, subject only to restrictions and limitations within its charter, so long as the ordinance or regulation is not in conflict with general laws [*see Cal. Const., art. XI, §§ 5, 7*; *see also Regents of University of California v. City of Santa Monica (1978) 77 Cal. App. 3d 130, 135-137, 143 Cal. Rptr. 276]* .

[b] Initiative

For its own government, a county or city may adopt a charter by majority vote of its electors. An election to amend, revise, or repeal the charter may be proposed by initiative or by the governing body [*see Cal. Const., art. XI, § 3*]. The initiative power may extend to all local legislation, including zoning ordinances [*see Bayless v. Limber (1972) 26 Cal. App. 3d 463, 468-470, 102 Cal. Rptr. 647* ; *see also Civ. Code § 3536*].

An initiative measure limiting municipal growth that is inconsistent with the general plan cannot be construed as an amendment to the general plan if there is no basis in the title, ballot summary, or elsewhere in the ballot materials to support the conclusion that the voters both understand that the initiative amends the general plan and that they intend to do so. If an initiative is a zoning ordinance and is inconsistent with the general plan, the initiative is invalid [*Lesher Communications, Inc. v. City of Walnut Creek (1990) 52 Cal. 3d 531, 540-546, 277 Cal. Rptr. 1, 802 P.2d 317]* . An initiative that does not directly amend a city's general plan but directs the city council to amend the plan is invalid as beyond the power of initiative [*Marblehead v. City of San Clemente (1991) 226 Cal. App. 3d 1504, 1509-1510, 277 Cal. Rptr. 550]* .

An initiative is not proper when the power to make the decision has been delegated by the Legislature to the legislative

body, such as when a statute authorized the board of supervisors to enact ordinances for development fees [*Committee of Seven Thousand v. Superior Court (1988) 45 Cal. 3d 491, 500-507, 247 Cal. Rptr. 362, 754 P.2d 708]* . An initiative that requires the vote of the electorate on a general plan amendment for an annexation also is invalid because annexation procedures are a matter of state-wide concern and therefore are not subject to municipal initiatives [*L. I. F. E. Committee v. City of Lodi (1989) 213 Cal. App. 3d 1139, 1146-1148, 262 Cal. Rptr. 166]* .

Zoning by initiative process in a chartered city does not have to conform to the notice and hearing requirements applicable to ordinances that are enacted by a legislative body. A hearing on a legislative matter is held to inform the lawmakers of relevant facts and policy considerations; it is not held to protect individual rights, property, or otherwise. Unless constitutionally compelled, the requirements for lawmaking by the legislative process should not be imposed on lawmaking by the initiative process. The electoral process itself normally provides both notice and an opportunity to be heard to all electors, by written arguments and otherwise [*Bayless v. Limber (1972) 26 Cal. App. 3d 463, 468-470, 102 Cal. Rptr. 647* ; *see Elec. Code § 4017*].

[c] Applicability of State Regulations

If a chartered city has an ordinance that pertains to a purely municipal matter, it is not automatically invalid because it is in conflict with general state laws or because state laws have been enacted that cover the same subject. However, for matters that are of statewide concern, chartered cities remain subject to and controlled by applicable general state laws if it is the intent and purpose of those general laws to occupy the field to the exclusion of municipal regulation [*City of Los Angeles v. Department of Health (1976) 63 Cal. App. 3d 473, 479, 133 Cal. Rptr. 771]* . Thus, when intended to be applicable through out the state, state zoning laws apply to chartered cities.

Although *Gov. Code §§ 65100-65763* (local planning) and *Gov. Code §§ 65800-65912* (zoning regulations) do not generally apply to chartered cities, there are some notable exceptions, among them the applicability of the procedural standards and rules set forth in *Gov. Code § 65804* [*Gov. Code §§ 65700, 65803, 65804*]. Chartered cities must adopt general plans containing the mandatory elements of *Gov. Code § 65302* [*Gov. Code § 65300*; for discussion of *Gov. Code § 65302, see § 579.50[2]*]. *Gov. Code § 65008*, prohibiting discrimination in actions pursuant to *Gov. Code §§ 65000-66499.58* (planning and land use), and *Gov. Code § 65104*, describing allowable fees, specifically apply to chartered cities. Additionally, *Gov. Code §§ 65590, 65590.1* (low and moderate income housing within coastal zone), *Gov. Code §§ 65913, 65914* (housing development approvals), and *Gov. Code §§ 65915-65918* (incentives and density bonuses) all apply to chartered cities [*Gov. Code §§ 65700, 65913.9, 65918*, respectively].

Often, the application of statewide zoning provisions to chartered cities is a reflection that the topic is a matter of statewide concern [*see, e.g., Gov. Code §§ 65850.5, 65913.9*]. Indeed, in declaring legislative policy toward open-space zoning, *Gov. Code § 65561* says that it is necessary to provide for the development of statewide coordinated plans for the conservation and preservation of open-space lands and thus includes charter cities within that goal [*Gov. Code § 65561(d)*]. The state statutes governing local regulation of solar energy systems apply to chartered cities [*Gov. Code § 65850.5*]. *Gov. Code § 65852.3* pertaining to manufactured homes is also specifically applicable to charter cities.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationInitiative & ReferendumGovernmentsLocal GovernmentsChartersGovernmentsLocal GovernmentsOrdinances & RegulationsGovernmentsLocal GovernmentsPolice PowerReal Property LawZoning & Land UseOrdinances

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§ 579.14 Legislative Versus Administrative Acts

[1] Limitation on Initiative and Referendum Power

The powers of referendum and initiative apply only to legislative acts by a local governing body [*Yost v. Thomas (1984) 36 Cal. 3d 561, 569, 205 Cal. Rptr. 801, 685 P.2d 1152]* . The adoption or amendment of a general plan or a specific plan is a legislative act [*Yost v. Thomas (1984) 36 Cal. 3d 561, 570, 205 Cal. Rptr. 801, 685 P.2d 1152]* . Similarly, the enactment of zoning ordinances or amendments are legislative acts; the size of the area or the number of property owners affected is not relevant [*Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal. 3d 511, 515-516, 169 Cal. Rptr. 904, 620 P.2d 565]* . Administrative decisions, such as variances, use permits, subdivision maps, and similar proceedings are adjudicative [*Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal. 3d 511, 522, 522 n.11, 169 Cal. Rptr. 904, 620 P.2d 565]* .

The formal name of an act of local authorities, such as whether it is called an ordinance or a resolution, is not determinative of its legislative or administrative nature. Actions that relate to subjects of a permanent or general character are considered to be legislative, while those that are temporary in operation and effect are not. Acts constituting a declaration of public purpose or policy and making provisions for ways and means of its accomplishment, may be seen as legislative. The crucial test is whether the action is making a new law or executing a law already in existence. Administrative acts are those that are assigned to the executive department or necessary to be done to carry out legislative policies already declared by the legislative body [*O'Loane v. O'Rourke (1965) 231 Cal. App. 2d 774, 783-784, 42 Cal. Rptr. 283]* .

Acts of a local governing body which, in a purely local context, would otherwise be legislative may become administrative in a situation in which the state's system of regulation over a matter of statewide concern is so pervasive that it converts the local legislative body into an administrative agency of the state. However, state regulation of a matter does not necessarily preempt the power of local voters to act when there is wide discretion to a local government not only to determine the contents of its land use plans, but to choose how to implement those plans. Thus, the California Coastal Act [*Pub. Res. Code § 30000 et seq.*], does not preclude a referendum on a local land use measure affecting the coastal zone adopted by the local governing body after the California Coastal Commission has approved

the city's land use plan, because the local government has wide discretion in implementing the plan [*Yost v. Thomas (1984) 36 Cal. 3d 561, 569-573, 205 Cal. Rptr. 801, 685 P.2d 1152]* .

[2] Judicial Review

In addition to their origin, there are significant distinctions between legislative and administrative actions. A zoning ordinance is reviewable by ordinary mandate [*Code Civ. Proc. § 1084*], while an administrative decision is reviewable by administrative mandate [*Code Civ. Proc. § 1094.5*]. A zoning ordinance does not require explicit findings, and is valid if it is reasonably related to the public welfare, while administrative decisions must implement established standards and rest on findings supported by substantial evidence [*Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal. 3d 511, 522, 169 Cal. Rptr. 904, 620 P.2d 565* ; for discussion of judicial remedies in zoning cases, *see § 579.210* et seq. and *§ 579.240* et seq; for general discussion and forms relating to traditional mandate proceedings, *see* Ch. 358, *Mandate and Prohibition* ; for discussion and forms relating to administrative mandate proceedings generally, *see* Ch. 474 et seq., *Availability of Judicial Review of Agency Decisions*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLegislationInitiative & ReferendumGovernmentsLocal GovernmentsOrdinances & RegulationsReal Property LawZoning & Land UseJudicial ReviewReal Property LawZoning & Land UseOrdinancesReal Property LawZoning & Land UseSpecial Permits & Variances

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§ 579.15 Preservation of Historical Property

To promote the preservation of property of historical significance, the Legislature may define that property and provide that when it is enforceably restricted, it will be valued for property tax purposes only on a basis that is consistent with its restrictions and uses [*Cal. Const., art. XIII, § 8*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawZoning & Land UseHistoric Preservation

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Chapter 579 ZONING AND PLANNING
PART II. LEGAL BACKGROUND
A. Introduction to Zoning and Planning Laws

51-579 California Forms of Pleading and Practice--Annotated § 579.16

§ 579.16 Open Space

[1] General Preservation

To promote the preservation of open space lands, the Legislature may define open space land and provide that when that land is enforceably restricted to recreation, enjoyment of scenic beauty, use or conservation of natural resources, or production of food or fiber, it will be valued for property tax purposes only on a basis that is consistent with its restrictions and uses [*Cal. Const., art. XIII, § 8*]. This open space amendment was not adopted to require counties and cities to establish land preserves. Rather, it was adopted to eliminate tax controversy; it reconciled assessments based on restricted open space uses with preexisting constitutional requirements that property be assessed at its full cash value [*Kelsey v. Colwell (1973) 30 Cal. App. 3d 590, 595, 106 Cal. Rptr. 420]* .

A variety of statutory schemes have been enacted in furtherance of perceivedopen space needs. For example, open space easement provisions [*Gov. Code §§ 51050-51065*], the Open Space Easement Act of 1974 [*Gov. Code § 51070 et seq.*], and the Roberti-Z'berg-Harris Urban Open-Space and Recreation Program Act [*Pub. Res. Code § 5620 et seq.*]. In recognition of the tax and assessment concerns associated with land earmarked as open space, provisions governing open-space subventions [*Gov. Code §§ 16140-16154*] and the valuation of open space land subject to an enforceable restriction [*Rev. & Tax. Code §§ 421-430.5*] were also enacted. These open space preservation provisions are distinct from the open space land portion of the general plan of a city or county [*see Gov. Code §§ 65560-65570, 65910*].

[2] Conservation of Agricultural Land

[a] Overview of Williamson Act

Perhaps the most widely used open space provision is the California Land Conservation Act of 1965 (also known as the Williamson Act) [*Gov. Code § 51200 et seq.*]. The Williamson Act was a response to the rapid and virtually irreversible loss of agricultural land to residential and other developed uses and the disorderly patterns of suburban development that mar the landscape, require extension of municipal services to remote residential enclaves, and interfere with agricultural activities [*Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 850, 171 Cal. Rptr. 619, 623 P.2d 180* ; *Honey Springs Homeowners Ass'n v. Board of Supervisors (1984) 157 Cal. App. 3d 1122, 1130, 203 Cal. Rptr. 886]* .

The state aims envisioned by the Williamson Act must be correlated with local environmental and community needs, including long-range community planning [*Honey Springs Homeowners Ass'n v. Board of Supervisors (1984) 157 Cal. App. 3d 1122, 1143, 203 Cal. Rptr. 886* ; *Kelsey v. Colwell (1973) 30 Cal. App. 3d 590, 594, 106 Cal. Rptr. 420]* .

The Williamson Act empowers any city or county having a general plan to establish agricultural preserves consisting of lands devoted to agricultural uses and related compatible uses. The owners of agricultural land within those preserves may enter into annually renewable contracts that restrict the land to open space use for at least 10 years. In return, the landowner is guaranteed a relatively stable tax base, founded on the value of the land for open space use only and unaffected by its development potential. Once the contract has not been renewed, taxes on the property gradually return to the level of taxes on comparable nonrestricted property, as the term of restriction draws nearer to expiration [*Sierra Club v. City of Hayward (1981) 28 Cal. 3d 840, 850-852, 171 Cal. Rptr. 619, 623* ; *see generally Gov. Code §§ 51230, 51236, 51240, 51242, 51244, 51246*; *Rev. & Tax. Code § 426*].

For additional coverage, see Manaster and Selmi, California Environmental Law and Land Use Practice, Ch. 70, *Agricultural Perservation* (Matthew Bender).

[b] Contents of Contract

Every Williamson Act contract must provide for the exclusion of uses other than agricultural and those compatible with agricultural uses, for the duration of the contract [*Gov. Code § 51243(a)*]. The construction and maintenance of utility, communication, or agricultural laborer housing facilites are usually compatible uses. Conditions to permit and encourage compatible use of the land, particularly public outdoor recreational uses, may also be imposed [*Gov. Code § 51238*; *see Gov. Code §§ 51238.1-51238.3*]. The contract may provide for restrictions, terms, and conditions, including fees, more restrictive that those required by the Act [*Gov. Code §§ 51240, 51242*]. A similar contract must be offered under appropriate similar terms to other landowners within the same agricultural preserve [*Gov. Code § 51241*]. The terms of every contract, including a description of the subject land, will be recorded in the appropriate county recorder's office and serve as notice to all persons under the recording laws [*Gov. Code § 51248*].

[c] Enforcement of Contract

The county, city, or landowner may bring any court action necessary to enforce a Williamson Act contract, including an action to enforce the contract by specific performance or injunction. An owner of land may bring any action to enforce a contract on land with an exterior boundary within one mile of his or her land. An owner of land under contract may bring any action to enforce a contract on land located within the same county or city [*Gov. Code § 51251*]. For forms for bringing actions on a contract, see Ch. 140, *Contracts* , and Ch. 528, *Specific Performance* ; for forms for bringing an action for injunctive relief, see Ch. 303, *Injunctions* .

[d] Nonrenewal of Contract

If either party to a Williamson Act contract chooses not to renew the contract, that party must give written notice of nonrenewal to the other party. A nonrenewing landowner must serve notice at least 90 days before the renewal date; a nonrenewing city or county must serve notice at least 60 days before the renewal date. On receipt of a nonrenewal notice a landowner may make a written protest [*Gov. Code § 51245*]. On notice of nonrenewal by either party, the existing contract remains in effect for the balance of the contract period remaining [*Gov. Code § 51246(a)*].

Notice of any proposal to disestablish or alter the boundary of an agricultural preserve must be published, and must be given to the owner of the affected land, to each owner of land under contract within one mile of the land to be removed, and every city within one mile, as well as the local agency formation commission [*Gov. Code §§ 51232, 51233*].

[e] Cancellation of Contract

The landowner may petition the county board of supervisors or city council for cancellation of a Williamson Act contract for all or part of the contract land. Tentative approval for cancellation may be granted if the board or council finds that cancellation is consistent with the purposes of the Williamson Act or is in the public interest [*Gov. Code § 51282* (includes descriptions of what is consistent with purposes of Williamson Act and what is in public interest); *see Gov. Code § 51280.1* (cancellation and alternative use)].

Before the cancellation of any contract, there must be a public hearing with notice sent to every owner of land under contract within the same agricultural preserve and within one mile of the exterior boundary of the contract land [*Gov. Code § 51284*]. Any owner of any property located in the county or city in which the agricultural preserve is situated may protest the proposed cancellation [*Gov. Code § 51285*].

Any action to set aside a decision concerning cancellation on the grounds of noncompliance with the Williamson Act must be brought within 180 days from the council or board action and is governed by *Code Civ. Proc. § 1094.5* (writ of mandate to review administrative proceedings) [*Gov. Code § 51286(a), (b)*; for procedure and forms, *see* Ch. 474, *Availability of Judicial Review of Agency Decisions* , through Ch. 474C, *Procedures in Reviewing Agency Decisions* [. However, if the gravamen of an action to set aside a cancellation is based on a challenge to the assessor's fair market value assessment of the property, the action is based on a liability created by statute, that is, the assessor's duty to determine the fair market value as though it were free of a Williamson Act restriction, and is therefore subject to the three-year limitation period of *Code Civ. Proc. § 338(a)* [*People Ex Rel. Dept. of Conservation v. Triplett (1996) 48 Cal. App. 4th 233, 251, 55 Cal. Rptr. 2d 610]* .

[f] Farmland Security Zones

An optional program within the Williamson Act allows a landowner or a group of landowners to petition county boards of supervisors to create farmland security zones that enable landowners who have Williamson Act contracts to rescind their traditional 10-year rolling contracts to enter into 20-year rolling contracts [*see Gov. Code § 51296.1*]. To qualify for a farmland security zone contract, the land must be predominantly prime farmland or be included in the Important Farmland Series Maps [*Gov. Code § 51296.8*; *see Gov. Code §§ 51201(c), 65570*]. In return for committing their land to a farmland security zone, landowners receive the benefits oflower property tax bills [*Gov. Code § 51296.2(a)*; *see Rev. & Tax. Code § 423.4*], and exemption from parcel taxes, annexation, and designation for school use [*see Gov. Code § 51296.2(b)*].

[g] Agricultural Conservation Easements

A landowner whose land is subject to a Williamson Act contract may petition a city or county to enter into an agreement to rescind the contract in accordance with the Act's cancellation provisions [*see Gov. Code § 51282*; *see also § 579.16[2][e]*] in order to simultaneously place other land under an agricultural conservation easement, consistent with the purposes and requirements of the Agricultural Land Stewardship Program [*see Pub. Res. Code § 10200 et seq.*; *see also § 579.16[4]*], provided the local governing body makes specified findings [*Gov. Code § 51256*]. The agreement will not take effect until it is approved by the Secretary of Resources [*Gov. Code § 51256.1*].

With certain exceptions, one or more cities or counties may adopt a plan for forming an agricultural conservation easement under *Gov. Code § 51256* with respect to multiple transactions within one or more specific areas, and submit the plan to the Director of Conservation for his or her approval. The plan may be approved only on a finding that it is consistent with the provisions of § 51256. Thereafter, individual transactions must be approved if they are consistent with the approved plan [*Gov. Code § 51256.2(a)*; *see Gov. Code § 51256(b), (c)* (exceptions)].

[3] Timberland Preserve Zones

The California Timberland Productivity Act of 1982 is set forth in *Gov. Code § 51100 et seq.* It was enacted in

acknowledgment that forest resources contribute substantially to the state's economy and environment and that the state's increasing population threatens to erode the timberland base and diminish forest resource productivity through pressures to divert timberland to urban and other uses and through pressures to restrict timber operations when in conflict with nontimberland uses [*Gov. Code § 51101*]. The Timberland Productivity Act furthers the state policy to maintain the optimum amount of the limited supply of timberland, to ensure its continued availability, to discourage unnecessary conversion of timberland, to discourage expansion of urban services into timberland, and to encourage investment in timberlands based on reasonable expectation of harvest by including all qualifying timberland in a timberland preserve zone [*Gov. Code §§ 51102(a), 51103*]. The Act does not preempt the authority of local government to limit timber harvesting in designated zones other than those timberland preserve zones designated under the Act [*Big Creek Lumber Co. v. County of San Mateo (1995) 31 Cal. App. 4th 418, 426-428, 37 Cal. Rptr. 2d 159]* . Local zoning ordinances that speak to the location of timber operations, but not to the manner in which they are carried out, are not preempted [*Big Creek Lumber Co. v. County of Santa Cruz (2006) 38 Cal. 4th 1139, 1157* (Forest Practice Act and California Timberland Productivity Act did not preempt county ordinances restricting timber harvesting operations to specific areas and regulating areas where helicopter operationsassociated with harvesting could occur)].

Parcels zoned as timberland production are zoned for an initial term of 10 years, and an additional year is added on each anniversary date unless a notice of rezoning is given [*Gov. Code § 51114*]. Those parcels will be zoned to restrict their use to growing and harvesting timber and to compatible uses [*Gov. Code § 51115*]. Zoning a parcel of land as a timberland preserve zone gives rise to a presumption that timber operations may be reasonably expected to and will occur on that parcel [*Gov. Code § 51115.1(a)*; *see Pub. Res. Code § 4527(a)(1)* ("timber operations" defined)]. Changes to any nonconforming use are limited to ordinary maintenance and repair, except that no change that enlarges or tends to make more permanent any nonconforming use will be permitted. If any nonconforming use ceases for a period of at least one year, subsequent use must conform to the Timberland Productivity Act [*Gov. Code § 51115.2*].

The designation of a timberland preserve zone is not irrevocable and a timberland parcel may be rezoned pursuant to *Gov. Code §§ 51130-51146*, which include the rules governing the assessment of the parcel and a tax recoupment fee.

For further coverage of timberland preserve zones and the California Timberland Productivity Act of 1982, see Manaster and Selmi, California Environmental Law and Land Use Practice, Ch. 80, *Forestry Development* (Matthew Bender).

[4] Agricultural Land Stewardship Program

A primary purpose of the Agricultural Land Stewardship Program Act of 1995 [*Pub. Res. Code § 10200 et seq.*] is to encourage voluntary, long-term private stewardship of agricultural lands by offering landowners financial incentives to maintain such lands in agricultural use [*Pub. Res. Code § 10202(a)*]. It is a separate program from the Williamson Act and cannot be construed to overrule, rescind, or amend any of the Williamson Act's requirements [*Pub. Res. Code § 10226*].

The Act establishes a program for grants from the Department of Conservation to local governments and nonprofit organizations, subject to prescribed requirements and in accordance with prescribed procedures, for acquisition of agricultural conservation easements, which restrict the development or improvement of land for any purpose other than agricultural production [*see Pub. Res. Code § 10211*]. The Program establishes a fund from which grants are made. The financial sources include gifts, donations, proceeds from general obligation bond sales, funds appropriated by the Legislature, and federal grants or loans [*Pub. Res. Code § 10230*]. Proposed easements must meet specified criteria that relate both to the physical characteristics of the parcel to be restricted and to the city or county's commitment to agricultural conservation [*see Pub. Res. Code §§ 10251, 10252*].

[5] Protection of Rangeland, Grazing Land, and Grassland

The Rangeland, Grazing Land, and Grassland Protection Act [*Pub. Res. Code § 10330 et seq.*] establishes a program to accomplish the following [*see Pub. Res. Code § 10331*]:

- Prevent the conversion of rangeland, grazing land, and grassland to more intensive agricultural uses as well as nonagricultural uses;

- Protect the long-term sustainability of livestock grazing; and

- Ensure the continued wildlife, water quality, watershed, and open space benefits from livestock grazing.

The Act establishes a program for grants from the Wildlife Conservation Board for the acquisition from property owners of conservation easements over qualified property. Grants may also be given to other state agencies, local public agencies, and nonprofit organizations for the same purposes [*Pub. Res. Code § 10334*]. For discussion of agricultural conservation easements, see *§ 579.16[2][g]*. For coverage of conservation easements generally, see *Ch. 240, Easements, § 240.12[3], [5]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseAgriculture & FarmlandReal Property LawLimited Use RightsEasementsConservation EasementsTax LawState & Local TaxesReal Property TaxAssessment & ValuationValuation

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§ 579.17 Discrimination Prohibited

[1] Against Particular Parcels

A local legislative body may not unfairly discriminate against a particular parcel of land, and the courts may properly examine the scheme of classfication and determine whether it has been applied fairly and impartially in each instance. The mere fact that some hardship is experienced is not material. An individual cannot complain of incidental injury if the power is exercised for proper purposes of public health, safety, morals, and general welfare, and if there is no arbitrary and unreasonable application in the particular case [*Wilkins v. City of San Bernardino (1946) 29 Cal. 2d 332, 338, 175 P.2d 542]* .

Zoning ordinances found to be invalid and unreasonable as applied to particular property fall roughly into the following four categories [*Wilkins v. City of San Bernardino (1946) 29 Cal. 2d 332, 340, 175 P.2d 542]* :

- When the zoning ordinance attempts to exclude and prohibit existing and established uses or businesses that are not nuisances;

- When the restrictions create a monopoly;

- When the use of adjacent property renders the land entirely unsuitable or unusable for the only purpose permitted by the ordinance; and

- When a small parcel is restricted and given less rights than the surrounding property, as in the case of a lot in the center of a business or commercial district limited to use for residential purposes, thereby creating an island in the middle of a larger area devoted to other uses.

[2] Against Particular Persons

Any action under the Planning and Zoning Law [*Gov. Code § 65000 et seq.*] by a city, county, or other local governmental agency is null and void if it denies to any individual or group of individuals the enjoyment of residence,

landownership, tenancy, or any other land use because of any of the following reasons [*Gov. Code § 65008(a)*]:

- The lawful occupation, age, race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income, or disability of that person [*see Gov. Code § 12955(a), (d), (m), (p)(1)*];

- The method used by an individual or group to finance any residential development; or

- The income level of persons who intend to occupy any residential development.

The prohibition of discrimination based on familial status does not apply to specialized housing specifically designed and intended for older persons or senior citizens [*Gov. Code § 65008(a)(1)(B)*].

No city, county, city and county, or other local governmental agency may, in the enactment or administration of ordinances under *Gov. Code § 65000 et seq.*, prohibit or discriminate against any residential development or emergency shelter due to the method of financing, or the lawful occupation, age, race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income, or disability of the owners or intended occupants, or because it is intended for occupancy by persons and families of very low, low, moderate, or middle income [*Gov. Code § 65008(b), (c)*; *see Gov. Code § 12955(a), (d), (m), (p)(1)*]. No city, county, city and county, or other local governmental agency may impose different requirements on a residential development or emergency shelter that is subsidized, financed, insured, or otherwise assisted by a governmental entity, than those imposed on nonassisted developments, except as provided in *Gov. Code § 65008(e)* [*Gov. Code § 65008(d)(1)*]. Nor may a city, county, city and county, or other local governmental agency, because of the lawful occupation, age, race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income, or disability of the owners or intended occupants, or because the development is intended for occupancy by persons and families of very low, low, moderate, or middle income, impose different requirements on these residential developments than those imposed on developments generally, except as provided in *Gov. Code § 65008(e)* [*Gov. Code § 65008(d)(2)*; *see Gov. Code § 12955(a), (d), (m), (p)(1)*].

A city, county, or city and county may, however, extend preferential treatment to residential developments or emergency shelters assisted by a governmental entity or intended for occupancy by persons and families of low, moderate, or middle income [*Gov. Code § 65008(e)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingGeneral OverviewCivil Rights LawContractual Relations & HousingProperty Rights (sec. 1982)General OverviewGovernmentsLocal GovernmentsPolice PowerReal Property LawZoning & Land UseOrdinancesReal Property LawZoning & Land UseSpecial Permits & Variances

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[Reserved]

§§ 579.18[Reserved]

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§ 579.30 Governing Law

Zoning is largely governed by city and county ordinances, which are enacted within a framework of state statutes. General plans are governed by *Gov. Code § 65300 et seq.*, while specific plans are governed by *Gov. Code § 65450 et seq.* Zoning ordinances are governed by *Gov. Code § 65800 et seq.* Interim ordinances are controlled by *Gov. Code § 65858*. Variances and conditional use permits are governed by *Gov. Code § 65900 et seq.* Building permits are controlled generally by *Health & Safety Code § 17910 et seq.* The California Coastal Act of 1976 is set forth in *Pub. Res. Code § 30000 et seq.*

Judicial review is governed generally by *Civ. Code § 3422*, Code Civ. Proc. § 526 (injunctions), *Code Civ. Proc. §§ 1060* (declaratory relief), 1085, 1086 (traditional mandate), and 1094.5 (administrative mandate). Review of decisions of the Coastal or regional commissions is governed by *Pub. Res. Code §§ 30801, 30802*. Actions to challenge a general plan are governed by *Gov. Code §§ 65750-65763*, and to review its consistency are governed by *Gov. Code § 65860(c)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureDeclaratory Judgment ActionsGeneral OverviewEnvironmental LawNatural Resources & Public LandsCoastal Zone ManagementGeneral OverviewReal Property LawZoning & Land UseOrdinancesReal Property LawZoning & Land UseSpecial Permits & Variances

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§ 579.31 Purposes of Zoning

[1] Protecting Most Appropriate Use of Land and Maintaining Property Values

The primary purpose of comprehensive zoning is to protect others, and the general public, from uses of property that will, if permitted, prove injurious to them [*Consolidated Rock Products Co. v. City of Los Angeles (1962) 57 Cal. 2d 515, 524, 20 Cal. Rptr. 638, 370 P.2d 342]* . Planning and zoning ordinances traditionally seek to maintain property values, protect tax revenues, provide neighborhood social and economic stability, attract business and industry, and encourage conditions which make a community a pleasant place to live and work [*Van Sicklen v. Browne (1971) 15 Cal. App. 3d 122, 128, 92 Cal. Rptr. 786* , overruled in part by *Hernandez v. City of Hanford (2007) 41 Cal. 4th 279*]. Basically, most zoning decisions are designed to protect the most appropriate use of land and conserve property values [*see Melton v. City of San Pablo (1967) 252 Cal. App. 2d 794, 801, 61 Cal. Rptr. 29]* .

Zoning regulates land use in many ways and zoning regulations involve a variety of criteria. Thus, a zoning restriction (1) may be based on the type of land use within a zone, specifying residential, commercial, industrial, or some other use, (2) may regulate signs and billboards, lot size and setback requirements, the intensity of land use, offstreet parking, and loading requirements, and (3) may also regulate land use based on aesthetic considerations, specifying an historical or other objective standard [*see Gov. Code § 65850*; *Sechrist v. Municipal Court (1976) 64 Cal. App. 3d 737, 743-744, 134 Cal. Rptr. 733]* .

[2] Traffic Considerations

The state has plenary power over streets and highways and has preempted the entire field of traffic control [*see Veh. Code § 21*]. The Legislature has delegated some authority to local governments to regulate traffic within their jurisdictions in *Veh. Code §§ 21100-21116*. This authority is very strictly construed and may not be expanded. Thus, unless expressly provided with the authority by the state, a city has no authority over vehicular traffic control [*Rumford v. City of Berkeley (1982) 31 Cal. 3d 545, 549-550, 183 Cal. Rptr. 73, 645 P.2d 124]* . The state has expressly given cities limited authority over traffic patterns in furtherance of their general plan [*see Gov. Code § 65302(b)*]. Specifically, a city may prohibit access to streets by various roadway design features, such as barriers, as part of the

implementation of the circulation element of its general plan [*Veh. Code § 21101(f)*].

Even though traffic control is in the hands of the state, the implication of traffic patterns on land is not totally irrelevant to local planning. A zoning decision based in part on a desire to limit the density of the area in order not to further burden public streets and highways may be upheld as a valid promotion of the public safety [*see Spindler Realty Corp. v. Monning (1966) 243 Cal. App. 2d 255, 271, 53 Cal. Rptr. 7]* . Additionally, the creation of a serious traffic hazard is sufficient grounds for local authority to deny an additional driveway access [*Delta Rent-A-Car Systems, Inc. v. City of Beverly Hills (1969) 1 Cal. App. 3d 781, 786, 82 Cal. Rptr. 318]* .

Traffic may be an important part of the zoned land use. If so, objections based on the volume of traffic may be inappropriate. For example, an objection to heavy traffic use was without merit in a commercial zone. Traffic, in the form of delivery trucks and store patrons, was a reasonable commercial use of land [*see San Francisco v. Safeway Stores, Inc. (1957) 150 Cal. App. 2d 327, 332, 310 P.2d 68]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawZoning & Land UseGeneral OverviewTransportation LawPrivate VehiclesTraffic RegulationGeneral Overview

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§ 579.32 Types of Uses and Zones; Control Methods

[1] Adoption of Ordinances

Under its basic zoning powers, the legislative body of any county or city may, pursuant to *Gov. Code § 65800 et seq.*, adopt ordinances that do any of the following [*Gov. Code § 65850*]:

- Regulate the use of buildings, structures, and land as between industry, business, residences, open space, including agriculture, recreation, enjoyment of scenic beauty, use of natural resources, and other purposes.

- Regulate signs and billboards.

- Regulate (1) the location, height, bulk, number of stories, and size of buildings and structures, (2) the size and use of lots, yards, courts, and other open spaces, (3) the percentage of a lot that may be occupied by a building or structure, and (4) the intensity of land use.

- Establish requirements for offstreet parking and loading.

- Establish and maintain building setback lines.

- Create civic districts around civic centers, public parks, public buildings, or public grounds, and establish regulations for those civic districts.

The local legislative body may also regulate, pursuant to a content neutral ordinance and under prescribed circumstances, the time, place, and manner of operation of sexually-oriented businesses [*Gov. Code § 65850.4(a)*]. In this context, a "sexually-oriented business" is one whose primary purpose is the sale or display of matter that, because of its sexually explicit nature, may, pursuant to state law or local regulatory authority, be offered only to persons over

18 [*Gov. Code § 65850.4(b)*]. A local legislative body is also authorized to enter into a legally sanctioned and appropriate cooperative agreement, consortium, or joint powers authority with other adjacent cities or counties regarding regulation of established negative secondary effects of these businesses and their proximity to churches, schools, residents, and other businesses located in adjacent jurisdictions [*Gov. Code § 65850.4(d)*].

Thus, land may be zoned into different areas based on the types of land uses allowed within that zone. For example, a commercial zone allows the operation of a commercial enterprise. Similarly, a residential use zone is designed for residential use and may restrict uses that are nonresidential in nature. A zone may be validly restricted to specified types of uses deemed to be compatible in that type of area [*see Sechrist v. Municipal Court (1976) 64 Cal. App. 3d 737, 743, 134 Cal. Rptr. 733]* .

Within each zone, three types of uses may be allowed: primary, accessory, and conditional. Most ordinances define what the primary use within a zone is, explicitly provide for a variety of accessory uses, and allow some compatible conditional uses only after prior approval, or a permit. Thus, in a residential zone the primary use may be restricted to various types of residences; accessory usesmay include storage of construction materials, rental of rooms, and erection of accessory buildings; and conditional uses may include temporary carnivals and hiking trails [*see Sechrist v. Municipal Court (1976) 64 Cal. App. 3d 737, 743-744, 134 Cal. Rptr. 733]* .

In addition, zoning ordinances will typically provide other detailed restrictions on land use, such as banning the keeping of certain animals, front and side yard setbacks, area requirements, and regulation of vehicle storage [*see Sechrist v. Municipal Court (1976) 64 Cal. App. 3d 737, 744, 134 Cal. Rptr. 733]* .

[2] Accessory Uses

Most ordinances list the permitted primary uses in a zone and then explicitly provide for permissible accessory uses and buildings normally incidental to the primary uses. If an ordinance is silent on accessory uses, and does not state what uses are permissible accessory uses, administrative and judicial interpretations may be made. For example, the home occupation exception is often explicitly described in the zoning ordinance as a permissible accessory use in a residential zone [*County of Butte v. Bach (1985) 172 Cal. App. 3d 848, 865, 218 Cal. Rptr. 613]* . When an ordinance is silent on accessory uses, and does not include any residuary clause, such as one allowing uses customarily incidental to the primary use, reasonable uses will be permitted [*Sechrist v. Municipal Court (1976) 64 Cal. App. 3d 737, 744, 748-749, 134 Cal. Rptr. 733]* .

The application of zoning use restrictions to a particular set of facts is subject to investigation by the courts and each case is determinable on its individual merits. Thus, whether a property owner in a residential zone can be deprived of the right to pursue on his or her premises activities incidental to an unrestricted use when those activities do not interfere with the primarily residential character of the district or affect the aesthetic values sought to be preserved, is a question of degree. He or she may not be deprived of the right to engage in the normal activities incidental to a use not prohibited by the ordinance, for this is the nature of an accessory use [*see City of Beverly Hills v. Brady (1950) 34 Cal. 2d 854, 856-857, 215 P.2d 460* ; *see also Greenfield v. Bd. of City Plan. Commrs. (1935) 6 Cal. App. 2d 515, 517, 45 P.2d 219* (storage allowed as accessory use by ordinance authorizing businesses requiring storage)].

An ordinance may condition acceptable accessory uses. For example, if an ordinance provides that accessory uses are those uses customarily incidental to and subordinate to residential use which do not involve a commercial enterprise, an incidental commercial use that might be acceptable under a different residential ordinance, is not permissible [*see Jones v. Robertson (1947) 79 Cal. App. 2d 813, 814-819, 180 P.2d 929]* . In a residential zone, accessory uses are commonly limited to persons who use that property as their principal residence. Thus, use of a house as a law office when the attorney's primary residence was elsewhere would not be allowed [*County of Butte v. Bach (1985) 172 Cal. App. 3d 848, 865-866, 218 Cal. Rptr. 613]* .

[3] Conditional Uses

Conditional uses are those uses permissible in a zone subject to prior approval, or a permit [*Sechrist v. Municipal Court (1976) 64 Cal. App. 3d 737, 744, 134 Cal. Rptr. 733]* . A conditional use is one that is generally compatible with the other uses within a zone, but has the potential of being incompatible. Thus, before granting a conditional use permit, the local legislative body will consider its effect on the public welfare [*see Sports Arenas Properties, Inc. v. City of San Diego (1985) 40 Cal. 3d 808, 814-815, 221 Cal. Rptr. 538, 710 P.2d 338* ; *see also § 579.114* for discussion of conditional use permits].

[4] Commercial Zones

It is not the proper function of a zoning ordinance to restrict competition or to protect an enterprise that may have been encouraged by a prior zoning classification [*Ensign Bickford Realty Corp. v. City Council (1977) 68 Cal. App. 3d 467, 475-476, 137 Cal. Rptr. 304]* . When the restrictions of a zoning ordinance create a monopoly, that ordinance may be invalid and unreasonable as applied to particular property [*see Wilkins v. City of San Bernardino (1946) 29 Cal. 2d 332, 340, 175 P.2d 542]* . However, so long as the primary purpose of a zoning ordinance is not to regulate economic competition, but is to subserve a valid objective pursuant to a city's police powers, that ordinance is not invalid even though it might have an indirect impact on economic competition [*Van Sicklen v. Browne (1971) 15 Cal. App. 3d 122, 128, 92 Cal. Rptr. 786* , overruled in part by *Hernandez v. City of Hanford (2007) 41 Cal. 4th 279*]. This does not mean, however, that a zoning ordinance is valid only when the ordinance has merely an "indirect impact" on economic competition, and never when the regulation of economic competition is a direct and intended effect of the ordinance [*Hernandez v. City of Hanford (2007) 41 Cal. 4th 279, 296-297, 59 Cal. Rptr. 3d 442, 159 P.3d 33* , *disapproving Van Sicklen v. Browne (1971) 15 Cal. App. 3d 122, 92 Cal. Rptr. 786* ; *Ensign Bickford Realty Corp. v. City Council (1977) 68 Cal. App. 3d 467, 137 Cal. Rptr. 304* ; *and Wal-Mart Stores, Inc. v. City of Turlock (2006) 138 Cal. App. 4th 273, 41 Cal. Rptr. 3d 420* , to the extent language in those cases could be read to suggest otherwise]. Even when the regulation of economic competition reasonably can be viewed as a direct and intended effect of a zoning ordinance or action, so long as the primary purpose of the ordinance or action--that is, its principal and ultimate objective--is not the impermissible private anticompetitive goal of protecting or disadvantaging a particular favored or disfavored business or individual, but instead is the advancement of a legitimate public purpose--such as the preservation of a municipality's downtown business district for the benefit of the municipality as a whole--the ordinance reasonably relates to the generalwelfare of the municipality and constitutes a legitimate exercise of the municipality's police power [*Hernandez v. City of Hanford (2007) 41 Cal. 4th 279, 296-297, 59 Cal. Rptr. 3d 442, 159 P.3d 33]* .

Ordinances formulated to regulate useful business enterprises are subject to investigation in the courts, with a view to determining whether the ordinance is a lawful exercise of the police power or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the right to carry on a lawful business, to make contracts, or to use and enjoy property [*Pacific Palisades Asso. v. Huntington Beach (1925) 196 Cal. 211, 217, 237 P. 538, 237 P. 538]* . However, an ordinance is not constitutionally defective when it classifies for residential use land that would yield a greater profit if used for business purposes. The fact that two parcels of property that are similar in nature but zoned differently does not make the zoning unreasonable due to economic regulation [*Ensign Bickford Realty Corp. v. City Council (1977) 68 Cal. App. 3d 467, 477, 137 Cal. Rptr. 304]* .

A municipality is not permitted, under the guise of regulating business and segregating it to a particular district, to grant a monopoly to business establishments and enterprises already situated in unrestricted districts[*Pacific Palisades Asso. v. Huntington Beach (1925) 196 Cal. 211, 216, 237 P. 538, 237 P. 538]* . Such a situation arose when planners divided a town into two districts, one devoted to residential uses and the other to business uses. The planners did not make adequate provision for the business district, but limited it to a small area which was already fully occupied by businesses. Business enterprises already established in that area were thereby favored to the exclusion of any future businesses; in essence a monopoly was created by that unreasonable restriction [*In re White (1925) 195 Cal. 516, 520-521, 234 P. 396]* . In contrast, a statistical indication that the population of an area warrants more commercial

enterprises than currently exist does not prove anything in the absence of a showing that the districts or zones in which those enterprises may be operated have been so constricted as to show an intent to shut out newcomers. A municipality cannot be held responsible for economic conditions with which it had nothing to do that might prevent an individual from securing desirable locations [*Safeway Stores v. City Council, San Mateo (1948) 86 Cal. App. 2d 277, 287-288, 194 P.2d 720]* .

Although a city may not regulate business competition through zoning, its decision whether or not an area should be zoned as commercial will be upheld absent an abuse of its discretion. Thus, the presence of commercial pockets in an area is not determinative when the immediately surrounding parcels are not zoned commercial. Nor is the fact that an owner may enjoy greater benefits or an enhancement of the value of his or her property [*see* *Safeway Stores v. City Council, San Mateo (1948) 86 Cal. App. 2d 277, 285, 194 P.2d 720]* . Moreover, a zoning decision may be based on a perceived proliferation of a type of land use in a neighborhood already adequately serviced in that particular business enterprise [*Van Sicklen v. Browne (1971) 15 Cal. App. 3d 122, 125-126, 92 Cal. Rptr. 786* (service station), overruled in part by *Hernandez v. City of Hanford (2007) 41 Cal. 4th 279]* .

[5] Residential Zones

[a] Protection of Home Life

Zoning establishing districts devoted to strictly private residences or single-family dwellings, from which are excluded businesses or multiple dwelling structures, as part of a comprehensive and systematic plan, is a legitimate exercise of the police power [*Wilkins v. City of San Bernardino (1946) 29 Cal. 2d 332, 337, 175 P.2d 542]* . Both single-family residential areas and minimum size lot areas have been allowed. While this zoning may cause a financial hardship to some, the benefit to society outweighs that hardship. A single-family dwelling restriction insures a homogeneous development of the neighborhood so that the quiet of the home will not be disturbed by the relative confusion and bustle of apartment buildings or the greater activity connected with commercial or manufacturing establishments [*Hamer v. Town of Ross (1963) 59 Cal. 2d 776, 790-792, 31 Cal. Rptr. 335, 382 P.2d 375]* .

Homogeneous residential zones are established to promote family life--to provide a safe, healthful, and aesthetic environment in which to raise a family--and those uses of property deleterious to this goal are excluded. Aesthetic considerations are a minor objective, and the more important consideration is that of preserving the basic character of a residential neighborhood for residential purposes [*Sechrist v. Municipal Court (1976) 64 Cal. App. 3d 737, 746, 134 Cal. Rptr. 733]* .

The restrictions on uses of property in a residential zone are a protective measure for the individual owner, and are also included to insure that a homemaker would not be deprived of the reasonable use of his or her premises. The residential use of property includes the broad sphere of home activities as they existed in common law. These activities include much more than the simple use of a house and grounds for food and shelter, and extend to the use of a home as a social institution, for the private religious, educational, cultural, and recreational advantages of the family. It includes those customary activities that make the home more comfortable and enjoyable, such as gardening, certain recreational activity, and the enjoyment of certain hobbies. The scope of such activity is circumscribed only insofar as it may not assume a commercial or public character, or constitute a health or safety hazard to the neighborhood. Clearly, a predominantly commercial use of property within a residential zone is prohibited. But even a semblance of commercial activity, incidental to the use of residential property, such as the establishment of a home occupation, may be an excludable use if it might affect the residential character of the neighborhood. Thus, when there is external evidence of such activity--the altering of a residential structure, or the storage of commercial vehicles on the property--it may be a use that is incompatible with a residential neighborhood and would accordingly be characterized as a non-residential use [*Sechrist v. Municipal Court (1976) 64 Cal. App. 3d 737, 746-750, 134 Cal. Rptr. 733]* .

An ordinance that prohibits commercial use of residential property for lodging for periods of more than 30 consecutive

days is valid and is not a taking of the property [*Ewing v. City of Carmel-by-the-Sea (1991) 234 Cal. App. 3d 1579, 1586-1595, 286 Cal. Rptr. 382]* .

[b] "Family" Restrictions

Zoning that attempts to restrict residential districts to a single family living in a dwelling may be subject to constitutional attack, even though the purpose of the ordinance is framed in terms of density and parking needs as valid public welfare concerns. Thus, a zoning ordinance that prohibited more than five unrelated persons from living together in a house in a single-family dwelling zone was unconstitutional under the right to privacy afforded by the California constitution [*City of Santa Barbara v. Adamson (1980) 27 Cal. 3d 123, 128-134, 164 Cal. Rptr. 539, 610 P.2d 436]* . Although the United States constitution provides similar protection,it is not as broad in scope [*see Village of Belle Terre v. Boraas (1974) 416 U.S. 1, 2-8, 94 S. Ct. 1536, 39 L. Ed. 2d 797]* .

[6] Minimum Lot Sizes

An ordinance prescribing a minimum lot size is valid as a promotion of the public health and general welfare [*see Clemons v. City of Los Angeles (1950) 36 Cal. 2d 95, 103-104, 222 P.2d 439]* . Frequently homogeneous residential zoning includes a minimum lot size requirement. This promotes homogeneous development of the neighborhood, and tends to insure adequate light and air and relieve congestion [*Hamer v. Town of Ross (1963) 59 Cal. 2d 776, 790-792, 31 Cal. Rptr. 335, 382 P.2d 375]* . A refusal to rezone a parcel so that it could be subdivided was an abuse of discretion when almost all of the neighboring parcels were smaller than any of the planned lots and the rezoning would have conformed to the zoning of most neighboring lots [*Ross v. City of Yorba Linda (1991) 1 Cal. App. 4th 954, 959-963, 2 Cal. Rptr. 2d 638]* .

However, this type of restrictive zoning is not always warranted. Thus, a zoning requirement setting forth a one acre lot limitation may be unwarranted when the property so zoned is located in an area of smaller parcels, thereby making it an island of one acre minimum lot size zoning in an area of substantially less restrictive zoning [*Hamer v. Town of Ross (1963) 59 Cal. 2d 776, 781-783, 31 Cal. Rptr. 335, 382 P.2d 375]* . A refusal to rezone a parcel so that it could be subdivided was an abuse of discretion when almost all of the neighboring parcels were smaller than any of the planned lots and the rezoning would conform to the zoning of most neighboring lots [*Ross v. City of Yorba Linda (1991) 1 Cal. App. 4th 954, 959-963, 2 Cal. Rptr. 2d 638]* .

In addition, if a zoning regulation prescribing minimum lot sizes is primarily designed for the development of new districts, but is framed in terms that renders it applicable to areas that have been fully improved and which cannot be made to conform to the new scheme, it must be applied reasonably. When an ordinance does not contain an exception concerning its application to old districts developed under different standards, it will be assumed that it was enacted with the understanding that it would not be given effect when the result would be to oppress the property owners without accomplishing any good whatsoever. Thus, a zoning ordinance that provides for a minimum width and area of lots will usually be invalid and unenforceable against an owner in an older, noncomplying district [*see Morris v. City of Los Angeles (1953) 116 Cal. App. 2d 856, 862-863, 254 P.2d 935]* .

[7] Setbacks

Ordinances imposing minimum setback requirements from the street, as well as minimum dimensions for sideyards and back yards, are valid [*see Christensen v. Thurber (1953) 120 Cal. App. 2d 517, 518-521, 261 P.2d 312]* . Strict limitations on a property owner's ability to construct accessory structures within the minimum setback area or yard areas have been upheld, recognizing that allowing structures in those areas would render a setback ordinance of little real efficacy [*Town of Atherton v. Templeton (1961) 198 Cal. App. 2d 146, 150-152, 17 Cal. Rptr. 680]* .

Analysis of a setback ordinance is not based on whether it is wise, but whether the city acted oppressively and

irrationally, exceeding its authority in imposing harsh and unreasonable standards not based on the public welfare [*Thille v. Board of Public Works (1927) 82 Cal. App. 187, 192, 255 P. 294]* . For example, a setback ordinance was unconstitutional as applied to an individual parcel, thereby supporting the issuance of a building permit without compliance with the setbacks, when enforcement of the setbacks would have resulted in a usable parcel of only 10 square feet. Confiscation, or virtual confiscation, of lands by zoning cannot be upheld [*Hoshour v. County of Contra Costa (1962) 203 Cal. App. 2d 602, 608, 21 Cal. Rptr. 714]* . However, if that confiscation would have been the result of a self-induced hardship, such as might have occurred if the landowner had originally owned a lot of sufficient size, but disposed of part of the property, the ordinance will be enforced [*see Town of Atherton v. Templeton (1961) 198 Cal. App. 2d 146, 154, 17 Cal. Rptr. 680]* .

[8] Aesthetic Considerations

[a] Valid Objective

A state may legitimately exercise its police powers to advance aesthetic values. The concept of the public welfare is broad and inclusive, and represents spiritual, physical, aesthetic, and monetary values [*City Council v. Taxpayers for Vincent (1984) 466 U.S. 789, 805, 104 S. Ct. 2118, 80 L. Ed. 2d 772]* . Aesthetic regulation is permissible if it is reasonably related to the public safety and welfare [*see Novi v. City of Pacifica (1985) 169 Cal. App. 3d 678, 682, 215 Cal. Rptr. 439]* . Indeed, an ordinance precluding the issuance of a site development permit if there is insufficient variety in the design of the structure and grounds to avoid monotony in the external appearance was upheld as a valid exercise of zoning power. Its intent was to avoid ticky-tacky development, and among its objectives was the avoidance of linear monotony and massive bulky appearance and the achievement of a small scale village atmosphere [*Novi v. City of Pacifica (1985) 169 Cal. App. 3d 678, 682-683, 215 Cal. Rptr. 439* (ordinance withstood charge of vagueness)].

Because it is within the police power to determine that the community should be beautiful as well as healthy, spacious as well as clean, and well-balanced, the improvement of the appearance of its community is within the authority of cities. Two different reasons have been cited as justification for this: the tourist industry in which aesthetic considerations assumeeconomic value, and the impossibility of present day city planning without some sort of aesthetic control [*Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 858-863, 164 Cal. Rptr. 510, 610 P.2d 407* , rev'd on other grounds, *453 U.S. 490, 521, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)]* . The encouragement of tourism and its impact on the local economy may also support enforcement of aesthetic requirements based on preservation of buildings with historical significance [*see Bohannan v. City of San Diego (1973) 30 Cal. App. 3d 416, 422, 106 Cal. Rptr. 333]* .

Similarly, zoning ordinances designed to protect the views of existing buildings are valid. Thus, an ordinance providing a mechanism for owners of buildings to voice objections and have those objections be considered prior to the issuance of a building permit for construction or modification that would impair their view is valid [*see Ross v. City of Rolling Hills Estates (1987) 192 Cal. App. 3d 370, 374-376, 238 Cal. Rptr. 561]* .

Generally, zoning standards are permitted a substantial amount of vagueness, and unless the restriction impacts on the right of expression, a zoning standard is sufficient if the administrative body is required to make its decision in accord with the general, health, safety, and welfare standard [*see Novi v. City of Pacifica (1985) 169 Cal. App. 3d 678, 682, 215 Cal. Rptr. 439]* . When aesthetic considerations control, general criteria for evaluation of the appropriateness of the structures are sufficient; minutely designated standards are not required [*see Bohannan v. City of San Diego (1973) 30 Cal. App. 3d 416, 424-425, 106 Cal. Rptr. 333]* . Even though aesthetic zoning regulations allow a fair amount of discretion, they may not be unreasonable or arbitrary. Thus, an ordinance prohibiting the parking of large commercial trucks in a low density rural zone in which the use of large vehicles and machinery is common, could not be justified by aesthetics [*see In re Scarpitti (1981) 124 Cal. App. 3d 434, 440-441, 177 Cal. Rptr. 387]* .

[b] First Amendment Limitations

An attempt to advance aesthetic values may sometimes result in an incidental restriction on expression. Thus, any aesthetic restriction that restricts expression must be narrowly tailored if it is to be justified as a reasonable regulation of the time, place, or manner of expression [*City Council v. Taxpayers for Vincent (1984) 466 U.S. 789, 808, 104 S. Ct. 2118, 80 L. Ed. 2d 772* (city ordinance prohibiting posting of signs on public property is not violative of *First Amendment*)]. Ordinances regulating the erection of signs in the name of aesthetics appear most sensitive to this form of constitutional attack. For example, an ordinance making it unlawful for anyone to erect a sign without first obtaining a permit from the city planning director, who was given considerable latitude in that decision, was unconstitutional. Although the aesthetic interest the city sought to further through the sign ordinance was a proper interest, because there were no definite or objective guidelines for issuance or denial of the permit, it acted as a prior restraint [*City of Indio v. Arroyo (1983) 143 Cal. App. 3d 151, 158-161, 191 Cal. Rptr. 565]* .

By comparison, a sign prohibition that is restricted to those areas of a city deemed to be of special cultural, historic, or scenic importance was upheld. There, the city's interests in reducing traffic hazards and beautifying vital areas of the city outweighed any incidental infringement on *First Amendment* rights, especially since the ordinance left abundant alternative forums for the same communication. Moreover, a sign ordinance may validly allow all forms of on-site advertising while prohibiting off-site messages [*City and County of San Francisco v. Eller Outdoor Advertising (1987) 192 Cal. App. 3d 643, 659-660, 237 Cal. Rptr. 815]* .

[c] Architectural Policy

A zoning ordinance may require conformance with a specified type of architecture; implementation of an architectural policy is within a city's zoning authority for a variety of reasons. An architectural policy appears valid as an aesthetic regulation [*see generally Novi v. City of Pacifica (1985) 169 Cal. App. 3d 678, 682, 215 Cal. Rptr. 439]* . Moreover, it could be likened to a use regulation, because requiring a building to conform to a design might, as a practical matter, limit its use to or prevent its use for a specific purpose. Similarly, such a policy could easily be used to regulate the location, height, bulk, number of stories, and size of buildings. Additionally, an architectural policy very likely would overlap the field of regulation granted a planning commission in the exercise of its authority to review the plans for buildings within civic districts in order to assure a orderly development in the vicinity [*Laguna Beach Taxpayers' Asso. v. City Council of Laguna Beach (1960) 187 Cal. App. 2d 412, 415-416, 9 Cal. Rptr. 775* ; *see Gov. Code § 65800*]. However an architectural policy is characterized, it is permissible if it is reasonably related to the public safety and welfare [*see generally Novi v. City of Pacifica (1985) 169 Cal. App. 3d 678, 682, 215 Cal. Rptr. 439]* .

[d] Height Restrictions

Whether or not a city has implemented an architectural policy, it may impose height regulations on buildings throughout the city or in particular and limited districts. The physical peculiarities of the city as a whole or of specific areas within the city may be considered in enacting height restrictions, as well as assurance of sunlight [*see Brougher v. Board of Public Works (1930) 107 Cal. App. 15, 22, 290 P. 140]* .

[9] Cluster and Planned Unit Developments

The terms "cluster development" and "planned unit development" are sometimes used interchangeably, although they have slightly different meanings. "Planned unit development" describes a tract of land absolvedfrom conventional zoning to permit clustering of residential uses and perhaps compatible commercial and industrial uses, and permitting structures of differing heights. "Cluster development" is a device for grouping dwellings to increase dwelling densities on some portions of the development area in order to have other portions free of buildings [*Orinda Homeowners Committee v. Board of Supervisors (1970) 11 Cal. App. 3d 768, 772, 90 Cal. Rptr. 88]* .

Neither a cluster development nor a planned unit development is in conflict with *Gov. Code § 65852*, which requires

that regulations must be uniform for each class or kind of building or use of land throughout the zone. A residential planned unit development does not conflict merely because the units are not uniform, that is, they are not all single family dwellings and perhaps the multi-family units differ among themselves. *Gov. Code § 65852* does not require the units to be alike even as to their character, whether single family or multi-family, but aims at the general objective of uniform land use within each land zone [*Orinda Homeowners Committee v. Board of Supervisors (1970) 11 Cal. App. 3d 768, 773, 90 Cal. Rptr. 88]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseConditional Use Permits & VariancesReal Property LawZoning & Land UseBuilding & Housing CodesReal Property LawZoning & Land UseConstitutional LimitsReal Property LawZoning & Land UsePlanned Unit DevelopmentsReal Property LawZoning & Land UseZoning Methods

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§ 579.33 Spot Zoning

Spot zoning refers to the rezoning of a particular parcel of property which restricts the use of that property while it leaves all similarly situated property subject to the provisions of the comprehensive zoning ordinance [*Kissinger v. City of Los Angeles (1958) 161 Cal. App. 2d 454, 460, 462-463, 327 P.2d 10]* . Spot zoning may be the result of zoning or rezoning. The granting of a variance does not create a spot zone [*see Rubin v. Board of Directors (1940) 16 Cal. 2d 119, 124, 104 P.2d 1041]* . Similarly, the allowing of a nonconforming use does not create a spot zone [*see Safeway Stores v. City Council, San Mateo (1948) 86 Cal. App. 2d 277, 280-281, 194 P.2d 720]* .

The propriety of rezoning a parcel as a spot zone is a matter of legislative determination and courts will not generally interfere. For example, a court refused to interfere with a city's refusal to change the zoning of an individual parcel when the facts indicated that the parcel was in no different situation than the surrounding property and all were being treated alike [*Tandy v. City of Oakland (1962) 208 Cal. App. 2d 609, 612-613, 25 Cal. Rptr. 429]* . Of course, if the rezoning of a parcel as a spot zone is inconsistent with the general plan of the enacting city or county, that spot zone may be challenged as inconsistent with the general plan [*see Gov. Code § 65860(b)*; *see also § 579.221*].

If the spot zoning evinces a discriminatory design against a property user, the courts will give weight to evidence disclosing a purpose other than that appearing on the face of the regulation to determine whether the scheme of classification has been applied fairly and impartially in each instance [*see G & D Holland Construction Co. v. City of Marysville (1970) 12 Cal. App. 3d 989, 994, 91 Cal. Rptr. 227]* .

Spot zoning is valid when long term changes in the neighborhood have created conditions compatible with the proposed new use. The very basis for the action--neighborhood change--provides the reclassification with a practical assurance of stability. Thus, an increase in population may render an agricultural classification unsuitable and justify rezoning a parcel to multiple family residential [*Scrutton v. County of Sacramento (1969) 275 Cal. App. 2d 412, 419-420, 79 Cal. Rptr. 872]* .

Spot zoning may be invalid as discriminatory zoning against a particular parcel of land. Thus, an ordinance that

arbitrarily rezoned a parcel of property to single family residential, a use to which it could not economically be put, because it was located between multiple dwelling development and commercial development, discriminated against its owner, when it permitted all other property similarly situated and zoned to continue in the former use [*see Kissinger v. City of Los Angeles (1958) 161 Cal. App. 2d 454, 460, 462-463, 327 P.2d 10]* . Spot zoning was also discriminatory when its purpose was to help a city prevent the development of discontinued railway rights-of-way for other than street purposes [*see People ex rel. Dept. Pub. Wks. v. Southern Pac. Trans. Co. (1973) 33 Cal. App. 3d 960, 963-965, 109 Cal. Rptr. 525]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsGeneral OverviewEnvironmental LawZoning & Land UseConditional Use Permits & VariancesReal Property LawZoning & Land UseNonconforming UsesReal Property LawZoning & Land UseSpot Zoning

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[Reserved]

§§ 579.34[Reserved]

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§ 579.50 General Plan

[1] Adoption Is Mandatory

Each planning agency must prepare, and the appropriate legislative body must adopt, a comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries that, in the planning agency's judgment, bears relation to its planning. Chartered cities must adopt general plans that contain the mandatory elements specified in *Gov. Code § 65302*, discussed in *§ 579.50[2]* [*Gov. Code § 65300*]. The general plan may be adopted in any format convenient to the legislative body and must be prepared by the planning agency so that all or individual elements of it may be adopted. The legislative body may adopt all or part of a plan of another public agency if that plan is sufficiently detailed and its contents are appropriate [*Gov. Code § 65301(a)*].

The legislative body of a newly incorporated city or newly formed county must adopt a general plan within 30 months of its incorporation or formation, unless an extension is granted by the state Director of Planning and Research [*Gov. Code §§ 65360, 65361*; *see generally Gov. Code§§ 65035, 65040, 65067-65067.3* (role of office of Planning and Research in assisting local planning)].

[2] Contents of General Plan

The general plan must address the elements specified in *Gov. Code § 65302* to the extent that the subject of the element exists in the planning area. The degree of specificity and level of detail of the discussion of each element must reflect local conditions and circumstances [*Gov. Code § 65301(c)*]. However, *Gov. Code § 65301(c)* is not to affect the requirements of *Gov. Code § 65302(c)* (housing element provisions), or the authority of the Department of Housing and Community Development to review housing elements pursuant to *Health & Safety Code § 50459* [*Gov. Code § 65301(c)*].

The general plan must consist of a statement of development policies and include diagrams and text setting forth objectives, principles, standards, and plan proposals. It must include elements addressing land use, circulation (transportation), housing, conservation, open-space, noise, and safety [*Gov. Code § 65302*]. If the general plan limits the

number of housing units that may be constructed annually, the adoption of that provision must contain findings that justify reducing the housing opportunities [*Gov. Code § 65302.8*].

The general plan may include any other elements or address any other subjects that, in the judgment of the legislative body, relate to the physical development of the county or city [*Gov. Code § 65303*].

The general plan must be consistent with the airport land use compatibility plan required by *Pub. Util. Code § 21675* [*Gov. Code § 65302.2*]. Every county in which there is an airport must establish an airport land use commission that is charged with ensuring compatible land uses in the vicinity of new airports, coordinating planning to provide for the orderly development of air transportation, and preparing airport land use planning [*see Pub. Util. Code §§ 21670, 21674*]. Airport land use commissions are governed by *Pub. Util. Code §§ 21670-21679*. When there is no airport land use commission, special procedures allow an interested party to initiate superior court proceedings to postpone the effective date of a zoning regulation [*see Pub. Util. Code § 21679*].

[3] Adoption of General Plan

[a] Legislative Act

The adoption of or any amendment to the general plan or any part thereof is a legislative act that is reviewable pursuant to *Code Civ. Proc. § 1085* [*Gov. Code § 65301.5*].

[b] Procedures

The planning agency must provide opportunities for public involvement through public hearings and any other means the planning agency deems appropriate during the preparation of the general plan or amendment to the general plan [*Gov. Code § 65351*]. It should also refer any proposed action to affected public agencies, allowing them at least 45 days to comment before any action by the legislative body, although failure to do so will not affect the validity of any action [*Gov. Code § 65352*].

If the county or city has a planning commission, prior to making its written recommendation on the proposal, the commission must hold at least one public hearing after complying with the notice provisions of *Gov. Code § 65090* [*Gov. Code §§ 65353, 65354*; for discussion of *Gov. Code § 65090, see § 579.72[1]*]. If a proposed general plan or amendments to a general plan would affect the permitted uses or the intensity of uses of real property, notice of the hearing must also be given pursuant to *Gov. Code § 65091(a)(1)-(3)*. If the number of owners to whom notice would be required to be mailed is greater than 1,000, a local agency may, in lieu of mailed or delivered notice, publish notice pursuant to *Gov. Code § 65091(a)(4)*. For discussion of notice requirements under *Gov. Code § 65091*, see *§ 579.72[2]*. The legislative body must also hold at least one public hearing before adopting or amending a general plan [*Gov. Code § 65355*].

The legislative body must act by resolution of a majority of its total membership to adopt or amend a general plan. It may approve, modify, or disapprove the planning commission's recommendation, although a substantial modification must be referred to the planning commission for its consideration [*Gov. Code § 65356*].

[c] Effect of Adoption of General Plan

Copies of the adopted or amended general plan must be sent to all affected public entities and be made available to the general public [*Gov. Code § 65357*].

There are prescribed limitations on the frequency of amendments to the general plan [*see Gov. Code § 65358*]. However, the legislative authority to amend general plans is not an implied limitation on the right to amend general plans by exercise of the local right of initiative. That right has been upheld by the California Supreme Court [*see*

DeVita v. County of Napa (1995) 9 Cal. 4th 763, 792-797, 38 Cal. Rptr. 2d 699, 889 P.2d 1019] .

The general plan must be compared to any other plan applicable to the same areas or matters affected by it, and the other plan amended as necessary to make it comply with the general plan [*Gov. Code § 65359*].

After the legislative body has adopted all or part of a general plan, the planning agency will investigate and make recommendations regarding means of implementation and provide an annual report on the status of the plan [*Gov. Code § 65400(a)*]. Proposed public works, acquisition or disposition of real property, and construction of public buildings must be submitted to the planning agency for a report regarding conformity with the general plan [*Gov. Code §§ 65401, 65402*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseComprehensive & General PlansReal Property LawZoning & Land UseComprehensive Plans

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§ 579.51 Specific Plans

[1] Preperation Is Permissive

After the legislative body of a city or county has adopted a general plan, the planning agency, either on its own or after direction from the legislative body, may prepare specific plans for the systematic implementation of the general plan for all or part of the area covered by the general plan [*Gov. Code § 65450*]. However, no specific plan may be adopted or amended unless the proposed plan or amendment is consistent with the general plan [*Gov. Code § 65454*].

[2] Contents of Specific Plan

A specific plan must include a statement of the relationship of the specific plan to the general plan. It must also include (1) text and diagrams detailing the distribution, location, and extent of the uses of the land, (2) the proposed distribution, location, extent, and intensity of essential facilities, standards by which development will proceed, (3) standards for conservation and utilization of natural resources, and (4) a program of implementation measures [*Gov. Code § 65451*].

[3] Procedures Affecting Specific Plan

A specific plan will be prepared, adopted, and amended in the same manner as a general plan, except that a specific plan may be adopted by resolution or by ordinance and may be amended as often as necessary [*Gov. Code § 65453(a)*; for discussion of the adoption of a general plan, *see § 579.50[3]*]. A specific plan may be repealed in the same manner as it is required to be amended [*Gov. Code § 65453(b)*].

[4] Effect of Adoption of Specific Plan

Copies of the documents adopting or amending the specific plan must be sent to all affected public entities and be made available to the general public [*Gov. Code § 65456(c)*].

No zoning ordinance may be adopted or amended within an area covered by a specific plan unless it is consistent with

the adopted specific plan. Nor may a local public works project, a tentative map, or a parcel map be approved if inconsistent with the adopted specific plan [*Gov. Code § 65455*]. Certain residential projects that are undertaken to implement and that are consistent with a specific plan for which an environmental impact report was certified after January 1, 1980, are exempt from the requirements of *Pub. Res. Code § 21000 et seq.* (California Environmental Quality Act) [*Gov. Code § 65457*; for discussion of CEQA, *see* Ch. 418, *Pollution and Environmental Matters* [.

[5] Assessment of Fees

After adopting a specific plan, the legislative body may impose a specific plan fee on persons seeking governmental approvals that are required to be consistent with the specific plan. Additionally, a city or county may require a person requesting adoption, amendment, or repeal of a specific plan to deposit with the planning agency an amount equal to the estimated cost of that action prior to any agency action [*Gov. Code § 65456(a), (b)*]. A reasonable fee may be charged for a copy of the specific plan [*Gov. Code § 65456(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawZoning & Land UseGeneral OverviewReal Property LawZoning & Land UseLocal Planning

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[Reserved]

§§ 579.52[Reserved]

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§ 579.70 Local Control Over Regulations

[1] Policy to Maximize

Gov. Code §§ 65800-65912 set forth statewide zoning regulations to provide for the adoption and administration of zoning laws, ordinances, rules, and regulations by counties and cities, and to implement local general plans. Except for *Gov. Code §§ 65910-65912* (open-space zoning) and *Gov. Code § 65913.1* (zoning vacant land for residential use), the regulations are intended to provide only a minimum of limitation in order that counties and cites may exercise the maximum degree of control over local zoning matters [*Gov. Code § 65800*].

[2] Minimum Procedural Standards

Gov. Code § 65804 contains some very broad procedural standards and rules governing the conduct of local zoning hearings to insure at least a modicum of uniformity and public access to zoning matters. These standards apply to all local zoning agencies, including chartered cities [*Gov. Code § 65804*]. The standards require the local agencies to do the following [*see Gov. Code § 65804*]:

- Develop and publish procedural rules for conduct of their hearings so that all parties will have advance knowledge of the procedures to be followed. These rules must incorporate the procedures required by *Gov. Code § 65854* for public hearings and notice in connection with proposed zoning ordinances and ordinance amendments [*see §§ 579.71* and *579.72*].

- Insure that, on written request made before the date of a hearing, a record of any contested proceeding is made and preserved, a copy of which must be available at cost, and for which the local agency may require a deposit.

- Make public before or at the beginning of the hearing any staff planning report; such reports must be a matter of public record.

- Include in the record of any hearing held on an application for a change of zone for parcels of at least 10 acres, a staff report with recommendations and the basis for the recommendations.

[3] General Powers

The legislative body of any county or city may, pursuant to *Gov. Code § 65800 et seq.*, adopt ordinances that do any of the following [*Gov. Code § 65850*]:

- Regulate the use of buildings, structures, and land as between industry, business, residences, open space, including agriculture, recreation, enjoyment of scenic beauty, use of natural resources, and other purposes.

- Regulate signs and billboards.

- Regulate (1) the locations, height, bulk, number of stories, and size of buildings and structures; (2) the size and use of lots, yards, courts, and other open spaces; (3) the percentage of a lot that may be occupied by a building or structure; and (4) the intensity of land use.

- Establish requirements for offstreet parking and loading.

- Establish and maintain building setback lines.

- Create civic districts around civic centers, public parks, public buildings, or public grounds, and establish regulations for those civic districts.

The local legislative body may also regulate, pursuant to a content neutral ordinance and under prescribed circumstances, the time, place, and manner of operation of sexually-oriented businesses [*Gov. Code § 65850.4(a)*]. In this context, a "sexually-oriented business" is one whose primary purpose is the sale or display of matter that, because of its sexually explicit nature, may, pursuant to state law or local regulatory authority, be offered only to persons over 18 [*Gov. Code § 65850.4(b)*]. A local legislative body is also authorized to enter into a legally sanctioned and appropriate cooperative agreement, consortium, or joint powers authority with other adjacent cities or counties regarding regulation of established negative secondary effects of such businesses and their proximity to churches, schools, residents, and other businesses located in adjacent jurisdictions [*Gov. Code § 65850.4(d)*].

The local legislative body may divide its area into zones of whatever number, shape, and area it deems appropriate [*Gov. Code § 65851*]. It may also enact special provisions governing second residential units pursuant to *Gov. Code § 65852.2*.

[4] Statutory Limitations on Power

[a] Uniformity Within Zones

If a city or county has divided its territory into zones, all regulations must be uniform for each class, kind of building, or use of land throughout each zone, but the regulation in one type of zone may differ from those in other types of zones [*Gov. Code § 65852*].

[b] Solar Energy Systems

Because of the state's policy to promote and encourage use of solar energy systems [*see Civ. Code § 801.5(a)(1), (2)*; *Gov. Code § 65850.5(g)(2)* ("solar energy system" defined)] and to limit obstacles to their use, a local legislative body must administratively approve an application to install a solar energy system by issuing a building or similar

nondiscretionary permit. The requirements of local law must be limited to those standards and regulations necessary to ensure that the system will not have a specific, adverse impact on public health or safety [*Gov. Code § 65850.5(a), (b)*; *see Health & Safety Code § 17959.1*]. If a local government denies an application for a use permit to install a solar energy system, it must make written findings based on substantial evidence in the record. The findings must include the government's basis for rejecting potential feasible alternatives for preventing the potential adverse impact on public health or safety [*Gov. Code § 65850.5(c)*].

[c] Manufactured Homes and Mobilehomes

The local political entity may not prohibit the installation of certified manufactured homes and mobilehomes or preclude mobilehome parks from land zoned for residential use [*see Gov. Code §§ 65852.3, 65852.7*; for discussion of zoning regulations specific to manufactured homes and mobilehomes, *see* Ch. 369, *Mobilehomes and Mobilehome Parks* [.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawSolar & Biomass IndustriesReal Property LawMobilehomes & Mobilehome ParksSubdivisionsReal Property LawZoning & Land UseOrdinancesReal Property LawZoning & Land UseState & Regional Planning

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§ 579.71 Enactment Procedures

[1] Generally

A zoning ordinance or an amendment to a zoning ordinance that changes any property from one zone to another or imposes any regulation listed in *Gov. Code § 65850* not previously imposed or removes or modifies any *Gov. Code § 65850* regulation, must be adopted in the manner set forth in *Gov. Code §§ 65854-65857* [*Gov. Code § 65853*; for discussion of *Gov. Code § 65850, see § 579.70[3]*]. Any other amendment to a zoning ordinance may be adopted as other ordinances are adopted [*Gov. Code § 65853*].

If the legislative body has required the planning commission to study and report on a proposed zoning ordinance or amendment and the commission fails to act,that failure is deemed an approval of the proposal [*see Gov. Code § 65853*].

[2] Hearing Required

The planning commission must hold a public hearing on the proposed zoning ordinance or amendment, the notice for which must be given pursuant to *Gov. Code § 65090*, and if the permitted uses of real property are affected, pursuant to the additional notice requirements of *Gov. Code § 65091* [*Gov. Code § 65854*; *see § 579.72*]. After the hearing, the planning commission must render its written recommendation to the legislative body. That recommendation must include the reasons for the recommendation, the relationship of the proposed ordinance or amendment to applicable general and specific plans, and must be transmitted in the form and manner specified by the legislative body [*Gov. Code § 65855*].

After receiving the commission's recommendation, the legislative body must hold a public hearing. Although no action on a proposed amendment need be taken if the proposed amendment was to change property from one zone to another and the recommendation was against the amendment, if local ordinance provides otherwise or if an interested party makes a written request for a hearing, a hearing must be held [*Gov. Code § 65856*]. The legislative body may approve, modify, or disapprove the recommendation of the planning commission. However, any suggested modification that was not previously considered by the commission must first be referred to it for report and recommendation without a public

hearing. Failure of the planning commission to act is deemed approval of the modification proposed [*Gov. Code § 65857*]. The legislative body is not required to make express findings of facts concerning the public purpose of the ordinance or its relation to the police power [*Ensign Bickford Realty Corp. v. City Council (1977) 68 Cal. App. 3d 467, 473, 137 Cal. Rptr. 304]* .

A zoning ordinance that imposes new zoning requirements and prohibits second units is void if it was adopted without public notice or a public hearing [*Sounhein v. City of San Dimas (1992) 11 Cal. App. 4th 1255, 1259-1260, 14 Cal. Rptr. 2d 656]* .

A "streamlined zoning process," under which the county gave notice of a hearing before the board of supervisors before the planning commission made its recommendation on a proposed amendment to the zoning ordinance, violated the Planning and Zoning Law [*Environmental Defense Project of Sierra County v. County of Sierra (2008) 158 Cal. App. 4th 877, 881, 70 Cal. Rptr. 3d 474*]. When a planning commission is required to hold a hearing and make a recommendation, the board hearing notice cannot be published until the commission (1) has completed its hearing, (2) adopted its recommendation, and (3) formally delivered the recommendation. Furthermore, the board hearing notice must include the commission's recommendation [*Environmental Defense Project of Sierra County v. County of Sierra (2008) 158 Cal. App. 4th 877, 893, 70 Cal. Rptr. 3d 474*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsAdministrative BoardsReal Property LawZoning & Land UseAdministrative ProcedureReal Property LawZoning & Land UseOrdinances

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§ 579.72 Public Hearings

[1] Notice by Publication or Posting

When a provision of *Gov. Code § 65000 et seq.* requires notice of a public hearing to be given pursuant to *Gov. Code § 65090*, notice must be published pursuant to *Gov. Code § 6061* (one-time publication) in at least one newspaper of general circulation within the jurisdiction of the local agency conducting the proceedings at least 10 days before the hearing, or if there is no newspaper of general circulation, the notice must be posted at least 10 days before the hearing in at least three public places within that jurisdiction. The notice must include the date, time, and place of the public hearing, the identity of the hearing body or officer, a general explanation of the matter to be considered, and a general description, in text or by diagram, of the location of the real property, if any, that is the subject of the hearing [*Gov. Code §§ 65090, 65094*]. A local agency may also give notice of the hearing in any other manner it deems necessary or desirable [*Gov. Code § 65090(c)*].

[2] Notice by Mail or Delivery

When a provision of *Gov. Code § 65000 et seq.* requires notice of a public hearing to be given pursuant to *Gov. Code § 65091*, notice must be given in several ways. Notice of the hearing must be mailed or delivered at least 10 days before the hearing to all of the following [*Gov. Code § 65091(a)(1), (3), (4)*]:

- The owner of the subject real property and the owner's duly authorized agent;
- The proposed applicant;
- Each local agency expected to provide essential facilities or services to the project whose ability to provide those facilities and services may be significantly affected; and
- All owners of real property within 300 feet of the real property that is the subject of the hearing.

If the statute requiring a Section 65091 notice is the Subdivision Map Act [*see Gov. Code § 66410 et seq.*], notice must also be given to any owner of a mineral right on the property who has recorded a notice of intent to preserve those rights [*Gov. Code § 65091(a)(2)*; *see Civ. Code § 883.230* (notice of intent)].

If the number of persons to whom notice would be mailed or delivered is greater than 1,000, a local agency, in lieu of mailed or delivered notice, may provide notice by placing a display advertisement of at least one-eighth page in at least one newspaper of general circulation within the local agency in which the proceeding is conducted at least 10 days before the hearing. If the notice is mailed or delivered to the owners of real property within 300 feet of the subject real property, the notice must also either (1) be published pursuant to *Gov. Code § 6061* (one-time publication) in at least one newspaper of general circulation within the local agency that is conducting the proceeding at least 10 days before the hearing, or (2) be posted at least 10 days before the hearing in at least three public places within the boundaries of the local agency, including one public place in the area directly affected by the proceeding [*Gov. Code § 65091(a)(4), (5)*]. The notice must include the date, time, and place of the public hearing, the identity of the hearing body or officer, a general explanation of the matter to be considered, and a general description, in text or by diagram, of the location of the real property, if any, that is the subject of the hearing [*Gov. Code §§ 65091(b), 65094*]. A local agency may also give notice of thehearing in any other manner it deems necessary or desirable [*Gov. Code § 65091(c)*].

[3] Notice to Blind, Aged, and Disabled of Hearing on Drive-Through Facility Permit

Whenever a local agency (1) considers adopting or amending policies or ordinances affecting drive-through facilities; or (2) holds a hearing regarding a permit for a drive-through facility or a modification of such a permit, the agency must incorporate, when necessary, notice procedures to the blind, aged, and disabled communities to facilitate their participation in any hearing on, or appeal of the denial of, such a facility. This notice requirement applies to charter cities as well as general law cities [*Gov. Code §§ 65090(d), 65091(d)*].

[4] Requests for Notice

When a provision of *Gov. Code § 65000 et seq.* requires notice of a public hearing to be given pursuant to *Gov. Code § 65090* or *65091*, the notice must also be mailed or delivered at least 10 days before the hearing to any person who has filed a written request for notice with either the clerk of the governing body or with any other designated person. The local agency may charge a fee reasonably related to its costs and may require each request to be annually renewed [*Gov. Code § 65092(a)*]. "Person" includes a California Native American tribe that is on the contact list maintained by the Native American Heritage Commission [*Gov. Code § 65092(b)*].

[5] Failure to Receive Notice

The failure of any person or entity to receive notice given pursuant to *Gov. Code § 6500 et seq.*, or pursuant to the procedures established by a chartered city, does not constitute grounds for any court to invalidate the actions of a local agency for which the notice was given [*Gov. Code § 65093*].

[6] Continuances

Any public hearing conducted under *Gov. Code § 65000 et seq.* may be continued from time to time [*Gov. Code § 65095*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawZoning & Land UseOrdinances

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[Reserved]

§§ 579.73[Reserved]

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§ 579.90 Interim Ordinance

[1] Statutory Provision for Urgency Measure

Without following the standard procedures for adopting a zoning ordinance, the legislative body of a county, city (including a charter city), or city and county, to protect the public safety, health, and welfare, may adopt as an urgency measure an interim ordinance prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body, planning commission, or the planning department is studying or intends to study within a reasonable time. The urgency measure requires a four-fifths vote of the legislative body for adoption. That interim ordinance will have no further force and effect 45 days from its date of adoption. After notice pursuant to *Gov. Code § 65090* and public hearing, the legislative body may extend the interim ordinance for 10 months and 15 days and subsequently extend the interim ordinance for one year. Any extension also requires a four-fifths vote for adoption. No more than two extensions may be adopted [*Gov. Code § 65858(a)*].

Alternatively, an interim ordinance may be adopted by a four-fifths vote following notice pursuant to *Gov. Code § 65090* and public hearing. As in the case of an interim ordinance enacted without notice, it will have no further force and effect 45 days from its date of adoption. After enacting the ordinance in this manner, it may be extended for 22 months and 15 days on a four-fifths vote after notice pursuant to *Gov. Code § 65090* and public hearing [*Gov. Code § 65858(b)*; for discussion of *Gov. Code § 65090, see § 579.72[1]*].

When any interim ordinance has been adopted, every subsequent interim ordinance, covering the whole or a part of the same property, will automatically terminate and be of no further force or effect on the termination of the initial ordinance or any extension thereof [*Gov. Code § 65858(e)*]. However, on termination of a prior interim ordinance, the legislative body may adopt another interim ordinance if the new ordinance is adopted to protect the public safety, health, and welfare from an event, occurrence, or set of circumstances that differs from the event, occurrence, or set of circumstances that led to the adoption of the prior ordinance [*Gov. Code § 65858(f)*]. Such a new interim ordinance that was in existence on or before April 14, 1997, may not be invalidated if challenged pursuant to *Gov. Code § 65858(e)* (discussed *above*) [*see* 1996 Stats., ch. 129, § 2].

The legislative body has no power to adopt or extend any interim ordinance unless the ordinance contains legislative findings that there is a current and immediate threat to the public health, safety, or welfare, and that the approval of additional subdivisions, use permits, variances, building permits, or any other applicable entitlement for use that isrequired to comply with a zoning ordinance would result in a threat to public health, safety, or welfare [*Gov. Code § 65858(c)*]. In addition, if an interim ordinance has the effect of denying approvals needed to develop projects with a significant component of multifamily housing, that is, projects in which multifamily housing consists of at least one-third of the project's total square footage, the ordinance may not be extended unless the local legislative body makes written findings supported by substantial evidence on the record that all of the following conditions exist [*Gov. Code § 65858(c)*; *see Gov. Code § 65858(h)*]:

- The continued approval of the development of multifamily housing projects would have a specific, adverse impact on the public health or safety;

- The interim ordinance is necessary to mitigate or avoid this specific, adverse impact; and

- There is no feasible alternative to satisfactorily mitigate or avoid this specific, adverse impact, as well or better, with a less burdensome or restrictive effect, than the adoption of the proposed interim ordinance.

"Specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they exist on the date the proposed ordinance is adopted [*Gov. Code § 65858(c)(1)*]. "Development of multifamily housing projects" does not include the demolition, conversion, redevelopment, or rehabilitation of multifamily housing that is affordable to lower income households, or that will result in an increase in the price or reduction of the number of affordable units in a multifamily housing project [*Gov. Code § 65858(g)*].

Ten days before the expiration of an interim ordinance or any extension, the legislative body must issue a written report describing the measures taken to alleviate the condition that lead to the adoption of that ordinance [*Gov. Code § 65858(d)*].

While the statute permits a local legislative body to adopt an interim ordinance prohibiting any uses that may conflict with a general plan being studied, an interim ordinance that prohibits the formal processing of development applications, such as a tentative subdivision map, is invalid [*Building Indus. Legal Defense Found. v. Superior Court (1999) 72 Cal. App. 4th 1410, 1420, 85 Cal. Rptr. 2d 828]* .

The limitations imposed by *Gov. Code § 65858* are applicable to moratoriums passed by initiative as well as those enacted by the legislative body. The legislative history of *Gov. Code § 65858* indicates that it is applicable to all moratoriums even though its specific language refers only to acts of the legislative body [*Bank of the Orient v. Town of Tiburon (1990) 220 Cal. App. 3d 992, 999-1004, 269 Cal. Rptr. 690] , overruled in part by Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 743* .

Neither rezoning nor the expiration of a moratorium prevents the application of the statute's requirement that the moratorium and any subsequent moratorium or extension must expire after two years [*Martin v. Superior Court (1991) 234 Cal. App. 3d 1765, 1769-1772, 286 Cal. Rptr. 513]* .

[2] Purposes Served

An interim ordinance is designed as a stop gap or incubation period zoning ordinance. It is a recognition that development of a zoning plan takes time, and it would be destructive to the plan if, during the period of its incubation,

parties seeking to evade its operation could be permitted to enter on a course of construction that might progess far enough to defeat in whole or in part the ultimate execution of the plan [*Metro Realty v. County of El Dorado (1963) 222 Cal. App. 2d 508, 515, 35 Cal. Rptr. 480* (decided under former *Gov. Code § 65806*)]. As a temporary device to preserve the status quo pending adoption of a comprehensive zoning plan, an interim ordinance may require a development permit to assure that priceless resources are not irreversibly committed to uses that would be inconsistent with the plan ultimately developed [*see State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 253-255, 115 Cal. Rptr. 497, 524 P.2d 1281* (Coastal Plan)].

There is no notice requirement for an interim zoning ordinance [*see Gov. Code § 65858*]. The reason no notice is required is that the ordinance is an urgency measure, the very purpose of which to preserve the status quo would be destroyed if notice and hearing were required. When the permanent plan and a zoning ordinance thereunder are before the county for adoption, notice and a hearing will be required [*Metro Realty v. County of El Dorado (1963) 222 Cal. App. 2d 508, 518, 35 Cal. Rptr. 480]* .

Interim ordinances are required to be reasonable; reasonableness in this connection is a matter of degree. A temporary restriction on land use may be a mere inconvenience when the same restriction indefinitely prolonged might possibly metamorphize into oppression [*Metro Realty v. County of El Dorado (1963) 222 Cal. App. 2d 508, 516, 35 Cal. Rptr. 480]* .

An interim ordinance may not be used to authorize a use formerly prohibited or to permit construction of a permanent structure. Such an ordinance would indicate an attempt to circumvent the statutory scheme of community development and the requirements of due process by misuse of a device designed only to maintain the status quo pending the completion of a comprehensive plan [*Silvera v. City of South Lake Tahoe (1970) 3 Cal. App. 3d 554, 555-558, 83 Cal. Rptr. 698]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 579.91 Holding Zone

Some land uses possess characteristics of such unique and special form that their automatic inclusion within a designated zone is impracticable. Thus, some zoning ordinances leave certain areas unclassified concerning the uses permitted, but provide that certain uses within those areas may be carried on only under a permit. Known as holding zones, these zones are frequently appropriate in rural areas where their rural character will be maintained only until some definite trend toward particular uses begins to develop. Classification as a holding zone recognizes that these areas have not reached a point of development warranting more specific regulation. This scheme forestalls a future claim that such a use, if not carried out under a terminable permit, had become a nonconforming use under restrictive zoning that might later be established [*see Castiglione v. County of San Diego (1971) 15 Cal. App. 3d 880, 883-884, 93 Cal. Rptr. 499]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseConditional Use Permits & VariancesReal Property LawZoning & Land UseOrdinancesReal Property LawZoning & Land UseSpecial Permits & Variances

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[Reserved]

§§ 579.92[Reserved]

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§ 579.110 Board of Zoning Adjustment

The local legislative body may, by ordinance, establish a board of zoning adjustment, an office of zoning administrator, or both [*Gov. Code § 65900*]. If neither is established, the local planning commission will exercise all of the functions and duties of that board or administrator [*Gov. Code § 65902*].

The board of zoning adjustment or zoning administrator will hear and decide applications for variances and conditional uses or other permits when the zoning ordinance provides therefor and establishes determination criteria. The board or administrator may exercise any other powers granted by local ordinance, and may adopt all rules and procedures necessary or convenient [*Gov. Code § 65901(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsAdministrative BoardsReal Property LawZoning & Land UseAdministrative ProcedureReal Property LawZoning & Land UseOrdinances

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§ 579.111 Board of Appeals

[1] Generally

The local legislative body may, by ordinance, create and establish a board of appeals [*Gov. Code § 65900*]. If a board of appeals is not established, the local legislative body will exercise all of its functions and duties [*Gov. Code § 65904*].

The board of appeals hears and determines appeals from the decisions of the board of zoning adjustment or the zoning administrator. Procedures for those appeals are as provided by local ordinance. The board may reverse or affirm, wholly or partly, or may modify the order, requirement, decision, or determination appealed from, and may make that order, requirement, decision, or determination as should be made, and that action will be final [*Gov. Code § 65903*].

[2] Decision Requires Public Hearing

Except as otherwise provided by *Gov. Code §§ 65900-65909.5*, a public hearing must be held on (1) an application for a variance from the requirements of a zoning ordinance, (2) an application for a conditional use permit, or equivalent development permit, (3) a proposed revocation or modification of a variance, use permit, or equivalent development permit, or (4) an appeal from the action taken on any of those applications [*Gov. Code § 65905(a)*]. Notice of that hearing must be given pursuant to *Gov. Code § 65091* [*Gov. Code § 65905(b)*; for discussion of *Gov. Code § 65091*, *see § 579.72[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsAdministrative BoardsReal Property LawZoning & Land UseAdministrative ProcedureReal Property LawZoning & Land UseAdministrative Procedure

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51-579 California Forms of Pleading and Practice--Annotated § 579.112

§ 579.112 Issuance of Variance or Permit

[1] Impermissible Conditions

No local governmental body, or any agency thereof, may condition the issuance of any zone variance or building or use permit on either of the following:

- The dedication of land for any purpose not reasonably related to the use of the property for which the variance, building, or use permit is requested.

- The posting of a bond to guarantee installation of public improvements not reasonably related to the use of the property for which the variance, building, or use permit is requested [*Gov. Code § 65909*].

[2] Fees

The local legislative body may establish reasonable fees for the processing of use permits, zone variances, or zone changes pursuant to the procedures required or authorized by *Gov. Code §§ 65800-65912* or local ordinance. Those fees cannot exceed the amount reasonably required to administer the processing of those permits or zone variances. The fees will be imposed pursuant to *Gov. Code §§ 54990-54994* (local agency service fees and charges) [*Gov. Code § 65909.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewEnvironmental LawZoning & Land UseConditional Use Permits & VariancesReal Property LawZoning & Land UseImpact FeesReal Property LawZoning & Land UseOrdinancesReal Property LawZoning & Land UseSpecial Permits & Variances

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§ 579.113 Variances

[1] Grounds for Granting

A variance sanctions a deviation from the standard set by the general zoning ordinance. Any variance granted must be in harmony with the general purpose and intent of the zoning laws [*Zakessian v. City of Sausalito (1972) 28 Cal. App. 3d 794, 801, 105 Cal. Rptr. 105]* . A variance will not be granted for a parcel of property that authorizes a use or activity that is not otherwise expressly authorized by the zone regulation governing the parcel of property [*Gov. Code § 65906*].

Variances are to be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives the property of privileges enjoyed by other property in the vicinity and under identical zoning classification [*Gov. Code § 65906*]. In addition to *Gov. Code § 65906*, local ordinance may provide guidelines for granting variances [*see Broadway, Laguna etc. Assn. v. Board of Permit Appeals (1967) 66 Cal. 2d 767, 771-772 ns. 3, 4, 59 Cal. Rptr. 146, 427 P.2d 810]* .

The granting of a variance rests largely in the discretion of the body designated by the ordinance for that purpose. The board's action will not be disturbed in the absence of a clear showing of an abuse of discretion [*Bringle v. Board of Supervisors (1960) 54 Cal. 2d 86, 89, 4 Cal. Rptr. 493, 351 P.2d 765* ; *City of Santa Clara v. Paris (1977) 76 Cal. App. 3d 338, 341, 142 Cal. Rptr. 818]* .

[2] Challenging Constitutionality of Ordinance

The application for a variance necessarily admits the constitutionality of the ordinance under which the city officials charged with the duty of administering a zoning ordinance are asked to exercise a discretion. Thus, an applicant may not challenge its constitutionality before the administrative body. However, once the decision of the administrative body is final, the applicant may assert in a judicial proceeding that the zoning law is unconstitutional as applied to his or her property [*Minney v. City of Azusa (1958) 164 Cal. App. 2d 12, 28-29, 330 P.2d 255 , appeal dismissed, 359 U.S. 436, 79 S. Ct. 941, 3 L. Ed. 2d 932 (1959)]* .

[3] Unnecessary Hardship

The essential requirement of a variance is a showing that a strict enforcement of the zoning limitation would cause unnecessary hardship; the burden of showing hardshipis on the applicant [*PMI Mortgage Ins. Co. v. City of Pacific Grove (1981) 128 Cal. App. 3d 724, 731, 179 Cal. Rptr. 185]* .

A variance is appropriate when the hardship is unique to the particular property owner seeking the variance. Unnecessary hardship clearly occurs when the circumstances of a particular parcel of land place its owner at a disadvantage vis-a-vis other landowners in the zoning district [*Zakessian v. City of Sausalito (1972) 28 Cal. App. 3d 794, 799-800, 105 Cal. Rptr. 105]* . Only that type of hardship that inheres in the particular property is recognized, such as inability to use it for purposes of its existing zoning due to the prevailing uses of surrounding property. A variance for undue hardship is grounded in conditions peculiar to the particular lot as distinguished from other property in the use district [*Minney v. City of Azusa (1958) 164 Cal. App. 2d 12, 31, 330 P.2d 255 , appeal dismissed, 359 U.S. 436, 79 S. Ct. 941, 3 L. Ed. 2d 932 (1959)]* .

Self-imposed burdens cannot legally justify the granting of a variance. Thus, the developer's adoption of superior building standards cannot support a hardship rationale [*Broadway, Laguna etc. Assn. v. Board of PermitAppeals (1967) 66 Cal. 2d 767, 778, 59 Cal. Rptr. 146, 427 P.2d 810]* . Although financial hardship alone ordinarily will not constitute unnecessary hardship, it may be considered along with other circumstances [*Zakessian v. City of Sausalito (1972) 28 Cal. App. 3d 794, 802, 105 Cal. Rptr. 105]* .

[4] Special Circumstances

Variances are required to be granted because of "special circumstances" applicable to the property [*Gov. Code § 65906*], a concept that the California Supreme Court has interpreted as emphasizing only undefined disparities between properties [*Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 520, 113 Cal. Rptr. 836, 522 P.2d 12]* . The disparities need not be physical, but may include, for example, a disparate impact of land use regulations on some properties in a particular zone [*Craik v. County of Santa Cruz (2000) 81 Cal. App. 4th 880, 890, 96 Cal. Rptr. 2d 538]* .

Examples of special circumstances justifying a variance vary with the facts of each case. For example, the requisite special circumstances existed when compliance with the ordinance requirement for a certain number of parking places would result in maintaining vacant and unused parking spaces and would not contribute to relieving traffic congestion, which was the stated purpose of the requirement [*Siller v. Board of Supervisors (1962) 58 Cal. 2d 479, 485-486, 25 Cal. Rptr. 73, 375 P.2d 41]* . Special circumstances were also found so as to uphold a variance granted to allow expansion of a resort hotel that had been built before the enactment of a zoning ordinance that only allowed cottage-type hotels. The hotel had been so designed and built, including irreplaceable matured landscaping, that it could never comply with the cottage requirement, without having a detrimental effect on the scenic drive adjacent to the hotel and destroying the aesthetic, architectural, and historic character and integrity of the hotel. The proposed project, however, would add only one building and would preserve the hotel's existing features, and result in a sleeping room density less than that of the only other hotel in the identical zoning classification [*Miller v. Board of Supervisors (1981) 122 Cal. App. 3d 539, 546-548, 176 Cal. Rptr. 136]* .

On the other hand, special circumstances justifying the granting of a variance were found not to exist based on the property's unusual subsoil condition when that condition bore no logical relationship to the variance requested. Nor did the factor of including attractive architectural features constitute an extraordinary condition applying to the intended use of the property that might have justified a variance under the ordinance in question [*Broadway, Laguna etc. Assn. v. Board of Permit Appeals (1967) 66 Cal. 2d 767, 774, 59 Cal. Rptr. 146, 427 P.2d 810]* . Also, profit motive is not an adequate ground for a variance. A distinction is drawn between those circumstances that prevent a builder from profitably developing a lot within the strictures of the planning code and those conditions that simply render a

complying structure less profitable than anticipated. To justify granting a variance on this basis, there must be a finding that the developer could not earn a reasonable return on the investment if the building complied with the code requirements [*Broadway, Laguna etc. Assn. v. Board of Permit Appeals (1967) 66 Cal. 2d 767, 775-776, 59 Cal. Rptr. 146, 427 P.2d 810* ; *see Hamilton v. Board of Supervisors (1969) 269 Cal. App. 2d 64, 68-70, 75 Cal. Rptr. 106]* .

[5] Attachment of Conditions to Avoid Privilege

Any variance granted is subject to those conditions that assure that the adjustment thereby authorized will not constitute a grant of special privileges inconsistent with the limitations on other properties in the vicinity and zone in which that property is situated [*Gov. Code § 65906*; *see Gov. Code § 65909*, discussed in *§ 579.112[1]*]. Explicit conditions may be attached to a variance to preserve the general purposes and intent of the zoning ordinance. When a variance is granted on reasonable conditions, the landowner cannot later claim that the ordinance is invalid as applied to his or her property [*Bringle v. Board of Supervisors (1960) 54 Cal. 2d 86, 90, 4 Cal. Rptr. 493, 351 P.2d 765]* .

If the property can be put to effective use, consistent with its existing zoning, without the deviation sought, a variance is not appropriate, even if it would make the applicant's property more valuable, enable him or her to recover a greater income, or provide relief from the cost of complying with the existing restrictions. Profit motive, attractive architectural features, benefit to the community, and practical difficulty do not justify a variance. A variance based on those factors would confer not parity, but privilege [*Hamilton v. Board of Supervisors (1969) 269 Cal. App. 2d 64, 69-70, 75 Cal. Rptr. 106* ; *see Gov. Code § 65906*].

[6] Special Parking Rules

Notwithstanding *Gov. Code § 65906*, a variance may be granted from the parking requirements of a zoning ordinance in order that some or all of the required parking spaces be located offsite, including locations in other local jurisdictions, or that in-lieu fees or facilities be provided instead of the required parking spaces, if both the following conditions are met:

- The variance will be an incentive to, and a benefit for, the nonresidential development.

- The variance will facilitate access to the nonresidential development by patrons of public transit facilities, particularly guideway facilities [*Gov. Code § 65906.5*].

[7] Relationship to Legislative Zoning

Radicial alteration of the nature of an entire zone is a proper subject for legislation, not for piecemeal adjudication by an administrative agency through the granting of variances for large parcels [*Topanga Asso. for a Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 522, 113 Cal. Rptr. 836, 522 P.2d 12* (variance for 28 acre parcel leads to suspicion that so large a parcel may not be sufficiently unrepresentative of realty in a zone to merit special treatment)].

Nor is annulment of legislative zoning a proper purpose of a variance. Thus, the granting of variances has no precedential value. Ill-advised or illegal variances do not furnish grounds for a repetition of the wrong. If that were so, one variance would sustain as well as compel others, thereby nullifying the general regulation [*Minney v. City of Azusa (1958) 164 Cal. App. 2d 12, 32, 330 P.2d 255 , appeal dismissed, 359 U.S. 436, 79 S. Ct. 941, 3 L. Ed. 2d 932 (1959)* ; *see Miller v. Board of Supervisors (1981) 122 Cal. App. 3d 539, 547, 176 Cal. Rptr. 136* (although variance granted to another owner is not by itself a special circumstance justifying granting of a similar variance, it is relevant in assessing "privileges enjoyed by other property" element of *Gov. Code § 65906*)].

Legal Topics:

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

Real Property LawZoning & Land UseComprehensive PlansReal Property LawZoning & Land UseConstitutional LimitsReal Property LawZoning & Land UseSpecial Permits & VariancesReal Property LawZoning & Land UseState & Regional Planning

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§ 579.114 Conditional Use Permit

[1] Generally

Various terms have been used to refer to the conditional use permit (CUP), including use permit, special use permit, and exceptional use permit [*see, e.g.,* *Metcalf v. County of Los Angeles (1944) 24 Cal. 2d 267, 272, 148 P.2d 645* (exception); Rohan, Zoning and Land Use Controls, Ch. 44, *Uses By Review,* § 44.01]. A CUP can be issued only if the local zoning ordinance has established criteria for determining such matters [*Stoddard v. Edelman (1970) 4 Cal. App. 3d 544, 548, 84 Cal. Rptr. 443* ; *see Gov. Code § 65901*]. Ordinarily, a zoning ordinance permits certain uses for an area and permits other uses only after consideration by an agency regarding whether the proposed other use will be in the best interests of public convenience and necessity and not contrary to the public welfare. Generally, a use requires a CUP because it could be incompatible in some respects with the applicable zoning. Once granted, the CUP does not permit uses other than those authorized by the permit or by the zoning ordinance without a permit [*Sports Arenas Properties, Inc. v. City of San Diego (1985) 40 Cal. 3d 808, 814-815, 221 Cal. Rptr. 538, 710 P.2d 338* ; *Neighborhood Action Group v. County of Calaveras (1984) 156 Cal. App. 3d 1176, 1183, 203 Cal. Rptr. 401]* .

Traditionally, the conditional use permit has enabled the local legislative body to exercise some measure of control over the extent of certain uses, such as service stations, which, although desirable in limited numbers, could have a detrimental effect on the community in large numbers [*Neighborhood Action Group v. County of Calaveras (1984) 156 Cal. App. 3d 1176, 1183-1184, 203 Cal. Rptr. 401* ; *see* *Upton v. Gray (1969) 269 Cal. App. 2d 352, 357, 74 Cal. Rptr. 783]* .

A conditional use permit runs with the land, and the successor in interest succeeds to any benefits that the original owner enjoyed under the permit issued. The successor in interest is also subject to the limitations in the permit and can assert no greater rights than the original permittee enjoyed [*County of Imperial v. McDougal (1977) 19 Cal. 3d 505, 510, 138 Cal. Rptr. 472, 564 P.2d 14]* .

[2] Criteria for Granting

The standards established by local ordinances for granting CUPs vary from very general to very specific, and have almost uniformly been judicially approved. Under the general welfare standard a permit may be issued if it is found that the proposed location of the use will be desirable to the public convenience or welfare and will be in harmony with the various elements and objectives of the master plan. This is not too vague to be valid [*Stoddard v. Edelman (1970) 4 Cal. App. 3d 544, 548, 84 Cal. Rptr. 443* ; *see Gov. Code § 65901*]. It is a near impossibility to devise standards to cover all possible situations in which a use permit can be issued [*Garavatti v. Fairfax Planning Com. (1971) 22 Cal. App. 3d 145, 150, 99 Cal. Rptr. 260]* . In general, a determination that a permit applicant has satisfied the standards imposed by local ordinance is sufficient to justify granting the permit; findings outside those required by the ordinance, such as a finding that the applicant has not violated the terms of a previously-issued CUP, are not required [*Baird v. County of Contra Costa (1995) 38 Cal. Rptr. 2d 93]* .

The granting of a CUP does not constitute rezoning and does not require observance of rezoning procedures [*Concerned Citizens of Palm Desert, Inc. v. Board of Supervisors (1974) 38 Cal. App. 3d 257, 266, 113 Cal. Rptr. 328]* . A conditional use permit is appropriate if it is shown that its use is essential or desirable to the public convenience or welfare and at the same time that it will not impair the integrity or character of the zoned district [*Mitcheltree v. City of Los Angeles (1971) 17 Cal. App. 3d 791, 795, 95 Cal. Rptr. 76]* .

Conditional use permits may be issued to allow a variety of uses. Some examples include (1) a planned residential development [*Concerned Citizens of Palm Desert, Inc. v. Board of Supervisors (1974) 38 Cal. App. 3d 257, 261, 113 Cal. Rptr. 328]* , (2) construction of a mobilehome park [*Jones v. City Council (1971) 17 Cal. App. 3d 724, 727, 94 Cal. Rptr. 897]* , and (3) construction of airplane hangars [*Mitcheltree v. City of Los Angeles (1971) 17 Cal. App. 3d 791, 797, 95 Cal. Rptr. 76]* .

Ordinances that purport to regulate the location and operation of adult businesses are subject to challenge under the *First Amendment* [*see, e.g.,* *Renton v. Playtime Theatres, Inc. (1986) 475 U.S. 41, 50, 106 S. Ct. 925, 89 L. Ed. 2d 29* ; *Gammoh v. City of Anaheim (1999) 73 Cal. App. 4th 186, 191, 197-198, 86 Cal. Rptr. 2d 194]* . While courts have accorded some deference to such ordinances if they do not completely ban restricted activity and serve a substantial governmental interest unrelated to suppression of speech, an ordinance must nonetheless be sufficiently specific to withstand the challenge that it is so vague that it constitutes an unconstitutional prior restraint [*Smith v. County of Los Angeles (1994) 24 Cal. App. 4th 990, 995, 29 Cal. Rptr. 2d 680* ; *Dease v. City of Anaheim (C.D. Cal. 1993) 826 F. Supp. 336, 342]* . The criteria to be applied by local authorities in making a permit determination must be sufficientlyprecise to meet the constitutional requirement that they be narrow, objective, and definite [*see Shuttlesworth v. City of Birmingham (1969) 394 U.S. 147, 150-151, 89 S. Ct. 935, 22 L. Ed. 2d 162]* . Applying this standard, the Court of Appeal held that a Los Angeles conditional use permit ordinance that purported to regulate adult businesses was unconstitutionally vague because it required those making decisions based on the ordinance to exercise too much subjective discretion [*Smith v. County of Los Angeles (1994) 24 Cal. App. 4th 990, 1004-1008, 29 Cal. Rptr. 2d 680]* . The ordinance required that operation of an adult business at a requested location could not "adversely affect the use" of schools, parks, playgrounds, places of worship, or similar uses within a 90-foot radius. The adult business likewise was required to be "sufficiently buffered" from "residentially zoned areas within the immediate vicinity so as not to adversely affect" those areas. Furthermore, its exterior appearance could not be "inconsistent" with commercial structures within the immediate neighborhood [*see* *Smith v. County of Los Angeles (1994) 24 Cal. App. 4th 990, 996, 29 Cal. Rptr. 2d 680]* .

[3] Challenging Issuance or Terms of Permit

Administrative mandate is appropriate to challenge the issuance or denial of a conditional use permit [*see* *Wheeler v. Gregg (1949) 90 Cal. App. 2d 348, 362, 203 P.2d 37* ; *see also § 579.317[7]*]. If the local general plan is defective, a CUP granted by that local legislative body may be successfully challenged [*Neighborhood Action Group v. County of Calaveras (1984) 156 Cal. App. 3d 1176, 1184-1186, 203 Cal. Rptr. 401* ; for discussion of challenges to general plans, *see § 579.223*]. However, the requirements for the plan need not be formally approved and adopted before authority

vests in relation to granting a CUP [*see Mitcheltree v. City of Los Angeles (1971) 17 Cal. App. 3d 791, 796-797 n.4, 95 Cal. Rptr. 76]* .

A permittee who fails to challenge the limitations imposed on him or her by the permit, waives any right to object [*County of Imperial v. McDougal (1977) 19 Cal. 3d 505, 510-511, 138 Cal. Rptr. 472, 564 P.2d 14]* .

[4] Revocation; Vested Rights

Once a use permit has been properly issued, the power of a municipality to revoke it is limited. If the permittee does nothing beyond obtaining the permit, it may be revoked. However, when a CUP has been properly obtained and in reliance on it the permittee has incurred material expense, he or she acquires a vested property right. Once a permittee has a vested right, the CUP may be revoked only if the permittee fails to comply with reasonable terms or conditions of the permit or if there is a compelling public necessity. Such a compelling public necessity may exist when the conduct of a business constitutes a nuisance [*O'Hagen v. Board of Zoning Adjustment (1971) 19 Cal. App. 3d 151, 158, 96 Cal. Rptr. 484]* .

Because a conditional use permit is a property right that runs with the land rather than a personal right of the permitee, when property that is subject to a CUP is transferred, the new owner accedes to the same rights under the permit as the previous owner, which includes any vested right to continuance of the permit so long as the new owner complies with the permit's original terms and conditions [*Malibu Mountains Rec., Inc. v. City of Los Angeles (1998) 67 Cal. App. 4th 359, 369-370, 79 Cal. Rptr. 2d 25]* .

[5] Modification

By contrast, the general health, safety, and welfare standard is a sufficient standard for the administrative body to apply in modifying a conditional use permit. Thus, when the application for a permit had represented that the proposed store would operate for specified hours, but the permittees did not abide by that representation, modification of the CUP to require shorter hours was valid because it was based on the public safety, health, and welfare [*Garavatti v. Fairfax Planning Com. (1971) 22 Cal. App. 3d 145, 147, 150-151, 99 Cal. Rptr. 260]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusEnvironmental LawZoning & Land UseConditional Use Permits & VariancesReal Property LawTortsNuisanceGeneral OverviewReal Property LawZoning & Land UseSpecial Permits & Variances

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[Reserved]

§§ 579.115[Reserved]

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§ 579.130 Local Power

[1] Regulation of Construction and Removal of Buildings

The legislative body of a city may regulate the building, construction, and removal of buildings within the city [*Gov. Code § 38601(b)*; *see Cal. Const., art. XI, § 7*]. Additionally, the legislative body of a city may do any of the following [*Gov. Code § 38660*]:

- Regulate the construction of and the materials used in all buildings, chimneys, stacks, and other structures and in foundations and foundation walls.

- Regulate the construction, repair, or alteration of buildings pursuant to former *Health & Safety Code § 15153* (*now see Health & Safety Code § 17951*, relating to fees and approval of alternative regulations to those prescribed by the State Building Standards Code).

- Prevent the erection and maintenance of unsafe building walls, chimneys, stacks, or other structures.

- Provide for the summary abatement, destruction, or removal of unsafe structures and of unsightly or partially destroyed buildings.

- Regulate the construction and location of drains and sewers.

- Regulate the materials used in wiring structures for electricity and in piping them for a water, gas, or electric supply, and regulate the manner of that piping.

- Prohibit the construction of structures not in conformance with its regulations.

[2] Permit Requirement

As part of its police power, a city or county may require a permit as a condition precedent to the erection of a structure on privately owned property [*see O'Hagen v. Board of Zoning Adjustment (1971) 19 Cal. App. 3d 151, 158, 96 Cal. Rptr. 484]* . The granting or denying of building permits is a local affair over which a city or county hassupreme control subject only to the rule that it must exercise sound discretion [*Agnew v. City of Los Angeles (1961) 190 Cal. App. 2d 820, 827, 12 Cal. Rptr. 507]* .

Legal Topics:

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§ 579.131 Effect of State Provisions

No building permit may be issued unless the proposed construction is consistent with the local open space plan [*Gov. Code § 65567*; *Elysian Heights Residents Assn., Inc. v. City of Los Angeles (1986) 182 Cal. App. 3d 21, 28-29, 227 Cal. Rptr. 226]* . However, there is no similar restriction on issuance of building permits in *Gov. Code § 65860*, which requires that zoning ordinances be consistent with the general plan. Thus, if a building permit conforms to existing zoning, opponents of the permit may not challenge the decision to issue it for failure to conform to the general plan, even though the zoning is subject to such a challenge [*Elysian Heights Residents Assn., Inc. v. City of Los Angeles (1986) 182 Cal. App. 3d 21, 28-31, 227 Cal. Rptr. 226]* .

The issuance of a building permit may not be conditioned on the dedication of land for a purpose not reasonably related to the use of the property for which the permit is requested, or the posting of a bond to guarantee installation of public improvements not reasonably related to the use of the property for which the permit is requested [*Gov. Code § 65909*].

If a local ordinance controlling building permits has not adopted an advisory state zoning provision, that provision will not control the issuance of a building permit [*see Elysian Heights Residents Assn., Inc. v. City of Los Angeles (1986) 182 Cal. App. 3d 21, 28-31, 227 Cal. Rptr. 226* (building permit not required to be consistent with general plan)]. If the local ordinance has adopted advisory state provisions, compliance with those provisions will be mandatory before the permit will be issued [*see Wesley Investment Co. v. County of Alameda (1984) 151 Cal. App. 3d 672, 677-680, 198 Cal. Rptr. 872* (*Gov. Code § 65920 et seq.* development projects)].

Legal Topics:

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§ 579.132 Expiration and Extension of Permits

Many ordinances controlling the granting of building permits provide for an expiration date when a permit will expire if the construction for which the permit was granted has not begun. Typically, the intent is to prevent a person from reserving land for future purposes when that person has no good faith intent to presently commence the proposed use, and extension periods are usually available. The granting or denying of the extension may be subject to the same type of discretion as applied in the initial granting of the permit. An abuse of discretion in failing to grant an extension may occur if the standard applied to determine the good faith of the permittee is unreasonable [*Morgan v. County of San Diego (1971) 19 Cal. App. 3d 636, 641, 97 Cal. Rptr. 180]* .

Legal Topics:

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

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§ 579.133 Effect of Change in Zoning Law

The mere application for a building permit or the submission of plans that comply with the law in existence at the time of that submission do not entitle an applicant to the issuance of the permit, if in the interim between administrative denial of the permit and the appeal from that denial, an ordinance has been enacted that would prohibit the project contemplated [*Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 125, 109 Cal. Rptr. 799, 514 P.2d 111]* .

Even after a permit has been issued, it may be revoked by an administrative body on the basis of a subsequent change in the zoning laws unless the permittee has made substantial improvements in good faith reliance on the permit [*Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 125, 109 Cal. Rptr. 799, 514 P.2d 111]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsLicensesReal Property LawZoning & Land UseOrdinances

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§ 579.134 Revocation

A city or county does not have unlimited discretion in revoking permits, and once a permit has been issued, the power to revoke it is limited. If the permittee does nothing beyond obtaining the permit or fails to comply with reasonable terms or conditions expressed in the permit granted, the proper authorities may revoke it. But a permit may not be revoked arbitrarily without cause [*San Marino v. Roman Catholic Archbishop (1960) 180 Cal. App. 2d 657, 669, 4 Cal. Rptr. 547 , cert. denied, 364 U.S. 909]* .

In determining that a validly issued permit should be revoked, the governing body acts in a quasi-judicial capacity. In revoking a permit lawfully granted, due process requires that it act only on notice to the permittee, on a hearing, and on evidence substantially supporting a finding of revocation. A revocation without notice, hearing, or reception of competent evidence is inoperative and of no legal force [*San Marino v. Roman Catholic Archbishop (1960) 180 Cal. App. 2d 657, 669, 4 Cal. Rptr. 547 , cert. denied, 364 U.S. 909]* .

Legal Topics:

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§ 579.135 Vested Rights

The doctrine of vested rights, grounded in the constitutional protection of property from deprivation without due process of law, provides that when a permittee in good faith has undertaken substantial construction and incurred substantial liabilities in reliance on a permit, his or her right to the permit and to the use authorized thereby becomes immunized from impairment or revocation by subsequent governmental regulations [*Highland Development Co. v. City of Los Angeles (1985) 170 Cal. App. 3d 169, 186, 215 Cal. Rptr. 881 , overruled in part by Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 743* ; *see U.S. Const., amend. V, XIV § 1*; *Cal. Const., art. I, § 19*].

The rights that may vest through reliance on a permit are no greater than those specifically granted by the permit itself [*Blue Chip Properties v. Permanent Rent Control Bd. (1985) 170 Cal. App. 3d 648, 660, 216 Cal. Rptr. 492]* . The reliance must be on the permit under which the person is claiming the vested right. Thus, substantial expenditures incurred in constructing a garage for which a building permit had been obtained could not support a vested rights argument on a driveway access permit [*Highland Development Co. v. City of Los Angeles (1985) 170 Cal. App. 3d 169, 186-187, 215 Cal. Rptr. 881 , overruled in part by Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 743*].

Neither the existence of particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of a vested right to build a structure that does not comply with the laws applicable at thetime the building permit was issued. Thus, when construction of a 10-story building was divided into two phases, substantial expenditures made in reliance on phase one permits which were expressly limited to construction of the first four stories and basement, did not result in a vested right for completion of the building [*see Court House Plaza Co. v. City of Palo Alto (1981) 117 Cal. App. 3d 871, 885, 173 Cal. Rptr. 161 , cert. denied and appeal dismissed 454 U.S. 1074]* .

Although a vested right is immune from divestment through ordinary police power regulations, it may be impaired or revoked if the use authorized or conducted thereunder constitutes a menace to the public health and safety or a public nuisance [*Highland Development Co. v. City of Los Angeles (1985) 170 Cal. App. 3d 169, 186, 215 Cal. Rptr. 881 ,*

overruled in part by Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 743].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseConstitutional LimitsGovernmentsLocal GovernmentsLicensesReal Property LawZoning & Land UseAdministrative ProcedureReal Property LawZoning & Land UseConstitutional Limits

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§ 579.136 Review

Traditional mandate is usually appropriate to compel the issuance of a building permit, because most local ordinances governing their issuance provide that compliance with the code requirements is all that is required and no discretion is afforded the department charged with their issuance [*see Court House Plaza Co. v. City of Palo Alto (1981) 117 Cal. App. 3d 871, 883, 173 Cal. Rptr. 161 , cert. denied and appeal dismissed, 454 U.S. 1074]* .

However, administrative mandate is the appropriate remedy by which to consider a claim that the denial of a building permit was based on the applicant's failure to comply with an invalid condition [*Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 128, 109 Cal. Rptr. 799, 514 P.2d 111]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesWritsCommon Law WritsMandamusGovernmentsLocal GovernmentsLicensesReal Property LawZoning & Land UseAdministrative Procedure

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§ 579.137 State Building Codes

There are a variety of building provisions that have statewide application. In addition to some isolated and very specific provisions, there are several important building codes. Among them are:

- Hospital Seismic Safety Act of 1983 [*Health & Safety Code § 129675 et seq.*].
- Essential Services Buildings Seismic Safety Act of 1986 [*Health & Safety Code § 16000 et seq.*].
- Earthquake protection standards [*Health & Safety Code § 19100 et seq.*].
- Access to public accommodations by physically handicapped persons [*Health & Safety Code § 19955 et seq.*].
- California Factory-Built Housing Law [*Health & Safety Code § 19960 et seq.*].

These building codes are enforced in different manners. For example, the Hospital Seismic Safety Act of 1983 and the Essential Services Buildings Seismic Safety Act of 1986 provide generally for the approval of building specifications by the enforcement agency before construction begins [*see Health & Safety Code §§ 129760-129770, 16011, 16016*]. Earthquake standards are enforced by a separate permit process, while access to public accommodations is enforced by the city or county building department [*see Health & Safety Code §§ 19130-19133, 19958*]. Finally, while all factory-built housing must be approved by the Department of Housing and Community Development, enforcement and inspection of the installation of factory-built housing is typically performed by local authorities [*see Health & Safety Code §§ 19969, 19991-19992*].

Another building code with a major impact throughout the state is the State Housing Law, set forth in *Health & Safety Code § 17910 et seq.* Because it has a pervasive influence and is probably the most detailed of the statewide codes, some of its procedural provisions are highlighted in § 579.138.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawZoning & Land UseBuilding & Housing Codes

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§ 579.138 State Housing Law

[1] Governing Statutes and Application of Law

The State Housing Law is set forth in *Health & Safety Code § 17910 et seq.* The State Building Standards Law is set forth in *Health & Safety Code § 18901 et seq.*, and the California Building Standards Code is set forth in *Health & Safety Code § 18935 et seq.*

The State Housing Law does not apply to any building regulated by *Health & Safety Code § 18000 et seq.* (manufactured housing), or 19960 et seq. (factory-built housing), unless those parts specifically require its application [*Health & Safety Code § 17911*; for discussion and forms relating to zoning regulation specific to mobilehomes, *see* Ch. 369, *Mobilehomes and Mobilehome Parks*].

[2] Statewide Standards

The rules and regulations promulgated under the State Housing Law and building standards published in the California Building Standards Code, relating to the erection or construction of buildings or structures, do not apply to existing buildings or structures or to buildings or structures on which construction is commenced or approved before the effective date of those rules. However, rules, regulations, and building standards relating to use, maintenance, and change of occupancy do apply to existing buildings and structures as well as those approved for construction [*see Health & Safety Code § 17912*].

Except as otherwise specifically provided by law, the building standards adopted and submitted by the Department of Housing and Community Development for approval under the California Building Standards Code, and the other rules and regulations, which are contained in Title 24 of the California Code of Regulations, are adopted by reference [*see Health & Safety Code § 17922(a)*].

The provisions published in the California Building Standards Code and the regulations promulgated under *Health & Safety Code § 17922* will be applicable to any city or county that does not amend, add, or repeal ordinances or

regulations to impose those requirements or make changes or modifications in those requirements on express findings. The provisions and regulations become effective 180 days after publication of the California Building Standards Code by the California Building Standards Commission [*Health & Safety Code § 17958*]. The 180-day period set forth in the statute merely establishes an effective date for new versions of the code and doesnot bar local entities from making amendments, additions, or deletions more than 180 days after publication [*California Apartment Assn. v. City of Fremont (2002) 97 Cal. App. 4th 693, 700-701, 118 Cal. Rptr. 2d 603]* .

[3] Local Modification of Standards

No local enforcement agency may prohibit the use of materials, appliances, installations, devices, arrangements, or methods of construction specifically permitted by the department to be used in the alteration or repair of existing buildings, but those things or methods may be specifically prohibited by local ordinance as provided by *Health & Safety Code § 17958.5* [*see Health & Safety Code § 17922(f)*].

The building department of any city or county may approve the use of an alternative material, appliance, installation, device, arrangement, or method, or work on a case-by-case basis if it finds that the proposed design is satisfactory and that the proposed alternative is satisfactory and is, for the purpose intended, at least the equivalent of that prescribed by the California Building Standards Code [*see Health & Safety Code § 17951(e)*].

Except as provided in *Health & Safety Code §§ 17958.8* (alteration and repair of existing building) and 17958.9 (moving apartment houses and dwellings), any city or county may make changes in the provisions adopted pursuant to *Health & Safety Code § 17922* and published in the California Building Standards Code or other regulations thereafter adopted pursuant to *Health & Safety Code § 17922* to amend, add, or repeal ordinances or regulations that impose the same requirements as are contained in the provisions adopted pursuant to *Health & Safety Code § 17922* and published in the California Building Standards Code or the other regulations adopted pursuant to *Health & Safety Code § 17922* or to make changes or modifications in those requirements on express findings pursuant to *Health & Safety Code §§ 17958.5* and *17958.7* [*Health & Safety Code § 17958*].

Except as provided by *Health & Safety Code § 17922.6* (minimum noise insulation regulations), in adopting ordinances or regulations pursuant to *Health & Safety Code § 17958*, a city or county may make changes or modifications in the requirements contained in the provisions published in the California Building Standards Code and the other regulations adopted pursuant to *Health & Safety Code § 17922*, including but not limited to green building standards, that it determines, pursuant to *Health & Safety Code § 17958.7*, are reasonably necessary because of local climatic, geological, or topographical conditions [*see Health & Safety Code § 17958.5*]. The local governing body must make an express finding that the modification or changes are reasonably necessary. The finding, together with the modification or change expressly marked, must be filed with the department. No modification or change is effective until the filing has been made [*see Health & Safety Code § 17958.7(a)*].

The State Housing Law is intended to preempt local regulation. A city ordinance that is stricter than the State Housing Law is invalid unless findings are made about local conditions requiring stricter standards [*Briseno v. City of Santa Ana (1992) 6 Cal. App. 4th 1378, 1381-1383, 8 Cal. Rptr. 2d 486]* .

Grading standards contained in a county building code, which were adopted pursuant to and in conformity with the State Housing Law, were not purely local law and did not conflict with PUC rules and regulations and thus could be enforced against a public utility with respect to its grading of access roads located on property over which the utility held an easement for maintenance of its electric transmission lines [*Leslie v. Superior Court of Ventura County (1999) 73 Cal. App. 4th 1042, 1047-1049*].

[4] Challenge to Statewide Application

Except as provided in *Health & Safety Code § 17922.6* (minimum noise insulation regulations), any person, firm, corporation, or governmental agency that opposes the application of any applicable building standard published in the California Building Standards Code or any other rule or regulation adopted by the department within a particular local area may request a hearing before the local appeals board regarding the matter. If the local appeals board determines after the hearing that because of local conditions it is not reasonable for that standard, rule, or regulation to be applied in that area, it will have no application within that local area [*see Health & Safety Code § 17925*].

[5] Fees

The governing body of any county or city, including a charter city, may prescribe fees for permits, certificates, or other forms or documents required or authorized by the State Housing Law or rules and regulations promulgated pursuant to the State Housing Law [*Health & Safety Code § 17951(a)*]. It may also prescribe fees to defray the enforcement costs [*see Health & Safety Code § 17951(b)*]. If the local enforcement agency fails to inspect permitted work for which fees have been charged within 60 days of receiving a notice of completion, the permittee is entitled to reimbursement of the permit fees. The right to reimbursement must be disclosed on each permit or on a document that accompanies each permit [*Health & Safety Code § 17951(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsLicensesReal Property LawZoning & Land UseAdministrative ProcedureReal Property LawZoning & Land UseBuilding & Housing CodesReal Property LawZoning & Land UseImpact Fees

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§ 579.139 Individual Appeal of Application of Rule

Except as provided in *Health & Safety Code § 18945* (appeals), the director of the Department of Housing and Community Development or his or her designee will hear appeals brought by any person regarding the application of any rule or regulation promulgated pursuant to the State Housing Law to that person when that person is alleging that the application or enforcement of any other rule or regulation by the department under the facts and circumstances is an erroneous or unlawful application or enforcement of the other rule or regulation by the department. Any appeal will be submitted through the designated local agency [*Health & Safety Code § 17930*].

Any appeal alleging erroneous or unlawful application by the department of a building standard published in the California Building Standards Code may be brought pursuant to *Health & Safety Code §§ 18945-18949* (appeal to State Building Standards Commission) [*Health & Safety Code § 17930*].

A decision of the director or his or her designee made pursuant to *Health & Safety Code § 17930* is final, except for that action as may be taken by a court or required by law [*Health & Safety Code § 17932*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsLicensesGovernmentsState & Territorial GovernmentsEmployees & OfficialsReal Property LawZoning & Land UseBuilding & Housing Codes

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§ 579.140 Enforcement

[1] Local Departments

A city or county may designate and charge a department organized to carry out the purposes of the State Housing Law with the enforcement of the provisions published in the California Building Standards Code, the provisions of the State Housing Law, and other rules and regulations promulgated pursuant to the State Housing Law for the protection of the public health, safety, and general welfare as set forth in *Health & Safety Code § 17921* [*see Health & Safety Code § 17964*; *see also Health & Safety Code § 17962* (enforcement of regulations relating to fire and panic safety reside in fire chief)].

The provisions published in the California Building Standards Code, the provisions of the State Housing Law, and other rules and regulations promulgated pursuant to the State Housing Law pertaining to the erection, construction, reconstruction, movement, enlargement, conversion, alteration, repair, removal, demolition, or arrangement of apartment houses, hotels, or dwellings are enforced by the building department of the city or county [*Health & Safety Code § 17960*]. Those provisions pertaining to maintenance, sanitation, ventilation, use, or occupancy of apartment houses, hotels, or dwellings are enforced by the city's or county's housing or health department or an authorized environmental agency [*see Health & Safety Code § 17961*]. Those provisions pertaining to fire prevention, fire protection, and fire safety generally are enforced by the chief of the local fire department or fire protection services district [*see Health & Safety Code § 17962*].

When there is no local enforcement agency charged with enforcement, the Department of Housing and Community Development will enforce all applicable provisions pertaining to apartment houses, hotels, or dwellings [*see Health & Safety Code § 17965*].

[2] Inspections

Any officer, employee, or agent of an enforcement agency may enter and inspect any building or premises whenever necessary to secure compliance with, or prevent a violation of, any provision published in the California Building

Standards Code, the provisions of the State Housing Law, and other rules and regulations promulgated pursuant to the State Housing Law that the enforcement agency has the power to enforce [*Health & Safety Code § 17970*]. The consent of the owner or occupants is necessary to enter a dwelling between 6 p.m. and 8 a.m., and if they are absent from the dwelling, a court order is necessary [*see Health & Safety Code § 17972*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsAdministrative BoardsGovernmentsLocal GovernmentsLicensesReal Property LawZoning & Land UseBuilding & Housing Codes

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§ 579.141 Violations

[1] Preliminary Notice to Correct

If any building is constructed, altered, converted, or maintained in violation of any provision of, or in violation of any order or notice giving a reasonable time to correct that violation issued by an enforcement agency pursuant to the building standards published in the California Building Standards Code, the provisions of the State Housing Law, and other rules and regulations promulgated pursuant to the State Housing Law, or if a nuisance exists in any building or on the lot on which it is situated, the enforcement agency will, after 30 days' notice to abate the nuisance, or violation, or to notice to abate with a shorter period of time if deemed necessary by the enforcement agency to prevent or remedy an immediate threat to the health and safety of the public or occupants of the structure, institute any appropriate action or proceeding to prevent, restrain, correct, or abate the violation or nuisance [*Health & Safety Code § 17980(a)*].

If any building is maintained in a manner that violates any provisions of the State Housing Law, applicable building standards published in the State Building Standards Code, any other rule or regulation adopted pursuant to the State Housing Law, or any provision in a local ordinance that is similar to a provision in the State Housing Law, and the violations are so extensive and of such a nature that the health and safety of residents or the public is substantially endangered, the enforcement agency may issue an order or notice to repair or abate [*Health & Safety Code § 17980.6*]. An order or notice pursuant to Section 17980.6 must be provided either by both posting a copy of the order or notice in a conspicuous place on the property and by first-class mail to each affected residential unit, or by posting a copy of the order or notice in a conspicuous place on the property and in a prominent place on each affected residential unit. The order or notice must include the name, address, and telephone number of the agency that issued the notice or order; the date, time, and location of any public hearing or proceeding concerning the order or notice; and information that the lessor cannot retaliate against a lessee pursuant to *Civ. Code § 1942.5* [*Health & Safety Code § 17980.6*].

A notice to repair is not required by *Health and Safety Code § 17980.6* to inform the property owner that receivership is a potential consequence of failure to correct or abate the identified violations, nor does the statute call for the disclosure of intent to seek a receivership at some point in the future [*City of Santa Monica v. Gonzalez (2008) 43 Cal. 4th 905,*

922, 76 Cal. Rptr. 3d 483, 182 P.3d 1027]. Furthermore, in *City of Santa Monica v. Gonzalez* the notice to repair was not rendered invalid by its failure to identify its statutory basis. However, the California Supreme Court encouraged enforcement agencies to do so in their notices to repair [*City of Santa Monica v. Gonzalez (2008) 43 Cal. 4th 905, 922, 76 Cal. Rptr. 3d 483, 182 P.3d 1027*]. Finally, Section 17980.6 does not mandate the specific caption "Order or Notice to Repair or Abate." Thus, a notice to repair captioned "Notice and Order to Comply" was not invalid [*City of Santa Monica v. Gonzalez (2008) 43 Cal. 4th 905, 922, 76 Cal. Rptr. 3d 483, 182 P.3d 1027*].

[2] Notice to Tenants

Tenants in a building must be provided with copies of any of the following [*Health & Safety Code § 17980(c)(1)*]:

- The notice of any violation that affects the health and safety of the occupants and that causes the building to be substandard pursuant to *Health & Safety Code § 17920.3* or in violation of *Health & Safety Code § 17920.10*.

- An order of the code enforcement agency issued after inspection of thepremises declaring the dwelling to be in violation of any provision described in *Health & Safety Code § 17980(a)* [*see § 579.141[1]*].

- The enforcement agency's decision to repair or demolish.

- The issuance of a building or demolition permit following the abatement order of an enforcement agency.

Each document provided must be provided to each affected residential unit by the enforcement agency that issued the order or notice [*Health & Safety Code § 17980(c)(2)*; *see Health & Safety Code § 17980.6(a)* (prescribed manner for providing documents)].

By requiring that any order or notice be posted "in a conspicuous place on the property," *Health and Safety Code § 17980.6* (notice to repair or abate; *see* [1], *above*) provides for notice reasonably calculated to apprise the owner and others that the property has been found by the applicable enforcement agency to be in violation of specified building standards and that repair or abatement of the violations is demanded. Because it would be unreasonable and a violation of due process to hold an owner accountable for building code violations and repair demands without providing adequate notice of such matters, the conspicuous-posting requirement is an essential component of Section 17980.6 intended primarily for the protection of the owner. However, in *City of Santa Monica v. Gonzalez*, in which the property owner challenged the appointment of a receiver, the California Supreme Court held that the city substantially complied with this requirement by personally serving the property owner with the notice to repair [*City of Santa Monica v. Gonzalez (2008) 43 Cal. 4th 905, 925, 76 Cal. Rptr. 3d 483, 182 P.3d 1027*]. Furthermore, because the provisions requiring notice to each affected unit are intended for the informational benefit of tenants, the property owner was in no position to rely on them as a basis for invalidating subsequently issued receivership orders [*City of Santa Monica v. Gonzalez (2008) 43 Cal. 4th 905, 926, 76 Cal. Rptr. 3d 483, 182 P.3d 1027*].

[3] Commencement of Abatement Proceedings

Whenever the enforcement agency has through inspection determined that the building is a substandard building, it will commence proceedings to abate the violation by repair, rehabilitation, vacation, or demolition of the building. It will not require the vacating of a residential building unless it concurrently requires expeditious demolition or repair [*see Health & Safety Code § 17980(b)*].

[4] Summons and Service

Service of summons in the manner provided in the Code of Civil Procedure is sufficient for any action or proceeding brought pursuant to *Health & Safety Code § 17980 et seq.* [*Health & Safety Code § 17988*; *see* Ch. 518, *Service of Summons and Papers*]. The time to file a written pleading in response to a summons in an action brought pursuant to *Health & Safety Code § 17980 et seq.* is 10 days [*Health & Safety Code § 17990*]. For a copy of Judicial Council Form SUM-145 (Summons--Enforcement of State Housing Law), see *§ 579.374*.

Except under conditions immediately affecting health or safety, every notice or order issued pursuant to *Health & Safety Code § 17980 et seq.* must be served five days before the time for doing or refraining from doing the thing to which it pertains [*Health & Safety Code § 17989*].

[5] Repair or Demolition of Building

The owner has the choice of repairing or demolishing. However, if the owner chooses to repair, the enforcement agency will require that the building be brought into compliance according to a reasonable and feasible schedule for expeditious repair [*Health & Safety Code § 17980(b)(1)*].

The enforcement agency may require vacation and demolition or may itself vacate the building, repair, demolish, or institute any other appropriate action or proceeding, if any of the following occur [*Health & Safety Code § 17980(b)(1)(A)-(C)*]:

- The repair work is not done within the period required by the notice [*see § 579.141[2]*].
- The owner does not make a timely choice of repair or demolition.
- The owner selects an option that cannot be completed within a reasonable period of time, as determined by the enforcement agency, for any reason, including an outstanding judicial or administrative order.

In its decision, the enforcement agency will give preference to the repair when it is economically feasible to do so, without having to repair more than 75 percent of the dwelling, as determined by the enforcement agency, and will give full consideration to the needs for housing as expressed in the housing element of the local jurisdiction [*Health & Safety Code § 17980(b)(2)*].

A notice and order to demolish within 120 days that does not provide the owner with the opportunity to select repair over demolition violates *Health & Safety Code § 17980(b)* and the owner's due process rights when immediate demolition is not required for health or safety reasons. Further, if a notice to repair or demolish has been given to a prior owner, due process requires succeeding owners be put on notice that the city has offered an option to repair or demolish, and on notice as to the time within which the option must be exercised [*Hawthorne Savings & Loan Assn. v. City of Signal Hill (1993) 19 Cal. App. 4th 148, 159-163, 23 Cal. Rptr. 2d 272]* .

Health & Safety Code § 17980.7 empowers a receiver of substandard property to sell the property or to take any other action respecting the property as the court may authorize [*City of Santa Monica v. Gonzalez (2008) 43 Cal. 4th 905, 930, 76 Cal. Rptr. 3d 483, 182 P.3d 1027*]. In *City of Santa Monica v. Gonzalez*, the California Supreme Court upheld the trial court's approval of the receiver's application to demolish the substandard building, despite the owner's desire to have the building repaired. The Supreme Court held that the trial court did not abuse its discretion in authorizing the receiver to contract for demolition on finding that the property was uninhabitable and that rehabilitation was "not economically feasible" [*City of Santa Monica v. Gonzalez (2008) 43 Cal. 4th 905, 933, 76 Cal. Rptr. 3d 483, 182 P.3d 1027*]. The evidence presented to the trial court amply demonstrated that the nature of the known code violations were extensive and supported its determination that the property was uninhabitable and that rehabilitation was not

economically feasible. In addition, therewas nothing to suggest the trial court approved a fraudulent, unfair, or oppressive course of action [*City of Santa Monica v. Gonzalez (2008) 43 Cal. 4th 905, 933, 76 Cal. Rptr. 3d 483, 182 P.3d 1027*].

The statutory right under *Health & Safety Code § 17980(b)(1)* to choose whether to repair or to demolish a building that is substandard or a nuisance did not aid the property owner in *City of Santa Monica v. Gonzalez* because it is part of a different, albeit related, statutory scheme that authorizes enforcement agencies to take actions concerning substandard buildings without involving a receiver. Nevertheless, the owner's wish to repair the property and to continue living there with his family was a legitimate factor for the trial court to consider. However, that factor did not mandate judicial disapproval of the demolition alternative, especially in view of the economic information presented [*City of Santa Monica v. Gonzalez (2008) 43 Cal. 4th 905, 934, 76 Cal. Rptr. 3d 483, 182 P.3d 1027*].

[6] Relief Pending Order

An enforcement agency that institutes any action or proceeding pursuant to *Health & Safety Code § 17980 et seq.* may, by verified complaint setting forth the facts, apply to the superior court for an order granting the relief for which the action or proceeding is brought until the entry of a final judgment or order [*Health & Safety Code § 17981*]. If any notice or order issued by an enforcement agency is not complied with within a reasonable time as specified in that notice or order, the enforcement agency may apply to the superior court for an order authorizing it to remove any violation or abate any nuisance specified [*see Health & Safety Code § 17982*].

[7] Notice of Action

Any enforcement agency that institutes an action or proceeding pursuant to *Health & Safety Code § 17980 et seq.* must record a notice of the pendency of the action or proceeding in the county recorder's office of the county where the property affected by the action or proceeding is situated. The notice will be recorded at the time of the commencement of the action or proceeding and has the same effect as the notice of pendency of action provided for in the Code of Civil Procedure [*see Health & Safety Code § 17985(a)*].

The enforcement agency will record a notice of final disposition of any action or proceeding in the county recorder's office where the property affected by the action or proceeding was recorded immediately following final resolution [*Health & Safety Code § 17985(b)*].

Any notice of pendency of action or proceeding may be vacated on the order of a judge of the court where the action or proceeding is pending. A certified copy of the order of vacation may be recorded in the office of the recorder [*see Health & Safety Code § 17987*].

[8] Penalties

Any person who violates any provision of the State Housing Law, the building standards published in the California Building Standards Code, or any other rule or regulation promulgated under the State Housing Law is guilty of a misdemeanor, punishable by a fine not exceeding $1,000, byimprisonment not exceeding six months, or by both [*Health & Safety Code § 17995*]. A subsequent conviction within a five-year period for violations at the same property is punishable by a fine not exceeding $5,000, by imprisonment not exceeding six months, or by both [*Health & Safety Code § 17995.1*].

Any person found in contempt of a court order or injunction pursuant to *Health & Safety Code § 17910 et seq.* for a subsequent time within a five year period for violation at the same property is guilty of a misdemeanor, punishable by a fine not exceeding $5,000, by imprisonment not exceeding six months, or by both [*Health & Safety Code § 17995.2*].

If the subsequent conviction is for a violation that endangers the immediate health and safety of residents or the public, is the result of the defendant's habitual neglect of customary maintenance, and displays a flagrant lack of concern for health and safety, it is punishable by a fine not exceeding $5,000 and by imprisonment of not less than six months but not exceeding one year. To impose this penalty the trier of fact must find at least four serious violations of statutorily listed health conditions [*see Health & Safety Code § 17995.3*]. A similar punishment is available under those conditions when the person has been found in contempt of a court order or injunction for a subsequent violation [*see Health & Safety Code § 17995.4*].

[9] Restrictions on Abatement Proceedings

No local ordinance may permit any action or proceedings to abate violations of regulations governing maintenance of existing buildings, unless the building is a substandard building or the violation is a misdemeanor [*Health & Safety Code § 17922(g)*].

The housing appeals board may, in cases of extreme hardship to the owner-occupants or tenants of dwellings, provide for deferral of the effective date of orders of abatement. Any such deferral terminates on any sale or transfer of the dwelling by the owner-occupant, but not if the dwelling is occupied by a tenant other than the owner-occupant [*Health & Safety Code § 17959.4*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewGovernmentsLocal GovernmentsAdministrative BoardsReal Property LawZoning & Land UseAdministrative ProcedureReal Property LawZoning & Land UseBuilding & Housing Codes

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§ 579.142 Transfer of Ownership of Property in Violation

The sale or other transfer of property to a third party will not render moot an administrative or judicial action or proceeding pursuant to *Health & Safety Code § 17980 et seq.*, including an action under *Health & Safety Code § 17982*, instituted by an enforcement agency, or a receiver on behalf of an enforcement agency, against the owner of record on the date that a citation for, or other notice of, a violation was issued [*Health & Safety Code § 17991(a)*].

If property is sold or otherwise transferred to a third party during the period between the issuance of the notice of violation and the abatement of the violation, or any related administrative or judicial actions, within five days after the sale or transfer occurs, the transferor must record a Notice of Conveyance of Substandard Property with the county recorder where the property is located. The notice must identify the name and address of the buyer or transferee, and it must be executed with a signature that the information is true and correct, under penalty of perjury [*Health & Safety Code § 17991(b)*]. The transferor must also provide the following information to the enforcement agency within the same five-day period [*Health & Safety Code § 17991(c)*]:

- If the seller or transferor is not an individual, the name, address, and driver's license number or identification card number of each individual who has an interest in excess of 5 percent in the entity which is selling or transferring the property.

- If the buyer or transferee is an individual person, that person's name, address, and driver's license number or identification number.

- If the buyer or transferee is not an individual person, the name, address, and driver's license or ID card number of each individual who has an interest in excess of 5 percent in the entity that is the buyer or transferee.

Any person who obtains an ownership interest in any property after a notice of pendency of an action or proceeding was recorded with regard to the property pursuant to *Health & Safety Code § 17985*, or any other notice of a violation was

recorded with the county recorder of the county in which the property is located, and when the notice has neither been withdrawn nor expunged, will be subject to any order to correct a violation, including time limitations specified in a citation issued pursuant to *Health & Safety Code §§ 17980* and *17981*, or any other properly recorded notice of a violation [*Health & Safety Code § 17992*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsAdministrative BoardsReal Property LawPurchase & SaleGeneral OverviewReal Property LawZoning & Land UseAdministrative ProcedureReal Property LawZoning & Land UseBuilding & Housing Codes

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[Reserved]

§§ 579.143[Reserved]

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§ 579.160 Nonconforming Uses

[1] Lawful Existing Use

A nonconforming use is a lawful use existing on the effective date of the zoning restriction and continuing since that time in nonconformance to the ordinance. Nonuse is not a nonconforming use, and reuse may be prohibited when a nonconforming use has been voluntarily abandoned [*Hill v. City of Manhattan Beach (1971) 6 Cal. 3d 279, 285-286, 98 Cal. Rptr. 785, 491 P.2d 369]* .

Typically, zoning ordinances include a provision permitting the continuance of a nonconforming use because of the hardship and doubtful constitutionality of compelling the immediate discontinuance of nonconforminguses [*County of San Diego v. McClurken (1951) 37 Cal. 2d 683, 686, 234 P.2d 972]* . The exemption may either exempt an existing use altogether or allow a limited period of continued operation adequate for amortization of the owners' investment in the particular use [*see, e.g.,* *National Advertising Co. v. County of Monterey (1970) 1 Cal. 3d 875, 83 Cal. Rptr. 577, 464 P.2d 33* ; *Livingston Rock etc. Co. v. County of L.A. (1954) 43 Cal. 2d 121, 272 P.2d 4]* .

Generally, an ordinance may not operate to immediately suppress or remove from a particular district an otherwise lawful business or use already established [*City of Los Angeles v. Gage (1954) 127 Cal. App. 2d 442, 453-454, 274 P.2d 34]* . However, because each zoning district is an appropriate area for the uses permitted by the zone plan in that area, and the existence of other uses tends to impair the development and stability of the area for the appropriate uses, pre-existing nonconforming uses are not perpetual. Thus, provisions that deny the right to add to buildings devoted to an existing nonconforming use, to resume a nonconforming use after a period of nonuse, to extend or enlarge an existing nonconforming use, and to substitute new buildings for those devoted to an existing nonconforming use are valid. In addition, an ordinance that requires termination of present nonconforming uses within a reasonable time may be permissible [*City of Los Angeles v. Gage (1954) 127 Cal. App. 2d 442, 453-454, 459-460, 274 P.2d 34* (elimination of existing uses over reasonable period held not to constitute taking of property or to necessarily restrict its use so that it cannot be used for any reasonable purpose)]. An ordinance may otherwise authorize revocation of the allowance of a nonconforming use when it can be done without impairment of constitutional rights. Thus, an ordinance allowing

revocation after a noticed public hearing, when it is found that the nonconforming use is a public nuisance or is exercised in a manner that was detrimental to the public health or safety is valid [*Livingston Rock etc. Co. v. County of L.A. (1954) 43 Cal. 2d 121, 128, 272 P.2d 4* ; for discussion and forms relating to public nuisance, *see* Ch. 391, *Nuisance*].

[2] Actual Use

It is the activity of the owner in the use of his or her property at the time it becomes subject to a zoning ordinance, not his or her plans regarding the future use of the property, that determines the scope of the nonconforming use excepted from the restrictions imposed by the ordinance. The property owner acquires a vested right to continue a use actually instituted, not to capitalize on anticipated profit [anderson v. *City Council (1964) 229 Cal. App. 2d 79, 88-89, 40 Cal. Rptr. 41]* . An application by the owner for a building permit does not establish a vested right by actual use until the permit has been issued and the owner has expended considerable funds in reliance on it [*see Spindler Realty Corp. v. Monning (1966) 243 Cal. App. 2d 255, 269, 53 Cal. Rptr. 7* , *cert. denied, 385 U.S. 975 (1967)]* .

[3] Change or Expansion Prohibited

The continuance of a nonconforming use is a continuance of the same use and not some other kind of use [*County of San Diego v. McClurken (1951) 37 Cal. 2d 683, 688, 234 P.2d 972]* . The use need not be identical, but must be substantially the same or similar. In determining whether a nonconforming use is the same before as after the application of a zoning ordinance, each case must stand on its own facts. Changes or additions to an existing nonconforming use are not protected when they make the use more noisome, enlarge it, or make it more permanent [*City of Los Altos v. Silvey (1962) 206 Cal. App. 2d 606, 609-611, 24 Cal. Rptr. 200* ; *see Sabek, Inc. v. County of Sonoma (1987) 190 Cal. App. 3d 163, 166-168, 235 Cal. Rptr. 350]* . Under some circumstances, such as those where the nonconforming use involves mining or quarrying operations, the "diminishing asset" doctrine will be applied as an exception to the general rule prohibiting expansion of the existing use [*see Hansen Bros. Enterprises v. Board of Supervisors (1996) 12 Cal. 4th 533, 553-559, 48 Cal. Rptr. 2d 778, 907 P.2d 1324]* . For further discussion, see *§ 579.160[4]*.

Essential maintenance repairs may be made to nonconforming uses, but those repairs cannot be relied on to defeat zoning legislation dictating the eventual liquidation of those nonconforming uses [*National Advertising Co. v. County of Monterey (1970) 1 Cal. 3d 875, 880, 83 Cal. Rptr. 577, 464 P.2d 33* , *cert. denied, 398 U.S. 946* , *disapproved on another point in Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848* , *that was overruled on other grounds in Metromedia, Inc. v. City of San Diego (1981) 453 U.S. 490, 521, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)*]. An example of an essential repair would be the temporary removal of corrals to grade for proper drainage when the maintenance of a dairy herd was the valid nonconforming use [*City of Fontana v. Atkinson (1963) 212 Cal. App. 2d 499, 503-507, 28 Cal. Rptr. 25]* .

[4] Vested Rights to Extractive Uses: Diminishing Asset Doctrine

Unlike other nonconforming uses of property that operate within an existing structure or boundary, extractive uses, such as mining and quarrying, anticipate extension of mining into areas of the property that were not being exploited at the time a zoning change caused the use to be nonconforming. The question thus arises whether this extension is a prohibited expansion of a nonconforming use into another area of the property. In California the answer is a qualified "no" under the "diminishing asset" doctrine--an exception to the general rule banning expansion of a nonconforming use that is specific to extractive enterprises [*Hansen Bros. Enterprises v. Board of Supervisors (1996) 12 Cal. 4th 533, 553, 48 Cal. Rptr. 2d 778, 907 P.2d 1324]* .

The very nature of an extraction business such as mining or quarrying is the continuing use of the land, and this use is what is endorsed by theconcept of a nonconforming use. The diminishing asset doctrine holds that an owner of a

nonconforming use may sometimes be found to have a vested right to use an entire tract even though only a portion of the tract was used when the restrictive zoning ordinance was enacted. The determining factor is whether the nature of the initial nonconforming use, in light of the character and adaptability to that use of the entire parcel, manifestly implies that the entire property was appropriated to that use before the restrictive ordinance was adopted. The landowner's mere subjective intention or hope to extend the use over the entire tract is insufficient. Successful application of the diminishing asset doctrine requires objective evidence that the owner intended to expand operations, and that this intent existed at the time of the zoning change [*Hansen Bros. Enterprises v. Board of Supervisors (1996) 12 Cal. 4th 533, 553-559, 48 Cal. Rptr. 2d 778, 907 P.2d 1324* ; *see McCaslin v. City of Monterey Park (1958) 163 Cal. App. 2d 339, 329 P.2d 522]* .

[5] Termination by Amortization

A city seeking to eliminate nonconforming uses may pursue two constitutionally equivalent alternatives: (1) it can eliminate the use immediately by payment of just compensation or (2) it can require removal of the use without compensation following a reasonable amortization period [*Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 881, 164 Cal. Rptr. 510, 610 P.2d 407 , overruled on other grounds, 453 U.S. 490, 521, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)]* .

Zoning legislation may validly provide for the eventual termination of nonconforming uses without compensation if it provides a reasonable amortization period commensurate with the investment involved. The determination of the length of a reasonable period of amortization is not merely a matter of accounting. It involves a process of weighing the public gain to be derived from a speedy removal of the nonconforming use against the private loss which the removal of the use would entail. The reasonableness of an amortization period as applied to each structure depends in part on facts peculiar to that structure. Such facts include the cost of the structure, its depreciated value, remaining useful life, the length and remaining term of the lease under which it is maintained, and the harm to the public if it remains standing beyond the prescribed amortization period. If the amortization period prescribed by the ordinance is a reasonable one, the fact that the city arrived at that period by a formula which did not include every one of the relevant considerations does not render the ordinance unconstitutional [*Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 882-884, 164 Cal. Rptr. 510, 610 P.2d 407 , overruled on other grounds, 453 U.S. 490, 521, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)]* .

Use of a reasonable amortization scheme allows the owner of the nonconforming use, by being afforded an opportunity to make new plans, to at least partially offset any losses suffered. Any loss suffered is spread out over a period of years and that owner enjoys a monopolistic position by virtue of the zoning ordinance [*City of Los Angeles v. Gage (1954) 127 Cal. App. 2d 442, 460, 274 P.2d 34]* . The landowner has the burden of proving the invalidity of the amortization period as applied to each of his or her structures [*Metromedia, Inc. v. City of San Diego (1980) 26 Cal. 3d 848, 884, 164 Cal. Rptr. 510, 610 P.2d 407 , overruled on other grounds, 453 U.S. 490, 521, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981)]* .

Legal Topics:

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

§§ 579.161[Reserved]

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§ 579.180 California Coastal Act

The California Coastal Act of 1976 (Coastal Act) is set forth in *Pub. Res. Code § 30000 et seq.* Among the purposes of the Coastal Act is to protect and maintain the quality of the coastal zone, to maximize public access to the coastal zone, and to assure balanced utilization of coastal zone resources [*Pub. Res. Code § 30001.5*].

For additional detailed coverage of the Coastal Act, see Manaster and Selmi, California Environmental Law and Land Use Practice, Ch. 66, *Coastal Zone Regulation* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNatural Resources & Public LandsCoastal Zone ManagementGeneral OverviewEnvironmental LawZoning & Land UseGeneral OverviewReal Property LawZoning & Land UseState & Regional Planning

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§ 579.181 Land Within Coastal Zone

"Coastal zone" means that land and water area of California from the Oregon border to the border of Mexico, extending seaward to the state's outer limit of jurisdiction, including all offshore islands, and extending inland generally 1,000 yards from the mean high tide line of the sea. In significant coastal estuarine, habitat, and recreational areas it extends inland to the first major ridgeline paralleling the sea or five miles from the mean high tide line of the sea, whichever is less. In developed urban areas, the zone generally extends inland less than 1,000 yards. The coastal zone does not include the area of jurisdiction of the San Francisco Bay Conservation and Development Commission, nor any area contiguous thereto, including any river, stream, tributary, creek, or flood control or drainage channel flowing into that area [*Pub. Res. Code § 30103(a)*; *see Gov. Code § 66600 et seq.* (jurisdiction of San Francisco Bay Conservation and Development Commission)].

The coastal zone boundary has been revised for various cities and counties [*see Pub. Res. Code §§ 30150-30176*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 579.182 Implementation of Coastal Act

[1] California Coastal Commission

The California Coastal Commission was created by the California Coastal Act of 1976 [*Pub. Res. Code § 30300*]. The commission, unless specifically provided otherwise, has the primary responsibility for implementing the Coastal Act. It is the state coastal zone planning and management agency, and may exercise any and all powers set forth in any federal act that relate to the planning or management of the coastal zone [*Pub. Res. Code § 30330*; *see, e.g.,* Federal Coastal Zone Management Act of 1972 (*16 U.S.C. §§ 1451-1464*)]. Additional powers and duties of the commission are set forth in *Pub. Res. Code §§ 30331-30344*.

The commission reviews the proposed local coastal program of local governments within the coastal zone, and will either certify or refuse to certify that plan [*see Pub. Res. Code §§ 30512-30513*]. It performs a similar review and certification process with amendments to the local coastal program [*Pub. Res. Code § 30514*]. The commission also hears appeals from local government action on development permits [*see Pub. Res. Code §§ 30602*, 36303].

Although several provisions within the Coastal Act specifically refer to regional commissions, those commissions have been eliminated. Except as otherwise provided in the Coastal Act, the state Coastal Commission has succeeded to all the obligations, powers, and duties of the regional coastal commissions that existed before Coastal Commission termination on July 1, 1981 [*see Pub. Res. Code §§ 30305, 30331*].

In the absence of a specific authorization, no state agency may exercise any powers or carry out any duties or responsibilities established by the Coastal Act [*Pub. Res. Code § 30400*]. The Coastal Act provides that all state agencies must carry out their duties and responsibilities in conformity with the Coastal Act, and delineates the interrelationships between the commission and state agencies with possibly conflicting authority [*Pub. Res. Code §§ 30402, 30401, 30403-30420*].

In *Marine Forests Society v. California Coastal Commission* [*Marine Forests Society v. California Coastal Com.*

(2002) 128 Cal. Rptr. 2d 869 , review granted, 132 Cal. Rptr. 2d 527)], the Third District Court of Appeal held that the appointment structure of the California Coastal Act, which gives the Senate Committee on Rules and the Speaker of the Assembly the power not only to appoint a majority of the Coastal Commission's voting members but also to remove them at will, contravened the separation of powers clause of the California Constitution. The court reasoned that by retaining the unilateral power to remove at will the majority of the voting members of the Commission, the legislative branch impermissibly controlled the Commission's executive function of implementing the Coastal Act. Accordingly, the court held that the trial court properly enjoined the Commission from granting, denying, or conditioning permits and from issuing and hearing cease and desist orders.

In response to *Marine Forests Society*, in February 2003 the Legislature amended *Pub. Res. Code § 30312* to provide that the Senate Committee on Rules and Assembly Speaker may appoint members to the Coastal Commission for fixed four-year terms (expanded from the prior two-year term) while the Governor keeps the authority to appoint members for two-year terms. Only the gubernatorial appointees serve at the pleasure of the Governor. Each legislative appointer must appoint two members to serve two-year terms and two members to serve four-year terms to set in motion a staggered cycling of fixed terms [2003 Stats., ch. 1, ABX2 1].

The California Supreme Court granted review in *Marine Forests* and reversed the court of appeal [*Marine Forests Society v. California Coastal Com. (2005) 36 Cal. 4th 1, 57-58, 30 Cal. Rptr. 3d 30]* . The Court concluded that as amended, the statutory provisions governing the composition of the Coastal Commission do not violate the separation of powers clause of the California Constitution. The Supreme Court found that the history of the State Constitution, as well as case law, made it clear that the California Constitution, unlike the United States Constitution, does not categorically preclude the Legislature from enacting a statutory provision authorizing the Legislature itself to appoint a member or members of an executive commission or board [*Marine Forests Society v. California Coastal Com. (2005) 36 Cal. 4th 1, 43, 30 Cal. Rptr. 3d 30]* . Rather, the Court concluded that the California separation of powers clause precludes the adoption of a statutory scheme authorizing the legislative appointment of an executive officer or officers whenever the statutory provisions as a whole, viewed from a realistic and practical perspective, operate to defeat or materially impair the executive branch's exercise of its constitutional functions. The Court found that the amended versions of *Pub. Res. Code §§ 30301* and *30312* do not violate that standard [*Marine Forests Society v. California Coastal Com. (2005) 36 Cal. 4th 1, 45, 30 Cal. Rptr. 3d 30]* .

The parties also requested, in light of the court of appeal's conclusion that the prior statutory scheme was unconstitutional, that the Supreme Court clarify the status of the numerous actions that were taken by the Coastal Commission during the period in which the prior statutes were in effect. The Court stated that even if it assumed that the prior version of the statutes violated the separation of powers clause, the past actions of the Commission could not properly be set aside on that ground. The Court stated that the applicable statute of limitations would bar a present challenge to most of the Commission's prior actions [*Marine Forests Society v. California Coastal Com. (2005) 36 Cal. 4th 1, 54, 30 Cal. Rptr. 3d 30]* . The Court further stated that even with regard to those cases in which a timely separation of powers challenge to the Commission's composition had been raised and remained pending, under the "de facto officer"doctrine, prior actions of the Commission could not be set aside on the ground that the appointment of the commissioners who participated in the decision might be vulnerable to constitutional challenge [*Marine Forests Society v. California Coastal Com. (2005) 36 Cal. 4th 1, 54-55, 30 Cal. Rptr. 3d 30* , citing *In re Redevelopment Plan for Bunker Hill (1964) 61 Cal. 2d 21, 37 Cal. Rptr. 74, 389 P.2d 538* (given existence of de jure office, "persons claiming to be public officers while in possession of an office, ostensibly exercising their function lawfully and with the acquiescence of the public, ... The lawful acts of an officer de facto, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of office, as valid and binding as if he were the officer legally elected and qualified for the office and in full possession of it")].

[2] Role of Local Government

Each local government lying, in whole or in part, within the coastal zone must prepare a local coastal program for that

portion of the coastal zone within its jurisdiction. Amendments to a local general plan for the purpose of developing a local coastal program will not constitute an amendment of a general plan [*Pub. Res. Code § 30500*; *see Gov. Code § 65358* (amendment of general plan); *see also* discussion of general plans in § 579.50[3]]. Procedures governing the establishment of a local coastal program, including certification of the local plan by the state commission, are set forth in *Pub. Res. Code § 30500.1 et seq.*

The authority to issue coastal development permits is delegated to the respective local government after its land use has been certified [*Pub. Res. Code § 30600.5*]. Any development within the coastal zone requires a coastal development permit, which can be obtained from the local government in whose jurisdiction the land to be developed is located [*Pub. Res. Code § 30600*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 579.183 Policies Governing Coastal Development

The Coastal Act sets forth detailed standards of public access in compliance with *Cal. Const., art. X, § 4*, and provides for maximum access, conspicuously posted, and recreational opportunities for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse [*Pub. Res. Code § 30210*; *see Pub. Res. Code §§ 30211-30214* (other public access provisions); *see also Pub. Res. Code §§ 30530-30534, 30610.3* (coastal access program)]. The Coastal Act also establishes policies regarding recreation, marine environment, land resources, development, and industrial development [*see Pub. Res. Code §§ 30220-30224, 30230-30237, 30240-30244, 30250-30255*, and *30260-30265.5*, respectively].

The policies articulated in *Pub. Res. Code § 30200 et seq.* are the standards by which the adequacy of local programs and the permissibility of proposed developments subject to the Coastal Act are determined. In the case of a conflict between policies, *Pub. Res. Code § 30007.5* (resolution of conflicts) will be used to resolve that conflict [*Pub. Res. Code § 30200*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 579.184 Development Controls

[1] Development Defined

"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (*Gov. Code § 66410 et seq.*), and any other division of land, including lot splits, except when the land division is brought about in connection with the purchase of that land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations that are in accordance with a timber harvesting plan submitted pursuant to the Z'berg-Nejedly Forest Practice Act of 1973 (*Pub. Res. Code § 4511 et seq.*) [*Pub. Res. Code § 30106*]. Because, like a subdivision of land or a lot split, a lot line adjustment is a division of land and can result in changes in the density or intensity of the use of property, a lot line adjustment is a "development" and therefore subject to the permit requirements of the Coastal Act [*La Fe, Inc. v. Los Angeles County (1999) 73 Cal. App. 4th 231, 240, 86 Cal. Rptr. 2d 217]* .

[2] Necessity of Permit

In addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, any person wishing to perform or undertake development in the coastal zone, other than a facility subject to *Pub. Res. Code § 25500* (certified power facility) and specified emergency work on public service facilities and state highways, must obtain a coastal development permit [*Pub. Res. Code § 30600(a), (e)*]. A coastal development permit will not be required for any development on tidelands, submerged lands, public trust lands, or for any development by a public agency for which a local government permit is not otherwise required [*Pub. Res. Code § 30600(b)(2)*].

[3] Permit Procedures

Before certification of its local coastal program, a local government may establish procedures governing the issuance of a coastal developmentpermit. If the local government does not opt to establish those procedures, a coastal development permit may be obtained from the commission or from the local government as provided in *Pub. Res. Code § 30519* (delegation of development review authority) or § 30600.5 [*Pub. Res. Code § 30600(b)-(d)*].

The state commission must adopt minimum standards for public notice, hearing, and appeal procedures to govern local government review of permit applications [*Pub. Res. Code § 30600.5(e)*; *see 14 Cal. Code Reg. § 13050 et seq.*]. Before the delegation of authority to issue coastal development permits, a local government, after appropriate notice and hearing, will adopt an ordinance prescribing the procedures to be used in issuing those permits. Each ordinance must incorporate at least the minimum standards for public notice, hearings, and appeals and must contain provisions that prohibit the issuance of a permit for any development that may conflict with the ordinances that are being prepared to implement the certified land use plan [*Pub. Res. Code § 30600.5(f)*]. After delegation of authority to issue coastal development permits, a permit will be issued by the respective local government or the commission on appeal, if that government or commission on appeal finds that the proposed development is in conformity with the certified land use plan [*Pub. Res. Code § 30600.5(c)*].

Any action taken by a local government on a coastal development permit application may be appealed to the commission pursuant to *Pub. Res. Code § 30602*. The commission will hear an appeal, unless it determines that the action taken by the local government raises no substantial issue regarding conformity with the certified land use plan. Failure by any local government to act within any specified time limit constitutes an action taken [*Pub. Res. Code § 30600.5(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 579.185 Permit Required From State Commission

Prior to certification of the local coastal program and, when applicable, in addition to a permit from local government pursuant to *Pub. Res. Code § 30600(b)* or *(d)*, a coastal development permit must be obtained from the commission for any of the following [*Pub. Res. Code § 30601*]:

- Developments between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea when there is no beach, whichever is the greater distance.

- Developments not included within first item, *above*, located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, stream, or within 300 feet of the top of the seaward face of any coastal bluff.

- Any development that constitutes a major public works project or a major energy facility.

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNatural Resources & Public LandsCoastal Zone ManagementPermits

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§ 579.186 Standing of Applicant

When the applicant for a coastal development permit is not the owner of a fee interest in the property on which a proposed development is to be located, but can demonstrate a legal right, interest, or other entitlement to use the property for the proposed development, the holder or owner of any superior interest in the property will not be required to join the applicant as coapplicant. However, all holders or owners of any other interests of record in the affected property must be notified in writing of the application and invited to join as coapplicant. In addition, prior to the issuance of a coastal development permit, the applicant must demonstrate the authority to comply with all conditions of approval [*Pub. Res. Code § 30601.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingPersonal StakeEnvironmental LawNatural Resources & Public LandsCoastal Zone ManagementPermits

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§ 579.187 Issuance of Permit

Prior to certification of the local coastal program, a coastal development permit will be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with *Pub. Res. Code § 30200 et seq.* and that it will not prejudice the ability of the local government to prepare a conforming local coastal program. A denial of the permit on the ground that it would prejudice the ability of the local government to prepare a conforming local coastal program must be accompanied by a specific finding that sets forth the basis for that conclusion [*Pub. Res. Code § 30604(a)*].

After certification of the local coastal program, a coastal development permit will be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with the certified local coastal program [*Pub. Res. Code § 30604(b)*].

Any permit that is issued or any development or action approved on appeal is subject to reasonable terms and conditions to ensure that the development or action will be in accordance with the terms of the Coastal Act [*Pub. Res. Code § 30607*]. Any condition attached to a permit must substantially advance the governmental interest it furthers. Thus, a coastal development permit to build a home conditioned on the landowner conveying an easement allowing the public to pass along a beach, imposed to further the governmental interest of preserving the public's access to and view of the ocean, has been held invalid [*Nollan v. California Coastal Comm'n (1987) 483 U.S. 825, 834-837, 107 S. Ct. 3141, 97 L. Ed. 2d 677* (suggesting that requiring an easement from the street to the beach or for a view point might have been so related to the stated governmental interest as to be a valid condition)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 579.188 Permit Not Necessary

[1] Generally

No development or any portion thereof that is outside the coastal zone is subject to the coastal development permit requirements of the Coastal Act. Moreover, nothing in the Coastal Act authorizes the denial of a permit on the ground that the proposed development within the coastal zone will have an adverse environmental effect outside the coastal zone [*Pub. Res. Code § 30604(d)*; *see Sierra Club v. California Coastal Com. (2005) 35 Cal. 4th 839, 848-849, 28 Cal. Rptr. 3d 316* (in making permit decision regarding development inside coastal zone, commission may consider impacts in coastal zone of portions of project outside coastal zone and may properly act to prevent those impacts to extent they are related to development inside coastal zone; however, commission may not deny permit request solely on basis of impacts within coastal zone that will result from proposed development outside coastal zone)].

Notwithstanding any provision in the Coastal Act, no coastal development permit is required for the following types of development and in the following areas [*Pub. Res. Code § 30610*]:

(1) Improvements to existing single-family residences. However, the commission will specify, by regulation [*see 14 Cal. Code Reg. § 13250(b)*], those classes of development that involve a risk of adverse environmental effect and will require that a permit be obtained.

(2) Improvements to any structure other than a single-family residence or a public works facility. However, the commission will specify, by regulation [*see 14 Cal. Code Reg. § 13253(b)*], those types of improvements that involve a risk of adverse environmental effect, adversely affect public access, or involve a change in use contrary to any policy of the Coastal Act. For those improvements, a permit will be required.

(3) Maintenance dredging of existing navigation channels or moving dredged material from those channels to a disposal area outside the coastal zone, pursuant to a permit from the United States Army Corps of Engineers.

(4) Repair or maintenance activities that do not result in an addition to, or enlargement or expansion of, the object of those activities. However, if the commission determines that certain extraordinary methods of repair and maintenance involve a risk of substantial adverse environmental impact it will, by regulation [*see 14 Cal. Code Reg. § 13252(a)*], require that a permit be obtained.

(5) Any category of development, or any category of development within a specifically defined geographic area, that the commission, after following the requisite procedures, has described or identified and with respect to which the commission has found that there is no potential for any significant adverse effect on coastal resources or on public access, and that when the exclusion precedes certification of the applicable local coastal program, that the exclusion will not impair the ability of local government to prepare a local coastal program.

(6) The installation, testing, and placement in service or the replacement of any necessary utility connection between an existing service facility and any development approved pursuant to the Coastal Act. However, the commission may, when necessary, require reasonable conditions to mitigate any adverse impacts on coastal resources, including scenic resources.

(7) The replacement of any structure, other than a public works facility, destroyed by a disaster. The replacement structure must conform to applicable existing zoning requirements, must be for the same use and in the same location as the destroyed structure, and must not exceed the floor area, height, or bulk of the destroyed structure by more than 10 percent.

(8) Any activity anywhere in the coastal zone that involves the conversion of any existing multiple-unit residential structure to a time-share project, estate, or use [*see Bus. & Prof. Code § 11212(x)*]. If any improvement to an existing structure is otherwise exempt from the permit requirements of the Coastal Act, no coastal development permit will be required for that improvement on the basis that it is to be made in connection with any exempt conversion. The division of a multiple-unit residential structure into condominiums (defined in *Civ. Code § 783*) is not considered a time-share project, estate, or use.

(9) Any proposed development that the executive director finds is a temporary event not having any significant adverse impact on coastal resources within the meaning of the commission's guidelines.

[2] Prior Permit

No person who obtained a vested right in a development prior to the effective date of the Coastal Act (January 1, 1977), or who obtained a permit pursuant to the former Coastal Act is required to secure approval for the development pursuant to the Coastal Act. However, no substantial change may be made in that development without prior approval having been obtained under the Coastal Act [*Pub. Res. Code § 30608*]. There is no distinction made between a person who has obtained a vested right and is therefore exempt and a person who obtained a permit under the former Coastal Act [*Pardee Construction Co. v. California Coastal Com. (1979) 95 Cal. App. 3d 471, 478, 157 Cal. Rptr. 184]* .

When, prior to the effective date of the Coastal Act, a permit was issued and expressly made subject to recorded conditions that are not dedications of land or interests in land for the benefit of the public, the owner of the real property that is the subject of the permit may apply for modification. Unless so modified or deleted, any condition imposed on a permit issued pursuant to the former CoastalAct remains in full force and effect [*Pub. Res. Code § 30609*].

[3] Urban Areas

Urban land areas will be excluded from the permit provisions by the commission, after public hearing, on request by a local government, when that area is either a residential area zoned and developed to a density of four or more dwelling units per acre or industrially zoned and developed on or before January 1, 1977. Additionally, the commission must find

that locally permitted development will be infilling or replacement and in conformity with the surrounding community and that there is no potential for significant adverse effects on public access. However, no area may be excluded unless more than 50 percent of the lots are built on, to the same general density or intensity of use [*Pub. Res. Code § 30610.5(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 579.189 Hearings Before Commission

The commission must provide for a de novo public hearing on applications for coastal development permits and any appeals brought pursuant to the Coastal Act. It must give to any affected person a written public notice of the nature of the proceeding and of the time and place of the public hearing. Notice must also be given to any person who made a written request for notification [*Pub. Res. Code § 30621(a)*].

A hearing on the application or appeal will be set no later than 49 days after the date on which the application or appeal is filed with the commission [*Pub. Res. Code § 30621(a)*]. The commission is only required to open the hearing within 49 days. At the initial hearing, it must determine whether it has jurisdiction and may then continue the matter to a later date [*Encinitas Country Day School, Inc. v. California Coastal Commission (2003) 108 Cal. App. 4th 575, 585,133 Cal. Rptr. 2d 551* (commission lost jurisdiction to hear appeal when it merely opened and continued hearing within 49-day period)]. A requirement that the hearing be concluded within 49 days would be unreasonable and create administrative impossibilities. Staff and environmental review would not be available in the 49-day period[*Coronado Yacht Club v. California Coastal Com. (1993) 13 Cal. App. 4th 860, 869-872, 17 Cal. Rptr. 2d 10]* .

The commission must act on the application or appeal within 21 days after the conclusion of the hearing [*Pub. Res. Code § 30622*].

The operation and effect of an action by any local government is stayed pending a decision by the commission on appeal [*Pub. Res. Code § 30623*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewEnvironmental LawNatural Resources & Public LandsCoastal Zone ManagementGeneral OverviewEnvironmental LawNatural Resources & Public LandsCoastal Zone ManagementPermitsReal Property LawZoning & Land UseAdministrative Procedure

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§ 579.190 Permit Without Hearing

[1] Emergencies and Specified Nonemergency Developments

The executive director or an appropriate local government authority may issue a permit without complying with normal procedures for notice and hearing in cases of emergency, other than those described in *Pub. Res. Code § 30611*, and for the following nonemergency developments [*Pub. Res. Code § 30624(a)*]:

- Improvements to any existing structure;
- Any single-family dwelling;
- Any development of up to four dwelling units within any incorporated area that does not require demolition;
- Any other development not in excess of $100,000 other than any division of land; and
- Any development specifically authorized as a principal permitted use and proposed in an area for which the land use portion of the applicable local coastal program has been certified.

A permit for any of these specified nonemergency developments will not be effective until after reasonable public notice and adequate review time has been given [*Pub. Res. Code § 30624(a)*].

One-third of the commissioners or the members of the local governing body may subsequently override the issuance of a permit for a nonemergency development and require the application to be processed by the usual procedures [*Pub. Res. Code § 30624(b), (c)*].

[2] Minor Developments

After a local coastal program has been certified, a local government may waive the public hearing requirement on a permit application for a "minor development" if [*Pub. Res. Code § 30624.9(b)*]:

- Notice that a public hearing will be held on request of any person is given to all persons who would otherwise be required to be notified of a public hearing as well as any other persons known to be interested in receiving notice; and

- No request for public hearing is received by the local government within 15 working days from the date this notice is sent.

The notice must include a statement that failure by any person to request a public hearing may result in loss of that person's ability to appeal to the commission any action taken on the permit application [*Pub. Res. Code § 30624.9(c)*].

For these purposes, a "minor development" is a development that the local government determines meets *all* of the following requirements [*Pub. Res. Code § 30624.9(a)*]:

- It is consistent with the certified local coastal program;

- It requires no discretionary approvals other than a coastal development permit; and

- It has no adverse effect either individually or cumulatively on coastal resources or public access to the shoreline or along the coast.

Legal Topics:

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§ 579.191 Vested Rights

[1] Generally

If a property owner has performed substantial work and incurred substantial liabilities in good faith reliance on a coastal development permit issued by the government, he or she acquires a vested right to complete construction within the terms of the permit. Once a landowner has secured a vested right, the commission may not, by virtue of a change in the Coastal Act, prohibit construction authorized by the permit the owner has relied on [*see Halaco Engineering Co. v. South Central Coast Regional Com. (1986) 42 Cal. 3d 52, 72-73, 227 Cal. Rptr. 667, 720 P.2d 15]* . A vested right is a property right protected by the constitution, and a failure to exercise that vested right to its fullest extent does not affect its vested character. Thus, a landowner exempt from the permit requirement of the former Coastal Act due to vested rights based on building permits, did not lose those vested rights by allowing the building permits to lapse [*Pardee Construction Co. v. California Coastal Com. (1979) 95 Cal. App. 3d 471, 474, 479, 157 Cal. Rptr. 184]* .

Preparatory work does not give rise to a vested right when it is done with knowledge that one or more additional permits will be required for actual construction, and the commission may apply the laws actually in effect at the time the additional permits are sought [*see Halaco Engineering Co. v. South Central Coast Regional Com. (1986) 42 Cal. 3d 52, 73, 227 Cal. Rptr. 667, 720 P.2d 15]* . For example, the permit exemption of *Pub. Res. Code § 30608* based on a vested right was found not to protect a landowner who constructed a water system and water storage tanks without acquiring the necessary building permit [*see Tosh v. California Coastal Com. (1979) 99 Cal. App. 3d 388, 393-396, 160 Cal. Rptr. 170]* .

[2] Confirmation of Claim

A developer who claims exemption from the permit requirement of the Coastal Act on the grounds that he or she has a vested right to continue development must seek confirmation of that claim and may not first assert it as a defense to an action by the commission to enjoin further development [*Halaco Engineering Co. v. South Central Coast Regional Com. (1986) 42 Cal. 3d 52, 63, 227 Cal. Rptr. 667, 720 P.2d 15* ; *see Pub. Res. Code § 30608* and its discussion in *§ 579.188[2]*]. Although the commission is the administrative tribunal charged with making the initial determination of a

vested rights claim under the Coastal Act, that procedural authority in no way changes the constitutional character of the vested right. The commission has no authority to limit or deny a previously recognized vested right basis for exemption [*Pardee Construction Co. v. California Coastal Com. (1979) 95 Cal. App. 3d 471, 480, 157 Cal. Rptr. 184]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNatural Resources & Public LandsCoastal Zone ManagementGeneral OverviewEnvironmental LawNatural Resources & Public LandsCoastal Zone ManagementPermitsEnvironmental LawZoning & Land UseConstitutional LimitsReal Property LawZoning & Land UseAdministrative ProcedureReal Property LawZoning & Land UseConstitutional Limits

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§ 579.192 Appeals to Commission

[1] Before Certification of Local Coastal Program--Appealable Decisions; Standing

Before its local coastal program has been certified, any local government action on a coastal development permit application may be appealed to the state commission by the executive director, any person (including the applicant), or any two members of the commission [*Pub. Res. Code § 30602*].

[2] Time Limits for Filing

The appeal must be filed within 20 working days after receipt of the notice required by *Pub. Res. Code § 30620.5(c)* or the local government decision will be final [*Pub. Res. Code § 30602*]. A decision is also final even when an appeal is filed, if the appeal is determined to be patently frivolous by the executive director and the filing fee that is therefore imposed is not deposited within five working days [*Pub. Res. Code § 30602*; *see Pub. Res. Code § 30620(d)*]. For discussion of frivolous appeals, see *§ 579.192[4]*.

[3] After Certification of Local Coastal Program

[a] Standing

After a city or county's local coastal program has been certified, certain permit decisions may be appealed to the state commission by the applicant, any aggrieved person, or any two members of the commission [*Pub. Res. Code § 30625(a)*]. An "aggrieved person" has been broadly defined to include residents or citizens of California or persons with a pecuniary or proprietary interest in the subject of the appeal [*Klitgaard & Jones, Inc. v. San Diego Coast Regional Com. (1975) 48 Cal. App. 3d 99, 110, 121 Cal. Rptr. 650]* .

[b] Appealable Decisions

A post-certification local government permit decision is appealable only if it concerns one of the following [*Pub. Res.*

Code § 30603(a)]:

(1) A development approved by the local government between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea when there is no beach, whichever is the greater distance.

(2) A development approved by the local government that is not included in (1), *above*, and that is located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff.

(3) Developments approved by the local government that are not included in (1) or (2), *above*, that are located in a sensitive coastal resource area [*see Pub. Res. Code § 30502(c)*].

(4) Any development approved by a coastal county that is not designated as the principal permitted use under the approved zoning ordinance or zoning district map [*see Pub. Res. Code §§ 30500-30534*].

(5) Any development that constitutes a major public works project or a major energy facility.

[c] Grounds for Appeal

Appeals of post-certification local government permit decisions are limited to an allegation that the development does not conform to the standards set forth in the certified coastal program or the public access policies in the Coastal Act [*Pub. Res. Code § 30603(b)(1)*]. If the appeal is from the denial of a permit for a major public works or major energy facility, the grounds for appeal are limited to an allegation that the development conforms to the standards set forth in the certified local coastal program and the public access policies in the Coastal Act [*Pub. Res. Code § 30603(b)(2)*].

[d] Time Limits for Filing Appeal

Once a local government has taken action on a permit application, it must send notification of that action to the commission by certified mail within seven calendar days of the date the action was taken [*Pub. Res. Code § 30603(d)*]. Any appeal of that action must be filed within 10 working days of the date the commission receives the local government's notice. If the 10-day period passes with no appeal being filed, the decision becomes final [*Pub. Res. Code § 30603(c)*]. A decision also becomes final even when an appeal is filed, if the appeal is determined to be patently frivolous by the executive director and the filing fee that is therefore imposed is not deposited within five working days [*Pub. Res. Code § 30603(c)*; *see Pub. Res. Code § 30620(d)*]. For discussion of frivolous appeals, see *§ 579.192[4]*.

[4] Patently Frivolous Appeals; When Appeal Is Considered Filed

When the applicant or any person other than members of the commission or a public agency requests an appeal of a local government action, whether before or after certification of a local plan, the executive director must determine whether the appeal is patently frivolous. The determination must be made within five working days after the commission receives the appeal. If such a determination is made, the appeal will not be considered filed unless a $300 filing fee is deposited with the commission within five working days of receipt of the executive director's determination. If the commission subsequently determines that the appeal raises a substantive issue, the filing fee will be refunded [*Pub. Res. Code § 30620(d)*].

An appeal that is properly submitted is considered to be filed only under the following circumstances [*Pub. Res. Code § 30621*]:

- The executive director determines that the appeal is not patently frivolous;

- The five-day period for the executive director to determine whether an appeal is patently frivolous expires without a determination; or

- The appellant pays the filing fee within the prescribed five-day period.

[5] Commission Decision to Hear Appeal

The commission will hear an appeal unless it determines the following [*Pub. Res.Code § 30625(b)*]:

- With regard to local government permit decisions before certification of the local coastal program, that there is no substantial issue regarding conformity with the Coastal Act's coastal resources, planning, and management policies [*see Pub. Res. Code §§ 30200-30265.5*].

- With regard to local government post-certification permit decisions, that there is no substantial issue with respect to the grounds on which the appeal was filed [*see Pub. Res. Code § 30603(b)*, discussed in *§ 579.192[3][c]*].

- With regard to appeals after certification of a port master plan, that there is no substantial issue with respect to conformity with that plan.

[6] Action on Appeal

Once the commission has accepted an appeal, it must set the matter for de novo hearing and provide notice as required by *Pub. Res. Code § 30621(a)*. For discussion of the hearing and notice requirements, see *§ 579.189*. The commission must act on the appeal within 21 days after the hearing is concluded [*Pub. Res. Code § 30622*], at which time it may approve, modify, or deny the proposed development [*Pub. Res. Code § 30625(a)*]. If the commission fails to meet this time limit, or fails to meet the 49-day limitation for setting the hearing [*see Pub. Res. Code § 30621(a)*], the local government decision appealed from will be deemedfinal, unless the permit applicant waives these time limits [*Pub. Res. Code § 30625(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNatural Resources & Public LandsCoastal Zone ManagementGeneral OverviewEnvironmental LawNatural Resources & Public LandsCoastal Zone ManagementPermitsReal Property LawZoning & Land UseAdministrative Procedure

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§ 579.193 Reconsideration of Permit

The terms and conditions of any coastal development permit granted by the commission may be reconsidered to correct any information contained in those terms and conditions [*see Pub. Res. Code § 30626*].

A request for reconsideration of the denial of an application for a permit or terms or conditions imposed on the permit may be made under the following procedures [*see Pub. Res. Code § 30627(a), (b)*]:

- Only an applicant for a permit is eligible to request reconsideration.

- The request for reconsideration must be made within 30 days of the decision on the application for the permit.

- The basis for the request for reconsideration must be either that there is relevant new evidence that, in the exercise of reasonable diligence, could not have been presented at the hearing on the matter, or that an error of fact or law has occurred that has the potential of altering the regional commission's initial decision.

- The commission has the discretion to grant or deny a request for reconsideration.

A decision to deny a request for reconsideration is not subject to appeal [*Pub. Res. Code § 30627(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 579.194 Violations of Coastal Act

[1] Notice of Violation

When the Coastal Commission is the legally responsible coastal development permitting authority, or when a local government or port governing body requests the Commission to assist in resolving an unresolved violation, and the executive director has determined that real property has been developed in violation of the Coastal Act, he or she may cause a notification of intention to record a notice of violation (NOV) to be mailed by regular and certified mail to the owner of the property at issue. The notice must (1) describe the real property, (2) identify the nature of the violation, (3) name the owners, and (4) state that if the owner objects to the filing of the NOV, he or she will be afforded the opportunity to present evidence on the issue of whether a violation has occurred [*Pub. Res. Code § 30812(a), (h)*]. The owner will then have 20 days to object to the filing of the NOV. If no timely objection is made, the NOV will be filed in each county in which all or part of the property is located [*Pub. Res. Code § 30812(b)*].

If the owner files a timely objection, a public hearing will be held at which the owner may present evidence as to why the NOV should not be recorded [*Pub. Res. Code § 30812(c)*]. If, following the hearing, the Commission finds that a violation has occurred, the NOV will be recorded. If there is a finding that no violation occurred, a clearance letter will be issued to the property owner [*Pub. Res. Code § 30812(d)*].

When the NOV is properly recorded and indexed, it will be considered notice of the violation to all successors in interest in the subject property. It is for informational purposes only, however, and does not constitute a defect, lien, or encumbrance on the property [*Pub. Res. Code § 30812(e)(2)*]. Once the violation has been finally resolved, a clearance letter will be mailed to the owner and a notice of rescission will be recorded in each county office in which the NOV was recorded. The notice will indicate that the NOV is no longer valid and has the same effect as a withdrawal or expungement under *Code Civ. Proc. § 405.61* [*Pub. Res. Code § 30812(f)*].

An NOV may not be issued until (1) existing methods (excluding the commencement of formal administrative or judicial proceedings) for resolving the violation have been utilized and (2) the property owner has been made aware of

the possibility that a NOV will be recorded [*Pub. Res. Code § 30812(g)*].

[2] Action to Restrain

Any person may maintain an action for declaratory and equitable relief to restrain any violation of the Coastal Act. On a prima facie showing of a violation of the Coastal Act, preliminary equitable relief will be issued to restrain any further violation of the Act. No bond will be required [*Pub. Res. Code § 30803*].

Any person may maintain an action to enforce the duties specifically imposed on the commission, any governmental agency, any special district, or any local government by the Coastal Act. No bond will be required [*Pub. Res. Code § 30804*]. *Pub. Res. Code § 30804* appears to be designed to make traditional mandate available to enforce ministerial duties imposed on the commission by the Coastal Act [*Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal. 3d 158, 169, 169 n.5, 188 Cal. Rptr. 104, 655 P.2d 306]* .

Any person may maintain an action for the recovery of civil penalties provided by *Pub. Res. Code § 30820* or *30821.6* [*Pub. Res. Code § 30805*]. *Pub. Res. Code § 30805* provides standing for private individuals to enforce the Coastal Act, but it does not mean that the penalties will be paid to them. All penalties under the Coastal Act are paid to the state [*see Sanders v. Pacific Gas & Elec. Co. (1975) 53 Cal. App. 3d 661, 670-678, 126 Cal. Rptr. 415* ; for discussion and forms pertaining to private individuals bringing an action in the name of the people or the attorney general, *see* Ch. 483, *Quo Warranto*].

The Coastal Commission may obtain a cease and desist order against violations of permit requirements [*Pub. Res. Code §§ 30809-30810*]. Anyperson may bring an action to enforce the order and seek penalties for its violation [*Pub. Res. Code §§ 30803, 30805, 30821.6*].

[3] Penalties

Any person who performs or undertakes development in violation of the Coastal Act may be civilly penalized by a superior court in an amount not exceeding $30,000 but not less than $500 [*Pub. Res. Code § 30820(a)(1)*]. Civil liability may also be imposed for any other violation of the Coastal Act in an amount that cannot exceed $30,000 [*Pub. Res. Code § 30820(a)(2)*]. In addition to any other penalties, any person who intentionally and knowingly performs any development in violation of the Coastal Act will be subject to a civil fine of not less than $1,000 nor more than $15,000 per day for each day in which the violation occurs [*Pub. Res. Code § 30820(b)*].

[4] Transferability

Any civil action under the Coastal Act by, or against, a city, county, or city and county, the Coastal Commission, a special district, or any other public agency must, on motion of either party, be transferred to a county or city and county not a party to the action or to a county or city and county other than that in which the city, special district, or any other public agency that is a party to the action is located [*Pub. Res. Code § 30806(a)*; *see Code Civ. Proc. §§ 397, 410.10-410.70* (venue); for discussion and forms relating to change of venue, *see* Ch. 571, *Venue* [.

[5] Remedies Not Exclusive

The provisions of *Pub. Res. Code §§ 30800-30824* are in addition to any other remedies available at law [*Pub. Res. Code § 30800*].

In addition to any other remedy provided by *Pub. Res. Code §§ 30800-30811*, any person, including the Coastal Commission, may bring an action to restrain a violation of the terms and conditions of an urban exclusion imposed pursuant to *Pub. Res. Code § 30610.5*. In any such action the court may grant whatever relief it deems appropriate to ensure compliance with the terms and conditions of the urban exclusion [*Pub. Res. Code § 30808*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureEquityReliefCivil ProcedureDeclaratory Judgment ActionsState JudgmentsGeneral OverviewEnvironmental LawNatural Resources & Public LandsCoastal Zone ManagementPermitsReal Property LawZoning & Land UseAdministrative Procedure

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[Reserved]

§§ 579.195[Reserved]

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§ 579.210 Standing

A petition for a writ of mandate must be brought by a party beneficially interested [*Code Civ. Proc. § 1086*]. Although *Code Civ. Proc. § 1094.5*, governing administrative mandamus, does not specify the beneficial interest requirement, cases involving administrative mandamus have applied that requirement [*see Silva v. City of Cypress (1962) 204 Cal. App. 2d 374, 376, 22 Cal. Rptr. 453]* . Zoning cases often combine a petition for a writ of mandate with a complaint for declaratory relief. The declaratory relief action requirement that there be an actual controversy between the parties relating to their rights appears to be met when a beneficial interest is shown [*Code Civ. Proc. § 1060*; *see Residents of Beverly Glen, Inc. v. City of Los Angeles (1973) 34 Cal. App. 3d 117, 121, 109 Cal. Rptr. 724]* .

Beneficial interest may be shown through residence or personal right or interest in the area affected or some other showing by the petitioner that he or she would be detrimentally affected or aggrieved [*see Silva v. City of Cypress (1962) 204 Cal. App. 2d 374, 376-377, 22 Cal. Rptr. 453]* . A resident landowner may be aggrieved by suffering a special damage distinguishable from that suffered by the public at large, perhaps through a decrease in property value or a restriction on the use of his or her property [*see Tustin Heights Assn. v. Bd. of Supervisors (1959) 170 Cal. App. 2d 619, 636-637, 339 P.2d 914]* .

Ownership of property is not mandatory, but some sort of injury or adverse affect is. For example, a corporation composed of residents in the affected area who would suffer an injury if the challenged project was allowed to proceed had standing, even though the corporation itself did not own property. The adverse affect on its members was sufficient [*Residents of Beverly Glen, Inc. v. City of Los Angeles (1973) 34 Cal. App. 3d 117, 121, 109 Cal. Rptr. 724]* . Indeed, residence within the boundaries of the local legislative body with zoning control is not required if an adverse affect can be shown. Thus, landowners outside the municipal limits whose property adjoined the property subject to the zoning have been held to have standing to challenge the zoning decisions of the municipality that affected their property [*Scott v. City of Indian Wells (1972) 6 Cal. 3d 541, 549, 99 Cal. Rptr. 745, 492 P.2d 1137]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewCivil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawThe JudiciaryCase or ControversyStandingGeneral Overview

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§ 579.211 Exhaustion of Administrative Remedies

When an administrative remedy is provided by statute, relief must be sought from the administrative body and that remedy exhausted before the courts will act. Unless exhaustion of administrative remedies is alleged in the petition or complaint, the pleadings may be subject to a general demurrer [*see Temescal Water Co. v. Dept. of Public Works (1955) 44 Cal. 2d 90, 106-107, 280 P.2d 1* (writ of mandate); *Igna v. City of Baldwin Park (1970) 9 Cal. App. 3d 909, 911-912, 88 Cal. Rptr. 581* (declaratory relief)].

As long as administrative remedies have been exhausted as to other issues in the case, a landowner may raise constitutional issues for the first time on judicial review of the administrative decision [*State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 250-251, 115 Cal. Rptr. 497, 524 P.2d 1281* ; *see Cal. Const., art. III, § 3.5*; *Metcalf v. County of Los Angeles (1944) 24 Cal. 2d 267, 272, 148 P.2d 645* (exception application); *Dunham v. City of Westminster (1962) 202 Cal. App. 2d 245, 249-250, 20 Cal. Rptr. 772* (variance)].

There are several exceptions to the doctrine of exhaustion of administrative remedies. Thus, remedies need not be exhausted (1) when the subject matter of the controversy lies outside the agency's jurisdiction, (2) when pursuit of an administrative remedy would result in irreparable harm, (3) when the agency cannot grant an adequate remedy, or (4) when the agggrieved party can positively state what the agency's decision in that particular case would be [*Ogo Associates v. City of Torrance (1974) 37 Cal. App. 3d 830, 834, 112 Cal. Rptr. 761]* . Also, a facial challenge to the constitutionality of a local ordinance in the form of a cause of action for violation of federal civil rights under *42 U.S.C. § 1983* is not barred by the exhaustion doctrine [*Yee v. City of Escondido (1993) 503 U.S. 519, 112 S. Ct. 1522, 1532, 118 L. Ed. 2d 153* ; *Del Oro Hills v. City of Oceanside (1995) 31 Cal. App. 4th 1060, 1078, 37 Cal. Rptr. 2d 677* (facial challenge based on claim of lost profits not sustainable)].

For full discussion of the doctrine of exhaustion of administrative remedies and the exceptions to it, see Ch. 474, *Availability of Judicial Review of Agency Decisions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewReviewabilityExhaustion of RemediesCivil ProcedureJusticiabilityExhaustion of RemediesAdministrative Remedies

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§ 579.212 Expedited Procedure for Review of Permit Decisions Involving First Amendment-Protected Expressive Conduct

An action to review the issuance, revocation, suspension, or denial of a permit or other entitlement for expressive conduct protected by the *First Amendment*, such as a license for the operation of a so-called adult business, is entitled to priority and subject to an expedited procedure for judicial review [*Code Civ. Proc. § 1094.8*]. These procedures were enacted in response to Baby Tam & Co., Inc. v. City of Las Vegas [Stats. 1999, ch. 49, § 2; *see Baby Tam & Co., Inc. v. City of Las Vegas (9th Cir. 1998) 154 F.3d 1097]* , which held that the Las Vegas business licensing ordinance was on its face a prior restraint of speech that violated the *First* and *Fourteenth Amendments* because it failed to provide for prompt judicial review of a license denial [*Baby Tam & Co., Inc. v. City of Las Vegas (9th Cir. 1998) 154 F.3d 1097, 1100-1102]* .

The expedited procedure permits either the public agency or the permit applicant to bring the action for judicial review. If the permit applicant brings the action, the action must be in the form of a petition for writ of mandate pursuant to *Code Civ. Proc. § 1085* or *Code Civ. Proc. § 1094.5*, as appropriate [*Code Civ. Proc. § 1094.8(d)(2)*]. Within five court days after receipt of written notification from a permit applicant that the permit applicant will seek judicial review of a public agency's action on the permit, the public agency must prepare, certify, and make available the administrative record to the permit applicant [*Code Civ. Proc. § 1094.8(d)(1)*].

The party bringing the action must file and serve the petition for writ of mandate on the respondent no later than 21 calendar days following the public agency's final decision on the permit. The title page of the petition must contain the following language in 18-point type: "ATTENTION: THIS MATTER IS ENTITLED TO PRIORITY AND SUBJECT TO THE EXPEDITED HEARING AND REVIEW PROCEDURES CONTAINED IN SECTION 1094.8 OF THE CODE OF CIVIL PROCEDURE" [*Code Civ. Proc. § 1094.8(d)(3)*]. The court clerk must set a hearing for review of the petition no later than 25 calendar days from the date the petition is filed. Moving, opposition, and reply papers must be filed as provided in the California Rules of Court. The petititoner must lodge the administrative record with the court no later than 10 calendar days in advance of the hearing date [*Code Civ. Proc. § 1094.8(d)(4)*]. Following the hearing

the court must render its decision "in an expeditious manner consistent with constricutional requirements in view of the particular facts and circumstances," but no later than 20 calendar days after the matter is submitted or 50 calendar days after the date the peititon is filed, whichever is earlier [*Code Civ. Proc. § 1094.8(d)(5)*].

If the presiding judge of the court in which the action is filed determines that the court will be unable to meet any of the above deadlines applicable to it, the presiding judge must request the temporary assignment of a judicial officer to hear the petition and render a decision within the above time limits, pursuant to *Gov. Code § 68543.8*. This request will be entitled to priority [*Code Civ. Proc. § 1094.8(e)*]. The parties to the action may jointly waive the above time limits [*Code Civ. Proc. § 1094.8(f)*].

A public agency may adopt an odinance or resolution that contains a description of the permits or entitlement issued by the public agency that are eligible for this expedited judicial review [*Code Civ. Proc. § 1094.8(c)*].

The United States Supreme Court has held that the *First Amendment* requires that an adult business ordinance provide both for prompt judicial review of the denial of a license and also for a prompt judicial decision. However, strict time limits do not apply. The requirement of a prompt judicial decision was met when the ordinance provided that an administrative decision could be appealed to the state courts [*City of Littleton v. Z. J. Gifts D-4, L.L.C. (2004) 541 U.S. 774, 124 S. Ct. 2219, 159 L. Ed. 2d 84]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewCivil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusConstitutional LawBill of RightsFundamental FreedomsFreedom of SpeechGeneral OverviewReal Property LawZoning & Land UseAdministrative Procedure

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§ 579.213 Rules of Procedure

Formal rules of evidence or procedure applicable in judicial actions and proceedings do not apply in any proceeding subject to *Gov. Code § 65000 et seq.* (planning and zoning) except to the extent that a public agency otherwise provides by charter, ordinance, resolution, or rule of procedure [*Gov. Code § 65010(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewEvidenceProcedural ConsiderationsRule Application & InterpretationReal Property LawZoning & Land UseGeneral Overview

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§ 579.214 Harmless Error Rule

No action, inaction, or recommendation by any public agency, its legislative body, or any of its administrative agencies or officials, on any matter subject to *Gov. Code § 65000 et seq.* will be held invalid or set aside by any court on the ground of the improper admission or rejection of evidence, or by reason of any error, irregularity, informality, neglect, or omission regarding any matter pertaining to petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals, or any matters of procedure subject to *Gov. Code § 65000 et seq.*, unless the court finds that the error was prejudicial and that the party complaining or appealing suffered substantial injury from that error and that a different result would have been probable if the error had not occurred. There is no presumption that error is prejudicial or that injury was done if the error is shown [*Gov. Code § 65010(b)*; *see Mack v. Ironside (1973) 35 Cal. App. 3d 127, 130, 110 Cal. Rptr. 557* (decided under former *Gov. Code § 65801*)]. The failure to consider the rights, desires, suggestions, and welfare of an entire class of landowners affected by a zoning action may be an error leading to a different result [*Scott v. City of Indian Wells (1972) 6 Cal. 3d 541, 550, 99 Cal. Rptr. 745, 492 P.2d 1137* (decided under former *Gov. Code § 65801*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewStandards of ReviewGeneral Overview

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51-579 California Forms of Pleading and Practice--Annotated § 579.215

§ 579.215 Resolution of Zoning Disputes by Court-Initiated Mediation

Once an action has been filed, disputes involving the following matters may be resolved by mediation:

- A public agency's approval or denial of a development project [*Gov. Code § 66031(a)(1)*].

- A failure to meet time limits of the Permit Streamlining Act [*Gov. Code § 66031(a)(3)*; *see Gov. Code § 65920 et seq.*].

- The adequacy of general or specific plans [*Gov. Code § 66031(a)(6)*; *see Gov. Code § 65100 et seq.*].

- The validity of any zoning decision made pursuant to *Gov. Code § 65800 et seq.*, which provide for the adoption and administration of zoning laws, ordinances, rules, and regulations by counties and cities, as well as the implementation of general plans.

The mediation process may be initiated by invitation from the court within five days after the deadline for the respondent or defendant to file a response to the action [*Gov. Code § 66031(b)*].

If the parties accept the court's invitation to mediate the dispute, all time limits with respect to the underlying action will be tolled while the mediator conducts the mediation [*Gov. Code § 66032(a)*]. The mediator is chosen according to prescribed procedures [*Gov. Code § 66031(c)*]. If the parties do not accept the court's invitation or if they cannot agree on a mediator, the civil action will proceed. The court is not permitted to draw any implication from either party's refusal to mediate [*Gov. Code § 66031(d)*]. Every 90 days after commencement of mediation, the civil action will be reactivated unless the parties either arrive at a settlement and implement it, or agree by written stipulation to extend the mediation for another 90 days [*Gov. Code § 66032(d)*].

If the mediation does not resolve the action, the court has discretion to schedule a settlement conference. If the action is

subsequently tried on its merits, the same judge who presided at the conference will preside at trial [*Gov. Code § 66034*]. In the event the mediation is unsuccessful and the action goes to trial, the following will apply: (1) *Evid. Code § 703.5*, which precludes the mediator from testifying at trial; and (2) *Evid. Code § 1115 et seq.*, which govern evidentiary issues in mediation proceedings and, among other things, limit the use at trial of evidence derived from mediation proceedings [*Gov. Code § 66032(e)*; *see Evid. Code § 1119*]. The Judicial Council is authorized to adopt rules, forms, and standards necessary to implement the mediation procedures [*Gov. Code § 66035*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsReal Property LawZoning & Land UseGeneral Overview

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51-579 California Forms of Pleading and Practice--Annotated § 579.216

§ 579.216 Review of Quasi-Judicial Acts

[1] By Administrative Mandate

Administrative mandamus is available to inquire into the validity of quasi-judicial actions of administrative agencies. It is available only when the order or decision sought to be reviewed is the result of a proceeding in which by law a hearing is required, evidence is required to be taken, and the determination of the facts is the responsibility of the administrative agency. It applies only when the agency has been called on to make a factual determination in the exercise of a quasi-judicial function [*Code Civ. Proc. § 1094.5*].

Administrative mandate is the appropriate form of review in several types of zoning decisions, including decisions involving the following:

- Variances [*see Siller v. Board of Supervisors (1962) 58 Cal. 2d 479, 481, 485-486, 25 Cal. Rptr. 73, 375 P.2d 41]* ;

- Conditional use permits [*see Scott v. City of Indian Wells (1972) 6 Cal. 3d 541, 546, 99 Cal. Rptr. 745, 492 P.2d 1137]* ;

- Tentative maps under the Subdivision Map Act [*see Youngblood v. Board of Supervisors (1978) 22 Cal. 3d 644, 651 n.2, 150 Cal. Rptr. 242, 586 P.2d 556]* ; and

- Review of decisions under the Coastal Act [*see Pub. Res. Code §§ 30801, 30802*].

With limited exceptions [*see McLain Western # 1 v. County of San Diego (1983) 146 Cal. App. 3d 772, 777, 194 Cal. Rptr. 594]* , a party who is displeased with an agency decision, but nonetheless complies with it andthen sues for damages will be unsuccessful because the party did not first seek review by administrative mandamus [*Rezai v. City of*

Tustin (1994) 26 Cal. App. 4th 443, 448-451, 453, 31 Cal. Rptr. 2d 559 ; *City of Santee v. Superior Court (1991) 228 Cal. App. 3d 713, 716-718, 279 Cal. Rptr. 22* ; *Pfeiffer v. City of La Mesa (1977) 69 Cal. App. 3d 74, 76, 78, 137 Cal. Rptr. 804]* .

When a public agency makes a decision regarding the issuance, revocation, suspension, or denial of a permit or other entitlement for expressive conduct protected by *U.S. Const., amend. I*, either the public agency or the permit applicant or permit holder may bring an action for expedited judicial review of that decision [*Code Civ. Proc. § 1094.8*]. If the permit applicant or permit holder brings the action, it must be in the form of a petition for writ of mandate pursuant to *Code Civ. Proc. § 1085* or *1094.5* [*Code Civ. Proc. § 1094.8(d)(2)*]. *Code Civ. Proc. § 1094.8* was enacted in response to a decision of the Ninth Circuit Court of Appeals in a case involving zoning relating to adult bookstores and judicial proceedings necessary to protect *First Amendment* expressive conduct rights with regard to decisions of public agencies regarding permits [*see Baby Tam & Co., Inc. v. City of Las Vegas (9th Cir. 1998) 154 F.3d 1097]* . For discussion of and a form for a petition for writ of mandate for expedited judicial review of a public agency's decision relating to a permit involving expressive conduct protected by the *First Amendment*, see Ch. 59 *Assemblies, Meetings, and Demonstrations* .

For general discussion of *Code Civ. Proc. § 1094.5*, see Ch. 474, *Availability of Judicial Review of Agency Decisions* , et seq.

[2] Variance

The granting or denying of a variance is an administrative or quasi-judicial function [*Allen v. Humboldt County Bd. of Suprs. (1966) 241 Cal. App. 2d 158, 163, 50 Cal. Rptr. 444]* . Review of variance proceedings is appropriate under *Code Civ. Proc. § 1094.5* [*Scott v. City of Indian Wells (1972) 6 Cal. 3d 541, 546 n.4, 99 Cal. Rptr. 745, 492 P.2d 1137* ; *Briggs v. City of Rolling Hills Estates (1995) 40 Cal. App. 4th 637, 644-648, 47 Cal. Rptr. 2d 29]* . The decision is within the discretion of the designated administrative body, and its decision will not be disturbed without a clear and convincing showing of an abuse of that discretion [*Allen v. Humboldt County Bd. of Suprs. (1966) 241 Cal. App. 2d 158, 163, 50 Cal. Rptr. 444]* . Traditional mandamus is not available to review the decision denying a variance [*Rubin v. Board of Directors (1940) 16 Cal. 2d 119, 126-127, 104 P.2d 1041]* .

[3] Conditional Use Permit

Issuance of a conditional use permit (CUP) is an exercise of quasi-judicial or administrative power; it is not an exercise of legislative power [*Wheeler v. Gregg (1949) 90 Cal. App. 2d 348, 362, 203 P.2d 37]* . Review of local planning commission proceedings regarding a CUP is appropriate under *Code Civ. Proc. § 1094.5* [*Scott v. City of Indian Wells (1972) 6 Cal. 3d 541, 546, 99 Cal. Rptr. 745, 492 P.2d 1137* ; *Rezai v. City of Tustin (1994) 26 Cal. App. 4th 443, 448, 31 Cal. Rptr. 2d 559]* . Traditional mandate is not available to review the decision denying a CUP [*Garden Grove Congregation v. City of Garden Grove (1959) 176 Cal. App. 2d 136, 140-142, 1 Cal. Rptr. 65]* .

The courts have no authority to interfere with the denial of a use permit except on a clear and convincing showing of fraud, illegality, or abuse of discretion [*Gong v. City of Fremont (1967) 250 Cal. App. 2d 568, 575, 58 Cal. Rptr. 664]* ; as for example, when the property owner is deprived of a fair hearing under state law on a permit application appeal [*see Clark v. City of Hermosa Beach (1996) 48 Cal. App. 4th 1152, 1169-1170, 56 Cal. Rptr. 2d 223]* . The same rules apply to a challenge of the validity of conditions attached to the grant of a conditional use permit [*see Mid-Way Cabinet etc. Mfg. v. County of San Joaquin (1967) 257 Cal. App. 2d 181, 182, 192-193, 65 Cal. Rptr. 37]* .

[4] Variance and Permit Decisions--Priority on Court Calendar

All actions brought pursuant to *Gov. Code § 65907* will be given preference over all other civil matters before the court, except probate, eminent domain, and forcible entry and unlawful detainer proceedings [*Gov. Code § 65907(a)*].

[5] Limitation of Issues

In an action or proceeding to attack, review, set aside, void, or annul a finding, determination, or decision of a public agency made pursuant to *Gov. Code § 65000 et seq.* (planning and land use) at a properly noticed public hearing, the issues raised are limited to those raised in the public hearing or in written correspondence delivered to the public agency by the time of the public hearing, except when the court finds either of the following [*Gov. Code § 65009(b)(1)*]:

- The issue could not have been raised at the public hearing by persons exercising reasonable diligence.

- The body conducting the public hearing prevented the issue from being raised at the public hearing.

If a public agency desires the provisions of *Gov. Code § 65009(b)* to apply to a matter, it must include a specified warning in any public notice issued [*Gov. Code § 65009(b)(2)*].

The application of *Gov. Code § 65009(b)* to causes of action brought pursuant to *Gov. Code § 65009(d)* [*see § 579.219*] applies only to the final action taken in response to the notice to the city or county clerk. If no finalaction is taken, then the issue raised in the cause of action brought pursuant to *Gov. Code § 65009(d)* will be limited to those matters presented at a properly noticed public hearing or to those matters specified in the notice given to the city or county clerk pursuant to § 65009(d), or both [*Gov. Code § 65009(b)(3)*].

[6] Pleading

A proceeding in mandate is subject to the general rules of pleading applicable to civil actions, except as otherwise provided in *Code Civ. Proc. §§ 1067-1110b*. Therefore, it is necessary for the petition to allege specific facts showing an abuse of discretion. If those facts are not alleged, the petition is subject to general demurrer or the court is justified in denying the petition out of hand [*Gong v. City of Fremont (1967) 250 Cal. App. 2d 568, 573, 58 Cal. Rptr. 664]* . The petition must also allege exhaustion of administrative remedies or it will be subject to a general demurrer [*see Temescal Water Co. v. Dept. of Public Works (1955) 44 Cal. 2d 90, 106-107, 280 P.2d 1]* .

[7] Developer Is Indispensable Party

When the action challenges a specific zoning decision that applies to a specific project, the developer of the project is an indispensable party, and the action must be dismissed if the developer was not joined within the relevant limitation period [*Beresford Neighborhood Assn. v. City of San Mateo (1988) 207 Cal. App. 3d 1180, 1188-1189, 255 Cal. Rptr. 434]* . Developers are not indispensable when the challenge is to a general plan and the determination will apply to all developments in an area [*Buena Vista Gardens Apartments Assn. v. City of San Diego Planning Dept. (1985) 175 Cal. App. 3d 289, 220 Cal. Rptr. 732]* .

[8] Scope of Review

The review is limited to whether there was a want or an excess of jurisdiction, whether there was a fair trial, and whether there was any prejudicial abuse of discretion. Abuse of discretion is shown by failure of the administrative agency to proceed as required by law, failure of the findings to support the decision, or failure of the evidence to support the findings [*Code Civ. Proc. § 1094.5*; *Topanga Asso. for Scenic Community v. County of Los Angeles (1974) 11 Cal. 3d 506, 514-515, 113 Cal. Rptr. 836, 522 P.2d 12]* .

An agency's findings are adequate if they formally incorporate findings made by others, for example, factual findings in a staff report [*Dore v. County of Ventura (1994) 23 Cal. App. 4th 320, 327-328, 28 Cal. Rptr. 2d 299]* . Inadequacy of a single finding does not necessarily undermine the denial of a permit when other, adequate findings are made unless

the findings are so intertwined that a failure of one could reasonably lead the local decision making agency to reconsider its decision to deny a permit [*Saad v. City of Berkeley (1994) 24 Cal. App. 4th 1206, 1213-1216, 30 Cal. Rptr. 2d 95]* .

[9] Standard of Review

In an administrative mandamus proceeding the proper standard of review is the substantial evidence test, that is, whether there was substantial evidence before the local agency to support its decision. Any reasonable doubts must be resolved in favor of the administrative findings and decision. However, as a matter of law, written findings of fact in an administrative decision are insufficient when they merely recite statutory language [*City of Carmel-by-the-Sea v. Board of Supervisors (1977) 71 Cal. App. 3d 84, 91-92, 139 Cal. Rptr. 214]* . Moreover, when a local ordinance provides that an agency must expressly state the agency's findings and must set forth the relevant supportive facts, there is no presumption that its ruling rested on the necessary findings and that those findings are supported by substantial evidence [*see Broadway, Laguna etc. Assn. v. Board of Permit Appeals (1967) 66 Cal. 2d 767, 772-773, 59 Cal. Rptr. 146, 427 P.2d 810]* . No new evidence may be received by the court [*Gong v. City of Fremont (1967) 250 Cal. App. 2d 568, 573, 58 Cal. Rptr. 664]* . Nor does the court have the right to judge the intrinsic value of the evidence or to weigh it [*Siller v. Board of Supervisors (1962) 58 Cal. 2d 479, 481-482, 25 Cal. Rptr. 73, 375 P.2d 41]* .

When a fundamental vested right is involved, such as the right to continue a 35-year legal nonconforming use as a tavern, the independent judgment test is the appropriate standard of review [*Goat Hill Tavern v. City of Costa Mesa (1992) 6 Cal. App. 4th 1519, 1525-1530, 8 Cal. Rptr. 2d 385 , citing Strumsky v. San Diego County Employees Retirement Ass'n (1974) 11 Cal. 3d 28, 32, 112 Cal. Rptr. 805, 520 P.2d 29* ; *see Malibu Mountains Rec., Inc. v. City of Los Angeles (1998) 67 Cal. App. 4th 359, 367-369, 79 Cal. Rptr. 2d 25* (revocation of conditional use permit)]. Whether an administrative zoning decision substantially affects a fundamental vested right is decided on a case-by-case basis. While no exact formula exists for making this decision, courts are less sensitive to preservation of purely economic interests [*see Metropolitan Outdoor Advertising Corp. v. City of Santa Ana (1994) 23 Cal. App. 4th 1401, 1403-1404, 28 Cal. Rptr. 2d 664]* .

[10] Res Judicata Effect

A proceeding in mandamus to review administrative proceedings does not bar an action challenging the constitutionality of the underlying ordinance. Although the same type of evidence may be used in the two actions, the issues are not the same and the denial of relief under the administrative remedy is not res judicata on the constitutional question[*H.W. Rohl Co. v. County of San Diego (1963) 212 Cal. App. 2d 707, 710-711, 28 Cal. Rptr. 196]* .

[11] By Writ of Review (Certiorari)

The writ of certiorari may also be an appropriate remedy to test the proper exercise of discretion by a local board exercising its quasi-judicial powers [*Livingston Rock etc. Co. v. County of L.A. (1954) 43 Cal. 2d 121, 128-129, 272 P.2d 4]* . The writ of certiorari, however, may only be granted by the court when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded its jurisdiction and there is neither an appeal nor any plain, speedy, and adequate remedy [*Code Civ. Proc. §§ 1067, 1068*; for discussion and forms relating to the writ of certiorari, *see* Ch. 492, *Review (Certiorari), Writ of*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewGeneral OverviewAdministrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewStandards of ReviewSubstantial EvidenceEnvironmental LawZoning & Land UseJudicial ReviewReal Property LawZoning & Land UseSpecial Permits & Variances

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§ 579.217 Review of Ministerial Acts

Traditional mandamus is available to compel the performance of a ministerial act [*see Code Civ. Proc. § 1085*]. It may be appropriate in a zoning case to compel ministerial actions by an administrative agency when the petitioner has complied with the controlling ordinance [*see Gong v. City of Fremont (1967) 250 Cal. App. 2d 568, 571-572, 58 Cal. Rptr. 664* (zoning clearance)]. It will not lie to control discretion within the area lawfully entrusted to the administrative body [*Hilton v. Board of Supervisors (1970) 7 Cal. App. 3d 708, 713, 86 Cal. Rptr. 754]* . A writ of mandate may be issued to any inferior tribunal or board to compel the performance of an act that the law specially enjoins, such as a duty resulting from an office, trust, or station. It may also issue to compel the admission of a party to the use and enjoyment of a right to which he or she is entitled, and from which he or she is unlawfully precluded by that inferior tribunal, corporation, board, or person [*Code Civ. Proc. § 1085*; for general discussion of *Code Civ. Proc. § 1085, see* Ch. 358, *Mandate and Prohibition* [. The writ issues when there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It may only be issued on the verified petition of the party beneficially interested [*Code Civ. Proc. § 1086*; *Flora Crane Service, Inc. v. Ross (1964) 61 Cal. 2d 199, 203, 37 Cal. Rptr. 425, 390 P.2d 193]* .

Traditional mandate is commonly appropriate in zoning and planning decisions that involve the following:

(1) A final map under the Subdivision Map Act [*see Youngblood v. Board of Supervisors (1978) 22 Cal. 3d 644, 653 n. 4, 655-656, 150 Cal. Rptr. 242, 586 P.2d 556]* .

(2) An action to challenge a general plan for noncompliance with *Gov. Code §§ 65300-65307* [*Gov. Code § 65751*; *see § 579.223*].

(3) The issuance of building permits [*see Court House Plaza Co. v. City of Palo Alto (1981) 117 Cal. App. 3d 871, 883, 173 Cal. Rptr. 161 , appeal dismissed and cert denied0, 454 U.S. 1074* ; *see also West Coast Advertising Co. v. City & County of San Francisco (1967) 256 Cal. App. 2d 357, 359, 64 Cal. Rptr. 94* (some discretion may be allowed in determining whether to issue a building permit when a pending ordinance not yet enacted would render proposed

building illegal)].

Exhaustion of administrative remedies is a prerequisite to a writ of mandate [*Pan Pacific Properties, Inc. v. County of Santa Cruz (1978) 81 Cal. App. 3d 244, 249-251, 146 Cal. Rptr. 428* ; *Stone v. Turton (1963) 220 Cal. App. 2d 417, 418-422, 33 Cal. Rptr. 853]* .

Mandate is available to control an official's actions when that official is required and authorized to do a prescribed act on a prescribed contingency. Indeed, that official may also be liable for any damages sustained as a result of his or her conduct, as might be the case when a building inspector intentionally and arbitrarily refused to grant a building permit [*Ellis v. City Council (1963) 222 Cal. App. 2d 490, 497, 35 Cal. Rptr. 317* ; for discussion of claims against public entities and officers, *see* Ch. 467, *Public Entities and Officers: Enforcement of Judgments Against Public Entities* [.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusCivil ProcedureRemediesWritsCommon Law WritsMandamusEnvironmental LawZoning & Land UseJudicial ReviewReal Property LawZoning & Land UseOrdinancesReal Property LawZoning & Land UseSpecial Permits & Variances

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§ 579.218 Review of Legislative Acts

[1] Presumption of Constitutionality

An ordinance restricting land use is valid if it has a real or substantial relation to the public health, safety, morals, or general welfare. To be unconstitutional, an ordinance must be clearly arbitrary and unreasonable, and have no substantial relation to the public health, safety, morals, or general welfare. Ordinances are presumed to be constitutional and come before the court with every intendment in their favor. If the validity of the ordinance is fairly debatable, the legislative judgment must be allowed to control [*Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 601-607, 135 Cal. Rptr. 41, 557 P.2d 473]* . The court's review of a zoning ordinance is not restricted to its impact on existing facilities. The court may look to the future and assume that development will proceed harmoniously with the requirements of the ordinance [*see Robinson v. City of Los Angeles (1956) 146 Cal. App. 2d 810, 815-817, 304 P.2d 814]* . Although the motives influencing the legislative body may not be considered by the court, when the facts show an attempt to exercise the police power in a manner that oppresses or discriminates against an individual, the court may consider the evidence disclosing a purpose other than that declared by the ordinance [*Kissinger v. City of Los Angeles (1958) 161 Cal. App. 2d 454, 462, 327 P.2d 10]* .

[2] Consideration of Regional Welfare

Municipalities are not isolated islands remote from the needs and problems of the area in which they are located. Thus an ordinance, althoughreasonable from the limited viewpoint of the enacting municipality, may be unreasonable when viewed from the larger perspective of surrounding communities. For example, a municipal ordinance may impact the supply and distribution of housing for an entire metropolitan region. If its impact is limited to the city boundaries, the inquiry may be limited accordingly. However, if an ordinance may strongly influence an entire metropolitan region, judicial inquiry must consider the welfare of that region. In determining whether a challenged ordinance restriction reasonably relates to the regional welfare, the trial court should forecast the probable effect and duration of the restriction, identify the competing interests affected by the restriction, and determine whether the ordinance, in light of its probable impact, represents a reasonable accommodation of the competing interests. In ascertaining whether a

challenged ordinance reasonably relates to the regional welfare, the extent and bounds of the region significantly affected by the ordinance should be determined as a question of fact by the trial court [*Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 607-609, 607-608 n.24, 135 Cal. Rptr. 41, 557 P.2d 473* ; *see Northwood Homes, Inc. v. Town of Moraga (1989) 216 Cal. App. 3d 1197, 1201-1203, 265 Cal. Rptr. 363* (initiative stopping development of 113 units had no significant effect on regional housing supply)].

[3] Certainty Requirement

A zoning ordinance that lists the permitted and prohibited uses within given zones is not subject to attack for lacking the requisite certainty under due process standards. Indeed, many ordinances use that format. The mere fact that a landowner must search the zoning ordinance to discover the scope of permitted uses within a zone, cannot alone render that ordinance vague and uncertain. However, if a permitted use is ambiguous, then the range of impliedly proscribed uses is equally unclear. A specific itemization of proscribed uses within a given zone is not mandated by due process, if from a fair reading of the ordinance, the acts proscribed are reasonably clear [*see Sechrist v. Municipal Court (1976) 64 Cal. App. 3d 737, 743, 134 Cal. Rptr. 733]* .

Most zoning ordinances provide that a violation of their provisions constitute a misdemeanor, and provide a penalty for that violation. A zoning ordinance with a penal provision that either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ concerning its application, violates the first essential of due process. Although mathematical exactitude is not required, reasonable certainty is. While the dangers of discriminatory enforcement and ex post facto punishment posed by vague penal provisions must be considered in construing zoning ordinances, liberal regard will be given to legislative intent in order to give effect to the salutary objects of the law [*Sechrist v. Municipal Court (1976) 64 Cal. App. 3d 737, 745, 134 Cal. Rptr. 733* ("residential use" not too vague)]. By contrast, when the zoning ordinance does not impose criminal sanctions for a violation, it appears that a lesser standard of certainty may be sufficient to uphold it. For example, in upholding an ordinance one court rationalized its finding by saying that a court would have no trouble ascertaining what the writers had in mind [*In re Valterza (1940) 37 Cal. App. 2d 682, 685, 100 P.2d 337]* .

[4] Effect of Changed Circumstances

Even though valid when adopted, a zoning regulation may become invalid due to changed circumstances. Thus, an originally valid ordinance may later prove to be confiscatory. Earlier compliance with the regulation does not forfeit the right of protest when the regulation becomes intolerable through the changed conditions [*Skalko v. City of Sunnyvale (1939) 14 Cal. 2d 213, 216, 93 P.2d 93]* .

[5] By Traditional Mandate

Traditional mandate may be used to challenge the consititutionality of zoning actions of the legislative body, that is, the validity of a zoning ordinance or actions taken with respect to rezoning of property [*Ensign Bickford Realty Corp. v. City Council (1977) 68 Cal. App. 3d 467, 472-473, 137 Cal. Rptr. 304* ; *see Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal. 3d 511, 522, 169 Cal. Rptr. 904, 620 P.2d 565]* .

[6] By Declaratory Relief

An action for declaratory relief is proper to test the constitutionality of a zoning ordinance [*see Agins v. City of Tiburon (1979) 24 Cal. 3d 266, 272-273, 277, 157 Cal. Rptr. 372, 598 P.2d 25 , aff'd, 447 U.S. 255, 259, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)]* .

A complaint for declaratory relief in a zoning case must allege an existing actual controversy regarding the ordinance in question [*see Code Civ. Proc. § 1060*; *C. Dudley De Velbiss Co. v. Kraintz (1951) 101 Cal. App. 2d 612, 615-616, 225 P.2d 969]* . For example, an action for declaratory relief is appropriate when a landowner alleges that a zoning

restriction destroyed almost all the reasonable value of his or her property [*Skalko v. City of Sunnyvale (1939) 14 Cal. 2d 213, 214, 216, 93 P.2d 93]* . Moreover, when a landowner brings an action for declaratory relief to establish his or her zoning rights on his or her property, neighboring property owners are parties in interest and entitled to intervene in that action [*Weiner v. City of Los Angeles (1968) 68 Cal. 2d 697, 706, 68 Cal. Rptr. 733, 441 P.2d 293]* .

The court's jurisdiction to entertain an action for declaratory relief is conditioned on a completion of any administrative procedure, even when the statute sought to be enforced by the administrative agency is challenged on constitutional grounds [*Igna v. City of Baldwin Park (1970) 9 Cal. App. 3d 909, 911-912, 88 Cal. Rptr. 581* ; *Dunham v. City of Westminster (1962) 202 Cal. App. 2d 245, 249-250, 20 Cal. Rptr. 772]* . That jurisdictional requirement may be waived in limited circumstances, however [*see Hoshour v. County of Contra Costa (1962) 203 Cal. App. 2d 602, 605-606, 21 Cal. Rptr. 714]* .

Actions for declaratory relief will be set for trial at the earliest possible date and will take precedence over all other cases, except older matters of the same character and matters to which special precedence may be given by law [*Code Civ. Proc. § 1062.3(a)*; *see Code Civ. Proc. § 1062.3(b)* for precedence of action combined with declaratory relief action].

For a form of complaint for declaratory relief challenging the constitutionality of a zoning ordinance, see *§ 579.370*. For discussion of declaratory relief actions generally and additional forms, see Ch. 182, *Declaratory Relief* .

[7] By Injunctive Relief

An aggrieved person, that is, one who is specially interested in the sense of being irreparably injured by enforcement of an allegedly invalid zoning ordinance, may enjoin enforcement of that ordinance against himself or herself if it is unconstitutionally applied or otherwise invalid [*see Johnston v. Board of Supervisors (1947) 31 Cal. 2d 66, 71, 187 P.2d 686* ; *Greenfield v. Bd. of City Plan. Commrs. (1935) 6 Cal. App. 2d 515, 518-519, 45 P.2d 219]* . For example, injunctive relief is appropriate when a zoning ordinance is discriminatory [*McCaslin v. City of Monterey Park (1958) 163 Cal. App. 2d 339, 347-348, 329 P.2d 522]* .

As with all injunctions, injunctive relief in zoning cases is governed by *Civ. Code § 3422* and *Code Civ. Proc. § 526*. Injunctive relief is not available when there is an adequate remedy at law. For example, injunctive relief is not available to challenge the decision of a planning commission, because administrative mandamus is appropriate and provides an adequate legal remedy [*Triangle Ranch, Inc. v. Union Oil Co. (1955) 135 Cal. App. 2d 428, 438, 287 P.2d 537]* .

[8] By Action for Inverse Condemnation

Although the California Supreme Court has held that a landowner may not elect to sue in inverse condemnation to contest the constitutionality of a zoning ordinance as an unconstitutional taking, the United States Supreme Court has held that such an action must be available, at least when the ordinance deprived the landowner of all use of its property [*First Lutheran Church v. Los Angeles County (1987) 482 U.S. 304, 315, 107 S. Ct. 2378, 96 L. Ed. 2d 250* ; *see Agins v. Tiburon (1979) 24 Cal. 3d 266, 272-273, 157 Cal. Rptr. 372, 598 P.2d 25 , aff'd, 447 U.S. 255, 259, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)* ; for further discussion, *see § 579.12[5][a]*].

[9] Period of Limitation

Except as provided in *Gov. Code § 65009(d)* (relating to low or moderate income housing [*see § 579.219*] and challenges to the adequacy of general plan housing elements, respectively), no action or proceeding may be maintained in any of the following cases by any person unless it is commenced and service is made on the legislative body within 90 days after its decision [*Gov. Code § 65009(c)*]:

(1) To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a general or specific plan. This does not apply when an action is brought based on the complete absence of a general plan or a mandatory element of the plan, but does apply to an action attacking a general plan or mandatory element of the plan on the basis that it is inadequate. The limitation period applies to adoption or amendments of a general plan made within the 120-day period. When an action is brought challenging the validity of a general plan based on amendments to the general plan within 120 days of the amendments, only the effect of the amendments may be challenged, and challenges to the validity of other parts of the general plan are barred by the 120-day limitation period [*Garat v. City of Riverside (1991) 2 Cal. App. 4th 259, 280-284, 3 Cal. Rptr. 2d 504 , overruled in part by Morehart v. County of Santa Barbara (1994) 7 Cal. 4th 725, 743*].

(2) To attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a zoning ordinance [*see Gonzalez v. County of Tulare (1998) 65 Cal. App. 4th 777, 782-785, 76 Cal. Rptr. 2d 707]* .

(3) To determine the reasonableness, legality, or validity of any decision to adopt or amend any regulation attached to a specific plan.

(4) To attack, review, set aside, void, or annul a legislative body's decision to adopt, amend, or modify a specific portion of a development agreement, when the agreement, amendment, or modification was adopted on or after January 1, 1996.

(5) To attack, review, set aside, void, or annul any decision on matters related to local government procedures involved in dealing with conditional use or other permits [*see Gov. Code §§ 65901, 65903*], or the validity of any condition attached to a variance, conditional use permit, or any other permit.

(6) Concerning any of the proceedings, acts, or determinations taken, done, or made before any of the decisions listed in 1-5, *above*.

On expiration of the time limits provided for in *Gov. Code § 65009*, all persons are barred from any further action or proceeding [*Gov. Code § 65009(e)*].

Gov. Code § 65009 applies to charter cities [*Gov. Code § 65009(f)*]. Except for challenges to post-1995 developments agreements [*see* (4), *above*], *Gov. Code § 65009* is applicable to those decisions of the legislativebody of a city, county, or city and county made pursuant to *Gov. Code § 65000 et seq.* on or after January 1, 1984 [*Gov. Code § 65009(h)*].

Except as provided in *Gov. Code § 65009(d), Gov. Code § 65009* does not affect any law prescribing or authorizing a shorter period of limitation than that specified herein [*Gov. Code § 65009(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 579.219 Low or Moderate Income Housing

Certain actions or proceedings brought in support of the development of housing projects that meet the requirements for housing for persons and families with low or moderate incomes [*see Health & Safety Code § 50079.5*], or very low incomes [*see Health & Safety Code § 50105*], or middle-income households [*see Gov. Code § 65008*] must be commenced and the legislative body served within one year after the accrual of the cause of action [*see Gov. Code § 65009(d)*]. An action under *Gov. Code § 65009(d)* cannot be maintained until 60 days have expired following notice to the city or county clerk by the party bringing the cause of action, or by his or her representative, specifying the deficiencies of the general plan, specific plan, or zoning ordinance. The cause of action accrues 60 days after notice is filed or the legislative body takes a final action in response to the notice, whichever occurs first. A notice or cause of action brought by one party pursuant to *Gov. Code § 65009(d)* will not bar filing of a notice and initiation of a cause of action by any other party [*Gov. Code § 65009(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Rights LawContractual Relations & HousingFair Housing RightsEconomic DiscriminationEnvironmental LawZoning & Land UseJudicial ReviewGovernmentsLegislationStatutes of LimitationsTime LimitationsPublic Health & Welfare LawHousing & Public BuildingsLow Income HousingReal Property LawZoning & Land UseOrdinances

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§ 579.220 Joinder of Types of Relief

Different methods of judicial relief may be combined in zoning cases. For example, an action to enjoin enforcement of a zoning ordinance is often joined with an action for declaratory relief [*see, e.g., Morris v. City of Los Angeles (1953) 116 Cal. App. 2d 856, 857, 254 P.2d 935]* . Additionally, a petition in mandamus is also commonly combined with a declaratory relief action [*see, e.g., Floresta, Inc. v. City Council (1961) 190 Cal. App. 2d 599, 612, 12 Cal. Rptr. 182]* . When a form of judicial relief is combined with an action for declaratory relief, the combined action may be given priority on the court calendar on noticed motion and a showing that the action requires a speedy trial [*Code Civ. Proc. § 1062.3(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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51-579 California Forms of Pleading and Practice--Annotated § 579.221

§ 579.221 Review of Ordinance Consistency With General Plan

[1] Required

City and county zoning ordinances must be consistent with the applicable general plan [*Gov. Code § 65860(a)*; *Resource Defense Fund v. County of Santa Cruz (1982) 133 Cal. App. 3d 800, 806, 184 Cal. Rptr. 371]* . The consistency requirement applies to zoning ordinances adopted by initiative or referendum as well as those adopted by legislative bodies [deBottari v. *City Council (1985) 171 Cal. App. 3d 1204, 1212-1213, 217 Cal. Rptr. 790* ; *see City of Irvine v. Irvine Citizens Against Overdevelopment (1994) 25 Cal. App. 4th 868, 30 Cal. Rptr. 2d 797]* . Consistency requires that the various land uses authorized by the zoning ordinance be compatible with the objectives, policies, general land uses, and programs specified in the general plan [*Gov. Code § 65860(a)*; *City of Irvine v. Irvine Citizens Against Overdevelopment (1994) 25 Cal. App. 4th 868, 879, 30 Cal. Rptr. 2d 797* ; *Corona-Norco Unified School Dist. v. City of Corona (1993) 17 Cal. App. 4th 985, 994, 21 Cal. Rptr. 2d 803]* .

With the exception of Los Angeles, the consistency requirement does not apply to charter cities [*Gov. Code § 65803*]. However, charter cities are not precluded from adopting consistency requirements that are similar to those required of general law cities [*see Gov. Code § 65803*; *City of Irvine v. Irvine Citizens Against Overdevelopment (1994) 25 Cal. App. 4th 868, 875-876, 30 Cal. Rptr. 2d 797]* .

In the event that a zoning ordinance becomes inconsistent with a general plan by reason of amendment to that plan, or to any element of that plan, that zoning ordinance must be amended within a reasonable time so that it is consistent with the general plan as amended [*Gov. Code § 65860(b)*].

Interim measures available to challenge a general plan are governed by *Gov. Code §§ 65750-65763*. For a discussion of *Gov. Code §§ 65750-65763*, see *§ 579.223*.

[2] Enforcement Action

Any resident or property owner within a city or county may bring an action or proceeding for writ of mandate in the superior court to enforce compliance with the consistency requirement. The action or proceeding must be commenced and service on the legislative body must be made within 90 days of the enactment or amendment of any new or existing zoning ordinance [*Gov. Code § 65860(b)*; *see Code Civ. Proc. § 1084 et seq.* (governing writ of mandate)].

[3] Applicable to Charter Cities

Gov. Code § 65860 applies in charter cities with a population of two million or more to a zoning ordinance adopted prior to January 1, 1979, which zoning ordinance must be consistent with the general plan of that city by July 1, 1982 [*Gov. Code § 65860(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusEnvironmental LawZoning & Land UseInitiative & ReferendumGovernmentsLocal GovernmentsChartersReal Property LawZoning & Land UseComprehensive PlansReal Property LawZoning & Land UseInitiative & Referendum

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§ 579.222 Review of Decisions Under California Coastal Act

[1] Decisions of Commission

Any aggrieved person has the right to judicial review of any decision or action of the California Coastal Commission by filing a petition for a writof mandate in accordance with the provisions of *Code Civ. Proc. § 1094.5* within 60 days after that decision or action has become final [*Pub. Res. Code § 30801*].

For purposes of *Pub. Res. Code §§ 30513(c)*, *30625*, and *30801*, an "aggrieved person" means any person who, in person or through a representative, appeared at a public hearing of the commission, local government, or port governing body in connection with the decision or action appealed, or who, by other appropriate means prior to a hearing, informed the commission, local government, or port governing body of the nature of his or her concerns or who for good cause was unable to do either. "Aggrieved person" includes the applicant for a permit and, in the case of an approval of a local coastal program, the local government involved [*Pub. Res. Code § 30801*].

[2] Decisions of Local Agency

Any person, including a permit applicant or the commission, aggrieved by the decision or action of a local government that is implementing a certified local coastal program or certified port master plan, or is exercising its powers pursuant to *Pub. Res. Code § 30600.5*, which decision or action may not be appealed to the commission, has the right to judicial review of that decision or action by filing a petition for writ of mandate under *Code Civ. Proc. § 1094.5* within 60 days after the action or decision has become final. The commission may intervene in that proceeding on a showing that the matter involves a question of the conformity of a proposed development with a certified local coastal program or certified port master plan or the validity of a local government action taken to implement a local coastal program or certified port master plan. Any local government or port governing body may request that the commission intervene. Notice of the action against a local government or port governing body must be filed with the commission within five working days of the filing of the action. When an action is brought challenging the validity of a local coastal program or certified port master plan, a preliminary showing must be made prior to proceeding on the merits concerning why that

action should not have been brought pursuant to *Pub. Res. Code § 30801* [*Pub. Res. Code § 30802*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewReviewabilityStandingEnvironmental LawNatural Resources & Public LandsCoastal Zone ManagementEnforcementEnvironmental LawZoning & Land UseJudicial Review

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§ 579.223 Actions to Challenge General Plan

[1] Traditional Mandate

Any action to challenge a general plan or any element thereof on the grounds that the plan or element does not substantially comply with the requirements of *Gov. Code §§ 65300-65307* (scope of general plans) must be brought pursuant to *Code Civ. Proc. § 1085* [*Gov. Code § 65751*].

[2] Time for Hearing

All actions brought pursuant to *Gov. Code § 65751*, including the hearing of any such action from the decision of a lower court, will be given preference over all other civil actions before the court in the setting for hearing or trial. All those actions will be speedily heard and determined [*Gov. Code § 65752*].

The petitioner must request a hearing or trial on the alternative writ or peremptory writ of mandate, and any other party may request a hearing or trial, within 90 days of the date the petitioner files the petition for a writ of mandate pursuant to *Gov. Code § 65751*. If no request is filed within 90 days of the date that petition is filed, the action or proceeding may be set for hearing or trial, dismissed on the motion of any party other than the petitioner, or dismissed on the court's own motion [*Gov. Code § 65753(a)*].

Within 30 days of the filing of the request for a hearing or trial pursuant to *Gov. Code § 65753(a)*, the court will set a date for a hearing or trial on the action or part of an action brought pursuant to *Gov. Code § 65751*. The hearing or trial will be set to be heard at the earliest possible date, but not more than 120 days after the filing of a request for hearing under *Gov. Code § 65753*. The court may continue for a reasonable time the date of the hearing or trial on written motion and a finding of good cause. However, if the court grants a continuance to a respondent, it must, on the written motion of the petitioner and on the petitioner meeting the requirements of *Gov. Code § 65757*, grant the relief provided in *Gov. Code § 65757* as temporary relief. But the court will not enjoin any housing developments that comply with applicable provisions of law and that may be developed without having an impact on the ability of the city or county to

properly adopt and implement an adequate housing element [*Gov. Code § 65753(b)*; *see § 579.223[4][c]*].

[3] Bringing General Plan Into Compliance

[a] 120-Day Time Limit

In any action brought to challenge the validity of the general plan of any city or county, or any mandatory element thereof, if the court, in a final judgment in favor of the plaintiff or petitioner, finds that the general plan or any mandatory element of a general plan, does not substantially comply with the requirements of *Gov. Code §§ 65300-65307* [*Gov. Code § 65754*]:

(a) The city or county must bring its general plan or relevant mandatory elements thereof into compliance with the requirements of *Gov. Code §§ 65300-65307* within 120 days.

(b) The city or county (including the chartered cities specified in *Gov. Code § 65860(d)*) must, in accordance with *Gov. Code § 65860*, bring itszoning ordinance into consistency with its general plan or relevant mandatory element or elements thereof within 120 days after the general plan has been amended in accordance with *Gov. Code § 65754(a)*.

[b] Housing Element

Notwithstanding *Gov. Code § 65585(b)* (ordinary time frame for review of amendments to plan), the planning agency of the city or county must submit a draft of its revised housing element or housing element amendment at least 45 days prior to its adoption to the Department of Housing and Community Development for its review, notifying the department that the element is subject to the review procedure of *Gov. Code § 65754*. The department will review the draft element or amendment and report its findings to the planning agency within 45 days of receipt of the draft. The legislative body will consider the department's findings prior to final adoption of the housing element or amendment if the department's findings are reported to the planning agency within 45 days after the department receives that draft element or amendment [*Gov. Code § 65754*].

[4] Remedies Available Pending Local Entity Compliance

[a] In General

The court will include, in the order or judgment rendered pursuant to *Gov. Code § 65754*, one or more of the following provisions for any or all types or classes or developments or any or all geographic segments of the city or county until the city or county has substantially complied with the requirements of *Gov. Code §§ 65300-65307* [*Gov. Code § 65755(a)*]:

(1) Suspend the authority of the city or county pursuant to *Health & Safety Code §§ 17910-17995.5*, to issue building permits, or any category of building permits, and all other related permits, except that the city or county will continue to function as an enforcement agency for review of permit applications for appropriate codes and standards compliance, prior to the issuance of building permits and other related permits for residential housing.

(2) Suspend the authority of the city or county pursuant to *Gov. Code §§ 65800-65912* to grant any and all categories of zoning changes, variances, or both.

(3) Suspend the authority of the city or county pursuant to *Gov. Code §§ 66410-66499.37* to grant subdivision map approvals for any and all categories of subdivision map approvals.

(4) Mandate the approval of all applications for building permits, or other related construction permits, for residential housing where a final subdivision map, parcel map, or plot plan has been approved for the project, where the approval

will not impact on the ability of the city or county to properly adopt and implement an adequate housing element, and where the permit application conforms to all code requirements and other applicable provisions of law except those zoning laws held to be invalid by the final court order, and changes to the zoning ordinances adopted after that final court order that were enacted for the purpose of preventing the construction of a specific residential development.

(5) Mandate the approval of any or all final subdivision maps for residential housing projects that have previously received a tentative map approval from the city or county pursuant to *Gov. Code §§ 66410-66499.37*.

(6) Mandate that notwithstanding the provisions of *Gov. Code §§ 66473.5* and *66474*, any tentative subdivision map for a residential housing project will be approved if all of the following requirements are met:

> (A) The approval of the map will not significantly impair the ability of the city or county to adopt and implement those elements or portions thereof of the general plan that have been held to be inadequate.
>
> (B) The map complies with all of the provisions of *Gov. Code §§ 66410-66499.37*, except those parts that would require disapproval of the project due to the inadequacy of the general plan.
>
> (C) The approval of the map will not affect the ability of the city or county to adopt and implement an adequate housing element.
>
> (D) The map is consistent with the portions of the general plan not found inadequate and the proposed revisions, if applicable, to the part of the plan held inadequate.

[b] Exclusion of Project Required to Be Consistent

Any order or judgment of a court that includes the remedies described in *Gov. Code § 65755(a)(1), (2),* or *(3)* will exclude from the operation of that order or judgment any action, program, or project required by law to be consistent with a general or specific plan if the court finds that the approval or undertaking of the action, program, or project complies with both of the following requirements [*Gov. Code § 65755(b)*]:

(1) That it will not significantly impair the ability of the city or county to adopt or amend all or part of the applicable plan as may be necessary to make the plan substantially comply with the requirements of *Gov. Code §§ 65300-65307* in the case of a general plan, or *Gov. Code §§ 65450-65457* in the case of a specific plan.

(2) That it is consistent with those portions of the plan challenged in the action or proceeding and found by the court to substantially comply with applicable provisions of law.

The party seeking exclusion from any order or judgment of a court pursuant to *Gov. Code § 65755(b)* has the burden of showing that the action, program, or project complies with its provisions [*Gov. Code § 65755(b)*].

[c] Temporary Remedy

During the pendency of any action described in *Gov. Code § 65754*, the court may, on a showing of probable success on the merits, grant the relief provided in *Gov. Code § 65755* as temporary relief. In any order granting temporary relief, the court will not enjoin during the pendency of the action any housing developments that comply with applicable provisions of law and that may be developed without having any impact on the ability of the city or county to properly adopt and implement an adequate housing element. Any housing developments permitted to proceed during the pendency of the action will not be subject to the restrictions specified in *Gov. Code § 65754(a)* or *(b)* as part of any final judgment [*Gov. Code § 65757*].

If the court orders any temporary relief in an action or proceeding subject to *Gov. Code §§ 65750-65763*, any party to the action may file with the court a written request that the court make a final determination in the action or proceeding, and the court will thereafter make a final determination and enter judgment within 180 days of the date the request was filed, unless the party who filed the request files a withdrawal of the request with the court prior to the filing by the court of its memorandum of intended decision [*Gov. Code § 65758*].

[5] Certain Housing Development May Not Be Enjoined

During the pendency of any action described in *Gov. Code § 65754*, or when issuing a final judgment in favor of the plaintiff or petitioner finding that the general plan or any element thereof does not conform to the requirements of *Gov. Code §§ 65300-65307*, the court will not enjoin the development of any housing development with respect to which all of the following conditions are met [*Gov. Code § 65754.5(a)*]:

(1) The legislative body has approved a development project (defined by *Gov. Code § 65928*), for housing or a specific plan for the housing development, and determined the development project for housing or the specific plan to be consistent with the general plan.

(2) The legislative body has certified an environmental impact report or a negative declaration for the development project for housing or for the specific plan for housing pursuant to the California Environmental Quality Act (*Pub. Res. Code § 21000 et seq.*), and no legal action was brought within the applicable statute of limitations period relating to that environmental impact report or negative declaration.

(3) The owner of the land on which the housing project is proposed to be developed, in satisfaction of any requirements imposed and in reliance on any action taken by the city or county pursuant to *Gov. Code § 65754.5(a)(1), (2)*, has irrevocably committed at least $1,000,000 for public infrastructure, including, but not limited to, roads and water and sewer facilities.

(4) The proposed housing development may be developed without having an impact on the ability of the city or county to implement an adequate housing element or to properly adopt an adequate housing element if the court determines, in the pending action, that the general plan or plan element is inadequate. The court will apply the provisions of *Gov. Code § 65760* to determine whether a housing development will have an impact on the ability of the city or county to properly adopt and implement an adequate housing element.

Gov. Code § 65754.5 applies to any legal action pending on January 1, 1984, and to every action commenced on or after that date [*Gov. Code § 65754.5(b)*]. *Gov. Code § 65754.5* will not be construed to preclude a public agency from exercising discretion, in a manner authorized by any other provision of law, to alter plans, zoning, or subsequent development approvals applicable to those lands, or from enacting and enforcing further regulations on their use [*Gov. Code § 65754.5(c)*].

[6] Residential Housing

[a] Presumption Governing Low Income Housing

In determining whether a housing development will have an impact on the ability of the city or county to properly adopt and implement an adequate housing element, the court will consider all relevant factors. There is a conclusive presumption that any housing development, 25 percent of which units are affordable to persons and families of low or moderate income (defined in *Health & Safety Code § 50093*), can be developed without having an impact on the ability of the city or county to properly adopt and implement an adequate housing element, except when the approval of a housing development may prevent the city or county from complying with the final judgment of the court [*Gov. Code § 65760*].

[b] Revocation of Building Permit Impermissible

In no event will any court grant as relief in any action brought pursuant to *Gov. Code §§ 65750-65763* the revocation of any building permits or related permits for the construction of residential housing that has been issued prior to the filing of the complaint in that action. Nothing in *Gov. Code § 65761* will be construed as a limitation on the ability to bring an action and to grant relief for a violation of *Gov. Code §§ 65560-65570* [*Gov. Code § 65761*].

[7] Reference of Action

If the court orders a reference of any action brought pursuant to *Gov. Code §§ 65750-65763* or pursuant to any provision of law that grants a court the authority to appoint expert witnesses, monitors, masters, or other third-party judicial assistants used in complex litigation, the personso appointed must report their findings to the court within not more than 90 days following that reference [*Gov. Code § 65756*].

[8] Environmental Effect

In any action brought under *Gov. Code § 65759* [*Gov. Code § 65759*]:

(1) The provisions of the California Environmental Quality Act (CEQA) (*Pub. Res. Code § 21000 et seq.*), will not apply to any action necessary to bring its general plan or relevant mandatory elements thereof into compliance with any court order or judgment under *Gov. Code § 65759*.

(2) The court for good cause shown may grant not more than two extensions of time, not to exceed a total of 240 days, in order to meet the requirements imposed by *Gov. Code § 65754*.

Even though CEQA does not apply, the local agency will prepare an initial study, within the time limitations specified in *Gov. Code § 65754*, to determine the environmental effects of the proposed action necessary to comply with the court order. If as a result of the initial study, the local agency determines that the action may have a significant effect on the environment, the local agency will prepare, with the time limitations specified in *Gov. Code § 65754*, an environmental assessment. The local agency must include notice of the preparation of the environmental assessment in all notices provided for the amendments to the general plan proposed to comply with the court order. The environmental assessment will be deemed part of the general plan and will only be reviewable as provided in *Gov. Code §§ 65750-65763* [*Gov. Code § 65759(a)(1)*].

The local agency may comply with the provisions of CEQA in any action necessary to bring its general plan or relevant mandatory elements thereof into compliance with any court order or judgment under *Gov. Code § 65759* so long as it does so within the time limitations specified in *Gov. Code § 65754* [*Gov. Code § 65759(a)(4)*].

[9] Application

Nothing in *Gov. Code §§ 65750-65763* prohibits a court from invalidating any development permit based on failure to comply with the Subdivision Map Act (*Gov. Code § 66410 et seq.*), the California Environmental Quality Act (*Pub. Res. Code § 21000 et seq.*), the planning and zoning law (*Gov. Code § 65000 et seq.*), or other applicable laws [*Gov. Code § 65762*].

The procedures and remedies set forth in *Gov. Code §§ 65750-65763* will not be construed to affect the substantive standards of court review of a general plan or of other local government land use decisions. Its remedies are interim measures that have no application after a general plan has been revised to substantially comply with state law [*Gov. Code § 65762*]. Actions to enforce ordinance compliance with a general plan are governed by *Gov. Code § 65860*. For discussion of *Gov. Code § 65860*, see *§ 579.221[1]*.

The provisions of *Gov. Code §§ 65750-65763* apply to all actions, proceedings, and causes of action set forth therein, whether commenced or alleged by the filing of a petition, complaint, cross-complaint, complaint in intervention, or otherwise. Nothing in *Gov. Code §§ 65750-65763* will be construed to create any cause of action in or to confer standing to sue on any person, entity, public officer, or state or other public agency [*Gov. Code § 65763*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusEnvironmental LawZoning & Land UseComprehensive & General PlansEnvironmental LawZoning & Land UseJudicial ReviewReal Property LawZoning & Land UseComprehensive PlansReal Property LawZoning & Land UseState & Regional Planning

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[Reserved]

§§ 579.224[Reserved]

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§ 579.240 Inspections Require Consent

Even though routine inspections of private property by local authorities in furtherance of public safety programs or zoning ordinances are a less hostile intrusion than the typical police search for the fruits and instrumentalities of crime, the freedom from unreasonable searches afforded by the *Fourth* and *Fourteenth Amendments* is applicable [*Camara v. Municipal Court (1967) 387 U.S. 523, 527-534, 87 S. Ct. 1727, 18 L. Ed. 2d 930]* . Thus, if a landowner refuses to consent voluntarily to an inspection of his or her premises as called for by a local zoning ordinance, a warrantless search is not permitted. The provisions of *Code Civ. Proc. §§ 1822.50-1822.60,* governing the issuance of warrants for routine administrative inspections, must be adhered to by public officials [*see Currier v. City of Pasadena (1975) 48 Cal. App. 3d 810, 814-817, 121 Cal. Rptr. 913* ; *County of Contra Costa v. Humore, Inc. (1996) 45 Cal. App. 4th 1335, 53 Cal. Rptr. 2d 647]* . For further discussion of administrative searches, see Ch. 471, *Investigations by Public Agencies* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental RightsSearch & SeizureScope of ProtectionCriminal Law & ProcedureSearch & SeizureWarrantless SearchesGeneral OverviewEnvironmental LawZoning & Land UseConstitutional LimitsReal Property LawZoning & Land UseConstitutional Limits

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§ 579.241 Enforcement by Government Entity

[1] Civil or Criminal

Many zoning ordinances provide that violation of the ordinance is a crime, thereby making criminal remedies available to the government entity in its enforcement efforts. Civil enforcement of zoning ordinances, in the form of injunctive relief, has in the past been justified by reference to nuisance law. However, recent cases indicate that a violation of a valid zoning ordinance itself constitutes a sufficient showing to permit civil enforcement [*see City of Santa Clara v. Paris (1977) 76 Cal. App. 3d 338, 341-342, 142 Cal. Rptr. 818]* . Of course, if the violation is also a public nuisance, the government entity may bring an action in nuisance. For discussion relating to public nuisance, see Ch. 391, *Nuisance* .

Enforcement of city zoning ordinances is the duty of administrative officers and the city attorney [*Taliaferro v. Wampler (1954) 127 Cal. App.2d 306, 309, 273 P.2d 829* ; for discussion of enforcement by private citizens, see *§ 579.243*].

[2] Estoppel From Enforcement

Estoppel against government enforcement of zoning ordinances is rare and only occurs when (1) the city or county acted affirmatively, (2) the party seeking to assert the estoppel acted in reliance thereon, and (3) the city or county then attempted to alter its position to the detriment of that innocent party [*see City etc. of San Francisco v. Burton (1962) 201 Cal. App. 2d 749, 756, 20 Cal. Rptr. 378]* .

Mere inaction in enforcement or permitting some persons to violate a zoning regulation does not preclude its enforcement against others. Unless the lax enforcement of an ordinance is the result of an intentional or arbitrary scheme to discriminate, it does not violate any constitutional right [*City etc. of San Francisco v. Burton (1962) 201 Cal. App. 2d 749, 755, 20 Cal. Rptr. 378]* . It is similarly stated that no vested right to violate a zoning ordinance may be acquired by continued violations [*see Acker v. Baldwin (1941) 18 Cal. 2d 341, 346, 115 P.2d 455* ; *Donovan v.*

City of Santa Monica (1948) 88 Cal. App. 2d 386, 396, 199 P.2d 51] .

[3] Notice of Enforcement Action

[a] Recordation

Any agency that institutes a judicial action or proceeding to enforce zoning regulations may file a notice of the pendency of that action or proceeding in the county recorder's office of the county where the affected property is situated. The notice will be filed at the time of the commencement of the action or proceeding, and, on its recordation, that notice will have the same effect as a notice recorded pursuant to *Code Civ. Proc. § 405.20* (filing lis pendens or notice of action with recorder). The notice will be recorded and indexed in the index of grantors and any other relevant index [*Gov. Code § 65908(a)*; for discussion of *Code Civ. Proc. § 405 et seq.*, see Ch. 348, *Lis Pendens*].

[b] Vacation

Any notice filed pursuant to *Gov. Code § 65908(a)* may, on motion by a party to the action or proceeding, be vacated on an appropriate showing of need therefor by an order of a judge of the court where the action or proceeding is pending. A certified copy of that order may be recorded in the same office of the recorder where the notice of pendency of action is recorded. On that recordation the notice of pendency of the action or proceeding will not serve as constructive notice of any of the matters contained therein nor create any duty of inquiry in any person [*Gov. Code § 65908(b)*].

The order of vacation will not be appealable, but the party aggrieved by that order may, within 20 days after service of written notice of the order, or within such additional time up to 20 days as the court may, within the original 20 days allow, but in no event later than 60 days after entry of the order, petition the proper reviewing court to review that order by writ of mandate. No order of vacation will be effective, nor will it be recorded in the office of any county recorder, until the time within which a petition for writ of mandate may be filed pursuant to *Gov. Code § 65908(b)* has expired [*Gov. Code § 65908(b)*].

[4] Statute of Limitations

Code Civ. Proc. § 343, which provides that an action must be commenced within four years after the cause of action accrues, is applicable to an action by a city or county in enforcing a zoning ordinance. If the zoning ordinance provides that the violator is deemed guilty of a separate offense for each day during which any portion of the violation is committed or permitted, there is a continuing violation and the statute runs from the last such violation [*City of Fontana v. Atkinson (1963) 212 Cal. App. 2d 499, 508-509, 28 Cal. Rptr. 25* (city seeking to enjoin unlawful extension or enlargement of nonconforming use and unlawful rebuilding was not barred due to continuing violation)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawZoning & Land UseOrdinances

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§ 579.242 Injunctions

[1] Availability Generally

A zoning ordinance that does not provide that a violation of its provisions is a crime and provide criminal sanctions is enforceable by injunction [*City of Stockton v. Frisbie & Latta (1928) 93 Cal. App. 277, 285, 270 P. 270]* . However, even if the zoning ordinance prescribes a criminal penalty for violations, an injunction is available if that criminal penalty seems inadequate [*Sapiro v. Frisbie (1928) 93 Cal. App. 299, 303-305, 270 P. 280]* .

The right of a city to bring an action for injunctive relief depends only on a violation of the zoning ordinance [*City of Santa Clara v. Paris (1977) 76 Cal. App. 3d 338, 342, 142 Cal. Rptr. 818* (failure to comply with variance condition)]. That violation may be enjoined without any necessity of showing that the violation constitutes a nuisance [*City etc. of San Francisco v. Burton (1962) 201 Cal. App. 2d 749, 756-757, 20 Cal. Rptr. 378]* . Indeed, a city has the right to injunctive relief to enforce a zoning ordinance, even when the injunction requires the landowner to remove alterations made to a building in violation of the ordinance [*City of San Mateo v. Hardy (1944) 64 Cal. App. 2d 794, 796-797, 149 P.2d 307]* .

[2] Preliminary Injunctions

If a zoning ordinance that a governmental entity is seeking to enforce by injunction specifically provides for injunctive relief, when the entityestablishes that it is reasonably probable it will prevail on the merits, a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant. If the defendant shows that he or she would suffer grave or irreparable harm from the issuance of the preliminary injunction, the court must then examine the relative actual harms to the parties. Once the defendant has made such a showing, an injunction should issue only if--after consideration of both the degree of uncertainty of the outcome on the merits, and the consequences to each of the parties of granting or denying interim relief--the trial court concludes that an injunction is proper [*IT Corp. v. County of Imperial (1983) 35 Cal. 3d 63, 72, 196 Cal. Rptr. 715, 672 P.2d 121]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewCivil ProcedureRemediesInjunctionsPreliminary & Temporary InjunctionsCriminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewReal Property LawZoning & Land UseOrdinances

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51-579 California Forms of Pleading and Practice--Annotated § 579.243

§ 579.243 Actions by Private Persons

[1] Injunctions

An owner of private property may bring an action to enjoin violations of a zoning ordinance that effect his or her property, when that property is in the same vicinity as the property on which the violation is occurring and that owner suffers a different type of injury or an injury of greater degree than that suffered by the public generally. For example, although the operation of a cafe or grocery store does not have a deleterious effect on the public generally, it may have such an effect on surrounding property owners when constructed in a residential zone [*Hopkins v. MacCulloch (1939) 35 Cal. App. 2d 442, 453-454, 95 P.2d 950* ; *see Taliaferro v. Wampler (1954) 127 Cal. App. 2d 306, 310, 273 P.2d 829]* . Private actions are not restricted to individuals, and a citizen's committee may have standing to sue when its members are property owners residing in close proximity to the parcel at issue. Standing has been found when each member of the committee had an interest in the enforcement of the ordinance peculiar to that member and each would have suffered special damage distinguishable from that suffered by the public at large as a result of the violation [*Simons v. City of Los Angeles (1979) 100 Cal. App. 3d 496, 501, 161 Cal. Rptr. 67]* .

Code Civ. Proc. § 731a places a limit on injunctive relief available to the private sector in certain zones. It provides that when manufacturing, commercial, or airport uses are expressly permitted within a zone, no person, firm, or corporation will be restrained by the injunctive process from the reasonable and necessary operation in that zone of any use expressly permitted, nor will that use be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation [*Code Civ. Proc. § 731a*; for further discussion, see Ch. 391, *Nuisance* [.

[2] Damages

The violation of the provisions of a zoning ordinance prohibiting any unauthorized nonconforming use of premises constitutes an actionable wrong against each member of the community for whose particular welfare that ordinance was enacted, remediable at the suit of the persons specially injured thereby [*McIvor v. Mercer-Fraser Co. (1946) 76 Cal. App. 2d 247, 253-254, 172 P.2d 758]* .

[3] Mandate to Compel Action by Administrative Officer

Even though other remedies may exist, mandamus lies to compel an administrative officer to enforce an ordinance that imposes a mandatory duty on him or her to do so [*Blankenship v. Michalski (1957) 155 Cal. App. 2d 672, 674, 318 P.2d 727]* . For example, a writ of mandate to compel an administrative officer to issue an arrest warrant for a violation of a zoning ordinance was properly granted when that officer's duty was mandatory [*see Wilson v. Edgar (1923) 64 Cal. App. 654, 655-657, 222 P. 623]* .

Mandamus cannot be employed to control the exercise of discretion by an administrative officer. For example, mandamus to compel a city attorney to commence proceedings to abate operation of a pharmacy alleged to be in violation of the zoning ordinance was properly denied when that ordinance permitted the attorney some discretion to determine whether a violation had occurred, and there was no abuse of that discretion in determining there was no violation [*Blankenship v. Michalski (1957) 155 Cal. App. 2d 672, 674-676, 318 P.2d 727]* . In response to an appropriate application, the court may compel administrative action, but it may not substitute its discretion for the discretion properly vested in the administrative officer [*Lindell Co. v. Board of Permit Appeals (1943) 23 Cal. 2d 303, 315, 144 P.2d 4]* .

[4] Period of Limitation

An action by a private party for injury to real property resulting from a violation of a zoning ordinance has a three year statute of limitation [*see Code Civ. Proc. § 338(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusCivil ProcedureJusticiabilityStandingGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawZoning & Land UseNonconforming UsesReal Property LawZoning & Land UseOrdinances

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§ 579.244 Defenses

[1] Authorized Use

There are a variety of defenses available to the charge of violation of a zoning ordinance, although not all of them are applicable in every case. An obvious defense is that the use is specifically authorized, as is the case when the questioned use is incidental to a permissive use, especially when that use does not interfere with the general character and aesthetic harmonies of the district [*City of Beverly Hills v. Brady (1950) 34 Cal. 2d 854, 857, 215 P.2d 460]* .

[2] Invalid Ordinance

Another defense is that the ordinance is invalid. A zoning ordinance may be unconstitutional if it amounts to an uncompensated destruction of aprivate property right [*see Agins v. Tiburon (1979) 24 Cal. 3d 266, 273, 157 Cal. Rptr. 372, 598 P.2d 25 , aff'd, 447 U.S. 255, 259, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)]* . A zoning ordinance may also be invalid because it is inconsistent with the general plan [*see Gov. Code § 65860(a)*; for discussion of actions under *Gov. Code § 65860, see § 579.221*]. An ordinance that is inconsistent with the general plan is invalid at the time it is enacted [*Sierra Club v. Board of Supervisors (1981) 126 Cal. App. 3d 698, 704, 179 Cal. Rptr. 261]* . Another ground of invalidity is vagueness. A zoning ordinance is invalid for vagueness or uncertainty when no one can know what use is or is not permitted and no procedure is prescribed whereby it may be ascertained [*People v. Binzley (1956) 146 Cal. App. 2d Supp. 889, 890-891 , 303 P.2d 903]* .

A zoning ordinance may also be invalid if it makes an improper delegation of authority. When restrictions imposed on the use of property are unnecessary, unreasonable, and oppressive, and absolute legislative discretion is delegated to the planning commission, that ordinance will be unconstitutional [*People v. Perez (1963) 29 Cal. Rptr. 781]* .

[3] Unconstitutional Application of Ordinance

Finally, one charged with violation of a zoning ordinance may assert as a defense improper application or construction

of that ordinance by the enforcing agent. An alleged violation of an ordinance was successfully defended when it was shown that the proposed interpretation would lead to uncertain results through defective notice, discriminatory enforcement, and ex post facto punishment [*see In re Scarpitti (1981) 124 Cal. App. 3d 434, 439-441, 177 Cal. Rptr. 387* (landowner parking large commercial dump truck used in his livelihood at his residence did not violate ordinance in rural residential zone)]. The construction of zoning ordinances is ruled by the same rules as general statutes [*City of Norwalk v. Auction City, Inc. (1960) 186 Cal. App. 2d 287, 290, 8 Cal. Rptr. 781* ; for discussion of the rules of statutory interpretation, *see* Ch. 531, *Statutes and Ordinances* [.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawBill of RightsFundamental FreedomsJudicial & Legislative RestraintsOverbreadth & VaguenessConstitutional LawBill of RightsFundamental RightsEminent Domain & TakingsEnvironmental LawZoning & Land UseConstitutional LimitsReal Property LawZoning & Land UseConstitutional LimitsReal Property LawZoning & Land UseOrdinances

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[Reserved]

§§ 579.245[Reserved]

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§ 579.260 Governing Law

The Subdivision Map Act is contained in *Gov. Code § 66410 et seq.* In addition, the subdivision of property may be governed by local ordinances adopted pursuant to the Subdivision Map Act. The Subdivided Lands Act is set forth in *Bus. & Prof. Code § 11000 et seq.* The Interstate Land Sales Full Disclosure Act is set forth in *15 U.S.C. § 1701 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleInterstate Land Sales Full Disclosure ActReal Property LawSubdivisionsLocal Regulation

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§ 579.261 Subdivision Map Act

The Subdivision Map Act (the Act) establishes general statewide criteria for land development planning and delegates authority to cities and counties to regulate the details of subdivisions [*Benny v. City of Alameda (1980) 105 Cal. App. 3d 1006, 1010-1011, 164 Cal. Rptr. 776]* . The Act and the ordinances passed in conformity with it have several purposes, such as: (1) to regulate and control the design and improvement of subdivisions, with proper consideration of their relation to adjoining areas; (2) to require the subdivider to install streets and drains; (3) to prevent fraud and exploitation; and (4) to protect both the public and the purchaser [*Tiburon v. Northwestern P. R. Co. (1970) 4 Cal. App. 3d 160, 175, 84 Cal. Rptr. 469* ; *Pratt v. Adams (1964) 229 Cal. App. 2d 602, 605-606, 40 Cal. Rptr. 505]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation

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§ 579.262 Definitions

[1] Subdivider

"Subdivider" means a person, firm, corporation, partnership, or association who proposes to divide, divides, or causes to be divided real property into a subdivision for himself, herself, or itself or for others. However, employees and consultants of those persons or entities, acting in that capacity, are not "subdividers" [*Gov. Code § 66423*].

[2] Subdivision

[a] Generally

"Subdivision" means the division, by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit or as contiguous units, for the purpose of sale, lease, or financing, whether immediate or future. Property will be considered as contiguous units, even if it is separated by roads, streets, utility easement, or railroad rights-of-way. "Subdivision" includes a condominium project as defined in *Civ. Code § 1351(f)*, a community apartment project as defined in *Bus. & Prof. Code § 11004*, or the conversion of five or more existing dwelling units to a stock cooperative as defined in *Bus. & Prof. Code § 11003.2* [*Gov. Code § 66424*].

An agreement that a seller could use a portion of a lot until the seller's adjacent lot was sold or the seller died did not create a subdivision because it was not a division for purposes of sale or lease of property [*Robinson v. City of Alameda (1987) 194 Cal. App. 3d 1286, 1288-1289, 239 Cal. Rptr. 926]* .

[b] Subsequent Subdivision

Nothing in *Gov. Code § 66424* prevents a purchaser of a unit of land created under the provisions of the Act or a local ordinance, fromsubdividing the land one or more times, pursuant to the provisions of the Act prior to the time that an equalized county assessment roll has been completed reflecting the creation of the unit proposed to be subdivided [*Gov. Code § 66424.1*].

Nothing in *Gov. Code §§ 66410-66424.6* prevents the same subdivider of a unit of land created under the provisions of the Act or a local ordinance, from making consecutive subdivisions of the same parcel or any portion of it. Further, local agencies must not prohibit consecutive subdivisions of the same parcel or portion thereof either by the same subdivider or a subsequent purchaser because the parcel was previously subdivided. However, the local agency may impose appropriate conditions or requirements on the consecutive subdivisions [*Gov. Code § 66424.1*].

[c] Environmental Subdivision

An "environmental subdivision" is a subdivision of land for biotic and wildlife purposes that meets specified conditions. Among other things, the parcel must consist of at least 20 acres, and be encumbered by an easement to ensure compliance with the goal of maintaining and preserving the biotic or wildlife character of the land [*Gov. Code § 66418.2*].

The concept of environmental subdivisions represents an effort to provide a market-based solution for developers and landowners who either need to satisfy local government-imposed mitigation conditions on development of environmentally sensitive lands, or who own land that cannot be developed due to environmental designation. For example, as a condition to approval of a proposed subdivision, a local government may require a subdivider to permanently protect an acre of wildlife land for every acre of habitat that the proposed development would convert to housing. By creating an environmental subdivision at another location, a developer can satisfy the mitigation condition and still proceed with its development. Environmental subdivisions are also intended to provide a landowner who cannot develop its property because it has been designated wildlife habitat with the possibility of an economic return on its investment by designating it an environmental subdivision and transferring it to a developer looking to satisfy mitigation conditions off-site.

[3] Local Agency

"Local agency" means a city, county, or city and county [*Gov. Code § 66420*].

[4] Local Ordinance

"Local ordinance" refers to a local ordinance regulating the design and improvement of subdivisions, enacted by the legislative body of any local agency under the provisions of the Act or any prior statute, regulating the design and improvements of subdivisions, insofar as the provisions of the ordinance are consistent with and not in conflict with the provisions of the Subdivision Map Act [*Gov. Code § 66421*].

[5] Tentative Map

"Tentative map" refers to a map made for the purpose of showing the design and improvement of a proposed subdivision and the existing conditions in and around it and need not be based on an accurate or detailed final survey of the property [*Gov. Code § 66424.5(a)*]. A "vesting tentative map" refers to a map that meets the requirements of *Gov. Code §§ 66424.5(a)* (tentative map) and 66452 (filing map) [*Gov. Code § 66424.5(b)*; *see § 579.267* (notice and filing of tentative map)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 579.263 Projects Outside Scope of Act

[1] Generally

The Subdivision Map Act does not apply to any of the following [*Gov. Code § 66412*]:

(1) The financing or leasing of apartments, offices, stores or similar space within apartment buildings, industrial buildings, commercial buildings, mobilehome parks, or trailer parks.

(2) Mineral, oil, or gas leases.

(3) Land dedicated for cemetery purposes under the Health and Safety Code.

(4) A lot line adjustment between four or fewer existing adjoining parcels, when the land taken from one parcel is added to an adjoining parcel, and when a greater number of parcels than originally existed is not thereby created, if the lot line adjustment is approved by the local agency, or advisory agency [*see, e.g., San Dieguito Partnership v. City of San Diego (1992) 7 Cal. App. 4th 748, 755-759, 9 Cal. Rptr. 2d 440* (lot line adjustment exception not limited to minor adjustments or to only two adjacent parcels; but applicable to adjustments to nine adjacent lots when no additional lots were created)].

(5) Boundary line or exchange agreements to which the State Lands Commission or a local agency holding a trust grant of tide and submerged lands is a party.

(6) Any separate assessment under *Rev. & Tax. Code § 2188.7* (tax on improvements).

(7) The conversion of a community apartment project [*see Bus. & Prof. Code § 11004*] to a condominium [*see Civ. Code § 783*], when specified statutory requirements are met.

(8) Unless a parcel or final map was approved by the legislative body of a local agency, the conversion of a stock

cooperative as defined in *Bus.& Prof. Code § 11003.2* to a condominium as defined in *Civ. Code § 783*, when specified statutory requirements are met.

(9) The leasing of, or the granting of an easement to, a parcel of land, or any portion thereof, in conjunction with the financing, erection, and sale or lease of a windpowered electrical generation device on the land, if the project is subject to discretionary action by the advisory agency or legislative body.

(10) The leasing or licensing of a portion of a parcel, or the granting of an easement, use permit, or similar right on a portion of a parcel, to a telephone corporation exclusively for the placement and operation of cellular radio transmission facilities, if the project is subject to discretionary action by the local advisory agency or legislative body.

(11) Leases of agricultural land for agricultural purposes, which are defined as the cultivation of food or fiber, or the grazing or pasturing of livestock.

(12) The leasing of, or granting an easement to, a parcel of land in conjunction with the financing, erection, and sale or lease of a solar electrical generation device on the land; provided the project is otherwise subject either to review under local agency ordinances regulating design and improvement or, to other discretionary action by the advisory agency or legislative body.

(13) The leasing of, or granting an easement to, a parcel of land in conjunction with a biogas project that uses agricultural waste or byproducts from the land where the project is located and reduces overall emissions of greenhouse gases from agricultural operations on the land; provided the project is otherwise subject either to review under local agency ordinances regulating design and improvement or, to discretionary action by the advisory agency or legislative body.

The Act is also inapplicable to the financing or leasing of any parcel of land, or any portion thereof, in conjunction with the construction of commercial or industrial buildings on a single parcel, unless the project is not subject to review under other local agency ordinances regulating design and improvement. Nor is it applicable to the financing or leasing of existing separate commercial or industrial buildings on a single parcel [*Gov. Code § 66412.1*].

The Act does not apply to the creation of second units pursuant to *Gov. Code § 65852.2*. However, it does apply to the sale or transfer of those units [*Gov. Code § 66412.2*]. Moreover, when so provided by local ordinance, the Act does not apply to subdivisions of four parcels or less for construction of removable commercial buildings having a floor area of less than 100 square feet [*Gov. Code § 66412.5*].

[2] Regulation by Local Agency

Each local agency may, by ordinance, regulate and control subdivisions not within the Act, provided that those regulations are not more restrictive than the regulations for those subdivisions within the Act, and provided that those regulations are not applied to short-term leases of a portion of the operating right-of-way of a railroad corporation unless public policy necessitates the application of those regulations to those short-term leases [*see Gov. Code § 66411*].

Notwithstanding the fact that a local ordinance may permit the parcel map requirement to be waived in favor of requiring a tentative map [*see Gov. Code § 66428*, discussed in *§ 579.265[4]*], any improvements that are required for a division of land that is not a subdivision of five or more lots must be limited to dedication of rights-of-way or easements, and construction of reasonable off-site and on-site improvements for the parcels being created. Construction requirements for these off-site and on-site improvements must be noticed by a certificate that is (1) on the parcel map itself, (2) in the instrument that evidences the waiver of a parcel map, or (3) in a separate instrument. The certificate must be recorded on, concurrently with, or before the parcel map or the instrument waiving the parcel map is filed for record [*Gov. Code § 66411.1(a)*].

Unless required by the public health and safety or as a prerequisite to the orderly development of the surrounding area, the subdivider cannot be required to fulfill any requirements to construct off-site or on-site improvements until either (1) the local agency has issued a permit or other grant of approval for development of the parcel, or (2) the time construction of the improvements is required pursuant to any authorized agreement between the subdivider and the local agency. If there is no agreement and the public agency finds that fulfillment of the construction requirements is necessary for either the public health and safety or as a prerequisite to the orderly development of the surrounding area, the subdivider may be required to fulfill the requirements within a reasonable time after the parcel map is approved or a waiver granted, but before a permit or other approval for the development is issued [*Gov. Code § 66411.1(b)*]. Although the local agency cannot require that the improvements be finished before approving the parcel map, it can require the developer to provide security to insure that the improvements will be completed [*see 62 Ops. Cal. Atty. Gen. 175, 176-179 (1979)]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 579.264 Local Control

Regulation and control of the design and improvement of subdivisions are vested in the legislative bodies of local agencies [*Gov. Code § 66411*]. They impliedly have the power to adopt supplementary regulations pursuant to the Act, when that power is not expressly granted by the Act, provided the regulation is reasonably related to the purposes of the Act [*Soderling v. City of Santa Monica (1983) 142 Cal. App. 3d 501, 506, 191 Cal. Rptr. 140]* . However, local ordinances that are inconsistent with the language and apparent intent of the Act are invalid [*Benny v. City of Alameda (1980) 105 Cal. App. 3d 1006, 1011, 164 Cal. Rptr. 776]* .

In performing its functions under the Act, a local government must follow the Act's procedures, the purpose of which is to preserve the affected parties' procedural safeguards. A city failed to fulfill its obligations under the Act when it refused to accept and process a developer's tentative map application pending the receipt of a determination from the Department of Health Services as to whether or not the parcel to be developed was a hazardous waste property. In holding that the city must accept and consider the developer's application for tentative map, the court of appeal noted that nothing in the statutes governing local land use regulationexcuses a local government from following the statutorily mandated procedures when a hazardouswaste issue is suspected. The court further noted that the Planning and Zoning Law in general, and the Subdivision Map Act specifically, provide multiple means and opportunities to ensure the public health and safety as part of the procedural process [*see* *Beck Development Co., Inc. v. Southern Pacific Transportation Co. (1996) 44 Cal. App. 4th 1160, 1200-1203, 52 Cal. Rptr. 2d 518]* .

Each local agency must, by ordinance, regulate and control subdivisions for which the Act requires a tentative and final or parcel map. In the development, adoption, revision, and application of that ordinance, the local agency must comply with the provisions of *Gov. Code § 65913.2* (guidelines governing exercise of authority) in developing and applying the ordinance. The ordinance must specifically provide for proper grading and erosion control, including the prevention of sedimentation or damage to offsite property [*Gov. Code § 66411*]. The agency must also regulate and control the initial design and improvement of common interest subdivisions as defined in *Civ. Code § 1351* [*Gov. Code § 66411*].

In carrying out the provisions of the Act, each local agency must consider the effect of ordinances and actions adopted pursuant to the Act on the housing needs of that region and balance those needs against the public service needs of its

residents and available fiscal and environmental resources [*Gov. Code § 66412.3*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsAdministrative BoardsReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation

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§ 579.265 Map Requirement

[1] Governing Statutes

The necessity for tentative, final, and parcel maps is governed by *Gov. Code §§ 66425-66431* [*Gov. Code § 66425*].

[2] Tentative and Final Map

A tentative and final map is required for all subdivisions creating five or more parcels, five or more condominiums as defined in *Civ. Code § 783*, a community apartment project containing five or more parcels, or for the conversion of a dwelling to a stock cooperative containing five or more dwelling units, except when [*Gov. Code § 66426*]:

- The land before division contains less than five acres, each parcel created by the division abuts on a maintained public street or highway and no dedications or improvements are required by the legislative body;

- Each parcel created by the division has a gross area of 20 acres or more and has an approved access to a maintained public street or highway;

- The land consists of a parcel or parcels of land that has approved access to a public street or highway that comprises part of a tract ofland zoned for industrial or commercial development, and that has the approval of the governing body concerning street alignments and widths;

- Each parcel created by the division has a gross area of not less than 40 acres or is not less than a quarter or a quarter section; or

- The land is being subdivided solely for the creation of an environmental subdivision pursuant to *Gov. Code § 66418.2* [*see § 579.262[2][c]*].

A local ordinance may require a tentative map when a parcel map is required by *Gov. Code §§ 66425-66431*. If the local

ordinance does not require a tentative map when a parcel map is required by the Act, the subdivider has the option of submitting a tentative map, or if the subdivider desires to obtain the rights conferred by *Gov. Code §§ 66498.1-66498.9* (development rights), a vesting tentative map [*Gov. Code § 66428*]. For further discussion, see *§ 579.265[3]*.

[3] Vesting Tentative Map

A subdivider is permitted to file a vesting tentative map whenever the Subdivision Map Act requires a tentative map to be filed [*Gov. Code § 66498.1(a)*]. This confers a vested right to proceed with development in substantial compliance with the ordinances, policies, and standards in effect at the time the application is deemed complete or approved [*Gov. Code § 66498.1(b)*]. This procedure is intended to provide greater statutory protection to subdividers than was afforded under the common law vested rights doctrine [*Bright Development v. City of Tracy (1993) 20 Cal. App. 4th 783, 792, 24 Cal. Rptr. 2d 618]* . Because a subdivider will be bound by the local ordinances, policies, and standards in effect at the time the map application is deemed complete, due process requires that the subdivider have actual or constructive notice of those ordinances, policies, and standards, including any development fees [*see Kaufman & Broad Central Valley, Inc. v. City of Modesto (1994) 25 Cal. App. 4th 1577, 1588-1589, 30 Cal. Rptr. 2d 904]* . It may be possible, however, for a local agency to provide in its ordinances, policies, and standards for increases in fees that may take place after a vesting tentative map is deemed complete. But provision for an increase in fees must provide reasonable notice of the nature of any fee increase and the manner in which it will be calculated. A general fee escalation provision in the original ordinances, policies, and standards, by itself, is not sufficient notice [*Kaufman & Broad Central Valley, Inc. v. City of Modesto (1994) 25 Cal. App. 4th 1577, 1589, 30 Cal. Rptr. 2d 904]* .

[4] Parcel Map

[a] When Required

A parcel map is required for the five types of subdivisions described in *Gov. Code § 66426(a)-(e)* as exceptions from the requirement for tentativeand final maps [*Gov. Code § 66426(f)*; *see § 579.265[2]*]. A parcel map is also required for subdivisions for which a final or parcel map is not otherwise required by *Gov. Code §§ 66425-66431*, unless the preparation of that parcel map is waived by local ordinance [*Gov. Code § 66428*].

A parcel map is not required for either of the following [*Gov. Code § 66428(a)*]:

- Subdivisions of a portion of the operating right-of-way of a railroad corporation (defined in *Pub. Util. Code § 230*) that are created by short-term leases; or

- Land conveyed to or from a governmental agency, public entity, or public utility, or for land conveyed to a subsidiary of a public utility for conveyanceto that public utility for rights-of-way, unless a showing is made in individual cases, on substantial evidence, that public policy necessitates a parcel map.

[b] Waiver

A local agency must, by ordinance, provide a procedure for waiving the requirement for a parcel map imposed by the Act, including the requirements for a parcel map imposed by *Gov. Code § 66426*. The procedure may include provisions for waiving the requirement for a tentative and final map for the construction of a condominium project on a single parcel. The ordinance must require a finding by the legislative body or advisory agency that the proposed division of land complies with those requirements that have been established with regard to the following: area, improvement and design, floodwater drainage control, appropriate improved public roads, sanitary disposal facilities, water supply availability, environmental protection, and other requirements of the Act or local ordinance. In any case, when the requirement for a parcel map is waived by local ordinance pursuant to *Gov. Code § 66428*, a tentative map may be required by local ordinance [*Gov. Code § 66428*]. A local agency must act on an application for parcel map

waiver within 60 days of the time the application is deemed complete under *Gov. Code § 65943* [*Gov. Code § 66451.7*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation

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§ 579.266 Map Procedures

The procedures set forth in *Gov. Code §§ 66451-66472.1* govern the processing, approval, conditional approval, disapproval, filing, and mediation of tentative, final, and parcel maps. Local ordinances may modify those procedures to the extent authorized by *Gov. Code §§ 66451-66472.1* [*Gov. Code § 66451*]. The local agency may establish reasonable fees for required or authorized procedures [*Gov. Code §§ 66451.2, 66451.3(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState RegulationReal Property LawZoning & Land UseAdministrative Procedure

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§ 579.267 Tentative Map

[1] Notice of Filing

When a subdivision is to be created from the conversion of residential real property into a condominium project, community apartment project, or stock cooperative project, the subdividing owner must give notice of the intention to convert to each tenant at least 60 days before filing the tentative map [*Gov. Code §§ 66427.1(a)(2)(A), 66452.18*; for discussion and forms relating to condominiums, *see* Ch. 124, *Condominiums and Other Common Interest Developments*]. Additionally, at least 60 days before filing the tentative map, the subdivider must give notice of that filing to each person applying for rental of a unit of the subject property immediately prior to the acceptance of any rent or deposit from the prospective tenant by the subdivider [*Gov. Code §§ 66427.1(a)(2)(A), 66452.17(a)*]. Failure to provide the requisite notice will result in the subdivider paying specified monies to the formerly prospective tenant [*Gov. Code § 66452.17(c)*].

[2] Filing

A tentative map must be filed with the clerk of the advisory agency or, if there is no advisory agency, with the clerk of the legislative body, or with any officer or employee of the local agency that may be designated by local ordinance [*Gov. Code § 66452(a)*].

[3] Staff Recommendation

Any report or recommendation on a tentative map by the staff of the local agency to the advisory agency or legislative body must be in writing and a copy served on the subdivider and on each tenant of the subject property, in the case of a proposed conversion of residential real property to a condominium project, community apartment project, or stock cooperative project, at least three days prior to any hearing or action on that map by the advisory agency or legislative body [*Gov. Code § 66452.3*]. The subdivider may collect fees for expenses incurred [*Gov. Code §§ 66451.2, 66452.3*].

[4] Procedure When Advisory Agency Exists--Decision or Report

If an advisory agency exists, it may be authorized either to make an initial decision on the map or merely to draft a report on the map for the legislative body [*see Gov. Code § 66452.1(a), (b)*].

[5] Decision

If the advisory agency is authorized by local ordinance to approve, conditionally approve, or disapprove the tentative map, it must take action within 50 days after its filing and report its action to the subdivider [*Gov.Code § 66452.1(b)*]. The advisory agency must comply with the time periods of *Pub. Res. Code § 21151.5* (environmental impact report), within the time limits of *Gov. Code § 66452.1*. However, if an environmental impact report is prepared, the 50-day time period is not applicable, and the advisory agency must render its decision within 45 days after certification of the environmental impact report [*Gov. Code § 66452.1(c)*; for general discussion of environmental impact report requirements, *see Ch. 418, Pollution and Environmental Matters, §§ 418.34 -418.36*].

If no action is taken on a tentative map by the advisory agency, the tentative map is deemed approved as filed, insofar as it complies with other applicable requirements of the Act and local ordinance [*Gov. Code § 66452.4(a)*]. A map cannot be deemed approved if it does not comply with all applicable requirements of the Subdivision Map Act and local ordinance [*Pongputmong v. City of Santa Monica (1993) 15 Cal. App. 4th 99, 104-105, 18 Cal. Rptr. 2d 550* (map not deemed approved when tenant approvals required by local ordinance were obtained through coercion and misrepresentation)]. Once a tentative map is deemed approved, the subdivider is entitled to request and receive a written certification of approval [*Gov. Code § 66452.4(b)*].

An advisory agency that is faced with expiration of the prescribed time limits for it to act on an application for a tentative map may not disapprove the map solely because the time limit is about to expire; there must be additional reasons for disapproval [*Gov. Code § 66451.4*].

Gov. Code § 66452.4 is silent on the effect of the agency's failure to act when it has no final authority to approve, conditionally approve, or disapprove the tentative map.It appears that failure of the advisory agency to act within 50 days triggers the 30-day period within which the legislative body must act, and the failure of that body to act within 30 days would be deemed an approval of the map [*Benny v. City of Alameda (1980) 105 Cal. App. 3d 1006, 1012-1013, 164 Cal. Rptr. 776* ; *see Gov. Code § 66452.2*, discussed in *§ 579.267[6], [7]*].

[6] Report

If the advisory agency is not authorized by local ordinance to approve, conditionally approve, or disapprove the tentative map, it must make its written report of the tentative map to the legislative body within 50 days after its filing [*Gov. Code § 66452.1(a)*]. The advisory agency must comply with the time periods of *Pub. Res. Code § 21151.5* (environmental impact report), within the time limits of *Gov. Code § 66452.1*. The 50-day time period then begins after the environmental impact report is certified, a negative declaration is adopted, or it is determined that the project is exempt [*Gov. Code § 66452.1(c)*].

At the next regular meeting of the legislative body following the filing of the advisory agency's report with it, that body must set a date for consideration of the tentative map. That date must be within 30 days, during whichtime the legislative body must approve, conditionally approve, or disapprove the tentative map [*Gov. Code § 66452.2(a)*]. The local agency must comply with the time periods of *Pub. Res. Code § 21151.5* (environmental impact report), within the time limits of *Gov. Code § 66452.2* [*Gov. Code § 66452.2(c)*; for general discussion of environmental impact report requirements, *see Ch. 418, Pollution and Other Environmental Matters, §§ 418.34 -418.36*].

If no action is taken on a tentative map by the legislative body within the specified time limits, the tentative map is deemed approved as filed, insofar as it complies with other applicable requirements of the Act and local ordinance [*Gov. Code § 66452.4(a)*].

[7] Procedure When No Advisory Agency Exists

If there is no advisory agency, the clerk of the legislative body must submit the tentative map to the legislative body at its next regular meeting. The legislative body must approve, conditionally approve, or disapprove that map within 50 days after submission [*Gov. Code § 66452.2(b)*]. The local agency must comply with the time periods of *Pub. Res. Code § 21151.5* (environmental impact report), within the time limits of *Gov. Code § 66452.2*. The 50-day time period then begins after the environmental impact report is certified, a negative declaration is adopted, or it is determined that the project is exempt [*Gov. Code § 66452.1(c)*; for general discussion of environmental impact report requirements, *see Ch. 418, Pollution and Other Environmental Matters, §§ 418.34 -418.36*].

If no action is taken on a tentative map by the legislative body within the specified time limits, the tentative map is deemed approved as filed, insofar as it complies with other applicable requirements of the Act and local ordinance [*Gov. Code § 66452.4(a)*].

A local legislative body that is faced with expiration of the prescribed time limits for it to act on an application for a tentative map may not disapprove the map based solely on the fact that the time limit is about to expire; there must be additional reasons for disapproval [*Gov. Code § 66451.4*].

[8] Approval Conditioned on Availability of Sufficient Water Supply

The local legislative body or the advisory agency (to the extent that the latter is authorized by local ordinance to approve, conditionally approve, or disapprove a tentative map) must include as a condition in any tentative map that includes a subdivision consisting of a residential development of more than 500 dwelling units, a requirement that a sufficient water supply be available. Proof of the availability of a sufficient water supply must be requested by the subdivision applicant or local agency, at the agency's discretion, and must be based on written verification from the applicable public water system within 90 days of a request [*Gov. Code § 66473.7(b)*; *see Gov. Code § 66473.7(a)(1), (2)* ("subdivision" and "sufficient water supply" defined for these purposes)].

The condition does not apply to any residential project proposed for a site that is within an urbanized area and has been previously developed for urban uses, or when the immediate contiguous properties surrounding the residential project site are, or previously have been, developed for urban uses, or housing projects that are exclusively for very low and low-income households [*Gov. Code § 66473.7(i)*].

[9] Expiration

An approved or conditionally approved tentative map will expire 24 months after its approval or conditional approval, or after any additional period of time that may be prescribed by local ordinance, not to exceed 12 months [*Gov. Code § 66452.6(a)(1)*]. However, this expiration time may be different under some circumstances. For example, if the subdivider is subject to a requirement of at least $178,000 to construct, improve, or finance public improvements outside the boundary of the tentative map, the expiration time may be extended [*Gov. Code § 66452.6(a)(1)*; *see Gov. Code § 66452.6(a)(2)* (amount adjusted for inflation each calendar year beginning January 1, 2005)]. That time may also be changed due to a development moratorium imposed after approval of the tentative map [*Gov. Code § 66452.6(b)* ; *see Ailanto Properties, Inc. v. City of Half Moon Bay (2006) 142 Cal. App. 4th 572, 48 Cal. Rptr. 3d 340* (*Gov. Code § 66452.6(b)(1)* limits to five years length of any moratorium-related tolling of tentative map's expiration, and does not address length of moratorium itself)].

The period of time specified in *Gov. Code § 66452.6(a)(1)*, including any local discretionary extension of up to six years granted pursuant to *Gov. Code § 66452.6(e)*, does not include the period of time during which a lawsuit involving the approval or conditional approval of the tentative map is or was pending in court, if the stay of the time period is approved by the local agency pursuant to *Gov. Code § 66452.6*. After service of the initial petition or complaint in the

lawsuit on the local agency, the subdivider may apply to the local agency for a stay pursuant to the local agency's adopted procedures. Within 40 days after receiving the application, the local agency must either stay the time period for up to five years or deny the requested stay. Thelocal agency may, by ordinance, establish procedures for reviewing the requests, including, but not limited to, notice and hearing requirements, appeal procedures, and other administrative requirements [*Gov. Code § 66452.6(c)*].

The expiration of the approved or conditionally approved tentative map will terminate all proceedings and no final map or parcel map of all or any portion of the real property included within the tentative map will be filed with the legislative body without first processing a new tentative map. Once timely filing is made, subsequent actions of the local agency, including, but not limited to, processing, approving, and recording, may lawfully occur after the date of expiration of the tentative map. Delivery to the county surveyor or city engineer will be deemed a timely filing [*Gov. Code § 66452.6(d)*]. This language prohibits a subdivider from filing a final map after the tentative map has expired. However, the language "once a timely filing is made, subsequent actions of the local agency, including, but not limited to, processing, approving, and recording, may lawfully occur after the date of expiration of the tentative map" authorizes the local agency to approve a timely filed application for an extension of a tentative map [*Bodega Bay Concerned Citizens v. County of Sonoma (2005) 125 Cal. App. 4th 1061, 1070, 23 Cal. Rptr. 3d 327]* .

In 2008, because of the depressed housing market with subdividers facing the prospect of having their tentative and parcel maps expire before they could obtain financing or have their projects be economically viable on completion, legislation was enacted to extend by 12 months the expiration date of any tentative or vesting tentative map or parcel map that had not expired on July 15, 2008, but was due to expire before January 1. 2011 [*Gov. Code § 66452.21(a)*]. The extension is in addition to any other statutory extensions [*Gov. Code § 66452.21(b)*; *see Gov. Code §§ 66452.6, 66452.11, 66452.13, 66463.5*]. The determination of whether a map expires before January 1, 2011, will count only those local discretionary extensions of time pursuant to *Gov. Code § 66452.6(e)* approved on or before July 15, 2008, and any additional time in connection with the filing of a final map pursuant to *Gov. Code § 66452.6(a)* for a map that was recorded on or before July 15, 2008. The determination does not include any development moratorium or litigation stay [*Gov. Code § 66452.21(d)*]. In 1993 and 1996, extensions were granted under similar economic circumstances and, although any affected maps have undoubtedly expired, the legislation remains part of the Subdivision Map Act [*see Gov. Code §§ 66452.11, 66452.13*].

In 2009, the Legislature amended the Act to extend, for an additional 24 months, the expiration date of any tentative or vesting tentative map, or parcel map for which a tentative or vesting tentative map has been approved, that (1) was in existence on July 15, 2009, and (2) will not expire before January 1, 2012 [*Gov. Code § 66452.22(a)*; *see Gov. Code § 66452.22(d)* (determining whether map expires before January 1, 2012)]. The extension also applies to any legislative, administrative, or other state agency approval pertaining to a development project included in the map, provided the approval had not expired on July 15, 2009 [*Gov. Code § 66452.22(c)*]. These extensions are automatic, and in addition to all other discretionary and mandatory extensions available under the Act [*Gov. Code § 66452.22(b), (c)*].

Legal Topics:

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§ 579.268 Final Map

[1] Preparation

After the approval or conditional approval of the tentative map and before the expiration of that map, the subdivider may have the real property included within the map, or any part thereof, surveyed and a final map thereof prepared in accordance with the approved or conditionally approved tentative map [*Gov. Code § 66456*]. Under some circumstances, a subdivider may file multiple final maps [*see Gov. Code § 66456.1*]. The filing of a final map on a portion of an approved or conditionally approved tentative map will not invalidate any part of that tentative map [*Gov. Code § 66456.1*].

[2] Filing

A final map or parcel map conforming to the approved or conditionally approved tentative map, if any, may be filed with the legislative body for approval after all required certificates or statements on the map have been signed and, when necessary, acknowledged [*Gov. Code § 66457(a)*].

If the subdivision lies entirely within the territory of a city, the map must be filed with the city. If the subdivision lies partially within two or more territories, the map must be filed with each, and each territory must act on the map [*Gov. Code § 66457(b)*].

[3] Approval

The legislative body must, at the meeting at which it receives the map or at its next regular meeting, approve the map if it conforms to all the Act requirements and any local subdivision ordinance applicable at the time of approval orconditional approval of the tentative map and any rulings thereunder. If the map does not conform, the legislative body mustdisapprove the map [*Gov. Code § 66458(a)*; *see Soderling v. City of Santa Monica (1983) 142 Cal. App. 3d 501, 505, 191 Cal. Rptr. 140]* .

If the legislative body does not approve or disapprove the map within the prescribed time and the map conforms to all

requirements and rulings, it will be deemed approved [*Gov. Code § 66458(b)*]. The legislative body that is faced with expiration of the prescribed time limits for it to act on a final map may not disapprove the map solely on the basis that the time limit is due to expire; there must be additional reasons for disapproval [*Gov. Code § 66451.4*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 579.269 Factors Governing Map Decisions

[1] Generally

A local agency must disapprove a map for failure to meet or perform any of the requirements or conditions imposed by the Act or local ordinance enacted pursuant to the Act. Local ordinance may provide a procedure for waiver of the Act's provisions when the failure of the map is the result of a technical and inadvertent error that, in the determination of the local agency, does not materially affect the map's validity [*Gov. Code § 66473*].

In considering tentative or final maps of proposed subdivisions, the local agency is bound by a requirement of public access to public natural resources, and must protect public access to the stream banks of public waterways, including rivers, streams, ocean coastlines, bay shorelines, lakes, and reservoirs [*see Gov. Code §§ 66478.1-66478.14*].

[2] Tentative Map or Parcel Map

[a] Prerequisites

No local agency will approve a tentative map, or a parcel map for which a tentative map was not required, unless the legislative body finds that the proposed subdivision, together with provisions for its design and improvement, is consistent with the general plan [*Gov. Code §§ 65300-65307*] or any specific plan [*Gov. Code §§ 65450-65457*]. A proposed subdivision is consistent with a general or specific plan only if the local agency has officially adopted such a plan and the proposed subdivision is compatible with the objectives, policies, general land uses, and programs specified in the plan [*Gov. Code § 66473.5*]. The consistency standard does not require an exact match between a proposed subdivision and the applicable plan; rather, it means that the subdivision must be in agreement or harmony with the plan [*Sequoyah Hills Homeowners Assn. v. City of Oakland (1994) 23 Cal. App. 4th 704, 717-718, 29 Cal. Rptr. 2d 182* ; *Greenebaum v. City of Los Angeles (1984) 153 Cal. App. 3d 391, 406, 200 Cal. Rptr. 237* ; for discussion of the general plan and specific plans, *see §§ 579.50, 579.51*].

In determining whether to approve or disapprove an application for a tentative map, the local agency must apply only those ordinances, policies,and standards in effect at the date the local agency has determined that the application is

complete pursuant to *Gov. Code § 65943*. However, if the local agency has formally initiated proceedings to amend applicable ordinances before receiving the complete application, the local agency may apply any policies in effect on the date it approves or disapproves the tentative map [*Gov. Code § 66474.2*].

A local government may approve a tentative map, or a parcel map for which a tentative map was not required, if an environmental impact report was prepared with respect to the project and a finding was made pursuant to *Pub. Res. Code § 21081(c)* that specific economic, social, or other considerations make infeasible the mitigation measures or project alternatives identified in the environmental impact report [*Gov. Code § 66474.01*]. For general discussion of the environmental impact report requirement, see Ch. 418, *Pollution and Other Environmental Matters* .

[b] Disapproval Mandatory

A legislative body of a city or county must deny approval of a tentative map, or a parcel map for which a tentative map was not required, if it makes any of the following findings [*Gov. Code § 66474*]:

- That the proposed map is not consistent with applicable general plans as specified in *Gov. Code § 65451*.

- That the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans.

- That the site is not physically suitable for the type of development.

- That the site is not physically suitable for the proposed density of development.

- That the design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat.

- That the design of the subdivision or type of improvements is likely to cause serious health problems.

- That the design of the subdivision or the type of improvements will conflict with easements, acquired by the public at large, for access through or use of, property within the proposed subdivision.

The legislative body must also deny approval of a tentative map, or parcel mapfor which a tentative map was not required, if it finds that either (1) the resulting parcels following subdivision would be too small to sustain their agricultural use [*see Gov. Code § 66474.4(b)*; *but see Gov. Code § 66474.4(c)* (when legislative body may approve subdivision with parcels smaller than those specified)], or (2) the subdivision will result in residential development not incidental to the commercial agricultural use of the land, *and* the legislative body finds that the land is subject to any of the following [*Gov. Code § 66474.4(a)*; *see Gov. Code § 66474.4(k)* (amendments made to § 66474.4 in 2001-2002 Regular Session of Legislature apply only to contracts or easements entered into on or after January 1, 2003); *see also § 579.16*]:

- A contract entered into pursuant to the California Land Conservation Act of 1965 before the contract's last three years [*see Gov. Code § 66474.4(f)*; *see also Gov. Code § 51200 et seq.*];

- An open-space easement entered into on or after January 1, 2003 [*see* Gov. Code § 51074 et seq.];

- An agricultural conservation easement entered into on or after January 1, 2003 [*see* Gov. Code § 10260 et seq.]; or

- A conservation easement entered into on or after January 1, 2003 [*see Civ. Code § 815*].

The legislative body's authority to approve a tentative or parcel map with regard to land subject to one of these easements is not limited, however, if the resulting parcels can sustain uses consistent with the easement's intent or purposes [*Gov. Code § 66474.4(h), (i)*].

[3] Final Map

A final map must be disapproved only for failure to meet or perform requirements or conditions that were applicable to the subdivision at the time of approval of the tentative map. That disapproval must be accompanied by a finding identifying the requirements or conditions that have not been met or performed [*Gov. Code § 66473*].

A legislative body must not deny approval of a final or parcel map if it (1) has previously approved a tentative map for the proposed subdivision and (2) finds that the final or parcel map is in substantial compliance with the previously approved tentative map [*Gov. Code § 66474.1*].

The conversion of rental property to condominiums is considered to be a subdivision under the Subdivision Map Act. A local legislative body may not approve a final map for a subdivision to be created from the conversion of residential rental property into a condominium project, a community apartment project, or a stock cooperative unless that body finds that each tenant of the proposed conversion project and each person applying to rent a unit in the residential property to be converted has received or will have received all applicable notices and rights required under the Act [*Gov. Code § 66427.1(a)(1)*; *see Gov. Code § 66427.1(a)(2)* (list of notices)]. For further discussion of these requirements, see *Ch. 124, Condominiums and Other Common Interest Developments, § 124.19*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 579.270 Approval Conditioned on Indemnification

Under prescribed circumstances, a local agency may require, as a condition for a tentative, parcel, or final map application or approval, that the subdivider or its agent, defend, indemnify, and hold harmless the local agency or its agents, officers, and employees from any claim, action, or proceeding against the local agency as a result of the action or inaction of the local agency, advisory agency, appeal board, or legislative body in reviewing, approving, or denying the map [*Gov. Code § 66474.9(a)*]. Any condition imposed must include the requirement that the local agency promptly notify the subdivider of any claim, action, or proceeding and that the local agency cooperate fully in the defense. The local agency's failure to fulfill the requirement eliminates the subdivider's responsibility [*Gov. Code § 66474.9(b)(2)*].

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§ 579.271 Obligations of Subdivider

[1] Dedication of Land

Local ordinance may impose a requirement of dedication or irrevocable offer of dedication of real property within the subdivision for streets and alleys, including access rights and abutter's rights, drainage, public utility easements, and other public easements [*Gov. Code § 66475*]. Dedications may also be required for bicycle paths, local transit facilities, easements to insure the receipt of sunlight, park or recreational purposes, and elementary schools [*see Gov. Code §§ 66475.1-66475.3, 66477, 66478*]. For discussion of dedication generally, see Ch. 183, *Dedication* .

Land dedicated other than for open space, parks, and schools must be returned to the subdivider if the public entity determines that the public purpose for which it was dedicated no longer exists. This requirement applies only to land dedicated on or after January 1, 1990 [*Gov. Code § 66477.5*].

[2] Reservation for Public Uses

A local ordinance may require that areas of real property within the subdivision be reserved for parks, recreational facilities, fire stations, libraries, or other public uses. The required reservation must be in accordance with an adopted specific orgeneral plan, in effect for at least 30 days before the filing of the tentative map, that contains policies for public use. The reserved area must be of a size and shape that permits the balance of the property to develop in an orderly and efficient manner and that does not make development of the remaining subdivision land infeasible [*Gov. Code § 66479*].

[3] Fees

Fees may be imposed by local ordinance for defraying the costs of constructing planned drainage and sanitary sewer facilities, bridges, major thoroughfares, and ground water recharge facilities [*Gov. Code §§ 66483, 66484, 66484.5*]. When the subdivider installs improvements for thebenefit of the subdivision, local ordinance may require the improvements to contain supplemental size, capacity, number, or length for the benefit of property not within the subdivision, although the subdivider will be reimbursed for those supplemental costs [*Gov. Code §§ 66485, 66486*].

Legal Topics:

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§ 579.272 Appeals

[1] By Developer or Tenant From Advisory Agency Action

The subdivider, or any tenant of the subject property, in the case of a proposed conversion of residential real property to a condominium project, community apartment project, or stock cooperative project, may appeal from any action of the advisory agency with respect to a tentative map to the appeal board established by local ordinance, or if none, to the legislative body [*Gov. Code § 66452.5(a)(1)*].

Any appeal must be filed with the clerk of the appeal board, or if there is none, with the clerk of the legislative body, within 10 days after the action of the advisory agency from which the appeal is being taken [*Gov. Code § 66452.5(a)(2)*]. When the appeal has been filed, the appeal board, or legislative body, must set the matter for hearing. The hearing must be held within 30 days after the date of a request filed by the subdivider or appellant. If there is no regular meeting of the legislative body within the 30-day period, the appeal may be heard at the legislative body's next regular meeting for which notice can be given, or within 60 days from the date of receiving the request, whichever period is shorter. The decision must be rendered within 10 days following the hearing's conclusion [*Gov. Code § 66452.5(a)(3)*]. The decision must be supported by findings that are consistent with the Subdivision Map Act and any local ordinance adopted pursuant to that Act [*Gov. Code § 66452.5(e)*].

[2] From Appeal Board Action

[a] When Appeal Board Acts

The subdivider, any tenant of the subject property, in the case of a conversion of residential real property, or the advisory agency may appeal from the action of the appeal board to the legislative body [*Gov. Code § 66452.5(b)(1)*].

Any appeal must be filed in writing with the clerk of the legislative body within 10 days after the action of the appeal board from which the appeal is being taken [*Gov. Code § 66452.5(b)(1)*]. After the filing of an appeal, the legislative body must set the matter for hearing, which must be held within 30 days after the date the hearing request was filed. If there is no regular meeting of the legislative body within the 30-day period, the appeal may be heard at the legislative

body's next regular meeting for which notice can be given, or within 60 days from the date of receiving the request, whichever period is shorter. The decision must be rendered within 10 days following the hearing's conclusion [*Gov. Code § 66452.5(b)(2)*]. The decision must be supported by findings that are consistent with the Subdivision Map Act and any local ordinance adopted pursuant to that Act [*Gov. Code § 66452.5(e)*].

[b] When Appeal Board Fails to Act

If there is an appeal board and it fails to act on an appeal within the specified time limit, the decision from which the appeal was taken is affirmed and an appeal of that decision may be taken to the legislative body as provided in *Gov. Code § 66452.5(b)*. If no further appeal is taken, the tentative map, insofar as it complies with applicable Act requirements and local ordinance, will be deemed approved or conditionally approved as last approved or conditionally approved by the advisory agency [*Gov. Code § 66452.5(c)(1)*].

If the legislative body fails to act on an appeal within the specified time limit, the tentative map, insofar as it complies with applicable Act requirements and local ordinance, will be deemed approved or conditionally approved as last approved or conditionally approved [*Gov. Code § 66452.5(c)(2)*].

[3] By Adversely Affected Person

An interested person adversely affected by a decision of the advisory agency or appeal board may file an appeal with the legislative body concerning any decision of the agency or appeal board. Any appeal must be filed with the clerk of the legislative body within 10 days after the action of the advisory agency or appeal board that is the subject of the appeal. On the filing of the appeal, the legislative body must set the matter for hearing. The hearing must be held within 30 days after it was requested by the subdivider or appellant. If there is no regular meeting of the legislative body within the 30-day period, the appeal may be heard at the legislative body's next regular meeting for which notice can be given, or within 60 days from the date of receiving the request, whichever period is shorter. The hearing may be a public hearing for which notice must be given in the time and manner provided [*Gov. Code § 66452.5(d)(1)*].

On conclusion of the hearing the governing body must, within 10 days, declareits findings based on the testimony and documents produced before it, the advisory board, or the appeal board. It may sustain, modify, reject, or overrule any recommendations or rulings of the advisory board or appeal board and may make findings that are not inconsistent with the Act or local ordinance [*Gov. Code § 66452.5(d)(2)*]. The decision must be supported by findings that are consistent with the Subdivision Map Act and any local ordinance adopted pursuant to that Act [*Gov. Code § 66452.5(e)*].

[4] Notice Requirements

Notice of each hearing provided for in *Gov. Code § 66452.5* must be sent by United States mail to each tenant of the subject property, in the case of a conversion of residential real property to a condominium project, community apartment project, or stock cooperative project, at least three days prior to any hearing [*Gov. Code § 66452.5(f)*]. This notice requirement will be deemed satisfied if the notice complies with the legal requirements for service by mail. Fees may be collected from the subdivider for expenses incurred [*Gov. Code § 66452.5(f)*; *see Gov. Code § 66451.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationReview of Initial DecisionsCivil ProcedureJusticiabilityStandingGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsConversionsReal Property LawSubdivisionsLocal Regulation

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§ 579.273 Hearings Under Act

[1] Required for Signficant Deprivation of Property Right

Whenever approval of a tentative subdivision map will constitute a substantial or significant deprivation of the property rights of otherlandowners, the affected persons are entitled to reasonable notice and an opportunity to be heard before the approval occurs. For example, a landowner who claimed that the particular details of a plan would cause him injury in that the lots in the proposed subdivision were topographically unsuited for residential construction, that the design of the subdivision would hinder access to his property thereby creating substantial traffic and parking congestion, and that the county's environmental assessment of the project was inadequate, alleged a sufficient deprivation to require a hearing [*Horn v. County of Ventura (1979) 24 Cal. 3d 605, 616, 156 Cal. Rptr. 718, 596 P.2d 1134]* . As the first step in the subdivision map process, the tentative subdivision map is the principal time at which a deprivation of property rights would be asserted. For discussion of the approval of tentative subdivision maps, see *§ 579.269[2][a]*.

The nature, content, and timing of the requisite notice are within the determination of the affected local government. However, depending on the magnitude of the project and the degree to which a particular landowner's interests may be affected, acceptable techniques might include notice by mail to the owners of record of property situated with a designated radius of the subject property, or by the posting of notice at or near the project site, or both. Notice must occur sufficiently prior to a final decision to permit a meaningful predeprivation hearing to affected landowners [*Horn v. County of Ventura (1979) 24 Cal. 3d 605, 618, 156 Cal. Rptr. 718, 596 P.2d 1134]* .

[2] Notice and Attendance

Unless otherwise provided, notice of a hearing held pursuant to the Act must be given pursuant to *Gov. Code §§ 65090* and *65091*. If the proposed subdivision is a conversion of residential real property to a condominium project, community apartment project, or stock cooperative project, the notice must also be given by the local agency by United States mail to each tenant of the subject property, and must also include notification of the tenant's right to appear and be heard. These requirements may be satisfied by service of the notice in compliance with the requirements for service of legal process by mail [*Gov. Code § 66451.3(a), (b)*; for discussion of *Gov. Code §§ 65090, 65091, see § 579.72*].

Any interested person may appear at the hearing and be heard [*Gov. Code § 66451.3(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationReview of Initial DecisionsReal Property LawSubdivisionsLocal Regulation

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51-579 California Forms of Pleading and Practice--Annotated § 579.274

§ 579.274 Reversion

[1] Generally

Subdivided real property may be reverted to acreage pursuant to *Gov. Code §§ 66499.11-66499.20*3/4[*Gov. Code § 66499.11*]. Reversion proceedings may be initiated by the legislative body on its own motion or by petition of all of the landowners within the subdivision [*Gov. Code § 66499.12*]. The petition by the landowners must be in the form prescribed by the local agency and include the contents set forth in *Gov. Code § 66499.13*. A noticed public hearing must be held [*Gov. Code § 66499.15*].

[2] Prerequisites to Reversion

Subdivided real property may be reverted to acreage only if the legislative body finds that the dedications to be abandoned by the reversion are unnecessary for present or prospective public purposes and one of the following applies [*Gov. Code § 66499.16*]:

(1) All owners of an interest in the real property within the subdivision have consented to the reversion; or

(2) None of the improvements required to be made have been made within two years from the date the final or parcel map was filed for record, or within the time allowed by agreement for completion of the improvements, whichever is later; or

(3) No lots shown on the final or parcel map have been sold within five years from the date that map was filed for record.

As conditions of reversion, the legislative body must require the following [*Gov. Code § 66499.17*]:

- Dedications or offers of dedication necessary for the purposes specified by local ordinance following reversion.

- Retention of all previously paid fees if necessary to accomplish the purposes of the Act or local ordinance adopted pursuant to the Act.

- Retention of any portion of required improvement security or deposits necessary to accomplish the purposes of the Act and local ordinance adopted pursuant to the Act.

[3] Effect of Reversion

Reversion will be effective on the final map being filed for record by the county recorder. Thereafter, all dedications and offers of dedication not shown on the map will be of no further force or effect [*Gov. Code § 66499.18*].

[4] Filing of Parcel Map for Reversion

A city or county may authorize a parcel map to be filed under *Gov. Code §§ 66499.11-66499.29* for the purpose of reverting to acreage land previously subdivided and consisting of four or less contiguous parcels under the same ownership. That map must be accompanied by evidence of title and nonuse or lack of necessity of any streets or easements that are to be abandoned. Any streets or easements to be left in effect after the reversion must be delineated on the map. The filing of the map with thecounty recorder will constitute legal reversion to acreage and abandonment of all streets and easements not shown on the map. It will also constitute a merger of the separate parcels into one parcel and be shown as such on the assessment roll. On the parcel map used for reverting acreage, a certificate must appear signed and acknowledged by all parties having any record title interest in the land being reverted, consenting to the preparation and filing of the parcel map [*Gov. Code § 66499.20*1/4].

[5] Resubdivision Without Reversion

Subdivided lands may be merged and resubdivided without reverting to acreage by complying with all the subdivision requirements of the Act and local ordinance. The filing of the final or parcel map will constitute legal merging of the separate parcels into one parcel and the resubdivision of that parcel. Any unused fees or deposits previously made will be credited pro rata towards any similar requirements applicable at the time of resubdivision. Any streets or easements to be left in effect after the resubdivision must be delineated on the map. The filing of the map with the county recorder will constitute legal merger and resubdivision of the land, and abandonment of all streets and easements not shown on the map [*Gov. Code § 66499.20*1/2]. *Gov. Code § 66499.20*1/2 applies only when there is a previously-recorded subdivision map. When there are recorded easements and no recorded subdivision map, the filing of a subdivision map that does not delineate the easements does not render them abandoned [*Negron v. Dundee (1990) 221 Cal. App. 3d 1502, 1506-1508, 271 Cal. Rptr. 381]* .

When a parcel map requirement may be waived pursuant to a local ordinance adopted under *Gov. Code § 66428*, property may be resubdivided without reversion as long as the property owner complies with the local ordinance requirements. For example, a resubdivision was accomplished when, as required by the county waiver ordinance, a unilateral agreement was recorded setting forth, among other matters, a statement signed by the owner and subdivider under penalty of perjury attesting that all the conditions of approval had been met. When the unilateral agreement was endorsed by the county director of planning and recorded, a subdivision was deemed effective [*see Gomes v. County of Mendocino (1995) 37 Cal. App. 4th 977, 44 Cal. Rptr. 2d 93]* .

A city or county may authorize the merger of contiguous parcels under common ownership without reverting to acreage. That ordinance will require the recordation of an instrument evidencing the merger [*Gov. Code § 66499.20* 3/4].

Legal Topics:

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

Real Property LawOwnership & TransferTransfer Not By DeedDedicationGeneral OverviewReal Property LawSubdivisionsLocal RegulationReal Property LawZoning & Land UseComprehensive Plans

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§ 579.275 Exclusion

[1] Procedure

All or any portion of the real property included within the boundaries of a subdivision may be excluded from that subdivision and the recorded map altered or vacated, in accordance with the procedures set forth in *Gov. Code §§ 66499.21-66499.29* [*Gov. Code § 66499.21*]. An exclusion proceeding is initiated by filing, in the superior court of the county in which the subdivision is located, a petition signed by the owners of at least two-thirds of the total area of the real property sought to be excluded [*Gov. Code §§ 66499.21, 66499.22*; *see § 579.390*].

After a petition for exclusion has been filed, public notice of the hearing on the petition must be given [*see Gov. Code § 66499.24*]. If no objection is filed, and the petitioner produces satisfactory evidence of the necessity of the exclusion, that the petitioners are the owners of two-thirds of the area sought to be excluded, and that there is no reasonable objection to making that exclusion, the requested exclusion may be ordered [*Gov. Code § 66499.25*].

If a material objection is made to the petition, the court will hear that objection and may adjourn the proceedings to such time as may be necessary on proper notice to the petitioners and objectors [*Gov. Code § 66499.26*].

[2] Effect

A certified copy of the court decree excluding any real property or ordering the alteration or vacation of any recorded map will be recorded in the office of the county recorder of the county in which that real property is situated [*Gov. Code § 66499.28*]. At that time, a copy of the new map will be filed for record with the county recorder, and a copy will also be filed with the local agency. A reference to this map will be sufficient identification of the real property for reassessment purposes [*Gov. Code § 66499.29*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSubdivisionsLocal Regulation

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§ 579.276 Effect of Noncompliance With Act

No person shall sell, lease, or finance any parcel of real property or commence construction of any building for sale, lease, or financing thereon, except for model homes, or allow occupancy thereof, for which a final or parcel map is required by the Act or local ordinance, until a map in full compliance with the provisions of the Act and local ordinance has been filed for record by the recorder of the county in which any portion of the subdivision is located [*Gov. Code § 66499.30(a), (b)*].

Conveyances of any part of a division of real property for which a final or parcel map is required by the Act or local ordinance will not be made by parcel or block number, initial or other designation, unless and until that map has been filed for record by the recorder of the county in which any portion of the subdivision is located [*Gov. Code § 66499.30(c)*].

Gov. Code § 66499.30(a), (b), and *(c)* does not apply to any parcel of a subdivision offered for sale or lease, contracted for sale or lease, or soldor leased in compliance with or exempt from any law (including a local ordinance), regulating the design and improvement of subdivisions in effect at the time the subdivision was established [*Gov. Code § 66499.30(d)*].

Nothing in *Gov. Code § 66499.30(a), (b)* prohibits an offer or contract to sell, lease, or finance real property or to construct improvements thereon when that sale, lease, or financing, or the commencement of that construction, is expressly conditioned on the approval and filing of a final subdivision map or parcel map, as required under the Act [*Gov. Code § 66499.30(e)*]. However, a contract for the purchase and sale of four acres of real property that allowed the purchaser of the property who was the drafter of the contract to complete the purchase if, at its election, the four acres were made into a legal parcel by recording a final map or if the buyer "waived" the recording of a final map was void at its inception. The contract allowed the sale of a parcel of real property before the final map had been filed without being "expressly conditioned" on the approval and filing of a final subdivision or parcel map. It was therefore void as a matter of law at the time it was executed [*Sixells, LLC v. Cannery Business Park (2008) 170 Cal. App. 4th 648, 653-654, 88 Cal. Rptr. 3d 235*].

Nothing in *Gov. Code § 66499.30(a)-(c)*, inclusive, in any way modifies or affects the provisions of *Bus. & Prof. Code § 11018.2* (public report applicable to subdivided lands transaction) [*Gov. Code § 66499.30(f)*; for discussion of the rules governing subdivided lands transactions, *see § 579.281*].

For purposes of *Gov. Code § 66499.30*, the limitation period for commencing an action, either civil or criminal, against the subdivider or an owner of record at the time of a violation of the Act, will be tolled for any time period during which there is no constructive notice of the transaction constituting the violation, because the owner of record, at the time of the violation or at any time thereafter, failed to record a deed, lease, or financing document with the county recorder [*Gov. Code § 66499.30(g)*].

Each violation of the Act by a person who is the subdivider or an owner of record, at the time of the violation, of property involved in the violation is punishable by imprisonment in the county jail or in the state prison for a period not exceeding one year, by a fine not exceeding $10,000, or by both fine and imprisonment. Every other violation of the Act is a misdemeanor [*Gov. Code § 66499.31*].

The Act does not bar any legal, equitable, or summary remedy to which any aggrieved local agency or other public agency, or any person, firm, or corporation may otherwise be entitled, and any aggrieved entity or person may file a suit in the superior court of the county in which any real property attempted to be sold, leased, or financed in violation of the Act or local ordinance enacted pursuant to the Act is located, to restrain or enjoin any attempted or proposed subdivision or sale, lease, or financing in violation of the Act or local ordinance [*Gov. Code § 66499.33*].

Any deed of conveyance, sale, or contract to sell real property that has been divided, or that has resulted from a division, in violation of the provisions of the Act or local ordinance enacted pursuant to the Act, is voidable at the sole option of the grantee, buyer, or person contracting to purchase, or his or her heirs, personal representative, or trustee in insolvency or bankruptcy within one year after the date of discovery of the violation. However, the deed of conveyance, sale, or contract to sell is binding on any successor in interest of the grantee, buyer, or person contracting to purchase, other than those above enumerated. It is also binding on the grantor, vendor, or person contracting to sell, or his or her assignee, heir, or devisee [*Gov. Code § 66499.32(a)*; *see Munns v. Stenman (1957) 152 Cal. App. 2d 543, 554, 314 P.2d 67* (decided under former *Bus. & Prof. Code § 11540*)]. For general discussion and forms for use by a purchaser in rescinding a contract for the sale of real property, see Ch. 569, *Vendor and Purchaser* .

Any grantee, or his or her successor in interest, of real property that has been divided, or has resulted from a division, in violation of the provisions of the Act or local ordinance, may, within one year of the date of discovery of that violation, bring an action in the superior court to recover any damages he or she has suffered by reason of that division of property. The action may be brought against the person who divided the property in violation of the Act or local ordinance and against any successors in interest who have actual or constructive knowledge of that division of property [*Gov. Code § 66499.32(b)*].

This remedy does not limit or affect in any way the rights of a grantee or his or her successor in interest under any other provision of law [*Gov. Code § 66499.32(b)*]. For general discussion and forms for use by a purchaser in seeking damages based on a misleading contract for the sale of real property, see Ch. 569, *Vendor and Purchaser* .

Neither the voidability nor the damage remedy is available in connection with the conveyance of any parcel of real property identified in a certificate of compliance filed pursuant to *Gov. Code § 66499.35* or identified in a recorded final or parcel map, from and after the date of recording [*Gov. Code § 66499.32(b)*; for discussion of *Gov. Code § 66499.35*, *see § 579.279*]. This limitation is intended to prevent a challenge to a deed based on an allegedly invalid property division that has been previously adjudged as proper. Thus, it denies a buyer the option of voiding the contract whenever a certificate of compliance, parcel map, or final map exists to ratify the seller's compliance with the Act. However, it does not preclude a buyer from voiding a sale when the seller has violated the Act and, by doing so, has also violated the certificate of compliance, parcel map, or final map [*Le Gault v. Erickson (1999) 70 Cal. App. 4th*

369, 374, 82 Cal. Rptr. 2d 692] .

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewGovernmentsLegislationStatutes of LimitationsTollingReal Property LawPriorities & RecordingGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawSubdivisionsLocal Regulation

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§ 579.277 Violation of Act

[1] Permit Precluded

No local agency shall issue any permit or grant any approval necessary to develop any real property that has been divided, or resulted from a division, in violation of the Act or local ordinance enacted pursuant to the Act if it finds that development of that property is contrary to public healthor safety. The authority to deny that permit or approval applies whether the applicant was the owner of record at the time of the violation, is the current owner of record, or is a vendee of the current owner of record pursuant to a contract of sale of the real property. It applies whether or not the applicant had actual or constructive knowledge of the violation at the time of the acquisition of his or her interest in that property [*Gov. Code § 66499.34*].

[2] Conditional Permit

If a city or county issues a permit or grants approval for the development of real property that has been divided, or resulted from a division, in violation of the Act or local ordinance enacted pursuant to the Act, it may impose only those conditions that would have been applicable to the division of the property at the time the applicant acquired his or her interest in that real property, and that had been established at that time by the Act or local ordinance [*Gov. Code § 66499.34*; *see Keizer v. Adams (1970) 2 Cal. 3d 976, 980-981, 88 Cal. Rptr. 183, 471 P.2d 983* (decided under former Subdivison Map Act)]. However, when the applicant was the owner of record at the time of the initial violation, and by a grant of the real property, created parcels in violation of the Act or local ordinance, and that person is the current owner of record of one or more of those parcels, then the local agency may impose those conditions as would be applicable to a current division of the property. Moreover, if a conditional certificate of compliance has been filed for record under *Gov. Code § 66499.35(b)*, only those conditions stipulated in that certificate will be applicable [*Gov. Code § 66499.34*].

[3] Certificate of Compliance Available

The issuance of a permit or grant of approval for development of real property, or with respect to improvements completed prior to the time a permit or grant of approval for development was required by local ordinances in effect at

the time of the improvement, or with respect to improvements completed in reliance on a permit or grant of approval for development, constitutes "real property which has been approved for development," for the purposes of *Gov. Code § 66499.35(c)*. On request by the person owning the real property or a vendee of that person pursuant to a contract of sale, the local agency must issue a certificate of compliance for the affected real property [*Gov. Code § 66499.34*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseConditional Use Permits & VariancesGovernmentsLocal GovernmentsLicensesReal Property LawSubdivisionsLocal RegulationReal Property LawZoning & Land UseSpecial Permits & Variances

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§ 579.278 Notice of Violation

[1] Notice of Intention to Record

Whenever a local agency has knowledge that real property has been divided in violation of the provisions of the Act or local ordinance, it must cause to be mailed by certified mail to the then current owner of record of the property a notice of intention to record a notice of violation, describing the real property in detail, naming the owners, and stating that an opportunity will be given to the owner to present evidence. The notice will specify a time, date, and place for a meeting at which the owner may present evidence to the legislative body or advisory agency why the notice should not be recorded. The notice must also contain a description of the violations and an explanation of why the subject parcel is not lawful under *Gov. Code § 66412.6(a)* or *(b)* [*Gov. Code § 66499.36*].

[2] Determination of Violation

The meeting between the owners and the local agency must take place no sooner than 30 days and no later than 60 days from the date of mailing. If, within 15 days of receipt of the notice, the owner of the real property fails to inform the local agency of his or her objection to recording the notice of violation, the legislative body or advisory agency will record the notice of violation with the county recorder. If, after the owner has presented evidence, it is determined that there has been no violation, the local agency will mail a clearance letter to the then current owner of record. If, however, after the owner has presented evidence, the legislative body or advisory agency determines that the property has in fact been illegally divided, it will record the notice of violation with the county recorder. The notice of violation, when recorded, will be deemed to be constructive notice of the violation to all successors in interest in that property. The county recorder will index those names of the fee owners in the general index [*Gov. Code § 66499.36*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPriorities & RecordingGeneral OverviewReal Property LawSubdivisionsLocal RegulationReal Property LawZoning & Land UseNonconforming Uses

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§ 579.279 Certificate of Compliance

[1] Request by Owner or Vendee

Any person owning real property or a vendee of that person pursuant to a contract of sale may request, and a local agency must determine, whether that real property complies with the provisions of the Act and local ordinances enacted pursuant to the Act [*Gov. Code § 66499.35(a)*]. In determining whether a parcel complies with the provisions of the Act and of local ordinances enacted pursuant to it, the presumption of lawful creation set forth in *Gov. Code § 66412.6(b)* is not operative [*Gov. Code § 66412.6(b)*]. On making a determination of compliance the city or county will cause a certificate of compliance to be filed with the recorder of the county in which the real property is located. The local agency may impose a reasonable fee to cover the cost of issuing and recording the certificate of compliance [*Gov. Code § 66499.35(a)*].

A certificate of compliance must be issued for any real property that has been approved for development pursuant to *Gov. Code § 66499.34* [*Gov.Code § 66499.35(c)*]. Because the Subdivision Map Act specifically exempts any parcel that was sold in compliance with or exempt from any law regulating the design and improvement of subdivisions in effect at the time the subdivision was established, a certificate of compliance must be issued on request for those parcels as well. This also applies to parcels that were created before 1893 when the subdivision of land was first regulated in California [*Lakeview Meadows Ranch v. County of Santa Clara (1994) 27 Cal. App. 4th 593, 599, 32 Cal. Rptr. 2d 615* ; *see Gov. Code § 66499.30(d)* (exempting from current law parcels that complied with law in effect at time they were subdivided)].

When a certificate of compliance is recorded, it is a conclusive determination that parcels have not merged, and any claim of merger must be reviewed by challenge to the merger determination and not by a later nuisance action against the landowner [*Stell v. Jay Hales Development Co. (1992) 11 Cal. App. 4th 1214, 1226-1228, 15 Cal. Rptr. 2d 220]* .

[2] Conditional Certificate

If a local agency determines that the real property is not in compliance, it will issue a conditional certificate of compliance. A local agency may, as a condition to granting a conditional certificate of compliance, impose those

conditions that would have been applicable to the division of the property at the time the applicant acquired his or her interest therein, and that had been established at that time by the Act or local ordinance. However, when the applicant was the owner of record at the time of the initial violation and, by a grant of the real property, created parcels in violation of the Act or local ordinance, and that person is the current owner of record of one or more of those parcels, then the local agency may impose those conditions that would be applicable to a current division of the property. On making that determination and establishing those conditions the city or county will cause a conditional certificate of compliance to be filed with the recorder of the county in which the real property is located. That certificate will serve as notice that the fulfillment and implementation of those conditions will be required prior to subsequent issuance of a permit or other grant of approval for development of the property [*Gov. Code § 66499.35(b)*].

Compliance with those conditions will not be required until a permit or other grant of approval for development of that property is issued by the local agency [*Gov. Code § 66499.35(b)*].

[3] Contents of Certificate

A certificate of compliance must identify property and state that the division of the property complies with applicable provisions of the Subdivision Map Act and relevant local ordinances [*Gov. Code § 66499.35(a)*]. The certificate or conditional certificate must also include all of the following information as well as any other information the local agency deems necessary: (1) the name or names of the owners of the parcel or parcels; (2) the assessor parcel number or numbers; (3) the number of parcels for which the certificate or conditional certificate is being issued and recorded; (4) the legal description of the parcel or parcels for which the certificate or conditional certificate is being issued and recorded; (5) any conditions to be fulfilled and implemented before a permit or other grant of development approval will be issued; and (6) a prescribed notice stating the effect of the certificate [*Gov. Code § 66499.35(f)(1)*].

A recorded final map, parcel map, or official map will constitute a certificate of compliance with respect to the parcels of real property described in it [*Gov. Code § 66499.35(d)*]. An official map prepared pursuant to *Gov. Code § 66499.52(b)* will constitute a certificate of compliance with respect to the parcels of real property described therein and may be filed for record, whether or not the parcels are contiguous, so long as the parcels are within the same section or, with the approval of the city engineer or county surveyor, within contiguous sections of land [*Gov. Code § 66499.35(e)*].

[4] Antiquated Subdivision Maps

Certificates of compliance may be obtained without compliance with Subdivision Map Act requirements for parcels of a subdivision that were offered for sale or lease, contracted for sale or lease, or sold or leased in compliance with, or under an exemption from, any law regulating the design and improvement of subdivisions in effect at the time the subdivision was established [*Gov. Code § 66499.30(d)*]. This exemption may apply to parcels created before 1893 when the subdivision of land was first regulated in California [*Gardner v. County of Sonoma (2003) 29 Cal. 4th 990, 999, 129 Cal. Rptr. 2d 869, 62 P.3d 103* ; *Lakeview Meadows Ranch v. County of Santa Clara (1994) 27 Cal. App. 4th 593, 599, 32 Cal. Rptr. 2d 615]* . For purposes of this exception, a subdivision is deemed established on the date of recordation of the final map or parcel map [*Gardner v. County of Sonoma (2003) 29 Cal. 4th 990, 999, 129 Cal. Rptr. 2d 869, 62 P.3d 103* ; *Gov. Code § 66412.7*]. In the case of (1) maps filed for approval before March 4, 1972, and subsequently approved by the local agency, or (2) subdivisions exempted from map requirements by a certificate of exception applied for before this date and subsequently issued by the local agency under local ordinance, the subdivision will be deemed established on the date the map or application for a certificate of exception was filed with the local agency [*Gov. Code § 66412.7*].

In the absence of an applicable subdivision statute, ordinance, or regulation, an antiquated subdivision map [*see Gardner v. County of Sonoma (2003) 29 Cal. 4th 990, 996, 129 Cal. Rptr. 2d 869, 62 P.3d 103* ("antiquated subdivision maps" are subdivision maps recorded before 1893)] does not in and of itself establish subdivisions or create legal

parcelsfor which certificates of compliance must be issued [*Gardner v. County of Sonoma (2003) 29 Cal. 4th 990, 1006, 129 Cal. Rptr. 2d 869, 62 P.3d 103]* . In *Gardner*, the Supreme Court reasoned that because *Gov. Code § 66499.30(d)* recognizes only parcels or parcel sales that were made in compliance with or were exempt from the provisions of any law "regulating the design and improvement of subdivisions in effect at the time the subdivision was established," the logical inference was that *Gov. Code § 66412.7*'s requirement of approval for maps filed before March 4, 1972, must likewise be related to subdivision design and improvement. The Court therefore concluded that *Gov. Code §§ 66412.7* and *66499.30(d)* protect subdivisions that either already were approved by local agencies, or were deemed exempt under previous subdivision laws in effect at the time the subdivisions were established [*Gardner v. County of Sonoma (2003) 29 Cal. 4th 990, 1000, 129 Cal. Rptr. 2d 869, 62 P.3d 103]* . The map at issue in *Gardner*, which was recorded in Sonoma County in 1865, did not qualify under these statutes because there was no statewide mechanism generally authorizing local agencies to review or approve subdivision maps before 1893 and there was no other subdivision statute, ordinance, or regulation specifically authorizing public agency approval of subdivisions in Sonoma County in 1865 [*Gardner v. County of Sonoma (2003) 29 Cal. 4th 990, 1000, 129 Cal. Rptr. 2d 869, 62 P.3d 103]* .

Furthermore, unlike a modern-day final map or parcel map, which on recordation ordinarily converts what was formerly a single parcel into as many separate lots as appear on the map, the recordation of an antiquated subdivision map without something more such as a conveyance would not have worked a legal subdivision of the property shown on that map. Thus, property owners who recorded subdivision maps in Sonoma County in 1865 generally remained free to deed parcels and lots as they desired without regard to the depicted subdivisions [*Gardner v. County of Sonoma (2003) 29 Cal. 4th 990, 1002, 129 Cal. Rptr. 2d 869, 62 P.3d 103]* . It was undisputed in *Gardner* that the property in question remained intact under sequential owners throughout its history. Consequently, the plaintiffs could not fit their case within the decisions recognizing the establishment of subdivisions by conveyance [*Gardner v. County of Sonoma (2003) 29 Cal. 4th 990, 1003, 129 Cal. Rptr. 2d 869, 62 P.3d 103]* .

A map that was undisputedly recorded in compliance with subdivision map laws in effect in 1915 was not valid under the Subdivision Map Act, because the statutes in effect in 1915 did not regulate the design and improvement of subdivisions as required by *Gov. Code § 66499.30(d)* [*Witt Home Ranch., Inc. v. County of Sonoma (2008) 165 Cal. App. 4th 543, 564, 81 Cal. Rptr. 3d 123*]. As a result of this decision, the Act's grandfather provisions do not validate subdivision maps approved under the statutes in effect from 1893 (the date of the state's first regulation of private subdivision maps) through 1915 [*Witt Home Ranch., Inc. v. County of Sonoma (2008) 165 Cal. App. 4th 543, 548, 81 Cal. Rptr. 3d 123*]. The reasoning of *Witt Home Ranch* was subsequently applied by a court holding that maps recorded in compliance with the 1907 statewide subdivision map law do not come within the scope of the Subdivision Map Act grandfather clause [*Abernathy Valley, Inc. v. County of Solano (2009) 173 Cal. App. 4th 42, 51, 92 Cal. Rptr. 3d 459]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsLocal GovernmentsLicensesReal Property LawSubdivisionsLocal Regulation

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§ 579.280 Review of Decisions Under Subdivision Map Act

[1] Limitation Period

Any action or proceeding to attack, review, set aside, void, or annul the decision of an advisory agency, appeal board, or legislative body concerning a subdivision, or any of the proceedings, acts, or determinations taken, done, or made prior to that decision, or to determine the reasonableness, legality, or validity of any condition attached thereto, including, but not limited to, the approval of a tentative or final map, must be commenced, and service of summons effected, with 90 days after the date of the decision. Thereafter all persons are barred from any such action or proceeding or any defense of invalidity or unreasonableness of that decision or of those proceedings, actions, or determinations [*Gov. Code § 66499.37*]. The requirement that service of summons be within 90 days is mandatory and not subject to equitable tolling. Failure to satisfy it will subject a complaint to mandatory dismissal [*Maginn v. City of Glendale (1999) 72 Cal. App. 4th 1102, 1108-1110, 85 Cal. Rptr. 2d 639]* .

Moreover, even if an action is brought within the statutory period, it may be barred by laches if an unjustified delay has operated to the injury of another. For example, laches might bar an action if the affected landowner expended substantial time, expense, and effort in processing the application with the county over a lengthy period of time and expended substantial additional time, money, and expense based on the approved application to his or her detriment [*Resource Defense Fund v. County of Santa Cruz (1982) 133 Cal. App. 3d 800, 809-810, 184 Cal. Rptr. 371]* .

[2] Priority on Court Calendar

Any proceeding based on a decision of an advisory agency, appeal board, or legislative body will take precedence over all matters of the court calendar except criminal, probate, eminent domain, and forcible entry and unlawful detainer proceedings [*Gov. Code § 66499.37*].

[3] Mediation of Disputes Involving Subdivision Map Act Time Limits

Once an action has been filed, a dispute involving a failure to meet time limits specified in the Subdivision Map Act may be resolved by mediation [*Gov. Code § 66031(a)(3)*]. The process may be initiated by invitation from the court

within five days after the deadline for the respondent or defendant to file a response to the action [*Gov. Code § 66031(b)*].

If the parties accept the court's invitation to mediate the dispute, all time limits with respect to the underlying action will be tolled while the mediator conducts the mediation [*Gov. Code § 66032(a)*]. If the parties agree to mediate, a mediator is chosen according to prescribed procedures [*Gov. Code § 66031(c)*]. If the parties do not accept the court's invitation or if they cannot agree on a mediator, the civil action will proceed. The court is not permitted to draw any implication from either party's refusal to mediate [*Gov. Code § 66031(d)*]. Every 90 days after commencement of mediation, the civil action will be reactivated unless the parties either arrive at a settlement and implement it, or agree by written stipulation to extend the mediation for another 90 days [*Gov. Code § 66032(d)*].

If the mediation does not resolve the action, the court has discretion to schedule a settlement conference. If the action is subsequently tried onits merits, the same judge who presided at the conference will preside at trial [*Gov. Code § 66034*]. In the event the mediation is unsuccessful and the action goes to trial, the following provisions will apply [*Gov. Code § 66032(e)*; *see Evid. Code § 1119*]:

- *Evid. Code § 703.5*, which precludes the mediator from testifying at trial; and

- *Evid. Code § 1115 et seq.*, which govern evidentiary issues in mediation proceedings and, among other things, limit the use at trial of evidence derived from mediation proceedings.

The Judicial Council is authorized to adopt rules, forms, and standards necessary to implement the mediation procedures [*Gov. Code § 66035*].

For discussion of *Evid. Code §§ 703.5* and *1115 et seq.*, along with general discussion of mediation, see Ch. 31, *Mediation* .

[4] Standard of Review

[a] Approval of Tentative Subdivision Map

Approval of a tentative subdivision map is a quasi-judicial act subject to judicial review for abuse of discretion under *Code Civ. Proc. § 1094.5* [*Youngblood v. Board of Supervisors (1978) 22 Cal. 3d 644, 651 n. 2, 150 Cal. Rptr. 242, 586 P.2d 556* (decided under prior law)].

[b] Approval of Final Subdivision Map

Approval of the final subdivision map is a ministerial act reviewable by ordinary mandamus pursuant to *Code Civ. Proc. § 1085*. Once the tentative map is approved, the developer often must expend substantial sums to comply with the conditions attached to that approval. These expenditures will result in the construction of improvements consistent with the proposed subdivisions, but often inconsistent with alternative uses of the land. Consequently, it is only fair to the developer and to the public interest to require the governing body to render its discretionary decision whether and on what conditions to approve the proposed subdivision when it acts on the tentative map. Approval of the final map thus becomes a ministerial act once the appropriate officials certify that it is in substantial compliance with the previously approved tentative map [*Youngblood v. Board of Supervisors (1978) 22 Cal. 3d 644, 653 n. 4, 655-656, 150 Cal. Rptr. 242, 586 P.2d 556* (decided under prior law)].

However, when a tentative map is approved subject to conditions and those conditions remain unfulfilled, approval of a final subdivision map is not a ministerial act [*Soderling v. City of Santa Monica (1983) 142 Cal. App. 3d 501, 509, 191 Cal. Rptr. 140* ; *see Gov. Code § 66473*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewStandards of ReviewAbuse of DiscretionCivil ProcedureAlternative Dispute ResolutionMediationsReal Property LawSubdivisionsLocal RegulationReal Property LawZoning & Land UseJudicial Review

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§ 579.281 Subdivided Lands Act

The Subdivided Lands Act is contained in *Bus. & Prof. Code § 11000 et seq.* It is a limited economic regulation of the use of real property imposed to protect the members of the public exposed to that land use. Its object is the prevention of fraud and sharp practices in a type of real estate transaction peculiarly open to those abuses [*People v. Byers (1979) 90 Cal. App. 3d 140, 148, 153 Cal. Rptr. 249]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSubdivisionsState Regulation

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§ 579.282 Subdivided Lands and Subdivision

[1] Within Subdivided Lands Act

"Subdivided lands" and "subdivision" refer to improved or unimproved land or lands divided or proposed to be divided for the purpose of sale, lease, or financing, whether immediate or future, into five or more lots or parcels [*Bus. & Prof. Code § 11000(a)*]. Those terms also include improved or unimproved land or lands, lot or lots, or parcel or parcels, of any size, in which, for the purpose of sale, lease, or financing, whether immediate or future, five or more undivided interests are created or are proposed to be created. However, certain undivided interests are excluded [*Bus. & Prof. Code § 11000.1*].

Additionally, "subdivided lands" and "subdivision" include (1) any planned development, as defined in *Bus. & Prof. Code § 11003*, containing five or more lots; (2) any community apartment project as defined in *Bus. & Prof. Code § 11004*, containing five or more apartments; (3) any condominium project containing five or more condominiums, as defined in *Civ. Code § 783*; (4) certain stock cooperatives, as defined in *Bus. & Prof. Code § 11003.2*, having two or more shareholders; and (5) any limited-equity housing cooperative, as defined in *Bus. & Prof. Code § 11003.4*. In addition, any accompanying memberships or other rights of privileges created in, or in connection with, any of these forms of development, as well as any interests or memberships in any owners' association created in connection with any of these developments, are also subject to the Subdivided Lands Act. Time-share plans, exchange programs, incidental benefits, and short term product subject to the Vacation Ownership and Time-Share Act of 2004 [*see Bus. & Prof. Code § 11210 et seq.* (operative July 1, 2005), discussed in *§ 579.286*] are not subdivisions or subdivided lands for purposes of the Subdivided Lands Act [*Bus. & Prof. Code § 11004.5*].

The leasing of apartments in a community apartment project as defined in *Bus. & Prof. Code § 11004* is also subject to the Subdivided Lands Act [*Bus. & Prof. Code § 11000*].

[2] Exempt From Subdivided Lands Act

Land or lands sold by lots or parcels of not less than 160 acres that are designated by such lot or parcel description by government surveys andthat appear as such on the current roll of the county in which those lands are situated are not

"subdivided lands" or a "subdivision" within the meaning of *Bus. & Prof. Code § 11000*, unless that land or lands are divided or proposed to be divided for the purpose of sale for oil and gas purposes [*Bus. & Prof. Code § 11000(a)*].

The Subdivided Lands Act does not apply to the leasing of apartments, offices, stores, or similar space within an apartment building, industrial building, commercial building, or mobilehome park, as defined in *Health & Safety Code § 18214*. However, leases in a mobilehome park are subject to the Subdivided Lands Act when acceptance of a mandatory term of more than five years is a prerequisite to tenancy [*Bus. & Prof. Code § 11000(a)*].

The Subdivided Lands Act does not apply to the proposed sale or lease of lots or other interests in a subdivision in which lots or other interests are either [*Bus. & Prof. Code § 11010.3*]:

- Limited to industrial or commercial uses by zoning; or

- Limited to industrial or commercial uses by a declaration of CC&Rs that has been recorded in the official records of the county or counties in which the subdivision is located.

The Act does not apply to subdivided land that is offered or proposed to be offered for sale, lease, or financing by most public agencies [*Bus. & Prof. Code § 11010.6*].

For transactions entered into on or after January 1, 2001 [*see Bus. & Prof. Code § 11010.35(c)*], the Subdivided Lands Act does not apply to the proposed sale or lease of five or more lots, parcels, or other interests in a subdivision or the sale of one or more lots or parcels when the subject property is intended to be further subdivided into five or more lots, parcels, or other subdivision interests to any person who acquires the property in order to engage in the business of constructing residential, commercial, or industrial buildings, or for the purpose of resale or lease to persons engaged in such a business. To qualify for this exemption, the purchase or lease agreement (or a separate disclosure document) must include a statement or provision that the purchaser or lessee is required to comply with the applicable provisions of the Subdivided Lands Act before offering for sale or lease any lot, parcel, or other subdivision interest acquired pursuant to the exemption [*Bus. & Prof. Code § 11010.35(a)*].

Finally, the Subdivided Lands Act does not apply to subdivisions that are offered for sale in California, but located entirely outside California [*Bus. & Prof. Code § 11000(c)*; *see Bus. & Prof. Code § 10249.1* ("subdivision" defined for purposes of regulating out-of-state land promotions)].

Although not exempt from the Subdivided Lands Act itself, some situations do not require a notice of intention [*see Bus. & Prof. Code §§ 11010.4, 11010.7*; *see also Bus. & Prof. Code § 11010.10* (alternative requirements)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawSubdivisionsState Regulation

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§ 579.283 Public Report

[1] Application

Except as otherwise specifically provided, any person who intends to offer subdivided lands within California for sale or lease must file with the Department of Real Estate an application for a public report consisting of a notice of intention and a completed questionnaire form. The notice of intention must contain specified information about the subdivided lands and the proposed offering. The information required in the notice includes the identities of the owner and subdivider, the legal description and area of the land, the condition of title to the land, a statement of the terms of disposition of the land, including copies of proposed contracts, any provisions for public utilities, and other essential information [*Bus. & Prof. Code § 11010*].

If the developer proposes to create a senior citizen housing development, as defined in *Civ. Code § 51.3*, through phased development and marketing of subdivision interests, additional information is required [*Bus. & Prof. Code § 11010.05*].

[2] Issued by Commissioner

In subdivisions for which a notice of intention is required, no person shall sell, lease, or offer for sale or lease in California any parcels in a subdivision without first obtaining a public report from the Real Estate Commissioner [*Bus. & Prof. Code § 11018.2*]. The Commissioner will make an examination of any subdivision and issue to the subdivider a public report authorizing the sale or lease of the parcels within the subdivision. The report will contain the data obtained in accordance with *Bus. & Prof. Code § 11010* and that the Commissioner determines is necessary [*Bus. & Prof. Code § 11018*].

Bus. & Prof. Code § 11018.5 provides for the issuance of a public report on specified findings by the Commissioner.

[3] Denial of Public Report

[a] Grounds

The grounds for the denial of a public report are the following [*Bus. & Prof. Code § 11018*]:

- Failure to comply with any of the provisions of the Subdivided Lands Act or pertinent regulations.
- The sale or lease would constitute misrepresentation to or deceit or fraud of the purchasers or lessees.
- Inability to deliver title or other contracted interest.
- Inability to demonstrate that adequate financial arrangements have been made for all offsite improvements.
- Inability to demonstrate that adequate financial arrangements have been made for any community, recreation, or other facilities included in the offering.
- Failure to make a showing that the parcels can be used for the purpose for which they are offered; and in the case of a subdivision being offered for residential purposes, failure to make a showing that vehicular access and a source of potable domestic water will be available.
- Failure to provide in the contract or other writing the use or uses for which the parcels are offered, together with any covenants or conditions relative thereto.
- Agreements or bylaws to provide for management or other services pertaining to common facilities in the offering, which fail to comply with the regulations of the Commissioner.
- Failure to demonstrate that adequate financial arrangements have been made for any guaranty or warranty included in the offering.

[b] Objection to Denial

Any subdivider objecting to the denial of a public report may, within 30 days after receiving the order of denial, file a written request for a hearing. The Commissioner will hold the hearing within 20 days unless the party requesting the hearing requests a postponement. If the hearing is not held within 20 days after request for a hearing is received plus the period of any requested postponement or if a proposed decision is not rendered within 45 days after submission and an order adopting or rejecting that proposed decision is not issued within 15 days thereafter, the order of denial will be rescinded and a public report issued [*Bus. & Prof. Code § 11018.3*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationHearingsRight to HearingStatutory RightReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawSubdivisionsState Regulation

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§ 579.284 Desist Order

[1] Grounds for Issuance

Whenever the Commissioner determines from available evidence that a person has done any of the following, that person may be ordered to desist and refrain from those acts and omissions or from the further sale or lease of interests in the subdivision until the condition has been corrected [*Bus. & Prof. Code § 11019(a)*]:

- Violated or caused the violation of any provision of *Bus. & Prof. Code § 11000 et seq.* or the regulations pertaining thereto.

- Violated or caused a violation of *Bus. & Prof. Code §§ 17537*, *17537.1*, or *17539.1* (representations to public regarding contests or prizes) in advertising or promoting the sale of subdivision interests.

- Failed to fulfill representations or assurances with respect to the subdivision or the subdivision offering on which the Department relied in issuing a subdivision public report.

- Failed to inform the Department of material changes that have occurred in the subdivision or subdivision offering that have caused the subdivision public report to be misleading or inaccurate or that would have caused the Department to deny a public report if the conditions had existed at the time of issuance.

[2] Review Procedure

On receipt of that order, the person to whom the order is directed must immediately discontinue activities in accordance with the order [*Bus. & Prof. Code § 11019(b)*]. Any person to whom the order is directed may, within 30 days of its service on him or her, file with the Commissioner a written request for a hearing to contest the order. The Commissioner will then assign the matter to the office of Administrative Hearings to conduct a hearing for findings of fact and determinations of the issues set forth in the order [*Bus. & Prof. Code § 11019(c)*].

If the hearing is not commenced within 15 days after receipt of the request or on the date to which continued with the agreement of the person requesting the hearing, or if the decision of the Commissioner is not rendered within 30 days after completion of the hearing, the order will be deemed vacated [*Bus. & Prof. Code § 11019(c)*]. Service and proof of service of an order issued by the Commissioner pursuant to *Bus. & Prof. Code § 11019* may be made in a manner and on those persons as prescribed for the service of summons in *Code Civ. Proc. §§ 415.10-417.40* [*Bus. & Prof. Code § 11019(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationHearingsGeneral OverviewAdministrative LawAgency AdjudicationHearingsRight to HearingStatutory RightReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawSubdivisionsState Regulation

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§ 579.285 Violations

[1] Injunctive Relief

Whenever the Commissioner believes from satisfactory evidence that a violation of the Subdivided Lands Act has occurred or is about to occur, he or she may bring an action against the violator or would-be violator to enjoin that person from continuing that violation or doing any acts in furtherance of that violation. Additionally, when the circumstances warrant it, a receiver may be appointed to manage the defendant's business [*Bus. & Prof. Code § 10081*].

[2] Accrual of Cause of Action

For the purpose of calculating the period of any applicable statute of limitations in any action or proceeding, either civil or criminal, involving any violation of *Bus. & Prof. Code § 11000 et seq.*, the cause of action will be deemed to have accrued not earlier than the time of recording, with thecounty recorder of the county in which the property is situated, of any deed, lease, or contract of sale conveying property sold or leased in violation of *Bus. & Prof. Code § 11000 et seq.* and that describes that lot or parcel. Moreover, any such action may be maintained at any time before the recording of those instruments [*Bus. & Prof. Code § 11021*].

[3] Misrepresentation

It is unlawful for any owner, subdivider, agent, employee of that subdivision, or other person with intent directly or indirectly to sell or lease any subdivided land, to authorize, use, direct, or aid in the publication, distribution, or circularization of any advertisement, radio broadcast, or telecast concerning subdivided lands, that contains any statement, pictorial representation, or sketch that is false or misleading [*Bus. & Prof. Code § 11022(a)*]. However, unless the publisher, employee, or printer of the publication has actual knowledge of its falsity or has an interest either as an owner or agent in the subdivided lands so advertised, he or she is not liable [*Bus. & Prof. Code § 11022(c)*].

Marketing advertisements may be, but are not required to be, submitted, along with a prescribed fee, to the Department of Real Estate for approval before they are disseminated. If disapproval of the submitted advertisement is not communicated within 15 days, it will be deemed approved. The Department, however, is not precluded from

disapproving a later use of the same or similar advertising [*Bus. & Prof. Code § 11022(b)*].

[4] Recission of Contract

A person who has made an offer to purchase an interest in certain undivided interests in which five or more undivided parcels were created as defined in Bus. & Prof. Code § 11001.1 has the right to rescind any contract resulting from the acceptance of that offer until midnight of the third calendar day following the day on which the offer to purchase was executed [*Bus. & Prof. Code § 11000.2(a)*]. The owner must, in accordance with Real Estate Commissioner regulations, clearly and conspicuously disclose the right of rescission to all prospective purchasers of undivided interests, and must furnish to each offeror a form with which to exercise that right [*Bus. & Prof. Code § 11000.2(b)*].

For general discussion and forms for use by a purchaser in rescinding a contract for the sale of real property, see Ch. 569, *Vendor and Purchaser* .

The availability of rescission is limited to executory contracts between purchaser and subdivider. Subsequent purchasers of subdivided land do not have standing to seek rescission of the original sale from the subdivider to the subsequent purchaser's predecessor in interest [*Drake v. Martin (1994) 30 Cal. App. 4th 984, 995-996, 36 Cal. Rptr. 2d 704]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionFalse AdvertisingState RegulationCivil ProcedureRemediesInjunctionsGeneral OverviewGovernmentsLegislationStatutes of LimitationsTime LimitationsReal Property LawPurchase & SaleRemediesRescission & RestitutionReal Property LawSubdivisionsState Regulation

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§ 579.286 Regulation of Time-Share Developments

[1] The Vacation Ownership and Time-Share Act of 2004 (VOTSA)

The Vacation Ownership and Time-Share Act of 2004 (VOTSA) [*Bus & Prof. Code § 11210 et seq.*], which went into effect on July 1, 2005 [*see Bus. & Prof. Code § 11288*], provides for the disclosure to purchasers and prospective purchasers of time-share plans and exchange programs, as defined, by time-share developers and exchange companies. It requires specified time-share plans offered for sale in California or created and existing in California to comply with specified fee, registration, notice, and disclosure requirements with regard to oral and written communications, including the issuance of a public report by the Real Estate Commissioner.

Time-share plans, exchange programs, incidental benefits, and short-term products that are subject to VOTSA are not "subdivisions" or "subdivided lands" within the meaning of the Subdivided Lands Act, and are exempt from other specified provisions of existing law [*Bus. & Prof. Code § 11004.5(g)*; *see Bus. & Prof. Code § 11000 et seq.* (Subdivided Lands Act)].

Regulation of time-share plans and exchange programs is an exclusive power and function of the state [*Bus. & Prof. Code § 11280(a)*]. However, no provision of VOTSA can be construed to violate any zoning, subdivision, or building code or other real estate use law, ordinance, or regulation [*Bus. & Prof. Code § 11280(b)*].

[2] Scope and Application of VOTSA

[a] Projects That Must Be Registered

VOTSA applies to all of the following [*Bus. & Prof. Code § 11211.5*]:

- Time-share plans with an accommodation or component site in California [*see Bus. & Prof. Code § 11212(a), (f), (z)* ("accommodation," "component site," and "time-share plan" defined)];

- Time-share plans without an accommodation or component site in California, if those plans are sold

or offered for sale to any individual located in California;

- Exchange programs *Bus. & Prof. Code § 11212(l)*; and

- Short term products [*see Bus. & Prof. Code § 11212(v)* ("short term product" defined)].

The application of VOTSA to single site time-share plans and component sites of multisite plans that are located outside California that are offered for sale or sold in California is somewhat limited [*see Bus. & Prof. Code § 11211.5(d)*].

[b] Exempt Projects

VOTSA does not apply to any of the following [*Bus. & Prof. Code § 11211.5(b)*]:

- Time-share plans, whether or not an accommodation is located in California, consisting of 10 or fewer time-share interests.

- Time-share plans, whether or not an accommodation is located in California, the use of which extends over any period of three years or less.

- Time-share plans, whether or not an accommodation is located in California, under which the prospective purchaser's total financial obligation will be equal to or less than $3,000 during the entire term of the time-share plan.

Use of an exchange program by owners of time-share interests to secure access to other accommodations does not affect the exemption described in the first bullet, *above* [*Bus. & Prof. Code § 11211.5(b)(1)*].

[c] Effect of VOTSA on Time-Share Plans Registered Before July 1, 2005

All registrations of time-share plans that were in effect on July 1, 2005, remain in full force and effect and will be considered registered pursuant to VOTSA [*Bus. & Prof. Code § 11219(b)(1)*]. These plans must fully comply with VOTSA when they seek amendment or renewal of their existing registrations. While an amendment or renewal is pending, the existing registration will continue in full force and effect [*Bus. & Prof. Code § 11219(b)(2)*].

Any existing injunction or temporary restraining order that prohibits unregistered practice of time-share developers, time-share plans, or their agents is not invalidated by the enactment of VOTSA and will continue to have full force and effect on and after July 1, 2005 [*Bus. & Prof. Code § 11219(c)*].

Time-share plans that are registered as Qualified Resort Vacation Club Projects under prior law will continue to operate under that law notwithstanding VOTSA [*Bus. & Prof. Code § 11219(a)*].

[3] Registration Requirements

Any person who, to any individual located in California, sells, offers to sell, or attempts to solicit prospective purchasers to purchase a time-share interest, or any person who creates a time-share plan with an accommodation in California, must register the plan with the Commissioner, unless the plan is otherwise exempt [*Bus. & Prof. Code § 11226(a)*; *see Bus. & Prof. Code § 11225* (exemptions)]. A developer, or any of its agents, may not sell, offer, or dispose of a time-share interest in the state unless [*Bus. & Prof. Code § 11226(b)*]:

- All necessary registration requirements are provided and approved by the Real Estate Commissioner;

- The sale, offer, or disposition is otherwise permitted by VOTSA; or
- An order revoking or suspending a registration is in effect.

In this context, the terms "sells," "offers to sell," and "attempts to solicit prospective purchasers" include any written or oral communication that is disseminated or otherwise used in California for the purpose of inducing a resident to travel outside California for a required presentation with the primary intention of causing the person to purchase time-share interests located outside California [*10 Cal. Code Reg. § 2805.5*].

[4] Public Report

A developer must prepare a public report that fully and accurately discloses the facts concerning the developer and time-share plan that are required by VOTSA and its implementing regulations. The report must be provided to each purchaser of a time-share interest in any time-share plan at the time of purchase. It must be written and dated, and the purchaser must certify its receipt in writing [*Bus. & Prof. Code § 11234*]. There are different content requirements for the report depending on whether it is for (1) a single site time-share plan [*see Bus. & Prof. Code § 11234(a)*; *10 Cal. Code Reg. § 2809.1*], (2) a specific time-share interest multisite time-share plan [*see Bus. & Prof. Code § 11234(a), (b)*; *10 Cal. Code Reg. §§ 2809.1, 2809.2*], or (3) a nonspecific time-share interest multisite time-share plan [*see Bus. & Prof. Code § 11234(c)*; *10 Cal. Code Reg. § 2809.3*].

The Commissioner must issue a final public report if all registration requirements have been met and if all deficiencies and substantive inadequacies in the application for final public report have been corrected [*Bus. & Prof. Code § 11227(a)*].

The term of a final public report is five years, but may be renewed on application and submission of any additional information the Commissioner may require [*Bus. & Prof. Code § 11228*].

The Commissioner may refuse to issue a public report if the applicant fails to comply with any provisions of VOTSA and its implementing regulations [*Bus. & Prof. Code § 11229(b)*].

[5] Prohibited Marketing Practices

VOTSA includes numerous, specific prohibitions on marketing practices related to misrepresentation of information and failure to give disclosures required to be made to prospective purchasers [*see Bus. & Prof. Code § 11245*; *but see Bus. & Prof. Code § 11217*]. A violation constitutes a public offense punishable by fine, imprisonment, or both [*see Bus. & Prof. Code § 11287*].

[6] Resolution of Disputes Between Time-Share Interest Owners or Association and Developer

Any procedure provided for in a sales contract or in the time-share instruments implemented after July 1, 2005, for resolving a dispute or claim between a time-share interest owner and a developer, or any provision in the time-share instruments implemented after July 1, 2005, setting forth terms, conditions, and procedures for resolving a dispute of a claim between an association and the developer, must, at a minimum, provide that the dispute or claim resolution process be conducted in accordance with the following rules [*Bus. & Prof. Code § 11275(a)*]:

- The developer must advance the fees necessary to initiate the dispute or claim resolution process, with the costs and fees, including ongoing costs and fees, if any, to be paid as agreed by the parties. If they cannot agree then the costs and fees are to be paid as determined by the person or persons presiding at the dispute or claim resolution proceeding or hearing.

- There must be a neutral or impartial person to administer and preside over the claim or dispute resolution process.

- The selection of the person who will administer and preside over the claim or dispute resolution process must be made within a specified period of time, which in no event may be more than 60 days from initiation of the claim or dispute resolution process. The person selected may be challenged for bias.

- The venue of the claim or dispute resolution process must be in the county where the time-share is located unless the parties agree to some other location.

- The claim or dispute resolution process must be commenced in a prompt and timely manner.

- The claim or dispute resolution process must be conducted in accordance with rules and procedures that are reasonable and fair to the parties.

- The claim or dispute resolution process must conclude in a prompt and timely manner, including the issuance of any decision or ruling.

- The person presiding at the claim or dispute resolution process must be authorized to provide all recognized remedies available in law or equity for any cause of action that is the basis of the proceeding or hearing. The parties may authorize the limitation or prohibition of punitive damages.

If the claim or dispute resolution process provides or allows for a judicial remedy in accordance with the laws of California, it will be presumed that the proceeding or hearing satisfies the provisions listed above [*Bus. & Prof. Code § 11275(c)*].

[6A] Regular and Special Assessments

The owners' association is permitted to levy regular and special assessments against the time-share owners and to secure a lien against delinquent assessments [*see Bus. & Prof. Code § 11265*]. Assessments are delinquent 30 days after they become due unless the time-share instrument provides a longer period. If an assessment is delinquent, the association may recover the following [*Bus. & Prof. Code § 11265.1(a)*]:

- Reasonable costs incurred in collecting the delinquent assessment, including attorneys' fees;

- A late charge not exceeding 10 percent of the assessment or $10, whichever is greater, unless the time-share instrument specifies a smaller amount; and

- Interest on the delinquent assessment, reasonable fees and costs of collection, and reasonable attorneys' fees.

Regular assessments are exempt from execution by the association's judgment creditor only to the extent necessary for the association to perform essential services, such as paying for utilities and insurance. The exemption does not apply to [*Bus. & Prof. Code § 11265.1(b)*]:

- Consensual pledges, liens, or encumbrances that have been approved by the owners;

- State tax liens; or

- Liens for labor or materials supplied to common areas.

[7] Investigation of Violations and Enforcement of VOTSA

Responsibility for investigating violations of VOTSA and enforcing its provisions falls on the Real Estate Commissioner [*see Bus. & Prof. Code §§ 11282-11284*].

Violations of specified provisions of VOTSA are public offenses punishable by fine and/or imprisonment [*see Bus. & Prof. Code §§ 11286, 11287*].

[8] Owners' and Association's Right to Relief

Any time-share interest owner or association may bring an action for damages or injunctive or declaratory relief against a developer, seller, or marketer of time-share interests, or an escrow holder, or the managing entity for a violation of VOTSA. This right to relief does not exclude other remedies provided by law [*Bus. & Prof. Code § 11285*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionFalse AdvertisingState RegulationCivil ProcedureAlternative Dispute ResolutionGeneral OverviewCivil ProcedureRemediesInjunctionsGeneral OverviewReal Property LawCommon Interest CommunitiesTimesharesReal Property LawSubdivisionsState Regulation

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§ 579.287 Interstate Land Sales

The Interstate Land Sales Full Disclosure Act is set forth in *15 U.S.C. § 1701 et seq.* Designed to protect against fraud in interstate land sales, it insures that the buyer is informed of the facts necessary to make an informed decision about whether or not to purchase property [*see Law v. Royal Palm Beach (5th Cir. 1978) 578 F.2d 98, 99]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleInterstate Land Sales Full Disclosure Act

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§ 579.288 Definitions

"Subdivision" means any land that is located in any state or in a foreign country and is divided or is proposed to be divided into lots, whether contiguous or not, for the purpose of sale or lease as a part of a common promotional plan [*15 U.S.C. § 1701(3)*].

"Common promotional plan" means a plan, undertaken by a single developer or a group of developers acting in concert, to offer lots for sale or lease. Where that land is offered for sale by that developer or group of developers acting in concert, and is contiguous or is known, designated, or advertised as a common unit or by a common name, that land will be presumed, without regard to the number of lots covered by each individual offering, as being offered for sale or lease as part of a common promotional plan [*15 U.S.C. § 1701(4)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleInterstate Land Sales Full Disclosure ActReal Property LawSubdivisionsGeneral Overview

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§ 579.289 Exemptions

Unless the method of disposition is adopted to evade the Full Disclosure Act, its provisions do not apply to various types of real estate sales and leases. Among the types of real estate sales and leases to which the Full Disclosure Act does not apply are [*15 U.S.C. § 1702(a)*]:

- The sale or lease of lots in a subdivision containing less than 25 lots.

- The sale or lease of any improved land on which there is a building, or the sale or lease of land under a contract obligating the seller to erect such a building within two years.

- The sale or lease of lots to any person who acquires those lots for the purpose of engaging in the business of constructing residential, commercial, or industrial buildings or for the purpose of resale or lease of those lots to persons engaged in those businesses.

Additionally, unless the method of disposition is adopted to evade the Full Disclosure Act, its provisions requiring registration and disclosure do not apply in several instances. Among these instances are [*15 U.S.C. § 1702(b)*]:

- The sale or lease of lots in a subdivision containing fewer than 100 lots.

- The sale or lease of lots in a subdivision, if within 12 months not more than 12 lots are sold or leased, and the sale or lease of the first 12 lots in that subdivision in any subsequent 12-month period.

- The sale or lease of lots in a subdivision in which each of the lots is at least 20 acres.

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleInterstate Land Sales Full Disclosure Act

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§ 579.290 Acts Prohibited

It is unlawful for any developer or agent, directly or indirectly, to make use of any means of interstate commerce or of the mails with respect to the sale or lease of any nonexempt lot unless a statement of record regarding that lot is in effect and a printed property report is furnished to the purchaser in advance of the signing of any contract; and when any part of the statement of record or the property report contains an untrue statement of a material fact or omits to state a material fact or to display to prospective purchasers or lessees promotional material that is inconsistent with information required to be disclosed in the property report [*15 U.S.C. § 1703(a)(1)*].

It is unlawful for any developer or agent, directly or indirectly, to make use of any means of interstate commerce or of the mails with respect to the sale or lease of any lot not exempt under *15 U.S.C. § 1702(a)* to employ any device, scheme, or artifice to defraud, or to obtain money or property by means of a material misrepresentation, or to engage in any transaction, practice, or course of business that operates or would operate as a fraud or deceit on a purchaser [*15 U.S.C. § 1703(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleInterstate Land Sales Full Disclosure ActReal Property LawPurchase & SaleRemediesDuty to Disclose

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§ 579.291 Revocation of Contract or Agreement

Any contract or agreement for the purchase or lease of any nonexempt lot may be revoked at the option of the purchaser or lessee until seven daysafter it has been signed or until a later time required pursuant to state law [*15 U.S.C. § 1703(b)*].

If the required property report was not given to the purchaser or lessee in advance of his or her signing the contract or agreement, that contract or agreement may be revoked at the option of the purchaser or lessee within two years from the date of its signing [*15 U.S.C. § 1703(c)*].

Any contract or agreement for the purchase or lease of any nonexempt lot that does not provide the statutorily required notice regarding breach or default may be revoked at the option of the purchaser or lessee within two years from the date of its signing [*15 U.S.C. § 1703(d)*]. *15 U.S.C. § 1703(d)* does not apply to the sale of a lot for which, within 180 days after the signing of the sale contract the purchaser receives a warranty deed [*15 U.S.C. § 1703(d)*].

If a contract or agreement is revoked pursuant to *15 U.S.C. § 1703(b), (c),* or *(d),* if the purchaser or lessee tenders to the sell er or lessor an instrumentconveying his or her rights and interests in the lot, and if the rights and interests and the lot are in a condition substantially similar to the condition in which they were conveyed or purported to be conveyed, that purchaser or lessee is entitled to all money paid [*15 U.S.C. § 1703(e)*]. For general discussion and forms for use by a purchaser in rescinding a contract for the sale of real property, see Ch. 569, *Vendor and Purchaser* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleInterstate Land Sales Full Disclosure ActReal Property LawPurchase & SaleRemediesRescission & Restitution

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§ 579.292 Civil Liabilities

A purchaser or lessee may bring an action at law or in equity against a developer or agent if the sale or lease was made in violation of *15 U.S.C. § 1703(a)*. In such a suit, the court may order damages, specific performance, or such other relief as the court deems fair, just, and equitable. In determining that relief, the court may take into account, but not be limited to, the following factors [*15 U.S.C. § 1709(a)*]:

- The contract price;
- The amount actually paid;
- The cost of any improvements to the lot;
- The fair market value of the lot or leasehold at the time relief is determined; and
- The fair market value of the lot or leasehold at the time that lot was purchased or leased.

A purchaser or lessee may bring an action at law or in equity against the seller or lessor (or successor thereof) to enforce any rights under *15 U.S.C. § 1703(b), (c), (d),* or *(e)* [*15 U.S.C. § 1709(b)*].

The amount recoverable in a suit authorized by *15 U.S.C. § 1709* may include, in addition to matters specified, interest, court costs, and reasonable amounts for attorney's fees, independent appraiser's fees, and travel to and from the lot [*15 U.S.C. § 1709(c)*].

Every person who becomes liable to make any payment under *15 U.S.C. § 1709* may recover contributions as in cases of contract from any person who, if sued separately, would have been liable to make the same payment [*15 U.S.C. § 1709(d)*].

Generally, an action maintained under *15 U.S.C. § 1709* must be brought within three years after the date of signing the

sale contract or lease, or within three years after the violation was or should have been discovered [*15 U.S.C. § 1711*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesCosts & Attorney FeesAttorney Expenses & FeesGeneral OverviewCivil ProcedureRemediesCosts & Attorney FeesCostsGeneral OverviewReal Property LawPurchase & SaleInterstate Land Sales Full Disclosure ActReal Property LawPurchase & SaleRemediesDamagesGeneral OverviewReal Property LawPurchase & SaleRemediesSpecific Performance

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§ 579.293 No Limitation of Rights

Any condition, stipulation, or provision binding any person acquiring any lot in a subdivision to waive compliance with any provision of *15 U.S.C. §§ 1701-1720* is void [*15 U.S.C. § 1712*].

The rights and remedies provided by *15 U.S.C. §§ 1701-1720* are in addition to any and all other rights and remedies that may exist at law or in equity [*15 U.S.C. § 1713*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleInterstate Land Sales Full Disclosure ActReal Property LawPurchase & SaleRemediesGeneral Overview

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§ 579.294 Injunctions and Investigations

Whenever it appears that any person is engaged or about to engage in any acts or practices that constitute or will constitute a violation of the provisions of *15 U.S.C. §§ 1701-1720* or of any rule or regulation prescribed pursuant thereto, the Secretary may bring an action in any federal district court to enjoin those acts or practices, and, on a proper showing, a permanent or temporary injunction or restraining order will be granted without bond. The Secretary may transmit evidence to the Attorney General who may institute the appropriate criminal proceedings [*15 U.S.C. § 1714(a)*].

The Secretary may make those investigations deemed necessary to determine whether any person has violated or is about to violate any provision of *15 U.S.C. §§ 1701-1720* or any rule or regulation prescribed pursuant thereto, and may require or permit any person to file a written statement regarding all the facts and circumstances concerning the matter to be investigated. The Secretary may publish information concerning any violations [*15 U.S.C. § 1714(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesInjunctionsGeneral OverviewReal Property LawPurchase & SaleInterstate Land Sales Full Disclosure Act

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§ 579.295 Penalties

Any person who willfully violates any of the provisions of *15 U.S.C. §§ 1701-1720* or the rules and regulations prescribed pursuant thereto, or any person who willfully, in a statement of record filed under, or in a property report issued pursuant to *15 U.S.C. §§ 1701-1720*, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein, will, on conviction, be fined not more than$10,000 or imprisoned not more than five years, or both [*15 U.S.C. § 1717*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & ProcedureCriminal OffensesMiscellaneous OffensesGeneral OverviewReal Property LawPurchase & SaleInterstate Land Sales Full Disclosure Act

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§ 579.296 Jurisdiction and Venue

The district courts of the United States, the United States courts of any territory, and the United States District Court for the District of Columbia have jurisdiction of offenses and violations under *15 U.S.C. §§ 1701-1720* and under the rules and regulations issued pursuant thereto. Those courts have concurrent jurisdiction with the state courts of all suits in equity and actions at law brought to enforce any liability or duty created by *15 U.S.C. §§ 1701-1720*. Any such suit or action may be brought in the district wherein the defendant is found, is an inhabitant, or transacts business, or in the district where the offer or sale took place, if thedefendant participated therein. No case arising under *15 U.S.C. §§ 1701-1720* and brought in any state court of competent jurisdiction will be removed to any court of the United States, except when the United States or any officer or employee of the United States in his or her official capacity is a party [*15 U.S.C. § 1719*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJurisdictionSubject Matter JurisdictionGeneral OverviewCivil ProcedureJurisdictionSubject Matter JurisdictionJurisdiction Over ActionsConcurrent JurisdictionCriminal Law & ProcedureJurisdiction & VenueGeneral OverviewReal Property LawPurchase & SaleInterstate Land Sales Full Disclosure Act

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§ 579.297 Interplay With State Law

15 U.S.C. §§ 1701-1720 does not prevent or limit the authority of the state or local government to enact and enforce with regard to the sale of land any law, ordinance, or code not in conflict with the Interstate Land Sales Full Disclosure Act [*15 U.S.C. § 1708(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleInterstate Land Sales Full Disclosure Act

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[Reserved]

§§ 579.298[Reserved]

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51-579 California Forms of Pleading and Practice--Annotated § 579.310

§ 579.310 California Legal Forms

For discussion and forms relating to building permits and seeking relief from zoning ordinances, see California Legal Forms, Ch. 30B, *Zoning, Building and Environmental Entitlements and Permits* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawZoning & Land UseAdministrative Procedure

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§ 579.311 California Real Estate

For discussion of general zoning regulations, including variances, conditional use permits, and nonconforming uses, see California Real Estate Law and Practice, Chs. 260- 265; for discussion of zoning enforcement and judicial review of zoning decisions, see Chs. 280- 283; for discussion of building permits, see Ch. 423, *Building Codes* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseConditional Use Permits & VariancesEnvironmental LawZoning & Land UseJudicial ReviewReal Property LawZoning & Land UseJudicial ReviewReal Property LawZoning & Land UseNonconforming Uses

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§ 579.312 California Environmental Law

For detailed coverage of zoning regulations, including types and methods of zoning, conditional use permits and variances, constitutional and nonconstitutional limits on zoning power, nonconforming uses, and judicial review of zoning restrictions, see Manaster and Selmi, California Environmental Law and Land Use Practice, Ch. 60, *Zoning* (Matthew Bender); for discussion of general and specific plans, see Ch. 62, *Planning* ; for discussion of the California coastal zone, see Ch. 66, *Coastal Zone Regulation*

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseConditional Use Permits & VariancesEnvironmental LawZoning & Land UseConstitutional LimitsReal Property LawZoning & Land UseJudicial ReviewReal Property LawZoning & Land UseNonconforming UsesReal Property LawZoning & Land UseZoning Methods

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§ 579.313 Federal Statutes

Coastal Zone Management Act. *16 U.S.C. § 1451 et seq.*

National Environmental Policy Act of 1969 (NEPA). *42 U.S.C. § 4321 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNational Environmental Policy ActGeneral OverviewEnvironmental LawNatural Resources & Public LandsCoastal Zone ManagementGeneral Overview

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§ 579.314 State Statutes

[1] Building Regulations

State Housing Law. *Health & Safety Code § 17910 et seq.*

State Building Standards Law. *Health & Safety Code §§ 18901, 18949.31*

State Building Standards Code. *Health & Safety Code §§ 18902, 18935 et seq.*

Reconstruction standards for earthquake hazardous buildings. *Health & Safety Code §§ 19160-19168*

[2] Cemeteries

Required notice under *Gov. Code §§ 65091-65094* when application is made to use cemetery for other than cemetery uses. *Gov. Code § 65096*; *Health & Safety Code § 8120*

[3] Coastal Lands

State Coastal Conservancy. *Pub. Res. Code § 31000 et seq.*

California Coastal Act of 1976. *Pub. Res. Code § 30000 et seq.*

San Francisco Bay Area Conservancy Program. *Pub. Res. Code § 31160 et seq.*

[4] General

Planning and Zoning Law. *Gov. Code § 65000 et seq.*

Dedication of land for schools as condition for approval of residential development. *Gov. Code § 65970 et seq.*

Procedures for adopting certain fees. *Gov. Code § 66016 et seq.*

Procedures for protesting residential development fees. *Gov. Code § 66020 et seq.*

Official Maps. *Gov. Code § 66499.50 et seq.*

California Environmental Quality Act (CEQA). *Pub. Res. Code § 21000 et seq.*

Airport land use commission. *Pub. Util. Code § 21670 et seq.*

[5] Judicial Review

Injunctions. *Civ. Code § 3422*; *Code Civ. Proc. § 526*

Action for declaratory relief. *Code Civ. Proc. § 1060*

Traditional Mandate. *Code Civ. Proc. §§ 1085, 1086*

Administrative Mandate. *Code Civ. Proc. § 1094.5*

California Coastal Act review. *Pub. Res. Code §§ 30801, 30802*

Actions challenging local government decision. *Gov. Code § 65009*

Rules of evidence and procedure. *Gov. Code § 65010*

Challenge to general plan. *Gov. Code §§ 65750-65763*

Review of general plan. *Gov. Code § 65860*

Review of variances and conditional use permits. *Gov. Code § 65907*

Notice of enforcement. *Gov. Code § 65908*

[6] Plans

General plans. *Gov. Code § 65300 et seq.*

Specific plans. *Gov. Code §§ 65450-65457*

[7] Zoning Regulations

Zoning regulations. *Gov. Code § 65800 et seq.*

Adoption of regulations. *Gov. Code § 65850 et seq.*

Variances and conditional use permits. *Gov. Code § 65900 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawNatural Resources & Public LandsCoastal Zone ManagementGeneral OverviewReal Property LawZoning & Land UseAdministrative ProcedureReal Property LawZoning & Land UseBuilding & Housing CodesReal Property LawZoning & Land UseJudicial ReviewReal Property LawZoning & Land UseSpecial Permits & Variances

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51-579 California Forms of Pleading and Practice--Annotated § 579.315

§ 579.315 Federal Regulations

Implementation of National Environmental Policy Act of 1969. *40 C.F.R. § 6.100 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 579.316 State Regulations

Coastal development permits. *14 Cal. Code Reg. § 13050 et seq.*

Implementation of California Environmental Quality Act (CEQA Guidelines). *14 Cal. Code Reg. § 15000 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawGeneral OverviewEnvironmental LawNatural Resources & Public LandsCoastal Zone ManagementGeneral Overview

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§ 579.317 Decisions

[1] Accessory Uses

When commercial and residential zones were on opposite sides of an alley, use of residentially-zoned portion of alley to gain access to building in commercially-zoned area constituted commercial accessory use in violation of zoning restrictions of residential district. *Teachers Ins. & Annuity Assn. v. Furlotti (1999) 70 Cal. App. 4th 1487, 1495, 83 Cal. Rptr. 2d 455*

Zoning ordinance that prohibited commercial use of dwelling when assistants were employed was valid and did not violate privacy rights. *City of Los Altos v. Barnes (1992) 3 Cal. App. 4th 1193, 1199-1202, 5 Cal. Rptr. 2d 77*

[2] Administrative Mandate

Administrative action of board is overturned only on clear showing of abuse of discretion. *Rubin v. Board of Directors (1940) 16 Cal. 2d 119, 126-127, 104 P.2d 1041* ; *Garden Grove Congregation v. City of Garden Grove (1959) 176 Cal. App. 2d 136, 140-141, 1 Cal. Rptr. 65*

Administrative mandamus under *Code Civ. Proc. § 1094.5* was appropriate remedy to challenge city's decision, which required removal of nonconforming patio as condition to grant of variance. *Briggs v. City of Rolling Hills Estates (1995) 40 Cal. App. 4th 637, 644-648, 47 Cal. Rptr. 2d 29*

Federal civil rights claim under *42 U.S.C. § 1983* challenging city's zoning decision, which required removal of nonconforming patio as condition to grant of variance, was barred by plaintiff's failure to petition for administrative mandamus under *Code Civ. Proc. § 1094.5*. *Briggs v. City of Rolling Hills Estates (1995) 40 Cal. App. 4th 637, 644-648, 47 Cal. Rptr. 2d 29*

In administrative mandamus proceeding, court is limited to reviewing record before board and as not to substitute its

opinion on facts. *Patterson v. Board of Supervisors (1947) 79 Cal. App. 2d 670, 671-672, 180 P.2d 945*

[3] Adult Entertainment Zoning

First Amendment requires that adult business ordinance provide both for prompt judicial review of denial of license and also for prompt judicial decision. *City of Littleton v. Z. J. Gifts D-4, City of Littleton (2004) 541 U.S. 774, 124 S. Ct. 2219, 159 L. Ed. 2d 84*

City could rely on 1977 study showing association between areas with high concentrations of adult establishments and high crime rates in support of ordinance prohibiting operation of more than one adult entertainment business in the same building, even though study did not consider secondary effects of combined operations in a single building. *City of Los Angeles v. Alameda Books, Inc. (2002) 535 U.S. 425, 122 S. Ct. 1728, 1734, 152 L. Ed. 2d 670*

Injunction against enforcement of adult entertainment business zoning was proper based on finding of serious hardship to adult businesses because of lack of adequate number of potential relocation sites that met zoning criteria. *Topanga Press, Inc. v. Los Angeles (9th Cir. 1993) 989 F.2d 1524*

Adult theatre zoning is unconstitutional when its separation requirement precludes reasonable alternative sites for adult theatres. *Walnut Properties, Inc. v. City of Whittier (9th Cir. 1988) 861 F.2d 1102*

Zoning ordinance that restricted area for adult entertainment establishments was valid when all commercially zoned areas were available for these establishments and space was available in commercial area; private landowners' refusal to rent to adult entertainment establishments was not relevant. *City of National City v. Wiener (1992) 3 Cal. 4th 832, 847-849, 12 Cal. Rptr. 2d 701, 838 P.2d 223*

Theatre is adult theatre for zoning purposes if theatre shows adult films are regular and substantial course of conduct. *People v. Superior Court (Lucero) (1989) 49 Cal. 3d 14, 26-28, 259 Cal. Rptr. 740, 774 P.2d 769*

City ordinance forbidding adult businesses within 100 feet of freeway was unconstitutional on its face; purpose of avoiding visual blight could be addressed by less intrusive means, such as appropriate sign and exterior requirements. *Gammoh v. City of Anaheim (1999) 73 Cal. App. 4th 186, 199-200, 86 Cal. Rptr. 2d 194*

City ordinance prohibiting location of adult businesses within 400 feet of any area zoned residential was unconstitutional as applied to business that would be located within 400 feet of single wedge-shaped vacant residential lot in industrial zone next to freeway. *Gammoh v. City of Anaheim (1999) 73 Cal. App. 4th 186, 197-198, 86 Cal. Rptr. 2d 194*

Inclusion of adult newsracks in adult entertainment zoning is unconstitutional as violation of *First Amendment* right of free speech. *Sebago, Inc. v. City of Alameda (1989) 211 Cal. App. 3d 1372, 1381-1386, 259 Cal. Rptr. 918*

[4] Aesthetics

Advancement of esthetic values is legitimate exercise of state police powers; public welfare is broad and inclusive concept and represents spiritual, physical, aesthetic, and monetary values. *City Council v. Taxpayers for Vincent (1984) 466 U.S. 789, 805, 104 S. Ct. 2118, 80 L. Ed. 2d 772*

Ordinance imposing height limitations on pre-existing foliage was legitimate exercise of city's police power. *Echevarietta v. City of Rancho Palos Verdes (2001) 86 Cal. App. 4th 472, 479, 103 Cal. Rptr. 2d 165*

Zoning ordinance preserving views and sunlight against unreasonable obstruction by tree growth and providing for private enforcement advanced aesthetic values and was reasonable exercise of police power. *Kucera v. Lizza (1997) 59 Cal. App. 4th 1141, 1148, 69 Cal. Rptr. 2d 582*

Ordinance that provided for discretionary review to consider effect of construction on neighborhood was valid even though it allowed prohibition of building that met zoning requirements; ordinances requiring considerationof aesthetics are valid under police power. *Guinnane v. San Francisco City Planning Com. (1989) 209 Cal. App. 3d 732, 736-742, 257 Cal. Rptr. 742*

Sign regulation is valid when it expressly prohibits signs characterizing person or object in only certain areas of city, permits them in other areas with conditional use permit subject to zoning administrator approval if they are desirable and in character with area, and sign shape, not message, is determinative. *City of Salinas v. Ryan Outdoor Advertising, Inc. (1987) 189 Cal. App. 3d 416, 433, 234 Cal. Rptr. 619*

On-premises business sign is protected as property right and is limited *First Amendment* free speech right; size, location, and other physical attributes of sign is subject to regulation in interests of public safety and aesthetics; prohibition of nonoffensive name on sign simply because it may attract undesirable clientele is unconstitutional violation of right to free speech. *Kuhns v. Board of Supervisors (1982) 128 Cal. App. 3d 369, 376, 181 Cal. Rptr. 1*

Signs and billboards are subject to reasonable regulation through police power; size, location, and other physical attributes of sign and number of signs that may be posted, affixed, or installed are subject to regulation; classification of advertising signs is not to be arbitrarily made for mere purpose of classification, but must be based on some distinction, natural, intrinsic, or constitutional, which suggests reason for and justifies particular legislation. *Carlin v. City of Palm Springs (1971) 14 Cal. App. 3d 706, 712, 92 Cal. Rptr. 535*

[5] Building Permits

City estopped from revoking building permit on ground building's size violated city building code; permit was issued following settlement of litigation over permit requirements, and city had ample opportunity to review both building plans and settlement agreement before granting permit. *Congregation Etz Chaim v. City of Los Angeles (9th Cir. 2004) 371 F.3d 1122, 1124-1125*

Plaintiff's building permit did not give it vested rights in proposed redevelopment agency plan or in parking spaces allocated to it in proposed parking facility, when permit contained no commitment on part of agency to provide parking spaces and because this right could not be created by estoppel under facts of case. *Boone v. Redevelopment Agency of City of San Jose (9th Cir. 1988) 841 F.2d 886, 893*

Party challenging plan review and building permit fees under *Gov. Code § 66014* must seek prospective fee reduction under *Gov. Code § 66016* and may not seek refund of allegedly excess fees under *Gov. Code § 66020*. *Barratt American, Inc. v. City of Rancho Cucamonga (2005) 37 Cal. 4th 685, 699, 37 Cal. Rptr. 3d 149, 124 P.3d 719*

Action seeking removal of conditions imposed by ordinance on building permit was timely under *Gov. Code § 65009(c)(1)(E)* even though plaintiff raised facial rather than as-applied challenge, because action was brought within 90 days of final decision imposing conditions. *Travis v. County of Santa Cruz (2004) 33 Cal. 4th 757, 767, 16 Cal. Rptr. 3d 404, 94 P.3d 538*

Transit development fee imposed after issuance of building permit was valid when permit contained condition that developer participate in assessment district or similar mechanism for transit and fee actually imposed was similar to assessment district. *Russ Bldg. Partnership v. City and County of San Francisco (1988) 44 Cal. 3d 839, 845-854, 244*

Cal. Rptr. 682, 750 P.2d 324

Increased in-lieu affordable housing fee to be paid by developer on issuance of building permits for market-rate housing was not "reasonably justified" within meaning of development agreement because there was no reasonable relationship between amount of fee as increased and deleterious public impact of development. *Building Industry Assn. v. City of Patterson (2009) 171 Cal. App. 4th 886, 898, 90 Cal. Rptr. 3d 63*

Statute of limitations set forth in *Gov. Code § 65009(c)(1)(E)* applied to action challenging city planning department issuance of building permit. *Honig v. San Francisco Planning Dept. (2005) 127 Cal. App. 4th 520, 524, 528, 25 Cal. Rptr. 3d 649*

Building permit properly denied on aesthetic grounds; applicant's claim that denial was arbitrary and capricious was not sufficient to state claim for violation of substantive due process under *42 U.S.C. § 1983* without showing that applicant was deprived of protected property interest. *Breneric Associates v. City of Del Mar (1999) 69 Cal. App. 4th 166, 182-183, 81 Cal. Rptr. 2d 324*

Developer challenging change of zoning and other local actions based on alleged substantive due process violation under *42 U.S.C. § 1983* had no vested right on which to base its claim due to fact that it had not applied for nor received building permit for its project. *Stubblefield Construction Co. v. City of San Bernardino (1995) 32 Cal. App. 4th 687, 708, 38 Cal. Rptr. 2d 413*

[6] California Coastal Act

[a] Definition of Development

Use of settling pond and waste disposal area was within definition of development in *Pub. Res. Code § 30106*, which includes placement of any solid material and disposal of any dredged material. *Halaco Engineering Co. v. South Central Coast Regional Com. (1986) 42 Cal. 3d 52, 58, 62, 227 Cal. Rptr. 667, 720 P.2d 15*

Development includes placement on land of any structure, including 18,000 gallon propane tank; structure includes any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line. *Halaco Engineering Co. v. South Central Coast Regional Com. (1986) 42 Cal. 3d 52, 76-77, 227 Cal. Rptr. 667, 720 P.2d 15*

Lot line adjustments constitute "development" within meaning of *Pub. Res. Code § 30106*, for which permit or waiver is required under *La Fe, Inc. v. County of Los Angeles (1999) 73 Cal. App. 4th 231, 240, 86 Cal. Rptr. 2d 217*

[b] EIR

EIR for aquarium that did not consider alternative sites on waterfront that would not require fill was adequate when all waterfront sites were analyzed and no sites that did not require fill were identified. *Save San Francisco Bay Ass'n v. San Francisco Bay Conservation Etc. Com. (1992) 10 Cal. App. 4th 908, 919-922, 13 Cal. Rptr. 2d 117*

[c] In General

Commission's decision involves discretion; issuing of permit requires delicate balancing of effect of each proposed development on coastal environment; development must not have any substantial adverse environmental or ecological effect or irreversibly commit coastal zone resources, and must enhance environment of coastal zone. *State v. Superior*

Court of Orange County (1974) 12 Cal. 3d 237, 247-248, 115 Cal. Rptr. 497, 524 P.2d 1281

Before certification of local coastal plan, Coastal Commission or other permit issuing agency has authority to designate property as environmentally sensitive habitat area and deny permit on that basis. *Douda v. California Coastal Commission (2008) 159 Cal. App. 4th 1181, 1193, 72 Cal. Rptr. 3d 98*

When project approval is appealed to California Coastal Commission and Commission issues permit after conducting de novo proceeding, subsequent administrativemandamus challenge naming local governmental entity but not Commission is vulnerable to claim that Commission is indispensable party. *Kaczorowski v. Mendocino County Bd. of Supervisors (2001) 88 Cal. App. 4th 564, 569-570, 106 Cal. Rptr. 2d 14*

Coastal Commission properly determined that wetlands existed on proposed development site. *Kirkorowicz v. California Coastal Com. (2000) 83 Cal. App. 4th 980, 987-988, 100 Cal. Rptr. 2d 124*

City was not required to obtain Coastal Commission approval before implementing and enforcing interim ordinance imposing height and density restrictions on development in coastal zone, because ordinance was not in conflict with Coastal Act and did not authorize a use other than those designated in local coastal plan. *Conway v. City of Imperial Beach (1997) 52 Cal. App. 4th 78, 88-89, 60 Cal. Rptr. 2d 402*

Coastal commission had authority to deny certification to coastal plan that allowed oil and gas development on Santa Cruz island and did not sufficiently limit residential development. *Pier Gherini v. California Coastal Com. (1988) 204 Cal. App. 3d 699, 705-710, 251 Cal. Rptr. 426*

In reviewing regional commission decision, state commission is required to exercise its independent judgment to decide if conformity with statewide standards has been achieved. *City of Chula Vista v. Superior Court (1982) 133 Cal. App. 3d 472, 488-490, 183 Cal. Rptr. 909*

Commission is authorized to require dedication for public parking through its power to provide access consistent with needs for public safety and to protect public rights, private property owners' rights, and natural resources areas from overuse; provision requiring parking for use to be made of land involved is proper, to require landowner to dedicate property for free public parking far beyond his or her own land use requirements is improper. *Liberty v. California Coastal Com. (1980) 113 Cal. App. 3d 491, 502-503, 170 Cal. Rptr. 247*

Rule of exhaustion of administrative remedies is applicable in Coastal Act cases. *La Costa Beach Homeowners Assn. v. Wayne (1979) 89 Cal. App. 3d 327, 330-332, 152 Cal. Rptr. 355*

Coastal Act creates chain of responsibility; regional commission has responsibility to adjudicate propriety of granting or denying permit, recognizing regional effect on ecosystem; on appeal, state commission takes unlimited look at same request by de novo public hearing, reviewing regional effect and statewide effect of proposed development. *REA Enterprises v. California Coastal Zone Conservation Com. (1975) 52 Cal. App. 3d 596, 605, 125 Cal. Rptr. 201* (decided under former Coastal Act)

Denial of building permit during preparation of coastal zone plan was not taking of property for public use without compensation, even when denial was result of Department of Parks and Recreation expressing interest in and intent to acquire that property. *Briggs v. State of California ex rel. Dept. Parks & Recreation (1979) 98 Cal. App. 3d 190, 203-205, 159 Cal. Rptr. 390*

[d] Permits

Placement of 18,000-gallon propane tank after effective date of Coastal Act was change or new development for which permit is required, even though rest of operation was exempt from *Coastal Act. Halaco Engineering Co. v. South Central Coast Regional Com. (1986) 42 Cal. 3d 52, 76-77, 227 Cal. Rptr. 667, 720 P.2d 15*

Coastal Commission must make findings to support grant of permit for development in environmentally sensitive habitat area on basis that denial of permit would effect unconstitutional taking. *McAllister v. California Coastal Commission (2009) 169 Cal. App. 4th 912, 942, 87 Cal. Rptr. 3d 365*

Coastal Commission properly granted permit although addition to home would partially block view of sea; in providing that "permitted development shall be sited and designed to protect views" [*see Pub. Res. Code § 30251*] Legislature did not intend that permits be denied for all projects that infringed in any way, no matter how minimally, on any view, no matter how limited. *Farr v. Coastal Commission (2009) 173 Cal. App. 4th 1474, 1479-1480, 93 Cal. Rptr. 3d 710*

Coastal Commission lacked jurisdiction to designate proposed development site as an environmentally sensitive habitat area on appeal of local government's grant of coastal development permit. *Security National Guaranty Inc. v. California Coastal Commission (2008) 159 Cal. App. 4th 402, 425, 71 Cal. Rptr. 3d 522*

Coastal Commission acted within its jurisdiction in imposing mitigation fee on homeowners' association in connection with permit to build a seawall; Commission was not limited by *Pub. Res. Code § 30235* ("seawalls ... shall be permitted when required ... to protect existing structures ... and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply") in the type of conditions it could impose in granting such permit. *Ocean Harbor House Homeowners Association v. California Coastal Commission (2008) 163 Cal. App. 4th 215, 241, 77 Cal. Rptr. 3d 432*

Mitigation fee imposed by Coastal Commission on homeowners' association in connection with permit to build seawall did not effect an unconstitutional taking. *Ocean Harbor House Homeowners Association v. California Coastal Commission (2008) 163 Cal. App. 4th 215, 241, 77 Cal. Rptr. 3d 432*

Doctrine of equitable estoppel did not bar Coastal Commission from ordering homeowner to remove private three-hole golf course from around house and restore area to its native sand dune vegetation in accordance with applicable restrictions on landscaping, even though property had been in visible violation of coastal development permit conditions for 18 years. *Feduniak v. California Coastal Com. (2007) 148 Cal. App. 4th 1346, 1380, 56 Cal. Rptr. 3d 591*

Following Coastal Commission proceedings on appeal of development permit, property owner could not state cause of action against the county under California Environmental Quality Act (CEQA) because county's determinations were superseded by Coastal Commission's environmental review. *McAllister v. County of Monterey (2007) 147 Cal. App. 4th 253, 294, 54 Cal. Rptr. 3d 116*

Coastal Commission may not include boaters' "right to a view" of coastline as factor to deny or restrict development permits in coastal zone. *Schneider v. California Coastal Comm'n (2006) 140 Cal. App. 4th 1339, 1348, 44 Cal. Rptr. 3d 867*

Coastal Commission had authority to allow Malibu property owners to delete permit conditions requiring on-site view corridors and to substitute off-site view and access mitigation. *La Costa Beach Homeowners' Assn. v. California Coastal Commission (2002) 101 Cal. App. 4th 804, 817, 124 Cal. Rptr. 2d 618*

Coastal development permit was activated on approval of final subdivision map, and therefore did not expire even though construction was commenced prior to permit expiration date. *Trancas Property Owners Assn. v. City of Malibu (1998) 61 Cal. App. 4th 1058, 1061-1062, 72 Cal. Rptr. 2d 131*

Vested right was not acquired by permanent construction under emergency permit and Commission was not estopped

from requiring removal of construction. *Barrie v. California Coastal Com. (1987) 196 Cal. App. 3d 8, 14-20, 241 Cal. Rptr. 477*

Former Pub. Res. Code § 27401 (*now see Pub. Res. Code § 30601*) provides for interim permit procedure, with two-thirds vote needed for approval, for developments in particularly sensitive area. *Patterson v. Central Coast Regional Com. (1976) 58 Cal. App. 3d 833, 847, 130 Cal. Rptr. 169*

[e] Vested Right

Developer claiming exemption from permit requirement of Coastal Act on grounds of having vested right to continue development was required to seek confirmation of vested right claim by regional commission; developer was unable to first assert claim in defense to action by regional commission to enjoin further development. *Halaco Engineering Co. v. South Central Coast Regional Com. (1986) 42 Cal. 3d 52, 63, 227 Cal. Rptr. 667, 720 P.2d 15*

Vested rights doctrine protects property owners from changes in zoning or other land use regulations that occur before completion of owner's coastal development project; vested right to complete project arises only after property owner has performed substantial work, incurred substantial liability, and shown good faith reliance on coastal development permit. *Halaco Engineering Co. v. South Central Coast Regional Com. (1986) 42 Cal. 3d 52, 64-65, 227 Cal. Rptr. 667, 720 P.2d 15* ; *Tosh v. California Coastal Com. (1979) 99 Cal. App. 3d 388, 392-393, 160 Cal. Rptr. 170*

Filing of vesting tentative map in 1990 did not deprive Coastal Commission of jurisdiction to deny development permit on appeal based on policies enacted after tentative map was filed. *Charles A. Pratt Construction Co. v. California Coastal Commission (2008) 162 Cal. App. 4th 1068, 1074-1075, 76 Cal. Rptr. 3d 466*

Property owners acquired no vested right in development under *Pub. Res. Code § 30608* resulting from tentative map approval under former California Coastal Act when that approval was conditioned on property owners conveying scenic easement to county and obtaining permit for water system from county health department and they failed to comply with either condition, even though they expended substantial sum of money and performed approximately 80 percent of work. *Tosh v. California Coastal Com. (1979) 99 Cal. App. 3d 388, 392-396, 160 Cal. Rptr. 170*

1976 Coastal Act did not terminate vested right that existed under law prior to its passage; Coastal Act does not make distinction in exemptions between person with vested right and person who obtained permit under former *Coastal Act. Pardee Construction Co. v. California Coastal Com. (1979) 95 Cal. App. 3d 471, 479-480, 157 Cal. Rptr. 184*

[7] Conditional Use Permit

[a] Application

Lessee has standing as owner to apply for conditional use permit. *Shell Oil Co. v. City and County of San Francisco (1983) 139 Cal. App. 3d 917, 920-921, 189 Cal. Rptr. 276*

[b] Approval

Determination that permit applicant has satisfied local ordinance standards is sufficient to justify granting permit; findings outside those of ordinance, such as finding that applicant has not violated terms of previously-issued conditional use permit, are not required. *Baird v. County of Contra Costa (1995) 38 Cal. Rptr. 2d 93*

[c] Condition

Condition of approval of use permit that is specifically related to individual is invalid because conditional use permit regulates land, not individuals; any condition imposed must relate to property and not to particular applicant. *Sounhein v. City of San Dimas (1996) 47 Cal. App. 4th 1181, 1187, 55 Cal. Rptr. 2d 290*

Condition that conditional use permit not be transferrable with property was invalid. *Anza Parking Corp. v. Burlingame (1987) 195 Cal. App. 3d 855, 858-860, 241 Cal. Rptr. 175*

[d] Estoppel

County was not estopped to assert invalidity of conditional use permit, when builder knew that permit issued to former landowner had expired, when no construction had commenced prior to expiration, and there was no evidence that any extension would have been granted. *Strong v. County of Santa Cruz (1975) 15 Cal. 3d 720, 722-727, 125 Cal. Rptr. 896, 543 P.2d 264*

[e] Expiration

Permit that was to expire within one year unless substantial evidence of use was in progress did not expire when funding had been sought, professionals hired, property purchased, and plans submitted even though construction had not actually begun. *Community Development Com. v. City of Fort Bragg (1988) 204 Cal. App. 3d 1124, 1129-1130, 251 Cal. Rptr. 709*

[f] Review

Ninety-day limitations period (*Gov. Code § 65009(c)*) applied to proceeding challenging board of supervisors' decision granting conditional use permit on ground a supervisor had conflict of interest in violation of *Political Reform Act. Ching v. San Francisco Bd. of Permit Appeals (1998) 60 Cal. App. 4th 888, 891, 70 Cal. Rptr. 2d 700*

Period of limitations for review of decision to issue conditional use permit. *Hawkins v. County of Marin (1976) 54 Cal. App. 3d 586, 592-593, 126 Cal. Rptr. 754*

[g] Standards

Los Angeles conditional use permit ordinance that purported to regulate adult businesses was unconstitutionally vague because it required those making decisions based on ordinance to exercise too much subjective discretion. *Smith v. County of Los Angeles (1994) 24 Cal. App. 4th 990, 1004-1008, 29 Cal. Rptr. 2d 680*

Federal law regulating satellite dishes preempted local law and required specific aesthetic standards in zoning ordinance requiring conditional use permit to install satellite dish. *Hunter v. City of Whittier (1989) 209 Cal. App. 3d 588, 596-598, 257 Cal. Rptr. 559*

[8] Constitutional Challenges

[a] Deprivation of Property

Zoning ordinance that is so unreasonable or arbitrary as to virtually deprive landowner of complete use and enjoyment of his or her property is unconstitutionally excessive under *U.S. Const., amend. V*, and *Cal. Const., art. I, § 19.* *Agins*

v. Tiburon (1979) 24 Cal. 3d 266, 272-273, 277, 157 Cal. Rptr. 372, 598 P.2d 25 , aff'd, 447 U.S. 255, 259, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)

[b] Discriminatory Zoning

Zoning action is not overthrown absent physical facts requiring conclusion that ordinance is unreasonable; when spot zoning or other restriction on particular property evinces discriminatory design against property user, evidence disclosing purpose other than that appearing on face of regulation is given weight by court. *G & D Holland Construction Co. v. City of Marysville (1970) 12 Cal. App. 3d 989, 994, 91 Cal. Rptr. 227*

[c] Due Process

Developer failed to establish that city's delay in processing its permit application constituted violation of substantive due process, because there was reasonable explanation on face of the complaint for every delay in city's eventual approval of application; condition included only in developer's permit and no others did not support claim for violation of equal protection, because city did not intentionally treat developer differently than other developers. *North Pacifica LLC v. City of Pacifica (9th Cir. 2008) 526 F.3d 478, 485-486*

County's decision to rezone landowner's property deprived landowner of protected property interest, and thus landowner was entitled to constitutional due process prior to deprivation; individual notice to landowner was required because county specifically changed zoning of landowner's land on receiving request to make change to restrict its use after county had published notice of proposed general plan amendment that did not include change. *Harris v. County of Riverside (9th Cir. 1990) 904 F.2d 497, 503-505*

Applicant's claim that city's denial of building permit was arbitrary and capricious was not sufficient by itself to state claim for violation of substantive due process under *42 U.S.C. § 1983*; applicant had to show deprivation of protected property interest. *Breneric Associates v. City of Del Mar (1999) 69 Cal. App. 4th 166, 182-183, 81 Cal. Rptr. 2d 324*

In action under *42 U.S.C. § 1983*, landowner's interest in approval of development project permits did not rise to level of property interest that is constitutionally protected; thus, city council's denial of permits did not violate landowner's procedural and substantive due process rights, although he was denied fair hearing under state law. *Clark v. City of Hermosa Beach (1996) 48 Cal. App. 4th 1152, 1177-1187, 56 Cal. Rptr. 2d 223*

Land developer's action for deprivation of due process, equal protection, and just compensation in inverse condemnation under *42 U.S.C. § 1983* against city and county based on regulations severely limiting development of parcel of land was not ripe for adjudication when there was no final decision on developer's applications for annexation of parcel by city, zoning variances, and building permit. *Long Beach Equities, Inc. v. County of Ventura (1991) 231 Cal. App. 3d 1016, 1041-1042, 282 Cal. Rptr. 877*

[d] Equal Protection

City's refusal to rezone to higher density was not denial of equal protection when based on rational basis of protection of neighborhood values. *Nelson v. City of Selma (9th Cir. 1989) 881 F.2d 836*

City ordinance that allowed second units in single-family residential zones only if person occupying second unit was property owner or his or her dependent, or owner's or dependent's caregiver, violated *equal protection clause* of California Constitution because it effectively classified permissible users of second units. *Coalition Advocating Legal Housing Options v. City of Santa Monica (2001) 88 Cal. App. 4th 451, 462, 105 Cal. Rptr. 2d 802*

Local ordinance that limited number of persons over age 18 who could live in non-owner-occupied single-family residences in targeted areas violated equal protection because no significant relationship existed between stated purpose of ordinance, which was to alleviate overcrowding of single-family dwellings, and non-owner-occupied classification contained in ordinance. *College Area Renters & Landlord Assn. v. City of San Diego (1996) 43 Cal. App. 4th 677, 686-688, 50 Cal. Rptr. 2d 515*

[e] First Amendment Impact

Zoning ordinance requiring conditional use permit for operation of adult bookstore is subject to strict scrutiny because it impacts on *First Amendment* right. *City of Imperial Beach v. Escott (1981) 115 Cal. App. 3d 134, 137, 171 Cal. Rptr. 197*

[f] Free Exercise of Religion

City's denial of application to rezone property to build college for religious education did not violate applicant's *First Amendment* rights or Religious Land Use and Institutionalized Persons Act of 2000; city's zoning requirements were general laws of neutral application and there was no evidence that city enforced its ordinance in discriminatory manner. *San Jose Christian College v. City of Morgan Hill (9th Cir. 2004) 360 F.3d 1024*

Denial of conditional use permit to use house in residential neighborhood as church was not violation of free exercise of religion; ordinance did not preclude use of home as church in other areas and city had interest in protecting neighborhood. *Christian Gospel Church, Inc. v. City and County of San Francisco (9th Cir. 1990) 896 F.2d 1221*

[g] Method of Challenge

City's refusal to rezone to higher density was not denial of equal protection when based on rational basis of protection of neighborhood values. *Nelson v. City of Selma (9th Cir. 1989) 881 F.2d 836*

Ordinance was not subject to constitutional attack in administrative mandamus proceeding; proper remedy was action for declaratory relief. *Gong v. City of Fremont (1967) 250 Cal. App. 2d 568, 574, 58 Cal. Rptr. 664*

[h] Right of Privacy

City ordinance that allowed second units in single-family residential zones only if person occupying second unit was property owner or his or her dependent, or owner's or dependent's caregiver, violated state constitutional right of privacy. *Coalition Advocating Legal Housing Options v. City of Santa Monica (2001) 88 Cal. App. 4th 451, 461, 105 Cal. Rptr. 2d 802*

[9] Declaratory Relief

Action for declaratory relief was not available to attack administrative order, but will be regarded as petition for writ of mandate for purposes of ruling on general demurrer. *Scott v. City of Indian Wells (1972) 6 Cal. 3d 541, 546, 99 Cal. Rptr. 745, 492 P.2d 1137*

[10] Dedication

Requirement that portion of property be dedicated for street widening as condition for zoning change was improper when zoning change would not increase traffic. *Rohn v. City of Visalia (1989) 214 Cal. App. 3d 1463, 1474-1477, 263 Cal. Rptr. 319*

[11] Development Agreements

Development agreement that instituted zoning freeze at planning state of large real estate development did not unconstitutionally contract away county's right to exercise its police power in future. *Santa Margarita Area Residents Together v. San Luis Obispo County Board of Supervisors (2000) 84 Cal. App. 4th 221, 232, 100 Cal. Rptr. 2d 740*

[12] Exhaustion of Administrative Remedies

Developer who was not ultimate developer of housing and thus not in usual position of developer seeking building permits, was not exempt from requirement to exhaust administrative remedies as prerequisite to filing as-applied challenge to local growth control ordinance. *Del Oro Hills v. City of Oceanside (1995) 31 Cal. App. 4th 1060, 1077, 37 Cal. Rptr. 2d 677*

Facial challenge to constitutionality of local ordinance in form of cause of action for violation of federal civil rights under *42 U.S.C. § 1983* is not barred by exhaustion doctrine. *Del Oro Hills v. City of Oceanside (1995) 31 Cal. App. 4th 1060, 1077-1078, 37 Cal. Rptr. 2d 677*

[13] Enforcement of Zoning Ordinances

[a] Against Municipality

Municipality owning property within another municipality was subject to latter's zoning ordinances; private person suffering identifiable harm by violation of ordinance was entitled to bring action against violating municipality. *Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 939-940, 101 Cal. Rptr. 568, 496 P.2d 480* (municipal airport located in residential zone of neighboring city)

[b] By Government Entity

Right of local legislative body to bring action for injunctive relief is dependent only on violation of zoning ordinance. *City of Santa Clara v. Paris (1977) 76 Cal. App. 3d 338, 342, 142 Cal. Rptr. 818*

Mere inaction in enforcement of zoning regulations against some persons does not preclude its enforcement against others. *City etc. of San Francisco v. Burton (1962) 201 Cal. App. 2d 749, 755, 20 Cal. Rptr. 378*

[c] By Private Persons

Person who suffers identifiable harm due to violation of municipal zoning law has right to sue private violator for compensatory damages and injunctive relief. *Nestle v. City of Santa Monica (1972) 6 Cal. 3d 920, 939-940, 101 Cal. Rptr. 568, 496 P.2d 480*

Citizen's committee comprised of property owners residing in close proximity to parcel in violation had standing to bring enforcement action. *Simons v. City of Los Angeles (1979) 100 Cal. App. 3d 496, 501, 161 Cal. Rptr. 67*

[14] Exhaustion of Administrative Remedies

Petitioner for writ of mandate to compel issuance of building permit on ground that zoning ordinance was unconstitutional was not required to exhaust administrative remedy of application for variance when evidence was overwhelming that city council rezoned area because petitioner intended to build project there. *Ogo Associates v. City of Torrance (1974) 37 Cal. App. 3d 830, 834, 112 Cal. Rptr. 761*

Action attacking city zoning ordinance was subject to demurrer without leave to amend when plaintiff failed to exhaust administrative remedies, knew of applicable administrative procedures, and had not incurred building expenses immediately prior to en actment of ordinance. *Igna v. City of Baldwin Park (1970) 9 Cal. App. 3d 909, 911-914, 88 Cal. Rptr. 581*

Applicant does not waive rights to object to validity of ordinance affecting his or her property by proceeding under statute and exhausting administrative remedies to secure variance or conditional use permit. *Garden Grove Congregation v. City of Garden Grove (1959) 176 Cal. App. 2d 136, 143, 1 Cal. Rptr. 65*

[15] Families

Zoning ordinance that restricted occupancy of home to members of single family and defined "family" as only limited categories of related persons was violation of due process. *Moore v. East Cleveland (1977) 431 U.S. 494, 498-500, 97 S. Ct. 1932, 52 L. Ed. 2d 531*

Local ordinance restricting land use to one-family dwellings and defining "family" as persons related by blood, adoption, or marriage or as two persons living and cooking together but not related by blood, adoption, or marriage was constitutional. *Village of Belle Terre v. Boraas (1974) 416 U.S. 1, 2-8, 94 S. Ct. 1536, 39 L. Ed. 2d 797*

Zoning ordinance prohibiting more than five unrelated persons from living together in house in single-family dwelling zone was unconstitutional under California constitution's right to privacy. *Santa Barbara v. Adamson (1980) 27 Cal. 3d 123, 128-134, 164 Cal. Rptr. 539, 610 P.2d 436*

Zoning ordinance prohibiting more than three unrelated persons from occupying one house in residential zone was unconstitutional, even though there were overcrowding and parking problems; zoning ordinance designed to prevent overcrowding, minimize traffic and parking congestion, and avoid undue financial burden on schools and other public facilities must be based on floor space and facilities rather than biological or legal relationships. *Chula Vista v. Pagard (1981) 115 Cal. App. 3d 785, 791-800, 171 Cal. Rptr. 738*

[16] Federal Preemption

Private contractor constructing building to be leased to federal agency was not exempt from local regulation. *Smith v. County of Santa Barbara (1988) 203 Cal. App. 3d 1415, 1422-1424, 251 Cal. Rptr. 1*

[17] General Plan

[a] In General

Memorandum of understanding between cities and county providing that each jurisdiction's general plan amendments related to particular parcel were ineffective unless other parties to memorandum enacted like amendments constituted

impermissible delegation of local jurisdiction's power to adopt, review, and amend general plan. *Alameda Land Use Assn. v. City of Hayward (1995) 38 Cal. App. 4th 1716, 1724-1725, 45 Cal. Rptr. 2d 752*

Gov. Code § 65300.5 requirement of internally consistent policy among elements of general plan was violated when precedence clause in plan subordinated open space and conservation element in cases of conflict with land use element. *Sierra Club v. Board of Supervisors (1981) 126 Cal. App. 3d 698, 704, 708, 179 Cal. Rptr. 261*

California Environmental Quality Act applies to amendment of general plan and Environmental Impact Report was required. *City of Santa Ana v. City of Garden Grove (1979) 100 Cal. App. 3d 521, 526-534, 160 Cal. Rptr. 907*

[b] Amendment

Exercise of local power of initiative is proper means of amending general plan notwithstanding statutorily-prescribed amendment authority of local legislative body. *DeVita v. County of Napa (1995) 9 Cal. 4th 763, 777-784, 38 Cal. Rptr. 2d 699, 889 P.2d 1019*

[c] Consistency of Specific Plan

To be "consistent" with general plan, specific plan must (1) be compatible with general plan, (2) not frustrate general plan's goals and policies, and (3) include definite, affirmative commitments to mitigate adverse effects of general plan. *Napa Citizens for Honest Government v. Napa County Board of Supervisors (2001) 91 Cal. App. 4th 342, 378-379, 110 Cal. Rptr. 2d 579*

[d] Consistency of Zoning With Plan

Zoning changes must conform to local general plan and must reasonably relate to welfare of affected region. *Arnel Development Co. v. City of Costa Mesa (1981) 28 Cal. 3d 511, 524, 169 Cal. Rptr. 904, 620 P.2d 565* ; *Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 609-610, 135 Cal. Rptr. 41, 557 P.2d 473*

Zoning ordinance is consistent with city's general plan when, considering all of its aspects, ordinance furthers objectives and policies of general plan and does not obstruct their attainment. *City of Irvine v. Irvine Citizens Against Overdevelopment (1994) 25 Cal. App. 4th 868, 879, 30 Cal. Rptr. 2d 797*

When city is granted extension of time to adopt general plan and has proposed amendment to general plan, application for development is required to conform to proposed general plan. *Harroman Co. v. Town of Tiburon (1991) 235 Cal. App. 3d 388, 394-396, 1 Cal. Rptr. 2d 72*

City was not required to rezone land to higher density even though general plan allowed higher density when there was evidence of inadequate parks, lack of sidewalks, traffic bottlenecks, and inadequate schools. *Mira Development Corp. v. City of San Diego (1988) 205 Cal. App. 3d 1201, 1213-1215, 252 Cal. Rptr. 825*

When general plan lacks mandatory element that is directly involved in project being reviewed, zoning change is not valid. *Guardians of Turlock's Integrity v. Turlock City Council (1983) 149 Cal. App. 3d 584, 594-597, 197 Cal. Rptr. 303*

Denial of permit to convert apartment to condominiums was appropriate when evidence showed violations of building code and inconsistency with general plan. *Rasmussen v. City Council (l983) 140 Cal. App. 3d 842, 848-849, 190 Cal. Rptr. 1*

Absence of valid general plan or valid relevant elements thereof precludes enactment of zoning ordinances. *Resource Defense Fund v. County of Santa Cruz (1982) 133 Cal. App. 3d 800, 806-807, 184 Cal. Rptr. 371*

Injunction against subdivision activity until county adopted adequate general plan was proper. *Camp v. Board of Supervisors (1981) 123 Cal. App. 3d 334, 354-358, 176 Cal. Rptr. 620*

[18] Interim Ordinances

Gov. Code § 65858, which authorizes adoption of interim ordinances prohibiting any uses that may be in conflict with contemplated general plan, specific plan, or zoning proposal that legislative body, planning commission, or planning department is studying or intends to study within reasonable time, does not authorize adoption of interim ordinance that prohibits formal processing of development applications. *Building Industry Legal Defense Foundation v. Superior Court (1999) 72 Cal. App. 4th 1410, 1420, 85 Cal. Rptr. 2d 828*

[19] Judicial Review in General

Declaratory relief action is proper to test constitutionality of zoning ordinance, but not appropriate method for judicial review of administrative decisions; complaint for declaratory relief improperly brought to review administrative decision is treated as petition for writ of mandate. *Hill v. City of Manhattan Beach (1971) 6 Cal. 3d 279, 287, 98 Cal. Rptr. 785, 491 P.2d 369*

Administrative mandamus is exclusive remedy for owner to challenge condition in conditional use permit. *City of Santee v. Superior Court (1991) 228 Cal. App. 3d 713, 718-720, 279 Cal. Rptr. 22*

When agency acts in two capacities simultaneously and performs two functions, which are subject to different standards of review, with only one decision, review of that determination must be by more stringent standard; thus, if board of supervisors in its discretionary (legislative) role determines change in general plan and in its ministerial (quasi-judicial) role approves private development plan in one decision, that decision is reviewed by stricter substantial evidence test of *Code Civ. Proc. § 1094.5* rather than arbitrary and capricious test of *Code Civ. Proc. § 1085*. *Mountain Defense League v. Board of Supervisors (1977) 65 Cal. App. 3d 723, 727-729, 135 Cal. Rptr. 588*

[20] Nonconforming Use

[a] Amortization Period

Facts of individual case was controlling in determination of whether or not amortization period prescribed by legislation providing for eventual discontinuance of nonconforming uses was reasonable and commensurate with investment involved and so may validly apply to particular property and use at issue. *National Advertising Co. v. County of Monterey (1970) 1 Cal. 3d 875, 879, 83 Cal. Rptr. 577, 464 P.2d 33*

Local zoning legislation requiring termination of nonconforming uses is valid if it provides for reasonable amortization period, considering investment involved; reasonableness is dependent on interplay of many factors, including depreciated value of structures to be removed, their remaining usefullife, and harm to public if they are left standing. *City of Salinas v. Ryan Outdoor Advertising, Inc. (1987) 189 Cal. App. 3d 416, 423-424, 234 Cal. Rptr. 619*

Nonconforming use was terminable after amortization period when property owner failed to establish that amortization period was unreasonable; reasonableness of amortization period was indicated by facts showing property owner had no

investment in permanent property improvements, lease expired during amortization period, and cost of removing nonconforming materials was negligible. *Castner v. City of Oakland (1982) 129 Cal. App. 3d 94, 96-97, 180 Cal. Rptr. 682*

Zoning ordinance prohibiting parking of large commercial trucks in residential neighborhood where defendants had always parked their truck had 14-month amortization period, which was time from adoption of ordinance to enforcement; amortization period was reasonable because it did not deprive defendants of investment in either house or truck. *People v. Tolman (1980) 168 Cal. Rptr. 328*

[b] In General

"Permitted conditional use," defined in San Francisco Planning Code as property use that lawfully existed on effective date of new zoning controls, distinguished from "nonconforming use" on ground permitted conditional use provision did not require uses to be brought into compliance with Code. *Tenderloin Housing Clinic, Inc. v. Astoria Hotel, Inc. (2000) 83 Cal. App. 4th 139, 146, 98 Cal. Rptr. 2d 924*

Burden is on landowner to establish that nonconforming use preexisted zoning ordinance. *City and County of San Francisco v. Board of Permit Appeals (1989) 207 Cal. App. 3d 1099, 1108-1109, 255 Cal. Rptr. 307*

Zoning ordinance requiring immediate discontinuance of nonconforming use that existed when ordinance was adopted was deprivation of property without due process of law unless use was public nuisance. *City of Los Altos v. Silvey (1962) 206 Cal. App. 2d 606, 609, 24 Cal. Rptr. 200* ; *McCaslin v. City of Monterey Park (1958) 163 Cal. App. 2d 339, 346-347, 329 P.2d 522*

[21] Notice and Hearing

Property owner had right to notice of specific general plan change affecting only a few property owners. *Harris v. County of Riverside (9th Cir. 1990) 904 F.2d 497*

Due process requires notice and hearing only in quasi-judicial or adjudicatory settings and not in adoption of general legislation; general zoning legislation may be enacted without affording affected landowners notice and hearing. *San Diego Bldg. Contractors Assn. v. City Council (1974) 13 Cal. 3d 205, 210-211, 118 Cal. Rptr. 146, 529 P.2d 570*

[22] Particular Zone Requirements

San Bernardino County general plan classification of "Desert Special Service Center," was not zone, but isolated area in DL (desert living) zone in which commercial development was allowed on site-by-site basis by issuance ofconditional use permit. *United Outdoor Advertising Co., Inc. v. Business, Transportation & Housing Agency (1988) 44 Cal. 3d 242, 249-251, 242 Cal. Rptr. 738, 746 P.2d 877*

Ordinance was not precluded from requiring different things from property owners in areas zoned differently; property owners in different zones were in different positions and dedication of land for access purposes was not required in all zones. *Southern Pac. Co. v. City of Los Angeles (1966) 242 Cal. App. 2d 38, 49-50, 51 Cal. Rptr. 197*

[23] Purposes of Zoning--Traffic Considerations

City creating cul de sac pursuant to *Veh. Code § 21101(f)* is not required to find that street is "no longer needed for

vehicular traffic" as provided in *Veh. Code § 21101(a)(1).* *Save the Sunset Strip Coalition v. City of West Hollywood (2001) 87 Cal. App. 4th 1172, 1181, 105 Cal. Rptr. 2d 172*

[23A] Religious Land Use and Institutionalized Persons Act

County's denial of conditional use permit for construction of Sikh temple on land zoned for agricultural use, despite applicant's agreement to numerous conditions and recommendation by county planning commission that permit be granted, violated *Religious Land Use and Institutionalized Persons Act. Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter (9th Cir. 2006) 456 F.3d 978, 992*

City's denial of application to rezone property to build college for religious education did not violate applicant's *First Amendment* rights or Religious Land Use and Institutionalized Persons Act of 2000. City's zoning requirements were general laws of neutral application and there was no evidence that city enforced its ordinance in discriminatory manner. *San Jose Christian Coll. v. City of Morgan Hill (9th Cir. 2004) 360 F.3d 1024, 1035*

[24] Traditional Mandate

Local assessment committee appointed to advise county on application for permit to expand hazardous waste site did not have "beneficial interest" required by *Code Civ. Proc. § 1086* for standing to challenge county's subsequent approval of permit. *Laidlaw Environmental Services, Inc. v. Kern County (1996) 44 Cal. App. 4th 346, 351-353, 51 Cal. Rptr. 2d 666*

Mandate proceeding to compel county to grant permit for permitted use of property was properly denied when plaintiff failed to exhaust administrative remedy in form of discretionary conditional use permit that, if granted, would have given plaintiff everything sought in judicial action. *Sabek, Inc. v. County of Sonoma (1987) 190 Cal. App. 3d 163, 165-168, 235 Cal. Rptr. 350*

Traditional mandate is not available to review conditional use permit decision. *Garden Grove Congregation v. City of Garden Grove (1959) 176 Cal. App. 2d 136, 140-142, 1 Cal. Rptr. 65*

[25] Variance

[a] Conditions

Conditions may be attached to variance to preserve general purposes and intent of zoning ordinance. *Cow Hollow Improvement Club v. Board of Permit Appeals (1966) 245 Cal. App. 2d 160, 183, 53 Cal. Rptr. 610*

[b] Grounds

Self-imposed burdens, such as developer's adoption of superior building standards, are not legal justification for granting variance. *Broadway Laguna etc. Assn. v. Board of Permit Appeals (1967) 66 Cal. 2d 767, 778, 59 Cal. Rptr. 146, 427 P.2d 810*

Variance improperly granted gasoline station that was nonconforming use in residential area; because there were no other gas stations located in same geographic area, station owner could not show he was deprived of useafforded to other properties in same zone and vicinity. *Stolman v. City of Los Angeles (2003) 114 Cal. App. 4th 916, 928-929, 8 Cal. Rptr. 3d 178*

Lot's location in "fringe area" of one zone was not acceptable justification for variance; surrounding lots in nonconformance with law were not justification for variance. *Cow Hollow Improvement Club v. Board of Permit Appeals (1966) 245 Cal. App. 2d 160, 178-179, 53 Cal. Rptr. 610*

[c] Review

Code Civ. Proc. § 1094.5 is applicable in reviewing validity of zoning variance. *Scott v. City of Indian Wells (1972) 6 Cal. 3d 541, 546 n.4, 99 Cal. Rptr. 745, 492 P.2d 1137*

[26] Vested Rights

Allocation of specific units under interim development ordinance did not create vested rights when allocation was conditioned on application for building permit within specified period. *Consaul v. City of San Diego (1992) 6 Cal. App. 4th 1781, 1796-1801, 8 Cal. Rptr. 2d 762*

[27] Waiver

Governmental body is unable to waive requirements of ordinance enacted for public benefit; county is unable to waive its right to insist on application for extension of use permit. *Strong v. County of Santa Cruz (1975) 15 Cal. 3d 720, 727, 125 Cal. Rptr. 896, 543 P.2d 264*

Legal Topics:

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§ 579.318 Attorney General Opinions

Local agency is prohibited from charging building permit and similar fees, based on Uniform Building Code Valuation Tables or otherwise, that are more than estimated reasonable cost of providing services rendered unless fee amounts are approved by electorate; fees charged by local agency are invalid to extent they exceed reasonable costs of providing services rendered. *76 Ops. Cal. Att'y Gen. 4, 8-11 (1993)*

Coastal Act's provisions for approval of amendments to certified local coastal program or land use plan by Coastal Commission are applicable to charter cities. *70 Ops. Cal. Att'y Gen. 221 (1987)*

City or county is not permitted, without Coastal Commission approval, to authorize or prohibit, by ordinance, including one adopted by initiative or referendum, use of land in coastal zone when use is not permitted or prohibited by local coastal program or land use plan certified by Commission. 70 Ops. Cal. Att'y Gen. 220-221 (1987)

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51-579 California Forms of Pleading and Practice--Annotated §§ 579.321-579.339

[Reserved]

§§ 579.321[Reserved]

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51-579 California Forms of Pleading and Practice--Annotated § 579.340

§ 579.340 California Legal Forms

For discussion and forms relating to the Subdivided Lands Act, Interstate Land Sales Full Disclosure Act, and Subdivision Map Act, see California Legal Forms, Ch. 30 *Subdivision Regulation* , (Matthew Bender)

For discussion and forms relating to the Vacation Ownership Time-Share Act of 2004, see California Legal Forms, Ch. 34 *Condominiums and Other Common Interest Developments*, Pt. D, *Time-Share Projects* , (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawCommon Interest CommunitiesTimesharesReal Property LawPurchase & SaleInterstate Land Sales Full Disclosure ActReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation

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51-579 California Forms of Pleading and Practice--Annotated § 579.341

§ 579.341 California Real Estate

For discussion of the Subdivision Map Act, see California Real Estate Law and Practice, Ch. 290- 292 (Matthew Bender)

For discussion of the regulation of subdivided land sales, see California Real Estate Law and Practice, Ch. 424, *Regulation of Subdivided Land Sales* (Matthew Bender)

For discussion of the regulation of time-share developments, see California Real Estate Law and Practice, Ch. 425, *Regulation of Time-Share Developments* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
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51-579 California Forms of Pleading and Practice--Annotated § 579.342

§ 579.342 California Environmental Law

For detailed coverage of subdivision regulation, see California Environmental Law and Land Use Practice, Ch. 61, *Subdivision Regulation* (Matthew Bender)

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation

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§ 579.343 Federal Statutes

Interstate Land Sales Full Disclosure Act. *15 U.S.C. §§ 1701-1720*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleInterstate Land Sales Full Disclosure Act

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51-579 California Forms of Pleading and Practice--Annotated § 579.344

§ 579.344 State Statutes

Out of state land promotions. *Bus. & Prof. Code §§ 10249-10249.93*

Disclaimer requirement for offerings related to subdivided land entirely located outside California, but within United States. *Bus. & Prof. Code § 10249.8*

Disclaimer requirement for offerings related to subdivided land outside United States. *Bus. & Prof. Code § 10249.9*

Subdivided Lands Act. *Bus. & Prof. Code § 11000 et seq.*

Vacation Ownership and Time-Share Act of 2004. *Bus. & Prof. Code § 11210 et seq.*

Violation of specified provisions of Subdivided Lands Act as penal offense. *Bus. & Prof. Code § 11023*

Procedure for imposing fees as condition of approval of development projects. *Gov. Code § 66000 et seq.*

Subdivision Map Act. *Gov. Code § 66410 et seq.*

Subdivision Map Act review. *Gov. Code § 66499.37*

Legal Topics:

For related research and practice materials, see the following legal topics:
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51-579 California Forms of Pleading and Practice--Annotated § 579.345

§ 579.345 Federal Regulations

Interstate Land Sales Registration Program. *24 C.F.R. § 1710.1 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawPurchase & SaleInterstate Land Sales Full Disclosure Act

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§ 579.346 State Regulations

Subdivided lands. *10 Cal. Code Reg. § 2790 et seq.*

Time-Share Projects. *10 Cal. Code Reg. § 2805 et seq.*

Environmental impact evaluation of subdivided lands. *10 Cal. Code Reg. § 2820 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Environmental LawZoning & Land UseGeneral OverviewReal Property LawCommon Interest CommunitiesTimesharesReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation

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51-579 California Forms of Pleading and Practice--Annotated § 579.347

§ 579.347 Decisions

[1] Certificate of Compliance

Developer who lost all interest in property following foreclosure lacked standing to maintain mandamus action to compel county to issue certificates of compliance for property. *County of San Luis Obispo v. Superior Court (2001) 90 Cal. App. 4th 288, 295, 108 Cal. Rptr. 2d 753*

[2] Development Fees

Heightened scrutiny of development conditions required by U.S. Supreme Court for determining whether compensable regulatory taking has occurred applies to development conditions that require payment of monetary fee (rather than requiring possessory dedication), at least when governmental conditions requiring monetary exactions are imposed on individual and discretionary basis, rather than generally or ministerially. *Ehrlich v. City of Culver City (1996) 12 Cal. 4th 854, 865, 50 Cal. Rptr. 2d 242, 911 P.2d 429*

[3] Interstate Land Sales Full Disclosure Act

Defendants' voluntary ceasing of selling land was no defense to suit for injunctive relief brought by *Secretary. Lynn v. Biderman (9th Cir. 1976) 536 F.2d 820, 825*

Developers served with subpoenas duces tecum issued in course of investigation under Interstate Land Sales Full Disclosure Act were entitled to protective order prohibiting administrator from writing letters to their customers advising them they had right to void their contracts and receive refund. *Lynn v. Biderman (9th Cir. 1976) 536 F.2d 820, 826-827*

When defendant is not developer or agent, defendant must have assisted or participated in fraud in violation of

Interstate Land Sales Full Disclosure Act in order to be liable as aider or abettor. *Fuls v. Shastina Properties, Inc. (N.D. Cal. 1978) 448 F. Supp. 983, 990*

Papers properly filed and accepted by state are accepted as appropriate and complete statement of record for purposes of Interstate Land Sales Full *Disclosure Act. Happy Investment Group v. Lakeworld Prop., Inc. (N.D. Cal. 1975) 396 F. Supp. 175, 185*

Tolling of statute of limitations required showing that defendants concealed from plaintiffs basic facts forming cause of action and that plaintiffs were ignorant of facts through no fault of their own. *Happy Investment Group v. Lakeworld Prop., Inc. (N.D. Cal. 1975) 396 F. Supp. 175, 188*

[4] Subdivided Lands Act

Buyer who rescinded real estate contract with developer on learning that developer had violated Subdivision Lands Act was entitled to attorneys' fees pursuant to attorneys' fees clause in contract, even though buyer elected to "void" contract. *Yuba Cypress Housing Partners, Ltd. v. Area Developers (2002) 98 Cal. App. 4th 1077, 1083, 120 Cal. Rptr. 2d 273*

Right to rescind contract subject to Subdivided Lands Act is limited to executory contracts between purchaser and subdivider; thus, subsequent purchaser of subdivided land does not have standing to seek rescission of original sale from subdivider to subsequent purchaser's predecessor in interest. *Drake v. Martin (1994) 30 Cal. App. 4th 984, 995-996, 36 Cal. Rptr. 2d 704*

[5] Subdivision Map Act

[a] In General

When developer had secured final subdivision map approval to convert units to condominiums and had satisfied requirements established by state law, later enacted ordinance regulating condominium conversions was not applicable to approved conversions. *CUPity of West Hollywood v. Beverly Towers, Inc. (1991) 52 Cal. 3d 1184, 1190-1194, 278 Cal. Rptr. 375, 805 P.2d 329*

Subdivision Map Act did not preempt city's attempt to regulate condominium conversion in connection with rent control law. *Santa Monica Pines, Ltd. v. Rent Control Board (1984) 35 Cal. 3d 858, 868-869, 201 Cal. Rptr. 593, 679 P.2d 27* (overruled on other grounds in *City of West Hollywood v. Beverly Towers, Inc. (1991) 52 Cal. 3d 1184, 1191-1192, 278 Cal. Rptr. 375, 805 P.2d 329* (noted *above*))

Subdivision Map Act does not control land division by probate court in setting aside probate homestead because state law overrides local ordinance. *Wells Fargo Bank v. Town of Woodside (1983) 33 Cal. 3d 379, 384-390, 189 Cal. Rptr. 41, 657 P.2d 819*

Filing of subdivision map is insufficient to exempt one from subsequent zone change. *Palmer v. Board of Supervisors (1983) 145 Cal. App. 3d 779, 783, 193 Cal. Rptr. 669*

Subdivision Map Act allows local ordinances relating to matters covered by Act. *Benny v. City of Alameda (1980) 105 Cal. App. 3d 1006, 1011, 164 Cal. Rptr. 776* (overruled on other grounds in *The Pines v. Santa Monica (1981) 29 Cal. 3d 656, 664, 175 Cal. Rptr. 336, 630 P.2d 521*); *Longridge Estates v. City of Los Angeles (1960) 183 Cal. App. 2d 533, 538-539, 6 Cal. Rptr. 900* (construing former *Bus. & Prof. Code §§ 11500-11628*)

[b] Effect of Noncompliance with Act

Gov. Code § 66499.32(b), which denies buyer the option of voiding contract whenever certificate of compliance, parcel map, or final map exists to ratify seller's compliance with Subdivision Map Act, is inapplicable when any of those documents constitute proof of violation; although senior lienholder who foreclosed on lot in improperly subdivided parcel had option to void contract, he elected not to do so, and junior lienholder who foreclosed on entire merged parcel had no standing to void deed for that lot. *Le Gault v. Erickson (1999) 70 Cal. App. 4th 369, 374, 82 Cal. Rptr. 2d 692*

[c] Extension

Extension of subdivision map beyond 10-year limit to 13 years was possible by mandatory extension if discretionary extension used during initial 10-year period. *California Country Club Homes Ass'n v. City of Los Angeles (1993) 22 Cal. Rptr. 2d 917*

[d] Map Approval

Once developer has complied with conditions attached to approval of tentative subdivision map and submitted final map corresponding to tentative map, approval of final map by county board of supervisors is ministerial. *Youngblood v. Board of Supervisors (1978) 22 Cal. 3d 644, 648, 655-656, 150 Cal. Rptr. 242, 586 P.2d 556*

When parcels in subdivision are resubdivided by subsequent parcel map recorded in compliance with Subdivision Map Act, new parcel map amends provisions of any previously recorded parcel map made in compliance with *Subdivision Map Act. Christian v. Flora (2008) 164 Cal. App. 4th 539, 542, 78 Cal. Rptr. 3d 892*

While project is not required to be in perfect conformity with each and every general plan policy, nature of policy and nature of inconsistency are critical factors that must be considered; inconsistency with general plan policy that was fundamental and mandatory was fatal. *Families Unafraid to Uphold Rural Etc. County v. Board of Supervisors (1998) 62 Cal. App. 4th 1332, 1341-1342, 74 Cal. Rptr. 2d 1*

Statutory requirement that proposed subdivision map be consistent with general plan does not require exact match between proposed subdivision and applicable general plan; rather it requires map to be "in agreement or harmony with" the plan. *Sequoyah Hills Homeowners Assn. v. City of Oakland (1994) 23 Cal. App. 4th 704, 717-718, 29 Cal. Rptr. 2d 182* ; *Greenebaum v. City of Los Angeles (1984) 153 Cal. App. 3d 391, 406, 200 Cal. Rptr. 237*

If approval of tentative subdivision map is conditioned on performance of work that requires building permit, when permit is sought landowner must comply with all applicable laws, including those enacted after conditional approval of tentative map. *Hazon-Iny Development, Inc. v. City of Santa Monica (1982) 128 Cal. App. 3d 1, 9-11*

Express finding of consistency with applicable general plan is legal prerequisite of approval of proposed map; tie votes of council and planning commission does not constitute requisite findings. *Woodland Hills Residents Assn., Inc. v. City Council (1975) 44 Cal. App. 3d 825, 832-838, 118 Cal. Rptr. 856* (decided under former *Bus. & Prof. Code § 11526.2*)

[e] Noticed Hearing

When approval of subdivision map constitutes significant or substantial deprivation of property rights of other landowners, those landowners are entitled to reasonable notice and opportunity for hearing prior to approval. *Horn v.*

County of Ventura (1979) 24 Cal. 3d 605, 615, 156 Cal. Rptr. 718, 596 P.2d 1134

When approval of tentative subdivision map will constitute substantial or significant deprivation of property rights of other landowners, those landowners are entitled to reasonable notice and opportunity to be heard before approval occurs. *Kennedy v. City of Hayward (1980) 105 Cal. App. 3d 953, 960-961, 165 Cal. Rptr. 132*

[f] Periods of Limitation

Ninety-day service of summons requirement in *Gov. Code § 66499.37* applies to CEQA causes of action concerning a subdivision. *Friends of Riverside's Hills v. City of Riverside (2008) 168 Cal. App. 4th 743, 754, 85 Cal. Rptr. 3d 695*

Action challenging city council's decision to merge lot with adjacent parcel and thereby preclude residential use of property was subject to 90-day statute of limitations in Subdivision Map Act rather than longer limitations period set forth in *Mitigation Fee Act. Fogarty v. City of Chico (2007) 148 Cal. App. 4th 537, 544, 55 Cal. Rptr. 3d 795*

Service of summons within 90 days is mandatory under *Gov. Code § 66499.37* and not subject to equitable tolling. *Maginn v. City of Glendale (1999) 72 Cal. App. 4th 1102, 1109, 85 Cal. Rptr. 2d 639*

Limitation period of *Gov. Code § 66499.37* applies to action for declaratory relief asking that expiration date of tentative map be tolled. *Presenting Jamul v. Board of Supervisors (1991) 231 Cal. App. 3d 665, 670-672, 282 Cal. Rptr. 564*

When extension of effective period of tentative map specifically authorized by local ordinance is challenged as unlawful, *Gov. Code § 66499.37* statute of limitations begins to run at time extension is granted; limitation period does not begin again on approval of final map. *Griffis v. County of Mono (1985) 163 Cal. App. 3d 414, 421-423, 209 Cal. Rptr. 519*

Limitation period of *Gov. Code § 66499.37* is applicable when conduct of local agency is called into question, whether under traditional mandate of *Code Civ. Proc. § 1085* alleging violation of ministerial duty or under administrative mandate of *Code Civ. Proc. § 1094.5* alleging abuse of discretion. *Kirk v. County of San Luis Obispo (1984) 156 Cal. App. 3d 453, 460, 202 Cal. Rptr. 606*

Failure to seek judicial review of denial of certificate of compliance under *Gov. Code § 66499.35* within limitation period of *Gov. Code § 66499.37* bars judicial review. *Kirk v. County of San Luis Obispo (1984) 156 Cal. App. 3d 453, 460-461, 202 Cal. Rptr. 606*

Laches due to unjustified delay bars action attacking decision regarding subdivision even though brought within time constraints of *Gov. Code § 66499.37*. *Resource Defense Fund v. County of Santa Cruz (1982) 133 Cal. App. 3d 800, 809-810, 184 Cal. Rptr. 371* ; *Holt v. County of Monterey (1982) 128 Cal. App. 3d 797, 801-802, 180 Cal. Rptr. 514*

Gov. Code § 66499.37 requires that decision must be judicially attacked within stated number of days of that decision; when decision approves map and attaches conditions, period begins to run from date of decision, not from date on which conditions must be performed. *Timberidge Enterprises, Inc. v. City of Santa Rosa (1978) 86 Cal. App. 3d 873, 885-886, 150 Cal. Rptr. 606*

[g] Remedies

Claim of violation of due process in processing subdivision map act application is ripe for review when subdivision map is rejected. *Herrington v. County of Sonoma (9th Cir. 1987) 834 F.2d 1488*

Subdivision Map Act does not require innocent purchaser to suffer for violation of Act by his or her grantor, of which he or she has neither knowledge nor means of discovery; local authority may require innocent purchaser, as condition to issuance of building permit, to comply with reasonable conditions and to perform reasonable improvements as could have been required of grantor before subdivision by Act and local ordinance at time of sale to purchasers. *Keizer v. Adams (1970) 2 Cal. 3d 976, 980-981, 88 Cal. Rptr. 183, 471 P.2d 983*

Developers whose subdivision application was denied could not assert estoppel against city based on city's prior recommendation that "clustered" design would comply with city's open space policies, when developer had obtained no permits or preliminary approvals and city's recommendation did not address project's consistency with other important policies. *Toigo v. Town of Ross (1999) 70 Cal. App. 4th 309, 323-324, 82 Cal. Rptr. 2d 649*

Subdivider was liable to public entity for breach of contract to install improvements when water and sewer systems were defective. *County of Mariposa v. Yosemite West Associates (1988) 202 Cal. App. 3d 791, 805-812, 248 Cal. Rptr. 778*

[h] Vesting Tentative Maps

Due process notice requirement implicit in vesting tentative map statutes [*Gov. Code §§ 66498.1-66498.9*] limits increases in developer's fees to those for which adequate standards for determining scope and extent of fee increases are in place at time vesting tentative map is deemed complete. *Kaufman & Broad Central Valley, Inc. v. City of Modesto (1994) 25 Cal. App. 4th 1577, 1589, 30 Cal. Rptr. 2d 904*

Vesting tentative map statutes [*Gov. Code §§ 66498.1-66498.9*] require prior notice, either actual or constructive, as condition to imposing local ordinances, policies, and standards on applicant who is entitled to rely on complete vesting tentative map. *Bright Development v. City of Tracy (1993) 20 Cal. App. 4th 783, 798, 24 Cal. Rptr. 2d 618*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewCivil ProcedureRemediesWritsCommon Law WritsMandamusReal Property LawPurchase & SaleInterstate Land Sales Full Disclosure ActReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation

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§ 579.348 Attorney General Opinions

Subdivider, tenants, and advisory agency may appeal tentative map determination made by city advisory agency or appeal board; any interested person adversely affected by determination may obtain review by filing complaint. *73 Ops. Cal. Att'y Gen. 338, 341 (1990)*

Legislature may enact statute that prohibits persons affected by parcel or tentative map determination from appealing to governing body of city; but that action may notbe accomplished by a charter provision. *73 Ops. Cal. Att'y Gen. 338, 345, 347 (1990)*

County must issue certificates of compliance for lots that were described on map properly recorded under predecessor statute to Subdivision Map Act, as well as local ordinances enacted thereunder. *74 Ops. Cal. Att'y Gen. 149 (1991)*

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureJusticiabilityStandingGeneral OverviewGovernmentsLocal GovernmentsChartersGovernmentsState & Territorial GovernmentsLegislaturesReal Property LawSubdivisionsLocal RegulationReal Property LawSubdivisionsState Regulation

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§ 579.349 Law Reviews

Note, *The Pines v. City of Santa Monica: Redefining the Focus of California's Subdivision Map Act, 16 Loy. L. Rev. 61 (1983)*

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§ 579.350 Text References

Powell, The Law of Real Property, Ch. 70A, *Federal Regulation of Interstate Land Sales--The Interstate Land Sales Full Disclosure Act* (Matthew Bender)

Rohan, Zoning and Land Use Controls, Ch. 45, *Subdivision Controls* (Matthew Bender)

California Subdivision Map Act Practice (Cal CEB 1987), Chs. 1-10

Guide to California Subdivision Sales Law (Cal CEB 1974), Ch. 2, *Applicability of the Subdivided Lands Act*, §§ 2.1-2.23

Anderson, American Law of Zoning, Vol 3, Ch. 19 *Subdivision Controls*, §§ 19.01-19.48

Miller and Starr, Current Law of California Real Estate, (2d ed), Vol. 4, Ch. 24, *Subdivisions and Condominiums*, §§ 24:33-24:57, 24:58-24:80

Legal Topics:

For related research and practice materials, see the following legal topics:
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§§ 579.351[Reserved]

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PART IV. FORMS
A. Zoning and Planning

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§ 579.370 Complaint [Code Civ. Proc. § 425.10] for Declaratory Relief [Code Civ. Proc. § 1060] and for Preliminary [Code Civ. Proc. §§ 526, 527(a)] and Permanent Injunctions [Civ. Code § 3422]--Zoning Ordinance Unconstitutional and Void [U.S. Const., Amends. V, XIV § 1; Cal. Const., art. IV, § 16(a)]

[1] FORM Complaint [Code Civ. Proc. § 425.10] for Declaratory Relief [Code Civ. Proc. § 1060] and for Preliminary [Code Civ. Proc. §§ 526, 527(a)] and Permanent Injunctions [Civ. Code § 3422]--Zoning Ordinance Unconstitutional and Void [U.S. Const., Amends. V, XIV § 1; Cal. Const., art. IV, § 16(a)]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Plaintiff,	)	NO. _____
vs.	)	COMPLAINT FOR DECLARATORY RELIEF,
_____ [*names*],	)	AND FOR PRELIMINARY AND PERMANENT
Defendants.	)	INJUNCTIONS
	)	[*U.S. Const., amend. XIV, § 1*; *Cal. Const., art. IV, § 16(a)*; *Civ. Code § 3422*; *Code Civ. Proc. §§ 526, 527(a)* 1060]
	)	

_____

Plaintiff alleges:

FIRST COUNT
(Declaratory Relief)

1. Defendant is _____ [County *or* _____ (*name of city*), a municipal corporation organized and existing under the constitution and laws of the State of California and situated in _____

County], California.

2. Defendant _____ [board of supervisors *or* city council] is the legally constituted legislative body of _____ [*name of city or county*] consisting of individual defendants _____ [*names*]. One of the duties with which defendant is charged is enacting ordinances dividing the _____ [city *or* county] or portions thereof into zoning districts in accordance with the promotion of the public welfare.

3. Defendant _____ [*specify administrative agency, e.g.,* planning commission] is a duly constituted appointive body of defendant _____ [city *or* county] consisting of individual defendants _____ [*names*]. Oneof the duties with which defendant is charged is classifying and reclassifying private real property according to its location withinzoning districts in accordance with the promotion of the public welfare, for the purpose of recommending to defendant legislative body the enactment or amendment of ordinances zoning that real property.

4. Plaintiff is, and at all times herein mentioned was, _____ [*state facts showing plaintiff's standing to challenge the ordinance, e.g.,* the operator of coin-operated flipper amusement games who desired to install those games at various game arcades located throughout the city].

5. On _____ [*date*], the _____ [the city council of _____ (*name of city*) *or* the board of supervisors of _____ County] enacted a comprehensive zoning ordinance entitled _____ [*title*]. That ordinance _____ [*set forth briefly what the ordinance did, e.g.,* regulated the use of property throughout the city by regulating the allowable commercial operation of games throughout the city]. _____ [Section(s) _____ (*specify section(s) relevant to dispute*) of that ordinance provide(s) as follows: "_____" *or* A true copy of the ordinance is attached to this complaint as Exhibit A and made a part of this complaint].

6. _____ [*State ultimate facts establishing that the ordinance is unconstitutional on its face, e.g.,* The ordinance prohibits the commercial operation of mechanical games involving the use of flippers, which are games of skill, but allows commercial operation of other types of games involving skill, thereby establishing an invidious discrimination between operation of flipper games and operation of other skill games and other recreational and sporting activities that are predominantly of skill].

7. Under defendant's comprehensive zoning ordinance, a person aggrieved by a zoning action of defendant may _____ [*specify the administrative remedies and appeals provided for by the ordinance*].

[*EITHER*]

8. On or about _____ [*date*], plaintiff _____ [*set forth the steps taken by plaintiff in complying with the administrative remedies and attach copies of any written rulings*].

[*OR*]

8. _____ [*State why exhaustion of administrative remedies would have been futile, e.g.,* Defendant city council expressly enacted the above-described ordinance to prevent plaintiffs from operating his/her games within the city].

[*CONTINUE*]

9. Plaintiff has pursued and exhausted all administrative remedies available to him/her in attempting to obtain relief from the above-described ordinance. There is no provision for further appeal from those decisions, and by reason thereof, plaintiff has no plain, speedy, and adequate remedy in the ordinary course of law.

10. An actual controversy exists between plaintiff and defendant relating to the legal rights and duties of the respective parties.

11. Plaintiff contends that the above-described ordinance is unconstitutional _____ [*specify basis of contention, e.g.,* in that it is based on an unreasonable and arbitrary classification between commercial games and establishes an invidious discrimination between flipper games and other skill and recreational or sporting activities that are predominantly of skill in violation of the *Fourteenth Amendment to the United States Constitution* and *Article IV, section 16(a) of the California Constitution*]; whereas defendant contends that the above-described ordinance is a reasonable exercise of the police power and has a reasonable relation to the public health, safety, morals, and general welfare.

12. Plaintiff desires a judicial determination of his/her rights and a declaration that the above-described ordinance is invalid.

13. A judicial determination is necessary and appropriate at this time under the circumstances in order that plaintiff may ascertain his/her rights and duties under the above-described ordinance.

SECOND COUNT
(Injunctive Relief)

14. Plaintiff refers to and herein incorporates Paragraphs 1-9 of the First Count.

15. Defendant's enforcement of the ordinance, unless and until enjoined and restrained by order of this court, will _____ [*specify particular facts establishing grounds for preliminary injunctive relief, e.g.,* cause great and irreparable injury to plaintiff in that plaintiff will be unable to operate his/her coin-operated flipper games within defendant city].

16. Plaintiff has no adequate remedy at law for the injuries currently being suffered in that _____ [*specify any additional facts tending to show grounds for permanent injunctive relief, e.g.,* if defendant is allowed to continue its enforcement of the above-described ordinance, plaintiff will be permanently prohibited from operating his/her coin-operated flipper games within defendant city in that the arcade owners will fill their arcades with the games allowed under the ordinance, and will not have any room left for plaintiff's games].

WHEREFORE, plaintiff prays judgment as follows:

On the FIRST COUNT:

1. For a declaration that the above-described ordinance is unconstitutional, invalid, and void on its face.

On the SECOND COUNT:

2. For issuance of preliminary injunction and permanent injunction restraining and enjoining defendants from _____ [*specify, e.g.,* enforcing the zoning ordinance enacted on _____ (*date*)];

On BOTH COUNTS:

3. For costs of suit herein incurred;

4. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Plaintiff

VERIFICATION

I, _____ [*name*], am the plaintiff in the above-entitled action. I have read the foregoing complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form of complaint is for use by a plaintiff to bring an action for declaratory relief to determine the constitutionality of a zoning ordinance. The form contains a second count for use to seek injunctive relief from enforcement of the ordinance.

The ground alleged for the unconstitutionality of the ordinance is that it is based on an arbitrary and unreasonable classification that establishes an invidious discrimination between the plaintiff and other persons similarly situated [*U.S. Const., amend. XIV, § 1*; *Cal. Const., art. IV, § 16(a)*; *see Cossack v. City of Los Angeles (1974) 11 Cal. 3d 726, 734, 114 Cal. Rptr. 460, 523 P.2d 260]* .

CAUTION:

A complaint seeking preliminary injunctive relief must be either verified or accompanied by affidavits (or declarations under *Code Civ. Proc. § 2015.5*) in support of the allegations of the complaint [*Code Civ. Proc. § 527(a)*]. If relying on a verified complaint instead of affidavits (or declarations), counsel must plead evidentiary facts that would entitle plaintiff to the relief sought [*see E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1* ; *San Juan G. Co. v. San Juan R. etc. Assn. (1939) 34 Cal. App. 2d 159, 174, 93 P.2d 582]* . For discussion, a procedural checklist, and additional forms necessary to obtain a temporary restraining order or preliminary injunction, see Ch. 303, *Injunctions* .

[3] Constitutional Challenges

[a] Generally

If an ordinance is clearly arbitrary and unreasonable and has no substantial relation to the public health, safety, morals,

or general welfare it may be unconstitutional [*see Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 601-607, 135 Cal. Rptr. 41, 557 P.2d 473* ; *see also § 579.218[1]*]. An ordinance may also be subject to constitutional challenge when it creates discriminatory spot zoning [*see Kissinger v. City of Los Angeles (1958) 161 Cal. App. 2d 454, 460, 462-463, 327 P.2d 10* ; *see also § 579.33*].

[b] Method of Challenge

An action for declaratory relief and an action seeking injunctive relief from enforcement are only appropriate to challenge the constitutionality of an ordinance that is allegedly unconstitutional on its face [*see Agins v. Tiburon (1979) 24 Cal. 3d 266, 272-273, 277, 157 Cal. Rptr. 372, 598 P.2d 25 , aff'd, 447 U.S. 255, 259, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)* ; *State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 250-252, 255, 115 Cal. Rptr. 497, 524 P.2d 1281]* . When the ordinance is allegedly unconstitutional as applied to an individual property owner, administrative mandate is the appropriate form of relief [*see Agins v. Tiburon (1979) 24 Cal. 3d 266, 272-273, 277, 157 Cal. Rptr. 372, 598 P.2d 25 , aff'd, 447 U.S. 255, 259, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)* ; *State v. Superior Court of Orange County (1974) 12 Cal. 3d 237, 249, 115 Cal. Rptr. 497, 524 P.2d 1281]* .

[4] Allegations

The first cause of action in the above complaint alleges: (1) defendant's capacity (Paragraphs 1-3); (2) plaintiff's capacity (Paragraph 4); (3) the enactment of the ordinance (Paragraph 5); (4) the facts indicating that the ordinance is unconstitutional on its face as a violation of equal protection of the law based on an arbitrary classification (Paragraph 6) [*U.S. Const., amend. XIV, § 1*; *Cal. Const., art. IV, § 16(a)*]; (5) plaintiff's exhaustion of available administrative remedies or the futility of doing so (Paragraphs 7-9) [*see Igna v. City of Baldwin Park (1970) 9 Cal. App. 3d 909, 911-912, 88 Cal. Rptr. 581* ; *see also Ogo Associates v. City of Torrance (1974) 37 Cal. App. 3d 830, 834, 112 Cal. Rptr. 761* (futility); for discussion of the exhaustion requirement, see Ch. 474 et seq., *Availability of Judicial Review of Agency Decisions*]; and (6) the existence of an actual controversy and the necessity for a judicial determination (Paragraphs 9-13) [*see Code Civ. Proc. § 1060*; *see also* Ch. 182, *Declaratory Relief* [.

The second cause of action in the complaint incorporates by reference the paragraphs setting forth the necessity for relief and alleges (1) facts to support preliminary injunctive relief (Paragraph 15) [*see Code Civ. Proc. § 526*; *E.H. Renzel Co. v. Warehousemen's Union (1940) 16 Cal. 2d 369, 373, 106 P.2d 1]* ; and (2) any additional facts necessary to support permanent injunctive relief (Paragraph 16) [*see Civ. Code § 3422*; *see also* Ch. 303, *Injunctions* [.

[5] State Statutes

Injunctions. Civ. Code § 3244; *Code Civ. Proc. § 526*

Action for declaratory relief. *Code Civ. Proc. § 1060*

[6] Decisions

Zoning ordinance is unconstitutional when it is so unreasonable or arbitrary as virtually to deprive landowner of complete use and enjoyment of his or her property. *Agins v. Tiburon (1979) 24 Cal. 3d 266, 272-273, 277, 157 Cal. Rptr. 372, 598 P.2d 25 , aff'd, 447 U.S. 255, 259, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980)*

Equal protection of laws requires that classification be reasonable, not arbitrary, and must have some ground of difference so that all persons similarly situated are treated alike. *Cossack v. City of Los Angeles (1974) 11 Cal. 3d 726, 734, 114 Cal. Rptr. 460, 523 P.2d 260*

Ordinance is improperly and unlawfully discriminatory when it confers particular privileges on class arbitrarily selected from larger class of persons all of whom stand in same relation to privileges granted and between whom no reasonable difference exists to justify inclusion of one and exclusion of another. *Looff v. Long Beach (1957) 153 Cal. App. 2d 174, 181, 314 P.2d 518*

[7] Cross References

For alternative allegations as to agency, capacity, and residence of parties, and fictitious name allegations, see Ch. 20, *Allegations Commonly Used*

For alternative forms of captions and introductions, see Ch. 108, *Captions and Introductions*

For discussion and forms relating to the format of complaints, see Ch. 123, *Complaints and Cross Complaints*

For discussion and forms relating to damages and pleading damages, see Ch. 177, *Damages*

For discussion of jurisdiction in California courts in general, see Ch. 323, *Jurisdiction: Personal* , and Ch. 324, *Jurisdiction: Subject Matter*

For alternative forms of prayers, see Ch. 420, *Prayers*

For discussion and forms relating to service of summons generally, see Ch. 518, *Service of Summons and Papers*

For forms of allegations showing proper venue, see Ch. 571, *Venue*

For alternative forms of verification, see Ch. 572, *Verification*

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51-579 California Forms of Pleading and Practice--Annotated § 579.371

§ 579.371 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Review Administrative Decision [Code Civ. Proc. § 1094.5]--Denial of Variance

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Review Administrative Decision [Code Civ. Proc. § 1094.5]--Denial of Variance

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION FOR WRIT OF MANDATE
_____ [*name* (*s*)],	)	[*Code Civ. Proc. § 1094.5*]
Respondent(s).	)	
	)	
	)	

Petitioner represents:

1. Petitioner is, and at all times herein mentioned was, the owner of land located at _____ [*address*], _____ [*city*], _____ County, California, more particularly described as follows: _____ [*set forth legal description*].

2. Respondent is _____ [County *or* _____ (*name of city*), a municipal corporation organized and existing under the constitution and laws of the State of California and situated in _____ County], California.

3. Respondent _____ [*specify administrative agency, e.g.,* board of zoning adjustment] is a duly

constituted appointive body of respondent _____ [city *or* county] consisting of individual respondents _____ [*names*]. Respondent is charged with the duty of administering the planning code of _____ [city *or* county].

4. Respondent _____ [board of supervisors *or* city council] is the legally constituted legislative body of _____ [*name of city or county*] consisting of individual respondents _____ [*names*]. One of the duties with which respondent is charged is hearing and determining appeals from decisions of respondent _____ [*specify administrative agency, e.g.,* board of zoning adjustment].

5. Petitioner intends to _____ [*briefly describe plans for development of property, e.g.,* construct a 19-story apartment building with 190 dwelling units for residency by middle income persons on his/her above-described property].

6. According to the comprehensive zoning ordinance of _____ [*name of city of county*], development within the zone in which the above-described property of petitioner is located _____ [*set forth applicablezoning requirement, e.g.,* requires one off-street parking space for every dwelling unit within a multiple dwelling structure].

7. _____ [*Describe request for action made to respondent, e.g.,* Petitioner filed an application with respondent for a variance from the off-street parking provision of the zoning ordinance in which he/she requested that the number required be reduced by one-half].

8. *Government Code Section 65905(a)* requires _____ [*name of city of county*] to hold a public hearing on an application for a variance from the requirements of a zoning ordinance. Respondent is required to exercise its discretion in making a decision on a variance application.

9. On _____ [*date*], the required hearing was held. The evidence presented at the hearing indicated that _____ [*set forth facts, e.g.,* his/her apartment building is designed for persons of middle income, of whom only 50 percent have cars and that there are three public garages within two blocks of his/her property which have consistently high vacancy rates]. On _____ [*date*], petitioner received notice of respondent's decision denying his/her request for a variance. [A copy of that decision is attached to this petition as Exhibit A and made a part of this petition.]

10. _____ [*Set forth reasons why the decision is claimed to be invalid, e.g.,* Respondent's decision is invalid as an abuse of discretion because the stated purpose of the off-street parking requirement is to relieve traffic congestion, and not allowing petitioner a variance will in no way serve that purpose while creating an unnecessary hardship for him/her].

[11. *Exhaustion of administrative remedies allegation. See § 579.370, Paragraphs 7-9.*]

[12. Respondent's actions in denying petitioner's requested variance were frivolous, and petitioner has become and is obligated personally to pay his/her counsel _____ (*name*), attorney's fees _____ (in the sum of $ _____ *or* according to proof) as a result of being forced to exhaust his/her administrative remedies and bringing and maintaining this proceeding.]

WHEREFORE, petitioner prays:

1. That the court issue a peremptory writ of mandate ordering respondent _____ [city *or* county] to grant petitioner the variance requested;

[2. For attorney's fees _____ (in the sum of $_____ *or* according to proof)];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Petitioner

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceedings. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signature*]

[2] Use of Form

This form is for use by a person to petition for a writ of mandate to obtain judicial review of an administrative decision that a variance not be granted [*see Siller v. Board of Supervisors (1962) 58 Cal. 2d 479, 485-486, 25 Cal. Rptr. 73, 375 P.2d 41* ; *see also § 579.113*]. It may be modified for use to petition for a writ of mandate in other zoning decisions in which the administrative body exercises its discretion, such as a conditional use permit or a tentative map under the Subdivision Map Act [*see Scott v. City of Indian Wells (1972) 6 Cal. 3d 541, 546, 99 Cal. Rptr. 745, 492 P.2d 1137* and *Youngblood v. Board of Supervisors (1978) 22 Cal. 3d 644, 651 n. 2, 150 Cal. Rptr. 242, 586 P.2d 556* (decided under prior law), respectively].

The form is adapted from the fact situation in *Siller v. Board of Supervisors (1962) 58 Cal. 2d 479, 25 Cal. Rptr. 73, 375 P.2d 41* .

CAUTION:

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Points and authorities customarily accompany a petition filed in a superior court, although they do not appear to be expressly required by statute. When no alternative writ is sought, proof of service of a copy of the petition need not accompany the application, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

[3] Allegations

The petition alleges: (1) the petitioner's standing (Paragraph 1); (2) the respondents' identities as the decision makers (Paragraphs 2-4); and (3) the necessity for and holding of an evidentiary hearing in which respondent exercises its discretion (Paragraphs 7-10) [*see Code Civ. Proc. § 1094.5*; *see also* Ch. 474 et seq., *Availability of Judicial Review of Agency Decisions*].

Optional paragraphs are also included to allege (1) that attorney's fees were incurred due to repondent's frivolous conduct (Paragraph 12) [*see Gov. Code § 800*]; and (2) that plaintiff exhausted any available administrative remedies; they must be exhausted if they exist, but not all zoning ordinances provide additional remedies after the hearing (Paragraph 11) [*see Temescal Water Co. v. Dept. of Public Works (1955) 44 Cal. 2d 90, 106-107, 280 P.2d 1]* .

[4] State Statutes

Administrative mandate. *Code Civ. Proc. § 1094.5*

[5] Decisions

Award of attorney's fees is allowable under *Code Civ. Proc. § 1021.5* (private attorney general theory) in action against planning agency to compel compliance with *Subdivision Map Act. Margolin v. Regional Planning Com. (1982) 134 Cal. App. 3d 999, 1001-1007, 185 Cal. Rptr. 145*

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51-579 California Forms of Pleading and Practice--Annotated § 579.372

§ 579.372 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Review Administrative Decision [Code Civ. Proc. § 1094.5]--Conditional Use Permit Issued Subject to Invalid Condition [Gov. Code § 65909]

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Review Administrative Decision [Code Civ. Proc. § 1094.5]--Conditional Use Permit Issued Subject to Invalid Condition [Gov. Code § 65909]
SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION FOR WRIT OF MANDATE
_____ [*name(s)*],	)	[*Code Civ. Proc. §§ 1085, 1086* 1094.5; *Gov. Code § 65909*]
Respondent(s).	)	
	)	
	)	

Petitioner represents:

1. [*Petitioner's capacity. See § 579.371, Paragraph 1.*]

2. [*Identity and capacity of respondents. See § 579.371, Paragraphs 2-4.*]

3. Petitioner intends to _____ [*describe plans for development of property, e.g.*, construct a church, with an adjoining parking lot and meeting hall].

4. According to the comprehensive zoning ordinance of _____ [*name of city or county*], the zone in which the above-described property of petitioner is located _____ requires a conditional use permit

_____ [*specify petitioner's use, e.g.,* for construction and operation of a church].

5. On or about _____ [*date*], _____ [*allege compliance with conditional use permit procedures, e.g.,* petitioner filed an application with respondent for a conditional use permit. A public hearing was held on that application, and on or about _____ [*date*], respondent made its decision, and sent a copy to petitioner. [A true copy of that decision is attached to this petition as Exhibit A and made a part of this petition].

6. Respondent issued the requested conditional use permit, conditioned on _____ [*specify conditions attached to conditional use permit issued to petitioner, e.g.,* petitioner's dedicating the back one-fourth of the above-described property for use as a public baseball field].

7. *Government Code Section 65909* provides that no conditional use permit may be conditioned on _____ [the dedication of land for any purpose *and/or* the posting of a bond to guarantee installation of publicimprovements] not reasonably related to the use of the property for which the permit is requested.

8. _____ [*Set forth reasons why the condition is impermissible, e.g.,* The dedication condition imposed on petitioner by respondent is prohibited because it is not reasonably related to the use of the property as a church].

[9. *Exhaustion of administrative remedies. See § 579.370, Paragraphs 7-9.*]

[10. Respondent's actions in imposing the above-described condition on the conditional use permit it granted to petitioner were frivolous, and petitioner has become and is obligated personally to pay his/her counsel _____ (*name*), attorney's fees _____ (in the sum of $_____ *or* according to proof) as a result of being forced to exhaust his/her administrative remedies and bringing and maintaining this proceeding.]

WHEREFORE, petitioner prays:

1. That the court issue a peremptory writ of mandate ordering respondents to remove the conditions attached to the conditional use permit issued to petitioner;

[2. For attorney's fees _____ (in the sum of $_____ *or* according to proof)];

3. For costs of suit herein incurred; and

4. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 579.371.*]

[2] Use of Form

This form is for use by a person to petition for a writ of mandate to obtain judicial review of an administrative decision conditioning the issuance of a conditional use permit on impermissible conditions [*Gov. Code § 65909*; *see Nollan v. California Coastal Commission (1987) 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677* (requirement that easement be conveyed in return for use permit may constitute unconstitutional taking of land under U.S. Const., art. V, and *amend.*

XIV, unless requirement substantially advances legitimate state interests; requirement that does not further the same legitimate purpose that denial of permit would is invalid); *Dolan v. City of Tigard (1994) 512 U.S. 374, 386-391, 114 S. Ct. 2309, 129 L. Ed. 2d 304* (once it is found that conditions imposed on approval of permit advances legitimate state interest, there must be some sort of individualized determination that conditions are related both in nature and extent to projected impact of proposed development); *see also Lingle v. Chevron U.S.A. Inc. (2005) 544 U.S. 528, 125 S. Ct. 2074, 2086-2087, 161 L. Ed. 2d 876* (rule articulated in *Nollan* is not whether exaction would substantially advance *some* legitimate state interest but rather whether exaction would substantially advance same interests that land use authorities asserted would allow them to deny permit altogether)]. With appropriate modifications, this form may be used when the impermissible condition is attached to the issuance of a variance or building permit [*see Gov. Code § 65909*].

For discussion of conditional use permits, see *§ 579.114*.

CAUTION:

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Points and authorities customarily accompany a petition filed in a superior court, although they do not appear to be expressly required by statute. When no alternative writ is sought, proof of service of a copy of the petition need not accompany the application, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

[3] Allegations

This petition alleges (1) the necessity for the conditional use permit and its issuance (Paragraphs 3-5); and (2) the attachment of prohibited conditions to the conditional use permit that was granted (Paragraphs 6-8) [*Gov. Code § 65909*].

[4] Decisions

To be constitutional, exaction must substantially advance same interests that land use authorities asserted would allow them to deny permit altogether. *Lingle v. Chevron U.S.A. Inc. (2005) 544 U.S. 528, 125 S. Ct. 2074, 2087, 161 L. Ed. 2d 876*

Conditioning approval of building permit on applicant's dedication of portion of its property for flood control and traffic purposes is unconstitutional taking because conditions were not "roughly proportional," i.e., related in nature and extent, to projected impact of expansion of applicant's place of business. *Dolan v. City of Tigard (1994) 512 U.S. 374, 386, 114 S. Ct. 2309, 129 L. Ed. 2d 304*

Requirement that landowner convey public easement running along beach in return for building permit is unconstitutional taking of property because requirement did not have sufficient nexus with legitimate police power purpose of preserving access to and view of beach. *Nollan v. California Coastal Commission (1987) 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677*

Administrative mandate is appropriate remedy when alleging that denial of permit was based on applicant's failure to comply with invalid condition. *Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal. 3d 110, 128, 109 Cal. Rptr. 799, 514 P.2d 111*

Zoning officials are not allowed to deny permit as means of coercing applicant to comply with separate and entirely unrelated provisions of zoningordinance. *Ellis v. City Council (1963) 222 Cal. App. 2d 490, 497, 35 Cal. Rptr. 317*

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51-579 California Forms of Pleading and Practice--Annotated § 579.373

§ 579.373 Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Compel Issuance of Building Permit

[1] FORM Petition for Writ of Mandate [Code Civ. Proc. §§ 1085, 1086]--To Compel Issuance of Building Permit

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

_____ [*name*],	)	
Petitioner,	)	NO. _____
vs.	)	PETITION FOR WRIT OF MANDATE
_____ [*name(s)*],	)	[*Code Civ. Proc. §§ 1085, 1086*]
Respondent(s).	)	
	)	
	)	

Petitioner represents:

1. [*Petitioner's status as landowner within jurisdiction of respondent. See § 579.371, Paragraph 1.*]

2. Respondent is _____ [County *or* _____ (*name of city*), a municipal corporation organized and existing under the constitution and laws of the State of California and situated in _____ County], California.

3. Respondent _____ [*specify administrative agency, e.g.,* Building and Safety Department] is a duly constituted and appointed body of respondent _____ [city *or* county], under the direction of _____ [*name*], the appointed and qualified Director. One of the duties with which respondent is charged is issuing building permits to applicants under the planning and zoning ordinance of _____ [city *or* county].

4. Petitioner _____ [*set forth activity requiring building permit, e.g.,* wants to build a swimming pool in her backyard].

5. According to the comprehensive planning and zoning ordinance of _____ [city *or* county], a building permit for _____ [*specify, e.g.,* construction of a swimming pool] requires _____ [*set forth construction requirements*] and provides that once these requirements are met, that building permit must be issued by _____ [*specify administrative agency, e.g.,* the Building and Safety Department].

6. Petitioner has complied with all the requirements set forth in that ordinance, and filed an application for a building permit indicating complete compliance with the code requirements.

7. Respondent has a clear, present, and ministerial duty to issue the requested building permit to petitioner. Respondent has refused to issue the permit and continues to refuse to issue the permit.

8. [*Exhaustion of admininstrative remedies allegation. See § 579.370, Paragraphs 7-9.*]

9. As a proximate result of respondent's failure to issue the requested building permit, petitioner has sustained damages _____ [*specify nature and extent of damages, e.g.,* in that she has already executed building contracts and purchased building materials], all to petitioner's damage in the sum of $_____].

10. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought herein, in that _____ [*set forth facts showing lack of recourse, e.g.,* there is no other authority from whom petitioner can obtain the required building permit].

WHEREFORE, petitioner prays:

1. That the court issue an alternative writ of mandate commanding respondent to issue the building permit to petitioner or show cause before this court at a time specified by court order why it has not done so and why a peremptory writ should not issue;

2. That on return of the alternative writ and the hearing of the petition, this court issue a peremptory writ of mandate ordering respondent to issue the building permit to petitioner;

3. For compensatory damages in the sum of $_____;

4. For costs of suit herein incurred; and

5. For such other and further relief as the court may deem proper.

_____ [*signature*]

Attorney for Petitioner

[*Verification. See § 579.371.*]

[2] Use of Form

This form is for use by a person whose application for a building permit has been denied to petition for a writ of mandate to compel the planning department to issue a building permit and to seek damages [*see Court House Plaza Co. v. City of Palo Alto (1981) 117 Cal. App. 3d 871, 883, 173 Cal. Rptr. 161 , appeal dismissed and cert denied, 454 U.S. 1074, 102 S. Ct. 623, 70 L. Ed. 2d 607* ; *Ellis v. City Council (1963) 222 Cal. App. 2d 490, 499, 35 Cal. Rptr. 317]* . It may be modified for use to petition for a writ of mandate in other zoning decisions in which actions of the administrative body are ministerial, such as approval of a final map on completion of the conditions of the tentative map already approved under the Subdivision Map Act [*see Youngblood v. Board of Supervisors (1978) 22 Cal. 3d 644, 653 n. 4, 655-656, 150 Cal. Rptr. 242, 586 P.2d 556* (decided under prior law)].

CAUTION:

A petition for a writ of mandate must be verified [*Code Civ. Proc. § 1086*]. Proof of service on each respondent and real party in interest of a copy of a petition that seeks an alternative writ must accompany the petition when it is offered for filing except when, in its discretion and for good cause, the court has granted the application for the writ ex parte [*Code Civ. Proc. § 1107*; for a discussion of serving the petition, see Ch. 358, *Mandate and Prohibition* [. Points and authorities also customarily accompany a petition filed in a superior court, although they do not appear to be expressly required by statute. When no alternative writ is sought, proof of service of a copy of the petition need not accompany the application, but proof of service of a copy of the filed petition must be lodged with the court prior to a hearing or any action by the court [*Code Civ. Proc. § 1088.5*].

[3] Allegations

This petition alleges: (1) the petitioner's standing (Paragraph 1); (2) the respondents' duty to issue and the petitioner's right to receive the permit (Paragraphs 2-7) [*see Code Civ. Proc. § 1085*; *see also* Ch. 481, *Public Works*]; (3) exhaustion of administrative remedies (Paragraph 8) [*see Temescal Water Co. v. Dept. of Public Works (1955) 44 Cal. 2d 90, 106-107, 280 P.2d 1]* ; (4) compensatory damages (Paragraph 9) [*see Civ. Code § 3333*]; and (5) lack of an adequate legal remedy (Paragraph 10) [*see Phelan v. Superior Court (1950) 35 Cal. 2d 363, 366, 217 P.2d 951* ; *see also* Ch. 358, *Mandate and Prohibition*].

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§ 579.374 Summons for Enforcement of State Housing Law [Health & Safety Code § 17990]---Judicial Council Form SUM-145

[1] FORM Summons for Enforcement of State Housing Law [Health & Safety Code § 17990]---Judicial Council Form SUM-145

Click here to view image.

[2] Use of Form

The form in [1], *above*, is the Judicial Council-approved form of summons for mandatory use in the enforcement of the State Housing Law [*see Health & Safety Code § 17990*]; Judicial Council Form SUM-145; *see also § 579.141[4]*].

This form is available in an interactive, electronic format in LexisNexis(R) Automated California Judicial Council Forms, which may be accessed at *www.lexisone.com* for an individual or monthly charge. A noninteractive version in PDF format also is available at *www.lexisone.com* at no charge.

[3] Contents of Summons

The manner in which the blanks are to be filled in and boxes checked is self-explanatory.

[4] Summons Procedure

The issuance and service of a summons in a civil action is governed by *Code Civ. Proc. §§ 412.10-417.40*. See Ch. 518, *Service of Summons and Papers* .

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California Forms of Pleading and Practice--Annotated

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Volume 51: Vexatious Litigants thru Zoning and Planning-Chs. 573-579
Chapter 579 ZONING AND PLANNING
PART IV. FORMS
A. Zoning and Planning

51-579 California Forms of Pleading and Practice--Annotated §§ 579.375-579.389

[Reserved]

§§ 579.375[Reserved]

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Volume 51: Vexatious Litigants thru Zoning and Planning-Chs. 573-579
Chapter 579 ZONING AND PLANNING
PART IV. FORMS
B. Subdivision Map Act

51-579 California Forms of Pleading and Practice--Annotated § 579.390

§ 579.390 Petition to Exclude Real Property From Subdivision [Gov. Code § 66499.22]

[1] FORM Petition to Exclude Real Property From Subdivision [Gov. Code § 66499.22]

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF _____

	)	
	)	NO. _____
IN RE PETITION TO EXCLUDE REAL PROP-	)	PETITION
ERTY FROM SUBDIVISION	)	[*Gov. Code § 66499.22*]
	)	

_____

Petitioners allege:

1. _____ [*Describe real property within subdivision from which exclusion is sought by reference to the recorded map or by another accurate survey*].

2. Petitioners constitute the owners of _____ [*specify proportion of at least two-thirds*] of the total area of the real property proposed to be excluded from the above-described subdivision.

3. Petitioners request that the following property be excluded from the above-described subdivision: _____ [*describe real property to be excluded by reference to the recorded map or by another accurate survey*].

4. Petitioners request exclusion of the above-described property for the following reasons: _____ [*set forth reasons*].

5. As far as is known to petitioners, the following persons are owners of real property situated within the boundaries of the area sought to be excluded: _____ [*set forth names and addresses of persons*].

6. A map showing the boundaries of the subdivision as it will appear after exclusion and alteration is attached to this petition as Exhibit A and made a part of this petition.

WHEREFORE, petitioners pray as follows:

1. For an order directing the clerk of the court to give notice of the filing of this petition, and to fix a time and place for hearing as prescribed by law.

2. For the court to enter an order excluding the above-described real property from the above-described subdivision and to further order the alteration or vacation of the recorded map.

[3. For such other and further relief as the court may deem equitable.]

Residence	Date	Name
_____	_____	_____ [*signature*]
_____	_____	_____ [*signature*]
_____	_____	_____ [*signature*]
_____	_____	_____ [*signature*]

[*COMPILE signatures of the owners of at least two-thirds of the total area of property sought to be excluded*]

VERIFICATION

I, _____ [*name*], am the petitioner in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein alleged on information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ [*date*]

_____ [*signatures of all petitioners*]

[2] Use of Form

This form is for use by the owners of land within a subdivision to petition to exclude their land from that subdivision. It

is filed with the county surveyor and clerk of the board of supervisors of the county in which the subdivision or the portion thereof sought to be excluded is situated [*Gov. Code § 66499.22*; *see § 579.275*].

CAUTION:
This petition must be verified [*Gov. Code § 66499.22*].

[3] Contents of Petition

The petition must (1) accurately and distinctly describe the real property sought to be excluded by reference to the recorded map or by any accurate survey (Paragraph 3) [*Gov. Code § 66499.22*]; (2) set forth the reasons for the requested exclusion (Paragraph 4) [*Gov. Code § 66499.22*]; (3) show the names and addresses of all owners of real property in the subdivision or in the portion thereof sought to be excluded as far as they are known to the petitioners (Paragraph 5) [*Gov. Code § 66499.22*]; (4) be signed and verified by the owners of at least two-thirds of the total area of the real property sought to be excluded (Paragraph 2) [*Gov. Code § 66499.22*]; and(5) be accompanied by a new map showing the boundaries of the subdivision as it appears after the exclusion and alteration, with numbered or lettered designations of the parcels excluded and showing the acreage of each (Paragraph 6) [*Gov. Code § 66499.23*].

[4] Jurisdiction

The superior court of the county in which the subdivision is situated has jurisdiction over the petition [*Gov. Code § 66499.21*].

[5] Notice of Petition

On the filing of a petition for exclusion of property from a subdivision, a judge of the superior court will make an order directing the court clerk to give notice of the petition. The notice will be given once a week for not less than five consecutive weeks and will be by publication in a newspaper of general circulation within the county, or if there is no newspaper published therein, by posting in three of the principal places in the county. However, if any portion of the property is situated within a city, notice is given in the same manner but within that city. The notice is required to state the nature of the petition and explain that any person may file a written objection to the petition at any time before the expiration of the time of publication or posting. On expiration of the notice time, an affidavit showing that publication or posting must be filed with the clerk of the court [*Gov. Code § 66499.24*].

[6] Hearing

If no objection has been filed, the court may proceed without further notice to hear the petition. If during the hearing the petitioners produce to the court satisfactory evidence of the necessity of the exclusion of the real property, that the owners of two-thirds of the area of the real property sought to be excluded are the petitioners, and that there is no reasonable objection to making that exclusion, the court may proceed to exclude the real property sought to be excluded, and order the alteration or vacation of the recorded map and enter its decree accordingly [*Gov. Code § 66499.25*]. If a material objection is made to the petition, the court will proceed to hear that objection and may adjourn the proceedings to such time as may be necessary on proper notice to the petitioners and objectors [*Gov. Code § 66499.26*].

[7] Decree

A certified copy of the decree granting the petition and a new map are filed with the county recorder [*Gov. Code § 66499.28*; *see § 579.275[2]*].

[8] State Statutes

Form of verification. *Code Civ. Proc. § 446*

Exclusion does not affect public street or highway. *Gov. Code § 66499.27*